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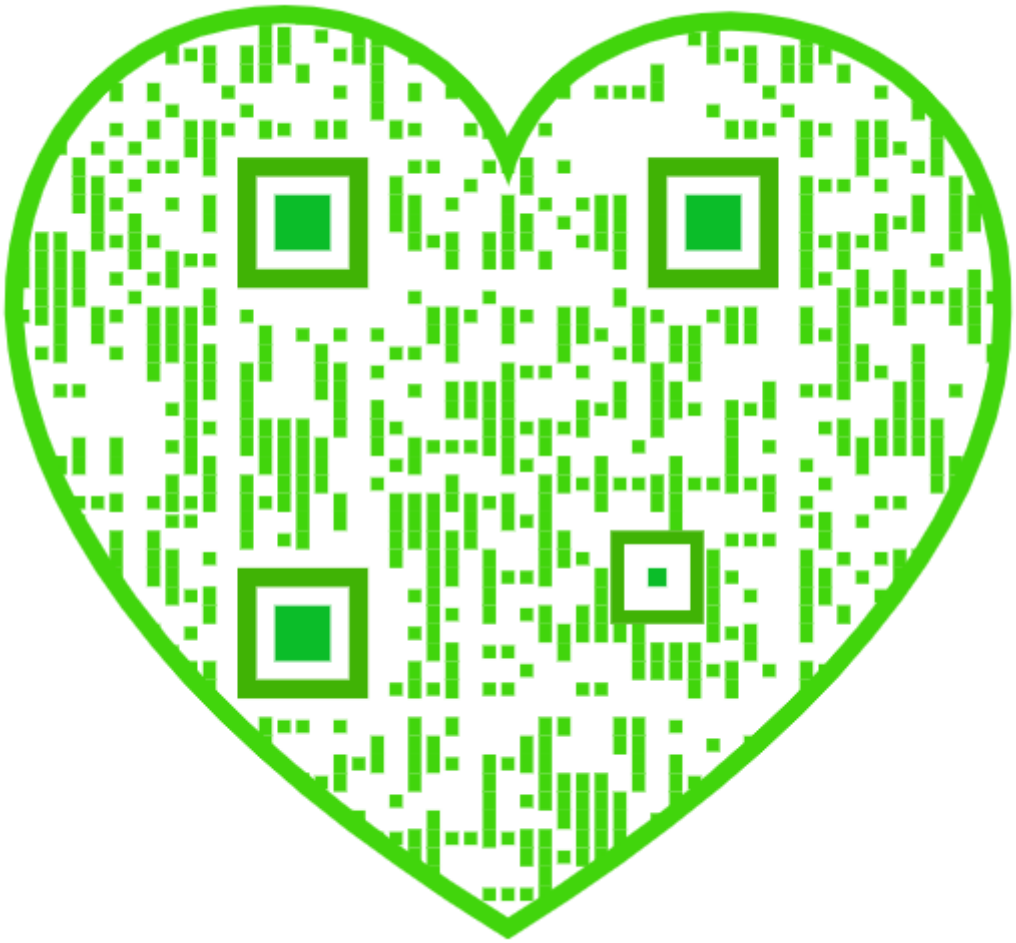

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more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes which are therefore respectfully dedicated to him.

William Mack.

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I. DEFINITION.

A motion in practice means an application to a court by one of the parties to a cause, or his counsel, in order to obtain some rule or order of court which he deems to be necessary in the progress of the cause, or to get relieved in a summary manner from some matter which would work injustice.[1] Properly a motion

1. Cyclopedic L. Dict.
Other definitions are: An application for an order. McGuire *v.* Drew, 83 Cal. 225, 232, 23 Pac. 312; Wallace *v.* Lewis, 9 Mont. 399, 403, 24 Pac. 22; Matter of Lima, etc., R. Co., 68 Hun (N. Y.) 252, 22 N. Y. Suppl. 967; Rogers *v.* McElhone, 12 Abb. Pr. (N. Y.) 292, 293; Wesley *v.* Bennett, 6 Abb. Pr. (N. Y.) 12, 13.
"An application for a rule or order of the

means an application for a rule or order made *viva voce* to a court or judge ;[2] but the term is now generally employed with reference to all such applications, whether written or oral.[3]

II. NATURE AND SCOPE OF REMEDY.

The right to proceed by motion implies the pendency of a suit between the parties, and is confined to incidental matters in the progress of the cause.[4]

court." Low *v.* Cheney, 3 How. Pr. (N. Y.) 287, 288.

"An application for an order addressed to the court or judge by a party to a suit or proceeding, or one interested therein." Reid *v.* Fillmore, 12 Wyo. 72, 74, 73 Pac. 849.

"An application to a court, by one of the parties in the cause, in order to obtain some rule or order." Citizens' St. R. Co. *v.* Reed, 28 Ind. App. 629, 63 N. E. 770, 771.

Defined by statute see Cal. Code Civ. Proc. (1903) § 1003; Indian Terr. Annot. St. (1897) § 3409; Iowa Code (1897), § 3831; Kan. Gen. St. (1901) § 5009; Minn. Gen. St. (1894) § 5225; N. Y. Code Civ. Proc. (1899) § 768; Clark Code N. C. (1900) § 594; N. D. Rev. Codes (1899), § 5715; Bates Annot. St. Ohio (1904), § 5121; Oreg. Annot. Code & St. (1901) § 534; S. C. Code Civ. Proc. (1902) § 402; S. D. Code Civ. Proc. (1903) § 549; Utah Rev. St. (1898) § 3323; Ballinger Annot. Code & St. Wash. (1897) § 5080*a*; Wis. Rev. St. (1898) § 2813; Wyo. Rev. St. (1899) § 3595.

An application for a new trial on the judge's minutes is a motion. Cohen *v.* Krulewitch, 81 N. Y. App. Div. 147, 80 N. Y. Suppl. 689. See NEW TRIAL.

Enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgment sustaining or overruling demurrers, etc. Rogers *v.* Pearsall, 21 N. Y. App. Div. 389, 47 N. Y. Suppl. 551. See also N. Y. Gen. Prac. Rules No. 38 *et seq.*

"Collateral motion" see Thiehaud *v.* Tait, (Ind. 1892) 31 N. E. 1052.

"Motions of course" are those which are granted without the court being called upon to investigate the truth of any allegation or suggestion upon which they are founded. Merchants' Bank *v.* Crysler, 67 Fed. 388, 390, 14 C. C. A. 444.

"Special motions" are all of those applications, addressed to the chancellor, which he may or may not grant in his discretion, and which usually involve an investigation of the facts or circumstances on which the application is predicated. Special motions are subdivided into two kinds: those which may be granted *ex parte*, and those which require notice of their presentation and hearing. Merchants' Bank *v.* Crysler, 67 Fed. 388, 390, 14 C. C. A. 444.

2. People *v.* Ah Sam, 41 Cal. 645, 650; Reilly *v.* Wilkins, 67 Ill. App. 104, 106; Washington Park Club *v.* Baldwin, 59 Ill. App. 61, 63; Wallace *v.* Lewis, 9 Mont. 399, 403, 24 Pac. 22.

Distinguished from petition, etc.— It is distinguished from the more formal applications for relief by petition or complaint. People *v.* Ah Sam, 41 Cal. 645. A petition in common phrase is a request in writing; and in legal language describes an application to a court in writing in contradistinction to a motion which may be made *viva voce*. Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 547, 23 Am. Rep. 138 [*citing* Bergen *v.* Jones, 4 Metc. (Mass.) 371; 2 Daniell Ch. Pr. pp. 1587, 1683]. See also State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450.

3. People *v.* Ah Sam, 41 Cal. 645; Wallace *v.* Lewis, 9 Mont. 399, 24 Pac. 22.

The careful practitioner will either prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. This is not necessary, however. The motion may be made orally. Herrlich *v.* McDonald, 80 Cal. 472, 22 Pac. 299.

4. Junek *v.* Hezeau, 11 La. Ann. 731; Mielke's Succession, 8 La. Ann. 11; Thomas *v.* Bourgeat, 6 Rob. (La.) 435; Hyde *v.* Henry, 3 Mart. N. S. (La.) 179; *In re* Jetter, 78 N. Y. 601; Rensselaer, etc., R. Co. *v.* Davis, 55 N. Y. 145; Shuford *v.* Cain, 22 Fed. Cas. No. 12,823, 1 Abb. 302. See also White *v.* Merchants' Bank, 4 Rob. (La.) 363.

Thus on a naked motion the court will not decide a question which involves in it the whole merits of the cause (Howard *v.* Waldo, 1 Root (Conn.) 538), except where a summary proceeding for that purpose is expressly allowed by law (Thomas *v.* Bourgeat, 6 Rob. (La.) 435).

A motion, unless it be such a one as arises incidentally in the prosecution of a suit, is to all intents and purposes an action. It differs from other actions only in being conducted *ore tenus*. There must be in it, as well as in other actions, *actor*, *reus*, and *judex*. Richardson *v.* Talbot, 2 Bibb (Ky.) 382, 384.

Existence of other adequate remedy.— Where a motion presents difficult questions of law or material questions of fact, the court, in the exercise of sound discretion, should refuse to consider and decide them in that summary manner, but should leave the party to his remedy by action. People *v.* Calhoun Cir. Judge, 24 Mich. 408; Hill *v.* Hermans, 59 N. Y. 396; Dietz *v.* Dietz, 2 Hun (N. Y.) 339; Mutual L. Ins. Co. *v.* Belknap, 19 Abb. N. Cas. (N. Y.) 345; McLean *v.* Tompkins, 18 Abb. Pr. (N. Y.) 24; *In re* New York El. R. Co., 63 How. Pr. (N. Y.) 14; People *v.* Erie R. Co., 54 How. Pr. (N. Y.) 59; Iselin *v.* Port Royal R. Co., 6 N. Y. Wkly. Dig. 130; Hauselt *v.* Vilmar, 3 N. Y. Wkly. Dig. 31; Camp *v.* McCormick, 1 Den. (N. Y.) 641. See also Chapman *v.*

III. APPLICATION.

A. Jurisdiction and Venue — 1. JURISDICTION — a. While Cause Pending. The rule is that a motion in a cause must be made in that court alone where such cause is pending.[5]

b. After Dismissal of Cause. After a cause is dismissed the jurisdiction of the court over it ceases, and the court, it has been held, cannot properly entertain any motion in relation to its subject-matter.[6]

2. VENUE. In New York the rule is statutory that a motion on notice in the supreme court must be made within the judicial district in which the action is triable, or in an adjoining county, except that where the action is triable in the first judicial district, the motion must be made in that district.[7]

B. Time For. Unless satisfactory reason is shown for the moving party's delay,[8] a motion based on a mere irregularity,[9] or a motion of a merely dilatory

Blakeman, 31 Kan. 684, 3 Pac. 277; Goddard *v.* Stiles, 90 N. Y. 199; Causey *v.* Snow, 120 N. C. 279, 26 S. E. 775. But the mere pendency of an action is not a bar to a motion for the same relief, where it is discretionary with the court to grant relief upon the motion during the pendency of the action. Phillips *v.* Wheeler, 67 N. Y. 104. Nor will the fact that there also exists a remedy by action bar relief by motion, where the latter remedy is more speedy, economical, and efficacious. Moore *v.* Muse, 47 Tex. 210. See also Curtis *v.* Engle, 4 Edw. (N. Y.) 117.

5. Edwards *v.* Shreve, 83 N. Y. App. Div. 165, 82 N. Y. Suppl. 514; Parmenter *v.* Roth, 9 Abb. Pr. N. S. (N. Y.) 385; Thomas *v.* Raymond, 4 S. C. 347. See also Merritt *v.* Slocum, 3 How. Pr. (N. Y.) 309.

Failure to determine motion at term when submitted.— Where a motion is submitted for decision during the term or in vacation, the court, by failure to determine the motion until the next term, does not lose jurisdiction so as to require resubmission. Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

6. Hill *v.* Richards, 11 Sm. & M. (Miss.) 194.

7. Delahunty *v.* Canfield, 106 N. Y. App. Div. 386, 94 N. Y. Suppl. 815; Matter of Haworth, 59 N. Y. App. Div. 393, 69 N. Y. Suppl. 843 (holding that under the statute alluded to in the text, where a decree awarding plaintiff a divorce was entered in C county, a motion to modify the decree cannot be entertained in E county, which is not in the same judicial district with, nor adjoining, C county); Dupignac *v.* Van Buskirk, 44 Hun (N. Y.) 45. See also Bangs *v.* Selden, 13 How. Pr. (N. Y.) 374.

A motion by a client to compel his attorney to surrender papers in a suit is not necessarily a motion in such suit, and may be made out of the district in which it is triable. Cunningham *v.* Widing, 5 Abb. Pr. (N. Y.) 413.

Motion to consolidate.— The statute providing that any motion in an action triable in the first judicial district shall not be made in any other district prohibits a motion in another district to consolidate an action triable there with one triable in the first district. Dupignac *v.* Van Buskirk, 44 Hun (N. Y.) 45.

After final judgment.— The statute prescribing the districts in which motions on notice must be made applies only to such motions as are made during the pendency of the action, and not to such as may be made in proceedings instituted for the entry of final judgment therein. Phillips *v.* Wheeler, 67 N. Y. 104; Curtis *v.* Greene, 28 Hun (N. Y.) 294.

Waiver.— When the question as to the proper venue of a motion is waived, it should appear by recitals in the order appealed from or in a stipulation to that effect, so that it will not come before the court on appeal to be disputed as a question of fact. Newhall *v.* Appleton, 46 N. Y. Super. Ct. 6.

8. O'Flynn *v.* Eagle, 7 Mich. 306; Gray *v.* Jones, 3 How. Pr. (N. Y.) 71; Ogdensburgh Bank *v.* Paige, 2 Code Rep. (N. Y.) 67; Rogers *v.* Bigelow, 10 Wend. (N. Y.) 547.

Reason for not noticing appearing on face of record.— However, where the reason for not noticing a motion at the earliest opportunity appears on the face of the record, no affidavit of excuse need be made. Kane *v.* Scofield, 2 Cai. (N. Y.) 368.

What to be considered in determining laches.— Proper regard should be had to the just claim of other business or terms of court and other material facts, in determining whether a party has been guilty of laches in making a motion. Butler *v.* Mitchell, 17 Wis. 52.

What deemed sufficient excuse.— An affidavit by counsel, under whose direction an attorney of record is acting, showing that affiant had forgotten the day on which the term commenced, will be accepted as an excuse for not noticing a motion for the first day of the term. Bayard *v.* Malcom, 3 Cai. (N. Y.) 102. That a motion was previously noticed for a term which adjourned unexpectedly, and was thereafter noticed at the earliest practicable day of another term, is a sufficient excuse for not noticing it earlier. Whipple *v.* Williams, 4 How. Pr. (N. Y.) 28.

9. Beall *v.* Blake, 13 Ga. 217, 58 Am. Dec. 513; O'Flynn *v.* Eagle, 7 Mich. 306; Johnson *v.* Johnson, Walk. (Mich.) 309; Lawrence *v.*

nature,[10] must be made at the first opportunity; but this rule does not apply to motions for relief affecting the substantial rights of parties.[11]

C. Form and Requisites[12] — **1. In General.** In the absence of statutory provisions or rules of court requiring it,[13] a motion need not be reduced to writing,[14] but may be made orally in open court.[15] Reducing to writing and filing an application for a rule or order of the court is not sufficient; the attention of the court must be called to it, and the court moved to grant the relief asked for.[16]

2. Entitling. A motion required to be in writing will be denied for wrongfully entitling the application and motion papers.[17] Thus unless it appears that an adverse party has been in no wise misled,[18] it is a fatal defect that the papers are wrongly entitled as to the court,[19] as to the suit,[20] or as to the parties.[21] But an objection that the moving papers are not properly entitled cannot be based on opposing papers entitled in the same manner.[22]

3. Statement of Grounds. The particular grounds of a motion should appear plainly either by the notice of motion or the affidavits accompanying the same.[23]

Jones, 15 Abb. Pr. (N. Y.) 110; Persse, etc., Paper Works *v.* Willet, 14 Abb. Pr. (N. Y.) 119; Reddy *v.* Wilson, 9 How. Pr. (N. Y.) 34; Cagger *v.* Gardner, 1 How. Pr. (N. Y.) 142; Ogdensburgh Bank *v.* Paige, 2 Code Rep. (N. Y.) 67; Rogers *v.* Bigelow, 10 Wend. (N. Y.) 547; Doty *v.* Russell, 5 Wend. (N. Y.) 129; Anonymous, 5 Wend. (N. Y.) 82; McEvers *v.* Markler, 1 Johns. Cas. (N. Y.) 248; Cowman *v.* Lovett, 10 Paige (N. Y.) 559; Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

Rule abrogated in New York.— The old rule requiring a party to move against an irregularity at the first special term is abrogated by the present system, by which special terms in a judicial district are held successively at different places in the district. Titus *v.* Relyea, 8 Abb. Pr. 177.

10. Clifford *v.* Eagle, 35 Ill. 444; Miller *v.* Metzger, 16 Ill. 390; Kinney *v.* Bauer, 6 Ill. App. 267.

11. Doty *v.* Russell, 5 Wend. (N. Y.) 129.

Although an irregularity is such that it affects a substantial right, a delay of seven months in making a motion based on such irregularity is fatal. Patterson *v.* Graves, 11 How. Pr. (N. Y.) 91.

12. **Necessity for notice of motion** see *infra*, III, E, 1, a.

13. See the statutes of the several states and the rules of the various jurisdictions.

Under the Texas act of 1846, requiring the docketing of motions filed in the district court, all motions in that court must be in writing. Houston *v.* Jones, 4 Tex. 170.

14. Reilly *v.* Wilkins, 67 Ill. App. 104; Seidel *v.* Hurley, 1 Woodw. (Pa.) 352. See also Johnson *v.* Adleman, 35 Ill. 265; and *supra*, I, text and notes 1, 2.

Where a motion is founded on prior proceedings in the cause, the proper practice is to present the matter by written petition, so that the grounds on which the application is made can be made a matter of record. Holcomb *v.* Coryell, 12 N. J. Eq. 289.

15. People *v.* Ah Sam, 41 Cal. 645; Reilly *v.* Wilkins, 67 Ill. App. 104; Washington Park Club *v.* Baldwin, 59 Ill. App. 61; Wallace *v.* Lewis, 9 Mont. 399, 24 Pac. 22; Seidel *v.* Hurley, 1 Woodw. (Pa.) 352.

16. People *v.* Ah Sam, 41 Cal. 645; Prall *v.* Hunt, 41 Ill. App. 140; Wallace *v.* Lewis, 9 Mont. 399, 24 Pac. 22.

17. Foote *v.* Emmons, 2 How. Pr. (N. Y.) 89; Hawley *v.* Donnelly, 8 Paige (N. Y.) 415.

18. Hawley *v.* Donnelly, 8 Paige (N. Y.) 415; Jerauld County *v.* Williams, 7 S. D. 196, 63 N. W. 905.

19. Clickman *v.* Clickman, 1 N. Y. 611.

But a motion to remove a cause from the common pleas to the supreme court is properly entitled in the common pleas. Miller *v.* Dows, 2 How. Pr. (N. Y.) 98.

20. Morrall *v.* Prichard, 11 Jur. N. S. 969, 13 L. T. Rep. N. S. 425, 14 Wkly. Rep. 172.

A motion to amend a clerical error in the amount of an execution may be entitled in a suit for false imprisonment brought for an arrest under it. Holmes *v.* Williams, 3 Cai. (N. Y.) 98.

21. Williams *v.* Field, 1 How. Pr. (N. Y.) 214; Felt *v.* Hyde, 1 How. Pr. (N. Y.) 64; Parkman *v.* Sherman, 1 Cai. (N. Y.) 344, holding that when both notice and affidavit are wrongly entitled by reversing the parties the error is fatal.

A notice of motion which names the first defendant with the abbreviation *et al.* is sufficient where the adverse party was not misled by the failure to insert the names of all the defendants. Jerauld County *v.* Williams, 7 S. D. 196, 63 N. W. 905.

22. Atwater *v.* Williams, 2 How. Pr. (N. Y.) 274.

23. Pick *v.* Glickman, 54 Ill. App. 646; Livermore *v.* Bainbridge, 14 Abb. Pr. N. S. (N. Y.) 227; Ellis *v.* Jones, 6 How. Pr. (N. Y.) 296; Boyd *v.* Weeks, 6 Hill (N. Y.) 71; Wilson *v.* Wetmore, 1 Hill (N. Y.) 216. See also Vincent *v.* Thwaites, 4 Ir. Eq. 689. But see Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657.

Notice of motion generally see *infra*, III, E.

In New York a rule of practice requires that when a motion is for irregularity the notice must specify the irregularity, and the courts hold that the rule is not satisfied by specifying the irregularity complained of in the moving affidavits alone. German-Ameri-

4. Filing or Entry — a. Time. A notice of motion must be entered in court on the day the adverse party is notified to appear.[24] But failure to enter the notice on the day it was returnable is cured, if the parties appear, and no objection is made to the regularity of the notice.[25]

b. Manner — (I) *In General.* The usual manner of entering in court a notice of motion is by making an entry thereof in the motion docket, and marking the notice filed.[26]

(II) *By Implication.* Where a party files a motion, inconsistent with a former motion which he withdraws, and the court thereafter entertains the second motion, it will be considered as having been refiled after the withdrawal of the other.[27]

c. Parties Affected. A mere entry on the motion docket is not notice of what it imports, except as between the parties who, in legal contemplation, are in court.[28]

5. Objections — a. Time For. An irregularity in making a motion must, by proper objection, be taken advantage of at the first opportunity.[29]

b. Waiver of. When parties appear and resist a motion on its merits, without objection, they will be deemed to have waived all previous irregularities.[30]

D. Parties.[31] It is always the right of a party to a suit to invoke the action of the court by a motion for proper cause;[32] but the general rule, supported by the weight of authority, is that a stranger to the suit cannot appear therein and make a motion,[33] although he may be interested in the subject-matter of the

can Bank *v.* Dorthy, 39 N. Y. App. Div. 166, 57 N. Y. Suppl. 172; Asinari *v.* Volkening, 2 Abb. N. Cas. 454; Lewis *v.* Graham, 16 Abb. Pr. 126; Montrait *v.* Hutchins, 49 How. Pr. 105; Selover *v.* Forbes, 22 How. Pr. 477; Perkins *v.* Mead, 22 How. Pr. 476; Coit *v.* Lambeer, 2 Code Rep. 79; Stevens *v.* Middleton, 14 N. Y. Wkly. Dig. 126. *Compare* Blake *v.* Locy, 6 How. Pr. 108, 1 Code Rep. 406.

When grounds must be specified in notice. — The rule requiring that a notice of motion must specify the particular points intended to be insisted upon applies only to cases where the opposite party has a right to explain or answer the matters complained of by affidavit, and to cases where he has a right to amend defective proceedings on terms. Hanna *v.* Curtis, 1 Barb. Ch. (N. Y.) 263.

24. Miller *v.* Boyd, 1 Dana (Ky.) 272; Trabue *v.* Tilford, 3 A. K. Marsh. (Ky.) 142, holding that, where there is notice to appear and answer to a motion on a given day, and the motion is not entered on that day, it is error to take it up on the succeeding day, unless the adverse party appears.

Who may object to belated entry. — Mo. Rev. St. § 2558, requiring that motions filed in term shall be filed at least one day before they may be argued or determined, is for the protection of the adverse party; and when he does not claim the benefit of the statute, the party filing the motion cannot. State *v.* Underwood, 76 Mo. 630.

25. Taylor *v.* Hardin, 4 B. Mon. (Ky.) 363. See also Miller *v.* Boyd, 1 Dana (Ky.) 272.

26. Wallace *v.* Cason, 42 Ga. 435, holding, however, that where a motion is properly docketed, failure to enter "Filed in office" by the clerk upon it, does not invalidate it.

Although not in his office at the time, a motion handed to the clerk, and by him indorsed "Filed," with his official signature, is properly filed. Hammock *v.* May, 38 Tex. 196.

Effect of failure to note entry on motion docket. — The clerk's failure to enter a motion on the motion docket upon filing of the motion, as required by law, should not be allowed to work an injury to the party filing the same. Hammock *v.* May, 38 Tex. 196.

The litigant or his attorney must bear the consequences of the non-filing, if they fail to see that the clerk actually files a motion placed in his hands therefor. Ford *v.* Brooks, 35 La. Ann. 151.

Sending a written motion to a judge is not equivalent to filing it in his court, as he is not the custodian of the files or the keeper of the records. Lewis *v.* Firemen's Ins. Co., 67 Ill. App. 195.

27. Louisville, etc., R. Co. *v.* Renicker, 17 Ind. App. 619, 47 N. E. 239.

28. Oswitchee Co. *v.* Hope, 5 Ala. 629.

29. Dean *v.* Feeley, 66 Ga. 273; Matter of Rogers, 9 Abb. N. Cas. (N. Y.) 141.

30. Com. *v.* Marks, 2 Duv. (Ky.) 387.

31. **Right of amicus curiæ** to make motion see Amicus Curiae.

32. Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516.

33. *California.* — *In re* Aveline, 53 Cal. 259.

Kentucky. — Price *v.* Shelby Cir. Ct., Hard. 254.

Nebraska. — See Neitzel *v.* Lyons, 48 Nebr. 892, 67 N. W. 867.

New Jersey. — Linn *v.* Wheeler, 21 N. J. Eq. 231.

New York. — Mayer *v.* Flammer, 81 N. Y. Suppl. 1062. *Compare* Dwight's Case, 15 Abb. Pr. 259.

suit.[34] An exception to this rule is recognized, as where a motion made by a stranger is for the purpose of being made a party to the suit.[35] The objection that a stranger to the action who files a motion therein has no standing to present the motion is waived where the parties to the action voluntarily appear after notice of motion and resist the same solely on its merits.[36]

E. Notice of Motion[37] — **1. Generally — a. Necessity** — (I) *Motions in Court in Causes on the Record.* The practice requiring motions to be made with the knowledge or in the presence of opposing counsel is a matter of courtesy and not of right;[38] and, in legal strictness, parties are bound to take notice of all motions made in court during the pendency of the action,[39] unless actual notice is required by statute,[40] or by the court rules,[41] or by some express direction of the court made in the cause by decree or otherwise.[42]

(II) *Motions Out of Court or in Causes Not on the Record.* Parties, however, are not bound to take notice of motions made out of court,[43] or after the action has been terminated by final judgment.[44] Motions in causes not on the record will not be heard without notice.[45]

b. Authority to Give. A motion or notice of motion relative to a suit pending in a court of record, when required to be in writing, must be subscribed by the attorney of record for the moving party.[46]

c. Requisites — (I) *Necessity of Written Notice.* Where a statute requires notice of motion, it means written notice,[47] or notice in open court, of which a minute is made by the clerk.[48]

(II) *Explicitness in Terms.* Where the law only requires notice of a motion, and such notice is so explicit as to render a mistake impossible, it will be sustained, although liable to technical objections.[49]

Wisconsin.— Ward *v.* Clark, 6 Wis. 509.

See 35 Cent. Dig. tit. "Motions," § 13.

Compare Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516.

34. Price *v.* Shelby Cir. Ct., Hard. (Ky.) 254. *Compare* Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516.

35. Linn *v.* Wheeler, 21 N. J. Eq. 231.

36. Neitzel *v.* Lyons, 48 Nebr. 892, 67 N. W. 867.

37. A notice that a motion would be made is no evidence that such motion was actually made. Herrlich *v.* McDonald, 80 Cal. 472, 22 Pac. 299.

38. Seidel *v.* Hurley, 1 Woodw. (Pa.) 352.

39. *Illinois.*— Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110, holding, however, that a party in court is not bound to take notice of a motion to approve a proposed sale reported by a receiver of the property in controversy, where no actual notice of such motion is required by the decree made in the cause.

Iowa.— Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503.

Kentucky.— Riley *v.* Wiley, 3 Dana 75. See also McCormick *v.* Young, 3 J. J. Marsh. 180.

Ohio.— Gardner *v.* Cline, 2 Ohio Dec. (Reprint) 301, 2 West. L. Month. 329.

Pennsylvania.— Seidel *v.* Hurley, 1 Woodw. 352.

See 35 Cent. Dig. tit. "Motions," § 14.

40. Hughes *v.* McCoy, 11 Colo. 591, 19 Pac. 674; Mallon *v.* Higenbotham, 10 Colo. 264, 15 Pac. 352; Cates *v.* Mack, 6 Colo. 401; Nevitt *v.* Crow, 1 Colo. App. 453, 29 Pac. 749.

41. Dupuis *v.* Thompson, 16 Fla. 69.

42. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

43. Gardner *v.* Cline, 2 Ohio Dec. (Reprint) 301, 2 West. L. Month. 329.

44. Stringer *v.* Echols, 46 Ala. 61; Perry *v.* Kaspar, 113 Iowa 268, 85 N. W. 22; George *v.* Middough, 62 Mo. 549; Laughlin *v.* Fairhanks, 8 Mo. 367; Gardner *v.* Cline, 2 Ohio Dec. (Reprint) 301, 2 West. L. Month. 329; De Witt *v.* Monroe, 20 Tex. 289. See also Riley *v.* Wiley, 3 Dana (Ky.) 75.

45. Carpenter *v.* People, 19 Mich. 9.

46. Harris *v.* Spader, 2 N. Y. City Ct. 147; Simmons *v.* Fisher, 46 Tex. 126.

Notice signed by counsel.—It has been held in an old case that a notice of motion, signed by counsel for an attorney of record, is good if the attorney has absconded. Bogert *v.* Bancroft, 3 Cai. (N. Y.) 127.

47. Borland *v.* Thornton, 12 Cal. 440; Floyd *v.* Black, Litt. Sel. Cas. (Ky.) 11.

48. Borland *v.* Thornton, 12 Cal. 440.

49. Quick *v.* Merrill, 3 Cai. (N. Y.) 133; Alexander *v.* Brown, 1 Pet. (U. S.) 683, 7 L. ed. 314.

Statement of grounds of motion see *supra*, III, C, 3.

Filing and entry of notice of motion see *supra*, III, C, 4.

Surplusage disregarded.— Where a motion should be addressed to a judge of the court, and not to the special term, the words "at the next special term," in a notice of motion, after the name of the judge, may be rejected as surplusage. People *v.* Sessions, 10 Abb. N. Cas. (N. Y.) 192.

Motion descending to particulars.— Where

(III) *Designation of Time and Place*—(A) *Time.* A notice of motion for the next term of a given court, without specifying any particular day, is sufficient;[50] and if it add a particular day for the motion, which is several terms afterward, this addition may be rejected as surplusage.[51] But the notice must specify one certain time only,[52] and cannot be in the alternative[53] or for a day when no court can, by any possibility, be sitting.[54]

(B) *Place.* Where the place of a term of court is fixed by law, no place need be mentioned in the notice of motion to be heard at special term, and if a wrong place be mentioned it will be rejected as surplusage.[55]

d. Service.[56] A notice of a motion may be served by delivering it personally to the attorney of the adverse party,[57] or leaving it at the attorney's office or place of business with his clerk.[58]

e. Waiver—(I) *In General.* It is competent for a party to waive want or irregularity of notice of motion[59] verbally[60] or in writing.[61]

(II) *By Appearance*[62]—(A) *To Contest on Merits.* The rule is that want[63]

a notice of motion for summary relief is the act of the parties, and not of their counsel, and such notice is general, it is favorably expounded; but, if it descends to particulars, it must be correct as to them. Drew *v.* Anderson, 1 Call (Va.) 51.

50. Dye *v.* Knox, 1 Bibb (Ky.) 573; Jackson *v.* Brownson, 4 Cow. (N. Y.) 51; Avery *v.* Cadugan, 1 Cow. (N. Y.) 230.

Sufficient designation of term.— A notice that a motion will be made at the "next special or adjourned term" of the district court of Olmstead county to be held, "etc.," "on the 28th day of January, 1867," contains a sufficient designation of the term, where it appears that the party receiving the notice was in no wise misled or injured. Blake *v.* Sherman, 12 Minn. 420.

Subsequent change of time for holding term.— Notice was given that a motion would be made at a court to be held on the first Monday in May. The legislature in the meantime changed the time to the second Monday. It was held that the party receiving the notice must take notice of the change. Price *v.* White, 27 Mo. 275.

Cause not to be continued by notice from term to term.— A notice of motion for a particular term, and that, if not then made, it will be continued on the calendar from term to term until it shall be made is insufficient. Beekman *v.* Reed, 5 Cow. (N. Y.) 23.

51. Jackson *v.* Brownson, 4 Cow. (N. Y.) 51.

52. Crane *v.* Crofoot, 1 How. Pr. (N. Y.) 191.

Wrong day certain.— A notice which states that a motion will be made on Friday, the seventh, when Friday is the eighth of the month, is bad. Brown *v.* Williamson, 8 N. J. L. 363.

Noticing for holiday.— A notice of motion to be made on a day specified, which is a legal holiday, on which a court cannot sit, "or as soon thereafter as the court can attend to the same," is good for the day following the designated day. White *v.* Rockafellar, 45 N. J. L. 299.

53. Crane *v.* Crofoot, 1 How. Pr. (N. Y.) 191.

54. Maullin *v.* Rogers, 55 L. J. Q. B. 377, 55 L. T. Rep. N. S. 121, 34 Wkly. Rep. 592.

55. William *v.* Brown, 5 Cow. (N. Y.) 281; Bodwell *v.* Willcox, 2 Cai. (N. Y.) 104. See also Brown *v.* State, 8 Heisk. (Tenn.) 871.

By appearing and resisting the motion, a failure to specify the place of holding the court is cured. Brown *v.* State, 8 Heisk. (Tenn.) 871.

56. Service of motion papers see *infra*, III, F, 1, c.

57. Hoffman *v.* Rowley, 13 Abb. Pr. (N. Y.) 399, holding further that where an attorney for a party to an action has died, and due notice has been given to such party to appoint a new attorney, as provided by statute, notice of a motion is properly given to such party personally.

58. Jackson *v.* Yale, 1 Cow. (N. Y.) 215 (holding further that an attorney need not be present in the office at the time of the delivery of the notice to his clerk); Jackson *v.* Giles, 3 Cai. (N. Y.) 88; Paddock *v.* Beebee, 2 Johns. Cas. (N. Y.) 117 (two preceding cases holding, however, that service of a notice on the attorney's clerk is irregular unless made while the clerk was in the office); Rathbone *v.* Blackford, 1 Cai. (N. Y.) 343.

Leaving notice at attorney's lodgings.— Service of a notice of motion on an attorney by leaving it at his lodgings instead of at his office or place of business is insufficient. Jackson *v.* Eacker, 1 Johns. Cas. (N. Y.) 331; Anonymous, 1 Cai. (N. Y.) 73.

59. Priest *v.* Varney, 64 Wis. 500, 25 N. W. 551.

60. *Ex p.* Crosby, 8 Cow. (N. Y.) 119.

61. Talman *v.* Barnes, 12 Wend. (N. Y.) 227; Fraser *v.* Ryan, 4 Rich. (S. C.) 460.

62. Effect of appearance generally see APPEARANCES, 3 Cyc. 514 *et seq.*

63. *Alabama.*— Bondurant *v.* Woods, 1 Ala. 543.

Arkansas.— Ferguson *v.* Blakeney, 6 Ark. 296.

California.— Herman *v.* Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

or irregularity [64] of notice of motion is cured by voluntarily appearing, and, without objection, contesting the motion.

(B) *To Take Objection.* The rule, however, is otherwise where the appearance is made specially for the purpose of taking objection to want or irregularity of service.[65]

2. By Order to Show Cause — a. Nature. An order to show cause is in effect a short notice of motion.[66]

b. Requisites — (I) *Entitling.* Where the motion papers are entitled in the action, it is not necessary that the order to show cause shall be so entitled.[67]

(II) *Grounds.* An order to show cause cannot be properly granted unless the affidavits and papers upon which the same is asked show special reasons for shortening the regular and usual time for notice of motion.[68]

(III) *Discretion of Court.* The granting of an order to show cause is in the discretion of the court.[69]

(IV) *When and Where Returnable.* Under a statute providing that when

Colorado.— Blyth *v.* People, 16 Colo. App. 526, 66 Pac. 680.

Idaho.— Curtis *v.* Walling, 2 Ida. (Hasb.) 416, 18 Pac. 54.

Indiana.— College Corner, etc., Gravel Road Co. *v.* Moss, 77 Ind. 139; Louisville, etc., R. Co. *v.* Thompson, 62 Ind. 87; Hardy *v.* Donellan, 33 Ind. 501.

Iowa.— Billings *v.* Kothe, 49 Iowa 34.

Kansas.— Teagarden *v.* Linn County, 49 Kan. 146, 30 Pac. 171; Smith *v.* State, 1 Kan. 365.

Kentucky.— Miller *v.* Cavanaugh, 99 Ky. 377, 35 S. W. 920, 18 Ky. L. Rep. 183, 59 Am. St. Rep. 463; Smith *v.* Robinson, 1 T. B. Mon. 14; McDowall *v.* Macker, Ky. Dec. 145.

New York.— Crane *v.* Stiger, 58 N. Y. 625.

Tennessee.— Brown *v.* State, 8 Heisk. 871; State *v.* Faust, 7 Coldw. 109; Watkins *v.* Barnes, 1 Sneed 201; Cheatham *v.* Hodges, Peck 177.

Wisconsin.— Priest *v.* Varney, 64 Wis. 500, 25 N. W. 551.

See 35 Cent. Dig. tit. "Motions," § 20.

What does not amount to appearance.— Giving notice of appeal from a judgment on a motion (McLean *v.* Thompkins, 18 Abb. Pr. (N. Y.) 24; De Witt *v.* Monroe, 20 Tex. 289; McKinney *v.* Jones, 7 Tex. 598, 58 Am. Dec. 83), agreeing to a statement of facts after notice of appeal (De Witt *v.* Monroe, *supra*), or moving to vacate a judgment (McLean *v.* Tompkins, *supra*).

64. *Florida.*— Pearce *v.* Thackeray, 13 Fla. 574.

Indiana.— Lane *v.* Fox, 8 Blackf. 58.

Mississippi.— Izod *v.* Addison, 5 How. 432.

New York.— Dugro *v.* Vandewater, 35 N. Y. App. Div. 471, 34 N. Y. Suppl. 777; Berford *v.* New York Iron Mine, 55 N. Y. Super. Ct. 516, 2 N. Y. Suppl. 699; Grafton *v.* Union Ferry Co., 13 N. Y. Suppl. 878; Cronin *v.* O'Reiley, 7 N. Y. Suppl. 337; Main *v.* Pope, 16 How. Pr. 271.

North Dakota.— Gilbreath *v.* Teufel, (1906) 107 N. W. 49.

South Carolina.— Ferguson *v.* Gilbert, 17 S. C. 26.

Tennessee.— Chaffin *v.* Crutcher, 2 Sneed 360.

West Virginia.— Venable *v.* Coffman, 2 W. Va. 310.

See 35 Cent. Dig. tit. "Motions," § 20.

By appearing and requesting further time to oppose a party waives irregularity of notice of motion. *Ex p.* Morland, 3 Deac. & C. 248.

65. Curtis *v.* Walling, 2 Ida. (Hasb.) 416, 18 Pac. 54; Wood *v.* Critchfield, 1 Cromp. & M. 72, 1 Dowl. P. C. 587, 2 L. J. Exch. 2, 3 Tyrw. 235; Warner *v.* Wood, 3 Dowl. P. C. 262. *Compare* Harvey *v.* Hall, 23 L. T. Rep. N. S. 391.

66. Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 233; Gilbreath *v.* Teufel, (N. D. 1906) 107 N. W. 49. See also Stryker *v.* Churchill, 39 Misc. (N. Y.) 578, 80 N. Y. Suppl. 588.

Order containing stay.— An order to show cause, if made by a judge out of court and returnable in less than two days, is irregular if it contains a stay of proceedings, where a court rule provides that no stay shall be granted by a judge out of court, except on a notice of at least two days. Asinari *v.* Volkening, 2 Abb. N. Cas. (N. Y.) 454.

67. Paddock *v.* Palmer, 32 Misc. (N. Y.) 426, 66 N. Y. Suppl. 743.

68. Barclay *v.* Moloney, 44 N. Y. App. Div. 632, 60 N. Y. Suppl. 403; Proctor *v.* Soulier, 82 Hun (N. Y.) 353, 31 N. Y. Suppl. 472; Springsteen *v.* Powers, 4 Rob. (N. Y.) 624; Schiller *v.* Weinstein, 45 Misc. (N. Y.) 591, 91 N. Y. Suppl. 76; Paddock *v.* Palmer, 32 Misc. (N. Y.) 426, 66 N. Y. Suppl. 743; *In re* Lyman, 60 N. Y. Suppl. 76 [*affirmed* on another point in 29 N. Y. App. Div. 390, 52 N. Y. Suppl. 1145]; Shaughnessy *v.* Chase, 23 N. Y. Wkly. Dig. 228.

Waiver of objection.— The objection that the affidavit does not show the necessity for an order to show cause is waived by failure to take such objection at the hearing. Wooster *v.* Batemen, 4 Misc. (N. Y.) 431, 24 N. Y. Suppl. 112.

69. Goodrich *v.* Hopkins, 10 Minn. 162; Fraenkel *v.* Miner, 10 N. J. L. J. 341; Sixth

a notice of motion is necessary, it shall be served at least eight days before the time appointed for the hearing, unless the judge makes an order to show cause why the application shall not be granted, and directs that service thereof less than eight days shall be sufficient, the order to show cause may be returnable in more than eight days from the granting of the order.[70] An order to show cause is returnable before the judge who issued it.[71]

3. COUNTER NOTICE. It is proper for a party against whom a motion is made to give a counter notice that, if the motion against him prevails, he will ask such relief on his part as would be appropriate in that contingency.[72]

F. Affidavits[73] — 1. SUPPORTING AFFIDAVITS — a. Necessity — (I) *IN GENERAL.* In many jurisdictions it is a rule of practice that a motion based on facts outside of the record,[74] or of which the court cannot take judicial notice,[75] must be supported by affidavits showing such facts.

(II) *AFFIDAVIT OF MERITS.* A rule of practice, in one jurisdiction, at least, is that an affidavit of merits is necessary on motions by defendant before answer.[76]

b. Sufficiency — (I) *AS TO AVERMENTS* — (A) *In General.* The affidavits in support of a motion should contain positive averments of the facts necessary to make out a case for the relief sought.[77]

(B) *Presumption Regarding.* Where an affidavit in support of a motion does not state that which ought to be alleged, the presumption is that it could not be asserted.[78]

(II) *AS TO LANGUAGE.* The court may in its discretion refuse to consider an affidavit not written in the English language.[79]

c. Service[80] — (I) *NECESSITY.* A copy of an affidavit on which a special motion is founded must be regularly served on the opposite party.[81]

(II) *TIME OF SERVICE AND NATURE OF COPIES.* Copies of affidavits served with notice of motion must be true and complete.[82] Copies of supplemental affidavits

Ave. R. Co. *v.* Gilbert El. R. Co., 71 N. Y. 430; Springsteen *v.* Powers, 4 Rob. (N. Y.) 624; Gilbreath *v.* Teufel, (N. D. 1906) 107 N. W. 49.

70. *In re* Ferris, 37 Misc. (N. Y.) 606, 76 N. Y. Suppl. 159. *Compare* Vale *v.* Brooklyn Cross-Town R. Co., 12 N. Y. Civ. Proc. 102, based on rule 37 of the general rules of practice, which rule, as it then existed, declared that every order to show cause should fix a day for showing cause less than eight days after it was made.

71. Rogers *v.* Baere, 1 N. Y. Month. L. Bul. 45.

Waiver of objection as to place returnable. — Where an order made by a judge is returnable in the alternative, as "before me or one of the justices of this court," the latter part thereof can be rejected as surplusage, and where the parties actually appear before the judge who makes the order the statute is complied with, and subsequent objections to the order should be overruled. Rogers *v.* Baere, 1 N. Y. Month. L. Bul. 45.

72. Clark *v.* Clark, 11 Abb. N. Cas. (N. Y.) 333.

73. **Affidavit** generally see AFFIDAVITS.

74. Shellenberger *v.* Ward, 8 Iowa 425; Spaulding *v.* Knight, 118 Mass. 528; Storey *v.* Child, 2 Mich. 107; Goodwin *v.* Blanchard, 73 N. H. 550, 64 Atl. 22. See also Hodges *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 673.

75. McDonel *v.* State, 90 Ind. 320.

76. Paddock *v.* Palmer, 32 Misc. (N. Y.) 426, 66 N. Y. Suppl. 743; Bingham *v.* Bingham, 1 N. Y. Civ. Proc. 166.

77. Amory *v.* Amory, 26 Wis. 152.

Particular allegations.—The affidavits must show that the motion is made in the proper place. Schemerhorn *v.* Develin, 1 Code Rep. (N. Y.) 13. When proceedings are based on an affidavit made on information and belief, it should appear who the informant is and reason should be given why the affidavit of such informant could not be procured. Fay *v.* Bowen, 1 N. Y. Month. L. Bul. 41.

78. Roosevelt *v.* Dean, 3 Cai. (N. Y.) 105.

79. Spenser *v.* Doane, 23 Cal. 418.

80. **Service of notice of motion** see *supra*, III, E. 1, d.

81. Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 413; Fitzroy *v.* Card, 1 Johns. Cas. (N. Y.) 30; Brown *v.* Ricketts, 2 Johns. Ch. (N. Y.) 425; Smith *v.* Hoyt, 14 Wis. 252, holding, however, that the rule does not apply to affidavits showing service of summons and failure to answer and the filing of notice of *lis pendens*.

82. Chesebro *v.* Chesebro, 21 Mich. 506.

Omission of jurat.— In one jurisdiction the omission of the jurat in the copy of the affidavit served is held to be fatal (Chesebro *v.* Chesebro, 21 Mich. 506), while in another jurisdiction the view obtains that the jurat may be dispensed with if the facts purport-

in support of a motion must be served the same length of time before the day for which the motion is noticed as is necessary for the service of principal affidavits.[83]

(III) *Effect of Failure to Serve.* Affidavits which have not been served cannot be read in support of a motion.[84]

d. Amendments. The court may allow affidavits in support of a motion to be amended, so long as the motion is pending and undetermined.[85]

e. Filing — (I) *Necessity.* It is the duty of the respective attorneys to file affidavits used by them on a motion.[86]

(II) *Time For.* Filing affidavits in support of a motion at the time the motion is made is sufficient, in the absence of statutory requirements as to the time of filing.[87]

(III) *Compelling.* The court will order an attorney to file original affidavits used on motion, although the filing will subject the party who made them to prosecution for perjury.[88]

f. Taking Affidavits For Use on Motion — (I) *Generally* — (A) *Necessity of Notice.* Where the allowance of a motion is not a mere matter of course, the affidavits in support of it must be taken on notice.[89]

(B) *To Whom Notice Given.* The notice of taking affidavits to be used on a motion should be given to the attorney, and not to the party himself.[90]

(C) *Service of Notice.* Proof of service of notice of the taking of affidavits to be used on a motion may be made *viva voce* at the bar of the court where the affidavits are offered to be read.[91]

(II) *By Compulsion*[92] — (A) *In General.* In a few jurisdictions it has been provided by statute that when any party[93] intends to make a motion or to oppose a motion in any court of record and it shall be necessary for such party to have the affidavit of any person or persons[94] who shall have refused to make the

ing to be stated in the body of the affidavit are intelligible without it (Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 413).

83. Wilcox *v.* Howland, 6 Cow. (N. Y.) 576.

84. State *v.* Second Judicial Ct., 25 Mont. 202, 64 Pac. 352; Northrup *v.* Sidney, 97 N. Y. App. Div. 271, 90 N. Y. Suppl. 23; Bennett *v.* Pratt, 2 How. Pr. (N. Y.) 77; Campbell *v.* Grove, 2 Johns. Cas. (N. Y.) 105.

Reading of affidavits not served discretionary with the court.— Where affidavits to be used in support of special motions are not served on the opposite counsel a reasonable time before the motion is brought on, the court may reject the affidavits, or, in its discretion, allow the same to be read giving the opposite party the option to proceed with the hearing or to take time for the perusal and examination of the affidavits, and production of affidavits in reply, if they are competent and necessary. Sterrick *v.* Pugsley, 22 Fed. Cas. No. 13,379, 1 Flipp. 350.

An affidavit containing new matter cannot be read in support of a motion, although the facts in it were not known until the day of hearing; but the party should serve copies and move the next day. Bergen *v.* Boerum, 2 Cai. (N. Y.) 256. *Compare* State *v.* Second Judicial Dist., 25 Mont. 202, 64 Pac. 352.

85. Goings *v.* Chapman, 18 Ind. 194.

86. Savage *v.* Relyea, 3 How. Pr. (N. Y.) 276; Clemens *v.* Horton, 13 Wkly. Notes Cas. (Pa.) 504.

Refusal to file.— The court may refuse to allow affidavits to be read on the hearing of a motion, where the party making the motion and producing affidavits declines to file them, after being notified in open court that objection would be made to the reading of them unless filed. Hubble *v.* Osborn, 31 Ind. 249.

87. Makepeace *v.* Lukens, 27 Ind. 435, 92 Am. Dec. 263; Clemens *v.* Lukens, 13 Wkly. Notes Cas. (Pa.) 504.

Papers filed after the submission of a motion, and before its decision, without leave of court or the knowledge of the judge, will not aid a party in regard to the motion. Jacoby *v.* Mitchell, 19 Nebr. 537, 26 N. W. 225.

88. Anonymous, 5 Cow. (N. Y.) 13.

89. Parker *v.* Sussex Bank, 8 N. J. L. 160.

The practice of taking affidavits ex parte, to be used on the motion, is peculiar to the chancery court and does not prevail in law courts. Baldwin *v.* Flagg, 43 N. J. L. 495.

Effect of failure to give notice.— Where the rule of the court requires all depositions to be read on the hearing of all motions to be taken on notice to the adverse party, the court may reject *ex parte* affidavits offered in support of a motion. Fowler *v.* Colton, 1 Pinn. (Wis.) 331.

90. Hadley *v.* Geiger, 9 N. J. L. 225.

91. Anonymous, 12 N. J. L. 94.

92. **Compelling the making of affidavit** generally see 2 Cyc. 37.

93. **Only parties** to an action can compel the making of affidavits for use on motions. Atty.-Gen. *v.* Continental L. Ins. Co., 66 How. Pr. (N. Y.) 51.

94. **Parties to a suit** cannot be compelled

same,[95] such court may,[96] by order, appoint a referee to take the affidavit or deposition of such person or persons.[97]

(B) *Proceedings For*—(1) NOTICE. Notice of application for an order authorizing the taking of an affidavit for the purposes of a motion need not be given to the adverse party.[98]

(2) AFFIDAVIT TO OBTAIN ORDER. The affidavit to obtain an order for the taking of a compulsory affidavit for the purposes of a motion must show why and in what manner such affidavit is necessary,[99] that the affidavit is intended to be used in making or opposing the motion,[1] and that the third party has refused to make the affidavit.[2]

(3) EXAMINATION.[3] The witness cannot be examined upon the general merits of the controversy.[4] Nor can the witness be compelled to submit to cross-examination.[5]

to make an affidavit for use on a motion therein. King *v.* Leighton, 58 N. Y. 383; Spratt *v.* Huntington, 4 Thomps. & C. (N. Y.) 551; Hodgskin *v.* Atlantic, etc., R. Co., 3 Daly (N. Y.) 70; Stubbs *v.* Stubbs, 7 N. Y. St. 282; Knoeppel *v.* Kings County F. Ins. Co., 47 How. Pr. (N. Y.) 412; Palmer *v.* Adams, 22 How. Pr. (N. Y.) 375; Stake *v.* Andre, 9 Abb. Pr. (N. Y.) 420, 18 How. Pr. 159. *Contra*, Cockey *v.* Hurd, 14 Abb. Pr. N. S. (N. Y.) 183; Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.

The relator in an application for mandamus is a "party" whose affidavit cannot be taken for use on a motion under N. Y. Code Civ. Proc. § 885, authorizing the appointment of a referee for that purpose. People *v.* Paton, 20 Abb. N. Cas. (N. Y.) 172.

Strangers.— A third person, who refuses to make an affidavit for the purposes of a motion may be compelled so to do. Rogers *v.* Durant, 2 Thomps. & C. (N. Y.) 676, holding further that where a person was requested several times on successive days to make an affidavit for the purposes of a motion, but each time declined to make the affidavit until he had consulted his counsel, there was a sufficient refusal to authorize an order for a compulsory affidavit.

95. A refusal to make an affidavit for use on a motion is not shown where the witness merely declines to answer all questions on oath, in the presence of a stenographer, when no affidavit has been drawn and submitted to him. Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279.

Subsequent tender of voluntary affidavit.— After a person has refused to make affidavit and a compulsory affidavit has been ordered, the court should not arrest his examination on the ground that an affidavit has been subsequently tendered, unless it clearly appears that such affidavit is full and frank. Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.

96. Discretion of court.— The granting of an order, under a statute providing for compulsory affidavits for use on motions, is in the discretion of the court. Dauchy *v.* Miller, 16 Abb. Pr. N. S. (N. Y.) 100; Hudson River West Shore R. Co. *v.* Kay, 14 Abb. Pr. N. S. (N. Y.) 191.

97. Dauchy *v.* Miller, 16 Abb. Pr. N. S. (N. Y.) 100; Hudson River West Shore R. Co. *v.* Kay, 14 Abb. Pr. N. S. (N. Y.) 191; Pierie *v.* Berg, 7 S. D. 578, 64 N. W. 1130.

Applies only to civil cases.— The statute authorizing compulsory affidavits for use on motions applies only to civil cases. People *v.* Squire, 3 N. Y. St. 194.

An application made to the judge for an ex parte order to hold to bail is not contemplated by the statute authorizing compulsory affidavits to be used on a motion in a court of record. De Hart *v.* Hatch, 4 Thomps. & C. (N. Y.) 11.

98. Keenan *v.* O'Brien, 2 N. Y. Suppl. 242; Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73. *Contra*, Brooks *v.* Schultz, 5 Rob. (N. Y.) 656.

99. Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. 212; Dauchy *v.* Miller, 16 Abb. Pr. N. S. (N. Y.) 100; Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279; Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430; Cockey *v.* Hurd, 45 How. Pr. (N. Y.) 70; Matter of Bannister, 1 N. Y. Month. L. Bul. 9; Pierie *v.* Berg, 7 S. D. 578, 64 N. W. 1130.

Submitting affidavit to be verified.— Where the compulsory affidavit of a person is sought for the purposes of a motion, the proper practice is to draft an affidavit and submit it for verification before applying for an order. Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279; Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430; Pierie *v.* Berg, 7 S. D. 578, 64 N. W. 1130.

1. Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279; Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. 212.

2. Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279; Pierie *v.* Berg, 7 S. D. 578, 64 N. W. 1130.

3. Arresting examination upon subsequent tender of voluntary affidavit see *supra*, note 95.

4. Dauchy *v.* Miller, 16 Abb. Pr. N. S. (N. Y.) 100; Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279.

5. Keenan *v.* O'Brien, 2 N. Y. Suppl. 242; Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279; Camp *v.* Fraser, 4 Dem. Surr. (N. Y.) 212. But see Brooks *v.* Schultz, 3 Abb. Pr. N. S. (N. Y.) 124; N. Y. Code Civ. Proc. § 885.

So too it has been held that the witness cannot be compelled to produce books or papers or to obey a subpœna duces tecum.[6]

(4) Setting Aside Order — (a) In General. An order for a compulsory affidavit will be set aside where there is nothing in the affidavit on which it was granted to show that the affidavit desired was material or necessary on the motion,[7] or where it clearly appears that it was not obtained for the legitimate purpose of securing testimony for use on a motion.[8] But an order will not be set aside at the instance of the adverse party for irregularity, unless he shows that he is injured by such irregularity.[9]

(b) At Whose Instance. An order for a compulsory affidavit to be used on a motion may be set aside on the application of the adverse party,[10] or the person ordered to make the affidavit.[11]

2. Counter Affidavits. Counter affidavits may be read in opposition to a motion, without having been served.[12] The moving party will not generally be allowed to read additional affidavits which are not in answer to new matter introduced by the adverse party, but merely corroborative of the facts set forth in the moving papers;[13] but the court may in its discretion relax the rule where the facts ought to be more fully developed to enable the court to intelligently decide the motion.[14]

IV. Withdrawal or Abandonment.

A. Withdrawal. A motion may be withdrawn by leave of the court,[15] but only upon payment of the costs of the motion.[16]

B. Abandonment. If a motion was never called to the attention of the court, the right to make a motion under that notice will be presumed to have been waived.[17] The moving party may, before the day of the hearing, also waive the motion by making an inconsistent motion in the cause.[18] Similarly by taking

6. Wallace *v.* Baring, 2 N. Y. App. Div. 501, 37 N. Y. Suppl. 1078; Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.

7. Williams *v.* Western Union Tel. Co., 3 N. Y. Civ. Proc. 448.

8. Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. 212.

9. Ramsey *v.* Gould, 57 Barb. (N. Y.) 398, 39 How. Pr. 62; Brooks *v.* Schultz, 3 Abb. Pr. N. S. (N. Y.) 124.

10. Ramsey *v.* Gould, 57 Barb. (N. Y.) 398, 39 How. Pr. 62; Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. 212. *Contra*, Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.

11. Spratt *v.* Huntington, 2 Hun (N. Y.) 341; McCue *v.* Tribune Assoc., 1 Hun (N. Y.) 469; Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.

The fact that a person is in contempt for disobeying an order for taking his affidavit for use on a motion does not prevent him from moving to vacate such order on the ground that it is irregular. Spratt *v.* Huntington, 2 Hun (N. Y.) 341.

After a person has appeared and submitted to an examination in compliance with an order, he cannot move to vacate it on the ground of insufficiency of the affidavit on which it was granted. McCue *v.* Tribune Assoc., 1 Hun (N. Y.) 469; Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.

12. Lathrop *v.* Hicks, 2 Dougl. (Mich.) 223; Strong *v.* Platner, 5 Cow. (N. Y.) 21; Campbell *v.* Grove, 2 Johns. Cas. (N. Y.) 105. See also Philips *v.* Blagge, 3 Johns. (N. Y.) 141.

Favorable to moving party. — Where the affidavits offered in opposition to a motion show the moving party to be entitled to the relief prayed, although on grounds not stated in the moving papers, he may take advantage of the grounds thus shown. Richards *v.* White, 7 Minn. 345.

13. Jacobs *v.* Miller, 10 Hun (N. Y.) 230; Powell *v.* Clark, 5 Abb. Pr. (N. Y.) 70.

The earlier New York cases announce that it is a rigid rule of practice, that a party will never be allowed to read counter supplementary affidavits in support of his motion. Callen *v.* Kearny, 2 Cow. 529; Deas *v.* Smith, 1 Cai. 171; Campbell *v.* Grove, 2 Johns. Cas. 105. See also Merritt *v.* Baker, 11 How. Pr. 456.

14. Young *v.* Rollins, 85 N. C. 485.

15. Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592; Hoover *v.* Rochester Printing Co., 2 N. Y. App. Div. 11, 37 N. Y. Suppl. 419; Walkinshaw *v.* Perzel, 7 Rob. (N. Y.) 606.

16. Hoover *v.* Rochester Printing Co., 2 N. Y. App. Div. 11, 37 N. Y. Suppl. 419; Walkinshaw *v.* Perzel, 7 Rob. (N. Y.) 606, holding further that the rule that a motion cannot be withdrawn without payment of costs does not apply where the motion is for two distinct purposes and one part is withdrawn, leaving the matter as to the other part pending.

17. Hoops *v.* Culbertson, 17 Iowa 305; Elliott County *v.* Kitchen, 14 Bush (Ky.) 289. See also Foster *v.* Wade, 4 Metc. (Ky.) 252.

18. Kentucky Cent. R. Co. *v.* McGinty, 9 Ky. L. Rep. 356.

some step in the cause, before the hearing of the motion, which renders the motion unnecessary the moving party will be deemed to have abandoned or waived his motion.[19]

V. QUASHING OR DISMISSING.

Although a motion to quash or dismiss another motion is not proper practice,[20] yet the granting of such a motion will be considered tantamount to overruling the original motion.[21]

VI. HEARING AND DETERMINATION.

A. Hearing — 1. PLACE. The place of hearing follows that fixed in the notice of motion.[22]

2. TIME. The time of hearing the motion must follow the notice if the motion is noticed for a day out of an appointed term.[23]

3. BURDEN OF PROOF. Upon the hearing of a motion the burden of proof rests with the moving party; but if the adverse party admits the principal allegations on which the motion is founded, and sets up new matter in avoidance, the burden of proof shifts to him.[24]

4. RECEPTION OF EVIDENCE — a. Oral Testimony. In some jurisdictions it is the practice to receive oral testimony on the hearing of a motion;[25] while in other jurisdictions such practice is unknown.[26]

b. After Submission of Motion. Parties have no right, after submission of a motion, to introduce additional affidavits or evidence, except by leave of court and upon notice to the other side.[27]

5. ARGUMENT — a. Generally — (I) *SUBJECTS OF CONSIDERATION.* As to the proper subjects of consideration on the argument of a motion, the authorities are in conflict, it being held in one or more jurisdictions that the parties are confined to the grounds stated in the motion,[28] while in another jurisdiction the contrary view obtains.[29]

(II) *RIGHT TO OPEN AND CLOSE.* The moving party is entitled to open[30] and

19. Goch *v.* Marsh, 8 How. Pr. (N. Y.) 439.

So far as an enumerated motion is concerned, the only mode of procuring its denial or dismissal is to notice it for argument and bring it to a hearing, where a proper order to stay proceedings is in force. Everitt *v.* Wood, 7 Cow. (N. Y.) 414.

The overruling of a motion to quash another motion does not necessarily pass upon the question whether the original motion was a proper one or was filed in season. German Sav. Bank *v.* Cady, 114 Iowa 228, 86 N. W. 277.

21. Long *v.* Ruch, 148 Ind. 74, 47 N. E. 156; Blemel *v.* Shattuck, 133 Ind. 498, 33 N. E. 277; Reid *v.* Fillmore, 12 Wyo. 72, 73 Pac. 849.

22. Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 233.

23. Vernovy *v.* Tauney, 3 How. Pr. (N. Y.) 359.

A motion may, however, be made on any day of the term after that for which it is noticed, although the notice does not contain the words "or as soon thereafter as counsel can be heard." Anonymous, 1 Johns. (N. Y.) 143.

24. Shearman *v.* Hart, 14 Abb. Pr. (N. Y.) 358.

25. Tyler *v.* Safford, 24 Kan. 580; State *v.* Stackhouse, 24 Kan. 445. See also U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,619, 4 Cranch C. C. 472, holding that where a motion is supported by an affidavit which is contested on the ground that the affiant is an idiot, the court will order that he be produced and examined by the court.

New York rule.— A responding party, who has made no affidavit on his own behalf, cannot be compelled by the judge before whom the motion is heard to appear and be examined orally touching matters of fact involved in the controversy. Meyer *v.* Lent, 7 Abb. Pr. 225. See also Huelin *v.* Ridner, 6 Abb. Pr. 19.

26. O'Docherty *v.* McGloin, 25 Tex. 67; Carr *v.* Racine Commercial Bank, 18 Wis. 255; Fowler *v.* Colton, 1 Pinn. (Wis.) 331.

27. Dunwell *v.* Warden, 6 Minn. 287.

28. Challiss *v.* Headley, 9 Kan. 684; Nevada Co. *v.* Farnsworth, 89 Fed. 164.

29. Den *v.* Geiger, 9 N. J. L. 225.

30. Wilmington First Nat. Bank *v.* Lieberman, 1 Marv. (Del.) 367, 41 Atl. 90; New York, etc., Co. *v.* New York, 1 Hilt. (N. Y.)

close[31] the argument whether the motion is brought before the court upon an order to show cause or otherwise.

b. Reargument — (I) *Distinguished From Renewal.* A reargument or rehearing differs from a renewal in the following particulars: (1) It is not an independent proceeding, but is always to be heard on the same notice and the same papers upon which the original motion was heard;[32] (2) although the time to move has elapsed and the court has no power to grant leave to renew, so as to enlarge such time, yet a motion for a rehearing may be entertained;[33] (3) it is not appealable.[34]

(II) *Grounds.* Where there has been a decision upon a motion, the doctrine of *res judicata* does not go so far as to preclude a further inquiry and a rehearing where there has been a misapprehension of the fact,[35] or where it appears that some decision or principle of law, which would have had a controlling effect, has been overlooked;[36] but the power to grant a rehearing or reargument cannot be arbitrarily exercised, and if the judge grants it on insufficient grounds his action constitutes reversible error.[37]

(III) *Discretion of Court.* A motion for reargument of a motion is generally addressed to the discretion of the court.[38]

(IV) *On What Papers Granted.* On proper grounds a judge deciding a motion may grant a rehearing or reargument on the same papers only,[39] and it is in this respect that reargument differs from renewal which may be upon the same or new papers.[40]

(V) *Mode of Procuring.* Where the argument of a motion for leave to reargue involves the reargument itself, the motion for leave to reargue may be combined with the notice of reargument.[41]

562; Tarbel *v.* White River Bank, 24 Vt. 655.

31. Wilmington First Nat. Bank *v.* Lieberman, 1 Marv. (Del.) 367, 41 Atl. 90; New York, etc., Co. *v.* New York, 1 Hilt. (N. Y.) 562.

32. Matter of Blackwell, 48 N. Y. App. Div. 230, 62 N. Y. Suppl. 793; Seletsky *v.* Third Ave. R. Co., 44 N. Y. App. Div. 632, 60 N. Y. Suppl. 405; Wright *v.* Terry, 24 Hun (N. Y.) 228.

33. Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657.

34. Conlen *v.* Rizer, 109 N. Y. App. Div. 537, 96 N. Y. Suppl. 566; Tucker *v.* Dudley, 104 N. Y. App. Div. 191, 93 N. Y. Suppl. 355.

35. Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616; Klipstein *v.* Marchmedt, 39 Misc. (N. Y.) 794, 81 N. Y. Suppl. 317; Arnold *v.* Oliver, 64 How. Pr. (N. Y.) 452.

Decision on motion as res judicata see 23 Cyc. 1224.

For the purpose of introducing facts not in existence at the time the motion was made, reargument of a motion will not be allowed. Webb *v.* Groom, 6 Rob. (N. Y.) 532.

36. Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616; Bolles *v.* Duff, 56 Barb. (N. Y.) 567; Webb *v.* Groom, 6 Rob. (N. Y.) 532; Klipstein *v.* Marchmedt, 39 Misc. (N. Y.) 794, 81 N. Y. Suppl. 317.

After expiration of time for appeal.— The power to grant a rehearing or reargument of a motion is not exercisable after the expiration of the time for appealing from the former decision for the purpose of correcting an error of law disclosed for the first time by a subsequent decision of a higher court. Klipstein *v.* Marchmedt, 39 Misc. (N. Y.) 794, 81 N. Y. Suppl. 317; Matter of Silliman, 38 Misc. (N. Y.) 226, 77 N. Y. Suppl. 267. See also Megary *v.* Shipley, 72 Md. 33, 19 Atl. 151.

Decision not palpably erroneous.— Where an assignor moved to set aside an *ex parte* order directing the sale of a trade-mark composed of his name which would prevent him from forever using his own name in retrieving his fortune and would permit a stranger to use it, although not associated with his own business, and especially where before the assignment the assignor had sold one half a million labels bearing the trade-mark to be used on the goods to be purchased of the assignee, a decision of a justice sustaining the motion was not so palpably erroneous as would permit a reargument on the ground that he had overlooked decisions inconsistent with his conclusion. Matter of Adams, 24 Misc. (N. Y.) 293, 53 N. Y. Suppl. 666.

37. *In re* Livingston, 34 N. Y. 555; Klipstein *v.* Marchmedt, 39 Misc. (N. Y.) 794, 81 N. Y. Suppl. 317.

38. Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616; Klipstein *v.* Marchmedt, 39 Misc. (N. Y.) 794, 81 N. Y. Suppl. 317; Holmes *v.* Rogers, 2 N. Y. Suppl. 501.

39. Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616; Bolles *v.* Duff, 56 Barb. (N. Y.) 567; Webb *v.* Groom, 6 Rob. (N. Y.) 532; Klipstein *v.* Marchmedt, 39 Misc. (N. Y.) 794, 81 N. Y. Suppl. 317; Akerly *v.* Vilas, 1 Fed. Cas. No. 120, 3 Biss. 332.

40. People *v.* Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644.

41. Bolles *v.* Duff, 56 Barb. (N. Y.) 567.

6. Continuance or Postponement — a. For Cause. The granting of a postponement or continuance of the hearing of a motion for cause is within the discretion of the court.[42]

b. As Matter of Course. Motions not heard on the day for which noticed, in consequence of the inability of the court to hear them, stand over as a matter of course.[43]

B. Determination — 1. In General. A party is entitled to have his motion heard and determined on the merits, if properly made.[44]

2. Denial When Proper — a. Not Grantable in Form Demanded. Unless the moving party is entitled, as a matter of right, to the relief demanded, it is not error to deny a motion which cannot be allowed substantially in the form in which it is presented.[45]

b. Unnecessary Motion. A motion may be denied on the ground that it is unnecessary.[46]

3. Questions of Fact. A question of fact involved in a motion must be decided, like any other fact, by the weight of evidence,[47] and whatever fact a court may inquire into on a motion, it can also determine, and its determination establishes the fact for all the purposes of the motion.[48]

4. Time of Determination. A clearly frivolous motion may be overruled immediately, notwithstanding a statute requiring motions to be filed at least one day before they are determined.[49] Delay of the court in announcing its decision on a motion will not operate to the prejudice of the party in whose favor the decision is made, and the court must give effect to the decision as of the time when the motion was made.[50]

5. Division in Opinion of Court. Where there is an equal division of opinion in the court, the motion fails.[51]

42. Gurney *v.* Steffens, 56 Kan. 295, 43 Pac. 241; Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983; Westheimer *v.* Cooper, 40 Kan. 370, 19 Pac. 852; Harlow *v.* Warren, 38 Kan. 480, 17 Pac. 159; Bliss *v.* Carlson, 17 Kan. 325; Davis *v.* Wilson, 11 Kan. 74.

Postponement to prepare or procure affidavits.— The court will not postpone the hearing of a motion to enable the adverse party to prepare his affidavits, unless he can show some reason why he was not prepared. Jackson *v.* Ferguson, 3 Cai. (N. Y.) 127. But where the adverse party was necessarily absent when motion papers were served upon his attorneys, reasonable delay should be granted, when the motion comes up for hearing, to enable him to prepare his affidavits. Ohly *v.* Ohly, 11 N. Y. Wkly. Dig. 129.

Where a conclusive answer is given to a special motion, the motion may be denied, and will not be continued to a subsequent term to give the moving party an opportunity of replying. Standard *v.* Williams, 10 Wend. (N. Y.) 599.

43. Hartman *v.* Viera, 113 Ill. App. 216; Com. *v.* McClelland, Hard. (Ky.) 28; Bronner *v.* Loomis, 17 Hun (N. Y.) 439; Mathis *v.* Vail, 10 How. Pr. (N. Y.) 458. But see Ireland *v.* Spalding, 11 Mich. 455, holding that where a motion is noticed for a certain day in a term, and is not then called up, or postponed by order of the court to a subsequent day, it cannot afterward be taken up without consent of the parties.

44. Cornish *v.* Coates, 91 Minn. 108, 97 N. W. 579.

45. Palmer *v.* Ulysses First Bank, 59 Nebr. 412, 81 N. W. 303; Beebe *v.* Latimer, 59 Nebr. 305, 80 N. W. 904; Draper *v.* Taylor, 58 Nebr. 787, 79 N. W. 709; Dobry *v.* Western Mfg. Co., 58 Nebr. 667, 79 N. W. 559; Chadron First Nat. Bank *v.* Engelbrecht, 58 Nebr. 639, 79 N. W. 556; Hudelson *v.* Tobias First Nat. Bank, 56 Nebr. 247, 76 N. W. 570.

Reference of question of fact see References.

46. Star F. Ins. Co. *v.* Godet, 34 N. Y. Super. Ct. 359; Hill *v.* Smith, 2 How. Pr. (N. Y.) 242.

47. Southworth *v.* Resing, 3 Cal. 377.

In passing on a conflicting state of facts, presented by motion papers, weight should be given to a construction in accordance with the probability of human action as seen in the actual dealings of men. Verastegni *v.* Luzunarez, 12 N. Y. Wkly. Dig. 489.

Necessity of affirmative findings of fact.— The statute requiring findings to be made by the trial court upon issues of fact applies only to those issues which arise upon the pleadings, and not to issues arising upon motion, and a decision will not be reversed if there is evidence of facts upon which it can be properly based, although such facts are not affirmatively found. McCoy *v.* Brooks, (Ariz. 1905) 80 Pac. 365.

48. Hottenstein *v.* Conrad, 9 Kan. 435.

49. Valle *v.* Picton, 16 Mo. App. 178.

50. Willson *v.* Henderson, 15 How. Pr. (N. Y.) 90.

51. *In re* Contested Elections, 1 Brewst. (Pa.) 126; Goddard *v.* Coffin, 10 Fed. Cas. No. 5,490, 2 Ware 382.

6. Relief Awarded — a. To Moving Party. As to those interested in the subject-matter of the motion, who, being served with notice thereof, do not appear thereon, the relief granted must not go beyond the terms of the notice;[52] but the rule is otherwise as between those who appear and take part in the hearing on the motion.[53] Where the notice of motion asks for specific relief, or for such other or further order as may be just, the court may, under the alternative clause, afford any relief compatible with the facts presented.[54] The court will see, however, that the adverse party is not in any respect taken by surprise or deprived of the privilege of being heard in argument and by proof as to the further relief to be granted.[55]

b. To Adverse Party. It is irregular to grant affirmative relief to the adverse party upon matter appearing in the opposing papers which the moving party had no opportunity to answer.[56]

VII. Renewal.[57]

A. Leave Therefor — 1. Necessity — a. On Same State of Facts. The general rule is that a motion once denied on the merits cannot be renewed on the same facts without leave of the court.[58] And if the relief sought is the same, the

52. De Walt *v.* Kinard, 19 S. C. 286; *Ex p.* Winding-up Acts, 2 Eq. Rep. 652, 18 Jur. 339, 23 L. J. Ch. 761, 2 Wkly. Rep. 367.

Where a motion is made under a statute for a particular remedy therein provided, it is not competent for the court to grant other equitable relief not embraced in or relied on in the motion. Schneider *v.* Meyer, 56 Mo. 475.

53. *Ex p.* Winding-up Acts, 2 Eq. Rep. 652, 18 Jur. 339, 23 L. J. Ch. 761, 2 Wkly. Rep. 367.

54. People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295; Landis *v.* Olds, 9 Minn. 90; Bissell *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385; Martin *v.* Kanouse, 2 Abb. Pr. (N. Y.) 327; Boylen *v.* McAvoy, 29 How. Pr. (N. Y.) 278; Ferguson *v.* Jones, 12 Wend. (N. Y.) 241; Rogers *v.* Toole, 11 Paige (N. Y.) 212.

Where a party moves for an order to which he is not entitled, it is discretionary with the court whether to grant proper relief under the alternative prayer for general relief contained in the notice of motion, or to deny the motion altogether. Van Slyke *v.* Hyatt, 46 N. Y. 259.

55. Landis *v.* Olds, 9 Minn. 90.

56. Garcie *v.* Sheldon, 3 Barb. (N. Y.) 232.

57. **Distinguished from reargument** see *supra*, VI, A, 5, b, (I).

58. *California.*— Reed *v.* Allison, 54 Cal. 489; Ford *v.* Doyle, 44 Cal. 635.

Kansas.—Adams *v.* Lockwood, 30 Kan. 373, 2 Pac. 626.

Michigan.— Johnson *v.* Johnson, Walk. 309.

Minnesota.— Stacy *v.* Stephen, 78 Minn. 480, 81 N. W. 391.

Nebraska.— Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620; Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863; Livingston *v.* Coe, 4 Nebr. 379.

New York.— Riggs *v.* Pursell, 74 N. Y. 370; Gall *v.* Gall, 58 N. Y. App. Div. 97, 68 N. Y. Suppl. 649; Sheehan *v.* Carvalho, 12 N. Y. App. Div. 430, 24 N. Y. Suppl. 222; Hoover *v.* Rochester Printing Co., 2 N. Y. App. Div. 11, 37 N. Y. Suppl. 419; Klumpp *v.* Gardner, 44 Hun 515; Belmont *v.* Erie R. Co., 52 Barb. 637; Willet *v.* Fayerweather, 1 Barb. 72; Melville *v.* Matthewson, 49 N. Y. Super. Ct. 388; Cazneau *v.* Bryant, 6 Duer 668; Dunn *v.* Meserole, 5 Daly 434; Kalichman *v.* Nagler, 34 Misc. 809, 68 N. Y. Suppl. 396; Talcott *v.* Burnstine, 13 N. Y. St. 552; Schultze *v.* Rodewald, 1 Abb. N. Cas. 365; Hall *v.* Emmons, 8 Abb. Pr. N. S. 451, 39 How. Pr. 187; Pattison *v.* Bacon, 12 Abb. Pr. 142; Smith *v.* Spalding, 30 How. Pr. 339; Lovell *v.* Martin, 21 How. Pr. 238; Mills *v.* Thursby, 11 How. Pr. 114; Bellinger *v.* Martindale, 8 How. Pr. 113; Snyder *v.* White, 6 How. Pr. 321; Bascom *v.* Feazler, 2 How. Pr. 16; Pike *v.* Power, 1 How. Pr. 164; Harker *v.* McBride, 1 How. Pr. 108; Thayer *v.* Parr, 13 N. Y. Wkly. Dig. 137; Dollfus *v.* Frosch, 5 Hill 493, 40 Am. Dec. 368; Mitchell *v.* Allen, 12 Wend. 290; Dodd *v.* Astor, 2 Barb. Ch. 395; De Peyster *v.* Hildreth, 2 Barb. Ch. 109; Banks *v.* American Tract Soc., 4 Sandf. Ch. 438; Irving Nat. Bank *v.* Kernan, 3 Redf. Surr. 1. *Compare* People *v.* Eddy, 3 Lans. 80, holding that the court may in its sound discretion permit the renewal of a motion, without prior leave therefor having been obtained, as where the original motion was dismissed by a subordinate tribunal without any ground whatever.

North Carolina.— Jones *v.* Thorne, 80 N. C. 72.

North Dakota.— Clopton *v.* Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749.

Pennsylvania.— Brown *v.* O'Brien, 4 Pa. L. J. 454.

Wisconsin.— Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037; Webster *v.* Oconto County, 47 Wis. 225, 2 N. W. 335; Rogers *v.* Hoenig, 46 Wis. 361, 1 N. W. 17; Corwith *v.* State Bank, 11 Wis. 430, 78 Am. Dec. 719.

United States.—A. B. Dick Co. *v.* Wichelman, 109 Fed. 81.

See 35 Cent. Dig. tit. "Motions," § 53.

Where a party proceeds in a second motion upon a different property interest and right

mere fact that the new motion is based on different grounds does not take the case out of the general rule.[59]

b. On New State of Facts. If, however, a new state of facts arises after the denial of a motion, the motion may be renewed on such facts, although no leave therefor has been obtained.[60]

2. What Constitutes. The fact of hearing a motion a second time is proof that the court has given leave to present the matter anew.[61] However, the fact that the court, in denying a motion for the vacation of an order, orally stated on the hearing that another motion could be made to vacate the order on the merits, does not constitute leave to renew the motion.[62]

3. When Grantable. It is quite usual in the practice of the several jurisdictions when a motion is denied to have the entry show that the motion was

from that involved in the first motion, the doctrine that a motion once denied cannot be renewed as a matter of right, and without leave of the court, except upon facts arising subsequent to the decision, does not apply. Steuben County Bank *v.* Alberger, 83 N. Y. 274.

To a motion founded on irregularity, the rule stated in the text does not apply. Rondout First Nat. Bank *v.* Hamilton, 50 How. Pr. (N. Y.) 116.

Where the second motion asks for the exercise of the court's discretion as a matter of favor, after a first motion, made as one of right, has been denied because not made in time, the rule stated in the text does not apply. Hall *v.* Emmons, 9 Abb. Pr. N. S. (N. Y.) 370.

The rule in North Dakota is that where a motion has been once denied the right to apply for an order a second time, on the same grounds, is not a strict legal right, and leave to do so should be sparingly granted to prevent abuse and vexatious litigation. Clopton *v.* Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749.

59. Sheehan *v.* Carvalho, 12 N. Y. App. Div. 430, 42 N. Y. Suppl. 222; Klumpp *v.* Gardner, 44 Hun (N. Y.) 515; Pattison *v.* Bacon, 12 Abb. Pr. (N. Y.) 142, 21 How. Pr. 478; Lovell *v.* Martin, 21 How. Pr. (N. Y.) 238.

60. Harlan *v.* White, 18 La. Ann. 399; Buel *v.* New York Steamer, 17 La. 541; Riggs *v.* Pursell, 74 N. Y. 370; Malone *v.* Saints Peter & Paul's Church, 83 N. Y. App. Div. 80, 82, N. Y. Suppl. 519; Havana Bank *v.* Moore, 5 Hun (N. Y.) 624; Erie R. Co. *v.* Ramsey, 57 Barb. (N. Y.) 449; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Willet *v.* Fayerweather, 1 Barb. (N. Y.) 72; German Exch. Bank *v.* Kroder, 14 Misc. (N. Y.) 179, 35 N. Y. Suppl. 380; Wentworth *v.* Wentworth, 51 How. Pr. (N. Y.) 289; Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339; Fox *v.* Fox, 24 How. Pr. (N. Y.) 385; Bonnel *v.* Henry, 13 How. Pr. (N. Y.) 142; Butts *v.* Burnett, 6 Abb. Pr. N. S. (N. Y.) 302; People *v.* Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Ray *v.* Connor, 3 Edw. (N. Y.) 478; Jones *v.* Thorne, 80 N. C. 72; Steele *v.* Charlotte, etc., R. Co., 14 S. C. 324.

A new motion is a matter of right when made upon a new state of facts. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Dollfus *v.* Frosch, 5 Hill (N. Y.) 493, 40 Am. Dec. 368; Clopton *v.* Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749.

New matter which will justify the renewal of a motion without leave must be something which has occurred or come to the knowledge of the moving party since the decision of the first motion. Havana Bank *v.* Moore, 5 Hun (N. Y.) 624; Willet *v.* Fayerweather, 1 Barb. (N. Y.) 72; Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339.

Statements impeaching the character of the adverse party may sometimes be considered as new and additional facts on which the motion may be renewed. Apsley *v.* Wood, 67 How. Pr. (N. Y.) 406.

Failure to state new facts in affidavit.— On a second *ex parte* application for the examination of parties, made after the order granting the first application had been vacated, the fact that the affidavit did not state what new facts were claimed to be shown on the second application, or whether there were any new facts to be shown, as required by general rule of practice 25, is only an irregularity and does not compel the court to refuse the application. Skinner *v.* Steele, 88 Hun (N. Y.) 307, 34 N. Y. Suppl. 748.

It is only where the facts remain the same that a party whose motion has once been denied is estopped from renewing it. Akerly *v.* Vilas, 1 Fed. Cas. No. 120, 3 Biss. 332. See also *supra*, VII, A, 1, a.

61. Clopton *v.* Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749. See also Harris *v.* Brown, 93 N. Y. 390, holding that the fact that no formal leave to renew a motion on additional papers was granted does not necessarily determine that a second motion made on an order to show cause is not a renewal, the granting of the order to show cause and hearing the second motion on the original and additional papers being in effect a grant of leave to renew and a renewal.

62. Sheehan *v.* Carvalho, 12 N. Y. App. Div. 430, 42 N. Y. Suppl. 222.

Granting an order to show cause, on a subsequent application to the judge who made an order denying a motion, does not of itself amount to leave to renew the motion. Amsinck *v.* Northrup, 12 N. Y. Wkly. Dig. 573; Webster *v.* Oconto County, 47 Wis. 225, 2 N. W. 335.

denied without prejudice, but leave to renew may be given afterward as well as at the time of the denial.[63]

4. Power of Court — a. In General. The doctrine of *res adjudicata*, in its strict sense, does not apply to the decision of a motion,[64] and the court may, upon a proper showing, allow the renewal of a motion once denied.[65] But no judge has the power to grant a renewal or rehearing of a motion denied by another.[66]

b. Discretion of Court. An application for leave to renew a motion, which has been denied, is generally addressed to the discretion of the court.[67]

5. Effect of Leave. An order allowing a motion to be renewed does not extend the time within which the statute requires the motion to be made.[68]

B. Appeal From Order on Original Motion — 1. Affecting Right to Renew. By taking appeal from an order granted on a motion, the appellant does not waive his right to renew the motion denied by the order appealed from.[69]

2. Effect of Renewal Upon the Appeal. After appeal taken from an order denying a motion, the renewal of the motion, under leave given in the order, precludes the appellant from prosecuting his appeal from such order.[70]

MOTIVE.[1] That which stimulates or incites an action;[2] the mainspring of human action;[3] some cause or reason that moves the will and induces action;[4] the moving power which impels to action for a definite result;[5] an inducement, or that which leads or tempts the mind to indulge a criminal act.[6] (Motive: Affecting — Action or Right to Action, see Actions; Damages, see Damages; Fraudulent Conveyance, see Fraudulent Conveyances; Validity of Assignment, see Assignments For Benefit of Creditors. Evidence of in General, see Criminal Law; Evidence. For Crime, see Criminal Law. In Action Relating to Gift, see Gifts. In Criminal Prosecution, see Criminal Law, and the Particular Criminal Titles. In Malicious Prosecution, see Malicious Prosecution. See also Intent; Intention; Malice.)

63. Bowers *v.* Cherokee Bob, 46 Cal. 279. **The rule in Wisconsin** is, however, that leave to renew the motion must be granted by the court, if at all, at the time of its decision, and be a part and qualification of the order entered on the decision. Webster *v.* Oconto County, 47 Wis. 225, 2 N. W. 335.

64. Bowers *v.* Cherokee Bob, 46 Cal. 279; Ford *v.* Doyle, 44 Cal. 635; Reeves *v.* Best, 13 Colo. App. 225, 56 Pac. 985; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Snyder *v.* White, 6 How. Pr. (N. Y.) 321; Banks *v.* American Tract Soc., 4 Sandf. Ch. (N. Y.) 438.

65. Kenney *v.* Kelleher, 63 Cal. 442; Bowers *v.* Cherokee Bob, 46 Cal. 279; Reeves *v.* Best, 13 Colo. App. 225, 56 Pac. 985; Barkley *v.* New York Cent., etc., R. Co., 42 N. Y. App. Div. 597, 59 N. Y. Suppl. 742; White *v.* Munroe, 33 Barb. (N. Y.) 650; Adams *v.* Bush, 2 Abb. Pr. N. S. (N. Y.) 112; Wentworth *v.* Wentworth, 51 How. Pr. (N. Y.) 289.

66. Cazneau *v.* Bryant, 4 Abb. Pr. (N. Y.) 402; Arnold *v.* Oliver, 64 How. Pr. (N. Y.) 452; Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339; Dollfus *v.* Frosch, 5 Hill (N. Y.) 493, 40 Am. Dec. 368; Steele *v.* Charlotte, etc., R. Co., 14 S. C. 324.

67. *California.*— Kenney *v.* Kelleher, 63 Cal. 442; Bowers *v.* Cherokee Bob, 46 Cal. 279.

Minnesota.— Irvine *v.* Meyers, 6 Minn. 558.

Nebraska.— Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620; Livingston *v.* Coe, 4 Nebr. 379.

New York.— King *v.* Merchants' Exch. Co., 5 N. Y. 547; Belmont *v.* Erie R. Co., 52 Barb. 637; White *v.* Munroe, 33 Barb. 650; Lanahan *v.* Drew, 17 N. Y. Suppl. 840; Smith *v.* Spalding, 30 How. Pr. 339; Bellinger *v.* Martindale, 8 How. Pr. 113.

North Dakota.— Clopton *v.* Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749.

This discretion exists notwithstanding the fact that on the rehearing the court may be bound to take the same view of the facts as the judge who originally heard the motion. Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339.

68. Wheeler *v.* Brady, 2 Hun (N. Y.) 347.

69. Union Mills First Nat. Bank *v.* Clark, 42 Hun (N. Y.) 90, 3 N. Y. St. 438; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637. *Compare* Harrison *v.* Neher, 9 Hun (N. Y.) 127.

70. Harris *v.* Brown, 93 N. Y. 390; Apsley *v.* Wood, 67 How. Pr. (N. Y.) 406; Peel *v.* Elliott, 16 How. Pr. (N. Y.) 483. See also Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339.

1. Distinguished from "intent" see 22 Cyc. 1454 note 15.

2. Willis *v.* Jolliffe, 11 Rich. Eq. (S. C.) 447, 489.

3. Darrier *v.* Darrier, 58 Mo. 222, 231.

4. *In re* Eaves, 30 Fed. 21, 26.

5. People *v.* Molineux, 168 N. Y. 264, 297, 61 N. E. 286, 62 L. R. A. 193.

6. People *v.* Fitzgerald, 156 N. Y. 253, 258, 50 N. E. 846.

MOTOR VEHICLES

By Alfred W. Varian *

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CROSS-REFERENCES

For Matters Relating to:
Electricity Generally, see ELECTRICITY.
Law of the Road, see STREETS AND HIGHWAYS.
License-Fee in General, see LICENSES; MUNICIPAL CORPORATIONS.
Livery Stable, see LIVERY-STABLE KEEPERS.
Master and Servant, see MASTER AND SERVANT.
Negligence and Contributory Negligence, see NEGLIGENCE.
Nuisance in General, see NUISANCES.
Railroad, see RAILROADS.
Sale of Personal Property in General, see SALES.
Steam Generally, see STEAM.
Street or Highway in General, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.
Street Railroad, see STREET RAILROADS.
Turnpike or Toll Road, see TOLL ROADS.

I. DEFINITIONS.

A. Motor Vehicle. A motor vehicle is defined by statute as including all vehicles propelled by any power other than muscular power. Exception to the application of the statutes is usually made as to traction engines, road rollers, and such motor vehicles as run only upon rails or tracks.[1]

B. Automobile. An automobile,[2] in the sense in which that term has come to be commonly understood, is a motor vehicle, usually propelled by steam, electricity, or gasoline,[3] and carrying its motive power within itself.[4] It falls within the appellation of "carriage"[5] and "vehicle."[6]

II. PRINCIPLES OF LAW APPLICABLE.

The popular use of automobiles or motor vehicles is of recent origin and growth, being a new contrivance for transportation purposes,[7] and so constructed

1. See the statutes of the several states. See also Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

A road locomotive or traction engine used to draw cars is a motor vehicle within N. H. Laws (1905), c. 86. Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

A motor is the motion-producing contrivance of a car, not the entire car. State *v.* Clinton, 54 N. J. L. 92, 98, 23 Atl. 281.

2. Automobile is defined as "self-propelling; self-moving; applied especially to motor vehicles, such as carriages and cycles of those types usually or formerly propelled by horses or men. An autocar or horseless carriage." Standard Dict. Addenda.

The word denotes primarily: A vehicle designed mainly for transportation of persons on highways or unprepared ground, equipped with an internal combustion, hydrocarbon-vapor engine, which furnishes the motive power and forms a structural portion of the vehicle. Secondarily, it is used as synonymous with "motor vehicle," denoting a vehicle moved by inanimate power of any description, generated or stored within it, and intended for the transportation of either goods or persons on common highways. Americana.

The terms "automobile" and "motor cycle," as used in the statute, include "all vehicles propelled by other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks, and road rollers." Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

"An automobile is not a work of art, nor a machine about which there can be any very peculiar fancy or taste but it is not a common, gross thing, like a road-wagon or an ox-cart." Walker *v.* Grout Bros. Automobile Co., 124 Mo. App. 628, 642, 102 S. W. 25.

Auto is an abbreviation of "automobile," used as a prefix with the meaning of self-moving, self-propelling; as an autocar, an autotruck, etc., and automobile car, carriage, truck, etc. Webster Int. Dict. Suppl.

Autocar is defined as an automobile vehicle especially for street travel. Standard Dict. Addenda.

Automotor is defined as a self-propelled machine (Standard Dict. Addenda), and as an automobile (Webster Int. Dict. Suppl.).

Autotruck is defined as a self-propelling or self-moving truck adapted for heavy grades. Standard Dict. Addenda.

An automobilist is "one who owns, rides in, or drives an automobile." Standard Dict. Addenda.

"Stage line," "railroad line," and "automobile line" are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities, and do not include hacks, stages, and automobiles which merely operate from point to point in one city for the transportation of the public. Com. *v.* Walton, 104 S. W. 323, 31 Ky. L. Rep. 916.

3. McFern *v.* Gardner, 121 Mo. App. 1, 10, 97 S. W. 972; Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

4. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Thies *v.* Thomas, 77 N. Y. Suppl. 276, 279.

5. Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Com. *v.* Hawkins, 14 Pa. Dist. 592.

Carriage defined see 6 Cyc. 351.

A motor bicycle which is propelled by an engine is a carriage within the meaning of 51 & 52 Vict. c. 8, § 4. O'Donoghue *v.* Moon, 68 J. P. 349, 90 L. T. Rep. N. S. 843, 20 T. L. R. 495.

6. Gassenheimer *v.* District of Columbia, 26 App. Cas. (D. C.) 557; Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Thies *v.* Thomas, 77 N. Y. Suppl. 276. See also *infra*, IV, B, 2, note 62. *Compare* Washington Electric Vehicle Transp. Co. *v.* District of Columbia, 19 App. Cas. (D. C.) 462; Mallory *v.* Saratoga Lake Bridge Co., 53 Misc. (N. Y.) 446, 104 N. Y. Suppl. 1025; Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651.

7. *California.*— *In re* Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160.

Delaware.—Hannigan *v.* Wright, 5 Pennew. 537, 63 Atl. 234.

Missouri.— McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972.

as to go upon common roads at great velocity.[8] While their use is new yet there is nothing novel in the principles of law to be applied with respect to their use on public highways. The difficulty is in applying the principles to the facts owing to their novelty.[9] While the operation of a motor vehicle is attendant with dangers not common to the use of the ordinary vehicle, it cannot be placed in the same category as locomotives, gunpowder, dynamite, and similar dangerous machines and agencies, and the rules of law applicable to dangerous instrumentalities do not apply.[10]

III. RIGHTS AND DUTIES IN ABSENCE OF STATUTE.

A. Rights on Public Highways. The use of motor vehicles as a means of conveyance upon the public streets and highways is of itself neither a nuisance,[11] nor unlawful,[12] and when operated with due regard to the rights of others is not

New Hampshire.— Emerson Troy Granite Co. *v.* Pearson, (1906) 64 Atl. 582.

Pennsylvania.— *In re* Automobile Acts, 15 Pa. Dist. 83.

8. *In re* Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

9. Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; House *v.* Cramer, (Iowa 1907) 112 N. W. 3. See also note to Christy *v.* Elliott, 108 Am. St. Rep. 212.

Common-law rules applicable.— Until some change is made by statute the responsibility of persons owning, keeping, and operating motor cars will be determined according to the precedents of the common law and the general law upon cognate subjects. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338.

The rules of law applicable to the relation of master and servant extend to the owner of a motor vehicle and his chauffeur. Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234. See also *infra*, VI, E; VII, E.

Application of old statutes to automobiles see *infra*, IV, B, 2.

Duty of pedestrians to look and listen for automobiles see *infra*, note 34.

10. Jones *v.* Hoge, (Wash. 1907) 92 Pac. 433.

"**There is nothing dangerous** in the use of an automobile when managed by an intelligent and prudent driver. Its guidance, its speed and its noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless, or may soon become as harmless, on the road, as other vehicles in common use. It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that constitutes a menace to public safety." McIntyre *v.* Orner, 166 Ind. 57, 62, 76 N. E. 750, 4 L. R. A. N. S. 1130.

"**It is not the ferocity** of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the rate of pay allotted to judges in this state few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil disposed mules, and the like." Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338, 340.

11. Chicago *v.* Banker, 112 Ill. App. 94.

12. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249; Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999.

In Iowa the right to use an automobile as a vehicle of travel on the highways of the state is expressly conferred by Laws (1904), c. 53. House *v.* Cramer, (1907) 112 N. W. 3.

Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion or even an extraordinary method, if it is not of itself calculated to prevent a reasonably safe use of the streets by others. Chicago *v.* Banker, 112 Ill. App. 94.

"**The law does not denounce motor carriages, as such,** on the public ways. For so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with

negligent.[13] They have equal right thereon with other vehicles,[14] the highways being open and free to all on equal terms, and their use must be extended to meet the modern means of locomotion,[15] and cannot be appropriated to any particular class or classes of travel.[16] The fact that automobiles have a tendency to frighten horses unaccustomed to seeing them is no reason for abridging their use upon the public highways.[17] Although the general use of motor vehicles upon the highways is permissible, yet one might be so constructed or operated as to constitute a nuisance, in which event its use would be prohibited.[18]

B. Rights on Turnpikes. The rights of motor vehicles on turnpikes have not been authoritatively determined. It has in one state been held that they have no right thereon without payment of toll.[19] It will, however, depend upon the terms of the particular franchise, and if it is not sufficiently broad to include such vehicles they are entitled to pass thereon free, and their rights, duties, and liabilities are the same as upon public highways.[20]

inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road." Indiana Springs Co. *v.* Brown, 165 Ind. 465, 468, 74 N. E. 615, 1 L. R. A. N. S. 238.

13. Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

14. *Delaware.*— Simeone *v.* Lindsay, (1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. 537, 63 Atl. 234.

Illinois.— Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118 [*affirming* 122 Ill. App. 159].

Indiana.— McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

Iowa.— House *v.* Cramer, (1907) 112 N. W. 3.

Kentucky.— Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249.

Michigan.— Wright *v.* Crane, 42 Mich. 508, 106 N. W. 71.

Missouri.— State *v.* Swagerty, 203 Mo. 517, 102 S. W. 483; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972.

New York.— Johnson *v.* New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545; Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999; Nason *v.* West, 31 Misc. 583, 65 N. Y. Suppl. 651.

Pennsylvania.— Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1; Silberman *v.* Huyette, 22 Montg. Co. Rep. 39.

See 25 Cent. Dig. tit. "Highways," § 457 *et seq.*

15. Chicago *v.* Banker, 112 Ill. App. 94; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; Mason *v.* West, 61 N. Y. App. Div. 40, 70 N. Y. Suppl. 478; Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651.

New methods of travel may be adopted.— "When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them." Macomber *v.* Nichols, 34 Mich. 212, 217, 22 Am. Rep. 522 [*quoted* with approval in Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651].

16. See Johnson *v.* New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545.

17. Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651.

18. See Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999; Mason *v.* West, 61 N. Y. App. Div. 40, 70 N. Y. Suppl. 478; Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651; Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1.

Operation constituting a nuisance.— "It will not do to say that it is proper to run any kind of a contrivance upon the street, in which persons may be carried. A machine that would go puffing and snorting through the streets, trailing clouds of steam and smoke, might be a nuisance, but this is not such a case." Nason *v.* West, 31 Misc. (N. Y.) 583, 586, 65 N. Y. Suppl. 651.

Nuisance generally see NUISANCES.

19. Bertles *v.* Laurel Run Turnpike Co., 15 Pa. Dist. 94.

20. See, generally, TOLL ROADS. Also see Mallory *v.* Saratoga Lake Bridge Co., 53 Misc. (N. Y.) 446, 104 N. Y. Suppl. 1025.

Right to exclude from highway.— "The managers of highways, owned by private corporations, have an undoubted right, in the exercise of a sound discretion, to prevent such use of the highway as will make it dangerous to the general public. Unless forbidden by legislative enactment . . . they may exclude from its highway a carriage or vehicle, the use of which is dangerous, where the safety of the general public demands such exclusion. The legislature has not seen fit to control the exercise of this discretion as to motor vehicles or automobiles." Bertles

C. Toll. The right to collect toll is fixed by the charters granted to the turnpike or bridge companies, and they have no right to collect except as therein provided. These charters generally fix the rate and enumerate the vehicles which are required to pay.[21]

D. Reciprocal Rights and Duties — 1. In General. All persons using the highway owe reciprocal duties to each other. Each must exercise his right without interfering with the safety of others in the exercise of the same right.[22]

2. Right to Assume Observance of Duty. Persons using the highway, whether in motor cars or other vehicles, or as pedestrians, have a right to assume that every other person thereon will properly observe his duties and the laws in his use of the roads.[23]

E. Care Required in Use of Highway in General. Persons operating motor vehicles have the same duties to perform as operators or drivers of other vehicles are subjected to,[24] and must be held to that degree of care which is commensurate with the dangers naturally incident to their use.[25] The exercise by

v. Laurel Run Turnpike Co., 15 Pa. Dist. 94, 95.

21. See, generally, Bridges; Toll Roads. In Mallory *v.* Saratoga Lake Bridge Co., 53 Misc. (N. Y.) 446, 104 N. Y. Suppl. 1025, it was held that a bridge company, incorporated under Laws (1854), c. 64, and authorized thereunder to collect tolls from certain animals and vehicles, could not demand toll from automobiles. An injunction was granted restraining the bridge company from exacting toll from the complainant.

Fixing amount of toll.— The court refused to grant a writ of mandamus to permit an owner of an automobile to use the road of a turnpike company where no rate of toll for automobiles had been fixed by the company and it was admitted that by reason of their character "no possible toll for automobiles over turnpikes would be adequate." Bertles *v.* Laurel Run Turnpike Co., 15 Pa. Dist. 94.

A demand of more than the proper amount of toll will not warrant a breach of the peace in order to force a passage. Com. *v.* Rider, 29 Pa. Super. Ct. 621.

22. *Delaware.*—Simeone *v.* Lindsay, (1907) 65 Atl. 778.

Illinois.— Chicago *v.* Banker, 112 Ill. App. 94.

Indiana.— McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

Iowa.— House *v.* Cramer, (1907) 112 N. W. 3.

Massachusetts.— Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345.

Michigan.—Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

Pennsylvania.— Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1.

See 25 Cent. Dig. tit. "Highways," § 459 *et seq.*

23. *Delaware.*—Simeone *v.* Lindsay, (1907) 65 Atl. 778.

Massachusetts.— Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345.

New Jersey.— Kathmeyer *v.* Mehl, (Sup. 1905) 60 Atl. 40.

New York.— McCarragher *v.* Proal, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208; Buscher *v.* New York Transp. Co., 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 798; Cæsar *v.* Fifth Ave. Coach Co., 45 Misc. 331, 90 N. Y. Suppl. 359; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

Rhode Island.— Benoit *v.* Miller, (1907) 67 Atl. 87.

Every operator of an automobile has the right to assume, and to act upon the assumption, that every person whom he meets will also exercise ordinary care and caution according to the circumstances, and will not negligently or recklessly expose himself to danger, but rather make an attempt to avoid it. It is only when such an operator has had time to realize, or by the exercise of a proper lookout should have realized, that a person whom he meets is in a somewhat helpless condition, or in a position of disadvantage, and therefore seemingly unable to avoid the coming automobile, that the operator is required to exercise increased exertion to avoid a collision. This applies peculiarly when children of tender years are met. Thies *v.* Thomas, 77 N. Y. Suppl. 276.

24. Thies *v.* Thomas, 77 N. Y. Suppl. 276.

25. *Delaware.*— Simeone *v.* Lindsay, (1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. 537, 63 Atl. 234.

Illinois.— Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

Indiana.— Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

Iowa.— House *v.* Cramer, (1907) 112 N. W. 3.

Kentucky.— Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249.

Michigan.— Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

Missouri.— McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972.

the operator of the motor vehicle of reasonable care and caution for the safety of others is all that is required.[26]

F. Meeting Vehicles. The general rule, sometimes so expressly enacted, that where two vehicles are approaching from opposite directions, each should keep to the right of the center of the road and take reasonable care to avoid injury to the other,[27] is applicable to motor vehicles.[28]

G. Overtaking Vehicles. The operator of a motor vehicle may overtake and pass other vehicles going in the same direction, if it can be accomplished in safety.[29] In passing, both by custom and statute, he is required to go to the left of the vehicle overtaken,[30] and the overtaken vehicle should keep over to the right side of the road.[31]

H. As to Pedestrians. A pedestrian has the same right to the use of the public streets and highways as a vehicle of any kind,[32] and the motorist must use reasonable care to avoid injuring him.[33] On the other hand the pedestrian is bound to make use of all his senses and exercise reasonable care to prevent

New Hampshire.— Emerson Troy Granite Co. *v.* Pearson, (1906) 64 Atl. 582.

New Jersey.— Kathmeyer *v.* Mehl, (Sup. 1905) 60 Atl. 40.

New York.— Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45; Buscher *v.* New York Transp. Co., 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 798; Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

Pennsylvania.— Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1.

South Carolina.— Rochester *v.* Bull, (1907) 58 S. E. 766.

Washington.— Jones *v.* Hoge, (1907) 92 Pac. 433; Lampe *v.* Jacobsen, (1907) 90 Pac. 654.

See 25 Cent. Dig. tit. "Highways," § 459.

The degree of care required in the use and operation of a machine or vehicle upon the streets of a city depends not only upon the condition of the streets, but also on the dangerous character of the machine or vehicle, and its liability to do injury to others, lawfully upon such streets. The more dangerous its character and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation. In determining therefore the degree of care that the operator of an automobile should have used the jury may take into consideration its speed, size, appearance, manner of movement, the amount of noise it makes, and anything else that indicates unusual or peculiar danger. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

26. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; House *v.* Cramer, (Iowa 1907) 112 N. W. 3.

27. See, generally, STREETS AND HIGHWAYS.

28. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; State *v.* Unwin (N. J. 1907) 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163]; Wright *v.* Fleischman, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62.

In England and Canada the rule is the reverse. See STREETS AND HIGHWAYS.

29. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778. See, generally, STREETS AND HIGHWAYS.

An automobilist was held guilty of negligence for running down a bicyclist preceding him on the highway in Heath *v.* Cook, (R. I. 1907) 68 Atl. 427.

30. State *v.* Unwin, (N. J. 1907) 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163]; Wright *v.* Fleischman, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62.

31. State *v.* Unwin, (N. J. 1907) 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163]. See also the statutes of the several states.

32. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345.

Reciprocal duties.— "The person having the management of the automobile and the traveler on foot are both required to use such reasonable care, circumspection, prudence, and discretion as the circumstances require; an increase of care being required where there is an increase of danger. And both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances." Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778, 780. See also *supra*, III, D.

A person standing in the roadway conversing with a friend in a wagon is not because of such fact guilty of negligence. Kathmeyer *v.* Mehl, (N. J. 1905) 60 Atl. 40. See also Turner *v.* Hall, (N. J. Sup. 1906) 64 Atl. 1060.

33. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Gregory *v.* Slaughter, 99 S. W. 247, 30 Ky. L. Rep. 500, 8 L. R. A. N. S. 1228; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

receiving injury, which care must be in proportion to the danger in each particular case.[34]

I. Duty to Watch Road For Vehicles and Pedestrians. It is the duty of the operator to keep a vigilant watch ahead for pedestrians and other vehicles, and at the first appearance of danger to take proper steps to avert it.[35] There is no duty to keep on the lookout for vehicles which might be overtaking him, unless he has occasion to suddenly stop or slow up.[36]

J. Speed[37] — **1. In General.** Irrespective of any statute or ordinance,[38] the rate of speed must not be so great as to prevent the operator from maintaining control of the machine,[39] and must be within such bounds as will not endanger others, considering the place and circumstances.[40]

2. At Corners and Crossings. At corners and crossings, the vehicle should be slowed down and in such control as to be able to be immediately stopped, if necessary.[41]

34. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345; McCarragher *v.* Proal, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208; Lampe *v.* Jacobsen, (Wash. 1907) 90 Pac. 654.

Duty to look and listen.— Failure to look and listen for motor vehicles upon a highway is not necessarily negligent. The rule that one who passes on to a railroad grade crossing without looking for approaching trains and is injured is guilty of contributory negligence does not apply to travelers in their daily and common use of our highways. The usual rule of ordinary care does not impose upon them the burden of being constantly on the lookout to see if their path is free from dangerous defects, or in a state of apprehension of personal injury from other travelers. The traveler not only has a right to presume that the way is reasonably fitted for his use but also that those who may be lawfully using it with himself will exercise a proper degree of care. Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345.

35. McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

36. McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Foley *v.* Forty-Second St., etc., R. Co., 97 N. Y. Suppl. 958; Thies *v.* Thomas, 77 N. Y. Suppl. 276. See also Streets and Highways.

Vehicle in tow.— Plaintiff, a pedestrian, desiring to cross a street, asked permission of defendant, who was seated in an automobile which was being towed by another machine by means of a rope, both machines being stationary by reason of street blockade, to pass between the two machines. Upon receiving permission, she started to pass between them, when the chauffeur in charge of the forward machine started up, thereby causing the rope to rise and trip plaintiff. The blockade had not been removed and defendant had no reason to believe that the chauffeur would start. It was held that, conceding that the chauffeur was his servant, defendant was not guilty of negligence, as the chauffeur had no reason to believe that such a movement would be likely to injure plaintiff or any one else. Titus *v.* Tangeman, 116 N. Y. App. Div. 487, 101 N. Y. Suppl. 1000.

37. Statutory regulations see *infra*, IV, F.

38. Thies *v.* Thomas, 77 N. Y. Suppl. 276.

39. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

40. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778.

The true test.— No matter how great the speed may be which the law and the ordinances permit, the motorist still remains bound to anticipate that he may meet persons at any point in a public street, and he must keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision with another person also using proper care and caution. If necessary he must even slow up and stop. No blowing of a horn or of a whistle, nor the ringing of a bell or gong, without an attempt to slow the speed is sufficient, if the circumstances at a given point demand that the speed should be slackened or the machine be stopped, and such a course is practicable, or, in the exercise of ordinary care and caution proportionate to the circumstances, should have been practicable. The true test is that he must use all care and caution which a careful and prudent driver would have exercised under the same circumstances. Thies *v.* Thomas, 77 N. Y. Suppl. 276.

41. Buscher *v.* New York Transp. Co., 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 798.

Going behind cars.— Where an automobilist, not being able to see a crossing which he was approaching, because of a passing street car, instead of stopping his machine, merely changed its direction so as to go around the car, and by so doing came suddenly upon and ran into a person who was running for the car, he was held to be guilty of gross negligence, and liable for the injuries. Gregory *v.* Slaughter, 99 S. W. 247, 30 Ky. L. Rep. 500, 8 L. R. A. N. S. 1228.

3. In Cities, Etc. A lower rate of speed will usually be required in cities and closely built sections than in the open country roads.[42]

K. Racing. It may be stated as a general proposition that racing upon the public highway is unlawful unless specially authorized by the proper authorities, and all persons participating therein are liable in damages for injuries sustained by third persons lawfully upon the highway.[43] But as to one voluntarily present for the express purpose of witnessing a race or speed contest, the participants therein can only be held liable on proof of their negligence.[44]

L. Lights.[45] At night an automobile should be equipped with lights to let others on the highway have reasonable notice of its presence.[46]

M. Signals.[47] A motor vehicle should be equipped with some suitable device so as to give reasonable notice to others of its approach, which should be used as occasion demands.[48] It is unnecessary to use such signal where the person to be warned has already seen the vehicle or has knowledge of its presence.[49]

N. Leaving Motor Vehicle Unattended. The fact that a motor vehicle is temporarily left unattended, in such condition that it cannot start of its own accord, does not render the owner liable if, by the act of a third person, the vehicle is set in motion and causes injury; the injury not being the proximate result of leaving the car unattended.[50]

O. As to Horses and Draft Animals — 1. In General. The owners of motor vehicles are chargeable with notice of their tendency to frighten horses.[51] The operator of such a vehicle must therefore exercise care in its movement so as

42. Lampe *v.* Jacobsen, (Wash. 1907) 90 Pac. 654. See also Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

43. Johnson *v.* New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545. See also Streets and Highways.

44. Johnson *v.* New York, 186 N. Y. 139, 147, 78 N. E. 715, 116 Am. St. Rep. 545. This was an action against a municipality for injuries to plaintiff from being hit by an automobile during a speed contest which the city of New York had, by her invalid ordinance, authorized, the court said: "Highways are constructed for public travel, and, as already said, the acts of the defendants were doubtless an illegal interference with the rights of the traveler. It may well be that for an injury to the traveler, or to the occupants of the lands adjacent to the highway, or even to a person who visited the scene of the race for the purpose of getting evidence against the defendants and prosecuting them for their unlawful acts, the defendants would have been absolutely liable regardless of the skill or care exercised. But the plaintiff was in no such situation. She was not even a casual spectator whose attention was drawn to the race while she was traveling in the vicinity. She went from her home, a distance of five miles from the scene of the race, expressly to witness it and to enjoy the pleasure that the contest offered. As to the elements which made the contest illegal she was aware of their existence. She knew it was to take place on a highway, and she knew it was to be a contest for speed, and that, therefore, the automobiles would be driven at the greatest speed of which they were capable." From these circumstances the court held that plaintiff could not recover.

45. Statutory regulations see *infra*, IV, G.

46. Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972. See also Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488; Bennett *v.* Busch, (N. J. Sup. 1907) 67 Atl. 188.

47. Statutory regulations see *infra*, IV, H.

48. McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Lampe *v.* Jacobsen, (Wash.) 1907) 90 Pac. 654. See also Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488; Dultz *v.* Fischlowitz, 104 N. Y. Suppl. 357.

49. West *v.* New York Transp. Co., 47 Misc. (N. Y.) 603, 94 N. Y. Suppl. 426.

50. Berman *v.* Schultz, 40 Misc. (N. Y.) 212, 81 N. Y. Suppl. 647; Berman *v.* Schultz, 84 N. Y. Suppl. 292.

Whether the principle of the turn-table cases is applicable to automobiles and they can be deemed attractive nuisances see Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338; Berman *v.* Schultz, 84 N. Y. Suppl. 292.

51. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; House *v.* Cramer, (Iowa 1907) 112 N. W. 3. See also Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582; Rochester *v.* Bull, (S. C. 1907) 58 S. E. 766.

"If a horse can not be driven past a vehicle or car properly managed, the owner should keep him off the highway or submit to the consequences." Silberman *v.* Huyette, 22 Montg. Co. Rep. (Pa.) 39, 40. See also Murphy *v.* Meacham, 1 Ga. App. 155, 57 S. E. 1046; Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325.

to avoid frightening horses, and to prevent accident when horses become frightened.[52] The mere fact that an automobile causes a horse to become frightened causing injury does not give the injured party a cause of action,[53] nor will the fact that the driver of a team frightened by a motor vehicle fails to give a signal to stop make him necessarily guilty of contributory negligence.[54]

2. Movement, Speed, and Noises. Care must be exercised both in the movement and speed of the vehicle,[55] and also in making unusual noises.[56]

3. When Duty to Stop. If the operator sees, or by the exercise of ordinary care ought to see, that a horse is frightened, he must exercise ordinary care and, if necessary to avoid accident, stop his automobile,[57] and should not start up again where it is apparent that by so doing it will cause the horse further fright and likely result in an accident.[58]

IV. Statutory Regulations.

A. In General. Since the advent of the automobile, most of the states have enacted statutes regulating in various particulars their use. These statutes are largely similar in their general scope, but it is not within the aim of this article to set forth in detail their numerous provisions.[59]

B. Construction of Statutes — 1. In General. It is the duty of the courts to construe the statutes pertaining to motor vehicles, like other statutes,[60] and to

52. *Illinois.*— Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118 [*affirming* 122 Ill. App. 159].

Indiana.— Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

Iowa.—Strand *v.* Grinnell Automobile Garage Co., (1907) 113 N. W. 488; House *v.* Cramer, (1907) 112 N. W. 3.

Kentucky.— Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249.

New York.— Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253; Mason *v.* West, 61 N. Y. App. Div. 40, 70 N. Y. Suppl. 478.

South Carolina.— Rochester *v.* Bull, (1907) 58 S. E. 766.

53. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488; Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651.

54. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488.

55. Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45; Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253.

"It is not pleasant to be obliged to slow down these rapid running machines to accommodate persons driving or riding slow country horses that do not readily become accustomed to the innovation. It is more agreeable to send the machine along, and let the horse get on as best he may, but it is well to understand, if this course is adopted and accident and injury result, that the automobile owner may be called upon to respond in damages for such injuries." Murphy *v.* Wait, 102 N. Y. App. Div. 121, 124, 92 N. Y. Suppl. 253.

56. House *v.* Cramer, (Iowa 1907) 112 N. W. 3. For analogous cases and extended statement of the law in regard to liability for frightening horses on highways see Railroads.

Noises incident to the operation of the machine are not of themselves negligent. House *v.* Cramer, (Iowa 1907) 112 N. W. 3; Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325.

Explosions from gasoline engine.— Where the operator of an automobile stopped it in the street near a blacksmith shop, and anticipating starting again shortly, he was not negligent in allowing the explosions from his gasoline engine to continue, unless he saw that they were frightening plaintiff's team, or in the exercise of ordinary care ought to have noticed it, and by ordinary diligence might have stopped the explosions in time to have avoided the runaway. House *v.* Cramer, (Iowa 1907) 112 N. W. 3.

57. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488; Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249; Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253.

58. Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999. In this case defendant motorist, having noticed that plaintiff's horse had become frightened at his machine, came to a full stop. Plaintiff got out and took the horse by the head, and while the animal was still snorting and prancing the motorist started up again. The horse broke away, upsetting the carriage and throwing plaintiff down. It was held that defendant had violated the duty which he owed plaintiff to refrain from careless or heedless injury and was liable in damages.

59. See the statutes of the several states.

60. **Construction of statute** generally see Statutes.

sustain their validity if it is possible to do so and give due effect to their provisions so as to render effectual the purpose of the legislative body.[61]

2. Application of Old Statutes. Statutes and regulations governing the operation of vehicles generally apply equally to motor vehicles, although passed prior to the time that their use had become general;[62] but the statutes creating a special right or duty in relation to vehicles have been held not to apply to motor vehicles where the statutes were passed prior to the time such vehicles were known or in practical use.[63]

C. Validity. Statutes regulating the registration,[64] licensing,[65] operating,[66] and speed[67] of motor vehicles are not invalid as special or class legislation simply because they do not affect or apply equally to all kinds of vehicles, and they constitute a proper exercise of the police power of the state.[68] The registration fee is not a tax on property but it is a license-fee.[69]

D. Registration, etc., of Motor Vehicles[70] — **1. In General.** The registration and numbering of motor vehicles in communities where there are a considerable number of them is necessary to secure a proper observance of their duties on the highways and for the purpose of identification in case they fail to

61. Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; State *v.* Goodwin, (Ind. 1907) 82 N. E. 459; Bellingham *v.* Cissna, (Wash. 1906) 87 Pac. 481.

62. Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Com. *v.* Hawkins, 14 Pa. Dist. 592. See also State *v.* Thurston, (R. I. 1907) 66 Atl. 580; Taylor *v.* Goodwin, 4 Q. B. D. 228, 48 L. J. M. C. 104, 40 L. T. Rep. N. S. 458, 27 Wkly. Rep. 489.

63. See cases cited *infra*, this note.

A statute authorizing a bridge company to collect tolls from vehicles was held not to authorize the collection of tolls from motor vehicles. Mallory *v.* Saratoga Lake Bridge Co., 53 Misc. (N. Y.) 446, 104 N. Y. Suppl. 1025.

A statute imposing a license upon "hacks, cabs, omnibuses, and other vehicles for the transportation of passengers for hire" was held not to apply to motor vehicles used for such purpose, the statute having been passed before motor vehicles were in practical use. Washington Electric Vehicle Transp. Co. *v.* District of Columbia, 19 App. Cas. (D. C.) 462.

N. Y. Pen. Code, § 640, subd. 11, prohibiting the use of any vehicle propelled by steam in the public streets (except on railroad tracks) unless a person is sent at least an eighth of a mile ahead to warn travelers does not apply to motor vehicles. Nason *v.* West, 31 Misc. 583, 65 N. Y. Suppl. 651.

64. Com. *v.* Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; State *v.* Unwin, (N. J. 1907) 68 Atl. 110.

Registration statutes see *infra*, IV, D.

65. State *v.* Swagerty, 203 Mo. 517, 102 S. W. 483; Com. *v.* Densmore, 13 Pa. Dist. 639, 29 Pa. Co. Ct. 217.

Licensing statutes see *infra*, IV, E.

66. State *v.* Swagerty, 203 Mo. 517, 102 S. W. 483.

Statutes regulating operation of motor vehicles see *infra*, IV, F–J.

67. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; State *v.* Swagerty, 203 Mo. 517, 102 S. W. 483.

Speed regulations see *infra*, IV, F.

68. *Illinois.*— Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

Massachusetts.— Com. *v.* Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464.

Missouri.— State *v.* Swagerty, 203 Mo. 517, 102 S. W. 483.

New Jersey.— State *v.* Unwin, (1907) 68 Atl. 110.

New York.— People *v.* MacWilliams, 91 N. Y. App. Div. 176, 86 N. Y. Suppl. 357.

Pennsylvania.— Com. *v.* Densmore, 13 Pa. Dist. 639, 29 Pa. Co. Ct. 217; Com. *v.* Templeton, 22 Montg. Co. Rep. 203.

Special or class legislation generally see Constitutional Law, 8 Cyc. 695.

License to use highway cannot be required. —"The speed of the automobile may be regulated, and reasonable safety appliances, such as gongs and brakes, may be required; but to compel one who uses his automobile for his private business and pleasure only, to submit to an examination and to take out a license (if the examining board see fit to grant it) is imposing a burden upon one class of citizens in the use of the streets, not imposed upon the others. We must therefore hold this ordinance, so far as it obliges appellee to take out a license before he can use his own automobile in his own business or for his own pleasure, is beyond the power of the city council and is therefore void." Chicago *v.* Banker, 112 Ill. App. 94, 99.

69. Com. *v.* Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; State *v.* Unwin, (N. J. 1907) 68 Atl. 110.

License-fees generally see Licenses, 25 Cyc. 593 *et seq.*

70. **Constitutionality** of regulation see *supra*, IV, C.

Municipal regulation see *infra*, p. 36 note 15.

observe such duties.[71] Most of the statutes require, as a condition to the use of a motor vehicle on the public highways of the state, the registration or licensing of each motor vehicle by the owner with some state office or official,[72] for which a fee is usually charged.[73] Upon the registration of the vehicle, a seal or certificate is issued and a distinctive number is assigned to the vehicle, both of which are required to be at all times thereafter conspicuously displayed in a certain manner upon such vehicle.[74] The size of the numbers and the character of the figures are also provided for.[75] Exceptions are sometimes made in favor of non-residents who have duly registered their machine in the state of their domicile.[76] In Pennsylvania other state registrations are not recognized and the motorist is prohibited from displaying numbers obtained in any other place or state while in that commonwealth.[77]

2. By Manufacturers and Dealers. The provisions as to registration of motor vehicles is in most states somewhat relaxed in favor of manufacturers and dealers. Some states entirely dispense with such registration in such cases, at least as to machines not used upon the highway,[78] while others require the registration of one vehicle of each style or type manufactured or dealt in, or one registration to cover all vehicles.[79]

3. Registration of Owner. Some states do not register the vehicle but the owner, thus permitting an owner of several such vehicles to make but one registration, and to have one number cover all of his vehicles.[80]

E. Licensing of Chauffeur or Operator.[81] The statutes generally require the operator of a motor vehicle to take out a license, but this is sometimes restricted to persons operating the machine as chauffeur.[82]

F. Speed Regulations[83] **— 1. In General.** There are usually special speed

71. *Massachusetts.*— Com. *v.* Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464.
Michigan.— People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345.
New Hampshire.— Emerson Troy Granite Co. *v.* Pearson, (1906) 64 Atl. 582.
New York.— People *v.* MacWilliams, 91 N. Y. App. Div. 176, 86 N. Y. Suppl. 357.
Pennsylvania.— Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1.
The object of the license is to furnish a further guaranty that proper use of the vehicle will be made and that it will be operated in compliance with the law. Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

72. Com. *v.* Sherman, 191 Mass. 439, 78 N. E. 98.
The Pennsylvania act of April 19, 1905, is not an act for the registration of motor vehicles but applies solely to the persons engaged in operating them. Com. *v.* Templeton, 22 Montg. Co. Rep. 203.
License in each county.— The Missouri statute has been construed to require the owner of an automobile to take out a license in each and every county over whose roads he desires to run his automobile. State *v.* Cobb, 113 Mo. App. 156, 87 S. W. 551.
A corporation or partnership which owns or controls a motor vehicle should register it in the corporation or partnership name. Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.

73. *In re* Automobile Acts, 15 Pa. Dist. 83.
74. *In re* Automobile Acts, 15 Pa. Dist. 83.
75. *In re* Automobile Acts, 15 Pa. Dist. 83.
76. See the statutes of the several states.

77. *In re* Automobile Acts, 15 Pa. Dist. 83; Com. *v.* Templeton, 22 Montg. Co. Rep. (Pa.) 203.
The act of April 19, 1905, regulating licensing, etc., of motor vehicles, provides *inter alia* that not more than one state license number shall be carried on the vehicle, and that "a license number obtained in any other place or state shall be removed from said vehicle while the vehicle is being used within this Commonwealth." This statute is not in conflict with a prior municipal ordinance providing for the licensing, etc., of motor vehicles within its corporate limits, and the numbers required by the ordinance must be used in addition to the state numbers while the vehicle is used in such municipality. Brazier *v.* Philadelphia, 15 Pa. Dist. 14 [*affirmed* in 215 Pa. St. 297, 64 Atl. 508].

78. *In re* Automobile Acts, 15 Pa. Dist. 83.
79. See the statutes of the several states.
80. See Conn. Laws (1905), c. 230.
81. Constitutionality of regulation see *supra*, IV, C.
82. *In re* Automobile Acts, 15 Pa. Dist. 83.
A partnership, corporation, or composite body is not entitled to a license as such under N. H. Laws (1905), p. 499, c. 86, requiring every operator to obtain a license, which he must have with him when operating his machine. "The license contemplated by the statute is personal to the particular person who operates the vehicle. Every person who operates it must have a license." Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582.
83. Constitutionality of regulation see *supra*, IV, C.

regulations applicable to motor vehicles, and the statutes of the several states must be specially consulted in this regard, as they vary greatly even in different subdivisions of the states. A lower rate is usually required at corners, crossings, curves, and descents.[84]

2. Do Not Abrogate Municipal Regulations.[85] Park and municipal regulations affecting speed are not abrogated by the passage of a statute in regard thereto, unless a contrary intent appears from the enactment.[86]

G. Equipment of Motor Vehicles.[87] Efficient brakes,[88] and also a suitable bell, horn, or other signal[89] are required, and, between certain hours, one or more lamps of a particular character are necessary.[90]

H. Warning of Approach.[91] On approaching pedestrians, horses, draft animals, or other vehicles, the operator of a motor vehicle is required to give reasonable warning of its approach.[92]

I. Special Rules of the Road. The usual rules of the road[93] are sometimes in part reënacted in the motor vehicle statutes. The statute in New York, and in some other states, requires, on turning a corner at the intersection of public highways, if to the right, that the vehicle keep to the right of the intersection of the centers of such highways, and pass to the right of such intersection when turning to the left.[94]

J. Stopping When Horse Is Frightened[95] — 1. Upon Signal. Most of the motor vehicle statutes contain a provision that the operator of such a vehicle shall stop the same whenever it shall appear that a horse is frightened or is about to become frightened by its approach, or a signal to stop is given by the person driving the horse.[96] The duty to stop upon signal must be observed even though the signal comes from one not actually engaged in handling the reins.[97]

2. Without Signal. Under such statutes it has been held that there is a duty to stop whenever, by the exercise of reasonable diligence on the part of the driver, it would have appeared that a horse was frightened,[98] irrespective of any

Duty in absence of statute see *supra*, III, J.

84. See the statutes of the several states.

85. Municipal or local regulations see *infra*, V.

86. Com. *v.* Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245; Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1.

87. Constitutionality of regulations see *supra*, IV, C.

Duty in absence of statutory regulations see *supra*, III, L, M.

88. *In re* Automobile Acts, 15 Pa. Dist. 83.

89. *In re* Automobile Acts, 15 Pa. Dist. 83.

90. Bennett *v.* Busch, (N. J. Sup. 1907) 67 Atl. 188; *In re* Automobile Acts, 15 Pa. Dist. 83.

91. Constitutionality of regulation see *supra*, IV, C.

Duty in absence of statute see *supra*, III, M.

92. Gifford *v.* Jennings, 190 Mass. 54, 76 N. E. 233.

93. See *supra*, III, F, G.

94. Mendleson *v.* Van Rensselaer, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578.

95. Constitutionality of regulation see *supra*, IV, C.

Duty in absence of statute see *supra*, III, O.

96. *Illinois.*— Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

Indiana.— State *v.* Goodwin, (1907) 82 N. E. 459.

Iowa.— Strand *v.* Grinnell Automobile Garage Co., (1907) 113 N. W. 488.

Minnesota.— Mahoney *v.* Maxfield, (1907) 113 N. W. 904.

New York.— Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45; Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253.

Wisconsin.— McCummins *v.* State, (1907) 112 N. W. 25.

97. State *v.* Goodwin, (Ind. 1907) 82 N. E. 459.

98. Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488.

Where horse's fright not apparent.—Under these statutes, where the driver of the horse does not make known his distress to the motorist by giving the prescribed signal, and the horse's fright or likelihood to become unmanageable is not apparent to the operator of the automobile as an ordinarily cautious and prudent man, or would not become seen or known upon the exercise of reasonable care, then the motorist is warranted in proceeding with due caution. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. E. 488.

signal to stop being given by the operator or any other person either in or out of the vehicle.[99]

3. REMAINING STATIONARY. The duty to stop carries with it a duty to remain stationary until the horse passes the vehicle or it becomes reasonably safe to start up.[1]

4. STOPPING MOTIVE POWER. Except, however, in those states where it is otherwise expressly provided,[2] there is no absolute duty to stop the motive power in addition to stopping the vehicle.[3]

K. Federal Regulations. The only federal regulation affecting motor vehicles which has, to the present time, been before the courts deals with the transportation of motor vehicles on passenger steamers, and consists of an amendment to the Revised Statutes relating to the carrying of explosive burning fluids upon passenger steamers, and makes an exception in favor of motor vehicles.[4] By this amendment,[5] motor vehicles using such fluids as a motive power were permitted to go upon passenger steamers provided all fire in them be extinguished before entering the vessel and not relighted until after they had left the vessel.[6] The authority of the federal government to make such regulations falls within the admiralty clause of the federal constitution.[7]

V. LOCAL ORDINANCES.

A. Authority to Pass. The power to pass ordinances affecting the use of motor vehicles within the limits of a municipality or the like must be either granted in express words or necessarily or fairly implied in or incident to the powers expressly granted to such municipality or essential to its declared objects and purposes.[8] The right to pass such ordinances has been deemed within a grant

99. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488.

1. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488; Gifford *v.* Jennings, 190 Mass. 54, 76 N. E. 233.

Unless forward movement necessary.— Under Wis. Laws (1905), p. 469, c. 304, § 4, requiring the operator of an automobile to stop all motor power and remain stationary upon a signal of distress from the driver of a frightened horse "unless a movement forward shall be deemed necessary to avoid accident or injury," it is for the operator of the machine to determine whether a forward movement is necessary and his conclusion is controlling, unless he acts unreasonably or in bad faith. McCummins *v.* State, (Wis. 1907) 112 N. W. 25.

2. Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253; McCummins *v.* State, (Wis. 1907) 112 N. W. 25.

3. Mahoney *v.* Maxfield, (Minn. 1907) 113 N. W. 904.

4. U. S. Rev. St. (1878) § 4472, amended by 31 U. S. St. at L. 799, c. 386 [U. S. Comp. St. (1901) p. 3050].

5. 31 U. S. St. at L. 799, c. 386 [U. S. Comp. St. (1901) p. 3050].

6. The Texas, 134 Fed. 909.

A still further amendment is as follows: "Nothing in the foregoing or following sections of this Act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished immediately after entering the said vessel, and that the same be not relighted until immediately before said vehicle shall leave the vessel: Provided further, that any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which contain gasoline, naphtha, or other dangerous burning fluids." 34 U. S. St. at L. 720, c. 586.

7. See ADMIRALTY, 1 Cyc. 797 *et seq.*

8. State *v.* Thurston, (R. I. 1907) 66 Atl. 580. See also, generally, COUNTIES; MUNICIPAL CORPORATIONS; TOWNS.

In the city of New York the right to regulate the speed of automobiles is conferred upon the board of aldermen by Greater New York Charter, § 1454. People *v.* Ellis, 88 N. Y. App. Div. 471, 85 N. Y. Suppl. 120.

In Pennsylvania.— The municipalities through the powers delegated to them, by the legislature "have prescribed rules, the validity of which has been confirmed by numberless decisions, requiring the numbering of machines; licensing the driver; regulating the speed of vehicles; restricting the time of having parades and processions; setting aside certain parts [of the highways] for particular uses; signalling by bells and lights; etc." Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1, 6.

to control and regulate streets and highways[9] and to be within the police powers generally delegated to such bodies,[10] notwithstanding the state legislature has passed a general statute covering the same subject-matter,[11] in which case both the ordinance and the statute must be complied with.[12] However, local ordinances regulating the use or operation of motor vehicles are sometimes prohibited by the general statutes covering this subject or their operation abridged.[13]

B. Construction of Provisions. The general rules governing the construction of ordinances apply with equal force to ordinances affecting motor vehicles.[14]

C. Must Be Reasonable. Where such local regulations are authorized and not prohibited, they must be reasonable in their terms.[15]

9. People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345; Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1; Brazier *v.* Philadelphia, 15 Pa. Dist. 14 [*affirmed* in 215 Pa. St. 297, 64 Atl. 508].

Racing or speed contests cannot be lawfully granted by a municipality under a grant of power to such municipality to regulate the use of the streets and the rate of speed at which vehicles may be propelled thereon. Johnson *v.* New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545.

10. People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345.

Regulating public motor vehicles and fixing the rate of fares to be charged is within the powers of Atlantic City. Atlantic City *v.* Fonsler, (N. J. Sup. 1903) 56 Atl. 119.

11. Com. *v.* Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245; Brazier *v.* Philadelphia, 15 Pa. Dist. 14 [*affirmed* in 215 Pa. St. 297, 64 Atl. 508]; Radnor Tp. *v.* Bell, 29 Pa. Co. Ct. 444 [*affirmed* in 27 Pa. Super. Ct. 1]; Bellingham *v.* Cissna, (Wash. 1906) 87 Pac. 481.

The power to license "every description of carriages" granted by a prior statute was not taken away by the Pennsylvania act of April 23, 1903, regulating the use of automobiles. Com. *v.* Hawkins, 14 Pa. Dist. 592.

12. Brazier *v.* Philadelphia, 15 Pa. Dist. 14 [*affirmed* in 215 Pa. St. 297, 64 Atl. 508].

13. See Bellingham *v.* Cissna, (Wash. 1906) 87 Pac. 481.

Speed regulations.— In Pennsylvania, since the act of April 19, 1905 (Pamphl. Laws 217), no city, borough, or other municipality may legally fix a maximum speed limit within its boundaries less than the speed limits provided for in section 3 of the act. *In re* Automobile Acts, 15 Pa. Dist. 83. Where a state statute prohibited the passage of any ordinance imposing a penalty on any act punishable under any state law, and there existed a state statute imposing a fine upon every person riding or driving "faster than a common travelling pace," an ordinance restricting the speed of automobiles to fifteen miles per hour was held invalid. State *v.* Thurston, (R. I. 1907) 66 Atl. 580.

Posting signs.— Speed regulations adopted by park commissioners are valid, although signs are not posted on the roads affected at the points where they join other roads. Mass. St. (1903) p. 511, c. 473, § 14, requiring notices of special speed regulations to be so posted applies only to the regulations of boards of aldermen of cities and selectmen of towns. Com. *v.* Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245. In New York to make effective an ordinance limiting the speed below that prescribed by the general law the city or village enacting it must comply with the provisions of the act with respect to posting notices on the streets. People *v.* Prison Keeper, 190 N. Y. 315, 83 N. E. 44.

14. Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531; State *v.* Thurston, (R. I. 1907) 66 Atl. 580.

Construction of ordinance generally see MUNICIPAL CORPORATIONS, *post*.

Where streets named as boundaries in a speed ordinance do not meet, their lines will be considered as if extended to the meeting point; where a river in the west is mentioned without naming it the first river in that direction is meant. If a municipal speed ordinance takes in outside territory, the ordinance is invalid only as to the outside territory and is valid as to that portion within the corporate limits. Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531.

"Crossings" mean "highway crossings" and not railroad crossings within an ordinance requiring motor vehicles to slow down at crossings. Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325.

15. See cases cited *infra*, this note.

License invalid.—An ordinance of the city of Chicago was held invalid where it required the owner to submit to an examination and procure a license in order to operate his automobile on the streets of that city. Chicago *v.* Banker, 112 Ill. App. 94.

That two licenses are required by the operator of an automobile, one from the state and one under municipal ordinance, is not a conclusive objection to the ordinance or ground for holding that a general state law passed after such ordinance supersedes the latter. Brazier *v.* Philadelphia, 15 Pa. Dist. 14 [*affirmed* in 215 Pa. St. 297, 64 Atl. 508].

Prohibiting the use of certain country roads to automobiles between sunset and sunrise is not unreasonable. *In re* Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160.

Public vehicles to carry all persons.— It is reasonable to require public motor vehicles to carry all persons applying for passage and tendering the fare, and to place a notice

VI. LIABILITY FOR INJURY TO PERSONS AND PROPERTY.

A. Necessity of Negligence. Liability for injury by a motor vehicle must be predicated upon some negligent act or omission on the part of the person to be held or his agent or servant.[16] For injuries received from unavoidable accident there can be no recovery.[17] The rules of law applicable to the care and protection of dangerous instrumentalities do not apply.[18]

B. What Constitutes Negligence. What constitutes negligence depends upon the facts and circumstances in each case. A failure to observe the rules as laid down for the government of oneself and vehicle upon the public highways and to have due regard for one's own safety and the rights of others is of itself negligent.[19]

C. Contributory Negligence and Its Effect — 1. In General. It is an almost universal rule that the contributory negligence of the person injured will bar any recovery for such injuries.[20] This applies equally to pedestrians and persons in vehicles. Every person is bound to exercise due care to prevent injury.[21] Even though he is but a passenger in a vehicle, he must exercise such care.[22]

2. Acts In Extremis. Acts which may be done *in extremis* to avoid a peril in which plaintiff is placed by defendant's negligence cannot be held to constitute

on the vehicle where it has already been engaged. Atlantic City *v.* Fonsler, (N. J. Sup. 1903) 56 Atl. 119.

Registration of motor vehicles and the displaying of a number furnished by the municipality is within the police power of a city to require. People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345. See also Brazier *v.* Philadelphia, 15 Pa. Dist. 14 [*affirmed* in 215 Pa. St. 297, 64 Atl. 508].

Speed.— The following rates of speed prescribed for motor vehicles by ordinances have been held to be reasonable: Ten miles an hour. Radnor Tp. *v.* Bell, 27 Pa. Super Ct. 1. Eight miles an hour. Com. *v.* Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245. Seven miles an hour. Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531. Six miles per hour between crossings and four miles per hour at crossings. Eichman *v.* Buchheit, 128 Mich. 385, 107 N. W. 325.

16. See cases cited *infra*, note 17 *et seq.*

17. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Jones *v.* Hoge, (Wash. 1907) 92 Pac. 433. See also King *v.* Consolidated Traction Co., 33 Pittsh. Leg. J. N. S. (Pa.) 138.

18. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338; McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130; Jones *v.* Hoge, (Wash. 1907) 92 Pac. 433.

19. Campbell *v.* St. Louis Transit Co., 121 Mo. App. 406, 99 S. W. 58; Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522. See also NEGLIGENCE; STREETS AND HIGHWAYS.

20. *Delaware.*— Simeone *v.* Lindsay, (1907) 65 Atl. 778.

Missouri.— Campbell *v.* St. Louis Transit Co., 121 Mo. App. 406, 99 S. W. 58.

New Jersey.— Turner *v.* Hall, (Sup. 1906) 64 Atl. 1060.

New York.— Turck *v.* New York Cent., etc., R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100; Morris *v.* Interurban St. R. Co., 100 N. Y. App. Div. 295, 91 N. Y. Suppl. 479.

Texas.— Routledge *v.* Rambler Automobile Co., (Civ. App. 1906) 95 S. W. 749.

See also NEGLIGENCE.

21. See cases cited *supra*, note 20.

No contributory negligence.— Where a pedestrian crossing a street has reached a point where he has a right to assume that an approaching auto will avoid him, he is not guilty of contributory negligence, if struck by the auto. Thus, where a person leaves the sidewalk to cross the road when an automobile is seventy-two feet away coming slowly, and has passed the middle of the road, and is in the act of looking back to the sidewalk when struck by the machine, negligence cannot be attributed to him. Benoit *v.* Miller, (R. I. 1907) 67 Atl. 87.

22. Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Ward *v.* Brooklyn Heights R. Co., 115 N. Y. App. Div. 104, 100 N. Y. Suppl. 671.

To remain in a carriage when the horse is frightened by a motor vehicle is not contributory negligence. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130.

Passenger in vehicle driven at dangerous speed.— Where a passenger riding in an automobile going at a dangerous rate was injured the court stated that if he had urged the driver of the automobile to go at a high rate of speed, or if he had acquiesced in the demand of his comrades, who were also passengers, for a high rate of speed and the driver had thereby been induced to go at an unsafe rate and the accident happened by reason thereof, the passenger would have

contributory negligence, simply because another course was open, and, if taken, the injury would have been avoided.[23]

3. Imputed Negligence. The negligence of the operator of a vehicle is not imputable to other occupants not in control of the vehicle;[24] but such occupants themselves must exercise due care for their own protection and, if their failure to do so results in their injury, no recovery can be had therefor.[25]

D. Negligence Must Be Proximate Cause. The act or omission alleged to be negligent must always be the proximate cause of the injury in order to be actionable;[26] and so too must the alleged contributory negligence be, in order to bar recovery, such that the injury would not have been sustained except for such negligence.[27]

E. Persons Liable — 1. Owner — a. Having Control of Vehicle. Where an injury is inflicted by the use or operation of a motor vehicle upon the public highways, the owner thereof is liable to respond in damages therefor, if the vehicle was being operated by such owner or was under his control or was in the custody or control of his agent or servant acting within the scope of his employment and for the benefit of the owner. In all cases where the owner is present he will be responsible for injuries sustained by third persons unless the operator disobeys instructions as the owner is in law in control of the vehicle.[28]

b. Vehicle in Charge of Third Persons — (I) *In General.* The liability of the owner for injuries sustained by the operation of his vehicle by some third person depends upon the existence of the relation at the time of the injury,[29] of master and servant between the owner and the operator or person in charge of the vehicle.[30]

(II) *Chauffeur or Servant.* Where the owner is not occupying the vehicle and it is being operated by or is in charge of his chauffeur or servant, he is liable for injuries sustained by third persons due to the negligent or tortious acts of the chauffeur or servant, provided such chauffeur or servant was acting within the

been guilty of contributory negligence. Routledge *v.* Rambler Automobile Co., (Tex. Civ. App. 1906) 95 S. W. 749.

23. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Sherwood *v.* New York Cent., etc., R. Co., 105 N. Y. Suppl. 547; Garside *v.* New York Transp. Co., 146 Fed. 588.

24. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Ward *v.* Brooklyn Heights R. Co., 104 N. Y. Suppl. 95; Routledge *v.* Rambler Automobile Co., (Tex. Civ. App. 1906) 95 S. W. 749.

25. Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522.

26. Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325; Campbell *v.* St. Louis Transit Co., 121 Mo. App. 406, 99 S. W. 58.

27. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Garside *v.* New York Transp. Co., 146 Fed. 588.

Negligence of both parties.— Where a person negligently injured by an auto is also guilty of negligence, he may recover damages, notwithstanding his negligence, "if it was the negligence of the defendant alone that was the proximate or immediate cause of the accident; in other words, if, notwithstanding the previous negligence of the plaintiff, the defendant could have prevented the accident by the use of ordinary and reasonable care." Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778, 780.

28. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

Liability of owner of vehicle being towed for negligence of chauffeur of towing vehicle. —An automobile, having broken down, the father of the owner directed his chauffeur to take it to the repair shop, and to use his own (the father's) machine for that purpose. The owner of the disabled machine occupied it for the purpose of steering it. Under these circumstances it was held that the father's chauffeur, who ran the forward machine, was not the servant of the son so as to render the latter liable for the chauffeur's negligence. Titus *v.* Tangeman, 116 N. Y. App. Div. 487, 101 N. Y. Suppl. 1000.

29. In order to establish liability, the persons must not only be general employees of the owner but must be in his business at the time the injuries are caused and not merely in their own recreation and pleasure. Clark *v.* Buckmobile Co., 107 N. Y. App. Div. 120, 94 N. Y. Suppl. 771.

30. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Collard *v.* Beach, 81 N. Y. App. Div. 582, 81 N. Y. Suppl. 619.

Relation of master and servant generally see Master and Servant.

Criminal liability of owner for violations

course of his employment.[31] If the chauffeur or servant is using the vehicle contrary to the express direction of the owner,[32] or for his own benefit or pleasure,[33] the owner is not liable. Neither is the owner liable where the servant or chauffeur, although originally taking the vehicle out for the owner's use, deviates from his owner's business and goes upon some independent journey for his own or another's pleasure or benefit.[34] If the actual operation of the vehicle while in charge of the chauffeur acting in the master's business is intrusted to another by the chauffeur and injury is sustained by a third person owing to the negligent operation of the vehicle, the owner is liable.[35]

(III) *Licensee.* Where a motor vehicle is being used by a mere licensee and is under his control, the owner is not liable no matter how gross may be his negligence.[36]

of laws and ordinances when vehicle is being operated by third persons see *infra*, XI.

31. Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511; Bennett *v.* Busch, (N. J. Sup. 1907) 67 Atl. 188; Doran *v.* Thomsen, (N. J. Sup. 1907) 66 Atl. 897; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161; Collard *v.* Beach, 81 N. Y. App. Div. 582, 81 N. Y. Suppl. 619; Curley *v.* Electric Vehicle Co., 68 N. Y. App. Div. 18, 74 N. Y. Suppl. 35.

Law of master and servant applies.— "The acts of the chauffeur, in operating an automobile, within the authority of his employment, are the acts of a servant. The relation of master and servant exists between the chauffeur and his employer, and the rules of law applicable to that relation apply." Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234, 236.

A chauffeur furnished under a contract of sale by the vendor of a motor vehicle, for the purpose of teaching the purchaser to operate the vehicle, is the vendor's servant and the vendor is liable to the purchaser for injuries resulting from the careless and reckless running of the vehicle by the chauffeur while testing its operation. Burnham *v.* Central Automobile Exch., (R. I. 1907) 67 Atl. 429.

32. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161. See also McEnroe *v.* Taylor, 107 N. Y. Suppl. 565.

Chauffeur held to have acted within scope of authority.— Where a chauffeur, upon informing his employer that oil was needed for the lamps of the auto, was instructed to go into the cellar of the hotel at which they were stopping and get the oil, and the chauffeur, instead of following these instructions, ran the machine to a near-by garage for the purpose of obtaining the oil, and collided with a wagon on the way, the employer was held liable for the damage. The court said: "From this recital of facts, it seems clear that, although the chauffeur in this particular instance made use of the master's machine in apparent disobedience of the latter's instructions, he was nevertheless engaged in the furtherance of his master's business, and the inference is legitimate at least that he was acting within the general scope of his authority, which was to care for the machine and keep it in order and to drive it on occasions." Bennett *v.* Busch, (N. J. Sup. 1907) 67 Atl. 188, 189.

33. *Georgia.*— Lewis *v.* Amorous, (App. 1907) 59 S. E. 338.

Iowa.— Reynolds *v.* Buck, 127 Iowa 601, 103 N. W. 946.

Minnesota.— Slater *v.* Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. N. S. 598.

New York.— Clark *v.* Buckmobile Co., 107 N. Y. App. Div. 120, 94 N. Y. Suppl. 771; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161.

Pennsylvania.— Lotz *v.* Hanlon, 217 Pa. St. 339, 66 Atl. 525.

Washington.— Jones *v.* Hoge, (1907) 92 Pac. 433.

United States.— Patterson *v.* Kates, 152 Fed. 481.

Incidental service for owner.— The fact that the servant, while using his master's vehicle for his own pleasure, had in mind at the time of the accident to stop and make purchases for the future use of the vehicle will not render the master liable for injuries inflicted upon third persons. Lotz *v.* Hanlon, 217 Pa. St. 339, 66 Atl. 525.

34. Patterson *v.* Kates, 152 Fed. 481.

The fact that the chauffeur makes a detour from the direct route while upon his master's business does not show that he was not acting within the scope of his authority. Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511.

35. Collard *v.* Beach, 81 N. Y. App. Div. 582, 81 N. Y. Suppl. 619.

36. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338; Doran *v.* Thomsen, (N. J. Sup. 1907) 66 Atl. 897.

Where the vehicle is in charge of a member of the owner's family, for such member's own pleasure or benefit, and there is no relation of master and servant existing between the owner and operator there is no liability on the part of the owner for injuries sustained in its operation, the use being that of a licensee. Reynolds *v.* Buck, 127 Iowa 601, 103 N. W. 946; Doran *v.* Thomsen, (N. J. Sup. 1907) 66 Atl. 897.

Under the English Motor Car Act of 1903, a person causing or permitting a motor car to be used contrary to the regulation is held

(IV) *TRESPASSER.* The owner of a motor vehicle is not liable for injuries sustained by the operation of the vehicle by a trespasser.[37]

2. OPERATOR. One who, by his want of care and attention, is the cause of injury to another is liable to respond in damages therefor. This general rule has special application to the liability of one operating a motor vehicle whether for himself, the owner of the vehicle, or for another person. For his own negligence he is always individually liable.[38]

3. LESSEE. The liability of the lessee of a motor vehicle depends upon whether he was in control of its operation at the time of the accident or his acts contributed to the injury. Where a motor vehicle is hired together with the chauffeur and the hirer only directs the chauffeur as to where and when he shall go, there is no liability for the negligence of the chauffeur;[39] but if the lessee is in control of the vehicle or places one employed by him in control, he is then liable for injuries resulting from its negligent operation.[40] But the lessee is not liable where the injury results from a defect in the vehicle unknown to him.[41]

4. PERSONS OCCUPYING VEHICLE. An occupant of a motor vehicle is not liable for injuries sustained by its operation unless he was either the operator, the person in charge, or the owner of the vehicle.[42] One in charge of the operation of a motor vehicle, although he is neither the owner nor the person actually operating it, is nevertheless liable for injuries sustained by third persons by reason of its negligent operation, as the person actually operating the vehicle will be deemed his servant irrespective of whether he employed him or not.[43]

F. Injury to Motor Vehicles and Their Occupants — 1. IN GENERAL. The liability of third persons for injuries to motor vehicles and their occupants is, in respect to injuries from other vehicles, founded upon the duties and obligations which have heretofore been discussed.[44] In regard to the duties of a motorist in

responsible, as well as the driver, in certain instances. See Pettitt Law Motor Cars 61.

37. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338; Berman *v.* Schultz, 84 N. Y. Suppl. 292.

The acts of boys in starting an automobile left unattended was held not to render the owner liable in Berman *v.* Schultz, 40 Misc. (N. Y.) 212, 81 N. Y. Suppl. 647. In Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338, 340, the court said in regard to Berman *v.* Schultz, *supra*: "Without approving that decision, so far as it places the acts of small boys upon the same footing with those of conscious agents *sui juris*, we cite the case upon the general principle involved."

38. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215. See, generally, MASTER AND SERVANT.

The chauffeur was held not liable, where in operating the machine the steering gear locked and the controller froze without any fault on his part and by reason thereof a person was injured. Bohan *v.* Metropolitan Express Co., 107 N. Y. Suppl. 530.

39. Routledge *v.* Rambler Automobile Co., (Tex. Civ. App. 1906) 95 S. W. 749.

Lessee not liable.— Where an express company hired an automobile from a transportation company, the transportation company furnishing the chauffeur, and the automobile was used in making deliveries of packages which were in charge of employees of the express company, it was held that the express company was not liable for injuries resulting from the operation of the vehicle. Bohan *v.* Metropolitan Express Co., 107 N. Y. Suppl. 530.

The owner is liable for injuries resulting to third persons from the negligent operation of the vehicle by his chauffeur, although the vehicle has been hired out to another who urges the chauffeur to run the vehicle at a reckless rate of speed. Routledge *v.* Rambler Automobile Co., (Tex. Civ. App. 1906) 95 S. W. 749.

40. Braverman *v.* Hart, 105 N. Y. Suppl. 107.

Operation under contract of conditional sale.— The owner of an automobile delivered it to B who was to use it for hire and pay the owner the purchase-price out of the proceeds derived from the use. B injured a person while driving it. B was not in the employ of or under the control of the owner. It was held that if B was negligent the owner was not chargeable with his negligence. Braverman *v.* Hart, 105 N. Y. Suppl. 107.

41. Bohan *v.* Metropolitan Express Co., 107 N. Y. Suppl. 530.

42. See Ward *v.* Brooklyn Heights R. Co., 115 N. Y. App. Div. 104, 100 N. Y. Suppl. 671 [*affirmed* in 104 N. Y. Suppl. 95].

43. Simcone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

44. Garfield *v.* Hartford, etc., St. R. Co., 79 Conn. 458, 65 Atl. 598. See also *supra*, III; IV; VI, A–E.

protecting himself and his vehicle from injuries, he is required to exercise the same care upon the highways as other vehicles. On approaching a railroad track he is bound before crossing to look and listen for trains.[45] This same duty extends usually to the passengers in the vehicle, especially where by so doing the injury could be averted; but negligence upon the part of the operator is not imputable to a passenger.[46]

2. FROM DEFECTIVE HIGHWAYS. Motor vehicles having equal rights upon the public roads with other vehicles, it necessarily follows that municipalities and others charged with the duty of keeping the highways in repair and free from obstructions owe the same duties to motorists in regard thereto.[47]

VII. CHAUFFEURS.

A. Definition. A chauffeur, as that term is used in connection with the law of motor vehicles, is any person operating a motor vehicle, as mechanic or employee for hire.[48]

B. License. As already referred to, the statutes of the several states which have passed laws regulating the use of motor vehicles require a chauffeur to take out a license.[49]

C. Qualifications. A chauffeur should possess the requisite understanding of the mechanism of the vehicle he is operating, and skill and sound judgment in regard to its management.[50]

45. Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Turck *v.* New York Cent., etc., R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100; Read *v.* New York Cent., etc., R. Co., 107 N. Y. Suppl. 1068.

46. Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Read *v.* New York Cent., etc., R. Co., 107 N. Y. Suppl. 1068; Ward *v.* Brooklyn Heights R. Co., 104 N. Y. Suppl. 95 [*affirming* 115 N. Y. App. Div. 104, 100 N. Y. Suppl. 671].

Age, condition, and attending circumstances must be considered.— In determining whether or not a failure on the part of a passenger riding in an automobile to look or listen before crossing the tracks of a railroad company constitutes contributory negligence, the age, condition, and situation of the passenger, the existing circumstances, and the condition in which the passenger approached the tracks are to be considered. It is not in every case that a failure to look or listen would be a negligence, as in the case of a passenger in a street car approaching a railroad track, where the car is entirely under the control and management of those charged with its management, or in the case of a very young child in a conveyance approaching the track. In other words it must not only appear that there was a failure to look and listen to constitute contributory negligence as a matter of law, but it must also appear that there was nothing in the age or condition of the person injured, or in the attending circumstances, which excused or would have rendered unavailing any knowledge that was acquired by the person injured. Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522. To the same effect see Sherwood *v.* New York Cent., etc., R. Co., 105 N. Y. Suppl. 547. A failure on the part of a man, thirty-six years old and in full possession of his faculties, riding as a guest or passenger in the rear seat of an automobile, to look or listen, before crossing a railroad track, to see if a train is approaching is negligence, where he had an unobstructed view of the track for a distance of two thousand feet, and where an injury results under such circumstances from a collision between a train and the automobile the railroad company is not liable. Read *v.* New York Cent., etc., R. Co., 107 N. Y. Suppl. 1068. To the same effect see Turck *v.* New York Cent., etc., R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100.

47. Upton *v.* Windham, 75 Conn. 288, 53 Atl. 660, 96 Am. St. Rep. 197; Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Gedroice *v.* New York, 109 N. Y. App. Div. 176, 95 N. Y. Suppl. 645; Morris *v.* Interurban St. R. Co., 100 N. Y. App. Div. 295, 91 N. Y. Suppl. 479.

48. See the statutes of the several states.

A chauffeur is "one who drives or operates an automobile." Standard Dict. Addenda.

"This term has recently come into use in the English language to designate at first the engineer or motorman of a steam-driven road carriage; but by extension it is now applied to any professional machinist who operates an automobile, electrically or otherwise propelled." Americana.

49. See *supra*, IV, E.

50. Walker *v.* Grout Bros. Automobile Co., 124 Mo. App. 628, 102 S. W. 25; Emerson Troy Granite Co. *v.* Pearson, (N. H. 1906) 64 Atl. 582; Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1. See also People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345.

D. Duties. The usual duties of a chauffeur are to care for the vehicle, to keep it in proper running order, and to drive or operate it on such occasions as the owner may require.[51]

E. Liabilities. The chauffeur bears the same legal relation to his employer as other employees, and his liabilities to his employer and to third persons are fully treated elsewhere in this work.[52]

F. Compensation. The compensation of a chauffeur is usually fixed by private agreement, but in the absence of any such agreement he will be entitled to recover for the reasonable value thereof.[53]

VIII. GARAGES AND GARAGE KEEPERS.

A. Definitions. The public garage is the modern substitute for the livery stable,[54] and may be defined as a building or inclosure for the care and storage of motor vehicles and in which motor vehicles are kept for hire.[55]

B. License and Regulation.[56] In some jurisdictions a special license is required in order to conduct a public garage, and where gasoline or other dangerous burning fluids are kept upon the premises, as is generally necessary in conducting a garage, the laws and ordinances pertaining to the storage of such fluids must be complied with.[57]

C. Not Nuisances.[58] The maintenance of an automobile station or garage is not a common-law nuisance.[59] The conduct of such a business in a proper manner and in a suitable locality is perfectly lawful and legitimate.[60] If the locality is utterly unsuitable and amidst surroundings not fitted for such a business, it might constitute a nuisance;[61] so too if the business be so conducted as to be dangerous to either property or health or to emit offensive odors, it might properly be designated as a nuisance and the continuance thereof abated.[62]

51. Bennett *v.* Busch, (N. J. Sup. 1907) 67 Atl. 188. See also MASTER AND SERVANT.

52. See MASTER AND SERVANT, 26 Cyc. 941 *et seq.* See also *supra*, VI.

53. See MASTER AND SERVANT, 26 Cyc. 1025 *et seq.*

54. Smith *v.* O'Brien, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673.

55. See Standard Dict. Addenda, where it is said that a garage is "a building, as a stable or shed, for the storage of automobiles and other horseless vehicles."

56. License generally see LICENSES; MUNICIPAL CORPORATIONS.

57. District of Columbia *v.* Weston, 23 App. Cas. (D. C.) 363; O'Hara *v.* Nelson, (N. J. Ch. 1906) 63 Atl. 836.

A license to conduct a general automobile storage and repair business authorizes the taking on storage of the vehicles under the necessary conditions of their ordinary use, which includes the permitting of gasoline to remain in their tanks. This is not a storage of gasoline on one's premises. Weston *v.* District of Columbia, 23 App. Cas. (D. C.) 367.

58. Nuisance generally see NUISANCES.

59. Stein *v.* Lyon, 91 N. Y. App. Div. 593, 87 N. Y. Suppl. 125.

Constituting violation of restrictive covenant in deed.— A deed of real estate contained a covenant that the property should not be used for the erecting or maintenance of "any mechanical or mercantile business or any stable or any building other than a dwelling house on the portion of the said premises lying south of the strip [of land] thereof now occupied by the track of the South Side Railroad of Long Island." It was held that the restriction excepted from its operation the entire right of way of the railroad company and not merely that part of the right of way physically occupied by the track of the railroad. And where the owner of the property erected a building partly on the right of way and partly outside, the part on the right of way being used as a garage and the part outside being used as a kitchen, it was held that there was no violation of the restrictive covenant. Stein *v.* Lyon, 91 N. Y. App. Div. 593, 594, 87 N. Y. Suppl. 125. A restrictive covenant in a deed providing that the property conveyed shall not be used for any business "offensive to the neighborhood for dwelling houses" is violated by the erection of an automobile garage designed to accommodate one hundred and twenty-five automobiles, one part of the garage being equipped with a portable forge and intended for use as a repair shop, it further appearing that demonstration cars would be kept in the building, with demonstrators to operate them and that from seventy-five to one hundred customers were expected to store automobiles there. Evans *v.* Foss, (Mass. 1907) 80 N. E. 587.

60. Stein *v.* Lyon, 91 N. Y. App. Div. 593, 87 N. Y. Suppl. 125.

61. O'Hara *v.* Nelson, (N. J. Ch. 1906) 63 Atl. 836.

Locating a garage on a boulevard in a summer resort does not *per se* constitute a nuisance. Stein *v.* Lyon, 91 N. Y. App. Div. 593, 87 N. Y. Suppl. 125.

62. O'Hara *v.* Nelson, (N. J. Ch. 1906) 63 Atl. 836.

D. Rights, Duties, and Liabilities of Garage Keepers — 1. In General. The rights, duties, and liabilities of garage keepers are quite analogous to the rights, duties, and liabilities of livery-stable keepers,[63] and, in the absence of a direct precedent upon any particular point, one will find the principles involved fully treated under that title.[64]

2. As to Property Left in Their Care. As to motor vehicles and their accessories left in the care of a garage keeper, he is bailee of them for hire and as such is liable to the owner for any loss or injury thereto resulting from his or his servants' wrongful or negligent acts or omissions. In regard to such property he must exercise that degree of care which a prudent man would exercise over his own property under similar circumstances. In the absence of a special agreement, he is not, however, an insurer of such property, or liable for its loss or injury not occasioned by his default.[65]

3. As to Vehicles Rented Out. In furnishing motor vehicles for hire, the garage keeper must use ordinary care and skill in furnishing a vehicle free from defects and suitable for the purpose for which it is let.[66] He is not liable for injuries sustained by reason of latent defects not discoverable by the exercise of due diligence.[67] And where the garage keeper undertakes to supply a chauffeur to operate the vehicle during the period of hiring, he must exercise due care in selecting one having the requisite skill and experience ordinarily possessed by persons exercising such calling.[68]

4. Compensation. The compensation for the use of motor vehicles, where not fixed by ordinance, may properly be the subject of private agreement, and in the absence of such there will be an implied contract to pay the usual rate for similar services.[69]

5. Liability For Injuries to Third Persons. A garage keeper, where he lets out a motor vehicle, is under the same liability as to third persons as other owners of motor vehicles and, if the vehicle is in charge of one of his servants, acting within the scope of his authority, he is liable for the damages resulting from its negligent operation;[70] but, if the vehicle is turned over to the hirer and the latter takes full charge thereof, no liability for its negligent operation can fall upon the garage keeper.[71]

6. Lien — a. In General. In the absence of a special statute or agreement, the garage keeper has no lien upon a motor vehicle which the owner keeps at the garage and takes out from time to time.[72] This is in conformity with the common-law rule that to have a lien on personal property the lienor must have an independent and exclusive possession either actual or constructive.[73]

b. Statutory Lien. The statutory lien of a livery-stable[74] keeper has been held not to extend to the keeper of a garage.[75]

63. See Smith *v.* O'Brien, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673.

64. See Livery-Stable Keepers, 25 Cyc. 1504 *et seq.*

65. See Bailments, 5 Cyc. 157 *et seq.*; Livery-Stable Keepers, 25 Cyc. 1512 *et seq.*

A garage keeper is not liable for injuries to a motor vehicle where the owner thereof delivers it to an agent of the garage keeper without the latter's knowledge and where the agent was off duty and used the vehicle solely for his own benefit, even though the agent represented that he wished to exhibit it to a prospective purchaser. Evans *v.* A. L. Dyke Automobile Supply Co., 121 Mo. App. 266, 101 S. W. 1132.

66. See Livery-Stable Keepers, 25 Cyc. 1513 *et seq.*

67. See Livery-Stable Keepers, 25 Cyc. 1513.

68. See Livery-Stable Keepers, 25 Cyc. 1514.

69. See Contracts, 9 Cyc. 213 *et seq.*

70. Routledge *v.* Ramhler Automobile Co., (Tex. Civ. App. 1906) 95 S. W. 749.

Liability of owner as to third persons see *supra*, VI.

71. Bohan *v.* Metropolitan Express Co., 107 N. Y. Suppl. 530. See also *supra*, VI, E, 3.

72. Smith *v.* O'Brien, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673.

73. Smith *v.* O'Brien, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673. See also Liens, 25 Cyc. 655 *et seq.*; Livery-Stable Keepers, 25 Cyc. 1507.

74. See Livery-Stable Keepers, 25 Cyc. 1507.

75. Smith *v.* O'Brien, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673.

c. Warehouseman's Lien. If the vehicle is left with the garage keeper strictly for the purpose of storage without any agreement, either expressed or implied, that the owner shall have the right of continuous use of the vehicle during such period, it seems that the garage keeper may then have a warehouseman's lien thereon for his proper charges.[76]

IX. SALES.

A. In General. The general rules governing contracts of sales are applicable to the contracts for the sales of motor vehicles.[77] These contracts frequently provide that the vendor will furnish a chauffeur to instruct the vendee to operate the vehicle, in which event the vendor is liable for injuries sustained by the vendee and third persons by the negligence of the chauffeur.[78] They also sometimes provide for the turning in of another vehicle in part payment.[79]

B. Statutory Regulations. In many states the vendor of a registered motor vehicle is required, within a specified time after completing the sale, to return the registration seal or license of such vehicle to the state official from whom it was obtained.[80]

C. Warranties. For a breach of warranty,[81] the vendee has the right to rescind the contract and recover back the purchase-price or he may retain the vehicle and hold the vendor for his damages.[82] A statement that a second hand vehicle is "as good as new," "all right," or "in first class condition" does not constitute a warranty that the vehicle is free from defects, but is merely an expression of opinion not affecting the contract, unless fraudulently made.[83]

D. Sales Agents. An agent who succeeds in effecting the sale of a vehicle for the manufacturer or dealer is entitled to his commission thereon even though the contract is finally closed through another agent.[84]

76. Smith *v.* O'Brien, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673. See also WAREHOUSEMEN.

77. See, generally, SALES.

Terms too indefinite.— Where an automobile company manufactures three different styles of cars, at different prices, an order for fifty machines, which does not specify the style of machine desired, even if accepted, is too indefinite for enforcement by either party. Wheaton *v.* Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399.

Satisfactory to purchaser.— Where a contract stipulates that the vehicle will be satisfactory to the purchaser, the purchaser may return it and demand the repayment of the purchase-price if the vehicle is not satisfactory. Under such a contract, the purchaser is the sole judge as to the satisfactory character of the vehicle. Walker *v.* Grout Bros. Automobile Co., 124 Mo. App. 628, 102 S. W. 25.

Right to rescind.— Where the purchaser has the right to rescind, he must exercise that right within a reasonable time, and not conduct himself in a manner inconsistent with such right. Cunningham *v.* Wanamaker, 217 Pa. St. 497, 66 Atl. 748.

78. Burnham *v.* Central Automobile Exch. (R. I. 1907) 67 Atl. 429.

The adjusting and testing of the machine by the chauffeur until the lessons are completed is within the provision of defendant's contract of sale of an automobile to plaintiff that it will furnish a chauffeur to teach plaintiff to operate the machine. Burnham *v.* Central Automobile Exch., (R. I. 1907) 67 Atl. 429.

79. Drexel *v.* Hollander, 112 N. Y. App. Div. 25, 98 N. Y. Suppl. 104.

80. See the statutes of the several states.

81. **What constitutes a warranty** see SALES.

82. Buick Motor Co. *v.* Reid Mfg. Co., (Mich. 1907) 113 N. W. 591; Isaacs *v.* Wanamaker, 189 N. Y. 122, 81 N. E. 763; Beecroft *v.* Van Schaick, 104 N. Y. Suppl. 458.

83. Morley *v.* Consolidated Mfg. Co., (Mass. 1907) 81 N. E. 993; Warren *v.* Walter Automobile Co., 50 Misc. (N. Y.) 605, 99 N. Y. Suppl. 396.

Construction of representation.— Plaintiffs' agent in the sale to defendant of a steam automobile for demonstrating purposes wherewith to sell others, by explaining to defendant the use and necessity of a fusible plug as an equipment of a steam automobile, and stating to him that all plaintiffs' automobiles were thus equipped, represented that the car sold defendant was a 1903 car, all plaintiffs' cars of that year having such an equipment, while their cars of the year 1902 were without such equipment, as was the case with the car they sent defendant. Grout *v.* Moulton, 79 Vt. 122, 64 Atl. 453.

84. Fredricksen *v.* Locomobile Co., (Nebr. 1907) 111 N. W. 845.

An agency within the meaning of the automobile trade consists in giving to the agent the exclusive right to purchase for cash from the manufacturer at a discount from the list price, and to retail them to consumers within specified territory at the full list price. In other words no commission as such is paid to an agent on the sale of a machine, but

X. ACTIONS.

A. Remedies. The same legal and equitable remedies are available by and against automobilists for the preservation and enforcement of their rights and duties as are afforded to others under similar circumstances.[85]

B. Joinder of Parties[86] — **1. PLAINTIFF.** A joint action by husband and wife may be maintained where the suit is for injuries sustained by the wife and damages sustained by the husband, growing out of defendant's negligence.[87]

2. DEFENDANT. Where several persons contribute to the injury they may be sued jointly or severally, although there is no concert between their acts.[88]

C. Pleading[89] — **1. DECLARATION, COMPLAINT, OR PETITION — a. In General.** The manner of setting forth a cause of action growing out of the infringement of some right or breach of duty pertaining to motor vehicles is not different than in setting forth causes of action founded upon other similar rights and duties.[90]

b. In Negligence Cases. Causes of action founded upon negligence should set forth the facts which it is claimed constitute such negligence,[91] with proper averments as to damage[92] as in other cases.

2. ANSWER. So too the rules governing the framing of answers in civil cases generally apply equally to cases involving the rights and duties of automobilists.[93]

3. DEMURRER. The constitutionality of the motor vehicle law may be raised by demurrer,[94] but the particular article or section or provision of the constitution claimed to be violated should be pointed out or required in defendant's motion papers or in his brief.[95]

4. MOTIONS IN REGARD TO PLEADINGS. The general rules as to motions affecting

he has the exclusive right to certain territory and purchases on his own account for cash at a discount from the retail or list price. Fredricksen *v.* Locomobile Co., (Nebr. 1907) 111 N. W. 845.

85. See cases cited *infra*, this note, and note 87 *et seq.*

Injunction.— Where a bridge or turnpike company wrongfully exact toll from automobilists the latter have a remedy by injunction. Mallory *v.* Saratoga Lake Bridge Co., 53 Misc. (N. Y.) 446, 104 N. Y. Suppl. 1025. So an injunction will issue to restrain the introduction of gasoline into the tanks of automobiles inside a frame building used as a garage, where by so doing it endangers adjacent properties. O'Hara *v.* Nelson, (N. J. Ch. 1906) 63 Atl. 836.

Mandamus.—A writ of mandamus will not issue to permit a person to run an automobile on a turnpike where it is admitted that by reason of the character of the vehicle no toll would be adequate. Bertles *v.* Laurel Run Turnpike Co., 15 Pa. Dist. 94.

86. Joinder of parties generally see PARTIES.

87. Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138. See also HUSBAND AND WIFE, 21 Cyc. 1550 *et seq.*

88. Corey *v.* Havener, 182 Mass. 250, 65 N. E. 69. See also NEGLIGENCE.

89. Pleading generally see PLEADING.

90. See, generally, PLEADING.

A complaint to recover the purchase-price after the rescission of a contract to purchase an automobile was held to be sufficient in Walker *v.* Grout Bros. Automobile Co., 124 Mo. App. 628, 102 S. W. 25.

A petition for mandamus to compel a turnpike company to permit an automobilist to operate his car on its roads upon the payment of proper toll should aver that the petitioner has complied with the provisions of the motor vehicle law as to the licensing of the operator, posting of the numbers on the vehicle, the equipment of the vehicle with brakes, signal devices, etc. Bertles *v.* Laurel Run Turnpike Co., 15 Pa. Dist. 94.

91. Trout Brook Ice, etc., Co. *v.* Hartford Electric Light Co., 77 Conn. 338, 59 Atl. 405; Hughes *v.* Connable, 5 Pennew. (Del.) 523, 64 Atl. 72. See also NEGLIGENCE.

Alleging relation of master and servant.— An allegation, in a complaint for personal injuries sustained while defendant's automobile was being used by defendant's daughter, which averred that defendant negligently directed and allowed the vehicle to be propelled by his daughter, sufficiently charges the existence of the relation of master and servant between defendant and his daughter. Doran *v.* Thomsen, (N. J. Sup. 1907) 66 Atl. 897. Where the complaint merely sets forth that the operator of the automobile was the agent or servant of the owner, without explicitly or implicitly disclosing the scope of the employment, and then sets forth that the operator caused the injury, it is demurrable as there is no inference that the act was within the scope of the employment. Lewis *v.* Amorous, (Ga. App. 1907) 59 S. E. 338.

92. Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511.

93. See, generally, PLEADING.

94. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

95. State *v.* Cobb, 113 Mo. App. 156, 87 S. W. 551.

pleadings apply here,[96] and where a party desires a more particular statement of his opponent's claim he should apply for a bill of particulars and not move to have the pleading made more definite and certain.[97]

D. Joinder of Causes of Action.[98] An action for the cost price of an automobile cannot be joined with an action for the conversion of another one, although both causes of action are founded upon one transaction which was for the sale of an automobile for which an old automobile was taken in part payment and retained by the vendor and his failure to deliver the new car.[99]

E. Witnesses — 1. In General. The general rules as to the competency of witnesses apply to cases involving the rights of motorists.[1]

2. Experts. An expert can only answer to a hypothetical question based upon facts which are in evidence.[2] In order to be competent to testify as to the speed at which a motor vehicle was traveling on a particular occasion it need not be shown that the witness has any expert knowledge on the subject.[3] Simply a knowledge of time and distance is sufficient,[4] coupled with a reasonable opportunity to judge.[5]

F. Evidence — 1. Presumptions and Burden of Proof. The burden of proof, as in other cases, is on plaintiff to establish each material fact constituting his cause of action, by a fair preponderance of the evidence.[6] This rule applies to proof: That the chauffeur was about the owner's business at the time of the injury, where it is sought to hold the owner for injury occurring to some third person while the vehicle was in the hands of the chauffeur,[7] although a presumption of that fact may arise from the circumstances in the particular case;[8] that defendant was

96. See, generally, Motions; Pleading.

Striking out irrelevant matter see Garfield *v.* Hartford, etc., St. R. Co., 79 Conn. 458, 65 Atl. 598.

97. Harrington *v.* Stillman, 105 N. Y. Suppl. 75.

An application for a bill of particulars which asks for more than the applicant is entitled to may be denied. An application calling for the precise hour of the accident, the direction plaintiff was moving, the number of the automobile with a description of it, including its make, color, size, kind of motive power, etc., and a description of its occupants at the time of the alleged accident was denied and such practice condemned as trifling with the court in Shepard *v.* Wood, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306.

98. Joinder of actions generally see Joinder and Splitting of Actions.

99. Drexel *v.* Hollander, 112 N. Y. App. Div. 25, 98 N. Y. Suppl. 104.

1. See, generally, Witnesses.

Value of vehicle.— The owner of an automobile and the person from whom the same was purchased are competent to testify as to its value in an action against a carrier for injuries to the vehicle. Paterson *v.* Chicago, etc., R. Co., 95 Minn. 57, 103 N. W. 621.

2. Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45.

3. Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138.

4. Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138.

5. Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

6. See, generally, Evidence; Trial.

Obstruction of highway — Removal of light. —In an action against a municipality for injuries sustained by an automobilist in running into an obstruction in the highway during the night-time and about which, at the time of the accident, there was no light, defendant proved that a light had been fastened above the obstruction in the evening but the next morning it was found to have been removed. It was held that the burden was upon plaintiff to show that defendant had actual knowledge that the light had been removed. Gedroice *v.* New York, 109 N. Y. App. Div. 176, 95 N. Y. Suppl. 645.

7. Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511; Lotz *v.* Hanlon, 217 Pa. St. 339, 66 Atl. 525.

8. Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511.

A prima facie case is made out by showing that defendant was the owner of the automobile and that the chauffeur was in his employ to operate it and was operating it at the time of the injury complained of, but this is not conclusive. Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161. There is a presumption that the chauffeur is acting within the scope of his authority and this is not overcome by proof of the fact that he made a detour from the direct route of the journey which he was on for the owner at the time of the accident. Long *v.* Nute, *supra*.

The fact of defendant's ownership of the automobile does not warrant the inference that the person in charge thereof was his servant and acting within the scope of his authority. Lotz *v.* Hanlon, 217 Pa. St. 339, 66 Atl. 525.

negligent;[9] and usually that plaintiff was free from contributory negligence.[10] And where an automobile ordinance is attacked on the ground that it is unreasonable the burden is on the party attacking it to show that it is unreasonable.[11]

2. Judicial Notice. The courts will take judicial notice of the fact that automobiles on highways, especially where they are infrequent, have a tendency to frighten animals,[12] and their other characteristics and consequences of their use;[13] and also that such vehicles may be driven at a great speed.[14] But the court will not take judicial notice of municipal ordinances regulating the use of motor vehicles.[15]

3. Admissibility and Sufficiency — a. In General. Testimony as to the comparative amount of noise made by different makes of motor vehicles, based on comparisons made by the witness, is incompetent where there is no proof of the condition of the machines with which the test was made.[16] And in an action on a contract to reshoe automobile tires evidence as to whether or not the tires needed reshoeing is immaterial.[17]

b. To Establish Ownership. Proof that an automobile in which a person was riding was registered in the name of such person is sufficient to warrant a finding that he was the general owner thereof or had such a special property therein as to give him control of the vehicle.[18]

c. To Show Relation of Master and Servant. Evidence that a person sued for an injury caused by the operation of his motor vehicle fails to deny, when served with the summons and complaint, that the chauffeur who operated the vehicle was acting within the scope of his authority is not competent to prove that the agent was acting within his authority.[19] And where the chauffeur is called as a witness by plaintiff for the purpose of showing that he was employed by defendant, it is competent on cross examination to show that he was operating the machine for his own benefit, without the knowledge or authority of his employer.[20]

G. Variance. The proof should conform to the pleadings, but a substantial conformance is all that is necessary.[21]

H. Measure of Damages[22] — 1. In General. Damages based upon expert testimony as to the value of the use of a motor vehicle are not recoverable where it is not shown that the vehicle was used for any business purpose or that the owner hired another to take its place while it was being repaired.[23]

2. Breach of Warranty. The measure of damages for the breach of a warranty on a sale of an automobile where the contract is not rescinded is the difference between the value of the car, had it been as warranted, and the actual value.[24]

3. For Death of Person.[25] Damages which are recoverable for the death of

9. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

10. Nadeau *v.* Sawyer, 73 N. H. 70, 59 Atl. 369; McCarragher *v.* Proal, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208; Buscher *v.* New York Transp. Co., 114 N. Y. App. Div. 85, 99 N. Y. Suppl. 673; Wilkins *v.* New York Transp. Co., 52 Misc. (N. Y.) 167, 101 N. Y. Suppl. 650; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

11. *In re* Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160.

12. Rochester *v.* Bull, (S. C. 1907) 58 S. E. 766.

13. *In re* Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160.

14. People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345.

15. Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531.

16. Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138.

17. Morris *v.* Fisk Rubber Co., (Ala. 1907) 43 So. 483.

18. Com. *v.* Sherman, 191 Mass. 439, 78 N. E. 98.

19. McEnroe *v.* Taylor, 107 N. Y. Suppl. 565.

20. Quigley *v.* Thompson, 211 Pa. St. 107, 60 Atl. 506.

21. Trout Brook Ice, etc., Co. *v.* Hartford Electric Light Co., 77 Conn. 338, 59 Atl. 405, holding that an allegation in a complaint founded upon frightening of horses by defendant's automobile was not supported by the proof.

22. Damages generally see Damages.

23. Foley *v.* Forty-Second St., etc., R. Co., 52 Misc. (N. Y.) 183, 101 N. Y. Suppl. 780. See also Burnham *v.* Central Automobile Exch., (R. I. 1907) 67 Atl. 429.

24. Isaacs *v.* Wanamaker, 189 N. Y. 122, 81 N. E. 763. See also Sales.

25. Damages for death generally see Death, 13 Cyc. 362 *et seq.*

a person by the negligent operation of a motor vehicle are limited to those which are pecuniary and compensatory.[26] Exemplary or punitive damages are not recoverable.[27]

4. For Injury to Person. Damages for personal injuries[28] may include moneys expended in effecting a cure,[29] the reasonable value of time lost,[30] earnings,[31] compensation for the pain and suffering in the past and such as may come to plaintiff in the future,[32] and probable loss from impairment of ability to earn a living.[33] In addition thereto a sum may be allowed as punitive damages where the negligence is gross.[34]

5. For Injury to Animal.[35] For injuries to a horse there may be recovered amounts necessarily expended in endeavoring to heal the same and the value of the horse's services while disabled.[36] But deterioration of a horse due to fright is not a proper element of damage.[37]

I. Trial[38] — **1. Questions For Court and Jury.** It is the province of the court to determine questions of law, and that of the jury to weigh the evidence and ascertain the facts.[39] Unless it is established beyond fair debate and there is an absence of contradictory evidence it is for the jury to determine whether a particular road was defective,[40] whether a chauffeur was acting within the scope of his authority,[41] the rate of speed at which an automobile was traveling, and whether such speed was negligent,[42] whether it is negligent to run a motor vehicle in dark without a headlight,[43] whether under the particular circumstances it was negligent for a passenger in an automobile to fail to look and listen for trains before crossing a railroad track,[44] and whether the fact of a child playing in the street constitutes

26. Thies *v.* Thomas, 77 N. Y. Suppl. 276.

27. Thies *v.* Thomas, 77 N. Y. Suppl. 276.

28. **Verdicts approved** for the following amounts: Four hundred dollars for miscellaneous bruises and injuries. Weiskopf *v.* Ritter, 97 S. W. 1120, 29 Ky. L. Rep. 1268; One thousand and twenty dollars for a permanent serious loss in the vision of one eye in addition to superficial bruises. Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249. Two thousand five hundred dollars for dislocated shoulder, fracture of two ribs, and bruises, without any permanent injuries; verdict so reduced from eight thousand one hundred and fifty dollars. Kathmeyer *v.* Mehl, (N. J. Sup. 1905) 60 Atl. 40. Two thousand five hundred dollars awarded for permanent injury to hand bruises and broken finger and loss of time which was estimated at one thousand dollars. Gregory *v.* Slaughter, 99 S. W. 247, 30 Ky. L. Rep. 500, 8 L. R. A. N. S. 1228. Twenty-five thousand dollars for the loss of a leg by a girl sixteen years old; verdict so reduced from thirty-five thousand dollars. Noakes *v.* New York Cent., etc., R. Co., 106 N. Y. Suppl. 522.

29. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488.

Value of a wife's services in nursing the plaintiff may be included. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488.

30. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

31. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234; Gregory *v.* Slaughter, 99 S. W. 247, 30 Ky. L. Rep. 500, 8 L. R. A. N. S. 1228.

32. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

33. Simeone *v.* Lindsay, (Del. 1907) 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.) 537, 63 Atl. 234.

34. Weiskopf *v.* Ritter, 97 S. W. 1120, 29 Ky. L. Rep. 1268.

35. **Damages for injuries to animals** generally see Animals, 2 Cyc. 426 *et seq.*

36. Long *v.* Nute, 123 Mo. App. 204, 100 S. W. 511.

37. Nason *v.* West, 31 Misc. (N. Y.) 583, 65 N. Y. Suppl. 651. See also Mendleson *v.* Van Rensselaer, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578.

38. **Trial** generally see Trial.

39. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130.

Whether or not a horse has become frightened is a question of fact and not a conclusion. Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118.

Negligence.— If under the rules of law a given class of facts, embodying all the controlling facts in evidence and the reasonable inferences arising therefrom, constitute negligence, or due care, it is proper for the judge to tell the jury so. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. N. S. 1130.

40. Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336.

41. Bennett *v.* Busch, (N. J. Sup. 1907) 67 Atl. 188; Curley *v.* Electric Vehicle Co., 68 N. Y. App. Div. 18, 74 N. Y. Suppl. 35.

42. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Garside *v.* New York Transp. Co., 146 Fed. 588. See also Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138.

43. Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

44. Noakes *v.* New York Cent., etc., R. Co.,

contributory negligence,[45] and all other questions relating to the negligence of defendant,[46] or the contributory negligence of plaintiff.[47] Also what constitutes a reasonable time within which a purchaser of an automobile should exercise his right to rescind the contract is a question of fact for the jury.[48]

2. INSTRUCTIONS. The general rules governing instructions in civil actions apply here.[49]

3. VERDICT. The rules governing general and special verdicts in actions growing out of the rights and duties of automobilists are the same as those that apply to civil actions generally.[50]

4. JUDGMENT.[51] A judgment may be rendered against each of two motor cyclists for injuries to which they each independently contributed, but one satisfaction is all that can be had.[52]

J. New Trial, Appeal and Error. New trials[53] of actions involving questions as to rights and duties pertaining to motor vehicles, their owners and operators, and also appeals or writs of error, are governed by the same rules that apply to civil actions generally.[54]

XI. CRIMES AND OFFENSES.[55]

A. In General. The statutes usually make it a misdemeanor, punishable either by fine or imprisonment, for the violation of any of the statutes, or of any rule, ordinance, or regulation made pursuant to their authority.[56]

B. Procedure. In a criminal prosecution for a violation of a statute or ordinance regulating the use of motor vehicles, the precise charge should be set forth in the indictment or information in clear and unambiguous language.[57] The pro-

121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522.

45. Turner *v.* Hall, (N. J. Sup. 1906) 64 Atl. 1060; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

46. Raher *v.* Hinds, 133 Iowa 312, 110 N. W. 597; Weiskopf *v.* Ritter, 97 S. W. 1120, 29 Ky. L. Rep. 1268; Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345; Corey *v.* Havener, 182 Mass. 250, 65 N. E. 69; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Mendleson *v.* Van Rensselaer, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578; Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253; Rochester *v.* Bull, (S. C. 1907) 58 S. E. 766; Lampe *v.* Jacobsen, (Wash. 1907) 90 Pac. 654; Garside *v.* New York Transp. Co., 146 Fed. 588.

47. Strand *v.* Grinnell Automobile Garage Co., (Iowa 1907) 113 N. W. 488; Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345; Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Turner *v.* Hall, (N. J. Sup. 1906) 64 Atl. 1060; Noakes *v.* New York Cent. R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Mendleson *v.* Van Rensselaer, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578; Curley *v.* Electric Vehicle Co., 68 N. Y. App. Div. 18, 74 N. Y. Suppl. 35; Cæsar *v.* Fifth Avenue Coach Co., 45 Misc. (N. Y.) 331, 90 N. Y. Suppl. 359; Lampe *v.* Jacobsen, (Wash. 1907) 90 Pac. 654; Garside *v.* New York Transp. Co., 146 Fed. 588.

48. Cunningham *v.* Wanamaker, 217 Pa. St. 497, 66 Atl. 748.

49. See, generally, TRIAL. See also Murphy *v.* Meacham, 1 Ga. App. 155, 57 S. E. 1046; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Ward *v.* Meredith, 122 Ill. App. 159 [*affirmed* in 220 Ill. 66, 77 N. E. 118]; Weiskopf *v.* Ritter, 97 S. W. 1120, 29 Ky. L. Rep. 1268; Buscher *v.* New York Transp. Co., 114 N. Y. App. Div. 85, 99 N. Y. Suppl. 673; Wiggers *v.* Cincinnati Traction Co., 17 Ohio S. & C. Pl. Dec. 798.

50. See, generally, TRIAL. See also Bush *v.* Fourcher, (Ga. App. 1907) 59 S. E. 459.

51. Judgment generally see JUDGMENTS.

52. Corey *v.* Havener, 182 Mass. 250, 65 N. E. 69.

53. See, generally, NEW TRIAL. See also Murphy *v.* Meacham, 1 Ga. App. 155, 57 S. E. 1046; Silberman *v.* Huyette, 22 Montg. Co. Rep. (Pa.) 39.

54. See, generally, APPEAL AND ERROR.

55. Criminal law and procedure generally see CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

56. Com. *v.* Sherman, 191 Mass. 439, 78 N. E. 98; *In re* Automobile Acts, 15 Pa. Dist. 83.

Lending or keeping duplicate sets of tags is no offense under the Pennsylvania act. Com. *v.* David, 15 Pa. Dist. 793.

One who operates a motor vehicle with tags issued to another may, even though licensed, be punished for failure to display the tags issued to him. Com. *v.* David, 15 Pa. Dist. 793.

Owner may be convicted for speed violations where he is in the automobile at the time of such violations, although not actually operating the machine. Com. *v.* Sherman, 191 Mass. 439, 78 N. E. 98.

57. People *v.* Ellis, 88 N. Y. App. Div. 471, 85 N. Y. Suppl. 120; McCummins *v.* State,

ceedings should be conducted in the manner prescribed for conducting criminal proceedings generally,[58] and upon conviction the punishment, whether fine or imprisonment, must be within the limits of the statute or ordinance under which the prosecution was had.[59]

MOUNTAIN. In Ireland, a term which applies to and includes uncultivated land,[8] used to denote the situation, and not the quality, of land.[9]

MOUNTEBANKERY. Acts which may consist of boastful and vain pretensions, appearing in the character of certain persons, imitating their traits, language, and actions, and performing pretended feats.[10]

MOUNTED OFFICER. One who, by statute, regulations, or army organizations, is required to be mounted at his own expense, whether he or his company be fully equipped or not.[11]

MOUSE. A small rodent quadruped.[12]

MOUSE-COLORED MULE. A mule whose color is that of a mouse.[13]

MOVABLE ESTATE. Sometimes synonymous with "personal estate."[14]

MOVABLE FREEHOLD. A term applied where the owner of seashore acquires or loses land as the water recedes or approaches.[15]

MOVABLES.[16] GOODS, *q. v.*; FURNITURE, *q. v.*; distinguished from real or immovable possessions,[17] things substantive which have locality and may move or be moved.[18] In the singular as an adjective, the term as applied to property, signifies that it is capable of being moved or put out of one place into another.[19] (See GOODS.)

(Wis. 1907) 112 N. W. 25; Rex *v.* Wells, 20 Cox C. C. 671, 68 J. P. 392, 2 Loc. Gov. 913, 91 L. T. Rep. N. S. 98, 20 T. L. R. 549.

Substantially following the language of the statute is sufficient. State *v.* Cobb, 113 Mo. App. 156, 87 S. W. 551.

A licensed automobile used for hire may be described as a "hack" in an information for a violation of regulations in respect to the carriage of passengers where it is provided therein that every vehicle licensed thereunder shall be considered a hack. Gassenheimer *v.* District of Columbia, 26 App. Cas. (D. C.) 557.

58. See, generally, CRIMINAL LAW.

59. See cases cited *infra*, this note.

A fine in excess of the court's jurisdiction renders the judgment void, and an appellate court has no power to send the case back to the trial court to pass proper judgment. People *v.* De Graff, 107 N. Y. Suppl. 1038.

Statutes and ordinances prescribing different speed limits.— In the city of New York, where an ordinance limits the speed to eight miles an hour and prescribes a penalty of ten dollars for its violation, if the offender exceed eight but not ten miles an hour, he is punishable under the ordinance. If he exceed ten miles an hour he is punishable under the general law. People *v.* Prison Keeper, 190 N. Y. 315, 83 N. E. 44.

8. Waterpark *v.* Fennell, 7 H. L. Cas. 650, 658, 5 Jur. N. S. 1135, 7 Wkly. Rep. 634, 11 Eng. Reprint 259.

9. Kildare *v.* Fisher, Str. 71, 72. But see Cottingham *v.* Rex, 1 Burr. 623, 629.

10. Thurber *v.* Sharp, 13 Barb. (N. Y.) 627, 628.

11. Matter of Harrold, 23 Ct. Cl. 295, 298.

12. Sparks *v.* Brown, 46 Mo. App. 529, 536.

13. Sparks *v.* Brown, 46 Mo. App. 529, 536.

14. Den *v.* Sayre, 3 N. J. L. 598, 602.

15. Holman *v.* Hodges, 112 Iowa 714, 718, 84 N. W. 950, 84 Am. St. Rep. 367, 58 L. R. A. 673.

16. **The word is derived from the civil law.** Penniman *v.* French, 17 Pick. (Mass.) 404, 405, 28 Am. Dec. 309.

17. Johnson Dict. [*quoted* in Penniman *v.* French, 17 Pick. (Mass.) 404, 405, 28 Am. Dec. 309].

18. Wood *v.* George, 6 Dana (Ky.) 343, 344. See also Jackson *v.* Vandersprelgle, 2 Dall. (Pa.) 142, 1 L. ed. 323.

The word is usually understood to signify the utensils which are to furnish or ornament a house. Dictionnaire de l'Académie Française [*quoted* in Penniman *v.* French, 17 Pick. (Mass.) 404, 405, 28 Am. Dec. 309].

As used in the definition of "occupancy," as the taking possession of movables belonging to no one, "'movables' must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other." Goddard *v.* Winchell, 86 Iowa 71, 82, 52 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788.

The words "goods and movables," when used in a will bequeathing testator's goods and movables, will include bonds belonging to the testator. Jackson *v.* Robinson, 1 Yeates (Pa.) 101, 102, 1 Am. Dec. 293.

19. Strong *v.* White, 19 Conn. 238, 245.

"Movable property" is such as attends a man's person wherever he goes, in contradistinction to things immovable. Bouvier L. Dict. [*quoted* in Hardeman *v.* State, 16 Tex. App. 1, 4, 49 Am. Rep. 821].

MOVE.[20] A term sometimes used as meaning to propel;[21] to remove.[22]

MRS. An abbreviation for MISTRESS, *q. v.*, generally made use of to distinguish the person named as a married woman.[23]

MUCH. A term sometimes used as synonymous with "many."[24] (See MANY.)

MULATTO. Every one who is not of white blood;[25] a person begotten between a white and black;[26] a person having one-fourth or more of negro blood in his veins;[27] the middle term between the extremes, or the offspring of a white and a black.[28] (See COLORED PERSONS, and Cross-References Thereunder; CREOLE.)

MULCT. A fine imposed for an offense; a penalty.[29] (See, generally, FINES.)

MULCTA DAMNUM FAMÆ NON IRROGAT. A maxim meaning "A fine does not involve loss of character."[30]

MULE. See ANIMALS.[31]

MULIER AMISSA PUDICITIA HAUD ALIA ABNUERIT. A maxim meaning "When a woman has lost her chastity she may be suspected of not refusing any thing else of crime."[32]

MULTA CONCEDUNTUR PER OBLIQUUM, QUÆ NON CONCEDUNTUR DEDIRECTO. A maxim meaning "Many things are allowed indirectly which are not allowed directly."[33]

MULTA FIDEM PROMISSA LEVANT. A maxim meaning "Many promises lessen confidence."[34]

MULTA IGNORAMUS QUÆ NOBIS NON LATERENT SI VETERUM LECTIO NOBIS FUIT FAMILIARIS. A maxim meaning "We are ignorant of many things which would not be hidden from us if the reading of old authors was familiar to us."[35]

20. "Movement" and "stroke" see U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., 125 Fed. 378, 379, 60 C. C. A. 244.

21. Hamilton *v.* Groesbeck, 19 Ont. 76, 81.

22. Davis *v.* State, 68 Ala. 58, 60, 44 Am. Rep. 128.

23. Schmidt *v.* Thomas, 33 Ill. App. 109, 112. *Compare* Ballard *v.* St. Albans Advertiser Co., 52 Vt. 325, 328, where it is said that there are a large class of women who are entitled to be called "Mrs.," yet who have no husbands by reason of death or divorce.

Not a proper christian name.— Schmidt *v.* Thomas, 33 Ill. App. 109, 112; Elberson *v.* Richards, 42 N. J. L. 69, 70 [*citing* 1 Chitty Pl. 256]. *Compare* Salem *v.* Montville, 33 Conn. 141, 143.

24. Washington *v.* Pratt, 8 Wheat. (U. S.) 681, 687, 5 L. ed. 714.

25. People *v.* Hall, 4 Cal. 399, 403.

Not embracing a free negro see Scott *v.* Raub, 88 Va. 721, 727, 14 S. E. 178, as used in a statute.

26. Thurman *v.* State, 18 Ala. 276, 278; Johnson Dict. [*quoted* in State *v.* Scott, 1 Bailey (S. C.) 270, 273].

The term includes every one coming within the definition, whether the taint in the blood be derived from the father or the mother. Thurman *v.* State, 18 Ala. 276, 278; State *v.* Scott, 1 Bailey (S. C.) 270, 273. But see Medway *v.* Natick, 7 Mass. 88, 89, where it was said that the term does not include a person whose father was a mulatto and whose mother was a white woman.

In legal as well as common parlance the term is understood to be a mixture of the white and negro race. State *v.* Hayes, 1 Bailey (S. C.) 275, 276.

As used in the Spanish and French West Indies, the term applies to persons who are an intermixture of a white person with a negro. Daniel *v.* Guy, 19 Ark. 121, 131.

27. Gentry *v.* McMinnis, 3 Dana (Ky.) 382, 385; Anderson *v.* Millikin, 9 Ohio St. 568, 570, 574; Scott *v.* Raub, 88 Va. 721, 727, 14 S. E. 178.

28. Williams *v.* Whitewater Tp. School Dist. No. 6, Wright (Ohio) 578, 579 [*cited* in Jeffries *v.* Ankeny, 11 Ohio 372, 375].

The definition of the term seems to be vague, signifying generally a person of mixed white, or European, and negro descent, in whatever proportion the blood of the two races may be mingled in the individual; but it is not invariably applicable to every admixture of the African blood with the European, nor is one bearing all the features of the white to be ranked with the degraded class, designated by the laws of this state "persons of color," because of some remote taint of the negro race. State *v.* Davis, 2 Bailey (S. C.) 558, 559.

29. Cook *v.* Marshall County, 119 Iowa 384, 400, 93 N. W. 372, 104 Am. St. Rep. 283 [*citing* Anderson L. Dict.; Century Dict.; Ebersole L. Dict.].

30. Black L. Dict.

31. See also 21 Cyc. 1103 note 39.

32. Morgan Leg. Max.

33. Burrill L. Dict.

Applied in Dowdale's Case, 6 Coke 46*a*, 47*a*.

34. Black L. Dict.

Applied in Brown *v.* Castles, 11 Cush. (Mass.) 348, 350.

35. Black L. Dict.

Applied in Marshalsea's Case, 10 Coke 68*a*, 73*a*.

MULTA IN JURE COMMUNI CONTRA RATIONEM DISPUTANDI, PRO COMMUNI UTILITATE INTRODUCTA SUNT. A maxim meaning "Many things have been introduced into the common law with a view to the public good, which are inconsistent with sound reason." [36]

MULTA MULTO EXERCITATIONE FACILIUS QUAM REGULIS PERCIPIES. A maxim meaning "You will perceive many things much more easily by practice than by rules." [37]

MULTA NON VETAT LEX, QUÆ TAMEN TACITE DAMNAVIT. A maxim meaning "The law forbids not many things which yet it has silently condemned." [38]

MULTA TRANSEUNT CUM UNIVERSITATE, QUÆ NON PER SE TRANSEUNT. A maxim meaning "Many things pass with the whole, which do not pass separately." [39]

MULTIFARIOUSNESS. See EQUITY.

MULTI MULTA, NEMO OMNIA NOVIT. A maxim meaning "Many men have known many things; no one has known everything." [40]

MULTIPHASE SYSTEM. In the law of electricity, the ordinary mode of transmission of high potential currents.[41] (See, generally, ELECTRICITY.)

MULTIPLE. Manifold; having many parts or relations.[42]

MULTIPLICATA TRANSGRESSIONE CRESCAT PŒNÆ INFLICTIO. A maxim meaning "As transgression is multiplied, the infliction of punishment should increase." [43]

MULTIPLICITY OF SUITS. A phrase descriptive of a state of affairs where several different actions are brought on the same issue;[44] an aggregation of suits to which a complainant will be a party.[45]

MULTITUDE.[46] An assemblage of many people.[47] (See MOB, and Cross-References Thereunder.)

MULTITUDINEM DECEM FACIUNT. A maxim meaning "Ten make a multitude." [48]

MULTITUDO ERRANTIUM NON PARIT ERRORI PATROCINUM. A maxim meaning "The multitude of those who err furnishes no countenance or excuse or error." [49]

MULTITUDO IMPERITORUM PERDIT CURIAM. A maxim meaning "The great number of unskillful practitioners ruins a court." [50]

MULTO UTILIUS EST PAUCA IDONEA EFFUNDERE QUAM MULTUS INUTILIBUS HOMINES GRAVARI. A maxim meaning "It is more useful to pour forth a few useful things than to oppress men with many useless things." [51]

36. Burrill L. Dict. [*citing* Broom Leg. Max. 67 (117); Coke Litt. 70*b*].

37. Black L. Dict. [*citing* 4 Inst. 50].

38. Black L. Dict.

39. Burrill L. Dict. [*citing* Coke Litt. 12*a*].

40. Black L. Dict. [*citing* 4 Inst. 348].

41. Harrison *v.* Detroit, etc., R. Co., 137 Mich. 78, 80, 100 N. W. 451.

42. Century Dict.

Embraces all multiples.— In the act of 5 & 6 Wm. IV, c. 63, establishing a certain system of weights and measures and providing that all contracts, sales, etc., shall be made and had according to said standard of weight, or to the said gallon, or the parts, multiples, or proportions thereof, the term "multiple" is not to be understood in its restrictive sense, so as to comprehend only multiples numerically expressed, such as ten pounds, one hundred pounds, etc., but generally all multiples, however expressed, such as a stone, a hundredweight, or ton, or any other weight, such as a weigh, a tod, or a hobbet, supposing these words to be in use for expressing multiples of the pound avoirdupois. Giles *v.* Jones, 11 Exch. 393, 395, 1 Jur. N. S. 982, 24 L. J. Exch. 259, 3 Wkly. Rep. 576.

43. Black L. Dict. [*citing* 2 Inst. 479].

44. Williams *v.* Millington, 1 H. Bl. 81, 83, 2 Rev. Rep. 724.

45. Thomas *v.* Council Bluffs Canning Co., 92 Fed. 422, 423, 34 C. C. A. 428 [*cited* in Turner *v.* Mobile, 135 Ala. 73, 119, 33 So. 132].

46. Distinguished from "multiplicity" see Murphy *v.* Wilmington, 6 Houst. (Del.) 108, 138, 22 Am. St. Rep. 345.

47. Black L. Dict. [*citing* Coke Litt. 257]. See Pike *v.* Witt, 104 Mass. 595, 597, where it is said that where two persons went to a mill, taking with them a workman and entering such mill, there was not an entry with a "multitude," which of itself tends to excite terror.

48. Black L. Dict.

49. Black L. Dict.

Applied in Magdalen College Case, 11 Coke 66*b*, 75*a*.

50. Black L. Dict. [*citing* 2 Inst. 219].

51. Black L. Dict.

MUNICIPAL.[52] Pertaining to a municipality;[53] of or pertaining to a town or city;[54] that which belongs to a corporation or a city;[55] pertaining to local self-government;[56] pertaining to corporate or local self-government,[57] or the corporate government of a city or town;[58] pertaining to a city or corporation having the right of administering local government;[59] belonging to a city, town or place having the right of local government;[60] self-governing;[61] belonging to or affecting a particular state or separate community.[62] The term is sometimes used in contradistinction to INTERNATIONAL,[63] *q. v.*; it may also mean LOCAL, *q. v.*; particular; INDEPENDENT,[64] *q. v.* Strictly, this word applies only to what belongs to a city;[65] and is usually applied to what belongs to a city; but it has a more extensive meaning, and is in legal effect the same as public or governmental as distinguished from private.[66] (Municipal: Aid — Generally, see MUNICIPAL CORPORATIONS; To Agricultural Society, see AGRICULTURE; To Charity, see CHARITIES; To Irrigation Company, see WATERS; To Railroad, see RAILROADS; To Turnpike or Toll-Road, see TOLL-ROADS; To Water Company, see WATERS. Corporation, see MUNICIPAL CORPORATIONS.)

MUNICIPAL AFFAIRS. Affairs relating to or involved in the local government of the inhabitants of any locality.[67] (See MUNICIPAL; and, generally, MUNICIPAL CORPORATIONS.)

MUNICIPAL AUTHORITIES. As applied to a town, a term which refers to its selectmen.[68] (See MUNICIPAL; and, generally, MUNICIPAL CORPORATIONS.)

Applied in Palmer *v.* Thorpe, 4 Coke 20*a*, 20*b*, 76 Eng. Reprint 909.

52. "Municipal election" includes an election upon the question of constructing city waterworks. State *v.* Kidd, 74 Ind. 554, 556.

"Municipal function" see Davenport *v.* Elrod, (S. D. 1096) 107 N. W. 833, 835. See also *post*, MUNICIPAL FUNCTION.

53. State *v.* Orleans Levee Dist. Com'rs, 109 La. 403, 435, 33 So. 385, where it is said: "The adjective 'municipal' is much more elastic in its meaning than is the word 'municipality,' or even than the term 'municipal corporation.'"

54. Sessions *v.* State, 115 Ga. 18, 21, 41 S. E. 259.

55. Horton *v.* Mobile School Com'rs, 43 Ala. 598, 607 [*citing* Blackstone Comm. 44; Burrill L. Dict.; 2 Kent Comm. 275]; Worcester Dict. [*quoted* in Charlotte *v.* St. Stephen, 32 N. Brunsw. 292, 297].

56. Century Dict. [*quoted* in *In re* Werner, 129 Cal. 567, 573, 62 Pac. 97; 5 Encyclopædic Dict. [*quoted* in State *v.* Denny, 118 Ind. 382, 402, 21 N. E. 252, 4 L. R. A. 79; Charlotte *v.* St. Stephen, 32 N. Brunsw. 292, 297].

57. Sessions *v.* State, 115 Ga. 18, 21, 41 S. E. 259.

58. Century Dict. [*quoted* in *In re* Werner, 129 Cal. 567, 573, 62 Pac. 97; Charlotte *v.* St. Stephen, 32 N. Brunsw. 292, 297].

59. Webster Dict. [*quoted* in *In re* Werner, 129 Cal. 567, 572, 62 Pac. 97].

60. Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533 [*citing* Blackstone Comm. 44; Burrill L. Dict.].

61. Century Dict. [*quoted* in Charlotte *v.* St. Stephen, 32 N. Brunsw. 292, 297].

62. Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533.

The term may include the rules or laws by which a particular district, community, or nation is governed. Horton *v.* Mobile School Com'rs, 43 Ala. 598, 607 [*citing* Blackstone Comm. 44; Burrill L. Dict.; 2 Kent Comm. 275].

63. Bouvier L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 105]; Burrill L. Dict. [*cited* in Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533].

64. Horton *v.* Mobile School Com'rs, 43 Ala. 598, 607 [*citing* Burrill L. Dict.; 2 Kent Comm. 275]; Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533.

65. Bouvier L. Dict. [*quoted* in *In re* Werner, 129 Cal. 567, 573, 62 Pac. 97; Root *v.* Erdelmyer, Wils. (Ind.) 99, 105].

66. Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533 [*citing* Burrill L. Dict.].

The word has a double meaning, one a narrow, confined meaning as relating to a *municipium* or free town, or as we should say in the present age, relating to cities, towns, and villages; and another broader and more usual signification relating to the state or nation. State *v.* Leffingwell, 54 Mo. 458, 465.

67. Charlotte *v.* St. Stephen, 32 N. Brunsw. 292, 297, where it is said: "Such as are generally managed and controlled by a local governing administration, illustrated practically every day in and by our county and city councils, consisting of presiding officers and councillors or aldermen, in whom are vested both legislative and executive authority in relation to and affecting the local affairs of the locality."

68. State *v.* Hellman, 56 Conn. 190, 192, 14 Atl. 806, where it is said that the term does not mean justices of the peace, constables, or the grand jury, since they do not represent the town as such, or have any agency in its corporate affairs, but are the agents of the law. Neither can the words appropriately refer to town-clerks, treasurers, or registers, whose duties are special and limited, without any agency representing the municipality.

MUNICIPAL BOND. In its ordinary commercial sense, a negotiable bond[69] issued by a municipal corporation, to secure its indebtedness.[70] (See, generally, MUNICIPAL CORPORATIONS.)

MUNICIPAL CLAIMS. Lawful claims in favor of, or against, a municipal corporation.[71] (See, generally, MUNICIPAL CORPORATIONS.)

69. Austin *v.* Nalle, 85 Tex. 520, 542, 22 S. W. 668, 960. See also Kiowa County *v.* Howard, 83 Fed. 296, 297, 27 C. C. A. 531 [*affirming* Howard *v.* Kiowa County, 73 Fed. 406, 407].

70. Black L. Dict.

That it does not include evidences of indebtedness of a municipal corporation, promising to pay money at a future date, not given for the purpose of creating a new debt, but only to extend and provide for the payment of existing obligations see Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359, 364.

71. City *v.* Vandevier, 1 Leg. Gaz. (Pa.) 397, 398, such as taxes. But see Philadelphia *v.* Scott, 72 Pa. St. 92, 97, holding that registered taxes are not "municipal claims."

MUNICIPAL CORPORATIONS

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I. DEFINITION, HISTORY, NATURE, AND STATUS.

A. Definition — 1. "MUNICIPAL CORPORATION." A municipal corporation is a legal[1] institution[2] formed by charter[3] from sovereign power,[4] erecting a populous community of prescribed area[5] into a body politic and corporate[6] with corporate name[7] and continuous succession[8] and for the purpose and with the authority[9] of subordinate self-government[10] and improvement[11] and local administration of affairs of state.[12]

1. See *infra*, I, A, 4, a.
2. See *infra*, I, A, 4, b.
3. See *infra*, I, A, 4, c.
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11. See *infra*, I, A, 4, l.
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Other definitions are: "An Assembly or Cominality of many men gathered or joined together in a City, Town or Burrough into one Fellowship, Brotherhood or Mind, by mutual consent to support the common charge, each of other and to live under such laws as they shall agree upon to make to be governed by for their mutual good and advantage in a perpetual succession." Shepheard Corp. (1659) 4–5.

"An investing the people of the place with the local government thereof." Cuddon *v.* Eastwick, 1 Salk. 192, 193. See also Coyle *v.* McIntire, 7 Houst. (Del.) 44, 93, 30 Atl. 728, 40 Am. St. Rep. 109; Wahoo *v.* Reeder, 27 Nebr. 770, 773, 43 N. W. 1145; Brinckerhoff *v.* New York Bd. of Education, 37 How. Pr. (N. Y.) 499, 514; People *v.* Morris, 13 Wend. (N. Y.) 325, 334; Salt Lake City *v.* Wagner, 2 Utah 400, 403; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400, 436.

"A civil corporation aggregate for the purpose of investing the inhabitants of a particular borough or place with the power of self-government and with certain other privileges and franchises." Arnold Mun. Corp. 3.

"An incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government." Glover Mun. Corp. 1 [*quoted* in Philadelphia *v.* Fox, 64 Pa. St. 169, 180].

"The body corporate constituted by the incorporation of the inhabitants of a borough." Eng. Mun. Corp. Act (1882), § 7.

"A public corporation, created by government for political purposes, and having subordinate and local powers of legislation." Bouvier L. Dict. [*quoted* in Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464; Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 105, 17 N. W. 191; Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544; Covington *v.* Highlands Dist., 113 Ky. 612, 621, 68 S. W. 669, 24 Ky. L. Rep. 433; Heller *v.* Stremmel, 52 Mo. 309, 311].

"A body corporate and politic, established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district incorporated." East Tennessee Univ. *v.* Knoxville, 6 Baxt. (Tenn.) 166, 171. See also Downs *v.* Smyrna, 2 Pennew. (Del.) 132, 134, 45 Atl. 717; Coyle *v.* McIntire, 7 Houst. (Del.) 44, 89, 30 Atl. 728, 40 Am. St. Rep. 109; Wetherell *v.* Devine, 116 Ill. 631, 637, 6 N. E. 24; Beach *v.* Leahy, 11 Kan. 23, 30; Fischer Land, etc., Co. *v.* Bordelon, 52 La. Ann. 429, 437, 27 So. 59; Wahoo *v.* Reeder, 27 Nebr. 770, 773, 43 N. W. 1145; Shipley *v.* Hacheney, 34 Oreg. 303, 306, 55 Pac. 971; Lehigh Water Co.'s Appeal, 102 Pa. St. 515, 517; Johnson County *v.* Searight Cattle Co., 3 Wyo. 777, 799, 31 Pac. 268.

"Organized cities and towns, and other like organizations, with political and legislative powers for the local, civil government and police regulations of the inhabitants of the particular district included in the boundaries of the corporation." Heller *v.* Stremmel, 52 Mo. 309, 312. See also State *v.* Leffingwell, 54 Mo. 458, 471.

"A public corporation created by the government for political purposes, and having subordinate and local powers of legislation: 2 Kent's Com. 275; an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government: Glover Mun. Corp. 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government." Philadelphia *v.* Fox, 64 Pa. St. 169, 180. See also Kansas City *v.* Vineyard, 128 Mo. 75, 81, 30 S. W. 326; Darby *v.* Sharon Hill, 112 Pa. St. 66, 70, 4 Atl. 722.

"A governmental institution, designed to create a local government over a limited territory." Langley *v.* Augusta, 118 Ga. 590, 594, 45 S. E. 486, 98 Am. St. Rep. 133.

"A body politic and corporate established by law to assist in the civil government of the State with delegated authority to regulate and administer the local or internal affairs of a city, town or district which is incorporated." Coyle *v.* McIntire, 7 Houst. (Del.) 44, 89, 30 Atl. 728, 40 Am. St. Rep. 109.

"An agency of the state to discharge some of the functions of government." People *v.* Coler, 166 N. Y. 1, 10, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

Other cases defining municipal corporations see Payne *v.* Treadwell, 16 Cal. 220, 222;

2. "MUNICIPALITY," A MODERN SYNONYM. A municipal corporation is commonly called a "municipality," a word formerly employed to designate only the body of officers of the corporation,[13] but now by judicial recognition and common use enlarged to a synonym of the corporation in its entirety.[14] When such an intention on the part of the legislature appears, the term "municipality" will be construed in a broad sense so as to include counties and other quasi-municipal corporations.[15]

3. ANALYSIS OF DEFINITION. The foregoing definition presents the logical and practical view of a municipal corporation. It is a brief formula embracing the essential elements and excluding other kindred bodies called quasi-corporations.[16] It expressly includes: (1) The body of individuals; (2) the sanction of the sovereign; (3) the definite public purpose; (4) the necessary powers; (5) the charter; and (6) the primary incidents of name and succession. These are the elements generally recognized as essential to a municipality.[17] It impliedly excludes par-

Lewis *v.* Denver City Water-Works Co., 19 Colo. 236, 240, 34 Pac. 993, 41 Am. St. Rep. 248; Duval County *v.* Charleston Lumber etc., Co., 45 Fla. 256, 259, 33 So. 531, 60 L. R. A. 549; Wabash River Leveeing Directors *v.* Houston, 71 Ill. 318, 322; Chicago League Ball Club *v.* Chicago, 77 Ill. App. 124, 139; Root *v.* Erdelmyer, Wils. (Ind.) 99, 106; State *v.* Downs, 60 Kan. 788, 791, 57 Pac. 962; State *v.* Douglas County, 47 Nebr. 428, 452, 453, 66 N. W. 434; James *v.* Fell Tp. Poor Bd., 7 Pa. Dist. 12; Com. *v.* Culp, 16 Phila. (Pa.) 496, 498; State *v.* McAllister, 38 W. Va. 485, 495, 18 S. E. 770, 24 L. R. A. 343.

"Municipal corporations" distinguished from other bodies see *infra*, I, C, 3.

The District of Columbia is a municipal corporation. U. S. *v.* Trimble, 14 App. Cas. (D. C.) 414; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231. See DISTRICT OF COLUMBIA, 14 Cyc. 528.

An incorporated village is a municipal corporation. State *v.* Chichester, 31 Nebr. 325, 47 N. W. 934, 11 L. R. A. 104; Wahoo *v.* Reeder, 27 Nebr. 770, 43 N. W. 1145; Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070; Matter of Lansingburgh Bd. of Health, 43 N. Y. App. Div. 236, 60 N. Y. Suppl. 27. *Compare* Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

13. Bouvier L. Dict. This definition of "municipality" correctly described the borough or city with royal charter before the reform of 1835. The charter of the seventeenth and eighteenth centuries generally conferred municipal privileges and powers, not upon the people of the borough but upon a favored few, the mayor and common council, the officiality of the corporation. Eastman *v.* Meredith, 36 N. H. 284, 291, 72 Am. Dec. 302.

14. Black L. Dict.; Encycl. Brit.; Standard Dict. This change in definition is the natural outcome of the radical change in the British municipal corporations wrought by the Reform Act of 1835.

A "municipality" has been defined as "an organization for the self-government of a city or town by means of a corporation empowered generally to maintain peace and order, and to manage the affairs of the inhabitants." Encycl. Brit. tit. "Municipality." "A state agency for governmental purposes." Lexington *v.* Thompson, 113 Ky. 540, 547, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775. "A subdivision of the State for the purpose of local self government." State *v.* Elliott, 158 Ind. 168, 172, 63 N. E. 222. "A public corporation created for governmental purposes, and having local powers of legislation and self-government." Memphis Trust Co. *v.* St. Francis Levee Dist., 69 Ark. 284, 286, 62 S. W. 902. "A body formed by the incorporation of the inhabitants of a particular place or district, established to assist in the civil government of the state by the exercise of subordinate specified powers of legislation and regulation with respect to local and internal concerns." Reid *v.* Wiley, 46 N. J. L. 473, 474. "A public corporation as distinguished from a private trading corporation." Guarantee Trust, etc., Co.'s Petition, 3 Pa. Dist. 205, 208. "A city, a municipal corporation." Anderson L. Dict. [*quoted* in Fitzgerald *v.* Walker, 55 Ark. 148, 156, 17 S. W. 702]. "A municipal district, a borough, a city, town or village." Webster Dict. [*quoted* in *In re* Werner, 129 Cal. 567, 573, 62 Pac. 97]. "A town or city possessed of corporate privileges of local self-government; a community under municipal jurisdiction." Century Dict. [*quoted* in *In re* Werner, *supra*]. "The city or town councils, through which municipal action is expressed and had." Rittman *v.* Payne, 68 Ark. 338, 340, 58 S. W. 350. "The body of officers, taken collectively, belonging to a city, who are appointed to manage the affairs, and defend its interests." Bouvier L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 105].

The term "municipality" does not include a joint senatorial district. State *v.* Elliott, 158 Ind. 168, 172, 63 N. E. 222.

15. Union Stone Co. *v.* Hudson County, (N. J. Ch. 1906) 65 Atl. 466, 467. As to inclusion of such bodies see *infra*, I, C, 3, b, (III), (B).

16. Ingersoll Pub. Corp. 20 *et seq.* 110. See *infra*, I, C, 3, b, (III), (B).

17. *Missouri.*— State *v.* Leffingwell, 54 Mo. 458.

ishes, counties, townships, and districts, which are almost municipalities and yet are deficient in some of the essential attributes of a municipal corporation;[18] while it expresses the complex nature of the corporation, whereby it acts as a *municipium*, and also as a local agency for administering and enforcing the laws of the state.[19] The legal fictions of personality and citizenship and the abstractions of invisibility and intangibility, commonly applied to other corporations,[20] are rarely attributed to a municipal corporation, which embraces and embodies the territory of its *situs*, as well as the inhabitants, in its corporate entity, and cannot be divorced therefrom, either in fact, thought, or law.[21]

4. Definition Explained — a. "Legal." A municipal corporation is a "legal" institution because dependent upon law for its existence and faculties.[22]

b. "Institution." It is an institution because it is a system of laws establishing an organization, ordaining legal relations and promoting civilization.[23]

c. "Charter." The charter is a prominent feature, distinguishing the municipal corporation proper from other public corporations or agencies of government, such as counties, townships, and districts, sometimes called municipal, but better denominated quasi-corporations, which are created and governed by general law.[24] The community is erected or converted into a municipality by means of the charter, which is the foundation of every complete corporation.[25]

New Hampshire.— Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302.

New York.— People *v.* Morris, 13 Wend. 325.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Wisconsin.— Norton *v.* Peck, 3 Wis. 714.

Serjeant Shepheard, writing during the Protectorate, enumerated as "the things of essence in a corporation:" (1) A Warrant; (2) Persons; (3) Apt words of Constitution; (4) The place. Shepheard Corp. (1659) 6–18.

18. *Alabama.*—Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Massachusetts.— Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193.

New Hampshire.— Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58.

Ohio.— Hamilton County *v.* Mighels, 7 Ohio St. 109.

Texas.— Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

See also *infra*, I, A, 4, c; I, C, 3, b, (III), (B).

19. *Georgia.*— Bearden *v.* Madison, 73 Ga. 184.

Indiana.— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Louisiana.— Milne *v.* Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189.

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Virginia.— Jones *v.* Richmond, 18 Gratt. 517, 98 Am. Dec. 695.

See *infra*, I, C, 1, 2; III, C.

Some judges have declared that all municipal powers and functions are public. Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, per Denio, C. J. See also Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

20. Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 12, 26 L. ed. 643; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 (per Marshall, C. J.); 1 Blackstone Comm. 467.

21. *Illinois.*— Galesburg *v.* Hawkinson, 75 Ill. 152.

Indiana.— Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

New York.— Clarke *v.* Rochester, 24 Barb. 446.

United States.— Kelly *v.* Pittsburg, 104 U. S. 78, 26 L. ed. 659.

22. People *v.* Watertown, 1 Hill (N. Y.) 616; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. See *infra*, II, A; III.

23. Black L. Dict.; Bouvier L. Dict.; Standard Dict.; Webster Int. Dict.

24. *Alabama.*—Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Arkansas.— Pulaski County *v.* Reeve, 42 Ark. 54.

Georgia.— Scales *v.* Chattahoochee County, 41 Ga. 225.

Massachusetts.— Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Com. *v.* Roxbury, 9 Gray 451; Warren *v.* Charlestown, 2 Gray 84.

New Hampshire.— Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58.

New York.— Lorillard *v.* Monroe, 11 N. Y. 392, 62 Am. Dec. 120.

Ohio.— Hamilton County *v.* Mighels, 7 Ohio St. 109.

Texas.— Hamilton County *v.* Garrett, 62 Tex. 602.

United States.— Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923; Levy Ct. *v.* Woodward, 2 Wall. 501, 17 L. ed. 851.

See *infra*, I, C, 3, b, (III), (B).

25. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; State *v.* Bradford, 32 Vt. 50; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229; Ander-

d. Popular Assent. The organization is generally effected by the action of the inhabitants in conformity to the charter or to general law, signifying some measure of popular assent to the incorporation.[26]

e. Source of Charter. A municipal charter can emanate only from sovereign power, which alone can delegate faculties and functions of government. In England it may be granted by the king or by parliament; in the United States it is solely an act of sovereign legislative power.[27]

f. Territory and Population. A municipal corporation, being a part of the state, must, like it, embrace both territory and population.[28] Efforts to incorporate a rural area without population in order to exercise therein certain peculiar municipal privileges, such as liquor selling, have been frustrated by judicial denunciation as corporate frauds on the ground, among others, that population and even popular corporate action is an essential condition of a municipal corporation.[29] And schemes to bring farming lands under corporate jurisdiction, solely for the purpose of taxation, have likewise fallen under judicial condemnation.[30] So also have miscarried plans to incorporate into a single municipality separate districts or areas which were non-contiguous; the territory and inhabitants must form a single community.[31] Pertaining to a populous community of limited area, as distinguished from the state or a large district thereof,[32] is the present technical and legal, as well as popular, meaning of "municipal" as distinguished from the national or governmental sense in which it was used by Blackstone.[33] Indeed "municipal" is now generally employed as the antithesis of "governmental" to designate the property and functions of an incorporated city or town, pertaining to it as a local community, as distinguished from those belonging to it as an agency of the state for general public purposes.[34]

g. Body Politic and Corporate. It is called a "body corporate" because the persons are made into a body and are of capacity to take, grant, etc., by a particular name,[35] and a "body politic" because framed as to this capacity by policy.[36]

h. Name. The corporate name is a means of identification of the body and an essential incident to the corporate life and action, since without a name it cannot take or alien title, sue or be sued, or exercise any of its powers as a body.[37]

son L. Dict. tit. "Charter"; Bouvier L. Dict. tit. "Charter." See also *infra*, II, A, 1, 13, 14.

26. The legislative power to charter a municipal corporation at discretion may be practically nullified by the unanimous refusal of the inhabitants to organize under the charter; but unless the constitution or general law or charter so provides, the assent of a majority is not required. Sufficient citizens legally qualified to vote and hold office might in pursuance of the charter proceed to choose officers and set the municipal machinery in motion. Morford *v.* Unger, 8 Iowa 82; People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346. But there are judicial opinions stressing the legislative power to the extent of holding the incorporation complete without any popular action whatever under the charter; thus making a mere paper municipality an actual corporation. People *v.* Wren, 5 Ill. 269; Berlin *v.* Gorham, 34 N. H. 266; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385; People *v.* Morris, 13 Wend. (N. Y.) 325.

Necessity for assent see further *infra*, II, A, 13, c; II, A, 14, b, (v).

27. Mattox *v.* State, 115 Ga. 212, 14 S. E. 709; Berlin *v.* Gorham, 34 N. H. 266; New Boston *v.* Dunbarton, 12 N. H. 409; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495; Hope *v.* Deaderick, 8 Humphr. (Tenn.) 1, 47 Am. Dec. 597. See *infra*, II, A, 1–3.

28. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Angel *v.* Spring City, (Tenn. Ch. App. 1899) 53 S. W. 191. "The term embraces both the territory and its inhabitants." State *v.* Barker, 116 Iowa 96, 102, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244.

29. State *v.* Frost, 103 Tenn. 685, 691, 54 S. W. 986.

30. See *infra*, II, A, 12, b.

31. See *infra*, II, A, 12, a; II, B, 2, h, (III).

32. Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

33. 1 Blackstone Comm. 44.

34. Black L. Dict.; Standard Dict.; Webster Int. Dict. See *infra*, I, C; III, C.

35. 1 Blackstone Comm. 467; Coke Litt. 250*a*.

36. Thomas *v.* Dakin, 22 Wend. (N. Y.) 9; Coke Litt. 250*a*.

37. Bacon Abr. tit. "Corporation" C; 1 Blackstone Comm. 474–5; 10 Coke Rep. 28. See also *infra*, II, A, 10.

i. Continuous Succession. Perpetual or continuous succession is the peculiar attribute of a corporation, whereby its life is continued indefinitely, notwithstanding the death of its members, an event terminating *ipso facto* the existence of natural persons and partnerships.[38]

j. Purpose and Powers. The purpose of incorporation is a fundamental test of character and powers; and the authority consequent upon the delegation of powers, adequate and appropriate to the exercise of municipal functions, is the very life-blood of the corporation.[39]

k. Self-Government. Self-government, subordinate to the imperial power of Rome, was the distinguishing quality of the *municipium* and still inheres as an essential attribute of the modern municipal corporation.[40]

l. Improvement. The improvement of the municipality, local and general, not only in parking, grading, paving and sewering, but in providing light, water, carriage, and other utilities through municipal ownership has in modern times come to be of as much importance and difficulty to the corporation as all the ordinary functions of government, and ever demands special legal consideration.[41]

m. Governmental Agency. The municipal corporation, formerly an object of royal jealousy, is now quite generally employed in Europe, as well as in America, as a local agency of the state for administering general laws within its boundaries, thus giving it special sovereign power and exemption.[42]

5. Integral Parts. The integral parts of the municipal corporation are:

38. "For all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." 1 Blackstone Comm. 468.

39. *California.*—Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

Illinois.— Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Massachusetts.— Somerville *v.* Dickerman, 127 Mass. 272.

New York.— Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178.

North Carolina.— Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766.

Powers and functions see *infra*, III.

40. State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; State *v.* Leffingwell, 54 Mo. 458; State *v.* Douglas County, 47 Nebr. 428, 66 N. W. 434; People *v.* Morris, 13 Wend. (N. Y.) 325. And see the other cases cited *supra*, I, A, 1. See also *infra*, IV.

41. *Arkansas.*—Newport *v.* Batesville, etc., R. Co., 58 Ark. 270, 24 S. W. 427.

California.— Low *v.* Marysville, 5 Cal. 214.

Illinois.— Scammon *v.* Chicago, 42 Ill. 192.

Indiana.— Anderson *v.* Endicutt, 101 Ind. 539.

Iowa.— Gallaher *v.* Head, 72 Iowa 173, 33 N. W. 620.

New Jersey.— Cross *v.* Morristown, 18 N. J. Eq. 305.

Ohio.— Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

Pennsylvania.— Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Dec. 208.

Washington.—Germond *v.* Tacoma, 6 Wash. 365, 33 Pac. 961.

Public improvements see *infra*, XIII.

42. *Alabama.*— Dargan *v.* Mobile, 31 Ala. 469, 70 Am. Dec. 505.

California.— Chico High School Bd. *v.* Butte County, 118 Cal. 115, 50 Pac. 275.

Colorado.— Lewis *v.* Denver City Waterworks Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248.

Idaho.— State *v.* Steunenberg, 5 Ida. 1, 45 Pac. 462.

Illinois.— Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703; Wetherell *v.* Devine, 116 Ill. 631, 6 N. E. 24. "Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits." Chicago League Ball Club *v.* Chicago, 77 Ill. App. 124, 139 [*quoting* 1 Dillon Mun. Corp. § 66].

Kentucky.— Green County *v.* Shortell, 116 Ky. 108, 75 S. W. 251, 25 Ky. L. Rep. 357; Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 918, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 361; Jelly *v.* Hawesville, 89 Ky. 279, 12 S. W. 313, 11 Ky. L. Rep. 477; Pollock *v.* Louisville, 13 Bush 221, 26 Am. Rep. 260.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Corning *v.* Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526.

New York.— People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

Pennsylvania.—Com. *v.* Culp, 16 Phila. 496.

Virginia.— Jones *v.* Richmond, 18 Gratt 517, 98 Am. Dec. 695.

United States.—Covington *v.* Kentucky, 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 679; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225;

(1) The territory; (2) the inhabitants;[43] and (3) the charter, the loss of any one of which would be fatal to the municipality as a living organism. The other elements included in the definition may be denominated incidents or inherent faculties.[44]

B. History.[45] The complex and peculiar nature of a municipal corporation is obviously due to its origin, its vicissitudes and evolution under various political conditions. The *municipium* was a town out of Rome, particularly in Italy, which possessed the right of Roman citizenship, but was governed by its own laws.[46] Under the dominion of Rome by conquest, it yet enjoyed and exercised the power of local self-government and cherished with pride the idea of being a free city.[47] The name and right were preserved through the decadence of the Roman empire and extended to the cities of western Europe.[48] The *municipium* survived the dark ages and even the tyrannies of the houses of Hapsburg, Bourbon, and Stuart, although not in pristine vigor. Many English cities were

Fowle *v.* Alexandria, 3 Pet. 398, 7 L. ed. 719; Beeson *v.* Chicago, 75 Fed. 880.

See also *infra*, I, C, 1, b; III, C; XIV, A, 2.

A political power.— A municipal corporation, while nominally a person, is virtually a political power, a constituent element of one sovereignty, and its local legislation and administration are the legislation and administration of the state. Wooster *v.* Plymouth, 62 N. H. 193. See also Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703; Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624.

43. See *supra*, I, A, 4, f.

44. Sutton's Hospital Case, 10 Coke 23, 77 Eng. Reprint 960; 1 Blackstone Comm. 475, 476.

During the Tudor and Stuart dynasties, the integral parts of a municipal corporation were: (1) The mayor; (2) the aldermen; (3) the commonalty, practically an insignificant element. These three classes constituted the municipality and the presence of each class or some representative thereof was essential to the validity of corporate action. In earlier times the charter did not incorporate the town or city but the persons whom the king chose to govern it together with a few of the inhabitants, whose power was nominal and fatuous. Glover Mun. Corp. 16; 3 Hallam Const. Hist. 52; Willcock Mun. Corp. 8. The royal charter of those days was multiform; some being to "the Mayor and Cominalty"; some to the "Mayor and Aldermen"; some to the "Mayor and Burgesses"; some to the "Mayor, Aldermen and Cominalty"; some to the "Mayor and Bailiffs," etc., etc. Shepheard Corp. 10. Schedule 1 to Municipal Corporations Reform Act (1835).

The modern view developed under the Municipal Corporation Reform Act both in England and America and expressed in the text is more consistent with the logical idea of a corporation as well as the spirit of modern civilization. Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830. See also Galesburg *v.* Hawkinson, 75 Ill. 152; People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107; Clarke *v.* Rochester, 24 Barb. (N. Y.) 446; O'Connor *v.* Memphis, 6 Lea (Tenn.) 730.

45. See State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244, where the history of municipal corporations is reviewed at length.

Burghs of barony in Scotland see Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613.

46. Andrew Lat. Eng. Lex. tit. "Municipium"; 1 Savigny Hist. Rom. Rights 16.

Ancient municipalities.— Ancient Italy and Gaul each had twelve hundred cities and Spain three hundred and sixty; while Asia contained five hundred and Africa three hundred. In Gaul were Marseilles, Arles, Nismes, Narbonne, Toulouse, Autun, Bordeaux, Lyons, Langres, and Treves; in Britain were York, Bath, and London. Gibbon Rom. Empire, c. 2. A thousand years later were developed worthy successors of the city states of Italy in the famous free cities of Germany, which did so much to curb the power of the haughty barons, promote manufactures and commerce, and increase the comfort and health of urban living. 2 Janssen Hist. Germ. People 34; Zimmern The Hanse Cities. Closely following these in time came the growth and development of the cities of the low countries to first importance in western Europe. 1 Motley Rise Dutch Rep. 81–96. Municipal extravagance, incompetence, and corruption in the fourth century A. D. invited imperial interference to the curtailing of local autonomy by the appointment of *curatores*, a sort of imperial mayor, who exercised most of the municipal functions until, after the establishment of christianity under Constantine, they were generally succeeded by the bishops, and in many cities ecclesiastical succeeded municipal government for a time. Guizot Civilization Europe 52–3. 1 Mommsen Rom. Prov. 302. 1 Kitchin Hist. France 51–3 281. In the thirteenth century, although besides London, no English town had over five thousand population, many of those chose their own officers and levied and disbursed their own taxes. 3 Stubbs Const. Hist. 577; Report Comm. Mun. Corp. Parl. Papers, p. 16.

47. 1 Gibbon Decline and Fall of Rom. Empire 41, 42.

48. 3 Hallam Middle Ages, c. 8, pt. 1; 1 Hume Hist. Eng. App. 2.

despoiled of their charters by Jeffreys under forms of law,[49] and by surrender made to placate the royal tyranny. These were, however, reënfranchised after the revolution of 1688 by act of parliament.[50] The early American municipalities were formed in the likeness of their British archetype.[51] Some changes in these were wrought by the spirit of the American Revolution; but it was left to the nineteenth century to develop the existing municipal corporation among English-speaking people. The Municipal Corporation Act of the British parliament (1835) is among the greatest achievements of that era of reform.[52] It resulted in the abolition of the "rotten boroughs"; the substitution of popular election for self-perpetuation in the governing bodies of municipalities; the establishment of a uniform fiscal policy; and the erection of municipal courts administering justice rather than granting favors and exemptions.[53] Municipal offices were converted from personal perquisites into public trusts; democracy succeeded oligarchy; and the whole municipal system of the kingdom was thoroughly reformed, both in law and morals.[54] The Municipal Reform Act of 1835 remains to this day the basis of municipal government in the United Kingdom; and most of its provisions have been copied in so many of the United States that it may not inappropriately be styled the basis also of the American system of municipal government.[55] In the nineteenth century the United States began to extensively employ existing municipalities as public local agents to enforce the state laws in the municipal boundaries. Thus these corporations have become important parts of the state government, as well as self-governing communities. They often collect state taxes, maintain highways and bridges, conduct the public schools, and perform other functions of local administration for the state.[56] The cities and villages of the United States have also quite generally assumed the function of providing public utilities for themselves and their inhabitants. Many have thus become

49. Green Short Hist. English People, (Harp. ed.) 90–5, 175–8, 190–200, 662–5.

50. Macaulay Hist. Eng. c. 15.

51. Cooley Const. Lim. (6th ed.) 225.

52. 5 & 6 Wm. IV, c. 66, entitled "An act to provide for the regulation of municipal corporations in England and Wales," passed Sept. 9, 1835, comprising one hundred and forty-two sections.

53. Importance of Reform Act.— The thoroughness of this long act of more than eighty pages may be inferred from the fact that section one repealed so much of the charter of one hundred and seventy-eight boroughs as were inconsistent with its provisions; but a reading of it and of the report of the commission on which it was framed is requisite to an appreciation of its scope and effect. In fifty boroughs the corporators numbered less than thirty, while in one hundred and sixty others the average number was one hundred and fifty; and they acted independently of their respective communities. Some had no criminal jurisdiction and some had power to punish capitally. In some instances the corporate powers were exercised by non-residents. Many corporations were preserved and perpetuated solely as political engines to maintain party ascendancy or family influence. The councils were generally self-elected and held office for life and conducted all corporate affairs in secret. The conclusion of the commission was that "the municipal corporations of England and Wales neither possess nor deserve the confidence or respect of British subjects." The coöperation of the king and Brougham effected the reform. Glover Hist. Summ. Corp. System 39–45.

54. For a comprehensive survey of the extent of this movement to which is traceable the growth, improvement, and prosperity of the British boroughs during the last six decades of the nineteenth century see Roebuck Reform Mun. Corp. 30 Westminster Rev. 48.

55. The legislation in the United States embodying the principles of the Municipal Corporation Reform Act and providing by general law for the creation of municipalities resembling those erected by that act seems to have begun in Missouri in 1845. Then followed Tennessee (1849), Pennsylvania (1851), Ohio (1852), Indiana (1857), and many others at later dates. In some states this method of incorporation is exclusive. In others it is concurrent with the old mode of special statutory charter. See *infra*, II, A, 6, 13, 14.

56. In this character the municipality loses its generic and historic faculty of self-government and becomes, like the quasi-corporation, "an agency of the state through which it can most conveniently and effectively discharge the duties which the state, as an organized government, assumes to every person, and by which it can best promote the welfare of all." Galveston *v.* Posnainsky, 62 Tex. 118, 126, 50 Am. Rep. 517. See also Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248; Weightman *v.* Washington Corp., 1 Black (U. S.) 39, 17 L. ed. 52.

manufacturers and distributors of light, heat, and power, and furnishers of water and transportation in their limits and to their suburbs. These civic utilities and conveniences are usually furnished at fixed prices and rates to such as use and consume them. The municipality thus comes to be also an organization for business as well as for government, incidentally making profit out of these municipal necessities and comforts, and thus performing the functions of a stock corporation organized for profit.[57]

C. Nature and Status — 1. Dual Nature — a. In General. The modern municipality, although it has but a single organization and affords the best example of a complete public corporation, has developed into a highly complicated legal institution, performing a variety of functions, some governmental,[58] some gainful, and others purely municipal.[59] The nature of a municipal corporation, corresponding with these functions, although apparently threefold, is generally regarded by authors and judges as dual.[60]

b. In Its Governmental Aspect. The municipality, being recognized as an appropriate instrumentality for the administration of general laws of the state within its boundaries and appointed and empowered for that purpose, thereby becomes an agent of the state for local administration and enforcement of its sovereign power. This is the governmental aspect of the municipal corporation.[61]

57. *Illinois.*— Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

Indiana.— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Michigan.—People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Montana.— State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15.

Pennsylvania.— Com. *v.* Philadelphia, 132 Pa. St. 288, 19 Atl. 136; Philadelphia *v.* Fox, 64 Pa. St. 169.

United States.— Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375.

58. **Governmental aspect** see *infra*, I, C, 1, b.

59. **Municipal aspect** see *infra*, 1, C, 1, c.

Municipal corporations "possess a double character, the one governmental, legislative, or public; the other in a sense proprietary or private. In its governmental or public character, the corporation is made by the state one of its instruments, the local depositary of certain limited and prescribed political powers to be exercised for the public good on behalf of the state, and not for itself. . . . But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality." Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 143, 13 C. C. A. 375. See also Coyle *v.* McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109; Snouffer *v.* Cedar Rapids, etc., R. Co., 118 Iowa 287, 92 N. W. 79; Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525; Gianfortone *v.* New Orleans, 61 Fed. 64, 24 L. R. A. 592.

60. **Modern municipal complications.**—During the last half century judges and authors have been wont to speak of the "dual nature" or "two-fold aspect" of this complex organism, corresponding to its governmental and municipal functions. The introduction of new methods into municipal life has established new relations demanding recognition and regulation, and requiring logically and practically the addition of the business aspect to the municipal and governmental, and the application of appropriate legal formulas to it, thus converting the body of dual nature into one three-fold. But the courts, while recognizing the new methods and their consequences, have not generally concurred in following this to its logical result and adding the private feature to the municipality. Ingersoll Pub. Corp. 176 *et seq.*

61. *California.*— Stedman *v.* San Francisco, 63 Cal. 193.

Georgia.— Forsyth *v.* Atlanta, 45 Ga. 152, 12 Am. Rep. 576.

Illinois.— Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703.

Indiana.— Anderson *v.* East, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35, 2 L. R. A. 712.

Massachusetts.—Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525.

Virginia.— Jones *v.* Richmond, 18 Gratt. 517, 98 Am. Dec. 695.

United States.— U. S. *v.* Baltimore, etc., R. Co., 17 Wall. 322, 21 L. ed. 597; Fowle *v.* Alexandria, 3 Pet. 398, 7 L. ed. 719. See also Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375.

See *supra*, I, A, 4, m; *infra*, III, C, 2, b.

"Municipal corporations are parts of the State government exercising delegated political powers, for public purposes." Baltimore *v.* Root, 8 Md. 95, 102, 63 Am. Dec. 696. It is not only a representative of the state, but is a portion of its governmental

c. In Its Municipal Aspect. Being devised and preserved as an institution to supply the wants and regulate the conduct of congested populations by allowing them respectively to preserve and maintain their own peculiar traditions, customs, and habits of life, by ordinances of their own making and officers of their own choice, the municipality is peculiarly an organization for local self-government, subordinate to the state. This was its primary object, and in this respect it is purely municipal according to history and etymology.[62] When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. It is performing a function, not governmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal but the method is not. It leads to profit, which is the object of the private corporation. Some courts and authors therefore term the municipality in this aspect a quasi-private corporation.[63]

2. Divers Relations — a. Sovereign Exemption and Official Liability. The various aspects and functions of a municipality give varied character to its numer-

power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597; Atlantic Trust Co. *v.* Darlington, 63 Fed. 76 [*affirmed* in 68 Fed. 849, 16 C. C. A. 28]; Lewis *v.* Shreveport, 15 Fed. Cas. No. 8,331, 3 Woods 205 [*affirmed* in 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728]. See also Scott *v.* Laporte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Springville *v.* Johnson, 10 Utah 351, 37 Pac. 577.

62. State *v.* Bogard, 128 Ind. 480, 27 N. E. 1113; Hathaway *v.* New Baltimore, 48 Mich. 251, 12 N. W. 186; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Nichol *v.* Nashville, 9 Humphr. (Tenn.) 252; Richmond Mayoralty Case, 19 Gratt. (Va.) 673.

Municipal functions see further *infra*, III, C, 2, c.

63. *California.*— Grogan *v.* San Francisco, 18 Cal. 590; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

Massachusetts.— Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485.

Michigan.— Niles Water Works *v.* Niles, 59 Mich. 311, 26 N. W. 525; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480; Webb *v.* New York, 64 How. Pr. 10; Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669 [*affirmed* in 2 Den. 433].

Pennsylvania.— Com. *v.* Philadelphia, 132 Pa. St. 288, 19 Atl. 136; Philadelphia *v.* Fox, 64 Pa. St. 169; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 185; Brumm *v.* Pottsville Water Co., 9 Pa. Cas. 483, 12 Atl. 855.

Tennessee.—Nichol *v.* Nashville, 9 Humphr. 252.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

United States.— U. S. *v.* Baltimore, etc., R. Co., 17 Wall. 322, 21 L. ed. 597; Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375.

See also *infra*, III, C, 2, c.

Ancient and modern municipal utilities compared.— The municipal purveyance of public utilities and conveniences for urban life is not entirely modern. In ante-christian times Antioch, Athens, and other oriental cities were supplied with water by aqueducts of great size and cost erected at public expense, some of which are still in use; and Syracuse is yet supplied with drinking water by conduits mentioned by Thucydides. The aqueducts of ancient Rome had a total length of three hundred and sixty miles and a capacity to supply simultaneous bathing for more than fifty thousand persons. And at Constantinople, Segovia, Nismes, Mayence, and Metz are remarkable monuments to the Roman structural skill and municipal organization for water-supply. Encycl. Brit. tit. "Aqueduct." The necessity for this new phase of the municipal corporation comes chiefly from the commercial methods of modern life, applied to municipal affairs, whereby have been issued multiplied millions of dollars of municipal bonds to build plants providing public utilities of various kinds, which are often claimed and sometimes held as securities to the bondholders; and from the sale or hire of these utilities to individual consumers rather than the free use thereof by all citizens. As to rights of creditors see Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620. See also Adams *v.* Rome, 59 Ga. 765; Middleton Sav. Bank *v.* Dubuque, 15 Iowa 394; Edey *v.* Shreveport, 26 La. Ann. 636; Adams *v.* Memphis, etc., R. Co., 2 Coldw. (Tenn.) 645. As to rights of city as proprietor see Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 247, 6 Am. Rep. 70; New York *v.* Second Ave. R. Co., 32 N. Y. 261. As to rights of consumers or rate payers see Atty.-Gen. *v.* Boston, 123 Mass. 460; Atty.-

ous acts, and different relations to those whom these acts affect. Different rules of law control the courts in determining liabilities asserted against it, and the powers claimed by it, depending upon the character in which it acts. As a governmental agency, the municipality is, like its principal, the state, entitled to sovereign respect and duty from the citizen; and like other public agents it is subject to visitation and punishment from the state for failure to perform its duty. It may be indicted for neglecting to repair a bridge,[64] or creating a public nuisance,[65] but is not subject to civil action for tort committed in the exercise of the police power, or other sovereign function.[66]

b. When Subject to General Law. As a quasi-private corporation, exercising its powers for profit, it is subject to the same measure of liability both in contract and tort as private corporations.[67]

c. Conflicting Doctrines as to Municipium. In its strictly municipal character, the rules of law are not certain or uniform, on account of the dual nature of the municipality in the exercise of municipal functions. Certain of its powers are recognized to be held and exercised solely or specially for the general good, and others for the peculiar benefit of the corporation or its citizens. Logically, the rule of sovereign exemption from liability would seem to apply to the former class, and personal liability be incurred in the latter. But the decisions are discordant upon this phase of liability and cannot be reconciled with the rules of logic, nor with each other.[68] Thus it is generally held that a city is liable to one injured for negligence in failing to keep its streets in repair, which would appear to be a breach of duty to the general public; while it is not liable for negligence in failing to furnish water, firemen, or apparatus to extinguish a fire, which is obviously a breach of duty to its own inhabitants and not to the general public; and the same rule of exemption applies to cases of injury resulting from municipal negligence to properly construct and repair municipal buildings, such as town halls and school-houses.[69]

Gen. *v.* Salem, 103 Mass. 138. In this phase the charter powers of the municipality, whether conferred by general or special legislative act, are considered, like the charter of a private corporation, contractual and protected by the contract clause of the federal constitution. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; Seibert *v.* U. S., 122 U. S. 284, 7 S. Ct. 1190, 30 L. ed. 1161; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

64. Russell *v.* Devon County, 2 T. R. 667, 1 Rev. Rep. 585.

65. Com. *v.* Gloucester, 110 Mass. 491; People *v.* Albany Corp., 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; State *v.* Shelbyville Corp., 4 Sneed (Tenn.) 176.

Liability to indictment see further *infra*, XVIII.

66. *Alabama.*— Dargan *v.* Mobile, 31 Ala. 469, 70 Am. Dec. 505.

Maine.— Small *v.* Danville, 51 Me. 359.

Minnesota.— Snider *v.* St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

Ohio.— Wheeler *v.* Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

Tennessee.— Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. 419.

Wisconsin.— Hayes *v.* Oshkosh, 33 Wis. 314, 14 Am. Rep. 760.

Liability for torts see further *infra*, XIV.

67. *Georgia.*— Savannah *v.* Collens, 38 Ga. 334, 95 Am. Dec. 398.

Louisiana.— Fennimore *v.* New Orleans, 20 La. Ann. 124.

New York.— Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669 [*affirmed* in 2 Den. 433].

Pennsylvania.— Philadelphia *v.* Collins, 68 Pa. St. 106.

Rhode Island.— Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

South Carolina.— Chapman *v.* Charleston, 28 S. C. 373, 6 S. E. 158, 13 Am. St. Rep. 681.

Virginia.— Suffolk *v.* Parker, 79 Va. 660, 52 Am. Rep. 640.

Contracts see further *infra*, IX.

Torts see further *infra*, XIV.

68. Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656; Abendroth *v.* Greenwich, 29 Conn. 356; McGinnis *v.* Medway, 176 Mass. 67, 57 N. E. 210; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

69. See *infra*, XIV. The general doctrine of the law would, from this, seem to be that the inhabitant has no right of action against the municipality for neglect to perform a municipal duty, which it owes peculiarly to its own citizens; but that in common with other persons he may recover damages from it for injury suffered by its negligence to perform a duty to the general public. But this is notoriously not the law in regard to

d. Contractual Relations. In regard to municipal contracts the rules of law are more fixed and certain, the general doctrine being that a municipal corporation may make such contracts as its charter expressly authorizes or as are appropriate to execute powers expressly conferred or necessarily implied therefrom, or incidental to the corporate existence;[70] and a municipal corporation may, in the absence of restriction or prohibition, express or implied, use the same means to accomplish a municipal object that might be employed by a private corporation or person in the transaction of business.[71]

e. Community Rights and Liabilities. So intimate are the relations of the municipality and its territory and citizens that, in case of dissolution, the inhabitants and proprietors of the territory of the dissolved corporation are regarded as having an interest in the municipal property acquired and held for local uses;[72] and, on reincorporation of substantially the same territory, the new municipality, as successor to the old, takes and holds this property in public trust for the inhabitants,[73] and also becomes liable for the just indebtedness of the predecessor, and especially that incurred in the purchase of municipal implements and utilities.[74]

3. Distinguished From Other Bodies — a. In General. Although in respect of certain property rights, municipal corporations have the same attributes as private corporations,[75] they are in general distinguished from them in the fact that they are public corporations.[76]

b. Corporations Classified — (I) *In General.* All corporations are divisible into two classes, public and private, according to their objects.[77]

(II) *Private Corporations.* Private corporations include all those corporate bodies created specially for the benefit of private persons, in which the public has only an indirect or incidental interest.[78] Such are all corporations whose object is profit-making, commonly called stock corporations or business corpo-

the exercise of the police powers, neglect of which gives no right of action against the municipality. See *infra*, XIV, A.

70. See *infra*, IX, A.

71. See *infra*, III, B, 2, d, 3; IX, A, 4.

72. See *infra*, II, C, 2, f, (III).

73. See *infra*, II, C, 1, e, (III).

74. See *infra*, II, C, 1, e, (III).

75. See *supra*, I, C, 1, c.

76. See *supra*, I, A, 4, j, m.

77. **Classification as public and private peculiarly American.**— This classification of corporations, now the most common and useful in the United States, is not made by Coke or Blackstone. Nor indeed is it mentioned in Bacon's Abridgment or Baron Comyns' Digest of later date. By all these writers the legal classification is recognized as that stated by Mr. Justice Blackstone (Comm. 469, 471), who, after vaunting the English refinement and improvement of the Roman *collegia* and *universitates*, "according to the universal English genius," marshals corporations under the following classification: (1) Aggregate and sole; (2) ecclesiastical and lay; (3) civil and eleemosynary. In view of the recognition of the corporation sole in several American cases it is worthy of note that Blackstone's immediate successor at Oxford had rejected this archaic anomaly (1 Woodes System 471, 2), and it has received scant tolerance from any American author. Our tendency is strongly toward the old Roman maxim, "*Tres facit collegium.* See Corporations, 10 Cyc. 148; Thompson Corp. 9; Taylor Corp. 13; 2 Kent Comm. 273. Nor has the ecclesiastical corporation any better standing in the United States. The importance of this division of corporations into public and private became apparent during the pendency of the great Dartmouth college case, the decision of which was made to turn on the character of the corporation. The supreme court of New Hampshire held that the college was a public corporation, and therefore the act of the assembly amending the charter was not contrary to the contract clause of the federal constitution. Dartmouth College *v.* Woodward, 1 N. H. 111. The United States supreme court declared the corporation private and the charter a contract and reversed the judgment. Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629. Since this date (1819) the primary and chief classification of corporations in the United States has been public and private.

78. Dr. Adam Smith's view that private corporations should be created only for the public welfare found response not only in England, but also in the constitutional convention of New York (1821) by which a two-thirds majority was required for any bill creating a corporation; and also in court decisions, that there was implied in every charter of incorporation a consideration of service or benefit to the state. Mills *v.* Williams, 33 N. C. 558; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

rations;[79] all those organized for the pleasure, comfort, improvement, or convenience of the members, such as social or athletic clubs, societies, libraries, fraternities, and the like;[80] also all those erected for charitable, religious, or educational uses, provided the foundation be private as was illustrated in the celebrated Dartmouth College case.[81] None of these classes can embrace municipal corporations, whose fundamental objects are the public welfare and municipal government,[82] while its quasi-private rights and obligations are purely municipal.[83] The fact that a corporation otherwise public is made subject to a statute which for the most part is applicable to private corporations does not make it a private corporation.[84]

(III) *Public Corporations*—(A) *In General.* Public corporations are all those created specially for public purposes as instruments or agencies to increase the efficiency of government, supply public wants, and promote the public welfare.[85] This class includes not only municipal corporations but also all other incorporated agencies of government of whatever size and form or degree of organization.[86]

(B) *Quasi-Corporations*—(1) In General. There are also many public bodies which are not corporations in the full sense but resemble them in that they have some of the attributes of a corporation, and which are therefore called quasi-corporations.[87] Some of these, like the New England towns, are almost perfect in

79. *Alabama.*— State Bank *v.* Gibson, 6 Ala. 814.

California.— Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Massachusetts.— Com. *v.* Lowell Gas Light Co., 12 Allen 75.

New Jersey.— Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

New York.— People *v.* Forrest, 97 N. Y. 97.

North Carolina.— State Bank *v.* Clark, 8 N. C. 36.

South Carolina.— State Bank *v.* Gibbs, 3 McCord 377.

United States.— Kentucky Bank *v.* Wister, 2 Pet. 318, 7 L. ed. 437; U. S. Bank *v.* Planters' Bank, 9 Wheat. 904, 6 L. ed. 244.

80. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Govenor *v.* McEwen, 5 Humphr. (Tenn.) 241; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

81. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

82. See *supra*, I, A, 4, j, k, m.

83. See *supra*, I, C, 1, c; III, C, 2, c.

84. Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161.

85. *Alabama.*— Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221.

California.— Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Connecticut.— McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278.

Illinois.— Wabash River Leveeing Directors *v.* Houston, 71 Ill. 318.

Iowa.— Soper *v.* Henry County, 26 Iowa 264.

Maryland.— State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Nebraska.— State University *v.* McConnell, 5 Nebr. 423.

New Jersey.— Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

New York.— People *v.* Morris, 13 Wend. 325.

North Carolina.— Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

Ohio.— Hamilton County *v.* Mighels, 7 Ohio St. 109.

Pennsylvania.— Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242.

United States.— Dartmouth College *v.* Woodward, 4 Wheat. 519, 4 L. ed. 629.

86. *Alabama.*—Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Arkansas.— Faulkner County School Dist. No. 11 *v.* Williams, 38 Ark. 454.

Connecticut.— McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689.

Georgia.— Scales *v.* Chattahoochee County, 41 Ga. 225.

Illinois.— Rogers *v.* People, 68 Ill. 154.

Kansas.— Beach *v.* Leahy, 11 Kan. 23.

Maine.— Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88.

Maryland.—Talbot County Com'rs *v.* Queen Anne's County Com'rs, 50 Md. 245.

Massachusetts.— Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

Pennsylvania.— Com. *v.* Green, 4 Whart. 531.

Rhode Island.— Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202.

The state is not a municipal corporation, within the meaning of N. Y. Code Civ. Proc. § 3400, providing a means for enforcing mechanics' liens against municipal corporations. Tice *v.* Atlantic Constr. Co., 52 N. Y. App. Div. 284, 65 N. Y. Suppl. 79.

A state university, although it is a public corporation, is not a municipal corporation. Spalding *v.* People, 172 Ill. 40, 49 N. E. 993.

87. The term "quasi corporation" is generally used to designate counties and other political divisions of a state possessing only a low order of corporate existence. Scates

their organization and scarcely distinguishable from municipalities.[88] Others, like road districts, represent the lowest order of corporate life, with few powers and imperfect organization.[89] Between these two extremes are a larger number of districts erected as agencies of government, of divers names and objects, with varying degrees of organization; including counties,[90] townships,[91] school-dis-

v. King, 110 Ill. 456, 466. The term is applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special. Richardson County School Dist. No. 56 *v.* St. Joseph F. & M. Ins. Co., 103 U. S. 707, 708, 26 L. ed. 601. The term is applied to such bodies as school-districts or counties, which are given the designation by reason of the limited number of their corporate powers; such designation being used to distinguish them from corporations aggregate and from municipal corporations proper, such as cities, villages, or towns acting under charters or incorporating statutes. Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 62 N. Y. Suppl. 276. See also Duval County *v.* Charleston Lumber, etc., Co., 45 Fla. 256, 33 So. 531, 60 L. R. A. 549; Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235; Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225; Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; McKim *v.* Odom, 3 Bland (Md.) 407; Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35; Sauk Center Bd. of Education *v.* Moore, 17 Minn. 412; Murphy *v.* Mercer County, 57 N. J. L. 245, 31 Atl. 229; English *v.* Jersey City, 42 N. J. L. 275; Dunn *v.* Brown County Agricultural Soc., 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754; Briegel *v.* Philadelphia, 135 Pa. St. 451, 19 Atl. 1038, 20 Am. St. Rep. 885; White *v.* Charleston, 2 Hill (S. C.) 571; Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541; Powder River Cattle Co. *v.* Johnson County, 3 Wyo. 597, 29 Pac. 361, 31 Pac. 278; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566; Ætna L. Ins. Co. *v.* Pleasant Tp., 53 Fed. 214.

88. *Maine.*— Hooper *v.* Emery, 14 Me. 375; Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88.

Massachusetts.— Easthampton *v.* Hill, 162 Mass. 302, 38 N. E. 502; Coolidge *v.* Brookline, 114 Mass. 592; Warren *v.* Charlestown, 2 Gray 84; Spaulding *v.* Lowell, 23 Pick. 71; Allen *v.* Taunton, 19 Pick. 485; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63.

New Hampshire.— Lovell *v.* Charlestown, 66 N. H. 584, 32 Atl. 160; Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302.

Rhode Island.— Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306; Smith *v.* Westerly, 19 R. I. 437, 35 Atl. 526.

Vermont.— Rutland *v.* West Rutland, 68 Vt. 155, 34 Atl. 422.

United States.— Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923.

See, generally, TOWNS.

Early Connecticut towns see Webster *v.* Harwinton, 32 Conn. 181.

89. Dixon County *v.* Chicago, etc., R. Co., 1 Nebr. (Unoff.) 240, 95 N. W. 340. See STREETS AND HIGHWAYS.

90. *Alabama.*— Dunn *v.* Wilcox County Revenues Ct., 85 Ala. 144, 4 So. 661.

California.—San Mateo County *v.* Coburn, 130 Cal. 631, 63 Pac. 78, 621; People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66.

Colorado.— Stermer *v.* La Plata County, 5 Colo. App. 379, 38 Pac. 839.

Florida.— Duval County *v.* Charleston Lumber, etc., Co., 45 Fla. 256, 33 So. 531, 60 L. R. A. 549.

Illinois.— Scates *v.* King, 110 Ill. 456.

Kentucky.— Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225.

Minnesota.— Goodnow *v.* Ramsey County, 11 Minn. 31.

Nevada.— Schweiss *v.* Storey County First Judicial Dist. Ct., 23 Nev. 226, 45 Pac. 289, 34 L. R. A. 602.

New York.— Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 62 N. Y. Suppl. 276.

North Carolina.— White *v.* Chowan, 90 N. C. 437, 47 Am. Rep. 534.

Ohio.— Hamilton County *v.* Mighels, 7 Ohio St. 109.

Pennsylvania.— Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208.

Tennessee.— Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541.

Wyoming.— Johnson County *v.* Searight Cattle Co., 3 Wyo. 777, 31 Pac. 268; Powder River Cattle Co. *v.* Johnson County, 3 Wyo. 597, 29 Pac. 361, 31 Pac. 278.

See COUNTIES, 11 Cyc. 342.

91. *Kansas.*—Rathbone *v.* Hopper, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674.

Minnesota.— Kreger *v.* Bismark Tp., 59 Minn. 3, 60 N. W. 675.

Nebraska.— Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

New York.— Robinson *v.* Fowler, 80 Hun 101, 30 N. Y. Suppl. 25.

North Dakota.— Vail *v.* Amenia, 4 N. D. 239, 59 N. W. 1092.

Pennsylvania.— Shoe *v.* Nether Providence Tp., 3 Pa. Super. Ct. 137.

Wisconsin.— Mueller *v.* Cavour, 107 Wis. 599, 83 N. W. 944; Cathcart *v.* Comstock, 56 Wis. 590, 14 N. W. 833; Eaton *v.* Manitowoc County Sup'rs, 44 Wis. 489; Norton *v.* Peck, 3 Wis. 714, holding that the several organized towns of the state, under Rev. St. c. 12,

tricts,[92] drainage districts,[93] irrigation districts,[94] levee districts or directors thereof,[95] fire districts,[96] sanitary districts,[97] reclamation districts,[98] and all other sections of territory delimited and organized for the performance of certain governmental functions;[99] and also boards of official persons established for public purposes, local or general, such as boards of education,[1] public works,[2] railroads,[3] levy courts,[4] waterways,[5] sanitary commissions,[6] and the like.[7] These are sometimes declared by statute

§ 1, providing that each organized town should be a body corporate, and should have power to purchase, hold, convey, and dispose of real estate, to sue and be sued, to make contracts, etc., were quasi-corporations only.

United States.—Folsom *v.* Abbeville County Tp. Ninety-Six, 159 U. S. 611, 16 S. Ct. 174, 40 L. ed. 278; Barnum *v.* Okolona, 148 U. S. 393, 13 S. Ct. 638, 37 L. ed. 495; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923; Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323; Pompton Tp. *v.* Cooper Union, 101 U. S. 196, 25 L. ed. 803; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566; Ætna L. Ins. Co. *v.* Pleasant Tp., 53 Fed. 214.

See, generally, TOWNS.

Township a "municipality" see Hanson *v.* Cresco, (Iowa 1906) 109 N. W. 1109.

92. *Arkansas.*— School Dist. No. 3 *v.* Bodenhamer, 43 Ark. 140.

California.— Denman *v.* Webster, 139 Cal. 452, 73 Pac. 139; Shakespear *v.* Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327.

Connecticut.— Half-way River School-Dist. *v.* Bradley, 54 Conn. 74, 5 Atl. 861.

Dakota.— Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767.

Illinois.— People *v.* School Trustees, 78 Ill. 136.

Iowa.— Sheridan Dist. Tp. *v.* Frahm, 102 Iowa 5, 70 N. W. 721; Holliday *v.* Hilderbrandt, 97 Iowa 177, 66 N. W. 89.

Kansas.— Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235; Beach *v.* Leahy, 11 Kan. 23.

Massachusetts.— Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193.

Michigan.— Hutchins *v.* Colfax Tp. School Dist. No. 1, 128 Mich. 177, 87 N. W. 80.

Minnesota.— Sauk Centre Bd. of Education *v.* Moore, 17 Minn. 412; Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

Mississippi.—Littlewort *v.* Davis, 50 Miss. 403.

Missouri.— Newton County School Dist. No. 4 *v.* Smith, 90 Mo. App. 215.

New Hampshire.—Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58.

New York.— Robie *v.* Sedgwick, 35 Barb. 319 [*affirmed* in 4 Abb. Dec. 73].

North Carolina.— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524.

Ohio.— State *v.* Duerr, 11 Ohio Cir. Ct. 303, 5 Ohio Cir. Dec. 400.

Pennsylvania.— Briegel *v.* Philadelphia, 135 Pa. St. 451, 19 Atl. 1038, 20 Am. St. Rep. 885; Wharton *v.* Cass Tp. School Directors, 42 Pa. St. 358.

Tennessee.— Shankland *v.* Phillips, 3 Tenn. Ch. 556.

Vermont.— Sherwin *v.* Bugbee, 16 Vt. 439.

Washington.— Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

Wisconsin.—School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

See, generally, SCHOOLS AND SCHOOL-DISTRICTS.

93. Lussem *v.* Chicago Sanitary Dist., 192 Ill. 404, 61 N. E. 544; Elmore *v.* Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363. See DRAINS, 14 Cyc. 1018.

94. *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755; Middle Kittitas Irr. Dist. *v.* Peterson, 4 Wash. 147, 29 Pac. 995. See, generally, WATERS.

95. Memphis Trust Co. *v.* St. Francis Levee Dist., 69 Ark. 284, 287, 62 S. W. 902; People *v.* Williams, 56 Cal. 647; Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679; Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629; St. Francis Levee Dist. *v.* Bodkin, 108 Tenn. 700, 69 S. W. 270. See LEVEES, 25 Cyc. 188.

96. Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161.

97. *In re* Werner, 129 Cal. 567, 62 Pac. 97. But the sanitary district of Chicago is a municipal corporation, having powers of legislation, taxation, and administration. Reddick *v.* People, 82 Ill. App. 85 [*affirmed* in 181 Ill. 334, 54 N. E. 963].

98. *In re* Werner, 129 Cal. 567, 62 Pac. 97; Reclamation Dist. No. 542 *v.* Turner, 104 Cal. 334, 37 Pac. 1038.

99. Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; Norfleet *v.* Cromwell, 70 N. C. 634, 16 Am. Rep. 787.

1. Heller *v.* Stremmel, 52 Mo. 309; State *v.* State Bd. of Education, 18 Nev. 173, 1 Pac. 844.

2. Larned *v.* Briscoe, 62 Mich. 393, 29 N. W. 22.

3. People *v.* Harper, 91 Ill. 357.

4. Levy Ct. *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851.

5. River Tone Conservators *v.* Ash, 10 B. & C. 349, 8 L. J. K. B. O. S. 226, 21 E. C. L. 152.

6. State *v.* Newark Bd. of Health, 54 N. J. L. 325, 23 Atl. 949. See HEALTH, 21 Cyc. 382.

7. Park commissioners see Andrews *v.* People, 83 Ill. 529. *Compare* West Chicago Park Com'rs *v.* Chicago, 152 Ill. 392, 38 N. E. 697, holding that the West Chicago park commissioners was a municipal corporation.

to be corporations;[8] but all of them lack some of the essential elements or integral parts requisite to constitute a complete corporation. They strongly resemble and are almost corporations;[9] and by courts and authors they are recognized as constituting a peculiar class of public institutions,[10] and are generally called quasi-corporations.[11] Such bodies, although not "municipal corporations" nor "municipalities" in the proper sense, must be construed as falling within such terms in a constitution, statute, or other instrument, if such appears to be the intention;[12]

Street commissioners see English *v.* Jersey City, 42 N. J. L. 275. Police boards see Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142. Police juries see Ouachita Parish Police Jury *v.* Monroe, 38 La. Ann. 630. Overseers of poor see Boston Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122; Governor *v.* Gridley, Walk. (Miss.) 328; Rouse *v.* Moore, 18 Johns. (N. Y.) 407. Board of trustees to construct and operate a canal for the purposes of commerce and supplying power, heat, and light see State *v.* Douglas County, 47 Nebr. 428, 66 N. W. 434. Board of fire or water commissioners see O'Leary *v.* Marquette Fire, etc., Com'rs, 79 Mich. 281, 44 N. W. 608, 19 Am. St. Rep. 169, 7 L. R. A. 170, where it is said that there can be no "municipal corporation" that is not the direct representative of the people of its locality, and hence a board of commissioners, incorporated as a municipal agency, which furnishes the city with water, is not a municipal corporation.

8. State *v.* Newark Bd. of Health, 54 N. J. L. 325, 23 Atl. 949; Governor *v.* McEwen, 5 Humphr. (Tenn.) 241; Elliot Pub. Corp. 219.

9. People *v.* Harper, 91 Ill. 357; Larned *v.* Briscoe, 62 Mich. 393, 29 N. W. 22; Todd *v.* Birdsall, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522.

10. 2 Beach Pub. Corp. § 1003; Elliot Pub. Corp. 219; Ingersoll Pub. Corp. 13, 20; 2 Kent Comm. 278; Tiedeman Mun. Corp. § 339; Green *v.* Cape May, 41 N. J. L. 45; Bassett *v.* Fish, 75 N. Y. 303; Com. *v.* Green, 4 Whart. (Pa.) 531, 598; Governor *v.* McEwen, 5 Humphr. (Tenn.) 241.

11. Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Harris *v.* Canaan School Dist., 28 N. H. 58; Pomeroy *v.* Wells, 8 Paige (N. Y.) 406; Levy Ct. *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851. See also Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235; Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524; Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161; Norton *v.* Peck, 3 Wis. 714; and other cases cited in the preceding notes.

"Public corporations are those which are founded with public means, and for public purposes. Their criterion is, that no individual has any interest in their foundation, except as a member of the general body politic. To this class belong all municipal corporations, beginning with the United States, and descending down through States, Counties, Townships, school districts, and the like. These are for the most part denominated quasi corporations, since, with the exception of cities and boroughs, they require no special act of incorporation. They possess scarcely any other corporate properties than those of holding property, and being parties to suits." Walker Am. L. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106].

12. *Alabama.*— *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 6 Am. Rep. 722, counties.

California.—Pacific Coast R. Co. *v.* Porter, 74 Cal. 261, 15 Pac. 774, counties.

Illinois.— Spalding Lumber Co. *v.* Brown, 171 Ill. 487, 49 N. E. 725 (school boards); West Chicago Park Com'rs *v.* Chicago, 152 Ill. 392, 38 N. E. 697 (park commissioners); People *v.* Nelson, 133 Ill. 565, 27 N. E. 217 (sanitary districts).

Indiana.—Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, civil or school township.

Iowa.— Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 17 N. W. 191 (school-district township); Winspear *v.* Holman Dist. Tp., 37 Iowa 542 (school-district).

Kansas.— State *v.* Wilson, 65 Kan. 237, 69 Pac. 172 (school-district); Rathbone *v.* Hopper, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674 (counties and townships).

Kentucky.— Brown *v.* Newport Bd. of Education, 108 Ky. 783, 57 S. W. 612, 22 Ky. L. Rep. 483, holding a city board of education to be a "municipality" within the meaning of a constitutional limitation of the power to incur indebtedness.

Michigan.—Kent County Agricultural Soc. *v.* Houseman, 81 Mich. 609, 46 N. W. 15, county agricultural society.

Minnesota.— Dowlan *v.* Sibley County, 36 Minn. 430, 31 N. W. 517, counties.

New Jersey.— Reid *v.* Wiley, 46 N. J. L. 473 (townships); Union Stone Co. *v.* Hudson County, (Ch. 1906) 65 Atl. 466 (counties); Trenton Public Instruction Com'rs *v.* Fell, 52 N. J. Eq. 689, 29 Atl. 816 (school-districts).

New York.— Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 62 N. Y. Suppl. 276 (counties); People *v.* Carpenter, 31 N. Y. App. Div. 603, 52 N. Y. Suppl. 781 (counties).

North Carolina.— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524, school-districts.

Pennsylvania.— Sprague *v.* Baldwin, 18 Pa. Co. Ct. 568, townships.

South Carolina.— Carolina Grocery Co. *v.* Burnet, 61 S. C. 205, 213, 39 S. E. 381, 58 L. R. A. 687 (counties or townships); Glenn

and cases are frequently found in the reports in which they are so designated by the courts.[13]

(2) DISTINGUISHING FEATURES. These public quasi-corporations, notwithstanding the variety of their functions and modes of organization and operation, possess in common certain attributes and characteristics, and are lacking in others which distinguish them from the municipal corporation. (1) They are created solely as governmental agencies for the purpose of administering the general laws of the state.[14] (2) They are involuntary organizations "superimposed by the sovereign and paramount authority" of the state of its own supreme will and discretion, without consideration of the wishes of the community.[15] (3) They are not chartered corporations.[16] (4) They do not have the incidental powers or inherent attributes of a corporation, but only such as are expressly granted or necessarily implied from the express powers.[17] The use of the municipal corporation as a convenient and effective instrument for the local administration of public governmental affairs, although now common in the United States, is only a secondary and inferior object of its creation and existence, which primarily was and is local self-government, subordinate to the state.[18]

II. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

A. Incorporation and Incidents — 1. POWER TO CREATE. A municipal corporation can have no other source than sovereign power.[19] There are various

v. York County Com'rs, 6 S. C. 412 (counties).

Washington.— Lincoln County *v.* Brock, 37 Wash. 14, 79 Pac. 477 (counties); State *v.* Grimes, 7 Wash. 191, 34 Pac. 833 (school-districts); Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110 (school-districts); Middle Kittitas Irr. Dist. *v.* Peterson, 4 Wash. 147, 29 Pac. 995.

Wisconsin.— Lund *v.* Chippewa County, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131, counties.

United States.— Richardson County School Dist. No. 56 *v.* St. Joseph F. & M. Ins. Co., 103 U. S. 707, 26 L. ed. 601 (school-districts); West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553 (townships).

See also COUNTIES, 11 Cyc. 342; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS.

"The word 'municipal,' as originally used, in its strictness applied to cities only, but the word now has a more extended meaning; and, when applied to corporations, the word 'political,' 'municipal,' and 'public' are used interchangeably." Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 104, 17 N. W. 191 [*cited* in Cook *v.* Portland, 20 Oreg. 580, 27 Pac. 263, 13 L. R. A. 533]. The term "municipal corporations" is synonymous with the term "political corporations" or "public corporations." It is often used to signify "a community clothed with extensive civil authority." Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544. In Ill. Const. (1870) art. 9, § 9, authorizing the general assembly to vest the corporate authority of cities, towns, and villages to make local improvements by special assessments, and authorizing all other municipal corporations to assess and collect taxes for all municipal purposes, is not used "in the primary sense of cities, towns, and villages, but in the more enlarged sense of public local corporations, exercising some governmental function." Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 464, 27 N. E. 203.

"Public" and "municipal" corporations distinguished see *In re* Werner, 129 Cal. 567, 573, 62 Pac. 97; Brown *v.* Newport Bd. of Education, 108 Ky. 783, 787, 57 S. W. 612, 22 Ky. L. Rep. 483.

13. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 524, 25 L. ed. 699; Tippecanoe County *v.* Lucas, 93 U. S. 108, 114, 23 L. ed. 822; Laramie County *v.* Albany County, 92 U. S. 307, 308, 23 L. ed. 552; and other cases cited in the notes following.

14. Scioto *v.* Gherky, Wright (Ohio) 493; St. Peter's Parish Road Com'rs *v.* McPherson, 1 Speers (S. C.) 218; Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

15. Freeport *v.* Stephenson County, 41 Ill. 495; Hamilton County *v.* Mighels, 7 Ohio St. 109.

16. Ingersoll Pub. Corp. 27.

17. Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193; Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58; Taylor *v.* Salt Lake County Ct., 2 Utah 405.

18. *Indiana.*— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— People *v.* Morris, 13 Wend. 325.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Tennessee.— East Tennessee University *v.* Knoxville, 6 Baxt. 166.

Wisconsin.— State *v.* Milwaukee, 20 Wis. 87.

19. Com. *v.* Plaisted, 148 Mass. 375, 19

methods of incorporation; as in England by royal charter,[20] or by act of parliament;[21] and in the United States by special legislative act,[22] or under general law prescribing a mode of procedure and organization.[23] Every known method recognizes that the municipality is a political creature;[24] and that the creature cannot be greater than its creator.[25] Every municipal corporation, great or small, has elements of sovereign power,[26] as legislative power,[27] and the power of eminent domain.[28] Nothing less than sovereign power can confer the supreme faculties upon any creature.[29] It is a mistake to suppose that such a political entity, possessing and exercising sovereign powers, can emanate from any source beneath

N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; New Boston *v.* Dunbarton, 12 N. H. 409; Hope *v.* Deaderick, 8 Humphr. (Tenn.) 1, 47 Am. Dec. 597; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; 1 Blackstone Comm. 472; 2 Kent Comm. 275, 276. See also Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234; and *supra*, I, A, 4, e. The inhabitants of a given territory have no right or power to incorporate themselves in the absence of legislative authority. Buford *v.* State, *supra*.

20. Mode of obtaining royal charters, and their effect.— This was for centuries the only method of creating a municipal corporation in England. A populous community desiring definite rights and self-government, through its chief men would offer to pay the crown a fixed annual revenue to be exempt from royal levies of uncertain and arbitrary amount. The sum being adjusted, the king, of his royal prerogative, would grant the charter to said chief men and (nominally also) to the commonalty of the borough or city, conferring upon them and their successors *in perpetuo* certain *jura regalia* and other rights, franchises, powers, and privileges, such as exemption from royal levies, power to enact by-laws for their local government and to collect from the inhabitants taxes sufficient to pay the crown the municipal quota and to bear the expenses of self-government. Their charters were not uniform but were adapted to meet the traditions and customs of the several communities. By changes conformed to the demands of the most powerful class they were later granted to the prosperous merchant guilds of the commercial towns, and still later to the more numerous and powerful craft guilds. Green Short Hist. English People, § 6, p. 93, c. 4, § 4, pp. 193, 201. Finally by royal tyranny of the Stuarts and commercial complaisance of the burghers and citizens, the old charters were forfeited or surrendered and new charters given to royal favorites whereby to insure support to the crown in its struggle for absolute power. Stephen English Const. c. 7, p. 455. The act of parliament after the Revolution, restoring the former charters to the cities and boroughs, did not impair the royal prerogative, which to this day remains as the ancient source of municipal charters. Rutter *v.* Chapman, 8 M. & W. 1–117.

21. The theory of royal assent to the constitution of municipal corporations is fully recognized in their creation by act of parliament, which is composed of the king, lords, and commons, and thus represents the supreme sovereignty of the realm. 1 Blackstone Comm. 147.

22. See *infra*, II, A, 13. This was the sole method of constituting a municipal corporation for the first seventy years of the republic; and many cities and towns still retain their charters in the form of special legislative acts with the frequent amendments required by the ever-increasing complications of modern urban life. Those special acts of legislation are called charters, not because they conform to the documents of that name granted by the British crown, but because they operate to effect the same result, viz., the creation of a municipal corporation with all its common-law incidents. Ingersoll Pub. Corp. 171.

23. See *infra*, II, A, 14. Many of the United States, by their constitutions, now confine their legislatures to this mode of creating municipal corporations. Some are using both special and general legislation for the purpose. A few still pursue only the early mode of special acts. Ingersoll Pub. Corp. 129, 137, 187. See *infra*, I, A, 6, 13, 14.

24. Heller *v.* Stremmel, 52 Mo. 309; Berlin *v.* Gorham, 34 N. H. 266; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385; People *v.* Morris, 13 Wend. (N. Y.) 325; 2 Kent Comm. 275.

25. People *v.* Morris, 13 Wend. (N. Y.) 325.

26. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People *v.* Morris, 13 Wend. (N. Y.) 325; Hamilton County *v.* Mighels, 7 Ohio St. 109.

27. Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756; Heland *v.* Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670; Metcalf *v.* St. Louis, 11 Mo. 102; State *v.* Hayes, 61 N. H. 264, 314. See also *Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747; State *v.* Tryon, 39 Conn. 183; Perdue *v.* Ellis, 18 Ga. 586; Mason *v.* Shawneetown, 77 Ill. 533. And see *infra*, VI; XI, A.

28. Higginson *v.* Nahant, 11 Allen (Mass.) 530; Mayor Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180; North Pac. Lumber, etc., Co. *v.* East Portland, 14 Oreg. 3, 12 Pac. 4; Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336. See EMINENT DOMAIN, 15 Cyc. 543.

29. Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec.

the sovereign. He who has no sovereign power can confer none.[30] The functions performed by courts and commissioners in the incorporation of cities, towns, boroughs, and villages are purely ministerial. They act only as instruments of the sovereign.[31] The basis of all this action is, in England, the royal prerogative or the omnipotence of parliament;[32] in America the sovereign power of legislation.[33] No court, commission, governor, or other officer of the state in America may endow a community with municipal functions, except when and as empowered by law.[34] Then it is not the ministerial acts of the officer or court, but the sovereign will expressed in a solemn act of legislation that speaks the municipal microcosm into being and gives it life and power.[35]

2. **What Bodies Possess the Power — a. In England.** From the Norman Conquest down to the Revolution (1688) the English kings were wont to allow this "flower of the prerogative,"[36] to be exercised by certain great lords of the realm, both temporal and spiritual, by chartering boroughs and cities in their respective counties palatine, some of which charters existed till the period of reform, in 1835.[37] And it is recorded that even the pope once claimed and exercised this sovereign power.[38] But since the Reformation the power has been recognized as existing only in the crown and parliament, which alone can now speak municipal corporations into being.[39] The king holds this power to grant a charter of incorporation of a city or borough as a common-law prerogative of the crown,[40] which was not materially increased or diminished by the famous act of parliament for the reform of municipal corporations.[41] But by a later act[42] the crown was empowered by royal charter to extend to any corporation created thereby in addition to the common-law municipal powers, the powers given to existing corporations by the Municipal Corporations Reform Act aforesaid.[43]

385; Morristown *v.* Shelton, 1 Head (Tenn.) 24.

30. Doe *v.* Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732; Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; People *v.* Morris, 13 Wend. (N. Y.) 325; Mills *v.* Williams, 33 N. C. 558.

31. See *infra*, II, A, 3.

32. Arnold Mun. Corp. c. 2. See *infra*, II, A, 2, a.

33. McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; New Boston *v.* Dunbarton, 12 N. H. 409; Hope *v.* Deaderick, 8 Humphr. (Tenn.) 1, 47 Am. Dec. 597. See II, A, 2, b.

34. State *v.* Leatherman, 38 Ark. 81; State *v.* Jennings, 27 Ark. 419; State *v.* Armstrong, 3 Sneed (Tenn.) 634; *Ex p.* Chadwell, 3 Baxt. (Tenn.) 98; Territory *v.* Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *In re* North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638. See *infra*, II, A, 3.

The apparently contrary view expressed in State *v.* Weir, 33 Iowa 134, 11 Am. Rep. 115, and in People *v.* Fleming, 10 Colo. 553, 16 Pac. 298, may be reconciled with the text on the basis of the Tennessee doctrine that if the legislature authorizes the creation of municipal corporations by general law, the ministerial functions may be performed through the agency of other departments of the government. See cases in the following note.

35. Morristown *v.* Shelton, 1 Head (Tenn.) 24; *Ex p.* Burns, 1 Tenn. Ch. 83. See *infra*, II, A, 3.

36. Willcock Mun. Corp. 25.

37. The English counties palatine were Durham, Chester, and Lancaster. Sometimes the great lords claimed the right to exercise this function without royal authority; and it was permitted in periods of uncertain and insecure sovereignty. Four charters were granted by bishops of Durham to their see city in the twelfth, seventeenth, and eighteenth centuries, under the last of which it was governed until the Municipal Corporations Reform Act of 1835. Encycl. Brit. tit. "Durham."

38. This was an incident of the paramount temporal sovereignty claimed for the Roman pontiff during the middle ages and conceded by the weaker kings. The first charter of Durham was confirmed by Pope Alexander III, A. D. 1180. It is still preserved in the hutch at the guild hall of the city. Encycl. Brit. tit. "Durham."

39. 2 Bacon Abr. tit. "Corporations," B. The counties palatine, Chester, Durham, and Lancaster were generally shorn of their *jura regalia* by divers acts of parliament before the nineteenth century (Comyns Dig. tit. "Franchises," (D. T.) p. 458 note) and Durham, the last survivor, lost its power to grant charters to cities and boroughs under the reform legislation of 1835.

40. 1 Blackstone Comm. 472.

41. St. 5 & 6 Wm. IV, c. 76.

42. St. 1 Vict. c. 76, § 49.

43. Rutter *v.* Chapman, 10 L. J. Exch. 495, 8 M. & W. 1. This ruling case on municipal corporations evoked separate opinions from all the justices of the queen's bench, sup-

And this power was confirmed by the Municipal Corporations Act of 1882,[44] which is now the municipal code of the kingdom regulating the creation and constitution of municipalities.[45] It results that the crown now has the option of creating by royal charter a municipal corporation having only common-law powers; or, on petition of the inhabitants and advice of the privy council, one having not only these but also the powers conferred on municipal corporations by the acts of parliament.[46] The royal charter requires the assent of the inhabitant householders to give it effect and validity;[47] while it is within the supreme power of parliament to create and constitute a municipal corporation with the consent or even against the wish of the inhabitants, and confer or withhold such franchises as to it seems fit.[48]

b. In the United States — (I) *In General.* In the United States there exists no method of incorporation analogous to the royal charter. Here only a sovereign act of legislation can constitute a municipality.[49] Such act may be special or general.[50] It may be enacted by (1) a state legislature,[51] (2) the federal congress,[52] or (3) a territorial legislature thereunto empowered by congress.[53]

(II) *State Legislatures.* Most American municipalities have been incorporated by state legislation. All sovereign powers in domestic affairs not ceded to the federal government are reserved to the states and the people thereof.[54] A state legislature may perform any function of local legislation which is not forbidden by state or federal constitution,[55] and the creation of a municipal corporation is obviously an act of local legislation and within its power[56] Nobody

porting the validity of the charter of Manchester granted by the crown in 1838 under the Municipal Corporations Reform Act and fully discussing the act and the prerogative.

44. St. 45 & 46 Vict. c. 50, § 216.

45. Encycl. Brit. tit. "Municipality."

46. Rutter *v.* Chapman, 10 L. J. Exch. 495, 8 M. & W. 1.

47. Arnold Mun. Corp. 4. See also Opinion of Tindal, J., in Rutter *v.* Chapman, 10 L. J. Exch. 495, 8 M. & W. 97, 100; and *infra*, II, A, 13, c, note 35.

48. 1 Blackstone Comm. 474. See *infra*, II, A, 13, c, text and note 35.

49. Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; New Boston *v.* Dunbarton, 12 N. H. 409; Norristown *v.* Shelton, 1 Head (Tenn.) 24; Hope *v.* Deaderick, 8 Humphr. (Tenn.) 1, 47 Am. Dec. 597; Buford *v.* State, 72 Tex. 182, 10 S. W. 401. See *infra*, II, A, 2, b, (II).

50. Unless restrained by constitutional limitations it is obviously competent for the legislature to exercise its law-making function by either special or general acts and thus completely create the corporation by one, or by the other empower the community desiring the incorporation to effect organization by a prescribed mode of procedure under the supervision of a court or commission. Cooley Const. Lim. (5th ed.) 168. See *infra*, II, A, 6, 13, 14.

51. See *infra*, II, A, 2, b, (II).

52. See *infra*, II, A, 2, b, (III).

53. See *infra*, II, A, 2, b, (IV).

54. U. S. Const. Amendm. X.

55. *Illinois.*— People *v.* Wright, 70 Ill. 388.
Michigan.— Sears *v.* Cottrell, 5 Mich. 251.
New York.— People *v.* Draper, 15 N. Y. 532.
Tennessee.—Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.
Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

56. *Arkansas.*— State *v.* Jennings, 27 Ark. 419.
California.— People *v.* Riverside, 70 Cal. 461, 11 Pac. 759; San Francisco *v.* Canavan, 42 Cal. 541.
Colorado.— People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074.
Florida.— Robinson *v.* Jones, 14 Fla. 256.
Illinois.— Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; People *v.* Wren, 5 Ill. 269.
Indiana.— Doe *v.* Douglass, 8 Blackf. 10, 44 Am. Dec. 732.
Minnesota.— St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278.
Missouri.— Taylor *v.* Carondelet, 22 Mo. 105.
Nebraska.—Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740.
New Hampshire.— New Boston *v.* Dunbarton, 12 N. H. 409.
New York.— People *v.* Draper, 15 N. Y. 532.
Ohio.— Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Markle *v.* Akron, 14 Ohio 586.
Tennessee.—Trigally *v.* Memphis, 6 Coldw. 382; Morristown *v.* Shelton, 1 Head 24; Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.
Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.
Wisconsin.— Slauson *v.* Racine, 13 Wis. 398.
See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2, 4.

Power to impose limitations.— The power to create a municipal corporation is vested

except the legislature of a state has authority to incorporate a municipality within its borders.[57]

(III) *CONGRESS.* The federal congress is invested with "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," [58] and to exercise exclusive legislation over such district as may become the seat of government of the United States.[59] Under this authority congress has erected the District of Columbia into a municipal corporation, and has organized territories and chartered cities and towns within their boundaries.[60] Its authority to incorporate municipalities in any territory of the United States is obviously beyond question.[61] It has plenary power to govern the territories in any mode not forbidden by the federal constitution.[62] It might govern any territory exclusively by congressional legislation.[63]

(IV) *TERRITORIAL LEGISLATURES.* In most of the territories, however, a local government has been constituted, and empowered with certain legislative functions.[64] The measure of these powers is the organic act constituting the government of the territory.[65] It may or may not confer the power to erect municipal corporations according to its terms. Power over all rightful subjects of legislation has been construed to confer upon territorial legislatures authority to incorporate municipalities;[66] while power to pass general laws enabling persons

in the legislature and implies the power to create it with such limitations as that body may see fit to impose, and to impose such limitations at any stage of its existence. Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740. See also *infra*, II, C, 1, a; III, D, 3; IV, A.

57. *Georgia.*— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

Illinois.— Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304.

Kentucky.— Cheaney *v.* Hooser, 9 B. Mon. 330.

Nebraska.— Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266; New Boston *v.* Dunbarton, 12 N. H. 409.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

Tennessee.— Morristown *v.* Shelton, 1 Head 24; Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.

Texas.— Buford *v.* State, 72 Tex. 182, 10 S. W. 401.

Wisconsin.— *In re* North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2, 4.

58. U. S. Const. art. 4, § 3, cl. 2.

59. U. S. Const. art. 1, § 8, cl. 17.

60. See Deitz *v.* Central, 1 Colo. 323; Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637. See also U. S. *v.* Trimble, 14 App. Cas. (D. C.) 414; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231. 16 U. S. St. at L. 419, charters the District of Columbia. Congress has rarely exercised its undoubted power to charter municipalities in other territories than Alaska, for the same reason perhaps that restrains parliament from exercising its paramount power to charter municipal corporations, namely, such power is a "flower of the (territorial) prerogative."

61. Deitz *v.* Central, 1 Colo. 323; People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346. Congress has power to erect a corporation whenever such corporation is a necessary or proper means for executing power conferred upon it. Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808.

62. This is a corollary of the express grant of power "to make all laws . . . necessary and proper for carrying into execution . . . powers vested . . . in the government of the United States." U. S. Const. art. 1, § 8, cl. 18.

63. This is within the express grant of power to make all needful rules and regulations respecting any territory of the United States, and is the method of governing the territory of Alaska which has no territorial legislature but is governed by codes enacted by congress in 1899 and 1900. U. S. Const. art. 4, § 3, cl. 2.

64. The only exception to this rule on the continent of North America is to be found in the territory of Alaska. The insular possessions of the United States are subject to special laws adapted to their peculiar conditions. Hawaii *v.* Mankichi, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016; Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; U. S. *v.* Dorr, 47 L. ed. appendix 1187.

65. This enabling act is the paramount law of the territory, resembling the charter of a municipal corporation or the constitution of a state. Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 129, 25 L. ed. 1046. And see Wagner *v.* Harris, 1 Wyo. 194.

66. Burnes *v.* Atchison, 2 Kan. 454. See also Wagner *v.* Harris, 1 Wyo. 194.

In Massachusetts under Const. Amendm. art. 2, authorizing the general court to erect and constitute city governments in towns of

to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits does not authorize the creation of municipal corporations.[67] This delegation of the sovereign power is a peculiar feature of the American territory, which has been sustained as constitutional on repeated challenge.[68] As to municipal charters it finds precedent in the regal power of incorporation exercised by certain great nobles during the periods of royal dependence;[69] but this incorporating power of the territory is not inherent; and, like any other delegated legislative function, it may be withdrawn by congress at pleasure.[70]

3. Delegation of Power. A legislature cannot delegate the power of legislation to the judicial or executive departments, but it may delegate the power to determine some fact or state of things upon which it makes or intends to make its own action depend.[71] It follows that the power to create municipal corporations cannot be delegated to the courts or other bodies;[72] but the legislature may and frequently does confer upon the courts or upon some officer or board the power and duty to perform judicial or ministerial acts in the formation of municipal corporations, or to determine the existence of conditions prescribed by the statute as a prerequisite to the corporation.[73] The legislature cannot constitutionally leave it to the vote of the people whether an act for the incorporation of

twelve thousand inhabitants, or over, and to grant to the inhabitants thereof such powers, privileges, and immunities as the general court shall deem necessary and expedient for the government thereof, it is the duty of the general court to act on each application, and grant or withhold a charter according to its judgment, and, if it grant one, to grant such powers and privileges as may be expedient and necessary in that particular case; and it has no power to pass an act authorizing the inhabitants of towns containing the required population to become cities, according to articles prescribed in the act, at the will of a majority of the inhabitants voting at a meeting held for the purpose. Larcom *v.* Olin, 160 Mass. 102, 35 N. E. 113.

67. Seattle *v.* Yesler, 1 Wash. Terr. 571.

68. *Colorado.*— Deitz *v.* Central, 1 Colo. 323.

Kansas.— State *v.* Young, 3 Kan. 445.

Missouri.— Riddick *v.* Amelin, 1 Mo. 5.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

United States.— Vincennes University *v.* Indiana, 14 How. 268, 14 L. ed. 416.

69. Goodyer *v.* Shaw, Styles 298; Tewkesbury *v.* Bricknell, 2 Taunt. 120, 11 Rev. Rep. 537.

70. Seattle *v.* Yesler, 1 Wash. Terr. 571.

71. See Constitutional Law, 8 Cyc. 830 *et seq.*

72. *California.*— People *v.* Nevada, 6 Cal. 143.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Minnesota.— State *v.* Simons, 32 Minn. 540, 21 N. W. 750.

Tennessee.— State *v.* Armstrong, 3 Sneed 634; *Ex p.* Burns, 1 Tenn. Ch. 83.

Washington.— Territory *v.* Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106.

Wisconsin.— *In re* North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638.

See also Constitutional Law, 8 Cyc. 830 *et seq.*

73. *Arkansas.*— Foreman *v.* Marianna, 43 Ark. 324.

Colorado.— People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

Iowa.— Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031.

Kansas.— Callen *v.* Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736. See also Kirkpatrick *v.* State, 5 Kan. 673.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Minnesota.— State *v.* Simons, 32 Minn. 540, 21 N. W. 750.

Missouri.— Kayser *v.* Bremen, 16 Mo. 88.

Nebraska.— Wahoo *v.* Dickinson, 23 Nebr. 426, 36 N. W. 813.

Pennsylvania.— *In re* Sewickley Borough, 36 Pa. St. 80, 2 Grant 135.

Tennessee.— Heck *v.* McEwen, 12 Lea 97; *Ex p.* Chadwell, 3 Baxt. 98, 103; Morristown *v.* Shelton, 1 Head 24; *Ex p.* Burns, 1 Tenn. Ch. 83.

United States.— Field *v.* Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2, 4.

The mistaken inference has followed that the legislature could delegate and had delegated this power of incorporation to the courts; whereas the effect of the legislation has been merely to confer upon the courts the ministerial functions necessary to organize municipal corporations and set them in motion. The matter of difficulty and of difference in the cases upon this subject is not the delegability of legislative power, on which there is general consensus of opinion; but rather the determination of what is and what is not a legislative function. See People *v.* Fleming, 10 Colo. 553, 557, 16 Pac. 298; People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107; Kayser *v.* Bremen, 16 Mo. 88; and other cases above cited.

municipalities shall take effect and become a law;[74] but in most states it is not an unconstitutional delegation of legislative power to pass a law for the incorporation of municipalities and leave it to the vote or other action of the people whether they will organize and become incorporated thereunder.[75]

4. Municipal Assent to Incorporation. The arbitrary erection of a municipality in any community regardless of the will of the inhabitants, although within the competency of the sovereign legislative power in the absence of constitutional restriction,[76] is utterly antagonistic to the Anglo-Saxon spirit and foreign to the genius of American institutions.[77] It would operate to deprive the people of that home rule which is a peculiar characteristic of the American system of self-government, and commonly regarded as a bulwark of civil liberty.[78] It would assimilate our municipalities to cities and communes of centralized governments and make them the abject instruments of imperial authority.[79] A corporation thus arbitrarily created and operated by external power or sovereign deputies, although it might have the legal body or form of a municipal corporation, would be lacking in its essence and spirit.[80] It would not be the Roman municipium, nor the Anglo-Saxon municipality exercising the power of self-government in all matters peculiarly local and municipal,[81] but rather a public quasi-corporation constituted to enforce the imperial will or centralized authority of the state.[82]

5. Differences in Incidents. This local quasi-corporation, whether created by general law or special act of legislation, has no *jura regalia*,[83] or other franchises,

Power to annex territory to municipal corporations given to circuit courts by Ark. Act, April 28, 1873, did not imply or include power to create such corporations. State *v.* Leatherman, 38 Ark. 81.

74. Barto *v.* Himrod, 8 N. Y. 483, 59 Am. Dec. 506; People *v.* Stout, 23 Barb. (N. Y.) 349; Bradley *v.* Baxter, 15 Barb. (N. Y.) 122; Thorne *v.* Cramer, 15 Barb. (N. Y.) 112.

75. *California.*— People *v.* Nally, 49 Cal. 478.

Colorado.— People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

Illinois.— Guild *v.* Chicago, 82 Ill. 472; People *v.* Salomon, 51 Ill. 37.

Kentucky.— Clarke *v.* Rogers, 81 Ky. 43.

Mississippi.— Alcorn *v.* Hamer, 38 Miss. 652.

Missouri.— State *v.* Wilcox, 45 Mo. 458.

New York.— Clarke *v.* Rochester, 28 N. Y. 605 (holding that if an act by its terms is to take effect immediately, a provision that certain powers conferred upon a municipal corporation are not to be exercised until approved by a vote of the inhabitants, is not unconstitutional as a delegation of legislative power); Chenango Bank *v.* Brown, 26 N. Y. 467; Corning *v.* Greene, 23 Barb. 33.

Pennsylvania.— Com. *v.* Judges Quarter Sess., 8 Pa. St. 391.

Virginia.— Bull *v.* Read, 13 Gratt. 78.

United States.— Currier *v.* West Side El. Patent, etc., R. Co., 6 Fed. Cas. No. 3,493, 6 Blatchf. 487.

See also *infra*, II, A, 13, c; II, A, 14, b, (v).

76. See *infra*, II, A, 13, c; II, A, 14, b, (v).

77. Hamilton County *v.* Mighels, 7 Ohio St. 109; Cooley Const. Lim. (6th ed.) 139; 1 Hume Hist. England, App. II; Norton Hist. London, c. 20. See also Prince George's County Com'rs *v.* Bladensburg, 51 Md. 465; People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

78. See People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Markle *v.* Akron, 14 Ohio 586; Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382; Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637. See also *infra*, IV, A; and Constitutional Law, 8 Cyc. 779.

79. The houses of Bourbon, Hapsburg, and Romanoff well nigh accomplished on the continent of Europe what the Stuarts temporarily effected in England; and scarce the semblance of municipal freedom was to be found in their domains at the beginning of the nineteenth century. The story in them all is that told of France by Guizot in his History of Civilization, Lecture XIX. The cities of Europe for four centuries were generally ruled, not by the citizens and burghers, but by imperial and royal governors called mayors by courtesy only. See also Hallam Middle Ages, c. 11, pt. 2.

80. Montesquieu Spirit of Laws, bk. 2, c. 2.

81. The Roman municipium was "a community of which the citizens are members of the whole nation, all possessing the same rights and subject to the same burdens, but retaining the administration of law and government in all local matters which concern not the state at large." Liddell Rome, c. 27, § 8.

82. For an example of such a corporation see Perkins *v.* Slack, 86 Pa. St. 270, wherein is recounted the erection by the state of Pennsylvania for the city of Philadelphia of its magnificent city hall by forced levies on the protesting citizens.

83. Regal rights. In England especially those royal powers delegated to the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster to be exercised by them

powers, or privileges of sovereign nature, to grant which was the peculiar office of a charter;[84] nor any of the common-law incidents of a corporation inhering in it as a body politic and corporate.[85] But no municipal corporation is created without a charter, whatever may be its form or source, which endows it with some measure of sovereign power, especially of taxation, legislation, and eminent domain;[86] and in it inheres those incidental qualities of a corporation mentioned by Coke, Blackstone, and Kent, such as corporate name for purchase and alienation, suing and being sued, perpetual succession, having a common seal, and making by-laws.[87]

6. Constitutional Provisions. The inherent and inalienable power of the legislative department to create corporations[88] is limited in many of the United States by provisions in their respective constitutions.[89] Some of these limitations, in general terms, include all corporations, public and private;[90] some specially

respectively in those several counties, which were therefore given the German name "Counties Palatine," so-called *a palatio*. 1 Blackstone Comm. 117. In the United States the term is by analogy peculiarly applicable to such sovereign rights or powers as may be delegated by the state or federal union to the municipal corporation.

84. By immemorial usage, antedating *magna charta*, the word "charter" has been made the sacred vehicle for transferring from the sovereign to the subject or citizen the dearest human rights, franchises, and immunities, and especially those delegated to boroughs, cities, and colonies. 1 Blackstone Comm. 108; 8 Coke 1*a*, 5*b*; Encycl. Brit. tit. "Charter"; 1 Story Com. Const. 145.

85. Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193; Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58; Hamilton County *v.* Mighels, 7 Ohio St. 109.

86. Rutter *v.* Chapman, 10 L. J. Exch. 495, 8 M. & W. 1; Quinette *v.* St. Louis, 76 Mo. 402; Cooley Const. Lim. (6th ed.) 227; Arnold Mun. Corp. c. 2.

87. Sutton's Hospital Case, 10 Coke 30*b*; 1 Blackstone Comm. 475, 476; 2 Kent Comm. (9th ed.) 277, 278.

88. See *supra*, I, A, 2.

89. The power to create corporations, although expressly conferred and enjoined in a few American state constitutions, is a sovereign function of the legislative department of government to be exercised freely according to its discretion, except only as restricted or directed by the constitution.

California.— People *v.* Riverside, 70 Cal. 461, 11 Pac. 759.

New Hampshire.— New Boston *v.* Dunbarton, 12 N. H. 409.

New Jersey.— Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 16 N. J. Eq. 321.

New York.—Thomas *v.* Dakin, 22 Wend. 9.

Ohio.— State *v.* Covington, 29 Ohio St. 102.

Tennessee.— State *v.* Wilson, 12 Lea 246; Trigally *v.* Memphis, 6 Coldw. 382; Nichol *v.* Nashville, 9 Humphr. 252; Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.

Nev. Act, Feb. 25, 1875 (St. (1875) p. 87), to incorporate Carson city, is not repugnant to Const. art. 8, § 8, requiring the legislature to restrict a city's power of loaning its credit, although the act makes no provision for such a restriction, since it grants to the city no such power. State *v.* Swift, 11 Nev. 128.

N. J. Act, March 12, 1890 (Pub. Laws, p. 58), authorizing the holding of an election for the acceptance of a scheme of municipal government by the electors of an area of given size and value, upon which resides for any period of the year a population of two hundred, is unconstitutional, since the temporary presence of two hundred persons, not required to be possessed of any element of citizenship or residence, is a purely figmentary characteristic and can in no way be germane to the exercise of local municipal franchises by the inhabitants who are possessed of the constitutional and legislative requirements of electors. Atty.-Gen. *v.* Anglesea, 58 N. J. L. 372, 33 Atl. 971.

The recognition in the New York constitution of the established division of the state into counties, cities, and towns does not take from the legislature the power of establishing additional civil divisions for general and permanent objects of government, not inconsistent with the usefulness of existing divisions for the purposes contemplated by the constitution. People *v.* Draper, 15 N. Y. 532.

Constitutional provision for apportionment of senators and representatives.— The power of the legislature to organize counties, towns, and cities is not limited or restricted by the constitutional provisions concerning the apportionment of senators and representatives once in every five years. Slauson *v.* Racine, 13 Wis. 398.

90. *California.*— Const. (1880) art. 12, § 1.

Illinois.— Const. (1870) art. 11, § 1.

Kansas.— Const. (1859) art. 12, § 1, providing that corporations may be created under general laws, and that the legislature shall pass no special act conferring corporate powers, applies to municipal corporations. Atchison *v.* Bartholow, 4 Kan. 124.

Mississippi.— Const. (1890) § 87.

Missouri.— Const. (1875) art. 4, § 53.

Nebraska.— Const. (1885) art. 11*b*, § 1.

name the particular class of corporations affected or excepted,[91] while others in general terms have been confined by judicial construction to a particular class of corporations.[92] The most common of these limitations is that one which in general terms forbids the legislature to pass any special act to create or alter a corporation.[93] This inhibition affecting municipalities, which is usually coupled with the positive mandate to provide by general law for municipal incorporation, is found in the constitutions of Arkansas,[94] California,[95] Illinois,[96] Indiana,[97] Iowa,[98]

New Jersey.— Const. (1844) art. 4, § 7, p. 11.

Ohio.— Const. (1851) art. 13, § 1.

Pennsylvania.— Const. (1874) art. 3, § 7.

Tennessee.— Const. (1870) art. 11, § 8.

West Virginia.—Const. (1872) art. 11, § 1.

Wisconsin.— Const. (1848) art. 11, § 1.

91. *Alabama.* — "Corporations may be formed under general laws, but shall not be created by special act, except for municipal . . purposes," etc. Const. (1875) art. 14, § 1.

Colorado.— "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal . . . corporations as are or may be under the control of the state." Const. (1876) art. 15, § 2.

Florida.— "The legislature shall establish a uniform system of county and municipal government, which shall be applicable, except in cases where local or special laws are provided by the legislature that may be inconsistent therewith." Const. (1885) art. 3, § 24.

Idaho.— Same as in Colorado. Const. (1889) art. 11, § 2.

Kentucky.— "The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." Const. (1891) § 156.

Maine.— "Corporations shall be formed under general laws, and shall not be created by special acts of the Legislature, except for municipal purposes, etc." Const. (1876) art. 4, § 14.

Maryland.— Same as in Alabama. Const. (1876) art. 3, § 48.

Michigan.— Same as in Alabama. Const. (1850) art. 15, § 1.

Minnesota.— "No corporations shall be formed under special acts, except for municipal purposes." Const. (1857) art. 10, § 2.

Nevada.— "The legislature shall pass no special Act in any manner relating to corporate powers, except for municipal purposes," etc. Const. (1864) art. 8, § 1.

New York.— Same as in Alabama. Const. (1900) art. 8, § 1.

North Carolina.— Same as in Alabama. Const. (1868) art. 8, § 1.

Oregon.— Same as in Alabama. Const. (1857) art. 11, § 2.

Wisconsin.— "Corporations . . . may be formed under general laws, but shall not be created by special act, except for municipal purposes." Const. (1848) art. 11, § 1. It shall be the duty of the legislature and they are hereby empowered to provide for the organization of cities and incorporated villages, etc. Const. (1848) art. 11, § 3.

Wyoming.— "The legislature shall not pass local or special laws . . . for incorporation of cities, towns or villages." Const. (1899) art. 3, § 27. "The legislature shall provide by general laws for the organization and classification of municipal corporations," etc. Const. (1899) art. 13, § 1.

Preëxisting corporations under special acts not affected by constitution see Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234.

92. State *v.* Wilson, 12 Lea (Tenn.) 246, holding that Const. art. 11, § 8, providing that "no corporation shall be created or its powers increased or diminished by special laws," limits the power of the legislature as to private corporations, but not as to municipal corporations. See *infra*, II, A, 13, a.

93. See *supra*, this section, note 90.

General law not including municipalities under prior special charters.— N. J. Acts (1895), p. 218, providing for the formation of town governments, is not unconstitutional, because not including towns incorporated by special charter prior to the passage of the general act for the incorporation of towns. Butler *v.* Montclair, 67 N. J. L. 426, 51 Atl. 494.

94. "The general assembly shall pass no special act conferring corporate powers, except for charitable, educational, penal or reformatory purposes . . . to be and remain under the patronage and control of the state." Ark. Const. (1874) art. 12, § 2. "The general assembly shall provide, by general laws, for the organization of cities (which may be classified) and incorporated towns." Ark. Const. (1874) art. 12, § 3.

95. "Corporations may be formed under general laws, but shall not be created by special act." Cal. Const. (1880) art. 12, § 1.

96. "No corporation shall be created by special laws, or its charter extended, changed or amended . . . but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created. Ill. Const. (1870) art. 11, § 1.

97. "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Ind. Const. (1851) art. 11, § 212.

98. "The general assembly shall not pass local or special laws . . . for the incorpora-

Kansas,[99] Minnesota,[1] Mississippi,[2] Missouri,[3] Nebraska,[4] New Jersey,[5] North Dakota,[6] Ohio,[7] Pennsylvania,[8] South Carolina,[9] South Dakota,[10] Utah,[11] Virginia,[12] Washington,[13] and West Virginia.[14] The territories of the United States by the "Harrison Act" are likewise forbidden to incorporate municipal corporations by special legislation.[15] This provision is held not to be applicable to municipal corpo-

tion of cities and towns." Iowa Const. (1857) art. 3, § 30. No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created," etc. Iowa Const. (1857) art. 8, § 1.

99. "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed." Kan. Const. (1859) art. 12, § 1. "Provision shall be made by general law for the organization of cities, towns and villages." Kan. Const. (1859) art. 12, § 5.

1. "The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district," etc. Minn. Const. art. 4, § 33, as amended 1892.

2. "No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law," etc. Miss. Const. (1890) art. 4, § 87. "The legislature shall pass general laws . . . under which cities and towns may be chartered and their charters amended," etc. Miss. Const. (1890) art. 4, § 88.

3. "The General Assembly shall not pass any local or special law . . . creating corporations, or amending, renewing, extending or explaining the charter thereof." Mo. Const. (1875) art. 4, § 53. "The General Assembly shall provide, by general laws, for the organization and classification of cities and towns." Mo. Const. (1875) art. 11, § 7.

4. Same as in Illinois. Nebr. Const. (1885) art. 11*b*, § 1.

5. "The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature." N. J. Const. (1844) art. 4, § 7, par. 11.

6. "The legislative assembly shall not pass local or special laws . . . for the incorporation of cities, towns or villages, or changing or amending the charter of any town, city or village." N. D. Const. (1889) art. 2, § 69. "The legislative assembly shall provide by general law for the organization of municipal corporations," etc. N. D. Const. (1889) art. 4, § 130.

7. "The general assembly shall pass no special act conferring corporate powers." Ohio Const. (1851) art. 13, § 1. "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws," etc. Ohio Const. (1851) art. 13, § 6.

8. "The general assembly shall not pass any local or special law . . . creating corporations or amending, renewing or extending the charters thereof." Pa. Const. (1874) art. 3, § 7.

9. "The General Assembly of this State shall not enact local or special laws . . . to incorporate cities, towns or villages, or change, amend or extend the charter thereof." S. C. Const. (1895) art. 3, § 34.

10. "The legislature is prohibited from enacting any private or special laws . . . incorporating cities, towns and villages or changing or amending the charter of any town, city or village," etc. S. D. Const. (1899) art. 3, § 23. "The legislature shall provide by general laws for the organization and classification of municipal corporations." S. D. Const. (1899) art. 10, § 1.

11. "Corporations for municipal purposes shall not be created by special laws; the Legislature, by general laws, shall provide for the incorporation, organization, and classification of cities and towns in proportion to population," etc. Utah Const. (1895) art. 11, § 5.

12. "General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in Article Four of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house." Va. Const. (1902) art. 7, § 117. "The General Assembly may, by general laws, confer upon . . . the councils of cities and towns, such powers of local and special legislation, as it may from time to time deem expedient, not inconsistent with the limitations contained in this Constitution." Va. Const. (1902) art. 4, § 65.

13. "The legislature is prohibited from enacting any private or special laws . . . for incorporating any town or village, or to amend the charter thereof." Wash. Const. (1899) art. 2, § 28.

14. "The Legislature shall provide for the organization of all corporations hereafter to be created, by general laws, uniform as to the class to which they relate; but no corporation shall be created by special law." W. Va. Const. (1872) art. 11, § 1.

15. "The legislatures of the Territories of the United States . . . shall not pass local or special laws . . . incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village." 1 Supp. U. S. Rev. St. p. 503, being c. 818, 49th Cong. 1st Sess. July 30, 1886.

rations in Tennessee.[16] In this state therefore, as well as in those states where there are no constitutional limitations, the legislature still exercises the power to create municipalities by special act;[17] thereby giving to each corporation its own peculiar powers, privileges, and franchises, and presenting a confusing panorama of varied features of municipal law.[18] In the rest of the foregoing states the prohibition is applied to all corporations and in them the creation of municipalities is effected under general legislation only.[19] In some states there are special provisions giving authority to charter cities in towns of sufficient population.[20] In others the right of local self-government is fully recognized and established by express constitutional authority to cities of certain population to frame and adopt their own charters, in like manner as the people of a state in the exercise of inherent sovereignty frame their own constitution.[21] In some states constitutional pro-

16. See *supra*, this section, note 92.

17. Beside the states named *supra*, note 91, those exercising this power are Connecticut, Delaware, Georgia, Massachusetts, New Hampshire, Tennessee, Texas, and Vermont.

Under the former Missouri constitution (art. 8, § 4), prohibiting the creation of corporations by special acts except "for municipal purposes," it was held that this contemplated that no corporation independent of a city government should perform any of the functions thereof; and that a corporation "for municipal purposes," which the constitution permitted to be created by a special act, was either a municipality, such as a city or town, created expressly for local self-government with delegated legislative powers, or a subdivision of the state for governmental purposes, such as a county, a school-district, or road district, etc.; but that it must embrace some of the functions of government, local or general. State *v.* Leffingwell, 54 Mo. 458.

18. This lack of uniformity in municipalities of the same class and grade in the same state has caused all recent state constitutional conventions to forbid special legislation for the creation of municipal corporations. See *supra*, notes 94–14.

19. See *supra*, note 90 *et seq.*

20. *Massachusetts.*— "The general court [assembly] shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth . . . provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose." Const. Amendm. art. 2.

Pennsylvania.— "Cities may be chartered, whenever a majority of the electors of any town or borough, having a population of at least ten thousand, shall vote, at any general election, in favor of the same." Const. (1874) art. 15, § 1.

Rhode Island.— "Hereafter the general assembly may provide by general law for the creation and control of corporations," etc. Const. art. 4, § 17.

Texas.— "Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law." Const. (1876) art. 11, § 4. "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature," etc. Const. (1876) art. 11, § 5.

West Virginia.— "The Legislature shall not pass local or special laws . . . incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand." Const. (1872) art. 6, § 39.

Wisconsin.— See State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

21. In California "any city containing a population of more than three thousand five hundred inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State," etc. Cal. Const. art. 11, § 8 (Am. ed. 1902). In Missouri there is the same provision for a "city having a population of more than one hundred thousand inhabitants." Mo. Const. art. 9, § 16. See Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943. And in Washington there is the same provision for a "city containing a population of twenty thousand inhabitants or more." Wash. Const. art. 11, § 10. In Minnesota "any city or village in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state." Minn. Const. Amendm. (1897) art. 4, § 36. See State *v.* St. Louis County Dist. Ct., 90 Minn. 457, 97 N. W. 132. Minn. Const. art. 4, § 36, authorizing a city to frame a charter for its own government, to be submitted "at the next election thereafter," authorized such submission at either a general or special election. State *v.* Kiewel, 86 Minn. 136, 90 N. W. 160.

Extent of power under such provision.— The power and authority conferred by the constitution upon cities to frame their own charters extends to and embraces any subject appropriate to the orderly conduct of municipal affairs. State *v.* St. Louis County Dist. Ct., 90 Minn. 457, 97 N. W. 132; State *v.* O'Connor, 81 Minn. 79, 83 N. W. 498. Within this rule the matter of the presentation of claims against the city, the auditing and al-

visions are to the effect: (1) That the legislature shall not pass a special or local bill incorporating villages;[22] that no special act shall be passed "to create corporations for municipal purposes";[23] and (3) requiring notice of application for special legislation.[24] In most states the legislature has the same power to increase or diminish the powers of or dissolve corporations as it has to create new ones and define their powers.[25] In some states there is a provision for a uniform system of county, town, and municipal government.[26] The powers of congress in this particular are unlimited by the constitution, and it may charter municipalities in the territories either by general or special act.[27] Acts partially repugnant to these constitutional provisions have in some cases been held void *in toto*,[28] and in some cases valid except as to those parts in conflict with the constitution.[29] Some constitutional provisions in relation to the incorporation of municipalities are self-executing, while others are not.[30]

7. Classes and Grades of Corporations. The classification of corporations is not general and uniform, but a matter peculiar to each state and sovereignty. It is usually based upon population, and the various classes are called cities, towns, boroughs, villages, and hamlets.[31] City is the name in common use in all states to describe a municipality of the higher grade and greater population.[32] Town is used in New England to define the political unit which is almost a municipality;

lowing of the same, and the manner and proceedings for reviewing the action of the auditing body, are appropriate subjects for charter supervision and regulation. State *v.* St. Louis County Dist. Ct., *supra*. So also is the condemnation of land for public use. State *v.* Ramsey County Dist. Ct., 87 Minn. 146, 91 N. W. 300. See also Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

Effect of charter as superseding general statutes.— The special charter and amendments framed and adopted by a city under such a constitutional provision supersede the general statutes, where the two conflict as to a mere municipal regulation; and condemnation proceedings to acquire lands for streets, parks, waterworks, sewers, etc., are mere matters of municipal regulation within this rule. Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

Power of legislature to amend charter see *infra*, II, C, 1, a.

22. N. Y. Const. (1900) art. 3, § 18.

23. See *supra*, notes 98, 1, 6, 9–13, 15.

24. "No local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated." Ga. Const. (1877) art. 3, § 6, p. 16. But in Rhode Island a somewhat similar provision was held not applicable to municipal corporations. State *v.* Narragansett Dist., 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295.

25. See *supra*, notes 91, 92, 96, 3, 4, 6, 8–10, 13. See also *infra*, II, B; II, C; IV.

26. *California.*— Const. art. 2, § 4.
Florida.— Const. art. 4, § 21.
Georgia.— Const. art. 2, § 31.
Missouri.— Const. art. 9, § 7.
Nevada.— Const. art. 4, § 25.
Wisconsin.— Const. art. 4, § 23.

27. U. S. Const. art. 1, §§ 8, 9.

28. *In re* Council Grove, 20 Kan. 619; Gilmore *v.* Norton, 10 Kan. 491; Atty.-Gen. *v.* Anglesea, 58 N. J. L. 372, 33 Atl. 971; State *v.* Pugh, 43 Ohio St. 98, 1 N. E. 439; State *v.* Cincinnati, 20 Ohio St. 18.

29. Brooks *v.* Fischer, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429; Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740.

30. **Self-executing constitutional provisions** generally see Constitutional Law, 8 Cyc. 752 *et seq.*

Cal. Const. art. 11, § 8, providing for the framing of charters by cities of more than one hundred thousand inhabitants, is self-executing and requires no legislation to give it effect. People *v.* Hoge, 55 Cal. 612.

Wash. Const. art. 11, § 10, authorizing a city of more than twenty thousand inhabitants to frame a charter, is not self-executing, so as to invalidate an act prescribing the manner of exercising such power. Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

Wyo. Const. art. 13, § 2, declaring that "no municipal corporation shall be organized without the consent of the majority of the electors residing within the district proposed to be so incorporated, such consent to be ascertained in the manner and under such regulations as may be prescribed by law," is not self-executing, and did not, without legislation to carry it into effect, by implication repeal the then existing law authorizing the incorporation of towns on the application of thirty electors. State *v.* Lamoureux, 3 Wyo. 731, 30 Pac. 243.

31. State *v.* Steunenberg, 5 Ida. 1, 45 Pac. 462; Stephens *v.* Felton, 99 Ky. 395, 35 S. W. 1116, 18 Ky. L. Rep. 248; Green *v.* Com., 95 Ky. 233, 24 S. W. 610, 16 Ky. L. Rep. 161; State *v.* Babcock, 25 Nebr. 709, 41 N. W. 654; People *v.* Page, 6 Utah 353, 23 Pac. 761.

Organic and ordinary is a classification not recognized in Louisiana. Reynolds *v.* Baldwin, 1 La. Ann. 162.

32. Black L. Dict. tit. "City"; Standard Dict. tit. "City."

but in other portions of the United States it describes a county-seat or other populous community, usually incorporated and next to a city in grade and importance.[33] Boroughs exist in New Jersey and Connecticut and are numerous in Pennsylvania.[34] This word, used in England to designate an ancient town, corporate or not, that sent burgesses to parliament,[35] is employed in a few American states to describe a part of a town or township having a municipal charter.[36] "Village" is the common term used to describe the lowest grade of corporations in Illinois,[37] Kansas,[38] Michigan,[39] Nebraska,[40] New York,[41] Vermont,[42] and some other states.[43] In Ohio a hamlet may be incorporated as part of a township, the very least of municipalities.[44] In many states cities are by constitution or general law classified according to population into cities of the first, second, third, and even fourth class,[45] and certain additional powers and franchises are conferred upon each higher class or grade not granted to those in the lower class, for example,

33. Black L. Dict. tit. "Town"; 15 Am. Encycl. tit. "Town." And see Martin *v.* People, 87 Ill. 524; Com. *v.* Rose, 105 Ky. 326, 49 S. W. 29, 20 Ky. L. Rep. 1220.

As including borough.— The word "town" as used in N. J. Pub. Laws (1895), p. 551, § 1, providing that the inhabitants of any district lying wholly in one county and having a certain population may become incorporated as a city, but that such district shall not include any territory already within the limits of any "incorporated city or town," means any municipal corporation above the grade of township, and below that of city, and therefore includes an incorporated borough. Stout *v.* Glen Ridge, 59 N. J. L. 201, 35 Atl. 913.

As including village.— Under Ida. Const. art. 12, § 1, providing that the legislature shall by general law provide for the organization of cities and towns, and the act of Feb. 2, 1899, § 1, providing for the issue and sale of municipal bonds by cities or towns, a village organized under the general laws is included within the word "town." Brown *v.* Grangeville, 8 Ida. 784, 71 Pac. 151. Where, on the organization of a village, the statute in regard to the organization of villages was followed, it was held that the fact that in some of the proceedings it was designated as a town, and that the name adopted was "The Town of ——," did not invalidate the organization. People *v.* Pike, 197 Ill. 449, 64 N. E. 393.

As including city.— The word "town" is often used to embrace cities as well as villages, and when the expression "incorporated town" is used in an act it may include cities, unless the contrary appears from the whole statute to have been the intent of the legislature. Smithville *v.* Lee County Dispensary Com'rs, 125 Ga. 559, 54 S. E. 539.

34. The Pennsylvania boroughs number more than seven hundred. *In re* Millville Borough, 10 Pa. Co. Ct. 321, per Ikeler, P. J. A borough is a public municipal corporation, and has within its sphere all the powers necessary for its corporate existence. Lansdowne *v.* Delaware County, etc., Electric R. Co., 9 Pa. Super. Ct. 621, 7 Del. Co. 398; Lansdowne *v.* Citizens' Electric Light, etc., Co., 9 Pa. Super. Ct. 620, 7 Del. Co. 399; Ridley Park *v.* Citizen's Electric Light, etc., Co., 9 Pa. Super. Ct. 615, 7 Del. Co. 395.

Whether corporation is a borough.— Where a municipality was created by an act to incorporate Washington, in the county of W., etc., into a borough or town corporate, and the first section declared that Washington was constituted a town corporate and should be known as "the inhabitants of the borough of Washington," it was held that Washington was a borough. Tuttle *v.* Washington, (N. J. Sup. 1902) 52 Atl. 1101.

35. 1 Blackstone Comm. 114.

36. Oil City *v.* MacAloy, 74 Pa. St. 249, 1 Leg. Chron. (Pa.) 331; Pa. Act, April 3, 1851.

37. Hyde Park *v.* Borden, 94 Ill. 26.

38. Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558.

39. Evart *v.* Postal, 86 Mich. 325, 49 N. W. 53.

40. Ponca *v.* Crawford, 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144.

41. Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550.

42. Winooski *v.* Gokey, 49 Vt. 282.

43. Pine City *v.* Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; Green City *v.* Holsinger, 76 Mo. App. 567.

44. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288. A hamlet is governed by three trustees, who are vested with the powers of legislation, taxation, and other usual municipal powers. 1 Bates Annot. St. Ohio, § 1536–889, 894–6.

45. See the constitutions and statutes of the various states.

Construction and effect of statutes see the following cases:

Nebraska.— State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New Jersey.— Wood *v.* Atlantic City, 56 N. J. L. 232, 28 Atl. 427; *In re* Passaic Sewer Assessment, 54 N. J. L. 156, 23 Atl. 517.

Ohio.— Hayes *v.* Cleveland, 55 Ohio St. 117, 44 N. E. 518; State *v.* Wall, 47 Ohio St. 499, 24 N. E. 897; State *v.* Maxfield, 9 Ohio Cir. Ct. 26, 6 Ohio Cir. Dec. 11.

Pennsylvania.—Hoffman *v.* Mathes, 6 Lanc. L. Rev. 89; Phœnix *v.* Reynolds, 13 Phila. 522.

power to tax for and establish a sewer system in cities of first, second, and third class, but not of the fourth class;[46] or power to cities of a certain class to frame their own charters.[47] Pennsylvania formerly carried this division of cities as high as the sixth class;[48] and Ohio divides her classes into grades, whereunder a city is declared to be of the "second grade, first class."[49] The statute usually provides the method whereby the transfer or advance from a lower to a higher grade or class by increase of population may be effected and determined, so that the city may *ipso facto* assume the added powers and franchises; but unless the statute so provides the method is not exclusive.[50]

8. WHAT BODIES MAY BE INCORPORATED.[51] Except in so far as it is controlled by constitutional provisions,[52] the legislature has the power to determine what bodies shall be incorporated.[53] It may and frequently does require a certain

Utah.— People *v.* Page, 6 Utah 353, 23 Pac. 761.

Washington.— Rohde *v.* Seavey, 4 Wash. 91, 29 Pac. 768.

See 36 Cent. Dig. tit. "Municipal Corporations," § 9.

Effect of classification as creating corporation.— The Kentucky act of Sept. 30, 1892 (St. § 2744), classifying cities and towns, did not create towns, but applied only to those already established; and the fact that it classified as a town territory which was not incorporated as such, but was a civil district only, did not constitute such territory a town. Stephens *v.* Felton, 99 Ky. 395, 35 S. W. 1116, 18 Ky. L. Rep. 248.

Constitutionality of statute.— The Pennsylvania act of May 23, 1874, dividing cities into classes, etc., with a clause making it optional with the cities whether or not they would become subject to its provisions, was held unconstitutional as in violation of Const. art. 3, § 7, prohibiting specified local legislation. *In re* Sixteenth St. Opening, 4 Pa. Co. Ct. 124.

Estoppel of city to assert unconstitutionality.— The adoption of said act by a city council will not estop the city from asserting its unconstitutionality on exceptions to the reports of viewers assessing damages to a landowner for land taken by the opening of a street in the city. *In re* Sixteenth St. Opening, 4 Pa. Co. Ct. 124.

Power of courts.— Under Ky. Const. § 156, providing that the general assembly shall assign the cities and towns of the state to the classes to which they belong and change assignments as the population varies, but that no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor, where the general assembly has assigned a city to a certain class, it cannot be taken out of such class by a court because it has not the requisite population to entitle it to be so classified. Green *v.* Com., 95 Ky. 233, 24 S. W. 610, 16 Ky. L. Rep. 161.

Statutes violating constitutional provision as to classification.— Mo. Act, April 1, 1893, empowering every city organized under Const. art. 9, § 16, to establish a system of parks and boulevards, providing the methods for condemning land therefor, and declaring that the act shall take effect, "any provisions in the charter of any such city to the contrary notwithstanding," is in violation of Const. art. 9, § 7, providing that the general assembly shall provide for the classification of cities and towns, but that the number of such classes shall not exceed four, and that the power of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same provisions, it appearing that the assembly had previously created four classes, since the effect of such statute is to create another class. Kansas City *v.* Scarritt, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111. The said section 7 of the constitution, however, does not prevent the application of general laws to cities having special charters; and therefore it was held that such provision was not violated by the act of March 28, 1881, authorizing a sewerage system in cities of a certain size and acting under special charter. Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249.

Class of city judicially noticed see People *v.* Page, 6 Utah 353, 23 Pac. 761.

46. Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249.

47. Cal. Const. art. 11, § 8; Minn. Const. Amendm. (1896); Mo. Const. art. 9, § 16. See *supra*, II, A, 6, text and note 21.

48. Pa. Act, May 23, 1874. But recently the classes have been reduced to three. Act June 25, 1895; Pamphl. Laws, p. 275, § 1.

49. Hayes *v.* Cleveland, 55 Ohio St. 117, 44 N. E. 518.

50. People *v.* Page, 6 Utah 353, 23 Pac. 761. See State *v.* Steunenberg, 5 Ida. 1, 45 Pac. 462; Brady *v.* State, 59 Ohio St. 546, 53 N. E. 63 [*reversing* State *v.* Brady, 16 Ohio Cir. Ct. 509, 9 Ohio Cir. Dec. 193; Com. *v.* Rose, 105 Ky. 326, 49 S. W. 29, 20 Ky. L. Rep. 1220.

51. **Organization of existing corporation under general laws** see *infra*, II, A, 14, a, (II).

52. See *infra*, II, A, 6.

53. Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; People *v.* Draper, 15 N. Y. 532; State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. See *supra*, II, A, 2, b; *infra*, II, A, 12, a.

Ohio Rev. St. § 1561a, pertaining to ham-

number of inhabitants;[54] and it may also prescribe the area of the territory.[55] While the legislature may provide by general law for the incorporation of any community or territory, however insignificant, the body seeking incorporation must show itself to be substantially within the terms of the legislative requirement.[56] Thus, where provision is made for the incorporation of a village or town on petition of a majority of the taxable inhabitants, such privilege cannot be obtained by the people of a rural district without compact center or nucleus of population or plotted lands, for they do not constitute a village or town in the ordinary sense of the term.[57] But where the borough system prevails, two contiguous villages which practically adjoin each other and are connected by a common system of streets may be joined into a single incorporated borough;[58] as may also a town needing drainage, lights, streets, and police protection, which cannot be procured through township government.[59] The question of necessity or expediency of incorporating a village and adjacent territory into a borough in Pennsylvania does not depend so much upon the will of a majority of the freeholders residing outside the limits of the proposed borough, or upon the unanimous consent of those residing within the proposed lines, as it does upon the

lets, was passed for the purpose of allowing part of a township to become incorporated because its needs are different from adjacent territory; and, while it cannot be said to be fraudulent, it is against public policy to defeat the purpose of the statute by allowing a whole township to become a hamlet for the sole purpose of keeping the smaller territory from forming itself into a hamlet, especially where it desires to retain the smaller part because of the revenue arising from taxes. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288.

54. State *v.* Bilby, 60 Kan. 130, 55 Pac. 843; *In re* Elba, 30 Hun (N. Y.) 548; State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. See also *infra*, II, A, 12, a.

Number of inhabitants.— The legislature has a discretion uncontrolled by any constitutional limitation, to decide when a given locality has a sufficient number of inhabitants to entitle it to be incorporated as a city. Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

In Pennsylvania the court of quarter sessions has the power, under the act of April 3, 1851, § 21, to incorporate a borough without regard to its population, and the soundness of the discretion exercised by it is not the subject of review. *In re* Sewickley, 36 Pa. St. 80, 2 Grant 135. See also *In re* Blooming Valley, 56 Pa. St. 66; Philadelphia, etc., Coal, etc., Co. *v.* Ashland, 1 Leg. Rec. 130.

An actual resident of territory which it is sought to incorporate into a village, within a statute requiring that there must be a certain number of actual residents of such territory to authorize the incorporation, is one who is in the place with intent to establish, or who has already established, his domicile there. State *v.* Mote, 48 Nebr. 683, 68 N. W. 810. See also *infra*, II, A, 14, b, (II), (B), text and note 75.

55. State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. Under Hurd Rev. St. Ill. (1899) c. 24, par. 182, providing that an area of contiguous territory not exceeding two square miles may be incorporated as a village, the area so incorporated may be less than, but cannot exceed, two square miles. People *v.* Marquiss, 192 Ill. 377, 61 N. E. 352.

56. *In re* Elba, 30 Hun (N. Y.) 548; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743. See also State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

57. State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498. See also State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

Colo. Gen. St. § 3299, which provides for incorporation "when the inhabitants of any part of any county, not embraced within the limits of any city or incorporated town, shall desire to be organized into a city or incorporated town," etc., setting forth the mode of procedure, does not apply exclusively to inhabitants of unincorporated towns, villages, settlements, or collections of houses, but to any part of the county not within an incorporated town or city. People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

58. *In re* Eddystone, 3 Del. Co. (Pa.) 541. When a number of distinct villages have coalesced by the growth of population, they may be incorporated as a borough although the different parts which have grown into one community may continue to be known locally by their original designations. *In re* Alliance Borough, 19 Pa. Super. Ct. 178.

59. *In re* Narberth Borough, 16 Pa. Co. Ct. 32.

Incorporation of town or village into borough.— Under Pa. Act (1834), § 1 (Pub. Laws 163), conferring power upon the court of quarter sessions with the concurrence of the grand jury to incorporate "any town or village within their jurisdiction," the locality sought to be incorporated into a borough must possess the character of a town or village, but if a proposed borough contains a small assemblage of houses, collocated on the plan of streets and lanes, it is a village, within the meaning of the statute. *In re* Edgewood Borough, 130 Pa. St. 348, 18 Atl. 646.

fact that the advantages to the whole people as a community will overbalance the disadvantages.[60]

9. TWOFOLD INCORPORATION. The axiom of physics that two bodies cannot occupy the same space at the same time finds general application in the law of municipal corporations and prevents the inclusion of the same territory within the boundaries of two distinct corporations.[61] Confusion, repugnancy, and strife would certainly result from the attempted exercise of the same sovereign functions over the same territory and people by separate authorities.[62] But this rule does not prevent the state from establishing and maintaining both county and municipal government over the same territory by separate governmental officers and agencies, and in a number of states this has been done.[63] So too a municipal

60. *In re* Prospect Park Borough, 166 Pa. St. 502, 31 Atl. 254; *In re* Millville Borough, 10 Pa. Co. Ct. 321. It has been held therefore that the fact that the people within the proposed lines of the borough are peaceable and law-abiding citizens, and do not require such incorporation for their benefit or protection, is no ground for its denial (*In re* Millville Borough, *supra*); and that the fact that creating such territory into a borough may not be immediately advantageous to a few property-owners is insufficient ground for denying incorporation, where the advantages as to the entire community will greatly exceed the disadvantages (*In re* Prospect Park Borough, *supra*). But where two thirds of the land proposed to be incorporated in a borough was evidently included only for purposes of taxation, and the greater part of the balance was irregular and rough and difficult of municipal improvement, and the town itself was small, consisting of houses along one street only, it was held that an application for incorporation of the proposed borough should be refused. *In re* Wall Borough, 30 Pittsb. Leg. J. N. S. (Pa.) 308. It is no objection to the incorporation of a borough that it will necessitate a rearrangement of school-districts and polling places, and that the financial burdens of the rest of the township may be slightly increased. *In re* Smithville Borough, 23 Pa. Co. Ct. 583. In determining whether a borough should be incorporated the court will consider the subject broadly, having in view the highest interests of all concerned, and not only the present situation, but the needs and growth of the locality for the future. *In re* Smithville Borough, *supra*.

Under Pa. Act, May 8, 1855, and Act, May 20, 1857, providing for the creation of independent school-districts, and forbidding the carving out of the wealthier from the poorer portions of the townships, to the prejudice of the rights and interests of the latter, it was held that a petition could not be maintained to incorporate certain territory into a borough, on the ground that it would enable the inhabitants to run better schools both inside and outside the proposed borough, where it would prejudice the rights and interests of the remaining portion of the district. *In re* Lehman Borough, 4 Pa. Co. Ct. 37.

61. Enterprise *v.* State, 29 Fla. 128, 10 So. 740; State *v.* Winter Park, 25 Fla. 371, 5 So. 818; Darby *v.* Sharon Hill, 112 Pa. St. 66, 4 Atl. 722; State *v.* Wofford, 90 Tex. 514, 39, S. W. 921. See also *infra*, II, A, 14, a, (II).

This means, however, two legal and effective corporations, and does not apply where there is a *de facto* corporation without right, and a corporation legally organized, but not in actual government until the former is ousted. The functions of the legal corporation are in abeyance until the ouster, and then come into full activity. State *v.* Winter Park, 25 Fla. 371, 5 So. 818.

62. History affords illustrations of this condition in the stormy periods of revolutionary strife in Great Britain and France. And, omitting the experience of the Spanish-American republics, and our own colonies in ante-revolutionary times, the United States gives examples in the comparatively peaceful coexistence in Tennessee (1784–1789) of the dual governments of North Carolina and of the unique, ephemeral state of Franklin, and of the four-fold territorial and state governments of Kansas in the stormy period of 1855–1856.

63. *Alabama.*— Osborne *v.* Mobile, 44 Ala. 493.

California.— Stedman *v.* San Francisco, 63 Cal. 193; People *v.* Hill, 7 Cal. 97.

Colorado.— Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858; and other cases cited *infra*, this note.

New York.— People *v.* Morris, 13 Wend. 325.

North Carolina.—Caldwell *v.* Burke County Justices, 57 N. C. 323.

Ohio.—Shanklin *v.* Madison County Com'rs, 21 Ohio St. 575.

Tennessee.— Grant *v.* Lindsay, 11 Heisk. 651.

San Francisco is a conspicuous example of cities clothed with powers of both municipal and county government. Kahn *v.* Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; People *v.* Hill, 7 Cal. 97.

Baltimore also occupies a unique status among cities. Md. Const. art. 11. It is called a county. Md. Pub. Gen. Laws (1904), art. 1, § 11.

Status as city.— Under the San Francisco Consolidation Act (St. (1856) p. 145), which provided that the corporation known as the "City of San Francisco" "shall remain and continue to be a body politic and corporate in

territory may be included in a township, drainage district, or other quasi-corporate boundary.[64]

10. Corporate Name.[65] Every corporation must have a name by which it is known and identified.[66] The name is usually conferred by charter and is as unchangeable as the name of a man given at baptism.[67] If the name is not expressly given in the charter it may appear by implication therefrom.[68] Lacking both these sources the name may be conferred by usage.[69] The name may be changed by a new charter,[70] or by statute.[71] If, as sometimes happens, an existing corporation is empowered by statute to perform a particular act by a name other than its proper name, it must act in the special name or suffer the penalty

name and in fact, by the name of the City and County of San Francisco," such corporation, in matters of government, must be regarded as a city. Kahn *v.* Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620.

The city of St. Louis was prior to the constitution of 1875 clothed with powers of both municipal and county government, but as constituted by the scheme of separation it is now a city proper, and not a county; and the provisions of law which were in force before its adoption, requiring the election of a county collector and county marshal for the county of St. Louis, are not applicable to the city. State *v.* Walsh, 69 Mo. 408.

In Colorado, under Const. art. 20, providing for the consolidation of the city and county governments of the city of Denver and county of Arapahoe, under the name "City and County of Denver," section 2 declaring that the officers for the city and county and their terms, duties, and qualifications, and compensation shall be as fixed by the city charter to be framed by a charter commission, and section 3, providing in general terms for a transfer of government from the city of Denver and county of Arapahoe to the new municipal corporation, the authority of the charter convention to legislate under such article was held to be limited to matters of purely local municipal concern, so that the provisions of the charter adopted March 29, 1904, increasing the number of judges of county courts to two, and changing the time of election of such county judges, and of the county assessor, county clerk and *ex officio* recorder, treasurer, constables, sheriff, county commissioners, and justices of the peace who are state officers, are unconstitutional and void. People *v.* Horan, 34 Colo. 304, 86 Pac. 252; People *v.* Armstrong, 34 Colo. 204, 86 Pac. 251; People *v.* Berger, 34 Colo. 199, 86 Pac. 250; People *v.* Elder, 34 Colo. 197, 86 Pac. 250; Byrne *v.* People, 34 Colo. 196, 86 Pac. 250; People *v.* Alexander, 34 Colo. 193, 86 Pac. 249; People *v.* Johnson, 34 Colo. 143, 86 Pac. 233; Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858.

64. People *v.* Nibbe, 150 Ill. 269, 37 N. E. 217; Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 27 N. E. 203; People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480.

Chicago affords exceptional illustration of manifold incorporation in the creation by the state legislature of boards of commission for the separate functions of government, each endowed with sovereign powers of legislation and taxation for the performance of its respective functions. Reddick *v.* People, 82 Ill. App. 85 [*affirmed* in 181 Ill. 334, 54 N. E. 963].

65. Misnomer: In bond or contract see *infra*, IX. In actions or proceedings see *infra*, XVII. And see Names.

66. *Alabama.*— Smith *v.* Central Plank-Road Co., 30 Ala. 650.

Illinois.— Galesburg *v.* Hawkinson, 75 Ill. 152.

Indiana.— Johnson *v.* Indianapolis, 16 Ind. 227.

New Hampshire.—South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 317.

England.— Rex *v.* Morris, 1 Ld. Raym. 337 [*cited* in Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 1238]; Anonymous, 1 Salk. 191; Bacon Abr. tit. "Corporations," C; 1 Blackstone Comm. 475; Comyns Dig. tit. "Franchises," F. 9.

67. Sutton's Hospital Case, 10 Coke 23, 28, 77 Eng. Reprint 960.

68. Physicians College *v.* Salmon, 3 Salk. 102; Dutch West-India Co. *v.* Moses, Str. 612.

69. Willcock Mun. Corp. 34.

70. Cambridge *v.* York, 1 Kyd Corp. 256.

Retention of former name on reincorporation under general law.— Johnson *v.* Indianapolis, 16 Ind. 227.

71. West *v.* Columbus, 20 Kan. 633; *In re* East Stroudsburg Borough, 9 Pa. Co. Ct. 529; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53. Where the municipality of C was organized as a town under a general law providing that a town so organized should be known by the name of "The inhabitants of the town of ——," and a later act changed all towns of less than two thousand inhabitants into cities of the third class, and provided that the corporate name of such cities should be "The City of ——," it was held that this did not change the name of such cities to "The City of the Inhabitants of the Town of ——." West *v.* Columbus, *supra*.

In Pennsylvania the court of quarter sessions will not approve of a change of the name of a borough under the act of April 1, 1834, section 4, where it will be misleading and confusing. *In re* East Stroudsburg Borough, 9 Pa. Co. Ct. 529, where the court refused on this ground to approve of a change from "The Borough of East Stroudsburg" to "Penn City."

of loss or misnomer.[72] A corporation which derives its name from usage may have more than one name derived from that source,[73] and, being equally well known by each name, it may sue or be sued, receive, purchase, alien, or contract by any one of them.[74] And this, it seems, may be done when by usage and conduct it has acquired and employed a name different from that given it by charter.[75] A corporation may have one name by prescription and another name by grant.[76]

11. EFFECT OF INCORPORATION. Incorporation is the term used to describe the result of the entire course of legal proceeding whereby a municipality is brought into existence *de jure* and *de facto*.[77] Both legislation and organization are essential to this end.[78] The former may theoretically create a corporation by special charter, but until action by the inhabitants is taken thereunder, the corporation is but a legal potentiality.[79] And so under a general law all the material steps prescribed for incorporation must be taken before the municipality becomes a body corporate and politic.[80] Pending the process of incorporation the political *status quo* remains in full force and virtue, and acts of local officers and boards affecting the territory of the proposed municipality are valid and binding.[81] When, however, the organization is completed, the corporation is endowed instantly with all the powers, privileges, and franchises conferred by the charter, former powers are superseded, and former officials supplanted by those of the new corporation.[82] It succeeds without judicial decree or investiture to the property held in public trust for the community; and it assumes immediate possession and control of the public utilities and improvements theretofore made and (held by the state or county within the corporate limits.[83] So also corporate obligations of a predecessor in the same territory are generally cast upon it.[84])

12. WHAT TERRITORY MAY BE INCLUDED — a. In General. It is within the scope of legislative power, unless forbidden by the constitution, to incorporate by special act any inhabited district within its sovereign jurisdiction, be it large or small.[85] And where forbidden to incorporate by special acts, the legislature may

72. Willcock Mun. Corp. 35.

73. Carlisle *v.* Blamire, 8 East 487, 9 Rev. Rep. 491; Atty.-Gen. *v.* Farnham, Hardres 504; Knight *v.* Wells, 1 Ld. Raym. 80; Kerby *v.* Whichelow, Lutw. 1498; Anonymous, 1 Salk. 191.

74. South School Dist. *v.* Blakeslee, 13 Conn. 227; Sutton First Parish *v.* Cole, 3 Pick. (Mass.) 232; Atty.-Gen. *v.* Rye, 1 Moore C. P. 267, 7 Taunt. 546, 2 E. C. L. 486; 2 Kent Comm. 292; Willcock Mun. Corp. 34.

75. Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049; Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36; McMinn Academy *v.* Reneau, 2 Swan (Tenn.) 94.

76. Knight *v.* Wells, 1 Ld. Raym. 80; Anonymous, 1 Salk. 191.

77. Black L. Dict. tit. "Incorporation."

78. Hobart *v.* Butte County Sup'rs, 17 Cal. 23; Alcorn *v.* Hamer, 38 Miss. 652; State *v.* Noyes, 30 N. H. 279; Chenango Bank *v.* Brown, 26 N. Y. 467. See *infra*, II, A, 13, d; II, A, 14, b, (x).

79. State *v.* Haines, 35 Oreg. 379, 58 Pac. 39. *Compare infra*, II, A, 13, c.

80. See *infra*, II, A, 14, b.

81. State *v.* Putnam County, 23 Fla. 632, 3 So. 164; Durant *v.* Lawrence, 1 Allen (Mass.) 125.

82. State *v.* Putnam County, 23 Fla. 632, 3 So. 164; People *v.* Draper, 15 N. Y. 532; People *v.* Morris, 13 Wend. (N. Y.) 325; Lynch *v.* Lafland, 4 Coldw. (Tenn.) 96.

83. See *infra*, II, A, 17.

84. See *infra*, II, A, 17, b.

85. *Georgia.*— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

Illinois.— Crook *v.* People, 106 Ill. 237.

Indiana.— State *v.* Tipton, 109 Ind. 73, 9 N. E. 704; Indianapolis *v.* Indianapolis Gas-Light, etc., Co., 66 Ind. 396; Lafayette *v.* Jenners, 10 Ind. 70.

Kentucky.— Cheaney *v.* Hooser, 9 B. Mon. 330.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Missouri.— St. Louis *v.* Allen, 13 Mo. 400; St. Louis *v.* Russell, 9 Mo. 507.

Nebraska.— State *v.* Holden, 19 Nebr. 249, 27 N. W. 120.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

New York.— Demarest *v.* New York, 74 N. Y. 161; People *v.* Morris, 13 Wend. 325.

North Carolina.— Wallace *v.* Sharon Tp., 84 N. C. 164.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169; Reading *v.* Keppleman, 61 Pa. St. 233.

Tennessee.— Daniel *v.* Memphis, 11 Humphr. 582.

Wisconsin.— State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

United States.— Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; Girard

by general law declare what area and what population shall be requisite for any class of municipality;[86] and any community wishing to be incorporated under these laws must possess these essential statutory requisites.[87] Lacking any of these essentials, the process of incorporation will be vain and the charter void; and the community will remain as before, in the eyes of the law, unincorporated.[88] Thus, where the law requires a population of three hundred in a proposed village corporation of one square mile and provides that the territory in excess of one square mile shall contain three hundred persons for each additional square mile, a proceeding showing only four hundred and twenty-seven persons in a total of one and one-fourth square miles is void on its face.[89] Likewise separate bodies not contiguous may not be included in a single corporation under general law.[90] Nor may a large rural district be incorporated under the statute authorizing the incorporation, as a village, of platted lands and those adjacent thereto.[91] Nor will the bisection of a village by a railroad authorize the separate incorporation of either side.[92] But the inclusion of certain unplatted adjacent lands will not render the incorporation of the platted portion void.[93] And it seems that unplatted lands may properly be included in a municipality when they are closely suburban and identified in interest with the urban property;[94] but not where they are a wilderness.[95] General laws providing for the formation of municipalities sometimes expressly exclude from their operation territory included within the limits of any incorporated town, village, or city.[96]

b. Farming Lands. The rules of law in respect to farming lands included within municipal boundaries are not uniform but depend upon the peculiar policy of the state as manifested in its constitution and statutes. In some states

v. Philadelphia, 7 Wall. 1, 19 L. ed. 53; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629.

86. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493; Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354; Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; Smith Mun. Corp. 52.

87. State *v.* Clark, (Nebr. 1906) 106 N. W. 971; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101. See also State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; and cases cited in the notes following.

88. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; State *v.* Clark, (Nebr. 1906) 106 N. W. 971; State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Angel *v.* Spring City, (Tenn. Ch. App. 1899) 53 S. W. 191.

89. *In re* Elba, 30 Hun (N. Y.) 548.

90. Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

91. *Arkansas.*— Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

Minnesota.— State *v.* Fridley Park, 61 Minn. 146, 63 N. W. 613; State *v.* Minnetonka, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755.

Missouri.—State *v.* McReynolds, 61 Mo. 203.

Nebraska.— State *v.* Mote, 48 Nebr. 683, 67 N. W. 810; State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498.

Pennsylvania.— *In re* Little Meadows, 35 Pa. St. 335; *In re* West Philadelphia, 5 Watts & S. 281; *In re* Larksville, 13 Pa. Co. Ct. 351, 7 Kulp 84.

Texas.— State *v.* Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

92. *In re* Narberth, 11 Montg. Co. Rep. (Pa.) 18 [*affirmed* in 171 Pa. St. 210, 33 Atl. 72].

Lands upon which railroad tracks are laid will not be included within a proposed borough, where no good reason is shown therefor. *In re* Riverton Borough, 20 Pa. Co. Ct. 63; *In re* Wall Borough, 30 Pittsb. Leg. J. N. S. (Pa.) 308.

93. Lancaster County *v.* Rush, 55 Nebr. 119, 52 N. W. 837; McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282; State *v.* Baird, 79 Tex. 63, 15 S. W. 98.

94. People *v.* Marquiss, 192 Ill. 377, 61 N. E. 352; State *v.* Fridley Park, 61 Minn. 146, 63 N. W. 613; State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498; *In re* Yeadon Borough, 14 Pa. Co. Ct. 290, 5 Del. Co. 405; *In re* Tullytown Borough, 11 Pa. Co. Ct. 97, 4 Del. Co. 583.

95. *In re* Little Meadows, 28 Pa. St. 256.

96. People *v.* Fleming, 10 Colo. 553, 16 Pac. 298; People *v.* Harvey, 142 Ill. 573, 32 N. E. 295. A town created under township organization, being merely an involuntary organization for governmental purposes, is not "an incorporated town," within the meaning of Ill. Rev. St. c. 24, art. 11, § 5, which allows the formation of municipal corporations in territory which is not included within the limits of any incorporated town, village, or city. People *v.* Harvey, *supra.*

Effect of general laws as to existing corporations see *infra*, II, A, 14, a, (II).

unplatted farming lands may be included within municipal boundaries.[97] In others such inclusion is expressly forbidden.[98] In some cases, it seems, their inclusion operates to render the incorporation void *in toto*;[99] in others the corporation stands as to the urban property, but the farming lands are excluded.[1] In some cases the rules of exclusion are strictly enforced;[2] in others loosely.[3] And there are cases where the validity of the municipality is tried by the *bona fides* of the incorporation and inclusion of the farming lands.[4] In Pennsylvania the mere fact that farming lands are included is no ground for denying an application for the incorporation of a borough,[5] but the statute expressly authorizes the exclu-

97. *California.*— People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620.

Indiana.— Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49.

Kansas.— Levitt *v.* Wilson, 72 Kan. 160, 83 Pac. 397.

Missouri.— State *v.* McReynolds, 61 Mo. 203, in the absence of express prohibition.

Washington.— Ferguson *v.* Snohomish, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795.

Agricultural lands or remote territory cannot be included within the limits of a proposed village for the sole purpose of obtaining a sufficient number of actual residents necessary to incorporate, without the consent of the owner. State *v.* Clark, (Nebr. 1906) 106 N. W. 971.

Minn. Laws (1885), p. 148, c. 145, providing for the incorporation of a village of any district platted into lots and blocks, and "also the land adjacent thereto," does not authorize the incorporation of large tracts of rural territory having no natural connection with any village and no adaptability to village purposes. State *v.* Holloway, 90 Minn. 271, 96 N. W. 40. See also State *v.* Fridley Park, 61 Minn. 146, 63 N. W. 613; State *v.* Minnetonka, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755.

98. See State *v.* McReynolds, 61 Mo. 203; Ewing *v.* State, 81 Tex. 172, 16 S. W. 872.

Under Mo. Rev. St. (1889) § 977, authorizing the incorporation of unincorporated towns and cities when the majority of the taxable inhabitants present a petition therefor, the incorporation of a city by an order of the county court is not void because the order of incorporation includes within the limits of the city tracts not included within the original unincorporated town, some of which are used for agricultural purposes, where such use is merely temporary and such tracts are so surrounded and connected with the lands, used for city purposes, as to constitute a part thereof. State *v.* Fleming, 158 Mo. 558, 59 S. W. 118.

The Texas statute does not make it the duty of the county judge to determine whether the proposed limits of a city or town to be incorporated embraced territory that ought not to be included; but it is the duty of the promoters of the corporation to fix these limits, and to so fix them as not to include an unreasonable amount of pastural, agricultural, and woodland therein; and if an unreasonable amount of such territory is embraced in the corporation and included for the purpose of taxation only, these facts will render the corporation void. State *v.* Larkin, (Civ. App. 1905) 90 S. W. 912. See also Ewing *v.* State, 81 Tex. 172, 16 S. W. 872; State *v.* Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733; Judd *v.* State, 25 Tex. Civ. App. 418, 62 S. W. 543; Thompson *v.* State, 23 Tex. Civ. App. 370, 56 S. W. 603. Under Tex. Gen. Laws (1895), p. 17 (1 Sayles Rev. Civ. St. art. 386*a*), providing that cities or towns having less than two thousand inhabitants shall not be incorporated with more than two square miles of territory, and Rev. St. art. 580, declaring that in incorporation proceedings no territory shall be included, except that which is intended to be used for strictly town purposes, it is a question of fact whether or not the included area was included strictly for town purposes. Junction City School Incorporation *v.* School Dist. No. 6, 81 Tex. 148, 16 S. W. 742; State *v.* Baird, 79 Tex. 63, 15 S. W. 98; Thompson *v.* State, *supra.* Where seventy-five to eighty per cent of the land included in the petition for the incorporation of a town was agricultural and pastural land, the incorporation was held invalid. State *v.* Larkin, (Civ. App. 1905) 90 S. W. 912; Judd *v.* State, *supra.*

99. State *v.* McReynolds, 61 Mo. 203.

1. State *v.* Campbell, 120 Mo. 396, 25 S. W. 392; Lancaster County *v.* Rush, 35 Nebr. 119, 52 N. W. 837; McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282; State *v.* Baird, 79 Tex. 63, 15 S. W. 98.

2. Ewing *v.* State, 81 Tex. 172, 16 S. W. 872.

3. *In re* Taylor Borough, 160 Pa. St. 475, 28 Atl. 934; State *v.* Baird, 79 Tex. 63, 15 S. W. 98; Ferguson *v.* Snohomish, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795.

4. McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518.

5. *In re* Prospect Park Borough, 166 Pa. St. 502, 31 Atl. 254; *In re* Taylor Borough, 160 Pa. St. 475, 28 Atl. 934; *In re* Duquesne Borough, 147 Pa. St. 58, 23 Atl. 339; *In re* Blooming Valley, 56 Pa. St. 66. See also *In re* Swoyerville Borough, 12 Pa. Super. Ct. 118; *In re* Rouseville Borough, 21 Pa. Co. Ct. 262; *In re* Collingdale, 4 Del. Co. (Pa.) 595; *In re* Alliance Borough, 7 North. Co. Rep. (Pa.) 396. On a petition for incorporation as a borough, the extent and character of the land are not *per se* controlling objections, if the parties to be affected are willing to be included, but the court should, however, exercise a sound dis-

sion of land used exclusively for farming.[6] The boundaries of a borough may be so fixed as to include, when reasonable and necessary, some farming lands between the centers of population, or large mills and factories wherein the inhabitants are employed.[7]

cretion in these respects. *In re* Blooming Valley, *supra*.

6. *In re* Old Forge, 7 Del. Co. (Pa.) 462 [*affirmed* in 12 Pa. Super. Ct. 359].

As to the inclusion or exclusion of farming lands see *In re* Narberth Borough, 171 Pa. St. 211, 33 Atl. 72 [*affirming* 11 Montg. Co. Rep. 18]; *In re* Wilkinsburg, 131 Pa. St. 365, 20 Atl. 381, 131 Pa. St. 368, 18 Atl. 931; *In re* Little Meadows, 28 Pa. St. 256, 35 Pa. St. 335; *In re* Tullytown Borough, 11 Pa. Co. Ct. 97, 4 Del. Co. 583. See *In re* Duquesne Borough, 147 Pa. St. 58, 23 Atl. 339; *In re* Swoyerville Borough, 12 Pa. Super. Ct. 118; *In re* Smithfield Borough, 23 Pa. Co. Ct. 583; *In re* Yeadon Borough, 14 Pa. Co. Ct. 290, 5 Del. Co. 405; *In re* Highspire, 5 Dauph. Co. Rep. (Pa.) 296; Oliver's Appeal, 30 Wkly. Notes Cas. (Pa.) 493; *In re* Cross Roads Borough, 13 York Leg. Rec. (Pa.) 85. Under the act of April 1, 1863 (Pub. Laws 200), authorizing the exclusion from the limits of a proposed borough of lands used exclusively for farming "and not properly belonging to the town or village," it must appear, in order that land so used may be excluded, that it does not properly belong to and constitute a part of the village or town. *In re* Duquesne Borough, *supra*. In determining whether a borough should be incorporated, the court will consider the subject broadly, having in view the highest interests of all concerned, and not only the present situation. but the needs and growth of the locality in the future. *In re* Smithfield Borough, *supra*. The court will not refuse to incorporate a borough because a large body of unoccupied land is included within the limits if it appears that the owners of this land do not object, and the evidence shows that incorporation will be of great advantage to the community interested. *In re* Rouseville Borough, 21 Pa. Co. Ct. 262. The limits of a proposed borough should not be so contracted as to afford no room for street and building improvements; and the symmetry of the borough should not be destroyed by excluding lands for no other purpose than to escape opposition from such landowners. The individual preference of the landowner is not the true criterion by which his exclusion should be determined. The applicants should not resort to irregular lines for no other purpose than to impose undue burdens upon the township or to escape the repair of public roads which properly fall within the proposed borough. *In re* Schwenksville, 18 Montg. Co. Rep. (Pa.) 208. In carrying out the request of the owners of farm lands to have the same excluded from a proposed borough, the court has power to make such change or modification of the boundaries as may be necessary for that purpose, even though it may have the effect of excluding other farm lands lying beyond that of the petitioners. *In re* Forty Fort Borough, 4 Kulp (Pa.) 225.

Truckmen, who raise small fruits, vegetables, and the like for barter with the villagers or townspeople, are not farmers within the meaning of the act providing for the incorporation of boroughs. *In re* Tullytown Borough, 11 Pa. Co. Ct. 97.

Where the mansion-house of a farm is properly a part of a village, it may be included within the limits of a borough, although the greater part of the farm to which it belongs is excluded. *In re* Tullytown Borough, 11 Pa. Co. Ct. 97.

Rearrangement of school-districts and polling places.— It is no objection to the incorporation of a borough that it will necessitate a rearrangement of school-districts and polling places, and that the financial burdens of the rest of the township may be slightly increased. *In re* Smithfield Borough, 23 Pa. Co. Ct. 583. See also *In re* Rouseville Borough, 21 Pa. Co. Ct. 262; *In re* West Homestead Borough, 31 Pittsb. Leg. J. N. S. (Pa.) 172. A borough will be incorporated notwithstanding the fact that the financial burdens of the township from which it is detached will be increased, if it appears that the village sought to be incorporated is a rapidly growing one, and that its vicinity to a larger town compels it to contend with much of the lawlessness and disorder incident to the larger population near it. *In re* Rouseville Borough, *supra*.

Who may object.— The inclusion of farm lands within the borough limits of incorporation cannot be raised as an objection to such an incorporation by persons not the owners of such lands. *In re* Tullytown Borough, 11 Pa. Co. Ct. 97; *In re* Cross Roads Borough, 13 York Leg. Rec. (Pa.) 85. See also *In re* Rouseville Borough, 21 Pa. Co. Ct. 262.

Time of application to modify boundaries. — Under Pa. Act, April 1, 1863 (Pamphl. Laws 200), § 1, providing that whenever an application shall be made by the freeholders of any town for incorporation into a borough, and the boundaries embrace lands exclusively used for farming, the courts of quarter sessions of the county where such application is made may, at the request of the party aggrieved, change such boundaries so as to exclude such land, the proposed boundaries can be modified, "at the request of the party aggrieved," only at the time the charter is before the court for approval. *In re* Wilkinsburg, 131 Pa. St. 365, 20 Atl. 381, 131 Pa. St. 368, 18 Atl. 931.

7. *In re* Taylor Borough, 160 Pa. St. 475, 28 Atl. 934; *In re* Duquesne Borough, 147 Pa. St. 58, 23 Atl. 339; *In re* Yeadon

13. Special Charters or Acts — a. In General. The legislature unless forbidden by the constitution may incorporate municipalities in its discretion either by special act or by general legislation authorizing the erection and organization of corporations by popular initiative and referendum.[8] The former method was the one in general use in the United States during the last century and is still employed in several states.[9] In some states, as has been seen,[10] constitutional provision has been made for the framing and adoption of a charter by the inhabitants of large cities.[11] In whatever method the charter of a municipality is enacted, it becomes, when lawfully provided, the fundamental law of the corporation just as the constitution is the fundamental law of the state.[12] The organic act, if special, names a certain community or territory, constitutes it a municipal corporation and declares its corporate name;[13] specifies the offices and names the first officers, providing for the election of their successors by the corporation;[14] enumerates the powers, privileges, and franchises of the corporation;[15] and fixes the municipal boundaries and the limits of its jurisdiction.[16] No particular form of words is necessary to create the corporation provided the legislative intention to incorporate the place is evident.[17] The usual words employed in a royal charter to constitute a municipal corporation were, "*Creamus, erigimus, fundamus, incorporamus*," signifying, we create, erect, found, incorporate;[18] but words of similar import have been held sufficient both in royal charters,[19] and in legislative

Borough, 14 Pa. Co. Ct. 290, 5 Del. Co. 405. The mere fact that houses are massed in groups separated by land used for farming or manufacturing or mining purposes does not constitute such groups villages, so as to justify the court in excluding them and the intervening land in the proceeding for incorporation of the borough. *In re* Swoyerville Borough, 12 Pa. Super. Ct. 118. But where a large part of the territory within the boundary lines of a proposed borough consists of farm land, not connected by lines of buildings or improvements with either of two villages also within such boundary lines, and the landowners of such village are opposed to the new borough, the court will not be justified in confirming the report of a grand jury establishing a borough. *In re* Larksville, 13 Pa. Co. Ct. 351, 7 Kulp 84.

8. Elliott Mun. Corp. 20; Ingersoll Pub. Corp. 137. See *supra*, II, A, 6.

9. Pell *v.* Newark, 40 N. J. L. 550; State *v.* Narragansett, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295; Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; Ballentine *v.* Pulaski, 15 Lea (Tenn.) 633; State *v.* Wilson, 12 Lea (Tenn.) 246; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425. In all the Tennessee cases just cited, the provision in the state constitution that "no corporation shall be created, or its powers increased or diminished, by special law," was held to apply only to private and not to municipal corporations. See *supra*, II, A, 6.

10. See *supra*, II, A, 6.

11. This has been true for years past of Missouri and California. Under the unique provisions of the constitutions of these two states, the great cities of St. Louis and San Francisco framed and adopted their own charters in much the same manner as a state orders its own constitution, thus affording practical examples of municipal home rule without precedent in modern times. Mo. Const. art. 9, § 16; Cal. Const. art 11, § 8. In San Francisco in 1856 the two governments were consolidated, and the consolidated governments now consist of a mayor, twelve supervisors, and regular city and county officers. As to the dual nature of the government of San Francisco see Kahn *v.* Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620. See also *supra*, II, A, 9.

Nearly all the large American cities exist under special charters. St. Louis is in no county, but was formerly embraced in St. Louis county. The city now levies and collects city and state taxes within its municipal limits and manages its own affairs free from all outside control except that of the state legislature. Voters of the city have the right to amend the charter at intervals of two years at a general or special election, provided the proposed amendments have been duly sanctioned and submitted to the people by the municipal council. St. Louis *v.* Russell, 9 Mo. 507.

12. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Gotten *v.* Gowen, 113 Tenn. 174, 80 S. W. 1087; State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Bouvier L. Dict. tit. "Charter"; Cooley Const. Lim. (6th ed.) 227.

13. Elliott Mun. Corp. 21.

14. Ingersoll Pub. Corp. 138.

15. 1 Beach Pub. Corp. § 67–69.

16. State *v.* Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737.

17. River Tone Conservators *v.* Ash, 10 B. & C. 349, 8 L. J. K. B. O. S. 226, 21 E. C. L. 152; Ingersoll Pub. Corp. 189; 1 Kyd Corp. 63.

Creation by implication see *infra*, II, A, 18, b.

18. 1 Blackstone Comm. 473; 2 Kent Comm. 27; 1 Kyd Corp. 62.

19. River Tone Conservators *v.* Ash, 10

acts.[20] It is enough that there is a clear manifestation of legislative intention to constitute a corporation;[21] to invest a place with corporate powers and franchises;[22] or to recognize an existing body as having the essential franchises and powers of a corporation, such as perpetual succession, name, right to sue and be sued, power to contract, receive, purchase, and convey property, enact and enforce laws and the like.[23] If the special act of legislation either expresses these things or employs words from which they may fairly be implied, then the courts, *ut res magis valeat quam pereat*, sustain the charter of the corporation.[24] Being a legislative enactment, a special charter is subject to the fixed canons of statutory construction to determine its meaning and effect.[25] It is a familiar and unvarying rule of law that the charter of a corporation is not a contract between the municipality and the state,[26] and therefore not protected by the contract clause of the federal constitution.[27] And this rule applies to all kinds of municipal charters, special as well as general; those voluntarily accepted by the community as well as those imposed upon it by sovereign power.[28] There are instances in which a special act provides for the organization of a particular corporation under the existing

B. & C. 349, 8 L. J. K. B. O. S. 226, 21 E. C. L. 152; 1 Kyd Corp. 63. It is not necessary that the charter powers, without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property be specified, although such powers are in general expressly given. Ingersoll Pub. Corp. 173; Willcock Mun. Corp. 31. In England the charter seems to have been in general terms, erecting the corporation but not specifying its powers, rights, and capacities, some of which it acquired after formation, and others were necessarily and inseparably incident to every corporation. 1 Blackstone Comm. 475. See *infra*, III.

20. Dean *v.* Davis, 51 Cal. 406. Where a statute appointed commissioners to purchase land and lay it off into lots, with convenient streets, and provided that when so laid off it was, by force of the act, "constituted and erected a town," and the land was laid off accordingly, with ascertained limits, and these boundaries were acknowledged by the inhabitants for sixty years, and the place was recognized as a town by several subsequent statutes, it was held that it was an incorporated town with defined limits and boundaries. Trenton *v.* McDaniel, 52 N. C. 107.

21. Montgomery County School Com'rs *v.* Dean, 2 Stew. & P. (Ala.) 190; Levant Ministerial, etc., Fund *v.* Parks, 10 Me. 441.

22. Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489. See also Mahoney *v.* State Bank, 4 Ark. 620; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

23. River Tone Conservators *v.* Ash, 10 B. & C. 349, 8 L. J. K. B. O. S. 226, 21 E. C. L. 152; Grant Corp. 30; 1 Kyd Corp. 63.

24. People *v.* Farnham, 35 Ill. 562; Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; State *v.* Young, 3 Kan. 445; Smith *v.* Crutcher, 92 Ky. 586, 18 S. W. 521, 13 Ky. L. Rep. 817; Rains *v.* Oshkosh, 14 Wis. 372.

25. Long *v.* Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; Leonard *v.* Canton, 35 Miss. 189; St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Thomas *v.* Richmond, 12 Wall. (U. S.) 349, 20 L. ed. 453; Minturn *v.* Larue, 23 How. (U. S.) 435, 16 L. ed. 574.

26. *Connecticut.*— Hewison *v.* New Haven, 37 Conn. 475, 9 Am. Rep. 342.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Rhode Island.— Smith *v.* Wescott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

United States.— Meriwether *v.* Garrett, 103 U. S. 472, 26 L. ed. 197; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; East Hartford *v.* Bridge Co., 10 How. 511, 13 L. ed. 518, 531.

See *infra*, II, B, 2, a, (I); II, C, 1, a, c; II, C, 2, a; IV, A.

The right of a state to repeal the charter of a municipality cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at pleasure. This is common learning found in all adjudications on the subject of municipal bodies. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control. See *infra*, II, C, 2, c.

Townships and incorporated towns are created, altered, and abolished at the pleasure of the legislature, and have no vested rights, and hence they have no legal right to complain of the manner in which changes therein are allowed by law to be made. Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351.

27. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; and other cases above cited.

28. Hewison *v.* New Haven, 37 Conn. 475, 9 Am. Rep. 342.

general law, in which case the corporation, when so organized, is a corporation under and governed by the general law, and not one created solely by the special act.[29] A special charter cannot take effect if it is so indefinite, uncertain, and incomplete that the legislative intent cannot be ascertained.[30]

b. Approval and Publication. Two methods of special legislative action providing special charters for municipalities exist in the United States: (1) The common method whereby the legislature, assuming the initiative, takes the first formal action by enacting the law under which the corporation is organized;[31] and (2) the special method whereby the community first formulates its charter and it is then submitted to the legislature for adoption or rejection as a whole.[32] Under the first the act does not become operative as a law until all the constitutional conditions of legislation have been complied with, including publication of the act.[33] Under the last method a formal act of legislation is not necessary; but a resolution of approval is sufficient unless otherwise required by the constitutional provision.[34]

c. Acceptance or Consent. Sometimes by constitutional provision a municipal corporation cannot be created without the consent of a majority of the inhabitants or voters of the territory affected; but in the absence of such a provision their consent or acceptance is not necessary unless required by the statute.[35] Being an act of legislation it is within the plenitude of legislative

29. State *v.* Cornwall, 35 Minn. 176, 28 N. W. 144. See *infra*, II, A, 14.

30. Warren *v.* Branan, 109 Ga. 835, 35 S. E. 383 (holding that the act of Dec. 20, 1899, providing for the incorporation of the town of Kirkwood, and undertaking to establish its corporate limits, cannot be given effect, since the description given was so indefinite, uncertain, and incomplete that the legislative intent could not be ascertained even by resort to competent extrinsic evidence); Doyle *v.* Belleview, 1 Ky. L. Rep. 168 (holding that where an act amending the charter of a municipal corporation declared that the charter of another municipal corporation should be adopted by the former "so far as applicable," but failed to specify how far the charter was applicable, it was abortive as a charter of the second municipality, and conferred no municipal powers on the officers thereof).

Location of corporation.— Although Tex. Act, May 22, 1871, incorporating the town of Yorktown and defining its limits by metes and bounds, does not situate it in any county, yet, as the act provides that the first election shall be held "under the direction of the presiding justice of De Witt county," and a village with that name, and with surveyed boundaries, corresponding with the metes and bounds set out in the act, had been in existence in De Witt county since 1848, it was held that the act applied to Yorktown, in De Witt county, and was not void for uncertainty. State *v.* Hoff, (Tex. Civ. App.) 29 S. W. 672.

31. Clark *v.* Janesville, 10 Wis. 136.

32. Brooks *v.* Fischer, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429.

33. Clark *v.* Janesville, 10 Wis. 136.

34. State *v.* Curran, 12 Ark. 321; Brooks *v.* Fischer, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429.

35. *Georgia.*— Brunswick *v.* Finney, 54 Ga. 317.

Illinois.— People *v.* Wren, 5 Ill. 269. See also Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161.

Iowa.— Morford *v.* Unger, 8 Iowa 82. See also Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Kentucky.— Smith *v.* Crutcher, 92 Ky. 586, 18 S. W. 521, 13 Ky. L. Rep. 817; Cheaney *v.* Hooser, 9 B. Mon. 330.

Maine.— Gorham *v.* Springfield, 21 Me. 58.

Maryland.— Prince George's County *v.* Bladensburg, 51 Md. 465.

Massachusetts.— See Warren *v.* Charlestown, 2 Gray 84.

Michigan.— See People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Missouri.— State *v.* Leffingwell, 54 Mo. 458; St. Louis *v.* Russell, 9 Mo. 507.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

Nebraska.— State *v.* Babcock, 25 Nebr. 709, 41 N. W. 654.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266; Bristol *v.* New Chester, 3 N. H. 524.

New York.— New York Fire Dept. *v.* Kip, 10 Wend. 266. See also People *v.* Stout, 23 Barb. 349; People *v.* Morris, 13 Wend. 325.

North Carolina.— Mills *v.* Williams, 33 N. C. 558.

Ohio.— Foote *v.* Cincinnati, 11 Ohio 408, 38 Am. Dec. 737.

Oregon.— State *v.* Haines, 35 Oreg. 379, 58 Pac. 39.

Rhode Island.— Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161.

Texas.— Buford *v.* State, 72 Tex. 182, 10 S. W. 401; Blessing *v.* Galveston, 42 Tex. 641.

United States.— Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488.

power;[36] and whenever constitutionally enacted, the special charter becomes a law binding upon all persons and things within its scope and purview.[37] The unanimous refusal of the inhabitants to accept the charter and assume corporate functions thereunder might partially nullify the statute,[38] but would not affect its validity. The dormant corporation might at any time be inspired with vitality by a minority of the inhabitants of the place assuming corporate functions and official positions under the charter and thus become an active agent and potent instrumentality of government with authority to compel respect and obedience from all the inhabitants within the scope of its charter powers and jurisdiction.[39] But a corporation thus imposed upon an unwilling people is not in the true sense municipal; and generally acceptance of the charter is expressly required.[40] Acceptance of a charter may be implied, as from acts done under it, unless it is required to be manifested in some particular way.[41] It cannot be partially accepted, but must, if accepted at all, be accepted as offered and *in toto*.[42]

d. Completion of Incorporation. When a corporation is created by a statute which requires certain acts to be done before it can be considered *in esse*, such acts

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2, 17.

In England parliament may create a municipal corporation without the consent of the inhabitants of the territory affected, but a charter granted by the king must be accepted. People *v.* Bennett, 29 Mich. 451, 456, 18 Am. Rep. 107; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385; Rex *v.* Amery, Anstr. 178, 2 Bro. P. C. 336, 1 T. R. 575, 2 T. R. 515, 1 Rev. Rep. 306, 533, 1 Eng. Reprint 981; Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267. See also Brunswick *v.* Finney, 54 Ga. 317. And see *supra*, II, A, 2, a.

36. Morford *v.* Unger, 8 Iowa 82.

37. *California.*— Johnson *v.* Simonton, 43 Cal. 242.

Georgia.— Perdue *v.* Ellis, 18 Ga. 586.

Indiana.— Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624.

Kansas.— Swift *v.* Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772.

Maine.— State *v.* Merrill, 37 Me. 329.

New York.— Buffalo *v.* Schleifer, 2 Misc. 216, 21 N. Y. Suppl. 913.

North Carolina.— Plymouth Com'rs *v.* Pettijohn, 15 N. C. 591.

Ohio.— Dodge *v.* Gridley, 10 Ohio 173.

Oregon.— State *v.* Haines, 35 Oreg. 379, 58 Pac. 39.

Tennessee.— Knoxville *v.* King, 7 Lea 441.

38. Ingersoll Pub. Corp. 182. See *supra*, II, A, 4.

39. People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346; State *v.* Canterbury, 28 N. H. 195; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385. See also Warren *v.* Charleston, 2 Gray (Mass.) 84.

40. See the following cases:

Georgia.—Brunswick *v.* Finney, 54 Ga. 317.

Kentucky.— Clarke *v.* Rogers, 81 Ky. 43.

Maryland—Prince George's County Com'rs *v.* Bladensburg, 51 Md. 465.

Minnesota.—State *v.* Tosney, 26 Minn. 262, 3 N. W. 345.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

Pennsylvania.— Smith *v.* McCarthy, 56 Pa. St. 359.

Constitutionality.— A special act incorporating a municipality, provided a certain number or proportion of the inhabitants of the territory affected shall vote therefor at an election to be held for the purpose, is not unconstitutional as being a delegation of legislative power or otherwise.

Georgia.— Brunswick *v.* Finney, 54 Ga. 317.

Kentucky.— Clarke *v.* Rogers, 81 Ky. 43.

Massachusetts.—Stone *v.* Charlestown, 114 Mass. 214.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

Pennsylvania.—Smith *v.* McCarthy, 56 Pa. St. 359.

See also *supra*, II, A, 3; *infra*, II, A, 14, b, (v); and CONSTITUTIONAL LAW, 8 Cyc. 830 *et seq.*

41. Lafayette *v.* Jenners, 10 Ind. 70; Taylor *v.* Newberne, 55 N. C. 141, 64 Am. Dec. 566; Blessing *v.* Galveston, 42 Tex. 641; Rex *v.* Hughes, 7 B. & C. 708, 6 L. J. K. B. O. S. 190, 1 M. & R. 625, 31 Rev. Rep. 288, 14 E. C. L. 319.

Legislative recognition as evidence of acceptance.— Where the charter of a municipal corporation or an amendment thereof provides that it shall be submitted to a vote of the electors and go into effect if there be a majority in its favor, acceptance is *prima facie* shown by a subsequent act of the legislature recognizing the charter or amendment as in force. State *v.* Tosney, 26 Minn. 262, 3 N. W. 345.

42. Rex *v.* Amery, Anstr. 178, 2 Bro. P. C. 336, 1 T. R. 575, 2 L. R. 515, 1 Rev. Rep. 306, 533, 1 Eng. Reprint 981; Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267.

must be done to bring the corporation into existence.[43] When charters are voluntarily assumed or adopted by communities the consummation of the incorporation is generally manifested by some formal act or record, which must be made by the officers or authorities thereunto appointed by law and in substantial compliance with its requirements.[44]

14. General Laws — a. Construction and Operation — (I) *In General.* Provision for the self-incorporation of communities by the voluntary action of the inhabitants thereof, being in accord with the genius of self-government, has been enacted in most of the United States, either as the exclusive method of municipal incorporation under constitutional mandate, or as a convenient method of conferring upon local communities the initiative and referendum concerning matters of government especially affecting themselves, and such provision is constitutional.[45] These general laws are far from uniform in the several states, but generally they provide for the incorporation of unorganized communities of sufficient population, and also, in some states, for the elevation of existing municipalities into a higher grade of corporation on compliance with the statutory requirements.[46] The interpretation given to these statutes by the state courts is likewise necessarily varied and dissonant,[47] according to the peculiar phraseology of each statute

43. New York Fire Department *v.* Kip, 10 Wend. (N. Y.) 266.

44. Barnes *v.* Gottschalk, 3 Mo. App. 111.

Certificate of election.— Under Mo. Const. art. 9, § 21, providing for the filing of a certificate by the mayor of the city of St. Louis and the presiding justice of the county court of St. Louis county as to the result of an election for the adoption of a charter, the certificate must have been made by the mayor and presiding justice, and could not be made by the clerk of the county court. Barnes *v.* Gottschalk, 3 Mo. App. 111.

45. *California.*— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309; Hobart *v.* Butte County Sup'rs, 17 Cal. 23.

Colorado.—People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

Florida.— State *v.* Winter Park, 25 Fla. 371, 5 So. 818.

Georgia.— Duncan *v.* Toombsboro, 81 Ga. 353, 9 S. E. 1100.

Idaho.— Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64; State *v.* Steunenberg, 5 Ida. 1, 45 Pac. 462. The act entitled, "An act to provide for the organization, government and powers of cities and villages," approved March 4, 1893 (Laws (1893), p. 97), and reënacted in 1899 (Laws (1899), p. 192), provides a complete scheme or plan for the organization, government, and powers of cities and villages, and repeals all prior acts upon that subject. Wardner *v.* Pelkes, *supra.*

Illinois.— People *v.* Saloman, 51 Ill. 37. The general incorporation act of 1874 prohibits the incorporation of towns under former laws, and provides that towns thereafter incorporated shall be incorporated under that act. People *v.* Pike, 197 Ill. 449, 64 N. E. 393.

Iowa.—Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031, holding also that such a statute was not unconstitutional because no provision was made for notice of the proceedings in the district court to persons owning property within the territory proposed to be incorporated or annexed, since such notice is necessary only in cases where the court acts judicially.

Minnesota.—State *v.* O'Connor, 81 Minn. 79, 83 N. W. 498.

Mississippi.— Yazoo City *v.* Lightcap, 82 Miss. 148, 33 So. 949; Alcorn *v.* Hamer, 38 Miss. 652.

Missouri.—State *v.* Campbell, 120 Mo. 396, 25 S. W. 392. There is no constitutional objection to permitting the voters of a city to frame and adopt a charter for its government in subordination to the constitution and laws of the state. Ewing *v.* Hoblitzelle, 85 Mo. 64.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New York.— Chenango Bank *v.* Brown, 26 N. Y. 467.

Tennessee.— Under Shannon's code, section 1881, which provides that any part of a county not included within any municipality may be incorporated if any number of legal voters over fourteen, being freeholders and residing within the territory to be incorporated, apply for a charter, equity cannot restrain the requisite number of persons from incorporating a town on the outskirts of a settlement having schools and churches, and which was formerly incorporated, but the charter of which the people surrendered to obtain the benefit of the law which prohibits the maintenance of a saloon within four miles of a school, unless within an incorporated town, although the apparent object of defendants in so incorporating is to legalize the maintenance of a saloon within four miles of the schools of such settlement. Raucher *v.* Frost, (Ch. App. 1899) 53 S. W. 318.

46. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545. See *supra*, II, A, 7; *infra*, II, A, 14, a, (II).

47. **Construction of particular statutes** see the following cases:

Alabama.— Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61.

Arkansas.—Babcock *v.* Helena, 34 Ark. 499.

and the general canons of construction which usually guide the courts in ascertaining their operation.[48] Where a special law provides that certain territory "be, and the same is hereby, incorporated as the village of Pine Island, pursuant to" a general law for the incorporation of villages, the village is to be organized under the general law, no other organization being provided for, and it is not a special corporation independent of the general law, but is governed by such law.[49]

(II) *Effect as to Existing Corporations.* Statutes providing for the incorporation of towns and cities do not always embrace those already incorporated,[50] and where such is the case proceedings to incorporate a city or town already incorporated are void and abortive.[51] A statute may, however, provide for acceptance of its provisions and reincorporation by an existing municipal corporation into a new corporation of the same or a different kind, or acceptance by an existing corporation of different or additional powers conferred by the statute.[52] And a general law may authorize reincorporation under its provisions of a city incorporated after its enactment by special charter.[53]

b. Proceedings For Incorporation — (I) *In General.* Under a general law for the incorporation of municipalities all the material steps prescribed by the statute must be taken, and the statute must be substantially complied with, before the municipality can become a *de jure* body corporate and politic, and the failure to comply with the statute may be such as to prevent its becoming even a corporation *de facto*.[54] Under such statutes prescribing the method for incorporation,

California.— Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615.

Colorado.— People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

Illinois.—Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

Indiana.— St. Clair *v.* Kelly, 50 Ind. 535.

Iowa.— Decorah *v.* Bullis, 25 Iowa 12.

Kansas.— Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558.

Minnesota.—State *v.* Spaude, 37 Minn. 322, 34 N. W. 164.

Missouri.— Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860.

Nebraska.— State *v.* Mote, 48 Nebr. 683, 67 N. W. 810.

New Mexico.— Socorro County *v.* Leavitt, 4 N. M. 74, 12 Pac. 759.

New York.— People *v.* Feitner, 156 N. Y. 694, 51 N. E. 1093; Moran *v.* Long Island City, 101 N. Y. 439, 5 N. E. 80.

Pennsylvania.— Erie *v.* Flint, 8 Pa. Co. Ct. 482; York Borough Case, 3 Pa. Co. Ct. 514.

Washington.— King County *v.* Davies, 1 Wash. 290, 24 Pac. 540.

West Virginia.— Powell *v.* Parkersburg, 28 W. Va. 698; Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

Wisconsin.— State *v.* Weingarten, 92 Wis. 599, 66 N. W. 716.

See 36 Cent. Dig. tit. "Municipal Corporations," § 20 *et seq.*

48. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

49. State *v.* Cornwall, 35 Minn. 176, 28 N. W. 144.

50. Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; Decorah *v.* Bullis, 25 Iowa 12; Harness *v.* State, 76 Tex. 566, 13 S. W. 535; State *v.* Dunson, 71 Tex. 65, 9 S. W. 103; Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

51. Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61. An attempt to incorporate a city under the general law, while the special act incorporating it is in force, is void. State *v.* Larkin, (Tex. Civ. App.) 90 S. W. 912. And see State *v.* Wofford, 90 Tex. 514, 39 S. W. 921; Harness *v.* State, 76 Tex. 566, 13 S. W. 535; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; State *v.* Dunson, 71 Tex. 65, 9 S. W. 103.

52. *Idaho.*— State *v.* Steunenberg, 5 Ida. 1, 45 Pac. 462.

Illinois.— Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

Indiana.— State *v.* Hertsch, 136 Ind. 293, 36 N. E. 213; St. Clair *v.* Kelly, 50 Ind. 535.

Kansas.— Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558, incorporation of a town as a village.

Missouri.— State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

New Mexico.— Socorro County *v.* Leavitt, 4 N. M. 74, 12 Pac. 759.

Pennsylvania.— Erie *v.* Flint, 8 Pa. Co. Ct. 482. Incorporation of town or borough into city see York Borough Case, 3 Pa. Co. Ct. 514.

Washington.— King County *v.* Davies, 1 Wash. 290, 24 Pac. 540.

Wisconsin.— Somo Lumber Co. *v.* Lincoln County, 110 Wis. 286, 85 N. W. 1023 (reincorporation under general law of a city incorporated by a special charter); State *v.* Weingarten, 92 Wis. 599, 66 N. W. 716 (incorporation of village as independent municipality from town).

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 20, 21.

53. Somo Lumber Co. *v.* Lincoln County, 110 Wis. 286, 85 N. W. 1023.

54. *Alabama.*— West End *v.* State, 138 Ala. 295, 36 So. 423.

California.— People *v.* Linden, 107 Cal. 94,

the required number of citizens usually initiate the proceeding for incorporation by a petition or some other appropriate document filed in the designated office; with the result that an enumeration of the inhabitants within the proposed precincts of the corporation is made, and an election held by the officer appointed by the statute to determine whether a majority of the inhabitants favor an incorporation.[55] This being determined in the affirmative and duly recorded,[56] the court, board, or officer thereunto authorized, in the performance of ministerial functions,[57] either formulates the charter of the corporation or approves the one proposed for it by the initiators of the movement for the incorporation.[58] In some states in lieu of an election the favor of a majority is manifested by the signing of a petition.[59] And in some the court or board hears proof to show that the proposed incorporation is within the requirements of the statute, and thereupon orders or decrees that the corporation is constituted and exists henceforth as such with the powers, functions, and duties prescribed by law for such a body.[60] The boundaries set forth are necessarily peculiar to the particular corporation; but otherwise the charter is substantially a transcript from the general law under which the corporation is created,[61] with the result that all cities and towns of the same grade in any state have identical charters, when constituted under the general law.

(II) *The Petition*—(A) *In General.* When required by the statute, a

40 Pac. 115; Page *v.* Los Angeles County, 85 Cal. 50, 24 Pac. 607.

Colorado.—People *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

Idaho.— Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

Illinois.— People *v.* Weber, 222 Ill. 180, 78 N. E. 56.

Kansas.— State *v.* Bilby, 60 Kan. 130, 55 Pac. 843.

Michigan.— Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

Missouri.—Meriwether *v.* Campbell, 120 Mo. 396, 25 S. W. 392; State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471; State *v.* Jenkins, 25 Mo. App. 484.

New Jersey.— Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070; Yard *v.* Ocean Beach, 48 N. J. L. 375, 5 Atl. 142.

Pennsylvania.— *In re* Versailles Borough, 159 Pa. St. 43, 28 Atl. 230; *In re* Summit Borough, 114 Pa. St. 362, 7 Atl. 219; *In re* Osborne, 101 Pa. St. 284; *In re* Little Meadows, 28 Pa. St. 256; *In re* Benjamin Borough, 17 Pa. Co. Ct. 531; *In re* Narberth Borough, 16 Pa. Co. Ct. 29; *In re* Wintergreen Alley, 11 Pa. Co. Ct. 126; *In re* Throop, 3 Lack. Jur. 293.

Tennessee.— State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; Angel *v.* Spring City, (Ch. App. 1899) 53 S. W. 191.

Texas.— Huff *v.* Preuitt, (Civ. App. 1899) 53 S. W. 844.

See 36 Cent. Dig. tit. "Municipal Corporations," § 22 *et seq.*

Sufficient compliance with statute see Duncan *v.* Toombsboro, 81 Ga. 353, 9 S. E. 1100; and cases cited under the sections following.

The Pennsylvania act of April 1, 1834 (Pub. Laws 163), providing for the incorporation of boroughs, is in force except in so far as it is altered by the later enactments on the subject. McFate's Appeal, 105 Pa. St. 323; *In re* Waynesboro' Extension, 6 Pa. Co. Ct. 140. And see the cases cited *supra*, II, A, 12. The act of June 26, 1895 (Pub. Laws 389) repeals the act of June 2, 1871, § 1 (Pub. Laws 283), so far as it applies to proceedings for incorporation of boroughs. Matter of Emsworth, 5 Pa. Super. Ct. 29. The said act of 1895 was held to apply to proceedings pending at the time of its enactment. *In re* Benjamin Borough, 17 Pa. Co. Ct. 531. The act is constitutional. Matter of Emsworth, *supra*.

Corporations de facto see *infra*, II, A, 15.

55. *Georgia.*— Duncan *v.* Toombsboro, 81 Ga. 353, 9 S. E. 1100.

Indiana.—Stembel *v.* Bell, 161 Ind. 323, 68 N. E. 589; Taylor *v.* Ft. Wayne, 47 Ind. 274.

Iowa.— State *v.* Council, 106 Iowa 731, 77 N. W. 474.

Mississippi.— Jackson *v.* Whiting, 84 Miss. 163, 36 So. 611.

Ohio.— Lawrence *v.* Mitchell, 10 Ohio S. & C. Pl. Dec. 265, 8 Ohio N. P. 8.

56. **Record** see *infra*, II, A, 14, b, (VIII).

57. People *v.* Fleming, 10 Colo. 553, 16 Pac. 298; Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558; Dayton *v.* Dayton Coal, etc., Co., (Tenn. Ch. App. 1897) 43 S. W. 740.

58. Ashley *v.* Calliope, 71 Iowa 466, 32 N. W. 458; State *v.* Goowin, 69 Tex. 55, 5 S. W. 678.

59. State *v.* Jenkins, 25 Mo. App. 484.

Petition see *infra*, II, A, 14, b, (II).

60. Taylor *v.* Ft. Wayne, 47 Ind. 274; Huff *v.* Preuitt, (Tex. Civ. App. 1899) 53 S. W. 844.

Hearing see *infra*, II, A, 14, b, (VI).

Order or decree see *infra*, II, A, 14, b, (VII).

61. State *v.* Young, 61 Mo. App. 494; *In re* Duquesne Borough, 147 Pa. St. 58, 23 Atl.

proper petition by the inhabitants, voters, or freeholders of the territory to be included, or a certain proportion or number of them, is essential.[62] The essentials of a petition for incorporation are generally recognized to be the following:[63] (1) It must be in writing;[64] (2) signed by the required number of *bona fide* inhabitants or freeholders[65] within the time prescribed by the statute;[66] and (3) duly verified or accompanied by affidavits;[67] and (4) it must describe the boundary of territory to be incorporated,[68] or be accompanied by a map or plat when this

339; *In re* Rouseville Borough, 21 Pa. Co. Ct. 262; Ewing *v.* State, 81 Tex. 172, 16 S. W. 872.

62. *Alabama.*— West End *v.* State, 138 Ala. 295, 36 So. 423.

California.— People *v.* Linden, 107 Cal. 94, 40 Pac. 115; Page *v.* Los Angeles County, 85 Cal. 50, 24 Pac. 607.

Colorado.—People *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

Michigan.— Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

Missouri.— Meriwether *v.* Campbell, 120 Mo. 396, 25 S. W. 392; State *v.* Jenkins, 25 Mo. App. 484.

New Jersey.— Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858; Yard *v.* Ocean Beach, 48 N. J. L. 375, 5 Atl. 142.

New York.— *In re* Pine Hill, 33 N. Y. Suppl. 181.

Pennsylvania.— *In re* Taylorsport, 10 Pa. Cas. 1, 13 Atl. 224; *In re* Narberth Borough, 16 Pa. Co. Ct. 29.

Tennessee.— Angel *v.* Spring City, (Ch. App. 1899) 53 S. W. 191.

See 36 Cent. Dig. tit. "Municipal Corporations," § 23 *et seq.*

63. **Sufficiency of petition** generally see People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620; Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708.

The petition need not state facts not required by the statute, as that there is a town within the proposed boundaries. People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620.

A miscitation of the section of the general law under which a corporation is formed in the petition for incorporation will not make the petition fatally defective or the incorporation void, where the incorporation is otherwise in substantial compliance with the statute. Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

64. West End *v.* State, 138 Ala. 295, 36 So. 423; *In re* Narberth Borough, 16 Pa. Co. Ct. 29.

65. See *infra*, II, A, 14, b, (II), (B).

66. People *v.* Linden, 107 Cal. 94, 40 Pac. 115. The requirement of the Pennsylvania act of June 2, 1871, that a petition for incorporation of a borough shall be signed by the petitioners within three months immediately preceding its presentation to the court does not require that fact to be stated in the petition, but the fact must appear in the record. *In re* Summit Borough, 114 Pa. St. 362, 7 Atl. 219.

67. People *v.* Linden, 107 Cal. 94, 40 Pac. 115; Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49.

Date of affidavits.— Although affidavits accompanying a petition for incorporation of a city were dated March 13, while the petition was filed April 7, they were held sufficient, where they showed that a certain number of electors had signed the petition on March 13, the presumption being that the state of facts shown continued, and it being for the opponents of the incorporation to show in the hearing that, by death or departure from the district, the number had been reduced below that required. Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708.

Affidavit nunc pro tunc.— As it is merely necessary that the record of proceedings for incorporation of a borough shall affirmatively show somewhere that the application for incorporation has been signed by the petitioners, whose names are attached thereto, within three months before presentation, an affidavit to that effect filed *nunc pro tunc* before decree was held sufficient. *Re* La Plume, 8 Pa. Cas. 51, 4 Atl. 455.

Affidavits as evidence.— Under Ind. Rev. St. (1894) § 4317 (Rev. St. (1881) § 3296), providing that the petition for incorporation of a town shall be subscribed by the applicants, and verified by affidavits, such affidavits are admissible to prove the facts stated in the petition. Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49.

68. *Florida.*— Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

Georgia.— Warren *v.* Branan, 109 Ga. 835, 35 S. E. 383.

Idaho.— Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

Missouri.— Burnes *v.* Edgerton, 143 Mo. 563, 45 S. W. 293; State *v.* Young, 61 Mo. App. 494.

New Jersey.— Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858.

Pennsylvania.— A petition for incorporation which does not contain a particular description of the proposed boundaries will be denied, although no exceptions are filed. *In re* Riverton Borough, 6 Pa. Dist. 685, 20 Pa. Co. Ct. 63.

Texas.— Furrh *v.* State, 6 Tex. Civ. App. 221, 24 S. W. 1126.

West Virginia.— Shank *v.* Ravenswood, 43 W. Va. 242, 27 S. E. 223.

Sufficiency of description.— State *v.* Young, 61 Mo. App. 494; *In re* Edgeworth Borough, 25 Pa. Super. Ct. 554; Ewing *v.* State, 81 Tex. 172, 16 S. W. 872. A petition for incorporation of a city alleging that it states the population "as nearly as the same can be stated by your petitioners" is sufficient under a statute requiring it to state the population

is required by the statute;[69] (5) show what grade of corporation is expected or sought;[70] and (6) be seasonably filed with the appointed tribunal.[71] Publicity is provided for in some states by publication;[72] in others by delay and reference to some arm or branch of the tribunal.[73]

(B) *Requisites as to Petitioners.* The courts have generally inclined to a strict construction and rigid enforcement of the requirements of the law as to the number and qualifications of the signers of petitions for the incorporation, on the ground of jurisdiction.[74] "Residents" must be actual *bona fide* residents, and

"as nearly as may be." Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708. Where applicants for the incorporation of a new borough have adopted boundaries which are plainly not the best that can be made, and have not presented any good reason for the incorporation, it is not expedient to incorporate the borough. *In re* Circleville Borough, 28 Pa. Co. Ct. 508. Under the Pennsylvania act of April 1, 1834 (Pamphl. Laws 163), requiring that the courses and distances of the boundaries of a proposed borough be set forth in words at length, a petition setting forth boundaries along the course of a well-known and considerable stream is in substantial compliance with the statute when the distance along such a stream is given at length. *In re* Moosic, 12 Pa. Super. Ct. 353. The middle of a township road may be a boundary. *In re* Edgewood Borough, 130 Pa. St. 348, 18 Atl. 646; *In re* Ridley Park Borough, 1 Pa. Dist. 308, 4 Del. Co. 597. A petition for the incorporation of a borough which gives as a boundary for the proposed borough the low water line of a river between two points, stating the distance, is sufficient, it not being necessary to give the river's courses and distances. *In re* Duquesne Borough, 147 Pa. St. 58, 23 Atl. 339. It is insufficient to describe by bounding properties. *In re* Ridley Park Borough, *supra.*

Power of legislature to authorize designation of boundaries see *infra,* II, B, 2, a, (I), text and note 34.

Boundaries stated binding on court.— In an application for incorporation of a borough the court cannot direct that certain territory be taken in or omitted, but is limited to the determination of accepting or rejecting the application as it stands. *In re* Munhall, 25 Pa. Co. Ct. 287.

Amendment.— The court may, while the matter is pending and all the parties are represented, permit an amendment of the petition so as to set out the courses and distances in words at length. *In re* Edgeworth Borough, 25 Pa. Super. Ct. 554.

Supplemental map.— A defective map filed with a petition for the creation of a hamlet with township trustees may be supplemented by a more perfect one before action is taken by the trustees. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288.

Sufficiency of filing.— The clerk of a township is also the clerk of its board of trustees, and when the board is not in session papers should be filed with the clerk in order to constitute a legal filing with the trustees; and where the petition for the creation of a hamlet and map are filed with the township clerk under such circumstances, it is a legal filing; and it is none the less so because it is returned by the clerk to the person filing it as a mere convenience in carrying it to the township trustees. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288.

Marking "Filed" nunc pro tunc.— Where a plan or plot was filed with an application for the incorporation of a borough, but was not attached to the application or marked "Filed" at the time of presentation, it was held that it was not error for the court to permit counsel to certify to the fact that the plot was filed as stated, and to direct the clerk to mark the same filed *nunc pro tunc* as to the time of filing the petition. *In re* Jeannette Borough, 129 Pa. St. 567, 18 Atl. 557.

69. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288; *In re* Jeannette Borough, 129 Pa. St. 567, 18 Atl. 557. Sayles Civ. St. (1897) art. 580, requiring an application to a county court for an election to decide on the incorporation of a city to be accompanied by a map or plat of the territory to be incorporated, is mandatory, and an election granted on an application accompanied only by a boundary of such territory is illegal. Huff *v.* Preuitt, (Tex. Civ. App. 1899) 53 S. W. 844.

70. Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64. See *supra,* II, A, 7.

The class of corporation sought need not be specially named in the petition, if from the facts stated the class can be easily inferred. People *v.* Riverside, 70 Cal. 461, 11 Pac. 759.

71. Brooks *v.* Fischer, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429; State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288.

In Pennsylvania a petition for the incorporation of a borough, filed at an adjourned session of the court, referred to the next grand jury, and by them reported on, is regularly presented. *In re* Eddystone, 3 Del. Co. 541.

Filing of map of plot with petition see *supra,* note 69.

72. People *v.* Linden, 107 Cal. 94, 40 Pac. 115.

73. Burnes *v.* Edgerton, 143 Mo. 563, 45 S. W. 293.

74. *Alabama.*—West End *v.* State, 138 Ala. 295, 36 So. 423, holding that under Acts (1900–1901), p. 965, amending Code (1896), § 2937, and providing that proceedings to incorporate towns shall be begun by petition in writing signed by fifty or more qualified electors who reside within the boundaries of

the same is true of "landowners."[75] "Inhabitants" means taxable inhabitants.[76] "Owners" of land, "freeholders," or voters must be such at the date of filing the petition;[77] and they must be owners or freeholders in their own right.[78] Female freeholders may sign the petition and are also to be counted in computing the majority as well as in ascertaining the whole number of resident freeholders.[79]

the proposed town, who are also householders and freeholders, unless fifty signers of the petition have the requisite qualifications, the petition is defective to inaugurate the proceedings, and forms no valid basis for any subsequent step.

California.— Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708; People *v.* Linden, 107 Cal. 94, 40 Pac. 115; Page *v.* Los Angeles County, 85 Cal. 50, 24 Pac. 607.

Colorado.— People *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

Illinois.— People *v.* Pike, 197 Ill. 449, 64 N. E. 393.

Michigan.— Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

Missouri.— State *v.* Jenkins, 25 Mo. App. 484.

New Jersey.— Yard *v.* Ocean Beach, 48 N. J. L. 375, 5 Atl. 142.

New York.— *In re* Pine Hill, 33 N. Y. Suppl. 181.

Pennsylvania.—*In re* Summit Borough, 114 Pa. St. 362, 7 Atl. 219; *In re* Osborne, 101 Pa. St. 284; *Re* Taylorport, 10 Pa. Cas. 1, 13 Atl. 224; *In re* Moosic Borough, 7 Pa. Dist. 203 [*affirmed* in 12 Pa. Super. Ct. 353]; *In re* Akron Borough, 16 Pa. Co. Ct. 252; *In re* Narberth Borough, 16 Pa. Co. Ct. 29; *In re* Tullytown Borough, 11 Pa. Co. Ct. 97. A petition for the incorporation of a borough must be signed by a majority of the resident freeholders within the limits of the proposed borough, in order to give the court jurisdiction; and, this issue being made, the fact that there is a majority must be affirmatively established. *In re* Old Forge, 7 Del. Co. 462. The fact that a proposed borough will include within its limits, together with other territory, the whole of an existing unincorporated village does not make it necessary for a majority of the freeholders of such village to sign the petition for incorporation. *In re* Eddystone, 3 Del. Co. 541.

Tennessee.— Pepper *v.* Smith, 15 Lea 551.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 23, 25.

Second signature as joint owner.— A petition for the incorporation of a borough must be signed by a majority of the *bona fide* landowners, and when an owner has signed individually a second signature as joint owner with another cannot be counted. *In re* Springtown Borough, 17 Pa. Co. Ct. 529.

The assessment-rolls may be resorted to in determining whether a majority of the freeholders signed the petition. *In re* Old Forge, 7 Del. Co. (Pa.) 462 [*affirmed* in 12 Pa. Super. Ct. 359].

75. Page *v.* Los Angeles County, 85 Cal. 50, 24 Pac. 607; People *v.* Stratton, 33 Colo. 464, 81 Pac. 245; *In re* Taylorport, 10 Pa. Cas. 1, 13 Atl. 224.

An actual resident of territory which it is sought to incorporate is one who is in the place with the intent to establish or who has already established his domicile there. State *v.* Mote, 48 Nebr. 683, 68 N. W. 810. Under the Colorado statute (2 Mills Annot. St. § 4364), requiring petitions for the incorporation of a town to be signed by thirty electors owning land and residing in the territory sought to be incorporated, persons who move into the territory temporarily and merely for the purpose of signing the petition, and persons who are granted land solely in order to qualify them as signers of the petition and as a reward for signing, are not *bona fide* electors and landowners, and are not qualified as signers. People *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

76. State *v.* Jenkins, 25 Mo. App. 484. Under Ariz. Laws (1893), Act No. 72, declaring that whenever two thirds of the taxable inhabitants of any town shall petition the supervisors of the county for the incorporation of the town, setting forth the metes and bounds of the same, the board may order such town incorporated, the action of the supervisors incorporating a town bounded as described in the petition was not invalid because the whole town was not included; it being only necessary that the board should ascertain whether the petitioners are two thirds of the taxable inhabitants of the described territory. Territory *v.* Jerome, 7 Ariz. 320, 64 Pac. 417.

77. Yard *v.* Ocean Beach, 48 N. J. L. 375, 5 Atl. 142. Persons to whom deeds to property in a town seeking incorporation, and who sign the petition for incorporation, are not delivered before the filing of the petition, have no freehold when they become petitioners, and under Ala. Acts (1900–1901), p. 965, amending Code (1896), § 2937, requiring petitioners for the incorporation of towns to be freeholders, are not qualified as petitioners. West End *v.* State, 138 Ala. 295, 36 So. 423.

Under Tenn. Code, § 1667, relating to the organization into taxing districts of towns or cities whose charters have been repealed, and providing for a "petition of a majority of the voters within the limits of any such town or city, at the time of the repeal or surrender of its charter," the words "at the time of the repeal" merely define the limits of the town and do not qualify the word "voters," and limit the right of petition to those persons who were then voters. Pepper *v.* Smith, 15 Lea 551.

78. *In re* Pine Hill, 33 N. Y. Suppl. 181, ownership of land by wife of one signing the petition is not enough to qualify him.

79. *In re* Akron Borough, 16 Pa. Co. Ct. 252.

(c) *Withdrawal of Petitioners.* After a petition for incorporation has been presented and jurisdiction has attached, a petitioner cannot withdraw his name.[80]

(d) *Alteration of Petition.* Unauthorized alterations of a petition for incorporation after it has been presented or filed may render the subsequent proceedings void.[81]

(iii) *Notice and Objection Thereto.* The notice of the application for incorporation, or of the hearing thereon or election, as the case may be, must be given substantially as required by the statute.[82] Notice of the filing of a petition for incorporation of a municipality is not necessary, however, except as required by the statute;[83] and even when notice is required the courts seem to incline to a liberal construction of the statute.[84] Thus "for a period of not less than thirty days" does not mean thirty full days, but the first or last day may be included in the count and the election had on the last day.[85] Persons appearing to contest an

80. *In re* Flemington Borough, 168 Pa. St. 628, 32 Atl. 86; *In re* Quakertown, 3 Grant (Pa.) 203; *In re* Old Forge Borough, 12 Pa. Super. Ct. 359 [*affirming* 7 Del. Co. 462]; *In re* Tullytown Borough, 11 Pa. Co. Ct. 97. From the time that two thirds of the residents of a locality have signed a petition asking for the incorporation of territory as a village municipality the county council has jurisdiction of the petition, and the fact that certain of the signatures are withdrawn therefrom so that the names of two thirds of the residents do not remain does not take away the jurisdiction of the council and its subsequent proceedings are not *ultra vires.* Martin *v.* D'Arthabaska County Corp., 21 Quebec Super. Ct. 119 [*reversing* 20 Quebec Super. Ct. 329].

81. Thus under Mo. Rev. St. (1889) § 977, permitting a city or town to incorporate when a majority of the inhabitants should present a petition to the court, setting out the metes and bounds, it was held that the action of the court in allowing three of the petitioners to strike off the names of six petitioners, and to alter the boundaries in the petition, after its filing, avoided the incorporation. State *v.* Campbell, 120 Mo. 396, 25 S. W. 392.

82. People *v.* Riverside, 70 Cal. 461, 11 Pac. 759; State *v.* Oakland, 69 Kan. 784, 77 Pac. 694; *In re* Linton Borough, 5 Pa. Super. Ct. 36 [*affirming* 26 Pittsb. Leg. J. N. S. 293]; *In re* Pyne Borough, 6 Pa. Dist. 353; *In re* Springtown Borough, 17 Pa. Co. Ct. 529; York Borough's Case, 3 Pa. Co. Ct. 514; *In re* Throop, 3 Lack. Jur. (Pa.) 293. The provisions of the Pennsylvania act of June 26, 1895, requiring advertisement for thirty days immediately before the next regular term following the presentation and filing of an application for the incorporation of a borough are mandatory, and neglect to comply therewith is a fatal defect; and the fact that the exceptants had notice, and appeared and were heard on the merits, does not deprive them of their right to raise the question of want of regularity. *In re* Pyne Borough, *supra.* Prior to the act of June 26, 1895, it was required that the notice of an application for incorporation of a borough should state the time and place when and where the petition would be presented (*In re* Jeannette Borough, 129 Pa. St. 567, 18 Atl. 557; *In re* Osborne, 101 Pa. St. 284; *In re* Freeland Borough, 7 Kulp (Pa.) 107); but by the terms of the said act of 1895 the notice required is to be given after the application has been presented to the court and filed with the clerk. The notice required by the act of 1895 takes the place of the notice prescribed by the act of June 2, 1871, and both notices are not necessary. *In re* Emsworth Borough, 5 Pa. Super. Ct. 29.

Notice of election see *infra,* II, A, 14, b, (v), (b).

The names of the signers of the petition are not an essential part of the posted or published notice of the petition, unless made so by the statute. State *v.* Oakland, 69 Kan. 784, 77 Pac. 694.

Notice of the boundaries must be filed and published in Tennessee. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986.

83. Stembel *v.* Bell, 161 Ind. 323, 68 N. E. 589. Under Burns Rev. St. Ind. (1904) § 4317, requiring application for the incorporation of a town to be presented to the board of county commissioners at the time indicated in the notice of the application, citizens remonstrating against the incorporation are not entitled to notice of the time of the presentation of the application. Stembel *v.* Bell, *supra.*

84. People *v.* Riverside, 70 Cal. 461, 11 Pac. 759; State *v.* Oakland, 69 Kan. 784, 77 Pac. 694.

Advertisement.— In Pennsylvania notice of the petition for the incorporation of a borough need not be personally served on the supervisors of the township. Advertisement in a public newspaper is sufficient. *In re* Eddystone Borough, 3 Del. Co. (Pa.) 541.

Cure of defects in affidavit of publication. — The jurisdiction of a board of county supervisors in the matter of the incorporation of a city is not affected by the insufficiency of the affidavit of publication filed with the petition and affidavits of electors, a sufficient affidavit of publication having been filed before they reached their final determination. Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708.

85. State *v.* Winter Park, 25 Fla. 371, 5 So. 818. See also *In re* Jeannette Borough, 129 Pa. St. 567, 18 Atl. 557.

application for incorporation are estopped to subsequently question the form of notice.[86]

(iv) *Census or Enumeration of Inhabitants.* Statutes relating to municipal incorporation sometimes provide for the taking of a census of the population resident within the territory affected, or an enumeration of the inhabitants, and substantial compliance with such provision is necessary;[87] but no census or enumeration of inhabitants is necessary when it is not required by the statute.[88]

(v) *Acceptance or Consent*—(a) *In General.* Unless prevented by a constitutional provision,[89] it is within the power of the legislature to create municipal corporations by a general law without the consent of the inhabitants;[90] but as a rule general laws for the creation of such corporations are merely enabling and require consent of the inhabitants or voters of the territory affected, or a majority of them, to be manifested in some way prescribed by the statute, as by a vote at an election to be held for the purpose, and in such case the statutory conditions must be complied with.[91]

86. *In re* Taylor Borough, 160 Pa. St. 475, 28 Atl. 934; *In re* Edgewood Borough, 130 Pa. St. 348, 18 Atl. 646. *Compare*, however, *In re* Linton Borough, 5 Pa. Super. Ct. 36 (holding that an order refusing an application for the incorporation of a borough because of failure to give statutory notice will not be reversed because the exceptants appeared, as they may not comprise all the parties in interest); and *In re* Pyne Borough, 6 Lack. Leg. N. (Pa.) 124 (holding that, on proceedings for the incorporation of a borough, the fact that those excepting to the proceedings have notice of the same will not prevent their objecting that others had not notice, since, where a political subdivision of a state is to be created, the proceedings must bind all or none).

87. See Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49.

Failure to list the head of a family consisting of husband, wife, and child, in enumerating a population of eleven hundred and thirty-one persons, preparatory to the incorporation of a town, as required by Burns St. Ind. (1901) § 4315, will not render the incorporation invalid. Stembel *v.* Bell, 161 Ind. 323, 68 N. E. 589.

The use of initials for christian names in enumerating the list of the population resident within the territory sought to be incorporated does not vitiate the census. Stembel *v.* Bell, 161 Ind. 323, 68 N. E. 589.

In Tennessee, under Shannon Code, §§ 1882–1884, 1887, 1897, before making application for municipal incorporation, a list of the qualified voters in the proposed municipality must be made, verified, and filed. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986.

88. Smith *v.* Skagit County Com'rs, 45 Fed. 725.

89. See State *v.* Lamoureux, 3 Wyo. 731, 30 Pac. 243.

90. State *v.* Babcock, 25 Nebr. 709, 41 N. W. 654 (holding that a statute providing that all cities, towns, and villages containing more than fifteen hundred and less than fifteen thousand inhabitants should be cities of the second class and be governed by the provisions of the act, created such towns and villages into cities of the second class without any acceptance or other act of the municipality or its inhabitants); State *v.* Holden, 19 Nebr. 249, 27 N. W. 120. The positive provisions of the general statute of incorporation that all cities, towns, and villages of a certain population shall be cities of a certain class and be governed by the law applicable to that class, takes effect without formal acceptance or consent of the inhabitants and any place on attaining to that population becomes *ipso facto* a corporation of that class. State *v.* Ramsey County Dist. Ct., 84 Minn. 377, 87 N. W. 942.

91. *California.*— Santa Rosa *v.* Bower, 142 Cal. 299, 75 Pac. 829.

Illinois.— Stephens *v.* People, 89 Ill. 337.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Minnesota.— State *v.* Kiewel, 86 Minn. 136, 90 N. W. 160.

Missouri.— State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

Texas.— Ewing *v.* State, 81 Tex. 172, 16 S. W. 872; State *v.* Dunson, 71 Tex. 65, 9 S. W. 103; Lum *v.* Bowie, (1891) 18 S. W. 142.

United States.— Smith *v.* Skagit County Com'rs, 45 Fed. 725.

Constitutionality.— Such a statute is not unconstitutional as being a delegation of legislative power.

California.— *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755.

Colorado.— People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

Georgia.— Brunswick *v.* Finney, 54 Ga. 317.

Minnesota.— State *v.* Kiewel, 86 Minn. 136, 90 N. W. 160.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

New Jersey.— De Hart *v.* Atlantic City, 62 N. J. L. 586, 41 Atl. 687; Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

Washington.— Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

See also *supra*, II, A, 3; II, A, 13, c; and Constitutional Law, 8 Cyc. 830 *et seq.*

(B) *Election.*[92] The election on the question of incorporation of a municipality must be had and conducted substantially as required by the statute;[93] the required notice therefor must be given;[94] and the vote required by the statute must be in favor of the incorporation.[95] So also the result of the election must be submitted to the court, judge, or other body or officer for action, as required by the statute.[96]

92. See, generally, ELECTIONS.

93. People *v.* Weber, 222 Ill. 180, 78 N. E. 56; Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070; York Borough Case, 3 Pa. Co. Ct. 514.

Voting places.— An election is not rendered void by the fact that but one place for the entire town was designated in the ordinance calling the election, instead of one in each ward in the town. State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

An election on a legal holiday is not invalid, where the statute merely prohibits "judicial business" on a holiday. People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620.

94. People *v.* Riverside, 70 Cal. 461, 11 Pac. 759; York Borough Case, 3 Pa. Co. Ct. 514.

Sufficiency of notice see People *v.* Riverside, 70 Cal. 461, 11 Pac. 759.

Publication or posting.—Under a municipal incorporation act calling for an election notice, either by publication or by posting, it is sufficient, where it is given both ways, if it is given properly either way. Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708.

Monthly magazines or journals are not included in the words "all newspapers published in the town" in a statute relating to the publication of notice. York Borough Case, 3 Pa. Co. Ct. 514.

The class of corporation sought need not be specially named in the notice, if from the facts stated the class can be easily inferred. People *v.* Riverside, 70 Cal. 461, 11 Pac. 759.

Posting notices of election.— Where the law only requires four notices of election to be posted within the boundaries of the proposed corporation, an error in the order of the supervisors in requiring the posting of a fifth notice at a place afterward discovered to be outside of the boundaries does not vitiate the notice, it appearing that a literal compliance with the order resulted in a compliance with the law. People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620.

Notice of second election.— Under N. Y. Laws (1870), c. 291, § 13, as amended by Laws (1878), c. 59, providing that where an election to incorporate a village has been set aside by the county judge, and another election ordered, it "shall be held on notice of such election signed by some one or more of the persons designated as inspectors of election for the previous election as to incorporation," the provision that the first election shall be called by at least twenty electors resident within the bounds of the proposed village does not apply to the calling of a second election after the first one has been set aside by order of the judge, and the authority for that election is the order of the judge and the statutory notice for that election. People *v.* Snedeker, 30 N. Y. App. Div. 1, 51 N. Y. Suppl. 768.

95. People *v.* Weber, 222 Ill. 180, 78 N. E. 56; Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743.

Number of votes required.— If the proposition to vote upon city organization under the general law is submitted at a special election held for that purpose, a majority of the votes cast for the purpose is sufficient to carry it; but if it is submitted at a general election a majority of all votes cast at the election is essential, unless the statute providing for its submission provides that a majority of the votes cast upon the particular proposition submitted shall be sufficient to adopt it. People *v.* Weber, 222 Ill. 180, 78 N. E. 56. See ELECTIONS, 15 Cyc. 389. Pa. Const. art. 15, § 1, and Pa. Act, May 23, 1874, providing that cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand shall vote at any general election in favor of the same, are complied with when the majority of those voting shall vote to that effect, although not a majority of all the electors of the borough. York Borough Case, 3 Pa. Co. Ct. 514. See also *infra*, II, B, 2, d, (XIII).

Illegal votes will not render the election invalid, if it appears that the result was not affected thereby. People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620. See also *infra*, II, B, 2, d, (XIII); and ELECTIONS, 15 Cyc. 416, 430.

A certificate of the inspectors of an election to determine the question of incorporation of a village, which states that ninety-one qualified electors residing in the territory voted, and that the canvass showed that eighty ballots were cast, of which forty-four were in favor of incorporation, and thirty-six against it, shows that a majority of the votes were cast in favor of the incorporation, as required by Wis. Rev. St. (1898) § 865, as it will be presumed, in the absence of proof to the contrary, that the excess of votes over eighty were rejected for valid reasons. State *v.* Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

96. Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070.

The certificate of the sheriff holding an election for municipal incorporation is in Tennessee required to be indorsed on the application for the charter and registered with it, and a failure to comply with such

(VI) *Hearing and Determination.* The statutes variously provide for a hearing and determination by some court or board on an application for incorporation of a municipality;[97] and compliance with the statute in this respect is essential.[98] Under some statutes a court or board determines whether the conditions as to population, area, character of the territory, etc., exist, or as to whether the petition is signed by the required number of inhabitants of the required qualifications, and then decrees or orders an election to determine whether there shall be incorporation.[99] In Pennsylvania the propriety of the proposed incorporation of a borough is determined, on an application duly presented to it, by the court of quarter sessions.[1] Formerly the application was required to be first submitted to the grand jury for their consideration and report to the court,[2] but this is no longer necessary.[3] Where two applications affecting the same territory are made for incorporation, the one first presented should be first acted upon.[4] Regular adjournments of a hearing from time to time do not oust the court or board of jurisdiction.[5]

requirement will render an attempted organization void. Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858.

Declaring result of election.— Where on the same day the inhabitants of a town voted to incorporate under the general law as a city and also to become an independent school-district, the incorporation as a city was valid although the result of the school district election was first declared by the county judge. State *v.* Bean, 26 Tex. Civ. App. 605, 65 S. W. 202.

97. See the statutes of the several states.

Conclusiveness of findings see *infra*, II, A, 14, b, (IX), text and note 25.

98. Huff *v.* Preuitt, (Tex. Civ. App. 1899) 53 S. W. 844.

99. People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620; Taylor *v.* Ft. Wayne, 47 Ind. 274.

In Texas under Sayles Civ. St. (1897) art. 581, providing that, on application, a county court may grant an election to determine the question of incorporation of a city, if satisfactory proof is made that the proposed city contains the requisite number of inhabitants, a hearing is necessary, and it is immaterial that the city has formerly been incorporated, or that the judge is satisfied from his own knowledge that it contains the requisite number of inhabitants. Huff *v.* Preuitt, (Civ. App. 1899) 53 S. W. 844.

1. See *In re* Alliance Borough, 19 Pa. Super. Ct. 178; and cases cited in the notes following.

What bodies may be incorporated see *supra*, II, A, 8.

Territory that may be included see *supra*, II, A, 12.

Boundaries stated in petition binding on court see *supra*, II, A, 14, b, (II), (A), note 68.

Visiting of locality by judge.— Proceedings to incorporate a borough are not invalid because the judge, with the acquiescence of the parties and for their convenience, went to the locality to be incorporated and there heard the witnesses, where no order or decree of the court was made at such place. *In re* Herndon Borough, 19 Pa. Super. Ct. 127.

2. For cases as to the submission to the grand jury under the former provision see *In re* Summit Borough, 114 Pa. St. 362, 7 Atl. 219; *In re* Pennsburgh, (Pa. 1888) 13 Atl. 93; *In re* Warriorsmark, 1 Walk. (Pa.) 66; *Re* La Plume, 8 Pa. Cas. 51, 4 Atl. 455; *In re* Larksville, 13 Pa. Co. Ct. 351, 7 Kulp 84; *In re* Lehman Borough, 4 Kulp (Pa.) 312; *In re* Linton, 26 Pittsb. Leg. J. (Pa.) 293.

3. The act of 1834, providing for the submission of applications for incorporation of boroughs to the grand jury, is repealed in this respect by the act of June 26, 1895. Matter of Emsworth, 5 Pa. Super. Ct. 29; *In re* Pyne Borough, 6 Pa. Dist. 353; *In re* Tylerdale Borough, 26 Pa. Co. Ct. 650; *In re* Smithfield Borough, 23 Pa. Co. Ct. 583; *In re* East Pittsburg Borough, 19 Pa. Co. Ct. 102.

4. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288, holding that where two petitions are filed with township trustees, each for a hamlet, one for a portion of the township and the other for the whole township, the petition first filed should be first acted upon and submitted to vote, and if the petition filed last is first acted upon the proceedings thereunder will be null and void.

In such case mandamus will lie to compel the township trustees to proceed upon the petition first filed. State *v.* Mitchell, 22 Ohio Cir. Ct. 208, 12 Ohio Cir. Dec. 288.

5. People *v.* Linden, 107 Cal. 94, 40 Pac. 115, holding that the board of supervisors do not lose jurisdiction of proceedings for the incorporation of a municipality by adjourning the hearing of the petition from day to day without fixing the hour for resuming the hearing.

In Pennsylvania the hearing by the court of quarter sessions of an application for the incorporation of a borough may be regularly adjourned from time to time by the court as it may see fit; and in such case the decree may be entered at any subsequent term. *In re* Leetsdale Borough, 25 Pa. Super. Ct. 623; *In re* Wayne Borough, 12 Pa. Super. Ct. 363.

(VII) *ORDER OR DECREE.*[6] After the hearing of an application for municipal incorporation the statutes sometimes require the court or board having jurisdiction in the matter to make an order or decree incorporating the municipality.[7] The order or decree must, when so required by the statute, show the existence of the prescribed conditions to incorporation,[8] and it is sometimes required to designate the metes and bounds of the municipality.[9] The order or decree will not be vitiated by immaterial errors or irregularities.[10] The order or decree of a court incorporating a municipality may be corrected at the same term or, it has been held, even at a subsequent term;[11] or it may be vacated at the same term;[12] and an order of a board of supervisors defining the boundaries of a proposed municipality, and providing for an election therein, may be rescinded at any time before the election is held.[13]

(VIII) *RECORD.* Although municipalities may exist by prescription,[14] none are created in modern times under general law without record evidence of the incorporation.[15] It is of prime importance that the record shall show the facts essential to give jurisdiction to the tribunal appointed to conduct the incorporation;[16] and it is essential that the order or decree of incorporation, or the charter, shall be properly entered or recorded as provided by the statute.[17] This being

6. As to costs in proceedings for incorporation of a borough see *In re* Wayne, 12 Pa. Super. Ct. 372.

7. See the statutes of the several states, and the cases cited in the notes following.

8. State *v.* Bilby, 60 Kan. 130, 55 Pac. 843, holding invalid an order of the board of county commissioners incorporating a city, because of its failure to show that a majority of the taxpayers were in favor of the incorporation, and that the territory contained the number of inhabitants required by the statute.

9. State *v.* Bilby, 60 Kan. 130, 55 Pac. 843, holding that an order of the board of county commissioners incorporating a city was invalid, where it failed to designate the metes and bounds. See also Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

10. Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64 (holding that a miscitation of the section of the statute under which a corporation is organized in the order of incorporation will not render the order void, where the proceedings are otherwise in substantial compliance with the statute); Austrian *v.* Guy, 21 Fed. 500 (holding that the organization of a town is valid and legal, although the orders of the county board in setting apart certain territory and designating the boundaries thereof to form said town are not in the exact language of the statute).

11. Woods *v.* Henry, 55 Mo. 560.

12. *In re* Herndon Borough, 19 Pa. Super. Ct. 127, holding that where the court of quarter sessions has entered a decree incorporating a borough, it has power within the same term to vacate such decree.

13. Vernon *v.* San Bernardino County, 142 Cal. 513, 76 Pac. 253.

14. See *infra*, II, A, 18, c.

15. See People *v.* Linden, 107 Cal. 94, 40 Pac. 115; and other cases in the notes following.

16. *In re* Versailles Borough, 159 Pa. St. 43, 28 Atl. 230 (proceedings for incorporation of a borough fatally defective for failure of the record to show that the petition was signed, as required by the statute, within three months immediately preceding its presentation); *In re* Jeannette Borough, 129 Pa. St. 567, 18 Atl. 557 (to the same effect); *In re* Osborne, 101 Pa. St. 284 (to the same effect); *In re* Little Meadows, 28 Pa. St. 256 (failure of record to show that there was a town or village to be incorporated into a borough and that a majority of the freeholders therein petitioned therefor); *In re* Pyne Borough, 6 Lack. Leg. N. (Pa.) 124; *In re* Versailles Borough, *supra*; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858. See also Fleener *v.* Johnson, 38 Ind. App. 334, 77 N. E. 366. All facts necessary to give a board of county commissioners jurisdiction, under Kan. Gen. St. (1889) c. 19*a*, § 2, to authorize the incorporation of a town or village as a city of the third class, must appear by its record of such proceeding. Kansas Town, etc., Co. *v.* Kensington, 6 Kan. App. 247, 51 Pac. 804.

Effect of failure to record petition see Corey *v.* Edgewood Borough, 18 Pa. Super. Ct. 228 [*affirming* 31 Pittsb. Leg. J. N. S. 299].

17. People *v.* Linden, 107 Cal. 94, 40 Pac. 115; People *v.* Sausalito, 106 Cal. 500, 39 Pac. 937; *In re* Wintergreen Alley, 11 Pa. Co. Ct. 126; State *v.* Frost, 103 Tenn. 685, 54 S. W. 986. *Compare*, however, State *v.* Peterson, (Tex. Civ. App. 1895) 29 S. W. 415, holding that the requirement of Rev. St. art. 513, that a copy of the entry of the county judge as to the incorporation of a town should be recorded was directory merely.

Sufficiency of record see People *v.* Sausalito, 106 Cal. 500, 39 Pac. 937; State *v.* Broach, (Tex. Civ. App. 1896) 35 S. W. 86.

Certification and registration of a municipal charter is required in Tennessee. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986 (hold-

satisfactorily shown, every presumption is indulged in favor of the regularity of the proceeding.[18] Mere irregularities will not invalidate the incorporation.[19] It is sufficient that there has been substantial compliance with the requirements of the statute.[20] So long as the proceedings are still open, the court or board, as the case may be, may allow a *nunc pro tunc* entry showing the action taken and compliance with the statutory conditions.[21]

(IX) *REVIEW.* Provision is sometimes made by statute for a review of proceedings for municipal incorporation under general laws;[22] but since incorporation is not a judicial, but a ministerial proceeding, and a court conducting the proceeding exercises the special ministerial function conferred on it by legislation, rather than the judicial powers derived from the constitution,[23] a proceeding for incorporation or the order or decree therein is subject to review on appeal, writ of error, or otherwise, only when and in the manner specially provided by law.[24]

ing that under Shannon's code, section 1897, providing that a municipal charter shall be certified before registered, it will not be presumed that it was registered, where the record of proceedings setting out the charter does not show the certification, although it states that the charter was registered); Angel *v.* Spring City, (Tenn. Ch. App. 1899) 53 S. W. 191.

Certificate of officer holding election.— An attempted organization of a municipal corporation is void in Tennessee, under Acts (1877), c. 121, § 8, where there has been a failure to comply with the requirement that the certificate of the sheriff holding the election be indorsed on the application for the charter and that both the application and the certificate be registered. Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858.

18. Kittell *v.* Richards, 5 Pa. Co. Ct. 487.

19. State *v.* Broach, (Tex. Civ. App. 1896) 35 S. W. 86. See also *infra*, II, A, 15, a.

20. Hummelstown *v.* Brunner, 2 Dauph. Co. Rep. (Pa.) 376; State *v.* Broach, (Tex. Civ. App. 1896) 35 S. W. 86. See also *infra*, II, A, 15.

21. Fleener *v.* Johnson, 38 Ind. App. 334, 77 N. E. 366 (holding also that an application by petitioners for the incorporation of a town to amend the records of the board of county commissioners *nunc pro tunc* may be granted *ex parte* and without notice to objectors); *In re* Summit Borough, 114 Pa. St. 362, 7 Atl. 219 (holding that in a proceeding for the incorporation of a borough the fact that the petition was signed, as required by the statute, within three months immediately preceding its presentation, can be shown and made a matter of record at any time before final decree). See also *In re* Pennshurg, 22 Wkly. Notes Cas. (Pa.) 106.

An uncontradicted affidavit as to the time of the signing of a petition for incorporation of a borough, filed *nunc pro tunc* after the presentation of the petition, but before entry of the decree, is sufficient. *Re* La Plume, 8 Pa. Cas. 51, 4 Atl. 455.

22. See Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102; Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49; Lawrence *v.* Mitchell, 10 Ohio S. & C. Pl. Dec. 265, 8 Ohio N. P. 8; *In re* Osborne, 101 Pa. St. 284; and other cases cited in the notes following.

Exceptions, objections, record, and review see Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49. See also *infra*, this section, note 24.

Amendment of errors.— In Indiana issues raised before a court of county commissioners in proceedings to incorporate a city may be amended on appeal to the circuit court. Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102.

Bond see Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102.

Hearing and disposition of appeal.— Under the Indiana statute (Rev. St. (1894) § 4313 *et seq.*; Rev. St. (1881) § 3293 *et seq.*), providing for the incorporation of towns and directing that the returns of the election shall be made to the county commissioners, and that, if satisfied of the legality of the election, they shall declare the town incorporated, where persons appear before the commissioners and move to dismiss the proceeding, it is an appearance, and sufficient to raise an issue as to the validity of the election, and on appeal by objectors to the circuit court, after a denial of their motion, such issue, or the sufficiency of the objections, should be decided on the merits, and not on motion to dismiss the appeal. Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102.

23. See the cases cited in the notes following.

24. *California.*— Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708.

Colorado.— Velasquez *v.* Zimmerman, 30 Colo. 355, 70 Pac. 419; Eldred *v.* Johnson, 18 Colo. App. 384, 71 Pac. 891, holding that 2 Mills Annot. St. § 4364, authorizing incorporation of a town on petition of a certain number of electors and landowners, and section 4365, providing for appointment by the county court, on presentation of the petition, of commissioners to hold an election and report the result to the court, and section 4366, requiring a certified copy of all papers and record entries relating to the matter on file in the office of the clerk of the county court to be made and filed in the recorder's office, do not vest the county court with judicial power to hear objections and render a judgment.

Where the statute vests the court or board with discretionary power to determine all questions of fact and expediency on an application for municipal incorporation, its determination cannot be reviewed on certiorari or appeal in the absence of abuse of discretion.[25]

Missouri.— Hall *v.* De Armond, 46 Mo. App. 596, holding that no appeal would lie from the action of the county court incorporating a town, under Rev. St. (1889) § 977, as such action was not a judgment or judicial order within the meaning of the statute allowing appeals.

New Jersey.— Certiorari will lie to review an order of the court of common pleas directing a special election for the incorporation of a borough before the election and the filing of the certificates of the officers of election in the county clerk's office. Long Branch *v.* Sloane, 49 N. J. L. 356, 8 Atl. 101. But after the certificate of the officers of election has been so filed, a corporation exists which cannot be defeated by certiorari, but must be dissolved, if at all, by quo warranto. Campbell *v.* Wainright, 50 N. J. L. 555, 14 Atl. 603.

Ohio.— Since under Rev. St. §§ 1651*a*–1651*c*, providing for a petition to township trustees for the establishment of a hamlet and proceedings thereunder, the same remedy is given as when proceedings are brought before the county commissioners for the establishment of hamlets out of "allotted territory," such proceedings are subject to review, and, for proper cause shown, to reversal. Lawrence *v.* Mitchell, 10 Ohio S. & C. Pl. Dec. 265, 8 Ohio N. P. 8.

Pennsylvania.— Prior to the act of 1889, hereinafter referred to, the supreme court had power by certiorari to review the proceedings of courts of quarter sessions incorporating boroughs (*In re* Quakertown, 3 Grant 203. See also *In re* Osborne, 101 Pa. St. 284; *In re* Sewickley, 36 Pa. St. 80; *Re* La Plume, 8 Pa. Cas. 51, 4 Atl. 455); but an appeal would not lie from the decree of incorporation (*In re* Osborne, *supra; In re* Sewickley, *supra*). Under the act of May 9, 1889 (Pamphl. Laws 174), however, an appeal will lie from a decree incorporating a borough, if taken by not less than three persons aggrieved thereby. *In re* Taylor Borough, 160 Pa. St. 475, 28 Atl. 934; *In re* Swissvale Borough, 9 Pa. Super. Ct. 212. This act was not impliedly repealed by the act of June 26, 1895 (Pamphl. Laws 389). *In re* Swissvale Borough, *supra*. An appeal taken by less than three persons is not authorized and must be quashed. *In re* Wilkinsburg Borough, 131 Pa. St. 365, 20 Atl. 381; *In re* Swissvale Borough, *supra*. And the appeal must be taken out within the time prescribed by law. *In re* Morton Borough, 15 Pa. Super. Ct. 466 [*affirming* 8 Del. Co. 47]. See also *In re* Wayne Borough, 12 Pa. Super. Ct. 363.

Texas.— State *v.* Goowin, 69 Tex. 55, 5 S. W. 678 (holding that the findings of a county judge under Rev. St. art. 508, that the territory sought to be embraced within a contemplated municipal corporation had the population required by statute, was conclusive, since the law provided no means whereby his findings might be revised); Word *v.* Schow, 24 Tex. Civ. App. 120, 68 S. W. 192 (holding that under Rev. St. art. 581, declaring that, when satisfactory proof is made that a town or village contains the requisite number of inhabitants, it shall be the duty of the county judge to make an order for an election on the question of incorporation, the decision of the county judge on the sufficiency of the proof that the territory contains the requisite number of inhabitants is final and not subject to review).

West Virginia.— *In re* Union Mines, 39 W. Va. 179, 19 S. E. 398, holding that the circuit court in the discharge of its duties under the code, chapter 47, in relation to the incorporation of municipalities, acts in a legislative capacity only, and the supreme court has no power to review its decision.

Wisconsin.—*In re* Schumaker, 90 Wis. 488, 63 N. W. 1050, holding that under Rev. St. § 3069, as amended by Laws (1895), c. 212, providing that appeals should lie only from final orders in special proceedings, an order of reference of the issues in a proceeding for the incorporation of a village was not appealable.

'See 36 Cent. Dig. tit. "Municipal Corporations," § 32.

The writ of review lies to correct errors of the board of county supervisors in proceedings for municipal incorporation in excess of jurisdiction, but cannot be used to correct errors or irregularity within their jurisdiction, or to review a purely legislative or executive act. Borchard *v.* Ventura County, 144 Cal. 10, 77 Pac. 708. The action of a board of supervisors of a county in the matter of an incorporation of a city in determining the boundaries is legislative, and, in canvassing the returns and announcing the result, is ministerial, and therefore cannot be reviewed under a writ of review. Borchard *v.* Ventura County, *supra*.

25. *In re* Narberth Borough, 171 Pa. St. 211, 33 Atl. 72 [*affirming* 11 Montg. Co. Rep. 22]; *In re* Osborne, 101 Pa. St. 284; and other cases cited *infra*, this note.

In Pennsylvania, on application for borough charters, the court of quarter sessions (formerly the court of quarter sessions and the grand jury) have discretionary power to determine all questions of fact and expediency, and their discretion cannot be reviewed on certiorari (*In re* Osborne, 101 Pa. St. 284; *In re* Sewickley, 36 Pa. St. 80), or on appeal under the act of 1889, which has the same legal effect as a certiorari (*In re* Narberth Borough, 171 Pa. St. 211, 33 Atl. 72 [*affirming* 11 Montg. Co. Rep. 22]; *In re* Taylor Borough, 160 Pa. St. 475, 28 Atl. 934; *In re*

(x) *Organization.* Incorporation of a municipality is completed by organization under the charter.[26] This is effected by the election and qualification of the officers provided for by the charter and putting in operation a municipal government.[27] Until this is done the corporation is only initiate;[28] but with the installation of officers sworn to execute the law, and perform the functions of the corporation, the municipality becomes consummate and its charter, powers, and duties previously potential become vital and actual.[29] The general laws in relation to the incorporation of municipalities usually contain express provision for the calling and holding of the first meeting or election of a newly created municipality.[30]

(xi) *Prohibition and Injunction.* A writ of prohibition will not issue to stay a special proceeding for the incorporation of a municipal corporation on the ground that the statute authorizing the incorporation of such municipality is unconstitutional, since such a writ is issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity.[31] An injunction will doubtless lie in a proper case;[32] but it has been held that an injunction will not be granted to restrain proceedings to

Camp Hill Borough, 142 Pa. St. 511, 21 Atl. 978; *In re* Herndon Borough, 19 Pa. Super. Ct. 127; *In re* Rouseville Borough, 12 Pa. Super. Ct. 126. See also *In re* Leetsdale Borough, 25 Pa. Super. Ct. 623; *In re* Edgeworth Borough, 25 Pa. Super. Ct. 554; *In re* Swoyerville Borough, 12 Pa. Super. Ct. 118). The limit and size of a borough and the question as to what land is to be included or excluded are matters of discretion with the court of quarter sessions, and not reviewable in the absence of abuse of discretion. *In re* Sewickley, *supra; In re* Quakertown Borough, 3 Grant 203; *In re* Old Forge, 12 Pa. Super. Ct. 359 [*affirming* 7 Del. Co. 462, 5 Lack. Leg. N. 185]; *In re* Moosic, 12 Pa. Super. Ct. 353; Hummelstown *v.* Brunner, 2 Dauph. Co. Rep. 376; and other cases above cited. The same is true of the question whether the territory proposed to be incorporated is a village or town with properly appurtenant land. *In re* Leetsdale Borough, 25 Pa. Super. Ct. 623; *In re* Alliance Borough, 19 Pa. Super. Ct. 178. A decree of incorporation of a borough is not reviewable on appeal, unless illegality in the proceedings is manifest on the record, or abuse of discretion by the court is distinctly charged and clearly established. *In re* Narberth Borough, 171 Pa. St. 211, 33 Atl. 72. Whether the required number of freeholders have signed the petition for borough incorporation is a question of fact, and where the court of quarter sessions determines the same, their action is an adjudication which will not be disturbed where the record shows no error. *In re* Old Forge, 12 Pa. Super. Ct. 359 [*affirming* 7 Del. Co. 462, 5 Lack. Leg. N. 185]. And the same is true of the question whether or not the signers of the petition are freeholders. *In re* Moosic, 12 Pa. Super. Ct. 353. Review on certiorari see also Darby *v.* Sharon Hill, 112 Pa. St. 66, 4 Atl. 722; *In re* Little Meadows, 28 Pa. St. 256.

In Texas see the cases cited *supra*, this note.

26. Coles County *v.* Allison, 23 Ill. 437.

27. People *v.* Morrow, 181 Ill. 315, 54 N. E. 839; Crook *v.* People, 106 Ill. 237; State *v.* Arnold, 38 Ind. 41. See *supra*, II, A, 14, b, (I).

28. State *v.* Arnold, 38 Ind. 41.

29. State *v.* Arnold, 38 Ind. 41.

30. See the statutes of the several states.

Delegation of power to fix place of meeting. — The county commissioner to whom application is made for the organization of a municipal corporation (a plantation, under Me. Laws (1870), c. 121) cannot delegate the power to fix the place of meeting for that purpose to the person to whom his warrant is addressed. State *v.* Shaw, 64 Me. 263.

Notice of the meeting or election must be given as prescribed by the statute. State *v.* Shaw, 64 Me. 263.

Provision directory as to time. — The provision in a town charter that the first election of officers shall be held upon a certain day has been held to be merely directory, so that failure to elect on that day will not prevent the organization of the town under the charter. Coles County *v.* Allison, 23 Ill. 437.

Statute applicable to private corporations only. — R. I. Pub. St. c. 152, § 4, providing that the first meeting of all corporations shall be called by a notice signed by one of the persons named in the act of incorporation, which shall be delivered to each member thereof, or published, etc., does not apply to municipal corporations, since, as no person is named as a corporator in the charter of a public corporation, and as there are no members of such a corporation within the meaning of the statute, compliance is impossible as to such corporations. Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161.

31. *In re* Schumaker, 90 Wis. 488, 63 N. W. 1050. See, generally, Prohibition.

32. See Injunctions, 22 Cyc. 888 *et seq.*

incorporate a municipality because of the mere fact that some part of the territory does not contain the population required by the statute, or because the parties applying for the injunction will be subjected to burdens of local government disproportionate to the benefits accruing to them therefrom.[33]

15. DEFECTIVE CORPORATIONS — a. In General. The failure to comply substantially with the essential requirements of the law of incorporation makes the body defective, but not necessarily invalid and void.[34] It is to the interest of the public that government shall be stable, and that existing institutions shall not be easily destroyed, and the courts therefore in obedience to the maxim *ut res magis valeat quam pereat* are slow to declare a municipal corporation utterly null and void unless required to do so by the positive mandates of the law.[35] Failure to comply with provisions of the statute which are merely directory will not render the corporation invalid;[36] and substantial compliance with the law is generally held sufficient.[37] The fact that the legislature has created a municipality without bestowing upon it all the powers necessary for its government will not authorize the court to declare that the municipality has not a legal existence.[38]

b. Classification Based on Defects. The result of this policy has been to divide municipal corporations with reference to their defects in creation or organization into three classes: (1) Corporations *de jure*; (2) corporations *de facto*; and (3) void corporations; the first, being strictly legal and impregnable to assault in the courts from any source,[39] the second, being subject only to attack by the state in a direct proceeding to forfeit franchises,[40] and the last subject to legal challenge by any party in any judicial proceeding.[41]

c. Corporations De Facto. The judicial decisions are so discordant as to this

33. Stephens *v.* Minnerly, 3 Hun (N. Y.) 566, 6 Thomps. & C. 318.

34. Woods *v.* Henry, 55 Mo. 560 (holding that where a town was laid off on section 23, and the petition of the inhabitants for incorporation erroneously described the location as in section 24, and such misdescription was followed by the county court in its decree of incorporation, in quo warranto to oust the trustees of the corporation, where enough remained in the description, without the false particulars, to ascertain the location, the false description should be stricken out); Omaha *v.* South Omaha, 31 Nebr. 378, 47 N. W. 1113. But *compare* Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

35. Gilkey *v.* How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483.

36. Coles County *v.* Allison, 23 Ill. 437, holding that the provision in a town charter that the first election of officers should be held upon a certain day was merely directory, and the failure to elect on that day did not prevent the organization of the town under the charter. See also People *v.* Los Angeles, 133 Cal. 338, 65 Pac. 749.

37. *Idaho.*— Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

Illinois.— People *v.* Pike, 197 Ill. 449, 64 N. E. 393.

Pennsylvania.— Hummelstown *v.* Brunner, 2 Dauph. Co. Rep. 376.

Texas.— State *v.* Broach, (Civ. App. 1896) 35 S. W. 86.

United States.— Austrian *v.* Guy, 21 Fed. 500.

See *supra*, II, A, 14, b, (I).

Strict compliance with statute in Tennessee see *infra*, note 44.

38. State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941; Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858.

39. People *v.* Farnham, 35 Ill. 562; Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; State *v.* Young, 3 Kan. 445; Smith *v.* Crutcher, 92 Ky. 586, 18 S. W. 521, 13 Ky. L. Rep. 817; Rains *v.* Oshkosh, 14 Wis. 372.

40. Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558; Kansas Town, etc., Co. *v.* Kensington, 6 Kan. App. 247, 51 Pac. 804; Gilkey *v.* How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483. See *infra*, II, A, 15, c.

41. Colton *v.* Rossi, 9 Cal. 595; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; Angel *v.* Spring City, (Tenn. Ch. App. 1899) 53 S. W. 191. The provisional city of Guthrie, organized before the passage of the organic act of May 2, 1890, providing for the organization of municipal corporations, did not become a municipal corporation *de jure* or *de facto* until it had complied with the provisions of that act in respect to petitioning for incorporation. Guthrie *v.* Wylie, 6 Okla. 61, 55 Pac. 103.

A judgment against a pretended municipal corporation having no legal existence as such is a mere nullity. Colton *v.* Rossi, 9 Cal. 595.

Contradicting recitals in order or decree.— One not a party to proceedings to incorporate a town is not prevented, by a recital in the order appointing commissioners to call an election, that the proceedings were had before the court, from showing that they were had before the judge and therefore void. State *v.* Council, 106 Iowa 731, 77 N. W. 474.

class of corporations as not to be reconcilable, varying in doctrine from those of the theorists who deny the existence of such a corporation, and admit only two classes, the valid and the void,[42] to those who hold any actual organization in ostensible possession of municipal powers to be a *de facto* corporation.[43] There is a general consensus of judicial opinion on the middle ground between these extremes to the effect that *de facto* corporations should be recognized upon the basis of the following essentials of existence: (1) A valid statute authorizing incorporation; (2) an organization in good faith under it; (3) a colorable compliance with the law; and (4) an assumption of corporate powers.[44] Some states require only the last three, holding that an unconstitutional statute is sufficient basis for a corporation *de facto*;[45] but in other states the cases are to the contrary.[46] Such corporations and contracts made or acts done by them may be validated by legislation,[47] and even without validation of the corporation its contracts are binding upon it.[48]

d. Validating Acts. Where a municipality undertakes to incorporate under a general or special law, but by reason of failure to comply with the requirements of the law the corporation is defective or invalid, the legislature may by subsequent legislation, subject to constitutional limitations as to general and special laws, validate the incorporation and the acts already done or contracts already made.[49]

16. Impeaching Validity of Corporation — a. By the State. If a pretended municipal corporation has failed to become a corporation *de jure*, even though it

42. Guthrie *v.* Wylie, 6 Okla. 61, 55 Pac. 103; Ingersoll Pub. Corp. 143.

43. Back *v.* Carpenter, 29 Kan. 349; Atty.-Gen. *v.* Dover, 62 N. J. L. 138, 41 Atl. 98. See also Carleton *v.* People, 10 Mich. 250; Guthrie *v.* Wylie, 6 Okla. 61, 55 Pac. 103; Com. *v.* McCombs, 56 Pa. St. 436.

44. *Colorado.*—Duggan *v.* Colorado Mortg., etc., Co., 11 Colo. 113, 17 Pac. 105.

Illinois.— People *v.* Pederson, 220 Ill. 554, 77 N. E. 251.

Kansas.— Mendenhall *v.* Barton, 42 Kan. 570, 22 Pac. 558; Back *v.* Carpenter, 29 Kan. 349; Stafford County School Dist. No. 25 *v.* State, 29 Kan. 57. Where a town or village organizes a city government based on an order of the board of county commissioners wherein the jurisdictional facts to authorize the order do not appear, such government is a corporation *de facto*, and its acts in levying taxes on property within its corporate limits are not subject to collateral attack. Kansas Town, etc., Co. *v.* Kensington, 6 Kan. App. 247, 51 Pac. 804. *Compare* Oswego Tp. *v.* Anderson, 44 Kan. 214, 24 Pac. 486.

Minnesota.— Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

Nebraska.— Arapahoe *v.* Albee, 24 Nebr. 242, 38 N. W. 737, 8 Am. St. Rep. 202.

New Jersey.— Atty.-Gen. *v.* Dover, 62 N. J. L. 138, 41 Atl. 98; Stout *v.* Zulick, 48 N. J. L. 599, 7 Atl. 362.

New York.— Eaton *v.* Aspinwall, 19 N. Y. 119.

Ohio.— Society Perun *v.* Cleveland, 43 Ohio St. 481, 3 N. E. 357.

Texas.— Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758; Foster *v.* Hare, 26 Tex. Civ. App. 177, 62 S. W. 541; Eustis *v.* Henrietta, (Civ. App. 1896) 37 S. W. 632; White *v.* Quanah, (Civ. App. 1894) 27 S. W. 839.

Wisconsin.— Gilkey *v.* How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483.

United States.— Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101; Miller *v.* Perris Irr. Dist., 85 Fed. 693; Hill *v.* Kahoka, 35 Fed. 32.

In Tennessee contrary to the general doctrine announced in most of the above cases, a strict compliance with the statutory requirements is held to be essential to the incorporation of a municipality, so that want of such compliance will render a municipal charter void and prevent the coming into existence of a corporation *de facto*. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; State *v.* Waggoner, 88 Tenn. 290, 12 S. W. 721; Angel *v.* Spring City, (Ch. App. 1899) 53 S. W. 191.

45. Back *v.* Carpenter, 29 Kan. 349; Atty.-Gen. *v.* Dover, 62 N. J. L. 138, 41 Atl. 98; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101. See also Carleton *v.* People, 10 Mich. 250; Taylor *v.* Skrine, 3 Brev. (S. C.) 516.

46. Colton *v.* Rossi, 9 Cal. 595. See also Guthrie *v.* Wylie, 6 Okla. 61, 55 Pac. 103; and Corporations, 10 Cyc. 255.

47. See *infra*, II, A, 15, d.

48. White *v.* Quanah, (Tex. Civ. App. 1894) 27 S. W. 839; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101; Hill *v.* Kahoka, 35 Fed. 32. And see, generally, *infra*, IX.

49. *Arkansas.*— State *v.* Leatherman, 38 Ark. 81.

Illinois.— People *v.* Farnham, 35 Ill. 562;

may be one *de facto*, by reason of there being no valid law authorizing the incorporation, or by reason of a failure to substantially comply with the requirements of the law, the state may in quo warranto proceedings oust it from the exercise of corporate powers and privileges,[50] unless it is estopped or barred by laches,[51] or unless the order or decree of incorporation is conclusive.[52]

Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304.

Indiana.— Stembel *v.* Bell, 161 Ind. 323, 68 N. E. 589.

Minnesota.— State *v.* Spande, 37 Minn. 322, 34 N. W. 764.

Tennessee.— Muse *v.* Lexington, 110 Tenn. 655, 76 S. W. 481.

Texas.— Mathews *v.* State, 82 Tex. 577, 18 S. W. 711; McMickle *v.* Hardin, 25 Tex. Civ. App. 222, 61 S. W. 322.

Washington.— State *v.* Centralia, 8 Wash. 659, 36 Pac. 484; Pullman *v.* Hungate, 8 Wash. 519, 36 Pac. 483; *In re* Campbell, 1 Wash. 287, 24 Pac. 624.

Wisconsin.— Winneconne *v.* Winneconne, 111 Wis. 13, 86 N. W. 590; State *v.* McGovern, 100 Wis. 666, 76 N. W. 593.

Acts not validating defective corporations. — It has been held, however, that a place once incorporated by an act of the legislature as a town will not become one of the cities of the state until there is a legislative enactment expressly declaring it to be a city, and that the mere fact that in different legislative acts referring to such towns it is sometimes designated as a "city" will not make it a municipal corporation of the character indicated by that term, and that where the act incorporating it as a town has never been repealed its existence as such is not affected by subsequent acts of the legislature referring to it as a city. Savannah, etc., R. Co. *v.* Jordan, 113 Ga. 687, 39 S. E. 511. So in Texas it has been held that where the incorporation of a town is invalid because seventy-five per cent of the lands included in its boundaries were agricultural lands, the defect is not cured by Rev. St. art. 616*c*, validating attempts to incorporate which are defective because of failure to comply with all the requirements of the law, since the statute has no application to the incorporation of municipalities in violation of law. Judd *v.* State, 25 Tex. Civ. App. 418, 62 S. W. 543.

Reincorporation or reorganization see *infra*, II, C, 1, f.

50. *Alabama.*—West End *v.* State, 138 Ala. 295, 36 So. 423.

California.— People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620; People *v.* Los Angeles, 133 Cal. 338, 65 Pac. 749.

Colorado.— People *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

Florida.— Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

Missouri.— State *v.* Fleming, 147 Mo. 1, 44 S. W. 758; State *v.* Huff, 105 Mo. App. 354, 79 S. W. 1010; State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471.

Nebraska.— State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941.

Texas.— Furrh *v.* State, 6 Tex. Civ. App. 221, 24 S. W. 1126.

See, generally, QUO WARRANTO.

51. State *v.* Leatherman, 38 Ark. 81 (holding that the state may by long acquiescence and continued recognition of a municipal corporation, through her officers, state and county, be precluded from an information to deprive it of franchises long exercised in accordance with the general law); State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471 (holding that where a municipality was organized as a city by decree of a county court, and acted as such for eight years, and in quo warranto to oust it from its franchises for illegality in its incorporation there was no evidence that a judgment in favor of relator could serve any useful purpose, but on the contrary it appeared that it might result in great injury, the state was barred by laches from obtaining such relief).

52. Thus in Missouri it is held that neither the state nor its attorney-general or prosecuting attorney can by quo warranto, or by any other writ or independent process known to the law, question the validity of the incorporation of a city by the county court, acting within the scope of its constitutional and statutory authority, unless fraud and collusion on the part of such court has been charged and proven, or unless fraud has been so practised upon it in the matter of procuring the order that for that reason it might be treated as fraudulent. Unless this is shown, such judgment is final and conclusive, and binding on all courts. State *v.* Fleming, 158 Mo. 558, 59 S. W. 118. *Compare* State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471. So in California, under the statute relating to the creation of municipal corporations, which provides that the board of county supervisors shall, on the hearing of a petition for incorporation, determine how many inhabitants reside within the proposed boundaries and whether the petition is signed by a sufficient number of electors of the district, it is held that in quo warranto by the state attacking the validity of the corporation, the finding of the board on those questions is conclusive, in the absence of a law providing for an appeal, and in the absence of a showing that the decision was induced by fraud. People *v.* Loyalton, 147 Cal. 774, 82 Pac. 620; People *v.* Los Angeles, 133 Cal. 338, 65 Pac. 749. But in Alabama under Code (1896), §§ 2938, 2941, providing that on the filing of a petition, which, under Acts (1900–1901), p. 965, amending Code, § 2937, must be signed by fifty or more qualified electors residing within the boundaries of the proposed town, and who are also householders and freeholders, the probate judge must direct an election to be held to determine

b. By Private Individuals — (I) *Direct Attack.* A private individual cannot institute quo warranto proceedings to contest the validity of the existence of a municipal corporation,[53] unless such a proceeding is authorized by statute.[54]

(II) *Collateral Attack.* The existence and growth of municipalities is a matter of interest to the state, and the general rule is that, so long as the state does not see fit to forfeit the charter of a *de facto* municipality, or to oust it from the exercise of corporate powers, its existence is not subject to collateral attack at the private suit of any person.[55] Suits by owners of property to enjoin the collection of taxes, or to recover taxes paid under protest, or to remove a tax cloud from the title, or to replevy or recover for the conversion of personalty distrained for taxes, or defenses in an action by the municipality, cannot be maintained on the ground of defect of incorporation or organization, unless such defect is so fatal as to render the incorporation absolutely void.[56] It is held in some jurisdic-

whether the town shall be incorporated, and, when the result is certified to him, must make an order of record that the inhabitants of the town are incorporated, it is held that the action of the probate judge on the petition is merely ministerial, as there is no provision whereby he can judicially ascertain the qualification of the petitioners, and that it does not preclude inquiry into the validity of the petition by proper and direct attack by quo warranto. West End *v.* State, 138 Ala. 295, 36 So. 423.

53. See Moore *v.* Seymour, 69 N. J. L. 606, 55 Atl. 91. See, generally, Quo Warranto.

54. State *v.* Council, 106 Iowa 731, 77 N. W. 474; State *v.* McLean County, 11 N. D. 356, 92 N. W. 385.

55. *Colorado.*— Velasquez *v.* Zimmerman, 30 Colo. 355, 70 Pac. 419; Cowell *v.* Colorado Springs Co., 3 Colo. 82.

Florida.— Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

Illinois.— People *v.* Pederson, 220 Ill. 554, 77 N. E. 251; Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617; Tisdale *v.* Minonk, 46 Ill. 9; Hamilton *v.* Carthage, 24 Ill. 22; Cleveland, etc., R. Co. *v.* Dunn, 61 Ill. App. 227.

Indiana.— Mullikin *v.* Bloomington, 72 Ind. 161.

Iowa.— Decorah *v.* Gillis, 10 Iowa 234.

Kansas.— Levitt *v.* Wilson, 72 Kan. 160, 83 Pac. 397; Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558; Kirkpatrick *v.* State, 5 Kan. 673; Kansas Town, etc., Co. *v.* Kensington, 6 Kan. App. 247, 51 Pac. 804.

Louisiana.— Chicago, etc., R. Co. *v.* Kentwood, 49 La. Ann. 931, 22 So. 192.

Michigan.— People *v.* Smith, 131 Mich. 70, 90 N. W. 666 (in prosecution for resisting an officer); Coe *v* Gregory, 53 Mich. 19, 18 N. W. 541; Bird *v.* Perkins, 33 Mich. 28; People *v.* Maynard, 15 Mich. 463.

Minnesota.— Where a municipality is acting under color of law, and exercising all the functions of a corporation *de jure*, and it has been recognized as a corporation for some years by the state, the validity of its corporate existence cannot be collaterally attacked. St. Paul Gaslight Co. *v.* Sandstone, 73 Minn. 225, 75 N. W. 1050.

Missouri.— State *v.* Fuller, 96 Mo. 165, 9 S. W. 583; Fredericktown *v.* Fox, 84 Mo. 59; St. Louis *v.* Shields, 62 Mo. 247; Kayser *v.* Bremen, 16 Mo. 88; State *v.* Huff, 105 Mo. App. 354, 79 S. W. 1010; Newton County School Dist. No. 4 *v.* Smith, 90 Mo. App. 215; Trenton *v.* Devorss, 70 Mo. App. 8 (prosecution for violation of ordinance); Clarence *v.* Patrick, 54 Mo. App. 462; Billings *v.* Dunnaway, 54 Mo. App. 1.

Nebraska.— Osborn *v.* Oakland, 49 Nebr. 340, 68 N. W. 506; State *v.* Whitney, 41 Nebr. 613, 59 N. W. 884; McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282.

New Jersey.— Rellstab *v.* Belmar, 58 N. J. L. 489, 34 Atl. 885.

New York.— Gardner *v.* Christian, 70 Hun 547, 24 N. Y. Suppl. 339.

North Carolina.— Henderson *v.* Davis, 106 N. C. 88, 11 S. E. 573.

Pennsylvania.— Carey *v.* Borough of Edgwood, 31 Pittsb. Leg. J. N. S. 299.

Texas.— Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758; McCrary *v.* Comanche, (Civ. App. 1896) 34 S. W. 679; Higgins *v.* Bordages, (Civ. App. 1894) 28 S. W. 350; Troutman *v.* McClesky, 7 Tex. Civ. App. 561, 27 S. W. 173.

Wisconsin.— Gilkey *v.* How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483.

United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Hill *v.* Kahoka, 35 Fed. 32; Austrian *v.* Guy, 21 Fed. 500; Judson *v.* Plattsburg, 14 Fed. Cas. No. 7,570, 3 Dill. 181. Where a reputed public corporation is acting under the forms of law, unchallenged by the state, the validity of its organization cannot be brought in question by private parties. Neither the nature nor the extent of an illegality in its organization can affect its existence, if it be acting under color of law, and the state makes no complaint. Miller *v.* Perris Irr. Dist., 85 Fed. 693.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 41, 42.

56. *Florida.*— Bateman *v.* Florida Commercial Co., 26 Fla. 423, 8 So. 51, bill to enjoin the tax-collector of a town from selling property for taxes.

Illinois.— People *v.* Pederson, 220 Ill. 554, 77 N. E. 251; Nunda *v.* Crystal Lake, 79 Ill. 311, hill to enjoin collection of taxes.

Kansas.— Back *v.* Carpenter, 29 Kan. 349.

Louisiana.— Chicago, etc., R. Co. *v.* Kentwood, 49 La. Ann. 931, 22 So. 192.

tions that the existence of a pretended municipal corporation may be collaterally attacked by a private individual if the attempted incorporation is an absolute nullity and there is neither a corporation *de jure* nor *de facto*;[57] but this does not apply in those states which recognize any municipal organization, whether chartered or not, whether *bona fide* or *mala fide*, as a *de facto* corporation.[58] A judgment against a pretended municipal corporation having no existenco *de jure* or *de facto* has been held a nullity.[59]

(III) *Estoppel.* An individual may be estopped by his conduct to attack the validity of the incorporation of a municipality, even though, but for such estoppel, he might do so.[60] Thus it has been held that one who files a specific objection to the inclusion of his land in a proposed borough cannot attack the decree incorporating the borough on the ground that his land was excluded.[61] So it has been held that the obligors on a bond given to a municipal corporation, by making and signing the instrument, admit the corporate capacity of the obligee, and cannot plead *nul tiel corporation* in an action on the bond.[62] One who deals with a corporation in its corporate capacity cannot afterward collaterally assail the legality of its corporate existence.[63]

17. Preëxisting Rights and Liabilities[64] — a. In General. The law, to a certain extent, and equity fully, recognizes the property rights and liabilities of an organized community and preserves and enforces them through all the changes of class and grade of municipal corporation by the application of the doctrine of succession, wherever it is applicable.[65] The few apparent exceptions to this rule

Michigan.— Coe *v.* Gregory, 53 Mich. 19, 18 N. W. 541 (replevin to recover property seized for a village tax); Bird *v.* Perkins, 33 Mich. 28 (trover to recover the value of property taken and sold for taxes).

Missouri.— Kayser *v.* Bremen, 16 Mo. 88.

Nebraska.— McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282 (suit to enjoin collection of assessment); Omaha *v.* South Omaha, 31 Nebr. 378, 47 N. W. 1113; South Platte Land Co. *v.* Buffalo County, 15 Nebr. 605, 19 N. W. 711 (suit to enjoin imposition of taxes).

New Jersey.— Rellstab *v.* Belmar, 58 N. J. L. 489, 34 Atl. 885, certiorari to review assessment of horough taxes.

New York.— Gardner *v.* Christian, 70 Hun 547, 24 N. Y. Suppl. 339, action of conversion against tax-collector and others for taking property to satisfy taxes.

Texas.— Eustis *v.* Henrietta, (Civ. App. 1896) 37 S. W. 632; McCrary *v.* Comanche, (Civ. App. 1896) 34 S. W. 679 (defense in action by city to recover taxes); Higgins *v.* Bordages, (Civ. App. 1894) 28 S. W. 350 (defense in action by purchaser at a tax-sale for possession of the property purchased); Troutman *v.* McClesky, 7 Tex. Civ. App. 561, 27 S. W. 173 (suit to enjoin collection of taxes).

United States.— Austrian *v.* Guy, 21 Fed. 500, proceeding by owner of town lots to remove a cloud on his title caused by a tax deed issued to the purchaser at a tax-sale for taxes levied by the town.

See 36 Cent. Dig. tit. "Municipal Corporations," § 43.

57. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Woodbury *v.* Brown, 101 Tenn. 707, 50 S. W. 743; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; State *v.* Waggoner, 88 Tenn. 290, 12 S. W. 721; Angel *v.* Spring City, (Tenn. Ch. App. 1899) 53 S. W. 191.

58. Atty.-Gen. *v.* Dover, 62 N. J. L. 138, 41 Atl. 98; Guthrie *v.* Wylie, 6 Okla. 61, 55 Pac. 103; Gilkey *v.* How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483.

59. Colton *v.* Rossi, 9 Cal. 595.

60. *In re* Flemington Borough, 168 Pa. St. 628, 32 Atl. 86.

61. *In re* Flemington Borough, 168 Pa. St. 628, 32 Atl. 86.

62. St. Louis *v.* Shields, 62 Mo. 247.

63. Cowell *v.* Colorado Springs Co., 3 Colo. 82.

64. Preëxisting rights and liabilities on: Annexation or detachment of territory, or consolidation or division see *infra*, II, B, 2, g. New charter and reorganization see *infra*, II, C, 1, e. Repeal of charter see *infra*, II, C, 2, f.

65. *Alabama.*— Amy *v.* Selma, 77 Ala. 103.

California.— Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891.

Connecticut.— Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777.

Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Kansas.— Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844; Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415; Oswego Tp. *v.* Anderson, 44 Kan. 214, 24 Pac. 486.

Kentucky.— Frankfort *v.* Mason, etc., Co., 100 Ky. 48, 37 S. W. 290, 18 Ky. L. Rep. 543.

Massachusetts.— Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172; Lakin *v.* Ames, 10 Cush. 198.

Missouri.— Thompson *v.* Abbott, 61 Mo. 176.

New Jersey.— Jersey City, etc., St. R. Co. *v.* Garfield, 68 N. J. L. 587, 53 Atl. 11;

are based upon a difference in the character of the two corporations or upon statutory provisions or other special grounds.[66] Sometimes the matter is the subject of express statutory regulation.[67]

b. Creditors' Rights and Remedies. The courts generally, and especially the federal courts, have enforced this doctrine of succession of liability for corporate indebtedness in favor of creditors, no matter what the mode or effect of change in the corporation, so long as the territory and population remained substantially identical.[68] Nor can this liability or obligation be avoided by contract or arrange-

Bloomfield Tp. *v.* Glen Ridge, 55 N. J. Eq. 505, 37 Atl. 63.

New York.— Rose *v.* Hawley, 118 N. Y. 502, 23 N. E. 904; Watervliet *v.* Colonie, 27 N. Y. App. Div. 394, 50 N. Y. Suppl. 487; Schoenberg *v.* Taylor, 9 N. Y. App. Div. 236, 41 N. Y. Suppl. 491; Tyler *v.* Lansingburgh, 37 Misc. 604, 76 N. Y. Suppl. 139; Bronx Gas, etc., Co. *v.* New York, 17 Misc. 433, 41 N. Y. Suppl. 358.

Tennessee.— O'Connor *v.* Memphis, 6 Lea 730.

Texas.— White *v.* Quanah, (Civ. App. 1894) 27 S. W. 839.

Wisconsin.—Washburn Water Works Co. *v.* Washburu, 129 Wis. 73, 108 N. W. 194.

United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 45 *et seq.*, 132. See also *infra*, II, B, 2, g; II, C, 1, e.

Property held in trust.— A municipal corporation succeeds without judicial decree or investiture to property held in trust for the community by its predecessor under a devise. Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53. A town or other municipality does not lose its identity by being incorporated as a city; and property held by the inhabitants of the town in trust passes to the city on the same trust, and no action of any court is necessary to vest the title to such property in the city. Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172.

Public improvements and utilities.— On the creation of a municipal corporation it assumes immediate possession and control of all public utilities and improvements theretofore made and held by the state or county within the corporate limits, unless there is some legislative provision to the contrary. Almand *v.* Atlanta Consol. St. R. Co., 108 Ga. 417, 34 S. E. 6.

Control and duty with respect to streets and highways see *infra*, XII, A; XIV.

66. *Louisiana.*— New Orleans *v.* General Sinking Fund Com'rs, 1 Rob. 279.

Massachusetts.— Mayhew *v.* Gay Head Dist., 13 Allen 129; Essex *v.* Low, 5 Allen 595.

Michigan.— Saginaw Tp. *v.* Saginaw School Dist. No. 1, 9 Mich. 541.

Ohio.— Board of Education *v.* Board of Education, 41 Ohio St. 680.

Oklahoma.— Guthrie Nat. Bank *v.* McElHinney, 5 Okla. 107, 47 Pac. 1062; Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

Wisconsin.— Goodhue *v.* Beloit, 21 Wis. 636.

United States.— Bull *v.* Southfield, 4 Fed. Cas. No. 2,120, 14 Blatchf. 216.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 45, 46.

67. *Connecticut.*— Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777.

New Jersey.— Hoboken *v.* Ivison, 29 N. J. L. 65.

New York.— Bronx Gas, etc., Co. *v.* New York, 17 Misc. 433, 41 N. Y. Suppl. 358.

Pennsylvania.— Darby Tp. *v.* Lansdowne, 174 Pa. St. 203, 34 Atl. 574.

Texas.— White *v.* Quanah, (Civ. App. 1894) 27 S. W. 839.

Wisconsin.— Goodhue *v.* Beloit, 21 Wis. 636.

See 36 Cent. Dig. tit. "Municipal Corporations," § 46.

Apportionment of indebtedness see Bronx Gas, etc., Co. *v.* New York, 17 Misc. (N. Y.) 433, 41 N. Y. Suppl. 358; Dunmore's Appeal, 52 Pa. St. 374 (right of appeal on apportionment); School Board's Petition, 1 Leg. Rec. (Pa.) 11 (when new borough is created out of an adjoining township or parts of adjoining townships). Under the Pennsylvania act of June 12, 1878, providing that, on the erection of a borough out of a township, the court shall have power, on the application of a creditor of the township, or the application of the township or borough, to ascertain the indebtedness of the township at the time the borough was incorporated, and adjust it between the township and borough, and that it shall thereupon decree the proportion each shall pay, the court's power is limited to the adjustment of the debt as between the township and borough, so that each may levy and collect its share, and there is no power to limit the right of the creditor to enforce the whole debt against either. Darby Tp. *v.* Lansdowne, 174 Pa. St. 203, 34 Atl. 574.

Constitutionality of statutes see Brewis *v.* Duluth, 9 Fed. 747, 3 McCrary 219, 13 Fed. 334, 3 McCrary 223.

68. *Alabama.*— Amy *v.* Selma, 77 Ala. 103.

California.— Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891.

Connecticut.— Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777.

Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Kansas.— Manley *v.* Emlen, 46 Kan. 655,

ment between the original debtor and its successor.[69] And even where, after dissolution, only a portion of the territory of the dissolved corporation became reincorporated a *pro rata* liability has been adjudged and enforced against the new municipality as a *pro tanto* successor to the old.[70] Under this doctrine the creditors of a town or township or other quasi-corporation are allowed an efficient remedy for the collection of their debts from the municipality into which it is incorporated;[71] a city succeeding a village, town, or borough becomes liable for the debts of the latter;[72] and also a city of higher grade for one of lower grade.[73] But a newly created city or other municipality does not become liable for the debts of a purely voluntary association, contracted for public improvements falling within the limits of the municipality, or otherwise,[74] unless such liability is imposed by the legislature.[75]

c. Successor's Power of Taxation. So also without special and express statu-

27 Pac. 844; Oswego Tp. *v.* Anderson, 44 Kan. 214, 24 Pac. 486.

Kentucky.— Maysville *v.* Shultz, 3 Dana 10.

Minnesota.— Rumsey *v.* Sauk Centre Town, 59 Minn. 316, 61 N. W. 330.

Missouri.— Thompson *v.* Abbott, 61 Mo. 176.

New Jersey.— Hoboken *v.* Ivison, 29 N. J. L. 65.

New York.— Schoenberg *v.* Taylor, 9 N. Y. App. Div. 236, 41 N. Y. Suppl. 491; Tyler *v.* Lansingburgh, 37 Misc. 604, 76 N. Y. Suppl. 139; Bronx Gas, etc., Co. *v.* New York, 17 Misc. 433, 41 N. Y. Suppl. 358.

Oklahoma.— Blackburn *v.* Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708; Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

Pennsylvania.— Darby Tp. *v.* Lansdowne, 174 Pa. St. 203, 34 Atl. 574.

Tennessee.— O'Connor *v.* Memphis, 6 Lea 730; Shankland *v.* Phillips, 3 Tenn. Ch. 556.

Texas.— See Morris *v.* State, 62 Tex. 728; White *v.* Quanah, (Civ. App. 1894) 27 S. W. 839.

Wisconsin.— Washburn Water Works Co. *v.* Washburn, 129 Wis. 73, 108 N. W. 194.

United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; Hill *v.* Kahoka, 35 Fed. 32; Laird *v.* De Soto, 22 Fed. 421; Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 46, 132; and *infra*, II, B, 2, g, (I), (G); II, B, 2, g, (II), (C); II, C, 1, e.

69. Oswego Tp. *v.* Anderson, 44 Kan. 214, 24 Pac. 486.

70. Brown *v.* Milliken, 42 Kan. 769, 23 Pac. 167; Bradish *v.* Lucken, 38 Minn. 186, 36 N. W. 454; Brewis *v.* Duluth, 9 Fed. 747, 3 McCrary 219, 13 Fed. 334, 3 McCrary 223. See also *infra*, II, C, 2, f, (IV).

71. Brown *v.* Milliken, 42 Kan. 769, 23 Pac. 167; Maysville *v.* Shultz, 3 Dana (Ky.) 10; Laird *v.* De Soto, 22 Fed. 421.

72. Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777; Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530; Rumsey *v.* Sauk Centre Town, 59 Minn. 316, 61 N. W. 330; Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. See *infra*, II, C, 1, e, (III).

73. Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844. See *infra*, II, C, 1, e, (III).

74. Guthrie *v.* T. W. Harvey Lumber Co., 9 Okla. 464, 60 Pac. 247, holding that the provisional governments for the regulation and management of the affairs of the cities and towns of the territory of Oklahoma, which were established prior to the act of congress of May 2, 1890, providing a temporary government for the territory of Oklahoma, were but voluntary associations of the people living in them, were without legal authority, and had no power to contract debts which should constitute legal obligations upon the municipalities afterward formed under authority of law. See also Oklahoma City *v.* T. M. Richardson Lumber Co., 3 Okla. 5, 39 Pac. 386; Blackburn *v.* Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708; Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. See also Guthrie Nat. Bank *v.* McEl Hinney, 5 Okla. 107, 47 Pac. 1062.

75. Where the contracts for provisional municipal organizations having no legal existence cannot be enforced as contracts either against the contracting parties or their successors, the legislature has power to provide for payment by the village corporation, which succeeds such provisional government, of the debt and liabilities contracted by the latter. Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

Due process of law.— For a statute held invalid as attempting to affix a liability without due process of law see Guthrie Nat. Bank *v.* McEl Hinney, 5 Okla. 107, 47 Pac. 1062.

Special legislation.— A statutory provision for payment by a village corporation of the debts and liabilities contracted by a provisional municipal organization to which it has succeeded is not special legislation, within the act of congress (24 U. S. St. at L. 170), prohibiting the legislatures of territories from passing any local or special laws incorporating or amending the charter of any city, town, or village, or granting to any city or town any special or exclusive privilege, immunity, or franchises. Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

tory or charter power therefor, the successor to such liability has *ex necessitate rei* power under general law to levy and collect taxes to discharge the legal obligation.[76]

18. Evidence of Incorporation[77] — a. In General. The proper evidence of incorporation is a charter of the municipality or the record thereof made under general law and proof of organization by the exercise of corporate power thereunder.[78] In the absence of the best evidence secondary proof may be admitted on this as well as on other issues under the general rules of evidence;[79] and admissions in an action by or against a municipal corporation may render the introduction of its charter or other proof of its incorporation unnecessary.[80]

b. Implication. Incorporation is often implied from sovereign or official recognition of a municipality,[81] as where the legislature has expressly or by necessary implication recognized a place as a corporation by annexing other municipal territory to it,[82] by conferring additional municipal powers upon it,[83] by granting to it borough or town representation in the legislature,[84] by empowering it to issue municipal bonds,[85] by granting to it land for town commons,[86] or by enacting any other legislation, affecting its powers, franchises, functions, obligations, or liabilities which is inconsistent with the idea of its being unincorporated.[87]

Effect of statute limiting amount of indebtedness.— The statute (24 U. S. St. at L. 171), providing that no municipal corporation shall become indebted in excess of four per cent of the value of the taxable property, is a limit on the municipal authorities, but does not limit the power of the legislature to levy assessments on the property within the corporation by proper legislation. Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

76. Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777; Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896. See also *infra*, II, B, 2, g, (I), (H); II, B, 2, g, (II), (D); II, C, 1, e, (IV).

Where a city and town covering the same territory are consolidated so that "the powers vested in such town shall be exercised by the city council," the council has no power to levy taxes for roads and bridges, since town highway commissioners cannot levy taxes for the construction or maintenance of city streets. People *v.* Chicago, etc., R. Co., 172 Ill. 71, 49 N. E. 982.

77. Proof of general or special laws see Statutes.

Judicial notice see Evidence, 16 Cyc. 891.

78. Bradley *v.* Spickardsville, 90 Mo. App. 416; Keeler *v.* New Bern, 61 N. C. 505.

Certification and registration of charter.— Under Shannon Code Tenn. § 1897, providing that a municipal charter shall be certified before registered, it will not be presumed that it was registered, where the record of proceedings setting out the charter does not show the certification, although it states that the charter was registered. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986. See also Angel *v.* Spring City, (Tenn. Ch. App. 1899) 53 S. W. 191.

79. *Illinois.*— People *v.* Pike, 197 Ill. 449, 64 N. E. 393.

Massachusetts.— Dillingham *v.* Snow, 5 Mass. 547, where reputation prevailed because the records had been destroyed by fire.

Missouri.— Eubank *v.* Edina, 88 Mo. 650.

New Hampshire.— Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

North Carolina.— Trenton *v.* McDaniel, 52 N. C. 107.

Oregon.— Milarkey *v.* Foster, 6 Oreg. 378, 25 Am. Rep. 531.

Evidence admitted without objection.— In an action against a city, the fact that it is incorporated as a city of the fourth class may be established by the introduction in evidence, without objection, of a pamphlet containing the ordinances of the city and showing that it has such officers as are required for cities of the fourth class. Eubank *v.* Edina, 88 Mo. 650.

80. Keeler *v.* New Bern, 61 N. C. 505, holding that, in an action against a municipal corporation, admissions that the city was incorporated, and that the charter and laws required a mayor and commissioners to be elected, dispensed with the necessity of the production of the charter to show existence of the corporation.

81. *Arkansas.*— State *v.* Leatherman, 38 Ark. 81.

Georgia.— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Sessions *v.* State, 115 Ga. 18, 41 S. E. 259.

Illinois.— Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304.

New Hampshire.— Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

New Jersey.— Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070.

North Carolina.— Trenton *v.* McDaniel, 52 N. C. 107; Bath *v.* Boyd, 23 N. C. 194.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 49, 50.

82. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

83. Broking *v.* Van Valen, 56 N. J. L. 85, 27 Atl. 1070.

84. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

85. Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304.

86. Bath *v.* Boyd, 23 N. C. 194.

87. People *v.* Farnham, 35 Ill. 562; Jame-

Recognition of a place by state officers as a municipal corporation has been ruled on proper plea to preclude the state from proceeding by information in the nature of quo warranto to question its legal incorporation.[88] Indeed there are cases in which it has been ruled that the fact of existence and user of corporate powers is *prima facie* evidence of incorporation, and places upon the challenger the burden of proving the contrary.[89]

e. Prescription. This method of proving incorporation which has long been recognized and practised in England in the cases of cities that have existed as municipal corporations "time whereof the memory of man runneth not to the contrary,"[90] also obtains in the United States.[91] It has been adjudged sufficient proof of incorporation that a municipality has exercised corporate powers without challenge for a long time, as for fifty years;[92] for thirty years;[93] and even for twenty years.[94] Some of these municipalities in England were doubtless self-constituted, having assumed the privileges of other towns without grant or authority.[95] If such a corporation be once dissolved, a new corporation chartered in its place and endowed with all its powers, privileges, immunities, and property cannot claim by prescription of the former body.[96] The old common-law rule being that the franchise to be a corporation can subsist only in those to whom it is granted, when the corporation is dissolved homage ancestral is gone.[97] An act of incorporation of a town does not raise any conclusive presumption that the town was not before a corporate town.[98]

d. Surrender of Charter and Reincorporation. A petition to change the charter of an incorporated town, signed by two thirds of the inhabitants of the corporation, and a second order of incorporation by the county court in pursuance of the petition, together with a subsequent election of town officers under the charter as changed by the county court, was held evidence upon which a jury might presume a surrender of the first, and an acceptance of the second, charter.[99]

B. Territorial Extent and Subdivisions, Annexation, Consolidation, and Division — 1. Designation and Establishment of Boundaries and Territory Included — a. In General. Subject to constitutional and statutory provisions, any

son *v.* People, 16 Ill. 257, 63 Am. Dec. 304; State *v.* Tosney, 26 Minn. 262, 3 N. W. 345; Chicot County Levee Inspectors *v.* Crittenden, 94 Fed. 613, 36 C. C. A. 418.

88. State *v.* Leatherman, 38 Ark. 81.

89. House *v.* Greensburg, 93 Ind. 533; State *v.* Hauser, 63 Ind. 155; Centerville *v.* Woods, 57 Ind. 192; Brazil *v.* Kress, 55 Ind. 14.

90. On the continent of Europe cities and towns were first erected into corporate communities and endowed with many valuable franchises in the eleventh century. The consent of the feudal sovereign was absolutely necessary to their erection, inasmuch as many of his prerogatives and revenues were thereby considerably diminished. And so in England Blackstone tells us the king's consent, either impliedly or expressly given, was absolutely necessary to the erection of any corporation. 1 Blackstone Comm. 472. The methods by which this consent was expressly given were by act of parliament or by charter. Where the corporation existed by prescription, as in the case of the city of London, the consent of the king was conclusively presumed. Back *v.* Carpenter, 29 Kan. 349; Cooley Const. Lim. (6th ed.) 236.

91. *Illinois.*— Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304.

Indiana.— Pidgeon *v.* McCarthy, 82 Ind. 321, where a lot had been taxed by a city for sixty years without question or objection, and this was held sufficient to show that the lot was within the corporate limits.

Massachusetts.—Stockbridge *v.* West Stockbridge, 12 Mass. 400.

New Hampshire.— Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

New York.— Robie *v.* Sedgwick, 35 Barb. 319 [*affirmed* in 4 Abb. Dec. 73, 5 Transcr. App. 151].

Vermont.— Londonderry *v.* Andover, 28 Vt. 416.

Wisconsin.— Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 49, 50.

92. New Boston *v.* Dunbarton, 15 N. H. 201.

93. Stockbridge *v.* West Stockbridge, 12 Mass. 400.

94. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

95. Willcock Mun. Corp. 8.

96. Willcock Mun. Corp. 330.

97. Willcock Mun. Corp. 330.

98. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

99. Sellick *v.* Fayette, 3 Mo. 99.

part of a state not already within a municipality may be incorporated if it contains the requisite number of legal voters, being freeholders and residents of the territory to be incorporated.[1] From their nature and the objects for which they are created it is necessary that the territory included in a municipal corporation should be clearly defined and well bounded;[2] and whether or not certain territory is included in a particular municipality must generally be determined by its charter, including amendments.[3] The supreme control of municipalities by the legislature includes the power to prescribe the territorial lines.[4] But the questions whether the boundary is definite and what it is are for the courts and not the legislature to determine.[5] The general incorporation acts make provision for determining the boundaries of municipalities created under such acts;[6] and in case of incorporation by special act the boundaries of the city or town are designated in the act of incorporation.[7] A misdescription of a boundary of a proposed municipality is not a fatal defect, if other courses, distances, and descriptions show with reasonable certainty the boundary intended.[8] The petition for incorporation setting forth the metes and bounds of the intended municipality may be regarded as a part of the order of incorporation, if the latter refers to the former as its basis.[9] In determining the boundaries of municipalities it has been judicially declared that fixed monuments govern courses and distances;[10] that the true lines

1. State *v.* Frost, 103 Tenn. 685, 54 S. W. 986. As to what territory may be included see *supra*, II, A, 12.

2. Plantation No. 9 *v.* Bean, 40 Me. 218; State *v.* Tucker, 48 Mo. App. 531. See also *infra*, this section, text and notes 12, 14, 15; and *supra*, II, A, 13, a, 14, b, (II), (A), (VII). "Commencing with Samuel Hall, thence to William Scales, and also including John W. Dana, Jason and Warren Britt and Thomas Lyford," these being names of persons, is not a sufficient bounding within an act for laying out the limits and bounds of a village. The description must be such as to include territory within certain lines. Cutting *v.* Stone, 7 Vt. 471.

3. *Alabama.*— Luverne *v.* Shows, 101 Ala. 359, 13 So. 509.

California.—Fisher *v.* San Diego Police Ct., 86 Cal. 158, 24 Pac. 1000; San Diego *v.* Granniss, 77 Cal. 511, 19 Pac. 875.

Idaho.— Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

Iowa.— Under the act of 1847 designating the northern boundary line of Dubuque as starting from a certain "stake and stone," and running "thence on the north boundary north sixty-seven degrees thirty minutes east to the middle of the main channel of the Mississippi River," it was held that the termini being locative and visible objects, and the course specially and clearly given, the term "north boundary," without being identified, was too vague and equivocal to justify any deflection from the given course. Morrison *v.* Langworthy, 4 Greene 177.

Louisiana.— Milne *v.* New Orleans, 13 La. 68.

New Hampshire.— Under the description in the charter of Troy commencing at the southwest corner of Marlborough; "thence east, two hundred fifteen rods, to the Branch turnpike road in Marlborough; thence southerly, on said road, to the line of lot No. 9, in Marlborough," the line was adjudged to extend to the center of the turnpike road. *In re* Reed, 13 N. H. 381.

Pennsylvania.— Neal *v.* Com., 17 Serg. & R. 67.

Vermont.— Gray *v.* Sheldon, 8 Vt. 402.

See 36 Cent. Dig. tit. "Municipal Corporations," § 52 *et seq.*

Extension of street.— When an act of the legislature directs the extension of a city to a boundary to be determined by extension of a street, the street must be extended in its original direction. Monroe *v.* Ouachita Parish Police Jury, 47 La. Ann. 1061, 17 So. 498.

4. Luverne *v.* Shows, 101 Ala. 359, 13 So. 509; McCallie *v.* Chattanooga, 3 Head (Tenn.) 317; Wade *v.* Richmond, 18 Gratt. (Va.) 583. See *infra*, II, B, 2, a; IV, B.

5. Little Rock *v.* Parish, 36 Ark. 166.

6. State *v.* Pocatello, 3 Ida. 174, 28 Pac. 411; Williams *v.* Willard, 23 Vt. 369.

7. Green *v.* Cheek, 5 Ind. 105; State *v.* Rainey, 121 N. C. 612, 28 S. E. 366; State *v.* Wofford, 90 Tex. 514, 39 S. W. 921; Oak Cliff *v.* State, (Tex. Civ. App. 1903) 77 S. W. 24.

8. People *v.* Linden, 107 Cal. 94, 40 Pac. 115; Pacific Sheet Metal Works *v.* Roeder, 26 Wash. 183, 66 Pac. 428. See Sowles *v.* St. Albans, 71 Vt. 418, 45 Atl. 1050.

"Crossing the bar" between two islands, dividing a town, means passing clear across the entire width of the bar on the line of low water. Bremen *v.* Bristol, 66 Me. 354.

9. State *v.* Pocatello, 3 Ida. 174, 28 Pac. 411.

The legislature has power to authorize the inhabitants of a town or village to designate in their petition for incorporation the boundaries of such town or village, subject to review by the county commissioners and on appeal by the district court. Wardner *v.* Pelkes, 8 Ida. 333, 69 Pac. 64.

10. Gate *v.* Thayer, 3 Me. 71.

An express exclusion of a certain lot of land in a statute providing for the taking of

of a township are meant, although others be marked on the ground;[11] that the description must give a definite location;[12] that a call for a turnpike road means the middle of the road and not its margin;[13] that the description must be such as to include territory within certain lines;[14] that the description, however, is sufficient if a surveyor can ascertain the boundaries with reasonable certainty;[15] that lands covered by railroad tracks will not be included within the limits unless required in express terms;[16] that the territory bounded by a railroad does not include any portion of its right of way or premises;[17] and that the word "westerly" in describing a boundary means due west.[18] A petition for an adjustment of boundaries need not generally be verified.[19] Notice of an application for the appointment of commissioners to establish boundaries is usually unnecessary.[20]

b. Boundaries on Waters. Municipal corporations situated upon a river and bounded by such river usually have jurisdiction to the middle thereof.[21] Sometimes the charter or act of incorporation denotes that the boundary is the margin of the stream;[22] but even then the jurisdiction, for the service of process and the enforcement of the law, may extend, by ancient and unvarying usage, to the middle of the river.[23] Acts of incorporation which make a fresh water and running stream the boundary of a town are to be construed in the same manner as deeds which make such a stream the boundary between coterminous proprietors; that is, if the stream be non-navigable, the boundary follows the thread of such stream;[24] and if it be navigable the low water mark will constitute the boundary.[25] But the middle of a navigable stream may be constituted the boundary of a municipality by statute.[26]

c. Harbor and Territory Beyond Low Water Mark. In the absence of any

a part of the territory of one town, and annexing it to another, was held to control courses and distances laid down in the same statute. Bailey *v.* Rolfe, 16 N. H. 247.

11. Wesley *v.* Sargent, 38 Me. 315.

12. State *v.* Tucker, 48 Mo. App. 531. See *supra*, this section, text and note 2.

13. *In re* Read, 13 N. H. 381.

14. Cutting *v.* Stone, 7 Vt. 471. See Luverne *v.* Shows, 101 Ala. 359, 13 So. 509.

15. Williams *v.* Willard, 23 Vt. 369.

16. *In re* Riverton Borough, 6 Pa. Dist. 29, 18 Pa. Co. Ct. 539.

17. New Jersey Southern R. Co. *v.* Chandler, 65 N. J. L. 173, 46 Atl. 732.

18. State *v.* Huff, 105 Mo. App. 354, 79 S. W. 1010.

19. *In re* Dallas Boundary Line, 10 Kulp (Pa.) 64.

20. *In re* Dallas Boundary Line, 10 Kulp (Pa.) 64.

Compensation of commissioners appointed to establish a disputed boundary line between a township and a borough see *In re* Carbondale, 2 Lack. Leg. N. (Pa.) 109.

21. Perkins *v.* Oxford, 66 Me. 545; Granger *v.* Avery, 64 Me. 292; Cold Spring Iron Works *v.* Tolland, 9 Cush. (Mass.) 492; State *v.* Canterbury, 28 N. H. 195; St. Louis Public Schools *v.* Risley, 10 Wall. (U. S.) 91, 19 L. ed. 850; Jones *v.* Soulard, 24 How. (U. S.) 41, 16 L. ed. 604.

22. Municipality No. 2 *v.* Municipality No. 1, 17 La. 573; Thompson *v.* Blackwell, 5 La. 465; Luke *v.* Brooklyn, 43 Barb. (N. Y.) 54 [*affirmed* in 1 Abb. Dec. 24, 3 Keyes 444, 3 Transcr. App. 305].

23. Hayden *v.* Noyes, 5 Conn. 391; Pratt *v.* State, 5 Conn. 388.

24. *Maine.*—Perkins *v.* Oxford, 66 Me. 545.

Massachusetts.— Cold Spring Iron Works *v.* Tolland, 9 Cush. 492. In the act incorporating the town of Hamilton in Massachusetts, where the boundary line was described as "running by a river to a wall," etc., "then by said wall," etc., and the wall was nearly at right angles with the river, and from the end of it was a wooden fence about two rods, and beyond that the bank was so steep that a fence was unnecessary, it was held that the boundary line did not cross the river diagonally to the end of the wall, but followed the thread of the river (not navigable) until it reached the point where the wall, if continued, would intersect the thread of the river, and thence making an angle, it took the line of the wall. *In re* Ipswich, 13 Pick. 431.

New Jersey.— State *v.* Davis, 25 N. J. L. 386.

Pennsylvania.— Gilchrist *v.* Strong, 167 Pa. St. 628, 31 Atl. 931.

South Carolina.— State *v.* Columbia, 27 S. C. 137, 3 S. E. 55.

25. State *v.* Eason, 114 N. C. 787, 19 S. E. 88, 41 Am. St. Rep. 811, 23 L. R. A. 520. The limit of a municipality bounded by a navigable river is the low water mark of that river, unless express language to the contrary is used in the act of incorporation. Gilchrist's Appeal, 109 Pa. St. 600.

26. Gilchrist *v.* Strong, 167 Pa. St. 628, 31 Atl. 931. And see Hart *v.* Albany, 3 Paige (N. Y.) 213.

statutory restriction as to the boundaries of municipal corporations, it is proper that their jurisdiction and limits should extend over the harbor and navigable water of the shore front; and all ships and vessels are under the jurisdiction of a city when at its wharves or within its harbor.[27] An act extending the boundaries of a town over the adjacent navigable waters does not thereby grant to the town the land covered by such water.[28]

d. Territory Included by Usage or Acquiescence. Monuments and plain lines of location must generally, in determining the extent of territorial limits, prevail over any mere acts of user or attempted jurisdiction by the municipal authorities.[29] But when the boundary of a city has been acquiesced in by all persons interested for a period of twenty years or longer, such boundary will be considered the correct one, although its situation is a matter of uncertainty.[30] Although the charter of a municipality does not expressly include a certain place supposed to be within the corporate limits, yet if the inhabitants of such place have considered themselves residents thereof and have exercised and enjoyed the same municipal privileges and benefits as the other inhabitants for a long time, they will be amenable to police regulations.[31] But the payment of taxes on lands erroneously assessed by a city is not such acquiescence on the part of the owner thereof as will prevent him from asserting that such land was not within the city.[32]

e. Legislative Recognition. Where the boundaries of a town have been defined by ordinance, and as thus defined the authorities of the town claim and

27. Atlantic Dock Co. *v.* Brooklyn, 1 Abb. Dec. (N. Y.) 24; Stryker *v.* New York, 19 Johns. (N. Y.) 179; Udall *v.* Brooklyn, 19 Johns. (N. Y.) 175; Neal *v.* Com., 17 Serg. & R. (Pa.) 67; Smith *v.* Skagit County, 45 Fed. 725. The actual line of low water mark on the Brooklyn side formed the boundary of territorial jurisdiction of the city of Brooklyn in that direction. Atlantic Dock Co. *v.* Brooklyn, *supra*. And see Luke *v.* Brooklyn, 43 Barb. (N. Y.) 54 [*affirmed* in 1 Abb. Dec. 24, 3 Keyes 444, 3 Transcr. App. 305]. Even if the city of Brooklyn extended to low water mark only of the Long Island shore, it included all piers and other artificial erections below low water mark, and such piers in Gowanus bay were within the jurisdiction of the city assessors. Teho *v.* Brooklyn, 134 N. Y. 341, 31 N. E. 984 [*affirming* 10 N. Y. Suppl. 749]. Where the boundaries of a village were by its charter described as "commencing at a point on the shore of the bay of New York," and running thence "in a due south-easterly line to the lower bay of New York; and thence along the lower and upper bay of New York north-easterly and northerly to the place of beginning," it was held that the intention of the legislature was to give, not an absolute and fixed boundary at the shore as it then existed, but a shifting terminus at the shore as it might exist either by changes in the natural banks or by artificial improvements. Bechtel *v.* Edgewater, 45 Hun (N. Y.) 240 [*affirmed* in 122 N. Y. 649, 25 N. E. 957]. See also *supra*, II, B, 1, b.

In **Massachusetts** the report of the harbor and land commissioners purporting to define the boundary line of tide-water between Hull and Boston is not evidence as to the jurisdiction of the city of Boston over islands situated in said tide-water, since the duty of the commissioners was to make an equitable division of the tide-water for purposes of municipal jurisdiction, and they had no power to define the boundaries on land between municipalities. Russ *v.* Boston, 157 Mass. 60, 31 N. E. 708.

Oakland, California.—Lands under the navigable waters of the bay of San Francisco, below the line of low tide in front of the Oakland water front, belong to the state, and are not within the boundaries or under the jurisdiction of the town of Oakland, as described in the freeholders' charter of 1889, and are therefore not subject to the provisions of such charter. Southern Pac. Co. *v.* Western Pac. R. Co., 144 Fed. 160.

28. Palmer *v.* Hicks, 6 Johns. (N. Y.) 133.

29. New Jersey Southern R. Co. *v.* Chandler, 65 N. J. L. 173, 46 Atl. 732.

30. Belknap *v.* Louisville, 93 Ky. 444, 20 S. W. 309, 14 Ky. L. Rep. 420. Where an act dividing a town into two precincts described the dividing line as "a straight line," and appointed a surveyor to run the line, which he did, and one of the precincts was afterward incorporated as a separate town, and the line run by the surveyor was perambulated from time to time by the selectmen, and acquiesced in by the two towns for more than one hundred years, it was held that the line run by the surveyor was the true dividing line between the two towns, although not perfectly straight. Chenery *v.* Waltham, 8 Cush. (Mass.) 327. Where there has been in fact a practical location of a town under the charter, with lines and monuments well defined, but varying from the charter, the actual location will govern. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

31. Milne *v.* New Orleans, 13 La. 68.

32. Armstrong *v.* Topeka, 36 Kan. 432, 13 Pac. 843. *Compare* Anthony *v.* Adams, 1 Metc. (Mass.) 284.

exercise jurisdiction, a subsequent act of the legislature recognizing the town as a corporate body will operate to confirm such claim of boundaries as well as other matters of jurisdiction.[33]

2. Alteration and Creation of New Municipalities — a. In General — (I) *Power to Make Change.* The power, in the first place, to determine the boundaries of a municipality and subsequently to alter them, resides, in the absence of constitutional restriction, in the legislature.[34] Its sovereign powers include the power to change the boundaries of municipal corporations at discretion and without consent of the municipality or its inhabitants.[35] Towns and cities mentioned by name in the state constitutions do not thereby acquire a constitutional fixity of boundary which will prevent the legislature from altering such boundary.[36]

(II) *Changes in General.* The courts of this country have been inclined to restrict the scope of legislative power in changing the territory of municipal corporations.[37] They have declared that a municipality is a single body, and that its territory must be included within a single boundary.[38] Conceding the power of the legislature to create municipal corporations, and to alter them according to its own judgment of the public welfare, the courts have nevertheless held that

33. People *v.* Farnham, 35 Ill. 562.

34. Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351; Galesburg *v.* Hawkinson, 75 Ill. 152; Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382; Hollister *v.* Rochester, 41 Misc. (N. Y.) 559, 85 N. Y. Suppl. 147; Slauson *v.* Racine, 13 Wis. 398. See *infra*, II, B, 2, b, (I). A statute enacting that when the selectmen of different towns disagree in renewing and establishing the boundaries and lines of such towns the court of sessions for the county in which such town is situated are authorized to settle and establish such disputed lines and renew the bounds and marks of the same does not give the court of sessions authority to alter existing lines and establish new ones. Gorrill *v.* Whittier, 3 N. H. 265.

Change of boundary of assembly district.— A statute altering the boundary of a city or other local division of the state is unconstitutional, if its incidental effect would be to alter the boundary of an assembly district at any other time than on the decennial enumeration of population. Kinne *v.* Syracuse, 2 Abb. Dec. (N. Y.) 534.

35. *Arkansas.*— Little Rock *v.* Parish, 36 Ark. 166.

California.— People *v.* Coronado, 100 Cal. 571, 35 Pac. 162.

Connecticut.— See Suffield *v.* East Granby, 52 Conn. 175.

Florida.— Ormond *v.* Shaw, 50 Fla. 445, 39 So. 108.

Indiana.— Stilz *v.* Indianapolis, 55 Ind. 515.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140; Miller *v.* Pineville, 89 S. W. 261, 28 Ky. L. Rep. 379.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Mississippi.— Forbes *v.* Meridian, 86 Miss. 243, 38 So. 676; Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

Missouri.— St. Louis *v.* Allen, 13 Mo. 400.

New Hampshire.— State *v.* Canterbury, 28 N. H. 195; Bristol *v.* New Chester, 3 N. H. 524.

Ohio.— Hill *v.* McClure, 27 Ohio Cir. Ct. 376.

Pennsylvania.— Smith *v.* McCarthy, 56 Pa. St. 359.

Tennessee.— McCallie *v.* Chattanooga, 3 Head 317. See Norris *v.* Smithville, 1 Swan 164.

Virginia.— Wade *v.* Richmond, 18 Gratt. 583.

Wisconsin.—Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364; Slauson *v.* Racine, 13 Wis. 398.

See 36 Cent. Dig. tit. "Municipal Corporations," § 64 *et seq.* See also *infra*, IV, B. And see particularly, as to annexation or detachment of territory and consolidation or division of municipalities, *infra*, II, B, 2, b, c.

Legislative control generally see *infra*, IV, B.

Consent of inhabitants see *infra*, II, B, 2, d, (XIII).

Power to amend charters see *infra*, II, C, 1.

36. Wade *v.* Richmond, 18 Gratt. (Va.) 583.

37. State *v.* Waxahachie, 81 Tex. 626, 17 S. W. 348.

38. *Arkansas.*— Vogel *v.* Little Rock, 54 Ark. 335, 15 S. W. 836; Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

Colorado.— Denver *v.* Coulehan, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751.

Georgia.— Code, §§ 484, 486, providing for the changing of the lines of old militia districts whenever necessary, does not contemplate that an isolated portion of the territory of one district not contiguous to the other shall be transferred to the latter, nor that as a result of a change in lines two portions of the district shall be left entirely segregated from each other. Howell *v.* Kinney, 99 Ga. 544, 27 S. E. 204.

this right must be exercised in accordance with the facts of nature.[39] Slight injustice to a part of the inhabitants will not be good ground for a court to enjoin a change in the boundaries of a municipality, where the public welfare requires such change;[40] and the courts are slow to declare acts changing the boundaries of a municipality void for indefiniteness.[41]

b. Annexation[42] — (i) *In General.* Subject to constitutional limitations,[43] the legislature has general power, not only to determine the territory and boundaries of all public corporations, but also to alter by annexing or authorizing

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96.

Wisconsin.— Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

39. *Arkansas.*—Woodruff *v.* Eureka Springs, 55 Ark. 618, 19 S. W. 15.

Florida.— Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

Illinois.— Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351.

Indiana.— Evansville *v.* Page, 23 Ind. 525.

Iowa.— Truax *v.* Pool, 46 Iowa 256.

Nebraska.— McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282; South Platte Land Co. *v.* Buffalo County, 15 Nebr. 605, 19 N. W. 711.

New Jersey.— Miller *v.* Camden, (Sup. 1899) 44 Atl. 961.

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96.

Wisconsin.— Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561.

United States.— Clark *v.* Kansas City, 176 U. S. 114, 20 S. Ct. 284, 44 L. ed. 392.

See 36 Cent. Dig. tit. "Municipal Corporations," § 74 *et seq.*

40. *In re* West Homestead Borough, 31 Pittsb. Leg. J. N. S. (Pa.) 172.

41. New Decatur *v.* Nelson, 102 Ala. 556, 15 So. 275.

42. Proceedings see *infra*, II, B, 2, d.

Operation and effect see *infra*, II, B, 2, g.

Repeal of statutes.—Pa. Act, April 1, 1834, authorizing alteration of borough limits, was not repealed by Act, April 3, 1851, § 30. McFate's Appeal, 105 Pa. St. 323. And said acts of April 1, 1834, and April 3, 1851, § 30, were not repealed by the acts of June 11, 1879, and May 17, 1883. *In re* Plymouth Borough, 167 Pa. St. 612, 31 Atl. 933; *In re* Waynesboro, 6 Pa. Co. Ct. 140; *In re* Tunkhannock Borough Extension, 3 Pa. Co. Ct. 480. Wash. Act, Feb. 26, 1890, providing for the extension of the corporate limits of cities, was repealed by the act of March 27, 1890. King County *v.* Davies, 1 Wash. 290, 34 Pac. 540.

43. Right of people to representation.— Mass. St. (1854) c. 433, for abolishing Charlestown and annexing the territory included within its limits to Boston, providing that the territory of Charlestown, for the purposes of electing representatives to the general court, should, until otherwise provided by law, be a distinct representative district, entitled to the same number of representatives, and with the same rights and duties in their selection, as it would have possessed under the laws if the act had not been passed, was held unconstitutional and void, as creating and conferring on an anomalous representative district rights and duties conferred by Const. (1780) c. 1, art. 2, § 3, only upon corporate towns. Warren *v.* Charlestown, 2 Gray (Mass.) 84. And under Mich. Const. art. 4, § 4, providing that representatives in the state legislature shall be apportioned with reference to the population, and once an apportionment is made it shall not be changed until another enumeration, it was held that an act detaching portions of certain adjoining townships, and attaching them to a city as parts of existing wards, and in the formation of a new ward, which also had the effect of transferring such portions from one representative district to another, was unconstitutional. People *v.* Holihan, 29 Mich. 116. But it was held that the fact that Ga. Act, Aug. 12, 1903, providing for the enlargement of the boundaries of the city of Macon, did not provide for representation of the two wards created out of the new territory until the next election of members of the council did not render the act void. Toney *v.* Macon, 119 Ga. 83, 46 S. E. 80. See also Atty.-Gen. *v.* Springwells Tp. Bd., 143 Mich. 523, 107 N. W. 87; Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Right to local self-government.— Mich. Local Acts (1905), p. 1068, No. 627, providing for the annexation of certain territory to the city of Detroit, is not unconstitutional as depriving the people of the annexed territory of their right to local self-government in their village and school matters. Atty.-Gen. *v.* Springwells Tp. Bd., 143 Mich. 523, 107 N. W. 87. See as to the right of local self-government *infra*, IV.

Due process of law.— Nor is such statute unconstitutional as depriving the residents of the annexed territory of their property without due process of law by means of taxation. Atty.-Gen. *v.* Springwells Tp. Bd., 143 Mich. 523, 107 N. W. 87.

Withholding advantages.—A statute withholding absolutely for the period of ten years from newly added territory the advantages of police, light, and fire protection enjoyed by the old city, is unconstitutional, and this is true, although it further provides that the new territory shall be exempt from taxation for these purposes during such period. Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138.

Retrospective laws see Perry *v.* Denver, 27 Colo. 93, 59 Pac. 747.

Title of statute and unity of subject-matter see Hyde Park *v.* Chicago, 124 Ill. 156, 16 N. E. 222; Atty.-Gen. *v.* Springwells Tp. Bd., 143 Mich. 523, 107 N. W. 87; and, generally, STATUTES.

the annexation of territory or extending boundaries;[44] and this may be done without the consent of the inhabitants of the territory affected, although extra

Local and special laws see State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186; and, generally, STATUTES. N. J. Pub. Laws (1888), p. 330, establishing a scheme for practical effectuation of annexation of territory to cities, which requires the annexed territory to be divided into wards in election districts by a commission which shall also appoint election officers, under whom a special election shall be held, when called on a notice to be given by the city clerk, is operative equally everywhere and at all times, and does not violate the constitutional prohibition against special legislation in regard to cities. Miller *v.* Camden, (N. J. Sup. 1899) 44 Atl. 961. See also Miller *v.* Camden, 64 N. J. L. 201, 44 Atl. 882. The act annexing the town of Stockton to the city of Camden (Pub. Laws (1899), p. 355) does not violate the amendment of the N. J. Const. (1875) limiting to general laws the power of regulating internal affairs of towns and counties. This constitutional provision does not apply either to the creation of municipal corporations or to the change of boundaries or political divisions, as this is not a regulation of internal affairs. Miller *v.* Greenwalt, 64 N. J. L. 197, 44 Atl. 880.

Classification.— The annexation of territory to cities relates to their "organization and government," within Ky. Const. § 156, providing for the classification of cities for that purpose, and the laws in relation to the annexation of territory to cities of the various classes may differ. Lewis *v.* Brandenburg, 105 Ky. 14, 47 S. W. 862, 48 S. W. 978, 20 Ky. L. Rep. 1011.

Partial unconstitutionality.—A scheme for adding territory to a city, embodied in several statutes passed contemporaneously, providing among other things, for sewers and waterworks, and which would not have been passed had an unconstitutional provision not been inserted exempting the added territory from taxation of a certain kind for a certain period, must fail with such unconstitutional provision, the statute being void *in toto*. Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138.

Provision for an election under an unconstitutional statute renders a law providing for the annexation of territory inoperative. *In re* Millvale Borough, 5 Pa. Dist. 726, holding inoperative the Pennsylvania act of May 8, 1895 (Pamphl. Laws 56).

Provisions as to courts and pending causes or proceedings see Stone *v.* Charlestown, 114 Mass. 214.

Constitutional limitations as to the power to create municipal corporations only do not restrict the power of the legislature with respect to the annexation of territory to existing municipalities. Chandler *v.* Boston, 112 Mass. 200 (holding that the provisions of the second amendment of the Massachusetts constitution providing that no municipal or city government should be erected or constituted in any town not containing twelve thousand inhabitants had no application to the annexation, by the authority of the legislature, of a town to a city already existing); Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 339 (holding that the Pennsylvania act of May 24, 1887, providing for the annexation of territory adjacent to a city on petition of three fifths of the taxable inhabitants thereof, and ordinances of the city council pursuant thereto, were not in violation of Const. art. 15, § 1, providing that cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand, shall vote at any general election in favor of the same).

44. *Alabama.*—Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85.

Arkansas.— Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785; Little Rock *v.* Parish, 36 Ark. 166, holding that the effect of the act of April 20, 1873, providing that all tracts adjacent to a city of the first class laid off in lots "shall be, and the same is hereby declared to be, a part of said city," was to make and continue "Du Val's Addition" to the city of Little Rock as a part of the city, such addition having been laid off in lots and blocks, in 1872.

California.— People *v.* Ontario, 148 Cal. 625, 84 Pac. 205; People *v.* Oakland, 123 Cal. 598, 56 Pac. 445; People *v.* Coronado, 100 Cal. 571, 35 Pac. 162; Santa Rosa *v.* Coulter, 58 Cal. 537.

Colorado.— Denver *v.* Coulehan, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751. Under Const. art. 14, § 13, requiring the legislature to provide for the organization and classification of cities by general laws, and section 14, enabling existing municipalities to elect whether they will retain their special charters or be governed by the general laws, it was held that, while the legislature may by special act amend an existing charter retained by a city, it cannot, by special act, under the guise of amending the charter of such a city, extend the city limits so as to destroy the corporate existence of adjoining towns incorporated under the general law. *In re* Denver, 18 Colo. 288, 32 Pac. 615.

Georgia.— Toney *v.* Macon, 119 Ga. 83, 46 S. E. 80.

Illinois.— Covington *v.* East St. Louis, 78 Ill. 548. Const. art. 9, § 12, which limits the extent of municipal indebtedness, does not render invalid the annexation of one municipality to another, although the indebtedness of one or both of them exceeds the constitutional limit. True *v.* Davis, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266.

Indiana.— Stilz *v.* Indianapolis, 55 Ind. 515; Edmunds *v.* Gookins, 20 Ind. 477.

Iowa.— Morford *v.* Unger, 8 Iowa 82. See also McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979; Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031.

burdens may be thereby imposed upon them.[45] The charter of a municipality is not a contract with the state, and the legislature may therefore enlarge its territorial extent, at its discretion.[46] Some limitations, however, have been placed by the courts upon this general power, particularly with respect to the territory which may be annexed.[47] The legislature may take territory from one municipal corporation and add it to another without the consent of either;[48] or may extend the limits of a municipality, or authorize the municipality to extend the same, so as to include the territory of another municipality;[49] and territory may

Kentucky.— Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721; Boyd *v.* Chambers, 78 Ky. 140; Covington *v.* Southgate, 15 B. Mon. 491; Cheaney *v.* Hooser, 9 B. Mon. 330. Where a town is extended by improvement, so as to give those living adjacent to the town boundary all the advantages which the citizens enjoy from the local government of the town, the legislature have the constitutional power to extend the limits of the town, and subject the owners of the property to a share of the burdens of the local government. Sharp *v.* Dunavan, 17 B. Mon. 223.

Louisiana.— Stoner *v.* Flournoy, 28 La. Ann. 850; Layton *v.* New Orleans, 12 La. Ann. 515.

Maine.— Gorham *v.* Springfield, 21 Me. 58.

Maryland.—Act (1888), c. 98, extending the limits of Baltimore city by including therein parts of Baltimore county, does not violate Const. art. 13, § 1, relating to the organization of new counties, and the location of county-seats, which provides that the lines of a county shall not be changed without the consent of a majority of the voters of the territory sought to be taken from one and added to another county. Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Massachusetts.— Chandler *v.* Boston, 112 Mass. 200.

Michigan.— People *v.* Bradley, 36 Mich. 447. See also Atty.-Gen. *v.* Springwells Tp. Bd., 143 Mich. 523, 107 N. W. 87.

Mississippi.— Forbes *v.* Meridian, 86 Miss. 243, 38 So. 676.

Missouri.— St. Louis *v.* Allen, 13 Mo. 400; St. Louis *v.* Russell, 9 Mo. 507.

New Jersey.— Miller *v.* Camden, (Sup. 1899) 44 Atl. 961.

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96; Powers *v.* Wood County, 8 Ohio St. 285.

Pennsylvania.—Philadelphia *v.* Fox, 64 Pa. St. 169; Smith *v.* McCarthy, 56 Pa. St. 359; Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 339.

Tennessee.— Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138; Willett *v.* Bellville, 11 Lea 1; McCallie *v.* Chattanooga, 3 Head 317; Norris *v.* Smithville, 1 Swan 164. And see Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364.

Texas.— Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742. The extent to which it is proper to enlarge the limits of a municipal corporation is a question for the legislature, whose decision cannot be reviewed by the courts. Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541.

Virginia.— Wade *v.* Richmond, 18 Gratt. 583.

Washington.— State *v.* Warner, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263.

West Virginia.— Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278.

Wisconsin.— Milwaukee *v.* Milwaukee, 12 Wis. 93.

United States.— Clark *v.* Kansas City, 176 U. S. 114, 20 S. Ct. 284, 44 L. ed. 392; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; Henderson *v.* Jackson County, 12 Fed. 676, 2 McCrary 615.

See 36 Cent. Dig. tit. "Municipal Corporations," § 66 *et seq.* And see *supra*, II, B, 2, a, (I).

Annexation of territory for special purposes.— The legislature has power to attach outside territory to the territory of a town, and erect the territory so attached, together with the territory of the town, into a district, and authorize the district so formed to vote a subscription to the stock of a street railroad, and issue bonds in payment thereof, although the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits. Henderson *v.* Jackson County, 12 Fed. 676, 2 McCrary 615.

Extension for police purposes only.— The legislature has power to extend the corporate limits of a municipality for police purposes merely, and may confer power on city authorities to pass by-laws operating for such purposes beyond the corporate limits. Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85. See also *infra*, III, B, 4; XI, A, 5.

45. See the cases cited *supra*, note 44; and *infra*, II, B, 2, g, (I), (G).

46. *Illinois.*—People *v.* Peoria, 166 Ill. 517, 46 N. E. 1075.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 541, 13 L. ed. 518, 531.

See also *infra*, II, C, 1, a.

47. See *infra*, II, B, 2, b, (III).

48. Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278. And see *infra*, II, B, 2, c, (I).

49. Hyde Park *v.* Chicago, 124 Ill. 156, 16 N. E. 222. And see Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721.

In New Jersey the legislature may by special act annex a town to a city, where such

be annexed to an existing municipality without direct legislation.[50] Usually general laws are enacted authorizing annexation of territory, and applying to existing as well as to subsequently created municipalities,[51] and to municipalities created by special act as well as to those organized under general laws;[52] but sometimes the statutes are more or less restricted in their application.[53] The legislature cannot delegate the power to annex territory to a municipality;[54] but it may by general laws authorize and provide for annexation and place the matter in the hands of the municipality or some appropriate board;[55] and it may vest in a court or other special tribunal power to determine when the conditions exist

act does not regulate the internal affairs of either municipality. Miller *v.* Camden, (Sup. 1899) 44 Atl. 961.

In Missouri a city of over one hundred thousand inhabitants, organized under a freeholders' charter, by authority of Const. art. 9, § 16, providing for such organization, can extend its limits, by amending its charter, so as to include another municipality, under Rev. St. (1889) § 1880, as amended by Laws (1895), p. 55, providing a general law whereby such cities may extend their limits. Kansas City *v.* Stegmiller, 151 Mo. 189, 52 S. W. 723.

Cal. St. (1883) p. 97, classifying municipalities according to population, and providing a charter for each class, and authorizing the consolidation of contiguous municipal corporations, does not authorize the annexation of an incorporated sanitary district, or a part thereof, to an incorporated city or town. People *v.* Oakland, 123 Cal. 598, 56 Pac. 445.

Annexation by de facto corporation.— Whether a municipal organization was in all respects strictly legal or not in its inception is not for the authorities of an adjacent city to determine in proceedings to annex the same. If a corporation exists and exercises governmental powers the state, and not a rival corporation, must determine the question of its legality. Kirkpatrick *v.* State, 5 Kan. 673. See *supra*, II, A, 15, c.

Consolidation see *infra*, II, B, 2, c, (II).

50. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937.

51. See Stilz *v.* Indianapolis, 55 Ind. 515; Burlington *v.* Leebrick, 43 Iowa 252; Browne *v.* Providence, 114 La. 631, 38 So. 478, holding that the power and authority conferred on municipalities extending their limits as provided by La. Acts (1898), p. 224, No. 136, were granted to municipalities existing at the date of the enactment of the statute, as well as those which might be created thereafter, and under section 43 (page 243) was an absolute right conferred at once, without the necessity of such existing corporations being forced as a condition precedent to avail themselves of the same to have placed themselves under the provisions.

Provisional municipalities established by Fla. Laws (1885), c. 3606, 3607, for cities whose charters were repealed for indebtedness, appointing commissioners with certain general powers, and declaring the defunct cities to be municipalities, "the boundaries of which shall be coextensive with the boundaries of such defunct cities and towns," and giving to the officers thereof the same powers vested in the officers of such defunct cities under the act of 1869, were held to have the power to extend their territorial limits, under the act of Feb. 4, 1869 (McClellan Dig. p. 255, § 44), as amended by Laws (1879), c. 3163, § 2, giving municipal authorities the power to extend their territorial limits and defining generally the powers and duties of municipalities. Saunders *v.* Pensacola Provisional Municipality, 24 Fla. 226, 4 So. 801.

52. Burlington *v.* Leebrick, 43 Iowa 252, holding that Iowa Code (1873), § 411, providing that cities may institute proceedings in the circuit court for the annexation of contiguous territory under certain conditions, is not controlled, with respect to its operation upon cities acting under special charters, by Code, § 551; and its provisions apply as well to cities organized under special charters as to those incorporated under the general law.

53. People *v.* Mabie, 73 Hun (N. Y.) 495, 26 N. Y. Suppl. 450 [*affirming* 23 N. Y. Suppl. 801, and *affirmed* in 142 N. Y. 343, 37 N. E. 115], holding that a village (Peekskill) having a special charter fixing its boundaries cannot be enlarged by the county board of supervisors under N. Y. Laws (1870), c. 291, since that act, being general, expressly confines its application to villages incorporated under it, nor under Laws (1884), c. 308, granting to the trustees and officers of a specially chartered village all powers granted in any general act to incorporate villages, not conflicting with the charter.

Ky. St. § 3713, restricting the boundary of towns when created, does not apply to a sixth-class town organized by special charter and then in existence, the boundary of which may be extended any reasonable distance. Yancey *v.* Fairview, 66 S. W. 636, 23 Ky. L. Rep. 2087.

54. Galesburg *v.* Hawkinson, 75 Ill. 152; Willett *v.* Bellville, 11 Lea (Tenn.) 1. See *supra*, II, A, 3.

55. *Arkansas.*—Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785; Dodson *v.* Ft. Smith, 33 Ark. 508.

California.— People *v.* Oakland, 123 Cal. 598, 56 Pac. 445.

Indiana.— Strosser *v.* Ft. Wayne, 100 Ind. 443; Jeffersonville *v.* Weems, 5 Ind. 547.

Kansas.— Emporia *v.* Smith, 42 Kan. 433, 22 Pac. 616.

Mississippi.— Forbes *v.* Meridian, 86 Miss. 243, 38 So. 676.

Missouri.— Kelly *v.* Meeks, 87 Mo. 396.

under which municipal territory may or may not be extended.[56] It is not a delegation of legislative power to leave the annexation of territory to the option of the municipality, or provide for submission of the question to the vote of the people.[57] The corporate authorities can in no case annex territory without the authority of the legislature.[58] The authority to annex territory to a city does not rest on the same ground as the power to take property by eminent domain.[59] The powers with respect to the annexation of territory must always be exercised by the authority to whom such powers are delegated and in accordance with the provisions of the statute.[60] The presumption is always in favor of a legal annexation.[61]

(II) *Grounds For Annexation and Objection.* The following have been declared sufficient grounds for annexation under general statutes: (1) That persons residing in the territory to be annexed have the advantage of a city government, and should therefore bear a portion of the city expenses;[62] (2) that the

Ohio.—Blanchard *v.* Bissell, 11 Ohio St. 96.

Texas.— East Dallas *v.* State, 73 Tex. 371, 11 S. W. 1030.

56. Foreman *v.* Marianna, 43 Ark. 324 (holding that the legislature may vest in the county courts the power of determining when the organization of municipal corporations and the extension of those already existing may or may not be necessary or useful); Paul *v.* Walkerton, 150 Ind. 565, 50 N. E. 725; Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031; Burlington *v.* Lubrick, 43 Iowa 252. Nebr. Comp. St. c. 14, § 99, providing that, after a city council has voted to annex any contiguous territory, the district court shall, on petition by the city and after notice to the owners of such territory, determine the truth of the allegations of the petition, and whether all or any part of such territory would receive material benefit from annexation to the city, and whether justice and equity require such annexation, and shall enter a decree accordingly, does not attempt to invest the courts with any extrajudicial powers. Wahoo *v.* Dickinson, 23 Nebr. 426, 36 N. W. 813. *Compare* Galesburg *v.* Hawkinson, 75 Ill. 152, holding that the Illinois act of April 10, 1872, entitled "An act to provide for annexing and excluding territory to and from cities, towns and villages," so far as it attempted to confer power upon the courts to change the boundaries of such municipal bodies by annexing or disconnecting territory, was unconstitutional, such acts being in their nature legislative and not judicial acts.

In Pennsylvania the quarter sessions have no authority as to changing the limits of a borough except that which is expressly granted by the legislature. Darby Borough's Appeal, 3 Lanc. L. Rev. 141.

57. People *v.* Ontario, 148 Cal. 625, 84 Pac. 205; People *v.* Nally, 49 Cal. 478; Stone *v.* Charlestown, 114 Mass. 214; Atty.-Gen. *v.* Springwells Tp. Bd., 142 Mich. 523, 107 N. W. 87; Blanchard *v.* Bissell, 11 Ohio St. 96. And see Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785; Perry *v.* Denver, 27 Colo. 93, 59 Pac. 747; Stilz *v.* Indianapolis, 55 Ind. 515. See also *supra*, II, A, 13, c; II, A, 14, b, (v); *infra*, II, B, 2, d, (XIII), (A).

58. Atchison, etc., R. Co. *v.* Maquilkin, 12 Kan. 301 (holding that the city of Troy, incorporated under Acts (1860), p. 217, limiting the territory to be incorporated, had no power to extend, by ordinance, its corporate limits); Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382; Darby Borough's Appeal, 3 Lanc. L. Rev. (Pa.) 141; Willett *v.* Bellville, 11 Lea (Tenn.) 1; McCallie *v.* Chattanooga, 3 Head (Tenn.) 317; Norris *v.* Smithville, 1 Swan (Tenn.) 164.

59. Stilz *v.* Indianapolis, 55 Ind. 515.

60. Strosser *v.* Ft. Wayne, 100 Ind. 443 (holding that where jurisdiction is given to a board of commissioners by a statute to annex lands to a city, the power cannot be exercised by the common council); Willett *v.* Bellville, 11 Lea (Tenn.) 1. In Kansas the city of Troy, incorporated under Acts (1860), p. 217, limiting the territory to be incorporated, had no power to extend by ordinance its corporate limits. Atchison, etc., R. Co. *v.* Maquilkin, 12 Kan. 301. A city under the sanction of the legislature has the right to extend its limits. Covington *v.* Southgate, 15 B. Mon. (Ky.) 491. Boards of supervisors have no authority to extend the boundaries of villages with special charters by virtue of N. Y. Laws (1884), providing that the trustees of any village with a special charter shall have the same powers as are prescribed in any general act for the incorporation of villages. People *v.* Mabie, 142 N. Y. 343, 37 N. E. 115.

61. Cleveland, etc., R. Co. *v.* Dunn, 61 Ill. App. 227 (holding that where the owner of a strip of land transferred it, or the possession of it, in some way not disclosed, to a city having power to extend its boundaries, and the city, after such transfer, devoted it to municipal uses and worked it as a street, the presumption was that the land had been legally annexed to the city and the city's boundaries extended accordingly); Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435; Huff *v.* Lafayette, 108 Ind. 14, 8 N. E. 701; Mullikin *v.* Bloomington, 72 Ind. 161.

62. Catterlin *v.* Frankfort, 87 Ind. 45. Where persons residing in territory adjacent to a town have all the advantages of town government and institutions, including police

annexation will make the limits of the city regular;[63] (3) that it is necessary to attach the territory to enable the city to establish a uniform grade for its streets and for the improvement of its highways in the district to be annexed;[64] (4) that the public convenience and health require the annexation;[65] (5) that the annexation is necessary for the enforcement of city ordinances for the protection of the property and persons of the citizens of the territory;[66] (6) and that the annexation is necessary to foster and encourage the growth and prosperity of the city;[67] or that the lands are needed or the annexation is necessary for a gas or water system, for the extension of streets and sewers, and for proper police regulation,[68]

and fire protection and public school privileges, and the town needs additional revenue for such purposes, and there is no public way for ingress or egress from the territory except over the streets of the town, which it has improved without any contribution from the residents in the territory, annexation is proper. McCoy *v.* Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

63. Catterlin *v.* Frankfort, 87 Ind. 45.

64. Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435.

65. Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957. An extension of the limits of a city is reasonable where it is necessary for the protection of health that the territory in question should be included within the city limits. Forbes *v.* Meridian, 86 Miss. 243, 38 So. 676.

Annexation of sanitary district.— Under a statute authorizing the annexation of new territory to towns or cities not forming part of any incorporated town or city, and providing proceedings for that purpose, an incorporated sanitary district, or a part thereof, may be annexed to an incorporated town or city. People *v.* Oakland, 123 Cal. 598, 56 Pac. 445.

66. Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778; Chandler *v.* Kokomo, 137 Ind. 295, 36 N. E. 847; Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957.

67. Catterlin *v.* Frankfort, 87 Ind. 45. A finding that a failure to annex certain territory to a town would materially retard its prosperity and that of the owners and inhabitants of the territory sought to be annexed could not be disturbed on appeal, where it appeared that the only depot was located in the territory sought to be annexed, that the people of the town were dependent thereon for the shipping of their freight, passenger travel, and their mail, and that there was no sidewalk from the town boundary to the depot, although one was necessary, etc. Collins *v.* Crittenden, 70 S. W. 183, 24 Ky. L. Rep. 899. Where, subsequent to the building of a railroad depot some eight hundred yards from the center of a town containing not to exceed two hundred and fifty people, and outside of its corporate limits as then established, an addition was platted, adjoining such depot, and an unincorporated village, containing a population of about one hundred and forty persons, sprung up in such addition, it was held that an order sustaining objections to the extension of the limits of the original town to include such village should be reversed on appeal, if the court was satisfied that a failure to annex would materially retard the prosperity of the town. Fredonia *v.* Rice, 115 Ky. 443, 73 S. W. 1125, 24 Ky. L. Rep. 2331.

68. Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133. While the general rule is that municipal corporations cannot exercise their powers beyond their own limits, there are some exceptions; as for example, to provide for the discharge of sewerage. Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601. An order of annexation is not invalid because it includes in the territory annexed land which is vacant, wet, and covered with timber, and which is not platted, although the platted territory of an incorporated town touches it upon two sides to its entire extent, unless it also appears that the land was not needed for any proper town purposes, as the extension of the street, sewer, gas, or water system, or to furnish needed places of abode or business for its residents, or for the extension of needed police regulation. Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778. A petition by a city council to the board of county commissioners for annexation of contiguous unplatted territory, assigning as reasons therefor that the territory is a portion of the right of way of a railroad company, which needs better police surveillance than can be given without municipal control; that the company and its employees enjoy police protection without paying taxes therefor; that a number of the city streets and alleys are intercepted by such territory, and could be opened across it if a part of the city, and that such opening is needed for travel; that drains, sewers, and water-pipes should be constructed across such territory, which cannot be done by the city without annexation; and that the city is in need of increased revenue which would accrue from the taxation of such territory for purposes of police, water, and fire service, and the repair of streets, sets forth sufficient reasons for such annexation to warrant the board in annexing the territory and the circuit court in affirming such action. Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435.

Drainage and police purposes.— The extension of the limits of a city is not unreasonable when the territory annexed thereby is nearly all improved, and necessary for drain-

or for more adequate school facilities.[69] It is not a valid excuse for refusing annexation of territory that the taxes of such territory will be increased.[70] But on the objection of owners, sparsely settled outlying territory which would receive no substantial advantage from municipal government should not be annexed.[71] And it seems that either the territory to be annexed must receive a material benefit or the annexation must be required by justice and equity; otherwise the proceedings are invalid.[72]

(III) *Territory Which May Be Annexed*—(A) *In General.* General laws providing for the annexation of territory to municipalities generally contain limitations with respect to the territory which may be annexed.[73] Boards of commissioners or other tribunals having delegated authority from the legislature may annex adjacent territory.[74] Platted lands held for sale as town lots may reason-

age and police purposes. Kansas City *v.* Stegmiller, 151 Mo. 189, 52 S. W. 723.

69. Redfield School Dist. No. 12 *v.* Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180.

70. Plattsburg *v.* Riley, 42 Mo. App. 18; *In re* Edgewood Borough, 130 Pa. St. 348, 18 Atl. 646.

71. Latonia *v.* Hopkins, 104 Ky. 419, 47 S. W. 248, 20 Ky. L. Rep. 620.

72. Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957; Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715. See also *infra*, II, B, 2, b, (III).

Nebr. Comp. Sts. (1895) c. 14, § 99, art. 1, authorizes the boundaries of a village to be extended so as to include adjacent lands, where either they will be materially benefited from the annexation, or justice and equity require that it be done. Syracuse *v.* Mapes, 55 Nebr. 738, 76 N. W. 458; Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957. Under said section the corporate limits of a village may be extended so as to embrace contiguous territory which is in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. Syracuse *v.* Mapes, *supra*; Wahoo *v.* Tharp, 45 Nebr. 563, 63 N. W. 840; State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498. Contiguous territory may be annexed, although it may not have been subdivided into tracts of ten acres or less, the statute providing for annexation "whether such territory has been subdivided into tracts or parcels of ten acres or less, or has not been so subdivided, in case the same would receive material benefits or advantages by its annexation to the corporation, or justice and equity require such annexation to be made." Syracuse *v.* Mapes, *supra*.

Effect of remonstrances.— Under a statute which authorizes the court to approve the annexation of territory to a town if satisfied "that less than seventy-five per cent of the freeholders of the territory to be annexed have remonstrated, and that the adding of the territory to the town will be for its interest, and will cause no material injury to the persons owning real estate in the territory sought to be annexed," the fact that less than seventy-five per cent of the freeholders have remonstrated is not conclusive in favor of annexation. Latonia *v.* Hopkins, 104 Ky. 419, 47 S. W. 248, 20 Ky. L. Rep. 620.

73. Construction of particular statutes see People *v.* Ontario, 148 Cal. 625, 84 Pac. 205; Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Jeffersonville *v.* Weems, 5 Ind. 547; Tabor, etc., R. Co. *v.* Dyson, 86 Iowa 310, 53 N. W. 245; Portsmouth Sav. Bank *v.* Smith, 74 Kan. 223, 86 Pac. 462; Emporia *v.* Smith, 42 Kan. 433, 22 Pac. 616; and other cases in the notes following.

Mo. Rev. St. (1889) § 981, which provides that no city shall be "organized" within two miles of the limits of any city of the first class, unless such city be in a different county, does not prevent a city of the fourth class from extending its limits to within two miles of a city of the first class in the same county. Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 22 S. W. 490.

In Pennsylvania where the lands sought to be excluded from the annexation of a village to a borough manifestly constituted a part of the village, and could not be excluded without leaving a portion of the township in which the village was located lying between the ends of a principal street of the borough as it would be after annexation, it was proper not to exclude such lands. Glade Tp.'s Petition, 168 Pa. St. 441, 32 Atl. 37.

In Texas Rev. St. art. 503, which provides the means whereby a designated class of inhabitants of any territory adjoining the limits of a city "to the extent of a half mile in width" may procure the addition of such territory to the city, the words quoted were not intended to confine the authority to make an annexation of territory to an area neither more nor less than half a mile wide, but it was intended to limit the area which might be added to a city to half a mile wide. East Dallas *v.* State, 73 Tex. 370, 11 S. W. 1030.

Subdivision required by statute.—An ordinance attempting to annex property to a city, when the property was not subdivided by the owner as specified in the statute, is ineffective. Chicago, etc., R. Co. *v.* Nebraska City, 53 Nebr. 453, 73 N. W. 952.

74. *Connecticut.*— Gillette *v.* Hartford, 31 Conn. 351.

ably and properly be annexed to a city;[75] and even if they are not platted, but are held by the owner with the intention to sell them for town lots when they increase in value, they may be annexed.[76] It is proper to annex territory which represents the actual growth of a city furnishing habitation for a large and densely populated community of citizens,[77] or land which is certain to become valuable for future town purposes.[78] The extension of the limits of a city or town, if otherwise reasonable, cannot be objected to as unreasonable on the ground that it includes and subjects to taxation for municipal purposes land lying along the river and subject to overflow.[79] Under some statutes land in an adjoining county may be annexed.[80] City limits should never be extended so as to include unoccupied contiguous lands which give no promise of ever becoming valuable for corporation or other town purposes;[81] nor should agricultural or horticultural lands be included when they are valuable as such and are not needed for present town purposes.[82] As a rule non-contiguous territory cannot be annexed;[83] and it has

Indiana.— Collins *v.* New Albany, 59 Ind. 396; Evansville *v.* Page, 23 Ind. 525. As only "lots laid off and adjoining" the city (Ind. Rev. St. (1894) § 3658; Rev. St. (1881) § 3195) can be annexed by the common council, without the consent of the owners, the jurisdiction of the county commissioners to annex contiguous territory, on petition of the city, under Rev. St. (1894) § 3659 (Rev. St. (1881) § 3196), is not affected by the fact that within the limits of the territory sought to be annexed there are certain platted lots not contiguous to the city limits, and hence not recorded. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576.

Iowa.— Truax *v.* Pool, 46 Iowa 256.

Kansas.— Kirkpatrick *v.* State, 5 Kan. 673.

Missouri.— Giboney *v.* Cape Girardeau, 58 Mo. 141.

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96.

Pennsylvania.— Kelly *v.* Pittsburgh, 85 Pa. St. 170, 27 Am. Rep. 633.

Wisconsin.— Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 67, 74, 75.

75. Glover *v.* Terre Haute, 129 Ind. 593, 29 N. E. 412; Taylor *v.* Ft. Wayne, 47 Ind. 274; Tilford *v.* Olathe, 44 Kan. 721, 25 Pac. 223; Emporia *v.* Smith, 42 Kan. 433, 22 Pac. 616. See Jeffersonville *v.* Weems, 5 Ind. 547.

76. Glass *v.* Cedar Rapids, 68 Iowa 207, 26 N. W. 75.

77. *Arkansas.*— Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13.

Kansas.— Tilford *v.* Olathe, 44 Kan. 721, 25 Pac. 223.

Kentucky.— Where every lot in a town save three had been built upon at the time an ordinance annexing territory was passed, and much of the annexed territory was used by citizens of the town as pasture lots, it was held that the court was justified in concluding that the proposed territory was necessary for the growth of the town, and that the annexation of the territory would cause no serious injury to the persons owning real estate therein. Yancey *v.* Fairview, 66 S. W. 636, 23 Ky. L. Rep. 2087.

Missouri.— Plattsburg *v.* Riley, 42 Mo. App. 18.

Nebraska.— Wahoo *v.* Tharp, 45 Nebr. 563, 63 N. W. 840.

78. Woodruff *v.* Eureka Springs, 55 Ark. 618, 19 S. W. 15; Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13; Monk *v.* George, 86 Iowa 315, 53 N. W. 240.

79. Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031.

80. Portsmouth Sav. Bank *v.* Smith, 74 Kan. 223, 86 Pac. 462, holding that Kan. Gen. St. (1901) § 1172, authorizing cities of the third class to annex adjacent tracts of land by ordinance, when construed in connection with Gen. St. (1901) §§ 1179–1183, relating to the organization of such cities from territory lying in different counties, empowers a city lying in one county to extend its boundaries into another. It has been said, however, that the extension of a city across a county boundary is so unusual and is attended with such manifest practical inconveniences growing out of the relation of the municipal and county governments that an intention to authorize such an act should not be lightly inferred from the use of general language, but should be evidenced by express terms or by the clearest implication. Portsmouth Sav. Bank *v.* Smith, *supra*. See Tabor, etc., R. Co. *v.* Dyson, 86 Iowa 310, 53 N. W. 245, holding that an incorporated town situated on the border of a county cannot, by proceedings under chapter 10 of the code, annex contiguous territory in an adjoining county.

81. Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778; Latonia *v.* Hopkins, 47 S. W. 248, 20 Ky. L. Rep. 620; Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957; Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715.

82. Langworthy *v.* Dubuque, 13 Iowa 86; Williamstown *v.* Mathews, 103 Ky. 121, 44 S. W. 387, 19 Ky. L. Rep. 1766; Weeks *v.* Milwaukee, 10 Wis. 242.

But the consent of the inhabitants of the annexed territory will overrule this objection. State *v.* Waxahachie, 81 Tex. 626, 17 S. W. 348.

83. *Arkansas.*—Woodruff *v.* Eureka Springs, 55 Ark. 618, 19 S. W. 15; Vestal *v.* Little

also been held that an unoccupied tract of country or farming land cannot be made a part of a municipality for the mere purpose of increasing the municipal revenue;[84] that lands occupied by the owner exclusively as a florist and farmer, to which no streets or municipal improvements extend, and which the lines of settlements have not reached, cannot be annexed.[85] Nor can two square miles of territory containing two settlements of people separated by unoccupied farming lands, not connected by lines of buildings or other improvements, be annexed to a municipal corporation;[86] and a city comprising two square miles of territory cannot annex a territory of ten square miles including farms and unoccupied land.[87] The mere fact that lands are contiguous is never a sufficient ground alone to justify annexation; nor is the fact that such lands are greatly enhanced in value unless it is due to their adaptability for town uses.[88] But when the legislature exercises the power of direct legislation it may annex to a municipal corporation any territory which it deems proper to be included in the municipality.[89] Difficult questions have

Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

Colorado.— Denver *v.* Coulehan, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751.

Florida.— Enterprise *v.* State, 29 Fla. 128, 10 So. 740.

Illinois.— Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351.

Indiana.— Evansville *v.* Page, 23 Ind. 525.

Iowa.— Truax *v.* Pool, 46 Iowa 256; Morford *v.* Unger, 8 Iowa 82. Davenport city charter, providing that tracts of land laid off into town lots adjoining the boundaries of the city shall be a part of the city whenever the same were duly recorded, does not include a subdivision laid off into lots, which does not touch the city boundaries at any point. Truax *v.* Pool, *supra.*

Nebraska.— McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282.

New Jersey.— Miller *v.* Camden, (Sup. 1899) 44 Atl. 961.

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96.

Wisconsin.— Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561; Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 66 *et seq.*, 75. *Compare infra,* II, B, 2, b, (III), (B).

84. *Arkansas.*— Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

Iowa.— Buell *v.* Ball, 20 Iowa 282; Fulton *v.* Davenport, 17 Iowa 404; Langworthy *v.* Dubuque, 13 Iowa 86; Morford *v.* Unger, 8 Iowa 82.

Kansas.— Union Pac. R. Co. *v.* Kansas City, 42 Kan. 497, 22 Pac. 633.

Kentucky.— Henderson *v.* Lambert, 8 Bush 607.

Nebraska.— Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957, where the court decided against the annexation of all lots not subdivided and said that "the principal benefit [in this case] would be to the village by adding to the taxable property therein, but this of itself is not sufficient."

Unjust and unequal levies upon farming lands have been allowed by courts on the ground that there was no constitutional warrant for judicial interference to prevent or correct unfair results from competent legislation. Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661; Norris *v.* Waco, 57 Tex. 635; Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364; Clark *v.* Kansas City, 176 U. S. 114, 20 S. Ct. 284, 44 L. ed. 392; Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659.

Under Cal. St. (1889) p. 358, c. 247, providing that territory may be annexed to any incorporated town by the filing of a petition describing the territory desired to be annexed and a favorable vote by the inhabitants of the town and the territory to be annexed, territory, portions of which are uninhabited, may be annexed if as a whole it may fairly be said to be inhabited; St. (1899) p. 37, c. 41, providing for the annexation of uninhabited territory, and expressly stating that it shall not be construed to repeal any part of any act relating to the annexation of inhabited territory, applying only to territory all of which is uninhabited. People *v.* Ontario, 148 Cal. 625, 84 Pac. 205.

85. Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

In Pennsylvania whether agricultural or purely farm land shall be annexed to a city of the third class is wholly for the determination of the inhabitants of the district proposed to be annexed and the city councils. Susquehanna Tp.'s Appeal, 17 Pa. Co. Ct. 398.

86. *In re* Larksville, 13 Pa. Co. Ct. 351, 7 Kulp 84.

87. State *v.* Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

88. Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957; Judd *v.* State, 25 Tex. Civ. App. 418, 62 S. W. 543.

89. *Illinois.*— Covington *v.* East St. Louis, 78 Ill. 548.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Louisiana.— New Orleans *v.* Cazelar, 27 La. 156.

Massachusetts.— Chandler *v.* Boston, 112 Mass. 200.

Michigan.— People *v.* Bradley, 36 Mich. 447.

Mississippi.— Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

arisen in regard to taxation, and in most of the states the taxation of rural property within a municipality is fixed by law at a different rate from that imposed upon the city proper.[90] The boundaries of one city cannot be extended so as to include the territory of another city,[91] except in cases of consolidation authorized by statute.[92]

(B) *"Adjacent" and "Contiguous" Territory.* "Adjacent lands" mean those lands lying in such close proximity to the territory of a municipality as to be suburban in their character and to have some unity of interest with the city.[93] Contiguous lands are such as are not separated from the corporation by outside lands.[94] It has been ruled that non-contiguous territory cannot be annexed;[95] but in some instances the expression is "the land annexed must be contiguous or adjacent."[96] Where only a natural non-navigable stream intervenes between the territory sought to be annexed and the corporate boundary of the city, that would not alone constitute a barrier to the extension of the corporate limits over territory platted into lots;[97] and territory separated from a city by a navigable stream may be "contiguous."[98] If land proposed to be annexed is contiguous to another annexed tract or lot which is contiguous to the city it may be brought within the city by annexation.[99] The annexation of contiguous territory suited for city pur-

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96.

90. *Connecticut.*— Gillette *v.* Hartford, 31 Conn. 351.

Indiana.— Kalbrier *v.* Leonard, 34 Ind. 497.

Louisiana.— New Orleans *v.* Michoud, 10 La. Ann. 763.

Ohio.— Barker *v.* State, 18 Ohio 514.

Pennsylvania.— Serrill *v.* Philadelphia, 38 Pa. St. 355.

Tennessee.— Carriger *v.* Morristown, 1 Lea 116.

See 36 Cent. Dig. tit. "Municipal Corporations," § 71 *et seq.*; and *infra*, XV, D.

91 *Florida.*—State *v.* Winter Park, 25 Fla. 371, 5 So. 818.

Indiana.— Taylor *v.* Ft. Wayne, 47 Ind. 274.

Iowa.— Ashley *v.* Calliope, 71 Iowa 466, 32 N. W. 458.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

Pennsylvania.— McAskie's Appeal, 154 Pa. St. 24, 26 Atl. 60.

92. See *infra*, II, B, 2, c, (II).

93. Hurla *v.* Kansas City, 46 Kan. 738, 27 Pac. 143; Emporia *v.* Smith, 42 Kan. 433, 22 Pac. 616; *In re* Alliance Borough, 2 Blair Co. Rep. (Pa.) 34, 7 North. Co. Rep. 396. Where an incorporated town embracing about forty acres nearly in the center of a section of land had its boundaries extended by a special charter so as to include one mile square, which charter provided that "whenever a tract of land adjoining said town" should "be at any time laid off or subdivided into town lots and recorded as an addition to said town, such tract" should become a part of said town, and within the corporate limits thereof and subject to all the provisions of the act, it was held that the words "land adjoining" meant land adjoining the town as incorporated by the charter and were not confined to an addition to the original town plat within the square mile. Murray *v.* Virginia, 91 Ill. 558.

94. Ingersoll Pub. Corp. 152; and cases cited in the preceding note.

95. See *supra*, II, B, 2, b, (III), (A), text and note 83.

96. *Arkansas.*— Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13; Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

Indiana.— Evansville *v.* Page, 23 Ind. 525.

Kansas.— Hurla *v.* Kansas City, 46 Kan. 738, 27 Pac. 143; Union Pac. R. Co. *v.* Kansas City, 42 Kan. 497, 22 Pac. 633; Emporia *v.* Smith, 42 Kan. 433, 22 Pac. 616.

Pennsylvania.— Brinton's Appeal, 142 Pa. St. 511, 21 Atl. 978; Heidler's Petition, 122 Pa. St. 653, 16 Atl. 97.

Texas.— State *v.* Waxahachie, 81 Tex. 626, 17 S. W. 348.

Wisconsin.— Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 74, 75.

97. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937.

98. Vogel *v.* Little Rock, 54 Ark. 335, 15 S. W. 836; Blanchard *v.* Bissell, 11 Ohio St. 96. Under a statute authorizing proceedings before the county court, on the petition of a municipal corporation for the annexation of contiguous territory, an order granting the petition is not invalid because the land sought to be annexed is separated from the city by a large river, although at the time the only means of communication are two toll bridges and a number of small boats operated by private persons for hire. Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

99. Huff *v.* Lafayette, 108 Ind. 14, 8 N. E. 701; Catterlin *v.* Frankfort, 87 Ind. 45; Evansville *v.* Page, 23 Ind. 525; Hurla *v.* Kansas City, 46 Kan. 738, 27 Pac. 143; *In re* Camp Hill Borough, 142 Pa. St. 511, 21 Atl. 978.

poses, densely populated, and already receiving many advantages of a city, is reasonable and cannot be successfully resisted.[1] It has been held that the council or board having authority to annex land contiguous to a city cannot annex land separated from it by the right of way of a railroad;[2] but under some statutes lands occupied by a railroad company may be annexed.[3] An uninhabited tract of land nowhere adjoining an existing village, and in which the existing corporation has no special interest, cannot be made, even by an act of the legislature, a part of such a village merely for the purpose of increasing the corporate revenues.[4]

c. Detachment of Territory, Consolidation, and Division — (I) *DETACHMENT OF TERRITORY.* The same inherent authority of the legislative assembly by which it enlarges municipal boundaries may also be exercised in diminishing such boundaries by excision or detachment of a part of a territory;[5] and this may be

Under the Kansas statute, providing that "any city of the first class may enlarge or extend its limits or area by an ordinance specifying with accuracy the new line or lines to which it is proposed to enlarge or extend such limits or area," a city of the first class has the power to enlarge or extend its limits so as to include several tracts of land, some of which adjoin the city, and others of which adjoin those that do adjoin the city, so as to form one continuous body. Hurla *v.* Kansas City, 46 Kan. 738, 27 Pac. 143.

1. Paul *v.* Walkerton, 150 Ind. 565, 50 N. E. 725; Parker *v.* Zeisler, 73 Mo. App. 537; Syracuse *v.* Mapes, 55 Nebr. 738, 76 N. W. 458.

2. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576.

3. Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435.

In West Virginia a town may, under Code, c. 47, providing for changing the limits of towns, extend its corporate limits so as to include a railroad bridge across the Ohio river. Point Pleasant Bridge Co. *v.* Point Pleasant, 32 W. Va. 328, 9 S. E. 231.

4. Morford *v.* Unger, 8 Iowa 82; Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561. It was held error to include in land annexed to a city land of a farmer in cultivation, distant from a half to three quarters of a mile from an unincorporated town, and to which no streets or other improvement or any settlement extended and which was not needed for city use. Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

5. *California.*— People *v.* Coronado, 100 Cal. 571, 35 Pac. 162.

Indiana.— Indianapolis *v.* Ritzinger, 24 Ind. App. 65, 56 N. E. 141.

Iowa.— Evans *v.* Council Bluffs, 65 Iowa 238, 21 N. W. 584; Way *v.* Center Point, 51 Iowa 708, 1 N. W. 692; McKean *v.* Mt. Vernon, 51 Iowa 306, 1 N. W. 617.

Kentucky.— Miller *v.* Pineville, 89 S. W. 261, 28 Ky. L. Rep. 379.

Louisiana.— Winter *v.* Donaldsonville, 8 Mart. N. S. 553.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Maryland.— Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Missouri.— Thompson *v.* Abbott, 61 Mo. 176.

Ohio.— Metcalf *v.* State, 49 Ohio St. 586, 31 N. E. 1076.

Texas.— Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

West Virginia.— Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278.

United States.— Morgan *v.* Beloit, 7 Wall. 613, 19 L. ed. 203.

Constitutionality.—Fla. Acts (1903), p. 139, c. 5197, relating to the contracting of territorial limits of municipalities, is not in violation of Const. art. 8, § 8, providing that the legislature shall have power to establish and abolish municipalities, provide for their government, and alter their jurisdiction and powers at any time. Ormond *v.* Shaw, 50 Fla. 445, 39 So. 108. Bates Annot. St. Ohio, §§ 1536–1560, authorizing a proceeding in a court of common pleas for the detachment of unplatted farm lands from a municipality and attachment thereof to the adjacent township, is not unconstitutional on the ground that it violates public policy, or on the ground that it takes away the power of local self-government existing prior to the adoption of the constitution and preserved therein. Grover Hill *v.* McClure, 27 Ohio Cir. Ct. 376. Ohio Act (1890) (87 Ohio Laws), detaching from the city of Findlay a portion of its territory, and attaching it to an adjoining township, is not unconstitutional, as conferring corporate power. Metcalf *v.* State, 49 Ohio St. 586, 31 N. E. 1076. And Ky. St. (1903) § 3483, authorizing the changing of the boundaries of cities by reducing the limits thereof, etc., is not invalid because only the taxpayers in the territory proposed to be stricken off can make a defense, and because the defense is limited to a showing that the change will impose unjust burdens on them; the legislature having the power to reduce the limits of municipalities and to limit the defense to a proceeding therefor. Miller *v.* Pineville, 89 S. W. 261, 28 Ky. L. Rep. 379. But Ark. Act, March 9, 1877, "to define the boundary of the city" of Little Rock, was held unconstitutional, in that it operated to suspend a general law, so that the attempt made therein to cut off an addition to the city of Little Rock failed. Little Rock *v.* Parish, 36 Ark. 166.

done without consulting the municipality, or that portion of its inhabitants thus summarily detached, unless forbidden by constitutional limitations,[6] although sometimes the statute provides for submission of the question to the voters.[7] This power of increase and diminution of municipal territory is plenary, inherent, and discretionary in the legislature, and, when duly exercised cannot be revised by the courts.[8] The statutes generally provide for the detachment or excision of territory on application to some officer or board,[9] or to the courts,[10] and such

Construction of statute.— W. Va. Act, Feb. 28, 1872, "for the relief of Samuel W. Johnston," providing "that the farm of Samuel W. Johnston, on which he now resides, be, and the same is hereby, excluded from the corporate limits of the city of Huntington," did not exclude any portion of the farm sold and conveyed by Johnston before the act was passed. Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17. Where plaintiff's land was within the limits of a town as originally incorporated, but a subsequent act of incorporation included the section as originally laid out, "bounded therein by lands now belonging to" plaintiff, it was held that the act excluded from the incorporation the lands of plaintiff. Winter *v.* Donaldsonville, 8 Mart. N. S. (La.) 553.

6. Ingersoll Pub. Corp. 156. And see *infra*, II, B, 2, d, (XIII), (A).

The legislature may take territory from one municipality and add it to another without the consent of either. Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278. See *supra*, II, B, 2, a, (I). But under Fla. Acts (1877), c. 3025, authorizing county commissioners to prescribe new boundaries for incorporated towns when it appears that the boundaries are extended beyond necessary and useful limits, and include an undue quantity of vacant farming lands, it was held that the power to sever a part of a town in order to annex it to another was not conferred. Jacksonville *v.* L'Engle, 20 Fla. 344.

7. Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505. See *infra*, II, B, 2, d, (XIII).

In Texas under Laws (1895), p. 17, providing for establishing the boundaries of cities and towns, and to validate the previous incorporation of any city or town, and allowing ninety days for a resurvey of towns containing a greater area than was authorized by such act, until the period allowed for the resurvey has elapsed no election can be held under Sayles Civ. St. art. 503*a*, for withdrawing territory from a town. Wilson *v.* Bristley, 13 Tex. Civ. App. 200, 35 S. W. 837.

8. State *v.* Demann, 83 Minn. 331, 86 N. W. 352; Guthrie *v.* Wylie, 6 Okla. 61, 55 Pac. 103; Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364. See Cooley Const. Lim. (6th ed.) 228.

9. Young *v.* Carey, 184 Ill. 613, 56 N. E. 960 [*reversing* 80 Ill. App. 601]; Lebanon *v.* Knott, 72 S. W. 790, 24 Ky. L. Rep. 1992; Matter of Mathews, 59 N. Y. App. Div. 159, 69 N. Y. Suppl. 203; Pelletier *v.* Ashton, 12 S. D. 366, 81 N. W. 735.

Discretion.— Under Hurd Rev. St. Ill. (1897) p. 289, c. 24, par. 206, providing that whenever the owners, representing a majority of the area of any land embraced in any village, and on the borders thereof, shall petition the trustees of the village to detach such territory, the trustees may, by ordinance, to be passed by a majority of the members elected to the board of trustees, detach the territory described in the petition, the trustees have no discretion to refuse to detach, if a petition signed by the requisite number of property-owners, owning property on the borders of a village, shall be presented to them. Young *v.* Carey, 184 Ill. 613, 56 N. E. 960 [*reversing* 80 Ill. App. 601]; Roberts *v.* People, 93 Ill. App. 645.

Veto by supervisor.— Where a village had no supervisor or similar officer in the county board of supervisors, the failure of the supervisor of the town in which the village was located to vote in favor of the report that a petition to diminish the village boundaries be granted was an effective veto of the report, within N. Y. Laws (1871), c. 870, § 33, providing that no act, ordinance, or resolution for the purpose of diminishing the boundaries of a village shall be valid unless it receive the affirmative vote of the supervisor, if any, of such village. Matter of Mathews, 59 N. Y. App. Div. 159, 69 N. Y. Suppl. 203.

Mandamus to compel action see *infra*, II, B, 2, d, (II), (XIII), (A), note 16.

10. Johnson *v.* Forest City, 129 Iowa 51, 105 N. W. 353; Ashley *v.* Calliope, 71 Iowa 466, 32 N. W. 458; Evans *v.* Council Bluffs, 65 Iowa 238, 21 N. W. 584; Lebanon *v.* Knott, 72 S. W. 790, 24 Ky. L. Rep. 1992; Coughran *v.* Huron, 17 S. D. 271, 96 N. W. 92; Pelletier *v.* Ashton, 12 S. D. 366, 81 N. W. 735.

In the absence of a statutory provision therefor, a court of equity has no jurisdiction of an action to detach territory from a municipality at the suit of property owners. Hastings *v.* Hansen, 44 Nebr. 704, 63 N. W. 34.

Discretion of court or jury.— Whether outlying property within the territorial limits of a town shall be severed therefrom, as authorized by Code, § 622 *et seq.*, is a matter within the judicial discretion of the court or jury hearing the application for severance. Johnson *v.* Forest City, 129 Iowa 51, 105 N. W. 353, holding that where the entire tract of outlying property within the boundaries of a town was desirable and suitable for residential purposes, and although there were no streets or alleys, except certain roads crossing the tract, and it had no fire protection, it had been policed by the town

laws apply to municipalities existing under special charter as well as to those organized under a general law, unless they are excepted.[11] Territory extended by ministerial authority beyond necessary and useful limits and including an undue amount of farming land may be detached;[12] but territory within a city's limits

and been subject to sanitary regulations, and by reason of the rapid growth of the town would shortly be needed for residences, it was not an abuse of the trial court's discretion to refuse to grant a petition for severance thereof.

Mandatory statutes.—In Colorado the statute providing for the disconnection of territory from a town or city is mandatory, and, when the facts required to be established by the statute have been shown by competent proof, the court must disconnect the territory, without regard to its views concerning justice or equity. Anaconda Min. Co. *v.* Anaconda, 33 Colo. 70, 80 Pac. 144.

When application should not be granted.— Cal. Act, March 19, 1889 (St. (1889) p. 356), entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom," was not intended as a means by which a city might be practically disincorporated, and a petition for a special election thereunder should not be granted when the contemplated change of boundaries will exclude nearly the whole of the city's territory, nine tenths of its population, and four fifths of its trustees, and the population left will be less than one half that necessary to form a municipal corporation of the lowest class. Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580.

Maintenance of streets precluding detachment.— Under an act authorizing the disconnection of territory from a town or city, and making it a condition precedent that the city shall not have maintained streets, lights, and other public utilities for the period of three years, the maintenance of one street precludes disconnection. Anaconda Min. Co. *v.* Anaconda, 33 Colo. 70, 80 Pac. 144.

Platted territory.—Under Colo. Sess. Laws (1901), p. 386, c. 106, § 2, relative to disconnecting territory from a town and providing that it must appear that no part of the territory has been platted into lots and blocks as a part of the town, where the territory in question constitutes a portion of a subdivision of the town included in the town site at the time of the incorporation, and the plat of the subdivision shows the streets of the town running east and west, and each alternate street running north and south laid out through the subdivision, and the spaces between the streets divided into parcels of various dimensions, the parcels being numbered, the territory cannot be disconnected, as it is platted into lots and blocks. Fruita *v.* Williams, 33 Colo. 157, 80 Pac. 132.

Rival villages.— Where a small village became incorporated, and included territory two miles long and one mile wide, and a rival village afterward sprang up in another portion of the territory so included, and the interests of the villages, whose centers were about a mile apart, were antagonistic, and the land lying between them was not platted or used for town purposes, it was held that a petition by the people of the new village, under Iowa Code, §§ 440–446, for a severance of their territory from the corporation, was properly granted. Ashley *v.* Calliope, 71 Iowa 466, 32 N. W. 458.

Cities not included in statute.— Nebr. Comp. St. (1893) c. 14, § 101, relating to the change of municipal limits, and detaching territory included therein, by proceedings in the district court, does not apply to cities of the first class having less than twenty-five thousand inhabitants. Hastings *v.* Hansen, 44 Nebr. 704, 63 N. W. 34.

In Pennsylvania the court of quarter sessions has no authority on petition of a single landowner to exclude his land from the borough after the borough has been duly incorporated, since the act of 1863 (Pamphl. Laws 300), giving a landowner the right to object when he finds his property included within the limits of a proposed borough, can only be taken advantage of when a borough is about to be incorporated. Lark's Petition, 3 Pa. Co. Ct. 479. Where farming lands have been included within the boundaries of a borough, without objection at the proper time on the part of the owner, the court, upon an application to erect a new borough out of the old one, has no jurisdiction to grant a petition to exclude such lands from the new borough, to which they properly belong by reason of their location. *In re* Collingdale Borough, 11 Pa. Co. Ct. 105.

11. Coughran *v.* Huron, 17 S. D. 271, 96 N. W. 92, so holding as to Pol. Code, § 1609.

12. Jacksonville *v.* L'Engle, 20 Fla. 344. Where an incorporated city included within its limits four sections of land, only eighty acres of which were platted, and the rest was cultivated land, and the owners received no benefit from its being within the city limits and were subjected to increased taxation thereby, and the land was not necessary for any public purpose, except to increase the city's revenue, it was held that such land was properly excluded by the circuit court after the city council had refused so to do. Pelletier *v.* Ashton, 12 S. D. 366, 81 N. W. 735. Where lands included within the limits of a city are used wholly for cultivation, and are not needed for city purposes, and are not benefited by being within the corporation, they should be severed from the city upon the petition of the owners; and where the lands have never been liable for municipal taxes, such severance should not be conditioned upon payment by the owners of any portion of the indebtedness incurred by the city while the lands were attached thereto. Evans *v.* Council Bluffs, 65 Iowa 238, 21 N. W. 584.

cannot be severed on the ground that it receives no benefits from the municipal improvements, and is not needed for present municipal purposes, where it is manifest that it will soon be required for such purposes in the extension of the city in that direction.[13] The vacation by the owner of a plot of addition to a city within the corporate limits does not *ipso facto* disconnect the platted lands from the municipality.[14] A person whose land has been improperly included within municipal boundaries may be estopped to ask that it be detached or excluded;[15] but the mere fact that the petitioner may have received benefits from the city while his lands were within city limits will be no reason for refusing detachment of such territories when sufficient grounds are shown.[16] The state immediately assumes full control of detached territory previously embraced in a city.[17]

(II) *CONSOLIDATION.*[18] The legislature may also consolidate or authorize the consolidation of two separate corporations into a single one, this being but another illustration of the inherent and plenary power possessed by the legislature to create, control, and dissolve all municipal corporations.[19] Since the legislature

13. Mosier *v.* Des Moines, 31 Iowa 174. In an action to strike certain territory from out the limits of a city, evidence that the land is not needed for any possible increase of the population, that it is taxed higher, and the owners are deprived of school advantages which they would enjoy if severed therefrom, was held insufficient to warrant a verdict in favor of the city being set aside. Christ *v.* Webster City, 105 Iowa 119, 74 N. W. 743. Under Miller Code Iowa, § 443, authorizing a severance of land included within the limits of a town or city, if the court or jury shall be "satisfied that the prayer of the petitioner should be granted," it is not an abuse of discretion for the court to refuse a severance, where the land in question is within a block of the business portion of the town, and it appears that portions of such land are desirable for residences. Monk *v.* George, 86 Iowa 315, 53 N. W. 240.

14. Kershaw *v.* Jansen, 49 Nebr. 467, 68 N. W. 616.

15. See *infra*, II, B, 2, f, (III).

Facts not constituting an estoppel.—But it has been held that the fact that the owner of unplatted land, used exclusively for agricultural purposes for years, tacitly submitted to its inclusion in the incorporated limits of the village, does not estop him from proceeding under the statute to have it disconnected therefrom. Barber *v.* Franklin, (Nebr. 1906) 108 N. W. 146.

16. Geneva *v.* People, 98 Ill. App. 315.

17. People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305.

18. **Who may question** see *infra*, II, B, 2, f.

Operation and effect see *infra*, II, B, 2, g, (I).

19. *Arkansas.*— Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785.

California.— People *v.* Hill, 7 Cal. 97.

Colorado.— Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

Illinois.— True *v.* Davis, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266.

Kentucky.— St. § 3287, a part of the charter of cities of the third class, providing for the annexation of territory, with a provision that, if any city be annexed to another, the city so annexing the territory of another shall be bound for all debts and liabilities of such municipal corporation, gives the power to annex the territory of another municipality. Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721.

Louisiana.— Layton *v.* New Orleans, 12 La. Ann. 515.

Maryland.— Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Massachusetts.—Stone *v.* Charlestown, 114 Mass. 214, statute uniting Boston and Charlestown held constitutional.

Michigan.— Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Minnesota.— Adams *v.* Minneapolis, 20 Minn. 484.

Missouri.— Thompson *v.* Abbott, 61 Mo. 176.

Oregon.— Winter *v.* George, 21 Oreg. 251, 27 Pac. 1041.

Pennsylvania.—Smith *v.* McCarthy, 56 Pa. St. 359.

Tennessee.— Daniel *v.* Memphis, 11 Humphr. 582.

Washington.— Const. art. 11, § 10, declaring that municipal corporations shall not be created by special laws, does not prevent two existing municipal corporations, or one existing corporation and an adjacent body whose incorporation was void, from being consolidated under a law authorizing a special election on the question of consolidation. State *v.* New Whatcom, 3 Wash. 7, 27 Pac. 1020.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

Representative districts.— Mich. Local Act (1889), No. 455, consolidating the cities of Saginaw and East Saginaw, which comprised distinct representative districts, does not contravene Const. art. 4, §§ 3, 4, which provides for the division of the state into representative districts, and enacts that such division shall remain unaltered until the return of another enumeration, which is to be had every ten years, as the act expressly

by one act might dissolve an existing corporation and by two succeeding acts charter two other contiguous municipalities comprising the same territory in the exercise of its conceded powers it may of course effect the same result by a single act without circumlocution. It is usual to submit the question of consolidation by legislative enactment to a vote of the people of the several corporations to be thus united; but unless the constitution so requires, it is competent for the legislature to make a consolidation without consulting the wishes of the people.[20] The legislative power to unite two cities is not affected by the existence of charitable trusts for the schools and for the poor of one of the cities.[21] Under a statute providing for the consolidation of cities "lying adjacent to each other, and not more than three fourths of one mile apart," the consolidation of three cities is not illegal because one of them is not contiguous to the other two; the distance separating them being less than three fourths of a mile.[22]

(III) *Division.*[23] The legislature also has the power to divide a municipal corporation, such special power being a part of that general authority which the legislature possesses over all municipal corporations as agencies of the government.[24] There can be no division by the municipal authorities except under legislative authority.[25]

d. Proceedings — (I) *In General.* The proceedings for annexation or detachment of territory to or from a municipality are prescribed by statute, and to be

provides (tit. 16, § 31) that it shall not change in any respect the boundaries of the existing representative districts, or the manner of electing representatives, and preserves the old voting precincts intact. Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Partial unconstitutionality.—The fact that an act consolidating two cities authorizes and makes it the duty of the council of the consolidated city to issue bonds to raise money to purchase a site for and erect a city hall, and provides that this requirement shall not be abrogated without the assent of a majority of the aldermen, and shall be construed as in the nature of a contract between the two cities, if unconstitutional, does not affect the validity of the balance of the act. Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Construction of statutes.— Under Nebr. Comp. St. c. 12*a*, § 3, providing that a city of the metropolitan class may include within its corporate limits an area not to exceed twenty-five square miles, including any township or village organization within such limits, and that such organization shall thereupon cease and terminate, such a city cannot divide the territory of a village and annex a portion thereof, but it must include the entire village. Omaha *v.* South Omaha, 31 Nebr. 378, 47 N. W. 1113. Such statute does not authorize a city of the metropolitan class to extend its limits so as to include a city of the second class. Omaha *v.* South Omaha, *supra.* The existence of a natural boundary line between two villages, such as a deep, wooded ravine, is not such division of territory as requires separate corporate existence; and where a majority of the landowners on each side of the ravine demand incorporation with one of the villages into a borough, it cannot be said that the limits of that village would be unduly extended, or adjacent territory of the neighboring village invaded, by granting the application. *In re* Edgewood Borough, 130 Pa. St. 348, 18 Atl. 646.

Application to existing corporations under special charters.—Wash. Act, March 27, 1890 (Acts, p. 138), providing that "two or more contiguous municipal corporations may become consolidated into one corporation after proceedings had as required in this section," and authorizing a special election to be held on the question of consolidation, applies to preëxisting corporations, created by special charter, as well as to those organized under general incorporation laws. State *v.* New Whatcom, 3 Wash. 7, 27 Pac. 1020.

20. See *infra*, II, B, 2, d, (XIII), (A).

21. Stone *v.* Charlestown, 114 Mass. 214.

22. State *v.* Kansas City, 50 Kan. 508, 31 Pac. 1100.

23. **Operation and effect** see *infra*, II, B, 2, g, (II).

Wards, precincts, and other subdivisions see *infra*, II, B, 3.

24. Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; Prescott *v.* Lennox, 100 Tenn. 591, 47 S. W. 181; Wade *v.* Richmond, 18 Gratt. (Va.) 583; State *v.* Wood County, 61 Wis. 278, 21 N. W. 55; Ingersoll Pub. Corp. 157. See also North Yarmouth, 45 Me. 133, 71 Am. Dec. 530; Weymouth, etc., Fire District *v.* Norfolk County Com'rs, 108 Mass 142. The power of the legislature to divide municipalities is strictly a legislative power. Washburn Water Works Co. *v.* Washburn, 129 Wis. 73, 108 N. W. 194.

What is a "division."— The vacation of a town and attachment of all its territory to several other organized towns is not the "division" of a town, within the meaning of Wis. Rev. St. § 671, and may therefore be done by the county board without complying with the requirements of the section. State *v.* Wood County, 61 Wis. 278, 21 N. W. 55.

25. Carr *v.* McCampbell, 61 Ind. 97.

valid they must be at least in substantial, and according to some of the cases in strict, conformity with the statute authorizing them.[26] The county board of commissioners in some states and the county or some other court in others,[27] and often

26. *Arkansas.*— Little Rock *v.* Parish, 36 Ark. 166.

California.— People *v.* Nevada, 6 Cal. 143.

Connecticut.— Suffield *v.* East Granby, 52 Conn. 175.

Florida.— Except in the mode provided by statute for enlarging the boundaries of a city, the action of the county board of commissioners purporting to do so is of no effect, and does not authorize an assessment by the municipal officers on property outside the original boundaries. Pensacola *v.* Louisville, etc., R. Co., 21 Fla. 492.

Illinois.— Galesburg *v.* Hawkinson, 75 Ill. 152.

Indiana.— Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; Windman *v.* Vincennes, 58 Ind. 480; Stilz *v.* Indianapolis, 55 Ind. 515.

Iowa.— Laws (1858), c. 157 (an act for the incorporation of cities and towns) §§ 19–27, applied to municipal corporations existing at the time it went into effect; and proceedings under them to exclude property from the limits of a city were, by section 107, cumulative to proceedings under the code. Whiting *v.* Mt. Pleasant, 11 Iowa 482.

Kansas.— Stewart *v.* Adams, 50 Kan. 568, 32 Pac. 912.

Louisiana.— Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382.

Mississippi.— Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

Missouri.— St. Louis *v.* Allen, 13 Mo. 400.

Nebraska.— Seward *v.* Conroy, 33 Nebr. 430, 50 N. W. 329.

Pennsylvania.— *In re* Morrellville Borough, 20 Pa. Co. Ct. 257 [*affirmed* in 7 Pa. Super. Ct. 532] (under Act, May 23, 1889); *In re* Phœnixville Borough, 2 Chest. Co. Rep. 228 (under Act, April 1, 1834).

South Dakota.— Oehler *v.* Big Stone City, 16 S. D. 86, 91 N. W. 450.

Tennessee.— McCallie *v.* Chattanooga, 3 Head 317.

Texas.— Buford *v.* State, 72 Tex. 182, 10 S. W. 401.

Virginia.— Wade *v.* Richmond, 18 Gratt. 583.

Washington.— King County *v.* Davies, 1 Wash. 290, 24 Pac. 540.

Wisconsin.—Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364; Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465.

See 36 Cent. Dig. tit. "Municipal Corporations," § 81 *et seq.*

Strict construction of statute.—An act providing that if any city desires to annex contiguous territory not laid off in lots, and the owner will not consent to it, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and at the same time present to such board an accurate description, by metes and bounds, accompanied with a plat of the lands desired to be annexed; that the common council shall give thirty days' notice by publication in some newspaper of the intended petition, describing said lands; that such board, on reception of the petition, shall hear the testimony, and if, after inspection of the map, etc., it is of opinion that the prayer should be granted, they shall cause an entry to be made in the order book specifying the territory annexed, etc., according to the survey, and cause a copy to be filed with the county recorder, is not one against private right, nor in derogation of the common law, but should be strictly construed. Stilz *v.* Indianapolis, 55 Ind. 515.

In Pennsylvania, where borough limits were changed by annexing new territory by proceedings of the borough council under the act of April 30, 1851, and the required plan of the territory annexed was filed with the clerk of the court, as directed by the act of June 2, 1871, the matter might be laid before any subsequent grand jury; and, if in other respects there was no violation of the statutory requirements, the proceedings would not be set aside after their approval by a grand jury and the court. *In re* Edwardsville Borough, 18 Pa. Co. Ct. 475, 8 Kulp 339.

Survey and resurvey see *infra*, II, B, 4.

Certificate of grand jury in proceedings to annex land to a borough see *In re* Freeland, 7 Kulp (Pa.) 107.

27. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Jeffersonville *v.* Weems, 5 Ind. 547; Burlington *v.* Leebrick, 43 Iowa 252; Powers *v.* Wood County, 8 Ohio St. 285.

In Indiana, where territory not platted is sought to be annexed to a city to which it lies adjacent, the board of county commissioners has exclusive original jurisdiction over the matter, and the city must by petition secure from that body the proper order. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937.

The legislature may constitutionally pass a general law providing for the annexation of territory to a municipal corporation and providing for such annexation on petition to a court, requiring the court to determine whether justice and equity require such annexation, and authorizing it to enter a decree accordingly; the question being so far of a judicial character that the courts may be vested with jurisdiction to determine the same. Wahoo *v.* Dickinson, 23 Nebr. 426, 36 N. W. 813. See also Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031; Burlington *v.* Leebrick, 43 Iowa 252; Blanchard *v.* Bissell, 11 Ohio St. 96; *In re* Little Meadows, 35 Pa. St. 335. Kan. Laws (1886), c. 69, § 1, providing for the extension of the limits of a city and conferring upon the district courts power to hear and determine

the municipal council, take proceeding for the change of municipal territory.[28] The question whether annexed territory immediately adjoins the limits of the town is a question of fact for the board or court to determine upon a proper hearing for that purpose.[29] The proceedings necessary to effect a change in the limits of a borough are usually the same as those required to be taken in the original incorporation.[30] In some states unplatted lots contiguous to a city can, in the absence of the owner's consent, be annexed only on petition to the commissioners or court.[31] The courts will order the exclusion of farming lands upon petition if satisfied that no public or private right will thereby be injured.[32] Under some statutes a city council has no discretion in the matter of detaching territory when the petition for such purpose conforms to the law, while under others it has such discretion.[33]

(11) *ORDINANCES.* Ordinances annexing or detaching territory must be passed as required by statute, otherwise the proceedings are void.[34] A city cannot, by an ordinance purporting to define the boundary lines, disconnect territory legally

whether a proposed ordinance of a city extending its limits will be to the interest of the city, and will cause no manifest injury to the persons owning the land, is not unconstitutional as delegating legislative power to a judicial officer; the findings of fact made by a judge of the district court by virtue of the statute being the exercise of judicial power. Callen *v.* Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736.

28. Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785; People *v.* Oakland, 123 Cal. 598, 56 Pac. 445; Covington *v.* East St. Louis, 78 Ill. 548; Geneva *v.* People, 98 Ill. App. 315; *In re* Morrellville Borough, 7 Pa. Super. Ct. 532 [*affirming* 20 Pa. Co. Ct. 257]. And see Seward *v.* Conroy, 33 Nebr. 430, 50 N. W. 329.

In Illinois, where the charter of a city existing at the time of the adoption of the constitution of 1870 provided that any tract of land adjoining such city, laid off into city or town lots, a plat of which being duly recorded, etc., should be and form a part of said city, provided the city council should so declare, and in 1875 the city council declared a tract of land, which came within the requirements of the charter, a part of the city it was held that the action of the city council was lawful, and that such territory thereby became a part of the city. Covington *v.* East St. Louis, 78 Ill. 548.

In Pennsylvania in proceedings for annexation of a borough by a city under the act of May 23, 1889, the petition invoking action by the quarter sessions for election purposes, jurisdiction is vested upon petition filed by the presidents of councils. The neglect or refusal of the mayor to act cannot have the effect of nullifying the law. *In re* Morrellville Borough, 7 Pa. Super. Ct. 532 [*affirming* 20 Pa. Co. Ct. 257].

29. Cicero *v.* Williamson, 91 Ind. 541. See *infra*, II, B, 2, d, (XII), (B).

30. Borough's Appeal, 3 Lanc. L. Rev. (Pa.) 141.

31. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576.

32. *In re* Robinson's First Addition, etc., 62 Kan. 426, 63 Pac. 426.

33. Burchett *v.* People, 197 Ill. 593, 64 N. E. 543 [*reversing* 99 Ill. App. 251]; Geneva *v.* People, 98 Ill. App. 315. See *supra*, II, B, 2, c, (I).

34. Murray *v.* Virginia, 91 Ill. 558; Bardstown *v.* Hurst, 89 S. W. 724, 28 Ky. L. Rep. 603; Lebanon *v.* Knott, 72 S. W. 790, 24 Ky. L. Rep. 1992; Matter of Mathews, 59 N. Y. App. Div. 159, 69 N. Y. Suppl. 203; Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 339. The mere filing of the petition does not complete the disconnection, but the passing and filing of the ordinance are the consummation of the act. People *v.* Binns, 192 Ill. 68, 61 N. E. 376.

Time of determining reasonableness of ordinance.— Under Miss. Rev. Code (1892), §§ 2912*a*, 2913, as amended by Acts (1902), p. 154, c. 103, permitting the annexation by cities of adjacent unincorporated territory by ordinance, and providing that appeal from the ordinance shall be to the circuit court on an issue to be made up there, and that the question shall be whether the proposed extension be or be not unreasonable, the reasonableness of the extension is to be tested by the circumstances existing at the time of the enactment of the ordinance. Jackson *v.* Whiting, 84 Miss. 163, 36 So. 611.

Ordinance pending protesting suits.— The fact that suits protesting against the annexation of territory to a city were still pending when the final ordinance providing for annexation was passed does not render the ordinance invalid; it being sufficient that the right of the city to make the annexation had been determined in one action already decided, the judgment therein being binding upon all residents of the territory. Specht *v.* Louisville, 58 S. W. 607, 22 Ky. L. Rep. 699.

Construction of ordinance.—An ordinance to extend town limits "one-third of a mile from the public well on the corner of T. and M. streets" calls for addition of a square. Hardesty *v.* Mt. Eden, 86 S. W. 687, 27 Ky. L. Rep. 745.

Failure of mayor to issue proclamation.— The failure of the mayor, immediately after an election to determine whether a town incorporated under a special law shall become

annexed. That can be done only by a proceeding in compliance with the statute;[35] and an ordinance annexing territory, part of which is subdivided into lots, and part not so subdivided, is void *in toto* where the statute provides that only subdivided territory may be annexed in this manner.[36] An ordinance annexing or detaching territory from a municipality passed before the repeal of the statute authorizing the same is not necessarily affected by the repeal,[37] but an ordinance passed after the repeal is ineffective.[38] Mandamus will lie in a proper case to compel the council or board of trustees to investigate the facts and pass an ordinance if the statutory conditions exist.[39]

(III) *NOTICE AND APPEARANCE.*[40] The statutes providing for the annexation of territory to municipal corporations usually require notice to be given of the annexation or the application therefor or the hearing thereon and such requirement must be observed.[41] No part of a specified territory can be annexed to a city

incorporated under the general laws, to issue his proclamation extending the city limits, as required by the ordinance, is immaterial, where an ordinance is subsequently passed, recognizing the added territory as a part of the city. State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

Showing as to passage of ordinance see Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 339.

Ordinance as evidence of annexation.—An ordinance defining the boundaries of a city cannot be accepted as evidence of the annexation of contiguous territory, not included in the corporate limits prior to the passage of such ordinance. Hall County School Dist. No. 30 *v.* Grand Island School Dist., 63 Nebr. 44, 88 N. W. 120.

Repeal of ordinance.— Where an ordinance proposing the annexation of territory to a city of the first class, as provided by section 2761 of Kentucky statutes, was repealed after a petition had been filed by residents of such territory objecting to the annexation, it was held that the refusal of the court to sustain the city's motion to dismiss the proceeding at its cost was prejudicial error, as a judgment adverse to annexation precludes the city from making another effort to annex the territory for two years thereafter. Louisville *v.* Crescent Hill, 52 S. W. 1054, 21 Ky. L. Rep. 755.

35. Cleveland, etc., R. Co. *v.* Dunn, 61 Ill. App. 227.

36. Stewart *v.* Adams, 50 Kan. 560, 32 Pac. 122.

37. Croll *v.* Franklin, 40 Ohio St. 340, holding that a city ordinance for the annexation of contiguous territory, passed while the act of March 1, 1877 (74 Ohio Laws, p. 36) was in force, continued in force until annexation was finally effected, or a final decision was rendered on the merits, although that act was repealed before a third application was finally granted by an act continuing in force all existing ordinances "not inconsistent with this title."

38. Phœnix Nursery Co. *v.* Seibert, 101 Ill. App. 147, holding that the disconnection of territory from a village under the act of 1879 was not consummated by the filing of a petition containing the statutory requirements, and the repeal by the legislature of the enabling act of 1879 prior to the passage of an ordinance by the village disconnecting such territory defeated the proceeding.

39. Young *v.* Carey, 184 Ill. 613, 56 N. E. 960 [*reversing* 80 Ill. App. 601], holding that upon the filing of a petition to disconnect territory from a city or village, under the act of 1879, the only questions for the council or board of trustees to determine are whether the territory is located and the petition signed as required by the statute, and mandamus will lie to compel an investigation of such facts, and the passage of an ordinance if they are found to exist. See also Roberts *v.* People, 93 Ill. App. 645. Under Ky. St. § 3483, providing a method for striking territory from the boundaries of cities, and requiring the city council, on petition, to pass an ordinance defining the boundary to be stricken, and also requiring, after publication of such ordinance, a petition to be filed in the circuit court for a judgment for the relief demanded, it was held that, in mandamus to compel a city council to pass the ordinance provided for in such section, that an answer averring that the city had a large bonded indebtedness incurred for waterworks, and that many of the petitioners for the ordinance received special privileges therefrom, etc., was demurrable. Lebanon *v.* Knott, 72 S. W. 790, 24 Ky. L. Rep. 1992.

40. **Notice of election** see *infra*, II, B, 2, d, (XIII), (B).

41. *Arkansas.*— Gunter *v.* Fayetteville, 56 Ark. 202, 19 S. W. 577.

Indiana.— Cicero *v.* Williamson, 91 Ind. 541.

Kentucky.— Bardstown *v.* Hurst, 89 S. W. 147, 724, 28 Ky. L. Rep. 92, 603.

Michigan.— Pelton *v.* Ottawa County Sup'rs, 52 Mich. 517, 18 N. W. 245.

Ohio.— Franklin *v.* Croll, 31 Ohio St. 647; State *v.* Cincinnati, 8 Ohio Cir. Ct. 523, 8 Ohio Cir. Dec. 689.

Pennsylvania.— *In re* Freeland Borough, 2 Pa. Dist. 780, 13 Pa. Co. Ct. 399. A city cannot, under the act of May 16, 1891, extend its boundaries from the middle of a stream so as to include the whole bed thereof, without giving a borough on the opposite bank, the boundary of which has extended to the middle of the stream, an opportunity to be heard. Wilkes Barre Case, 13 Luz. Leg.

without public notice of the hearing, as required by statute.[42] This has been held to be true notwithstanding a majority of the property holders are present at the hearing and consent to the annexation.[43] Notice is sufficient, if it accurately describes the territory by metes and bounds, and an additional allegation professing to give the names of the landowners is surplusage and the omission to name all the landowners is of no consequence;[44] but the notice must always be such as to give the landowners notice that their lands are involved.[45] Annexation proceedings are not invalidated by erroneous statements of the names of owners of land to be annexed in the notice, where such lands are described accurately by metes and bounds.[46] In reckoning time the first day is excluded and the last day included.[47] The following have been held requisite and sufficient notice in the several jurisdictions: Notice signed by the city clerk and attested by the city attorney, as sufficiently showing that the common council authorized the giving of the notice;[48] personal service on all landowners of the territory sought to be annexed;[49] notice posted on the territory proposed to be annexed;[50] publication of the ordinance in two newspapers;[51] a notice stating the day when the petition will be presented.[52] In one state at least it is held, under the general rule of the effect of appearance, that there is a waiver of objection to notice by all the interested parties being present in court.[53] Where an owner, whose land a town begins proceedings to annex, moves to quash the service on him because the petition does not set out sufficient reasons for annexation, he makes a general appearance notwithstanding his motion recites that he enters a special one, and he thereby waives defects in the service.[54]

(IV) *PETITION*—(A) *In General.* General laws providing for the annexation or detachment of territory to or from a municipal corporation usually require a petition therefor, and such requirement must be complied with.[55] The

Reg. 113. A published notice which fails to designate definitely the changes to be made in the boundary of the city will not bind the borough. Wilkes Barre Case, *supra*.

See 36 Cent. Dig. tit. "Municipal Corporations," § 84.

Record of notice see *infra*, II, B, 2, d, (XI).

42. Gunter *v.* Fayetteville, 56 Ark. 202, 19 S. W. 577.

43. Gunter *v.* Fayetteville, 56 Ark. 202, 19 S. W. 577.

44. Woodfill *v.* Greensburgh, 18 Ind. 203.

45. Woodfill *v.* Greensburgh, 18 Ind. 203.

Variance between notice and petition.— Where the notice of a petition for the annexation of land to a city described one of the boundary lines as along a certain road N. "24½°" W., and the petition described the line as N. "24¼°" W., it was held that the variance was immaterial, the monuments given in both fixing the course definitely. Catterlin *v.* Frankfort, 87 Ind. 45.

46. Powell *v.* Greensburg, 150 Ind. 148, 49 N. E. 955.

47. Catterlin *v.* Frankfort, 87 Ind. 45.

48. Catterlin *v.* Frankfort, 87 Ind. 45.

49. Cicero *v.* Williamson, 91 Ind. 541.

50. Franklin *v.* Croll, 31 Ohio St. 647.

51. State *v.* Cincinnati, 8 Ohio Cir. Ct. 523, 8 Ohio Cir. Dec. 689, holding that under a law providing for annexation to a city "upon the terms and conditions hereinafter recited": (1) Passage of an ordinance declaring intention to annex; (2) publication of the ordinance in two newspapers,—the provision for publication is mandatory, and it is not sufficient that it was published in one paper published in English and one published in German.

52. *In re* Freeland Borough, 2 Pa. Dist. 780, 13 Pa. Co. Ct. 399.

53. *In re* Camp Hill Borough, 142 Pa. St. 511, 21 Atl. 978; *In re* Edgewood Borough, 130 Pa. St. 348, 18 Atl. 646. But see Gunter *v.* Fayetteville, 56 Ark. 202, 19 S. W. 577; and *supra*, this section, text and note 43.

54. McCoy *v.* Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

55. *Indiana.*— Stilz *v.* Indianapolis, 55 Ind. 515; Elston *v.* Crawfordsville, 20 Ind. 272.

Iowa.— Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031.

Louisiana.— Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382 (holding that where a statute authorizing annexation of territory requires a petition signed by one third of the owners of property within the territory to be annexed, annexation proceedings based solely upon a petition from the residents of the city, that is, the original city as well as of the territory to be annexed, is invalid); Layton *v.* Monroe, 50 La. Ann. 121, 23 So. 99.

Nebraska.— Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957.

Pennsylvania.— Devore's Appeal, 56 Pa. St. 163; *In re* Stroudsburg Borough, 4 Pa. Dist. 576, 16 Pa. Co. Ct. 485; Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 422. To warrant any burgess and town council in declaring by ordinance the admission of an adjacent tract

petition must generally set forth the reasons for annexation, and also be accompanied by a plat or map accurately describing the metes and bounds of the territory proposed to be annexed, and must be verified by affidavit.[56] The sufficiency of the reasons is left to the discretion of the tribunal passing on the petition.[57] The names of the several owners need not be included in the petition if the land owned by them is properly described in the notice;[58] and erroneous statements of the names of owners of land to be annexed in the petition and notice will not invalidate proceedings for annexation if such lands be described accurately by metes and bounds.[59] In some states it is required that the petition be addressed to the board of county commissioners, if the owners of lands to be included refuse their consent;[60] otherwise to the city council.[61] It will not be necessary in a petition to the board of county commissioners to allege that the owner has not consented to such annexation, as this will be presumed.[62] It has been held that the word "taxables" in a petition will not be construed to mean "taxable inhabitants."[63] Two separate and disconnected sections cannot be included in one petition for annexation.[64] A circuit court has no jurisdiction of a petition which does not show that all the preliminary steps before a city council have been taken.[65]

of land into the limits of a borough, the petition therefor must have been signed by twenty freehold owners of the land or parts of the land proposed to be included, and all of the petitioners must be residents on those lands. Devore's Appeal, *supra*. See also Coal, etc., Co. *v.* Ashland, 1 Leg. Rec. 130.

South Dakota.— Coughran *v.* Huron, 17 S. D. 271, 96 N. W. 92; Oehler *v.* Big Stone City, 16 S. D. 86, 91 N. W. 450.

See 36 Cent. Dig. tit. "Municipal Corporations," § 86 *et seq.*

A petition for the disconnection of territory from a town, alleging that the town had not maintained any streets, alleys, "or" other public utilities within the tract in question, was not insufficient on the theory that, as the statute requires land shall not be disconnected when it is shown that the town has maintained streets, lights, "and other public utilities," the use of the word "or," instead of "and," rendered the petition insufficient. Fletcher *v.* Smith, 33 Colo. 473, 81 Pac. 256.

Petition by sole owner.— Under S. D. Pol. Code, § 1609, providing that on petition in writing signed by not less than three fourths of the legal voters, and by the owners of not less than three fourths in value of the property in any territory in any incorporated city or town, and being upon the border and within the limits thereof, the city may disconnect and exclude such territory from such city, where it affirmatively appears from the petition that there is no person residing on the property sought to be excluded, and the petition is signed by the sole owner thereof, the statute is complied with. Coughran *v.* Huron, 17 S. D. 271, 96 N. W. 92.

Filing of petition see Stilz *v.* Indianapolis, 55 Ind. 515.

56. Chandler *v.* Kokomo, 137 Ind. 295, 36 N. E. 847; Stilz *v.* Indianapolis, 55 Ind. 515; Elston *v.* Crawfordsville, 20 Ind. 272; Hartington *v.* Luge, 33 Nebr. 623, 50 N. W. 957. It is a sufficient description of the territory in a petition by a town for its annexation that it alleges that the territory is fully and accurately described by metes and bounds in a map or plat attached thereto and made a part thereof as an exhibit, and duly verified by affidavit. McCoy *v.* Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

57. Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 55 N. E. 435; Chandler *v.* Kokomo, 137 Ind. 295, 36 N. E. 847; Catterlin *v.* Frankfort, 87 Ind. 45.

58. Stilz *v.* Indianapolis, 55 Ind. 515; Elston *v.* Crawfordsville, 20 Ind. 272.

59. Powell *v.* Greensburg, 150 Ind. 148, 49 N. E. 955.

60. Stilz *v.* Indianapolis, 55 Ind. 515. The common council of a city having filed its petition with the proper county board, asking that certain described lands, not platted, lying contiguous to such city, be annexed thereto, to which it is averred that the owner will not consent, such board has no power to order the annexation of a part only of such lands, but must grant or refuse the prayer of such petition as a whole. Peru *v.* Bearss, 55 Ind. 576.

61. Stilz *v.* Indianapolis, 55 Ind. 515, where it was also held that such petition need not be filed with the auditor thirty days before presentation to the board.

62. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Huff *v.* Lafayette, 108 Ind. 14, 8 N. E. 701.

63. Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 422. *Contra, In re* West New Castle, 19 Pa. Co. Ct. 33.

64. Devore's Appeal, 56 Pa. St. 163; *In re* Stroudsburg Borough, 4 Pa. Dist. 576, 16 Pa. Co. Ct. 485, holding that under the act of June 11, 1879 (Pamphl. Laws 150), providing for the extension of borough limits on application "by the inhabitants of any lots, outlots or other tracts of land adjacent to the borough," which must be signed by a majority of freeholders within the limits to be annexed, separate sections of territory could not be included in one petition.

65. Weiland *v.* Ashton, 17 S. D. 621, 98 N. W. 87. And see Seward *v.* Conroy, 33 Nebr. 430, 50 N. W. 329.

The corporation attorney of a city is its agent, and such attorney is the proper party to sign a petition in a proceeding instituted by a city for the annexation of territory;[66] and a petition by a city for the annexation of territory, purporting to be that of the common council and mayor, is sufficient, at least as against a collateral attack, although signed by the mayor only,[67] or by two thirds of the city council.[68]

(B) *Amendment.* In proper cases the petition may be amended.[69] Where an application by a city for the annexation of contiguous territory has been appealed from the county to the circuit court, there to be tried *de novo*, the circuit court may exercise the power conferred on the county court of allowing the petition to be amended so as to exclude part of the land included in it;[70] but unless authorized by statute such an amendment cannot be allowed either to increase or diminish the proposed area.[71] No ordinance of the city council is necessary to empower the city attorney to make an amendment;[72] but the court has no right to amend the petition on its own motion, or to authorize the attorney to do so, except on terms that permit those protesting against the annexation to be fairly heard on the amended petition.[73]

(V) *Plat, Map, or Plan of Property to Be Annexed.* A plat, map, or plan must be attached to or accompany a petition for annexation of territory, when it is so required by the statute.[74] It need not, however, be filed at the same time with the petition, but may be filed afterward and before the petition is considered.[75] In Pennsylvania the omission of the filing of a plan of an intended extension in the office of the court of quarter sessions, as required by statute, is fatal to the proceedings, even though the exceptors may have had actual knowledge;[76] but such plat need not show which roads are opened, what portion of the lands is built upon, or what improvements exist.[77]

(VI) *Pendency of Other Proceedings.* Pendency of other proceedings may prevent consideration of a petition for the annexation of territory;[78] but

66. Pollock *v.* Toland, 25 Ohio Cir. Ct. 75.

67. Huff *v.* Lafayette, 108 Ind. 14, 8 N. E. 701.

68. Stilz *v.* Indianapolis, 55 Ind. 515.

69. Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13; Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778; Dodson *v.* Ft. Smith, 33 Ark. 508; Wilcox *v.* Tipton, 143 Ind. 241, 42 N. E. 614; Shugars *v.* Williams, 50 Ohio St. 297, 34 N. E. 248; Pollock *v.* Toland, 25 Ohio Cir. Ct. 75.

Notice of amendment.— Under Ohio Rev. St. § 1557, providing that a petition for the annexation of territory may be amended by leave of the county commissioners, no notice of such amendment is required. Pollock *v.* Toland, 25 Ohio Cir. Ct. 75.

70. Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13; Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778. So in Indiana, in proceedings by a town for the annexation of territory, it is proper to permit the town, after appeal to the circuit court, to amend its petition by omitting therefrom part of the lands originally included. McCoy *v.* Cloverdale, 31 Ind. App. 331, 67 N. E. 1007. But such an amendment cannot be made in the supreme court; the cause must be remanded to the lower court, the amendments made there and the case tried *de novo*. Vestal *v.* Little Rock, *supra*.

71. Foreman *v.* Marianna, 43 Ark. 324.

72. Eureka Springs *v.* Woodruff, 55 Ark. 616, 19 S. W. 15; Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13.

73. Woodruff *v.* Eureka Springs, 55 Ark. 618, 19 S. W. 15.

74. Elston *v.* Crawfordsville, 20 Ind. 272; *In re* Tunkhannock Borough, 3 Pa. Co. Ct. 480; and other cases in the notes following.

In Kansas the plat or map of a proposed addition to a city must be made and acknowledged by the owner of the lands sought to be added to the city; and when such map or plat embraces land not owned by the parties making and acknowledging the same, such land does not become a part of the city, even after all of the proposed addition is attempted to be added thereto by a city ordinance. Armstrong *v.* Topeka, 36 Kan. 432, 13 Pac. 843.

75. Stilz *v.* Indianapolis, 55 Ind. 515.

76. *In re* Tunkhannock Borough, 3 Pa. Co. Ct. 480.

Amendment.— On application for approval of a city ordinance annexing territory to the city limits, the court may allow, by amendment, the plat of the land to be annexed, accompanying the petition to the city councils, which was indescriptive, to be corrected by filing another plat properly describing the land to be annexed. *In re* Chester Tp., 174 Pa. St. 177, 34 Atl. 457.

77. Susquehanna Tp.'s Appeal, 17 Pa. Co. Ct. 398.

78. People *v.* Morrow, 181 Ill. 315, 54 N. E. 839, holding that a proceeding for the annexation of territory to a contiguous city

under a statute requiring the city council, on receiving a petition for the annexation of territory to the city, to submit the question whether such annexation shall be made without delay to a vote of the electors of the city and of the territory to be annexed, it was held that the city council had jurisdiction of a petition for the annexation of territory, even though it had not yet taken final action on a prior petition for the annexation of the same territory, where the second petition included all the territory covered by the first, and everyone entitled to vote on the first was also entitled to vote on the second.[79]

(VII) *PARTIES.* The statutes providing for annexation or detachment of territory to or from a municipal corporation usually prescribe who may apply therefor,[80] and who shall be made parties to the proceeding.[81] Under some statutes the application can only be made by the municipal authorities,[82] while under others it is made by the legal voters or a majority of them, or by the owners of the property affected.[83]

(VIII) *OBJECTIONS AND REMONSTRANCES.* The statutes authorizing the annexation of territory to a municipality usually provide for the filing of objections or remonstrances by the owners of the property affected,[84] and proceedings in disregard of objections or remonstrances properly filed will be invalid.[85]

under Ill. Rev. St. (1874) p. 244, par. 195, was illegal and void where it was instituted after the filing of a petition for an election to organize the territory into a village, under article 11 and sections 1 and 6 of said act, and while the latter proceeding was still pending and undetermined. See also Taylor *v.* Ft. Wayne, 47 Ind. 274; Sheldon Independent Dist. *v.* Sioux County, 51 Iowa 658, 2 N. W. 590.

79. People *v.* Oakland, 123 Cal. 598, 56 Pac. 445, under St. (1889) p. 358, § 1.

80. Osmond *v.* Smathers, 62 Nebr. 509, 87 N. W. 310.

81. In a proceeding under Fla. Acts (1903), p. 139, c. 5197, to exclude land from the corporate limits of a municipality, the husbands of married women, who are among the owners of the land so sought to be excluded, are not improper parties, and the widow and executors of a deceased testator may, in the absence of a contrary showing, be considered owners of the land for purposes of such proceeding. Ormond *v.* Shaw, 50 Fla. 445, 39 So. 108.

82. Mason *v.* Loudon, 8 Baxt. (Tenn.) 94, holding that an alteration of the corporate limits of a town cannot, under Acts (1871), c. 54, § 7, be made in the chancery court upon the application of an individual, but only upon that of the authorities of the town.

83. **In Nebraska,** Comp. St. c. 14, art. 1, § 101, providing for disconnection of territory from a city or village on petition of a majority of the legal voters of such territory, is available only to the legal voters of the territory sought to be disconnected. Osmond *v.* Matteson, 62 Nebr. 512, 87 N. W. 311; Osmond *v.* Smathers, 62 Nebr. 509, 87 N. W. 310; State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498. But this statute does not prevent the owner of agricultural lands erroneously included within the boundaries of a village, although not a voter therein, from maintaining a suit independently of the statute to have such lands detached. Osmond *v.* Matteson, *supra*; Osmond *v.* Smathers, *supra*; State *v.* Dimond, *supra*.

In Pennsylvania, under Act, April 1, 1863 (Pamphl. Laws 200), authorizing the court to change or modify the boundaries of a proposed borough at the request of the party aggrieved when his land is exclusively used for farming, land used for farming will not be excluded on exceptions filed by strangers to the title, where the owners wish to be included. *In re* Alliance, 7 North. Co. Rep. 396.

84. Orlando *v.* Orlando Water, etc., Co., 50 Fla. 207, 39 So. 532; Bardstown *v.* Hurst, 89 S. W. 147, 724, 28 Ky. L. Rep. 92, 603.

Remonstrating petitions not evidence see *infra*, II, B, 2, d, (IX), note 92.

85. Orlando *v.* Orlando Water, etc., Co., 50 Fla. 207, 39 So. 532, holding that under Fla. Rev. St. (1892) § 722, providing for the extension of limits of cities, the filing of objections under the act within thirty days with the clerk of the circuit court is proper and will stay action by the city until further order of court, and failure to present such objections to the judge and to procure the statutory order thereon will not authorize the city to proceed, after the objections are properly filed, where no laches on the part of objectors are shown.

Under Ky. St. (1903) §§ 3611, 3612, relating to alteration of boundaries of cities of the fifth class, there must be an enactment of an ordinance defining the territory to be annexed or stricken off, and there must be a publication thereof four times in a weekly newspaper in the city, if there is no daily paper published therein, and in not less than thirty days after the enactment of the ordinance, after the publication, if no remonstrance is filed in the circuit court by a resident or freeholder of the territory to be annexed within thirty days of the enactment of the first ordinance, the city council may by ordinance annex to the city limits the terri-

(IX) *Hearing and Evidence.* Where a town has voted for annexation the burden is upon the remonstrants to show sufficient cause against it.[86] Statutes authorizing the annexation of unplatted contiguous territory not laid out in lots render the fact that such lands are unplatted "jurisdictional," and it must be not only alleged but proved in a proceeding to annex such territory.[87] Evidence that a tract of land is occupied as a homestead for agricultural purposes does not show it to be unplatted for purposes of annexation to a city.[88] Any evidence is proper which tends to show the location of the town, its improvements and surroundings, its institutions and advantages as a trading point, the various kinds of industries carried on in the town and territory to be annexed, the business relations between the owners of the land in the territory to be annexed and the mutual benefits between the remonstrant and the town.[89] That persons signing the petition were taxable inhabitants of the territory to be annexed may be shown by other evidence than the assessment rolls.[90] Where the territory sought to be annexed is connected, although upon different sides of the town, the residents of the territory are not entitled to have the questions of annexation of territory on different sides of the town considered as separate propositions.[91] Statutes sometimes provide for submission of an application for annexation of territory by the court to the grand jury for an investigation and report by them.[92]

(X) *Order or Decree.*[93] The order or decree of the board or court vested with jurisdiction in proceedings for the annexation or detachment of territory to or from a municipal corporation must, to be valid, be in compliance with the statutory requirements.[94] Unless authorized by the statute a county board

tory described in the first ordinance. It was held that the statute contemplates that the notice should be published in each of the four succeeding weekly issues of the newspaper, and that, where a city did not publish such notice four weeks consecutively, but published the same irregularly, taking two months therefor, a remonstrance filed thirty days before the enactment of the second or annexing ordinance, although more than thirty days after the first ordinance, prevented the city from taking further action in the matter until the circuit court determined the questions arising on the petition. Bardstown *v.* Hurst, 89 S. W. 147, 724, 28 Ky. L. Rep. 92, 603.

86. Dodson *v.* Ft. Smith, 33 Ark. 508.

87. Chandler *v.* Kokomo, 137 Ind. 295, 36 N. E. 847.

88. Chandler *v.* Kokomo, 137 Ind. 295, 36 N. E. 847.

89. Windfall Mfg. Co. *v.* Emery, 142 Ind. 456, 41 N. E. 814; Kentucky Wagon Mfg. Co. *v.* Louisville, 46 S. W. 499, 20 Ky. L. Rep. 408.

90. *In re* Chester Tp., 174 Pa. St. 177, 34 Atl. 457.

91. Lewis *v.* Brandenburg, 105 Ky. 14, 47 S. W. 862, 48 S. W. 978, 20 Ky. L. Rep. 1011.

92. See Pa. Act, June 11, 1879 (Pub. Laws 150); Pa. Act, May 17, 1883 (Pub. Laws 367).

Certificate of grand jury.— In a proceeding under this act to annex land to a borough it is necessary that the certificate of the grand jury should set forth substantially that, after a full investigation of the case, they find that the conditions prescribed by law have been complied with, and that it is expedient to grant the prayer of the petitioners. A mere certificate that the application is "approved" is insufficient. *In re* Freeland, 7 Kulp (Pa.) 107.

Petitions not evidence.— Petitions remonstrating against annexation of land to a borough, under Pa. Act, June 11, 1879, §§ 2, 3 (Pamphl. Laws 150), are not evidence and therefore are properly excluded by the court from the grand jury which has the matter of annexation under investigation. Glade Tp.'s Petition, etc., 168 Pa. St. 441, 32 Atl. 37.

Disqualification of grand juror.—A grand juror is properly excluded from participation in proceedings to annex territory to a borough, where it appears that he has interests in the borough, and where he states to the court under oath that he is opposed to the annexation, and that he had previously declared that he would do all that he could against it. *In re* Plymouth Borough, 167 Pa. St. 612, 31 Atl. 933.

93. See also *supra*, II, A, 14, b, (VII).

94. Peru *v.* Bearss, 55 Ind. 576.

What order must show.— Under W. Va. Code (1887), c. 47, §§ 48, 49, providing that the corporate limits of towns containing a population of less than two thousand inhabitants shall be changed by vote ordered by the council, the result of which vote, if in favor of the change, shall be certified to the circuit court, and that the circuit court shall enter an order approving and confirming the change, and directing a copy certified to the council, etc., it is not necessary to the validity of the order approving such change that it should show on its face that the town contained less than two thousand inhabitants. Point Pleasant Bridge Co. *v.* Point Pleasant,

has no power to order annexation of a part only of the lands covered by the petition.[95]

(XI) *RECORD.* The record of proceedings for the annexation of territory to a municipality must affirmatively show compliance as to jurisdictional matters with the statute authorizing the same;[96] but the proceedings will not be invalidated by immaterial omissions or by omissions which may be afterward supplied or corrected.[97] The record need not contain the notices of election, unless this is required by the statute, but it is sufficient if it appears that the notices were given.[98]

(XII) *REVIEW ON APPEAL, WRIT OF ERROR, OR CERTIORARI*[99]—(A) *In General.* Whether proceedings for the annexation or detachment of territory to or from a municipal corporation may be reviewed on appeal or writ of error depends upon the statute and the nature of the proceedings.[1] Generally the proceedings may be so reviewed.[2] Under some statutes an appeal can only be taken

32 W. Va. 328, 9 S. E. 231; Davis *v.* Point Pleasant, 32 W. Va. 289, 9 S. E. 228.

95. Peru *v.* Bearss, 55 Ind. 576, holding that where, under Ind. Act, March 14, 1867, "for the incorporation of cities," etc., the common council of a city filed its petition with the proper county board, asking that certain described lands, not platted, lying contiguous to such city, be annexed thereto, to which it was averred that the owner would not consent, such board had no power to order the annexation of a part only of such lands, but must grant or refuse the prayer of such petition as a whole.

96. Seward *v.* Conroy, 33 Nebr. 430, 50 N. W. 329; Carbondale Tp.'s Appeal, 5 Pa. Co. Ct. 339. See also Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031; and *supra*, II, A, 14, b, (VIII).

Passage of ordinance or resolution see Seward *v.* Conroy, 33 Nebr. 430, 50 N. W. 329; Carbondole Tp.'s Appeal, 5 Pa. Co. Ct. 339.

97. Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031, holding that where all the proceedings relating to the annexation of territory to an incorporated city or town are regular, and the city or town has assumed unquestioned jurisdiction of the territory, the annexation is not invalidated by the fact that the copies of the proceedings filed in the office of the county recorder, and of the secretary of state, as required by Iowa Code, § 428, are not certified to be correct copies; especially where the proper certificates are supplied, even after the sufficiency of the annexation is called in question by actions commenced.

Showing as to determination of board.— Under Cal. St. (1889) p. 358, c. 247, providing that the board of trustees of a town, on receiving a petition signed by one fifth of the voters of the town and of territory sought to be annexed, shall call a special election and submit the question of annexation to a popular vote, it is not necessary that any record of the determination of the board as to the sufficiency of the petition be made other than the order submitting the proposition, which order implies a finding that the petition was sufficient to give the board power to act; and even if it were necessary for the record to show that the board had passed on the sufficiency of the petition, a recital in the order calling the election that the petition was signed by one fifth of the voters would be sufficient for that purpose. People *v.* Ontario, 148 Cal. 625, 84 Pac. 205.

98. Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031.

99. Appeal from order or decree apportioning debts, etc., see *infra*, II, B, 2, g, (I), (G).

Stay of exercise of governmental functions pending appeal see *infra*, II, B, 2, f, (I), note 36.

1. See Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 46 N. E. 641; Windman *v.* Vincennes, 58 Ind. 480; and other cases cited in the notes following.

2. *Colorado.*—Martin *v.* Simpkins, 20 Colo. 438, 38 Pac. 1092, holding that the writ of error being a constitutional writ of right from the supreme court to every final judgment of the county court, it cannot be abolished as to such judgments, nor its scope of office materially impaired; and that the proceeding required to be instituted, carried on, and consummated in the county court as the means of dissolving one municipality and annexing the same to another under the act of April 11, 1893, is a judicial proceeding, and the approval of the report of the annexation proceedings by such court is a judgment to which the writ of error will lie from the supreme court; and holding further that resident citizens and taxpayers of a municipality sought to be annexed to another under said act have such an interest in the subject-matter of the annexation proceedings that they are entitled to a writ of error from the supreme court to review the judgment of the county court approving such proceedings. Under Sess. Laws (1885), p. 158, authorizing appeals to the district court from final judgments of the county court, an appeal lies to it from the finding of the county court, under the act of 1893, section 8, declaring that the county court shall examine the report of annexation proceedings, and hear evidence concerning the regularity or irregularity of the proceedings, and, if satisfied that the proceedings are regular, shall approve the report. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

Florida.— The proceedings by petition on

by a resident freeholder.[3] The action of village trustees in annexing territory by ordinance on petition is not reviewable by certiorari, since the act is legislative rather than judicial, and involves a decision only of the questions of fact whether the petition has been properly signed and whether the territory is contiguous to the village.[4]

(B) *Review.* On appeal or writ of error to review proceedings for the annexation or detachment of territory to or from a municipal corporation the decision of the lower court or board will be reversed, if it does not appear from the record

behalf of one desiring to have his land excluded from the corporate limits of a town, authorized by Rev. St. § 720, as amended by Laws (1897), c. 4601, is one at law, and the judgment can be reviewed only by writ of error, and not by an appeal. Heebner *v.* Orange City, 44 Fla. 159, 32 So. 879.

Indiana.— Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 46 N. E. 641; Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576, holding that the action of the board of county commissioners in passing on a petition of a city council for annexation of territory to the city, which must give the reasons why, in the opinion of the council, annexation should take place, and which must be on notice to parties interested, is judicial, and therefore courts are properly given jurisdiction of an appeal therefrom.

Nebraska.— The annexation of adjacent territory by municipal corporations under Comp. St. (1891) c. 14, § 99, is a judicial proceeding in which landowners are entitled to all the rights of contravention and appeal. Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715.

Pennsylvania.— Under the act of April 30, 1851, providing for the change of borough limits by annexing new territory by proceedings of the borough council, any person affected could appeal from the ordinance to the court. *In re* Edwardsville Borough, 18 Pa. Co. Ct. 475, 8 Kulp 339. An appeal under section 27 of said act against an annexation ordinance was determined by testimony before the court. An appeal under the act of June 2, 1871, is determined in the same manner as proceedings under the act of 1834, which must be submitted to the grand jury. *In re* East Pittsburg Borough, 19 Pa. Co. Ct. 102. Where a township is attached to a borough under the acts of 1851 and 1871, under the provision giving a right of appeal to "citizens of a borough or of the territory annexed," a school-district cannot appeal. *In re* Braddock Tp., 27 Pittsb. Leg. J. N. S. (Pa.) 198. An appeal from the supplementary proceedings before the quarter sessions in annexation of a borough is in the nature of a certiorari, and the appellate jurisdiction is limited to a review of the proceedings below for the purpose of determining the extent and limits of the power of the quarter sessions, and the regularity of its exercise. *In re* Morrellville Borough, 7 Pa. Super. Ct. 532 [*affirming* 20 Pa. Co. Ct. 257]. Under the act of May 23, 1889, providing that the action of a city council in annexing territory shall be conclusive, unless an appeal is taken to the quarter sessions, and on such appeal the clerk shall certify all the papers and proceedings in the case, where a citizen presents a petition to the court of quarter sessions praying for an appeal from an ordinance of a city of the third class annexing territory, and leave is given to file appeal, the petition may be considered as an appeal sufficient to support an order directing the city clerk to certify to the court all the papers and proceedings in the case. Logan Tp. Case, 24 Pa. Co. Ct. 541.

South Dakota.— Oehler *v.* Big Stone City, 16 S. D. 86, 91 N. W. 450.

3. Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 46 N. E. 641 (holding that the charter of Indianapolis (act of March 6, 1891) authorizing it to annex territory and providing (section 38) that an appeal may be taken from such annexation by one or more "resident freeholders, in the territory sought to be annexed," limits the right of appeal to those persons who are citizens and freeholders of the territory); Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586.

Constitutionality of statute.—Ind. Rev. St. (1894) §§ 3808, 3809, giving a city council power by ordinance to annex contiguous territory and providing that, if it be unplatted ground, an appeal may be taken by resident freeholders thereof, etc., do not, because granting appeal to resident freeholders only, violate Const. art. 1, § 23, providing that the legislature shall not grant to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens, or U. S. Const. Amendm. 14, providing that no state shall deny to any person within its jurisdiction the equal protection of its laws. Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586.

Who are resident freeholders.—A railroad company owning land in a tract annexed to a city is not a "resident freeholder in the territory sought to be annexed," within the meaning of a statute providing for an appeal by such freeholder, although it has railroad property and a master mechanic's office, together with its construction and repair shops, in such territory, where its office and place of business is in the city, outside of such territory. Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 46 N. E. 641.

4. Whittaker *v.* Venice, 150 Ill. 195, 37 N. E. 240.

that the statute was complied with in jurisdictional matters;[5] but the court will not control or interfere with the discretion of the lower court or board in the absence of an abuse thereof,[6] and findings on questions of fact are conclusive where there is any evidence to sustain them.[7] A judgment of the district court in a proceeding to detach territory from a municipal corporation will not be impeached on appeal, in the absence of a showing that the trial judge made an important mistake of fact or an erroneous inference of fact or of law.[8]

(c) *Trial De Novo.* Under some statutes on appeal to the circuit court from a judgment of a county court or decision of a board of commissioners annexing or refusing to annex territory to a municipal corporation, the case is triable *de novo.*[9]

(d) *Costs.* In Pennsylvania all costs of appeal by citizens of the territory to be annexed are to be paid by the city, notwithstanding the decision is in favor of the city.[10] An appellant is the agent for others who have agreed to share the costs of appeal and notices served on the actual appellant are binding on all for whom he acts.[11]

(xiii) *Submission of Question to Inhabitants and Consent* — (a) *Necessity of Submission or Consent.* In many states it is provided by the constitution that the territory of a municipality shall not be increased without the consent of a majority of the qualified voters expressed in a public election for that purpose.[12] In

5. Oehler *v.* Big Stone City, 16 S. D. 86, 91 N. W. 450. Under Nebr. Comp. St. (1881) c. 14, § 99, prescribing the method of annexation of contiguous territory to cities or villages, requiring a resolution favoring such annexation to be passed by a two-thirds vote of the city council, and then providing for the commencement by the city of an action in the district court having for its object the annexation of such territory, it was held that where the record on appeal in such action, which is certified to contain all the evidence, contains no proof of the passage of the resolution by the city council, a decree in favor of the annexation of the territory must be reversed, as such a resolution is necessary to confer jurisdiction on the district court. Seward *v.* Conroy, 33 Nebr. 430, 50 N. W. 329.

6. Windfall Mfg. Co. *v.* Emery, 142 Ind. 456, 41 N. E. 814 (holding that the sufficiency of the reasons for the annexation of a territory to a town, as set forth in the petition, is within the discretion of the authority passing on the petition, and the exercise of such discretion will not be controlled by the supreme court); Johnson *v.* Forest City, 129 Iowa 51, 105 N. W. 353; Monk *v.* George, 86 Iowa 315, 53 N. W. 240 (holding that under Mills Code, § 443, authorizing a severance of land included within the limits of a town or city, if the court or jury shall be "satisfied that the prayer of the petitioner should be granted," it is not an abuse of discretion for the court to refuse a severance, where the land in question is within a block of the business portion of the town, and it appears that a portion of the land is desirable for residences); Ashley *v.* Calliope, 71 Iowa 466, 32 N. W. 458.

7. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224 (holding that whether a bias on the part of the trustees of a town and their appointees existed and was carried to the extent of preventing a declaration of the wishes of the majority in the election on the question of annexation, which, if a fact, would vitiate the election, is a question for the district court on appeal from the finding of the county court on the question of the regularity of the annexation proceeding); Orlando *v.* Orlando Water, etc., Co., 50 Fla. 207, 39 So. 532 (holding that where there is evidence to support an order of the circuit court, under Rev. St. (1892) § 722, that objections to annexation of territory to a city be sustained, and that such territory be not annexed, the order will not be disturbed on appeal). See also Williamstown *v.* Mathews, 103 Ky. 121, 44 S. W. 387, 19 Ky. L. Rep. 1766.

8. Gregory *v.* Franklin, (Nebr. 1906) 108 N. W. 147; Michaelson *v.* Tilden, 72 Nebr. 744, 101 N. W. 1026.

9. Dodson *v.* Ft. Smith, 33 Ark. 508 (holding that on appeal to the circuit court from a judgment of the county court refusing to annex territory, the case was triable *de novo*); Paul *v.* Walkerton, 150 Ind. 565, 50 N. E. 725 (holding that the Indiana statute providing for an appeal to the circuit court by either party from the final decision of the board of commissioners in a proceeding to annex contiguous territory to a town, conferred the power to hear and determine such causes *de novo* and to render final judgment annexing or refusing to annex such territory to the municipality, without regard to the judgment of the board of commissioners).

Amendment of petition on appeal see *supra*, II, B, 2, d, (iv), (b).

10. Susquehanna Tp.'s Appeal, 17 Pa. Co. Ct. 640; *In re* South Chester, 4 Lack. Leg. N. (Pa.) 20.

11. *In re* Edwardsville Borough, 18 Pa. Co. Ct. 475, 8 Kulp 339.

12. Ingersoll Pub. Corp. 140. See Westport *v.* Kansas City, 103 Mo. 141, 15 S. W. 68.

these states the legislatures sometimes refuse to take any action whatever until the election has been held and the popular will expressed;[13] but frequently the statute authorizing annexation is first passed and the popular consent given afterward.[14] In the absence of constitutional provision to the contrary the legislature may extend the limits of municipalities, or detach territory, or consolidate or divide municipalities, without the assent of the inhabitants of either the municipality or of the part to be annexed or detached;[15] but the statutes providing for or authorizing such changes may and generally do provide for submission of the question to the vote of the inhabitants of the municipality or the territory to be affected.[16]

13. Ingersoll Pub. Corp. 140.

14. *Illinois.*— People *v.* Reynolds, 10 Ill. 1.

Indiana.— Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185.

Maine.— Call *v.* Chadbourne, 46 Me. 206.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

Ohio.— State *v.* Cincinnati, 8 Ohio Cir. Ct. 523, 8 Ohio Cir. Dec. 689.

15. *California.*— *In re* Strand, (1889) 21 Pac. 654.

Georgia.— The existence of prior statutes permitting the enlargement of the boundaries of a city with the consent of the common council, and of the property-owners in the territory proposed to be annexed, does not deprive the legislature of the power to compel the annexation without the consent of the persons affected thereby. Toney *v.* Macon, 119 Ga. 83, 46 S. E. 80.

Illinois.— Smith *v.* People, 154 Ill. 58, 39 N. E. 319; Quincy *v.* O'Brien, 24 Ill. App. 591.

Indiana.— Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 46 N. E. 641; Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586; State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Indianapolis *v.* Patterson, 112 Ind. 344, 14 N. E. 551; Stilz *v.* Indianapolis, 55 Ind. 515.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Kentucky.— Covington *v.* Southgate, 15 B. Mon. 491; Cheaney *v.* Hooser, 9 B. Mon. 330.

Maryland.— Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Michigan.— Muskegon *v.* Gow, 94 Mich. 453, 54 N. W. 170.

Mississippi.— Forbes *v.* Meridian, 86 Miss. 243, 38 So. 676.

Missouri.— Giboney *v.* Cape Girardeau, 58 Mo. 141; St. Louis *v.* Allen, 13 Mo. 400. The statute of 1841, extending the limits of the city of St. Louis, became absolute on being accepted by a majority of the citizens embraced by the charter thus amended, although against the consent of those embraced by it who were not included in the limits of the old charter. St. Louis *v.* Russell, 9 Mo. 507.

Nebraska.— Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715; State *v.* Babcock, 25 Nebr. 709, 41 N. W. 654.

North Carolina.— Manly *v.* Raleigh, 57 N. C. 370.

Ohio.— State *v.* Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; Blanchard *v.* Bissell, 11 Ohio St. 96; Powers *v.* Wood County, 8 Ohio St. 285; Mohn *v.* Collins, 1 Ohio S. & C. Pl. Dec. 554. The legislature may authorize the annexation to a city of several municipalities which it desires annexed, by submission of the question to them as a single proposition, so that, there being a majority of votes therefor in all the municipalities, taken collectively, they shall all be annexed, although in one there was a majority against it. State *v.* Cincinnati, 8 Ohio Cir. Ct. 523, 8 Ohio Cir. Dec. 689.

Oregon.— Winters *v.* George, 21 Oreg. 251, 27 Pac. 1041.

Pennsylvania.— Com. *v.* Macferron, 152 Pa. St. 244, 25 Atl. 556, 19 L. R. A. 568; Smith *v.* McCarthy, 56 Pa. St. 359.

Rhode Island.— *In re* Canal, etc., St., 18 R. I. 129, 25 Atl. 975.

Tennessee.— McCallie *v.* Chattanooga, 3 Head 317.

Texas.— Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541; Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742.

Virginia.— Richmond *v.* Richmond, etc., R. Co., 21 Gratt. 604; Wade *v.* Richmond, 18 Gratt. 583.

United States.— New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943; Essex Public Road Bd. *v.* Skinkle, 140 U. S. 334, 11 S. Ct. 790, 35 L. ed. 446.

See 36 Cent. Dig. tit. "Municipal Corporation," §§ 64 *et seq.*, 99 *et seq.* And see *supra*, II, A, 13, c, II, A, 14, b, (v).

16. *Arkansas.*—Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785; Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13.

Colorado.— Perry *v.* Denver, 27 Colo. 93, 59 Pac. 747.

Louisiana.— Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382.

Massachusetts.— Warren *v.* Charlestown, 2 Gray 84.

Missouri.—State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

North Carolina.— Watson *v.* Pamlico County Com'rs, 82 N. C. 17.

Ohio.— State *v.* Cincinnati, 8 Ohio Cir. Ct. 523, 8 Ohio Cir. Dec. 689.

Texas.— Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742; Lum *v.* Bowie, (1891) 18 S. W. 142.

Under Mo. Rev. St. (1889) § 1580, which empowers the mayor and board of aldermen of a city of the fourth class, with the consent of a majority of the legal voters of the city voting at an election therefor, to extend the corporate limits over adjacent territory, it is immaterial whether the vote is taken be-

In proceedings to annex a village to a city, the municipality voting first, and in favor of annexation, will retain its separate corporate existence until a majority of the voters of the other municipality shall also have voted in favor of annexation.[17] If the act is unconstitutional, an election thereunder cannot be ordered, or, if it is had, it can have no effect.[18]

(B) *Requisites and Sufficiency of Submission.* The rules governing the requisites and sufficiency of submission of the question of annexation to the inhabitants of the territory to be added to the town are statutory and the statutes must be followed;[19] but an ordinance failing to state that territory to be annexed is contiguous is not thereby rendered invalid.[20] Notice of the election must be given substantially as required by the statute;[21] but it has been held that the

fore or after the passage of the ordinance extending the limits; and the ratification of such an ordinance by a majority of the qualified voters at an election provided for therein is a substantial compliance with the statute. State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

Under the Texas statute (Sayles Civ. St. art. 343), enacting that the limits of a city shall remain as fixed by the act of incorporation, except that they may be extended by additional territory whenever the majority of the qualified electors of said territory shall indicate a desire to be included within the limits of the corporation, it was held that the limits of a city could not be extended by vote of the electors thereof, without the consent of the voters of the territory to be annexed. Lum *v.* Bowie, (Tex. 1891) 18 S. W. 142. The act of April 14, 1883, which amends and is a part of Rev. St. tit. 17, and provides for elections to withdraw territory from corporate limits, but does not direct the manner thereof, is not therefore invalid, but the election in question should be held as other elections provided for in the title. Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

Mandamus to compel ordering of election to restrict limits of city see Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

17. North Springfield *v.* Springfield, 140 Ill. 165, 29 N. E. 849.

18. Warren *v.* Charlestown, 2 Gray (Mass.) 84; *In re* Millvale, 26 Pittsb. Leg. J. N. S. (Pa.) 411.

19. Eureka Springs *v.* Woodruff, 55 Ark. 616, 19 S. W. 15; Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13; Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224; State *v.* Westport, 116 Mo. 582, 22 S. W. 888. Where the statute authorizing annexation of territory to a city requires an election by the electors of the territory proposed to be added, and another election by the electors in the city to which the addition is to be made, and but one election is held, and that by the electors of the city, the addition being treated as a part of it, the annexation is invalid. Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382.

Time of holding elections.— Mansfield Dig. Ark. § 922, providing that "when any municipal corporation shall desire to annex any contiguous territory thereto, lying in the same county, it shall be lawful for the council to submit the question to the qualified electors at least one month before the annual election," does not contemplate that the election to determine the annexation shall be held at least one month before the annual election, but that the council shall make an order at least a month before such election, for the submission of the question at that election. Vogel *v.* Little Rock, 55 Ark. 609, 19 S. W. 13. An election to determine the question of the annexation of a village with an adjoining city is not required to be held in both municipalities on the same day, unless the statute so provides, but the same may be held on different days if so fixed by the court. North Springfield *v.* Springfield, 140 Ill. 165, 29 N. E. 849.

Judges of election.—Under Gen. St. § 1272, declaring that "all judges of election shall on being appointed hold their office for one year or until their successors are appointed, and shall serve at all special elections during their term of office," special judges cannot legally be appointed while the regular judges are in office, to hold a special election on the question of annexation of territory, and an election held by special judges so appointed is void. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

Provision as to ballots.— A provision of an ordinance for election on the question of annexation of a town to a city, that the ballots be prepared according to the provisions of the Colorado Australian ballot law, conflicts with section 2 of such law, providing that it shall not apply to "any special election at which no persons are to be voted for," and also with Colo. Act (1893), § 6, in regard to annexation, declaring that "all ballots cast in pursuance of this act shall be 'For annexation' or 'Against annexation' and shall be deposited in a separate ballot box and for that purpose only." Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

20. Woodruff *v.* Eureka Springs, 55 Ark. 618, 19 S. W. 15.

21. Under Cal. St. (1889) p. 358, c. 247, providing that on presentation of a petition for the annexation of territory to a town, the board shall call a special election and cause notice to be given, a notice signed by the acting president of the board, attested by the town-clerk, and published by order of

polling of a large vote where the proof of notice is defective authorizes the conclusion that the notice was duly given.[22] It has also been held that so long as a majority of the qualified electors voted for annexation, the others cannot complain that the proceedings were kept secret and put through in haste.[23] Unless so required by statute, the vote need not be by ballot, but may be by any method satisfactory to the voters and the council.[24]

(c) *Who Are Qualified Voters.* In determining who are legal voters on questions of annexation the word "citizen" has been held to mean resident or inhabitant,[25] and "freeholders" are only those who hold in their own right.[26] The qualification prescribed by statute for a voter at an election for annexation that he be a "duly qualified voter in the election precinct" does not require that he be registered.[27] Payment of taxes is sometimes required.[28]

e. Curative Statutes. Defective annexation may be cured by subsequent legislation,[29] but it has been held that a curative act cannot make valid annexation proceedings which are absolutely void for want of jurisdiction;[30] and that, where territory has under general law been illegally annexed to an existing municipality a subsequent special statute cannot validate the first proceedings.[31]

f. Preventing or Attacking Annexation, Detachment, Consolidation, Etc.[32]— (i) *In General.* The validity of proceedings to annex or detach territory to or from a municipal corporation, or of the consolidation of corporations, may be attacked by the state in quo warranto;[33] and passing an ordinance of annexation, taking steps preparatory to levying a tax on the new territory, and recognizing it as a ward of the city are a sufficient indication of the purpose of the city to sustain quo warranto to determine the validity of the annexation.[34] Taxpayers of the territory sought to be annexed to a municipal corporation may maintain a suit in their own behalf and on the behalf of others to prevent the consummation of an illegal annexation;[35] and injunction is a proper remedy in these cases.[36] In the same action in which the legality of the annexation is attacked the question of

the board, is sufficient. People *v.* Ontario, 148 Cal. 625, 84 Pac. 205.

Notice of election and correspondence of ballots to notice see People *v.* Ontario, 148 Cal. 625, 84 Pac. 205.

22. State *v.* Westport, 116 Mo. 582, 22 S. W. 888.

23. State *v.* Waxahachie, 81 Tex. 626, 17 S. W. 348.

24. State *v.* Waxahachie, 81 Tex. 626, 17 S. W. 348 [*following* Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742].

25. Morris *v.* Nashville, 6 Lea (Tenn.) 337.

26. Morris *v.* Nashville, 6 Lea (Tenn.) 337, holding that husbands of women holding freehold estates are not "freeholders" within such a statute.

27. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

28. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224, holding that under Colo. Act (1893), § 5, prescribing as a qualification for voting at an election for annexation that the person "shall have, in the year next preceding said election paid a property tax in said town or city," payment of a tax for any year is not sufficient; it appearing later in the same section that it is the "tax for such preceding year."

29. Edmunds *v.* Gookins, 20 Ind. 477, 24 Ind. 169; McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979.

30. Strosser *v.* Ft. Wayne, 100 Ind. 443.

31. Atchison, etc., R. Co. *v.* Maquilkin, 12 Kan. 301.

32. Appeal, writ of error, or certiorari see *supra*. II, B, 2, d, (XII).

33. People *v.* Ontario, 148 Cal. 625, 84 Pac. 205; State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186; East Dallas *v.* State, 73 Tex. 370, 11 S. W. 1030. See, generally, QUO WARRANTO.

Sufficiency of record and effect of determination of board see People *v.* Ontario, 148 Cal. 625, 84 Pac. 205.

Legality of proceedings whereby one municipality is absorbed by another will not be determined for the benefit of third persons, where neither of the corporations interested is before the court. State *v.* Henderson, 145 Mo. 329, 46 S. W. 1076.

34. East Dallas *v.* State, 73 Tex. 370, 11 S. W. 1030.

35. *Indiana.*— Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937.

Louisiana.— Layton *v.* Monroe, 50 La. Ann. 121, 23 So. 99.

Nebraska.— Osmond *v.* Smathers, 62 Nebr. 509, 87 N. W. 310.

Pennsylvania.— Pittsburg's Appeal, 79 Pa. St. 317.

Tennessee.— Morris *v.* Nashville, 6 Lea 337.

36. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; Eskridge *v.* Emporia, 63 Kan. 368, 65 Pac. 694. When the conditions of a statute (La. Act (1892), No. 105), that

the city's power of taxation cannot be raised.[37] In some jurisdictions provision is expressly made by statute for proceedings to test the validity of the annexation of territory or other changes.[38]

(II) *Collateral Attack.* If annexation or other like proceedings are absolutely void, as for want of jurisdiction, or for failure to comply with jurisdictional requirements of the statute, they are subject to collateral attack;[39] but as a rule

before an election can be held to annex property to a city the petition of one third of the *bona fide* owners, in number and value, of the property to be annexed, must be filed with the mayor and council, have not been complied with, the owner of property within the area to be annexed may enjoin the execution of an ordinance for such an election. Layton *v.* Monroe, 50 La. Ann. 121, 23 So. 99.

Stay of execution of governmental functions pending appeal.— But pending appeal from a judgment declaring territory annexed to a city, the supreme court will not stay the exercise, by the city, of governmental functions over the annexed territory and restrain consideration of the judgment of annexation in the elections, taxation, and internal improvements of the city; the exercise of none of such acts being alleged to be imminent, except that of the voting by the residents of the annexed territory at an approaching election, and there being no immediate and imperious necessity for interference as to the other acts. Forsythe *v.* Hammond, 137 Ind. 426. 37 N. E. 537.

Effect as to homestead.— In an action to enjoin a city from extending its corporate limits over a rural homestead of more than one acre of land, the question whether the incorporating of such homestead in the city will reduce such homestead to one acre cannot be litigated. Eskridge *v.* Emporia, 63 Kan. 368, 65 Pac. 694.

Sufficiency of complaint see Windman *v.* Vincennes, 58 Ind. 480. Where the complaint states facts sufficient to show a right to have a municipal corporation restrained from exercising corporate powers over a territory not legally annexed to a city, the pleading is not bad because it fails to aver that the treasurer had the tax duplicate in his hands. The case is not like that of a proceeding simply to enjoin a treasurer from levying taxes, nor is it like the case of an officer seeking to defend a seizure of goods for taxes. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937.

37. Stilz *v.* Indianapolis, 55 Ind. 515; Kuhn *v.* Port Townsend, 12 Wash. 605, 41 Pac. 923, 50 Am. St. Rep. 911, 29 L. R. A. 445.

38. **In Iowa,** under Miller Code, § 3348, providing that, on the refusal of the county attorney to bring proceedings to test the validity of the annexation of territory to a city, any person interested may apply to the district court for leave to do so, and on obtaining such leave may prosecute the action to final judgment, the authority of an owner of land annexed to bring such suit cannot be questioned after leave granted by the court on the ground that his interest in the proceeding is trifling. State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186.

In Nebraska the provision of Comp. St. c. 14, § 101, authorizing a majority of the legal voters of any territory within the corporation of any city or village to petition for the disconnection of the territory therefrom, is available only to legal voters of the territory sought to be detached; but this statute does not preclude the owner of agricultural lands included within the boundaries of any village, although not a voter therein, from maintaining a suit to have such lands detached from a municipality. Osmond *v.* Matteson, 62 Nebr. 512, 87 N. W. 311; Osmond *v.* Smathers, 62 Nebr. 509, 87 N. W. 310; State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498.

39. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; Cicero *v.* Williamson, 91 Ind. 541 (holding that personal service on those whose lands are sought to be annexed to a town is necessary to give jurisdiction, and that the want thereof renders the proceedings void, although attacked collaterally); Windman *v.* Vincennes, 58 Ind. 480; Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382; Lum *v.* Bowie, (Tex. 1891) 18 S. W. 142. See also Hyde Park *v.* Chicago, 124 Ill. 156, 16 N. E. 222.

The municipal record is not conclusive proof where the statute has not been complied with. Windman *v.* Vincennes, 58 Ind. 480.

A city council's jurisdiction in annexation proceedings may be attacked collaterally where the conditions prescribed by the statute for jurisdiction do not exist, notwithstanding recitals in the record of the council that they do exist. Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576.

Injunction against taxation.— Where an attempted annexation of territory to a municipality is illegal and void for want of jurisdiction, or for failure to observe jurisdictional requirements, the annexation may be attacked in a suit to enjoin the collection of taxes. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937. A citizen sued for taxes by a municipal corporation claiming the power to levy taxes on the territory embracing his property under proceedings by which such territory is alleged to have been annexed to the city may resist the collection of the taxes by injunction, where there is no law to authorize the asserted proceeding or when at a later period the requisite law is enacted but the record shows no substantial compliance with the statute in the proceedings on

the regularity of the proceedings for annexation, etc., of a tribunal having jurisdiction cannot be attacked collaterally.[40] The question of the validity of an act extending the territorial limits of a city so as to include farming lands, contrary to the owner's wishes, cannot be raised by quo warranto as to the authority of the city officers to exercise their functions as such within the extended territory.[41] The motives which a city had in annexing territory cannot be taken into account in an action to restrain the collection of taxes levied on the same by the city;[42] and the informality of the proceedings of the trustees of the town is not subject to collateral attack.[43] Nor will the fact that the petition or notice does not show the names of the owners of lands to be annexed or particularly describe their lands render the proceedings subject to collateral attack.[44]

(III) *ESTOPPEL.* Taxpayers or inhabitants may be estopped to question the validity of annexation or detachment of territory to or from a municipal corporation,[45] as by acquiescence in the annexation or delay in attacking the

which the corporation relies. Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382. Where a city has voted to extend its limits, without the consent of the electors of the territory sought to be annexed, an injunction will lie to restrain collection of taxes levied by the city on such territory. Lum *v.* Bowie, (Tex. 1891) 18 S. W. 142.

Action to recover taxes paid.— Where an attempted annexation is void for want of jurisdiction, it may be attacked in an action to recover taxes illegally collected. Strosser *v.* Ft. Wayne, 100 Ind. 443.

40. *Illinois.*— Cleveland, etc., R. Co. *v.* Dunn, 61 Ill. App. 227, 63 Ill. App. 531.

Indiana.— Powell *v.* Greensburg, 150 Ind. 148, 49 N. E. 955; Huff *v.* Lafayette, 108 Ind. 14, 8 N. E. 701; Logansport *v.* La Rose, 99 Ind. 117; Terre Haute *v.* Beach, 96 Ind. 143; Cicero *v.* Williamson, 91 Ind. 541.

Iowa.— McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979.

Kansas.— McGrew *v.* Stewart, 51 Kan. 185, 32 Pac. 896. Where a city of the second class has attempted by ordinance to annex certain territory, and in pursuance thereof has exercised authority over the same for eighteen years, treating it in all respects as a part of the municipal organization, the validity of the ordinance cannot be attacked in a collateral proceeding by a private person seeking to recover taxes levied on property in such territory, on the ground that it is not a part of the city. Atchison, etc., R. Co. *v.* Lyon County, 72 Kan. 13, 82 Pac. 519, 84 Pac. 1031.

Nebraska.— Sage *v.* Plattsmouth, 48 Nebr. 558, 67 N. W. 455; Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715.

Washington.— Frace *v.* Tacoma, 16 Wash. 69, 47 Pac. 219; Kuhn *v.* Port Townsend, 12 Wash. 605, 41 Pac. 923, 50 Am. St. Rep. 911, 29 L. R. A. 445.

Wisconsin.— Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

See 36 Cent. Dig. tit. "Municipal Corporations," § 96.

The fact that certain unplatted land was improperly annexed to a municipal corporation does not render the annexation void and subject to collateral attack. McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282; South Platte Land Co. *v.* Buffalo County, 15 Nebr. 605, 19 N. W. 711.

In proceedings to open a street a property-owner cannot question the authority of the city by collaterally attacking the validity of the proceedings annexing the territory through which the street is to extend. Powell *v.* Greensburg, 150 Ind. 148, 49 N. E. 955.

Even if the vote or method of ascertaining the will of the majority of the inhabitants as to the annexation of territory to a municipality is not expressed in accordance with the constitution and laws, the action of the city council in admitting the territory is not void. The state alone can annul their act in a proceeding begun for that purpose, and its legality cannot be questioned by a taxpayer living in the annexed territory, in a proceeding to enjoin a tax on his property levied by the city authorities. Graham *v.* Greenville, 67 Tex. 63, 2 S. W. 742 [*citing* Kettering *v.* Jacksonville, 50 Ill. 39; Mendota *v.* Thompson, 20 Ill. 197; Bird *v.* Perkins, 33 Mich. 28].

Validity of statute.— It has even been held that the validity of a statute authorizing annexation of territory to a city is, as a general rule, not subject to a collateral attack. McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979.

41. People *v.* Whitcomb, 55 Ill. 172; Stultz *v.* State, 65 Ind. 492.

42. Glover *v.* Terre Haute, 129 Ind. 593, 29 N. E. 412; Logansport *v.* Seybold, 59 Ind. 225; McCoy *v.* Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

43. Cicero *v.* Williamson, 91 Ind. 541.

44. Powell *v.* Greensburg, 150 Ind. 148, 49 N. E. 955; Huff *v.* Lafayette, 108 Ind. 14, 8 N. E. 701; Cicero *v.* Williamson, 91 Ind. 541.

45. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937 (where, however, it was held that there was no estoppel in the particular case); Strosser *v.* Ft. Wayne, 100 Ind. 443; State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186; Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281; Kuhn *v.* Port Townsend, 12 Wash. 605, 41 Pac. 923, 50 Am. St. Rep. 911, 29 L. R. A. 445.

same,[46] or by failure to exercise the rights of contravention and appeal given them by statute.[47] So also a municipality may be estopped;[48] and there may be an estoppel against an individual to attack an annexation of territory by quo warranto proceedings under a statute.[49] One who delays a long time, as for eight months, in filing a petition to amend an order of annexation and offers no excuse for the delay cannot question its legality.[50] A property holder is not estopped from contesting the validity of annexation proceedings by voting and offering himself as a candidate for office;[51] but long acquiescence without protest, paying municipal taxes and several times voting for municipal officers or holding office, will bar his right to contest;[52] and he is also estopped if he allows the annexed territory to be improved without objection.[53]

g. Operation and Effect — (i) *Annexation and Consolidation* — (A) *In General.* When territory is duly annexed to a municipality pursuant to law, it immediately on such annexation becomes a part of the municipality and, in the absence of statutory provision to the contrary,[54] comes under the power, control, and jurisdiction of the municipality for all purposes,[55] including school pur-

A citizen sued for taxes by a municipal corporation is not estopped to attack proceedings annexing the territory in which he resides to the city by the fact that other persons have paid the tax. Dees *v.* Lake Charles, 50 La. Ann. 356, 23 So. 382.

46. Logansport *v.* La Rose, 99 Ind. 117; Sage *v.* Plattsmouth, 48 Nebr. 558, 67 N. W. 455; Kuhn *v.* Port Townsend, 12 Wash. 605, 41 Pac. 923, 50 Am. St. Rep. 911, 29 L. R. A. 445; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252; and other cases cited in the preceding note. See also Atchison, etc., R. Co. *v.* Lyon County, 72 Kan. 13, 82 Pac. 519, 84 Pac. 1031.

47. Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715, holding that the forcible annexation of adjacent property to cities and villages, which Comp. St. (1891) c. 14, § 99, provides may be done when the court shall find that the property would receive material benefit, or that justice and equity require it, is a judicial proceeding, in which the landowner is required to be summoned, and in which he is entitled to all the rights of contravention and appeal; and where his land has been so annexed, and becomes under section 113, liable to subdivision into lots and blocks with streets and alleys, and subject to taxation for the city's antecedent debts, and no appeal has been taken, the landowner cannot afterward, in another action, complain that the law authorizing the annexation was unconstitutional in that it authorized the taking of private property for public use without compensation.

48. People *v.* Maxon, 139 Ill. 306, 28 N. E. 1074, 16 L. R. A. 178 [*affirming* 38 Ill. App. 152]. In this case a village ordinance disconnected part of its lands whereby they became part of the township. The ordinance was invalid, but the commissioners of highway in such town acted thereon and improved the highways on the land so disconnected, and built a bridge thereon at a cost of three thousand dollars to the town. For seven years the village exercised no jurisdiction over such land and expended no money thereon; and the voters residing on such land exercised no rights in the village government. Under these circumstances it was held that the village was estopped from claiming a right to tax such land.

49. State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186, holding that where an annexation resulted in the abandonment of municipal incorporation in the territory annexed, and the city had for four years levied taxes and made improvements, for which warrants were issued, and assumed jurisdiction over the territory, without objection, the annexation would be sustained in quo warranto by an individual to attack its validity, under the doctrine of estoppel, although the act annexing the territory was unconstitutional as special legislation.

50. Black *v.* Brinkley, 54 Ark. 372, 15 S. W. 1030. Where a city has annexed and assumed jurisdiction over adjacent territory, one who petitioned for the annexation, and accepted the benefits of improvements, cannot, after the lapse of four years, question the jurisdiction of the city to assess taxes against a part of the annexed territory belonging to him. Kuhn *v.* Port Townsend, 12 Wash. 605, 41 Pac. 923, 50 Am. St. Rep. 911, 29 L. R. A. 445.

51. Strosser *v.* Ft. Wayne, 100 Ind. 443.

52. Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281; Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742.

53. Strosser *v.* Ft. Wayne, 100 Ind. 443. See also Kuhn *v.* Port Townsend, 12 Wash. 605, 41 Pac. 923, 50 Am. St. Rep. 911, 29 L. R. A. 445.

54. See People *v.* Harrison, 191 Ill. 257, 61 N. E. 99; State *v.* Raine, 4 Ohio Cir. Ct. 72, 2 Ohio Cir. Dec. 426.

55. *Colorado.* — Donahue *v.* Morgan, 24 Colo. 389, 50 Pac. 1038.

Illinois. — School Trustees *v.* Peoria School Inspectors, 115 Ill. App. 479.

New York. — Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

Oregon. — Ladd *v.* Portland, 32 Oreg. 271, 51 Pac. 654, 67 Am. St. Rep. 526.

United States. — See Illinois Cent. R. Co.

poses.[56] In the absence of a statute to the contrary, the extension of territory of a municipality imposes upon the municipality the same municipal duties and liabilities as to streets and other improvements in the annexed territory as rest upon it in regard to those in the original territory.[57] So in other cases a continuing public duty imposed by law upon two or more municipal corporations, which are afterward consolidated by the legislature, devolves upon the new corporation.[58] All parts of the city, annexed as well as original territory, are entitled to the same advantages,[59] and they must also bear like burdens.[60] Where the whole territory

v. Chicago, 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622.

56. Cravener *v.* Chicago Bd. of Education, 133 Ill. 145, 24 N. E. 532 (holding that by virtue of the annexation of the town of Lake to the city of Chicago the board of education of Chicago became vested with exclusive jurisdiction over the public schools within the town of Lake); McGurn *v.* Chicago Bd. of Education, 133 Ill. 122, 24 N. E. 529; School Trustees *v.* Peoria School Inspectors, 115 Ill. App. 479. See, generally, SCHOOLS AND SCHOOL-DISTRICTS.

Statute to contrary.—But under Ohio Rev. St. § 1604, providing for the annexing of territory on the application of a municipal corporation, and directing that when the annexation has been completed it shall be a part of the corporation, and the inhabitants residing in such territory shall have all the rights and privileges of the inhabitants residing within the original limits of the corporation; and section 3893, providing that territory situated in one school-district may be transferred to another by the mutual consent of the board of education having control of such district, it was held that where territory is annexed to a municipal corporation on its application without the consent of the board of education of a special school-district therein, such territory remains a part of the school-district to which it was attached previous to the annexation. State *v.* Raine, 4 Ohio Cir. Ct. 72, 2 Ohio Cir. Dec. 426 [*affirmed* without report, Feb. 4, 1893].

57. Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622. See also Wabash R. Co. *v.* Defrance, 52 Ohio St. 262, 40 N. E. 89.

58. Winters *v.* George, 21 Oreg. 251, 27 Pac. 1041, duty to construct and maintain bridges. Under the provisions of the charter of the city of St. Paul imposing on the municipality the duty to keep in good repair for public use all streets, highways, and bridges within its limits, such duty and obligation extend to the bridge across the Mississippi river at Ft. Snelling, the city limits having been subsequently extended to include such bridge, notwithstanding the fact that the bridge, when constructed, was not within the limits of the city, and that the statute under which it was constructed (Sp. Laws (1876), c. 125) imposed such duty on the county of Ramsey. Moore *v.* St. Paul, 82 Minn. 494, 85 N. W. 163.

Oregon act of Feb. 18, 1891, entitled "An act to authorize the cities of Portland, East Portland, and Albina to construct, purchase, and acquire by condemnation or other means, one or more bridges across the Willamette river," and providing that the authority so conferred should be exercised by a committee to be appointed, two from each of the cities of East Portland and Albina, and four from the city of Portland, and that the said committee should have power to issue the bonds of the three cities as the joint obligation of said cities to an amount not exceeding five hundred thousand dollars, was not impliedly repealed by the act of Feb. 19, 1891, consolidating the three cities into one, to be known as the "City of Portland," and providing that the said city might incur an indebtedness of five hundred thousand dollars for building bridges across the Willamette river, but that it should never incur an indebtedness for more than two years, except by the issue of negotiable bonds. Winters *v.* George, 21 Oreg. 251, 27 Pac. 1041.

59. Donahue *v.* Morgan, 24 Colo. 389, 50 Pac. 1038; Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138, holding therefore that Tenn. Act (1898), c. 6, § 4, providing that certain territory annexed to the city of Memphis shall not receive the benefit of police, fire, and light protection for ten years, is invalid.

Presumption that advantages will be extended.— But the inhabitants of a village annexed to a city of the third class, who enjoy the use of the markets, streets, and schools of the annexing municipality cannot complain, in a suit brought by them soon after the passage of the annexing ordinance to test its validity, that they do not enjoy the advantages and protection of the water, light, and fire departments of the city, as it is to be presumed that these advantages will be extended to them. Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721.

Representation in city government.— In Pennsylvania, when the annexation of a borough to a city is an accomplished fact, the court of quarter sessions has jurisdiction to make a decree giving the people proper representation in the different branches of the city government. *In re* Morrellville Borough, 7 Pa. Super. Ct. 532 [*affirming* 20 Pa. Co. Ct. 257].

60. Donahue *v.* Morgan, 24 Colo. 389, 50 Pac. 1038; Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721; Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138.

Contracts and indebtedness see *infra*, II, B, 2, g, (I), (G).

Taxes and assessments see *infra*, II, B, 2, g, (I), (H).

of one municipality is annexed to another, the annexed municipality is destroyed.[61] And where existing corporations are consolidated and a new corporation thereby created, the new corporation takes the place of the old corporations and they cease to exist and can no longer exercise any corporate power unless their existence is expressly continued for some purpose.[62] In Illinois, where a village lying within the limits of an incorporated town is annexed to an adjacent city, whose limits are coterminous with those of another town, such annexation does not cause the village territory to become part of the latter town.[63]

(B) *Extent of Annexation.* The extent of the annexation of territory and the question whether particular territory is included depend of course upon the proceedings for annexation and the statute authorizing them,[64] or, where the annexation is by special act, upon the terms of the act.[65] In construing such an act, however, the courts are not confined to the literal meaning of the words used, but may so construe it as to carry out the manifest intention of the legislature.[66]

(C) *When Annexation Takes Effect.* Annexation by statute takes effect at the time of the passage of the act, except in so far as it provides otherwise.[67] Where the annexation is by an election under a general law, it takes effect and the jurisdiction of the annexing municipality over the annexed territory commences when the result of the election is declared, and does not relate back to the time when the election was ordered.[68]

(D) *Laws and Ordinances.*[69] When territory is annexed to a municipality it thereby becomes subject to all the laws and ordinances by which the municipality is governed, without the necessity of express legislative or municipal action to give them such application,[70] unless there is some statutory provision to the contrary;[71] and where one municipality is annexed to another and ceases to exist, its ordinances have no further force, unless the statute continues them in force, as it may do.[72] An act consolidating two municipal corporations and providing that all

61. Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554; Stroud *v.* Stevens Point, 37 Wis. 367.

62. See Bloomfield Tp. *v.* Glen Ridge, 54 N. J. Eq. 276, 33 Atl. 925.

After the passage of the Philadelphia Consolidation Act of Feb. 2, 1854, uniting the county districts to the city of Philadelphia, and prohibiting the contracting of debts thereafter by the old corporations no power remained in the councils of the old city to make any new or other contracts for the purchase of sites for market houses, and no person could be vested by them or their joint committees with any authority for that purpose. Twitchell *v.* Philadelphia, 33 Pa. St. 212.

63. East St. Louis *v.* Rhein, 139 Ill. 116, 28 N. E. 1089.

64. See *supra*, II, B, 2, d, (III), (IV), (V), (X).

Territory that may be annexed see *supra*, II, B, 2, b, (III).

65. Indiana, etc., R. Co. *v.* People, 154 Ill. 558, 39 N. E. 133.

66. Indiana, etc., R. Co. *v.* People, 154 Ill. 558, 39 N. E. 133, holding therefore that a statute which by its title purports to "extend the corporate powers" of a town previously incorporated, and which in terms provides that the boundaries of such town shall include specified parts of sections in a designated range, which is twelve miles distant from the town as originally laid out and in another county, would be construed as referring to the true range in which the original town was located.

67. See People *v.* Flanagan, 66 N. Y. 237 [*affirming* 5 Hun 187].

68. Little Rock R., etc., Co. *v.* North Little Rock, 76 Ark. 48, 88 S. W. 826, 1026.

69. Effect as to laws and ordinances of: Amendment of charter see *infra*, II, C, 1, e, (II). New charter and reorganization see *infra*, II, C, 1, e, (II).

70. People *v.* Harrison, 191 Ill. 257, 61 N. E. 99; McGurn *v.* Chicago Bd. of Education, 133 Ill. 122, 24 N. E. 529; School Trustees *v.* Peoria School Inspectors, 115 Ill. App. 479; St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121; Miller *v.* Greenwalt, 64 N. J. L. 197, 44 Atl. 880.

Municipal consent to location of railroad, etc.— A portion of a city subsequently included by enlarging its boundaries is subject to the provision of a railroad company's charter requiring the consent of the common council for the location of the railroad track, depots, and engine houses, within the city. Illinois Cent. R. Co. *v.* Chicago, 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622 [*affirming* 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408].

71. People *v.* Harrison, 191 Ill. 257, 61 N. E. 99 (as to which case see the note following); Camp *v.* Minneapolis, 33 Minn. 461, 23 N. W. 845 (as to which case see *infra*, text and note 73).

72. People *v.* Harrison, 191 Ill. 257, 61 N. E. 99, holding that under the Illinois An-

ordinances made by the council of either city shall remain in force does not have the effect of extending the ordinances then in force in each of such two cities over the consolidated city, but merely preserves such ordinances, with the same force and effect and territorial operation as they then have until they shall be changed by the council of the consolidated city.[73]

(E) *Officers and Employees.*[74] As a rule the officers within annexed territory whose tenure is not expressly saved by the statute become at once *functi officio.*[75] Usually, however, the matter is the subject of express statutory regulation;[76] and provision is sometimes made by the legislature for the devolution of official powers upon officers of the new municipality as successors of those of the annexed territory.[77] The statutes sometimes contain express provision as to the police,

nexation Act of 1889, section 18, providing that when one municipality is annexed to another, the ordinances of the annexed municipality regarding licensing of dramshops shall continue until repealed by popular vote, where the ordinances of Hyde Park in force at the time of its annexation to Chicago regulated the whole liquor traffic, including the sale by wholesale quantities in single packages, there were preserved to Hyde Park all the liquor ordinances in force at the time of annexation for all time, except as they should be changed therein, and hence a wholesale malt dealer could not be licensed under a subsequent Chicago ordinance, which conflicted with those of Hyde Park. See also Swift *v.* Klein, 163 Ill. 260, 45 N. E. 219; People *v.* Cregier, 138 Ill. 401, 28 N. E. 812; Camp *v.* Minneapolis, 33 Minn. 461, 23 N. W. 845.

The legislature may provide that, where any incorporated town, village, or city is annexed to another, any ordinance in force at the time of the annexation, prohibiting or regulating the licensing of dramshops within the territory so annexed, shall be continued in force. Swift *v.* Klein, 163 Ill. 269, 45 N. E. 219; People *v.* Cregier, 138 Ill. 401, 28 N. E. 812.

73. Camp *v.* Minneapolis, 33 Minn. 461, 23 N. W. 845.

74. Effect of new charter or reorganization see *infra*, II, C, 1, e, (v).

75. Graff *v.* Moylan, 28 La. Ann. 75 (holding that after the passage of the Louisiana Act of March 16, 1870, annexing the city of Jefferson to the city of New Orleans, a constable of the parish of Jefferson could not perform any official duty in the city and parish of Orleans); Miller *v.* Greenwalt, 64 N. J. L. 197, 44 Atl. 880. *Compare*, however, People *v.* Wolfert, 6 N. Y. St. 103, holding that the annexation of the town of New Lots to the city of Brooklyn, under Laws (1886), c. 335, wrought no change in the official status of the supervisor of that town, holding office at the time, nor in the duties of his official position; and he might be compelled to annul an order for the payment to the contractor under a contract entered into before the annexation.

76. See Matter of Fifth Ave., 91 Hun (N. Y.) 259, 36 N. Y. Suppl. 141.

Town officers.— Commissioners appointed to grade a street in a town are not town officers, and will not go out of office, under N. Y. Laws (1894), c. 451, annexing the town to an adjoining city, section 6 of which provides that all officers, commissioners, etc., except justices of the peace and constables, shall cease and determine at the time of the taking effect of the act. Matter of Fifth Ave., 91 Hun (N. Y.) 259, 36 N. Y. Suppl. 141.

Transfer of subordinates.— Although the street commissioner of Rockaway Beach was made a public officer by the act creating the office, yet since the trustees had exclusive control of the streets, and he was subject to their direction, and was not the head of a department, nor charged with the performance of any independent duty, he was a "subordinate," within Greater New York Charter, c. 378, § 1536, transferring all subordinates in any branch of the public service in each of the municipalities consolidated to similar positions after the consolidation. Murray *v.* New York, 60 N. Y. App. Div. 541, 69 N. Y. Suppl. 959.

The district attorney of Kings county, N. Y., did not become an officer of the city of Brooklyn by virtue of the act consolidating said county with the city, although the consolidating act charged the city with the payment of all liabilities then existing against the county, or which but for the act would be charged against the county; but his salary could only be drawn from the city treasurer by the mode prescribed by the city charter. People *v.* Taylor, 17 Misc. (N. Y.) 505, 40 N. Y. Suppl. 321.

Ohio Rev. St. § 568, relating to the right of justices of the peace in townships which, during their term of office, are annexed to another township, to continue their duties in the township to which they are annexed, as amended March 19, 1894, excepting counties containing cities of the second grade of the first class, is constitutional. Reed *v.* Maxfield, 32 Cinc. L. Bul. 50.

In Washington a justice of the peace in a city of less than five thousand inhabitants does not, by the subsequent incorporation therewith, under the same name, of another city, so as to make the combined population over five thousand, became a justice of the peace for a city of over five thousand inhabitants, and entitled to the salary provided by statute for such justices. Whiting *v.* Collier, 9 Wash. 412, 37 Pac. 660.

77. Carey *v.* Wurster, 31 N. Y. App. Div. 553, 52 N. Y. Suppl. 160, holding that under

firemen, and other employees of annexed or consolidated municipalities, either continuing their employment or providing for their transfer to the new municipality.[78] A contract of employment binding upon a municipality at the time of its annexation to another municipality will, as to its unexpired term, be binding on the latter in the absence of provision to the contrary.[79]

(F) *Property and Assets.*[80] A change in the limits of a municipality by annexing territory thereto does not change the identity of the corporation or affect the title of property which it holds at the time of such annexation.[81] As a general rule, on the consolidation of municipal corporations or the annexation by one municipality of the territory of another under legislative authority, the property and assets of the old corporations or the corporation whose territory is annexed becomes, in the absence of provision to the contrary, the property and assets of the consolidated or annexing corporation.[82] In such cases it is within the

N. Y. Laws (1897), c. 525, authorizing the mayor and controller of the city of Brooklyn and another person to ascertain and determine certain claims against the late town of Flatlands, the intent was to confer this authority upon the mayor and controller as such, and not as individuals; and therefore, when the city of Brooklyn passed out of existence, it devolved upon the mayor and controller of the new city of New York, who for that purpose were to be considered as their successors.

78. N. Y. Laws (1894), cc. 449, 450. And see Matter of Worth, 3 N. Y. App. Div. 443, 39 N. Y. Suppl. 495. Under N. Y. Laws (1895), c. 934, providing for annexation of Wakefield and other towns to New York city, and providing, in section 1, that the rights and privileges should be the same "as if such territory had been included" within said city "by the provisions of chapter 613 of the Laws of 1873," providing for the annexation of certain towns to New York city, which latter act provided for the retention of police officers and patrolmen in office in the latter towns, did not tend to make patrolmen of Wakefield members of the police force of New York city. People *v.* Roosevelt, 24 N. Y. App. Div. 17, 48 N. Y. Suppl. 1043.

79. See *infra*, II, B, 2, g, (I), (G). And see Bell *v.* New York, 46 N. Y. App. Div. 195, 61 N. Y. Suppl. 709, holding that one who was employed as librarian of a school-district of the town of East Chester, under a contract for a year, made with its board of education, was not a public officer, but an employee, the burden of whose unexpired contract the city of New York assumed under the Annexation Act (Laws (1895), c. 934).

80. Effect as to existing property and rights of: Amendment of charter see *infra*, II, C, 1, e. Division or detachment of territory see *infra*, II, B, 2, g, (II), (B). Incorporation see *supra*, II, A, 17. New charter and reorganization see *infra*, II, C, 1, e. Repeal of charter see *infra*, II, C, 2, f.

81. Heizer *v.* Yohn, 37 Ind. 415; Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172 (property held in trust); Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53 (does not affect right to hold property devised to the original corporation in trust).

82. *Indiana.*— Maumee School Tp. *v.* Shirley City School Town, 159 Ind. 423, 65 N. E. 285; Allen School Tp. *v.* Macy School Town, 109 Ind. 559, 10 N. E. 578.

Missouri.— Thompson *v.* Abbott, 61 Mo. 176.

New Jersey.— Bloomfield Tp. *v.* Glen Ridge, 54 N. J. Eq. 276, 33 Atl. 925.

Oregon.— Winters *v.* George, 21 Oreg. 251, 27 Pac. 1041.

Pennsylvania.— Oil City *v.* Oil City, 1 Leg. Gaz. 502 (holding that where two boroughs and part of the township were constituted into one municipality by a statute which was silent as to the description of the public property within, but expressly gave the officers control of the department to which such property belonged, the officers must assume control of the property; and an action by one of the inhabitants of one of the boroughs against the inhabitants of the whole municipality for the public property belonging to it at the time of its incorporation could not be maintained); *In re* Wilkins Tp. School Dist., 31 Pittsb. Leg. J. 189 [*reversed* on other grounds in 18 Pa. Super. Ct. 293] (holding that where a portion of a township was added to a borough by petition to the borough council and an ordinance of the council thereon, the school buildings on the part annexed passed to the borough, and there was no act of assembly authorizing the adjustment of indebtedness and value of school real estate).

Tennessee.— Nashville *v.* Lawrence [*cited* in Prescott *v.* Lennox, 100 Tenn. 591, 593, 47 S. W. 181].

Washington.— De Mattos *v.* New Whatcom, 4 Wash. 127, 29 Pac. 933.

Wisconsin.— Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554; Dousman *v.* Milwaukee, 1 Pinn. 81. *Compare*, however, Milwaukee *v.* Milwaukee, 12 Wis. 93.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699. On the consolidation of a city and adjacent municipalities the consolidated city holds property previously devised in trust to the original city. Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.*

Compare, however, Springwells Tp. *v.*

power of the legislature to provide for an equitable adjustment and apportionment of preëxisting property and rights, and such provision is generally made.[83] Where the old or annexed corporation is indebted for property, the legislature may require the consolidated or annexing corporation to pay therefor before it shall be entitled to possession;[84] but in the absence of such provision its right to the property is not affected by the fact that it has not been paid for.[85]

(G) *Contracts and Indebtedness.*[86] On the consolidation of two or more municipalities, or the annexation to one municipality of the territory of another, the legislature may make the consolidated or annexing corporation liable for the indebtedness of the old corporation, or it may provide for an equitable adjustment or apportionment thereof, as by providing that the indebtedness of the respective municipalities at the date of consolidation or annexation shall remain the indebtedness of the municipality contracting it, and provide for payment of such indebtedness by taxation upon the property within the limits of the contracting municipality.[87] In the absence of such provision the general rule is that

Wayne County Treasurer, 58 Mich. 240, 25 N. W. 329; White *v.* Fuller, 38 Vt. 193.

Temporary annexation.— This rule does not apply, however, where the annexation is merely for a temporary purpose. Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

Annexation of part of territory of another municipality see *infra*, II, B, 2, g, (II).

83. Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858 (sustaining and construing Const. Amendm. art. 20, creating the city and county of Denver); Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208; Boston, etc., Smelting Co. *v.* Elder, 20 Colo. App. 96, 77 Pac. 258; Stone *v.* Charlestown, 114 Mass. 214 (holding that, as the public property of municipalities is held for public use, the legislature, when changing municipal boundaries, may itself divide the property among the municipalities, or may intrust the division to the courts); Weymouth, etc., Fire Dist. *v.* Norfolk County Com'rs, 108 Mass. 142; Paye *v.* Grosse Pointe Tp., 134 Mich. 524, 96 N. W. 1077. See also *infra*, IV, F, 2.

Right to jury trial on apportionment of property see JURIES, 24 Cyc. 103.

Proceeds of bonds for improvement of streets.— Where by statute (Mich. Acts (1901), p. 65, No. 303) a township board was authorized to improve a certain street and to issue bonds therefor, and subsequently a statute (Act May 28, 1903) created a village including within its limits a part of the road so to be improved, and declared that the amount raised by the sale of the bonds, with accretions, should be paid over by the township authorities to the village treasurer, it was held that, since by the change in the political authority over the territory the village authorities became the only ones in control of the highway, and authorized to expend the money raised thereon, such act was not invalid as a violation of the right of local self-government. Paye *v.* Grosse Pointe Tp., 134 Mich. 524, 96 N. W. 1077.

84. Maumee School Tp. *v.* Shirley City School Town, 159 Ind. 423, 65 N. E. 285.

85. Where a statute (Ind. Acts (1899), p. 276; Burns Rev. St. (1901), § 5997*a*) provided that where any city or incorporated town had annexed or should thereafter annex any territory, or where any town should be "thereafter incorporated," in which territory so annexed or incorporated there was or should be any school property for which the district was or should be indebted, the corporation should be liable therefor, and until it should be paid should not have possession of the property; and prior to said act a town had been incorporated, the boundaries of which included a school lot and building previously built by a township, and for which it was indebted, it was held that the statute did not apply to the case, since creating a corporation embracing territory was not equivalent to annexing territory to an existing corporation, and since the terms of the statute as to the incorporation of towns excluded any retrospective operation. Maumee School Tp. *v.* Shirley City School Town, 159 Ind. 423, 65 N. E. 285.

86. Effect as to existing contracts and indebtedness of: Amendment of charter see *infra*, II, C, 1, e, (III). Division or detachment of territory see *infra*, II, B, 2, g, (II), (C). Incorporation see *supra*, II, A, 17. New charter and reorganization see *infra*, II, C, 1, e, (III). Repeal of charter see *infra*, II, C, 2, f, (IV).

87. *Colorado.*— Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858 (sustaining and construing Const. Amendm. art. 20, creating the city and county of Denver and providing that it should own all the property previously owned or possessed by the included municipalities and by the county of Arapahoe, and should succeed to all the rights, liabilities, and benefits, and assume all the bonds and indebtedness, of the constituent bodies); Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

Kansas.— Topeka Bd. of Education *v.* State, 64 Kan. 6, 67 Pac. 559, holding that under Laws (1893), c. 128, § 2, providing that the board of education or the district board retaining the school-house should assume the bonded indebtedness incurred in building and furnishing the same, where a city had annexed a school-district which had

the contracts and indebtedness of the old corporations become the contracts and

issued bonds for the furnishing and erection of a school-house, the city was liable to pay the bonds issued for building and furnishing the school-house, and also the bonds used for the purchase of the site.

Kentucky.— Carpenter *v.* Central Covington, 119 Ky. 785, 81 S. W. 919, 26 Ky. L. Rep. 430, holding also that under Ky. St. (1903) § 3667, providing that if any incorporated town be annexed to another, the town so annexing shall be bound for all the debts of the other, a town annexing unincorporated territory assumes no obligation.

Louisiana.— Layton *v.* New Orleans, 12 La. Ann. 515.

Massachusetts.— Stone *v.* Charlestown, 114 Mass. 214.

Michigan.— Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Minnesota.— Humboldt *v.* Barnesville, 83 Minn. 219, 86 N. W. 87 (construing Spec. Laws (1889), c. 3, in relation to the city of Barnesville and the towns of Barnesville and Humboldt); Adams *v.* Minneapolis, 20 Minn. 484 (holding that a cause of action which accrued against the city of Minneapolis prior to its consolidation with the city of St. Anthony was preserved by Spec. Laws (1872), c. 10, subc. 9, § 5, which provides that all acts and ordinances superseded by the Consolidation Act so far as they affected "rights of every kind, inchoate or perfected, . . . shall be deemed to continue in force," and that "it is not intended that any rights vested" shall be lost by such consolidation).

New Jersey.— Orvil Tp. *v.* Woodcliff, 61 N. J. L. 107, 38 Atl. 685; Neilson *v.* Newark, 49 N. J. L. 246, 8 Atl. 292 (holding that an act dividing a township between two municipalities, and directing the debts owing by the township to be paid, in certain proportions, by the two corporate bodies imposed a duty on them to pay the debts, which was enforceable by creditors); Lodi Tp. *v.* Hackensack Imp. Commissioners, 60 N. J. Eq. 229, 46 Atl. 782 (holding that a borough set off from a township was not liable for the previously contracted debts of such township, under Laws (1896), p. 270, providing a mode of equitable apportionment of the indebtedness and assets on the setting off of such township).

New York.— Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 [*affirming* 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132] (holding that Laws (1894), c. 356, § 4, providing that the city of Brooklyn should not be liable for any debt, liability, or obligation of the town of Flatbush, which the act annexed to the city, incurred before annexation, but that the property in such town should remain liable, merely defined the area of taxation for such liabilities, and did not relieve the city from liability in a suit by one injured by the construction of a sewer by the town of Flatbush prior to the annexation); Lanigan *v.* New York, 70 N. Y. 454 (construing Laws (1874), c. 304, consolidating the New York city and county governments); Tyler *v.* Lansingburgh, 76 N. Y. App. Div. 165, 78 N. Y. Suppl. 433 [*affirming* 37 Misc. 604, 76 N. Y. Suppl. 139] (under Laws (1900), c. 665, annexing the village of Lansingburgh to the city of Troy); Matter of Vacheron, 51 N. Y. App. Div. 182, 64 N. Y. Suppl. 503 (liability for and payment of debts of Queens county under the Greater New York Charter); Queens County *v.* New York, 48 N. Y. App. Div. 337, 62 N. Y. Suppl. 1047 (apportionment of debt of Queens county between it and New York city under the Greater New York Charter); Bell *v.* New York, 46 N. Y. App. Div. 195, 61 N. Y. Suppl. 709; Worth *v.* Brooklyn, 34 N. Y. App. Div. 223, 54 N. Y. Suppl. 484; Koelesch *v.* New York, 34 N. Y. App. Div. 98, 54 N. Y. Suppl. 110 (holding that where the mayor and common council of Long Island city neglected their legal duty to provide money for the payment of certain warrants drawn against the city until by operation of Laws (1897), c. 378, the city of New York had succeeded to all the rights and powers and assumed all the obligations of Long Island city, on the refusal of the controller of New York city to pay the warrants the owners were entitled to recover the amount thereof in an action against it); Carey *v.* Wurster, 31 N. Y. App. Div. 553, 52 N. Y. Suppl. 160; Schoenberg *v.* Taylor, 9 N. Y. App. Div. 236, 41 N. Y. Suppl. 491 (liability of the city of Brooklyn for a debt of Kings county). Under Greater New York Charter (Laws (1897), c. 378), annexing a part of Queens county, and section 1588, providing that the supreme court may fix the apportionment of the debt of said county between it and New York city, and that such apportionment shall be determined by the relative assessed valuation of real property included in or remaining without the city, the court was bound by the rule of apportionment so provided, and could not adopt another, as being more equitable. Queens County *v.* New York, *supra*. Under Laws (1895), c. 934, annexing certain towns to New York city and declaring in section 1 that the city should be liable for all debts, obligations, and liabilities of the annexed territory, "except as may be modified by the provisions herein contained," and providing in section 3 that "such proportion of the debts and liabilities of each of said towns . . . as should proportionately and equitably be paid by the inhabitants . . . of the territory by this act annexed" should be paid by New York city to each of said towns, it was held that said section 3 did not apply where towns were wholly annexed, but in such cases New York city was liable for all the debts of the annexed towns. Bronx Gas, etc., Co. *v.* New York, 17 Misc. 433, 41 N. Y. Suppl. 358. Enforcement of liability of New York city for proportionate part of debt of town partly annexed under Laws (1895), c. 934, see Matter of Lent, 16 Misc. 606, 40 N. Y. Suppl. 570.

Pennsylvania.— The provisions of the act of June 1, 1887 (Pamphl. Laws 285), pro-

indebtedness of the consolidated or annexing corporation.[88] Debts of a munici-

viding for the annexing of territory to a borough and the adjustment of property by proceeding in court, are not applicable where the annexation has been made under another act and other proceedings. *In re* Wilkins Tp. School Dist., 31 Pittsb. Leg. J. N. S. 189 [*reversed* on other grounds in 18 Pa. Super. Ct. 293]. In a proceeding for an adjustment of indebtedness between a township and a borough carved out of it, the township is not entitled to an allowance for counsel fees. Kingston Tp. *v.* Luzerne, 5 Kulp 49.

Texas.— Barber *v.* East Dallas, 83 Tex. 147, 18 S. W. 438; Dallas *v.* Beeman, 23 Tex. Civ. App. 315, 55 S. W. 762.

Washington.— Potter *v.* Black, 15 Wash. 186, 45 Pac. 787; De Mattos *v.* New Whatcom, 4 Wash. 127, 29 Pac. 933.

United States.— Pepin Tp. *v.* Sage, 129 Fed. 657, 64 C. C. A. 169; Burlington Sav. Bank *v.* Clinton, 106 Fed. 269 (construing Iowa Code, §§ 612–614); D'Esterre *v.* New York, 104 Fed. 605, 44 C. C. A. 75 (holding that under the Greater New York Charter the city of New York became liable for bonds which had been issued by the town of Gravesend); Brewis *v.* Duluth, 13 Fed. 334, 3 McCrary 223, 9 Fed. 747, 3 McCrary 219.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.* See also *infra*, IV, H.

Liability for tort.— Under N. Y. Laws (1900), c. 665, annexing the village of Lansingburgh to the city of Troy, section 4 of which provided that upon the taking effect of the act the municipal and public corporation of Lansingburgh should cease and its power should devolve upon the city of Troy, section 8 of which made all the outstanding indebtedness of the village a charge on the city of Troy, and section 10 of which provided that, to pay a maturing indebtedness of the village, a sufficient sum should be levied by tax on the real and personal property of the village, it was held that the liabilities contemplated by said sections 8 and 10 included liabilities arising *ex delicto* as well as those arising *ex contractu*, and therefore, where an action for negligence was pending against Lansingburgh at the time the consolidation act took effect, the city of Troy was properly substituted as defendant therein. Tyler *v.* Lansingburgh, 76 N. Y. App. Div. 165, 78 N. Y. Suppl. 433 [*affirming* 37 Misc. 604, 76 N. Y. Suppl. 139]. See also Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 [*affirming* 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132]. So, under Texas Act, April 3, 1889, repealing the charter of East Dallas and annexing its territory to the city of Dallas and providing (section 4) that the latter should pay all the lawful debts of the former, it was held that the word "debts" included a liability for damages resulting from the tortious acts of the municipal officers in removing a private dwelling and tearing down a fence preparatory to taking land for a public street. Barber *v.* East Dallas, 83 Tex. 147, 18 S. W. 438. See also Dallas *v.* Beeman, 23 Tex. Civ. App. 315, 55 S. W. 762, holding the city of Dallas liable for damages to plaintiff's land caused by the wrongful digging of a ditch through it by the city of East Dallas.

Bonds of municipalities annexed to New York city.—Greater New York Charter, § 172 (Laws (1897), c. 378), providing that bonds of the annexed municipalities may be converted into registered bonds, authorizing the controller to issue registered bonds therefor, and providing that when the bonds shall have coupons attached, the controller may, on the registration thereof, detach all the coupons, and indorse the fact of such registration, does not give a holder of the coupon bonds of villages annexed the right to compel the controller to issue in place thereof registered stock of the city, but only the right to have such registration indorsed on the bonds, making the city thereafter liable for the interest. People *v.* Coler, 26 Misc. (N. Y.) 327, 56 N. Y. Suppl. 1072.

Power of city auditor to pass on claims.— Under N. Y. Laws (1874), c. 304, consolidating the city and county of New York and making all charges against the county charges against the city, and Laws (1873), c. 335, whereby the voucher for a claim against the city was required to be examined and allowed by the auditor, and approved by the controller, it was held that where a valid claim against the county had been duly audited and approved by the board of supervisors, there was nothing for the city auditor to do before allowing such claim but to examine the voucher and see that it was in proper form, and he had no right to revise the action of the supervisors. Lanigan *v.* New York, 70 N. Y. 454.

Limitation of indebtedness see De Mattos *v.* New Whatcom, 4 Wash. 127, 29 Pac. 933.

Right to jury trial on apportionment of indebtedness see JURIES, 24 Cyc. 103.

Retroactive statutes.— Where a school-district adjoining a city issued bonds for the purchase of a site for a school-house and for the erection of the building, and in 1889 the city annexed a part of the territory of the school-district, including the school-house and a statute subsequently enacted (Kan. Laws (1893), c. 128) provided for a settlement between the school-district and the city, it was held that the law, although retroactive, was valid, as a moral obligation rested on the city after the annexation to assume payment of the bonds, and the act changed this into a legal obligation. Topeka Bd. of Education *v.* State, 64 Kan. 6, 67 Pac. 559. See also Orvil Tp. *v.* Woodcliff, 61 N. J. L. 107, 38 Atl. 685, holding that a statute which imposed upon a borough a proportionate part of the liabilities of a township from which it had been set off, and assigned to it a proportionate part of the assets of such township, was valid, although not passed until after the formation of the borough.

88. *Georgia.*— Cash *v.* Douglasville, 94 Ga. 557, 20 S. E. 438.

pality contracted before an addition become a burden upon the added territory as well as upon the original territory, unless it is otherwise provided by statute.[89] A city contract designed for the city at large, as a contract with a gas company for furnishing the city with gas, operates throughout its entire boundaries, including territory annexed after the contract is made.[90] Contracts of the annexed municipality which there was no power to make are as a rule not binding on the municipality to which it is annexed.[91] The remedy of creditors against the con-

Louisiana.— Lake Charles Ice, etc., Co. *v.* Lake Charles, 106 La. 65, 30 So. 289; State *v.* New Orleans, 41 La. Ann. 91, 5 So. 262.

Michigan.— Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Missouri.— Thompson *v.* Abbott, 61 Mo. 176.

New York.— Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 [*affirming* 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132]; Bronx Gas, etc., Co. *v.* New York, 17 Misc. 433, 41 N. Y. Suppl. 358.

Washington.— De Mattos *v.* New Whatcom, 4 Wash. 127, 29 Pac. 933.

Wisconsin.— Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554; Dousman *v.* Milwaukee, 1 Pinn. 81.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Pepin Tp. *v.* Sage, 129 Fed. 657, 64 C. C. A. 169; Brewis *v.* Duluth, 13 Fed. 334, 3 McCrary 223, 9 Fed. 747, 3 McCrary 219.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.*

Temporary annexation.— This rule does not apply when the annexation is merely for a temporary purpose, as until the electors can organize a town government for the election of officers. Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

On the dissolution of a municipal corporation and the transfer of its territory to others, where the legislature does not apportion its indebtedness between such others, they will be severally liable in proportion to the value of the taxable property of the dissolved corporation which falls within their boundaries respectively. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Pepin Tp. *v.* Sage, 129 Fed. 657, 64 C. C. A. 169.

Illegal amendment of charter.— Where a city charter is amended so as to extend its limits and the new corporation succeeds to the old corporation, it is liable for legitimate debts contracted in furnishing water and light to the city within the old limits to the extent furnished, although the amendment is illegal, since such amendment does not have the effect of placing the city in a situation to deny its indebtedness. Lake Charles Ice, etc., Co. *v.* Lake Charles, 106 La. 65, 30 So. 289.

Liable for torts of annexed municipality.— Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 [*affirming* 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132]. And see *supra*, this section, note 87.

Estoppel to limit operation of contract to original limits of city see St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121, contract with a gas company for furnishing gas to city.

89. *Georgia.*— Cash *v.* Douglasville, 94 Ga. 557, 20 S. E. 438. The obligation resting on territory annexed to a city to pay taxes for the purpose of paying a prior indebtedness of the city is supported by the equitable consideration that the values have been increased by proximity to the city, and the further consideration that the newly incorporated inhabitants acquire an interest in the public property purchased by previous bond issues and taxation. Toney *v.* Macon, 119 Ga. 83, 46 S. E. 80.

Kentucky.— Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721, holding that the inhabitants of a village annexed to a city cannot complain that the city has a large debt which they had no voice in creating, where it was created for public improvements which they enjoy in common with others.

Michigan.— Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964.

Nebraska.— Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715.

North Carolina.— Watson *v.* Pamlico County Com'rs, 82 N. C. 17.

90. St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121.

91. Vacheron *v.* New York, 34 Misc. (N. Y.) 420, 69 N. Y. Suppl. 608, holding that where plaintiff in 1897 made a ten years' contract with Queens county for sprinkling roads at a certain amount per mile per season, such contract was valid only for the year 1897, since the charter of New York taking effect Jan. 1, 1898, deprived the board of supervisors of the power over such roads after that date; and therefore plaintiff could not recover from the city of New York for services afterward performed under such contract. See also Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680 [*affirming* 38 N. Y. App. Div. 480, 56 N. Y. Suppl. 580]. However, where plaintiff sued the city of New York under a contract made in December, 1897, with the trustees of an incorporated village for sprinkling streets from May 1, 1898, to October 1, and the village, under the Greater New York Charter, became merged in the city of New York on Jan. 1, 1898, and it appeared that under the New York Charter the village authorities had prepared a budget which included the contract in question, and that taxes had been accordingly levied, and that plaintiff had performed the contract to defendant's knowledge, it was held that it was error to dismiss the complaint on the ground that the village trustees had no authority to make a contract extending beyond their term of office, and that plaintiff should have been allowed to

solidated or annexing municipality depends primarily upon the statute. Under some statutes an action at law will lie.[92] Otherwise the remedy is by a suit in equity.[93] Whether the annexing or consolidated municipality can maintain actions on contracts or bonds made with or to the annexed or old corporations depends upon the terms of the statute.[94] Attorneys cannot recover from the annexing city for their services in contesting the annexation.[95]

(H) *Taxes and Assessments.*[96] When the corporate limits of a municipality are extended the annexed territory will become subject to taxation for its proportion of all municipal indebtedness then existing as well as for such as is subsequently contracted, unless it is otherwise provided by statute.[97] Generally, however, this is the subject of express statutory provision and regulation, and such statutes have been sustained.[98] So also, in the absence of provision to the contrary, where municipal corporations are consolidated or territory is annexed, the

show that the tax required for payment for such contract had been duly levied, and performance by him of the terms of the contract. Schwan *v.* New York, 173 N. Y. 32, 65 N. E. 774 [*reversing* 65 N. Y. App. Div. 420, 72 N. Y. Suppl. 806].

92. Neilson *v.* Newark, 49 N. J. L. 246, 8 Atl. 292; Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 [*affirming* 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132]; Koelesch *v.* New York, 34 N. Y. App. Div. 98, 54 N. Y. Suppl. 110; Vacheron *v.* New York, 34 Misc. (N. Y.) 420, 69 N. Y. Suppl. 608. See also Schwan *v.* New York, 173 N. Y. 32, 65 N. E. 774 [*reversing* 65 N. Y. App. Div. 420, 72 N. Y. Suppl. 806].

Audit of claim not necessary before action. — Vacheron *v.* New York, 34 Misc. (N. Y.) 420, 69 N. Y. Suppl. 608. *Compare*, however, People *v.* Coler, 48 N. Y. App. Div. 492, 62 N. Y. Suppl. 964; McDonnell *v.* New York, 4 Hun (N. Y.) 472.

93. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Burlington Sav. Bank *v.* Clinton, 106 Fed. 269.

94. Stowe *v.* Luce, 27 Vt. 605.

Action on bond to annexed municipality. — Under a statute (Vt. Laws (1848), p. 11, § 3) empowering the trustees of an annexing municipality to maintain actions on "notes" executed to the trustees of the annexed municipality does not include a bond to the inhabitants of the annexed municipality to secure a faithful execution of the office of trustees to manage its surplus fund, and to indemnify the municipality for any loss from their neglect. Stowe *v.* Luce, 27 Vt. 605.

95. Henderson *v.* New York, 65 N. Y. App. Div. 180, 72 N. Y. Suppl. 609.

96. **Effect as to taxes and assessment of:** Amendment of charter see *infra*, II, C, 1, e, (IV). Division or detachment of territory see *infra*, II, B, 2, g, (II), (D). New charter and reorganization see *infra*, II, C, 1, e, (IV). Repeal of charter see *infra*, II, C, 2, f, (V).

97. *Georgia.* — Cash *v.* Douglasville, 94 Ga. 557, 20 S. E. 438.

Kentucky. — Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721.

Nebraska. — Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715.

Ohio. — State *v.* Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; Blanchard *v.* Bissell, 11 Ohio St. 96.

Texas. — Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541.

United States. — Pepin Tp. *v.* Sage, 129 Fed. 657, 64 C. C. A. 169.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 107, 109.

98. See Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208; Carpenter *v.* Central Covington, 119 Ky. 785, 81 S. W. 919, 26 Ky. L. Rep. 430; Layton *v.* New Orleans, 12 La. Ann. 515.

Limitation of rate of taxation on annexed territory until completion of certain improvements see St. Louis *v.* Allen, 13 Mo. 400.

Exemption from taxation. — Carpenter *v.* Central Covington, 119 Ky. 785, 81 S. W. 919, 26 Ky. L. Rep. 430. Under Nebr. Comp. St. (1891) c. 14, § 95, which provides for the voluntary annexation of adjacent territory to cities and villages, and exempts such property from taxation for the antecedent debts of the city or village, and section 99, which provides for the involuntary and forcible annexation of property when the court shall find that it "would receive material benefit," or that "justice and equity require it," but neither exempts such territory from taxation for such antecedent debts, nor provides for such taxation, it was held that the two sections are not *in pari materia*, to be construed together, so as to exempt from such taxation territory forcibly annexed under section 99. Gottschalk *v.* Becher, 32 Nebr. 653, 49 N. W. 715. The New Jersey act (Pub. Laws, p. 402) annexing a portion of Weehawken township to Hoboken, exempting the territory annexed from any tax for prior indebtedness incurred by said city, excepting certain bonds, after assent filed by a majority of the property-owners of said territory and payment of a certain sum of money, is, when executed by them, in the nature of a contract, and these lands cannot be assessed by ordinance for the principal or interest of bonds thereafter issued for satisfaction of such prior indebtedness. Under such act improvement certificates issued under the charter for work done in the streets of Hoboken before annexation are within the exemption; and bonds afterward issued by

added territory becomes liable to assessment for streets and other local improvements.[99] On the consolidation of municipal corporations or annexation of territory it is competent for the legislature to provide for the disposition of the municipal taxes uncollected at the date of consolidation or annexation.[1] In the absence of provision to the contrary, taxes assessed on the annexed territory, but not collected at the date of annexation, belong to the annexing city.[2] When, in the progress of proceedings by a village to make improvements by special assess-

authority of an act passed before annexation, to pay judgments reserved on such certificates, are not chargeable by taxation on the lands annexed. Hoboken Land, etc., Co. *v.* Hoboken, 43 N. J. L. 96.

"Debts" contracted prior to annexation.— Where a person made a contract with the city of Memphis before the passage of the act of Dec. 3, 1867, whereby certain new territory was annexed to the city, but the work under the contract was, for the most part, performed after the annexation of said territory, and the act of Dec. 1, 1869, exempted the annexed territory from taxation for any debt contracted prior to annexation, it was held that the word "debt" was not to be construed in its technical sense, and that the city's liability on the above contract was a debt contracted prior to annexation, within the meaning of the act. U. S. *v.* Memphis, 97 U. S. 284, 24 L. ed. 937.

Unconstitutional exemption.— Tenn. Act (1898), c. 6, § 3, which provides that certain territory annexed to the city of Memphis shall be exempt from taxation for police, fire, and light purposes for a period of ten years, is in violation of Const. art. 2, § 28, providing that taxation must be equal and uniform throughout the state, and section 29, empowering the legislature to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, on principles established in regard to state taxation. Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138.

99. Ladd *v.* Portland, 32 Oreg. 271, 51 Pac. 654, 67 Am. St. Rep. 526. Where a village, while making a street improvement, is annexed to a city, which completes the improvement, the city can assess the annexed proprietors to the same amount that it could other citizens, and is not limited to the amount that the village could assess. Andrews *v.* Felton, 4 Ohio Dec. (Reprint) 168, 1 Clev. L. Rep. 85. Where a village was annexed to a city pending proceedings by the village for a special assessment, and after the annexation the proceedings were still carried on in the name of the village, as directed by Ill. Laws (1889), p. 71, § 7, it was held that the fact that some of the orders in the proceeding recited that the city appeared therein was immaterial. McChesney *v.* Hyde Park, 151 Ill. 634, 37 N. E. 858, (1891) 28 N. E. 1102. It was also held that it was immaterial whether that part of the cost of the proposed assessment which was found to be of public benefit was assessed to the city or the village, so far as the validity of the assessment on the lands specially benefited by the improvement was concerned. McChesney *v.* Hyde Park, (Ill. 1891) 28 N. E. 1102.

Effect of statutory exemption from further improvement and assessment.— The charter of East Portland, Oregon (Laws (1870), p. 156, art. 6), providing that the trustees may improve a street within the city limits at the expense of abutting property-owners, and section 27, providing that, when a street has been once improved under the charter, it shall not be again improved, but may be repaired, are not a contract between a property-owner on a street so improved and the public that his property shall for all time thereafter be exempt from special assessment; and the passage of a charter for the city of Portland, which had been consolidated with East Portland by Laws (1891), p. 796, providing (Laws (1893), p. 810, c. 9) that the council may improve any street thereof and assess the cost on abutting property, is not in conflict with U. S. Const. art. 1, § 10, par. 1, providing that no state shall pass any law impairing the obligations of contracts. Ladd *v.* Portland, 32 Oreg. 271, 51 Pac. 654, 67 Am. St. Rep. 526. Nor did the provision in the said consolidation act that no rights previously vested should be lost or impaired prohibit the legislature from authorizing the city of Portland to tax street improvements to abutting property-owners who had paid a tax for an improvement of the same street before the consolidation under the charter of East Portland, providing that a property-owner should be required to pay tax for the improvement of the same street but once. Ladd *v.* Portland, *supra*.

Proceedings carried to finality before annexation.— Where a special assessment for street improvements in a town, part of which was subsequently annexed to an adjacent city, had been levied and collected in full, the proceedings had been "carried to a finality," within Hurd Rev. St. Ill. (1899) p. 302, c. 24, providing that, when part of a town is annexed to a city, street improvement proceedings instituted prior to such annexation may be carried to a finality; and the annexed portion of the town was not liable to a supplemental assessment, levied after the annexation, to pay a deficiency in the prior assessment. Cicero *v.* Hill, 193 Ill. 226, 61 N. E. 1020.

1. Stone *v.* Charlestown, 114 Mass. 214.

2. Gilford *v.* Munsey, 68 N. H. 609, 44 Atl. 536.

Annexation of part of the territory of another municipality see *infra*, II, B, 2, g, (II), (D).

ment, the village becomes annexed to a city, the city has the same power in respect to the street improvement and assessment as the village had prior to such annexation, and it may discontinue the proceedings, abandon the improvement, and refuse to collect the assessment.[3]

(II) *Detachment of Territory and Division* — (A) *In General.* A statute dividing a municipal corporation as originally chartered and incorporating out of its territory two new municipalities abolishes the corporate and municipal existence of the original municipality.[4] But such is not the effect of merely detaching a part of the territory of one municipality and annexing it to another or erecting it into a separate municipality.[5]

(B) *Property, Rights, and Privileges.* The general rule is that, on the division of a public corporation into separate communities, each becomes entitled to hold in severalty the public property which falls within its limits, in the absence of provision to the contrary;[6] but where a part of the territory of a municipality is set off and incorporated as or annexed to a new municipality, the original municipality still retains all its property, rights, powers, and privileges.[7] Legisla-

3. Chicago *v.* Weber, 94 Ill. App. 561.

4. Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Montpelier *v.* East Montpelier, 27 Vt. 704.

5. See Blanchard *v.* Cumberland, 18 Me. 113. And see *infra*, II, B, 2, g, (II), (B), text and note 7.

6. *Indiana.*— Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626; Allen School Tp. *v.* Macy School Town, 109 Ind. 559, 10 N. E. 578.

Louisiana.—West Carroll Parish *v.* Gaddis, 34 La. Ann. 928; New Orleans First Municipality *v.* General Sinking Fund Com'rs, 1 Rob. 279; Municipality No. 1 *v.* Brothers, 15 La. 128; Municipality No. 1 *v.* Barnett, 13 La. 344.

Massachusetts.—Lynn *v.* Nahant, 113 Mass. 433; Danvers School Dist. No. 6 *v.* Tapley, 1 Allen 49; Stoneham School Dist. No. 1 *v.* Richardson, 23 Pick. 62.

New York.— North Hempstead *v.* Hempstead, 2 Wend. 109 [*affirming* Hopk. 288]; Denton *v.* Jackson, 2 Johns. Ch. 320.

Tennessee.— Prescott *v.* Lennox, 100 Tenn. 591, 47 S. W. 181.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.*

But see Winona *v.* Winona County School-Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46.

In Indiana, however, it has been held that the rule does not apply to money, choses in action, or other kindred property, in existence at the time of the division, but that in such case, in the absence of an express provision as to that class of property, the respective claims of the two corporations become a matter of equitable jurisdiction, and must be adjusted on equitable principles. Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626. See also Towle *v.* Brown, 110 Ind. 599, 10 N. E. 628; Johnson *v.* Smith, 64 Ind. 275.

Property held in trust.— Where a municipal corporation holds property as trustee of a charity or of other private rights and interests, and it is divided, the old corporation being abolished and two new corporations being created, it has been held that neither of the new corporations takes the property or any interest therein. Montpelier *v.* East Montpelier, 27 Vt. 704. In such a case a court of equity will assume the execution of the trust, and if necessary will appoint new trustees to take charge of the property and carry the trust into effect. Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; 1 Dillon Mun. Corp. § 64. See also Philadelphia *v.* Fox, 64 Pa. St. 169; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53.

7. *California.*— Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149.

Illinois.— People *v.* Township 39 School Trustees, 86 Ill. 613.

Kansas.— Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415.

Maine.— South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Frankfort *v.* Winterport, 54 Me. 250; North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530; Poland *v.* Strout, 19 Me. 121.

Michigan.— Springwells Tp. *v.* Wayne County Treasurer, 58 Mich. 240, 25 N. W. 329.

Minnesota.— Winona *v.* Winona County School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46.

New Hampshire.— Greenville *v.* Mason, 53 N. H. 515.

New Jersey.—Bloomfield Tp. *v.* Glen Ridge, 55 N. J. Eq. 505, 37 Atl. 63 [*affirming* 54 N. J. Eq. 276, 33 Atl. 925].

New York.— Denton *v.* Jackson, 2 Johns. Ch. 320.

Wisconsin.— Milwaukee *v.* Milwaukee, 12 Wis. 93.

United States.—Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.*

Where the new corporation attempts to interfere by ordinance with such property, the appropriate remedy in New Jersey is by certiorari to set aside the ordinance. Bloom-

tion is not necessary to apportion the real property upon division;[8] although in many instances there is such legislation.[9] The legislature may make such a division of the common property as in its opinion is for the public welfare, or may make provision for such division, and this is generally done.[10]

(c) *Contracts and Indebtedness.* On the division of a municipality the legislature may provide for apportionment of the burden of the indebtedness between the two new municipalities or the old and new, as the case may be, or itself determine the portion to be borne by each.[11] In the absence of such legislative apportionment, the old municipality if still existing, and it alone, must bear the

field Tp. *v.* Glen Ridge, 55 N. J. Eq. 505, 37 Atl. 63.

8. See State *v.* Lake City, 25 Minn. 404; Prescott *v.* Lennox, 100 Tenn. 591, 47 S. W. 181.

9. South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Frankfort *v.* Winterport, 54 Me. 250; Poland *v.* Strout, 19 Me. 121; Sanbornton *v.* Tilton, 53 N. H. 438.

10. *California.*— Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149.

Maine.—South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502 (holding also that it is to be presumed that the legislature considered all the equities in doing so; and where the town property, consisting of school-houses, ferry wharf, and other like property, has been apportioned by the legislature by giving to each town what was situated within its territory, the language of the statute cannot be modified by the court to meet any supposed equity); Frankfort *v.* Winterport, 54 Me. 250; North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530; Poland *v.* Strout, 19 Me. 121; North Yarmouth *v.* Cumberland, 6 Me. 21 (holding that where, on the division of a municipality and the incorporation of a new municipality out of its territory, commissioners were appointed by the legislature to ascertain the amount to be paid by the one municipality to the other to do justice between them, and it was provided that an action might be brought on their award, an award made by them would not be reviewed on the ground of excess of powers or mistake of law or fact).

Massachusetts.— Tisbury *v.* West Tisbury, 171 Mass. 201, 50 N. E. 522 (holding also that St. (1892) c. 216, providing for the division of the town of Tisbury, and that the corporate property within the respective limits of the new towns shall be owned by them, subject to such payment in cash from one to the other as will equalize the value of the property after division, and dividing the debt of the town in the ratio of seven tenths to Tisbury and three tenths to West Tisbury, does not entitle the town of Tisbury to seven tenths of the town property); Wrentham *v.* Norfolk, 114 Mass. 555 (holding that a public common reserved by the original proprietors for public uses was not, and a school fund held generally for the support of schools was, corporate property within the meaning of St. (1870) c. 35, § 4, providing for the apportionment of "corporate property" on the detachment of territory from a municipality and creation of a new municipality); Simmons *v.* Nahant, 3 Allen 316 (holding, however, that St. (1853) c. 114, incorporating a municipality and providing that it should be entitled to receive of another municipality its proportion of all the corporate property then owned by the latter, did not of itself transfer or vest in the new municipality the title to any real estate owned by the latter).

New Hampshire.— Gilford *v.* Munsey, 68 N. H. 609, 44 Atl. 536; Tilton *v.* Sanbornton, 55 N. H. 610 note; Sanbornton *v.* Tilton, 55 N. H. 603; Greenville *v.* Mason, 53 N. H. 515; Bristol *v.* New Chester, 3 N. H. 524.

Pennsylvania.—Munhall Borough *v.* Mifflin Tp., 210 Pa. St. 527, 60 Atl. 155.

Vermont.— Collins *v.* Burlington, 44 Vt. 16.

Wisconsin.— Washburn Water Works Co. *v.* Washburn, 129 Wis. 73, 108 N. W. 194; Milwaukee *v.* Milwaukee, 12 Wis. 93.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.* See also *infra*, IV, F, 2.

Property held in trust.— It has been held that where a municipal corporation is abolished and its territory erected into two new corporations, a provision in the statute for a division of the property of the old corporation does not apply to property held in trust. Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Montpelier *v.* East Montpelier, 27 Vt. 704.

Finality of award of commissioners.— Under Mass. Pub. St. c. 153, § 6, providing that the superior court may, after verdict or decision, report the case for determination by the supreme judicial court, a superior court may report questions of law arising out of the report of commissioners to divide the property of towns, even though the statute under which the commissioners are appointed provides that their award when accepted by the court shall be binding. Tisbury *v.* West Tisbury, 171 Mass. 201, 50 N. E. 522.

Equity jurisdiction to apportion assets see Munhall Borough *v.* Mifflin Tp., 210 Pa. St. 527, 60 Atl. 155.

Right to jury trial on apportionment see JURIES, 24 Cyc. 103.

11. *California.*—Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178, holding that where territory is excluded from a municipal corporation under an act of the

entire debt.[12] When, however, the old municipality is legislated out of existence, and the territory assigned to other municipal corporations, the latter must pay the debts of the former, in the ratio of the territory allotted to each; and the legislature

legislature, the legislature, in permitting the division, may adjust the burden of the existing corporate debts, and decree that the excluded territory shall continue to bear its former proportion of the burden, but such adjustment by the legislature not being in the nature of a contract, the provisions thereof may be changed at pleasure, where the constitutional rights of creditors of the corporation are not invaded; and the legislature may therefore by subsequent act provide for relieving the excluded territory, or for such future adjustments as the equities of the case may suggest.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149 [*affirmed* in 10 How. (U. S.) 511, 541, 13 L. ed. 518, 531].

Kansas.— Hurt *v.* Hamilton, 25 Kan. 76; Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101; Sedgwick County *v.* Bunker, 16 Kan. 498.

Kentucky.— Montgomery County *v.* Menefee County Ct., 93 Ky. 33, 18 S. W. 1021, 13 Ky. L. Rep. 891.

Maine.— South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Vose *v.* Frankfort, 64 Me. 229; North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530; North Yarmouth *v.* Cumberland, 6 Me. 21.

Massachusetts.— Tisbury *v.* West Tisbury, 171 Mass. 201, 50 N. E. 522; Cottage City *v.* Edgartown, 134 Mass. 67.

Minnesota.— State *v.* Demann, 83 Minn. 331, 86 N. W. 352. See also Humboldt *v.* Barnesville, 83 Minn. 219, 86 N. W. 87.

Mississippi.— Chickasaw County *v.* Clay County, 62 Miss. 325.

New Jersey.— Neilson *v.* Newark, 49 N. J. L. 246, 8 Atl. 292, holding that an act dividing a township between two municipalities and directing the debts owing by the township to be paid, in certain proportions, by the two corporate bodies, imposed upon them a duty to pay the debts, which was enforceable by creditors.

New York.— Queens County *v.* New York, 48 N. Y. App. Div. 337, 62 N. Y. Suppl. 1047. And see other cases in this jurisdiction cited *supra*, II, B, 2, g, (I), (G), note 87.

Oregon.— Morrow County *v.* Hendryx, 14 Oreg. 397, 12 Pac. 806.

Pennsylvania.— Munhall Borough *v.* Mifflin Tp., 210 Pa. St. 527, 60 Atl. 155 (holding that equity has jurisdiction under the act of June 12, 1878 (Pamphl. Laws 184), to adjust the liabilities where a borough has been set off from a township); Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959. On the organization of a new borough out of a part of an old one which has a funded debt, under the act of May 29, 1889 (Pamphl. Laws 393), the liabilities of the old borough and its creditors may be adjusted under the act of June 1, 1887 (Pamphl. Laws 285), which provides for adjusting the liabilities for "all indebtedness" of a borough when proceedings are commenced for changing its limits. Darby Borough's Appeal, 140 Pa. St. 250, 21 Atl. 394.

Texas.— Mills County *v.* Brown County, 85 Tex. 391, 20 S. W. 81.

Vermont.— Collins *v.* Burlington, 44 Vt. 16, holding that where a municipality was divided into two distinct municipalities, and money which was the property of the whole municipality before division, which had been set apart for the satisfaction of a certain class of claims, was also divided between the two corporations proportionally, an action upon one of the claims could not be maintained against the two corporations jointly, but an action should be brought against each separately for its individual liability.

United States.— Brewis *v.* Duluth, 9 Fed. 747, 3 McCrary 219, 13 Fed. 334, 3 McCrary 223.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.* And see *infra*, IV, G, H.

No right of appeal from a decision of the court accepting an award of commissioners apportioning indebtedness see Cottage City *v.* Edgartown, 134 Mass. 67.

Right to jury trial on apportionment of indebtedness see JURIES, 24 Cyc. 103.

12. *California.*—Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149 [*affirmed* in 10 How. (U. S.) 511, 541, 13 L. ed. 518, 531].

Kentucky.— Miller *v.* Pineville, 89 S. W. 261, 28 Ky. L. Rep. 379, holding that in the absence of statutory or constitutional provisions to the contrary, property within the territory placed beyond the limits of a city, on the boundaries thereof being changed as authorized by St. (1903) § 3483, is not subject to taxation for the amount of bonds issued by the city while the territory was within its limits.

Maine.— South Portland *v.* Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Massachusetts.—Waldron *v.* Lee, 5 Pick. 323; Richards *v.* Dagget, 4 Mass. 534.

Minnesota.— State *v.* Lake City, 25 Minn. 404, holding that the legislature may organize a new municipal corporation out of the territory forming part of an existing one, without making provision for existing debts and obligations, and its failure so to do does not impair the obligation of the contract, although the resources of the town were thereby reduced; and in such case the original corporation is alone liable for the indebtedness.

Mississippi.—Chickasaw County *v.* Sumner County, 58 Miss. 619.

New Hampshire.— Londonderry *v.* Derry, 8 N. H. 320.

cannot constitutionally impair the rights of creditors in this respect.[13] An action on a contract made by a city before its division must be brought against the city itself, and will not lie against a part cut off, even though it is benefited by the contract.[14] On detachment of territory from a municipal corporation and creation of a new and separate municipality, contracts created by ordinance of the original municipality, extending throughout its limits, cannot be abrogated by the new municipality by annulling the ordinance within its limits.[15]

(D) *Taxes and Assessments.* Where taxes are assessed and levied or become due before territory is detached from a municipal corporation, the persons in such territory remain liable, and taxes may be collected from them by the original municipality after the division;[16] but in the absence of statutory provision taxes cannot be assessed or levied on land by a municipality after the land has been detached therefrom;[17] and the power to enforce a lien for taxes on land which was within the city when the taxes fell due, but which by amendment of the city

Pennsylvania.— North Lebanon *v.* Arnold, 47 Pa. St. 488, holding that residents of an incorporated borough are not individually responsible, unless made so by statute, for any portion of the existing indebtedness of the corporation after they are thrown out by a change of its limits under an act of the legislature, and made citizens of an adjoining township.

Wisconsin.— Land, etc., Co. *v.* Oneida County, 83 Wis. 649, 53 N. W. 491; Milwaukee *v.* Milwaukee, 12 Wis. 93. When a part of the territory of a town is detached therefrom and annexed to another town or created into a new town, the old town remains liable for all debts existing at the time such territory is detached, and none of such debts become a charge against the town to which the territory is annexed, or against the new town created, unless specially so provided in the statute or ordinance making the change; and the fact that the territory detached had formerly been a separate town and had then incurred the debts in question does not alter the rule. Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

United States.— Brewis *v.* Duluth, 9 Fed. 747, 3 McCrary 219, 13 Fed. 334, 3 McCrary 223.

See 36 Cent. Dig. tit. "Municipal Corporations," § 105 *et seq.*

13. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Brewis *v.* Duluth, 9 Fed. 747, 3 McCrary 219, 13 Fed. 334, 3 McCrary 223; Beckwith *v.* Racine, 3 Fed. Cas. No. 1,213, 7 Biss. 142. Where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the remedy of the creditors of the extinguished corporation is in equity against the corporations succeeding to its property and powers. Mt. Pleasant *v.* Beckwith, *supra*; Brewis *v.* Duluth, *supra*. See also *supra*, II, B, 2, g, (I), (G). If two new townships are created out of an old one a judgment creditor of the latter may revive the judgment by scire facias against each of the new townships, subject to only one satisfaction. Plunkett's Creek Tp. *v.* Crawford, 27 Pa. St. 107.

14. Lerey *v.* Municipality No. 3, 18 La. 312.

15. Jersey City, etc., St. R. Co. *v.* Garfield, 68 N. J. L. 587, 53 Atl. 11, holding that where a township committee passed an ordinance granting certain rights to the prosecutor, an electric railway company, and after the acceptance of its ordinance by the prosecutor, a borough was formed out of a part of the territory of the township, an ordinance of the borough annulling the ordinance of the township was void.

16. New Decatur *v.* Nelson, 102 Ala. 556, 15 So. 275 (holding that where the corporate limits of a town are changed after the ending of the tax year but before the taxes are collected by excluding certain lots from the corporation limits, the collection of the taxes on such lots will not be enjoined); Waldron *v.* Lee, 5 Pick. (Mass.) 323 (holding that if, after a tax has been raised and assessed on the inhabitants of a school-district, part of the district is laid off into another district, the inhabitants of such part remain liable to pay the tax, the debt being fixed by the assessment); Springwells Tp. *v.* Wayne County Treasurer, 58 Mich. 240, 25 N. W. 329 (holding that the right of a municipality to a liquor tax becomes vested at the time at which the law requires the tax to be paid; and if not then paid the subsequent annexation of part of the territory to another municipality before its payment does not transfer to the latter municipality the right to the money); Deason *v.* Dixon, 54 Miss. 585.

17. Miller *v.* Pineville, 89 S. W. 261, 28 Ky. L. Rep. 379 (holding that in the absence of statutory or constitutional provisions to the contrary, property within the territory placed beyond the limits of a city, on the boundaries thereof being changed as authorized by St. (1903) § 3483, is not subject to taxation for the payment of bonds issued by the city while the territory was within its limits); Richards *v.* Dagget, 4 Mass. 534 (holding that if, after the inhabitants of a school-district have voted to raise money for building a school-house, and before the same is assessed, the town sets off certain of the inhabitants and forms them into a separate district, such inhabitants are not liable to be assessed for the money so voted). See also Gillmor *v.* Dale, 27 Utah 372, 75 Pac. 932.

charter is, before sale day, outside the new boundaries, is lost in the absence of a statute to the contrary,[18] although the owner is not released from liability for the taxes, and his property remaining within the city may be sold for the entire tax.[19] The effect of division of a municipality, or detachment of territory therefrom, on taxes and assessments and on the right to levy and collect the same, is generally the subject of express statutory provision.[20]

3. Wards, Precincts, and Other Subdivisions — a. In General. Authority to divide or redivide a city into wards, districts, or precincts emanates from the legislature.[21] Frequently power is conferred upon city councils by the legislature to redistrict their cities into an appropriate number of wards whenever, in their opinion, there is proper occasion for so doing;[22] the number, size, and boundaries

But see New Decatur *v.* Nelson, 102 Ala. 556, 15 So. 275.

18. Deason *v.* Dixon, 54 Miss. 585. But see New Decatur *v.* Nelson, 102 Ala. 556, 15 So. 275.

19. Deason *v.* Dixon, 54 Miss. 585.

20. See Vose *v.* Frankfort, 64 Me. 229 (holding that under the act of 1867, chapter 291, setting off a part of Frankfort to the town of Winterport, the inhabitants set off, for the purpose of paying the existing debts of the town of Frankfort, remain subject to taxation as if the act had not been passed); Frankfort *v.* Winterport, 54 Me. 250 (holding that under Spec. Laws (1860), c. 42, § 2, relating to the incorporation of the town of Winterport out of the town of Frankfort, and providing that "the inhabitants of Winterport shall pay all unpaid taxes legally assessed on them by the town of Frankfort," the original town retained the right to collect unpaid taxes); Gilford *v.* Munsey, 68 N. H. 609, 44 Atl. 536 (holding that under Laws (1893), c. 241, annexing a part of the town of Gilford to the city of Laconia as "Ward 6," specifying that certain property should belong to Gilford, and that Ward 6 "should have and own all the other corporate assets and property of the present town of Gilford," taxes due Gilford in such territory, but uncollected at the date of annexation, belonged to Laconia).

Under Pa. Act, June 1, 1887, relating to municipal indebtedness in case of the formation of a new borough by detaching part of the territory of another borough, making it the duty of the court to appoint an auditor, who shall ascertain and report to it the existing liabilities, with the form of a decree adjusting the liabilities for all indebtedness, and providing that the court may direct a special tax to be levied on the property so detached from such borough, for the payment of so much of the indebtedness as may be awarded against it, and direct how it shall be assessed and collected, such new borough cannot levy a special tax to meet its part of the debts of the old borough, in the absence of direction therefor in such decree. But where a special tax has been levied by the new borough to meet such debts without authority, because not directed to do so by such decree, the court may amend its decree *nunc pro tunc*, and thus legalize the prior ordinance providing for the tax; and this should be done where the court finds that the special tax is a reasonable and proper levy. Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959.

21. People *v.* Young, 38 Ill. 490.

A city council has no power to change the wards except in so far as such power is conferred by the legislature. People *v.* Young, 38 Ill. 490.

General act repeals city charter.— A grant of power to change ward lines contained in a general act supersedes and repeals a city charter in so far as it refers to the subject. State *v.* Bayonne, 54 N. J. L. 125, 22 Atl. 1006.

Construction of particular statutes see Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333; State *v.* Holden, 19 Nebr. 249, 27 N. W. 120; Wood *v.* Atlantic City, 56 N. J. L. 232, 28 Atl. 427 (holding that a statute authorizing cities "already divided into wards" to subdivide the wards when they reached a certain size was not confined to cities which had been divided into wards before its passage); State *v.* Jersey City, 53 N. J. L. 112, 20 Atl. 829 (consent of three fourths of common council or board of aldermen); People *v.* Shepard, 36 N. Y. 285 (description of territory to be included in district); *In re* Norristown, 3 Pa. Co. Ct. 475.

Constitutionality of statutes see People *v.* Shepard, 36 N. Y. 285. Pa. Act, May 14, 1874, prescribing the manner by which courts may divide the boroughs into wards, is not in conflict with Const. art. 8, providing that townships and boroughs shall be divided into election districts as the court of quarter sessions may direct. *In re* Norristown, 3 Pa. Co. Ct. 475.

Injunction.— A taxpayer has a right of action to restrain a city from holding an election in a new ward, claimed to have been illegally created, and from expending the public revenues in defraying the expenses thereof. Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333.

Effect of repeal of statute.— The repeal by the legislature of a statute, which conferred upon city authorities the power to divide the municipality into wards, does not have the effect to abolish existing legally established wards. State *v.* Stewart, 52 Nebr. 243, 71 N. W. 998.

22. People *v.* Danville, 147 Ill. 127, 35 N. E. 154; Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

thereof being left to the discretion of the council.[23] If, however, no discretion is given by the statute, its provisions must be strictly conformed to.[24] In some states the legislature in providing for such division must observe the principle of equality of representation.[25] In others the division must be made with regard to equality of population.[26]

b. Proceedings to Divide. The subdivision of the wards of a city is a legislative act which should be done by ordinance or resolution.[27] The procedure is purely statutory and varies in the different states.[28] In Pennsylvania the act providing for the division of boroughs into wards[29] enacts that upon the petition of freeholders resident in the borough,[30] the court of quarter sessions shall appoint commissioners to inquire into the propriety of making such division,[31] and report

Presumption of necessity.— When a city council sees fit, in its legislative discretion, to change the boundaries of wards, it will be presumed, at least in the absence of clear proof to the contrary, that it acts upon some sufficient reason or necessity in doing so. People *v.* Danville, 147 Ill. 127, 35 N. E. 154.

Change of population, as between the wards, may afford a sufficient ground for redistricting the wards. People *v.* Danville, 147 Ill. 127, 35 N. E. 154.

Power to ascertain and define the wards into which a city is divided does not authorize the council to increase or diminish the number of wards. Schroder *v.* Charleston, 3 Brev. (S. C.) 533. See also People *v.* Young, 38 Ill. 490.

23. Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330, holding that one sewerage district may be prescribed for a whole city.

24. Osgood *v.* Clark, 26 N. H. 307.

25. People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465; State *v.* Cincinnati, 6 Ohio S. & C. Pl. Dec. 196, 3 Ohio N. P. 127.

Annexed territory should be divided into new wards, or attached to existing wards, as may best observe that requirement. State *v.* Cincinnati, 6 Ohio S. & C. Pl. Dec. 196, 3 Ohio N. P. 127.

26. Griffin *v.* Wanser, 57 N. J. L. 535, 31 Atl. 222.

Cities may be constitutionally classified on the basis of population, for the purpose of fixing the size of their wards. Wood *v.* Atlantic City, 56 N. J. L. 232, 28 Atl. 427.

27. State *v.* Darrow, 65 Minn. 419, 67 N. W. 1012.

In Iowa under Code, tit. 5, § 641, authorizing the creation and changing of city wards, without providing whether the power shall be exercised by ordinance or resolution, and section 680, providing that cities may make ordinances "for carrying into effect or discharging the powers and duties conferred by this title," it was held that a change of the wards of a city must be by ordinance, and not by resolution. Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333. An ordinance fixing the wards of a city can be amended or repealed only by another ordinance, and not by resolution. Cascaden *v.* Waterloo, *supra*. Where an ordinance divides a city into four wards, a resolution changing two of them, and creating a fifth, is void under Code, § 681, where it does not contain "the entire ordinance or section revised or amended," as required by such section. Cascaden *v.* Waterloo, *supra*.

28. See the statutes of the several states.

29. Act March 14, 1874.

30. *In re* North Chester Election Dist., 3 Pa. Co. Ct. 247; *In re* Freeland, 9 Kulp (Pa.) 387; *In re* Dickson City Borough, 1 Lack. Leg. N. (Pa.) 131.

In a proceeding to divide a borough into wards, it is not necessary for the petitioners to ask for division into a different number of wards and suggest the boundaries thereof. The proper practice is to ask for a division, leaving the details as to the number of wards and the boundaries thereof to the judgment of the commissioners under the supervision of the court. *In re* Gettysburg, 90 Pa. St. 355.

31. See Brown *v.* Fowzer, 114 Pa. St. 446, 6 Atl. 706, holding that an order for the appointment of commissioners to divide a borough into wards, under the act of May 14, 1874 (Purdon Dig. p. 201, § 2, pl. 30), which contains no direction to them to inquire into the propriety of making such division, nor any equivalent for it, is fatally defective.

A proper notice of the proceedings should be directed by the court on the filing of the petition, and the character of the notice to be given should be embodied in the order. *In re* Columbia Borough, 163 Pa. St. 259, 30 Atl. 6; Brown *v.* Fowzer, 114 Pa. St. 446, 6 Atl. 706; *In re* Shamokin Borough, 6 Pa. Co. Ct. 573; *In re* Exeter Borough, 8 Kulp (Pa.) 115.

Meetings outside of borough.— Where commissioners appointed to inquire into the propriety of dividing a borough into wards held three meetings, all outside the borough, and did not visit the borough or examine the territory, their report should be set aside. *In re* Sharpsburg Borough, 30 Pittsb. Leg. J. N. S. (Pa.) 267, 13 York Leg. Rec. 156.

Notice of adjourned meeting.— Commissioners before whom a petition to divide a borough into wards is tried need not give notice of an adjourned meeting, when the adjournment is public and a matter of convenience, of which all the parties must take notice. *In re* Lansford Borough, 141 Pa. St. 134, 21 Atl. 503.

to the court at its next term,[32] which shall make such order thereupon as shall appear just and reasonable.[33]

c. Review. In some states citizens whose domiciles have been changed by a resolution of the common council altering the ward limits of a city may bring certiorari to test the validity of the action of the council.[34] In Pennsylvania it is provided that when a report has been made by the commissioners on petition to divide a borough into wards, etc., it shall be conferred *nisi* by the court, and that such confirmation shall become absolute, unless exceptions are filed not later than the third day of the next term, and that, if exceptions are filed as aforesaid, they shall be disposed of on such evidence as shall be deemed just, provided that, if desired, a review may be had if, in the opinion of the court, it may be necessary to secure a fair adjudication.[35]

4. Plans, Plats, and Surveys. Generally speaking the proceedings under this head are statutory and the statutes must be substantially followed.[36] As soon as a plat of an addition to a town has been duly acknowledged and recorded, such

32. In proceedings under the act of March 14, 1874 (Pamphl. Laws 159), to divide a borough into wards to "suit the convenience of the inhabitants," a report of the commissioners stating "that the necessities of the petitioners require the division" is insufficient. *In re* Borough, 3 Lanc. L. Rev. (Pa.) 179.

Notice of proceedings.— The report of the commissioners should specify particularly what notice was given, so that it may appear on the face of the proceedings that the order of court has been complied with. *In re* Columbia Borough, 163 Pa. St. 259, 30 Atl. 6; Brown *v.* Fowzer, 114 Pa. St. 446, 6 Atl. 706; *In re* Shamokin Borough, 6 Pa. Co. Ct. 573; *In re* Borough, 3 Lanc. L. Rev. (Pa.) 179.

Time for making report.— A report by commissioners after the time in which they are required to report, when their authority has elapsed, is of no force, and cannot be confirmed. *In re* Jermyn Borough, 3 C. Pl. (Pa.) 39. *Compare In re* Fifteenth Ward, 11 Phila. (Pa.) 406.

33. The report will be confirmed absolutely unless exceptions be filed to the same not later than the third day of the next term after that to which the report is presented and confirmed *nisi*. *In re* Strasburg Borough, 2 Lanc. L. Rev. (Pa.) 175.

34. State *v.* Bayonne, 54 N. J. L. 125, 22 Atl. 1006.

35. Act May 14, 1874, § 3 (Pamphl. Laws (1874), p. 159).

A petition for review in a proceeding to divide into wards under the above statute need not be signed by freeholders, as is required by section 2 with respect to a petition for such division. *In re* Freeland, 9 Kulp (Pa.) 387. Nor need a petition for review state, as in the case of the petition for division into wards, the number of wards desired. *In re* Freeland, *supra*.

Time of filing petition for review.— Where the report of commissioners appointed to divide a borough into wards is confirmed absolutely, exceptions not having been filed to the same within the time allowed, a petition for review filed thereafter is too late, and will be dismissed. *In re* Strasburg Borough, 2 Lanc. L. Rev. (Pa.) 175.

Discretion.— Whether there shall be a review under the above mentioned statute is purely a matter of judicial discretion. *In re* Freeland, 9 Kulp (Pa.) 387.

36. State *v.* Head, 34 Kan. 419, 8 Pac. 722, holding that under the act of March 13, 1879, making provision for changing the fronting of lots in cities, the proceeding, being a statutory one, must be substantially followed; and that the certificate must follow the statute, and is fatally defective in not describing the lots to be changed, or in making such references as to enable them to be ascertained. See People *v.* Carpenter, 1 Mich. 273, plan of old town of Detroit.

Substantial compliance with statute sufficient see Gebhardt *v.* Reeves, 75 Ill. 301, holding therefore that the fact that a plat and survey were made by one not a county surveyor did not invalidate the proceedings, as it was the acknowledging and recording of the plat that vested the fee of streets and alleys in the corporation; and also that the fact that no corner stone was designated on the plat, as required by statute, did not render the plat inoperative to pass the title to streets and alleys, where other monuments were designated from which the location of the lots, streets, and alleys could be ascertained with equal certainty.

Construction and application of particular statutes see Taylor *v.* Ft. Wayne, 47 Ind. 274 (holding that a plat of lots, not purporting to be the plat of a town or of an addition to a town or city, but simply of out lots in a congressional section of land, was not such a plat as was recognized and entitled to record by Gavin & H. St. Ind. § 632); Giltner *v.* Albia, 128 Iowa 658, 105 N. W. 194 (holding that under Code, § 915, providing that the plat of an addition to a city shall be approved by the city council as a condition precedent to its record, and that all plats shall be considered by the council, and, if the plat conforms to the statute, the council shall direct its approval, it is only necessary, to entitle a proprietor to an approval of his plat, that he comply with the

addition becomes an integral part of the town.[37] Under some statutes a plan of a municipality is complete on approval by the court and before it is recorded,[38] although the statutes generally require recording.[39] The municipal board having delegated authority to reject plans, or revisions of plans and surveys, may order a general rearrangement of the streets or a street may be blotted out or vacated and others substituted.[40] A city in accepting and approving a plat performs a discretionary act which the courts will not revise so long as no legal rule is

statute, and the city council can consider it for no other purpose); Rice *v.* Highland Imp. Co., 56 Minn. 259, 57 N. W. 452 (holding that the city of Duluth, the charter of which (Spec. Laws (1889), c. 19, § 3) provides for the official supervision of town plats by the board of public works and the common council, is excepted from the operation of Gen. Laws (1889), c. 56, requiring town plats to be certified by the county surveyor, but excepting plats of cities "having a duly constituted officer or officers with jurisdiction over said plats for the purposes above mentioned"); Kissell *v.* St. Louis Public Schools, 16 Mo. 553 (survey of St. Louis under Act Cong. June 13, 1812).

Finality of confirmation by board.—The confirmation of a plan of survey by the board of surveyors of Philadelphia under the Pennsylvania act of June 6, 1871, sections 1, 2, is final, and no appeal lies to the court of quarter sessions. *In re* Plan No. 166, 93 Pa. St. 221. *Compare* Ferree *v.* Board of Surveyors, 9 Phila. (Pa.) 518.

Resurvey.—Under Tex. Laws (1893), p. 176, § 1, limiting the area of towns containing less than two hundred thousand inhabitants to two square miles, and section 2, making it the duty of existing towns with more than that territory to cause a resurvey within ninety days after the passage of the act, and Laws (1895), p. 17, reënacting the above statute for the purpose (section 4) of extending time to towns that had failed to make a survey within the time limited, the time for making a resurvey was extended by the latter act to ninety days from its passage. State *v.* Broach, (Tex. Civ. App. 1896) 35 S. W. 86. See also Wilson *v.* Bristley, 13 Tex. Civ. App. 200, 35 S. W. 837.

Time of performance of duty see Ripka's Appeal, 21 Pa. St. 55, holding that under the act of 1842, by which the road committee appointed by the burgess and council of a borough were enjoined to survey the roads, streets, and alleys already laid out and within the borough, and to lay out such others, or to widen those already laid out, as they should deem necessary, and to make a draft or plan thereof and return it to the court, the making and confirmation of surveys and plans of the streets, etc., in parts of the borough at different times, was regular, since, as no time was prescribed for the performance of the duty, part could be discharged at one time and the residue at another.

A statement at the foot of a town plat, that certain real estate contained therein was reserved for a public square did not indicate an intention to part with the property, but rather the opposite. Scantlin *v.* Garvin, 46 Ind. 262.

An explanatory note on a town plat which is inconsistent with the plat, including courses and distances marked thereon, will not control the other facts appearing, when a question of the location of a lot is in controversy. Hunter *v.* Eichel, 100 Ind. 463.

Effect of plan, plat, or survey as evidence.—A survey made by the county surveyor, as provided by statute, conclusively binds the parties thereto unless an appeal be taken. Hunter *v.* Eichel, 100 Ind. 463. Where the legislature, in granting a charter to the city of St. Paul, provided for a new and accurate survey of streets, etc., and required an accurate plat thereof to be made and recorded, and made such map *prima facie* evidence, it was held that if, in the making of such survey and map, stakes were removed and the contour of lots changed, it would be presumed that the prior survey was the erroneous one. Wilder *v.* St. Paul, 12 Minn. 192.

Reservations in plat by landowner.—Where a city possesses certain rights and powers over property added to its territory and the streets therein, such rights cannot be controlled by reservations in a plat of the addition made by the original proprietor, which are against public policy. Ward *v.* Detroit, etc., R. Co., 62 Mich. 46, 28 N. W. 775, 785; Riedinger *v.* Marquette, etc., R. Co., 62 Mich. 29, 28 N. W. 775.

37. Warren *v.* Daniels, 72 Ill. 272.

38. Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582.

39. Winona *v.* Huff, 11 Minn. 119.

Effect of failure to record.—Where, however, the city of Omaha was laid out in lots, blocks, streets, and squares, and the same were recognized, used, and enjoyed, and the lots taxed as such, but through someone's neglect of duty no map or plat of the city was ever filed or recorded, it was held that after twenty-five years inquiry would not be made as to whether as the result of such neglect the lots had no legal existence, as a decision to that effect would be against public policy. Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245.

Legislative recognition.—An act of the legislature distinctly recognizing the fact of the record of a particular town plat is admissible as evidence of the fact of the record of the plat, the presumption being that the statutory requisites to entitle the plat to record were complied with. Winona *v.* Huff, 11 Minn. 119.

40. *In re* Arch St., 10 Phila. (Pa.) 117.

violated.[41] In the absence of a statute there is no power on the part of the common council, the city surveyors, or any one else to divide up the land of a citizen into lots, and to make and record, or to cause to be made and recorded, plats or maps thereof, without his privity, knowledge, or consent, or in like manner to change the numbers, designation, or description of his lots contained in a legally recorded plat, so as to authorize taxation according to the plats or maps so made,[42] and statutes providing for a platting of land in a municipality usually give such right to the owners only.[43] In some jurisdictions the owner of a lot or lots platted as an addition to a municipality is authorized by statute to vacate the plat by an instrument in writing, duly executed and recorded, and without the concurrence of the municipal authorities.[44] The owner of land may plat it into

41. Funke *v.* St. Louis, 122 Mo. 132, 26 S. W. 1034.

42. Merton *v.* Dolphin, 28 Wis. 456.

43. People *v.* Board of Public Works, 41 Mich. 724, 49 N. W. 924 (holding that an administrator was not the owner of his decedent's land within Comp. Laws, c. 32, providing that the owner of land might plat the same and lay out streets thereon, and that he was not authorized to make such plat by a license from the probate court to sell the decedent's land); Merton *v.* Dolphin, 28 Wis. 456.

44. Littler *v.* Lincoln, 106 Ill. 353, holding that Rev. St. (1874) c. 109, §§ 6, 7, authorizing the owner or owners of lots platted as an addition to a town to vacate the plat, or any part thereof, by a written instrument, etc., does not require the concurrence or joint action of the municipal authorities with the owner of the premises, but allows him of his own volition alone to vacate the plat or part of it, by his deed declaring that fact, subject only to the restrictions named in the statute, that it shall not abridge or destroy the rights or privileges of other proprietors in such plat, and shall not authorize the closing or obstructing of any public highway laid out according to law. This statute only requires that the owners of lots or blocks within the part of a town plat sought to be vacated shall execute the deed for that purpose, and does not prescribe what the deed shall contain further than that it shall declare the plat or part thereof vacated. Littler *v.* Lincoln, *supra*. The party vacating must be the exclusive owner of the lots and blocks, but it is not required that the deed shall make an exhibit of his title nor recite how he became the sole owner. Littler *v.* Lincoln, *supra*. A deed vacating a part of the plat of an addition by one person is *prima facie* valid and conclusive of his right to make such vacation; but it may be impeached by showing that the party making it did not possess the capacity for want of ownership of all the lots in the part of the plat attempted to be vacated. The *prima facie* case made by the adjudication of such deed must be overcome by the satisfactory evidence of the disability of the person to make it. Littler *v.* Lincoln, *supra*. A petition to the city council by the owner of a plat for leave to vacate the same, stating that he is the owner of all the lots except two, will not overcome the presumption of his entire ownership arising from a subsequent deed of vacation of the whole plat. Littler *v.* Lincoln, *supra*. Under the provision of section 7 of said statute that "any part of a plat" may be vacated, subject to the conditions in the preceding section relative to the vacation of an entire plat, which are that the vacation shall be before any lots are sold or, if any lots are sold, all the owners of lots in the plat shall join in the deed of vacation, no person need join in the vacation of part of a plat other than the owner of such part. Chicago Anderson Pressed Brick Co. *v.* Chicago, 138 Ill. 628, 28 N. E. 756. Under the proviso of said section 7 that such vacation shall not abridge or destroy any other rights or privileges of other proprietors, there can be no such abridgment or destruction where no other lots in the plat face on the street whereon the part of the plat vacated lies. Chicago Anderson Pressed Brick Co. *v.* Chicago, *supra*. The further proviso of said section 7, that nothing contained therein shall authorize the closing or obstructing of any public highway "laid out according to law" does not apply to a street designated on a plat, but with regard to which the proper officers have taken no action. Chicago Anderson Pressed Brick Co. *v.* Chicago, *supra*. The vacation of a plat under this statute does not prevent the city from a subsequent laying out of streets across the territory affected, such vacation being merely a withdrawal of the proposed dedication. Littler *v.* Lincoln, *supra*. Under the Illinois act of 1874, giving power to vacate town plats or parts thereof, and providing that the execution and recording of a certain writing should operate to destroy the force and effect of the plat vacated, and to divest all public rights in the streets, alleys, commons, and public grounds therein laid out or described, a plat of land named in the act incorporating a town could be vacated without withdrawing the land from the town limits. Johnson *v.* People, 42 Ill. App. 402.

Under Iowa Code, §§ 563, 564, authorizing the vacation of the whole of a town plat by the proprietors at any time before sale of any of the lots, by a certain instrument of writing, or of any part of a plat, provided such vacation does not abridge or destroy any of the rights and privileges of other proprietors

lots without submitting the plan for approval of the municipal authorities or to a court, unless there is a statutory provision to the contrary.[45]

C. Amendment, New Charter, Repeal, and Forfeiture of Charter or Dissolution[46] — **1. Amendment or New Charter — a. Power to Amend in General.** The legislative control of municipal corporations in the United States is inherent, plenary, and exclusive,[47] subject only to constitutional limitations.[48] As the legislature has the inherent power to create a municipal corporation,[49] so likewise it has power to destroy it,[50] and of course the lesser power to amend its charter, not only in respect of its territory,[51] but also in respect of its powers, privileges, and franchises, and this power may be exercised without the consent of the municipality or its inhabitants.[52] This is a corollary of the inherent and sovereign power of the legislature over all agencies of government, wherein it is not restricted by

in the plat, it was held that the term "proprietors," as used in these sections, indicates the owners of the land, and not merely the persons who originally platted the land; and therefore such owners who have acquired title from such original proprietors may exercise the power of vacation conferred by the sections. McGrew *v.* Lettsville, 71 Iowa 150, 32 N. W. 252. Under said section 564, providing that any part of a town plat may be vacated, but not so as to close or obstruct any public highway laid out according to law, etc., where the right to vacate is exercised, it does not affect the authority of the corporation over the part so vacated or take such part out of the boundaries of the corporation. McGrew *v.* Lettsville, *supra.* Although the vacation of a portion of a town plat by an agreement of the owners thereof will, by the closing of certain streets, diminish the number of ways of access to the property of other parties, such an agreement is valid, where there remain one or more ways which are reasonably convenient, so that no substantial right is abridged. Lorenzen *v.* Preston, 53 Iowa 580, 5 N. W. 764. When the owner of lots laid out on a plat vacates alleys and streets, under said section 564, a city council has no authority to make an *ex parte* judicial determination that such vacation is void, although the section prescribes the condition that the vacation "shall not abridge or destroy the rights of the other proprietors in said plat." Conner *v.* Iowa City, 66 Iowa 419, 23 N. W. 904.

45. Ollie *v.* Ogilvie, 13 La. 472. Ohio Rev. St. § 2614, providing that where a change in an addition to a city is to be made, a regular suit must be brought in the courts, and all the property-owners to be affected by the change must be made parties to the suit, refers only to changes in plats affecting streets and alleys, and the owners of lots may subdivide them without any application to the court. Huling *v.* Huffman, 11 Ohio Dec. (Reprint) 303, 26 Cinc. L. Bul. 73.

46. **Alteration of boundaries and annexation of territory, etc.,** see *supra,* II, B, 2.

47. People *v.* Hill, 7 Cal. 97; People *v.* Morris, 13 Wend. (N. Y.) 325; State *v.* Wilson, 12 Lea (Tenn.) 246; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425. See *infra,* IV.

48. See *infra,* II, C, 1, c; IV, B.

49. See *supra,* II, A, 1, 2.

50. See *infra,* II, C, 2, a.

51. See *supra,* II, B, 2.

52. *Alabama.*— State *v.* Mobile, 24 Ala. 701.

Arkansas.— Eagle *v.* Beard, 33 Ark. 497; State *v.* Jennings, 27 Ark. 419.

California.— Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615; San Francisco *v.* Canavan, 42 Cal. 541; People *v.* Burr, 13 Cal. 343.

Georgia.—Churchill *v.* Walker, 68 Ga. 681; State *v.* Savannah, R. M. Charlt. 250.

Idaho.— Wiggin *v.* Lewiston, 8 Ida. 527, 69 Pac. 286.

Illinois.— Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351; Crook *v.* People, 106 Ill. 237; People *v.* Wright, 70 Ill. 388.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; Sloan *v.* State, 8 Blackf. 361. See also Warren *v.* Evansville, 106 Ind. 104, 5 N. E. 876.

Iowa.— Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455; Morford *v.* Unger, 8 Iowa 82.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140.

Louisiana.— Layton *v.* New Orleans, 12 La. Ann. 515; Bossier Police Jury *v.* Shreveport, 5 La. Ann. 661.

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Michigan.— Smith *v.* Adrian, 1 Mich. 495.

Missouri.— St. Louis *v.* Russell, 9 Mo. 507.

Nebraska.—Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740 (where it was said that the power to create a municipal corporation is vested in the legislature and implies the power to create it with such limitations as that body may see fit to impose, and to impose such limitations at any stage of its existence); State *v.* Holden, 19 Nebr. 249, 27 N. W. 120.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

New York.— People *v.* Briggs, 50 N. Y. 553; People *v.* Stout, 23 Barb. 349; Davidson *v.* New York, 27 How. Pr. 342; People *v.* Morris, 13 Wend. 325.

Ohio.— Marietta *v.* Fearing, 4 Ohio 427.

Pennsylvania.—Philadelphia *v.* Fox, 64 Pa. St. 169.

Tennessee.— Memphis *v.* Memphis Water Co., 5 Heisk. 495; Lynch *v.* Lafland, 4 Coldw. 96; McCallie *v.* Chattanooga, 3 Head 317;

constitutional limitations.[53] In this respect a municipal charter is not a contract within the constitutional prohibition of laws impairing the obligation of contracts.[54]

b. New Charter and Reorganization — (I) *In General.* The ingenuity of citizens and statesmen has devised a mode of change in the constitution of municipalities, differing from amendment and repeal, and yet possessing some of the elements of both, which the courts have recognized and upheld under the name of reorganization.[55] The two elements of territory and population remain substantially the same, but a new charter is introduced under which occurs a reorganization of the corporation, whereby in law is created a new body which is in fact identical with the old.[56] Out of this double aspect of the new municipality have arisen many questions of relation and obligation, which have been generally decided one way in the courts of law, and another way in equity.[57] Because the charter is a *sine qua non* of municipal life, the law logically treats the body established under the new charter as a separate municipality;[58] but since the same community continues to exercise and enjoy municipal privileges, franchises, property, and improvements, the same under the new as under the old organization and charter, equity inclines to treat the two bodies as identical, or at least the new as the successor to the old.[59] Under the automatic municipal provisions of some of the states, whereby cities are allowed to frame their own new charters, the identity of the municipality is preserved at law as well as in equity, the new charter being thus treated as an amendment to the old.[60] Legislative authority is essential to enable a municipality to adopt a new charter or to reincorporate.[61]

(II) *Reincorporation After Defective or Void Incorporation.* A municipality acting under a supposed incorporation which is void because of a valid and existing charter previously obtained cannot procure a new charter by proceedings as for an original incorporation.[62] But a statute may provide for reincorporation or reorganization of a municipality defectively incorporated or which has attempted to incorporate under a void act.[63]

Daniel *v.* Memphis, 11 Humphr. 582; Nichol *v.* Nashville, 9 Humphr. 252.

Texas.—Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742; Blessing *v.* Galveston, 42 Tex. 641.

Utah.— People *v.* Page, 6 Utah 353, 23 Pac. 761.

United States.— Tippecanoe County *v.* Lucas, 93 U. S. 108, 23 L. ed. 822; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. ed. 518, 531; Judson *v.* Plattsburg, 14 Fed. Cas. No. 7,570, 3 Dill. 181. In East Hartford *v.* Hartford Bridge Co., *supra*, Woodbury, J., said: "One of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency. It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first."

See 36 Cent. Dig. tit. "Municipal Corporations," § 122 *et seq.* And see Constitutional Law, 8 Cyc. 941.

53. Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425; and other cases above cited. See *supra*, I, C, 1, b; *infra*, IV.

54. Layton *v.* New Orleans, 12 La. Ann. 515; Reynolds *v.* Baldwin, 1 La. Ann. 162; Blessing *v.* Galveston, 42 Tex. 641. See *supra*, II, A, 13, a; *infra*, II, C, 2, a; IV. And see Constitutional Law, 8 Cyc. 941.

55. State *v.* Mobile, 24 Ala. 701; *Ex p.* Strahl, 16 Iowa 369; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896.

56. Boyd *v.* Chambers, 78 Ky. 140; Kansas City *v.* Summerwell, 58 Mo. App. 246.

57. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Beckwith *v.* Racine, 3 Fed. Cas. No. 1,213, 7 Biss. 142 [*affirmed* in 100 U. S. 514, 25 L. ed. 699].

58. Jefferson *v.* Edwards, 37 Mo. App. 617.

59. Amy *v.* Selma, 77 Ala. 103; Kansas City *v.* Summerwell, 58 Mo. App. 246.

60. Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632. See also *supra*, II, A, 6; *infra*, II, C, 1, d, (IV), (A).

61. State *v.* Dunson, 71 Tex. 65, 9 S. W. 103. And see Harness *v.* State, 76 Tex. 566, 13 S. W. 535.

62. Harness *v.* State, 76 Tex. 566, 13 S. W. 535.

63. White *v.* Quanah, (Tex. Civ. App. 1894) 27 S. W. 839; State *v.* Berry, 13 Wash. 700, 42 Pac. 622; Abernethy *v.* Medical Lake, 9 Wash. 112, 37 Pac. 306; State *v.* Centralia, 8 Wash. 659, 36 Pac. 484; Pullman *v.* Hungate, 8 Wash. 519, 36 Pac. 483; Medical Lake *v.* Landis, 7 Wash. 615, 34 Pac. 836; Medical Lake *v.* Smith, 7 Wash. 195, 34 Pac. 835;

c. Constitutional Limitations. The power of the legislature to amend municipal charters or provide a new charter for a municipality is subject of course to constitutional limitations,[64] such as provisions in relation to the enactment of laws,[65] the title and the unity of the subject-matter of legislative acts,[66] amendment of laws by reference to the title only,[67] provisions prohibiting amendment by special or local laws and requiring general laws,[68] and provisions for amendment only by certain action of the municipal authorities or inhabitants.[69]

d. Mode of Amendment or Reorganization and Proceedings — (i) *In General.* The constitution sometimes prescribes the mode in which municipal charters may be amended, and in such case it is usually held that the constitutional mode is exclusive, at least except with respect to details, and that a failure to comply

In re Campbell, 1 Wash. 287, 24 Pac. 624. See also McCrary *v.* Comanche, (Tex. Civ. App. 1896) 34 S. W. 679.

64. Davis *v.* Woolnough, 9 Iowa 104; *Ex p.* Pritz, 9 Iowa 30; St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174. And see Constitutional Law, 8 Cyc. 941 *et seq.*

"Extension" of charter.— Increasing the privileges of municipal corporations, or assigning to them new duties, is not an "extension" of their charters within the meaning of a constitutional provision. To extend a charter is to give one which exists a greater or longer time in which to operate than that to which it was originally limited. Moers *v.* Reading, 21 Pa. St. 188.

Delegation of legislative power see *infra*, II, C, 1, d. (iv), (a), text and note 87.

Provision for amendment by municipality see *infra*, II, C, 1, d, (iv).

Partial unconstitutionality see Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

65. Morford *v.* Unger, 8 Iowa 82. And see, generally, Statutes.

Majority or two-thirds vote.— The provision of the New York constitution, requiring the assent of two thirds of the members elected to each branch of the legislature to every bill creating, continuing, altering, or renewing any body corporate or politic, does not apply to public corporations, but to private corporations only, and therefore laws affecting public corporations, such as cities and villages, may be passed by mere majority vote. People *v.* Morris, 13 Wend. (N. Y.) 325.

In Pa. Const. (1838) art. 1, § 25, providing that no corporate body shall be created, renewed, or extended with banking or discounting privileges, without six months' previous public notice of the intended application for the same, and that "no law thereafter enacted shall create, renew, or extend the charter of more than one corporation," the clause quoted does not apply to municipal corporations, but is limited to at least to private corporations, if not to private corporations for banking. Moers *v.* Reading, 21 Pa. St. 188.

66. *Georgia.*— Churchill *v.* Walker, 68 Ga. 681; Ayeridge *v.* Social Circle, 60 Ga. 404.

Idaho.— Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234.

Illinois.— Guild *v.* Chicago, 82 Ill. 472.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Nebraska.— State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New York.— People *v.* Rochester, 50 N. Y. 525.

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

See, generally, Statutes.

67. David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174. See, generally, Statutes. But an act of the legislature which purports to be an amendment of the charter of a municipal corporation and confers upon it important additional powers, but which does not change existing authority or present any different mode of exercising it, is not such an amendment as is prohibited by the constitutional provision that "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length." Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925. The clause of the constitution which says, "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act," cannot be held to embrace every enactment which in any degree, however remotely, affects the prior law on a given subject. An act complete in itself is not within the mischief designed to be remedied by this provision, and is not prohibited by it. People *v.* Wright, 70 Ill. 398. The mere fact that an act does not, in its title, profess to amend a city charter, is unimportant; it is an amendment if it professes to, and does, enact that which makes new organic law for the city government. People *v.* Wright, *supra.*

68. See *infra*, II, C, 1, d, (ii).

69. St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; Kansas City *v.* Scarritt, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111. *Compare* Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625. See also *infra*, II, C, 1, d, (i), (iv).

Power to amend charter framed by city.— The Missouri act of April 1, 1893, by which the legislature sought to amend the charter framed by the freeholders of Kansas City under Const. (1875) art. 9, § 16, in respect to a matter of local municipal government, was held unconstitutional and void because

substantially with the mandatory requirements is fatal.[70] So also mandatory statutory provisions as to the mode of amendment by the municipality must be observed.[71] A municipal charter may be amended or in part repealed by adoption of a constitutional provision,[72] unless there is a saving clause.[73]

(II) *General and Special Laws.* In the absence of constitutional provision to the contrary, the legislature may amend the charter of a municipal corporation either by a special act,[74] or by a general law whether the corporation exists under a special charter or under a general law.[75] In some states, however, the constitu-

in violation of the grant in the constitution to such cities of power to frame their own charters, and permitting amendments thereto by the action of the people of the city "and not otherwise." Kansas City *v.* Scarritt, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111.

Wash. Act, March 4, 1895, authorizing cities of the first class to make "new" charters by altering, adding to, or repealing their existing charters, is sanctioned by Const. art. 11, § 10, which provides that a city with a population of twenty thousand or more shall be permitted to "frame a charter" for its own government. Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625. The constitution, in providing that the legislative authority of any city containing a population of twenty thousand or more "may," for the purpose of framing a new charter, cause an election to be held, etc., does not vest in the city council the exclusive right to determine whether such election shall be called; and hence the act of March 4, 1895, § 1, declaring that upon the petition of one fourth of the qualified voters of a city of the first class the council "shall" call an election for that purpose, is not unconstitutional. Reeves *v.* Anderson, *supra*.

General laws not prohibited.— Cal. Const. art. 11, § 8, which provides that the charter of a city "may be amended at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof," refers to amendments made only at the instance of the officers and electors of the city, and does not prevent the legislature from passing general laws affecting the powers of corporations, such as a general law providing for changing the boundaries of municipalities and excluding territory therefrom, since the constitution plainly declares that all charters of cities framed or adopted by its authority shall be subject to and controlled by general laws, and there is no limit of time as to when such laws may be passed and take effect. People *v.* Coronado, 100 Cal. 571, 35 Pac. 162. See also Kansas City *v.* Stegmiller, 151 Mo. 189, 52 S. W. 723.

70. Blanchard *v.* Hartwell, 131 Cal. 263, 63 Pac. 349, 62 Pac. 509; St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214; Wade *v.* Tacoma, 4 Wash. 85, 29 Pac. 983. And see *infra*, II, C, 1, d, (IV).

Constitutional provision not self-executing. — Wash. Const. art. 11, § 10, providing that any city of a certain population shall be permitted to frame a charter for its own government, and for such purpose the legislative authority of such city may cause an election to be had for freeholders to frame such charter, etc., is not self-executing in the sense that it renders invalid an act of the legislature pointing out the manner in which the right so conferred may be exercised and prescribing rules for the guidance of the city council in relation thereto. Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

Constitutional method for proposing and submitting amendment not exclusive.— The mere fact that a constitutional provision that cities shall be permitted to frame a charter for their own government prescribes a method for proposing and submitting amendments to a vote of the people does not necessarily exclude every other method, so as to prevent the legislature from prescribing a method. Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625. See also Martin *v.* San Francisco Election Com'rs Bd., 126 Cal. 404, 58 Pac. 932.

71. See *infra*, II, C, 1, d, (IV).

72. Mobile *v.* Dargan, 45 Ala. 310; Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615; East St. Louis *v.* People, 124 Ill. 655, 17 N. E. 447. See CONSTITUTIONAL LAW, 8 Cyc. 751. But see Guild *v.* Chicago, 82 Ill. 472.

73. Griffin *v.* Inman, 57 Ga. 370.

74. *Colorado.*— People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828; Brown *v.* Denver, 7 Colo. 305, 3 Pac. 455.

Georgia.—Churchill *v.* Walker, 68 Ga. 681.

Idaho.— Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234; Wiggin *v.* Lewiston, 8 Ida. 527, 69 Pac. 286.

Indiana.— Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; Sloan *v.* State, 8 Blackf. 361.

Maryland.— Cumberland *v.* Magruder, 34 Md. 381.

Michigan.— Chamberlain *v.* Saginaw, 135 Mich. 61, 97 N. W. 156.

Tennessee.— Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364.

See 36 Cent. Dig. tit. "Municipal Corporations," § 122 *et seq.*

75. *California.*— McGivney *v.* Pierce, 87 Cal. 124, 25 Pac. 269; Thomason *v.* Ashworth, 72 Cal. 73, 14 Pac. 615; People *v.* Clunie, 70 Cal. 504, 11 Pac. 775. But under Const. art. 11, § 6, declaring that cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and con-

tion prohibits local or special laws changing or amending municipal charters.[76] The prohibition does not affect amendments made by special act prior to the adoption of the constitution;[77] and in some jurisdictions it does not prevent amendment, by special act, of city charters granted prior to the adoption of the constitution.[78] An amendatory law is not local or special, within the meaning of the prohibition, where it is applicable to all municipalities of a certain character

trolled by general laws, it was held that a town incorporated by special act passed prior to the adoption of the constitution is not subject to the control of general laws in municipal affairs. *Ex p.* Helm, 143 Cal. 553, 77 Pac. 453.

Illinois.— Crook *v.* People, 106 Ill. 237; Allen *v.* People, 84 Ill. 502.

Indiana.— Sloan *v.* State, 8 Blackf. 361.

Iowa.— State *v.* Olinger, (1897) 72 N. W. 441 (general law amending the charters of all cities incorporated under special charters); State *v.* King, 37 Iowa 462.

Minnesota.—State *v.* Spaude, 37 Minn. 322, 34 N. W. 164.

Nebraska.— State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New Jersey.— Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

New York.— Moran *v.* Long Island City, 101 N. Y. 439, 5 N. E. 80; People *v.* Morris, 13 Wend. 325.

See 36 Cent. Dig. tit. "Municipal Corporations," § 122 *et seq.*

General laws.— La. Const. (1898) art. 48, in prohibiting the amendment by local or special laws of the charters of municipal corporations, with the exception of those having a population of not less than two thousand five hundred inhabitants, did not abridge the power of the general assembly to enact general laws affecting the charters of the class of municipal corporations excepted. Lake Charles *v.* Roy, 115 La. 939, 40 So. 362.

Amendment of general law adopted by municipality.— Where a city, under the provisions of a general law for the incorporation of cities, adopts such general law, it does so subject to the power of the legislature to repeal or amend the same; and whenever the city takes any steps or institutes any proceedings under such law, after it has been amended, it will be regulated and governed therein by the law as amended, and not by the law as it was when adopted by the city. Guild *v.* Chicago, 82 Ill. 472.

76. *Colorado.*— *In re* Senate Bill No. 293, 21 Colo. 38, 39 Pac. 522; Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

Illinois.— Guild *v.* Chicago, 82 Ill. 472; Covington *v.* East St. Louis, 78 Ill. 548.

Iowa.— State *v.* King, 37 Iowa 462; Davis *v.* Woolnough, 9 Iowa 104; *Ex p.* Pritz, 9 Iowa 30.

Missouri.—Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281.

New Jersey.— Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

Wisconsin.— Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561.

United States.— German-American Ins. Co. *v.* Youngstown, 68 Fed. 452.

See also *supra*, II, A, 6; and, generally, STATUTES.

Constitutional prohibition applicable to private corporations only.— Tenn. Const. art. 11, § 8, providing that "no corporation shall be created, or its powers increased or diminished, by special laws," applies to private corporations only and does not prevent amendment of municipal charters by special act. Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; Ballentine *v.* Pulaski, 15 Lea (Tenn.) 633; State *v.* Wilson, 12 Lea (Tenn.) 246.

Extent of amendment by general law.— Amendments of the charters of cities, towns, and villages must be by general law, which must apply alike to all cities, towns, and villages desiring to amend their charters in that particular respect, so that one city, town, or village may not amend its charter by adopting one provision, and another city, town, or village amend its charter by adopting another and different law on the same subject, but whether the amendment to be adopted shall extend to a single or many subjects is not within the regulation of the constitution. Its mandate is observed where the amendment, whether extensive or limited, is by general law. Guild *v.* Chicago, 82 Ill. 472.

77. Covington *v.* East St. Louis, 78 Ill. 548.

78. In Colo. Const. art. 14, § 13, providing that the legislature shall provide by general laws for the organization and classification of cities and towns, and that the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions, and section 14, providing that the legislature shall also make provision by general law whereby any city, town, or village incorporated by any special or local law may elect to be subject to and be governed by the general law relating to said corporation, do not prohibit a special act amending a city charter, like that of Denver, granted by a local act prior to the adoption of the constitution, when such city has not elected to become subject to and governed by the general law. People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; Darrow *v.* People, 8 Colo. 426, 8 Pac. 924; Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828; Brown *v.* Denver, 7 Colo. 305, 3 Pac. 455. So in Idaho, where there is now a constitutional prohibition against special legislation, the legislature nevertheless has power to amend special municipal charters granted prior to

or class, as in the case of an act conferring certain powers upon all municipalities incorporated under special charters.[79]

(III) *AMENDMENT BY IMPLICATION.* Subject to constitutional limitations, the amendment of a municipal charter may be effected either expressly or by necessary implication from subsequent general or special legislation.[80] The general doctrine, however, is that a special charter or act or amendment thereof is not to be construed as changed by implication from general legislation, unless a proper construction manifests an unmistakable intention on the part of the legislature to make such change.[81] As a rule statutes of a general nature do not by implication repeal charters by special acts passed for the benefit of particular municipalities.[82] A special act conferring additional powers upon a municipality existing under a special charter does not impliedly repeal any part of the original charter, except

the adoption of the constitution in matters germane to the object and purpose of the charter. Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234.

79. State *v.* King, 37 Iowa 462. And see, generally, STATUTES.

80. *California.*— McGivney *v.* Pierce, 87 Cal. 124, 25 Pac. 269; Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615.

Georgia.—Churchill *v.* Walker, 68 Ga. 681.

Illinois.— Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448; Allen *v.* People, 84 Ill. 502; People *v.* Wright, 70 Ill. 388. And see Crook *v.* People, 106 Ill. 237.

Indiana.— Sloan *v.* State, 8 Blackf. 361.

Iowa.— State *v.* Olinger, (1897) 72 N. W. 441.

Kentucky.— Com. *v.* Louisville, 5 B. Mon. 293.

Michigan.— Smith *v.* Adrian, 1 Mich. 495.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

Missouri.— State *v.* Severance, 55 Mo. 378.

New Jersey.— Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

New York.— People *v.* Briggs, 50 N. Y. 553; People *v.* Daley, 37 Hun 461; People *v.* Morris, 13 Wend. 325. In order that a law may operate as an amendment to a municipal charter, it is not necessary that it shall specify that it is an amendment thereto, but it is sufficient that the provisions affect the corporation in its governmental capacity. People *v.* Briggs, *supra.*

Tennessee.— Memphis *v.* Memphis Water Co., 5 Heisk. 495 (holding that the creation of a private corporation with exclusive power to erect waterworks and supply a city and its inhabitants with water, impliedly revoked the power of the city to do so under its charter); Lynch *v.* Lafland, 4 Coldw. 96.

Texas.— Buford *v.* State, 72 Tex. 182, 10 S. W. 401.

Utah.— People *v.* Page, 6 Utah 353, 23 Pac. 761.

See 36 Cent. Dig. tit. "Municipal Corporations," § 122 *et seq.*

81. *Arkansas.*—Babcock *v.* Helena, 34 Ark. 499.

California.— People *v.* Clunie, 70 Cal. 504, 11 Pac. 775.

Connecticut.— McGarty *v.* Deming, 51 Conn. 422.

Georgia.— Griffin *v.* Inman, 57 Ga. 370.

Illinois.— People *v.* Hummel, 215 Ill. 71, 74 N. E. 78; Smith *v.* People, 154 Ill. 58, 39 N. E. 319; East St. Louis *v.* Maxwell, 99 Ill. 439; Covington *v.* St. Louis, 78 Ill. 548; Ottawa *v.* La Salle County, 12 Ill. 339; School Trustees *v.* Peoria School Inspectors, 115 Ill. App. 479.

Iowa.— Clark *v.* Davenport, 14 Iowa 494.

Louisiana.— Garrett *v.* Aby, 47 La. Ann. 618, 17 So. 238; Bond *v.* Hiestand, 20 La. Ann. 139.

Maryland.— Cumberland *v.* Magruder, 34 Md. 381.

Massachusetts.— Goddard *v.* Boston, 20 Pick. 407.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751, holding that Laws (1887), Act No. 34, making the offense of keeping a house of ill fame a felony, and punishable as such, did not repeal by implication the provision of the charter of the city of Detroit authorizing the common council to prohibit, prevent, and suppress the keeping of such houses.

Minnesota.— Tierney *v.* Dodge, 9 Minn. 166.

Missouri.— State *v.* Severance, 55 Mo. 378.

Nebraska.— State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New Jersey.— Bodine *v.* Trenton, 36 N. J. L. 198; Pancoast *v.* Troth, 34 N. J. L. 377; Cross *v.* Morristown, 33 N. J. L. 57; Fish *v.* Branin, 23 N. J. L. 484.

New York.—McKenna *v.* Edmundstone, 91 N. Y. 231.

Ohio.— Fosdick *v.* Perrysburg, 14 Ohio St. 472; Cass *v.* Dillon, 2 Ohio St. 607.

Pennsylvania.— *In re* Henry St., 123 Pa. St. 346, 16 Atl. 785; Harrisburg *v.* Sheck, 104 Pa. St. 53; Rounds *v.* Waymart Borough, 81 Pa. St. 395; Erie *v.* Bootz, 72 Pa. St. 196.

West Virginia.—Powell *v.* Parkersburg, 28 W. Va. 698.

Wisconsin.— State *v.* Kersten, 118 Wis. 287, 95 N. W. 120; Janesville *v.* Markoe, 18 Wis. 350; Walworth County Sup'rs *v.* Whitewater, 17 Wis. 193.

See 36 Cent. Dig. tit. "Municipal Corporations," § 122 *et seq.* And see, generally, STATUTES.

82. *California.*— Wood *v.* San Francisco Election Com'rs, 58 Cal. 561.

in so far as it is inconsistent therewith.[83] A constitutional provision may impliedly repeal part of a municipal charter, but it will do so only in so far as they are inconsistent.[84]

(IV) *ADOPTION OF AMENDMENT OR NEW CHARTER BY MUNICIPALITY*— (A) *In General.* In some jurisdictions a general statute or constitutional provision authorizes municipal corporations generally, or corporations of a particular class, to adopt an amended or new charter in a prescribed mode, as by action of the corporate authorities[85] or vote of the people, or both, or to come under the operation of a general municipal incorporation law or particular sections thereof;[86] and such a statute is not unconstitutional as a delegation of legislative powers to

Illinois.— People *v.* Hummel, 215 Ill. 71, 74 N. E. 78; East St. Louis *v.* Maxwell, 99 Ill. 439.

Iowa.— Clark *v.* Davenport, 14 Iowa 494.

Louisiana.— Bond *v.* Hiestand, 20 La. Ann. 139.

Missouri.— State *v.* Severance, 55 Mo. 378.

New Jersey.— Bodine *v.* Trenton, 36 N. J. L. 198.

West Virginia.— Powell *v.* Parkersburg, 28 W. Va. 698.

This rule does not apply where a general law inconsistent with a special municipal charter in terms relates to all municipal corporations. In such a case the special act is repealed in so far as it is inconsistent with the subsequent general law. Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

83. Goddard *v.* Boston, 20 Pick. (Mass.) 407.

84. Griffin *v.* Inman, 57 Ga. 370; Fosdick *v.* Perrysburg, 14 Ohio St. 472; Cass *v.* Dillon, 2 Ohio St. 607. See CONSTITUTIONAL LAW, 8 Cyc. 751.

85. Jackson *v.* Shlomberg, 70 Miss. 47, 11 So. 721; Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758.

86. *California.*— Blanchard *v.* Hartwell, 131 Cal. 263, 63 Pac. 349, 62 Pac. 509.

Illinois.— Crook *v.* People, 106 Ill. 237; Guild *v.* Chicago, 82 Ill. 472.

Louisiana.— Lake Charles *v.* Roy, 115 La. 939, 40 So. 362.

Minnesota.— Wolfe *v.* Morehead, 98 Minn. 113, 107 N. W. 728; Hopkins *v.* Duluth, 81 Minn. 189, 83 N. W. 536.

Mississippi.— Jackson *v.* Slomberg, 70 Miss. 47, 11 So. 721, holding that by Code (1892), c. 93, § 3035, declaring that after the chapter became operative every municipality should be governed by its provisions, but that any municipality might, within twelve months, "elect not to come under the provisions hereof," power was given municipalities, affirmatively, to accept the provisions of the chapter and be governed thereby.

Missouri.— St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

New Hampshire.— Atty.-Gen. *v.* Shepard, 62 N. H. 383, 13 Am. St. Rep. 576.

New York.— Chenango Bank *v.* Brown, 26 N. Y. 467.

Texas.— Dobbin *v.* San Antonio, 2 Tex. Unrep. Cas. 708.

Washington.—Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609; Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

Wisconsin.— Hay *v.* Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. N. S. 84.

See 36 Cent. Dig. tit. "Municipal Corporations," § 122 *et seq.*

Rescinding action.— Where the municipal authorities have formally resolved to accept the provisions of the general incorporation act the city becomes bound thereby, and subsequent action of the authorities purporting to rescind the resolution of acceptance, although within the time limited by the statute for acceptance or rejection, is ineffectual. Jackson *v.* Shlomberg, 70 Miss. 47, 11 So. 721.

Mandamus to compel submission of charter amendment to vote see Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609.

In Louisiana it has been held that a statute conferring upon incorporated towns the power of amending their charters only confers upon them the power to regulate their internal organization and the modes and agencies by which the powers and privileges conferred upon them by law may be exercised, and that it does not authorize them, by such amendments, to extend or enlarge their powers and privileges or to alter or destroy the existing authority of the state over their inhabitants. Cook *v.* Dendinger, 38 La. Ann. 261. To the same effect see Nelson *v.* Homer, 48 La. Ann. 258, 19 So. 271.

Mo. Const. art. 9, § 16, authorizing a city of a certain population to frame a charter "for its own government" consistent with and subject to the constitutional laws of the state, gives the city the power, in framing a charter, to assume such powers only as appertain to the city government. It does not authorize them to assume other powers which the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does it confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental protection, which are foreign to the scope of municipal government. Therefore it has been held that such a constitutional provision does not authorize the city in framing its charter to assume the power to regulate prices to be charged by

the municipality or its inhabitants,[87] nor as violating a constitutional prohibition against the imposition of taxes upon a municipal corporation for municipal purposes, although adoption of the amendment may occasion expense to the municipality.[88] Nor is a state constitutional provision for the submission of new municipal charters or amendments to the voters for ratification in violation of the guarantee, by the federal constitution,[89] to every state of a republican form of government.[90] Under a statute authorizing a municipality to adopt an amendment of its charter, but prohibiting any amendment contravening or repugnant to the constitution or statute laws of the state, an amendment repugnant to a statute is void.[91] A special charter may be amended by the adoption by a municipality of a general law.[92]

(B) *Proceedings and Elections to Adopt.* Where the constitution prescribes the mode of adoption of an amended or new charter by a municipality, such mode is generally exclusive and must be strictly pursued.[93] So when the mode of municipal action to amend or reorganize is prescribed by statute, an amendment or reorganization attempted in any other mode or without substantial compliance

a telephone or other like corporation intrusted with a franchise of a public utility character. State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41. Nor is such power conferred by the enabling act of 1887, enacted for the purpose of enabling cities to avail themselves of such constitutional provision, and providing that they may frame a charter for their own government and regulate the same. State *v.* Missouri, etc., Tel. Co., *supra.*

Successive amendments.— The power conferred by Wash. Const. art. 11, § 10, upon a city containing a population of twenty thousand or more, to "frame a charter" for its own government, subject to general laws, is a continuing right vested in the electors, and does not become exhausted because once exercised. Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

87. *California.*— Hobart *v.* Butte County, 17 Cal. 23.

Illinois.— Guild *v.* Chicago, 82 Ill. 472.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

New York.— Chenango Bank *v.* Brown, 26 N. Y. 467, holding that Act (1847), c. 426, § 92, authorizing the electors of an incorporated village to determine what sections of the general act for the incorporation of villages shall apply to their village, was not unconstitutional as a delegation of legislative power, but was a valid tender to these municipalities of such specified amendments to their respective charters as they might elect to accept.

Pennsylvania.— Moers *v.* Reading, 21 Pa. St. 188.

Texas.— Dobbin *v.* San Antonio, 2 Tex. Unrep. Cas. 708.

Washington.— Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625, holding that Act, March 4, 1895, conferring upon cities of a certain class the right to frame a charter for their local self-government, subject to the general laws of the state, is not unconstitutional as a delegation of legislative powers.

See also CONSTITUTIONAL LAW, 8 Cyc. 839, 842, 843.

88. Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609.

89. U. S. Const. art. 4, § 4.

90. Hopkins *v.* Duluth, 81 Minn. 189, 83 N. W. 536.

91. Jodan *v.* Brenham, 57 Tex. 655, holding that an amendment providing for the levy of a school-tax of one half of one per cent was void as repugnant to the act of March 15, 1875, authorizing cities and towns to levy for school purposes a tax of not to exceed one fourth of one per cent in addition to the tax allowed to be levied by the general laws.

92. Hay *v.* Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. N. S. 84. And see *supra,* II, C, 1, d, (II).

93. Blanchard *v.* Hartwell, 131 Cal. 263, 63 Pac. 349; People *v.* Gunn, 85 Cal. 238, 24 Pac. 718; St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214; Wade *v.* Tacoma, 4 Wash. 85, 29 Pac. 983. But the constitutional requirement that all elections by the people shall be by ballot is no restriction upon the power of the legislature to provide that the will of persons desiring amendment of a municipal charter may be ascertained in some other manner than by public election. Graham *v.* Greenville, 67 Tex. 63, 2 S. W. 742. See also *supra,* II, C, 1, d, (I), text and note 70.

Notice.— If the constitution requires a particular notice, a different notice, although it may be, in the opinion of the court, equally or even more efficacious, will not be sufficient. Wade *v.* Tacoma, 4 Wash. 85, 29 Pac. 983.

Number of votes.— Since Wash. Const. art. 11, § 10, provides that proposed amendments shall be submitted to the electors at any general election and ratified by a majority of the qualified voters "voting thereon," a majority in favor of the amendments of the voters voting for or against the same is sufficient to ratify them, notwithstanding that the city charter provides that they shall be

with mandatory requirements of the statute is null and void.[94] Substantial compliance with the statute is all that is necessary, and a failure to comply with provisions which are merely directory does not affect the validity of the amendment or reorganization.[95] The proceedings to reincorporate, if conducted by a tribunal having jurisdiction, are valid if in substantial accordance with the requirements

ratified by a majority of the voters "voting thereat." State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214. See also Santa Rosa *v.* Bower, 142 Cal. 299, 75 Pac. 829. See also *infra*, this section, text and note 97.

94. Foote *v.* Cincinnati, 11 Ohio 408, 38 Am. Dec. 737; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; Pierce *v.* Spokane City Clerk, 7 Wash. 132, 34 Pac. 428.

Particular election prescribed.— Where a statute amending the charter of a municipality provides that it shall not take effect until adopted by a majority of the voters, and authorizes such adoption at a particular election, an adoption thereof at a different election is of no effect. Foote *v.* Cincinnati, 11 Ohio 408, 38 Am. Dec. 737. A regular annual election provided by law for the election of municipal officers, although no state or county officers are chosen, is a "general election" within the meaning of a statute. People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838.

Petition by qualified voters see Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609. Under Cal. St. (1883) p. 93, § 4, providing for submission to a vote at the next general election, of a proposition to organize a town as a city whenever a petition shall be presented to the board of trustees of the town, signed by one third of the qualified electors, a petition to which are attached the required number of signatures cut from other petitions, identical in form, gives the board no jurisdiction to submit such proposition People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838.

Who are qualified voters see Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609, holding that under Acts (1903), p. 393, c. 186, requiring submission to the voters of an amendment of a city charter on petition of a certain proportion of the qualified voters of the city, it lies with the city council in the first instance to pass on the qualifications of the signers, and, holding further, that registration is not necessary. When the qualifications of voters on a proposed reorganization is not prescribed all voters of the existing corporation may vote. Matter of Sag Harbor, 32 Misc. (N. Y.) 624, 67 N. Y. Suppl. 574.

Affidavits as to genuineness of signatures not evidence of the qualifications of the signers see Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609.

Publication of proposed amendment see Wolfe *v.* Morehead, 98 Minn. 113, 107 N. W. 728; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

Submission to and passage by city council see Pierce *v.* Spokane City Clerk, 7 Wash. 132, 34 Pac. 428; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

Resolution or ordinance.— In a city having power to amend its charter, the proceeding for submission to the electors may be inaugurated in the council by resolution unless the statute requires an ordinance therefor. Ehrhardt *v.* Seattle, 33 Wash. 664, 74 Pac. 827.

Notice of election and sufficiency thereof see State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

Ballots see State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214. Where a proposed amendment to a city charter consisted of several sections, all relating to the same subject, a description of the amendment on the ballots which required the voter to vote for or against the entire amendment was held not to be objectionable for failure to submit in such a form that each section of the amendment might be voted on separately. State *v.* Riplinger, 30 Wash. 281, 70 Pac. 748. Fraudulent ballots, ballots with unintelligible marks, expressing no effective vote upon any subject of choice, as well as ballots upon which no markings have been made by the voter, should be excluded from the aggregate number upon which the requisite four sevenths required by the constitutional amendment is to be estimated, in determining the ratification of the proposed charter. Hopkins *v.* Duluth, 81 Minn. 189, 83 N. W. 536.

95. State *v.* Riplinger, 30 Wash. 281, 70 Pac. 748; State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; Pierce *v.* Spokane City Clerk, 7 Wash. 132, 34 Pac. 428; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

Words added to the statutory form of the submission, which extend the real meaning but do not change the sense thereof, do not vitiate such submission. Hopkins *v.* Duluth, 81 Minn. 189, 83 N. W. 536 [*following* State *v.* Stearns, 72 Minn. 200, 75 N. W. 210].

Omissions of clerk as to notice of election. — Where a statute relating to amendments of a city charter provided for notice in each election district by publication in the daily newspapers and by "causing the same to be posted at each polling place in the several election districts thereof," and the city ordinance submitting proposed amendments provided for the posting of a certified copy of each amendment at each of the polling places within the city, it was held that failure of the clerk to discharge his full duty in that he did not post certified copies as provided by

of the statute authorizing the reorganization.[96] Where the constitution or statute providing for submission of an amendment or new charter to the people at an election requires assent by a majority of the electors "voting thereat" it is generally held to refer to all persons voting at the election, while "voting thereon" means a majority of those voting on the question of amendment or reorganization.[97] Whether a new charter or amendment has been legally and constitutionally adopted is not determined by the requisite legislative vote of approval, but is open for decision by the courts on proper proceedings.[98] The courts, however, can review proceedings for reincorporation only in the mode prescribed by law for such cases.[99] They have power to revise the discretion of the trustees on a legal application to have an election on the question of reincorporation and to compel them to perform a plain official duty.[1]

e. Effect of Amendment or New Charter[2] — (I) *In General.* The amendment of a municipal charter supersedes the original charter in so far as it is inconsistent therewith or substitutes new provisions on a particular subject, and the imposition or adoption of a new charter repeals the original charter, although there are no express words of repeal;[3] but adoption by a municipality of the provisions of a general law does not affect the provisions of a former special charter

the ordinance, did not render the election invalid, where newspaper clippings containing copies of the proposed amendment were duly posted in the voting booths, and the pendency of the election was a matter of public notoriety throughout the city. State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

Failure of a city clerk to record amendments to the city charter in the charter book, as required by statute, does not affect the validity of the amendments. State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

96. People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203; People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; People *v.* Hoge, 55 Cal. 612; Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758.

Attestation of action of council by corporate seal not necessary see Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758.

Qualification of freeholders elected to prepare charter.— People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203.

Acts of de facto freeholders sustained.— People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203.

97. Santa Rosa *v.* Bower, 142 Cal. 299, 75 Pac. 829; State *v.* St. Louis, 73 Mo. 435; State *v.* Denny, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214. And see South Bend *v.* Lewis, 138 Ind. 512, 37 N. E. 986. See also Elections, 15 Cyc. 390. Under Cal. Const. art. 11, § 6, authorizing towns to organize under the general laws relating to municipal corporations "whenever a majority of the electors voting at a general election shall so determine," a majority of all the electors voting at such elections, and not merely a majority voting on such proposition, is required. People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838.

98. People *v.* Gunn, 85 Cal. 238, 24 Pac. 718.

99. Matter of Sag Harbor, 32 Misc. (N. Y.) 624, 67 N. Y. Suppl. 574.

1. People *v.* Daley, 89 N. Y. App. Div. 156, 85 N. Y. Suppl. 429.

2. Effect of annexation, detachment of territory, consolidation, or division see *supra*, II, B, 2, g.

3. *California.*— People *v.* Oakland, 92 Cal. 611, 28 Pac. 807.

Illinois.— Crook *v.* People, 106 Ill. 237.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140; Com. *v.* Louisville, 5 B. Mon. 293.

Michigan.— Chamberlain *v.* Saginaw, 135 Mich. 61, 97 N. W. 156, holding that where an amendment of the provision of a city charter requiring notice to the city of claims arising from its alleged negligence covers the entire ground as to the notice, etc., and is in direct conflict with the former provision, such provision is repealed.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518, holding that where there is a city charter which has been several times amended, and an elaborate and completely new and independent charter, intended to constitute a perfect system within itself, is then granted to the city, the new charter operates as a repeal of all omitted portions of the former charter and amendments, although it contains no express words of repeal.

Missouri.— Jefferson *v.* Edwards, 37 Mo. App. 617.

Washington.— State *v.* Riplinger, 30 Wash. 281, 70 Pac. 748.

See 36 Cent. Dig. tit. "Municipal Corporations," § 123 *et seq.*

Compare Reading *v.* Keppleman, 61 Pa. St. 233.

Pa. Act, May 23, 1874, providing for a surrender of the charters of all municipal corporations accepting its provisions, is not supplemental to prior acts, but a substitute for them, notwithstanding rights of property and officers' rights, powers, etc., theretofore existing, are expressly preserved, such preservation being for the time being to prevent

not inconsistent with or repugnant to the provisions of the general law.[4] The amendment of a municipal charter will impliedly repeal the general law within the city limits, in so far, but only in so far, as it is inconsistent therewith.[5] The adoption by a city existing under a special charter of a part of the general charter *pro tanto* amends the former and renders it to that extent subject to further amendment by legislative action alone to change the part so adopted.[6] Where a provision in an amendment to a city charter is but a reënactment of a provision which refers to the general statutes, the amendment will not be deemed to refer to amendments of the general statutes made after the enactment of the original charter.[7] In the case of reorganization or reincorporation, it is within the legislative power to determine when it shall take effect and what shall be the operation and effect of the reorganization or reincorporation.[8] It may declare or indicate that the reorganized municipality is merely a continuation of the former body and thus preserve its municipal identity through all the changes wrought by the

disorder and confusion. Erie *v.* Flint, 8 Pa. Co. Ct. 482.

Where a town was reincorporated as a city by an act which repealed all conflicting laws, the territory embraced within the town thereafter became a city, although the act granting the charter to the town was not specially repealed. Wright *v.* Overstreet, 122 Ga. 633, 50 S. E. 487.

Prior annexation of territory.— Since a description of the territory whose inhabitants are incorporated is an essential part of the charter, an amendment of such description by proceedings to annex additional territory is an amendment of the charter, which is wholly superseded by a new charter under Cal. Const. art. 11, § 8, providing that when a charter has been presented to the legislature and approved it shall become the charter and organic law of such city, and shall supersede any existing charter and all amendments thereof, and all special laws inconsistent therewith. People *v.* Oakland, 92 Cal. 611, 28 Pac. 807.

4. People *v.* Hummel, 215 Ill. 71, 74 N. E. 78; School Trustees *v.* Peoria School Inspectors, 115 Ill. App. 479; Taylor *v.* Hoya, 9 Tex. Civ. App. 312, 29 S. W. 540. See *supra*, II, C, 1, d, (III).

Schools and school-districts.— A common school-district created by a special charter continues under its provisions, notwithstanding the community reorganizes under a general law containing no school-district provisions. Smith *v.* People, 154 Ill. 58, 39 N. E. 319. The city of Chicago, by incorporating under the general law for the incorporation of cities, did not abrogate any of the provisions of its special charter relative to schools, since such law contains no provisions as to schools and provides that all laws and parts of laws not inconsistent therewith and applicable to such cities shall continue in force. Brenan *v.* People, 176 Ill. 620, 52 N. E. 353. See also School Trustees *v.* Peoria School Inspectors, 115 Ill. App. 479. And see, generally, SCHOOLS AND SCHOOL-DISTRICTS.

Prior public improvements and assessment of damages.— Where a special act incorporating a city authorized it to straighten a certain creek within its limits, and subsequently a general corporation act, which was adopted by the city, was passed, authorizing cities to alter the channels of watercourses, and providing for proceedings for the assessment of damages, it was held that the latter did not repeal the former, as to work done in straightening said creek and proceedings for damages. Harrisburg *v.* Sheck, 104 Pa. St. 53.

5. Tierney *v.* Dodge, 9 Minn. 166 (holding that a provision in a city charter that no appeal should be allowed from the judgment of a city justice in cases of assault, where the judgment or fine imposed exclusive of costs was less than twenty-five dollars, prevailed over the general statute allowing appeals in all cases of convictions before justices of the peace); State *v.* De Bar, 58 Mo. 395 (holding that an amendment of a city charter, authorizing it to "regulate or suppress" bawdy-houses, operated to repeal within the city limits a general law prohibiting the keeping of such houses); State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471 (to the same point); St. Louis *v.* Alexander, 23 Mo. 483; Burchard *v.* State, 2 Oreg. 78; Palmer *v.* State, 2 Oreg. 66 (both holding that city charters did not repeal a general law as to sales of intoxicating liquors); *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

Special acts relating to Brooklyn continued in force on consolidation with New York see New York *v.* H. W. Johns-Manville Co., 89 N. Y. App. Div. 449, 85 N. Y. Suppl. 757.

6. Hay *v.* Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. N. S. 84.

7. *In re* Main St., 98 N. Y. 454 [*affirming* 30 Hun 424].

8. Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197. Where a charter has been prepared and submitted under Minn. Const. (1898) § 36, art. 4, authorizing such submission, and providing that, if four sevenths of the qualified voters voting shall ratify the charter, it shall, at the end of thirty days thereafter, become the charter of such city, etc., and has been actually ratified, it takes effect, and becomes the charter, of the city or village at the end of thirty

new charter;[9] or it may manifest its intention that the new corporation shall be a separate and distinct corporation,[10] and the legislative intention will be given full effect in the courts of law.[11] If the latter intention appears, pending suits at law by or against the old corporation are abated.[12] If the former, they remain *in statu quo* or may be revived.[13] The date of the reincorporation is also generally appointed by the legislature. In some states this is determined by the date of the registration of the new charter;[14] but usually the new corporation goes into operation and effect on the day of the completion of the actual reorganization under the new charter.[15] An amendment adopted by a municipality under constitutional or statutory authority takes effect from the day of its approval, in the absence of provision to the contrary.[16]

(11) *Ordinances, By-Laws, Etc.* Amendment of a municipal charter or reorganization under a new charter will operate to repeal all ordinances, by-laws, etc., or parts of the same, in so far as they are in conflict therewith,[17] unless they

days after the day of election; and it is immaterial that such ratification is not judicially determined, on appeal from the decision of the canvassing board, until after the thirty-day period has expired. Davis *v.* Hugo, 81 Minn. 220, 83 N. W. 984.

Mo. Rev. St. (1879) § 4386, which provided that upon the reorganization of a city, none of its rights or liabilities, and no suit or prosecution of any kind, should be affected by such change, was not meant to retain previous forms of remedy, so as to enable a city, after its reorganization, to bring suit for taxes in its own name, as it was previously empowered to do. Jefferson *v.* Edwards, 37 Mo. App. 617.

The provision of Kansas City Charter (1889), art. 17, § 10, that rights, liens, or liability subsisting under the provisions of the previous charter shall be enforced, "and such action or proceeding shall be carried on in all respects as if this charter had not taken effect," refers to and includes only such actions and proceedings as had been commenced prior to the adoption of the charter of 1889. Kansas City *v.* Summerwell, 58 Mo. App. 246.

9. *Alabama.*— Amy *v.* Selma, 77 Ala. 103.
California.— People *v.* Oakland, 92 Cal. 611, 28 Pac. 807.
Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.
Maryland.— Watts *v.* Port Deposit, 46 Md. 500.
Mississippi.— Harris *v.* Water Valley, 78 Miss. 659, 29 So. 401.
Ohio.— Fosdick *v.* Perrysburg, 14 Ohio St. 472.
United States.— Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Pacific Imp. Co. *v.* Clarksdale, 74 Fed. 528, 20 C. C. A. 635.
See 36 Cent. Dig. tit. "Municipal Corporations," § 130 *et seq.*

10. *Kentucky.*— Boyd *v.* Chambers, 78 Ky. 140.
Minnesota.— Carey *v.* St. Louis County, 38 Minn. 218, 36 N. W. 459.
Mississippi.— Port Gibson *v.* Moore, 13 Sm. & M. 157.
Texas.— Quanah *v.* White, 88 Tex. 14, 28 S. W. 1065.
United States.— Jones *v.* Pensacola, 13 Fed. Cas. No. 7,488.

Transfer of powers of old corporation.— Upon the reorganization of a municipal corporation, which is essentially changed thereby, in order to transfer to the new the particular powers of the old corporation, there must be an enabling clause empowering the new corporation to act in the particular case, or a general clause embracing the particular case. Savannah *v.* Georgia Steam Boat Co., R. M. Charlt. (Ga.) 342. The general assembly can confer on a city all the powers granted to the town from which it was organized by an enactment to the effect that all laws and ordinances in force at the time of the passage of the act and all powers belonging to the town corporation shall belong to the city. Wright *v.* Overstreet, 122 Ga. 633, 50 S. E. 487.

11. Watts *v.* Port Deposit, 46 Md. 500; McCrary *v.* Comanche, (Tex. Civ. App. 1896) 34 S. W. 679; Taylor *v.* Hoya, 9 Tex. Civ. App. 312, 29 S. W. 540.

12. Knight *v.* Ashland, 65 Wis. 166, 26 N. W. 565.

13. Watts *v.* Port Deposit, 46 Md. 500; O'Connor *v.* Memphis, 6 Lea (Tenn.) 730; Milner *v.* Pensacola, 7 Fed. Cas. No. 9,619, 2 Woods 632. Where, in a suit brought against a town, a trial resulted in favor of defendant, and plaintiff thereupon brought the case to the supreme court, where the judgment was reversed and the case remanded, and pending the suit in the supreme court the town was changed by statute into a city, it was held that as the town and the city were substantially the same corporation when the case was remanded and notice given to the official authorities of the city, the court had the same jurisdiction over it that it would have had over the town if the style of the corporation had remained unchanged. Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

14. Brewer *v.* State, 7 Lea (Tenn.) 682.

15. McGrath *v.* Chicago, 24 Ill. App. 19; Kansas City *v.* Stegmiller, 151 Mo. 189, 52 S. W. 723.

16. Kansas City *v.* Stegmiller, 151 Mo. 189, 52 S. W. 723.

17. Baader *v.* Cullman, 115 Ala. 539, 22

are continued in force by the act of amendment;[18] but in so far as existing ordinances are not inconsistent with the amendment or new charter, there is as a rule no repeal.[19]

(III) *Property Rights, Privileges, and Obligations or Liabilities.* The mere amendment of a municipal charter does not destroy the identity of the municipality or its right to property, nor as a rule are its property rights affected by reorganization under a new charter, even though it thereby becomes technically a new corporation.[20] Nor is a municipal corporation relieved from its preëxisting obligations or liabilities, either by an amendment of its charter or by the imposition or adoption of a new charter, the general doctrine being that a municipal liability or obligation binds the community through all changes so long as the territory and property retain substantial identity.[21] Indeed, since the legislature

So. 19; Chamberlain *v.* Evansville, 77 Ind. 542; Quinette *v.* St. Louis, 76 Mo. 402 [*affirming* 8 Mo. App. 583].

18. Spokane *v.* Williams, 6 Wash. 376, 33 Pac. 973.

Inconsistent ordinances.— But where a new city charter expressly repeals the old charter and all laws in conflict with the new charter, and provides that all existing by-laws, resolutions, and ordinances of the town shall remain in force until repealed or modified by the city council, only such by-laws, resolutions, and ordinances as are in consonance with the provisions of the new charter are preserved. Baader *v.* Cullman, 115 Ala. 539, 22 So. 19. See also Quinette *v.* St. Louis, 76 Mo. 402 [*affirming* 8 Mo. App. 583].

Effect of continuance.— The Greater New York Charter (Laws (1901), c. 466, § 41), providing that the ordinances in force Jan. 1, 1902, not inconsistent with the charter, were continued in full force and effect, did not continue such ordinances as part of the statutory law incorporated in the provisions of the charter. New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937.

Recording.— A provision in a statute erecting a borough into a city that the existing borough ordinances should remain in force, provided they should be recorded within four months thereafter, was merely directory, so that a failure to comply therewith did not affect the validity of such ordinances. Erie Academy *v.* Erie, 31 Pa. St. 515.

19. *Indiana.*— Chamberlain *v.* Evansville, 77 Ind. 542.

Iowa.— *Ex p.* Strabl, 16 Iowa 369.

Kansas.—Ritchie *v.* South Topeka, 38 Kan. 368, 16 Pac. 332.

Pennsylvania.— Erie Academy *v.* Erie, 31 Pa. St. 515, holding that a statute erecting a borough into a city did not of itself affect existing borough ordinances.

Texas.— Garey *v.* Galveston, 42 Tex. 627.

20. *Alabama.*— State *v.* Mobile, 24 Ala. 701.

California.— Smith *v.* Morse, 2 Cal. 524.

Kansas.— Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415. In this case, in consideration of "one dollar and the enhanced value of lots that are owned by the grantor," certain lots were conveyed to a township, "its successor or successors," to be used for the erection of a town hall thereon. The building was erected and paid for by the township. The lots were within a city of the third class, which was then a part of the township, and was subsequently organized as a city of the second class, parts of the township having been detached and included in other townships. It was held that, by operation of law and by the express terms of the conveyance, the city was the owner of the property, and that in Laws (1889), c. 62, passed while a suit to quiet title was pending, the legislature exceeded its authority in providing for the sale of its property and division of its proceeds between the city and the township.

Massachusetts.— Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172 (property held in trust); Lakin *v.* Ames, 10 Cush. 198.

New York.—Watervliet *v.* Colonie, 27 N. Y. App. Div. 394, 50 N. Y. Suppl. 487.

Texas.— See Taylor *v.* Hoya, 9 Tex. Civ. App. 312, 29 S. W. 540.

Wisconsin.— Washburn Water Works Co. *v.* Washburn, 129 Wis. 73, 108 N. W. 194.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53, property devised to municipality.

See 36 Cent. Dig. tit. "Municipal Corporations," § 130 *et seq.*

Property held subject to conditions.— Where land is conveyed to a municipality on certain conditions, and after the date of the deed the grantee is incorporated as a village and later as a city, the city assumes the same relation to the conveyance as the town. In other words, in taking the property, as successor of the town, it takes subject to the conditions. Rose *v.* Hawley, 118 N. Y. 502, 23 N. E. 904.

21. *Alabama.*—Amy *v.* Selma, 77 Ala. 103.

California.— Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891; Smith *v.* Morse, 2 Cal. 524.

Delaware.—Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Kansas.— Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844.

Kentucky.—Maysville *v.* Shultz, 3 Dana 10.

Louisiana.— Lake Charles Ice, etc., Co. *v.* Lake Charles, 106 La. 65, 30 So. 289.

Minnesota.—Rumsey *v.* Sauk Center Town,

cannot constitutionally impair the obligation of contracts, the power to revoke acts of incorporation does not include the power to alter or amend a municipal charter so as to relieve the municipality from duties and liabilities arising from its acceptance and acts thereunder.[22] Generally there is express provision in the new charter or statute for the continuance or adjustment of existing rights and liabilities,[23] and

59 Minn. 316, 61 N. W. 330. *Compare*, however, Carey *v.* St. Louis County, 38 Minn. 218, 36 N. W. 459.

Mississippi.— Ross *v.* Wimberly, 60 Miss. 345 [*overruling* Port Gibson *v.* Moore, 13 Sm. & M. 157].

New Jersey.— Scaine *v.* Belleville Tp., 39 N. J. L. 526.

North Carolina.—Broadfoot *v.* Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610.

Oklahoma.— Greer County *v.* Clarke, 12 Okla. 197, 70 Pac. 206; Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. A *de jure* successor of a *de facto* municipal corporation, which acquires the property, rights, and improvements, and embraces the same territory, and is composed of the same people as its *de facto* predecessor, is liable for the valid contracts and legal liabilities of the *de facto* corporation. Blackburn *v.* Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708.

Tennessee.— O'Connor *v.* Memphis, 6 Lea 730; Shankland *v.* Phillips, 3 Tenn. Ch. 556.

Texas.— Rankin *v.* McCallum, 25 Tex. Civ. App. 83, 60 S. W. 975, holding that a municipal corporation succeeding another embracing substantially the same body of inhabitants becomes, by operation of law, responsible for the drainage bonds of its predecessor, although the latter was abolished by a judicial decree declaring it null and void because irregularly organized, since it was a *de facto* corporation, and its successors, succeeding to all its property rights, must be held to have assumed their payment. See also White *v.* Quanah, (Civ. App. 1894) 27 S. W. 839.

Wisconsin.— Washburn Water Works Co. *v.* Washburn, 129 Wis. 73, 108 N. W. 194 (holding that where the inhabitants and territory of a municipal corporation are the same, or substantially the same, it will be presumed that the legislature in providing for a reorganization of the corporation, intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer the affairs of the municipality, and that, in the absence of express provisions to the contrary, the liabilities as well as the property rights of the corporation in its old form should accompany it into its reorganization); Dousman *v.* Milwaukee, 1 Pinn. 81.

United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; Pacific Imp. Co. *v.* Clarksdale, 74 Fed. 528, 20 C. C. A. 635; Hill *v.* Kahoka, 35 Fed. 32; Laird *v.* De Soto, 22 Fed. 421; Brewis *v.* Duluth, 13 Fed. 334, 3 McCrary 223; Grantland *v.* Memphis, 12 Fed. 287; Jones *v.* Pensacola, 13 Fed. Cas. No. 7,488; Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632. The rule is not affected by the fact that different powers are possessed under the new charter and different officers administer its affairs. Mobile *v.* Watson, *supra*. An invalid reorganization of an incorporated town as a city cannot affect its corporate existence; and where the invalid reorganization is dissolved by a decree in quo warranto proceedings, and a valid city organization, composed of the same people and trustees, is created in the place of the town, the new organization becomes liable, as the successor of the town, upon its bonds, notwithstanding the city contains a trifle less land within its limits than the town. Laird *v.* De Soto, *supra*.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 125, 132.

Action after change of name see *infra* XVII.

An action at law may be maintained against a new corporation as successor of the old on a judgment recovered against the old corporation before dissolution. Amy *v.* Selma, 77 Ala. 103.

Revival of former municipality.— Where, after a township has been, by statute, converted into a city, and debts have accrued, such statute is repealed, making no provision for payment of the city debts, an action will lie for such claims against the revived township. Scaine *v.* Belleville Tp., 39 N. J. L. 526.

Water company privilege.— Where a corporation is granted the privilege of supplying a village with water, the subsequent incorporation of a city as a legal successor of such village does not destroy or abridge the privilege conferred. Grand Rapids *v.* Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749.

22. Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451.

23. Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777; Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844 (holding that since a city of the second class had power to contract for water to be furnished to itself and its inhabitants, a contract for that purpose remained binding on it after it had become a city of the first class, as expressly provided by the Kansas First Class City Act, §§ 119–121; and hence it had power to levy a tax to pay such contract obligation); Hoboken *v.* Ivison, 29 N. J. L. 65; Lee *v.* Thief River Falls, 82 Minn. 88, 84 N. W. 654; White *v.* Quanah, (Tex. Civ. App. 1894) 27 S. W. 839 [*reversed* on other grounds in 88 Tex. 14, 28 S. W. 1065].

Taxpayer's consent.— Under a Texas stat-

such provision is not unconstitutional as an unlawful interference with vested rights, a taking of property without due process of law, or for any other reason.[24]

(IV) *TAXES AND ASSESSMENTS.* The revenue due to the old municipality may be collected by its successor, and all liens and remedies therefor pass to it unless otherwise provided by law.[25] Where a new municipal corporation is liable for the debts of the old, it has the same powers of taxation to pay them which existed at the time of their creation, and which entered into the contracts.[26] So also it may assess benefits and appraise damages for public improvements.[27]

(V) *OFFICERS.* The statutes providing for reorganization usually contain specific provision for officers; but lacking such provisions the courts hold that the officers of the old corporation hold their offices and exercise their powers until the officers of the succeeding corporation are elected and qualified.[28]

(VI) *DUTIES PENDING REORGANIZATION.* During the reorganization of a municipal corporation it is not released from its obligation to exercise the power

ute providing that the reorganized city shall be liable for the debts of its predecessor, if the taxpayers vote to take over its property, a special taxpayer's election after reorganization is necessary to impose this burden upon the reorganized corporation. Quanah *v.* White, 88 Tex. 14, 28 S. W. 1065.

Mandamus to compel payment of judgment see Lee *v.* Thief River Falls, 82 Minn. 88, 84 N. W. 654.

Remedy under new charter.— Under Kansas City Charter (1889), art. 17, § 10, providing that such charter "shall not in any manner affect any right, lien or liability accrued, established, or subsisting under and by virtue of the previous charter or any amendment thereto," one having a right or lien existing under the old charter may avail himself of the remedy accruing under the new charter. Kansas City *v.* Summerwell, 58 Mo. App. 246.

24. White *v.* Quanah, (Tex. Civ. App. 1894) 27 S. W. 839. See also *supra*, II, B, 2, g, (I), (II); *infra*, IV, F, G, H.

25. Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539; Bennison *v.* Galveston, 34 Tex. Civ. App. 382, 78 S. W. 1089.

Assessments for previous years.— Under Ky. St. § 3258, which is a part of the charter of cities of the third class, and which provides that any right, lien, or liability acquired or accrued under a former charter shall continue and be enforced, a city, which at the time of the enactment of such new charter had the right under its former charter to assess property for previous years, its assessment having been omitted, may still exercise such right, although under the new statute (Rev. St. § 3403) the right to make such assessment would be barred by limitation. Frankfort *v.* Mason, etc., Co., 100 Ky. 48, 37 S. W. 290, 18 Ky. L. Rep. 543.

26. Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896. See also Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844.

27. Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777, holding that where a borough was chartered as a city, and the charter provided that the city should succeed to all rights, and be subject to all obligations, of the borough, the city properly proceeded under its charter to assess the benefits and appraise the damage caused by the change of grade of a highway by the borough, such action not having been taken by the borough, and no change in respect to such action being made by its charter, except as to its method of procedure.

Reassessment see Cassidy *v.* Bangor, 61 Me. 434.

28. *California.*— People *v.* Bagley, 85 Cal. 343, 24 Pac. 716.

Colorado.— Central *v.* Sears, 2 Colo. 588.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Illinois.— McGrath *v.* Chicago, 24 Ill. App. 19. But see Crook *v.* People, 106 Ill. 237, holding that the absolute and unconstitutional repeal of a municipal charter abolishes all offices under it, and the substitution of another charter with inconsistent provisions, without any saving clause as to the rights of officers under the former charter, will have the same effect. See also People *v.* Brown, 83 Ill. 95.

Kansas.— Stewart *v.* Adams, 50 Kan. 560, 32 Pac. 122; Moser *v.* Shamleffer, 39 Kan. 635, 18 Pac. 956; Ritchie *v.* South Topeka, 38 Kan. 368, 16 Pac. 332.

Kentucky.— Lafferty *v.* Huffman, 99 Ky. 80, 35 S. W. 123, 18 Ky. L. Rep. 17, 32 L. R. A. 203. *Compare* Boyd *v.* Chambers, 78 Ky. 140, holding that where the charter of a city has been repealed, and a new act of incorporation granted, it is the creation of a new city government, with its civil and police jurisdiction, as well as the manner of electing all of its officers, when not in violation of the constitution.

Nebraska.—State *v.* Babcock, 25 Nebr. 709, 41 N. W. 654, holding that a city created by the act of March 1, 1879, out of a village having a president and board of trustees, might, until the election of a mayor and council, exercise the ordinary powers of a city, including the order of an election to vote the bonds and the issue of bonds duly voted, through the instrumentality and agency of the said president and trustees.

New York.— People *v.* Hull, 19 N. Y. Suppl. 536. But *compare* Watervliet *v.* Colonie, 27 N. Y. App. Div. 394, 50 N. Y. Suppl. 487, holding that where a statute dissolves a town as a municipal corporation and re-

with which it is invested to keep its streets and sidewalks in a safe condition, or perform other like duties imposed upon it by law.[29]

f. Void or Defective Reorganization. Mere irregularity in the proceedings does not invalidate the reorganization;[30] but attempted reorganizations of municipalities have been declared void on account of the following substantial defects: Want of jurisdiction in the board or officer assuming to determine the question of reorganization;[31] want of power in the tribunal assuming to warrant or conduct the proceedings;[32] want of approval of the step by the inhabitants;[33] want of approval by the council;[34] and because the body attempting the reorganization was not within the purview of the statute.[35] The legislature may validate a defective corporation,[36] or the corporation may be estopped to deny the validity of its reorganization;[37] and even though an act under which a municipality attempts to reorganize is afterward declared void, acts done during its *de facto* existence under the statute are valid.[38] An invalid reorganization of a municipality cannot affect its corporate existence under its original charter, the attempted reorganization being a mere nullity.[39]

g. Repeal of Amendment. The repeal of an act amending a municipal charter does not revive, within such municipality, a general statute expressly or impliedly repealed within such limits by the amendatory act.[40]

2. Forfeiture and Dissolution — a. In General. The American doctrine in regard to municipal corporations seems to be that they can be dissolved only as the direct result of legislative action.[41] This may be effected either by repeal of the

places it by a city, the new corporation succeeds to the governmental property of the old, and hence the former officers of the town do not exist for the purpose of winding up its affairs.

Pennsylvania.— Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761; Com. *v.* Wyman, 137 Pa. St. 508, 21 Atl. 389; Ayars' Appeal, 122 Pa. St. 266, 16 Atl. 356, 2 L. R. A. 577. Under Act (1874), § 57, providing that, after the acceptance thereof by cities, all of the elected officers therein shall hold their respective offices until the expiration of the term for which they were respectively elected, and shall have all of the rights which belong to them under the laws in existence at the date of the acceptance, the school directors of a borough do not lose their offices when a city charter is adopted by the borough. Knerr *v.* Krause, 3 Pa. Co. Ct. 563.

Tennessee.— State *v.* Wilson, 12 Lea 246.

Compare infra, IV, E.

29. Evanston *v.* Gunn, 99 U. S. 660, 25 L. ed. 306.

30. See *supra,* II, C, 1, d, (IV), (B).

31. People *v.* Bancroft, 3 Ida. 356, 29 Pac. 112; Largen *v.* State, 76 Tex. 323, 13 S. W. 161.

32. *Ex p.* Moore, 62 Ala. 471; People *v.* Hoge, 55 Cal. 612.

33. People *v.* Gunn, 85 Cal. 238, 24 Pac. 718; Largen *v.* State, 76 Tex. 323, 13 S. W. 161. See also *supra,* II, C, 1, d, (IV).

34. Lum *v.* Bowie, (Tex. 1891) 8 S. W. 142.

35. Harness *v.* State, 76 Tex. 566, 13 S. W. 535.

36. Stembel *v.* Bell, 161 Ind. 323, 68 N. E. 589; Muse *v.* Lexington, 110 Tenn. 655, 76 S. W. 481; State *v.* McGovern, 100 Wis. 666, 76 N. W. 593. See also *supra,* II, A, 15, d.

37. Thus where the legislature enacted that a city might abandon its charter and become incorporated under the general law by a vote of two thirds of its council entered on its journal, and that a copy thereof, under the corporate seal, should be filed in a certain office, and the city voted to become so incorporated, and a copy was entered in the journal of its council, and a copy filed as required, except that it was not sealed, and the city had been incorporated for twenty years, but had never had a seal, it was held that it was estopped from raising that objection to its reincorporation. Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758.

38. Back *v.* Carpenter, 29 Kan. 349.

39. Laird *v.* De Soto, 22 Fed. 421. See also Harness *v.* State, 76 Tex. 566, 13 S. W. 535, holding that an attempt by a town of over one thousand inhabitants, incorporated under Tex. Rev. St. tit. 17, c. 11, to reorganize under the provision of title 17, chapter 1, was invalid and did not result in the surrender of its existing charter, even though all steps were taken as prescribed.

40. State *v.* De Bar, 58 Mo. 395.

41. *California.*— People *v.* Hill, 7 Cal. 97.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1.

Kansas.— State *v.* Hamilton, 40 Kan. 323, 19 Pac. 723; State *v.* Osborn, 36 Kan. 530, 13 Pac. 850; State *v.* Meadows, 1 Kan. 90.

Kentucky.— See Hill *v.* Anderson, 90 S. W. 1071, 28 Ky. L. Rep. 1032, holding that an incorporated town was not dissolved by such a decrease of its population as to render it insufficient to authorize new organization as a town.

New York.— People *v.* Draper, 15 N. Y. 532; Blauvelt *v.* Nyack, 9 Hun 153.

Tennessee.—Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; State *v.* Waggoner, 88

charter[42] or by express provision contained in the charter or general law that the corporation shall cease and determine for failure to comply with certain conditions therein prescribed;[43] or by the expiration of the time limited for the existence of the corporation.[44] This is a distinct departure from the English doctrine and practice under which a municipality might be dissolved, not only by act of parliament,[45] but also by loss of an integral part,[46] by a surrender of franchises,[47] or by forfeiture of its charter in proceedings by scire facias or quo warranto.[48] Neither of these three last-named methods have received general recognition in America, and the last two have generally been rejected as contrary to the genius and spirit of our institutions.[49] Under the common law the several classes of officers and the class of persons named in the charter were denominated the integral parts of a municipal corporation, for example the mayor, aldermen, and commonalty.[50] The loss of its mayor by failure to elect at the appointed time, or by death at such time that the office could not be filled, operated to dissolve the corporation.[51] So likewise the loss of all or a majority of the aldermen or of all the commonalty, whereby the corporation became incapacitated to perform its functions.[52] But this has been provided against by statute and it may well be doubted whether dissolution can now be effected by this method even in England.[53] In America, if indeed this method of dissolution ever was recognized, the life of the municipality does not hang by such a slender thread. There are no classes of persons to form integral parts.[54] The charter incorporates the inhabitants and territory into a municipality; and these three constituent elements, charter, territory, and inhabitants, may be regarded as its integral parts, the loss of any one of which might well be held to work dissolution, since without all the corporation could not exist.[55] Certainly the loss of the charter, by repeal or in any other lawful way, would disincorporate the municipality.[56] And if the people should entirely abandon the territory embraced within its boundaries the wilderness remaining would not constitute a municipal corporation; for inhabitants are essential to municipal life and operation.[57] So also if all the territory within the boundaries of the municipality should be washed away by flood or otherwise destroyed, the former inhabitants, even with their charter preserved, would no longer be a municipal corporation, for the integral territory would be wanting.[58]

b. Surrender of Charter. Although it was otherwise in England,[59] a municipal charter cannot be surrendered in the United States without legislative sanction. The legislature, being the sole judge as to the public necessity for the existence of a public corporation, may, unless forbidden by the constitution, determine when and where one shall exist and what powers and franchises it shall

Tenn. 290, 12 S. W. 721; Luehrman *v.* Shelby Taxing Dist., 2 Lea 425.

42. See *infra*, II, C, 2, e.

43. Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; Hornbrook *v.* Elm Grove, 40 W. Va. 543, 21 S. E. 851, 28 L. R. A. 416. See *infra*, II, C, 2, c.

44. Pope *v.* St. Luke's Parish Road Com'rs, 12 Rich. (S. C.) 407.

45. Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302; Rex *v.* Amery, Anstr. 178, 2 Bro. P. C. 336, 2 T. R. 515, 1 T. R. 575, 1 Rev. Rep. 306, 533, 1 Eng. Reprint 981; Coke Litt. 176; 1 Blackstone Comm. 485; 2 Kent Comm. 305.

46. Rex *v.* Morris, 3 East 213, 4 East 17; Reg. *v.* Bewdley, 1 P. Wms. 207, 24 Eng. Reprint 357; Rex *v.* Pasmore, 3 T. R. 199, 1 Rev. Rep. 688; Willcock Mun. Corp. 328.

47. See *infra*, II, C, 2, b.

48. See *infra*, II, C, 2, d.

49. Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; State *v.* Waggoner, 88 Tenn. 290, 12 S. W. 721; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; State *v.* Dunson, 71 Tex. 65, 9 S. W. 103; Morris *v.* State, 65 Tex. 53. See *infra*, II, C, 2, b, d.

50. Willcock Mun. Corp. 40.

51. Willcock Mun. Corp. 328.

52. Willcock Mun. Corp. 329.

53. Willcock Mun. Corp. 328, 329.

54. Oakes *v.* Hill, 10 Pick. (Mass.) 333; People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465; Ingersoll Pub. Corp. 180.

55. People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; O'Conner *v.* Memphis, 6 Lea (Tenn.) 730; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425.

56. See *supra*, this section.

57. Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425; Ingersoll Pub. Corp. 165.

58. Ingersoll Pub. Corp. 105.

59. Rex *v.* Osbourne, 4 East 326; Rex *v.*

have independent of the wishes of the inhabitants, and without legislative authority therefor the citizens may not surrender their charter and thereby nullify the legislative will.[60] Municipal corporations, however, may be authorized by statute to surrender their franchises and powers by disincorporation by popular vote or other municipal action.[61] This is not in strictness a dissolution by surrender of the charter, but a dissolution by operation of law consequent upon the condition expressed in the statute; or in other words, it is a repeal of the charter in the mode prescribed by law.[62]

e. Non-User or Misuser. Where the legislature creates a municipal corporation, refusal of the inhabitants to accept the charter or organize thereunder, or to carry on the organization after completion, would render the corporation dormant, but would not dissolve it.[63] Non-user or misuser may subject the corporation to penalty; but the generally prevalent doctrine in America is that it does not work municipal dissolution;[64] and at any time before repeal of the charter even a minority of the citizens may revive the corporation with all its lawful powers, privileges, and franchises.[65] Non-user by failure to elect officers, or otherwise, for however long a period of time, does not of itself operate to forfeit the charter of or dissolve a municipal corporation.[66] It has been held, however, that if the charter contains a clause that on failure to elect officers annually all municipal powers, immunities, and franchises shall cease, the failure to elect municipal officers, as required, will operate to repeal the charter and dissolve the corporation, according to the legislative will.[67] Other decisions are to the contrary.[68]

d. Forfeiture by Judicial Proceedings. Forfeiture is herein used in that sense whereby is expressed the judgment of a court ousting a municipality from its

Miller, 6 T. R. 268, 3 Rev. Rep. 172; Grant Corp. 306; Willcock Mun. Corp. 331–333.

60. Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425. See *supra*, II, A, 4, 13, c; II, A, 14, b, (v).

In England it was otherwise. See *supra*, II, C, 2, b, text and note 59.

61. State *v.* Husband, 26 Ind. 308; Blauvelt *v.* Nyack, 9 Hun (N. Y.) 153.

62. State *v.* Husband, 26 Ind. 308; Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; Blauvelt *v.* Nyack, 9 Hun (N. Y.) 153; Largen *v.* State, 76 Tex. 323, 13 S. W. 161.

63. People *v.* Wren, 5 Ill. 269; Welch *v.* Ste. Genevieve, 29 Fed. Cas. No. 17,372, 1 Dill. 130.

64. Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; *Ex p.* Moore, 62 Ala. 471; Harris *v.* Nesbit, 24 Ala. 398; Cain *v.* Brown, 111 Mich. 657, 70 N. W. 337; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; State *v.* Dunson, 71 Tex. 65, 9 S. W. 103; State *v.* Hoff, (Tex. Civ. App. 1895) 29 S. W. 672; Welch *v.* Ste. Genevieve, 29 Fed. Cas. No. 17,372, 1 Dill. 130.

65. People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Ingersoll Pub. Corp. 182.

66. *Alabama.*— Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; *Ex p.* Moore, 62 Ala. 471; Harris *v.* Nesbit, 24 Ala. 398.

Illinois.— People *v.* Wren, 5 Ill. 269.

Iowa.— Muscatine Turn Verein *v.* Funck, 18 Iowa 469.

Kentucky.— Hill *v.* Anderson, 90 S. W. 1071, 28 Ky. L. Rep. 1032.

North Carolina.— Trenton *v.* McDaniel, 52 N. C. 107, holding that where the election of commissioners of an incorporated town was vested in the free male citizens thereof, mere failure for a long time to elect commissioners did not destroy the right, but it continued so long as there were free male citizens enough to fill vacancies.

Tennessee.—Lynch *v.* Lafland, 4 Coldw. 96.

Texas.— Buford *v.* State, 72 Tex. 182, 10 S. W. 401; State *v.* Dunson, 71 Tex. 65, 9 S. W. 103; Morris *v.* State, 65 Tex. 53; State *v.* Hoff, (Civ. App. 1895) 29 S. W. 672. *Compare* Lea *v.* Hernandez, 10 Tex. 137.

Wisconsin.—Schriber *v.* Langlade, 66 Wis. 616, 29 N. W. 547, 554.

United States.— Welch *v.* Ste. Genevieve, 29 Fed. Cas. No. 17,372, 1 Dill. 130.

England.— Colchester *v.* Seaber, 3 Burr. 1866, W. Bl. 591.

See 36 Cent. Dig. tit. "Municipal Corporations," § 138.

67. Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; Largen *v.* State, 76 Tex. 323, 13 S. W. 161.

68. *California.*— Wood *v.* San Francisco Election Com'rs, 58 Cal. 561.

Illinois.— Dodge *v.* People, 113 Ill. 491, 1 N. E. 826. See Whalin *v.* Macomb, 76 Ill. 49.

Kentucky.— Cincinnati, etc., R. Co. *v.* Baughman, 76 S. W. 351, 25 Ky. L. Rep. 705.

Texas.— Lea *v.* Hernandez, 10 Tex. 137.

West Virginia.— Hornbrook *v.* Elm Grove, 40 W. Va. 543, 21 S. E. 851, 28 L. R. A. 416, holding that under Code, c. 47, § 44, providing that if any municipal corporation should

charter powers, privileges, and franchises, and thereby dissolving the corporation.[69] Formerly in England this judgment might be pronounced in scire facias and quo warranto proceedings, against public as well as private corporations.[70] It was the legal weapon employed by the servile judiciary of the Stuart dynasty to punish the cities for their participation in the popular resistance to absolutism,[71] as well as to deprive the American colonies of their charter rights and franchises.[72] It is the familiar judgment used in the United States at the instance of the state to inflict capital punishment upon a private corporation for culpable misuser or non-user of its franchises,[73] and in a few cases it has been recognized in our state courts as a proper proceeding against a municipal corporation;[74] but the great weight of judicial opinion is to the effect that the courts have no power to dissolve a municipal corporation.[75] That power belongs exclusively to the legislative department of the government.[76] This departure from the course of the common law is explained and justified upon the ground that the American municipality, unlike its English prototype, is strictly a public corporation, an instrumentality and agency of the state for the performance of governmental functions for the public welfare; and that the propriety of its existence as such public agency is not a judicial but exclusively a political question solely within the discretion of the legislative department, so that, while the courts may adjudge and enforce legal penalties against them and their officers for misuser or non-user of powers and franchises, they have no right to destroy a public agency which the legislature has created and in its plenary discretion sees fit to continue for the administration of affairs of the commonwealth.[77] To permit this would perniciously disturb the balance of powers essential to the welfare and proper existence of the American state and menace the perpetuity of our system of government.[78] The cases in which American courts have exercised jurisdiction to pronounce judgment of forfeiture do not assail this apparently impregnable position of the great majority of our courts on the subject of the proper balance of legislative and judicial powers, but assume the power in the judiciary to adjudge forfeiture, for non-user of franchise, against municipalities whose charters ought long before to have been repealed.[79] Such judgments, however meritorious in themselves and consonant with the English cases, manifest such indifference to fundamental principles of constitutional limitation, that they cannot be considered as disturbing the general American doctrine that courts do not possess the power to dissolve a municipal corporation by judgment of forfeiture of its charter powers and franchises.[80]

e. Repeal of Charter — (i) *Power to Repeal.* The inherent power of the legislative department to abolish or dissolve a municipal corporation by a repeal of its charter has been settled by repeated adjudication,[81] subject of course to

fail for one year to keep its streets, sidewalks, etc., in repair, it should thereby forfeit its charter and all rights thereunder, such forfeiture could not be ascertained and declared in an action to restrain the collection of taxes imposed by a municipality.

69. Black L. Dict. tit. "Forfeiture."

70. Atty.-Gen. *v.* Shrewsbury, 6 Beav. 220, 7 Jur. 757, 12 L. J. Ch. 465, 49 Eng. Reprint 810; Rex *v.* Kent, 13 East 220, 12 Rev. Rep. 330; Rex *v.* Saunders, 3 East 119; Rex *v.* Grosvener, 7 Mod. 198; Willcock Mun. Corp. 333–336.

71. 1 Blackstone Comm. 485.

72. 1 Bancroft Hist. U. S. (23d ed.) 189, 409.

73. See CORPORATIONS, 10 Cyc. 1281 *et seq.*

74. Dodge *v.* People, 113 Ill. 491, 1 N. E. 826; Cincinnati, etc., R. Co. *v.* Baughman, 76 S. W. 351, 25 Ky. L. Rep. 705.

75. Cain *v.* Brown, 111 Mich. 657, 70 N. W. 337; State *v.* Huff, 105 Mo. App. 354, 79 S. W. 1010; Largen *v.* State, 76 Tex. 323, 13 S. W. 161; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; Welch *v.* Ste. Genevieve, 29 Fed. Cas. No. 17,372, 1 Dill. 130.

76. People *v.* Morris, 13 Wend. (N. Y.) 325.

77. People *v.* Morris, 13 Wend. (N. Y.) 325; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425.

78. Cooley Const. Lim. (6th ed.) 104–110.

79. Dodge *v.* People, 113 Ill. 491, 1 N. E. 826; Cincinnati, etc., R. Co. *v.* Baughman, 76 S. W. 351, 25 Ky. L. Rep. 705.

80. Cooley Const. Lim. (6th ed.) 228–230.

81. *Alabama.*—Amy *v.* Selma, 77 Ala. 103.

Arkansas.— State *v.* Jennings, 27 Ark. 419.

California.— Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 3 L. R. A. 178; People *v.* Hill, 7 Cal. 97.

constitutional limitations;[82] and this power is not affected by the fact that the corporation is the trustee of a public charity.[83] A municipal charter is not a contract within the constitutional prohibition against laws impairing the obligation of contracts;[84] and municipal consent is not required, unless required by the constitution.[85] The dissolution may be enacted, even against the protest of the inhabitants;[86] nor can the legislative motive be questioned judicially.[87] Of course a municipal charter may be repealed by the adoption of a constitutional provision.[88]

(II) *METHOD* — (A) *In General.* The repeal of a municipal charter may be effected by any appropriate mode of legislation.[89] The legislature, in the exercise of its sovereign power and discretion, may not only create and destroy public corporations, when in its judgment the public good requires it, but it may pursue its own method of legislation in effecting such results, provided only that it does not transgress constitutional limitations.[90] Dissolution may be effected by the repeal of a special charter;[91] or, in most jurisdictions, of the general law under which the community has assumed the municipal charter and organization.[92] A munici-

Connecticut.— Granby *v.* Thurston, 23 Conn. 416.

Georgia.— State *v.* Savannah, R. M. Charlt. 250.

Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Kansas.— State *v.* Hamilton, 40 Kan. 323, 19 Pac. 723.

Kentucky.—Boyd *v.* Chambers, 78 Ky. 140.

Louisiana.—Layton *v.* New Orleans, 12 La. Ann. 515.

New Jersey.— Fish *v.* Branin, 23 N. J. L. 484. See also Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

New York.— Blanvelt *v.* Nyack, 9 Hun 153.

North Carolina.— Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41. See also Wallace *v.* Sharon Tp., 84 N. C. 164.

Pennsylvania.— *In re* Sharon Hill Borough, 140 Pa. St. 250, 21 Atl. 394; Philadelphia *v.* Fox, 64 Pa. St. 169.

Tennessee.— State *v.* Waggoner, 88 Tenn. 290, 12 S. W. 721; Luehrman *v.* Shelby Taxing Dist., 2 Lea 425; Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.

Texas.— Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

Wisconsin.— State *v.* Harshaw, 73 Wis. 211, 40 N. W. 641.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Jones *v.* Pensacola, 14 Fed. Cas. No. 7,488.

See 36 Cent. Dig. tit. "Municipal Corporations," § 134 *et seq.* And see CONSTITUTIONAL LAW, 8 Cyc. 941.

82. Davis *v.* Woolnough, 9 Iowa 104; *Ex p.* Pritz, 9 Iowa 30.

83. Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

Appointment of new trustee see *infra*, II, C, 2, f, (III).

84. *Indiana.*— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Louisiana.—Montpelier Academy *v.* George, 14 La. 4, 33 Am. Dec. 585.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

Tennessee.— Luehrman *v.* Shelby Taxing Dist., 2 Lea 425.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 541, 13 L. ed. 518.

See *supra*, II, A, 13, a; and CONSTITUTIONAL LAW, 8 Cyc. 941.

85. People *v.* Hill, 7 Cal. 97; Montpelier Academy *v.* George, 14 La. 4, 33 Am. Dec. 585; St. Louis *v.* Allen, 13 Mo. 400.

86. People *v.* Hill, 7 Cal. 97; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People *v.* Morris, 13 Wend. (N. Y.) 325; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425.

87. St. Louis *v.* Allen, 13 Mo. 400.

88. See Covington *v.* East St. Louis, 78 Ill. 548. And see *supra*, II, C, 1, d, (I).

89. Watervliet *v.* Colonie, 27 N. Y. App. Div. 394, 50 N. Y. Suppl. 487; Muse *v.* Lexington, 110 Tenn. 655, 76 S. W. 481; Buford *v.* State, 72 Tex. 182, 10 S. W. 401; U. S. *v.* Mobile, 12 Fed. 768 note, 4 Woods 536; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, 5 McLean 158.

90. State *v.* Severance, 55 Mo. 378; People *v.* Morris, 13 Wend. (N. Y.) 325; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495; Buford *v.* State, 72 Tex. 182, 10 S. W. 401.

91. Sloan *v.* State, 8 Blackf. (Ind.) 361; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425.

92. *Georgia.*— Griffin *v.* Inman, 57 Ga. 370.

Louisiana.—Bond *v.* Hiestand, 20 La. Ann. 139.

Maryland.— Hammond *v.* Haines, 25 Md. 541, 90 Am. Dec. 77.

Tennessee.— State *v.* Wilson, 12 Lea 246.

pality existing under a general act may, unless the constitution forbids, be dissolved by a special act.[93] Sometimes, however, the constitution prohibits repeal as well as amendment,[94] by special act, so that a municipal charter can only be repealed by the municipality under a general law enacted for that purpose.[95]

(B) *Repeal by Implication.* A municipal charter may be repealed either expressly or impliedly by subsequent legislation.[96] A special charter may be impliedly repealed by a special act,[97] or by a general law which embraces such special charter.[98] The repeal of a general statute authorizing the incorporation of communities by their own political choice is a legislative withdrawal of the sovereign permission to such communities to continue the enjoyment of municipal franchises and necessarily operates as a repeal of the charters of all corporations organized under such general statute.[99] But mere inconsistency in the two acts will not necessarily operate to effect a repeal.[1] Repeal of municipal charters by implication is a doctrine which meets with special disfavor in our courts, because of its destructive effect upon public institutions; and municipal life will be declared to be terminated by statute only when the later statute is wholly irreconcilable with the former.[2] The act relied on for repeal by implication must, by its terms, plainly manifest the legislative intention that such shall be its effect on the former statute; otherwise it will remain in force and the corporation will still stand.[3] Adoption of a constitutional prohibition against the incorporation of

United States.— Union Pac. R. Co. *v.* Ryan, 113 U. S. 516, 5 S. Ct. 601, 28 L. ed. 1098.

Contra.— In Missouri the repeal of the general law of incorporation has been held not to dissolve a municipality incorporated under it. State *v.* Huff, 105 Mo. App. 354, 79 S. W. 1010.

93. People *v.* Morris, 13 Wend. (N. Y.) 325; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495.

94. See *supra*, II, C, 1, d, (II).

95. Davis *v.* Woolnough, 9 Iowa 104; *Ex p.* Pritz, 9 Iowa 30.

96. State *v.* Jennings, 27 Ark. 419; Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; and other cases cited in the notes following.

97. Buford *v.* State, 72 Tex. 182, 10 S. W. 401; Fowle *v.* Alexandria, 9 Fed. Cas. No. 4,993, 3 Cranch C. C. 70. No express words of repeal in a completely new and independent charter are required to repeal all omitted portions of a former charter which it is obviously intended to supersede. State Bd. of Education *v.* Aberdeen, 56 Miss. 518. Where a town was reincorporated as a city by an act which repealed all conflicting laws, it was held that the territory embraced within the town thereafter became a city, notwithstanding the fact that the act granting a charter to the town had not been expressly repealed, as the effect of the act incorporating the city was to repeal by necessary implication the charter of the town. Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

98. McInerney *v.* Huelefield, 116 Ky. 28, 75 S. W. 237, 25 Ky. L. Rep. 272; Smith *v.* Hightstown, 71 N. J. L. 536, 60 Atl. 393 (holding that the Borough Act of 1897 (Laws (1897), p. 285) is a general law regulating the internal affairs of that class of municipalities and repeals inconsistent provisions of previous local acts or special charters of boroughs); Fish *v.* Branin, 23 N. J. L. 484; State *v.* Kersten, 118 Wis. 287, 95 N. W. 120.

99. Reed *v.* Camden, 50 N. J. L. 87, 11 Atl. 137; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425. *Compare*, however, State *v.* Huff, 105 Mo. App. 354, 79 S. W. 1010.

1. Wood *v.* Election Com'rs, 58 Cal. 561; Garrett *v.* Aby, 47 La. Ann. 618, 17 So. 238; Harrisburg *v.* Sheck, 104 Pa. St. 53; State *v.* Kersten, 118 Wis. 287, 95 N. W. 120. Where a statute does not in express terms annul a right or power given to a municipal corporation by a former act, but merely confers the same rights and powers upon it under a new name, and with additional powers, the later act does not repeal the earlier. State *v.* Mobile, 24 Ala. 701.

2. Wood *v.* Election Com'rs, 58 Cal. 561; People *v.* Highland Park, 88 Mich. 653, 50 N. W. 660; Green *v.* Clarke, 56 N. J. L. 62, 27 Atl. 924; Fish *v.* Branin, 23 N. J. L. 484; State *v.* Kersten, 118 Wis. 287, 95 N. W. 120.

3. *California.*— Wood *v.* Election Com'rs, 58 Cal. 561.

Georgia.— Horn *v.* State, 114 Ga. 509, 40 S. E. 768.

Louisiana.— Garrett *v.* Aby, 47 La. Ann. 618, 17 So. 238.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

Nebraska.— State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New Mexico.— Socorro County *v.* Leavitt, 4 N. M. 74, 12 Pac. 759.

Ohio.— North Bend *v.* Cincinnati, etc., Electric St. R. Co., 25 Ohio Cir. Ct. 268.

Pennsylvania.— *In re* Henry St., 123 Pa. St. 346, 16 Atl. 785.

South Dakota— Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

Texas.— Buford *v.* State, 72 Tex. 182, 10

municipalities or amendment of their charters by special act does not operate to repeal charters previously granted by special act, but the provision refers to future legislation only.[4]

f. Operation and Effect of Repeal or Dissolution — (I) *In General.* The primary effect of the dissolution of a municipal corporation by legislative repeal of its charter or otherwise, without provision for reincorporation, is to destroy the corporation.[5] Its life is ended, its franchises withdrawn, its powers abrogated, and its functions cease.[6] It is no longer a public institution. It can neither sue nor be sued; receive nor convey property; make contracts; nor commit torts or crimes.[7] The corporation is defunct, and naught remains but to administer on its effects.[8] The repeal of a special charter of incorporation, which had been accepted by the town in lieu of a previous charter under general laws, does not operate to revive the first charter, but wholly disincorporates the community.[9]

(II) *Officers.* The absolute repeal of a charter destroys all offices under it and puts an end to the functions of the incumbents.[10]

(III) *Property.* The strictly public property of a defunct municipality may be disposed of by the legislature as other state property.[11] That encumbered for creditors will be subject to their liens.[12] Other property which has been purchased by the inhabitants for other than governmental purposes, such as parks, lighting plants, waterworks, and street railways, owned by the municipality are subject to peculiar considerations and regarded diversely in various states. In Michigan it is treated as private property held for the people of the locality,[13] while in Pennsylvania it is treated as public property subject to absolute legislative control.[14] The judicial views in other states are various, but on the middle

S. W. 401; *Ex p.* Cross, 44 Tex. Cr. 376, 71 S. W. 289.

See 36 Cent. Dig. tit. "Municipal Corporations," § 134 *et seq.*

4. Guild *v.* Chicago, 82 Ill. 472; Covington *v.* East St. Louis, 78 Ill. 548. See also Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234, where existing municipalities were continued in force by the constitution.

5. Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; Burk *v.* State, 5 Lea (Tenn.) 349.

6. State *v.* Reads, 76 Minn. 69, 78 N. W. 883; Lilly *v.* Taylor, 88 N. C. 489; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; Burk *v.* State, 5 Lea (Tenn.) 349; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

7. Dodge *v.* People, 113 Ill. 491, 1 N. E. 826; Beckwith *v.* Racine, 3 Fed. Cas. No. 1,213, 7 Biss. 142.

In a quo warranto proceeding against a municipal corporation requiring it by its officers to show by what warrant it acted as such, such a proceeding being authorized by statute, a judgment has the effect to dissolve the corporation, whether it existed *de facto* or *de jure*, and is a good defense in a suit on the bond of a tax-collector by the village, or by the state for the use of the corporation. Dodge *v.* People, 113 Ill. 491, 1 N. E. 826.

8. Lilly *v.* Taylor, 88 N. C. 489; Burk *v.* State, 5 Lea (Tenn.) 349.

9. State *v.* Reads, 76 Minn. 69, 78 N. W. 883; Ruohs *v.* Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; Burk *v.* State, 15 Lea (Tenn.) 349.

10. State *v.* Savannah, R. M. Charlt. (Ga.) 250 (holding also that the legislature has power to destroy all offices, except those held by constitutional officers, which are made for civil government, and thus put an end to the functions of the incumbents before their term of office has expired); Crook *v.* People, 106 Ill. 237; People *v.* Brown, 83 Ill. 95; Boyd *v.* Chambers, 78 Ky. 140; Beckwith *v.* Racine, 3 Fed. Cas. No. 1,213, 7 Biss. 142 [*affirmed* in 100 U. S. 514, 25 L. ed. 699]. *Compare infra*, IV, E.

On the dissolution of a municipal corporation by a judgment in quo warranto, as permitted by statute, the authority of its treasurer to demand or recover money from the collector or any one else, on behalf of such corporation, is absolutely revoked, and the corporation cannot sue on the bond of the collector. Dodge *v.* People, 113 Ill. 491, 1 N. E. 826. After such dissolution the state cannot maintain an action on the tax-collector's bond for the use of the defunct municipality, and the money held by him should be kept until someone having a right thereto demands it. Dodge *v.* People, *supra*.

11. O'Conner *v.* Memphis, 6 Lea (Tenn.) 730; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197. See also *infra*, IV, F.

12. Amy *v.* Selma, 77 Ala. 103; Small *v.* Danville, 51 Me. 359; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Bailey *v.* New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699. See *infra*, IV, H.

13. People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

14. Perkins *v.* Slack, 86 Pa. St. 270.

ground between these two extremes.[15] Where the corporation is the trustee of a public charity, the legislature may provide for a substitute trustee.[16]

(IV) *OBLIGATIONS.* Creditors of the defunct corporation can enforce their claims against it at law only in the manner and to the extent specially provided by law.[17] Judgment cannot be recovered, as there is no one to sue; the debt remains, but the remedy is gone.[18] The doctrine of the Dartmouth college case affords no protection in this particular, for this was a private corporation.[19] The common-law doctrine that the debts are extinguished prevails in the courts of law, and therein the creditor is without remedy, except as specially provided by statute.[20] In equity, however, the liability of a municipal corporation to creditors is not extinguished by a repeal of its charter. The obligation to perform its contracts rests upon a municipal corporation as it does upon a natural person, and a legislative act which deprives such a corporation of its charter cannot be construed as relieving it from its liability to its creditors.[21] Legislation having such effect would be unconstitutional as impairing the obligation of contracts.[22] A court of equity therefore will afford relief by enforcing against municipal property liens which survive the corporation.[23] Strictly, public property is not subject to such liens, since, being held for public uses only, it could not be encumbered in favor of private persons;[24] but property held by the municipality in its quasi-private character is subject to encumbrance;[25] and such encumbrance will be enforced in equity even on revenue and after the corporation is extinct.[26]

(V) *TAXES.* With the corporation, its offices and officers also become defunct, and no taxes can be thereafter either levied or collected by them.[27] However, taxes levied for any special public purpose may be collected by the agency succeeding to that function,[28] and those pledged to secure any municipal obligation may be collected in equity and applied to the obligation.[29] But the courts cannot exercise the sovereign power to assess and levy taxes.[30]

III. POWERS AND FUNCTIONS.

A. In General. The powers and functions of a municipal corporation represent and embody its life as a social and political organism, "power" expressing

15. *Maryland.*— Baltimore *v.* Reitz, 50 Md. 574; Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *In re* Adams, 165 Mass. 497, 43 N. E. 682.

Nebraska.— Jefferson County Com'rs *v.* People, 5 Nebr. 127.

New York.— People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

Wisconsin.— Jensen *v.* Polk County, 47 Wis. 298, 2 N. W. 320.

See also *infra*, IV, F.

16. *Pennsylvania.*— Philadelphia *v.* Fox, 64 Pa. St. 169.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

Tennessee.— Luehrman *v.* Shelby Taxing Dist., 2 Lea 425.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See *infra*, IV, F.

17. San Miguel County Com'rs *v.* Pierce, 6 N. M. 324, 28 Pac. 512.

18. O'Conner *v.* Memphis, 6 Lea (Tenn.) 730; Beckwith *v.* Racine, 3 Fed. Cas. No. 1,213, 7 Biss. 142 [*affirmed* in 100 U. S. 514, 25 L. ed. 699].

19. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

20. San Miguel County Com'rs *v.* Pierce, 6 N. M. 324, 28 Pac. 512.

21. Amy *v.* Selma, 77 Ala. 103; Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891; Morris *v.* State, 62 Tex. 728; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632.

22. Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891; Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632. And see *infra*, IV, H; and CONSTITUTIONAL LAW, 8 Cyc. 941.

23. Amy *v.* Selma, 77 Ala. 103; Boyd *v.* Chambers, 78 Ky. 140; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

24. Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

25. Morris *v.* State, 62 Tex. 728.

26. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

27. Lilly *v.* Taylor, 88 N. C. 489.

28. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

29. Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 5 S. Ct. 895, 29 L. ed. 172; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

30. Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

legal faculty or authority to do an act,[31] and "function," the proper activity or duty of the municipality.[32] Considered together, they mark and define the relation of the municipal corporation to the state, county, township, and other instrumentalities of government, and also to natural persons, and the boundary of its rights and duties as a corporate being.[33] The extent and operation of these functions and powers are always to be considered with reference to the purpose and object of the creation and existence of the corporation, toward which all powers and functions are assumed to operate.[34] It must, however, be borne in mind that the modern municipality is not the medieval corporation, called a "franchise," and given to a favored few to promote commerce and guarantee liberty and exemption from royal burdens,[35] but a public institution for self-government and improvement and local administration of the affairs of state.[36]

B. Powers[37] — **1. In General.** Being a creature of the state and continuing its existence under the sovereign will and pleasure, a municipal corporation possesses such powers and such only as the state confers upon it,[38] subject to addition

31. Webster Dict. tit. "Power."

32. Black. L. Dict. tit. "Function"; Standard Dict. tit. "Function."

33. Cooley Const. Lim. 231–3.

34. Harris *v.* Livingston, 28 Ala. 577; Porter *v.* Vinzant, 49 Fla. 213, 38 So. 607, 111 Am. St. Rep. 93; Joplin *v.* Leckie, 78 Mo. App. 8; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720. And see *infra*, III, B, 2, d; III, C, 1.

35. 4 Comyn Dig. tit. "Franchises," F, 1; 17 Encycl. Brit. tit. "Municipality"; Smith Wealth of Nations, c. 3; Willcock Mun. Corp. 32.

36. See *supra*, I, A, 1.

37. Powers of: Governing bodies see *infra*, V, A; IX, B. Particular officers, agents, boards, etc., see *infra*, VII; IX, C.

Powers with respect to: Actions see *infra*, XVII. Contracts see *infra*, IX. Fiscal management, debt, security, and taxation see *infra*, XV. Ordinances, resolutions, and by-laws see *infra*, VI. Police power see *infra*, XI. Property see *infra*, VIII. Streets, sewers, public buildings, places, etc., see *infra*, XII.

Legislative control of municipal powers see *infra*, IV.

Liability for torts see *infra*, XIV.

Criminal responsibility see *infra*, XVIII.

38. *Alabama.*— Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862; Gambill *v.* Erdrich, 143 Ala. 506, 39 So. 297; *Ex p.* Florence, 78 Ala. 419; Mobile *v.* Dargan, 45 Ala. 310; *Ex p.* Burnett, 30 Ala. 461.

Alaska.— *In re* Bruno Munro, 1 Alaska 279.

California.— Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; McCoy *v.* Briant, 53 Cal. 247; Glass *v.* Ashbury, 49 Cal. 571; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Douglass *v.* Placerville, 18 Cal. 643; Low *v.* Marysville, 5 Cal. 214.

Colorado.— Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

Connecticut.— Crofut *v.* Danbury, 65 Conn. 294, 32 Atl. 365; Webster *v.* Harwinton, 32 Conn. 131; New London *v.* Brainard, 22 Conn. 552; Willard *v.* Killingworth Borough, 8 Conn. 247.

Florida.— *Ex p.* Sims, 40 Fla. 432, 25 So. 280.

Illinois.— Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230; Cook County *v.* McCrea, 93 Ill. 236.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528; Lewisville Natural Gas Co. *v.* State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734; Ft. Wayne First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35. The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits they are to be favored by the courts. Kyle *v.* Malin, 8 Ind. 34.

Iowa.— McAllen *v.* Hamblin, 129 Iowa 329, 105 N. W. 593, 3 L. R. A. N. S. 145; Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261; Field *v.* Des Moines, 39 Iowa 575, 28 Am. Rep. 46; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Clark *v.* Davenport, 14 Iowa 494; Mt. Pleasant *v.* Breeze, 11 Iowa 399.

Kansas.— Leavenworth *v.* Norton, 1 Kan. 432.

Kentucky.— Johnston *v.* Louisville, 11 Bush 527.

Louisiana.— Shreveport *v.* Maples, 27 La. Ann. 636; New Orleans *v.* Philippi, 9 La. Ann. 44; New Orleans First Municipality *v.* General Sinking Fund, 1 Rob. 279.

Maine.—Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Hooper *v.* Emery, 14 Me. 375.

Maryland.— Baltimore *v.* Howard, 6 Harr. & J. 383.

Massachusetts.— Greenough *v.* Wakefield, 127 Mass. 275; Somerville *v.* Dickerman, 127 Mass. 272; Spaulding *v.* Lowell, 23 Pick. 71.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350, 35 L. R. A. 859; Taylor *v.* Bay City St. R. Co., 80 Mich. 77, 45 N. W. 335; Cooper *v.* Alden, Harr. 72.

Minnesota.—Bentley *v.* Chisago County, 25 Minn. 259; St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Mississippi.— Leonard *v.* Canton, 35 Miss. 189.

or diminution at its supreme discretion.[39] These powers are conferred by the legislature either under special charter or general law,[40] and are often considered and treated under the division of general and particular powers, the former having reference to the powers usually possessed by all municipal corporations,[41] and the latter to those specially granted for particular purposes or to particular municipalities.[42] This division of powers, however, is useful for purposes of description rather than for practical application or classification, all of them being alike to promote the object of the corporation.[43] The particular powers of a municipal corporation are so varied and extensive as not to be susceptible of enumeration, and embrace all other functions of municipal government not included within those usually denominated general powers.[44] The general powers usually con-

Missouri.— State *v.* Butler, 178 Mo. 272, 77 S. W. 560; State *v.* Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Joplin *v.* Leckie, 78 Mo. App. 8; Knox City *v.* White, 19 Mo. App. 528; Knox City *v.* Thompson, 19 Mo. App. 523.

New Jersey.— Meday *v.* Rutherford, 65 N. J. L. 645, 48 Atl. 529; State *v.* Zeigler, 32 N. J. L. 262; Weeks *v.* Forman, 16 N. J. L. 237.

New York.— Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178; Smith *v.* Newburgh, 77 N. Y. 130; People *v.* Ham, 32 Misc. 517, 66 N. Y. Suppl. 264; Parker *v.* Baker, Clarke 223.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Ohio.—Cleveland *v.* Payne, 72 Ohio St. 347, 74 N. E. 177; Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118, 12 N. E. 445; Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465.

Oregon.— Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134.

Pennsylvania.— Lesley *v.* Kite, 192 Pa. St. 268, 43 Atl. 959; Whelen's Appeal, 108 Pa. St. 162, 1 Atl. 88.

Rhode Island.— Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502.

Texas.— Williams *v.* Davidson, 43 Tex. 1; Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242; *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

Utah.— Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721.

Virginia.— Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174, 113 Am. St. Rep. 1056, 2 L. R. A. N. S. 910; Duncan *v.* Lynchburg, (1900) 34 S. E. 964; Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; Kirkham *v.* Russell, 76 Va. 956.

Washington.— Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217; Tacoma Gas, etc., Co. *v.* Tacoma, 14 Wash. 288, 44 Pac. 655.

Wisconsin.— Becker *v.* La Crosse, 99 Wis. 414, 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829.

United States.— Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669; Minturn *v.* Larue, 23 How. 435, 16 L. ed. 574; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720; Detroit *v.* Detroit City R. Co., 56 Fed. 867; Grand Rapids Electric Light, etc., Co. *v.* Grand Rapids Edison Electric Light, etc., Co., 33 Fed. 659; Scott *v.* Shreveport, 20 Fed. 714; *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333; Tatum *v.* Tamaroa, 14 Fed. 103, 9 Biss. 475.

Canada.— Sutherland-Innis Co. *v.* Romney Tp., 30 Can. Sup. Ct. 495 [*reversing* 26 Ont. App. 495]; Ottawa Electric Light Co. *v.* Ottawa, 12 Ont. L. Rep. 290; Tremblay *v.* Montreal, 28 Quebec Super. Ct. 411.

See 36 Cent. Dig. tit. "Municipal Corporations," § 141 *et seq.* See also *infra*, III, B, 2, d; III, D, 4.

39. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440. Municipal corporations are mere instrumentalities of the state for the convenient administration of the government, and their powers may be enlarged or withdrawn at pleasure. Tippecanoe County *v.* Lucas, 93 U. S. 108, 23 L. ed. 822. They possess rights and responsibilities analogous to those of private corporations that are perpetual and coëxtensive with the corporate limits, which no power can either enlarge or diminish, except the legislature alone. Borough's Appeal, 3 Lanc. L. Rev. (Pa.) 141.

Power to amend charters see *supra*, II, C, 1, a.

Legislative control see *infra*, IV.

40. See *infra*, III, B, 2, c.

41. Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475; Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178; Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766.

42. *Colorado.*— Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14.

Illinois.— Wheeler *v.* Wayne County, 132 Ill. 599, 24 N. E. 625.

Iowa.— Weitz *v.* Des Moines Independent Dist., 79 Iowa 423, 44 N. W. 696.

Michigan.— Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525.

Pennsylvania.— Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693.

Virginia.— Whiting *v.* West Point, 88 Va. 905, 14 S. E. 698, 29 Am. St. Rep. 750, 15 L. R. A. 860.

Wisconsin.— Wells *v.* Burnham, 20 Wis. 112.

United States.— Minturn *v.* Larue, 23 How. 435, 16 L. ed. 574.

43. East St. Louis *v.* East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97; Douglass *v.* Virginia City, 5 Nev. 147.

44. Springfield F. & M. Ins. Co. *v.* Keese-

ferred upon municipal corporations, and which are elsewhere treated, are eminent domain,[45] improvement,[46] police power,[47] and taxation.[48]

2. Classification of Powers — a. In General. All the powers of a municipal corporation, as well as of other corporations, are considered and treated by judges and authors by common consent as apparently divisible into two great classes — express powers and implied powers; and by some it has been said that there are no other;[49] while others have preferred to classify these powers as (1) express, (2) implied, and (3) incidental, indispensable, or inherent.[50] This classification seems more consistent with the derivation and history of powers and is adopted in this article.

b. Inherent Powers. Inherent powers are such as are necessary and inseparably incidental to every corporation, and as soon as the municipality is duly erected they become its faculties and are a part of its life as matter of course.[51] They are sometimes described as the common-law incidents or the common-law powers of a corporation, and are enumerated by Blackstone as follows: (1) To have perpetual

ville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660; State *v.* Covington, 29 Ohio St. 102.

45. See Eminent Domain, 15 Cyc. 543.

46. See *infra*, XIII.

47. See *infra*, XI.

48. See *infra*, XV, D.

49. *Connecticut.*— New London *v.* Brainard, 22 Conn. 552.

Indiana.— Lafayette *v.* Cox, 5 Ind. 38.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

New Hampshire.— State *v.* Ferguson, 33 N. H. 424.

New Jersey.— State *v.* Morristown, 33 N. J. L. 57.

New York.— Ketchum *v.* Buffalo, 14 N. Y. 356.

Wisconsin.— Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

United States.— Beaty *v.* Knowler, 4 Pet. 152, 7 L. ed. 813.

50. *Alabama.*—Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862; Gambill *v.* Endrich, 143 Ala. 506, 39 So. 297; Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.

Connecticut.—Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475.

Illinois.— Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558; Cook County *v.* McCrea, 93 Ill. 236.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528.

Iowa.— McAllen *v.* Hamblin, 129 Iowa 329, 105 N. W. 593, 5 L. R. A. N. S. 434.

Louisiana.— Ouachita Parish *v.* Monroe, 42 La. Ann. 782, 7 So. 717.

Massachusetts.— Somerville *v.* Dickerman, 127 Mass. 272.

Missouri.— St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278.

New York.— Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178; Ketchum *v.* Buffalo, 14 N. Y. 356.

North Carolina.— Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766.

Oregon.— Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

South Carolina.— Blake *v.* Walker, 23 S. C. 517.

Virginia.— Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174, 113 Am. St. Rep. 1056, 2 L. R. A. N. S. 910; Danville *v.* Shelton, 76 Va. 325.

Washington.— Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217.

West Virginia.— Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774.

Wisconsin.— Gilman *v.* Milwaukee, 61 Wis. 588, 21 N. W. 640.

United States.— Grand Rapids Electric Light, etc., Co. *v.* Grand Rapids Edison Electric Light, etc., Co., 33 Fed. 659; Kelly *v.* Milan, 21 Fed. 842.

Canada.— Ottawa Electric Light Co. *v.* Ottawa, 12 Ont. L. Rep. 290; Tremblay *v.* Montreal, 28 Quebec Super. Ct. 411.

Compare Ingersoll Pub. Corp. 188; and *infra*, III, B, 2, d.

Municipal corporations possess the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved against the corporation. Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720. A municipal corporation can exercise only those powers that are granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those indispensable, as distinguished from convenient, to the declared objects and purposes of the corporation. Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862. They can exercise only the powers granted in express words, those necessarily or fairly implied, and those essential to the declared objects and purposes of the corporation. Joplin *v.* Leckie, 78 Mo. App. 8. Their powers are limited to those expressly granted and those fairly implied therefrom or incidental thereto. Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; and other cases cited *supra*, this note.

51. 1 Blackstone Comm. 475.

succession; (2) to sue and to be sued, implead or to be impleaded, grant and receive by its corporate name, and do other acts as natural persons; (3) to purchase, hold, and sell property, real and personal, for the benefit of the municipality; (4) to have a common seal alterable at pleasure; and (5) to make by-laws and ordinances for the government of the corporation.[52] Some courts have spoken of other powers as inherent in the very nature of the corporation because essential to enable it to accomplish the end for which it is created.[53] These essential powers are sometimes denominated incidental, because they are, not simply convenient, but indispensable to the declared objects and purposes of the corporation.[54] The safer nomenclature seems to limit "inherent" to those congenital powers recognized at common law as inhering in the corporation from the date and fact of its creation.[55] Customary powers, being those which the boroughs and cities of England had, without express grant, been wont severally to exercise according to their respective local customs, "time whereof the memory of man runneth not to the contrary,"[56] are not recognized in America as valid, and cannot be embraced in the class of inherent powers.[57] Such of these as are essential to the normal life of the corporation may be sustained as implied or incidental powers by liberal construction;[58] but those which are merely convenient or useful cannot under our law be maintained and exercised.[59]

c. Express Powers. This class of powers includes such only as are granted in express words by the special charter or the general law under which the corporation is organized.[60] In states where special charters are inhibited by the constitution, these powers are of course uniform in municipalities of the same class; but the general policy is to distinguish the various classes of municipal corporations by a grant of additional powers to each advanced class or grade.[61] Special charters do not allow any orderly classification of powers. Every municipality

52. 1 Blackstone Comm. 475. And see Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484; Conservators River Tone *v.* Ash, 10 B. & C. 349, 21 E. C. L. 152; 1 Kyd Corp. 63. Apart from the few faculties incident to the existence of a municipal corporation, such as the capacity to sue and be sued, and have a common seal, it has no power to do any act except such as are essential to the plain purpose of its creation, or are authorized by the express provisions of its charter, or a clear or necessary implication therefrom. *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.

Power: To sue and be sued see *infra*, XVII. To grant and receive by corporate name see *infra*, VIII; IX. To purchase, hold, and sell property see *infra*, VIII. To have common seal see *infra*, IX, G. To make by-laws and ordinances see *infra*, VI; XI, A.

53. Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; Bluffton *v.* Studabaker, 106 Ind. 129, 6 N. E. 1; Hasty *v.* Huntington, 105 Ind. 540, 5 N. E. 559; Clark *v.* South Bend, 85 Ind. 276, 44 Am. Rep. 13.

54. Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178.

55. 1 Blackstone Comm. 475.

56. York *v.* Welbank, 4 B. & Ald. 438, 6 E. C. L. 551; Winton *v.* Wilks, 2 Ld. Raym. 1129; 17 Encycl. Brit. tit. "Municipality"; Willcock Mun. Corp. 6, 21, 24.

57. Hood *v.* Lynn, 1 Allen (Mass.) 103.

58. Frazier *v.* Warfield, 13 Md. 279.

59. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

60. *Alabama.*— Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.

Illinois.— Cook County *v.* McCrea, 93 Ill. 236.

Indiana.— Richmond *v.* McGirr, 78 Ind. 192.

Iowa.— Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623.

Louisiana.— Ouachita Parish *v.* Monroe, 42 La. Ann. 782, 7 So. 717.

Massachusetts.— Somerville *v.* Dickerman, 127 Mass. 272.

North Carolina.— Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766.

Oregon.— Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

Texas.— Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143.

Virginia.— Danville *v.* Shelton, 76 Va. 325.

West Virginia.— Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774.

Wisconsin.— Gilman *v.* Milwaukee, 61 Wis. 588, 21 N. W. 640.

61. *California.*— Pritchett *v.* Stanislaus County, 73 Cal. 310, 14 Pac. 795.

Illinois.— Devine *v.* Cook County, 84 Ill. 590.

Minnesota.— State *v.* Cooley, 56 Minn. 540, 58 N. W. 150.

New Jersey.— State *v.* Trenton, 42 N. J. L. 486.

North Dakota.— Edmonds *v.* Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725.

Pennsylvania.— Wheeler *v.* Philadelphia, 77 Pa. St. 338.

asks for such powers as its location or conditions suggest, or its population or promoters may desire, and gets all which legislative complaisance may yield, with the result that an array of municipal charters of the United States present to legal view at once an amusing exhibition and a perplexing problem.[62] The legislative attempt often seems to be to enumerate all the powers intended to be granted; and then, recognizing the futility of such effort, the legislature supplies omissions with a clause known as the general welfare clause, granting to the corporation power to do all such acts and pass such ordinances as may conduce to the public welfare.[63] This residuary grant of municipal power, in whatsoever phrase it may be couched, although obviously intended to add to the enumerated powers of the municipality, has been thought in some cases to be nugatory under the constructive limitations of the preceding specific enumeration.[64] The better view seems to be that the "general welfare clause" alone amounts to a grant of all usual and necessary municipal powers, and the enumeration of particular powers grants all others therein specified.[65] The enumeration usually contains legislative, judicial, and executive powers, corresponding to the three recognized departments of government in America, with a specific statement of the amount or extent of each granted to the municipality.[66] What is the measure of these powers opens the broad field of statutory construction, which with all its diversified phases and incongruous illustrations belongs within the domain of implied powers, wherein it will receive treatment.[67] The express powers granted under general statutes providing for the organization of a municipal corporation in accordance with their terms are more uniform and consistent, and lend themselves much more readily to doctrine and rule.[68] These general statutes in the various states, if not copies or imitations of each other, all bear strong resemblance, their differences being attributable to varied social, industrial, economical, and constitutional conditions in the several states; and even these under legislative and judicial tendencies are gradually vanishing.[69] General statutes, like special charters, also contain a "general welfare clause."[70] The particular express powers will be hereafter treated under appropriate headings.[71]

d. Implied Powers — (1) *In General.* This phrase comprehends all other

62. St. Louis *v.* Russell, 9 Mo. 507; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

63. Ingersoll Pub. Corp. 173.

64. Clark *v.* South Bend, 85 Ind. 276, 44 Am. Rep. 13; State *v.* Ferguson, 33 N. H. 424; Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465.

65. *Florida.*— Porter *v.* Vinzant, 49 Fla. 213, 38 So. 607, 111 Am. St. Rep. 93.

Kansas.— Leavenworth *v.* Norton, 1 Kan. 432.

Louisiana.— New Orleans *v.* Philippi, 9 La. Ann. 44.

Massachusetts.— Spaulding *v.* Lowell, 23 Pick. 71.

New Jersey.— A grant by the legislature to a municipal corporation of power to legislate by ordinance on enumerated subjects connected with its municipal affairs is an addition to that power of making by-laws which is incidental to the creation of a corporation. Cross *v.* Morristown, 33 N. J. L. 57.

Tennessee.— A general clause in the charter of a municipal corporation may confer authority to pass ordinances on subjects not named among the specific powers of the corporation. Nashville *v.* Linck, 80 Tenn. 499.

Wisconsin.— Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

Powers conferred or denied under "general welfare clause" relating to: Police power see *infra*, XI, A, 7, a. Public improvements see *infra*, XIII, A. Streets, sewers, watercourses, buildings, water-fronts, markets, parks, etc., see *infra*, XII.

66. Ingersoll Pub. Corp. 171.

67. See *infra*, III, B, 2, d.

68. Ingersoll Pub. Corp. 137.

69. 1 Smith Mun. Corp. 53.

70. See *supra*, this section, text and note 65, and cross-references thereunder.

71. **Express powers with respect to:** Actions see *infra*, XVII. Bonds, securities, and sinking funds see *infra*, XV, C. Buildings and fixtures see *infra*, XII, C, 1. Contracts generally see *infra*, IX. Fiscal management and indebtedness see *infra*, XV, A, B, C. Markets, stands, and stalls see *infra*, XII, C, 3. Municipal departments generally see *infra*, VII, C. Municipal expenses see *infra*, X. Officers, agents, and employees generally see *infra*, VII. Ordinances, resolutions, and by-laws see *infra*, VI. Parks, public squares, and places see *infra*, XII, C, 4. Property generally see *infra*, VIII. Public improvements and assessments therefor see *infra*, XIII. Regulations under the police power see *infra*, XI. Sewers, drains, and watercourses see *infra*, XII, B. Streets, avenues,

than inherent and express powers, and is employed to designate those powers which arise by natural implication from the grant of express power, or by inevitable inference from the purpose or functions of the corporation.[72] It has often been judicially declared that a corporation claiming a right or power as against the public must be prepared to prove its title;[73] and that the courts incline against any presumption of power being granted which is not of common right, or in other words treat charters with the rules of strict construction;[74] yet it seems to be also well established by repeated adjudications that municipal corporations may exercise all powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to the powers expressly granted;[75]

and alleys see *infra*, XII, A. Taxation see *infra*, XV, D. Water frontage see *infra*, XII, C, 2.

72. *Alabama.*—*Ex p.* Burnett, 30 Ala. 461.
California.— People *v.* Harris, 4 Cal. 9.
Florida.— Porter *v.* Vinzant, 49 Fla. 213, 38 So. 607, 111 Am. St. Rep. 93.
Illinois.— Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497; Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230.
Indiana.— Smith *v.* Madison, 7 Ind. 86.
Kentucky.—Johnston *v.* Louisville, 11 Bush 527.
Maine.— Mayo *v.* Dover, etc., Fire Co., 96 Me. 539, 53 Atl. 62.
Massachusetts.— Spaulding *v.* Lowell, 23 Pick. 71; Page *v.* Weeks, 13 Mass. 199.
New York.— Ketchum *v.* Buffalo, 14 N. Y. 356.
North Carolina.— Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766.
Oregon.— Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134.
Texas.— Galveston *v.* Loonie, 54 Tex. 517.
Wisconsin.— Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.
United States.— *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.
See 36 Cent. Dig. tit. "Municipal Corporations," § 149. And see the cases cited *supra*, III, B, 2, a.

73. *Alabama.*— Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.
Georgia.— Savannah *v.* Hartridge, 8 Ga. 23.
Indiana.— Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Lafayette *v.* Cox, 5 Ind. 38.
Michigan.— Grand Rapids *v.* Hughes, 15 Mich. 54.
Mississippi.— Spengler *v.* Trowbridge, 62 Miss. 46.
New Hampshire.— State *v.* Ferguson, 33 N. H. 424.
New York.— Rochester *v.* Collins, 12 Barb. 559; Dunham *v.* Rochester, 5 Cow. 462.
Ohio.— Reed *v.* Toledo, 18 Ohio 161.
Pennsylvania.— Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.
Texas.— Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143.
See also *infra*, III, B, 3; III, D.

74. *Alabama.*— *Ex p.* Florence, 78 Ala. 419.
California.— Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; Douglass *v.* Placerville, 18 Cal. 653.
Connecticut.— Crofut *v.* Danbury, 65 Conn. 294, 300, 32 Atl. 365, where it is said: "The powers expressly granted to a municipal corporation carry with them such other powers as are necessarily implied in or incident to such grants, and it also possesses all powers which are indispensable to the attainment and maintenance of its declared objects and purposes. Municipal corporations are more strictly limited in these respects than private corporations. The test of their right by implication to exercise any particular power is the necessity of such power, not its convenience. If there is a reasonable doubt as to its existence, it does not exist."
Indiana.— Lafayette *v.* Cox, 5 Ind. 38.
Iowa.— Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261; Burlington *v.* Kellar, 18 Iowa 59; Clark *v.* Davenport, 14 Iowa 494.
Kansas.— Leavenworth *v.* Norton, 1 Kan. 432.
Kentucky.— Henderson *v.* Covington, 14 Bush 312; Johnston *v.* Louisville, 11 Bush 527.
Louisiana.— Wilson *v.* Shreveport, 29 La. Ann. 673.
Massachusetts.— Carr *v.* Dooley, 122 Mass. 255.
Michigan.— Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.
Mississippi.— Leonard *v.* Canton, 35 Misc. 189.
Missouri.— State *v.* Butler, 178 Mo. 272, 77 S. W. 560.
New Jersey.— Meday *v.* Rutherford, 65 N. J. L. 645, 48 Atl. 529.
New York.— People *v.* Ham, 32 Misc. 517, 66 N. Y. Suppl. 264; Parker *v.* Baker, Clarke 223 [*reversed* on other grounds in 8 Paige 428].
Oregon.— Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134.
Pennsylvania.— Lesley *v.* Kite, 192 Pa. St. 268, 43 Atl. 959; Whelen's Appeal, 108 Pa. St. 162, 1 Atl. 88.
Tennessee.— Memphis *v.* Adams, 9 Heisk. 518, 24 Am. Rep. 331.
Virginia.— Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.
United States.— *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.
See 36 Cent. Dig. tit. "Municipal Corporations," §§ 148, 149. And see *supra*, III, B, 1; *infra*, III, B, 3.

75. *Alabama.*—*Ex p.* Burnett, 30 Ala. 461.

and that in so doing they have the choice of the means adapted to the ends and are not confined to any one mode of operation.[76] The latter view seems much more consistent with reason, since the grant of power to a municipality is a grant not to a private company for personal use and profit, but to a public institution for the public welfare.[77]

(II) *ILLUSTRATIONS.* In accordance with these principles it is held that a municipal corporation has by implication the power to purchase, and to take and hold property, real or personal, for the purposes of its incorporation,[78] to sell or dispose of property,[79] to make contracts generally,[80] to create indebtedness,[81] and to issue warrants and certificates of indebtedness[82] or bonds and other securities[83] for a legitimate municipal purpose; to compromise claims and suits,[84] submit claims to arbitration,[85] employ attorneys to defend or prosecute actions,[86] and to indemnify or reimburse an officer for losses sustained on behalf of the corporation.[87] Power to remove from streets all obstructions and encroachments implies power to employ any appropriate means to ascertain and locate the street lines and boundaries and the existence and extent of such encroachments and obstructions,[88] and power to erect bridges and approaches implies power to acquire the right to swing a bridge over private property and grant in consideration thereof the use of a vault under a street.[89] Power to enumerate population endows the municipality with power, when necessary to the ascertaining of its status or rank, to make and publish a census of its population.[90] Power to assess, impose, and

Arkansas.— Vance *v.* Little Rock, 30 Ark. 435.

California.— *In re* Robinson, 63 Cal. 620.

Connecticut.— Burritt *v.* New Haven, 42 Conn. 174.

Indiana.—Anderson *v.* O'Conner, 98 Ind. 168; Smith *v.* Madison, 7 Ind. 86.

Iowa.— Mt. Pleasant *v.* Breeze, 11 Iowa 399.

Kentucky.— Johnston *v.* Louisville, 11 Bush 527.

Massachusetts.— Page *v.* Weeks, 13 Mass. 199.

Michigan.— Port Huron *v.* McCall, 46 Mich. 565, 10 N. W. 23.

Nevada.— Tucker *v.* Virginia City, 4 Nev. 20.

New York.— Ketchum *v.* Buffalo, 14 N. Y. 356.

North Carolina.— Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766.

Pennsylvania.— Johnson *v.* Philadelphia, 60 Pa. St. 445; Greensburg *v.* Young, 53 Pa. St. 280.

Texas.— Galveston *v.* Loonie, 54 Tex. 517.

Wisconsin.— Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

Compare infra, III, D, 4.

76. *Colorado.*— Denver *v.* Capelli, 4 Colo. 25, 34 Am. Rep. 62.

Connecticut.— Diamond Match Co. *v.* New Haven, 55 Conn. 510, 13 Atl. 409, 3 Am. St. Rep. 70.

Iowa.— Wicks *v.* De Witt, 54 Iowa 130, 6 N. W. 176.

Massachusetts.— Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592.

Missouri.— Imler *v.* Springfield, 55 Mo. 119, 17 Am. Rep. 645.

Pennsylvania.— Collins *v.* Philadelphia, 93 Pa. St. 272.

Rhode Island.— McCaughey *v.* Tripp, 12 R. I. 449.

South Carolina.— Gibbes *v.* Beaufort, 20 S. C. 213.

Tennessee.— Horton *v.* Nashville, 4 Lea 47, 40 Am. Rep. 1.

United States.— Johnston *v.* District of Columbia, 118 U. S. 19, 6 S. Ct. 923, 30 L. ed. 75.

See *infra,* III, E.

77. See *supra,* I, A, 1.

78. People *v.* Harris, 4 Cal. 9; Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996. See *infra,* VIII.

Power to take and hold property in trust see *infra,* VIII, B, 3.

79. **Disposal of property** see *infra,* VIII, D.

80. **Contracts** generally see *infra,* IX.

81. **Power to incur indebtedness** see *infra,* XV, A.

82. **Warrants and certificates of indebtedness** see *infra,* XV, B, 2.

83. **Bonds and securities** see *infra,* XV, C.

84. **Compromise** see *infra,* XVI, C; XVII, C.

85. **Submission to arbitration** see *infra,* IX, A, 6, l; XVI, D.

Submission of assessment of damages and betterments for public improvements see *infra,* XIII.

86. **Employment of attorneys** see *infra,* VII, C, 4, c; IX, A, 6, o.

Representation by counsel see *infra,* XVII, J.

87. **Indemnification or reimbursement of officer** see *infra,* VII, A, 13.

88. Lathrop *v.* Morristown, 65 N. J. L. 467, 47 Atl. 450 [*affirmed* in 67 N. J. L. 247, 51 Atl. 852].

89. Chicago *v.* Norton Milling Co., 196 Ill. 580, 63 N. E. 1043. And see *infra,* VIII; IX; XII.

90. McFarlain *v.* Jennings, 106 La. 541, 31 So. 62, holding that in view of the special

collect fines by writ of capias ad satisfaciendum warrants imprisonment in the county jail.[91] On the other hand a municipal corporation has no implied power to grant exclusive privileges;[92] to pay newspaper reporters their contingent expenses in attending sittings of the common council or committees;[93] to appropriate money to procure from the legislature an increase of powers;[94] to supply another municipality with water;[95] to control the salary of a state officer;[96] to create municipal courts;[97] to imprison for contempt;[98] to give a right of civil action to one of its citizens against another;[99] or to create an action of debt of which the city magistrates, as justices of the peace, shall have jurisdiction.[1] The implied powers of a municipal corporation in the exercise of its police power are elsewhere fully treated,[2] as are also its implied powers with respect to streets, avenues, and alleys;[3] sewers, drains, and watercourses;[4] buildings, etc.;[5] water frontage;[6] markets, stands, and stalls;[7] parks, public squares, etc.;[8] public improvements and assessments therefor;[9] and taxation.[10]

3. General Rules of Construction. The following general rules for the construction of statutes in regard to municipal power in the United States are established by the weight of authority: (1) Where a particular power is claimed for a municipal corporation, and particularly where private right is infringed or imperiled by a power claimed, any fair, reasonable doubt as to the existence and possession of the power will be resolved against the corporation and the power denied to it.[11] (2) But the possession of the power being established, a generous measure of its exercise will be permitted to the end that it may effectuate its pur-

power expressly granted, and the absence of legislative provision regarding enumeration required to enable a municipal corporation to enforce a grant of power, it is competent for the municipal authorities, by regular methods, to ascertain and make public the number of persons resident in the municipalities.

91. State *v.* Beaufort, 2 Rich. (S. C.) 496. See *infra*, XI, B, 4, g, (II), (A).

92. **Exclusive privileges** see *infra*, IX, A, 6, i; XI, A, 7, b, (VI); XII, A, 8, a, (VII).

93. Tremblay *v.* Montreal, 28 Quebec Super. Ct. 411.

94. Henderson *v.* Covington, 14 Bush (Ky.) 312.

95. Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217. And see *infra*, VIII, B, 2, e; IX, A, 6, b.

96. Bladen *v.* Philadelphia, 60 Pa. St. 464, holding that the control of the city councils of Philadelphia over payment of salaries of city officers, etc., does not extend to a state officer whose salary or perquisites are fixed by law, such as the officers of the courts, or the necessary expenses of the administration of justice. The municipality has no more control over such matters in the city than commissioners have in the several counties of the commonwealth.

97. *In re* Bruno Munro, 1 Alaska 279.

98. Llewellyn's Case, 2 Pa. Dist. 631, 13 Pa. Co. Ct. 126. And see Kielley *v.* Carson, 7 Jur. 137, 4 Moore P. C. 63, 13 Eng. Reprint 225. See also *infra*, III, D, 2, text and note 86.

99. Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755. See *infra*, XI, B, 5.

1. A city charter which makes the city magistrates "justices of the peace *ex officio*" does not thereby authorize the city to create an action of debt of which the city magistrates, as justices of the peace, shall have jurisdiction. Weeks *v.* Forman, 16 N. J. L. 237.

2. **Regulations under police power** see *infra*, XI.

3. **Streets, avenues, and alleys** see *infra*, XII, A.

4. **Sewers, drains, and watercourses** see *infra*, XII, B.

5. **Buildings and fixtures** see *infra*, XII, C, 1.

6. **Water frontage** see XII, C, 2.

7. **Markets, stands, and stalls** see *infra*, XII, C, 3.

8. **Parks, public squares, and places** see *infra*, XII, C, 4.

9. **Public improvements and assessments** see *infra*, XIII.

10. **Taxation** see *infra*, XV, D.

11. *Alabama.*— *Ex p.* Florence, 78 Ala. 419.

California.— Von Schmidt *v.* Widbor, 105 Cal. 151, 38 Pac. 682; Glass *v.* Ashbury, 49 Cal. 571.

Connecticut.— Crofut *v.* Danbury, 65 Conn. 294, 32 Atl. 365.

Georgia.—Savannah *v.* Hartridge, 8 Ga. 23.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528.

Iowa.— Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261; Clark *v.* Davenport, 14 Iowa 494.

Kentucky.— Henderson *v.* Covington, 14 Bush 312.

Michigan.— Port Huron *v.* McCall, 46 Mich. 565, 10 N. W. 23.

Missouri.— State *v.* Butler, 178 Mo. 272, 77 S. W. 560.

New Jersey.— Meday *v.* Rutherford, 65 N. J. L. 645, 48 Atl. 529.

New York.— People *v.* Ham, 32 Misc. 517, 66 N. Y. Suppl. 264.

pose.[12] (3) Where a municipality is by virtue of a specific provision of the general municipal corporation law given a certain power, such power cannot be added to by general language found elsewhere in the act.[13] (4) Where a charter expressly grants a power, but prescribes neither the time nor the mode of its exercise, it must be exercised in a mode and at a time deemed reasonable by the court.[14]

4. Restriction of Powers to Territorial Limits. As a general rule a municipal corporation's powers cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits.[15] The legislature, however, may authorize the exercise of powers beyond municipal limits, and has frequently done so, particularly in matters within the police power.[16]

C. Functions — 1. In General. The functions of all corporations are depend-

Oregon.— Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134.

Pennsylvania.— Lesley *v.* Kite, 192 Pa. St. 268, 43 Atl. 959.

Rhode Island.— Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502.

Utah.— Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721.

Virginia.— Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; Kirkham *v.* Russell, 76 Va. 956.

United States.— Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

Canada.— Tremblay *v.* Montreal, 28 Quebec Super. Ct. 411.

See also *supra*, III, B, 2, d.

Strict construction see *supra*, III, B, 2, d.

12. State *v.* Butler, 178 Mo. 272, 77 S. W. 560. See also Galveston *v.* Loonie, 54 Tex. 517; Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758, where it is said that a more liberal rule of construction is allowed in favor of public charters granted for the general good than in private charters for individual gain. Although charters are to be construed strictly, yet they are to be so construed as to carry into effect every power clearly intended to be conferred, and every power necessary to be implied for the complete exercise of those granted. Smith *v.* Madison, 7 Ind. 86. Authority to a city to imprison certain designated classes of persons carries with it a delegated power to pass the necessary prohibitory and penal ordinances on the subject-matter for the violation of which the imprisonment is to follow. New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532. Where a doubt exists as to whether an enterprise which a city is authorized by statute to undertake is for a city purpose, it will be decided in the affirmative, as, in all questions involving the constitutionality of a statute, every intendment is in its favor. Sun Printing, etc., Assoc. *v.* New York, 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607.

13. Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035].

14. Kirkham *v.* Russell, 76 Va. 956.

15. *California.*— South Pasadena *v.* Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093, regulation of rates of transportation of a street railway connecting the city with another.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528; Robb *v.* Indianapolis, 38 Ind. 49; Begein *v.* Anderson, 28 Ind. 79, prohibition of cemeteries or burying grounds outside of city limits.

Pennsylvania.— Gettyshurg *v.* Zeigler, 2 Pa. Co. Ct. 326, fixing rates to be charged by owners of vehicles for transportation of passengers to points beyond the municipal limits.

Tennessee.— Gass *v.* Greeneville Corp., 4 Sneed 62.

Virginia.— Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174, 113 Am. St. Rep. 1056, 2 L. R. A. N. S. 910; Duncan *v.* Lynchburg, (1900) 34 S. E. 964.

Washington.— Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217, supplying water to another municipality.

Wisconsin.— Becker *v.* La Crosse, 99 Wis. 414, 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829.

United States.— *Ex p.* Deane, 7 Fed. Cas. No. 3,712, 2 Cranch C. C. 125; Lenox *v.* Georgetown, 15 Fed. Cas. No. 8,245, 1 Cranch C. C. 608 (regulating rates of transportation beyond city limits); Ward *v.* Washington, 29 Fed. Cas. No. 17,163, 4 Cranch C. C. 232.

See also *infra*, XI, A, 5.

16. *Alabama.*—Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85; Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758.

Connecticut.— Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354.

Illinois.— Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

Indiana.— Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618, use of public way outside of municipal boundaries for the purpose of drainage.

Kansas.— State *v.* Franklin, 40 Kan. 410, 19 Pac. 801.

Massachusetts.— Martin *v.* Gleason, 139 Mass. 183, 29 N. E. 664.

Michigan.— Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

New York.— Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275, sewers and drainage.

Pennsylvania.—Allentown *v.* Waggoner, 27 Pa. Super. Ct. 485.

Extraterritorial exercise of police power generally see *infra*, XI, A, 5.

ent upon and subservient to the objects of their creation.[17] They are faculties of the organism which it may or must exercise to continue its existence and fulfil its purpose.[18] They may, like powers, be specially declared, or may be implied from the express nature and objects of the institution.[19] Municipal corporations are designed ultimately for no other end but the welfare of the public and especially of the communities where they are established, and to this end their functions must be exercised.[20]

2. Classification — a. In General. The functions of municipal corporations, although all of a public nature, are properly divisible into two great classes, according to the double nature and purpose of the institution; namely, (1) governmental, which are those conferred or imposed upon it as a local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the state, and promoting the public welfare generally;[21] and (2) municipal, being those granted for the special benefit and advantage of the urban community embraced within the corporate boundaries.[22]

b. Governmental Functions. This class of functions includes all those which are usually performed by the state in rural communities under general laws, and were so performed within the municipal boundaries before the organization of the corporation, and which the state would resume on disincorporation.[23] These functions are served by the police power[24] and power of eminent domain;[25] and also by those promoting public education,[26] those maintaining and operating a fire department,[27] those furthering the administration of justice,[28] and such other powers as are to be exercised by the corporation for the public weal, in or for the exercise of which the municipality receives no compensation or particular benefit.[29] This class of functions are not franchises or privileges, to be exercised or ignored by the municipality at discretion,[30] but rather legal duties imposed by the state upon its creature, which it may not omit with impunity but must perform at its peril.[31]

Acquiring and holding property beyond territorial limits see *infra*, VIII, A, 2.

Acquisition of territory for water-supply beyond municipal limits see *infra*, XI, A, 5, text and note 29.

17. Harris *v.* Livingston, 28 Ala. 577; Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; State *v.* Ferguson, 33 N. H. 424; Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178; 2 Kyd Corp. 102, 149. See *supra*, III, A.

18. 7 Encycl. Am. tit. "Function"; Standard Dict. tit. "Function."

19. Pullman *v.* New York, 54 Barb. (N. Y.) 169; Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134; Galveston *v.* Loonie, 54 Tex. 517.

20. Bossier Police Jury *v.* Shreveport, 5 La. Ann. 661; People *v.* Morris, 13 Wend. (N. Y.) 325; Philadelphia *v.* Fox, 64 Pa. St. 169; East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166; 2 Bouvier L. Dict. 21; 2 Kent Comm. 275. Municipal corporations are not established for the exclusive advantage of the corporators, but for the public at large. Herbert *v.* Benson, 2 La. Ann. 770.

21. People *v.* Morris, 13 Wend. (N. Y.) 325. See *infra*, III, C, 2, b.

22. Philadelphia *v.* Fox, 64 Pa. St. 169; East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166. See *infra*, III, C, 2, c.

23. Ingersoll Pub. Corp. 194, 406. See also *supra*, I, C, 1, b.

24. *Illinois.*— Culver *v.* Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270.

Iowa.— Calwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154.

Massachusetts.—Kimball *v.* Boston, 1 Allen 417.

Minnesota.— Gullikson *v.* McDonald, 62 Minn. 278, 64 N. W. 812.

New York.— Woodhull *v.* New York, 150 N. Y. 450, 44 N. E. 1038.

Pennsylvania.— Kies *v.* Erie, 135 Pa. St. 144, 19 Atl. 142, 20 Am. St. Rep. 867.

Police power see *infra*, XI.

25. *Connecticut.*— Hine *v.* New Haven, 40 Conn. 478.

Massachusetts.— Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694.

Michigan.— People *v.* Hawley, 3 Mich. 330.

Mississippi.—Brown *v.* Beaty, 34 Miss. 227, 69 Am. Dec. 389.

Pennsylvania.—Harvey *v.* Thomas, 10 Watts 63, 36 Am. Dec. 141.

See, generally, Eminent Domain.

26. Ingersoll Pub. Corp. 177.

27. Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434.

Fire department see *infra*, VII, B, 8.

28. Boyd *v.* Chambers, 78 Ky. 140.

29. Stedman *v.* San Francisco, 63 Cal. 193.

30. Anne Arundel County *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557; Allegany County Public Schools *v.* Allegany County Com'rs, 20 Md. 449.

31. *Kentucky.*— Com. *v.* Hopkinsville, 7 B. Mon. 38.

Maine.— State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

They may be imposed in the charter or by general laws, which the corporation must obey, as must any natural person, or suffer the consequences of violated law.[32] They cannot be indicted for offenses which derive their criminality from evil intention, or from breach of social duty, pertaining to human beings; nor can they be guilty of treason, felony, or offenses against the person, or be imprisoned; but they may be indicted and suffer fine or penalty under judicial sentence;[33] and in some states even forfeiture of charter,[34] for omission to perform governmental duty imposed by law. These governmental functions are of comparatively recent imposition upon municipalities, being nearly or quite all the development of the nineteenth century.[35] They are all imposed by statute, and are necessarily mandatory or peremptory functions, and subject to increase or diminution at the pleasure of the state.[36] In the performance of governmental duties the municipality represents the state, uses its power, and is often permitted to use its name.[37] The officers performing these duties and exercising these powers are rather officers of the state than of the municipality, and as such are liable to state control.[38] Accordingly it has been repeatedly held by the courts that the state may create and appoint officers for the performance of these governmental functions, such as fire and police commissions, and even city hall commissions.[39] And in the functions of taxation, administration of justice, and enforcement of the criminal law, the state often operates through the media of its own general officers, within as well as without the municipal boundaries.[40] Whether the function of caring for and keeping in repair the public highways within the municipality is governmental or municipal has been often mooted and diversely decided.[41]

c. Municipal Functions — (1) *In General.* All functions of a municipal corporation, not governmental, are strictly municipal.[42] They are sometimes called

Massachusetts.— Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Com. *v.* Gloucester, 110 Mass. 491; Com. *v.* Boston, 16 Pick. 442.

New Jersey.— State *v.* Hudson County, 30 N. J. L. 137.

New York.— People *v.* Albany Corp., 11 Wend. 539, 27 Am. Dec. 95.

Pennsylvania.— Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921.

Tennessee.— State *v.* Loudon, 3 Head 263; Chattanooga *v.* State, 5 Sneed 578; State *v.* Shelbyville Corp., 4 Sneed 176.

Vermont.— State *v.* Whitingham, 7 Vt. 390.

32. Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Wild *v.* Paterson, 47 N. J. L. 406, 1 Atl. 490; People *v.* Albany Corp., 11 Wend. (N. Y.) 539, 27 Am. Dec. 95. Village corporations, being creatures of legislative enactment, owe their creation to the particular statute which gives them their existence. This statute, with the general provisions of law applicable to them, confers upon them the powers they possess, and, like other municipal corporations, imposes upon them certain public duties which they owe to the state in the administration of its local government. Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

33. Com. *v.* New Bedford Bridge Proprietors, 2 Gray (Mass.) 339; People *v.* Albany Corp., 11 Wend. (N. Y.) 539, 27 Am. Dec. 95. See *infra*, XVIII.

34. Dodge *v.* People, 113 Ill. 491, 1 N. E. 826. *Compare supra*, II, C, 2, d.

35. Mun. Corp. Reform Act (1835); Elliott Mun. Corp. 72; Willcock Mun. Corp. 15–18.

36. A municipal corporation in the exercise of its duties is a department of the state. Its powers may be large or small. They may be increased or diminished from time to time at the pleasure of the state, or the state may itself directly exercise in any locality all the powers usually conferred upon such a corporation. Such changes do not alter its fundamental character. Barnes *v.* Dist. of Columbia, 91 U. S. 540, 23 L. ed. 440.

Legislative control see *infra*, IV.

37. Dargan *v.* Mobile, 31 Ala. 469, 70 Am. Dec. 505; Harman *v.* St. Louis, 137 Mo. 494, 38 S. W. 1102; Fowle *v.* Alexandria, 3 Pet. (U. S.) 398, 7 L. ed. 719. A municipal corporation is an agency established directly or indirectly by the state for the better administration of certain local affairs of a district, town, or city; and wherever such an agency exists it is justly termed "municipal," whether its functions be lodged in a single hand or confided to various departments or bodies acting independently or as an organic whole. Culp *v.* Com., 25 Pittsb. Leg. J. N. S. (Pa.) 288.

38. Ingersoll Pub. Corp. 177.

State control of officers see *infra*, IV, E.

39. See *infra*, IV, E.

40. Kreigh *v.* Chicago, 86 Ill. 407; Astor *v.* New York, 62 N. Y. 567.

41. See *infra*, III, C, 2, e, (I); XII, A; XIV, A, D.

42. Murphy *v.* Lowell, 124 Mass. 564; Grimes *v.* Keene, 52 N. H. 330; Pittsburgh *v.*

private, just as the governmental are called public; but this terminology is unfortunate, since all municipal functions are public, as pertaining to the public nature of the corporation.[43] Under this class of functions are included, in most jurisdictions, the proper care of streets and alleys,[44] parks and other public places,[45] and the erection and maintenance of public utilities and improvements generally.[46] Logically all those are strictly municipal functions which specially and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public.[47] This class of functions was almost the sole possession of the English municipalities before the nineteenth century, and were called municipal franchises,[48] by which was generally understood royal privileges granted to a municipality, and not duties imposed upon it.[49] Under modern judicial opinion, however, this kind of functions is properly divisible into two classes — imperative and discretionary.[50] The use of municipal powers to furnish public utilities to citizens for hire does not make the municipality a private corporation.[51]

(II) *Imperative Functions.* Imperative functions, often called "mandatory," are such as the state has imposed upon the municipality, and may compel it to perform under legal penalty.[52] The state, leaving no option to the corporation, has enacted by its legislature that the act is proper and must be done; wherefore the municipality may not refuse or abdicate this function with impunity.[53] It must proceed to perform the duty or take legal consequences for its dereliction.[54] Usually the mandatory functions are imposed by words of

Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434. See also *supra*, I, C, 1, c.

43. Ingersoll Pub. Corp. 177.

44. Sinton *v.* Ashbury, 41 Cal. 525. See *infra*, XII, A; XIV, A, D.

45. People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202. But see David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174. *Compare infra*, XII, C; XIV, B.

46. *California.*— People *v.* Harris, 4 Cal. 9.

Georgia.— Cartersville *v.* Baker, 73 Ga. 686.

Indiana.— Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

Minnesota.— Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322.

New York.— Mills *v.* Brooklyn, 32 N. Y. 489; Reynolds *v.* Albany, 8 Barb. 597.

Texas.— Galveston *v.* Devlin, 84 Tex. 319, 19 S. W. 395.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

The construction of a rapid transit railway in New York city at the expense of the city, so as to afford needed facilities to the inhabitants of the city in traveling between their homes and places of business, is a city purpose, and therefore the Rapid Transit Act (Laws (1891), c. 4, as amended by subsequent statutes), authorizing the construction of such a railway in each city of over one million inhabitants, is constitutional. Sun Printing, etc., Assoc. *v.* New York, 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607.

47. Murphy *v.* Lowell, 124 Mass. 564; Grimes *v.* Keene, 52 N. H. 335; Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

48. Beach Pub. Corp. §§ 19–22; 4 Comyns Dig. tit. "Franchise"; Willcock Mun. Corp. 1–6.

49. Arnold Mun. Corp. 3; 1 Blackstone Comm. 475; Willcock Mun. Corp. 7–11.

50. Veazie *v.* China, 50 Me. 518; St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485; Hurford *v.* Omaha, 4 Nebr. 336.

51. A municipal corporation, while exercising the functions of a private corporation in supplying its citizens with water, does not thereby lose its distinctive municipal character. Lehigh Water Co.'s Appeal, 102 Pa. St. 515.

52. In the leading New York case of People *v.* Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95, the city of Albany, being authorized to excavate, deepen, and cleanse a basin, connected with the Hudson river, was indicted and convicted for permitting a nuisance to public health by failing to perform its imperative public duty, arising out of this corporate function. A similar decision was made in Pennsylvania against a municipality failing to keep its sewers clean. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921. See also *infra*, XVIII.

53. *Georgia.*— Vason *v.* Augusta, 38 Ga. 542.

Illinois.— Ottawa *v.* People, 48 Ill. 233.

Kentucky.— Com. *v.* Hopkinsville, 7 B. Mon. 38.

Maine.— Davis *v.* Bangor, 42 Me. 522.

Massachusetts.— Com. *v.* Boston, 16 Pick. 442.

Tennessee.— State *v.* Murfreesboro, 11 Humphr. 217.

54. *Massachusetts.*— Com. *v.* Gloucester, 110 Mass. 491.

New Hampshire.— State *v.* Dover, 46 N. H. 452.

imperative form or signification, as, "shall" or "must," in the charter or statute;[55] but sometimes, especially when the means are supplied, or the public is specially interested in the performance of the act, the words "hereby authorized,"[56] or "shall be lawful,"[57] or "may,"[58] have been construed to create a mandatory duty. Proper maintenance and care of streets and alleys is held to be an imperative function, whether treated as municipal or governmental.[59] So also of sewers and other public utilities, after they are established,[60] even though the improvement is *in limine* purely discretionary.[61]

(III) *Discretionary Functions.* All other than imperative duties are discretionary functions of the municipality.[62] This class embraces nearly or quite all matters of improvement. Before the work is contracted for the municipality is at liberty to undertake it or ignore it; it is a matter of legislative discretion, and not subject to judicial supervision.[63] After a contract for improvements is made, the discretion is subject to the terms of the contract.[64] After the work is completed, its proper maintenance and repair is henceforth imperative.[65]

D. Limitation of Powers — 1. In General. Unlimited power in any phase

New Jersey.— State *v.* Hudson County, 30 N. J. L. 137.

Tennessee.— State *v.* London, 3 Head 263; State *v.* Shelbyville Corp., 4 Sneed 176; State *v.* Barksdale, 5 Humphr. 154.

Vermont.— State *v.* Whittingham, 7 Vt. 390.

55. Vason *v.* Augusta, 38 Ga. 542; Ottawa *v.* People, 48 Ill. 233; People *v.* Police Bd., 75 N. Y. 38.

56. Vason *v.* Augusta, 38 Ga. 542. Where a public body or officer is clothed by statute with power to do an act which concerns the public interest or the rights of third parties, the execution of the power may be insisted on as a duty, although the statute is only permissive in its terms. Logansport *v.* Wright, 25 Ind. 512.

57. New York *v.* Furze, 3 Hill (N. Y.) 612; Mason *v.* Fearson, 9 How. (U. S.) 248, 13 L. ed. 125.

58. New York *v.* Furze, 3 Hill (N. Y.) 612; Newburgh, etc., Turnpike Co. *v.* Miller, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274; Rex *v.* Barlow, 2 Salk. 609; Rex *v.* Derby, Skinn. 370; Blackwell's Case, 1 Vern. Ch. 152, 23 Eng. Reprint 381.

59. *Alabama.*— Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46.

Florida.— Jacksonville *v.* Drew, 19 Fla. 106, 45 Am. Rep. 5.

Georgia.— Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719.

Illinois.— Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883; Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342.

Iowa.— Weirs *v.* Jones County, 80 Iowa 351, 45 N. W. 883.

Kansas.— Rosedale *v.* Golding, 55 Kan. 167, 40 Pac. 284.

Maine.— Perkins *v.* Oxford, 66 Me. 545.

Massachusetts.— Doherty *v.* Braintree, 148 Mass. 495, 20 N. E. 106.

Minnesota.— Daly *v.* St. Paul, 7 Minn. 390.

Missouri.— Jordan *v.* Hannibal, 87 Mo. 673.

New Hampshire.— Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526.

New York.— People *v.* Kerr, 27 N. Y. 188.

Tennessee.— State *v.* Murfreesboro, 11 Humphr. 217; State *v.* Barksdale, 5 Humphr. 154.

See *infra*, XII, A; XIV, A, D; XVIII.

60. Atlanta *v.* Warnock, 91 Ga. 210, 18 S. E. 135, 44 Am. St. Rep. 17, 23 L. R. A. 301; Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814; Chattanooga *v.* Dowling, 101 Tenn. 342, 47 S. W. 700. See *infra*, XII, B; XIV, C.

61. Nashville *v.* Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465; Horton *v.* Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1. See *infra*, III, C, 2, c, (III), text and note 65.

62. Vason *v.* Augusta, 38 Ga. 542; Ottawa *v.* People, 48 Ill. 233. See *infra*, XII, A–C; XIV, A–D.

63. *Georgia.*— Wells *v.* Atlanta, 43 Ga. 67.

Illinois.— Morgan Park *v.* Wiswall, 155 Ill. 262, 40 N. E. 611.

Pennsylvania.— Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342.

Tennessee.—Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814; Chattanooga *v.* Reid, 103 Tenn. 616, 53 S. W. 937; Chattanooga *v.* Dowling, 101 Tenn. 342, 47 S. W. 700; Horton *v.* Nashville, 4 Lea 39, 40 Am. Rep. 1.

Texas.— Hutcheson *v.* Storrie, (Civ. App. 1898) 48 S. W. 785.

64. Wells *v.* Atlanta, 43 Ga. 67; Newport *v.* Phillips, 40 S. W. 378, 19 Ky. L. Rep. 352; Hudson Electric Light Co. *v.* Hudson, 163 Mass. 346, 40 N. E. 109; United States Water Works *v.* Du Bois, 176 Pa. St. 439, 35 Atl. 251.

65. *Alabama.*— Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46.

Florida.— Jacksonville *v.* Drew, 19 Fla. 106, 45 Am. Rep. 5.

Georgia.— Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719.

Illinois.— Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883; Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342.

Iowa.— Weirs *v.* Jones County, 80 Iowa 351, 45 N. W. 883.

Kansas.— Rosedale *v.* Golding, 55 Kan. 167, 40 Pac. 284.

or feature of government is wholly foreign to American ideals.[66] Our complicated political system is one of checks and balances from turret to foundation; and nowhere so much as in the municipality does this dominant idea of limitation of power find expression and illustration. The corporation being a mere creature of the state for subordinate self-government and local administration, and having only granted powers subject to legislative control and revocation, is the most dependent and unstable of all our political institutions.[67] From above the state, and from below the citizen is constantly challenging the authority of the corporation to perform some municipal function, and it must therefore be in frequent contention before the courts over alleged limitations upon its powers. The physical limitations of boundary present easy problems for solution; not so, however, may we speak of those limitations to municipal action set by constitution, by statute, and by the charter of the corporation, for against them all the municipality must be able to assert and maintain its corporate authority before the courts.[68] Contention generally arises over contracts and ordinances, under which topics special questions will receive consideration.[69] Here only certain general phases will be noticed.

2. Constitutional Limitations.[70] Municipal powers are subject to limitations of both the federal and the state constitutions. Restrictions imposed upon the state legislature by these supreme expressions of the sovereign will apply with equal force to all subordinate agencies and instrumentalities of the state that exercise any of its political functions.[71] A municipality therefore may not pass any

Maine.— Perkins *v.* Oxford, 66 Me. 545.

Massachusetts.— Doherty *v.* Braintree, 148 Mass. 495, 20 N. E. 106.

Missouri.— Jordan *v.* Hannibal, 87 Mo. 673.

New Hampshire.— Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526.

Tennessee.—Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814; Chattanooga *v.* Dowling, 101 Tenn. 342, 47 S. W. 700; Nashville *v.* Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465.

See *supra*, III, C, 2, c, (II); *infra*, XII, A–C; XIV, A–D; XVIII.

66. De Tocqueville Democracy in America, c. 5; Lieber Civ. Lib. & Self-Gov. c. 1.

67. Cooley Const. Lim. (7th ed.) 266 *et seq.* See *Ex p.* Florence, 78 Ala. 419.

68. *California.*—Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Douglass *v.* Placerville, 18 Cal. 643.

Colorado.— Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

Connecticut.— Willard *v.* Killingworth Borough, 8 Conn. 247.

Florida.— *Ex p.* Sims, 40 Fla. 432, 25 So. 280.

Illinois.—Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230.

Indiana.— Ft. Wayne First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35.

Iowa.— Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261; Clark *v.* Davenport, 14 Iowa 494.

Massachusetts.— Spaulding *v.* Lowell, 23 Pick. 71.

Minnesota.— St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Mississippi.— Leonard *v.* Canton, 35 Miss. 189.

New Jersey.— Meday *v.* Rutherford, 65 N. J. L. 645, 48 Atl. 529.

Ohio.— Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465.

Pennsylvania.— Lesley *v.* Kite, 192 Pa. St. 268, 43 Atl. 959.

Rhode Island.—Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502.

Tennessee.—Nichol *v.* Nashville, 9 Humphr. 252.

Texas.— Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143.

Virginia.— Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.

Wisconsin.— Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664.

United States.— Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669; Minturn *v.* Larue, 23 How. 435, 16 L. ed. 574.

See *supra*, III, B, 1.

69. Contracts see *infra*, IX.

Ordinances see VI; XI, A.

70. Unconstitutional ordinances see *infra*, VI, G, 2.

71. *Alabama.*— Mobile *v.* Dargan, 45 Ala. 310.

Arkansas.— Vance *v.* Little Rock, 30 Ark. 435.

California.— *Ex p.* Felchlin, 96 Cal. 360, 31 Pac. 224, 31 Am. St. Rep. 223.

Colorado.— Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230.

Georgia.— Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452; Haywood *v.* Savannah, 12 Ga. 404.

Illinois.— Baldwin *v.* Smith, 82 Ill. 162; Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447; McGrath *v.* Chicago, 24 Ill. App. 19.

Michigan.— Mt. Pleasant *v.* Vansice, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193.

ex post facto ordinance;[72] nor any ordinance which violates the obligation of contracts.[73] Nor may it coin money or make anything but gold and silver a legal tender, or impose duties on either imports or exports except for necessary inspection.[74] Nor may any municipality by ordinance or otherwise do any of the acts forbidden or encroach upon any of the liberties guaranteed or rights safeguarded by the first eight amendments to the federal constitution, often called the Federal Bill of Rights,[75] deny or abridge any of those rights protected by amendments thirteen, fourteen, and fifteen,[76] or regulate interstate commerce.[77] For example a city council may not authorize a railroad company to take or injure private property;[78] or issue general search warrants;[79] or exercise inquisition upon any one under arrest;[80] or deprive any person of life, liberty, or property without due process of law;[81] or require excessive bail;[82] or take private property for public use without just compensation.[83] All these things are forbidden by the paramount law of the United States. So also, whatever private rights of person or property the people of the state have specially guaranteed or protected by their bill of rights or state constitution against infringement by any power are beyond the reach of municipal authority;[84] and whatever acts they have prohibited the state government from doing are equally prohibited to municipal government.[85] For example it has been held that a city council has no power to punish for contempt where the constitution restricts such power to the legislature and the courts;[86] that it cannot enact a penalty for a misdemeanor, with imprisonment in default of payment, on summary conviction by the mayor or an alderman;[87] and that it cannot repeal the criminal laws of the state;[88] or impose a license in violation of constitutional rights;[89] or prescribe qualifications of voters.[90]

3. STATUTORY AND COMMON-LAW LIMITATIONS. It is also a general rule that a

Minnesota.— Judson *v.* Reardon, 16 Minn. 431.

New York.— Stuyvesant *v.* New York, 7 Cow. 588.

See also *infra*, VI, G, 2.

72. Newlan *v.* Aurora, 14 Ill. 364; Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424. See *infra*, VI, G, 2, a; and CONSTITUTIONAL LAW, 8 Cyc. 1027 *et seq.*

73. Kansas City *v.* Carrigan, 86 Mo. 67; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730. See *infra*, VI, G, 2, a; and CONSTITUTIONAL LAW, 8 Cyc. 947.

74. Cooley Const. Lim. (7th ed.) 36, 857; U. S. Const. art. 1, § 8.

75. Cooley Const. Lim. (7th ed.) 365 *et seq.*; U. S. Const. Amendm. 1–8.

76. State *v.* Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. Rep. 948, 19 L. R. A. 858; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220; Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Stockton Laundry Case, 26 Fed. 611. See CONSTITUTIONAL LAW, 8 Cyc. 695.

77. Baxter *v.* Thomas, 4 Okla. 605, 46 Pac. 479; Moran *v.* New Orleans, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653. As to the commerce clause of the constitution see, generally, COMMERCE, 7 Cyc. 407.

78. Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

79. U. S. Const. Amendm. 4.

80. U. S. Const. Amendm. 5.

81. Baldwin *v.* Smith, 82 Ill. 162 (holding unconstitutional an ordinance authorizing the authorities to close a saloon or grocery by force, without having it first judicially declared a nuisance and ordered to be abated); Judson *v.* Reardon, 16 Minn. 431 (arrest and detention in violation of constitutional rights); *Ex p.* Smith, 135 Mo. 223, 36 S. W. 628, 58 Am. St. Rep. 576, 33 L. R. A. 606 (invasion of the rights of personal liberty). See CONSTITUTIONAL LAW, 8 Cyc. 1080.

82. U. S. Const. Amendm. 8.

83. Baldwin *v.* Smith, 82 Ill. 162; Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447. See *infra*, XIII, D; and EMINENT DOMAIN, 15 Cyc. 543.

84. *Ex p.* Deane, 7 Fed. Cas. No. 3,712, 2 Cranch C. C. 125.

85. Cooley Const. Lim. 241, 242. See Mobile *v.* Dargan, 45 Ala. 310; Haywood *v.* Savannah, 12 Ga. 404.

86. *In re* Whitcomb, 120 Mass. 118, 21 Am. Rep. 502. See also *supra*, III, B, 2, d, (II), text and note 98.

87. Barter *v.* Com., 3 Penr. & W. (Pa.) 253. *Compare infra*, XI, A, 8, g.

88. *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

89. State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652; Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361; St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278; Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576. See *infra*, XI, A, 8, c.

90. See the constitutions and statutes of the several states; and U. S. Const. Amendm. 15.

municipal corporation can exercise no power which is repugnant to the common or statute law of the state.[91] It cannot without express legislative authority legalize a common nuisance.[92] The municipality has such measure of power as the legislature thinks it wise to grant for the public good, either by special charter or general laws. But this power, not being protected from impairment by the contract clause of the federal constitution, is subject to the legislative will and discretion.[93] The general assembly has undoubted authority to prescribe the limits of municipal powers, and to add to or subtract from them at pleasure.[94] Nor can its motives be questioned.[95] This diminution or increase of power may be effected directly by an amendment of a special charter or the general law under which the corporation was organized.[96] The corporate powers may also be diminished by a repeal of certain sections of the general law.[97] This change may likewise be indirectly effected by the enactment of a law repugnant to charter provisions, whether special or general.[98] Whether the enactment has such effect depends upon the rules of statutory construction in regard to repeal by implication, prescribed and applied to ascertain and effectuate the legislative intention.[99] They will be con-

91. *Georgia.*— Haywood *v.* Savannah, 12 Ga. 404.

Louisiana.— State *v.* Burns, 45 La. Ann. 34, 11 So. 878.

New Jersey.— Jersey City Supply Co. *v.* Jersey City, 71 N. J. L. 631, 60 Atl. 381.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Pennsylvania.— Matter of Tax-Receipts, 12 Phila. 637.

92. State *v.* Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; Douglass *v.* Leavenworth, 6 Kan. App. 96, 49 Pac. 676.

93. *Arkansas.*— Vance *v.* Little Rock, 30 Ark. 435.

California.— San Francisco *v.* Canavan, 42 Cal. 541; People *v.* Hill, 7 Cal. 97.

Georgia.— Churchill *v.* Walker, 68 Ga. 681.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Louisiana.— State *v.* Flanders, 24 La. Ann. 57; Layton *v.* New Orleans, 12 La. Ann. 515.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 541, 13 L. ed. 518, 531; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629.

See *supra*, II, C, 1, a; III, A, 1; *infra*, IV, A.

94. *Illinois.*— Crook *v.* People, 106 Ill. 237.

Nebraska.— Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740; State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New York.— People *v.* Morris, 13 Wend. 325.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169; Reading *v.* Keppleman, 61 Pa. St. 233.

Tennessee.—Daniel *v.* Memphis, 11 Humphr. 582.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

See also *supra*, III, B, 1.

Amendment and repeal of charter see *supra*, II, C, 1, a; II, C, 2, e, (I).

Legislative control see *infra*, IV, A.

The Michigan statute of 1875, granting and defining the powers of villages (Howell Annot. St. c. 81), applies to villages incorporated after its passage, under the general act of 1857 for the incorporation of villages, as well as under special acts, and, as to such villages, supersedes the provisions of the act of 1857. Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61.

The Minnesota statute (Laws (1885), c. 145) providing that every village incorporated under the general statutes shall be thereafter governed according to the provisions of this chapter, to the end that uniformity of village government and equal privileges to all may be secured, applies to all villages incorporated under any general law of the state. State *v.* Spaude, 37 Minn. 322, 34 N. W. 164.

95. State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Wright *v.* Defrees, 8 Ind. 298.

96. *Georgia.*— Churchill *v.* Walker, 68 Ga. 681.

Nebraska.— State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New York.— People *v.* Morris, 13 Wend. 325.

Ohio.— State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

Tennessee.— Daniel *v.* Memphis, 11 Humpr. 582.

Amendment of special charter or general law see *supra*, II, C, 1, d.

97. Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137. See *supra*, II, C, 1, d, (I), (II); II, C, 2, e, (II).

98. Sloan *v.* State, 8 Blackf. (Ind.) 361; Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137. See *supra*, II, C, 1, d, (III); II, C, 2, e, (II), (B).

99. McGivney *v.* Pierce, 87 Cal. 124, 25 Pac. 269; Allen *v.* People, 84 Ill. 502; State *v.* Severance, 55 Mo. 378. See *supra*, II, C, 1, d, (III); II, C, 2, e, (II), (B).

sidered under the head of charter limitations. Suffice it here to say that whenever the repeal of a charter clause giving power is effected, the particular power therein granted is taken away from the corporation, whether the power was granted by general law or special charter; and henceforth it cannot be exercised by the municipality.[1] All ordinances enacted under that power are thus repealed, and henceforth have no effect;[2] nor may the corporation thereafter enact any by-law or ordinance in assertion of the power or in conflict with the existing law.[3] Valid contracts theretofore made or rights vested in the exercise of that power are of course not impaired by this statutory limitation of municipal power.[4] Such limitations are not retroactive, and never so construed or applied as to impair the contractual obligation of the municipality.[5]

4. CHARTER LIMITATIONS. Since the municipality is a creature of granted powers only, including all classes of powers, whether styled express, implied, inherent, common-law, indispensable, or incidental, the primary limitation of municipal powers is naturally to be found in the charter, under the maxim *expressio unius, exclusio alterius*.[6] The charter is the source of all municipal powers, and to it we must look to ascertain under established rules of construction what is the extent and measure of the powers conferred upon the corporation.[7] By charter the corporation is created, and by the mere fact of creation it receives the inherent or congenital powers, called also common-law powers.[8] An enumeration of powers is inserted in the charter, and thus the municipality receives its express powers.[9] But they cannot be efficiently exercised for the objects of the corporation; all appropriate functions cannot be performed without other powers, which are therefore implied from the charter.[10] And beside these three classes of powers, all obtained from the charter, municipalities can have none other.[11] The ever present problem of municipal life, in all its varied activities, is to decide what power the charter has conferred on the corporation.[12] This depends upon judicial construction under the recognized canons of interpretation, of which the one receiving most frequent mention in opinion and treatise is that one described by the hackneyed phrase "strict construction," and with this ample shield the rights of the individual and the welfare of the public are often protected from the greedy assaults of graft and the more ambitious aspirations of tyranny.[13] But a wise and patriotic judge, who, as author, inculcated this doctrine in a treatise of wide acceptation and generally recognized authority, judicially repudiated it, "when the power conferred in its exercise concerns only the municipality and can wrong or injure no one."[14] In determining the effect of

1. Sloan *v.* State, 8 Blackf. (Ind.) 361. See *supra*, II, C, 1, e, (I).

2. See *supra*, II, C, 1, e, (II).

3. Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452; Marietta *v.* Fearing, 4 Ohio 427. See *infra*, VI, G, 3.

4. Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419; Morris *v.* State, 62 Tex. 728; Louisiana *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 28 L. ed. 574; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

5. See the cases in the preceding note and *infra*, IV, H.

6. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Leavenworth *v.* Norton, 1 Kan. 432; Whelen's Appeal, 108 Pa. St. 162, 1 Atl. 88. See *supra*, III, B, 1.

7. Mt. Pleasant *v.* Breeze, 11 Iowa 399; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437. See *supra*, III, B, 1.

8. 1 Blackstone Comm. 475–476. See *supra*, III, B, 2, b.

9. Ingersoll Pub. Corp. 172. See *supra*, III, B, 2, c.

10. Implied powers see *supra*, III, B, 2, d.

11. *Alabama.*— *Ex p.* Burnett, 30 Ala. 461.

Connecticut.— New London *v.* Brainard, 22 Conn. 552.

Illinois.— Cook County *v.* McCrea, 93 Ill. 236.

Massachusetts.— Greenough *v.* Wakefield, 127 Mass. 275.

Minnesota.—Bentley *v.* Chisago County, 25 Minn. 259.

New York.— Smith *v.* Newburgh, 77 N. Y. 130.

See *supra*, III, B, 1.

12. Ingersoll Pub. Corp. 172.

13. *Indiana.*— Lafayette *v.* Cox, 5 Ind. 38.

Kentucky.— Henderson *v.* Covington, 14 Bush 312.

Michigan.— Port Huron *v.* McCall, 46 Mich. 565, 10 N. W. 23.

Mississippi.— Leonard *v.* Canton, 35 Miss. 189.

See *supra*, III, B, 2, d; III, B, 3.

14. Judge Thomas M. Cooley in Port

subsequent inconsistent statutes relied upon to amend municipal charters or repeal certain power-giving clauses of the charter, the courts, in harmony with the general doctrines of statutory construction have commonly adopted and applied the following rules: The intention of the legislature as expressed in the statute must be ascertained and effected.[15] Such construction will be adopted as if possible to allow both acts to have full force; and the charter will be considered amended, or a particular clause repealed only when the subsequent act is so obviously repugnant to it that no reasonable interpretation will permit both acts to stand together.[16] Particular stress is to be given to the latter rule when a general law is invoked to effect a limitation of peculiar power conferred upon a municipality by special act or charter.[17]

E. Mode of Exercising Powers. If the statute conferring a municipal power prescribes the manner in which it shall be exercised, this is generally mandatory and exclusive of other methods, so that any attempt to exercise it in a different manner will be void;[18] and this rule is especially applicable where there are negative words in effect prohibiting the doing of the thing unless it is done in the manner prescribed.[19] Thus authority granted to a city council to prescribe regulations by ordinance does not empower it to regulate the subject by mere resolution, and a resolution adopted for that purpose is null and void.[20] So also bonds have been declared void for want of a resolution of the council authorizing their issuance, when the terms of the act required such resolution as authority for issuance.[21] If the mode of exercise is not prescribed in the act or charter conferring the power or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion.[22] But the mode of exercising the power chosen by the corporation must be reasonable and customary; otherwise it may be enjoined.[23] The courts, however, are averse to

Huron *v.* McCall, 46 Mich. 565, 574, 10 N. W. 23.

15. Allen *v.* People, 84 Ill. 502; State *v.* Severance, 55 Mo. 378; State *v.* Miller, 30 N. J. L. 368, 86 Am. Dec. 188 [*affirmed* in 31 N. J. L. 521]; People *v.* Daley, 37 Hun (N. Y.) 461. See *supra*, II, C, 1, d, (III).

16. *Arkansas.*— Babcock *v.* Helena, 34 Ark. 499.

Illinois.— Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448; Covington *v.* East St. Louis, 78 Ill. 548.

Massachusetts.— Goddard *v.* Boston, 20 Pick. 407.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

Ohio.— Cass *v.* Dillon, 2 Ohio St. 607.

Pennsylvania.— Rounds *v.* Waymart Borough, 81 Pa. St. 395.

See *supra*, II, C, 1, d, (III); II, C, 2, e, (II), (B).

17. *California.*— People *v.* Clunie, 70 Cal. 504, 11 Pac. 775.

Connecticut.—McGarty *v.* Deming, 51 Conn. 422.

Georgia.— Griffin *v.* Inman, 57 Ga. 370.

Illinois.— Ottawa *v.* La Salle County, 12 Ill. 339.

Maryland.— Cumberland *v.* Magruder, 34 Md. 381.

Minnesota.—Tierney *v.* Dodge, 9 Minn. 166.

New Jersey.— State *v.* Branin, 23 N. J. L. 484.

Pennsylvania.— Harrisburg *v.* Sheck, 104 Pa. St. 53.

See *supra*, II, C, 1, d, (III); II, C, 2, e, (II), (B).

18. *California.*— McCoy *v.* Briant, 53 Cal. 247; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

Colorado.— Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14.

Indiana.— Ft. Wayne First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35.

Iowa.— Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

Michigan.— Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525.

Nevada.— Sadler *v.* Eureka County, 15 Nev. 39.

New Jersey.— State *v.* Newark, 25 N. J. L. 399.

New York.— Smith *v.* Newburgh, 77 N. Y. 130.

Texas.— Ferguson *v.* Halsell, 47 Tex. 421; Mills *v.* San Antonio, (Civ. App. 1901) 65 S. W. 1121.

United States.— Ft. Scott *v.* W. D. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

19. Ft. Wayne First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35.

20. See *infra*, VI, A, 1.

21. McCoy *v.* Briant, 53 Cal. 247. See *infra*, XV, C, 4, b.

22. Swift *v.* People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; Baltimore *v.* Howard, 6 Harr. & J. (Md.) 383; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 280, 20 Atl. 859. See *supra*, III, B, 2, d.

23. Chicago, etc., R. Co. *v.* Carlinville, 103 Ill. App. 251; Kirkham *v.* Russell, 76 Va. 956. See *infra*, III, I.

substituting their own discretion for that of the municipal authorities, and will do so only in case of a manifest abuse of discretion.[24]

F. Surrender of Powers.[25] The power of governing is a trust committed by the people to the government no part of which can be granted away; and this doctrine, usually announced in regard to a sovereign state is equally true of a municipality in regard to its governmental functions, which are committed to it by the state for the public weal.[26] The rule is generally applied to such municipal functions as are regarded as mandatory.[27] The trust must be faithfully performed for the benefit of the public, and any attempt to barter or surrender it is unauthorized and void.[28] The maxim on which these rulings are made seems applicable also to those municipal powers which are merely discretionary, and it has been so ruled.[29] On the contrary other courts have sustained contracts whereby the governing body has assumed to barter away municipal rights and apparently surrender sovereign power, on the ground that their invalidation would impair the obligation of contracts, in violation of the federal constitution.[30] This constitutional provision, however, is applicable only when the repudiation of the contract is attempted by legislation.[31]

G. Delegation of Powers[32] **— 1. In General.** Since all governmental power is held in trust by the state for the benefit of the public, it has been generally denied that such power can be delegated by the state to any body.[33] But repeated adjudication has settled that the maxim *potestas delegata non est deleganda* does not preclude the legislature from conferring sovereign powers on municipalities in such measure as to it seems wise and proper.[34] More important and difficult is it now to ascertain whether the governing body of the municipality may delegate its powers to another; and if so which powers, and to what

24. Kitchel *v.* Union County, 123 Ind. 540, 24 N. E. 366. See *infra*, III, I.

25. Delegation of powers see *infra*, III, G.

26. *California.*— Thompson *v.* Alameda, 144 Cal. 281, 77 Pac. 951.

Illinois.— Kreigh *v.* Chicago, 86 Ill. 407.

Louisiana.— New Orleans Third Municipality *v.* Ursuline Nuns, 2 La. Ann. 611.

Missouri.— St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; National Water Works Co. *v.* Kansas City, 20 Mo. App. 237.

New York.— Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; Whitney *v.* New York, 6 Abb. N. Cas. 329 note.

Virginia.— McCrowell *v.* Bristol, 89 Va. 652.

Wisconsin.— Lauenstein *v.* Fond du Lac, 28 Wis. 336.

27. Gillett *v.* Logan County, 67 Ill. 256; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Edwards *v.* Watertown, 61 How. Pr. (N. Y.) 463.

28. Western, etc., R. Co. *v.* Young, 83 Ga. 512, 10 S. E. 197; New Orleans Third Municipality *v.* Ursuline Nuns, 2 La. Ann. 611; Whitney *v.* New York, 6 Abb. N. Cas. (N. Y.) 329 note.

29. *Maryland.*— Baltimore *v.* Scharf, 54 Md. 499.

Massachusetts.— Day *v.* Green, 4 Cush. 433.

Missouri.— Ruggles *v.* Collier, 43 Mo. 353.

New Jersey.— State *v.* Paterson, 34 N. J. L. 163.

New York.— Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 455.

30. State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341.

31. Haywood *v.* Savannah, 12 Ga. 404; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229; Neill *v.* Gates, 152 Mo. 585, 54 S. W. 460; Walla Walla *v.* Water Co., 172 U. S. 1, 43 L. ed. 341; West Virginia Cent. Land Co. *v.* Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. ed. 91. See Constitutional Law, 8 Cyc. 932.

32. Surrender of power see *supra*, III, F.

33. Grant *v.* Camp, 105 Ga. 428, 31 S. E. 429; Curtis *v.* Whipple, 24 Wis. 350, 1 Am. Rep. 187; Foster *v.* Kenosha, 12 Wis. 616. See Constitutional Law, 8 Cyc. 830 *et seq.*

34. *California.*— *Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747.

Connecticut.— State *v.* Tryon, 39 Conn. 183.

Florida.— Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259; State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Georgia.— Wells *v.* Savannah, 107 Ga. 1, 32 S. E. 669; Perdue *v.* Ellis, 18 Ga. 586.

Illinois.— Mason *v.* Shawneetown, 77 Ill. 533.

Indiana.— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514; Indianapolis *v.* Indianapolis Gas-Light, etc., Co., 66 Ind. 396.

Massachusetts.— Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670.

Michigan.— Pioneer Iron Co. *v.* Negaunee, 116 Mich. 430, 74 N. W. 700.

Minnesota.— Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235.

extent delegation may be made by the council. It has repeatedly been held that the municipality had no such power of delegation.[35] But it is now the recognized rule that the state may expressly authorize delegation of certain powers by the corporation.[36] In the absence of such express authority the council must itself exercise all discretionary powers;[37] but this does not forbid the delegation of ministerial or administrative functions to subordinate officials.[38]

2. Powers Delegable.[39] The general rule seems to be that powers which are not imperative may be delegated by the common council to some subordinate body or officer.[40] Thus, supplying gas not being a municipal duty, the lease of the city gas-works is not an unlawful delegation of municipal power.[41] A city

Missouri.— North Missouri R. Co. *v.* Gott, 25 Mo. 540; Metcalf *v.* St. Louis, 11 Mo. 102.

New Hampshire.— State *v.* Hayes, 61 N. H. 264; Ash *v.* Cummings, 50 N. H. 591.

New Jersey.— Smith *v.* Howell, 60 N. J. L. 384, 38 Atl. 180; Trenton Horse R. Co. *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

Ohio.— Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Markle *v.* Akron, 14 Ohio 586.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

35. *California.*— Oakland *v.* Carpentier, 13 Cal. 540.

Indiana.— State *v.* Hauser, 63 Ind. 155.

Iowa.— Mullarky *v.* Cedar Falls, 19 Iowa 21.

Kentucky.— Hydes *v.* Joyes, 4 Bush 464, 96 Am. Dec. 311.

Massachusetts.— Day *v.* Green, 4 Cush. 433.

Michigan.— Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80.

Missouri.— Thompson *v.* Booneville, 61 Mo. 282.

New Jersey.— State *v.* Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352; State *v.* Paterson, 34 N. J. L. 163.

New York.— Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; Lyon *v.* Jerome, 26 Wend. 485, 37 Am. Dec. 271.

Ohio.— State *v.* Bell, 34 Ohio St. 194.

Pennsylvania.— Schenley *v.* Com., 36 Pa. St. 62.

Virginia.— McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653.

Wisconsin.— Lauenstein *v.* Fond du Lac, 28 Wis. 336.

36. State *v.* Garibaldi, 44 La. Ann. 809, 11 So. 36; State *v.* Paterson, 34 N. J. L. 163; Brooklyn *v.* Breslin, 57 N. Y. 591.

37. *California.*— Perine Contracting, etc., Co. *v.* Pasadena, 116 Cal. 6, 47 Pac. 777; Meuser *v.* Risdon, 36 Cal. 239.

Connecticut.— State *v.* Glavin, 67 Conn. 29, 34 Atl. 708; Pinney *v.* Brown, 60 Conn. 164, 22 Atl. 430.

Georgia.— Johnston *v.* Macon, 62 Ga. 645.

Illinois.— Kankakee *v.* Potter, 119 Ill. 324, 10 N. E. 212; Jackson County *v.* Brush, 77 Ill. 59.

Indiana.—Indianapolis *v.* Indianapolis Gas-Light, etc., Co., 66 Ind. 396.

Kentucky.— Hydes *v.* Joyes, 4 Bush 464, 96 Am. Dec. 311.

Louisiana.—State *v.* Garibaldi, 44 La. Ann. 809, 11 So. 36.

Maryland.— Baltimore *v.* Scharf, 54 Md. 499.

Massachusetts.— Ruggles *v.* Nantucket, 11 Cush. 433; Coffin *v.* Nantucket, 5 Cush. 269; Day *v.* Green, 4 Cush. 433.

Minnesota.— Minneapolis Gas Light Co. *v.* Minneapolis, 36 Minn. 159, 30 N. W. 450.

Missouri.— St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

New Jersey.— State *v.* Paterson, 34 N. J. L. 163; State *v.* Jersey City, 25 N. J. L. 309.

New York.— Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

Tennessee.— Whyte *v.* Nashville, 2 Swan 364.

Virginia.— McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653.

West Virginia.— Dancer *v.* Mannington, 50 W. Va. 322, 40 S. E. 475.

38. *Arkansas.*— Main *v.* Ft. Smith, 49 Ark. 480, 5 S. W. 801.

Connecticut.— Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666; Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 458.

Florida.— Holland *v.* State, 23 Fla. 123, 1 So. 521.

Illinois.—Alton *v.* Mulledy, 21 Ill. 76.

Indiana.— State *v.* Hauser, 63 Ind. 155.

Massachusetts.—Dorey *v.* Boston, 146 Mass. 336, 15 N. E. 897; Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908; Damon *v.* Granby, 2 Pick. 345.

Missouri.— Ruggles *v.* Collier, 43 Mo. 353.

New Jersey.— Harcourt *v.* Asbury Park, 62 N. J. L. 158, 40 Atl. 690; Brady *v.* Bayonne, 57 N. J. L. 379, 30 Atl. 968; Burlington *v.* Dennison, 42 N. J. L. 165; State *v.* Jersey City, 25 N. J. L. 309.

New York.— Kramrath *v.* Albany, 53 Hun 206, 6 N. Y. Suppl. 54 [*affirmed* in 127 N. Y. 575, 28 N. E. 400]; Edwards *v.* Watertown, 24 Hun 426.

Pennsylvania.— Com. *v.* Pittsburgh, 14 Pa. St. 177.

United States.— Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

39. **Delegation with respect to police powers** see *infra*, XI, A, 3.

40. Gillet *v.* Logan County, 67 Ill. 256; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

41. Baily *v.* Philadelphia, 184 Pa. St. 594, 39 Atl. 494, 63 Am. St. Rep. 812, 39 L. R. A. 837.

council may by ordinance adopt a city code compiled by the city attorney, as the adoption, not the compilation, is the legislative act.[42] The distribution of a pension fund may be committed to the fund association.[43] The street committee may be vested with the power of granting a license for a temporary obstruction of streets with materials.[44] The mayor may be authorized to designate the place in the existing water-pipe system, where connection shall be made by contractors to furnish the water-supply,[45] or to determine whether a license to sell cigarettes shall issue to an applicant,[46] or to issue valid warrants on the treasury in lieu of irregular or invalid ones.[47] So also a park board has been authorized to determine within fixed limits the amount of tax to be levied for park purposes;[48] to recommend to the council plans for a municipal park system;[49] and to take possession of land purchased by the city on approval and executing of title by the city solicitor.[50] And it seems that the council may authorize the city auditor, in lieu of the board of public works, to execute its order for the removal or destruction of a city building.[51] And water commissions may empower their chief engineer to determine certain technical questions as to the details of construction of city water works.[52] The board of aldermen of a city authorized to regulate the numbering of houses and lots in streets may, by resolution, authorize a borough president to renumber buildings on a street.[53]

3. Powers Not Delegable.[54] Illustration of the non-delegability of municipal powers is found in decisions to the effect that a city attorney may not be authorized by the council to employ an assistant and fix his compensation;[55] that the mayor cannot be empowered to fix license-fees,[56] to sell city bonds at his discretion as to price,[57] or to contract for the collection of delinquent taxes;[58] that the city clerk cannot be authorized to appoint a superintendent and janitors for the city hall,[59] or to appoint dates for the hearing of cases before the council;[60] and that the council cannot devolve upon a board the power to regulate the sale, price, and use of city water,[61] to elect a fire engineer and assistants,[62] to cancel statutory licenses,[63] or to make street improvements.[64] Nor has it power to authorize a magistrate to affix penalties at his discretion, without limit;[65] or to delegate to a committee its discretionary power as to the construction of sewers,[66] of bicycle paths,[67] or contracting for electric lighting of the city.[68]

42. Western, etc., R. Co. *v.* Young, 83 Ga. 512, 10 S. E. 197.

43. Com. *v.* Walton, 182 Pa. St. 373, 38 Atl. 790, 61 Am. St. Rep. 712.

44. Harcourt *v.* Asbury Park, 62 N. J. L. 158, 40 Atl. 690.

45. Brady *v.* Bayonne, 57 N. J. L. 379, 30 Atl. 968.

46. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

47. State *v.* Winter, 15 Wash. 407, 46 Pac. 644.

48. State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115.

49. Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860.

50. Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

51. Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666.

52. Chase *v.* Los Angeles, 122 Cal. 540, 55 Pac. 414; Ampt *v.* Cincinnati, 17 Ohio Cir. Ct. 516, 9 Ohio Cir. Dec. 690.

53. Van Ingen *v.* Hudson Realty Co., 106 N. Y. App. Div. 444, 94 N. Y. Suppl. 645.

54. Delegation with respect to police powers see *infra*, XI, A, 3.

55. Knight *v.* Eureka, 123 Cal. 192, 55 Pac. 768.

56. Thurlow Medical Co. *v.* Salem, 67 N. J. L. 111, 50 Atl. 475.

57. Elyria Gas, etc., Co. *v.* Elyria, 57 Ohio St. 374, 49 N. E. 335; Blair *v.* Waco, 75 Fed. 800, 21 C. C. A. 517.

58. Brand *v.* San Antonio, (Tex. Civ. App. 1896) 37 S. W. 340.

59. Lillard *v.* Ampt, 7 Ohio S. & C. Pl. Dec. 167, 4 Ohio N. P. 305.

60. State *v.* Jersey City, 25 N. J. L. 309.

61. Arnold *v.* Pawtucket, 21 R. I. 15, 41 Atl. 576.

62. Atty.-Gen. *v.* Lowell, 67 N. H. 198, 38 Atl. 270.

63. *Re* Foster, 31 Ont. 292.

64. Chase *v.* Los Angeles, 122 Cal. 540, 55 Pac. 414.

65. Tomlin *v.* Cape May, 63 N. J. L. 429, 44 Atl. 209; Slocum *v.* Ocean Grove Camp Meeting Assoc., 59 N. J. L. 110, 35 Atl. 794.

66. People *v.* McWethy, 177 Ill. 334, 52 N. E. 479; Lowery *v.* Lexington, 116 Ky. 157, 75 S. W. 202, 25 Ky. L. Rep. 392; Matter of Pittsburgh, 27 N. Y. App. Div. 353, 50 N. Y. Suppl. 356.

67. Porter *v.* Shields, 200 Pa. St. 241, 49 Atl. 785.

68. Foster *v.* Cape May, 60 N. J. L. 78, 36 Atl. 1089.

H. Ultra Vires — 1. Contracts. Much confusion and discord appears in the decisions and text-books on corporations upon the doctrine of *ultra vires*, resulting chiefly from the use of this phrase in different senses. It has been used to characterize not only acts which are repugnant to or beyond the corporate powers, but also acts done by a majority of stock-holders in disregard of the rights of the minority.[69] To avoid, if possible, this confusion, the phrase *ultra vires* is here used in the sense declared to be proper by a distinguished federal judge in the following lucid and comprehensive statement: "Two propositions are settled: One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which created it consents, *ultra vires*. . . . The other is that the powers of a corporation are such, and such only, as its charter confers; and an act beyond the measure of those powers, as either expressly stated or fairly implied, is *ultra vires*. . . . These two propositions embrace the whole doctrine of *ultra vires*. They are its alpha and omega."[70] To escape the apparent injustice of enforcing this doctrine in regard to the dealings and doings of private corporations, the courts have apparently in many instances either ignored or evaded its full force and meaning, and have thus shown "how hard cases can make bad law."[71] This has not been so, however, with regard to contracts of public corporations.[72] Generally the courts have recognized as a truism that what a municipality has no power to do it has not done merely because it tried to do it, and have accordingly refused to give legal effect to *ultra vires* contracts.[73] And so it has been declared that contracts by which a municipality gave away or exchanged city streets for other property,[74] offered a reward for the apprehension of a person,[75] borrowed money to pay the expenses of an election contest over the removal of a county-seat,[76] or made loans and donations to colleges,[77] are *ultra*

69. Reese Ultra Vires, 26.

70. Mr. Justice Brewer, dissenting in Chicago, etc., R. Co. *v.* Union Pac. R. Co., 47 Fed. 15, 20 [*affirmed* in 51 Fed. 309 (*affirmed* in 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265)]. Properly *ultra vires* means beyond the powers of the corporation itself. Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 48 N. J. L. 530, 7 Atl. 523.

71. See Corporations, 10 Cyc. 1146 *et seq.*

72. Ingersoll Puh. Corp. 292.

73. *Alabama.*— Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862.

California.— McCoy *v.* Briant, 53 Cal. 247; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

Illinois.—Agnew *v.* Broll, 124 Ill. 312, 16 N. E. 230.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Louisiana.— Seibrecht *v.* New Orleans, 12 La. Ann. 496.

Maine.— Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252.

Massachusetts.— Somerville *v.* Dickerman, 127 Mass. 272; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Minnesota.— Newberry *v.* Fox, 37 Minn. 141, 143, 33 N. W. 333, 5 Am. St. Rep. 830, where it is said: "A different rule of law would, in effect, vastly enlarge the power of public agents to bind a municipality by contracts, not only unauthorized, but prohibited, by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent."

New York.— McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144; Hodges *v.* Buffalo, 2 Den. 110.

Ohio.— Western Homeopathic Medicine College *v.* Cleveland, 12 Ohio St. 375.

Pennsylvania.— Hague *v.* Philadelphia, 48 Pa. St. 527.

Virginia.— Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.

Washington.— Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217.

United States.— Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669; Thomas *v.* Richmond, 12 Wall. 349, 20 L. ed. 453; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; Burrill *v.* Boston, 4 Fed. Cas. No. 2,198, 2 Cliff. 590.

Canada.— Ottawa Electric Light Co. *v.* Ottawa, 12 Ont. L. Rep. 290; Tremblay *v.* Montreal, 28 Quebec Super. Ct. 411.

See also *infra*, VIII, E; IX, A, 5; IX, H.

74. Beebe *v.* Little Rock, 68 Ark. 39, 56 S. W. 791.

75. Hanger *v.* Des Moines, 52 Iowa 193, 2 N. W. 1105, 35 Am. Rep. 266; Patton *v.* Stephens, 14 Bush (Ky.) 324; Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822. *Compare*, however, York *v.* Forscht, 23 Pa. St. 391.

76. Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452.

77. Fulton *v.* Northern Illinois College, 158 Ill. 333, 42 N. E. 138.

vires, and not enforceable at law. So likewise of a purchase by a city of a right of way for a railroad;[78] a contract granting a monopoly of the streets to a water company;[79] promising money to aid in the erection of a county court-house, or to donate its real estate for that purpose;[80] county bonds issued without legislative authority;[81] and a promise not to extend a street in a city.[82] These and many other similar contracts the courts have refused to enforce or recognize because they were illegal restrictions of the public power and duty of the municipality or because they were beyond the scope of the municipal powers. Some earlier cases were not in accord with these decisions, but supported the unlawful contract upon the doctrine of estoppel, so often applied formerly to the contracts of private corporations.[83] But there is at present general concurrence in the doctrine that the law will not recognize or enforce a municipal contract which it does not authorize.[84] Parties therefore seeking recompense for money loaned, material furnished, or labor done for a municipal corporation under an *ultra vires* contract do not sue for breach of the contract or seek specific performance thereof, but seek recompense either upon the theory of an implied contract and assumpsit, or under some doctrine of equity.[85] On the other hand, however, it has been held that persons or corporations accepting and exercising rights and franchises from a municipality on certain conditions are estopped to avoid their obligations on the ground that the conditions imposed were *ultra vires*.[86]

2. TORTS. The same rules of law are also applicable to torts sought to be imputed to a municipal corporation. A municipal corporation cannot confer upon its agents or officers lawful authority to represent it beyond the scope of its charter powers.[87] For acts not governmental, but strictly corporate or municipal within the scope of the municipal power exercised for a municipal purpose, the municipality may be liable for misfeasance; as in the negligent construction by officers of a sewer not authorized or directed by the municipal council,[88] or in the forcible and irregular taking of private property without pursuing the legal and authorized procedure for exercising eminent domain and compensating the owner.[89] Or it may be liable for non feasance in failing to perform a municipal duty whereby individuals are injured either in person or property.[90] But for the malfeasance of agents or officers of the corporation in assuming to do acts which are entirely beyond the municipal powers and purposes, and cannot therefore be lawfully authorized by the municipality, the corporation cannot be held liable in damages to persons suffering injuries therefrom.[91] This logical doctrine based upon elementary principles of the common law received general, if not universal, recog-

78. Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

79. Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

80. Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180; Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822. But a contrary doctrine seems to prevail in Michigan wherein a municipal levy to build a county court-house has been sustained. Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677.

81. Concord *v.* Robinson, 121 U. S. 165, 7 S. Ct. 937, 30 L. ed. 885.

82. Grand Rapids *v.* Grand Rapids, etc., R. Co., 66 Mich. 42, 33 N. W. 15.

83. See CORPORATIONS, 10 Cyc. 1146 *et seq.*

84. Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118; Ft. Wayne *v.* Lehr, 88 Ind. 62; Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996; Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351.

85. Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996; Thomson *v.* Elton, 109 Wis. 589, 85 N. W. 425; Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

86. Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95. See *infra*, IX, H, 4.

87. Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

88. Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

89. Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299.

90. Moore *v.* Los Angeles, 72 Cal. 287, 13 Pac. 855; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Ft. Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

91. *California.*— Sievers *v.* San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153; Chambers *v.* Satterlee, 40 Cal. 497.

Georgia.— Moss *v.* Augusta, 93 Ga. 797, 20 S. E. 653.

Maine.— Goddard *v.* Harpswell, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373.

nition in America by the concurrent decisions of the courts for almost a century.[92] It was applied in all civil actions for torts caused by the malfeasance of corporate officers or agents when pursuing any undertaking not within the scope of municipal purposes or powers, express, inherent, or implied; and it still remains the general doctrine of the courts, although not so firmly established and universally recognized as formerly.[93]

I. Judicial Supervision.[94] The increase of urban population, the creation and extension of numerous municipalities causing schemes of improvement often ill-advised, and involving the pledging of municipal credit, and the increase of burdens of taxation sometimes amounting to confiscation, have given rise to much complaint at municipal action and frequent challenge of municipal power which

Minnesota.— Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Missouri.— Beatty *v.* St. Joseph, 57 Mo. App. 251.

Nebraska.— Wabaska Electric Co. *v.* Wymore, 60 Nebr. 199, 82 N. W. 626.

New York.— Reynolds *v.* Little Falls Union Free School Dist., 33 N. Y. App. Div. 88, 53 N. Y. Suppl. 75.

92. Wahaska Electric Co. *v.* Wymore, 60 Nebr. 199, 82 N. W. 626. The acts of city authorities in cutting a ditch along the side of a lot outside the city limits are *ultra vires*, and hence the city is not liable for injuries resulting therefrom to the lot owner. Loyd *v.* Columbus, 90 Ga. 20, 15 S. E. 818.

93. The stability of this doctrine of the law is supposed to be shaken by the decision of the supreme court of the United States in the unique case of Salt Lake City *v.* Hollister, 118 U. S. 256, 260, 6 S. Ct. 1055, 30 L. ed. 176, where Mr. Justice Miller, in delivering the opinion of the court, said: "The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured." Concerning this a recent author says: "The effect of this decision is to broaden materially the view of liability of municipal corporations for torts, and it is a strong authority in support of the contention that these bodies should be liable for negligence in respect to their *ultra vires* acts. Such an act of the corporation is made doubly wrongful by the fact that it is in excess of the corporate power, and for the damages resulting from it the corporation should respond." Jones Negl. Mun. Corp. § 47. An examination of this case shows the foregoing language of Mr. Justice Miller to be an *obiter dictum*. Salt Lake City, having erected a distillery, proceeded without authority to engage in the business of distilling spirits, and while so doing, in violation of the United States revenue laws, made fraudulent returns of the quantity of spirits produced. Its fraud was detected, and a lawful assessment made upon the city as a distiller for the gallon tax upon the liquor actually produced and fraudulently omitted from the required report. To enforce the collection of this tax and penalty, the government was about to seize municipal property, whereupon the city, to save its property, paid the tax under protest, and then brought action against the collector to recover the amount so paid. The ground of its action was that the business of distilling spirits by Salt Lake City was *ultra vires*. The very impudence of the contention provoked the court to pungent ridicule of plaintiff's action; and, naturally, strong language was used in refuting its absurd contention and denying its demand. But the question in the case was not whether a municipality is liable in a civil action to an individual injured by the tortious acts of its agents or officers *ultra vires*, but only whether it could recover from the government a sum of money paid under protest to avoid seizure of its property for a lawful tax and penalty. And accordingly the digest syllabus thus accurately expresses the decision in the case: "A municipal corporation engaged in the business of distilling spirits is subject to internal revenue taxation under the laws of the United States, whether its acts in that respect are or are not *ultra vires*." The gist of the decision is found in the following excerpt from the opinion: "A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted." The fundamental rules of law upon which a person or corporation becomes liable for a tax are so widely different from those which declare liability for a tort that even these cogent words of Justice Miller, used *arguendo* in the decision of a revenue case, are not likely to unsettle the logical rule as to torts to private individuals established by the concurrent decisions of courts of last resort through scores of years in the United States.

94. **Mandamus to municipal corporations and officers** see MANDAMUS, 26 Cyc. 249.

have resulted in decisions as to judicial supervision of municipal conduct which are conflicting and not easily reconciled.[95] By the weight of authority, however, as well as by the logic and reason of the matter, the following doctrines of law with regard to the power of the courts to review and supervise the exercise of municipal functions may be regarded as established: (1) The acts of a municipal body within the scope of the powers conferred upon it are conclusive upon the courts and cannot be reviewed or enjoined unless they are so unreasonable, oppressive, and subversive of individual rights as to clearly indicate an abuse rather than a lawful use of a power.[96] (2) If the legislature has expressly conferred upon the municipality power to do a certain act the courts cannot question, except upon constitutional grounds, the right of the municipality to exercise the power.[97] (3) If the legislature has expressly conferred upon the municipal body discretionary power to decide whether certain municipal acts or undertakings shall be done or entered upon, the courts have no jurisdiction to substitute their judgment for that of the municipal body or interfere with the act or undertaking because it is not consistent with the judicial reasoning or policy.[98] (4) Courts of equity have no general supervisory jurisdiction over municipal affairs. The redress of injuries for transgressing municipal powers or violating fundamental rules of procedure belongs to the courts of law, except in those cases falling under some recognized head of equitable jurisdiction.[99] (5) Courts have undoubted jurisdiction to determine whether a municipal act or undertaking is *ultra vires* and void, and if so, to enjoin or prohibit the municipality from engaging therein.[1]

IV. LEGISLATIVE CONTROL.

A. In General. During the existence of the municipality it is subject to a large measure of legislative control. The sovereign power which has created it, and which may alter or dissolve it at pleasure, may likewise supervise and direct its conduct in all public matters. The state thus acts as general guardian of the person and property of the municipal corporation; and the only limitation upon its supreme legislative power in this particular will be found in the state or federal

95. *Alabama.*— Echols *v.* State, 56 Ala. 131.

California.— Spring Valley Water-Works *v.* San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756.

Minnesota.— State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.

Missouri.— State *v.* Fitzgerald, 44 Mo. 425.

New York.— People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536.

Pennsylvania.— Com. *v.* Allen, 70 Pa. St. 465.

96. Poulan *v.* Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657; McMaster *v.* Waynesboro, 122 Ga. 231, 50 S. E. 122; Kitchel *v.* Union County, 123 Ind. 540, 24 N. E. 366; Heman *v.* Schulte, 166 Mo. 409, 66 S. W. 163; Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419. See also *supra*, III, E, text and notes 23, 24; and INJUNCTIONS, 22 Cyc. 888 *et seq.*

97. Chicago, etc., R. Co. *v.* Carlinville, 103 Ill. App. 251; *In re* Anderson, 69 Nebr. 686, 96 N. W. 149. See also INJUNCTIONS, 22 Cyc. 889.

98. Denver *v.* Campbell, 33 Colo. 162, 80 Pac. 142; Carling *v.* Jersey City, 71 N. J. L. 154, 58 Atl. 395; Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659. See also *supra*, III, E, text and note 24; and INJUNCTIONS, 22 Cyc. 889.

99. Phelps *v.* Watertown, 61 Barb. (N. Y.) 121. See also INJUNCTIONS, 22 Cyc. 888 *et seq.*

1. *Iowa.*— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Louisiana.— Seibrecht *v.* New Orleans, 12 La. Ann. 496.

Massachusetts.— Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Michigan.— Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 330.

Missouri.— State *v.* Gates, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. N. S. 152.

New Jersey.— Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419; Paterson, etc., R. Co. *v.* Paterson, 24 N. J. Eq. 158; Schumm *v.* Seymour, 24 N. J. Eq. 143; Bond *v.* Newark, 19 N. J. Eq. 376.

New York.— McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144.

Ohio.— Western College, etc. *v.* Cleveland, 12 Ohio St. 375.

Pennsylvania.— Hague *v.* Philadelphia, 48 Pa. St. 527.

United States.— Ottawa *v.* Carey, 108 U. S. 110, 27 L. ed. 669; Thomas *v.* Richmond, 12 Wall. 349, 20 L. ed. 453.

See also *infra*, IX; and INJUNCTIONS, 22 Cyc. 888 *et seq.*

constitution.[2] This power of control and supervision is a necessary corollary of

2. *Alabama.*— State *v.* Mobile, 24 Ala. 701.

Arkansas.— Eagle *v.* Beard, 33 Ark. 497; Vance *v.* Little Rock, 30 Ark. 435; State *v.* Jennings, 27 Ark. 419.

California.— Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923; Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; San Francisco *v.* Canavan, 42 Cal. 541; Sinton *v.* Ashbury, 41 Cal. 525; Grogan *v.* San Francisco, 18 Cal. 590; Underhill *v.* Sonora, 17 Cal. 172; People *v.* Burr, 13 Cal. 343; People *v.* Hill, 7 Cal. 97.

Colorado.—Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

Delaware.— Coyle *v.* McIntire, 7 Houst. 44, 30 Atl. 728, 40 Am. St. Rep. 109.

Georgia.— Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106; Churchill *v.* Walker, 68 Ga. 681.

Idaho.— State *v.* Steunenberg, 5 Ida. 1, 45 Pac. 462.

Illinois.— Cicero *v.* Chicago, 182 Ill. 301, 55 N. E. 351; Crook *v.* People, 106 Ill. 237; Fox *v.* Kendall, 97 Ill. 72; People *v.* Brown, 83 Ill. 95; Sangamon County *v.* Springfield, 63 Ill. 66; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278; Freeport *v.* Stephenson County, 41 Ill. 495; Robertson *v.* Rockford, 21 Ill. 451; Gutzweller *v.* People, 14 Ill. 142; School Trustees *v.* Tatman, 13 Ill. 27; Richland County *v.* Lawrence County, 12 Ill. 1; Holliday *v.* People, 10 Ill. 214; People *v.* Wren, 5 Ill. 269.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Indianapolis *v.* Indianapolis Home for Friendless Women, 50 Ind. 215; Lucas *v.* Tippecanoe County, 44 Ind. 524; Sloan *v.* State, 8 Blackf. 361.

Iowa.— Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455; Morford *v.* Unger, 8 Iowa 82.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140; Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 664; Cheaney *v.* Hooser, 9 B. Mon. 330.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 478; State *v.* Flanders, 24 La. Ann. 57; Amite City *v.* Clementz, 24 La. Ann. 27; New Orleans *v.* Hoyle, 23 La. Ann. 740; Layton *v.* New Orleans, 12 La. Ann. 515; Bossier Police Jury *v.* Shreveport, 5 La. Ann. 661; Reynolds *v.* Baldwin, 1 La. Ann. 162.

Maine.— Yarmouth *v.* North Yarmouth, 34 Me. 411, 56 Am. Dec. 666; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Hooper *v.* Emery, 14 Me. 375.

Maryland.— Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446; Hagerstown *v.* Sehner, 37 Md. 180; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Brighton *v.* Wilkinson, 2 Allen 27; Warren *v.* Charlestown, 2 Gray 84.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbert, 24 Mich. 44, 9 Am. Rep. 103; Smith *v.* Adrian, 1 Mich. 495.

Minnesota.— Daley *v.* St. Paul, 7 Minn. 390.

Mississippi.— Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

Missouri.— St. Louis *v.* Sheilds, 52 Mo. 351; State *v.* Linn County Ct., 44 Mo. 504; St. Louis *v.* Allen, 13 Mo. 400; St. Louis *v.* Russell, 9 Mo. 507.

Nebraska.— Redill *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740; Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365; State *v.* Holden, 19 Nebr. 249, 27 N. W. 120; State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266.

New Jersey.— Rader *v.* Road Dist., 36 N. J. L. 273; State *v.* Fuller, 34 N. J. L. 227; State *v.* Branin, 23 N. J. L. 484; Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360.

New York.— Wilcox *v.* McClellan, 185 N. Y. 9, 77 N. E. 986 [*affirming* 110 N. Y. App. Div. 378, 97 N. Y. Suppl. 311 (*affirming* 47 Misc. 465, 95 N. Y. Suppl. 941)]; Allison *v.* Welde, 172 N. Y. 421, 65 N. E. 263; People *v.* Pinckney, 32 N. Y. 377; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248; People *v.* Kerr, 27 N. Y. 188; People *v.* Draper, 15 N. Y. 561; Pettit *v.* McClellan 110 N. Y. App. Div. 390, 97 N. Y. Suppl. 320; Davidson *v.* New York, 27 How. Pr. 342; Morris *v.* People, 3 Den. 381; Purdy *v.* People, 4 Hill 384; People *v.* Morris, 13 Wend. 325.

North Carolina.— Harriss *v.* Wright, 121 N. C. 172, 28 S. E. 269; Wallace *v.* Sharon Tp., 84 N. C. 164.

Ohio.— Marietta *v.* Fearing, 4 Ohio 427.

Oklahoma.— Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

Oregon.— Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299; David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174; O'Harra *v.* Portland, 3 Oreg. 525.

Pennsylvania.— Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837; Perkins *v.* Slack, 86 Pa. St. 270; Philadelphia *v.* Fox, 64 Pa. St. 169; Burns *v.* Clarion County, 62 Pa. St. 422; Erie *v.* Erie Canal Co., 59 Pa. St. 174; Philadelphia *v.* Field, 58 Pa. St. 320; Dunmore's Appeal, 52 Pa. St. 374; Plymouth *v.* Jackson, 15 Pa. St. 44; Allentown *v.* Wagner, 27 Pa. Super. Ct. 485.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

Tennessee.— State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; State *v.* Wilson, 12 Lea 246; Luehrman *v.* Shelby Taxing Dist., 2 Lea 425;

the plenary power of the state over all public matters and concerns.[3] It is the sovereign; and wherein not restrained by the supreme law of the land, the legislature, as trustee of the public for the general weal, has power and duty not only to interpose its arm for protection, but to show its might in positive and affirmative acts of government in particular matters over which it had conferred general charter power upon the corporation.[4] The courts cannot pass upon the motives of the legislature.[5] This paramount power of the state manifests itself over the municipality in acts changing boundaries,[6] regulating municipal powers,[7] appointing public officers,[8] imposing public burdens and obligations,[9] diverting or appropriating municipal revenues,[10] revoking franchises,[11] prescribing and modifying public improvements,[12] and converting and appropriating municipal property.[13] The power extends to the validation of defective and voidable obligations,[14] and the control of municipal trusts.[15] The constitutional limitations upon this legislative power are those protecting private property,[16] preventing the impairment of contractual obligations,[17] prescribing uniformity, and forbidding special legislation.[18] Thus are protected the rights of creditors who have lent money on con-

Memphis *v.* Memphis Water Co., 5 Heisk. 495; Nichol *v.* Nashville, 9 Humphr. 252; Governor *v.* McEwen, 5 Humphr. 241.

Texas.— Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742; Bass *v.* Fontleroy, 11 Tex. 698.

Vermont.— Atkins *v.* Randolph, 31 Vt. 226; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

Virginia.— Richmond *v.* Richmond, etc., R. Co., 21 Gratt. 604.

West Virginia.— Board of Education *v.* Board of Education, 30 W. Va. 424, 4 S. E. 640.

United States.— Covington *v.* Kentucky, 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 679; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629; Terrett *v.* Taylor, 9 Cranch 43, 3 L. ed. 650; Linton *v.* Carter County, 23 Fed. 535.

See 36 Cent. Dig. tit. "Municipal Corporations," § 156 *et seq.* And see CONSTITUTIONAL LAW, 8 Cyc. 902 *et seq.*, 941 *et seq.*

The fact that the constitution mentions and recognizes a municipal corporation does not make its charter a constitutional charter, so as to place it beyond the reach of legislative power. Baltimore *v.* Baltimore Police Bd., 15 Md. 376, 74 Am. Dec. 572.

Municipality not an "officer."— The corporation of the city of New York is not an "officer" within the meaning of Const. (1846) art. 10, in such sense that to diminish or restrict its general legislative or administrative power is to abrogate or change a public office. People *v.* Pinckney, 32 N. Y. 377.

3. People *v.* Morris, 13 Wend. (N. Y.) 325; Williams *v.* Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047; 2 Kent Comm. 275.

4. See the cases above cited.

5. State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

6. See *infra*, IV, B.

7. See the cases cited *supra*, note 2.

8. See *infra*, IV, E.

9. See *infra*, IV, H.

10. See *infra*, IV, I.

11. See *infra*, IV, F, 4.

12. See *infra*, IV, G.

13. See *infra*, IV, F.

14. See *infra*, IV, H, 2.

15. See *infra*, IV, F, 2.

16. Grogan *v.* San Francisco, 18 Cal. 590; Benson *v.* New York, 10 Barb. (N. Y.) 223; Webb *v.* New York, 64 How. Pr. (N. Y.) 10. See *infra*, IV, F, 3.

17. *California.*— People *v.* Bond, 10 Cal. 563.

New York.—Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Benson *v.* New York, 10 Barb. 223.

Pennsylvania.— Williams' Appeal, 72 Pa. St. 214.

Texas.— Morris *v.* State, 62 Tex. 728.

Wisconsin.— Smith *v.* Appleton, 19 Wis. 468.

United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Memphis *v.* U. S., 97 U. S. 293, 24 L. ed. 920.

See also *infra*, IV, H, 1; IV, I, 2; and CONSTITUTIONAL LAW, 8 Cyc. 941 *et seq.*

18. *California.*— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Colorado.— Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

Illinois.— People *v.* Cooper, 83 Ill. 585.

Iowa.— Davis *v.* Woolnough, 9 Iowa 104; *Ex p.* Pritz, 9 Iowa 30.

New Jersey.— New Brunswick *v.* Fitzgerald, 48 N. J. L. 457, 8 Atl. 729; Hammer *v.* State, 44 N. J. L. 667; Gingham *v.* Camden, 40 N. J. L. 156; State *v.* Parsons, 40 N. J. L. 123; Pell *v.* Newark, 40 N. J. L. 71, 29 Am. Rep. 266 [*affirmed* in 40 N. J. L. 550].

Wisconsin.— Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561.

See also *supra*, II, C, 1, d, (II); and, generally, STATUTES.

tracts pledging municipal revenues or property;[19] and in some instances, it is claimed, the rights of the community whose contributions have erected public utilities for local use and purchased other municipal property.[20] The fundamental basis of this power, instances of the exercise of which seem oppressive, is that governmental powers conferred upon a municipality cannot ripen into vested rights.[21] But the dual character of the municipality palpably affects this power of legislative control. In its governmental aspect the corporation is completely subject to the legislative will.[22] The power which gave may take away, and may alter, vary, or amend at pleasure.[23] It was law which gave all life, power, and authority;[24] and the law may diminish or totally withdraw it.[25] It appointed the agent and clothed it with power; and it may limit the power or revoke the agency.[26] Whatever is within the proper scope of legislation, that may be effected in a municipality by the legislature.[27] But there are many elements in a municipality which were not given to it by legislation, and these things cannot be taken

19. See the cases cited *supra*, this section, note 17. And see *infra*, IV, H, 1; IV, I, 2.

20. See *infra*, IV, F, 3.

21. *Maryland.*—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New Jersey.— Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 485.

New York.— People *v.* Draper, 15 N. Y. 532; People *v.* Morrell, 21 Wend. 563.

See CONSTITUTIONAL LAW, 8 Cyc. 902 *et seq.*, 941 *et seq.*

22. See the cases cited *supra*, this section, note 2.

23. See the cases cited *supra*, note 2.

Amendment of charter see *supra*, II, C.

24. *Georgia.*— Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

New Hampshire.— New Boston *v.* Dunbarton, 12 N. H. 409.

New York.— People *v.* Watertown, 1 Hill 616.

Ohio.— Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

Tennessee.— Memphis *v.* Memphis Water Co., 5 Heisk. 495; Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.

25. *Alabama.*— State *v.* Mobile, 24 Ala. 701.

Arkansas.— Little Rock *v.* Parish, 36 Ark. 166; State *v.* Jennings, 27 Ark. 419.

California.— San Francisco *v.* Canavan, 42 Cal. 541; People *v.* Burr, 13 Cal. 343.

Colorado.— Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

Georgia.— State *v.* Savannah, R. M. Charlt. 250.

Illinois.— Crook *v.* People, 106 Ill. 237.

Indiana.— Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Indianapolis *v.* Indianapolis Gas-Light, etc., Co., 66 Ind. 396.

Iowa.— Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Kentucky.— Buckner *v.* Gordon, 81 Ky. 665; Boyd *v.* Chambers, 78 Ky. 140.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530; Yarmouth *v.* North Yarmouth, 34 Me. 411, 56 Am. Dec. 666.

Massachusetts.—Cobb *v.* Kingman, 15 Mass. 197.

Michigan.— Smith *v.* Adrian, 1 Mich. 495.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266.

New Jersey.— State *v.* Branin, 23 N. J. L. 484.

New York.— Demarest *v.* New York, 74 N. Y. 161; Gray *v.* Brooklyn, 2 Abb. Dec. 267, 10 Abb. Pr. N. S. 186; Davidson *v.* New York, 27 How. Pr. 342; People *v.* Morris, 13 Wend. 325.

Ohio.— Scovill *v.* Cleveland, 1 Ohio St. 126; Marietta *v.* Fearing, 4 Ohio 427.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169; Reading *v.* Keppleman, 61 Pa. St. 233.

Tennessee.— Luehrman *v.* Shelby Taxing Dist., 2 Lea 425; Lynch *v.* Lafland, 4 Coldw. 96; Daniel *v.* Memphis, 11 Humphr. 582.

Wisconsin.—Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 541, 13 L. ed. 518, 531.

26. *Connecticut.*— Granby *v.* Thurston, 23 Conn. 416.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140.

Massachusetts.— Cobb *v.* Kingman, 15 Mass. 197.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266.

Tennessee.— Lynch *v.* Lafland, 4 Coldw. 96.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See also cases cited *supra*, note 2.

27. *Arkansas.*— Eagle *v.* Beard, 33 Ark. 497; State *v.* Jennings, 27 Ark. 419.

California.— Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923; San Franciso *v.* Canavan, 42 Cal. 541; Underhill *v.* Sonora, 17 Cal. 172.

Colorado.— Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

Illinois.— People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

Iowa.— Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Maine.— Hooper *v.* Emery, 14 Me. 375.

away or controlled. The legislature did not create the community, or give the population; or the municipal buildings, parks, water and light plants, and other improvements. These things pertain to the locality and not to the public at large; they are for the community and not for the state; and the legislative control of this property therefore is not absolute.[28] The corporation in this aspect is municipal rather than governmental, and has been held to be entitled to the same measure and character of protection as private corporations and persons.[29] In some jurisdictions, even in the absence of express constitutional provision, legislative acts interfering with a municipal corporation in matters of purely local concern are condemned and held invalid as an unauthorized interference with the right of local self-government,[30] but in other jurisdictions this doctrine is not recognized or else is recognized only to a limited extent.[31]

B. Boundaries. The physical features of the corporation are subjects of legislative control, and the legislature may therefore contract or expand the territory of the municipality, and may thus give it shape, size, and character, according to legislative discretion,[32] subject only to the limitations and restrictions found

Maryland.— Hagerstown *v.* Sehner, 37 Md. 180.

Missouri.— St. Louis *v.* Sheilds, 52 Mo. 351; State *v.* Linn County Ct., 44 Mo. 504.

Nebraska.— Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

New Jersey.— Jersey City *v.* Jersey, etc., R. Co., 20 N. J. Eq. 360.

North Carolina.— Harriss *v.* Wright, 121 N. C. 172, 28 S. E. 269.

Oklahoma.— Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

28. See *infra*, IV, F, 3.

A municipal corporation possesses two classes of powers and two classes of rights, public and private.— In all that relates to one class it is merely the agent of the state, and subject to its control. In the other, it is the agent of the inhabitants of the place, the corporators, maintains the character and relations of individuals, and is not subject to the absolute control of the legislature, its creator. Among this latter class is the right to acquire, hold, and dispose of property, to sue and be sued, etc., just as certain rights are conferred on private corporations and persons, not *sui juris*, such as minors and married women, but are not afterward, as long as they exist, under legislative control. Coyle *v.* McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 732, 40 Am. St. Rep. 109; New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 478.

29. *Illinois.*— Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

Indiana.— State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.

Iowa.— State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517.

Michigan.— People *v.* Detroit, 29 Mich. 108; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlhut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

Pennsylvania.— Com. *v.* Philadelphia, 132 Pa. St. 288, 19 Atl. 136; Philadelphia *v.* Fox, 64 Pa. St. 169.

See also *infra*, IV, F, 3.

30. *Indiana.*— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Iowa.— State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244.

Kentucky.— Lexington *v.* Thompson, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775.

Michigan.— People *v.* Detroit, 29 Mich. 108; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

Montana.— Helena Consol. Water Co. *v.* Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

Nebraska.— State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

New York.— Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408.

See also *infra*, IV, E, G, H; and CONSTITUTIONAL LAW, 8 Cyc. 779–787.

31. *Alabama.*—Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529.

Colorado.— *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Ohio.— State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

Rhode Island.— Newport *v.* Horton, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330.

See also *infra*, IV, E, G, H; and CONSTITUTIONAL LAW, 8 Cyc. 779–787.

32. *California.*— People *v.* Riverside, 70 Cal. 461, 11 Pac. 759; People *v.* Nevada, 6 Cal. 143.

Connecticut.— Suffield *v.* East Granby, 52 Conn. 175.

Georgia.— Kelly *v.* Tate, 43 Ga. 535.

in the state constitution.[33] These matters having already received special consideration in treating of territorial extent, annexation, consolidation, and division [34] call for no further treatment here in explication of the extent of legislative control. This being a governmental feature the control is complete.[35]

C. Streets and Highways. All highways whether rural or urban belong to the public; and the legislature as supreme trustee for the people has power of control over all streets, avenues, and alleys.[36] The rule applies to a bridge constituting a part or continuation of a street.[37] This power is usually delegated to

Idaho.— Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130.

Illinois.— Galesburg *v.* Hawkinson, 75 Ill. 152.

Indiana.— Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; Stilz *v.* Indianapolis, 55 Ind. 515.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Kansas.— *In re* Howard County, 15 Kan. 194.

Louisiana.— Stoner *v.* Flournoy, 28 La. Ann. 850.

Maine.— Gorham *v.* Springfield, 21 Me. 58.

Maryland.— Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Massachusetts.— Chandler *v.* Boston, 112 Mass. 200.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Minnesota.— Roos *v.* State, 6 Minn. 428.

Mississippi.— Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

Missouri.— Woods *v.* Henry, 55 Mo. 566; St. Louis *v.* Allen, 13 Mo. 400.

New York.— Rumsey *v.* People, 19 N. Y. 41.

North Carolina.— Mills *v.* Williams, 33 N. C. 558.

Ohio.— Blanchard *v.* Bissell, 11 Ohio St. 96.

Pennsylvania.— Hewitt's Appeal, 88 Pa. St. 55.

Tennessee.— Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; McCallie *v.* Chattanooga, 3 Head 317.

Texas.— Norris *v.* Waco, 57 Tex. 635.

Virginia.— Wade *v.* Richmond, 18 Gratt. 583.

Wisconsin.— Chicago, etc., R. Co. *v.* Langlade, 56 Wis. 614, 14 N. W. 844.

United States.— Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

33. *North Dakota.*— Schaffner *v.* Young, 10 N. D. 245, 86 N. W. 733.

Pennsylvania.— Johns *v.* Davidson, 16 Pa. St. 512.

South Dakota.— Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147.

Tennessee.— Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; McCallie *v.* Chattanooga, 3 Head 317.

Wisconsin.— Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364.

34. See *supra*, II, B, 2, a, b, c.

35. See the cases cited *supra*, note 32.

36. *Florida.*— State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590.

Illinois.— Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110; People *v.* Walsh, 96 Ill. 232, 36 Am. Rep. 135; Kreigh *v.* Chicago, 86 Ill. 407.

Iowa.— Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773; Gray *v.* Iowa Land Co., 26 Iowa 387; Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Kansas.— La Harpe *v.* Elin Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448.

Maryland.— Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

Minnesota.— Daley *v.* St. Paul, 7 Minn. 390.

Missouri.— State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41; Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483, 1 S. W. 86.

New Jersey.— United R., etc., Co. *v.* Jersey City, 71 N. J. L. 80, 58 Atl. 71; Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 366.

New York.— Hoey *v.* Gilroy, 129 N. Y. 132, 29 N. E. 85; People *v.* McDonald, 69 N. Y. 362; Astor *v.* New York, 62 N. Y. 567; People *v.* Flagg, 46 N. Y. 401; People *v.* Kerr, 27 N. Y. 188; People *v.* New York, etc., R. Co., 45 Barb. 73, 26 How. Pr. 44; Wilcox *v.* McClellan, 47 Misc. 465, 95 N. Y. Suppl. 941 [*affirmed* in 110 N. Y. App. Div. 378, 97 N. Y. Suppl. 311 (*affirmed* in 185 N. Y. 9, 77 N. E. 986)].

Oregon.— Simon *v.* Northrup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

Pennsylvania.— McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Baird *v.* Rice, 63 Pa. St. 489; Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; O'Connor *v.* Pittsburgh, 18 Pa. St. 187.

United States.— Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87; Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336; Memphis *v.* Postal Tel. Cable Co., 139 Fed. 707; Columbus *v.* Union Pac. R. Co., 137 Fed. 869, 70 C. C. A. 207.

See 36 Cent. Dig. tit. "Municipal Corporations," § 167.

Power of territorial legislature under townsite act see Ashby *v.* Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. ed. 469 [*affirming* 5 Mont. 68, 1 Pac. 204].

37. Floyd County *v.* Rome St. R. Co., 77 Ga. 614, 3 S. E. 3.

the municipality, but always subject to revocation in the legislative discretion.[38] Even when it has the title, the municipality has no property in the streets;[39] and the legislature may at any time resume control, either partial or total, of them, and regulate their care and keeping by other public instrumentalities, as a street or park commission.[40] The municipality, being a mere agent of the sovereign power of the people, may not challenge the authority of its principal to revoke the agency and impose the duty or confer the power upon another agent of its own selection.[41] The state, as the sovereign agency of the people for the purposes of government, holds all public powers and utilities in trust for the public welfare, including those within as well as those beyond municipal boundaries.[42] Its proper function is to decide what conveniences the public may enjoy for traffic and travel.[43] Within constitutional limitations, it may determine when, where, and how streets and other public highways shall be opened, graduated, improved, and regulated;[44] and, although a street is used by the public for the purposes of travel and traffic, the state may determine and declare the manner of the use of particular streets, excluding traffic from some, and allowing railroads or street cars upon them, or their use by telegraph and telephone companies, water and gas companies, etc., as it deems best.[45] The state may, for convenience of business,

38. *California.*— Sinton *v.* Ashbury, 41 Cal. 525.

Georgia.— Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156.

Illinois.— Illinois Cent. R. Co. *v.* Galena, 40 Ill. 344.

Indiana.— Terre Haute *v.* Turner, 36 Ind. 522.

Massachusetts.— Boston Electric Light Co. *v.* Boston Terminal Co., 184 Mass. 566, 69 N. E. 346.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350, 35 L. R. A. 859.

Pennsylvania.— Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99.

United States.— City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114.

See also cases cited *supra*, note 36. And see *infra*, XII, A.

39. *Florida.*— State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590.

Illinois.— Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110.

Iowa.— Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 973; Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

New York.— People *v.* Kerr, 27 N. Y. 188, holding that the fee of streets acquired by the city of New York under Act (1813), § 118 (2 Rev. Laws 409), was held by it in trust for the use of all the people of the state, and not as a corporate or municipal property, and such property being acquired by the exercise of the right of eminent domain, and the trust of the city being *publici juris*, it is under the unqualified control of the legislature, and any appropriation of it to a public use by any legislative authority is not a taking of private property so as to require compensation to the city to render it constitutional.

Oregon.— Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

40. West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; People *v.* Walsh, 96 Ill. 232, 36 Am. Rep. 135; Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Astor *v.* New York, 62 N. Y. 567; Wilcox *v.* McClellan, 47 Misc. (N. Y.) 465, 95 N. Y. Suppl. 941 [*affirmed* in 110 N. Y. App. Div. 378, 97 N. Y. Suppl. 311 (*affirmed* in 185 N. Y. 9, 77 N. E. 986)]; Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; and other cases cited in the preceding note.

41. Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

42. Kreigh *v.* Chicago, 86 Ill. 407; Astor *v.* New York, 62 N. Y. 567.

43. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; Barrows *v.* Sycamore, 150 Ill. 588, 37 N. E. 1096, 41 Am. St. Rep. 400, 25 L. R. A. 585; True *v.* Davis, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266; Meyer *v.* Teutopolis, 131 Ill. 552, 23 N. E. 651; Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

44. *Illinois.*—Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; Barrows *v.* Sycamore, 150 Ill. 588, 37 N. E. 1096, 41 Am. St. Rep. 400, 25 L. R. A. 535; People *v.* Walsh, 96 Ill. 232, 36 Am. Rep. 135.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

Minnesota.— Daley *v.* St. Paul, 7 Minn. 390.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Baird *v.* Rice, 63 Pa. St. 489.

The legislature may appoint officers or boards within a city to lay out a street and to assess damages and benefits. Daley *v.* St. Paul, 7 Minn. 390.

45. *California.*—Arcata *v.* Arcata, etc., R.

authorize awnings or other structures in streets which, without such authority, would be nuisances;[46] and it has even been held that it may allow barriers, such as toll-gates, to be erected upon them.[47] The legislature likewise possesses the power to locate streets, and may exercise it without municipal consent,[48] and it may vacate streets and close them to the public when it sees fit,[49] although not so as to destroy the vested rights of abutting proprietors.[50] These powers of control and regulation of course are legislative in their nature, and are subject to judicial control only when legislative acts transcend constitutional limitations.[51] Usually the legislature requires that the street railway companies shall obtain their franchise from the city;[52] but in the absence of constitutional restriction, these franchises may be conferred by the legislature directly without regard to corporate author-

Co., 92 Cal. 639, 28 Pac. 676. *Compare* San Francisco *v.* Spring Valley Water-Works, 48 Cal. 493, holding that the state has no proprietary interest in the streets of a city dedicated to public use, and its power to grant to a private corporation an easement over streets not common to the public at large is limited to such power as it possesses in its sovereign capacity to grant a franchise, and not any proprietary interest in the streets.

Florida.— State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Randall *v.* Jacksonville St. R. Co., 19 Fla. 409.

Georgia.— Floyd County *v.* Rome St. R. Co., 77 Ga. 614, 3 S. E. 3 (bridge forming continuation of street); Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602.

Illinois.— West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215.

Indiana.— Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561.

Iowa.— Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773; Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Louisiana.— Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438; New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517.

Maryland.— Hodges *v.* Baltimore Union Pass. R. Co., 58 Md. 603; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117, tunneling.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Springfield *v.* Connecticut River R. Co., 4 Cush. 63.

Missouri.—State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41; Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483, 1 S. W. 86.

New Jersey.— United R., etc., Co. *v.* Jersey City, 71 N. J. L. 80, 58 Atl. 71; Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360, holding also that the absolute right to lay a railroad track in the streets of a city, given to a railroad company by a supplement to its charter, is inconsistent with a provision in the city charter by which the city has the supervision of all public streets and the right to regulate the grading and paving the same, and is inconsistent with a provision in the original charter of the company requiring the consent of the city to be obtained before such track can be laid. Hence such charter provisions are repealed by a section of such supplement which repeals all acts and parts of acts inconsistent with any of its provisions.

New York.— Kellinger *v.* Forty-Second St., etc., R. Co., 50 N. Y. 206; People *v.* Kerr, 27 N. Y. 188; Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471; People *v.* New York, etc., R. Co., 45 Barb. 73, 26 How. Pr. 44.

Oregon.— Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

Pennsylvania.— Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; *In re* Philadelphia, etc., R. Co., 6 Whart. 25, 36 Am. Dec. 202; Reading *v.* Consumers' Gas Co., 2 Del. Co. 437; West End Pass. R. Co. *v.* Philadelphia City Pass. R. Co., 30 Leg. Int. 257.

United States.— Memphis *v.* Postal Tel. Cable Co., 139 Fed. 707; Columbus *v.* Union Pac. R. Co., 137 Fed. 869, 70 C. C. A. 207.

Compensation to abutting owners see EMINENT DOMAIN, 15 Cyc. 592, 626.

46. Hoey *v.* Gilroy, 129 N. Y. 132, 29 N. E. 85.

47. Milarkey *v.* Foster, 6 Oreg. 378, 25 Am. Rep. 531; Stormfeltz *v.* Manor Turnpike Co., 13 Pa. St. 555.

48. Sinton *v.* Ashbury, 41 Cal. 525; Lennon *v.* New York, 55 N. Y. 361.

49. Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237. See also West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; Gray *v.* Iowa Land Co., 26 Iowa 387; Eudora *v.* Darling, 54 Kan. 654, 39 Pac. 184.

50. Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661.

51. Where the legislature has vested in a village board discretionary power to vacate streets of the village, the courts will not ordinarily look into the motives influencing such board in doing such discretionary act. Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002; People *v.* Fields, 58 N. Y. 491.

52. State *v.* Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798.

ity.[53] In some states, however, the concurrence of both legislature and city is required.[54]

D. Ordinances. An ordinance is the product of legislative power conferred upon the municipality. One essential to its validity is that it shall not conflict with the laws of the state.[55] It is obvious therefore that it is competent for the legislature specially to authorize or even require the enactment of a particular ordinance;[56] or to prevent it by the passage of a law so repugnant to its provisions that both cannot stand together;[57] or by directly forbidding its enactment.[58] It is likewise within legislative power to repeal an ordinance by enacting a general law absolutely inconsistent with its letter and spirit.[59] So also may the legislature validate an ordinance which is void for lack of due form or procedure in its passage.[60] The power of the legislature to repeal existing ordinances by express intendment depends upon its constitutional power to pass any special law affecting municipal corporations.[61] Obviously in those states where such legislation is forbidden by the constitution an ordinance cannot be expressly repealed by a legis-

53. Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602; Buhach *v.* Hannibal, etc., R. Co., 89 Mo. 483, 1 S. W. 86; People *v.* Kerr, 27 N. Y. 188; Milwaukee *v.* Milwaukee, etc., R. Co., 7 Wis. 85; and other cases cited in the preceding notes.

54. Ingersoll Pub. Corp. 217.

55. *Connecticut.*— Southport *v.* Ogden, 23 Conn. 128.

Georgia.— Adams *v.* Albany, 29 Ga. 56; Dubois *v.* Augusta, Dudley 30.

Iowa.— Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419.

Missouri.— State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; Carr *v.* St. Louis, 9 Mo. 191.

New Jersey.— Volk *v.* Newark, 47 N. J. L. 117; Cross *v.* Morristown, 33 N. J. L. 57.

New York.— Mark *v.* State, 97 N. Y. 572; Wood *v.* Brooklyn, 14 Barb. 425.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268.

Tennessee.— Kratzenberger *v.* Law, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185; Robinson *v.* Franklin, 1 Humphr. 156, 34 Am. Dec. 625.

Texas.— Flood *v.* State, 19 Tex. App. 584.

Vermont.— *In re* Snell, 58 Vt. 207, 1 Atl. 566.

See *infra*, VI, G, 3.

The legislature may delegate to a municipal corporation the power to make all by-laws and ordinances which are reasonable and not contrary to the general law of the state. Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249. The legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance, although general statutes exist, relating to the same subjects. State *v.* Fourcade, *supra*. It is for legislative discretion to determine within the limitations of the constitution to what extent city or town councils shall be invested with power of local legislation. Burckholter *v.* McConnellsville, 20 Ohio St. 308. And see Clarke *v.* Rochester, 28 N. Y. 605. See also *infra*, VI; XI. And see CONSTITUTIONAL LAW, 8 Cyc. 839. The legislature has no power, however, to delegate to a municipal corporation power which the constitution precludes it from exercising. Clark *v.* Rochester, 13 How. Pr. (N. Y.) 204 [*reversed* on other grounds in 24 Barb. 446, 5 Abb. Pr. 107, 14 How. Pr. 193]. See also *infra*, VI, G, 2; and CONSTITUTIONAL LAW, 8 Cyc. 839 note 12.

56. Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768. An act providing that it shall be unlawful to permit any animals specified to run at large in any city or town of the state of five thousand inhabitants or more, and that the municipal authorities are "hereby authorized and empowered and required to adopt" such ordinances as shall be necessary to prevent such stock so running at large, is mandatory on the municipal authorities of the cities and towns to which it applies. Huey *v.* Waldrop, 141 Ala. 318, 37 So. 380.

57. *Connecticut.*— Southport *v.* Ogden, 23 Conn. 128.

Georgia.—Adams *v.* Albany, 29 Ga. 56.

Iowa.— Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419.

New Jersey.— Volk *v.* Newark, 47 N. J. L. 117.

North Carolina.— State *v.* Austin, 114 N. C. 855, 19 S. E. 919, 41 Am. St. Rep. 817, 25 L. R. A. 283.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268.

Tennessee.— Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185.

Texas.— Flood *v.* State, 19 Tex. App. 584.

See also *supra*, II, C, 1, e, (II).

58. Cooley Const. Lim. 198.

59. Southport *v.* Ogden, 23 Conn. 128; Marietta *v.* Fearing, 4 Ohio 427. See also *supra*, II, C, 1, e, (II).

60. Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513. See *infra*, VI, G, 10.

61. Horr & B. Mun. Pol. Ord. §§ 60, 61.

lative act;[62] but where no such constitutional limitation exists, no reason appears why the legislature may not pass an act expressly to amend or repeal a municipal ordinance.[63] Indeed it would seem that the legislature unless prohibited by some constitutional limitation might in the plenitude of its power enact an entire code of laws as ordinances for a single municipality, or for all of a certain class of municipal corporations, which, although not ordinances or by-laws in the usual sense of these words,[64] because not enacted by the corporation, and therefore not subject to repeal and amendment by it, would yet serve as local laws for the regulation of municipal affairs and conduct.[65] The exercise of such a power, however, to this extent would be inconsistent with the idea of self-government, inherent in a municipality, according to the history and etymology of the word,[66] and would convert the municipal into a public corporation,[67] or a commune,[68] for the execution of state law. And in some states such an exercise of central power to the exclusion of self-government would be considered unconstitutional.[69]

E. Offices and Officers — 1. In General. The favorite American doctrine of home rule finds expression and illustration in the provision found in nearly all municipal charters that the corporation shall choose the municipal officers, provided for by the charter for the execution of the municipal powers.[70] In some states this popular local right to choose officers is secured by express constitutional guaranty;[71] and even when there is no such constitutional provision, it is held in

62. See *supra*, II, C, 1, d, (II).

63. *Arkansas.*— Eagle *v.* Beard, 33 Ark. 497; State *v.* Jennings, 27 Ark. 419.

California.— San Francisco *v.* Canavan, 42 Cal. 541; Underhill *v.* Sonora, 17 Cal. 172.

Colorado.— Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

Illinois.— People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

Iowa.— Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Maine.— Hooper *v.* Emery, 14 Me. 375.

Maryland.— Hagerstown *v.* Sehner, 37 Md. 180.

Missouri.— St. Louis *v.* Sheilds, 52 Mo. 351.

Nebraska.— Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

North Carolina.— Harriss *v.* Wright, 121 N. C. 172, 28 S. E. 269.

Oklahoma.—Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

64. Coal-Float *v.* Jeffersonville, 112 Ind. 15, 13 N. E. 115; Reg. *v.* Osler, 32 U. C. Q. B. 324; Black L. Dict. tit. "Ordinances"; 1 Blackstone Comm. 475; Bouvier L. Dict. tit. "By-Laws."

65. *Arkansas.*— Taylor *v.* Pine Bluff, 34 Ark. 603.

Georgia.— Winn *v.* Macon, 21 Ga. 275; Frederick *v.* Augusta, 5 Ga. 561.

Indiana.— Logansport *v.* Crockett, 64 Ind. 319.

Iowa.— McMillen *v.* Boyles, 6 Iowa 304.

Massachusetts.— Com. *v.* Stodder, 2 Cush. 562, 48 Am. Dec. 679.

Michigan.— Napman *v.* People, 19 Mich. 352.

Pennsylvania.— Devers *v.* York City, 150 Pa. St. 208, 24 Atl. 668.

United States.— Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098.

66. *California.*— Taylor *v.* Palmer, 31 Cal. 240.

Illinois.— People *v.* Chicago, 51 Ill. 17, 2 Am. Dec. 278.

Indiana.— Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

Michigan.— People *v.* Highland Park, 88 Mich. 653, 50 N. W. 660.

New Jersey.— State *v.* Wright, 54 N. J. L. 130, 23 Atl. 116.

New York.— People *v.* Albertson, 55 N. Y. 50.

Pennsylvania.— Com. *v.* Denworth, 145 Pa. St. 172, 22 Atl. 820.

Vermont.—Atkins *v.* Randolph, 31 Vt. 226.

67. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

68. Encycl. Brit. tit. "Commune."

69. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103. See *supra*, IV, A, text and notes 30, 31.

70. See Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345. And see *infra*, VII, A, 4.

71. In New York the constitution provides that "all city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns or villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose," and that "all other officers whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct." Const. art. 10, § 2. Under this provision the legislature has power to regulate, increase, or diminish the duties of a local municipal office. People *v.* State Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884 [*reversing* 79

some states that local self-government in a municipality, according to the American ideal, requires the choice of officers as well as the making of laws for local purposes, so that, whenever the function of the office and the duties of the officer are peculiarly or exclusively municipal, the legislature, having created the municipality and the offices and prescribed their duties and compensation, has exhausted its power; and although it may thereafter amend the charter and thus destroy

N. Y. App. Div. 183, 80 N. Y. Suppl. 85, 1145]. See also Wilcox *v.* McClellan, 185 N. Y. 9, 77 N. E. 986 [*affirming* 110 N. Y. App. Div. 378, 97 N. Y. Suppl. 311 (*affirming* 47 Misc. 465, 95 N. Y. Suppl. 941)] (holding that Laws (1905), pp. 1533, 1548, 1550, cc. 629–631, simply imposing additional duty on the board of estimate and apportionment, which had theretofore been performed by the board of aldermen, was not in violation of this home-rule provision of the constitution, as the statute did not assume to appoint any one to a local or other office); *In re* New York, 99 N. Y. 569, 2 N. E. 642 [*affirming* 34 Hun 441]; Pettit *v.* McClellan, 110 N. Y. App. Div. 390, 97 N. Y. Suppl. 320 (to the same effect). The legislature also has the power to abolish a local office, unless it is a constitutional office (Allison *v.* Welde, 172 N. Y. 421, 65 N. E. 263; Koch *v.* New York, 152 N. Y. 72, 46 N. E. 170 [*affirming* 5 N. Y. App. Div. 276, 39 N. Y. Suppl. 164]), or to lessen or extend the term of officers to be subsequently elected or appointed (People *v.* McKinney, 52 N. Y. 374. And see Long *v.* New York, 81 N. Y. 425); and it has the power to distribute the powers of local government as between the city and county governments, as by changing a county office, like that of the commissioner of jurors, to a city office, and *vice versa* (Allison *v.* Welde, *supra*; People *v.* Dunlap, 66 N. Y. 162). It has been steadfastly held, however, that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by the legislature or otherwise than by the electors or authorities of the municipality. People *v.* State Tax Com'rs, *supra*; and other cases cited *infra*, this note. Laws (1883), c. 354, § 8, requiring that the mayor of a city shall prepare general rules under which city officers are to be selected, which shall go into effect when approved by the state civil service commission, does not subordinate the power of the local authorities to that of the state officers in such manner as to be in conflict with the constitution. Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579 [*affirming* 3 N. Y. Suppl. 674]. And it was held that the constitution did not forbid the legislature to interfere with the percentage to be charged or the emoluments to be received by the chamberlain of the city and county of New York. People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377.

Appointment of officers, extension of terms of office, etc.— Under the above-mentioned constitutional provision the legislature cannot directly or indirectly appoint local officers or authorize their appointment by state officials, or extend the terms of local officers already elected or appointed, or limit the power of local authorities in the appointment of local officers. People *v.* State Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884 [*reversing* 79 N. Y. App. Div. 183, 80 N. Y. Suppl. 85, 1145]; People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815 [*affirming* 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350]; *In re* Brenner, 170 N. Y. 185, 63 N. E. 133 [*affirming* 67 N. Y. App. Div. 375, 73 N. Y. Suppl. 689; and 67 N. Y. App. Div. 368, 73 N. Y. Suppl. 741]; People *v.* Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552 [*affirming* 45 N. Y. App. Div. 68, 61 N. Y. Suppl. 452] (cannot vest power of appointment in civil service commission); People *v.* Palmer, 154 N. Y. 133, 47 N. E. 1084 [*affirming* 21 N. Y. App. Div. 101, 47 N. Y. Suppl. 403]; People *v.* Randall, 151 N. Y. 497, 45 N. E. 841 [*affirming* 91 Hun 266, 36 N. Y. Suppl. 202]; Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408 [*affirming* 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535]; People *v.* Foley, 148 N. Y. 677, 43 N. E. 171 [*affirming* 33 N. Y. Suppl. 1132]; People *v.* Albertson, 55 N. Y. 50; People *v.* Crooks, 53 N. Y. 648; People *v.* McKinney, 52 N. Y. 374; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; People *v.* Raymond, 37 N. Y. 428; Devoy *v.* New York, 36 N. Y. 449; Matter of Haase, 88 N. Y. App. Div. 242, 85 N. Y. Suppl. 462 [*affirming* 41 Misc. 114, 83 N. Y. Suppl. 932]; Saratoga Springs *v.* Van Norder, 75 N. Y. App. Div. 204, 77 N. Y. Suppl. 1020; Fox *v.* Mohawk, etc., Humane Soc., 25 N. Y. App. Div. 26, 48 N. Y. Suppl. 625 (holding that Laws (1896), c. 448, giving to humane societies in certain cities the right to collect a license on dogs and to kill or confiscate unlicensed dogs, vested in a private corporation the execution of certain police powers, and in effect made it a public officer, and was therefore in violation of the constitutional provision); Kelly *v.* Van Wyck, 35 Misc. (N. Y.) 210, 71 N. Y. Suppl. 814; Warner *v.* People, 2 Den. (N. Y.) 272, 43 Am. Dec. 740. *Compare* People *v.* Batchelor, 22 N. Y. 128; People *v.* Stevens, 51 How. Pr. (N. Y.) 103. City magistrates of New York are within this provision. They must be either elected or appointed as therein provided, and the legislature cannot provide both for their election and appointment; nor can it extend their term while in office. People *v.* Dooley, *supra*; Kelly *v.* Van Wyck, *supra*.

Powers and functions not peculiarly or exclusively local and municipal.— The constitution does not prevent the legislature from transferring from local officers to state officers or boards powers and functions not

the office, or limit its functions and salary, or prescribe qualifications therefor or the manner of election or appointment by the people or municipal authorities,

peculiarly or exclusively local or municipal, but which concern the state at large. People *v.* State Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884 [*reversing* 79 N. Y. App. Div. 183, 80 N. Y. Suppl. 85, 1145], holding therefore that the constitution does not prevent the legislature from conferring upon state officers the right to assess the special franchises of street railroad companies who occupy the streets of a municipality, and also to assess the tangible property connected therewith, which was formerly exercised by the local board of assessment. See also cases cited *infra*, this note. But a statute absolutely overthrowing a local assessor and transferring all of his functions to a state official has been held unconstitutional. People *v.* Raymond, 37 N. Y. 428.

Police, fire, sanitary, and excise districts, etc.— The constitution does not prevent the legislature from establishing police districts including the territory of a municipal corporation and appointing a board of commissioners with power to appoint and control all policemen, etc. In such case the members of the board of commissioners are state and not local officers. People *v.* Draper, 15 N. Y. 532 [*cited* to this effect in People *v.* State Bd. Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884]. Similar acts creating a new system by erecting a metropolitan fire or sanitary district, a metropolitan board of excise, and a capital police district, each embracing the territory of two or more municipal divisions of the state, have also been sustained, although functions formerly belonging to the local officers were thereby transferred to state officers. Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661 (sanitary district); People *v.* Shepard, 36 N. Y. 285 (capital police district); Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657 (metropolitan board of excise); People *v.* Pinckney, 32 N. Y. 377 (fire district). It is held, however, that the legislature cannot appoint or control the local power of appointment or election of the police department and officers in a city only. Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408 [*affirming* 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535]. And an act which established a police district consisting of a city, with a police force already organized, and three small patches of sparsely settled territory, in all less than a square mile, was held unconstitutional as an obvious attempt to evade the constitutional restriction relating to home rule, because it was designed for the city only. People *v.* Albertson, 55 N. Y. 50.

Public buildings, parks, highways, etc.— Acts authorizing state officials to construct public buildings, parks, and highways, the expense of which is to be paid locally, have been sustained, although the power to make such improvements had been previously vested in the local authorities, and it was urged that the transfer of the power was an encroachment upon the right of local self-government guaranteed by the constitution. People *v.* Oneida County, 170 N. Y. 105, 62 N. E. 1092 (board of commissioners to erect a courthouse); People *v.* McDonald, 69 N. Y. 362 (highways); Astor *v.* New York, 62 N. Y. 567 (parks and highways); People *v.* Flagg, 46 N. Y. 401 (highways). See also *In re* New York, 99 N. Y. 569, 2 N. E. 642 [*affirming* 34 Hun 441], parks. A statute extending the jurisdiction of the department of public parks of New York created by the legislature over that portion of the land authorized to be acquired under it outside of the city and within the limits of Westchester county was held not to be violative of the constitutional preservation to counties, cities, towns, etc., of the right to elect their own local officers, as the park police did not become Westchester county officers, and no officers of that county were legislated out of office. *In re* New York, 99 N. Y. 569, 2 N. E. 642.

Judicial officers.— Local judicial officers, like city magistrates, are within Const. art. 10, § 2, above referred to. People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815 [*affirming* 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350]; Kelly *v.* Van Wyck, 35 Misc. (N. Y.) 210, 71 N. Y. Suppl. 814. They are also within the special provision of art. 6, § 17, that all judicial officers in cities, whose election or appointment is not otherwise provided for in the constitution, shall be chosen by the electors of such cities or appointed by some local authorities thereof. This applies to city magistrates and prevents the legislature from appointing them or authorizing their election or appointment otherwise than as therein provided. People *v.* Dooley, *supra*. But the act of May 10, 1895 (Laws (1895), c. 601), abolishing the office of police justices in the city and county of New York and terminating the powers and jurisdiction of such justices and their courts, was held constitutional. Koch *v.* New York, 152 N. Y. 72, 46 N. E. 170 [*affirming* 5 N. Y. App. Div. 276, 39 N. Y. Suppl. 164]. *Compare* People *v.* Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838 [*affirming* 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347]; Gertum *v.* Kings County, 109 N. Y. 170, 16 N. E. 328; Coulter *v.* Murray, 4 Daly 506.

Colo. Const. art. 5, § 35, providing that the legislature "shall not delegate to any special commission, private corporation or association any power to make, supervise or interfere with any municipal improvement, money, property or effects, . . . or perform any municipal function whatever," does not prevent the legislature from creating a board of public works for the city of Denver, the boards of which are to be appointed by the governor with the advice and consent of the senate, charged with duties and endowed with

etc.,[72] it may not choose or designate the person to hold the office and discharge its duties or provide for their appointment by other agency than the electorate or authorities of the municipality.[73] This principle has been applied for example to

powers relating to the expenditure of city funds, the payment and cancellation of outstanding city warrants and the making of public improvements, as such board is not a "special commission," but a department of the city government. *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

In Kentucky the former constitutional provision for the "election" of municipal officers for such terms and in such manner as might be prescribed by law was held to exclude any power of appointment which might otherwise exist in the legislature or executive officers of the state. Speed *v.* Crawford, 3 Metc. 207.

La. Const. art. 319, providing that the electors of the city of New Orleans shall have the right to choose the public officers who shall be charged with the exercise of police power and of the administration of the affairs of the corporation in whole or in part, and article 320, excepting from the operation of said article 319 those boards whose powers extend beyond the limits of the parish and two thirds of whose members are chosen by the city council or appointed by the mayor, are not violated by La. Acts (1902), p. 106, No. 79, as amended by Acts (1904), pp. 214, 369, Nos. 96, 179, requiring the parish of Orleans to erect a court-house, providing that the state shall contribute toward the erection of the building and be a part-owner thereof, and confiding the detail of the construction to a board, three members of which are to be chosen by the city, since the acts do not affect the police power of the city or its power of administration. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792.

In Michigan see Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Wis. Const. art. 13, § 9, providing that all city officers shall be elected by the electors of such cities or appointed by such authorities thereof as the legislature may designate, was violated by Laws (1889), c. 35, providing that the term of office of the then incumbent of the office of city attorney of Milwaukee should be extended two years, as this was an appointment of such incumbent to that office for the term of two years. State *v.* Krez, 88 Wis. 135, 59 N. W. 593.

72. *Illinois.*— Crook *v.* People, 106 Ill. 237 (where it is held that there is no such thing as a vested right, in the strict sense of that term, in a municipal office that places it above legislative control, and that the same power that creates such an office can abolish it); People *v.* Brown, 83 Ill. 95.

Indiana.—Turpen *v.* Tipton County, 7 Ind. 172; Coffin *v.* State, 7 Ind. 157.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140.

Louisiana.— Reynolds *v.* Baldwin, 1 La. Ann. 162.

Michigan.— Speed *v.* Detroit, 100 Mich. 92, 58 N. W. 638; Stow *v.* Grand Rapids, 79 Mich. 595, 44 N. W. 1047; People *v.* Mahaney, 13 Mich. 481.

Mississippi.— Kendall *v.* Canton, 53 Miss. 526; Swann *v.* Buck, 40 Miss. 268.

New Jersey.— *In re* Cleveland, 52 N. J. L. 188, 19 Atl. 17, 7 L. R. A. 431.

New York.— People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Connor *v.* New York, 5 N. Y. 285; People *v.* Warner, 7 Hill 81; People *v.* Morrell, 21 Wend. 563.

Ohio.— Bonebrake *v.* Wall, 11 Ohio Dec. (Reprint) 38, 24 Cinc. L. Bul. 175.

Oregon.— Territory *v.* Pyle, 1 Oreg. 149.

Wisconsin.— State *v.* Von Baumbach, 12 Wis. 310.

United States.— Butler *v.* Pennsylvania, 10 How. 402, 13 L. ed. 472.

As to compensation, however, *compare* Lexington *v.* Thompson, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775, referred to *infra,* note 73.

73. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 322, 57 L. R. A. 244; Lexington *v.* Thompson, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Lothrop, 24 Mich. 235; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103. See also *supra,* IV, A, text and note 30.

Compensation.— It has also been held that the fixing of the compensation of the officers and members of a city fire department, devised for the benefit of the local community, is not governmental in its nature, but is a matter for the municipality in its private corporate capacity, and therefore Ky. Act (1900), § 4, attempting to fix such compensation, is void as violative of the city's right to control its local affairs. Lexington *v.* Thompson, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775.

The constitutional provision that "all officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law," is not a surrender of the right of the people of the municipality to local self-government, including the right to select their own officers. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Removal.— But it was held in Michigan that Howell Annot. St. § 653, authorizing the governor in certain cases to remove officers chosen by the electors of cities and villages, including the mayor, was valid, under

the appointment by a municipality of a board of public works,[74] of park commissioners,[75] of water commissioners[76] or trustees of waterworks,[77] and of a board to take charge and control of the fire department.[78] In other jurisdictions this doctrine as to the right of local self-government free from legislative control is not recognized, but it is held or assumed that the legislature has the power to appoint or provide for the appointment of, and to control, all municipal officers, whether their offices are governmental or purely municipal,[79] except in so far as such power is limited by express constitutional provisions.[80] It is perhaps agreed that if the functions of the office are governmental rather than municipal, if they concern the general public more than the local community, although confined to the municipal limits, the officers are state officers and as completely under the control of the legislature as are the general officers of the state.[81] The legislature may therefore

Const. art. 15, § 13, conferring upon the legislature exclusive authority over the incorporation and organization of cities and villages, and art. 12, § 7, requiring the legislature to provide by law for the removal of any officer elected by a county, township, or school-district. Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

74. State *v.* Denny, 118 Ind. 382, 21 N. E. 274, 4 L. R. A. 79; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

75. People *v.* Detroit, 29 Mich. 343; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Lothrop, 24 Mich. 235.

76. People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

77. State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244.

78. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. See also Lexington *v.* Thompson, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775.

79. *Colorado.*— *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

Georgia.— Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; Churchill *v.* Walker, 68 Ga. 681, holding that the legislature might appoint a board of commissioners to administer the municipal government of a city and county.

Kansas.— State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Minnesota.— Daley *v.* St. Paul, 7 Minn. 390, holding that the legislature has power to appoint officers within a city for a specific purpose, as for laying out a street, etc., and the acts of these officers are the acts of the city precisely as if they had been done by the municipal authorities.

Missouri.— St. Louis County Ct. *v.* Griswold, 58 Mo. 175, park commissioners.

Nebraska.—Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740 [*overruling* State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624]; State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

Nevada.— State *v.* Swift, 11 Nev. 128.

New Jersey.— It is competent for the legislature to provide for the speedy determination of the controversies relating to municipal officers; the statute securing to the incumbents of such offices the same rights, in substance, that they would have had if the procedure had been by quo warranto. *In re* Cleveland, 52 N. J. L. 188, 19 Atl. 17, 20 Atl. 317, 7 L. R. A. 431.

Ohio.— State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; State *v.* Covington, 29 Ohio St. 102.

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174, holding that the legislature may appoint a committee to construct and maintain waterworks for a city.

Pennsylvania.— Perkins *v.* Slack, 86 Pa. St. 270 (appointment of a commission for erection of a city hall, or other public building, with authority to make all necessary contracts, etc.); Philadelphia *v.* Fox, 64 Pa. St. 169.

Rhode Island.— Newport *v.* Horton, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330.

See also *supra*, IV, A, text and note 31.

80. New Brunswick *v.* Fitzgerald, 48 N. J. L. 457, 8 Atl. 729 (where the first clause of section 1 of the act of March 5, 1885, establishing the tenure of officers and men of the police department of any city to be during good behavior, except where the term of office is fixed by statute, was held invalid, because the regulation it introduces, and the exception by which the regulation is limited, give different cities a different kind of tenure of office and fix no regulation common to all); *In re* Newport Charter, 14 R. I. 655 (holding that the legislature cannot prescribe qualifications for voters at elections of municipal officers different from those prescribed by the constitution, or exclude persons entitled to vote under the constitution).

81. *Connecticut.*— Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.

Kansas.— State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Louisiana.— State *v.* Flower, 49 La. Ann. 1199, 22 So. 623.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Com. *v.* Plaisted, 148

ignore the citizens of the municipality and provide for the appointment of officers for such positions in any manner not prohibited by the constitution.[82]

2. Police Power. In the absence of special constitutional provision,[83] it seems to be established that all officers, wheresoever they may be located and whatsoever may be their special functions, whose duty pertains to the exercise of the police power of the state are state officers, and therefore under the direct control of the legislature, which may provide for their appointment and control in any constitutional manner.[84] To this class have been assigned police boards and commissioners,[85] drainage boards,[86] boards of health,[87] and all health and police officers of a

Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; People *v.* Mahaney, 13 Mich. 481.

Nebraska.— State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

Ohio.—State *v.* Covington, 29 Ohio St. 102.

Pennsylvania.— Norristown *v.* Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771.

Virginia.— Burch *v.* Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

Under New York constitution see *supra*, this section, note 71.

Police power see *infra*, IV, E, 2.

82. Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740; People *v.* Pinckney, 32 N. Y. 377; State *v.* Covington, 29 Ohio St. 102; and other cases cited in the preceding note. "The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change." Philadelphia *v.* Fox, 64 Pa. St. 169, 181, per Sharswood, J.

83. Under New York constitution see *supra*, IV, E, 1, note 71.

84. *Connecticut.*— Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Kansas.— State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Louisiana.— State *v.* Flower, 49 La. Ann. 1199, 22 So. 623.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; People *v.* Mahaney, 13 Mich. 481.

Nebraska.— State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

New York.— People *v.* Draper, 15 N. Y. 532.

Pennsylvania.— Norristown *v.* Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771.

Virginia.— Burch *v.* Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

See 36 Cent. Dig. tit. "Municipal Corporations," § 161 *et seq.*

85. *Connecticut.*— Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

Georgia.— Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230, holding that the general assembly may take from a municipal corporation its charter power respecting the police and their appointment, and may by statute provide for a permanent police for the corporation, under the control of a board of police not elected by the people of the municipality or appointed or elected by the corporate authorities, but consisting of commissioners appointed in such other manner as the general assembly may direct.

Illinois.— People *v.* Wright, 70 Ill. 388.

Indiana.—State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65. The act of March 4, 1891, which amends the act of March 5, 1883, by providing that, in all cities having an enumeration of fourteen thousand children between the ages of six and twenty-one years, there shall be established a board of metropolitan police, consisting of three commissioners, to be appointed by the governor, secretary of state, treasurer, and auditor, does not trench on the right of self-government, but is simply the exercise of the power to provide for the selection of peace officers of the state. State *v.* Kolsem, *supra*.

Kansas.— State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— People *v.* Mahaney, 13 Mich. 481.

Nebraska.— State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

New York.— People *v.* Draper, 15 N. Y. 532.

Ohio.—State *v.* Covington, 29 Ohio St. 102.

Rhode Island.— Horton *v.* Newport, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. N. S. 512.

Virginia.— Burch *v.* Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

86. State *v.* Flower, 49 La. Ann. 1199, 22 So. 623, holding that Sess. Acts (1896), creating a board for the purpose of improving the drainage of New Orleans, is not in violation of the constitutional provisions securing to the citizens of that city the right to appoint the officers to conduct the police administration of the city, but is a valid exercise of the police powers of the state.

87. Kingman, Petitioner, 153 Mass. 566,

municipality,[88] although this may be dependent upon the scope of their official duties and the functions of the office.[89] But boards of public works are generally regarded as municipal officers and not subject to state control;[90] and the same is true of the fire department and the officers thereof.[91]

3. Eminent Domain. The legislature has power also to control officers whose duty it is to exercise the sovereign power of eminent domain, and may therefore constitutionally appoint officers within a municipality to lay off streets and assess damages, even though the city must pay the same out of the municipal treasury.[92]

4. Courts and Judicial Officers. In the absence of constitutional restrictions,[93] the legislature has the power to abolish or alter the courts and judicial officers in a municipal corporation whenever it shall deem such change to be for the benefit of the inhabitants.[94]

5. Test of Control. Much of the apparent confusion and discord on the subject of legislative control of officers is dissipated by a critical examination of the functions assigned to the office. Many officers are charged with the performance of both governmental and municipal duty, and may therefore be assigned to either class, and therefore held to be within a constitutional inhibition applicable to that class.[95] It is the function rather than the officer that is within the constitutional provision and therefore either within or without the legislative control.[96] And so generally it may be accepted as law in all the states that if the function of the office is purely governmental the legislature may control it, despite municipal wish to the contrary.[97] In those states where self-government is constitution-

27 N. E. 778, 12 L. R. A. 417. See also State *v.* Wordin, 56 Conn. 216, 14 Atl. 801; Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783. A statute providing for the disposition of sewage from a number of towns and cities, including an area of one hundred and thirty square miles, and containing one sixth of the population of the state, has for its purpose the promotion of the public health, warranting the expenditure or the advancement for the time being of money from the treasury of the commonwealth, within the legislative power conferred by the constitution. Kingman, Petitioner, *supra*.

88. *Connecticut.*— Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

Georgia.— Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64.

Kansas.— State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Ohio.— State *v.* Covington, 29 Ohio St. 102.

Pennsylvania.— Norristown *v.* Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771.

Texas.— Rusher *v.* Dallas, 83 Tex. 151, 18 S. W. 333.

Virginia.— Burch *v.* Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

89. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; State *v.* Hunter, 38 Kan. 578, 17 Pac. 177; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

90. State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

91. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Lexington *v.* Thompson, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L. R. A. 775. *Contra*, State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

92. Daley *v.* St. Paul, 7 Minn. 390; People *v.* Kerr, 27 N. Y. 188; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

93. People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815. Under the New York constitution see *supra*, IV, E, 1, note 71.

94. Boyd *v.* Chambers, 78 Ky. 140, holding also that this power on the part of the legislature is not taken away by Const. art. 4, § 41, providing that police courts established in any city or town shall remain, until otherwise directed by law, with their present power and jurisdiction, and the judges, clerks, and marshals of such courts shall have the same qualifications and shall be elected by the qualified voters of such cities or towns, at the same time and in the same manner, and hold their offices for the same terms as county judges, clerks, and sheriffs, respectively, and shall be liable to removal in the same manner; and that the general assembly may vest judicial powers, for police purposes, in mayors of cities, police judges, and trustees of towns.

95. See Britton *v.* Steber, 62 Mo. 370.

96. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; State *v.* Hunter, 38 Kan. 578, 17 Pac. 177; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People *v.* Draper, 15 N. Y. 532.

97. *Kansas.*— State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

ally granted to municipal corporations, the legislature has no control over officers with municipal functions.[98] In other states the law of legislative control over municipal offices seems to be largely a question of public policy; and since this is within the legislative competency, the judicial power can interfere to check the legislative will only when it transgresses constitutional limitation.[99]

F. Property and Franchises — 1. In General. The property, real and personal, of a municipality, including profitable franchises owned and exercised by it, may be either (1) governmental, that is, such as is held by the corporation in trust for the use and benefit of the general public; or (2) municipal, that is, such as has been acquired by the corporation in the course of administration and is held by it for the special benefit of its citizens, rather than the general public; and the character in which property or franchises are thus held by a municipality determines the extent of the legislative control over the same.[1]

2. Public Property. The public property of a municipal corporation, real and personal, or in other words such property as is held in trust for the public generally,[2] is subject to the control of the legislature.[3] It has been so held, for example, of public streets, squares, parks, and promenades;[4] public buildings;[5]

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— People *v.* McDonald, 69 N. Y. 362. See *supra*, IV, E, 1, note 71.

Virginia.— Burch *v.* Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

98. *Connecticut.*— State *v.* Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83.

Indiana.— State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.

New Jersey.—State *v.* O'Connor, 54 N. J. L. 36, 22 Atl. 1091.

New York.— People *v.* McKinney, 52 N. Y. 374. See *supra*, IV, E, 1, note 71.

Texas.— Stanfield *v.* State, 83 Tex. 317, 18 S. W. 577.

Virginia.— Richmond Mayoralty Case, 19 Gratt. 673.

99. See *supra*, IV, E, 1.

1. Grogan *v.* San Francisco, 18 Cal. 590; North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530; Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471; Philadelphia *v.* Fox, 64 Pa. St. 169; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53; and other cases cited under the sections following.

2. See *supra*, IV, F, 1.

3. *Alabama.*— Amy *v.* Selma, 77 Ala. 103.

California.— San Francisco *v.* Canavan, 42 Cal. 541; Payne *v.* Treadwell, 16 Cal. 220.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149.

Delaware.— Coyle *v.* McIntire, 7 Houst. 44, 30 Atl. 728, 40 Am. St. Rep. 109.

Illinois.—Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Iowa.— Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Kansas.—Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517; State *v.* Flanders, 24 La. Ann. 57.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515; Stone *v.* Charlestown, 114 Mass. 214; Weymouth, etc., Fire Dist. *v.* Norfolk County Com'rs, 108 Mass. 142.

Michigan.— Paye *v.* Grosse Pointe Tp., 134 Mich. 524, 96 N. W. 1077.

New York.— Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248; People *v.* Kerr, 27 N. Y. 188.

Ohio.— Gleason *v.* Cleveland, 49 Ohio St. 431, 31 N. E. 802.

Oregon.—Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

United States.— Memphis *v.* Postal Tel. Cable Co., 139 Fed. 707.

See 36 Cent. Dig. tit. "Municipal Corporations," § 166 *et seq.*

Pueblo lands of California municipalities see San Francisco *v.* Canavan, 42 Cal. 541; Payne *v.* Treadwell, 16 Cal. 220; Hart *v.* Burnett, 15 Cal. 530.

4. *California.*—People *v.* Broadway Wharf Co., 31 Cal. 33.

Illinois.— Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

New York.— Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Baird *v.* Rice, 63 Pa. St. 489.

United States.— Memphis *v.* Postal Tel. Cable Co., 139 Fed. 707.

But see New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 478; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202. And *compare* New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517.

Control of streets and highways see *supra*, IV, C.

5. Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415; Perkins *v.* Slack, 86 Pa. St. 270.

lots conveyed for erection of a town-hall and used for such purpose;[6] in some states wharves, levees, and landings;[7] public funds;[8] and property acquired and held for police purposes.[9] This class of property the legislature may partition on division of the municipality[10] or transfer, on consolidation of two or more municipalities, to the consolidated successor;[11] may commit to the care, supervision, and control of a board, commission, or other governmental agency appointed for the purpose;[12] and may convert, either in specie or by sale and appropriation of proceeds, to other governmental or public uses.[13] The power of the legislature, however, over property dedicated to a particular public use is not absolute. While it may regulate the use of such property or promote its improvement, it cannot divert or subject it to any use clearly inconsistent with the contract of dedication.[14] Where a municipal corporation holds property in trust the legislature cannot divert it from the purposes of the trust;[15] but it may divest the municipality of the power and transfer it to another trustee for the purpose of carrying out the object of the trust.[16] Of course the legislature cannot impair the lien of bondholders or others on public property.[17]

3. MUNICIPAL PROPERTY. Absolute legislative control over property held by the municipality for other than governmental purposes or public uses is generally

6. Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415.

7. Bateman *v.* Covington, 90 Ky. 390, 14 S. W. 361, 12 Ky. L. Rep. 384; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299. *Contra*, see *infra*, IV, F, 3, text and note 28.

8. State *v.* Flanders, 24 La. Ann. 57. And see *infra*, IV, I.

9. State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

10. Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; Granby *v.* Thurston, 23 Conn. 416; Winona *v.* Winona County School-Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552. See *supra*, II, B, 2, g, (II), (B).

11. See *supra*, II, B, 2, g, (I), (F).

12. *Delaware.* — Coyle *v.* McIntyre, 7 Houst. 44, 30 Atl. 728, 40 Am. St. Rep. 109.

Indiana.— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515.

Michigan.— Paye *v.* Grosse Pointe Tp., 134 Mich. 524, 96 N. W. 1077; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Streets and highways see *supra*, IV, C.

13. Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

Erection of monument.— The act of April 16, 1888 (85 Ohio Laws, p. 564), authorizing the erection of a soldiers' and sailors' monument in a public square in the city of Cleveland without the consent of the city, is valid; the square having been donated not to the city, but to the public generally. Gleason *v.* Cleveland, 49 Ohio St. 431, 31 N. E. 802.

Authorizing sale of park by city.— Where a city has, by an act of the legislature, taken lands for a public park, it can be relieved of the trust to hold such lands for such use, and authorized to sell the land, by act of the legislature; and the fact that such abandonment of the use will lessen the value of adjacent property assessed for benefits is of no avail. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

14. New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517; Cummings *v.* St. Louis, 90 Mo. 259, 2 S. W. 130; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

15. *Indiana.*— State *v.* Springfield Tp., 6 Ind. 83.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517.

Missouri.— Cummings *v.* St. Louis, 90 Mo. 259, 2 S. W. 130.

New Hampshire.— Greenville *v.* Mason, 53 N. H. 515.

Vermont.—White *v.* Fuller, 38 Vt. 193; Montpelier *v.* East Montpelier, 27 Vt. 704.

Compare Bass *v.* Fontleroy, 11 Tex. 698.

16. *New York.*— People *v.* Kerr, 27 N. Y. 188.

Pennsylvania.—Philadelphia *v.* Fox, 64 Pa. St. 169; Girard's Appeal, 4 Pennyp. 347.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See also *supra*, II, B, 2, g, (II), (B), note 6; II, C, 2, f, (III), text and note 16.

17. See *infra*, IV, H, 1.

denied by the courts upon the ground that such property is private, or at least quasi-private, in its nature, and therefore entitled to constitutional protection against sovereign power.[18] Thus Judge Cooley in an important Michigan case said: "It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the 'law of the land.'"[19] In other states, where the doctrine of private property in a public corporation is not so favorably regarded, municipal property, held for other than strictly governmental or public purposes, is declared to be impressed with a trust, of which the community or its creditors are *cestuis que trustent*,[20] so that, although the municipality, as trustee, be dissolved, the trust will be maintained and enforced by the courts, even against legislative effort to ignore or violate it.[21] What property is thus protected by constitutional limitations upon the sovereign power has been much mooted, and it cannot be said that the line of demarcation between public and quasi-private municipal property is definitely established.[22] Obviously private property would include all stocks, bonds, or other interest in private corporations held by the municipality;[23] and logically and by the weight of judicial opinion it also includes all other property which is not useful or necessary to the performance of some governmental function, such as waterworks,[24] gas-works,[25] electric light and power

18. *California.*— Grogan *v.* San Francisco, 18 Cal. 590; Wheeler *v.* Miller, 16 Cal. 124; Holladay *v.* Frisbie, 15 Cal. 630; Wood *v.* San Francisco, 4 Cal. 190, legislature cannot interfere with disposition of property by city.

Illinois.— Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Richland County *v.* Lawrence County, 12 Ill. 1.

Indiana.— State *v.* Springfield Tp., 6 Ind. 83.

Iowa.— State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 478.

Massachusetts.—Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515.

New York.— People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701]; Benson *v.* New York, 10 Barb. 223; Webb *v.* New York, 64 How. Pr. 10.

South Carolina.— *In re* Malone, 21 S. C. 435.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Montpelier *v.* East Montpelier, 27 Vt. 704.

Wisconsin.— Milwaukee *v.* Milwaukee, 12 Wis. 93.

See 36 Cent. Dig. tit "Municipal Corporations," § 166 *et seq.*

Contra.— Coyle *v.* McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109.

Ferry franchise see *infra*, IV, F, 4.

19. Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140, 5 N. W. 275.

20. *Connecticut.*—Jones *v.* New Haven, 34 Conn. 1.

Maine.— Small *v.* Danville, 51 Me. 359.

New York.— Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468.

Ohio.—Western Homeopathic Medicine College, etc., *v.* Cleveland, 12 Ohio St. 375.

Tennessee.— O'Conner *v.* Memphis, 6 Lea 730.

21. Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530; Erie Academy *v.* Erie, 31 Pa. St. 515; Shankland *v.* Phillips, 3 Tenn. Ch. 556; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53; Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Wood 632; Ingersoll Pub. Corp. 214, 215.

22. Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

23. Grogan *v.* San Francisco, 18 Cal. 590; Webb *v.* New York, 64 How. Pr. (N. Y.) 10; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; 2 Kent Comm. 257.

24. People *v.* McClintock, 45 Cal. 11; Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244. And see Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. *Contra*, Coyle *v.* McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109, holding that a municipal corporation does not hold property acquired by it for the purpose of furnishing the inhabitants with water as a private corporation, so as to prevent the legislature from modifying or changing the management thereof; and that a statute taking the control of the waterworks of a municipal corporation from the mayor and common council and placing it under control of a special board is constitutional.

25. Helena Water Co. *v.* Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; Cincinnati *v.* Cameron, 33 Ohio St. 336; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Illinois Trust, etc.,

plants,[26] street railways,[27] wharves or docks,[28] a cemetery,[29] a reservoir,[30] and any other property held for municipal profit, comfort, or convenience rather than for necessary public sanitation, education, locomotion, or policing.[31]

4. Franchises. Such franchises as are granted to a municipality to engage in business, which might be transacted by a private corporation, such as supplying light, power, or water to the city, are obviously contractual in their nature,[32] and, although held by a public corporation, are protected by the constitutional guaranty against summary revocation.[33] But other public franchises, such as one to control and operate a ferry,[34] or build and maintain a toll-bridge,[35] or wharf or landing,[36] are held to be merely administrative and revocable at any time in the legislative discretion.[37]

G. Improvements — 1. Of Public Concern. Where municipal improvements concern the public at large and are not merely of local concern, it is well settled that they are subject to the absolute control of the legislature,[38] except in

Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

26. Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Harlem Gaslight Co. *v.* New York, 33 N. Y. 309; Levis *v.* Newton, 75 Fed. 884.

27. Grand Junction, Colorado, is the only American city with the peculiar distinction of municipal ownership of street railways. In Great Britain, however, many cities own their street railways, among which are Glasgow, Liverpool, Belfast, Sheffield, Hull, Southampton, and Plymouth. Encycl. Amer. tit. "Municipal Ownership."

28. Ellerman *v.* McMains, 30 La. Ann. 190, 31 Am. Rep. 218, holding therefore that where a municipal corporation under the express authority of an act of the legislature was clothed with the exclusive right to collect wharfage rates from all vessels that should make use of its wharves, the right was a vested right and could not be abrogated or impaired by any subsequent act of the legislature. See also Horn *v.* People, 26 Mich. 221; New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015. *Contra*, see *supra*, IV, F, 2 text and note 7.

29. Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515.

30. Webb *v.* New York, 64 How. Pr. (N. Y.) 10, holding that the corporation of New York, by virtue of its ancient charters, confirmed by the constitution, was the owner in fee simple of the lands covered by the Forty-second street reservoir, and that the legislature could not order the demolition of the structure thereon, except for public purposes and on making just compensation; and therefore that N. Y. Laws (1881), c. 456, was unconstitutional in so far as it authorized the removal of such reservoir and provided for conversion of the land into a public park.

31. Wood *v.* San Francisco, 4 Cal. 190; New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 478; Milwaukee *v.* Milwaukee, 12 Wis. 93.

32. *Louisiana.*— Ellerman *v.* McMains, 30 La. Ann. 190, 31 Am. Rep. 218.

Montana.— Helena Consol. Water Co. *v.* Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

New York.— Benson *v.* New York, 10 Barb. 223; Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Pennsylvania.—Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

33. Grogan *v.* San Francisco, 18 Cal. 590; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Cooley Const. Lim. 238; and cases cited in the preceding note.

34. *Alabama.*—Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149.

Indiana.— Snyder *v.* Rockport, 6 Ind. 237.

Iowa.— Muscatine *v.* Hershey, 18 Iowa 39.

Louisiana.— Bossier Police Jury *v.* Shreveport, 5 La. Ann. 661.

United States.— New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 541, 13 L. ed. 518, 531.

But see Benson *v.* New York, 10 Barb. (N. Y.) 223, holding that the city of New York had vested rights, of which it could not be deprived by the legislature, in certain ferries between New York city and Long Island.

35. Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938.

36. Ellerman *v.* McMains, 30 La. Ann. 190, 31 Am. Rep. 218; New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015.

37. See also State *v.* Flanders, 24 La. Ann. 57; Reynolds *v.* Baldwin, 1 La. Ann. 162.

38. *California.*— Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71; Oakland Paving Co. *v.* Rier, 52 Cal. 270.

Colorado.— *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

New Jersey.— Easton, etc., R. Co. *v.* New Jersey Cent. R. Co., 52 N. J. L. 267, 19 Atl. 722.

New York.— People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

so far as it is restricted by express constitutional provision.[39] Thus the legislature may, without the consent of a municipality or its inhabitants, compel a municipality, at its expense or at the expense of property-owners benefited thereby, to construct, improve, or repair streets or other highways within its limits;[40] and the same principle has been applied to the acquiring or constructing of bridges,[41] subways,[42]

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

39. *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

Colo. Const. art. 5, § 35, providing that the legislature "shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, . . . or perform any municipal function whatever," does not prevent the legislature from creating a board of public works for the city of Denver, the members of which are to be appointed by the governor with the advice and consent of the senate, charged with duties and endowed with powers relating to the expenditure of city funds, the payment and cancellation of outstanding city warrants and the making of public improvements, as such board is not a "special commission," but a department of the city government. *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

Ill. Const. art. 9, § 9, providing that the general assembly may vest the corporate authorities of cities, towns, or villages with power to make local improvements by special assessment or special taxation or otherwise, is a limitation upon the power of the legislature to confer such power upon any bodies other than corporate authorities, and "corporate authorities," within the meaning of the provision, are the authorities of the municipality who are either elected directly by the people to be taxed or appointed in some mode to which they have given their assent; but this provision of the constitution is not violated by Local Improvement Act, June 14, 1897, authorizing the corporate authorities of cities to make such local improvements as are authorized by law by special assessment on contiguous property, and creating an improvement board, and providing that no ordinance for an improvement shall be passed by the council unless recommended by such board, since the legislative intention in creating such board was to form a municipal agency to determine preliminary questions, and not to vest in the board the power to make the improvement and levy the special tax to pay for it. Givins *v.* Chicago, 188 Ill. 348, 58 N. E. 912.

N. Y. Const. art. 10, § 2, providing that all city officers whose appointment or election is not provided for by the constitution shall be elected by the electors of the city, or appointed by authorities thereof as designated by the legislature, does not prohibit the legislature from clothing officers appointed by it to carry out a public improvement with power to perform acts having an essential relation to and connection with such improvement, simply because the power to perform such acts was vested in local officers elected by the people at the time of the adoption of the constitution. Astor *v.* New York, 62 N. Y. 567.

40. Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71; Daley *v.* St. Paul, 7 Minn. 390; Astor *v.* New York, 62 N. Y. 567; People *v.* Flagg, 46 N. Y. 401. And see *In re* Reynolds, 21 N. Y. Suppl. 592. See also Tocci *v.* New York, 73 Hun (N. Y.) 46, 25 N. Y. Suppl. 1089, holding that the legislature might require a city to contribute to the expense of elevating the tracks of a railroad that exclusively occupied a street, for the purpose of restoring the street to public use, and that whether the statute required the city to pay too high a consideration could not be considered by the courts.

41. Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171 (holding that the act of Feb. 21, 1895 (Laws (1895), p. 421), providing for the appointment of a bridge committee, with power to acquire, on behalf of the city of Portland and in its name, certain bridges, and to issue and sell bonds of the city to pay therefor, was not void on the ground that it compelled the city to pay a debt incurred without its consent, since the legislature has the power to compel a municipal corporation to perform a duty in which the general public beyond the borders of such municipality have an interest, and to pay the debt incurred in so doing); Philadelphia *v.* Field, 58 Pa. St. 320 (sustaining the acts of April 5, 1866, and April 5, 1867, appointing commissioners to build a free bridge over the Schuylkill river within the city of Philadelphia, and to create a loan for that purpose, and requiring the councils of Philadelphia to provide for the payment of the loan and its interest). See also Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446; Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Norwich *v.* Hampshire County Com'rs, 13 Pick. (Mass.) 60; Guilder *v.* Otsego, 20 Minn. 74.

42. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610, sustaining St. (1894) c. 548, authorizing the construction of a subway in Boston, against the objection that it imposed a heavy debt upon the city, and to a certain extent took away from the city the control of its streets, and that the work was not put in charge of the street commissioners of the city, since the legislature could provide for doing the work at the expense of the city, but through other agents than those regularly appointed by the city, and might impose liability on the city,

waterworks,[43] sewers,[44] a park or park system,[45] docks, wharves, etc.,[46] or a court-house.[47] The legislature in such cases may appoint commissioners or other officers to carry out the improvement and to assess the damages and benefits,[48] or otherwise regulate and control the mode of the improvement and the assessments therefor.[49] The legislature may regulate the making of contracts for public

incur the expenses, and require payment by the city.

43. David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174, holding that the legislature had the power to appoint a water committee or board for the purpose of constructing and maintaining waterworks for a large city, or to provide for the appointment of such commissioners by the governor; the court saying that while public parks and the supply of gas, water, or sewerage in towns and cities may ordinarily be classed as private objects, they often become matters of public importance, and whether they are the one or the other is a fact which may be decided by the legislature, and that, in considering an act to supply a city with water the court may take judicial notice of the fact that the city is the metropolis of the state, having important business relations with all its citizens, and that the entire community have a direct interest in the city's welfare.

44. Thus in Massachusetts it was held that the legislature could constitutionally, for the promotion of the public health, provide for the construction of sewers and the disposition of sewage from a number of cities and towns including an area of one hundred and thirty square miles and a large population, and impose the expense upon the cities, towns, and counties in the district; and further that an objection on behalf of one town that such system of sewage would not benefit it because it had no sewage system, and an objection on behalf of another that it had a system of its own, were not material to the constitutionality of the act providing for the construction of such sewage system, and the appointment thereunder of commissioners to determine the proportion which the several towns were to be assessed. Kingman, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. See also King *v.* Reed, 43 N. J. L. 186 [*affirmed* in 48 N. J. L. 370]. The legislature may regulate and control the manner in which sewers shall be constructed by a city, and its power in this respect cannot be foreclosed by any contracts of the city. *In re* New York Protestant Episcopal Public School, 46 N. Y. 178.

45. Baltimore *v.* Reitz, 50 Md. 574 (holding that the legislature may pass a mandatory act requiring cities to purchase lots or condemn land for a public park); *In re* Adams, 165 Mass. 497, 43 N. E. 682 (sustaining an act establishing a metropolitan park district); Astor *v.* New York, 62 N. Y. 567. See also St. Louis County Ct. *v.* Griswold, 58 Mo. 175. *Contra,* see *infra,* IV, G, 2, text and note 57.

46. Easton, etc., R. Co. *v.* Central R. Co., 52 N. J. L. 267, 19 Atl. 722.

47. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792, holding that the legislature could compel a municipality to join with the state in the erection of a court-house.

48. *Arkansas.*— Little Rock *v.* Board of Improvements, 42 Ark. 152, holding that the legislature may delegate the power of local assessment to a board of assessors acting independently of the city council.

California.— Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71.

Minnesota.— Daley *v.* St. Paul, 7 Minn. 390.

Missouri.— St. Louis County Ct. *v.* Griswold, 58 Mo. 175.

New Jersey.— King *v.* Reed, 43 N. J. L. 186 [*affirmed* in 48 N. J. L. 370].

New York.— *In re* New York, 99 N. Y. 569, 2 N. E. 642; Astor *v.* New York, 62 N. Y. 567.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Philadelphia *v.* Field, 58 Pa. St. 320.

Compare In re Senate Bill, 12 Colo. 188, 21 Pac. 481.

See also *supra,* IV, E.

49. Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71 (holding that the legislature may provide for the widening of a street, declare what district is benefited by the improvement, and provide for assessments by a commission, where it is left to the city council to say whether the work shall be done or not, and to levy the assessments); Thomason *v.* Ruggles, 69 Cal. 465, 11 Pac. 20; Oakland Paving Co. *v.* Rier, 52 Cal. 270 (holding that the legislature, in providing for the improvement of the streets of a city, may adopt one mode for part of the streets and a different mode for the remainder, and may authorize the assessment of a levy per front foot to pay for either mode of improvement); Sinton *v.* Ashbury, 41 Cal. 525 (holding that the legislature may prescribe whether the cost of opening a street shall be borne by the contiguous property or by all the property of the city, or by a certain proportion of each); King *v.* Reed, 43 N. J. L. 186 [*affirmed* in 48 N. J. L. 370] (holding that an act providing for the building of a sewer which should receive drainage from three towns, and providing also that each of them should issue bonds previous to the completion of the work, furnish money during its progress, and that if, after its completion and the assessment of the expense to the towns, it should appear that any one of them should issue bonds in excess of its appropriation, the excess should be distributed to the others, was not an act designed to fix upon one municipality the debt of another); *In re* Van Antwerp, 56 N. Y. 261 [*affirming* 1 Thomps. &

improvements in a municipality,[50] provided it does not violate constitutional provisions, and particularly constitutional provisions granting the right of local self-government, or unlawfully interfere with the freedom of contract.[51] The legislature cannot compel a city to bear the whole expense of county buildings,[52] but it may compel it to bear its proportion.[53]

2. Of Local or Private Concern. In some states, in the absence of express

C. 423]; *In re* New York Protestant Episcopal Public School, 46 N. Y. 178; Seanor *v.* Whatcom County, 13 Wash. 48, 42 Pac. 552.

Assessment by legislature.— In New York it is held that an assessment for a municipal improvement is a species of tax which the legislature, under the taxing power, may impose; and where the assessment is irregular, the legislature may make an assessment itself, instead of authorizing a reassessment. *In re* Van Antwerp, 56 N. Y. 261 [*affirming* 1 Thomps. & C. 423]. But in California it has been held that the legislature cannot directly exercise the power of assessment within an incorporated city, although it may empower the municipal authorities to do so. People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677. The legislature cannot by special act deprive the city council or other proper local authority of the municipal corporation of all discretion with respect to a local improvement, where by the charter of the city the matter of such improvements is left to the judgment and discretion of such local authority. People *v.* Lynch, *supra*.

Equality and uniformity.— The legislature has no power to levy for a municipal improvement an assessment which is not uniform and equal, nor can it validate an assessment which has been made by the municipal authorities for such purpose, and which is void for want of uniformity and equality. People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677. A bill providing for public improvements by special taxes levied upon districts having territorial limits different from the municipal corporation levying the tax, and without limiting the rate of taxation or amount of indebtedness for such purposes, was held unconstitutional. *In re* House Bill No. 165, 15 Colo. 595, 26 Pac. 141.

Relieving property improperly assessed.— Where a municipal corporation, in exercising the power of assessment to pay for a public improvement, levied the assessment upon property which was not subject to be charged therewith, and, in a suit brought to enforce the assessment, the property thus charged was ordered to be sold to pay the same, it was held that it was competent for the legislature to relieve the property thus ordered to be sold, and to require the amount improperly charged thereon to be paid out of the funds of the corporation. State *v.* Hoffman, 35 Ohio St. 435.

50. Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781, holding that it was competent for the legislature to require that persons contracting for the improvement of streets should give bonds for the faithful carrying out of their contracts executed by some surety company authorized to do business in the state. See *infra*, XIII, C, 4.

51. Street *v.* Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895, 98 Am. St. Rep. 325, 61 L. R. A. 154 (holding that the act of March 9, 1901 (Acts (1901), p. 282, c. 122; Burns Rev. St. (1901) §§ 7055, 7055*b*), enacting that unskilled labor employed on any public work of the state, counties, cities, and towns shall receive not less than twenty cents an hour, which may be enforced in a proper action, and that any contractor whose duty it is to pay the unskilled labor, and who shall violate the statute, shall be guilty of a misdemeanor, etc., is invalid, because: (1) The power to confiscate the property of taxpayers by forcing them to pay an arbitrary price for labor on public works is not one of the powers of the legislature over municipal corporations as agencies of the state; (2) because the statute is obnoxious to the objection that through its operation a citizen may be deprived of his property without due process of law; and (3) because inasmuch as the statute merely attempts to fix a minimum rate of wages to be paid "unskilled labor," it is an unnatural classification, rendering the statute invalid as class legislation); People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701 (*reversing* 32 Misc. 78, 66 N. Y. Suppl. 163)] (holding that the labor law (Laws (1897), c. 415, as amended by Laws (1899), cc. 192, 567), providing that laborers on public work shall be paid the prevailing rate of wages; that contracts for such work shall stipulate that they shall be void unless complying with the act; and that the contractor shall not be entitled to receive any sum, and no public officer shall pay the same, for work done on a contract which in form or manner of performance violates the statutory requisites of such contracts, and section three providing that public officers violating the act shall be guilty of malfeasance, and that any citizen may maintain proceedings to suspend him, or to avoid or cancel contracts violating the act, or to restrain payment on such contracts, is unconstitutional, since it takes away the liberty of freely contracting both from municipalities and those contracting therewith, and contravenes the provision of the constitution that no person shall be deprived of his property without due process of law).

52. Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677.

53. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792. *Compare* Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

constitutional limitations, the courts have held that the legislature has control over municipalities with respect to public improvements of purely local concern,[54] so that it may compel the municipality at its expense to erect a public building,[55] and may appoint commissioners or other officers to carry out the improvement.[56] In some states, however, this power with respect to matters of purely local concern is restricted by express constitutional provision, and in others it is held independently of any express constitutional provision, that the legislature cannot constitutionally interfere with the power of local self-government by controlling the city with respect to municipal improvements of a purely local character and concern.[57] The legislature cannot compel a municipal corporation to make or aid in improvements or works of a private character, or works which, although public in some respects, are private in others.[58] A statute appointing or providing for appointment by the governor of a board of public works for a city, with power merely to take preliminary steps with relation to local improvements, is not unconstitutional as depriving the city of control of its local officers, where such preliminary steps are not binding on the city, but the making of the improvements recommended and the assessments therefor are finally left to the city authorities.[59]

54. Perkins *v.* Slack, 86 Pa. St. 270. And see other cases cited *supra*, IV, A, E.

55. Perkins *v.* Slack, 86 Pa. St. 270; Baird *v.* Rice, 63 Pa. St. 489.

56. Perkins *v.* Slack, 86 Pa. St. 270.

57. Cairo, etc., R. Co. *v.* Sparta, 77 Ill. 505; Marshall *v.* Silliman, 61 Ill. 218; People *v.* Salomon, 51 Ill. 37; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278 (holding that the power of legislative control over municipal corporations cannot be so used as to compel such a corporation, against its will, to incur a debt and issue its bonds for the erection of a public park or for any other local improvement); State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79 (holding that the act of March 8, 1889 (Acts (1889), p. 247), assuming to give the exclusive control of streets, alleys, sewers, lights, water-supply, etc., in cities of more than fifty thousand inhabitants, to boards of public works to be chosen by the legislature from residents of the cities affected, was void as denying the right of local self-government); People *v.* Detroit, 29 Mich. 343 (holding in effect that the legislature cannot compel a municipal corporation to contract a debt for local purposes against its will, as for the acquisition and improvement of land as a park); People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202 (to the same effect); People *v.* Lothrop, 24 Mich. 235; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103 (appointment by the legislature of a board of public works for a municipality); People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701 (*reversing* 32 Misc. 78, 66 N. Y. Suppl. 163)] (holding that the legislature of a state has no right to interfere and control by compulsory legislation the action of municipal corporations with respect to property and contract rights of purely local concern). See also *supra*, IV, A, E.

Constitution not retrospective.— Pa. Const. art. 3, § 20, providing that the legislature should not delegate to any special commission any power to interfere with any municipal improvement, was prospective only, and did not apply to special commissions existing before its adoption. Perkins *v.* Slack, 86 Pa. St. 270.

58. People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480, holding that the legislature cannot compel a municipal corporation to aid in the construction of a railroad by subscribing for its stock and issuing bonds therefor, since railroads owned and operated by corporations for the benefit of their stock-holders are not public highways in the same sense as streets and common roads, and a railroad corporation, while public as to its franchises, is private as to the ownership of its property and its relation to its stock-holders, and a municipal corporation in subscribing for its stock acts as a private corporation. See also Cairo, etc., R. Co. *v.* Sparta, 77 Ill. 505; People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701 (*reversing* 32 Misc. 78, 66 N. Y. Suppl. 163)]. And see *infra*, IV, H, I.

59. Denver *v.* Londoner, 33 Colo. 104, 80 Pac. 117.

Other statutes not open to such objection. — Cal. Act, March 24, 1876, providing that the board of supervisors, if they should deem it expedient to continue the construction of the new city hall in San Francisco, in the mode and manner prescribed in the act, were thereby authorized and empowered to express such judgment by resolution or order, in such form as they might deem proper, was held not to be open to the objection that it was an attempt by the legislature to deprive the supervisors of their discretion in matters of local improvement. People *v.* Bartlett, 67 Cal. 156, 7 Pac. 417. The same is true of a statute providing for the widening of a street and declaring what district is benefited by the improvement, and providing for assessments by a commission, where it is left to the city council to say whether the work shall be done or not and to levy the assess-

H. Contracts and Obligations — 1. Cannot Impair Obligation of Contracts. A municipality, as will be seen in another place, has the power within the scope of its charter to enter into contractual relations and assume legal obligations with other corporations and with natural persons, for breach of which it will incur liability just as an individual;[60] and such contracts, when not *ultra vires* or otherwise invalid, are protected by the prohibition in the federal constitution against laws impairing the obligation of contracts.[61] Legislation producing this result, says the federal supreme court, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded — treated as if never enacted, by all courts recognizing the constitution as the paramount law of the land.[62] This doctrine has been repeatedly asserted by this court, and also expressed by the state courts, when attempts have been made to limit the power of taxation of a municipal body, upon faith of which contracts have been made, and by means of which alone they could be performed.[63] So long as the corpora-

ments. Lent *v.* Tillson, 72 Cal. 401, 14 Pac. 71.

60. Power to contract see *infra*, IX.

61. *California.*— San Francisco *v.* Fowler, 19 Cal. 11; People *v.* Bond, 10 Cal. 563 (holding that the act of May 1, 1851, authorizing the funding of the floating debt of San Francisco, was substantially a trust deed, whereby she agreed, on a valuable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations in the mode and according to the terms of her agreement, and as the act was of this character, it was not competent for the legislature to substantially change its terms without the sanction of the creditors); People *v.* Wood, 7 Cal. 579; Wood *v.* San Francisco, 4 Cal. 190; Smith *v.* Morse, 2 Cal. 524.

Indiana. — Indianapolis *v.* Indianapolis Gaslight, etc., Co., 66 Ind. 396.

Kentucky.— Boyd *v.* Chambers, 78 Ky. 140.

Louisiana.—Layton *v.* New Orleans, 12 La. Ann. 515.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

Missouri.— State *v.* Miller, 67 Mo. 604.

New Jersey.— Rader *v.* Southeasterly Road Dist., 36 N. J. L. 273.

New York.—Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70, holding that where bonds have been issued and used to raise funds to pay for land acquired by a city for a public park, under legislative authority, the terms of the issue of the bonds constitute a contract between the bondholder on the one part and the city and state on the other, specifically pledging the land taken for the payment of the bonds, the statute so providing, and a subsequent act authorizing a sale of any portion of the park free of all liens existing by virtue of the original act, is void as impairing the obligation of contracts.

Pennsylvania.— Williams' Appeal, 72 Pa. St. 214; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

Tennessee.— Memphis *v.* Memphis Water Co., 5 Heisk. 495.

Texas.— Morris *v.* State, 62 Tex. 728.

Wisconsin.— Smith *v.* Appleton, 19 Wis. 468, holding that where a statute (Gen. Laws (1861), c. 90) authorized the common council of a city to issue bonds to a certain amount to take up outstanding bonds of the city to that amount, and, among other stringent provisions to secure their prompt payment, prohibited the council from thereafter issuing the bonds of the city "for any other purpose whatever except in payment of the bonded debt of said city," and where the arrangement was accepted by the creditors of the city and new bonds were issued, this provision of the law was a material element of the new contract, and it was not subject to legislative repeal or amendment so as to impair the rights or diminish the security of the creditors without their assent.

United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Seibert *v.* U. S., 122 U. S. 284, 7 S. Ct. 1190, 30 L. ed. 1161; State *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Memphis *v.* U. S., 97 U. S. 293, 24 L. ed. 920.

See Constitutional Law, 8 Cyc. 939 *et seq.*

62. U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. ed. 793.

63. State *v.* New Orleans, 37 La. Ann. 13; Goodale *v.* Fennell, 27 Ohio St. 426, 22 Am. Rep. 321; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; State *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Sibley *v.* Mobile, 22 Fed. Cas. No. 12,829, 3 Woods 535. *Compare* Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305. If a municipal corporation is authorized to contract debts, no subsequent

tion continues in existence, the courts have said that the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfilment.[64] However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination of the principles which secure the inviolability of contracts.[65]

2. Power to Regulate or Validate Contracts or Impose Obligations.[66] In the various state constitutions are to be found other restrictions upon the inherent legislative control over municipal contracts and obligations, which forbid the state to impose pecuniary obligations upon a municipality without its consent.[67] And in many of the states the courts recognize the right of a municipal corporation to determine for itself what contracts it will make and what pecuniary obligations it will assume for purposes purely local.[68] Subject to these limitations the legislative control over municipal contracts and obligations seems to be plenary and undisputed.[69] It is well settled that the legislature may prescribe the mode by which municipalities shall enter into contracts and the limit of their power of contracting.[70] It may forbid municipal contracts with such of its officers as exercise the municipal power of contracting.[71] It may prescribe the terms upon which the corporation may make contracts,[72] and the objects for which alone it may con-

legislation can impair them, and therefore where an act incorporated a borough and other territory into a city and directed a tax of two per cent to be levied on property lying in what was the borough "until the present debt of the borough" should be paid, and the subsequent act directed that after advertising the trustees should four times a year offer all the money in the treasury publicly, and award the same to the creditor or creditors who would release the greater sum of indebtedness therefor; and no interest should be computed on said indebtedness, after the borough charter was annulled, the latter act was held unconstitutional. Williams' Appeal, 72 Pa. St. 214.

64. People *v.* Bond, 10 Cal. 563; Seibert *v.* U. S., 122 U. S. 284, 7 S. Ct. 1190, 30 L. ed. 1161; Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305.

65. People *v.* Burr, 13 Cal. 343; Davidson *v.* New York, 27 How. Pr. (N. Y.) 342; Morris *v.* State, 62 Tex. 728; Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; and other cases above cited.

66. Imposition or apportionment of obligations and liabilities on annexation or division of territory or consolidation see *supra*, II, B, 2, g, (I), (G); II, B, 2, g, (II), (C).

67. Fitch *v.* Manitou County, 133 Mich. 178, 94 N. W. 952.

68. *Illinois.*— East St. Louis *v.* East St. Louis Gas-Light Co., 98 Ill. 415, 38 Am. Rep. 97; Wider *v.* East St. Louis, 55 Ill. 133.

Michigan.— People *v.* Detroit, 29 Mich. 343; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

Nevada.— Douglass *v.* Virginia City, 5 Nev. 147.

New York.— People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701 (*reversing* 32 Misc. 78, 66 N. Y. Suppl. 163)].

Vermont.—Atkins *v.* Randolph, 31 Vt. 226. See also *supra*, IV, A, E, G.

69. State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Sloan *v.* State, 8 Blackf. (Ind.) 361; and other cases cited in the notes following. See also *supra*, IV, A, E, G; *infra*, IV, I.

70. Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229. And see *supra*, III; *infra*, IX. The power of the legislature to regulate the manner in which public works, such as sewers, shall be constructed, cannot be foreclosed by any contract of a municipal corporation for doing the work. *In re* New York Protestant Episcopal Public School, 46 N. Y. 178. See also *supra*, IV, G.

71. West *v.* Berry, 98 Ga. 402, 25 S. E. 508; Benton *v.* Hamilton, 110 Ind. 294, 11 N. E. 238; Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127; Macy *v.* Duluth, 68 Minn. 452, 71 N. W. 687; American Emigrant Co. *v.* Wright County, 97 U. S. 339, 24 L. ed. 912.

72. *California.*— Douglass *v.* Placerville, 18 Cal. 643.

Connecticut.— Webster *v.* Harwinton, 32 Conn. 131; Abendroth *v.* Greenwich, 29 Conn. 356; Willard *v.* Killingworth Borough, 8 Conn. 247.

Massachusetts.— Frost *v.* Belmont, 6 Allen 152; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Michigan.—Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

Missouri.— Lackland *v.* North Missouri R. Co., 31 Mo. 180.

Nevada.— Hess *v.* Pegg, 7 Nev. 23.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268.

Virginia.— Ould *v.* Richmond, 23 Gratt. 464, 14 Am. Rep. 139.

United States.— Claiborne County *v.* Brooks, 111 U. S. 400, 4 S. Ct. 489, 28 L. ed. 470.

See also *infra*, IX.

tract.[73] It may validate contracts or acts made or done *ultra vires* and such as are void or voidable for informality or irregularity in their execution.[74] And it may by statute compel the making of any contract by the municipality essential to enable it to discharge its public functions and perform its governmental duties.[75] As to the extent of legislative power in the imposition of pecuniary burdens upon the municipality, there is such variety of judicial views as to render the law rather uncertain and elastic. Thus it has been decided that the legislature may impose a debt upon a city, without its consent, to construct a railroad subway;[76] to provide for sewers;[77] to reimburse the state for moneys paid out for public improvements;[78] to discharge obligations not cognizable either at law or in equity;[79] to pay for property appropriated to public use under the

73. *Illinois.*— Welch *v.* Post, 99 Ill. 471; Pitzman *v.* Freeburg, 92 Ill. 111; Chicago *v.* Frazer, 60 Ill. App. 404.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Maine.— Parsons *v.* Monmouth, 70 Me. 262.

Minnesota.— Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

Missouri.— Cheeney *v.* Brookfield, 60 Mo. 53.

New York.—Starin *v.* Genoa, 23 N. Y. 439; Hodges *v.* Buffalo, 2 Den. 110.

United States.— Kelley *v.* Milan, 127 U. S. 139, 8 S. Ct. 1101, 32 L. ed. 77; Thomas *v.* Richmond, 12 Wall. 349, 20 L. ed. 453.

See also *infra*, IX.

74. *Alabama.*— Lockhart *v.* Troy, 48 Ala. 579.

California.—San Francisco *v.* Certain Real Estate, 42 Cal. 513; Creighton *v.* San Francisco, 42 Cal. 446; Grogan *v.* San Francisco, 18 Cal. 590; People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521; Payne *v.* Treadwell, 16 Cal. 220.

Connecticut.— Bartholomew *v.* Harwinton, 33 Conn. 408.

Georgia.— Winn *v.* Macon, 21 Ga. 275; Frederick *v.* Augusta, 5 Ga. 561.

Illinois.— Johnson *v.* Campbell, 49 Ill. 316; Keithsburg *v.* Frick, 34 Ill. 405.

Indiana.— Edmunds *v.* Gookins, 20 Ind. 477.

Iowa.— McMillen *v.* Boyles, 6 Iowa 304.

Kansas.— Leavenworth *v.* Leavenworth, etc., Water Co., 69 Kan. 82, 76 Pac. 451; Mason *v.* Spencer, 35 Kan. 512, 11 Pac. 402; Atchison *v.* Butcher, 3 Kan. 104.

Kentucky.— Allison *v.* Louisville, etc., R. Co., 9 Bush 247.

Louisiana.— New Orleans First Municipality *v.* Orleans Theatre Co., 2 Rob. 209.

Maryland.— Smith *v.* Stephan, 66 Md. 381, 7 Atl. 561, 10 Atl. 671.

Minnesota.— Kunkle *v.* Franklin, 13 Minn. 127, 97 Am. Dec. 226.

Missouri.— State *v.* Miller, 66 Mo. 328.

New Jersey.— State *v.* Guttenberg, 38 N. J. L. 419; State *v.* Union, 33 N. J. L. 350; State *v.* Newark, 27 N. J. L. 185; Den *v.* Downam, 13 N. J. L. 135.

New York.— Brown *v.* New York, 63 N. Y. 239; Lennon *v.* New York, 55 N. Y. 361; People *v.* Law, 34 Barb. 494, 22 How. Pr. 109.

North Carolina.— Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

Pennsylvania.—Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 539.

Wisconsin.— Hasbrouck *v.* Milwaukee, 21 Wis. 217.

United States.— Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786; Anderson *v.* Santa Anna, 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633; Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521; Campbell *v.* Kenosha, 5 Wall. 194, 18 L. ed. 610; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

Pending judicial proceedings.— Enactments dispensing with the use of formalities not essential to the jurisdiction of courts, and validating proceedings had by municipal corporations under their charters, notwithstanding irregularities apparent in them, are valid, even when made pending judicial proceedings. State *v.* Union, 33 N. J. L. 350.

75. *Massachusetts.*— Haverhill *v.* Groveland, 152 Mass. 510, 25 N. E. 976; Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 236.

Minnesota.— Guilder *v.* Otsego, 20 Minn. 74.

Nebraska.— Jefferson County *v.* People, 5 Nebr. 127.

New York.— Kirkwood *v.* Newburg, 122 N. Y. 571, 26 N. E. 10.

Pennsylvania.— Shadler *v.* Blair, 136 Pa. St. 488, 20 Atl. 539.

United States.— Pacific Bridge Co. *v.* Clackamas County, 45 Fed. 217.

76. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

77. Kingman, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417.

78. Kingman, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417.

79. *California.*— Creighton *v.* San Francisco, 42 Cal. 446; Sinton *v.* Ashbury, 41 Cal. 525; Grogan *v.* San Francisco, 18 Cal. 590; People *v.* Burr, 13 Cal. 343.

Connecticut.— Bartholomew *v.* Harwinton, 33 Conn. 408; Waldo *v.* Portland, 33 Conn. 363; Booth *v.* Woodbury, 32 Conn. 118; Bald-

power of eminent domain;[80] to pay debts unlawfully incurred in excess of charter limitations;[81] to reimburse a city officer for expenses incurred by him for counsel fees in a contest over city property;[82] to pay the salaries of police commissioners appointed by the legislature or governor;[83] to pay for the construction of a railroad;[84] to make a municipal assessment for local improvements;[85] to provide for public parks;[86] to build or acquire a free bridge;[87] to pay an assignee of municipal warrants;[88] to pay claims barred by the statute of limitations;[89] to pay a claim which the municipality had by duly authorized vote refused to recognize as valid;[90] to compensate an unauthorized private party for expenses incurred on behalf of the municipality;[91] to enforce an equitable accounting between con-

win *v.* North Branford, 32 Conn. 47; Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475.

Illinois.— Schofield *v.* Watkins, 22 Ill. 66.

Massachusetts.— Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 236; Grover *v.* Pembroke, 11 Allen 88; Freeland *v.* Hastings, 10 Allen 570.

Minnesota.— Flynn *v.* Little Falls Electric, etc., Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; Nash *v.* Lowry, 37 Minn. 261, 33 N. W. 787; State *v.* Lake City, 25 Minn. 404; Comer *v.* Folsom, 13 Minn. 219; Kunkle *v.* Franklin, 13 Minn. 127, 97 Am. Dec. 226.

Mississippi.— Vasser *v.* George, 47 Miss. 713.

Missouri.— North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141.

New York.— New York *v.* Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618 (holding that the provision of the act of 1872 (Laws (1872), c. 9), authorizing and directing the controller of the city of New York to pay back to the various banks, etc., of the city all moneys which had been advanced by them "for the use of any of the departments or commissioners of the city or county" was a valid exercise of legislative power and made such advances binding obligations of the city); People *v.* Essex County, 70 N. Y. 228; Brewster *v.* Syracuse, 19 N. Y. 116 (holding that the legislature has the power to authorize the levy of a tax for the purpose of paying to one who has constructed a municipal improvement an addition to the contract price, which the corporation was forbidden by its charter to pay); People *v.* New York, 3 Misc. 131, 23 N. Y. Suppl. 1060; *In re* Reynolds, 21 N. Y. Suppl. 592 (holding that where a city, in opening a street, injures a building on private property which is adjacent thereto, but none of which is actually taken for the street, it is within the power of the legislature (Laws (1890), c. 393) to require the city to make just compensation to the owner, by assessing the amount of his damages on the property benefited, even though the city could successfully defend against the claim in a court of law).

Oklahoma.— Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841, holding that while the contracts of a provisional municipal government cannot be enforced as contracts either against the contracting parties or their successors, the legislature has power to provide for the payment by a village corporation which succeeds a provisional government of the debts and liabilities contracted by the latter.

Pennsylvania.—Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575.

Wisconsin.— Hasbrouck *v.* Milwaukee, 21 Wis. 217.

United States.— Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796; Utter *v.* Franklin, 172 U. S. 416, 19 S. Ct. 183, 43 L. ed. 498; Lewis *v.* Pima County, 155 U. S. 54, 15 S. Ct. 22, 39 L. ed. 67; Read *v.* Plattsmouth, 107 U. S. 568, 2 S. Ct. 208, 27 L. ed. 414; Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

80. Duffy *v.* New Orleans, 49 La. Ann. 114, 21 So. 179. See, generally, EMINENT DOMAIN, 15 Cyc. 543.

81. People *v.* Burr, 13 Cal. 343; Syracuse *v.* Hubbard, 64 N. Y. App. Div. 587, 72 N. Y. Suppl. 802; Guilford *v.* Cornell, 18 Barb. (N. Y.) 615; Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521. And see *supra*, this section, note 74.

82. Stilwell *v.* New York, 19 Abb. Pr. (N. Y.) 376. See *infra*, VII, A, 13, a, (I), (L).

83. Horton *v.* Newport, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. N. S. 512.

84. Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; Williams *v.* Duanesburgh, 66 N. Y. 129. *Compare* on this question *infra*, XV, A, 5.

85. *In re* Van Antwerp, 56 N. Y. 261. *Compare*, however, *supra*, IV, G, 1.

86. *In re* Adams, 165 Mass. 497, 43 N. E. 682. *Compare supra*, IV, G, 1, 2.

87. Philadelphia *v.* Field, 58 Pa. St. 320. The Oregon act of 1895, providing for the appointment of a bridge committee to acquire in the name and on behalf of the city of Portland a certain bridge and ferry, and to issue and sell bonds of the city in payment thereof, was not void because it compelled the city to pay for the expense incurred without its consent. Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171. See also *supra*, IV, G, 1.

88. Merchants' Nat. Bank *v.* East Grand Forks, 94 Minn. 246, 102 N. W. 703. See also *infra*, XV, B, 2, j.

89. People *v.* New York, 3 Misc. (N. Y.) 131, 23 N. Y. Suppl. 1060. See also *infra*, XVI.

90. Guilford *v.* Cornell, 18 Barb. (N. Y.) 615.

91. O'Neill *v.* Hoboken, 72 N. J. L. 67, 60 Atl. 50.

tiguous towns contributing to a joint public improvement;[92] to expend money for docks, wharves, and levees,[93] or for schools;[94] or to pay for the support of paupers.[95] But it has also been held that it rests exclusively with the people of the municipality to decide whether or not a debt shall be incurred for purely municipal purposes;[96] whether it will subscribe for stock in a railroad company;[97] and whether it will pay for public parks which it has not voluntarily purchased.[98]

I. Revenues and Fiscal Management — 1. In General. This topic embraces rules and powers for the collection and appropriation of public funds raised by the exercise of the sovereign function of taxation and is closely connected with the subject of municipal obligations, treated in the preceding section.[99]

2. Public Funds and Revenues. The ordinary revenues of a city are not its property in the sense in which private property is held by an individual.[1] Such revenues belong to the public, and the collection and appropriation thereof by a city is the exercise of a trust function by the municipality for the benefit of the public.[2] The legislature is the representative of the public in this as well as other matters, and it may change these public revenues from one public object to another at its discretion.[3] The doctrine is generally recognized that no municipal corporation can have any vested right in the powers conferred upon it for governmental purposes.[4] Therefore revenues raised by taxation, although levied for specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the municipality.[5] In an early Illinois case it

92. King *v.* Reed, 43 N. J. L. 186 [*affirmed* in 48 N. J. L. 370].

93. Easton, etc., R. Co. *v.* New Jersey Cent. R. Co., 52 N. J. L. 267, 19 Atl. 722. See also *supra*, IV, G, 1.

94. State *v.* Blue, 122 Ind. 600, 23 N. E. 963; State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240. See, generally, Schools and School-Districts.

95. Fox *v.* Kendall, 97 Ill. 72. See, generally, Paupers.

96. *Illinois.*— People *v.* Harper, 91 Ill. 357; Cairo, etc., R. Co. *v.* Sparta, 77 Ill. 505; Marshall *v.* Silliman, 61 Ill. 218.

Michigan.—People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

New York.— People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

Vermont.—Atkins *v.* Randolph, 31 Vt. 226.

Wisconsin.— State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622.

See also *supra*, IV, A, G.

97. People *v.* State Treasurer, 23 Mich. 499; People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480. *Compare infra*, XV, A, 5.

98. People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202. See also *supra*, IV, G, 2.

99. See *supra*, IV, H, 2.

1. Creighton *v.* San Francisco, 42 Cal. 446; Sangamon County *v.* Springfield, 63 Ill. 66.

2. Ingersoll Pub. Corp. 201.

3. Creighton *v.* San Francisco, 42 Cal. 446. In Sangamon County *v.* Springfield, 63 Ill. 66, it was held that the revenues are the result of taxation exercised for the public good, and the public interest requires that the legislature shall have power to direct and control their application. See also Chicago *v.* Cook County, 106 Ill. App. 47; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248. Mich. Local Acts (1895), No. 337, § 27, which incorporates into the city charter of Detroit a provision directing the city treasurer to place to the credit of the board of health a certain sum of money for its maintenance for the fiscal year, etc., by transfer from any other funds in the city treasury, and which provides for replacing the sums thus transferred by temporary loan, to be repaid from money collected from the liquor taxes, is not in conflict with U. S. Const. art. 14, § 1, providing that no state shall deprive any person of life, liberty, or property without due process of law; as the fund arising from such source is under the absolute control of the legislature. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

4. People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; St. Louis *v.* Shields, 52 Mo. 351; People *v.* Morris, 13 Wend. (N. Y.) 325, 331. In the last case, the court said: "It is an unsound and even absurd proposition, that political power, conferred by the legislature, can become a vested right as against the government in any individual or body of men." See also Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

5. *California.*—Creighton *v.* San Francisco, 42 Cal. 446; Beals *v.* Amador County, 35 Cal. 624; People *v.* Stewart, 28 Cal. 395; People *v.* Pacheco, 27 Cal. 175; Hobart *v.* Butte County Sup'rs, 17 Cal. 23; People *v.* Burr, 13 Cal. 343. The act of March 4, 1870, requiring the city and county of San Francisco to advance out of its treasury a sufficient sum to pay for the services of the commissioners and certain other persons employed on the proposed extension of certain streets was held constitutional. Sinton *v.* Ashbury, 41 Cal. 525.

Connecticut.—Bridgeport *v.* Housatonic R. Co., 15 Conn. 475.

Illinois.— People *v.* Power, 25 Ill. 187;

was decided that the legislature had authority to repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, the fees of which were directed to be appropriated to the support of city paupers, Judge Caton, in the opinion, remarking that the charter power to license "gives the city no more a vested right to issue licenses because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city."[6] When the city of Lafayette was consolidated with New Orleans it was provided that the respective obligations of the two cities should rest upon and be borne by the former territory of the two cities severally; but this just and equitable arrangement was, over the protest of the people of Lafayette, whose burden had been light, soon changed by a statutory provision requiring all portions of the consolidated city to bear equal parts of taxation. The supreme court of Louisiana answered the complaint of the citizens of Lafayette with a repetition of the fundamental doctrine that public corporations are wholly under the control of the legislature, and it may provide in what manner taxes shall be levied to support them and pay their debts.[7]

3. Authority in Public Matters Only. The power of the legislature to control municipal funds applies only to the strictly public or governmental revenues of the city,[8] and rests obviously upon the sovereign legislative power of the state in all public matters. This power of control does not exist with regard to property in which the municipality has a private interest or creditors have a vested right.[9] Public revenues, however, are not regarded as private property;[10] nor has any one a vested right in them until after their actual appropriation.[11] The legisla-

Dennis *v.* Maynard, 15 Ill. 477; School Trustees *v.* Tatman, 13 Ill. 27; Richland County *v.* Lawrence County, 12 Ill. 1; Pike County Com'rs *v.* People, 11 Ill. 202.

Indiana.— Schenck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

Maryland.— Hagerstown *v.* Sehner, 37 Md. 180.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 58; Dovock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

New York.— Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685; People *v.* New York, 47 N. Y. 501; Guilford *v.* Chenango County, 13 N. Y. 143; Morris *v.* People, 3 Den. 381.

North Carolina.— Love *v.* Schenck, 34 N. C. 304.

Ohio.— Cass *v.* Dillon, 2 Ohio St. 607. The legislature has the power to provide that water rents collected by a city may or shall be applied to aid in the construction of waterworks. Alter *v.* Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737.

Pennsylvania.— Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

Rhode Island.— Horton *v.* Newport, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. N. S. 512, holding that since the police system of the city of Newport forms a part of the state government, the legislature has the right to provide for the payment of the expenses of the department out of the local funds of such city.

South Carolina.— Duke *v.* Williamsburg County, 21 S. C. 414.

United States.— Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. ed. 403.

See 36 Cent. Dig. tit. "Municipal Corporations," § 176 *et seq.*

6. Gutzweller *v.* People, 14 Ill. 142; Richland County *v.* Lawrence County, 12 Ill. 1. See also Sangamon County *v.* Springfield, 63 Ill. 66.

7. Layton *v.* New Orleans, 12 La. Ann. 515. See also *supra*, II, B, 2, g, (I), (F)-(H).

8. Ingersoll Pub. Corp. 203.

9. State *v.* New Orleans, 37 La. Ann. 13; Goodale *v.* Fennell, 27 Ohio St. 426, 22 Am. Rep. 321; Louisiana *v.* St. Martin's Parish, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; Ralls County Ct. *v.* U. S., 105 U. S. 733, 26 L. ed. 1220; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305. See also *supra*, IV, F, 3; IV, H, 1.

10. Sangamon County *v.* Springfield, 63 Ill. 66.

11. Memphis *v.* U. S., 97 U. S. 293, 24 L. ed. 920; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Pereles *v.* Watertown, 19 Fed. Cas. No. 10,980, 6 Biss. 79. That this power pertains to public benefits was judicially declared and maintained in the celebrated case of State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319, decided by the supreme court of Maryland in 1842, and affirmed by the supreme court of the United States in 1844. Maryland *v.* Baltimore, etc., R. Co., 3 How. (U. S.) 534, 11 L. ed. 714. The railroad company accepted a charter requiring it to locate and build its road through three certain towns, upon penalty, in case of failure, that it should forfeit one million dollars to the state of Maryland

ture cannot authorize or compel a city to give any of its money or property, or to loan its credit for any private purpose, or to expend any of its money, directly or indirectly, for any other than city purposes.[12]

4. Examples of Power. This is the general rule with regard to public property owned and controlled by the municipality as trustee or representative of the public for public use, which could not be held by private individuals for such use.[13] As a consequence the legislature has full power over the revenues of a corporation, the source of which it may prescribe and alter at its pleasure.[14] It may give or it may withhold, for example, the power to grant and tax licenses for various occupations;[15] also the power to levy and collect wharfage or ferriage,[16] or penalties for breach of law or of contract.[17] In the exercise of this sovereign power by the legislative authority over municipal funds and revenues limitations are found along the same uncertain boundary line between strictly governmental and purely municipal functions, noticed hitherto,[18] which in several states has been run on different constitutional courses, and by different local rules of variation, and is therefore difficult to be followed, as will appear from the following instances: In California the imposition of a license-tax on a business or occupation is a municipal affair.[19] In Illinois a city may be burdened by statute with the expense of caring for delinquent children.[20] In Kentucky the legislature may prescribe the purpose and fix the maximum rate of municipal taxation; but the assessment and collection of taxes for such purposes are in the discretion of the municipality.[21] It has power to impose local taxation to carry out local enterprises, such as the construction of a railroad.[22] In Louisiana the legislature has no power to compel a municipality to levy a tax for school purposes.[23] In Mary-

for the use of Washington county. After action brought to recover the penalty, the legislature repealed that clause of the charter which imposed the penalty, and thereupon, under a plea *puis darrein continuance*, it was held that the county could not recover, since the penalty was released. Here again it was declared that the corporation had no vested right in such a fund as this, but that the same was under the sovereign control of the legislature.

12. People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701 (*reversing* 32 Misc. 78, 66 N. Y. Suppl. 163)].

13. Ingersoll Pub. Corp. 204.

14. *Indiana.*—Lucas *v.* Tippecanoe County, 44 Ind. 524.

Kentucky.— Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370.

Louisiana.— Carondelet Canal Nav. Co. *v.* New Orleans, 44 La. Ann. 394, 10 So. 871.

Massachusetts.—McGee *v.* Salem, 149 Mass. 238, 21 N. E. 386.

Nebraska.— Darst *v.* Griffin, 31 Nebr. 668, 48 N. W. 819.

Nevada.— Youngs *v.* Hall, 9 Nev. 212.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7; People *v.* Fields, 58 N. Y. 491.

North Carolina.—State *v.* Currituck County, 107 N. C. 110, 12 S. E. 190.

Pennsylvania.— Northampton County *v.* Easton Pass. R. Co., 148 Pa. St. 282, 23 Atl. 895.

Texas.— Taylor *v.* Robinson, 72 Tex. 364, 10 S. W. 245.

United States.— Essex Public Road Bd. *v.* Skinkle, 140 U. S. 334, 11 S. Ct. 790, 35 L. ed. 446; Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825.

See 36 Cent. Dig. tit. "Municipal Corporations," § 176 *et seq.*

15. *California.*— Mendocino County *v.* Mendocino Bank, 86 Cal. 255, 24 Pac. 1002.

Georgia.— Grantham *v.* State, 89 Ga. 121, 14 S. E. 892.

Illinois.— Sangamon County *v.* Springfield, 63 Ill. 66.

Virginia.— Richmond *v.* Railroad, etc., R. Co., 21 Gratt. 604.

United States.— Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825.

See Licenses, 25 Cyc. 593.

16. St. Louis *v.* Shields, 52 Mo. 351.

17. *California.*—*Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747.

Illinois.— Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344; Holliday *v.* People, 10 Ill. 214; Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161.

Maryland.— State *v.* Baltimore, etc., R. Co., 12 Gill & J. 399, 38 Am. Dec. 319.

Missouri.— Conner *v.* Bent, 1 Mo. 235.

United States.— Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. ed. 514.

18. See *supra*, IV, A; IV, F; IV, H, 2; IV, I, 3.

19. *Ex p.* Helm, 143 Cal. 553, 77 Pac. 453.

20. Chicago *v.* Cook County, 106 Ill. App. 47.

21. McDonald *v.* Louisville, 113 Ky. 425, 68 S. W. 413, 24 Ky. L. Rep. 271.

22. Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

23. State *v.* New Orleans, 42 La. Ann. 92, 7 So. 674.

land a law allowing certain commissioners in lieu of the municipality to levy municipal taxes may be valid.[24] In Michigan the legislature may require a municipality to pay money to the credit of the board of health;[25] but not to expend money for purely local improvements.[26] In Missouri a city's proportion of revenues for the maintenance of a state road through it may be raised by legislative levy;[27] and the same is true of the salary of an officer of a court required to be held in a certain city.[28] In Montana the legislature cannot compel a municipality to purchase or condemn for its use any existing local water-plant, owned by a private corporation or person, or forbid the erection by the municipality of any public utility.[29] In New Jersey the expense of swamp drainage may be imposed by the legislature upon the municipalities benefited thereby.[30] In New York the legislature may designate persons to audit certain *ultra vires* municipal liabilities, which the municipal auditor was by charter forbidden to approve.[31] In Ohio the legislature may relieve property ordered to be sold under an assessment levied for a public improvement, and charge the amount so levied to the municipality.[32] In Oklahoma the legislature may impose special municipal levies in excess of the four per cent maximum levy permitted by general law.[33] In Washington the legislature may impose upon a municipality its fair portion of the cost of county road improvement, fixed by the county commissioners without municipal consent.[34] In Wisconsin the legislature cannot, without municipal assent, divert municipal funds raised for erecting a city high school building, to the purchase of a site for a state normal school in the city;[35] but it may withdraw power to collect revenues in a municipality from municipal officers and confer it upon county officers.[36] In the federal courts the decisions scrupulously and consistently support the legislative power to enforce, and deny its authority to impair the obligation of municipal contracts by any legislation in regard to the municipal revenues or fiscal management.[37] The legislature has such control over the revenues of a municipal corporation that it may pass an act rendering the municipal corporation liable to persons whose property may be destroyed in consequence of mobs or riots.[38]

5. Trust Funds. There is general concurrence in the doctrine that the legislature has no power to divert municipal funds devoted to a charitable trust from the trust object and apply or appropriate them to any other object,[39] although it may effect a change of trustee for the administration of the trust.[40]

6. Void Assessments and Defective Obligations. In the rapid growth of Ameri-

24. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

25. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

26. People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202. And see *supra*, IV, G, 2.

27. Elting *v.* Hickman, 172 Mo. 237, 72 S. W. 700.

28. Young *v.* Kansas City, 152 Mo. 661, 54 S. W. 535.

29. Helena Consol. Water Co. *v.* Steele, 20 Mont. 1, 49 Pac. 382. 37 L. R. A. 412.

30. O'Neill *v.* Hoboken, 72 N. J. L. 67, 60 Atl. 50.

31. Syracuse *v.* Hubbard, 64 N. Y. App. Div. 587, 72 N. Y. Suppl. 802.

32. State *v.* Hoffman, 35 Ohio St. 435.

33. Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

34. Seanor *v.* Whatcom County, 13 Wash. 48, 42 Pac. 552.

35. State *v.* Haben, 22 Wis. 660.

36. State *v.* Hundhausen, 26 Wis. 432.

37. Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310. And see *supra*, IV, H, 1.

38. Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248. As to such liability see *infra*, XIV, A, 5, f.

39. *Indiana.*— State *v.* Springfield Tp., 6 Ind. 83.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

New Hampshire.— Greenville *v.* Mason, 53 N. H. 515.

Texas.— Bass *v.* Fontleroy, 11 Tex. 698.

Vermont.— White *v.* Fuller, 38 Vt. 193; Montpelier *v.* East Montpelier, 27 Vt. 704.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See *supra*, IV, F, 1.

40. *Pennsylvania.*— Philadelphia *v.* Fox, 64 Pa. St. 169.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

Tennessee.— Luehrman *v.* Shelby Taxing Dist., 2 Lea 425.

Vermont.— Montpelier *v.* East Montpelier, 27 Vt. 704, 29 Vt. 12, 67 Am. Dec. 748.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53.

See *supra*, IV, F, 1.

can cities it often happens that municipal appropriations for improvements are inconsiderately and irregularly made, and far outrun municipal revenues; and thus by fiscal mismanagement affairs become involved in confusion from which neither municipal nor judicial action can lawfully extricate the corporation.[41] In such cases resort is often had to the legislature for relief; and not infrequently the general assembly passes curative acts for the purpose of validating assessments and obligations which are void because *ultra vires*, illegal, informal, or irregular.[42] Such curative acts of legislation are generally held to be valid, as acts of ratification or approval by the state of unauthorized acts of its governmental agent, whenever it would have been competent for the legislature to authorize them originally to be done, as they were actually done by the municipality.[43] But if such municipal action were beyond the power of legislative authorization by reason of constitutional limitation, then the curative acts are unconstitutional and void.[44] The doctrine of the law upon this subject is based upon the familiar rule of agency that subsequent ratification is equivalent to original authorization;[45] and this has been applied in some instances to pending judicial proceedings.[46]

J. Acceptance of Statute by Municipality. While it is thus within the power of the legislature, subject to the limitation stated, to control municipal corporations by compulsory legislation,[47] it does not always exercise such control, but frequently, in enacting a statute affecting municipalities, leaves it for them to say, by vote or otherwise, whether the act shall apply to them.[48] So where

41. Encycl. Amer. tit. "Finance, Municipal"; Cooley Const. Lim. (6th ed.) 263–268. The financial debts of one hundred American cities aggregate eight hundred and forty-five million dollars, of which almost two hundred million dollars represent waterworks municipal bonds. Encycl. Amer. tit. "Debts, Municipal."

42. Becker *v.* Baltimore, etc., R. Co., 17 Ind. App. 324, 46 N. E. 685; Smith *v.* Buffalo, 159 N. Y. 427, 54 N. E. 62; Chester *v.* Pennell, 169 Pa. St. 300, 32 Atl. 408.

43. *In re* Amberson Ave., 179 Pa. St. 634, 36 Atl. 354. Whatever a legislature may originally authorize a municipal corporation to do, it may, if the state constitution interposes no obstacle, subsequently ratify; and such ratification is equivalent to an original grant of power, operative, by relation, as of the date of the thing ratified. Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720. See also *supra*, IV, H, 1.

44. People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

45. Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786.

46. Walter *v.* Union, 33 N. J. L. 350.

47. See *supra*, IV, A–I.

48. See Fox *v.* Kendall, 97 Ill. 72; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106; Jackson *v.* Shlomberg, 70 Miss. 47, 11 So. 721. See also *supra*, II, A, 4, 13, c, 14, b, (v); II, B, 2, d, (xiii); II, C, 1, d, (iv).

By whom accepted or adopted.— Where all the powers of a municipal corporation are vested by its charter in the city council, the acceptance by the mayor and aldermen and common council of a statute required to be accepted by the municipality is a legal acceptance. Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

Adoption at special or regular meeting.— A statute which provides for its adoption at a legal meeting of the city council of a city, or of the inhabitants of a town, called for that purpose does not contemplate a special meeting of a city council; but adoption at a regular meeting is sufficient. Quinn *v.* Lowell Electric Light Corp., 140 Mass. 106, 3 N. E. 200.

Failure to comply with statutory provision as to rejection.— Under Miss. Code (1892), c. 93, § 3035, providing that any municipality preferring its existing charter might elect not to come under the code provisions, by resolution of its corporate authorities "entered of record and certified to the secretary of state within twelve months" after the chapter became operative, a resolution so adopted within the twelve months, but not certified to the secretary of state until after the twelve months, was held ineffectual to prevent the operation of the code chapter as to such municipality. State *v.* Govan, 70 Miss. 535, 12 So. 959.

Cure by legislature of defective or illegal vote.— Where the legislature enacts, subject to adoption by vote of a municipality, a statute which it might impose upon the municipality without such vote, such as a statute imposing liability for the support of paupers, it may by subsequent retrospective legislation cure any defective or illegal vote, under the principle that if a defect in an act or proceeding by a municipality consists in doing or omitting something which the legislature might have made immaterial by prior law, it may be made immaterial by subsequent law. Fox *v.* Kendall, 97 Ill. 72.

Special legislation.— An act of the legislature providing that, where municipalities have voted for the support of paupers, and have acted in good faith for the period of five years under the authority of such vote,

the law is such that the legislature cannot by compulsory legislation control a municipality in a particular matter, it may pass an act having such effect, subject to its adoption by the municipality.[49] Where a public act has been legally adopted by a municipality in accordance with its provisions, a subsequent amendatory act needs no such adoption unless its provisions expressly require it.[50]

V. GOVERNING BODIES AND THEIR PROCEEDINGS.

A. Nature and Powers of Such Bodies — 1. IN GENERAL. Such is the nature of a corporation that it cannot be seen, felt, or touched by the senses, but can act, and be recognized and identified only by means of its human agencies.[51] Its impersonality as a legal entity with powers, duties, and liabilities is apprehended and held to account in law through responsible officers, boards, and agencies, duly constituted and authorized to represent it in its dealings and conduct affecting the state and other corporations and persons.[52] In this respect municipalities share the common lot of all corporations of whatever kind or nature.[53] In all its numerous and diverse activities, whether as a depositary of public power, or a self-centered community working for its own interest, the municipal corporation must exercise its powers and perform its functions through those agencies which the state has appointed for it, or empowered it to appoint in a manner prescribed by law.[54] These agencies, howsoever constituted, are necessarily of widely differing

their acts shall be deemed legal and binding, notwithstanding any informality in the time or manner of holding such election, is not a special act, within the constitutional prohibition. Fox *v.* Kendall, 97 Ill. 72. See, generally, STATUTES.

Revocation of consent.— Under Miss. Code (1892), c. 93, § 3035, declaring that after the chapter became operative every municipality should be governed by its provisions, but that any municipality might, within twelve months, "elect not to come under the provisions thereof," power was given to municipalities to affirmatively accept the provisions of the chapter and to be governed thereby; and where the proper corporate authorities formally resolved to accept the provisions of the chapter the city became bound thereby, and subsequent action of the authorities purporting to rescind the resolution of acceptance, although within the twelve months, was held ineffectual. Jackson *v.* Shlomberg, 70 Miss. 47, 11 So. 721.

49. See Andrews *v.* People, 83 Ill. 529; and *supra*, II, B, 2, d, (XIII); II, C, 1, d, (IV).

The power to charter a street railroad was not withdrawn from the legislature by Tex. Const. (1876) art. 10, § 7, providing that "no law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway," but such power still exists, provided the consent of the local authorities is first obtained. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 26 S. Ct. 261, 50 L. ed. 491 [*affirming* (Tex. Civ. App. 1904) 81 S. W. 106].

50. Swett *v.* Sprague, 55 Me. 190. Where, by a vote of the people under the original act relating to the park in West Chicago, the park commissioners became corporate authorities for the purpose of constructing and maintaining certain public improvements, it was held that the legislature might regulate and modify their powers and duties without submitting the supplemental act to a popular vote. Andrews *v.* People, 83 Ill. 529. See also West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215.

51. See Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636, 667, 4 L. ed. 629, where Marshall, C. J., gave terse expression to this fundamental idea of a corporation in these famous words: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law;" and where Mr. Justice Story said: "[A corporation is] an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real person."

52. "A municipal corporation may act through its mayor, through its common council, or its legislative department by whatever name called, its superintendents of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position,— whether they are elected by the people of the municipality, or appointed by the President or a governor." Barnes *v.* District of Columbia, 91 U. S. 540, 545, 23 L. ed. 440.

53. A corporation can act only by its agents or servants. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

54. An elected mayor or an appointed mayor derives his authority to act from the

powers and authority, according to their respective functions, extending through all the grades of corporate activity from the lofty vocation of law-giving and administration down to the humble labors of street-cleaning and sewer-digging; and, although all are subject to the same general doctrines of the law of agency, yet the difference in degree of authority and in nature of functions requires careful discrimination in the application of these doctrines to the different agencies.[55] In every municipality, whether created under general or special law, there is and necessarily must be a body or board, constituted and empowered to exercise the sovereign powers of government delegated to the corporation by the state; and in the larger cities may be found separate boards, each authorized to exercise distinct powers of government, as boards of education, of public works, of assessment and equalization, of fire and police, etc., all in addition to the council and distinct from it.[56] The name, number, and character of these boards and their respective functions depend upon the charter of each corporation.[57] Whether a corporation has one or more of these bodies, they are properly called governing bodies, and are all subject to the same legal rules and regulations.[58]

2. THE COMMON COUNCIL. There is a governing body common to all municipalities, great or small, generally called the common council.[59] It may be a single body or may be composed of two bodies resembling state legislative bodies.[60] Its members are called councilmen or aldermen, or both, if the council is bi-cameral.[61] But, howsoever constituted, the council is the general agent of the municipality for all purposes, and exercises all the corporate powers, not expressly committed by law to other boards or officers.[62] It is the depositary of the most important power of legislation, conferred by the charter, and by its action the municipal ordinances and by-laws are enacted for the local government of the corporation.[63] In towns and smaller cities the council also performs most of the administrative duties of the corporation, through the mayor, who is usually the presiding officer, as well as the chief executive of the municipality.[64]

same source to wit: The legislature. The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers as well as the manner of selecting and compensating its agents. Howsoever these agents or boards get their authority, the corporation must act through them. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

55. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

56. Smith Mun. Corp. 1761. See *infra*, V, A, 3; VII, B.

57. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

58. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

59. Baltimore *v.* Poultney, 25 Md. 18; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106; Schumm *v.* Seymour, 24 N. J. Eq. 143; Dey *v.* Jersey City, 19 N. J. Eq. 412; Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774.

60. Ingersoll Pub. Corp. 218.

61. Ingersoll Pub. Corp. 218.

62. *Georgia.*— Semmes *v.* Columbus, 19 Ga. 471.

Maryland.— Baltimore *v.* Poultney, 25 Md. 18.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 15 Gray 106.

Missouri.— State *v.* Haynes, 72 Mo. 377.

New Jersey.— Schumm *v.* Seymour, 24 N. J. Eq. 143; Dey *v.* Jersey City, 19 N. J. Eq. 412.

New York.— Moore *v.* New York, 73 N. Y. 238, 29 Am. Rep. 134.

West Virginia.— Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774.

Ordinance generally see *infra*, VI, B, 1.

Fixing place for holding mayor's court.— Under a city charter granting the mayor and aldermen the right to adopt necessary ordinances for the government, police interest, and welfare of the city, and to provide for the punishment of criminal offenses, and conferring upon the mayor jurisdiction to try and punish violation of laws, and providing that the mayor and aldermen may adopt by-laws and ordinances necessary to carry out the powers conferred, it is within the province of the mayor and aldermen, in council, to direct where the mayor's court shall be held, and not the right of the mayor alone. Mitchell *v.* Gadsden, 109 Ala. 390, 19 So. 808.

Council not the "corporation."— It is the citizens of a city, and not the common council, who constitute the "corporation" of the city. The aldermen and the other charter officers are only officers of the corporation. Clarke *v.* Rochester, 24 Barb. (N. Y.) 446, 5 Abb. Pr. 107, 14 How. Pr. 193; Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 325.

63. Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106. And see *infra*, VI.

64. Ingersoll Pub. Corp. 220.

But much of this work is effected through the instrumentality of committees of the council, of which the mayor may be *ex-officio* chairman.[65] The elective functions of the corporation, when not expressly given to the people, are exercised by the council, which chooses all municipal officers, unless the law constitutes another and different electorate.[66] Some judicial functions of the municipality are also conferred upon the council as a body, especially such as pertain to impeachments, and other trials of municipal officers for official delinquencies.[67] But the ordinary judicial functions of the corporation are exercised by the recorder, mayor, or some other judicial tribunal created by the law for this purpose.[68] Indeed it will be found that whenever and however a power of any kind is conferred upon the municipal corporation either by charter or general law, and no officer or body or other person is expressly clothed with such power, then such municipal function is to be exercised by the common council as the general agent of the municipality, just as the board of directors, the general agency of a private corporation, exercises its corporate functions.[69] The constitution of the common council is determined by the municipal charter, which is the supreme law of the corporation.[70] When the council is bi-cameral the relation of the two bodies is very like that of the senate and house of representatives in the federal government; and its mode of transacting official business generally resembles that of the congress or state legislature.[71] A single body is generally presided over by the mayor and has a much simpler *modus operandi*.[72] Whether composed of one or two bodies, the common council must act as one in effect — if double, both bodies must concur in their conclusions in order to make their actions that of the corporation.[73] The exception to this requirement may be

65. Gillet *v.* Logan County, 67 Ill. 256; Burlington *v.* Dennison, 42 N. J. L. 165; Kramrath *v.* Albany, 53 Hun (N. Y.) 206, 6 N. Y. Suppl. 54 [*affirmed* in 127 N. Y. 575, 28 N. E. 400]; Com. *v.* Pittsburgh, 14 Pa. St. 177.

66. Horan *v.* Lane, 53 N. J. L. 275, 21 Atl. 302; Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 19 Am. St. Rep. 870, 6 L. R. A. 308.

Election or appointment of officers see *infra*, VII, A, 4.

67. Goodwin *v.* State, 142 Ind. 117, 41 N. E. 359; Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364.

68. Keenan *v.* Goodwin, 17 R. I. 649, 24 Atl. 148.

69. Quincy *v.* Cooke, 107 U. S. 549, 2 S. Ct. 614, 27 L. ed. 549. See *supra*, this section, note 62.

Delegation of powers by governing body of a municipality see *supra*, III, G; XIII, A, 3, e.

Power to punish for violation of ordinances.— Where, under the act incorporating a town, each member of the town council is invested with authority as a magistrate, within the corporate limits of the town, to impose fines and to imprison for violation of a municipal ordinance, the power to imprison cannot be exercised until there has been a judicial ascertainment of the fact that such ordinance has been violated. Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461. The town council as a judicial body has no power to adjudge fines and imprison under such an act, although each individual composing the council is constituted *virtute officii* a magistrate, before whom a recovery of fines for violation of ordinances may be had. Craig *v.* Burnett, *supra*.

In Canada municipal councils have no rights or prerogatives other than are conferred upon them by the municipal code. Vallières *v.* St. Henri de Lauzon, 14 Quebec K. B. 16 [*reversing* 26 Quebec Super. Ct. 447].

Power to censure mayor or members.— Municipal councils have no right or power to sit in judgment upon or censure the conduct of their members, where no such power is given them by their charter or the general law. Vallières *v.* St. Henri de Lauzon, 14 Quebec K. B. 16 [*reversing* 26 Quebec Super. Ct. 447], holding also that no such power was given by the municipal code of Canada, and that a resolution of a municipal council censuring the conduct of the mayor was unlawful and should be rescinded, and to this effect the judgment of the court declaring the illegality of the resolution should be inserted in the minute books of the council on the margin of the resolution; and further that the corporation was to be held liable for the act of its council and should be condemned to pay nominal damages.

70. Smith Mun. Corp. 290. See also Decorah *v.* Bullis, 25 Iowa 12.

Constitution of body see *infra*, V, B, 1, a.

71. Ingersoll Pub. Corp. 218.

72. State *v.* Kiichli, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779.

73. Chandler *v.* Lawrence, 128 Mass. 213; Wetmore *v.* Story, 22 Barb. (N. Y.) 414; Beekman's Case, 11 Abb. Pr. (N. Y.) 164, 19 How. Pr. 518 (holding further that a municipal ordinance, passed by one board at one session, but not passed by the other until

found in those municipalities, wherein, after the analogy of the federal government, the mayor is given power to appoint officers with the consent of the upper body of the council, which, in such case, exercises this function after the manner of the senate of the United States.[74] Moreover the members of the council cannot act separately, but must assemble in meetings regularly called, to the end that there may be conference and discussion of measures proposed for corporate action.[75] The citizens of a municipality cannot, by vote or otherwise, confer upon the common council any powers or functions not conferred by the charter or general law;[76] nor can they control the action of the council in matters within its powers, although they may by statute be authorized to meet and advise or recommend action.[77] The mayor, aldermen, and council of a municipality are not trustees for the citizens in the technical sense of the words in courts of equity, and are not like proper trustees subject to chancery control.[78] They are "civil officers" within the meaning of that term as nsed in the constitution.[79] Where a continuing power is vested in the common council, such as the power to appoint to a certain office, one common council cannot by enactment of an ordinance or regulation on the subject defeat or materially interfere with the exercise of the power by succeeding councils.[80]

3. OTHER BOARDS. In the charters of many of the larger cities of the United States there is a segregation of the complicated functions of municipal government, and a designation of separate bodies for the exercise of the different classes of powers. Thus, while the general powers of the corporation are wielded by the common council, a board of education controls the city schools; a board of public works looks after the streets, sewers, and public buildings; a fire and police board manages these departments of city government; a park-board has supervision of parks and other places of public resort; and commissioners care for municipal docks and wharves, and for the municipal improvements.[81] The extent and degree of power exercised by these several boards or departments depends of

the next session, is void); Lewis *v.* New York, 35 How. Pr. (N. Y.) 162.

74. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529; People *v.* Freeman, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122; Atty.-Gen. *v.* Varnum, 167 Mass. 477, 46 N. E. 1; State *v.* Boucher, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.

75. *Arkansas.*— Little Rock *v.* Board of Improvements, 42 Ark. 152.

California.— Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

Maryland.— Baltimore *v.* Poultney, 25 Md. 18.

New Jersey.— Schumm *v.* Seymour, 24 N. J. Eq. 143; Dey *v.* Jersey City, 19 N. J. Eq. 412.

New York.— People *v.* Stowell, 9 Abb. N. Cas. 456.

Oregon.— Murphy *v.* Albina, 22 Oreg. 106, 29 Pac. 353, 29 Am. St. Rep. 578.

Wisconsin.— Deichsel *v.* Maine, 81 Wis. 553, 51 N. W. 880.

Village trustees.— But it was held that the requirement of N. Y. Laws (1873), c. 323, that the consent of a majority of the trustees of a village be obtained before the supervisors can grant power to borrow money to lay out a road through the village does not import that the trustees must act as a board and by vote; but it is sufficient if a majority of the trustees join in a written request therefor to the board of supervisors. People *v.* Queens County, 18 Hun (N. Y.) 4.

76. Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

77. Kelley *v.* Kennard, 60 N. H. 1, holding that where a statute (Gen. Laws, c. 46, § 18), required the mayor and aldermen to call a general meeting of the inhabitants for any purpose not unconstitutional or otherwise illegal, when requested to do so in writing by one hundred legal voters, a vote concerning contemplated action by the council, passed at a meeting of the inhabitants of the city called in pursuance of the statute, was merely advisory and did not control the action of the council, in which all the legislative and administrative powers of the municipality were vested by the charter.

78. Semmes *v.* Columbus, 19 Ga. 471.

79. *In re* Newport Charter, 14 R. I. 655.

80. Horan *v.* Lane, 53 N. J. L. 275, 21 Atl. 302; Columbus Gaslight, etc., Co. *v.* Columbus, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510. And see Corry *v.* Cincinnati, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194.

81. *Illinois.*— People *v.* Harper, 91 Ill. 357; Andrews *v.* People, 83 Ill. 529, 84 Ill. 28.

Louisiana.— Ouachita Parish Police Jury *v.* Monroe, 38 La. Ann. 630.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Larned *v.* Brisco, 62 Mich. 393, 29 N. W. 22.

course upon the provisions of the municipal charter.[82] In some cities they are only, or chiefly, boards of administration to execute the plans and designs enacted by the common council.[83] In others they possess power to enact rules and regulations for the government of their respective departments, and to enforce the same.[84] Some municipal boards have been given such measure of power and independence of action as to be declared separate corporations, or quasi-corporations, with power to contract, sue and be sued, and even to exercise the sovereign powers of taxation, eminent domain, and the police power.[85] The powers wielded by these boards and departments are of course conferred upon them by the state through legislative bodies, subject to revision and withdrawal at their discretion, and must be exercised by them in subordination to the superior powers of the state, as expressed in its constitution and laws;[86] and sometimes subject to the general supervision and control of the common council.[87] The meetings and proceedings of these bodies are controlled by the same general rules and regulations as those governing the council.[88] They are municipal agencies, and must act solely within their respective spheres and for the municipal welfare.[89]

B. Organization, Meetings, Rules, and Proceedings — 1. In General — a. Constitution of Body. The powers of a municipal corporation must be exercised by the proper governing body, and in the manner prescribed by the constituent act or charter.[90] The governing body is composed of members chosen by the electors of the corporation to the number and in the manner provided by the charter, or by general law; and, although they are usually chosen as representatives of the several wards of the corporation, the legislature may provide for their election by general vote of the municipality at large, unless the state constitution imperatively requires ward representation.[91] At the organization of

Nevada.— State *v.* State Bd. of Education, 18 Nev. 173, 1 Pac. 844.

New Jersey.— State *v.* Newark Bd. of Health, 54 N. J. L. 325, 23 Atl. 949.

Rhode Island.— Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202.

United States.— Washington County Levy Ct. *v.* Woodward, 2 Wall. 501, 17 L. ed. 851. See also *infra*, VII.

82. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440. See *infra*, VII.

83. Smith Mun. Corp. 1769. See *infra*, VII.

84. Heyker *v.* Herbst, 106 Ky. 509, 50 S. W. 859, 51 S. W. 820, 20 Ky. L. Rep. 1983. And see *infra*, VII.

85. Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Todd *v.* Birdsall, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522; Rouse *v.* Moore, 18 Johns. (N. Y.) 407; Washington County Levy Ct. *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851; Elliott Mun. Corp: 219. See also, *infra*, VII, B.

86. Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718. And see *infra*, VII, B.

87. This relation of other boards to the common council is fixed by the charter, which may make them coördinate, in which case no such supervision is exercised by the council, as general agency, over the other municipal boards; or it may confer upon these boards only subordinate powers, or purely administrative functions, in which event the council, being endowed with the local legislative authority, may by virtue thereof prescribe regulations and enact by-laws which shall control and direct their course of action. Elliott Mun. Corp. 218.

88. Boards are *ex vi termini* bodies of officials, invested with powers which may be exercised only by the members in session collectively; and for the orderly and lawful performance of these functions there are rules to govern the members in meeting assembled, either adopted formally or recognized as established by long usage for all such bodies. Little Rock *v.* Board of Improvements, 42 Ark. 152; Holt *v.* Somerville, 127 Mass. 408; Bennett *v.* New Bedford, 110 Mass. 433; Schumm *v.* Seymour, 24 N. J. Eq. 143. And see *infra*, VII, B.

89. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440. And see *infra*, VII, B.

90. Decorah *v.* Bullis, 25 Iowa 12.

Mode of action in general see *infra*, V, B, 1, d.

91. Zumstein *v.* Mullen, 67 Ohio St. 382, 66 N. E. 140.

In Colorado the state constitution does not imperatively require local aldermanic representation in towns or cities. Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

In Pennsylvania the state census of 1870, being the latest list of "taxable inhabitants" made preceding the organization of the Philadelphia city government in 1872, determined the number of members of the common council which each ward was entitled to elect in October, 1872. Com. *v.* Omensetter, 9 Phila. 489. The act of 1874, limiting the number of aldermen in cities of the third class to

the corporation, or the creation of a new board, the new officers may be designated for temporary service by an act of assembly.[92] Under most state constitutions permanent members of governing boards must be chosen by the inhabitants to the number provided for by the charter, either specifically or on the basis of population.[93] The council when duly organized becomes a continuous body, even though the terms of its members should all expire at the same time; and a new city council may take up proceedings where they were left by the old council.[94] In municipalities where two wardens are *ex-officio* members of the council, a charter amendment, increasing the council to seven members, authorizes the election of only five councilmen, who, with the wardens, constitute the new council.[95]

b. Mayor or Other Chief Officer as Member of Body. The nature and function of the chief executive, whether called mayor, burgess, reeve, or warden, are declared in the charter, or in general statutes.[96] He may be a member of the body, and as such an integral part of the legislative department;[97] he may be its presiding officer as is almost universally the case in towns and smaller cities;[98] or he may be entirely separate from the legislative department, as the head of the executive department, after the manner of a state governor.[99] In his absence the

one for each ward, was held applicable to all cities of that class, whether incorporated under such act or under the act of May 23, 1889, which is silent upon the question of aldermen. Com. *v.* Hastings, 16 Pa. Co. Ct. 425.

In Rhode Island the provisions of the city charter of Newport, in so far as they withhold from registered voters the right to vote for aldermen and common councilmen, or do not extend such right to the registered voters, were held unconstitutional and void. *In re* Newport Charter, 14 R. I. 655.

92. People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074; Opinion of Justices, 138 Mass. 601; State *v.* Covington, 29 Ohio St. 102; Bridges *v.* Shallcross, 6 W. Va. 562.

93. State *v.* Champlin, 16 R. I. 453, 17 Atl. 52.

94. Booth *v.* Bayonne, 56 N. J. L. 268, 28 Atl. 381.

95. State *v.* Champlin, 16 R. I. 453, 17 Atl. 52.

In Pennsylvania, under the act of June 2, 1871, providing that the number of members of borough councils theretofore fixed at five should be six, and authorizing the proper courts in granting borough charters to direct that the burgess should serve as a member of the council, it was held that when the burgess was authorized to serve, only five members of the council were to be elected. Young's Petition, 11 Pa. Co. Ct. 209.

96. Ingersoll Pub. Corp. 221.

Election of chief burgess of borough in Pennsylvania see Com. *v.* Angle, 14 Pa. Co. Ct. 538.

97. See People *v.* Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. Rep. 498 (where it was said that a provision in a charter that "the mayor, recorder, and aldermen, when assembled together . . shall constitute the common council" makes the mayor a member of the council); State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

In North Carolina the intendant of the city of Raleigh under the early government was a member of the board of commissioners and entitled to participate in making ordinances for the regulation of the public market, etc. Raleigh *v.* Sorrell, 46 N. C. 49.

In Texas the Galveston City Charter, § 25 (Spec. Laws (1876), p. 16), makes the mayor a member of the city council, and the action of the council in dismissing a police officer does not require his subsequent assent. Doherty *v.* Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804.

98. Elliott Mun. Corp. 220.

99. Union Depot, etc., Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329; Cochran *v.* McCleary, 22 Iowa 75.

In California the Consolidation Act of 1856, section 68, requiring certain ordinances of the board of supervisors of the city and county of San Francisco to be presented to the mayor for approval before they should take effect, did not make the mayor a member of the board of supervisors as a "governing body." Jacobs *v.* San Francisco, 100 Cal. 121, 34 Pac. 630.

In Pennsylvania there have been numerous conflicting decisions in the lower courts throughout the state on the question whether the act of April 1, 1834, section 8, providing *inter alia* that "the burgess shall be president of the town council, and shall have and exercise all the rights and privileges of a member thereof," was impliedly repealed by the act of April 3, 1851, known as the "General Borough Law," and the supplementary act of June 2, 1871. See Com. *v.* Kempsmith, 13 Pa. Co. Ct. 667; Caroline *v.* Shellenberger, 13 Pa. Co. Ct. 145; Darrach *v.* Kenney, 12 Pa. Co. Ct. 391; Price *v.* Beale, 5 Pa. Co. Ct. 491; Kittell *v.* Richards, 5 Pa. Co. Ct. 487; Tunkhannock Borough Extension, 3 Pa. Co. Ct. 480; *In re* Beechwood Ave., 3 Montg. Co. Rep. 111; Com. *v.* Kepner, 10 Phila. 510. But the question was set at rest in 1893 by the decision of the supreme court in Zane *v.* Rosenberry, 153

council may have charter authority to elect a mayor *pro tem*, with all the powers of the office, or its power may be limited to the choice of one of its members as temporary chairman, who will possess only the authority of a presiding officer.[1] Cases have also arisen wherein, under the peculiar language of the charter, the mayor, or mayor *pro tem*, has been authorized to vote as a member of the council, and cast another vote in case of a tie, and also to exercise the veto power of a municipal executive.[2] When the president or chairman of the council vacates his seat and refuses further to act in the office, then even though he remains in the council chamber, the council may elect a president *pro tem* to perform the functions of the office.[3]

c. Organization. The organization of a common council must be effected in conformity to the provisions of the municipal charter, and of the general law.[4]

Pa. St. 38, 25 Atl. 1086 [*affirming* 12 Pa. Co. Ct. 382], wherein it was held that the said act of 1834, section 8, was repealed by the act of 1871, section 2, fixing the number of councilmen at six and giving power to the courts to "change the charter of any borough so as to authorize the burgess" to serve as a member of the town council, so that, where the charter is not so changed, the burgess is not entitled to act as a member of council. It was further held that the right of the burgess as a member and presiding officer of the council is not recognized by the said act of April 3, 1851, providing (section 6) that "it shall be the duty of the chief burgess to sign the several by-laws, rules, regulations, and ordinances adopted after they shall have been duly and correctly transcribed by the secretary," and (section 8) that "the secretary shall transcribe the by-laws, rules, regulations and ordinances, adopted into a book, kept for that purpose, and when signed by the presiding officer shall attest the same." Zane *v.* Rosenberry, *supra*. The act of March 23, 1893 (Pamphl. Laws 113), providing that the voters of "every borough in the commonwealth" should in February, 1894, etc., elect a burgess who should not be a member of nor preside at the meetings of the council, and that all inconsistent acts were repealed, operated to repeal special charters of boroughs providing that the burgess was a member and presiding officer of the council. Bridgeport *v.* Schneipp, 15 Pa. Co. Ct. 150.

Injunction.— It has been held that where the burgess of a borough undertakes to act as president of councils without any color of right to do so, equity will assume jurisdiction to prevent confusion and delay, as well as danger to the public interests, and an injunction will issue. Carline *v.* Shellenberger, 13 Pa. Co. Ct. 145; Zane *v.* Rosenberry, 12 Pa. Co. Ct. 382 [*affirmed* in 153 Pa. St. 38, 25 Atl. 1086].

1. People *v.* Blair, 82 Ill. App. 570 (wherein it is held that if the mayor is in the city, but is absent from the meeting, either by reason of illness, executive business in another part of the city, or by choice, the power of the council is confined to the appointment of a temporary president or chairman who will possess the authority of presiding officer only, and not that of the mayor); Com. *v.* Corcoran, 9 Kulp (Pa.) 507.

Appointment of presiding officer pro tempore see the following cases:

California.— Truman *v.* San Francisco, 110 Cal. 128, 42 Pac. 421.

Kentucky.— Keith *v.* Covington, 109 Ky. 781, 60 S. W. 709, 22 Ky. L. Rep. 1414.

Missouri.— Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769, holding that the approval of an ordinance by the acting president of the board of aldermen in the absence of the mayor was sufficient where the statute provided that in the absence of the mayor he should perform the duties with all the rights, power, and jurisdiction of the mayor.

New York.— People *v.* Brush, 31 N. Y. Suppl. 586.

Washington.— Cline *v.* Seattle, 13 Wash. 444, 43 Pac. 367.

In Nebraska, Comp. St. (1903) c. 13, § 13, art. 1, as amended by Laws (1905), c. 16, providing that the mayor of a city shall be *ex-officio* president of the council and preside at the meetings and appoint standing committees, and section 27, providing that in case of the absence or disability of the mayor the president of the council shall exercise his powers, are not in conflict because the first provides for a president *pro tem* of the council in the absence or disability of the mayor, and the other designates the officer as president of such body. State *v.* Dunn, (1906) 107 N. W. 236.

2. State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205. See also *infra*, V, B, 4, e.

3. Keith *v.* Covington, 109 Ky. 781, 60 S. W. 709, 22 Ky. L. Rep. 1414; Heyker *v.* McLaughlin, 106 Ky. 509, 50 S. W. 859, 51 S. W. 820, 20 Ky. L. Rep. 1983.

4. Oakland *v.* Carpentier, 13 Cal. 540.

Election of president see Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650]; People *v.* Strack, 1 Hun (N. Y.) 96, 3 Thomps. & C. 165. See also *supra*, V, B, 1, b.

Number of votes to elect officers on organization of council see *infra*, V, B, 4, d, (I), text and note 21.

And in details for which there is no provision made by the charter or statute the common council must conform its proceedings for organization to the laws and usages of the body, or, lacking these, to rules and customs of similar bodies in analogous cases.[5] Members holding over are entitled to have their names first enrolled, after which the new members elected should be required to present their certificates to be passed upon, and have their names enrolled, if they are approved.[6] Existing boards in a public corporation about to be merged into a municipality of a different class under a law providing for their continuance in office until their successors are elected and qualified become instanter the council of such new corporation directly the merger is effected as required by law.[7] But such merger under general law can be effected only by corporate action or valid election, and ordinances passed by the old board under the new charter or corporation are wholly invalid.[8] The question of the validity of two rival municipal organizations cannot be tried and determined in an action of assumpsit against the corporation for breach of contract by one of them.[9]

d. Mode of Action in General. Where the method of exercising the corporate powers is specially prescribed by charter, or by general law, such method must be pursued in order to give validity to the action taken thereunder.[10] If no mode is prescribed the council may exercise the power in any appropriate method.[11] Thus, in the absence of a specific method designated by charter, an order or resolution may be employed as effectively as an ordinance to make a contract, order a special

Filing certificate of election of members.— Burns Annot. St. Ind. (1901) § 4331, requiring a certificate of the election of town trustees to be filed in the office of the clerk of the circuit court before any valid ordinance can be passed by them, applies, in view of section 4333, providing for the election of only a part of the trustees at any one time, only to the first election of town trustees, which is held upon the incorporation of the town, and has no application to subseqnent elections. Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822.

Lots to determine short and long terms.— Where five members of the city council were chosen at an election, and by an oversight it was not indicated which of them was to fill an unexpired term, it was held that the proper way of settling the dispute as to which should take the short term was to cast lots. Hobbs *v.* Uppington, 89 S. W. 128, 28 Ky. L. Rep. 131.

Failure to organize vacating offices.— In Pennsylvania by statute, if the councilmen in any borough fail to organize for the transaction of business within ten days after the time fixed by law for such organization, the court of quarter sessions, upon proper complaint and on rule to show cause, as provided in the statute, may declare the seats of the delinquent councilmen vacant and appoint others in their stead. Pa. Act. March 27, 1897 (Pamph. Laws 8). See *In re* Lemoyne Borough Councilmen, 15 Pa. Dist. 241, where, on refusal of part of the members declared elected councilmen to attend meetings, so that it was impossible to organize, the court declared the seats of all the councilmen vacant under this statute.

5. Kerr *v.* Trego, 47 Pa. St. 292.

On the division of a municipal council into two parts, each claiming to be the true council, the test of their legality is which of them has maintained the regular forms of organization, according to the laws and usages of such body, or, in the absence of this, in accordance with the laws and customs of similar bodies in analogous cases. Kerr *v.* Trego, 47 Pa. St. 292.

6. Kerr *v.* Trego, 47 Pa. St. 292.

7. Bybee *v.* Smith, 61 S. W. 15, 22 Ky. L. Rep. 1684.

8. Bybee *v.* Smith, 61 S. W. 15, 22 Ky. L. Rep. 1684.

9. Giles *v.* Winton, 4 Lack. Leg. N. (Pa.) 171.

10. *Colorado.*— Central *v.* Sears, 2 Colo. 588.

Indiana.— Brazil *v.* McBride, 69 Ind. 244. The common council of a city can only contract by an order, resolution, or ordinance passed in the manner required by statute; and when thus made it can be repealed or annulled only by a vote of the council. Terre Haute *v.* Lake, 43 Ind. 480.

Missouri.— Cape Girardeau *v.* Fougeu, 30 Mo. App. 551.

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

New Jersey.— Paterson *v.* Barnet, 46 N. J. L. 62.

Oregon.— Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835.

Texas.— San Antonio *v.* Micklejohn, 89 Tex. 79, 33 S. W. 735.

See 36 Cent. Dig. tit. "Municipal Corporations," § 188.

Mode of contract in general see *infra*, IX.

Public improvements and contracts therefor see *infra*, XIII.

Necessity to act as a board see *supra*, V, A, 2, text and note 75.

11. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802; Green *v.* Cape May, 41 N. J. L. 45. Where the council is vested with full power over a subject, and the mode

election or choose officers.[12] As a rule, however, an officer's salary cannot be ordered to be paid before the passage of an ordinance fixing the salary.[13] Where a municipal charter requires a proceeding to be instituted by an ordinance, it cannot be instituted by a resolution,[14] and an office created by ordinance, as authorized by the charter, cannot be abolished by resolution.[15]

2. Qualifications of Members — a. In General — (i) *In the United States.* The qualifications for membership in governing bodies, being prescribed by each state for its own municipalities, are necessarily far from uniform in the United States. Indeed there is diversity in the several corporations of each of those states wherein special charters are allowed to be granted.[16] Usually, no doubt, members are required to be resident voters owning real estate in the corporation and ward they represent.[17] In some states they are prohibited from holding another public office under authority of the state or of the United States, the statutes varying in the different states, and are disqualified as councilmen if they do so.[18]

of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient, and may act by its officers or properly authorized agents, and contract like an individual. Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835.

12. Chicago *v.* McKechney, 91 Ill. App. 442; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543; Brady *v.* Bayonne, 57 N. J. L. 37?, 30 Atl. 968; Butler *v.* Passaic, 44 N. J. L. 1?1; Burlington *v.* Dennison, 42 N. J. L. 165; Green *v.* Cape May, 41 N. J. L. 45; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859. Where a statute authorized a city corporation to elect commissioners, and the corporation appointed them by resolution, it was held that, as no mode of election was prescribed by the statute, this was a good exercise of the power. Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302. A special election may be called by an order of the council instead of by ordinance, in the absence of statutory or charter provision to the contrary. O'Laughlin *v.* Kirkwood, 107 Mo. App. 302, 81 S. W. 512. A charter provision that the city shall not be liable on "any contract unless the same is authorized by ordinance, and made in writing," etc., was held to be limited to those cases in which the power of the corporation must be exercised by ordinance and the work let to the lowest bidder after notice, so that it did not apply where the council was directly authorized to do the work, without the formality of an express contract. Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835. See also *infra*, VI, A, 1.

13. Thus it has been held that a city council empowered to fix the compensation of city officers must fix the same by ordinance, and not by resolution; and a city officer cannot recover salary fixed by resolution only. Central *v.* Sears, 2 Colo. 588. As a general principle, an ordinance by a city council to pay a municipal officer his salary should be founded upon another ordinance fixing the salary of the office, for public officers ought to have a fixed compensation so as not to be dependent upon councils, who are but trustees of public functions and ought not to vote money as a matter of grace or favor. Smith *v.* Com., 41 Pa. St. 335.

Assumpsit on implied contract.— Under an act for the incorporation of cities, providing that the salaries of all city officers must be fixed by ordinance by the common council, it has been held that a city officer cannot sue in assumpsit as on an implied contract to recover an alleged balance on salary as such officer. Brazil *v.* McBride, 69 Ind. 244.

Salary or other compensation of officers see *infra*, VII, A, 13.

14. Paterson *v.* Barnet, 46 N. J. L. 62. See also Brazil *v.* McBride, 69 Ind. 244. In the absence of an affirmative showing that a resolution is passed with the same formalities, and notified to the public in the same manner, as an ordinance, an act which a municipal charter requires to be done by ordinance cannot be done by resolution; nor can a general ordinance authorize it to be done. Cape Girardeau *v.* Fougeu, 30 Mo. App. 551. See also *infra*, VI, A, 1.

Resolution or ordinance as to improvements see *infra*, XIII, B, 8, a, (II).

Contracting "pecuniary liability."— Under La. Rev. St. § 2448, forbidding cities to contract any "pecuniary liability," except by ordinance, it was held that the prohibition did not extend to a debt for gas-lighting of streets, which was for the city's current expenses, and payable out of the current revenues of the several years in which it was contracted. Laycock *v.* Baton Rouge, 35 La. Ann. 475.

15. San Antonio *v.* Micklejohn, 89 Tex. 79, 33 S. W. 735.

16. Illustration of this was found in the state of Ohio in the days of special charters, when the peculiar preferences of the settlers of the western reserve from Connecticut, of the eastern counties from Pennsylvania, and of the Scioto valley from Virginia, found diverse expression in the charters given to the towns and cities in these several sections.

17. See the statutes of the several states.

18. People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659. And see Davenport *v.* New

(11) *In England and Canada.* In England the qualifications for burgess are prescribed by the Municipal Corporations Act;[19] and in Canada municipal corporations follow more closely the British model; and the requirements for membership of the municipal council are more uniform as well as more exacting than in the United States. He must be not only an inhabitant freeholder owning an unencumbered estate of fixed value, but must actually have been assessed on the roll,[20] and have paid his taxes thereon;[21] and he must not be an innkeeper or dealer in spirituous liquors.[22] Moreover he must have made and published a declaration of essential qualifications in announcing his candidacy.[23]

b. Determination of Qualification and Election. A person having the required certificate of election to membership in a city council is presumably a member elect thereof, and has the right to have his name placed on the council roll and to participate as a member.[24] But those lacking such certificate, even though duly elected, must bide their time until competent authority has made due declaration of their election.[25] The certificate of election is the only evidence admissible at the organization of the board;[26] and it is conclusive for that occasion and purpose.[27] The legislature has the power, in some states by express constitutional provision, to declare what tribunal shall determine the qualifications of members of governing boards and councils, and what effect shall be given to the decision.[28]

York, 67 N. Y. 456; State *v.* De Gress, 53 Tex. 387.

In Indiana, however, it was held that the office of city councilman, to which compensation is attached, although it is a "lucrative office," is not within Ind. Const. art. 2, § 9, which provides that "no person holding a lucrative office or appointment, under the United States, or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted," since such office is an office purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state. State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239.

19. They are: (1) That he is of full age; (2) occupancy, on July 15, and for twelve months next preceding, of a house, warehouse, counting house, shop, or other building in the corporate boundaries; (3) residence in the borough or within seven miles thereof for the year next preceding; (4) rating for all the poor rates made during the same period; (5) payment of all rates before 20 July previous to election; (6) is not an alien or alms-receiver. Mun. Corp. Act (1882).

20. Reg. *v.* McIntosh, 46 U. C. Q. B. 98.

Residence of candidate see Reg. *v.* Rochester, 7 Can. L. J. 102; Reg. *v.* Smith, 7 Can. L. J. 66.

21. Reg. *v.* Boyd, 4 Ont. Pr. 204.

22. Reg. *v.* McMahon, 7 Can. L. J. 155; McKay *v.* Brown, 5 Can. L. J. 91. An unlicensed person who, under the color of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail, is not disqualified under Mun. Act (1877), § 71, from holding the office of alderman, although he may have rendered himself liable to penalties for breach of the liquor license acts. Reg. *v.* Conway, 46 U. C. Q. B. 85.

Lease of inn before election see Reg. *v.* Taylor, 6 Can. L. J. 60.

Transfer of interest in license see Reg. *v.* Booth, 3 Ont. 144.

23. Reg. *v.* Dickey, 1 Can. L. J. N. S. 190; Reg. *v.* Ferris, 5 Ont. Pr. 241. Notwithstanding the use of the word "estate," in the declaration of a candidate under the Consolidated Municipal Act of 1873, he is nevertheless qualified, if the rating of the value on the roll is sufficient in amount. No change has been made in the law that encumbrances are not to be considered in ascertaining the amount of qualification. Reg. *v.* McLean, 6 Ont. Pr. 249. Where the declaration of qualification had not been made, leave was given to defendant to make the same within ten days, otherwise leave was granted to file an information on the ground that defendant illegally exercised the franchises of the office. Reg. *v.* Conway, 46 U. C. Q. B. 85.

24. Com. *v.* Philadelphia, 9 Pa. Dist. 257, 23 Pa. Co. Ct. 631; Com. *v.* McAllister, 24 Pa. Co. Ct. 96.

25. Com. *v.* Philadelphia, 9 Pa. Dist. 257, 23 Pa. Co. Ct. 631.

26. Com. *v.* McAllister, 24 Pa. Co. Ct. 96.

The common council of a city sitting as a board of canvassers under the charter have power only to canvass or count the number of votes given at elections, as returned from the different wards, and to declare elected the persons appearing to have the highest number of votes as members of council. It cannot, as such board of canvassers, go into an investigation as to which received in point of fact the highest number of votes. Hanna *v.* Rahway, 33 N. J. L. 110.

27. People *v.* Fornes, 79 N. Y. App. Div. 618, 80 N. Y. Suppl. 385 [*affirmed* in 175 N. Y. 114, 67 N. E. 216].

28. Cripple Creek *v.* Hanley, 19 Colo. App.

Usually the council or board is itself vested by charter or statute with exclusive power to decide the election and qualifications of its members, and such decision is in most jurisdictions final and conclusive, at least except on review as to questions of law.[29] In some states, however, such statutes do not oust the courts of law of their inherent or statutory power to issue a quo warranto to determine qualifications or, by certiorari or other appropriate process, prevent the usurpation

390, 75 Pac. 600; New Orleans *v.* Morgan, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232.

29. *California.*— People *v.* Metzker, 47 Cal. 524.

Colorado.— Booth *v.* Arapahoe County Ct., 18 Colo. 561, 33 Pac. 581.

Illinois.— Massey *v.* People, 201 Ill. 409, 66 N. E. 392; Keating *v.* Stack, 116 Ill. 191, 5 N. E. 541. The city council in cities incorporated under the general law is the exclusive judge of the election and qualifications of its members, and the courts will not exercise jurisdiction to hear and determine such election and qualification, except at the suit of the people in quo warranto proceedings to determine the *de jure* right of such member to act. Evanston *v.* Carroll, 92 Ill. App. 495. Under the Cities and Villages Act, art. 3, § 6, and art. 11, §§ 8, 9, giving the village board of trustees the power to pass upon the qualifications of its members, the county court has no jurisdiction of a proceeding to contest the election of such trustees. Foley *v.* Tyler, 161 Ill. 167, 43 N. E. 845.

Louisiana.— New Orleans *v.* Morgan, 7 Mart. N. S. 1, 18 Am. Dec. 232.

Michigan.— People *v.* Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. Rep. 498; Doran *v.* De Long, 48 Mich. 552, 12 N. W. 848; Alter *v.* Simpson, 46 Mich. 138, 8 N. W. 724; People *v.* Fitz Gerald, 41 Mich. 2, 2 N. W. 179.

New Hampshire.— Cate *v.* Martin, 69 N. H. 610, 45 Atl. 644.

Oregon.— Simon *v.* Portland, 9 Oreg. 437.

Texas.— See State *v.* De Gress, 72 Tex. 242, 11 S. W. 1029; State *v.* De Gress, 53 Tex. 387.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 189, 190.

Constitutionality.— An act providing that the city council shall be judge of the election of mayor and recorder, and of its members, is not unconstitutional as vesting a judicial power in the council. New Orleans *v.* Morgan, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232.

Operation of amendment conferring power. — Where an amendment of a city charter provided that the board of councilmen should be the final judge of the election returns, and of the validity of elections and qualifications of its own members, whereas prior to the amendment the superior court had jurisdiction of the matter, it was held that the board of councilmen had jurisdiction in the case of an election held prior to the passage of the amendment. Selleck *v.* South Norwalk, 40 Conn. 359.

Extent of power.— The power given to the mayor and aldermen by a provision in the city charter to judge and decide as to the election and qualifications of their own members applies only to a contest between two or more members claiming membership by election to the same board, and it does not enlarge the power and duty conferred by other sections of the charter to act as supervisors in the elections of their successors in counting the votes and declaring the result. Hudmon *v.* Slaughter, 70 Ala. 546.

Election and qualification of mayor.— Where the charter of a municipality makes the common council the judge of the election and qualifications of its members, and gives it the power to determine contested elections, and the mayor is a member of the council, it has the power to determine his election and qualifications. Booth *v.* Arapahoe County Ct., 18 Colo. 561, 33 Pac. 581; People *v.* Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. Rep. 498.

Forfeiture of office.— Although under a city council's charter authority to judge of the election and qualifications of its members and determine contested elections of city officers, the council may "refuse the seat" to one claiming to have been elected mayor, because of disqualification, or "may remove him because of continuing disqualification," its action in declaring him elected and installing him into office cannot oust the courts of their constitutional jurisdiction to inquire into the forfeiture of the office, as by accepting another office under the state or the United States. State *v.* De Gress, 53 Tex. 387.

In New Jersey, section 26 of the charter of the city of Camden, enacting that the city council should be the sole judge of the election returns and the qualifications of its own members, was not repealed by the act entitled "An act to regulate elections," which gives jurisdiction generally to circuit courts to hear and determine contested elections of city officers. Henry *v.* Camden, 42 N. J. L. 335.

Mandamus.— Where the common council are by charter given the right, in effecting their organization, to judge of the election and qualifications of their members, it is their duty to execute the power, and if they refuse, mandamus will lie to compel them to perform the duty. Henry *v.* Camden, 42 N. J. L. 335.

Necessity for determining qualifications.— A charter or statute providing that the city council shall judge by a majority vote of the qualifications of its members has application only where a seat is contested, and does not require determination of the quali-

of office without legal election thereto, or review the determination of the council or board.[30] It has been held that charter power in a council to judge of the election returns and qualification of its members authorizes it by ordinance to provide for contesting the election and to make the contest triable before itself.[31] In Canada quo warranto seems to be the usual proceeding for determining the election and qualification of councilmen.[32] Proceedings by a council to determine the election and qualifications of a member must of course be conducted in accordance with its charter and with the law.[33] Whenever the council is judge of the election and qualification of its own members, the action of a council assuming to determine such matters for its successor is null and void;[34] the power rests in the incoming not the outgoing council.[35] On the other hand, where the charter makes the common council judges of the election and qualifications of its members, a subsequent council cannot review the action of its predecessor.[36]

fications of members as to whom there is no contest. Jobson *v.* Bridges, 84 Va. 298, 5 S. E. 529.

30. *Missouri.*— State *v.* Fitzgerald, 44 Mo. 425, holding that a charter provision that the board of councilmen should judge of the qualifications, elections, and returns of the members thereof did not, in the absence of express words to that effect, make their judgment final and conclusive or exclude the common-law jurisdiction of the courts therein.

New Jersey.— Meachem *v.* New Brunswick, 73 N. J. L. 121, 62 Atl. 303 (holding that the common council of New Brunswick, in declaring vacant a seat of one of its members under the charter provision that the common council should be the sole judge of elections, returns, and qualifications of its own members, was subject to the supervisory jurisdiction of the supreme court, which could set the proceedings aside on certiorari on its appearing that the action of the council was not justified by any evidence whatever); Henry *v.* Camden, 42 N. J. L. 335.

New York.— McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106 [*reversing* 1 Hun 35, 3 Thomps. & C. 131]; People *v.* Hall, 80 N. Y. 117 [*reversing* a judgment of the general term which *affirmed* 58 How. Pr. 147]; People *v.* Hull, 64 Hun 638, 19 N. Y. Suppl. 536.

Pennsylvania.— Auchenbach's Contested Election, 5 Pa. Co. Ct. 153, holding that the Municipal Act of May 24, 1887, section 4, providing that each branch of councils shall judge the qualifications of its members, and contested elections shall be determined by courts of law, does not make councils the exclusive judges of such qualifications; but they are *prima facie* judges until the courts of law determine the question, and then the decision of the court must prevail. See also Com. *v.* Bumm, 31 Leg. Int. 340. *Compare* Snyder *v.* Smith, 1 Leg. Gaz. 35.

Washington.— State *v.* Morris, 14 Wash. 262, 44 Pac. 266, holding that the jurisdiction to entertain quo warranto to determine who is entitled to the office of councilman of a city under Const. art. 4, § 6, providing that the superior court shall have original jurisdiction of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, is not ousted by Gen. St. § 634, providing that the city council shall judge of the qualifications of its members and of all election returns, as the latter statute affords merely a cumulative remedy.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 189, 190.

An injunction will not issue against a person about to vote as a city alderman on questions affecting the property of plaintiff, although he is without lawful authority to do so, plaintiff's remedy being by quo warranto. Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121. And see INJUNCTIONS, 22 Cyc. 888.

31. *Ex p.* Strahl, 16 Iowa 369. See also Keating *v.* Stack, 116 Ill. 191, 5 N. E. 541.

32. Reg. *v.* Frizell, 6 Ont. Pr. 12; Reg. *v.* Lindsay, 18 U. C. Q. B. 51.

33. See Winters *v.* Warmolts, 70 N. J. L. 615, 56 Atl. 245.

Voting by person interested.— Under a statute empowering the board of aldermen to judge of qualifications of its members, a vote determining a certain alderman duly qualified during a certain year, which was taken while the alderman in question was holding over as an officer *de facto*, and which would not have been carried without his vote, cannot be considered in determining his right to the office. Winters *v.* Warmolts, 70 N. J. L. 615, 56 Atl. 245. And see *infra*, V, B, 4, d, (II).

Reconsideration see *infra*, V, B, 4, g.

34. Stack *v.* Com., 118 Ky. 481, 81 S. W. 917, 26 Ky. L. Rep. 343.

35. Green *v.* Adams, 119 Ala. 472, 24 So. 41.

In Michigan, under Grand Rapids City Charter (1877), tit. 10, § 4, making the common council judge of the election and qualification of its members and authorizing it to determine contested elections, such duty falls on the new body; tit. 2, § 20, providing that the council of the preceding year shall meet after election and determine what persons are duly elected, refers only to officers, the determination of whose election is not vested elsewhere. Hilton *v.* Grand Rapids, 112 Mich. 500, 70 N. W. 1043.

36. Doran *v.* De Long, 48 Mich. 552, 12 N. W. 848.

3. MEETINGS — a. Time and Place in General. Meetings of municipal bodies are of two kinds: (1) Regular or stated; and (2) called or special.[37] The former are held at the time and place appointed by charter, ordinance, or regulation, or by general law, for the assemblage of the body for the transaction of all municipal business intrusted to it by law.[38] They are usually held weekly or monthly, according to the extent of the municipal business, and at the council room, or other room in the city hall or town hall assigned to the use of the body.[39] As a rule a meeting held at an unauthorized time or place is illegal.[40]

b. Special Meetings. Special meetings are those called for other than the regular dates of meetings, or at another place than the usual room or hall.[41] It is well settled that municipal affairs may be transacted and valid obligations assumed by the corporation at a special as well as a regular meeting.[42] Two things only are essential to validity: (1) That authority exists to call such a meeting;[43] (2) that it is called pursuant to such authority.[44] Then if all members are duly notified or present,[45] a valid meeting may be held and corporate business may be legally transacted.[46]

37. Ingersoll Pub. Corp. 218.

38. Fitzgerald *v.* Pawtucket St. R. Co., 24 R. I. 201, 52 Atl. 887; Willcock Mun. Corp. § 59.

39. North *v.* Cary, 4 Thomps. & C. (N. Y.) 357.

40. Shugars *v.* Hamilton, 92 S. W. 564, 29 Ky. L. Rep. 127.

Meeting of old council after time for organization of new.— Under a city charter providing that the council should meet for organization at a certain time, and that officers should hold their respective offices until election and qualification of their successors, it was held that the old council had no authority to hold a meeting after the time set for the organization of the new council, except to act in an emergency in case the new members did not qualify. Fitzgerald *v.* Pawtucket St. R. Co., 24 R. I. 201, 52 Atl. 887.

Unauthorized place.— Where a city council has designated by ordinance the place at which meetings of the council shall be held, a meeting held in another place, unless a cogent reason may be shown why it was not held at the regular place, is unauthorized, under Ky. St. (1903) § 3633, providing that all meetings of the council shall be held at such place as may be designated by ordinance. Shugars *v.* Hamilton, 92 S. W. 564, 29 Ky. L. Rep. 127.

41. Lord *v.* Anoka, 36 Minn. 176, 30 N. W. 550.

42. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; People *v.* Batchelor, 22 N. Y. 128; and cases cited in the notes following.

Statement of object by mayor on assembling.— Under St. Louis Charter, art. 4, § 18, providing that the mayor shall state to the council, when assembled in special session, the objects for which they have been convened, and their action shall be confined to such objects, it was held that the mayor could not enlarge the scope of legislation by stating in his message calling such session that he was not averse to submitting any measure during the session, if deemed of public interest, and that an ordinance passed at the submission of the mayor during the session was void. St. Louis *v.* Withaus, 90 Mo. 646, 3 S. W. 395 [*affirming* 16 Mo. App. 247].

43. Provision for special meetings and the method of calling them is usually found in the charter; but if not, it seems that they may be provided for by ordinance of the corporation (State *v.* Kantler, 33 Minn. 69, 21 N. W. 856), and they may be held at any time by the consent and presence of all members of the body (Lord *v.* Anoka, 36 Minn. 176, 30 N. W. 550; Willcock Mun. Corp. §§ 79, 80). A charter provision requiring a council to meet at such a time and place as they by resolution may direct is mandatory and directory, but not prohibitory, and will not prevent a valid special meeting being held at other times and places. State *v.* Smith, 22 Minn. 218. Under the Kansas City charter provision that the common council shall meet on certain specified days and not oftener, unless especially convened by the mayor in pursuance of law, and that the mayor shall call special sessions by proclamation, which shall be published as may be provided by ordinance, it was held that, in the absence of such ordinance, special meetings of the council called by proclamation of the mayor and all acts of the council at such meeting was illegal. Forry *v.* Ridge, 56 Mo. App. 615.

44. Forry *v.* Ridge, 56 Mo. App. 615. At common law a meeting can be summoned only by the mayor; and it was an indictable offense to convene and elect a presiding officer in his absence, and without his permission. Willcock Mun. Corp. § 94. But modern American charters usually provide for a call to be made by the clerk on the authority of a specified number of members of the body. See *infra*, V, B, 3, d.

45. **Call and notice of meeting** see *infra*, V, B, 3, d.

46. *Illinois.*— Schofield *v.* Tampico, 98 Ill. App. 324.

Iowa.— Moore *v.* Perry, 119 Iowa 423, 93 N. W. 510.

Minnesota.— State *v.* Smith, 22 Minn. 218.

c. Adjourned and Continued Meetings. Meetings of the council or board on a day other than the stated one for regular meetings, assembled pursuant to adjournment of the regular meetings, are not special meetings, nor a distinct class of meetings, but according to the great weight of authority are regular meetings with all the power and authority for municipal affairs possessed on the stated day for assembling, and all municipal action taken at such meeting is as valid as if taken on the first day of the session.[47] A possible exception to this general rule may be found in municipal action taken at the adjourned meeting on new matter not introduced on the first day of the session.[48] But even in such case legislation has been sustained, although introduced at the adjourned meeting, because it was germane to a general subject under consideration at the first meeting.[49] Nothing contrary appearing of record, the adjournment is presumed to have been regular.[50]

Nebraska.— Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

Ohio.— Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

See *infra*, V, B, 3, d.

47. *Maine.*— Auburn *v.* Paul, 84 Me. 212, 24 Atl. 817, holding that, where an act of the legislature was not to take effect until its acceptance by a city council at a meeting legally called therefor, the act might be accepted at a regularly adjourned meeting duly held after a regular session of the council, and that no previous notice of the business to be acted on was necessary to render its acceptance valid.

Minnesota.— State *v.* Smith, 22 Minn. 218.

Nebraska.— Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786; *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

New Hampshire.— Kimball *v.* Marshall, 44 N. H. 465, holding also that where an adjournment of a meeting of the mayor, aldermen, and council for the election of a city clerk was voted, one half of the aldermen could not remain away from the adjourned meeting and defeat the action of those who attended; and that they were bound to take notice of it as well as of the time appointed for the election.

New Jersey.— Stiles *v.* Lambertville, 73 N. J. L. 90, 62 Atl. 288 (holding that the session of a city council convened in pursuance of a special motion adopted at a regular meeting to adjourn the meeting to a stated time is a continuation of the regular meeting, and at such session the council can do anything that it could have done at the early session); Hudson County *v.* New Jersey R., etc., Co., 24 N. J. L. 718.

Pennsylvania.— Com. *v.* Fleming, 23 Pa. Super. Ct. 404 (holding that a regular meeting of a borough council may adjourn to a definite future day, and at such adjourned meeting the body may transact any business which might have been transacted at the meeting from which the adjournment was had); Avoca *v.* Pittston, 7 Kulp 470 (to the same effect).

See 36 Cent. Dig. tit. "Municipal Corporations," § 194.

Adjournment or continuance in absence of quorum.— Under the charter of the city of Bridgeport giving the aldermen present at any meeting of the board, if less than a quorum, power to require the mayor to issue a warrant to arrest and bring in the absent members, it was held that where less than a quorum met pursuant to the call of the mayor for the meeting, and a majority of those present remained continuously in the aldermanic chamber for nearly two days, to keep the meeting alive, while an effort was being made to arrest and bring in the absent members, the meeting was legally continued to the end of such time, and business then transacted by a quorum was legal. State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653. So, under the Portland City Charter, § 66, providing that a majority of the members of a council shall constitute a quorum to do business, but a less number may meet and adjourn from "time to time," and under an ordinance of the council providing that in case a quorum is not present, the chief of the police shall inform the absent members that their presence is required, and that in case they fail to appear on such notice, the members present shall adjourn to the next "regular" meeting, it was held that where there is no quorum present, and the chief of police does not notify the absent members to attend, the members present may adjourn to a day specially set, under said section 66, and need not adjourn to the next regular meeting in accordance with the ordinance. Duniway *v.* Portland, 47 Oreg. 103, 81 Pac. 945.

48. By the common law it seems that adjournment could be had only for a reasonable cause, as, that the meeting occurred on Christmas day, or that the business of the session could not all be transacted on one day. Willcock Mun. Corp. § 60. In such cases obviously no exception like this would apply. But under the wide discretion now allowed to bodies to adjourn at will, it is questionable whether at an adjourned meeting return can be made in the order of business to a section completed at the original meeting and action taken upon matters pertaining thereto not mentioned on that day.

49. Avoca *v.* Pittston, 7 Kulp (Pa.) 470.

50. Hudson County *v.* New Jersey R., etc., Co., 24 N. J. L. 718.

d. Call and Notice. Regular or stated meetings require no other call or notice than the charter or by-law gives, as every member is assumed to be thus duly notified by law of the time and place for assembly;[51] and this rule applies to an adjourned meeting duly held after a regular or stated meeting;[52] but it is essential to the validity of special meetings and of action taken thereat either that all members be voluntarily present,[53] or that all within the city be duly notified to attend at the time and place appointed;[54] and also of the business to be transacted if it be special or unusual.[55] The call for special meetings is usually authorized

51. Fitzgerald *v.* Pawtucket St. R. Co., 24 R. I. 201, 52 Atl. 887; Rex *v.* Hill, 4 B. & C. 426, 441, 443, 10 E. C. L. 644; Willcock Mun. Corp. § 59.

52. Auburn *v.* Paul, 84 Me. 212, 24 Atl. 817.

53. *Illinois.*— Schofield *v.* Tampico, 98 Ill. App. 324.

Iowa.— Moore *v.* Perry, 119 Iowa 423, 93 N. W. 510.

Minnesota.— Lord *v.* Anoka, 36 Minn. 176, 30 N. W. 550; State *v.* Smith, 22 Minn. 218.

Nebraska.— Magneau *v.* Fremont, 30 Nebr. 843, 851, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786, where it is said: "It seems clear to us that when all the members of the council and the mayor meet and act as a body, they may at such meeting, or at any adjourned session thereof, transact any business within the powers conferred by law, notwithstanding no written call for the meeting was made by the mayor or two councilmen, or in case one was made which failed to specify the purpose of the meeting."

Ohio.— Young *v.* Rushsylvania, 8 Ohio Cir. Ct. 75, 4 Ohio Cir. Dec. 319; Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

See 36 Cent. Dig. tit. "Municipal Corporations," § 195 *et seq.*

The unanimous consent of the entire membership of the board at a special meeting voluntarily assembled is considered a waiver of call and notice; and ordinances thus passed and contracts thus made have been upheld as valid. Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786; and other cases cited *supra*, this note.

Where all but one are present, parol proof of service of notice on him is admissible to validate proceedings. Gill *v.* Dunham, (Cal. 1893) 34 Pac. 68.

54. *California.*— Harding *v.* Vandewater, 40 Cal. 77.

Connecticut.— State *v.* Kirk, 46 Conn. 395; Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Kansas.— Rogers *v.* Slonaker, 32 Kan. 191, 4 Pac. 138.

Kentucky.— Shugars *v.* Hamilton, 92 S. W. 564, 29 Ky. L. Rep. 127, holding that under St. (1903) § 3633, providing that special meetings of the council may be held on written notice of the proposed meeting, notice of special meetings must be given to each member of the council, and special meetings called without such notice are invalid, when any of the members are absent.

Maryland.— Burgess *v.* Pue, 2 Gill 254.

Massachusetts.— Wiggin *v.* Lowell First Freewill Baptist Church, 8 Metc. 301.

Michigan.— Lewick *v.* Glazier, 116 Mich. 493, 74 N. W. 717.

Minnesota.— Lord *v.* Anoka, 36 Minn. 176, 30 N. W. 550.

New York.— See People *v.* Batchelor, 28 Barb. 310 [*affirmed* in 22 N. Y. 128].

Pennsylvania.— *In re* Chad's Ford Turnpike Road, 5 Binn. 481.

Tennessee.— Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; London, etc., Land Co. *v.* Jellico, 103 Tenn. 320, 52 S. W. 995.

Texas.— Cassin *v.* Zavalla County, 70 Tex. 419, 8 S. W. 97.

See 36 Cent. Dig. tit. "Municipal Corporations," § 195 *et seq.*

Where service of notice on one is not legally practicable, because he is absent from the city, proceedings are not vitiated by his absence. State *v.* Kirk, 46 Conn. 395; Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

Under Ohio Mun. Code, § 119, providing that a majority of all the members elected to a council shall be a quorum to do business, section 121, providing that the council shall determine its own rules, and section 122, declaring that no ordinance shall be passed by a council without the concurrence of a majority of all members elected thereto, it was held that the action of a council in approving a depositary's bond at a special meeting was not void because one of the members was not notified and failed to attend, where it appeared that he was absent from the city, that the special meeting was held at the council chamber, that six members and all the officers were present, and the meeting was organized in form as a council, and the proceedings were entered by the clerk on the minute book, and there properly attested. State *v.* Bowers, 26 Ohio Cir. Ct. 326 [*affirmed* without opinion in 70 Ohio St. 423, 72 N. E. 1155].

Ratification.— When a special meeting is invalid for want of notice to all members, the proceedings may be validated by ratification at a legal session of the board. Territory *v.* De Wolfe, 13 Okla. 454, 74 Pac. 98.

55. Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666; Mills *v.* San Antonio, (Tex. Civ. App. 1901) 65 S. W. 1121; Willcock Mun. Corp. § 74.

Sufficiency of call.—A call for a special session of a city council "in the council chamber in the City Hall, for the purpose of considering communications, petitions, resolutions, committee reports and ordinances on first, second and third reading and passage," properly recorded in the journal, with the

to be made by the mayor, or by two or more members of the board, by writing filed with the clerk or recorder as authority for notice or publication.[56] No proof of call is necessary when all members are present at the special meeting.[57] And it has been held that, although the call was not made in writing as required by statute, the meeting was valid, actual notice to all members being proven, and all being present except one.[58] And a copy of a resolution passed by the board and issued by the clerk notifying the mayor of a special meeting to elect officers will be presumed to have been passed by a majority of the board.[59] But a tax levy or special assessment at a special meeting is invalid, when it is made to appear that it was not called in the manner prescribed by law.[60] Notice required to be given personally or by leaving a copy at the usual place of abode is not properly given by leaving a copy at the place of business;[61] but when every member has actual personal notice, this is equivalent to written notice left at the residence.[62] Meetings adjourned to assemble at the call of the mayor or reeve are not regular or adjourned meetings, but are special meetings, and the proceedings are not valid unless the required notice is given or waived.[63]

4. Conduct of Business — a. Quorum — (I) *In General.* The majority rule prevails in all municipal bodies, unless the charter or some statute otherwise provides.[64] The entire membership of the body need not be present to validate the transactions of the body, but only a quorum thereof, which under the common law is a bare majority of all the members.[65] This quorum of the council, when duly assembled in a corporate meeting, is clothed with the powers of the munici-

proceedings of the council when assembled, was held sufficient to enable the council to introduce, read, and pass ordinances at such special meeting. Richardson *v.* Omaha, (Nebr. 1905) 104 N. W. 172.

Sufficiency of warning of meeting of fire district to purchase engine, apparatus, etc. see Hunneman *v.* Jamaica Fire Dist. No. 1, 37 Vt. 40.

56. Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786; Young *v.* Rushsylvania, 8 Ohio Cir. Ct. 75, 4 Ohio Cir. Dec. 319.

57. Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786. See *supra*, this section, text and note 53.

58. Gill *v.* Dunham, (Cal. 1893) 34 Pac. 68. See also Young *v.* Rushsylvania, 8 Ohio Cir. Ct. 75, 4 Ohio Cir. Dec. 319.

59. Canniff *v.* New York, 4 E. D. Smith (N. Y.) 430.

60. Auburn *v.* Union Water Power Co., 90 Me. 71, 37 Atl. 335.

61. Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

62. Russell *v.* Wellington, 157 Mass. 100, 31 N. E. 630, holding that a provision of a city charter declaring that the mayor may call special meetings of the council "by causing notice to be left at the usual residence of each member" does not prevent personal notice to the members. See also Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

63. Forry *v.* Ridge, 56 Mo. App. 615.

64. Thurston *v.* Huston, 123 Iowa 157, 98 N. W. 637; Collopy *v.* Cloherty, 39 S. W. 431, 18 Ky. L. Rep. 1061; Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15; State *v.* Farr, 47 N. J. L. 208; State *v.* Deliesseline, 1 McCord (S. C.) 52. See *infra*, V, B, 4, d, (I).

An amendment to a city charter, which authorizes the council to do certain things, without expressly requiring the unanimous vote of all the members, confers the power upon a majority of such council, although the original charter may have required unanimity as a condition to the exercise of that particular power. Covington *v.* Boyle, 6 Bush (Ky.) 204.

Members refusing or failing to vote see *infra*, V, B, 4, f.

65. *Connecticut.*— Williams *v.* Brace, 5 Conn. 190. And see State *v.* Chapman, 44 Conn. 595.

Maryland.— Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

Massachusetts.— Dartmouth *v.* Bristol County, 153 Mass. 12, 26 N. E. 425.

New Jersey.— Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092]; Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15; State *v.* Farr, 47 N. J. L. 208; State *v.* Miller, 45 N. J. L. 251; State *v.* Jersey City, 27 N. J. L. 493.

Ohio.— State *v.* Orr, 61 Ohio St. 384, 56 N. E. 14.

Pennsylvania.— *In re* Lemoyne Borough Councilmen, 15 Pa. Dist. 241; Doyle's Nomination, 7 Pa. Dist. 635; Com. *v.* Ayre, 5 Pa. Dist. 575, 8 Kulp 243; *In re* Elizabethville Borough Election, 5 Pa. Dist. 227; Com. *v.* Lefevre, 13 Lanc. L. Rev. 121.

West Virginia.— Benwood *v.* Wheeling R. Co., 53 W. Va. 465, 44 S. E. 271; Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906.

See 36 Cent. Dig. tit. "Municipal Corporations," § 201 *et seq.* And see the cases cited *infra*, V, B, 4, d, (I).

pality, and may perform all municipal functions, not expressly conferred on some other officer or agency.[66] If conferred upon another board, then a quorum of that body may exercise the power, unless legislation requires a greater number.[67] In reckoning a quorum, the total number of all members of the body authorized to be elected to it is usually taken as the basis.[68] The mayor, burgess, or reeve is to be included in the count, when the charter makes him a constituent member of the body.[69] If he is only a presiding officer, and not a component member, he is not to be reckoned in the count.[70] In some states the rule seems to be to count as the basis of the quorum only the number of members actually elected and holding membership at the time of the meeting.[71] The actual presence of the quorum in the meeting is sufficient, although some members refuse to vote, or even though they be present under compulsion or arrest.[72] When the two component parts of a bi-cameral council are authorized to elect an officer or perform any other act in

One who has a right to vote only in case of a tie cannot be counted in determining whether there is a quorum present. State *v.* Porter, 113 Ind. 79, 14 N. E. 883.

In the New England towns, where the corporate power is primarily exercised by citizens at large, any number, although less than a majority of the whole, then assembled at a legal meeting, have the power to act for the whole unless otherwise provided by law. Com. *v.* Ipswich, 2 Pick. (Mass.) 70. See, generally, TOWNS.

In Pennsylvania, under the act of April 1, 1834 (Pamphl. Laws 163), providing for the election of five councilmen and a burgess upon the organization of a borough, and declaring (section 8) that four of them, including the burgess, if present, shall be a quorum, it has been held that, although the number of councilmen was increased to six by the act of June 2, 1871, and to seven by the act of May 22, 1895, yet, as there has been no other legislation fixing the number which shall constitute a quorum, nor any repeal of that provision in the act of 1834, a quorum of council is still four. And therefore, where seven councilmen were to be elected for a borough and only five were declared elected, there being a tie as to the other two, it was held that three of the five councilmen declared elected could not hold a meeting and fill the two vacancies, even if a council had authority to appoint in such a case, since three members would not constitute a quorum. *In re* Lemoyne Borough Councilmen, 15 Pa. Dist. 241. See also *In re* Elizabethville Borough Election, 5 Pa. Dist. 227.

66. Labourdette *v.* New Orleans First Municipality, 2 La. Ann. 527; Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092]; Mueller *v.* Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89; and other cases cited in the preceding notes. See also *infra*, V, B, 4, d, (I).

67. Williams *v.* Brace, 5 Conn. 190.

68. Evanston *v.* O'Leary, 70 Ill. App. 124; State *v.* Dickie, 47 Iowa 629; Warnock *v.* Lafayette, 4 La. Ann. 419.

69. People *v.* Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. Rep. 498, holding that a provision in a charter that "the mayor, recorder, and aldermen, when assembled together and organized, shall constitute the common council" makes the mayor a member of the council. So, in People *v.* Wright, 30 Colo. 439, 71 Pac. 365, it was held that where, in a city council composed of eight aldermen and a mayor, the terms of four aldermen expired, the council then consisted of the remaining four aldermen and the mayor, three of whom constituted a quorum, and an election to fill a vacancy by the unanimous vote of such three was valid under Sess. Laws (1901), pp. 384, 385, requiring such election to be made by a majority vote of all the members. Under Ky. St. (1903) § 3634, providing that at meetings of a city council a majority of the members shall constitute a quorum, and that the mayor shall preside at the meetings, four members of the council of a city of the fifth class constitute a quorum, although the mayor may not be present, and a member of the council chosen as mayor *pro tem* may be counted as a councilman for the purpose of a quorum. Shugars *v.* Hamilton, 92 S. W. 564, 29 Ky. L. Rep. 127. See also *supra*, V, B, 1, b.

70. Somerset *v.* Smith, 105 Ky. 678, 49 S. W. 456, 20 Ky. L. Rep. 1488; Bybee *v.* Smith, 61 S. W. 15, 22 Ky. L. Rep. 1684. Where the common council of a municipality consists of six members, with the mayor as presiding officer, the mayor and three of the councilmen do not constitute a quorum, and their acts are void. Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129.

71. Mueller *v.* Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89.

72. Schmulbach *v.* Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922. See also Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315. Members of a borough council cannot, by "withdrawing" during a meeting, and refusing to vote, while they in fact remain present, break a quorum and nullify the proceedings; and the secretary may properly record them as present and not voting. Com. *v.* Schubmehl, 3 Lack. Leg. N. (Pa.) 186. And see the cases cited *infra*, V, B, 4, d, (I).

joint convention, a majority of the total number of members of both bodies constitute the quorum, although only a minority of one body is present.[73] When, however, the power is conferred upon the council in general terms, then each body must act separately, and a quorum of each is essential to a valid meeting for the exercise of the power.[74] A corporate body may not fix its own quorum, that being a subject of charter regulation.[75] If the charter is silent, and there is no general law fixing a statutory quorum, then the common-law rule of majority will govern, notwithstanding there may be a municipal by-law, rule, or order prescribing a greater or less number for a quorum.[76] A *de facto* member is to be counted in reckoning a quorum.[77]

(II) *Non-Qualified Members.* In reckoning for a quorum where actual membership is the basis, the rule is not to count as members those who are not at the date of the meeting legal members of the body.[78] Those therefore are omitted from the count of members who, by reason of resignation or removal from their respective wards, are out of office;[79] and also those whose terms of office have expired by law.[80] And a quorum cannot be forced by members of the council, less than a majority, electing persons as members to fill vacancies, whether real or declared by such minority.[81] But the presence of ineligible members or the existence of vacancies in the body does not vitiate its action, when a majority of the whole number are present participating in the meeting.[82]

b. Rules of Procedure in General.[83] The proceedings of a governing body of a municipality may be regulated by its charter or by general law;[84] and when the rules are thus fixed they cannot be changed by the body.[85] When rules of

73. Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362; Schmulbach *v.* Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922. Where the day of meeting of the mayor, aldermen, and city council for the election of a city clerk was fixed by statute for the same day on which the city officers elect were required to assemble and take the oath of office, it was held that one half of the aldermen could not defeat an election by absenting themselves for the purpose of leaving that board without a quorum. Kimball *v.* Marshall, 44 N. H. 465. See also Beck *v.* Hanscom, 29 N. H. 213.

74. State *v.* Chapman, 44 Conn. 595; Com. *v.* Hargest, 2 Dauph. Co. Rep. (Pa.) 409; Lowry *v.* Scranton, 4 Lack. Leg. N. (Pa.) 317.

75. Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

Reduction of number by forfeiture of office.— But in State *v.* Orr, 61 Ohio St. 384, 56 N. E. 14, it was held that the municipality has power to provide by ordinance that a member of the council who removes from his ward shall be deemed to have resigned his office, and that in such case the office may be regarded and treated as vacant and the number of members reduced accordingly, so that, where there is such a vacancy, a quorum will consist of a majority of all the members elected and remaining qualified. See also *infra*, V, B, 4, a, (II).

76. Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308, where the council declared two thirds of the members elected to be necessary for a quorum, although there was no provision of the statute or charter on the subject, and it was decided that the ordinance was void.

77. Willcock Mun. Corp. § 68.

78. State *v.* Orr, 61 Ohio St. 384, 56 N. E. 14.

79. State *v.* Orr, 61 Ohio St. 384, 56 N. E. 14.

80. People *v.* Wright, 30 Colo. 439, 71 Pac. 365.

81. Benwood *v.* Wheeling R. Co., 53 W. Va. 465, 44 S. E. 271. The power given borough councils in Pennsylvania to fill vacancies in their own body does not apply when there is less than a quorum of members in office. *In re* Elizabethville, 2 Dauph. Co. Rep. (Pa.) 380. And see Lemoyne Borough Councilmen, 15 Pa. Dist. 241.

82. Lewis *v.* Brandenburg, 105 Ky. 14, 47 S. W. 862, 48 S. W. 978, 20 Ky. L. Rep. 1011.

83. Enactment of ordinances see *infra*, VI, B, 3, c.

84. Ingersoll Pub. Corp. 225.

85. *California.*— Zottman *v.* San Francisco, 20 Cal. 96, 103, 81 Am. Dec. 96, where it is said: "The mode in which alone they [the Common Council] could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. . . Where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed."

Florida.— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Indiana.— Terre Haute *v.* Lake, 43 Ind. 480.

New Jersey.— Paterson *v.* Barnet, 46 N. J. L. 62.

procedure are not thus prescribed it is competent for the body to adopt its own regulations.[86] If these rules are peremptory, proceedings had in violation of their requirements are void;[87] but if they are merely directory, then proceedings without regard to their provisions will not vitiate the action taken.[88] The body may at any time repeal or suspend its own rules of order;[89] and in some cases it has been held that formal action is not necessary to effect this, but it will be inferred from the council merely waiving or ignoring their own rules.[90] But statutory or charter regulations, being imposed by law, may not be either repealed, suspended, or ignored by the body.[91] Proceedings are not vitiated by failure to observe parliamentary rules, provided the rule of the majority prevails.[92] If the presiding

Texas.— San Antonio *v.* Micklejohn, 89 Tex. 79, 33 S. W. 735.

And see *infra*, this section, text and note 91.

86. Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199; Mann *v.* Le Mars, 109 Iowa 251, 80 N. W. 327; Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650]. "The city council, a legislative body, has the inherent power, by ordinance, to provide for and establish rules for its own procedure, and the rules thus adopted will not be interfered with or set aside by the courts, unless they are directly, or by necessary implication, in conflict with some provision of the statute." State *v.* Dunn, (Nebr. 1906) 107 N. W. 236, 238. Where the charter of a city declared that the common council should have power "to make, enact, ordain, establish . . . alter, modify, amend and repeal . . . ordinances, rules, resolutions and by-laws for the government and good order of the city, for the suppression of vice," etc., and that "all laws, ordinances, regulations, and by-laws" should be passed by a vote of a majority of the common council, and signed by the mayor, and published, etc., and another part of the charter, relating to the office of city treasurer, was amended, so as to provide that the common council, at their last regular meeting in March, should "fix the salary of the treasurer to be elected at the next ensuing election," it was held that any form of procedure which the council might resort to in expressing its determination as to what the salary should be would be a compliance with the charter, if such action were made to appear in the record of its proceedings in some written, permanent form, as by the record in the minutes of an oral motion, and the vote thereon. Green Bay *v.* Branus, 50 Wis. 204, 6 N. W. 503.

Rules governing elections.— Under Ky. St. § 3272, providing that a city council "may determine its own rules of proceeding," it may, during an election by it of a city attorney, after several ballots with the same result, no one receiving a majority, provide by resolution that after the next ballot the candidate receiving the lowest number of votes be dropped; and a member voting for a candidate dropped under such resolution will be counted as not voting. Wheeler *v.* Com., 98 Ky. 59, 32 S. W. 259, 17 Ky. L. Rep. 636.

Adoption of rules.— N. Y. Laws, c. 298, § 34, providing that no "ordinances" shall be adopted except by a two-thirds vote, does not apply to rules of order of a city council. Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650]. See also *infra*, this section, note 89.

The provision of the Chicago charter of 1863 that all ordinances, before their passage, should be referred to a committee and only acted upon at a subsequent meeting, was superseded by the adoption of the general law of 1872, empowering the common council to determine its own rule of proceeding. Swift *v.* People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470.

87. Hicks *v.* Long Branch Commission, 69 N. J. L. 300, 54 Atl. 568, 55 Atl. 250; State *v.* Hoyt, 2 Oreg. 246. And see *infra*, VI, B.

88. Striker *v.* Kelly, 7 Hill (N. Y.) 9 [*reversed* on other grounds in 2 Den. 323]. And see McGraw *v.* Whitson, 69 Iowa 348, 28 N. W. 632.

89. Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460; Sedalia *v.* Scott, 104 Mo. App. 595, 78 S. W. 276; *In re* Broad St., 9 Kulp (Pa.) 37.

Rules of prior council and new rules.— Where a city council resolves that the rules of the prior council be adopted until a committee reports rules, the prior rules cease to be in force on the report of the committee. Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650]. Although the rules of a prior council, temporarily adopted until new rules can be reported by a committee, provide that they cannot be amended except by a two-thirds vote, the new rules, when reported, can be adopted by a majority vote. Armatage *v.* Fisher, *supra*. See also *supra*, this section, notes 85, 86.

90. *In re* Broad St., 9 Kulp (Pa.) 37; City Sewage Utilization Co. *v.* Davis, 8 Phila. (Pa.) 625.

91. State *v.* Bergen, 33 N. J. L. 39, where an ordinance for opening a street was introduced at one meeting and at the next meeting the name of one of the commissioners was changed and the ordinance was passed, and the court held that the ordinance was void, as the name of the commissioner who was substituted should have been laid over to a subsequent meeting. And see *supra*, this section, text and note 85.

92. Mann *v.* Le Mars, 109 Iowa 251, 80

officer refuses to put a motion before the body, then any member may do so;[93] and if the mayor declare adjourned a body which votes not to be adjourned, those remaining may organize and lawfully proceed to transact business, and make elections which will be valid and binding.[94]

c. Mode of Voting. As a general rule, regulations which prescribe the manner in which a vote of the body shall be taken are mandatory, and failure to comply with them is fatal to any action taken.[95] Thus when a vote is required to be by ballot, a *viva voce* vote is ineffectual.[96] So when it is required that the vote shall be by yeas and nays, which shall be recorded, any other mode of voting on the question is vain and futile;[97] and a record which fails to show the votes of the members on a measure thus prescribed is fatally defective, and incompetent to support the action taken.[98] But it seems that a record showing what members were present, and that the vote was unanimous in favor of the measure, is a substantial compliance with this requirement, and supports the action taken.[99] A rule requiring yeas and nays on the passage of ordinances is not to be applied to

N. W. 327; McGraw *v.* Whitson, 69 Iowa 348, 28 N. W. 632; Madden *v.* Smeltz, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

Strict parliamentary rules should not be applied to municipal bodies exercising legislative functions, so as to overthrow, on technical rules or strict construction of parliamentary law, substantial results, although they may be founded on irregular methods of procedure. Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184.

93. Hicks *v.* Long Branch Commission, 69 N. J. L. 300, 54 Atl. 568, 55 Atl. 250.

94. Atty.-Gen. *v.* Remick, 73 N. H. 25, 58 Atl. 871.

95. *Arkansas.*— Cutler *v.* Russellville, 40 Ark. 105.

Colorado.— Tracey *v.* People, 6 Colo. 151.

Illinois.— Rich *v.* Chicago, 59 Ill. 286; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Indiana.—Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587.

Iowa.— Olin *v.* Meyers, 55 Iowa 209, 7 N. W. 509.

Kentucky.— See Goodloe *v.* Fox, 96 Ky. 627, 29 S. W. 433, 16 Ky. L. Rep. 653.

Massachusetts.— Morrison *v.* Lawrence, 98 Mass. 219.

Michigan.— McCormick *v.* Bay City, 23 Mich. 457; Steckert *v.* East Saginaw, 22 Mich. 104.

Tennessee.—Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

Vermont.— State *v.* Harris, 52 Vt. 216.

United States.— Coffin *v.* Portland, 43 Fed. 411.

See 36 Cent. Dig. tit. "Municipal Corporations," § 206.

96. See Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308 (holding that as the board of aldermen had no power to elect except by ballot, no action by them ratifying a previous invalid election could make such election valid); State *v.* Harris, 52 Vt. 216 (holding that where a village charter provided for the election of a clerk and trustees by ballot, if called for, and a ballot was called for, but refused, and a committee was appointed instead and reported names, which were declared accepted, the election was illegal).

What officers are within the rule.—A provision of the rules of the council that officers whose salaries are payable from the city treasury shall be elected by ballot applies only to elective officers to be chosen by the council under the charter, and not to subordinate appointees whose compensation is fixed by the mayor and aldermen. Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348.

97. *Arkansas.*— Cutler *v.* Russellville, 40 Ark. 105.

Colorado.— Tracey *v.* People, 6 Colo. 151.

Illinois.— Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Iowa.— Olin *v.* Meyers, 55 Iowa 209, 7 N. W. 509.

Massachusetts.— Morrison *v.* Lawrence, 98 Mass. 219.

Michigan.— McCormick *v.* Bay City, 23 Mich. 457.

New Jersey.— Hicks *v.* Long Branch Commission, 69 N. J. L. 300, 54 Atl. 568, 55 Atl. 250.

United States.— Coffin *v.* Portland, 43 Fed. 411.

See 36 Cent. Dig. tit. "Municipal Corporations," § 206.

Cities having special charters.— Iowa Code (1873), § 493, requiring the "yeas" and "nays" to be called and recorded on the passage and adoption of an ordinance by a city council, does not affect cities having special charters. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

Motions to adjourn.— A city charter provision that "the vote of the common council shall, in all cases, be taken by ayes and noes, and every vote shall be entered at length upon the journal," is not intended to apply to votes on motions to adjourn. Green Bay *v.* Brauns, 50 Wis. 204, 6 N. W. 503.

Proceedings as to improvements see *infra*, XIII, A, 8, b, (VI).

98. Steckert *v.* East Saginaw, 22 Mich. 104.

99. Marion Water Co. *v.* Marion, 121 Iowa 306, 96 N. W. 883; Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

mere resolutions.[1] Under a nay and yea rule ordinances cannot be adopted in a bunch, but a separate vote must be had on each one proposed.[2] When the mode of voting is not prescribed, any reasonable mode may be adopted.[3] A vote by yeas and nays complies with a requirement for a *viva voce* vote, and is sufficient in any case when the mode of voting is not specially prescribed.[4] A vote put by the clerk, on the mayor's refusal to put it to the body, is fatally irregular, when the charter vests the municipal affairs in a mayor and councilmen.[5]

d. Number of Votes Required[6] — (i) *In General.* In the absence of charter or statutory provision to the contrary the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any ordinance, resolution, or order properly arising for the action of a municipal council or other municipal body.[7] Sometimes, however, the charter or statute requires for particular action a majority of all the members elected,[8] or the concurrence of

1. Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330.

2. Sullivan *v.* Pausch, 5 Ohio Cir. Ct. 196, 3 Ohio Cir. Dec. 98.

3. Thus where a statute provides that certain city officers shall be appointed by the council, without specifying the mode of appointment or election, the council may properly appoint them by ballot, instead of by a vote by ayes and nays. Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

4. Chicago *v.* McKechney, 91 Ill. App. 442; Matter of Brearton, 44 Misc. (N. Y.) 247, 89 N. Y. Suppl. 893.

5. Golden *v.* Toluca, 108 Ill. App. 467.

6. To pass ordinances, etc., see *infra*, VI, B.

Adoption of rules see *supra*, V, B, 4, b, text and notes 86, 89.

Proceedings as to improvements see *infra*, XIII, A, 8, b, (VI).

7. *Connecticut.*— State *v.* Chapman, 44 Conn. 595.

Illinois.— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Indiana.— Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315.

Iowa.— Thurston *v.* Huston, 123 Iowa 157, 98 N. W. 637; Strohm *v.* Iowa City, 47 Iowa 42.

Kentucky.— Wheeler *v.* Com., 98 Ky. 59, 32 S. W. 259, 17 Ky. L. Rep. 636; Morton *v.* Youngerman, 89 Ky. 505, 12 S. W. 944, 11 Ky. L. Rep. 886; Covington *v.* Boyle, 6 Bush 204; Collopy *v.* Cloherty, 39 S. W. 431, 18 Ky. L. Rep. 1061.

Louisiana.— Labourdette *v.* First Municipality, 2 La. Ann. 527.

Maryland.— Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

Massachusetts.—Kingsbury *v.* Centre School Dist., 12 Metc. 99.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

New Hampshire.— Atty.-Gen. *v.* Shepard, 62 N. H. 383, 13 Am. St. Rep. 576.

New Jersey.— Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092]; Mueller *v.* Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89; Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15; Cadmus *v.* Farr, 47 N. J. L. 208; McDermott *v.* Miller, 45 N. J. L. 251; State *v.* Jersey City, 27 N. J. L. 493.

Ohio.— See State *v.* Green, 37 Ohio St. 227.

South Carolina.— State *v.* Deliesseline, 1 McCord 52.

Tennessee.—Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

United States.—Wirt *v.* McEnery, 21 Fed. 233.

England.— Rex *v.* Monday, Cowp. 530. *Compare* Oldknow *v.* Wainwright, 2 Burr. 1017.

See 36 Cent. Dig. tit. "Municipal Corporations," § 207 *et seq.*

Quorum see *supra*, V, B, 4, a.

Members refusing or failing to vote see *infra*, V, B, 4, f.

Unauthorized vote excluded.— Where, on counting the votes put into the ballot box in an election of an officer by a municipal council, it appears that thirteen votes were put in, when the members present were entitled to give twelve votes only, and that seven were in favor of plaintiff and six in favor of another person, there is no election. Labourdette *v.* New Orleans First Municipality, 2 La. Ann. 527.

Validity of charter.— A city charter which vests the administration of all municipal affairs in a mayor and board of aldermen, to be called the city council, is not invalid because it fails to specify whether the council must act by a majority of the members or may act by a majority of a quorum. State *v.* Bevins, 70 Vt. 574, 41 Atl. 655.

8. *Colorado.*— Sullivan *v.* Leadville, 11 Colo. 483, 18 Pac. 736.

Illinois.—Evanston *v.* O'Leary, 70 Ill. App. 124.

Iowa.— Thurston *v.* Huston, 123 Iowa 157, 98 N. W. 637; State *v.* Alexander, 107 Iowa 177, 77 N. W. 841; Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333; State *v.* Dickie, 47 Iowa 629, holding that under Code (1873), § 530, providing that in case any office, except that of members of the city council, should become vacant before the expiration of the term, the vacancy should be filled by the city council until election of a successor,

two thirds of all the members,[9] or even a unanimous vote.[10] Whether or not a particular matter is within a charter or statutory provision or rule of council requiring a certain vote is a question of construction.[11] The number of votes necessary to effect the passage or adoption of a measure by a governing body have been ruled in various cases as follows: When a majority or other specified number of all members elected is required, the requisite number is not diminished by the resignation of a member.[12] A majority of all is not required to change the boundaries of a city, because such majority is required for the appropriation

and section 493, providing that all appointments of officers by any council should be made *viva voce*, and that the concurrence of the majority of the whole number of members elected to the city council should be required, a majority of all the members of the city council, and not simply the majority of a quorum, was necessary to the validity of all appointments to fill vacancies.

Louisiana.—Warnock *v.* Lafayette, 4 La. Ann. 419.

Michigan.— Fournier *v.* West Bay City, 94 Mich. 463, 54 N. W. 277; McCormick *v.* Bay City, 23 Mich. 457.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

Nebraska.— State *v.* Gray, 23 Nebr. 365, 36 N. W. 577.

New Jersey.—State *v.* Paterson, 35 N. J. L. 190, holding that under the Paterson City charter, providing that the board of aldermen, by a vote of the majority of its members, should appoint a clerk, controller, city treasurer, etc., an appointment of the city treasurer by less than a majority of the whole number of aldermen was unlawful and void.

West Virginia.—Wherever the words "the council for the time being shall by a majority vote of all the members elected," or words of like import, occur in the charter of a municipal corporation, relative to the members of the common council thereof, they will be construed to mean a majority of the whole number of members to which the common council is entitled under the charter. Wood *v.* Gordon, 58 W. Va. 321, 52 S. E. 261.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 207, 208.

9. Logansport *v.* Legg, 20 Ind. 315, holding that where the transcript showed that the common council consisted of ten members, and that when the action in question was taken there were but nine members present, of whom six voted for and three against the measure, it was not legally carried, the statute requiring concurrence of two thirds of the members. See also Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721. Where the rules and orders of a city council provided that certain orders should not be passed unless two thirds of the whole number of each branch of the city council should vote in the affirmative by a vote taken by yeas and nays, and the whole number composing the council was twenty-one, and the number voting in the affirmative on the passage of the order was ten, the order was held void for want of a requisite number of votes. Blood *v.* Beal, 100 Me. 30, 60 Atl. 427. *Compare*, however, English *v.* State, 7 Tex. App. 171, holding that Acts (1875), c. 100, authorizing any city, "by a two-thirds vote of the city council," to accept the provisions of the general liquor law, meant a two-thirds vote of a quorum of the city council present and voting.

Vote to suspend rules.—An ordinance requiring a two-thirds vote of the council to suspend the rules means not less than two thirds of all members present. Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50. And see *infra*, VI, B, 4.

10 See Cline *v.* Seattle, 13 Wash. 444, 43 Pac. 367.

Amendment dispensing with requirement of unanimity see Covington *v.* Boyle, 6 Bush (Ky.) 204.

11. See the cases cited *infra*, this note, and in the notes following.

Appropriations and expenditures.— Under a charter provision that "all moneys arising from taxation, donation or other sources, shall be paid to the treasurer of the city, and no appropriation thereof shall be made, except for necessary expenses of the city, and but by a concurring vote of six-eighths of all the councilmen," the requirement of a six-eighths vote was held to apply only to expenditures outside the necessary expenses. Gardner *v.* New Berne, 98 N. C. 228, 3 S. E. 500.

Resolution for appropriation of money.—A resolution by the common council of a city attempting to fix the salary of one of its officers is a resolution for the appropriation of money, within a provision of the city charter that no resolution appropriating money shall be passed or adopted except by a majority vote of all the aldermen elect. Fournier *v.* West Bay City, 94 Mich. 463, 54 N. W. 277.

12. Satterlee *v.* San Francisco, 23 Cal. 314; Pimental *v.* San Francisco, 21 Cal. 351; McCracken *v.* San Francisco, 16 Cal. 591; San Francisco *v.* Hazen, 5 Cal. 169. Under the Detroit City Charter, § 103, providing that two thirds of all the members elected at the common council shall be necessary to pass an ordinance over a veto, where one of the aldermen had died and one resigned, and their places were vacant, a two-thirds vote of the remaining aldermen was held not to be sufficient to pass an ordinance over a veto. Pollasky *v.* Schmid, 128 Mich. 699, 87 N. W. 1030, 92 Am. St. Rep. 560, 55 L. R. A. 614. To the contrary see State *v.* Orr, 61 Ohio St. 384, 56 N. E. 14.

or payment of money.[13] It has been held that where the mayor is only entitled to vote in case of a tie and a majority of all the "members elect" of the council is required to pass a measure, the mayor cannot vote, when the members are equally divided, so as to give such majority,[14] and is not to be counted in determining whether the measure has been passed;[15] but it is otherwise when the language is "all the members."[16] When the board consists of a mayor and five aldermen, authorized to employ counsel for the city, the vote of two out of three members present is sufficient to allow the account of an attorney employed by the mayor for the city.[17] When the words employed in designating the body of which a certain portion are required to pass a measure are "the council" or some phrase of similar import, it is generally construed to mean the members present at a valid meeting.[18] A resolution requiring only a majority vote, attached to a tax budget requiring a five-sevenths vote, and voted on at the same time, is passed, although the budget is defeated, four sevenths of the members only voting for the measure.[19] A common council having power to elect by a majority vote an officer removable at pleasure, may remove him by a majority vote, although two thirds are required to dismiss him for an offense in office.[20] In the absence of provision to the contrary, in choosing the officers necessary to effect the organization of a city council, the members being present and voting for candidates therefor, a plurality of the votes cast is sufficient to elect.[21]

(II) *Disqualification From Interest.* There is a general rule of law that no member of a governing body shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest, if that be immediate, particular, and distinct from the public interest.[22] This rule has been

13. Strohm *v.* Iowa City, 47 Iowa 42.

14. State *v.* Gray, 23 Nebr. 365, 36 N. W. 577. See also Gostin *v.* Brooks, 89 Ga. 244, 15 S. E. 361.

Acting mayor.— Under a charter requiring the mayor to preside at meetings of the council and providing that, if he is absent from such meetings, the council shall select one of its members to preside, and that, if the mayor is absent from the city, the council shall select one of its members as acting mayor, who shall thereupon be vested with all the powers of the mayor until his return, such acting mayor, when presiding at meetings of the council, has no vote, within a provision that certain ordinances be passed by a unanimous vote of the council. Cline *v.* Seattle, 13 Wash. 444, 43 Pac. 367.

15. See Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721, holding that where a charter provided that the common council should consist of the mayor and twelve aldermen, and that to levy a tax the vote making the levy should be passed by two thirds of the "members elect," a vote to levy a tax passed by eight aldermen was properly passed, and the mayor, although a member of the council, was not to be counted in such voting.

16. Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405; State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205. See also Somers *v.* Bridgeport, 60 Conn. 521, 22 Atl. 1015. Under a village charter, providing that the president and trustees shall constitute the common council, and that no tax shall be ordered except by a two-thirds vote of the members, an assessment for which only four votes were cast is invalid, where the council consists of the president and six trustees. Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184.

17. Dougherty *v.* Excelsior Springs, 110 Mo. App. 623, 85 S. W. 112. Where the charter provided that the common council should consist of the mayor and the twelve aldermen, and that a tax should be voted by two thirds of the members elect, it was held that a vote of eight aldermen was enough. Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

18. Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315; North Platte *v.* North Platte Water-Works Co., 56 Nebr. 403, 76 N. W. 906.

19. Wittmer *v.* New York, 50 N. Y. App. Div. 482, 64 N. Y. Suppl. 170.

20. Madison *v.* Korbly, 32 Ind. 74.

21. State *v.* Anderson, 45 Ohio St. 196, 12 N. E. 656.

22. State *v.* Shea, 106 Iowa 735, 72 N. W. 300; Buffington Wheel Co. *v.* Burnham, 60 Iowa 493, 15 N. W. 282; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547; and other cases cited in the notes following. Where two out of the five trustees of a village voted to open a street, and the other three did not vote on account of their interest, but assented, the vote was held invalid. Coles *v.* Williamsburgh, 10 Wend. (N. Y.) 659.

A mayor of a city may decide a tie vote of the council on the question of an appropriation of money to pay the fees of an attorney employed by him to bring mandamus proceedings to compel the clerk of the council to record his veto of a resolution, since his interest in the question is not such a pecuniary or personal one as to disqualify him

held to disqualify members from voting under the following conditions: When the member is directly and pecuniarily interested in a disputed claim before the board for action;[23] when the question is on the increase of their salaries;[24] when the question is as to the qualifications of the member voting;[25] or when the member is a stock-holder in a street railway company, which is asking for a street franchise,[26] in a bridge company coöperating therewith,[27] or in a corporation to which it is proposed to convey lands.[28] But they are not disqualified from voting on measures because they would receive personal benefits as part of the community or of the locality to be improved.[29] Nor is one disqualified to vote to award a contract to a company by having acted as counsel for it, jointly with the city;[30] nor to vote to issue bonds, voted by the people, to a company with which he is a construction contractor.[31] And it seems that the mayor may issue the bonds, although he is president of the company.[32] An alderman, who is also a commissioner of police, may vote against the confirmation of one nominated to succeed him as commissioner.[33]

e. Vote of Presiding Officer, Tie Votes, and Casting Votes. The general rule of parliamentary bodies that the presiding officer, unless he is peculiarly a member of the body, votes only in case of a tie, commonly prevails in municipal bodies;[34] but where the charter makes the president a member of the council

to vote. Smedley *v.* Kirby, 120 Mich. 253, 79 N. W. 187.

23. Rider *v.* Portsmouth, 67 N. H. 298, 38 Atl. 385; Holderness *v.* Baker, 44 N. H. 414. Where members of a village council were individually liable to a materialman for materials furnished to a village contractor, because of the council's failure to require a bond of the contractor, it was held that they had a direct interest in the allowance of a claim against the village by such materialman, and were therefore legally disqualified from voting to allow such claim. Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547.

24. State *v.* Shea, 106 Iowa 735, 72 N. W. 300.

25. Winters *v.* Warmolts, 70 N. J. L. 615, 56 Atl. 245, holding that under a statute empowering the board of aldermen to judge of the qualifications of its members, a vote determining a certain alderman duly qualified during a certain year, which was taken while the alderman in question was holding over as an officer *de facto* after the expiration of his term, and which would not have been carried without his vote, could not be considered as determining his right to the office.

26. Jolly *v.* Pittsburg, etc., R. Co., 16 Pa. Co. Ct. 1, holding also that he cannot render himself competent by assigning his stock to a relative for the purpose of relieving the disability, but with no intention of disposing of his interest.

27. Jolly *v.* Pittsburg, etc., R. Co., 16 Pa. Co. Ct. 1.

28. San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106, holding that if an act of the legislature authorizing the board exercising the corporate authority of a city to convey its lands to a corporation vests in the board any discretion in the matter, a member of such board who is a stock-holder or director in the corporation cannot act officially in relation to the matter.

29. Topeka *v.* Huntoon, 46 Kan. 634, 26 Pac. 488; Goff *v.* Nolan, 62 How. Pr. (N. Y.) 323.

30. Hicks *v.* Long Branch Commission, 69 N. J. L. 300, 54 Atl. 568, 55 Atl. 250.

31. Wrought Iron Bridge Co. *v.* Arkansas City, 59 Kan. 259, 52 Pac. 869.

32. Wrought Iron Bridge Co. *v.* Arkansas City, 59 Kan. 259, 52 Pac. 869.

33. State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653.

34. *Connecticut.*— State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653; State *v.* Chapman, 44 Conn. 595.

Georgia.— Gostin *v.* Brooks, 89 Ga. 244, 15 S. E. 361.

Illinois.— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405; Carrollton *v.* Clark, 21 Ill. App. 74.

Iowa.— State *v.* Alexander, 107 Iowa 177, 77 N. W. 841.

Kansas.— Carroll *v.* Wall, 35 Kan. 36, 10 Pac. 1.

Louisiana.— See Reynolds *v.* Baldwin, 1 La. Ann. 162, recorder.

Maine.— Brown *v.* Foster, 88 Me. 49, 33 Atl. 662, 31 L. R. A. 116.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

Nebraska.— State *v.* Gray, 23 Nebr. 365, 36 N. W. 577. *Compare* Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

New York.— Lake Shore, etc., R. Co. *v.* Dunkirk, 65 Hun 494, 20 N. Y. Suppl. 596 [*affirmed* in 143 N. Y. 660, 39 N. E. 21].

See 36 Cent. Dig. tit. "Municipal Corporations," § 209.

Informality in vote or concurrence of presiding officer.— It has been held that where the validity of the action of the common council depended on the concurrence of four members, the affirmative vote of three members upon a proposition and the announcement by the president, who was a member

with the right to vote in every case and a casting vote in case of a tie, he may vote on a question and give an additional vote if there is a tie.[35] So great is the force of the general rule that the mayor is permitted to give the casting vote, even when the tie vote is on confirmation of his own nominees.[36] An equal vote for each of three candidates for two positions creates a tie authorizing the mayor to cast the deciding vote;[37] but where an equal number of votes was cast for each of two candidates and there was also a blank vote, and the law required a majority vote of all the members present and participating, it was held that the blank vote must be counted, and therefore there was not a tie so as to entitle the mayor to give a casting vote.[38]

f. Determination of Result of Vote. As a general rule, the number of lawful votes actually cast decides the question; so that it is generally held that, if a quorum is present, an election or measure is determined by the majority of the votes actually cast, although an equal or even a greater number refuse or fail to vote.[39]

of the council, that the same was carried, showed the concurrence of the presiding member with his associates as expressed in their vote. State *v.* Armstrong, 54 Minn. 457, 56 N. W. 97. And where, by a city charter, the mayor was allowed a casting vote in the council, in accordance with a statute, it was held that his act was sufficiently formal for that purpose, where he determined and declared which of two candidates was elected, although he did not go through the formality of casting a ballot. Small *v.* Orne, 79 Me. 78, 8 Atl. 152. *Compare,* however, Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308, holding that where, at a meeting of the mayor and aldermen of a city, complainant received four votes for a certain office, and three votes were scattering and one was blank, the action of the mayor in declaring complainant elected was not equivalent to a vote for him.

Counting mayor or his vote in determining number of votes required see *supra,* V, B, 4, d, (I).

35. Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184.

Disqualification from interest see *supra,* V, B, 4, d, (II), note 22.

36. *Connecticut.*— State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653.

Kansas.— Carroll *v.* Wall, 35 Kan. 36, 10 Pac. 1.

Maine.— Brown *v.* Foster, 88 Me. 49, 33 Atl. 662, 31 L. R. A. 116.

Maryland.— Hecht *v.* Coale, 93 Md. 692, 49 Atl. 660.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

Oregon.— McCourt *v.* Beam, 42 Oreg. 41, 69 Pac. 990.

See 36 Cent. Dig. tit. "Municipal Corporations," § 209.

37. Wooster *v.* Mullins, 64 Conn. 340, 30 Atl. 144, 25 L. R. A. 694.

38. State *v.* Chapman, 44 Conn. 595. So where, on a vote by a city council to appoint a certain person to an office, three members voted yea, two did not vote, and one voted for another person, and the latter were recorded as voting no, and the mayor, deciding that there was a tie, voted yea and declared the motion carried, it was held that there was no tie, and that the motion was not carried. State *v.* Alexander, 107 Iowa 177, 77 N. W. 841.

39. *Illinois.*— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405, holding that where a city council consisting of eight aldermen and a mayor are all present, or a quorum is present, and the election of an officer is properly proposed, whoever receives a majority of those who do vote will be elected, although a majority of the members of the council may abstain from voting, or may even protest against the election.

Indiana.— Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315, holding that where three of the six members composing a common council vote in favor of a resolution the other three members, although present, declining to vote, the resolution is legally adopted.

Kentucky.—Wheeler *v.* Com., 98 Ky. 59, 32 S. W. 259, 17 Ky. L. Rep. 636, holding that in the election of city officers by the council, a quorum being present, a majority of those voting is sufficient to elect, provided that number is a majority of the number required to constitute a quorum, a majority of the whole number of members present not being required. See also Morton *v.* Youngerman, 89 Ky. 505, 12 S. W. 944, 11 Ky. L. Rep. 886, holding that under a regulation adopted by a city council, providing that "a majority of the members elected and voting shall be necessary to choose any officer elective by the board," a candidate who receives six votes of the twelve members present, three not voting, is legally elected.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

New Hampshire.— Atty.-Gen. *v.* Shepard, 62 N. H. 383, 13 Am. St. Rep. 576, holding that in the absence of express regulation to the contrary, when a quorum is present at a meeting of a board of aldermen and their journal properly shows the presence of a quorum, a proposition is carried by a majority of the votes cast, and it is not necessary that a quorum should vote.

Ohio.— State *v.* Green, 37 Ohio St. 227, holding that where all the members of a city

It has been held, however, that those voting blank ballots are to be counted as present and not concurring.[40] The majority rules, and when that has been ascertained in a lawful method the result cannot be defeated by the arbitrary ruling of the presiding officer.[41] After a valid election by ballot no resolution declaring the party elected is necessary, nor after announcement of the result of the vote can the lawful result be defeated by a resolution declaring a different result.[42]

g. Reconsideration and Rescission. Ordinary measures before a municipal body are subject to reconsideration under parliamentary rules, unless forbidden by special regulation.[43] And it seems that before any action has been taken by

council are present and engaged in holding an election, members cannot, by refusing to vote when their names are called, defeat the election or divest the body of the power to elect; and that in such case the legal effect of refusing to vote is an acquiescence in the choice of those who do vote, even though those refusing to vote object to the mode of voting, and on the ground that no quorum voted.

Pennsylvania.— Com. *v.* Read, 2 Ashm. 261; Com. *v.* Schubmehl, 3 Lack. Leg. N. 186.

England.—Oldknow *v.* Wainwright, 2 Burr. 1017.

See 36 Cent. Dig. tit. "Municipal Corporations," § 207 *et seq.*

Statements of rule.—"After an election has been properly proposed whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting because their presence suffices to constitute the elective body; and if they neglect to vote it is their own fault, and shall not invalidate the action of the others; and such election is valid, although the majority of those whose presence is necessary to the assemhly protest against any election at the time, or even the election of the individual who has the majority of votes." Willcock Mun. Corp. § 546. "Those who are present, and who help to make up the quorum, are expected to vote on every question, and their presence alone, is enough to make the vote decisive and binding, whether they actually vote or not. The objects of legislation cannot be defeated by the refusal of any one to vote when present. If eighteen are present, and nine vote, all in the affirmative, the measure is carried, the refusal of the other nine to vote being construed as a vote in the affirmative so far as any construction is necessary." Horr & B. Mun. Pol. Ord. § 43.

Contrary rule under special provisions.— This rule may of course be changed by special provisions. See Collopy *v.* Cloherty, 39 S. W. 431, 18 Ky. L. Rep. 1061, holding that under a city charter providing that a majority of the board of councilmen should constitute a quorum, and a rule of the council that a majority of the quorum elected and voting should be necessary to choose an officer elected by the board, a quorum of the members elected must vote, and a majority of that quorum could elect when such quorum was voting.

Limitation of rule to cases of elections.— It seems that in England this rule is limited to cases of elections and does not extend to the transaction of other corporate business, and that in the latter case a majority of those present must vote for a proposition to carry it. Gosling *v.* Veloy, 1 C. L. R. 950, 4 H. L. Cas. 679, 17 Jur. 939, 10 Eng. Reprint 627. In the United States, however, the rule seems to be otherwise. Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405 (holding that the rule applied to the approval of an officer's bond); Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315 (applying the rule to a resolution for the purchase of an electric light plant under statutory authority).

Illegible ballots.— Where, at an election for an office by a joint convention of a city council, one ballot was so illegibly written that it could not be read, it was held proper to count the same as a scattering vote. Keough *v.* Holyoke, 156 Mass. 403, 31 N. E. 387. And where the mayor decided that one ballot was illegible, the result of which decision was that no candidate received a majority, and the convention, without objecting to the mayor's decision, proceeded to a second ballot, at which all the members voted, and at which one of the candidates received a majority, such candidate was held legally elected, since the mayor's decision as to the illegible ballot, when thus acquiesced in by the convention, was conclusive. Keough *v.* Holyoke, *supra.*

40. Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

41. Chariton *v.* Holiday, 60 Iowa 391, 14 N. W. 775. And see Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

42. State *v.* Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, where it was sought to defeat a valid election by ballot by a resolution that the ballot was void.

43. *Arkansas.*— Reiff *v.* Conner, 10 Ark. 241.

Georgia.— Red *v.* Augusta, 25 Ga. 386.

Kansas.— Higgins *v.* Curtis, 39 Kan. 283, 18 Pac. 207.

Maine.— See Bigelow *v.* Hillman, 37 Me. 52.

Massachusetts.— Baker *v.* Cushman, 127 Mass. 105.

New Jersey.— Whitney *v.* Van Buskirk, 40 N. J. L. 463; State *v.* Crosley, 36 N. J. L. 425; Jersey City *v.* State, 30 N. J. L. 521; State *v.* Justice, 24 N. J. L. 413; State *v.* Foster, 7 N. J. L. 101.

the other party under a contractual measure the body may rescind its action thereon.[44] But after a contract has been closed and performance begun, no matter how slightly, a vote of rescission is vain and futile; it amounts only to a breach or renunciation of the contract.[45] Nor can a reconsideration be effected after a conclusion has been reached by a final vote.[46] Thus after a veto has been sustained or overruled by vote of the council its power is exhausted and the matter is concluded, and further action thereon is void.[47] So, under a charter provision for the appointment of a city officer by the mayor, with the consent of the common council, who shall hold the office for two years, the confirmation by the council of the mayor's appointment of such officer exhausts its power in the matter, and therefore it cannot reconsider its action therein.[48] And where a city council is the sole judge of the election and qualifications of its members, it cannot, after having seated a member on investigation, at a subsequent meeting order a second investigation.[49] The same effect is produced by an adjournment and promulgation of the action taken on any measure.[50] When reconsideration or rescission is lawful, as large a vote is required therefor as for the original action.[51] Where a council passes an *ultra vires* and void ordinance or resolution, reconsideration and rescission thereof is not necessary to the validity of a new and valid ordinance or resolution on the subject.[52]

5. Committees[53] — a. Power to Appoint. Municipal councils have inherent power, when it is not otherwise directed by law, to provide for and appoint committees for the preparation and consideration of business.[54] But they cannot by

New York.— People *v.* Mills, 32 Hun 459.

Vermont.— Estey *v.* Starr, 56 Vt. 690.

See 36 Cent. Dig. tit. "Municipal Corporations," § 211.

As to improvements see *infra*, XIII, B, 9.

Suspension of rule against reconsideration. — Where an ordinance creating a loan failed on the first vote and was afterward reconsidered in contravention of a rule of the council and passed by the requisite two-thirds vote, it was held that, as the same number could suspend the rules, the vote on the ordinance ought to be considered as a virtual suspension of the rules, and the ordinance was valid. City Sewage Utilization Co. *v.* Davis, 8 Phila. (Pa.) 625. See *supra*, V, B, 4, b.

44. Red *v.* Augusta, 25 Ga. 386.

45. New Orleans *v.* St. Louis Church, 11 La. Ann. 244; Brown *v.* Winterport, 79 Me. 305, 9 Atl. 844.

46. *Maine.*— State *v.* Phillips, 79 Me. 506, 11 Atl. 274, (1887) 10 Atl. 447.

Massachusetts.— Keough *v.* Holyoke, 156 Mass. 403, 31 N. E. 387.

Minnesota.— State *v.* Wadhams, 64 Minn. 318, 67 N. W. 64.

New Jersey.— Whitney *v.* Van Buskirk, 40 N. J. L. 463.

New York.—Ashton *v.* Rochester, 60 Hun 372, 14 N. Y. Suppl. 855 [*affirmed* in 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619]; People *v.* Stowell, 9 Abb. N. Cas. 456.

Pennsylvania.— Sank *v.* Philadelphia, 8 Phila. 117.

See 36 Cent. Dig. tit. "Municipal Corporations," § 211.

47. Ashton *v.* Rochester, 60 Hun 372, 14 N. Y. Suppl. 855 [*affirmed* in 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619]; Sank *v.* Philadelphia, 8 Phila. (Pa.) 117.

48. State *v.* Wadhams, 64 Minn. 318, 67 N. W. 64. See also State *v.* Phillips, 79 Me. 506, 11 Atl. 274, (1887) 10 Atl. 447 (holding that the election of an officer by the board of aldermen at a legal meeting cannot be reconsidered at an adjourned session and another person elected in his place); People *v.* Stowell, 9 Abb. N. Cas. (N. Y.) 456.

49. Kendell *v.* Camden, 47 N. J. L. 64, 54 Am. Rep. 117.

50. Whitney *v.* Van Buskirk, 40 N. J. L. 463.

51. Naegely *v.* Saginaw, 101 Mich. 532, 60 N. W. 46; Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184; Stockdale *v.* Wayland School Dist., 47 Mich. 226, 10 N. W. 349.

52. Green Bay *v.* Brauns, 50 Wis. 204, 6 N. W. 503, where, at the time the statute did not authorize a city treasurer's salary to be fixed in excess of one thousand dollars, the council undertook to fix it at fifteen hundred dollars, and subsequently, at an adjourned meeting, when the statute would have permitted the salary to be fixed as high as two thousand dollars, the council voted that it should be one thousand dollars, and it was held that failure to reconsider and rescind the former void resolution had no effect upon the validity of the later determination.

53. **Committee to execute improvements** see *infra*, XIII, B, 8, c, (VI).

54. *Illinois.*— Gillet *v.* Logan County, 67 Ill. 256.

Maine.— Preble *v.* Portland, 45 Me. 241.

Missouri.— Dreyfus *v.* Lonergan, 73 Mo. App. 336.

New Jersey.— Burlington *v.* Dennison, 42 N. J. L. 165.

any action deprive their presiding officers of charter authority to appoint committees.[55] And it seems that they cannot appoint a committee to investigate charges of corruption against one of their number, although they have power to expel.[56]

b. Authority. In the absence of provision to the contrary, a majority of a committee to whom a matter is referred constitute a quorum and are competent to act.[57] When composed of only two members, both must act together.[58] A committee whose report on a proposed measure is essential to the action of the council has the right to the possession of documents laid before its predecessor touching the same matters.[59] A governing body may confer its power of examination and inquisition upon a committee and authorize it to require the attendance of witnesses and the production of documents,[60] and the refusal to appear or produce books or papers or to answer pertinent questions within the scope of the inquiry delegated to the committee will constitute a contempt for which the delinquent may be punished under charter or statutory provision therefor.[61] The rep-

New York.—Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54].

Pennsylvania.— Com. *v.* Pittsburgh, 14 Pa. St. 177.

United States.— Bissell *v.* Jeffersonville, 24 How. 287, 16 L. ed. 664.

Contest as to election of members of council.—A common council, being the sole judge of the election of its members, may, upon a contest respecting the election of one of its members, appoint a committee to take testimony and to report the facts and the evidence to the council. Salmon *v.* Haynes, 50 N. J. L. 97, 11 Atl. 151.

Investigation of accounts.— Lussier *v.* Maisonneuve, 15 Quebec Super. Ct. 45.

55. Buckton *v.* People, 12 Colo. App. 86, 54 Pac. 871.

56. Com. *v.* Hillenbrand, 96 Ky. 407, 29 S. W. 287, 16 Ky. L. Rep. 485.

57. Van Vorst *v.* Jersey City, 27 N. J. L. 493.

58. Rider *v.* Portsmouth, 67 N. H. 298, 38 Atl. 385.

59. Buckton *v.* People, 12 Colo. App. 86, 54 Pac. 871.

60. *In re* Dunn, 9 Mo. App. 255. Where committees of the houses of a city assembly are duly empowered under the city charter and ordinance to compel the attendance of witnesses and production of papers relating to investigations of matters lawfully pending before them, and to issue writs of subpœna *duces tecum* for that purpose, a subpœna need not state that the papers demanded are material to the investigation. *In re* Dunn, *supra*. A resolution of a common council authorizing a subcommittee to issue subpœnas and examine witnesses in effect makes the subcommittee a committee of the council and removes any doubt as to its right to summon and examine witnesses. Yard's Case, 10 Pa. Co. Ct. 41 [*affirmed* in 148 Pa. St. 509, 24 Atl. 63].

61. *In re* Dunn, 9 Mo. App. 255. *Compare* Lussier *v.* Maisonneuve, 15 Quebec Super. Ct. 45. As N. Y. Laws (1872), c. 150, § 32 (charter of Kingston) provides for the commitment of a witness summoned to appear before a committee of the common council only where he refuses to attend or to be sworn or affirmed, or to answer after being sworn, there is no authority for the commitment of a witness who refuses to produce books and accounts. People *v.* Van Tassel, 64 Hun (N. Y.) 444, 19 N. Y. Suppl. 643 [*affirming* 17 N. Y. Suppl. 938, and *affirmed* in 135 N. Y. 638, 32 N. E. 646].

Judicial functions.— Lussier *v.* Maisonneuve, 15 Quebec Super. Ct. 45.

No implied power to punish for contempt see *supra*, III, B, 2, d, (II), text and note 98; III, D, 2, text and note 86.

Propriety of questions.—A witness before an investigating or other committee of a city council cannot be compelled by process for contempt to answer an irrelevant question. Simon's Case, 16 Pa. Co. Ct. 353. Under a statute (N. Y. Act, 1855) which authorizes an attachment against a witness subpœnaed before a committee of the common council and refusing to "answer any proper question," those only are proper questions which are pertinent to the investigation and connected with the subject referred, and which relate to matters about which it is within the power of the common council to inquire. Van Tine *v.* Nims, 3 Abb. Pr. (N. Y.) 39, 12 How. Pr. 507. A special committee of the common council of a city, appointed to investigate the action of a committee on streets, who had under consideration the widening and improving of a certain street, have no power to inquire of a witness before it in reference to his own acts with individuals other than the committee whose action is being investigated. Van Tine *v.* Nims, *supra*. A resolution of a city council, appointing a committee to look after all bills from the various departments of the city government, and to send for papers, and to employ counsel and experts, does not authorize it to ask a witness summoned before it whether he has seen any gambling in the city or any places where liquor was sold without a license, and he is therefore not punishable for contempt in refusing to answer such questions. Matter of Cole, 16 Misc. (N. Y.) 134, 38 N. Y. Suppl. 955. A witness is not in contempt for

resentation of a committee to a third person touching matters with which it is charged are binding upon the corporation.[62] But members of a board or committee created by a city to act as its agent in a particular matter cannot bind the city by their actions as individuals.[63]

c. Irregularities. Irregularity in mode of action by a committee, or unauthorized participation therein by the mayor will not vitiate ultimate action taken by the council on its report.[64]

d. Expenses. The corporation is liable for necessary expenses of a committee,[65] including the pay of a stenographer employed, under authority from the council, to take testimony.[66] Each member may maintain his separate action for expenses against the municipality.[67]

6. Minutes and Records[68] — a. In General. The minute books and records of a municipal corporation are of a public nature and open to inspection by all citizens of the municipality.[69] The entries in them show the proceedings of the governing body and are made by the clerk or recorder,[70] who usually has custody of the books, and must keep them at a public office open to lawful inspection at all proper times.[71] Possession of them may be restored by action of replevin or detinue;[72] or a mandamus may be obtained to compel their production.[73] They are properly authenticated by the signature of the presiding officer attested by the clerk.[74] They are the best and sometimes the only evidence of the corporate action;[75] but they do not, after the manner of judicial records, import absolute verity.[76] The failure of the body, however, to keep proper minutes cannot be made a means of escape from liability for corporate action duly taken;[77] for such action may be proven *dehors* the record, and by parol evidence.[78] Minutes made

refusing to answer the questions of an investigating committee of the city council which may tend to incriminate him. Van Tine *v.* Nims, *supra*.

An attachment will not be granted against a witness subpœnaed to attend and testify before a committee of the common council, unless it satisfactorily appears to the judge to whom application is made: (1) That the witness refused to obey the subpœna issued by the clerk; (2) that on appearing he refused to be sworn as a witness; (3) or that after being sworn he refused to answer some question, which, in the opinion of the judge, was a question proper to be put. Therefore, where the witness attended pursuant to the subpœna, and submitted to be sworn, and then stated that he declined generally to answer any questions, and none were put to him by the committee, an attachment was refused. Briggs *v.* Matsell, 2 Abb. Pr. (N. Y.) 156.

62. Sharp *v.* New York, 40 Barb. (N. Y.) 256, 25 How. Pr. 389.

63. Joyce Surveying Co. *v.* St. Louis, 68 Mo. App. 182.

64. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659.

65. Rider *v.* Portsmouth, 67 N. H. 298, 38 Atl. 385.

66. Salmon *v.* Haynes, 50 N. J. L. 97, 11 Atl. 151.

67. Rider *v.* Portsmouth, 67 N. H. 298, 38 Atl. 385.

68. **Record of ordinances** see *infra*, VI, E. **Minutes and records as to improvements** see *infra*, XIII, B, 8, d.

69. Willcock Mun. Corp. 343, 348.

70. Atty.-Gen. *v.* Crocker, 138 Mass. 214.

71. Willcock Mun. Corp. 345, 347.

72. Willcock Mun. Corp. 346. See, generally, Detinue, 14 Cyc. 239; Replevin.

73. Rex *v.* Ingram, W. Bl. 50. See Mandamus, 26 Cyc. 288.

74. Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946; Barber Asphalt Paving Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110; Matter of Vivian, 14 Manitoba 153; Tassé *v.* Beaubien, 4 Quebec Pr. 372.

75. Logansport *v.* Crockett, 64 Ind. 319; Small *v.* Pennell, 31 Me. 267; Moser *v.* White, 29 Mich. 59; Stevenson *v.* Bay City, 26 Mich. 44; Hill *v.* Cleveland, 4 Ohio Dec. (Reprint) 562, 2 Clev. L. Rep. 385. See Evidence, 17 Cyc. 506.

76. Hazelgreen *v.* McNabb, 64 S. W. 431, 23 Ky. L. Rep. 811.

77. Denison First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cas. § 971.

78. *Indiana.*—Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa.— Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070.

Kansas.— Troy *v.* Atchison, etc., R. Co., 13 Kan. 70.

Kentucky.— Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917.

Michigan.— Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384.

Ohio.— Ratcliff *v.* Teters, 27 Ohio St. 66.

Pennsylvania.— Bohan *v.* Avoca Borough, 154 Pa. St. 404, 26 Atl. 604; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. 409; Fisher *v.* South Williamsport, 1 Pa. Super. Ct. 386; Barton *v.* Pitts-

and records kept by a clerk *de facto* or a clerk *pro tem* are as valid as if made or kept by a regular clerk *de jure*.[79]

b. Requisites and Sufficiency. It is a fundamental requisite of municipal minutes that they shall be kept in such form as to be legible and intelligible to others than the scribe,[80] and that they shall by fair and natural construction have reasonable certainty of meaning.[81] But if defective or ambiguous they may be supplemented or explained.[82] What matters shall be recorded is often provided by statute and such provision, if mandatory, makes omissions fatal;[83] but if it is directory only, omissions will not invalidate the record.[84] Under these general rules municipal minutes of the following form have been held sufficient compliance with the requirement that ayes and nays shall be called and recorded: "Upon the ballot being spread for its approval and adoption, the votes stood as follows: (six members naming them) aye; noes none."[85] So also minutes showing what members were present and that the vote was unanimous.[86] *A fortiori* where the law does not require ayes and nays to be recorded.[87] Even a requirement to this effect has been held to be directory only.[88] It seems that "adopted" is a sufficient minute to show favorable action by the council upon the report of a committee.[89] A requirement of the record of ayes and nays in a general

burg, 4 Brewst. 373; Avoca *v.* Pittston, etc., St. R. Co., 7 Kulp 470.

Vermont.— Hutchinson *v.* Pratt, 11 Vt. 402.

Wisconsin.— Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614.

United States.— Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; German Ins. Co. *v.* Independent School Dist., 80 Fed. 366, 25 C. C. A. 492. An action on a note purporting to have been made by a city and given for the price of goods sold cannot be defeated on the ground that the acceptance of the contract must be shown by the minutes in writing of the meeting at which the acceptance was ordered; and where such record shows no meeting, none can be proved. Bridgford *v.* Tuscumbia, 16 Fed. 910, 4 Woods 611.

See EVIDENCE, 17 Cyc. 507.

79. Hutchinson *v.* Pratt, 11 Vt. 402, holding that under the act of Nov. 11, 1836, incorporating the village of Woodstock and providing that the clerk should keep a record of all the proceedings of the corporation, a record made by a clerk *pro tem*, chosen in the absence of the regular clerk, was admissible in evidence when certified to by him, although before taking his office he was not sworn. Under Mich Comp. Laws (1897), § 2731, requiring the village clerk to keep all records and files not intrusted to other officers, making him clerk of the council, providing for the appointment of a member as clerk *pro tem* in his absence, and declaring that the clerk shall record all the proceedings of the council, where the minutes of a meeting of the council at which the clerk was not present were authenticated on their face by its president and by a member purporting to act as clerk *pro tem*, the clerk cannot refuse to record them on the ground that the member purporting to act was not actually present, but must enter the proceedings subject to corrections by the council. People *v.* Ihnken, 129 Mich. 466, 89 N. W. 72.

80. Louisville *v.* McKegney, 7 Bush (Ky.) 651.

81. Steckert *v.* East Saginaw, 22 Mich. 104.

Matter "continued on the table."—A motion of the city council that the matter of a reassessment be "continued on the table" until the next regular meeting, while expressed in inappropriate language, should be construed in accordance with the intention of the council to effect a continuance of the business, and should not be construed as operating to lay the matter on the table, and deprive the council of jurisdiction thereof. Duniway *v.* Portland, 47 Oreg. 103, 81 Pac. 945.

82. State *v.* Kennedy, 69 Conn. 220, 37 Atl. 503; Indianapolis *v.* Imberry, 17 Ind. 175; Darlington *v.* Com., 41 Pa. St. 68.

Amendment see *infra*, V, B, 6, d.

83. Schofield *v.* Hudson, 56 Ill. App. 191; Logansport *v.* Crockett, 64 Ind. 319; O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

84. Belknap *v.* Miller, 52 Ill. App. 617; Barber Asphalt Paving Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110.

85. Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399.

86. Goodyear Rubber Co. *v.* Eureka, 135 Cal. 613, 67 Pac. 1043; Barr *v.* Auburn, 89 Ill. 361; Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577; Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

87. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

88. Belknap *v.* Miller, 52 Ill. App. 617; Striker *v.* Kelly, 7 Hill (N. Y.) 9 [*reversed* on other grounds in 2 Den. 323]. But in Iowa it was held that it was essential to the validity of an ordinance of a municipal corporation, not only that a majority of all the members of the council should concur in it, but also that the yeas and nays should be called and recorded, as required by Code (1873), § 493. Olin *v.* Meyers, 55 Iowa 209, 7 N. W. 509. See also *supra*, V, B, 4, c.

89. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

statute does not apply to cities having special charters,[90] or to motions to adjourn in any municipal council.[91] The following minutes have been held insufficient compliance with the ayes and nays requirement: "New ordinances Nos. 1, 2, 3, and 10 were adopted and passed by the board;"[92] "adopted unanimously on call;"[93] and "all voting aye."[94] It seems indispensable in some states that in some form the names of those voting for the measure shall appear of record.[95] Action required to be taken at a stated meeting is not established by a record of an "adjourned meeting";[96] and the adoption of a resolution is not proven by minutes showing merely that it was introduced and read, that a motion was made that the vote upon it be by ballot, and that this motion was put and carried.[97]

c. **Presumptions and Effect.** Defective minutes of municipal proceedings in councils or boards are often materially aided by judicial presumptions in favor of the regularity and legality of the conduct of sworn officials of the corporation; indeed the inclination of the courts seems general to apply the maxim *ut res valeat quam pereat.*[98] Where it was shown that the records of a city council had been destroyed or lost, it was presumed that an order of the council allowing the salary of a certain officer was made pursuant to a previous order conferring authority to make the allowance.[99] But it was held that a recital in the minutes

90. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

91. Green Bay *v.* Brauns, 50 Wis. 204, 6 N. W. 503.

92. Schofield *v.* Hudson, 56 Ill. App. 191.

93. Steckert *v.* East Saginaw, 22 Mich. 104.

94. Matter of South Market St., 76 Hun (N. Y.) 85, 27 N. Y. Suppl. 843.

95. Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90, holding that where the journal entries of the proceedings of a city council showed only that on the passage of an ordinance the yeas and nays were called, and a certain number of votes were cast, but omitted to show the names of members voting or how each voted, such entries were insufficient to establish the fact that the ordinance was adopted by the council.

96. State *v.* Jersey City, 25 N. J. L. 309.

97. State *v.* Curry, 134 Ind. 133, 33 N. E. 685.

98. *Colorado.*— Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460.

Iowa.— Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148; State *v.* Vail, 53 Iowa 550, 5 N. W. 709; Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737.

Kansas.— Downing *v.* Miltonvale, 36 Kan. 740, 14 Pac. 281.

Kentucky.— Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819; Lexington *v.* Headley, 5 Bush 508.

Minnesota.— Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235; State *v.* Smith, 22 Minn. 218.

New Hampshire.— Peterborough *v.* Lancaster, 14 N. H. 382.

New York.— Rome *v.* Whitestown Water Works Co., 113 N. Y. App. Div. 547, 100 N. Y. Suppl. 357 [*affirmed* in 187 N. Y. 542, 80 N. E. 1106].

Oregon.— Duniway *v.* Portland, 47 Oreg. 103, 81 Pac. 945.

Washington.— Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002.

Wisconsin.— O'Mally *v.* McGinn, 53 Wis. 353, 10 N. W. 515.

See 36 Cent. Dig. tit. "Municipal Corporations," § 216.

The same presumptions obtain that a city ordinance was legally passed as in the case of an act of the legislature; and hence, where the record fails to show that the necessary formalities were omitted, it will be presumed that they were all complied with. Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235.

Illustrations.— Thus where a motion to dispense with the second and third readings of an ordinance was adopted at a town council at a meeting at which six out of seven members were present, but the record failed to show the vote on such motion, and the ordinance was passed by a vote of five members, it was held that it would be presumed that the motion received the vote of three fourths of the council as required by statute. State *v.* Vail, 53 Iowa 550, 5 N. W. 709. Where the council record recites that the rule requiring an ordinance to be read three times was suspended, without showing the number of votes on the proposition, it will be conclusively presumed in a collateral action that it is correct. Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148. Under a statute providing that "all ordinances of the city shall be read and considered by sections at a public meeting of the council, and the vote on their final passage shall be taken by yeas and nays, which shall be entered on the journal by the clerk," where the journal shows the full vote adopting the ordinance as a whole on its final passage, it will be presumed that it was read and adopted by sections. Downing *v.* Miltonvale, 36 Kan. 740, 14 Pac. 281. An ordinance which appears by the records to have been passed may be presumed to have been passed by the full number of votes required by the charter, where such fact does not affirmatively appear on the records. Lexington *v.* Headley, 5 Bush (Ky.) 508.

99. Ross *v.* Wimberly, 60 Miss. 345.

of the proceedings of a council that on motion a certain change in licenses was made, and that the mayor was instructed to prepare an ordinance covering such changes, did not show a complete legislative act, and did not change the existing law, although the minutes were kept by the clerk and signed by the mayor, as required by the charter, which also declared that they should have "the force and effect of a record."[1] And a two-thirds majority was not presumed in favor of a resolution from a record showing its adoption.[2] Nor was a meeting presumed to have been held from proof of an advertised call for it.[3] A town cemetery actually laid out and occupied was not limited to an acre, by a recital on its minutes, "the town have one acre at the burial place."[4] The approval of minutes of a special meeting at a following regular meeting cannot have the effect of a ratification of the action taken.[5]

d. Approval and Amendment. It is the right and duty of the body to approve and verify its minutes of proceedings, to the end that there may be true record of the corporate actions and proceedings.[6] The minutes made by the clerk or recorder are therefore subject to correction and amendment by the body at the ensuing meeting, so as to show the proceedings actually taken by the body.[7] But after they have been duly approved and verified by the signatures of the presiding officer and clerk, they are not subject to change by the clerk;[8] and where a city charter required the city clerk to keep a record of the proceedings of the council, and the clerk made a record of certain proceedings at a meeting of the council, which the council, at a subsequent meeting, attempted to amend by a vote, it was held that an amendment could be made only by the clerk or by order of the court upon a mandamus, and that the attempted amendment was of no effect.[9] But a *nunc pro tunc* entry may be made on minutes of a succeeding meeting.[10] And it has even been held that the clerk of a municipal corporation may amend its records according to his own knowledge of the truth, so long as he has the custody of them.[11]

1. Jones *v.* McAlpine, 64 Ala. 511.
2. *In re* Buffalo, 78 N. Y. 362.
3. Parker *v.* Doe, 20 Ala. 251.
4. Southampton *v.* Post, 4 N. Y. Suppl. 75 [*affirmed* in 121 N. Y. 685, 24 N. E. 1098].
5. Mills *v.* San Antonio, (Tex. Civ. App. 1901) 65 S. W. 1121.
6. Anniston *v.* Davis, 98 Ala. 629, 13 So. 331, 39 Am. St. Rep. 94.
7. *Alabama.*—Anniston *v.* Davis, 98 Ala. 629, 13 So. 331, 39 Am. St. Rep. 94.
Connecticut.—Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.
Illinois.—Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821.
Kentucky.—Becker *v.* Henderson, 100 Ky. 450, 38 S. W. 857, 18 Ky. L. Rep. 881.
Ohio.—McClain *v.* McKisson, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357.
Pennsylvania.—Com. *v.* Schubmehl, 3 Lack. Leg. N. 186.
See 36 Cent. Dig. tit. "Municipal Corporations," § 218.
The law attaches much less sanctity and importance to the entries of the votes and proceedings of towns and other municipal corporations than to judicial records, and the rules which govern the amendment of the latter are not applicable to the correction of the former. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.
As to voting.— Where the minutes of the meeting at which an ordinance was passed gave the names of the councilmen present and of those voting nay, and on correction of the minutes at the next meeting the names of those voting yea were ordered to be entered, proof that the correction was then made shows a substantial compliance with Ky. St. § 3279, providing that on the passage of ordinances relating to street improvements the yeas and nays shall be called and entered on the minutes. Becker *v.* Henderson, 100 Ky. 450, 32 S. W. 857, 18 Ky. L. Rep. 881.
8. McClain *v.* McKisson, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357.
9. Samis *v.* King, 40 Conn. 298.
By subsequent board.—A journal of a public body, such as a city council, cannot be amended by a vote passed by a subsequent board, so as to recite as passed an order which appears only as reported. Covington *v.* Ludlow, 1 Metc. (Ky.) 295.
10. *Illinois.*—Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821.
Indiana.—Everett *v.* Deal, 148 Ind. 90, 47 N. E. 219; Logansport *v.* Crockett, 64 Ind. 319.
Kentucky.—Becker *v.* Henderson, 100 Ky. 450, 38 S. W. 857, 18 Ky. L. Rep. 881; Pineville *v.* Burchfield, 42 S. W. 340, 19 Ky. L. Rep. 984.
Massachusetts.—See Mayhew *v.* Gay Head Dist., 13 Allen 129.
Michigan.—See Pontiac *v.* Axford, 49 Mich. 69, 12 N. W. 914.
11. Mott *v.* Reynolds, 27 Vt. 206. See also Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821.

7. DECISIONS AND REVIEW.[12] Decisions made by a governing body in the exercise of its legislative functions, or of discretionary powers conferred by charter or general law, are in their nature conclusive and not subject to review by the courts except in cases specially provided for by law.[13] But the courts will exercise judicial supervision over the actions, decisions, and proceedings of municipal bodies where they are in palpable violation of law, and will restrain their execution by appropriate process.[14] Thus a general order of the council to investigate newspaper charges of corruption in appointments and promotions on the police force, and assuring impunity to witnesses confessing crime, was enjoined as *ultra vires* and unauthorized.[15] So of an *ultra vires* ordinance requiring a railroad company to provide and maintain at its own expense lights at crossings,[16] and an ordinance passed in violation of a rule of order of the body.[17] The same process was also used to prevent a burgess from usurping the office of president of the council;[18] but it was refused against a disqualified alderman to prevent his voting in council, because quo warranto was the proper remedy,[19] and also in cases of irregular proceedings, which had been cured by subsequent legislative action.[20]

VI. ORDINANCES, RESOLUTIONS, AND BY-LAWS.[1]

A. In General — 1. DEFINITION. Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the

12. **Judicial supervision of municipal corporations** see also *supra*, III, I.

13. Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 246, 39 N. E. 943; People *v.* Rome, 136 N. Y. 489, 32 N. E. 984 [*reversing* 20 N. Y. Suppl. 223]; Schanck *v.* New York, 10 Hun (N. Y.) 124 [*affirmed* in 69 N. Y. 444]; Pawcatuck Valley St. R. Co. *v.* Westerly, 22 R. I. 307, 47 Atl. 691.

Where a parliamentary question has been determined by a city council, the courts will not review or disturb their ruling. Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667.

Provision for appeal.— R. I. Pub. St. c. 38, § 35, providing that any person aggrieved by the judgment or decree of a town council may appeal within forty days after the entry of such judgment or decree, and not thereafter, amounts simply to a general limitation of the time within which an appeal may be taken from the appealable doings of a town council, and does not of itself confer any right of appeal. Walsh *v.* Johnston, 18 R. I. 88, 25 Atl. 849.

14. Swann *v.* Cumberland, 8 Gill (Md.) 150, holding that where a county court, acting in virtue of its ordinary jurisdiction, brought proceedings of a town council before it by a writ of certiorari, an appeal would lie from its judgment on the writ.

Certiorari.— Where a municipal council acts in a legislative, executive, or ministerial capacity, its action is not subject to review by certiorari. Carr *v.* Augusta, 124 Ga. 116, 52 S. E. 300. See CERTIORARI, 6 Cyc. 753. But it is otherwise where it acts in a judicial capacity. Carr *v.* Augusta, *supra*.

No appeal lies to the circuit court from the refusal of a city council to issue a permit to build a house, for the council acts, not in a judicial but in an administrative capacity. *Ex p.* Evans, 72 S. C. 547, 52 S. E. 419.

Injunction of ultra vires acts see *supra*, III, I; and INJUNCTIONS, 22 Cyc. 888 *et seq.*

15. Martin *v.* Montreal, 18 Quebec Super. Ct. 30.

16. Hazleton *v.* Lehigh Valley R. Co., 11 Pa. Dist. 644, 10 Kulp 571.

17. See Zeiler *v.* Central R. Co., 84 Md. 304, 35 Atl. 932, 34 L. R. A. 469.

18. Carline *v.* Shallanberger, 13 Pa. Co. Ct. 145.

19. Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121.

20. State *v.* Guttenberg, 38 N. J. L. 419; People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. 109.

1. **Appealability of decisions concerning validity of ordinances, charters, and franchises** see APPEAL AND ERROR.

Civil action by individual for violation of ordinance see ACTIONS, 1 Cyc. 680, 681.

Constitutionality of ordinance: Relating to intoxicating liquors see INTOXICATING LIQUORS. Relating to licenses for occupation and privileges see LICENSES.

Enforcement of in admiralty see ADMIRALTY, 1 Cyc. 809.

Estoppel of city by ordinance see ESTOPPEL.

Injunctions against: Enactment of ordinance see INJUNCTIONS, 22 Cyc. 890. Enforcement of ordinance see INJUNCTIONS, 22 Cyc. 767.

Judicial notice of ordinances see EVIDENCE, 16 Cyc. 899.

Licenses relating to business of livery-stable keepers see LIVERY-STABLE KEEPERS.

Ordinances and resolutions of county boards see COUNTIES.

Ordinances: Constituting dedication of property to public use see DEDICATION. Creating rules of navigation see COLLISION. Prohibiting liquor traffic see INTOXICATING LIQUORS. Relating to health see HEALTH. Relating to license and taxation of liquor traffic see INTOXICATING LIQUORS. Relating to operation of railroads see RAILROADS.

corporation.[2] In modern municipal parlance, ordinance and by-law are convertible terms, meaning the local law of the municipality.[3] "By-law" is the general term applicable to the self-adopted rules of all classes of corporations; "ordinance" is used to describe the self-governing rule of a municipality.[4] It is not so comprehensive as "regulation" and is more solemn and formal than "resolution."[5] "Ordinance" is a continuing regulation, while "resolution," although sometimes held to enact a law,[6] is usually declared not to be the equivalent of an ordinance, but rather an act of a temporary character, not prescribing a permanent rule of government.[7] Authority granted to a city council to prescribe regulations by ordinance does not empower it to regulate the subject by mere resolution; and a

Police ordinance and regulation in general see *infra*, XI.

Sufficiency of ordinance and resolution as to dedication see DEDICATION.

Violation of: Constitutional right to trial by jury of municipal regulations see JURIES. Ordinance as affecting right to recover on accident policy see ACCIDENT INSURANCE, 1 Cyc. 267. Ordinances as evidence of negligence see ASSAULT AND BATTERY, 3 Cyc. 1058. Ordinances resulting in injuries by animals see ANIMALS, 2 Cyc. 382.

2. Horr & B. Mun. Pol. Ord. § 1 [*quoted* in Bills *v.* Goshen, 117 Ind. 221, 225, 20 N. E. 115, 3 L. R. A. 261].

Other definitions are: "A rule or regulation adopted by a municipal corporation." Anderson L. Dict. [*quoted* in Rutherford *v.* Swink, 96 Tenn. 564, 567, 35 S. W. 554].

"A local law — a rule of conduct prospective in its operation, and applying generally to the persons and things subject to the local jurisdiction." Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 193, 50 Pac. 277.

"The generic term for acts of council affecting the affairs of the corporation." Kepner *v.* Com., 40 Pa. St. 124, 130; Fuller *v.* Scranton, 2 Pa. Cas. 61, 66, 4 Atl. 467; Fuller *v.* Scranton, 1 Pa. Co. Ct. 405, 407.

"A rule established by authority; a permanent rule of action; a law or statute." Black L. Dict. [*quoted* in Shuttuck *v.* Smith, 6 N. D. 56, 72, 69 N. W. 5].

"A local law, prescribing a general and permanent rule." Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 336, 16 N. E. 624.

"An ordinance is not in the constitutional sense a public law. It is a mere local rule or by-law, a police or domestic regulation, devoid in many respects of the characteristics of public or general laws." McInerney *v.* Denver, 17 Colo. 302, 312, 29 Pac. 516; State *v.* Fourcade, 45 La. Ann. 717, 727, 13 So. 187, 40 Am. St. Rep. 249.

"The word 'ordinance,' as applicable to the action of a municipal corporation, should be deemed to mean the local laws passed by the governing body." Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 172, 26 N. Y. Suppl. 364.

"'Ordinance' . . . in its usual primary sense, means a local law — a rule of conduct prospective in its operation, and applying generally to the persons and things subject to the local jurisdiction." Southern Pac. Co. *v.* Western Pac. R. Co., 144 Fed. 160, 181.

3. Bills *v.* Goshen, 117 Ind. 221, 225, 20 N. E. 115, 3 L. R. A. 261 (upon which point the court said that the words "ordinances" and "by-laws" are used interchangeably and that they are synonymous); Evison *v.* Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; State *v.* Lee, 29 Minn. 445, 451, 13 N. W. 913; Rutherford *v.* Swink, 96 Tenn. 564, 567, 35 S. W. 554; National Bank of Commerce *v.* Grenada, 44 Fed. 262, 263 (in which case it was said: "The terms 'by-laws' and 'ordinances' are used in their ordinary sense, and imply one and the same thing").

4. Com. *v.* Turner, 1 Cush. (Mass.) 493.

5. Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Cape Girardeau *v.* Fougeu, 30 Mo. App. 551; State *v.* Bayonne, 35 N. J. L. 335; Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809. And see Blanchard *v.* Bissell, 11 Ohio St. 96.

6. *California.*— San Francisco Gas Co. *v.* San Francisco, 6 Cal. 190.

Kentucky.— Gleason *v.* Barnett, 61 S. W. 20, 22 Ky. L. Rep. 1660.

Louisiana.— See First Municipality *v.* Cutting, 4 La. Ann. 335.

Missouri.—Tipton *v.* Norman, 72 Mo. 380; Rumsey Mfg. Co. *v.* Schell City, 21 Mo. App. 175.

Pennsylvania.— Sower *v.* Philadelphia, 35 Pa. St. 231.

United States.— Crebs *v.* Lebanon, 98 Fed. 549, holding that it is immaterial that an ordinance required to be submitted for ratification to the electors of a city is submitted by a resolution of the council, instead of by an ordinance, where the resolution contains all the essentials of an ordinance.

When resolution equivalent to ordinance.— A formal resolution by the council will be construed to be an ordinance if it is such in substance and intention, and has been duly passed and promulgated in the mode required for ordinances. Kerlin Bros. Co. *v.* Toledo, 20 Ohio Cir. Ct. 603, 11 Ohio Cir. Dec. 56. And see Mulberry *v.* O'Dea, 4 Cal. App. 385, 88 Pac. 367; Tipton *v.* Norman, 72 Mo. 380.

7. People *v.* Mount, 186 Ill. 560, 58 N. E. 360; Merchants' Union Barb Wire Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494; Newman *v.* Emporia, 32 Kan. 456, 4 Pac. 815; Butler *v.* Passaic, 44 N. J. L. 171; Campbell *v.* Cincinnati, 49 Ohio St. 463, 470, 31 N. E. 606; Blanchard *v.* Bissell, 11 Ohio St. 96. And see Marchildon *v.* Baril, etc., Soc., 15 Quebec Super. Ct. 499.

resolution adopted for that purpose is null and void.[8] A resolution is the appropriate form of corporate action for the removal of an officer, the acceptance of a dedication, the levying of a tax for a specific purpose, the purchase of corporate property, the making of corporate contracts, and the ratification of acts of agents. It is employed to express a view or opinion, a purpose or intention, and sometimes to formulate the proposition or acceptance of a contract by the body.[9]

2. ORIGIN. A by-law or bye-law, is a law of the by or bye, a word of Norse derivation signifying town or place, brought into England by the Angles or Danes, and is peculiarly appropriate to municipal phraseology,[10] although now used more commonly, and in the United States, almost exclusively, to describe the subordinate regulations of private corporations, companies, and societies.[11] In Great Britain and Canada, however, it is still the common word employed in reference to that kind of ordinances which every corporation has an incidental power of making for the regulation of their municipal affairs.[12] From time immemorial the municipal corporations of England have exercised this power, not only when expressly granted in the charter, but as an inherent right necessarily pertaining to all corporations for their proper self-government.[13] "Ordinance" from long usage in ecclesiastical law suggests sanctity or importance.[14] It was formerly used to include, besides by-laws, all local laws of the corporation, whether customary, statutory, or charter regulations.[15] But later usage confines it to such laws as are enacted by the corporation.[16]

3. AUTHORITY.[17] The authority of a municipal corporation to exercise the legislative function of government seems to have gone unquestioned in England for centuries; an early case[18] having necessarily included that power in its quaint definition of such a body: The investing of the people of a place with the local

8. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14; Mills *v.* San Antonio, (Tex. Civ. App. 1901) 65 S. W. 1121. See *supra*, V, B, 1, d.

9. *California.*— San Francisco Gas Co. *v.* San Francisco, 6 Cal. 190.

Illinois.— Alton *v.* Mulledy, 21 Ill. 76; Egan *v.* Chicago, 5 Ill. App. 70.

Indiana.— Allen County *v.* Silvers, 22 Ind. 491; Indianapolis *v.* Imberry, 17 Ind. 175.

Iowa.— Burlington *v.* Putnam Ins. Co., 31 Iowa 102.

New Jersey.— Green *v.* Cape May, 41 N. J. L. 45; State *v.* Elizabeth, 37 N. J. L. 432; State *v.* Jersey City, 27 N. J. L. 493.

Pennsylvania.— Sower *v.* Philadelphia, 35 Pa. St. 231.

United States.— Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573; Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. In Atchison Bd. of Education *v.* De Kay, *supra*, the general rule was stated to be that where the charter commits the decision of the matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by ordinance; and to the same effect are: Merchants' Union Barb Wire Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494; First Municipality *v.* Cutting, 4 La. Ann. 335; State *v.* Jersey City, 27 N. J. L. 493; Green Bay *v.* Brauns, 50 Wis. 204, 6 N. W. 503.

Appointment of trustees.— A board of high school trustees may be appointed by resolution of the municipal council having jurisdiction; a by-law is not necessary. Port Arthur High School Bd. *v.* Ft. William, 25 Ont. App. 522.

A city of the third class may authorize a railroad to occupy streets by resolution under the act of May 23, 1889. Central Valley R. Co. *v.* Pittston, 13 Pa. Dist. 675.

10. CORPORATIONS, 10 Cyc. 350; 1 Bacon Abr. tit. "By-law"; 2 Encycl. Laws of England 315; Terms de la Ley, tit. "By-law"; 1 Thompson Corp. § 938; Webster Dict. tit. "By-law."

11. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691; Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508; 1 Thompson Corp. § 940; Taylor Corp. 582–584; Clark Corp. 454.

12. Hopkins *v.* Swansea, 4 M. & W. 621; Traves *v.* Nelson, 7 Brit. Col. 48; Bogart *v.* Seymour Tp., 10 Ont. 322; Bell *v.* Westmount, 15 Quebec Super. Ct. 580.

13. 2 Bacon Abr. tit. "Corp. (D.) 260"; 1 Blackstone Comm. 475, 476; 2 Kent Comm. 278; Willcock Mun. Corp. 100.

14. Book of Common Prayer, *passim*; Standard Dict. tit. "Ordinance"; Worcester Dict. tit. "Ordinance."

15. Willcock Mun. Corp. 73.

16. Kepner *v.* Com., 40 Pa. St. 124, 130; Black L. Dict. tit. "Ordinance"; Standard Dict. tit. "Ordinance"; Webster Int. Dict. tit. "Ordinance."

17. **Constitutionality of statutes delegating to municipal corporations authority in local affairs** see CONSTITUTIONAL LAW, 8 Cyc. 837 *et seq.*

18. Cuddon *v.* Eastwick, 1 Salk. 143.

government thereof.[19] Not so, however, in America, for there is scarcely a state in which the authority of a municipal corporation to exercise the governmental function of legislation has not been challenged; and the familiar maxim of agency in the Roman law, "*Delegata potestas non potest delegare*," [20] has been made to do valiant service in argument to support our democratic constitutions.[21] This contention has received scant favor in our courts, and the power of a community, duly invested with the function of local self-government, to enact municipal by-laws or ordinances has been irrevocably established by repeated and concurring decisions throughout the United States.[22]

4. Nature and Requisites — a. Nature. Municipal ordinances being established by the exercise of a delegated function of legislation, for a limited locality and particular purposes, subordinate to the general government of the state, are obviously subject to many restrictions and limitations, which confine them to a comparatively narrow field.[23] A community, although incorporated and invested with the power of local self-government, is none the less an integral part of the state, and its inhabitants are subject to the same general laws as the rural population, and their ordinances cannot regulate civil rights and liabilities.[24] As such inhabitants cannot be deprived of their personal or property rights except by due process of law,[25] so neither can they, in the exercise of municipal functions, renounce their allegiance or repudiate their civic obligations.[26] They are incorporated for public purposes only, and may not pervert public powers to private purposes.[27] The common weal of the community is the pole star of its organiza-

19. See, generally, VI, A, 1.

20. 2 Bouvier L. Dict. tit. "Maxims."

21. A common formula whereby the people confer legislative power upon the department of government, intrusted with that function, is substantially that found in the federal constitution: "All legislative Powers . . . shall be vested in a Congress of the United States." U. S. Const. art. 1, § 1. For further illustrations see the following constitutional provisions: Miss. (1868) art. 4, § 1; Mo. (1875) art. 4, § 1; Nebr. (1866) art. 2, § 1; N. H. (1792) pt. 2, § 1; N. J. (1876) art. 4, § 1; N. Y. (1846) art. 3, § 1; N. C. (1876) art. 2, § 1; Ohio (1851), art. 2, § 1; Oreg. (1857) art. 4, § 1; Pa. (1873) art. 2, § 1; Tenn. (1870) art. 2, § 3; Tex. (1876) art. 3, § 1; Va. (1870) art. 5, § 1.

Power of legislature to delegate its functions to subordinate body.— Treating this delegation of legislative power by the people of the states to the legislative department as absolute and final, the power of that department to delegate any portion of its legislative function to any subordinate body has been repeatedly and strenuously challenged in the courts of nearly every state of the American Union in cases involving the power of municipalities to enforce ordinances of their own enactment. But the courts have consistently and uniformly responded that logic is not law; and the common-law power of municipal corporations to legislate in matters of local self-government has been uniformly sustained as peculiarly consistent with the democratic doctrine of home rule. See the cases cited in the note next following.

22. *Georgia.*— Perdue *v.* Ellis, 18 Ga. 586.

Illinois.— Tugman *v.* Chicago, 78 Ill. 405; Mason *v.* Shawneetown, 77 Ill. 533.

Iowa.— Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Massachusetts.—Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670.

Missouri.— Metcalf *v.* St. Louis, 11 Mo. 103.

New Jersey.— Trenton Horse R. Co. *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

New York.— Clarke *v.* Rochester 28 N. Y. 605.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

And see Constitutional Law, 8 Cyc. 839.

Where a corporation is empowered to make ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified; all others being excluded by implication. New Orleans *v.* Philippi, 9 La. Ann. 44. And see State *v.* Zeigler, 32 N. J. L. 262.

23. Willcock Mun. Corp. 100.

24. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; *In re* Romney Tp., 11 Ont. App. 712; *In re* Peck, 46 U. C. Q. B. 211.

The primary object of municipal ordinances is public and not private, and their violation is redressed by the legal penalties. Cook *v.* Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703; Taylor *v.* Lake Shore, etc., R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457.

25. U. S. Const. Amendm. 14, § 1.

26. "It is an unsound and even absurd proposition," it has been said, "that political power, conferred by the legislature, can become a vested right as against the government in any individual or body of men." People *v.* Morris, 13 Wend. (N. Y.) 325, 331, per Nelson, C. J.

27. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; May *v.* People, 1 Colo. App.

tion and to it the corporate course must always be directed, and all municipal legislation must subserve that end.[28] All ordinances must be enacted in respect of the sovereign powers of the state, which cannot tolerate departure from its public policy or defiance of its supreme authority.[29] In fine, municipal ordinances are local laws to preserve the peace, order, health, and comfort of the people, and to give the corporation remedy for their violation.[30]

b. Requisites. The fundamental rules of municipal legislation, generally recognized by the courts, for breach of any of which an ordinance will be invalidated may be thus summarized: (1) There must be a valid municipal corporation *de jure* or *de facto*.[31] (2) The ordinance must be enacted by the governing body in lawful meeting assembled.[32] (3) It must be passed in the manner and by the majority required by law.[33] (4) It must be duly promulgated and published.[34] (5) It must relate to a subject within the scope of the corporate powers.[35] (6) It must not be repugnant to the constitution or laws of the United States or the state, the charter, or the common law in force in the state.[36] (7) It must not be unreasonable or oppressive.[37] (8) It must by fair and natural

157, 27 Pac. 1010; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; Mongenais *v.* De Rigaud, 11 Quebec Super. Ct. 348; Bell *v.* Manvers Tp., 2 U. C. C. P. 507; Biggar Mun. Man. Can. 332.

28. *California.*— *In re* Hang Kie, 69 Cal. 149, 10 Pac. 327; Johnson *v.* Simonton, 43 Cal. 242.

Connecticut.— State *v.* Welch, 36 Conn. 215.

Georgia.— Morris *v.* Rome, 10 Ga. 532; Frederick *v.* Augusta, 5 Ga. 561.

Illinois.— King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89.

Indiana.—Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830.

Kentucky.— Megowan *v.* Com., 2 Metc. 3.

Maine.— State *v.* Merrill, 37 Me. 329.

Missouri.— St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791. See also St. Charles *v.* Meyer, 58 Mo. 86.

New Hampshire.— State *v.* Freeman, 38 N. H. 426.

New York.— New York *v.* Williams, 15 N. Y. 502.

North Carolina.—Washington *v.* Frank, 46 N. C. 436.

South Carolina.— State *v.* Williams, 11 S. C. 288; Charleston *v.* Benjamin, 2 Strobh. 508, 49 Am. Dec. 606.

Tennessee.—Knoxville *v.* Bird, 12 Lea 121, 49 Am. Rep. 326.

Wisconsin.— Platteville *v.* Bell, 43 Wis. 488.

29. *California.*— Placerville *v.* Wilcox, 35 Cal. 21.

Colorado.— Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230.

Georgia.— Haywood *v.* Savannah, 12 Ga. 404.

Illinois.— People *v.* Mount, 186 Ill. 560, 58 N. E. 360; Jacksonville *v.* Allen, 25 Ill. App. 54.

Kentucky.— Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556.

Michigan.— People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721.

Minnesota.— St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Missouri.— St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; Kemp *v.* Monett, 95 Mo. App. 452, 69 S. W. 31.

Ohio.— Canton *v.* Nist, 9 Ohio St. 439.

Tennessee.—Long *v.* Shelby County Taxing Dist., 7 Lea 134, 40 Am. Rep. 55.

Texas.— Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242.

Wisconsin.—Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

United States.— Thomas *v.* Richmond, 12 Wall. 349, 20 L. ed. 453.

30. They are intended as expressed in the sententious words of the great English commentator to regulate the conduct of citizens, who "like members of a well-governed family, are bound to conform, their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious and inoffensive in their respective stations." 4 Blackstone Comm. 162.

31. Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558; Johnson *v.* Okerstrom, 70 Minn. 303, 73 N. W. 147.

32. Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786; Dugan *v.* Farrier, 47 N. J. L. 383, 1 Atl. 751 [*affirmed* in 48 N. J. L. 613, 7 Atl. 881]. And see Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

33. Horr & B. Mun. Pol. Ord. "In Loco."

34. See *infra*, VI, F.

35. Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698 (in which case it was held to come within the province of a by-law to declare dense smoke from any locomotive or boat to be a nuisance, and to prescribe a penalty therefor. This ordinance was held also not to impose such regulation on commerce as to interfere with the constitutional prerogative of congress to regulate commerce); Louisville, etc., R. Co. *v.* Louisville, 8 Bush (Ky.) 415.

36. See *infra*, VI, G.

37. See *infra*, VI, G, 4.

construction convey a reasonable certainty of meaning.[38] (9) It must not be unequal, unfair, or discriminating.[39]

B. Enactment[40] — **1. In General.** The common-law power to enact by-laws, inherent in a municipal corporation, belongs to the body at large.[41] If the power is conferred upon the corporation by charter, the modern doctrine is that the power belongs to the council, unless some other body is specially designated therefor.[42] An ordinance or by-law enacted by any other than the authorized body is null and void.[43] Ordinances imposing extraordinary pecuniary obligations upon municipalities are now commonly required to be enacted or specially authorized by popular vote of the citizens.[44] Lacking this, the enactment of an ordinance by the council is vain and futile, and bonds issued thereunder are void.[45] A *de facto* board or council may enact a valid ordinance.[46] And, since the council is a continuing body, an ordinance, requiring three readings and votes, may be passed by a single reading and vote of a new council, provided its predecessor had given it the two previous readings and votes required.[47] The minutes of the council must show with reasonable certainty a compliance with the statutory requirements for enacting an ordinance or by-law.[48]

2. Parliamentary Law. Municipal governing bodies usually adopt or recognize parliamentary law as their rules of order and proceeding.[49] Yet the courts, unless positively required by express statutory provision, will not annul or invalidate an ordinance enacted in disregard of parliamentary rule, provided the enactment is made in the manner required by statute.[50]

3. Formal Requisites — a. In General. Non-compliance with merely formal requirements in the manner of enacting an ordinance is generally considered by the courts as no ground for declaring it void.[51] Indeed any form of words signifying clearly the will of the governing body that a by-law exists which the corporation was competent to enact has been held to be sufficient.[52] But this will not be so held when matters of substance are ignored or disregarded by the body.[53] Yet every reasonable intendment of record will be made by the courts

38. See *infra*, VI, C.

39. See *infra*, VI, G, 4, b.

40. Mode of voting see *supra*, V, B, 4, c. Number of votes required to pass ordinance see *supra*, V, B, 4, d.

41. Willcock Mun. Corp. 100.

42. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Polinsky *v.* People, 73 N. Y. 65; People *v.* New York Bd. of Health, 33 Barb. (N. Y.) 344; Cushing *v.* Buffalo Bd. of Health, 13 N. Y. St. 783.

43. People *v.* Coon, 25 Cal. 635; Marshall *v.* Cadwalader, 36 N. J. L. 283.

44. See constitutions of the various states.

45. Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164.

46. *Alabama.*— Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; Lockhart *v.* Troy, 48 Ala. 579.

Iowa.— Decorah *v.* Bullis, 25 Iowa 12; Cochran *v.* McCleary, 22 Iowa 75.

Kentucky.— Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721.

Maryland.— Koontz *v.* Hancock, 64 Md. 134, 20 Atl. 1039.

Nebraska.— State *v.* Gray, 23 Nebr. 365, 36 N. W. 577.

Ohio.— Kirker *v.* Cincinnati, 48 Ohio St. 507, 27 N. E. 898; Scovill *v.* Cleveland, 1 Ohio St. 126.

Tennessee.— Ensley *v.* Nashville, 2 Baxt. 144.

Texas.— State *v.* Goowin, 69 Tex. 55, 5 S. W. 678.

Virginia.— Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

Wisconsin.— Dean *v.* Gleason, 16 Wis. 1.

47. McGraw *v.* Whitson, 69 Iowa 348, 28 N. W. 632; Smith *v.* Columbus, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 441, 1 Ohio N. P. 1.

48. Markham *v.* Anamosa, 122 Iowa 689, 98 N. W. 493. See *supra*, V, B, 6.

49. Landes *v.* State, 160 Ind. 479, 67 N. E. 189.

50. *Iowa.*— McGraw *v.* Whitson, 69 Iowa 348, 28 N. W. 632.

Kentucky.— Weatherhead *v.* Cody, 85 S. W. 1099, 27 Ky. L. Rep. 631.

Massachusetts.— Holt *v.* Somerville, 127 Mass. 408.

Michigan.— Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184.

Ohio.— Madden *v.* Smeltz, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

Texas.— Hutcheson *v.* Storrie, (Civ. App. 1898) 48 S. W. 785.

See 36 Cent. Dig. tit. "Municipal Corporations," § 222.

51. Matter of Guerrero, 69 Cal. 88, 10 Pac. 261; Rockville *v.* Merchant, 60 Mo. App. 365. And see Rumsey Mfg. Co. *v.* Schell City, 21 Mo. App. 175.

52. Chicago, etc., R. Co. *v.* Beaver, 96 Ill. App. 558; Lisbon *v.* Clark, 18 N. H. 234.

53. Simmerman *v.* Wildwood, 60 N. J. L.

in order to give validity to an ordinance which is within the municipal powers.[54]

b. Enacting Clause. Defects in the form of the enacting clause have often challenged the attention of the courts with an almost unanimous modern tendency to support the ordinance, "*ut magis valeat quam pereat.*"[55] In a few cases judgment has gone against an ordinance because the enacting clause was wholly lacking or fatally defective in recitals.[56] But the very great weight of authority favors the ignoring of formal defects, and the sustaining of by-laws wherever implication and presumption will permit, without violating any recognized rule of law.[57]

c. Reading, Referring, and Time For Passing. It is well settled that when there is no constitutional or statutory provision as to the mode of enactment or conditions precedent thereto, the municipal body may then prescribe its own rules, or pursue its own method.[58] But what effect is to be given to rules prescribed by the legislature for the conduct of municipal business seems to be an insoluble problem, the cases presenting an interesting array of rulings pro and con that are irreconcilable.[59]

367, 40 Atl. 1132 [*affirmed* in 61 N. J. L. 695, 43 Atl. 1097].

54. *Kentucky.*— Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150.

Louisiana.— Crowley *v.* Ellsworth, 114 La. 308, 38 So. 199, 108 Am. St. Rep. 353, 69 L. R. A. 276.

Maryland.— Baltimore *v.* Hughes, 1 Gill & J. 480, 19 Am. Dec. 243.

Massachusetts.— Com. *v.* Dow, 10 Metc. 382.

Pennsylvania.— Johnson *v.* Philadelphia, 60 Pa. St. 445.

The misrecital in a city ordinance of the source of the power by which the ordinance is passed does not invalidate it. Baltimore *v.* Ulman, 79 Md. 469, 30 Atl. 43.

Omission of date in original draft.—Where proof of the date of an ordinance is supplied by the minutes of council, the omission of the date in the original draft and passage of the ordinance is immaterial. *In re* Denniston Ave., 34 Pittsb. Leg. J. N. S. (Pa.) 162.

55. *Colorado.*—People *v.* Chipman, 31 Colo. 90, 71 Pac. 1108.

Illinois.— People *v.* Burke, 206 Ill. 358, 69 N. E. 45.

Michigan.— People *v.* Murray, 57 Mich. 396, 24 N. W. 118.

Missouri.— Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

Washington.— State *v.* Fountain, 14 Wash. 236, 44 Pac. 270.

Wisconsin.— State *v.* Noni, 113 Wis. 15, 88 N. W. 1004.

See 36 Cent. Dig. tit. "Municipal Corporations," § 224. And see *supra*, V, B, 6, c.

56. Galveston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1896) 36 S. W. 776. Thus it was held that a borough ordinance recited as enacted by the chief burgess and town council, when the corporate name is the chief burgess, assistant burgess, and town council, is void. Milton Borough *v.* Hoagland, 3 Pa. Co. Ct. 283.

57. See cases cited *supra*, note 55.

58. *Illinois.*— Swift *v.* People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470.

Indiana.— Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

Louisiana.— First Municipality *v.* Cutting, 4 La. Ann. 335.

Nebraska.— McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543.

New Jersey.— Butler *v.* Passaic, 44 N. J. L. 171.

See 36 Cent. Dig. tit. "Municipal Corporations," § 225. See also *supra*, V, B, 4, b.

Reference to joint or separate committee.—An ordinance which passed first reading, and was then printed and was afterward considered section by section by councils, sitting as a committee of the whole, and thereafter passed second reading, is valid, and does not violate the act of May 23, 1889, providing that "no bill shall be considered unless referred to a joint or separate committee, returned therefrom and printed for the use of the members." Hallock *v.* Lebanon, 215 Pa. St. 1, 64 Atl. 362.

59. *Arkansas.*— White *v.* Clarksville, 75 Ark. 340, 87 S. W. 630.

Illinois.— Swift *v.* People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470.

Iowa.— State *v.* Nebraska Tel. Co., 127 Iowa 194, 103 N. W. 120; McGraw *v.* Whitson, 69 Iowa 348, 28 N. W. 632; Cutcomp *v.* Utt, 60 Iowa 156, 14 N. W. 214.

Kentucky.— Louisville *v.* Selvage, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809, 21 Ky. L. Rep. 349, 620; East Tennessee Tel. Co. *v.* Anderson County Tel. Co., 57 S. W. 457, 22 Ky. L. Rep. 418.

Missouri.— Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946.

New Jersey.— Bill Posting Sign Co. *v.* Atlantic City, 71 N. J. L. 72, 58 Atl. 342; Jersey City, etc., R. Co. *v.* Passaic, 68 N. J. L. 110, 52 Atl. 242; Delaware, etc., Tel. Co. *v.* Pensauken Tp., 67 N. J. L. 91, 50 Atl. 452 [*affirmed* in 67 N. J. L. 531, 52 Atl. 482]; Thorhill *v.* Stephany, 66 N. J. L. 171, 48 Atl. 573; Flood *v.* Atlantic City, 63 N. J. L. 530, 42 Atl. 829; Cowen *v.* Wildwood, 60 N. J. L. 365, 38 Atl. 22.

Ohio.— Elyria Gas, etc., Co. *v.* Elyria, 57

4. Suspension of Rules. There seems less discord in the rulings where rules of order have been suspended by the council and the ordinance passed speedily or summarily, the courts inclining to uphold all legal suspensions and ordinances passed thereunder, but refusing recognition to emergent action taken in apparent ignorance or defiance of wholesome rules of reading, reference, and time for passing ordinances and by-laws.[60]

5. Passage by Both Houses or Branches. Rules to insure considerate municipal action in case of a bi-cameral governing body usually require a delay of one day after introduction before voting on an ordinance, or forbid passage by both bodies on the same day, although in some cases the rule seems to have required action of both bodies at the same session.[61] The decisions in the cases seem to ignore breach of merely formal requirements;[62] and to denounce action taken in violation of the spirit of the regulation.[63]

6. Curing Defective Enactments. The courts do not uphold mere makeshifts of the council with a view to remedy defects in the prescribed mode of enacting an ordinance; and therefore it was held that the substantial defects of want of signature by the presiding officer, and attestation by the clerk, and recordation of a by-law cannot be cured by subsequent motion adopted by the body to validate the by-law notwithstanding the defects.[64] Nor will a subsequent approval of minutes by a full meeting operate to ratify the void enactment of an ordinance by a minority.[65] But it seems that actual ratification of each defective action by a valid meeting will cure the defect resulting from passage by less than a quorum.[66]

C. Certainty — 1. In General. Ordinances must by fair and natural construction be certain to a common intent.[67]

Ohio St. 374, 49 N. E. 335; Campbell *v.* Cincinnati, 49 Ohio St. 463, 31 N. E. 606; Thatcher *v.* Toledo, 19 Ohio Cir. Ct. 311, 10 Ohio Cir. Dec. 272; Cincinnati *v.* Johnson, 17 Ohio Cir. Ct. 291, 9 Ohio Cir. Dec. 736; Chillicothe *v.* Logan Natural Gas, etc., Co., 11 Ohio S. & C. Pl. Dec. 24, 8 Ohio N. P. 88.

Washington.— Vancouver *v.* Wintler, 8 Wash. 378, 36 Pac. 278, 685.

See 36 Cent. Dig. tit. "Municipal Corporations," § 225.

60. *Iowa.*— Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

Kentucky.— Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819.

Nebraska.— Brown *v.* Lutz, 36 Nebr. 527, 54 N. W. 860.

New Jersey.— South Jersey Tel. Co. *v.* Woodbury, 73 N. J. L. 276, 63 Atl. 4.

Ohio.— Campbell *v.* Cincinnati, 49 Ohio St. 463, 31 N. E. 606; Bloom *v.* Xenia, 32 Ohio St. 461.

Pennsylvania.— Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271; *In re* Fourth St., 19 Pa. Co. Ct. 488.

See 36 Cent. Dig. tit. "Municipal Corporations," § 226.

61. Altoona *v.* Bowman, 171 Pa. St. 307, 33 Atl. 187.

62. Specht *v.* Louisville, 58 S. W. 607, 22 Ky. L. Rep. 699; Oswald *v.* Gosnell, 56 S. W. 165, 21 Ky. L. Rep. 1660; Hallock *v.* Lebanon, 215 Pa. St. 1, 64 Atl. 362.

63. Wetmore *v.* Story, 22 Barb. (N. Y.) 414, 3 Abb. Pr. 262; Beekman's Case, 11 Abb. Pr. (N. Y.) 164, 19 How. Pr. 518.

64. Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

65. Pimental *v.* San Francisco, 21 Cal. 351; McCrackin *v.* San Francisco, 16 Cal. 591.

66. Shawneetown *v.* Baker, 85 Ill. 563. And see White *v.* Clarksville, 75 Ark. 540, 87 S. W. 630.

67. *California.*— San Francisco Pioneer Woolen Factory *v.* Brickwedel, 60 Cal. 166.

Connecticut.— State *v.* Clarke, 69 Conn. 371, 37 Atl. 975, 61 Am. St. Rep. 45, 39 L. R. A. 670.

Indiana.— Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

Iowa.— State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652.

Louisiana.— Shreveport *v.* Roos, 35 La. Ann. 1010.

Massachusetts.— Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146; Com. *v.* Roy, 140 Mass. 432, 4 N. E. 814.

Missouri.— Becker *v.* Washington, 94 Mo. 375, 7 S. W. 291.

New Jersey.— Glen Ridge Bd. of Health *v.* Werner, 67 N. J. L. 103, 50 Atl. 585; McConvill *v.* Jersey City, 39 N. J. L. 38.

New York.— Tappan *v.* Young, 9 Daly 357.

North Carolina.— State *v.* Rice, 97 N. C. 421, 2 S. E. 180; State *v.* Cainan, 94 N. C. 883.

Texas.— *Ex p.* Bell, 32 Tex. Cr. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

Ordinance void for uncertainty.— A penal ordinance which fails to cast on any particular person or persons the duty of making repairs on leaky vaults is too vague and uncertain. State *v.* Forman, 50 La. Ann. 1022, 24 So. 603. An ordinance imposing a fine of not more than fifty dollars for a violation is void for uncertainty. State *v.* Irvin, 126 N. C. 989, 35 S. E. 430. An ordinance

2. As to Penalty or License-Fee. Some American rulings, especially in the early cases, denounce as void a police by-law which instead of fixing a sum certain as penalty gives discretion to the magistrate to vary the penalty within prescribed limits.[68] The prevailing modern doctrine, however, is that an ordinance or by-law is not rendered void by the magisterial discretion conferred by it to vary the fine, within express limits, according to the enormity of the offense.[69] But a police ordinance providing no penalty for its violation is void,[70] and so likewise are all amendments thereto.[71] The penalty, however, may well be prescribed in another section than the one declaring the offense.[72]

D. Approval or Veto[73] — 1. In General. Acts of legislation, whether of state or corporation, are not valid unless they receive the concurrent approbation of all the elements constituting the legislative department of government.[74] Whenever therefore the charter of a municipal corporation makes the mayor a constituent element of its legislature, either directly or indirectly, by positive expression or necessary implication, his approval is essential to the validity of

may be void for uncertainty, as where it prescribes that an awning may be upon a suitable frame. State *v.* Clarke, 69 Conn. 371, 37 Atl. 975, 61 Am. St. Rep. 45, 39 L. R. A. 670.

68. Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441 [*overruled* in Huntsville *v.* Phelps, 27 Ala. 55]; *In re* Ah You, 88 Cal. 99, 25 Pac. 974, 22 Am. St. Rep. 280, 11 L. R. A. 408; State *v.* Clinton, 53 N. J. L. 329, 21 Atl. 304 [*following* Melick *v.* Washington, 47 N. J. L. 254; State *v.* Zeigler, 32 N. J. L. 262, and *explaining* and *distinguishing* McConvill *v.* Jersey City, 39 N. J. L. 38]; State *v.* Worth, 95 N. C. 615; State *v.* Cainan, 94 N. C. 883; State *v.* Crenshaw, 94 N. C. 877; Louisburg *v.* Harris, 52 N. C. 281. See also Cooley Const. Lim. 202; 2 Kyd Corp. 157; Willcock Mun. Corp. 154; 13 Law Lib. 85 [all *cited* in McConvill *v.* Jersey City, 39 N. J. L. 38, 40].

This is the English rule.— Wood *v.* Searl, J. Bridgm. 139; Piper *v.* Chappell, 9 Jur. 601, 14 M. & W. 624.

Reason for rule.— This view was derived doubtless from the common law that the form of action for recovery of such penalty was debt. Meaher *v.* Chattanooga, 1 Head (Tenn.) 74. Where the charter authorizes the municipality to enforce its ordinances by penalties, not exceeding a certain amount, to be recovered by "an action of debt," it has been held that the council must prescribe a precise penalty for each offense, for the reason that the action of debt can only be maintained for a sum capable of being ascertained at the time the action is brought. State *v.* Zeigler, 32 N. J. L. 262. In New Jersey the distinction is made between ordinances imposing penalties which must be recovered by action of debt and those not so recoverable, the former being bad within the rule, and the latter being upheld as valid. See the New Jersey cases cited *supra*, this note.

Option between fine or imprisonment.— A town ordinance requiring the removal of all signs projecting or suspended over the sidewalks, and providing that any person violating such ordinance "shall, upon conviction before the Mayor, be fined fifty dollars, or imprisoned thirty days," is not void for uncertainty, because it gives the mayor the discretion to impose the penalty of either fine or imprisonment. State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446. See State *v.* Clinton, 53 N. J. L. 329, 21 Atl. 304, holding that where a municipal charter authorizes the common council to prescribe a penalty for violation of its ordinances, to be recovered by action of debt, the ordinance must fix the precise penalty.

69. *Alabama.*— Huntsville *v.* Phelps, 27 Ala. 55 [*overruling* Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441].

Florida.— Atkins *v.* Phillips, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158.

Indiana.— Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

Michigan.— See *In re* Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

New Jersey.— McConvill *v.* Jersey City, 39 N. J. L. 38 [*distinguishing* State *v.* Zeigler, 32 N. J. L. 262].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1318.

Compare Poughkeepsie *v.* King, 38 N. Y. App. Div. 610, 57 N. Y. Suppl. 116, under a special charter empowering the city to ordain "fixed penalties."

"The better rule seems to be that it is definite enough to set limits to the amount of the fine that may lawfully be exacted, or the length of the imprisonment that may be inflicted." Horr & B. Mun. Pol. Ord. § 89 [*quoted* in Bills *v.* Goshen, 117 Ind. 221, 228, 20 N. E. 115, 3 L. R. A. 261].

70. *In re* O'Keefe, 19 N. Y. Suppl. 676. But *compare* Coden *v.* Gettysburg, 8 Leg. Gaz. (Pa.) 167.

71. *In re* O'Keefe, 19 N. Y. Suppl. 676.

72. Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210, 7 Ohio N. P. 435.

73. Approval or veto of appointments see *infra*, VII, A, 4, (III), (B).

74. Gleason *v.* Peerless Mfg. Co., 1 N. Y. App. Div. 257, 37 N. Y. Suppl. 267 [*affirmed* in 163 N. Y. 574, 57 N. E. 1110].

any ordinance enacted by the council.[75] And this approval must be active, direct, and formal, showing his positive official concurrence in the measure.[76] It may not be presumed or inferred from other kindred acts, or from silence, except in the manner, under the conditions, and to the extent expressed in the charter or the general law.[77] If he does not approve he may veto, which is a formal non-concurrence in the measure, with his reasons therefor, which the council may generally overrule by a two-thirds or three-fourths vote.[78] This important legislative function does not reside in the mayor as a part of the council or its presiding officer; but only when it is manifest from the charter that he is a distinct factor of the legislative department, like the federal president or a state governor.[79] This power is generally confined to purely legislative acts and does not apply to elections or mere matters of an administrative character.[80] But to determine its exact scope and limitation, particular regard must be had to the charter of the municipality.[81]

2. NECESSITY FOR APPROVAL.[82] Whatever acts are required by law to have the executive approval are invalid unless they receive it.[83] And while generally only acts of the council which are of a legislative character are supposed to require approval, yet the language of the charter or the general law may be such as to include other than legislative acts. Thus, it has been decided that a charter requirement that every ordinance or resolution of the common council shall be approved by the mayor, or returned with his objections, extends to all acts of the council, legislative or otherwise.[84] So likewise where the language is "every legislative act of the common council shall be by resolution or ordinance, and every ordinance or resolution shall, before it shall take effect, be presented, duly certified, to the mayor for his approval."[85] And where the charter provided that the council might make "by-laws, ordinances, resolutions, and regulations," and the mayor's approval was required only of "by-laws and ordinances" it was held that "resolutions and regulations" must also be approved by the mayor.[86] And generally the character of a measure passed by the council is to be determined, not by its name or form, but by its nature and effect; and thus resolutions are classed as ordinances, and motions as resolutions requiring the executive approval.[87] But

75. Heins *v.* Lincoln, 102 Iowa 69, 71 N. W. 189.

76. Moore *v.* Perry, 119 Iowa 423, 93 N. W. 510; Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081.

77. Ashley *v.* Newark, 25 N. J. L. 399.

78. *In re* Robin St., 1 La. Ann. 412; People *v.* Geneva, 98 N. Y. App. Div. 383, 90 N. Y. Suppl. 275.

79. Burlington *v.* Dennison, 42 N. J. L. 165. And see Hanson *v.* Grandmere, 11 Quebec K. B. 77.

80. Rich *v.* McLaurin, 83 Miss. 95, 35 So. 337; Erwin *v.* Jersey City, 60 N. J. L. 141, 37 Atl. 732, 64 Am. St. Rep. 584; Gleason *v.* Peerless Mfg. Co., 1 N. Y. App. Div. 257, 37 N. Y. Suppl. 267 [*affirmed* in 163 N. Y. 574, 57 N. E. 1110].

81. State *v.* Darrow, 65 Minn. 419, 67 N. W. 1012; Booth *v.* Bayonne, 56 N. J. L. 268, 28 Atl. 831.

82. Election of officers see *infra*, VII, A, 4.

83. *Colorado.*— Central *v.* Sears, 2 Colo. 588.

Connecticut.— New York, etc., R. Co. *v.* Waterbury, 55 Conn. 19, 10 Atl. 162.

Iowa.— Chicago, etc., R. Co. *v.* Council Bluffs, 109 Iowa 425, 80 N. W. 564.

Louisiana.— New Iberia *v.* Moss Hotel Co., 112 La. 525, 36 So. 552.

Michigan.— Whitney *v.* Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291.

Missouri.— State *v.* Butler, 178 Mo. 272, 77 S. W. 560; Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

New Jersey.— Padavano *v.* Fagan, 66 N. J. L. 167, 48 Atl. 998; Hendrickson *v.* Point Pleasant, 65 N. J. L. 535, 47 Atl. 465; Ashley *v.* Newark, 25 N. J. L. 399.

Ohio.— State *v.* Barr, 8 Ohio S. & C. Pl. Dec. 541, 5 Ohio N. P. 435.

Oregon.— Ladd *v.* East Portland, 18 Oreg. 87, 22 Pac. 533.

Pennsylvania.— Kepner *v.* Com., 40 Pa. St. 124; Bridgeport *v.* Bate, 22 Montg. Co. Rep. 87; Harrison *v.* Philadelphia, 3 Phila. 138.

Wisconsin.— Reilly *v.* Racine, 51 Wis. 526, 8 N. W. 417.

See 36 Cent. Dig. tit. "Municipal Corporations," § 230.

84. People *v.* Schroeder, 76 N. Y. 160. And see Baar *v.* Kirby, 118 Mich. 392, 76 N. W. 754.

85. Gleason *v.* Peerless Mfg. Co., 1 N. Y. App. Div. 257, 37 N. Y. Suppl. 267.

86. Kepner *v.* Com., 40 Pa. St. 124.

87. Pierson *v.* Dover, 61 N. J. L. 404, 39 Atl. 675; Cumberland Valley Electric Pass.

it seems that where separate functions are devolved upon the board of aldermen, distinct from those vested in the "mayor and aldermen," the approval of the mayor is not required to acts passed or done in this exceptional character.[88] And the necessity for approval cannot be obviated by the termination of the council's term or session before the expiration of the period allowed the mayor for action.[89]

3. Necessity For Signing. Laws and charters providing that the mayor shall sign ordinances and resolutions are of such variant tenor or have received such different construction that they can scarcely be reconciled or harmonized.[90] In some cases where signing seems to be treated as the equivalent of approval, the rules stated in the preceding section are followed.[91] In others, where the signing seems to be for the purpose of verification rather than approval, the provisions are held to be directory rather than mandatory, and lack of signature does not vitiate the measure,[92] although in some jurisdictions lack of signature invalidates a by-law.[93] In some cases, where the ordinance has been copied at length into the minutes, signature of the minutes has been considered a compliance with the requirement and the ordinance has been thus sustained.[94]

4. Requisites and Sufficiency. The general rules with regard to approval or veto of municipal ordinances seem to be that the ordinance after adoption by the council shall be duly presented to the mayor for his official action thereon;[95] that if he approves he shall plainly indorse his approval in writing over his official signature;[96] that if he disapproves he shall set forth in writing over his official signature the reasons for his veto;[97] that he shall make due return to the clerk or recorder, within the period limited by law, of the ordinance or resolution with his official action thereon;[98] and that no previous recommendation or suggestion of the mayor, or any words spoken, or signature to any other records or documents can be a substitute for the official approval or veto.[99]

5. Who May Approve or Sign. The approval or veto of an act of the common

R. Co. *v.* Carlisle Borough, 7 Pa. Dist. 323; Bates *v.* Titusville, 29 Leg. Int. (Pa.) 277.

88. Hibbard *v.* Suffolk County, 163 Mass. 34, 39 N. E. 285. And see State *v.* Henderson, 38 Ohio St. 644.

89. State *v.* Carr, 1 Mo. App. 490.

90. *Illinois.*— Terre Haute, etc., R. Co. *v.* Voelker, 31 Ill. App. 314, signature unnecessary.

Louisiana.— MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128, signature unnecessary.

Michigan.— Chaffee *v.* Granger, 6 Mich. 51, signature unnecessary.

New Jersey.— Piard *v.* Jersey City, 30 N. J. L. 148, signature unnecessary.

New York.—Smith *v.* Utica, 6 N. Y. Suppl. 792, signature unnecessary.

Ohio.— Fisher *v.* Graham, 1 Cinc. Super. Ct. 113, signature unnecessary.

Pennsylvania.— Waln *v.* Philadelphia, 99 Pa. St. 330, signature necessary.

See 36 Cent. Dig. tit. "Municipal Corporations," § 231.

Where an act of a city council for levying taxes is in its nature a resolution, although clothed in the form of an ordinance, it may have the effect of a valid resolution, although not signed by the presiding officer. Blanchard *v.* Bissell, 11 Ohio St. 96.

91. See *supra*, VI, D, 2.

92. Conboy *v.* Iowa City, 2 Iowa 90; Com. *v.* Williams, 120 Ky. 314, 86 S. W. 553, 27 Ky. L. Rep. 695; Opelousas *v.* Andrus, 37 La. Ann. 699; Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706. And see Landes *v.* State, 160 Ind. 479, 67 N. E. 189; Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

93. Breaux's Bridge *v.* Dupuis, 30 La. Ann. 1105.

94. Woodruff *v.* Stewart, 63 Ala. 206.

95. Knell *v.* Buffalo, 54 Hun (N. Y.) 80, 7 N. Y. Suppl. 233. And see Farwell *v.* Boston, 191 Mass. 15, 78 N. E. 303.

96. New York, etc., R. Co. *v.* Waterbury, 55 Conn. 19, 10 Atl. 162; *In re* Standiford, 5 Mackey (D. C.) 549.

97. Lowell *v.* Dadman, 191 Mass. 370, 77 N. E. 717 (holding that under a statute requiring the mayor of a city if he disapproves of an order of the city council to return it with his objections in writing, a veto by a mayor simply stating that he returns the order without his approval, and containing no statement of objections, is of no effect); Truesdale *v.* Rochester, 33 Hun (N. Y.) 574.

98. Baar *v.* Kirby, 118 Mich. 392, 76 N. W. 754. And see Erie *v.* Bier, 10 Pa. Super. Ct. 381.

99. Oswald *v.* Gosnell, 56 S. W. 165, 21 Ky. L. Rep. 1660; Whitney *v.* Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291; Graham *v.* Carondelet, 33 Mo. 262.

Applications of rule.— Where a resolution was vetoed by the mayor and returned to the council, who altered it to meet one of the objections set out in the veto, and again passed it, the resolution as last passed could not become effective until again submitted to the mayor for his approval, since by the alteration it became a new resolution. Pada-

council is official and personal and cannot be delegated.[1] It must be performed by the mayor, burgess, or reeve in office at the date of the enactment if present in the city.[2] If the law authorizes the election of a mayor *pro tem* with full powers, it seems that the function may be performed by him.[3] But the council can neither confer nor defeat the lawful power of approval or veto.[4] And where a city charter provides that if the mayor be disabled or absent, the president of the council may sign ordinances, the latter cannot sign an ordinance during a vacancy in the office of mayor.[5]

6. Passage Over Veto. Under the authority usually conferred upon the common council to pass an ordinance by sufficient majority notwithstanding a veto, it is necessary to the validity of the ordinance that action shall be taken at the very meeting specified by the charter;[6] that the required majority shall vote in favor of the ordinance;[7] and that this shall be shown at the first vote taken, and not upon a second vote after the veto had been sustained.[8]

E. Record and Filing — 1. Record. The kind of municipal ordinance sometimes called the customary ordinance arising out of and perpetuated by local usage, "time whereof the memory of man runneth not to the contrary," supported and enforced in England as part of the *lex non scripta*,[9] has received scant recognition in America where general rules require all ordinances to be reduced to writing before passage and to be preserved and perpetuated by solemn record of the municipality.[10] The form and nature of this record is specified in some of the recent charters.[11] In some instances the courts have ruled that the statutory requirement of recordation of by-laws is mandatory, and failure of record evidence of the corporation ordinances is fatal to their validity.[12] In others such statutes have been construed as directory only, and omission to comply with their provisions has been refused any vitiating effect upon ordinances duly and legally enacted.[13] In some other cases, even where the statute seems mandatory, informal

vano *v.* Fagan, 66 N. J. L. 168, 48 Atl. 998. Where a resolution of a city council to extend the city limits was not approved by the mayor, nor effectively passed without such approval, but the resolution was submitted to the electors, a calling of the election by the mayor did not constitute an approval by him, so as to render the proceedings valid. Moore *v.* Perry, 119 Iowa 423, 93 N. W. 510.

1. Lyth *v.* Buffalo, 48 Hun (N. Y.) 175.

2. Altman *v.* Dubuque, 111 Iowa 105, 82 N. W. 461; Mandeville *v.* Band, 111 La. 806, 35 So. 915; Detroit *v.* Moran, 46 Mich. 213, 9 N. W. 252; *In re* Front St., 24 Pa. Co. Ct. 88. *Compare* Leavenworth *v.* Douglas, 3 Kan. App. 67, 44 Pac. 1099, holding that an ordinance cannot be signed by any other than the mayor even though he be absent from the state.

3. Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769; O'Mally *v.* McGinn, 53 Wis. 353, 10 N. W. 515; *In re* Preston, 21 U. C. Q. B. 626.

4. Barber Asphalt Paving Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110; Lehigh Coal, etc., Co. *v.* Inter-County St. R. Co., 167 Pa. St. 126, 31 Atl. 477.

5. Babbidge *v.* Astoria, 25 Oreg. 417, 36 Pac. 291, 42 Am. St. Rep. 796.

6. Gleason *v.* Peerless Mfg. Co., 1 N. Y. App. Div. 257, 37 N. Y. Suppl. 267; Peck *v.* Rochester, 3 N. Y. Suppl. 872.

7. State *v.* Hoboken, 52 N. J. L. 88, 18 Atl. 685.

8. Peck *v.* Rochester, 3 N. Y. Suppl. 872; Sank *v.* Philadelphia, 8 Phila. (Pa.) 117.

9. In England the ordinances were often but declarations of the prevailing customs. Some contained regulations as to the mode of working, and as to the conduct of the persons engaged therein. They appear to have depended for their validity upon the ancient customs of the country. Rogers *v.* Brenton, 10 Q. B. 26, 12 Jur. 263, 17 L. J. Q. B. 34, 59 E. C. L. 26; Harris *v.* Wakeman, Say. 254.

10. Hammond *v.* New York, etc., R. Co., 5 Ind. App. 526, 31 N. E. 817.

11. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

12. *Illinois.*— Schofield *v.* Tampico, 98 Ill. App. 324.

Missouri.— *Ex p.* Bedell, 20 Mo. App. 125.

Pennsylvania.— Kepner *v.* Com., 40 Pa. St. 124; Bridgeport *v.* Bate, 22 Montg. Co. Rep. 87; Logan *v.* Tyler, 1 Pittsb. 244.

Wisconsin.— Schwartz *v.* Oshkosh, 55 Wis. 490, 13 N. W. 450.

Canada.— Bickford *v.* Chatham, 14 Ont. App. 32 [*affirmed* in 16 Can. Sup. Ct. 235]; *Re* Henderson, 29 Ont. 669.

See 36 Cent. Dig. tit. "Municipal Corporations," § 237.

13. *Indiana.*—Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

Iowa.— Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

Kentucky.— Com. *v.* Williams, 120 Ky. 314, 86 S. W. 553, 27 Ky. L. Rep. 695.

compliance with its provisions has been held sufficient, and liberal presumptions have been made in favor of the validity of ordinances impeached.[14] In some cases authority to enact ordinances has been held to import the function and duty of recordation.[15] Where an ordinance has been recorded as required by law when originally passed, a subsequent revision of ordinances which does not affect it does not make it necessary to record it again.[16]

2. Filing. In a case where an ordinance was required to be filed before taking effect, it was ruled that depositing it with the proper officer was sufficient even though he had failed to mark it "filed."[17]

F. Publication[18] **— 1. Necessity For Publication.** The courts of America, hesitating between the common-law doctrine that neither writing nor publication is necessary to the validity of a municipal ordinance, and the intuitive and reasonable aversion of a free people to considering as law anything not generally known or officially formulated and promulgated, have brought the law on publication of ordinances into confusion and discord that seems irreconcilable. In the absence of any statutory requirement, the prevailing doctrine seems to be that publication is not an essential requisite of a valid ordinance, but that it may be enforced before publication or without it;[19] but not without vigorous dissent and protest from courts of repute, especially where the ordinance is penal.[20] And even when publication is prescribed it has been held that the statutes are merely directory,[21] although the weight of authority is that they are mandatory.[22] In some instances

Louisiana.— Crowley *v.* Rucker, 107 La. 213, 31 So. 629.

Massachusetts.— Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577.

Michigan.—Stevenson *v.* Bay City, 26 Mich. 44.

Pennsylvania.— Erie Academy *v.* Erie, 31 Pa. St. 515.

Wisconsin.— See Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664.

United States.— Crebs *v.* Lebanon, 98 Fed. 549.

See 36 Cent. Dig. tit. "Municipal Corporations," § 237.

14. Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888; Verona's Appeal, 108 Pa. St. 83. But pasting in the ordinance book a printed copy with the authenticating signatures of the mayor and the clerk likewise printed thereto has been declared insufficient compliance with the law for recording ordinances. *In re* Tunkhannock Borough, 3 Pa. Co. Ct. 480.

15. Rumsey Mfg. Co. *v.* Schell City, 21 Mo. App. 175.

16. *Ex p.* Bedell, 20 Mo. App. 125.

17. McGregor *v.* Lovington, 48 Ill. App. 202.

18. Admissibility of evidence of publication see *infra*, VI, O, 2.

19. Sacramento *v.* Dillman, 102 Cal. 107, 36 Pac. 385; Shugars *v.* Hamilton, 92 S. W. 564, 29 Ky. L. Rep. 1127; Paducah *v.* Ragsdale, 92 S. W. 13, 28 Ky. L. Rep. 1057; Com. *v.* McCafferty, 145 Mass. 384, 14 N. E. 451; Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577; Com. *v.* Brooks, 109 Mass. 355; Stevenson *v.* Bay City, 26 Mich. 44; Schweitzer *v.* Liberty, 82 Mo. 309.

20. Union Pac. R. Co. *v.* Montgomery, 49 Nebr. 429, 68 N. W. 619; National Bank of Commerce *v.* Grenada, 44 Fed. 262.

21. Whalim *v.* Macomb, 76 Ill. 49. And see Moore *v.* New York, 73 N. Y. 238, 29 Am. Rep. 134, holding that an ordinance passed by the common council, for the improvement of a street, was not *ultra vires* and void, although passed without the prior publication required; that while the omission would be a substantial and fatal defect, invalidating a local assessment upon property benefited, yet, as to the city, and those dealing with it, it was but an irregularity not fatal to the ordinance, or to contracts made in pursuance of it.

22. *California.*—Napa *v.* Easterby, 61 Cal. 509.

Colorado.— See Central City *v.* Sears, 2 Colo. 588.

Connecticut.— Higley *v.* Bunce, 10 Conn. 435, 567.

Illinois.— Gomnley *v.* Day, 114 Ill. 185, 28 N. E. 693; Barnett *v.* Newark, 28 Ill. 62.

Indiana.— Meyer *v.* Fromm, 108 Ind. 208, 9 N. E. 84.

Minnesota.— State *v.* Darrow, 65 Minn. 419, 67 N. W. 1012.

Missouri.— *Ex p.* Bedell, 20 Mo. App. 125.

New Jersey.— Rutgers College Athletic Assoc. *v.* New Brunswick, 55 N. J. L. 279, 26 Atl. 87. And see Croker *v.* Camden, 73 N. J. L. 460, 63 Atl. 901.

New York.— *In re* Douglass, 46 N. Y. 42, 12 Abb. Pr. N. S. 161 [*reversing* 58 Barb. 174, 9 Abb. Pr. N. S. 84, 40 How. Pr. 201]; Kneib *v.* People, 50 How. Pr. 140.

North Dakota.— O'Hare *v.* Park River, 1 N. D. 279, 47 N. W. 380.

Oklahoma.— Stillwater *v.* Moor, (1893) 33 Pac. 1024.

Pennsylvania.— Waln *v.* Philadelphia, 99 Pa. St. 330; Bridgeport *v.* Bate, 22 Montg. Co. Rep. 87.

Wisconsin.— Herman *v.* O'Conto, 100 Wis.

this difference of holding is attributable to the phraseology of the statutes;[23] while in others the severity of the penalty seems to have influenced the courts.[24] In ordinances providing for special assessments the publication is often required to be before their enactment, so that interested persons may be heard in objection to their passage.[25] Mere orders of the council to the board of public works to execute existing ordinances are not legislative but administrative in their nature and therefore not within a statutory or charter provision requiring publication of ordinances, resolutions, and by-laws.[26]

2. REQUISITES AND SUFFICIENCY — a. In General. When the legislature has prescribed the nature and mode of publication, none other is sufficient to give validity to the ordinance,[27] although this does not preclude additional publication in other ways at the discretion of the council.[28] The publication must show that the matter printed is an ordinance passed by the municipal council.[29] But it need not include the provisions of law authorizing it;[30] nor maps and books;[31] nor the original ordinance amended by a published amendatory ordinance.[32] Mere verbal inaccuracies do not vitiate the publication;[33] and this may be proven *prima facie* in the manner in common use in the state for proving legal publication.[34]

b. Newspaper in Which Published. The publication must be made in a newspaper of the kind prescribed in the statute requiring publication,[35] and in a regular edition thereof.[36] After an official paper has been designated for the municipality, publication in any other will be invalid.[37] While publication in a village newspaper is usually upheld,[38] it is equally valid to publish an ordinance in any other paper of general circulation within the municipality.[39] Failure to contract in writing, for the publishing, as required by the charter, will not affect the validity of the publication.[40]

c. Language of Publication. Publication must be made in the language of the country, unless otherwise prescribed or permitted by the law.[41] In the United States English is the language to be used, and publication made in another language cannot be charged against the municipality without special statutory authority.[42]

391, 76 N. W. 364; Schwartz *v.* Oshkosh, 55 Wis. 490, 13 N. W. 450. But it has been held under a statute providing that an ordinance imposing a penalty or forfeiture shall be published before taking effect, that it is only when the ordinance itself imposes a penalty or forfeiture and not when its violation is punished by a general statute that publication is necessary. Oak Grove *v.* Juneau, 66 Wis. 534, 29 N. W. 644.

United States.— National Bank of Commerce *v.* Grenada, 44 Fed. 262.

23. State *v.* Omaha, etc., R., etc., Co., 113 Iowa 30, 84 N. W. 983, 86 Am. St. Rep. 357, 52 L. R. A. 315.

24. Barnett *v.* Newark, 28 Ill. 62; Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; Union Pac. R. Co. *v.* Montgomery, 49 Nebr. 429, 68 N. W. 619; National Bank of Commerce *v.* Grenada, 44 Fed. 262.

25. Nevada *v.* Eddy, 123 Mo. 546, 27 S. W. 471.

26. Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325.

27. Higley *v.* Bunce, 10 Conn. 436; Chamberlain *v.* Hoboken, 38 N. J. L. 110.

28. Wasem *v.* Cincinnati, 2 Cinc. Super. Ct. (Ohio) 84.

29. Rathbun *v.* Acker, 18 Barb. (N. Y.) 393.

30. People *v.* Mayhew, 27 Cal. 655.

31. Napa City *v.* Easterly, 76 Cal. 222, 18 Pac. 253.

32. *Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747; Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150.

33. Vincent *v.* Pacific Grove, 102 Cal. 405, 36 Pac. 773; Moss *v.* Oakland, 88 Ill. 109.

34. De Loge *v.* New York, etc., R. Co., 92 Hun (N. Y.) 149, 36 N. Y. Suppl. 697 [*affirmed* in 157 N. Y. 688, 51 N. E. 1090]; Janesville *v.* Dewey, 3 Wis. 245.

35. *In re* Astor, 50 N. Y. 363; Columbus *v.* Barr, 27 Ohio Cir. Ct. 264.

36. State *v.* Omaha, etc., R. Co., 113 Iowa 30, 84 N. W. 983, 52 L. R. A. 315.

37. *In re* Astor, 50 N. Y. 363.

38. Moss *v.* Oakland, 88 Ill. 109; Charleston *v.* Truchelut, 1 Nott & M. (S. C.) 227.

39. Tisdale *v.* Minonk, 46 Ill. 9.

40. McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769.

41. Wilson *v.* Trenton, 56 N. J. L. 469, 29 Atl. 183; State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62; State *v.* Cincinnati, 8 Ohio Cir. Ct. 523, 8 Ohio Cir. Dec. 689. But see Loze *v.* New Orleans, 2 La. 427, holding that an ordinance of the city council was binding, although published in French only.

42. Chicago *v.* McCoy, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413.

d. Time and Number of Times. Publication is a matter fixed by law, and its time cannot be prescribed by any merely administerial officer,[43] although it may be regulated by ordinance under express charter authority.[44] Publication made before the introduction or passage of the ordinance avails nothing.[45] When the requirement is merely that the ordinance shall be published in some newspaper, a single publication in a Sunday edition is sufficient.[46] An ordinance of the kind requiring publication before the third reading, if amended on third reading, must be again published as amended, before another reading.[47] If no special time is limited as the period for publication, then it will be sufficient if made within a reasonable time after passage of the ordinance.[48] Requirement for publication in a newspaper or in a pamphlet is complied with by publishing in either.[49] Where an ordinance has been published in accordance with the legal requirements, a subsequent revision of ordinances which does not affect it does make a second publication necessary.[50] Under special requirements of a peculiar nature, publications made as follows have been ruled to be sufficient: Five successive week days, where the requirement was five successive days, the official journal having no Sunday edition;[51] fourteen consecutive days satisfies, "at least two weeks";[52] publication once ten days before adoption satisfies "at least as many as ten days" before adoption;[53] once a week for two weeks satisfies "at least once a week";[54] three successive weekly editions satisfies a requirement for twenty days;[55] and as many times a week as the official journal is issued complies with for "at least one week";[56] but not a less number.[57]

3. Operation and Effect. Publication not only validates that which unpublished is null and void, but, when purporting and appearing to be made under the municipal authority, estops the municipality as against strangers from asserting that the published ordinances were not duly enacted.[58] A publication of a proposed ordinance not finally passed and approved will not operate as publication of a similar one subsequently enacted.[59]

G. Validity[60] **— 1. Introductory Statement.** By-laws and ordinances, although duly and lawfully enacted and approved, recorded and published, and conformable to all technical requirements, may yet be null and void, because of fatal defects in substance or in their relation to other laws or to human reason.[61] The general rules now prevalent in England[62] seem to be that a municipal corporation may make by-laws for the regulation of its internal affairs, of the con-

43. Thornton *v.* Sturgis, 38 Mich. 639.
44. Thornton *v.* Sturgis, 38 Mich. 639.
45. *In re* Levy, 4 Hun (N. Y.) 501.
46. Dumars *v.* Denver, 16 Colo. 375, 65 Pac. 580; Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; Hastings *v.* Columbus, 42 Ohio St. 585, holding that the publication of a preliminary and other ordinances of street improvement, which were required to be made in a newspaper of general circulation, might be made in a paper published only on Sunday.
47. Doyle *v.* Newark, 30 N. J. L. 303.
48. St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278.
49. Dumars *v.* Denver, 16 Colo. 375, 65 Pac. 580; Standard *v.* Industry, 55 Ill. App. 523.
50. *Ex p.* Bedell, 20 Mo. App. 125.
51. *Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310.
52. Derby *v.* Modesto, 104 Cal. 515, 38 Pac. 900.
53. Smith *v.* Atlanta, 123 Ga. 877, 51 S. E. 741.
54. Com. *v.* Matthews, 122 Mass. 60.
55. Hoboken *v.* Gear, 27 N. J. L. 265.
56. Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.
57. Union Pac. R. Co. *v.* McNally, 54 Nebr. 112, 74 N. W. 390.
58. People *v.* Maxon, 139 Ill. 306, 28 N. E. 1074 [*affirming* 38 Ill. App. 152].
59. *In re* Allegheny, 8 Pa. Super. Ct. 104, 43 Wkly. Notes Cas. 223.
60. **Invalidity as ground for relief by habeas corpus** see Habeas Corpus.
61. Elliott Mun. Corp. 192. "A by-law must be consonant with the law of the land, and if not so it is void, although the charter contain an express power of making such a by-law. No unreasonable by-law is warranted by a general custom to make by-laws. The rule may be laid down generally, that neither a power conferred by charter, nor a general custom to make by-laws, will give an ordinance any greater claim to validity, than if it had been made under the incidental power in every corporation." Willcock Mun. Corp. § 159.
62. **Cases involving the validity of municipal by-laws** concerning the delegation of corporate powers, concerning offices, and admis-

duct of its members, of the reasonable exercise of a right, or of the mode by which a person, with an inchoate title, may be admitted to membership.[63] But a by-law cannot be made to take away an existing right, or impose any unreasonable restraint in the exercise thereof.[64] And it is a general rule that any by-law that is unreasonable, unjust, or uncertain is bad.[65] The spirit of these rules pervades American jurisprudence; and English cases of the last century are generally speaking of more interest to the American lawyer than those antedating our independence.[66] The body of American law upon the validity of municipal ordinances is of great and rapidly increasing volume, and because of the growth of urban population, and the enlarged sphere of municipal action in recent times, is coming to be of first importance in our jurisprudence.[67] The challenge of validity is heard in every court; their authority being invoked to hear and determine contentions over the legal effect of a municipal by-law.[68] The grounds of chal-

sion to the corporation, and concerning the government of the place, frequently arose in England, the opinions in which make a voluminous body of common law on the subject of by-laws. Willcock Mun. Corp. 108–146. These decisions, although of great interest to the historical student, as illustrating the royal methods in overawing judges to maintain and increase prerogative, to diminish popular power in the municipalities, and to vest the corporate franchises in a select body of complaisant courtiers, are of little practical use since the Municipal Reform Act of 1835 revolutionized the English municipalities and rendered uniform and consistent their constitution and operation. See Municipal Reform Act 1835. This act followed the report of a committee of barristers, which on a tour of the kingdom had personally examined into the condition of nearly two hundred and fifty municipalities. This report showed utter absence of uniformity in municipal government, except that it was uniformly bad. The rights and interests of the people were wholly ignored. Offices were treated not as public trusts, but as private "grafts." The governing bodies were self-perpetuating and kept their own incompetent and worthless favorites in the offices, or dismissed them at will to make place for choicer ones. There was no equable, uniform, fiscal policy, or reputable judicial system. Magistrates and constables were ignorant, base, and reckless, and juries were appointed from favor, and to render prescribed verdicts. There was no civic conscience, and the corporations were perverted by corruption and oppression to private gain and partisan success. The report startled the English people, lords, and crown. Under Brougham's lead, parliament declared there was urgent and imperative need of immediate reform; and addressing its best energies to the subject, formulated and passed the Municipal Corporations Reform Act, establishing uniformity in municipal government, restoring the power to inhabitants, and punishing official misconduct. The barristers' report concluded with the expression of the committee's opinion that the municipal corporations of England and Wales neither possessed nor deserved the respect or confidence of the people. The Reform Act was so appropriate and thorough in its plan and details that it remains to this day the basis of the municipal system not only of the United Kingdom, but also by adoption of the states of the American Union. Ingersoll Pub. Corp. 124 note.

63. Willcock Mun. Corp. 135. The power of the corporation to pass by-laws in many English cases is said to be derived from custom — ancient and long-continued usage ripening into a prescriptive right on the part of the municipal corporation. Chamberlain of London's Case, 5 Coke 63, 77 Eng. Reprint 150; Franklin *v.* Cromwell, Dal. C. P. 95; Cromwell's Case, Dyer 321*a*, 73 Eng. Reprint 727; Day *v.* Savadge, Hob. 85, 80 Eng. Reprint 235; Excester *v.* Smith, 2 Keb. 367; Lambert *v.* Thornton, 1 Ld. Raym. 91; Davenent *v.* Hurdis, Moore K. B. 576, 72 Eng. Reprint 769.

64. Willcock Mun. Corp. 159; Augusta *v.* Clark, 124 Ga. 254, 52 S. E. 881; McKnight *v.* Toronto, 3 Ont. 284.

65. Willcock Mun. Corp. 142, 159. A by-law was declared bad for uncertainty, and also *ultra vires* because the council delegated the power of fixing certain of the days when the shops might remain open, to the exhibition association. *Re* Cloutier, 11 Manitoba 220.

66. See *supra*, note 62.

67. Smith Mun. Corp. 462.

68. *Alabama.*— Greensboro *v.* Ehrenreich, 80 Ala. 579, 582, 2 So. 725, 60 Am. Rep. 130, in which case it was said: "Notwithstanding the grant of power is general — 'to pass and enforce ordinances deemed necessary and proper' — ordinances passed under the power must not be unreasonable, partial, or unfair; must not be in restraint of trade; nor contravene the general laws and public policy. . . . And though the necessity and propriety of a particular ordinance is primarily of legislative determination, its character, whether reasonable, impartial, and consistent with the State policy, are questions for the court." Marion *v.* Chandler, 6 Ala. 899.

California.— *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642.

Illinois.— Field *v.* Western Springs, 181 Ill. 186, 54 N. E. 929; Walker *v.* Morgan Park, 175 Ill. 570, 51 N. E. 636; Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003; McChesney *v.* Chicago, 171 Ill. 253, 49 N. E. 548; Hawes

lenge are numerous, as that they are unreasonable, oppressive, partial, and unfair, unconstitutional, inconsistent with public policy, contrary to statute, prohibitory of trade, in contravention of common right, and enacted by an unqualified body or from corrupt motives.[69] All these objections, with the possible exception of the last one,[70] are vital in character, and demand due consideration; and first in importance, and in natural order are those based upon constitutional inhibition.[71]

2. Unconstitutional Ordinances — a. Federal Constitution. The constitution of the United States as the paramount law of the land, nullifying state legislation and even constitutions[72] in conflict with its inhibitions, must of course receive obedience from municipal bodies of all grades of importance.[73] Whatever the state is forbidden to do is of course equally prohibited to its creature, the municipal corporation.[74] The state may not authorize its agent to perform acts interdicted to itself.[75] These inhibitions in the federal constitution upon the power of the states are of two kinds, those preserving the national supremacy,[76] and those protecting individual rights.[77] By-laws contravening a provision of either class are of course equally invalid.[78] To the first class belong the following: Ordinances to coin money, emit bills of credit, or make anything a legal tender except gold or silver coin;[79] ordinances laying imposts or duties upon imports or

v. Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225.

Louisiana.— Vicksburg, etc., R. Co. *v.* Monroe, 48 La. Ann. 1102, 20 So. 664.

Missouri.— Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678; St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Springfield R. Co. *v.* Springfield, 85 Mo. 674; Cape Girardeau *v.* Riley, 72 Mo. 220; St. Louis *v.* Weber, 44 Mo. 547.

Nebraska.— Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588. An illegal ordinance is wholly inoperative. It is not made valid by an ordinance continuing in force all existing ordinances until repealed or changed. Omaha *v.* Harmon, 58 Nebr. 339, 78 N. W. 623.

United States.— California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 26 S. Ct. 100, 50 L. ed. 204.

69. Elliott Mun. Corp. 198, 203; Ingersoll Pub. Corp. 234, 235; Smith Mun. Corp. 491, 499.

70. Elliott Mun. Corp. 221; Ingersoll Pub. Corp. 236; Smith Mun. Corp. 516.

71. See *infra*, VI, G, 2.

72. U. S. Const. art. 6.

73. Municipal ordinances have been declared void as in violation of some clause of the federal constitution in the following cases:

Alabama.— Calhoun *v.* Fletcher, 63 Ala. 574, as depriving a citizen of property without "due process of law."

Indiana.— Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857, as denying to citizens of the United States the equal protection of the law.

Missouri.— River Rendering Co. *v.* Behr, 77 Mo. 91, 46 Am. Rep. 6, no "due process of law" nor "just compensation" for private property taken.

Tennessee.— Long *v.* Shelby County Taxing Dist., 7 Lea 134, 40 Am. Rep. 55, as an unwarranted infringement on personal liberty.

United States.— Moran *v.* New Orleans, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653, as contravening federal authority to "regulate commerce among the States."

74. Haywood *v.* Savannah, 12 Ga. 404; Illinois Conference Female College *v.* Cooper, 25 Ill. 148; Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175.

The power of municipal corporations to make by-laws is controlled by the constitution of the United States.— The restrictions imposed by this instrument, and which directly limit the legislative power of the state, rest equally upon all the instruments of the government created by the state. If a state cannot pass an *ex post facto* law, or law impairing the obligations of contracts, neither can any agency do so which acts under the state with delegated authority. By-laws therefore which in their operation would be *ex post facto*, or violate contracts, are not within the power of municipal corporations; and whatever the people by the state constitution have prohibited the state government from doing, it cannot do indirectly through the local governments. Cooley Const. Lim. 198.

75. Cooley Const. Lim. 198, and the preceding note.

76. "No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts. . . . No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . . No State shall, without the Consent of Congress, lay any Duty of Tonnage." U. S. Const. art. 1, § 10.

77. "No State shall . . . pass any . . . *ex post facto* Law, or Law impairing the Obligations of Contracts." U. S. Const. art. 1, § 10. See first ten amendments to United States constitution, which constituted the Bill of Rights, and Amendm. 14.

78. Cooley Const. Lim. 198.

79. U. S. Const. art. 1, § 10.

exports;[80] ordinances regulating interstate or foreign commerce;[81] and ordinances laying a duty of tonnage.[82] To the second class belong *ex post facto* or retroactive ordinances affecting vested rights;[83] ordinances impairing contractual obligations;[84] ordinances denying to any person due process of law or the equal protection of the laws;[85] ordinances abridging the privileges or immunities of citizens of the United States;[86] ordinances basing discriminations in suffrage on race, color, or previous condition of servitude;[87] ordinances denying trial by jury or any other common right of freemen guaranteed by the federal constitution.[88]

b. State Constitutions. Many of the guarantees of personal and property rights contained in the federal constitution are likewise found in the bills of rights of the state constitutions, thereby affording double protection to the citizen against the use of tyrannical power by a municipality.[89] Beyond these most of the state constitutions contain other inhibitory provisions which operate to restrain the municipality in the exercise of the legislative power delegated to it by the state.[90] Ordinances and by-laws therefore made in violation of these constitutional provisions are void.[91] Of this class of void ordinances are those creating monopolies or perpetuities;[92] those making irrevocable grants of special privileges and

80. U. S. Const. art. 1, § 10, par. 2; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

81. "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States." U. S. Const. art. 1, § 8.

82. U. S. Const. art. 1, § 10, par. 3.

83. U. S. Const. art. 1, § 10; Forbes *v.* Wilmington, 1 Marv. (Del.) 186, 40 Atl. 1105; Newlan *v.* Aurora, 14 Ill. 364; Carson *v.* Bloomington, 6 Ill. App. 481; Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424. And see Martin *v.* Oskaloosa, (Iowa 1904) 99 N. W. 557.

"No laws can operate retrospectively unless they are explanatory of the statute, or declaratory of the common law. With these exceptions, statutes or ordinances will always be construed as applying their principles to cases in future, or subsequent to their enactment." Howard *v.* Savannah, T. U. P. Charlt. (Ga.) 173, 174. Retroactive effect may, however, be given to an ordinance unless constitutional rights are infringed. Thus an ordinance passed after a municipal election, may create a tribunal and prescribe the mode of procedure for determining election contests growing out of it. State *v.* Johnson, 17 Ark. 407.

84. *Georgia.*—Haywood *v.* Savannah, 12 Ga. 404

Illinois.— Illinois Conference Female College *v.* Cooper, 25 Ill. 148.

Indiana.— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Iowa.— Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Missouri.— Neill *v.* Gates, 152 Mo. 585, 54 S. W. 460; State *v.* Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; Kansas City *v.* Corrigan, 86 Mo. 67.

New York.— Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 358; Stuyvesant *v.* New York, 7 Cow. 588.

Pennsylvania.— Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

Virginia.—Davenport *v.* Richmond City, 81 Va. 636, 59 Am. Rep. 694.

United States.— Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; Const. art. 1, § 10.

85. "Equal protection of the law."— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; State *v.* Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. Rep. 948, 19 L. R. A. 858; *In re* Sam Kee, 31 Fed. 680, 12 Sawy. 379. Ordinance requiring bicycle to carry light after dark is constitutional. Des Moines *v.* Keller, 116 Iowa 648, 88 N. W. 827, 93 Am. St. Rep. 268, 57 L. R. A. 243. Ordinance forbidding keeping private markets within specified distance from public market is constitutional. Natal *v.* Louisiana, 139 U. S. 621, 11 S. Ct. 636, 35 L. ed. 288.

86. U. S. Const. art. 2, § 2; U. S. Const. Amendm. 14.

87. U. S. Const. Amendm. 15.

88. U. S. Const. Amendm. 6. An ordinance forbidding the sale of a specified newspaper was held unconstitutional. *Ex p.* Neill, 32 Tex. Cr. 275, 22 S. W. 923, 40 Am. St. Rep. 776. And so was an ordinance changing the rule of evidence as to the presumption of innocence. *In re* Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138.

89. See Bill of Rights of the several state constitutions.

90. See *infra*, cases cited in subsequent notes in this section.

91. Cooley Const Lim. 198; Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Weith *v.* Wilmington, 68 N C. 24; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Trigally *v.* Memphis 6 Coldw. (Tenn.) 382. And see *Ex p.* Zhizhuzza, 147 Cal. 328, 81 Pac. 955

For ordinance held not invalid as being obnoxious to the "law of the land" see Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382.

92. Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Logan *v.* Pyne, 43 Iowa 524, 22

immunities;[93] those diverting public funds to private use;[94] those which prohibit subsidizing in any way either by loaning credit, granting money, or taking stock in any corporation or association;[95] those changing the compensation of municipal officers during their term of office;[96] those granting extra allowance or compensation to any officer, agent, employee, or contractor after service or work begun, above that stipulated beforehand, or validating the invalid acts of such officers, agents, employees, or contractors;[97] those authorizing the payment of claims against the corporation arising under contracts *ultra vires*;[98] and other similar provisions made generally to defraud the municipal treasury.[99] While due regard is given by the courts to the legislative power vested in municipal bodies by the state, and ordinances and by-laws treated as local legislation by lawful authority,[1] yet it cannot be said that the judges manifest the same judicial hesitancy to nullify an ordinance as they do to nullify an act of the general assembly,[2] although the full measure of legislative discretion seems to be conceded to the legislative body of the municipality as of the state.[3]

3. Ordinances Contravening Statutes — a. Charter. A municipal charter in whatever form is a statute of the state, and the organic law of the corporation.[4] It gives the municipality its power to enact by-laws, just as the federal constitution gives the congress its power of legislation;[5] and it is too plain for argument

Am. Rep. 261; Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143; *In re* Brodie, 38 U. C. Q. B. 580.

Applications of rule.—A municipal by-law allowing the owners of a quantity of timber lands to open a winter road along the whole length of a cultivated tract, in perpetuity and without indemnity to the owner of such land, is illegal as having the effect of creating, without indemnity, a permanent servitude upon the land where such road would pass. Beauchemin *v.* Beloeil, 15 Quebec Super. Ct. 174.

93. "It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise." Gale *v.* Kalamazoo, 23 Mich. 344, 354, 9 Am. Rep. 80, per Cooley, J.

94. *Illinois.*—Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230; Petersburg *v.* Mappin, 14 Ill. 193, 56 Am. Dec. 501.

Massachusetts.—Matthews *v.* Westborough, 134 Mass. 555; Claflin *v.* Hopkinton, 4 Gray 502.

Missouri.— Hitchcock *v.* St. Louis, 49 Mo. 484.

New York.— Hodges *v.* Buffalo, 2 Den. 110; Cornell *v.* Guilford, 1 Den. 510.

Pennsylvania.— Com. *v.* Gingrich, 21 Pa. Super. Ct. 286.

Rhode Island.— Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648.

Canada.— Jarvis *v.* Fleming, 27 Ont. 309; Jones *v.* Port Arthur, 16 Ont. 474.

95. Moran *v.* Thompson, 20 Wash. 525, 56 Pac. 29.

96. Wadsworth *v.* Maysville, 113 Ky. 455, 68 S. W. 391, 24 Ky. L. Rep. 312; Grenada *v.* Wood, 81 Miss. 308, 33 So. 173.

97. Buck *v.* Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409. And see Locke *v.* Central, 4 Colo. 65, 34 Am. Rep. 66.

98. Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452; Hanger *v.* Des Moines, 52 Iowa 193, 2 N. W. 1105, 35 Am. Rep. 266; Patton *v.* Stephens, 14 Bush (Ky.) 324; Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.

99. Capitol City Light, etc., Co. *v.* Tallahassee, 42 Fla. 462, 28 So. 810; Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624; Detroit Citizens' St. R. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350, 35 L. R. A. 859; Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650.

1. Kepner *v.* Com., 40 Pa. St. 124.

2. Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130.

3. See Knapp, etc., Co. *v.* St. Louis, 156 Mo. 343, 56 S. W. 1102; Estes *v.* Owen, 90 Mo. 113, 23 S. W. 133; Seibert *v.* Tiffany, 8 Mo. App. 33.

4. Anderson L. Dict. tit. "Charter."

A charter of a municipality is not a contract within the meaning of the constitution. Covington *v.* Kentucky, 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 679. See also *supra*, IV, A.

Mode of exercising power prescribed by charter to be followed.— The rule is general and applicable to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised is prescribed by the charter, that mode must be followed. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

5. *California.*— Douglass *v.* Placerville, 18 Cal. 643.

Connecticut.— Webster *v.* Harwinton, 32 Conn. 131; Baldwin *v.* North Branford, 32 Conn. 47; Willard *v.* Killingworth Borough, 8 Conn. 247.

Massachusetts.— Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Michigan.— Younghlood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

Missouri.—Kansas City *v.* Corrigan, 86 Mo. 67; Quinette *v.* St. Louis, etc., R. Co., 76

that the by-laws must not contravene the constitution of the corporation.[6] Any municipal ordinance in conflict with the charter is null and void.[7] And so likewise is an ordinance outside of the charter powers.[8] And persons assuming to act under its provisions will not receive protection from the courts.[9] But a by-law enacted by a municipal corporation in pursuance of special charter authority has the same force and effect as a law within the municipal boundaries, as though it had been enacted by the general assembly,[10] and such a by-law has been repeatedly sustained by the courts, although contravening general laws,[11] on the ground

Mo. 402; Lackland *v.* North Missouri R. Co., 31 Mo. 180; Carr *v.* St. Louis, 9 Mo. 191.

Texas.— Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242.

6. *Illinois.*— People *v.* Chicago, etc., R. Co., 118 Ill. 113, 7 N. E. 116; Petersburg *v.* Metzker, 21 Ill. 205.

Kentucky.— March *v.* Com., 12 B. Mon. 25.

Maine.— Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256.

Michigan.— People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721.

Missouri.— Carr *v.* St. Louis, 9 Mo. 191; Kemp *v.* Monett, 95 Mo. App. 452, 69 S. W. 31.

New York.— Cowen *v.* West Troy, 43 Barb. 48.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Ohio.— Canton *v.* Nist, 9 Ohio St. 439; Mays *v.* Cincinnati, 1 Ohio St. 268.

Pennsylvania.— Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Tennessee.—Pesterfield *v.* Vickers, 3 Coldw. 205.

See 36 Cent. Dig. tit. "Municipal Corporations," § 246.

Municipal by-laws must be in harmony with the general laws of the state, and with the provisions of the municipal charter.— Whenever they come in conflict with either, they are void. Cooley Const. Lim. 278.

A general clause in a city charter authorizing the common council to pass ordinances for the general welfare does not authorize it to pass an ordinance contrary to the express provisions of the charter. Brooklyn *v.* Furey, 9 Misc. (N. Y.) 193, 30 N. Y. Suppl. 349.

7. *Kansas.*— Garden City *v.* Abbott, 34 Kan. 283, 8 Pac. 473.

Michigan.— People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721.

Missouri.— Kemp *v.* Monett, 95 Mo. App. 452, 69 S. W. 31.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268.

Tennessee.— State *v.* Nashville, 15 Lea 697, 54 Am. Rep. 427.

United States.— Thompson *v.* Carroll, 22 How. 422, 16 L. ed. 387.

8. Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452 (holding that municipal corporations cannot legislate criminally upon a case fully covered by state law); Paine *v.* Boston, 124 Mass. 486; State *v.* Kantler, 33 Minn. 69, 21 N. W. 856; Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242.

"The question is well settled that a corporation can exercise no power not clearly delegated in the act of incorporation, or arising by necessary implication out of some delegated power. Angell and Ames on Corporations 97. An ordinance, therefore, not warranted by the charter, is void, and can furnish no justification to persons acting under its authority. Sedgwick on Stat. and Cons. Law, 466, 468; Welch *v.* Stowell, 2 Dougl. (Mich.) 332." Miller *v.* Burch, 32 Tex. 208, 210, 5 Am. Rep. 242.

9. Seibrecht *v.* New Orleans, 12 La. Ann. 496; Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669.

Applications of rule.—A *bona fide* holder of warrants, drawn by officers of the city upon the city treasury, in taking the warrants is bound at his peril to ascertain the nature and extent of the power of the officers and the city; and want of corporate power or want of authority in municipal officers cannot be supplied by their unauthorized acts or representations. Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423. Those dealing with the agents of a municipal corporation must at their peril see to it that such agents are acting within the line of their duty and in the manner directed by the charter. McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144.

10. Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768. In Beiling *v.* Evansville, 144 Ind. 644, 648, 42 N. E. 621, 35 L. R. A. 272, the court said: "It is well settled that when the adoption of a municipal ordinance or by-law is expressly authorized by the Legislature, and where the express grant of power is not in conflict with a constitutional prohibition or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal." Ingersoll Pub. Corp. 236, 237; Smith Mun. Corp. 494.

11. *Illinois.*— McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857.

Kentucky.— Paducah *v.* Ragsdale, 92 S. W. 13, 28 Ky. L. Rep. 1057.

Massachusetts.— Com. *v.* Patch, 97 Mass. 221; *In re* Goddard, 16 Pick. 504, 28 Am. Dec. 259.

Minnesota.— State *v.* Dwyer, 21 Minn. 512.

New Jersey.— State *v.* Clarke, 25 N. J. L. 54.

that it is equivalent to a special statute repugnant to a general one, and therefore operates as an implied repeal of the general law within the municipal territory.[12]

b. General Laws. But, lacking such special authority to enact a particular ordinance, a municipality may not ordain by-laws in contravention of state statutes, whether special or general.[13] It is well settled therefore that what the state has licensed or expressly permitted the municipality cannot forbid;[14] nor may it

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

12. State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; State *v.* Morristown, 33 N. J. L. 57; State *v.* Clarke, 25 N. J. L. 54; Mark *v.* State, 97 N. Y. 572; *In re* Snell, 58 Vt. 207, 1 Atl. 566.

Restatement of doctrine.— In St. Johnsbury *v.* Thompson, 59 Vt. 300, 305, 9 Atl. 571, 59 Am. Rep. 731, the court said: "If the by-law is authorized by the charter, it has the effect of a special law of the legislature within the limits of a village, and supersedes the general law upon the subject of victualing-houses therein; for the charter giving the village power to pass the by-law inconsistent with and repugnant to the general law, by necessary implication, operated to repeal the general law within the territorial limits of the village, on the principle that provisions of different statutes which are in conflict with each other can not stand together; and, in the absence of anything showing a different intent on the part of the legislature, general legislation upon a particular subject must give way to later inconsistent special legislation on the same subject."

13. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130; Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Arkansas.— Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; Siloam Springs *v.* Thompson, 41 Ark. 456; State *v.* Lindsay, 34 Ark. 372; Vance *v.* Little Rock, 30 Ark. 435.

California.— *Ex p.* Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640; *Ex p.* Solomon, 91 Cal. 440, 27 Pac. 757.

Connecticut.— State *v.* Smith, 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301; State *v.* Welsh, 36 Conn. 215; Southport *v.* Ogden, 23 Conn. 128.

Florida.— State *v.* Dillon, 42 Fla. 95, 28 So. 781.

Georgia.—Rothschild *v.* Darien, 69 Ga. 503; Livingston *v.* Albany, 41 Ga. 21; Adams *v.* Albany, 29 Ga. 56; Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452; Haywood *v.* Savannah, 12 Ga. 404. And see Kassell *v.* Savannah, 109 Ga. 491, 35 S. E. 147.

Illinois.—Petersburg *v.* Metzker, 21 Ill. 205; Duggan *v.* Peoria, etc., R. Co., 42 Ill. App. 536.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Kansas.—Garden City *v.* Abbott, 34 Kan. 283, 8 Pac. 473; State *v.* Young, 17 Kan. 414.

Kentucky.— March *v.* Com., 12 B. Mon. 25.

Louisiana.— State *v.* Burns, 45 La. Ann. 34, 11 So. 878; New Orleans *v.* Philippi, 9 La. Ann. 44.

Massachusetts.— Newton *v.* Belger, 143 Mass. 598, 10 N. E. 464; Com. *v.* Roy, 140 Mass. 432, 4 N. E. 814.

Minnesota.— State *v.* St. Paul Municipal Ct., 32 Minn. 329, 20 N. W. 243; St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278; St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Missouri.— Wood *v.* Kansas City, 162 Mo. 303, 62 S. W. 433; Ruggles *v.* Collier, 43 Mo. 353; Carr *v.* St. Louis, 9 Mo. 191; Lonergan *v.* Louisiana, 83 Mo. App. 101; Kansas City *v.* Hallett, 59 Mo. App. 160.

Nebraska.— State *v.* Hardy, 7 Nebr. 377.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New Jersey.— Outwater *v.* Carlstadt, 66 N. J. L. 510, 49 Atl. 533; Lozier *v.* Newark, 48 N. J. L. 452, 2 Atl. 815.

New York.— Cowen *v.* West Troy, 43 Barb. 48; Wood *v.* Brooklyn, 14 Barb. 425; New York *v.* Nichols, 4 Hill 209.

North Carolina.— State *v.* McCoy, 116 N. C. 1059, 21 S. E. 690; State *v.* Austin, 114 N. C. 855, 19 S. E. 919, 41 Am. St. Rep. 817, 25 L. R. A. 287; Weith *v.* Wilmington, 68 N. C. 24.

Ohio.— Canton *v.* Nist, 9 Ohio St. 439; Mays *v.* Cincinnati, 1 Ohio St. 268; Marietta *v.* Fearing, 4 Ohio 427.

Pennsylvania.— Livingston *v.* Wolf, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936.

South Carolina.— State *v.* Charleston, 12 Rich. 480.

Tennessee.—Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185; State *v.* Nashville, 15 Lea 697, 54 Am. Rep. 427; Trigally *v.* Memphis, 6 Coldw. 382; Pesterfield *v.* Vickers, 3 Coldw. 205; Robinson *v.* Franklin, 1 Humphr. 156, 34 Am. Dec. 625.

Texas.— *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845; Flood *v.* State, 19 Tex. App. 584.

Wisconsin.— State *v.* Fisher, 33 Wis. 154.

Canada.— Jones *v.* Port Arthur, 16 Ont. 474.

See 36 Cent. Dig. tit. "Municipal Corporations," § 246.

14. Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465; Robinson *v.* Franklin, 1 Humphr. (Tenn.) 156, 34 Am. Dec. 625.

Applications of rule.— Thus a town may not, without special authority, prohibit liquor selling within its boundaries if the state refuses to prohibit and licenses the occupation. State *v.* Brittain, 89 N. C. 574; State *v.* Langston, 88 N. C. 692; Robinson *v.* Frank-

license what the state has expressly interdicted.[15] But the courts have repeatedly recognized the authority of a municipal corporation under the police power to regulate the occupation of liquor selling, by ordinances imposing restriction in addition to the state regulations.[16]

c. Public Policy. It often happens that a municipal ordinance, although not in verbal conflict with the language of any state statute, seems to contravene the public policy of the state as set forth in its general laws; such an ordinance, unless specially authorized by charter, is invalid.[17] The creature must be obedient to the will of the creator.[18]

4. Unreasonable and Oppressive Ordinances — a. In General. Except where the corporation has special charter power to enact the by-law or ordinance,[19] the courts

lin, 1 Humphr. (Tenn.) 156, 34 Am. Dec. 625, in which case it was said that a by-law of a town, prohibiting all persons from retailing spirituous liquors within the limits of the corporation, under a money penalty, unless the person obtain a license from the corporate authorities by the payment of a fixed sum, was in conflict with the laws of the state permitting persons who might obtain a license as prescribed by those laws to retail spirituous liquors, and therefore void, and could not be enforced even against a person who had no license from the state.

15. *In re* Ridenbaugh, 5 Ida. 371, 49 Pac. 12; McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857; Behan *v.* New Orleans, 34 La. Ann. 128; State *v.* Caldwell, 3 La. Ann. 435; Com. *v.* Goodnow, 117 Mass. 114.

16. *California.*— *Ex p.* Smith, 38 Cal. 702, prohibiting in the night-time after twelve o'clock, midnight, any person to play or make a noise upon any musical instrument in any drinking saloon, or beer cellar, or to permit or allow the same by the proprietor, agent, or manager thereof, and also prohibiting females to be in such places at such time.

Indiana.— Rowland *v.* Greencastle, 157 Ind. 591, 707, 62 N. E. 474, 1103, designating the districts within the corporate limits where liquor may be sold and excluding sale elsewhere.

Kansas.—Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

Michigan.— Wells *v.* Torrey, 144 Mich. 689, 108 N. W. 423.

North Carolina.— State *v.* Austin, 114 N. C. 855, 19 S. E. 919, 41 Am. St. Rep. 817, 25 L. R. A. 283, forbidding minors to enter saloons.

Tennessee.— Bennett *v.* Pulaski, (Ch. App. 1899) 52 S. W. 913, 47 L. R. A. 278.

17. Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. 820; State *v.* Burns, 45 La. Ann. 34, 11 So. 878; Thompson *v.* Mt. Vernon, 11 Ohio St. 688; Canton *v.* Nist, 9 Ohio St. 439.

Ordinances must also be in harmony with the principles of the common law in force in the state. Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

18. The will of the creator is expressed in the charter granted to the creature. This charter is the constitution of the creature, which under it may enact by-laws and ordinances not inconsistent with it. Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Cooley Const. Lim. 227; Smith Mun. Corp. 54.

19. *Alabama.*— Lindsay *v.* Anniston, 104 Ala. 257, 16 So. 545, 53 Am. St. Rep. 44, 27 L. R. A. 436.

Colorado.— Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230.

District of Columbia.— District of Columbia *v.* Waggaman, 4 Mackey 328.

Illinois.— Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; Peoria *v.* Calhoun, 29 Ill. 317.

Indiana.— Pittsburgh, etc., R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; Shelbyville *v.* Cleveland, etc., R. Co., 146 Ind. 66, 44 N. E. 929; Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Rund *v.* Fowler, 142 Ind. 214, 41 N. E. 456; Skaggs *v.* Martinsville, 140 Ind. 476, 39 N. E. 241, 49 Am. St. Rep. 209, 33 L. R. A. 781.

Louisiana.— State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390.

Minnesota.— St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278.

Missouri.— See Morse *v.* Westport, 136 Mo. 276, 37 S. W. 932.

New Jersey.— Haynes *v.* Cape May, 50 N. J. L. 55, 13 Atl. 231 [*affirmed* in 52 N. J. L. 180, 19 Atl. 176]; Breninger *v.* Belvidere, 44 N. J. L. 350.

South Carolina.— Darlington *v.* Ward, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326.

Illustration.— Where a statute expressly authorizes a municipal board to designate the number of street railway tracks that shall be laid in any street, lane, or avenue of the city, the court cannot set aside as unreasonable an ordinance which authorizes the laying of a double track. State *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281.

Dillon's statement of rule.— "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In

not only annul ordinances and by-laws, because they contravene the higher laws of constitutions and statutes, but they do not hesitate to declare them void and inoperative because they appear to the judicial mind unreasonable or oppressive.[20]

other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." Dillon Mun. Corp. (4th ed.) 405.

20. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

Arkansas.— Taylor *v.* Pine Bluff, 34 Ark. 603; Waters *v.* Leech, 3 Ark. 110.

California.— *Ex p.* Chin Yan, 60 Cal. 78; *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642.

Georgia.— Toney *v.* Macon, 119 Ga. 83, 46 S. E. 80; Gilham *v.* Wells, 64 Ga. 192.

Illinois.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; Tugman *v.* Chicago, 78 Ill. 405; Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Chicago *v.* Gunning System, 114 Ill. App. 377 (*affirmed* in 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230]; Pierce *v.* Aurora, 81 Ill. App. 670; Peoria *v.* Gugenheim, 61 Ill. App. 374.

Indiana.— Cleveland, etc., R. Co. *v.* Connersville, 147 Ind. 277, 46 N. E. 579, 62 Am. St. Rep. 418, 37 L. R. A. 175.

Iowa.— Davis *v.* Anita, 73 Iowa 325, 35 N. W. 244; State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652; Meyers *v.* Chicago, etc., R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50.

Kansas.— Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Kentucky.— See Com. *v.* Steffee, 7 Bush 161.

Louisiana.— Shreveport *v.* Robinson, 51 La. Ann. 1314, 26 So. 277; Laviosa *v.* Chicago, etc., R. Co., McGloin 299.

Maryland.— Baltimore *v.* Radecke, 49 Md. 217, 33 Am. Rep. 239.

Massachusetts.— Com. *v.* Robertson, 5 Cush. 438; Boston *v.* Shaw, 1 Metc. 130; Com. *v.* Worcester, 3 Pick. 462.

Michigan.—Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6; *In re* Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

Missouri.— Cape Girardeau *v.* Riley, 72 Mo. 220; Corrigan *v.* Gage, 68 Mo. 541; St. Louis *v.* Fitz, 53 Mo. 582; Springfield *v.* Starke, 93 Mo. App. 70; Skinker *v.* Heman, 64 Mo. App. 441; Lamar *v.* Weidman, 57 Mo. App. 507.

New Jersey.— State *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513; State *v.* Jersey City, 47 N. J. L. 286; State *v.* East Orange Tp., 41 N. J. L. 127; Long *v.* Jersey City, 37 N. J. L. 348; Kip *v.* Paterson, 26 N. J. L. 298; Paxson *v.* Sweet, 13 N. J. L. 196; Dayton *v.* Quigley, 29 N. J. Eq. 77.

New York.— Yonkers *v.* Yonkers R. Co., 51 N. Y. App. Div. 271, 64 N. Y. Suppl. 955; Buffalo *v.* Collins Baking Co., 39 N. Y. App. Div. 432, 57 N. Y. Suppl. 347; People *v.* Rochester, 44 Hun 166; Buffalo *v.* Webster, 10 Wend. 99; Dunham *v.* Rochester, 5 Cow. 462.

Pennsylvania.—Livingston *v.* Wolf, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936; Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 384; O'Maley *v.* Freeport, 96 Pa. St. 24, 42 Am. Rep. 527; Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa. St. 318.

Tennessee.— Ward *v.* Greeneville, 8 Baxt. 228, 35 Am. Rep. 700; Memphis *v.* Winfield, 8 Humphr. 707.

Texas.— *Ex p.* Battis, 40 Tex. Cr. 112, 48 S. W. 513, 76 Am. St. Rep. 708, 43 L. R. A. 863.

Virginia.— Kirkham *v.* Russell, 76 Va. 956.

Wisconsin.— State *v.* Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. Rep. 948, 19 L. R. A. 858; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; Clason *v.* Milwaukee, 30 Wis. 316; Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

United States.— Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220.

Canada.— Davis *v.* Clifton Municipality, 8 U. C. C. P. 236.

See 36 Cent. Dig. tit. "Municipal Corporations," § 247.

The court exercises judicial scrutiny over the details of ordinances. Evison *v.* Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434.

Instances of ordinances held invalid.—An ordinance ordering the arrest, imprisonment, and punishment of a free negro found out of doors after ten o'clock at night (Memphis *v.* Winfield, 8 Humpbr. (Tenn.) 707); one punishing any person knowingly associating with persons having the reputation of being thieves and prostitutes (St. Louis *v.* Fitz, 53 Mo. 582); one committing the right to erect and maintain a steam engine and boiler to the unbridled discretion of the mayor (Baltimore *v.* Radecke, 49 Md. 217, 33 Am. Rep. 239); one denying the use of water from the city waterworks to any one who owed, or whose tenant owed, a bill for water supplied in a previous year, or to a different house (Dayton *v.* Quigley, 29 N. J. Eq. 77); one committing to an official arbitrary discretion to allow or prohibit parades (*In re* Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; State *v.* Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. Rep. 948, 19 L. R. A. 858); one prohibiting the altering, repairing, or rebuilding of any frame or wooden building situate within specified limits, whenever the amount required to alter, rebuild, or re-

Where the power to legislate upon a given subject is granted, and the mode of its exercise and the details of such legislation are not prescribed, the ordinance passed pursuant thereto must be a reasonable exercise of the power or it will be pronounced invalid.[21] This the courts will do notwithstanding the unquestionable power of a legislative body to consider and decide upon the reason and justice of any proposed measures of legislation,[22] and even where the by-law has been indorsed on referendum.[23] The English judges found abundant warrant for exercising this control over municipal legislation, in the fact that the making of by-laws, being the inherent right of every municipal corporation,[24] and unrestrained by the terse royal charter, merely creating the municipality without specifying or limiting its powers,[25] was liable to gross abuse in the hands of the royal favorites thus incorporated, and that unless the courts did intervene to protect the rights and liberties of the subjects of the crown, they would be without remedy against the petty tyranny of the municipalities.[26] These English precedents the American courts followed as part of the common law,[27] apparently ignoring the fundamental difference in royal and legislative charters,[28] and the numerous constitutional limitations upon all oppressive and discriminating legislation;[29] and although by-laws may not contravene constitution or statute and may be within the scope of charter powers, yet if they seem to the court oppressive, unfair, partial, or discriminating they are declared unreasonable and void,[30] whether this appear from their face or from proof *aliunde*.[31] Although this often seriously disturbs the self-government of the municipality, it is a power too well established by a long line of concurring decisions to be doubted or challenged.[32]

b. Partial and Discriminating Ordinances. Ordinances which are partial or unfair, or which discriminate in favor of one class against another, are invalid.[33]

pair shall exceed three hundred dollars (Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481); one requiring transient merchants to pay a license-fee of two hundred and fifty dollars per month (Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734); one forbidding a licensed retailer of liquors to sell between the hours of six P. M. and six A. M. (Ward *v.* Greeneville, 8 Baxt. (Tenn.) 228, 35 Am. Rep. 700); one ordering the closing of all shops at a certain hour (Coaticook *v.* Lathrop, 22 Quebec Super. Ct. 225); and likewise one forbidding sale of liquors whenever any denomination of christian people are holding divine services (Gilham *v.* Wells, 64 Ga. 192). For other applications of rule see *infra*. XI, A, 8, i.

21. Pittsburgh, etc., R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; and see cases cited in the preceding note.

22. Judge Niblack in an Indiana case said: "An ordinance can not be held to be unreasonable which is expressly authorized by the Legislature. The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely." Coal-Float *v.* Jeffersonville, 112 Ind. 15, 19, 13 N. E. 115.

23. Le Feber *v.* West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

24. The power "to make by-laws or private statutes for the better government of the corporation [is] inseparably incident to every corporation." 1 Blackstone Comm. 475, 476.

25. Willcock Mun. Corp. 26, 27.

26. Willcock Mun. Corp. 154.

27. *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642; Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Morgan *v.* Orange, 50 N. J. L. 389, 13 Atl. 240; Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 384.

28. The royal charter was sufficient if it merely named the place and constituted it a corporation. Willcock Mun. Corp. 26. The modern American charter usually contains an enumeration of the powers delegated to the municipality. Ingersoll Pub. Corp. 172.

29. See *supra*, VI, G, 2.

30. Elliott Mun. Corp. 198–202.

31. Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; Kip *v.* Paterson, 26 N. J. L. 298; Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; Clason *v.* Milwaukee, 30 Wis. 316.

32. See *infra*, VI, G, 4, b.

33. *California.*— *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642.

Delaware.— Gray *v.* Wilmington, 2 Marv. 257, 43 Atl. 94.

Georgia.— Tonay *v.* Macon, 119 Ga. 83, 46 S. E. 80.

Illinois.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; Tugman *v.* Chicago, 78 Ill. 405; Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

Indiana.— Mt. Vernon First Nat. Bank *v.*

c. Ordinance in Derogation of Common Right. So ordinances in derogation of common right are void and unenforceable.[34] Ordinances to the following effect have been declared invalid: One imposing a license-tax for selling lemonade and cake at a temporary stand on the sidewalk;[35] one requiring a license-fee of three hundred dollars from an auctioneer;[36] two hundred dollars from butchers,[37] or twenty-five dollars from a peddler;[38] one prohibiting hotel runners from going within twenty feet of a railroad train, although permitted to do so by the railroad company;[39] one forbidding the renting of private property to lewd women;[40] and one preventing a licensed cab-driver from stationing himself on the private property of an innkeeper with the latter's consent.[41] And yet where a right is not protected by constitutional guaranty, and the legislature has conferred police power on a municipality, many courts have followed the lead of the supreme court of South Carolina in an early case on the "common right" of shopkeepers to keep spirits in their shops and secret back rooms, in holding that a previously common right may be taken away by "a legal restraint imposed on a few for the benefit of the many."[42]

Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624; Graffty *v.* Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

Kentucky.— Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556.

Louisiana.— State *v.* Mahner, 43 La. Ann. 496, 9 So. 480; New Orleans First Municipality *v.* Blineau, 3 La. Ann. 688.

New Jersey.— Red Star Line Steamship Co. *v.* Jersey City, 45 N. J. L. 246.

New York.— Canajoharie *v.* Buel, 43 How. Pr. 155.

Pennsylvania.— Frey *v.* Norristown, 22 Montg. Co. Rep. 118.

Tennessee.— Whyte *v.* Nashville, 2 Swan 364.

Applications of rule.— Within the rule stated the following ordinances have been held invalid: One requiring certain water consumers to put in expensive meters under penalty of cutting off the water-supply (Red Star Line Steamship Co. *v.* Jersey City, 45 N. J. L. 246); one requiring a certain individual named to do certain acts in respect to a building, and imposing a penalty for non-compliance (New Orleans First Municipality *v.* Blineau, 3 La. Ann. 688); one requiring license of itinerant merchants only (Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522); one requiring particular individuals by name to construct local improvements in front of their lots (Whyte *v.* Nashville, 2 Swan (Tenn.) 364); one forbidding the repairing, altering, or rebuilding of any frame building within fire limits, the cost of which should exceed three hundred dollars (Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481); one prohibiting dairies within certain designated limits without the consent of the city council (State *v.* Mahner, 43 La. Ann. 496, 9 So. 480); one which fixed one rate of license fee for selling goods which are within or in transit to the city, and another, and much larger, rate for goods which are not within or in transit to the city (*Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642); one requiring municipal licenses from non-residents driving interurban carriages or omnibuses into the city (Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679); one placing a burden upon some of the members of a municipality while others engaged in similar business are exempt (Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556); one prohibiting any person bringing second-hand clothing into a city or town, or exposing it for sale therein without proof of its non-infection (Kosciusko *v.* Slomberg, 68 Miss. 469, 9 So. 297, 24 Am. St. Rep. 281, 12 L. R. A. 528); and one which makes an act done by one penal, and imposes no penalty for the same act done, under like circumstances, by another (Tugman *v.* Chicago, 78 Ill. 405). For other illustrations see *infra*, XI, A, 8, j.

Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the municipality must show its authority under plain and specific legislative enactment. Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33.

34. See *infra*, cases cited in following notes in this section.

35. Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

36. Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361.

37. St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278.

38. State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652.

39. Napman *v.* People, 19 Mich. 352. See also State *v.* Robinson, 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339. But see Chillicothe *v.* Brown, 38 Mo. App. 609.

40. Milliken *v.* Weatherford, 54 Tex. 388, 38 Am. Rep. 629.

41. Desmarals *v.* Samson, 5 Quebec Pr. 167.

42. The supreme court of South Carolina observed: "That which is not prohibited may be lawfully done, but that which is pro-

5. Effect of Partial Invalidity[43] — **a. In General.** The rule is well settled that municipal ordinances, like statutes, may be valid in some of their provisions and invalid as to others.[44] Where the portion of an ordinance which is invalid is distinctly separable from the remainder, and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected and the remainder will stand as valid and operative.[45] Nevertheless the part that is good

hibited by law, no one has a right to do. If there was no law interfering, the butcher might kill his beeves and his hogs in the street. If the butcher could do it any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right.— Before the Ordinance . . . it was the common right of every citizen to keep spirituous liquors in his retail shop or any where else at his pleasure; but when it was found by experience that this was an easy method of violating the law prohibiting shop keepers from selling spirits to slaves and cab loafers about town; and an Ordinance was passed to prohibit such shop keepers from keeping it in their shops and in secret back rooms adjoining, it was no longer a common right, but a legal restraint imposed on a few for the benefit of the many." Charleston *v.* Ahrens, 4 Strobh. (S. C.) 241, 257.

43. Illegality of part of ordinance providing for public improvement see *infra*, XIII, B, 8, h.

44. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

Florida.— Tampa *v.* Salomonson, 35 Fla. 446, 17 So. 581.

Illinois.— Quincy *v.* Bull, 106 Ill. 337; Baker *v.* Normal, 81 Ill. 108; Imes *v.* Chicago, etc., R. Co., 105 Ill. App. 37.

Iowa.— Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148; Cantril *v.* Sainer, 59 Iowa 26, 12 N. W. 753.

Louisiana.— State *v.* Riley, 49 La. Ann. 1617, 22 So. 843.

Massachusetts.—Com. *v.* Dow, 10 Metc. 382.

Michigan.— Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79.

Minnesota.— Wykoff *v.* Healey, 57 Minn. 14, 58 N. W. 685.

Nebraska.— Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

New Jersey.— Trowbridge *v.* Newark, 46 N. J. L. 140.

New York.— Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

Ohio.— Piqua *v.* Zimmerlin, 35 Ohio St. 507.

Wisconsin.— Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

Canada.— Reg. *v.* Jin Sing, 4 Brit. Col. 338.

See 36 Cent. Dig. tit. "Municipal Corporations," § 248.

45. *Alabama.*— Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141; *Ex p.* Florence, 78 Ala. 419.

Arkansas.— Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921; Rau *v.* Little Rock, 34 Ark. 303.

California.—*Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747.

District of Columbia.— Cooper *v.* District of Columbia, MacArthur & M. 250.

Florida.— Canova *v.* Williams, 41 Fla. 509, 27 So. 30.

Georgia.— Augusta *v.* Clark, 124 Ga. 254, 52 S. E. 881.

Illinois.— Illinois Cent. R. Co. *v.* People, 161 Ill. 244, 43 N. E. 1107.

Indiana.— Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857.

Kentucky.— McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430.

Maine.— State *v.* Robb, 100 Me. 180, 60 Atl. 874.

Michigan.— Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79; People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721.

Minnesota.— State *v.* McFarland, 96 Minn. 482, 105 N. W. 187; Wykoff *v.* Healey, 57 Minn. 14, 58 N. W. 685; Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235.

Missouri.— St. Louis *v.* Leissing, 190 Mo. 464, 89 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. N. S. 718; Rockville *v.* Merchant, 60 Mo. App. 365.

Nebraska.— Morgan *v.* State, 64 Nebr. 369, 90 N. W. 108; State *v.* Crete, 32 Nebr. 568, 49 N. W. 272; Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208; State *v.* Hardy, 7 Nebr. 377.

New Jersey.— Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176; State *v.* Washington, 45 N. J. L. 318 [*affirmed* in 46 N. J. L. 209].

New York.— Broadway, etc., R. Co. *v.* New York, 49 Hun 126, 1 N. Y. Suppl. 646; Eighth Ave. R. Co. *v.* New York, 4 N. Y. Suppl. 956; Twenty-Third St. R. Co. *v.* New York, 4 N. Y. Suppl. 487.

Ohio.— Sterling *v.* Bowling Green, 26 Ohio Cir. Ct. 581.

Texas.— *Ex p.* Henson, (Cr. App. 1905) 90 S. W. 874.

Utah.— Eureka City *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904.

Wisconsin.— Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

United States.— *In re* Ah Toy, 45 Fed. 795.

See 36 Cent. Dig. tit. "Municipal Corporations," § 248.

Restatement of rule.— It is well settled that a municipal ordinance, like a legislative statute, may be good in part and upheld, while part thereof may be adjudged to be illegal and void, provided the void parts thereof are not so connected with or essential to the completeness of the valid parts as that

must be clearly distinguished from the part that is bad so that if the invalid portion is eliminated that which stands remains a distinct and complete ordinance capable of being enforced.[46] Where a municipal ordinance is entire, each part being essential to and connected with the balance, the invalidity of one part renders the whole invalid.[47]

b. Conflicting With Charter or Statute. The general rules stated in the preceding section apply in the case of ordinances, some provision or provisions of which are in contravention of the general statutes of the state or the charter of the municipality.[48] Thus where a by-law consists of several distinct and independent parts, some of which are void because not authorized by the charter, this does not affect the validity of other independent provisions.[49] It has accordingly been held that where an ordinance affixes a larger penalty than allowed by charter, it may be enforced to the charter limit;[50] and that where several acts

the latter cannot stand alone or be carried out independently of and without the void provisions, or unless the different parts of the ordinance are so interdependent or blended together that it cannot fairly be said that the legislature would not have adopted the one without the other. Tampa *v.* Salomonson, 35 Fla. 446, 17 So. 581.

Applications of rule.— If there are several prohibitions in an ordinance, some of which are void and others valid, if a penalty is provided applying to each offense separately, the ordinance may be enforced as to offenses in respect to which it is valid, as if the void parts had been omitted. Poyer *v.* Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. Where an ordinance of a city grants an exclusive use of its streets for thirty years for laying water-pipes, etc., to supply the city with water, and fixes the compensation the city shall pay for the use of water supplied to it, the ordinance may be void as to the grant of an exclusive use, and as to the indebtedness incurred thereby, it being in excess of the constitutional limit, yet valid as to the right of the grantee to construct the waterworks and lay his mains and pipes in the streets for the purpose of supplying water for private use. Quincy *v.* Bull, 106 Ill. 337. The provision in a municipal ordinance that, when a judgment for a fine shall be less than ten dollars, a fee of two dollars and fifty cents for the city attorney shall be taxed as costs, is severable from the provisions that he shall receive a percentage on judgments for fines rendered for the benefit of the commonwealth, and the invalidity of the former provision does not affect the validity of the latter. Moody *v.* Williamsburg, 88 S. W. 1075, 28 Ky. L. Rep. 60.

46. Reg. *v.* Jin Sing, 4 Brit. Col. 338.

47. *Alabama.*— *Ex p.* Florence, 78 Ala. 419.

Florida.— Canova *v.* Williams, 41 Fla. 509, 27 So. 30; Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Illinois.— Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035].

Louisiana.— New Orleans Second Municipality *v.* Morgan, 1 La. Ann. 111.

New Jersey.— Wiesenthal *v.* Atlantic City, 73 N. J. L. 245, 63 Atl. 759; State *v.* Hoboken, 38 N. J. L. 110.

North Carolina.— State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

Application of rule.— Where that part of an ordinance requiring a telephone company to relocate its poles is void, the part imposing a penalty on the company if it does not make the relocation is also void. Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23. So an ordinance otherwise valid providing illegal penalties will be wholly inoperative. Omaha *v.* Harmon, 58 Nebr. 339, 78 N. W. 623.

48. See cases cited *infra*, this section.

49. *Alabama.*— Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143.

California.— *Ex p.* Mansfield, 106 Cal. 400, 39 Pac. 775; *Ex p.* Holmquist, (1891) 27 Pac. 1099; San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694.

Florida.— State *v.* Dillon, 42 Fla. 95, 28 So. 781.

Kansas.— Clearwater *v.* Bowman, 72 Kan. 92, 82 Pac. 526.

Minnesota.— Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235; State *v.* Kantler, 33 Minn. 69, 21 N. W. 856.

Missouri.— State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Nebraska.— State *v.* Hardy, 7 Nebr. 377.

New York.— Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

Pennsylvania.— Coden *v.* Gettysburg, 8 Leg. Gaz. 167.

Wisconsin.— Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

See 36 Cent. Dig. tit. "Municipal Corporations," § 250.

When it prohibits disjunctively two or more acts, the invalidity of one part does not affect the validity of the others. Kettering *v.* Jacksonville, 50 Ill. 39.

50. *Arkansas.*— Eureka Springs *v.* O'Neal, 56 Ark. 350, 19 S. W. 969.

California.— *Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747.

Dakota.— Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

Illinois.— Schofield *v.* Tampico, 98 Ill. App. 324.

are forbidden by the same ordinance, part of which are *ultra vires*, it may be enforced as to all the prohibitions which are *intra vires*.[51] On the other hand, where the provisions of an ordinance, some of which are valid and some in contravention of the charter or general laws, are inseparably connected with each other, the entire ordinance is void.[52]

c. Conflicting with Constitution. An unconstitutional provision in an ordinance does not vitiate the whole ordinance, unless the two provisions are so closely connected in object and meaning that the one cannot exist without the other.[53] Accordingly by-laws forbidding certain acts within the scope of charter powers, but affixing unconstitutional as well as constitutional penalties, are sustained in all features except the unconstitutional penalty.[54] And an ordinance is not void *in toto* because retrospective in part, if in so far as it is prospective it is in no way connected with or dependent on such void part.[55]

d. Unreasonable Ordinances. The fact that a portion of an ordinance is void because unreasonable does not invalidate the whole ordinance, where such portion is distinctly separable from the remainder which in itself contains the essentials of a complete ordinance.[56]

6. Invalidity of Dependent Ordinances. From reference to a prior ordinance or treatment of the same subject-matter it often happens that an ordinance becomes dependent upon its predecessor for its operation and effect; in which case, although possessing no inherent defects in itself, it loses validity because of some fatal defect in the previous ordinance: Thus, where an ordinance providing for the opening of a street is void because not registered as required by law, a subsequent ordinance appropriating funds for the cost of opening the street is also invalid.[57] So also an ordinance forbidding sales of meat elsewhere than at the public market unless authorized by the council was held invalid because the ordinance authorizing private meat-markets was declared void.[58]

7. Conflict With Prior Ordinance. Power to enact implies power to repeal

North Carolina.— State *v.* Earnhardt, 107 N. C. 789, 12 S. E. 426.

See 36 Cent. Dig. tit. "Municipal Corporations," § 250.

51. Harbaugh *v.* Monmouth, 74 Ill. 367; Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148 (as if the charter authorizes the prohibition of the sale of malt and vinous liquors only and the by-laws forbid the sale of all intoxicating liquors); Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665, 93 Am. St. Rep. 394 (holding that an ordinance extending the fire limits in a city which forbids the creation of any wooden structures within such limits, or any building inferior in character to those already standing therein, although void as to the last clause, may be enforced as to the first).

52. New Orleans Second Municipality *v.* Morgan, 1 La. Ann. 111; Ramsey *v.* Field, 115 Mo. App. 620, 92 S. W. 350 (holding that under Kansas City Charter, art. 9, p. 137, authorizing the city council to construct sidewalks of such dimensions and under such regulations as may be provided by ordinance, where an ordinance for the construction of a sidewalk contains no provision for the width or location of the walk, except that embraced in an invalid section, the rejection of the invalid section leaves no authority for the construction of the walk, and renders the ordinance and tax bills issued thereunder unenforceable); Landis *v.* Vineland, 54 N. J. L. 75, 23 Atl. 357.

53. *Arkansas.*— Rau *v.* Little Rock, 34 Ark. 303.

Illinois.— Quincy *v.* Bull, 106 Ill. 337.

Louisiana.— Villavaso *v.* Barthet, 39 La. Ann. 247, 1 So. 599.

Minnesota.— State *v.* Kantler, 33 Minn. 69, 21 N. W. 856.

Missouri.— St. Louis *v.* St. Louis R. Co., 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82 [*affirming* 14 Mo. App. 221]; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

See 36 Cent. Dig. tit. "Municipal Corporations," § 249.

54. Keokuk *v.* Dressell, 47 Iowa 597.

55. Rau *v.* Little Rock, 34 Ark. 303.

56. Lamar *v.* Weidman, 57 Mo. App. 507; Rahway Gaslight Co. *v.* Rahway, 58 N. J. L. 510, 34 Atl. 3.

Applications of rule.—An ordinance applying the same rule as to moving trains or cars on all streets alike was enforced on all except two, where it would be unreasonable to enforce it (Pennsylvania R. Co. *v.* Jersey City, 47 N. J. L. 286), and an ordinance forbidding the keeping of a dram-shop without license, and affixing a penalty therefor to every sale, was enforced as to a single penalty only, and refused enforcement as to the other sales because the penalty would be unreasonable and excessive (Eureka Springs *v.* O'Neal, 56 Ark. 350, 19 S. W. 969).

57. *Re* Henderson, 29 Ont. 669.

58. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

an ordinance; and unless prohibited by constitution, charter, or statute, a municipal council may repeal by implication.[59] But under a charter prohibiting repeal by implication, any special or general ordinance, in conflict with a prior general ordinance, unrepealed by express provision to that effect, is void and inoperative.[60]

8. Motives For Enacting Ordinance. It is a settled rule of conduct prescribed by the courts for their own government that they will not inquire into the motives of members of the legislature in enacting laws.[61] And by analogy to this rule it is very generally held that the courts cannot inquire into the motives of members of a municipal council for the purpose of determining the validity of ordinances enacted by them.[62] And this rule has been repeatedly applied in cases, wherein allegations of fraud and corruption were made and proof offered to show that an ordinance or by-law had been enacted by a council whose members had been bribed or were influenced by other corrupt motives.[63] And yet in some cases

59. *Georgia.*— Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71.

Indiana.— Coghill *v.* State, 37 Ind. 111.

Iowa.— Decorah *v.* Dunstan, 38 Iowa 96.

Kentucky.— Wethington *v.* Owensboro, 53 S. W. 644, 21 Ky. L. Rep. 960.

Michigan.— Grand Rapids *v.* Norman, 110 Mich. 544, 68 N. W. 269; Lenz *v.* Sherrott, 26 Mich. 139.

Nebraska.— *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

New Jersey.— Burlington *v.* Estlow, 43 N. J. L. 13.

Tennessee.— Schmalzried *v.* White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782.

See 36 Cent. Dig. tit. "Municipal Corporations," § 253.

Applications of rule.—An ordinance prohibiting the sale of spirituous liquors under a penalty is repealed by a subsequent ordinance prohibiting their sale without a license. Barton *v.* Gadsden, 79 Ala. 495. A subsequent ordinance revising the whole subject of selling or delivering any spirituous liquors will be held to be a substitute for all prior regulations on the same subject, although words of repeal are not used. Booth *v.* Carthage, 67 Ill. 102.

Rule governing statutes applied to ordinances.— The general rule governing the construction of statutes, that the later statute clearly intended to prescribe the only rule which shall govern the case provided for should be construed to repeal the earlier, has been applied to ordinances. Roche *v.* Jersey City, 40 N. J. L. 257.

60. Lemoine *v.* St. Louis, 72 Mo. 404; Asphalt, etc., Constr. Co. *v.* Haenssler, (Mo. App. 1904) 80 S. W. 5; St. Louis Charter, art. 3, § 28; Mun. Code St. Louis, p. 224.

Application of rule.— Where there is an existing ordinance not expressly repealed, imposing a license-tax of fifty dollars on brokers, a subsequent ordinance imposing a license-tax of one hundred dollars on the same occupation is invalid. St. Louis *v.* Sanguinet, 49 Mo. 581.

61. 1 Dillon Mun. Corp. § 311; Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; McCulloch *v.* State, 11 Ind. 424; State *v.* Hays, 49 Mo. 604, 607, in which it was said: "The legislature is a co-ordinate branch of the State government, and in the enactment of laws is entirely independent of the judiciary; and if the laws are otherwise legal, the Courts have no power to annul or set them aside on the ground that the members acted from improper or unlawful views." And see Statutes.

62. *Illinois.*— Meyer *v.* Teutopolis, 131 Ill. 552, 23 N. E. 651.

Indiana.— Lilly *v.* Indianapolis, 149 Ind. 648, 49 N. E. 887.

Michigan.— People *v.* Gardner, 143 Mich. 104, 106 N. W. 541.

Missouri.— Dreyfus *v.* Lonergan, 73 Mo. App. 336. And see Young *v.* St. Louis, 47 Mo. 492.

New Jersey.— Moore *v.* Haddonfield, 62 N. J. L. 386, 792, 41 Atl. 946.

New York.— Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081.

Pennsylvania.— Freeport *v.* Marks, 59 Pa. St. 253.

Washington.— Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

Wisconsin.— State *v.* Milwaukee County Super. Ct., 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819.

See 36 Cent. Dig. tit. "Municipal Corporations," § 254.

63. *Illinois.*— People *v.* Cregier, 138 Ill. 401, 28 N. E. 812.

Iowa.— Buell *v.* Ball, 20 Iowa 282.

Louisiana.— Villavaso *v.* Barthet, 39 La. Ann. 247, 1 So. 599.

New York.— Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659.

Tennessee.—Knoxville Corp. *v.* Bird, 12 Lea 121, 47 Am. Rep. 326.

Washington.— Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

See 36 Cent. Dig. tit. "Municipal Corporations," § 254.

"Although the circumstances surrounding and accompanying the passage of the order may be given in evidence, it does not by any means follow that the motives, reasons and considerations which operated upon the minds of the members of the council to induce them to vote for an order which partakes so much of the character of legislation, are competent or proper." Paine *v.* Boston, 124 Mass. 486, 490.

proof has been admitted to establish corrupt motives, and ordinances have been nullified by the courts, when this charge was established.[64] Much safer and wiser, however, appears the rule declared by the supreme court of the United States, which refuses to consider legislative motives "except as they may be disclosed on the face of the acts, or inferrible from their operation and effect."[65] To the general rule, however, there is a well-recognized exception in the case of ordinances, by-laws, or resolutions of a contractual character.[66] Such proceeding, of whatever form, being the municipal expression of assent to a contract is not legislative, but ministerial or administrative, and must in the very nature of the case be subject to judicial investigation in the same manner and for the same purpose as the contracts of private corporations;[67] and when proven to be procured by fraud, such contracts will be annulled or rescinded just as those of natural persons.[68]

9. Disqualification of Members of Board or Council. There are some cases holding an ordinance or by-law void because the enacting council was not lawfully constituted *de jure*, or some of its members were disqualified to act.[69] But the great weight of authority opposes this view and maintains the general doctrine that the acts of a *de facto* officer are valid, and ordinances are not invalidated by the fact that some of the members or even all are not *de jure* members, provided it is a *de facto* council.[70]

10. Validating Void Ordinance. A void municipal ordinance may be validated (1) by act of the general assembly, or (2) by act of the common council. Legislative control over municipal corporations, mere creatures of law, comprehends all matters of local legislation not under constitutional interdiction.[71] The general assembly, having conferred upon the municipality all legislative power

64. Shinkle *v.* Covington, 83 Ky. 420. And see Kansas City *v.* Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766, 7 L. R. A. N. S. 639; Kansas City *v.* Hyde, 196 Mo. 515, 96 S. W. 206; Knapp, etc., Co. *v.* St. Louis, 156 Mo. 343, 56 S. W. 1102; Davis *v.* New York, 1 Duer (N. Y.) 451 [*affirmed* in 9 N. Y. 263, 59 Am. Dec. 536].

65. "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." Soon Hing *v.* Crowley, 113 U. S. 703, 710, 5 S. Ct. 730, 28 L. ed. 1145.

66. State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262.

67. Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678; Talcott *v.* Buffalo, 125 N. Y. 280, 26 N. E. 263; Cooley Const. Lim. §§ 186, 187, 208.

68. Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678.

The passage of a resolution by a council awarding a contract for street lighting is not legislative, but a ministerial act in the nature of a business transaction relating to the management of municipal affairs. Seitzinger *v.* Tamaqua, 187 Pa. St. 539, 41 Atl. 454; Howard *v.* Olyphant Borough, 181 Pa. St. 191, 37 Atl. 258.

69. Acts of the members of a board of town trustees were held to be illegal where they did not proceed to qualify as was required by the charter. Dinwiddie *v.* Rushville, 37 Ind. 66.

70. Perkins *v.* Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786; State *v.* Gray, 23 Nebr. 365, 36 N. W. 577; Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782 [*reversed* on other grounds in 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412]. Such body may legally elect or appoint city officers. Mitchell *v.* Tolan, 33 N. J. L. 195.

71. Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513. "Unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance." U. S. Mortgage Co. *v.* Gross, 93 Ill. 483, 494 [*quoted* with approval in Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786; Anderson *v.* Santa Anna, 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633].

possessed by it, may of course aid in the defective execution of the power; and if the legislature might originally have conferred the power to pass an ordinance, it may legally ratify such an ordinance after its passage.[72] It is important, however, that the legislative intent to cure the particular defect, or confer the necessary retroactive power, shall be manifest;[73] it cannot be inferred from general and comprehensive provisions evidencing no such intent.[74] So also to render subsequent proceedings of a common council evidence of the ratification of an invalid ordinance, it must appear that such proceedings were had with full knowledge of the invalidity of the ordinance, and with manifest intention to cure it thereby.[75] And the curative act must be passed in the manner essential to the valid enactment of the original.[76] If an ordinance enacted by a municipality is beyond its powers, no subsequent action in relation thereto can give it validity.[77]

11. Proceedings to Determine Validity. Divers modes of challenging the validity of municipal ordinances and by-laws prevail in different jurisdictions: In Canada the primary method is, by statute, to move the superior court, on due notice, to quash the by-law.[78] In Kentucky there is a statute providing that the validity or constitutionality of an ordinance shall be tried by writ of prohibition,[79] or by injunction;[80] and in Missouri also it has been held that the validity of an ordinance may be determined in a proceeding to enjoin its enforcement.[81] In New Jersey recourse is had to the common-law writ of certiorari.[82] In other states resort has been had to quo warranto, and even habeas corpus.[83] And in general the law permits a defendant in an action by the municipality to challenge the validity of the ordinance because unconstitutional, unlawful, *ultra vires*, or unreasonable.[84]

72. *Illinois.*— U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

Kansas. — Emporia *v.* Norton, 13 Kan. 569.

Minnesota.— State *v.* Starkey, 49 Minn. 503, 52 N. W. 24.

New York.— Hatzung *v.* Syracuse, 92 Hun 203, 36 N. Y. Suppl. 521, holding that the legislature may confirm municipal ordinances and proceedings irregularly adopted.

Oregon.— Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Pennsylvania.— Com. *v.* Marshall, 69 Pa. St. 328; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

See also *supra*, IV, D; IV, H, 2; IV, I, 6.

73. Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

74. An act of the legislature passed subsequent to the passage of a void ordinance purporting to empower the local corporation to enforce any regulation heretofore made upon a particular subject, but not naming the ordinance in question, is inadequate to render the ordinance valid. Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

75. McCracken *v.* San Francisco, 16 Cal. 591.

76. Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

77. Crofut *v.* Danbury, 65 Conn. 294, 32 Atl. 365.

78. Bogart *v.* Seymour Tp., 10 Ont. 322; Reg. *v.* Cuthbert, 45 U. C. Q. B. 19; Roy *v.* St. Gervais, 17 Quebec Super. Ct. 377.

79. Bybee *v.* Smith, 57 S. W. 789, 22 Ky. L. Rep. 467, 61 S. W. 15, 22 Ky. L. Rep. 1684.

80. Boyd *v.* Frankfort, 117 Ky. 199, 77 S. W. 669, 25 Ky. L. Rep. 1311, 111 Am. St. Rep. 240.

81. Sylvester Coal Co. *v.* St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566; Heman *v.* Ring, 85 Mo. App. 231.

82. Reed *v.* Woodcliff, (N. J. Sup. 1905) 60 Atl. 1128; Schwarz *v.* Dover, 70 N. J. L. 502, 57 Atl. 394; State *v.* Long Branch Com'rs, 42 N. J. L. 375; State *v.* Morristown, 34 N. J. L. 445; State *v.* Newark, 30 N. J. L. 303; New Jersey R., etc., Co. *v.* Jersey City, 29 N. J. L. 170; Camden *v.* Mulford, 26 N. J. L. 49.

A municipal ordinance which is not entirely void cannot be questioned on certiorari by a person not shown to be affected by any of its provisions. Morwitz *v.* Atlantic City, 73 N. J. L. 254, 62 Atl. 996.

83. Quo warranto may be invoked for the unwarranted assumption of public powers. In an early South Carolina case, the writ was allowed against a municipal corporation by the attorney-general in behalf of the state, in order to test the right of the corporation to tax by ordinance certain bonds, notes, and other obligations. State *v.* Charleston, 1 Mill (S. C.) 36. Habeas corpus was used by the courts of Missouri to look into and investigate the constitutionality of a statute or ordinance on which a judgment resulting in the imprisonment of petitioner was found. *Ex p.* Smith, 135 Mo. 223, 36 S. W. 628, 58 Am. St. Rep. 576, 33 L. R. A. 606.

84. *Connecticut.*— Southport *v.* Ogden, 23 Conn. 128.

Indiana.— Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Louisiana.— Conery *v.* New Orleans Water-

H. Subjects and Title[85] — **1. Plurality of Subjects in Title and Body of Ordinance — a. Effect of Constitutional Provisions.** The provision commonly found in the legislative article of recent state constitutions that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title, has been consistently construed by the courts to have no application to municipal ordinances and by-laws.[86] Unless therefore there is some charter or statutory provision requiring it, no title need precede an ordinance;[87] or if a title is superscribed, an error in it will not vitiate the ordinance;[88] nor will duplicity in the body of the ordinance invalidate it.[89]

b. Effect of Provisions in Statute or Charter — (i) *In General.* It is of course competent for the legislature to prescribe to municipalities the method and mode by which they shall exercise their legislative functions; and the violation of mandatory legislative requirements will render the ordinance null and void.[90] Such charter provision may obviously be repealed or suspended by the legislature.[91]

(ii) *Plurality of Subjects in Body of Ordinance.* Many statutes and charters forbid the passage of an ordinance embracing more than one subject; and they are generally held to be mandatory.[92] Ordinances have been held invalid under such laws, which extend the city limits and appropriate funds to build a bridge,[93] grant a franchise to an electric light and power company to use the streets and alleys of a city, and make a contract for municipal lighting;[94] grant a license to a water company to lay its pipes and mains, and also provide for annual rental for hydrants, for an annual levy to pay the same, and for the purchase of the waterworks;[95] provide for letting franchises to supply the city with light, heat, and power by means of gas alone, or of gas and hot water, or of gas, hot water, and steam;[96] and prohibit animals from running at large, forbid any one to keep a dog without paying a tax, direct the marshal to kill unlicensed dogs, and make the owner liable to criminal prosecution for keeping dogs without license.[97] But under such statutes and charters of inhibition ordinances and

Works Co., 39 La. Ann. 770, 2 So. 555; Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593.

Tennessee.— Long *v.* Shelby County Taxing Dist., 7 Lea 134, 40 Am. Rep. 55.

And see *supra*, VI, G, 2, a, b; VI, G, 4, a.

85. Subjects and titles of statutes see Statutes.

86. *California.*— Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; *Ex p.* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

Illinois.— Harris *v.* People, 218 Ill. 439, 75 N. E. 1012; Chicago Union Traction Co. *v.* Chicago, 207 Ill. 544, 69 N. E. 849; Hinsdale *v.* Shannon, 182 Ill. 312, 55 N. E. 327; Schofield *v.* Tampico, 98 Ill. App. 324.

Indiana.— Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Green *v.* Indianapolis, 25 Ind. 490.

Kansas.— Topeka *v.* Raynor, 61 Kan. 10, 58 Pac. 557; Humboldt *v.* McCoy, 23 Kan. 249.

Louisiana.— Callaghan *v.* Alexandria, 52 La. Ann. 1013, 27 So. 540.

Michigan.— People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286; People *v.* Hanrahan, 75 Mich. 611, 44 N. W. 1124, 4 L. R. A. 751.

Missouri.— Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

Pennsylvania.— Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271; *In re* Yardley Borough, 22 Pa. Co. Ct. 179; Nocton *v.* Pennsylvania R. Co., 20 Montg. Co. Rep. 74.

South Carolina.— State *v.* Gibbes, 60 S. C. 500, 39 S. E. 1.

See 36 Cent. Dig. tit. "Municipal Corporations," § 258 *et seq.*

87. Green *v.* Indianapolis, 25 Ind. 490; Callaghan *v.* Alexandria, 52 La. Ann. 1013, 27 So. 540.

88. Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235; Com. *v.* La Bar, 5 Lack. Leg. N. (Pa.) 229, 7 North. Co. Rep. 85.

89. State *v.* Gibbes, 60 S. C. 500, 39 S. E. 1.

90. Missouri Pac. R. Co. *v.* Wyandotte, 44 Kan. 32, 23 Pac. 950; Stebbins *v.* Mayer, 38 Kan. 573, 16 Pac. 745. But see Napa City *v.* Easterby, 76 Cal. 222, 18 Pac. 253.

91. Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014.

92. Missouri Pac. R. Co. *v.* Wyandotte, 44 Kan. 32, 23 Pac. 950; Stebbins *v.* Mayer, 38 Kan. 573, 16 Pac. 745.

93. Missouri Pac. R. Co. *v.* Wyandotte, 44 Kan. 32, 23 Pac. 950.

94. Morrow County Illuminating Co. *v.* Mt. Gilead, 10 Ohio S. & C. Pl. Dec. 235, 8 Ohio N. P. 669.

95. Marion Water Co. *v.* Marion, 121 Iowa 306, 96 N. W. 883.

96. Silva *v.* Newport, 119 Ky. 587, 84 S. W. 741, 27 Ky. L. Rep. 212.

97. Stebbins *v.* Mayer, 38 Kan. 573, 16 Pac. 745.

by-laws have been held valid in the following cases, as not containing more than one subject: An ordinance defining and prescribing the punishment for twenty-six different offenses;[98] one licensing and regulating various trades and occupations, among which were auctioneers, second-hand dealers, bill-posters, hotel-runners, pawnbrokers, and persons engaged in the temporary sale of goods;[99] one incurring bonded indebtedness for ten distinct species of municipal improvements;[1] one vacating an alley and granting the land formerly occupied by it;[2] one granting a franchise for electric light and power, and a privilege to conduct water from an artesian well to the light and power plant;[3] one providing for both grading and paving an alley;[4] a license-tax for both regulation and revenue;[5] and "an ordinance to prevent the operation of poolrooms," punishing the operator and his employees, the owner or agent knowingly leasing it for the purpose, the company transmitting messages to or from it, and the person buying or having possession of its tickets.[6]

(III) *Plurality of Subjects in Title.* Many statutes and charters provide that no ordinance shall embrace more than one subject in the title, and a violation of this requirement renders the ordinance void.[7] It has been so held in respect of an ordinance whose title embraces the two distinct subjects of extending the limits of the city and of appropriating funds to build a bridge.[8] On the other hand it has been held that ordinances entitled as follows are not bad as embracing more than one subject in the title: "An ordinance to prohibit the manufacture and sale of intoxicating liquors, except . . . and to regulate the manufacture and sale thereof for said excepted purposes;"[9] "An ordinance regulating the keeping, storing and handling and licensing the removal of garbage . . . and to repeal a prior ordinance on the same subject and prescribing penalties for the violation thereof;"[10] "An ordinance providing for the licensing of telegraph, telephone, and electric light poles and wires, and collecting an annual license tax therefor;"[11] "An ordinance relative to misdemeanors, breaches of the peace, and disorderly conduct;"[12] an ordinance to authorize the purchase of waterworks or, failing in this, to erect a new plant;[13] and an ordinance requiring removal of screens in saloons, and forbidding sale of spirituous liquors during a certain period, and closing saloons and coffee houses during such period.[14]

2. Sufficiency of Title to Indicate Subject-Matter. The requirement of law that the subject of an ordinance shall be "clearly expressed" in the title has been much mooted in the courts on ordinances of divers kinds, especially those regulating or licensing various acts and occupations, with the result of establishing by general recognition the following rules: (1) The expression of subject in the title of an ordinance is sufficient if it calls attention to the general subject of the legislation.[15] (2) It is not necessary that the title refer to details within the general

98. State *v.* Wells, 46 Iowa 662.
99. Seattle *v.* Barto, 31 Wash. 141, 71 Pac. 735.
1. Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014.
2. Dempsey *v.* Burlington, 66 Iowa 687, 24 N. W. 508.
3. Hanson *v.* Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.
4. Weber *v.* Johnson, 37 Mo. App. 601.
5. Kansas City *v.* Overton, 68 Kan. 560, 75 Pac. 549.
6. Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924.
7. Missouri Pac. R. Co. *v.* Wyandotte, 44 Kan. 32, 23 Pac. 950. And see, generally, Statutes.
8. Missouri Pac. R. Co. *v.* Wyandotte, 44 Kan. 32, 23 Pac. 950.
9. *In re* Thomas, 53 Kan. 659, 37 Pac. 171.
10. St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1043.
11. New Castle *v.* Chicago Illuminating Electric Co., 16 Pa. Co. Ct. 663.
12. State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.
13. Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665.
14. McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430.
15. *Idaho.*— St. Anthony *v.* Brandon, 10 Ida. 205, 77 Pac. 322.
Illinois.— Thompson *v.* Highland Park, 187 Ill. 265, 58 N. E. 328.
Iowa.— Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.
Kentucky.— Elliot *v.* Louisville, 101 Ky. 262, 40 S. W. 690, 19 Ky. L. Rep. 414.

subject, nor those which may be reasonably considered as appropriately incident thereto.[16] The crucial test of sufficiency of title is generally found in the answer to the question: Does the title tend to mislead or deceive the people or the council as to the purpose or effect of the legislation, or to conceal or obscure the same? If it does then the ordinance is void; if not, it is valid.[17]

I. Amendment[18] — **1. Power to Amend.** Power to enact ordinances and by-laws necessarily implies power in the same body to amend its enactments.[19] But power conferred by charter upon a court of record to "repeal" a by-law because unreasonable or contrary to law or constitution, being a judicial power to annul, does not empower the court to legislate an amendment.[20] A constitutional prohibition of amendment of laws by reference to their titles does not prevent the common council from making amendment, in that manner, of municipal ordinances.[21] Neither is the council deprived of its inherent power to amend any pending bill, before passing it into an ordinance, by a statute requiring advertisement of an offered by-law before its passage.[22] But ordinances embodying contracts cannot be amended so as to impair their obligation, or deprive any one of a right acquired and vested thereunder, unless power to amend is reserved in the ordinance so amended.[23]

2. Requisites and Sufficiency of Amendment. In general power to amend a

Missouri.— State *v.* St. Louis, 169 Mo. 31, 68 S. W. 900; Senn *v.* Southern R. Co., 124 Mo. 621, 28 S. W. 66; Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, 1 S. W. 384. And see St. Louis *v.* Green, 7 Mo. App. 468.

Pennsylvania.— Esling's Appeal, 89 Pa. St. 205.

See 36 Cent. Dig. tit. "Municipal Corporations," § 261.

Applications of rule.— The title to a city ordinance, reciting that its object was to "grant certain rights and privileges to a certain telephone company" was sufficient to sustain a grant to such company of the right to use the streets of the city for its telephone lines. State *v.* Nebraska Tel. Co., 127 Iowa 194, 103 N. W. 120. All the provisions of an ordinance being germane to the one subject of regulating the business of selling milk and cream, the charter provision that the subject-matter be expressed in the title of an ordinance is satisfied by the title, being an ordinance to license and regulate the sale of milk and cream, to provide for the inspection thereof, and prescribe the penalties to prevent the sale and distribution of any but pure milk and cream. St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918. An ordinance of a city of the second class, entitled "An ordinance to regulate and prohibit the running at large of animals," and containing therein provisions for the taking up and impounding of cattle running at large within the corporate limits of the city, contains a title sufficiently extended to embrace also a section prohibiting any person from breaking open the inclosure established by the city as a pound, and forbidding the unlawfully taking and driving therefrom of animals impounded therein. Smith *v.* Emporia, 27 Kan. 528.

16. *Idaho.*— State *v.* Calloway, 11 Ida. 719, 84 Pac. 27, 114 Am. St. Rep. 285, 4 L. R. A. N. S. 109.

Iowa.— Healy *v.* Johnson, 127 Iowa 231, 103 N. W. 92; Des Moines *v.* Keller, 116 Iowa 648, 88 N. W. 827, 93 Am. St. Rep. 268.

Kentucky.— Paducah *v.* Ragsdale, 92 S. W. 13, 28 Ky. L. Rep. 1057.

Maryland.— Baltimore *v.* Stewart, 92 Md. 535, 48 Atl. 165.

Minnesota.— Duluth *v.* Abrahamson, 96 Minn. 39, 104 N. W. 682.

Missouri.— St. Louis *v.* Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. N. S. 936.

Ohio.— Belle *v.* Glenville, 27 Ohio Cir. Ct. 181; Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531.

Pennsylvania.— Com. *v.* Larkin, 27 Pa. Super. Ct. 397; Barton *v.* Pittsburg, 4 Brewst. 373.

Washington.— Seattle *v.* Barto, 31 Wash. 141, 71 Pac. 735.

17. State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658. And see Cantril *v.* Sainer, 59 Iowa 26, 12 N. W. 753.

18. Amendment of ordinance, resolution, or order relating to public improvement see *infra*, XIII, B, 9, b.

19. Foster *v.* Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; Rice *v.* Foster, 4 Harr. (Del.) 479; Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

20. Pratt *v.* Litchfield, 62 Conn. 112, 25 Atl. 461.

21. State *v.* Cozzens, 42 La. Ann. 1069, 8 So. 268; Walters *v.* Duke, 31 La. Ann. 668.

22. East Orange *v.* Richardson, 71 N. J. L. 458, 59 Atl. 897. And see Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693.

23. *Illinois.*— Quincy *v.* Bull, 106 Ill. 337; People *v.* Chicago West Div. R. Co., 18 Ill. App. 125.

Indiana.— Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

Iowa.— Des Moines *v.* Chicago, etc., R. Co., 41 Iowa 569.

Maine.— See Bigelow *v.* Hillman, 37 Me. 52.

by-law or ordinance is to be exercised in the same mode as power to enact.[24] But many states have by law or constitution limited this liberty of amendment by prescribing the manner for effecting it; as for example by requiring that the ordinance or section amended be set forth in the amending ordinance.[25] And in other states there is a general statute to the same effect.[26] Many special charters also contain the same provision, with special inhibition against amendment by striking out certain words, or inserting certain words, or substituting certain words in lieu of others.[27] Obviously the object of such provisions, whether in constitution, statute, or charter, is to prevent the confusion likely to result from the inept efforts at legislation made by bodies of men unskilled in this noble art.[28] But since a literal construction and severe application of the law would operate to nullify many well-meant and fairly executed attempts at amendment of defective by-laws, the courts have adopted liberal rules of construction in cases challenging the validity of amendments to ordinances, and in effect decided that whenever the method employed avoids the evil in view and the result attains the object, the amendment is valid and effectual, as is illustrated by the following rulings of sufficient compliance with these requirements. An ordinance attempting to amend by adding new sections, which are fully expressed, need not recite any part of the ordinance amended.[29] An amending ordinance need not contain the entire section amended, but only that provision thereof sought to be amended.[30] Repeal by implication is effected when a subsequent ordinance, without purporting to amend a former one, contains a provision repugnant to it.[31] However, an ordinance cannot be amended by mere resolution or motion, but only by another ordinance enacted with like formality as the original ordinance,[32] especially where it does not contain

Missouri.— State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361.

New York.— People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255.

Ohio.— State *v.* Pinto, 7 Ohio St. 355.

United States.— St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380.

24. Thus an ordinance cannot be amended, repealed, or suspended by an order or resolution, or other act by a council of less dignity than the ordinance itself. Galt *v.* Chicago, 174 Ill. 605, 51 N. E. 653; Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596. And a resolution that the mayor be instructed to purchase certain property cannot, in a suit for specific performance, be amended by parol on the ground of mistake. Carskaddon *v.* South Bend, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1.

25. Morrison *v.* St. Louis, etc., R. Co., 96 Mo. 602, 9 S. W. 626, 10 S. W. 148; State *v.* Thruston, 92 Mo. 325, 4 S. W. 930; State *v.* Chambers, 70 Mo. 625; State *v.* Draper, 47 Mo. 29; Boonville *v.* Trigg, 46 Mo. 288.

Amendment held sufficient.—An amended ordinance which does not attempt to amend the old by adding to or taking from one of its sections, but contains in full the section as it was designed to be when amended, sufficiently complies with a charter which requires that an amended ordinance shall contain the ordinance or parts thereof which it attempts to revise or amend. Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480.

Amendment held insufficient.— Where the act undertakes to amend a former statute, it is not sufficient to say that certain words are stricken out or certain words are inserted, but the section as amended must be set out in full; however, in addition to setting out the section in full, as amended, it is not required that the amendatory act should recite the designated words stricken out, or the others inserted, or both. State *v.* Miller, 100 Mo. 439, 13 S. W. 677.

26. Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333; Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516; *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660; Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

27. Charter City St. Louis, art. 3, § 19; Mun. Code St. Louis, p. 206; 2 Mo. Rev. St. (1899) p. 2483, § 19; Charter San Francisco, art. 2, c. 1, § 10; Cal. St. & Amendm. to Code, p. 245; Cowley *v.* Rushville, 60 Ind. 327.

28. See the cases cited *supra*, notes 25, 26 and 27.

29. Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480; Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516; Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

30. *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

31. Bozant *v.* Campbell, 9 Rob. (La.) 411.

32. People *v.* Sathain, 203 Ill. 9, 67 N. E. 403; Paxton *v.* Bogardus, 201 Ill. 628, 66 N. E. 853; People *v.* Mount, 186 Ill. 560, 58 N. E. 360; Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Hearst's Chicago American *v.* Spiss, 117 Ill. App. 436; Hope *v.* Alton, 116 Ill. App. 116 [*affirmed* in 214 Ill. 102, 73 N. E. 406]; Chicago, etc., R.

"the entire ordinance or section revised or amended."[33] It has been held that one prosecuted for violation of an ordinance with a severe penalty cannot impeach the ordinance as unreasonable, when, pending the suit, the penalty has by amendment been reduced to a reasonable amount.[34] And it seems that a valid revision of the ordinances of a city receiving a new charter may be made after the expiration of the period therefor prescribed by the law.[35]

3. Amendment of Void Ordinances. Attempts made by councils to amend void ordinances have uniformly been nullified by the courts.[36] But when a single section only of an ordinance, separable from the other sections, has been declared void, it is competent and lawful for the council to amend the ordinance by striking out the void section and substituting a valid one in lieu thereof.[37]

J. Annulment and Repeal[38] **— 1. Defined and Distinguished.** Annulment is the judicial act of annulling or declaring invalid and void, and can be performed only by the court.[39] Repeal is the legislative act of repealing or revoking by competent authority an existing law, and can be performed only by a legislative body.[40] The former nullifies the ordinance *ab initio*.[41] The latter abrogates it *in futuro*.[42] Both alike terminate its operation as a living law.[43]

2. Annulment. The judicial act of nullifying an ordinance or by-law, known indifferently as annulling, avoiding, quashing, or vacating is evoked in various ways. In Canada any person interested may, on due notice, make summary application before the superior or circuit court to quash a municipal by-law for illegality.[44] And in British Columbia if no application to quash is made within a

Co. *v.* Salem, 166 Ind. 71, 703, 76 N. E. 631, 634; Carskaddon *v.* South Bend, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1; Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333; Victoria *v.* Meston, 11 Brit. Col. 341.

33. Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333.

34. Baker *v.* Lexington, 53 S. W. 16, 21 Ky. L. Rep. 809.

35. Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516.

36. State *v.* Kantler, 33 Minn. 69, 21 N. W. 856; Beekman's Case, 11 Abb. Pr. (N. Y.) 164, 19 How. Pr. 518; O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434; Schwartz *v.* Oshkosh, 55 Wis. 490, 13 N. W. 450.

37. State *v.* Kantler, 33 Minn. 69, 21 N. W. 856.

38. **Personal liability of officers for repeal of ordinances** see *infra*, XIV, A, 2, a, (II), (B); XIV, A, 5, b.

Repeal of ordinance, resolution, or order relating to public improvement see *infra*, XIII, B, 9, c.

39. Black L. Dict. tit. "Annul"; Standard Dict. tit. "Annul."

40. 2 Bouvier L. Dict. tit. "Appeal"; Rapalje & L. L. Dict. tit. "Appeal."

41. See 2 Cyc. 471.

42. Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; Potter Dwarris, p. 162, n. 9.

43. Anderson L. Dict. tit. "Annul and Repeal."

44. *Re* Shaw, 18 Ont. Pr. 454; *Re* Sweetman, 13 Ont. Pr. 293.

To whom application to quash made.— The divisional court ought not to entertain applications to quash by-laws, which should be made to a single judge. Landry *v.* Ottawa, 11 Ont. Pr. 442. A judge in practice court has no authority to quash a by-law of the corporation. Sams *v.* Toronto, 9 U. C. Q. B. 181.

Time of moving to quash.— Where parties complaining of the illegality of a municipal by-law or resolution permit a term of the courts of common law to pass without moving to quash it, the court of chancery will refuse an injunction to restrain the municipality from enforcing the by-law. Carroll *v.* Perth, 10 Grant Ch. (U. C.) 64.

Proof of interest.— *In re* Kinghorn, 26 U. C. Q. B. 130.

Time within which suit may be brought after quashal.— Under 22 Vict. c. 99, § 201, before an action can be maintained for anything done under a by-law, a month's notice of action must be given, and a month allowed to elapse after the quashing or repealing of such by-law. Smith *v.* Toronto, 11 U. C. C. P. 200; Carmichael *v.* Slater, 9 U. C. C. P. 423.

When jurisdiction to quash exercised.— The jurisdiction to quash on motion conferred by section 378 of Can. Mun. Act (1903) ought, generally speaking, to be exercised in every case of an illegal by-law which cannot be validated; but in the case of one which can be validated, it should be exercised only, generally speaking, when the irregularities in question affected or might have affected the passing of it. Cartwright *v.* Napanee, 11 Ont. L. Rep. 69.

Annulment of ordinance providing for conditional obligation.— An action to annul a municipal by-law will lie, although the obligation thereby incurred may be conditional and the condition has not been and may never be accomplished. Where a resolutory condition precedent to the payment of a bonus under

month after publication the by-law is held valid.[45] In other provinces three months are allowed to make the motion to quash; after which time it seems that challenge of validity may be made by action or petition.[46] Under the latter proceeding special interest in plaintiff must be shown;[47] the summary proceeding by motion is invited in the publication of the enactment of the by-law, and the door left open for a limited period to any one to challenge the validity of the same.[48] Courts have clear power to annul municipal legislation, not only when it is illegal or unconstitutional, but also when unreasonable or oppressive.[49] But to allow annulment on this latter ground, the evidence must be clear and satisfactory in order to overcome the presumption of the good faith of the council in its local legislation.[50]

3. Repeal[51] **— a. In General.** Power to enact implies power also to repeal ordinances, unless the right is limited or abrogated by a higher law.[52] All ordinances too are subject to repeal except such as are contractual in their character.[53] Ordinances contractual in nature or effect may not be repealed by the munici-

a municipal by-law in aid of the construction and operation of a railway has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default, notwithstanding that there may have been part performance of the obligations on the part of the railway company and that a portion of the bonus may have been advanced to the company by the municipality. Toronto Bank *v.* St. Lawrence F. Ins. Co., [1903] A. C. 59, 72 L. J. P. C. 14, 87 L. T. Rep. N. S. 462; Sorel *v.* Quebec Southern R. Co., 36 Can. Sup. Ct. 686.

45. Kane *v.* Kaslo, 4 Brit. Col. 486.

46. Prevost *v.* St. Jerome, 5 Rev. de Jur. 395; *Re* Cooke, 18 Ont. 72. And see *Re* Davis, 21 Ont. 243.

When application considered made.—A summary application to quash a municipal by-law is "made" when notice of the motion is served, the affidavits in support of it having been already filed. *Re* Shaw, 18 Ont. Pr. 454.

47. Prevost *v.* St. Jerome, 5 Rev. de Jur. 395.

48. Kane *v.* Kaslo, 4 Brit. Col. 486.

Recognizance.— A condition precedent to the entertaining of a motion to quash a municipal by-law is the entering into, allowance, and filing of a recognizance, and a bond, even though allowed by a county court judge, cannot be effectively substituted for a recognizance. *Re* Burton, 16 Ont. Pr. 160.

Proof of by-laws.—A by-law is sufficiently authenticated for the purpose of a motion against it, by an affidavit of the relator that the copy produced was received by T from the clerk of the council, and delivered by him to the deponent (Fisher *v.* Vaughan, 10 U. C. Q. B. 492); by a copy of the by-law, authenticated by the seal of the corporation, and certified by the township clerk to be a true copy of a by-law passed on, etc. Bessey *v.* Grantham, 11 U. C. Q. B. 156); where the seal of the corporation is not mentioned in the clerk's certificate, but is on the same page with the certificate, just above it, and opposite to the signatures of the reeve and clerk (Baker *v.* Paris, 10 U. C. Q. B. 621); where the copy of the by-law filed is under the seal of the municipality and sworn to have been received from the clerk, and opposite the seal is the signature, "M. Flanagan, City Clerk," with the words "a true copy," above (*In re* Kinghorn, 26 U. C. Q. B. 130); where no seal is affixed to the by-law, but an impression of the seal is made thereon (*Re* Coome, 6 Ont. 188).

49. Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299.

50. San Diego Water Co. *v.* San Diego, 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460, in which case it was said that it is an elementary doctrine of constitutional law that the question of just compensation is a judicial question, to be determined in the ordinary course of judicial proceedings; and we find no difficulty in holding that, whenever the rates fixed by the council are grossly and palpably insufficient to furnish such a revenue as will afford just compensation within the rules above declared, redress may be had in the courts.

51. Repeal of ordinance operating to remove officer see Chandler *v.* Lawrence, 128 Mass. 213.

52. *Florida.*— Greeley *v.* Jacksonville, 17 Fla. 174.

Indiana.— Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722.

Maryland.— Robinson *v.* Baltimore, 93 Md. 208, 49 Atl. 4.

Missouri.—Kaime *v.* Harty, 4 Mo. App. 357.

South Carolina.— Charleston *v.* Wentworth St. Baptist Church, 4 Strobh. 306.

England.— Rex *v.* Bird, 13 East 367; Rex *v.* Ashwell, 12 East 22.

Canada.— *In re* Great Western R. Co., 23 U. C. C. P. 28.

See 36 Cent. Dig. tit. "Municipal Corporations," § 266½.

53. Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339.

Administrative ordinance.—An ordinance fixing the fiscal year of a municipal corporation is an administrative measure and

pality, without consent of the other party,[54] unless power to repeal is reserved by the original ordinance;[55] for such repeal would impair the obligation of the contract.[56] But when the municipality, in the body and as part of the ordinance, reserves the power of repeal, this is equivalent to the rescission clause in a private contract, under which either or both parties may rescind the contract; and, although the other party has begun work under such a contract, yet, inasmuch as he agreed beforehand that the contract ordinance might be repealed at any time, the ordinance of repeal does not impair any contractual obligation, but is entirely consistent with the repeal clause thereof, and operates according to the contract.[57] And an ordinance may be repealed at any time before compliance with the steps necessary to render it effective, because in such case no one is deprived of any vested right.[58] The entire ordinance may be repealed;[59] also any separable part thereof, without affecting the rest.[60] Improvement ordinances until accepted, or even after acceptance but before the beginning of operations thereunder, may be repealed.[61] But such repeal, or any other, must be subject to the vested rights of the parties acquired under the repealed ordinance.[62] Unless otherwise provided by statute the common-law effect is given to the repeal of an ordinance, and the penal jurisdiction of the court in pending cases is terminated,[63] unless the council,

is subject to repeal. Du Quoin First Nat. Bank *v.* Keith, 84 Ill. App. 103.

54. *Illinois.*— Quincy *v.* Bull, 106 Ill. 337; People *v.* Chicago West Div. R. Co., 18 Ill. App. 125.

Iowa.— Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145.

Louisiana.— Missouri, etc., Trust Co. *v.* Smart, 51 La. Ann. 416, 25 So. 443.

Wisconsin.— Ashland *v.* Wheeler, 88 Wis. 607, 60 N. W. 818.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

55. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255; People *v.* Boston, etc., R. Co., 70 N. Y. 569; Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Southern Bell Tel., etc., Co. *v.* Richmond, 98 Fed. 671.

An act granting a franchise which is a mere license to enjoy the privilege conferred for the time, and on the terms specified, is subject to future legislative control and may be taken away by an act of the body granting it. Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079.

56. Erie *v.* Paskett, 14 Pa. Super. Ct. 400.

57. Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98, 11 S. Ct. 226, 34 L. ed. 898.

58. Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693.

59. The power to pass ordinances or regulations carries with it the power to repeal such ordinances or regulations; and therefore if the council may pass an ordinance it may repeal the whole of same. See *supra*, note 52.

60. Noonan *v.* People, 183 Ill. 52, 55 N. E. 679; Pardridge *v.* Hyde Park, 131 Ill. 537, 23 N. E. 345.

61. Noonan *v.* People, 183 Ill. 52, 55 N. E. 679; Kaime *v.* Harty, 4 Mo. App. 357.

62. *Georgia.*— Rome *v.* Lumpkin, 5 Ga. 447.

Illinois.— Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693; Baldwin *v.* Smith, 82 Ill. 162.

Indiana.— Terre Haute *v.* Lake, 43 Ind. 480.

Iowa.— Des Moines *v.* Chicago, etc., R. Co., 41 Iowa 569.

Louisiana.— New Orleans *v.* St. Louis Church, 11 La. Ann. 244; Musgrove *v.* St. Louis Catholic Church, 10 La. Ann. 431.

Maine.— See Bigelow *v.* Hillman, 37 Me. 52.

Maryland.— State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639.

Massachusetts.— Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131.

Missouri.— State *v.* Ross, 49 Mo. 416.

New Jersey.— Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419.

New York.— People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255.

Ohio.— State *v.* Pinto, 7 Ohio St. 355.

South Carolina.— Charleston *v.* Wentworth St. Baptist Church, 4 Strobh. 306.

Vermont.— Stoddard *v.* Gilman, 22 Vt. 568.

63. *Alabama.*— Barton *v.* Gadsden, 79 Ala. 495.

California.— Sonora *v.* Curtin, 137 Cal. 583, 70 Pac. 674; Spears *v.* Modoc County, 101 Cal. 303, 35 Pac. 869.

Connecticut.— See Southport *v.* Ogden, 23 Conn. 128.

Illinois.— Naylor *v.* Galesburg, 56 Ill. 285.

Missouri.— Kansas City *v.* White, 69 Mo. 26; Kansas City *v.* Clark, 68 Mo. 588.

Ohio.— Earhart *v.* Lebanon, 5 Ohio Cir. Ct. 578, 3 Ohio Cir. Dec. 282.

Tennessee.— Rutherford *v.* Swink, 96 Tenn. 564, 35 S. W. 554.

See 36 Cent. Dig. tit. "Municipal Corporations," § 267.

Express repeal required.— Under St. Louis city charter, providing that no special or general ordinance which is in conflict with general ordinances of prior date shall be valid until such prior ordinance, or the con-

as it may do, provides otherwise by the repealing ordinance.[64] But repeal will not validate a transaction which was unlawful at the beginning.[65]

b. Methods of Repeal — (I) *In General.* The repeal may not be effected by mere resolution or motion[66] or by a void ordinance,[67] but must be enacted in the manner required for passing a valid ordinance.[68] There are two methods of repeal: Express, that is, by positive expression in the repealing legislation;[69] and implied, that is, by subsequent valid legislation incompatible with the existing ordinance.[70]

(II) *Express Repeal* — (A) *By Common Council.* The simple and direct mode of effecting repeal of an ordinance is by a later ordinance passed by the common council, enacting that the former ordinance, describing it, is hereby repealed.[71] But this may be inserted in an ordinance containing other legislation also.[72] A resolution, however, that a certain ordinance "be reconsidered" does not amount to a repeal.[73] Indeed as already shown a repeal cannot be effected by mere resolution or order, not passed and published as an ordinance.[74] But a later ordinance, containing a general repealing clause, repeals a former one, when the first two sections of each are the same, and all other matter of the first is supplied by adequate provisions in the second.[75] The courts have no power to inquire into the motives of the council, or any member in enacting a valid repealing ordinance, even when the ordinance repealed had granted license to use the streets.[76]

flicting parts thereof, be repealed by express terms, a general ordinance imposing a license on real estate agents, and not in express terms repealing a prior general ordinance imposing a license on such agents, is invalid. St. Louis *v.* Sanguinet, 49 Mo. 581.

64. Kansas City *v.* White, 69 Mo. 26.

65. Denning *v.* Yount, 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103.

66. People *v.* Latham, 203 Ill. 9, 67 N. E. 403; People *v.* Mount, 186 Ill. 560, 58 N. E. 360; Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Hearst's Chicago American *v.* Spiss, 117 Ill. App. 436; Hope *v.* Alton, 116 Ill. App. 116 [*affirmed* in 214 Ill. 152, 73 N. E. 406]; Joliet *v.* Petty, 96 Ill. App. 450; Backhaus *v.* People, 87 Ill. App. 173; State *v.* Swindell, 146 Ind. 527, 45 N. E. 700, 58 Am. St. Rep. 375, 35 L. R. A. 50; Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333; Ryce *v.* Osage, 88 Iowa 558, 55 N. W. 532. And see Terre Haute *v.* Lake, 43 Ind. 480; Charter *v.* San Francisco, art. 2, c. 1, § 18.

An ordinance cannot be repealed by mere verbal motion to that effect without reference to the title, number, or date of passage of the ordinance to be repealed. State *v.* Swindell, 146 Ind. 527, 45 N. E. 700, 58 Am. St. Rep. 375, 35 L. R. A. 50.

A resolution providing that a particular ordinance theretofore duly enacted "be reconsidered" is not a repeal of such ordinance. Ashton *v.* Rochester, 60 Hun (N. Y.) 372, 14 N. Y. Suppl. 855.

A resolution rescinding a former resolution conditionally only is inoperative. Buffalo *v.* Chadeayne, 134 N. Y. 163, 31 N. E. 443.

67. People *v.* Mount, 186 Ill. 560, 58 N. E. 360.

68. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; State *v.* Swindell, 146 Ind. 527, 45 N. E. 700, 58 Am. St. Rep. 375, 35 L. R. A. 50; Cunningham *v.* Almonte, 21 U. C. C. P. 459.

69. Horr & B. Mun. Pol. Ord. §§ 60, 61. A statute regulating the taking up of stray animals, and providing that nothing in any municipal charter shall be construed to authorize an ordinance dealing with the subject in any other manner, repeals an existing valid ordinance of that description. Marietta *v.* Fearing, 4 Ohio 427.

70. *Illinois.*— Naylor *v.* Galesburg, 56 Ill. 285.

Iowa.— Decorah *v.* Dunstan, 38 Iowa 96.

Kentucky.— Wethington *v.* Owensboro, 53 S. W. 644, 21 Ky. L. Rep. 960.

Michigan.— De Lano *v.* Doyle, 120 Mich. 258, 79 N. W. 188; Grand Rapids *v.* Norman, 110 Mich. 544, 68 N. W. 269; Lenz *v.* Sherrott, 26 Mich. 139.

New Jersey.— Burlington *v.* Estlow, 43 N. J. L. 13.

New York.— Dexter, etc., R. Co. *v.* Allen, 16 Barb. 15.

Ohio.— Lorain Plank Road Co. *v.* Cotton, 12 Ohio St. 263.

Tennessee.—Schmalzried *v.* White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782.

West Virginia.— Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163.

See 36 Cent. Dig. tit. "Municipal Corporations," § 268.

71. Anderson L. Dict. tit. "Repeal"; 2 Bouvier L. Dict. tit. "Repeal." And see Lenz *v.* Sherrott, 26 Mich. 139.

72. State *v.* Enger, 81 Minn. 399, 84 N. W. 218.

73. Ashton *v.* Rochester, 60 Hun (N. Y.) 372, 14 N. Y. Suppl. 855 [*affirmed* in 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619].

74. See *supra*, VI, I, 2.

75. Com. *v.* Lebanon City, 7 Pa. Dist. 163.

76. Southern Bell Tel., etc., Co. *v.* Richmond, 98 Fed. 671.

(B) *By General Assembly.* Although the power of express repeal of a municipal ordinance is seldom exercised by the general assembly, yet, since it confers upon the municipality its power of legislation, and may at any time in its discretion revoke that power wholly or in part, in states where special municipal legislation is not forbidden by constitution it is competent for the supreme legislative power of the state to pass a statute, expressly repealing an ordinance.[77]

(III) *IMPLIED REPEAL*—(A) *By Ordinance.* A later ordinance may operate to repeal a former one, although it contain no words of repeal.[78] An implied repeal is effected whenever the later ordinance is so incompatible with or repugnant to the former that both cannot stand together in a system of laws.[79] In such case the later ordinance is adjudged to express the legislative intention as to the subject-matter, and the former from its irreconcilable conflict therewith is held to be repealed.[80] It is of course essential to the repeal that the later act shall contain all the requisites of a valid ordinance.[81] The repeal thus effected may be total, affecting the whole of the former ordinance;[82] or it may be partial and affect only such separable parts of it as are essentially repugnant to the later ordinance.[83]

77. Southport *v.* Ogden, 23 Conn. 128. See *supra*, IV, D.

78. Booth *v.* Carthage, 67 Ill. 102; Wethington *v.* Owensboro, 53 S. W. 644, 21 Ky. L. Rep. 960; De Lano *v.* Doyle, 120 Mich. 258, 79 N. W. 188; Grand Rapids *v.* Norman, 110 Mich. 544, 68 N. W. 269; Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163. And see Ashland Water Co. *v.* Ashland County, 87 Wis. 209, 58 N. W. 235.

79. *Alabama.*— Barton *v.* Gadsden, 79 Ala. 495.

District of Columbia.— Stevens *v.* Stoutenburgh, 8 App. Cas. 513.

Florida.— Greeley *v.* Jacksonville, 17 Fla. 174.

Kentucky.— Wethington *v.* Owensboro, 53 S. W. 644, 21 Ky. L. Rep. 960.

Nebraska.— *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

New Jersey.— Von der Leith *v.* State, 60 N. J. L. 590, 40 Atl. 1132; Burlington *v.* Estlow, 43 N. J. L. 13; Public Service Corp. *v.* De Grote, 70 N. J. Eq. 454, 62 Atl. 65; Budd *v.* Camden Horse R. Co., 63 N. J. Eq. 804, 52 Atl. 1130.

Tennessee.—Schmalzried *v.* White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782.

See 36 Cent. Dig. tit. "Municipal Corporations," § 268.

Applications of rule.— A special ordinance, granting to a particular person permission to store refined oils within the city limits, is repealed by a subsequent general ordinance applicable to all persons making such storage of oils a criminal offense. Crowley *v.* Ellsworth, 114 La. 308, 38 So. 199, 108 Am. St. Rep. 353, 69 L. R. A. 276. So where an ordinance amending a section of a former ordinance provides that such section "shall read as follows," stating the provisions, the section as amended becomes for all future purposes the entire section, and anything which was in the original section, but is omitted from it as amended, is repealed. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Subsequent ordinances not repealing former.— An ordinance which gives a city attorney ten per cent of all sums of money collected for the city is not repugnant to a subsequent ordinance giving him a salary and fees in addition in specified cases and is not impliedly repealed thereby. Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70. And the mere change of a district to a city with the same boundaries does not repeal an ordinance of the district. Ferrell *v.* Opelika, 144 Ala. 135, 39 So. 249. For other decisions in which it was held that there was no implied repeal see Greensboro *v.* Mullins, 13 Ala. 341; Smyrk *v.* Sharp, 82 Md. 97, 33 Atl. 411; Des Moines *v.* Hillis, 55 Iowa 643, 8 N. W. 638; Martineau *v.* Rochester, R. Co., 81 Hun (N. Y.) 263, 30 N. Y. Suppl. 778 [*affirmed* in 146 N. Y. 376, 41 N. E. 90]; New York *v.* Wood, 15 Daly (N. Y.) 341, 6 N. Y. Suppl. 657; Eidemiller *v.* Tacoma, 14 Wash. 376, 44 Pac. 877.

Repeal by revision.— Where the general ordinances of a city were revised and consolidated for publication, and were thus adopted and reënacted and an ordinance under which a prosecution had been begun was reënacted in substantially the same language, without any words of repeal, or any clause saving pending prosecutions, the effect of the reënactment was to continue in force the provisions of the original ordinance, and the pending prosecution was not thereby abated or affected. Junction City *v.* Webb, 44 Kan. 71, 23 Pac. 1073.

80. Naylor *v.* Galesburg, 56 Ill. 285; Grand Rapids *v.* Norman, 110 Mich. 544, 68 N. W. 269; Von der Leith *v.* State, 60 N. J. L. 46, 37 Atl. 436 [*affirmed* in 60 N. J. L. 590, 40 Atl. 1132]; Burlington *v.* Estlow, 43 N. J. L. 13; Roche *v.* Jersey City, 40 N. J. L. 257; Schmalzried *v.* White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782.

81. Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Naegely *v.* Saginaw, 101 Mich. 532, 60 N. W. 46.

82. Booth *v.* Carthage, 67 Ill. 102; Decorah *v.* Dunstan, 38 Iowa 96.

83. Goldsmith *v.* Huntsville, 120 Ala. 182, 24 So. 509; Noonan *v.* People, 183 Ill. 52, 55 N. E. 679; Pardridge *v.* Hyde Park, 131

If, however, these repugnant portions are not separable from the rest of the ordinance, then the repeal is total.[84]

(B) *By Statute or Constitution.* A valid ordinance with which the aldermen and citizens of a municipality are entirely satisfied may without their consent or knowledge even be repealed by an enactment of the general assembly on the same subject, utterly repugnant to it.[85] And *a fortiori*, whenever the provisions of a new constitution come into force any repugnant by-law must yield to the mandate of paramount law.[86] So it seems that the repeal of a statute which gives authority to the towns to pass a particular by-law will in general annul the by-law.[87] But a change made in the organic law under which cities of a designated class are organized does not repeal existing ordinances while the power to pass the same ordinances continues to exist,[88] and an ordinance remains in force after adoption of a new charter, authorizing such an ordinance and providing that existing ordinances shall remain in force until repealed.[89]

K. Suspension, Expiration, and Revival[90] — **1. Suspension.** Where an ordinance has been duly enacted the council has no authority to set aside or disregard it except in some manner prescribed by law.[91] While the operation of an ordinance may for a time be suspended by another ordinance,[92] it cannot be suspended by a mere resolution.[93]

Ill. 537, 23 N. E. 345; Hyde Park *v.* Corwith, 122 Ill. 441, 12 N. E. 238.

84. Budd *v.* Camden Horse R. Co., 61 N. J. Eq. 543, 48 Atl. 1028.

85. *Colorado.*—Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

Connecticut.—Southport *v.* Ogden, 23 Conn. 128.

Louisiana.— See New Orleans *v.* Southern Bank, 15 La. Ann. 89.

Michigan.— People *v.* Furman, 85 Mich. 110, 48 N..W. 169.

Missouri.— State *v.* Higgins, 125 Mo. 364, 28 S. W. 638; State *v.* Bell, 119 Mo. 70, 24 S. W. 765.

New Jersey.— Mulcahy *v.* Newark, 57 N. J. L. 513, 31 Atl. 226.

Pennsylvania.— Com. *v.* Gillam, 8 Serg. & R. 50.

Rhode Island.— State *v.* McCulla, 16 R. I. 196, 14 Atl. 81.

See 36 Cent. Dig. tit. "Municipal Corporations," § 272. And see *supra*, II, C, 1, e, (II).

Application of rule.—A charter of an incorporated village authorizing it to "regulate" its victualing houses repeals by implication the general law authorizing the selectmen of a town to license persons to keep such houses, and confers upon the village power to license. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

Ordinances not repugnant to statutes.—"An ordinance for the government and regulation of the police of North Providence" is not repealed by a statute entitled "an act authorizing the town of North Providence to establish bridewells and for other purposes." State *v.* Pollard, 6 R. I. 290. So an ordinance authorizing persons engaged in building to deposit materials for such building in any of the streets of the city for a reasonable time, occupying not to exceed one third of the street, is not inconsistent with the general act for cities of June 18, 1852, which provides that ordinances not inconsistent with the act shall remain in force, and therefore is saved from repeal by section 57 of that act which gives the common council exclusive power over the streets of the city. Wood *v.* Mears, 12 Ind. 515, 74 Am. Dec. 222.

86. Donahue *v.* Graham, 61 Cal. 276; Hagerstown *v.* Dechert, 32 Md. 369; Public School Trustees *v.* Taylor, 30 N. J. Eq. 618; East St. Louis *v.* U. S., 120 U. S. 600, 7 S. Ct. 739, 30 L. ed. 798.

87. Lisbon *v.* Clark, 18 N. H. 234, holding, however, that the Revised Statutes, in repealing the laws which gave such authority, and in reënacting them at the same time in the same forms, do not convey an expression of the legislative will to abrogate the by-laws passed under the preëxisting laws; they having been passed by towns in the exercise of a municipal power, which the legislature plainly intended to leave intact.

88. Hall's Application, 10 Nebr. 537, 7 N. W. 287.

89. Ferrell *v.* Apelika, 144 Ala. 135, 39 So. 249.

90. Reconsideration of vote requiring public improvements see *infra*, XIII, B, 9, a.

91. Ristine *v.* Clements, 31 Ind. App. 338, 66 N. E. 924.

Reconsideration generally see *supra*, V, B, 4, *g*.

92. Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451, ordinance relating to fireworks.

93. People *v.* Latham, 203 Ill. 9, 67 N. E. 403; People *v.* Mount, 186 Ill. 560, 58 N. E. 360; Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Hearst's Chicago American *v.* Spiss, 117 Ill. App. 436; Terre

2. Expiration. Like a state law, an ordinance may become unpopular, and its violation may be ignored for years consecutively, or it may, like Sunday laws, be enforced by the police authority against one class and not against another, and yet it remains the law of the municipality, which the citizen is bound to obey, until repealed by lawful authority; for desuetude has no legislative authority in state or municipality, and statutes and ordinances do not expire or lose their vital force from neglect of the governmental agency to enforce their mandates.[94] If an ordinance contains a clause prescribing a definite period for its operation, then it will expire of its own limitation.[95] Where ordinances are shown to have been passed prior to a certain day they will be presumed to have been still in force upon that day in the absence of evidence to the contrary.[96]

3. Revival. Ordinances and by-laws are also subject to another rule of statutory construction and operation of equal importance. Like statutes they are not only subject to repeal, but when the legislative authority of the municipality repeals a repealing ordinance, such repeal operates to revive the original ordinance and give it full force.[97] This operation, however, is not retroactive, but gives the original ordinance new force and effect only from the date of the repealing ordinance.[98]

L. Construction — 1. Rules Applicable to Ordinances Generally. Municipal ordinances and by-laws are construed by the same rules as statutes of the general assembly.[99] Among the rules of construction well established and recognized in such cases are the following: Every part of the law or ordinance should if possible be given operation and effect;[1] the construction should be reasonable and not strained;[2] punctuation must yield to manifest intention;[3] of two possible constructions, one consistent with and the other repugnant to law, the former is to be preferred;[4] private encroachments upon public rights are not to be favored

Haute *v.* Lake, 43 Ind. 480; Ryce *v.* Osage, 88 Iowa 558, 55 N. W. 532.

94. Ryce *v.* Osage, 88 Iowa 558, 55 N. W. 532; Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577.

95. Chillicothe *v.* Logan Natural Gas, etc., Co., 11 Ohio S. & C. Pl. Dec. 24, 8 Ohio N. P. 88.

96. St. Louis, etc., R. Co. *v.* Eggman, 161 Ill. 155, 43 N. E. 620.

97. People *v.* Wintermute, 1 Dak. 63, 46 N. W. 694; New York *v.* Broadway, etc., R. Co., 97 N. Y. 275; *In re* Albany St., 6 Abb. Pr. (N. Y.) 273; Gale *v.* Mead, 4 Hill (N. Y.) 109 [*affirmed* in 2 Den. 232].

98. Rutherford *v.* Swink, 96 Tenn. 564, 35 S. W. 554.

99. *California.*— *In re* Yick Wo, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12.

Illinois.— Mason *v.* Shawneetown, 77 Ill. 533; Pennsylvania Co. *v.* Frana, 13 Ill. App. 91.

Indiana.— Zorger *v.* Greensburgh, 60 Ind. 1.

Kansas.— Denning *v.* Young, 9 Kan. App. 708, 59 Pac. 1092.

Maryland.— State *v.* Kirkley, 29 Md. 85; Baltimore *v.* Clunet, 23 Md. 449.

Massachusetts.— Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670.

Missouri.— Quinette *v.* St. Louis, 76 Mo. 402; Taylor *v.* Carondelet, 22 Mo. 105.

See 36 Cent. Dig. tit. "Municipal Corporations," § 275.

1. Whitlock *v.* West, 26 Conn. 406; Metropolitan L. Ins. Co. *v.* Darenkamp, 66 S. W. 1125, 23 Ky. L. Rep. 2249; Reynolds *v.* Baldwin, 1 La. Ann. 162.

Ordinances must be given full effect so far as possible, consistent with superior laws. San Luis Obispo *v.* Fitzgerald, 126 Cal. 279, 58 Pac. 699; Gabel *v.* Houston, 29 Tex. 335.

2. Whitlock *v.* West, 26 Conn. 406; New Orleans First Municipality *v.* Cutting, 4 La. Ann. 335; Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 77 S. W. 632; *In re* Arkell, 38 U. C. Q. B. 594.

3. Charleston *v.* Reed, 27 W. Va. 681, 55 Am. Rep. 336.

4. *Illinois.*— Blanchard *v.* Benton, 109 Ill. App. 569.

Kansas.— Swift *v.* Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772.

Kentucky.— Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516.

Louisiana.— Merriam *v.* New Orleans, 14 La. Ann. 318.

Maryland.— Baltimore *v.* Hughes, 1 Gill & J. 480, 19 Am. Dec. 243.

Massachusetts.— Com. *v.* Dow, 10 Metc. 382.

Michigan.— Inkster *v.* Carver, 16 Mich. 484.

Pennsylvania.— Johnson *v.* Philadelphia, 60 Pa. St. 445.

Canada.— *In re* Cameron, 13 U. C. Q. B. 190.

See 36 Cent. Dig. tit. "Municipal Corporations," § 275.

Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power, and

by construction;[5] a doubt as to whether an ordinance is invalid as conflicting with individual rights should be resolved against the municipality;[6] ordinances on the same subject-matter must be construed together;[7] ordinances which may be defective alone if in regard to the same subject-matter may be given effect and operation by construing them together;[8] legislative construction and understanding contemporaneous with the passage of the ordinance or by-law are not to be lightly disregarded;[9] ordinances, when so intended by the council and acted upon by others, will be construed so as to operate as a contract;[10] presumption favors the validity of ordinances and by-laws passed in pursuance of competent statutory authority.[11]

2. Police Ordinances. Police ordinances being penal in their nature are subject to strict construction.[12] Such ordinances more than any other municipal regu-

a contrary conclusion will never be reached upon slight consideration. It is the province and the right of the municipality to regulate its local affairs, within the law of course; and it is the duty of the courts to uphold such regulations, unless it manifestly appears that the ordinance or by-law transcends the power of the municipality, or contravenes the rights secured to the citizens by the constitution. *Ex p.* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

5. Alpena Electric Light Co. *v.* Alpena, 130 Mich. 413, 90 N. W. 36; Traverse City Gas Co. *v.* Traverse City, 130 Mich. 17, 89 N. W. 574; Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327; Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036; Rogers Park Water Co. *v.* Fergus, 180 U. S. 624, 21 S. Ct. 490, 45 L. ed. 702; Danville Water Co. *v.* Danville, 180 U. S. 619, 21 S. Ct. 505, 45 L. ed. 696; Freeport Water Co. *v.* Freeport, 180 U. S. 587, 21 S. Ct. 493, 45 L. ed. 679.

6. Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442; Edgerton *v.* Goldsboro Water Co., 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444.

7. Denning *v.* Yount, 9 Kan. App. 708, 59 Pac. 1092; Eureka *v.* Jackson, 8 Kan. App. 49, 54 Pac. 5; Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442; Erie *v.* Carey, 12 Pa. Super. Ct. 584.

8. Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

9. *Illinois.*— Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438.

Missouri.— State *v.* Severance, 49 Mo. 401.

Nebraska.— *In re* Langston, 55 Nebr. 310, 75 N. W. 828.

New Hampshire.— Saunders *v.* Nashua, 69 N. H. 492, 43 Atl. 620.

New Jersey.— Clark *v.* Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737.

10. Erie *v.* Paskett, 14 Pa. Super. Ct. 400.

11. Chicago, etc., R. Co. *v.* Carlinville, 103 Ill. App. 251; Johnstown *v.* Central Dist., etc., Tel. Co., 23 Pa. Super. Ct. 381.

12. *Florida.*— *Ex p.* Sims, 40 Fla. 432, 25 So. 280.

Kansas.— Snyder *v.* North Lawrence, 8 Kan. 82.

Kentucky.—Krickle *v.* Com., 1 B. Mon. 367.

Louisiana.— New Orleans First Municipality *v.* Cutting, 4 La. Ann. 335; New Orleans First Municipality *v.* Blineau, 3 La. Ann. 688.

Michigan.— People *v.* Brill, 120 Mich. 42, 78 N. W. 1013.

Missouri.— St. Louis *v.* Goebel, 32 Mo. 295.

New Jersey.— State *v.* Millville, 63 N. J. L. 123, 43 Atl. 443.

Construction in connection with charter conferring power see McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539.

General words controlled by particular words see Snyder *v.* North Lawrence, 8 Kan. 82. But *compare* Vicksburg *v.* Briggs, 102 Mich. 551, 61 N. W. 1, holding that where a village ordinance in one section provided that every assemblage of persons in any street or public place of said village, engaged in boisterous language or conduct, should be deemed a disorderly assemblage, and in the next section provided that any such assemblage in "any" place in said city should be deemed a disorderly assemblage, the scope of the latter section was not limited to the places enumerated in the former section.

Penal ordinances must be general in their operation. New Orleans First Municipality *v.* Blineau, 3 La. Ann. 688.

Retroactive effect applied.— Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Willow Springs *v.* Withaupt, 61 Mo. App. 275. *Compare* New York Fire Dept. *v.* Wendell, 13 Daly (N. Y.) 427, holding that under a statute requiring buildings to be kept provided with metallic leaders for conducting the water from the roof, and providing that in no case shall the water from the leaders be permitted to flow upon the sidewalk, an owner of a building erected prior to the act, who permits water from the roof to be discharged from the mouth of the leader upon the public highway, is liable to the penalty imposed for a violation of the act. See also St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872, 64 L. R. A 679, holding that where a municipal ordinance provides that no dairy stable shall thereafter be established within the city limits without first having obtained permission from the municipal assembly by a proper ordinance, the fact that prior to the passage of such ordinance certain premises within

lations, and more than state statutes, being domestic and intimate and commonly believed to interfere with the personal liberty of the citizen and to deny the enjoyment of his constitutional right and inherent privileges, and that too by a mere creature of the state assuming to exercise a sovereign power, are the frequent subjects of resentful and contemptuous challenge based upon any and sometimes many or even all of the following grounds: Not within the police power of the state; non-delegable power; not conferred upon a municipality; not duly enacted; contrary to constitution or statute; in contravention of common right; unreasonable. Illustrations of these contentions will be seen in the cases cited below.[13]

3. PROVINCE OF COURT OR JURY. Generally the construction of ordinances is matter of law for the court;[14] and in all cases where the contention is over the constitutionality or legality of an ordinance or by-law this rule seems to be without exception.[15] So the reasonableness or unreasonableness of a municipal ordinance is ordinarily a question for the decision of the court, in the light of all existing circumstances and conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption.[16] Where, however, the facts which may or may not make an ordinance unreasonable are controverted,[17] or are of such nature that the court has no judicial knowledge thereof,[18] the question

the city were occupied for dairy purposes by third persons did not authorize defendant to start a new dairy there without the necessary permission; the old dairy, after the passage of such ordinance, having been abandoned.

Two clauses connected by "and."— In an ordinance declaring that it shall be unlawful for any person or corporation to do a certain act, a second clause, connected therewith by "and," will be presumed to bind the class of persons mentioned in the first. So held as to the ordinance of Chicago prohibiting the sale of coal oil that will not bear a fire test of one hundred degrees Fahrenheit, proceeding, "and it shall be unlawful to keep," etc., "excepting a cellar," five feet below the grade of the adjacent streets. Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438.

Particular police ordinances or regulations construed see Macfarland *v.* Washington, etc., R. Co., 18 App. Cas. (D. C.) 456; Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438; Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; People *v.* Brill, 120 Mich. 42, 78 N. W. 1013; Vicksburg *v.* Briggs, 102 Mich. 551, 61 N. W. 1; Lenz *v.* Sherrott, 26 Mich. 139; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; St. Louis *v.* Sanguinet, 49 Mo. 581; Willow Springs *v.* Withaupt, 61 Mo. App. 275; State *v.* Millville, 63 N. J. L. 123, 43 Atl. 443; Leland *v.* Long Branch Com'rs, 42 N. J. L. 375; Watkins *v.* Hillerman, 73 Hun (N. Y.) 317, 26 N. Y. Suppl. 252; New York Fire Dept. *v.* Wendell, 13 Daly (N. Y.) 427; Coden *v.* Gettysburg, 8 Leg. Gaz. (Pa.) 167; McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539; *In re* Ah Lung, 45 Fed. 684.

13. Newbern *v.* McCann, 105 Tenn. 159, 58 S. W. 114, 50 L. R. A. 476; McKinney *v.* Nashville, 96 Tenn. 79, 33 S. W. 724; Theilan *v.* Porter, 14 Lea (Tenn.) 622, 52 Am. Rep. 173; Ward *v.* Greeneville, 8 Baxt. (Tenn.) 228, 35 Am. Rep. 700; Maxwell *v.* Jonesboro Corp., 11 Heisk. (Tenn.) 257.

14. Denver, etc., R. Co. *v.* Oslen, 4 Colo. 239; Pennsylvania Co. *v.* Frana, 13 Ill. App. 91; Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300; Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

15. Ho Ah Kow *v.* Nunan, 12 Fed. Cas. No. 6,546, 5 Sawy. 552.

16. *Alabama.*— Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130.

California.— Merced County *v.* Fleming, 111 Cal. 46, 43 Pac. 392; *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642.

Illinois.— Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268.

Louisiana.—State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.

Maine.— State *v.* Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750.

Massachusetts.— Boston *v.* Shaw, 1 Metc. 130; *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351; Com. *v.* Worcester, 3 Pick. 462.

Minnesota.— Evison *v.* Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434.

Missouri.— St. Louis *v.* Weber, 44 Mo. 547.

New Jersey.— State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; State *v.* East Orange Tp., 41 N. J. L. 127; Long *v.* Jersey City, 37 N. J. L. 348.

Pennsylvania.— Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 384; Scranton City *v.* Straff, 28 Pa. Super. Ct. 258. *Compare* Fisher *v.* Harrisburg, 2 Grant 291.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

17. Austin *v.* Austin City Cemetery Assoc., (Tex. Civ. App. 1895) 28 S. W. 1023.

18. Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352;

may become a mixed question of law and fact to be passed on by the jury under proper instructions.

M. Operation and Effect — 1. In General. Ordinances authorized by the charter of the municipality enacting them and not in contravention of organic or statutory law have the same force and effect within the municipal territory as acts of the legislature [19] so long as they stand unrepealed.[20] They have the local force and authority of a state statute, whether originally authorized or subsequently ratified by the general assembly.[21] And where the legislature by charter confers on a municipality exclusive control over certain subjects ordinances enacted in accordance with such authority supersede within the limits of such municipality general laws on the same subject.[22] Without such special authority, however, no ordinance can have this effect.[23]

2. Application to Persons and Places. Municipal ordinances and by-laws can have no extraterritorial force, unless specially provided by the empowering statute for particular purposes, such as sanitation or police.[24] But they will operate throughout the boundaries of a municipality irrespective of any change made in them.[25] And it is competent for the legislature in providing for the annexation of the territory of one municipality to another to continue in force in the municipality annexed designated ordinances operative in such municipality before annexation.[26] They are operative with all the force and effect of statutes both

Clason *v.* Milwaukee, 30 Wis. 316; Hayes *v.* Appleton, 24 Wis. 542.

19. *Georgia.*— Bearden *v.* Madison, 73 Ga. 184.

Illinois.— Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780; Mason *v.* Shawneetown, 77 Ill. 533.

Iowa.— Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 509, 24 Am. Rep. 756, in which it was said: "Within the sphere of their delegated powers municipal corporations have as absolute control as the General Assembly would have if it never had delegated such powers and exercised them by its own laws."

Massachusetts.— Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670; Buttrick *v.* Lowell, 1 Allen 172, 79 Am. Dec. 721.

Missouri.— State *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920; Taylor *v.* Carondelet, 22 Mo. 105.

New York.— McDermott *v.* Metropolitan Police Dist., 5 Abb. Pr. 422.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

United States.—New Orleans Water-Works Co. *v.* New Orleans, 164 U. S. 471, 17 S. Ct. 161, 41 L. ed. 518.

Valid municipal ordinances and by-laws are to be treated as the sovereign legislative will in regard to the municipality, and are to be given effect and operation as such. San Luis Obispo *v.* Fitzgerald, 126 Cal. 279, 58 Pac. 699.

20. Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577; Bohan *v.* Weehawken Tp., 65 N. J. L. 490, 47 Atl. 446; Shroder *v.* Lancaster, 6 Lanc. Bar. (Pa.) 201; Manhattan Trust Co. *v.* Dayton, 59 Fed. 327, 8 C. C. A. 140.

21. Griffin *v.* Gloversville, 67 N. Y. App. Div. 403, 73 N. Y. Suppl. 684; State *v.* Williams, 11 S. C. 288.

22. *Colorado.*— Rogers *v.* People, 9 Colo. 450, 12 Pac. 843, 59 Am. Rep. 146.

Massachusetts.— *In re* Goddard, 16 Pick. 504, 28 Am. Dec. 259.

Missouri.— State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

New Jersey.— State *v.* Morristown, 33 N. J. L. 57.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *In re* Snell, 58 Vt. 207, 1 Atl. 566.

23. March *v.* Com., 12 B. Mon. (Ky.) 25; Bailey *v.* Com., 64 S. W. 995, 23 Ky. L. Rep. 1223.

24. *Georgia.*— Taylor *v.* Americus, 39 Ga. 59.

Illinois.— Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545; Strauss *v.* Pontiac, 40 Ill. 301.

Indiana.— Robb *v.* Indianapolis, 38 Ind. 49; Horney *v.* Sloan, 1 Ind. 266.

Iowa.— Gosselink *v.* Campbell, 4 Iowa 296.

Canada.— Barton Tp. *v.* Hamilton, 18 Ont. 199; *Re* Boylan, 15 Ont. 13; St. Paul *v.* Cook, 22 Quebec Super. Ct. 498.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2761. See *supra*, III, B, 4; *infra*, XI, A, 5.

Applications of rule.— Ordinance cannot regulate fares of a street-car company to be charged beyond the city limits. South Pasadena *v.* Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093. An ordinance cannot tax land beyond limits for municipal purposes. Wells *v.* Weston, 22 Mo. 384, 66 Am. Dec. 627.

25. St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121; Virginia *v.* Smith, 28 Fed. Cas. No. 16,967, 1 Cranch C. C. 47. See *supra*, II, B, 2, g, (I), (D).

26. Swift *v.* Klein, 163 Ill. 269, 45 N. E. 219; People *v.* Cregier, 138 Ill. 401, 28 N. E. 812. See *supra*, II, B, 2, g, (I), (D).

against residents and non-residents within the limits of the municipality,[27] and also against the property of non-residents within the limits of the municipality.[28] Persons and corporations within the corporate territory are bound to take notice of their provisions, when duly enacted and promulgated,[29] and to obey them on their own private property as well as elsewhere within the municipal boundaries.[30]

3. TIME OF TAKING EFFECT. Usually the time when ordinances or by-laws take effect is prescribed by the municipal charter or general law,[31] which date is usually a fixed time after passage, or promulgation, or publication.[32] In some states by constitutional interdiction no ordinance prescribing a penalty or forfeiture can be enforced until it has been duly published.[33] In these states even actual knowledge by the violator will not be a substitute for the publication required by the constitution.[34] And generally no ordinance or by-law can take effect till the lapse of the constitutional or statutory period after publication.[35]

27. *Alabama.*— North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

Iowa.— Starr *v.* Burlington, 45 Iowa 87; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756; Gosselink *v.* Campbell, 4 Iowa 296.

Massachusetts.— Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670; *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351.

Minnesota.— Bott *v.* Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47.

New York.— Jones *v.* Firemen's Fund Ins. Co., 2 Daly 307 [*affirmed* in 51 N. Y. 318]; Buffalo *v.* Webster, 10 Wend. 99.

South Carolina.— Charleston *v.* Pepper, 1 Rich. 364 (non-resident employing wagon for hire within city without license); Kennedy *v.* Sowden, 1 McMull. 323; Charleston *v.* King, 4 McCord 487.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

England.— Pierce *v.* Bartrum, Cowp. 269, resident.

Canada.— Reg. *v.* Osler, 32 U. C. Q. B. 324.

See 36 Cent. Dig. tit. "Municipal Corporations," § 276.

28. *Indiana.*— Horney *v.* Sloan, Smith 136, hogs running at large.

Iowa.— Gosselink *v.* Campbell, 4 Iowa 296.

North Carolina.— Whitfield *v.* Longest, 28 N. C. 268, hogs running at large.

Ohio.— Dodge *v.* Gridley, 10 Ohio 173, hogs running at large.

South Carolina.— Kennedy *v.* Sowden, 1 McMull. 323.

Tennessee.— Knoxville *v.* King, 7 Lea 441, stock running at large.

See 36 Cent. Dig. tit. "Municipal Corporations," § 276.

29. *Alabama.*— North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

Georgia.— Central R., etc., Co. *v.* Brunswick, etc., R. Co., 87 Ga. 386, 13 S. E. 520.

Illinois.— Hope *v.* Alton, 214 Ill. 102, 73 N. E. 406; Mather *v.* Ottawa, 114 Ill. 659, 3 N. E. 216.

Massachusetts.— Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670.

Missouri.— Palmyra *v.* Morton, 25 Mo. 593.

New York.— Buffalo *v.* Webster, 10 Wend. 99.

England.— See Butchers' Co. *v.* Bullock, 3 B. & P. 434; Pierce *v.* Bartrum, Cowp. 269; James *v.* Tutney, Cro. Car. 497, 79 Eng. Reprint 1029.

30. Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382.

31. *California.*— Los Angeles County *v.* Eikenberry, 131 Cal. 461, 63 Pac. 766.

Illinois.—Illinois Cent. R. Co. *v.* People, 161 Ill. 244, 43 N. E. 1107; People *v.* Peoria, etc., R. Co., 116 Ill. 410, 6 N. E. 459; Standard *v.* Industry, 55 Ill. App. 523.

Minnesota.— Warsop *v.* Hastings, 22 Minn. 437.

Ohio.— Reynolds *v.* Harris, 11 Ohio Dec. (Reprint) 509, 27 Cinc. L. Bul. 229.

Wisconsin.— Janesville *v.* Dewey, 3 Wis. 245.

United States.— National Bank of Commerce *v.* Grenada, 44 Fed. 262.

See 36 Cent. Dig. tit. "Municipal Corporations," § 277.

32. Roodhouse *v.* Johnson, 57 Ill. App. 73; Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78; Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204; Davy *v.* Hyde Park, 16 Ohio Cir. Ct. 506, 8 Ohio Cir. Dec. 371.

The fact that certain provisions of an ordinance are not to take effect until a certain time in the future does not affect the validity either of the entire ordinance or of the particular provisions. Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

33. Pitts *v.* Opelika Dist., 79 Ala. 527; Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837.

Publication see *supra*, VI, F.

34. O'Hara *v.* Park River, 1 N. D. 279, 47 N. W. 380; National Bank of Commerce *v.* Grenada, 44 Fed. 262.

35. *California.*— Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Illinois.— Tisdale *v.* Minonk, 46 Ill. 9; Raker *v.* Maquon, 9 Ill. App. 155.

Iowa.— Larkin *v.* Burlington, etc., R. Co., 91 Iowa 654, 60 N. W. 195; Albia *v.* O'Harra, 64 Iowa 297, 20 N. W. 444.

Kansas.— Pittsburg *v.* Reynolds, 48 Kan. 360, 28 Pac. 757; Leavenworth *v.* Douglass, 3 Kan. App. 67, 44 Pac. 1099.

But it is competent for the common council by a provision in an ordinance to fix a date in the future beyond such period when it shall become operative, or provide for its becoming operative on the happening of a certain contingency.[36] Administrative ordinances not penal in their nature may take effect immediately after passage or approval.[37] So where by express statutory provision an ordinance becomes a law on receiving the approval of the mayor, another provision requiring publication does not postpone the operation of the ordinance till after publication has been made,[38] and if a charter provides that ordinances shall take effect from the time therein respectively limited, they will go into effect at such time, notwithstanding statutory provisions requiring publication.[39]

N. Pleading[40] — **1. Necessity.** The general rule is well settled that municipal ordinances and by-laws are not laws of which judicial notice will be taken, but facts to be pleaded and proven.[41] If not duly pleaded, they cannot be proven;[42] and if duly pleaded and not proven in legal method, the action must

Michigan.— Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204; Thornton *v.* Sturgis, 38 Mich. 639; Van Alstine *v.* People, 37 Mich. 523.

Nebraska.— Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208.

New Jersey.— Hoboken *v.* Gear, 27 N. J. L. 265.

New York.— Watkins *v.* Hillerman, 73 Hun 317, 26 N. Y. Suppl. 252.

Wisconsin.— Janesville *v.* Dewey, 3 Wis. 245.

See 36 Cent. Dig. tit. "Municipal Corporations," § 277.

36. Bradley-Ramsay Lumber Co. *v.* Perkins, 109 La. 317, 33 So. 351; State *v.* Kirkley, 29 Md. 85; Baltimore *v.* Clunet, 23 Md. 449; Northern Cent. R. Co. *v.* Baltimore, 21 Md. 93; Heman Constr. Co. *v.* Loevy, 64 Mo. App. 430; Buffalo *v.* Chadeayne, 134 N. Y. 163, 31 N. E. 443.

37. Stevenson *v.* Bay City, 26 Mich. 44.

Under this rule the part of an ordinance providing for an election on referendum will take immediate effect, although the penal part cannot be enforced until approved by the electorate and may never become operative. Parker *v.* Zeisler, 73 Mo. App. 537.

38. State *v.* Anderson, 26 Fla. 240, 8 So. 1. And see Anderson *v.* Camden, 58 N. J. L. 515, 33 Atl. 846.

39. Com. *v.* McCafferty, 145 Mass. 384, 14 N. E. 451; Com. *v.* Davis, 140 Mass. 485, 4 N. E. 557; Com. *v.* Brooks, 109 Mass. 355.

40. Pleading ordinance in action for death see Death, 13 Cyc. 290.

Pleading ordinance in petition or complaint for order of mandamus see Mandamus, 26 Cyc. 125.

41. *Alabama.*—Case *v.* Mobile, 30 Ala. 538.

Colorado.— Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460.

Georgia.— Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Idaho.— People *v.* Buchanan, 1 Ida. 681.

Illinois.— Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478.

Indiana.— Green *v.* Indianapolis, 22 Ind. 192.

Iowa.— Goodrich *v.* Brown, 30 Iowa 291; Garvin *v.* Wells, 8 Iowa 286. See also Wolf *v.* Keokuk, 48 Iowa 129.

Kansas.— Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16; McPherson *v.* Nichols, 48 Kan. 430, 29 Pac. 679.

Kentucky.— Lucker *v.* Com., 4 Bush 440.

Louisiana.— New Orleans *v.* Labatt, 33 La. Ann. 107; Hassard *v.* New Orleans Municipality No. 2, 7 La. Ann. 495.

Maine.— Lewiston *v.* Fairfield, 47 Me. 481.

Minnesota.— Winona *v.* Burke, 23 Minn. 254.

Missouri.—St. Louis *v.* Roche, 128 Mo. 541, 31 S. W. 915; Butler *v.* Robinson, 75 Mo. 192; State *v.* Sherman, 42 Mo. 210; Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Cox *v.* St. Louis, 11 Mo. 431; Keane *v.* Klausman, 21 Mo. App. 485; St. Louis *v.* St. Louis R. Co., 12 Mo. App. 591.

New York.— People *v.* New York, 7 How. Pr. 81; Harker *v.* New York, 17 Wend. 199.

North Carolina.— Hendersonville *v.* McMinn, 82 N. C. 532; Greensboro *v.* Shields, 78 N. C. 417.

Pennsylvania.— Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362.

South Carolina.— Brasington *v.* South Bend R. Co., 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905; Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845.

Texas.— Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70.

Wisconsin.— Stittgen *v.* Rundle, 99 Wis. 78, 74 N. W. 536.

United States.— Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237.

See 36 Cent. Dig. tit. "Municipal Corporations," § 281 *et seq.*

Under the statutes of Massachusetts it will be sufficient to describe the act complained of fully and allege that it was against the ordinance in such cases made and provided. Com. *v.* Odenweller, 156 Mass. 234, 30 N. E. 1022; Com. *v.* Nightingale, Thach. Cr. Cas. 251.

42. Stittgen *v.* Rundle, 99 Wis. 78, 74 N. W. 536; Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237.

fail no matter how notorious the ordinance may have been.[43] The general rule, however, is held not to apply to proceedings brought in a municipal court, for here the ordinance is the peculiar law of that forum, of which the court is bound to take judicial notice, and this obviates any necessity for pleading the ordinance.[44]

2. SUFFICIENCY — a. In General. As respects the enactment of an ordinance, it is sufficient to allege generally that it was duly passed or enacted.[45] It is not necessary to allege power in the municipality to enact the ordinance,[46] or to refer to the charter or general law conferring the power.[47]

b. Provisions of Ordinances. In pleading the provisions of an ordinance it is of course sufficient to set them out *in hæc verba*,[48] and in a few decisions this has been held necessary.[49] These latter decisions are, however, against the great weight of authority, which is to the effect that it will be sufficient to set forth the provisions of the ordinance in substance.[50] Nevertheless in the absence of some statute providing otherwise, the provisions of the ordinance relied on must be set out either *in totidem verbis* or in substance.[51] But when this is done it is not

43. Union Pac. R. Co. *v.* Ruzicka, 65 Nebr. 621, 91 N. W. 543.

44. *California.*— *Ex p.* Davis, 115 Cal. 445, 47 Pac. 258.

Iowa.— Scranton *v.* Danenbaum, 109 Iowa 95, 80 N. W. 221; Laporte City *v.* Goodfellow, 47 Iowa 572; State *v.* Leiber, 11 Iowa 407; Conboy *v.* Iowa City, 2 Iowa 90.

Kansas.— Solomon *v.* Hughes, 24 Kan. 211; West *v.* Columbus, 20 Kan. 633; Emporia *v.* Volmer, 12 Kan. 622.

Maine.— O'Malia *v.* Wentworth, 65 Me. 129.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632; Charleston *v.* Chur, 2 Bailey 164.

West Virginia.— Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373; Wheeling *v.* Black, 25 W. Va. 266.

Relation which municipal court holds to ordinances.—To ordinances a municipal court holds the same relation that the superior courts hold to the laws enacted by the legislature, and may notice their provisions because they are among the things which, as to it, are established by law. *Ex p.* Davis, 115 Cal. 445, 47 Pac. 258.

Appeal from municipal court — Effect.— In misdemeanor cases, where an appeal is taken from the police court of a city to the district court, the latter will take judicial notice of the ordinance under which defendant is being prosecuted. In such cases the district court is *pro hac vice* the police court. Downing *v.* Miltonvale, 36 Kan. 740, 14 Pac. 281; Smith *v.* Emporia, 27 Kan. 528; Olathe *v.* Thomas, 26 Kan. 233; Solomon *v.* Hughes, 24 Kan. 211.

45. Los Angeles *v.* Waldron, 65 Cal. 283, 1 Pac. 883, 3 Pac. 890; Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706; Vinson *v.* Monticello, 118 Ind. 103, 19 N. E. 734; Hardenbrook *v.* Ligonier, 95 Ind. 70; Tennessee Paving Brick Co. *v.* Barker, 119 Ky. 654, 59 S. W. 755, 22 Ky. L. Rep. 1069; State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228.

The reason is that in pleading that an ordinance was duly passed it is necessarily implied that all essential antecedent acts requisite to legal enactment were done. Becker *v.* Washington, 94 Mo. 375, 7 S. W. 291; Werth *v.* Springfield, 78 Mo. 107.

46. State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228; Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

47. State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228; Winooski *v.* Gokey, 49 Vt. 282.

48. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Woods *v.* Prineville, 19 Oreg. 108, 23 Pac. 880.

49. Buckley *v.* Eisendrath, 58 Ill. App. 364; Rockford City R. Co. *v.* Matthews, 50 Ill. App. 267.

50. *Indiana.*— Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706.

Kentucky.— Lexington *v.* Woolfolk, 117 Ky. 708, 78 S. W. 910, 25 Ky. L. Rep. 1817.

Missouri.— Hirst *v.* Ringen Real Estate Co., 169 Mo. 194, 69 S. W. 368; Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014; Apitz *v.* Missouri Pac. R. Co., 17 Mo. App. 419.

New Jersey.— Kip *v.* Paterson, 26 N. J. L. 298; Keeler *v.* Milledge, 24 N. J. L. 142.

Texas.— Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70.

Wisconsin.— Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554.

See 36 Cent. Dig. tit. "Municipal Corporations," § 284.

51. *Illinois.*— Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617.

Kansas.— Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16.

Maryland.— Shanfelter *v.* Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648.

Missouri.— State *v.* Sherman, 42 Mo. 210; Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576.

New Jersey.— Keeler *v.* Milledge, 24 N. J. L. 142.

New York.— People *v.* Justices Ct. Spec. Sess., 12 Hun 65; Harker *v.* New York, 17 Wend. 199.

North Carolina.— State *v.* Edens, 85 N. C. 522; State *v.* Dunston, 78 N. C. 418.

Ohio.— Cincinnati Water Co. *v.* Cincinnati, 4 Ohio 443.

Oregon.— Woods *v.* Prineville, 19 Oreg.

necessary to set out the title of the ordinance or the date on which the ordinance was passed.[52]

c. Pleading by Number, Title, and Date. Where it is expressly so provided by statute, in pleading an ordinance it will be sufficient to refer to it by its title and the date of its passage.[53] There is no question, however, that this method is insufficient in the absence of a statute authorizing it.[54] And under a statute making it sufficient to plead an ordinance by its title and the day of its passage, a mere reference to the number of the ordinance is insufficient.[55] So a statute declaring sufficient a complaint for violation of a municipal ordinance by describing it by section and title was held unconstitutional, where the section embraced several distinct offenses.[56]

O. Evidence — 1. Presumption and Burden of Proof — a. In General. When an action or defense is predicated upon a municipal ordinance, it is necessary to show that such an ordinance exists, for if there is no law there can be no infraction thereof.[57] And inasmuch as municipal corporations exercise only delegated and limited powers, the general rule is that courts can indulge in no presumptions in favor of the validity of ordinances, in the absence of statutory authorization.[58] If defendant relies on the repeal of an ordinance offered in evidence as a defense, the burden is on him to prove such repeal.[59]

b. Authority to Enact. Authority of a municipality to enact an ordinance will not be presumed but must be proved.[60] To prove authority, production of

108, 23 Pac. 880; Nodine *v.* Union, 13 Oreg. 587, 11 Pac. 298.

Pennsylvania.— Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362.

Texas.— Brush Electric Light, etc., Co. *v.* Lefevre, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771.

See 36 Cent. Dig. tit. "Municipal Corporations," § 284.

Illustration.—A declaration against a railroad company for the negligent killing of plaintiff's intestate, which alleges that defendant was running its train at a speed of over twenty miles an hour through the limits of a certain city, "in violation of an ordinance of said city in such case made and provided," is obnoxious to demurrer for insufficient pleading of the ordinance. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

52. Kansas City *v.* Johnson, 78 Mo. 661; Apitz *v.* Missouri Pac. R. Co., 17 Mo. App. 419; Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554.

53. *California.*— *Ex p.* Davis, 115 Cal. 445, 47 Pac. 258.

Colorado.— Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. 820.

Indiana.—Elkhart *v.* Calvert, 126 Ind. 6, 25 N. E. 807; Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802; Goshen *v.* Kern, 63 Ind. 468, 30 Am. Rep. 234; Huntington *v.* Cheesbro, 57 Ind. 74; Huntington *v.* Pease, 56 Ind. 305.

Minnesota.— Fairmont *v.* Meyer, 83 Minn. 456, 86 N. W. 457.

Missouri.— Welch *v.* Mastin, 98 Mo. App. 273, 71 S. W. 1090.

New Jersey.— Meyer *v.* Bridgeton, 37 N. J. L. 160.

See 36 Cent. Dig. tit. "Municipal Corporations," § 282.

If an action to recover a penalty is based on two sections of an ordinance, reference should be made to both sections by their date and number. Whitson *v.* Franklin, 34 Ind. 392.

Effect of failure to set out title.— Under a statute providing that in a suit for the recovery of any fine or penalty under any ordinance of a city it shall be sufficient to state "the title of the ordinance without reciting the same at length, a complaint is defective which does not recite any part of the ordinance or state its title. Miles City *v.* Kern, 12 Mont. 119, 29 Pac. 720.

54. *Kansas.*— Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16.

Maryland.— Shanfelter *v.* Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648.

Missouri.— St. Louis *v.* Stoddard, 15 Mo. App. 173.

New York.— People *v.* New York, 7 How. Pr. 81; Harker *v.* New York, 17 Wend. 199.

Oregon.— Nodine *v.* Union, 13 Oreg. 587, 11 Pac. 298; Pomeroy *v.* Lappeus, 9 Oreg. 363.

See 36 Cent. Dig. tit. "Municipal Corporations," § 282.

55. Tulare *v.* Hevren, 126 Cal. 226, 58 Pac. 530.

56. Fink *v.* Milwaukee, 17 Wis. 26.

57. Stevens *v.* Chicago, 48 Ill. 498.

58. Schott *v.* People, 89 Ill. 195.

59. Hanna *v.* Kankakee, 34 Ill. App. 186.

60. Schott *v.* People, 89 Ill. 195; Alton *v.* Hartford F. Ins. Co., 72 Ill. 328; St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89; Union Pac. R. Co. *v.* Ruzicka, 65 Nebr. 621, 91 N. W. 543; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462. And see Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230].

Under a statute of Indiana providing that

the charter, or a copy thereof, is necessary.[61] Defendant may, however, by demurrer, or other pleading, estop himself to question the validity of an ordinance by admitting its validity.[62]

c. Due Enactment. That an ordinance or by-law was duly enacted is presumed in the following instances: When its adoption is certified by the clerk;[63] where it appears that it was adopted "by the mayor and council";[64] where it has been in force for fourteen years;[65] where it is published in the ordinance book required by law;[66] where it appears that it was made "in pursuance of an act amending the charter."[67] But this presumption is not as strong as that of the regularity of a published act of the general assembly.[68] And it seems that in certain cases oral proof of regularity may be heard.[69]

d. Publication. Ordinarily when publication of an ordinance or by-law is required to give it force, such publication must be proven,[70] but where for many years an ordinance has been treated and acted on as a valid and subsisting one, proof of publication is unnecessary. Due publication will be presumed.[71] Under the provisions of some statutes proof of publication is not required until denied under oath.[72] And by express provision of other statutes publication is presumed until the contrary is shown.[73] So the burden is on defendant to show failure to publish where the statute makes printed copies of ordinances published by the authority of the municipality, and manuscript copies of the same, copied by the proper officer and having the seal of the municipality attached, evidence of the existence of the ordinances and their contents, and makes the failure to publish a sufficient defense to any suit or prosecution for the fines or penalties imposed by the ordinances.[74] Where ordinances have been duly recorded in the book of ordinances in accordance with a statute making such book *prima facie* evidence that the ordinances appearing therein have been published, the burden is on the one setting up invalidity of an ordinance for want of publication to show such facts.[75]

e. Reasonableness. It will be presumed that an ordinance is reasonable.[76]

a copy of an ordinance or sections thereof need not be filed with the complaint, if defendant claims that particular sections are invalid he must bring their invalidity forward by way of defense. Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

61. Woods *v.* Prineville, 19 Oreg. 108, 23 Pac. 880.

62. Buffalo *v.* Collins Baking Co., 24 Misc. (N. Y.) 745, 53 N. Y. Suppl. 968.

63. Moody *v.* Spotorno, 112 La. 1008, 36 So. 836.

64. Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594.

65. Santa Rosa City R. Co. *v.* Central St. R. Co., (Cal. 1895) 38 Pac. 986.

66. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

67. Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209.

68. Altoona *v.* Bowman, 171 Pa. St. 307, 33 Atl. 187. But see Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235.

69. Heller *v.* Alvarado, 1 Tex. Civ. App. 409, 20 S. W. 1003.

70. Schott *v.* People, 89 Ill. 195; Elizabethtown *v.* Lefler, 23 Ill. 90; Shaw *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 137, 83 N. Y. Suppl. 91.

71. Santa Rosa City R. Co. *v.* Central R. Co., (Cal. 1895) 38 Pac. 986 (fourteen years); Quincy *v.* Chicago, etc., R. Co., 92 Ill. 21 (twenty years); Atchison *v.* King, 9 Kan. 550. And see Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150, holding that where city tax levy ordinances for several years were passed by the city council, signed by the mayor, attested by the clerk, and spread at large on the city's record book, thereby importing a legal enactment, it will be presumed, in the absence of proof to the contrary, that they were properly published.

72. Rowland *v.* Greencastle, 157 Ind. 591, 62 N. E. 474; Hardenbrook *v.* Ligonier, 95 Ind. 70; Green *v.* Indianapolis, 25 Ind. 490; Lake Erie, etc., R. Co. *v.* Noblesville, 16 Ind. App. 20, 44 N. E. 652.

73. State *v.* Atlantic City, 34 N. J. L. 99.

74. Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

75. Fletcher *v.* Hickman, 136 Fed. 568, 69 C. C. A. 350.

76. *Alabama.*— Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85.

District of Columbia.— Taylor *v.* District of Columbia, 24 App. Cas. 392.

Illinois.— People *v.* Cregier, 138 Ill. 401, 28 N. E. 812.

Indiana.— Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

Missouri.— Skinker *v.* Heman, 64 Mo. App. 441.

New Jersey.— State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

New York.— New York *v.* Dry Dock, etc., R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609.

And it is incumbent on one who claims that an ordinance is unreasonable to prove the facts that make it so.[77]

2. Admissibility of Evidence — a. In General. What evidence of or pertaining to ordinances or by-laws is admissible in any action must obviously depend upon the nature of the action and the issues made by the pleadings; for ordinances and by-laws may become material and competent evidence not only in actions by the city to enforce penalties, but also in suits on contracts of which they form a part,[78] and for torts committed in violation of them.[79] Of the numerous vehicles of proof of ordinances and by-laws the following have been held to be admissible: The minute-book of the corporation;[80] the municipal record book in which are copied all the ordinances promulgated by the corporation;[81] certified copies from these books;[82] a printed book of municipal ordinances purporting to be published by corporate authority;[83] proven copies of ordinances lost or destroyed;[84] original drafts or sheets containing the ordinances as adopted, kept, and filed by the clerk in lieu of a book, with the memoranda of action thereon;[85] and oral evidence in extreme cases.[86] But a book or pamphlet purporting to contain the ordinances or by-laws of a municipality is not admissible if it does not also purport to be issued by corporate authority.[87]

b. Publication. According to some decisions parol evidence to show the publication of an ordinance is admissible as primary evidence thereof,[88] especially where there is no charter or other provision requiring proof in a particular way;[89] and it has also been held admissible as secondary evidence where it is shown that

Pennsylvania.— See as tending to sustain this view Scranton City *v.* Straff, 28 Pa. Super. Ct. 258.

Virginia.— Norfolk, etc., News Co. *v.* Norfolk, 105 Va. 139, 52 S. E. 851.

See 36 Cent. Dig. tit. "Municipal Corporations," § 284.

77. State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; West Conshohocken Borough *v.* Conshohocken Electric Light, etc., Co., 29 Pa. Super. Ct. 7.

78. Hagerstown *v.* Startzman, 93 Md. 606, 49 Atl. 838; Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Hutcheson *v.* Storrie, (Tex. Civ. App. 1898) 48 S. W. 785.

79. Mahoney *v.* Dankwart, 108 Iowa 321, 79 N. W. 134.

80. Clarence *v.* Patrick, 54 Mo. App. 462; Billings *v.* Dunnaway, 54 Mo. App. 1; Kennedy *v.* Newman, 1 Sandf. (N. Y.) 187.

81. Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576; Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49; Rutherford *v.* Swink, 90 Tenn. 152, 16 S. W. 76.

82. *Arkansas.*— Pugh *v.* Little Rock, 35 Ark. 75.

Georgia.— Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

Illinois.— Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617.

Indiana.— Green *v.* Indianapolis, 25 Ind. 490.

Iowa.— Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

See 36 Cent. Dig. tit. "Municipal Corporations," § 287.

83. *Arkansas.*—Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 19 S. W. 1053.

Georgia.— Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

Illinois.— Chicago, etc., R. Co. *v.* Thorson, 68 Ill. App. 288; Chicago, etc., R. Co. *v.* Winters, 65 Ill. App. 435; Wapella *v.* Davis, 39 Ill. App. 592.

Missouri.— Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

Texas.— Starks *v.* State, 38 Tex. Cr. 233, 42 S. W. 379.

See 36 Cent. Dig. tit. "Municipal Corporations," § 287.

84. Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246; *Ex p.* Canto, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

85. Troy *v.* Atchison, etc., R. Co., 11 Kan. 519.

86. Cavanee *v.* Milan, 99 Mo. App. 672, 74 S. W. 408; Oakley *v.* Luzerne Borough, 25 Pa. Super. Ct. 425.

Where the clerk has failed to make any record of its passage, the passage of an ordinance may be established by parol testimony. Weatherhead *v.* Cody, 85 S. W. 1099, 27 Ky. L. Rep. 631.

87. Western, etc., R. Co. *v.* Hix, 104 Ga. 11, 30 S. E. 424; Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368; Raker *v.* Maquon, 9 Ill. App. 155.

88. Larkin *v.* Burlington, etc., R. Co., 91 Iowa 654, 60 N. W. 195; Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818; Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148; Des Moines *v.* Casady, 21 Iowa 570.

Whether or not an ordinance has been published is an extrinsic fact, a matter in pais, susceptible of proof by any one cognizant thereof. Des Moines *v.* Casady, 21 Iowa 570.

89. Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002 [*modifying* Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474].

the files of the paper in which the ordinance was said to be published cannot be obtained.[90]

3. WEIGHT AND SUFFICIENCY — a. In General. The weight of evidence in case of conflict is a practical matter for the jury, for which the law does not furnish scales.[91] But certain rules in regard to the sufficiency of proof to make out a *prima facie* case are well recognized by the courts, among which are the following: The production of the authorized record book of ordinances, containing the ordinance in question is *prima facie* proof of its due enactment.[92] So likewise of a printed book of ordinances purporting to be published by municipal authority.[93] So of the city clerk's certificate to an ordinance, that it was a copy of an ordinance passed by the council and deposited in his office.[94] So also of a recorder's certificate to an ordinance that it was a true copy of one passed by the town council at a meeting held at a certain date.[95] So too of an original ordinance produced by a village clerk.[96] It has also been ruled that the passage of an ordinance on a certain date did not disprove the existence of a previous ordinance to the same effect.[97] And the validity of an ordinance lacking record of approval was established by the parol testimony of the mayor that it has not been the uniform practice for the mayor to record his approval, and that as a matter of fact he did approve it, and it has been officially promulgated and acted upon by the municipality.[98] So also of an ordinance approved by a mayor *pro tem*, although it was not proven that the mayor was absent from the city.[99] Proof that an ordinance was in force at a specified date is *prima facie* proof that it is in force at a subsequent date.[1]

b. Publication. Publication is sufficiently proved by certificate under oath of the publisher or foreman of the paper in which publication was made,[2] by certificate of the clerk of the city or village clerk under his official seal,[3] by duly attested copies of ordinances,[4] by a printed pamphlet or book of ordinances purporting to be published by authority of the village trustees,[5] by the ordinance book of the municipality with the original affidavit of publication attached

90. Larkin *v.* Burlington, etc., R. Co., 91 Iowa 654, 60 N. W. 195.

91. 1 Wigmore Ev. § 29.

92. Boyer *v.* Yates City, 47 Ill. App. 115; State *v.* King, 37 Iowa 462; Grier *v.* Homestead, 6 Pa. Super. Ct. 542, 42 Wkly. Notes Cas. 18.

93. Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415; McGregor *v.* Lovington, 48 Ill. App. 202; Canton *v.* Ligon, 71 Mo. App. 407.

94. McChesney *v.* Chicago, 159 Ill. 223, 42 N. E. 894; Webb City *v.* Parker, 103 Mo. App. 295, 77 S. W. 119.

95. Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

96. Schofield *v.* Tampico, 98 Ill. App. 324.

97. Illinois Cent. R. Co. *v.* Gilbert, 157 Ill. 354, 41 N. E. 724; Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56.

98. Knight *v.* Kansas City, etc., R. Co., 70 Mo. 231.

99. Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002.

1. O'Leary *v.* Chicago, etc., R. Co., (Iowa 1905) 103 N. W. 362.

2. Kettering *v.* Jacksonville, 50 Ill. 39; Rowland *v.* Greencastle, 157 Ind. 591, 62 N. E. 474; De Loge *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 149, 36 N. Y. Suppl. 697; Schwartz *v.* Oshkosh, 55 Wis. 490, 13 N. W. 450.

Proof that affiant was foreman or publisher.— Where a charter provides that the publication of ordinances shall be proved by the affidavit of the foreman or publisher of such newspaper, the statement in the affidavit that the person making it was the foreman or publisher of the newspaper is sufficient evidence of that fact. Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

3. Moss *v.* Oakland, 88 Ill. 109; Chamberlain *v.* Litchfield, 56 Ill. App. 652; O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

Evidence insufficient to rebut evidence of publication.— When a city officer makes affidavit that he posted a notice of a resolution on September 12, and the same day caused a like notice to be published for one insertion in a certain weekly newspaper, such publication is not disproved by production of all the numbers of the paper of that year except that of September 17, the first issue after the notice was posted, and showing that it is not in such numbers. Vincent *v.* Pacific Grove, 102 Cal. 405, 36 Pac. 773.

4. Weatherhead *v.* Cody, 85 S. W. 1099, 27 Ky. L. Rep. 631.

5. Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415; Canton *v.* Ligon, 71 Mo. App. 407.

The ordinance book is *prima facie* evidence of due publication of an ordinance therein contained. State *v.* King, 37 Iowa 462; Grier *v.* Homestead, 6 Pa. Super. Ct. 542, 42 Wkly. Notes Cas. 18. And see Fletcher *v.* Hickman, 136 Fed. 568, 69 C. C. A. 350.

thereto, if such evidence identifies the ordinance,[6] or by the record of an ordinance with a note appended thereto stating that the ordinance was duly published, in the absence of any evidence to the contrary.[7] And where an ordinance is certified by the recorder as having been passed by the council on a certain day, and he testifies that it was published in a certain newspaper on a day named, the publication is sufficiently proved.[8] It cannot be inferred, however, that a city ordinance was published because it was passed, and if the city charter makes the publication *prima facie* evidence of the ordinance, and a copy of the published order alone presumptive evidence of the facts therein recited, the mere statement of a witness that the ordinance was published creates no presumption that it was published by authority.[9] Under a statute which provides that a book of ordinances purporting to be published by authority shall after a designated time be conclusive evidence of publication, there must be some declaration in, on, and as a part of a book that its publication is by reason of some competent authority, to make the book conclusive evidence of publication.[10] And it has been held that the authority to reprint and publish a city charter is not authority to publish ordinances in a book therewith so as to make it conclusive of publication under such statute.[11]

VII. OFFICERS, AGENTS, AND EMPLOYEES AND MUNICIPAL DEPARTMENTS.[12]

A. Municipal Officers in General — 1. TERMINOLOGY.[13] A municipal officer is one who holds for a time a permanent municipal position of trust and responsibility, with definite municipal powers, duties, and privileges.[14] At common law an office was defined to be "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging . . . whether public . . . or private."[15] In America office, unlike the offices known to the common law, which lying in grant, were deemed incorporeal hereditaments, has in it no element of property. It is not alienable or inheritable.[16] Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed

6. Albia *v.* O'Harra, 64 Iowa 297, 20 N. W. 444.

7. Downing *v.* Miltonville, 36 Kan. 740, 14 Pac. 281. And see Boyer *v.* Yates City, 47 Ill. App. 115.

8. Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

Date of publication.— Under a charter requiring publication of ordinances and requiring the recorder to certify of record to the publication "when the same shall have been published and posted," it was held that the certificate need not show dates of publication. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

9. Napa *v.* Easterby, 61 Cal. 509.

10. Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664.

11. Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664.

12. **Government and officers of counties** see COUNTIES.

Liability of officers and agents to punishment for violation of injunction see INJUNCTIONS, 22 Cyc. 101.

Mandamus as to acts of officers see MANDAMUS, 26 Cyc. 249 *et seq.*

Mandamus to prevent removal or interference with discharge of duties see MANDAMUS, 26 Cyc. 266.

Mandamus to restore possession of office to one illegally removed or suspended see MANDAMUS, 26 Cyc. 260.

Municipality as party to suit to enjoin its officers from performance of acts apparently within the scope of their authority see INJUNCTIONS, 22 Cyc. 914.

Power of member of city council to make affidavit for issuance of subpœna duces tecum in action in which city is party see AFFIDAVITS, 2 Cyc. 9.

Proceedings by officers as constituting acknowledgment or new promise interrupting statute of limitations see LIMITATIONS OF ACTIONS, 25 Cyc. 1361.

13. "Agents" and "Employees" see *infra*, VII, C, 1.

14. See Abbott L. Dict.; Black L. Dict.; English L. Dict.; and cases cited *infra*, *passim*.

15. 2 Blackstone Comm. 36; State *v.* Valle, 41 Mo. 29; People *v.* Nostrand, 46 N. Y. 375; Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

The term "office" has no legal meaning attached to it different from its ordinary acceptation. People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659.

16. *Ex p.* Lambert, 52 Ala. 79; Beebe *v.* Robinson, 52 Ala. 66.

should be selected solely with a view to the public welfare.[17] Right they may have to fees and emoluments;[18] but these are purely incidental to the office they hold,[19] the controlling idea being, not the right of the officers, but the welfare of the public whose servants they are.[20] The office endures;[21] the officer is temporary.[22]

2. WHO ARE MUNICIPAL OFFICERS. The mayor is a municipal officer.[23] He is the official head of the municipality, and its chief executive officer;[24] the president of the corporation and specially identified with the local interests centering in the municipality.[25] Councilmen or aldermen are municipal officers,[26] and so are city treasurers.[27] Whether officers of a department of a municipality are state or municipal officers depends on the nature of the duties which they perform. This question will be considered in another part of this title.[28]

3. CREATION AND ABOLITION OF OFFICE[29] — a. Creation. Municipal offices can only be created by legislation.[30] This creative act may be either immediate, when done by the general assembly, which possesses all inherent creative power for corporations; or delegated, when the corporation is expressly empowered by charter or general law to create the office for itself.[31] Creation by the municipality can only be effected by means of ordinance or by-law.[32] Offices may be

17. Cooley Torts (3d ed.), 752. And see the following cases: *Ex p.* Lambert, 52 Ala. 79; Beebe *v.* Robinson, 52 Ala. 66; People *v.* Stratton, 28 Cal. 382; Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

18. People *v.* Nostrand, 46 N. Y. 375. "Offices," says Kent (vol. 3, p. 454), "consist in a right, and correspondent duty, to execute a public or private trust, and to take the emoluments." To the same effect are 3 Cruise Dig. 117, and Bouvier L. Dict. *verbum* "office."

The existence of a statutory provision providing for emoluments is a ground which taken with others will constitute an office. People *v.* Nostrand, 46 N. Y. 375.

"Lucrative office."—An office to which there is a compensation attached is a lucrative office. State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239.

19. Grieb *v.* Syracuse, 94 N. Y. App. Div. 133, 87 N. Y. Suppl. 1083; State *v.* Anderson, 45 Ohio St. 196, 12 N. E. 656, but not a necessary incident.

20. Bosworth *v.* New Orleans, 26 La. Ann. 494; Blackburn *v.* Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708. An office is a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attached for the time being, and which is exercised for the benefit of the public. Doyle *v.* Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

21. Olmstead *v.* New York, 42 N. Y. Super. Ct. 481.

22. In People *v.* Nostrand, 46 N. Y. 375, it was said that the idea of an officer clearly embraces the idea of tenure, duration, fees, or emoluments, and rights and powers as well as that of duty; a public station or employment; an employment confirmed by appointment of government. But the term of office is usually fixed by law for a definite time and therefore the officer is temporary. See *infra*, note 23.

23. Britton *v.* Steber, 62 Mo. 370. *Compare* Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211, in which it was held that the office of mayor of a city whose charter makes the mayor a conservator of the peace and a member of the board of health and empowers him to administer oaths and hear complaints and annul or suspend licenses for violations of the city ordinances or any other law of the state is an officer under the state.

24. Burch *v.* Hardwicke, 23 Gratt. (Va.) 51; Bouvier L. Dict. tit. "Mayor"; Elliot Mun. Corp. § 255; Ingersoll Pub. Corp. 258; Rapalje & L. L. Dict. tit. "Mayor"; Smith Mun. Corp. § 186.

25. People *v.* Gregg, 59 Hun (N. Y.) 107, 13 N. Y. Suppl. 114; People *v.* Wood, 4 Park. Cr. (N. Y.) 144; Elliot Mun. Corp. § 271.

26. State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239. And see Garvie *v.* Hartford, 54 Conn. 440, 7 Atl. 723; *In re* Newport Charter, 14 R. I. 655.

27. State *v.* Wilmington, 3 Harr. (Del.) 294; State *v.* Walton, 62 Me. 106; Morse *v.* Lowell, 7 Metc. (Mass.) 152.

28. See *infra*, VII, B.

29. Creation and abolition of departmental offices see *infra*, VII, B.

Creation and abolition of departments see *infra*, VII, B, 2, 3.

30. Brown *v.* Blake, 46 Conn. 549; State *v.* Hillard, 42 Conn. 168; Lowery *v.* Lexington, 116 Ky. 157, 75 S. W. 202, 25 Ky. L. Rep. 392; Hoboken *v.* Harrison, 30 N. J. L. 73.

31. Anderson *v.* Camden, 58 N. J. L. 515, 33 Atl. 846.

A city has no power to create any office other than those provided for in the constitution and its charter. Lowery *v.* Lexington, 116 Ky. 157, 75 S. W. 202, 25 Ky. L. Rep. 392; Hoboken *v.* Harrison, 30 N. J. L. 73; O'Connor *v.* Walsh, 83 N. Y. App. Div. 179, 82 N. Y. Suppl. 499.

32. People *v.* Blair, 82 Ill. App. 570; Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516; Kriseler *v.* Le Valley, 122 Mich. 576, 81 N. W. 580.

created not only by express and positive act of legislation, but also by implication, as where an office is referred to as existing, and the duties of the officer are prescribed;[33] but the implication must be plain and certain.[34]

b. Abolition — (I) *In General.* It is well settled that the absolute and unconditional repeal of a municipal charter,[35] or the substitution of another charter with inconsistent provisions, without any saving clause as to the rights of officers under the former charter,[36] abolishes all offices thereunder. It is for this reason that there is no such thing as a vested right in a municipal office.[37] The power creating such an office has, in the absence of statutory or constitutional restraint, the right to abolish it,[38] if done in good faith;[39] and a constitutional provision that the compensation of no municipal officer shall be changed during his term of office does not impair such right.[40] But a city office created by the legislature cannot be abolished by the city.[41]

(II) *Effect of Veteran Acts.* The right of municipal authorities to abol-

33. State *v.* Kennedy, 69 Conn. 220, 37 Atl. 503; Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516; Weesner *v.* Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

34. State *v.* Hillard, 42 Conn. 168; Grieb *v.* Syracuse, 94 N. Y. App. Div. 133, 87 N. Y. Suppl. 1083.

35. Crook *v.* People, 106 Ill. 237; People *v.* Brown, 83 Ill. 95.

General act repealing special charter.— Although the act May 23, 1893, is a general act, yet, since it abolishes the office of assistant burgess in "all of the boroughs," and provides that in "each" borough a chief burgess shall be elected for three years, and repeals all acts and parts of acts inconsistent therewith, it is to be construed to apply to boroughs organized under special charter. *In re* Huntingdon Borough, 3 Pa. Dist. 435.

An office created by ordinance is abolished by the repeal of the ordinance. Donaghy *v.* Macy, 167 Mass. 178, 45 N. E. 87; State *v.* Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

36. Crook *v.* People, 106 Ill. 237; People *v.* Feitner, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094 [*affirmed* in 156 N. Y. 694, 51 N. E. 1093].

The adoption of a general incorporation law by a city organized under a special charter determines the tenure of all officers under such charter (Crook *v.* People, 106 Ill. 237; People *v.* Brown, 83 Ill. 95; People *v.* Blair, 82 Ill. App. 570; Barrett *v.* New Orleans, 32 La. Ann. 101), unless the act provides that the number, character, powers, and duties of officer in existence shall remain as then provided (Com. *v.* Ricketts, 9 Kulp (Pa.) 361). And see Parrish *v.* Wilkes-Barre, 9 Kulp (Pa.) 201.

By amendment of charter.—People *v.* Davie, 114 Cal. 363, 46 Pac. 150.

After separation of county and city.— The office of collector of St. Louis county does not exist in the city of St. Louis since the scheme of separation was adopted. State *v.* Walsh, 69 Mo. 408.

37. *California.*— People *v.* Davie, 114 Cal. 363, 46 Pac. 150.

Illinois.— Crook *v.* People, 106 Ill. 237; People *v.* Brown, 83 Ill. 95.

Missouri.— Primm *v.* Carondelet, 23 Mo. 22.

New Jersey.— Burlington *v.* Estlow, 43 N. J. L. 13.

Utah.— Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602.

See 36 Cent. Dig. tit. "Municipal Corporations," § 299.

38. *Georgia.*— Raley *v.* Warrenton, 120 Ga. 365, 47 S. E. 972.

Illinois.— Crook *v.* People, 106 Ill. 237; People *v.* Brown, 83 Ill. 95.

Indiana.— Downey *v.* State, 160 Ind. 578, 67 N. E. 450; Goodwin *v.* State, 142 Ind. 117, 41 N. E. 359; State *v.* Wilson, 142 Ind. 102, 41 N. E. 361.

Kentucky.— Frankfort *v.* Brawner, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497, 18 Ky. L. Rep. 684.

Michigan.— Atty.-Gen. *v.* Cogshall, 107 Mich. 181, 65 N. W. 2.

New York.— People *v.* Brooklyn, 149 N. Y. 215, 43 N. E. 554.

Pennsylvania.— Com. *v.* Moir, 7 Lack. Leg. N. 50.

Tennessee.— Waldraven *v.* Memphis, 4 Coldw. 431.

Utah.— Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602; McAllister *v.* Swan, 16 Utah 1, 50 Pac. 812.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 299, 300.

An office created by ordinance can be abolished only by ordinance. San Antonio *v.* Micklejohn, 89 Tex. 79, 33 S. W. 735.

39. People *v.* Ham, 166 N. Y. 477, 60 N. E. 191 [*reversing* 57 N. Y. App. Div. 367, 68 N. Y. Suppl. 298]; People *v.* La Grange, 7 N. Y. App. Div. 311, 40 N. Y. Suppl. 1026; Silvey *v.* Boyle, 20 Utah 205, 57 Pac. 880. *Contra*, Downey *v.* State, 160 Ind. 578, 67 N. E. 450, holding that the abolition of an office being an act of legislative power, the intent of the municipality in making such abolition cannot be reviewed by the court.

40. Gilbert *v.* Paducah, 115 Ky. 160, 72 S. W. 316, 24 Ky. L. Rep. 1998.

41. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650

ish an office, in good faith and for reasons of economy, is not affected by the so-called Veteran Acts providing that veteran soldiers or sailors or volunteer firemen, holding positions by appointment, shall not be removed therefrom except for cause.[42] But where an ordinance purporting to abolish such an office is only a device for the purpose of removing the incumbent while the office practically still remains in existence, it is an evasion of the law, and void.[43]

4. Appointment or Election[44] — a. In General — (1) *Right* — (A) *In General.* By the weight of authority the existence of a fundamental right of municipal local self-government is necessarily dependent upon some constitutional provision or manifest implication,[45] and in the absence of such a provision, municipal officers are appointed by the legislature, or chosen or appointed in the mode prescribed by charter or by general law.[46] In such case, the principle of local self-government is recognized to a certain extent, and the selection of officers is generally intrusted to the electors of the respective municipalities, or their appointment committed to the authorities thereof;[47] and it is competent for the legislature to delegate to the municipality the power to ordain whether an office shall be elective or appointive.[48] In many state constitutions a provision exists to the effect that all city officers whose election is not otherwise provided for shall be elected by the electors of the city, or be appointed by such authorities thereof as the legislature may designate for that purpose.[49] Such a constitutional pro-

42. Sutherland *v.* Jersey City St., etc., Com'rs, 61 N. J. L. 436, 39 Atl. 710; Boylan *v.* Newark Police Com'rs, 58 N. J. L. 133, 32 Atl. 78; Newark Fire Com'rs *v.* Lyon, 53 N. J. L. 632, 23 Atl. 274; Evans *v.* Hudson County, 53 N. J. L. 585, 22 Atl. 56; People *v.* Brooklyn, 149 N. Y. 215, 43 N. E. 554 [*reversing* 91 Hun 308, 36 N. Y. Suppl. 172]; People *v.* Simis, 18 N. Y. App. Div. 199, 45 N. Y. Suppl. 940; People *v.* King, 13 N. Y. App. Div. 400, 42 N. Y. Suppl. 961.

Presumption of duty in abolishing office.— In a mandamus proceeding by a Union veteran, whose position under a municipality has been abolished by the city officers, to compel his reinstatement, the presumption is that such officers did their duty in abolishing the position. People *v.* Simis, 18 N. Y. App. Div. 199, 45 N. Y. Suppl. 940.

43. Womsley *v.* Jersey City, 61 N. J. L. 499, 39 Atl. 710.

44. Appointment or election of departmental officers see *infra*, VII, B.

Appointment or employment of agents or employees see *infra*, VII, C, 4.

45. State *v.* Swift, 11 Nev. 128.

46. *California.*— *In re* Bulger, 45 Cal. 553; People *v.* Squires, 14 Cal. 12.

Georgia.— Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230.

Nebraska.—Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740.

Nevada.— State *v.* Swift, 11 Nev. 128.

New Hampshire.— State *v.* Wimpfheimer, 69 N. H. 166, 38 Atl. 786.

New York.— People *v.* Draper, 15 N. Y. 532.

North Carolina.— Harriss *v.* Wright, 121 N. C. 172, 28 S. E. 269.

Ohio.— State *v.* Covington, 29 Ohio St. 102.

Pennsylvania.— Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837.

Texas.— Brown *v.* Galveston, 97 Tex. 1, 75 S. W. 488.

Virginia.— Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

Contrary rule—Inherent right of local self-government.— Some courts have taken a different view, and in some instances have held that the right of local self-government is an inherent right in the people of a municipality, and that the legislature has no power, in the absence of express authority in the constitution, to appoint the permanent officers of a municipality. State *v.* Fox, 158 Ind. 126, 63 N. E. 19; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; *Ex p.* Levine, 46 Tex. Cr. 364, 81 S. W. 1206; *Ex p.* Lewis, 45 Tex. Cr. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

47. State *v.* Swift, 11 Nev. 128.

48. Ball *v.* Fagg, 67 Mo. 481.

49. Buckner *v.* Gordon, 81 Ky. 665; People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815 [*affirming* 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350]; Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408 [*affirming* 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535 (*distinguishing* Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579)]; *In re* Lester, 21 Hun (N. Y.) 130; People *v.* Blake, 49 Barb. (N. Y.) 9; People *v.* Acton, 48 Barb. (N. Y.) 524; Whipple *v.* Henderson, 13 Utah 484, 45 Pac. 274; Cole *v.* Black River Falls, 57 Wis. 110, 14 N. W. 906.

A city attorney is a "city officer" within Wis. Const. art. 13, § 9, providing that all city officers shall be elected by the electors of such cities, or appointed by such authorities thereof as the legislature may designate. State *v.* Krez, 88 Wis. 135, 59 N. W. 593.

vision has been held not to be violated by an act incorporating a city and making provisional appointments to certain offices until they can be filled by election[50] or by a power given to the governor to remove.[51]

(B) *Civil Service Restrictions* — (1) IN GENERAL. The civil service statutes constitute a general system of statute law, applicable to appointments and promotions in every department of the civil service, with such exceptions only as are specified in the statute itself.[52] The restrictions placed upon the appointing power by these laws, and by the rules prescribed by commissioners appointed under such laws, have been quite generally held to be constitutional.[53] Thus it has been held that these laws are not violative of constitutional provisions, by creating a different tenure of office;[54] as requiring an illegal test of applicants for office;[55] or depriving the municipal authorities of the power of appointment,[56] except in so far as they compel the appointment of the person graded highest on the eligible list;[57] delegating to civil service commissioners the exercise of judicial func-

City magistrates are within the provision of the constitution, requiring existing city officers to be elected or appointed by authorities which the legislature shall designate, although their duties have been transferred to officials under a new name. Kelly *v.* Van Wyck, 35 Misc. (N. Y.) 210, 71 N. Y. Suppl. 814.

A detective sergeant is a city officer within such a constitutional provision. People *v.* Partridge, 38 Misc. (N. Y.) 697, 78 N. Y. Suppl. 249.

The right to fill an office by a new selection at the expiration of each term thereof is secured to the people of the locality specially concerned, the same as the power to fill the place in the first instance, and any attempt to interfere with that right, working a continuance of an incumbent in office, under the general rule that his incumbency shall continue until a successor is elected and qualified, is held to be as much a legislative appointment and usurpation of power as an express appointment to the place. O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831.

An act is not unconstitutional because it provides for the "election" of the president of a village by the trustees instead of an "appointment" by them, as prescribed by N. Y. Const. art. 10, § 2. People *v.* Sturges, 27 N. Y. App. Div. 387, 50 N. Y. Suppl. 5 [*affirming* 21 Misc. 605, 47 N. Y. Suppl. 999].

Vesting appointment in governor.— The act of the legislature of New York (Laws (1867), c. 410, § 1) vesting the appointment of commissioners of taxes of the city of New York in the governor, with the advice and consent of the senate, is unconstitutional, inasmuch as the same functions were performed by similar officers at the time of the adoption of the constitution, which provides that such officers shall be elected by the electors of cities, etc., or appointed by such authorities thereof as the legislature shall designate. People *v.* Raymond, 37 N. Y. 428, 5 Transcr. App. 233, 35 How. Pr. 173.

The individual members of the common council are not "authorities" within the meaning of the constitution of New York. Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535 [*affirmed* in 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408].

50. Lambert *v.* Norman, 119 Ga. 351, 46 S. E. 433; Moreland *v.* Millen, 126 Mich. 381, 85 N. W. 882 (holding that legislative appointments can only be upheld in case of exigency); State *v.* Ruhe, 24 Nev. 251, 52 Pac. 274; Neuls *v.* Scranton City, 20 Pa. Super. Ct. 286. *Contra*, Saratoga Springs *v.* Van Norder, 75 N. Y. App. Div. 204, 77 N. Y. Suppl. 1020; People *v.* Blake, 49 Barb. (N. Y.) 9.

51. People *v.* Coler, 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205 [*affirmed* in 173 N. Y. 103, 65 N. E. 956].

52. People *v.* Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399.

53. Fish *v.* McGann, 205 Ill. 179, 68 N. E. 761; Kipley *v.* Luthardt, 178 Ill. 525, 53 N. E. 74; People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Chittenden *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579. But see Matter of Balcom, 45 N. Y. App. Div. 68, 61 N. Y. Suppl. 452 [*reversing* 28 Misc. 1, 58 N. Y. Suppl. 1097].

Exemption from civil service rules.— A second assistant city clerk, for whose fidelity the city clerk is answerable upon his official bond, is within the exemption clause of a statute providing that officers and clerks, for the faithful discharge of whose duties a superior officer is required to give bond, shall not be affected by the rules of the civil service commission as to their election, selection, or appointment. Butler *v.* Milwaukee, 119 Wis. 526, 97 N. W. 185.

54. People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785.

55. People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785; People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.

56. Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579. But see Matter of Balcom, 45 N. Y. App. Div. 68, 61 N. Y. Suppl. 452 [*reversing* 28 Misc. 1, 58 N. Y. Suppl. 1097].

57. People *v.* Mosher, 163 N. Y. 32, 57

tions;[58] abridging the privileges and immunities of citizens in violation of the fourteenth amendment of the United States constitution;[59] or violating the right of trial by jury.[60] The determination of civil service commissioners in rating candidates in competitive examinations cannot be reviewed either on certiorari or by mandamus, in the absence of charges of bad faith or illegal action.[61]

(2) THE VETERAN ACTS.[62] Civil service regulation has been attempted in the so called "Veteran Acts" of many of the states, giving preference of appointment to honorably discharged soldiers of the Civil war.[63] These acts have been sustained by the courts where they do not discriminate as to eligibility or qualification for office,[64] but they have been held unconstitutional so far as they require that certain offices shall be filled by veterans in preferment to all other persons without regard to actual fitness.[65] In all examinations, competitive and non-competitive, veterans have no preference over other citizens of the state; but when as a result of these examinations, a list is made up from which appointments can be made, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference without regard to his standing on that list,[66] provided he seasonably claims his preference.[67]

N. E. 88, 79 Am. St. Rep. 552 [*affirming* 45 N. Y. App. Div. 68, 61 N. Y. Suppl. 452].

58. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775.

59. People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785.

60. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775.

61. People *v.* McCooey, 100 N. Y. App. Div. 240, 91 N. Y. Suppl. 436.

62. Mandamus to compel preference of honorably discharged soldiers or sailors see MANDAMUS, 26 Cyc. 254.

63. See Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L. R. A. 253; State *v.* Miller, 66 Minn. 90, 68 N. W. 732; Baker *v.* Delaney, 55 N. J. L. 9, 25 Atl. 936; Matter of Sullivan, 55 Hun (N. Y.) 285, 8 N. Y. Suppl. 401.

The Veteran Acts do not apply to heads of departments or chief officers, but were intended to protect veterans in subordinate offices. People *v.* Saratoga Springs, 35 N. Y. App. Div. 141, 54 N. Y. Suppl. 1083 [*affirmed* in 159 N. Y. 568, 54 N. E. 1093]; People *v.* Yonkers, 14 N. Y. Suppl. 455.

64. People *v.* Stratton, 79 N. Y. App. Div. 149, 80 N. Y. Suppl. 269 [*affirmed* in 174 N. Y. 531, 66 N. E. 1114]; Matter of Sullivan, 55 Hun (N. Y.) 285, 8 N. Y. Suppl. 401.

New York — Preference only as to appointments and not as to promotions. — The civil service laws, giving a preference to an honorably discharged Union soldier over others, apply only to original appointments, and not to promotions. Brown *v.* Duane, 60 Hun (N. Y.) 98, 14 N. Y. Suppl. 450; Matter of McGuire, 50 Hun (N. Y.) 203, 2 N. Y. Suppl. 760.

No preference if not equally qualified. — N. Y. Laws (1887), c. 464, providing that honorably discharged Union soldiers shall be preferred for appointment and employment means that where two or more apply for an office, one of whom is a discharged Union soldier, and all are equally qualified, the soldier shall be preferred, but not where the soldier is not equally qualified for the office as one of the others; and the appointment of another applicant by a municipal body, after a determination in good faith of his superior fitness as compared with a discharged soldier, is not reviewable. People *v.* Saratoga Springs, 54 Hun (N. Y.) 16, 7 N. Y. Suppl. 125.

Limitation as to age. — The civil service rule of the city of Buffalo requiring applicants for positions to be between twenty-one and sixty years of age does not limit the appointment of soldiers and sailors to such as are within the designated age limit, it being provided by general law that they shall not be disqualified from holding any position in the civil service on account of their age. People *v.* Civil Service Com'rs, 20 Misc. (N. Y.) 217, 45 N. Y. Suppl. 46.

Notice of right to preference. — Where the civil service commissioners certify an eligible list of persons for appointment, certifying that one is a veteran, such certificate sufficiently advises the appointing power of his right to a preference in appointment. People *v.* Stratton, 79 N. Y. App. Div. 149, 80 N. Y. Suppl. 269 [*affirmed* in 174 N. Y. 531, 66 N. E. 1114].

65. Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L. R. A. 253; *In re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

66. People *v.* Stratton, 174 N. Y. 531, 66 N. E. 1114 [*affirming* 79 N. Y. App. Div. 149, 80 N. Y. Suppl. 269]; *In re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; People *v.* Burch, 79 N. Y. App. Div. 156, 80 N. Y. Suppl. 274.

Preference between soldier and fireman. — Under a statute providing that in appointment to certain offices preference shall be given to honorably discharged soldiers and to veteran firemen, on application to a village board by a fireman and a soldier, the board has the power to select. People *v.* Dobbs Ferry, 63 N. Y. App. Div. 276, 71 N. Y. Suppl. 578.

67. People *v.* Wilson, 106 N. Y. App. Div.

(II) *Time*—(A) *In General.* The time for holding municipal elections and making appointments to office is usually fixed by charter or statute,[68] and if made upon an antecedent day they are void.[69] Statutes fixing the time for holding an election have, however, been held directory merely, and not mandatory, to the extent of permitting and authorizing an election or appointment at a later day than that named in the law, where the body whose duty it is to elect or appoint upon a day certain neglects to perform the duty, and the obligation still remains.[70] Where no date is fixed by the charter or statute, the mayor and council may fix it by ordinance.[71] When the commencement of a term is fixed by law, the election to such office should take place at the last election held before the time such term commences.[72]

(B) *Change.* The officer or body having authority to fix the time for holding an election or making an appointment may change it;[73] but where the time is fixed by statute, the council has no power to alter it by ordinance.[74]

(III) *Mode*—(A) *Popular Election.* If there is no constitutional right of election to a municipal office the legislature may make it appointive.[75] Certain offices, however, are usually made elective by constitution,[76] and the right so conferred cannot be evaded by any legislative subterfuge, such as a change in the

609, 94 N. Y. Suppl. 544; People *v.* Snyder, 106 N. Y. App. Div. 28, 94 N. Y. Suppl. 541.

68. See Kelly *v.* Gahn, 112 Ill. 23, 1 N. E. 167; State *v.* Winter, 148 Ind. 177, 47 N. E. 462; Goodloe *v.* Fox, 96 Ky. 627, 29 S. W. 433, 16 Ky. L. Rep. 653; Johnson *v.* Wilson, 95 Ky. 415, 25 S. W. 1057, 15 Ky. L. Rep. 852; State *v.* Cornwall, 35 Minn. 176, 28 N. W. 144; Sibbald *v.* Brickell, 59 N. J. L. 420, 36 Atl. 1032.

Appointment after time limited.— Persons appointed by the controller of the city and county of New York to the office of commissioner of taxes and assessments, after the expiration of the time fixed by the act conferring on him such authority, derive no authority from such appointment; and if they attempt to exercise the functions and powers of such office they will be guilty of an unlawful intrusion into the same. People *v.* Woodruff, 32 N. Y. 355, 29 How. Pr. 203.

69. State *v.* Winter, 148 Ind. 177, 47 N. E. 462; State *v.* Murray, 41 Minn. 123, 42 N. W. 858; Sibbald *v.* Brickell, 59 N. J. L. 420, 36 Atl. 1032; State *v.* Hoff, 88 Tex. 297, 31 S. W. 290.

Where a city council passes an ordinance redistricting the city into wards, a special election thereunder is specifically prohibited by Rev. St. § 1632, and hence, where a special election is attempted to be held for the selection of members of the council under such ordinance, such special election is inoperative. State *v.* Kearns, 47 Ohio St. 566, 25 N. E. 1027.

70. People *v.* Murray, 15 Cal. 221; Russell *v.* Wellington, 157 Mass. 100, 31 N. E. 630; State *v.* Smith, 22 Minn. 218; Lynch *v.* Lafland, 4 Coldw. (Tenn.) 96.

Default of duty necessary.— The occasion for holding a law directory in its terms cannot arise until there has been an omission or neglect from some cause to obey its provisions until there has been a default of duty, with a continuing obligation to perform. State *v.* Murray, 41 Minn. 123, 42 N. W. 858.

71. State *v.* Thomas, 102 Mo. 85, 14 S. W. 108; State *v.* Hoff, (Tex. Civ. App. 1895) 29 S. W. 672.

72. People *v.* Kent, 83 N. Y. App. Div. 554, 82 N. Y. Suppl. 172.

73. People *v.* Haskell, 5 Cal. 357; People *v.* Woodruff, 32 N. Y. 355, 29 How. Pr. 203; Tharin *v.* Seabrook, 6 S. C. 113.

A constitutional provision fixing the date for holding municipal elections is not self-operative, and without further legislation previous laws on the subject remain in force. State *v.* Patton, 32 La. Ann. 1200.

The amendment of the charter of the city of St. Augustine passed in 1891 does not change the time of election of municipal judges under the original charter of said city. State *v.* Philips, 30 Fla. 579, 11 So. 922.

74. State *v.* Hoff, 88 Tex. 297, 31 S. W. 290 [*reversing* (Civ. App. 1895) 29 S. W. 672].

75. Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837.

76. **Police justices not included.**— The provision of the constitution of New York (art. 6, § 18), declaring that "justices of the peace and District Court justices shall be elected in the different cities of this State," etc., does not include police justices in the city of New York; but these officers may rightfully be appointed as provided by the act of 1873, entitled "An act to secure better administration in the police courts of the city of New York" (Laws (1873), c. 538). Wensler *v.* People, 58 N. Y. 516.

The word "electors" in a constitutional provision that all city, town, and village officers shall be elected by the electors of such cities, etc., means residents therein who have the qualifications of electors prescribed in another article of the constitution. State *v.* Tuttle, 53 Wis. 45, 9 N. W. 791.

name of an office, or a division of its duties between two appointive officers.[77] Authority for the election of an officer may as well be drawn by necessary implication from an act of the legislature as from its express terms,[78] but the inference must be a legitimate one.[79]

(B) *Appointment*[80]—(1) AUTHORITY TO APPOINT—(a) IN GENERAL. The power of appointing municipal officers need not be given by direct and exclusive legislation;[81] an act conferring upon a particular officer sole power to supervise a municipal function gives him power to appoint the officers necessary to perform the function.[82] Power of appointment is usually conferred upon the mayor,[83] the city council,[84] or the mayor with the confirmation of the council.[85] An ordinance which assumes to transfer the power of appointment to persons other than those upon whom it has been committed by charter is invalid;[86] but a statute transferring all executive powers from the council to the mayor has been held to confer on him the power to appoint officers heretofore chosen by that body.[87]

(b) CONCURRENT ACTION OF BODIES OR OFFICERS — aa. *Branches of City Council.* It is frequently provided by statute or ordinance that city officers shall be elected by joint ballot or concurrent vote of both branches of the city council. Election by joint ballot is the act of a single body formed from two bodies convened together, and it is only necessary that a quorum be present.[88] Election by concurrent vote

77. People *v.* Albertson, 55 N. Y. 50.

78. Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869.

79. **A constitutional provision that county and township officers shall be elective does** not imply that city and village officers must be elected. State *v.* Covington, 29 Ohio St. 102.

80. **Authority of heads of departments** to appoint subordinates see *infra*, VII, B.

81. State *v.* Ehrmentraut, 63 Minn. 104, 65 N. W. 251.

82. Union Pac. R. Co. *v.* Ryan, 2 Wyo. 408.

83. People *v.* Lindsley, 37 Colo. 476, 86 Pac. 352; Atty.-Gen. *v.* Corliss, 98 Mich. 372, 57 N. W. 410; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570; People *v.* Lacombe, 99 N. Y. 43, 1 N. E. 599.

Under statutory power conferred a city may, by ordinance, empower the mayor to make appointments to office. Sales *v.* Barber Asphalt Paving Co., 166 Mo. 671, 66 S. W. 979.

A mayor pro tem may be given the same power of appointment that the mayor possesses. Mills *v.* State, 2 Wash. 566, 27 Pac. 560. Authority conferred upon the president of the common council to perform the duties of the mayor during the latter's absence from the city gives such president the power to make appointments to office (People *v.* Van Anden, 116 Mich. 654, 74 N. W. 1009; State *v.* Byrne, 98 Wis. 16, 73 N. W. 320), provided an emergency exists requiring immediate action (Watkins *v.* Mooney, 114 Ky. 646, 71 S. W. 622, 24 Ky. L. Rep. 1469); but proof of appointment by the president of the council is not sufficient without showing the facts upon which the right to exercise such power depends (Clarke *v.* Trenton, 49 N. J. L. 349, 8 Atl. 509).

An outgoing mayor, whose term of office expired at twelve o'clock noon, Jan. 1, 1902, could, at any time before that hour, make an appointment to any position which the mayor had a legal right to fill. Bakely *v.* Nowrey, 68 N. J. L. 95, 52 Atl. 289.

Department subordinates.—A statute granting to the mayor the right to appoint and remove "officers and persons employed by the city" does not apply to assistants employed in any of the departments, who are employed by the chief of the department, and not directly by the city, through its mayor or other authorized officer. Peters *v.* Bell, 51 La. Ann. 1621, 26 So. 442.

84. Wilder *v.* Chicago, 26 Ill. 182; Russell *v.* Chicago, 22 Ill. 283; State *v.* Poucher, 98 Mo. App. 109, 71 S. W. 1125; State *v.* Wimpfheimer, 69 N. H. 166, 38 Atl. 786.

Existing council.— Under a statute providing for certain new executive officers in cities, "which shall be chosen by city councils," it was held that the existing council at the time of the change should choose such officers. Com. *v.* Wyman, 137 Pa. St. 508, 21 Atl. 389.

85. See *infra*, VII, A, 4, a, (III), (B), (1), (b), bb.

86. Volk *v.* Newark, 47 N. J. L. 117.

87. Atty.-Gen. *v.* Varnum, 167 Mass. 477, 46 N. E. 1.

88. Tillman *v.* Otter, 93 Ky. 600, 20 S. W. 1036, 14 Ky. L. Rep. 586, 29 L. R. A. 110; Whiteside *v.* People, 26 Wend. (N. Y.) 634 [*reversing* 23 Wend. 9].

It is not a valid reason for refusing to obey the law, on the part of a majority of the select council of a city, by meeting with the common council and appointing the heads of departments, that members of the common council may have been fraudulently excluded, since each branch is the sole judge of the election and qualification of its own members; nor that they are about to propose a change of the law, for while the law remains they are bound by it, and must obey its requirements. Lamb *v.* Lynd, 44 Pa. St. 336.

requires the separate act of two or more distinct and independent bodies, each of which must have a quorum of its own, and each has a veto upon the other.[89] But it has been held that where the law requires an election to be by joint ballot of two branches, an election by the separate action of each branch is sufficient to give color of title to the office.[90]

bb. *Mayor and Council.* City charters often provide for the appointment of certain officers by the mayor, with the consent and approval of the council.[91] In such a case an ordinance cannot authorize the appointment by either alone,[92] or by joint convention of the two branches of the council.[93] But where power is given to the mayor to appoint officers to serve during his will and pleasure, confirmation by the council is unnecessary.[94] A charter requirement that ordinances and resolutions of the council must have the approval of the mayor has been held not to apply to elections by that body,[95] but there are cases to the contrary.[96]

(2) MANNER OF APPOINTMENT — (a) IN GENERAL. The course of procedure to be followed by a municipal council in the election of officers is usually prescribed in the charter of each respective town or city,[97] and when so prescribed cannot be changed by ordinance or by-law.[98] If the particular method is not prescribed, then it is left to the discretion of the council, subject to the proviso that the election must be conducted in harmony with the fundamental principles recognized by the common law to be applicable.[99] So where the appointment is directed to

89. Saunders *v.* Lawrence, 141 Mass. 380, 5 N. E. 840 (no concurrence); Whiteside *v.* People, 26 Wend. (N. Y.) 634 [*reversing* 23 Wend. 9].

90. Belfast *v.* Morrill, 65 Me. 580.

91. O'Brien *v.* Thorogood, 162 Mass. 598, 39 N. E. 287; Armstrong *v.* Whitehead, 67 N. J. L. 405, 51 Atl. 472; Whipple *v.* Henderson, 13 Utah 484, 45 Pac. 274.

Appointment void without confirmation.— An appointment by the city council requires confirmation by the city council and gives the appointee no right to the office without such confirmation. People *v.* Weber, 89 Ill. 347.

An appointment by the mayor without the concurrence of the aldermen is not justified by the fact that the mayor and board of aldermen might fail to agree upon the person to fill such a vacancy, and that the office would in consequence remain vacant. Brumby *v.* Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

An appointment by a mayor pro tem, confirmed by the council, is valid. Mills *v.* State, 2 Wash. 566, 27 Pac. 560.

Duty of council to act in good faith.— It is the duty of the council to act in good faith upon a pending nomination, and others that may be made, in case of rejection, so that, on confirmation, quo warranto may be possible. Hoell *v.* Camden, 68 N. J. L. 226, 52 Atl. 213.

A constitutional provision for confirmation by the senate of appointments by the governor has no application to appointments to municipal offices. State *v.* Churchman, 5 Pennew. (Del.) 361, 51 Atl. 49; Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837.

92. Com. *v.* Crogan, 155 Pa. St. 448, 26 Atl. 697.

93. Hooper *v.* Creager, 84 Md. 195, 35 Atl. 967, 36 Atl. 359, 35 L. R. A. 202.

94. State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

95. *Alabama.*— Huey *v.* Jones, 140 Ala. 479, 37 So. 193.

Connecticut.— State *v.* Longdon, 68 Conn. 519, 37 Atl. 383.

Mississippi.— Rich *v.* McLaurin, 83 Miss. 95, 35 So. 337.

New Hampshire.—Cate *v.* Martin, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613.

New Jersey.— McDermott *v.* Kenny, 45 N. J. L. 251; Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234].

New York.— North *v.* Cary, 4 Thomps. & C. 357; Achley's Case, 4 Abb. Pr. 35.

But see cases cited in the following note.

96. People *v.* Schroeder, 76 N. Y. 160; Cassidy *v.* Brooklyn, 47 N. Y. 659; People *v.* Fitchie, 76 Hun (N. Y.) 80, 28 N. Y. Suppl. 600. See *supra*, VI, D.

The mayor may veto an ordinance providing for and appointing an officer by the same act; and the same is thereby totally defeated. Kindermann *v.* West Bay City, 117 Mich. 516, 76 N. W. 10.

97. Goodloe *v.* Fox, 96 Ky. 627, 29 S. W. 433, 16 Ky. L. Rep. 653.

98. Bates *v.* Nome, 1 Alaska 208; State *v.* Newark, 47 N. J. L. 117; State *v.* Michellon, 42 N. J. L. 405. See *supra*, V, B, 4, b.

99. Murdoch *v.* Strange, 99 Md. 89, 57 Atl. 628; Rich *v.* McLaurin, 83 Miss. 95, 35 So. 337; Volk *v.* Newark, 47 N. J. L. 117. See *supra*, V, B, 4, b.

Secret ballot see Goodloe *v.* Fox, 96 Ky. 627, 29 S. W. 433, 16 Ky. L. Rep. 653; Cynthiana *v.* Board of Education, 52 S. W. 969, 21 Ky. L. Rep. 731; Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

Yea and nay vote see Atty.-Gen. *v.* Remick, 71 N. H. 480, 53 Atl. 308.

Adoption of resolution see Huey *v.* Jones, 139 Ala. 479, 37 So. 193.

be made by ballot, the manner of taking the ballot is within the discretion of the council.[1]

(b) Vote Necessary to a Choice. The general rule, in the absence of specific provision, is that a majority of the members of a municipal council will constitute a quorum for the election of officers, and when duly met, a majority of the quorum may act.[2] A quorum being present, it is not necessary that all, or even a majority, of those present should vote. Members by refusing to vote cannot defeat the election, or divest the body of the power to elect.[3] In such case the legal effect of refusing to vote is an acquiescence in the choice of those who do vote;[4] and this is so, although those refusing to vote object to the mode of voting, and on the ground that no quorum voted.[5]

(c) Right of Mayor to Vote. When a choice has been made it is not essential that the mayor, as the presiding officer, shall declare the result.[6] In such case the mayor has as a general rule no duty whatever to perform as to the election. He can take part only in case of a tie vote.[7] It has been held, however, that the

1. State *v.* Starr, 78 Conn. 636, 63 Atl. 512. See *supra*, V, B, 4, c.

2. *Connecticut.*— State *v.* Chapman, 44 Conn. 595.

Delaware.— State *v.* Wilmington City Council, 3 Harr. 294.

Michigan.— Baker *v.* Port Huron Police Com'rs, 62 Mich. 327, 28 N. W. 913.

New Jersey.— Cadmus *v.* Farr, 47 N. J. L. 208; Mason *v.* Paterson, 35 N. J. L. 190; State *v.* Parker, 32 N. J. L. 341.

New York.— Matter of Brearton, 44 Misc. 247, 89 N. Y. Suppl. 893; Coles *v.* Williamsburgh, 10 Wend. 659.

Tennessee.— Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

Compare State *v.* Miller, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732; State *v.* Anderson, 45 Ohio St. 196, 12 N. E. 656.

See also *supra*, V, B, 4, a, d.

A majority of the whole council is sometimes expressly required by statute. People *v.* Herring, 30 Colo. 275, 71 Pac. 413; Armstrong *v.* Whitehead, 67 N. J. L. 405, 51 Atl. 472; Hawkins *v.* Cook, 62 N. J. L. 84, 40 Atl. 781. See also Randall *v.* Schweikart, 115 Mich. 386, 73 N. W. 417. See also *supra*, V, B, 4, a.

All the members of the electing body must have notice of the time fixed for holding the election. People *v.* Batchelor, 22 N. Y. 128. But when notice is duly given, the refusal of any of the members of the body to be present will not invalidate, if a quorum be present and participate in the election. State *v.* Withers, 121 N. C. 376, 28 S. E. 522. See *supra*, V, B, 3, d.

3. *Connecticut.*— State *v.* Chapman, 44 Conn. 595.

Illinois.— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Kentucky.— Wheeler *v.* Com., 98 Ky. 59, 32 S. W. 259, 17 Ky. L. Rep. 636; Morton *v.* Youngerman, 89 Ky. 505, 12 S. W. 944, 11 Ky. L. Rep. 886.

Maryland.— Murdoch *v.* Strange, 99 Md. 89, 57 Atl. 628.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

New Hampshire.— Atty.-Gen. *v.* Shepard, 62 N. H. 384, 13 Am. St. Rep. 576.

New York.— Matter of Brearton, 44 Misc. 247, 89 N. Y. Suppl. 893.

Ohio.— See State *v.* Green, 37 Ohio St. 227.

A blank ballot cannot be considered in summing up a total vote, a majority of which a candidate must receive to be elected. Murdoch *v.* Strange, 99 Md. 89, 57 Atl. 628. *Contra*, Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308. See also State *v.* Chapman, 44 Conn. 595.

4. *Connecticut.*— Somers *v.* Bridgeport, 60 Conn. 521, 22 Atl. 1015.

Kentucky.— Wheeler *v.* Com., 98 Ky. 59, 32 S. W. 259, 17 Ky. L. Rep. 636.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

New York.— Matter of Brearton, 44 Misc. 247, 89 N. Y. Suppl. 893.

Ohio.— State *v.* Green, 37 Ohio St. 227.

England.— Oldknow *v.* Wainwright, 2 Burr. 1017.

See also *supra*, V, B, 4, f.

5. State *v.* Green, 37 Ohio St. 227.

6. State *v.* Miller, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732.

7. *Alabama.*—Huey *v.* Jones, 140 Ala. 479, 37 So. 193.

Connecticut.— State *v.* Chapman, 44 Conn. 595.

Georgia.— Gostin *v.* Brooks, 89 Ga. 244, 15 S. E. 361.

Illinois.— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Maine.— Small *v.* Orne, 79 Me. 78, 8 Atl. 152.

Maryland.— Hecht *v.* Coale, 93 Md. 692, 49 Atl. 660.

Mississippi.— Rich *v.* McLaurin, 83 Miss. 95, 35 So. 337; Ott *v.* State, 78 Miss. 487, 29 So. 520; Bousquet *v.* State, 78 Miss. 478, 29 So. 399.

Montana.— State *v.* Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

New Jersey.— Armstrong *v.* Whitehead, 67 N. J. L. 405, 51 Atl. 472; Hawkins *v.* Cook, 62 N. J. L. 84, 40 Atl. 781.

action of the mayor in declaring an officer elected is equivalent to a vote for him.[8]

(3) Evidence of Appointment. Except where a verbal appointment is permitted by the terms of the act conferring the appointing power, an appointment to a municipal office must be in writing,[9] or in the form of a resolution of the appointing board duly entered in its records.[10] There must be a commission, that is, a formal writing signed by the official with whom the power of appointment rests, showing clearly his intention to appoint the person named, his belief that such writing is that required by the statute, and his intention to make it the final act on his part to perfect the appointment.[11] The commission need not be in any particular form. The written appointment signed by the officer, or any paper signed by him, showing that he has made the appointment, is sufficient, and the commission need not be delivered.[12]

(4) Reconsideration or Recall of Appointment. While an election may be set aside for irregularity or illegality before it is declared,[13] where it has been declared and entered of record it cannot be reconsidered at a subsequent meeting, and a new election had.[14] Nor is it within the power of any member of the

New York.— Matter of Dudley, 33 N. Y. App. Div. 465, 53 N. Y. Suppl. 742.

Ohio.— State *v.* Miller, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732; State *v.* Anderson, 45 Ohio St. 196, 12 N. E. 656.

Tennessee.— Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

Wisconsin.— State *v.* Mott, 111 Wis. 19, 86 N. W. 569.

A member of the council, appointed mayor pro tem, is entitled to vote, although there is no tie. Harris *v.* People, 18 Colo. App. 160, 70 Pac. 699.

Must be legal division between two candidates.— The mayor can only cast a deciding vote in favor of a candidate when the entire board of aldermen are equally divided between two candidates. He cannot cast a vote in order to make a majority in favor of one candidate when the other votes were scattering. State *v.* Mott, 111 Wis. 19, 86 N. W. 569.

Right to vote twice.— The mayor, not being a member of the council, cannot vote, as an alderman, to make a tie, and then, as mayor, to break it. Ott *v.* State, 78 Miss. 487, 29 So. 520; Bousquet *v.* State, 78 Miss. 478, 29 So. 399.

Where ten of the twelve members are present, and six vote for a candidate for an office, it is not a tie, and the mayor has no vote. Matter of Dudley, 33 N. Y. App. Div. 465, 53 N. Y. Suppl. 742.

8. Small *v.* Orne, 79 Me. 78, 8 Atl. 152. *Contra*, Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

9. People *v.* Murray, 70 N. Y. 521; People *v.* Fitzsimmons, 68 N. Y. 514.

The position of morgue keeper being one of public trust, with a fixed salary, and certain continuous duties, which are not menial, is a public office, within the rule requiring an appointment thereto to be evidenced by a writing. People *v.* Keller, 30 Misc. (N. Y.) 52, 61 N. Y. Suppl. 746.

10. People *v.* Stowell, 9 Abb. N. Cas. (N. Y.) 456.

11. The signing of the commission is an integral part of the duty of the delegated power, and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office. People *v.* Murray, 70 N. Y. 521.

Certificate of appointment.— Under a city charter requiring a certificate of appointment to a city office to be made and filed by the council, a certificate signed by the mayor alone does not show *prima facie* title to the office. Matter of Dudley, 33 N. Y. App. Div. 465, 53 N. Y. Suppl. 742.

12. People *v.* Fitzsimmons, 68 N. Y. 514.

13. Baker *v.* Cushman, 127 Mass. 105.

When appointment becomes absolute.— Where the appointment of an officer is made by a legislative body by ballot, the appointment does not become absolute until the result of the ballot is ascertained and announced. State *v.* Starr, 78 Conn. 636, 63 Atl. 512.

14. *Connecticut.*—State *v.* Starr, 78 Conn. 636, 63 Atl. 512.

Maine.— State *v.* Phillips, 79 Me. 506, 11 Atl. 274.

Massachusetts.— Keough *v.* Holyoke, 156 Mass. 403, 31 N. E. 387.

Minnesota.— State *v.* Wadhams, 64 Minn. 318, 67 N. W. 64.

New York.— Matter of Fitzgerald, 88 N. Y. App. Div. 434, 82 N. Y. Suppl. 811, 84 N. Y. Suppl. 1125 (holding that a city charter authorizing the common council to make, modify, amend, or repeal ordinances, rules, regulations, by-laws, and resolutions, does not authorize the council to recall or annul such appointment); People *v.* Stowell, 9 Abb. N. Cas. 456.

Ohio.— State *v.* Miller, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732.

Virginia.— See Kirkham *v.* Russell, 76 Va. 956.

See also *supra*, V, B, 4, g.

council to change the result by changing his vote.[15] An appointment duly completed is beyond the power of recall.[16]

(IV) *Contests and Proceedings to Try Title*[17]—(A) *In General.* In the absence of any remedy prescribed by law,[18] the right to a municipal office can be determined only by quo warranto, or an information in the nature thereof.[19] Such right cannot be determined upon a bill for an injunction;[20] nor is a writ of certiorari the appropriate remedy, even though the appointee has not entered upon the office so as to be liable to an information in the nature of quo warranto.[21]

(B) *Collateral Attack.* It is a generally recognized doctrine that the right of a municipal incumbent to hold an office or the validity of his title cannot be attacked collaterally, although he be only an officer *de facto*.[22] Such question can be examined and determined only in a proceeding to which the officer is a party with the right to defend his title.[23]

(V) *Restraining Officer From Acting.* As a general rule a suit to restrain a claimant of a municipal office from attempting to exercise its powers and duties cannot be maintained, as the question of title to such office is involved, and can only be tried in an action of quo warranto;[24] but it has been held that an

Announcement not precluding second ballot. — Where the first ballot taken for the election of a city surveyor resulted in twenty-five ballots being cast, and it was then announced that there were more ballots than members voting, thirteen ballots being cast for relator and eleven for respondent, and one blank, it was held that such announcement was not an announcement of the election of relator, precluding the city council from taking a new ballot. State *v.* Starr, 78 Conn. 636, 63 Atl. 512.

15. State *v.* Miller, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732.

16. Atty.-Gen. *v.* Oerliss, 98 Mich. 372, 57 N. W. 410; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

17. **Jurisdiction of municipal councils** see Elections, 15 Cyc. 396.

Quo warranto to try title to office see Quo Warranto.

Statutory mode of contest held exclusive see Elections, 15 Cyc. 395 note 75.

18. *In re* Cleveland, 51 N. J. L. 319, 18 Atl. 67 [*affirmed* in 52 N. J. L. 188, 19 Atl. 17, 7 L. R. A. 431]; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

Under the Missouri constitution, the court of appeals is the court of last resort in a contest over the title to an office, not under the state. The mayor of a city is not such an office. Britton *v.* Steber, 62 Mo. 370.

The office of city notary of New Orleans not being created or recognized by its charter is not a municipal office, and the act of 1868, usually termed the "Intrusion Act," relating to state and municipal offices of a public nature, cannot be invoked in a contest between two such notaries for the position. State *v.* Castell, 22 La. Ann. 15.

19. *Iowa.*— Daniels *v.* Newbold, 125 Iowa 193, 100 N. W. 1119; Cochran *v.* McCleary, 22 Iowa 75.

Louisiana.— State *v.* Gastinel, 18 La. Ann. 517.

New York.— Mott *v.* Connolly, 50 Barb. 516.

North Carolina.— Ellison *v.* Raleigh, 89 N. C. 125.

Ohio.— State *v.* Kearns, 47 Ohio St. 566, 25 N. E. 1027.

See, generally, Quo Warranto.

The chief clerk in the office of the assessor of Detroit is not an "officer," although independent of his superior officer in the tenure of his position; and information in the nature of quo warranto will not lie to oust an incumbent. People *v.* Langdon, 40 Mich. 673.

20. Cochran *v.* McCleary, 22 Iowa 75.

21. Simon *v.* Hoboken, 52 N. J. L. 367, 19 Atl. 259; Haines *v.* Camden, 47 N. J. L. 454, 1 Atl. 515.

22. *Alabama.*— *Ex p.* Moore, 62 Ala. 471.

Louisiana.— Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; Schwartz *v.* Thirty-Two Flatboats, 14 La. Ann. 243.

Michigan.— Carlisle *v.* Saginaw, 84 Mich. 134, 47 N. W. 444.

New York.— People *v.* New York, etc., Bridge, 7 N. Y. Suppl. 806.

North Carolina.— State *v.* Thomas, 141 N. C. 791, 53 S. E. 522.

Texas.— Stubbs *v.* Galveston, 3 Tex. App. Civ. Cas. § 143.

See 36 Cent. Dig. tit. "Municipal Corporations," § 310. See, generally, Officers.

Application to a judge under the statute to compel the surrender of books and papers belonging to an appointive municipal officer is designed to be a summary proceeding, and the officer to whom it is made has no power to declare the question of the appointing and confirming power void for official corruption, especially where there is no clear proof of that fact. People *v.* Allen, 51 How. Pr. (N. Y.) 97.

23. *Ex p.* Moore, 62 Ala. 471; Mott *v.* Connolly, 50 Barb. (N. Y.) 516; Cornish *v.* Young, 1 Ashm. (Pa.) 153.

24. Cochran *v.* McCleary, 22 Iowa 75; Johnston *v.* Garside, 65 Hun (N. Y.) 208, 20 N. Y. Suppl. 327; Morris *v.* Whelan, 11 Abb.

injunction will issue to prevent an individual from using a false certificate of election.[25]

b. Vacancies — (i) *In General.* In the absence of any express provision the power of filling vacancies in appointive offices is in the original appointing power.[26] Frequently power is expressly conferred upon the mayor[27] or the city council[28] to fill vacancies in such offices. But while a regularly appointed and qualified officer continues in office, no power exists to appoint another.[29] Provision is usually made for filling vacancies in elective offices by election.[30] Where a considerable time will elapse before the next regular election at which such vacancy can be filled, a special election may be authorized,[31] or the vacancy may be filled by appointment until the next election and then by election.[32] Sometimes, however, vacancies in elective offices are authorized to be filled by the council upon nomination by the mayor.[33]

N. Cas. (N. Y.) 64; Updegraff *v.* Crans, 47 Pa. St. 103; Huels *v.* Hahn, 75 Wis. 468, 44 N. W. 507.

25. Reid *v.* Moulton, 51 Ala. 255; Miller *v.* Lowry, 5 Phila. (Pa.) 202.

26. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529; People *v.* Woodruff, 32 N. Y. 355, 29 How. Pr. 203 [*overruling* People *v.* Allen, 42 Barb. 203]; People *v.* Conover, 26 Barb. (N. Y.) 516 [*affirmed* in 17 N. Y. 64]; *In re* Philadelphia Mercantile Appraisers, 1 Pa. Dist. 64.

27. Watkins *v.* Mooney, 114 Ky. 646, 71 S. W. 622, 24 Ky. L. Rep. 1469; Bakely *v.* Nowrey, 68 N. J. L. 95, 52 Atl. 289.

28. Rittman *v.* Payne, 68 Ark. 338, 58 S. W. 350; Traynor *v.* Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 25 Ky. L. Rep. 283, 981; Com. *v.* McMellen, 4 Lanc. Bar (Pa.) Feb. 15, 1873; Kilpatrick *v.* Smith, 77 Va. 347.

President and board of trustees.— Under a statute providing that a vacancy in the office of treasurer, in villages, shall be filled by appointment of the president and board of trustees, the president has no greater power in such appointment than a trustee. Rowley *v.* People, 53 Ill. App. 298.

The office of city controller of Philadelphia is a county office which the governor and not the city councils may fill upon vacancy. Com. *v.* Oellers, 140 Pa. St. 457, 21 Atl. 1085; Taggart *v.* Com., 102 Pa. St. 354.

Election at adjourned meeting.— Where a regular meeting of a borough council is adjourned to a date fixed "for the purpose of closing up the old business of the council," an election may be held at the adjourned meeting to fill a vacancy. Com. *v.* Fleming, 23 Pa. Super. Ct. 404.

Official notification of vacancy.— The ordinances of Baltimore city providing that the council shall be officially notified of vacancies in offices within its appointment, which it shall thereupon fill, does not apply to appointments on the expiration of a term, which the council may make without receiving such notice. Hooper *v.* New, 85 Md. 565, 37 Atl. 424.

29. State *v.* Curry, 134 Ind. 133, 33 N. E. 685; State *v.* Pollner, 18 Ohio Cir. Ct. 304, 10 Ohio Cir. Dec. 141; McAllister *v.* Swan, 16 Utah 1, 50 Pac. 812.

Prospective appointment.—A common council, being constituted as it will be when a term of office about to expire shall end, and having authority to appoint the successor of the incumbent, may lawfully make appointment before the expiration of the current term. State *v.* Lane, 53 N. J. L. 275, 21 Atl. 302; State *v.* Catlin, 84 Tex. 48, 19 S. W. 302. But such body cannot appoint to an office which will become vacant at a time when it will be differently constituted. Dickinson *v.* Jersey City, 68 N. J. L. 99, 52 Atl. 278. Nor can an outgoing board fill an office that will not become vacant during the term of their own official life. Bownes *v.* Meehan, 45 N. J. L. 189.

30. Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345 (holding that where the charter of a municipality provides that a vacancy in the office of mayor shall be filled by election, the governor cannot legally fill such vacancy by appointment, in virtue of a general law authorizing him to fill vacancies in municipal offices); State *v.* Hamilton, 29 Nebr. 198, 45 N. W. 279; Com. *v.* Callen, 101 Pa. St. 375.

31. Sheridan *v.* St. Louis, 183 Mo. 25, 81 S. W. 1082; State *v.* Thomas, 102 Mo. 85, 14 S. W. 108.

32. Todd *v.* Johnson, 99 Ky. 548, 36 S. W. 987, 18 Ky. L. Rep. 354, 33 L. R. A. 399. See also Smith *v.* Doyle, 76 S. W. 519, 25 Ky. L. Rep. 958.

The policy of the law is to give the people a chance to fill a vacancy in an elective office as soon as practicable. Todd *v.* Johnson, 99 Ky. 548, 36 S. W. 987, 18 Ky. L. Rep. 354, 33 L. R. A. 399.

33. Fryer *v.* Norton, 67 N. J. L. 537, 52 Atl. 476 [*affirming* 67 N. J. L. 23, 50 Atl. 661].

The mayor has no power to fill a vacancy by his individual appointment, although the council is not in session. Brumby *v.* Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874. The fact that the mayor and board of aldermen might fail to agree upon the person to fill such a vacancy, and that the office would in consequence remain vacant, cannot operate to permit, on the ground of public policy or

(II) *What Constitutes.* In case of the death, removal, or resignation of an officer a vacancy occurs which may be filled in the usual way;[34] but the bare expiration of the term of an office does not create a vacancy, when the law declares that the incumbent must continue to discharge the duties of his office until his successor is elected and qualified.[35] So a vacancy exists where an officer fails to qualify within the time limited,[36] or where, by reason of any casualty, an office is without an incumbent.[37] The creation of new city wards entitled to aldermen may also be said to create vacant offices.[38]

5. Eligibility[39] — a. In General. To be eligible to office, one must possess such qualifications as may be prescribed by the constitutional and statutory provisions.[40] No qualifications, however, other than those imposed by constitution or statute are necessary.[41] Qualifications in addition to those prescribed by charter cannot be imposed by ordinance.[42] Where the constitution does not prescribe the qualifications of municipal officers the legislature may do so,[43] but statutory provisions as to eligibility and qualifications in contravention of constitutional provisions are void.[44]

b. Residence. In the absence of any constitutional or statutory provision prohibiting it, municipal officers may be elected from non-residents of the corporation,[45] or from those who have not been residents for a period sufficient to enable them to qualify as voters.[46] The rule is otherwise of course where there is an express statutory requirement that municipal officers must be residents of the corporation.[47] So in the absence of some constitutional or statutory requirement to that effect the officer need not continue his residence to hold his office, if a resident

necessity, an appointment by the mayor without the concurrence of the aldermen. Brumby *v.* Boyd, *supra.*

34. People *v.* Hammond, 66 Cal. 654, 6 Pac. 741.

35. People *v.* Hammond, 66 Cal. 654, 6 Pac. 741. *Contra,* State *v.* Thomas, 102 Mo. 85, 14 S. W. 108.

36. Beebe *v.* Robinson, 52 Ala. 66; Douglass *v.* Essex County, 38 N. J. L. 214; Vaughan *v.* Johnson, 77 Va. 300.

37. **Vacancy by rejection of nominee.**— The word "occur" in the charter of the city of Washington, providing that the mayor "shall appoint persons to fill up all vacancies, which may occur during the recess of the board of aldermen, to hold such appointment until the end of their ensuing session," referred to casualties not provided for by law, and not to a rejection by the board of aldermen of a nomination made by the mayor. Miller *v.* Washington, 17 Fed. Cas. No. 9,593*a*, 2 Hayw. & H. 241.

Failure to elect owing to a tie vote does not create a vacancy. State *v.* Ives, 167 Ind. 13, 78 N. E. 225.

38. Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679; State *v.* McMillan, 108 Mo. 153, 18 S. W. 784; *In re* Eleventh Ward Constable, 7 North. Co. Rep. (Pa.) 187.

39. **Eligibility of departmental officers** see *infra,* VII, B.

Eligibility of agents and employees see *infra,* VII, C, 2, a.

Eligibility of mayor for office of sheriff see SHERIFFS AND CONSTABLES.

40. People *v.* Ballhorn, 100 Ill. App. 571; Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796; State *v.* Bayonne, 35 N. J. L. 476.

41. State *v.* Swearingen, 12 Ga. 23; Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869; State *v.* Blanchard, 6 La. Ann. 515; Com. *v.* Corcoran, 9 Kulp (Pa.) 507.

42. Com. *v.* Willis, 42 S. W. 1118, 19 Ky. L. Rep. 962.

43. State *v.* Ruhe, 24 Nev. 251, 52 Pac. 274; State *v.* Von Baumback, 12 Wis. 310.

44. State *v.* Holman, 58 Minn. 219, 59 N. W. 1006; State *v.* Stevens, 29 Oreg. 464, 44 Pac. 898.

45. State *v.* George, 23 Fla. 585, 3 So. 81; State *v.* Swearingen, 12 Ga. 23; State *v.* Blanchard, 6 La. Ann. 515. See also Com. *v.* Jones, 12 Pa. St. 365; Com. *v.* Newhart, 7 Kulp (Pa.) 344. *Compare dictum* in People *v.* Ballhorn, 100 Ill. App. 571, to the effect that sound public policy requires that those who represent the local units of government shall themselves be component parts of such units, and this purpose can only be truly served by requiring such representatives to be and remain actual residents of the units which they represent, in contradistinction from constructive residents.

Statute held not to require residence.— The charter of the town of Flora, section 2, provided that the board of aldermen shall consist of two members from each ward, and by section 3 it was provided that no person should be elected alderman unless he shall have previously resided in the town for one year, etc. It was held that a residence in the ward for which he was elected was not a necessary qualification of one elected to the board of aldermen. Jones *v.* Mills, 11 Ill. App. 350.

46. State *v.* George, 23 Fla. 585, 3 So. 81.

47. Hill *v.* Anderson, 90 S. W. 1071, 28 Ky. L. Rep. 1032.

at date of election.[48] It is otherwise, however, where there is a charter provision that a municipal officer shall reside in the ward from which he is elected and that the office shall become vacant on the incumbent ceasing to be a resident thereof.[49] Where the constitution provides that every person entitled to vote at any election shall be eligible to any office elective by the people in the district where he resides, a statute providing that members at large of the assembly shall reside in specified parts of the city is void.[50] When so provided by the constitution a non-resident of the state cannot hold municipal office.[51] Municipal candidates are within a constitutional provision making any elector of thirty days' residence qualified for office in his ward or district.[52] And a statute providing that no person shall be eligible to the office of alderman, unless a resident of the ward where elected "for at least one year preceding such election," means one year next preceding the election.[53] Residence in an annexed territory for the statutory period immediately preceding annexation is equivalent to residence in the city.[54] In some cases "residence" has been held to be the equivalent of domicile.[55] Temporary absence for a transient object *animo revertendi* does not render one ineligible.[56]

c. Right to Vote. Some statutory provisions make it a requisite of eligibility to municipal office that one seeking such office shall be an elector.[57] A secretary of a town council is not within the general borough law requiring that electors only shall be eligible to be borough officers.[58] And an employee at will, although holding a responsible position, is not a municipal officer, required to be a registered voter.[59] Under a charter providing that all persons qualified to vote shall be eligible for any municipal office a qualified voter is eligible to the office of city attorney, although not admitted to practice as an attorney at law.[60]

d. Property. The legislature, when not restricted by any constitutional provision to the contrary, may impose a property qualification, on the right to hold municipal office.[61] The requirement that an officer shall be a freeholder is satisfied where the wife is the owner of an estate in fee, the husband having a freehold *jure uxoris*.[62] Where actual occupation of real estate of a certain value is required as a qualification it has been held sufficient that the candidate occupies land of the required value, as a copartner.[63] Ownership of property, even though purchased for the purpose of satisfying a statutory requirement as to ownership, will be sufficient,[64] and it is immaterial that the deed was not registered until after election.[65] If one owns property at the time of the election this will satisfy a requirement that he must at the time of the election be the owner of property assessed upon the last preceding assessment roll, even though the property be

48. Allard *v.* Charlebois, 14 Quebec Super. Ct. 310.

49. People *v.* Ballhorn, 100 Ill. App. 571.

50. State *v.* Holman, 58 Minn. 219, 59 N. W. 1006.

51. Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796.

52. State *v.* Holman, 58 Minn. 219, 59 N. W. 1006.

53. Dowty *v.* Pittwood, 23 Mont. 113, 57 Pac. 727.

54. Gibson *v.* Wood, 105 Ky. 740, 49 S. W. 768, 20 Ky. L. Rep. 1547, 43 L. R. A. 699.

55. People *v.* Platt, 117 N. Y. 159, 22 N. E. 937; Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743.

56. Daubmann *v.* Camden, 39 N. J. L. 57.

57. See Com. *v.* Lally, 10 Phila. (Pa.) 507 (holding that under a statute requiring qualified electors of a borough at the next election of borough officers, and annually thereafter, to elect one person as borough treasurer, the officers of such borough must be qualified electors of the borough); State *v.* McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446 (holding that under a charter, providing that the "legal voters in each ward shall annually elect one alderman . . . from among the legal voters therein, and shall also vote for Mayor and City Judge," an alderman, to be eligible for office, must be a legal voter of the ward for which he is elected).

58. Com. *v.* Newhart, 7 Kulp (Pa.) 344.

59. Baltimore *v.* Lyman, 92 Md. 591, 48 Atl. 145.

60. State *v.* Nichols, 83 Minn. 3, 85 N. W. 717.

61. State *v.* Ruhe, 24 Nev. 251, 52 Pac. 274.

62. State *v.* Russell, 1 Tenn. Ch. App. 554.

63. Reg. *v.* Mason, 28 Ont. 495.

64. Pettit *v.* Yewell, 113 Ky. 777, 68 S. W. 1075, 24 Ky. L. Rep. 565.

65. Pettit *v.* Yewell, 113 Ky. 777, 68 S. W. 1075, 24 Ky. L. Rep. 565.

assessed thereon as that of the former owner;[66] and under a statute which requires the mayor of a city to be a "taxpaying freeholder," a person who, at the time of his election, owned and paid taxes on personalty, and owned realty on which he was not liable for taxes for that year because acquired since the date of assessment, is eligible.[67]

e. Delinquency or Misconduct. A statute designating the payment of taxes as a necessary qualification of membership in the board of aldermen is not in conflict with a constitutional provision that no person except a qualified elector shall be elected to any office in the state.[68] Under a statute making payment of taxes a qualification for office-holding, it is sufficient if the candidate pays his taxes while the election is in progress,[69] and even after election but before induction into office.[70] The office of mayor is one of profit and trust under a statute making ineligible for office any person who is in default as collector and custodian of public money and property.[71] Under a statute rendering members of a council ineligible to succeed themselves or each other in case of an unauthorized increase of municipal indebtedness, the indebtedness meant is one created by contract or ordinance participated in or voted for by the members of the council whose eligibility is in question. One who voted against the indebtedness is not within the statute.[72] The electors of a city, the mayor of which has been ousted for official misconduct, cannot in a special election limit the effect or the enforcement of the judgment of ouster by electing the unfaithful officer for the remainder of the forfeited term.[73]

f. Conviction. Charter provisions disqualifying persons convicted of crime have been held not to include persons convicted in the federal court of an offense created by act of congress.[74] And one convicted of selling lottery tickets is not disqualified from holding office under a charter providing among other qualifications for a member of the municipal assembly that he shall not have been convicted of malfeasance in office, bribery, or other corrupt practices or crimes.[75] Expulsion from the council for disorderly conduct does not disqualify the expelled member from reëlection, there being nothing in the charter conferring power of expulsion, which makes expulsion operate as a disqualification to hold office.[76]

g. Holding Other Office or Employment. In the absence of any statutory or constitutional restrictions, one holding a municipal office is not for that reason ineligible for election or appointment to another municipal office.[77] And where the constitution does not prescribe the qualifications of municipal officers, nor declare who shall be eligible, the legislature may do so.[78] Where a constitutional

66. People *v.* Davis, 43 Misc. (N. Y.) 397, 89 N. Y. Suppl. 334. *Compare* Reg. *v.* Rose, 33 Can. L. J. N. S. 692, holding a final assessment roll conclusive as to the property qualification.

67. Mayer *v.* Sweeney, 22 Mont. 103, 55 Pac. 913.

68. Darrow *v.* People, 8 Colo. 417, 8 Pac. 661.

69. State *v.* Berkeley, 140 Mo. 184, 41 S. W. 732.

70. People *v.* Hamilton, 24 Ill. App. 609. *Contra*, State *v.* Page, 140 Mo. 501, 41 S. W. 963.

71. State *v.* Moores, 52 Nebr. 770, 73 N.W. 299.

"Default" explained.— The term "default," it seems, implies more than a mere civil liability. It is said that there must exist a wilful omission to account and pay over, with a corrupt intention, or such a flagrant disregard of duty as to fairly justify the inference that his conduct was wilful and corrupt. State *v.* Moores, 52 Nebr. 770, 73 N. W. 299.

72. State *v.* Cavett, 78 Miss. 851, 29 So. 853, holding further that the statute does not embrace involuntary obligations, such as judgments, charges fixed by law, such as salaries of officers, transfers of money from one fund to another, or expenditures of funds for a purpose other than that for which they were set aside.

73. State *v.* Rose, 74 Kan. 262, 86 Pac. 296, 6 L. R. A. N. S. 843.

74. Hildreth *v.* Heath, 1 Ill. App. 82.

75. State *v.* Bersch, 83 Mo. App. 657.

76. Tyrrell *v.* Jersey City, 25 N. J. L. 536.

77. Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869; Com. *v.* Corcoran, 9 Kulp (Pa.) 507.

78. State *v.* Von Baumbach, 12 Wis. 310.

Illustration.— In the absence of any constitutional provision on the subject the legislature may forbid the election of a council-

provision forbids the enactment of special laws in conflict with general statutes on the same subject, and declares void a statute passed in violation thereof, a special statute, in conflict with a general statute providing that certain municipal officers shall not hold more than one municipal office, is void.[79] Within constitutional or statutory prohibitions against holding two offices the following have been held officers: Health inspectors;[80] a member of the board of health;[81] deputy marshals;[82] the mayor of a town;[83] a superintendent of the bureau of water;[84] members of school-boards;[85] and a poor director of a district of which the city was a part.[86] The following have been held not to be officers within the rule: An employee at will, although his duties require skill and his functions are of high character;[87] a sergeant at arms to the council of the municipal assembly;[88] a night-watchman of a federal post-office building appointed by the treasury department;[89] one appointed to print the laws of the United States in his newspaper;[90] and a master commissioner is not a state officer within constitutional inhibition against holding state and municipal office at the same time.[91] So the office of councilman in a city, although a lucrative office in the ordinary sense of the words, has been held not a lucrative office within a constitutional provision that no person shall hold more than one lucrative office at the same time.[92] It has also been held that a mayor is not a councilman or alderman within a statute making them ineligible, during their term of office, to any other office;[93] and although required by charter to supervise municipal elections, he is not a commissioner of election, so as to render him ineligible for reëlection.[94] A mayor, however, is a judicial officer and therefore ineligible to any other judicial office.[95] A retired officer of the United States army who has not been assigned to any duty after retirement does not hold a federal office within the meaning of a statute providing that certain municipal officers shall hold no other federal, state, or municipal office.[96] If a person already holding an office is elected or appointed to another incompatible with the one which he holds, and he accepts and qualifies as to the second, such acceptance and qualification operate *ipso facto* as a resignation of the former office.[97]

man to any other municipal office. State *v.* Von Baumbach, 12 Wis. 310.

79. Jones *v.* McCaskell, 112 Ga. 453, 37 S. E. 724.

80. Brumby *v.* Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

81. State *v.* Wichgar, 27 Ohio Cir. Ct. 743.

82. Com. *v.* Ford, 5 Pa. St. 67.

83. Crovatt *v.* Mason, 101 Ga. 246, 28 S. E. 891, holding further that under an act which provides that "the mayor and aldermen shall hold their office for two years, or until their successors are elected and qualified," the term of such an officer is not reduced or changed by his resignation and the election of his successor before the expiration of two years from the beginning of such term, so as to remove his incompetency to hold another office during such term.

84. People *v.* Drake, 43 N. Y. App. Div. 325, 60 N. Y. Suppl. 309 [*affirmed* in 161 N. Y. 642, 57 N. E. 1122].

85. State *v.* McMillan, 15 Ohio Cir. Ct. 163, 8 Ohio Cir. Dec. 380; Com. *v.* Shoener, 1 Leg. Chron. (Pa.) 177.

86. Com. *v.* Bohan, 10 Kulp (Pa.) 80.

87. Olmstead *v.* New York, 42 N. Y. Super. Ct. 481.

88. Padden *v.* New York, 45 Misc. (N. Y.) 517, 92 N. Y. Suppl. 926.

89. Doyle *v.* Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

90. Com. *v.* Binns, 17 Serg. & R. (Pa.) 219.

91. Goodloe *v.* Fox, 96 Ky. 627, 29 S. W. 433, 16 Ky. L. Rep. 653.

92. State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239. See *supra*, V, B, 2, a, (I).

93. Akerman *v.* Ford, 116 Ga. 473, 42 S. E. 777.

In Canada it has been held that the mayor of a town, although the head of the council and chief executive officer of the corporation, is not a member of the council within the meaning of section 135 of the Municipal Institutions Act, so as to be eligible, if chosen, to hold the office of reeve; in other words, that the offices of mayor and reeve cannot in such case be holden by one and the same person. Reg. *v.* Haggart, 1 Can. L. J. N. S. 74.

94. Tyler *v.* Fant, (Miss. 1888), 3 So. 374.

95. Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

96. People *v.* Duane, 121 N. Y. 367, 24 N. E. 845.

97. Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869; Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782; People *v.* Duane, 121 N. Y. 367, 24 N. E. 845; People *v.* Drake, 43 N. Y.

h. Removal of Disability. Where the disability concerns the holding of the office, and is not merely a disqualification to be elected to an office, a person who is ineligible at the election will be entitled to enter upon and hold the office, if his disability be removed or cured before the issuance of the certificate, and before entering upon the discharge of the duties of the office for which he is elected.[98] This rule has been applied in the case of aliens,[99] and to persons who are in arrears for city taxes;[1] and it seems would be applicable to minors or persons who have not resided one year in the state.[2]

i. Civil Service Laws and Rules — (I) *Competitive Class* — (A) *In General.* Under the civil service laws and rules of several states, appointments and promotions are required to be made according to merit and fitness, to be ascertained so far as practicable by examination, which so far as practicable shall be competitive; provided, however, that honorably discharged soldiers from the army and navy of the United States in the late Civil war, who are citizens and residents of the state, shall be entitled to preference in appointment and promotion, without regard to the standing on any list from which such appointment or promotion may be made.[3] The examination should properly be for both merit and fitness, but where the character of the examination certified to be for merit only is such as to cover the field of both merit and fitness, and is so regarded by the civil service board, their action in doubling the rating in lieu of holding a separate examination for fitness has been held not to contravene the principle of competitive examination.[4] After the qualification of a candidate for office, the board should certify his name to be placed upon the eligible list,[5] but they have no power to certify that he is entitled to be appointed to the office.[6] Mandamus will lie against civil service commissioners to compel them to certify to the eligible list the name of a duly qualified applicant for office,[7] and also to replace a name which they have unlawfully removed therefrom.[8] The commissioners cannot arbitrarily strike the name of a qualified applicant for office from the eligible list;[9] nor can they annul their decision as to a person's eligibility for appointment to office without meeting as a body to determine the question.[10]

(B) *Promotions.* Under the New York civil service law, the commission has

App. Div. 325, 60 N. Y. Suppl. 309 [*affirmed* in 161 N. Y. 642, 57 N. E. 1122]; State *v.* Brinkerhoff, 66 Tex. 45, 17 S. W. 109.

98. State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622; Privett *v.* Bickford, 26 Kan. 52, 40 Am. Rep. 301; State *v.* Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489. And see Com. *v.* Jones, 12 Pa. St. 365.

99. State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622; State *v.* Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

1. State *v.* Berkeley, 140 Mo. 184, 41 S. W. 732, holding that where an election was in progress at the time a candidate paid his city taxes, and continued until the closing of the polls as provided by statute, the law will regard the fraction of a day, if necessary, to make such payment a compliance with the statutory requirement that no person shall be elected to office who shall at the time be in arrears for unpaid city taxes.

2. State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

3. See People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785; People *v.* Knauber, 43 N. Y. App. Div. 342, 60 N. Y. Suppl. 298 [*affirmed* in 163 N. Y. 23, 57 N. E. 161]; People *v.* Civil Service Com'rs, 20 Misc. (N. Y.) 217, 45 N. Y. Suppl. 46.

4. People *v.* Knauber, 163 N. Y. 23, 57 N. E. 161 [*affirming* 43 N. Y. App. Div. 342, 60 N. Y. Suppl. 298].

5. McNeill *v.* Chicago, 93 Ill. App. 124; People *v.* Knauber, 43 N. Y. App. Div. 342, 60 N. Y. Suppl. 298 [*affirmed* in 163 N. Y. 23, 57 N. E. 161].

6. People *v.* Knauber, 43 N. Y. App. Div. 342, 60 N. Y. Suppl. 298 [*affirmed* in 163 N. Y. 23, 57 N. E. 161], holding that the duty of the board is performed when they certify that the relator is qualified by both merit and fitness to be placed upon the eligible list, and when this is done the appointing power must assume the responsibility of making the appointment.

7. People *v.* Knauber, 163 N. Y. 23, 57 N. E. 161 [*affirming* 43 N. Y. App. Div. 342, 60 N. Y. Suppl. 298].

8. People *v.* Cobb, 13 N. Y. App. Div. 56, 43 N. Y. Suppl. 120.

9. People *v.* Cobb, 13 N. Y. App. Div. 56, 43 N. Y. Suppl. 120.

10. People *v.* Cobb, 13 N. Y. App. Div. 56, 43 N. Y. Suppl. 120.

power to require applicants for examination for promotion to have served a stated period in the next lower grade.[11] Such a rule is reasonable and proper,[12] and does not violate a constitutional provision that promotions in the civil service shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations,[13] or that promotions shall be based on merit and competition, as the section further provides that promotions shall be based on the superior qualifications of the person promoted as shown by his previous service.[14]

(c) *Limitation as to Age.* Honorably discharged soldiers and sailors are not disqualified from holding any position in the civil service on account of age, nor by reason of any disability, providing such disability does not render them incompetent to perform the duties of the position applied for.[15]

(ii) *Non-Competitive Class.* In the non-competitive class the appointing power may name or indicate to the civil service board the person whose appointment is desired, and, if the board finds that such person is qualified and fitted for such position, and so certifies, such appointment may then be made, and not until then.[16] An appointment made before certification by the board as to qualification and fitness is void.[17]

j. Miscellaneous. The office of treasurer of a municipality is not a "civil office in this state" within a constitutional provision excluding the clergy from civil office.[18] Having, as agent for an insurance company, contracts to insure municipal property does not disqualify from holding municipal office.[19]

6. Qualification and Commission[20] — a. In General. Qualification in this section is used, not with reference to the attributes and faculties necessary in a candidate for office, but to describe the post-election acts to be done by the successful candidate before assuming office, so that it may be alleged of him that he was duly elected and qualified.[21] These qualifying acts are prescribed by law, and if the statute is mandatory they are essential conditions precedent to the assumption and performance of official functions and the enjoyment of the privileges and emoluments pertaining to the office;[22] not so, however, if the statute is directory only.[23] These qualifying acts are almost invariably the taking of an official oath, and the giving of an official bond.[24] The failure of an officer elect to comply with these requirements within the time prescribed by law by express provision of some statutes operates as a waiver or surrender of right and title, and vacates the office,[25]

11. Matter of Ricketts, 111 N. Y. App. Div. 669, 98 N. Y. Suppl. 502.

12. Matter of Ricketts, 111 N. Y. App. Div. 669, 98 N. Y. Suppl. 502.

13. Matter of Ricketts, 111 N. Y. App. Div. 669, 98 N. Y. Suppl. 502.

14. Matter of Ricketts, 111 N. Y. App. Div. 669, 98 N. Y. Suppl. 502.

15. People *v.* French, 52 Hun (N. Y.) 464, 5 N. Y. Suppl. 712.

The civil service rule of the city of Buffalo requiring applicants for positions to be between twenty-one and sixty years of age, and declaring such rule applicable in all cases "except as far as the same shall be superseded by the provisions of the laws of the state of New York relating to the preference of honorably discharged soldiers and sailors," does not limit the appointment of soldiers and sailors to such as are within the designated age limit. People *v.* Civil Service Com'rs, 20 Misc. (N. Y.) 217, 45 N. Y. Suppl. 46.

16. People *v.* Ingham, 107 N. Y. App. Div. 41, 94 N. Y. Suppl. 733 [*affirmed* in 183 N. Y. 547, 76 N. E. 1102].

17. People *v.* Ingham, 107 N. Y. App. Div. 41, 94 N. Y. Suppl. 733 [*affirmed* in 183 N. Y. 547, 76 N. E. 1102].

18. State *v.* Wilmington City Council, 3 Harr. (Del.) 294.

19. Pinder *v.* Evans, 23 Quebec Super. Ct. 229.

20. **Qualification of departmental officers** see *infra*, VII, B.

21. See *infra*, VII, B, 6, a, b, c.

22. State *v.* Matheny, 7 Kan. 327; Douglass *v.* Essex County, 38 N. J. L. 214; Courser *v.* Powers, 34 Vt. 517, where it was held that a justice of the peace, sued for an arrest, could not justify unless he had taken the oath of office before the arrest, although he took it on the same day.

23. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Throop Public Officers, § 173, and numerous cases there cited.

24. Howell *v.* Com., 97 Pa. St. 332. And see *infra*, VII, B, 6, b, c.

25. Douglass *v.* Essex County, 38 N. J. L. 214; Vaughan *v.* Johnson, 77 Va. 300; Johnson *v.* Mann, 77 Va. 265. *Compare* State *v.* Porter, 7 Ind. 204.

and also forfeits all right to official salary or compensation.[26] But under others failure to qualify is at most only a ground of forfeiture in proceedings had for that purpose.[27] And the municipal authorities may waive the default and permit qualification after the expiration of the time fixed by statute therefor.[28] In case of a tie vote on the face of the returns the duty to qualify does not arise until the result of an election shall be finally determined in some mode provided by law; failure to qualify before such determination works no forfeiture and creates no vacancy.[29] So no forfeiture or vacancy ensues from the failure of others to perform their official duties in connection with the precedent acts to be performed by the candidate elect, if the officer elect has done what the law requires of him.[30]

b. Official Oath. The nature of the oath, and its scope and contents, together with the time, place, and officer to administer, are prescribed by statute; and the omission of any material part of the oath is fatal to the whole.[31] But defect in form or irregularity in mere formal matters are immaterial if there is substantial compliance with the statute.[32] Although municipal charters prescribe who may administer the oath of office to municipal officers, the title of an officer will not be invalidated because the oath was administered by some other officer having power to administer oaths.[33] By the express provisions of some statutes failure to take the oath[34] or to take it in the prescribed time[35] operates to create a vacancy. Under others failure to take the oath does not create a vacancy but at most only furnishes a ground for forfeiture, and a vacancy can only be created by a direct

The failure of a duly elected city revenue commissioner to take the prescribed anti-dueling oath leaves the office vacant. Branham *v.* Long, 78 Va. 352.

26. State *v.* Eshelby, 2 Ohio Cir. Ct. 468, 1 Ohio Cir. Dec. 592; Philadelphia *v.* Given, 60 Pa. St. 136.

27. Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405; Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Kriseler *v.* Le Valley, 122 Mich. 576, 81 N. W. 580; People *v.* Mt. Vernon, 59 Hun (N. Y.) 204, 13 N. Y. Suppl. 447 [*affirmed* in 128 N. Y. 657, 29 N. E. 148].

28. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182 [*reversing* 2 Ill. App. 332].

29. State *v.* Kraft, 20 Oreg. 28, 23 Pac. 663. See also Murdoch *v.* Strange, 99 Md. 89, 57 Atl. 628.

30. State *v.* Barnes, 51 Kan. 688, 33 Pac. 621; *In re* Fitzgerald, 82 N. Y. Suppl. 811; State *v.* Kraft, 20 Oreg. 28, 23 Pac. 663.

31. Hayter *v.* Benner, 67 N. J. L. 359, 52 Atl. 351; Halbeck *v.* New York, 10 Abb. Pr. (N. Y.) 439; Bohlman *v.* Green Bay, etc., R. Co., 40 Wis. 157.

Oaths held insufficient.—An oath "faithfully to discharge their duties" does not fulfil a prescribed form to discharge their duties "impartially, and to the best of their judgment." *In re* Cambria St., 75 Pa. St. 357. So under a statute requiring councilmen to take oath faithfully and impartially to discharge the duties of their office, an oath as follows, "I hereby accept the office . and obligate myself to perform the duties of such office required by the constitution and by-laws of said borough, to the best of my ability," not being in the form required, and not assuming obligation of statutory duties other than those of the borough constitution and by-laws, was insufficient. Hayter *v.* Benner, 67 N. J. L. 359, 52 Atl. 351.

Time of taking oath.—A statute providing that any person theretofore elected to any office in any borough who shall, prior to the commencement of his term of office, have taken and subscribed and filed his oath of office, shall be deemed to have fully and properly qualified as such officer, fully qualifies a mayor of a borough who has been elected and has taken his oath of office more than ten days after his election, even though Pub. Laws (1897), p. 285, requiring him to take his oath of office within ten days after his election be still in effect, and although the act of 1906 was passed after the commencement of proceedings to determine the right to the office. Atty.-Gen. *v.* Petty, 73 N. J. L. 333, 63 Atl. 911.

32. State *v.* Trenton, 35 N. J. L. 485 [*affirmed* in 36 N. J. L. 499]; Bassett *v.* Denn, 17 N. J. L. 432.

Application of rule.—Under a general statute requiring the invoice and assessment to be signed and sworn to by the selectmen and assessors, where the selectmen of a town, in making an assessment for taxes, have been sworn to faithfully discharge all the duties of their office, it is immaterial that they were not sworn as assessors. Odiorne *v.* Rand, 59 N. H. 504.

33. State *v.* Kennedy, 69 Conn. 220, 37 Atl. 503; Canniff *v.* New York, 4 E. D. Smith (N. Y.) 430; People *v.* Stowell, 9 Abb. N. Cas. (N. Y.) 456; *Ex p.* Heath, 3 Hill (N. Y.) 42. And see State *v.* Walthams, 64 Minn. 318, 67 N. W. 64.

For statute construed to authorize mayor to administer oath to city officers see Drew *v.* Morrill, 62 N. H. 23.

34. People *v.* Callaghan, 83 Ill. 128.

35. Douglass *v.* Essex County, 38 N. J. L.

proceeding for that purpose.[36] The refusal of the officer named therefor to administer the official oath, or his failure to certify, will not prejudice the officer elect, provided he has done or offered to do all the laws require of him to qualify.[37]

c. **Official Bond** — (I) *Necessity For Giving Bond and Approval Thereof.* In the absence of some statute requiring bond the giving thereof is not a prerequisite of qualification to office.[38] If required by statute or ordinance the execution of the official bond is commonly held to be a condition precedent to assuming office, and such bond must be approved by the prescribed authority;[39] and the default of the officer in giving it will prove fatal to his claim to the office and its emoluments.[40] Nevertheless if a sufficient bond is tendered by one chosen to office mere neglect or failure of the proper authority to approve it will not defeat his right to the office.[41] So there are some decisions in which the courts have held the statutes to be merely directory, and that failure to comply with the requirements does not vacate the office but is merely ground for forfeiture, and that the municipal authorities may waive the default and permit qualification after expiration of the time fixed.[42] And under a statute providing that a village council may declare an office vacant for failure to give a bond, an office is not vacated by such failure until action by the council.[43]

(II) *Grounds For Refusal to Approve.* It is no ground to refuse approval of a bond tendered by one appointed to office by the mayor that the latter attempted to recall the appointment and appoint another. An appointment once made by the mayor is beyond his power to recall.[44] Nor can the council refuse to approve the bond on the ground that it may prejudice the rights of the one occupying the office without his being heard, as any rights of his will be considered in quo warranto proceedings.[45] So the fact that the person attempted to be appointed city counselor by the mayor, after he had already appointed a person to the office, is occupying the position of city counselor, furnishes no ground for the council's refusal to approve the bond of the person first appointed.[46] And it has also been held that it is no ground to refuse approval of a bond that a contest of the election is pending.[47]

(III) *Requisites and Sufficiency of Bond and Approval.* When the terms and conditions of the bond have been fixed by statutory or charter provision, the municipality cannot add others thereto, and the statutory bond is sufficient;[48] but it is necessary for the bond to comply with such requirements.[49]

214 (statute held to apply to chosen freeholders); Branham *v.* Long, 78 Va. 352.

36. People *v.* Mt. Vernon, 59 Hun (N. Y.) 204, 13 N. Y. Suppl. 447.

37. *In re* Fitzgerald, 82 N. Y. Suppl. 811; State *v.* Kraft, 20 Oreg. 28, 23 Pac. 663. The officer who is required to administer the oath cannot lawfully refuse to do so on account of the ineligibility of the person appointed. People *v.* Dean, 3 Wend. (N. Y.) 438.

38. See Quimby *v.* Wood, 19 R. I. 571, 35 Atl. 149.

39. Lynam *v.* Com., (Ky. 1900) 55 S. W. 686; De Lacey *v.* Brooklyn, 12 N. Y. Suppl. 540; Howell *v.* Com., 97 Pa. St. 332; Wyoming *v.* Wilkesbarre, etc., R. Co., 8 Kulp (Pa.) 113.

For statute held to give city council right to require bond see Somerville *v.* Wood, 129 Ala. 369, 30 So. 280; Natchitoches *v.* Redmond, 28 La. Ann. 274.

40. Philadelphia *v.* Given, 60 Pa. St. 136.

41. State *v.* Barnes, 51 Kan. 688, 33 Pac. 621. See also *In re* Fitzgerald, 82 N. Y. Suppl. 811 [*affirmed* in 88 N. Y. App. Div. 434, 84 N. Y. Suppl. 1125].

42. Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405; Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182.

43. Kriseler *v.* Le Valley, 122 Mich. 576, 81 N. W. 580.

44. Atty.-Gen. *v.* Corliss, 98 Mich. 372, 57 N. W. 410; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

45. Atty.-Gen. *v.* Corliss, 98 Mich. 372, 57 N. W. 410; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

46. Atty.-Gen. *v.* Corliss, 98 Mich. 372, 57 N. W. 410; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

47. Com. *v.* City, 15 Pittsb. Leg. J. (Pa.) 337.

48. Com. *v.* Chittenden, 13 Pa. Co. Ct. 362, 2 Pa. Dist. 804, holding that under a statute providing that the city solicitor's bond is a lawful bond with two or more sufficient sureties to be approved by the councils, an ordinance requiring a judgment bond is invalid.

49. Hecht *v.* Coale, 93 Md. 692, 49 Atl.

Although an ordinance provides that sureties on the bond of an officer shall be responsible for fines imposed against him, this is merely declaratory of the legal effect of the bond, which need not be so conditioned, the charter prescribing its form, not requiring it.[50] Validity of a bond given by the officer of a city subsequently consolidated with another, whose charter continues the office, is not impaired by the fact that the bond was given before the date when the charter took effect, the breach arising after such date.[51] Acknowledgment of the bond is not essential to its validity,[52] and the mere failure of the sureties to justify is not sufficient to invalidate the bond or work a forfeiture of the office.[53] Where the names of the sureties are written in the body of the bond and they signed the justification attached thereto, followed by the official oath of the officer, although they did not sign on the blank lines for that purpose at the end of the stipulations and conditions, the bond is valid.[54] And where a charter provides that the bond "shall be approved by the mayor and common council," and also that the mayor and aldermen shall constitute the common council, the bond must be approved by the mayor independently of the common council, and approval by the council does not include approval by the mayor, although he was a part of it.[55] Approval of a bond by a justice of the supreme court does not satisfy a requirement that before filing the bond the city clerk shall indorse and certify thereon "the resolution of the common council approving the same."[56] The doctrine of estoppel, as applied to official bonds, often cures irregularities and informalities of all kinds, and holds sureties liable whenever, on faith of their bond, their principal has assumed office, and performed its functions, and defaulted in duty.[57]

d. Commission. While it is the fact of due election or appointment and qualification that entitles one to office, the inducting officer may require production of a commission or due certificate as the best proof of these facts.[58] But, after the officer has been inducted into and assumed his office, neither himself, his sureties, nor any other person can challenge his official right, title, or liability for want or informality of commission.[59] It is not essential that a written appointment to office should use the word "appoint." Either of the words, "nominate," "select," "designate" or "choose," may answer the same purpose, if used in the sense of "appoint."[60]

7. De Facto Officers. An officer *de facto* is one who exercises the duties of an office under color of an appointment or election to that office,[61] or who has acted as such with the acquiescence of the public for a sufficient length of time to permit the presumption of an election or appointment, which presumption arises from the reputation he thus acquires as an officer from such acts, and the

660, holding that a bond by a city treasurer conditioned to give an account, on the expiration of his office, of all moneys coming into his hands, and to pay all balances to his successor, is not a sufficient compliance with an ordinance requiring such treasurer, before entering upon his official duties, to file a bond conditioned that he will faithfully perform all his official duties. And see Philipsburg *v.* Degenhart, 30 Mont. 299, 76 Pac. 694.

50. Houston *v.* Fraser, (Tex. Civ. App. 1904) 80 S. W. 1198; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.

51. Fohs *v.* Rain, 39 Misc. (N. Y.) 316, 79 N. Y. Suppl. 872.

52. People *v.* Pace, 57 Ill. App. 674.

53. State *v.* Barnes, 51 Kan. 688, 33 Pac. 621.

54. Tumwater *v.* Hardt, 28 Wash. 684, 69 Pac. 378, 92 Am. St. Rep. 901.

55. North *v.* Cary, 4 Thomps. & C. (N. Y.) 357.

56. De Lacey *v.* Brooklyn, 12 N. Y. Suppl. 540.

57. Oakland *v.* Snow, 145 Cal. 419, 78 Pac. 1060; People *v.* Pace, 57 Ill. App. 674. And see as sustaining this view Middleton *v.* State, 120 Ind. 166, 22 N. E. 123; Mt. Vernon *v.* Kenlon, 97 N. Y. App. Div. 191, 89 N. Y. Suppl. 817.

58. People *v.* Willard, 44 Hun (N. Y.) 580. And see People *v.* Keller, 30 Misc. (N. Y.) 52, 61 N. Y. Suppl. 746.

59. Souhegan Nail, etc., Factory *v.* McConihe, 7 N. H. 309.

60. People *v.* Fitzsimmons, 68 N. Y. 514.

61. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143; Rice *v.* Com., 3 Bush (Ky.) 14; People *v.* Albertson, 8 How.

acquiescence of the public therein.[62] There must, however, be a *de jure* office to be filled before there can be a *de facto* office.[63] He differs from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office.[64] A mere usurper or intruder is not an officer *de facto*.[65] He lacks the color of title and the public reputation and acquiescence essential to a *de facto* officer,[66] and his actions are always subject to collateral attack.[67] The acts of officers *de facto* in regard to public matters affecting the public interests are to be regarded as valid and binding; as much so as if the same acts had been performed in the same manner by an officer *de jure*.[68] Offices are created for the benefit of the public,

Pr. (N. Y.) 363; Trenton *v.* McDaniel, 52 N. C. 107.

62. State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Hand *v.* Deady, 79 Hun (N. Y.) 75, 29 N. Y. Suppl. 633.

De facto officers generally see OFFICERS.

63. People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203.

Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached. Decorah *v.* Bullis, 25 Iowa 12; Weesner *v.* Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319. See, generally, OFFICERS.

64. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

65. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129; Keeler *v.* New Bern, 61 N. C. 505.

One assuming to perform the duties incident to a public office without attempting to qualify is without color of title and an usurper. Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143. And see, generally, OFFICERS.

Attempt to fill non-existing vacancy.— Where less than a quorum of a city council attempted to fill a supposed vacancy in the council when none in fact existed, their appointee was not a *de facto* officer, although he qualified and acted as councilman. Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129.

66. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; Han *v.* Deady, 79 Hun (N. Y.) 75, 29 N. Y. Suppl. 633; Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412 [*affirmed* in 142 N. Y. 665, 37 N. E. 570]; Brumby *v.* Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

67. People *v.* Albertson, 8 How. Pr. (N. Y.) 363.

68. *Alabama.*— Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61; *Ex p.* Moore, 62 Ala. 471; Lockhart *v.* Troy, 48 Ala. 579.

California.— People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203.

Connecticut.— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Trinity College *v.* Hartford, 32 Conn. 452.

Georgia.— Hawkins *v.* Jonesboro, 63 Ga. 527.

Indiana.— State *v.* Frentress, 37 Ind. App. 245, 76 N. E. 821.

Iowa.— Cochran *v.* McCleary, 22 Iowa 75.

Kentucky.— Rice *v.* Com., 3 Bush 14; Yancy *v.* Fairview, 66 S. W. 636, 23 Ky. L. Rep. 2087.

Maryland.— Koontz *v.* Hancock, 64 Md. 134, 20 Atl. 1039.

Mississippi.—Greene *v.* Rienzi, 87 Miss. 463, 40 So. 17, 112 Am. St. Rep. 449.

Missouri.— Hilgert *v.* Barber Asphalt Paving Co., 107 Mo. App. 385, 81 S. W. 496; Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

Nebraska.— State *v.* Gray, 23 Nebr. 365, 36 N. W. 577.

New Jersey.—Long *v.* Bayonne, 73 N. J. L. 109, 62 Atl. 270.

New York.— People *v.* Lister, 106 N. Y. App. Div. 61, 93 N. Y. Suppl. 830; Canaseraga *v.* Green, 88 N. Y. Suppl. 539; People *v.* Albertson, 8 How. Pr. 363.

North Carolina.— Trenton *v.* McDaniel, 52 N. C. 107.

Ohio.— Scovill *v.* Cleveland, 1 Ohio St. 126.

Rhode Island.— Murphy *v.* Moies, 18 R. I. 100, 25 Atl. 977.

Texas.— Nalle *v.* Austin, (Civ. App. 1906) 93 S. W. 141; State *v.* Hoff, (Civ. App. 1895) 29 S. W. 672.

Virginia.— Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

Wisconsin.— Dean *v.* Gleason, 16 Wis. 1.

United States.— Lampasas *v.* Talcott, 94 Fed. 457, 36 C. C. A. 318.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 324–325.

Power to sign ordinance.— Under the act of March 7, 1901 (Pub. Laws 20), abolishing the office of mayor of Pittsburg, and substituting in its place the office of recorder, where the mayor holds over until the recorder takes his place he has the power as *de facto* mayor to sign ordinances. Keeling *v.* Pittsburg, etc., R. Co., 205 Pa. St. 31, 54 Atl. 485.

Assessment for fire protection.— Under N. Y. Village Law (Laws (1897), pp. 377, 386, c. 414), §§ 43, 68, declaring that the board of water commissioners shall be appointed by the board of trustees, and that all offices, except certain specified ones, not including water commissioner, shall be appointive, a water commissioner verbally appointed by the board of trustees is an officer *de facto* for the purpose of making an assessment for

and private parties are not permitted to inquire into the titles of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions.[69] For the good order and peace of society their authority is to be respected and obeyed, until in some regular mode prescribed by law their title is investigated and determined.[70] Within these general rules the following have been held officers *de facto*: Councilmen irregularly elected by call of the sheriff instead of by their predecessors;[71] persons not possessing the qualifications to hold office who have been elected and have qualified as officers;[72] acting officers who have taken no oath and filed no bond,[73] or who were not freeholders as required by law and had not taken the oath;[74] officers holding over whose terms have expired;[75] officers continuing to act after moving beyond the corporate limits;[76] officers whose offices have been vacated by reason of the section in which they reside being detached from the village;[77] officers of a city under military government;[78] an officer elected by *de facto* aldermen;[79] officers elected by illegal votes;[80] and one erroneously counted into an office and holding the same.[81]

8. Deputies and Assistants. Where the charter so provides, the appointment of deputy officers cannot be made without the consent of the city council.[82] And a charter providing that the city attorney "shall receive such compensation as the city council by ordinance or the order of appointment shall allow" and authorizing it "to audit and allow all just claims against the city, and direct the payment of such as are allowed" does not authorize the enactment of ordinances authorizing the city attorney "to appoint as many assistant attorneys as the mayor may deem necessary."[83] The duties of deputies are coextensive with the duties of their principals and their official acts as valid in all respects as the acts of the principals when appointed in accordance with charter provisions authorizing it.[84] A deputy tax commissioner does not hold a confidential relation to the tax commissioner and is not a "deputy" within the meaning of a statute prohibiting the removal except for cause after a hearing of a veteran soldier holding an appointive position in a city, provided this shall not apply to the position of "private secretary" or chief clerk or deputy of any official of department or to any other person holding a confidential relation to the appointing officer.[85] A statute providing that every officer who shall receive any money to be paid over to the city shall, before he shall be entitled to receive any salary, make a return to the controller showing the amount thereof, has been held

fire protection under section 230 (page 435), as amended by Laws (1902), p. 1628, c. 591. Canaseraga *v.* Green, 88 N. Y. Suppl. 539.

Enjoining exercise of functions.— *De facto* officers cannot be enjoined from performing the duties of their offices merely because they are such; it must also appear that they are abusing or about to abuse their possession of official power to the public injury, and that the public will sustain no damage by the suspension for an indefinite time of all city government State *v.* Wolfenden, 74 N. C. 103.

69. People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203; Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679; Cochran *v.* McCleary, 22 Iowa 75.

70. People *v.* White, 24 Wend. (N. Y.) 520; Kirker *v.* Cincinnati, 48 Ohio St. 507, 27 N. E. 898.

71. Butler *v.* Walker, 98 Ala. 358, 13 So. 261, 39 Am. St. Rep. 61.

72. People *v.* Hecht, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203.

73. Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

74. Trinity College *v.* Hartford, 32 Conn. 452.

75. Hale *v.* Bischoff, 53 Kan. 301, 36 Pac. 752; Canaseraga *v.* Green, 88 N. Y. Suppl. 539; Keeling *v.* Pittsburg, etc., R. Co., 205 Pa. St. 31, 54 Atl. 485. See also Nalle *v.* Austin, (Tex. Civ. App. 1906) 93 S. W. 141.

76. Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

77. People *v.* Highland Park, 88 Mich. 653, 50 N. W. 660.

78. Ensley *v.* Nashville, 2 Baxt. (Tenn.) 144.

79. People *v.* Stevens, 5 Hill (N. Y.) 616.

80. Hawkins *v.* Jonesboro, 63 Ga. 527.

81. Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

82. Humphreys *v.* Stevens, 49 Ind. 491.

83. Huron *v.* Campbell, 3 S. D. 309, 53 N. W. 182.

84. Tower *v.* Welker, 93 Mich. 332, 53 N. W. 527.

85. People *v.* Barker, 14 Misc. (N. Y.) 360, 35 N. Y. Suppl. 727.

to apply only to the officers themselves and not to their assistants and subordinates.[86]

9. Term of Office[87] — **a. Definition.** "Term of office" is a phrase used to describe the period of time during which one regularly chosen by election or appointment and inducted into an office is entitled to hold the same, perform its functions, and enjoy its privileges and emoluments.[88]

b. Commencement of Term. The time when a term of office commences is usually fixed by law.[89] When no date for beginning a term of office is fixed by law, the term usually begins on the day of appointment.[90] But when the appointee or person elected is allowed a designated time wherein to qualify by oath or bond, or both, the term begins from the date of qualification.[91] Statutes fixing the time of commencement of a term in contravention of constitutional provisions are of course void.[92]

c. Duration — (1) *In General.* While the phrase "term of office" is usually understood to apply to a fixed and certain term established by law for the performance of certain official duties,[93] it may also be used with reference to a period uncertain in its duration depending upon the performance of the duties prescribed, or upon the favor of the appointing power.[94] The duration of the term may be fixed by the constitution.[95] If not so fixed, then it may be prescribed by

86. Gale *v.* New York, 8 Hun (N. Y.) 370.

87. Term of office as city constables see Sheriffs and Constables.

Term of office of departmental officers see *infra*, VII, B.

88. Smith Mun. Corp. § 166.

89. State *v.* Jonas, 27 La. Ann. 179. And see Bakely *v.* Nowrey, 68 N. J. L. 95, 52 Atl. 289.

90. Hale *v.* Bischoff, 53 Kan. 301, 36 Pac. 752; Haight *v.* Love, 39 N. J. L. 476, 23 Am. Rep. 234.

91. People *v.* Callaghan, 83 Ill. 128.

92. People *v.* Fitzgerald, 180 N. Y. 269, 73 N. E. 55, 34 N. Y. Civ. Proc. 56 [*affirming* 96 N. Y. App. Div. 242, 89 N. Y. Suppl. 268], holding that Laws (1901), p. 42, c. 466, § 94, providing that the term of an incoming mayor of the city of New York shall commence at noon on the first day of January after his election is void under Const. art. 12, § 3, providing that the terms of mayors of cities except of the third class shall expire at the end of an odd-numbered year.

93. Speed *v.* Crawford, 3 Metc. (Ky.) 207; Gibbs *v.* Morgan, 39 N. J. Eq. 126; People *v.* Lacombe, 99 N. Y. 43, 1 N. E. 599; Somers *v.* State, 5 S. D. 321, 58 N. W. 804. See also Prince *v.* Lynn, 149 Mass. 193, 21 N. E. 296; Chase *v.* Lowell, 7 Gray (Mass.) 33; People *v.* Breen, 53 N. Y. Super. Ct. 167.

94. See State *v.* Alt, 26 Mo. App. 673.

95. McDermott *v.* Louisville, 98 Ky. 50, 32 S. W. 264, 17 Ky. L. Rep. 617; Lexington *v.* Wilson, 97 Ky. 707, 31 S. W. 471, 17 Ky. L. Rep. 435.

California — Who are officers within constitution.— The commissioners appointed under the act to fund the floating debt of the city of San Francisco, and to provide for the payment of the same, are not officers, within the meaning of Const. art. 11, § 7, which provides that no officer shall hold office for more than four years. People *v.* Middleton, 28 Cal. 603. The provisions of Const. art. 22, § 10, that the term of all officers elected at the first election, under the constitution, shall be one year shorter than the regular term, etc., refer only to the officers mentioned in section 20 of article 20, "as provided for by this Constitution," and not to municipal or county officers. Barton *v.* Kalloch, 56 Cal. 95.

Kentucky.— Const. § 160, providing that when certain city officers, including treasurer, assessor, and civil engineer, shall be appointed or elected as the general assembly may by a general law provide, their term of office shall be four years, and until their successors are appointed, does not apply to officers elected under a city charter before the passage of any general law regarding the election of such officers. Lexington *v.* Wilson, 97 Ky. 707, 31 S. W. 471, 17 Ky. L. Rep. 435. Under Const. § 167, providing that city officers shall be elected as provided in their charters, until the general election in 1893, and until their successors shall be qualified, at which time the terms of all such officers shall expire, and at that election all officers shall be elected, etc., the term of a mayor elected in October, 1892, expired at the general election in November, 1893. Jones *v.* Wilshire, 98 Ky. 391, 33 S. W. 199, 17 Ky. L. Rep. 989 [*following* Johnson *v.* Wilson, 95 Ky. 415, 25 S. W. 1057, 15 Ky. L. Rep. 852].

Appointment during good behavior.—A provision of a city charter placing the police and fire departments under a civil service commission, and declaring that the appointees thereof shall hold their positions during good behavior, is not invalid as violative of a constitutional provision declaring that the duration of offices not fixed by the constitution shall never exceed two years; the provision meaning that the appointee shall hold office during good be-

the legislature, either in the charter or by general law,[96] or authority to prescribe it may be expressly or impliedly delegated to the municipality.[97] But a municipality cannot by ordinance fix a term for an office that has been placed by the legislature at the pleasure of the appointing power.[98] If no definite term be fixed, the office is held at the will of the authority which conferred it,[99] provided the term so conferred does not extend beyond that of the appointing power.[1]

(II) *Curtailing Future Power of Appointment.* Except where the legislature has committed to the city the power to pass ordinances regulative of the office in question,[2] a municipal body in which the appointing power is lodged cannot, by appointing for a specific term, create a condition that curtails the power of appointment otherwise possessed by its successors.[3]

d. Filling Vacancies. Charter provisions relating to the filling of vacancies which are in contravention of constitutional provisions are void and inoperative.[4]

havior, not exceeding the constitutional limit. Callaghan *v.* McGowan, (Tex. Civ. App. 1905) 90 S. W. 319. *Contra*, Neumeyer *v.* Krakel, 110 Ky. 624, 62 S. W. 518, 23 Ky. L. Rep. 190.

96. *Georgia.*— Collins *v.* Russell, 107 Ga. 423, 33 S. E. 444.

Indiana.— Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858.

Iowa.— Sherman *v.* Des Moines, 100 Iowa 88, 69 N. W. 410.

Michigan.— Atty.-Gen. *v.* Shekell, 138 Mich. 287, 101 N. W. 525.

New Jersey.— Vreeland *v.* Pierson, 70 N. J. L. 508, 57 Atl. 151; *In re* Passaic Sewer Assessment, 54 N. J. L. 156, 23 Atl. 517.

New York.— Abrams *v.* Horton, 18 N. Y. App. Div. 208, 45 N. Y. Suppl. 887.

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

Texas.— Staufield *v.* State, 83 Tex. 317, 18 S. W. 577.

Wisconsin.— State *v.* McKone, 95 Wis. 216, 70 N. W. 164.

See 36 Cent. Dig. tit. "Municipal Corporations," § 328.

Elective and appointive offices.— Under statutes providing for a different tenure of office for elective and appointive officers, the word "appointment" generally means the designation of a person to hold an office by an individual, or a limited number of individuals to whom the power of selection has been delegated, while the word "election" is properly applied to the choice of an officer by the votes of those upon whom the law has conferred the right of electing such officer. Under this rule the choice of an officer by the common council is an election. State *v.* Brady, 42 Ohio St. 504; State *v.* Squire, 39 Ohio St. 197.

A provision for biennnial appointment does not necessarily fix a term of two years. People *v.* Tremain, 68 N. Y. 628; People *v.* Kilbourn, 68 N. Y. 479.

Change by adoption of constitutional provision.— The length of the term or time of its commencement when established by the legislature may be repealed by the adoption of a constitutional provision providing otherwise. McMurray *v.* Hollis, 5 Wash. 458, 32 Pac. 293.

97. People *v.* Blair, 82 Ill. App. 570; Field *v.* Malster, 88 Md. 691, 41 Atl. 1087.

During good behavior.— Under such a statute, the municipality may fix the term of office during good behavior. Cleary *v.* Trenton, 50 N. J. L. 331, 13 Atl. 228.

A city may establish by ordinance the term of office for those of its officers whose terms are not fixed by law. State *v.* Wimpfheimer, 69 N. H. 166, 38 Atl. 786.

98. Uffert *v.* Vogt, 65 N. J. L. 621, 48 Atl. 574 [*affirming* 65 N. J. L. 377, 47 Atl. 225].

99. *Missouri.*— State *v.* Alt, 26 Mo. App. 673.

New Jersey.— Gilhooly *v.* Hudson County, (Sup. 1899) 43 Atl. 569.

Pennsylvania.— Field *v.* Girard College, 54 Pa. St. 233.

South Dakota.— Somers *v.* State, 5 S. D. 321, 58 N. W. 804.

Tennessee.— State *v.* Williford, 104 Tenn. 694, 58 S. W. 295.

West Virginia.— Hunter *v.* Berkeley Springs, 47 W. Va. 343, 34 S. E. 729.

See 36 Cent. Dig. tit. "Municipal Corporations," § 328.

1. Augusta *v.* Ramsey, 43 Ga. 140; Egan *v.* St. Paul, 57 Minn. 1, 58 N. W. 267; Richmond Mayoralty Case, 19 Gratt. (Va.) 673. See also *infra*, next section.

2. Bohan *v.* Weehawken Tp., 65 N. J. L. 490, 47 Atl. 446; Bradshaw *v.* Camden, 39 N. J. L. 416.

3. Peal *v.* Newark, 66 N. J. L. 265, 49 Atl. 468; Mathis *v.* Rose, 64 N. J. L. 45, 44 Atl. 875; State *v.* Lane, 53 N. J. L. 275, 21 Atl. 302; Adams *v.* Haines, 48 N. J. L. 25, 8 Atl. 723; Greene *v.* Hudson County, 44 N. J. L. 388. *Compare* Anderson *v.* Camden, 58 N. J. L. 515, 33 Atl. 846.

4. People *v.* Erie County, 42 N. Y. App. Div. 510, 59 N. Y. Suppl. 476 [*affirming* 26 Misc. 233, 56 N. Y. Suppl. 318], holding that a charter provision that the term of office of a ward supervisor elected by the common council to fill a vacancy shall continue until the next 31st day of December of an odd-numbered year, violates Const. art. 10, § 5, providing that "in case of elective officers

The formalities required by statute for filling vacancies must be strictly complied with.[5] And an election to fill a supposed vacancy is of course of no effect where no vacancy exists.[6] Where a statute provides that all vacancies in the office of councilman shall be filled by appointment by the common council, when a new ward is created, the common council has power to fill the vacancies thereby made in the common council.[7] As a general rule one appointed to fill a vacant office holds only until the expiration of the regular term.[8] And if by mistake of law he is elected before this unexpired term for a full term, he can hold only for the unexpired term for which he is appointed.[9] Where, by constitution or statute, the officer appointed *ad interim* holds only till the next municipal election, the vacancy is filled by election for the rest of the regular term.[10] But an *ad interim* appointee holds until a lawful election, and cannot be displaced by a second appointee.[11] Under a statute providing that an officer shall hold over after the expiration of his term until his successor shall be chosen and qualified, but after the expiration of his term the office shall be vacant for the purpose of choosing his successor, where there is a failure, in an annual village election, to elect a trustee for a ward, a new election must be had for that purpose.[12] Under a constitutional provision that in case of elective officers no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy, the term of a ward supervisor elected by a common council to fill a vacancy expires on the first of January next succeeding the first annual election after the happening of the vacancy.[13] Where an election held to fill a vacancy is void, one previously appointed to fill the vacancy continues to hold under that appointment, although he was voted for at the void election and declared elected.[14] Where a mayor mistakenly supposing that he has

no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy."

Statutes held to confer power on council to create and fill vacancy see Atty.-Gen. *v.* Remick, 73 N. H. 25, 58 Atl. 871, 111 Am. St. Rep. 594; Koster *v.* Coyne, 110 N. Y. App. Div. 742, 97 N. Y. Suppl. 433 [*affirmed* in 184 N. Y. 494, 77 N. E. 983].

5. Armstrong *v.* Whitehead, 67 N. J. L. 405, 51 Atl. 472, holding that under the Revised Borough Act (Pamphl. Laws (1897), p. 285, §§ 3, 23, 26), the appointment of one to the office of common councilman to fill a vacancy requires not only a nomination by the mayor, but the affirmative vote of a majority of the whole council, the mayor having no vote thereon except to give a casting vote in case of a tie.

6. State *v.* Campbell, 25 La. Ann. 340. And see Wright *v.* Jacobs, 12 Okla. 138, 70 Pac. 193.

7. Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679.

8. *Florida.*— State *v.* Philips, 30 Fla. 579, 11 So. 922.

Indiana.— Carson *v.* State, 145 Ind. 348, 44 N. E. 360; Parcel *v.* State, 110 Ind. 122, 11 N. E. 4; Parmater *v.* State, 102 Ind. 90, 3 N. E. 382; State *v.* La Porte, 28 Ind. 248.

Kansas.— Hale *v.* Bischoff, 53 Kan. 301, 36 Pac. 752.

Kentucky.— Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721; Hoke *v.* Richie, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132, 18 Ky. L. Rep. 546.

Maine.— French *v.* Cowan, 79 Me. 426, 10 Atl. 335; *In re* Opinion of Justices, 50 Me. 607.

Missouri.— State *v.* Stonestreet, 99 Mo. 361, 12 S. W. 895; State *v.* Pearcy, 44 Mo. 159.

Nebraska.— State *v.* Moores, 56 Nebr. 1, 76 N. W. 503.

Ohio.— State *v.* Spiedel, 62 Ohio St. 156, 56 N. E. 871; State *v.* Muskingum County, 7 Ohio St. 125.

Pennsylvania.— *In re* Philadelphia Mercantile Appraisers, 1 Pa. Dist. 64; Com. *v.* Jackson, 16 Pa. Co. Ct. 561.

Utah.— People *v.* Hardy, 8 Utah 68, 29 Pac. 1118.

Wisconsin.— State *v.* Hadley, 7 Wis. 700.

See 36 Cent. Dig. tit. "Municipal Corporations," § 329.

9. Tillyer *v.* Mindermann, 70 N. J. L. 512, 57 Atl. 329.

10. Tillson *v.* Ford, 53 Cal. 701; State *v.* Cook, 78 Tex. 406, 14 S. W. 996. And see Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721.

11. State *v.* Elliott, 13 Utah 471, 45 Pac. 346.

12. Matter of Travis, 87 N. Y. App. Div. 554, 84 N. Y. Suppl. 534.

13. People *v.* Erie County, 42 N. Y. App. Div. 510, 59 N. Y. Suppl. 476 [*affirming* 56 N. Y. Suppl. 318].

14. Lynam *v.* Com., (Ky. 1900) 55 S. W. 686.

power to make an *ad interim* appointment of a city officer assumes to exercise that power and that alone, the appointment cannot be deemed an appointment for a full term, which the mayor had the power but not the intention to make.[15]

e. Holding Over After Term Expires. In many states there are constitutional or statutory provisions extending the term until the successor is duly chosen and qualified,[16] and during this time there is no vacancy in office, and no *ad interim*

15. People *v.* Hall, 104 N. Y. 170, 10 N. E. 135.

16. *California.*— Ruggles *v.* Woodland, 88 Cal. 430, 26 Pac. 520. And see People *v.* Murray, 15 Cal. 221.

Georgia.— Lambert *v.* Norman, 119 Ga. 351, 46 S. E. 433; Scales *v.* Faulkner, 118 Ga. 152, 44 S. E. 987.

Illinois.— Crook *v.* People, 106 Ill. 237; People *v.* Fairbury, 51 Ill. 149.

Indiana.— State *v.* Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

Kentucky.— Johnson *v.* Wilson, 95 Ky. 415, 25 S. W. 1057, 15 Ky. L. Rep. 852; Bybee *v.* Smith, 57 S. W. 789, 22 Ky. L. Rep. 467.

Maine.— Bath *v.* Reed, 78 Me. 276, 4 Atl. 688; Rounds *v.* Smart, 71 Me. 380.

Missouri.— State *v.* Lund, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572.

New York.— People *v.* North, 72 N. Y. 124; People *v.* Barrett, 8 N. Y. Suppl. 677.

Ohio.— State *v.* Kearns, 47 Ohio St. 566, 25 N. E. 1027.

Pennsylvania.— Com. *v.* O'Neal, 203 Pa. St. 132, 52 Atl. 134.

Rhode Island.— *In re* Budlong, 15 R. I. 322, 5 Atl. 77.

Virginia.— Johnson *v.* Mann, 77 Va. 265; *In re* Richmond Mayoralty Case, 19 Gratt. 673. And see Vaughan *v.* Johnson, 77 Va. 300.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 293, 331.

Construction of particular provisions as to holding over.—All powers formerly exercised by the assessors of the old city of Brooklyn were by the Greater New York charter devolved, not upon successors *eo nomine*, but upon other boards or officials, leaving the old board, on Jan. 1, 1898, without any function, power, right, or duty; and therefore section 1613, which, for the purpose of avoiding any possible interregnum, provided that all officers should hold over under the new charter until their successors should be elected and appointed, did not operate to thus continue in office the former board of assessors. People *v.* Feitner, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094 [*affirmed* in 156 N. Y. 694, 51 N. E. 1093]. Greater New York Charter (Laws (1897), c. 378), abolishing the village of Richmond Hill, and providing (section 1613) that all persons in office when the act takes effect shall remain until their successors have qualified, applies only to officers whose successors are provided for in the act. Richmond Hill Fire Dept. *v.* Davies, 25 Misc. (N. Y.) 683, 54 N. Y. Suppl. 1077.

"City officers then in office," as used in a statute providing that such officers shall, after the adoption of the act, exercise the powers conferred on like officers until their successors are elected and qualified, mean the officers elected at the municipal election of the previous year, and not those elected at the time the law was adopted. Crook *v.* People, 106 Ill. 237. A constitutional provision that, in the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official term, and until their successors shall be duly elected or appointed and qualified, applies to the officers of a municipality. State *v.* Lund, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572.

A city attorney is within a constitutional provision that, with the exception of members of the general assembly and members of any board or assembly, two or more of whom are elected at the same time, every person holding any municipal civil office shall, unless removed according to law, exercise the duties of his office till his successor is duly qualified. People *v.* Herring, 30 Colo. 445, 71 Pac. 413.

Elective officers.— Some of the provisions apply to elective officers only. Sherman *v.* Des Moines, 100 Iowa 88, 69 N. W. 410; Stubbs *v.* Galveston, 3 Tex. App. Civ. Cas. § 143.

Reasonable time for qualification of successor.— The charter of the city of Montgomery provides for biennial elections of the city clerk, as of the mayor and aldermen; and the provision for his continuance in office, in addition to that term, "until his successor is duly elected and qualified," is only intended to cover the reasonable time, varying with circumstances, which may be necessary for his successor to qualify. Montgomery *v.* Hughes, 65 Ala. 201.

Retroactive effect.—A constitutional provision that when certain city officers shall be appointed or elected as the general assembly may by general law provide, their term of office shall be four years, and until their successors are appointed, does not apply to officers elected under a city charter before the passage of any general law regarding the election of such officers. Lexington *v.* Wilson, 97 Ky. 707, 31 S. W. 471, 17 Ky. L. Rep. 435.

Officers failing to perform their duty to order or hold an election for their successors are subject to ouster at any time after the expiration of their term, even though the statute authorizes them to hold over till their successors are elected and qualified. People *v.* Bartlett, 6 Wend. (N. Y.) 422.

appointment is valid.[17] Even in the absence of some constitutional or statutory provision that officers shall hold over until their successors are elected, or appointed and qualified, municipal officers hold over until election or appointment, and qualification, unless there is some constitutional or statutory restriction express or implied to the contrary,[18] as is sometimes the case.[19] Thus the phrase "and no longer,"[20] or "unless sooner removed,"[21] following the period fixed for the term, operates to terminate the office at the expiration of the period, and a vacancy instantly ensues; and thereafter the incumbent is not even a *de facto* officer.[22] Under a statute providing that certain officers shall hold their offices for one year from the second Monday in April of the year when elected, and until their successors are qualified, the time between the election of a successor and the time he actually qualifies is a part of the preceding term, although the party elected is his own successor.[23] The abolition of the municipality of which one was an officer destroys the "hold over" incident of his office.[24] Officers lawfully holding over continue to exercise the functions and enjoy the privileges and emoluments of office.[25]

f. Enlargement or Abridgment of Term. A constitutional amendment providing that all officers whose successors would under the law as it existed at the time of their election be elected in an odd-numbered year shall hold their office for an additional year and until their successors are qualified applies only to county and township officers and does not operate to extend the term of an incumbent of a municipal office.[26] The legislative power of the state is absolute with respect to all offices that it creates where no constitutional restriction is placed upon its power with reference to such offices.[27] In the absence of such restriction it may shorten or lengthen the term of an incumbent in office,[28] but

17. Central *v.* Sears, 2 Colo. 588; State *v.* Davis, 45 N. J. L. 390; State *v.* Wright, 56 Ohio St. 540, 47 N. E. 569.

18. *California.*— People *v.* Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

Colorado.— Central *v.* Sears, 2 Colo. 588.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Illinois.— People *v.* Blair, 82 Ill. App. 570.

Nebraska.— See McMillin *v.* Richards, 45 Nebr. 786, 64 N. W. 242.

New York.— People *v.* Ferris, 16 Hun 219 [*affirmed* in 76 N. Y. 326]; White *v.* New York, 4 E. D. Smith 563; De Lacey *v.* Brooklyn, 12 N. Y. Suppl. 540.

Oklahoma.— Territory *v.* Jacobs, 12 Okla. 152, 70 Pac. 197; Wright *v.* Jacobs, 12 Okla. 138, 70 Pac. 193.

Tennessee.— State *v.* Wilson, 12 Lea 246; Lynch *v.* Lafland, 4 Coldw. 96.

Texas.— Keen *v.* Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983.

Utah.— Pratt *v.* Swan, 16 Utah 483, 52 Pac. 1092.

West Virginia.— Wheeling *v.* Black, 25 W. Va. 266.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 293, 331.

Contra.— McDermott *v.* Louisville, 98 Ky. 50, 32 S. W. 264, 17 Ky. L. Rep. 617, holding that the omission of Const. § 160, providing that city legislative boards shall hold office for two years, to further provide that they shall hold until their successors are chosen, will not be supplied by the courts.

19. McDermott *v.* Louisville, 98 Ky. 50, 32 S. W. 264, 17 Ky. L. Rep. 617; People *v.* Tieman, 30 Barb. (N. Y.) 193. And see cases cited in the two following notes.

20. Louisville *v.* Higdon, 2 Metc. (Ky.) 526.

21. State *v.* Land, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572.

Where the incumbent has no right to hold over until appointment of his successor, the fact that it has been the custom of his predecessors to so hold over and that inconvenience results from the office being vacant is no defense to a proceeding in the nature of quo warranto. State *v.* Land, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572.

22. Long *v.* New York, 81 N. Y. 425.

23. Grand Haven *v.* U. S. Fidelity, etc., Co., 128 Mich. 106, 87 N. W. 104.

24. Ward *v.* Elizabeth City, 121 N. C. 1, 27 S. E. 993.

25. De Lacey *v.* Brooklyn, 12 N. Y. Suppl. 540.

26. Griffith *v.* Manning, 67 Kan. 559, 73 Pac. 75.

27. Collins *v.* Russell, 107 Ga. 423, 33 S. E. 444.

28. *Alabama.*— Beebe *v.* Robinson, 64 Ala. 171.

Colorado.— *In re* Senate Bill No. 45, 12 Colo. 339, 21 Pac. 485.

Georgia.— Collins *v.* Russell, 107 Ga. 423, 33 S. E. 444. See also Lamb *v.* Dunwody, 94 Ga. 58, 20 S. E. 637.

Indiana.— State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418.

Kentucky.—Standeford *v.* Wingate, 2 Duv. 440.

any statute of this character is of course void if in contravention of the organic law;[29] and a statute creating a vacancy in the appointive public office of an officer of a designated municipality, and enlarging the present incumbent's term from its expiration until a designated date, being unconstitutional in so far as it enlarged the present incumbent's term, the appointee of the common council of the city at the termination of the incumbent's previous term, as against such incumbent, was entitled to the custody of the office and the possession of the books and papers thereof.[30] Where a charter or statute has fixed the term of an office, a municipality cannot, by ordinance, vary the term;[31] nor is it competent for the appointing power to prescribe a fixed term when the legislature has provided for a holding during good behavior.[32] So an appointment for less than the term fixed is valid for the full statutory period,[33] even though there be a

Louisiana.— See Fortier *v.* Capdevielle, 104 La. 561, 29 So. 215.

New York.— People *v.* Kent, 83 N. Y. App. Div. 554, 82 N. Y. Suppl. 172.

Pennsylvania.— Erb *v.* Com., 91 Pa. St. 212.

South Carolina.— Alexander *v.* McKenzie, 2 Rich. 81.

See 36 Cent. Dig. tit. "Municipal Corporations," § 330.

A constitutional provision against extending the term of a public office has been held inapplicable to municipal officers. Com. *v.* Nichols, 10 Kulp (Pa.) 193.

Statutes lengthening term.—A statute providing that the qualified voters of each ward in a city of the third class shall elect "a properly qualified person, according to law, to act as county assessor under existing laws, who shall serve for three years," does not establish a new office of county assessor, or provide for the election of a new officer of that name, but merely lengthens the term of the official charged with making the assessment for county purposes to three years, whatever may be his legal title. Kuhlman *v.* Smeltz, 171 Pa. St. 440, 33 Atl 358. Ind. Rev. St. (1894) § 3476, in extending the term of office of city attorney (an officer appointed by the council) from May to September, provided the consent of his surety to such extension was filed, and conferring on the common council power to remove such officers as they might appoint under its provisions, amending Rev. St. (1881) § 3043, under which the council already possessed the power of removal of the city attorney, extended his term subject to the council's right to abolish the office, or remove its incumbent, at its pleasure, at any time between May and September. State *v.* Wilson, 142 Ind. 102, 41 N. E. 361. And see State *v.* Witt, 72 Ohio St. 584, 74 N. E. 1075.

Statutes not extending term.— Under Colo. Laws (1901), pp. 384, 385, providing that aldermen should be elected in 1901 for the term of two years, provided that those elected prior to 1901 whose terms would not expire until 1902 should hold over for the term for which they were elected, "and until the second Monday after the election to be held in April, A D. 1902, at which time their terms shall expire, and the city council . . . shall select their successors," the term of office of such alderman was not extended beyond April, 1902, although no election was held in that month. People *v.* Wright, 30 Colo. 439, 71 Pac. 365.

29. Clarke *v.* Rogers, 4 Ky. L. Rep. 929; Matter of Haase, 41 Misc. (N. Y.) 114, 83 N. Y. Suppl. 932 [*affirmed* in 88 N. Y. App. Div. 242, 85 N. Y. Suppl. 462]; Kelly *v.* Van Wyck, 35 Misc. (N. Y.) 210, 71 N. Y. Suppl. 814; State *v.* Catlin, 84 Tex. 48, 19 S. W. 302; O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831, holding that "the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election."

Statutes held unconstitutional.—An amendment to a city charter, purporting to extend the term of city magistrates, is in violation of a constitutional provision requiring existing city officers to be elected or appointed by such authorities as the legislature shall designate, such act being in effect an appointment by the legislature, and void. Kelly *v.* Van Wyck, 35 Misc. (N. Y.) 210, 71 N. Y. Suppl. 814.

Removal of constitutional objection.— Although an act providing a new charter for a town and continuing the terms of the "present incumbents" of certain offices required by the constitution is so far unconstitutional, yet where the charter is submitted to the people before it becomes law and is voted on and accepted by them, the constitutional objection is removed. By this means the officers must be understood as elected for their terms as extended by the charter. Clarke *v.* Rogers, 4 Ky. L. Rep. 929.

30. Matter of Haase, 41 Misc. (N. Y.) 114, 83 N. Y. Suppl. 932 [*affirmed* in 88 N. Y. App. Div. 242, 85 N. Y. Suppl. 462].

31. State *v.* Dillon, 42 Fla. 95, 28 So. 781; East St. Louis *v.* Kase, 9 Ill. App. 409; O'Rourke *v.* Newark, 66 N. J. L. 109, 48 Atl. 578 [*affirmed* in 66 N. J. L. 265, 49 Atl. 468]; Uffert *v.* Vogt, 65 N. J. L. 621, 48 Atl. 574.

32. Stewart *v.* Hudson County, 61 N. J. L. 117, 38 Atl. 842.

33. Hale *v.* Bischoff, 53 Kan. 301, 36 Pac.

custom to the contrary, previously acquiesced in by the officer.[34] And the common provision that an officer shall hold till his successor is duly elected and qualified is not regarded as a violation of constitutional inhibition against extension of official term, but rather as an emergent provision for temporary purposes.[35] An act providing that the term of any office in any particular city or city of any particular class "shall be three years" does not extend the tenure of any present holder of such office, but applies only to terms beginning *in futuro*.[36]

g. Effect of Municipal Transition From One Class to Another. The term of a municipal officer is liable to change by the transition which the corporation undergoes in process of reorganization,[37] or in passing from one class or grade of corporation to another.[38] In such transitions the legislature usually makes provision for enlarging or abridging the terms of office so as to obviate conflict or hiatus;[39] but lacking such provision the courts lend their aid to the same orderly purpose by holding that the old officers hold over till the election and qualification of the officers of the new organization.[40] But where a hiatus occurs by the dissolution of a corporation without immediate connection with its successor, the term of course ends with the life of the municipality.[41] Provisions for extending terms in such cases of transition are held to apply to fixed terms, and do not include officials holding only during the pleasure of the appointing power.[42] They apply to officers, although the offices which they hold are not elective.[43] And where the transition was from a municipality with a single council to one bi-cameral, ordinances enacted, proceedings taken, and contracts made by the single council in the period elapsing between the date of change and the election under the new organization were valid.[44] Where on transition of a municipality from one class to another, there is no provision in the statute declaring a certain office vacant, and the duties under it are in each case substantially the same, the transition does not vacate the office.[45]

10. Resignation and Abandonment[46] — a. Right to Resign. At common law a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear.[47] From this it followed of course that,

752. See also People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815 [*affirming* 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350], holding that where the term for which a municipal officer may be appointed is supposed to have been shortened by a statute which is invalid, a provision in his appointment fixing the termination of his term at the time it would end if the statute were valid will be regarded as surplusage, and the officer is entitled to hold for his full term.

34. State *v.* Brady, 42 Ohio St. 504.

35. Crook *v.* People, 106 Ill. 237.

The words "or until his successor is elected and qualified," it has been held, do not reduce or change the term for which the officer is elected, but merely extend the time in which he may hold the office beyond his term to a period when the office is filled by another, who has been duly elected and qualified. Crovatt *v.* Mason, 101 Ga. 246, 28 S. E. 891.

36. Bird *v.* Johnson, 59 N. J. L. 59, 34 Atl. 929.

37. People *v.* Feitner, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094 [*affirmed* in 156 N. Y. 694, 51 N. E. 1093].

38. State *v.* Wymen, 97 Iowa 570, 66 N. W. 786.

39. Ayars' Appeal, 122 Pa. St. 266, 16 Atl. 356, 2 L. R. A. 577.

40. *In re* Passaic, 54 N. J. L. 156, 23 Atl. 517; Com. *v.* Davis, 9 Pa. Dist. 222, 22 Pa. Co. Ct. 533; Com. *v.* Hillman, 9 Kulp (Pa.) 359.

41. Com. *v.* Wyman, 137 Pa. St. 508, 21 Atl. 389.

42. People *v.* Van Wart, 25 Misc. (N. Y.) 215, 55 N. Y. Suppl. 68 [*affirmed* in 36 N. Y. App. Div. 518, 55 N. Y. Suppl. 522]. And see Richmond Hill Fire Dept. *v.* Davies, 25 Misc. (N. Y.) 683, 54 N. Y. Suppl. 1077.

43. Com. *v.* Ricketts, 196 Pa. St. 598, 46 Atl. 900.

44. Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092].

45. State *v.* White, 20 Nebr. 37, 28 N. W. 846.

46. **Resignation and abandonment** of office by departmental officers see *infra*, VII, B.

47. Coleman *v.* Sands, 87 Va. 689, 13 S. E. 148; Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314; Rex *v.* Bower, 1 B. & C. 585, 2 D. & R. 842, 1 L. J. K. B. O. S. 110, 8 E. C. L. 247; Rex *v.* Burder, Nolan 111, 4 T. R. 778; Rex *v.* Jones, Str. 1146; Rex *v.* Lone, Str. 920.

after an office was conferred and assumed, it could not be laid down without the consent of the appointing power; and this is the law in many states,[48] although there are some authorities which seem to recognize the absolute right of a municipal officer to resign his office, and hold that the resignation is complete without acceptance.[49] When the law provides that an incumbent shall hold office until his successor is elected and qualified, he is not, in most jurisdictions, relieved from the duties of his office even by the acceptance of his resignation, but must await the qualification of his successor,[50] but the contrary has been held.[51]

b. Form and Sufficiency — (I) *In General.* A resignation may be either express or implied.[52] Where the form and manner of resignation are prescribed by law, the requirements must be strictly complied with to make a resignation effectual.[53]

(II) *Implied Resignation* — (A) *By Abandonment of Office.* Abandonment of an office constitutes an implied resignation.[54] A single wilful absence or act of delinquency does not constitute abandonment.[55] The absence must be so long continued as to justify the presumption of abandonment,[56] and the time necessary to raise such presumption must be a mixed question of law and fact to be determined from the circumstances of each case.[57]

(B) *By Accepting Incompatible Office.* At common law the acceptance by one who holds a municipal office of a second office incompatible therewith operates *ipso facto* as a resignation of the first.[58] But if the duties of the second office are not incompatible, either by nature or statute, with those of the first, the officer

48. Fryer *v.* Norton, 67 N. J. L. 537, 52 Atl. 476 [*affirming* 67 N. J. L. 23, 50 Atl. 661]; State *v.* Ferguson, 31 N. J. L. 107; Coleman *v.* Sands, 87 Va. 689, 13 S. E. 148; Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314. See also Cloutman *v.* Pike, 7 N. H. 209.

49. People *v.* Porter, 6 Cal. 26; Primm *v.* Carondelet, 23 Mo. 22; State *v.* Lincoln, 4 Nebr. 260; Reiter *v.* State, 51 Ohio St. 74, 36 N. E. 943. 23 L. R. A. 681.

50. People *v.* Barnett Tp., 100 Ill. 332; Jones *v.* Jefferson, 66 Tex. 576, 1 S. W. 903; Keen *v.* Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983; Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991; U. S. *v.* Green, 53 Fed. 769.

51. State *v.* Grace, 113 Tenn. 9, 82 S. W. 485.

52. People *v.* Hanifan, 6 Ill. App. 158; Cloutman *v.* Pike, 7 N. H. 209.

53. See Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121, holding that under provisions of a charter, which direct that an alderman or other officer may resign by giving written notice to the city clerk, and publishing a copy of such notice in the corporation papers, a simple communication to the mayor and common council tendering a resignation is ineffectual.

54. Harrison *v.* People, 36 Ill. App. 319; People *v.* Hanifan, 6 Ill. App. 158; Ward *v.* Elizabeth City, 121 N. C. 1, 27 S. E. 993.

Failure to qualify not abandonment.— Mere failure of one elected to a constitutional office to qualify within the statutory time cannot be construed into an abandonment of the office. State *v.* Peck, 30 La. Ann. 280.

55. Harrison *v.* People, 36 Ill. App. 319. See also Com. *v.* Jones, 7 Lack. Jur. (Pa.) 256.

56. Eight months.—A village trustee, who wilfully absents himself from the regular meetings of the board for a period of eight months, abandons his office, and the vacancy may be filled by special election ordered by the remaining members of the board. Harrison *v.* People, 36 Ill. App. 319.

Five months.— Where one who had been elected alderman failed for five months to attend the meetings of the city council, or perform the duties of his office, he was considered as having impliedly resigned his position, so as to authorize an election to fill his place. People *v.* Hanifan, 6 Ill. App. 158.

57. Harrison *v.* People, 36 Ill. App. 319.

58. *Arkansas.*—State Bank *v.* Curran, 10 Ark. 142.

Connecticut.— Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375.

Illinois.— People *v.* Hanifan, 96 Ill. 420.

Louisiana.— State *v.* West, 33 La. Ann. 1261.

Tennessee.— State *v.* Grace, 113 Tenn. 9, 82 S. W. 485.

See 36 Cent. Dig. tit. "Municipal Corporations," § 336.

Illustrations.— In the following cases the offices have been considered incompatible and not capable of being held by the same person at the same time: Alderman and city marshal (State *v.* Hutt, 2 Ark. 282; U. S. *v.* Saunders, 120 U. S. 126, 7 S. Ct. 467, 30 L. ed. 594); justice of the peace and sheriff (State Bank *v.* Curran, 10 Ark. 142; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251); constable and justice of the peace (People *v.* Sanderson, 30 Cal. 160; Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375; Pooler *v.* Reed, 73 Me. 129); township trustee and postmaster (Foltz *v.* Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197; Howard *v.* Shoemaker, 35 Ind. 111); teacher and school trustee (Ferguson *v.* True, 3 Bush

may occupy both offices.[59] The same rule obtains where the holding of two offices by one person at the same time is forbidden by constitution or statute. In such case the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential.[60] Although the offices be incompatible there is no abandonment or implied resignation by mere election or appointment to the second office;[61] actual acceptance of the second office by the officer is essential to such implication.[62]

c. Acceptance. The acceptance may be express or implied;[63] it may be manifested by a formal declaration, or by the appointment of a successor.[64] So the appointment of the incumbent of an office to another office is equivalent to an agreement to accept the appointee's resignation of the former office.[65]

d. Effect. Where acceptance is necessary mere tender of resignation does not affect the officer's status or relation,[66] but a complete resignation operates to sever the officer from the office and creates a vacancy.[67] A fraudulent resignation will not, however, relieve an officer from the discharge of duties imposed by law;[68] nor can an officer, by resignation, take from the city any remedy for wrongs committed by him during his term of office.[69]

11. Disqualification and Suspension[70] — a. Disqualification. Under some statutes removal of an officer from the ward, borough, or city as the case may be,

(Ky.) 255); member of the legislature and judge of municipal court (Woodside *v.* Wagg, 71 Me. 207); mayor and governor (Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211; Ellis *v.* Lennon, 86 Mich. 468, 49 N. W. 308); office of prudential committee and auditor of school-district (Cotton *v.* Phillips, 56 N. H. 220; Richards *v.* Columbia, 55 N. H. 96); alderman and member of congress (People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659); justice of district court and deputy sheriff (State *v.* Goff, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921); and secretary and recorder of a city (State *v.* Hutt, 2 Ark. 282).

59. Illustrations.— In the following cases the offices have been considered not incompatible and capable of being held by the same person at the same time: Town marshal and bailiff (Lewis *v.* Wall, 70 Ga. 646); justice and register of deeds (*In re* Opinions of Justices, 68 Me. 582); and deputy sheriff and school-director (State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616).

60. Keating *v.* Covington, 35 S. W. 1026, 18 Ky. L. Rep. 245; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; State *v.* Brinkerhoff, 66 Tex. 45, 17 S. W. 109.

In New York a representative in congress holds such "public office" as within the Brooklyn charter of 1873 caused his office as alderman immediately to become vacant. People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659. An attendant on the court of general sessions in New York city, being appointed by the judges thereof, is an officer of the court, and not of the city, although his salary is payable out of the city treasury, and hence is not within Consol. Act (1882), c. 410, § 55, providing that any person holding an office under the city shall be deemed to have vacated it by accepting any office under the government of the United States or the state. O'Brien *v.* New York, 84 Hun 50, 32 N. Y. Suppl. 34. The office of assistant clerk of a district court of New York city is not a city or county office, within the provision of Laws (1873), c. 335, § 114, making one's acceptance of another office a vacation of a city or county office held by him. People *v.* Murray, 73 N. Y. 535.

Where an officer is made ineligible to another office by statute, his appointment to such office and acceptance thereof do not work an abandonment of his former office, since the appointment to the second office is absolutely void. State *v.* Kearns, 47 Ohio St. 566, 25 N. E. 1027.

61. Ingersoll Pub. Corp. 274.

62. Mechem Pub. Officers, § 421.

63. Cloutman *v.* Pike, 7 N. H. 209.

64. Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314.

Formal declaration.— People *v.* Hanifan, 6 Ill. App. 158.

Appointment of successor.— Bath *v.* Reed, 78 Me. 276, 4 Atl. 688; Reiter *v.* State, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681; Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314.

65. State *v.* Brinkerhoff, 66 Tex. 45, 17 S. W. 109.

66. Fryer *v.* Norton, 67 N. J. L. 537, 52 Atl. 476. And see *supra*, VII, A, 10, a.

67. People *v.* Hanifan, 96 Ill. 420; Pariseau *v.* Escanaba Bd. of Education, 96 Mich. 302, 55 N. W. 799; State *v.* Lincoln, 4 Nebr. 260; State *v.* Grace, 113 Tenn. 9, 82 S. W. 485.

Unconditional resignation irrevocable.—An unconditional resignation, properly tendered and accepted, cannot be revoked. State *v.* Grace, 113 Tenn. 9, 82 S. W. 485.

68. Gorgas *v.* Blackburn, 14 Ohio 252.

69. Philadelphia *v.* Marcer, 1 Leg. Gaz. (Pa.) 355.

70. Disqualification and suspension of departmental officers see *infra*, VII, B.

Suspension of agents and employees see *infra*, VII, C, 5.

operates to render the office vacant.[71] And these statutes have been held to apply as well to cases when an officer ceases to be a resident because of a legislative change of boundaries as to cases where he ceases to be a resident of his own volition,[72] although there is some authority to the contrary.[73] Where, however, a statute merely provides that a councilman shall be a resident of the ward at the time of his election, his subsequent removal to another ward does not create a vacancy, as he is not an officer of the ward electing him but of the entire city.[74] Where a statute provides that the acceptance of another office by a commissioner shall cause his office to become vacant, the acceptance disqualifies the commissioner from any further action as commissioner without a judicial determination that the vacancy exists.[75] The fact that officers while candidates pledged themselves to a certain course of action, not unlawful, does not disqualify them from performance of their official duties.[76] Under a city charter providing that members of the council "shall, during the whole term for which they are elected be possessed of all the qualifications . . . and if any one of them during the time for which he was elected shall fail to retain all the qualifications necessary to render him eligible to election," then any taxpaying citizen may file a petition to have his office declared vacant, such remedy does not apply where the councilman was not qualified when elected, in which case his predecessor would be entitled to the remedy by mandamus.[77]

b. Suspension. Power to suspend an officer holding for a fixed term depends upon authority conferred by charter or statute.[78] Where a resolution is adopted declaring that a designated officer is presented to the board of aldermen for impeachment, an impeachment is "pending" from the time of the resolution within a statute providing that, pending impeachment and until the final disposition thereof, the party shall not exercise the functions of his office.[79] According to some decisions power to suspend is not to be inferred from power to remove.[80] Others hold that the power of removal includes the power of suspension pending trial.[81] Where an officer is suspended until the legislature shall act upon the subject and the legislature adjourns without taking any action he is entitled to resume his office immediately on adjournment.[82]

12. Removal[83] — a. When Not Affected by Civil Service Restrictions and Other Acts — (I) *Power to Remove* — (A) *In Absence of Express Authority.* As will be subsequently shown, the persons or boards in whom the power to

71. People *v.* Ballhorn, 100 Ill. App. 571; People *v.* Hull, 19 N. Y. Suppl. 36; Com. *v.* Yeakel, 13 Pa. Co. Ct. 615; Com. *v.* Lally, 30 Leg. Int. (Pa.) 296. See also Com. *v.* James, 214 Pa. St. 319, 63 Atl. 743 [*reversing* 3 Schuyl. Leg. Rec. 56].

72. Ketcham *v.* Wagner, 90 Mich. 271, 51 N. W. 281; People *v.* Highland Park, 88 Mich. 653, 50 N. W. 660; Ross *v.* Barber, 86 Mich. 380, 49 N. W. 35.

73. Scovill *v.* Cleveland, 1 Ohio St. 126.

74. State *v.* Craig, 132 Ind. 54, 31 N. E. 352, 32 Am. St. Rep. 237, 16 L. R. A. 688.

75. Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782.

76. Spring Valley Water Works *v.* Bartlett, 16 Fed. 615, 8 Sawy. 555.

77. Kean *v.* Rizer, 90 Md. 507, 45 Atl. 468.

78. State *v.* Lingo, 26 Mo. 496.

Under a statute of Missouri, providing that in cities of the fourth class elective and appointive officers may be removed by a two-thirds vote of the board of aldermen, and authorizing the board to regulate the manner of impeachment and removals, a city of this class has power to provide by ordinance that, pending the investigation of charges preferred against an officer, he may be suspended by a three-fourths vote of the board of aldermen. Blackwell *v.* Thayer, 101 Mo. App. 661, 74 S. W. 375.

In Ohio under the revised statutes the mayor may suspend certain officers for specified causes, and temporarily fill their places, such suspensions and appointments to be acted upon by the council. The council may approve or disapprove, and may act upon such information as is obtainable; and their disapproval terminates the right of the temporary appointee to exercise the functions of the office. State *v.* Heinmiller, 38 Ohio St. 101.

79. State *v.* Ramos, 10 La. Ann. 420.

80. Tyrrell *v.* Jersey City, 25 N. J. L. 536; Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854; Gregory *v.* New York, 11 N. Y. St. 506.

81. State *v.* Peterson, 50 Minn. 239, 52 N. W. 655; State *v.* St. Louis Police Com'rs, 16 Mo. App. 48; Shannon *v.* Portsmouth, 54 N. H. 183.

82. State *v.* Herron, 24 La. Ann. 594.

83. Prohibition to restrain mayor from removing officers see Prohibition.

remove municipal officers exists are usually designated by the organic law of the state, or by the charters of the municipalities.[84] The purpose of this section is to determine what power of removal exists, in the absence of any such provision. On this question there is considerable conflict of opinion. According to some decisions, in the absence of any constitutional or statutory provisions therefor, a municipality has incidental power to remove for cause, "all corporate officers, whether appointive or elective," and the power may be exercised by the body which represents the municipality in the exercise of its corporate powers,[85] it being said that "the power to amove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations."[86] It was further held that power of removal conferred by charter is neither greater nor less than the municipality would have had, if the charter had been silent on the subject.[87] In other decisions in which it was not necessary to lay down the rule so broadly it was held that in the absence of all constitutional provision or statutory regulation, the power of removal "of appointive officers" is incident to the power of appointment.[88] This, however, has been denied in other cases.[89] And as respects "elective officers," there are decisions holding that there is no inherent power of removal in any officer or municipal board; but that the power must be conferred by constitutional or statutory provisions.[90]

(B) *Under Constitutional or Statutory Authority.* The power of removal and the persons or tribunal who shall exercise it is sometimes provided for by the organic law of the state.[91] And in the absence of any constitutional restriction against its so doing, the legislature may vest the power of removal in any officer or board which it may see fit to designate;[92] and the power to remove may also

Removal of agents or employees see *infra*, VII, C, 5.

Removal of officers of departments see *infra*, VII, B.

84. See *infra*, VII, A, 12, a, (I), (B).

85. Savannah *v.* Grayson, 104 Ga. 105, 30 S. E. 693; State *v.* New Orleans, 107 La. 632, 32 So. 22; Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774. And see as sustaining this view the following statement of Judge Dillon: "The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our municipal corporations as ordinarily constituted, does possess, in the absence of any express or implied restriction in the charter, the incidental power . . . for cause to remove corporate officers, whether elected by it or by the people." 1 Dillon Mun. Corp. § 242.

86. Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774.

87. State *v.* New Orleans, 107 La. 632, 32 So. 22.

88. People *v.* McAllister, 10 Utah 357, 37 Pac. 578. And see as sustaining this view Newson *v.* Cocke, 44 Miss. 352, 7 Am. Rep. 686; *Ex p.* Hennen, 13 Pet. (U. S.) 230, 10 L. ed. 138.

89. Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842. And see Caulfield *v.* State, 1 S. C. 461.

90. Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72; Doran *v.* De Long, 48 Mich. 552, 12 N. W. 848. And see *dictum* in Shaw *v.* Macon, 19 Ga. 468, that "the corporation has no incidental power of removing an officer, deriving and holding" his office by election.

91. See People *v.* Robb, 126 N. Y. 180, 27 N. E. 267; People *v.* New York Fire Com'rs, 73 N. Y. 437; Lane *v.* Com., 103 Pa. St. 481, in which it was held that under Const. art. 6, § 4, the governor alone, without the concurrence of the senate, may remove at his pleasure recorders of cities of the first class. Although the statute provides for their appointment by and with the advice and consent of the senate, the language of the constitutional provision is explicit as to the power of the governor alone to remove appointed officers, other than judges of courts of record and superintendents of public instruction.

92. *Massachusetts.*— Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348.

Michigan.—Atty.-Gen. *v.* Cain, 84 Mich. 223, 47 N. W. 484.

Missouri.— Manker *v.* Faulhaber, 94 Mo. 430, 6 S. W. 372.

New York.— People *v.* New York, 16 Hun 309. And see People *v.* Scully, 35 Misc. 613, 72 N. Y. Suppl. 123.

Oklahoma.—Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

Pennsylvania.—Neuls *v.* Scranton, 211 Pa. St. 581, 61 Atl. 77.

South Dakota.— State *v.* Williams, 6 S. D. 119, 60 N. W. 410.

Wisconsin.—State *v.* Superior, 90 Wis. 612, 64 N. W. 304.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 343, 344.

For charter provisions held not to confer power on city treasurer to remove his sub-

be conferred by ordinance provided it is not in contravention of the municipal charter,[93] but it is obvious that power to remove conferred by such charter cannot be limited or taken away by ordinance.[94] It is competent for the legislature to place the power of appointment in one person or body of persons, and the power of removal in another person or body of persons.[95] The power of removal is frequently conferred by statute on the city council or board of aldermen,[96]

ordinate officers or employees see Morgan *v.* Denver, 14 Colo. App. 147, 59 Pac. 619.

93. State *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663, holding that an ordinance prescribing removal from office by the mayor as a penalty for misconduct in office of an appointed officer is within the general welfare clause of the St. Louis charter, empowering the city to pass such ordinances, not inconsistent with the state laws, as may be expedient in maintaining the peace, good government, and welfare of the city, and to enforce the same by fines and penalties.

94. Mathis *v.* Rose, 64 N. J. L. 45, 44 Atl. 875.

95. People *v.* McAllister, 10 Utah 357, 37 Pac. 578.

96. *Indiana.*—Goodwin *v.* State, 142 Ind. 117, 41 N. E. 359.

Kentucky.— Gibbs *v.* Louisville, 99 Ky. 490, 36 S. W. 524, 18 Ky. L. Rep. 341; Com. *v.* Willis, 42 S. W. 1118, 19 Ky. L. Rep. 962.

Louisiana.— State *v.* Adams, 46 La. Ann. 830, 15 So. 490.

Missouri.— State *v.* Walker, 68 Mo. App. 110.

Pennsylvania.— Com. *v.* Sanderson, 1 Pa. Dist. 714, 11 Pa. Co. Ct. 593.

West Virginia.— Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774.

Wisconsin.— State *v.* Superior, 90 Wis. 612, 64 N. W. 304.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 343, 344.

Statutes conferring power.—A statute providing that all the corporate powers of the corporation shall be exercised by the common council confers on it the power of removal of officers for misconduct, which at common law is vested in the corporation at large. Richards *v.* Clarksburg, 30 W. Va. 491, 4 S. E. 774. So where a charter of a city authorized the board of trustees to remove from office any appointees, for misconduct, or to impose a penalty of perpetual disqualification for office. The fact that the latter penalty might be beyond the power of the board of trustees to inflict did not deprive them of the power, given under the charter, to try charges preferred against its appointees, the power to impose the other penalty being unquestioned Croly *v.* Sacramento, 119 Cal. 229, 51 Pac. 323. For other statutes held to confer power see State *v.* Noblesville, 157 Ind. 31, 60 N. E. 704.

Statutes not taking away right of removal.—A proviso in a statute continuing city officers then in office until a designated date, being intended to fix a uniform time when the terms of such officers shall commence, does not take from the council the power granted by a previous proviso, of removing an officer before that date. Goodwin *v.* State, 142 Ind. 117, 41 N. E. 359. So the power of the city council to remove municipal officers having been separated by statute from the power of appointing, which was given by such statute to the mayor, the restoration to the city council of said power of appointment by such statute did not take away from it such power of removal. Atty.-Gen. *v.* Cahill, 169 Mass. 18, 47 N. E. 433. And it has been held that a statute which confers on the superior court jurisdiction to remove municipal officers for official misconduct and neglect does not subordinate and control a provision of a freeholders' charter, providing for the removal of such officers by the municipal board of trustees, which they leave in full operation, prescribing merely a concurrent remedy, and are not, as so construed, displaced as to the municipality by a constitutional provision declaring that municipal charters shall be controlled by general laws "except in municipal affairs." Coffey *v.* Sacramento County Super. Ct., 147 Cal. 525, 82 Pac. 75.

Statutes held not in conflict with constitutional provisions.— The power given the courts by constitution to remove municipal officers has been held not exclusive, and a city charter authorizing the common council to remove recorders of the recorders' court, on impeachment proceedings, is valid. State *v.* Adams, 46 La. Ann. 830, 15 So. 490. It has also been held that a statute providing that each branch of city councils "shall have power and authority to vacate the seat of any member for misbehavior, neglect of duty or other misdemeanor" is not in conflict with a constitutional provision that all officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime, and that all officers elected by the people shall be removed by the governor for reasonable cause after due notice and full hearing, on the address of two thirds of the senate. Com. *v.* Sanderson, 1 Pa. Dist. 714, 11 Pa. Co. Ct. 593.

Change of constitution not invalidating power conferred by statute.— The constitution of 1849 provided that the judicial power of the commonwealth should be vested in a court of appeals, the courts established by the constitution, and such inferior courts "as the General Assembly may, from time to time, establish"; and such provision was changed in the later constitution, which provides that the judicial power shall be vested

on the mayor,[97] on the mayor and aldermen,[98] or on the governor,[99] and power so conferred cannot be delegated[1] or exercised by any other than

in the senate, when sitting as a court of impeachment, and in the court of appeals and the courts established by the constitution. It was held that the change did not invalidate Gen. St. § 2781, providing that executive and ministerial officers in cities shall be removable by the board of aldermen "sitting as a court," since the power conferred on such board is not strictly judicial, and it does not act as a court of impeachment. Gibbs *v.* Louisville, 99 Ky. 490, 36 S. W. 524, 18 Ky. L. Rep. 341.

Previous passage of ordinance unnecessary. — Where the statute provides that the council may remove elective officers for cause, it may sit as a court of impeachment without the previous passage of an ordinance regulating the manner of impeachment and removal. State *v.* Walker, 68 Mo. App. 110.

What officers removable.— A city charter provided that the city council should have power to remove any officer after due notice, etc., and the next article provided that, in addition to the "foregoing power of removal," the council should have power to remove by resolution any officer elected by them. It was held that the phrase, "any officer" in the former provision, referred to all officers, whether elected by the people or by the council. Riggins *v.* Richards, 97 Tex. 229, 77 S. W. 946.

97. State *v.* Kennelly, 75 Conn. 704, 55 Atl. 555; Hogan *v.* Collins, 183 Mass. 43, 66 N. E. 429; Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 248; Keenan *v.* Goodwin, 17 R. I. 649, 24 Atl. 148; State *v.* Williams, 6 S. D. 119, 60 N. W. 410.

Statutes held to confer power.— At any time a charter providing that, within six months after commencement of his term, the mayor, elected for a full term, may remove any public officer holding by appointment from the mayor, with certain exceptions, authorizes the first mayor to remove the officers indicated within the time stated. People *v.* Nixon, 158 N. Y. 221, 52 N. E. 1117 [*affirming* 32 N. Y. App. Div. 513, 53 N. Y. Suppl. 230]. For other statutes held to confer power on mayor see Hogan *v.* Collins, 183 Mass. 43, 66 N. E. 429; People *v.* Van Wyck, 159 N. Y. 509, 54 N. E. 31 [*affirming* 34 N. Y. App. Div. 573, 54 N. Y. Suppl. 675].

For statutes conferring power on mayor to remove for acts committed prior to his incumbency see Avery *v.* Studley, 74 Conn. 272, 50 Atl. 752.

Provisions held not to limit power of mayor.— By the terms of Laws (1890), § 5, art. 3, c. 37, which provides, that "the mayor shall have power to remove any officer appointed by him, whenever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reasons for such removal to the council at its next regular meeting," power is conferred upon the mayor of a city incorporated under that act to remove any officer of the city appointed by him "whenever he shall be of the opinion that the interests of the city demand such removal." And the last clause of the section, which requires the mayor to report "the reasons for such removal to the council at its next regular session," does not constitute a qualification or limitation upon such power of removal by the mayor. State *v.* Williams, 6 S. D. 119, 60 N. W. 410. And an ordinance as to hearing complaints against police officers for "any irregularity, not sufficient to call for his removal from the force," applies to minor irregularities, and does not limit the power of removal vested in the mayor by the charter. Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348.

Constitutionality of statutes.— A charter authorizing the mayor to suspend or remove constables from office is not in conflict with a constitutional provision relating to the removal of officers elected by a county, township, or school-district, since such section does not refer to officers of a city. Brandau *v.* Detroit, 115 Mich. 643, 74 N. W. 210.

98. Andrews *v.* King, 77 Me. 224, holding that where an officer is "subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," the hearing must be by the "board of mayor and aldermen." A hearing by the aldermen alone is not sufficient, even if by the officer's consent.

President of board acting as mayor.— Under a statute providing that in the absence of the mayor of the city of New York the president of the board of aldermen becomes acting mayor, he can with the consent of the board of aldermen legally remove for cause the city chamberlain and appoint another in his place; another statute vesting the power to remove in the mayor on the consent of the aldermen. Devlin *v.* Platt, 20 How. Pr. (N. Y.) 167. So under a statute providing that the mayor may remove, for cause shown, with the consent of the majority of the council, any elective officer, and that the council, in like manner, may remove by a two-thirds vote independently of the mayor; also that the mayor shall be president of the council, and that a president *pro tem* shall be elected to preside in his absence, the council has power, when presided over by the president *pro tem*, to try the mayor, as a court of impeachment. State *v.* Walker, 68 Mo. App. 110.

99. See Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211, holding that a statute conferring on the governor power to remove all city officers chosen by the electors of any city, was not repealed as to the mayor of the city of Detroit by the charter of such city, which provides for the removal of all city officers other than the mayor.

1. People *v.* Tracy, 35 N. Y. App. Div. 265, 54 N. Y. Suppl. 1070. And see People *v.* Blair, 82 Ill. App. 570, holding that the fact

the board or tribunal on whom it is conferred.[2] Where power is conferred on an officer to remove officers designated in the statute, the officer on whom the power is conferred cannot remove any other officers than those so designated.[3] By express constitutional provision in one state[4] if the duration of the term of one appointed to office is not prescribed by law, the power appointing a person to office may also remove him.[5] Where the power of removal is fixed by statute the doctrine of removal as incidental to the power of appointment has no application.[6]

(II) *Whether Removable at Pleasure or For Cause.* By the express provisions of some constitutions an officer appointed for an indefinite time is removable at the will or pleasure of the appointing power.[7] By other constitutional provisions appointive officers are removable at pleasure, although the appointment be for a fixed time.[8] And in the absence of constitutional restrictions the legislature may authorize the appointing power to remove an appointive officer at pleasure,[9] and also elective officers.[10] And when a power of removal is thus expressly given by statute to be exercised at pleasure, the officer upon whom it is conferred is made the sole and exclusive judge as to the propriety of its exercise.[11] And it is immaterial that the removal was in fact induced by reprehensible motives.[12] In the absence of statutory authority an officer hold-

that a mayor has been derelict in his duty to nominate a city marshal, and that the preservation of public order demands the appointment of such an officer, does not justify the council in taking the reins of power from the mayor and appointing a mayor *pro tem* who will make the nomination.

2. State *v.* Donovan, 89 Me. 448, 36 Atl. 982 (holding that power of removal conferred on the mayor and council does not authorize removal by the mayor alone); Stahlhut *v.* Bauer, 51 Nebr. 64, 70 N. W. 496 (holding that a statute providing that the mayor and council of a city of a designated class can provide for removing officers of such city for misconduct does not clothe the council with power to remove the mayor).

3. Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269; Palmer *v.* Foley, 44 How. Pr. (N. Y.) 308 [*reversed* on other grounds in 36 N. Y. Super. Ct. 14, 45 How. Pr. 110].

Application of rule.— A charter authorizing the mayor to remove for cause any one appointed to office by him refers to the officers appointed by the mayor, and not to individuals appointed by the mayor's appointees. O'Neil *v.* Mansfield, 47 Misc. (N. Y.) 516, 95 N. Y. Suppl. 1009.

4. See N. Y. Const. art. 10, § 3.

5. People *v.* Robb, 126 N. Y. 180, 27 N. E. 267; People *v.* New York Fire Com'rs, 73 N. Y. 437; Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364.

6. People *v.* McAllister, 10 Utah 357, 37 Pac. 578.

7. People *v.* Robb, 126 N. Y. 180, 27 N. E. 267; People *v.* New York Fire Com'rs, 73 N. Y. 437.

8. Houseman *v.* Com., 100 Pa. St. 222.

9. Atty.-Gen. *v.* Cain, 84 Mich. 223, 47 N. W. 484; People *v.* New York, 82 N. Y. 491 [*affirming* 16 Hun 309]; Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135; State *v.* Williams, 6 S. D. 119, 60 N. W. 410.

Statute conferring power.— The charter of the city of Gloucester (St. (1873) c. 246), providing, in section 11, that the mayor and aldermen shall have full and exclusive power to appoint police officers, "the same to remove at pleasure," and in section 9, that the mayor may, if in his opinion the public good requires, "remove, with the consent of the appointing power, any officer" appointed upon his nomination, authorizes the mayor with such consent to remove police officers, including the appointees of a predecessor without a hearing or cause shown. Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348. So it has been held that under the provision of a charter authorizing the city council, when assembled from time to time, to elect and appoint a street supervisor, the city council has power to remove an incumbent and appoint his successor at their pleasure. Mathis *v.* Rose, 64 N. J. L. 45, 44 Atl. 875 [*affirmed* in 64 N. J. L. 726, 49 Atl. 1135]. For other statutes held to confer power see London *v.* Franklin, 118 Ky. 105, 80 S. W. 514, 25 Ky. L. Rep. 2306; Rogers *v.* Congleton, 84 S. W. 521, 27 Ky. L. Rep. 109; Magnar *v.* St. Louis, 179 Mo. 495, 78 S. W. 782; People *v.* Scully, 35 Misc. (N. Y.) 613, 72 N. Y. Suppl. 123.

What officers removable.— A charter authorizing the mayor to remove at pleasure, during the first six months of their respective terms, all officers appointed by him, applies to an officer who has been reappointed to a second term. MacLellan *v.* Marine, 98 Md. 53, 56 Atl. 359. It also applies to appointees of his predecessor. MacLellan *v.* Marine, *supra*.

10. Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

11. State *v.* Kennelly, 75 Conn. 704, 55 Atl. 555; People *v.* New York, 82 N. Y. 491. And see Com. *v.* Willis, 42 S. W. 1118, 19 Ky. L. Rep. 962; State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131.

12. State *v.* Kennelly, 75 Conn. 704, 55 Atl. 555.

ing for a definite term is not removable at pleasure, but only for cause.[13] The reason of the rule is the evident repugnance between the fixed term and the power of arbitrary removal; and the effect of the rule is that the right to hold during a fixed term can only be overcome by an express grant of power to remove at pleasure.[14] Under a constitutional provision giving the governor power to remove appointive officers at pleasure, officers holding elective offices cannot be removed except for cause.[15] Officers can of course only be removed for cause when there are statutory requirements to that effect.[16] Where provision is made for the removal of officers for cause, the power to remove at will is excluded.[17] By the term "for cause," "just cause" is meant.[18]

(III) *Grounds.* In the absence of statutory specification the sufficiency of the cause for removal is to be determined with reference to the character of the office and the qualifications necessary to fill it. The misconduct for which an officer may be removed must be found in his acts and conduct in the office from which the removal is sought, and must constitute a legal cause of removal and one that affects the proper administration of his office.[19] If the constitution enumerates certain grounds for removal, and none are prescribed by statute, the only grounds for removal are those prescribed by the constitution.[20] And where grounds are specified by the municipal charter, the power of removal cannot be exercised except on the ground so specified.[21] The grounds must have arisen after election or appointment.[22] It is good ground for removal of an entire city council that it failed to organize within the time prescribed by law merely because of a failure to agree on the officers to be chosen.[23] So it has been held sufficient ground for removal from office that the incumbent has been guilty of soliciting bribes,[24] receiving bribes for official influence and votes,[25] or of intoxication for periods of fifteen minutes each while performing his duties,[26] or soliciting campaign expenses from officers of other departments,[27] persistent refusal to sign orders for the pay of city officers to which they are entitled and without which they cannot be paid,[28] refusal

13. Field *v.* Malster, 88 Md. 691, 41 Atl. 1087; State *v.* Walker, 68 Mo. App. 110; State *v.* Brown, 57 Mo. App. 199.

An inferential authority to remove at pleasure cannot be deduced, since the existence of a defined term *ipso facto* negatives such an inference, and implies a contrary presumption, that is, that the incumbent shall hold to the end of his term, subject to removal for cause. State *v.* Brown, 57 Mo. App. 199.

14. State *v.* Brown, 57 Mo. App. 199.

15. *In re* Removal of Officers, 16 Pa. Co. Ct. 305, holding that one appointed to fill out an unexpired term of an elective officer holds an elective office within the meaning of the provision.

16. People *v.* Thompson, 94 N. Y. 451; People *v.* Baker, 12 Misc. (N. Y.) 389, 34 N. Y. Suppl. 49; People *v.* McAllister, 10 Utah 357, 37 Pac. 578.

17. Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842.

18. Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234]; Milliken *v.* Weatherford, 54 Tex. 388, 38 Am. Rep. 629.

19. Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842; State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234]; People *v.* Thompson, 94 N. Y. 451.

20. Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72. *Compare* Savannah *v.* Grayson, 104 Ga. 105, 30 S. E. 693, holding that a municipality has the power to remove from office for misconduct all corporate officers, although the power to do so is not expressly given by its charter to such corporation.

21. Shaw *v.* Macon, 19 Ga. 468.

22. State *v.* Jersey City, 25 N. J. L. 536 (holding that where a member of a city council is expelled for disorderly conduct pursuant to the city charter, and is reëlected, he cannot be expelled a second time for the offense for which he had been previously expelled); Ellison *v.* Raleigh, 89 N. C. 125.

23. *In re* Lemoyne Borough Councilmen, 15 Pa. Dist. 241; *In re* Jenkintown, 16 Montg. Co. Rep. (Pa.) 73. See *supra*, V, B, 1, c.

24. Com. *v.* Sanderson, 11 Pa. Co. Ct. 593, under statute making misbehavior, neglect of duty, or misdemeanor ground for removal.

25. State *v.* Jersey City, 25 N. J. L. 536, under statute authorizing removal for disorderly conduct.

26. Hogan *v.* Collins, 183 Mass. 43, 66 N. E. 429.

27. State *v.* Superior, 90 Wis. 612, 62 N. W. 304.

28. Riggins *v.* Waco, (Tex. Civ. App. 1905) 90 S. W. 657, 93 S. W. 426, under statute

to obey municipal ordinances,[29] negligence and incompetency on the part of the officer in regard to some particular work which it was his duty to do or to supervise,[30] entering into stipulations with litigants against the city not to appeal from adverse decisions,[31] being interested in the purchase of real estate by the municipality,[32] having an interest in a municipal contract,[33] commission of an assault by striking a person with a pistol,[34] or appropriation of municipal funds coming into his hands and denial when inquiries were made concerning the matter by the proper officials that there was anything payable.[35] On the other hand, it is not ground for removal that the officer removed appointed as a police officer one under prosecution for resisting an officer,[36] or approved a tax return and allowed it to go on the tax duplicate knowing it to be too low in amount, such acts being useless and without legal effect, because there was no statute requiring such consent or approval,[37] or refused to sign an order for payment for property purchased by the city, on the ground that the financial condition of the city did not warrant such an expenditure,[38] or demanded a reasonable fee for certifying for a purchaser of city bonds the minutes of the council relating to the bond issue, the demand having been promptly withdrawn upon an intimation that such certifying might fairly be considered city business.[39] So the making of a statement, in confidence by a member of a council of a city to the mayor, that he had heard rumors reflecting on the integrity of other members of the council, is no ground for removal, although the informant on whom he relies fails to substantiate his statement.[40] Mere political bias or personal dislike by the officer having the power of removal is not cause.[41] So it has been held that a statute making it unlawful for any candidate to provide, or agree to provide, money to be used by another in making any bet on any event arising out of the election, and declaring that a violation thereof shall be a misdemeanor, does not authorize the removal by the board of trustees of a mayor who has violated it, in the absence of a prosecution and conviction of such offense in a court of competent jurisdiction.[42] And it has also been held that the rule that a municipal officer shall be responsible for any want

authorizing removal of incumbent for misconduct in office.

29. Riggins *v.* Waco, (Tex. Civ. App. 1905) 90 S. W. 657, 93 S. W. 426, under statute authorizing removal from office for incompetency.

30. Heaney *v.* Chicago, 117 Ill. App. 405; People *v.* Coler, 40 N. Y. App. Div. 65, 57 N. Y. Suppl. 636 [*affirmed* in 159 N. Y. 569, 54 N. E. 1094].

31. People *v.* Auburn, 85 Hun (N. Y.) 601, 33 N. Y. Suppl. 165, under statute authorizing removal for misfeasance and malfeasance in office.

32. People *v.* New York, 52 Hun (N. Y.) 483, 5 N. Y. Suppl. 538 [*affirmed* in 126 N. Y. 621, 27 N. E. 409], under a statute providing that the violation of the provision in the act that no head of department shall be interested directly or indirectly in the purchase of real estate for the corporation shall be sufficient cause for removal by the mayor, and further holding it immaterial that the provision provided for the punishment of such offense.

33. Matter of Smith, 48 N. Y. App. Div. 634, 63 N. Y. Suppl. 1018, holding further that it is no justification that he acted in good faith and received no more on his contract than other contractors received.

Evidence insufficient to show good faith.— Where, in an action to remove defendant from office for violation of a statute providing that no village officer shall be interested in a contract with the village, defendant did not deny knowledge of the law, and admitted that he was in office when the law went into effect, and knew that the previous law prohibited such contracts, he did not show that he acted in good faith while violating the law. Matter of Smith, 48 N. Y. App. Div. 634, 63 N. Y. Suppl. 1018.

34. Johnson *v.* Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150, under a statute authorizing removal for misconduct.

35. Matter of Odell, 28 N. Y. App. Div. 464, 51 N. Y. Suppl. 122.

36. State *v.* Teasdale, 21 Fla. 652, under statute authorizing removal for disorderly behavior or misconduct in office.

37. State *v.* Sullivan, 15 Ohio Cir. Ct. 477, 8 Ohio Cir. Dec. 346, 15 Ohio Cir. Ct. 333, 8 Ohio Cir. Dec. 294.

38. Townsend *v.* Sauk Centre, 71 Minn. 379, 74 N. W. 150, under a statute authorizing removal "for cause."

39. Wendell *v.* Newark, 63 N. J. L. 216, 42 Atl. 767.

40. State *v.* New Orleans, 107 La. 632, 32 So. 22.

41. People *v.* New York, 19 Hun (N. Y.) 441.

42. Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72.

of judgment, skill, or failure of duty, which may cause unnecessary loss of life, limb, or property, contemplates the happening of one of the several events stated, and the officer will not be removed for a single error of judgment not resulting in the losses specified.[43]

(IV) *WHO ARE MUNICIPAL OFFICERS.* Not every officer with functions solely municipal is an officer within the meaning of constitutional or statutory provisions for removal. It has been so held in respect of the president of the city council who is considered merely an officer of that body and, as such, removable at its will.[44] So a file clerk of the county records, a chief janitor of the county buildings, a special officer for justices' courts and a county physician, none of whom take any oath of office or file any official bond, are not officers, but employees within the meaning of the statutes as to the removal of officers.[45] Assistant assessors and city sheriffs are municipal officers.[46] Park commissioners are within the meaning of a constitutional provision for the appointment and removal of officers.[47] And so is a collector of delinquent taxes of a city.[48] So a deputy tax commissioner is an officer,[49] and a receiver of taxes of a city is a public officer and not a private employee, and where the charter provides that he may be removed at pleasure, his appointment for a period of five years does not constitute an irrevocable contract which will prevent his removal during such time.[50]

(V) *PROCEEDINGS AND REVIEW*— (A) *In General.* The power of removal for cause is one that cannot be arbitrarily exercised.[51] The proceeding is usually considered judicial or quasi-judicial in its character,[52] and, while no particular form of procedure is necessary unless expressly required,[53] the rules of procedure

43. People *v.* Fire Com'rs, 6 N. Y. St. 658.

44. State *v.* Kiichli, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779.

45. Trainor *v.* Wayne County, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

46. Coogan *v.* State, 1 S. C. 468.

47. Wilcox *v.* People, 90 Ill. 186.

48. Houseman *v.* Com., 100 Pa. St. 222.

49. People *v.* Wells, 176 N. Y. 462, 68 N. E. 883, 178 N. Y. 135, 70 N. E. 218.

50. Uffert *v.* Vogt, 65 N. J. L. 377, 47 Atl. 225 [*affirmed* in 65 N. J. L. 621, 48 Atl. 574].

51. O'Neil *v.* Mansfield, 47 Misc. (N. Y.) 516, 95 N. Y. Suppl. 1009; State *v.* Hoglan, 64 Ohio St. 532, 60 N. E. 627.

52. *Colorado.*— Carter *v.* Durango, 16 Colo. 534, 27 Pac. 1057, 25 Am. St. Rep. 294.

Georgia.— Macon *v.* Shaw, 16 Ga. 172.

Kentucky.— Tompert *v.* Lithgow, 1 Bush 176.

Maine.— Andrews *v.* King, 77 Me. 224.

Michigan.— Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842; People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644; Stockwell *v.* White Lake, 22 Mich. 341.

New Jersey.— State *v.* Nowrey, (N. J. 1902) 52 Atl. 289; Bowlby *v.* Dover, 68 N. J. L. 97, 52 Atl. 289.

New York.— People *v.* Nichols, 79 N. Y. 582; People *v.* Saratoga Springs, 4 N. Y. App. Div. 399, 39 N. Y. Suppl. 607; O'Neil *v.* Mansfield, 47 Misc. 516, 95 N. Y. Suppl. 1009.

Oklahoma.—Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

Utah.— People *v.* McAllister, 10 Utah 357, 37 Pac. 578.

See 36 Cent. Dig. tit. "Municipal Corporations," § 350.

Proceedings administrative. — Some cases hold that the power to remove officers for cause, although to be exercised in a judicial manner, is administrative, not judicial. State *v.* Superior, 90 Wis. 612, 64 N. W. 304. See also *In re* Fire, etc., Com'rs, 19 Colo. 482, 36 Pac. 234. The removal of an officer upon conviction of an offense which forfeits his right to hold the office is an act mainly judicial. The removal of an officer as incident to the executive power of appointment is not judicial, and even where such removal is restricted by the establishment of certain precedent formalities, it is not judicial in the same sense as a removal made wholly as a punishment for an offense. Avery *v.* Studley, 74 Conn. 272, 50 Atl. 752. See also State *v.* Kennelly, 75 Conn. 704, 55 Atl. 555.

53. State *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650].

The absence of any ordinance prescribing the mode of removal does not invalidate a removal, where the proceedings were regular, and no rights of the incumbent were infringed. State *v.* Smith, 72 Conn. 572, 45 Atl. 355; Riggins *v.* Richards, 97 Tex. 229, 77 S. W. 946.

If no mode of inquiry be prescribed, the removing officer or body is at liberty to adopt such mode as to him shall seem proper. *In re* Fire, etc., Com'rs, 19 Colo. 482, 36 Pac. 234.

Where a mode of removal is prescribed, it is exclusive. State *v.* Thompson, 91 Minn. 279, 97 N. W. 887.

according to the common law requiring notice of charges preferred and an impartial hearing must be observed.[54]

(B) *Competency of Triers.* Where an officer is entitled to a hearing before he can be lawfully removed, the proceedings must be had by and before the authorized body duly assembled,[55] and not by and before a committee of such body.[56] The tribunal should be disinterested and impartial;[57] and it has been held that, when sitting as judges to try charges against an officer, municipal officers must be specially sworn for that purpose,[58] although this has been doubted in some cases,[59] and denied in others.[60]

(C) *Who May Institute Proceedings.* In the absence of a statute prescribing who may prefer charges against a municipal officer, they may be preferred by any one.[61] The mayor may properly formulate the charges of his own motion.[62] In his supervision over the conduct of officers, it may be his duty to do so.[63]

(D) *Notice and Hearing*—(1) RIGHT TO. When the tenure of a municipal officer is at the pleasure of the appointing body, the power to remove is discretionary, and may be exercised without notice or hearing.[64] But where the appointment is for a fixed term or during good behavior, or where the removal must be for cause, the power of removal can only be exercised on charges preferred, after notice and hearing, with a reasonable opportunity to be heard before the officer or body having the power to remove.[65] At the hearing the accused is

54. Andrews *v.* King, 77 Me. 224; Reid *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650].

55. **Both mayor and aldermen.**— Under a statute providing that an officer "is subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," the hearing must be by the mayor and aldermen. A hearing by the aldermen alone is not sufficient, even if with the officer's consent. Andrews *v.* King, 77 Me. 224.

Trial of mayor.— The mayor cannot act as a member of the board to try his own case. State *v.* Superior, 90 Wis. 612, 64 N. W. 304.

A majority of the council may act on removal charges. Riggins *v.* Richards, 97 Tex. 229, 77 S. W. 946.

56. Jacksonville *v.* Allen, 25 Ill. App. 54.

57. Andrews *v.* King, 77 Me. 224.

An alderman who prefers charges against an officer is not thereby disqualified to participate in his trial, the council not sitting as a court, but as an administrative body. People *v.* Auburn, 85 Hun (N. Y.) 601, 33 N. Y. Suppl. 165; Riggins *v.* Richards, 97 Tex. 229, 77 S. W. 946; State *v.* Superior, 90 Wis. 612, 64 N. W. 304. *Contra*, People *v.* Saratoga Springs, 4 N. Y. App. Div. 399, 39 N. Y. Suppl. 607.

58. Tompert *v.* Lithgow, 1 Bush (Ky.) 176.

A clerk of a board of aldermen, although also a notary public, has no authority to administer oaths to members of the board, sitting as a court of impeachment; and any acts done by such board under such organization are void. Tompert *v.* Lithgow, 1 Bush (Ky.) 176.

59. Andrews *v.* King, 77 Me. 224.

60. State *v.* Noblesville, 157 Ind. 31, 60 N. E. 704; State *v.* Superior, 90 Wis. 612, 64 N. W. 304.

61. Andrews *v.* King, 77 Me. 224.

In California section 772 of the penal code provides for proceedings in the superior court upon an accusation, in writing, filed by any person against any officer for "charging and collecting illegal fees for services rendered, or to be rendered, in his office," or neglect "to perform the official duties pertaining to his office." When the proceedings are for any other kind of misconduct in office, they must be commenced by accusation presented by a grand jury. Crossman *v.* Lesher, 97 Cal. 382, 32 Pac. 449.

"Party interested."— A ratepayer is not a "party interested," under the act of March 7, 1881, subjecting supervisors failing to fix rates in February, to go into effect July 1 of each year, to removal from office "at the suit of any interested party," where the rate was fixed after February, but before July, and the suit was not commenced until July 15, since he was in no way injured by the failure to fix the rates in February. Fitch *v.* San Francisco, 122 Cal. 285, 54 Pac. 901.

62. Andrews *v.* King, 77 Me. 224.

63. Andrews *v.* King, 77 Me. 224.

64. Carter *v.* Durango, 16 Colo. 534, 27 Pac. 1057, 25 Am. St. Rep. 294; State *v.* St. Louis, 90 Mo. 19, 1 S. W. 757; State *v.* Smith, 35 Nebr. 13, 52 N. W. 700, 16 L. R. A. 791; State *v.* McQuade, 12 Wash. 554, 41 Pac. 897.

65. *Colorado.*— Denver *v.* Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215.

Kentucky.— Todd *v.* Dunlap, 99 Ky. 449, 36 S. W. 541, 18 Ky. L. Rep. 329.

Louisiana.— State *v.* New Orleans, 107 La. 632, 32 So. 22.

Maine.— Andrews *v.* King, 77 Me. 224.

Michigan.— Kriseler *v.* Le Valley, 122 Mich. 576, 81 N. W. 580; Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408.

Missouri.— State *v.* Walbridge, 119 Mo.

entitled to produce his witnesses, and to cross-examine those of the prosecution;[66] and he also has the right to be represented by counsel.[67] The rule as thus stated is subject to the exception that notice may be dispensed with: (1) When the officer appears and answers; (2) when he has permanently left the municipality; and (3) in certain cases where it is apparent that a motion was for good cause and that the order to restore would be without practical and useful effect.[68]

(2) SUFFICIENCY. Unless expressly required, it is not necessary that the notice set out the charges in detail, but it should contain the substantial fact that the proceeding to remove is intended.[69] In the absence of statute or ordinance, analogies of the ordinary procedure of courts may be followed respecting notice, mode of service, and the like.[70]

(E) *Statement of Charges.* An investigation by a city council into the official conduct of a city officer is not governed by the strict rules of criminal trials at law; and, although the charge is not drawn with the precision of an

383, 24 S. W. 457, 41 Am. St. Rep. 663; State *v.* St. Louis, 90 Mo. 19, 1 S. W. 757; State *v.* Walker, 68 Mo. App. 110.

Nebraska.— State *v.* Smith, 35 Nebr. 13, 52 N. W. 700, 16 L. R. A. 791.

New Jersey.— Bowlby *v.* Dover, 68 N. J. L. 97, 52 Atl. 289; Krueger *v.* Chesilhurst, 64 N. J. L. 523, 45 Atl. 780; Corwin *v.* Markley, 55 N. J. L. 107, 25 Atl. 260; Markley *v.* Cape May Point, 55 N. J. L. 104, 25 Atl. 259; Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234]. But see Hoboken *v.* Gear, 27 N. J. L. 265.

New York.— People *v.* Nichols, 79 N. Y. 582; Armatage *v.* Fisher, 74 Hun 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650]; People *v.* New York, 19 Hun 441.

Ohio.— State *v.* Hoglan, 64 Ohio St. 532, 60 N. E. 627; State *v.* Sullivan, 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781.

Oklahoma.— Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

Rhode Island.— Maroney *v.* Pawtucket, 19 R. I. 3, 31 Atl. 265.

Tennessee.— Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182.

Utah.— People *v.* McAllister, 10 Utah 357, 37 Pac. 578.

See 36 Cent. Dig. tit. "Municipal Corporations," § 353.

Express power necessary.— It is only in cases where power to remove without notice or hearing is expressly given that it can be exercised. Todd *v.* Dunlap, 99 Ky. 449, 36 S. W. 541, 18 Ky. L. Rep. 329; Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408. See also State *v.* South Bend, 154 Ind. 693, 56 N. E. 721. *Compare* Kimball *v.* Olmsted, 20 Wash. 629, 56 Pac. 377.

Mere silence of the statute with respect to notice and hearing will not justify the removal of such an officer without knowledge of the charges and an opportunity to be heard. Reid *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; State *v.* St. Louis, 90 Mo. 19, 1 S. W. 757.

A power to remove "for such cause as he shall deem sufficient" is a power to remove without hearing. Atty.-Gen. *v.* Cahill, 169 Mass. 18, 47 N. E. 433.

Officers whose functions have expired.— Section 95 of the Greater New York charter does not render it necessary for the mayor to give notice to remove officials whose functions have expired. People *v.* Feitner, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094 [*affirmed* in 156 N. Y. 694, 51 N. E. 1093].

66. *Colorado.*— Denver *v.* Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215.

Illinois.— Jacksonville *v.* Allen, 25 Ill. App. 54.

Maine.— Andrews *v.* King, 77 Me. 224.

Missouri.— Reid *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663.

New York.— Armatage *v.* Fisher, 74 Hun 167, 26 N. Y. Suppl. 364 [*reversing* 4 Misc. 315, 24 N. Y. Suppl. 650]; People *v.* New York, 19 Hun 441; O'Neil *v.* Mansfield, 47 Misc. 516, 95 N. Y. Suppl. 1009.

67. Denver *v.* Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215; State *v.* New Orleans, 107 La. 632, 32 So. 22; People *v.* Nichols, 79 N. Y. 582; People *v.* New York, 19 Hun (N. Y.) 441; O'Neil *v.* Mansfield, 47 Misc. (N. Y.) 516, 95 N. Y. Suppl. 1009; Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

Refusal to allow representation by counsel in removal proceedings is not alone sufficient to invalidate such proceedings. Avery *v.* Studley, 74 Conn. 272, 50 Atl. 752.

68. State *v.* New Orleans, 107 La. 632, 32 So. 22.

69. State *v.* Walker, 68 Mo. App. 110.

Effect of amendment of charges after notice.— Where proper notice of charges to be preferred against a municipal officer is given, its sufficiency is not affected by the fact that some of the charges are afterward amended, where the amendment is only an amplification of the original charges, and an adjournment is taken to give relator an opportunity to meet the amended charges. People *v.* Auburn, 85 Hun (N. Y.) 601, 33 N. Y. Suppl. 165.

Waiver of defects in notice.— Defects in the notice given are waived by appearance of the officer whose removal is sought. People *v.* Brookfield, 6 N. Y. App. Div. 445, 39 N. Y. Suppl. 677 [*affirmed* in 151 N. Y. 674, 46 N. E. 1150].

70. State *v.* Walker, 68 Mo. App. 110.

indictment, it is sufficient if it acquaints defendant with the substance of the accusation against him.[71] The specific acts complained of should be stated, in order that it may appear, as matter of law, that the removing body has jurisdiction of the alleged offense.[72]

(F) *Adjudication.* After the hearing, there should be an adjudication upon the truth or falsity of the charges as matters of fact; for upon such adjudication the order of removal is based. An omission to pass upon the truth of the charges invalidates the order of removal.[73]

(G) *Review* — (1) By Certiorari. Where the power of a municipal body to remove from office is not discretionary,[74] but only for cause, after notice and hearing, the proceedings are judicial in the nature, and may be reviewed on certiorari.[75] On such review the court will inspect the record to see whether the body had jurisdiction and kept within it,[76] and whether the charges preferred

71. Andrews *v.* King, 77 Me. 224; State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; State *v.* Hoglan, 64 Ohio St. 532, 60 N. E. 627; Zumstein *v.* Tafel, 6 Ohio S. & C. Pl. Dec. 484, 4 Ohio N. P. 314; State *v.* Superior, 90 Wis. 612, 64 N. W. 304.

Where a wilful violation of a statute is made a ground of removal from office, a charge, to justify a removal, must allege a wilful violation of such law. State *v.* Ballard, 10 Wash. 4, 38 Pac. 761.

Charges held too indefinite.— Where the statute imposes the duty upon a board of supervisors, acting as a board of equalization, to equalize returns of personal property only, a charge that the board has knowingly consented to an undervaluation of real and personal property in gross, but which fails to charge any undervaluation as to such personalty, is not sufficiently definite to support a finding of neglect of duty, and an order of removal from office. State *v.* Sullivan, 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781.

Variance.— In proceedings by a municipal board for the removal of one of its members, where he was specifically charged with asking for a bribe, and he was found guilty merely of failing to disclose to the council that a bribe had been offered him, the variance was fatal. Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182.

The burden is on those prosecuting charges against a city officer to establish them. Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

72. Heaney *v.* Chicago, 117 Ill. App. 405; State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253. *Compare* State *v.* Ward, 70 Minn. 58, 72 N. W. 825 (holding that the insufficiency of the charges does not affect the jurisdiction of the tribunal); Zumstein *v.* Tafel, 6 Ohio S. & C. Pl. Dec. 484, 4 Ohio N. P. 314 (holding that, although charges against an officer are insufficient in law, and are so defective that they cannot be made the foundation of an order of removal by the mayor, a court of chancery will not restrain the mayor from hearing the charges and removing the incumbents from office).

73. Andrews *v.* King, 77 Me. 224.

74. **A removal without notice is not a judicial function,** and is not reviewable by certiorari. Matter of Carter, 141 Cal. 316, 74 Pac. 997.

When removal discretionary.— The motives actuating councilmen in connection with removals are not ordinarily subject to judicial inquiry, and, in the absence of deception or fraud, courts will decline to interfere with the removal of an officer who holds his office only at their pleasure. Carter *v.* Durango, 16 Colo. 534, 27 Pac. 1057, 25 Am. St. Rep. 294.

75. *Colorado.*— Denver *v.* Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215.

Georgia.— Macon *v.* Shaw, 16 Ga. 172.

Minnesota.— State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.

New York.— People *v.* Nichols, 79 N. Y. 582; People *v.* Cooper, 21 Hun 517; People *v.* New York, 19 Hun 441.

Tennessee.— Hayden *v.* Memphis City Council, 100 Tenn. 582, 47 S. W. 182.

See 36 Cent. Dig. tit. "Municipal Corporations," § 356.

But see State *v.* Kennelly, 75 Conn. 704, 55 Atl. 555.

Laches will preclude a petitioner from obtaining reinstatement after removal by the civil service commission. Heancy *v.* Chicago, 117 Ill. App. 405.

Effect of failure to take oath.— An officer's failure to take the official oath prescribed by the charter before entering on his duties does not deprive him of a standing to contest by certiorari his attempted removal from his office by a succeeding council during his fixed term. Peal *v.* Newark, 66 N. J. L. 265, 49 Atl. 468 [*reversing* 66 N. J. L. 105, 48 Atl. 576, but *affirming* O'Rourke *v.* Newark, 66 N. J. L. 109, 48 Atl. 578].

76. *Colorado.*— Denver *v.* Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215, holding that Denver City Charter, art. 2, § 3, which provides that "each board [of aldermen] shall be the sole judge of the qualifications, election and returns of its own members," does not divest the courts of their **correctional power,** by certiorari, to review the regularity of the proceedings of such board in ousting a member.

Illinois.— Heaney *v.* Chicago, 117 Ill. App. 405.

Louisiana.— State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893.

were sufficient in law,[77] and will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnished any legal and substantial basis for the removal.[78] Such bodies being essentially legislative and administrative, their proceedings, even when judicial in their nature, are not to be tested by the strict legal rules which prevail in courts of law. If they keep within their jurisdiction, and the evidence furnishes a legal and substantial basis for their decision, it will not be disturbed for mere informalities or irregularities which might amount to reversible error in the proceedings of a court.[79] But if the good faith and integrity of the decision is impaired, the determination should be annulled.[80]

(2) By Quo Warranto. In some jurisdictions it is held that the proper remedy of one removed from a city office is by quo warranto proceedings against the incumbent appointed as his successor, and in such proceedings the court may inquire into the sufficiency of the charges and findings upon which the removal was made.[81] But after an officer has gone to trial upon charges preferred against him, without objection to their sufficiency, and the issues have been found against him, resulting in his removal from office, he cannot, by quo warranto proceedings, raise the objection that the charges were not sufficiently specific.[82]

(3) By Prohibition. The removing officer or body is amenable to the writ of prohibition when acting in excess of the jurisdiction conferred.[83]

(4) By Appeal. In some states a special remedy in the nature of an appeal has been given by statute to one whom it is attempted to remove from office for cause.[84] Such an appeal brings before the court only the validity of the proceed-

Minnesota.— State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.

Texas.— Riggins *v.* Waco, (Civ. App. 1905) 90 S. W. 657, 93 S. W. 426.

See 36 Cent. Dig. tit. "Municipal Corporations," § 356.

No intendments can be indulged as to the jurisdiction and regularity of the proceedings in such cases. State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253.

Effect of failure to give notice.— Where a hearing before removal of the city official is given by statute, and the body charged with giving it has acted without it or refused it, the proceedings will be set aside. Bowlby *v.* Dover, 68 N. J. L. 97, 52 Atl. 289; People *v.* Constable, 27 N. Y. App. Div. 74, 50 N. Y. Suppl. 121.

77. State *v.* New Orleans, 107 La. 632, 32 So. 22; State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893; State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; State *v.* Hoglan, 64 Ohio St. 532, 60 N. E. 627.

If the cause assigned is a reasonable one, then, whether, under the circumstances, it is sufficient to justify a removal, is for the removing body to decide, and its decision is final. Ayers *v.* Hatch, 175 Mass. 489, 56 N. E. 612; People *v.* Brady, 48 N. Y. App. Div. 128, 62 N. Y. Suppl. 603. But whether the cause assigned constituted of itself, as matter of law, ground for removal, is a question of law for the courts. Ayers *v.* Hatch, *supra.*

78. State *v.* New Orleans, 107 La. 632, 32 So. 22; State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; People *v.* Grant, 12 Daly (N. Y.) 294; Riggins *v.* Waco, (Tex. Civ. App. 1906) 93 S. W. 426.

The decision of the removing officer is not open to revision, either to pass upon the weight of the evidence, or to determine whether the evidence justified the finding. Hogan *v.* Collins, 183 Mass. 43, 66 N. E. 429.

79. State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.

Errors as to evidence.— Courts will not reverse the action of the removing officer for merely formal errors as to the admission or rejection of testimony, but there must be substantially a fair trial and a fair exercise of judgment on the evidence before him. O'Neil *v.* Mansfield, 47 Misc. (N. Y.) 516, 95 N. Y. Suppl. 1009.

80. People *v.* Monroe, 97 N. Y. App. Div. 283, 89 N. Y. Suppl. 929.

81. State *v.* Kirkwood, 15 Wash. 298, 46 Pac. 331; State *v.* Van Brocklin, 8 Wash. 557, 36 Pac. 495. See, generally, Quo Warranto.

82. State *v.* Kirkwood, 15 Wash. 298, 46 Pac. 331.

83. Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842. See, generally, Prohibition.

84. The provision in the charter of the city of Oswego authorizing an officer, upon conviction of the cause charged for his removal, to appeal to the supreme court, has been held to mean the special term and not the appellate division. O'Neil *v.* Mansfield, 47 Misc. 516, 95 N. Y. Suppl. 1009. It is proper procedure, on appeal from the mayor's action in removing city officers, to order the mayor to certify and return a record of his proceedings in relation to the removal of the officers, and to show cause why the appeal should not prevail and his proceedings be reversed and set aside. O'Neil *v.* Mansfield, *supra.*

ings required by law before removal is made, and the discretion of the removing power will not be reviewed.[85]

b. Under Civil Service Restrictions and Veteran Acts — (I) *In General.*[86] The power of removal is frequently expressly restricted by statutes with regard to persons holding an office or position under the civil service laws,[87] or with regard to honorably discharged veterans of the army and navy,[88] or of volunteer fire companies,[89] the statutes providing that persons holding offices or positions under the civil service laws shall not be discharged except for cause and after a hearing,[90] or that certain classes of such persons shall not be discharged without being given an opportunity to explain,[91] and the grounds of removal reduced to writing and filed,[92] or that veterans shall not be discharged except for cause or certain specified causes and after a hearing,[93] or the offices or positions held by

85. Avery *v.* Studley, 74 Conn. 272, 50 Atl. 752.

An assignment of error stating that the court, in considering an appeal from the order of the mayor of a city removing plaintiffs from office, erred "in approving the order of the mayor upon the facts stated in the finding" is too indefinite for consideration by the appellate court. Avery *v.* Studley, 74 Conn. 272, 50 Atl. 752.

86. See also *infra*, VII, B; VII, C, 5, b.

87. Lindblom *v.* Doherty, 102 Ill. App. 14; People *v.* Dalton, 158 N. Y. 175, 52 N. E. 1113 [*reversing* 34 N. Y. App. Div. 627, 54 N. Y. Suppl. 1112]; Waters *v.* New York, 43 Misc. (N. Y.) 154, 88 N. Y. Suppl. 238.

88. Ayers *v.* Hatch, 175 Mass. 489, 56 N. E. 612; Ellis *v.* Grand Rapids, 123 Mich. 567, 82 N. W. 244; Ingram *v.* Jersey City St., etc., Com'rs, 63 N. J. L. 542, 43 Atl. 445; Bean *v.* Clauson, 113 N. Y. App. Div. 129, 99 N. Y. Suppl. 44; People *v.* Hoffman, 98 N. Y. App. Div. 4, 90 N. Y. Suppl. 184.

89. People *v.* Folks, 89 N. Y. App. Div. 171, 85 N. Y. Suppl. 1100; People *v.* Sturgis, 38 Misc. (N. Y.) 433, 77 N. Y. Suppl. 1008.

90. Lindblom *v.* Doherty, 102 Ill. App. 14; Chicago *v.* Luthardt, 91 Ill. App. 324.

During the probationary period.— A removal may be made under the Illinois statute without a hearing on written charges. Fish *v.* McGann, 205 Ill. 179, 68 N. E. 761 [*affirming* 107 Ill. App. 538].

91. People *v.* Dalton, 158 N. Y. 175, 52 N. E. 1113 [*reversing* 34 N. Y. App. Div. 627, 54 N. Y. Suppl. 1112]; People *v.* Feitner, 49 N. Y. App. Div. 101, 63 N. Y. Suppl. 209 [*affirming* 29 Misc. 702, 62 N. Y. Suppl. 969]; Waters *v.* New York, 43 Misc. (N. Y.) 154, 88 N. Y. Suppl. 238; People *v.* Feitner, 27 Misc. (N. Y.) 153, 57 N. Y. Suppl. 807 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1112].

The "head of a bureau" is, under the New York statute, entitled to an opportunity to explain, but the statute relates only to bureaus established by the charter or under its authority and not to bureaus established by the different departments without legislative authority, merely for administrative purposes. People *v.* Ahearn, 111 N. Y. App. Div. 741, 98 N. Y. Suppl. 492.

"Removed or reduced."— Under a statute providing that persons in certain positions shall not be removed or reduced without an opportunity to explain, the term "reduced" applies to a reduction in salary, although there is no removal or change in position. Waters *v.* New York, 43 Misc. (N. Y.) 154, 88 N. Y. Suppl. 238.

Non-competitive positions.— If the office or position was at the time of removal classified as not subject to competitive examination, the occupant is not entitled to an opportunity to explain under the New York statute. People *v.* Keller, 158 N. Y. 187, 52 N. E. 1107 [*affirming* 35 N. Y. App. Div. 493, 54 N. Y. Suppl. 1011]; People *v.* Keller, 157 N. Y. 90, 51 N. E. 431 [*affirming* 31 N. Y. App. Div. 248, 52 N. Y. Suppl. 950].

A person improperly appointed without examination to a position requiring a competitive examination is not entitled as a person holding a position "subject to competitive examination" to an opportunity to explain before removal. People *v.* McAdoo, 113 N. Y. App. Div. 770, 99 N. Y. Suppl. 324.

Public officers.— The dock master in the department of docks of New York city is a public officer and not an employee, and the duration of his office not being prescribed he may be summarily discharged without a hearing. People *v.* Cram, 164 N. Y. 166, 58 N. E. 112 [*reversing* 50 N. Y. App. Div. 380, 64 N. Y. Suppl. 158 (*affirming* 29 Misc. 359, 61 N. Y. Suppl. 858)].

92. People *v.* Dalton, 158 N. Y. 175, 52 N. E. 1113 [*reversing* 34 N. Y. App. Div. 627, 54 N. Y. Suppl. 1112]; People *v.* Feitner, 49 N. Y. App. Div. 101, 62 N. Y. Suppl. 969, 63 N. Y. Suppl. 209 [*affirming* 29 Misc. 702, 62 N. Y. Suppl. 969]; Waters *v.* New York, 43 Misc. (N. Y.) 154, 88 N. Y. Suppl. 238.

93. Ingram *v.* Jersey City St., etc., Com'rs, 63 N. J. L. 542, 43 Atl. 445; People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060 (*affirming* 24 Misc. 10, 53 N. Y. Suppl. 108)]; Bean *v.* Clausen, 113 N. Y. App. Div. 129, 99 N. Y. Suppl. 44; People *v.* Hoffman, 98 N. Y. App. Div. 4, 90 N. Y. Suppl. 184; People *v.* Constable, 65 N. Y. App. Div. 176, 72 N. Y. Suppl. 535; People *v.* Coler, 31 N. Y. App. Div. 523, 52 N. Y. Suppl. 197 [*affirmed* in 157 N. Y. 676, 51 N. E. 1093].

The Massachusetts statute of 1896, providing that veterans shall not be removed or

them abolished for the purpose of terminating their employment,[94] and statutes conferring upon certain officers a general power of removal must be construed with and limited by the statutes imposing a restriction in favor of such persons.[95] The statutes requiring a hearing or opportunity to explain apply only where the removal is for incompetency, misconduct, or other reason personal to the individual removed,[96] and not where the removal is made in good faith from motives of economy,[97] as where the services are no longer needed,[98] or there is not a sufficient appropriation to pay salaries,[99] or the office or position is in good faith abolished;[1] but to make a compliance with the statutes unnecessary, the office must be abolished in good faith.[2] The civil service laws, in the absence of any express restrictions, do not affect the power of removal,[3] and the removal of persons holding civil service positions which are not within the classes to which the restrictions apply is governed by the rules applicable to the question of removals generally.[4]

(II) *Grounds.* Where the statute prohibits a removal except for cause but does

suspended except after a full hearing, does not apply to all veterans in the employ of the municipality, but only to those holding an office or employment under the civil service laws. Ayers *v.* Hatch, 175 Mass. 489, 56 N. E. 612.

The Michigan statute of 1897, providing that "no veteran holding an office or employment in the public works of any city or town" shall be removed except after a full hearing, and making a violation of the statute a misdemeanor, is a penal statute and must be strictly construed, and the term "public works" does not include public departments so as to entitle a clerk in the office of the city attorney to the protection of the statute. Ellis *v.* Grand Rapids, 123 Mich. 567, 82 N. W. 244.

Exception as to private secretaries and deputies.— The New York statute prohibiting the discharge of a veteran except for incompetency or misconduct shown after a hearing upon due notice expressly excepts a private secretary or deputy of any official or department. People *v.* Wells, 176 N. Y. 462, 68 N. E. 883 [*reversing* 86 N. Y. App. Div. 270, 83 N. Y. Suppl. 789], 178 N. Y. 135, 70 N. E. 218; People *v.* Scannell, 51 N. Y. App. Div. 360, 64 N. Y. Suppl. 593; People *v.* Tracy, 35 N. Y. App. Div. 265, 54 N. Y. Suppl. 1070; People *v.* Scully, 35 Misc. (N. Y.) 613, 72 N. Y Suppl. 123.

The uniformed force of the street cleaning department of New York city is not within the application and protection of the veteran statute. People *v.* McCartney, 36 N. Y. App. Div. 39, 55 N. Y. Suppl. 156.

Waiver of right to hearing.— One entitled to a hearing before removal by reason of being a veteran or volunteer fireman must, unless the removing officer has knowledge or there is a record of the fact, give notice that he is a veteran or fireman, and claim his right to a hearing at the time of removal, or he will be held to have waived his right. People *v.* White, 59 N. Y. App. Div. 17, 69 N. Y. Suppl. 30; People *v.* Clausen, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993; People *v.* Porter, 90 Hun (N. Y.) 401, 35 N. Y. Suppl. 811.

Failure to reappoint a veteran at the expiration of his term of office is not a removal from office. People *v.* Follett, 24 Misc. (N. Y.) 510, 53 N. Y. Suppl. 956.

94. Ingram *v.* Jersey City St., etc., Com'rs, 63 N. J. L. 542, 43 Atl. 445.

95. People *v.* Hoffman, 98 N. Y. App. Div. 4, 90 N. Y. Suppl. 184; People *v.* Constable, 65 N. Y. App. Div. 176, 72 N. Y. Suppl. 535. But see Jacobus *v* Van Wyck, 33 N. Y. App. Div. 318, 53 N. Y. Suppl. 914 [*reversing* 24 Misc. 329, 53 N. Y. Suppl. 71].

96. Fitzsimmons *v.* O'Neill, 214 Ill. 494, 73 N. E. 797 [*affirming* 114 Ill. App. 168]; People *v.* New York, 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123]; Kenny *v.* Kane, 27 Misc. (N. Y.) 680, 59 N. Y. Suppl. 555.

97. Fitzsimmons *v.* O'Neill, 214 Ill. 494, 73 N. E. 797; Caulfield *v.* Jersey City, 63 N. J. L. 148, 43 Atl. 433; Kenny *v.* Kane, 27 Misc. (N. Y.) 680, 59 N. Y. Suppl. 555.

98. People *v.* Waring, 7 N. Y. App. Div. 204, 40 N. Y. Suppl. 275; Kenny *v.* Kane, 27 Misc. (N. Y.) 680, 59 N. Y. Suppl. 555.

99. People *v.* New York, 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123].

1. Fitzsimmons *v.* O'Neill, 214 Ill. 494, 73 N. E. 797 [*affirming* 114 Ill. App. 168]; Chicago *v.* People, 114 Ill. App. 145; Caulfield *v.* Jersey City, 63 N. J. L. 148, 43 Atl. 433; Matter of Kelly, 42 N. Y. App. Div. 283, 59 N. Y. Suppl. 30.

2. Ingram *v.* Jersey City St., etc., Com'rs, 63 N. J. L. 542, 43 Atl. 445; Jones *v.* Wilcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420; People *v.* Dalton, 44 N. Y. App. Div. 556, 60 N. Y. Suppl. 909.

3. People *v.* Dalton, 23 Misc. (N. Y.) 294, 50 N. Y. Suppl. 1028 [*affirmed* in 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1112].

4. People *v.* Dalton, 159 N. Y. 235, 53 N. E. 1113 [*affirming* 34 N. Y. App. Div. 302, 54 N. Y. Suppl. 216]; People *v.* New York, 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123]; People *v.* Drake, 43 N. Y. App. Div. 325, 60 N. Y. Suppl. 309 [*affirmed* in 161 N. Y. 642, 57 N. E. 1122]; People *v.* Dalton, 23 Misc. (N. Y.) 294, 50 N. Y. Suppl. 1028 [*affirmed*

not specify what shall constitute cause, the question is for the determination of those vested with the power of conducting the hearing;[5] and a provision that the civil service commission shall make and publish rules in regard to removals does not require that it shall determine and specify in advance the grounds upon which a removal may be made.[6] Cause for removal is not limited to offenses done while the officer or person is acting strictly within the line of his duties.[7]

(III) *Procedure.* The opportunity to explain required by statute in certain cases before a discharge is not a trial and no formal procedure is required.[8] It is not necessary that the charges should be verified under oath,[9] or witnesses produced,[10] or if produced that they should be sworn;[11] but only that the charges should be definitely made and a fair opportunity to explain them given,[12] and the proceeding may be conducted by a deputy as well as the head of a department.[13] Where a removal can be made only for cause and after a hearing, the hearing, while not a common-law or criminal proceeding,[14] is of a judicial character and must be so conducted,[15] giving the accused a full and fair opportunity to be heard and to examine witnesses and present evidence in his own behalf,[16] and the burden of establishing the charges is upon the party alleging them.[17] Sufficient notice must also be given to enable the person accused to procure counsel and prepare his defense,[18] and the charges must be made in writing if the statute so provides,[19] and with sufficient definiteness and certainty properly to inform the accused of their character and extent,[20] but the technical language and particularity required in an indictment or complaint is not necessary.[21] Under the Illinois statute the civil service commission is given jurisdiction to try the question of removal on charges,[22] and they may compel the production of any books and papers relevant to the investigation;[23] but their functions are limited to investigating the charges and certifying the result of their investigation, the right of removal being in the appointing officer.[24]

(IV) *Review.* Where the right of removal is restricted by statute the proceedings are reviewable on certiorari,[25] and will be reversed where it appears that

in 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1122].

5. Kammann *v.* Chicago, 222 Ill. 63, 78 N. E. 16.

6. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

7. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

8. People *v.* Coler, 40 N. Y. App. Div. 65, 57 N. Y. Suppl. 636 [*affirmed* in 159 N. Y. 569, 54 N. E. 1094]; People *v.* Cruger, 17 N. Y. App. Div. 483, 45 N. Y. Suppl. 519 [*affirmed* in 155 N. Y. 701, 50 N. E. 1121].

9. People *v.* Coler, 40 N. Y. App. Div. 65, 57 N. Y. Suppl. 636 [*affirmed* in 159 N. Y. 569, 54 N. E. 1094].

10. People *v.* Cruger, 17 N. Y. App. Div. 483, 45 N. Y. Suppl. 519 [*affirmed* in 155 N. Y. 701, 50 N. E. 1121].

11. People *v.* Coler, 40 N. Y. App. Div. 65, 57 N. Y. Suppl. 636 [*affirmed* in 159 N. Y. 569, 54 N. E. 1094].

12. People *v.* Cruger, 17 N. Y. App. Div. 483, 45 N. Y. Suppl. 519 [*affirmed* in 155 N. Y. 701, 50 N. E. 1121].

13. People *v.* Coler, 40 N. Y. App. Div. 65, 57 N. Y. Suppl. 636 [*affirmed* in 159 N. Y. 569, 54 N. E. 1094].

14. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

15. People *v.* McCartney, 34 N. Y. App. Div. 19, 53 N. Y. Suppl. 1047.

The witnesses should be sworn on such a hearing. People *v.* McCartney, 34 N. Y. App. Div. 19, 53 N. Y. Suppl. 1047. But see People *v.* Brookfield, 6 N. Y. App. Div. 445, 39 N. Y. Suppl. 677 [*affirmed* in 151 N. Y. 674, 46 N. E. 1150].

16. People *v.* McCartney, 34 N. Y. App. Div. 19, 53 N. Y. Suppl. 1047.

17. People *v.* Crani, 34 N. Y. App. Div. 313, 54 N. Y. Suppl. 355.

18. People *v.* McCartney, 34 N. Y. App. Div. 19, 53 N. Y. Suppl. 1047.

19. Lindblom *v.* Doherty, 102 Ill. App. 14.

20. Lindblom *v.* Doherty, 102 Ill. App. 14.

Waiver of objections.—Any lack of definiteness in the specification of charges is waived by an appearance and participation in the proceedings without any objection. People *v.* Brookfield, 6 N. Y. App. Div. 445, 39 N. Y. Suppl. 677 [*affirmed* in 151 N. Y. 674, 46 N. E. 1150].

21. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

22. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

23. Kanter *v.* Clerk Cir. Ct., 108 Ill. App. 287.

24. Lindblom *v.* Doherty, 102 Ill. App. 14.

25. Kammann *v.* Chicago, 222 Ill. 63, 78 N. E. 16; People *v.* Hoffman, 98 N. Y. App. Div. 4, 90 N. Y. Suppl. 184.

a hearing in a case within the application of the statute was denied,[26] or the proceedings were not fairly conducted;[27] but not where it appears that the proceedings were fairly conducted and the evidence sufficient to sustain the charges,[28] or where the charges if true are sufficient to warrant a removal, and it does not appear that the discharged officers abused their discretion in refusing to accept the explanation made.[29]

(v) *Reinstatement or Transfer.* Where a person has been improperly removed without a hearing or opportunity to explain, as required by statute, mandamus will lie to compel his reinstatement.[30] The application must be preceded by a demand for reinstatement, stating the grounds upon which it is based,[31] and the petition must show that the position from which relator was removed was one within the application of the statutes.[32] The person appointed to fill the position from which relator was removed is not a necessary party.[33] The right to a reinstatement may be barred by laches,[34] and will be denied in the case of one who was a veteran where the removing officer had no notice of the fact, and the right to a hearing was not claimed at the time of removal,[35] or where the officer making the removal and against whom the proceedings are instituted was without authority either to remove or reinstate.[36] The New York statutes also provide that where the position held by a veteran becomes unnecessary or is abolished, he shall not be dismissed from the public service but transferred to some other position which he is competent to fill.[37] This statute does not, however, give the veteran an unqualified right to be retained, but only to a transfer in case there is a vacancy which he is competent to fill,[38] it not being contemplated that the municipality should be burdened with the expense of persons

26. People *v.* Hoffman, 98 N. Y. App. Div. 4, 90 N. Y. Suppl. 184.

27. People *v.* McCartney, 34 N. Y. App. Div. 19, 53 N. Y. Suppl. 1047.

28. People *v.* Coler, 78 N. Y. App. Div. 248, 79 N. Y. Suppl. 1085 [*affirmed* in 175 N. Y. 510, 67 N. E. 1088]; People *v.* Brady, 62 N. Y. App. Div. 609, 70 N. Y. Suppl. 823.

29. People *v.* Brady, 43 N. Y. App. Div. 60, 59 N. Y. Suppl. 322; People *v.* Cruger, 17 N. Y. App. Div. 483, 45 N. Y. Suppl. 519 [*affirmed* in 155 N. Y. 701, 50 N. E. 1121].

30. Ingram *v.* Jersey City St., etc., Com'rs, 63 N. J. L. 542, 43 Atl. 445; People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060 (*affirming* 24 Misc. 10, 53 N. Y. Suppl. 108)]; People *v.* Dalton, 158 N. Y. 175, 52 N. E. 1113 [*reversing* 34 N. Y. App. Div. 627, 54 N. Y. Suppl. 1112]; People *v.* Dalton, 41 N. Y. App. Div. 458, 58 N. Y. Suppl. 929 [*affirmed* in 160 N. Y. 686, 55 N. E. 1099]; People *v.* Coler, 31 N. Y. App. Div. 523, 52 N. Y. Suppl. 197 [*affirmed* in 157 N. Y. 676, 51 N. E. 1093]; Nuttall *v.* Simis, 31 N. Y. App. Div. 503, 52 N. Y. Suppl. 308 [*affirming* 22 Misc. 19, 47 N. Y. Suppl. 1097].

Compensation on reinstatement.— The New York statute of 1904 provides that if a veteran is improperly removed and reinstated on mandamus, he shall be entitled to and shall receive the same compensation from the date of removal to his reinstatement as he would have received if he had not been removed, and mandamus will lie to compel the payment of such compensation. People *v.* Grout, 44 Misc. (N. Y.) 526, 90 N. Y. Suppl. 122.

31. People *v.* Clausen, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993.

32. People *v.* Dalton, 159 N. Y. 235, 53 N. E. 1113 [*affirming* 34 N. Y. App. Div. 302, 54 N. Y. Suppl. 216]; People *v.* Ahearn, 111 N. Y. App. Div. 741, 98 N. Y. Suppl. 492; People *v.* Dalton, 23 Misc. (N. Y.) 294, 50 N. Y. Suppl. 1028 [*affirmed* in 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1122].

33. People *v.* Ahearn, 111 N. Y. App. Div. 741, 98 N. Y. Suppl. 492.

34. People *v.* Welde, 28 Misc. (N. Y.) 582, 59 N. Y. Suppl. 1030, holding that a delay of over four months in moving for mandamus for reinstatement, if unexplained, is such laches as will bar the right.

35. People *v.* White, 59 N. Y. App. Div. 17, 69 N. Y. Suppl. 30; People *v.* Clausen, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993.

36. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060 (*affirming* 24 Misc. 10, 53 N. Y. Suppl. 108)], holding that in such case the removal proceedings are void, and that mandamus will not issue to compel an officer to do that which he has no authority to do.

37. Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420; People *v.* Voorhis, 63 N. Y. App. Div. 249, 71 N. Y. Suppl. 266; People *v.* Scannell, 48 N. Y. App. Div. 69, 62 N. Y. Suppl. 682 [*affirming* 27 Misc. 734, 59 N. Y. Suppl. 480].

38. People *v.* Lindenthal, 173 N. Y. 524, 66 N. E. 407 [*reversing* 79 N. Y. App. Div. 43, 79 N. Y. Suppl. 828]; *In re* Breckenridge, 160 N. Y. 103, 54 N. E. 670 [*affirming* 40 N. Y. App. Div. 633, 58 N. Y. Suppl. 1146].

whose services are not needed,[39] or discharge any person already acceptably filling a position but who is not protected by the veteran act in order to make room for a veteran.[40] If there is a vacancy which the veteran is competent to fill, mandamus will lie to compel his reinstatement and transfer to such position,[41] but the burden is upon the applicant to show his qualifications for the position.[42]

c. Effect of Removal. The sentence of removal by competent authority operates forthwith to terminate official life and function, unless otherwise prescribed by statute.[43] He cannot hold office until it has been decided by some authority vested with the power of review, whether or not he has been legally removed.[44] Where judgment of ouster is pronounced against persons holding seats in a city council, and they are ousted therefrom on the ground that the wards from which they claimed to have been elected had no legal existence, such ouster does not create vacancies in the council which may be filled by a special election.[45] So where a mayor by official misconduct forfeits his office, and the forfeiture is judicially declared in a quo warranto proceeding, the judgment of ouster operates to deprive him of the right to take or hold the office during the remainder of the term to which he has been elected.[46]

d. Action For Wrongful Removal and Damages Recoverable. Under a statute providing that if judgment, on the trial of the right of a person to office, be rendered in his favor, he may recover the damages sustained by the usurpation thereof by defendant, no damages may be recovered from the body exercising the power where a city office was taken from plaintiff and given to defendant under a void act of the legislature.[47] Where damages for removing a municipal officer are recoverable, they are such as necessarily result from the amotion, namely, the salary and perquisites of the office.[48] In an action for wrongful ouster from office, it is not error to permit plaintiff to strike out an allegation as to the power of defendant mayor and aldermen to remove for cause the incumbent of an office created by charter or ordinance, as the state of facts on which the action is based remains unaltered.[49] In an action for damages for wrongful removal from office by the mayor and aldermen of a city, the refusal by the court to permit defendants to read the provisions of the city charter giving them authority to remove for cause is erroneous.[50]

13. Compensation[51] — a. Right Thereto — (I) *Of De Jure Officers* — (A) *In General.* Unless, at the time of the performance of services, compensation

39. *In re* Breckenridge, 160 N. Y. 103, 54 N. E. 670 [*affirming* 40 N. Y. App. Div. 633, 58 N. Y. Suppl. 1146].

40. People *v.* Lindenthal, 173 N. Y. 524, 66 N. E. 407 [*reversing* 79 N. Y. App. Div. 43, 79 N. Y. Suppl. 828]; *In re* Breckenridge, 160 N. Y. 103, 54 N. E. 670 [*affirming* 40 N. Y. App. Div. 633, 58 N. Y. Suppl. 1146].

41. People *v.* Scannell, 48 N. Y. App. Div. 69, 62 N. Y. Suppl. 682 [*affirming* 27 Misc. 734, 59 N. Y. Suppl. 480].

The application for mandamus is premature where certain positions have been abolished by law and the positions created under the new law in place of those abolished have not been classified or the salaries fixed. People *v.* Voorhis, 63 N. Y. App. Div. 249, 71 N. Y. Suppl. 266.

42. Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420.

43. Heffran *v.* Hutchins, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353.

44. Heffran *v.* Hutchins, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353 [*affirming* 56 Ill. App. 581]; Welchaus *v.* Lancaster, 12 Lanc. Bar (Pa.) 135.

45. State *v.* Kearns, 47 Ohio St. 566, 25 N. E. 1027.

46. State *v.* Rose, 74 Kan. 262, 86 Pac. 296, 6 L. R. A. N. S. 843.

47. Bravin *v.* Tombstone, 4 Ariz. 83, 33 Pac. 589.

48. Shaw *v.* Macon, 19 Ga. 468.

49. Manker *v.* Faulhaber, 94 Mo. 430, 6 S. W. 372.

50. Manker *v.* Faulhaber, 94 Mo. 430, 6 S. W. 372.

51. Compensation of agents and employees see *infra*, VII, C, 6.

Compensation of officers of departments see *infra*, VII, B.

Exemption of salary of officers see EXEMPTIONS, 18 Cyc. 1434.

Garnishment of salaries of officers, agents, and employees see GARNISHMENT, 20 Cyc. 1030.

Municipal corporations or their officers or agents as persons subject to garnishment see GARNISHMENT, 20 Cyc. 988, 989.

Supplementary proceedings against salaries of officers and employees see EXECUTIONS, 17 Cyc. 1416.

therefor had been fixed and declared by statute,[52] ordinance,[53] or express agreement authorized by law,[54] a municipal officer is not entitled to compensation for official services rendered by him.[55] An officer whose salary is fixed by law is entitled to that salary, not as under a contract of employment but as incident to the office, and he cannot be deprived of it so long as he holds the office.[56]

(B) *Pending Determination of Right to Office.* A *de jure* officer who is illegally kept out of his office cannot recover emoluments thereof until there has been a judicial determination establishing his right to the office;[57] but after such determination he may recover salary for the period for which he was prevented from performing his official duties,[58] except where the same has been actually paid to an officer *de facto* holding office and performing the duties.[59] After such

52. Lewis *v.* Widher, 99 Cal. 412, 33 Pac. 1128.

Abolition of one office and creation of another with same duties.— Where a statute abolishes a given office and creates another differing in title but not in the duties pertaining thereto, and is silent as to compensation, the incumbent of the latter office is entitled to the salary attached to the former office before it was abolished. Nichols *v.* Edenton, 125 N. C. 13, 34 S. E. 71.

Amendment of charter for purpose of giving salary.—Where a city charter is amended so as to give a certain officer a salary, no compensation having been previously given, the statute does not have a retroactive effect so as to entitle a person holding such office at the time of the enactment of the amendment to compensation for the portion of his term prior to the amendment. Montpelier *v.* Senter, 72 Vt. 112, 47 Atl. 392.

Exceeding debt limit.— A constitutional provision that no city shall incur any liability exceeding in any year the income of the revenue provided for such year without the assent of two thirds of the qualified voters of such city has no application to the liability of a city for the salary of a municipal officer whose fee has been created and whose salary has been fixed by statute, as such liability has been established by the legislature and cannot be said to be incurred by the city. Lewis *v.* Widber, 99 Cal. 412, 33 Pac. 1128.

53. Devers *v.* York City, 150 Pa. St. 208, 24 Atl. 668.

Invalid ordinance.— Under Laws (1889–1890), p. 223, § 6, providing that elected officers shall receive such salaries as may be prescribed in the city charter, an ordinance providing for compensation to councilmen is invalid, where the charter provides none. Bardsley *v.* Sternberg, 17 Wash. 243, 49 Pac. 499.

54. Tice *v.* New Brunswick, 73 N. J. L. 615, 64 Atl. 108, holding that Gen. St. p. 2123, § 8, concerning salaries of officers in cities and townships, authorizes an agreement requiring the officer to perform his duties for a compensation limited to the value of the services that may be rendered and without any stipulated salary.

55. *Kentucky.*— Louisville *v.* Baird, 15 B. Mon. 246.

Louisiana.— Bosworth *v.* New Orleans, 26 La. Ann. 494.

Maine.— Goud *v.* Portland, 96 Me. 125, 51 Atl. 820.

New Jersey.— See McEwan *v.* West Hoboken, 58 N. J. L. 512, 34 Atl. 130.

New York.— Wittmer *v.* New York, 50 N. Y. App. Div. 482, 64 N. Y. Suppl. 170; Haswell *v.* New York, 9 Daly 1 [*affirmed* in 81 N. Y. 255]; O'Connor *v.* New York, 48 Misc. 407, 95 N. Y. Suppl. 504.

Texas.— Brownwood *v.* Farmer, 3 Tex. App. Civ. Cas. § 350.

Wisconsin.— Gilbert-Arnold Land Co. *v.* Superior, 91 Wis. 353, 64 N. W. 999.

In Canada it has been held that where a by-law appoints an officer, but does not fix his salary, the law will fix it at a reasonable sum, regard being had to the services performed. Bogart *v.* Seymour Tp., 10 Ont. 322.

56. Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835; Grieb *v.* Syracuse, 94 N. Y. App. Div. 133, 87 N. Y. Suppl. 1083.

One who is neither a de facto nor de jure officer is not entitled to the compensation attached to a municipal office. Hampton *v.* Jones, 105 Va. 306, 54 S. E. 16.

57. McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106.

58. McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106; Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168. See also Philadelphia *v.* Rink, 1 Pa. Cas. 390, 2 Atl. 505.

59. *Louisiana.*— Michel *v.* New Orleans, 32 La. Ann. 1094.

Michigan.— Scott *v.* Crump, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 418, holding that when one candidate for city controller is given the office by virtue of the decision of a board of canvassers, payment of salary to him prior to a judgment of ouster in favor of the other candidate will bar recovery of salary by the latter for such time as the former occupied the office and received a salary therefor, and it makes no difference that the city had notice of contest or that members of the city council were *ex-officio* members of the canvassing board, there having been no fraud on their party.

New Jersey.— McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384.

New York.— McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106; Dolan *v.* New York, 68 N. Y. 274, 23

adjudication any amount for services rendered not paid to the intruder is payable to the one adjudged the *de jure* officer,[60] and where, after the adjudication and notice thereof to the disbursing officer, the intruder still continues to perform the duties of the office, the compensation therefor belongs to the *de jure* officer and he may maintain an action therefor against the municipality, although the disbursing officer has paid it to the intruder.[61]

(c) *During Period of Suspension.* An officer who is arbitrarily suspended without cause but not removed is entitled to his salary during the period of suspension.[62] Otherwise, however, as to an officer legally suspended for cause. He cannot recover for services which he did not and had no right to render.[63] Under an ordinance providing that an officer shall not receive any compensation during the time he is suspended by the mayor for a supposed offense, nor until the council decides the case, one who is suspended is entitled, on acquittal and reinstatement, to his salary during the time of suspension,[64] although another officer was appointed to perform his duties during such period.[65]

(d) *On Removal.* An incumbent of a municipal office legally removed therefrom is not entitled to the compensation attached to the office after such removal.[66] But where the officer was wrongfully removed, the rule is that he may on reinstatement recover from the municipality the salary that accrued during the period of removal,[67] unless it appears that such salary was paid to a *de facto* officer holding the office and performing the duties;[68] reinstatement, however, by a competent legal tribunal in direct proceedings for that purpose being a

Am. Rep. 168; Smith *v.* New York, 37 N. Y. 518; Demarest *v.* New York, 74 Hun 517, 26 N. Y. Suppl. 585 [*affirmed* in 147 N. Y. 203, 41 N. E. 405]. *Compare* People *v.* Brennan, 45 Barb. 457, 30 How. Pr. 417.

Ohio.— State *v.* Eshelby, 2 Ohio Cir. Ct. 468, 1 Ohio Cir. Dec. 592.

Utah.— Kendall *v.* Raybould, 13 Utah 226, 44 Pac. 1034.

The municipality is protected from a second payment of compensation once paid to one actually discharging the duties of an office, under color of title, whether the compensation was fixed by fees payable from the municipal treasury for the specified service rendered or by an annual salary payable at recurring periods, and also whether the office is held by appointment or by election. McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106.

60. McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106.

61. McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106.

62. Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19; Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854. *Compare* Steubenville *v.* Culp, 38 Ohio St. 18, 43 Am. Rep. 417, holding that an officer suspended without cause is not entitled to compensation for the period during which he was suspended, where the statute declares that the suspension creates a vacancy and provides how that vacancy shall be filled.

63. Westberg *v.* Kansas City, 64 Mo. 493.

64. State *v.* Carr, 3 Mo. App. 6.

65. State *v.* Carr, 3 Mo. App. 6.

66. Turner *v.* Chicago, 76 Ill. App. 649; Mandell *v.* New Orleans, 21 La. Ann. 9; Lethbridge *v.* New York, 133 N. Y. 232, 30 N. E. 975.

Where a municipal officer is thrown into prison on a criminal charge, and thereby incapacited from discharging his duties, and another is elected, he cannot upon his acquittal recover the salary for the balance of his term. Brunswick *v.* Fahm, 60 Ga. 109.

67. Chicago *v.* Luthardt, 191 Ill. 516, 61 N. E. 410; Padden *v.* New York, 45 Misc. (N. Y.) 517, 92 N. Y. Suppl. 926.

Abolition of office after removal therefrom. — The clerk of a department of the city of New York which was abolished on Jan. 1, 1902, was unlawfully dismissed therefrom on Aug. 20, 1901, and was reinstated on Jan. 27, 1902, and reëmployed June 10, 1902, at the same salary by the president of the borough on whom the duties of the department had devolved. It was held, under Laws (1901), c. 456, § 1543, providing that a person legally holding the office or filling the position abolished shall be suspended without pay, that the clerk was not entitled to salary from Jan. 1, 1901, to June 10, 1902. Kastor *v.* New York, 39 Misc. (N. Y.) 709, 80 N. Y. Suppl. 952.

68. Martin *v.* New York, 82 N. Y. App. Div. 35, 81 N. Y. Suppl. 412 [*affirmed* in 176 N. Y. 371, 68 N. E. 640]. See also McManus *v.* Brooklyn, 5 N. Y. Suppl. 424.

Payment after notice.— An officer who has been prevented from performing the duties of his office by an illegal removal by the municipal authorities is still an officer *de jure*, and may recover from the city his salary for the period of removal, although the same has been paid to an officer *de facto* appointed to fill the assumed vacancy, provided the municipal authorities had knowledge of his claim therefor prior to such payment. Andrews *v.* Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280.

condition precedent to the right of recovery. Title to office cannot be tried in an action to recover the salary incident thereto.[69]

(E) *During Absence From City.* No deduction from the salary of a municipal officer can be made by reason of his absence from the city on private business.[70]

(F) *While Holding Over.* A *de jure* officer continuing to perform the duties of his office after the expiration of his term, owing to the want of appointment of a successor, is to be deemed as holding over and is entitled to compensation up to the time he ceases to discharge such duties.[71]

(G) *After Abolition of Office.* Where a municipal office is abolished the former incumbent has no right to demand compensation for the unexpired term,[72] even where he continues to perform the duties of the office.[73] But if the abolition of the office is subsequently declared invalid, an incumbent who in good faith performed,[74] or was willing to perform,[75] the duties of his office, becomes entitled to its emoluments.

(H) *For Particular Acts and Services.* Compensation in the form of fees or commissions may be and often is allowed by statute or ordinance for the performance of a particular service.[76] And the right of an officer to compensation so fixed

69. Lee *v.* Wilmington, 1 Marv. (Del.) 65, 40 Atl. 663; Gorley *v.* Louisville, 104 Ky. 372, 47 S. W. 263, 20 Ky. L. Rep. 602; Hagan *v.* Brooklyn, 126 N. Y. 643, 27 N. E. 265; McManus *v.* Brooklyn, 5 N. Y. Suppl. 424; Selby *v.* Portland, 14 Oreg. 234, 12 Pac. 377, 58 Am. Rep. 307.

70. Bates *v.* St. Louis, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701, holding further that St. Louis Charter, art. 4, § 17, providing that the president of the council or speaker of the house of delegates, if the former be absent, shall perform the duties of mayor in case of the absence of the mayor, and "shall receive the same compensation as the mayor," while so acting, does not intend that the salary shall accrue to the acting officer during the interim or that any deduction for personal private absences shall be made from the mayor's salary.

Reason for rule.— The right of an officer to his fees, emoluments, or salary is such only as is prescribed by statute; and while he holds the office such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment provided by law. Bates *v.* St. Louis, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701 [*quoting* Throop Public Officers, § 500].

71. Gilbert *v.* Paducah, 115 Ky. 160, 72 S. W. 816, 24 Ky. L. Rep. 1998; Taylor *v.* New York, 67 N. Y. 87.

Office to which no compensation attached.— Where a city treasurer who by law was *ex-officio* treasurer of the school fund for which, however, he was not entitled to compensation, continued to hold the school fund, his successor qualifying as city treasurer, but failing to qualify as school treasurer by giving an additional bond, it was held that the officer holding over was not entitled to compensation therefor, since if he was city treasurer his salary covered all the duties of the office, and if he was not, his holding of the school fund was an unlawful act for which he could not demand compensation. Knorr *v.* Board of Education, 8 Ohio Dec. (Reprint) 672, 9 Cinc. L. Bul. 182.

The provision of Ky. St. § 3264, that the transfer of a city of the third class to another class shall not in any wise affect the rights and duties of any officer thereof, is to be read in connection with section 3172, being part of the act for government of cities of the second class; so that the officers of a city coming into the second class, like those of a city originally in the class, are entitled to hold their offices and receive the same compensation as before till the induction into the office of the officers elected at the next regular election for cities of the second class. Gilbert *v.* Paducah, 115 Ky. 160, 72 S. W. 816, 24 Ky. L. Rep. 1998.

72. Wittmer *v.* New York, 50 N. Y. App. Div. 482, 64 N. Y. Suppl. 170; Palestine *v.* West, (Tex. Civ. App. 1896) 37 S. W. 783; Meissner *v.* Boyle, 20 Utah 316, 50 Pac. 1110; Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602; McAllister *v.* Swan, 16 Utah 1, 50 Pac. 812.

73. Wittmer *v.* New York, 50 N. Y. App. Div. 482, 64 N. Y. Suppl. 170; Meissner *v.* Boyle, 20 Utah 316, 50 Pac. 1110; McAllister *v.* Swan, 16 Utah 1, 50 Pac. 812.

Constitutional provision against change of salary.— The provision of Const. § 161, that the compensation of no municipal officer shall be changed after his election or during his term of office is to be read with section 156, giving the power to transfer in the city from one class to another, and does not impair the power to abolish the municipality or the office, thereby depriving the incumbent of such office of his right to demand compensation for the unexpired term. Gilbert *v.* Paducah, 115 Ky. 160, 72 S. W. 816, 24 Ky. L. Rep. 1998.

74. Frankfort *v.* Brawmer, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497, 18 Ky. L. Rep. 684.

75. San Antonio *v.* Micklejohn, 89 Tex. 79, 33 S. W. 735.

76. Smith *v.* Waterbury, 54 Conn. 174, 7 Atl. 17; Austin *v.* Johns, 62 Tex. 179; Hous-

for a particular service cannot be defeated by the act of a municipality in placing it beyond his power to perform that service;[77] but he cannot claim remuneration for a particular service when it was not performed by himself but by another whose duty it was to render it.[78]

(I) *For Duties of Another Office.* A municipal officer having a fixed salary, who is vested with the powers and duties of another municipal office, is deemed to be compensated for acting in both capacities by his salary, unless the law expressly declares that he shall receive a different and additional compensation.[79] An officer having a fixed salary who is *ex officio* a member of some municipal board or body is not entitled to additional compensation for acting in the latter capacity,[80] except where the statute expressly so provides.[81]

(J) *Interest on Municipal Funds.* Unless the law expressly so provides,[82] the interest received by a city officer from funds under his official control does not belong to him as perquisites.[83]

(K) *Extra Compensation* — (1) OFFICIAL ACTS — (a) IN GENERAL. The rule is that a person accepting a municipal office with a fixed salary is bound, in the absence of some express provision of law,[84] to perform all the duties of the office

ton *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49.

Officer obtaining judgment.— The commission of five per cent under Louisiana act of 1852 to the assistant city attorney upon tax bills collected by suit was due to the officer who obtained the judgment, and not to one who collected the amount of it. Hiestand *v.* New Orleans, 14 La. Ann. 330. Under a resolution of the city council providing that the city attorney shall be allowed a commission on all sums collected by him for the city by action to enforce collection of taxes, the attorney was entitled to commissions on taxes paid the city after he went out of office on judgments obtained by him. Houston *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49. If the city without the attorney's consent arbitrarily released a portion of such judgments or purchased any of the property in satisfaction of the judgments against it, it would be liable to the attorney for the full amount of his commission. Houston *v.* Stewart, *supra.*

Costs and allowances in actions prosecuted. — Under a charter providing that the corporation counsel shall be entitled in actions in which the city shall be successful to costs collected from the adverse party, the corporation counsel, on the city succeeding in an action to foreclose tax liens, is entitled to the taxable costs, although it became the purchaser of the land. Under the circumstances it is considered that the costs are collected from the adverse party. Sutherland *v.* Rochester, 189 N. Y. 198, 82 N. E. 171 [*reversing* 112 N. Y. App. Div. 712, 98 N. Y. Suppl. 970].

The St. Louis land commissioner was not entitled to fees for making and certifying a transcript of proceedings before him, required for the purpose of an appeal from his decision. State *v.* Ryan, 2 Mo. App. 303.

Services to be completed.— The assistant city attorney of New Orleans is not entitled to recover five per cent commissions on uncollected judgments, under Act No. 175 of 1859, giving him the right to recover commission on judgments only when the amounts thereof have been actually collected and paid into the treasury. Hiestand *v.* New Orleans, 28 La. Ann. 456.

Defendants working out fines.— Under a city ordinance providing that the recorder shall not be paid fees unless defendants against whom he has proceeded have paid their fines in money or other current funds, he is not entitled to fees where defendants work out their fines on the streets. Boucher *v.* Moberly, 74 Mo. 113.

77. Baxley *v.* Holton, 114 Ga. 724, 40 S. E. 728; Beard *v.* Decatur, 64 Tex. 7, 53 Am. Rep. 735.

78. Hiestand *v.* New Orleans, 28 La. Ann. 456.

79. Upton *v.* Clinton, 52 Iowa 311, 3 N. W. 81; Johnson *v.* State, 94 Tenn. 499, 29 S. W. 963, holding that, although the police judge of a city is vested by the city charter with the powers of a justice of the peace, he is not entitled to the fees allowed a justice, as his office of police judge is a salaried one. But see Portland *v.* Denny, 5 Oreg. 160.

Ineligible to second office.— A person holding a municipal office who by reason thereof is ineligible to another office cannot accept such second office and recover the compensation attached to the same. State *v.* Wichgar, 27 Ohio Cir. Ct. 743.

80. Oakland *v.* Snow, 145 Cal. 419, 78 Pac. 1060; Council Bluffs *v.* Waterman, 86 Iowa 688, 53 N. W. 289; Billings *v.* New York, 68 N. Y. 413.

81. Powers *v.* Oshkosh, 56 Wis. 660, 14 N. W. 826.

82. Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414.

83. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182.

84. Durango *v.* Hampson, 29 Colo. 77, 66 Pac. 883 (holding further that where the ordinance of a city provides for extra compensation to the street supervisor for the performance of certain acts in the line of his official duty he cannot recover such compensation unless he performs the prescribed serv-

for the salary,[85] and no very nice distinctions will be indulged as to what are and what are not official duties.[86] And any agreement to give additional compensation to any municipal officer for the performance of a service which he is already legally obliged to render is void as against public policy.[87]

(b) NEW DUTIES IMPOSED. An officer having a fixed salary cannot claim extra compensation for an increase of his official duties,[88] especially where he accepts the office after knowledge of the new duties imposed.[89]

ices or it appears that his failure so to do resulted from some fault on the part of the city); *In re* Board of St. Opening, etc., 33 N. Y. App. Div. 137, 53 N. Y. Suppl. 354 [*affirmed* in (1899) 52 N. E. 1123] (holding that Greater New York Charter, § 998, which provides for additional allowance to commissioners of estimate and assessment in cases of "an unusually difficult or extraordinary character," does not warrant an extra allowance in ordinary cases however laborious or important the commissioner's services may be, but only in extreme cases, markedly out of the common). See also Council Bluffs *v.* Waterman, 86 Iowa 688, 53 N. W. 289.

Charter provision not repealed by general law.— A charter provision that the salary of a city attorney shall be fixed by the common council at not to exceed a given sum, and that he shall receive no extra compensation, is not repealed by a general law giving a city attorney remuneration in the form of counsel fees and costs in assessment proceedings. Lacey *v.* Waples, 28 La. Ann. 158.

85. *Colorado.*— Durango *v.* Hampson, 29 Colo. 77, 66 Pac. 883.

Iowa.— Ryce *v.* Osage, 88 Iowa 558, 55 N. W. 532; Council Bluffs *v.* Waterman, 86 Iowa 688, 53 N. W. 289.

Louisiana.— O'Sullivan *v.* New Orleans, 49 La. Ann. 616, 21 So. 854; Lacey *v.* Waples, 28 La. Ann. 158.

Maryland.— Baltimore *v.* Ritchie, 51 Md. 233.

Michigan.— Iron Mountain *v.* Waldenberg, 127 Mich. 189, 86 N. W. 434.

Minnesota.— State *v.* Vasaly, 98 Minn. 46, 107 N. W. 818; Young *v.* Mankato, 97 Minn. 4, 105 N. W. 969, 3 L. R. A. N. S. 849.

Missouri.— Carroll *v.* St. Louis, 12 Mo. 444.

New Hampshire.— Clark *v.* Portsmouth, 68 N. H. 263, 44 Atl. 388.

New Jersey.—Evans *v.* Trenton, 24 N. J. L. 764.

New York.— Marshall *v.* Haywood, 74 N. Y. App. Div. 27, 77 N. Y. Suppl. 57; Poughkeepsie *v.* Wiltsie, 36 Hun 270; Leveridge *v.* New York, 3 Sandf. 263; Palmer *v.* New York, 2 Sandf. 318.

Pennsylvania.— Hays *v.* Oil City, 8 Pa. Cas. 185, 11 Atl. 63.

Wisconsin.— Kollock *v.* Dodge, 105 Wis. 187, 80 N. W. 608.

See 36 Cent. Dig. tit. "Municipal Corporations," § 360.

Overtime.— Since St. Louis Charter, art. 3, § 26, forbids salaried officers to receive other compensation for their services, and art. 4, § 43, defines as officers all persons holding situations under the city government with an annual salary, the principal deputy recorder of funds, appointed by the recorder at a fixed annual salary, is not entitled to extra pay for time over seven hours allowed to the clerks of deputies paid by the day. Lemoine *v.* St. Louis, 120 Mo. 419, 25 S. W. 537. Detroit City Charter, § 250, prohibits a common council from creating any liability payable out of a particular fund in excess of the amount raised for that fund. The return of council for a given year included compensation for an assistant engineer for a specified number of days at a fixed rate per day. It was held that the assistant engineer who received the compensation fixed in the estimate could not recover for extra compensation based on his having worked over eight hours per day, although an ordinance declared that eight hours should constitute a day's work. Kobel *v.* Detroit, 142 Mich. 38, 105 N. W. 79. A municipal officer who receives an annual salary for his services cannot recover extra compensation for services rendered on Sunday, unless some statute allows it. Tyrrell *v.* New York, 159 N. Y. 239, 53 N. E. 1111.

Under a constitutional provision forbidding the municipality to pay or grant any extra compensation to a public officer during his continuance in office, a city council the members of which received no regular pay had no right to vote compensation to themselves for performing the duties pertaining to their office. Garvie *v.* Hartford, 54 Conn. 440, 7 Atl. 723.

In Iowa the statute makes it a misdemeanor for a municipal officer to demand and receive for the performance of the duties of his office compensation in addition to that provided by law. State *v.* Olinger, (Iowa 1897) 72 N. W. 441.

86. Kollock *v.* Dodge, 105 Wis. 187, 80 N. W. 608.

87. Ryce *v.* Osage, 88 Iowa 558, 55 N. W. 532; Council Bluffs *v.* Waterman, 86 Iowa 688, 53 N. W. 289; People *v.* Monroe County Ct., 105 N. Y. App. Div. 1, 93 N. Y. Suppl. 452.

In the absence of express agreement authorized by law a municipal officer is not entitled to claim compensation for services pertaining to his office, by virtue of an understanding previous to the time when his official appointment was contemplated. Detroit *v.* Whittemore, 27 Mich. 281.

88. Covington *v.* Mayberry, 9 Bush (Ky.) 304; People *v.* New York, 1 Hill (N. Y.) 362; People *v.* Monroe County Ct., 105 N. Y. App. Div. 1, 93 N. Y. Suppl. 452; Palmer *v.* New York, 2 Sandf. (N. Y.) 318.

89. Palmer *v.* New York, 2 Sandf. (N. Y.) 318.

(2) Extra-Official Acts. The rule of law forbidding extra compensation to a municipal officer does not extend to payment for services not within the compass of his official duties,[90] unless it appears that such services were intended to be gratuitous.[91] Thus an officer appointed by the common council to perform an extra-official service stands in the same position as a stranger and is entitled to payment therefor.[92]

(L) *Reimbursement For Expenditures* — (1) In General. The general rule is that a municipality may, when not prohibited by its charter, reimburse one of its officers for moneys actually and necessarily expended by him in the discharge of a duty pertaining to his office.[93]

(2) Office Expenses. Where the law imposes on a city the absolute duty of providing and maintaining an office at some suitable place for the transaction of the business pertaining to a given office, and the city fails so to do, it is liable to the incumbent for the rent and expenses of an office rented by him;[94] but the rule is otherwise where the duty imposed upon the municipality is not absolute and the office is hired without its authority or sanction.[95]

(3) Clerk Hire. If a fixed salary be attached to a municipal office, the duties of which necessarily require, besides the personal services of the incumbent, the services of a clerk or assistant, the municipality must remunerate the incumbent for the reasonable expenses of the hire of such person;[96] but if a previous ordinance or usage has existed fixing a rate of compensation for such clerk or assistant, the officer is not warranted in exceeding such rate without express sanction of the municipality.[97]

(4) Liability Incurred in Discharge of Duty. It is within the discretionary power of a municipality to indemnify one of its officers against liability incurred by reason of any act done by him while in the *bona fide* discharge

90. Calais *v.* Whidden, 64 Me. 249; Niles *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670; Merzbach *v.* New York, 163 N. Y. 16, 57 N. E. 96; People *v.* Monroe County Ct., 105 N. Y. App. Div. 1, 93 N. Y. Suppl. 452.

An unauthorized agreement fixing the compensation for extra-official services can be validated only by subsequent ratification on the part of the proper municipal authorities. Calais *v.* Whidden, 64 Me. 249.

Services not authorized or accepted.—Where the secretary of a municipal board of health whose official duties are merely clerical renders services in the treatment of smallpox patients during an epidemic, but without authority of the city officers, or acceptance by them, or notice that he would hold the city liable, cannot recover therefor from the city. Nash *v.* Knoxville, 108 Tenn. 68, 64 S. W. 1062.

Mandate revocable at will.— A contract made by a municipality with one of its officers for the collection of taxes in arrear during an indefinite period, for an eventual remuneration, is not a contract of hiring of labor but of mandate, which is revocable at will, and the officer is not entitled to any compensation after the time of revocation. Gurley *v.* New Orleans, 41 La. Ann. 75, 5 So. 659.

91. Merzbach *v.* New York, 163 N. Y. 16, 57 N. E. 96; McBride *v.* Grand Rapids, 47 Mich. 236, 10 N. W. 353.

92. *Michigan.*— McBride *v.* Grand Rapids, 47 Mich. 236, 10 N. W. 353; Niles *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670; Detroit *v.* Redfield, 19 Mich. 376.

Minnesota.— State *v.* Vasaly, 98 Minn. 46, 107 N. W. 818.

New Jersey.— Evans *v.* Trenton, 24 N. J. L. 764.

New York.— Cloonan *v.* Kingston, 37 Misc. 322, 75 N. Y. Suppl. 425.

Wisconsin.— Kollock *v.* Dodge, 105 Wis. 187, 80 N. W. 608.

93. *In re* Olyphant Auditors, 8 Del. Co. (Pa.) 53.

Illustration.— Thus it has been held an officer is entitled to receive from a municipality his necessary disbursements in suits prosecuted by him on behalf of the municipality. Sniffen *v.* New York, 4 Sandf. (N. Y.) 193.

94. Hill *v.* Clarinda, 103 Iowa 409, 72 N. W. 542 (holding, however, that where the office furnished by the mayor is also used by a law firm of which he is a member, the city is liable only for its fair share in rent, fuel, and lights); Manchester *v.* Potter, 30 N. H. 409.

Where office room free of rent is furnished to a town collector by the county treasurer, an allowance to such collector for office rent by an auditing committee is unlawful and the payment of such an allowance is an unlawful expenditure. Gorman *v.* Tidholm, 94 Ill. App. 371.

95. Coleman *v.* Elgin, 45 Ill. App. 64; Gilchrist *v.* Wilkes Barre, 142 Pa. St. 114, 21 Atl. 805.

96. Sniffen *v.* New York, 4 Sandf. (N. Y.) 193.

97. Sniffen *v.* New York, 4 Sandf. (N. Y.) 193.

of his official duties,[98] and the municipality has the right to employ counsel to defend the officer,[99] or to appropriate funds for the necessary expenses incurred by him in such defense,[1] or to pay a judgment rendered against him.[2] But while there exists a discretionary power to thus favor an officer, there is no fixed obligation on the part of the municipality which may be enforced by such officer in an action at law.[3]

(II) *De Facto Officers.* The right to the salary, fees, or other compensation attached to a municipal office follows the true title, and hence a *de facto* officer is not entitled thereto, and can maintain no action therefor.[4] Possession under color of right, it has been said, may well serve as a shield for defense; but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office.[5]

b. Rate or Amount — (I) *In General.* A municipal officer claiming a salary of a given amount must point to the provision of law which with certainty and

98. *Indiana.*— Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571, 53 Am. Rep. 504.

Massachusetts.— Fuller *v.* Groton, 11 Gray 340; Hadsell *v.* Hancock, 3 Gray 526; Babbitt *v.* Savoy, 3 Cush. 530; Bancroft *v.* Lynnfield, 18 Pick. 566, 29 Am. Dec. 623.

Minnesota.—Moorhead *v.* Murphy, 94 Minn. 123, 102 N. W. 219, 110 Am. St. Rep. 345, 68 L. R. A. 400.

Missouri.— State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

New York.— McCredie *v.* Buffalo, 2 How. Pr. N. S. 336.

North Carolina.— Roper *v.* Laurinburg, 90 N. C. 427.

Rhode Island.— Sherman *v.* Carr, 8 R. I. 431.

The true test in such cases is, Did the act done by the officer relate directly to the matter in which the city had an interest, or affect municipal rights or property, or the rights or property of citizens which the officer was charged with a duty to protect or defend? State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

Good faith.— Where city aldermen have been convicted of contempt in disobeying an injunction, which conviction stands unreversed, it cannot be said that they were acting in good faith so as to entitle them to reimbursement for the expenses incident to their defense. West *v.* Utica, 71 Hun (N. Y.) 540, 24 N. Y. Suppl. 1075.

Removal proceedings.— Greater New York Charter, Laws (1901), c. 460, § 231, authorizing the board of estimate and apportionment to audit and allow as charges against a city the reasonable costs and expenses incurred by any commissioners or city magistrate who shall successfully defeat proceedings to remove him from office or prosecution for malfeasance in office is constitutional and valid. Kane *v.* McClellan, 110 N. Y. App. Div. 44, 96 N. Y. Suppl. 806.

99. Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571, 53 Am. Rep. 504; State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Roper *v.* Laurinburg, 90 N. C. 427.

1. *Connecticut.*— Hotchkiss *v.* Plunkett, 60 Conn. 230, 22 Atl. 535.

Minnesota.—Moorhead *v.* Murphy, 94 Minn. 123, 102 N. W. 219, 110 Am. St. Rep. 345, 68 L. R. A. 400.

New Hampshire.— Pike *v.* Middleton, 12 N. H. 278.

New Jersey.— Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15; State *v.* Hammonton, 38 N. J. L. 430, 20 Am. Rep. 404.

New York.— McCredie *v.* Buffalo, 2 How. Pr. N. S. 336; Powell *v.* Newburgh, 19 Johns. 284.

North Carolina.— Roper *v.* Laurinburg, 90 N. C. 427.

See 36 Cent. Dig. tit. "Municipal Corporations," § 368.

2. State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Sherman *v.* Carr, 8 R. I. 431.

3. Gormly *v.* Mt. Vernon, 134 Iowa 394, 108 N. W. 465.

4. Andrews *v.* Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Sheridan *v.* St. Louis, 183 Mo. 25, 81 S. W. 1082; Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168; Philadelphia *v.* Given, 60 Pa. St. 136; Jones *v.* Easton, 4 Pa. Dist. 509. See also Darby *v.* Wilmington, 76 N. C. 133. *Compare* Blackburn *v.* Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708, holding that where plaintiff was a *de facto* city clerk of a *de jure* corporation, and after the *de jure* corporation was organized continued to act as city clerk for about three weeks, he can recover for such services if during that time there was no *de jure* clerk performing the duties of the office.

Who are de facto officers.— A municipal officer, unless he has duly qualified, is to be deemed a *de facto* officer, and, although performing the duties relating to the office, is not entitled to compensation therefor (Philadelphia *v.* Given, 60 Pa. St. 136; Com. *v.* Slifer, 25 Pa. St. 23, 64 Am. Dec. 680); but a municipal officer is not deprived of his right to compensation for services rendered, because of a defect in the manner of his appointment, in the absence of objection to his services by the city, and of any other rightful claimant (Cousins *v.* Manchester, 67 N. H. 229, 38 Atl. 724).

5. Throop Public Officers, § 517.

beyond doubt authorizes it.[6] But when the amount of the officer's salary is fixed by law and he has performed his whole duty, he has entitled himself to that amount.[7]

(II) *Power to Fix*—(A) *In General.* When the salary of a municipal officer is not fixed by some statutory provision,[8] the power so to do is by law generally vested in the common council, the amount being left entirely to the discretion of that body,[9] or to be fixed by it within certain specified limits.[10] But in the absence of clear legislative grant of power,[11] the members of the governing body of a city are not authorized to fix and determine their own compensation.[12]

(B) *Exercise*—(1) In General. A statute empowering a council to fix the salary of a municipal officer is not self-executing, but becomes operative only when the contemplated action is taken by the council.[13]

6. State *v.* Brittin, 52 La. Ann. 94, 26 So. 753; Goud *v.* Portland, 96 Me. 125, 51 Atl. 820; Fernald *v.* Dover, 70 N. H. 42, 47 Atl. 258.

Necessity of establishing amount.— Where the statute authorizes a municipality to fix the salary of a given officer within certain limits, the amount to be determined by ordinance, no compensation whatever is recoverable until an ordinance is actually passed. State *v.* McDowell, 19 Nebr. 442, 27 N. W. 433.

7. People *v.* New York Bd. of Apportionment, etc., 43 How. Pr. (N. Y.) 412.

8. Bourke *v.* Chicago Sanitary Dist., 92 Ill. App. 333; Behan *v.* New Orleans, 34 La. Ann. 128; Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; Furth *v.* McIntosh, 2 Wash. 108, 26 Pac. 79.

9. *Kentucky.*— Barrett *v.* Falmouth, 109 Ky. 151, 58 S. W. 520, 22 Ky. L. Rep. 667; Newport *v.* Berry, 80 Ky. 354.

Massachusetts.— Faulkner *v.* Sisson, 183 Mass. 524, 67 N. E. 669.

Missouri.— Kemp *v.* Monett, 95 Mo. App. 452, 69 S. W. 31.

Nebraska.— State *v.* McDowell, 19 Nebr. 442, 27 N. W. 433.

New Jersey.— Rightmire *v.* Camden, 50 N. J. L. 43, 13 Atl. 30.

Canada.— Matter of Prince, 25 U. C. Q. B. 175.

Salary in lieu of fee theretofore received.— The legislature may confer authority upon city councils to fix by ordinance the salary of a municipal officer in lieu of the fees theretofore retained by such officer under prior statutes of the state, and such provision is not unconstitutional as a delegation of power to legislate. Des Moines *v.* Hillis, 55 Iowa 643, 8 N. W. 638.

Void ordinance.— Where the compensation of an officer is provided by general statute, a subsequent ordinance for that purpose is void. Furth *v.* McIntosh, 2 Wash. 108, 26 Pac. 79.

Officer appointed by different body.— Under Mass. St. (1900) c. 367, the city council of Lynn may fix by ordinance the salary of a deputy street commissioner appointed by the board of public works. Faulkner *v.* Sisson, 183 Mass. 524, 67 N. E. 669.

To be fixed by charter, not council.—Wash. Enabling Act, Laws (1889–1890), p. 223, provides that the legislative powers of any city organized under the provisions thereof shall be vested in a mayor and city council, who with such other elective officers as may be provided for in its charter shall receive such compensation as may be prescribed in said charter. It was held that the city council of a city, organized under such act, could not fix the salary of a controller, an elective officer of such city, but that such salary must be fixed by the charter. Taylor *v.* Tacoma, 8 Wash. 174, 35 Pac. 584.

10. Paducah *v.* Evitts, 120 Ky. 444, 86 S. W. 1123, 27 Ky. L. Rep. 867.

An ordinance is void which attempts to fix the compensation of a municipal officer at less than the minimum salary fixed by the statute. Paducah *v.* Evitts, 120 Ky. 444, 86 S. W. 1123, 27 Ky. L. Rep. 867.

Limited to appropriation therefor.— Under N. Y. Laws (1871), c. 583, § 3, the board of apportionment was empowered "to regulate all salaries of officers" of the city and county of New York, not exceeding the appropriation therefor, for which the city could be held liable; but, in the absence of proof to the contrary, it would not be presumed that in regulating a salary in question by resolution the board exceeded the amount appropriated for its payment. Eickhoff *v.* New York, 49 How. Pr. (N. Y.) 47.

According to value of services.— Under a statute authorizing the city to enter into an agreement with any city officer to perform the duties of his office for a salary less than that fixed by law, it is competent for such an officer to agree to perform his duties according to the value of his services, rather than according to an arbitrary measure fixed in addition in the form of a salary. Tice *v.* New Brunswick, 73 N. J. L. 615, 64 Atl. 108.

11. McEwan *v.* West Hoboken, 58 N. J. L. 512, 34 Atl. 130; Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

Legislative grant of power construed.— The power conferred on the common council to fix the compensation of all city officers, except the mayor, does not authorize its members to fix and determine their own compensation. McFarland *v.* Gordon, 70 Vt. 455, 41 Atl. 507.

12. Gregory *v.* Jersey City, 34 N. J. L. 429; McFarland *v.* Gordon, 70 Vt. 455, 41 Atl. 507.

13. State *v.* Olinger, (Iowa 1897) 72 N. W. 441.

(2) TIME OF. The rule is that the compensation must be established before the commencement of the term of office.[14] It has been held, however, that where the statute provides that the salary of a municipal officer shall be fixed by ordinance, not exceeding a given sum, such salary may be fixed within that limit during the term of office.[15]

(3) MODE OF. When the power to fix the compensation of a municipal officer is vested by law in the common council, such power is usually and properly exercised by ordinance.[16]

(4) REVIEW. In the absence of proof of bad faith the courts will not interfere with the discretion of the common council,[17] or other body,[18] in fixing and determining the salary of municipal officers.

(III) *MODIFICATION*—(A) *In General.* It is well settled that, in the absence of any prohibition or restriction, the compensation of a municipal officer may be changed by the proper authorities, and such change may apply to officers then in office as well as to those thereafter selected.[19]

(B) *Increase.* The rule is well settled that an increase of the salary of a municipal officer during his term of office is usually interdicted by constitutional[20]

14. Stuhr *v.* Hoboken, 47 N. J. L. 147, holding further that where the ordinance fixing the salary is passed prior to the commencement of the official term, the rule stated in the text is not violated by the fact that because of the necessity of publication the ordinance does not go into effect until after the commencement of the term.

After appointment.— A municipality empowered to fix the salary of all officers appointed may fix the salary of a given officer after his appointment but before commencement of his term. Wesch *v.* Detroit, 107 Mich. 149, 64 N. W. 1051.

After election.— A common council empowered to fix the salary of an elective municipal officer elected under a new charter at the same time may exercise such power after the election of such officer, notwithstanding a constitutional provision forbidding a change of compensation during the term of a municipal officer. Barrett *v.* Falmouth, 109 Ky. 151, 58 S. W. 520, 22 Ky. L. Rep. 667. Where the charter of a city authorizes the council to fix the compensation of its members, the council has the right, in the absence of an ordinance regulating the same, to fix such amount and order it paid by ordinance, even where no fee or salary was attached to the office by statute or ordinance at the time of their election. Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

15. State *v.* McDowell, 19 Nebr. 442, 27 N. W. 433.

16. Faulkner *v.* Sisson, 183 Mass. 524, 67 N. E. 669; Stuhr *v.* Hoboken, 47 N. J. L. 147; Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

Whether mode imperative.— On the one hand it has been held that the legislative power of the council, as in fixing the compensation of municipal officers, must be exercised by ordinance (Central *v.* Sears, 2 Colo. 588), and, on the other hand, that if the charter does not specify the mode, it may be fixed by resolution (State *v.* Nichols, 83 Minn. 3, 85 N. W. 717).

17. Newport *v.* Berry, 80 Ky. 354; Wesch *v.* Detroit, 107 Mich. 149, 64 N. W. 1051, holding further that it is immaterial that the compensation was fixed at less than the amount received by the incumbent for the preceding term.

18. People *v.* Haverstraw, 23 N. Y. App. Div. 231, 48 N. Y. Suppl. 740.

19. Kollock *v.* Dodge, 105 Wis. 187, 80 N. W. 608.

20. *California.*— Buck *v.* Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409; Milner *v.* Reibenstein, 85 Cal. 593, 24 Pac. 935.

Illinois.— Wolf *v.* Hope, 210 Ill. 50, 70 N. E. 1082; Cook County *v.* Sennott, 136 Ill. 314, 26 N. E. 491.

Kentucky.— Paris *v.* Webb, 33 S. W. 87, 17 Ky. L. Rep. 1006.

Missouri.— State *v.* Johnson, (1894) 25 S. W. 855.

Washington.— Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 370, 371.

The fact that his office was created by statute and the attempted increase was by an act of legislature does not take the case out of the operation of a constitutional prohibition against increasing the salary during the term of office. Cook County *v.* Sennott, 136 Ill. 314, 26 N. E. 491.

The words "continuance in office" in Conn. Const. Amendm. 24, prohibiting the legislature from increasing the salary of any public officer during his "continuance in office," mean continuing in office under one appointment, and the act of 1881 providing that "the city attorney shall be entitled to fees for his services in cases tried for said city," is not unconstitutional, so far as it affects that officer under his reappointment to that position in 1881, at the expiration of his former term. Smith *v.* Waterbury, 54 Conn. 174, 7 Atl. 17.

A municipal officer subject to removal at the pleasure of the council is not an officer within Mo. Const. art. 14, § 8, prohibiting an increase in the salary of any officer during

or statutory[21] provision against change thereof during the term of office; but in the absence of such provision the power to fix the salary of a municipal officer for a given term carries with it as a necessary incident the power to increase such salary during that term.[22]

(c) *Reduction*—(1) In General. In the absence of express provision of law,[23] the compensation of municipal officers may be diminished from time to time during the continuance of their term of office by the authority which fixed

his term of office. State *v.* Johnson, (Mo. 1894) 25 S. W. 855.

Act giving increase construed to be prospective.— An amendment of a charter providing that "each alderman shall be entitled to an annual salary" greater than the compensation previously allowed is not to be construed as operating retroactively, either from its terms or from the nature of the legislation, and has the effect to increase the compensation of the aldermen during the remainder only of the official year after its passage. State *v.* Hill, 32 Minn. 275, 20 N. W. 196.

Increase held not unconstitutional.— Wash. Act, March 9, 1893, making the county treasurer *ex-officio* collector of the city taxes and requiring the city to pay him a given sum per year for his services, is not in conflict with Const. art. 11, § 8, forbidding the salary of a municipal officer to be increased during his term of office, or with Const. art. 11, § 12, denying to the legislature the right to impose taxes on municipal corporations. State *v.* Carson, 6 Wash. 250, 33 Pac. 428. Compensation of a member of the governing board of a city, fixed by statute at five dollars for attendance at each meeting, is not "salary" within Ohio Const. art. 2, § 20, providing that the salary of any officer shall not be increased during his term. Gobrecht *v.* Cincinnati, 51 Ohio St. 68, 36 N. E. 782, 23 L. R. A. 609.

Ratification of unlawful increase.— N. Y. Laws (1870), c. 383, providing a gross sum for salaries of the city courts of the city of New York, based on estimates stating the salaries of police justices to be ten thousand dollars per annum, does not ratify the unlawful increase of such salaries by resolution of the common council. Cox *v.* New York, 103 N. Y. 519, 9 N. E. 48.

21. Barnes *v.* Williams, 53 Ark. 205, 13 S. W. 845; Rowland *v.* New York, 83 N. Y. 372; Smith *v.* New York, 3 Thomps. & C. (N. Y.) 160.

Delay in giving bond.— An officer who has been reëlected cannot by postponing the giving of his bond prolong his prior term beyond the date when he might have qualified for his new term, and thereby avoid the operation of a charter provision forbidding an increase of an officer's salary during his term. Rightmire *v.* Camden, 50 N. J. L. 43, 13 Atl. 30.

22. Kollock *v.* Dodge, 105 Wis. 187, 80 N. W. 608. See also cases cited in the two preceding notes.

An act legalizing the payment of an unlawful increase of compensation does not give the right to recover such increase to one to whom it had not been paid. Bixby *v.* New York, 61 Hun (N. Y.) 490, 16 N. Y. Suppl. 364.

23. *Illinois.*— Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414.

Indiana.— Walker *v.* Evansville, 33 Ind. 393.

Kentucky.— Louisville *v.* Wilson, 99 Ky. 598, 36 S. W. 944, 19 Ky. L. Rep. 427.

Michigan.— Wesch *v.* Detroit, 107 Mich. 149, 64 N. W. 1051.

Nebraska.— State *v.* Moores, 61 Nebr. 9, 84 N. W. 399.

Pennsylvania.—Zimmerman *v.* York, (1893) 27 Atl. 248; Devers *v.* York City, 156 Pa. St. 359, 27 Atl. 247.

Tennessee.— State *v.* Nashville, 15 Lea 697, 54 Am. Rep. 427.

Utah.— Hulaniski *v.* Ogden City, 20 Utah 233, 57 Pac. 876.

Washington.— Mudgett *v.* Liebes, 14 Wash. 482, 45 Pac. 19; Ballard *v.* Keane, 13 Wash. 201, 43 Pac. 27.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 370, 371.

A municipal officer not having a fixed term and removable at pleasure cannot invoke the constitutional provision forbidding the decrease of salary of a municipal officer during his term of office, where it appears that until the time of discharge he accepted without objection his salary as reduced by ordinance. Lexington *v.* Rennick, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106, 20 Ky. L. Rep. 1609, 1924.

Limitation confined to municipal year.— The limitation on the power of the council of the city of Galveston, which prohibits the council from diminishing the compensation of a municipal officer during the term for which he shall be elected, was intended to be confined to the municipal year, rather than to the term of office. Melnery *v.* Galveston, 58 Tex. 334.

Salary not lawfully fixed.— Where at the time of the election of an officer the salary has not been legally fixed, an act passed during his term of office does not violate a constitutional provision against diminishing the salary of a municipal officer during his term of office. State *v.* McDowell, 19 Nebr. 442, 27 N. W. 433.

Ordinance violative of constitutional provision.— Since the constitution provides that the compensation of a municipal officer can neither be increased nor diminished during the term for which he is elected or appointed, an ordinance reducing the salary of a city officer passed during the term of that officer will not be held to take effect so as to diminish the

it.[24] But when such provision of law exists, the compensation of the officer fixed by law cannot be diminished during the term of office directly, by express ordinance[25] or contract,[26] or indirectly, by diminution[27] or entire cessation[28] of the duties of the office.

(2) WHAT DOES NOT CONSTITUTE. Merely appropriating for the payment of a municipal salary a less amount than has been previously paid does not fix the salary at a smaller sum, where the body making the appropriation continues to allow the bills for salary at the former rate.[29] And an attempt by the council by resolution alone to reduce the compensation of an officer which has been fixed by ordinance does not effect such reduction.[30]

(3) BY ONE BODY OF SALARY FIXED BY ANOTHER. When the charter provides that the salary of a given officer shall be fixed by one municipal body and shall not be changed during his term, an attempted reduction thereof by another municipal body is invalid.[31]

(IV) *INTEREST ON SALARY.* A municipal officer is entitled to interest on his salary due and owing to him from the time of demand,[32] except where the delay in payment is caused by the failure of another officer to perform a conceded ministerial duty, in which case no interest whatever is recoverable.[33]

(V) *WAIVER AS TO AMOUNT.* The rule supported by the weight of authority is that a municipal officer who continues to hold his office for the full term and receives his compensation at a fixed rate, without dissent, thereby waives his right to claim a higher rate named in some act,[34] or ordinance;[35] but in one jurisdiction at least the view obtains that the doctrine of waiver has no application when the salary of a municipal officer is fixed by law, and that there can be

officer's salary, but will be considered as going into force not until the expiration of his term, so that the salary of his successor is governed by the ordinance. Roodhouse *v.* Johnson, 57 Ill. App. 73.

Holding over under appointment.—The constitutional prohibition against change in the salary of an officer during his term of office does not apply to the period during which a city officer holds over under an appointment, and his salary may be reduced during such period. Woehler *v.* Toledo, 8 Ohio Dec. (Reprint) 206, 6 Cinc. L. Bul. 282.

24. Iowa City *v.* Foster, 10 Iowa 189; Marden *v.* Portsmouth, 59 N. H. 18; Love *v.* Jersey City, 40 N. J. L. 456; Com. *v.* Bacon, 6 Serg. & R. (Pa.) 322; McFall *v.* Austin, 1 Tex. App. Civ. Cas. § 450.

Before commencement of term.— A provision of law forbidding diminution of salary during a municipal officer's term does not prevent a body empowered to fix the compensation of all municipal officers elected or appointed from fixing the salary of an officer, after his appointment but before commencement of his term, at less than the amount received by the incumbent for the previous year. Wesch *v.* Detroit, 107 Mich. 149, 64 N. W. 1051.

Salary fixed by statute.— The salary of the administrator of the city of New Orleans being fixed by statute cannot be reduced or remitted by any action of council when not assented to by the administrator. Behan *v.* New Orleans, 34 La. Ann. 128.

Diminution by "law."— A constitutional provision that no "law" shall diminish the salary of a municipal officer after his election and appointment does not forbid the decrease of the salary of a municipal officer by an ordinance enacted by the city. Baldwin *v.* Philadelphia, 99 Pa. St. 164.

25. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650; Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414.

26. Purdy *v.* Independence, 75 Iowa 356, 39 N. W. 641.

27. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650.

However, where the right of an officer to receive compensation for a special duty is purely permissive, that is to say, the officer may or may not be paid for discharging such duties, an act relieving him from the duty does not violate a constitutional prohibition against diminishing the compensation of a municipal officer during his term of office. Heilig *v.* Puyallup, 7 Wash. 29, 34 Pac. 164.

28. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650.

29. Fountain *v.* Jackson, 50 Mich. 260, 15 N. W. 487.

30. Hisey *v.* Charleston, 62 Mo. App. 381.

31. Grant *v.* Rochester, 175 N. Y. 473, 67 N. E. 1083.

32. Taylor *v.* New York, 67 N. Y. 87.

33. Gordon *v.* Omaha, 71 Nebr. 570, 99 N. W. 242.

34. Love *v.* Jersey City, 40 N. J. L. 456.

35. Rau *v.* Little Rock, 34 Ark. 303; McInery *v.* Galveston, 58 Tex. 334; McFall *v.* Austin, 1 Tex. App. Civ. Cas. § 450. See also Galbreath *v.* Moberly, 80 Mo. 484.

Receiving less rate under protest.— It has been held that where a municipal officer accepts payment of salary under protest at a given rate, he is thereby estopped to claim a higher rate named in an ordinance. Chandler *v.* Johnson City, 105 Tenn. 633, 59 S. W. 142.

no waiver as to amount, either by express agreement[36] or by the conduct of the officer,[37] except where the officer or body authorized to effect the employment is also empowered to fix or agree upon the salary or compensation of the officer.[38]

c. Form of Compensation. When the common council is authorized to fix the compensation of a municipal officer, the entire compensation may be fixed in the form of a salary,[39] or fees,[40] or salary and fees,[41] or in a lump sum for salary, assistants, and office expenses.[42]

d. Payment — (I) *Mode.* The fixed salary of a municipal officer is payable only in the mode provided by law,[43] which is usually from a particular fund by a particular disbursing officer.[44] Therefore, unless expressly empowered by law, a municipal officer cannot pay himself directly,[45] or indirectly by retaining the funds collected by him in the performance of his official duties.[46] A charter provision that salaries are to be paid monthly does not require that they shall be paid in cash, but means nothing more than that warrants for their payment shall be issued monthly.[47]

(II) *Proceedings to Enforce* — (A) *Against Municipality* — (1) Mandamus. Mandamus is a proper remedy for the enforcement of payment by a

36. People *v.* Board of Police, 75 N. Y. 38; Grant *v.* Rochester, 79 N. Y. App. Div. 460, 80 N. Y. Suppl. 522 [*affirmed* in 175 N. Y. 473, 67 N. E. 1083].

37. Pryor *v.* Rochester, 166 N. Y. 548, 60 N. E. 252; Grant *v.* Rochester, 79 N. Y. App. Div. 460, 80 N. Y. Suppl. 522 [*affirmed* in 175 N. Y. 473, 67 N. E. 1083]. *Compare* Hobbs *v.* Yonkers, 102 N. Y. 13, 5 N. E. 778, holding that while the agreement of a municipal officer to take less than his fees fixed by statute is invalid, yet he has a right to release the municipality of all claims beyond the amount agreed upon by turning over to the municipality the fees received in excess of the agreed compensation.

38. Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19.

39. Shepard *v.* Lawrence, 141 Mass. 479, 5 N. E. 854; Hatch *v.* Cincinnati, 17 Ohio St. 48.

40. Lemoine *v.* St. Louis, 72 Mo. 404; Thaison *v.* Sanchez, 13 Tex. Civ. App. 73, 35 S. W. 478.

41. Manchester *v.* Potter, 30 N. H. 409; Houston *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49.

Salary by ordinance and fees by statute.— A city ordinance gave the city attorney salary in lieu of all other compensation, and a subsequent statute gave him fees for the trial of cases. It was held that the compensation given by the statute, not being in terms in lieu of all other compensation, was cumulative, and that the city attorney was entitled both to the salary given by the ordinance and the fees given by the statute. Smith *v.* Waterbury, 54 Conn. 174, 7 Atl. 17.

Fees contingent.— Where the charter provides that the common council shall have power to fix the compensation of all officers of the city, it may provide by ordinance that in addition to his salary certain fees payable to the city attorney on conviction of violation of ordinances shall be contingent on their collection from defendant. Kemp *v.* Monett, 95 Mo. App. 452, 69 S. W. 31.

42. Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414.

43. Syracuse *v.* Reed, 46 Kan. 520, 26 Pac. 1043; New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569; New York *v.* Sands, 39 Hun (N. Y.) 519.

Where a municipal charter provides a peculiar mode of payment of the compensation attached to a given office, a person accepting that office is deemed to have notice of such provision and is confined to the mode of payment which is thereby prescribed. Baker *v.* Utica, 19 N. Y. 326.

Statutes held inapplicable.— A statute providing that it shall not be lawful for the board of supervisors of the city and county of San Francisco to authorize, allow, contract for, or pay any demand against the treasury or any of the funds thereof which shall in the aggregate exceed one-twelfth part of the amount allowed by laws existing at the time of such contract, allowance, or payment, to be expended within the fiscal year of which the said month is a part, has no application to the auditing and payment of the demand of the salaried officers whose appointment is provided for and fixed by law. Cashin *v.* Dunn, 58 Cal. 581.

44. Lewis *v.* Widber, 99 Cal. 412, 33 Pac. 1128; Cashin *v.* Dunn, 58 Cal. 581.

45. New Orleans *v.* Finnerty, 27 La. 685, 21 Am. Rep. 569.

46. Wilder *v.* Chicago, 26 Ill. 182; Russell *v.* Chicago, 22 Ill. 283; Syracuse *v.* Reed, 46 Kan. 520, 26 Pac. 1043; New Orleans *v.* Finnerty, 27 La. 681, 21 Am. Rep. 569; New York *v.* Sands, 39 Hun (N. Y.) 519.

Charging salary against taxes.— A statute which requires that city officers be paid by salaries, to be fixed each year by the city council, gives no authority to a city or its officers named therein to charge any part of their salaries against taxes collected for the city school corporation. Indianapolis *v.* Wasson, 74 Ind. 133.

47. Eidemiller *v.* Tacoma, 14 Wash. 376, 44 Pac. 877.

municipality,[48] or by a disbursing officer thereof,[49] of the fixed salary of one of its officers.

(2) Action at Law — (a) In General. An action at law by an officer to recover his fixed compensation is maintainable against the municipality,[50] even though he may be entitled to relief by mandamus.[51]

(b) Parties. A statute making compensation for the whole service of assessors depend for the most part on the amount of the assessment list does not create such a joint interest in the compensation as to make it necessary for all the assessors to join in an action for its recovery.[52]

(c) Pleading. In actions to recover the compensation attached to a municipal office, the pleadings are governed by the rules applicable to civil actions in general.[53]

(d) Defenses. It is a good defense to the action that the salary was actually paid to a *de facto* officer discharging the duties of the office,[54] that plaintiff's

48. Speed *v.* Detroit, 100 Mich. 92, 58 N. W. 638; McBride *v.* Grand Rapids, 47 Mich. 236, 10 N. W. 353.

Defense.— The issuance of a writ will not be denied because the general fund out of which salaries are usually payable is exhausted, where it appears that the salary is contingent, and, under the charter, payable out of the contingent fund, which is amply sufficient. Speed *v.* Detroit, 100 Mich. 92, 58 N. W. 638.

49. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650; Lewis *v.* Widber, 99 Cal. 412, 33 Pac. 1128.

To compel a special appropriation for a fixed salary, mandamus will not lie. Silvey *v.* Boyle, 20 Utah 205, 57 Pac. 880.

50. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650; Morgan *v.* Denver, 14 Colo. App. 147, 59 Pac. 619; Macon *v.* Hays, 25 Ga. 590; King *v.* Buffalo, 57 Hun (N. Y.) 586, 10 N. Y. Suppl. 564.

Increase of compensation.— An action at law against the city is the proper remedy to determine the right of a member of the board of legislation of a city to an increase of compensation. Gobrecht *v.* Cincinnati, 51 Ohio St. 68, 36 N. E. 782, 23 L. R. A. 609.

Action barred by non-presentation of claim. — Under Cal. St. (1856) § 90, a demand on the treasury for the monthly salary of an officer of the city and county of San Francisco must be presented for payment, properly audited, within one month after such demand shall have become due and payable; otherwise it will be forever barred. Paxson *v.* Holt, 40 Cal. 466.

51. Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650.

Not confined to remedy by execution.— Under the Ohio act of May 15, 1886, providing that in all cities of a certain class each justice of the peace shall receive a certain salary in lieu of all fees payable out of the city treasury, and that it shall be the duty of each justice in such cities to collect the fees as provided in sections 615 and 621, and pay the same into the city treasury, such justice may, during his office, maintain a civil action to collect the fees, and is not limited to the usual mode of collecting them by execution. Hart *v.* Murray, 48 Ohio St. 605, 29 N. E. 576.

52. Skinner *v.* Woodstock, 25 Conn. 408, holding further that the case comes within the rule that where the interest or cause of action is several, each of the covenantees may bring an action for his particular damage notwithstanding the words of the covenant are joint.

53. See, generally, Pleadings.

Complaint.— In a suit for the compensation attached to a municipal office, the complaint must allege either that plaintiff was in possession of the office and was wrongfully ousted, or that his claim to the office has been legally determined. Hughlett *v.* Wellsville, 75 Mo. App. 341. Complaint in a suit by a municipal officer for his salary, alleging that plaintiff was duly appointed to the office, that a salary was fixed by resolution at a stated sum, and that he served a stated time before his discharge, for a portion of which he has not been paid, states a good cause of action. Hart *v.* Minneapolis, 81 Minn. 476, 84 N. W. 342.

Answer.— In an action against a city for services rendered by its attorney, duly appointed by defendant's councilmen at a stated salary, an answer which denies that the persons named in the petition as councilmen were ever elected, or ever qualified and acted as such, and that plaintiff was ever appointed city attorney, puts in issue plaintiff's appointment and is good against a demurrer. Lebanon *v.* Cooper, 37 S. W. 579, 18 Ky. L. Rep. 636.

Estoppel to plead.— Where a city has had the benefit of an officer's services rendered under a verbal contract to pay therefor a sum in excess of his salary fixed by ordinance, the city is not estopped from pleading the ordinance in an action to recover such excess, since such contract is against public policy and void. Ryce *v.* Osage, 88 Iowa 558, 55 N. W. 532.

54. *Louisiana.*— Michel *v.* New Orleans, 32 La. Ann. 1094.

Michigan.— Scott *v.* Crump, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478.

New Jersey.— McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384.

employment was properly terminated after the exhaustion of the fund from which his salary was payable,[55] that plaintiff has not been reinstated by a competent tribunal after removal,[56] or that plaintiff was guilty of want of ordinary care and diligence in the discharge of his duties, resulting in damage which the city was forced to repair.[57] Where a city officer is removed from his office by the city council, and sues for his salary, claiming that he was unlawfully removed, the city is not confined in its defense to the cause of removal specified in the resolution removing him, but may plead and prove other matter justifying the removal.[58]

(e) REVIEW. In actions to recover the compensation attached to a municipal office, questions relating to review on appeal are governed by rules applicable to civil actions in general.[59]

(B) *De Facto Officer.* A *de jure* municipal officer, who was wrongfully removed but subsequently reinstated by a competent tribunal, may maintain an action against a *de facto* officer, to whom was paid the compensation attached to the office during the period of removal, for money had and received.[60] So too a *de jure* officer may recover in such an action from a *de facto* officer the salary collected by the latter pending a determination of the former's right to the office.[61]

(III) *RECOVERY BACK.* The rule is that a municipality cannot recover from one of its officers compensation, voluntarily paid, with a full knowledge of all the facts, although no obligation to make such payment existed.[62] To this rule, how-

New York.— McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106; Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168; Smith *v.* New York, 37 N. Y. 518; Martin *v.* New York, 82 N. Y. App. Div. 35, 81 N. Y. Suppl. 412 [*affirmed* in 176 N. Y. 371, 68 N. E. 640]; Demarest *v.* New York, 74 Hun 517, 26 N. Y. Suppl. 585 [*affirmed* in 147 N. Y. 203, 41 N. E. 405]. *Compare* People *v.* Brennan, 45 Barb. 457, 30 How. Pr. 417.

Ohio.— State *v.* Eshelby, 2 Ohio Cir. Ct. 468, 1 Ohio Cir. Dec. 592.

Utah.— Kendall *v.* Raybould, 13 Utah 226, 44 Pac. 1034.

See 36 Cent. Dig. tit. "Municipal Corporations," § 373.

55. Lethbridge *v.* New York, 133 N. Y. 232, 30 N. E. 975.

An act increasing the salary of a municipal officer imposes upon the municipality the increased burden consequent thereon, although in terms no provision to meet it is made. Green *v.* New York, 8 Abb. Pr. (N. Y.) 25.

56. Lee *v.* Wilmington, 1 Marv. (Del.) 65, 40 Atl. 663; Gorley *v.* Louisville, 104 Ky. 372, 47 S. W. 263, 20 Ky. L. Rep. 602; Hagan *v.* Brooklyn, 126 N. Y. 643, 27 N. E. 265; McManus *v.* Brooklyn, 5 N. Y. Suppl. 424; Selby *v.* Portland, 14 Oreg. 234, 12 Pac. 377, 58 Am. Rep. 307.

However, where there has been no actual removal, reinstatement is not a condition precedent to the right of a municipal officer to maintain an action for the recovery of his salary. Morgan *v* Denver, 14 Colo. App. 147, 59 Pac. 619.

57. Kathman *v.* New Orleans, 11 La. Ann. 146; Andrews *v.* Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835.

58. Davis *v.* Cordele, 115 Ga. 770, 42 S. E. 63.

59. See, generally, APPEAL AND ERROR.

An exception to the finding in an action to recover a balance of salary that plaintiff was duly appointed does not raise the question as to whether there was a vacancy in the office at the time that such appointment was made. King *v.* Buffalo, 57 Hun (N. Y.) 586, 10 N. Y. Suppl. 564.

60. Nichols *v.* MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; Martin *v.* New York, 82 N. Y. App. Div. 35, 81 N. Y. Suppl. 412 [*affirmed* in 176 N. Y. 371, 68 N. E. 640].

61. Michel *v.* New Orleans, 32 La. Ann. 1094; Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168; State *v.* Eshelby, 2 Ohio Cir. Ct. 468, 1 Ohio Cir. Dec. 592.

Damages.— After verdict and judgment establishing plaintiff's right to the office of mayor, the court allowed a supplemental complaint claiming damages and an answer, and on a day named a trial was had and damages assessed. It was held a proper proceeding, under N. Y. Code Civ. Proc. § 1953, providing that where judgment is in favor of the claimant of an office, he may recover in the same action for damages which he has sustained. People *v.* Nolan, 101 N. Y. 539, 5 N. E. 446.

62. Cox *v.* New York, 103 N. Y. 519, 9 N. E. 48; Philadelphia *v.* Gilbert, 14 Phila. (Pa.) 212; Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372. But see People *v.* Starkweather, 42 N. Y. Super. Ct. 325.

Limitation.— The words, in the Peculation Act (Laws (1875), c. 49). "after the action shall accrue," used respecting the limitations

ever, an exception is recognized where the officer receiving payment was a member of the council or other body which ordered such payment.[63]

14. Functions and Powers[64] **— a. In General.** The power of officers of a municipality depends entirely on the provisions of the charter and on ordinances passed in pursuance thereof,[65] and such officers take nothing beyond the powers so conferred.[66] A city council may delegate to an officer the power to do acts which do not involve judgment or discretion, but are merely mechanical or ministerial,[67] but it has no power to confer on one officer powers or duties which the charter prescribes for another.[68]

b. Mayor or Other Chief Executive.[69] The executive head of the municipality is the mayor, who is generally also a member of the governing body, and presides over it *ex officio*.[70] But in the larger cities his functions are purely executive;[71] and the presiding officer is another person, either chosen by the members from their own number, or elected by the voters of the corporation to that special office.[72] The powers and duties of the mayor of a city depend entirely on the provisions of the charter, and valid ordinances passed in pursuance thereof,[73] and

of actions against officers, refers, not to the cause of action the city had against an officer, but to that given to the people in such act; and hence an action by the people thereunder, against a municipal officer, to recover fees received without authority, is not barred merely because, before such act, it was barred as to the city by the statute then applicable thereto. People *v.* Starkweather, 42 N. Y. Super. Ct. 325.

Defenses.— In an action by a city to recover money illegally paid to a councilman for services, defendant can show that the services were outside his official duty, and were performed by him in superintending work on the streets, bridges, and buildings of the city, where it appears that the work was authorized by the city, beneficial to it, the benefits were retained by it, and the contract was fully executed by both parties, although such contract was unauthorized by law and against public policy. Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

Counter-claim.— In an action by the people under the Peculation Act (Laws (1875), c. 49), to recover fees paid without authority to a municipal officer, no claim not affecting the people can be counter-claimed; and hence a claim against the city cannot be. People *v.* Starkweather, 42 N. Y. Super. Ct. 325.

63. Weeks *v.* Texarkana, 50 Ark. 81, 6 S. W. 504; Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

64. Functions and powers of: Agents and employees see *infra*, VII, C. Departmental officers see *infra*, VII, B. Departments or boards see *infra*, VII, B.

Powers as to contracts generally see *infra*, IX, B, C.

65. People *v.* Ransom, 56 Barb. (N. Y.) 514; Galveston *v.* Hutches, (Tex. Civ. App. 1903) 76 S. W. 214. And see Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

Powers in respect of property.— Municipal officers have no other right over property dedicated to public use than to watch over it, and prevent its diversion to other uses, and to remove all obstacles to its full enjoyment by the public according to the terms and object of the dedication. Livaudais *v.* Municipality No. 2, 16 La. 509.

The city council have a right to investigate the accounts of the clerk and judge of the police court, and to have access to the files and papers thereof. Schwartz *v.* Barry, 90 Mich. 267, 51 N. W. 279.

The board of auditors of a borough, not being a court of record, nor specially authorized by statute so to do, have no power to imprison a witness who refuses to answer a question as to the conduct of borough officers. Llewellyn's Case, 2 Pa. Dist. 631, 13 Pa. Co. Ct. 126.

Appropriation by the city council of money to pay the salary of an officer having no legal existence is an act in excess of its powers. Ward *v.* Cook, 78 Ill. App. 111.

66. People *v.* Ransom, 56 Barb. (N. Y.) 514.

67. Matter of Guerrero, 69 Cal. 88, 10 Pac. 261, delegation to clerk of power to issue and collect licenses.

68. Reed *v.* Camden, 50 N. J. L. 87, 11 Atl. 137; Beard *v.* Decatur, 64 Tex. 7, 53 Am. Rep. 735.

69. Pardon by mayor see PARDON.

Power as to contracts see *infra*, IX, C, 2, b.

Power of appointment see *supra*, VII, A, 4, a, (III), (B), (1).

Prohibition to mayor see PROHIBITION.

70. Elliot Mun. Corp. § 255; Ingersoll Pub. Corp. 220.

71. Jacobs *v.* San Francisco, 100 Cal. 121, 34 Pac. 630; Cochran *v.* McCleary, 22 Iowa 75.

72. State *v.* Kiichli, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779.

73. Dillon Mun. Corp. § 206; Bigby *v.* Tyler, 44 Tex. 351; Galveston *v.* Hutches, (Tex. Civ. App. 1903) 76 S. W. 214; *Ex p.* Deane, 7 Fed. Cas. No. 3,712, 2 Cranch C. C. 125.

Authority to grant an exclusive right to sell liquor within the limits of the municipality, not being conferred on the mayor, he has no power to grant such right. Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646.

a municipality cannot by ordinance confer a greater power upon its mayor than that given by charter.[74] The mayor's functions, as prescribed in the charter, differ in various municipalities. In some of them, as the executive head of the corporation, he possesses the veto power,[75] and as chief executive he has supervision over the minor officers of the municipality, not expressly made subject to the control of other officers or boards.[76] He is not a judicial officer, and can exercise only such limited judicial powers as are conferred upon him by charter,[77] and not even then, if the charter is in contravention of some constitutional provision.[78] The old common-law rule that the mayor was an integral part of a municipal corporation, and his presence necessary to a valid corporate meeting, does not prevail in America.[79] When he is absent from the city his office may be supplied by a *pro tem* election from among the members of the board;[80] and under some statutes the person chosen is authorized to exercise the functions of the mayor during the latter's absence as fully as he could do if present.[81] Under others he possesses the authority of presiding officer only.[82] Where a statute provides that, in the absence of a mayor from a city, the duties of his office shall be performed by the president of the common council, the mayor can perform no official duty while absent from the city, and the appointment of a board of commissioners made by him while so absent is a nullity.[83]

Calling elections.— Where the organic act provides that the council shall have power "to make rules for all municipal elections," an action called by the mayor, without any general or special action by the council, is void, and will be enjoined. Bates *v.* Nome, 1 Alaska 208.

Taking affidavits.— By some charters the mayor is vested with power to take affidavits. Turner *v.* Rogers, 49 Ark. 51, 4 S. W. 193.

Under a statute authorizing the erection of a soldiers' and sailors' memorial arch, and appointing the mayor, commissioner of public works, etc., a board of commissioners to carry the act into effect (N. Y. Laws (1893), c. 532), a contention that the incumbents of such offices had no power to act because they were not in office when the act took effect is untenable, since the act does not mention individuals, but refers to officers, and the fact that the individuals who then held the offices have ceased to hold them is immaterial. Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329, 67 N. Y. Suppl. 1054.

74. Union Depot, etc., Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329.

75. Elliot Mun. Corp. § 208.

Overcoming veto by requisite vote.— An objection to a resolution by the proper municipal authorities, making an appropriation to pay a claim against the municipality, interposed by way of veto by a mayor having a veto power, and overcome by the requisite vote, cannot be again urged by the mayor to avoid doing a mere ministerial act to effectuate such appropriation. Ahrens *v.* Fiedler, 43 N. J. L. 400.

76. Burch *v.* Hardwicke, 23 Gratt. (Va.) 51.

77. Beesman *v.* Peoria, 16 Ill. 484; Edina *v.* Brown, 19 Mo. App. 672.

Power of legislature to invest mayor with judicial functions.—The legislature has power under a constitutional provision authorizing it to provide for the establishment of special courts for the trials of misdemeanors in cities and towns, to grant to the chief officers of cities and towns all the jurisdiction which it could grant to judges of special courts under the constitution. State *v.* Pender, 66 N. C. 313.

78. Hagerstown *v.* Dechert, 32 Md. 369.

79. Martindale *v.* Palmer, 52 Ind. 411.

80. Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769; Cline *v.* Seattle, 13 Wash. 444, 43 Pac. 367. See also *supra*, V, B, 1, b.

Time of absence.— Under a Kentucky statute providing that the chairman *pro tem* of the board of council of a city of the fourth class "shall not perform the office of mayor unless the regular mayor has been absent from the county for at least three days, or is for any reason unable to discharge the duties," it is not necessary that the mayor shall be absent for three days after the election of the chairman *pro tem* before the latter is authorized to act as mayor. Chesapeake, etc., R. Co. *v.* Maysville, 69 S. W. 728, 24 Ky. L. Rep. 615.

81. Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769 (may approve ordinance); State *v.* Thomas, 141 N. C. 791, 53 S. E. 522.

Signing warrant for street improvements. — Under the consolidation act of the city and county of San Francisco, providing for the appointment by the board of an acting mayor in the absence or inability of the mayor, an assessment for street improvements is not void, in the absence of other evidence, merely because the warrant was signed by one of the supervisors as "acting mayor." City St. Imp. Co. *v.* Rontet, 140 Cal. 55, 73 Pac. 729.

82. People *v.* Blair, 82 Ill. App. 570; North *v.* Cary, 4 Thomps. & C. (N. Y.) 357. And see State *v.* Hance, 26 Ohio Cir. Ct. 273, holding that a mayor *pro tem* has no jurisdiction to hear and determine a prosecution for a misdemeanor.

83. State *v.* Byrne, 98 Wis. 16, 73 N. W. 320.

c. Particular Executive Officers. As with the mayor, so with the minor executive officers, their authority is determined by charter and lawful ordinances,[84] and they have no power to go beyond the authority so conferred.[85]

d. Filling Vacancies. Where the charter provides that the presiding officer of the common council during a vacancy in the office of mayor shall possess all the powers of that officer, an alderman appointed chairman of the common council when the mayoralty was vacant may legally perform the duties of that office.[86] A statute which provides that whenever a vacancy shall exist in either the offices of collector of taxes for a city or collector of taxes for a town of the same name, by death, removal, resignation, or otherwise, the remaining collector shall discharge the duties of said vacant office, contemplates these offices as filled by different persons, and intends that, on the death, removal, or resignation of one, the duties of his office shall be discharged by the other.[87] Where a mayor elect after entering on the discharge of his official duties without objection from the outgoing mayor is subsequently ousted in a proceeding to which his predecessor is not a party, it is not material error for the court pronouncing the judgment of ouster to direct that the office be turned over to the president of the board of supervisors who is named by statute as the successor in case of a vacancy, although the constitution provides that the incumbents of municipal offices, unless removed according to law, shall exercise the duties connected therewith until their successors are duly qualified.[88]

e. Estoppel by Act of Officer. A municipal corporation as well as a private corporation is subject to an estoppel *in pais* from the words, acts, or conduct of its officers, as to its business affairs;[89] but only when and so far as they are acting within the scope of their authority.[90] And it has been held that the acts of an officer of a municipal corporation, although within the scope of his general authority, cannot bind the corporation if they violate his specific instructions.[91] Conduct of officers of the city after an investigation was made of the charge of corruption cannot estop the city, where plaintiff does not show that the particular

84. Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80; *In re* Lorillard, 13 N. Y. Suppl. 83; People *v.* Neilson, 48 How. Pr. (N. Y.) 454; *In re* Llewellyn, 7 Kulp (Pa.) 69; Philadelphia *v.* Gas Works, 12 Wkly. Notes Cas. (Pa.) 477. And see Valentine Clark Co. *v.* Allegheny City, 143 Fed. 644.

For construction of statutes as to powers conferred on particular officers see Tennessee Mut. Bldg., etc., Assoc. *v.* State, 99 Ala. 197, 13 So. 687; Baer *v.* School Director, 4 Pa. Co. Ct. 43; Scott *v.* Forrest, 13 Wash. 166, 42 Pac. 519.

Validity of ordinance conferring power.— Where a city controller is required to perform "such duties in relation to the finances" as "shall be prescribed by ordinance" an ordinance is valid which empowers him to negotiate and dispose of city bonds. Stevenson *v.* Bay City, 26 Mich. 44.

85. Louisville *v.* Louisville R. Co., 111 Ky. 1, 63 S. W. 14, 23 Ky. L. Rep. 390, 98 Am. St. Rep. 387 (holding that the city attorney of a city of the first class has no power to compromise claims for taxes either before or after suit is brought); Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471 (holding that in the absence of special authority, the city's attorney could not bind the city by an agreement that the land bought for taxes should be rented until the rents paid the tax claim, and then should be returned to the former owner).

86. State *v.* Buffalo, 2 Hill (N. Y.) 434.

87. State *v.* Fowler, 66 Conn. 294, 32 Atl. 162, 33 Atl. 1005.

88. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

89. George F. Blake Mfg. Co. *v.* Chicago Sanitary Dist., 77 Ill. App. 287; Moore *v.* New York, 73 N. Y. 238, 29 Am. Rep. 134; London, etc., Land Co. *v.* Jellico, 103 Tenn. 320, 52 S. W. 995.

Private intent not to bind municipality.— The effect of an act performed by a town officer in the course of his official duty cannot be obviated by proof that there was a private intent not to bind the town, as where a highway commissioner performs acts amounting to an acceptance of a bridge dedicated to the public. Dayton Highway Com'rs *v.* Rutland Highway Com'rs, 84 Ill. 279, 25 Am. Rep. 457.

90. Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194; Burns *v.* New York, 3 Hun (N. Y.) 212, 5 Thomps. & C. 371; Cincinnati *v.* Cameron, 33 Ohio St. 336.

Illustration.— A public official of a city, not the legal officer thereof, cannot bind it by any legal opinion which he may give with respect to a supposed property right. Chicago *v.* Malkan, 119 Ill. App. 542 [*affirmed* in 217 Ill. 471, 75 N. E. 548, 2 L. R. A. N. S. 488].

91. Baltimore *v.* Eschbach, 18 Md. 276.

acts relied on by the city as a defense were disclosed by the investigation.[92] Because persons dealing with them are bound by the constructive notice of the law and the municipal records as to the measure of their powers and functions,[93] the municipality cannot, by the representations of the officers as to this matter, be estopped to deny their authority,[94] even when acting within the apparent scope of their official functions.[95]

15. Duties and Liabilities[96] — a. In General. Official duties are those acts pertaining to office which the incumbent is required by law to perform,[97] and are of two classes: (1) Ministerial or mandatory;[98] and (2) discretionary or judicial.[99] The former are such as a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done;[1] the latter such as necessarily require the exercise of reason in the adaptation of means to end, and discretion in determining how, or whether the act shall be done or the course pursued.[2] Municipal officers are not in general liable for acts done in the ordinary exercise of their corporate powers.[3] They are, however, subject to the general law of liability to the person injured by nonfeasance, or misfeasance of a ministerial duty,[4] and that too independent of statute;[5] but they can only be held liable for damages caused by an alleged nonfeasance on proof showing an omission on their part to perform a duty devolved upon them by law.[6] Municipal officers, like other officers, are immune from liability for the injurious effects of the discharge of discretionary duties, unless they act corruptly[7] or exceed their authority.[8] A municipal officer acting entirely without and beyond any authority conferred by the charter will be liable personally for the consequences of such acts, even though he be an officer who exercises quasi-judicial

92. Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678 [*reversing* 82 Hun 67, 31 N. Y. Suppl. 186].

93. Rissing *v.* Ft. Wayne, 137 Ind. 427, 37 N. E. 328; Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Cleveland *v.* State Bank, 16 Ohio St. 236, 88 Am. Dec. 445.

94. Dickerson *v.* Spokane, 35 Wash. 414, 77 Pac. 730.

95. Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219.

96. **Duties and liabilities of:** Agents and employees see *infra*, VII, C, 2, b. Departmental officers see *infra*, VII, B. Departments or boards see *infra*, VII, B.

Liability of municipality for acts of officers, agents, and employees see *infra*, XIV.

Liability of officers for violation of injunction see INJUNCTIONS, 22 Cyc. 1012.

97. Smith Mun. Corp. § 155.

98. Monroe Water Co. *v.* Heath, 115 Mich. 277, 73 N. W. 234 (holding that the mayor of a city of the fourth class, under Pub. Acts (1895), No. 215, c. 7, § 1, is the chief executive officer of the city, and should obey the directions of the city council in performing the ministerial act of executing a contract on behalf of the city, and mandamus will lie to compel him to do so); State *v.* Meier, 72 Mo. App. 618 (holding that the duty imposed upon the president of the city council of St. Louis, by a provision of the city charter, of affixing his signature to all bills read and adopted on their final passage, as therein prescribed, is not discretionary, but ministerial and mandatory); Springfield Milling Co. *v.* Lane County, 5 Oreg. 265; Underwood *v.* Russell, 4 Tex. 175.

99. See Craig *v.* Burnett, 32 Ala. 728.

1. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468. And see *Ex p.* Batesville, etc., R. Co., 39 Ark. 82.

2. See Eyman *v.* People, 6 Ill. 4.

3. Smith *v.* Stephans, 66 Md. 381, 7 Atl. 561, 10 Atl. 671. And see Interstate Transp. Co. *v.* New Orleans, 52 La. Ann. 1859, 28 So. 310.

4. *Kansas.*— McCarty *v.* Bauer, 3 Kan. 237.

Kentucky.— Prather *v.* Lexington, 13 B. Mon. 559, 56 Am. Dec. 585.

Maine.— Rounds *v.* Mansfield, 38 Me. 586.

Montana.— Merritt *v.* McNally, 14 Mont. 228, 36 Pac. 44.

New York.— Bennett *v.* Whitney, 94 N. Y. 302.

Nonfeasance and misfeasance defined.— "Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all." Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741.

5. Porter *v.* Thomson, 22 Iowa 391.

6. Fitzpatrick *v.* Slocum, 89 N. Y. 358.

7. Craig *v.* Burnett, 32 Ala. 728; Gray *v.* Batesville, 74 Ark. 519, 86 S. W. 295; Baker *v.* State, 27 Ind. 485; Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238. And see Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630.

8. Craig *v.* Burnett, 32 Ala. 728.

functions, as the protection accorded judicial officers is not extended to matters without the pale of their jurisdiction.[9] Although the charter of a city or town is a local act, it is not an act of a private character, so as to deprive the city officers of their public character and consequent immunities which the law confers on them.[10] But municipal officers doing illegal acts are not impliedly exempted from liability by a statute making the municipality liable therefor;[11] and in actions of tort against them can justify their acts by the authority of the municipality only to the same extent that the city might do so.[12]

b. Legislative Power in Respect of Duties and Liabilities. It is clearly within the legislative authority to impose additional duties upon an office at any time,[13] and to transfer official functions from one office to another,[14] or to unite two offices in one, and impose the duties of both upon a single officer.[15] Under this comprehensive legislative power of prescribing official duties and qualifications have been enacted civil service laws for municipal corporations.[16]

c. Gratuitous Service. Where an officer must perform the duties of his office gratuitously, the law providing no compensation, he is not personally liable for the wrongful acts of those whom he is bound to necessarily employ.[17]

d. Damages From Improvements. Municipal officers, acting in good faith, without negligence, and *intra vires* are not personally liable for damages suffered, by any private person by reason of the construction or repair of municipal improvements;[18] but where the municipality is liable in trespass or case, they may be equally and jointly liable with it.[19] So also they may be personally liable to one whose property is assessed for street improvements for corruptly allowing the contractor to use inferior materials, where such owner is specially damaged thereby.[20] And he is not prevented from recovering damages on the ground that they performed a judicial function in accepting the work;[21] nor by failure to sue to enjoin a departure from the terms of the contract, to obtain mandamus to compel the members of the board to perform their duty, or to object to the appli-

9. Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737; Burch *v.* Hardwicke, 30 Gratt. (Va.) 24, 32 Am. Rep. 640. And see Sherlock *v.* Winnetka, 68 Ill. 530.

10. Graves *v.* McWilliams, 1 Pinn. (Wis.) 491.

11. Rounds *v.* Mansfield, 38 Me. 586.

12. Wamesit Power Co. *v.* Allen, 120 Mass. 352.

13. Covington *v.* Mayberry, 9 Bush (Ky.) 304; Auburn Bd. of Education *v.* Quick, 99 N. Y. 138, 1 N. E. 533; Leveridge *v.* New York, 3 Sandf. (N. Y.) 263; Commissioners *v.* Murray, 3 Watts (Pa.) 348.

14. Demarest *v.* New York, 74 N. Y. 161.

15. People *v.* Hazlewood, 116 Ill. 319, 6 N. E. 480.

16. *In re* Opinion of Justices, 138 Mass. 601.

17. Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649.

18. *Massachusetts.*— Proctor *v.* Stone, 158 Mass. 564, 33 N. E. 704.

Michigan.—See Chilson *v.* Wilson, 38 Mich. 267.

New York.— Atwater *v.* Canandaigua, 124 N. Y. 602, 27 N. E. 385 [*affirming* 56 Hun 293, 9 N. Y. Suppl. 557].

North Carolina.— Tate *v.* Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671.

Ohio.— Scovil *v.* Geddings, 7 Ohio, Pt. II, 211.

South Carolina.— Parks *v.* Greenville, 44 S. C. 168, 21 S. E. 540.

See 36 Cent. Dig. tit. "Municipal Corporations," § 382.

Trespass quare clausum does not lie against a street commissioner duly authorized by a city council to construct a street within their jurisdiction, laid out by their action, and upon a petition in legal form; nor does the fact that two or three members of the council voted to construct the street because a bond was filed, render void the proceedings, and authorize the action on that account. Gay *v.* Bradstreet, 49 Me. 580, 77 Am. Dec. 272.

19. Rives *v.* Columbia, 80 Mo. App. 173. And see Buskirk *v.* Strickland, 47 Mich. 389, 11 N. W. 210, holding that where a municipality is without power to make certain improvements, an officer acting under direction of the municipality is liable for injuries resulting from such improvements made by him. *Compare* Squiers *v.* Neenah, 24 Wis. 588, holding that the village, and not the village trustees, are liable for their laying out a street through land after the owner has withdrawn his assent.

20. Gage *v.* Springer, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191 [*reversing* 112 Ill. App. 103].

21. Gage *v.* Springer, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191 [*reversing* 112 Ill. App. 103].

cation for judgment for the assessment.[22] They are not liable for a tort committed by a municipal employee, not of their selection, nor subject to their order of removal.[23]

e. Negligence. For culpable negligence a municipal officer may be liable for damages resulting to an employee,[24] to the municipality,[25] or to a third person.[26] But it seems the fact that the other members of a city council are silent, while one of their number directs work done *ultra vires*, does not render them personally liable for damages resulting from negligence in such work.[27] The common-law liability of officers for simple negligence is not affected by a statutory provision making officers liable for damages caused by their wilful neglect;[28] nor by the repeal of a statute making officers criminally and civilly liable for neglect.[29]

f. Nuisances and Abatement Thereof. Municipal officers lawfully engaged in the exercise of official functions or the performance of legal duties in a lawful manner are not personally liable for injuries resulting from what would be a nuisance if maintained by private individuals.[30] Nor are they personally liable for damage caused in abating a nuisance unless they acted corruptly, maliciously, or illegally.[31] If, however, they occasion injury by abating the nuisance in an unauthorized manner they are liable for the damages caused thereby.[32]

g. Costs. The general rule is that officers impleaded in their representative character are not personally liable for costs;[33] but they must pay the costs of a suit to enjoin them from doing an illegal act.[34]

h. Non-Payment of Municipal Debts. Officers may make themselves personally liable by promising to pay a debt at a time or out of a fund not authorized by law.[35] Also by refusing on demand to levy the necessary tax to pay it, if it is in their power to levy such tax.[36] But they are not liable when they have exhausted

22. Gage *v.* Springer, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191 [*reversing* 112 Ill. App. 103].

23. Bacheller *v.* Pinkham, 68 Me. 253.

24. Bowden *v.* Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223; Breen *v.* Field, 157 Mass. 277, 31 N. E. 1075.

Duty to furnish reasonably safe place to work.— In the execution of public works, he who selects the place in which the work is to be done and directs the workmen assumes an obligation of seeing that such place is reasonably safe. Bowden *v.* Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223.

Road commissioner as public officer.— Where a road commissioner has charge of the erection of a wall, and employs laborers who are paid by the city, he acts as a public officer, and is responsible only for reasonable care in the selection of men and materials, and is under no liability beyond this except for his own acts. Bowden *v.* Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223.

25. Christie *v.* Johnston, 12 Grant Ch. (U. C.) 534.

26. Butler *v.* Ashworth, 102 Cal. 663, 36 Pac. 922; Bennett *v.* Whitney, 94 N. Y. 302; Piercy *v.* Averill, 37 Hun (N. Y.) 360; Rankin *v.* Buckman, 9 Oreg. 253; Rounds *v.* Mumford, 2 R. I. 154. And see Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547.

Charter fixing liability for negligence on officers.— Where, by its charter, a city is declared not to be liable for an injury resulting from the defective condition of its streets, but any officer thereof who, by his "wilful neglect" of a duty enjoined by law, causes such injury, is so liable, the common council is bound to provide by ordinance for the repair of the streets, and if it wilfully neglects so to do the members thereof are liable personally in damages to one who is injured in consequence thereof. Balls *v.* Woodward, 51 Fed. 646.

27. Carle *v.* De Soto, 63 Mo. App. 161.

28. Bennett *v.* Whitney, 94 N. Y. 302.

29. Hanlon *v.* Partridge, 69 N. H. 88, 44 Atl. 807.

30. Bates *v.* Horner, 65 Vt. 471, 27 Atl. 134, 22 L. R. A. 824.

31. Harvey *v.* Dewoody, 18 Ark. 252; Pruden *v.* Love, 67 Ga. 190; Walker *v.* Hallock, 32 Ind. 239; Privett *v.* Whitaker, 73 N. C. 554.

32. Coddington *v.* White, 2 Duer (N. Y.) 390; Logan *v.* Hurlburt, 23 Ont. App. 628.

33. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

34. Scott *v.* Alexander, 23 S. C. 120.

35. McCracken *v.* Lavalle, 41 Ill. App. 573.

Promising payment in municipal bonds.— Officers promising municipal contractors payment in corporation bonds are personally liable for failure to deliver them for whatever cause, since they either contracted in excess of their power, or contracted with sufficient funds and permitted them to be appropriated to other purposes. Paulding *v.* Cooper, 10 Hun (N. Y.) 20 [*affirmed* in 74 N. Y. 619].

36. Porter *v.* Thomson, 22 Iowa 391. And see Oswald *v.* Thedinga, 17 Iowa 13, holding that if a municipal corporation has not money sufficient to pay a judgment against

their taxing power and lawfully appropriated the revenue,[37] nor can they be treated as private trustees or collection agents of the creditor.[38] In order to recover against public officers having the control and distribution of public money, for non-payment of a debt liquidated by a judgment against the corporation, to enforce which a mandamus was granted, and which was placed on the budget of expenditures, it is necessary to prove that the fund required to pay it was raised, that it was diverted, and that the creditor has sustained loss and injury.[39]

i. Collection of Taxes and Fees. Officers make themselves personally liable by an illegal levy for taxes;[40] or the collection of illegal fees even though they have paid them into the treasury,[41] and they may not justify under an *ultra vires* or void ordinance.[42] Under a statute providing that the selectmen shall have the ordering and managing of all the provincial affairs of the town, they have a discretionary power to give an indemnity to a collector on behalf of the town, saving him from the cost and expenses of defending actions brought against him for acts done in the performance of his duties.[43]

j. Wrongful Disbursements. Municipal officers who pay or authorize the payment of funds illegally are personally liable for the same,[44] although paid out for a useful object,[45] or drawn out, not by themselves, but by their confidential agents.[46] But they are not liable when in good faith they discharge valid obligations out of the wrong fund, when another may be provided by special tax,[47] or when in default of demand from the person entitled they in good faith pay to another municipal officer.[48]

k. Issuance or Transfer of Invalid Warrants and Bonds. Officers acting in good faith and in accordance with law are not personally liable to the holder for corporate paper issued wrongfully because of the official misconduct of other officers.[49] But they may be liable to purchasers for false representations as to their compliance with the law and the validity of the securities.[50] And an officer who negotiates municipal bonds, knowing them to be invalid, is liable to the town for the money realized on the sale, and it is no defense that he was also the president of the company subsidized and accounted to it for the proceeds of the sale.[51]

l. Unauthorized Contract. An officer who in good faith and under misapprehension makes a contract in behalf of the municipality which is invalid for want of authority to make it will not be held personally liable on the contract where the other contracting party has equal means of knowledge as to his authority.[52]

it, it is not necessary, in order to hold the officers of such corporation personally responsible, that the judgment creditor should demand the issue of scrip, as well as the levy of a tax, as he would not have been obliged to accept the scrip if it had been tendered.

37. Porter *v.* Thomson, 22 Iowa 391; *In re* Isaacson, 36 La. Ann. 56. And see Jones *v.* Currie, 34 La. Ann. 1093.

38. Berrian *v.* New York, 4 Rob. (N. Y.) 538.

39. Jones *v.* Currie, 34 La. Ann. 1093.

40. Higgins *v.* Ausmuss, 77 Mo. 351.

For statutes held to impose the duty of extending the city taxes on the county tax list upon the city treasurer and not upon the county clerk see State *v.* Johnson, 16 Mont. 570, 41 Pac. 706.

41. Townshend *v.* Dyckman, 2 E. D. Smith (N. Y.) 224.

42. Bergen *v.* Clarkson, 6 N. J. L. 352.

43. Pike *v.* Middleton, 12 N. H. 278.

44. Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 5 L. R. A. 180; People *v.* Bender, 36 Mich. 195; Blair *v.* Lantry, 21 Nebr. 247, 31 N. W. 790.

Ratification of unauthorized payment.—The action of the city treasurer in paying out city money in a manner not authorized by law cannot be ratified by the city council. East St. Louis *v.* Flannigen, 34 Ill. App. 596.

45. McCracken *v.* Soucy, 29 Ill. App. 619.

46. New Orleans *v.* Blache, 6 La. 500.

47. Little Valley *v.* Ayres, 2 N. Y. Suppl. 691.

48. American S. P. C. A. *v.* Doyle, 65 How. Pr. (N. Y.) 459.

49. Fuller *v.* Mower, 81 Me. 380, 17 Atl. 312; Ontario *v.* Hill, 99 N. Y. 324, 1 N. E. 887.

50. Robinson *v.* Bishop, 39 Hun (N. Y.) 370.

51. Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22].

52. Newman *v.* Sylvester, 42 Ind. 106; Southworth *v.* Flanders, 33 La. Ann. 190. And see Lyon *v.* Irish, 58 Mich. 518, 25 N. W. 502.

Illustration.— If the members of the common council of a city, in passing an ordinance and letting a contract for the improvement

One who voluntarily contracts with a municipality is bound to consider its powers and cannot hold its officers for mutual error.[53] So where one makes a contract with a municipal officer, knowing that such contract is without validity unless ratified by the municipal board, he cannot hold the officer personally liable in the absence of proof of intent on his part to render himself so liable.[54]

m. Failure to Award Contract. The lowest bidder, entitled to a municipal contract, cannot maintain an action against the councilmen for refusing to award him the contract, as their duty is not to him, but to the municipality.[55]

n. Wrongful Removal of Another Officer. A mayor who unlawfully and maliciously assumes power to remove an officer is liable to him in a civil action for damages.[56] But it has been held that assumption of authority by an officer to suspend another officer is not ground for an action in damages, when in good faith and in pursuance of a precedent established on a previous occasion, in the interest of and at the instance of such suspended officer, to save him on such previous occasion from an injurious publicity.[57]

o. Legislation of Municipal Body. City officers acting in a legislative capacity are not liable in damages for acts done in their official capacity, although such acts are void as in excess of jurisdiction, or otherwise without authority of law.[58] No member of a municipal council can be held liable to any individual for the enactment or repeal of an ordinance within its authority whereby the latter has suffered damage;[59] nor can his motives be inquired into.[60] Even though the council has exceeded its authority, the mayor, not being a part of the council, is not liable merely because he signed the ordinance.[61]

p. Actions to Enforce Liabilities. Suits to prevent the waste of municipal funds by officers, or to compel a performance of duty by them, are generally authorized to be brought against the offending officer only;[62] and where an officer

of a street, act in good faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having a like knowledge with the members of the council, they cannot be held liable for the cost of such improvement, although the place where the same is made is not within the corporate limits. Newman *v.* Sylvester, 42 Ind. 106.

53. Southworth *v.* Flanders, 33 La. Ann. 190.

54. Miller *v.* Board, 15 Misc. N. Y. 322, 37 N. Y. Suppl. 766.

55. East River Gaslight Co. *v.* Donnelly, 93 N. Y. 557.

56. Burch *v.* Hardwicke, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

57. De Armas *v.* Bell, 109 La. 181, 33 So. 188.

58. Lough *v.* Estherville, 122 Iowa 479, 98 N. W. 308, creation of debt in excess of constitutional limitation.

59. Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Jones *v.* Loving, 55 Miss. 109, 30 Am. Rep. 508; Freeport *v.* Marks, 59 Pa. St. 253.

Application of rule.—A police judge cannot maintain an action against the mayor and members of the city council for damages resulting from the passage of an ordinance during his term of office, materially reducing the emoluments thereof by allowing a salary in lieu of the fees which were required to be paid into the city treasury; nor can a recovery be had because of directions to the police force to institute proceedings for violations of the law before justices of the peace in the name of the state. McHenry *v.* Sneer, 56 Iowa 649, 10 N. W. 234.

60. Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Jones *v.* Loving, 55 Miss. 109, 30 Am. Rep. 508.

61. Sylvester *v.* Macauley, Wils. (Ind.) 19. Iowa Code, § 885, gives cities power to purchase or condemn grounds for the purpose of donation to a railroad company for station buildings, etc.; and section 886 requires a petition to the council, and the submission of the question of donation to a popular vote. It was held that proceedings under these sections being presumed to have been regular, city officials were not personally liable to the city for an indebtedness thus contracted in excess of the constitutional limitation. Lough *v.* Estherville, 122 Iowa 479, 98 N. W. 308.

62. Wenk *v.* New York, 36 Misc. (N. Y.) 496, 73 N. Y. Suppl. 1003 [*affirmed* in 69 N. Y. App. Div. 621, 75 N. Y. Suppl. 1135].

What is not "injury or waste" to city.—The erection of poles and the stringing of wires in a street already occupied by a street railroad and another set of poles and wires are not an "injury or waste" to the city, within a statute providing for actions against officers to prevent "injury or waste" to public property. Sheehy *v.* Clausen, 26 Misc. (N. Y.) 269, 55 N. Y. Suppl. 1000 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1114].

disobeys a charter requirement that all city funds shall be deposited in the bank designated by the board of finance, and by reason thereof the city is deprived of interest thereon, an action for damages may be brought against him individually instead of on the bond.[63] Where other parties, in order that a complete judgment binding all interested may be rendered, are for any reason necessary parties they may be made defendants; but this is only incidental to the cause of action against the officers.[64] An officer mismanaging funds may not defend by pleading knowledge and approval of his unlawful conduct by other officers,[65] nor his own good faith;[66] and judgment may be rendered against officers personally as well as officially, although sued only as officers.[67] A suit against a municipal officer for a statutory penalty must fail if the corporation was organized by an unauthorized name.[68] Refusal to submit the question whether defendants who as officers of the town issued bonds without any authority acted in good faith or were guilty of negligence is not error, defendants being liable upon an implied warranty of the validity of their action.[69]

16. Accounting For Funds or Property — a. In General. The duty of accounting for all municipal assets of whatever kind that may come to an officer's hands may be expressly imposed by statute,[70] or may result from his fiduciary relation to the municipality.[71] And the abolition of the office of municipal treasurer operates to devolve his fiscal duties upon the treasurer of the county when a statute so provides.[72] The fact that an officer who files the report of his examination of another officer's accounts is under oath to faithfully discharge the duties of his office, coupled with the fact that the report is the result of an examination made by him, with the right to all concerned to be heard before the result is reported, is sufficient ground for dispensing with a verification of the report, standing in lieu of a petition, to the effect that the report is believed by the officer to be true.[73] Where the treasurer of a city has paid interest coupons in good faith, and turned them over to the city, which still retains them, he is entitled to be credited for the amount so paid in an action by the city against him to recover money alleged to have been collected by him as treasurer and not paid over.[74] It is no defense to an action to compel an officer to account for fees received by him that no salary has ever been attached to his office.[75] A city may receive from its defaulting treasurer his note in evidence or payment of his indebtedness if not prohibited or otherwise provided by statute.[76] In Pennsylvania the court of common pleas may, on affidavit of the treasurer's default made by a majority of councilmen, sequestrate the treasurer's property notwithstanding it is liable to execution on his official bond.[77]

63. New Haven *v.* Fresenius, 75 Conn. 145, 52 Atl. 823.

64. Wenk *v.* New York, 36 Misc. (N. Y.) 496, 73 N. Y. Suppl. 1003 [*affirmed* in 69 N. Y. App. Div. 621, 75 N. Y. Suppl. 1135].

65. New Haven *v.* Fresenius, 75 Conn. 145, 52 Atl. 823.

66. New Haven *v.* Fresenius, 75 Conn. 145, 52 Atl. 823, holding that where a certain bank had been designated as a depository and had agreed to pay interest, but the treasurer deposited funds in another bank which paid no interest thereon, the fact that the treasurer supposed that he had a discretion in the matter, and acted in good faith, was of no avail to him in an action against him by the city for damages.

67. Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826.

68. Barker *v.* Phelps, 39 Mo. App. 288.

69. Robinson *v.* Bishop, 39 Hun (N. Y.) 370.

70. Miller *v.* State, 106 Ind. 415, 7 N. E. 209; Philadelphia *v.* Marcer, 1 Leg. Gaz. (Pa.) 355.

71. A public official, it has been held, is regarded in respect of the performance of his public and official duties as a trustee for the corporation which he represents and for its interests whatever may be their character. Andrews *v.* Pratt, 44 Cal. 309; Elliott Mun. Corp. § 262.

72. Miller *v.* State, 106 Ind. 415, 7 N. E. 209.

73. *In re* Brown, 9 Ohio S. & C. Pl. Dec. 810, 7 Ohio N. P. 178.

74. Huron *v.* Meyers, 13 S. D. 420, 83 N. W. 553.

75. New York *v.* Kent, 21 Hun (N. Y.) 483.

76. Buffalo *v.* Bettinger, 76 N. Y. 393. See *infra*, VIII, B, 2, a.

77. Philadelphia *v.* Marcer, 1 Leg. Gaz. (Pa.) 355.

b. Loss of Funds. Municipal officers having the care of public moneys are by virtue of their office insurers of the same and are liable for a loss thereof, although such loss occurred without any fault or negligence on their part,[78] unless the loss was caused by the act of God or the public enemy.[79] Accordingly it has been held that where city funds are lost by being deposited in a bank which subsequently fails, the officer so depositing them is liable therefor, although when ready to pay over the money he was notified by the mayor and finance committee to withhold the money and deposit it at the city's risk, there being no power in the mayor and finance committee to direct such action;[80] but an outgoing treasurer may be discharged by the act of the council in accepting from him on settlement of his accounts certificates of deposit in a bank which thereafter failed where the charter vests the council with full power to settle with an outgoing treasurer.[81]

c. Settled Accounts. The settled account of a municipal officer like that of an individual may be opened on any sufficient equitable ground, and payment enforced of any sum justly due.[82]

17. Liabilities on Official Bond[83] — a. In General. A municipal officer and his sureties are liable on the official bond for all acts of the officer done *virtute officii* which amount to a breach of the bond,[84] and that too although he is only a *de facto* officer.[85] In respect of acts done *colore officii* there is a conflict of authority. In a number of jurisdictions it is held that sureties on a bond are liable for acts of the officer done *colore officii* in the line of his official duty, but illegal as beyond his authority.[86] On the other hand, it is held in other jurisdictions that sureties on official bonds are liable for acts done by the officer only *virtute officii*, and not for acts done *colore officii*,[87] unless they assented to the acts

78. Adams *v.* Lee, 72 Miss. 281, 16 So. 243; Johnstown *v.* Rodgers, 20 Misc. (N. Y.) 262, 45 N. Y. Suppl. 661.

79. State *v.* Lee, 72 Miss. 281, 16 So. 243. *Contra*, Healdsburg *v.* Mulligan, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461.

80. State *v.* Lee, 72 Miss. 281, 16 So. 243.

81. Lansing *v.* Wood, 57 Mich. 201, 23 N. W. 769.

82. People *v.* Cooper, 10 Ill. App. 384; Wheeling *v.* Black, 25 W. Va. 266.

83. City constables see Sheriffs and Constables.

Liability of sheriff on bond for collection of city taxes see Sheriffs and Constables.

84. *California.*— Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159.

Georgia.— Anderson *v.* Blair, 118 Ga. 211, 45 S. E. 28.

Indiana.— Hunt *v.* State, 124 Ind. 306, 24 N. E. 887.

Michigan.— Stevenson *v.* Bay City, 26 Mich. 44.

Montana.— Philipsburg *v.* Degenhart, 30 Mont. 299, 76 Pac. 694.

Nebraska.— Hrabak *v.* Dodge, 62 Nebr. 591, 87 N. W. 358.

New Jersey.— Van Valkenbergh *v.* Paterson, 47 N. J. L. 146.

85. Hoboken *v.* Harrison, 30 N. J. L. 73.

86. *Indiana.*—State *v.* Hauser, 63 Ind. 155; Armington *v.* State, 45 Ind. 10.

Mississippi.— State *v.* McDaniel, 78 Miss. 1, 27 So. 994, 84 Am. St. Rep. 618, 50 L. R. A. 118.

New Jersey.— Seiple *v.* Elizabeth, 27 N. J. L. 407.

Ohio.— Drolesbaugh *v.* Hill, 64 Ohio St. 257, 60 N. E. 202.

West Virginia.— Wheeling *v.* Black, 25 W. Va. 266.

Application of doctrine.—Applying this doctrine it has been held that the wrongful making of an arrest by an officer *colore officii* is an unfaithful discharge of his duties, and therefore a breach of his bond (Drolesbaugh *v.* Hill, 64 Ohio St. 257, 60 N. E. 202), and that where a clerk under color of his office filled up and signed certain orders which had been signed in blank by the mayor, made them payable to himself, presented them to the treasurer and procured the money thereon when nothing was due him from the city, it was a breach of the bond for which his sureties were liable. Armington *v.* State, 45 Ind. 10.

Reason advanced for doctrine.— "By an official act, is not meant a lawful act of the officer in the service of process. If so, the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office." State *v.* McDaniel, 78 Miss. 1, 5, 27 So. 994, 84 Am. St. Rep. 618, 50 L. R. A. 118.

87. San Jose *v.* Welch, 65 Cal. 358, 4 Pac. 207; Orton *v.* Lincoln, 156 Ill. 499, 41 N. E. 159 [*reversing* 56 Ill. App. 79]; East St. Louis *v.* Lautz, 20 Ill. App. 644; Linch *v.* Litchfield, 16 Ill. App. 612; Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198; Wilkes-Barre *v.* Rockafellow, 171 Pa. St. 177, 33 Atl. 269, 50 Am. St. Rep. 795, 30 L. R. A. 393.

Applications of rule.— The sureties on a city assessor's bond, conditioned that the

which made the loss possible.[88] Sureties are not liable for acts done by an officer when not engaged in the performance of any duty appertaining to his office.[89] The official bond of an officer is generally regarded as covering all acts of his deputies and assistants within the scope of their authority, the same as if performed by himself personally, although he may be entirely ignorant of their conduct.[90] Where by statute it is provided that an officer shall give a special bond for the safekeeping and disbursement of a designated fund, the sureties on the general bond are not liable for defalcations out of the special fund.[91]

b. Irregularities or Informalities in the Bond or in Its Execution or in the Delivery and Approval Thereof. While a bond given under an ordinance providing for the violation of existing laws is void and no action is maintainable thereon,[92] mere irregularities or informalities in the bond or in the execution thereof,[93] or in the delivery[94] or approval,[95] will not vitiate the bond or release the obligors from liability thereon. So it has been held that failure of the authorities to examine and approve the bond of an officer appointed by them and to designate the term of his office does not affect the liability of his sureties for his default.[96]

c. Duties Imposed After Execution of Bond. Sureties are responsible for the due performance of all such duties as were imposed upon the principal by his office, whether the same were attached to such office before or after the bond was executed.[97]

principal perform the duties of the office according to the laws, ordinances, and regulations of the city, are not responsible for taxes collected by such assessor on personal property which he fails to pay over to the treasurer, in the absence of any law or regulation of such city authorizing such assessor to make such collections. San Jose *v.* Welch, 65 Cal. 358, 4 Pac. 207. So it has been held that sureties on the bond of a city clerk are not responsible for money received by him for license-fees, where there is no ordinance authorizing him to receive the same. Linch *v.* Litchfield, 16 Ill. App. 612.

88. Wilkes-Barre *v.* Rockafellow, 171 Pa. St. 177, 33 Atl. 269, 50 Am. St. Rep. 795, 30 L. R. A. 393.

89. Carson *v.* Dezarne, 90 S. W. 281, 28 Ky. L. Rep. 761.

90. Butler *v.* Milwaukee, 119 Wis. 526, 97 N. W. 185; Baby *v.* Baby, 8 U. C. Q. B. 76.

91. Broad *v.* Paris, 66 Tex. 119, 18 S. W. 342.

92. Tuskaloosa *v.* Lacy, 3 Ala. 618.

93. *Georgia.*— Brunswick *v.* Harvey, 114 Ga. 733, 40 S. E. 754.

Kentucky.— Connelly *v.* American Bonding, etc., Co., 113 Ky. 903, 69 S. W. 959, 24 Ky. L. Rep. 714.

Michigan.— Stadler *v.* Detroit, 13 Mich. 346.

Mississippi.— Gloster *v.* Harrell, 77 Miss. 793, 23 So. 520, 941, 27 So. 609.

New Jersey.— Hoboken *v.* Evans, 31 N. J. L. 342.

Deviations in the wording of a bond, from the language prescribed by statute, is no defense in a suit upon the bond. Hoboken *v.* Evans, 31 N. J. L. 342.

Surplusage in a bond does not vitiate it or release from liability the obligors thereon. Stadler *v.* Detroit, 13 Mich. 346.

Where the bond is made to a mayor and to his successors in office, by mistake, instead of to the mayor and council as required by charter, the bond is good as a voluntary or common-law bond. Anderson *v.* Blair, 118 Ga. 211, 45 S. E. 28.

Where one as surety signs and delivers an official bond in blank as to the name and term of office, the penal sum, date, names of other sureties, and the like, such blanks may be subsequently filled up by the principal and he will be liable thereon. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182 [*reversing* 2 Ill. App. 332].

94. Todd *v.* Perry, 20 U. C. Q. B. 649, holding that if the officer did not deliver the bond until a few days too late he omitted a duty required by law, but this afforded no reason to release the sureties from liability.

95. Mowbray *v.* State, 88 Ind. 324. And see other cases cited in this note.

Failure to indorse approval of the sureties on the bond does not release them from liability thereon. Warren *v.* Philips, 30 Barb. (N. Y.) 646.

The approval of a bond by resolution instead of by ordinance does not release the obligors from liability thereon. Gloster *v.* Harrell, 77 Miss. 793, 23 So. 520, 941, 27 So. 609; Warren *v.* Philips, 30 Barb. (N. Y.) 646. And see Evart *v.* Postal, 86 Mich. 325, 49 N. W. 53.

That an official bond is not approved until after the death of the surety thereon does not affect its validity. Mowbray *v.* State, 88 Ind. 324.

96. State *v.* Frentress, 37 Ind. App. 245, 76 N. E. 821. And see Oakland *v.* Snow, 145 Cal. 419, 78 Pac. 1060.

97. Priet *v.* De la Montanya, 85 Cal. 148, 24 Pac. 612; Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159; Orman *v.* Pueblo,

d. Time During Which Bond Operative. The general rule is that sureties are liable only for a breach of official duty committed by their principal during the term of office for which the bond was given.[98] They are not liable for breaches committed by their principal occurring during a preceding term of which he was the incumbent.[99] The general rule, however, may not apply because of special stipulations in the bond itself.[1] And in a number of jurisdictions the rule is subject to the further limitation that obligors on an official bond are liable for default of the principal occurring after the expiration of his term of office, whether holding over until his successor is qualified,[2] or holding over for a second term without reappointment[3] or under reëlection for which he fails to give a new bond.[4] This doctrine, however, is flatly denied in other jurisdictions.[5] It has been held that sureties are not liable for a default of the officer occurring between the date of signing and the date of acceptance of the bond.[6] Where a bond given by a guaranty company to guard against fraud of a city treasurer stipulates that the liability of the company shall be limited to such losses as occur during the continuance of the bond, or any renewal thereof, and discovered during such continuance, or within six months thereafter, or within six months from the retirement of the treasurer from the service of the city, and that no two bonds shall be operative at the same time, the company is not liable under the original bond for any loss not discovered for more than six months after its expiration, although discovered within six months of the dismissal of the employee, and during the continuance of a subsequent bond.[7] Where the tenure of office of an officer was one year and until his successor should be elected and qualified a recital in the bond that he "was, at the last annual election, duly elected to the office for the next ensuing year" limits the responsibility of the sureties to his official conduct during his current term, but not during twelve calendar months only.[8]

8 Colo. 292, 6 Pac. 931; Daniel *v.* Grizzard, 117 N. C. 105, 23 S. E. 93.

Application of rule.—Although a register of deeds was not, at the time his bond was given, liable for his failure to index the registry of a mortgage, yet, where he remained in office after the passage of a statute rendering him liable therefor, the sureties on his bond are also liable. Daniel *v.* Grizzard, 117 N. C. 105, 23 S. E. 93.

98. Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633; Priet *v.* De la Montanya, (Cal. 1889) 22 Pac. 171; Paducah *v.* Cully, 9 Bush (Ky.) 323; Detroit *v.* Weber, 29 Mich. 24; Hoboken *v.* Kamena, 41 N. J. L. 435.

99. Detroit *v.* Weber, 29 Mich. 24; Mann *v.* Yazoo City, 31 Miss. 574; Hoboken *v.* Kamena, 41 N. J. L. 435.

Illustration.—When a city treasurer who was a defaulter in the previous years of his official existence is elected his own successor and gives a new bond, the sureties on such bond can only be held liable for his failure to perform his official duties during the time he holds office under his last appointment. Hoboken *v.* Kamena, 41 N. J. L. 435.

Where the principal has held the office for preceding terms the sureties' liability is to be determined by considering the term for which they were sureties by itself, precisely as if he had succeeded some other person, and then requiring them to account for all the public money that came to his hands during that term. Detroit *v.* Weber, 29 Mich. 24.

1. Waters' Appeal, 10 Wkly. Notes Cas. (Pa.) 146, in which it was held that a provision in the bond binding the principal and sureties for subsequent terms was a lawful condition to the obligation.

2. Cuthbert *v.* Brooks, 49 Ga. 179; Grand Haven *v.* U. S. Fidelity, etc., Co., 128 Mich. 106, 87 N. W. 104; Baker City *v.* Murphy, 30 Oreg. 405, 42 Pac. 133, 35 L. R. A. 88; Wheeling *v.* Black, 25 W. Va. 266.

Limitation of doctrine.—The liability of a surety will extend in such a case only for a reasonable time after the expiration of the term of office of the official. Camden *v.* Greenwald, 65 N. J. L. 458, 47 Atl. 458.

3. Laurium *v.* Mills, 129 Mich. 536, 89 N. W. 362.

4. Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001. And see Hart *v.* Guardians of Poor, 33 Leg. Int. (Pa.) 329.

5. Montgomery *v.* Hughes, 65 Ala. 201; Ballard *v.* Thompson, 21 Wash. 669, 59 Pac. 517.

6. Grand Haven *v.* U. S. Fidelity, etc., Co., 128 Mich. 106, 87 N. W. 104. But see Sumter *v.* Lewis, 10 Rich. (S. C.) 171, holding that in an action on the bond of a city treasurer, the sureties are responsible for money received by the treasurer belonging to the corporation before the execution of the bond.

7. Brunswick *v.* Harvey, 114 Ga. 733, 40 S. E. 754.

8. Fond du Lac *v.* Moore, 58 Wis. 170, 15 N. W. 782, holding, however, that such limitation cannot extend to the obligation imposed by the condition of the bond to pay over to his successor all moneys in his hands or for which he is accountable as treasurer

e. Acts Constituting Breach. The condition of official bonds is usually that the officer shall honestly and faithfully perform his official duties; and, with municipal treasurers or trustees having custody of public moneys, that they shall give a just account of all moneys received and pay over all balances due, under which it is well established that he must comply with all statutory requirements.[9] The following acts have been held to amount to breaches of the bond: Payment of an illegal warrant, knowing it to be illegal, out of money set apart for the payment of a warrant substituted for it;[10] procuring money to be paid him when nothing was due him from the city;[11] drawing a warrant for the payment of a claim not allowed by the council or for a larger amount than allowed, obtaining the money thereon and appropriating it to his own use;[12] drawing a warrant, where a valid claim has been allowed payable to the creditor or bearer, and then instead of delivering it to the creditor presenting it himself for payment, obtaining the money and converting it to his own use;[13] failure to pay over money to his successor, collected from gambling houses and brothels, received by virtue of his office;[14] failure of a register of deeds to index the registry of a mortgage;[15] unlawful arrest,[16] or unnecessary and illegal punishment by a police officer;[17] levy on the goods of one person under an execution or other process against the goods of another;[18] and failure to pay over taxes collected to the treasurer of the board of education in violation of a statute requiring it.[19] On the other hand the following acts have been held not a breach: The mere failure of a city treasurer to place the city moneys in a repository designated by ordinance;[20] drawing by a city treasurer of city moneys from the state treasury to reimburse himself for moneys advanced to the city from his private funds;[21] and failure to account for money forcibly taken by robbers.[22] And when claims have been duly audited and ordered paid by the city council, the mayor is under no legal or moral obligation to overrule its decision, and may rely on the action of the council, and sign warrants for the payment of such claims, and will not be liable on his official bond, unless he acts in bad faith, fraudulently, or corruptly.[23] So under statutes providing for mercantile appraisers, and the payment of their fees, the duty of the city or county treasurer to collect and account therefor is a duty owing to the commonwealth, the failure to perform which is a breach of the condition of the bond given to the commonwealth, and no recovery can be had on the bond given to the city.[24] And a city treasurer is not liable on his bond for the mere sale, assignment, and delivery of bonds pursuant to an agency vested in him by ordinance, but is liable only in his individual character as agent of the city council.[25]

f. New Bond. Where an officer during a single term of office either pursuant to statutory requirement, or in obedience to lawful order, gives a second official bond of like condition with the first, and no order is made discharging the sureties on the first bond, all the sureties on both bonds are equally liable for official default during that term.[26]

at the expiration of his term, although demand for such payment be not made until after his term has expired.

9. Bruce County *v.* Cromar, 22 U. C. Q. B. 321.

10. Priet *v.* De la Montanya, 85 Cal. 148, 24 Pac. 612.

11. Armington *v.* State, 45 Ind. 10.

12. Greenville *v.* Anderson, 58 Ohio St. 463, 51 N. E. 41.

13. Greenville *v.* Anderson, 58 Ohio St. 463, 51 N. E. 41.

14. Philipsburg *v.* Degenhart, 30 Mont. 299, 76 Pac. 694.

15. Daniel *v.* Grizzard, 117 N. C. 105, 23 S. E. 93.

16. Connelly *v.* American Bonding, etc., Co., 113 Ky. 903, 69 S. W. 959, 24 Ky. L. Rep. 714.

17. Connelly *v.* American Bonding, etc., Co., 113 Ky. 903, 69 S. W. 959, 24 Ky. L. Rep. 714.

18. Frenkenstein *v.* Cummisky, 46 Misc. (N. Y.) 485, 92 N. Y. Suppl. 708.

19. Anderson *v.* Blair, 118 Ga. 211, 45 S. E. 28.

20. Hoboken *v.* Kamena, 41 N. J. L. 435.

21. Hoboken *v.* Kamena, 41 N. J. L. 435.

22. Healdsburg *v.* Mulligan, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461.

23. People *v.* Hudson, 109 Ill. App. 6.

24. Com. *v.* Durkin, (Pa. 1885) 5 Atl. 201.

25. State *v.* Hauser, 63 Ind. 155.

26. Corprew *v.* Boyle, 24 Gratt. (Va.) 284.

g. Actions — (I) *Parties.* There is want of uniformity of rules in the various states as to the proper parties, to bring actions on bonds of municipal officers, caused chiefly by codes of practice. In some states the common-law rule that the action must be brought in the name of the obligee for the use of the party aggrieved prevails.[27] In others suit must be brought in the name of the party injured.[28] A bond guaranteeing the municipality against the dishonesty only of the treasurer, in which he does not join, not being the statutory bond, does not authorize a joint action against him and his sureties.[29]

(II) *Declaration or Complaint.* The presumptions of law being in favor of the legality of the acts of an officer, the allegations charging him with a violation of his duties must clearly show such violation;[30] and it must be alleged that the breach occurred during the term for which the bond was given.[31] It is not necessary to allege that the officer took the oath of office, if it appears that he entered upon the duties of the office, and when so acting broke any of the conditions of the bond.[32]

(III) *Pleas and Defenses* — (A) *In General.*[33] Pleas which are merely denials of unessential matters of inducement are bad.[34] So an averment that defendant without authority and in violation of duty issued certain certificates of improvements under the corporate seal to a creditor of the city, for work done on a contract, is not answered by a plea that defendant acted in good faith.[35] A plea by the sureties that the municipality induced and was privy to the misconduct alleged as a breach is good.[36] If the breach alleged is failure to pay over money as ordered by the council, but there is no averment of unreasonable delay, a plea *puis darrein continuance* for payment of such money in obedience to a second order of the council is good.[37] So where the breach alleged is failure to pay over the money as ordered by the city council, it is a good plea that the city

See also Loyd *v.* Ft. Worth, 82 Tex. 249, 17 S. W. 612, holding that the giving of a new bond by the city assessor, pursuant to a statute, does not release the sureties on the bond already existing from liability for default of the principal to that date.

27. Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770; Alexander *v.* Ison, 107 Ga. 745, 33 S. E. 657; Warrenton *v.* Arrington, 101 N. C. 109, 7 S. E. 652, holding, however, that joinder of the state is, under the code system of North Carolina, harmless error, as judgment may be rendered in favor of the party entitled. And see East St. Louis *v.* Flannigan, 26 Ill. App. 449 (holding that the municipality may bring suit for the use of a person injured); Hrabak *v.* Dodge, 62 Nebr. 591, 87 N. W. 358 (holding that a municipality can maintain an action against its defaulting treasurer and his bondsmen to recover license moneys collected by such treasurer, although the village is comprised within the limits of a single school-district, to which the money must ultimately be paid).

28. Somerville *v.* Wood, 129 Ala. 369, 30 So. 280; Auburn Bd. of Education *v.* Quick, 99 N. Y. 138, 1 N. E. 533. And see Moodey *v.* Shaw, Tapp. (Ohio) 330.

29. Brunswick *v.* Harvey, 114 Ga. 733, 40 S. E. 754.

30. Connelly *v.* American Bonding, etc., Co., 113 Ky. 903, 69 S. W. 959, 24 Ky. L. Rep. 714.

Where the condition of the bond is to perform certain duties prescribed by ordinance, and the ordinance is not set out, breaches of the condition cannot be shown without averment of the specific duties required by the ordinance. Tuskaloosa *v.* Lacy, 3 Ala. 618.

31. Hubert *v.* Mandheim, 64 Cal. 213, 30 Pac. 633.

Officer holding over. In an action to recover the amount of a defalcation that occurred after the expiration of the regular term for which the official was elected, and while he was holding over, it perhaps ought to be alleged that the defaulter was not elected his own successor; but where defendant answers without raising this point, the complaint will be held sufficient where it alleges that the defaulter's term expired on a certain day, but that he contested the election held on that day, and refused to surrender the office for a certain time during which he was a *de facto* officer. Baker City *v.* Murphy, 30 Oreg. 405, 42 Pac. 133, 35 L. R. A. 88.

32. Mowbray *v.* State, 88 Ind. 324.

33. Plea amounting to admission of execution of bond see Oakland *v.* Snow, 145 Cal. 419, 78 Pac. 1060.

34. Hoboken *v.* Evans, 31 N. J. L. 342.

35. Hoboken *v.* Evans, 31 N. J. L. 342.

36. Newark *v.* Dickerson, 45 N. J. L. 38. And see Newark *v.* Stout, 52 N. J. L. 35, 18 Atl. 943, holding that a plea by the sureties on a city treasurer's bond that the city, contriving and intending to injure defendants, wilfully neglected to examine the treasurer's accounts annually, and otherwise permitted, encouraged, induced, and were privy to the alleged breaches, is sufficient.

37. East St. Louis *v.* Renshaw, 153 Ill. 491, 38 N. E. 1048.

had never issued any warrant authorizing such payment, but on the contrary had forbidden it.[38] And where the breach alleged was the issue of a certificate of an overplus for certain improvements to the creditor of the city, with intent of causing him to be overpaid therefor, a plea traversing the allegation of delivery to the creditor is good.[39] The statute of limitations presents a good defense, although the fraud complained of was concealed and not discovered within the statutory period,[40] and so does the fact that the officer was, by an ordinance of the city, entitled to receive as compensation one sixth of all moneys collected by him, whereas he had only retained one tenth, and that the difference would more than counterbalance the amount he was charged with having embezzled.[41] It has also been held a good defense in favor of one surety that he belonged to a class prohibited by statute from acting as sureties.[42] The following, however, are not good defenses: Negligence of one officer, making possible the misconduct or delinquency of another;[43] as for instance in not discovering the defalcations which constitute the breach of the bond,[44] or publication of a report that the delinquent official's accounts are satisfactory,[45] or in not informing the sureties thereof on discovery;[46] the increase of official duty or responsibility during incumbency;[47] a secret contract between the municipality and the official authorizing him to use the funds of the city;[48] that the municipal officers suing on the bond are not rightfully in office;[49] and that there was no vacancy when a successor to the officer whose bond is sued on was appointed, it appearing that the appointment was made with the latter's acquiescence.[50] So where one of the sureties on an official bond given by a city officer was also mayor of the city, who had concurrent power with the recorder to approve such bonds, his knowledge of a fact tending to invalidate it could not bind the city, as the fact that he was a party to the bond would preclude him from acting officially in regard to it.[51] A resolution passed by a city council relating *inter alia* to the salary of the city treasurer, and providing that the city should "furnish" his bond, which was required by law, amounted only in legal effect to a vote by the council that the city should pay the premium on such bond as authorized by statute, and neither such resolution nor the fact that the city paid the premium charged by a surety company for becoming the treasurer's surety on his bond rendered such bond invalid as against the surety company because of false or fraudulent statements in the application of the company which was made by the treasurer in his own name and behalf.[52]

(B) *Estoppel.* The doctrine of estoppel is frequently availed of for the purpose of holding liable the principal and sureties on bonds of municipal officers. It has accordingly been held that sureties are estopped to deny the validity of a

38. East St. Louis *v.* Launtz, 20 Ill. App. 644.

39. Hoboken *v.* Evans, 31 N. J. L. 342.

40. Grimshaw *v.* Wilmington, 5 Del. Ch. 183.

41. Butte *v.* Cohen, 9 Mont. 435, 24 Pac. 206.

42. Fond du Lac *v.* Moore, 58 Wis. 170, 15 N. W. 782.

43. Greenville *v.* Anderson, 58 Ohio St. 463, 51 N. E. 41.

44. Anderson *v.* Blair, 121 Ga. 120, 48 S. E. 951; Winthrop *v.* Soule, 175 Mass. 400, 56 N. E. 575; Detroit *v.* Weber, 26 Mich. 284; Britton *v.* Ft. Worth, 78 Tex. 227, 14 S. W. 585, in which it was said that it is incumbent upon the sureties to keep a watch on their principal for the protection of the city rather than the duty of the city to keep such watch for the benefit of the sureties.

What does not amount to inducing sureties to sleep on their rights.—Neither the sending of copies of the town book to the sureties of the town treasurer, nor the acceptance by the town meeting of the reports of the auditor and treasurer as therein set forth, can be construed as a representation by the town that the statements of the reports are true, or as an inducement to the sureties to sleep upon their rights. Winthrop *v.* Soule, 175 Mass. 400, 56 N. E. 575.

45. Anderson *v.* Blair, 121 Ga. 120, 48 S. E. 951.

46. Newark *v.* Stout, 52 N. J. L. 35, 18 Atl. 943.

47. Beverley Tp. *v.* Barlow, 10 U. C. C. P. 178.

48. Manley *v.* Atchison, 9 Kan. 358.

49. Natchitoches *v.* Redmond, 28 La. Ann. 274, in which the court held that such question cannot be raised in a collateral proceeding.

50. Mowbray *v.* State, 88 Ind. 324.

51. Stevenson *v.* Bay City, 26 Mich. 44.

52. Ætna Indemnity Co. *v.* Haverhill, 142 Fed. 124, 73 C. C. A. 342.

bond on which the principal has received money not accounted for by virtue of his office.[53] That the principal is estopped to deny that his election was unauthorized because the time of election had not been fixed and the term of office and the duties to be performed by the treasurer prescribed by ordinance as required by statute.[54] So the obligors are estopped to deny the validity of ordinances under which the officer received moneys, which ordinances were in existence when the bond was executed,[55] or that the officer's debit entries in the official books were erroneous, and did not represent moneys actually received or retained by him *virtute officii*.[56]

(IV) *Replication.* Where it is pleaded as a defense that the bond was void because the mayor and council of the city were named as obligees, the replication alleging that the mayor and council had authority to be obligees is a sufficient answer to the plea to preclude a judgment for the obligor on his plea.[57]

(V) *Evidence.* The rules of evidence to establish the essential elements of liability according to the pleadings are those usually recognized and applied in civil actions generally;[58] so also of proofs on behalf of defendants to refute plaintiff's evidence,[59] or otherwise show their non-liability on the official bond.[60]

(VI) *Amount Recoverable.* The judgment for damages on an official bond cannot exceed the *ad damnum*.[61] And where a defaulting officer had mingled two separate funds the presumption is that he embezzled a *pro rata* proportion from each.[62] In determining liabilities on an officer's bond for collections made by him, an excess in his deposits over his collections for the first four months of the period covered by the bond should be credited to collections made prior to that time, and should not be applied on collections made thereafter, from which it could not have been received, and thereby reduce such liabilities by the amount of such excess.[63] Interest on funds of a village placed in bank by the treasurer without consent of the council belongs to the village and not to the treasurer, and may be recovered in an action on the bond.[64]

18. Criminal Liability — a. In General. A municipal officer is liable for wilfully doing acts forbidden by and made misdemeanors by statute,[65] and every

53. People *v.* Pace, 57 Ill. App. 674.

54. Paducah *v.* Cully, 9 Bush (Ky.) 323.

55. Middleton *v.* State, 120 Ind. 166, 22 N. E. 123.

56. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182.

57. Jenness *v.* Black Hawk, 2 Colo. 578.

58. See Bernhard *v.* Wyandotte, 33 Kan. 465, 6 Pac. 617 (in which it was held that in an action on the second bond, with the same sureties, of a city treasurer who has served two terms, it will be presumed that at the expiration of the first term he had in his possession all the money he should have had); Philadelphia *v.* Keithler, 173 Pa. St. 610, 34 Atl. 295.

The reports of a city treasurer are only *prima facie* evidence as against his sureties in an action on his official bond. Broad *v.* Paris, 66 Tex. 119, 18 S. W. 342.

Reports of a city treasurer to the city council of moneys received and disbursed during the month, which he is required to make by Pol. Code, § 4788, may be given in evidence against the sureties on his official bond, and are *prima facie* true, and, when not contradicted by the sureties, are binding on them. Philipsburg *v.* Degenhart, 30 Mont. 299, 76 Pac. 694.

Sufficiency to sustain findings.— In an action against a city auditor and *ex-officio* assessor on his bond, where the amount which he collected was shown, and the amount which he paid into the treasury during the term of his office was also shown, and there was neither allegation in the answer, nor proof on the part of defendants, that any further amount had been paid, a finding that the excess of the amount paid in by the official had been appropriated to his own use was sustained by the evidence. Oakland *v.* Snow, 145 Cal. 419, 78 Pac. 1060.

Sufficiency of evidence to show delivery of bond see Oakland *v.* Snow, 145 Cal. 419, 78 Pac. 1060.

59. American Bonding, etc., Co. *v.* Milstead, 102 Va. 683, 47 S. E. 853.

60. Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001, holding that in an action on the bond of a city tax-collector for failure to turn over money collected, the reports of the collector to the mayor and council, showing the amount collected by him, were *prima facie* correct, and it was incumbent on his sureties to point out errors therein.

61. Russell *v.* Chicago, 22 Ill. 283.

62. Britton *v.* Ft. Worth, 78 Tex. 227, 14 S. W. 585.

63. Laurium *v.* Mills, 129 Mich. 536, 89 N. W. 362.

64. Glenville *v.* Englehart, 19 Ohio Cir. Ct. 285, 10 Ohio Cir. Dec. 408.

65. People *v.* Wood, 4 Park. Cr. (N. Y.) 144.

culpable neglect of duty enjoined on a public officer either by common law or by statute is an indictable offense,[66] and neither corruption nor injurious result is an essential element of the crime.[67] The violation of a duty imposed is the gist of the offense, and where the officer is entitled to exercise discretion there can be no offense.[68]

b. Failure to Repair Streets. Municipal officers, upon whom is imposed the duty of keeping the streets in repair, are indictable for neglect to do so.[69]

c. Statutory Offenses. In many states statutory provisions exist commanding or forbidding certain specified acts to be done by particular officers. Thus it has been made an indictable offense for a municipal officer to ask or receive a reward or a promise thereof for doing an official act;[70] to obtain from a municipality any money not due him;[71] to award a contract without previous advertisement;[72] to give a lease of city real estate for a longer period than ten years;[73] to commit a

The mayor, aldermen, and councilmen of the city of New York are officers of the city government within the meaning of section 40 of the amendment to the New York city charter passed in 1857, and, as such, are liable to indictment for wilfully doing the acts forbidden by that section, and which are therein declared to be misdemeanors. People *v.* Wood, 4 Park. Cr. (N. Y.) 144.

66. State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114; State *v.* Startup, 39 N. J. L. 423; People *v.* Herlihy, 35 Misc. (N. Y.) 711, 72 N. Y. Suppl. 389 [*reversed* on other grounds in 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 326]; State *v.* Hall, 97 N. C. 474, 1 S. E. 683; State *v.* Fishblate, 83 N. C. 654; Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921.

A member of the board of public works of a city is an "officer elected to an office of trust or profit in the state." Doll *v.* State, 45 Ohio St. 445, 15 N. E. 293.

Civil justices of the New York city district courts are not city officers within the meaning of Laws (1873), c. 335, § 95, which declares that "any officer of the city government . . . who shall willfully violate or evade any of the provisions of this act . . . shall be deemed guilty of a misdemeanor." People *v.* New York County Ct. Gen. Sess., 13 Hun 395.

Bridge commissioners.— Commissioners appointed under Laws (1895), c. 789, providing for a commission to construct a suspension bridge over East river in New York city, are municipal officers, within the meaning of Labor Law (Laws (1897), c. 415) § 4, imposing certain penalties upon public officers for their violation of the law. People *v.* Van Wyck, 27 Misc. (N. Y.) 439, 59 N. Y. Suppl. 134.

Where authority is given to officers of a borough to make regulations necessary for health and cleanliness of the borough neglect of the officers to do so is a misdemeanor. Com *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921.

67. State *v.* Ragsdale, 59 Mo. App. 590; People *v.* Herlihy, 35 Misc. (N. Y.) 711, 72 N. Y. Suppl. 389 [*reversed* on other grounds in 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 236]; Morris *v.* People, 3 Den. (N. Y.) 381.

68. Alcorn *v.* State, (Miss. 1895) 16 So. 532.

69. Hammar *v.* Covington, 3 Metc. (Ky.) 494; Com. *v.* Hopkinsville, 7 B. Mon. (Ky.) 38; State *v.* Haywood, 48 N. C. 399; State *v.* Fayetteville, 4 N. C. 419, 6 Am. Dec. 567; Com. *v.* Jones, 5 Pa. Co. Ct. 13; Hill *v.* State, 4 Sneed (Tenn.) 443.

Where the indictment is against the corporation, the mayor cannot be held individually responsible. State *v.* Barksdale, 5 Humphr. (Tenn.) 154.

Authority to abolish street.— Where the corporate authorities of a municipality which has been erected out of a rural district have not adopted what was formerly a highway as a street, they are not indictable for failing or refusing to keep it in repair. McCain *v.* State, 62 Ala. 138.

70. People *v.* Kalloch, 60 Cal. 116, holding, however, that under a statute making it an offense for an officer to ask or receive a reward or a promise thereof for doing an official act, the mayor of a city cannot be indicted for procuring the salary of a city official to be increased, and for corruptly taking from him the amount of the increase.

71. People *v.* New York County Ct. Gen. Sess., 13 Hun (N. Y.) 395.

Means of obtaining money immaterial see State *v.* Crowley, 39 N. J. L. 264.

72. State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114; People *v.* Scannell, 40 Misc. (N. Y.) 297, 82 N. Y. Suppl. 362, 17 N. Y. Cr. 279, holding that in considering an indictment for letting a contract of over one thousand dollars to a bidder not the lowest, in violation of the city charter, the court cannot consider the question whether the higher bid accepted might not prove the lowest, because of the better quality of the article furnished thereby, where the charter makes the price the test of the bids.

Two lowest bids.— On an indictment for letting a city contract to one not the lowest bidder, it cannot be held that there was no lowest bidder because each of the two bidders bid the lowest price offered. People *v.* Scannell, 40 Misc. (N. Y.) 297, 82 N. Y. Suppl. 362, 17 N. Y. Cr. 279.

73. People *v.* Wood, 4 Park. Cr. (N. Y.) 144, holding, however, that it is not a misdemeanor for the mayor, aldermen, and council of a city to vote for and pass a resolution directing the controller of the city to lease city real estate for a longer term than ten

fraud on the city;[74] to become interested in any contract for the purchase of property for the use of a city;[75] to buy any city warrants;[76] or for police officials to be interested in the manufacture and sale of spirituous liquors.[77]

d. Indictment and Information. The indictment or information charging an officer with crime must set forth with reasonable certainty all the essential ingredients of the offense;[78] and it is fatally defective if it fails to point out the particular duty neglected,[79] or to refer to the statute imposing it, if the duty is so imposed.[80] An indictment against a police officer for failure to make an arrest should contain some averment of corrupt or improper motive on the part of the officer, or that he failed to act without reason or excuse, or with knowledge that

years, such voting not being of itself an unlawful act.

74. The non-payment of money collected on tax warrants within the time required by city ordinance was not a "fraud upon the city" within section 40 of the New York amended charter of April 14, 1857, by which the committing a fraud on the city was made a misdemeanor. People *v.* Taylor, 4 Park. Cr. (N. Y.) 158.

Approving bids against city. — Under Greater New York Charter, § 1551, providing that any officer of a city government who shall commit any fraud on the city shall be guilty of a misdemeanor, an indictment which alleges that an officer approved certain bills, stating their amount, well knowing that no contract had been entered into for such work as required by law, and that such acts were in violation of law, and were done with intent to commit a fraud on the city of New York, does not charge an offense, as it does not charge that the approval of such bills created a charge against the city. People *v.* Kane, 161 N. Y. 380, 55 N. E. 946, 14 N. Y. Cr. 295 [*affirming* 43 N. Y. App. Div. 472, 61 N. Y. Suppl. 195, 632].

75. People *v.* Mayer, 41 Misc. (N. Y.) 368, 84 N. Y. Suppl. 817, 17 N. Y. Cr. 479.

To become interested in a contract, it is not necessary that the officer should make profits on the same. It is sufficient if, while acting as an officer, he sells property to the city for its use, or is personally interested in the proceeds of the contract of sale, and receives the same, or part thereof, or has some pecuniary interest or share in the contract. Doll *v.* State, 45 Ohio St. 445, 15 N. E. 293.

A member of the legislative body of a city is a city officer, within a statute making it a misdemeanor for a city officer to be interested in a contract with the city. State *v.* Kelly, 103 Mo. App. 711, 77 S. W. 996.

76. Trine *v.* People, 36 Colo. 473, 86 Pac. 100.

77. Mayor not police official. — People *v.* Gregg, 59 Hun (N. Y.) 107, 13 N. Y. Suppl. 114.

Alderman not police official. — People *v.* Hannon, 13 N. Y. Suppl. 117.

78. Nowlin *v.* State, 49 Ala. 41; State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114; People *v.* Gregg, 59 Hun (N. Y.) 107, 13 N. Y. Suppl. 114; State *v.* Hall, 97 N. C. 474, 1 S. E. 683.

An indictment charging, in the language of the statute, that defendant, while a city officer, became interested, under an assumed name, in contracts for furnishing supplies for the city, is sufficient. State *v.* Kelly, 103 Mo. App. 711, 77 S. W. 996.

Tenure of office. — An indictment against commissioners of a city for failing to keep the streets in repair during a certain time therein named must aver the tenure and duration of their office. An averment that they were commissioners on a certain day during the time of the alleged neglect is not sufficient. State *v.* Haywood, 48 N. C. 399.

The specific acts constituting the offense of malicious oppression in office, under Mo. Rev. St. (1889) § 3732, are sufficiently set forth in an information alleging that defendant, as mayor, unlawfully and maliciously commanded a policeman to arrest the prosecuting witness, and assaulted him, and used threatening, profane, vile, and abusive language to him, while he was unlawfully detained in custody, setting forth the particular language as used. State *v.* Ragsdale, 59 Mo. App. 590.

An indictment charging that there were certain specified houses of ill fame in the precinct of a certain public officer, and that he wilfully omitted to suppress them, states facts sufficient to constitute a misdemeanor; and such statement is not affected by a further, but not inconsistent, description of the character of such houses, and of the unlawful practices of the inmates. People *v.* Herlihy, 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 236 [*affirmed* in 170 N. Y. 584, 63 N. E. 1120]. Such an indictment need not state separately the facts as to each of the alleged houses or the names of the keepers or inmates. People *v.* Herlihy, *supra.*

Duplicity. — An indictment charging that during all the time between specified dates, covering nearly one year, one hundred and nine specified houses in the precinct of defendant, a police officer, were houses of ill fame, and that he wilfully omitted to suppress them, states but one offense, and is not demurrable for duplicity. People *v.* Herlihy, 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 236 [*affirmed* in 170 N. Y. 584, 63 N. E. 1120].

79. Nowlin *v.* State, 49 Ala. 41; State *v.* King, 28 Mont. 268, 72 Pac. 657; People *v.* Gleason, 75 Hun (N. Y.) 572, 27 N. Y. Suppl. 670; State *v.* Hall, 97 N. C. 474, 1 S. E. 683; State *v.* Fishblate, 83 N. C. 654; State *v.* Haywood, 48 N. C. 399.

80. State *v.* Fishblate, 83 N. C. 654.

the failure was wrongful.[81] Two distinct branches of a city government cannot be jointly indicted for failure or refusal to perform their duties under the charter.[82]

e. Evidence. The general rules governing the admissibility of evidence in criminal cases apply on the trial of a municipal officer for neglect of duty.[83]

f. Defenses. Liability to impeachment for the same offense,[84] or to removal from office[85] is no bar to indictment; nor is retirement from office,[86] nor the subsequent discharge of the duty by successors in office.[87]

g. Effect of Conviction. Judgment of conviction forfeits the office without the institution of quo warranto proceedings.[88]

B. Municipal Departments and Officers Thereof[89] — **1. Nature and Status of Departments.** The various departments of a great city, charged with the supervision and control of divers municipal affairs and the exercise of different corporate functions, such as health, education, police, fire, water and light, streets, parks, wharves, etc., have such a variety of duties and powers, and are organized under such diverse legislation and charters, that they can scarcely be said to be amenable to the same general doctrines of the law, some being declared to be municipal corporations, others quasi-corporations, and still others not to be corporate bodies but only subordinate divisions of the municipal corporation.[90] The test by which their character is usually determined is the capacity to hold property and to sue and be sued by a corporate name.[91]

2. Creation and Existence of Departments. The power to create municipal departments to exist and act as corporations is not a municipal function, but belongs solely to the legislative department of the government.[92] It may, however, delegate this power to a municipality,[93] and the political policy or wisdom of so doing is of no concern to the courts and a matter over which they have no con-

81. Com. *v.* McPeek, 20 S. W. 220, 14 Ky. L. Rep. 215.

82. State *v.* Hall, 97 N. C. 474, 1 S. E. 683.

83. See cases cited *infra*, this note.

On the trial of a police officer for wilful neglect of duty, in failing to suppress a disorderly house, the rules of the police department (People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125 [*reversing* 78 N. Y. App. Div. 271, 630, 79 N. Y. Suppl. 997]), the weekly reports of the officer (People *v.* Diamond, 72 N. Y. App. Div. 281, 76 N. Y. Suppl. 57 [*affirmed* in 175 N. Y. 517, 67 N. E. 1087), and acts and conduct of the inmates of the house which an officer neglected to suppress (People *v.* Glennon, *supra*) are admissible in evidence. So evidence that a telephone message concerning a proposed raid on a disorderly house was sent to defendant at his request is admissible where he admitted that he heard of it, although he was not present when the message was received (People *v.* Glennon, *supra*); but evidence as to a raid on such house prior to the time mentioned in the indictment is inadmissible where it is not shown that he had any knowledge of it (People *v.* Glennon, *supra*).

Evidence held sufficient to justify conviction see People *v.* Diamond, 72 N. Y. App. Div. 281, 76 N. Y. Suppl. 57 [*affirmed* in 175 N. Y. 517, 67 N. E. 1087]; People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125 [*reversing* 78 N. Y. App. Div. 271, 630, 79 N. Y. Suppl. 997, 1141].

84. People *v.* Jerome, 36 Misc. (N. Y.) 256, 73 N. Y. Suppl. 306.

85. State *v.* Kelly, 103 Mo. App. 711, 77 S. W. 996.

86. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921.

87. Roberts *v.* Southern Pines, 125 N. C. 172, 34 S. E. 268, penal action.

88. State *v.* Ragsdale, 59 Mo. App. 590.

89. **Mandamus as to acts of officers** see Mandamus, 26 Cyc. 249 *et seq.*

90. See the following cases:

Louisiana.—State *v.* Kohnke, 109 La. 838, 33 So. 793.

Maryland.— Brotherton *v.* Baltimore Police Com'rs, 49 Md. 495.

Massachusetts.— Prout *v.* Pittsfield Fire Dist., 154 Mass. 450, 28 N. E. 679; Boston Overseers of Poor *v.* Sears, 22 Pick. 122.

Michigan.— Board of Education *v.* Detroit, 30 Mich. 505.

Missouri.— Heller *v.* Stremmel, 52 Mo. 309.

New Jersey.— Schumm *v.* Seymour, 24 N. J. Eq. 143.

New York.— Clarissy *v.* Metropolitan Fire Dept., 7 Abb. Pr. N. S. 352; Rauh *v.* Public Park Com'rs, 66 How. Pr. 368; Appleton *v.* New York Water Com'rs, 2 Hill 432.

Pennsylvania.— Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73, 72 Am. Dec. 724.

See 36 Cent. Dig. tit. "Municipal Corporations," § 415.

91. See cases cited in preceding note.

92. See *infra*, XI, A, 2, 3; XI, B, 4, c, (I).

93. Newcomb *v.* Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732; Boehm *v.* Baltimore, 61 Md. 259; Smith Mun. Corp. §§ 1674, 1675, 1676.

trol.[94] Power conferred on a city "to preserve the health of the city and to prevent and remove nuisances" authorizes it to create boards of health.[95] But power to create a department of municipal government is not conferred on a municipality by a charter authorizing it to sell property for its benefit.[96] Power conferred on a municipality to create new departments may be taken away by subsequent legislation, and thereafter no new departments can be created except by the legislature.[97]

3. Abolition of Departments. Departments may also be abolished by the power that gave them life — by the legislature if created by it; and if created by the municipality, then either by it or the state in exercise of its sovereign power.[98] And this power may be exercised at discretion without regard to the term or incumbency of any officers of the department.[99] Abolition of a department may be effected by express repeal of the statute or ordinance of creation,[1] or by other positive legislation incompatible with the law creating it.[2]

4. Public Works[3] — a. Term of Office. In many cities the board of public works is the administrative and business department of the municipality; the length of its term and extent of its powers being determined by the municipal charter,[4] if not in contravention of constitutional provisions.[5]

94. Newcomb *v.* Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732.

95. Boehm *v.* Baltimore, 61 Md. 259.

96. Smith *v.* Morse, 2 Cal. 524, sinking fund commission.

97. People *v.* New York Fire Com'rs, 23 Hun (N. Y.) 317 [*affirmed* in 86 N. Y. 149].

98. Com. *v.* Reese, 29 S. W. 352, 16 Ky. L. Rep. 493; Butcher *v.* Camden, 29 N. J. Eq. 478; Toledo *v.* Lake Shore, etc., R. Co., 4 Ohio Cir. Ct. 113, 2 Ohio Cir. Dec. 450.

Ordinance held to abolish department. — A city ordinance, reorganizing the police department and vesting the entire control of the police force in a city marshal, takes away the functions given to the board of police by the act of their creation and confers them upon the officers named in such ordinance. Sheridan *v.* Colvin, 73 Ill. 237.

For statute held not to abolish department see State *v.* Hornberger, 8 Ohio Dec. (Reprint) 96, 5 Cinc. L. Bul. 626.

99. City authorities may lawfully, by ordinance, abolish the fire department, notwithstanding terms of office of its officers are unexpired. Butcher *v.* Camden, 29 N. J. Eq. 478.

1. Toledo *v.* Lake Shore, etc., R. Co., 4 Ohio Cir. Ct. 113, 2 Ohio Cir. Dec. 450.

2. A statute creating the office of "inspector of weights and measures" abolished the office of "sealer of weights and measures," which theretofore existed. Com. *v.* Reese, 29 S. W. 352, 16 Ky. L. Rep. 493.

3. For statutes held not to repeal acts providing for the establishment of public works see Sherman *v.* Des Moines, 100 Iowa 88, 69 N. W. 410.

4. See Gilroy *v.* Smith, 5 N. Y. Suppl. 784.

Construction of particular provisions. — New York Consolidation Act (Laws (1882), c. 410), § 106, provides that the terms of all officers, whensoever actually appointed, shall commence on the first day of May in the year in which the terms of office of their predecessors shall expire; but the commissioner of public works to be appointed on the expiration of the term of the present incumbent, in December, 1884, shall hold from the first day of May succeeding such month. It was held that it was clearly the intention that the commissioner's term should begin on May 1, 1885, and it was immaterial that the termination of his predecessor's term was erroneously stated to be in December, 1884. People *v.* Barrett, 8 N. Y. Suppl. 677. The city charter passed April 30, 1873, provided in section 25 that the mayor should within twenty days after the passage thereof nominate successors of persons whose terms were ended by its passage, excepting the commissioner of public works and some other officers, who were expressly allowed to continue in office for the residue of their terms, which would expire in the following December, when he was permitted to appoint their successors for terms of four years. It further provided that "every head of department and person in this section named, except as herein otherwise provided," should hold their offices for six years, or until their successors should be appointed. The terms of all except "those first appointed" were to commence on May 1. As to those first appointed it was provided that their terms should commence on the expiration of the terms of the then incumbents, "as hereinafter provided," and continue until the "1st day of May in the year in which it is herein provided that their respective terms should expire." Section 117 contained a general provision ending the terms of all appointed officials on the 1st day of May, 1873, excepting the commissioner and some other officers. It was held that the charter made no change in the time at which the term of said commissioners should expire, which still continued to be in December, as before the passage of the charter. Gilroy *v.* Smith, 5 N. Y. Suppl. 784.

5. Bonebrake *v.* Wall, 11 Ohio Dec. (Reprint) 38, 11 Cinc. L. Bul. 175.

b. Eligibility. A statute providing that no person shall be appointed by the aqueduct commissioners, as inspector or superintendent, who shall not be certified by at least three members of the commission to be competent and fit for the duties of the position for which he is an applicant, and experienced in the subject-matter of the employment, being special and local in its character, is not to be deemed to be repealed by the civil service act directing that preference be given honorably discharged Union soldiers in certain civil appointments.[6]

c. Appointment and Filling of Vacancies. Under the constitutions of some states the legislature has no power to appoint members of boards of public works. The functions of such officers being local and municipal, the selection cannot properly be made without the assent of the local people or authorities.[7] Under the constitutions of other states the legislature may confer on the governor the power of appointment of members of the boards of public works.[8] When the governor, having the general constitutional power of appointment of officers not otherwise provided for, is by the charter vested with power to appoint members of this board, and fill vacancies arising therein, his appointments to fill vacancies and the time for which the appointees shall hold office is controlled by the charter and not by the constitution.[9] Under a charter provision that the governor shall appoint a board of public works by and with the advice and consent of the senate, and that he shall have power to fill vacancies in vacation of the senate, the governor may appoint for an unexpired term without the advice and consent of the senate.[10] A constitutional provision that in cases of elective officers no person appointed to fill a vacancy shall hold his office, by virtue of such appointment, for a period longer than the commencement of the political year next succeeding the annual election after the happening of the vacancy, applies only to offices created by the constitution and not to those created by the legislature; and a city charter declaring that a vacancy in the office of an elective commissioner of public works shall be filled by appointment of the mayor, and that his term shall last until the first day of January after the next municipal election, at which election a commissioner shall be elected, is not in contravention of the constitution.[11] So this charter provision is not in contravention of a constitutional provision that all elections of city officers, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday of November in an odd-numbered year. The office being statutory, the term, compensation, mode of appointment or election, and the term and manner of filling vacancies are all subject to the legislative will.[12]

d. Authority and Powers. These are such of course as are conferred by charter or general statute; and where the common council had been clothed with the duties of commissioners of highways, and a later statute, creating a board of public works, vested in it the powers of commissioners of highways, this was held to transfer to the board all the powers and authority formerly of the council.[13]

6. Brown *v.* Duane, 60 Hun (N. Y.) 98, 14 N. Y. Suppl. 450.

7. State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103. See *supra*, IV, E.

8. State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829. See *supra*, IV, E.

9. Monash *v.* Rhodes, 27 Colo. 235, 60 Pac. 569 [*affirming* 11 Colo. App. 404, 53 Pac. 236].

10. Monash *v.* Rhodes, 27 Colo. 235, 60 Pac. 569 [*affirming* 11 Colo. App. 404, 53 Pac. 236].

11. People *v.* Scheu, 167 N. Y. 292, 60 N. E. 650 [*affirming* 60 N. Y. App. Div. 592, 69 N. Y. Suppl. 597].

12. People *v.* Scheu, 167 N. Y. 292, 60 N. E. 650 [*affirming* 60 N. Y. App. Div. 592, 69 N. Y. Suppl. 597].

13. Matter of Watertown Public Works, 67 Hun (N. Y.) 190, 22 N. Y. Suppl. 112 [*affirmed* in 144 N. Y. 440, 39 N. E. 387]. See *supra*, IX, C, 1.

Power to change grade of street and make repairs.— North Adams city charter provides that the board of public works shall have control of the construction, alteration, and repair of streets, and, "except as herein otherwise provided," shall have the powers, etc., which "may be by law given" to road commissioners of towns; section 13 authorizes the city council, "so far as is not inconsistent with this act," to exercise all the legislative powers of towns; and section 23 gives the council exclusive power to lay out and discontinue streets and highways, and to assess damages sustained thereby, "except as herein otherwise provided," and to act in all matters re-

Where the duty of making plans, drawings, and specifications is imposed on the commissioner, a resolution authorizing the city controller to employ an architect to do the work, and the contract with the architect made pursuant thereto, are unauthorized encroachments on the commissioner's authority.[14]

e. Duties and Liabilities. It is the duty of a director, or member of a board of public works, always to act as a trustee for the municipality;[15] and, in case of conflict, to prefer its interests and welfare above that of all other corporations or persons, even his own.[16] Municipal officers and agents having general charge of public improvements and power to contract therefor are bound to investigate complaints against contractors for public works charging violation of laws regulating the hours of labor and wages of laborers employed on public works.[17] When a municipal charter requires a reference of a proceeding of the city council to the board of public works, such reference must be formally made to the board; and the matter referred should be duly considered and determined by the board, and not by the members of the board acting each for himself, and without the benefit of conference with the others.[18] A director or member of the board is not personally liable for damages caused by acts done by him in pursuance of a discretion with which he is vested in the absence of bad faith,[19] nor for the neglect of employees not appointed by him or under his control.[20] It has been held, however, that he is liable for damages for unauthorized acts done by him.[21]

f. Compensation. Members of boards of public works are "municipal officers" within a constitutional prohibition against any change of compensation during their term of office;[22] but a charter provision forbidding reduction of salaries during incumbency of any office does not prevent later legislation authorizing the municipality to allow such salary as it sees fit to officers of a board not in existence when the charter provision was enacted, and under such later legis-

lating to such laying out, altering, etc. It was held that the powers of the board of public works were not cut down by the powers granted to the city, and that it had power to change the grade of a street in making ordinary repairs, such repairs not being an alteration, within section 23. Simpson *v.* North Adams, 174 Mass. 450, 54 N. E. 878.

Power to employ night watchman and make contract for compensation.— A city ordinance declared that the minimum wage of a laborer or workman employed by any board or commission for the city should not be less than one dollar and fifty cents a day, and Local Acts (1901), p. 389, No. 415, § 6, provided that the Detroit commissioner of public works might appoint such employees of the department as the common council should provide for. It was held that, the city having created the position of night watchman in the department of public works, the commissioner of such department had power to employ a person to fill such position, and to agree with him that he should be paid for overtime without submitting the contract to the council for its approval, notwithstanding section 8, providing that the commissioner of public works shall have no power to enter into any contract on behalf of the city without the approval of the common council. Gadd *v.* Detroit, 142 Mich. 683, 106 N. W. 210.

14. Moreland *v.* Detroit, 130 Mich. 343, 89 N. W. 935.

15. See *supra*, VII, A, 1.

16. See *supra*, VII, A, 1.

17. People *v.* Van Wyck, 27 Misc. (N. Y.) 439, 59 N. Y. Suppl. 134.

18. Storrie *v.* Woessner, (Tex. Civ. App. 1898) 47 S. W. 837.

19. American Pavement Co. *v.* Wagner, 139 Pa. St. 623, 21 Atl. 160 [*affirming* 7 Pa. Co. Ct. 385].

20. Fitzpatrick *v.* Slocum, 89 N. Y. 358.

Statutory exemption.— Laws which exempt the commissioner of city works from liability for the misfeasance or nonfeasance of any of his subordinates are not in violation of the doctrine of *respondeat superior*, since the city, and not the commissioner, is the superior, and liable for the negligence of such subordinates. Bieling *v.* Brooklyn, 120 N. Y. 98, 24 N. E. 389.

21. Larned *v.* Briscoe, 62 Mich. 393, 29 N. W. 22.

22. Louisville *v.* Wilson, 99 Ky. 598, 36 S. W. 944, 18 Ky. L. Rep. 427. *Compare* Bonebrake *v.* Wall, 11 Ohio Dec. (Reprint) 38, 24 Cinc. L. Bul. 175, holding that a statute creating a board of public works for a municipality and establishing certain officers for such board, and which fails to fix the compensation of those officers, is not within the inhibition of a constitutional provision that the compensation of all officers not fixed by the constitution shall in all cases be fixed by the legislature, the reason assigned being that officers of the board of public works are permanent officers of the city government.

What does not amount to change.— Where a statute provides that the salary of a designated officer shall not be less than an

lation the compensation of such officers may be reduced during the term.[23] Where the salary of an officer of this department is by charter to be fixed by the board, with the approval of the council, the latter may not alone reduce it.[24] An officer illegally suspended may recover his salary during the time of suspension.[25]

g. Records. Such is the nature and importance of the functions of a board or director of public works for municipal corporations as necessarily to require that a record shall be kept of all official acts and transactions even though not expressly required by the charter.[26]

h. Removal. An officer of a board of public works holding for a definite term is not removable at pleasure unless this power is expressly conferred by statute.[27] An officer who simply attends board meetings and gives no personal attention to the public works of the corporation, and who exercises no care to check incompetent work or extravagant expenditures, is guilty of dereliction of duty, and subject to removal therefor.[28] When a regular trial is not contemplated, although removal may be only for cause, charges drawn with the exactness of pleadings are not necessary,[29] nor need the commission call witnesses or hear testimony.[30] But when trial is required the jury decide whether the facts proven sustain the charges.[31] Acts of an officer after his suspension, in seeking and accepting other employment, are not admissible against him to show that he understood, when he received notice of suspension, that he was discharged.[32] On appeal, if it appears that there was no evidence to sustain the charges, the removal is "not for cause" and may be reversed.[33]

i. Abolition of Office. The legislature has power to abolish the office of any officer of the board of public works.[34]

j. Criminal Liability. Violation of a prescribed duty by a board of public works is an indictable offense, although not made so in terms by statute,[35] and a member of such board is "an officer elected to an office of trust or profit" within a statute which makes it a crime for such officer to become "directly or indirectly interested in any contract for the purchase of any property or fire insurance, for the use of the state, county, township, city, town or village."[36] On a prosecution under such statute it cannot be shown as a defense that the proper officer had not certified that the money required for the contract was in the treasury to the credit of the proper fund, or specifically set apart for such expenditures, as required by statute.[37] But it seems that omission to take the prescribed official oath before assuming office is a personal and not an official omission of duty, within the meaning of a statute the provisions of which punish as a misdemeanor

amount named, but does not fix the amount, an ordinance fixing the salary of such officer at a greater amount than named in the statute, does not violate a constitutional prohibition against any change of the compensation of municipal officers during their terms of office. Louisville *v.* Wilson, 99 Ky. 598, 36 S. W. 944, 18 Ky. L. Rep. 427.

23. People *v.* Detroit, 38 Mich. 636.

24. Fountain *v.* Jackson, 50 Mich. 15, 14 N. W. 680.

25. Morley *v.* New York, 12 N. Y. Suppl. 609.

26. Larned *v.* Briscoe, 62 Mich. 393, 29 N. W. 22.

27. Todd *v.* Dunlap, 99 Ky. 449, 36 S. W. 541, 18 Ky. L. Rep. 329.

28. State *v.* Van Brocklin, 8 Wash. 557, 36 Pac. 495.

29. People *v.* Thompson, 94 N. Y. 451.

30. People *v.* Thompson, 94 N. Y. 451.

31. Wardlaw *v.* New York, 137 N. Y. 194, 33 N. E. 140.

32. Morley *v.* New York, 12 N. Y. Suppl. 609.

33. People *v.* Campbell, 82 N. Y. 247.

Finding not sustained by facts.— A charge that a member of a municipal board of public works voted to insure certain city property with companies through a corporation, as local agent, which received commissions therefor, and that he was a stock-holder of the agent company, and so interested in the commissions paid, was not sustained by a finding of the facts charged, except that he was a trustee only of such company. State *v.* Van Brocklin, 8 Wash. 557, 36 Pac. 495.

34. See McHugh *v.* Cincinnati, 1 Cinc. Super. Ct. (Ohio) 145, construing provisions which were held to abolish the office of city commissioner.

35. State *v.* Startup, 39 N. J. L. 423.

36. Doll *v.* State, 45 Ohio St. 445, 15 N. E. 293.

37. Doll *v.* State, 45 Ohio St. 445, 15 N. E. 293.

the wilful omission by a public officer of any public duty enjoined upon him by law.[38]

5. Police — a. Commissioners or Board — (I) *Nature and Status of Board.* The cases almost unanimously concur in holding that police commissioners are in fact state officers and not municipal, although a particular city or town be taxed to pay them.[39] It is a body separate and independent of the city council, with certain defined powers and duties, in the exercise of which it cannot be controlled by the council.[40] Such a board is held to be an administrative tribunal vested with disciplinary powers, and not a court limited in its functions, nor confined by the application of strict legal rules governing trials in courts of law.[41]

(II) *Appointment or Election* — (A) *In General.* It follows from the proposition above stated that police commissioners are state and not municipal officers,[42] that the legislature may, unless specially restrained in the constitution, take from a municipal corporation its charter powers respecting the police and their appointment, and, by statute, itself directly provide for permanent police for the corporation under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners appointed by the legislature, or by some designated officer.[43] Some of these acts providing

38. People *v.* Ryall, 58 Hun (N. Y.) 235, 11 N. Y. Suppl. 828.

39. *Connecticut.*— Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

Indiana.— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Kansas.—State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Maryland.— Baltimore *v.* Howard, 20 Md. 335; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Ohio.— Yaple *v.* Morgan, 2 Ohio Cir. Ct. 406, 1 Ohio Cir. Dec. 557 [*affirmed* in 25 Cinc. L. Bul. 336].

Rhode Island.—*In re* Police Com'rs, 22 R. I. 654, 49 Atl. 36.

See also cases cited *infra*, next section. But see Speed *v.* Crawford, 3 Metc. (Ky.) 207 (where it was held that members of the police board were "officers for cities and towns," within the provisions of Const. art. 6, par. 6); Mangam *v.* Brooklyn, 98 N. Y. 585, 50 Am. Rep. 705; People *v.* Albertson, 55 N. Y. 50; Shanley *v.* Brooklyn, 30 Hun (N. Y.) 396.

40. Cleveland *v.* Payne, 72 Ohio St. 347, 74 N. E. 177; Yaple *v.* Morgan, 2 Ohio Cir. Ct. 406, 1 Ohio Cir. Dec. 557 [*affirmed* in 25 Cinc. L. Bul. 336]; Jones *v.* Doherty, (Tex. Civ. App. 1900) 56 S. W. 596.

41. People *v.* New York Police Com'rs, 93 N. Y. 97.

42. See *supra*, VII, B, 5, a, (I).

43. *Indiana.*—Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025.

Kansas.—State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

Kentucky.— Police Com'rs *v.* Louisville, 3 Bush 597. But see Speed *v.* Crawford, 3 Metc. 207; Ader *v.* Newport, 6 S. W. 577, 9 Ky. L. Rep. 748.

Louisiana.— State *v.* New Orleans, 41 La. Ann. 156, 6 So. 592; Diamond *v.* Cain, 21 La. Ann. 309.

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Baker *v.* Port Huron Police Com'rs, 62 Mich. 327, 28 N. W. 913.

Missouri.— State *v.* Mason, 153 Mo. 23, 54 S. W. 524.

Nebraska.— State *v.* Broatch, 68 Nebr. 687, 94 N. W. 1016, 110 Am. St. Rep. 477; State *v.* Bennett, 22 Nebr. 470, 35 N. W. 235; State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

New Hampshire.— Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522; Gooch *v.* Exeter, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637.

New York.— People *v.* Draper, 15 N. Y. 532. But see People *v.* Acton, 48 Barb. 524, 33 How. Pr. 52.

Texas.—*Ex p.* Tracey, (Cr. App. 1905) 93 S. W. 538.

Virginia.— Burch *v.* Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

See 36 Cent. Dig. tit. "Municipal Corporations," § 459.

Contra.— O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831.

New York Metropolitan Police Act.— The act of April 15, 1857, constituting the metropolitan police district out of the counties of New York, Kings, Richmond, and Westchester, and providing for the government of such district, was not unconstitutional in creating a new district or division of the state unknown to the constitution for governmental purposes. People *v.* Draper, 25 Barb. (N. Y.) 344 [*affirmed* in 15 N. Y. 532].

Appointment by district judge.— The constitutional provision that the powers of the state shall be divided into legislative, executive, and judicial, and that the members of one department shall have no part in the management of the affairs of either of the other departments, refers wholly to the powers of the state government; and hence it is not violated by the act of April 1, 1878, empowering certain of the district judges to appoint members of a city police board. People *v.* Alvord, (Cal. 1884) 4 Pac. 676;

for boards of police commissioners have been assailed on the ground that they were inconsistent with the theory of local self-government, and for other reasons, but they have been generally upheld.[44]

(B) *Qualifications.* The legislature has the right to fix the qualifications of members of the board of police, and a provision that they shall be appointed from two principal political parties has been held constitutional.[45] Such a provision is usually regarded as directory merely, and not as an element in the tenure of the office,[46] and an appointment made irrespective of this political qualification is legal.[47] Failure of an act establishing a board of police commissioners in a certain city to expressly provide that the commissioners to be appointed shall be residents of the city does not render the act unconstitutional where the intention that they shall be such is manifest upon its face.[48]

(III) *Terms and Vacancies.* Usually police commissioners are authorized to hold their offices until their successors are duly elected or appointed under some existing provision of law.[49] A commissioner appointed to fill a vacancy caused by the death, resignation, or removal of an incumbent holds only for the unexpired term of his predecessor.[50] For the purpose of computing its duration, a term will be deemed to have commenced when an appointment might have been made, and not when it actually was made.[51]

(IV) *Removal.* There are two distinct and divergent theories entertained concerning the removal of police commissioners, the administrative and the judicial; under the former theory the act and judgment of the executive in removing a member of the police commission without hearing is final and conclusive;[52] under the latter there must be a charge and notice, and opportunity to be heard;[53]

Staude *v.* San Francisco Election Com'rs, 61 Cal. 313.

Right to appoint as dependent on population.— A statute providing that a board of police commissioners shall be appointed by the governor in cities of ten thousand inhabitants according to the United States census of 1890, or according to a census taken under authority of the mayor of the city, the governor's right to appoint is determined by the statement as to population certified to him by the mayor. Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025.

44. See cases cited in preceding note.

45. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142. But see Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535 [*affirmed* in 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408].

46. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

47. State *v.* Bennett, 22 Nebr. 470, 35 N. W. 235; State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

48. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529.

49. People *v.* Gunst, 110 Cal. 447, 42 Pac. 963; People *v.* Hammond, 66 Cal. 654, 6 Pac. 741; People *v.* Sague, 68 N. Y. App. Div. 643, 74 N. Y. Suppl. 161; State *v.* Simon, 20 Oreg. 365, 26 Pac. 170. See also State *v.* Bailey, 37 Ohio St. 98.

A police commissioner removed from office by the governor for official misconduct does not hold over until his successor is elected and qualified. When removed from his office he ceases to be an officer, and cannot therefore hold over as such. State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

50. State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653; People *v.* McClave, 99 N. Y. 83, 1 N. E. 235.

51. People *v.* McClave, 99 N. Y. 83, 1 N. E. 235.

52. People *v.* Martin, 19 Colo. 565, 36 Pac. 543, 24 L. R. A. 201; Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

Removable only by governor.— Police commissioners of a city, being appointed by the governor and empowered directly by the state, are not, as other municipal officers, removable for neglect of duty, by civil action, under statute, but only by the governor. State *v.* Shearman, 51 Kan. 686, 35 Pac. 455.

Power of supreme court to remove.— The power given to the mayor of the city of Troy, by the city charter, to suspend any appointed officer for misconduct or neglect, was repealed, as to police commissioners, by the amendatory act of 1881 (Laws (1881), c. 76), § 1, giving to the supreme court power to remove them; the provision of the later statute being inconsistent with and repugnant to those of the earlier one. People *v.* Crissey, 91 N. Y. 616.

53. State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893; Matter of Nichols, 6 Abb. N. Cas. (N. Y.) 474, 57 How. Pr. 395; People *v.* Cooper, 58 How. Pr. (N. Y.) 358; People *v.* Nichols, 58 How. Pr. (N. Y.) 200; Hogan *v.* Carbery, 6 Ohio Dec. (Reprint) 729, 7 Am. L. Rec. 595.

Essentials to exercise of power of removal. — To exercise the power of removal of a

and the removal is subject to review in the courts,[54] and on reversal the officer may be restored to his office.[55]

(v) *Authority and Powers.* The measure of authority and powers of a police board is the charter or the organic act creating it.[56] These powers, which are many and far-reaching in their results, are in almost every instance conferred upon the board as a body, and not upon the individual members thereof.[57] To carry into execution these powers the board frequently is authorized to employ and appoint a police force, with a chief of police and various other officers,[58] and to establish and enforce rules for the government and discipline of the police force.[59]

police commissioner, the removing officer must have good cause therefor, and grant an opportunity to be heard, which is given only by a definite statement of the charge, a reasonable time to answer it, and the right to hear, examine, and disprove the evidence given to sustain it, with the aid of counsel. Matter of Nichols, 6 Abb. N. Cas. (N. Y.) 474, 57 How. Pr. 395.

54. Matter of Nichols, 6 Abb. N. Cas. (N. Y.) 474, 57 How. Pr. 395; People *v.* Cooper, 58 How. Pr. (N. Y.) 358; People *v.* Nichols, 58 How. Pr. (N. Y.) 200.

55. State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893.

56. **Police commissioners being state officers** are strictly within the jurisdiction of the state authorities; and the statute law is the only guide in determining their rights and obligations. Baltimore *v.* Howard, 20 Md. 335.

Power to call out militia.— In Maryland the board of police is given the power to call out the military force of the city to aid in preventing threatened disorder, or to suppress insurrection, riot, or disorder. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

No authority to create debt against city.— Police commissioners are not corporate authorities, and therefore have no power to create a debt against the municipality without its consent (Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825; Wider *v.* East St. Louis, 55 Ill. 133), unless the right is expressly conferred (Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572).

57. **No authority to delegate powers.**—The general powers of the board must be performed by it as a body, and cannot be delegated to any member, be he president or vice-president. Francis *v.* Blair, 96 Mo. 515, 9 S. W. 894, 89 Mo. 291, 1 S. W. 297.

58. Francis *v.* Blair, 96 Mo. 515, 9 S. W. 894; Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522; Callaghan *v.* McGown, (Tex. Civ. App. 1905) 90 S. W. 319, holding that where a city charter places the police department under the control of a civil service commission giving the commission the right to discharge and appoint, the fact that officers and employees were appointed to their positions by the mayor and approved by the council did not deprive the commissioners of the control over them.

A city and county police board with discretionary powers may establish a police force for the city only, without organizing one for the county. Police Com'rs *v.* Louisville, 3 Bush (Ky.) 597.

No authority to increase force beyond statutory limit.—Authority conferred upon police commissioners to organize a police force does not confer authority to increase the regular force beyond the statutory limit for permanent policemen. State *v.* Mason, 153 Mo. 23, 54 S. W. 524.

Right to use and control of station houses. — Police commissioners are legally entitled to the use and control of station houses and other paraphernalia provided by a city for police purposes. Police Com'rs *v.* Louisville, 3 Bush (Ky.) 597; Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522.

Rules governing appointment of members of force — Utah.— The act of March 8, 1894, section 6, authorizing the board of police commissioners of Salt Lake City to adopt rules to govern the selection and appointment of persons "employed" on the police force, and section 9, providing that such rules shall specify the date when they shall take effect, and "thereafter" all selections shall be made according to such rules, do not authorize the board to require a person already employed to take the examination prescribed by it. Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 40 Pac. 264.

59. Francis *v.* Blair, 96 Mo. 515, 9 S. W. 894; Cain *v.* Warner, 45 N. Y. App. Div. 450, 60 N. Y. Suppl. 769.

Authority to make assignments to duty.— Except where the right to assign to duty the members of the uniformed force is expressly given to the chief of police (People *v.* Roosevelt, 5 N. Y. App. Div. 168, 39 N. Y. Suppl. 78), the board of police commissioners has authority to change the assignments from time to time (Fitzpatrick *v.* Gaster, 45 La. Ann. 1477, 14 So. 304; Stainsby *v.* Newark, 49 N. J. L. 175, 6 Atl. 882; People *v.* Greene, 91 N. Y. App. Div. 58, 86 N. Y. Suppl. 322 [*affirmed* in 178 N. Y. 617, 70 N. E. 1106]. Where the sole power to make transfers in the police force is lodged in the chief of police, a resolution of the board of police commissioners remanding a roundsman to patrol duty is a mere recommendation to the chief of police, and his act in carrying out the resolution is his own act. People *v.* Moss, 42 N. Y. App. Div. 196, 58 N. Y. Suppl. 1051. Under a city charter providing that no two platoons of patrolmen shall be on duty at the same time, except when, in the discretion of the police board, public demands require

(VI) *DUTIES AND LIABILITIES.* Police commissioners being considered state officers, their duties and liabilities are dependent upon statute.[60] A police board displaced by and yielding to *vis major* are yet amenable for official dereliction in matters not beyond their control.[61] Police commissioners acting in good faith under an unconstitutional law are not personally liable for policemen's salaries.[62]

(VII) *MEETINGS AND REGULATIONS.* In the absence of a special provision to the contrary, the presence of all the members of a police board is not indispensable to the transaction of business. Where members having reasonable notice neglect to attend a meeting, the action of those present, if a majority of all or a quorum authorized by statute or by-law, is the action of the board and binding.[63] Such a meeting may be called and presided over by the president *pro tem* when the mayor refuses to call it.[64] Regulations passed by the board repugnant to statutes are null and void;[65] but a rule adopted remains binding on the police force until altered or repealed, although the commissioner who made it has been succeeded in office by another person.[66]

b. Chief or Superintendent — (I) *CREATION, NATURE, AND ABOLITION OF OFFICE.* The office of chief of police has been held a state and not a municipal office.[67] It may not be created by municipal ordinance in the absence of some provision authorizing the creation of such office.[68] But where a municipality is vested with power to create the office by ordinance, and does so, it may likewise abolish the office by ordinance.[69] The enactment of a new police code, which

the aid of a second platoon, or the board may, in its discretion, on such occasions, order on duty all three platoons, the discretion of the board is not subject to review by the courts. People *v.* Jewett, 15 Misc. (N. Y.) 227, 36 N. Y. Suppl. 778.

Authority to employ police surgeon.— The board of commissioners has implied power to employ a necessary police surgeon (Cain *v.* Warner, 45 N. Y. App. Div. 450, 60 N. Y. Suppl. 769); but since New York City Charter (Laws (1901), p. 118, c. 466), § 276, allowing forty surgeons to the police department, does not constitute such surgeons a board, the police commissioner has no power to form them into a board, and a rule of the police department purporting to do so is invalid (Metcalf *v.* McAdoo, 48 Misc. (N. Y.) 420, 95 N. Y. Suppl. 511 [*affirmed* in 109 N. Y. App. Div. 892, 96 N. Y. Suppl. 868 (*affirmed* in 184 N. Y. 268, 77 N. E. 17)].

Right to forbid participation in political canvass.— The right to make reasonable regulations for the government of the force includes one forbidding members of the force from participation in any political caucus or canvass. Brownell *v.* Russell, 76 Vt. 326, 57 Atl. 103. See also McAvoy *v.* Press Pub. Co., 114 N. Y. App. Div. 540, 99 N. Y. Suppl. 1041.

Punishment for failure to pay debts.— A police board has authority to adopt a rule that any member of the department neglecting to pay any debt shall be punished by reprimand, fine, or dismissal (Cleu *v.* San Francisco Police Com'rs, 3 Cal. App. 174, 84 Pac. 672); and is not required to wait until a court has passed on the question of indebtedness before taking action against an officer charged with neglecting to pay his debts. Cleu *v.* San Francisco Police Com'rs, *supra*. Neither does the fact that after a charge had been filed the officer accused filed his petition in bankruptcy oust the jurisdiction of the board. Cleu *v.* San Francisco Police Com'rs, *supra*.

Rule against unbecoming conduct.— A rule by the board of police commissioners, authorized to make rules for the government of the police force, against conduct unbecoming an officer and a gentleman, is violated by an officer saying of a police commissioner that he was "a liar, and you could not believe him under oath." Alcutt *v.* Trenton Police Com'rs, 66 N. J. L. 173, 48 Atl. 1006.

60. **Duty to appoint janitor** of police station and fix compensation. Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522.

The duty of police commissioners to make special details of policemen from time to time for emergent duty does not require or authorize them to make permanent details for such service all the year round. Upshur *v.* Baltimore, 94 Md. 743, 51 Atl. 953.

61. Baltimore *v.* Howard, 20 Md. 335.

62. Welker *v.* Hinze, 16 Ill. App. 326.

63. State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348.

Where a board of police commissioners is composed of four members, three members of the board are sufficient to constitute a quorum. McManus *v.* Newark Police Com'rs, 73 N. J. L. 307, 62 Atl. 997.

64. State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893.

65. Francis *v.* Blair, 89 Mo. 291, 1 S. W. 297.

66. People *v.* Welles, 14 Misc. (N. Y.) 226, 35 N. Y. Suppl. 672.

67. Chicago *v.* Wright, 69 Ill. 318; Burch *v.* Hardwicke, 30 Gratt. (Va.) 24, 32 Am. Dec. 640, chief of police.

68. Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7.

69. State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653.

does not provide for a chief, and yet prescribes his duties, does not *ipso facto* abolish the preëxisting office.[70] Provision may be made by statute that the same person shall hold the office of chief of police and another office, and that notwithstanding such offices are held by the same person they shall be separate or separable.[71]

(II) *Eligibility, Appointment, and Qualification.* When so provided by organic and statutory provisions, one not a citizen[72] or elector[73] is not eligible to the office of chief of police, and under a statute providing that he shall be appointed from the classified list of the department a person was ineligible to appointment who could not have been legally on the classified list, because he had not passed an examination nor been a member of the police department prior to the time when the statute went into effect.[74] Where the charter provides that no member of the council shall during the period for which he was elected be eligible to any office the emoluments of which are paid from the city treasury, a member is not eligible to the office of chief of police who is appointed by the council and paid from the city treasury, although he has resigned before the appointment was confirmed.[75] Where a clause of the constitution provides that the citizens of a designated city shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the mode of elections which shall be prescribed by the legislature, a statute relative to elections in that municipality which provides for the appointment of a superintendent of police is not in violation of the constitution, as the act pertains to the body of the laws for the internal government of the state, and does not form a part of the "police" or government of the municipality.[76] And a provision in a city charter for appointment of a chief of police and policemen by a commissioner appointed by the governor is constitutional and valid.[77] A charter provision that "policemen" may be appointed for a probationary term does not apply to the office of chief of police, and an appointment for such term is void.[78] Where a charter contains a specific provision relating to the appointment of all police officers of a city, and also a general provision as to power of appointment, the specific provision must govern in the appointment of a chief of police.[79] A charter provision that the board of police shall appoint all of the "officers and men" of the police department does not apply to the office of chief of police which is created by charter and is filled by appointment by the mayor on whom is conferred a general power to appoint all charter officers.[80] Appointment of a chief of police by the board of police commissioners in accordance with power vested in them by statute is valid, although at the time such commissioners are appointed no ordinance has been passed requiring them to give official bonds, nor governing the appointment of the chief of police.[81] Where the chief of police is required to be appointed from the classified list of the police department, no appointment can be made, where the classified list has not been made up and established.[82] Under the provisions of the Civil Service Act and rules of the civil service commission the examination for the office of assistant superintendent

70. Pratt *v.* Swan, 16 Utah 483, 52 Pac. 1092; Pratt *v.* Board of Police, etc., Com'rs, 15 Utah 1, 49 Pac. 747; Eslinger *v.* Pratt, 14 Utah 107, 46 Pac. 763.

71. See Mead *v.* State, 73 Nebr. 754, 103 N. W. 433.

72. Drew *v.* Rogers, (Cal. 1893) 34 Pac. 1081.

73. State *v.* Hall, 111 N. C. 369, 16 S. E. 420.

74. State *v.* Stroble, 25 Ohio Cir. Ct. 762.

"Classified list" defined.— By the words "classified list" is meant the register prescribed by Mun. Code (1902), § 164. State *v.* Wyman, 71 Ohio St. 1, 72 N. E. 457.

75. Ellis *v.* Lennon, 86 Mich. 468, 49 N. W. 308.

76. State *v.* Giffin, 15 La. Ann. 420; State *v.* New Orleans, 15 La. Ann. 354.

77. *Ex p.* Tracey, (Tex. Cr. App. 1905) 93 S. W. 538.

78. State *v.* Vallins, 140 Mo. 523, 41 S. W. 887.

79. Com. *v.* Myers, 7 Kulp (Pa.) 25.

80. State *v.* Kizer, 14 Wash. 185, 44 Pac. 156.

81. State *v.* Bennett, 22 Nebr. 470, 35 N. W. 235; State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228.

82. State *v.* Stroble, 25 Ohio Cir. Ct. 762.

of police in the city of Chicago must be promotional and limited to members of the next lower rank desiring to submit to such examination, and not an original, public, competitive examination.[83] On an election by the council the fact that one has received a majority of the ballots cast does not of itself entitle him to the office; the council must ascertain the result and declare him elected.[84] After a policeman has been elected chief, his right to qualify as such is not impaired by any action of the council touching his salary.[85]

(III) *Term of Office and Removal.* Under a statute fixing the term of policemen at four years and of the chief of police at such time as the police board shall determine, a chief appointed without any specification of term or tenure holds for four years.[86] The statutory provision cannot be evaded either by neglecting or purposely omitting to fix his term of office.[87] So under a charter providing for a chief of police, who shall be appointed by the mayor and shall hold his office for three years, unless sooner removed, the chief of police first appointed under the charter, whether to fill a vacancy caused by death, removal, or resignation, or to take the place of a chief whose term has expired, holds his office for three years from the date of his appointment, unless sooner removed.[88] A conditional life tenure is created by the words "holds his office during good behavior."[89] In jurisdictions where the chief of police is a state and not a municipal officer, he is not removable by the municipality, although elected by the people thereof or appointed by the municipal authorities and paid by them.[90] If power to remove is vested in a board of police commissioners, a removal effected by the vote of one not even a *de facto* commissioner is null and void.[91] Where a charter provides for a certain number of policemen, and for the appointment of one of their number as chief of police, the person appointed does not hold two offices, so that he can be removed from the office of chief of police in any other manner than that prescribed for the removal of policemen.[92] And where a section of a city charter provides that the warden and burgesses shall have power to appoint policemen, one of whom shall be designated chief of police, and for the removal of policemen on a vote of five of the burgesses, a removal of the chief of police by a vote of less than five of the burgesses is invalid.[93] If the office is for a fixed term[94] or during good behavior[95] the incumbent is not removable at pleasure, but for cause only. So also where the statutes make the incumbent "subject to removal . . . for cause,"[96] and power to appoint for such time as the appointing authority shall determine does not include the power to discharge at pleasure.[97] Where, however, a new charter is adopted, which provides that all police officers at the time the charter becomes effective shall continue to hold their offices until removed by the police board thereby created, the chief of police does not become an officer under the new charter, but may be superseded by the appointment of another person by the police board and has no right to insist that he is removable for cause only.[98] Whenever the chief of police is removable only for cause, charges must be preferred and an opportunity to be heard given.[99] Otherwise the

83. Ptacek *v.* People, 194 Ill. 125, 62 N. E. 530 [*affirming* 94 Ill. App. 571].
84. Price *v.* Brock, 79 N. C. 600.
85. Huey *v.* Jones, 140 Ala. 479, 37 So. 193.
86. State *v.* Police Com'rs, 14 Mo. App. 297.
87. State *v.* St. Louis Police Com'rs, 88 Mo. 144.
88. Smith *v.* Cosgrove, 71 Vt. 196, 44 Atl. 73.
89. Pratt *v.* Board of Police, etc., Com'rs, 15 Utah 1, 49 Pac. 747.
90. Burch *v.* Hardwicke, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.
91. State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653.
92. State *v.* Kennedy, 69 Conn. 220, 37 Atl. 503.
93. State *v.* Kennedy, 69 Conn. 220, 37 Atl. 503.
94. State *v.* Police Com'rs, 14 Mo. App. 297.
95. McChesney *v.* Trenton, 50 N. J. L. 338, 14 Atl. 578.
96. State *v.* Police Com'rs, 14 Mo. App. 297.
97. State *v.* Police Com'rs, 14 Mo. App. 297.
98. State *v.* O'Connor, 81 Minn. 79, 83 N. W. 498.
99. Bowlby *v.* Dover, 68 N. J. L. 97, 52 Atl. 289; Norton *v.* Adams, 24 R. I. 97, 52

attempted removal is null and void and creates no vacancy.[1] He may introduce any testimony tending to show the falsity of the charges brought against him,[2] and may examine the president of the board as a witness.[3] It is ground for removal that the officer did not possess the necessary qualifications,[4] or that he violated a rule of a city police department forbidding the participation of members of the police force in a political caucus or canvass,[5] or took bribes from the keeper of a disorderly house for permission to allow it to be conducted without interference.[6] But the removal of the appointing board does not warrant removal of the chief.[7] A general finding of guilt on four charges and consequent removal, when only one charge is sustained by proof, will be set aside by the supreme court and a remand awarded for a new trial.[8] One appointed chief of police to hold office during the pleasure of the mayor and aldermen is not entitled to mandamus to prevent his successor from performing the duties of the office on the ground that the ordinance was invalid.[9]

(IV) *Compensation.* Where the charter provides that the chief of police shall receive no other compensation whatever than his salary, other sections of the charter authorizing or permitting him to receive and collect fees or compensation must be construed as intending such fees or compensation for the benefit of and belonging to the city, and an ordinance allowing him to appropriate them to his own use is in violation of the charter and void.[10] Where a charter provides that the common council shall readjust and fix anew the amount of all official salaries at stated periods, the reduction of the salary of the chief of police is not an amendment of the charter within a constitutional provision that charters can only be amended on vote of electors and approval by the legislature, but an execution of a power conferred by the charter itself.[11] It has been held that the chief of police is not an "officer" within constitutional or statutory provisions prohibiting the passing of ordinances increasing or diminishing the salary or compensation of an officer after his election or appointment.[12] The chief of police is not entitled to salary after lawful removal even though the council make an allowance for it,[13] but he does not forfeit his salary by reason of a suspension in respect of which a statutory requirement that he be given an opportunity to be heard is not complied with.[14] Voluntary service, after reduction of salary and acceptance of the reduced rate, amounts to a waiver of demand for further compensation.[15]

(V) *Authority, Powers, and Liabilities.* The power exercised by chiefs of police is a matter of statutory regulation.[16] Where power to promulgate rules for the regulation of the police department is conferred on both the chief of police

Atl. 688; Pratt *v.* Board of Police, etc., Com'rs, 15 Utah 1, 49 Pac. 747.

Statute specially providing for hearing.— Under a statute providing that when charges have been preferred against a chief of police he shall have the right to be heard in his own defense, a chief of police cannot be suspended without pay or removed from office unless he has been given an opportunity to be heard in his own defense. Pratt *v.* Swan, 16 Utah 483, 52 Pac. 1092.

1. Pratt *v.* Police, etc., Com'rs, 15 Utah 1, 49 Pac. 747.
2. People *v.* Whittemore, 10 N. Y. St. 363.
3. People *v.* Whittemore, 10 N. Y. St. 363.
4. Drew *v.* Rogers, (Cal. 1893) 34 Pac. 1081.
5. Brownell *v.* Russell, 76 Vt. 326, 57 Atl. 103, holding that such a rule is a reasonable exercise of the authority conferred by charter to make rules for the government of the police force.
6. People *v.* New York Police Com'rs, 84 Hun (N. Y.) 64, 32 N. Y. Suppl. 18 [*affirmed* in 148 N. Y. 757, 43 N. E. 988].
7. State *v.* Hudson, 44 Ohio St. 137, 5 N. E. 225.
8. Dodd *v.* Camden Police Com'rs, 56 N. J. L. 258, 28 Atl. 311.
9. Cunningham *v.* Cambridge, 188 Mass. 556, 74 N. E. 925.
10. McGuire *v.* Baker City, 27 Oreg. 340, 41 Pac. 669.
11. Coyne *v.* Rennie, 97 Cal. 590, 32 Pac. 578.
12. Russell *v.* Williamsport, 9 Pa. Co. Ct. 129.
13. State *v.* Williams, 6 S. D. 119, 60 N. W. 410.
14. Pratt *v.* Swan, 16 Utah 483, 52 Pac. 1092.
15. Coyne *v.* Rennie, 97 Cal. 590, 32 Pac. 578; Edmondson *v.* Jersey City, 48 N. J. L. 121, 3 Atl. 120.
16. See *infra*, cases cited in following notes in this section.

and the police board, and on the chief of police, subject to such rules as the board may make, to dismiss any subordinate, he may dismiss a subordinate in accordance with rules promulgated by him, in the absence of any rule promulgated by the board limiting his authority to make rules.[17] One who has been given "like powers with sheriffs" may pursue a person charged with crime in the city and arrest him in any county of the state.[18] An officer appointed to "superintend the police of a town" may serve warrants for violation of state police laws.[19] But he has no authority to imprison a policeman retaining for his compensation property, recovered by him, which had been stolen outside the municipality, for refusing to obey his order to surrender it.[20] No personal liability is incurred by a chief of police for enforcing ordinances in obedience to the police authorities.[21] And it has been held that his sureties are not liable for acts done by him *colore officii*.[22] The superintendent of police is not a "city officer" within a statute vesting in a designated court jurisdiction of all actions of a civil nature against "city officers."[23]

c. Marshal — (I) *Appointment or Election* — (A) *Authority.* Where authority is conferred by charter or statute, a city council may provide for the appointment of a city marshal and place the control of the police department in his hands.[24] But when the charter fails to provide for such an officer the council has no authority to elect one, and his acts are null and void.[25] So also after the abolition of the office.[26] The adoption by a city of the general law for the incorporation of cities operates *eo instanti* to abolish the office of marshal.[27] And under the general law there can be no office of city marshal unless the city council, after organization thereunder, creates it by ordinance directing whether such officer shall be appointed or elected.[28]

(B) *Time.* Where the time for the election of marshals is fixed by the constitution, a statute providing for their election on another date is unconstitutional;[29] but where the requirement that the election of marshals shall take place at a certain time is directory merely, an election at a later time is valid.[30]

(C) *Validity.* The validity of an appointment is not impaired by an interlineation of the municipal record.[31]

(II) *Eligibility.* To render one eligible to the office of marshal the same qualifications are usually required as in the case of a sheriff.[32] When the charter so requires, a candidate for the office of marshal must be a citizen of the city,[33] and not, at the time of the election, in arrears to the city for taxes, or indebted to

17. Eslinger *v.* Pratt, 14 Utah 107, 46 Pac. 763.

18. Chrisman *v.* Carney, 33 Ark. 316.

19. Com. *v.* Martin, 98 Mass. 4.

20. *In re* Hotchkiss, 6 D. C. 168, in which it was said that the property having been stolen and recovered beyond the municipal limits, he could take no cognizance of the matter.

21. Heald *v.* Lang, 98 Mass. 581.

22. Marquis *v.* Willard, 12 Wash. 528, 41 Pac. 889, 50 Am. St. Rep. 906.

23. Burroughs *v.* Eastman, 93 Mich. 433, 53 N. W. 532.

24. Sheridan *v.* Colvin, 78 Ill. 237.

Under the charter of the city of East St. Louis of 1869, section 13, authorizing the appointment of a city marshal and deputy, and providing that they shall qualify and be commissioned as county constable, and shall have the same power in executing process as the sheriff of the county, the power of the city council exists independently of the act of 1867, providing for the organization of a police force in that city, and if the two acts are in conflict, the act of 1869, being the later expression of the legislative will, must prevail. Wider *v.* East St. Louis, 55 Ill. 133; People *v.* Canty, 55 Ill. 33.

25. Cumming *v.* Puett, 97 Ga. 247, 22 S. E. 933.

26. Gano *v.* State, 10 Ohio St. 237.

27. People *v.* Blair, 82 Ill. App. 570.

28. People *v.* Blair, 82 Ill. App. 570.

29. Owensboro *v.* Webb, 2 Metc. (Ky.) 576.

30. **Appointment at second meeting instead of first.**— The failure of the board of aldermen of a city to appoint a marshal at their first meeting after election, as required by their charter, does not render the appointment of a marshal at their second meeting invalid, as such provision is merely directory. Greer *v.* Asheville, 114 N. C. 678, 19 S. E. 635.

31. Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399.

32. Hall *v.* Hostetter, 17 B. Mon. (Ky.) 784.

33. State *v.* Williams, 99 Mo. 291, 12 S. W. 905.

the city in any way.[34] Nor is one eligible to this office who holds an incompatible office;[35] but it has been held that, under a constitutional provision that no person shall hold more than one office under the state, a sheriff of a county may perform the duties of a city marshal, as the latter is not a state officer.[36]

(III) *Effect of Failure to Give Bond.* A marshal's failure to give an official bond within the statutory time does not vacate the office, unless the statute so provides.[37] But when a special bond is required for collecting taxes, the marshal is not entitled to demand the tax books merely on his official bond.[38]

(IV) *Term of Office* — (A) *In General.* The term of office of a city marshal is usually fixed by law,[39] and, for the purpose of ascertaining its duration, will be deemed to commence at the expiration of the previous term, and not at the actual date of appointment.[40] An intention to change the tenure of the office should be explicitly declared;[41] and an amendment changing the marshal's term from one year to the period of good behavior does not apply to an existing incumbency.[42]

(B) *Vacancies and Holding Over.* While one holding the office of city marshal is usually authorized to hold over after the expiration of his term until his successor is elected and qualified,[43] a vacancy in the office exists under such circumstances, which may be filled in the manner prescribed by law.[44] The office of marshal will be vacated by creation of that of superintendent of police, and the person elected marshal will have no further right thereto.[45]

(V) *Removal* — (A) *Authority.* Authority to remove a city marshal may be given by charter either to the mayor alone or to the council;[46] but where it is conferred upon the mayor by and with the advice and consent of the aldermen, the hearing must be by and before the board of mayor and aldermen.[47] Where the power of appointment and removal is in the mayor, he may remove an appointee of the council.[48] Pending the changes provided by an amended charter,

34. State *v.* Williams, 99 Mo. 291, 12 S. W. 905.

Failure to pay a saloon license, although it had not been demanded, disqualifies one to hold the office of marshal. State *v.* Williams, 99 Mo. 291, 12 S. W. 905.

35. State *v.* Hoyt, 2 Oreg. 246.

The offices of city councilman and city marshal are incompatible, and one holding the former is ineligible to the latter. State *v.* Hoyt, 2 Oreg. 246.

36. Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7.

37. State *v.* Porter, 7 Ind. 204.

38. Campbellsville *v.* Borders, 8 S. W. 446, 10 Ky. L. Rep. 162.

39. Upshur *v.* Hamilton, 95 Md. 561, 52 Atl. 977.

In Illinois the marshal of a city incorporated under the general law, where no term is fixed by the ordinance creating the office, is entitled to hold for two years unless the council during such period by ordinance prescribes a shorter term. People *v.* Blair, 82 Ill. App. 570.

40. French *v.* Cowan, 79 Me. 426, 10 Atl. 335.

41. Stadler *v.* Detroit, 13 Mich. 346 (holding that a section of an act, declaring the term of office two years, which prescribes an annual election to the office, does not operate to abridge the term); Greer *v.* Asheville, 114 N. C. 678, 19 S. E. 635 (holding that the term of office of a city marshal appointed under a charter providing that marshals shall hold office during the official term of the aldermen is not increased from one to two years by an act increasing the term of aldermen from one to two years).

42. Greer *v.* Asheville, 114 N. C. 678, 19 S. E. 635.

43. Forristal *v.* People, 3 Ill. App. 470, holding further that one holding the office of city marshal under a valid appointment is not precluded from continuing to act thereunder until his successor is elected and qualified by the mere fact that he has taken an oath and filed an official bond under a subsequent illegal election.

In the absence of any provision to that effect, a city marshal does not hold his office after the expiration of the year for which he was elected, and until another shall be chosen and qualified. Beck *v.* Hanscom, 29 N. H. 213.

44. State *v.* Thomas, 102 Mo. 85, 14 S. W. 108.

45. People *v.* Brown, 83 Ill. 95.

46. Stadler *v.* Detroit, 13 Mich. 346, holding that a charter provision which authorizes the mayor to suspend or remove the marshal for reasons to be reported to the council does not undertake to restrict the power of removal vested in the council by another charter provision and is not inconsistent with it.

47. Andrews *v.* King, 77 Me. 224.

48. Baxter *v.* Beacon, 112 Iowa 744, 84 N. W. 932.

it is held that authority to remove exists in the body empowered by the original charter.[49]

(B) *Grounds.* Express charter authority to remove a marshal for certain specified causes restricts the removing tribunal to those causes.[50] A provision that a marshal may be removed at the pleasure of the city council authorizes a removal before the expiration of the term without cause.[51]

(C) *Review.* Whether or not the action of the removing tribunal is reviewable by certiorari depends upon whether the act of removing is considered administrative or judicial. If the latter, certiorari lies;[52] if the former, it does not.[53]

(VI) *COMPENSATION*— (A) *In General.* The person who holds the legal title to the office of marshal has the legal right to the salary, and a *de facto* officer cannot maintain an action therefor.[54] It is sometimes provided that a city marshal shall receive the same fees as sheriffs and constables in similar cases.[55] As a general rule the compensation fixed is presumed to be in full for all duties imposed;[56] but additional compensation may be expressly allowed in fees,[57] and may also be contracted for and received for services outside the scope of his official duties.[58] Where the city council is given full power over the salary of officers without restriction or limitation on its exercise, it may reduce the salary of the city

49. Grant *v.* Alpena, 107 Mich. 335, 65 N. W. 230.

50. Shaw *v.* Macon, 19 Ga. 468; People *v.* Weygant, 14 Hun (N. Y.) 546.

Malpractice and neglect of duty.— Gambling by the city marshal does not constitute either malpractice in office or neglect of duty, within the terms of the amendment of Feb. 22, 1850, to the Macon city charter, authorizing the removal of the marshal by the mayor and council for such offenses. Macon *v.* Shaw, 16 Ga. 172.

A marshal's failure to prosecute for offenses committed in his presence, even though not notified to prosecute for them, is such a neglect of duty on his part as makes him removable from office by the mayor and council of the city. Shaw *v.* Macon, 21 Ga. 280. Other acts amounting to neglect of duty see Folsom *v.* Conklin, 3 Cal. App. 480, 86 Pac. 724.

51. London *v.* Franklin, 118 Ky. 105, 80 S. W. 514, 25 Ky. L. Rep. 2306.

52. Macon *v.* Shaw, 16 Ga. 172.

53. Lorbeer *v.* Hutchinson, 111 Cal. 272, 43 Pac. 896.

54. Andrews *v.* Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280. And see *supra*, VII, A, 7. But see Dickerson *v.* Butler, 27 Mo. App. 9, holding, however, that one who has abandoned the office is not a *de facto* officer.

A constable who performs the duties of marshal as defined in a new city charter reincorporating the city is entitled to the compensation provided therefor and allowed by the town authorities, although no such office as city marshal was provided under the old city charter, under which the services were performed. Ross *v.* Wimberly, 60 Miss. 345.

55. **Liability of county under such provision.**— A statute providing that a city marshal "shall receive the same fees as sheriffs and constables in similar cases" does not make the county liable for the fees of the city marshal in criminal cases. Guanella *v.* Pottawattamie County, 84 Iowa 36, 50 N. W. 217; Christ *v.* Polk County, 48 Iowa 302.

Where the fees allowed to sheriffs and constables differ in amount, a city marshal is entitled only to the lower fees. Christ *v.* Des Moines, 53 Iowa 144, 2 N. W. 419, 4 N. W. 869; Des Moines *v.* McHenry, 51 Iowa 710, 2 N. W. 264; Bryan *v.* Des Moines, 51 Iowa 590, 2 N. W. 414.

56. Mundell *v.* Pasadena, 87 Cal. 520, 25 Pac. 1061; Redwood City *v.* Grimmenstein, 68 Cal. 515, 9 Pac. 562; Brazil *v.* McBride, 69 Ind. 244; Worcester *v.* Walker, 9 Gray (Mass.) 78.

Services required for which no specific fees are provided are considered to be compensated by the fees allowed for other services. Neiswanger *v.* Kansas City, 71 Mo. 36; McCumber *v.* Waukesha County, 91 Wis. 442, 65 N. W. 51.

Estoppel to claim fees.— A marshal who claims the salary allowed him under an ordinance providing that he shall receive a stated salary and legal fees in state cases as full compensation cannot also claim fees for serving orders, notices, and process in city cases to which he would otherwise have been entitled under a statute providing that the marshal shall have the same powers and receive the same fees as sheriffs and constables in similar cases Christ *v.* Des Moines, 53 Iowa 144, 2 N. W. 419, 4 N. W. 869; Des Moines *v.* McHenry, 51 Iowa 710, 2 N. W. 264; Bryan *v.* Des Moines, 51 Iowa 590, 2 N. W. 414.

57. Independence *v.* Tronvalle, 15 Kan. 70; Wesson *v.* Collins, 72 Miss. 844, 18 So. 360, 917; Neiswanger *v.* Kansas City, 71 Mo. 36. See also Lyon *v.* Grand Rapids, 30 Mich. 253.

One who has voluntarily paid to the city commissions which he might have retained, in addition to his salary, cannot recover them. Wesson *v.* Collins, 72 Miss. 844, 18 So. 360, 917.

58. Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29.

Fees for services which are county charges. —A provision of a charter, that the marshal "shall receive no fee for any services, but shall be allowed a compensation to be fixed

marshal at any time;[59] but it cannot do so in contravention of an express statutory provision forbidding it.[60] The mere receipt by a marshal for two months, of a sum less than that due, will not preclude him from demanding full pay thereafter.[61] A lawful removal terminates the rights both to the office and its emoluments.[62] So one submitting to an illegal removal, and making no move for reinstatement, cannot, several years afterward, maintain an action for his salary.[63]

(B) *Expenses.* Provision is usually made for reimbursing a marshal for all necessary expenditures.[64]

(VII) *Authority and Powers.* The city marshal of a municipality is the chief police officer thereof, clothed with authority to apprehend offenders against its ordinances, etc.,[65] and occupying the same relation to the governmental affairs of the municipality as a sheriff does to his county[66] or a constable to his town.[67] Under some statutes his authority to make arrests has been held to extend to the limits of the county.[68] Where the office of county marshal has been abolished, the duties and functions of that office may be made to devolve upon the city marshal.[69] And where he has the power of a constable at common law, he may serve civil process within the corporate boundaries.[70]

(VIII) *Duties and Liabilities*—(A) *In General.* It is the duty of a marshal to report and account for all moneys received in his official capacity,[71] and ignorance of the law is no excuse for failure to file such report.[72] The performance of his duty to complain of and arrest a violator of an ordinance does not disqualify a marshal to perform his duties in the trial of the case.[73] A marshal is not liable for the wanton or wilful act of his deputy or assistant in enforcing a corporation ordinance,[74] nor for taking property under lawful proceedings of claim and delivery;[75] nor is his estate subject to legal mortgage for the faithful discharge of the duties of his office.[76] But he has been held liable in damages for cruelty and indignity inflicted on prisoners,[77] and

by the council," does not prevent his receiving fees for services which are county charges. People *v.* Orange County, 18 Hun (N. Y.) 19.

59. Brazil *v.* McBride, 69 Ind. 244.

60. Cox *v.* Burlington, 43 Iowa 612.

Iowa Code (1873), § 491, providing that the emoluments of city officers shall not be diminished during their terms of office, was not repealed by Acts 17th Gen. Assembly, c. 56, empowering cities to provide by ordinance that all city officers shall receive a fixed salary in lieu of all fees now allowed by law or ordinance, and a marshal is entitled to fees allowed by ordinances existing when he was appointed, although during his term of office an ordinance was passed abolishing all fees. Bryan *v.* Des Moines, 51 Iowa 590, 2 N. W. 414.

61. O'Hare *v.* Park River, 1 N. D. 279, 47 N. W. 380.

62. Miller *v.* Seney, 81 Ga. 489, 8 S. E. 423.

63. Cote *v.* Biddeford, 96 Me. 491, 52 Atl. 1019, 90 Am. St. Rep. 417.

64. For assistance in making arrests.— Rev. St. § 4488, making it compulsory on persons to render assistance to town marshals making arrests when called on, does not make a marshal personally liable for such assistance, and therefore he cannot recover from the county for expenditures to persons for assisting him in making arrests. McCumber *v.* Waukesha County, 91 Wis. 442, 65 N. W. 51.

For use of own vehicle.— A statute providing that a town marshal shall receive from the county "all his necessary disbursements actually made" does not entitle him to recover for the use of his own vehicle in conveying prisoners. McCumber *v.* Waukesha County, 91 Wis. 442, 65 N. W. 51.

For defense against charges preferred.— A city marshal cannot recover money expended in defending himself against charges preferred against him. Shaw *v.* Macon, 19 Ga. 468.

65. Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7; French *v.* Cowan, 79 Me. 426, 10 Atl. 335; Upshur *v.* Hamilton, 95 Md. 561, 52 Atl. 977.

66. Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7.

67. French *v.* Cowan, 79 Me. 426, 10 Atl. 335.

68. Newburn *v.* Durham, 88 Tex. 288, 31 S. W. 195.

69. State *v.* Mason, 4 Mo. App. 377.

70. Stewart *v.* People, 15 Ill. App. 336.

71. Folsom *v.* Conklin, 3 Cal. App. 480, 86 Pac. 724.

72. Folsom *v.* Conklin, 3 Cal. App. 480, 86 Pac. 724.

73. Mineral City *v.* Render, 51 Ohio St. 122, 42 N. E. 255.

74. Pritchard *v.* Keefer, 53 Ill. 117.

75. Cornell *v.* Fell, 2 N. Y. City Ct. 151 note.

76. Cain *v.* Bouligny, 7 Rob. (La.) 159.

77. Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

also for voluntarily allowing the escape of one who had been committed to jail for debt..[78]

(B) *Liability on Official Bonds.* Sureties on a marshal's bond are liable for damages resulting from official nonfeasance, misfeasance, or malfeasance *virtute officii*;[79] but not for mere naked trespasses of the officer while acting without legal process.[80] The sureties cannot escape liability because their principal was, at the time he qualified, ineligible to the office.[81] But no liability accrues under a bond, not accepted and approved as required by law.[82] Nor will the sureties be liable for the officer's delinquency as tax-collector, when the bond is conditioned merely for the faithful performance of the duties of marshal.[83] Where an official bond may be prosecuted only by judicial allowance the action lies only in the court specified by statute;[84] and under a statute providing that a person who shall have first obtained a judgment against the city marshal for official misconduct may move for leave to prosecute his official bond, such leave may be refused in case of a judgment not authorized by law.[85]

d. Policemen — (I) *Nature and Status.* A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city.[86]

(II) *Eligibility.* Policemen are officers within the meaning of an ordinance declaring that "all city officers" must be residents and qualified electors of the city,[87] and citizens of the United States.[88] Public drunkenness is an

78. Zenner *v.* Blessing, 4 N. Y. Suppl. 866.

The measure of damages in an action for the escape of a judgment debtor is the amount of the judgment, and proof of the debtor's insolvency is inadmissible. The officer's good faith is also immaterial. Zenner *v.* Blessing, 4 N. Y. Suppl. 866.

79. Rischer *v.* Mecham, 11 Ohio Cir. Ct. 403, 5 Ohio Cir. Dec. 640; Gerber *v.* Ackley, 32 Wis. 233.

Defalcation in collecting taxes.— Redwood City *v.* Grimmenstein, 68 Cal. 512, 9 Pac. 560.

Damages for false arrest.— In an action on the bond of a town marshal for a false arrest and for an assault and battery, only compensatory damages can be recovered. Scott *v.* Com., 93 S. W. 668, 29 Ky. L. Rep. 571.

80. Gerber *v.* Ackley, 32 Wis. 233.

81. Wade *v.* Mt. Sterling, 33 S. W. 1113, 18 Ky. L. Rep. 377.

82. O'Marrow *v.* Port Huron, 47 Mich. 585, 11 N. W. 397.

83. Harrisonville *v.* Porter, 76 Mo. 358.

Single bond may be valid.— Where the offices of marshal and collector, each requiring a bond, of a city whose council is vested with power to prescribe the amount and form of official bonds, are consolidated, a single bond, required by the council of the new officer as collector, is valid. Hallettsville *v.* Long, 11 Tex. Civ. App. 180, 32 S. W. 567.

84. Moog *v.* Kehoe, 42 Hun (N. Y.) 494.

85. Matter of Brasier, 13 Daly (N. Y.) 245.

86. *Connecticut.*— Farrell *v.* Bridgeport, 45 Conn. 191.

Massachusetts.—Kimball *v.* Boston, 1 Allen 417; Buttrick *v.* Lowell, 1 Allen 172, 173, 79 Am. Dec. 721, in which it was said: "Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment."

Pennsylvania.— Norristown *v.* Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771.

Texas.— Rusher *v.* Dallas, 83 Tex. 151, 18 S. W. 333.

Utah.— Everill *v.* Swan, 17 Utah 514, 55 Pac. 68.

A policeman has been held to be an officer within the meaning of a statute defining assaults on officers (Sanner *v.* State, 2 Tex. App. 458), an ordinance declaring that "all city officers" must be residents and qualified electors of the city (Johnson *v.* State, 132 Ala. 43, 31 So. 493), and a city charter providing for the tenure of officers (Jacksonville *v.* Allen, 25 Ill App. 54). But it has been held that a policeman is not entitled to an "officer's" tenure, when by express charter provision he is subject to summary removal by the council. Atty.-Gen. *v.* Cain, 84 Mich. 223, 47 N. W. 484. And in New York it is held that policemen are not "public officers" within the constitutional provision against changing compensation during the term of office. Mangam *v.* Brooklyn, 98 N. Y. 585, 50 Am. Rep. 705; Shanley *v.* Brooklyn, 30 Hun (N. Y.) 396.

87. Johnson *v.* State, 132 Ala. 43, 31 So. 493.

88. Larsen *v.* St. Paul, 83 Minn. 473, 86 N. W. 459, holding, however, that under a

offense disqualifying one from becoming a member of the police force of New York.[89]

(III) *Examination.* Although a police board is authorized to formulate rules for examination of applicants for the police force, the right of one appointed a policeman is not affected by the board not having made rules;[90] and even if it made such rules and he did not submit to them this is at most matter of defense to his action for salary, and cannot be raised by exception to his petition.[91] Persons already in the service cannot be required to take such an examination.[92] A rule that any police officer whose record is good, and who has been discharged without cause and without a trial, may reënter the police force without examination, etc., does not apply to a person who has been removed from the force, and has not been employed thereon for a number of years.[93]

(IV) *Qualification.* Although the manner of qualification of a policeman be not in strict conformity with the requirements of the charter or ordinances, one having taken the official oath and given a bond, which was accepted without objection, becomes an officer *de jure*.[94] Unless prescribed by statute or ordinance, an official oath is not an essential prerequisite to service by a regularly appointed policeman.[95] The officer upon whom the duty devolves cannot lawfully refuse to administer the oath to an officer regularly appointed, or inquire into the regularity of his appointment.[96]

(V) *Appointment and Promotion*—(A) *Appointment*—(1) In General—(a) Authority to Appoint. As a general rule authority to appoint the members of the police force is conferred either upon the city council,[97] or the mayor, with the consent of the council.[98] In the larger cities, however, it is customary to place the police department under the control of a board of commissioners who then have the same power of appointment which the mayor or the council would otherwise have.[99] Under a constitutional guaranty of the right of local

provision that no person shall be eligible to appointment as policemen, patrolmen, or other police officer who is not a citizen of the United States and under the age of thirty-five years, etc., it is not necessary that an appointee to the office of sergeant of police shall possess the requirements therein mentioned.

89. People *v.* New York Police Com'rs, 39 Hun (N. Y.) 507 [*affirmed* in 102 N. Y. 583, 7 N. E. 913].

90. Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.

91. Houston *v.* Clark, (Tex. Civ. App. 1904) 80 S. W. 1198.

92. Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 40 Pac. 264.

93. People *v.* Lindblom, 215 Ill. 58, 74 N. E. 73 [*affirming* 116 Ill. App. 213].

94. Houston *v.* Clark, (Tex. Civ. App. 1904) 80 S. W. 1198; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.

95. Com. *v.* Cushing, 99 Mass. 592; Com. *v.* Dugan, 12 Metc. (Mass.) 233; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.

Qualification to office in metropolitan police. — The section of the act of New York to establish the metropolitan police, which provides for the transfer to that organization of members of the former police, is repealed by the act of 1860, which restricts its force to the persons in office at the date of its passage who have taken and subscribed the oath of office as members of the metropolitan police; and a member of the former police, having omitted to comply with the requirements of the act of 1860, has no right to office in the metropolitan police. People *v.* Metropolitan Police Bd., 26 N. Y. 316.

96. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529.

97. Com. *v.* Pittsburgh, 14 Pa. St. 177; Com. *v.* Miller, 15 Pa. Co. Ct. 404; Com. *v.* Myers, 7 Kulp (Pa.) 25.

The council may delegate the power of appointing policemen to the mayor, subject to its approval. State *v.* Grabarkiewicz, 88 Minn. 16, 92 N. W. 446.

98. Houston *v.* Clark, (Tex. Civ. App. 1904) 80 S. W. 1198; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.

Policemen for duty in court. — Under a statute providing for the appointment by the mayor of policemen, approved by the judges of the municipal court, for special attendance and duty in such court, the power of appointing and removing such policemen is not exclusively vested in the mayor, but in him and the judges of the court; the act of both being essential. Parish *v.* St. Paul, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. Rep. 374.

Consent of the council is shown where an appointee's name appeared on the monthly pay rolls submitted to and approved by the city council for more than seven years. Larsen *v.* St. Paul, 83 Minn. 473, 86 N. W. 459.

99. Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230 (holding that

self-government, it is held that legislative appointment of policemen is unconstitutional.[1]

(b) Mode of Appointment. The prescribed mode of appointing policemen must be pursued,[2] and if an appointment is illegally made no subsequent declaration of the city authorities can make it legal.[3] A person irregularly appointed is, however, an officer *de facto*,[4] and his right to the office cannot be collaterally attacked.[5]

(c) Evidence of Appointment. The authority of a police officer is sufficiently proved by evidence that he was an acting officer.[6] His official appointment need not be produced.[7] Where a city ordinance authorizes the appointment of an officer by the mayor and marshal, his commission, signed by the mayor, is presumptive evidence of the concurrence of the marshal in his appointment.[8]

(d) Review. Since the appointment of police officers by the municipal authorities of a city is not a judicial act, certiorari does not lie to review such appointment.[9]

(2) Probation. City charters sometimes provide that all appointments to the police force shall be made for a probationary period, and that, at the end of such period, those who are considered competent shall receive permanent appointments.[10]

under Ga. Acts (1889), p. 961, providing for a board of police commissioners for the city of Americus, and authorizing them to provide the city with an efficient police force, any authority which the mayor and council of the city may have under their charter to appoint a police force cannot be exercised unless the board fails to provide an efficient force); Parish *v.* St. Paul, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. Rep. 374; Moores *v.* State, 54 Nebr. 486, 74 N. W. 823; People *v.* Worth, 16 Misc. (N. Y.) 664, 37 N. Y. Suppl. 126.

Sanitary sergeant.— Under Kan. Laws (1889), c. 181, § 12, police boards of cities of the first class having a population of less than forty thousand were authorized to appoint a policeman designated as "sanitary sergeant" in addition to policemen authorized by section 3 of the act of 1887. Mitchell *v.* Topeka, (Kan. App. 1898) 54 Pac. 292.

1. Sugden *v.* Partridge, 174 N. Y. 87, 66 N. E. 655 [*reversing* 78 N. Y. App. Div. 644, 80 N. Y. Suppl. 1149]; People *v.* Partridge, 74 N. Y. App. Div. 291, 77 N. Y. Suppl. 691; People *v.* York, 35 N. Y. App. Div. 300, 55 N. Y. Suppl. 10 [*affirmed* in 158 N. Y. 670, 52 N. E. 1125]; People *v.* Partridge, 38 Misc. (N. Y.) 697, 78 N. Y. Suppl. 249.

A detective sergeant is a city officer within a constitutional provision providing that electors of a city or the officers thereof shall elect or appoint to city offices. People *v.* Partridge, 38 Misc. (N. Y.) 697, 78 N. Y. Suppl. 249.

2. Com. *v.* Allen, 128 Mass. 308; Lyons *v.* Gloucester City, 49 N. J. L. 177, 6 Atl. 518.

Appointment before mode prescribed.— Under an act regulating state civil service, and providing that no person should be selected for appointment to a civil service office except in accordance with the provisions of that act, the appointment of a police clerk's assistant, made after the act took effect, but before rules and regulations for appointments thereunder were made, is invalid People *v.* Knox, 45 N. Y. App. Div. 518, 61 N. Y. Suppl. 469.

The appointment of police officers by police commissioners by a unanimous vote is a compliance with a statute requiring appointments to the police force to be made by a yea and nay vote of the commissioners. Keyser *v.* Upshur, 92 Md. 726, 48 Atl. 399.

Nomination by examiners.— Where an act creating a board of police examiners authorized them to make nominations to the police commissioners from graded lists of qualified persons for appointment or promotion on the police force, as determined by competitive examination, in the order in which they appeared on such list, the examiners are not restricted as to the number to be nominated for positions or promotion, and hence their act in nominating two hundred and ninety persons, when only twenty appointments were to be made, is proper. Keyser *v.* Upshur, 92 Md. 726, 48 Atl. 399. The fact that in passing on such nominations one of the commissioners nominated three, another four, and another thirteen, of the officers appointed, does not invalidate the appointment, since the commissioners were merely selecting from among those nominated. Keyser *v.* Upshur, *supra*.

3. People *v.* Partridge, 38 Misc. (N. Y.) 697, 78 N. Y. Suppl. 249.

4. Andrews *v.* Atlanta, 45 Ga. 154. See also *Ex p.* Tracey, (Tex. Cr. App. 1905) 93 S. W. 538.

5. State *v.* Barnard, 67 N. H. 222, 29 Atl. 410, 68 Am. St. Rep. 648.

6. State *v.* Holcomb, 86 Mo. 371; State *v.* Butman, 42 N. H. 490.

7. State *v.* Holcomb, 86 Mo. 371.

8. Westberg *v.* Kansas City, 64 Mo. 493.

9. Atty.-Gen. *v.* Northampton, 143 Mass. 589, 10 N. E. 450.

10. Matter of Murray, 18 N. Y. App. Div.

(3) Continuance in Office. Provisions of law for the continuance in service of policemen pending or following a reorganization of the police force do not amount to a reappointment of the members of the force.[11]

(B) *Promotion* — (1) Basis — (a) Seniority, Service, and Capacity. Promotions in the police department are generally required to be made on the basis of seniority, meritorious police service, and superior capacity, as shown by competitive examination.[12] Where such examinations are placed under the control of the civil service commission, that board has power to adopt rules governing the conduct thereof,[13] and fixing the relative weights of the subjects of rating.[14]

b. Special Acts of Heroism. Power conferred on a police board to promote a member of the police force for special acts of heroism, and his right to receive such promotion, is unaffected by any constitutional or statutory provision regu-

337, 46 N. Y. Suppl. 172 [*affirmed* in 155 N. Y. 628, 49 N. E. 1101], holding that the fact that breaches of discipline by a police patrolman appointed on probation were punished when they occurred is no reason why they should not be considered in determining whether he shall receive a permanent appointment.

11. State *v.* Whitaker, 116 La. 947, 41 So. 218; State *v.* St. Paul, 81 Minn. 391, 84 N. W. 1116.

New York — The metropolitan police bill of April 15, 1857, continued in office all who at that date were policemen, whether so *de facto* or *de jure*, without any new act of acceptance on their part. People *v.* Metropolitan Police Dist., 19 N. Y. 188; People *v.* Metropolitan Police Dist., 35 Barb. 544, 14 Abb. Pr. 151; People *v.* Metropolitan Police Dist., 35 Barb. 527.

Texas — Adoption by a city of a special charter, placing police and other departments of the city under civil service rules, does not amount to a reappointment of a policeman serving at that time for an additional term, to date from the expiration of the term which he was serving at the time of such action. Houston *v.* Ross, (Civ. App. 1904) 80 S. W. 1199; Houston *v.* Floeck, (Civ. App. 1904) 80 S. W. 1198; Houston *v.* Smith, 36 Tex. Civ. App. 43, 80 S. W. 1144; Houston *v.* Mahoney, 36 Tex. Civ. App. 45, 80 S. W. 1142. Neither does it create a vacancy on the date of the adoption, and constitute a reappointment from that date. Houston *v.* Floeck, *supra*; Houston *v.* Mahoney, *supra*.

12. **A roundsman appointed to the central office bureau of detectives** is promoted, within the meaning of the constitutional requirement of competitive examinations, and, when appointed after the classification of the position of detective sergeant in the competitive schedule by resolution of the municipal civil service commission, must be appointed pursuant to a civil service examination. People *v.* McAdoo, 108 N. Y. App. Div. 1, 95 N. Y. Suppl. 400 [*affirmed* in 185 N. Y. 537, 77 N. E. 1194]; People *v.* Bingham, 49 Misc. (N. Y.) 607, 99 N. Y. Suppl. 1111.

The designation of a patrolman as telegraph operator by the chief of police, intended to be permanent, is a "promotion," and, being made without an examination, is without effect. People *v.* Partridge, 89 N. Y. App. Div. 497, 85 N. Y. Suppl. 853 [*affirmed* in 179 N. Y. 530, 71 N. E. 1136].

A veteran is not exempt from such examination. Allaire *v.* Knox, 62 N. Y. App. Div. 29, 70 N. Y. Suppl. 845 [*affirmed* in 168 N. Y. 642, 61 N. E. 1127]; Matter of McGuire, 50 Hun (N. Y.) 203, 2 N. Y. Suppl. 760.

13. Ptacek *v.* People, 94 Ill. App. 571 [*affirmed* in 194 Ill. 125, 62 N. E. 530].

Promotions must be from grade to grade. — The rules adopted by the board of civil service commissioners of Chicago require that all promotions in the police department are to be from grade to grade, and are to be made on voluntary, open, competitive examinations. The competition in such examinations is to be limited to the employees in the next lower grade, and an examination not so limited and conducted is irregular, and contrary to the law and rules of the board. Ptacek *v.* People, 94 Ill. App. 571 [*affirmed* in 194 Ill. 125, 62 N. E. 530].

14. **Seniority of service.** — Under a rule of the municipal service commission providing that, in the relative weights of subjects of rating on any promotion examination, seniority of service in the position or grade from which promotion is sought shall count twenty, the words "position or grade" refer to a position or grade as constituted by law, and a policeman is not entitled in his rating in promotion examinations for seniority of service as roundsman while patrolmen were detailed to such service, but only from the time the Greater New York charter took effect, under which an appointment as roundsman was first recognized as a position or grade. Moran *v.* Baker, 49 Misc. (N. Y.) 327, 99 N. Y. Suppl. 197.

Conduct and efficiency. — The municipal civil service commission has the power to define what particular forms of meritorious service recorded on the efficiency record of any candidate shall be considered. Morris *v.* Baker, 49 Misc. (N. Y.) 440, 99 N. Y. Suppl. 957 [*affirmed* in 112 N. Y. App. Div. 900, 97 N. Y. Suppl. 1144].

The civil service commission should not, in determining the rating of a policeman after an examination for promotion, consider the record of the policeman during his probationary period, and deduct points for fines imposed during such period. People *v.* Baker, 49 Misc. (N. Y.) 143, 97 N. Y. Suppl. 453.

lating promotions under the civil service, and providing for a competitive examination when practical.[15]

(2) TIME. Where a certain period of service is required to render a patrolman eligible for promotion, such period has been held not to begin until the end of the probation term.[16]

(VI) *AUTHORITY, DUTIES, AND LIABILITIES*[17] — (A) *Authority and Powers.* A police system being a subject of state legislation, the legislature may define the powers and duties of police officers, and having done so powers inconsistent therewith cannot be conferred upon them by charter or ordinance.[18] The powers so conferred usually include all the powers of constables at common law, except the power of serving civil process.[19] Police officers must exercise their authority in a lawful manner, and any conduct on their part amounting to a trespass and tending to the irreparable injury of the party aggrieved will be restrained by injunction.[20]

(B) *Duties and Liabilities* — (1) IN GENERAL. The duties of policemen are prescribed by law or the rules of the department,[21] and for all neglect thereof

15. People *v.* Knox, 166 N. Y. 444, 60 N. E. 17 [*reversing* 67 N. Y. Suppl. 1142]; People *v.* Knox, 48 N. Y. App. Div. 477, 62 N. Y. Suppl. 940. *Compare* People *v.* Knox, 54 N. Y. App. Div. 334, 66 N. Y. Suppl. 984.

16. People *v.* McAdoo, 110 N. Y. App. Div. 740, 96 N. Y. Suppl. 445 [*affirmed* in 184 N. Y. 575, 77 N. E. 1193].

17. Arrest without warrant see ARREST, 3 Cyc. 877 *et seq.*

Arrest on warrant see ARREST, 3 Cyc. 875 *et seq.*

18. Com. *v.* Hastings, 9 Metc. (Mass.) 259; State *v.* Stuhie, 194 Mo. 14, 92 S. W. 191.

19. Com. *v.* Hastings, 9 Metc. (Mass.) 259; Burns *v.* Erben, 40 N. Y. 463.

Presumption of authority.— When it is shown that a policeman has been duly appointed by the proper authority of a city, whose charter confers on the common council the power to establish, organize, and maintain a city watch, and prescribe the duties thereof, and to regulate the general police of a city, it will be presumed, in the absence of evidence as to the power given to such policemen by the city ordinances, that he possesses the ordinary powers of peace officers at common law. Doering *v.* State, 49 Ind. 56, 19 Am. Rep. 669.

Special policeman.— The appointment of a special policeman, without any limitation as to the time or place, gives him all the powers of a police officer throughout the city. Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899. If his power is limited to a part of the city, as a theater, it is not limited to the space within the walls of the theater, but extends to the environs, so far as the special vigilance of an officer may be required to keep the peace and preserve order among persons frequenting the theater, or carrying others to and from it, or supplying refreshments, and also to shops, stalls, and stands kept in the vicinity for the purpose of supplying refreshments. Com. *v.* Hastings, 9 Metc. (Mass.) 259.

Limitation of power by ordinance.— By the city ordinances, the commissaries of the markets are authorized to have disturbers of the public peace arrested. The arrest of an individual by a policeman therefore, on the charge of taking possession of another's stall in a market, without his permission, is unlawful, unless ordered by the commissary. Tujacque *v.* Weisheimer, 15 La. Ann. 276.

20. Occupation of alleged suspected premises.— An injunction will lie to restrain a police captain from permanently posting officers upon private premises and driving off customers by threats of raiding. Delaney *v.* Flood, 45 Misc. (N. Y.) 97, 91 N. Y. Suppl. 672; Hale *v.* Burns, 44 Misc. (N. Y.) 1, 89 N. Y. Suppl. 711 [*affirmed* in 101 N. Y. App. Div. 101, 91 N. Y. Suppl. 929]; Cullen *v.* Bourke, 93 N. Y. Suppl. 1085. See also Weiss *v.* Herlihy, 23 N. Y. App. Div. 608, 49 N. Y. Suppl. 81.

21. Duty to report defects in streets.— It is competent for a city to require policemen to remedy or report defects in streets under its charter, authorizing it to prescribe in detail the duties of policemen, although its charter also provides for a board of street commissioners, who are charged with the duty of remedying defects in streets. Cummings *v.* Hartford, 70 Conn. 115, 38 Atl. 916. But when it does not appear that there is any act of the legislature authorizing a municipal corporation to prescribe the duties of a policeman, and to make him an agent of the corporation in respect to its duty of keeping its streets open and in repair, or when the legislature has conferred such power upon the corporation, and it does not appear that the council of such municipal corporation has, by ordinance or resolution, so prescribed the duties of a policeman, and so made him its agent for such purpose, a rule of the police department which requires a policeman to note defects in the streets or sidewalks, and to remove them when practicable, and in case of a complaint by any citizen to remove the same, is irrelevant and incompetent as evidence to charge such corporation with notice of a defect in the street or sidewalk, although it is shown in connection therewith that a policeman had knowledge of such defect. Cleveland *v.* Payne,

they are liable to punishment.[22] Policemen are liable in damages for unnecessary cruelties and indignities inflicted by them on prisoners in their charge.[23]

(2) Fines. Authority conferred upon police commissioners to make all necessary rules and regulations for the government and discipline of the force includes the power to establish fines and forfeitures for absence from, or neglect of, duty.[24] Where a fine is illegally imposed and paid, such payment is voluntary and cannot be recovered back.[25]

(3) Protection From Liability For Torts. The general doctrines of the law touching personal liability for torts apply to a policeman, and the municipality may not indemnify him out of fines derived from violation of an ordinance for damages recovered against him for enforcing it.[26]

72 Ohio St. 347, 74 N. E. 177, 70 L. R. A. 841.

"On duty" usually equivalent to "on active duty."— While, by the rules of the department, police officers may "be deemed always on duty," they are liable to arrest and to be served with subpœnas at any time when they are not actually on duty. Hart *v.* Kennedy, 39 Barb. (N. Y.) 186 [*affirming* 14 Abb. Pr. 432, 23 How. Pr. 417]. See also People *v.* Jewett, 15 Misc. (N. Y.) 227, 36 N. Y. Suppl. 778.

22. Failure to search suspected premises.— People *v.* Roosevelt, 16 N. Y. App. Div. 364, 44 N. Y. Suppl. 1003 [*affirmed* in 155 N. Y. 662, 49 N. E. 1102].

Failure to keep peace.— State *v.* Flynn, 119 Mo. App. 712, 94 S. W. 543.

Failure to report suspicious places.— A rule requiring police captains to transmit monthly reports of the location of suspicious places vests in such captains a discretion in determining what is a suspicious place, which discretion must be exercised with regard to evidence. People *v.* Greene, 92 N. Y. App. Div. 243, 87 N. Y. Suppl. 172. An order of the superintendent of police that no more reports should be made "of reputed or alleged" disorderly houses, without competent evidence of their disorderly character, does not justify a police captain in reporting that there are no disorderly houses in his precinct, when he has ground for suspecting that certain houses are disorderly. People *v.* Roosevelt, 16 N. Y. App. Div. 364, 44 N. Y. Suppl. 1003 [*affirmed* in 155 N. Y. 662, 49 N. E. 1102].

Failure to suppress disorderly houses.— State *v.* Boyd, 108 Mo. App. 518, 84 S. W. 191; People *v.* Herlihy, 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 236 [*affirmed* in 170 N. Y. 584, 63 N. E. 1120].

Justification.— A police officer failing to execute a warrant for the arrest of a person for a crime therein charged cannot justify absolutely by showing that the magistrate issuing the warrant orally requested him not to serve it, although such a defense may be considered in mitigation. People *v.* McAdoo, 98 N. Y. App. Div. 190, 90 N. Y. Suppl. 669.

Special assignment.— A sergeant, acting as a captain, is as much responsible for a neglect of duty as captain as though he were such an officer. People *v.* Greene, 104 N. Y. App. Div. 496, 93 N. Y. Suppl. 720 [*affirmed* in 184 N. Y. 565, 76 N. E. 1103]; People *v.* Greene, 91 N. Y. App. Div. 58, 86 N. Y. Suppl. 322 [*affirmed* in 178 N. Y. 617, 70 N. E. 1106]. Ignorance of the rules while acting under a special assignment is an excuse, the sufficiency of which is to be determined by the police commissioner before whom he is tried for such violation. People *v.* Greene, *supra*.

Absence from duty during time of dismissal.— Under a rule making absence from duty without leave neglect of duty, an officer is not guilty of neglect of duty for absence during the time he was unlawfully dismissed from service. The officer is not guilty of any offense for being absent at such time. People *v.* Metropolitan Police, 40 Barb. (N. Y.) 626, 16 Abb. Pr. 473, 26 How. Pr. 152 [*affirming* 16 Abb. Pr. 337, 25 How. Pr. 79, and *affirmed* in 39 N. Y. 506].

Using disrespectful language.— A roundsman is the superior officer of patrolmen, within the rule prohibiting the latter from using disrespectful language to the superior officers. People *v.* Moss, 38 N. Y. App. Div. 630, 56 N. Y. Suppl. 1032 [*affirming* 34 N. Y. App. Div. 475, 54 N. Y. Suppl. 262].

23. Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

24. Malcolm *v.* Boston, 173 Mass. 312, 53 N. E. 812.

Where the police board passes an order removing a policeman, and the order is reversed, he cannot be fined for neglect of duty in being absent from duty between the rendition and reversal of the order. People *v.* Metropolitan Police, 16 Abb. Pr. (N. Y.) 337, 25 How. Pr. 79 [*affirmed* in 40 Barb. 626, 16 Abb. Pr. 473, 26 How. Pr. 152 (*affirmed* in 39 N. Y. 506)].

Absence without leave.— Under a law prescribing the punishment of a police officer "for absence from duty without leave," a fine imposed by the board of police on an officer for being "absent from duty" is illegal. People *v.* Metropolitan Police, 40 Barb. (N. Y.) 626, 16 Abb. Pr. 473, 26 How. Pr. 152 [*affirming* 16 Abb. Pr. 387, 25 How. Pr. 79, and *affirmed* in 39 N. Y. 506].

25. Gross *v.* Cincinnati, 4 Ohio S. & C Pl. Dec. 393, 29 Cinc. L. Bul. 81; Kinney *v.* Toledo, 3 Ohio S. & C. Pl. Dec. 6, 1 Ohio N. P. 374. See, generally, Payment.

26. Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476.

(VII) *TERM OF OFFICE.* The term of office of policemen is often fixed by statute,[27] and when so fixed it cannot be changed by ordinance.[28] Where the duration of their appointment is not fixed, policemen hold their office at the pleasure of the appointing power,[29] provided there is no constitutional limitation upon the duration of official terms.[30]

(VIII) *RESIGNATION OR ABANDONMENT.* The acceptance of an incompatible office by a policeman amounts to a resignation.[31] Unexplained absence from duty for five days may also be deemed a resignation when so provided by a rule of the department.[32]

(IX) *REMOVAL*—(A) *In Whom Power Vested.* The power of removal is sometimes provided for by the organic law of the state,[33] but more frequently by municipal charter or general laws.[34] This power cannot be exercised in any case

Protection from liability to third persons.— Where a police officer is sued for false imprisonment for arresting plaintiff for violation of an ordinance, the municipality is not liable for failure of its officers to make a defense to the same, pursuant to their promise so to do, so as to render it liable to the police officer on recovery of a default judgment against him. Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476. The fact that an ordinance provided that the funds derived by way of fines for its violation should inure to the municipality does not enable the municipality to lawfully undertake to indemnify a police officer for any damages recovered against him for an attempt to enforce it. Vaughtman *v.* Waterloo, *supra.*

27. Kenneally *v.* Chicago, 220 Ill. 485, 77 N. E. 155 (holding that, under 1 Starr & C. Annot. St. Ill. (1896) p. 722, c. 24, par. 75 (City and Village Act, art. 6, § 3), providing that the term of appointive offices shall not exceed two years, the term of office of a policeman does not continue after the expiration of two years till his successor is appointed); Smith *v.* Haverhill, 187 Mass. 323, 72 N. E. 988 (holding that St. (1869) p. 441, c. 61, § 12, as amended by St. (1887) p. 978, c. 357, providing for the appointment of police officers to hold office till they resign or are removed for cause, is repealed by implication by St. (1894) p. 557, c. 480, covering the whole subject-matter of the police force, and providing for appointment of the whole force for terms of four years).

28. Jacksonville *v.* Allen, 25 Ill. App. 54. See also Union Depot, etc., Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329.

29. *Massachusetts.*— Lahar *v.* Eldridge, 190 Mass. 504, 77 N. E. 635 (holding that a city council has authority to pass ordinances prescribing one year as the term of office of a member of the police department); Com. *v.* Higgins, 4 Gray 34.

New Jersey.— Bohan *v.* Weehawken Tp., 65 N. J. L. 490, 47 Atl. 446.

New York.— People *v.* Sing Sing, 54 N. Y. App. Div. 555, 66 N. Y. Suppl. 1094.

Rhode Island.— Lowrey *v.* Central Falls, 23 R. I. 284, 49 Atl. 963.

Vermont.— Corbett *v.* Sullivan, 54 Vt. 619.

See 36 Cent. Dig. tit. "Municipal Corporations," § 484.

Term expires with resignation.— Where the term of office of a policeman is not fixed by statute, but is subject to the will of the mayor and council, and the officer resigns, no vacancy for an unexpired term occurs, but his term of office expires with his resignation. Russell *v.* Williamsport, 9 Pa. Co. Ct. 129.

A policeman irregularly appointed is removable at the pleasure of the appointing power. Lyons *v.* Gloucester, 49 N. J. L. 177, 6 Atl. 518.

Until successors chosen.— Where a statute provides that the mayor shall appoint with the consent of the council such policemen as he and the council may deem necessary to hold office until their successors are chosen, succeeding administrations have power to appoint policemen, and when such appointment has been made and the appointee has qualified the term of the predecessors in office expires. Oklahoma City *v.* Dean, 15 Okla. 139, 79 Pac. 755.

30. Houston *v.* Clark, (Tex. Civ. App. 1904) 80 S. W. 1198; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.

A charter provision that policemen shall hold office during good behavior is unconstitutional. Houston *v.* Floeck, (Tex. Civ. App. 1904) 80 S. W. 1198; Houston *v.* Mahoney, 36 Tex. Civ. App. 45, 80 S. W. 1142.

31. People *v.* Metropolitan Police Bd., 26 N. Y. 316; People *v.* Metropolitan Police Dist., 35 Barb. (N. Y.) 550.

32. People *v.* Diehl, 50 N. Y. App. Div. 58, 63 N. Y. Suppl. 362 [*affirmed* in 167 N. Y. 619, 60 N. E. 1118].

Absence caused by arrest.— Under Laws (1873), c. 755, § 5, providing that any member of the police force of New York city who shall be absent from duty without leave for five days shall, at the expiration thereof, cease to be a member of said force, a patrolman does not lose his office by being arrested and confined under criminal process, and upon his discharge and reporting for duty he is entitled to his pay during his enforced absence. People *v.* New York Police Com'rs, 114 N. Y. 245, 21 N. E. 421.

33. See *supra*, VII, A, 12.

34. See *infra*, cases cited in this section.

by an inferior officer or tribunal, unless granted expressly[35] or by necessary implication,[36] or by any other officer or tribunal than the one designated.[37] And the power conferred by the legislature cannot be taken away or abridged by ordinance.[38] The power of removal has by the charters and general statutory provisions been variously conferred upon the mayor,[39] or city council,[40] or on the mayor and council jointly,[41] in which case an attempted removal by either is void,[42] or on a board of police commissioners,[43] or on a police commissioner or inspector of police,[44] or upon some special tribunal, such as a police committee or the city council,[45] or a police trial board created by the civil service commission.[46] The power thus conferred is not affected by the fact that the misconduct for which a removal is sought is an indictable offense,[47] and it has been held that a change in the *personnel* of the board, pending trial, does not invalidate a removal by the new board,[48] and that an entirely new board may remove on evidence taken by

35. Vicksburg *v.* Rainwater, 52 Miss. 718; Bringgold *v.* Spokane, 27 Wash. 202, 67 Pac. 612, holding that, under a city charter providing that police officers may be removed by the board of police in certain cases, the board has no power to suspend.

36. Venable *v.* Portland Police Com'rs, 40 Oreg. 458, 67 Pac. 203, holding that where the power of appointing police officers is conferred on a police commission, and the tenure of office of such police officers is not otherwise defined, restrained, or limited, there is an implied power in the commission to remove such officers.

37. Murphy *v.* Webster, 131 Mass. 482; Com. *v.* Black, 201 Pa. St. 433, 50 Atl. 1008 [*reversing* 31 Pittsb. Leg. J. N. S. 1]. And see Nichols *v.* Weiss, 9 Kulp (Pa.) 548.

38. Carey *v.* Plainfield Bd. of Police, 53 N. J. L. 311, 21 Atl. 492; People *v.* Ham, 32 Misc. (N. Y.) 517, 66 N. Y. Suppl. 264 [*affirmed* in 57 N. Y. App. Div. 367, 68 N. Y. Suppl. 298].

39. McAuliffe *v.* New Bedford, 155 Mass. 216, 29 N. E. 517 (power to hear in the first instance); People *v.* Elmendorf, 57 N. Y. App. Div. 340, 68 N. Y. Suppl. 54.

A constitutional provision giving the mayor power to remove officers has been held not to give power to remove a police officer on the ground that he is an official of the state and not of the municipality. Smith *v.* Bryan, 100 Va. 199, 40 S. E. 652. And see Saul *v.* Scranton, 9 Pa. Dist. 156, holding that policemen are not public officers within a constitutional provision that public officers, with certain exceptions, may be removed by the power appointing them, and that the mayor who has the power of appointing policemen has no authority, under that section, to dismiss them.

Offenses committed either before or during the mayor's term of office are included within a provision conferring on the mayor power to hear and determine charges of misconduct of a police officer. People *v.* Elmendorf, 57 N. Y. App. Div. 340, 68 N. Y. Suppl. 54.

Where one claimant of the office of mayor is in possession of the office, another claimant cannot receive charges against a policeman, or officiate as a member of a tribunal organized for his trial. Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

40. Doherty *v.* Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804.

41. Gill *v.* Brunswick, 118 Ga. 85, 44 S. E. 830; Murphy *v.* Webster, 131 Mass. 482; Com. *v.* Black, 201 Pa. St. 433, 50 Atl. 1008 [*reversing* 31 Pittsb. Leg. J. N. S. 1]; Saul *v.* Scranton, 9 Pa. Dist. 156; Nichols *v.* Weiss, 9 Kulp (Pa.) 548; Lowrey *v.* Central Falls, 23 R. I. 354, 50 Atl. 639.

Necessity for mayor presiding over meeting.— The action of the mayor and board of aldermen of a city in dismissing a member of the police force is not invalid because the mayor did not preside over the meeting, as the statute does not require the mayor to preside, but only that the board shall elect a president who shall preside at all meetings. Lowrey *v.* Central Falls, 23 R. I. 354, 50 Atl. 639.

42. Murphy *v.* Webster, 131 Mass. 482; Com. *v.* Black, 201 Pa. St. 433, 50 Atl. 1008 [*reversing* 31 Pittsb. Leg. J. N. S. 1]; Saul *v.* Scranton, 9 Pa. Dist. 156.

43. *Illinois.*— Rockford *v.* Compton, 115 Ill. App. 406.

Nebraska.— Moores *v.* State, 54 Nebr. 486, 74 N. W. 823.

New Jersey.— Skillman *v.* Trenton Police Com'rs, 64 N. J. L. 489, 45 Atl. 803; Cavanagh *v.* Hoboken Police Com'rs, 59 N. J. L. 412, 35 Atl. 793.

New York.— People *v.* New York Police Com'rs, 99 N. Y. 676, 2 N. E. 151; People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696; People *v.* New York Police Com'rs, 23 Hun 351.

Oregon.— Venable *v.* Portland Police Com'rs, 40 Oreg. 458, 67 Pac. 203.

The action of a de facto board of police commissioners expelling a patrolman from the police force was, as to him, valid. Lang *v.* Bayonne, 73 N. J. L. 109, 62 Atl. 270.

44. State *v.* Whitaker, 116 La. 947, 41 So. 218; People *v.* Partridge, 181 N. Y. 530, 73 N. E. 1130 [*affirming* 99 N. Y. App. Div. 410, 91 N. Y. Suppl. 258].

45. Dodd *v.* Foster, 64 N. J. L. 370, 45 Atl. 802.

46. Chicago *v.* People, 210 Ill. 84, 71 N. E. 816 [*affirming* 111 Ill. App. 594].

47. Skillman *v.* Trenton Police Com'rs, 64 N. J. L. 489, 45 Atl. 803.

48. People *v.* New York Police Com'rs, 23

the former board.[49] So a quorum of the board making the removal is sufficient to give validity to the proceedings.[50] A police officer charged with misconduct is entitled to a trial before unprejudiced police commissioners, and where one of the board voting for his dismissal, and whose vote was essential to it, was a prosecuting witness, and, because of a statement made by the officer in connection with the offense with which he was charged, was justly incensed against the officer, and was in a sense himself on trial, the board is not such an unprejudiced tribunal as the officer is entitled to have consider and decide upon the case.[51] It has been held, however, that a police commissioner is not disqualified from trying and dismissing an officer because prior to the trial he had received a report of his misconduct and declared knowledge of his guilt.[52] And where police commissioners are called upon to sit in judgment upon an offense committed in the presence of one of them, who is not a witness to prove it, or who, being a witness, has not to pass upon a conflict of testimony, he has no such interest in the result as to disqualify him;[53] nor does the fact that one while on trial for absence without leave while on duty as a policeman later engaged in a quarrel with one of the commissioners disqualify the latter from sitting in the case on a judgment for dismissal for which he voted.[54] It has also been held that a commissioner may sit on a trial of charges against a policeman, after he has been challenged on the ground that he has prejudged the case and does not intend to give the policeman a fair trial, it not being claimed that the commissioner had any interest in the matter or was disqualified by any statute.[55]

(B) *Removal at Pleasure.* While, as will be shown in subsequent sections, policemen are generally removable only for cause and on charges, notice, and hearing,[56] they are removable at pleasure where the constitution[57] or charter[58] expressly so provides, and authority to appoint to hold office at pleasure carries with it the power to remove at pleasure, in the absence of a constitutional or statutory provision to the contrary.[59] So power to remove at pleasure exists where the power of appointment is conferred in general terms and without restriction, and the duration of the term is not fixed by constitution or statute;[60] where the term is not fixed by statute or ordinance and the charter provides that the office shall be held at the pleasure of the appointing power;[61] where it is provided by statute

Hun (N. Y.) 351. But see Tibbs *v.* Atlanta, 125 Ga. 18, 53 S. E. 811, holding that where the membership of a board of commissioners of a city is increased by a statute enacted pending the trial of a policeman, the new member has no authority to participate in the trial, although he was present at all the sittings of the board and heard all the evidence.

49. People *v.* Roosevelt, 7 N. Y. App. Div. 144, 40 N. Y. Suppl. 102.

50. State *v.* New Orleans Police Com'rs, 113 La. 424, 37 So. 16; People *v.* New York Police Com'rs, 99 N. Y. 676, 2 N. E. 151; State *v.* Barrett, 22 Ohio Cir. Ct. 104, 12 Ohio Cir. Dec. 231.

51. People *v.* Roosevelt, 23 N. Y. App. Div. 533, 48 N. Y. Suppl. 578.

52. People *v.* Partridge, 99 N. Y. App. Div. 410, 91 N. Y. Suppl. 258 [*affirmed* in 181 N. Y. 530, 73 N. E. 1130].

53. People *v.* Roosevelt, 23 N. Y. App. Div. 514, 48 N. Y. Suppl. 537 [*affirmed* in 155 N. Y. 702, 50 N. E. 1121].

54. People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696.

55. People *v.* New York Police Com'rs, 84 Hun (N. Y.) 64, 32 N. Y. Suppl. 18 [*affirmed* in 148 N. Y. 757, 43 N. E. 988].

56. See *infra*, VII, B, 5, d, (IX), (D).

57. Com. *v.* Rutherford, 8 Pa. Dist. 349, 22 Pa. Co. Ct. 425.

58. Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348; State *v.* St. Paul, 81 Minn. 391, 84 N. W. 127.

Extent of rule.— Under a charter providing that the mayor and aldermen shall have power to appoint police officers, and to remove them at pleasure, the power of removal is not confined to officers nominated by the mayor exercising it, but extends to officers nominated by his predecessors, although by another clause the mayor, with the consent of the appointing power, may remove "any officer over whose appointment he has . . . exercised the power of nomination." Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348.

Charter power to remove at pleasure cannot be restrained by ordinance. Williams *v.* Gloucester, 148 Mass. 256, 19 N. E. 348; Trowbridge *v.* Newark, 46 N. J. L. 140.

59. Oliver *v.* Americus, 69 Ga. 165.

60. People *v.* Robb, 126 N. Y. 180, 27 N. E. 267 [*affirming* 11 N. Y. Suppl. 383].

61. Leadville *v.* Bishop, 14 Colo. App. 517, 61 Pac. 58.

that the office shall be held during good behavior and the pleasure of the appointing power;[62] and where the officers are appointed for an indefinite term and the constitution provides that an officer holding for an indefinite term is removable at the pleasure of the appointing power.[63] So it has been held under a charter providing that policemen "shall hold their respective positions during good behavior, or until they may be severally removed by the Mayor, or by three-fifths vote of the council, after notice to and failure of the Mayor to act," that the mayor or city council, in case of his failure to act, has an absolute power of removal and is not limited to removals for cause.[64] Where an officer removable at pleasure is so removed, the removal is not affected by the subsequent action of the board in ordering to be paid a bill for services subsequent to removal.[65]

(c) *Removal by Impeachment.* A constitutional provision making the governor and all other executive officers liable to impeachment relates only to state officers and has no application to police officers elected by a town.[66]

(d) *Removal For Cause* — (1) Right to Trial or Hearing. By virtue of charter or statutory provisions or rules passed in accordance therewith, members of the police force in many municipalities are not removable at pleasure, but only for cause and on trial or hearing at which they shall have an opportunity to present a defense to what may be suggested as a cause of removal.[67] Any rules

Effect of ordinances.— Ordinances authorizing the election by the city council of numerous officers, including such policemen as may be deemed necessary, and providing for the removal of any such officer by a majority of the city council, for cause, and providing the procedure for preferring charges, notice, trial, etc., do not abridge a city council's statutory power to remove a policeman without notice or hearing, since an abridgment of a council's statutory power by ordinances, if this could be done at all, would not be unless the intention to do so was clear. Leadville *v.* Bishop, 14 Colo. App. 517, 61 Pac. 58.

62. State *v.* Police Com'rs, 6 Ohio Dec. (Reprint) 767, 8 Am. L. Rec. 21.

63. Smith *v.* Brown, 59 Cal. 672.

64. Smith *v.* Bryan, 100 Va. 199, 40 S. E. 652.

65. Quinn *v.* Portsmouth, 64 N. H. 324, 10 Atl. 677.

66. Lowrey *v.* Central Falls, 23 R. I. 354, 50 Atl. 639.

67. *Illinois.*— Chicago *v.* People, 210 Ill. 84, 71 N. E. 816 [*reversing* 111 Ill. App. 594]; Rockford *v.* Compton, 115 Ill. App. 406.

Indiana.— Roth *v.* State, 158 Ind. 242, 63 N. E. 460.

Kentucky.— Gorley *v.* Louisville, 104 Ky. 372, 47 S. W. 263, 20 Ky. L. Rep. 602.

Maine.—Andrews *v.* Biddeford Police Bd., 94 Me. 68, 46 Atl. 801.

Maryland.— Hagerstown St. Com'rs *v.* Williams, 96 Md. 232, 53 Atl. 923.

Massachusetts.— Ham *v.* Boston Police Bd., 142 Mass. 90, 70 N. E. 540.

Minnesota.— State *v.* St. Paul, 81 Minn. 391, 84 N. W. 127.

Missouri.— State *v.* Hawes, 177 Mo. 387, 76 S. W. 617.

Nebraska.— Moores *v.* State, 54 Nebr. 486, 74 N. W. 823.

New Hampshire.— Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128.

New Jersey.— Cleary *v.* Trenton, 50 N. J. L. 331, 13 Atl. 228.

New York.—People *v.* Humphrey, 156 N. Y. 231, 50 N. E. 860 [*reversing* 22 N. Y. App. Div. 632, 48 N. Y. Suppl. 1112]; People *v.* New York Police Com'rs, 67 N. Y. 475; People *v.* Dillon, 46 N. Y. App. Div. 187, 61 N. Y. Suppl. 537 [*affirmed* in 161 N. Y. 646, 57 N. E. 1122]; People *v.* Hudson, 77 Hun 548, 28 N. Y. Suppl. 940; People *v.* Doolittle, 44 Hun 293; McDermott *v.* Metropolitan Police Dist., 25 Barb. 635; People *v.* Jerome, 36 Misc. 256, 73 N. Y. Suppl. 306; People *v.* Troy Police Com'rs, 55 How. Pr. 454.

Texas.— Houston *v.* Floeck, (Civ. App. 1904) 80 S. W. 1198; Houston *v.* Mahoney, 36 Tex. Civ. App. 45, 80 S. W. 1142; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848; Proctor *v.* Blackburn, 28 Tex. Civ. App. 351, 67 S. W. 548.

Utah.— Everill *v.* Swan, 17 Utah 514, 55 Pac. 68.

See 36 Cent. Dig. tit. "Municipal Corporations," § 496.

Constitutionality of charter provisions.— A provision of a city charter prohibiting the discharge of policemen, except after trial, is valid, subject to a constitutional provision restricting the term of office to two years. Houston *v.* Floeck, (Tex. Civ. App. 1904) 80 S. W. 1198; Houston *v.* Mahoney, 36 Tex. Civ. App. 45, 80 S. W. 1142. A statute providing that policemen shall hold office until removed for cause is not in conflict with a constitutional provision that the general assembly shall not create any office the tenure of which shall be longer than four years. The constitutional provision is not applicable to the office of policeman. Roth *v.* State, 158 Ind. 242, 63 N. E. 460. A statute providing that no policeman shall be dismissed without his written consent, except by the decision of a court duly certified in writing by the mayor, which court shall be composed of persons belonging to the police force, equal or

made by the police board providing for removal without any offense being charged are in contravention of charter provisions of the character under consideration, and a removal under such rules is of no effect.[68] The rule requiring a hearing applies to substitute or chance policemen,[69] to a turnkey promoted to the position of patrolman,[70] and to a patrolman who has accepted the additional duties and pay of a roundsman.[71] It has no application where the officer was ineligible to the position because of a conviction of crime previous to his appointment,[72] nor to one whose conduct is declared by statute to be equivalent to a resignation,[73] nor to probationary policemen,[74] nor to one who has procured his appointment by fraud.[75] So policemen holding over after the expiration of their terms are subject to summary removal,[76] as is any other policeman who is not a *de jure* officer.[77]

(2) Right to Notice of Charges and Time of Hearing. Municipal charters and rules passed in accordance therewith frequently provide either expressly or by implication that an officer whose removal is sought must be notified of the charges against him,[78] and of the time and place of hearing.[79] The right to notice is given by a statute which provides that removal shall be made only for cause,[80]

superior in official position to the accused, is not repugnant to Const. art. 6, § 4, providing that appointed officers other than judges of the courts of record, and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed, as a police officer is not a public officer within such section. Com. *v.* Stokley, 4 Pa. Co. Ct. 334, 20 Wkly. Notes Cas. 315.

Waiver of protection afforded by provisions. —A summary removal based on a written admission of the charges and a consent to waive trial, not made to or in the presence of the board, and which are afterward withdrawn and revoked before the day set for hearing, is illegal (People *v.* New York Police Com'rs, 67 N. Y. 475); and where a policeman of a village, on its incorporation as a city, is induced to sign an application for appointment as patrolman of the city, which application is denied and the patrolman dismissed, he waives none of his rights by such application (People *v.* Dillon, 46 N. Y. App. Div. 187, 61 N. Y. Suppl. 537 [*affirmed* in 161 N. Y. 646, 57 N. E. 1122].

68. Andrews *v.* Biddeford Police Bd., 94 Me. 68, 46 Atl. 801.

69. Bakely *v.* Nowrey, 68 N. J. L. 95, 52 Atl. 289.

70. State *v.* Hawes, 177 Mo. 387, 76 S. W. 617.

71. McCann *v.* New Brunswick, 73 N. J. L. 161, 62 Atl. 191.

72. People *v.* French, 102 N. Y. 583, 70 N. E. 913; People *v.* Manning, 16 N. Y. Suppl. 604.

73. People *v.* York, 49 N. Y. App. Div. 173, 62 N. Y. Suppl. 36 [*affirmed* in 162 N. Y. 660, 57 N. E. 1121], absence without leave for five successive days.

74. Matter of Murray, 18 N. Y. App. Div. 337, 49 N. Y. Suppl. 172.

75. People *v.* Martin, 91 Hun (N. Y.) 425, 36 N. Y. Suppl. 851.

The reason is that one who has never had a valid right to appointment acquires no status as a member of the force and has no rights such as are possessed by legally appointed members. People *v.* Martin, 91 Hun (N. Y.) 425, 36 N. Y. Suppl. 851.

76. State *v.* Hawes, 177 Mo. 360, 76 S. W. 653.

77. Moon *v.* Champaign, 116 Ill. App. 403 [*affirmed* in 214 Ill. 40, 73 N. E. 408], holding further that an ordinance which merely defines what shall constitute the police department of the city, and provides among other things that such department shall consist of as many policemen as such council shall from time to time provide for, does not render the office of a patrolman taken into the city's service one *de jure*.

78. *Kentucky.*— Gorley *v.* Louisville, 104 Ky. 372, 47 S. W. 263, 20 Ky. L. Rep. 602.

Maryland.— Hagerstown St. Com'rs *v.* Williams, 96 Md. 232, 53 Atl. 923.

Massachusetts.— Ham *v.* Boston Police Bd., 142 Mass. 90, 70 N. E. 540.

Minnesota.— State *v.* St. Paul, 81 Minn. 391, 84 N. W. 127.

New York.— People *v.* Martin, 152 N. Y. 311, 46 N. E. 484; People *v.* Martin, 1 N. Y. App. Div. 420, 37 N. Y. Suppl. 274; People *v.* Metropolitan Police Dist., 26 Barb. 481; McDermott *v.* Metropolitan Police Dist., 25 Barb. 635; People *v.* Metropolitan Police Dist., 6 Abb. Pr. 162.

See 36 Cent. Dig. tit. "Municipal Corporations," § 498.

Where a turnkey is promoted to the position of patrolman, such promotion constitutes a new appointment as patrolman for a term of four years from its date; and, under the statute, the appointee cannot be removed during the four years succeeding his promotion, except upon notice. State *v.* Hawes, 177 Mo. 387, 76 S. W. 617.

79. Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128; People *v.* Martin, 1 N. Y. App. Div. 420, 37 N. Y. Suppl. 274; People *v.* Metropolitan Police Dist., 26 Barb. (N. Y.) 481; McDermott *v.* Metropolitan Police Dist., 25 Barb. (N. Y.) 635.

80. Hagerstown St. Com'rs *v.* Williams, 96 Md. 232, 53 Atl. 923.

and by a statute prohibiting removal except on written charges and after opportunity to be heard in defense.[81] The right to notice is not waived by an admission of the policeman that he is guilty, where he afterward states facts showing that he was not guilty of the main charges.[82] Where the time of trial has been fixed and notice given thereof, the time so fixed cannot be shortened,[83] and the tribunal has no authority to proceed with the trial or hearing previous to the day notified.[84]

(3) Right to Presentation of Charges. By virtue of express provision in many municipal charters an officer of the police force cannot be discharged for causes affecting his character or standing as a public servant, except where formal charges have been made against him,[85] nor can he be tried or removed for causes other than those specified in the charges.[86] These provisions usually require that the charges shall be in writing and this requirement must be complied with.[87] The charges must be stated specifically and with substantial certainty,[88] although the technical precision required in a declaration or indictment is not necessary.[89] It is sufficient if the charge fairly apprises the accused of the offense for which it is sought to remove him.[90] The charge should be verified when it is required by

81. People *v.* Police Bd., 3 Abb. Dec. (N. Y.) 488.

82. People *v.* Martin, 152 N. Y. 311, 46 N. E. 484.

83. People *v.* Martin, 152 N. Y. 311, 46 N. E. 484.

84. People *v.* Martin, 152 N. Y. 311, 46 N. E. 484.

85. *Kentucky.*— Gorley *v.* Louisville, 104 Ky. 372, 47 S. W. 263, 20 Ky. L. Rep. 602.

Minnesota.— State *v.* St. Paul, 81 Minn. 391, 84 N. W. 127.

Missouri.— State *v.* Hawes, 177 Mo. 387, 76 S. W. 617.

Nebraska.— Moores *v.* State, 54 Nebr. 486, 74 N. W. 823.

New Hampshire.— Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128.

New York.— People *v.* Humphrey, 156 N. Y. 231, 50 N. E. 860 [*reversing* 22 N. Y. App. Div. 632, 48 N. Y. Suppl. 1112]; People *v.* New York Police Com'rs, 67 N. Y. 475; People *v.* Dillon, 46 N. Y. App. Div. 187, 61 N. Y. Suppl. 537 [*affirmed* in 161 N. Y. 646, 57 N. E. 1122]; People *v.* Troy City Police Com'rs, 55 How. Pr. 454.

See 36 Cent. Dig. tit. "Municipal Corporations," § 499. And see cases cited in subsequent notes in this section.

86. Wilkinson *v.* Saginaw Police Com'rs, 107 Mich. 394, 65 N. W. 668; Wellman *v.* Metropolitan Police, 84 Mich. 558, 47 N. W. 1099; People *v.* New York Police Dept., 72 N. Y. 415. *Compare* Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

Variance between complaint and specifications of charge.— Where the complaint charges conduct unbecoming an officer, and the charge specifies the obtaining of sick leave, while performing manual labor at home, an objection that the officer was charged with conduct unbecoming an officer and neglect of duty is not well taken, as the specifications of the charge, and not the complaint, control. Oesterreich *v.* Fowle, 132 Mich. 9, 92 N. W. 497.

87. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184; Rockford *v.* Compton, 115 Ill. App. 406; Wellman *v.* Metropolitan Police, 84 Mich. 558, 47 N. W. 1099; People *v.* Troy City Police Com'rs, 55 How. Pr. (N. Y.) 454.

88. Rockford *v.* Compton, 115 Ill. App. 406; Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128; People *v.* Elmendorf, 42 N. Y. App. Div. 306, 59 N. Y. Suppl. 115; Reynolds *v.* Pawtucket, 23 R. I. 370, 50 Atl. 645.

Waiver of defect in charges.— Where charges against a police captain contained a specification to the effect that he had assigned a patrolman to do other than police duty, and the accused made no application to have the specification made more specific, it was sufficient to justify proof that he had detailed such patrolman to do certain work for accused on houses owned by him. People *v.* Greene, 94 N. Y. App. Div. 287, 87 N. Y. Suppl. 1017 [*reversed* on other grounds in 179 N. Y. 253, 72 N. E. 99].

89. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184; Rockford *v.* Compton, 115 Ill. App. 406; State *v.* Whitaker, 116 La. 947, 41 So. 218; Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128; People *v.* New York Police Com'rs, 93 N. Y. 97.

90. Oesterreich *v.* Fowle, 132 Mich. 9, 92 N. W. 497; People *v.* New York Police Com'rs, 93 N. Y. 97; People *v.* Hayden, 80 Hun (N. Y.) 397, 30 N. Y. Suppl. 332; People *v.* MacLean, 10 N. Y. Suppl. 851.

Charges held sufficient.— A charge against a police officer of being engaged in a fight with certain named persons "during which he is accused of attempting to shoot G. M.," is sufficient for the purpose of a trial before a police commissioner. People *v.* Hayden, 80 Hun (N. Y.) 397, 30 N. Y. Suppl. 332. Where a rule of the police department of the city of Cleveland provides as to officers of the force, that "they shall not interfere or make use of the influence of their office in elections, but may quietly exercise the right of suffrage as other citizens," a charge against an officer for a violation of such rule, stating that the officer, at a given election and at a given voting place, did use his influence as an officer to induce divers persons to vote for a given candidate, and did distribute money to certain parties named, for the purpose of in-

statute or by the rules of the department.[91] But want of verification is waived by appearing and answering to the charges,[92] or going to trial on the merits[93] without objection. The requirement of presentation of charges has been held to apply to a turnkey appointed to the position of patrolman.[94] It does not apply to one who procures his appointment by fraud,[95] nor, under a provision that no employee elected by the municipal board should be dismissed except on written charges, to a policeman who goes in under a commission and holds over from time to time.[96] And refusal to grant specifications on final hearing is not error, where the complaint was fairly full and there was evidence that at the first hearing the policeman admitted his guilt.[97]

(4) Grounds of Removal — (a) In General. Power to remove a police officer for good and sufficient cause and after due hearing contemplates some substantial cause, such as corruption or inefficiency, infraction of rules governing the police force, commission of an infamous crime, etc.[98] The following have been held sufficient grounds for removal when it is necessary to show cause: Neglect of duty;[99]

fluencing them to vote for such candidate, is sufficiently definite. State *v.* Barrett, 22 Ohio Cir. Ct. 104, 12 Ohio Cir. Dec. 231. A charge against a policeman that he procured himself to be carried on the time book as sick, when in fact he was at home, engaged in manual labor, showing falsehood and deception in his report to his superior officers, prejudicial to the good order and discipline of the department, was not a charge of absence from duty only, so as to limit the punishment to a forfeiture of pay and preclude dismissal under the rules of the department. Oesterreich *v.* Fowle, 132 Mich. 9, 92 N. W. 497.

Charge held insufficient.— A charge, although it states the particular kind of offense, is not a definite charge when it states neither the time nor place of the offense. People *v.* Elmendorf, 42 N. Y. App. Div. 306, 59 N. Y. Suppl. 115.

91. People *v.* Metropolitan Police Dist., 26 Barb. (N. Y.) 481, 6 Abb. Pr. 162.

Where charges made by a police captain need not be verified, an objection that charges were made by a roundsman and not verified cannot be sustained where it appeared that the charges were actually made by a captain and that the roundsman only appeared as complainant. People *v.* French, 1 Silv. Sup. (N. Y.) 97, 5 N. Y. Suppl. 57.

An inspector of police is a subordinate officer within regulations authorizing such an officer to prefer charges in writing against a patrolman without verification on information furnished him by another person. People *v.* Greene, 101 N. Y. App. Div. 33, 91 N. Y. Suppl. 803.

92. People *v.* French, 1 N. Y. Suppl. 638.

93. Oesterreich *v.* Fowle, 132 Mich. 9, 92 N. W. 497.

94. State *v.* Hawes, 177 Mo. 387, 76 S. W. 617.

95. People *v.* Martin, 20 N. Y. App. Div. 380, 46 N. Y. Suppl. 723.

96. Beverly *v.* Hattiesburg, 83 Miss. 342, 35 So. 876.

97. McAuliffe *v.* New Bedford, 155 Mass. 216, 29 N. E. 517.

98. Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128.

99. People *v.* Lewis, 111 N. Y. App. Div. 375, 97 N. Y. Suppl. 1057 [*affirmed* in 186 N. Y. 583, 79 N. E. 1113] (failure by patrolman to report by telephone to the station house from the places established on his beat for that purpose); People *v.* Partridge, 99 N. Y. App. Div. 410, 91 N. Y. Suppl. 258 [*affirmed* in 181 N. Y. 530, 73 N. E. 1130] (absence from post, gambling in saloon, and failure to arrest for violating excise law in his presence); People *v.* York, 58 N. Y. App. Div. 621, 68 N. Y. Suppl. 1077 [*affirmed* in 169 N. Y. 578, 61 N. E. 1133] (absence from post of duty without leave); People *v.* Martin, 9 N. Y. App. Div. 531, 41 N. Y. Suppl. 578 (absence from post of duty); People *v.* Roosevelt, 1 N. Y. App. Div. 434, 37 N. Y. Suppl. 113 [*affirmed* in 151 N. Y. 675, 46 N. E. 1150] (failure to make arrest for violation of excise law); People *v.* French, 52 Hun (N. Y.) 90, 5 N. Y. Suppl. 55; People *v.* MacLean, 14 N. Y. Suppl. 77 (lying down while on patrol duty in addition to numerous previous derelictions of duty); People *v.* MacLean, 13 N. Y. Suppl. 342 (absence from post of duty and drunkenness); People *v.* McClave, 13 N. Y. Suppl. 340 (absence without leave); People *v.* MacLean, 11 N. Y. Suppl. 110 (absence from post of duty); People *v.* Robh, 9 N. Y. Suppl. 649 (absence from post of duty); People *v.* Bell, 8 N. Y. Suppl. 748 (failure to make arrest); People *v.* New York, etc., Bridge, 7 N. Y. Suppl. 806 (absence without leave); People *v.* Bell, 3 N. Y. Suppl. 812 (failure to report circumstances tending to show crime); People *v.* Crimmins, 1 N. Y. Suppl. 656 (lying down while on patrol duty).

Failure of police instructor to prefer charges against class.— Relator, a policeman in charge of a school of instruction, had no knowledge that an envelope containing money had been left at his home, addressed to his wife, intended as a present from his class, which had been discharged, until the day before he was cited to appear before a police commissioner to explain the same, which he did, and within an hour after such explanation he was suspended while he was engaged at such school, after which he was not in a position to prefer charges. It was held that

incompetency or inefficiency;[1] physical incapacity;[2] insubordination;[3] being over a certain age;[4] conduct unbecoming an officer,[5] although not a violation of the rules and regulations of the department;[6] unprovoked or needless clubbing of citizens,[7] especially where he previously has been convicted of improperly using his club on two former occasions;[8] unprovoked assault on another officer;[9] attempting to procure publication of untruthful statements tending to degrade another officer;[10] the making or circulation of false reports or charges about a superior officer;[11] unwarranted arrest attended with circumstances of oppression and cruelty;[12] reckless riding resulting in injury to citizen;[13] crim-

relator's neglect to prefer such charges against the members of the class that had made up the purse was not ground for dismissal. People *v.* Greene, 96 N. Y. App. Div. 249, 89 N. Y. Suppl. 343.

Absence from post to attend to call of nature.— Absence of a policeman from his post during his tour of patrol duty is not cause for dismissal, where it was occasioned by the necessity of using a toilet closet, and there was no such closet on his post. People *v.* Roosevelt, 19 N. Y. App. Div. 152, 45 N. Y. Suppl. 880.

1. People *v.* Brooklyn Police, etc., Bd., 69 N. Y. 408; Steinback *v.* Galveston, (Tex. Civ. App. 1897) 41 S. W. 822, inability to read and write English.

2. Ayers *v.* Newark, 49 N. J. L. 170, 6 Atl. 659.

Insanity.— A member of the park police force is properly removed therefrom on the statements of physicians that he is suffering from an organic and progressive disease of the brain of an incurable character, and is quite likely to indulge in outbursts of insane temper. People *v.* Robb, 11 N. Y. Suppl. 383 [*distinguishing* People *v.* Robb, 55 Hun 425, 8 N. Y. Suppl. 502, which holds that a statute empowering the park commissioners of New York city to punish or dismiss members of the park police force on conviction of certain offenses, and to withhold the pay of any member of such force "for or on account of absence for any cause without leave, lost or sick time, sickness, or other disability, physical or mental," does not authorize the removal of a member of such force on the ground that he is subject to insane delusions].

3. Pierce's Appeal, 78 Conn. 666, 63 Atl. 161 (disobedience of orders); State *v.* Rusling, 64 Conn. 517, 30 Atl. 758 (disobedience of orders); Alcutt *v.* Trenton Police Com'rs, 66 N. J. L. 173, 48 Atl. 1006 (statement that police commissioner was a liar and not to be believed on oath); People *v.* Moss, 50 N. Y. App. Div. 308, 63 N. Y. Suppl. 912 [*affirmed* in 165 N. Y. 606, 58 N. E. 1090] (calling superior officer a liar in open court); People *v.* Metropolitan Police Bd., 15 Abb. Pr. (N. Y.) 167, 24 How. Pr. 481 (disobedience of orders).

What is not insubordination.— A police commissioner, while acting as a judge for the purpose of hearing charges against a policeman who has been suspended from duty, ceases to act for the time being as accused's superior officer, so that accused is not guilty of insubordination for refusing to testify under advice of counsel, in violation of the commissioner's direction. People *v.* Greene, 96 N. Y. App. Div. 249, 89 N. Y. Suppl. 343.

Using opprobrious epithet in relation to superior.— Upon the trial of a police officer before the commissioners, on a charge of using an opprobrious epithet with reference to his superior, he cannot be convicted on mere proof that he used the epithet, unless it is also shown that it was used with reference to the superior. People *v.* Hart, 25 N. Y. App. Div. 129, 49 N. Y. Suppl. 268.

4. People *v.* Troy Police Com'rs, 43 How. Pr. (N. Y.) 385.

5. People *v.* Roosevelt, 23 N. Y. App. Div. 533, 48 N. Y. Suppl. 578 [*affirmed* in 153 N. Y. 646, 47 N. E. 1110] (even though the offense was committed while he was on probation and before he received his full appointment); People *v.* Roosevelt, 13 N. Y. App. Div. 404, 43 N. Y. Suppl. 73.

6. Oesterreich *v.* Fowle, 132 Mich. 9, 92 N. W. 497.

7. Marran *v.* Bordentown, (N. J. Sup. 1905) 61 Atl. 13; People *v.* Carroll, 42 Hun (N. Y.) 438; People *v.* MacLean, 15 N. Y. Suppl. 219; People *v.* Bell, 10 N. Y. Suppl. 829; People *v.* French, 15 N. Y. St. 108.

8. People *v.* Partridge, 88 N. Y. App. Div. 60, 84 N. Y. Suppl. 779.

9. People *v.* McClave, 10 N. Y. Suppl. 764 [*affirmed* in 123 N. Y. 512, 25 N. E. 1047]; People *v.* Bell, 3 N. Y. Suppl. 314.

10. People *v.* Yonkers Police Com'rs, 41 Hun (N. Y.) 389.

11. Tibbs *v.* Atlanta, 125 Ga. 18, 53 S. E. 811; People *v.* Partridge, 87 N. Y. App. Div. 573, 84 N. Y. Suppl. 487; People *v.* Roosevelt, 2 N. Y. App. Div. 536, 38 N. Y. Suppl. 27 [*affirmed* in 153 N. Y. 657, 47 N. E. 1110].

12. People *v.* Roosevelt, 38 N. Y. App. Div. 635, 57 N. Y. Suppl. 11. And see People *v.* Jourdan, 90 N. Y. 53, in which it was held that the captain of a city police force is properly dismissed from office for sending two officers to the house of a married woman at two A. M. with instructions to bring her to the station, and then interrogating her in a coarse and vulgar manner, no complaint or warrant having been issued against her, and that it is immaterial that she was not in fact arrested, and that the officers were not ordered to arrest her.

13. People *v.* Strauss, 3 Misc. (N. Y.) 617, 23 N. Y. Suppl. 295 [*affirmed* in 143 N. Y. 645, 37 N. E. 823].

inal or immoral conduct;[14] devoting a part of his time to some other occupation in violation of the police regulations;[15] misrepresentation of facts in order to procure appointment;[16] violation of a rule forbidding members of the police force to be delegates to, or members of, political caucuses, or to take part in any political canvass;[17] and violation of a rule against accepting a gratuity without reporting the same to the captain of police.[18] On the other hand the extreme penalty of removal should not be visited upon a police officer for a mere technical violation of a rule which is not shown to have prejudiced any rights of the public or interfered with the proper discipline of the department.[19] So political reasons furnish no ground for removal,[20] nor conduct prior to entry upon service, when not so provided by rules.[21]

(b) Intoxication. Drunkenness is a frequent ground for removal, and if the intoxication occurs while the officer is on duty it is usually held sufficient.[22] Intoxication on duty cannot be excused on the ground that the liquor was taken for medicinal purposes, it not appearing that he had any reason to suppose that it would be good for him;[23] but intoxication produced by taking a drink to alleviate suffering, after being engaged several days in an arduous struggle with strikers, who were striving often with violence to prevent the running of street cars, will not constitute ground for removal.[24] Habitual drunkenness also authorizes removal, although no overt act resulting from intoxication is charged.[25] Convic-

14. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184 (unlawfully obtaining money from the state); People *v.* French, 32 Hun (N. Y.) 112; People *v.* New York Police Com'rs, 11 Hun (N. Y.) 403 (enticing girl to assignation house while off duty); People *v.* French, 3 Silv. Sup. (N. Y.) 335, 6 N. Y. Suppl. 431 (being caught in a compromising position with drunken woman); People *v.* McAdoo, 99 N. Y. Suppl. 949 (visiting disorderly house); People *v.* Robb, 16 N. Y. Suppl. 124 (indecent and wilful exposure of person to female); People *v.* McClave, 9 N. Y. Suppl. 263 (accepting bribe from saloon-keeper for making charge against him of lesser offense than that committed); People *v.* French, 60 How. Pr. (N. Y.) 377 [*affirmed* in 24 Hun 659, 12 N. Y. Wkly. Dig. 468] (accepting bribes from keeper of house of prostitution).

Necessity of previous conviction.— Under Laws (1873), c. 335, § 55, the New York police board cannot remove one on the charge of conduct unbecoming an officer, in that he swore falsely on trial of another before the board. He must first have been convicted of swearing falsely before a jury in an ordinary court of justice. People *v.* New York Police Com'rs, 20 Hun (N. Y.) 333. *Compare* People *v.* French, 32 Hun (N. Y.) 112.

15. People *v.* Bell, 4 N. Y. Suppl. 869.

16. Lindblom *v.* People, 116 Ill. App. 213 [*affirmed* in 215 Ill. 58, 74 N. E. 73].

17. Brownell *v.* Russell, 76 Vt. 326, 57 Atl. 103.

18. People *v.* Johnson, 10 N. Y. St. 404.

19. People *v.* Greene, 89 N. Y. App. Div. 296, 85 N. Y. Suppl. 866.

20. Moores *v.* State, 54 Nebr. 486, 74 N. W. 823.

Facts insufficient to show removal for political reasons.— In proceedings to test the validity of removal of police officers it appeared that ten were discharged on June 23, which was shortly after a municipal election; the order of discharge reciting that they had performed their duties, but were removed by the commission for want of funds. On June 30 one of the removed officers was appointed special policeman, and on August 2 four others were appointed as members of the force, and on September 2 two others were reappointed. There were no appointments made in place of the other officers removed. It was held insufficient to show that one of the officers was removed for political reasons, as prohibited by Portland City Charter (1898), §§ 99–101. Venable *v.* Portland Police Com'rs, 40 Oreg. 458, 67 Pac. 203.

21. Campbell *v.* Newark Police Com'rs, 71 N. J. L. 98, 58 Atl. 84. But see State *v.* Whitaker, 116 La. 947, 41 So. 218.

22. Marran *v.* Bordentown, (N. J. Sup. 1905) 61 Atl. 13; People *v.* French, 110 N. Y. 494, 18 N. E. 133; People *v.* French, 3 Silv. Sup. (N. Y.) 569, 7 N. Y. Suppl. 489; People *v.* Martin, 15 Misc. (N. Y.) 6, 36 N. Y. Suppl. 437 [*affirmed* in 149 N. Y. 621, 44 N. E. 1127]; People *v.* McLean, 1 Misc. (N. Y.) 463, 21 N. Y. Suppl. 625; People *v.* French, 18 N. Y. Suppl. 550; People *v.* MacLean, 13 N. Y. Suppl. 341; People *v.* French, 13 N. Y. Suppl. 337; People *v.* MacLean, 13 N. Y. Suppl. 225; People *v.* MacLean, 11 N. Y. Suppl. 486; People *v.* MacLean, 11 N. Y. Suppl. 307; People *v.* French, 10 N. Y. Suppl. 860; People *v.* MacLean, 10 N. Y. Suppl. 851; People *v.* French, 10 N. Y. Suppl. 792; People *v.* McClave, 10 N. Y. Suppl. 560; People *v.* French, 8 N. Y. Suppl. 874 [*affirmed* in 123 N. Y. 635, 25 N. E. 953]; People *v.* French, 8 N. Y. Suppl. 459. And see People *v.* Lewis, 111 N. Y. App. Div. 375, 97 N. Y. Suppl. 1057 [*affirmed* in 186 N. Y. 583, 79 N. E. 1113].

23. People *v.* French, 119 N. Y. 493, 23 N. E. 1058.

24. People *v.* French, 119 N. Y. 493, 23 N. E. 1058.

25. People *v.* French, 8 N. Y. Suppl. 874.

tion of the offense of intoxication before appointment is ground for removal under a statute prohibiting any person convicted of crime from being appointed to membership on the police force.[26]

(5) DEFENSES. The defenses may be arranged under three classes: (1) That the charges are not sufficient to suspend or remove;[27] (2) that the proof offered against him does not warrant such penalty;[28] and (3) that the appearances are misleading and the real facts of the case exonerate him from blame.[29] Where an officer is charged with committing a breach of the peace by drawing a pistol, and the evidence shows justification, a conviction on such a charge is illegal.[30] It is no defense that the offense was committed while the officer was only a probationer and before he had received his full appointment;[31] that he was off duty at the time of the misconduct;[32] that he made a mistake of judgment;[33] that a prosecution is pending before a magistrate;[34] that the charge was too serious for the board to consider;[35] or that the accused officer had an interest in the police fund.[36] Where a town police officer was not reëlected, but on mandamus was declared to be a member of the police department, a contention that a charge of misconduct dating after such failure of reëlection cannot be considered by the aldermen is without merit, as he was still a member of the force.[37] Where the offense charged is failure to report by telephone during the night as required, and returning to the station house drunk the next morning, testimony by the patrolman that he procured the liquor to relieve an attack of sickness is insufficient to excuse his conduct, as it was his duty to report the fact if he was ill.[38] So dismissal of a policeman for leaving his post will be confirmed, although he may have had a valid excuse therefor, if he failed to temporarily resign his duty to another member of the force, as required by a rule of the department, and gives no explanation of his neglect.[39]

(E) *Removal by Reduction of Force or Abolition of Office.* The office of a member of the police force may be abolished by the municipality,[40] or the membership of the police department reduced for economic reasons;[41] and in such case an officer may be dismissed from the service without a hearing and opportunity to show cause against the order of dismissal,[42] a resolution abolish-

26. People *v.* French, 102 N. Y. 583, 7 N. E. 913.

27. Matter of Taylor, 11 N. Y. Suppl. 189, 25 Abb. N. Cas. 143.

28. People *v.* MacLean, 11 N. Y. Suppl. 353.

29. People *v.* Martin, 143 N. Y. 407, 38 N. E. 460 [*affirming* 79 Hun 475, 29 N. Y. Suppl. 966].

30. Lamb *v.* Brunswick, 121 Ga. 345, 49 S. E. 275.

31. People *v.* Roosevelt, 23 N. Y. App. Div. 533, 48 N. Y. Suppl. 578.

32. People *v.* Bell, 8 N. Y. Suppl. 748; People *v.* French, 4 N. Y. Suppl. 222.

33. People *v.* McClave, 10 N. Y. Suppl. 561.

34. People *v.* Welles, 14 Misc. (N. Y.) 226, 35 N. Y. Suppl. 672.

35. Wellman *v.* Metropolitan Bd. of Police, 91 Mich. 427, 51 N. W. 1070.

36. Lazenby *v.* Elmira Bd. of Police, 76 N. Y. App. Div. 171, 78 N. Y. Suppl. 302.

37. Lowrey *v.* Central Falls, 23 R. I. 354, 50 Atl. 639.

38. People *v.* Lewis, 111 N. Y. App. Div. 375, 97 N. Y. Suppl. 1057 [*affirmed* in 186 N. Y. 583, 79 N. E. 1113].

39. People *v.* Tappen, 15 Misc. (N. Y.) 20, 36 N. Y. Suppl. 773 [*affirmed* in 151 N. Y. 620, 45 N. E. 1133].

40. Oldham *v.* Birmingham, 102 Ala. 357, 14 So. 793; McCann *v.* New Brunswick, 73 N. J. L. 161, 62 Atl. 191; Boylan *v.* Newark Police Com'rs, 58 N. J. L. 133, 32 Atl. 78; Meissner *v.* Boyle, 20 Utah 316, 58 Pac. 1110.

41. *Colorado.*— Hudson *v.* Denver, 12 Colo. 157, 20 Pac. 329.

Kentucky.— Neumeyer *v.* Krakel, 110 Ky. 624, 62 S. W. 518, 23 Ky. L. Rep. 190.

Missouri.— State *v.* Kansas City Police Com'rs, 80 Mo. App. 206 [*affirmed* in (1902) 71 S. W. 215].

Nebraska.— Moores *v.* State, 54 Nebr. 486, 74 N. W. 823; Lincoln *v.* Yeomans, 34 Nebr. 329, 51 N. W. 844.

New York.— Lazenby *v.* Elmira Bd. of Police, 76 N. Y. App. Div. 171, 78 N. Y. Suppl. 302.

Oregon.— Venable *v.* Portland Police Com'rs, 40 Oreg. 458, 67 Pac. 203.

See 36 Cent. Dig. tit. "Municipal Corporations," § 492.

Lack of funds to pay salaries is a good ground for reducing the force. Lincoln *v.* Yeomans, 34 Nebr. 329, 51 N. W. 844; Lazenby *v.* Elmira Bd. of Police, 76 N. Y. App. Div. 171, 78 N. Y. Suppl. 302.

42. State *v.* Kansas City Police Com'rs, 80 Mo. App. 206 [*affirmed* in (1902) 71 S. W. 215]; Moores *v.* State, 54 Nebr. 486, 74 N. W.

ing the office and causing the chief of police to notify the incumbent that he was discharged being effectual as a dismissal.[43] A dismissal by reason of reduction of the force or abolition of the office does not violate a rule that no member shall be removed except for cause,[44] or a rule requiring presentation of charges and a hearing;[45] nor do the veteran acts apply where an office is abolished in good faith.[46] It has been held, however, that the power to reduce the force cannot be exercised for the purpose of creating a vacancy and the appointment of some other person, but should be made in good faith.[47] On abolition of the office the right to salary ceases.[48]

(F) *Power to Take Testimony.* Provision is sometimes made for the taking of testimony by one member of a board having power of removal, to be reported to the board for final action,[49] and in such case the removal must be made by the board.[50] Under some provisions testimony is taken by a police committee of a city council which may remove upon the report of the committee,[51] or dismiss the proceedings on such report;[52] and under still others testimony is heard by the deputy police commissioner who reports the same and his finding thereon to his superior officer who has the power of removal.[53] A deputy police commissioner, before whom charges against a member of the police force is examined, need not make a written finding of guilt in order to give the police commissioner authority

823; Venable *v.* Portland Police Com'rs, 40 Oreg. 458, 67 Pac. 203; Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602.

43. Moores *v.* State, 4 Nebr. (Unoff.) 235, 93 N. W. 986.

44. Oldham *v.* Birmingham, 102 Ala. 357, 14 So. 793; Boylan *v.* Newark Police Com'rs, 58 N. J. L. 133, 32 Atl. 78; Lazenby *v.* Elmira Bd. of Police, 76 N. Y. App. Div. 171, 78 N. Y. Suppl. 302; Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602.

45. Moores *v.* State, 54 Nebr. 486, 74 N. W. 823; Venable *v.* Portland Police Com'rs, 40 Oreg. 458, 67 Pac. 203.

Nature of right.— The right given to an officer by the statute to a hearing and an opportunity to defend is manifestly a right to vindicate himself from an unjust accusation, and not a right to show that the revenues are sufficient to pay his salary, or that the public weal requires that his place be not abolished. Moores *v.* State, 54 Nebr. 486, 74 N. W. 823.

46. People *v.* York, 53 N. Y. App. Div. 429, 65 N. Y. Suppl. 1074.

47. People *v.* Schumaker, 27 La. Ann. 332, holding that authority to reduce the force did not authorize the discharge of an officer for the purpose of giving someone else his place. *Compare* Hudson *v.* Denver, 12 Colo. 157, 160, 20 Pac. 329 [*distinguishing* State *v.* Schumaker, *supra*], holding that where the council had power to reduce or increase the police force, whenever they considered it necessary, one discharged in pursuance of a resolution to reduce the force cannot complain because he was not reëmployed under another resolution adopted at the same meeting to increase the police force. The court said: "It is not for us to say that no exigency arose requiring a sudden and speedy increase of the police force; neither can we question the right of the councilmen to change their minds regarding the matter; nor is it our province to fix a period that must elapse after a reduction of the force before it may be lawfully increased. The presumption is that the city council acted honestly, and according to that which in their judgment was for the best interests of the city." It is difficult to see how any such presumption arises in this case. On the contrary these facts unexplained raise a conclusive presumption that the pretended reduction was a piece of political chicanery to enable the council to find places for men of its own choosing.

48. Oldham *v.* Birmingham, 102 Ala. 357, 14 So. 793.

49. People *v.* New York Police Com'rs, 99 N. Y. 676, 2 N. E. 151; People *v.* New York Bd. of Police, 20 Hun (N. Y.) 402; People *v.* New York Police Com'rs, 10 Hun (N. Y.) 106 [*affirmed* in 76 N. Y. 613]; People *v.* Robb, 1 Silv. Sup. (N. Y.) 448, 5 N. Y. Suppl. 869; People *v.* Howell, 16 N. Y. Suppl. 775; People *v.* New York, etc., Bridge, 7 N. Y. Suppl. 806.

50. People *v.* Robb, 1 Silv. Sup. (N. Y.) 448, 5 N. Y. Suppl. 869.

Failure to reduce evidence to writing how cured.— A failure to comply with rule 131 of the board of police commissioners of New York city in removing an officer from the force, where the trial of the charges against him was had before one commissioner only, and the testimony taken on such trial was not reduced to writing and submitted to the whole board, can be cured by a second judgment, confirming the first, made by the board in conformity with the rule. The first judgment is thus rendered effective. People *v.* French, 2 N. Y. St. 608.

51. Dodd *v.* Foster, 64 N. J. L. 370, 45 Atl. 802.

52. Marran *v.* Bordentown, (N. J. Sup. 1905) 61 Atl. 13.

53. People *v.* Partridge, 87 N. Y. App. Div. 573, 84 N. Y. Suppl. 487; People *v.* Partridge, 86 N. Y. App. Div. 310, 83 N. Y. Suppl. 705.

to remove.[54] Notwithstanding the term of the commissioner taking the testimony has ceased, the board of which he was a member may consider and act upon the evidence.[55] It is improper for two deputy commissioners to act alternately as accuser, witness, prosecutor, and judge;[56] but a commissioner who witnessed the transaction for which removal is sought, but who was not the complainant and did not testify as a witness, is not disqualified from taking testimony.[57] And the making of an order by a deputy police commissioner directing the captain to prefer charges against an officer does not disqualify him from taking evidence against the officer.[58]

(G) *Nature and Conduct of Hearing*—(1) IN GENERAL. The officer or board conducting a hearing need not be sworn in the absence of any statutory requirement to that effect.[59] While the proceedings are judicial in their nature,[60] they are not criminal proceedings.[61] An officer whose removal is sought is entitled to a fair trial and a reasonable opportunity to make his defense.[62] But strict conformity with the modes of procedure as in courts of law is not required,[63] and greater latitude in the reception and consideration of evidence is allowed.[64] Nor is the same accuracy in regard to rulings on evidence required as in courts of law.[65] Separate trials of several officers accused of receiving bribes may properly be refused where the money was charged to have been paid pursuant to a common purpose and understanding.[66] The accused has a right to examine witnesses and introduce evidence in his defense,[67] and is entitled to cross-examine witnesses introduced by the prosecution.[68] If no objection is raised on constitutional grounds the accused may be examined about the circumstances of the case before any case has been made against him.[69] Failure to administer the oath to witnesses against the accused does not vitiate the proceedings, where he makes

54. People *v.* Partridge, 180 N. Y. 237, 73 N. E. 4 [*reversing* 95 N. Y. App. Div. 633, 89 N. Y. Suppl. 1113, and *overruling* People *v.* Greene, 97 N. Y. App. Div. 404, 89 N. Y. Suppl. 1067].

55. People *v.* New York Police Com'rs, 98 N. Y. 332 [*reversing* 23 Hun 667, and *overruling* People *v.* New York Police Com'rs, 27 Hun 462]; People *v.* New York Police Com'rs, 31 Hun (N. Y.) 209.

56. People *v.* Greene, 96 N. Y. App. Div. 249, 89 N. Y. Suppl. 343.

57. People *v.* New York Police Com'rs, 10 Hun (N. Y.) 106 [*affirmed* in 76 N. Y. 613].

58. People *v.* Greene, 106 N. Y. App. Div. 230, 94 N. Y. Suppl. 477 [*affirmed* in 184 N. Y. 565, 76 N. E. 1103].

59. Doherty *v.* Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804.

60. Savannah *v.* Brown, 64 Ga. 229; People *v.* Jerome, 36 Misc. (N. Y.) 256, 73 N. Y. Suppl. 306.

61. Oesterreich *v.* Fowle, 132 Mich. 9, 92 N. W. 497; People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696; People *v.* Welles, 18 N. Y. App. Div. 132, 45 N. Y. Suppl. 713.

62. Ayers *v.* Newark, 49 N. J. L. 170, 6 Atl. 659.

63. Ayers *v.* Newark, 49 N. J. L. 170, 6 Atl. 659; Devault *v.* Camden, 48 N. J. L. 433, 5 Atl. 451; People *v.* McClave, 123 N. Y. 512, 25 N. E. 1047; People *v.* Peck, 73 N. Y. App. Div. 89, 76 N. Y. Suppl. 328.

Reason for rule.— The technical rules that have been judicially adopted with regard to inferior criminal prosecutions are not to be applied to these investigations, for while it is proper that proceedings to deprive persons of common rights for alleged crimes should be confined by somewhat strict limits, the removal of incompetent or ill-behaved officials from their exceptional positions of authority and responsibility should be easy and prompt, and no forms should be requisite which are not in themselves substantial safeguards of justice. Devault *v.* Camden, 48 N. J. L. 433, 5 Atl. 451.

64. People *v.* Peck, 73 N. Y. App. Div. 89, 76 N. Y. Suppl. 328.

65. People *v.* Roosevelt, 16 N. Y. App. Div. 364, 44 N. Y. Suppl. 1003 [*affirmed* in 155 N. Y. 662, 49 N. E. 1102].

66. People *v.* New York Police Com'rs, 84 Hun (N. Y.) 64, 32 N. Y. Suppl. 18 [*affirmed* in 148 N. Y. 757, 43 N. E. 988].

67. Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128.

The accused is not denied the right to examine witnesses where he merely inquires if he shall call certain witnesses and is told by the commissioners, on stating what he expects to prove by the witnesses, that they will do him no good, the witnesses not being present. People *v.* French, 3 Silv. Sup. (N. Y.) 312, 6 N. Y. Suppl. 213.

68. Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128.

69. People *v.* McClave, 123 N. Y. 512, 35 N. E. 1047 [*affirming* 10 N. Y. Suppl. 764], holding that an objection by the accused that commissioners ought to make out a case against him before he should be compelled to

no objection on that ground,[70] or where he admits the charges as to which they testify.[71] Nor can he object that his witnesses were not sworn where their testimony received the same consideration as if given under oath.[72] The fact that the police commissioner had before him the affidavits on which charges preferred against a patrolman were based in his investigation could not have prejudiced him, where the persons who made the affidavits were witnesses before the commissioner, and he had an opportunity to cross-examine them.[73]

(2) ADJOURNMENT AND POSTPONEMENT. The allowance of an adjournment is a matter within the discretion of the board or officer before whom the trial is had,[74] which cannot be reviewed unless such discretion has been abused.[75] Error in allowing an adjournment after examination of a few witnesses, to a day on which the witnesses examined were produced for cross-examination by the officer's counsel, and the officer produced and examined his own witnesses, cured an error in refusing the original request of the officer for an adjournment on the ground of the absence of his counsel and witnesses.[76] A postponement of a trial will not be granted for trivial causes.[77]

(3) RIGHT TO COUNSEL. Refusal of counsel on the trial of charges against a policeman was not formerly considered a denial of constitutional right;[78] but in later cases this holding was overruled, and his constitutional right vindicated.[79]

(H) *Evidence.* The record of a police officer cannot be considered for the purpose of determining his guilt as to the charges preferred against him, if it is not introduced in evidence and an opportunity given him to explain,[80] and if this is done the removal will be invalid, although there was abundant other evidence to sustain the charge.[81] Such record may, however, be considered for the purpose of fixing punishment.[82] In order that testimony of a member of the detective force

testify is directed to the order of examination and does not raise the question that the accused is compelled to criminate himself. And see People *v.* French, 8 N. Y. Suppl. 456.

70. People *v.* McAdoo, 184 N. Y. 304, 77 N. E. 260.

71. People *v.* Moss, 38 N. Y. App. Div. 630, 56 N. Y. Suppl. 1032, 34 N. Y. App. Div. 475, 54 N. Y. Suppl. 262.

72. People *v.* Moss, 38 N. Y. App. Div. 630, 56 N. Y. Suppl. 1032, 34 N. Y. App. Div. 475, 54 N. Y. Suppl. 262.

73. People *v.* Greene, 101 N. Y. App. Div. 33, 91 N. Y. Suppl. 803.

74. People *v.* Greene, 96 N. Y. App. Div. 1, 88 N. Y. Suppl. 1060 [*affirmed* in 181 N. Y. 554, 74 N. E. 1123].

75. People *v.* Greene, 96 N. Y. App. Div. 1, 88 N. Y. Suppl. 1060 [*affirmed* in 181 N. Y. 554, 74 N. E. 1123] (holding that on the trial of a member of the police force of the city of New York before a police commissioner the refusal to grant an adjournment on account of the absence of a material witness is not an abuse of discretion, where it is shown that several adjournments had been had, owing to the absence of the same witness, and there was testimony of a physician who had attended the absent witness to the effect that the illness of the witness was permanent, and that it would endanger his life to examine him either in court or at his residence); People *v.* Martin, 89 Hun (N. Y.) 373, 35 N. Y. Suppl. 377 (holding that refusal of the police board to adjourn a hearing of charges against a policeman, to enable him to procure witnesses, is not an abuse of discretion, where he did not state the names of any persons whom he desired to call, and was not sworn in his own behalf, and made no defense, and five days afterward filed an affidavit stating the names of persons by whom he testified that he could dispute the charge).

76. People *v.* Greene, 106 N. Y. App. Div. 230, 94 N. Y. Suppl. 477 [*affirmed* in 184 N. Y. 565, 76 N. E. 1103].

77. People *v.* Webster, 98 N. Y. App. Div. 581, 90 N. Y. Suppl. 723, a half degree elevation of temperature in the system of the accused.

78. People *v.* Police Com'rs, 31 Hun (N. Y.) 209.

79. People *v.* Greenbush Police Com'rs, 58 Hun (N. Y.) 224, 11 N. Y. Suppl. 841 [*affirmed* in 126 N. Y. 623, 27 N. E. 410]; People *v.* Hannan, 56 Hun (N. Y.) 469, 10 N. Y. Suppl. 71 [*affirmed* in 125 N. Y. 691, 26 N. E. 751].

80. People *v.* York, 52 N. Y. App. Div. 295, 65 N. Y. Suppl. 130; People *v.* Roosevelt, 2 N. Y. App. Div. 498, 37 N. Y. Suppl. 1083; People *v.* Roosevelt, 1 N. Y. App. Div. 577, 37 N. Y. Suppl. 488.

81. People *v.* York, 52 N. Y. App. Div. 295, 65 N. Y. Suppl. 130.

82. People *v.* Roosevelt, 13 N. Y. App. Div. 404, 43 N. Y. Suppl. 73 [*affirmed* in 153 N. Y. 646, 47 N. E. 1110]; People *v.* Roosevelt, 2 N. Y. App. Div. 536, 38 N. Y. Suppl. 27; People *v.* Roosevelt, 2 N. Y. App. Div. 498, 37 N. Y. Suppl. 1083; People *v.* Roosevelt, 40 N. Y. Suppl. 1147 [*affirmed* in 168 N. Y. 488, 61 N. E. 783].

may be considered, corroboration thereof is unnecessary.[83] Where the officer is charged with misconduct at a voting place, evidence as to his conduct during the entire day is admissible as tending to show whether the alleged misconduct was a mistake or was wilful and intentional.[84] And on a charge against a police officer for neglect of duty in regard to disorderly houses, the general reputation of a house is admissible.[85] As in trials for criminal offenses the judgment removing a police officer must be based on competent evidence,[86] but a conviction may be based on circumstantial evidence.[87] And to reach a conclusion warranting a removal the tribunal hearing the complaint may disbelieve the testimony of the accused,[88] and no evidence is necessary where the officer pleads guilty.[89] In the notes hereto are set out a number of decisions in which it was held that the evidence was or was not sufficient to authorize a removal.[90]

83. People *v.* Roosevelt, 2 N. Y. App. Div. 498, 37 N. Y. Suppl. 1083.

84. People *v.* Hayden, 7 Misc. (N. Y.) 278, 27 N. Y. Suppl. 881.

85. People *v.* Roosevelt, 16 N. Y. App. Div. 364, 44 N. Y. Suppl. 1003 [*affirmed* in 155 N. Y. 662, 49 N. E. 1102].

86. People *v.* Roosevelt, 6 N. Y. App. Div. 382, 39 N. Y. Suppl. 640.

Thus a removal cannot be based on hearsay evidence not under oath, consisting of a statement said to have been made by a burglar. People *v.* Roosevelt, 6 N. Y. App. Div. 382, 39 N. Y. Suppl. 640.

87. People *v.* Strauss, 3 Misc. (N. Y.) 617, 23 N. Y. Suppl. 295 [*affirmed* in 143 N. Y. 645, 37 N. E. 823].

88. People *v.* Peck, 73 N. Y. App. Div. 89, 76 N. Y. Suppl. 328.

89. People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696.

90. **Evidence held sufficient to authorize removal** — *For neglect of duty.*— People *v.* Greene, 106 N. Y. App. Div. 230, 94 N. Y. Suppl. 477 [*affirmed* in 184 N. Y. 565, 76 N. E. 1103]; People *v.* Greene, 98 N. Y. App. Div. 620, 90 N. Y. Suppl. 194. Such as intoxication (People *v.* French, 110 N. Y. 494, 18 N. E. 133, 123 N. Y. 635, 25 N. E. 953; People *v.* French, 52 Hun (N. Y.) 90, 5 N. Y. Suppl. 55; People *v.* French, 3 Silv. Sup. (N. Y.) 569, 7 N. Y. Suppl. 489; People *v.* Martin, 15 Misc. (N. Y.) 6, 36 N. Y. Suppl. 437 [*affirmed* in 149 N. Y. 621, 44 N. E. 1127]); People *v.* French, 18 N. Y. Suppl. 550; People *v.* French, 13 N. Y. Suppl. 337; People *v.* MacLean, 13 N. Y. Suppl. 225 [*following* People *v.* French, 119 N. Y. 493, 23 N. E. 1058]; People *v.* MacLean, 11 N. Y. Suppl. 486; People *v.* French, 11 N. Y. Suppl. 346; People *v.* McLean, 11 N. Y. Suppl. 307; People *v.* McClave, 10 N. Y. Suppl. 560; People *v.* French, 10 N. Y. Suppl. 217; People *v.* French, 8 N. Y. Suppl. 459 [*affirmed* in 123 N. Y. 636, 25 N. E. 415]; People *v.* French, 4 N. Y. Suppl. 172); absence from post without permission (People *v.* York, 169 N. Y. 578, 61 N. E. 1133 [*affirming* 58 N. Y. App. Div. 621, 68 N. Y. Suppl. 1077]; People *v.* Martin, 9 N. Y. App. Div. 531, 41 N. Y. Suppl. 578; People *v.* McClave, 13 N. Y. Suppl. 340; People *v.* MacLean, 11 N. Y. Suppl. 110; People *v.* Robb, 9 N. Y. Suppl. 831; People *v.* New York, etc., Bridge, 7 N. Y. Suppl. 806); failure to make arrest (People *v.* Roosevelt, 1 N. Y. App. Div. 434, 37 N. Y. Suppl. 113 [*affirmed* in 151 N. Y. 675, 46 N. E. 1150]; People *v.* Bell, 8 N. Y. Suppl. 748); or lying down while on patrol duty (People *v.* MacLean, 14 N. Y. Suppl. 77; People *v.* Crimmins, 1 N. Y. Suppl. 656).

Unprovoked clubbing of citizen.— People *v.* MacLean, 15 N. Y. Suppl. 219; People *v.* Bell, 10 N. Y. Suppl. 829.

Accepting gratuities without making report to police captain as required by rules.— People *v.* Johnson, 10 N. Y. St. 404.

Making false charge about officer.— People *v.* Roosevelt, 2 N. Y. App. Div. 536, 38 N. Y. Suppl. 27 [*affirmed* in 153 N. Y. 657, 47 N. E. 1110].

Criminal or immoral conduct.— People *v.* McAdoo, 99 N. Y. Suppl. 949; People *v.* McClave, 9 N. Y. Suppl. 263.

Deceiving police surgeon as to sickness.— People *v.* Yonkers Bd. of Police, 121 N. Y. 716, 29 N. E. 34 [*reversing* 55 Hun 445, 8 N. Y. Suppl. 640].

Making or circulating false charges or reports about superior officer.— Tibbs *v.* Atlanta, 125 Ga. 18, 53 S. E. 811; People *v.* Partridge, 87 N. Y. App. Div. 573, 84 N. Y. Suppl. 487.

Devoting part of time to some other calling.— People *v.* Bell, 10 N. Y. Suppl. 829.

Conduct unbecoming officer.— People *v.* Roosevelt, 13 N. Y. App. Div. 404, 43 N. Y. Suppl. 73 [*affirmed* in 153 N. Y. 646, 47 N. E. 1110].

Evidence held insufficient to authorize removal — *Neglect of duty.*— People *v.* Greene, 179 N. Y. 253, 72 N. E. 99 [*reversing* 94 N. Y. App. Div. 287, 87 N. Y. Suppl. 1017]. Such as intoxication while on duty (People *v.* Moss, 38 N. Y. App. Div. 633, 56 N. Y. Suppl. 951; People *v.* Roosevelt, 26 N. Y. App. Div. 183, 49 N. Y. Suppl. 975; People *v.* Welles, 88 Hun (N. Y.) 190, 34 N. Y. Suppl. 412; People *v.* MacLean, 60 N. Y. Super. Ct. 210, 70 N. Y. Suppl. 475 [*affirmed* in 133 N. Y. 527, 30 N. E. 1148]; People *v.* French, 11 N. Y. Suppl. 181; People *v.* McClave, 10 N. Y. Suppl. 441); absence from post of duty without leave (People *v.* Magee, 57 N. Y. App. Div. 281, 67 N. Y. Suppl. 906; People *v.* Roosevelt, 15 N. Y. App. Div. 401, 44 N. Y. Suppl.

(I) *Findings, Judgment, or Order and Record.* In order to render valid a removal of an officer there must be a finding that he was guilty of the charges preferred,[91] and it must be placed on the record.[92] The grounds on which an officer is removed must be stated in the judgment or order of removal.[93] But the judgment need not have the exact accuracy of the record of a criminal court;[94] and where there are several charges there need not be separate judgments on each charge. A finding of guilt on one charge is sufficient to warrant punishment, irrespective of other charges.[95]

(J) *New Trial.* Power is sometimes conferred by statute to grant new trials, the power to be exercised at the discretion of the tribunal if rules on that subject have not been adopted, and, if rules have been adopted, then to be exercised under the terms thereof.[96] An officer removed from office is not entitled to a new trial as a matter of right, in the absence of some provision therefor by statute or rule, and it is properly denied where there is a delay of several years in applying therefor.[97] An order granting a new trial is generally final and cannot be set aside unless inadvertently made; certainly not in the absence of legal cause.[98] Where the board, outside of its proper power, revokes an order for a new trial which it has legally granted, mandamus will lie to it, commanding it to proceed to a new trial of the case.[99]

(K) *Review* — (1) IN GENERAL. The determination of an officer or tribunal vested with the power of removal cannot be attacked in a collateral proceeding,[1]

102 [*affirmed* in 153 N. Y. 689, 48 N. E. 1106]; People *v.* Roosevelt, 7 N. Y. App. Div. 610, 40 N. Y. Suppl. 119; People *v.* Welles, 5 N. Y. App. Div. 523, 39 N. Y. Suppl. 50; People *v.* Martin, 5 N. Y. App. Div. 217, 39 N. Y. Suppl. 74; People *v.* MacLean, 57 Hun (N. Y.) 141, 10 N. Y. Suppl. 803); sitting on a barrel instead of walking his beat (Matter of Koch, 91 N. Y. App. Div. 194, 86 N. Y. Suppl. 459); failure to deliver promptly effects taken from the person of a dead man (People *v.* Roosevelt, 7 N. Y. App. Div. 181, 39 N. Y. Suppl. 1101) or permitting house of prostitution to exist within his district (People *v.* Greene, 92 N. Y. App. Div. 243, 87 N. Y. Suppl. 172).

Unwarranted assault on citizen.— People *v.* MacLean, 8 N. Y. Suppl. 511.

Larceny.— People *v.* Partridge, 83 N. Y. App. Div. 262, 82 N. Y. Suppl. 109; People *v.* Welles, 89 Hun (N. Y.) 96, 35 N. Y. Suppl. 1000.

Conduct unbecoming an officer.— People *v.* New York Police Dept., 72 N. Y. 415.

Immoral conduct.— People *v.* Police Com'rs, 13 N. Y. App. Div. 69, 43 N. Y. Suppl. 118.

Accepting bribes.— People *v.* Partridge, 95 N. Y. App. Div. 323, 88 N. Y. Suppl. 657; Matter of Cross, 85 Hun (N. Y.) 343, 32 N. Y. Suppl. 933.

Violation of rule forbidding use of profane language while on duty.— Lamb *v.* Brunswick, 121 Ga. 345, 49 S. E. 275.

False statement to superior officer with intent to deceive.— People *v.* Greene, 92 N. Y. App. Div. 243, 87 N. Y. Suppl. 172; People *v.* Partridge, 86 N. Y. App. Div. 310, 83 N. Y. Suppl. 705.

Criminal and immoral conduct.— People *v.* York, 35 N. Y. App. Div. 430, 54 N. Y. Suppl. 835.

Brawling.— People *v.* Martin, 41 N. Y. Suppl. 974.

Insufficiency of evidence to show acquiescence in removal.— Larson *v.* St. Paul, 83 Minn. 473, 86 N. W. 459.

91. State *v.* Police Com'rs, 109 La. 369, 33 So. 372; Cooper *v.* Jersey City, 53 N. J. L. 544, 22 Atl. 123; People *v.* Grady, 26 N. Y. App. Div. 592, 50 N. Y. Suppl. 424. But see O'Brien *v.* Pawtucket, 20 R. I. 49, 37 Atl. 302, 530, holding that a decision removing an officer rendered by a tribunal vested with that power necessarily implies a finding that the charges were true and is sufficient without an express finding to that effect.

Inconsistent findings.— Where there is a finding that the officer has done a specific act forbidden by the rules of the police department, the effect of such finding cannot be controlled by a further finding that he is not guilty. Brownell *v.* Russell, 76 Vt. 326, 57 Atl. 103.

92. State *v.* New Orleans Police Com'rs, 109 La. 369, 33 So. 372; Cooper *v.* Jersey City, 53 N. J. L. 544, 22 Atl. 123.

93. Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128; Selby *v.* Portland, 14 Oreg. 243, 12 Pac. 377, 58 Am. Rep. 307.

94. People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696.

95. People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696.

96. State *v.* New Orleans Police Bd., 51 La. Ann. 747, 25 So. 637.

97. People *v.* York, 43 N. Y. App. Div. 138, 59 N. Y. Suppl. 333.

98. State *v.* New Orleans Police Bd., 51 La. Ann. 747, 25 So. 637.

99. State *v.* New Orleans Police Bd., 51 La. Ann. 747, 25 So. 637.

1. Doherty *v.* Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804.

and while it is sometimes made reviewable on appeal by charter or general statutory provision,[2] no appeal lies in the absence of statutory authorization,[3] and *a fortiori* where the charter expressly declares that the determination shall not be appealable.[4] Neither can such determination be reviewed on application for mandamus. While a subordinate body vested with power to determine a question of fact can be compelled to determine the fact, it cannot be directed to decide in a particular way, however clearly it may be made to appear what the decision ought to be.[5] As is shown in another treatise in the Encyclopedia of Law and Procedure, certiorari lies to review the determination of tribunals or officers empowered to proceed in a summary way, or in a mode unknown to the common law, where no method of review is specially provided,[6] and this is accordingly the proper remedy for reviewing a judgment or order removing a police officer, unless some other method of review is provided by statute.[7]

(2) APPEAL. Where a statute provides that any officer removed may appeal to a judge of the superior court who may hear the cause and order such judgment as the facts shall warrant, a judgment of removal will be set aside only when some essential formality has been omitted, or when the officer exercising the power of removal has acted arbitrarily. It is no ground for reversal that the commissioner was mistaken in his conclusions.[8] On appeal to a court of last resort from a judgment of a court on certiorari to review the proceedings of a tribunal which removed an officer from the police force, only questions of law may be considered, and it is only where there is no evidence to sustain the adjudication of the tribunal that a review of the proceedings may be had.[9]

(3) CERTIORARI — (a) TIME FOR COMMENCING PROCEEDINGS. In the absence of any statute limiting the time in which application for a writ may be made, due diligence is necessary; and if the applicant delays for over a year the writ will be dismissed.[10] And where the time for making application is prescribed by statute, a writ will be dismissed if the application is not made within the time prescribed and no excuse is shown therefor.[11] The time fixed by statute commences to run against the review of a refusal of the police commissioners to reconsider their action in accepting the resignation of a policeman, where the proceedings terminating in such refusal were instituted in due time, from the date of the refusal to reconsider, and not from the date of accepting the resignation.[12]

(b) PETITION. An allegation, in a petition for certiorari to review the action of the police commissioner in removing relator as patrolman, that relator is informed and believes that certain affidavits were considered by respondent, where the source of information and grounds of belief are not disclosed, is not an allegation of fact which requires a denial.[13]

(c) RETURN. On certiorari to review a judgment removing a police officer, the

2. See Pierce's Appeal, 78 Conn. 666, 63 Atl. 161.

3. Donahue *v.* Cumberland, 25 R. I. 79, 54 Atl. 933.

4. Nolan *v.* New Orleans, 10 La. Ann. 106.

5. People *v.* MacLean, 62 Hun (N. Y.) 42, 16 N. Y. Suppl. 401.

6. See CERTIORARI, 6 Cyc. 738, 739.

7. *Georgia.*— Gill *v.* Brunswick, 118 Ga. 85, 44 S. E. 830; Savannah *v.* Brown, 64 Ga. 229.

Illinois.— Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

New Jersey.— See State *v.* Millville, 53 N. J. L. 368, 21 Atl. 570; State *v.* Millville, 53 N. J. L. 362, 21 Atl. 568.

New York.— People *v.* Metropolitan Police Bd., 3 Abb. Dec. 488, 16 How. Pr. 115; People *v.* Greene, 92 N. Y. App. Div. 243, 87 N. Y. Suppl. 172; People *v.* Metropolitan Police Dist., 26 Barb. 481, 6 Abb. Pr. 162.

Rhode Island.— Donahue *v.* Cumberland, 25 R. I. 79, 54 Atl. 933.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 504, 505.

8. Pierce's Appeal, 78 Conn. 666, 63 Atl. 161.

9. People *v.* French, 123 N. Y. 636, 25 N. E. 415 [*affirming* 8 N. Y. Suppl. 459].

10. Glori *v.* Newark Police Com'rs, 72 N. J. L. 131, 60 Atl. 47.

11. People *v.* New York Police Com'rs, 24 Hun (N. Y.) 284.

12. People *v.* Martin, 82 Hun (N. Y.) 1, 30 N. Y. Suppl. 1107.

13. People *v.* Greene, 101 N. Y. App. Div. 33, 91 N. Y. Suppl. 803.

return should state specifically just what the board considered in determining the charge.[14] It should state only the proceedings to be reviewed.[15] The courts have power to permit the amendment of a return in furtherance of justice.[16] Although a return is defective in not setting out the rule for violation of which plaintiff was removed, the writ will nevertheless be dismissed where it appears that he wilfully refused obedience of orders which the police board was expressly empowered to make.[17]

(d) Scope of Review — aa. *In General.* In the absence of statute providing otherwise, the only questions to be determined on certiorari for review of an order of judgment removing a police officer are whether the officer or inferior tribunal exercising the power of removal had jurisdiction to act, and whether in acting it exceeded its jurisdiction or failed to proceed according to the essential requirements of the law,[18] and these questions are to be determined on the face of the record. Matters not appearing thereon are not to be considered.[19] The court has power to review a removal when the proceedings are not in accordance with the procedure prescribed by statute.[20] So it is ground for reversal that the vote of the officer presiding over the tribunal which conducted the hearing and which would have changed the result was improperly ignored as illegal,[21] that witnesses against the officer are not sworn,[22] that the statutory requirement in respect of notice was not complied with,[23] that the charges were not sufficiently specific,[24] that matters were considered which were not introduced in evidence,[25] that incompetent evidence was admitted,[26] or that evidence for the accused was

14. People *v.* Roosevelt, 2 N. Y. App. Div. 498, 37 N. Y. Suppl. 1083. And see People *v.* Martin, 17 N. Y. App. Div. 555, 45 N. Y. Suppl. 577 [*affirmed* in 154 N. Y. 775, 49 N. E. 1102].

15. People *v.* Troy Police Com'rs, 55 How. Pr. (N. Y.) 454, holding that where an officer is removed without presentation of written charges, after-occurring events cannot be made a part of the return.

16. People *v.* York, 51 N. Y. App. Div. 502, 64 N. Y. Suppl. 736, holding that on certiorari to compel the reinstatement of a police officer dismissed after trial on charges before the police commissioners, for invalidity of the proceedings, defendants were entitled to amend their return by alleging that relator was absent from the force without leave for five days before the trial, which absence would suspend him by operation of law, since it would be idle to review the proceedings for dismissal, if relator was no longer a member of the force.

17. People *v.* Sague, 68 N. Y. App. Div. 643, 74 N. Y. Suppl. 161.

18. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

19. Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

20. People *v.* Peck, 73 N. Y. App. Div. 89, 76 N. Y. Suppl. 378.

21. Asbell *v.* Brunswick, 80 Ga. 503, 5 S. E. 500.

22. People *v.* New York Police Com'rs, 155 N. Y. 40, 49 N. E. 257 [*reversing* 12 N. Y. App. Div. 628, 42 N. Y. Suppl. 1131]; People *v.* York, 73 N. Y. App. Div. 445, 77 N. Y. Suppl. 43 [*affirmed* in 173 N. Y. 610, 66 N. E. 1114].

Where it does not affirmatively appear from the return to the writ that the witnesses against the officer were not sworn it will be presumed that they were. People *v.* Moss, 34 N. Y. App. Div. 475, 54 N. Y. Suppl. 262. And see People *v.* Roosevelt, 7 N. Y. App. Div. 308, 40 N. Y. Suppl. 117.

23. People *v.* Metropolitan Board of Police, 3 Abb. Dec. (N. Y.) 488, 16 How. Pr. 115.

24. People *v.* Welles, 18 N. Y. App. Div. 132, 45 N. Y. Suppl. 713, holding, however, that this objection was waived unless raised before the tribunal holding the trial. See also to the same effect Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

25. People *v.* York, 50 N. Y. App. Div. 359, 64 N. Y. Suppl. 2.

Evidence admissible for some purposes and inadmissible for others. — A decision of the police board dismissing a policeman will not be disturbed merely because the case shows that the policeman's record was before the board at some time during the proceeding, where it does not affirmatively appear that such record was improperly used, since an officer's record may properly be considered for the purpose of determining the punishment which ought to be inflicted, although it is not admissible as bearing on the question of the officer's guilt or innocence. People *v.* Roosevelt, 5 N. Y. App. Div. 328, 39 N. Y. Suppl. 290.

26. See People *v.* Hayden, 16 N. Y. Suppl. 98, holding, however, that a decision dismissing a policeman will not be disturbed on the ground that a commissioner received in evidence an envelope containing relator's previous record on the force, if no objections are taken at the time and it does not appear that relator was not allowed to read its contents.

Where the evidence was such as to leave no doubt of relator's guilt in the mind of an impartial person, and the police commissioner

improperly rejected.[27] So where the witnesses against the accused, after giving part of their testimony, did not appear to complete it and could not afterward be found, and the officer did not call any witnesses because the commissioner stated that he would recommend to the board that the testimony be stricken out and that he did not desire to hear any further testimony, but such testimony was not stricken out, either because the commissioner did not recommend or because the board overruled him and the officer was not present at the hearing before the board, the judgment will be reversed.[28]

bb. *Matters Within Discretion of Officer or Tribunal Having Power of Removal.* Acts done in the exercise of the discretion vested in the officer or tribunal before whom the hearing is had are not reviewable except in a clear case of abuse of discretion. It has therefore been held that the courts will not interfere on the ground that the punishment inflicted is too severe.[29] So the refusal of an adjournment will not be ground for reversal in the absence of an abuse of discretion.[30] In case there has been an abuse of discretion in refusing an adjournment the judgment will be reversed.[31]

cc. *Bias or Prejudice.* Where the power of removal is vested in a single officer bias or prejudice has been held not a ground for removal;[32] but where the trial is had before a board and there is a sufficient number of impartial commissioners to pass upon the case, but one of them is absent, and his place is filled by a commissioner who has a personal grievance against the accused inseparably connected with the charge under consideration, the action of the board in dismissing the accused is irregular, and will be annulled.[33]

(4) Evidence. In the absence of some statute authorizing or requiring it, the court will not review the evidence to ascertain whether the judgment is war-

who tried relator certified that, in determining guilt or innocence, he had not considered a letter written by prosecutor's attorney after submission of the cause, informing him of subsequent facts, relator was not entitled to a reversal because of the sending of such letter. People *v.* Greene, 97 N. Y. App. Div. 502, 90 N. Y. Suppl. 162 [*reversed* on other grounds in 181 N. Y. 308, 73 N. E. 1111].

27. People *v.* French, 51 Hun (N. Y.) 427, 3 N. Y. Suppl. 841.

What does not amount to exclusion of evidence.— At the close of a proceeding before the trial commissioner, leading to relator's dismissal from the police force, it was stated on behalf of relator that two or three citizens had given their names to him, whom he could get if necessary. Their names were not stated nor the facts to which they would testify, nor was any effort shown to procure their attendance, nor any application made for an adjournment. The trial commissioner then remarked that he did not think it necessary to get them. It was held that this casual remark was not a ruling, and that the facts did not indicate any deprivation of rights. People *v.* Roosevelt, 25 N. Y. App. Div. 580, 49 N. Y. Suppl. 897.

28. People *v.* Martin, 17 N. Y. App. Div. 555, 45 N. Y. Suppl. 577 [*affirmed* in 154 N. Y. 775, 49 N. E. 1102].

29. People *v.* French, 119 N. Y. 502, 23 N. E. 1061; People *v.* Greene, 96 N. Y. App. Div. 1, 88 N. Y. Suppl. 1060 [*affirmed* in 181 N. Y. 554, 74 N. E. 1123]; People *v.* Greene, 94 N. Y. App. Div. 287, 87 N. Y. Suppl. 1017 [*reversed* on other grounds in 179 N. Y. 253, 72 N. E. 99]; People *v.* York, 53 N. Y. App. Div. 336, 65 N. Y. Suppl. 696; People *v.* Roosevelt, 7 N. Y. App. Div. 308, 40 N. Y. Suppl. 117; People *v.* French, 52 Hun (N. Y.) 90, 5 N. Y. Suppl. 55; People *v.* Tappen, 15 Misc. (N. Y.) 20, 36 N. Y. Suppl. 773 [*affirmed* in 151 N. Y. 620, 45 N. E. 1133]; People *v.* McClave, 10 N. Y. Suppl. 561; People *v.* Bell, 8 N. Y. Suppl. 748.

30. People *v.* New York Police Com'rs, 84 Hun (N. Y.) 64, 32 N. Y. Suppl. 18 [*affirmed* in 148 N. Y. 757, 43 N. E. 988]. And see People *v.* Webster, 98 N. Y. App. Div. 581, 90 N. Y. Suppl. 723, holding that on certiorari to review a refusal of the commissioner to postpone the trial of a police officer, he cannot question the good faith and fairness of a physician called and offered by him to prove his cause for postponement, on the ground that the physician was an appointee of the commissioner.

31. People *v.* Webster, 98 N. Y. App. Div. 581, 90 N. Y. Suppl. 723; People *v.* Martin, 13 Misc. (N. Y.) 21, 33 N. Y. Suppl. 1000, where it was clearly proved that the policeman was too ill to attend trial.

Waiver of objection.— On review of the refusal of a commissioner to postpone a trial, the fact that relator has in fact been sick may not be considered, where no evidence thereof was given before the commissioner. People *v.* Webster, 98 N. Y. App. Div. 581, 90 N. Y. Suppl. 723.

32. People *v.* Elmendorf, 51 N. Y. App. Div. 173, 64 N. Y. Suppl. 775, 57 N. Y. App. Div. 340, 68 N. Y. Suppl. 54 [*affirmed* in 168 N. Y. 675, 61 N. E. 1133].

33. People *v.* Roosevelt, 23 N. Y. App. Div. 533, 48 N. Y. Suppl. 578.

ranted thereby.[34] This rule, however, has been materially modified by special statutory provision in some jurisdictions. Thus in New Jersey it is made the duty of the court in reviewing the proceedings of any special statutory tribunal to determine disputed questions of fact as well as of law.[35] Under this statute the court will not review the evidence if there be any evidence to justify a conviction.[36] It is sufficient that the evidence, whether weak or strong, forms a rational basis for judgment.[37] So by the express provisions of the New York code (Code of Civil Procedure, section 2140) it is made the duty of the court on certiorari to review the judgment removing an officer, to determine the sufficiency of the evidence.[38] The statute, however, limits the review to a determination of whether there was competent proof of the facts to justify conviction, and, if so, whether such a preponderance of the evidence was against the decision that a similar verdict of a jury would be set aside as against the weight of the evidence.[39] And under this statute a judgment of removal will not be disturbed unless so clearly against the weight of the evidence as would require a verdict to be set aside.[40] Judgment will not be disturbed where the evidence if believed would support a conviction,[41] where the evidence is not controverted,[42] or where upon the whole evidence the jury might have found the accused guilty;[43] not because there is a conflict in the evidence,[44] unless the preponderance of proof against their conclusion is so great as to warrant the belief that it was the result of passion, prejudice, or mistake on the part of the members of the tribunal;[45] nor because it is doubtful that the accused was guilty.[46] So the question of the credi-

34. See Joyce *v.* Chicago, 216 Ill. 466, 75 N. E. 184.

35. 1 N. J. Gen. St. p. 370, § 18.

36. Marran *v.* Bordentown, (N. J. Sup. 1905) 61 Atl. 13.

37. Alcutt *v.* Trenton Police Com'rs, 66 N. J. L. 173, 48 Atl. 1006 [*affirmed* in 67 N. J. L. 351, 51 Atl. 1108]; Reilly *v.* Jersey City, 64 N. J. L. 508, 45 Atl. 778; Cavanagh *v.* Hoboken Police Com'rs, 59 N. J. L. 412, 35 Atl. 793.

38. People *v.* New York, etc., Bridge, 1 N. Y. App. Div. 186, 37 N. Y. Suppl. 168.

39. People *v.* Greene, 98 N. Y. App. Div. 620, 90 N. Y. Suppl. 194; People *v.* French, 15 N. Y. St. 108.

When removal annulled.— When a police officer is charged with intoxication, and the evidence against him consists of certain symptoms, observed by a police surgeon who has examined him, and the inferences drawn by the surgeon from such symptoms, but it is made to appear that the appearances relied on to establish intoxication arose from other conditions, constituting no offense, defendant is entitled to an acquittal, and, if removed, to reinstatement. People *v.* Roosevelt, 19 N. Y. App. Div. 253, 46 N. Y. Suppl. 175.

40. People *v.* New York Police Com'rs, 93 N. Y. 97; People *v.* Greene, 106 N. Y. App. Div. 230, 94 N. Y. Suppl. 477 [*affirmed* in 184 N. Y. 565, 76 N. E. 1103]; People *v.* Greene, 96 N. Y. App. Div. 1, 88 N. Y. Suppl. 1060 [*affirmed* in 181 N. Y. 554, 74 N. E. 1123]; People *v.* Roosevelt, 16 N. Y. App. Div. 331, 44 N. Y. Suppl. 655; People *v.* MacLean, 13 N. Y. Suppl. 685. See also People *v.* Partridge, 95 N. Y. App. Div. 323, 88 N. Y. Suppl. 657; People *v.* Roosevelt, 26 N. Y. App. Div. 183, 49 N. Y. Suppl. 975; People *v.* Roosevelt, 22 N. Y. App. Div. 626, 627, 47 N. Y. Suppl. 806, 776.

Must be clearly against the weight of evidence.— To warrant interference with a judgment of the tribunal removing an officer it must be clearly against the weight of the evidence. People *v.* York, 35 N. Y. App. Div. 430, 54 N. Y. Suppl. 835; People *v.* Tappen, 15 Misc. (N. Y.) 23, 36 N. Y. Suppl. 435 [*affirmed* in 153 N. Y. 658, 47 N. E. 1110]; People *v.* Hayden, 7 Misc. (N. Y.) 278, 27 N. Y. Suppl. 881.

Applications of rule.— The determination of the police commissioner imposing the highest penalty on a policeman on four findings, by the deputy commissioner, of misconduct, will be reversed, and a new trial directed, the evidence being insufficient to sustain two of the findings, and the other two resting on the oath of a single witness, against the denial of the officer, who had been a member of the police force for thirty-four years, with a good record. People *v.* Partridge, 86 N. Y. App. Div. 310, 83 N. Y. Suppl. 705.

41. People *v.* Partridge, 88 N. Y. App. Div. 60, 84 N. Y. Suppl. 779; People *v.* Robb, 10 N. Y. Suppl. 867.

42. People *v.* Yonkers Board of Police, 121 N. Y. 716, 24 N. E. 934 [*reversing* 55 Hun 445, 8 N. Y. Suppl. 640]; People *v.* French, 9 N. Y. Suppl. 262.

43. People *v.* MacLean, 11 N. Y. Suppl. 311.

44. People *v.* Roosevelt, 38 N. Y. App. Div. 635, 57 N. Y. Suppl. 11; People *v.* Martin, 28 N. Y. App. Div. 73, 50 N. Y. Suppl. 897.

45. People *v.* Martin, 28 N. Y. App. Div. Div. 73, 50 N. Y. Suppl. 897.

46. People *v.* MacLean, 12 N. Y. Suppl. 773.

bility of the witnesses is solely for the determination of the officer or tribunal hearing the charge, and no question in that regard can be considered on certiorari.[47] A decision discharging a policeman is entitled to the same presumptions as the verdict of a jury.[48]

(5) MISCELLANEOUS. An officer who has been removed cannot object on certiorari to the constitutionality of the acts constituting the board which removed him.[49] Nor can it be objected that the acts for which the officer was removed constituted a criminal offense and that no criminal prosecution had been instituted before proceedings had by the board.[50] The legality of the relator's appointment may be inquired into on certiorari.[51] It cannot be objected on certiorari that the officer was an officer *de facto* and cannot be restored, although the proceedings against him were irregular.[52] It is no ground to reverse a judgment of removal that the designation of the officer who took the testimony was made orally, there being no statutory requirement that such designation be made in writing.[53]

(L) *Reinstatement by Mandamus.* To entitle a discharged officer to reinstatement by mandamus, he must have been a *de jure* officer at the time of his removal.[54] Nor is an officer improperly removed entitled to be reinstated, where he was regularly removed before commencing proceedings for reinstatement.[55] Where a statute transferred the police "organization and discipline" from the mayor to a board of police commissioners, mandamus does not lie to compel the board to reinstate an officer improperly removed by the mayor.[56] And where an officer of the village is removed before consolidation of the village with the city, mandamus will not lie to compel the police commissioners of the consolidated city to recognize him as an officer.[57] One seeking to compel his restoration to office cannot claim the benefit of the Civil Service Act, which is only applicable to those officers who shall have been appointed under its rules and after the prescribed examination, where by his own showing he had not been appointed after examination but appointment was refused him.[58] If an officer seeking reinstatement was ineligible at the time of his appointment, the question of whether or not he made false statements in regard thereto will not be considered, as it is immaterial.[59] Where an officer on being notified of his removal reports for duty on three days following, and finally complies with an order to surrender his insignia of office, he has done all that is necessary to claim his right to maintain proceedings for reinstatement.[60] Those who wish to avail themselves of the remedy by mandamus to compel restoration to office must move promptly. The right to maintain proceedings is lost by laches.[61] Where the time for commencing proceedings is lim-

47. People *v.* Greene, 106 N. Y. App. Div. 230, 94 N. Y. Suppl. 477 [*affirmed* in 184 N. Y. 565, 76 N. E. 1103].

48. People *v.* New York Police Com'rs, 84 Hun (N. Y.) 64, 32 N. Y. Suppl. 18 [*affirmed* in 148 N. Y. 757, 43 N. E. 988].

49. Ayers *v.* Newark, 49 N. J. L. 170, 6 Atl. 659.

50. People *v.* French, 60 How. Pr. (N. Y.) 377 [*affirmed* in 24 Hun 659].

51. State *v.* Millville, 53 N. J. L. 362, 21 Atl. 568.

52. People *v.* Hannan, 56 Hun (N. Y.) 469, 10 N. Y. Suppl. 71 [*affirmed* in 125 N. Y. 691, 26 N. E. 751].

53. People *v.* Greene, 183 N. Y. 483, 76 N. E. 614 [*affirming* 105 N. Y. App. Div. 642, 94 N. Y. Suppl. 1159].

54. Moon *v.* Champaign, 214 Ill. 40, 73 N. E. 408 [*affirming* 116 Ill. App. 403]; McNeill *v.* Chicago, 212 Ill. 481, 72 N. E. 450 [*affirming* 93 Ill. App. 124].

De facto officer.— Mandamus will not lie where the most that appears is that petitioner was a *de facto* officer when removed. McNeill *v.* Chicago, 212 Ill. 481, 72 N. E. 450 [*affirming* 93 Ill. App. 124].

Where it does not appear from the petition that the city council had by ordinance ever created the office of policeman, a petition for mandamus to be restored to the office of policeman is demurrable. Moon *v.* Champaign, 214 Ill. 40, 73 N. E. 408 [*affirming* 116 Ill. App. 403].

55. Michelson *v.* Saginaw Police Com'rs, 111 Mich. 587, 70 N. W. 142.

56. State *v.* Cincinnati Police Com'rs, 7 Ohio Dec. (Reprint) 326, 2 Cinc. L. Bul. 114.

57. People *v.* York, 53 N. Y. App. Div. 429, 65 N. Y. Suppl. 1074.

58. McNeill *v.* Chicago, 212 Ill. 481, 72 N. E. 450 [*affirming* 93 Ill. App. 124].

59. People *v.* Lindblom, 215 Ill. 58, 74 N. E. 73 [*affirming* 116 Ill. App. 213].

60. Lowrey *v.* Central Falls, 23 R. I. 284, 49 Atl. 963.

61. Streeter *v.* Worcester, 177 Mass. 29,

ited by statute and the petitioner delays the commencement of proceedings until the statutory period has nearly elapsed, he will not be allowed his salary for the time he is not on duty.[62] Reversal by the appellate court of a judgment awarding mandamus without remanding or reciting the facts in its judgment is proper, where there are no errors of law to be corrected on new trial, and no material controverted questions of fact, and the uncontroverted facts do not justify awarding mandamus.[63]

(M) *Actions For Wrongful Removal.* Where by express statutory provision police commissioners of a municipality are officers of the state vested with exclusive power to employ and dismiss police officers of the municipality, and in no way subject to its control or accountable to it for their action, a police officer wrongfully discharged by the commissioners has no right of action therefor against the municipality.[64] It has been held, however, that where the wrongful removal of an officer is based on the proceedings of the city council, and an appropriation made for the payment of his salary does not appear to have been paid to a *de facto* officer holding the office and performing the duties, the officer removed may recover the same from the city.[65]

(X) *Suspension.* Where a board having power to suspend passes a rule providing that any member of the police force may be suspended by the chief of police with the approval of the board, a suspension by the board without the consent of the chief is invalid.[66] It is not an arbitrary and unreasonable exercise of authority to suspend an officer pending a trial before the board on charges which, if tried, would involve his dismissal.[67] If an officer is suspended after his term of office has expired by limitation, it is immaterial whether the suspension was in accordance with the charter or not.[68] And notice to police officers that they have been suspended, accompanied by a copy of the ordinance abolishing the offices, is equivalent to notice that the suspension is permanent.[69] One who has been rightfully suspended from office cannot recover for services which he did not and

58 N. E. 277; People *v.* Moss, 42 N. Y. App. Div. 196, 58 N. Y. Suppl. 1051.

Construction of particular statutory provisions relating to time of commencing proceedings.— Greater New York Charter, § 302, providing that proceedings to compel reinstatement of a police officer might be brought at any time within two years, was amended by Laws (1901), c. 466, so as to change the period of limitation from two years to four months; but by the express terms of chapter 466, section 1614, that chapter did not affect any right accruing prior to Jan. 1, 1902, when the act went into effect. Hence a policeman, dropped from the rolls of the department prior to Jan. 1, 1902, might commence proceedings for reinstatement at any time within four months after Jan. 1, 1902, and within two years after his discharge, although more than four months thereafter. Healy *v.* Partridge, 75 N. Y. App. Div. 511, 78 N. Y. Suppl. 392. The provisions of Greater New York Charter, § 302, requiring an action by a police officer against the city for salary or reinstatement to be commenced within two years from cause of action accrued, and that causes "heretofore accrued may be . . . brought within six years . . . and within two years of the passage of this act," are identical with those of Consol. Act, § 272, as amended by Laws (1884), c. 180, § 7, except in the name of the police authorities and of the municipality. Section 1608 of the charter provides that, so far as the provisions of the charter are the same in substance as those of the Consolidation Act, the charter is not to be a new enactment, but a continuation of the Consolidation Act. It was held that the six-years limitation applied only to causes accruing before the passage of the amendment of 1884. People *v.* York, 36 N. Y. App. Div. 185, 55 N. Y. Suppl. 462.

62. People *v.* Partridge, 82 N. Y. App. Div. 262, 82 N. Y. Suppl. 109.

63. People *v.* Lindblom, 215 Ill. 58, 74 N. E. 73. And see Healy *v.* Partridge, 75 N. Y. App. Div. 511, 78 N. Y. Suppl. 392.

64. Riley *v.* Kansas City, 31 Mo. App. 439.

65. Chicago *v.* Luthardt, 191 Ill. 516, 61 N. E. 410, holding that the chief clerk of the detective bureau is an officer within the rule. *Compare* Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128, holding that where the police commissioners of a city removed a policeman without having preferred charges and without a hearing as required by law, the city was not liable for the unauthorized acts of the commissioners as for a breach of contract.

66. Bringgold *v.* Spokane, 27 Wash. 202, 67 Pac. 612.

67. State *v.* Police Com'rs, 16 Mo. App. 48.

68. Houston *v.* Albers, 32 Tex. Civ. App. 70, 73 S. W. 1084.

69. Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602.

had not the right to render.[70] Where a city charter authorizes the mayor to suspend policemen and report the suspension to the board of councilmen at the next meeting thereafter, with his reasons therefor, and provides that such officer may then be removed or restored by the board, a policeman who was suspended and failed to demand trial by the council cannot, after waiting two years, be reinstated without trial, because the council did not try him.[71]

(xi) *Resignation or Abandonment.* Where a member of the police force was asked to sign a resignation, and was told that he might better resign than have charges preferred against him, and he did not sign the resignation but requested leave of absence, and on refusal surrendered his insignia of office and did not report for duty for seven days afterward, it was held that a resolution by the police board declaring the absence a resignation under a rule providing that unexplained absence for five days shall, at the option of the board, be deemed a resignation, will not be disturbed.[72] A policeman ousted from office without authority does not accept an inconsistent office, and so abandon the office of policeman, by serving a few days as special policeman, under an appointment by the mayor, who is empowered to make such appointment, without the formalities required in case of regular policemen, to meet emergencies; the employment to terminate when the emergency ceases.[73] Where the police commissioners accept a voluntary resignation of a police officer, no proceedings having been instituted for his removal, their action cannot be inquired into on certiorari.[74] But where a police officer petitions the board of police commissioners for reinstatement, alleging that he was induced to resign by fraud and coercion, and his petition is denied without his being given an opportunity to be heard, on certiorari to review the action of the board it will be instructed to notify the petitioner of the time and place at which his petition will be heard, and to give him an opportunity to present his evidence.[75]

(xii) *Reduction in Rank or Transfer.* A charter provision that roundsmen shall be selected from among patrolmen of the first grade, but roundsmen may be reduced to the grade of patrolmen by the police commissioners, after trial on charges, authorizes the police commissioner to reduce a roundsman to patrolman after trial.[76] Where a charter provides for a detective bureau and the appointment of roundsmen and detective sergeants who shall not be reduced in rank except in the manner provided by law for sergeants and other police officers, and there is no provision for the reduction of sergeants, but there is a provision for the reduction of roundsmen after a trial upon charges, detective sergeants may be reduced after trial upon charges.[77] A charter provision empowering the board of police commissioners to fix and assign the rank and duties of transferred members applies only to cases where a police officer, before the consolidation, had been acting with title and rank not authorized by the consolidation, and does not authorize the board to reduce the rank after consolidation.[78] A detective officer in the police department of a city cannot be reduced to roundsman, at decreased pay, without notice and hearing as provided for in case of removals.[79] A statute providing that those acting as detective sergeants on a certain date should not be reduced in rank or salary except in case of removal as provided by law for members of the police force applies only to cases of those retained in that position

70. Westberg *v.* Kansas City, 64 Mo. 493.
71. Taylor *v.* Bayonne, 56 N. J. L. 265, 28 Atl. 380.
72. People *v.* Diehl, 50 N. Y. App. Div. 58, 63 N. Y. Suppl. 362 [*affirmed* in 167 N. Y. 619, 60 N. E. 1118].
73. Houston *v.* Clark, (Tex. Civ. App. 1904) 80 S. W. 1198. And see Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848.
74. People *v.* Martin, 10 N. Y. Suppl. 411.
75. People *v.* Voorhis, 66 Hun (N. Y.) 88, 20 N. Y. Suppl. 941.
76. People *v.* Greene, 99 N. Y. App. Div. 495, 90 N. Y. Suppl. 833.
77. People *v.* Greene, 91 N. Y. App. Div. 58, 86 N. Y. Suppl. 322 [*affirmed* in 178 N. Y. 617, 70 N. E. 1106].
78. Buschmaun *v.* New York City, 35 Misc. (N. Y.) 607, 72 N. Y. Suppl. 127.
79. State *v.* Jersey City, 53 N. J. L. 118, 20 Atl. 831.

until the act took effect.[80] Where a captain has been illegally reduced to the rank of patrolman and protested against the reduction, but served as patrolman, and began legal proceedings to procure his position as captain, his administratrix can recover his salary for the time he served, based on the pay of a police captain less the pay as a patrolman and less his dues to the police pension fund.[81] A policeman holding office under a statute declaring that policemen shall hold office for four years, and be subject to removal for cause only, who is, with his acquiescence reduced to the position of turnkey, provided for by a statute which declares that turnkeys shall be appointed for such time as the police commissioners shall determine, holds the office of turnkey only during the pleasure of the board, and subject to summary removal, where the board has failed to fix the term, even though the reduction constitutes a new appointment for a new office.[82] A statute forbidding the removal of a police officer except for incapacity, misconduct, nonresidence, or disobedience prohibits the transfer of an officer from the position of sergeant to the inferior position of patrolman for any other than the causes specified.[83] Where under a charter provision authorizing it a detective sergeant is assigned to do duty as desk sergeant, he must obey the rules of the police department, although the assignment is irregular, and a violation thereof renders him liable to such punishment as the charter and rules of the department permit.[84]

(XIII) *COMPENSATION*[85] — (A) *Right Thereto* — (1) OF DE JURE OFFICER — (a) IN GENERAL. Unless expressly fixed by statute,[86] or in the manner provided by statute,[87] a police officer is not entitled to compensation for his services as such.[88] And the appointment to such an office to which no salary or compensation is attached, and the performance of its duties, cannot raise an implied promise to pay,[89] even where the statute provides that the appointee's position shall depend upon a given action on the part of the municipality, if such action be not actually taken.[90]

(b) DURING PERIOD OF SUSPENSION. Where a police officer is suspended for a given number of days each week by a tribunal having no power so to do, another tribunal having that power, the attempted suspension is a nullity, and he is entitled to his salary for the period during which he was unlawfully suspended.[91] So too where a municipal board by its rule makes suspension a joint matter between itself and the chief of police, suspension of a policeman by the board alone pending the hearing of charges of misconduct is void, and he is entitled to his salary from the date of the suspension to the date of the order of removal.[92] But where a policeman is removed, for sufficient cause, by a tribunal having power so to do, he is not, although afterward reinstated by that tribunal, entitled to recover compensation during the period of suspension;[93] nor does the fact that the cause of suspension was subsequently declared insufficient entitle a policeman to salary during the period of suspension, where he was suspended by one having, for sufficient

80. People *v.* Greene, 87 N. Y. App. Div. 421, 84 N. Y. Suppl. 484 [*affirmed* in 180 N. Y. 504, 72 N. E. 1147], in which it was further held, however, that a patrolman assigned to duty in the detective bureau for five days, and continued in that position by respective assignment at the expiration of each five-day period, is not within the meaning of such statute, since his appointment was merely temporary and he ceased to become entitled to that position at the end of each five-day period.

81. Buschmann *v.* New York, 35 Misc. (N. Y.) 607, 72 N. Y. Suppl. 127.

82. State *v.* Hawes, 177 Mo. 360, 76 S. W. 653.

83. Leary *v.* Orange, 59 N. J. L. 350, 35 Atl. 786.

84. People *v.* Greene, 91 N. Y. App. Div. 58, 86 N. Y. Suppl. 322 [*affirmed* in 178 N. Y. 617, 70 N. E. 1106].

85. Right to rewards offered see REWARDS.

86. Mousseau *v.* Sioux City, 113 Iowa 246, 84 N. W. 1027.

87. Galvin *v.* St. Paul, 58 Minn. 475, 59 N. W. 1102; Sampson *v.* Rochester, 60 N. H. 477.

88. Mousseau *v.* Sioux City, 113 Iowa 246, 84 N. W. 1027; Sampson *v.* Rochester, 60 N. H. 477.

89. Mousseau *v.* Sioux City, 113 Iowa 246, 84 N. W. 1027.

90. Sampson *v.* Rochester, 60 N. H. 477.

91. Louisville *v.* Corley, 80 S. W. 203, 25 Ky. L. Rep. 2174.

92. Bringgold *v.* Spokane, 27 Wash. 202, 67 Pac. 612.

93. Shannon *v.* Portsmouth, 54 N. H. 183.

cause, the power so to do, and the charter speaks of the suspension as creating a vacancy and provides how that vacancy shall be filled.[94]

(c) During Period of Removal. A police officer who claims to have been illegally removed from his office by a tribunal having jurisdiction cannot maintain an action for salary alleged to have accrued after such dismissal, while such dismissal remains in force.[95] But where his title to the office has been determined in a proper proceeding,[96] or he has been reinstated by a competent tribunal,[97] the officer is entitled to the salary that accrued during the period of removal, and his right to compensation during such period is unaffected by the fact that he neither discharged[98] nor offered to discharge the duties of his office,[99] unless the charter makes active service a condition precedent to a right to receive any salary whatever;[1] nor can any deduction be made for what he earned or might have earned in another employment, compensation being not a matter of contract but of mandate.[2] Where a police officer is discharged without cause by one having no authority to do so, the effort to discharge is a nullity, and he is entitled to the salary accruing after such attempted discharge,[3] unless by acquiescing in his dismissal he must be deemed to have voluntarily abandoned or relinquished his office.[4]

(d) While Absent From Duty. A police officer comes within the general rule that a public officer has a *prima facie* right to the salary of his office,[5] although physically disabled from performing his duties;[6] and if there be no law or regu-

94. Steubenville *v.* Culp, 38 Ohio St. 18, 43 Am. Rep. 417, in which it was said that if the office is vacant it becomes, as to the suspended person, for the time being, as though it did not exist, and as to the public the person appointed to fill such vacancy is the sole incumbent.

95. Queen *v.* Atlanta, 59 Ga. 318; Van Sant *v.* Atlantic City, 68 N. J. L. 449, 53 Atl. 701; Hoboken *v.* Gear, 27 N. J. L. 265.

96. Everill *v.* Swan, 20 Utah 56, 57 Pac. 716.

97. State *v.* Walbridge, 153 Mo. 194, 54 S. W. 447.

Reinstatement impossible.— If the removal was illegal, and the officer's term has expired, so that he cannot be reinstated, the courts should simply give judgment for the salary accruing from the date of removal to the end of his term. State *v.* Walbridge, 153 Mo. 194, 54 S. W. 447.

If no removal reinstatement unnecessary.— Where a legally appointed and qualified police officer, without being suspended or removed, was prevented from performing his duties by agents of the municipality, and held himself ready at all times to discharge his duties and offered to discharge them, he is entitled to recover salary for the time he was thus prevented from performing the duties of his office. French *v.* Lawrence, 190 Mass. 230, 76 N. E. 730, where the court says that plaintiff, from anything disclosed by the declaration, was rightfully in possession and exercising the functions of his office, and no material averment is found on which defendant, relying upon Phillips *v.* Boston, 150 Mass. 491, 23 N. E. 202, can base an argument that if plaintiff has been suspended unlawfully or removed before he commenced the present action he must be restored to his office by appropriate legal proceedings before it can be maintained.

98. State *v.* Walbridge, 153 Mo. 194, 54 S. W. 447; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848; Cawthon *v.* Houston, 31 Tex. Civ. App. 1, 71 S. W. 329.

99. State *v.* Walbridge, 153 Mo. 194, 54 S. W. 447.

1. Wilkinson *v.* Saginaw, 11 Mich. 585, 70 N. W. 142.

2. Everill *v.* Swan, 20 Utah 56, 57 Pac. 716. See also State *v.* Walbridge, 153 Mo. 194, 54 S. W. 447; Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848; Cawthon *v.* Houston, 31 Tex. Civ. App. 1, 71 S. W. 329. *Contra*, in Colorado where the contract rule of abatement of amount recovered by the sum a police officer earned or might have earned in other employment is applied. Leadville *v.* Bishop, 14 Colo. App. 517, 61 Pac. 58; Denver *v.* Burnett, 9 Colo. App. 531, 49 Pac. 378.

3. Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848; Cawthon *v.* Houston, 31 Tex. Civ. App. 1, 71 S. W. 329.

4. Byrnes *v.* St. Paul, 78 Minn. 205, 80 N. W. 595, 79 Am. St. Rep. 384, where the court held that an appointive police officer unlawfully dismissed by one having no authority and prevented from rendering any service, who has made no complaint to the mayor or the city council, has not attempted to secure a reinstatement, but who has apparently acquiesced in the dismissal, cannot recover of the municipality the compensation incident to the office during the period in which he has performed no service, since he must be deemed to have voluntarily abandoned or relinquished his office, or, as it is sometimes expressed, to have "resigned by implication."

5. Wilkes-Barre *v.* Meyers, 113 Pa. St. 395, 6 Atl. 110.

6. Cavanee *v.* Milan, 99 Mo. App. 672, 72 S. W. 408; Cox *v.* Oil City, 157 Pa. St. 613, 27 Atl. 786 (holding, however, that a policeman in the service of the city with a distinct understanding that he shall not be paid for

lation authorizing the discontinuance of the compensation during the disability, the only remedy is by removal.[7] But under statutory authority to make all needful regulations for the efficiency of the police force, the city may provide that an officer absent from duty without leave shall forfeit all pay during the time of such absence,[8] except when sick and so certified by a physician;[9] and in addition fines and forfeitures may be established for absence or neglect of duty.[10] Under statutory authority to make all needful regulations for the efficiency of the police force, no deduction can be made by the city from the salary of an officer whose absence from duty was made necessary by a disability incurred in the performance of his duty.[11]

(e) While Holding Over. A policeman cannot continue to draw compensation from the city as an officer holding over after the expiration of his term, where, after holding over a while, his successor is elected and he is informed that he will not be paid for further services, although he continues, without authority, to render services.[12]

(f) After Abolition of Office. On the lawful abolition of the office of policeman, the salary incident thereto determines forthwith.[13]

(g) Constable Fees. As a general rule a salaried policeman may not claim for himself the statutory fees allowed for constable services,[14] but in some jurisdictions it is held that he is entitled to fees payable out of the county or state treasury for services in state cases.[15]

time he is not on duty cannot recover compensation for time he is relieved from actual duty by reason of sickness); Wilkes-Barre *v.* Meyers, 113 Pa. St. 395, 6 Atl. 110.

7. People *v.* French, 91 N. Y. 265; Wilkes-Barre *v.* Meyers, 113 Pa. St. 395, 6 Atl. 110.

8. People *v.* New York Police Com'rs, 27 Hun (N. Y.) 261; Williams *v.* Harrisburg, 4 Dauph. Co. Rep. (Pa.) 47.

Absence because of imprisonment.— However, a policeman arrested by his superior officer on a criminal charge, and afterward acquitted, is not deemed to have been voluntarily absent from his post without leave from the time of arrest until the time of his acquittal, so as to authorize a *pro rata* reduction from his salary during such period. People *v.* New York Police Com'rs, 27 Hun (N. Y.) 261.

9. Wilkes-Barre *v.* Meyers, 113 Pa. St. 395, 6 Atl. 110; Craighead *v.* Philadelphia, 5 Pa. Dist. 310.

10. Malcolm *v.* Boston, 173 Mass. 312, 53 N. E. 812.

11. People *v.* French, 91 N. Y. 265.

Evidence held sufficient to show disability contracted in service.—Under the act of April 11, 1853, relating to the police department of New York city, allowing the mayor to relieve policemen for any period they may be absent from duty without permission, except when absent from diseases contracted in the public service, and in such cases they shall receive their full pay, where it appears that a member of the police department who had been absent from duty on account of sickness had been previously exposed to severe weather and had been found sick while on his post, such evidence is sufficient to sustain a finding that the sickness was incurred in the discharge of his duty, entitling him to the portion of the salary accruing during his absence. Santa Minto *v.* New York, 3 E. D. Smith (N. Y.) 384.

12. Beverly *v.* Hattiesburg, 83 Miss. 342, 35 So. 876.

13. Oldham *v.* Birmingham, 102 Ala. 357, 14 So. 793; Meissner *v.* Boyle, 20 Utah 316, 58 Pac. 1110; Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602.

A provision inhibiting the diminution of a salary of a police officer during the term of his office does not entitle an officer to salary after the office is abolished to the end of the year to which he was appointed. Oldham *v.* Birmingham, 102 Ala. 357, 14 So. 793.

14. Johnson *v.* State, 94 Tenn. 499, 29 S. W. 963. See also Swisher *v.* Franklin County, 5 Pa. Dist. 209.

Serving a subpœna on a witness, or attending as a witness, is not a service pertaining to the office of a policeman for which, by the act of July, 1897, he is prohibited from taking compensation in addition to his salary. Com. *v.* Lloyd, 9 Kulp (Pa.) 25.

The act of July 14, 1897, forbidding any policeman to charge or accept any fee or other compensation in addition to his salary, repeals Act, April 4, 1837, c. 21, § 25, providing that policemen in the borough of Pottsville shall receive the same fees as the constables of the borough are entitled to by law. Weaver *v.* Schuylkill County, 17 Pa. Super. Ct. 327.

Ordinance requiring officer to pay over fees. — Where an ordinance provides that the salaried policeman shall pay over to the city all fees fixed by law and received by him for his official services, such policeman cannot retain a statutory fee for the performance of a given official duty. Worcester *v.* Walker, 9 Gray (Mass.) 78.

15. Ruell *v.* Alpena, 108 Mich. 290, 66 N. W. 49; White *v.* Manistee County, 105

(h) Reimbursement For Expenditures. In the absence of prohibitive charter provisions, a municipality has the power to reimburse a police officer for expenses and attorney's fees incurred in the defense of an action for false imprisonment, it appearing that the officer was acting in good faith in the exercise of his official duties.[16]

(i) Waiver as to Compensation. A policeman may waive, by his silence and acquiescence in his dismissal or removal from office, his right to the salary incident thereto.[17] But a police officer removed by the mayor alone, where the charter provides that it cannot be done by him except with the concurrence of the council, does not, by merely surrendering the insignia of his office and other public property, waive his right to compensation.[18]

(2) De Facto Officers. A policeman who is merely a *de facto* officer is not entitled to the compensation attached to the office.[19]

(B) *Amount* — (1) In General. When the amount of a police officer's compensation has been fixed by legal authority, that is the compensation, no more and no less, that he is entitled to receive.[20]

(2) Power to Fix. When the compensation of a police officer is not fixed by the legislature,[21] the doctrine is well settled that the power so to do may be, and generally is, delegated by it to the common council,[22] or to a board of police

Mich. 608, 63 N. W. 653; Com. *v.* Lloyd, 9 Kulp (Pa.) 25.

16. Moorhead *v.* Murphy, 94 Minn. 123, 102 N. W. 219, 110 Am. St. Rep. 345, 68 L. R. A. 400.

17. Phillips *v.* Boston, 150 Mass. 491, 23 N. E. 202; Byrnes *v.* St. Paul, 78 Minn. 205, 80 N. W. 959, 79 Am. St. Rep. 384; Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128; Healey *v.* Partridge, 75 N. Y. App. Div. 511, 78 N. Y. Suppl. 392.

18. Galvin *v.* St. Paul, 58 Minn. 475, 59 N. W. 1102.

19. Stephens *v.* Campbell, 67 Ark. 484, 55 S. W. 856; Nichols *v.* MacLean, 101 N. Y. 526, 3 N. E. 347, 54 Am. Rep. 730. See also Andrews *v.* Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280.

Illustration.— Thus, when illegally appointed, a policeman is not entitled to a salary attached to the office. Foster *v.* Wilmington, 8 Houst. (Del.) 415, 32 Atl. 348; O'Brien *v.* St. Paul, 72 Minn. 256, 75 N. W. 375.

One whose appointment as policeman is invalid because of his ineligibility cannot collect his salary as policeman for a period during which he was not actually in the office and was performing none of its duties. Yorks *v.* St. Paul, 62 Minn. 250, 64 N. W. 565.

20. Belleville *v.* Flemming, 9 Ill. App. 316; Ruell *v.* Alpena, 108 Mich. 290, 66 N. W. 49.

Detailed to perform special duty.— Under the ordinances which provide a less rate of compensation for policemen who are detailed by the mayor or chief of police for special duty than is provided for those who perform post or patrol duty, a policeman who, during the whole term of employment, was detailed by the mayor to serve at the court of sessions, is not entitled to be paid as patrolman, although he did patrol duty a part of every Sunday, and occasionally was called out to serve at fires. Mincho *v.* New York, 4 Bosw. (N. Y.) 47. A person appointed as a policeman to perform certain special duties, claimed, under certain acts of the legislature and ordinances of the city of New York, a salary of six hundred dollars per annum for the whole term of his services. It was held that as a policeman detailed on special duty, he was only entitled under the ordinance passed Aug. 18, 1851, as amended by the ordinance passed Nov. 14, 1851, to be compensated for his services at the rate of five hundred dollars per annum, but that under the ordinance of Sept. 13, 1853, he was entitled to be so compensated from Jan. 1, 1853, at the rate of six hundred dollars per annum. Walling *v.* New York, 4 Duer (N. Y.) 310.

Illegal discharge before expiration of term. — Where a policeman appointed at a salary of seventy-five dollars or eighty-five dollars per month, according to the detail of the work, was illegally discharged before the expiration of his term of service and was not thereafter permitted to perform any of the duties of his office, he was only entitled to recover at the rate of seventy-five dollars per month for the unexpired term. Cawthon *v.* Houston, 31 Tex. Civ. App. 1, 71 S. W. 329.

21. People *v.* Albany Police Com'rs, 108 N. Y. 475, 15 N. E. 692; Mahon *v.* New York, 29 Misc. (N. Y.) 251, 60 N. Y. Suppl. 541 [*affirmed* in 52 N. Y. App. Div. 631, 65 N. E. 1139], holding, however, that Laws (1894), c. 741, fixing the pay of members of the police force in cities does not apply to "park police" appointed by the park commissioners in New York city, under Consol. Act, § 690, authorizing the appointment of park police, such statute being a general statute and referring only to the force appointed by police commissioners.

22. See the following cases:

Kentucky.— Neumeyer *v.* Krakel, 110 Ky. 624, 62 S. W. 518, 23 Ky. L. Rep. 190.

commissioners.[23] But charter provisions authorizing police commissioners to fix salaries for patrolmen, and to enact by-laws, ordinances, rules, and regulations for their government, do not give them power to divide patrolmen into two or more distinct grades, with different salaries attached to each grade.[24]

(3) CHANGE DURING TERM OF OFFICE — (a) IN GENERAL. In the absence of constitutional prohibition the legislature may change, or authorize a municipality to change, the salary or compensation of a policeman while in office.[25] And even an existing constitutional prohibition against changing the salary of any municipal officer[26] or public officer[27] during his term of office applies only to officers having fixed terms, and not to a policeman removable at pleasure by the board of police commissioners.[28]

(b) ENFORCING RIGHT TO INCREASE. To compel a municipal civil service commissioner to certify an appointment and promotion in pursuance of law, so as to entitle the relator to increased compensation, mandamus will lie at the instance of a police officer;[29] but not when the officer's appointment is merely temporary which does not constitute a promotion.[30]

(4) WAIVER AS TO AMOUNT. It is well settled that a policeman, employed by the year[31] or removable at pleasure,[32] may, by continuing in the service and accepting his salary as reduced, be estopped after his discharge to question the validity of the reduction. But where the law, and not the commissioners, grades a police officer as to his compensation, such officer does not, by receiving compensation

Michigan.— Ruell *v.* Alpena, 108 Mich. 290, 66 N. W. 49.

Minnesota.— Galvin *v.* St. Paul, 58 Minn. 475, 59 N. W. 1102.

New Hampshire.— Gibbs *v.* Manchester, 73 N. H. 265, 61 Atl. 128.

New York.— Sbanley *v.* Brooklyn, 30 Hun 396.

Canada.— Matter of Prince, 25 U. C. Q. B. 175.

Power to fix does not warrant denial of compensation.— A city ordinance providing that the compensation of police officers shall be fixed by the mayor does not warrant the aldermen, the mayor not concurring, in denying to police officers lawfully holding their offices any compensation whatever. Murphy *v.* Webster, 131 Mass. 482.

23. Smith *v.* Lowell, 190 Mass. 332, 76 N. E. 956; Flanagan *v.* Kansas City, 69 Mo. 462; Gooch *v.* Exeter, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637; People *v.* Albany Police Com'rs, 108 N. Y. 475, 15 N. E. 692; People *v.* Robbins, 109 N. Y. App. Div. 387, 95 N. Y. Suppl. 901.

According to time actually employed.— Where the city provides for the appointment of special policemen by the board of police commissioners, who are to receive only the compensation allowed by the board, a special policeman, by accepting such appointment, becomes subject to the custom of the board to assign him to duty for but a portion of the time and to pay him the same compensation paid to regular policemen for the time he is actually employed. People *v.* Robbins, 109 N. Y. App. Div. 387, 95 N. Y. Suppl. 901.

24. People *v.* Albany Police Com'rs, 108 N. Y. 475, 15 N. E. 692.

25. Mangam *v.* Brooklyn, 98 N. Y. 585, 50 Am. Rep. 705.

26. Lexington *v.* Rennick, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106, 20 Ky. L. Rep. 1609, 1924.

27. Russell *v.* Williamsport, 9 Pa. Co. Ct. 129.

28. Lexington *v.* Rennick, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106, 20 Ky. L. Rep. 1609, 1924; Russell *v.* Williamsport, 9 Pa. Co. Ct. 129.

29. Toole *v.* Ogden, 39 Misc. (N. Y.) 581, 80 N. Y. Suppl. 584.

Error in certificate of officer's record.— A refusal of civil service commissioners to certify the promotion of a police officer on a pay roll because of an alleged error in the certificate of the captain's record, which error if it had not occurred would have reduced his rating below that required for promotion, is not justified where the officer is not charged with any fraud in the matter, and the evidence does not show that the error had any effect in causing his promotion. Toole *v.* Ogden, 39 Misc. (N. Y.) 581, 80 N. Y. Suppl. 584.

30. People *v.* Knox, 57 N. Y. App. Div. 155, 68 N. Y. Suppl. 267.

31. Galveston *v.* Murphy, 1 Tex. App. Civ. Cas. § 732, holding that where the monthly salary of a policeman employed by the year is reduced by resolution, such policeman may, by continuing in the service and drawing and receipting for the sum as reduced each month, until the end of the term, waive the right to question such reduction.

32. Lexington *v.* Rennick, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106, 20 Ky. L. Rep. 1609, 1924, holding that where a police officer, who is removable by the board of police commissioners at pleasure, accepts without objection his salary as reduced by ordinance, he is estopped after his discharge to question the validity of the reduction.

attached to the lower grade, estop himself to claim the difference.[33] And where a police officer is made to understand by his superiors that he will be discharged for failure to comply with an order of reduction, the signing of the pay roll does not under such circumstances constitute a waiver of the right to claim full compensation.[34]

(c) *Payment* — (1) FUND THEREFOR. It is no defense to a policeman's demand for his compensation against funds of the police appropriation still unexpended that the appropriation was only calculated for the force then existing, that claimant and others were afterward appointed in addition, and that if these are paid the fund will not hold out the year for the old men.[35] And the fact that the controller may have no funds in the treasury subject to the requisition of the police board will not excuse its refusal to draw a requisition for an officer's salary. It is for the controller to interpose such an objection, upon an application to him.[36]

(2) PROCEEDINGS TO ENFORCE — (a) MANDAMUS. So long as a police officer holds title to office, and is not removed or retired for disability, he is entitled to the entire salary, although disabled by sickness from performing his official duties, and mandamus lies to compel payment of his salary by the municipality.[37] So too mandamus lies to compel a municipal board to perform the ministerial duty of drawing a requisition for the salary of a police officer,[38] or to certify him on the monthly pay roll of the police department.[39]

(b) ACTION AT LAW — aa. *In General.* One having title to the office of a policeman who, although neither suspended nor removed, was prevented by the agents of the municipality from performing his official duties, and held himself ready at all times to discharge such duties and offered to discharge them, is entitled to maintain an action for salary for the time he was thus prevented from performing his duties.[40]

33. Meehan *v.* Brooklyn, 13 N. Y. Suppl. 563.

Where a petitioner is entitled under the Civil Service Act to the position and compensation of a first-class patrolman as classified pursuant to such act, the mere fact that he may monthly have received and receipted for an amount of compensation less than that fixed by ordinance for one entitled to and holding such a position does not, where he has not explicitly waived his rights, estop him from claiming the amount fixed by such ordinance. Chicago *v.* McNally, 117 Ill. App. 434.

Claiming salary in futuro.— One entitled to rank as sergeant does not, by receiving and receipting for salary as patrolman, estop himself from claiming his salary *in futuro* as a sergeant, after compelling his recognition as such. People *v.* Greene, 95 N. Y. App. Div. 397, 88 N. Y. Suppl. 601.

34. Louisville *v.* Corley, 80 S. W. 203, 25 Ky. L. Rep. 2174.

35. Com. *v.* Hinkson, 161 Pa. St. 266, 28 Atl. 1081.

36. People *v.* New York Bd. of Police, 75 N. Y. 38.

37. People *v.* French, 91 N. Y. 265.

38. Sanford *v.* Kansas City, 69 Mo. 466; Riley *v.* Kansas City, 31 Mo. App. 439.

39. Toole *v.* Ogden, 39 Misc. (N. Y.) 581, 80 N. Y. Suppl. 584.

40. French *v.* Lawrence, 190 Mass. 230, 76 N. E. 730.

Pleading.— Where a police officer has been kept out of his office by the city authorities during the period for which he seeks to recover salary, he need not allege in his complaint that he was ready and willing to perform the duties of the office. Everill *v.* Swan, 20 Utah 56, 57 Pac. 716. In an action against a city a declaration alleging that plaintiff had been appointed and confirmed a police officer and performed his duties until a certain date, when he was illegally and unjustifiably prevented and restrained from performing the duties of his office by the agents of defendant city, alleging the salary to which he was entitled during the time that he was so prevented, and seeking to recover the amount due for the time that his services were not accepted, it was held that the allegations in respect to the city for illegally and unjustifiably preventing plaintiff from performing his duties should be treated as surplusage and could not be construed as amounting to allegations that plaintiff had ever been suspended by removal, or that his tender of services were made during such suspension or after the removal. French *v.* Lawrence, 190 Mass. 230, 76 N. E. 730.

Defenses.— In an action by a policeman against a municipality for salary earned defendant may, under a general denial, show that the appointment of plaintiff was invalid by reason of the fact that the number of men on the force exceeded the statutory limit. Murtagh *v.* New York, 106 N. Y. App. Div. 98, 94 N. Y. Suppl. 308. It is a defense to an action for compensation by a

bb. *Conditions Precedent.* As previously shown one who has been removed by a tribunal having jurisdiction cannot maintain an action for salary while the judgment of removal remains in force.[41] There must be a judicial determination of his right to the office in a direct proceeding brought for that purpose.[42] And when the law prescribes a certificate or other evidence of the right to salary as a condition precedent to payment thereof, no action lies until the condition has been complied with.[43] But when a police officer is discharged by one having no power of removal, the power being vested in a police board, and the charter requires an appeal only from such board, the officer is not required to take an appeal as a condition precedent to an action against the city to recover his salary for the unexpired term.[44]

(3) RESTRAINING PAYMENT. Injunction will lie at the suit of a taxpayer to restrain payment by a municipality of compensation to police officers illegally appointed,[45] or where the steps taken for the payment did not conform to the requirements of a city ordinance.[46] But the writ will not lie on the ground that the officer was assigned to special duty in a given squad without his fitness having been previously ascertained in the manner prescribed by law.[47]

(XIV) *PENSIONS AND BENEFIT FUNDS* — (A) *Right Thereto* — (1) NATURE. Neither a police officer nor his beneficiary has a vested right in a pension fund

police officer who was illegally removed that the compensation attached to the office was actually paid to a *de facto* officer performing the duties of the office. Grant *v.* New York, 111 N. Y. App. Div. 160, 97 N. Y. Suppl. 685. *Contra*, Everill *v.* Swan, 20 Utah 56, 57 Pac. 716.

Evidence.— In an action for salary earned, plaintiff must show that he was duly appointed. Murtagh *v.* New York, 106 N. Y. App. Div. 98, 94 N. Y. Suppl. 308. Where the complaint in an action by a police officer for his salary during an unauthorized and void suspension alleged that he was a police officer during such suspension and performed all the work required of him, evidence that he at all times held himself in readiness to perform his duties was admissible under the allegations. Bringgold *v.* Spokane, 27 Wash. 202, 67 Pac. 612. Where the trial court finds plaintiff has been improperly removed, and that he is entitled to recover his salary for the balance of the term, evidence of the amount he had or could have earned in other employment should be admitted in mitigation of damages, and a rejection of such evidence is reversible error. Leadville *v.* Bishop, 14 Colo. App. 517, 61 Pac. 58. Where, in an action by a policeman for salary, the defense was that plaintiff had been removed prior to the time for which arrears of salary were claimed, by a person acting as mayor, together with a recorder and an alderman, plaintiff contending that another was mayor and the removal void, defendant cannot show that the person acting as mayor had the most votes and was entitled to the office, where the other candidate had the canvasser's certificate of election. Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416. The mayor of Albany being, unless absent, an essential member of the council provided for hearing charges against policemen, evidence is not admissible, in an action by a policeman to recover his salary, to show that such policeman was removed prior to the time when the salary claimed to be due accrued, by a body of which the mayor *de facto* was not a constituent party, it not appearing that the mayor was absent. Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412.

41. See *supra*, VII, B, 5, d, (XIII), (A), (1), (c).

42. Selby *v.* Portland, 14 Oreg. 243, 12 Pac. 377, 58 Am. Rep. 307.

43. Sanford *v.* Kansas City, 69 Mo. 466; Riley *v.* Kansas City, 31 Mo. App. 439.

Failure to make necessary appropriation must be shown.— A salaried policeman employed by the police department of a city which regularly provides funds out of which that department makes its own expenditures cannot sue the city for a balance of salary due unless he shows that there has been some default on the part of the city in making the necessary appropriation. Waterman *v.* New York, 7 Daly (N. Y.) 489 [*following* Dannat *v.* New York, 66 N. Y. 585].

44. Cawthon *v.* Houston, 31 Tex. Civ. App. 1, 71 S. W. 329.

45. Somers *v.* Bridgeport, 60 Conn. 521, 22 Atl. 1015, holding, however, that the appointment in question was valid both on the theory that members of the common council present but not voting should be regarded as having voted with the majority, and that a tie was broken by the declaration by the mayor of the result which amounted to a casting vote.

46. Somers *v.* Bridgeport, 60 Conn. 521, 22 Atl. 1015, holding, however, that it was competent for the council to waive the provisions of an ordinance designed to prescribe an orderly and systematic method of payment, and that a direction to pay constituted such waiver.

47. Stone *v.* New York Municipal Civil Service Commission, 63 N. Y. App. Div. 273, 71 N. Y. Suppl. 1054.

created by the state and to be paid upon the happening of a certain event,[48] until such event shall have actually happened.[49]

(2) Depending on Cause of Death. An act providing that the widow or children of a police officer who shall die from natural causes, after having served a given number of years, shall be entitled to share in a pension fund, does not apply to a death caused by a railroad accident.[50]

(3) Depending on Membership. A police officer does not become a member in good standing of a benefit association until he has conformed to all of the by-laws of such association, and to all contracts and agreements which he has entered into relative to the payment of benefits.[51] A retired member of a force who is still subject to be assigned to duty in case of emergency continues to be a member of such force, and comes within an act granting a pension to the widow of a member of the force dying from natural causes.[52] Under a statutory provision that the benefit to accrue by reason of the decease of members may be extended to such members as may be retired from the police force, the association may extend the benefit to a part only of the class named, by a by-law; and if this is done the association will not be bound by the acts of its officers in extending the benefit to those not included by such by-law.[53]

(4) Suspension of Payments. Under a rule providing that no money shall be drawn from the benefit fund until it reaches a certain sum, benefits are merely suspended, and become payable as soon as the sum stated is realized.[54]

(B) *Contributions to Fund*—(1) In General. If the act creating the fund leaves each member of the police force to determine for himself whether he will contribute to the fund and thereby avail himself of the benefits of the act, no deduction from the compensation of any member of the force for the purposes of the fund can be made against his will.[55]

(2) Return. Where the provisions of an act for the relief fund cannot be carried into effect without compulsory contributions, and the courts decide that such contributions are not compulsory, payments made before decision by members of the police force under the belief that they are compulsory should be refunded.[56] But officers who have no claim on a fund except upon the happening of a certain event are not entitled to the return of the amount contributed by them to the fund, where they are discharged from the force before the happening of the prescribed event.[57]

48. Clarke *v.* Police, etc., Ins. Bd., 123 Cal. 24, 55 Pac. 576; Nicols *v.* San Francisco Police Pension Fund Com'rs, 1 Cal. App. 494, 82 Pac. 557; St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091; Friel *v.* McAdoo, 101 N. Y. App. Div. 155, 91 N. Y. Suppl. 454 [*affirmed* in 181 N. Y. 558, 74 N. E. 1117]; Pennie *v.* Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426.

49. Kavanagh *v.* San Francisco Police Pension Fund Com'rs, 134 Cal. 50, 66 Pac. 36.

50. Slevin *v.* San Francisco Police Pension Fund Com'rs, 123 Cal. 130, 55 Pac. 785, 44 L. R. A. 114, holding further that such a provision is not one against suicide only, for that it is no more an unnatural death than any other death resulting from external violence.

51. **Agreement to pass physical examination.**— Where a patrolman agrees that he should not participate in the benefit of the association until he had passed a physical examination, which he never did, the agreement is not without consideration and no benefit is payable on his death. Lydon *v.* Pittsburg Police Pension Fund Assoc., 8 Pa. Super. Ct. 251.

52. Kavanagh *v.* San Francisco Police Pension Fund Com'rs, 134 Cal. 50, 66 Pac. 36.

Must be member of both force and association.— Under the charter of a police relief association providing that whenever any member of the police force who is a member of the association shall die, a certain sum shall be paid to the beneficiary, a beneficiary of a certificate on the life of a retired veteran of the police force cannot recover in the event of the death of such veteran, as a member of the force on whose life a certificate is issued must be at the time of his death a member of the police force as well as a member of the association to entitle his beneficiary to recover. Price *v.* St. Louis Police Relief Assoc., 90 Mo. App. 210.

53. Burbank *v.* Boston Police Relief Assoc., 144 Mass. 434, 11 N. E. 691.

54. Miller *v.* Hamilton Police Ben. Fund, 28 Can. Sup. Ct. 475.

55. People *v.* McClave, 102 N. Y. 468, 7 N. E. 406. See also Murray *v.* Buckley, 1 N. Y. Suppl. 247.

56. Murray *v.* Buckley, 1 N. Y. Suppl. 247.

57. Clarke *v.* Reis, 87 Cal. 543, 25 Pac. 759.

(c) *Designation of Beneficiary.* Where a former member of a police relief association resumes his membership on rejoining the force, the designation of his wife as beneficiary, made during his earlier membership, continuing of record with the association, the most that is necessary to continue the designation of the wife as payee is a formal or informal ratification of such designation by the member, acceptable to the association.[58]

(d) *Retirement of Officer* — (1) VOLUNTARY. The capacity in which a police officer shall be retired, or the amount of pension which he shall receive, is not affected by the fact that at the time of the application for retirement he is performing duties under a special assignment.[59] When service for a given period constitutes, for a police officer, ground of retirement on a pension, it is not necessary that such services shall be continuous.[60] To be eligible to voluntary retirement on a pension for disability incurred in the service, an officer must be a member of the force up to the time the final order is made placing his name on the retired list,[61] or at least a member at the time of the filing of his application.[62] When the police commissioners have a discretionary power to retire an officer on a pension after a given period of service, they may deny his right so to retire when charges of misconduct are pending against him.[63] Nor is it material that the charges were not preferred until after the filing of the application but before action thereon.[64] It has been held that even where the statute providing for retirement after a given period of service is mandatory in its terms, no right to be so retired while under suspension on charges of misconduct is conferred.[65] The discretionary power of a pension board to retire a member of the force on a pension after a given period of service cannot be controlled by mandamus.[66]

(2) INVOLUNTARY. Where the law requires the examination and certificate of a medical officer as to physical or mental disability, in order to authorize his compulsory retirement, such certificate is indispensable,[67] although the disability of the officer is conceded;[68] and the certificate must conform strictly in substance and form with the statutory requirements.[69] No discretion is vested in the police

58. St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091.

59. Fay *v.* Partridge, 78 N. Y. App. Div. 204, 79 N. Y. Suppl. 722 [*reversed* on other grounds in 174 N. Y. 526, 66 N. E. 1107], holding that while New York City Charter, § 276, recognizes the office of a detective sergeant, inasmuch as the mere detailing of a patrolman to perform the duties of a detective sergeant does not make him the holder or occupant of such office, that he is acting as detective sergeant at the time he makes application to be pensioned as such is of no avail to him.

60. People *v.* French, 46 Hun (N. Y.) 232.

61. State *v.* Milwaukee Policemen's Pension Fund, 123 Wis. 245, 101 N. W. 373.

62. People *v.* Chicago Police Pension Fund Com'rs, 116 Ill. App. 252; McGann *v.* Harris, 114 Ill. App. 308.

63. People *v.* Martin, 145 N. Y. 253, 39 N. E. 960.

An anonymous communication containing no statement of any act or neglect constituting a breach of duty on the part of the police officer, although certain statements were made reflecting upon him as an officer, is not a charge pending, even where it had been in the possession of the commissioner of police for two weeks before the application for retirement was filed. People *v.* Greene, 181 N. Y. 308, 73 N. E. 1111.

64. People *v.* Martin, 145 N. Y. 253, 39 N. E. 960; People *v.* French, 108 N. Y. 105, 15 N. E. 188.

65. People *v.* Greene, 87 N. Y. App. Div. 589, 84 N. Y. Suppl. 673.

66. Friel *v.* McAdoo, 101 N. Y. App. Div. 155, 91 N. Y. Suppl. 454 [*affirmed* in 181 N. Y. 558, 74 N. E. 1117].

67. People *v.* McAdoo, 184 N. Y. 268, 77 N. E. 17; State *v.* Policemen's Pension Fund, 119 Wis. 436, 96 N. W. 825.

68. State *v.* Policemen's Pension Fund, 119 Wis. 436, 96 N. W. 825.

69. People *v.* McAdoo, 184 N. Y. 268, 77 N. E. 17.

Certificate not properly authenticated.— An order of the police commissioners in the city of New York dismissing a policeman and placing him on the pension list on the certificate of the board of surgeons that he was unfit for full police duty, authenticated only by the signatures of the president and secretary, is invalid through lack of proper statutory certificate of disability required by Laws (1901), c. 466, § 357. People *v.* McAdoo, 184 N. Y. 268, 77 N. E. 17.

Certificate defective in substance.— A certificate of a medical board appointed to examine relator certified that he was permanently disabled so as to be "unfit for police duty"; that the cause of the disability was obesity, fatty heart, poor circulation, and

commissioners in reference to the retirement of an officer on pension when the statute directs that he shall be relieved and dismissed from service after having attained a given age.[70]

(E) *Revocation of Pension.* If the right of an officer to share in a pension fund created by the state depends upon the happening of a particular event, his interest in the fund is a mere expectancy and liable to be defeated at any time before the happening of the event by the action of the legislature in repealing the law creating the pension,[71] or making new and different provisions for the distribution of the fund.[72] And the right of the legislature to thus revoke the pension is not affected by the fact that a given sum was retained from the officer each month, since such sum, although called in law a part of his compensation, is in fact an appropriation of that amount by the state each month to the creation of the fund.[73] The power of trustees of a pension fund of which the state is donor is not exhausted by merely designating a beneficiary and fixing the amount of his pension, but such trustees have the authority in their discretion to subsequently discontinue the pension.[74] If a pension is awarded for past services under a law which does not forbid the pensioner's reëmployment on the force, a subsequent reëmployment does not operate to revoke his pension.[75]

(F) *Statutory Provisions.* Acts granting police pensions are prospective in their operation and do not govern cases where retired members of the force have died prior to their enactment.[76]

(XV) *VACATION.* Under a statute authorizing a city to make reasonable provisions for preserving the public peace and maintaining its internal police, a city has power to grant a reasonable vacation to policemen, not subjecting it to additional expense.[77] Power to grant a vacation exists also under a statute authorizing the mayor and aldermen to make such regulations for the government of the police department, not inconsistent with law, as they shall deem proper.[78]

e. Other Persons Connected With Police Department — (1) *INSPECTOR.* Seniority among several inspectors is determined by appointment, not by qualification.[79] Where an applicant for inspectorship has failed on competitive examination to show the required mental and physical standards mandamus will not lie to compel the examiners to certify his qualification for the office.[80]

that the nature of the disability was permanent and its extent such as to unfit him for the further performance of "full police duty." It was held that such certificate should be construed as a whole, and that the statement that he was unfit to perform "full police duty" qualified and limited the first clause that he was "unfit for police duty." People *v.* McAdoo, 184 N. Y. 268, 77 N. E. 17.

70. People *v.* French, 13 N. Y. St. 584.

71. Friel *v.* McAdoo, 101 N. Y. App. Div. 155, 91 N. Y. Suppl. 454 [*affirmed* in 181 N. Y. 558, 74 N. E. 1117].

72. Clarke *v.* Police, etc., Ins. Bd., 123 Cal. 24, 55 Pac. 576; Friel *v.* McAdoo, 101 N. Y. App. Div. 155, 91 N. Y. Suppl. 454 [*affirmed* in 181 N. Y. 558, 74 N. E. 1117]; Pennie *v.* Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426.

73. Pennie *v.* Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426.

74. People *v.* Matsell, 94 N. Y. 179.

Fund donated to then members of force.— Where the donors of a fund annexed a condition that the fund was to be applied to the then members of the police force, it was held that the board accepting the fund for disposal of it in accordance with the wishes of the donors could not divert it from that purpose and apply it to the formation of a merit fund for the whole body of the police that might thereafter exist. Peel *v.* Metropolitan Police, 44 Barb. (N. Y.) 91.

75. People *v.* York, 41 N. Y. App. Div. 419, 59 N. Y. Suppl. 735.

76. Clarke *v.* Police L., etc., Ins. Bd., 127 Cal. 550, 59 Pac. 994; People *v.* Partridge, 172 N. Y. 305, 65 N. E. 164, holding further that a police pension would be unconstitutional if construed to authorize the granting of a pension to the widow of a policeman who died several years before its enactment, as an appropriation of public moneys for private purposes.

77. Wood *v.* Haverhill, 174 Mass. 578, 55 N. E. 381.

78. Wood *v.* Haverhill, 174 Mass. 578, 55 N. E. 381.

79. People *v.* Martin, 23 N. Y. Suppl. 730, holding that a police inspector whose appointment precedes the appointment of another inspector by a few minutes is entitled to seniority, although the other may have been several hours earlier in taking the oath of office.

80. Allaire *v.* Knox, 62 N. Y. App. Div. 29, 70 N. Y. Suppl. 845 [*affirmed* in 168 N. Y. 642, 61 N. E. 1127].

(II) *Police Clerk.* An appointment of a police clerk is valid, although the resolution making the same does not show on its face that it was passed by a majority of the board.[81] The office of police clerk's assistant is an office of the competitive class within civil service laws, providing that applicants to civil service offices belong to the competitive class when the position to which they seek appointment is such that the applicant's merit can be determined by competitive examination.[82] Where police clerks are considered county and not city officers, a statute requiring every person appointed under the city government to take an oath before the mayor does not apply to them.[83] Where a statute provides that the salary of police clerks shall be paid out of the city treasury, the city is liable therefor, although they are county officers.[84] Assistant clerks are not included within a charter amendment fixing at a designated amount the salaries of "clerks of the police courts."[85] Where a statute makes it the duty of police commissioners to reduce the expenses of the department as far as is practicable, they may for this purpose remove a deputy clerk without notice or hearing, although the appropriation for the department is sufficient to pay the whole force employed.[86]

(III) *Police Judge.* A police judge is a judicial officer, but he is a judicial officer of a municipality, and does not come within a constitutional provision that judicial officers shall be elected at the time and in the manner that state officers are elected.[87]

(IV) *Police Matron.* One not regularly appointed police matron, but whose tenure is probationary and at the pleasure of the power appointing her, may be removed without cause.[88] If errors intervening in the progress of the trial for removal render the order of removal voidable only, it cannot be impeached collaterally in a suit for wages.[89]

(V) *Engineer and Crew of Patrol Boat.* The chief engineer of a police patrol boat is not a member of the police force, as he is not mentioned in the statute specifying the employees composing it,[90] and statutes authorizing the commissioner of police to employ such crew as he might deem necessary for the police patrol boat does not make such crew members of the police force, merely by virtue of their employment.[91]

(VI) *City Jailer.* The governing board of a city has no inherent power to create the office of city jailer. It can exercise only those powers granted in express terms or necessarily implied, or those essential to the declared object and purpose of the corporation, not simply convenient but indispensable.[92] Where a statute provides that a city jailer shall perform such duties as the general council shall prescribe, he may be required by ordinance to perform the duties of janitor of the city hall and the building adjacent, in which were located the offices of city officers.[93] Where the legislature fixes the minimum compensation of a city jailer,

81. Canniff *v.* New York, 4 E. D. Smith (N. Y.) 430.

Vacancy at time of appointment.— Where, to establish the validity of an appointment to the office of police clerk, it was necessary to show that a vacancy existed in that office at the time the appointment was made, it was held, in an action for salary, that the resignation of a former incumbent, in the absence of proof to the contrary, raised a presumption that the vacancy continued to the period when the present claimant was appointed. Canniff *v.* New York, 4 E. D. Smith (N. Y.) 430.

82. People *v.* Knox, 45 N. Y. App. Div. 518, 61 N. Y. Suppl. 469.

83. Canniff *v.* New York, 4 E. D. Smith (N. Y.) 430.

84. Canniff *v.* New York, 4 E. D. Smith (N. Y.) 430.

85. Cregier *v.* New York, 11 Daly (N. Y.) 171.

86. People *v.* French, 25 Hun (N. Y.) 111, 10 Abb. N. Cas. 418.

87. People *v.* Henry, 62 Cal. 557.

88. McNab *v.* Bay City, 125 Mich. 51, 83 N. W. 1022.

89. Chicago *v.* Campbell, 118 Ill. App. 129.

90. People *v.* York, 43 N. Y. App. Div. 444, 60 N. Y. Suppl. 208.

91. People *v.* York, 43 N. Y. App. Div. 444, 60 N. Y. Suppl. 208.

92. State *v.* Canavan, 17 Nev. 422, 30 Pac. 1079.

93. Paducah *v.* Evitts, 120 Ky. 444, 86 S. W. 1123, 27 Ky. L. Rep. 867.

the council cannot pass an ordinance fixing it at a sum less than the minimum prescribed by the legislature.[94]

(VII) *POUND-KEEPER.* Where the office of pound-keeper is a public office created by statute, a municipal corporation has no power to appoint such officer unless authority therefor is expressly conferred by charter.[95] Where appointment by a municipality is authorized, and the appointee's compensation for services as such fixed, he cannot recover salary for incidental services as special policeman, having been informed on his appointment to the latter office that he would receive no pay for services rendered in performing the duties thereof.[96]

(VIII) *DOORKEEPER.* A doorman at a station house is not a member of the police force where the charter expressly enumerates the force as "captain, roundsman and patrolmen," and the police board may appoint doormen to hold office at its pleasure.[97] Where under the statutes, the doorman at a station is not a police officer, he may be removed at the discretion of the police board, without preferring charges against him.[98] Where a doorman is illegally transferred to another department, his failure to perform the duties of the new office constitute no ground for removing him from his office as doorman.[99]

(IX) *POLICE SURGEON.* Charter authority to appoint an adequate police force confers no right to appoint a police surgeon as a member of the police force,[1] and if it were otherwise employment of a physician to attend policemen, at a stipulated fee for each visit, would not render him "attached to the police force," under a consolidation charter, providing for the transfer to the force of the city persons related to the police force transferred.[2] The fixing and allowing of a monthly salary for the police surgeon regularly employed by the police commissioners to perform services for the police department, required under their rules for the government and discipline of the police force, does not create an office.[3] A police surgeon has been held not a "clerk or employee" within a statute authorizing the police board to fix their compensation.[4]

(X) *WATCHMAN.* A night watchman appointed under charter authorization for a fixed term with a fixed salary has been held to be an officer and not a mere employee.[5] He is concluded as to his salary by the terms of the resolution appointing him, even though he did not in fact know them.[6]

(XI) *STATION MASTER.* A station-house keeper, although appointed by a police board pursuant to delegated authority, and with the implied consent of the council of the municipality to perform functions pertaining to the police department, is not a member of the police force, because not included in a provision expressly stating of whom the police force shall consist.[7] The common council may abolish the office of station master in the interest of economy and to lessen the expense of government.[8]

6. HEALTH — a. In General. The exercise of the powers essential to municipal

94. Paducah *v.* Evitts, 120 Ky. 444, 86 S. W. 1123, 27 Ky. L. Rep. 867.

95. White *v.* Tallman, 26 N. J. L. 67.

96. Decatur *v.* Vermillion, 77 Ill. 315.

97. People *v.* York, 35 N. Y. App. Div. 372, 54 N. Y. Suppl. 888.

Presumption of appointment.— The action of the police commissioners, under the Greater New York charter, in permitting the relator to perform the duties of doorman in the police force for two months after the charter took effect, does not authorize the presumption of a new appointment, since no such appointment is authorized under the charter. People *v.* York, 35 N. Y. App. Div. 372, 54 N. Y. Suppl. 888.

98. Tilley *v.* Cleveland, 4 Ohio Dec. (Reprint) 397, 2 Clev. L. Rep. 105.

99. People *v.* Bishop, 15 Misc. (N. Y.) 273, 36 N. Y. Suppl. 411 [*affirmed* in 157 N. Y. 675, 51 N. E. 1093].

1. People *v.* York, 32 N. Y. App. Div. 57, 52 N. Y. Suppl. 778.

2. People *v.* York, 32 N. Y. App. Div. 57, 52 N. Y. Suppl. 778.

3. Cain *v.* Warner, 45 N. Y. App. Div. 450, 60 N. Y. Suppl. 769.

4. People *v.* New York Bd. of Police, 75 N. Y. 38 [*reversing* 12 Hun 653].

5. Doolan *v.* Manitowoc, 48 Wis. 312, 4 N. W. 475.

6. Doolan *v.* Manitowoc, 48 Wis. 312, 4 N. W. 475.

7. People *v.* Ham, 166 N. Y. 477, 60 N. E. 191.

8. People *v.* Ham, 166 N. Y. 477, 60 N. E. 191 [*reversing* 57 N. Y. App. Div. 367, 68 N. Y. Suppl. 298].

sanitation and quarantine is usually committed to a board of health,[9] but they may be wielded by the police board or by the common council.[10] Its organization is usually dependent upon the provisions of the charter or the general statutes.[11] Members of the board of health have been held to be state and not municipal officers.[12]

b. Appointment and Removal of Officers — (I) *APPOINTMENT* — (A) *In General.* Authority to appoint the officers of a municipal health department is usually conferred upon the mayor or the city council,[13] and in the absence of statutory authority such power cannot be delegated.[14] When the manner in which appointments shall be made is prescribed, it should be followed, or the appointment will be invalid;[15] but an enlargement of the charter requirements by ordinance does not have that effect.[16]

(B) *Subordinate Officers.* Subordinate officers, clerks, and employees are generally authorized to be appointed by the head of the department.[17]

(II) *REMOVAL.* Where the right to remove health officers is reserved in the appointing power without the necessity of making charges it may be exercised in the discretion of the appointing power before the expiration of the term.[18] Where, however, the right of removal is made dependent upon the preferring of charges, one cannot be removed unless such charges are made,[19] unless the removal is made solely to meet a reduction in appropriations.[20]

c. Compensation of Officers. Health officers are officers of the city and must be paid by it.[21] When the amount of such compensation is not fixed by statute, it may be fixed by ordinance, and the salary so allowed will not be interfered with by the courts unless unreasonably small.[22] When expressly permitted the board

9. Smith Mun. Corp. §§ 1066, 1675.

10. Smith Mun. Corp. §§ 1052, 1058; State *v.* Hornberger, 8 Ohio Dec. (Reprint) 96, 5 Cinc. L. Bul. 626.

11. Smith Mun. Corp. § 1674.

12. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73, 72 Am. Dec. 724.

13. Health officers are city officers.— A statute directing a county judge to fill a vacancy in a city board of health after thirty days is unconstitutional in that members of that board are city officers within a constitutional provision that city officers shall be elected or appointed by the city authorities. People *v.* Houghton, 182 N. Y. 301, 74 N. E. 830 [*affirming* 102 N. Y. App. Div. 209, 92 N. Y. Suppl. 661].

14. Atty.-Gen. *v.* McCabe, 172 Mass. 417, 52 N. E. 717.

15. Klais *v.* Pulford, 36 Wis. 587.

16. St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918, holding that where the charter requires the city chemist to be appointed by the mayor and approved by the council, an appointment is not rendered invalid by the fact that an ordinance requires appointments to be also approved by the board of health.

17. The medical staff or board of visiting physicians of the Philadelphia hospital, consisting of specialists or experts in the various departments of medical science, performing gratuitous services, are not officers, clerks, or employees within such a provision. Com. *v.* Fitler, 147 Pa. St. 288, 23 Atl. 568, 15 L. R. A. 205 [*affirming* 10 Pa. Co. Ct. 144].

Coroner's physician.— Under a statute providing that each coroner of Greater New York city shall appoint a physician to be known as a "coroner's physician," the coroner has a right to appoint such a physician, whose term shall be the same as that of the coroner. People *v.* Goldenkranz, 38 Misc. (N. Y.) 682, 78 N. Y. Suppl. 267.

18. Riffe *v.* Tinley, 103 Ky. 631, 45 S. W. 1046, 20 Ky. L. Rep. 281; State *v.* Somers, 35 Nebr. 322, 53 N. W. 146.

Express removal unnecessary.— A health officer may as well be removed by the appointment of another to take his place as by an express act of removal. State *v.* Craig, 69 Ohio St. 236, 69 N. E. 228.

19. A health officer of a city is not an employee within a statute providing that no employees in the health department shall be removed or reduced in pay, except for cause assigned and after a hearing. State *v.* Craig, 69 Ohio St. 236, 69 N. E. 228.

Health wardens are neither chiefs of bureaus nor clerks within a statute authorizing the head of the department to remove chiefs of bureaus and clerks. Demarest *v.* New York, 42 Barb. (N. Y.) 186.

A salaried food inspector in the department of health of New York city is not a clerk or head of a bureau. People *v.* New York Health Dept., 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123].

20. People *v.* New York Health Dept., 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123].

21. Graves *v.* Paducah, 89 S. W. 708, 28 Ky. L. Rep. 576.

22. Graves *v.* Paducah, 89 S. W. 708, 28 Ky. L. Rep. 576.

of health may fix the salary of the health officers[23] and clerks.[24] While receiving a salary, no implied assumpsit can arise for specific services.[25] During a period of unlawful removal from office, health officers are, like other officers, entitled to their salaries,[26] where no one is appointed in their stead.[27] When it has been expressly declared and assented to that services rendered shall be honorary, no right to compensation exists.[28]

d. Authority, Powers, and Duties of Officers. City boards of health have general supervision of all matters pertaining to the preservation of the public health, and their power is commensurate with their duty.[29] To this end they are commonly given authority to adopt such rules and regulations, make such contracts, and employ such medical attendants and other persons as to them seems best to promote the public welfare;[30] to make orders for the suppression and removal of nuisances;[31] to make quarantine regulations;[32] to supervise vaccination;[33] and to maintain actions to restrain by injunction violation of its orders and regulations.[34] Other and further duties may be imposed upon health officers by the city council where power so to do has been expressly conferred.[35] Their power and jurisdiction is of course confined to their respective municipalities.[36] Under a statute constituting the city council the board of health, where no other board is appointed, neither the power nor the obligation of the council is lessened by the

23. Compensation of physician employed by board.— Where a board of health was authorized to fix the compensation of health officers, and audit the fees of persons employed by them, such board has power to fix the compensation of a physician employed by them, and the common council has no power to reduce the amount so fixed. Pease *v.* Saginaw, 126 Mich. 436, 85 N. W. 1082.

Must keep salaries within appropriation.— A board of health of a city has no power to fix the salary of the health officers in a sum in excess of the appropriation made by councils therefor, and by so doing make the city liable to respond to such officer for such excess. Watt *v.* Altoona, 9 Pa. Dist. 235, 23 Pa. Co. Ct. 410.

24. Wilson *v.* New York, 31 Misc. (N. Y.) 693, 65 N. Y. Suppl. 328.

25. Wendell *v.* Brooklyn, 29 Barb. (N. Y.) 204.

26. Stoddart *v.* New York, 80 N. Y. App. Div. 254, 80 N. Y. Suppl. 344; Smith *v.* Brooklyn, 6 N. Y. App. Div. 134, 39 N. Y. Suppl. 990.

27. Smith *v.* Brooklyn, 6 N. Y. App. Div. 134, 39 N. Y. Suppl. 990.

28. Haswell *v.* New York, 81 N. Y. 255 [*affirming* 9 Daly 1].

29. Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887.

Manner of incorporation of municipality immaterial.— Members of village boards of health are subjected to the same duties and liabilities, whether the village for which they are appointed is incorporated under a general or special act. Matter of Lansingburgh Bd. of Health, 43 N. Y. App. Div. 236, 60 N. Y. Suppl. 27.

30. Elliott *v.* Kalkaska Sup'rs, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706; Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887.

Employment of counsel.— Boards of health have no power to employ private counsel to prosecute indictments for nuisance. Reynolds *v.* Ossining, 102 N. Y. App. Div. 298, 92 N. Y. Suppl. 954; Smith *v.* Scranton, 2 Pa. Co. Ct. 331.

Where a board of health in awarding a contract do not exercise their untrammeled judgment, but are controlled by an illegal ordinance, which they supposed binding on them, such contract is not legal. Goddard *v.* Lowell, 179 Mass. 496, 61 N. E. 53.

31. Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3; Gould *v.* Rochester, 39 Hun (N. Y.) 79 [*reversed* on other grounds in 105 N. Y. 46, 2 N. E. 275].

32. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113.

33. Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127, holding that a city ordinance making it the duty of a board of health to provide for the vaccination of persons as a protection against smallpox does not impose upon the board or its members the duty to do such services personally, but only to provide therefor.

34. Gould *v.* Rochester, 39 Hun (N. Y.) 79 [*reversed* on other grounds in 105 N. Y. 46, 12 N. E. 275].

35. Wendell *v.* Brooklyn, 29 Barb. (N. Y.) 204, in which it was decided that the common council has authority to add to the duties of the health officer the duty of inspecting and granting to police officers and candidates for the place of police officers certificates of their physical fitness for the duties imposed upon them.

36. Gould *v.* Rochester, 39 Hun (N. Y.) 79 [*reversed* on other grounds in 105 N. Y. 46, 12 N. E. 275], holding that where a city discharged its sewerage into a creek to the injury of a town below, through which the creek ran, the town board of health, having no jurisdiction beyond the town limits, could make no order in the premises binding on the city nor maintain a suit to restrain the city from violating its order.

failure to designate a subagency, and their power is a police power and is commensurate with their duty.[37]

e. Criminal Responsibility of Officers. While health officers are not liable for injuries resulting from the mistaken exercise of discretionary power,[38] they are indictable for refusing to perform their duty,[39] and for gross negligence.[40]

7. Buildings — a. Appointment and Removal of Officers — (I) *Appointment.* The department of buildings may be established by statute, or by ordinance under charter authority.[41] An amended charter creating a department of buildings operates to repeal an ordinance creating a bureau of inspection and to remove all officers of the former bureau;[42] and the abolition of the department abolishes all offices in it not expressly excepted.[43] Where no department of buildings is created, it is usually provided that an inspector of buildings shall be appointed by the mayor or the council.[44] An ordinance defining the qualifications of an inspector is mandatory, and the appointment of one who has not such qualifications is invalid.[45]

(II) *Removal.* A building inspector, being an assistant to the building commissioner, is subject to removal by him at pleasure,[46] unless charges are expressly required to be preferred.[47]

b. Term of Office. Officers of the building department usually hold for a fixed and definite term, which may be changed by the power authorized to fix it.[48]

c. Compensation of Officers. The salary attached to an office in the building department is presumed to be in full for all services rendered, and an officer or employee is not entitled to extra compensation for special services.[49] Where no

37. Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887.

38. Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3.

39. Com. *v.* Genther, 17 Serg. & R. (Pa.) 135.

40. Aaron *v.* Broiles, 64 Tex. 316, 53 Am. Rep. 764.

41. Cutshaw *v.* Denver, 19 Colo. App. 341, 75 Pac. 22.

42. Cutshaw *v.* Denver, 19 Colo. App. 341, 75 Pac. 22.

43. O'Toole *v.* Stewart, 75 N. Y. App. Div. 497, 78 N. Y. Suppl. 473.

Reinstatement.— Under a statute providing that when any employment is abolished the persons filling the employment shall be deemed suspended without pay, and shall be entitled to reinstatement in any similar employment should there be need for their services, an employee of the abolished department of buildings is only entitled to reinstatement when the superintendent of buildings decides that his services are needed, and in the absence of any showing of bad faith on the part of the superintendent his decision in that regard is not reviewable by the courts. O'Toole *v.* Stewart, 75 N. Y. App. Div. 497, 78 N. Y. Suppl. 473.

44. *In re* Building Inspectors, 17 R. I. 819, 21 Atl. 913.

45. State *v.* Starkey, 49 Minn. 503, 52 N. W. 24.

"Practical building mechanic."— One who has for more than five years been a student of architecture and building construction, and has planned, worked on, and superintended the construction of buildings of different kinds, inspecting the work of construction in all its branches, is a "practical building mechanic," within a city charter prescribing the qualifications of inspectors of buildings. People *v.* Buffalo, 18 Misc. (N. Y.) 533, 42 N. Y. Suppl. 545.

46. Magner *v.* St. Louis, 179 Mo. 495, 78 S. W. 782; State *v.* Longfellow, 95 Mo. App. 660, 69 S. W. 596; State *v.* Longfellow, 93 Mo. App. 364, 67 S. W. 665. See also People *v.* Purroy, 10 N. Y. Suppl. 181 [*affirmed* in 125 N. Y. 713, 26 N. E. 755].

When building inspector not "officer."— Under a city charter defining the term "officers" to include all persons holding any city situation with an annual salary or for a definite term, a building inspector ceases to be an officer, as regards mode of removal, on the repeal of an ordinance prescribing a yearly salary and a definite term, and the substitution of another giving such inspector only a monthly salary and no definite term. Magner *v.* St. Louis, 179 Mo. 495, 78 S. W. 782.

That a notice to a building inspector of his removal is signed by the president of the board of public improvements, as well as by the commissioner of public buildings, does not affect the validity of the notice. State *v.* Longfellow, 95 Mo. App. 660, 69 S. W. 596.

47. People *v.* Brady, 48 N. Y. App. Div. 128, 62 N. Y. Suppl. 603, holding that the office of inspector of buildings being an important one, the commissioner is justified in removing from such office one who entered a saloon, and committed an assault on a person inside.

48. State *v.* Starkey, 49 Minn. 503, 52 N. W. 24.

49. Chamberlain *v.* Kansas City, 125 Mo. 430, 28 S. W. 745; McCabe *v.* New York, 77

salary has been fixed as required by law, none can be recovered.[50] When an office in such department is abolished, the salary attached thereto becomes extinct.[51]

d. Reimbursements For Expenditures. Building inspectors are entitled to an allowance for expenditures necessary for the performance of their official duties, but they have no implied power to appropriate to themselves a gross sum for which they are not to be accountable, or to estimate or guess what amount they probably have expended. They must render a detailed account.[52]

e. Powers, Duties, and Liabilities of Officers. The powers and duties of building superintendents and inspectors are defined by charter or ordinance,[53] and for any neglect or non-performance of a duty imposed whereby other persons sustain injury they may be held liable in damages.[54]

8. Fire Department[55] — a. Nature, Status, and Powers in General. Municipal corporations, particularly those of the first class, are usually given express power to provide for the organization and support of a fire department,[56] or the fire department may be created by the organic law of the municipality as a distinct department independent of the legislative department.[57] The municipal organization for fire protection is often regarded as a quasi-corporation,[58] and as

N. Y. App. Div. 637, 79 N. Y. Suppl. 176 [*affirmed* in 176 N. Y. 587, 68 N. E. 1119].

50. Middleton *v.* New York, 50 Misc. (N. Y.) 587, 99 N. Y. Suppl. 440.

51. Cutshaw *v.* Denver, 19 Colo. App. 341, 75 Pac. 22.

52. Matter of Building Inspectors' Accounts, 12 Phila. (Pa.) 226.

53. Supervising construction of city hall.— Where a city ordinance requires the department of public buildings to attend to the enforcement of all ordinances pertaining to the erection and alteration of buildings, and such other duties as may be required by the board of public works, the superintendent of that department can be required to supervise the construction of a city hall. Chamberlain *v.* Kansas City, 125 Mo. 430, 28 S. W. 745.

Requiring erection of fire-escapes on factories.— Labor Law (Laws (1897), p. 481, c. 415, § 82), providing that such fire-escapes as may be deemed necessary by the factory inspector shall be provided on the outside of every factory in this state consisting of three or more stories in height, does not repeal by implication the provision of the Greater New York Charter (Laws (1897), c. 378), enacted but nine days prior to the Labor Law, granting and continuing to the superintendent of buildings in the city of New York jurisdiction to require the erection of fire-escapes on factory buildings in that city. New York *v.* Sailors' Snug Harbor, 85 N. Y. App. Div. 355, 83 N. Y. Suppl. 442 [*affirmed* in 180 N. Y. 527, 72 N. E. 1140].

54. Merritt *v.* McNally, 14 Mont. 228, 36 Pac. 44; Connors *v.* Adams, 13 Hun (N. Y.) 427.

Personal default necessary.— McGuinness *v.* Allison Realty Co., 46 Misc. (N. Y.) 8, 93 N. Y. Suppl. 267.

55. Destruction of property under emergency police power see *infra*, XI, A, 8, k.

Exemption of firemen from jury duty see Juries, 24 Cyc. 205.

Liability of city to fireman for injury see *infra*, XIV, A, 2, b.

License-fees of insurance companies devoted to benefit of department see Insurance, 22 Cyc. 1391.

56. See the statutes of the several states and charters of particular municipalities. An see Moreton *v.* Swan, 20 Utah 79, 57 Pac. 718.

Where power is conferred upon the selectmen by general statute to establish a fire department they cannot be deprived of such power by vote of the town. Long *v.* Sargent, 101 Mass. 117, holding that the fact that a town has at its annual meeting elected fire wards does not affect the right of the selectmen, under Gen. St. c. 24, §§ 23–31, to establish a fire department.

Effect of organization of department.— In case a fire department is established the duties of town fire wards are suspended, although they remain officers of the town. Long *v.* Sargent, 101 Mass. 117.

57. People *v.* Newman, 96 Cal. 605, 31 Pac. 564, holding that a constitutional provision that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," did not authorize the board of supervisors of a certain city and county by ordinance to reorganize and regulate the fire department of that municipality, since the charter of the city and county provided for the organization and administration of such department as a branch of the municipal government, and could not be abrogated by such ordinance. See Clarissy *v.* Metropolitan Fire Dept., 7 Abb. Pr. N. S. (N. Y.) 352; Jones *v.* Doherty, (Tex. Civ. App. 1900) 56 S. W. 596.

58. Prout *v.* Pittsfield Fire Dist., 154 Mass. 450, 28 N. E. 679 (so holding of a fire district); Clarissy *v.* Metropolitan Fire Dept., 7 Abb. Pr. N. S. (N. Y.) 352. See also *supra*, I, C, 3, b, (III), (B), (1).

such may sue and be sued,[59] or may compromise doubtful and disputed claims;[60] but the fact that the fire department has this standing as a public quasi-corporation does not in itself render its officers civil officers.[61] By statute the powers with regard to building inspection usually vested in the building department[62] are sometimes vested in the fire department,[63] in which case it has no right to delegate such powers.[64] A board of fire wardens has no power to make by-laws affecting third persons except as such power is expressly granted.[65] A fire department has no power to prohibit the use of means for the extinguishment of fires, other than those employed by it, when such means are used without interference with or obstruction of its own operations.[66]

b. Volunteer Departments — (i) *In General.* Municipalities which do not maintain an entire paid department usually rely upon the services of volunteer companies,[67] the officers being in some instances salaried, while the members in general serve without compensation save certain exceptions, such as from militia[68] and jury[69] duty, or from poll[70] and general municipal[71] taxes. And these companies are regarded as a portion of the municipal government.[72] The facts that the fire department of a city is voluntary to the extent that no person is compelled to become a member, and that no member is under a legal obligation to continue his membership, does not render it a mere voluntary association; yet it may be regarded as a branch of the city government.[73] The members and officers of a volunteer fire department are not, as a mere result of such membership, civil and public officers.[74]

(ii) *Municipal Control.* Under a power to determine the number of fire companies required for the protection of the city a board of fire commissioners may reduce the number of companies.[75] And a provision requiring a hearing upon charges as precedent to a dismissal of individual members of a fire department does not limit the power to disband a volunteer company.[76] Where a volunteer company originally appointed by the council is incorporated, but it is provided in the act of incorporation that it shall remain subject to the same control of the council as before, the council upon resignation of all of its members has the

59. Prout *v.* Pittsfield Fire Dept., 154 Mass. 450, 28 N. E. 679; Clarissy *v.* Metropolitan Fire Dept., 7 Abb. Pr. N. S. (N. Y.) 352.

Liability of city see *infra*, XIV, A, 5, i.

By express provision in New York the fire department may maintain an action to collect from agents of fire associations, not incorporated in New York, the amount fixed by Consol. Act, § 523. New York Fire Dept. *v.* Stanton, 28 N. Y. App. Div. 334, 51 N. Y. Suppl. 242 [*affirmed* in 159 N. Y. 225, 54 N. E. 28].

60. Prout *v.* Pittsfield Fire Dist., 154 Mass. 450, 28 N. E. 679.

61. State *v.* Crawford, 17 R. I. 292, 21 Atl. 546, holding that fire wards are not civil officers, within the meaning of a constitutional provision that "no one shall be eligible to any civil office" unless he is a qualified elector for such office; and the fact that the duties are imposed on a fire ward which can only be imposed on an officer cannot of itself make him an officer. See also New York Fire Dept. *v.* Atlas Steamship Co., 106 N. Y. 566, 13 N. E. 329; People *v.* Pinckney, 32 N. Y. 377.

62. See *supra*, VII, B, 7.

63. See New York Fire Dept. *v.* Atlas Steamship Co., 106 N. Y. 566, 13 N. E. 329.

64. New York Fire Dept. *v.* Sturtevant, 33 Hun (N. Y.) 407, holding that the department has no right to delegate to a subordinate officer or bureau the power to require certain buildings to be equipped with fire-escapes.

65. Coffin *v.* Nantucket, 5 Cush. (Mass.) 269.

Organization of department as affecting status see *supra*, note 57.

66. Teutonia Ins. Co. *v.* O'Connor, 27 La. Ann. 371, holding a department not warranted in prohibiting absolutely all use of Babcock fire extinguishers, since owners or insurers of property have the right to use the extinguishers before the arrival of the firemen, or afterward, so that the operations of the department are not obstructed.

67. **Legislative control** see *supra*, IV, E.

68. See Militia.

69. See Juries.

70. See Streets and Highways.

71. See *infra*, XV, D, 4, q.

72. Empire Hook, etc., Co. No. 1 *v.* Phœnix Ins. Co., 12 N. Y. St. 510.

73. People *v.* San Francisco Fire Dept., 14 Cal. 479.

74. People *v.* Pinckney, 32 N. Y. 377.

75. People *v.* Auburn Fire Com'rs, 27 N. Y. App. Div. 530, 50 N. Y. Suppl. 506.

76. People *v.* Auburn Fire Com'rs, 27 N. Y. App. Div. 530, 50 N. Y. Suppl. 506.

right to appoint new members.[77] An application for certiorari to review the action of a board of fire commissioners in disbanding a company can be made only by a person aggrieved.[78]

(III) *MEETINGS, ELECTIONS, AND OFFICERS.* Volunteer fire companies being regarded as a portion of the local municipal government,[79] their meetings and elections must be held within the municipal boundaries.[80] Under some statutes recommendations for general officers of the department are made to the municipal council by a convention of delegates from the companies;[81] but in the absence of express authority the legislative branch of the municipal government cannot delegate to the companies the right to elect municipal officers, although the duties of such officers pertain only to the fire department.[82] A chief elected by a volunteer department who has no rights or authority except such as he acquires under the ordinances of the city may be removed by the legislative body of the city.[83] A municipal council in determining a contested election for engineer of a volunteer department exercises judicial functions which may be reviewed on certiorari.[84]

(IV) *OFFENSES.* Under some statutes a volunteer company may be ordered out of service temporarily or disbanded for rioting or fighting in the public streets.[85]

c. Boards of Fire Commissioners. The general control of the fire departments in the larger cities is frequently vested by statutes or charters in a board of fire commissioners,[86] which some statutes make branches of municipal government;[87] but unless expressly authorized the council cannot create a fire board

77. Miller *v.* Savannah Fire Co., 26 Ga. 678.

78. People *v.* Auburn Fire Com'rs, 27 N. Y. App. Div. 530, 50 N. Y. Suppl. 506, holding that a member of a volunteer company who holds for no definite time and is under no obligation to remain and who is paid from a sum allowed annually to the company in the discretion of the fire commissioners has no such interest as will allow him to maintain certiorari.

Persons entitled to certiorari in general see CERTIORARI, 6 Cyc. 766.

79. See *supra*, VII, B, 8, a.

80. Empire Hook, etc., Co. No. 1 *v.* Phœnix Ins. Co., 12 N. Y. St. 510.

81. People *v.* Hayes, 20 N. Y. App. Div. 36, 46 N. Y. Suppl. 546, holding that the board of trustees of an incorporated village were not required to appoint a chief engineer of the fire department, and assistants, until candidates had been so recommended.

After power of confirmation has been abolished.— Where by a consolidation a village is destroyed as a corporation, but it is provided that the paid fire department shall, as soon as practicable, be extended over the village, when the volunteer department shall be disbanded, it being the intention to preserve the volunteer fire department until the paid department was so extended, the taking away of the power of confirmation of officers selected does not abolish the right to select officers while the volunteer department continued. Richmond Hill Fire Dept. *v.* Davies, 25 Misc. (N. Y.) 683, 54 N. Y. Suppl. 1077.

82. Gouldey *v.* Atlantic City, 63 N. J. L. 537, 42 Atl. 852 (chief engineer); Hofford *v.* Allentown, 5 Pa. Co. Ct. 299 (chief).

83. Higgins *v.* Cole, 100 Cal. 260, 34 Pac. 678.

84. People *v.* San Francisco Fire Dept., 14 Cal. 479.

85. See *In re* Northern Liberty Hose Co., 13 Pa. St. 193, holding that a sentence in a proceeding under such a statute, ordering the company out of service, and directing the sheriff of the city and county to lock the doors of the engine house, and retain the keys in his possession for six months, did not exceed that allowed by the statute.

Sufficiency of complaint.— A complaint alleging that a certain company was guilty of rioting and fighting in a public street called "Fifth," on the evening of Thursday, Nov. 29, 1849, while they were "returning from a fire, or a false alarm thereof," and praying that such company be declared out of service, in accordance with the provisions of the act, was not insufficient by reason of want of particularity or for the alternative statement as to the fire or alarm. *In re* Northern Liberty Hose Co., 13 Pa. St. 193.

86. See the statutes of the several states. And see the cases cited in the following notes.

Appointment by fire underwriters.—A statute providing for the appointment of a board of fire commissioners by the board of underwriters of San Francisco, which was composed of the agents of the various insurance companies doing business in the state, some of them being foreign companies, is not obnoxious to a constitutional provision that all officers whose offices may hereafter be created by law shall be elected by the people or appointed as the legislature may direct, since it is not therein required that the appointing power shall be given citizens of the state. *In re* Bulger, 45 Cal. 553.

87. People *v.* San Francisco Fire Dept., 14 Cal. 479.

and delegate to it powers and duties, some of which are imposed by statute upon the council as a body and some of which are the duty of the chief engineer of the fire department, a city officer provided for by general law.[88] Where by the charter or statute certain defined powers and duties are conferred upon the board it cannot be controlled by the council in the exercise and performance thereof.[89] Where the board of fire commissioners are municipal officers, the mayor and aldermen have power to institute proceedings against them and remove them from office for misconduct or neglect of duty, without express legislative authority.[90] Under some statutes the power of appointment to these boards is vested in the governor.[91] But where a member of a fire commission holds office for a specified term and until appointment and qualification of his successor, the abolition of the body having the power of appointment of successors does not at the expiration of the term create a vacancy in office authorizing the governor to appoint.[92] A general power of removal of fire commissioners vested in the governor includes appointments made by and with the consent of the senate.[93] Where appointive officers of the governor have become city officers by constitutional provision consolidating several municipal corporations into a new corporation, and providing that existing officers shall hold as officers of the new corporation until their successors have been elected and qualified, the governor has no longer a power of removal.[94] The board cannot appoint to an office which will come into existence or become vacant at a time when the board will be differently constituted.[95]

d. Chief, Superintendent, or Other Executive. In case the organization of the department is under the control of the council the election of a chief for a definite term does not create a contract between him and the city and the council may abolish the office whenever it sees fit.[96] And where it is provided that he shall hold office for a year or until his successor is appointed and qualified, he may be removed by the appointment of a successor within a year.[97] But if the appointment is to be by the mayor with the advice and consent of the council no vacancy occurs in the office at the expiration of the term, but he holds until the confirmation of a successor.[98] As a general rule the same person cannot hold two positions.[99] But where an engineer holds under a board of fire commissioners and not under the council, he may become a member of the council, the case not being within an ordinance prohibiting a member of the council from holding any

88. Benjamin *v.* Webster, 100 Ind. 15.

89. Jones *v.* Doherty, (Tex. Civ. App. 1900) 56 S. W. 596.

90. Savannah *v.* Grayson, 104 Ga. 105, 30 S. E. 693, holding that the members of the board of fire commissioners of the city of Savannah were municipal or corporate officers of that city.

91. See the statutes of the several states. And see State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348; State *v.* Bennett, 22 Nebr. 470, 35 N. W. 235; State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228. *Compare* Ader *v.* Newport, 6 S. W. 577, 9 Ky. L. Rep. 748, holding that a constitutional provision requiring the election of town and city officers prevented the legislature from providing for the appointment of fire and police commissioners in a district extending beyond the municipal limits, but in practical operation confined thereto.

Power of legislature over fire department see *supra*, IV, E.

92. People *v.* Edwards, 93 Cal. 153, 28 Pac. 831 [*following* People *v.* Hammond, 66 Cal. 654, 6 Pac. 741].

93. Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236. But see State *v.* Smith, 35 Nebr. 13, 52 N. W. 700, 16 L. R. A. 791, holding that a general constitutional power in the governor to remove officers appointed by him applied only to those officers who were mentioned in the constitution and that it did not apply to fire and police commissioners who under the charter of a city he might appoint.

94. People *v.* Adams, 31 Colo. 476, 73 Pac. 866, construing Const. art. 20, providing for the government of the city and county of Denver.

95. Dickinson *v.* Jersey City, 68 N. J. L. 99, 52 Atl. 278.

96. Williams *v.* Newport, 12 Bush (Ky.) 438.

97. Higgins *v.* Cole, 100 Cal. 260, 34 Pac. 678.

98. State *v.* Bryson, 44 Ohio St. 457, 8 N. E. 470.

99. People *v.* Saratoga Springs Fire Com'rs, 76 Hun (N. Y.) 146, 27 N. Y. Suppl. 548, holding that the same person could not be both assistant chief engineer and a fireman.

salaried office under the council.[1] A power conferred upon a fire master or intendant to destroy buildings to prevent the spread of fire includes the power to decide on the necessity of so doing.[2] Under some statutes the fire master has authority to investigate the sources and circumstances of fires.[3]

e. Civil Service Rules — (I) *In General.*[4] Under the statutes or charters the fire department is frequently placed under civil service rules.[5] Under such provisions a civil service commission may have control over officers and employees, although such officers and employees were appointed by the mayor and approved by the council.[6] The acts of a civil service commission in classifying positions in the fire department are not judicial so as to be subject to review on certiorari, but the remedy for abuse is by mandamus.[7]

(II) *Appointment.* It is frequently provided that preference in appointment shall be given veteran soldiers, sailors, or volunteer firemen.[8] Under such provisions, however, a veteran is not entitled to preference without regard to his fitness mentally and by experience for the office.[9] Upon the consolidation of municipalities, officers in their fire departments become entitled to like positions in the department of the new municipality where the consolidation act so provides;[10] but upon reorganization of a department, employees of the old department cannot compel their appointment to offices in the new department which are not the same

1. Ryan *v.* Lewiston, 86 Me. 125, 29 Atl. 955.

2. White *v.* Charleston, 2 Hill (S. C.) 571.

Destruction of buildings under emergency police power see *infra*, XI, A, 8, k.

3. Harris *v.* People, 64 N. Y. 148 [*affirming* 4 Hun 1], holding that the fire marshal has jurisdiction to institute an investigation as to the circumstances of a fire without any complaint being made to him.

4. **Firemen as employees within eight-hour law** see *infra*, VII, C, 2, c, note 23.

5. See the statutes of the several states, and charters of particular cities.

Power to enact.— Rules and regulations for the government of the fire department of Cleveland, made by the mayor and head of the department under Ohio Rev. St. §§ 1545–1551, are made by the head of the department as contemplated by section 2464 and do not lose their force by the fact that the mayor joined in making them. State *v.* Hyman, 22 Ohio Cir. Ct. 213, 12 Ohio Cir. Dec. 265.

Alteration of rules.— Where it is provided that rules for the government of the fire department shall be formulated by the director of fire, and the mayor, and approved by the council, the director of fire must conduct his office in accordance with such rules and cannot change the rules by custom, unless such custom is known to the mayor and city council for such length of time that it may be considered assented to. State *v.* Hyman, 19 Ohio Cir. Ct. 622, 10 Ohio Cir. Dec. 235.

Retroactive effect of statutes.— A statute authorizing a board of fire and police commissioners to adopt rules to govern the selection and appointment, and that thereafter all selections shall be made according to such rules, does not authorize the board to compel a person already employed to take an examination prescribed by it. Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 40 Pac. 264.

The term "fire force" as used in a civil service statute is to be construed in its popular sense and includes the chief and assistant chief, the engineers, captains, lieutenants, drivers, stokers, tillermen, pipemen, firemen, etc. New Orleans *v.* New Orleans Fire Com'rs, 50 La. Ann. 1000, 23 So. 906, holding that the position of secretary-treasurer of the fire board is not included within the scope of the acts of 1896, Act No. 45, § 67, and hence the fire board has authority to appoint one to fill said position, independently of the civil service.

6. Callaghan *v.* McGown, (Tex. Civ. App. 1905) 90 S. W. 319.

7. People *v.* McWilliams, 185 N. Y. 92, 77 N. E. 785 [*reversing* 100 N. Y. App. Div. 176, 91 N. Y. Suppl. 675, and *overruling* People *v.* Collier, 175 N. Y. 196, 67 N. E. 309].

8. See the statutes of the several states. And see the cases cited in the following notes.

9. People *v.* Scannell, 63 N. Y. App. Div. 243, 71 N. Y. Suppl. 383, holding that a veteran on the eligible list for appointment as foreman of the New York fire department shops, and entitled to a preference under the constitution and statutes, but whose fitness therefor has not been determined by the civil service commission, is only entitled to such appointment over an applicant on the eligible list who is not a veteran when of equal or superior fitness therefor, which is to be determined by the fire commissioner, as the appointing power.

10. People *v.* Gray, 32 N. Y. App. Div. 458, 53 N. Y. Suppl. 274 [*reversing* 23 Misc. 602. 51 N. Y. Suppl. 1087], holding that under the organization of the present city of New York under the new charter (Laws (1897), c. 378), the fire marshal of the Brooklyn fire department became entitled to a transfer to the new position of fire marshal for the borough of Brooklyn and Queens, either by section 722, as being a member of the uniformed force, or, in any event, by section 1536, as being a "subordinate" in the department.

as those they have held.[11] Rules usually fix the age of eligibility.[12] A provision as to eligibility applies to a person whose name is on the eligible list at the time it takes effect, but who is not yet entitled to appointment.[13] The salaries of men appointed in violation of civil service regulation cannot be included in the amount of the annual budget of the commissioners for the purpose of determining whether it exceeds an annual limit.[14] An appointment to fill a vacancy in the department is not rendered illegal by the fact that the fire commissioners make subsequent appointments incurring an expenditure in excess of that they were authorized to incur.[15]

(III) *REMOVAL*—(A) *In General.* Under civil service rules officers and members of the department are ordinarily removable only after trial upon formal charges.[16] The right in a specific case to the protection of such laws depends of necessity upon the construction of the particular statute or ordinance involved.[17]

11. Maxwell *v.* San Francisco Fire Com'rs, 139 Cal. 229, 72 Pac. 996, 96 Am. St. Rep. 91, holding that a clerk of fire department could not compel his appointment as secretary to board of fire commissioners.

12. State *v.* Hyman, 19 Ohio Cir. Ct. 622, 10 Ohio Cir. Dec. 235, holding that under a rule providing "that persons appointed [to the fire department] shall be not less than nineteen nor more than twenty-eight years of age," a person who is over twenty-eight but not twenty-nine years of age is ineligible.

13. People *v.* Scannell, 49 N. Y. App. Div. 244, 62 N. Y. Suppl. 1064.

14. People *v.* Scannell, 69 N. Y. App. Div. 400, 75 N. Y. Suppl. 122 [*affirmed* in 172 N. Y. 316, 65 N. E. 165].

15. People *v.* Scannell, 172 N. Y. 316, 65 N. E. 165 [*affirming* 69 N. Y. App. Div. 400, 75 N. Y. Suppl. 122].

16. See the statutes of the several states, and specific city ordinances.

Construction of statutes.— Sections of a charter providing that the fire marshal may be removed on charges preferred by the mayor, and providing that the power to remove officers shall be vested in the common council after an opportunity has been given him to be heard, should be construed together and the power to remove a fire marshal is vested in the common council. People *v.* McGuire, 27 N. Y. App. Div. 593, 50 N. Y. Suppl. 520. A statute conferring upon a board of fire commissioners the power to appoint and remove all chiefs of bureaus, as also all clerks, officers, employees, and subordinates in their department, except that no regular clerk or head of a bureau can be removed except on charges, leaves other clerks, officers, and employees subject to removal at the pleasure of the board. People *v.* New York Fire Com'rs, 73 N. Y. 437.

17. See the cases cited *infra*, this note.

The uniformed force in New York includes the chief of the fire department (Croker *v.* Sturgis, 175 N. Y. 158, 67 N. E. 307 [*dismissing* appeal from but in effect *reversing* People *v.* Sturgis, 79 N. Y. Suppl. 640], holding that under Laws (1897), pp. 252–254, c. 378, §§ 724–728, the fire commissioner of the city of New York had no power to relieve the chief of the fire department from his duties or remove him from his position because he refused to continue a vacation granted to him on his own request), and a fire marshal for the boroughs of Manhattan, the Bronx, and Richmond in Greater New York (People *v.* Sturgis, 87 N. Y. App. Div. 413, 84 N. Y. Suppl. 403).

The competitive class includes an assistant secretary of the fire department of the borough of Manhattan, New York city (People *v.* Scannell, 28 Misc. (N. Y.) 401, 59 N. Y. Suppl. 950), or a driver (People *v.* Scannell, *supra*).

The force for extinguishing fires has been held to include a surgeon (People *v.* Wurster, 89 Hun (N. Y.) 7, 35 N. Y. Suppl. 86 [*affirmed* in 174 N. Y. 716, 42 N. E. 725]), or a telegraph operator (People *v.* Ennis, 7 N. Y. Suppl. 630 [*distinguishing* People *v.* Brooklyn Fire Com'rs, 28 Hun (N. Y.) 495, as decided under a prior charter]), but not to include an assistant superintendent of telegraphs (People *v.* Brooklyn Fire Com'rs, *supra*), or one appointed as a coal passer (People *v.* Wurster, 35 N. Y. Suppl. 90 [*affirmed* in 149 N. Y. 620, 44 N. E. 1127]), or laborer (People *v.* Wurster, 35 N. Y. Suppl. 88), although he was given a badge and fire-box key, and might be called on to hold a hose at a fire (People *v.* Wurster, 89 Hun (N. Y.) 5, 35 N. Y. Suppl. 89), or although he wore the costume of a fireman and assisted at fires (People *v.* Wurster, 89 Hun (N. Y.) 8, 35 N. Y. Suppl. 90).

A member of the department includes a stoker or fireman (People *v.* French, 12 Hun (N. Y.) 254), a clerk in the kerosene department (see People *v.* Brooklyn Fire, etc., Dept., 10 N. Y. St. 368), or a detailed fireman acting as kerosene inspector (People *v.* Brooklyn Fire, etc., Dept., 106 N. Y. 64, 12 N. E. 641 [*followed* in People *v.* Brooklyn Fire, etc., Dept., 106 N. Y. 676, 13 N. E. 92]; People *v.* Brooklyn Fire, etc., Dept., 8 N. Y. St. 634).

Officers and men include a clerk of the board of fire commissioners (Van Alst *v.* Jersey City, 49 N. J. L. 156, 6 Atl. 883), or veterinary surgeon (Wheeler *v.* New Orleans Fire Com'rs, 46 La. Ann. 731, 15 So. 179).

Heads of bureaus and regular clerks.— The "superintendent of telegraph" in the New York fire department is neither the "head of a bureau" nor a "regular clerk," within the

In order to entitle a person to the protection of the civil service laws he must have been legally appointed;[18] but an employee may be protected under civil service rules, although he did not comply with a rule as to eligibility to appointment where such rule could be and was waived by the board.[19] A provision entitling the officer or employee to information of the cause of removal and an opportunity for explanation does not entitle him to a formal trial,[20] but the explanation must be received and acted on in good faith.[21] A provision that an officer may be removed for cause upon charges furnished in writing by the mayor does not permit an arbitrary removal without a hearing.[22] The fact that the accused requests a postponement without denying the charge does not warrant a dismissal without a trial or investigation where the postponement is denied.[23]

(B) *What Constitutes Removal.* A civil service law does not prohibit a board of fire commissioners from vacating or abolishing superfluous, expensive, or antiquated offices if done in good faith and to promote the efficiency of the service, although it may displace men whose positions are secured to them during good behavior.[24] But the colorable abolition of an office or position for the purpose of

meaning of the charter of 1873. People *v.* New York Fire Com'rs, 86 N. Y. 149. The fact that persons as incident to the performance of their duties render some services which might have been performed by a clerk, such as keeping a record of, or reporting their proceeding, does not characterize their employment as that of regular clerk. People *v.* New York Fire Com'rs, 73 N. Y. 437, so holding of a "surveyor in the bureau of combustibles" and of an "assistant to the fire marshal."

18. State *v.* Hyman, 19 Ohio Cir. Ct. 622, 10 Ohio Cir. Dec. 235, where fireman was over age limit when appointed. See People *v.* Brooklyn Fire, etc., Dept., 103 N. Y. 370, 8 N. E. 730, holding that a fireman cannot be removed by the commissioners of the department of fire and buildings of the city of Brooklyn by a simple resolution, for the reason that he was appointed as a "detailed fireman," and that no such office existed, as the office of fireman is known to the law, and "detailed" means nothing more than "selected." *Compare* People *v.* Saratoga Springs Fire Com'rs, 90 Hun (N. Y.) 515, 35 N. Y. Suppl. 964 [*affirmed* in 149 N. Y. 575, 43 N. E. 988] (holding that under Laws (1887), c. 322, amending the charter of Saratoga Springs (Laws (1866), c. 220), and providing that the fire commissioners should control the expenditures of all funds of the fire department, limited by the charter to a certain amount, and have power to employ certain officers and firemen, but not to discharge them without cause, said commissioners were authorized to employ such officers and firemen as were necessary to the service, and could not discharge one of said firemen on the sole ground that there were no moneys unappropriated, or that no tax had been levied, for the salaries of such employees); People *v.* Brooklyn Fire, etc., Dept., 10 N. Y. St. 368 (holding that where the return to certain writs of certiorari to review the actions of fire commissioners in summarily removing relators by resolution did not directly deny the allegations of membership contained in the petition of each of the relators, and the petition and return together seemed to make a case, where the relators were in possession of the office, exercising the functions, but holding the possessions wrongfully, they could not be summarily removed; and such removal without trial of the validity of their title to the office was illegal).

19. Michaelis *v.* Jersey City, 49 N. J. L. 154, 6 Atl. 881, holding that an employee is protected, although he was appointed without filing an application sworn to, and having a physician's certificate showing his physical condition, as required by a rule adopted by a preceding board of fire commissioners.

20. People *v.* La Grange, 2 N. Y. App. Div. 444, 37 N. Y. Suppl. 99 [*affirmed* in 151 N. Y. 664, 46 N. E. 1150].

Receipt of evidence.— The fire commissioners may exercise a power of removal upon facts within their own knowledge or upon information which they have received and testimony is not required as the basis of their action. People *v.* La Grange, 2 N. Y. App. Div. 444, 37 N. Y. Suppl. 991 [*affirmed* in 151 N. Y. 664, 46 N. E. 1150].

21. People *v.* La Grange, 2 N. Y. App. Div. 444, 37 N. Y. Suppl. 991 [*affirmed* in 151 N. Y. 664, 46 N. E. 1150].

22. People *v.* McGuire, 27 N. Y. App. Div. 593, 50 N. Y. Suppl. 520.

23. People *v.* Brooklyn Fire, etc., Dept., 7 N. Y. Suppl. 439.

24. Newark Fire Com'rs *v.* Lyon, 53 N. J. L. 632, 23 Atl. 274 [*reversing* 53 N. J. L. 92, 20 Atl. 757]. See State *v.* Moores, 63 Nebr. 301, 88 N. W. 490 (holding that where members of the fire department are dismissed by the board of the fire and police commissioners without charges and without a hearing, evidence by one of such members that he had learned that the appointees of the board were practically all republican, and that the politics of those discharged were "supposed" to be fusionist, and that a number of men had been appointed since such discharge, without showing whether or not the subsequent appointees were in place of others resigned or dismissed, is insufficient to impeach the good faith of the board in dismissing such

getting rid of an incumbent is in effect a removal within the meaning of provisions requiring charges and a hearing.[25] The retirement of a fireman on account of disability incurred while in the service is not a removal,[26] nor is a transfer from one post to another, although the latter position is of less dignity and salary, where made in good faith and not for the purpose of evading the statutory restrictions.[27] A reduction of an officer to the original position from which fire commissioners mistakenly attempted to promote him is not a removal.[28] Where a rule of the department provides that absence without leave for a stated period shall be deemed a resignation, a member may be dropped for such an absence without a hearing upon charges.[29]

(c) *Grounds.* The various causes for which a member of the fire department of a municipal corporation may be removed are usually expressly provided by the charter or general statute,[30] as for example, disobedience to the rules and regulations,[31] misbehavior, incompetency, or inefficiency,[32] failure to pay

members as a reduction of the force for want of funds); People *v.* Scannell, 48 N. Y. App. Div. 445, 62 N. Y. Suppl. 930 [*affirmed* in 163 N. Y. 599, 57 N. E. 1121] (holding that Laws (1894), c. 104, authorizing the fire commissioner to appoint such laborers as may be "necessary for the inspection of fire hydrants" does not prevent him from abolishing the position on economic grounds after it has been filled by appointment, and holding further that the removal of seventeen honorably discharged Union veterans from their positions as fire-hydrant inspectors in Brooklyn, by the abolishment of their positions for economic reasons, and to secure uniformity in methods of inspection, is not, when standing alone, evidence of bad faith on the part of the commissioner in removing them).

25. People *v.* Coleman, 99 N. Y. App. Div. 88, 91 N. Y. Suppl. 432; People *v.* La Grange, 7 N. Y. App. Div. 311, 40 N. Y. Suppl. 1026.

26. People *v.* Scannell, 53 N. Y. App. Div. 161, 65 N. Y. Suppl. 832 [*affirmed* in 164 N. Y. 572, 58 N. E. 1091]; People *v.* Bryant, 28 N. Y. App. Div. 480, 51 N. Y. Suppl. 119.

27. Riley *v.* New York, 96 N. Y. 331; Monroe *v.* New York, 28 Hun (N. Y.) 258, change from battalion chief to foreman. But *compare* Michaelis *v.* Jersey City, 49 N. J. L. 154, 6 Atl. 881, holding that a transfer from engineer to stoker was a removal.

28. People *v.* New York Fire Com'rs, 114 N. Y. 67, 20 N. E. 824 [*affirming* 47 Hun 528].

29. People *v.* Sturgis, 77 N. Y. App. Div. 636, 78 N. Y. Suppl. 1037. See also People *v.* Sturgis, 77 N. Y. App. Div. 151, 78 N. Y. Suppl. 1034.

30. See the statutes of the several states, and charters of particular cities. See also cases cited in the following notes.

31. People *v.* Scannell, 74 N. Y. App. Div. 406, 77 N. Y. Suppl. 704 [*affirmed* in 173 N. Y. 606, 66 N. E. 1114].

Obsolete rules.— The failure of a member of a fire department of a city to comply with a rule thereof which has been disregarded for over thirty years is not a cause for his removal, in the absence of directions by the fire commissioner to comply therewith. People *v.* Sturgis, 96 N. Y. App. Div. 620, 88 N. Y. Suppl. 631 [*affirmed* in 183 N. Y. 540, 76 N. E. 1105].

Reliance upon orders of superiors.— A member of a fire department of a city, required by the rules thereof to certify that supplies procured and work ordered were for the benefit of the department, is justified in relying on the orders of his superiors for supplies and work, unless it is evident that the supplies or work were not for public purposes, in which case he should refuse to make the certificate. People *v.* Sturgis, 96 N. Y. App. Div. 620, 88 N. Y. Suppl. 631 [*affirmed* in 183 N. Y. 540, 76 N. E. 1105]. Under the provision of the charter of New York city giving the fire commissioner charge of the property of that department, the chief of the fire department was not guilty of allowing it to be converted to private use, in following the order of the commissioner, and storing hose at places removed from firehouses, and containing inflammable material. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687.

Reliance upon reports of other officers.— The action of the board of fire commissioners in removing the inspector of combustibles for issuing permits for the sale of fireworks in buildings in which persons other than the applicant or his family resided, and in frame buildings, in violation of the rules of the board, will not be disturbed, where it appeared that said inspector, although he acted on reports of surveyors appointed by the board, negligently accepted meager and insufficient reports, and issued permits for tenement houses and other houses, which were probably occupied by persons other than the applicants. People *v.* La Grange, 1 N. Y. App. Div. 338, 37 N. Y. Suppl. 297 [*affirmed* in 153 N. Y. 685, 48 N. E. 1106].

Acts as a citizen.— A fireman cannot urge as against his removal for contribution to a fund to affect legislation that his acts were done as an American citizen and not a fireman. People *v.* Scannell, 74 N. Y. App. Div. 406, 77 N. Y. Suppl. 704 [*affirmed* in 173 N. Y. 606, 66 N. E. 1114].

32. State *v.* Hyman, 22 Ohio Cir. Ct. 213, 12 Ohio Cir. Dec. 265; Ryan *v.* Handley, 43 Wash. 232, 86 Pac. 398, failure of a member of a fire department to report on time after

debts,[33] conduct unbecoming an officer,[34] neglect of duty,[35] or want of judgment.[36] Where it is merely provided that the dismissal shall be for cause the cause must be substantial and one which specially relates to and affects the administration of the office.[37] Where a member cannot be removed except for insufficiency or other cause detrimental to the department he cannot be removed because he becomes a member of the city council.[38]

(D) *Proceedings*— (1) CHARGES. The charges in removal proceedings need not have the technical accuracy of an indictment,[39] but they are in general sufficient if they specify the nature of the offense in such manner that the accused may prepare for trial,[40] and apprise him of the witnesses who are to appear against him.[41] Where the power of removal of fire commissioners is vested solely in the common council their action in preferring charges does not require the approval of the mayor.[42]

(2) NOTICE. The accused is entitled to notice of the hearing,[43] reasonable notice being required where no statutory provision is made.[44]

his regular leave, failure to respond to an alarm of fire, and his going to bed at the station without his night clothes in proper place.

33. State *v.* Hyman, 22 Ohio Cir. Ct. 213, 12 Ohio Cir. Dec. 265; State *v.* Hyman, 21 Ohio Cir. Ct. 187, 11 Ohio Cir. Dec. 559, holding that a member cannot be dismissed on the charge of refusal to pay a small debt, where the specifications fail to show the length of time that the debt has existed and the evidence fails to show that he ever refused to pay it.

34. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687 (holding that the chief of the fire department was not guilty of conduct unbecoming an officer in returning from his unexpired leave of absence and resuming command, as vacation is a personal privilege, that may be waived); State *v.* Hyman, 22 Ohio Cir. Ct. 213, 12 Ohio Cir. Dec. 265.

35. People *v.* Wurster, 91 Hun (N. Y.) 233, 36 N. Y. Suppl. 160 [*reversed* on other grounds in 149 N. Y. 549, 44 N. E. 298] (holding that absence without leave, when caused by sickness, did not constitute neglect of duty); People *v.* Partridge, 13 Abb. N. Cas. (N. Y.) 410 (holding that voluntary and excessive use of intoxicating liquors was "misconduct or neglect of duty"). See People *v.* Sanford, 35 N. Y. Suppl. 29, holding evidence of neglect of horses insufficient.

36. People *v.* New York Fire Com'rs, 106 N. Y. 257, 12 N. E. 596, holding that under General Orders No. 13, O. B. C. (1881) § 3, par. 5, providing that every officer of the fire department of New York city shall "be responsible for any want of judgment . . which may cause unnecessary loss of life, limb or property," the want of judgment for which, under the rule, the officer must be responsible, is a want from which unnecessary loss of life, etc., has resulted, and that, where no loss has been caused by such want of judgment, there can be no removal under the rule.

A single error of judgment will not warrant a removal on the ground of incapacity. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687; People *v.* New York Fire Com'rs, 43 Hun (N. Y.) 554 [*affirmed* in 8 N. Y. St. 695], holding that an assistant chief cannot be removed for "incapacity" for having sent more engines than necessary to a certain fire; no loss of life or property having resulted, and it being an open question as to whether an error of judgment was committed.

37. State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; People *v.* New York Fire Com'rs, 73 N. Y. 437; People *v.* New York Fire Com'rs, 72 N. Y. 445; People *v.* La Grange, 2 N. Y. App. Div. 444, 37 N. Y. Suppl. 991 [*affirmed* in 151 N. Y. 664, 46 N. E. 1150], holding that to be substantial the cause assigned must be some dereliction on the part of the subordinate, or neglect of duty, or some thing affecting his character or fitness for the position.

38. Ryan *v.* Lewiston, 86 Me. 125, 29 Atl. 955.

39. People *v.* Scannell, 80 N. Y. App. Div. 320, 80 N. Y. Suppl. 685.

40. People *v.* New York Fire Com'rs, 77 N. Y. 153; People *v.* Brooklyn Fire Dept., 3 N. Y. St. 144, holding that if the written complaint of incapacity presented to the fire commissioners for the removal of a fireman informs such fireman of the exact facts charged against him, it is sufficient; and it is immaterial if a reference to certain sections of the city charter, as authority for the charge, is erroneous, as such reference is surplusage.

41. People *v.* Scannell, 80 N. Y. App. Div. 320, 80 N. Y. Suppl. 685, holding that the one making the charges against a fireman could testify against him on the trial, although his name was not given as one of the witnesses.

Waiver.— Objection that a party could not testify against a fireman, because his name was not given as one of the witnesses, was waived, where not made when he is called. People *v.* Scannell, 80 N. Y. App. Div. 320, 80 N. Y. Suppl. 685.

42. State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.

43. People *v.* Scannell, 80 N. Y. App. Div. 320, 80 N. Y. Suppl. 685.

44. Duerr *v.* Newark Fire Com'rs, 55 N. J.

(3) Evidence. The duty is imposed upon those making charges to sustain them by a fair preponderance of the evidence,[45] and the proceedings being in some respects analogous to criminal ones[46] the person charged is entitled to the same presumptions in his favor as if the charges were made in a criminal court.[47] But since the proceedings are usually had before heads of department who are not lawyers, the technical rules of evidence are inapplicable,[48] and there is a wide discretion as to the kind of evidence that will be received,[49] although it should be confined to the charge.[50]

(4) Trial or Hearing.[51] The trial or hearing in removal proceedings need not proceed with the same formality as a criminal prosecution,[52] but the accused is entitled to appear and defend by counsel,[53] although it would seem that the trial may be had in his absence in case he is represented by counsel.[54] The trial is to be had before the board or officer designated by the statute or ordinance;[55] and where the power to try charges is vested in a particular officer he may try charges for misconduct committed prior to the creation of his office.[56] A presiding officer is

L. 272, 26 Atl. 144, holding that a notice that accused must attend the examination of said charges before the board of fire commissioners at eight o'clock in the evening, served at ten-thirty o'clock in the morning of the same day, was insufficient.

45. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687.

In case the charges are admitted and the only question involved is the sufficiency of excuses offered by accused, no proof of the charges is required. Ryan *v.* Handley, 43 Wash. 232, 86 Pac. 398, holding further that whether explanations were sufficient to exonerate accused was for the determination of the board of fire commissioners.

For evidence held sufficient to sustain particular charges see as to: Intoxication and disobedience (People *v.* Scannell, 56 N. Y. App. Div. 51, 67 N. Y. Suppl. 433); negligently or wilfully accepting inferior supplies (People *v.* Sturgis, 96 N. Y. App. Div. 620, 88 N. Y. Suppl. 631 [*affirmed* in 183 N. Y. 540, 76 N. E. 1105]); absence without leave (People *v.* Ennis, 19 N. Y. Suppl. 946).

For evidence held insufficient to sustain particular charges see as to: Failure of chief to enforce fire regulations, incompetency, conversion of public property, and conduct prejudicial to good order and discipline (People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687); permitting certain property of the department to be taken and kept at a hall ground for private use (People *v.* Sturgis, 96 N. Y. App. Div. 620, 88 N. Y. Suppl. 631 [*affirmed* in 183 N. Y. 540, 76 N. E. 1105]; People *v.* Sanford, 35 N. Y. Suppl. 29); urging members of the department not to appear as witnesses of what took place on a certain quarrel between members of the department (People *v.* Sturgis, 110 N. Y. App. Div. 1, 96 N. Y. Suppl. 1046).

46. People *v.* Wurster, 91 Hun (N. Y.) 233, 36 N. Y. Suppl. 160 [*reversed* on other grounds in 149 N. Y. 549, 44 N. E. 298].

47. People *v.* Sturgis, 110 N. Y. App. Div. 1, 96 N. Y. Suppl. 1046.

48. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687.

49. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687, holding that the discretion cannot be exercised by admitting everything offered to sustain the charges, and excluding evidence of as high or higher character offered in rebuttal; and holding further that an impartial trial was not allowed the chief of the fire department, on charges of prejudicial conduct toward some of his subordinates, by excluding evidence offered by him to discredit witnesses, showing a conspiracy against him, and by admitting evidence of rumors as to his intentions toward certain subordinates, and evidence of statements made in his absence by persons purporting to speak for him.

50. State *v.* Hyman, 21 Ohio Cir. Ct. 187, 11 Ohio Cir. Dec. 559, holding that on a proceeding based on a rule directing that a member may be discharged for neglect to pay his debts, other debts than the one with the refusal to pay which he is charged cannot be taken into consideration.

51. **Necessity of trial** see *supra*, VII, A, 12, b.

52. People *v.* Scannell, 80 N. Y. App. Div. 320, 80 N. Y. Suppl. 685.

53. People *v.* Flood, 64 N. Y. App. Div. 209, 71 N. Y. Suppl. 1067.

54. People *v.* Partridge, 13 Abb. N. Cas. (N. Y.) 410, holding that a fireman might be dismissed by the fire commissioner of Brooklyn, under Laws (1880), c. 377, § 7, for "misconduct or neglect of duty," even if not present at the hearing, but then confined in a lunatic asylum, although not having been judicially declared a lunatic.

55. See People *v.* Sturgis, 39 Misc. (N. Y.) 448, 80 N. Y. Suppl. 194, holding that the fire commissioner of the city of New York had power to dismiss the chief of the city fire department after a hearing for cause.

56. People *v.* Coyle, 31 Misc. (N. Y.) 593, 64 N. Y. Suppl. 894 [*affirmed* in 55 N. Y. App. Div. 223, 66 N. Y. Suppl. 827], holding that the fact that a writ of certiorari could have been taken from a decision of the board of fire commissioners, finding a fireman guilty of bad conduct, and could not be taken from such a decision of the commissioner of public safety, after Laws (1898), c. 182, had trans-

not disqualified by bias or prejudice,[57] but the evidence adjudged sufficient by him must be such as would satisfy an impartial tribunal.[58] The presiding officer should decide according to his own judgment and must not surrender his own views upon the facts.[59]

(5) JUDGMENT OR ORDER. A judgment dismissing a fireman need not have the exact accuracy of a record of the criminal court,[60] and an order of removal after a hearing upon several specific charges need not state whether the accused was found guilty under all the charges.[61]

(6) REVIEW. Where the removal of a member of the department is vested in the discretion of a particular officer or board[62] such discretion cannot be reviewed by mandamus.[63] A hearing upon charges looking to a removal is, however, usually regarded as judicial to the extent that it is reviewable upon certiorari,[64] with regard to questions of jurisdiction, procedure, or absence of evidence,[65] but a decision upon conflicting evidence will not be reviewed.[66] The fact that a hearing on return to a writ of certiorari is authorized by statute to make a final order annulling or modifying the determination reviewed does not permit a review of discretion.[67] An unreasonable delay in applying for a writ of certiorari will warrant its refusal.[68] As a general rule matters not urged below cannot be urged on certiorari.[69]

(IV) *REINSTATEMENT.* Where a member of the department has been wrongfully removed he may compel his reinstatement by mandamus,[70] but the writ will

ferred such causes to the latter, does not defeat his jurisdiction to try an offense committed before such law went into effect.

57. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687; People *v.* Sturgis, 39 Misc. (N. Y.) 448, 80 N. Y. Suppl. 194. See People *v.* Scannell, 74 N. Y. App. Div. 406, 77 N. Y. Suppl. 704 [*affirmed* in 173 N. Y. 606, 66 N. E. 1114].

58. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687, holding that the evidence showed that a fire commissioner's judgment was affected by bias and prejudice, so that he did not accord a fair and impartial trial to the chief of the fire department on charges against him.

Where the fireman's own evidence shows a violation of the law and rules, a dismissal will not be disturbed, although the commissioner before whom his examination is had is prejudiced. People *v.* Scannell, 74 N. Y. App. Div. 406, 77 N. Y. Suppl. 704 [*affirmed* in 173 N. Y. 606, 66 N. E. 1114].

59. People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687, holding that after a hearing by the fire commissioner of charges against a subordinate, it was improper for him to take up the record, in consultation with the corporation counsel and his assistants, who had conducted the prosecution, to determine what evidence was competent and might be considered in disposing of the case.

60. People *v.* Scannell, 80 N. Y. App. Div. 320, 80 N. Y. Suppl. 685.

61. People *v.* Sturgis, 96 N. Y. App. Div. 620, 88 N. Y. Suppl. 631 [*affirmed* in 183 N. Y. 540, 76 N. E. 1105].

62. See State *v.* Register, 59 Md. 283.

63. See MANDAMUS, 26 Cyc. 260.

64. Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 40 Pac. 264. See also State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595, holding that the action of a city council in removing a fire commissioner upon charges and hearing being of a judicial nature may be reviewed by certiorari.

65. People *v.* New York Fire Com'rs, 100 N. Y. 82, 2 N. E. 613; People *v.* Purroy, 20 N. Y. Suppl. 735; Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 40 Pac. 264.

66. State *v.* Jersey City, 54 N. J. L. 310, 23 Atl. 666; People *v.* New York Fire Com'rs, 100 N. Y. 82, 2 N. E. 613; People *v.* New York Fire Com'rs, 77 N. Y. 153; People *v.* Purroy, 20 N. Y. Suppl. 735; Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 40 Pac. 264. But *compare* People *v.* Sturgis, 91 N. Y. App. Div. 286, 86 N. Y. Suppl. 687.

67. People *v.* New York Fire Com'rs, 100 N. Y. 82, 2 N. E. 613 [*followed* in People *v.* Purroy, 61 N. Y. Super. Ct. 284, 19 N. Y. Suppl. 713], nature and extent of punishment.

68. People *v.* New York Fire Com'rs, 77 N. Y. 605, holding a delay of two and one-half years unreasonable.

69. People *v.* Purroy, 13 N. Y. Suppl. 119, holding that where the relator has gone to trial without objection he cannot for the first time on certiorari question the sufficiency of the notice of hearing.

70. People *v.* Scannell, 172 N. Y. 316, 65 N. E. 165 [*affirming* 69 N. Y. App. Div. 400, 75 N. Y. Suppl. 122] (holding that an appointment to fill a vacancy by the fire commissioners of Long Island City previous to its merger into Greater New York was not invalidated by the further appointment of other firemen whose salaries would be in excess of the expenditure the commissioners were permitted to make); People *v.* Sturgis, 77 N. Y. App. Div. 151, 78 N. Y. Suppl. 1034.

Mandamus by officer to compel reinstate-

not issue for such purpose where the resignation of a member has been made and accepted.[71] A fireman retired after a determination by a statutory board that he is permanently disabled does not become entitled to reinstatement simply by reason of subsequent recovery.[72]

f. Actions For Wrongful Removal. A fireman may maintain an action for damages against commissioners who have maliciously and wrongfully dismissed him.[73]

g. Compensation[74] — (i) *Right to Compensation in General.* No obligation to pay the members of a volunteer association for the extinguishment of fires in a municipal corporation arises or is implied from the rendition of such services.[75] But where a person renders services under fire ordinances and it is understood by both him and the municipality that such services are not gratuitous but that he is to be entitled to a sum which the municipality shall determine to be reasonable, he may recover such sum when fixed by the municipality.[76] Where a person accepts a position to which there is no salary attached by law or by the municipal authorities, but the compensation is left to be fixed by an officer of the department, he is bound by an agreement with such officer to work without compensation.[77] A fireman employed subject to the will of a board of commissioners and not for any definite period cannot recover pay for the remainder of a year on being discharged in a less time.[78] Failure of a secretary to enter upon the minutes a resolution employing a person will not deprive him of the right to compensation.[79]

ment in general see MANDAMUS, 26 Cyc. 265 *et seq.*

71. People *v.* Sturgis, 77 N. Y. App. Div. 636, 78 N. Y. Suppl. 1037, so holding where the resignation was implied from absence without leave. And see People *v.* Sturgis, 77 N. Y. App. Div. 151, 78 N. Y. Suppl. 1034, holding that an affidavit in opposition to the petition of a member of the uniformed force for mandamus to compel his reinstatement, which set up that he had been charged by the foreman with being absent without permission for five days, and that thereafter evidence having been brought to the commissioner which satisfied him that the member was guilty of the charge, he ordered that his name be dropped from the pay roll, etc., was insufficient because not alleging as a fact that the member was actually absent from duty, without leave for five days, and that his absence was unexplained, and that mandamus was properly issued.

72. People *v.* Bryant, 28 N. Y. App. Div. 480, 51 N. Y. Suppl. 119.

73. O'Neill *v.* Register, 75 Md. 425, 23 Atl. 960, holding that where a fireman, who has been dismissed on a charge of disrespect to one of the fire commissioners, sues the commissioners, alleging that his dismissal was in wilful violation of their duties, under an ordinance allowing the dismissal of employees for inefficiency, or failure to perform their duties to the satisfaction of the commissioners, but not for any political or other sentiments entertained by them, evidence as to plaintiff's conduct on previous occasions, or as to his efficiency and general reputation, has no bearing on the question of his guilt or innocence on the occasion mentioned in the charge, nor upon the fairness of the commissioners' judgment, and is irrelevant.

74. Right of fireman to reward see REWARDS.

75. Jacksonville *v.* Ætna Steam Fire Engine Co., 20 Fla. 100, holding that they have the burden of proving a contract.

76. Parks *v.* Waltham, 120 Mass. 160, holding that a vote of a town, determining what would be a reasonable compensation for certain officers of the fire department, constitutes an implied contract to pay the same.

77. McGough *v.* New York, 83 N. Y. App. Div. 322, 82 N. Y. Suppl. 117, holding that where after the removal of an assistant fire marshal plaintiff addressed a letter to the fire commissioners, stating that, if he was appointed to such position, he agreed to waive all claim for services if the person removed should be restored by order of court, and plaintiff was thereafter appointed by an order of the fire commissioners, which did not refer to his letter, but which provided that it was to take effect from July 1, 1900, and that the appointment was without compensation until otherwise ordered; and on May 16, 1901, the commissioners fixed plaintiff's salary at one thousand five hundred dollars per annum, to take effect from May 1, 1901, plaintiff on the failure of the removed officer's proceeding for reinstatement was not entitled to recover compensation for the time he served between the date of his appointment and the date his salary was fixed by the commissioners.

78. Parks *v.* Atlanta, 76 Ga. 828, holding that his rights under the contract would not be affected by a custom not such as to enter into the contract at the time it was made. See also Butcher *v.* Camden, 29 N. J. Eq. 478.

79. Calahan *v.* New York, 34 N. Y. App. Div. 344, 54 N. Y. Suppl. 279, holding that a resolution of the board of fire commissioners under which plaintiff was employed may be

(II) *Fixing of Salary or Compensation.* Salaries of members of the fire department must be fixed in accordance with charter or statutory provisions where such provisions exist.[80] A general charter provision authorizing the heads of departments to fix the salaries of their clerks or assistants will not control a special provision allowing a particular board to fix salaries in the fire department.[81] Where the amount at which salaries shall be fixed is provided by statute and the city fixes a less amount, the remedy is by mandamus to compel the fixing of the proper amount and not an action for the difference.[82] The various provisions of a statute for equalization of the salaries of members of the constituent fire department upon a consolidation of cities should be construed together where not inconsistent.[83]

(III) *Increase or Reduction of Salary.* In order that there may be an increase or decrease in salary some definite specific action must be taken, assented to by the proper authorities on one hand and the officer on the other.[84] Where,

proved by testimony of the president of the board, and by a subsequent resolution of the board amending its minutes to show it.

80. *In re* People, 146 N. Y. 357, 40 N. E. 988 [*reversing* 73 Hun 583, 26 N. Y. Suppl. 286] (holding that Laws (1892), c. 710, authorizing the boards of fire commissioners in all cities the population of which, according to the last census, exceeds nine hundred thousand, to fix the salaries of the members of the fire department as therein provided, with the approval of the board of estimate and apportionment, modifies the city charter of Brooklyn (Laws (1888), c. 583, tit. 13, § 6) so as to make it the duty of the fire commissioner of that city to fix the salaries referred to in said act, as therein provided, with the approval of the city's board of estimate); McCormick *v.* Syracuse, 25 Hun (N. Y.) 300 (holding that where under a charter, measures fixing the salaries of persons employed by the fire department must originate with the board of fire commissioners, and the common council had no power in the matter, except to approve or disapprove, the salaries of laddermen which were fixed at four hundred and eighty dollars per annum remained unchanged where the commissioners raised the amount to six hundred dollars, subject to the approval of the common council, and the common council approved the action of the commissioners to the amount of five hundred and forty dollars and no more). See also People *v.* Scannell, 71 N. Y. App. Div. 491, 75 N. Y. Suppl. 904 [*affirmed* in 171 N. Y. 690, 64 N. E. 1124]; Flynn *v.* New York, 69 N. Y. App. Div. 433, 75 N. Y. Suppl. 15 [*affirmed* in 174 N. Y. 521, 66 N. E. 1109].

Resolution or ordinance.— Under charter provision the city council may fix the compensation of members of the fire department by resolution. Hart *v.* Minneapolis, 81 Minn. 476, 84 N. W. 342, constituting Minneapolis city charter.

81. Flynn *v.* New York, 69 N. Y. App. Div. 433, 75 N. Y. Suppl. 15 [*affirmed* in 174 N. Y. 521, 66 N. E. 1109, and *followed* in People *v.* Scannell, 71 N. Y. App. Div. 491, 75 N. Y. Suppl. 904 (*affirmed* in 171 N. Y. 690, 64 N. E. 1124)], holding under charter of Brooklyn (Laws (1888), c. 583), tit. 13, § 6, providing that the compensation of the uniformed members of the fire department should be fixed by the board of estimate, and at not less than the salaries then paid to such members, nor greater than certain specified rates for members of the grades specified therein, that where persons were thereafter appointed to offices in such department which were not named in such act they were entitled to receive such compensation as was fixed from time to time by such board, and such compensation could not be reduced or changed by the fire commissioner.

82. Dolan *v.* Brooklyn, 55 Hun (N. Y.) 448, 8 N. Y. Suppl. 666 [*affirmed* in 129 N. Y. 646, 29 N. E. 1032].

83. Hurst *v.* New York, 55 N. Y. App. Div. 68, 67 N. Y. Suppl. 84 (holding that where a member of the Brooklyn fire department, entitled therein to annual promotion from grade to grade, was receiving, at the date of the consolidation, pay equal to that attached to one of the grades in the consolidated department, he was entitled to annual promotions to the next higher grade, and to receive the pay fixed therefor, since such promotion was one of the rights and privileges secured to him by the consolidation); Donnelly *v.* New York, 53 N. Y. App. Div. 447, 65 N. Y. Suppl. 1030 [*affirmed* in 166 N. Y. 592, 59 N. E. 1121] (holding that under Greater New York Charter, § 740, providing that the annual salary of engineer of steamers shall be one thousand six hundred dollars, and that any fireman of the uniformed force in the city of Brooklyn whose salary falls between any two of the grades established by the charter shall within three years have his salary made equal to the salary of the first grades, by equal annual additions, one who was an engineer of steamers in the fire department of the city of Brooklyn when the charter of the consolidated city went into effect, receiving a salary of one thousand four hundred dollars a year, is only entitled to the one thousand four hundred dollars salary for the next three years, together with the three equal annual additions of sixty-six dollars and sixty-six cents each).

84. Lyons *v.* New York, 82 N. Y. App. Div. 306, 81 N. Y. Suppl. 1079 [*affirmed* in 176

under the charter, firemen are city officers[85] their salaries cannot in the absence of statutory authority be legally changed during their terms;[86] but although a reduction in a fireman's salary from the amount fixed by statute may be illegal he cannot after acceptance of the reduced salary recover the difference if the acceptance was in pursuance of an agreement to work for less,[87] provided such agreement was made before the member entered upon his term of office or employment.[88] In the absence of an agreement such a result does not follow.[89] A consolidation act providing that members of the uniformed force of the fire departments of the constituent municipalities shall remain fixed at the amount they were receiving at the time of the new charter will not permit a member to demand an increase of pay which was awarded before but was not to take effect until after the date of consolidation.[90]

(iv) *Suspensions and Fines.* A board of fire commissioners has no power to declare pay forfeited for misconduct in excess of the amount they are authorized to impose as a fine;[91] but where a superior officer has power to discharge a fireman, the fireman cannot recover compensation for a period during which he is suspended for misconduct without pay, although the amount of such compensation is in excess of the amount to which a fine may be imposed.[92]

(v) *Recovery of Salary*—(a) *Upon Removal.* Where a fireman has been rightfully discharged[93] or his office rightfully abolished,[94] he can make no claim for further compensation. But while it is the general rule that where the city has already paid the salary of a specific office to another incumbent who has actually performed the duties of the office it is not liable to pay such salary a second time.[95] Upon reinstatement after a wrongful dismissal a member of the fire

N. Y. 609, 68 N. E. 1119, and *affirming* 38 Misc. 253, 77 N. Y. Suppl. 589], holding that an estimate of the amount to be paid to an officer for the ensuing year together with an action by the proper authorities to the end that such amounts may be raised was insufficient in the absence of a statute fixing the salary.

85. See Nelson *v.* Superior, 109 Wis. 618, 85 N. W. 412. *Compare* Wright *v.* Hartford, 50 Conn. 546 (holding that Const. Amendm. 24, inhibiting increase of compensation of "any public officer or employe," to take effect during continuance in office, etc., applies to a person employed as tillerman of a ladder carriage in a city fire department at a fixed yearly salary, payable monthly, and holding his place during good behavior); State *v.* Johnson, 123 Mo. 43, 27 S. W. 399 (holding that a chief engineer of a city fire department, appointed by the council and subject to removal by it, is not an officer within Const. art. 14, § 8, prohibiting an increase in the salary of any officer during his term of office); Padden *v.* New York, 45 Misc. (N. Y.) 517, 92 N. Y. Suppl. 926.

86. Nelson *v.* Superior, 109 Wis. 618, 85 N. W. 412.

87. De Boest *v.* Gambell, 35 Oreg. 368, 58 Pac. 72, 353.

88. Nelson *v.* Superior, 109 Wis. 618, 85 N. W. 412 [*distinguishing* Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378; De Boest *v.* Gambell, 35 Oreg. 368, 58 Pac. 72, 353].

89. Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378.

90. Lyons *v.* New York, 82 N. Y. App. Div. 306, 81 N. Y. Suppl. 1079 [*affirmed* in 176 N. Y. 609, 68 N. E. 1119, and *affirming* 38 Misc. 253, 77 N. Y. Suppl. 589]. See also People *v.* Scannell, 71 N. Y. App. Div. 491, 75 N. Y. Suppl. 904 [*affirmed* in 171 N. Y. 690, 64 N. E. 1124].

A medical officer is not a member of the uniformed force of the fire department and as such within the provision of Greater New York Charter (Laws (1897), p. 258, c. 378), § 740, providing that the pay of members of such force should remain fixed at the same amount they were receiving before the consolidation. Lyons *v.* New York, 82 N. Y. App. Div. 306, 81 N. Y. Suppl. 1079 [*affirmed* in 176 N. Y. 609, 68 N. E. 1119, and *affirming* 38 Misc. 253, 77 N. Y. Suppl. 589].

91. Tyng *v.* Boston, 133 Mass. 372.

92. Norton *v.* Brookline, 181 Mass. 360, 63 N. E. 930 [*distinguishing* Tyng *v.* Boston, 133 Mass. 372, on the ground that in that case the pay forfeited had become due], holding further that where in an action by a fireman against a town for salary stopped by the fire commissioner for misconduct, there was nothing to show whether or not the commissioner had power to change plaintiff's contract, except St. (1899) c. 135, § 1, authorizing him to employ and discharge firemen, and the fact that the town, in its defense, was adopting the commissioner's act, it could not be assumed that such act was unauthorized.

93. Parks *v.* Atlanta, 76 Ga. 828.

94. Butcher *v.* Camden, 29 N. J. Eq. 478.

95. Monroe *v.* New York, 28 Hun (N. Y.) 258, so holding where claimant had neither performed the service of the office or asserted any claim to compensation for several years.

department is usually regarded as entitled to recover the salary incident to the office,[96] but reinstatement is necessary.[97] As against the claim for his salary it has been held that the city cannot set off a sum earned in the interim by the fireman in private employment[98] or in municipal employment other than as an officer within an inhibition against the same person holding two offices.[99] If a board of fire commissioners is vested with absolute discretion as to dismissal, a fireman cannot recover from the city salary alleged to be due since his dismissal, but his remedy, if any, is an action against the commissioners for a fraudulent or illegal removal.[1]

(B) *Upon Reduction in Rank or Retirement.* Where an officer is reduced in rank and accepts the duties and salary of the inferior position it amounts to an acceptance of such position and a resignation of the other, and he cannot afterward recover the difference between the salaries of the positions.[2] If a fireman has been illegally retired upon an annuity and thereafter performs no service as fireman, it has been held he cannot recover the fireman's salary thereafter accruing.[3]

h. Retirement and Pensions. Where provision is made for the payment of pensions to members[4] of the fire department injured in the service,[5] or to the widows of members,[6] or for the retirement on half pay,[7] or transfer to light

96. Padden *v.* New York, 45 Misc. (N. Y.) 517, 92 N. Y. Suppl. 926.

97. Wood *v.* New York, 55 N. Y. Super. Ct. 230.

98. Padden *v.* New York, 45 Misc. (N. Y.) 517, 92 N. Y. Suppl. 926.

99. Padden *v.* New York, 45 Misc. (N. Y.) 517, 92 N. Y. Suppl. 926, holding that where a fireman wrongfully discharged pending reinstatement accepted employment as sergeant at arms to the city council, he did not thereby abandon his prior office, within New York City Charter (Laws (1897), p. 543, c. 378), § 1549, prohibiting municipal officers from holding two offices.

1. Baltimore *v.* O'Neill, 63 Md. 336.

2. Monroe *v.* New York, 28 Hun (N. Y.) 258; O'Brien *v.* New York, 28 Hun (N. Y.) 250; Reilly *v.* New York, 48 N. Y. Super. Ct. 274.

3. Wood *v.* New York, 44 N. Y. Super. Ct. 321, holding that where a board of fire commissioners sentenced an offending fireman "to be retired from active service on an annuity of $150," as the board had the power of removal, the sentence took effect as a discharge, although there was no power to grant the annuity.

4. See cases cited *infra*, this note.

Discharged member.—Where the benefits of a pension fund are limited to members of the department, a member who has been wrongfully discharged must be reinstated before he can make application. Karb *v.* State, 54 Ohio St. 383, 43 N. E. 920.

Substitutes.— A person appointed for temporary duty is not entitled to a pension as a substitute member of the department. State *v.* Firemen's Pension Fund, 18 Ohio Cir. Ct. 887, 9 Ohio Cir. Dec. 854.

Review of action on application.— Where no provision for a review or an appeal from the determination of a board as to the right to a pension is made, such determination if made in good faith is final. Karb *v.* State 54 Ohio St. 383, 43 N. E. 920, so holding of a determination of whether the disability of the claimant was caused in or induced by the actual performance of his duties as a fireman. See also People *v.* Firemen's Pension Fund, 95 Ill. App. 300, holding that under Laws (1887), p. 117, providing that the board of trustees of the fire department pension fund shall make all needful rules for its regulation, and shall decide all applications for pensions, and all its decisions on such applications shall be final and conclusive, and not subject to review, mandamus will not lie to compel the board to pension a fireman on the report of the medical examiner.

Vested right in pension see CONSTITUTIONAL LAW, 8 Cyc. 904.

5. See Scott *v.* Jersey City, 68 N. J. L. 687, 54 Atl. 441, holding that where a member of a fire department, whose entire time was devoted to the duties of his office, was killed by falling from a trolley car while on his way from the fire house to his home in the city, during the hours set apart for meals, he was not at the time of his death engaged in the performance of his duties, within the meaning of the act, and his widow was not entitled to recover therefor.

6. See Scott *v.* Jersey City, 68 N. J. L. 687, 54 Atl. 441.

Compelling hearing on application.— The officer charged with such duties may be compelled by mandamus to hear and determine a widow's application for a pension. Matter of Tobin, 64 N. Y. App. Div. 375, 72 N. Y. Suppl. 184.

7. See cases cited *infra*, this note.

Permanent disability.— A finding of permanent disability may be required precedent to retirement. People *v.* Bryant, 28 N. Y. App. Div. 480, 51 N. Y. Suppl. 119, holding that a finding by a retiring board that a member of the fire department "is not competent, physically, to perform the duties of

duties,[8] of members upon disability rights under such provisions must be determined under the particular charter or statute involved. Where the fire commissioner is given power to retire certain members of the department from service, and in every case is to determine the circumstances thereof, the power is discretionary and the discretion is a judicial one to be exercised reasonably and fairly.[9]

i. Relief Associations and Benefit Funds. Under express statutory sanction firemen's relief associations exist in many of the larger cities, supported in part by dues or assessments upon the active members of the department and in part by municipal and state aid.[10] These associations are, where express provision is not made, governed by the rules usually applicable to mutual benefit associations.[11] Where contributions of members of the department to a widows and orphans' relief fund are not voluntary but in the nature of assessments,[12] the widow of a member who some years before his death had been retired upon a pension was entitled to share in the fund, although the monthly contributions had not been deducted from his pension as required by law,[13] and although he had stated his unwillingness to contribute and that he did not desire his wife to receive any-

a fireman" is not equivalent to a finding of permanent disability, and did not warrant the placing of his name on the pension roll under Laws (1894), c. 708. See also People *v.* Sturgis, 85 N. Y. App. Div. 20, 82 N. Y. Suppl. 953 [*affirmed* in 176 N. Y. 563, 68 N. E. 1123].

Reduction of amount.— Where the member upon retirement is entitled to a pension of one half his salary, or such less sum as the condition of the pension fund will warrant, and the fire commissioner fixes a sum less than one half the salary, the member has the burden of showing that the full amount should not be allowed. Ramsey *v.* Hayes, 187 N. Y. 367, 80 N. E. 193 [*reversing* 112 N. Y. App. Div. 442, 98 N. Y. Suppl. 394].

Power of medical officer.— Under Laws (1887), p. 117, providing that if any member of the fire department of a city shall be found, on examination by a medical officer ordered by the board of trustees, to be disabled by reason of service in such department, so as to render necessary his retirement from service, the board of trustees shall retire him, such medical officer cannot conclusively decide that the applicant should be retired and pensioned, as his duty is to examine the applicant and report the result of his examination to the board. People *v.* Firemen's Pension Fund, 95 Ill. App. 300.

8. People *v.* Sturgis, 85 N. Y. App. Div. 20, 82 N. Y. Suppl. 953 [*affirmed* in 176 N. Y. 563, 68 N. E. 1123], holding that under such a provision where the fireman is not disqualified from all duties he cannot be retired upon a pension.

9. People *v.* Scannell, 34 Misc. (N. Y.) 709, 70 N. Y. Suppl. 1042, holding that where a member of a fire department, an honorably discharged veteran, was retired for alleged defective vision, under an order signed by the fire commissioner two weeks before it was issued, and prepared before a medical examination of the fireman thereafter discharged, and approved on a telephonic communication had by the employees of the commissioner with him at a place distant from the city, and the fireman at the time was entitled as first on an eligible list prepared by the civil service commission for promotion within a few days before his retirement, an exercise by the fire commissioner of his judicial discretion in making the retirement was not shown and the retirement was invalid.

10. See the statutes of the several states. And see Chicago Paid Fire Dept. Benev. Assoc. *v.* Farwell, 100 Ill. 197 (holding that under the act of May 24, 1877, all previous statutes upon the subject having been repealed, the benevolent association of the paid fire department of Chicago no longer had the right to the management of the fund for the relief of disabled members of the department, but that its management was vested in the controller of the city); Legault *v.* Minneapolis Fire Dept. Relief Assoc., 93 Minn. 72, 100 N. W. 666; Vannatta *v.* Smith, 61 N. J. L. 188, 38 Atl. 811.

Mandamus to compel relief.— Where an exempt fireman claims to be entitled to relief from an association, and his claim has been adjudicated by the trustees of such association who are vested by statute with jurisdiction to consider such claim, he cannot compel a further or other consideration by mandamus. Vannatta *v.* Smith, 61 N. J. L. 188, 38 Atl. 811.

Employment of physician.— In the absence of express provision in the articles or by-laws of the association the vice-president of a firemen's relief association has no authority to employ a physician not the regular surgeon of the association to treat an injured member for an indefinite length of time. Legault *v.* Minneapolis Fire Dept. Relief Assoc., 93 Minn. 72, 100 N. W. 666.

License-fees of insurance companies devoted to benefit of department see INSURANCE, 22 Cyc. 1391.

11. See MUTUAL BENEFIT INSURANCE.

12. See *In re* Tobin, 164 N. Y. 532, 58 N. E. 650 [*affirming* 53 N. Y. App. Div. 453, 66 N. Y. Suppl. 97].

13. *In re* Tobin, 164 N. Y. 532, 58 N. E. 650 [*affirming* 53 N. Y. App. Div. 453, 66 N. Y. Suppl. 97].

thing from the fund.[14] A member who has been suspended without pay but not discharged is still a member of the department so that upon his death his widow is entitled to a benefit fund.[15]

9. Streets and Sewers — a. Creation of Offices. Where the mayor and common council are given, by the city charter, the management and control of the streets and highways in the city, they have power to create and prescribe the duties of the office of street commissioner,[16] or foreman of street repairs.[17] Under a statute providing that certain duties shall be performed by a city engineer or other proper officer, an officer other than the city engineer may perform the duties required of a city engineer in regard to sewers, provided he has proper qualifications for the work.[18] A statute providing for the creation of a commission to superintend and control the grading and paving of a street in a certain city has been held to be violative of a constitutional provision forbidding the delegation of municipal functions to any special commission.[19]

b. Election or Appointment of Officers. Municipal street officers are to be elected at the time and for the terms provided by law.[20] Where a city charter creates the office of street commissioner and makes it elective and prescribes how the officer shall be elected, his qualifications, and the manner in which a vacancy in the office shall be filled, the common council can neither create a street commissioner nor fill a vacancy in the office, nor can it direct that the duties of the office shall be performed by any person other than the lawful incumbent.[21] In order that an appointment or election of a street commissioner by the board of road

14. *In re* Tobin, 164 N. Y. 532, 58 N. E. 650 [*affirming* 53 N. Y. App. Div. 453, 66 N. Y. Suppl. 97].

15. Reidy *v.* New York, 185 N. Y. 141, 77 N. E. 1011 [*reversing* 103 N. Y. App. Div. 361, 93 N. Y. Suppl. 16], holding under Greater New York Charter (Laws (1901), p. 334, c. 466, § 792), providing that all persons having paid specified sums into the insurance fund shall receive the benefit thereof and in case of death of any employee "in the service of said department" who has availed himself of such provision there shall be paid to his widow the sum of one thousand dollars; and section 1543 (page 636) providing that when a position is abolished the person legally filling the same shall be deemed "suspended" without pay and shall be entitled to reinstatement in the same or corresponding employment, if within a year thereafter there is need for his services, that where plaintiff's husband had been employed as clerk in the bureau of the chief of the fire department and for a series of years had contributed to the insurance fund and died within a year after the abolition of his position, he should be regarded as having been merely suspended, and not discharged, so that his widow was entitled to the benefit of such fund.

16. State *v.* May, 106 Mo. 488, 17 S. W. 660, holding that the provision of the charter of Kansas City of 1889, art. 3, § 1, giving the mayor and council exclusive power to clean and repair the streets, was not in conflict with art. 6, § 10, giving the board of public works power to "supervise" the same; and the mayor and council could create the office of street commissioner, and prescribe his duty as that of superintending the cleaning and repairing of the streets under the supervision of the board, and that the fact that the article in the charter of 1875, authorizing the appointment of such a commissioner, was omitted from the charter of 1889, did not evince an intention to abolish the office.

17. Collopy *v.* Cloherty, 95 Ky. 330, 25 S. W. 497, 15 Ky. L. Rep. 870, holding that a provision in the city charter that the legislative, executive, and ministerial power of the city should be vested in a mayor and a board of council and other officers named, "and such necessary deputies or assistants as may be required," could not be construed as denying authority to the board of councilmen to create other offices beside those enumerated, and that this would be true even if the power to appoint deputies and assistants had not been expressly given.

18. Weesner *v.* Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

19. Mellon *v.* Pittsburg, 31 Leg. Int. (Pa.) 212.

20. People *v.* Hossefross, 17 Cal. 137, holding that San Francisco Consol. Act (1856), § 6, providing that "there shall be elected hereafter, for said city and county of San Francisco, by the qualified electors thereof . . . one . . . Superintendent of Public Streets and Highways . . . who shall respectively continue in office for two years." intended that the superintendent of public streets and highways should be elected at the general election in the autumn of 1856 for the whole term of two years.

21. Payne *v.* San Francisco, 3 Cal. 122, holding that where a person elected street commissioner had forfeited the office by failing to qualify within the time prescribed, the mayor and common council could not subsequently admit him to the office, but the former incumbent had a right to hold over until the office was regularly filled.

commissioners shall be valid the meeting must have been called and conducted according to law.[22] Commissioners appointed by the legislature to lay a pavement within a city are agents of the state and not officers of the city, such as must be elected by electors thereof.[23] A statutory provision for the election of street commissioners by the city council is repealed by implication by a subsequent amendatory statute providing that there shall be chosen annually by the people and by general ticket a street commissioner to superintend the streets, roads, and bridges of the city.[24] Where the statute authorizes the election of the same person as surveyor of highways for more than one district, and the town has elected the same person as surveyor of three districts, the town council cannot assign him to one of the districts and elect other persons as surveyors of the other two districts.[25] Where the office of street commissioner of a city is a mere municipal agency, not created directly by the constitution or by statute, a vacancy in the office is to be filled, not by appointment of the governor but by the mayor and aldermen.[26] Where the charter of a city authorizes the mayor and city council to appoint and remove such officers as they may deem necessary to enforce the ordinances and regulations of the city, and they have created the office of street commissioner, such office must be filled by their concurring action and cannot be filled by the council alone.[27] Where the charter of a city provides merely that the street commissioner shall be appointed by the mayor "with the consent and approval of the common council," and does not prescribe the manner of confirmation, the nomination of a street commissioner made by the mayor to the common council on a list containing several other candidates for distinct and separate offices may properly be confirmed by the council in gross by one vote or resolution, and it is not necessary to act on each case separately.[28] Where a street commissioner is appointed for a definite term by the road commissioners and they have power to remove him only for cause, their action before the expiration of his term in declaring the office vacant and making an appointment to fill the vacancy is null and void.[29] In the absence of any statutory requirement the issuance of a formal commission is not requisite to the validity of the appointment of a street commissioner.[30] The legality of the appointment of a street commissioner cannot be questioned in an action of replevin for property pertaining to the office brought by one claiming subsequent appointment thereto.[31]

22. State *v.* Kirk, 46 Conn. 395, holding that under Bridgeport Charter, § 50, which provides that the mayor shall be *ex officio* a member of the board of road commissioners, and preside at its meetings when present, but shall have no vote unless there be a tie, it was necessary to the legality of a meeting of the board that the mayor should be notified of the meeting, and that a street commissioner, appointed by the board at a meeting of which the mayor was not notified, was not legally appointed, although there was a majority of the votes of the members in his favor, making a case in which the mayor would have had no vote, and holding further that a meeting of the board of road commissioners was rendered illegal by the appointment of the clerk of the board to preside and declare the vote for the office of street commissioner, he not being a member of the board.

23. Greaton *v.* Griffin, 4 Abb. Pr. N. S. (N. Y.) 310.

24. Eaton *v.* Burke, 66 N. H. 306, 22 Atl. 452, construing Laws (1889), c. 248, § 1, as having such effect.

25. State *v.* Gorman, 13 R. I. 318.

26. People *v.* Conover, 17 N. Y. 64 [*affirming* 26 Barb. 516].

27. Com. *v.* Crogan, 155 Pa. St. 448, 26 Atl. 697 [*reversing* 7 Kulp 23], holding further that an ordinance signed by the mayor giving the council alone authority to appoint a street commissioner could not deprive a subsequent mayor of the right to participate in the appointment.

28. People *v.* Allen, 51 How. Pr. (N. Y.) 97.

29. State *v.* Martin, 46 Conn. 479.

30. Cotanch *v.* Grover, 57 Hun (N. Y.) 272, 10 N. Y. Suppl. 754, holding that where the record of the proceedings of the village trustees shows that a street commissioner was appointed at a meeting of the trustees and took the oath of office and filed a bond as required by N. Y. Laws (1870), c. 291, under which the village was incorporated, it cannot be objected to the validity of his appointment that no commission was issued, as the act does not provide for a formal commission.

31. Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408.

c. Qualification. If a person elected as street commissioner fails to qualify within the time prescribed by the charter he forfeits the office.[32]

d. Term of Office. Where a statute provides for the election of street officers and fixes the term of office, they must be elected for such term.[33] Where the term of an officer to be appointed by the city council is prescribed by statute, his term commences at the time of his appointment.[34] A charter provision that the mayor with the consent and approval of the common council shall "biennially" appoint a street commissioner relates to the time when appointments shall be made and does not fix a two-year term of office for an appointee without regard to the time of appointment.[35] Where a city charter empowers the common council to establish the duration of the term of the office of street inspector at or within the period of three years, and this power of limitation has not been exercised otherwise than by an ordinance giving the road commissioners power to appoint a street commissioner "who shall hold office not exceeding three years," and the council has acquiesced in several appointments made by the commissioners with a different duration affixed to each, the term of office of an appointee is that which the road commissioners name at the time of his election if within the charter limits.[36] Where a municipal code created the new elective office of street commissioner and provided that all elected officers should serve for two years, and that special elections should be held to fill vacancies for unexpired terms, and fixed the annual period for the election of all officers, a person elected street commissioner at a special election held a few days after the code went into effect was entitled to hold office only until the election of his successor at the next annual election period.[37] The term of office of an inspector of streets, provided for by an old city charter, does not apply to the superintendent of streets, provided for by a new charter, the latter containing general words of repeal, having provisions respecting streets obviously designed to cover the whole ground, dispensing with the board which appointed the inspector, and providing for appointment of the superintendent by a new board, without fixing his term of office.[38]

e. Status of Officers, Boards, or Employees. A street inspector appointed by a board of road commissioners for a definite term under an ordinance giving such board power to appoint "a street inspector, who shall hold office not exceeding three years, but shall be removable by said board for due cause," is a public officer.[39] Where the ordinance providing for the appointment of a street commissioner or superintendent of streets provides that he shall hold his "office" for a designated term, that it shall be the duty of such "officer" to superintend the

32. Payne *v.* San Francisco, 3 Cal. 122, so holding under San Francisco City Charter, art. 4, § 15, providing that "if any person elected to a city office . . . shall fail to qualify within ten days after his election, his office shall be deemed vacant."

33. People *v.* Hossefross, 17 Cal. 137, holding that San Francisco Consol. Act (1856), § 6, providing that "there shall be elected hereafter, for said city and county of San Francisco, by the qualified electors thereof, one . . . Superintendent of Public Streets and Highways . . . who shall respectively continue in office for two years," intended that the superintendent of public streets and highways shall be elected at the general election in the autumn of 1856, and should hold his office for two years therefrom.

34. State *v.* Sohn, 97 Ind. 101.

Removal and reappointment.— Where such an officer is removed by the council, which they have power to do, and subsequently reappointed, his term commences from the time of his reappointment. State *v.* Sohn, 97 Ind. 101.

35. People *v.* Kilbourn, 68 N. Y. 479, holding that since the legislative intention was, as indicated by the charter, that the municipal government should be under the control of the officers who were required to be elected for the period of two years; and the provision made it the duty of each newly elected mayor, immediately upon his accession to the office, to make the appointments designated, without regard to the question whether the then incumbents had served for more or less than two years, where a street commissioner was appointed just prior to the expiration of the term of office of the then mayor, and a new appointment was made by his successor, the latter appointee was entitled to the office.

36. State *v.* Martin, 46 Conn. 479.

37. State *v.* Cook, 20 Ohio St. 252.

38. State *v.* Chatfield, 71 Conn. 104, 40 Atl. 922.

39. State *v.* Martin, 46 Conn. 479.

repairing and cleaning of the streets, and that before entering upon the duties of his "office" he shall give bond for a certain amount, the incumbent of the position is an officer and not merely an employee of the board of public works.[40] Under a statute defining the term "officer" to include any person holding any situation under the city government or any of its departments, with an annual salary or for a definite term of office, a person appointed to perform certain engineering duties with regard to sewers for no definite term, and to receive a *per diem* wage, is not an officer entitled to perform such work which the statute requires to be performed by a city engineer "or other officer."[41] Under a city charter authorizing the street commissioner to appoint street inspectors, subject to the approval of the common council, and naming them as city officers, such an inspector is an agent of the city and not an agent of the street commissioner,[42] nor is such an officer a laborer or workman within the meaning of the civil service laws.[43] Members of the uniformed force of the street cleaning department of New York city are not officers in any sense of the term, but are regarded as laborers.[44] Sewerage works are essentially matters of local concern, and a board whose functions relate exclusively to them is a municipal and not a state ageney.[45] A municipal sewerage board which by the law of its creation has been given a name and has power to contract and to sue is a body corporate.[46] Under the Arkansas statute an improvement district is not in any sense the agent of the city or town within which it is organized, but its powers are derived directly from the legislature; and in exercising such powers the board of improvement acts as the agent of the property-owners whose interests are affected by the duties it performs.[47]

f. Civil Service Laws and Rules. Whether street officers and employees come within the civil service laws and rules depends upon their status and the laws or ordinances under which they are appointed.[48] Compelling an applicant for the office of street inspector to comply with the civil service rules of a city is not requiring an additional test, within the meaning of a constitutional provision prescribing a form of oath to be taken by judicial and executive officers, and declaring that "no other oath, declaration, or test shall be required as a qualification for any office of public trust."[49] A provision of the civil service law that in every public department, and on all public works, honorably discharged soldiers shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion shall be made, does not prevent the head of the department of highways from dividing

40. State *v.* May, 106 Mo. 488, 17 S. W. 660, holding that under the charter of Kansas City, although the board of public works have power to supervise the performance of the duties of the superintendent of streets, they have no power to appoint or remove him, but the office is to be filled by the appointment of the mayor subject to the confirmation of the common council.

41. Weesner *v.* Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

42. Rogers *v.* Buffalo, 3 N. Y. Suppl. 671 [*affirmed* in 3 N. Y. Suppl. 674 (*affirmed* in 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579)].

43. Rogers *v.* Buffalo, 3 N. Y. Suppl. 671 [*affirmed* in 3 N. Y. Suppl. 674 (*affirmed* in 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579)].

44. Tepidino *v.* New York, 50 Misc. (N. Y.) 324, 98 N. Y. Suppl. 693.

45. State *v.* Kohnke, 109 La. 838, 33 So. 793.

46. State *v.* Kohnke, 109 La. 838, 33 So. 793.

47. Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702, holding that therefore the constitutional prohibition against the issuing of interest-bearing evidences of indebtedness by municipalities does not apply to a board of improvements.

48. A street inspector in the city of Brooklyn is within the civil service laws and rules. Rogers *v.* Buffalo, 3 N. Y. Suppl. 671 [*affirmed* in 3 N. Y. Suppl. 674 (*affirmed* in 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579)], Matter of Wortman, 2 N. Y. Suppl. 324, 22 Abb. N. Cas. 137, holding that therefore an honorably discharged soldier of the Civil war is entitled to preference in appointment.

An inspector of street paving in the city of Mt. Vernon is not within the municipal civil service regulation requiring examination before appointment. Carmody *v.* Mt. Vernon, 3 N. Y. App. Div. 347, 38 N. Y. Suppl. 314.

49. Rogers *v.* Buffalo, 3 N. Y. Suppl. 671 [*affirmed* in 3 N. Y. Suppl. 674 (*affirmed* in 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579)].

the employees into gangs, working in specified districts, for the benefit of the service, so long as veterans employed in such gangs are given preference over other employees in their particular gangs.[50]

g. Compensation. A statute forbidding the city authorities to contract to pay in any month any demand which shall exceed one-twelfth part of the amount allowed by laws existing at the time of the contract to be expended within the year of which such month is a part has no application to the auditing and payment of demands for salaries of deputy street superintendents whose appointments are provided for and whose salaries are fixed by law.[51] Where a city directed the making of a sewer by an ordinance reciting that it was in accordance with a petition of a majority of the property-owners, and employed therefor an inspector, who duly performed his services, and the cost of the sewer was to be paid by a special assessment, but it afterward transpired that the petition was not signed by a majority of the property-owners, and the work was discontinued, and no assessments made, the city was liable to the inspector for his salary on an implied warranty that the petition was sufficient, and that the assessment would be levied.[52] It has been held that where the common council of a city had, under the charter, the right to fix salaries and fees, it might, during the term of office, abolish the street commissioner's salaries and substitute fees.[53] One who claims a salary from the city as due him under an appointment as foreman of the bureau of street cleaning, for a time when he in fact rendered no services, must show an appointment or employment of such a nature or for such a period as entitles him to the salary claimed irrespective of the rendition of services.[54] Where a deputy collector of assessments appointed by a street commissioner has not been permitted to perform the duties of the office to which he has been appointed, he cannot maintain an action against the city to recover the fees accruing during his term.[55] A member of the uniformed force of the street cleaning department who, having been laid off by order of the commissioner, fails to tender his services to the commissioner during the periods of idleness, but accepts other employment, is estopped from afterward recovering compensation for the unemployed time, the compensation being in the nature of wages paid for specific labor, and not an official salary.[56] An employee of the street cleaning department is not entitled to extra pay for work done on Sundays, in the absence of any contract on the part of the city to compensate him therefor.[57] A member of the uniformed force of the street cleaning department of New York city, being competent to take a leave of absence and waive his compensation for the time, is estopped by his application for leave of absence without pay, which was granted, from recovering compensation for the time of his absence.[58] The

50. Schuyler *v.* New York, 95 N. Y. App. Div. 305, 88 N. Y. Suppl. 646, holding that where, in an action by a veteran employed in the department of streets in the city of New York, to recover wages for days on which he did not work, it appeared that he was neither arbitrarily prevented from working, nor was work refused him while there was work to be done in his district, but, on the contrary, he was given preference over the other workmen in his gang, his right to compensation being dependent on the rendition of services, he was not entitled to recover on the ground that during the days sued for laborers in other gangs and in other districts who were not veterans were furnished employment.

51. Cashin *v.* Dunn, 58 Cal. 581, holding that the salaries of deputies of the superintendents of streets of San Francisco must be paid out of the general fund in preference to any and all other demands.

52. Bill *v.* Denver, 29 Fed. 344.

53. Wilson *v.* San José, 7 Cal. 275.

54. Brandt *v.* New York, 48 N. Y. Super. Ct. 293.

55. Smith *v.* New York, 37 N. Y. 518 [*affirming* 1 Daly 219].

56. Driscoll *v.* New York, 78 N. Y. App. Div. 52, 79 N. Y. Suppl. 479 [*affirming* 38 Misc. 453, 77 N. Y. Suppl. 997], where it is said that plaintiff's failure to tender his services "put the city in the position of being unable, through the commissioner, to exercise that right which the commissioner had of discharging him instead of retaining him in employment."

57. McCormack *v.* New York, 14 Misc. (N. Y.) 272, 35 N. Y. Suppl. 757, where the court in such a case further pointed out as being material the fact that under the statute on the subject plaintiff's salary could not legally exceed the amount which he had received.

58. Tepidino *v.* New York, 50 Misc. (N. Y.) 324, 98 N. Y. Suppl. 693.

power to remove does not include the power to suspend, and hence where an inspector of grading and regulating, after service upon him of a notice of suspension, continues to tender his services daily, he is entitled to compensation for the period of suspension.[59]

h. Powers and Duties. So long as a street commissioner remains in office he is required to perform all the duties which the charter attaches to such office, and the common council cannot relieve him of any of those duties during his continuance in office.[60] A street commissioner has a right to use the necessary force to keep the public streets from being injured, and no action can be sustained against him or those who act under his orders from using such force.[61] Any act which is reasonably necessary to put or keep a street in good repair, suitable for travel thereon, is repairing or maintaining a street within the meaning of a statute giving street and park commissioners power to "repair and maintain streets and highways."[62] Where the purpose of a sewer district designated by a city council is merely the construction of sewers, and the object and authority of its board of improvement or commissioners is limited to such construction and the paying therefor, the commissioners cannot, after the completion of the sewers, bind the district, or themselves as a board, by a contract for water for flushing.[63] Under the New York City Consolidation Act,[64] before the commissioner of street cleaning enters into a contract for the removal of ashes and garbage, such contract must be approved by the board of estimate as to price, terms, and conditions.[65] A finding that a city has constituted its street commissioner its agent to make acceptances of assignments of future earnings by employees in his department is sustained by a statement of agreed facts showing that for several years the commissioner had been accustomed to accept such assignments, and that the wages afterward earned were paid to the assignees by the city treasurer, although it is also agreed that the city council never authorized the commissioner to accept assignments.[66]

i. Liabilities. A superintendent of streets is liable on his bond for neglect of duty;[67] but it is conceded that as a general rule a private suit cannot be maintained against commissioners of highways for neglect in repairing highways in

Where the appropriation for the street cleaning department is insufficient to pay the salaries of all the street sweepers, and in order to prevent a reduction of the force all the members agree to take leave of absence without pay for a certain time, one who was a party to such arrangement is estopped to afterward claim pay from the city for the time he was absent. Downs *v.* New York, 75 N. Y. App. Div. 423, 78 N. Y. Suppl. 442 [*reversing* 38 Misc. 649, 78 N. Y. Suppl. 222, and *affirmed* in 173 N. Y. 651, 66 N. E. 1107], holding further that an agreement between the commissioner and the city street sweepers, in view of a shortage in the appropriation, that they shall take a leave of absence for a day each week, without pay, is within the provision of Greater New York Charter, § 537, that leave of absence exceeding twenty days in a year shall not be allowed a member of the force, except on condition that he release not less than half his compensation during his absence.

59. Myers *v.* New York, 18 N. Y. Suppl. 904 [*following* Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854, and *distinguishing* Higgins *v.* New York, 131 N. Y. 128, 30 N. E. 44].

60. Mitchell *v.* Wiles, 59 Ind. 364. The common council of a city cannot suspend a street commissioner or release him from the discharge of his duties and still retain him in office. State *v.* Sohn, 97 Ind. 101.

61. Clark *v.* McCarthy, 1 Cal. 453.

62. Conner *v.* Manchester, 73 N. H. 233, 60 Atl. 436, holding that it could not be said, as a matter of law, that such commissioners were not authorized by such statute to remove dirt, rubbish, and ashes from the streets and from receptacles placed on or near streets by abutters.

63. Pine Bluff Water, etc., Co. *v.* Sewer Dist., 56 Ark. 205, 18 S. W. 576.

64. N. Y. Laws (1882), c. 410.

65. People *v.* Waring, 5 N. Y. App. Div. 311, 39 N. Y. Suppl. 193 [*distinguishing* Lynch *v.* New York, 2 N. Y. App. Div. 213, 37 N. Y. Suppl. 798].

66. Lamoureux *v.* Morin, 72 N. H. 76, 54 Atl. 1023.

67. Goodsell *v.* Ashworth, 96 Cal. 397, 31 Pac. 261, holding that under St. (1885) p. 160, § 22, providing that the superintendent of streets shall give bonds, on which, if he fails to see the laws, ordinances, orders, and regulations relative to streets and highways executed, after notice of violation thereof, he shall be liable to any one injured in person or property in consequence of his official neglect, and section 11, providing that all persons directly interested in any work provided for in the act, feeling aggrieved by

their respective towns, unless it is shown that they had the requisite funds for that purpose under their control.[68] Where a superintendent of streets undertakes to repair a street or sewer he must do so in a careful and skilful manner, and is liable for any damages resulting from his negligence, and cannot escape liability on the ground that he did such work in his official capacity;[69] and where he exceeded his authority in making such repairs his acts stand on the same footing as those of any other person making the repairs.[70] So also where street commissioners, abandoning the method prescribed by charter for repairs, undertake to carry out the work by means of a committee and superintendent, they become liable individually for injuries received by a person through the negligence of their employees.[71] Under a statutory provision that heads of departments and officers of a city shall not be liable to third persons for misfeasance or nonfeasance of any person appointed by or subordinate to them, a commissioner of city works is not liable to a person injured by the falling of a wooden awning in a street, where if there was misfeasance or nonfeasance anywhere in the department of city works in allowing the awning in question to be erected and to remain, it was that of the superintendent of streets, a subordinate in the department.[72]

j. Removal or Dismissal — (i) *In General.* Officers and employees of municipal street departments are very generally protected from summary or arbitrary removal by provisions in charters or general statutes or city ordinances that they shall not be removed except for cause or upon notice and after an opportunity to be heard.[73] Such a provision does not, however, authorize a trial

any act or determination of the superintendent relative thereto, shall appeal to the city council, and further providing that all the decisions of the city council shall in certain respects be final, the remedy of one complaining of the superintendent's neglect in not seeing that a sewer was properly constructed in accordance with the specifications is not confined to appeal, and, there having been none, he can sue on the bond.

68. Hutson *v.* New York, 5 Sandf. (N. Y.) 289, holding, however, that this rule did not apply to the corporation of the city of New York in their capacity of commissioners of highways.

69. Butler *v.* Ashworth, 102 Cal. 663, 36 Pac. 922.

In Massachusetts a superintendent of streets is liable for injuries resulting from his personal negligence in the performance of his duties, but he is not liable for injuries not caused by his negligence, or for injuries resulting from the negligence of his servants or agents. Moynihan *v.* Todd, 188 Mass. 301, 74 N. E. 367, 108 Am. St. Rep. 473.

70. Butler *v.* Ashworth, 102 Cal. 663, 36 Pac. 922.

71. Robinson *v.* Rohr, 73 Wis. 436, 40 N. W. 668, 9 Am. St. Rep. 810, 2 L. R. A. 366.

72. Bleling *v.* Brooklyn, 9 N. Y. St. 690.

73. State *v.* Martin, 46 Conn. 479 (holding that where an ordinance gives to the board of road commissioners power to appoint a street inspector who "shall be removable by said board for due cause," an appointee has the right to the office until the expiration of his term unless removed for cause, and cannot be ousted by a resolution declaring the office vacant and the appointment of a successor); People *v.* Woodbury, 102 N. Y. App. Div. 462, 92 N. Y. Suppl. 442 (holding that an order notifying a sawyer employed by the department of street cleaning that "you are hereby notified that you are discharged from this department as a sawyer, your services being no longer required" does not necessarily import that the position of sawyer has been abrogated, or that the department of street cleaning has no longer any work for a sawyer, so as to exclude the operation of Greater New York Charter (Laws (1901), p. 242, c. 466, § 537), providing that no member of the uniformed force of the department of street cleaning shall be removed until after a hearing, and requiring the true grounds of removal to be entered upon the records of the department); People *v.* Brookfield, 1 N. Y. App. Div. 68, 37 N. Y. Suppl. 107, holding that under New York City Consolidation Act (N. Y. Laws (1882), c. 410, §§ 48, 317), declaring that no regular clerk or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation, the superintendent of street improvements, who is declared by statute to be chief officer of a bureau, cannot be discharged on mere notice of an intended consolidation of his office with another office, and request for his resignation).

Where a street commissioner is appointed by the city council for a definite term, the city council cannot remove him except for cause and after notice and an opportunity to be heard, in the absence of any statutory provision giving them a discretionary power

or judicial hearing of any kind, but only a notification of the charge and an opportunity to make an explanation.[74] Where a member of a street-cleaning department is assigned to certain duties carrying an increased compensation, but such an assignment is a mere detail in the department, and not an appointment to a new and distinct position, he holds such detail at the discretion of the commisssioner of street cleaning, and may be relegated to his former position and his former rate of pay without notice.[75] A superintendent of streets, appointed by the executive board of a city under a charter provision giving them power to "appoint, and, at pleasure, remove" such officer, may be removed without charges against him and without a hearing;[76] and the same is true of a superintendent of streets appointed by the street commissioner under a charter provision giving him power to appoint such superintendents "who shall hold their places during the pleasure of the commissioner."[77] Under a charter provision granting the commissioner of street cleaning power to remove a member of the force, in his discretion, on evidence satisfactory to him of any breach of discipline, the refusal of an accused member to make explanation to the commissioner of a charge of insubordination preferred by the deputy is cause for immediate removal by the commissioner.[78] Under a charter provision that absence without leave of any member of the uniformed force of the street department for five consecutive days shall be deemed a resignation, the commissioner of street cleaning has power to dismiss a street sweeper, who had been appointed as an assistant foreman, without notice, where he was absent without leave for more than five

of removal. Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408.

74. People *v.* Woodbury, 114 N. Y. App. Div. 188, 99 N. Y. Suppl. 573, holding that where a member of a street cleaning department of Greater New York, having appeared before the board of appeals of the department in response to notice, had fully explained to him charges as to obtaining his position by false naturalization papers, and the employee asked and was granted several adjournments before he was finally dismissed, and the true ground of his removal was entered on the records of the department, there was a sufficient compliance with Greater New York Charter (Laws (1901), p. 242, c. 466, § 537), providing that no member of the street cleaning department shall be removed until he has been informed of the cause of the removal and allowed an opportunity of making an explanation.

75. Leach *v.* Woodbury, 75 N. Y. App. Div. 503, 78 N. Y. Suppl. 362, holding that under Greater New York Charter, § 536, which provides that members of the street cleaning department shall be divided into two general classes, viz., the clerical and uniformed force; that the uniformed force shall be appointed by the commissioner, and consist of one general superintendent, section foreman, and sweepers, and that there shall be paid to sweepers or drivers acting as assistants to the section or stable foreman nine hundred dollars, and to sweepers seven hundred and twenty dollars, the appointment of a sweeper as an assistant foreman was a mere detail in the department and the person so appointed, although an honorably discharged veteran of the Civil war, might be relegated to the duties and pay of a sweeper without notice.

76. People *v.* Armbruster, 59 Hun (N. Y.) 586, 13 N. Y. Suppl. 942, holding that he may be so removed, although he is an honorably discharged soldier of the Civil war, for he is a deputy of a department within the provisions of N. Y. Laws (1888), c. 119, as amended by N. Y. Laws (1890), c. 67, that the prohibition against the removal of an honorably discharged soldier from any appointive city or county except for cause shown after a hearing shall not apply to the position of deputy of any official or department.

77. People *v.* Baker, 12 Misc. (N. Y.) 389, 34 N. Y. Suppl. 49, holding that a street superintendent so appointed holds a "confidential relation" to the commissioner, within N. Y. Laws (1892), c. 577, declaring that its provisions restricting the removal of veteran volunteer firemen shall not apply to any person "holding a confidential relation to the appointing officer."

78. People *v.* Woodbury, 88 N. Y. App. Div. 593, 85 N. Y. Suppl. 161 [*affirmed* in 179 N. Y. 525, 71 N. E. 1137]; Com. *v.* Lynch, 8 Pa. Dist. 347, 22 Pa. Co. Ct. 422, 7 Del. Co. 417; Davis *v.* Filler, 47 W. Va. 413, 35 S. E. 6.

An ordinance making the term of a street supervisor one year cannot deprive the common council of the right to exercise the power of removing such officer, where such power is expressly given by the charter of the city. Mathis *v.* Rose, 64 N. J. L. 45, 44 Atl. 875 [*affirmed* in 64 N. J. L. 726, 49 Atl. 1135].

Failure to reappoint a commissioner at the expiration of his term and the selection of another is not a removal from office. People *v.* Dobbs Ferry, 63 N. Y. App. Div. 276, 71 N. Y. Suppl. 578.

consecutive days.[79] Where the common council have by statute the power to "dispense with the street commissioner," an order of the council dispensing with the incumbent's services as street commissioner is a removal from office.[80] In proceedings to remove a street commissioner from office, a charge that he disobeyed an order of the board of trustees that no new work should be begun without direction from the board is not sustained where it appears that the commissioner merely filled in, without direction from the board, places on a street that had recently been graded, but had sunk by reason of frost;[81] but a mere statement by a street commissioner that he will not obey a certain resolution of the board of trustees is not ground for his removal where he afterward does actually comply with such resolution.[82] A power conferred by statute upon the board of city affairs to remove such officers as it may deem necessary calls for the exercise of judgment and discretion, and cannot be delegated to the head of the street cleaning department.[83]

(II) *Review and Reinstatement.* The statutes frequently provide for a judicial review of the dismissal of an officer or employee of the street department;[84] but where a statute gives the town council the right to remove a surveyor of highways and does not provide for any appeal from their action, no appeal lies.[85] The statutory period within which a discharged employee of the street department may institute proceedings to review his dismissal runs from the time when he received notice of the dismissal.[86] A charter provision that a removed member of the uniformed force in the street cleaning department, who is successful in a proceeding instituted to review his discharge, shall be entitled to be reinstated, and to receive full pay during the time of his suspension or removal

79. Leach *v.* Woodbury, 75 N. Y. App. Div. 503, 78 N. Y. Suppl. 362.

80. State *v.* Sohn, 97 Ind. 101.

81. People *v.* Mace, 84 Hun (N. Y.) 344, 32 N. Y. Suppl. 335.

82. People *v.* Mace, 84 Hun (N. Y.) 344, 32 N. Y. Suppl. 335.

83. Kelley *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 611, 7 Ohio N. P. 360, holding that while the superintendent of the street cleaning department in Cincinnati must, from the nature and necessities of the work in his charge, and the large number of men under him, have the power to summarily suspend employees for insubordination or dereliction of duty, such suspension cannot be for an indefinite length of time, but can only last until reported to the board, where the action of the superintendent must, by four members, be approved or rejected, and the suspension becomes void on their failure to act thereon, and that where an employee of the street cleaning department, who was suspended by the superintendent, and upon whose suspension no action was taken by the board of city affairs, owing to a state of deadlock, for a period of six months, had during that time tendered his services, and stood ready and willing to discharge his duties, he was entitled to recover compensation for such time.

84. See People *v.* Woodbury, 88 N. Y. App. Div. 593, 85 N. Y. Suppl. 161 [*affirmed* in 179 N. Y. 525, 71 N. E. 1137].

Mandamus is not a proper remedy to review the dismissal of a member of the street cleaning force, under Greater New York Charter (Laws (1897), c. 378, § 537), providing that on dismissal a member shall have the right to sue out a writ of certiorari or other proper remedy, for the purpose of reviewing the action of the commissioner. People *v.* Woodbury, 88 N. Y. App. Div. 593, 88 N. Y. Suppl. 161 [*affirmed* in 179 N. Y. 525, 71 N. E. 1137].

85. Walsh *v.* Johnston, 18 R. I. 88, 25 Atl. 849, construing Pub. Sts. c. 38, § 12, and holding further that section 35, providing that "any person aggrieved by the judgment or decree of a town council may appeal within forty days after the entering up of such judgment or decree, and not thereafter," etc., was not intended to confer the right to appeal, but merely to fix a limitation of time within which such right, when it was elsewhere specifically given, could be exercised.

86. People *v.* Woodbury, 102 N. Y. App. Div. 333, 92 N. Y. Suppl. 444, holding that under New York Charter (N. Y. Laws (1901), p. 242, c. 466, § 537), providing that no member of the uniformed force of the street cleaning department shall be removed without a hearing, and that the commissioner of street cleaning shall have power to punish members of the force by dismissal, a record of which shall be entered in writing, a dismissal by the commissioner takes effect from the time it is communicated to the employee and not from the time the commissioner mentally determines upon it; and certiorari to review the dismissal sued out within four months from the time it was communicated to the employee, but more than four months after it was determined upon by the commissioner, is in time, under Code Civ. Proc. § 2125, requiring certiorari to be brought

from office, does not authorize the recovery of compensation in the reinstatement proceeding itself.[87]

k. De Facto Officers. Where a street inspector who is wrongfully appointed and qualified before the expiration of his predecessor's term exercises the office after the expiration of his predecessor's term, he is an officer *de facto*;[88] but where no such office as "sewer engineer" has ever been legally created, an incumbent thereof cannot be considered an officer *de facto*.[89] One who is in possession of the office of street commissioner, under an appointment giving him color of title, is street commissioner *de facto*, and as such entitled to possession of the books and papers of the office.[90]

10. Water and Light[91] — a. Creation of Offices. A statute authorizing a board of water commissioners to employ or appoint from time to time such engineers, surveyors, clerks, and other persons to aid them in the execution of the statute as they may deem necessary or as may be authorized or required by law for the city, and to fix their compensation, is not limited to such employees as were authorized or required for the city by preëxisting laws.[92] Under a charter provision authorizing the appointment of water commissioners when the city shall become the owner of any water-supply or shall decide to construct a system of water-supply, the city may appoint water commissioners, at a salary, where it leases a water plant.[93] Where a statute authorizes cities to construct, maintain, and operate waterworks and provides for the establishment of a board of trustees of such waterworks by the common council, no notice of a proceeding by the council to establish such board is necessary to give it validity.[94] Under a statute which authorizes "any city in which waterworks are, or may be situated, or in progress of construction" to establish a board of trustees of waterworks, a city in which no waterworks are situated and which has merely authorized a loan to construct them cannot establish a board of trustees of such works.[95]

b. Election or Appointment of Officers. Where a statute authorizes cities and incorporated towns to construct, maintain, and operate waterworks, and provides for the establishment of a board of trustees of such waterworks by the common council, and for their election by the qualified voters of such city or town, the establishment of such a board by a city council is not a necessary prerequisite to the election of such trustees by the voters of the city,[96] nor is such an election invalidated by the fact that no notice thereof was previously given, or that a large number of the electors were ignorant of the existence of the law.[97] It has been held that a statute creating the board of water commissioners of a village and granting them specific powers creates a new office within a constitutional provision that all officers whose offices shall thereafter be created by law shall be elected by the people or appointed in such manner as the legislature may direct, and is not unconstitutional because it names the persons who are to constitute the commission.[98] Where a statute clothed the "authorities" of incorporated villages with power to organize themselves into boards of waterworks to supply their villages with pure and wholesome water, and a subsequent statute defined the

within four months after the determination became final.

87. People *v.* Woodbury, 102 N. Y. App. Div. 462, 92 N. Y. Suppl. 442.

88. State *v.* Martin, 46 Conn. 479.

89. Weesner *v.* Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

90. Conover *v.* Devlin, 24 Barb. (N. Y.) 587, 5 Abb. Pr. 73, 14 How. Pr. 315.

91. **Supply of water to the public** see Waters and Watercourses.

92. Herrick *v.* Hoos, 61 N. J. L. 463, 39 Atl. 656, holding that in Jersey City it is not requisite to the validity of the appointment or employment of officers, clerks, or other persons by the board of street and water commissioners that there should be a concurrence therein of the board of finance.

93. Higgins *v.* San Diego, 131 Cal. 294, 63 Pac. 470, so holding on the ground that the word "owner" is used in the sense that the city should have control of the water-supply.

94. Lafayette *v.* State, 69 Ind. 218.

95. State *v.* Pinto, 7 Ohio St. 355.

96. Lafayette *v.* State, 69 Ind. 218.

97. Lafayette *v.* State, 69 Ind. 218.

98. Hequembourg *v.* Dunkirk, 49 Hun (N. Y.) 550, 2 N. Y. Suppl. 447.

"authorities" to be the president and trustees of villages, and a still later statute provided that the term "authorities" should include first the president and trustees of the villages with terms of office for the term for which they were elected, or, second, the same number of commissioners to be elected at a special election called by the trustees on the written request of a majority of the resident taxpayers, the right of the trustees to be a water board, in the absence of an election of commissioners upon the request of the taxpayers, was only provisional, and if a majority of the taxpayers made the request for a public election the trustees were obliged to call the meeting, and the persons elected became the board of water commissioners upon filing their official oath.[99] Where a statute gives a municipal water board "sole authority" to employ and dismiss at pleasure a superintendent, the mayor is excluded from casting a vote in the selection of a superintendent, notwithstanding a subsequent clause in the statute directing that, whenever the commissioners shall be equally divided in determining a question "touching the management of the said works," the casting vote shall be given by the mayor.[1] Where the power of appointment to fill vacancies in the membership of a city water board, caused by the failure of the councils to elect members, vested in the board, and, the board having failed to exercise it, the councils thereafter elected members who were received and recognized by the old members and participated in all their proceedings, the titles of the members so elected to their offices were merely voidable, and, not having been avoided, they were authorized to participate in appointments to fill subsequent vacancies caused by the failure of the council to act.[2] A municipal water commissioner upon whom is conferred no authority to appoint subordinate employees cannot make an appointment to fill a vacancy occurring in his department.[3]

c. Eligibility. The position of a member of a municipal board of waterworks is a "civil office" within the meaning of a constitutional provision that "no Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office under this State, which shall have been created, or the emoluments of which shall have been increased, during his continuance in office."[4]

d. Qualification. In a statute providing for waterworks for a city, and that certain persons shall be the "water committee" to purchase the plant and issue the bonds, the absence of a provision requiring them to take an official oath does not contravene a constitutional provision that "every person elected or appointed to any office under the constitution shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States and of this state, and also an oath of office," as the committee are not "officers under the constitution."[5]

e. Term of Office. A statute placing the management of municipal waterworks in the hands of a water commissioner, whose term of office is fixed at ten years, does not contravene a constitutional provision that "the legislative assembly shall not create any office, the term of which should be longer than four years," as the commissioners are not officers but agents of the corporation.[6] Under an ordinance providing for the annual appointment of a gas inspector by the city council, an appointment to such office "subject to the further orders of this

99. People *v.* Bird, 8 N. Y. Suppl. 801, holding also that testimony of the village clerk that the names contained in the petition for the election represented a majority of the taxpayers of the village as contained in the last assessment roll is sufficient proof that the petitioners did represent a majority of the taxpayers.

1. Com. *v.* Grant, 2 Woodw. (Pa.) 379.

2. Com. *v.* Hoff, 1 Woodw. (Pa.) 464. In this case the court held further that a special act of the legislature which ratified and confirmed the titles to office of acting members of the water board was constitutional and valid.

3. Percival *v.* Weir, 52 Nebr. 373, 72 N. W. 477.

4. State *v.* Vallé, 41 Mo. 29.

5. David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

6. David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

council" is invalid, since such appointment is in effect an appointment during the pleasure of the common council.[7]

f. Status of Officers or Boards. Waterworks are essentially matters of local and municipal concern, and a board organized to control them and whose functions relate exclusively to them is a municipal, and not a state, agency.[8] Members of the water board are "officers" of the city,[9] and so also is a superintendent of waterworks;[10] but a clerk or secretary of the board of waterworks trustees or the board of public service is a mere employee and not a public officer.[11] A municipal board of water commissioners is a representative and agent of the city and not an independent corporation, although it is authorized by statute to sue and be sued, to have a common seal, and to enter into contracts with reference to wateworks in its own name.[12]

g. Civil Service Laws and Rules. A lamp inspector, whose duties are to keep a record of the number and location of all the street lamps in the city, the number unlighted every night, and the reason therefor, to investigate all complaints relating to such lamps, and make report to the council, is a "subordinate officer or assistant," required to be examined for appointment under the civil service rules of New York.[13]

h. Compensation. Under a statute in reference to supplying a city with water, providing for the appointment of three commissioners, who, "for the first year after the commencement of the construction of waterworks, as hereinafter prescribed, shall each receive such salary as the common council shall fix," and empowering them to adopt and report any feasible plan for the works, "embracing the purchase of any water-works," the commissioners are entitled to compensation for the adoption and the recommendation to the council of a plan for purchasing works, and for their control and management of the works after the purchase.[14] A lamp-lighter whose pay was reduced by the superintendent without the authority of the common council has been held to be entitled to recover

7. King *v.* Buffalo, 10 N. Y. Suppl. 564.

8. State *v.* Kohnke, 109 La. 838, 33 So. 793.

9. O'Brien *v.* Thorogood, 162 Mass. 598, 39 N. E. 287, holding that where an act for supplying a city with water provided that the powers therein granted should be exercised by such agents as the "city council" should direct, and a water board was not provided for by any subsequent act, but subsequent ordinances of the city in designating its agents used the phrase "water board," and a subsequent statute amending the city charter recognized the existence of the water board but made no provision for the election of its members, except in a section providing that all "officers" not elected by voters should be appointed by the mayor, subject to confirmation by the board of aldermen, members of the water board were "officers" within the meaning of the latter section, and therefore an ordinance providing for their appointment in such manner was valid. But *compare* David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174, holding that the water committee or water commission of a city are merely agents of the municipality and not officers.

10. State *v.* Shannon, 133 Mo. 139, 33 S. W. 1137, holding that a superintendent of waterworks who is to hold his "office" for one year and give bond for the faithful performance of his duties is an officer of the city, although he is paid as are city employees generally, and is removable at the will of the board of public works.

11. Hutchinson *v.* Lima, 27 Ohio Cir. Ct. 545 [*following* State *v.* Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723].

12. Morton *v.* Power, 33 Minn. 521, 24 N. W. 194, holding that therefore the provision of Sp. Laws (1881), c. 188, as amended by Sp. Laws (1883), c. 75, authorizing the board of water commissioners of the city of St. Paul to make contracts with reference to the waterworks in its own name, as the representative of the city, do not create a corporation, within the inhibition of Const. art. 10, § 2, against forming corporations under special acts. But *compare* State *v.* Kohnke, 109 La. 838, 33 So. 793, holding that the sewerage and water board of the city of New Orleans, having been given a name and the power to contract and to sue, is a body corporate.

13. Peck *v.* Belknap, 130 N. Y. 394, 29 N. E. 977 [*reversing* 55 Hun 91, 8 N. Y. Suppl. 265], holding therefore that a resolution of the city council, authorizing the appointment or the hiring as such inspector of one who has not passed the examination required by law, is illegal, and the city will be restrained at the suit of a taxpayer from entering into a contract with him, or paying the salary agreed.

14. Schermerhorn *v.* Schenectady, 50 Hun (N. Y.) 331, 3 N. Y. Suppl. 435 [*affirmed* in 121 N. Y. 651, 24 N. E. 1091].

the full amount allowed by the ordinance of the common council, notwithstanding he has received the reduced amount and has receipted for it in full.[15] A city is authorized to raise and appropriate money to reimburse to its board of water commissioners expenses of their defense in an investigation of their official conduct, made by order of the city government, by a committee of that body, on charges which proved to be groundless.[16] A prohibition in the state constitution and the charter of a city against the increasing of an officer's salary during his term applies to the assessor and collector of water rates, and to the time during which he holds over after the expiration of his term.[17] Where it is apparent, from an examination of the various provisions of a village charter, that the omission to provide for compensation to members of the board of water commissioners was intentional, a member of the board has no right of action against the village for his services as a member, or for extra services rendered in the same line of duty.[18]

i. **Powers and Duties.** The water board of a city has power to employ special counsel, and need not rely upon the city attorney.[19] The water commissioner of the city of New York has no authority to purchase land for the purpose of adding to the water-supply of the city without the approval of the board of aldermen,[20] or until compliance with all the formalities required by the charter.[21] Where a statute providing for the government of a city is not explicit in indicating which department of the city shall have charge of the electric lighting of the city, the duty of lighting the city will not be transferred to the department of public works from the department of public safety, in the absence of fraud and proof of any injury to be apprehended, when a bureau of the latter department has acted exclusively of the department of public works, and for several years continuously the annual ordinances by the councils of appropriation of funds to the maintenance of the lighting of the city by electricity have been directed to the department of public safety.[22] Where the board of waterworks trustees is a creature of the city council and its powers are limited by statute, no act done upon the part of such trustees can create an estoppel against the city, especially an estoppel as to any claim that it may make as to the title to real estate.[23] A city charter declaring that, except as otherwise provided, all the powers previously vested in the trustees of the waterworks shall be vested in the director of public improvements, and all laws pertaining to those improvements shall apply to the department of public

15. Smith *v.* New York, 4 N. Y. Leg. Obs. 423.

16. Lawrence *v.* McAlvin, 109 Mass. 311.

17. State *v.* Smith, 87 Mo. 158.

18. Perry *v.* Cheboygan, 55 Mich. 250, 21 N. W. 333.

19. Freeman *v.* Brooks, 29 Misc. (N. Y.) 719, 62 N. Y. Suppl. 761.

20. Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610, holding that the only authority for the purchase of property for the purpose of increasing the water-supply of the city of New York, whether in the borough of Brooklyn or in the Bronx, must be found in the provisions of the Greater New York Charter dealing with this general subject, and not in the devolved powers; that assuming that the water department of Brooklyn had the power, without the concurrence or approval of the common council, to purchase real estate for the purpose of increasing the water-supply, such unlimited power did not devolve on the water commissioner of the city of New York; and that, even if the purchase of property to extend the water system of Brooklyn was not controlled by the general scheme provided in the Greater New York Charter, all the powers of the common council of Brooklyn, including its power to consent to the purchase of property for the extension of the system, were devolved on the board of aldermen of New York, and the commissioner of water-supply of New York would have no authority to purchase property at private sale for such purpose without the approval of the board.

21. Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610, holding that under the Greater New York Charter the water commissioner has no authority to purchase land generally, but only such real estate as has been determined to be necessary, and until maps have been prepared and approved, with all the formalities provided by sections 486, 488, and 489 of the charter, he has no authority to purchase real estate at all.

22. McIntyre *v.* Philadelphia, 9 Pa. Dist. 714, 24 Pa. Co. Ct. 439.

23. Dayton *v.* Cooper Hydraulic Co., 10

improvements, and be enforced by the director thereof, imbues him with all the powers previously exercised by the waterworks trustees, in addition to the powers which the charter expressly confers upon him.[24] Municipal gas trustees have been held to be without power to enter into a special contract fixing the price at which city gas will be furnished.[25] Where a city charter provides for the organization of a water and light commission and for the election of a president, who is required to draw warrants payable out of the funds under control of the commission, he has no authority as a general agent to settle claims against the city or the commission.[26] Where the commissioners of waterworks of a city were authorized to collect the revenue, turning over to the city any surplus over the expenditure for maintenance and to initiate works for improving the system, but the assent of the ratepayers was required to be obtained where more than a specified amount was to be expended in any one year, and the commissioners wished to make certain improvements; but finding that the cost would be more than double the amount which might be expended in a year without the assent of the ratepayers, they decided to carry out at the time only half of the proposed scheme, requiring the amount which they might expend without the consent of the ratepayers, it was held that as the commissioners had in good faith divided the work there was no illegal evasion of the statutory restrictions, and the contract for the work was not invalid as contravening the statute in this particular.[27] Where there is a statutory limit to the amount which may be expended on the waterworks system by a city, a contract of the water commissioners calling for an expenditure which will bring the total expenditure beyond such limit is *ultra vires* and not binding.[28] A charter provision that "the commissioner of water supply is authorized in his discretion to cause water-meters, the pattern and price of which shall be approved by the board of aldermen, to be placed in all stores," etc., contemplates the approval of a particular style or pattern of meter to be sold at a particular price, and a resolution of the board of aldermen, to be a compliance with this provision, must identify the particular pattern approved and the price at which it is to be sold.[29] While under the Greater New York charter and the rules of the department of water-supply, gas, and electricity, it is as a general rule the duty of the commissioner on request to test a meter, the pattern and price of which has been approved by the board of aldermen, he cannot be compelled by mandamus to go on making individual tests of a certain kind of meter approved by the board, after he has given one of them a thorough test and found it to be defective, his objection to it being directed to the principle on which it is constructed.[30] Where the superintendent and engineer contracted, in the name of the board of water commissioners of a city, to put in a water-pipe on private premises, and put it in accordingly, and the board refused to confirm such contract, such refusal did not take from the owner of the premises the right to the pipe, but amounted to an election on the part of the board to look to the superintendent for payment, and the latter could sue and recover on the contract in his own name.[31]

j. Liabilities. A board of commissioners intrusted with the management and control of waterworks owned by a city are public officers, and are not liable

Ohio S. & C. Pl. Dec. 192, 7 Ohio N. P. 495.

24. Fergus *v.* Columbus, 8 Ohio S. & C. Pl. Dec. 290, 6 Ohio N. P. 82.

25. Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

26. Austin *v.* Forbis, (Tex. 1905) 89 S. W. 405 [*reversing* Civ. App. 1905) 86 S. W. 29].

27. McDougall *v.* Windsor Water Com'rs, 27 Ont. App. 566.

28. McDougall *v.* Windsor Water Com'rs, 27 Ont. App. 566.

29. People *v.* Monroe, 84 N. Y. App. Div. 241, 82 N. Y. Suppl. 603 [*affirming* 39 Misc. 369, 79 N. Y. Suppl. 956], holding that therefore a resolution of the board of aldermen reciting that "the pattern and price of water meters manufactured by the Standard Water Meter Company of this city, is hereby approved for use in the city of New York," is not a sufficient approval of such meters.

30. People *v.* Monroe, 84 N. Y. App. Div. 241, 82 N. Y. Suppl. 603 [*affirming* 39 Misc. 369, 79 N. Y. Suppl. 956].

31. Hale *v.* Houghton, 8 Mich. 458.

as a body corporate in an action for negligence.[32] Where a city council elected a superintendent of waterworks, there being no law or ordinance specifying his duties or requiring him to give bond, but he gave bond, with sureties, for the discharge of his duties as superintendent and the payment of all money that might come into his hands, and subsequently an ordinance was passed defining his duties, one of which was collecting water rents, the sureties were not liable for his failure to pay over such rents.[33] Where by city ordinances it was made the duty of the city registrar to deliver to the superintendent of the waterworks blank water licenses from time to time, as required, taking duplicate receipts therefor, one of which was to be filed with the city auditor, who was to charge the superintendent with the amount thereof, and the superintendent was to issue the licenses and pay the money received therefor, weekly, into the city treasury, and he was also required to report quarterly, under oath, the amount so received and paid by him, and exhibit to the auditor the unissued licenses in his hands, but no such receipts were taken, and no quarterly report or settlement made, the superintendent was *prima facie* liable for the whole amount of the licenses delivered to him.[34] The fact that a register of water rents has given to the city a bond for the performance of his duties does not prevent the city from proceeding in equity against him for failure to pay in, as required by ordinance, all moneys received by him for water rents.[35]

k. Removal. The common council of a city has usually power to entertain and inquire into charges of malfeasance in office preferred against trustees of the city waterworks or members of the board of waterworks and to remove any or all of these officers for good cause shown.[36] Where a city charter vests the appointment and removal of superintendents of the bureau of water in the board of public works and the duration of the term of such officer is not declared by law, such officer holds office at the pleasure of the appointing board and can be removed by them at any time without notice.[37] Where the board of trustees of waterworks in fixing the term of officers appointed by it has made such term dependent upon the condition, which it has statutory authority to attach, that the incumbent may be removed at any time at the pleasure of the board, an incumbent may be removed by the board at any time without any reason being assigned.[38] A munici-

32. Gross *v.* Portsmouth Water Com'rs, 68 N. H. 389, 44 Atl. 529.

33. Lafayette *v.* James, 92 Ind. 240, 245, 47 Am. Rep. 140, where it is said: "It is quite clear, that, under his employment as such superintendent, it was not his right or duty to act as the fiscal agent of the city in the collection of water rents, and that the undertaking in the bond did not enlarge his duties, nor extend the liability of the sureties, beyond the duties of the employment."

34. St. Louis *v.* Foster, 24 Mo. 141.

35. Philadelphia *v.* Keyser, 10 Phila. (Pa.) 50.

36. Muhler *v.* Hedekin, 119 Ind. 481, 20 N. E. 700 (holding further that it is not within the jurisdiction of a court of equity to enjoin the common council of a city from proceeding to hear and investigate charges preferred against waterworks trustees and their removal from their office); Cohn *v.* New Brunswick, 73 N. J. L. 128, 62 Atl. 285 (holding that under a statute giving the common council power to remove from office members of a municipal board of waterworks for any unlawful act committed by them while holding office, the council may remove members of the board who fail to pay over moneys received by them to the city treasurer as required by statute, and that it was no excuse for members of the board that they did not know of the passage of the law whose provisions they violated).

Concurrence of mayor.— A statute providing that the mayor and council may at any time remove any water commissioners, provided it shall satisfactorily appear after reasonable notice to the parties and hearing the causes of complaint and answers thereto, if any shall be offered, that the commissioner whose removal is sought has been guilty of such maladministration or neglect of duty that his removal shall be right and proper, confers a judicial power, which cannot be executed by the council alone. Charles *v.* Hoboken, 27 N. J. L. 203.

37. People *v.* Drake, 43 N. Y. App. Div. 325, 329, 60 N. Y. Suppl. 309 [*affirmed* in 161 N. Y. 642, 57 N. E. 1122], where it is said: "The discretion is vested with the board and it can decapitate its appointees without rhyme or reason."

38. Lawrence *v.* Cincinnati, 5 Ohio Dec. (Reprint) 228, 3 Am. L. Rec. 598, holding that the power given to the board of trustees of waterworks by Mun. Code, § 336, to make the term of an officer appointed by it

pal water commissioner upon whom is conferred no power of removal cannot remove an employee, although he has control of the waterworks system and employees are required to obey his orders.[39] Where an employee of the board of public works who seeks to recover his salary from the time he was removed until the expiration of the time for which he was elected alleges in his petition that he was debarred from his office by the board of public works "while acting within the scope of their duties as such board," the only legitimate inference from this declaration is that plaintiff's removal was for cause, the board having statutory authority to remove employees for cause, and hence the petition is demurrable.[40] The person in charge of a branch office of the bureau for the collection of revenue from the sale and use of water is not the "head of a bureau," within a charter provision that no head of a bureau shall be removed until he has been allowed an opportunity of making explanation.[41] There is nothing in the duties or functions of a water registrar in the borough of Brooklyn which makes his position strictly confidential as to the commissioner of water-supply or the deputy commissioner for that borough so as bring him within the exception of a statute prohibiting the removal of a veteran without cause shown and a hearing had except in the case of one holding "a strictly confidential position."[42] A foreman of repairs in the bureau of the chief engineer in the department of the water-supply of the city of New York is not within any of the statutory or charter provisions against summary removal but may be removed by the commissioner of water-supply at pleasure without a hearing.[43] Where a veteran was removed from the position of land clerk for the reason merely that such position was abolished on economical grounds, and its duties attached to an existing office, which was filled by a person not a veteran, such removal, being in good faith, was not in violation of a statute providing that veterans holding any position in the city should not be removed except for cause, after a hearing, and that such person should hold office during good behavior.[44] Where the ordinances of a city provided for a water registrar to be elected by the water board and "hold office during the pleasure of the board," and give bond for the faithful performance of his duties, and subsequently the city made a general revision of its ordinances, reënacting the provisions of the old ordinance as to the water board without any material change, and provided that the repeal of former ordinances should not affect the tenure of office of any person holding office at the time the revision took effect, the office of water registrar was not vacated by the revision.[45]

l. **Forfeiture of Office.** Under a charter provision prohibiting any salaried officer of the city from holding any other public office during his incumbency, a superintendent of the bureau of water forfeits his position by accepting a commission in the United States army,[46] and is not affected by a subsequent statute

dependent on the condition that the incumbent might be removed at any time at the pleasure of the board was not taken away by section 343, giving the council the right to remove officers of the waterworks for cause.

39. Percival *v.* Weir, 52 Nebr. 373, 72 N. W. 477.

40. Hutchinson *v.* Lima, 27 Ohio Cir. Ct. 545, 551, where it is said: "There are other averments in the petition claiming that the removal was arbitrary and without reason, that plaintiff had performed his duties in compliance with law and to the satisfaction of said board and without any complaint or charges, etc., but under the familiar rule that a pleading of this nature must be construed most strongly against the pleader, the effect of the admissions above quoted must be apparent."

41. People *v.* Oakley, 93 N. Y. App. Div. 535, 87 N. Y. Suppl. 856.

42. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060 (*affirming* 24 Misc. 10, 53 N. Y. Suppl. 108)]; People *v.* Dalton. 41 N. Y. App. Div. 458, 58 N. Y. Suppl. 929 [*affirmed* in 160 N. Y. 686, 55 N. E. 1099].

43. People *v.* Dalton, 23 Misc. (N. Y.) 294, 50 N. Y. Suppl. 1028 [*affirmed* in 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1112].

44. People *v.* Adams, 51 Hun (N. Y.) 583, 4 N. Y. Suppl. 522.

45. Cambridge *v.* Fifield, 126 Mass. 428, holding that therefore the sureties on the water registrar's bond were liable for a default occurring after the revision.

46. People *v.* Drake, 43 N. Y. App. Div. 325, 60 N. Y. Suppl. 309 [*affirmed* in 161

providing for the payment of employees of the city who enlisted and after discharge returned to their employment.[47]

m. Abolition of Office. Where a special act of the legislature created as a body corporate the board of water commissioners of a city, and gave them authority to establish, maintain, and regulate a water-supply for the city, and provided that they should be elected at such times as the city council should determine, and a subsequent general act relating to the incorporation of cities and villages conferred on the city councils general authority in regard to water-supply, limited the term of office of water commissioners to two years, and provided that from the time of the organization of a city under its provisions all acts inconsistent therewith should cease to be applicable, when a city was organized under the latter act, the former was thereby repealed, and the board of water commissioners ceased to exist.[48] Under a charter, which provided that all offices forming a part of the local government of the municipal and public corporations and parts thereof which were united and consolidated into the city of New York were abolished as to all territory embraced within the limits of the city, and providing for the retention of office by clerks in public employ in the territory consolidated, the office of water registrar of the city of Brooklyn was abolished.[49]

11. Conduits and Subways — a. Aqueduct Commissioners, Officers, and Employees — (I) *Eligibility.* An officer of the United States army, who has been retired from active service on three-quarters pay on account of age, and who, although he still remains a part of the army and may be appointed to certain duties in connection with the soldiers' home under certain circumstances, has not been assigned to any duty by the federal government after such retirement, does not hold a federal office within the meaning of a statute providing that the aqueduct commissioners appointed by the mayor of the city of New York "shall hold no other federal, state or municipal office."[50]

(II) *Status.* An inspector of the New York aqueduct commission is an officer and not a mere employee.[51]

(III) *Civil Service Laws and Rules.* The provision of the New York statute relating to the Croton aqueduct, that "no person shall be appointed by the said aqueduct commissioners as inspector or superintendent, who shall not be certified by at least three members of the commission to be competent and fit for the duties of the position for which he is an applicant, and experienced in the subject-matter of the employment," being special and local in its character, was not repealed by the civil service act directing that preference be given honorably discharged Union soldiers in certain civil appointments.[52]

(IV) *Compensation.* Under the act creating the New York aqueduct commission, which allows the commissioners to appoint inspectors and fix their compensation, the commissioners, although they may remove at pleasure an inspector whom they have appointed without fixing his term of office, cannot suspend such inspector without pay during suspension, and hence an inspector can recover for the period of suspension;[53] but when such inspector agrees that if suspended by

N. Y. 642, 57 N. E. 1122], holding this to be true notwithstanding a resolution of the city council that employees enlisting for service should not lose their positions, or the granting of a leave of absence by the board of public works.

47. People *v.* Drake, 43 N. Y. App. Div. 325, 60 N. Y. Suppl. 309 [*affirmed* in 161 N. Y. 642, 57 N. E. 1122].

48. Springfield Water Com'rs *v.* People, 137 Ill. 660, 27 N. E. 698.

49. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060 (*affirming* 24 Misc. 10, 53 N. Y. Suppl. 108), and *followed* in People *v.* Oakley, 93 N. Y. App. Div. 535, 87 N. Y. Suppl. 856].

50. People *v.* Duane, 121 N. Y. 367, 24 N. E. 845 [*affirming* 55 Hun 315, 8 N. Y. Suppl. 439, *distinguishing* U. S. *v.* Tyler, 105 U. S. 244, 26 L. ed. 985, and *disapproving* State *v.* De Gress, 53 Tex. 387].

51. Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19 [*affirming* 59 N. Y. Super. Ct. 583, 13 N. Y. Suppl. 887]; Ryan *v.* New York, 91 Hun (N. Y.) 470, 36 N. Y. Suppl. 315.

52. Brown *v.* Duane, 60 Hun (N. Y.) 98, 14 N. Y. Suppl. 450.

53. Emmitt *v.* New York, 128 N. Y. 117, 28

the commissioners his pay shall cease from that time, he thereby waives all right to compensation during any subsequent suspension.[54]

(v) *Removal.* An aqueduct commissioner for the city of New York may be removed by the mayor at pleasure within six months after the commencement of the mayor's term of office,[55] and such right of removal is not affected by a provision of the charter that the term of office of the commission shall cease on a particular date, since such provision only fixes the date when the whole commission shall be abolished.[56] A person appointed chief engineer of the Croton aqueduct under the New York city charter cannot be removed except for cause.[57] Where the chief engineer of an aqueduct assumes added duties, even though he might have lawfully declined them, he is responsible for their proper performance, and if in the performance thereof he shows want of skill or ability as an engineer or an inefficient or slack control, this is sufficient ground for his removal;[58] but such officer is not responsible for and cannot be removed on account of the inefficiency or incapacity of assistants whom he did not and had no power to appoint, and over whom he had no official control, although he advised or instructed them.[59] Where a person employed by the New York aqueduct commissioners as an inspector was reported by the engineer in charge for intoxication, inattention, and unfitness, and, by direction of the commissioners, his resignation was demanded, and from that time he rendered no service and applied for no further pay, although he applied at different times for reinstatement, the demand for his resignation was in effect a discharge, and his employment ceased from that time.[60]

(vi) *Abandonment of Office.* An aqueduct commissioner will not be held to have abandoned his office by mere absence from his duties where the circumstances are not such as to indicate a relinquishment of the office.[61]

b. Rapid Transit Commissioners. Under the charter of Greater New York, which gives to the commissioner of water-supply, gas, and electricity cognizance and control of the construction of subways, etc., and requires his permit in writing therefor, he is authorized to impose as a condition of granting the permit that the subway company bear all reasonable expenses of inspection, so far as his jurisdiction extends.[62] It has been held that the court, in fixing the pay of the board of rapid transit commissioners for laying out a proposed railway under city streets, will fix the amount by analogy to the amounts allowed by the legislature to other public boards for similar service.[63]

N. E. 19 [*affirming* 59 N. Y. Super. Ct. 583, 13 N. Y. Suppl. 887 (*following* Mullen *v.* New York, 12 N. Y. Suppl. 269), and *following* Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854]; Phelan *v.* New York, 14 N. Y. Suppl. 785.

54. Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19 [*affirming* 59 N. Y. Super. Ct. 583, 13 N. Y. Suppl. 887]; Phelan *v.* New York, 14 N. Y. Suppl. 785.

55. People *v.* Van Wyck, 34 N. Y. App. Div. 573, 54 N. Y. Suppl. 675 [*affirmed* in 159 N. Y. 509, 54 N. E. 31].

56. People *v.* Van Wyck, 34 N. Y. App. Div. 573, 54 N. Y. Suppl. 675 [*affirmed* in 159 N. Y. 509, 54 N. E. 31].

57. People *v.* Campbell, 82 N. Y. 247.

58. People *v.* Campbell, 82 N. Y. 247.

59. People *v.* Campbell, 82 N. Y. 247.

60. Ryan *v.* New York, 91 Hun (N. Y.) 470, 36 N. Y. Suppl. 315.

61. So an aqueduct inspector will not be held to have abandoned his office by reason of absence from duty from May 1 until July 13, without any explanation at the time, where it appears that on May 28 he, on advice of his physician, applied for leave of absence without pay, to commence on June 1; that the application was denied; that on July 13 he reported for duty, and announced his readiness to go to work, but was told by the division engineer that there was no place for him; that he thereafter saw the chief engineer, who told him to come back again, and he would see; and that he continued to report to the chief engineer repeatedly thereafter, and held himself in readiness to obey his orders, although he was not assigned for duty, until notice was given him of his dismissal from the service. De Canio *v.* New York, 15 Misc. (N. Y.) 38, 36 N. Y. Suppl. 423.

62. People *v.* Monroe, 85 N. Y. App. Div. 542, 83 N. Y. Suppl. 382 [*affirmed* in 176 N. Y. 567, 68 N. E. 1122].

63. *In re* Rapid Transit R. Com'rs, 21 N. Y. Suppl. 570, where the court allowed the board of rapid transit commissioners for laying out a proposed railway under Broadway, where they spent two hundred and fifty days in actual service, five thousand dollars each, that being the annual salary fixed by the

12. WHARVES, DOCKS, AND PARKS — a. Wharf and Dock Officers — (I) *ELECTION OR APPOINTMENT.* Where the statute provided that a city council should have power to appoint or provide for the election of a wharf master and the council by ordinance provided for an election of such officer, and a municipal code subsequently enacted provided that the council might appoint a wharf master, but also provided, after naming a number of officers among whom the wharf master was not mentioned, that the council should have power to provide for the appointment or election of such other officers as should be deemed necessary, it was held that, the ordinance providing for the wharf master's election not having been repealed, a wharf master was properly elected by the people instead of being appointed by the council.[64]

(II) *STATUS.* Dock masters in the department of docks in the city of New York are public officers and not merely clerks or employees.[65]

(III) *COMPENSATION.* The administrator of commerce for a city has no power to authorize a wharfinger to retain a sufficient sum out of the moneys collected by him to pay his salary and also other employees in the office, and expenses of the office.[66]

(IV) *POWERS AND DUTIES.* Where the charter gives the common council power to ordain by-laws relating to wharves and the anchoring, moving, and mooring of vessels, a by-law appointing a superintendent of wharves, and giving him "full power to order and regulate, whenever requested by the owner or lessee of any wharf, the mooring of vessels at such wharf," is not void, as delegating to him the making of regulations which the charter gave the common council alone the power to make.[67]

(V) *LIABILITIES.* A wharfinger who is sued by the city for amounts collected by him in his official capacity and in the performance of his duties, which amounts it was his duty to pay into the city treasury, cannot set off the salary due him and amounts which he has paid to employees in his office and the expenses of his office.[68] Where a superintendent of wharves, the performance of whose duties was not enforced by a penalty, and who acted only upon application of parties interested and at their expense, in good faith ordered a vessel lying at a wharf to be hauled astern to make more room for another at an adjoining wharf, and was sued by the owner of the wharf for damages, the city cannot legally indemnify him for the expenses incurred by him in defending against the suit.[69]

(VI) *REMOVAL.* Under the Greater New York charter providing that subordinates of departments who were removable only for cause before consolidation shall remain in the employ of the city subject to removal for cause, and declaring that heads of departments shall have the power to remove persons assigned to service under them, a dock master in the department of docks, who was removable at will before consolidation and is not a veteran soldier or volunteer fireman, remains subject to removal at will by the commissioners of the dock department.[70] A dock master is not within the provision of the New York city municipal civil service commission rule that no removal of any person in the classified service of New York city shall be valid until a statement of the cause thereof has been filed with the commission, and a copy furnished to the person to be removed, and an opportunity given for a written explanation.[71] The provision of the New York statute

act of the legislature for aqueduct commissioners.

64. State *v.* Mulvihill, 9 Ohio Dec. (Reprint) 450, 13 Cinc. L. Bul. 569.

65. People *v.* Cram, 164 N. Y. 166, 58 N. E. 112 [*reversing* 50 N. Y. App. Div. 380, 64 N. Y. Suppl. 158 (*affirming* 29 Misc. 359, 61 N. Y. Suppl. 858)].

66. New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569.

67. Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 458.

68. New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569.

69. Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 458.

70. People *v.* Cram, 164 N. Y. 166, 58 N. E. 112 [*reversing* 50 N. Y. App. Div. 380, 64 N. Y. Suppl. 158 (*affirming* 29 Misc. 359, 61 N. Y. Suppl. 858)].

71. People *v.* Cram, 164 N. Y. 166, 58 N. E. 112 [*reversing* 50 N. Y. App. Div. 380, 64 N. Y. Suppl. 158 (*affirming* 29 Misc. 359, 61 N. Y. Suppl. 858)].

that veterans engaged in public service shall be removed only for incompetency and conduct inconsistent with their position protects a veteran engaged in painting in the department of docks of New York city from being discharged without a hearing and with no allegation of incompetency or inconsistent conduct.[72]

b. Park Commissioners, Officers, and Employees — (I) *Appointment or Election.* A statutory requirement that vacancies in a park commission be certified to the governor is merely directory, and does not restrict his power to fill such vacancies, which he may do without formal notification thereof, whenever they occur.[73] Where a city has by charter the power to appoint a superintendent of parks, and to provide for his salary and the other expenses of keeping up the parks, a resolution of the council appointing a person to preserve and protect the parks, and fixing his salary, is valid, although he is not designated as a superintendent;[74] and even if such an appointment should be made by ordinance, and not by resolution, the performance of the labor, and its acceptance by the city authorities, estops the city from denying its validity.[75] Although under the statutes the functions of city park commissioners are local and municipal and their selection cannot be properly made without the assent of the local people or authorities, where the board has completed its organization and performed important duties and reported its action to the city council for adoption or confirmation and the council has confirmed such action, this precludes any dispute concerning the appointment of the commissioners in a proceeding to try their right to their offices.[76]

(II) *Territorial Jurisdiction.* A statute extending the jurisdiction of a city department of public parks over land authorized to be acquired under it, outside of the city and within the limits of another county, has been held not violative of a constitutional provision preserving to counties, cities, towns, etc., the right to elect their own local officers.[77]

(III) *Term of Office.* Where the statute creating a park commission provided that there should be seven commissioners appointed, that the term of one commissioner, who should be selected by lot, should expire in one year from the time of his appointment, and that the terms of the others should expire at intervals of one year thereafter, the last one holding office for seven years, and the terms of their successors were not specified, the term of each commissioner appointed to succeed one of the original appointees was limited to seven years.[78]

(IV) *Status.* A department of parks or a board of park commissioners is an instrument of the city government for the performance of the corporate functions of the city,[79] and such department or board is not a separate municipality.[80]

72. People *v.* Cram, 30 Misc. (N. Y.) 561, 63 N. Y. Suppl. 1027, the work on which he was engaged being of such character and amount that under the charter it could properly be done by one paid *per diem* instead of by contract.

73. Holden *v.* People, 90 Ill. 434.

74. Smith *v.* Utica, 6 N. Y. Suppl. 792.

75. Smith *v.* Utica, 6 N. Y. Suppl. 792.

76. People *v.* Lothrop, 24 Mich. 235 [*approved* in People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202].

77. *In re* New York, 99 N. Y. 569, 2 N. E. 642.

78. Holden *v.* People, 90 Ill. 434.

79. Orvis *v.* Des. Moines Park Com'rs, 88 Iowa 674, 56 N. W. 294, 45 Am. St. Rep. 252; Atty.-Gen. *v.* Lothrop, 24 Mich. 235; Napier *v.* Brooklyn, 41 N. Y. App. Div. 274, 58 N. Y. Suppl. 506, holding that by Laws (1895), c. 947, amending Laws (1888), c. 583, tit. 16, § 2, so as to vest in the department of parks the exclusive government, management, and control of all the parks, squares, and public places in the city of Brooklyn, without any qualification, it was not intended that the park department was no longer to be regarded as an instrument for the performance of corporate functions of the city; the department of parks being still enumerated by the charter among those through which the administrative power of the city was to be exercised, and the duties thereof being unchanged.

80. A statute which creates a board of park commissioners in certain cities and vests the board with full control over the parks does not create a new municipality, distinct from the city, of which the board is the governing power, but the board is an instrumentality in aid of the city government. Orvis *v.* Des Moines Park Com'rs, 88 Iowa 674, 56 N. W. 294, 45 Am. St. Rep. 252, holding that the title of the act "An act to establish a

And it has also been held that the park commissioners of a municipality are not state officers but are officers of the municipality.[81]

(v) *Compensation.* A member of a board of park commissioners, who has been appointed auditor of the board, at the maximum salary allowed by law, and has been instructed by resolution to negotiate a loan on such terms as he might think to the best interests of the commissioners, but to whom no promises, either express or implied, have been made, on the part of the commissioners, to pay him for the services so rendered, beyond the compensation received by him as auditor, cannot recover any commissions for negotiating such loan.[82] A veteran taken from the civil service list and employed in the department of parks at a *per diem* wage, payable weekly, is not an officer of the city but a mere employee, and hence is not entitled to recover wages for time lost on account of sickness.[83] A regular clerk employed by the park board, who was illegally removed and kept out of office, but who took no steps to obtain a review of the order of removal or a reinstatement, cannot recover salary for a period subsequent to his removal, during which his duties were performed by another, who was paid therefor.[84]

(vi) *Powers.* A statute in relation to the powers and duties of park commissioners is not impliedly repealed by the mere fact that later statutes on the same subject extend the powers and duties of commissioners.[85] Where a park board is an instrument of the city government, bonds issued by it are a debt of the city, and hence the board cannot make a bond issue which would cause the municipal indebtedness to exceed the constitutional limit.[86] Where after the passage of an act authorizing the erection of a building in a certain park, and authorizing the department of public parks to do certain things with reference thereto, a new city charter took effect under which the powers of the department of parks were vested in three park commissioners, each of whom took jurisdiction of the parks within a certain part of the city, the duties with reference to the building in question were properly performed by the commissioner within whose territory the park was located.[87]

(vii) *Liability.* In jurisdictions where a board of park commissioners is considered a quasi-corporation, having certain limited powers granted to it by the legislature, it is not liable for damages resulting from the negligence of its officers or employees.[88]

(viii) *Remedy For Abuse of Discretion.* If park commissioners improperly make use of or perversely abuse their discretion as to the military organizations which can be safely and judiciously intrusted with the use of parade grounds acquired pursuant to statute, the remedy is by direct measures for their removal, or for punishing them in case they intentionally and wilfully omit to discharge the duties imposed on them and not by mandamus.[89]

board of park commissioners in certain cities," indicated on its face that the subject of legislation was with reference to cities then in existence; and the court could not infer that the purpose of the act was to create a new corporation, in the face of the constitutional provision that every act shall embrace but one subject, which shall be expressed in the title. *Contra*, Backer *v.* West Chicago Park Com'rs, 66 Ill. App. 507.

81. Denver *v.* Spencer, 34 Colo. 270, 82 Pac. 590, holding that where the duties imposed on park commissioners of a city by its charter are exclusively for the city's benefit and in no sense for the benefit of the state or any of its political subdivisions, and the parks controlled by the commissioners are the private exclusive property of the city, in which the state has no property interest whatever, such commissioners are municipal, and not state officers. *Contra*, Backer *v.* West Chicago Park Com'rs, 66 Ill. App. 507.

82. Sidway *v.* South Park Com'rs, 120 Ill. 496, 11 N. E. 852.

83. Eckerson *v.* New York, 80 N. Y. App. Div. 12, 80 N. Y. Suppl. 168 [*affirmed* in 176 N. Y. 609, 68 N. E. 1115].

84. Van Valkenburgh *v.* New York, 49 N. Y. App. Div. 208, 63 N. Y. Suppl. 6.

85. *In re* Knaust, 101 N. Y. 188, 4 N. E. 338.

86. Orvis *v.* Des Moines Park Com'rs, 83 Iowa 674, 36 N. W. 294, 45 Am. St. Rep. 252.

87. Bradley *v.* Van Wyck, 65 N. Y. App. Div. 293, 72 N. Y. Suppl. 1034.

88. Backer *v.* West Chicago Park Com'rs, 66 Ill. App. 507.

89. People *v.* Prospect Park, 58 Barb. (N. Y.) 638.

(IX) *REMOVAL.* Where park commissioners are appointed by the governor and are officers or agents of the state and not mere minor municipal or corporate officers, the governor may remove them under a power given him by the constitution to remove any officer whom he may appoint.[90] Where a statute provides that executive and ministerial officers in cities, unless otherwise provided, shall be removable by the board of aldermen sitting as a court on charges preferred, another statutory provision that if any member of the board of park commissioners commits a felony he shall immediately cease to be a member of such board, does not preclude the board of aldermen from assuming jurisdiction for the removal of a park commissioner charged with perjury.[91] A provision of the by-laws of the park department of a city making the appointment and removal of a regular clerk subject to the pleasure of the board does not impair the right of the clerk to a hearing under a statute providing that no regular clerk shall be removed from office until he has been informed of the cause of the proposed removal, and allowed opportunity to explain.[92] Where the position of messenger in the department of parks in a city is abolished in good faith, in the interest of economy, and none of the duties of such position have been assigned to any other employee of the department, the messenger may be summarily removed.[93]

13. EDUCATION[94] — a. Nature and Status of Board. In most jurisdictions a board of education is a distinct corporation for school purposes, and not a mere function or part of the municipal government of the city,[95] and may sue and be sued.[96] Where, however, a board of education is a mere instrumentality of the city government, it is incapable of being sued.[97] Being an involuntary quasi-corporation charged with the exercise of governmental functions, a board of education is not liable for the negligence of its employees or agents, in the absence of an express statutory provision creating such liability.[98]

b. Authority and Powers of Board. The powers of a board of education are such as are expressly or impliedly conferred upon it by the charter or act creating it. Thus it has power to select the text-books for the city schools,[99] to select sites

90. Wilcox *v.* People, 90 Ill. 186.

91. Gibbs *v.* Louisville, 99 Ky. 490, 36 S. W. 524, 18 Ky. L. Rep. 341.

92. Van Valkenburgh *v.* New York, 49 N. Y. App. Div. 208, 63 N. Y. Suppl. 6.

93. Matter of Seide, 38 Misc. (N. Y.) 663, 78 N. Y. Suppl. 253.

94. Powers of council acting as board of education see SCHOOLS AND SCHOOL-DISTRICTS.

Supervision and regulation of schools in general see SCHOOLS AND SCHOOL-DISTRICTS.

95. *Illinois.*— Kinnare *v.* Chicago, 171 Ill. 332, 49 N. E. 536 [*affirmed* in 70 Ill. App. 106].

Michigan.— Board of Education *v.* Detroit, 30 Mich. 505.

Missouri.— Heller *v.* Stremmel, 52 Mo. 309.

New Mexico.—Albuquerque Water Supply Co. *v.* Albuquerque, 9 N. M. 441, 54 Pac. 969.

New York.— Gunnison *v.* New York Bd. of Education, 80 N. Y. App. Div. 480, 81 N. Y. Suppl. 181 [*affirmed* in 176 N. Y. 11, 68 N. E. 106]; People *v.* Neilson, 48 How. Pr. 454. But see Ocorr, etc., Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 79 N. Y. Suppl. 251 [*affirmed* in 178 N. Y. 622, 70 N. E. 1104], board created by city charter.

School directors (Chalfant *v.* Edwards, 173 Pa. St. 246, 33 Atl. 1048), and school-district officers (Frans *v.* Young, 30 Nebr. 360, 46 N. W. 528, 27 Am. St. Rep. 412), are not municipal officers.

Applicability of civil service acts.— The board of education of the city of Chicago, authorized by the general school laws of 1872 (Laws (1871–1872), p. 700) and 1889 (Laws (1889), p. 239), providing that in all cities of over one hundred thousand inhabitants the public schools shall be controlled by the board of education, is still connected with and a part of the municipal government, and, as such, all its offices and places of employment are within the Civil Service Act, except the members of the board, the superintendent, and teachers, who are exempted from the classified service. Brenan *v.* People, 176 Ill. 620, 52 N. E. 353.

96. San Francisco Bd. of Education *v.* Fowler, 19 Cal. 11; Whitehead *v.* Detroit Bd. of Education, 139 Mich. 490, 102 N. W. 1028; Gunnison *v.* New York Bd. of Education, 80 N. Y. App. Div. 480, 81 N. Y. Suppl. 181 [*affirmed* in 176 N. Y. 11, 68 N. E. 106]; Donovan *v.* New York Bd. of Education, 55 How. Pr. (N. Y.) 176.

97. Madden *v.* Kinney, 116 Wis. 561, 93 N. W. 535.

98. Kinnare *v.* Chicago, 171 Ill. 332, 49 N. E. 536 [*affirming* 70 Ill. App. 106]; Whitehead *v.* Detroit Bd. of Education, 139 Mich. 490, 102 N. W. 1028; Donovan *v.* New York Bd. of Education, 85 N. Y. 117.

99. Madden *v.* Kinney, 116 Wis. 561, 93 N. W. 535.

for school buildings,[1] to reduce classes and retire unnecessary teachers,[2] and to enact rules for the conduct of its proceedings; but such authority does not empower it to change charter or common-law rules as to the power of a majority.[3] A board of education has no power to employ counsel, when the city attorney is bound to represent it in all litigation;[4] nor to advertise an election on school matters committed by law to the council.[5] Where a village becomes attached to a city, the power of the school board is extended over the annexed territory.[6] So also where a city is created out of a village, the board of education provided by the city charter immediately supersedes the old village school board.[7]

c. Members of Board — (I) *Eligibility.* When so provided by statute members of a board of education must be residents of the municipality;[8] and removal beyond the municipal boundaries or the limits of the ward from which one is chosen vacates the office.[9] Nor is one eligible to the office of school director who holds an incompatible office.[10] Conversely a member of the board of education may be forbidden to hold any office to be filled by such board.[11]

(II) *Appointment or Election* — (A) *In General.* Where the method of electing the members of a board of education is prescribed by law, an election in any other manner is invalid.[12] In case of failure of valid election at the prescribed time, the old members hold over till the election and qualification of their successors.[13]

(B) *Vacancies.* The method of filling vacancies in the office of school director or commissioner is usually prescribed by law.[14] Where a vacancy is caused by resignation to take effect at a certain date, it has been held that a successor for the unexpired term may be elected before that date.[15]

(III) *Removal.* Where school commissioners hold for a fixed and definite term, they cannot be summarily removed, without charges having been preferred.[16] Nor is the summary removal of school commissioners authorized by a statute providing that all city offices are held at the mayor's pleasure unless other-

Power to furnish free text-books. — Except in pursuance of legislative authority a school board of a city has no power to furnish free text-books. Detroit Bd. of Education *v.* Detroit, 80 Mich. 548, 45 N. W. 585.

1. Com. *v.* Davis, 199 Pa. St. 278, 49 Atl. 75.

2. Bates *v.* San Francisco Bd. of Education, 139 Cal. 145, 72 Pac. 907; Cusack *v.* New York Bd. of Education, 174 N. Y. 136, 66 N. E. 677 [*reversing* 78 N. Y. App. Div. 470, 79 N. Y. Suppl. 803], holding that where a principal has been discharged, where a change in the conduct of the school has rendered his services unnecessary, he is not entitled to a writ of mandamus to compel his reinstatement.

3. Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948; Heyker *v.* Herbst, 106 Ky. 509, 50 S. W. 859, 51 S. W. 820, 20 Ky. L. Rep. 1983.

4. Denman *v.* Webster, (Cal. 1902) 70 Pac. 1063.

5. Ocorr, etc., Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 79 N. Y. Suppl. 251 [*affirmed* in 178 N. Y. 622, 70 N. E. 1104].

6. School Trustees *v.* School Inspectors, 214 Ill. 30, 73 N. E. 412.

7. State *v.* Sweeney, 103 Wis. 404, 79 N. W. 420; State *v.* Fowle, 103 Wis. 388, 79 N. W. 419.

8. **School commissioner of New York city.** — No one can be chosen to the office of school commissioner of the city of New York who is not at the time a resident of the ward for which he is chosen. People *v.* New York Bd. of Education, 1 Den. (N. Y.) 647.

9. People *v.* New York Bd. of Education, 1 Den. (N. Y.) 647.

10. State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, holding, however, that the offices of deputy sheriff and school director are not incompatible.

11. State *v.* Bayonne Bd. of Education, 54 N. J. L. 313, 23 Atl. 670.

12. Elliott *v.* Burke, 113 Ky. 479, 68 S. W. 445, 24 Ky. L. Rep. 292.

13. Elliott *v.* Burke, 113 Ky. 479, 68 S. W. 445, 24 Ky. L. Rep. 292.

14. **Pennsylvania.** — Where a vacancy occurs in the board of school controllers in the city of Scranton, which is a city of the third class, divided into more than twelve wards, such vacancy is to be filled by the qualified voters of the proper ward at the next municipal election. Com. *v.* Evans, 102 Pa. St. 394.

15. Leech *v.* State, 78 Ind. 570.

16. Hooper *v.* Farnen, 85 Md. 587, 37 Atl. 430, holding that school commissioners are not brought within such power of removal by Baltimore City Code (1893), art. 1, § 46, providing that a term of office shall not be deemed to be fixed within Code Pub. Loc. Laws, art. 4, § 31, by the fact that the ordinance prescribes that the officer shall be appointed biennially, or as other city officers, or by other like expression; since such provision merely prescribes what words shall

wise provided by ordinance, where the terms of school commissioners are fixed by ordinance and they are not appointed by the mayor.[17] Where, however, a school commissioner is made a city officer, and the mayor is given authority to remove at pleasure any city officers appointed by him, a school commissioner may be summarily removed by the mayor, and a provision of the charter giving the power of removal to the common council is thereby repealed.[18]

(IV) *COMPENSATION.* The compensation of members of the board of education must be fixed by law. Where it is provided that no member shall receive any pay or emolument for his services, no recovery can be had except under a contract of employment.[19] Where the member relies upon an implied promise to pay, and not upon a contract of employment, services rendered are presumed to be voluntary and official duty for which there can be no recovery.[20]

d. Superintendent — (I) *APPOINTMENT.* Authority to appoint a superintendent of schools may be expressly conferred upon the board of education, or it may be implied from the power to govern the school-district.[21] But such power has been held to confer no right to appoint a superintendent of music.[22] Power to fill a vacancy in the office of superintendent is also generally given to the board of education.[23]

(II) *ELIGIBILITY.* Where a superintendent of schools is appointed by the school board, he is merely an employee of that department of the city government, and not a "municipal officer" within a charter provision that all municipal officers shall be registered voters of the city.[24]

(III) *REMOVAL.* Power conferred upon a city council to remove a superintendent of schools "for cause" does not give them power to remove him at their discretion, but only for legal cause, and their decision may be controlled by mandamus.[25]

(IV) *COMPENSATION.* The salary of a superintendent of schools is generally fixed by the board of education, and, while he has been held to be an employee and not a public officer within a constitutional provision forbidding a change in the salary of public officers during their term of office,[26] a voluntary increase of salary during such term is without consideration and against public policy.[27] A superintendent is not deprived of his right to salary by repeal of the ordinance authorizing his appointment after services rendered;[28] but he does lose such right by accepting another incompatible position under the school authorities.[29]

e. Teachers. Under a charter giving the board of education power to appoint teachers only on the superintendent's nomination,[30] the position of a teacher is that of an employee, resting on the contract of employment, and not that of an

not create a fixed term, and does not affect a term which may be in fact fixed.

17. Hooper *v.* Farnen, 85 Md. 587, 37 Atl. 430.

18. People *v.* Boland, 35 Misc. (N. Y.) 117, 71 N. Y. Suppl. 233.

19. Snyder *v.* Albuquerque Bd. of Education, 10 N. M. 446, 62 Pac. 1090.

20. Snyder *v.* Albuquerque Bd. of Education, 10 N. M. 446, 62 Pac. 1090.

21. Davidson *v.* Baldwin, 2 Cal. App. 733, 84 Pac. 238.

22. Perot *v.* Philadelphia, 11 Phila. (Pa.) 181.

23. People *v.* Babcock, 114 Cal. 559, 46 Pac. 818.

24. Baltimore *v.* Lyman, 92 Md. 591, 48 Atl. 145, 84 Am. St. Rep. 524, 52 L. R. A. 406.

25. State *v.* Watertown, 9 Wis. 254.

26. Ward *v.* Toledo Bd. of Education, 21 Ohio Cir. Ct. 699, 11 Ohio Cir. Dec. 671.

27. Ward *v.* Toledo Bd. of Education, 21 Ohio Cir. Ct. 699, 11 Ohio Cir. Dec. 671.

28. Kimball *v.* Salem, 111 Mass. 87.

29. Ward *v.* Toledo Bd. of Education, 21 Ohio Cir. Ct. 699, 11 Ohio Cir. Dec. 671.

30. Wetmore *v.* St. Louis Bd. of Education, 86 Mo. App. 362.

Appointment of principal.— Under the New York charter appointments of principals of the public schools must be made by the school boards of the several boroughs upon nominations previously made by the board of school superintendents for the particular borough, and from a list of eligible persons transmitted to such school boards by the superintendent of schools. Such list should contain the names of those licensed before the charter took effect as well as the names of those licensed by the board of examiners. People *v.* Maxwell, 65 N. Y. App. Div. 265, 73 N. Y. Suppl. 527 [*affirmed* in 169 N. Y. 608, 62 N. E. 1099].

officer of the city.[31] A teacher being an employee, the board of education has the power to reduce the salary of any teacher, either by an actual reduction in the amount paid, or by providing that the salary shall be paid only for the period during which the teacher actually performs service.[32] A teacher cannot as a rule be removed or discharged except on charges preferred, and after trial;[33] and if one is unlawfully removed, he is entitled to recover his salary for the time after such removal,[34] less any sum he may have earned as a substitute during such time.[35]

f. Funds. The school funds of a municipality are a trust fund and must be kept and handled by the legal custodian as provided by law.[36] Authority to disburse school funds is generally conferred upon the board of education,[37] subject to the supervision of the city council or board of estimates.[38]

14. Charities and Correction[39] — a. Nature and Status of Board. The nature and status of a board of charity commissioners is dependent upon the manner and form of its creation. Under some acts such a board is simply a department or subdivision of the city government, having no corporate existence, and therefore cannot sue or be sued as a board.[40] Under other laws commissioners of

31. Steinson *v.* New York Bd. of Education, 165 N. Y. 431, 59 N. E. 300; Murphy *v.* New York Bd. of Education, 87 N. Y. App. Div. 277, 84 N. Y. Suppl. 380 [*affirming* 38 Misc. 706, 78 N. Y. Suppl. 248].

32. Murphy *v.* New York Bd. of Education, 87 N. Y. App. Div. 277, 84 N. Y. Suppl. 380 [*affirming* 38 Misc. 706, 78 N. Y. Suppl. 248].

Pension fund.— An act providing for the pensioning of teachers in city districts of the second grade of the first class, and requiring the treasurer of the board of education in cities of the second grade of the first class to reserve at each payment of teachers' salaries a certain per cent thereof for the purpose of creating a fund to be used in pensioning teachers who shall have pursued their professional employment a certain length of time, is unconstitutional as in violation of a constitutional provision requiring that all laws of a general nature shall have uniform operation throughout the state. State *v.* Kurtz, 21 Ohio Cir. Ct. 261, 11 Ohio Cir. Dec. 705.

33. Brenan *v.* People, 176 Ill. 620, 52 N. E. 353; Steinson *v.* New York Bd. of Education, 165 N. Y. 431, 59 N. E. 300; People *v.* New York Bd. of Education, 78 N. Y. App. Div. 501, 79 N. Y. Suppl. 624 [*affirmed* in 174 N. Y. 169, 66 N. E. 674].

Marriage of teacher.— Where a city charter contemplates the removal or discharge of a teacher only on charges preferred and after trial, a by-law declaring a vacancy to exist as the result of the marriage of a female teacher is invalid. Matter of Murphy, 39 Misc. (N. Y.) 166, 79 N. Y. Suppl. 174.

A reduction of a teacher from one grade to another, accompanied by a decrease in pay, constitutes a "removal" and reappointment, rather than a "reassignment," and hence can only be brought about for cause. People *v.* New York Bd. of Education, 78 N. Y. App. Div. 501, 79 N. Y. Suppl. 624 [*affirmed* in 174 N. Y. 169, 66 N. E. 674].

34. Steinson *v.* New York Bd. of Education, 165 N. Y. 431, 59 N. E. 300.

35. Bogert *v.* New York Bd. of Education, 44 Misc. (N. Y.) 10, 89 N. Y. Suppl. 737 [*affirmed* in 106 N. Y. App. Div. 56, 94 N. Y. Suppl. 180].

36. People *v.* Centralia Bd. of Education, 166 Ill. 388, 46 N. E. 1099; Kas *v.* State, 63 Nebr. 581, 88 N. W. 776, holding that a village treasurer who distributes license moneys among the school-districts in whole or in part within the corporate limits in a different manner from that fixed by law does so at his peril.

37. Somerville *v.* Wood, 115 Ala. 534, 22 So. 476; Port Huron Bd. of Education *v.* Runnels, 57 Mich. 46, 23 N. W. 481; Times Pub. Co. *v.* White, 23 R. I. 334, 50 Atl. 383.

An appropriation to a department other than that of education, to pay a mere moral obligation of the city to a teacher for services rendered before the courts declared her appointment illegal, is not an interference with the functions of the department of education. Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691.

38. Detroit Bd. of Education *v.* Detroit, 80 Mich. 548, 45 N. W. 585, holding that a resolution of the council approving the estimates of the board of education is not final where it afterward submits such estimates to the board of estimates, and orders the amount approved by the latter to be levied.

The supervisory power of the board of estimates of Detroit is limited to the several funds mentioned in the city charter among which the educational fund is not included, and consequently that board has no power to supervise the estimates of the board of education except as to lots and buildings, power as to which is conferred on it by Laws (1873), No. 331. Detroit Bd. of Education *v.* Detroit, 80 Mich. 548, 45 N. W. 585.

39. Appointment or removal of overseer or superintendent of the poor see PAUPERS.

40. Monfort *v.* Wheelock, 78 Minn. 169, 80 N. W. 955; Heard *v.* New York Charities Com'rs, 51 N. Y. Suppl. 375.

Charity commissioners as overseers of poor. — The board of commissioners of public charities of the city of New York, created by the city charter (Laws (1873), c. 335, § 74),

public charities are public officers who discharge duties for the general public benefit imposed upon them by the legislature.[41] Such commissioners and their appointees are not therefore officers of the city,[42] for whose negligence the city is liable.[43] Under the mere grant of power to remove given to commissioners of charities, they cannot remove an appointee except for cause.[44]

b. City Physician — (I) *In General.* If a charter authorizes the election of a city physician, but does not prescribe his duties, the corporation has the power to declare what such duties shall be.[45] Whether such officer is entitled to hold over his term until his successor has been elected and qualified depends upon the charter.[46]

(II) *Salary.* A city physician is generally given an annual salary to be fixed by the council.[47] In the absence of anything showing a contrary intent, such salary is presumed to be in full for all official duties.[48] Where one is appointed to the office of city physician, and his compensation is not fixed by law, it has been held that he is entitled to recover what his services are reasonably worth.[49] A physician is entitled to his salary while wrongfully enjoined from acting.[50] Where an ordinance provides that the city physician shall receive, "when collected, all sums for medical services rendered by him for paupers belonging to other cities or towns," the physician has an action against the city for the money so collected.[51] Where a city physician, employed by the year, treats patients properly chargeable to the county, the city can recover from the county.[52]

15. Particular Institutions and Buildings — a. Libraries. Authority to establish and maintain libraries is usually conferred upon a board of trustees. Such board derives its powers from the act establishing it. Among those usually conferred is the power to take by gift, grant, purchase, devise, bequest, or otherwise any real or personal property;[53] to control and order the expenditure of all moneys in the library fund;[54] and to do all that may be necessary to carry out

are the overseers of the poor of a town, so as to enable them to sue for penalties imposed by Laws (1857), c. 628, relating to the suppression of intemperance, and regulating the sale of intoxicating liquors, which are recoverable in a civil action by and in the name of the overseers of the poor of the town in which the alleged penalty is incurred. New York Public Charities, etc., Com'rs *v.* McGurrin, 6 Daly (N. Y.) 349.

The Charleston marine hospital is under the exclusive control of the city council. Charleston *v.* Boyd, 1 Mill (S. C.) 353.

41. Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468.

42. **The medical superintendent of the asylum for the insane at Ward's island,** who receives a salary, is not an "officer" of the city of New York, within Laws (1882), c. 410, § 59, prohibiting officers of the corporation from being interested in the performance of any work to be paid for by the city. If, at the request of the district attorney, he examines a person about to be tried for felony, he is entitled to be compensated for the service. Macdonald *v.* New York, 32 Hun (N. Y.) 89.

43. Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468.

44. State *v.* Brown, 57 Mo. App. 199.

45. Tucker *v.* Virginia City, 4 Nev. 20.

46. Saunders *v.* Grand Rapids, 46 Mich. 467, 9 N. W. 495 (holding that under the charter of the city of Grand Rapids, failure of the city council to appoint an officer at a proper time to fill the office of city physician, which is not elective, will not give the incumbent any right to hold over); Lynch *v.* Lafland, 4 Coldw. (Tenn.) 96.

47. **Additional compensation in cases of infectious diseases.**— Where by ordinances of a city the city physician is entitled to an annual salary, to be fixed by the city council, and, in cases of infectious disease, to such additional compensation as the council may deem just, it was held that these provisions did not apply to services rendered to paupers, but that the compensation for attendance for the city upon all cases of such diseases was to be fixed by the city council. Preble *v.* Bangor, 64 Me. 115.

48. Edgecomb *v.* Lewiston, 71 Me. 343, holding that a city marshal has no authority to make any new contract with the city physician, or to pay him an extra compensation for performing services which he was under official obligations to render; nor can the overseers of the poor enlarge his salary.

49. Tucker *v.* Virginia City, 4 Nev. 20.

50. Memphis *v.* Woodward, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750.

51. Fletcher *v.* Belfast, 77 Me. 334.

52. Clinton *v.* Clinton County, 61 Iowa 205, 16 N. W. 87.

53. Atty.-Gen. *v.* Nashua, 67 N. H. 478, 32 Atl. 852.

54. Kelso *v.* Teale, 106 Cal. 477, 39 Pac. 948, holding that the board may appropriate money to pay the expense of a delegate to a congress of librarians.

the spirit and intent of the act.[55] A municipal library established and managed under special acts is not subject to the control of trustees provided for libraries established under general law.[56]

b. Other Municipal Structures. A committee created to take charge of a municipal building has authority to do and provide whatever is necessary to maintain it in a condition fit for its occupation and use for public purposes.[57] Where such a committee has pursued a certain line of conduct for a period of years, their authority so to act will be presumed.[58] Under the Greater New York charter, bridge commissioners appointed to control the construction of a bridge over the East river may be removed by the mayor.[59]

16. Miscellaneous Boards and Officers — a. Board of Revision. The appropriate functions of a municipal board of revision are administrative, not judicial, and do not include power to imprison for contempt, witnesses called before it.[60]

b. Board of Registration and Election. A statute establishing a board of commissioners of registration and election for a city, and providing that it shall be composed of four members, two of whom shall be from each of the two leading political parties of the city, contravenes a constitutional provision that no declaration or test shall be required as a qualification to any office or public trust.[61]

c. Weights and Measures. Where a municipality is authorized by statute to provide for the appointment of a sealer of weights and measures for the corporation, an ordinance providing for his appointment from nominees of the chamber of commerce is valid;[62] and after appointment of such an officer by the council pursuant to such ordinance, it cannot refuse to accept an unobjectionable bond and induct him into office.[63] And where such an officer is nominated and confirmed in a city of two districts without specifying to which district, he will be considered as appointed to the first.[64] And it seems that a nomination of four such officers for only two places does not invalidate all the nominations, but the two first confirmed will hold the offices.[65]

d. Excise Commissioners. The term for which officers of excise shall hold office is regulated by statute.[66] A supervisor of a city ward is not rendered ineligible to the office of excise commissioner of the city merely by force of a statute providing that "no person shall be eligible to the office of commissioner of excise who is a supervisor, justice of the peace or town clerk of a town."[67] A statute providing that all appointments of office in the city of New York now made by the mayor and confirmed by the board of aldermen shall hereafter be made by the mayor without such confirmation gives the mayor authority alone

55. Smith *v.* Minneapolis Library Bd., 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280, holding that such board has power to become an ordinary bailee of a collection of coins.

56. People *v.* Howard, 94 Cal. 73, 29 Pac. 485.

57. State *v.* McCardy, 62 Minn. 509, 64 N. W. 1133, holding that a joint committee created by statute to take charge of a city hall has authority to contract for heating and lighting the same.

Commissioners to take control of a lot for a city hall have power to summarily evict a city employee occupying the same. Swift *v.* Canavan, 52 Cal. 417.

Joint committee for city and county building.— A joint committee created to take charge of a city hall and court-house is not a department of either the city or county government, but a distinct and independent quasi-municipal board or body. Its powers, as well as the mode of exercising them, are determined exclusively by the act creating it, and not by the provisions of the city charter. State *v.* McCardy, 62 Minn. 509, 64 N. W. 1133.

58. Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

59. People *v.* Nixon, 32 N. Y. App. Div. 513, 53 N. Y. Suppl. 230 [*affirmed* in 158 N. Y. 221, 52 N. E. 1117].

60. *In re* Heffron, 9 Ohio Dec. (Reprint) 674, 16 Cinc. L. Bul. 285.

61. Atty.-Gen. *v.* Detroit, 58 Mich. 213, 24 N. W. 887, 55 Am. Rep. 675.

62. State *v.* Cincinnati, 11 Ohio St. 544.

63. State *v.* Cincinnati, 11 Ohio St. 544.

64. People *v.* Kneissel, 58 How. Pr. (N. Y.) 404.

65. People *v.* Kneissel, 58 How. Pr. (N. Y.) 404.

66. See People *v.* Lahr, 71 Hun (N. Y.) 271, 24 N. Y. Suppl. 1020, construing several statutes relating to the subject.

67. People *v.* Lahr, 71 Hun (N. Y.) 271, 24 N. Y. Suppl. 1020.

to make appointments to the office of excise commissioners which previous to the enactment of this law were made in the city of New York, although such officers were not strictly city officers, but were appointed to execute state authority.[68] The appointment must be in writing, there being nothing in the statute authorizing appointment by parol.[69] A statute providing for the establishment of excise boards, that the clerk of the city shall be clerk of the board, and that all license-fees shall be paid over to him, to be by him paid to the city treasurer, confers no authority on the board to fix the compensation of the clerk for such service.[70] Commissioners of excise may not transfer their offices to others but must relieve themselves of the duties of office in the manner prescribed by statute.[71] Commissioners of excise are town officers, within a statute which gives town officers the right to hold over until their successors have been elected and have qualified, although it also provides that town officers shall be elected for one year, while excise commissioners are elected for three years.[72]

e. Board of Equalization. Where a statute providing for a board of equalization of real property in a city does not fix the pay of the members, and another statute prescribes for each member of the county board of equalization such sum for each actual day's work as the county commissioners shall allow, the commissioners should fix and allow from the county treasury the compensation for the city board without reference to the rate allowed by the county board.[73]

f. Boiler-Inspector. In an action by a city boiler-inspector to recover for fees claimed to be due him as such, he must show his appointment in accordance with the city ordinance relating to the inspection of boilers; proof that he is a *de facto* officer is insufficient.[74]

g. City Surveyor. A city surveyor who receives no salary, and whose position becomes vacant only by death, resignation, or removal, is not an officer within a statute which provides that any person who shall hold or accept any other office connected with the government of the city shall be deemed thereby to have vacated every office held by him under the city government.[75] Where a city surveyor enters on the performance of his duties, and as to which the ordinances provide that the compensation shall be paid by the parties at whose request the work is done, there is no implied assumpsit on the part of the city in respect to his services.[76] So where he performs services upon the order of the common council without any provision as to the mode of compensation, there is no implied assumpsit in his favor except such as might arise from the charter.[77] And under a charter provision that a certain assessment shall include the expenses of surveying, a city surveyor cannot recover for his services unless such assessment has been collected, or the municipality has negligently omitted to make and enforce its collection.[78] Under an ordinance requiring a surveyor to survey and make maps of all the grounds required for the opening or changing of streets, the duties imposed relate only to the grounds required for the opening, and not to the lands to be assessed therefor, and he is entitled to compensation for extra services rendered in preparing maps of the property taken and assessed.[79]

h. City Engineer. A city engineer is an "officer" within a statute providing for the appointment of officers by the municipal government.[80] Where a statute fixes the compensation of a city engineer absolutely, the city council has no power

68. People *v.* Andrews, 104 N. Y. 570, 12 N. E. 274 [*affirming* 42 Hun 614].
69. People *v.* Murray, 70 N. Y. 521.
70. State *v.* Cherry, 53 N. J. L. 173, 20 Atl. 825.
71. People *v.* Murray, 70 N. Y. 521.
72. Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412 [*affirmed* in 142 N. Y. 665, 37 N. E. 570].
73. Baum *v.* Hamilton County, 1 Cinc. Super. Ct. (Ohio) 553.
74. Home Ins. Co. *v.* Tierney, 47 Ill. App. 600.
75. Wardlaw *v.* New York, 61 N. Y. Super. Ct. 174, 19 N. Y. Suppl. 6.
76. Locke *v.* Central, 4 Colo. 65, 34 Am. Rep. 66.
77. Baker *v.* Utica, 19 N. Y. 326.
78. Baker *v.* Utica, 19 N. Y. 326.
79. *In re* Hudson Ave., 6 Hun (N. Y.) 356.
80. Mobile *v.* Squires, 49 Ala. 339.

to reduce it.[81] Where the statute does not fix the salary at a definite sum, but merely prescribes a maximum, the council may fix it at any amount less than the maximum.[82] If the salary is fixed at a certain amount per day he is entitled to that amount whether he performs any services or not.[83] The right to compensation ceases on removal.[84] Where the governing and controlling power is lodged in the mayor and council, the mayor alone has no power to suspend a city engineer.[85] A city engineer is an "officer" removable at the will of the legislature,[86] or by the governing power of the municipality where power to remove "officers" is conferred on it by charter.[87] In determining whether a contract for street improvements has been substantially complied with, the city engineer acts in the exercise of quasi-judicial functions and is not liable to persons injured thereby unless his acts are maliciously and wilfully wrong.[88]

i. **City Attorney.** Under a charter requiring a city attorney to prosecute and defend all actions for the city, and advise all officers, boards, and commissions, and authorizing the board of education to require the services of the city attorney in all actions by or against it, it is the duty of the city attorney when so required to appear for and defend such board in all actions brought against it.[89] A charter provision requiring the city attorney to prosecute and defend actions by or against the board of education does not impose any "school function" on him, but his function remains that of attorney.[90] Under a charter providing that the corporation counsel shall be the attorney for the city, and each and every officer, and shall conduct all the law business in which the city is interested, except as otherwise provided, whether such business is in charge of a single officer or board, and that he shall be the legal adviser of the mayor, city boards, and officers, and shall furnish them such advice and legal assistance as may be required, but prohibiting the corporation counsel from acting in any merely private litigation, the law business in which the city was interested should be construed to mean a legal, and not a speculative, interest, and the charter does not authorize the corporation counsel to appear for and defend a policeman sued for a wilful assault in making an arrest.[91] But a charter provision that the corporation counsel may, in his dis-

Failure to file a certificate of appointment of a deputy city engineer does not vitiate the acts of a deputy actually appointed and recognized as such, notwithstanding a charter provision that the appointment shall be in writing and filed with the register. Kiley *v.* Forsee, 57 Mo. 390.

Expiration of power to appoint.— Under a statute providing for the appointment of city officers, and declaring that if the council shall fail to appoint any such officer within three weeks after a vacancy occurs it shall be the duty of the mayor, immediately upon the expiration of said three weeks, to appoint such officer to fill the vacancy, on resignation of the city engineer, after the expiration of three weeks the power of the council to fill the vacancy ceases. People *v.* Merrick, 61 Hun (N. Y.) 396, 16 N. Y. Suppl. 246.

Employment not equivalent to appointment.— Under a statute providing that no person shall be elected or appointed to any city office until he is a resident elector of the city, if no one is employed to perform the duties of the city engineer until he shall become a resident elector, the office remains vacant. People *v.* Merrick, 61 Hun (N. Y.) 396, 16 N. Y. Suppl. 246.

Turning over property to successor.—An ordinance requiring the city engineer to inspect and pass upon the construction of all public works and to do the surveying and engineering ordered by the city, and requiring him to preserve all plans and documents pertaining to his office and to deliver them to his successor, does not require him to turn over to his successor books containing field-notes made by him in surveying lots of individual owners upon their application, under their employment, and at their expense, for such books are his private property. Leffingwell *v.* Miller, 20 Colo. App. 429, 79 Pac. 327.

81. Rundlett *v.* St. Paul, 64 Minn. 223, 66 N. W. 967.

82. McFall *v.* Austin, 1 Tex. App. Civ. Cas. § 450.

83. Roberts *v.* Lincoln, 6 Nebr. 352.

84. Mobile *v.* Squires, 49 Ala. 339.

85. Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269.

86. Gray *v.* Granger, 17 R. I. 201, 21 Atl. 342.

87. Mobile *v.* Squires, 49 Ala. 339.

88. St. Joseph *v.* McCabe, 58 Mo. App. 542.

89. Denman *v.* Webster, (Cal. 1902) 70 Pac. 1063.

90. Denman *v.* Webster, (Cal. 1902) 70 Pac. 1063.

91. Donahue *v.* Keeshan, 91 N. Y. App. Div. 602, 87 N. Y. Suppl. 144.

cretion, appear in any action against any officer employed by the city by reason of any acts done while in the performance of his duty by such officer, whenever such appearance is requested by the head of the department or bureau by which the officer is employed, invests the head of such department or bureau with discretion to determine whether the action is *prima facie* founded on an act done by defendant while in the performance of his duty, and that such determination, followed by a request to the corporation counsel to appear and defend, is not subject to judicial review.[92] A city solicitor is under no official obligation to attend to the prosecution or aid in the adjustment of the claims of the city against the state for reimbursement.[93]

j. Commissioner of Deeds. Statutes authorizing the appointment of commissioners of deeds for all the municipalties of a state have no application to municipalities incorporated after the statutes went into effect.[94]

C. Agents and Employees[95] **— 1. Who Are.** It is oftentimes difficult to determine whether a person is an officer or merely an agent or employee of a municipality, since no fixed rule can be laid down to determine the question.[96] The following distinctions between the two may be noted. Generally an officer takes an oath of office while a mere agent or employee does not.[97] The duties and services of a mere employee are purely ministerial,[98] and he is not clothed with discretion nor with power to represent or bind the corporation.[99] A municipal agent holds a position of trust, responsibility, and discretion.[1] His relation is fiduciary and he may contract with third persons in the name of the corporation,[2] but he is distinguished from an officer in the fact that his position is not permanent,[3]

92. Briggs *v.* Lahey, 101 N. Y. App. Div. 136, 91 N. Y. Suppl. 576.

93. Calais *v.* Whidden, 64 Me. 249.

94. Parker *v.* Baker, Clarke (N. Y.) 223. [*reversed* on other grounds in 8 Paige 428].

95. As persons subject to garnishment see Garnishment, 20 Cyc. 989.

96. See Chicago *v.* Luthardt, 191 Ill. 516, 61 N. E. 410 [*affirming* 91 Ill. App. 324]; Goud *v.* Portland, 96 Me. 125, 51 Atl. 820; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

Effect of giving of bond.— The employment by an incorporated town, owning waterworks, of a person as superintendent of the plant, by written contract defining his duties, and the taking of a bond for the faithful discharge of such duties, does not make the employee a town officer, as between his sureties and the town, in the absence of an ordinance or resolution creating the office of such superintendent, or specifying his duties. Salem *v.* McClintock, 16 Ind. App. 656, 46 N. E. 39, 59 Am. St. Rep. 330.

Commissioner of jurors, under Greater New York charter, is not the head of a department but is a city officer. People *v.* Welde, 28 Misc. (N. Y.) 582, 59 N. Y. Suppl. 1030.

Commissioners appointed to construct a bridge over the East river are municipal officers. People *v.* Van Wyck, 27 Misc. (N. Y.) 439, 59 N. Y. Suppl. 134.

Persons held to be employees: An architect (State *v.* Broome, 61 N. J. L. 115, 38 Atl. 841), assistant secretary of commissioners of docks (Jackson *v.* New York, 87 Hun (N. Y.) 296, 34 N. Y. Suppl. 346), building inspectors (State *v.* Longfellow, 93 Mo. App. 364, 67 S. W. 665), clerks (Mohan *v.* Jackson, 52 Ind. 599), inspector of the regulating and grading of streets (Meyers *v.* New York, 69 Hun (N. Y.) 291, 23 N. Y. Suppl. 484), janitor (Sullivan *v.* New York, 48 How. Pr. (N. Y.) 238), mechanics (State *v.* Anderson, 57 Ohio St. 429, 49 N. E. 406), notary (State *v.* Castell, 22 La. Ann. 15), surveyor (Wardlaw *v.* New York, 61 N. Y. Super. Ct. 174, 19 N. Y. Suppl. 6), firemen (State *v.* Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723), superintendent of police telegraph system (Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956), teachers (Seymour *v.* Over-River School-Dist., 53 Conn. 502, 3 Atl. 552), public printer (Brown *v.* Turner, 70 N. C. 93), and waterworks commissioners (David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174).

97. Goud *v.* Portland, 96 Me. 125, 51 Atl. 820.

98. Alexander *v.* Vicksburg, 68 Miss. 564, 10 So. 62; Knight *v.* Philadelphia, 15 Wkly. Notes Cas. (Pa.) 307; Stephani *v.* Manitowoc, 89 Wis. 467, 62 N. W. 176; Hayes *v.* Oshkosh, 33 Wis. 314, 14 Am. Rep. 760.

Person working out poll tax as employee.— A person performing labor for a city in lieu of his poll tax is a laborer for the city, so as to constitute the relation of employer and employee. Winfield *v.* Peeden, 8 Kan. App. 671, 57 Pac. 131.

99. Fletcher *v.* Lowell, 15 Gray (Mass.) 103; Trainor *v.* Wayne County Bd. of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; Shanley *v.* Brooklyn, 30 Hun (N. Y.) 396.

1. Judevine *v.* Hardwick, 49 Vt. 180.

2. Nunemacher *v.* Louisville, 98 Ky. 334, 32 S. W. 1091, 17 Ky. L. Rep. 933.

3. New York, etc., R. Co. *v.* Wheeler, 72 Conn. 481, 45 Atl. 14; Pinney *v.* Brown, 60

but temporary, and for a special object, and this distinction is often a very important one.[4]

2. GENERAL CONSIDERATIONS — a. Requisites of Appointment or Employment, and Eligibility. Statutory provisions as to the appointment or the making of the contract of employment must be strictly observed.[5] The contract need not be in writing,[6] except where so required by statute or ordinance.[7] So the employment, in the absence of statutory or charter provisions, need not necessarily be by a formal ordinance, by-law, or resolution.[8] Ordinarily a single member of a common council has no power to employ municipal servants,[9] and under some statutes a municipal board must act as a unit in employing an attorney.[10] Generally an ordinance or resolution appointing an employee must be signed by the mayor and is subject to his veto as are other ordinances or resolutions.[11] An implied request for services, as well as an implied promise to pay therefor, may be raised against a municipality, the same as against an individual, by circumstances.[12] Under a charter providing that no salaried employee of any quasi-public corporation having a contract with the city shall be eligible to hold any office in the city, the term "salaried" refers to compensation for a fixed term and for services that are not menial in their nature.[13] Where a statute provides that no clerk in the employ of a municipality shall become interested in the performance of any contract or work, the price of which is payable by the city, a clerk cannot become a lecturer in an evening school under an appointment from the board of education.[14]

b. Duties, Liabilities, Scope, and Term of Agency or Employment. Statutes and civil service rules adopted pursuant thereto enter into and form a part of a contract of employment,[15] as does a valid provision of an ordinance in relation to the employment of city employees.[16] An agent of a municipality can act only within the limits of his authority,[17] and the municipality will not be bound by unauthorized acts of its agents, although done under color of office.[18] The liability of the agent or employee to the municipality or to third persons is largely governed by the rules relating to agency and master and servant in general.[19] Ratification by the municipality of an employment for a specified time will not

Conn. 164, 22 Atl. 430; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916.

4. Baldwin *v.* Logansport, 73 Ind. 346; Detroit Fress Press Co. *v.* State Auditor, 47 Mich. 135, 10 N. W. 171; Egan *v.* St. Paul, 57 Minn. 1, 58 N. W. 267; U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830; Travelers' Ins. Co. *v.* Oswego, 59 Fed. 58, 7 C. C. A. 669; Sanford *v.* Boyd, 21 Fed. Cas. No. 12,311, 2 Cranch C. C. 78.

5. Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587 (holding, however, that, although Rev. St. (1881) § 3099, declares that, "on the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken, and entered on the record," yet a contract by a council to pay for services to be rendered in effecting a compromise of the city's debt, when such compromise is effected and accepted, is good, although not in writing, and although the vote of the council does not appear on its record); Clerendon *v.* Philadelphia, 13 Phila. (Pa.) 54.

6. Wilt *v.* Redkey, 29 Ind. App. 199, 64 N. E. 228; Reed *v.* Orleans, 1 Ind. App. 25, 27 N. E. 109.

7. Crutchfield *v.* Warrensburg, 30 Mo. App. 456.

8. Wilt *v.* Redkey, 29 Ind. App. 199, 64 N. E. 228; Lowry *v.* Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. L. Rep. 516.

9. Justice *v.* Logansport, 6 Ind. App. 135, 32 N. E. 868.

10. Delaware County Com'rs *v.* Sackrider, 35 N. Y. 154.

11. People *v.* Schroeder, 12 Hun (N. Y.) 413 [*affirmed* in 76 N. Y. 160].

12. See *infra*, VII, C, 6, a.

13. State *v.* Duncan, 1 Tenn. Ch. App. 334.

14. McAdam *v.* New York, 36 Hun (N. Y.) 340.

15. Ransom *v.* Boston, 192 Mass. 299, 78 N. E. 481.

16. State *v.* Kent, 98 Mo. App. 281, 71 S. W. 1066.

17. Barnes *v.* Philadelphia, 3 Phila. (Pa.) 409; Davis *v.* Philadelphia, 3 Phila. (Pa.) 374.

Limitation of power.— The power expressly conferred on a municipal agent is not limited by the appointment of an advisory committee to aid the agent. Hunneman *v.* Jamaica Fire Dist. No. 1, 37 Vt. 40.

18. Baltimore *v.* Eschbach, 18 Md. 276.

19. See cases cited *infra*, this note.

Ratification by a municipality of the unauthorized action of its agents and thereafter pleading such action and its results as defense to a suit by a third person estopped

bind the municipality for a longer period.[20] Where a committee has power to appoint certain employees, it cannot appoint them for a period beyond the time for which it is itself appointed.[21]

c. Number of Hours Constituting Day's Work.[22] The statutes in some of the states fix eight hours as a day's work for all laborers employed by any municipality of the state.[23]

3. Civil Service Rules.[24] Under the civil service system in force in some municipalities certain positions are required to be filled from the persons obtaining the highest standing in a competitive examination.[25] The positions subject to competitive examination are determinable from the provisions of the statutes and the civil service rules.[26] Usually the rules are not applicable to confidential

the municipality from subsequently pursuing the agent on account of such action. New Orleans *v.* Southern Bank, 31 La. Ann. 560.

Liability of agent for failure to resist claim.— A municipal agent is not liable to the municipality for failure to resist the payment of a claim which it had already voted to pay, even if the claim could have been successfully resisted. Pittston *v.* Clark, 15 Me. 460.

Personal liability to third persons.— Members of a committee, where they enter into a contract describing themselves as such, may become personally liable on the contract as in the case of other agents. Simonds *v.* Heard, 23 Pick (Mass.) 120, 34 Am. Dec. 41. But members of the committee appointed, under Laws (1892), c. 331, to celebrate the four hundredth anniversary of the discovery of America, if acting in good faith, do not render themselves personally liable by making, on behalf of the committee, a contract which is not binding on the committee because such members exceeded their powers. Olifiers *v.* Belmont, 15 Misc. (N. Y.) 120, 36 N. Y. Suppl. 813 [*affirming* 12 Misc. 160, 33 N. Y. Suppl. 275].

The general rule that an agent cannot be permitted to make private gain with funds nor with matters of business intrusted to his care applies to municipal agents. Judevine *v.* Hardwick, 49 Vt. 180.

Estoppel.— Where a municipality adopts the act of its agent by its conduct, the agent and his sureties are estopped from denying his power to do the act in an action brought by the municipality. Indianapolis *v.* Skeen, 17 Ind. 628.

20. Barrett *v.* New Orleans, 32 La. Ann. 101.

21. Egan *v.* St. Paul, 57 Minn. 1, 58 N. W. 267. See also New Brunswick Water Com'rs *v.* Cramer, 61 N. J. L. 270, 39 Atl. 671, 68 Am. St. Rep. 705 [*reversing* 57 N. J. L. 478, 31 Atl. 384].

22. Extra pay for overtime see *infra*, VII, C, 6, b, (III).

23. State *v.* Wilson, 65 Kan. 237, 69 Pac. 172 (holding that a school-district is a municipality within such a statute); McAvoy *v.* New York, 52 N. Y. App. Div. 485, 65 N. Y. Suppl. 274 [*affirmed* in 166 N. Y. 588, 59 N. E. 1125]; McNulty *v.* New York, 60 N. Y. App. Div. 250, 70 N. Y. Suppl. 133 [*affirmed* in 168 N. Y. 117, 61 N. E. 111] (holding that the statute applies to drivers in the street cleaning department of New York city).

One working to pay a poll tax is a laborer for the city within the eight-hour law and an ordinance requiring two days' work of ten hours a day or a payment of three dollars in lieu thereof is void. *In re* Ashby, 60 Kan. 101, 55 Pac. 336.

Firemen are not employees within the eight-hour labor law. People *v.* Sturgis, 78 N. Y. App. Div. 400, 79 N. Y. Suppl. 969 [*affirmed* in 175 N. Y. 470, 67 N. E. 1088].

24. As affecting removal or discharge see *infra*, VII, C, 5, b.

Mandamus to enforce preference of appointment of employees see Mandamus, 26 Cyc. 254.

25. People *v.* Knox, 66 N. Y. App. Div. 517, 73 N. Y. Suppl. 361; People *v.* New York City Civil Service Bds., 5 N. Y. App. Div. 164, 39 N. Y. Suppl. 75; People *v.* Scannell, 66 N. Y. Suppl. 182, holding that there is no provision in the state civil service laws or the regulations made thereunder relating to municipal appointment by which a temporary appointment made to a competitive position with examination can ripen into a permanent one.

Excuses for failure to give preference to persons having highest standing.— Where an applicant for municipal employment has conformed to the requirements of the civil service commission, and has been actually accepted by it and placed upon the eligible list from which appointments are made, the appointing officer cannot excuse himself for failing to give the applicant the preference to which the list entitles him by asserting that the list is not properly made up, or that the applicant has not passed the examination required by law. Burke *v.* Holtzmann, 110 N. Y. App. Div. 564, 97 N. Y. Suppl. 218.

Sufficiency of examination for position as laborer see Burke *v.* Holtzmann, 110 N. Y. App. Div. 564, 97 N. Y. Suppl. 218.

26. People *v.* Dalton, 49 N. Y. App. Div. 71, 63 N. Y. Suppl. 258 [*affirmed* in 163 N. Y. 556, 57 N. E. 1121] (street cleaner); Walsh *v.* Albany, 32 N. Y. App. Div. 128, 52 N. Y. Suppl. 936 (bridge tender); Cutugno *v.* New York, 58 N. Y. Super. Ct. 567, 9 N. Y. Suppl. 729 (interpreter); *In re* Gaffney, 3 N. Y. Suppl. 664.

employees or appointees.[27] Employees of municipal officers as distinguished from state officers are subject to examination by the civil service board of the municipality and not by the state board.[28] Veterans are usually given a preference in the right to employment or appointment.[29] Promotions are also usually conditioned on high standing in competitive examinations,[30] as are transfers from one position or department to another.[31] Where an employee has voluntarily resigned it is generally provided that he may be reëmployed within a specified time without a further examination;[32] but such a rule does not apply where the position was not subject to competitive examination when the employee first entered the service.[33] Where an employee is suspended because the position he holds was abolished and by civil service rules he is entitled to reinstatement within a specified time where there is need for his services, his right to reinstatement cannot be barred by merely changing the name of the position so as to make it appear that his services are not needed.[34] The civil service commission must certify the standings and furnish an eligible list;[35] and it seems that it may be held liable in damages where they illegally refuse to certify as eligible the name of one who has passed the examination and is entitled to a preference.[36] So in some jurisdictions employment must be certified to by the commission to enable the employee to draw his salary.[37]

4. Power to Appoint or Employ — a. In General.[38] The power to appoint or employ a person as agent or servant depends upon the nature of the work to be performed and charter or statutory provisions.[39] There is no implied power in a

27. Shaughnessy *v.* Fornes, 73 N. Y. App. Div. 462, 77 N. Y. Suppl. 223 [*affirmed* in 172 N. Y. 323, 65 N. E. 168] (sergeant at arms of common council); Rowley *v.* Rochester, 34 Misc. (N. Y.) 291, 69 N. Y. Suppl. 160.

28. People *v.* Civil Service Supervisory, etc., Bds., 41 Hun (N. Y.) 287 [*affirming* 17 Abb. N. Cas. 64, and *affirmed* in 103 N. Y. 657] (employees of aqueduct commissioners); People *v.* Wheeler, 2 N. Y. St. 656.

29. Ramson *v.* Boston, 192 Mass. 299, 78 N. E. 481; Johnson *v.* Kimball, 170 Mass. 58, 48 N. E. 1020; Matter of Sullivan, 55 Hun (N. Y.) 285, 8 N. Y. Suppl. 401 (holding statute constitutional and applicable to ordinary laborers); People *v.* Wallace, 55 Hun (N. Y.) 149, 8 N. Y. Suppl. 591, (holding that Laws (1887), c. 464, § 1, providing that any honorably discharged soldier shall be preferred for employment on public works, requires the employment of men with their teams, when teams are necessary and being used, the same as of men without teams).

30. Hale *v.* Worstell, 48 Misc. (N. Y.) 339, 95 N. Y. Suppl. 485 [*affirmed* in 107 N. Y. App. Div. 624, 95 N. Y. Suppl. 1131].

Validity of civil service rules to the contrary.— A city civil service rule, which sanctions a promotion in the civil service in violation of Const. art. 5, § 9, and New York City Charter (Laws (1901), p. 48, c. 466, § 123 *et seq.*), requiring appointments to and promotions in the civil service to be from competitive examinations and according to the rating established thereby, is void. Hale *v.* Worstell, 48 Misc. (N. Y.) 339, 95 N. Y. Suppl. 485 [*affirmed* in 107 N. Y. App. Div. 624, 95 N. Y. Suppl. 1131].

The grade of an employee is fixed by the position which he occupies and for which he has passed a civil service examination, and although when he enters upon that position he does not receive the minimum amount of salary allotted to it, yet it may be increased to the maximum amount of that grade without its being a promotion requiring a new competitive examination, under N. Y. Laws (1899), c. 370, §§ 13, 15. People *v.* Knox, 58 N. Y. App. Div. 541, 69 N. Y. Suppl. 602 [*affirmed* in 167 N. Y. 620, 60 N. E. 1118].

31. People *v.* Grout, 45 Misc. (N. Y.) 47, 90 N. Y. Suppl. 861.

32. People *v.* Lantry, 32 Misc. (N. Y.) 80, 66 N. Y. Suppl. 185.

33. People *v.* Knox, 66 N. Y. App. Div. 517, 73 N. Y. Suppl. 361; People *v.* Lantry, 32 Misc. (N. Y.) 80, 66 N. Y. Suppl. 185.

34. People *v.* Grout, 45 Misc. (N. Y.) 47, 90 N. Y. Suppl. 861.

35. Gillen *v.* Wheeler, 5 N. Y. St. 904.

36. Gillen *v.* Wheeler, 5 N. Y. St. 904.

37. Doyle *v.* Knox, 67 N. Y. App. Div. 231, 73 N. Y. Suppl. 650.

38. Under civil service rules see *infra*, VII, C, 3.

39. See Kip *v.* Buffalo, 123 N. Y. 152, 25 N. E. 165 [*affirming* 7 N. Y. Suppl. 685]; People *v.* Sutton, 3 N. Y. App. Div. 440, 39 N. Y. Suppl. 492; Stenson *v.* New York, 40 Misc. (N. Y.) 533, 82 N. Y. Suppl. 946; *In re* Frackville, 94 Pa. St. 56.

Appointment of employees for independent contractor.— A charter provision that heads of departments shall have the sole power of appointment of all deputies and subordinate employees under them does not empower a superintendent of a department to appoint workmen in the employ of a contractor engaged in lighting the city under a contract. American Lighting Co. *v.* McCuen, 92 Md. 703, 48 Atl. 352.

municipality to employ persons to do work outside of duties germane to the city government.[40] Temporary positions for special or emergency service may be provided by the council notwithstanding a charter inhibition against creating new offices.[41]

b. Architect. Municipal power to erect buildings includes power to employ an architect.[42] And the appointment by a municipality of an architect to examine a federal building in process of erection to determine its safety has been held within its powers.[43] Whether a committee appointed to contract for and superintend the erection of a municipal building has authority to employ an architect has been held a question of fact for the jury.[44]

c. Counsel — (i) *In General.* Except where it is otherwise provided by statute, charter provisions, or ordinance,[45] it is generally held that a municipality

Agent to secure right of way.— Where a city needed a right of way, and was unable to obtain it advantageously, it was within its power to employ some third person to secure it, and an agreement to pay him for his services was binding. Stewart *v.* Council Bluffs, 58 Iowa 642, 12 N. W. 718.

Auctioneer.— An ordinance declaring that "the collector shall . . . annually, expose for rent at public auction all the stalls within the market house, and collect the rent for the same," without any provision for extra compensation, gives him no authority to employ, at the city's expense, an auctioneer for the purpose. Norfolk *v.* Pollard, 94 Va. 279, 26 S. E. 832.

Clerks in general.—See Browning *v.* O'Donnell, 60 N. J. L. 356, 37 Atl. 613; *In re* New York Public Improvements, 77 N. Y. App. Div. 351, 78 N. Y. Suppl. 1024 [*reversing* 38 Misc. 509, 77 N. Y. Suppl. 1078]; Collins *v.* New York, 3 Hun (N. Y.) 680; Drake *v.* New York, 7 Lans. (N. Y.) 340 [*affirmed* in 77 N. Y. 611]. A city charter authorizing a city council to provide for the employment of such clerks and other persons in any of the departments as the public service may demand applies only to cases not specifically provided for in the charter. Cutshaw *v.* Denver, 19 Colo. App. 341, 75 Pac. 22.

Detective.— Where a town has power to appoint an agent "for the purpose of commencing and prosecuting suits in behalf of the town and of defending the town in actions instituted against it," a town agent so appointed is authorized to employ a detective to ascertain what individuals composed a mob that destroyed property for which the town is liable to make compensation. Sargent *v.* Bristol, 21 Fed. Cas. No. 12,363, 2 Hask. 112.

Engineers.— Tennessee Paving Brick Co. *v.* Barker, 59 S. W. 755, 22 Ky. L. Rep. 1069; Hildreth *v.* New York, 111 N. Y. App. Div. 63, 97 N. Y. Suppl. 582; Drumheller *v.* Mt. Vernon, 93 N. Y. App. Div. 596, 88 N. Y. Suppl. 536.

Inspectors.— Muldoon *v.* Lowell, 178 Mass. 134, 59 N. E. 637; State *v.* Cherry, 53 N. J. L. 173, 20 Atl. 825; Harvier *v.* New York, etc., R. Co., 26 Misc. (N. Y.) 397, 56 N. Y. Suppl. 204. A board ordinarily has power to appoint an inspector to secure the enforcement of rules made by them. Groner *v.* Portsmouth, 77 Va. 488.

Janitor.— State *v.* Smith, 15 Mo. App. 412; Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522; Kennedy *v.* New York, 79 N. Y. 361; Bergen *v.* New York, 5 Hun (N. Y.) 243.

Physician.— Ordinarily a municipal officer has no power to employ a physician. Barber *v.* Saginaw, 34 Mich. 52.

Treasurer.— Covington Public Library *v.* Beitzer, 118 Ky. 738, 82 S. W. 421, 26 Ky. L. Rep. 611.

Watchman.— Madison *v.* Newsome, 39 Fla. 149, 22 So. 270; Harvier *v.* New York, etc., R. Co., 26 Misc. (N. Y.) 397, 56 N. Y. Suppl. 204; State *v.* Boyden, 6 Ohio S. & C. Pl. Dec. 509, 4 Ohio N. P. 322.

Power conferred on a municipality to light its streets and to operate its own plant includes power to employ labor necessary to carry on the work. Rockebrandt *v.* Madison, 9 Ind. App. 227, 36 N. E. 444, 53 Am. St. Rep. 348.

40. Potts *v.* Cape May, 66 N. J. L. 544, 49 Atl. 584. See also New Decatur *v.* Berry, 90 Ala. 432, 7 So. 838, 24 Am. St. Rep. 827 (quarantine); Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

Franchise not entitled to exercise.— A contract by a corporation to pay for services to be rendered in the exercise of a franchise which it is not lawfully entitled to exercise is void, and creates no right of action against the corporation. Perry *v.* Superior City, 26 Wis. 64.

Advertising agent.— The common council has no power to appoint a person to properly represent the city as an advertising agent of the city as a resort. Potts *v.* Cape May, 66 N. J. L. 544, 49 Atl. 584.

41. Costello *v.* New York, 63 N. Y. 48.

42. Peterson *v.* New York, 17 N. Y. 449.

The duties, terms, and compensation of an architect employed by a city board of education may, with his consent, be lawfully changed by the municipality at any time, so long as such municipal action is taken in good faith. Carling *v.* Jersey City, 71 N. J. L. 154, 58 Atl. 395.

43. Egan *v.* Chicago, 5 Ill. App. 70.

44. Upjohn *v.* Taunton, 6 Cush. (Mass.) 310.

45. Hope *v.* Alton, 214 Ill. 102, 73 N. E.

has power, either implied or under particular charter provisions, to employ an attorney.[46] Especially is this so where there is no municipal attorney or there is a vacancy in the office.[47] So where the city attorney refuses to act the municipality is often given the power to employ other counsel.[48] So municipal agents may be impliedly authorized to hire attorneys in suits brought by or against them.[49] The municipality, however, has no implied power to employ counsel in connection with proceedings in which it has no direct interest.[50] And a contract between a city and an attorney for the performance of legal serv-

406; Horn *v.* St. Paul, 80 Minn. 369, 83 N. W. 388; Lyddy *v.* Long Island City, 104 N. Y. 218, 10 N. E. 155 [*distinguished* in Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400].

Estoppel.— The action of the officers and council of a municipality in contracting for the services of a special attorney in violation of an ordinance does not estop the city to deny its liability for services performed under the contract. Hope *v.* Alton, 214 Ill. 102, 73 N. E. 406.

Under some charter provisions declaring that the law department of the municipality shall have charge of all the law business of the municipality, it is held that other counsel cannot be employed by any department of the city government or any of its officers. Rawson *v.* New York, 24 Barb. (N. Y.) 226, 4 Abb. Pr. 342, 15 How. Pr. 145; Roberts *v.* New York, 5 Abb. Pr. (N. Y.) 41.

Implied contract.— A city is not liable upon the implied contract to pay the reasonable value of professional services rendered by an attorney other than the city attorney in advising the mayor and aldermen where his employment was unauthorized, although the municipality was benefited by the services rendered. Bosard *v.* Grand Forks, 13 N. D. 587, 102 N. W. 164.

46. *California.*— Smith *v.* Sacramento, 13 Cal. 531.

Illinois.— Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435; Mt. Vernon *v.* Patton, 94 Ill. 65; Harvey *v.* Wilson, 78 Ill. App. 544.

Indiana.— Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571, 53 Am. Rep. 504. See also Baldwin *v.* Logansport, 73 Ind. 346.

Louisiana.— State *v.* Heath, 20 La Ann. 172, 96 Am. Dec. 390.

Massachusetts.— Cushing *v.* Stoughton, 6 Cush. 389. *Compare* Butler *v.* Charlestown, 7 Gray 12.

New York.— Matter of Plattsburgh, 27 N. Y. App. Div. 353, 50 N. Y. Suppl. 356 [*reversed* on other grounds in 157 N. Y. 78, 51 N. E. 512].

North Carolina.— Roper *v.* Laurinburg, 90 N. C. 427, town.

Oklahoma.— Treeman *v.* Perry, 11 Okla. 66, 65 Pac. 923.

Wisconsin.— Wilson *v.* Omro, 52 Wis. 131, 8 N. W. 821.

See 36 Cent. Dig. tit. "Municipal Corporations," § 584. And see *infra*, IX, A, 6, o.

Custom.— The mayor, city attorney, and treasurer, having ordinarily been suffered to make similar agreements, may engage attorneys to collect demands due the municipality, when its interests demand such service. Memphis *v.* Brown, 16 Fed. Cas. No. 9,415, 1 Flipp. 188 [*modified* in 20 Wall. 289, 22 L. ed. 264].

Termination of employment.— The employment by a city of counsel to collect arrearages of taxes, without any limitation as to time, was in law a contract terminable at the will of either party. Wilmington *v.* Ryan, 141 N. C. 666, 54 S. E. 543.

Review of discretion by courts.— Where the common council are the sole judges of the necessity of employing assistant counsel to defend suits brought against the city, the exercise of that discretion is not reviewable in a court of law. State *v.* Paterson, 40 N. J. L. 186.

47. Roodhouse *v.* Jennings, 29 Ill. App. 50.

When an exigency arises involving the corporate existence of a city, and such city finds itself without an attorney, it is within the powers of the mayor and council to employ counsel to protect its interests, and their action will not be defeated on account of a failure to comply with all the technical details incident to the employment of counsel in ordinary cases. Rice *v.* Gwinn, 5 Ida. 394, 49 Pac. 412.

Attorney need not be resident of city.— Roodhouse *v.* Jennings, 29 Ill. App. 50.

48. Curtis *v.* Gowan, 34 Ill. App. 516.

49. Nash *v.* New York, 4 Sandf. (N. Y.) 1, public administrator.

Where a municipality appoints agents to prosecute an action, such agents have authority to employ an attorney. Buckland *v.* Conway, 16 Mass. 396.

50. Butler *v.* Milwaukee, 15 Wis. 493, employment of counsel to aid in criminal prosecution instituted by state against persons who had lately been officers of the city for crimes committed under color of their official duties, to the pecuniary damage of the city.

In the absence of express power in its charter, the power of a corporation to employ counsel to attend to its interest in another state can be legitimately exercised only in regard to matters which pertain to the trust created by the act of incorporation. And whatever powers are requisite to the faithful execution of this trust are necessary incidents to the powers expressly delegated. Memphis *v.* Adams, 9 Heisk. (Tenn.) 518, 24 Am. Rep. 331.

Action against officers.— A municipal corporation has no such interest in a suit exclusively directed against its officers as will authorize it to retain counsel for its defense,

ices which the law requires the city attorney to perform is *prima facie* void.[51] So the municipality cannot employ an attorney where there are no funds to pay him with.[52] Where the employment by a certain officer must be with the approval of the mayor, the approval of such an employment by the council, in the absence of proof to the contrary, implies the approval of the mayor.[53]

(II) *Employment by Mayor.* Ordinarily the mayor has no authority, unless expressly conferred by the charter or ordinances, to employ counsel in behalf of the municipality.[54] However, in particular cases,[55] such as in emergency cases,[56] or where authority has been conferred on him by the common council,[57] he has been held authorized to employ counsel.

(III) *Employment by Board or Committee.* Except where forbidden by statute, charter provisions or ordinance,[58] a particular board or committee other than the common council may have implied power to employ necessary counsel;[59] and in some cases particular boards are expressly authorized to employ an attorney in case of necessity.[60] But a particular committee of the common council ordinarily has no power to employ counsel.[61] And a board has no authority to employ

although the bill may enjoin the officers from performing the functions of their office, and ask for the appointment of a receiver with power to control the corporate property and finances. Smith *v.* Nashville, 4 Lea (Tenn.) 69.

51. Clough *v.* Hart, 8 Kan. 487.

52. Wallace *v.* San Jose, 29 Cal. 180.

53. State *v.* Edwards, 136 Mo. 360, 38 S. W. 73.

54. Fletcher *v.* Lowell, 15 Gray (Mass.) 103; Carroll *v.* St. Louis, 12 Mo. 444; Mark *v.* West Troy, 69 Hun (N. Y.) 442, 23 N. Y. Suppl. 422.

55. Louisville *v.* Murphy, 86 Ky. 53, 5 S. W. 194, 9 Ky. L. Rep. 310, holding that where the general council of a city have failed to levy a tax by ordinance, and the city officials are proceeding to collect it by distraint, the mayor, believing the tax to be unlawful, and acting in good faith, and by advice of counsel, has authority to employ counsel to bring suit to restrain the collection of such tax.

56. Owensboro *v.* Weir, 95 Ky. 158, 24 S. W. 115, 15 Ky. L. Rep. 506, holding, however, that the mere fact that a county is about to inclose land claimed by a city, and that the city attorney had failed to present his case to the court so as to obtain injunctive relief, does not give rise to an emergency authorizing the mayor to employ counsel without calling a meeting of the council, in which is vested all control over the city property.

Mandamus proceedings.— Where the mayor of a city employs special counsel to defend him in mandamus proceedings to require him to sign an illegal issue of bonds, for the reason that neither the legal officers nor the legislative body of the city will assist him nor procure counsel for the purpose, the city is liable for the services of the special counsel so employed by the mayor, and this is true notwithstanding the fact that the employment of such special counsel may be contrary to the provisions of the charter. Wiley *v.* Seattle, 7 Wash. 576, 35 Pac. 415, 38 Am. St. Rep. 905.

Employment as conclusive on question of emergency.— The employment of the counsel by the mayor is not conclusive on the courts that an emergency existed authorizing him to act. Owensboro *v.* Weir, 95 Ky. 158, 24 S. W. 115, 15 Ky. L. Rep. 506.

57. Fletcher *v.* Lowell, 15 Gray (Mass.) 103, holding, however, that a vote of a city council that a petition by a bridge corporation for a jury to assess damages for the laying out of their bridge as a townway be "referred to the mayor, with power to employ such counsel as may be deemed expedient," does not authorize the mayor to employ counsel to procure the passage by the legislature of a pending bill which might affect such damages.

58. Greathouse *v.* Dunn, 60 Cal. 311.

59. Simrall *v.* Covington, 29 S. W. 880, 16 Ky. L. Rep. 770; Yaple *v.* Morgan, 2 Ohio Cir. Ct. 406, 1 Ohio Cir. Dec. 557 [*affirmed* in 25 Cinc. L. Bul. 336].

60. Matter of Ryan, 6 Misc. (N. Y.) 478, 27 N. Y. Suppl. 169.

61. Caswell *v.* Marshalltown, 101 Iowa 598, 70 N. W. 717.

However, where the charter provides that no contract shall be binding on the city unless made by some authorized agent it is not liable for legal services, beneficial to the city, performed by counsel retained by a majority of the board of aldermen without any official action of the common council or either branch thereof. Butler *v.* Charlestown, 7 Gray (Mass.) 12.

Custom.— The fact that acts of a committee of a city council, in employing assistant counsel for the city, have been several times approved and ratified by the council, does not establish a custom binding on the city, where an ordinance expressly provides that such employment shall be "at the discretion of the mayor or city council" (Caswell *v.* Marshalltown, 101 Iowa 598, 70 N. W. 717), and it is immaterial that the usage of the city has been to pay such bills approved by the committee of either board without any formal vote (Butler *v.* Charlestown, 7 Gray (Mass.) 12).

counsel to act in connection with matters not within the scope of the power of the board,[62] nor where there is no necessity therefor because attorneys employed by the municipality are available,[63] nor where the exclusive power to employ attorneys is vested in the common council or board of trustees.[64] So a board has no power to employ an attorney to defend an individual officer prosecuted for misconduct.[65] Where the board or committee is authorized to employ attorneys, it is immaterial that it was appointed for an illegal purpose.[66]

(IV) *Employment by Corporation Attorney.* A corporation attorney is sometimes authorized to employ additional counsel,[67] but such contract expires with the term of the office of the corporation attorney.[68]

d. Agent to Sell Bonds. Generally a municipality may employ a person to sell its bonds,[69] especially when it is given power to negotiate and sell them.[70] But a municipality has no authority to employ an agent to refund its bonds where that duty is imposed upon the governmental officials of the municipality.[71]

e. Ratification of Unauthorized Employment. Where one employs a person in behalf of a municipality without authority, the employment may be ratified by the municipality, either expressly or by conduct, so as to be valid.[72]

f. Delegation or Restriction of Power. The power to hire or appoint may be limited by charter provisions as to the amount of indebtedness the municipality may contract in a year, of which the employee must take notice.[73] Where the power to appoint is delegated to the common council it cannot delegate such

62. Johnson *v.* Troy, 19 Hun (N. Y.) 204, board of education.

63. Boggs *v.* Newark Sinking Fund Com'rs, 10 N. J. L. J. 219; People *v.* Town, 1 N. Y. App. Div. 127, 37 N. Y. Suppl. 864; Ramson *v.* New York, 24 Barb. (N. Y.) 226, 4 Abb. Pr. 342, 15 How. Pr. 145; Smith *v.* Scranton, 2 Pa. Co. Ct. 331.

64. People *v.* Town, 1 N. Y. App. Div. 127, 37 N. Y. Suppl. 864; Collins *v.* Saratoga Springs, 70 Hun (N. Y.) 583, 24 N. Y. Suppl. 234 [*affirmed* in 140 N. Y. 637, 35 N. E. 892].

65. Lunkenheimer *v.* Hewitt, 10 Ohio Dec. (Reprint) 798, 23 Cinc. L. Bul. 433.

66. Cushing *v.* Stoughton, 6 Cush. (Mass.) 389.

67. Smith *v.* New York, 5 Hun (N. Y.) 237. But see Fletcher *v.* Lowell, 15 Gray (Mass.) 103, holding that a city solicitor has no authority without express vote or ordinance to employ other counsel in behalf of the city to procure the passage by the legislature of a statute affecting a claim for damages against the city.

68. Wilmington *v.* Ryan, 141 N. C. 666, 54 S. E. 543.

69. Armstrong *v.* Ft. Edward, 159 N. Y. 315, 53 N. E. 1116 [*reversing* 84 Hun 261, 32 N. Y. Suppl. 433]; New York *v.* Sands, 105 N. Y. 210, 11 N. E. 820.

70. Reed *v.* Orleans, 1 Ind. App. 25, 27 N. E. 109.

71. People *v.* Smithville, 85 Hun (N. Y.) 114, 32 N. Y. Suppl. 668.

72. *Kansas.*— Mound City *v.* Snoddy, 53 Kan. 126, 35 Pac. 1112.

New Jersey.— Salmon *v.* Haynes, 50 N. J. L. 97, 11 Atl. 151.

New York.— Peterson *v.* New York, 17 N. Y. 449 [*reversing* 4 E. D. Smith 413]; Van Wart *v.* New York, 52 How. Pr. 78. *Compare* Mason *v.* New York, 28 Hun 115.

Oregon.— Ward *v.* Forest Grove, 20 Oreg. 355, 25 Pac. 1020; Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835.

Texas.— Denison *v.* Foster, (Civ. App. 1894) 28 S. W. 1052. But see Bryan *v.* Page, 51 Tex. 532, 32 Am. Rep. 637, holding that under a city charter, which provided that the common council might "by ordinances" employ legal counsel to prosecute suits for the city, an attorney employed by the mayor, in the absence of any ordinance therefor, cannot recover for a legal opinion, given under such employment, although used by the common council.

See 36 Cent. Dig. tit. "Municipal Corporations," § 587.

What constitutes ratification see Caswell *v.* Marshalltown, 101 Iowa 598, 70 N. W. 717. The fact that the board of aldermen drew a warrant in favor of the printer for printing the attorney's brief in the cause in which the services were rendered was not a ratification by the city of the attorney's employment. Crutchfield *v.* Warrensburg, 30 Mo. App. 456. A vote by the council, showing that a majority of the members were willing to appropriate something for the services of attorneys employed by the mayor, cannot be construed into a ratification of their employment by the mayor. Owensboro *v.* Weir, 95 Ky. 158, 24 S. W. 115, 15 Ky. L. Rep. 506. An increase by the common council of a municipal corporation of the salary of a messenger to the president of the board of aldermen is a ratification of his appointment. Smith *v.* New York, 67 Barb. (N. Y.) 223.

73. People *v.* Cartwright, 9 Hun (N. Y.) 159.

power to others,[74] except where the duty to appoint is merely executive or ministerial.[75]

5. Removal, Discharge, or Suspension[76] — a. Power. Except where it is otherwise provided by statute or charter provision,[77] a municipal employee hired or appointed for no particular period of time may generally be discharged at any time, with or without cause, by the municipality through its proper officers.[78] Power conferred upon a particular officer or board to appoint employees implies the power to remove them.[79] But where one is appointed or employed for a definite term at a fixed salary, the obligation of the contract cannot be impaired by a discharge without cause before the expiration of such time any more than in the case of private employment.[80]

b. Civil Service Statutes and Rules — (i) *In General.* In several jurisdictions the power to remove, discharge, or suspend certain employees is limited by civil service statutes and rules passed pursuant thereto, requiring the removal to be for cause and after notice and a hearing or an opportunity for explanation.[81] These statutes generally expressly apply to and protect in their

74. East St. Louis *v.* Thomas, 11 Ill. App. 283; Ridgeway *v.* Michellon, 42 N. J. L. 405. See also Fagan *v.* New York, 84 N. Y. 348.

75. Tampa *v.* Salomonson, 35 Fla. 446, 17 So. 581 (holding, however, that while a municipal corporation can delegate its power to perform a ministerial act, it cannot appoint four agents for such purpose, and authorize them to select for it a fifth); Hathaway *v.* Des Moines, 97 Iowa 333, 66 N. W. 188; McCullough *v.* New York, 51 How. Pr. (N. Y.) 486. See also Collins *v.* New York, 3 Hun (N. Y.) 680.

76. Mandamus to compel reinstatement of employee who has been removed see Mandamus, 26 Cyc. 260 *et seq.*

77. State *v.* Longfellow, 95 Mo. App. 660, 69 S. W. 596. See also *infra*, VII, C, 5, b.

78. State *v.* New Orleans, 107 La. 632, 32 So. 22; Carling *v.* Jersey City, 71 N. J. L. 154, 58 Atl. 395; Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956; Matter of Goodwin, 30 N. Y. App. Div. 418, 51 N. Y. Suppl. 355; People *v.* Murray, 2 N. Y. App. Div. 359, 37 N. Y. Suppl. 848, 5 N. Y. App. Div. 288, 39 N. Y. Suppl. 227; Jackson *v.* New York, 87 Hun (N. Y.) 296, 34 N. Y. Suppl. 346; Meyers *v.* New York, 69 Hun (N. Y.) 291, 23 N. Y. Suppl. 484. See also Rochester *v.* Whitehouse, 15 N. H. 468; Brinck *v.* New York, 16 Hun (N. Y.) 340.

Employees of independent contractor.— But a municipal officer cannot discharge workmen in the employ of a contractor engaged in lighting the city under a contract, since the contractor's doing the work is no interference with the superintendent's supervision and control of it. American Lighting Co. *v.* McCuen, 92 Md. 703, 48 Atl. 352.

Statutes — When removal is by board.— Where a deck hand on a city ferry-boat is discharged by the superintendent of ferries, and the action of the superintendent is approved by the board, the discharge is made by the board, within the meaning of the statute authorizing the board to remove employees. O'Dowd *v.* Boston, 149 Mass. 443, 21 N. E. 949.

Particular persons who may remove.— Under Laws (1901), p. 204, c. 466, § 452, declaring that commissioners at the heads of departments of the city of New York may designate deputies, who shall possess every power belonging to the office of commissioner so far as specified in the designation for a period of not more than three months, the act of a deputy commissioner in removing an employee of the department more than three months after authority was conferred upon the deputy to bear charges in the case was void. People *v.* Monroe, 105 N. Y. App. Div. 61, 93 N. Y. Suppl. 898.

79. Mack *v.* New York, 37 Misc. 371, 75 N. Y. Suppl. 809 [*affirmed* in 82 N. Y. App. Div. 637, 80 N. Y. Suppl. 1139 (*affirmed* in 176 N. Y. 573, 68 N. E. 1119)]; Price *v.* Seattle, 39 Wash. 376, 81 Pac. 847. See also Osborn *v.* Detroit, 111 Mich. 362, 69 N. W. 644; Kip *v.* Buffalo, 123 N. Y. 152, 25 N. E. 165 [*affirming* 7 N. Y. Suppl. 685].

80. Cramer *v.* New Brunswick Water Com'rs, 57 N. J. L. 478, 31 Atl. 384. But see Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522; Dolan *v.* Orange, 70 N. J. L. 106, 56 Atl. 130.

81. Thompson *v.* Troup, 74 Conn. 121, 49 Atl. 907; People *v.* New York Fire Com'rs, 72 N. Y. 445; People *v.* Welde, 27 Misc. (N. Y.) 697, 59 N. Y. Suppl. 474. See also Sheridan *v.* Willis, 6 N. Y. App. Div. 132, 39 N. Y. Suppl. 884.

Civil service rules inconsistent with the city charter are invalid. Murphy *v.* Keller, 61 N. Y. App. Div. 145, 70 N. Y. Suppl. 405.

Clerks.— Under the provision of a city charter including in its civil service as "clerks" those whose work was purely clerical and those requiring special knowledge, but excluding those requiring technical or professional education, an "examiner of records," whose duties were to examine the records of transfers of real estate and make abstracts as needed by the city, was a clerk, and could not be dismissed without cause shown. Thompson *v.* Troup, 74 Conn. 121, 49 Atl. 907.

Confidential position.— In New York city

employment veteran soldiers and sailors,[82] and give them a preference over

the civil service rules as to employees do not apply to confidential positions. People *v.* Wells, 85 N. Y. App. Div. 378, 83 N. Y. Suppl. 376 [*reversed* on other grounds in 178 N. Y. 411, 70 N. E. 926]; Matter of Wiegand, 39 Misc. (N. Y.) 454, 80 N. Y. Suppl. 173; People *v.* Scannell, 25 Misc. (N. Y.) 619, 56 N. Y. Suppl. 117 [*affirmed* in 40 N. Y. App. Div. 633, 58 N. Y. Suppl. 1146].

Probationary period.— In New York city a probationary period is fixed during which time employees cannot be discharged. People *v.* Kearny, 164 N. Y. 64, 58 N. E. 14 [*affirming* 49 N. Y. App. Div. 125, 62 N. Y. Suppl. 1097]; People *v.* De Forest, 83 N. Y. App. Div. 410, 82 N. Y. Suppl. 59. But an appointee may be discharged at the end of his probationary term without assigning any reason therefor. See People *v.* Wells, 38 Misc. (N. Y.) 573, 77 N. Y. Suppl. 1014. The probationary term begins to run from the date that the employee commences to work and not from the date of his appointment. O'Grady *v.* Low, 74 N. Y. App. Div. 246, 77 N. Y. Suppl. 661. The right to summarily discharge exists only on the day when the probationary term expires. People *v.* Kearny, 36 Misc. (N. Y.) 717, 74 N. Y. Suppl. 391. But notice to the appointee that his services will be dispensed with, given before the end of his probationary period, is sufficient to terminate his employment at the end thereof. People *v.* Coler, 56 N. Y. App. Div. 171, 67 N. Y. Suppl. 652. Where the probationary period, although intermittent because of illegal discharges in the meantime, exceeds six months, the appointing officer can only discharge the clerk after a hearing and an explanation, as his appointment has become permanent. People *v.* Kearny, *supra*.

In Washington the civil service commission is not itself vested with any power of removal. Easson *v.* Seattle, 32 Wash. 405, 73 Pac. 496.

82. Ransom *v.* Boston, 192 Mass. 299, 78 N. E. 481; Pratt *v.* Phelan, 67 N. Y. App. Div. 349, 73 N. Y. Suppl. 823; Stutzbach *v.* Coler, 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901 [*affirmed* in 168 N. Y. 416, 61 N. E. 697].

Statute constitutional.—Stutzbach *v.* Coler, 168 N. Y. 416, 61 N. E. 697 [*affirming* 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901].

Persons within class.— MacDonald *v.* Newark, 55 N. J. L. 267, 26 Atl. 82; Lewis *v.* Jersey City, 51 N. J. L. 240, 17 Atl. 112; People *v.* Hynes, 101 N. Y. App. Div. 453, 91 N. Y. Suppl. 1032, soldier who did not serve either in the Civil or Spanish war.

Employees in street cleaning department of New York city are not entitled to the protection of the Veteran Act. People *v.* Waring, 7 N. Y. App. Div. 247, 40 N. Y. Suppl. 35; People *v.* Waring, 1 N. Y. App. Div. 594, 37 N. Y. Suppl. 478 [*affirmed* in 149 N. Y. 621, 44 N. E. 1127].

Effect of want of knowledge that employee was veteran.— Where a clerk is not known to be a veteran by the head of the department he may be removed. Stutzbach *v.* Coler, 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901 [*affirmed* in 168 N. Y. 416, 61 N. E. 697]; People *v.* Waring, 62 N. Y. Suppl. 966. However, such want of knowledge does not affect the veteran's right to reinstatement. Pratt *v.* Phelan, 67 N. Y. App. Div. 349, 73 N. Y. Suppl. 823.

Employee of county.— A county detective appointed by the district attorney of Kings county is not an employee of the city so as to be within the Veteran Act. People *v.* Clarke, 54 N. Y. App. Div. 588, 66 N. Y. Suppl. 1068.

Salary as distinguished from wages— A veteran who works for wages at a stipulated price per day does not receive a "salary" so as to be within the Veteran Act. Myers *v.* New York, 69 Hun (N. Y.) 291, 23 N. Y. Suppl. 484; Nuttall *v.* Simis, 22 Misc. (N. Y.) 19, 47 N. Y. Suppl. 1097 [*affirmed* in 40 N. Y. App. Div. 633, 58 N. Y. Suppl. 1146]. While the fact that the compensation of a veteran employed at public work was so much a day did not necessarily make his employment wholly transitory in character, it was otherwise if his employment itself was by the day. Nuttall *v.* Simis, 31 N. Y. App. Div. 503, 52 N. Y. Suppl. 308 [*affirming* 22 Misc. 19, 47 N. Y. Suppl. 1097].

Discharge at end of period of employment is not forbidden by the Veteran Act. Horan *v.* Orange Bd. of Education, 58 N. J. L. 533, 33 Atl. 944. So where a veteran is appointed to an office and in connection therewith performs the duties of an employee he is not entitled to reinstatement after his term of office expires. People *v.* Albion, 61 N. Y. App. Div. 71, 70 N. Y. Suppl. 21.

Discharge on account of economy.— The Veteran Act applies only to a removal predicated on the personal conduct of the employee and not to discharges solely on the ground of economy in the public service. People *v.* Feitner, 58 N. Y. App. Div. 594, 69 N. Y. Suppl. 141; People *v.* Scannell, 48 N. Y. App. Div. 445, 62 N. Y. Suppl. 930 [*affirmed* in 163 N. Y. 599, 57 N. E. 1121]; People *v.* Waring, 62 N. Y. Suppl. 966. But a veteran cannot be discharged on the ground of economy if civilians are retained who perform the same services. Stutzbach *v.* Coler, 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901 [*reversing* 34 Misc. 119, 68 N. Y. Suppl. 738, and *affirmed* in 168 N. Y. 416, 61 N. E. 697].

Services no longer required.— Where a veteran is removed when his services are no longer required and there is no vacancy to which he can be transferred he is not entitled to reinstatement. People *v.* Adams, 133 N. Y. 203, 30 N. E. 851 [*reversing* 53 Hun 141, 6 N. Y. Suppl. 128]; People *v.* Gilroy, 60 Hun (N. Y.) 507, 15 N. Y. Suppl. 242; People *v.* Clausen, 29 Misc. (N. Y.) 701, 61 N. Y. Suppl. 579. A veteran employed

non-veterans;[83] and in some jurisdictions the protection is extended to veteran volunteer firemen.[84] Where there is no eligible list for the position for which a requisition is made, the employment of a temporary employee generally ceases under the civil service rules within a specified time after the receipt of an eligible list.[85]

(II) *Grounds.* Where the right to discharge or remove is limited to discharge or removal for cause, the cause must generally affect the general character or fitness of the employee.[86] Generally the grounds for removal are not specifically enumerated in the statute or civil service rules.[87]

only by the job is not discharged or suspended where he receives no pay after his special task is done. Clark *v.* Boston, 179 Mass. 409, 60 N. E. 793.

Grounds.— Refusal to submit to an examination as to competency on the change of system of heating from hot water to steam has been held ground for dismissing a veteran engineer appointed to take charge of the heating apparatus of a school. People *v.* Long Island City Bd. of Education, 84 Hun (N. Y.) 417, 32 N. Y. Suppl. 377.

83. See cases cited *infra*, this note.

Where there is not enough work for all, veterans cannot be discharged if non-veterans who perform like services are retained. Stutzbach *v.* Coler, 168 N. Y. 416, 61 N. E. 697 [*affirming* 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901]; People *v.* Adams, 133 N. Y. 203, 30 N. E. 851 [*reversing* 53 Hun 141, 6 N. Y. Suppl. 128]; Pratt *v.* Phelan, 67 N. Y. App. Div. 349, 73 N. Y. Suppl. 823; People *v.* Board of Public Parks, 17 N. Y. Suppl. 589.

84. People *v.* Lindenthal, 79 N. Y. App. Div. 43, 79 N. Y. Suppl. 828 [*reversed* on other grounds in 173 N. Y. 524, 66 N. E. 407]; People *v.* Sturgis, 38 Misc. (N. Y.) 433, 77 N. Y. Suppl. 1008; People *v.* Brookfield, 13 Misc. (N. Y.) 566, 34 N. Y. Suppl. 674. *Compare* People *v.* Waring, 7 N. Y. App. Div. 204, 40 N. Y. Suppl. 275.

A member of an incorporated fire company, which is not officially connected with a municipality, but the object of which is to render public service in the extinguishment of fires, is within Civil Service Law (Laws (1899), p. 809, c. 370, as amended by Laws (1902), p. 805, c. 270, § 21), providing that no person holding a municipal position or employment who shall have served the term required by law in the volunteer fire department of a city, town, or village shall be removed, except for cause, after a hearing. People *v.* Folks, 89 N. Y. App. Div. 171, 85 N. Y. Suppl. 1100.

A person claiming such protection must allege either that he has served the time required by law in the volunteer department, or was a member at its disbandment. People *v.* Coler, (N. Y. 1899) 54 N. E. 1094 [*affirming* 40 N. Y. App. Div. 65, 57 N. Y. Suppl. 636].

Salary as distinguished from wages.— A day laborer receiving a certain sum per day, although a veteran volunteer fireman, is not a person receiving a "salary" who cannot be discharged except for cause and after a hearing. Wagner *v.* Collis, 7 N. Y. App. Div. 203, 40 N. Y. Suppl. 171; People *v.* Brookfield, 13 Misc. (N. Y.) 566, 34 N. Y. Suppl. 674.

Who is "person holding a position by appointment or employment."—Where a veteran fireman contracted to furnish a horse and wagon to the city and drive the same for a specified sum per day, his engagement was for services other than personal employment, and hence the contract was subject to termination by the department, in accordance with its terms, at any time. People *v.* Redfield, 86 N. Y. App. Div. 367, 83 N. Y. Suppl. 373.

85. People *v.* Lantry, 32 Misc. (N. Y.) 80, 66 N. Y. Suppl. 185.

86. People *v.* New York Fire Com'rs, 72 N. Y. 445; People *v.* New York Fire Com'rs, 12 Hun (N. Y.) 500.

Illustrations.— People *v.* Monroe, 106 N. Y. App. Div. 607, 94 N. Y. Suppl. 366. The action of the commissioner of city works discharging a meter inspector will not be disturbed on certiorari, where it appears that he, without any apparent reason, reduced the reading of a water meter. People *v.* White, 30 N. Y. Suppl. 163 [*affirmed* in 151 N. Y. 637, 45 N. E. 1133]. A chief clerk in the bureau of inspection of buildings in New York city is properly removed for telling an applicant for permission to make alterations that he may go on without the approval of the inspector, the inspector being absent; and the fact that the inspector authorized such a course does not protect the clerk. People *v.* New York Fire Com'rs, 49 N. Y. Super. Ct. 369.

Absence from duty for three days without permission may be cause for removal of an employee by the civil service commission after a trial upon written charges, even though there is a rule of the commission providing that an employee in the classified service who absents himself from duty without permission for a period of ten days shall be considered as discharged. Kammann *v.* Chicago, 222 Ill. 63, 78 N. E. 16.

87. Kammann *v.* Chicago, 222 Ill. 63, 78 N. E. 16, holding that Hurd Rev. St. (1905) c. 24, § 457, providing that employees in the classified civil service may be remanded for cause if found guilty on an investigation of written charges before the civil service commission to conduct the examination, does not require the civil service commissioner to specify in written rules every case which shall be deemed cause for removal.

(III) *What Constitutes Discharge.*[88] No particular form of words is necessary to effect the discharge of a municipal agent or servant employed for no specified time,[89] and notice of a suspension without pay is ordinarily sufficient to discharge an employee.[90]

(IV) *Procedure* — (A) *Conditions Precedent.* Usually, under the civil service rules, the employee sought to be discharged is entitled to notice and a hearing or at least an opportunity for explanation.[91] Under some statutory and charter provisions, certain employees cannot be removed until given an opportunity of making an explanation and the filing in the department of the grounds of removal.[92] Under other provisions, the removal must be preceded by notice

88. See also *infra*, VII, C, 6, d.

89. McNamara *v.* New York, 152 N. Y. 228, 46 N. E. 507 [*affirming* 32 N. Y. Suppl. 1145]. See also Wilmington *v.* Bryan, 141 N. C. 666, 54 S. E. 543.

Demand for resignation.—A letter demanding immediate resignation sent to an employee where he thereafter fails to report for duty and has repeatedly asked to be reinstated shows a discharge. Ryan *v.* New York, 154 N. Y. 328, 48 N. E. 512 [*affirming* 7 N. Y. App. Div. 336, 40 N. Y. Suppl. 227]. So a resolution of a board requesting the resignation and declaring that if the employee did not resign by a certain time he was discharged is, without further action, effective as a discharge on the failure of such employee to resign. People *v.* Murray, 2 N. Y. App. Div. 359, 37 N. Y. Suppl. 848.

Dispensing with services because of want of work.— Where an officer having the power to discharge told an assistant that there was no further work for him to do, and that his services were dispensed with, it amounted to a discharge of the assistant. Connor *v.* New York, 19 N. Y. Suppl. 85 [*affirmed* in 137 N. Y. 545, 33 N. E. 336].

90. McNamara *v.* New York, 152 N. Y. 228, 46 N. E. 507 [*affirming* 32 N. Y. Suppl. 1145]; Jackson *v.* New York, 87 Hun (N. Y.) 296, 34 N. Y. Suppl. 346; Beach *v.* New York, 10 N. Y. Suppl. 793. *Compare* Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854.

91. See cases cited *infra*, this note.

In Illinois, in the absence of notice to a municipal employee of charges against him, a trial board and civil service commission is without authority to hear and determine them. Chicago *v.* Gillen, 222 Ill. 112, 78 N. E. 13.

Particular provisions.— Where the charter provides that there shall be no removal except for cause "duly shown," there can be no removal without a hearing given. Thompson *v.* Troup, 74 Conn. 121, 49 Atl. 907. But a provision for removal by a board "for such cause as they may deem sufficient and shall assign in their order for removal" does not require that a subordinate shall be given a hearing before the board, on charges preferred against him, before he can be removed. O'Dowd *v.* Boston, 149 Mass. 443, 21 N. E. 949.

92. People *v.* Scannell, 62 N. Y. App. Div. 249, 70 N. Y. Suppl. 983; People *v.* Scully, 56 N. Y. App. Div. 302, 67 N. Y. Suppl. 839; People *v.* Constable, 27 N. Y. App. Div. 74, 50 N. Y. Suppl. 121; People *v.* Andrews, 9 Misc. (N. Y.) 569, 30 N. Y. Suppl. 398 [*affirmed* in 31 N. Y. Suppl. 1131]; People *v.* Myers, 10 N. Y. Suppl. 815.

Retroactive effect.— People *v.* Scannell, 30 Misc. (N. Y.) 328, 63 N. Y. Suppl. 474 [*affirmed* in 56 N. Y. App. Div. 624, 67 N. Y. Suppl. 1142].

"Suspended" as distinguished from "removed."— An employee "suspended" is not entitled to notice and opportunity to explain, under charter provisions, that employees shall not be "removed" without such notice and opportunity for explanation. People *v.* Wells, 78 N. Y. App. Div. 373, 79 N. Y. Suppl. 728.

Reduction of salary.— Greater New York Charter, § 1543, applies only to removal by heads of departments and has no application to a reduction of salary of an employee by a deputy commissioner with the approval of the head of the department as expressly authorized by the charter. People *v.* Dalton, 85 N. Y. App. Div. 110, 83 N. Y. Suppl. 321.

Persons "head of bureau or regular clerk." — The Greater New York Charter, § 1543, provides that no "clerk or head of a bureau" shall be removed without opportunity for explanation, and that a statement showing the reason for removal shall be filed in the department. The following have been held such employees: Chief clerk of coroner. People *v.* Scholers, 42 Misc. (N. Y.) 355, 86 N. Y. Suppl. 713 [*reversed* on other grounds in 94 N. Y. App. Div. 282, 87 N. Y. Suppl. 1122]. Clerk of board of aldermen. People *v.* Scully, 56 N. Y. App. Div. 302, 67 N. Y. Suppl. 839. Employee in one of the departments to keep the records or accounts. People *v.* New York Fire Com'rs, 73 N. Y. 437. Assistant librarian in a city public library. Craigie *v.* New York, 114 N. Y. App. Div. 880, 100 N. Y. Suppl. 197. The following have been held not such employees: Cashier of commissioner of public works. Matter of Wiegand, 39 Misc. (N. Y.) 454, 80 N. Y. Suppl. 173. Fire commissioners. People *v.* New York Fire Com'rs, 86 N. Y. 149. Hose repairer in the fire department. People *v.* Scannell, 62 N. Y. App. Div. 249, 70 N. Y. Suppl. 983. Inspector of water-supply to shipping in the department of public works. People *v.* Dalton, 34 N. Y. App. Div. 302, 54 N. Y. Suppl. 216 [*affirmed* in 159 N. Y. 235, 53 N. E. 1113]. Property clerk. People *v.* McAdoo, 101 N. Y. App. Div. 183, 91 N. Y. Suppl. 553 [*affirmed* in 181 N. Y. 547, 74 N. E. 1123]. Rounds-

and a hearing.[93] Provisions as to a hearing or an opportunity to explain have been held not to apply where the removal is from motives of economy or because of necessity to cut down expenses so as not to exceed the appropriation for the department,[94] nor where the position is abolished in good faith,[95] nor where the employee is discharged because his services are no longer needed.[96] The giving of notice of removal on the abolition of a position instead of notice of suspension does not constitute an unlawful removal.[97] A charge must, it would seem, be so specific as to clearly inform the employee as to what he is required to answer and not consist of a mere conclusion.[98]

(B) *Hearing.* Where it is provided that certain employees shall not be removed until "an opportunity for explanation" has been given, it is held that the employee is not entitled to a trial,[99] nor is it necessary that evidence, either

man in employment of a department of docks. People *v.* Cram, 15 Misc. (N. Y.) 12, 36 N. Y. Suppl. 1117. Sanitary inspector of board of health. People *v.* New York Health Dept., 24 N. Y. Wkly. Dig. 197. Secretary of dock department. People *v.* Koch, 2 N. Y. St. 110. Superintendent of telegraph of fire department. People *v.* New York Fire Com'rs, 23 Hun (N. Y.) 317 [*affirmed* in 86 N. Y. 149]. The term "regular clerk" is applicable to persons employed in one of the city departments to keep the records or accounts and does not apply to subordinate ministerial officers, although in the performance of their duty or as an incident thereto they may render some service which might have been performed by a clerk. People *v.* New York Fire Com'rs, 73 N. Y. 437; People *v.* New York Fire Com'rs, 23 Hun (N. Y.) 317 [*affirmed* in 86 N. Y. 149]. Whether one is a "regular clerk" must be determined by the nature of his duties; a regular clerk being one employed in the duty of keeping records or accounts, or in doing writing relating to the ordinary conduct or business details of the department. People *v.* McAdoo, 101 N. Y. App. Div. 183, 91 N. Y. Suppl. 553 [*affirmed* in 181 N. Y. 547, 74 N. E. 1123]. The fact that one employed as a clerk is designated as a "contract clerk" does not show that he is not a regular clerk. People *v.* Sturgis, 38 Misc. (N. Y.) 433, 77 N. Y. Suppl. 1008. A mere employee not a regular clerk or the head of a bureau may be removed without being offered such opportunity to explain. People *v.* Kane, 70 N. Y. Suppl. 982.

Who are persons in the classified service within rule 42 of the civil service commission of New York city see People *v.* Scully, 56 N. Y. App. Div. 302, 67 N. Y. Suppl. 839.

Commissioner of jurors not head of department see People *v.* Plimley, 1 N. Y. App. Div. 458, 37 N. Y. Suppl. 152.

The notice need not be a written one.— People *v.* Campbell, 50 N. Y. Super. Ct. 82.

93. People *v.* Hayden, 133 N. Y. 198, 30 N. E. 970 [*reversing* 10 N. Y. Suppl. 794].

Veterans.—In New York city the procedure in case of veterans is different from the procedure in case of the removal of the "head of a bureau or regular clerk," in that in the former case the statute requires a hearing upon due notice upon stated charges. People *v.* Hynes, 101 N. Y. App. Div. 453, 91 N. Y. Suppl. 1032.

94. O'Neill *v.* Fitzsimmons, 114 Ill. App. 168 [*affirmed* in 214 Ill. 494, 73 N. E. 797]; Lethbridge *v.* New York, 133 N. Y. 232, 30 N. E. 975 [*reversing* 59 N. Y. Super. Ct. 486, 15 N. Y. Suppl. 562]; Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19; People *v.* New York Health Dept., 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123]; Phillips *v.* New York, 10 Daly (N. Y.) 278 [*affirmed* in 88 N. Y. 245, 14 N. Y. Wkly. Dig. 161]; Sheehan *v.* New York, 21 Misc. (N. Y.) 600, 48 N. Y. Suppl. 662; People *v.* Public Parks Dept., 60 How. Pr. (N. Y.) 130.

Bad faith is not to be inferred from the fact that the department did not exhaust its entire salary appropriation for the year, but carried over a surplus. People *v.* New York Health Dept., 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123]. The mere fact that during the year various persons were appointed to other places in the department, or that there were promotions, and some few increases of salary in other positions, did not indicate bad faith. People *v.* New York Health Dept., *supra*.

95. Phillips *v.* New York, 88 N. Y. 245; People *v.* Shea, 51 N. Y. App. Div. 227, 64 N. Y. Suppl. 973 [*affirmed* in 164 N. Y. 573, 58 N. E. 1091].

96. Langdon *v.* New York, 92 N. Y. 427 [*affirming* 27 Hun 288, 63 How. Pr. 134].

Person employed only during summer time. — Laws (1883), c. 354, § 13, as amended by Laws (1898), c. 186, § 3, giving municipal employees in competitive classes the right to be heard before removal, does not apply to an attendant of a recreation pier, chosen by competitive examination, whose employment lasts only during a certain season of the year. Vincent *v.* Cram, 27 Misc. (N. Y.) 158, 57 N. Y. Suppl. 771.

97. People *v.* Monroe, 99 N. Y. App. Div. 290, 90 N. Y. Suppl. 907.

98. People *v.* Starks, 33 Hun (N. Y.) 384.

Charge of "incompetency."— A regular clerk was notified that the board deemed him "incompetent for the proper and creditable performance" of his duties. It was held that the notice did not assign a cause for removal. People *v.* Starks, 33 Hun (N. Y.) 384.

99. People *v.* MacLean, 58 Hun (N. Y.)

parol or written, be produced to sustain the charges made;[1] but, in making the explanation, the employee has a right to be represented by counsel,[2] and a reasonable opportunity to explain is not given where the delinquent is called upon for his explanation at the instant of being informed of the charge.[3] On the other hand, where the statute or charter requires specific charges to be presented and a hearing thereon, a trial is necessary, and the burden of proof is upon the party making the charges.[4] Where the testimony is not required to be under oath, the fact that witnesses against the employee were not sworn is not prejudicial where he himself testified without being sworn and his evidence was considered.[5] An employee removed after being accorded an opportunity to explain is not prejudiced by the fact that he was subsequently given a trial and hearing to which he was not entitled.[6]

(c) *Review.*[7] Certiorari lies to review the removal of an employee, pursuant to civil service rules, upon written charges.[8] The exercise of discretion conferred upon an officer or board in removing an employee is not ordinarily reviewable by the courts;[9] and it follows that the sufficiency of the explanation made by the employee as a defense to his removal cannot be reviewed.[10] In some jurisdictions, where the removal is sustained by the civil service commission, their ruling is not reviewable by the courts.[11] In any event, the court will not consider objections not asserted before the officer or board.[12] On certiorari proceedings, where the record is incomplete, an order may be made directing certain papers to be added to the return.[13]

(v) *Reinstatement.* The right of a municipal employee to reinstatement under the civil service rules may be waived by conduct,[14] or by laches.[15] The

152, 11 N. Y. Suppl. 559; People *v.* Campbell, 50 N. Y. Super. Ct. 82; People *v.* Grant, 13 N. Y. Suppl. 676 [*affirmed* in 128 N. Y. 620, 28 N. E. 254]. See also People *v.* Brady, 58 N. Y. App. Div. 219, 68 N. Y. Suppl. 796, holding that where the employee's explanation was that his absence was due to sickness in the family it was not improper for the commissioner to refuse to hear evidence as to the truth of facts contained in such explanation.

1. People *v.* Thompson, 26 Hun (N. Y.) 28 [*affirmed* in 94 N. Y. 451].

2. Matter of Emmet, 65 How. Pr. (N. Y.) 266.

3. People *v.* MacLean, 58 Hun (N. Y.) 152, 11 N. Y. Suppl. 559.

4. People *v.* Dooling, 60 N. Y. App. Div. 321, 70 N. Y. Suppl. 26.

The police commissioner of a village is the only person entitled to hear charges preferred against a janitor of the police station, whether he is prejudiced against such janitor or not. People *v.* Magee, 55 N. Y. App. Div. 195, 66 N. Y. Suppl. 849.

Evidence held admissible on behalf of an employee see People *v.* Dooling, 60 N. Y. App. Div. 321, 70 N. Y. Suppl. 26. On hearing of charges against a janitor for neglect of duty, it was error to refuse to allow him to introduce evidence to show that the person preferring the charges was not actuated by a proper motive, but was in fact conducting the same by reason of pique or ill feeling. People *v.* Dooling, *supra.* But on the hearing, by a police commissioner, of charges preferred against a veteran employed as janitor of the police station, evidence to show prejudice on the part of such commissioner against such veteran is inadmissible. People *v.* Magee, 55 N. Y. App. Div. 195, 66 N. Y. Suppl. 849.

Sufficiency of evidence see People *v.* Magee, 55 N. Y. App. Div. 195, 66 N. Y. Suppl. 849.

5. People *v.* Brookfield, 6 N. Y. App. Div. 445, 39 N. Y. Suppl. 677 [*affirmed* in 151 N. Y. 674, 46 N. E. 1150].

6. People *v.* Hynes, 101 N. Y. App. Div. 453, 91 N. Y. Suppl. 1032.

7. **Mandamus as remedy** see MANDAMUS, 26 Cyc. 260.

8. Kammann *v.* Chicago, 222 Ill. 63, 78 N. E. 16; People *v.* Myers, 10 N. Y. Suppl. 815. And see CERTIORARI, 6 Cyc. 750 *et seq.*

9. People *v.* New York Fire Com'rs, 100 N. Y. 82, 2 N. E. 613.

10. People *v.* Brady, 166 N. Y. 44, 59 N. E. 701 [*reversing* on other grounds 53 N. Y. App. Div. 279, 65 N. Y. Suppl. 844]; People *v.* Dalton, 52 N. Y. App. Div. 627, 65 N. Y. Suppl. 426; People *v.* Thompson, 26 Hun (N. Y.) 28 [*affirmed* in 94 N. Y. 451].

11. Price *v.* Seattle, 39 Wash. 376, 81 Pac. 847.

12. People *v.* Cram, 15 Misc. (N. Y.) 12, 36 N. Y. Suppl. 1117, holding that rights of a city employee under the veteran laws to freedom from discharge cannot be considered on review of a board's action in discharging him, not having been asserted before it.

13. People *v.* Myers, 8 N. Y. Suppl. 555.

14. Matter of Hayes, 56 N. Y. App. Div. 20, 67 N. Y. Suppl. 340 [*affirmed* in 166 N. Y. 603, 59 N. E. 1123].

15. People *v.* Guilfoyle, 61 N. Y. App. Div. 187, 70 N. Y. Suppl. 442; Murphy *v.* Keller, 61 N. Y. App. Div. 145, 70 N. Y. Suppl. 405; Matter of Gaffney, 84 Hun (N. Y.) 503, 32

procedure to procure reinstatement is generally by mandamus proceedings, which are elsewhere treated.[16]

c. Action For Damages. Where an employee is unlawfully discharged, he may sue the municipality for the damages resulting therefrom.[17]

6. Compensation[18] — a. In General. Unlike a municipal officer, an employee is not entitled to receive his salary as an incident of his office, and if he performs no services, he is entitled to no compensation.[19] The right to compensation may depend upon statute or ordinance,[20] or contract,[21] and the contract may be implied as well as express.[22] In some fee offices, the officer himself is the only one liable to an employee therein.[23] If the employment is based upon a contract, the right to recover depends upon the appointment having been made by someone duly authorized,[24] and in the mode required by law.[25] Where the position is one filled

N. Y. Suppl. 873. See also Mandamus, 26 Cyc. 264, 393.

16. See Mandamus, 26 Cyc. 260.

17. Ransom *v.* Boston, 192 Mass. 299, 78 N. E. 481; Purcell *v.* Long Island City, 91 Hun (N. Y.) 271, 36 N. Y. Suppl. 290. See also Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522.

Measure of damages.— The measure of damages is the amount which the employee would have earned, had he been employed while there was work to be done, less what he earned, or in the exercise of proper diligence might have earned elsewhere. Ransom *v.* Boston, 192 Mass. 299, 78 N. E. 481.

18. **Garnishment of salary of employees** see Garnishment, 20 Cyc. 1030.

19. Quintard *v.* New York, 51 N. Y. App. Div. 233, 64 N. Y. Suppl. 904.

20. Failing *v.* Syracuse, 4 Misc. (N. Y.) 50, 24 N. Y. Suppl. 705; *In re* Public Parks Dept., 11 N. Y. Suppl. 176. See also Bachelder *v.* Epping, 28 N. H. 354; Muller *v.* New York, 63 N. Y. 353.

21. Chicago *v.* Roth, 26 Ill. 456.

Defenses.— It is no defense to a suit against the city by a laborer for his wages that the city officer by whom the laborer was hired disobeyed the lawful orders of the city government by which he was directed to suspend the work. Chicago *v.* Roth, 26 Ill. 456.

Preventing performance of services.— An attorney employed to perform professional services for a town by the proper town authorities is entitled to recover against the town for such services which he was prevented from performing by the town officers when he was ready and willing to carry out his contract. Mt. Vernon *v.* Patton, 94 Ill. 65. But the fact that one appointed and employed by resolution of a city "as driver of the street wagon, and to take care of the horses" was able and willing to perform the services did not put on the city the duty of keeping him employed, nor make it liable for failing to do so. White *v.* Alameda, 124 Cal. 95, 56 Pac. 795.

22. *Illinois.*— New Athens *v.* Thomas, 82 Ill. 259.

Indiana.— Wilt *v.* Redkey, 29 Ind. App. 199, 64 N. E. 228.

Kansas.— Ellsworth *v.* Rossiter, 46 Kan. 237, 26 Pac. 674.

New Hampshire.— Wiggin *v.* Manchester, 72 N. H. 576, 58 Atl. 522; Skinner *v.* Manchester, 72 N. H. 299, 56 Atl. 313.

Ohio.— Cincinnati *v.* Green, 2 Cinc. Super. Ct. 278.

Oregon.— Ward *v.* Forest Grove, 20 Oreg. 355, 25 Pac. 1020.

Vermont.— Tufts *v.* Chester, 62 Vt. 353, 19 Atl. 988.

See 36 Cent. Dig. tit. "Municipal Corporations," § 599.

Compare Covington *v.* Elliott, 53 S. W. 526, 21 Ky. L. Rep. 895.

Services outside of official duties.— When a town agent employs an attorney in a suit in favor of or against the town, the town is legally holden to pay the attorney's services, without an express vote to that effect; and the rule is the same if the town agent, being himself an attorney, renders professional services for the town. Langdon *v.* Castleton, 30 Vt. 285.

But where the statute provides that no liability can be created against a municipality unless the proposition to do so is adopted in a certain manner, the failure to observe such procedure prevents the municipality from being liable on an implied contract for services rendered. Bosard *v.* Grand Forks, 13 N. D. 587, 102 N. W. 164.

Mere failure to prevent performance of services.— But a village is not liable to a person who voluntarily renders services because the board of trustees failed to prevent him from rendering such services. Lydecker *v.* Nyack, 6 N. Y. App. Div. 90, 39 N. Y. Suppl. 509.

23. People *v.* Stout, 15 How. Pr. (N. Y.) 159.

24. State *v.* Paterson, 39 N. J. L. 489; McBride *v.* New York, 56 N. Y. App. Div. 520, 67 N. Y. Suppl. 550; Mason *v.* New York, 28 Hun (N. Y.) 115; Stenson *v.* New York, 40 Misc. (N. Y.) 533, 82 N. Y. Suppl. 946. See also Emmert *v.* De Long, 12 Kan. 67.

Ratification and estoppel.— Compensation for labor performed under a contract adopted by a minority of a town committee may be recovered from the town, if the contract was subsequently ratified by a majority of the committee. Hanson *v.* Dexter, 36 Me. 516. See also *supra*, VII, C, 2, a.

25. O'Connor *v.* New York, 11 Hun (N. Y.)

by appointment, the agent or employee must have been legally appointed,[26] and his salary fixed by lawful authority.[27] Where persons are appointed by the state, pursuant to statute, to render municipal services, the municipality is not liable.[28] So the municipality is not liable where plaintiff was employed by commissioners to whom a certain appropriation is made for a specified piece of work.[29] Where the purpose for which services are rendered is an illegal one, no action will lie against the municipality either on an express or an implied promise;[30] but where services are rendered in connection with a merely invalid municipal contract but afterward the contract is legally ratified the city is liable for such services.[31] So where work is done for the benefit of a municipality it is no defense to a claim for such services that they were rendered outside the city limits.[32] An ordinance or provision in the contract of employment that wages shall be non-assignable is valid.[33]

b. Rate or Amount — (i) *In General.* If the service is rendered under contract, the rate or amount is determined by its provisions;[34] and where the amount is not fixed by the contract or statute, the employee is entitled to recover what the services are reasonably worth.[35] The wages or salary may be fixed by charter or statute,[36] and sometimes it is provided by statute that the salaries of certain employees shall be fixed by a specified officer or board.[37] The maximum sum for attorney or clerk hire in the department may be fixed by charter or statute, in which case nothing in excess thereof is recoverable.[38] An employee may, by contract, waive his right to the statutory rate;[39] and an appointee under an ordinance fixing the rate cannot recover at a higher statutory rate.[40] A change in the appointing power works no change in the amount payable.[41] In some states statutes provide that laborers working for a municipality or for a con-

176; Graham *v.* New York, 33 Misc. (N. Y.) 56, 66 N. Y. Suppl. 754.

26. Skinner *v.* Manchester, 72 N. H. 299, 56 Atl. 313; Munch *v.* New York, 47 Misc. (N. Y.) 128, 93 N. Y. Suppl. 509.

27. Munch *v.* New York, 47 Misc. (N. Y.) 128, 93 N. Y. Suppl. 509.

28. Garnier *v.* St. Louis, 37 Mo. 554.

29. Miller *v.* New York, 76 N. Y. 151.

30. Drake *v.* Stoughton, 6 Cush. (Mass.) 393.

31. Dehm *v.* Havana, 28 Ill. App. 520.

32. Quigg *v.* Evans, 121 Cal. 546, 53 Pac. 1093.

33. State *v.* Kent, 98 Mo. App. 281, 71 S. W. 1066.

34. Mathewson *v.* Tripp, 14 R. I. 587.

A contract for excessive fees may be void for unreasonableness. Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81.

Where the amount in excess of a certain sum per annum is subject to the approval of the common council, one appointed at a salary in excess of such sum may recover notwithstanding a failure on the part of the council to act in the matter, as it is necessary for the council to disapprove the action of the board, and mere failure to approve is not sufficient. Mathewson *v.* Tripp, 14 R. I. 587.

35. Ellsworth *v.* Rossiter, 46 Kan. 237, 26 Pac. 674; Bleecker *v.* New York, 7 Daly (N. Y.) 439; *In re* Public Parks Dept., 11 N. Y. Suppl. 179 (surveyor); Cincinnati *v.* Green, 2 Cinc. Super. Ct. (Ohio) 278.

Civil engineer.— The fact that a civil engineer, employed by a city for several years, has charged five dollars per day for his services on common surveying, does not establish an implied contract for compensation at the same rate for preparing drawings and specifications for a cedar block pavement — a work requiring a higher degree of care and skill than the work formerly performed by him. Brauns *v.* Green Bay, 78 Wis. 81, 46 N. W. 889.

The amount paid in previous years to one occupying the same position is relevant (Walsh *v.* Albany, 32 N. Y. App. Div. 128, 52 N. Y. Suppl. 936), but not conclusive in case of new and more valuable service (Brauns *v.* Green Bay, 78 Wis. 81, 46 N. W. 889).

36. Martin *v.* New York, 34 Misc. (N. Y.) 582, 70 N. Y. Suppl. 379 [*affirmed* in 68 N. Y. App. Div. 78, 74 N. Y. Suppl. 92], doorman.

37. Powell *v.* New York, 65 N. Y. App. Div. 421, 72 N. Y. Suppl. 990; Norris *v.* Brooklyn, 19 Hun (N. Y.) 296; O'Connor *v.* New York, 11 Hun (N. Y.) 176; McCullough *v.* New York, 51 How. Pr. (N. Y.) 486.

Civil service rules.— Powell *v.* New York, 65 N. Y. App. Div. 421, 72 N. Y. Suppl. 990.

38. Hyde *v.* Brooklyn, 21 How. Pr. (N. Y.) 339. See also Kip *v.* Buffalo, 7 N. Y. Suppl. 685 [*affirmed* in 123 N. Y. 152, 25 N. E. 165].

39. Bell *v.* Sullivan, 158 Ind. 199, 63 N. E. 209.

40. Daniels *v.* Des Moines, 108 Iowa 484, 79 N. W. 269.

41. Devoy *v.* New York, 39 Barb. (N. Y.) 169 [*affirmed* in 36 N. Y. 446].

tractor holding the contract shall receive not less than "the prevailing rate" of wages,[42] and such statutes are held constitutional,[43] but not applicable to a person holding a position by appointment and receiving a fixed salary.[44]

(II) *Increase or Diminution.* Unless such change is prohibited by the constitution, statutes, or charter provisions,[45] the power vested in a municipal board or officer to fix the compensation of a municipal agent or employee generally includes the power to increase,[46] or reduce,[47] the salary or wages of such agents or employees. Where the common council has power to reduce salaries its motives

42. McAvoy *v.* New York, 52 N. Y. App. Div. 485, 65 N. Y. Suppl. 274 [*affirmed* in 166 N. Y. 588, 59 N. E. 1125]; People *v.* Waring, 52 N. Y. App. Div. 36, 64 N. Y. Suppl. 865 (holding that such a statute is not violated by a city's water commissioners employing laborers at a certain rate per hour which for eight hours does not equal the sum paid laborers by the day in such locality, where such rate per hour is the prevailing wage rate for common laborers in such city); McCunney *v.* New York, 40 N. Y. App. Div. 482, 58 N. Y. Suppl. 138 (holding that a person hired as a painter and doing work as a driver only cannot demand a painter's wages therefor); Walsh *v.* Albany, 32 N. Y. App. Div. 128, 52 N. Y. Suppl. 936; McMahon *v.* New York, 22 N. Y. App. Div. 113, 47 N. Y. Suppl. 1018. And see the statutes of the several states.

Waiver.— Continuing without protest to accept the wages at the former rate for several years after the passage of the statute waives any claim to recover the increase for that period. Ryan *v.* New York, 177 N. Y. 271, 69 N. E. 599 [*affirming* 78 N. Y. App. Div. 134, 79 N. Y. Suppl. 599]. But where an employee of a city, entitled by statute to "prevailing wages," is employed for a smaller sum, the fact that for a time he signs weekly receipts for the agreed amounts, in ignorance of the fact that they purport to be receipts in full, and with no intention of waiving his statutory right, does not debar him from subsequently enforcing his claim. McMahon *v.* New York, 22 N. Y. App. Div. 113, 47 N. Y. Suppl. 1018.

Repeal of statute see Rock *v.* New York, 63 N. Y. Suppl. 825.

Vested rights.—Services rendered under the statute gives the employees a vested right to such wages down to the date of the repeal of the law, which may be recovered by an action brought after the repeal. McCann *v.* New York, 52 N. Y. App. Div. 358, 65 N. Y. Suppl. 308 [*affirmed* in 166 N. Y. 587, 59 N. E. 1125]. *Contra*, Bock *v.* New York, 31 Misc. (N. Y.) 55, 64 N. Y. Suppl. 777; Rock *v.* New York, 63 N. Y. Suppl. 825.

43. Ryan *v.* New York, 177 N. Y. 271, 69 N. E. 599 [*affirming* 78 N. Y. App. Div. 134, 79 N. Y. Suppl. 599].

44. Bock *v.* New York, 31 Misc. (N. Y.) 55, 64 N. Y. Suppl. 777; Rock *v.* New York, 63 N. Y. Suppl. 825.

45. Black *v.* Board of Education, 92 N. Y. Suppl. 118.

46. Devoy *v.* New York, 39 Barb. (N. Y.) 169 [*affirmed* in 36 N. Y. 449]; People *v.* Corwin, 8 Misc. (N. Y.) 593, 29 N. Y. Suppl. 1077.

Limitations.— Where a charter authorizes heads of departments to fix the salary of clerks, and provides that the board of estimate shall fix a certain amount for each department for the ensuing year, the head of a department may raise the salary of a clerk at any time, so long as he keeps the expenses of his office within the amount allowed by the board of estimate. People *v.* Corwin, 8 Misc. (N. Y.) 593, 29 N. Y. Suppl. 1077.

47. Morris *v.* New York, 99 N. Y. 645, 1 N. E. 671; Riley *v.* New York, 96 N. Y. 331 [*affirming* 49 N. Y. Super. Ct. 537]; Gillespie *v.* New York, 6 Daly (N. Y.) 286; Black *v.* Board of Education, 92 N. Y. Suppl. 118. *Compare* Sullivan *v.* New York, 48 How. Pr. (N. Y.) 238.

What constitutes reduction to day wages. —A resolution of the common council reducing the salaries of certain clerks from two hundred and fifty dollars a month to four dollars a day does not reduce such salaries to day's wages, but leaves them on a salary measured by four dollars a day. People *v.* Sutton, 3 N. Y. App. Div. 440, 39 N. Y. Suppl. 492.

Authority.— A reduction in salary, to be valid as against the employee, must be the act of an officer or board duly authorized to reduce the salary. Hartmann *v.* New York, 44 Misc. (N. Y.) 272, 89 N. Y. Suppl. 912.

Discontinuance of full day's pay for half a day's work.— An ordinance of a city providing for the employment of workmen at *per diem* wages will not prevent the city or any of its departments from discontinuing the payment of a full day's wages for a half day's work. Wagoner *v.* Philadelphia, 215 Pa. St. 379, 64 Atl. 557.

Waiver of right to object.— See Grieb *v.* Syracuse, 94 N. Y. App. Div. 133, 87 N. Y. Suppl. 1083; Riley *v.* New York, 96 N. Y. 331 [*affirming* 49 N. Y. Super. Ct. 537]; Wagoner *v.* Philadelphia, 215 Pa. St. 379, 64 Atl. 557.

The veterans' law does not prevent a reduction of the salary of a veteran employed in the public service, when the reduction is reasonable, and does not amount to a removal or forcing of a resignation. Black *v.* Board of Education, 92 N. Y. Suppl. 118. See also People *v.* Coler, 38 N. Y. App. Div. 615, 56 N. Y. Suppl. 943.

Civil service rules.— The fact that plaintiff could not be removed without cause does not prevent a reasonable reduction or regulation

in making the reduction cannot be inquired into.[48] The rate fixed by authority of the council cannot be changed by subordinate boards or officers,[49] unless a reduction is required to keep the expenses within the limits of the appropriation.[50]

(III) *Overtime and Work Outside Duties.* Except where there is a special agreement therefor with one authorized to make such agreement, or a statute fixing a maximum number of hours as constituting a day's labor and provision made for pay for overtime,[51] no extra pay can be recovered for work outside of regular hours.[52] So, subject to the same exceptions, a municipal employee cannot recover extra pay for services outside of his duties.[53]

c. **Effect of Absence.** Where leave of absence is granted an employee on account of sickness, his right to salary does not cease until some action is taken by the proper authorities.[54] So where an employee is absent because of sickness but is carried on the pay rolls of the municipality, it will be deemed to have assented to his absence so that his wages for such time are recoverable.[55] So where the

of his salary. Black *v.* Board of Education, 92 N. Y. Suppl. 118. A reduction of the salary of an attendance officer employed by the school board of Greater New York from one thousand one hundred dollars to one thousand and fifty dollars per annum is not such a reduction that an opportunity for explanation must be given, or grounds therefor filed with the municipal civil service. Black *v.* Board of Education, *supra.*

48. People *v.* Sutton, 3 N. Y. App. Div. 440, 39 N. Y. Suppl. 492.

49. Hanauer *v.* Utica, 75 Hun (N. Y.) 524, 27 N. Y. Suppl. 663; Sullivan *v.* New York, 48 How. Pr. (N. Y.) 238.

50. Bannister *v.* New York, 40 Misc. (N. Y.) 408, 82 N. Y. Suppl. 244 [*affirmed* in 96 N. Y. App. Div. 625, 88 N. Y. Suppl. 1091]; Driscoll *v.* New York, 38 Misc. (N. Y.) 453, 77 N. Y. Suppl. 997 [*affirmed* in 78 N. Y. App. Div. 52, 79 N. Y. Suppl. 479].

51. O'Boyle *v.* Detroit, 131 Mich. 15, 90 N. W. 669; McCarthy *v.* New York, 96 N. Y. 1, 48 Am. Rep. 601; McNulty *v.* New York, 60 N. Y. App. Div. 250, 70 N. Y. Suppl. 133 [*affirmed* in 168 N. Y. 117, 61 N. E. 111]; McAvoy *v.* New York, 52 N. Y. App. Div. 485, 65 N. Y. Suppl. 274 [*affirmed* in 166 N. Y. 588, 59 N. E. 1125]; McGraw *v.* Gloversville, 32 N. Y. App. Div. 176, 52 N. Y. Suppl. 916; Vogt *v.* Milwaukee, 99 Wis. 258, 74 N. W. 789.

Where the statute provides that for certain classes of laborers eight hours shall constitute a day's work, but overwork for extra compensation by agreement is permitted, a laborer who entered into the employ of a municipal department at an agreed price per day, knowing that the custom of the department and the nature of the work required ten hours work each day, and who worked ten hours each day for two years, receiving his wages without claiming extra compensation, could not afterward claim extra compensation during that time. McCarthy *v.* New York, 96 N. Y. 1, 48 Am. Rep. 601.

Sunday work.— Tyrrell *v.* New York, 159 N. Y. 239, 53 N. E. 1111 [*reversing* 34 N. Y. App. Div. 334, 54 N. Y. Suppl. 372].

52. Grady *v.* New York, 182 N. Y. 18, 74 N. E. 488 [*reversing* 100 N. Y. App. Div. 515, 91 N. Y. Suppl. 1096]; Tyrrell *v.* New York, 159 N. Y. 239, 53 N. E. 1111; Morgan *v.* New York, 105 N. Y. App. Div. 425, 94 N. Y. Suppl. 175; People *v.* Corwin, 8 Misc. (N. Y.) 593, 29 N. Y. Suppl. 1077; Vogt *v.* Milwaukee, 99 Wis. 258, 74 N. W. 789. See also Beard *v.* Sedgwick County, 63 Kan. 348, 65 Pac. 638.

What constitutes pay for overtime.—Where the head of a department determines that certain copying clerks shall be paid by the folio instead of the salary theretofore received by them, and, by working out of office hours, they earn more than their salaries, such additional amount is an increase of salary, and not for extra service. People *v.* Corwin, 8 Misc. (N. Y.) 593, 29 N. Y. Suppl. 1077.

53. Bruns *v.* New York, 6 Daly (N. Y.) 156; Moffat *v.* Brooklyn, 1 N. Y. Suppl. 781. See also Perry *v.* Superior City, 26 Wis. 64. *Compare* Strassner *v.* New York, 6 N. Y. App. Div. 370, 39 N. Y. Suppl. 669, compensation of stenographer for board of coroners for transcript of testimony furnished district attorney.

Notary fees.— Municipal clerks holding a commission and rendering services as notaries public are not entitled to demand fees from the municipality for voluntary notarial services. Merzbach *v.* New York, 163 N. Y. 16, 57 N. E. 96; Morgan *v.* New York, 105 N. Y. App. Div. 425, 94 N. Y. Suppl. 175; Hughes *v.* New York, 84 N. Y. App. Div. 347, 82 N. Y. Suppl. 905 [*affirmed* in 176 N. Y. 585, 68 N. E. 1118]; Benjamin *v.* New York, 77 N. Y. App. Div. 62, 78 N. Y. Suppl. 1067; Spencer *v.* New York, 42 Misc. (N. Y.) 284, 86 N. Y. Suppl. 573.

54. O'Leary *v.* New York Bd. of Education, 93 N. Y. 1, 45 Am. Rep. 156 [*reversing* 9 Daly 161]; Devlin *v.* New York, 41 Hun (N. Y.) 281, holding that mere private memorandum purporting to cut off an employee's pay, and which memorandum was not communicated to the employee, did not preclude his right to recover.

55. O'Hara *v.* New York, 33 Misc. (N. Y.) 53, 66 N. Y. Suppl. 909. But see Conlin *v.* New York Bd. of Education, 43 Misc. (N. Y.) 125, 88 N. Y. Suppl. 210.

attendance of an employee at a certain place each day is not necessary to the faithful discharge of his duties, his failure to report every day at such office is no defense to an action for his salary.[56] But where leave of absence without pay is granted, although on the application of the employee induced by a representation that refusal to apply for leave might result in his discharge, pay for the period of absence is not recoverable.[57]

d. Discharge or Suspension. Where an employee is properly discharged his right to wages ceases;[58] and it is immaterial that the notice served on him is that he is "suspended,"[59] or "relieved from duty."[60] Where an employee is improperly discharged and thereafter obtains reinstatement by order of court, he may recover his wages while illegally removed;[61] but no recovery can be had where during such time a person appointed in his place performed the work and was paid therefor by the municipality.[62] So an employee unlawfully dismissed and prevented from rendering any service, who has made no complaint nor attempted to secure reinstatement, but has apparently acquiesced in the dismissal, cannot recover of the municipality compensation during the period in which he performed no service.[63] Failure to actually render services, where the employee is ready and willing to do so, during a time when the employment has not been terminated but no work is furnished, is no defense to an action for wages;[64] but where an employee has no right to continuous employment because of lack of funds, and is laid off temporarily or put on short time to keep the expenses within the appropriation or because there is no work for him to do, he cannot recover for such

56. Whitney *v.* New York, 39 N. Y. Super. Ct. 106.

57. Sheehan *v.* New York, 21 Misc. (N. Y.) 600, 48 N. Y. Suppl. 662.

58. Chicago *v.* Campbell, 118 Ill. App. 129; Ulrich *v.* New York, 33 Misc. (N. Y.) 508, 67 N. Y. Suppl. 716; Sheehan *v.* New York, 21 Misc. (N. Y.) 600, 48 N. Y. Suppl. 662. See also Barrett *v.* New Orleans, 32 La. Ann. 101; Driscoll *v.* New York, 38 Misc. (N. Y.) 453, 77 N. Y. Suppl. 997 [*affirmed* in 78 N. Y. App. Div. 52, 79 N. Y. Suppl. 479].

59. McNamara *v.* New York, 152 N. Y. 228, 46 N. E. 507 [*affirming* 32 N. Y. Suppl. 1145]; Lethbridge *v.* New York, 133 N. Y. 232, 30 N. E. 975; Francisco *v.* New York, 24 N. Y. App. Div. 22, 48 N. Y. Suppl. 911; Meyers *v.* New York, 69 Hun (N. Y.) 291, 23 N. Y. Suppl. 484; Donnell *v.* New York, 68 Hun (N. Y.) 55, 22 N. Y. Suppl. 661; Beach *v.* New York, 10 N. Y. Suppl. 793. See also Sheehan *v.* New York, 21 Misc. (N. Y.) 600, 48 N. Y. Suppl. 662. But see Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19; Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854; Kelly *v.* New York, 70 Hun (N. Y.) 208, 24 N. Y. Suppl. 1; Fox *v.* New York, 11 Misc. (N. Y.) 304, 32 N. Y. Suppl. 257 [*affirmed* in 152 N. Y. 637, 46 N. E. 1147], holding that the question whether the term "suspend" is equivalent to "discharge" was one for the jury.

60. Cook *v.* New York, 9 Misc. (N. Y.) 338, 30 N. Y. Suppl. 404 [*affirmed* in 150 N. Y. 578, 44 N. E. 1123].

61. McEvoy *v.* New York, 56 N. Y. App. Div. 222, 67 N. Y. Suppl. 593; O'Hara *v.* New York, 46 N. Y. App. Div. 518, 62 N. Y. Suppl. 146 [*affirmed* in 167 N. Y. 567, 60 N. E. 1117]; Holt *v.* New York, 35 Misc. (N. Y.) 642, 72 N. Y. Suppl. 201 (holding that where a city bath attendant was illegally discharged in July, he could only recover for services which he was willing to perform until the first of October, the close of the bathing season); People *v.* Dalton, 72 N. Y. Suppl. 198; Sullivan *v.* New York, 15 N. Y. Suppl. 168 [*following* Higgins *v.* New York, 14 N. Y. Suppl. 554]. See also People *v.* Cram, 28 Misc. (N. Y.) 321, 59 N. Y. Suppl. 922.

But costs and counsel fees in the mandamus proceedings are not recoverable. O'Hara *v.* New York, 28 Misc. (N. Y.) 258, 59 N. Y. Suppl. 36 [*affirmed* in 46 N. Y. App. Div. 518, 62 N. Y. Suppl. 146].

62. Higgins *v.* New York, 131 N. Y. 128, 30 N. E. 44; Meyers *v.* New York, 69 Hun (N. Y.) 291, 23 N. Y. Suppl. 484.

But where the removal is declared void and set aside by the appellate division, and the municipality has knowledge thereof, the employee may recover his wages from such notice until reinstated, although the municipality appealed to the court of appeals, which affirmed the decision, and in the meantime paid the wages to another person employed in his place. Jones *v.* Buffalo, 178 N. Y. 45, 70 N. E. 99 [*affirming* 79 N. Y. App. Div. 328, 79 N. Y. Suppl. 754].

63. Byrnes *v.* St. Paul, 78 Minn. 205, 80 N. W. 959, 79 Am. St. Rep. 384; Douglas *v.* Brooklyn Bd. of Education, 21 N. Y. App. Div. 209, 47 N. Y. Suppl. 435; Sullivan *v.* New York, 33 Misc. (N. Y.) 314, 67 N. Y. Suppl. 599.

64. Graham *v.* New York, 167 N. Y. 85, 60 N. E. 331 [*reversing* 55 N. Y. App. Div. 627, 67 N. Y. Suppl. 1133]. But *compare* White *v.* Alameda, 124 Cal. 95, 56 Pac. 795.

time, especially where he consented to the laying off.[65] An employee engaged by a commission for no fixed time is not entitled, on the revival of the commission, to pay during the period when there were no commissioners in office and consequently no duties to be performed.[66]

e. Time of Payment. Statutes in some jurisdictions require weekly payments of wages.[67]

f. Actions to Recover.[68] Actions to recover wages or compensation for services are largely governed by the general rules relating to actions by employees and agents in general.[69] An appropriation of funds by the common council to pay the expenses of the department to which the salary or wages is chargeable has been held not a condition precedent.[70] However, a particular city officer is, in no event, liable to pay a sum for services where he has no funds in his hands applicable to such purpose and not otherwise appropriated.[71] In some jurisdictions, the council need not first pass an ordinance for the payment of employees before the city auditor can be required to issue a warrant for their payment.[72] Under other statutes, an employee cannot recover his salary if the statutory certificate that the money necessary was in the municipal treasury was not issued by the clerk before making the contract.[73]

VIII. PROPERTY.

A. In General — 1. Capacity to Acquire and Hold. Among the common-law powers of municipal corporations are the powers to grant and receive, and to purchase and hold property, real and personal, for themselves and successors.[74]

65. Bannister *v.* New York, 40 Misc. (N. Y.) 408, 82 N. Y. Suppl. 244 [*affirmed* in 96 N. Y. App. Div. 625, 88 N. Y. Suppl. 1091]; Driscoll *v.* New York, 38 Misc. (N. Y.) 453, 77 N. Y. Suppl. 997 [*affirmed* in 78 N. Y. App. Div. 52, 79 N. Y. Suppl. 479].

66. Matter of Young, 44 Misc. (N. Y.) 521, 90 N. Y. Suppl. 74.

67. See the statutes of the several states.

Construction of statutes.— A person receiving an annual salary, even if an "employee" of the city, is not an employee earning "wages" within a statute providing that every municipal corporation in the state shall pay weekly each and every employee the wages earned by such employee to within six days of the date of such payment. People *v.* Myers, 11 N. Y. Suppl. 217, 25 Abb. N. Cas. 368. Such statute does not apply to a clerk in the mayor's office, the secretary and treasurer of the park commissioners, a member of the fire department, a schoolteacher, or a patrolman on the police force. People *v.* Buffalo, 57 Hun (N. Y.) 577, 11 N. Y. Suppl. 314.

68. See also Mandamus, 26 Cyc. 266 *et seq.*

69. See Master and Servant, 26 Cyc. 1052; Principal and Agent.

Evidence admissible see Hartman *v.* New York, 23 Hun (N. Y.) 586. The evidence must be within the issues raised by the pleadings. Brennan *v.* New York, 62 N. Y. 365.

Splitting action.— A cause of action for back wages cannot be split up and a recovery in one action therefor is a bar to another. Hartmann *v.* New York, 44 Misc. (N. Y.) 272, 89 N. Y. Suppl. 912.

Where there are conflicting claimants all must be impleaded. Fagan *v.* New York, 84 N. Y. 348; Kennedy *v.* New York, 79 N. Y. 361.

What is reasonable compensation must be determined from the facts of the particular case. *In re* Public Parks Dept., 11 N. Y. Suppl. 176.

Defenses.— It is no defense that no compensation for the services had previously been specifically provided for (Ellsworth *v.* Rossiter, 46 Kan. 237, 26 Pac. 674), nor that there were irregularities in the appointment or employment where the services have been fully performed and accepted by the municipality (Ellsworth *v.* Rossiter, *supra*). So the regularity of the meeting of the council at which a contract for services was made cannot be questioned where the services have been completed and accepted by the municipality. Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587.

70. Kip *v.* Buffalo, 123 N. Y. 152, 25 N. E. 165 [*affirming* 7 N. Y. Suppl. 685]. *Compare* Spencer *v.* New York, 42 Misc. (N. Y.) 284, 86 N. Y. Suppl. 573.

71. Huff *v.* Knapp, Seld. (N. Y.) 65.

72. State *v.* Cleveland, 10 Ohio Dec. (Reprint) 571, 22 Cinc. L. Bul. 113.

73. Drott *v.* Riverside, 4 Ohio Cir. Ct. 312, 2 Ohio Cir. Dec. 565.

74. *Kentucky.*— Louisville *v.* Louisville University, 15 B. Mon. 642, holding that a city, although itself a civil institution created to be employed to some extent as an instrument of the government, is not the government itself, but a distinct, although a subordinate, being, capable of holding property for itself or its corporators; and if the city should be abolished the state would not thereby become a beneficial proprietor of its property.

These powers are inherent, or, as phrased by Blackstone, "necessarily and inseparably incident to every corporation";[75] but usually the charters of municipal corporations or the general statutes in express terms give them the power to hold, purchase, and convey such real and personal property as their purposes may require.[76] The English statutes of mortmain, if applicable to municipal corporations at all,[77] are not in force in the United States.[78] There is, however, no general power to acquire and hold real estate; but such power is confined to the purposes and necessities of the municipality.[79] Within these limits the power may be exercised with freedom, and such title taken as is appropriate to the exercise of the power;[80] and the nature of the tenure will depend upon the purpose for which the property is acquired and used.[81]

2. Location of Property.[82] As a rule a municipal corporation has no power to purchase and hold land for a park, highway, or other municipal purpose beyond its territorial limits, unless the power has been specially conferred upon it by the legislature; and such power is not conferred by a general grant of power to purchase, hold, and convey such property, real and personal, as may be necessary for its public uses and purposes.[83] The legislature, however, may confer such power, either in express terms or by necessary implication;[84] and there are cases

Louisiana.— New Orleans First Municipality *v.* McDonough, 2 Rob. 244.

Massachusetts.— Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155; Windham *v.* Portland, 4 Mass. 384.

New Jersey.— Green *v.* Cape May, 41 N. J. L. 45.

New York.— *In re* Crane, 159 N. Y. 557, 54 N. E. 1089; Ketchum *v.* Buffalo, 14 N. Y. 356.

Virginia.— Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

United States.— Perin *v.* Carey, 24 How. 465, 16 L. ed. 701; McDonogh *v.* Murdoch, 15 How. 367, 14 L. ed. 732; Avery *v.* U. S., 104 Fed. 711, 44 C. C. A. 161 [*affirming* 98 Fed. 512]; Budd *v.* Budd, 59 Fed. 735; Root *v.* Shields, 21 Fed. Cas. No. 12,038, Woolw. 340.

See 36 Cent. Dig. tit. "Municipal Corporations," § 611.

75. 1 Blackstone Comm. 475.

76. See Chambers *v.* St. Louis, 29 Mo. 543, 574; and other cases hereinafter cited.

77. In Canada municipal corporations were held to be within the English statutes of mortmain. Brown *v.* McNab, 20 Grant Ch. 179.

78. Chambers *v.* St. Louis, 29 Mo. 543; State *v.* Toledo, 23 Ohio Cir. Ct. 327; Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701. And see CHARITIES, 6 Cyc. 927.

79. Sherlock *v.* Winnetka, 59 Ill. 389, 68 Ill. 530; Jackson *v.* Hartwell, 8 Johns (N. Y.) 422; Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340. See *infra*, VIII, B.

80. Davies *v.* New York, 83 N. Y. 207; Wade *v.* Newbern, 77 N. C. 460.

81. Alter *v.* Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737.

82. Extraterritorial improvements see *infra*, XIII, A, 2, l.

Extraterritorial police power and regulations see *infra*, XI, A, 5.

83. *Georgia.*— Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Loyd *v.* Columbus, 90 Ga. 20, 15 S. E. 818.

Michigan.— Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180, park. See also Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

New York.— Riley *v.* Rochester, 9 N. Y. 64 [*reversing* 13 Barb. 321], holding that a municipal corporation empowered "to purchase, hold and convey any estate, real or personal, for the public use of said corporation," cannot take a conveyance of lands beyond its boundaries for a public highway. See also North Hempstead *v.* Hempstead, 2 Wend. 109.

Virginia.— Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174, 113 Am. St. Rep. 1056, 2 L. R. A. N. S. 910; Duncan *v.* Lynchburg, (1900) 34 S. E. 964, 48 L. R. A. 331.

Wisconsin.— Becker *v.* La Crosse, 99 Wis. 414, 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829.

United States.— Quinby *v.* Consumers' Gas Trust Co., 140 Fed. 362, holding that a charter granted to an Indiana city at a time when natural gas was not known in the state, giving the power to construct gas works, could not be construed as giving it the power to drill or purchase gas wells at a distance from the city, and to construct or purchase pumping stations and pipe lines to bring the natural gas within its limits for consumption and sale to its inhabitants.

Beyond limits of state.— A city has no power to accept a privilege granted to it by the legislature of another state than that of its creation, of constructing a highway over territory belonging to such other state, subject to liability for damages caused by the improper construction or want of repair of such highway, and therefore it cannot be held liable for an injury caused by defects in a highway so constructed, occurring outside the state. Becker *v.* La Crosse, 99 Wis. 414, 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829.

Express prohibition see Girard *v.* New Orleans, 2 La. Ann. 897.

84. *Alabama.*— Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758, waterworks.

in which, without any special grant of such power, it has been implied as necessary in order to carry out powers granted.[85] It has also been held that a city may, without special authority from the legislature, take a devise of land beyond its limits for a public park,[86] and that it may do so in trust for a charitable use,[87]

Connecticut.— West Hartford *v.* Hartford Water Com'rs, 44 Conn. 360, waterworks.

Georgia.— Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

Illinois.— Champaign *v.* Harmon, 98 Ill. 491.

Indiana.— Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618 (drains); Begein *v.* Anderson, 28 Ind. 79 (cemetery).

Kansas.— State *v.* Franklin, 40 Kan. 410, 19 Pac. 801, hospitals and waterworks.

Massachusetts.— Somerville *v.* Waltham, 170 Mass. 160, 48 N. E. 1092 (holding that a city authorized by statute to acquire land for gravel and clay pits had power to acquire land for such purposes beyond its limits and within the limits of another municipality, such power being recognized by the statute as existing); Martin *v.* Gleason, 139 Mass. 183, 29 N. E. 664 (waterworks).

Michigan.— Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180, park.

New Jersey.— Butler *v.* Montclair, 67 N. J. L. 426, 51 Atl. 494, sewer outlet.

New York.— Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275 (land for opening ditches to carry off drainage); *In re* New York, 99 N. Y. 569, 2 N. E. 642 (holding also that the fact that a statute authorized a city to incur a debt for the purchase of lands outside the municipal boundaries did not bring it within the constitutional prohibition against incurring a debt except for "city purposes"; such purpose not being limited to a work or expenditure within the city); New York *v.* Bailey, 2 Den. 433 (waterworks).

Ohio.— Lorain *v.* Rolling, 24 Ohio Cir. Ct. 82 [*reversing* 13 Ohio S. & C. Pl. Dec. 87], pest-house.

Pennsylvania.— Allentown *v.* Wagner, 27 Pa. Super. Ct. 485 [*affirmed* in 214 Pa. St. 210, 63 Atl. 697].

Tennessee.— Newman *v.* Ashe, 9 Baxt. 380, holding that while it is the better rule to construe strictly the power of a municipal corporation, still it was within the corporate powers of the city of Knoxville to purchase and own lands outside of the city limits for water reservoir purposes, as the statute expressly gave the city power to construct waterworks and gave the mayor and aldermen authority to protect from injury by adequate penalties the pipes, buildings, etc., appertaining to said waterworks, "whether within or without the limits of said corporation."

85. *Georgia.*—Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

Idaho.— Wilson *v.* Boise City, 6 Ida. 391, 55 Pac. 887.

Illinois.— Cochran *v.* Park Ridge, 138 Ill. 295, 27 N. E. 939. And see Champaign *v.* Harmon, 98 Ill. 491.

Michigan.— Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

Missouri.— See Chambers *v.* St. Louis, 29 Mo. 543.

Wisconsin.— Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

United States.— Minnesota, etc., Land, etc., Co. *v.* Billings, 111 Fed. 972, 50 C. C. A. 70.

Illustrations.— Thus it has been held that a municipal corporation authorized to construct and maintain sewers or drains may, when necessary, procure an outlet for a sewer or drain beyond its corporate limits and acquire land by purchase or otherwise for such purpose. McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794; Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133 [*criticizing* Loyd *v.* Columbus, 90 Ga. 20, 15 S. E. 818]; Wilson *v.* Boise City, 6 Ida. 391, 55 Pac. 887; Callon *v.* Jacksonville, 147 Ill. 113, 35 N. E. 223; Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Cochran *v.* Park Ridge, 138 Ill. 295, 27 N. E. 939; Shreve *v.* Cicero, 129 Ill. 226, 21 N. E. 815; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601; Minnesota, etc., Land, etc., Co. *v.* Billings, 111 Fed. 972, 50 C. C. A. 700. But see South Orange *v.* Whittingham, 58 N. J. L. 655, 35 Atl. 407. See also *infra*, XIII, A, 2, l. It has also been held that under the general power given a city by statute to hold, purchase, and convey such real estate as its purposes shall require, it may, when necessary, acquire land outside its limits for wharf purposes, although its charter, reciting that it may purchase, receive, and hold real estate outside the city for certain purposes, does not mention wharf purposes. Hafner *v.* St. Louis, 161 Mo. 34, 61 S. W. 632. And see Champaign *v.* Harmon, 98 Ill. 491, location of cemeteries, pest-houses, and other purposes connected with the sanitary condition of the municipality. See also *infra*, XI, A, 5.

Stone quarries, gravel pits, etc.— In Wisconsin it was held that a city having express authority to grade and pave streets and to purchase and hold all real estate necessary or convenient for its use, had, by implication therefrom, authority to use all reasonable methods of executing the same, including that of purchasing a stone quarry either within or without its corporate limits for the purpose of obtaining therefrom raw material from which to manufacture crushed rock. Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996. The contrary, however, has been held in Virginia. Donahle *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174, 113 Am. St. Rep. 1056, 2 L. R. A. N. S. 910; Duncan *v.* Lynchburg, (Va. 1900) 34 S. E. 964, 48 L. R. A. 331.

86. Lester *v.* Jackson, 69 Miss. 887, 11 So. 114.

87. Chambers *v.* St. Louis, 29 Mo. 543. See also McDonogh *v.* Murdoch, 15 How. (U. S.) 367, 413, 14 L. ed. 732.

although it may not, in the absence of such special authority, be able to exercise any police power over it.

3. TITLE.[88] Among the muniments of title in favor of municipal corporations are deeds of conveyance, legislative grants in charters, or other acts, treaties, etc.;[89] and a municipal corporation may, as will be seen, acquire title by will, by dedication, by eminent domain, and by prescription or adverse possession.[90] A legislative grant to a municipal corporation is to be construed liberally in favor of the grantee.[91] Lands acquired by treaty, if municipal property under foreign rule, remain municipal after acquisition, unless otherwise provided by the treaty.[92] Whether a municipal corporation acquires title under a deed of conveyance or grant, and the nature of the title acquired, are questions of construction.[93] If the words obviously intend an investiture of title for the benefit of the municipality, then the title will be in the corporation;[94] but it seems that this will not result

88. **Adverse possession as against municipal corporation** see ADVERSE POSSESSION, 1 Cyc. 1117.

89. See cases in the notes following. And see *infra*, VIII, C.

Pueblo lands in California see Hart *v.* Burnett, 15 Cal. 530; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

90. See *infra*, VIII, C.

91. Hyman *v.* Read, 13 Cal. 444.

Title of San Francisco under "Water Lot Act" of 1851.— The California act of March, 1851, granting to San Francisco the use and occupation of all lots of land situated within certain boundaries, according to the survey of the city of San Francisco, and the map or plat on record in the office of the county of San Francisco and designated as beach and water lots, and describing the boundaries within which all the lots were situated, was held to include slips within such boundaries; that is, water lots surrounded on three sides by wharves opening out into the bay, and not divided into "lots," technically so called. Hyman *v.* Read, 13 Cal. 444.

Title of Toledo, Ohio, to canal lands.— While the Ohio act of 1868 gave to the city of Toledo an easement in that part of the Miami canal known as the Manhattan branch, for street, water, and sewerage purposes, it was the act of 1871 which gave to the city the full title, not only in the bed of that part of the canal, but also in all the land held by the state for canal purposes within the limits of the Manhattan branch of the canal, and the city had thereupon the power to give a full and complete title to part of such lands to a purchaser thereof. Paige *v.* Cherry, 17 Ohio Cir. Ct. 579, 9 Ohio Cir. Dec. 364.

92. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

93. Newmarket *v.* Smart, 45 N. H. 87; Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320; U. S. *v.* Case Library, 98 Fed. 512 [*affirmed* in 104 Fed. 711, 44 C. C. A. 161].

Title conveyed.— A deed of land to a city, containing apt words to convey the fee, is not reduced to the grant of a mere easement by a recital that the land is conveyed to the city as and for a public street, or by the terms of an ordinance accepting and confirming as a public street "the dedication of the land specified" in the deed; such ordinance being required by the statute for the purpose of constituting the land a public street for the care and maintenance of which the city should be responsible. U. S. *v.* Case Library, 98 Fed. 512 [*affirmed* in 104 Fed. 711, 44 C. C. A. 161]. A declaration in a deed of land to a city that the land is conveyed "as and for a public street of said city" does not make the title conveyed a base or qualified fee, or a fee on condition subsequent, so as to make it revert upon the termination of the use of the land for street purposes. U. S. *v.* Case Library, *supra*. See also Mahoning County *v.* Young, 59 Fed. 96, 8 C. C. A. 27 [*reversing* 51 Fed. 585].

Reservation by state.— Where a state in conveying land to a municipal corporation reserves a portion for a "pasture," the title remains in the state. Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355.

In the New Jersey act of April 4, 1872 (Pub. Laws (1872), p. 1356), granting to Jersey City certain lands of the state under the tide-waters of Communipaw bay, with the duty to improve the same for a basin, and with power to erect wharves, etc., the operative words of the grant, "the state does hereby grant," etc., import a grant *in præsenti*, and confer an immediate estate, and as to any conditions subsequent annexed to the grant, no one but the state or its representative can take advantage of a forfeiture for failure of the city to perform the same. Easton, etc., R. Co. *v.* Central R. Co., 52 N. J. L. 267, 19 Atl. 722.

Free public library.— Where real estate was conveyed to a city as a gift for a free public library, with the condition that the city would raise the remainder of an amount necessary to erect buildings on the same, and such buildings were erected with money raised by issuance of bonds under 2 N. J. Gen. St. p. 1950, and its supplement of 1895 (2 N. J. Gen. St. p. 1953), the title to the property should stand in the name of the city, with the use and control in the board of trustees of the free public library, and a resolution directing title to be conveyed to said board is illegal. Keuffel *v.* Hoboken, 71 N. J. L. 518, 59 Atl. 20.

94. Southampton *v.* Mecox Bay Oyster Co., 116 N. Y. 1, 22 N. E. 387.

from the mere use of words describing the grantees or vendees as municipal officers.[95] The fact that a city can only acquire and hold land for a public use does not prevent it from acquiring, as between it and its vendor or grantor, the absolute title to land which it is about to use for a public purpose, as for a street, so that, when such use becomes impossible, the city may alienate the land for its full value or use it for other purposes;[96] and the limitation upon the city's powers does not require that a deed of conveyance to it shall receive a more restricted construction as to the title conveyed than a deed between private parties.[97] In acquiring lands under the power of eminent domain the municipality obtains either a fee or an easement according to the provisions of the statute.[98] Where a municipal corporation acquires real estate upon a condition expressed in the deed, that within a certain time it shall erect thereon a certain building for municipal purposes, and fails to comply with the condition by not erecting the structure, it must permit the land to return to the grantor, like any other grantee of land on condition.[99]

4. Joint Tenancy and Tenancy in Common. While a municipal corporation cannot hold property as joint tenant,[1] it has been held, in the absence of constitutional or statutory restrictions, that it may hold as a tenant in common.[2] Under the constitutional or statutory provisions in some states, however, a municipal corporation is prohibited from holding property in common, either with another corporation or with an individual.[3]

5. Possession.[4] Title gives a municipality *prima facie* right of posses-

Under a grant "to the inhabitants" of a municipality "to be held by them as a body politic and corporate, and to their successors forever," the title vests in the municipality as a corporation. Newmarket *v.* Smart, 45 N. H. 87; Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

95. San Francisco *v.* Fowler, 19 Cal. 11.

96. U. S. *v.* Case Library, 98 Fed. 512 [*affirmed* in 104 Fed. 711, 44 C. C. A. 161]. A city authorized by statute to purchase or otherwise acquire land for a public park may purchase or acquire the fee of the land. Holt *v.* Somerville, 127 Mass. 408.

97. U. S. *v.* Case Library, 98 Fed. 512 [*affirmed* in 104 Fed. 711, 44 C. C. A. 161].

98. Avery *v.* United States, 104 Fed. 711, 44 C. C. A. 161. A municipal corporation, being authorized by the legislature, may, under the power of eminent domain, acquire the title in fee simple to lands of private persons required for public uses on the payment of a just compensation; and when such lands cease to be used for the purpose for which they were taken, the representatives of the original owners cannot claim any reversionary interest therein. Heyward *v.* New York, 7 N. Y. 314.

99. Clarke *v.* Brookfield, 81 Mo. 503, 51 Am. Rep. 243.

1. "Two corporations cannot hold as joint-tenants, because two of the essential unities are wanting, namely: of the same capacity and title. . . . Nor can they hold as joint tenants, for another reason: being each perpetual, there can be no survivorship between them . . . Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity of survivorship between them." De Witt *v.* San Francisco, 2 Cal. 289, 297.

2. De Witt *v.* San Francisco, 2 Cal. 289. See also Hunnicutt *v.* Atlanta, 104 Ga. 1, 30 S. E. 500; Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677. But *compare* Bergen *v.* Clarkson, 6 N. J. L. 352.

Partial use by municipality necessary.— But a contract by a city for the purchase of an undivided one fifth of a lot with a building thereon is void, unless it distinctly and unequivocally secures to the city the right to occupy and use for municipal purposes, so long as it shall own an interest in the fee, a portion at least of the property. Hunnicutt *v.* Atlanta, 104 Ga. 1, 30 S. E. 500.

3. Thus in Ohio the constitution provides that "the general assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association." Ohio Const. art. 8, § 6. This section of the constitution, it has been held, not only prohibits a business partnership, which carries the idea of joint or undivided interest, but it goes further and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality must be the sole owner and controller of the property in which it invests its public funds; and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property. The whole ownership and control must be in the public. Alter *v.* Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737.

4. **Action by municipal corporation for forcible entry and detainer** see Forcible Entry and Detainer, 19 Cyc. 1141.

sion,[5] and that officer or department for whose use any property is dedicated or appropriated is entitled to possession and custody.[6]

6. Lease. A municipal corporation may take a lease of real property for a legitimate corporate purpose,[7] provided charter and statutory provisions on the subject are complied with.[8] A municipality may also become liable, like an individual, by holding over after the expiration of the lease, and if the governing body permits an officer to hold over, the city cannot escape liability as lessee on the ground that the officer was without authority to continue the lease or hold over.[9]

7. Purchase of Mortgaged Property. Where a municipal corporation has no

5. Emporia *v.* Partch, 21 Kan. 202. Injunction will not lie to restrain a city from taking possession of fire apparatus previously intrusted to a fire company, where the latter shows no contract giving it the right to retain possession. Excelsior Fire Co. *v.* Washington, 6 N. J. L. J. 280.

6. Conover *v.* New York, 25 Barb. (N. Y.) 513, 5 Abb. Pr. 393, 14 How. Pr. 550.

Books and papers.— In a proceeding under the New York statute to compel the delivery of papers and books belonging or appertaining to the office of street commissioner in the city of New York, where the city claimed to own the books and papers because they were purchased for the office with its funds, it was held that, as they had been dedicated to the uses of the office, the city had no right to them inconsistent with the possession and use of them by the lawful incumbent of the office, and could not question his right to the possession and use of them for the due exercise of the duties of his office. Conover *v.* New York, 25 Barb. (N. Y.) 513, 5 Abb. Pr. 393, 14 How. Pr. 550.

Taking forcible possession.— Where the police department permitted the health department to occupy its premises temporarily and without rent, it was held that the police department had no authority to forcibly take possession of such premises on refusal of the health department to vacate. New York Health Dept. *v.* New York Police Dept., 41 N. Y. Super. Ct. 323.

Board of liquidation.— Stock acquired by the city in the New Orleans Waterworks Company, although declared to be exempt from seizure on execution, was never pronounced to be and was not property "dedicated to public use," within La. Act (1880), No. 133, § 5, by which the board of liquidation was entitled to receive from the city all its property, real and personal, not dedicated to public use; and it was held therefore that such stock should be transferred by the city to the board to be disposed of and applied by the latter as the law directed. State *v.* New Orleans, 36 La. Ann. 524.

7. *Arkansas.*— Halbut *v.* Forrest City, 34 Ark. 246.

Florida.— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Indiana.— Anderson *v.* O'Conner, 98 Ind. 168.

Massachusetts.— Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193.

Missouri.— Aull *v.* Lexington, 18 Mo. 401.

Nevada.— Fitton *v.* Hamilton City, 6 Nev. 196.

New York.— Davies *v.* New York, 83 N. Y. 207 [*reversing* 45 N. Y. Super. Ct. 373]; People *v.* Green, 64 N. Y. 499.

North Carolina.— Wade *v.* Newbern, 77 N. C. 460.

Wisconsin.— Gilman *v.* Milwaukee, 31 Wis. 563.

See 36 Cent. Dig. tit. "Municipal Corporations," § 612.

A charter power to a city to build a market house involves the power to lease a building for market purposes. Wade *v.* Newbern, 77 N. C. 460.

Purpose of lease.— The lease must be for an authorized purpose. Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602 [*affirming* 31 Pa. Co. Ct. 609]. See *infra*, VIII, B.

Execution of lease by municipality see *infra*, VIII, D, 11; IX, G.

Summary proceedings against municipality see Landlord and Tenant, 24 Cyc. 1417.

Purchase of sublease instead of lease.— Where a town council was empowered to purchase or rent lands for certain purposes, it was held that there was no authority to purchase lands held under a sublease, the interest in which might be lost by the default of the lessees. Mulholland *v.* Belfast Corp., 9 Ir. Ch. 292.

8. Smith *v.* Newburgh, 77 N. Y. 130.

Notice and special election.— Where the water commissioners of a city, after entering into a lease without causing notice to be published and a special election held, as required by a statute authorizing the council to improve the waterworks of the city, made a statement to the council recommending the construction of a reservoir on the property leased by the city for that purpose, and submitted an estimate of the expense, and a resolution was passed by the council directing a special election for the purpose of voting on the subject, and a notice of such election was published, specifying the items of expense, but without including the rent, and nothing was stated in the notice with regard to the lease, it was held that the vote authorizing the construction of the reservoir did not ratify or validate the lease. Smith *v.* Newburgh, 77 N. Y. 130.

9. Davies *v.* New York, 93 N. Y. 250 [*reversing* 48 N. Y. Super. Ct. 194]; Davies *v.* New York, 83 N. Y. 207 [*reversing* 45 N. Y. Super. Ct. 373]; Witt *v.* New York, 6 Rob. (N. Y.) 441. *Contra*, San Antonio *v.* French,

power to mortgage its property, it cannot purchase and hold property which is subject to a mortgage, even though it does not expressly obligate itself to pay the mortgage debt, for it must pay the debt or lose the property; nor can it purchase property which is mortgaged for a sum in excess of the amount of indebtedness which it is authorized to incur.[10]

B. Purposes of Municipal Acquisition — 1. In General. A municipal corporation may at common law, and generally by express charter or statutory provision, purchase or otherwise acquire and hold all such property, real and personal, as may be necessary to the proper exercise of any power specifically conferred or essential to those purposes of municipal government for which it was created.[11] On the other hand, while its title cannot always be questioned otherwise than in a direct proceeding by the state,[12] it has no power or authority to purchase or otherwise acquire or hold property for a purpose not within the powers specifically conferred upon it nor essential to carry out the objects of its creation.[13] Where a municipality purchases or leases property for its own use,

80 Tex. 575, 6 S. W. 440, 26 Am. St. Rep. 763.

10. Voss *v.* Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 106 Am. St. Rep. 201, 66 L. R. A. 95; Fidelity Trust, etc., Co. *v.* Fowler Water Co., 113 Fed. 560.

Power to mortgage property see *infra*, VIII, D, 9.

Limitation of indebtedness see *infra*, XV, A, 3.

11. *Arkansas.*— Halbut *v.* Forrest City, 34 Ark. 246.

Connecticut.— Derby *v.* Alling, 40 Conn. 410.

Illinois.— Champaign *v.* Harmon, 98 Ill. 491.

Indiana.— Bluffton *v.* Studabaker, 106 Ind. 129, 6 N. E. 1.

Kansas.— Delaney *v.* Salina, 34 Kan. 532, 9 Pac. 271.

Louisiana.— New Orleans First Municipality *v.* McDonough, 2 Rob. 244.

Michigan.— Hatheway *v.* Sackett, 32 Mich. 97.

Minnesota.— Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786.

New Jersey.— Green *v.* Cape May, 41 N. J. L. 45.

New York.— Davies *v.* New York, 83 N. Y. 207 [*reversing* 45 N. Y. Super. Ct. 373]; Buffalo *v.* Bettinger, 76 N. Y. 393; Le Couteulx *v.* Buffalo, 33 N. Y. 333; Ketchum *v.* Buffalo, 14 N. Y. 356; People *v.* Lowber, 28 Barb. 65.

Vermont.— Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

Virginia.— Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

Wisconsin.— Konrad *v.* Rogers, 70 Wis. 492, 36 N. W. 261; Gilman *v.* Milwaukee, 31 Wis. 563; State *v.* Madison, 7 Wis. 688.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 611, 616 *et seq.*

12. See *infra*, VIII, E.

13. *Alabama.*— Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.

California.— Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; Glass *v.* Ashbury, 49 Cal. 571; People *v.* McClintock, 45 Cal. 11.

Colorado.— Hayward *v.* Red Cliff, 20 Colo. 33, 36 Pac. 795.

Georgia.— Phipps *v.* Morrow, 49 Ga. 37.

Illinois.— Champaign *v.* Harmon, 98 Ill. 491; Sherlock *v.* Winnetka, 68 Ill. 530; Sherlock *v.* Winnetka, 59 Ill. 389. And see Livingston County *v.* Weider, 64 Ill. 427.

Iowa.— Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

Maine.— *In re* Opinion of Justices, 58 Me. 590.

Maryland.— Gregg *v.* Baltimore, 56 Md. 256.

Massachusetts.— *In re* Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809.

Michigan.— Baker *v.* Grand Rapids, 142 Mich. 687, 106 N. W. 208, 3 L. R. A. N. S. 76.

New Jersey.— Gregory *v.* Jersey City, 36 N. J. L. 166.

New York.— Riley *v.* Rochester, 9 N. Y. 64 [*reversing* 13 Barb. 321]; Jackson *v.* Hartwell, 8 Johns. 422.

Ohio.— Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

Pennsylvania.— Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602 [*affirming* 31 Pa. Co. Ct. 609]; Earley's Appeal, 103 Pa. St. 273.

Rhode Island.— Place *v.* Providence, 12 R. I. 1.

Virginia.— Duncan *v.* Lynchburg, (1900) 34 S. E. 964; Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

United States.— Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340.

Canada.— Jones *v.* Port Arthur, 16 Ont. 474.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 611, 616 *et seq.*

Burden of proof.— In an action against a municipal corporation on a bond or other common-law security given for deferred payments on real estate purchased by the corporation, defendant's plea of *nil debet* puts the burden of proof on plaintiff to show that the real estate purchased by defendant was reasonably necessary to the proper exercise and enjoyment by it of the powers and duties

the transaction is not invalidated by the fact that it allows the premises to be also used for other purposes of a public nature;[14] and where a municipality takes a conveyance of land for a legitimate corporate purpose, its title is not divested by a change of purpose.[15]

2. Particular Purposes — a. In General. In the application of these rules to particular cases or under particular charters, it has been held that a municipal corporation may purchase or otherwise acquire and hold land for necessary public buildings and other public improvements;[16] for schools,[17] and hospitals,[18] under certain circumstances; for water or lighting plants under some charters;[19] for burial grounds;[20] or for legitimate charitable uses;[21] and it may take a lease of premises to provide accommodations for the performance of corporate duties and work by its officers and agents,[22] and alter or fit up the premises for such purpose.[23] So it has power to take personal property for fire and police purposes,[24] and to suitably furnish public buildings, offices, and rooms.[25] It may take land to settle a debt due from a defaulting officer, if necessary to save the debt;[26] and may take and hold promissory notes executed by a defaulting officer as security for the payment of his indebtedness.[27] On the other hand, as a rule, a municipal corporation cannot purchase property in aid of any private enterprise, however laudable its purpose or useful its encouragement,[28] nor can it acquire or hold property for religious purposes,[29] or merely for purposes of litigation.[30] A

conferred upon it by its charter. Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

14. Halbut *v.* Forrest City, 34 Ark. 246. Where a municipal corporation erects or leases a building chiefly for the purpose of providing a market house, as authorized, the erection or leasing thereof is not rendered illegal because of an appropriation of a portion of the same for some other municipal purpose, such as holding of municipal courts. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

15. Newman *v.* Ashe, 9 Baxt. (Tenn.) 380; U. S. *v.* Case Library, 98 Fed. 512 [*affirmed* in 104 Fed. 711, 44 C. C. A. 161]. See also *supra*, VIII, A, 3.

16. See *infra*, VIII, B, 2, c.

17. See *infra*, VIII, B, 2, f.

18. See *infra*, VIII, B, 2, d.

19. See *infra*, VIII, B, 2, e.

20. State *v.* Madison, 7 Wis. 688, holding that such power existed under charter authority to establish and regulate boards of health, provide hospitals and cemetery grounds, and regulate burial of the dead. See, generally, Cemeteries, 6 Cyc. 707.

21. *In re* Robinson, 63 Cal. 620.

22. Witt *v.* New York, 6 Rob. (N. Y.) 441. See also People *v.* Harris, 4 Cal. 9.

23. People *v.* Harris, 4 Cal. 9.

24. See *infra*, VIII, B, 2, b.

25. Reynolds *v.* Albany, 8 Barb. (N. Y.) 597. See also People *v.* Harris, 4 Cal. 9.

Portrait of public officer.—It has been held that a municipal corporation having power to provide furniture for the room of the common council at the public expense may order the portrait of the governor of the state to be procured as an article of furniture therefor and vote an appropriation from the public funds to pay for the same. Reynolds *v.* Albany, 8 Barb. (N. Y.) 597.

26. Phipps *v.* Morrow, 49 Ga. 37.

27. Buffalo *v.* Bettinger, 76 N. Y. 393.

28. Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118; Sherlock *v.* Winnetka, 68 Ill. 530; Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

Private schools see *infra*, VIII, B, 2, f.

For railroad right of way.— The purchase of land by a municipality for the use of a railroad company for a right of way, although ostensibly for a public street, is *ultra vires*. Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

Fair grounds.— Under a city's charter authority to purchase and provide for the payment of "all such real estate and personal property as may be required for the use, convenience, and improvement of the city," etc., it has no power to purchase a tract of land within its limits for the benefit of an agricultural and mechanical association, and as a place for holding their annual fairs, giving the association the exclusive use of the premises. Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.

Aid to water company.— Under a statute authorizing a city to grant a license to a water company to supply water to the city and its inhabitants, the city has no power to acquire a lot for the use of such private corporation. Cain *v.* Wyoming, 104 Ill. App. 538.

Manufacturing plants.— A municipal corporation is without capacity to acquire land by purchase for the purpose of donating the same to a corporation or person as an inducement to build and operate manufacturing plants within the municipality. Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

29. Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403, 19 Ky. L. Rep. 1292, 39 L. R. A. 93.

30. Place *v.* Providence, 12 R. I. 1, holding that a municipal corporation cannot pur-

municipality may not become a real estate dealer,[31] or buy realty for investment,[32] or for mere speculation or profit,[33] or erect a building for the mere purpose of renting it out,[34] or take a lease of property merely for the purpose of deriving revenue therefrom by subletting or otherwise,[35] or purchase or lease property merely for the purpose of aiding or making a donation to the state or general government,[36] or another municipality,[37] or deal in coal and wood,[38] or purchase and run a manufacturing establishment.[39] But it has been held that it may receive a devise of a coal mine for experiment and operation;[40] that it may purchase and take an assignment of a lease for municipal uses;[41] and that it may, for sanitation, buy up lands for improvement and resale.[42] Where a statute authorizes a municipal corporation to take property for a special purpose or on special conditions only, it cannot take the same for another purpose or on other conditions.[43]

chase real property in order, by controlling it, to compel a taxpayer to abandon or compromise his litigation with the municipality.

Purchase of judgment for purpose of set-off.— The purchase by a municipal corporation, for the purpose of set-off, of a judgment held by a third party against a creditor of the corporation, is *ultra vires*. Especially is this so where it is apparent that the real object of the purchase is to enable such third party to collect his claim through the right of set-off of the corporation; such transaction constituting a loan of the credit of the corporation. Earley's Appeal, 103 Pa. St. 273.

31. Hayward *v.* Red Cliff, 20 Colo. 33, 36 Pac. 795.

32. Hunnicutt *v.* Atlanta, 104 Ga. 1, 30 S. E. 500.

33. Champaign *v.* Harmon, 98 Ill. 491.

Purchase at tax-sales.— A municipal corporation, in the absence of any enabling statute, has no authority of law to become the purchaser of lands or lots at a tax-sale, and acquire a title by complying with the statute in respect to such sales. The general power to buy and hold real estate does not authorize such a purchase. Champaign *v.* Harmon, 98 Ill. 491.

34. Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

35. Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602 [*affirming* 31 Pa. Co. Ct. 609], holding that a borough has no power under the Pennsylvania acts of April 3, 1851, or June 26, 1895, to lease from a private owner an inclosure for a pleasure park for the purpose of deriving revenue by subletting the same or charging the public for admission.

36. Livingston County *v.* Weider, 64 Ill. 427 (cannot provide site or location for a state institution); Jones *v.* Port Arthur, 16 Ont. 474 (holding that a municipal corporation had no power to purchase land to be presented to the dominion government as a site for a post-office and custom-house); Wallace *v.* Orangeville, 5 Ont. 37 (to the same effect).

37. Halbut *v.* Forrest City, 34 Ark. 246, holding that a town cannot rent a house solely for the use of the county as a court-house.

38. *In re* Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809, holding that the legislature could not authorize a city to buy coal and wood as fuel and sell them to its inhabitants, as the constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which towns may be authorized to tax their inhabitants. See also Baker *v.* Grand Rapids, 142 Mich. 687, 106 N. W. 208, holding that where the price of coal was greatly increased by dealers, a city could not purchase a quantity of coal for the purpose of selling the same to its inhabitants, and thus engage in a commercial enterprise and enter into competition with dealers, as such use of its money was not for a public purpose.

39. *In re* Opinion of Justices, 58 Me. 590, holding that the legislature could not enable a town to establish manufactories on its own account, and rent them by the ordinary town officers, or otherwise, as such enterprises are outside of the purposes and objects of such corporations.

40. Delaney *v.* Salina, 34 Kan. 532, 9 Pac. 271.

41. Curtis *v.* Portsmouth, 67 N. H. 506, 39 Atl. 439.

42. New Orleans First Municipality *v.* McDonough, 2 Rob. (La.) 244.

43. Thus in Glass *v.* Ashbury, 49 Cal. 571, it was held that when the municipal authorities of a city act under an authority derived from a statute, they must follow strictly its provisions; and therefore, where a statute (Cal. Act, March 16, 1874) authorized the supervisors of San Francisco to procure from the United States government a vessel, to be used as a training ship, on such terms, "consistent with the provisions of this Act, as the said Government may prescribe," and authorized the removal to the ship of boys sentenced to confinement in the industrial school, and the act of congress of June 20, 1874, authorized the secretary of the navy to furnish a vessel of the navy on the application of the governor of any state in which a nautical school was established, with the proviso "that no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime," it was held that the supervisors were not authorized to accept a ship from the general government on those terms.

b. Police and Fire Departments. There can be no doubt that a municipal corporation has power to acquire, furnish, and hold such buildings or rooms as may be necessary for the use of its police and fire departments.[44] Power to maintain a fire department or to suppress fires necessarily implies power to purchase machines and apparatus suitable for that purpose.[45] And a municipality may purchase arms and other personal property necessary for its police department.[46]

c. Public Buildings, Streets, Parks, and Other Public Improvements. Municipalities may purchase or otherwise acquire and hold land for and erect necessary public buildings,[47] including markets, where they are authorized to establish

44. Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715; State *v.* Babcock, 25 Nebr. 278, 41 N. W. 155; Witt *v.* New York, 6 Rob. (N. Y.) 441. And see *infra*, VIII, B, 2, c.

45. Bluffton *v.* Studabaker, 106 Ind. 129, 6 N. E. 1; Green *v.* Cape May, 41 N. J. L. 45. See also Allen *v.* Taunton, 19 Pick. (Mass.) 485.

Construction of express authority.— Hose carriages were within N. Y. Laws (1890), c. 232, § 3, authorizing the fire commissioners of Long Island City to purchase steam fire engines and "hose, implements, and apparatus of any and all kinds" for the use of the fire department. Leonard *v.* Long Island City, 20 N. Y. Suppl. 26.

46. State *v.* Buffalo, 2 Hill (N. Y.) 434, holding that the corporation of Buffalo, as an incident to an express grant of police powers, might contract for and procure two hundred stand of arms to preserve the peace and protect the persons and property of its citizens.

47. *Illinois.*— Greeley *v.* People, 60 Ill. 19.

Massachusetts.— French *v.* Quincy, 3 Allen 9; Spaulding *v.* Lowell, 23 Pick. 71.

Michigan.— Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

Missouri.— Clarke *v.* Brookfield, 81 Mo. 503, 51 Am. Rep. 243; State *v.* Haynes, 72 Mo. 377.

Nebraska.— See State *v.* Babcock, 25 Nebr. 278, 41 N. W. 155.

New Hampshire.— Parker *v.* Concord, 71 N. H. 468, 52 Atl. 1095.

Pennsylvania.— Newell *v.* Bradford City, 18 Pa. Co. Ct. 465.

Vermont.— Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

Wisconsin.—Konrad *v.* Rogers, 70 Wis. 492, 36 N. W. 261.

See also *infra*, XIII, A, 2, b.

Extent of authority conferred.— But under the Jersey City charter authorizing the board of public works "to purchase sites for, and purchase or construct a city hall, schoolhouses, engine-houses," etc., "and such other buildings as may be necessary," it was held that the board was not authorized to purchase a tract of land "to be used as a site for the location of a city hall and other city buildings." The legislature did not intend by these provisions to invest the board of public works with the arbitrary or unlimited power to purchase either land or buildings. Every lawful exercise of this power to purchase land necessarily involved the determination by the board of two things: (1) That some particular building is necessary; and (2) the quantity of land required as a site therefor. The legislature did not intend to confer on the board of public works the power to purchase a site or sites for buildings not designated or even known. Gregory *v.* Jersey City, 36 N. J. L. 166.

Additional purchases.— The city having power under an act of the legislature to purchase land for the erection of public buildings thereon, and having no authority to sell any land so purchased, cannot, after having selected and purchased land in pursuance of such legislation, purchase other land not adjacent to the first purchase for the same purpose. McGuire *v.* Atlantic City, 63 N. J. L. 91, 42 Atl. 781.

Slaughter-houses.— Ill. Rev. St. (1874) c. 24, art. 5, which empowers city councils to provide for and regulate the inspection of meat, poultry, etc., to prohibit any offensive or unwholesome business or establishment, and to do all acts and make all regulations necessary or expedient for the promotion of health or the suppression of disease, does not empower a city council to erect and maintain a public slaughter-house, in the absence of any provision in its charter expressly conferring such power. Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129 [*reversing* 25 Ill. App. 600].

Discretion as to cost.— The council has discretionary power to determine the cost of a city building. Parker *v.* Concord, 71 N. H. 468, 52 Atl. 1095.

Provision for future needs.— In erecting a public building a municipality is not restricted to present needs, but may make suitable provision for its prospective needs by erecting a larger building than is needed at the time; and if the building contains rooms not wanted for the time being for municipal business, the municipality may let them temporarily or allow them to be used gratuitously. French *v.* Quincy, 3 Allen (Mass.) 9; Spaulding *v.* Lowell, 23 Pick. (Mass.) 71; Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166. Where a municipal corporation, under its general powers, builds a market house two stories high and appropriates the lower story for a market, this being in good faith the principal and leading object in erecting the building, the appropriation of the upper story to other subordinate purposes is not such an excess of

markets,[48] although not, it seems, where they are authorized merely to "regulate" markets,[49] and also including public baths, where there is express authority to establish them.[50] It has also been held that they have the power to acquire real estate for the purpose of establishing and maintaining wharves[51] and parks.[52] For the purpose of municipal improvement, the corporation has been upheld by the courts in taking title, permanent or temporary, to streets,[53] in acquiring an abutting easement for grading,[54] and in exchanging one lot for another for a city hall.[55] According to the better opinion, a city having power to grade and pave streets has by implication power to purchase and hold a stone quarry to supply the raw material;[56] and power to erect bridges and approaches implies the power to acquire the right to swing a bridge over private property and grant in consideration thereof the use of a vault under a street.[57] But a city with charter power to take lands for canals may not in its exercise condemn a right of way through a great railroad yard;[58] nor may it provide, in an ordinance for improving a certain

authority as to render the erection of the building and the raising of money therefor *ultra vires* or illegal. Spaulding *v.* Lowell, *supra*.

48. Ketchum *v.* Buffalo, 14 N. Y. 356 [*affirming* 21 Barb. 294] (holding that authority to establish a market included, as a necessary incident, power to purchase real estate for the purposes of a market); People *v.* Lowber, 28 Barb. (N. Y.) 65. See also Spaulding *v.* Lowell, 23 Pick. (Mass.) 71; and *infra*, XIII, A, 2, j.

49. Ketchum *v.* Buffalo, 14 N. Y. 356.

50. Poillon *v.* Brooklyn, 101 N. Y. 132, 4 N. E. 191, holding that a grant of authority to establish and maintain public baths carried with it as a necessary incident power to designate and procure a proper place for the location of such a bath.

51. Hafner *v.* St. Louis, 161 Mo. 34, 61 S. W. 632, holding that such power existed under a charter giving a municipality general power to hold, purchase, and convey such real and personal estate as the purposes of the corporation should require. *Compare*, however, Roberts *v.* Louisville, 92 Ky. 95, 17 S. W. 216, 13 Ky. L. Rep. 406, where it is said that the power of a municipal corporation to acquire land for the purpose of erecting wharves thereon and to charge wharfage is not a necessary incident of its charter, but must be derived directly from the legislature, to be exercised within the limits and upon the conditions of the grant. See also *infra*, XIII, A, 2, i.

52. Lexington *v.* Kentucky Chautauqua Assembly, 114 Ky. 781, 71 S. W. 943, 24 Ky. L. Rep. 1568. And see under express grant of power Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; Scott *v.* Trombley, 20 N. Y. App. Div. 535, 46 N. Y. Suppl. 699; Budd *v.* Budd, 59 Fed. 735. *Contra*, Vaughn *v.* Greencastle, 104 Mo. App. 206, 78 S. W. 50; Graeff *v.* Felix, 24 Pa. Co. Ct. 657. *Compare infra*, XIII, A, 2, k.

Property dedicated.— Where the owner of a square or plat of ground situated in a city or village dedicates it to the use of the public, and calls it a "plaza," but does not in any manner designate how it shall be enjoyed, the city or village authorities may assume control of it, either as an open market place and common, or as a park for the pleasure and recreation of the public. Sachs *v.* Towanda, 79 Ill. App. 439.

Devise for park subject to payment of annuity see *infra*, VIII, C, note 89.

The charter of Kansas City, as amended June 6, 1895, adopted pursuant to Const. art. 9, § 16, providing that a city of more than one hundred thousand inhabitants may frame a charter for its own government, in so far as it provides a method of exercising the right of eminent domain, is not objectionable to the constitutional provision that such a charter shall always be in harmony with and subject to the constitution and laws of the state, in that the act of April 1, 1893, empowers every city organized under Const. § 16, art. 9, to establish a system of parks under a certain procedure, since it expressly provides (section 18) that it shall not abrogate or impair any right or power which such cities may have, or might thereafter have, to buy or condemn parks. Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860.

Water front.— Under the power given the city by the Long Branch City Charter (Pub. Laws (1903), p. 318, § 53, as amended by Pub. Laws (1904), pp. 347, 349, §§ 4, 8), to acquire land to protect the view oceanward from a sidewalk on the beach, it could acquire land under water. Murphy *v.* Long Branch, (N. J. Sup. 1905) 61 Atl. 593.

53. Derby *v.* Alling, 40 Conn. 410; Gilman *v.* Milwaukee, 31 Wis. 563, lease for temporary use as public street.

Opening streets, etc., see *infra*, XIII, A, 2, c.

54. Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786.

55. Konrad *v.* Rogers, 70 Wis. 492, 36 N. W. 261.

56. Schneider *v.* Menasha, 118 Wis. 298, 92 N. W. 94, 99 Am. St. Rep. 996. *Contra*, Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174, 113 Am. St. Rep. 1056, 2 L. R. A. N. S. 910; Duncan *v.* Lynchburg, (Va. 1900) 34 S. E. 964.

Ownership of quarry beyond municipal limits see *supra*, VIII, A, 2, note 85.

57. Chicago *v.* Norton Milling Co., 196 Ill. 580, 63 N. E. 1043.

58. *In re* Buffalo, 68 N. Y. 167.

district, for the surrender to the city of land not needed or available for municipal uses.[59]

d. Hospitals.[60] The legislature may expressly authorize a municipal corporation to purchase real estate for erection of a public hospital or a pest-house;[61] and a municipality has authority, under its power to preserve the public health, to lease a building for use as a hospital for contagious diseases;[62] but it has been held that power to buy a site for a smallpox hospital is not implied from general sanitary power, from power to make all regulations which may be necessary or expedient for the prevention of contagious diseases, or from the power to pay a liberal stipend "for the support of" a smallpox hospital.[63]

e. Water and Lighting Plants. A municipal corporation has the power to purchase and hold such real and personal property as may be necessary for the erection and maintenance of a plant or works for the purpose of furnishing water or light to itself and its inhabitants, where it has legislative authority, express or implied, to establish or own waterworks or a lighting plant for such purpose,[64]

59. Gregg *v.* Baltimore, 56 Md. 256.

60. See, generally, HOSPITALS, 21 Cyc. 1105.

61. Allentown *v.* Wagner, 27 Pa. Super. Ct. 485 [*affirmed* in 214 Pa. St. 210, 63 Atl. 697]; State *v.* Madison, 7 Wis. 688.

Beyond territorial limits see *supra*, VIII, A, 2.

62. Aull *v.* Lexington, 18 Mo. 401.

Authority "to remove or confine" persons having infectious or pestilential diseases gives power to rent a house for such purpose. Anderson *v.* O'Connor, 98 Ind. 168.

A city ordinance giving the board of health a general supervision over the health of the city includes the power to rent a building to be used as a hospital to protect the city from the infection of cholera. Aull *v.* Lexington, 18 Mo. 401.

63. Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682.

64. *Florida.*— Jacksonville Electric Light Co. *v.* Jacksonville, 36 Fla. 229, 18 So. 677, 51 Am. St. Rep. 24, 34 L. R. A. 540.

Illinois.— Blanchard *v.* Benton, 109 Ill. App. 569; Hay *v.* Springfield, 64 Ill. App. 671.

Indiana.— Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268.

Kansas.— State *v.* Hiawatha, 53 Kan. 477, 36 Pac. 1119.

Massachusetts.— *In re* Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487.

Michigan.— Arbuckle-Ryan Co. *v.* Grand Ledge, 122 Mich. 491, 81 N. W. 358 (may purchase engine to operate city lighting plant); Mitchell *v.* Negaunee, 113 Mich. 359, 71 N. W. 646, 67 Am. St. Rep. 489, 38 L. R. A. 198 (express grant of power to acquire electric light plant).

Nebraska.— Christensen *v.* Fremont, 45 Nebr. 160, 63 N. W. 364.

North Carolina.— Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870 [*overruling* Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163].

Ohio.— State *v.* Hamilton, 47 Ohio St. 52, 23 N. E. 935.

Pennsylvania.— Hughes *v.* Parnassus Borough, 23 Pa. Co. Ct. 196.

South Carolina.— Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

Texas.— Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702, may maintain irrigation ditch.

Wisconsin.— Connor *v.* Marshfield, 128 Wis. 280, 107 N. W. 639; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

United States.— Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 26 S. Ct. 224, 50 L. ed. 353; Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963; Indianapolis *v.* Consumers' Gas Trust Co., 144 Fed. 640, 75 C. C. A. 442; Colby University *v.* Canandaigua, 69 Fed. 671; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723.

See also *infra*, XIII, A, 2, f, g.

Operation of plant and preservation of property.— When a city has legally acquired a gas plant to provide its inhabitants with light and fuel, the power to operate the plant and to do the things necessary to accomplish the purpose for which the plant has been acquired, and to preserve the property from destruction and impairment to a degree not amounting to rebuilding or extension, is incident to and goes with the power to own as a current necessity. Findlay *v.* Parker, 17 Ohio Cir. Ct. 294, 9 Ohio Cir. Dec. 710.

Provision for arbitration in contract for purchase of plant see Lidgerwood Park Waterworks Co. *v.* Spokane, 19 Wash. 365, 53 Pac. 352.

Aid to private company see *supra*, VIII, B, 2, a, text and note 28.

Joint ownership with another.—Under Ohio Const. art. 8, § 6, providing that the general assembly shall never authorize any county, city, town, or township to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for or loan its credit to, or in aid of, any such company, corporation, or association, a city must be the sole proprietor of property in which it invests its funds and cannot unite its property with property of

but not otherwise.[65] The existence of such power is considered elsewhere in this article.[66]

f. Educational Purposes. A municipal corporation may of course be expressly authorized to purchase land and erect school-houses thereon;[67] and it has been held that unless there is something in its charter forbidding it to build school-houses, it has implied power to do so, on the ground that this is within the scope of the general powers of a municipal corporation.[68] Under some charters or statutes, however, this function is exercised not by the municipality, but by a board of education or special school corporation.[69] Under express or implied authority to purchase land and erect buildings for a school a municipal corporation has no authority to purchase land and erect a school-house for the purpose of conveying or leasing the same, without pay or rent, to an individual or private corporation for the purpose of having a school taught therein for pay.[70]

3. Power to Take and Hold Property in Trust. A municipal corporation has the capacity and power to take and hold real or personal property, by devise, bequest, or deed of gift, in trust for purposes of a public nature, including charitable uses, germane to the objects of the corporation,[71] even according to the weight of authority, although the object may be one which the municipality could

individuals or corporations, so that when united both together form one property, and therefore a statute authorizing a municipal corporation to permit a water company to make additions to the city's waterworks, or otherwise become a part owner of such waterworks, was held unconstitutional. Alter *v.* Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737. See *supra*, VIII, A, 4.

65. *California.*— Hyatt *v.* Williams, 148 Cal. 585, 84 Pac. 41; People *v.* McClintock, 45 Cal. 11.

Massachusetts.— Spaulding *v.* Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397.

New Jersey.— Howell *v.* Millville, 60 N. J. L. 95, 36 Atl. 691.

New York.— Potsdam Electric Light, etc., Co. *v.* Potsdam, 49 Misc. 18, 97 N. Y. Suppl. 190 [*affirmed* in 113 N. Y. App. Div. 894, 98 N. Y. Suppl. 1113].

Pennsylvania.— White *v.* Meadville, 177 Pa. St. 643, 35 Atl. 695, 34 L. R. A. 567.

South Carolina.— Stehmeyer *v.* Charleston, 53 S. C. 259, 31 S. E. 322.

66. See *infra*, XIII, A, 2, f, g.

67. Sherlock *v.* Winnetka, 68 Ill. 530.

68. Cartersville *v.* Baker, 73 Ga. 686. See also Le Couteulx *v.* Buffalo, 33 N. Y. 333.

Devise, bequest, or gift in trust for educational purposes see *infra*, VIII, B, 3.

69. State *v.* Terre Haute, 87 Ind. 212, holding that under the Indiana statutes a city had no power to buy, and give its notes for, a county seminary, which it was to use for school purposes in the city, as the school corporation of the city alone had that power. See also Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317.

70. Sherlock *v.* Winnetka, 68 Ill. 530.

71. *California.*— *In re* Robinson, 63 Cal. 620.

Connecticut.— Hamden *v.* Rice, 24 Conn. 350.

Illinois.— Prickett *v.* People, 88 Ill. 115; Heuser *v.* Harris, 42 Ill. 425.

Indiana.— Rush County *v.* Dinwiddie, 139 Ind. 128, 37 N. E. 795; Skinner *v.* Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; Craig *v.* Secrist, 54 Ind. 419.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

Kentucky.— Peynado *v.* Peynado, 82 Ky. 5.

Louisiana.— State *v.* McDonogh, 8 La. Ann. 171; Girard *v.* New Orleans, 2 La. Ann. 897.

Maine.— Bangor *v.* Beal, 85 Me. 129, 26 Atl. 1112.

Maryland.— Barnum *v.* Baltimore, 62 Md. 275, 50 Am. Rep. 219.

Massachusetts.— Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172; Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Fellows *v.* Miner, 119 Mass. 541; Drury *v.* Natick, 10 Allen 169; Webb *v.* Neal, 5 Allen 575; Green *v.* Putnam, 8 Cush. 21; Nourse *v.* Merriam, 8 Cush. 11; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Michigan.— Maynard *v.* Woodard, 36 Mich. 423; Hatheway *v.* Sackett, 32 Mich. 97, 100, where it is said that it is "the general doctrine in this country that cities and villages may take personal property in trust for all purposes in keeping with or in furtherance of the real and final objects meant to be accomplished by their creation; and that this rule must he recognized as operating without exception, unless when some plain regulation or condition exists to exclude it."

Missouri.— Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305; Chambers *v.* St. Louis, 29 Mo. 543.

New Hampshire.— Sargent *v.* Cornish, 54 N. H. 18; Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

New Jersey.— Mason *v.* Tuckerton M. E. Church, 27 N. J. Eq. 47.

New York.— Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715; Le Couteulx *v.* Buffalo, 33 N. Y. 333; Betts *v.* Betts, 4 Abb. N. Cas. 317; Coggeshall *v.* Pelton, 7 Johns. Ch. 292, 11 Am. Dec. 471.

not carry out at the public expense.[72] Thus it may take property in trust for the erection and maintenance of a court-house, city, or town hall, or other public building;[73] for repairing highways and bridges;[74] for laying out, improving, and lighting streets;[75] for planting and renewing shade trees;[76] for use in connection with waterworks;[77] for a public park;[78] for the erection and maintenance of colleges and schools, or other educational purposes,[79] including the maintenance of a

Ohio.—Christy *v.* Ashtabula County Com'rs, 41 Ohio St. 711; State *v.* Toledo, 23 Ohio Cir. Ct. 327.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169. And see Lawrence County *v.* Leonard, 83 Pa. St. 206; Philadelphia *v.* Elliott, 3 Rawle 170.

Rhode Island.— Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217.

Texas.— Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

Vermont.— Sheldon *v.* Stockbridge, 67 Vt. 299, 31 Atl. 414.

Wisconsin.— Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53; Perin *v.* Carey, 24 How. 465, 16 L. ed. 701; McDonogh *v.* Murdoch, 15 How. 367, 14 L. ed. 732; Vidal *v.* Girard, 2 How. 127, 11 L. ed. 205; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100 [*affirming* 91 Fed. 948]; Stuart *v.* Easton, 74 Fed. 854, 21 C. C. A. 146.

England.— Atty.-Gen. *v.* Newcastle-upon-Tyne, 5 Beav. 307, 49 Eng. Reprint 596, 12 Cl. & F. 402, 8 Eng. Reprint 1164, 6 Jur. 789.

See 9 Cent. Dig. tit. "Charities," § 30 *et seq.*; 36 Cent. Dig. tit. "Municipal Corporations," §§ 620, 621.

Maintenance of hotel included in devise.— The provision, in a devise to a city of property in trust for charitable objects, that a hotel included in the property should be kept perpetually, and that a fund should be provided from the income to preserve and improve it, does not prevent the taking of the devise by the city; nor does a provision of the devise that the name of the hotel shall be retained affect its validity. Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

Trustee of contract for citizens.— A city may be the depository, as trustee for its citizens, of a contract obligating a railroad company to locate and maintain its general offices and shops in the city, and may enforce such contract by suit. Tyler *v.* St. Louis, etc., R. Co., (Tex. 1906) 91 S. W. 1, 93 S. W. 997 [*reversing* (Civ. App. 1905) 87 S. W. 238]. See *infra*, IX, A, 6, q, text and note 6.

Refusal to accept trust.— Even though a city has a right to accept a trust, its refusal to do so would be an exercise by its council of judgment and discretion, which could not be enjoined by a court. Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

Bequest to foreign municipality sustained.— Peynado *v.* Peynado, 82 Ky. 5; *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620.

72. Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434; Chambers *v.* St. Louis, 29 Mo. 543; Sargent *v.* Cornish, 54 N. H. 18; Jones *v.* Habersham, 107 U. S. 174, 188, 2 S. Ct. 336, 27 L. ed. 401; Vidal *v.* Girard, 2 How. (U. S.) 126, 11 L. ed. 205.

73. Coggeshall *v.* Pelton, 7 Johns. Ch. (N. Y.) 292, 11 Am. Dec. 471; Stuart *v.* Easton, 74 Fed. 854, 21 C. C. A. 146.

74. Hamden *v.* Rice, 24 Conn. 350.

75. Philadelphia *v.* Fox, 64 Pa. St. 169.

76. Cresson's Appeal, 30 Pa. St. 437.

77. Penny *v.* Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858, bequest to the board of water commissioners of Detroit to enable them to improve and beautify the land in their custody about their works, and to maintain a library composed of works of practical utility to the persons engaged in looking after the works, and such as would properly be found in any such concern as part of their apparatus.

78. Lester *v.* Jackson, 69 Miss. 887, 11 So. 114; Budd *v.* Budd, 59 Fed. 735.

79. *Connecticut.*— Southington First Cong. Soc. *v.* Atwater, 23 Conn. 34.

Illinois.— Prickett *v.* People, 88 Ill. 115; Heuser *v.* Harris, 42 Ill. 425, bequest to school-district for school purposes.

Indiana.—Skinner *v.* Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; Richmond *v.* Davis, 103 Ind. 449, 3 N. E. 130; Lagrange County *v.* Rogers, 55 Ind. 297; Craig *v.* Secrist, 54 Ind. 419, sustaining a devise to a county in trust for the education of a certain class of children in the county. See also Richmond *v.* State, 5 Ind. 334.

Maine.— Bangor *v.* Beal, 85 Me. 129, 26 Atl. 1112 ("for the promotion of education"); Piper *v.* Moulton, 72 Me. 155.

Maryland.— Barnum *v.* Baltimore, 62 Md. 275, 50 Am. Rep. 219.

Massachusetts.— Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Drury *v.* Natick, 10 Allen 169; Sutton *v.* Cole, 3 Pick. 232.

Michigan.— Maynard *v.* Woodard, 36 Mich. 423 (bequest to school-district board to buy books for school library); Hatheway *v.* Sackett, 32 Mich. 97.

Missouri.— Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305.

New Hampshire.— Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445, gift to the inhabitants of a school-district to build and maintain a school-house.

New Jersey.— Mason *v.* Tuckerton M. E. Church, 27 N. J. Eq. 47, bequest to townships for the purpose of educating their poor orphan children.

New York.— Le Couteulx *v.* Buffalo, 33 N. Y. 333 (deed of land in trust for free or common schools); Iseman *v.* Myres, 26 Hun 651 (to school-district).

public library or reading room;[80] or for the relief and support of the poor.[81] It

Ohio.—Christy *v.* Ashtabula County Com'rs, 41 Ohio St. 711 (devise and bequest to county for educational purposes); State *v.* Toledo, 23 Ohio Cir. Ct. 327.

Oregon.— Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142, conveyance to county for educational purposes.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Texas.— Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

Vermont.— Sheldon *v.* Stockbridge, 67 Vt. 299, 31 Atl. 414; Castleton *v.* Langdon, 19 Vt. 210.

United States.— Girard *v.* Philadelphia, 7 Wall. 1, 19 L. ed. 53; Perin *v.* Carey, 24 How. 465, 16 L. ed. 701; McDonogh *v.* Murdock, 15 How. 367, 14 L. ed. 732; Vidal *v.* Girard, 2 How. 127, 11 L. ed. 205 (may take in trust to establish and maintain colleges, schools, and seminaries of learning, especially such as are for the education of orphans and poor scholars); Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100 [*affirming* 91 Fed. 948].

80. *Iowa.*— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434, holding that a provision of a devise to a city in trust that from the income of the property a fund should be raised for the benefit of a public library was germane to the objects of the city, as cities were authorized by Code, § 461, to establish and maintain free public libraries and to receive gifts, devises, and bequests therefor.

Maine.— Bangor *v.* Beal, 85 Me. 129, 26 Atl. 1112.

Massachusetts.— Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; Drury *v.* Natick, 10 Allen 169.

New York.— Betts *v.* Betts, 4 Abb. N. Cas. 317, holding that the board of education of New York had the power to take a bequest for the supply of a library for the College of the City of New York.

Wisconsin.— Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986, holding that a city had the power to accept lands devised to it for establishing and maintaining a public library, as Rev. St. § 931, conferred on cities the power to establish a public library.

81. *California.*— *In re* Robinson, 63 Cal. 620, bequest of money to a city in trust to invest the same and pay the interest from time to time to destitute women and children of the city.

Illinois.— Prickett *v.* People, 88 Ill. 115 (sustaining a bequest of money "to the poor of" a certain county and holding that it was a bequest to the poor of the county in a technical sense — that is, those whom the county were under legal liability to support, and that the county board of the county had the right to the control and custody of the fund); Heuser *v.* Harris, 42 Ill. 425 (to the same effect).

Indiana.— Rush County *v.* Dinwiddie, 139 Ind. 128, 37 N. E. 795, holding that a board of county commissioners was a corporation capable of taking a devise for the establishment of a home for the benefit of worthy homeless people and orphans, within the meaning of Rev. St. (1894) § 2726, Rev. St. (1881) § 2556), providing that a devise may be made to any person or corporation capable of holding the same.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434, holding that the establishment and maintenance of infirmaries for the poor is a proper municipal object, and that a city, although it could not do so at the public expense in the absence of express authority, may take a devise in trust for that purpose.

Louisiana.— Mary's Succession, 2 Rob. 438.

Massachusetts.—Fellows *v.* Miner, 119 Mass. 541 (sustaining a bequest to a town in trust to pay over the income to such of the native-born aged and infirm inhabitants of the town, and maiden ladies who are native-born inhabitants, although not aged, as should be deemed most needy); Webb *v.* Neal, 5 Allen 575 (holding that a city might act as trustee of a fund left by a will in trust with a provision that the income thereof should be expended in the purchase of fuel, "to be given, or sold at low prices, as may be deemed best by the trustees, to such worthy and industrious persons as are not supported in whole or in part at the public expense, but who may need some aid in addition to their own labor to enable them to sustain themselves and their families during the inclement season of the year; such aid to be afforded in the most private manner possible, and the names of the recipients to be withheld from the public").

Missouri.— Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305, sustaining a trust to establish and maintain an asylum for the maintenance and education of poor children. See also Chambers *v.* St. Louis, 29 Mo. 543.

New Jersey.— Mason *v.* Tuckerton M. E. Church, 27 N. J. Eq. 47, bequests to townships for the purpose of educating their poor orphan children, and in case the interest be not all consumed for this purpose, the balance to be appropriated annually to the poor widows in the townships.

New York.— Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715.

Pennsylvania.—Philadelphia *v.* Fox, 64 Pa. St. 169, devise and bequest of fund in trust to purchase and distribute fuel among the poor. See also Lawrence County *v.* Leonard, 83 Pa. St. 206 (bequest to county for support of the poor in a certain township); Philadelphia *v.* Elliott, 3 Rawle 170 (bequest to a city to purchase a lot and erect thereon a hospital for the relief of the indigent blind and lame).

Vermont.— Sheldon *v.* Stockbridge, 67 Vt. 299, 31 Atl. 414.

Wisconsin.—Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986, holding that a city had power to accept a devise for the purpose of estab-

has also been held that a municipality might take a fund in trust for the yearly purchase and use for display of United States flags;[82] for the purpose of furnishing relief to all poor emigrants and travelers coming to the city on the way to settle in the west;[83] and to loan the fund on interest to young married artificers to start them in business.[84] It is a general rule, however, that a municipal corporation cannot take and hold property in trust for a purpose which is foreign to the objects of its incorporation, and in which it has no interest.[85] Therefore a municipal corporation cannot hold land in trust for religious purposes,[86] nor can it in the United States, in the absence of a grant of power, accept and hold property upon a purely private trust.[87]

lishing a home for the aged and poor, as Rev. St. § 1499, charged cities with the relief of the resident poor.

United States.— Perin *v.* Carey, 24 How. 465, 16 L. ed. 701, trust for support and education of poor white male and female orphans.

England.—Atty.-Gen. *v.* Newcastle, 5 Beav. 307, 49 Eng. Reprint 596, 12 Cl. & F. 402, 8 Eng. Reprint 1164, 6 Jur. 789.

A foundling hospital for the special purpose of relieving unfortunate females and caring for and protecting their offspring is in effect a provision for the poor, and hence a city may accept a devise in trust for the maintenance of such a hospital. Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

Trusts for the poor not within the powers of a municipality see *infra*, this section, text and note 85.

82. Sargent *v.* Cornish, 54 N. H. 18.

83. Chambers *v.* St. Louis, 29 Mo. 543.

84. Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172. See also Atty.-Gen. *v.* Leicester, 7 Beav. 176, 29 Eng. Ch. 176, 49 Eng. Reprint 1031, where a municipal corporation held property on a charitable trust to employ the income in making loans to young men, repayable without interest. *Compare*, however, *infra*, this section, text and note 87.

85. *Connecticut.*— Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69, holding that, in the absence of authority granted by its charter, a city had no power to accept a bequest in trust to apply the income, through such agencies as the proper authorities might see fit, "for the supply of fuel and other necessaries to deserving indigent persons not paupers, preferring such as are aged or infirm." *Compare* Yale College's Appeal, 67 Conn. 237, 34 Atl. 1036.

Georgia.— Augusta *v.* Walton, 77 Ga. 517, 1 S. E. 214, trust for support of poor.

Kentucky.— Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403, 19 Ky. L. Rep. 1292, 80 Am. St. Rep. 355, 39 L. R. A. 93.

Massachusetts.— Bullard *v.* Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110.

New York.— Fosdick *v.* Hempstead, 126 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715 [*reversing* 8 N. Y. Suppl. 772] (holding that in order that a bequest to a town for the purpose of investing the principal and applying the income to a specific object may take effect as an absolute gift to the town, the gift must be made for some one or all of the purposes for which the town was incorporated; and since it is under no legal obligation to support persons who do not come within the statutory definition of poor persons, a bequest for such purpose cannot take effect as an absolute gift to the town); Jackson *v.* Hartwell, 8 Johns. 422.

Effect of want of power see *infra*, VIII, E, 1.

86. Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403, 19 Ky. L. Rep. 1292, 80 Am. St. Rep. 355, 39 L. R. A. 93 (holding that a municipality cannot take a dedication of a lot and hold the same in trust as a place of religious worship and instruction); Bullard *v.* Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110 (holding that a town cannot accept a bequest on condition that it support a clergyman and apply the interest of the fund to the payment of his salary).

Contra.— In New Hampshire, however, it was held that towns might legally take and hold property in trust for the support of religion within their limits. Atty.-Gen. *v.* Dublin, 38 N. H. 459. See also Orford Union Cong. Soc. *v.* West Cong. Soc., 55 N. H. 463.

That a church is to be established at a home for the benefit of homeless people and orphans, to be founded under a devise to a county for such purpose, does not invalidate the gift. Rush County *v.* Dinwiddie, 139 Ind. 128, 37 N. E. 795.

Trust for benefit of religious societies.— And it has been held that the prohibition of Iowa Code, § 552, against appropriation by cities of public money for institutions under ecclesiastical or sectarian management, does not prevent a city from taking a devise in trust for the religious societies thereof, without regard to denomination, cities having power (section 482) to do what will tend to promote the prosperity and improve the morals, comfort, and convenience of their inhabitants. Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

87. *In re* Franklin, 150 Pa. St. 437, 24 Atl. 626, 30 Am. Rep. 817, holding that a municipal corporation cannot accept and hold property in trust to loan the same out to artisans. *Contra*, Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. Ct. 241. And *compare* Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172, where such trust was recognized as valid.

In England, however, such trusts are valid. Gloucester *v.* Osborn, 1 H. L. Cas. 272, 285,

C. Mode of Acquisition. Authority on the part of a municipal corporation to acquire property includes any usual mode of acquisition, not prohibited by law,[88] as by devise or bequest,[89] by purchase[90] or gift,[91] or by deed of conveyance from private individuals or corporations,[92] by statutory grant from the state,[93] by an award of referees, under contract or statute, to transfer private waterworks to the municipality,[94] although to retain them it must comply with the terms of award,[95] by redemption from a sheriff's sale,[96] by dedication,[97] by eminent

9 Eng. Reprint 760. See also Atty.-Gen. *v.* Leicester, 7 Beav. 176, 29 Eng. Ch. 176, 49 Eng. Reprint 1031, where it was assumed that a municipal corporation could hold property on a charitable trust to employ the interest in making loans to young men, repayable without interest.

88. Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711.

89. *California.*— *In re* Robinson, 63 Cal. 620.

Connecticut.— Hamden *v.* Rice, 24 Conn. 350.

Indiana.— Hayward *v.* Davidson, 41 Ind. 212.

Kansas.— Delaney *v.* Salina, 34 Kan. 532, 9 Pac. 271.

Mississippi.— Lester *v.* Jackson, 69 Miss. 887, 11 So. 114.

Missouri.— Fulbright *v.* Perry County, 145 Mo. 432, 46 S. W. 955; Chambers *v.* St. Louis, 29 Mo. 543.

New York.— Matter of Crane, 12 N. Y. App. Div. 271, 42 N. Y. Suppl. 904 [*affirmed* in 159 N. Y. 557, 54 N. E. 1089].

Wisconsin.— Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986.

United States.— Perin *v.* Carey, 24 How. 465, 16 L. ed. 701; McDonogh *v.* Murdoch, 15 How. 367, 14 L. ed. 732; Vidal *v.* Girard, 2 How. 127, 11 L. ed. 205; Budd *v.* Budd, 59 Fed. 735.

And see the other cases cited *supra*, VIII, B, 3.

Devise subject to payment of annuity.— Where a municipal corporation has power under its charter to acquire and hold land by gift, devise, or purchase, for public parks, and the common council is authorized to provide by ordinance for the purchase or otherwise obtaining real estate for parks, to be paid out of the general funds or in three annual instalments, to be raised by assessments, the common council may accept a devise of land for a public park subject to payment of an annuity for life, and it is not prevented from doing so by a charter provision forbidding it to appropriate any money in excess of the revenue for the fiscal year actually collected, or to bind the city by any contract until a definite sum is appropriated for the liquidation of all liability flowing therefrom. Budd *v.* Budd, 59 Fed. 735.

90. Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711; Ketchum *v.* Buffalo, 14 N. Y. 356; Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

91. Nelson *v.* Georgetown, 190 Mass. 225, 76 N. E. 606; Keuffel *v.* Hoboken, 71 N. J. L. 518, 59 Atl. 20. In Nelson *v.* Georgetown, *supra*, a letter of a donor addressed to "the inhabitants" of a town, recited that he had caused the erection of a library building for the benefit "of yourselves and your successors," and that he took "pleasure in presenting it to you," and stated that he had placed in the hands of the library committee a specified fund, a part of which should be invested and the income used for the library, and the remainder invested and allowed to accumulate until a specified sum should be reached, when it might be used for the erection of a suitable building, and that the building erected should be the "property of the town" for the purpose of a library building. It was held that the gift of the building and the fund was to the town in its corporate capacity, subject to the restrictions imposed.

92. Beebe *v.* Little Rock, 68 Ark. 39, 56 S. W. 791; Keuffel *v.* Hoboken, 71 N. J. L. 518, 59 Atl. 20; U. S. *v.* Case Library, 98 Fed. 512 [*affirmed* in 104 Fed. 711, 44 C. C. A. 161]; Macartney *v.* Haldimand County, 10 Ont. L. Rep. 668.

93. See Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

94. *In re* Cornwall, 29 Ont. 350.

95. Cornwall Water Works Co. *v.* Cornwall, 29 Ont. 605. Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of sections 445 and 446 of the Municipal Act, it must pay into court the amount awarded, with interest to the date of payment in, and six months' interest in advance. *In re* Cornwall, 27 Ont. App. 48 [*affirming* 30 Ont. 81].

96. People *v.* Doane, 17 Cal. 476.

97. Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730. See, generally, DEDICATION.

When the Fort Dearborn reservation, near the mouth of the Chicago river, was subdivided by the agent of the secretary of war, proceeding under the act of congress of March 3, 1819, into lots, and they were sold with reference to the map or plat of such subdivision, and the reservation was no longer used as a military site or for any purpose connected with the exercise of the powers of the general government, all the lands embraced within its limits ceased to be a part of the national domain. The title to the specific lots passed to those who purchased them, while the title to and immediate possession and control of such property as was dedicated to public use for streets and grounds vested in the local government — that is, in the municipal corporation of Chi-

domain under legislative authority, but not otherwise,[98] and by prescription or adverse possession.[99] In the absence of express restrictions, a municipal corporation may purchase property on credit as well as for cash.[1] If the charter prescribes a particular mode of acquiring property, that mode must be followed;[2] but mere delegation by the legislature to a municipality of the right to acquire property under the power of eminent domain does not necessarily exclude the power to do so by purchase.[3] The action of the municipality as to personalty may be shown by resolution;[4] but as to realty the more solemn form of ordinance is usually necessary to bind the corporation.[5] As a rule the power to purchase property for a municipality is vested in the common council as its governing body;[6] but it may, subject to limitations, appoint a committee to make a purchase;[7] and on the other hand the charter may require the concurrent action of the common council and some other body.[8] Neither by the Spanish nor French laws could a city or community acquire title to real property, or to the use of it, without letters patent, grant, purchase, or deed.[9] Failure to comply with statutory formalities of purchase, prescribed in an unconstitutional statute, does not impair title.[10]

D. Sale or Disposal of Property[11] — **1. In General.** Municipal corporations, it has been said, hold all property in a fiduciary capacity; and they have not the power of disposition which belongs to the private proprietor.[12] All their

cago, as a public agency of that state for the purposes for which such dedication was made. Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

98. See EMINENT DOMAIN, 15 Cyc. 568.

99. *Massachusetts.*— Deerfield *v.* Connecticut River R. Co., 144 Mass. 325, 11 N. E. 105; Gould *v.* Boston, 120 Mass. 300.

Missouri.— Stephens *v.* Murray, 132 Mo. 468, 34 S. W. 56.

New York.— New York *v.* Carleton, 113 N. Y. 284, 21 N. E. 55; Sherman *v.* Kane, 86 N. Y. 57.

Rhode Island.— New Shoreham *v.* Ball, 14 R. I. 566.

Vermont.— Boothe *v.* Coventry, 4 Vt. 295.

See, generally, ADVERSE POSSESSION.

Streets and highways by prescription see, generally, STREETS AND HIGHWAYS.

1. New Orleans First Municipality *v.* McDonough, 2 Rob. (La.) 244; Ketchum *v.* Buffalo, 14 N. Y. 356 [*affirming* 21 Barb. 294]; Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460; State *v.* Madison, 7 Wis. 688.

2. Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711; Trester *v.* Sheboygan, 87 Wis. 496, 58 N. W. 747.

3. Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711, holding that the fact that a city was by statute given the power to condemn land for a sewer did not exclude its general power to purchase land for such purpose. *Compare,* however, Trester *v.* Sheboygan, 87 Wis. 496, 58 N. W. 747, holding that a city had no power to purchase an easement for street purposes, under a charter which contained the usual provisions for the condemnation of land for public grounds, streets, etc., although it also provided that the city might lease, purchase, and hold real or personal property sufficient for the convenience of the inhabitants thereof, and might sell and convey the same, and that the same while owned by the city should be free from taxation.

4. Green *v.* Cape May, 41 N. J. L. 45.

5. Fuller *v.* Scranton, 1 Pa. Co. Ct. 405.

6. Green *v.* Cape May, 41 N. J. L. 45. And see *supra,* V, A, 2.

7. Burlington *v.* Dennison, 42 N. J. L. 165; Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54]; Edwards *v.* Watertown, 24 Hun (N. Y.) 426, 61 How. Pr. 463. See *supra,* V, B, 5.

8. Lauenstein *v.* Fond du Lac, 28 Wis. 336, holding that where the charter of a city gave the common council a general power to purchase land for the necessary purposes of the corporation, but by another section it provided that the board of education should have power, with the consent of the common council, to buy sites for school-houses in said city, the general power of the council was qualified by the latter provision, and that a valid purchase of a site for a school-house could be made only by the concurrent action of the two bodies.

9. De Armas *v.* New Orleans, 5 La. 132.

10. Coward *v.* Bayonne, 67 N. J. L. 470, 51 Atl. 490.

11. Liability of municipal property to execution see EXECUTIONS, 17 Cyc. 978.

Adverse possession as against municipal corporation see ADVERSE POSSESSION, 1 Cyc. 1117.

Grant of easement by municipal corporation see EASEMENT, 14 Cyc. 1179.

Power to incur debt and expenditure see *infra,* XV, A.

Necessity for demand of rent under lease by municipal corporation see LANDLORD AND TENANT, 24 Cyc. 1355 note 59.

12. Savannah *v.* Georgia Steam Boat Co., R. M. Charlt. (Ga.) 342; Pittsburgh *v.* Epping-Carpenter Co., 29 Pittsb. Leg. J. N. S.

powers are held in trust for public use,[13] and the validity of their exercise generally depends upon the purpose thereof.[14] And in this matter must be observed the double nature of the corporation and its functions, governmental and municipal.[15] Property held by the corporation for strictly governmental purposes may be sold or disposed of only under express legislative authority.[16] But property acquired and held for general municipal purposes is subject to its discretionary power of use and disposal.[17] This does not, however, include the power of donation or gratuitous disposition;[18] but property acquired for one municipal purpose may be appropriated to or disposed of for another.[19] Like other municipal powers this is subject to constitutional and statutory limitations,[20] and deeds in defiance

(Pa.) 255; Huron Waterworks Co. *v.* Huron, 7 S. D. 9, 62 N. W. 975, 58 Am. St. Rep. 817, 30 L. R. A. 848, 8 S. D. 169, 65 N. W. 816, 30 L. R. A. 848.

13. Huron Waterworks Co. *v.* Huron, 7 S. D. 9, 62 N. W. 975, 58 Am. St. Rep. 817, 30 L. R. A. 848, 8 S. D. 169, 65 N. W. 816, 30 L. R. A. 848.

14. Savannah *v.* Georgia Steam Boat Co., R. M. Charlt. (Ga.) 342.

15. In Michigan, where the right of local self-government is fully recognized and protected by constitutional provision, Judge Cooley says: "It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the 'law of the land.'" Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140, 148, 5 N. W. 275. It is hardly proper in other states where home rule is not so highly favored to speak of any municipal property as private property. It is, however, essentially trust property, the municipality being a trustee, and the people of the locality *cestuis que trustent* of strictly municipal property.

16. De Motte *v.* Valparaiso, (Ind. App. 1903) 67 N. E. 465; Murray *v.* Allegheny, 136 Fed. 57, 69 C. C. A. 65.

17. Terre Haute *v.* Terre Haute Waterworks Co., 94 Ind. 305; Newark *v.* Elliott, 5 Ohio St. 113; Reynolds *v.* Stark County Com'rs, 5 Ohio 204. Under a charter authorizing the mayor and aldermen of the town "to do all things necessary to be done by corporations," they have the right to dispose of the public property of the corporation as they may think proper for the prosperity of the town, and apply it to a different use from that originally contemplated when the town was laid off. Memphis *v.* Wright, 6 Yerg. (Tenn.) 497, 27 Am. Dec. 489. Personal or real property, not devoted to the use of the public, or needed therefor, may be sold or transferred by a municipality under a general provision of its charter authorizing it to sell property. Ogden City *v.* Bear Lake, etc., Water-Works, etc., Co., 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305.

May lease its private property.— Horn *v.* People, 26 Mich. 221; Reynolds *v.* Stark County Com'rs, 5 Ohio 204.

Lease of hotel in park.— A lease by the department of public parks of the city of New York, for a term of years, of a hotel, upon park property for the use of park visitors, was held a reasonable and fair exercise of the general power of the city to hold and manage real estate, and it was further held that where the lessee has expended large sums of money in improvements and repairs, equity will restrain the city from ejecting him during the term. Gushee *v.* New York, 26 Misc. (N. Y.) 287, 56 N. Y. Suppl. 1002 [*affirmed* in 42 N. Y. App. Div. 37, 58 N. Y. Suppl. 967].

Gas plant.— Under Ohio Rev. St. § 1692, subd. 34, giving to cities and villages the power "to acquire by purchase or otherwise and hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same," a city or village has power to sell its gas plant. Thompson *v.* Nemeyer, 59 Ohio St. 486, 52 N. E. 1024.

Lease of water right to waterworks company sustained.— Ogden City *v.* Bear Lake, etc., Water-Works, etc., Co., 28 Utah 25, 76 Pac. 1069.

Sale of railroad.— The Ohio act of May 4, 1869 (66 Ohio Laws, p. 80), under which the "Cincinnati Southern Railway" was constructed by the city of Cincinnati, did not require that the road be kept under lease perpetually, by the board of trustees provided for by the act, nor exclude the power of alienation of the property by the proper municipal authorities, in accordance with appropriate legislation. Cincinnati *v.* Dexter, 55 Ohio St. 93, 44 N. E. 520.

18. Mt. Sinai Hospital *v.* Hyman, 92 N. Y. App. Div. 270, 87 N. Y. Suppl. 276; Wright *v.* Victoria, 4 Tex. 375. See *infra*, VIII, D, 4.

19. Gumpert *v.* Finn, 10 Kulp (Pa.) 185. Under a city charter providing that all the property of the city is vested in the mayor and city council, with full power of disposition of it, etc., an ordinance directing the mayor and other proper officers to lease a lot for the purpose of erecting thereon a building for the use of an English-German school does not deprive the mayor and city council of power to afterward use the lot and building erected thereon for some other purpose than the one originally designated. Davidson *v.* Baltimore, 96 Md. 509, 53 Atl. 1121. In the absence of a charter restriction, it has been said, a town has power to dispose of any property which it has a right to acquire. Newark *v.* Elliott, 5 Ohio St. 113.

20. Weekes *v.* Galveston, 21 Tex. Civ. App.

thereof are void;[21] but sales and deeds of unusual character may be specially authorized by statute.[22] Where a city has charter authority to contract and to sell and convey real estate it may execute a deed with a covenant of general warranty.[23]

2. DELEGATION OF POWER TO SELL. A municipality may not delegate its discretionary power of sale to another;[24] but the ministerial function may be conferred upon an officer or agent thereunto specially authorized.[25]

3. POWER TO CONVEY PROPERTY ACQUIRED OR HELD FOR SPECIAL PURPOSE — a. In General. The power of the municipality to convey property is generally declared to be equal to its power to acquire it;[26] and so, where it is acquired or held for a special purpose, as soon as that purpose is served, and the corporation has no further use for the property, it may be converted to another use or disposed of by the municipality.[27] But it seems that such power of disposition is not to be inferred from a general charter power to control municipal property, so long as the city has use for the property for the purpose to which alone it is serviceable.[28] Where a city has an easement only in lots conveyed to it to be used for levee purposes, its lease of the same for building purposes is void and confers no right of possession as against the grantor of the easement.[29]

102, 51 S. W. 544. Under Ohio Rev. St. § 1692, par. 34, conferring on municipal corporations the power "to acquire by purchase or otherwise and to hold real estate or any interest therein, and other property for the use of the corporation, and to sell or lease the same," the city of Toledo has power to sell its natural gas plant. Kerlin Bros. Co. *v.* Toledo, 20 Ohio Cir. Ct. 603, 11 Ohio Cir. Dec. 56. Ky. Const. § 203, providing that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges," applies only to private corporations, and not to municipal corporations. Carrollton Furniture Mfg. Co. *v.* Carrollton, 104 Ky. 525, 47 S. W. 439, 885, 20 Ky. L. Rep. 818.

21. Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312. The California act of May 4, 1852 (St. (1852) p. 180), §§ 1, 3, granting to the town of Oakland lands covered by the flux of tides, bounding the town on three sides, "with a view to facilitate the construction of wharves and other improvements . . . provided, that said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid," thereby give to the town authority that cannot be delegated; and hence a conveyance by the town to an individual of all of said lands is void, although he may agree to construct wharves, etc., as the ownership of a part of the land, at least, is essential to the exercise of said authority. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

22. Driscoll *v.* New Haven, 75 Conn. 92, 52 Atl. 618.

23. Abbott *v.* Galveston, 97 Tex. 474, 79 S. W. 1064.

24. Heydenfelt *v.* Hitchcock, 15 Cal. 514; Beal *v.* Roanoke, 90 Va. 77, 17 S. E. 738. The common council of San Francisco must exercise the functions imposed on them by their charter, and have no power to delegate them to others. The power to sell granted to them does not include the power to make a deed of trust, or place the property committed to their custody in charge of others, for the term of three years, with power to sell as they may deem advisable. Smith *v.* Morse, 2 Cal. 524.

25. Hutchinson *v.* Trenton, 42 N. J. L. 72.

26. Thompson *v.* Nemeyer, 59 Ohio St. 486, 52 N. E. 1024. Under a town charter which provides that the board of commissioners "shall have power to acquire any piece or pieces of land by purchase or lease as sites for markets or other buildings for the use of said town," the commissioners have full power to dispose of a town hall in such manner as to them may seem best for the interest of the town. Shaver *v.* Salisbury, 68 N. C. 291.

27. Newell *v.* Hancock, 67 N. H. 244, 35 Atl. 253. Where a *locus publicus* ceases in whole or part to be applicable to its original destination, the sovereign, who regulates *loci publici*, may direct its future application to any other public object, and, if necessary, order the sale of it on a ground-rent for the city or apply the proceeds in the same manner. Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624. Where a city bought a lot without the city limits for a reservoir, which the deed stipulated was to be built on the lot, and the city did not build the reservoir, but sold the land, and the grantor's executor afterward resold the land to one who brought ejectment against the grantee of the city, it was held that the city's title was not divested by the failure to use the land for the purpose specified. Newman *v.* Ashe, 9 Baxt. (Tenn.) 380.

28. State *v.* Taylor, 107 Tenn. 455, 64 S. W. 766. And see Weekes *v.* Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544. A public corporation cannot alien or grant the public property for purposes different from the objects of its original appropriation. Savannah *v.* State Steam Boat Co., R. M. Charlt. (Ga.) 342.

29. Sanborn *v.* Van Duyne, 90 Minn. 215, 96 N. W. 41.

b. Streets and Parks. A municipality holds its avenues, streets, and alleys in trust for the general public, and has no general or implied power to convey them or pervert them to other uses.[30] But they may be lawfully vacated, and then the property sold under a general power of alienation of municipal property;[31] and where, by its charter, a city has authority to open, lay out, widen, straighten, or otherwise change streets in the city, it may vacate and sell to an abutting owner a part of a street, where the selling and closing of the tract will straighten and make more uniform in width the street from which the tract is taken, without closing or preventing the free use of such street by the public.[32] The soil and earth taken off for graduation may be sold and the value thereof recovered from the purchaser.[33] Property dedicated to the municipality for public parks and squares is not subject to sale or conveyance by it;[34] but property purchased by a city for such purpose may be converted to other uses,[35] or sold or conveyed by the city under a general power of alienation.[36]

c. Wharves. In some states it has been held that a municipal corporation holds its public wharves as it does its streets, and that it has no power to sell or lease them to private persons in the absence of special statutory authority.[37] In other states the contrary has been held on the ground that the wharves are not highways, but private property of the municipality.[38]

d. Lands Held in Trust. Lands taken and held by a municipality under grant, will, gift, or dedication for a specific purpose[39] are subject to the law of trusts, and may not be alienated by the trustee at will without lawful authority,[40] even though

30. Giltner *v.* Carrollton, 7 B. Mon. (Ky.) 680; Augusta *v.* Perkins, 3 B. Mon. (Ky.) 437; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; People *v.* Albany, 4 Hun (N. Y.) 675; Murray *v.* Allegheny, 136 Fed. 57, 69 C. C. A. 65. And see Bateman *v.* Covington, 90 Ky. 390, 14 S. W. 361, 12 Ky. L. Rep. 384; Com. *v.* Young Men's Christian Assoc., 169 Pa. St. 24, 32 Atl. 121. The Michigan act of April 4, 1827, as amended by the act of June 29, 1832, vesting the common council of the city of Detroit with power to "make or alter" streets and do whatever might be for the "regularity, public health, and convenience of the city," did not authorize them to grant land, dedicated to public use, as a street, to the state, to be used for a purpose inconsistent with its use as a street, without the consent of adjoining lot owners. Cooper *v.* Alden, Harr. (Mich.) 72.

31. Arkenburgh *v.* Wood, 23 Barb. (N. Y.) 360.

Greater New York Charter (Laws (1901), p. 80, c. 466, § 205), empowering the commissioners of the sinking fund to sell the city title to lands within a discontinued and closed street, provided they determine such lands are not needed for any public use, frees the city of any special trust imposed by section 990 (page 419), providing that the title acquired by the city to lands required for a street shall be in trust and that the same be appropriated and kept open for a public street, forever, in like manner as other streets in the city are and of right ought to be. Reis *v.* New York, 113 N. Y. App. Div. 464, 99 N. Y. Suppl. 291 [*affirmed* in 188 N. Y. 58, 80 N. E. 573].

32. Patton *v.* Rome, 124 Ga. 525, 52 S. E. 742.

33. Griswold *v.* Bay City, 35 Mich. 452.

34. Warren *v.* Lyons, 22 Iowa 351; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

35. Mowry *v.* Providence, 16 R. I. 422, 16 Atl. 511; Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725.

36. Fort Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, 32 N. E. 215, 32 Am. St. Rep. 277, 18 L. R. A. 367.

37. Roberts *v.* Louisville, 92 Ky. 95, 17 S. W. 216, 13 Ky. L. Rep. 406, 13 L. R. A. 844; Bateman *v.* Covington, 90 Ky. 390, 14 S. W. 361, 12 Ky. L. Rep. 384; Louisville *v.* U. S. Bank, 3 B. Mon. (Ky.) 138, 157; Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Murray *v.* Allegheny, 136 Fed. 57, 69 C. C. A. 65; Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70.

38. Horn *v.* People, 26 Mich. 221; Thompson *v.* New York, 11 N. Y. 115.

39. Ellis *v.* San Francisco Funded Debt Com'rs, 38 Cal. 629.

40. District of Columbia *v.* Cropley, 23 App. Cas. (D. C.) 232; Lake County Water, etc., Co. *v.* Walsh, 160 Ind. 32, 65 N. E. 530, 98 Am. St. Rep. 264. Proprietors who dedicate land to a city for public use as a common remain for all other purposes its owners. The city may control and regulate such public use, but it cannot sell the property and devote it to a private use and thereby destroy the trust created for the benefit of the public. Cummings *v.* St. Louis, 90 Mo. 259, 2 S. W. 130. A municipal corporation has no implied power or authority to convey away for private purposes property dedicated to or held by it for the public use, such as ground, lying between lots fronting on a navigable river and low water mark, dedicated by the original plat by which the lots were sold as a public highway to give lot owners and the public access to the water front, and at suit of a lot owner a court of

the municipality itself be a beneficiary.[41] If the trust is for the public the legislature, as supreme trustee, may authorize its disposition,[42] subject, however, to any private right or trust therein.[43]

4. Donation and Dedication of Property. When duly authorized by the state a municipality may irrevocably dedicate any of its general property to a particular public use;[44] but it has no power to donate lands or personal property to private uses,[45] unless by constitutional authority;[46] and in some states express

equity will enjoin such conveyance, when not expressly authorized by statute. Murray *v.* Allegheny, 136 Fed. 57, 69 C. C. A. 65.

41. San Francisco *v.* Itsell, 80 Cal. 57, 22 Pac. 74.

42. San Francisco *v.* Beideman, 17 Cal. 443.

43. Granting the municipal lands within the city of San Francisco to have been conveyed by the city to the fund commissioners, in trust for her creditors, and that the property was unalterably fixed by this disposition, yet the city could grant the subject of the trust with the assent of the legislature, subject only to the rights of creditors or their trustees, and the grantee would hold subject only to the trust; and the city could not enjoin a sale by the grantee, or interfere with his use, or possession, until the enforcement of the trust was necessary. San Francisco *v.* Beideman, 17 Cal. 443.

44. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Cincinnati *v.* McMicken, 6 Ohio Cir. Ct. 188, 3 Ohio Cir. Dec. 409.

Dedication of land for street.— A city, having power to lay out and open streets, and to acquire land for that purpose, has power to dedicate its own lands to such use, and to bind itself by covenant with its grantees of abutting lands that land so dedicated shall be forever kept as a public street. Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146 [*reversing* 3 Abb. N. Cas. 478].

Dedication for public wharf.— In the absence of special restrictions a municipal corporation may make an irrevocable dedication of property to the public for the use of a public wharf. Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70.

Under an authority to sell any lands belonging to it, a municipal corporation was held not to be authorized to dedicate its timbered lands to the free and common use of its citizens, so as to prevent a sale by a subsequent council. Wright *v.* Victoria, 4 Tex. 375.

45. Mt. Sinai Hospital *v.* Hyman, 92 N. Y. App. Div. 270, 87 N. Y. Suppl. 276; Kent *v.* Dithridge, etc., Cut Glass Co., 10 Ohio Cir. Ct. 629, 5 Ohio Cir. Dec. 107.

Conveyance of land for erection of factory. — Where the authorities of a municipality, under an agreement with private parties, donated to them a large amount of the money of such municipality and a tract of land owned by it, in consideration of the erection by them of a factory in the municipality, it was held that the transaction was an unlawful diversion of the municipal property, and that the same could be recovered back from such private parties at the suit of the municipality. Kent *v.* Dithridge, etc., Cut Glass Co., 10 Ohio Cir. Ct. 529, 5 Ohio Cir. Dec. 107.

Grant of land to hospital.— A municipal corporation has no power to donate a part of its common lands to a private corporation organized for the maintenance of a hospital; and such a conveyance is not supported by a valuable consideration because of the fact that the land will be subject to taxation in the hands of a purchaser from the corporation. Mt. Sinai Hospital *v.* Hyman, 92 N. Y. App. Div. 270, 87 N. Y. Suppl. 276.

Conveyance or lease of schools.— A municipal corporation, having erected a school under charter authority, has no power to convey or lease the same to an individual or private corporation for the purpose of having a school taught therein for pay. Sherlock *v.* Winnetka, 68 Ill. 530.

Conveyance or lease to water company.— A city proceeding under the provisions of the statute authorizing it to grant a license to a water company to supply water to the city and its inhabitants has no power to either acquire a lot for the location of such private company, or to give it or its use to such company. Cain *v.* Wyoming, 104 Ill. App. 538.

Granting use of wharf.— Where property within the limits of a municipal corporation and along the bank of a navigable river has been dedicated to the public for the use of a wharf, and the municipal authorities are vested with the regulation and control of the uses of the property thus dedicated, they may by ordinance, in the absence of special restrictions, authorize the erection of a grain elevator thereon to facilitate the handling of grain at the wharf; but an ordinance by which municipal authorities undertake, without express legislative authority therefor, to surrender to a private corporation or person their control over the public wharf for a fixed period, as in the case of an ordinance giving to private persons the right to occupy a portion of the public wharf with a grain elevator company for fifty years without reserving the right to resume possession and regulate charges, is void. Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70. *Compare supra*, VIII, D, 3, c.

Ultra vires expenditures by way of donations or gratuities see *infra*, XV, A, 1, c, (III).

46. Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355, grant of right of way to railroad company.

constitutional provisions prevent such donations even under legislative authority.[47] In the absence of statutory authority a city cannot convey its real estate to the county in consideration of the location of the county-seat therein.[48] When a lawful grant, with clause of reversion, is made to a quasi-public corporation, which encumbers the land so granted, the creditors may subject the property to their claims, although it has reverted to the city.[49]

5. Estoppel of Municipality to Recover Property or Assert Title.[50] The courts have often applied the doctrine of estoppel to municipal corporations seeking to repudiate as unauthorized or invalid conveyances made of their property,[51] or releases made by ordinance[52] or by compromise;[53] or to claim title after repeated acts of recognition of title in another,[54] whereby it has received benefits or he has undergone expense. But there are cases refusing to apply the doctrine, some leaving the parties to their rights at law,[55] and others giving the municipality

47. Mt. Sinai Hospital *v.* Hyman, 92 N. Y. App. Div. 270, 87 N. Y. Suppl. 276.

Grant to hospital.— A grant by a city, pursuant to N. Y. Laws (1898), p. 770, c. 257, and Laws (1900), p. 372, c. 166, conveying a tract of land to a corporation incorporated under Laws (1848), p. 447, c. 319, and the acts amendatory thereof, and organized, as stated in its certificate of incorporation, to maintain a hospital for a particular nationality and creed, in consideration of the corporation pledging itself to apply the proceeds to the objects of the corporation as set forth in its certificate, was held void as in violation of N. Y. Const. art. 8, § 10, prohibiting any city from giving any property to or in aid of any individual, association, or corporation, except that it may make such provision for the aid or support of its poor as may be authorized by law. Mt. Sinai Hospital *v.* Hyman, 92 N. Y. App. Div. 270, 87 N. Y. Suppl. 276. Such a donation is also prohibited by N. Y. Const. art. 8, § 11, which provides for a state board of charities and declares that existing laws relating to charitable institutions shall remain in force, and section 14, which provides that nothing shall prevent the legislature from making provision for the education and support of the blind, dumb, etc., or prevent any city from providing for the care, etc., of inmates of orphan asylums, etc., under private or public control, but that no payments by cities to charitable institutions shall be made for any inmate thereof who is not received and retained therein pursuant to rules established by the state board of charities. Mt. Sinai Hospital *v.* Hyman, *supra*.

48. Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

49. *In re* New Orleans Auxiliary Sanitary Assoc., 109 La. 133, 33 So. 111.

50. See also Estoppel, 16 Cyc. 714, 781.

51. Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319. See also San Francisco, etc., Land Co. *v.* Hartung, 138 Cal. 223, 71 Pac. 337; Gushee *v.* New York, 26 Misc. (N. Y.) 287, 56 N. Y. Suppl. 1002 [*affirmed* in 42 N. Y. App. Div. 37, 58 N. Y. Suppl. 967]. The law of estoppel applies to a municipal corporation precisely as it does to a natural person in all things pertaining to the proprietary rights of such corporation, and a municipal corporation which assents to the sale of its interests in a railroad, and silently permits the vendee to improve the railroad in accordance with the contract, is thereby precluded five years afterward from questioning the validity of the sale on the ground of *ultra vires*. Searcy *v.* Yarnell, *supra*. The informality in a sale of real property by a municipality, arising from the execution of the deed by the mayor rather than by a special commissioner, will not sustain ejectment by the municipality to recover back the land after the purchase-price has been received by the city, and the land occupied by the purchaser for nearly twenty years. Wright *v.* Morgan, 191 U. S. 55, 24 S. Ct. 6, 48 L. ed. 89 [*affirming* 106 Fed. 452, 45 C. C. A. 421].

52. Grant *v.* Davenport, 18 Iowa 179.

53. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69 [*reversing* 5 Mo. App. 484].

54. Simplot *v.* Dubuque, 49 Iowa 630, 56 Iowa 639, 10 N. W. 221. In an action against a city for land claimed as public property it appeared that the land was triangular in shape, between diverging streets, and had never been traveled over as a street, except at a small point in the corner. Plaintiff had paid for paving the adjoining streets, and, after failing to fill in the lot, it was done by the city, and plaintiff was compelled to pay the expenses. It was held that plaintiff was entitled to the land. Simplot *v.* Dubuque, *supra*. Where a city has undertaken to convey property to one who had a prior equitable claim thereto, receiving the consideration demanded, and has for many years acquiesced in the ownership and possession of the grantee, the conveyance will be sustained by the courts, unless clearly illegal. Morgan *v.* Johnson, 106 Fed. 452, 45 C. C. A. 421 [*affirmed* in 191 U. S. 55, 24 S. Ct. 6, 48 L. ed. 89].

55. Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776; Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986. The fact that a city council, without complying with the law, attempted to grant a water right on condition that the grantee build a pier, will not estop the city from maintaining ejectment to recover the land with the pier. New York *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 324, 23 N. Y. Suppl. 562 [*affirmed* in 147 N. Y. 710, 42 N. E. 724].

active relief;[56] and it has been held in a number of cases that the unauthorized levy and collection of taxes on property by the officers of a municipality will not estop it from asserting title to the property for the benefit of the public.[57]

6. Estoppel of Purchaser. A purchaser of municipal property at a sale invalid from fatal irregularity in proceedings is not estopped to seek relief from his purchase because of invalidity of the proceedings and of his title thereunder.[58]

7. Ratification of Invalid Conveyance. A sale and conveyance under a void ordinance is validated by due municipal recognition of such ordinance as valid, in an ordinance passed before such sale and conveyance.[59] But an invalid or unauthorized sale and conveyance is not made good by a ratification or act of recognition not in itself valid.[60] And it seems that a sale absolutely void cannot be ratified by the corporation.[61] Nor does a legislative act, ratifying and confirming the ordinances of a town, validate an unauthorized sale by ordinance of valuable town property.[62] Nor is a sale of municipal property made under a forged letter of authority validated by municipal action taken before disclosure of the forgery.[63] Where authority to do any particular act on the part of a municipal corporation can only be conferred by ordinance a ratification of such act can only be by ordinance.[64] An invalid sale requiring the authority of an ordinance cannot be validated by resolution.[65]

8. Presumption of Authority and Validity. The deed of a municipality for property formerly owned by it, which is duly executed by the proper officers with the essential tokens of validity, is presumptively authorized and valid,[66] and

When a city has not appropriated money paid its treasurer as the price of an unauthorized sale of its waterworks, the receipt thereof by the treasurer does not estop the city from recovering the property without repayment of the money. Huron Waterworks Co. *v.* Huron, 7 S. D. 9, 62 N. W. 975, 58 Am. St. Rep. 817, 30 L. R. A. 848, 8 S. D. 169, 65 N. W. 816, 30 L. R. A. 848.

56. McCracken *v.* San Francisco, 16 Cal. 591; Snyder *v.* Mt. Pulaski, 69 Ill. App. 474.

57. *Iowa.*— Des Moines Park Com'rs *v.* Taylor, 133 Iowa 453, 108 N. W. 927; Cedar Rapids *v.* Young, 119 Iowa 552, 93 N. W. 567. *Compare* Brandirff *v.* Harrison County, 50 Iowa 164.

Massachusetts.— Rossire *v.* Boston, 4 Allen 57.

Michigan.— Ellsworth *v.* Grand Rapids, 27 Mich. 250.

Missouri.— St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

New York.— McFarlane *v.* Kerr, 10 Bosw. 249.

58. McCracken *v.* San Francisco, 16 Cal. 591.

59. Holland *v.* San Francisco, 7 Cal. 361.

60. Where the ordinance which was claimed to have ratified an invalid one was passed within an hour of the time of making the sale, and, under the invalid ordinance, ten days' notice of the sale was required, it was held that the ratification at best could only take effect from the passage of the ratifying act, and therefore that the notice was insufficient and the sale void for that reason. McCracken *v.* San Francisco, 16 Cal. 591.

61. Branham *v.* San Jose, 24 Cal. 585; Pimental *v.* San Francisco, 21 Cal. 351; Grogan *v.* San Francisco, 18 Cal. 590. Ratification by a city of an illegal public sale of its property is in effect making a private sale, and does not cure the illegality, where, under the law, the sale could only be made in a public manner. Pimental *v.* San Francisco, *supra*. Where an ordinance for the sale of city property was illegal, for the reason that it was not passed by a majority vote of the board of aldermen, it was held that the only way in which the city council could authorize a sale was by the passage of a law authorizing it, and that the sale could not be validated and confirmed by the passage of a subsequent ordinance, making an appropriation of the money realized from the sale, and accepting the reports of the land commissioner and city treasurer in relation to such proceeds. Grogan *v.* San Francisco, *supra*; McCracken *v.* San Francisco, 16 Cal. 591.

62. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

The relinquishment of the title of the United States to the city of San Francisco, effected by the act of congress of July 1, 1870, relinquishing the interest of the United States in lands to the city and county of San Francisco, did not impart validity to the grant of the alcalde, prior to August, 1850, as the relinquishment effected by the act was on certain designated trusts, to be executed by the city; and the holders of the alcalde grants within the relinquished premises were not among those mentioned in the act. Naglee *v.* Palmer, 50 Cal. 641.

63. Easthampton *v.* Bowman, 136 N. Y. 521, 32 N. E. 987 [*affirming* 60 Hun 163, 14 N. Y. Suppl. 668].

64. McCracken *v.* San Francisco, 16 Cal. 591.

65. Laredo *v.* Macdonnell, 52 Tex. 511.

66. San Francisco, etc., Land Co. *v.* Hartung, 138 Cal. 223, 71 Pac. 337; Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75; Mason *v.*

will withstand collateral attack without the support of a record;[67] and the party attacking its validity must by clear proof exclude the legal presumptions in favor of official acts.[68]

9. Power to Pledge or Mortgage. Power to pledge or mortgage its property, personal or real, is not an inherent or implied power of a municipality;[69] but is included in the charter power to "sell, lease, or dispose of for the use of the city";[70] or to "hold . . . property . . . and convey it in any way whatever, and make all contracts deemed necessary for the welfare of the city."[71] And power to purchase gives power to execute a mortgage in recognition and furtherance of the vendor's lien for the unpaid portion of the purchase-price,[72] even when popular assent is essential to the validity of a conveyance of realty.[73]

10. Authority of Officers and Agents. The validity of a municipal sale or conveyance depends upon the authority conferred upon the officers or agents making or executing the same;[74] if it is beyond the scope of their authority it is void.[75] A deed cannot be refused to a purchaser at an auction sale because of a subsequent higher offer.[76] It has been held that where a resolution of a city council authorized the mayor to "make deed" of land, a covenant of general warranty contained in the deed executed by him in pursuance thereof was binding on the city, although not expressly authorized;[77] but on this question there is

Mulholn, 6 Dana (Ky.) 140; Morrison *v.* McMillan, 4 Litt. (Ky.) 210, 14 Am. Dec. 115. A deed from the city of St. Louis, executed under the authority given by the Missouri act of March 18, 1835, conveying, under the corporate seal, a part of the city commons, title to which had been obtained by the city under the act of congress of June 13, 1812, if regular on its face, was *prima facie* evidence that all the prerequisites of the act of March 18 had been complied with. Swartz *v.* Page, 13 Mo. 603. A municipal corporation having power by its charter to dispose of its lands, its deed therefor will be presumed to have been executed in pursuance of the power, and it is unnecessary for the grantor to show any special authority by resolution or ordinance. Chouquette *v.* Barada, 33 Mo. 249.

67. Larned *v.* Jenkins, 113 Fed. 634, 51 C. C. A. 344.

68. Adams *v.* Dignowity, 8 Tex. Civ. App. 201, 28 S. W. 373.

69. Branham *v.* San Jose, 24 Cal. 585; Fidelity Trust, etc., Co. *v.* Fowler Water Co., 113 Fed. 560; Scott *v.* Shreveport, 20 Fed. 714. Where a town is authorized to construct bridges over a stream dividing its streets, it has no power to execute a deed of trust of the bridge to trustees, authorizing them to collect tolls, and pledging the bridge and the tolls for the payment of the debt created by its construction. Mullarky *v.* Cedar Falls, 19 Iowa 21.

Purchase of mortgaged property see *supra*, VIII, A, 7.

70. Adams *v.* Memphis, etc., R. Co., 2 Coldw. (Tenn.) 645.

71. Adams *v.* Rome, 59 Ga. 765.

72. Edey *v.* Shreveport, 26 La. Ann. 636.

73. Middleton Sav. Bank *v.* Dubuque, 15 Iowa 394.

74. Urch *v.* Portsmouth, 69 N. H. 162, 44 Atl. 112; Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581. Since the validity of an instrument executed by officers of a municipal corporation depends on the authority conferred on them, where the common council directed a release to be given of its claim against an estate, it was held that the instrument executed could have no validity as an assignment. Paff *v.* Kinney, 1 Bradf. Surr. (N. Y.) 1. An ordinance of a city authorizing the mayor to sell lot or lots, block or blocks, of the city, does not empower him to sell property of the city that has not been laid off into lots or blocks. Laredo *v.* Macdonnell, 52 Tex. 511. Where plaintiff purchased from the board of trustees of a town a parcel of land under water, and the boundaries of the land sold were plainly defined, but the deed executed by the president of the board included in addition the land in controversy, it was held that the deed was void as to the land in controversy, since the president either made a mistake or exceeded his authority. De Forest *v.* Walters, 28 N. Y. Suppl. 831 [*affirmed* in 153 N. Y. 229, 47 N. E. 294].

Authority of controller to waive default of bidder at auction sale see Miller *v.* New York, 53 Barb. (N. Y.) 653.

Authority to grant pueblo lands of San Francisco.— Hart *v.* Burnett, 15 Cal. 530.

75. The execution of a special power to convey lands by a public officer must be in strict pursuance of the power, or no title is conveyed. Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581. A deed executed by a committee authorized to execute in behalf of a municipal corporation is inoperative in so far as it purports to convey premises not authorized by the resolution directing the conveyance. Urch *v.* Portsmouth, 69 N. H. 162, 44 Atl. 112.

76. Kerr *v.* Philadelphia, 8 Phila. (Pa.) 292.

77. Abbott *v.* Galveston, 97 Tex. 474, 79 S. W. 1064 [*reversing* (Civ. App. 1903) 76 S. W. 214].

some conflict in the cases.[78] Where a city council refers a proposition to purchase city property to a committee "and the city solicitor, with power to act," such committee cannot make a contract with a proposed purchaser, which is binding on the city, without the concurrence of the city solicitor.[79]

11. Requisites and Validity of Sale or Lease. In the many incongruous decisions in regard to the validity of municipal sales and leases, there seems to be general recognition of the following as essential elements: (1) General or special power from the state to the municipality to sell or lease;[80] (2) valid legislative action by the municipality directing the sale or lease;[81] (3) exercise of function by the board or officer thereunto authorized;[82] (4) substantial compliance with the mandatory provisions for the sale;[83] (5) good faith and freedom from

78. See, generally, Principal and Agent.

79. Beal *v.* Roanoke, 90 Va. 77, 17 S. E. 738.

80. Bowlin *v.* Furman, 28 Mo. 427.

Exchange or compromise.— Where an act vested in the trustees of a city certain school lands, with power to sell and convey, the city might convey such lands by way of exchange or compromise. Bowlin *v.* Furman, 28 Mo. 427.

Reconveyance by town on breach of condition.— Where a charter subsequent to a conveyance of realty to a town, subject to condition that the corporation shall keep it in repair for the specific purpose of maintaining a public school, empowers the mayor and aldermen to hold real estate and convey it, a deed afterward made by the mayor, under an order of the board of mayor and aldermen, reconveying the property on a breach of the condition, is valid. McGehee *v.* Woodville, 59 Miss. 648.

Sale in blocks.— It is not unlawful to sell property constituting the drainage fund of a city in blocks, when it appears that to survey and subdivide it would be very expensive, and without substantial benefit. New Orleans *v.* Peake, 52 Fed. 74, 2 C. C. A. 626.

Sale of fee in streets.— The fact that property constituting the drainage fund of a city was advertised and sold by a receiver under an order of court in blocks intersected by public streets does not show that the court either ordered or approved a sale of the fee in the streets, when it appears that the sale was in the same lots or blocks existing when the city acquired title, and when the property was transferred to the receiver by the notarial act, and that a large plat, showing the position of the streets, was exhibited at the sale, thus charging the purchasers with notice of their location. New Orleans *v.* Peake, 52 Fed. 74, 2 C. C. A. 626.

81. Grogan *v.* San Francisco, 18 Cal. 590; Holland *v.* San Francisco, 7 Cal. 361.

To authorize a lease of the real estate owned by the town of Phillipsburg, to be made to a private person, the common council must first pass an ordinance directing such lease to be executed. It cannot be done by resolution. Shimer *v.* Phillipsburg, 58 N. J. L. 506, 33 Atl. 852.

82. Mackin *v.* Chicago, 93 Ill. 105. A sale of land in the city of San Francisco, by a portion of the board of commissioners of the funded debt, does not pass a legal title on which ejectment can be maintained. A majority may control, yet all must meet and consult, or have notice of the meeting, that they may attend if they desire. A general resolution passed by the whole board, a year before, that they would sell all the city property to pay its debts, will not give validity to the sale of a particular lot subsequently made, in pursuance of a resolution adopted by the board, when two of the five were absent. Leonard *v.* Darlington, 6 Cal. 123. Where an act of incorporation gave the trustees of a city the power to sell and dispose of its school lands, the trustees having a legal, although defeasible, title, such title becomes absolute in their vendee in a court of law. Bowlin *v.* Furman, 28 Mo. 427. Where a city council refers a proposition to purchase city property to "the sewer committee and city solicitor, with power to act," such sewer committee cannot make a contract with a proposed purchaser, which is binding on the city, without the concurrence of the city solicitor. Beal *v.* Roanoke, 90 Va. 77, 17 S. E. 738.

Approval of mayor.—Under Pa. Act (1887), § 12 (Pamphl. Laws 395), giving councils of cities of the second class full power to provide by ordinance for the sale of property held for the use of the poor, where an ordinance has been passed, and been approved by the mayor, directing a sale, prescribing the terms and conditions of sale, and the duties of the city officers in the premises, and providing finally for the approval and acceptance of the bid by the city councils, the resolution of the councils approving and accepting a bid is not such "legislative action" as under the statute requires the approval of the mayor. Straub *v.* Pittsburgh, 138 Pa. St. 356, 22 Atl. 93.

A lease made during the military occupation of New Orleans by the United States army, by the mayor appointed by the general commanding the department, pursuant to a resolution of the boards of finance and of street landings, conveying certain water front property in the city for a certain term, was sustained as a fair and reasonable exercise of the power vested in the military mayor and the two boards. New Orleans *v.* New York Mail Steamship Co., 20 Wall. (U. S.) 387, 22 L. ed. 354.

83. San Francisco, etc., R. Co. *v.* Oakland,

fraud;[84] and (6) municipal compliance with covenants.[85] There are special instances of sales held valid, because of general fairness in method and result, which fell short of meeting these requirements;[86] but they are not safe precedents.[87] The authorized officer or board may employ an agent or auctioneer to conduct the sale.[88] And where the statute gives direct authority to a board or officer to sell, municipal legislation is not necessary.[89]

12. Requisites to Valid Deed. By the common law a corporation could "act and speak only by its common seal."[90] And the proper form for a municipal deed or lease is in the corporate name, signed by the mayor, and sealed with corporate seal, affixed and attested by the recorder or other proper officer.[91] But under

43 Cal. 502. Under a city charter giving power to resell and dispose of real estate of the city for the benefit of the city the power to make a deed of trust, with power to the trustees to sell the estate as they may deem advisable, is not included. Smith *v.* Morse, 2 Cal. 524.

84. Schanck *v.* New York, 69 N. Y. 444 [*affirming* 10 Hun 124].

Error of judgment.— Under N. Y. Laws (1873), c. 335, § 18, prohibiting the common council of New York from leasing its lands "save at a reasonable rent," it was held that a lease by the common council would not, in the absence of fraud, be adjudged invalid on account of an error of judgment as to what constituted a reasonable rent. Schanck *v.* New York, 69 N. Y. 444 [*affirming* 10 Hun 124].

Sale to other than the highest bidder.— Where the action of a municipal corporation in selling real estate of the corporation to a person other than the highest bidder is called into question, it is sufficient if the court find that the council acted in perfect good faith, and that they had reasons before them which they might reasonable have considered good and sufficient to justify their action. Phillips *v.* Belleville, 11 Ont. L. Rep. 256.

85. Donelson *v.* Weakley, 3 Yerg. (Tenn.) 178.

86. Newbold *v.* Glenn, 67 Md. 489, 10 Atl. 242; McGehee *v.* Woodville, 59 Miss. 648; New Orleans *v.* Peake, 52 Fed. 74, 2 C. C. A. 626.

Notice of sale.— Where the mayor and city council of Baltimore sold certain property belonging to the city at private sale without complying with the statute authorizing the sale of the city property, which required notice of such proposed sale to be given in a newspaper printed in Baltimore city once a week for three successive weeks, it was held that as the property was sold for its full value, in the absence of fraud or collusion such sale was valid, and vested a good title in the purchaser. Newbold *v.* Glenn, 67 Md. 489, 10 Atl. 242.

87. In the Maryland case of Newbold *v.* Glenn, 67 Md. 489, 10 Atl. 242, is an illustration of particular justice done to all parties not according to law, but in violation of a mandatory statute enacted to insure fairness and publicity in sales of municipal property and to prevent collusion. This exception to legal rules is sometimes made by courts of equity, but cannot be relied on as precedents to be followed even in similar cases.

88. White *v.* Moses, 21 Cal. 34. A sale made at auction by the controller, and afterward clothed with the formalities of an authentic act, cannot be annulled on the ground that the adjudication was made by a person who was not regularly licensed as an auctioneer. Schwartz *v.* Thirty-Two Flatboats, 14 La. Ann. 243. Under Pa. Act, May 13, 1856, § 25, authorizing the councils of Philadelphia to sell the real estate vested in the city, with the qualification that such sale should not involve a sacrifice of price of such property, the councils on making a sale of city property were not performing executive duties, and might employ an auctioneer, although other offers at a lower commission were made. Conly *v.* Philadelphia, 2 Phila. (Pa.) 194.

89. Morgan *v.* Johnson, 106 Fed. 452, 45 C. C. A. 421 [*affirmed* in 191 U. S. 55, 24 S. Ct. 6, 48 L. ed. 89].

90. 1 Blackstone Comm. 475.

91. Young *v.* Mahoning, 53 Fed. 895 [*citing* Sheehan *v.* Davis, 17 Ohio St. 571], holding that Ohio Rev. St. (1880) § 4106, requiring that every deed shall be signed and sealed by the grantor or maker, does not apply to deeds made by municipal corporations, which are sufficient, if executed as required at common law; and hence a deed is sufficient in which the testatum clause reads as follows: "In witness whereof the said city of Youngstown and the city council have caused William M. Osborn, mayor aforesaid, to subscribe his name, and have caused the corporate seal of said city to be affixed, to these presents. William M. Osborn, Mayor. [City of Youngstown Seal.]"

Deed by city clerk.— Under Ohio Rev. St. § 1746, confiding in the mayor the execution of such writings as the corporation may be called upon to issue, a deed of land owned by a city, which it has power to convey, signed by the city clerk, sealed with his private scroll seal and his official seal as city clerk, and made under the authority of an ordinance, in form authorizing him to execute "a proper deed of conveyance, under the corporate seal of said city," is ineffectual to convey to a purchaser the city's title to such land. Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581.

Lease.— Where a lease by a municipality is under the corporate seal, affixed by the proper officer, it is sufficient *prima facie* to

modern statutes and modern decisions the rigors of the common law have been abated, and much less now satisfies legal requirement.[92] It has been held that the corporate seal is not an essential requisite to a valid deed;[93] nor signature by the mayor;[94] nor operative words of conveyance in the name of the corporation;[95] but that under valid authority from the council, another officer than the mayor may execute the deed;[96] and even that officers, agents, or committees may, under proper authorization, make the deed in their own name.[97] They must, however, be identified as the officers or persons so authorized,[98] which may be done by recitals and certificate;[99] and it seems that reference to the municipal record of authority may be sufficient without incorporating or reciting the same in the deed.[1] A deed or lease by a municipal officer must be, in its terms and otherwise, within the ordinance, resolution, or other authority under which it is executed.[2] The deed of a board may be signed by its chairman;[3] but commissioners or agents, unorganized, must all sign the deed,[4] except where otherwise provided by statute.[5]

13. Curative Statutes. Municipal deeds, inoperative because of defects or omissions in form or execution, may be validated by curative statutes, general or special, enacted before or after the date of the deeds.[6]

show the authority for its execution. Crescent City Wharf, etc., Co. *v.* Simpson, 77 Cal. 286, 19 Pac. 426. It is not necessary that the lessee shall affix his seal to the lease. His acceptance may be shown by his claiming under it, occupying the premises and paying rent. Crescent City Wharf, etc., Co. *v.* Simpson, *supra*.

92. New York *v.* Kent, 57 N. Y. Super. Ct. 109, 5 N. Y. Suppl. 567.

Under Me. Rev. St. c. 12, § 43, giving power to the trustees of a town to convey the school lands belonging to and lying in the town, and providing that the treasurer's deeds thereof, duly executed by order of the trustees, should pass the estate, and chapter 73, section 14, declaring that a deed of release in the usual form will convey the estate which the grantor has and can convey by deed or any other form, it was held that, in the absence of fraud and collusion, a deed executed by such acting treasurer of the trustees by their order, purporting to convey all the right, title, and interest of the trustees in the school lands of the town, conveyed whatever title there was vested in the inhabitants of the town in the land described. Abbott *v.* Chase, 75 Me. 83.

Recital of officer's authority.— Under Cal. Act, March 24, 1870 (Laws 1869–1870, p. 353), enacted to expedite the settlement of land titles in San Francisco, and providing that on an award of lands to a petitioner and publication of notice, the mayor, on receiving proof of publication, "is hereby authorized and empowered to execute, acknowledge, and deliver to the [petitioners] a deed of conveyance . . . and attach thereto the corporate seal of the city and county of San Francisco," it was held that the deed should be regarded, not as that of an officer under a power to convey, but as the deed of the municipality itself, so that no recital of the officer's authority was necessary to validate it. San Francisco, etc., Land Co. *v.* Hartung, 138 Cal. 223, 71 Pac. 337.

93. Gordon *v.* San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73, (1893) 32 Pac. 885.

94. Morgan *v.* Johnson, 106 Fed. 452, 45 C. C. A. 421 [*affirmed* in 191 U. S. 55, 24 S. Ct. 6, 48 L. ed. 89].

95. See Morgan *v.* Johnson, 106 Fed. 452, 45 C. C. A. 421 [*affirmed* in 191 U. S. 55, 24 S. Ct. 6, 48 L. ed. 89].

96. Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22.

97. Nohlehoro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22; McDonald *v.* Schneider, 27 Mo. 405; Proprietors' School Fund Appeal, 2 Walk. (Pa.) 37.

98. Wallace *v.* Dewey, 29 Fed. Cas. No. 17,099, 3 McLean 548.

99. Proprietors' School Fund Appeal, 2 Walk. (Pa.) 37.

1. San Francisco, etc., Land Co. *v.* Hartung, 138 Cal. 223, 71 Pac. 337.

2. A deed from a municipality to a person incorrectly described as the bishop of Colorado, habendum to him, his heirs, and assigns, is within the authority conferred by a resolution of the common council, granting the petition of the grantee, who was the Roman Catholic bishop of Denver, for a conveyance to him and his successors in office. Wright *v.* Morgan, 191 U. S. 55, 24 S. Ct. 6, 48 L. ed. 89 [*affirming* 106 Fed. 452, 45 C. C. A. 421].

3. Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670; Tigh *v.* Chouquette, 21 Mo. 233; Reilly *v.* Chouquette, 18 Mo. 220.

4. Carleton *v.* Darcy, 46 N. Y. Super. Ct. 484. But where a committee of a municipal corporation was empowered to lease certain lands of the corporation, a lease signed by a majority of such committee was held sufficient. Providence School Fund Appeal, 2 Walk. (Pa.) 37.

5. Westchester *v.* Davis, 7 Hun (N. Y.) 647.

6. Rousset *v.* Reay, 60 Cal. 328; Friedman *v.* Nelson, 53 Cal. 589; Ellis *v.* Eastman, 38

14. Payment. Where the terms of sale of municipal property, real or personal, are not prescribed in the act of authority, credit may be given in the discretion of the agency effecting the sale;[7] but unless specially authorized, only money, either in hand or on time, can be accepted as the consideration.[8]

15. Right to Renewal of Lease. A lessee cannot have specific performance of a contract for renewal of a municipal lease, contrary to the statute or public policy of the state.[9]

16. Right of Purchaser to Recover on Invalid or Unauthorized Sale. The right of a purchaser of municipal property at an invalid sale to recover purchase-money from the municipality has been sustained, where the ordinance was not duly enacted,[10] and the money received was appropriated to municipal purposes,[11] but denied where the sale was *ultra vires*.[12]

E. Effect of Want of Power to Acquire or Dispose of Property[13] — **1. Want of Power to Acquire.** An *ultra vires* contract by a municipal corporation to purchase and take property, real or personal, or to pay therefor, is absolutely void and cannot be enforced against the corporation,[14] even though it has received a conveyance and had possession and use of the property;[15] but where a municipal corporation having power under its charter to acquire and hold real estate for some purposes takes a conveyance of property for an unauthorized purpose, although the transaction is *ultra vires*, the deed is not void, but vests the title in the corporation, and its power to hold the property can be questioned only by the state in a direct proceeding for that purpose.[16] The same rule applies to a devise to a municipal corporation which is authorized to acquire and hold real estate for

Cal. 195; Providence School Fund Appeal, 2 Walk. (Pa.) 37. See also *supra*, IV, H, 2; *infra*, IX, I, 2.

7. People *v.* Middleton, 14 Cal. 540; Cincinnati *v.* Dexter, 55 Ohio St. 93, 44 N. E. 520; Newark *v.* Elliott, 5 Ohio St. 113.

8. Cleveland *v.* State Bank, 16 Ohio St. 236, 88 Am. Dec. 445. But where stock in a railroad company, to which a town had subscribed, was sold to one W at par, and W, by the direction of the town's agents, paid to the company the amount claimed by it for interest, and gave to the agents of the town his check for the balance due, which the agents were to hold until the stock was transferred to W, on the books of the company, it was held that the transaction with W was not violative of the act of 1857, requiring sale of the stock to be for cash. Gould *v.* Oneonta, 71 N. Y. 298.

9. New York, etc., Ferry Co. *v.* New York, 146 N. Y. 145, 40 N. E. 785.

10. Pimental *v.* San Francisco, 21 Cal. 351; Grogan *v.* San Francisco, 18 Cal. 590.

11. Herzo *v.* San Francisco, 33 Cal. 134.

12. Weekes *v.* Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544. If the treasurer of a municipal corporation receives money arising from the sale of city property, which sale was void for want of authority on the part of the city to make it, this is the unauthorized act of the agent of the city, and he alone is liable. The purchaser cannot recover the money from the city. Herzo *v.* San Francisco, 33 Cal. 134.

13. Injunction against acquisition or disposition of property see Injunctions, 22 Cyc. 879 *et seq.*

Right of purchaser to recover back price see *supra*, VIII, D, 16.

14. Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118; Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369. See *infra*, IX, A, 5; IX, H.

15. Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.

16. *California.*— Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Illinois.— Champaign *v.* Harmon, 98 Ill. 491. See Alexander *v.* Tolleston Club, 110 Ill. 65, 72.

Indiana.— Holten *v.* Lake County, 55 Ind. 194; Hayward *v.* Davidson, 41 Ind. 212.

Massachusetts.— See Com. *v.* Wilder, 127 Mass. 1, 6; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Missouri.— Hafner *v.* St. Louis, 161 Mo. 34, 61 S. W. 632; Land *v.* Coffman, 50 Mo. 243; Chambers *v.* St. Louis, 29 Mo. 543.

New Hampshire.— Gilbert *v.* Berlin, 70 N. H. 396, 48 Atl. 279.

Oregon.— Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

Tennessee.— See Barrow *v.* Nashville, etc., Turnpike Co., 9 Humphr. 304 [*cited* in Searight *v.* Payne, 2 Tenn. Ch. 175, 180].

To the contrary see Riley *v.* Rochester, 9 N. Y. 64 [*reversing* 13 Barb. 321]; Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

Cancellation of deed.— Where a municipal corporation has power to purchase land for corporate purposes, and a purchase is made, and in doing so the common council designed to pervert it to private purposes, that affords no ground for canceling the deed, as the parties could not be placed *in statu quo*. The vendor could not be compelled to pay for the buildings and other improvements placed

some purposes.[17] If, however, the charter of a municipal corporation forbids that it acquire and hold real estate, so that there is a want of capacity to take and hold the same for any purpose, then a conveyance or devise to the corporation can pass no title, and the want of capacity may be raised by any person interested.[18] Where a gift of property to a municipal corporation is made on a condition subsequent which the corporation has no power to perform, the gift fails;[19] and if a corporation has no power to hold property in trust it cannot maintain an action to recover property dedicated to it in trust.[20] However, the incapacity of the corporation to take and hold as trustee does not invalidate the trust.[21]

2. Want of Power to Dispose. It has been held that if a municipal corporation sells and conveys property without complying with the statutory prerequisites the conveyance is not merely voidable but absolutely void, and vests no right, title, or interest in the grantee.[22] On the other hand, it has been held that a municipal corporation which assents to the sale of its proprietary interests, accepts, converts, and retains the consideration, and silently permits the purchaser to better and improve what he has bought, is thereby precluded from afterward questioning the validity of the sale;[23] and that where a municipal corporation has undertaken to purchase and acquire title to land and to convey it to a person on consideration that he will build and operate manufactories within its limits, and afterward brings its action against such person to set aside the conveyance and obtain a reconveyance of the property with possession thereof, a court of equity will not lend its aid to either party, but will leave them where they have placed themselves.[24]

IX. Contracts.

A. Capacity and Power to Contract — 1. In General. It is intended here to treat generally only of municipal contracts and the principles governing their validity, construction, and effect, and of particular contracts not treated elsewhere. Various other contracts and questions relating to contracts are fully treated under other headings as shown in the note.[25]

thereon, and it would be inequitable for him to get them without paying therefor. Sherlock *v.* Winnetka, 59 Ill. 389.

17. Hayward *v.* Davidson, 41 Ind. 212; Chambers *v.* St. Louis, 29 Mo. 543; Vidal *v.* Girard, 2 How. (U. S.) 127, 11 L. ed. 205.

If land is devised to a municipal corporation in trust, and the trusts are in themselves valid, but the corporation incompetent to execute them, the heirs of the devisor could not take advantage of such inability; it could only be done by the state in its sovereign capacity, by a quo warranto or other proper judicial proceeding. Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53; Vidal *v.* Girard, 2 How. (U. S.) 127, 11 L. ed. 205.

18. Hayward *v.* Davidson, 41 Ind. 212.

19. Bullard *v.* Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110.

20. Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403, 19 Ky. L. Rep. 1292, 80 Am. St. Rep. 355, 39 L. R. A. 93.

21. Hatheway *v.* Sackett, 32 Mich. 97 (holding that whether or not there be a present lack of power in the corporation fitly to administer the trust is immaterial in a suit at law to obtain possession of the trust fund, since if when the fund is reduced to possession further power is needed to enable the corporation to carry out the trust, it is competent for the legislature to grant it); Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445; Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268; Vidal *v.* Girard, 2 How. (U. S.) 127, 11 L. ed. 205; Handley *v.* Palmer, 91 Fed. 948, the last four cases holding that the court will appoint a new trustee. And see Charities, 6 Cyc. 935. See, however, Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422, holding that a court of law cannot sustain a deed to a municipal corporation on a trust foreign to the corporation's object, as such a court has no power to appoint another trustee.

22. Herzo *v.* San Francisco, 33 Cal. 134; Pimental *v.* San Francisco, 21 Cal. 351; Grogan *v.* San Francisco, 18 Cal. 590; McCracken *v.* San Francisco, 16 Cal. 591.

23. Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319. See *supra*, VIII, D, 5.

24. Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

25. Power to incur debt and expenditure see *infra*, XV, A.

Limitation of amount see *infra*, XV, A, 3.

Aid to corporations and stock subscriptions see *infra*, XV, A, 5.

Administration, appropriation, and payments see *infra*, XV, B.

Warrants and certificates of indebtedness see *infra*, XV, B, 2.

Bonds, promissory notes, and other securities see *infra*, XV, C.

2. INHERENT POWER.[26] A municipality, because it is "a body corporate and politic," [27] has an inherent power to enter into contracts, just as has a private corporation.[28] This faculty to contract is an essential feature of its life, without which it could not exercise its functions or serve the purpose of its existence.[29] To this inherent power to contract may be referred all municipal contracts essential to the life of the corporation,[30] as a self-governing community and a local instrumentality of the sovereign for the general purposes of government;[31] and this faculty it may exercise with the state,[32] as well as with natural persons and with other corporations,[33] as in the case of a lease of court rooms to the state or a purchase of land from it.[34]

3. EXPRESS POWER.[35] A municipal charter usually contains a grant of express power to contract in regard to various subjects, many of which are embraced within the inherent capacity of a municipality; and therefore as to these it is a mere declaration of existing right.[36] But in regard to others beyond the scope of the inherent powers, the corporation receives its faculty to contract from the expression of the charter,[37] as in the case of the power to buy waterworks [38] or to contract for electric lights.[39]

4. IMPLIED POWER.[40] The third class of contractual powers are those not expressly granted but naturally inferable from the grant of certain powers or the imposition of certain duties, which could not be exercised or performed without

Compensation of officers, agents, and employees see *supra*, VII, A, 13; VII, B; VII, C, 6.

Legislative control see *supra*, IV, H, I.

Municipal expenses see *infra*, X.

Contracts relating to public improvements see *infra*, XIII, C.

Power to purchase or lease property see *supra*, VIII, A-C.

Power to sell or lease property see *supra*, VIII, D.

Power to mortgage or pledge property see *supra*, VIII, D, 9.

26. Inherent powers see *supra*, III, B, 2, b.

27. East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166.

28. *Alabama.*— Montgomery County *v.* Barber, 45 Ala. 237.

Georgia.— Rome *v.* Cabot, 28 Ga. 50.

Illinois.— Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557.

Indiana.—Indianapolis *v.* Indianapolis Gas-Light, etc., Co., 66 Ind. 396.

Kansas.— Wyandotte *v.* Zeitz, 21 Kan. 649.

Louisiana.— Prather *v.* New Orleans, 24 La. Ann. 41; Seibrecht *v.* New Orleans, 12 La. Ann. 496.

Michigan.— Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887.

Nevada.— Douglass *v.* Virginia City, 5 Nev. 147.

New York.— Ketchum *v.* Buffalo, 14 N. Y. 356; Pullman *v.* New York, 54 Barb. 169.

Ohio.— Straus *v.* Eagle Ins. Co., 5 Ohio St. 59.

Oregon.— Portland Lumbering, etc., Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536, 6 L. R. A. 290.

Pennsylvania.— Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208.

Tennessee.— East Tennessee University *v.* Knoxville, 6 Baxt. 166.

Vermont.— Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

Virginia.— Jones *v.* Richmond, 18 Gratt. 517, 98 Am. Dec. 695.

Wisconsin.— Miller *v.* Milwaukee, 14 Wis. 642.

The power to contract "inheres in every corporation, and is coëxtensive with its corporate powers." Portland Lumbering, etc., Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536, 6 L. R. A. 290. In the absence of statutory restrictions, a municipal corporation has the same general powers with other corporations, to make contracts in furtherance of corporate objects. Pullman *v.* New York, 54 Barb. (N. Y.) 169.

29. Ketchum *v.* Buffalo, 14 N. Y. 356.

30. Douglass *v.* Virginia City, 5 Nev. 147.

31. Philadelphia *v.* Fox, 64 Pa. St. 169; East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164.

32. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

33. Pullman *v.* New York, 54 Barb. (N. Y.) 169.

34. A city, although itself a civil institution, created to be employed to some extent as the instrument of the government, is not the government itself, but a distinct, although subordinate, being, capable of making contracts even with the state. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

35. Express powers see *supra*, III, B, 2, c.

36. Cooley Const. Lim. 195.

37. McCoy *v.* Briant, 53 Cal. 247; Lafayette *v.* Cox, 5 Ind. 38; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

38. Rome *v.* Cabot, 28 Ga. 50; Burlington Water-Works Co. *v.* Burlington, 43 Kan. 725, 23 Pac. 1068.

39. Lott *v.* Waycross, (Ga. 1890) 11 S. E. 558; Newport *v.* Newport Light Co., 84 Ky. 166.

40. Implied powers generally see *supra*, III, B, 2, d.

the making of contracts.[41] A municipal corporation has the power, unless in some way restricted by charter or statute, to enter into any contract and incur any debt necessary to enable it to carry out the particular powers expressly or impliedly conferred upon it,[42] and it has the right to adopt all the ordinary or usual means which may be necessary to the full execution and enjoyment of such power.[43]

5. Limitations Upon Power to Contract. Of course a municipal corporation has no power to enter into or bind itself by any contract which is expressly prohibited by its charter or by general law.[44] Nor has it any power, in the absence of express authority, to enter into any contract which is either foreign to the objects for which it was created or not necessary to enable it to carry out the powers conferred upon it.[45] The enumeration in the general statute for the incorporation of cities of certain powers which would belong to the corporation without such specific enumeration is merely a declaration of a preëxisting power, or of a power which is inherent in the nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it was created. Such enumeration of powers, although it includes a portion of those usually implied, does not necessarily operate as a limitation of corporate powers by excluding those not enumer-

41. See the cases cited in the notes following.

42. *California.*— Maurer *v.* Weatherby, 1 Cal. App. 243, 81 Pac. 1083.

Georgia.— Wells *v.* Atlanta, 43 Ga. 67.

Illinois.— East St. Louis *v.* East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97; New Athens *v.* Thomas, 82 Ill. 259; Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557.

Indiana.— Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711.

Michigan.— Goodrich *v.* Detroit, 12 Mich. 279.

Missouri.— Webb City, etc., Waterworks Co. *v.* Webb City, 78 Mo. App. 422.

Nebraska.— Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 92 N. W. 643.

Nevada.— Douglass *v.* Virginia City, 5 Nev. 147.

New York.— Ketchum *v.* Buffalo, 14 N. Y. 356; Pullman *v.* New York, 54 Barb. 169. See also Messenger *v.* Buffalo, 21 N. Y. 196.

Texas.— Dwyer *v.* Brenham, 65 Tex. 526; Galveston *v.* Loonie, 54 Tex. 517.

Virginia.— Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

Wisconsin.— Manske *v.* Milwaukee, 123 Wis. 172, 101 N. W. 377; Miller *v.* Milwaukee, 14 Wis. 642.

United States.— Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

See 36 Cent. Dig. tit. "Municipal Corporations," § 644 *et seq.* And see *supra*, III, B, 2, d.

43. St. Louis *v.* St. Louis Gas-Light Co., 5 Mo. App. 484; Douglass *v.* Virginia City, 5 Nev. 147; State *v.* Jersey City, 34 N. J. L. 390; McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144; Ketchum *v.* Buffalo, 14 N. Y. 356. And see *supra*, III, E.

Mode of contracting see *infra*, IX, G.

44. *California.*— McCoy *v.* Briant, 53 Cal. 247.

Iowa.— Weitz *v.* Des Moines Independent Dist., 79 Iowa 423, 44 N. W. 696.

Michigan.— Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525.

Texas.— Ferguson *v.* Halsell, 47 Tex. 421.

United States.— Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

See also *supra*, III, D; *infra*, IX, F, G, H.

Limitation as to amount of indebtedness see *infra*, XV, A, 3.

45. *Alabama.*—Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862; New Decatur *v.* Berry, 90 Ala. 432, 7 So. 838, 24 Am. St. Rep. 827; Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118.

California.— Higgins *v.* San Diego, (1896) 45 Pac. 824.

Georgia.—Covington, etc., R. Co. *v.* Athens, 85 Ga. 367, 11 S. E. 663.

Michigan.— Tucker *v.* Grand Rapids, 104 Mich. 621, 62 N. W. 1013.

Missouri.— St. Louis *v.* Davidson, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; Cheeney *v.* Brookfield, 60 Mo. 53.

New Hampshire.—Concord *v.* Boscawen, 17 N. H. 465.

New York.— Sillcocks *v.* New York, 11 Hun 431; Gamble *v.* Watkins, 7 Hun 448.

Pennsylvania.— Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602 [*affirming* 31 Pa. Co. Ct. 609]; Shroder *v.* Lancaster, 6 Lanc. Bar 201.

Washington.— Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217.

United States.— Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

See also *supra*, III, B, 1; III, D, 4.

The invalidity of contracts because ultra vires is more strictly maintained in favor of municipal corporations than of private corporations. Mobile *v.* Moog, 53 Ala. 561.

Acquiescence by citizens in construction of charter.— When contracts have been made, acts done, and labor performed in pursuance of a construction of a city charter, acquiesced in by all its citizens, such an interpretation will be sustained if justified by any possible reading of the statutes. Mem-

ated.[46] A contract by a municipality to perform a public duty is *ultra vires* and void.[47] And a municipality cannot make contracts which will embarrass or control its legislative powers and duties.[48] But it has been held, with some hesitation, that where public duty does not interfere with private service, a city may make a valid contract to use its instrumentalities and employees in the latter; and, in case of a breach by it of such a contract, it becomes liable like a private contractor.[49]

6. Particular Contracts — a. Public Improvements Generally. Where a municipal charter or the general law gives the city council authority to make certain improvements, the power so given carries with it the implied power to make a general contract therefor, if there is nothing in the statute evincing a different intent.[50] A city may, through its council, authorize the purchase of a right of way for a ditch or other public improvement, and will be bound to reimburse the party authorized to procure it; but it cannot enter into an agreement with such party that it will construct the improvement, nor can he recover damages for any alleged injuries he may have suffered by a subsequent determination of the council not to proceed with the work.[51]

b. Water-Supply.[52] Municipal corporations are frequently given express power to enter into contracts with private individuals or corporations for the supplying of water to the municipality and its inhabitants.[53] Such power may also be implied from other powers granted, as from the power to provide for a water-supply,[54] or from the power to make contracts for the welfare of the city,

phis *v.* Brown, 20 Wall. (U. S.) 289, 22 L. ed. 264.

46. Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268.

47. Penley *v.* Auburn, 85 Me. 278, 27 Atl. 158, 21 L. R. A. 657; The Maggie P., 25 Fed. 202. Therefore, where a street in a city was encumbered on one side by buildings projecting into it, and on the other side the abutters deeded a narrow strip of land to the city as a consideration for its covenant to remove these buildings from within the street, and keep the same open throughout its whole length, including the strip conveyed to it, it was held that, under Me. Rev. St. c. 18, § 52, requiring cities to keep their streets safe and convenient for travelers, but requiring no particular width, the city's covenant was *ultra vires* and void, being a covenant to perform a municipal duty. Penley *v.* Auburn, *supra*.

48. Peru *v.* Gleason, 91 Ind. 568; New York *v.* Second Ave. R. Co., 32 N. Y. 261; Brick Presb. Church *v.* New York, 5 Cow. (N. Y.) 538.

A city is not liable for damages resulting to lands outside the city limits by reason of its breach of a contract to construct within its limits a ditch to serve as an outlet for drains constructed by the owners of such lands. Peru *v.* Gleason, 91 Ind. 568.

Binding successors and duration of contract see *infra*, IX, E.

49. The Maggie P., 25 Fed. 202, holding that it is not a part of the public duty of a city to pump out and raise boats which sink at its levee, even where its charter gives it control of its levee and harbor, and makes it its duty to keep its wharf and the river along the shore free from wrecks and other improper obstacles; and therefore a contract to raise a sunken boat is one for private service, which it has the power to make.

50. Cumming *v.* Brooklyn, 11 Paige (N. Y.) 596; Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511; Galveston *v.* Heard, 54 Tex. 420; Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

Contracts relating to public improvements see *infra*, XIII, C.

51. Stewart *v.* Council Bluffs, 50 Iowa 668.

52. Erection or purchase and maintenance of waterworks see *infra*, XIII, A, 2, f.

Aid to corporations and stock subscriptions see *infra*, XV, A, 5.

Discretion of council or board and control thereof by courts see *infra*, IX, B, 1.

Powers of council or of particular boards, officers, or departments see *infra*, IX, B, C.

Power to bind successors and duration of contract see *infra*, IX, E.

53. *Illinois.*— Quincy *v.* Bull, 106 Ill. 337.

Kansas.— Columbus Water-Works Co. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354; Columbus Water-Works Co. *v.* Columbus, 46 Kan. 666, 26 Pac. 1046; Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844; Burlington Water-Works Co. *v.* Burlington, 43 Kan. 725, 23 Pac. 1068; Wood *v.* National Water Works Co., 33 Kan. 590, 7 Pac. 233.

New Jersey.— Hackensack Water Co. *v.* Hoboken, 51 N. J. L. 220, 17 Atl. 307.

Ohio.— Fremont *v.* June, 8 Ohio Cir. Ct. 124, 4 Ohio Cir. Dec. 326.

Pennsylvania.— White *v.* Meadville, 177 Pa. St. 643, 35 Atl. 695, 3 L. R. A. 567.

Texas.— Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 207.

United States.— Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

54. Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981 (holding that charter power "to make

or the general power to contract in connection with the power to provide for the police, health, security, and welfare of the inhabitants.[55] And charter authority "to provide for supplying the city with water" gives the city power to contract with a water company in respect to the rates to be charged to consumers.[56] So also authority to acquire or erect and maintain waterworks includes power to contract for the purchase or for the erection of such works.[57] Power to contract for a water-supply includes the power to contract for the use of the streets for that purpose by a private corporation or individual.[58] Under a city's express or implied authority to acquire waterworks or make contracts for supplying the city and its inhabitants with water, there is as a rule no power to contract to supply another municipality.[59] But it has been held that a city, although it has no

and establish public pumps, wells, cisterns, and hydrants, and to provide for and control the erection of waterworks for the supply of water for the city and its inhabitants" gave the municipality power and authority to enter into contracts with private individuals for the purpose of providing a water-supply); Hackensack Water Co. *v.* Hoboken, 51 N. J. L. 220, 17 Atl. 307; Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

55. *Alabama.*— Livingston *v.* Pippin, 31 Ala. 542.

Georgia.— Rome *v.* Cabot, 28 Ga. 50.

Kentucky.— Dyer *v.* Newport, 94 S. W. 25, 29 Ky. L. Rep. 656.

Louisiana.—Conery *v.* New Orleans Water-Works Co., 41 La. Ann. 910, 7 So. 8.

Missouri.— Webb City, etc., Waterworks Co. *v.* Webb City, 78 Mo. App. 422.

Exclusive and permanent contract.— It has been held, however, that in the absence of express statutory authority a municipal corporation cannot make a permanent and exclusive contract with a water company to build waterworks and supply it with water; and that such authority cannot be implied from the general power conferred by its charter to contract for the needs of the municipality. Greenville Water-Works Co. *v.* Greenville, (Miss. 1890) 7 So. 409. See also Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143. And as to the grant of exclusive privileges generally see *infra*, IX, A, 6, i; XII, A, 8, a (VII).

Contract amounting to pledge of credit.— And a municipality cannot, at least in the absence of express authority, enter into a contract for the supply of water by a private corporation, which in effect amounts to a pledge of its credit for the support of a private enterprise. Scott *v.* Laporte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

Source of supply.— A contract by a city for a water-supply, which is silent as to the source of supply, is not invalid because there is a possibility of the directors bringing the supply from outside the state, in which case the city might be unable to exercise its option to purchase the waterworks. Brady *v.* Bayonne, 57 N. J. L. 379, 30 Atl. 968.

Agreement to furnish hydrants.— Under N. Y. Laws (1862), c. 18, § 47, subd. 3, authorizing the city of Utica to provide necessary apparatus and means for the prevention and extinguishing of fires, the city might lawfully contract with the water company, which agreed to furnish water for the extinguishment of fires, to furnish all necessary hydrants in a system for the extension of the waterworks. Utica Water Works Co. *v.* Utica, 31 Hun (N. Y.) 426.

56. Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

Power to regulate rates see *infra*, XI, A, 7, b, (VII), (D).

57. Wells *v.* Atlanta, 43 Ga. 67; Rome *v.* Cabot, 28 Ga. 50; Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

Power to erect waterworks see *supra*, VIII, B, 2, e; XIII, A, 2, f.

Employment of engineer.— A contract by a borough employing one as engineer to make plans for, and superintend construction of, waterworks for it is not *ultra vires*, the subject-matter being entirely within its municipal functions, so that he can recover for his services rendered before the borough is enjoined from erecting such works, on the ground that it, being supplied with water by contract with a private corporation, had exhausted the power granted by Borough Act 1851, to supply itself with water. Harlow *v.* Beaver Falls, 188 Pa. St. 263, 41 Atl. 533.

58. Quincy *v.* Bull, 106 Ill. 337; Wood *v.* National Water-Works Co., 33 Kan. 590, 7 Pac. 233; Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. See also *infra*, XII, A, 8.

Grant of exclusive privilege see *infra*, IX, A, 6, i; XII, A, 8, a, (VII).

59. Rehill *v.* Jersey City, 71 N. J. L. 109, 58 Atl. 175 (holding in effect that, where a city has contracted for a supply of water for its own use, it has no power to contract to supply water to another municipality); Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217 (holding that under a charter and statutes giving a municipal corporation power to acquire waterworks and supply the municipality and its inhabitants with water, and a statute which, in defining the powers of cities to construct and operate waterworks, confines the purpose to the furnishing of such city and inhabitants thereof, and "any other persons," with a supply of water, the phrase "any other persons" only applies to persons within the corporate limits, and the city has

power, in the absence of an express grant thereof, to extend its water system beyond its limits, may sell any excess of its product to outsiders.[60] And it has been held to be within the general powers of a city to contract to allow a person a certain quantity of water from a stream which it has taken from him under the power of eminent domain.[61]

c. Lighting and Power.[62] Municipal corporations are sometimes given express power to contract for the lighting of the streets, public places, and buildings,[63] but express power is not necessary. If they are authorized to light their streets, etc., or given the power to provide for lighting them, they have the implied power to enter into contracts for that purpose with private gas or electric light companies, or with individuals;[64] and it has been held that the power to light the streets and public places of a municipality is one of its implied and inherent powers, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality, so that no statute is necessary to give it such power.[65] Having the power to enter into such a contract, it may bind

no authority to supply water to another municipality).

60. Dyer *v.* Newport, 94 S. W. 25, 29 Ky. L. Rep. 656; Rogers *v.* Wickliffe, 94 S. W. 24, 29 Ky. L. Rep. 587.

Sale of surplus electricity see *infra*, IX, A, 6, c.

61. Roberts *v.* Cambridge, 164 Mass. 176, 41 N. E. 230.

62. Liability of municipality for gas see GAS, 20 Cyc. 1165.

Discretion of council and control by courts see *infra*, IX, B, 1.

Power to erect or purchase lighting plant see *infra*, XIII, A, 2, g.

Aid to corporations and stock subscriptions see *infra*, XV, A, 5.

Power to bind successors and duration of contract see *infra*, IX, E.

63. Construction of particular charters and statutes see Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Davenport Gas, etc., Co. *v.* Davenport, 124 Iowa 22, 98 N. W. 892; Morrice *v.* Sutton, 139 Mich. 643, 103 N. W. 188; Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680; Black *v.* Chester, 175 Pa. St. 101, 34 Atl. 354.

Letting contract to lowest bidder see Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651. See also *infra*, IX, F.

Exemption from taxation on sale of gas plant by city.— Where a city sells its gas plant and the buyer contracts to light the city streets for a certain sum, in consideration whereof the city agrees to pay any city taxes assessed on the gas plant, it does not constitute an exemption from taxation, but a consideration for the purchase of the plant, and the contract is enforceable. Frankfort *v.* Capital Gas, etc., Co., 29 S. W. 855, 16 Ky. L. Rep. 780.

64. *Georgia.*— McMaster *v.* Waynesboro, 122 Ga. 231, 50 S. E. 122, holding also that a popular vote was not necessary under the statute to a ten years' lighting contract.

Illinois.— East St. Louis *v.* East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97.

Kentucky.— Newport *v.* Newport Light Co., 89 Ky. 454, 12 S. W. 1040, 11 Ky. L. Rep. 840; Newport *v.* Newport Light Co., 84 Ky. 166; Truesdale *v.* Newport, 90 S. W. 589, 28 Ky. L. Rep. 840.

Minnesota.— Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981, holding that a city had such power under the provisions of a charter giving it the power to provide for lighting the city with electricity, gas, or other means, and to control the erection of any works for that purpose, and to grant to any corporation or person the right to occupy its streets for that purpose.

New Jersey.— Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651.

Pennsylvania.— Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959.

United States.— Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736.

See also *infra*, XIII, A, 2, g.

Terms of contract.— A contract between a town and a gas company, for supplying the town with gas, is not illegal because it provides that such company shall be reimbursed by the town for any expenses incurred in making changes in the gas mains, pipes, or lamp posts, made necessary by changes in the grade of streets after the company has entered on the performance of the contract. Parfitt *v.* Furguson, 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 466 [*affirming* 12 Misc. 278, 33 N. Y. Suppl. 1111].

Reasonableness and discretion.— Such a contract may be so clearly unreasonable as to be void. Le Feber *v.* West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917. It must, however, be clearly so to authorize the court to interfere with the discretion of the municipal council or other authorities. See *infra*, IX, B, 1; IX, E, 2.

65. Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268. See also Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870; and *infra*, XIII, A, 2, g.

itself by an exclusive contract for a term of years.[66] And where a municipality has power to contract with a private corporation or individual for furnishing light, it may grant to it the privilege of occupying the streets for that purpose.[67] Where a city has the power to establish works for lighting its streets, it may, in connection therewith, furnish private consumers such light by contract.[68] Where a city owns its own electric light plant or has a valid contract for a certain supply from a private person or corporation, it may contract to furnish any surplus over its own needs to others,[69] even beyond the municipal boundaries;[70] and it may have power by charter or statute to contract to supply electricity to a street railroad company for power.[71] Ordinarily, however, a municipality has no power to purchase electricity for use and supplying it to others.[72] A municipality having authority to operate a lighting plant may contract for the purchase of an engine therefor.[73] A city has no implied power to enter into a contract or appropriate public money to aid a private person or corporation in the erection of a lighting plant.[74]

d. Sewers and Drains. The authority to construct sewers needed for the drainage of streets is an incidental power of a municipal corporation invested with a general power over highways within the corporate limits, and the corporate officers have authority to contract for a right to construct a sewer through private property.[75] But a contract whereby a city agrees to keep in repair a

66. Truesdale *v.* Newport, 90 S. W. 589, 28 Ky. L. Rep. 840, holding that St. (1903) § 3058, subs. 6, declaring that cities may by themselves or others provide for lighting the streets and for furnishing light to the inhabitants thereof, authorizes a city to adopt an ordinance providing for the sale at public bidding of the exclusive privilege of supplying it with gas for twenty years. See also Davenport Gas, etc., Co. *v.* Davenport, 124 Iowa 22, 98 N. W. 892 (where it was held that when a city has the power to contract for lights for a certain period, its contract is not void because of the exclusiveness, as this arises from the very nature of such a contract); Newport *v.* Newport Light Co., 84 Ky. 166. But it has been held that a provision in a contract between a gas company and a town for supplying the town with gas, that no other gas or electric light company shall have the consent of the board of improvement of such town to extend its mains or lay its pipes or conductors within the town during the term of the contract, is illegal and void. Parfitt *v.* Furguson, 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 466 [*affirming* 12 Misc. 278, 33 N. Y. Suppl. 1111]. *Compare infra*, IX, E.

Power during life of valid contract.—Under Mich. Comp. Laws, § 2908, providing that the council of an incorporated village may contract for any period not exceeding ten years for gas, electric, or other lights, the council has no power to enter into such contract during the life of a valid contract previously entered into covering the period of ten years. Morrice *v.* Sutton, 139 Mich. 643, 103 N. W. 188.

67. Newport *v.* Newport Light Co., 84 Ky. 166, exclusive privilege for a term of years.

Grant of privilege to use streets see *infra*, XII, A, 8.

Grant of exclusive privilege see *infra*, XII, A, 8, a, (VII).

68. Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268.

69. Henderson *v.* Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152. And see as to water *supra*, IX, A, 6, b.

70. Henderson *v.* Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152, holding that St. (1903) § 3290, subs. 5, authorizing cities of the third class to provide "the city and inhabitants thereof" with light, etc., does not prohibit the city from extending its electric light service to points beyond the city limits, where it can do so with very little additional expense and in such a way as to result in advantage to the city and its inhabitants.

71. Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736, holding that, since the city of Riverside had authority under section 862 of the California Municipal Corporation Act of 1883, as amended in 1891 and 1897, to acquire, own, and operate street railways, telephone and telegraph lines, gas, and other works for light and heat, and to permit the laying of tracks for street railways in the public streets, it had power to contract for a supply of electricity to be used for any of such purposes; and, where it has so contracted for a supply to be used by the terms of the contract in any way it should see fit, or disposed of to private citizens to use for any purpose whatever within the limits of the city, a subcontract to furnish a portion of such supply to a company for the operation of a street railroad to be constructed by the company was not on its face *ultra vires*.

72. Ottawa Electric Light Co. *v.* Ottawa, 12 Ont. L. Rep. 290.

73. Arbuckle-Ryan Co. *v.* Grand Ledge, 122 Mich. 491, 81 N. W. 358.

74. Morrice *v.* Sutton, 139 Mich. 643, 103 N. W. 188.

75. Leeds *v.* Richmond, 102 Ind. 372, 1

ditch constructed by it through plaintiff's land lying outside of the corporate limits, for the purpose of drainage of certain lands within such city, was held *ultra vires*.[76]

e. Sanitation and Charity. A municipal corporation has power to make all contracts which are reasonably necessary to enable it to carry out the general sanitary powers conferred upon it, or the power to prevent or abate nuisances injurious to the public health and safety.[77] Thus it may contract for the removal and destruction of garbage from private and public premises within its limits and to pay reasonable compensation therefor;[78] to contract for the removal of dead animals;[79] and to employ physicians, health officers, etc., to perform duties necessary to the preservation of the public health.[80] Having power to care for the public health, a city may contract to pay nurses and guards for persons detained at a smallpox camp or hospital during an epidemic, and also to pay for infected bedding and clothing.[81] It may also contract to pay for care of the indigent sick and insane at a private hospital,[82] and may contract with a physician for the care and maintenance of the indigent sick;[83] but it has been held that it has no authority to contract with a physician for furnishing medical attendance for the police or other officers of the city who are not indigent persons.[84]

f. Fire Department. As has been elsewhere shown, a municipal corporation may purchase necessary apparatus for the use of its fire department.[85] It may also contract for the purchase of coal for the fire department and for help in transporting the same from the coal docks to the place of use.[86]

N. E. 711. See *infra*, XII, B; XIII, A, 2, e; XIII, C.

76. Hamilton *v.* Shelbyville, 6 Ind. App. 538, 33 N. E. 1007.

77. *Kentucky.*— Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605, 8 Ky. L. Rep. 361.

Maryland.— Harrison *v.* Baltimore, 1 Gill 264.

Michigan.— Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887.

Nebraska.— Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 93 N. W. 643.

Vermont.— Hazen *v.* Strong, 2 Vt. 427.

Sanitary power of municipalities under police power see *infra*, XI, A, 7, a, (III); XI, A, 7, b, (VI).

Quarantine regulations.— It has been held, however, that a municipal corporation has no power to establish and enforce quarantine regulations, such power not being expressly granted or necessarily or fairly implied in or incident to the powers expressly granted, nor essential — that is, indispensable, and not simply convenient — to the declared objects and purposes of the corporation; and having no such power, it is not liable for the compensation of an officer employed to enforce quarantine regulations against a neighboring town, in which an epidemic was prevailing. New Decatur *v.* Barry, 90 Ala. 432, 7 So. 838, 24 Am. St. Rep. 827. *Compare infra*, XI, A, 7, a, (III).

78. Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 93 N. W. 643, holding that under a statute providing that a city shall have power to drain any lands covered by stagnant water, and giving the city power to prescribe rules for the abatement of nuisances and the regulation of places where offensive matter is likely to accumulate, with power to make contracts relating to city concerns and to create a board of health, a city can contract for the removal of garbage from private and public premises within its limits, and pay a reasonable compensation therefor. See also *infra*, XI, A, 7, b, (VI), (C).

Express grant of power.— Such power is sometimes expressly granted, and in such case the limitations in the charter or statute must be observed. See Detroit Reduction Co. *v.* Blades, 143 Mich. 591, 107 N. W. 286, holding that under the Detroit city charter a contract for the destruction of garbage to be collected by the city might be made by the council without previously submitting it to the commissioner of public works and obtaining an estimate from him.

79. Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605, 8 Ky. L. Rep. 361, sustaining a contract giving the exclusive right to remove dead animals for five years. See also *infra*, XI, A, 7, b, (VI), (D).

80. Harrison *v.* Baltimore, 1 Gill (Md.) 264 (employment of health officer to purify and disinfect vessels or premises from the infection of contagious diseases); Hazen *v.* Strong, 2 Vt. 427 (employment of physician to inoculate persons to prevent the spread of smallpox).

81. McPherson *v.* Nichols, 48 Kan. 430, 29 Pac. 679; Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887.

82. St. Louis Hospital Assoc. *v.* St. Louis, 15 Mo. 592; Tucker *v.* Virginia City, 4 Nev. 20.

83. Tucker *v.* Virginia City, 4 Nev. 20; Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

84. Tucker *v.* Virginia City, 4 Nev. 20.

85. See *supra*, VIII, B, 2, b.

86. Manske *v.* Milwaukee, 123 Wis. 172, 101 N. W. 377.

g. Schools. A municipal corporation may make contracts for the fitting up and maintenance of public schools when the duty or power is imposed or conferred upon it by charter or general law, but not otherwise.[87]

h. Borrowing Money and Issuing Securities. Subject to charter and statutory limitations a municipal corporation has the power to borrow money for legitimate corporate purposes;[88] and in most jurisdictions it has the power to execute and give bonds and promissory notes for debts lawfully contracted.[89]

i. Exclusive Privileges. The general rule is that a municipality has no implied power to grant exclusive privileges, but such power may be expressly conferred.[90]

j. Offer of Reward. Although there are decisions to the contrary,[91] the prevailing view is that a municipal corporation has no implied power to offer an award for the apprehension and conviction of offenders against the criminal laws of the state.[92]

k. Compromise. A municipality may, without express authority, compromise claims against it.[93]

l. Submission to Arbitration. So, also, a municipality may, without express authority, submit claims to arbitration.[94]

m. Public Entertainments. It is generally held that a municipal corporation

87. Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862. See, generally, SCHOOLS and SCHOOL-DISTRICTS.

88. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; Patton *v.* Chattanooga, 108 Tenn. 223, 65 S. W. 414. See *infra*, XV, A, 4, f.

89. Dutton *v.* Aurora, 114 Ill. 138, 28 N. E. 461; Douglass *v.* Virginia City, 5 Nev. 147; Ketchum *v.* Buffalo, 14 N. Y. 356; Merrill *v.* Monticello, 22 Fed. 589.

Bonds, promissory notes, and other securities see *infra*, XV, C.

90. Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624; Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261; Danville Water Co. *v.* Danville, 180 U. S. 619, 21 S. Ct. 505, 45 L. ed. 696; Freeport Water Co. *v.* Freeport, 180 U. S. 587, 21 S. Ct. 493, 45 L. ed. 679; Minturn *v.* Larue, 23 How. (U. S.) 435, 16 L. ed. 574; Illinois Trust, etc., Bank *v.* Arkansas City Water Co., 67 Fed. 196; Grand Rapids Electric Light, etc., Co. *v.* Grand Rapids Edison Electric Light, etc., Co., 33 Fed. 659. See *supra*, IX, A, 6, b, c; *infra*, IX, E; XII, A, 8, a, (VII); XIII, A, 3, e, (II).

91. Cranshaw *v.* Roxbury, 7 Gray (Mass.) 374; York *v.* Forscht, 23 Pa. St. 391. And see *infra*, XV, A, 1, c, (IV).

92. *Connecticut.*— Crofut *v.* Danbury, 65 Conn. 294, 32 Atl. 365.

District of Columbia.— Baker *v.* Washington, 7 D. C. 134.

Florida.— Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323.

Iowa.— Hanger *v.* Des Moines, 52 Iowa 193, 2 N. W. 1105, 35 Am. Rep. 266.

Kentucky.— Patton *v.* Stephens, 14 Bush 324.

Maine.— Gale *v.* South Berwick, 51 Me. 174.

New Hampshire.— Abel *v.* Pembroke, 61 N. H. 357.

Virginia.— Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.

Wisconsin.— Butler *v.* Milwaukee, 15 Wis. 493.

See also *infra*, XV, A, 1, c, (IV).

93. *California.*— People *v.* San Francisco, 27 Cal. 655; People *v.* Coon, 25 Cal. 635.

Illinois.— Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230.

Iowa.— Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66; Grimes *v.* Hamilton County, 37 Iowa 290.

Maine.— Baileyville *v.* Lowell, 20 Me. 178; Augusta *v.* Leadbetter, 16 Me. 45.

Nebraska.— State *v.* Martin, 27 Nebr. 441, 43 N. W. 244.

Pennsylvania.— Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691, holding also that the right to compromise and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity.

Wisconsin.— Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

See also *infra*, XVI, C; XVII, B.

94. *Illinois.*— Shawneetown *v.* Baker, 85 Ill. 563, 25 Am. Rep. 321.

Iowa.— Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 29 N. W. 806.

Kentucky.— Remington *v.* Harrison County Ct., 12 Bush 148.

Massachusetts.— Buckland *v.* Conway, 16 Mass. 396; Boston *v.* Brazer, 11 Mass. 447.

New Jersey.—Paret *v.* Bayonne, 39 N. J. L. 559 [*affirmed* in 40 N. J. L. 333].

Pennsylvania.— Smith *v.* Philadelphia, 13 Phila. 177.

Vermont.— Dix *v.* Dummerston, 19 Vt. 262.

Wisconsin.— Kane *v.* Fond du Lac, 40 Wis. 495.

See *infra*, XVI, D.

A provision for arbitration in a contract of sale of waterworks to a city is not void by reason of a stipulation that the finding of the arbitrators should be approved by the council to be binding on the city. Lidgerwood Park Waterworks Co. *v.* Spokane, 19 Wash. 365, 53 Pac. 352.

has no power to contract for providing an entertainment to the citizens and guests of the city.[95]

n. Printing.[96] Where the charter of a municipality provides that all of its ordinances when printed, etc., shall be admitted in evidence in all courts, without proof, it contemplates the printing of the ordinances, and there is necessarily in such municipality an implied power to have its ordinances printed, when needed in the accomplishment of its corporate purposes, and to contract to pay for such work.[97]

o. Employment of Attorney or Counsel. A municipal corporation has power to employ attorneys and counsel to prosecute or defend actions, and for other legitimate corporate purposes, and to bind itself on express or implied contracts to pay for their services.[98]

p. Stipulation For Liquidated Damages. A municipality may stipulate for liquidated damages.[99]

q. Other Contracts. A city ordinance authorizing a map to be made operates to charge the city with the expense of necessary preliminary surveying, as well as the map-making;[1] and a city council may contract for the supplying of comparative statements, maps, abstracts, etc., to aid it in equalizing the assessment roll and taxation of property.[2] A city may execute to the state a penal bond conditioned to build and keep in repair the county buildings.[3] And a city may insure its public buildings against loss by fire in a mutual insurance company.[4] Where a party has made permanent improvements on property leased from a city under a contract that the city would refund the value of the improvements on the termination of the lease, a plea that such contract was *ultra vires* is inequitable, and will not be allowed.[5] A city may be the depository, as trustee for its citizens, of a contract obligating a railroad company to locate its general offices and shops in the city, and may enforce such contract by suit.[6] Charter authority to lay out streets and pass all ordinances respecting them, and to make any other regulation that shall appear necessary and proper for the security, welfare, and interest of the city, confers no authority to make a contract to obtain a right of way through the city for a railway.[7] And the common council of a

95. Gamble *v.* Watkins, 7 Hun (N. Y.) 448; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110. See *infra*, XV, A, 1, c, (II).

96. See also *infra*, IX, B, 2.

97. Dwyer *v.* Brenham, 65 Tex. 526. But it was held that Nebr. Laws (1889), c. 14, §§ 29, 36, 40, 48, providing for the publication, in a newspaper of general circulation, of proclamations, ordinances, etc., of a city, and section 93, fixing the maximum price that the mayor or council shall pay therefor, did not require that such publication should be contracted for, nor authorize any officer or officers to make express contracts therefor. Call Pub. Co. *v.* Lincoln, 29 Nebr. 149, 45 N. W. 245. See also Stidger *v.* Red Oak, 64 Iowa 465, 20 N. W. 762, where authority to make such contracts was denied.

98. Smith *v.* Sacramento City, 13 Cal. 531; Mt. Vernon *v.* Patton, 94 Ill. 65; New Athens *v.* Thomas, 82 Ill. 259; State *v.* Heath, 20 La. Ann. 172, 96 Am. Dec. 390; Roper *v.* Laurinburg, 90 N. C. 427. A town council, not being expressly restricted by legislation, has power to employ special counsel to appear in litigation arising out of proceedings to annex the town to a city, although there is a town attorney whom the council has required by resolution to represent the town in all legal proceedings in which it may become involved. Denver *v.* Webber, 15 Colo. App. 511, 63 Pac. 804. See also *supra*, VII, C, 4, c; *infra*, X, E, 4, a.

99. Parr *v.* Greenbush, 42 Hun (N. Y.) 232.

1. Corsicana *v.* Kerr, 75 Tex. 207, 12 S. W. 982.

2. Maurer *v.* Weatherby, 1 Cal. App. 243, 81 Pac. 1083.

3. State *v.* Callehan, 1 Ind. 147.

4. French *v.* Millville, 66 N. J. L. 392, 49 Atl. 465 [*affirmed* in 67 N. J. L. 349, 51 Atl. 1109], holding also that by giving its premium notes for the payment of assessments to meet losses incurred by such an insurance company, the city does not loan its credit to the company, in violation of Const. art. 1, par. 19; and that by becoming a member of such an insurance company, it does not become the owner of any stocks or bonds belonging to the company, or of any stock in the company, in violation of the constitution.

5. Wilkins *v.* New York, 9 Misc. (N. Y.) 610, 30 N. Y. Suppl. 424.

6. Tyler *v.* St. Louis Southwestern R. Co., (Tex. 1906) 91 S. W. 1, 93 S. W. 997 [*reversing* (Civ. App. 1905) 87 S. W. 238].

7. Covington, etc., R. Co. *v.* Athens, 85 Ga. 367, 11 S. E. 663.

city has no authority to guarantee that a contractor shall make money under all circumstances out of a contract with the city.[8] Nor is a city liable for gold medals furnished to each of the members of the common council in pursuance of a resolution of that body.[9] The power of a town to raise money is confined to purposes specified by law and does not extend to raising money to build or repair a bridge in another town; and if a town gives a bond with condition to perform such act, the condition and obligation are void.[10] An order remanding a convicted felon to the city lockup to await sentence, being void, cannot form the basis of a contract to furnish the convict board while so confined.[11] The action of a city contracting the services of prisoners in its workhouse to a private person is *ultra vires* where neither authorized nor prohibited by its charter, but it is not illegal.[12]

B. Powers of Council or Other Governing Body[13] **— 1. In General.** Unless otherwise specially provided by law, the power to make municipal contracts resides in the council as the general governing body of the corporation.[14] This power in matters of official discretion must be exercised by the council itself;[15] but purely ministerial functions may be devolved by it on its committees or other officers and agents.[16] The courts may not substitute their own judgment of policy or propriety for the contracting discretion of the council;[17] but they

8. Patterson *v.* New Orleans, 20 La. Ann. 103.

9. Silleocks *v.* New York, 11 Hun (N. Y.) 431.

10. Concord *v.* Boscawen, 17 N. H. 465.

11. Tucker *v.* Grand Rapids, 104 Mich. 621, 62 N. W. 1013.

12. St. Louis *v.* Davidson, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764.

13. **Power to bind successors and duration of contract** see *infra*, IX, E.

14. Hall *v.* Cockrell, 28 Ala. 507; Denver *v.* Webber, 15 Colo. App. 511, 63 Pac. 804; Seibrecht *v.* New Orleans, 12 La. Ann. 496; Ryan *v.* Paterson, 66 N. J. L. 533, 49 Atl. 587. See *supra*, V, A, 2.

Maps.— Under Borough Act authorizing the council to cause an assessor's map of the borough to be made, showing the location and width of each street and of each individual lot of land, and cause the same to be numbered thereon, that an imperfect map, covering but part of the borough, was already in existence, did not prevent the council from causing to be made such map. Outwater *v.* Carlstadt, 66 N. J. L. 510, 49 Atl. 533.

Election and qualification of successors.— Where the power to contract for the construction of waterworks for a city was by the original charter of the city, and by statute conferred upon the mayor and council of the city, no portion of the powers over the construction and management of such works passed out of or away from the mayor and council under said act until the water commissioners provided for by the act, as successors in this respect to the mayor and council, were not only elected, but qualified and ready to succeed. Wells *v.* Atlanta, 43 Ga. 67.

The action of the mayor in conjunction with the council as its presiding officer, in awarding a contract, is sufficient, the city ordinances not requiring the mayor's separate action. Morley *v.* Weakley, 86 Mo. 451.

15. Jewell Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424, holding that the governing body of a municipality, charged with the management of its affairs, and alone clothed with power to contract for the municipality, cannot delegate to a member or committee thereof powers involving the exercise of judgment and discretion. See also Seibrecht *v.* New Orleans, 12 La. Ann. 496. The board of education and common council cannot delegate the power of purchasing a school-house site to a board of commissioners of the city, without an express grant from the legislature of authority to do so. Lauenstein *v.* Fond du Lac, 28 Wis. 336.

Delegation of powers see *supra*, III, G.

16. See *infra*, IX, C, 3.

17. *Georgia.*— Atlanta *v.* Halliday, 96 Ga. 546, 23 S. E. 509; Danielly *v.* Cabiniss, 52 Ga. 211; Wells *v.* Atlanta, 43 Ga. 67.

Indiana.— Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711. See also Seward *v.* Liberty, 142 Ind. 551, 42 N. E. 39; Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

Michigan.— Detroit *v.* Hosmer, 79 Mich. 384, 44 N. W. 622.

Minnesota.— Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981.

New Jersey.— Ryan *v.* Paterson, 66 N. J. L. 533, 49 Atl. 587.

United States.— Fidelity Trust, etc., Co. *v.* Fowler Water Co., 113 Fed. 560.

Illustrations.— Thus the discretion of the council in making a contract for water-supply or lighting will not be controlled or interfered with by the courts. McMaster *v.* Waynesboro, 122 Ga. 231, 50 S. E. 122; Wells *v.* Atlanta, 43 Ga. 67; Conery *v.* New Orleans Water-Works Co., 41 La. Ann. 910, 7 So. 8; Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622; Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Wade *v.* Oakmont Borough, 165 Pa. St. 479,

may interpose and declare void a contract which is *ultra vires*, fraudulent, or clearly unreasonable,[18] or to prevent the council from exercising municipal functions imposed by law on other boards and officers;[19] and contractors may not plead ignorance of the extent of power conferred by law on the several departments and boards of the municipal corporation.[20] Nor may they rely on an ordinance in contravention of charter or statute.[21] The council may not by contract renounce its legislative power;[22] but it may insert valid conditions precedent dependent upon municipal action;[23] and may without payment discharge doubtful claims either before or after judgment.[24] In making or authorizing contracts the council must act regularly as a board and at a legal meeting, and the members individually have no power to bind the municipality.[25]

2. CONTRACTS FOR PRINTING. When the amount and rate of municipal printing is prescribed by law, the council may not transcend the statutory limits,[26] nor make contracts therefor, when the function is imposed upon another department or officer.[27] But lacking such special provisions, the discretion therefor is

30 Atl. 959. It is within the legal discretion of a city council to select any system of lighting the city, in contracting therefor, that will furnish lights of the required brilliancy at the lowest rates. Detroit *v.* Hosmer, 79 Mich. 384, 44 N. W. 622.

18. Avery *v.* Job, 25 Oreg. 512, 36 Pac. 293; Le Feber *v.* West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917 (unreasonable lighting contract); Citizens' Savings, etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455. See also *supra*, III, I.

Restraining publication in paper having no subscription list see Lathrop *v.* Carbondale, 6 Lack. Jur. (Pa.) 343, as to a paper which was a mere advertising medium.

19. Francis *v.* Troy, 74 N. Y. 338 [*reversing* 10 Hun 515].

Under Denver City Charter, art. 2, § 26, subd. 8, empowering the council to provide for lighting the streets, and art. 3, § 35 (Sess. Laws (1893), p. 167), vesting the exclusive control of the erection of poles, stringing of wires, etc., in the board of public works, a contract by the council for furnishing street lights is not invalid on the ground that the power to contract for public lighting is vested in the board of public works, since the board is only empowered to supervise the erection of the poles and wires. Denver *v.* Hubbard, 17 Colo. App. 346, 68 Pac. 993.

Under Mass. St. (1885) c. 266, § 12, providing that neither the city council of Boston, nor either branch thereof, "shall directly or indirectly take part in the employment of labor, the making of contracts, the purchase of materials or supplies, the construction, alteration, or repair of any public works, buildings, or other property, or the care, custody, and management of the same," it was held that the language was broad enough to forbid the city council to make contracts of any kind, including one for the purchase of a parcel of land, and it was not limited by the provision of section 6, giving the subordinate officers and boards of the city power to "make all necessary contracts for the employment of labor, the supply of materials, and the construction, alteration, and repair of all public works and buildings." Brackett *v.* Boston, 157 Mass. 177, 31 N. E. 801.

20. Taft *v.* Pittsford, 28 Vt. 286. The limitation of the power of a common council to contract appearing in the statute, knowledge thereof by all dealing with the corporate authorities will be conclusively presumed. Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660. See *infra*, IX, C, 4.

Unconstitutional act.— The act creating a municipal board being unconstitutional, such board is without authority to make a contract binding the city for the employment of counsel to defend actions growing out of the act. Findlay *v.* Pendleton, 62 Ohio St. 80, 56 N. E. 649.

21. Defiance *v.* Defiance, 23 Ohio Cir. Ct. 96. Under Mass. St. (1896) c. 415, providing for a department of supplies under supervision of a chief, and directing that neither the council nor either branch thereof shall take part in the making of contracts, an ordinance directing with whom a contract for printing shall be made is invalid. Goddard *v.* Lowell, 179 Mass. 496, 61 N. E. 53.

22. New York *v.* Britton, 12 Abb. Pr. (N. Y.) 367 note; Britton *v.* New York, 21 How. Pr. (N. Y.) 251. See *supra*, III, F.

23. Municipal Signal Co. *v.* Holyoke, 168 Mass. 44, 46 N. E. 397.

24. The doctrine that the governing body of a municipal corporation has no power to discharge a debt due to it without payment does not apply to debts of questionable validity before final judgment, or debts against insolvent parties after judgment. Washburn County *v.* Thompson, 99 Wis. 585, 75 N. W. 309. See also *supra*, IX, A, 6, k.

25. Butler *v.* Charlestown, 7 Gray (Mass.) 12; Dey *v.* Jersey City, 19 N. J. Eq. 412; Birkett *v.* Athens, (Tenn. Ch. App. 1900) 59 S. W. 667. See *supra*, V, A, 2.

26. Chamberlain *v.* Hoboken, 38 N. J. L. 110.

27. Francis *v.* Troy, 74 N. Y. 338 [*reversing* 10 Hun 515]; Kernitz *v.* Long Island City, 50 Hun (N. Y.) 428, 3 N. Y. Suppl. 144. Where, in a city charter, special provision different from the ordinary course in city advertising is made for a particular

in the council.[28] It may not, however, impose terms and conditions tending to monopoly.[29]

C. Powers of Particular Officers, Boards, and Departments — 1. Boards and Departments.[30] Where special authority is given a board or department to do particular acts, ministerial in their nature, their powers are limited to the doing of these acts;[31] and whatever it may assume to do beyond this authority is null and void.[32] But where general power is granted to it, to effect a given purpose, or accomplish a certain result, it has implied power to use its official discretion in the exercise of its functions,[33] and to do and perform all acts in its judgment necessary to attain such purpose or result;[34] and the courts will not interfere in its work

class of advertisements, and a particular officer is designated to cause them to be published, and the expense is provided for, such advertisements are withdrawn from the general power of the common council, and the latter cannot incur expense for their publication. Francis *v.* Troy, *supra*. The contract to print and bind one thousand five hundred copies of the city charter was not a part of the ordinary daily printing of the corporation of New York city, such as the printing of its minutes, ordinances, resolutions, reports of committees, etc., of which the council had the entire control, without referring the subject to any executive department. McSpedon *v.* New York, 15 How. Pr. (N. Y.) 462 [*affirmed* in 7 Bosw. 601, 20 How. Pr. 395].

28. Jones *v.* New York, 7 Rob. (N. Y.) 209.

29. Atlanta *v.* Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; Peoples *v.* Byrd, 98 Ga. 688, 25 S. E. 677; Holden *v.* Alton, 179 Ill. 318, 53 N. E. 556; State *v.* Paterson, 66 N. J. L. 129, 48 Atl. 589.

30. Powers of departments and boards generally see *supra*, VII, B.

31. United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 57 N. J. L. 523, 31 Atl. 981. Under the act of congress creating the board of public works for the District of Columbia and requiring all contracts made by such board to be in writing and signed by the parties making them, and providing that they shall have no power to make contracts to pay money, except in pursuance of appropriations duly made, and not until such appropriations are made, such board has no authority to enter into contracts of a negotiable character signed by no one but an auditor, so as to pass a legal title to the same by mere delivery or indorsement. Ballard Pavement Co. *v.* Mandel, 2 MacArthur (D. C.) 351.

32. Woodside Water Co. *v.* Long Island City, 23 N. Y. App. Div. 78, 48 N. Y. Suppl. 686 [*affirmed* in 159 N. Y. 558, 54 N. E. 1095]; Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219; Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 6 Ohio N. P. 208. A board of water commissioners, acting on behalf of a municipal corporation, and authorized by statute to construct waterworks, and for that purpose to borrow money on the credit of the corporation, and issue bonds therefor, have no power to compromise a claim against the corporation, based on a void contract for the sale of bonds at less than par, made by themselves in disregard of a statutory prohibition, nor to pay the amount agreed on in compromise out of the proceeds of a sale of bonds. Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973 [*affirming* 86 Hun 548, 33 N. Y. Suppl. 784]. N. Y. Laws (1890), c. 566, § 81, as amended by Laws (1892), c. 617, authorizing water commissioners to contract for the furnishing of water to the city for public purposes, does not authorize a contract for the furnishing of water directly to the inhabitants through the private pipes of the company. Woodside Water Co. *v.* Long Island City, 23 N. Y. App. Div. 78, 48 N. Y. Suppl. 686 [*affirmed* in 159 N. Y. 558, 54 N. E. 1095].

33. Under Ohio Rev. St. § 2435-7, authorizing the construction of new waterworks in Cincinnati, and providing that "the commissioners shall, before entering into any contracts, cause plans and specifications, detailed drawings of forms of bids to be prepared," the commissioners are the judges of the sufficiency of such plans. Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 6 Ohio N. P. 208.

34. Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702, holding that the power of city boards of improvement to bind their districts for the payment of interest on a debt legally contracted is implied from the powers expressly conferred on the boards by the statute which provides that such boards shall have control of improvements in their districts, may make all contracts in reference thereto, borrow money at interest, and pledge all uncollected assessments for the payment thereof. A city board of water commissioners has power to bind the city for the price of meals furnished to the members of the board, their superintendent and secretary, and the president of the board of health, during the annual inspection of the water-supply of the city. Behm *v.* Reading, 21 Pa. Co. Ct. 545.

Oral contract with board of health. Under a statute authorizing the board of health to provide for all persons confined in a quarantined house and directing that the expenses so incurred when properly certified by the president and clerk of the board of health shall be paid by the person or persons quarantined when able, and when not by the city, an oral contract with the board of health, for necessaries furnished to a family

unless there is obvious fraud or collusion in the operations or an inexcusable transgression of the limit of its powers.[35] In this, as in other matters, however, ratifications of unauthorized contracts by a board or department validates the same.[36]

2. Particular Officers[37] — a. In General. Any officer assuming to bind the municipality by contract must produce express authority for his power thus to represent the corporation in a contractual relation, and a contract made without authority will not bind the municipality,[38] unless it is duly ratified.[39] But a municipal corporation, like a private corporation or individual, may so deal with third persons as to justify them in assuming the existence of an authority in another, which in fact has never been given, and become liable in this way for contracts entered into by an officer or other person without authority in fact.[40]

during quarantine, is binding on the city, it appearing that the account has been certified by the president and clerk of the board of health and that the quarantined family was not able to pay. Meily *v.* Columbus, 27 Ohio Cir. Ct. 822.

35. Kraft *v.* Weehawken Tp. Bd. of Education, 67 N. J. L. 512, 51 Atl. 483. Contracts of municipal boards will not be set aside by the court unless it appears that there is fraud or palpable abuse of the discretion of the board. Coward *v.* Bayonne, 67 N. J. L. 470, 51 Atl. 490.

36. Hill *v.* Indianapolis, 92 Fed. 467. See *infra*, IX, I, 1.

37. Powers of officers generally see *supra*, VII, A, 14.

38. *California.*— Findla *v.* San Francisco, 13 Cal. 534.

Connecticut.— Heublein *v.* New Haven, 75 Conn. 545, 54 Atl. 298.

Florida.— Madison *v.* Newsome, 39 Fla. 149, 22 So. 270.

Illinois.— Tamm *v.* Lavalle, 92 Ill. 263.

Louisiana.— Condran *v.* New Orleans, (1891) 9 So. 31; Burchfield *v.* New Orleans, 42 La. Ann. 235, 7 So. 448.

Maine.— French *v.* Auburn, 62 Me. 452; Millet *v.* Stoneham, 26 Me. 78.

Massachusetts.— Osgood *v.* Boston, 165 Mass. 281, 43 N. E. 108; Butler *v.* Charlestown, 7 Gray 12.

Michigan.— Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660.

Minnesota.— Jewell Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424.

Missouri.— Cheeney *v.* Brookfield, 60 Mo. 53; Carroll *v.* St. Louis, 12 Mo. 444.

New Hampshire.— Backman *v.* Charlestown, 42 N. H. 125.

New Jersey.— New Jersey Car Spring, etc., Co. *v.* Jersey City, 64 N. J. L. 544, 46 Atl. 649.

New York.— Davies *v.* New York, 93 N. Y. 250 [*reversing* on other grounds 48 N. Y. Super. Ct. 194]; Miller *v.* New York, 3 Hun 35, 5 Thomps. & C. 219; Farmers' L. & T. Co. *v.* New York, 4 Bosw. 80; Briggs *v.* New York, 2 Daly 304.

Ohio.— Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127.

Pennsylvania.— Farrell *v.* Coatesville Borough, 214 Pa. St. 296, 63 Atl. 742; Ross *v.* Philadelphia, 115 Pa. St. 222, 8 Atl. 398; Philadelphia *v.* Flanigan, 47 Pa. St. 21. Officers of a municipal corporation cannot bind it by any contract made without authority expressly given by an ordinance or resolution of the council, nor can they make a contract the effect of which would be to control or embarrass the legislative powers and duties of the corporation. Shrober *v.* Lancaster, 6 Lanc. Bar 201.

South Carolina— Park *v.* Laurens, 68 S. C. 212, 46 S. E. 1012; Willoughby *v.* Florence, 51 S. C. 462, 29 S. E. 242.

Tennessee.— Nash *v.* Knoxville, 108 Tenn. 68, 64 S. W. 1062.

Texas.— Indiana Road-Mach. Co. *v.* Sulphur Springs, (Civ. App. 1901) 63 S. W. 908; Tyler *v.* Adams, (Civ. App. 1901) 62 S. W. 119.

Wisconsin.— Wahl *v.* Milwaukee, 23 Wis. 272.

United States.—Sheridan *v.* New York, 145 Fed. 835; State Trust Co. *v.* Duluth, 104 Fed. 632.

Canada.— La Compagnie du Pacifique Canadien *v.* Montreal, 21 Quebec Super. Ct. 225.

See 36 Cent. Dig. tit. "Municipal Corporations," § 654.

Implied contract see *infra*, IX, G, 3, b.

De facto officer.— Where a mayor of a city accepts the office of sheriff of the county which under the law renders his commission as mayor null and void, but continues in office as mayor *de facto*, a contract signed by him as mayor cannot be set aside on an indirect attack by certiorari to which he is not a party. Ross *v.* Long Branch, 73 N. J. L. 292, 63 Atl. 609. But it is held that the doctrine that the official acts of officers *de facto* should be held valid is not applicable to a case where a contract was made with an officer after his right to perform the functions of his office had ceased, and the fact was notorious, and the other party to the contract had notice that the municipality which the officer claimed to represent had no interest in the subject-matter of the contract. Conway *v.* St. Louis, 9 Mo. App. 488. As to *de facto* officers generally see *supra*, VII, A, 7.

39. See *infra*, IX, I, 1.

40. Davies *v.* New York, 93 N. Y. 250 [*reversing* on other grounds 48 N. Y. Super. Ct. 194], holding that where a municipal

b. Mayor. Although the nominal and official head of the municipality,[41] the mayor has no power to bind the corporation by written or oral contract or representation,[42] unless he has been duly thereunto authorized by the governing body or by the state;[43] but he may, in the exercise of official discretion, refuse his executive approval to municipal contracts, ordained by the council and thereby defeat the same.[44]

c. Corporation Counsel. Unless the charter or municipal ordinances otherwise provide, the regular counsel of the corporation exercises the ordinary functions of retained lawyers,[45] and may bind the municipality to the same extent,[46] but no farther than other lawyers may bind their clients in the conduct of its law business.[47]

d. Controller. A city controller, although the chief financial officer of the corporation, cannot bind it by the insertion in a contract of terms not authorized;[48]

corporation takes a lease of rooms for the use of the recorder for one year, and permits him to occupy the same after termination of the lease, it will be held liable for the rent as on a renewal of the lease for another year, since it is the duty of the city, if it desires to terminate the lease, to surrender possession, or at least to notify the lessor that the agency will not continue, and the lessor has the right to assume, in the absence of notice, that the continuance of the recorder in possession is by authority of the city, and to treat it as a renewal of the lease for another year.

41. Elliot Mun. Corp. § 271. See *supra*, VII, A, 14, b.

42. Carrol *v.* St. Louis, 12 Mo. 444 (holding that the city of St. Louis was not liable for the services of an attorney appointed by the mayor, because the mayor had no authority to appoint him); Indiana Road-Mach. Co. *v.* Sulphur Springs, (Tex. Civ. App. 1901) 63 S. W. 908; Tyler *v.* Adams, (Tex. Civ. App. 1901) 62 S. W. 119. The mayor of the city of New York has no power, as such officer, to hire a pier for the purpose of removing offal from the city, so as to render the city liable to pay for such use, since the right to hire a pier for such purpose is a power inherent in the common council. Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80. So where one R contracted with a city council to build a city hall and to furnish all the material, such council was not made liable to one who sold R lumber for such building by the mere verbal assurance of the mayor that the amount would be paid out of the funds due R when the next instalment became payable, in the absence of any authority given the mayor by the council to give such assurance. Willoughby *v.* Florence, 51 S. C. 462, 29 S. E. 242. The signature of the mayor of a city to an agreement other than that which the city council had authorized him to sign does not bind the city in a matter in which it can be represented only by the city council, as a municipality can be bound only by the acts of those who are authorized to represent it. La Compagnie du Pacifique Canadien *v.* Montreal, 21 Quebec Super. Ct. 225.

Powers of mayor generally see *supra*, VII, A, 14, b.

43. Michigan City *v.* Leeds, 24 Ind. App. 271, 55 N. E. 799.

44. Com. *v.* Lebanon City, 7 Pa. Dist. 163. Where a city is incorporated under N. J. Pub. Laws (1889), cc. 40, 52, § 15, providing that every ordinance, before it takes effect, shall be presented to the mayor, who, if he approves it, shall sign it, a contract for street lighting for a definite term at a fixed price per lamp can only be made by the council by an ordinance or resolution submitted to the mayor as provided by such latter act. Platt *v.* Englewood, 68 N. J. L. 231, 52 Atl. 239.

45. Chicago *v.* Berger, 100 Ill. App. 158.

46. Bush *v.* Coler, 24 Misc. (N. Y.) 368, 53 N. Y. Suppl. 679 [*affirmed* in 52 N. Y. App. Div. 630, 65 N. Y. Suppl. 1129].

Agreement to abide result of test case.— A city attorney charged with the duty of managing all the city's litigation may bind the city, in a number of controversies, to abide by the result of a test case to be brought involving the same questions. Bank of Commerce *v.* Louisville, 88 Fed. 398.

Offer to allow judgment.— The corporation counsel of the city of New York has authority to make an offer to allow judgment for a certain sum, according to the regular practice, under section 255 of the charter, providing that he shall have charge of all the law business of the corporation and its departments and boards, and of all law business in which the city is interested, and that he shall be the legal adviser of all departments and officers, who are forbidden to employ any other attorney. Bush *v.* Coler, 24 Misc. (N. Y.) 368, 53 N. Y. Suppl. 679 [*affirmed* in 52 N. Y. App. Div. 630, 65 N. Y. Suppl. 1129], holding also that the duty of the controller of the city of New York to "settle and adjust all claims" against the city does not deprive the corporation counsel of the city of the power to compromise a claim sued on by an offer of judgment.

47. Bank of Commerce *v.* Louisville, 88 Fed. 398.

48. An ordinance authorizing the city controller to procure from a slaughter-house company, in the name of the city, "the privilege and right of all city butchers to use their slaughter-house for the slaughtering of animals thereat, free of charge to

nor may he make any municipal contract without authority from the legislature or the governing body of the corporation.[49]

e. Tax-Collector. The collector of municipal taxes may bind the city for expenses necessary to enable him to perform an official function;[50] but he may not advertise except as provided by law,[51] nor transgress the limits of appropriation.[52]

f. Treasurer. In the absence of an express grant of authority, a city treasurer has no authority to issue city warrants.[53]

g. Other Officers. And in general purely executive or ministerial officers have no implied power to bind the municipality by contract,[54] except in case of emergency involving peril to the corporation.[55]

3. Committees and Commissioners. A committee of the common council, when thereunto duly authorized, may make a contract binding upon a municipality;[56]

such butchers," does not authorize him to contract that the company should have the offal of the animals so slaughtered at their establishment. Wahl *v.* Milwaukee, 23 Wis. 272.

49. Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80; Briggs *v.* New York, 2 Daly (N. Y.) 304. The controller of New York has no power as such officer, in the absence of express authority, to hire a pier for the purpose of removing offal from the city, so as to render the city liable to pay for such use. Farmers' L. & T. Co. *v.* New York, *supra*.

Controller and chairman of finance committee.— Under a charter declaring that no debt or obligation against the city shall be created except by ordinance, and that neither the city council nor any officer shall make valid or in any manner recognize any demand against the city which was not at the time of its creation a valid claim, etc., the custom of the city officers to vest the financial control and management of the city in its controller and the chairman of the finance committee did not render a contract entered into by the latter officers, employing a broker to sell municipal bonds, binding on the city. Paul *v.* Seattle, 40 Wash. 294, 82 Pac. 601.

50. Dallas *v.* Martyn, 29 Tex. Civ. App. 201, 68 S. W. 710.

51. Philadelphia *v.* Flanigen, 47 Pa. St. 21. In Millet *v.* Stoneham, 26 Me. 78, it was held that towns were not liable to publishers of newspapers for the publication of notices of sales of land for taxes by direction of the collector.

52. The city councils of Philadelphia have power, in an appropriation for advertising delinquent taxpayers, to restrict it as to the number of newspapers, the number of insertions in each, and as to costs; and the receiver of taxes has no power to bind the city in excess of the appropriation, or to advertise otherwise than as directed by the councils. Philadelphia *v.* Flanigen, 47 Pa. St. 21.

53. Bardsley *v.* Sternberg, 17 Wash. 243, 49 Pac. 499. See *infra*, XV, B, 2.

54. Heuhlein *v.* New Haven, 75 Conn. 545, 54 Atl. 298.

City authorities having charge of the sale of buildings cannot bind the city by a guaranty giving a permit of removal on conditions different from those prescribed by the city ordinances and the regulations of the board of aldermen. Osgood *v.* Boston, 165 Mass. 281, 43 N. E. 108.

The board of trustees of gas works of cities or villages have no power to make contracts which would be binding upon such cities or villages, except "under such rules and regulations as, by ordinance, the council may prescribe," as provided by Ohio Rev. St. § 2484. Kerr *v.* Bellefontaine, 13 Ohio Cir. Ct. 24, 7 Ohio Cir. Dec. 93; Dalzell, etc., Co. *v.* Findlay, 5 Ohio Cir. Ct. 435, 3 Ohio Cir. Dec. 214.

City physician.— Where no authority is conferred on a city physician, either by the city charter or ordinances, to employ assistants in treating smallpox patients during an epidemic, the fact that the secretary of the board of health, whose official duties are merely clerical, renders services of such character under employment by the city physician, will not render the city liable therefor. Nash *v.* Knoxville, 108 Tenn. 68, 64 S. W. 1062.

The armory board, as constituted under N. Y. Laws (1898), p. 563, c. 212, § 134, had no authority to bind the city by an indebtedness incurred for architect's fees until the board had been authorized to incur such indebtedness by resolution of the commissioners of the sinking fund. Horgan *v.* New York, 114 N. Y. App. Div. 555, 100 N. Y. Suppl. 68.

School trustees.— The board of education of New York city, created by Laws (1851), c. 386, by a regulation which it was authorized to make, authorized the trustees of each ward to expend a certain sum, and no more, for the repairs of school-houses; and plaintiff, under the direction of trustees, made repairs on the school-houses of a ward, but the amount allowed to the trustees was expended without paying him therefor. It was held that plaintiff's employment was in excess of the powers of the trustees, and the board was not liable therefor. Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219.

55. Withers *v.* New York, 92 N. Y. App. Div. 147, 86 N. Y. Suppl. 1105; Sheehan *v.* New York, 37 Misc. (N. Y.) 432, 75 N. Y. Suppl. 802.

56. Conyers *v.* Kirk, 78 Ga. 480, 3 S. E.

but to give it validity it must have the approval of a majority.[57] So also by virtue of its sovereign power to control municipal affairs the general assembly may authorize a commission to make contracts which will bind the corporation without its consent.[58]

4. Notice of Limitation of Power. It is a general doctrine of the law that one dealing with municipal officers, boards, or committees is bound at his peril to take notice of the limitation of their authority.[59] It obviously follows that one

442; Jewell Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424; State *v.* McCardy, 62 Minn. 509, 64 N. W. 1133; Burlington *v.* Dennison, 42 N. J. L. 165; Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 6 N. Y. Suppl. 54]; People *v.* Green, 64 N. Y. 499, holding that as the common council has authority to take leases, it necessarily follows as a legal conclusion that they possess ample power, as that duty could not be conveniently performed by that body as such, to authorize some person in office to supervise the taking of a lease and to see that such instrument contains the proper covenants and conditions, and the evidence of the obligations which the parties assume to perform, as well as to direct who shall execute the same, unless such duty by law devolves upon some other officer of the corporation. See also Alton *v.* Mulledy, 21 Ill. 76; Hunneman *v.* Jamaica Fire Dist. No. 1, 37 Vt. 40. And see *supra*, III, G. A committee of councils has no authority to bind a borough by an agreement as to street lines; and any agreement which they may make for that purpose can only become effective by the ratification, evidenced by some unequivocal act, of an authority competent in that behalf to represent the borough. Washington Female Seminary *v.* Washington Borough, 18 Pa. Super. Ct. 555.

Written order.— Under charter provisions that "the common council shall have power to purchase fire-engines and other fire-apparatus," and that "all claims and demands against the city, before they are allowed by the common council, shall be audited and adjusted by the controller," and a city ordinance prohibiting the controller from auditing or approving any claim for purchases made for the fire department, unless such purchases were made upon the written order of the "committee on fire department," it was held that no one except the common council or someone acting under its direction has authority to make such purchase; and that if made by the "committee on fire department," such purchases can only be by written order. Basshor *v.* St. Paul, 26 Minn. 110, 1 N. W. 810.

57. Peterson *v.* New York, 4 E. D. Smith (N. Y.) 413 [*affirmed* in 17 N. Y. 449]. Where power to make contracts is intrusted to a street committee without an express provision that one member alone may exercise it, it can be exercised only by the concurrent action of at least a majority; and the chairman, as such, has no authority to make such contracts. Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786. A committee of a city council to select and purchase a horse is charged with a judicial duty which cannot be discharged by a majority without notice to the minority. Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550. Where two of the three members of a council committee to select and purchase a horse meet without previous notice or concurrence, and make the trade without the other member knowing that such transaction is in contemplation, the presumption of notice to him, or of his consent to the act of his associates, is rebutted. Kavanaugh *v.* Wausau, *supra*.

58. New York, etc., R. Co. *v.* Wheeler, 72 Conn. 481, 45 Atl. 14; Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080; Woodruff *v.* Catlin, 54 Conn. 277, 295, 6 Atl. 849.

59. *California.*— McCoy *v.* Briant, 53 Cal. 247.

Florida.— Persons dealing with an agent of a municipal corporation are bound to ascertain the nature and extent of the authority of such agent in all cases where the authority is conferred by statute. Madison *v.* Newsome, 39 Fla. 149, 22 So. 270.

Illinois.— Tamm *v.* Lavalle, 92 Ill. 263.

Iowa.— Bennett *v.* Mt. Vernon, 124 Iowa 537, 100 N. W. 349.

Massachusetts.— Osgood *v.* Boston, 165 Mass. 281, 43 N. E. 108.

Michigan.— Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660.

Minnesota.— Jewell Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424. It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make a contract. State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

Missouri.— Cheeney *v.* Brookfield, 60 Mo. 53; Mister *v.* Kansas City, 18 Mo. App. 217.

New Hampshire.— Sprague *v.* Cornish, 59 N. H. 161.

New Jersey.— New Jersey, etc., Tel. Co. *v.* Jersey City, 34 N. J. Eq. 580; New Jersey, etc., Tel. Co. *v.* Jersey City Fire Com'rs, 34 N. J. Eq. 117 [*affirmed* in 34 N. J. Eq. 580].

New Mexico.— Raton Waterworks Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898.

New York.— Briggs *v.* New York, 2 Daly 304.

Ohio.— Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation, or appropriation have been complied with. Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127.

Pennsylvania.— Shroder *v.* Lancaster, 6 Lanc. Bar 201.

has no right of action against a municipal corporation for breach of a contract which it was beyond the powers of the officer, board, or committee to make.[60]

D. Personal Interest of Officers[61] — **1. In General.** A public office is a public trust,[62] and a trustee may not contract with himself personally;[63] nor may a member of the council or board vote upon a contract in which he is personally interested.[64] Municipal contracts entered into with officers of the corporation in violation of these fundamental doctrines, or of a statute or charter provision declaring such rule, are void, and no action lies thereon.[65] But on the other hand, under some charter and local statutory provisions these general rules have been

Rhode Island.— McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

Vermont.— Taft *v.* Pittsford, 28 Vt. 286.

Washington.— Bardsley *v.* Sternberg, 17 Wash. 243, 49 Pac. 499.

United States.— Sheridan *v.* New York, 145 Fed. 835.

See 36 Cent. Dig. tit. "Municipal Corporations," § 656.

60. *Arkansas.*— Parsel *v.* Barnes, 25 Ark. 261.

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746.

Maryland.— Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

Minnesota.— State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

New York.— Miller *v.* New York, 3 Hun 35, 5 Thomps. & C. 219.

Ohio.— Kerr *v.* Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024.

See 36 Cent. Dig. tit. "Municipal Corporations," § 375. And see *supra*, IX, C, 1, 2, a.

Illustrations.—The doctrine that the official acts of officers *de facto* should be held valid will not be applied to a case where a contract was made with an officer after his right to perform the functions of his office had ceased, and the fact was notorious, and the other party to the contract had notice that the municipality which the officer claimed to represent had no interest in the subject-matter of the contract. Conway *v.* St. Louis, 9 Mo. App. 488. Where the appointment of an agent by the selectmen of a town for the purchase and sale of spirituous liquors contains a prohibition of the use of the town's credit, and is duly recorded as required by law, everyone who sells liquor to him is charged with notice of such limitation, and can maintain no action against the city for the price of the liquors. Backman *v.* Charlestown, 42 N. H. 125. An action could not be maintained against a school-board for failure to permit plaintiff to fulfil a contract to furnish materials for a school-house without showing that the board was authorized by the city to construct the building, or to use any of the funds received or receivable from the city for that purpose, or to appropriate any state funds to that end. Peck-Smead Co. *v.* Sherman, 26 Tex. Civ. App. 208, 63 S. W. 340.

61. Ratification where officer is interested see *infra*, IX, I, b.

62. Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L. R. A. 253.

63. Findlay *v.* Parker, 17 Ohio Cir. Ct. 294, 9 Ohio Cir. Dec. 710.

64. Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127; Stone *v.* Bevans, 88 Minn. 127, 92 N. W. 520, 87 Am. St. Rep. 506.

65. *California.*— Berka *v.* Woodward, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420 (under code and charter provisions); Finch *v.* Riverside, etc., R. Co., 87 Cal. 597, 25 Pac. 765. A statute forbidding any officer of a city of the fourth class to be interested in a contract with the city is not impliedly repealed by an act providing that under certain circumstances a street contract shall be awarded to the owners of a majority of the frontage on the street to be improved. Capron *v.* Hitchcock, 98 Cal. 427, 33 Pac. 431.

Georgia.— West *v.* Berry, 98 Ga. 402, 25 S. E. 508. A contract made by a mayor, while in office, with the city council, to lease a city park for five years, and for an annual sum paid him to keep the park in repair, is against public policy, and void, as it is a contract with nobody whose contracts it is his duty to superintend. Macon *v.* Huff, 60 Ga. 221.

Illinois.— Dwight *v.* Palmer, 74 Ill. 295.

Indiana.— Benton *v.* Hamilton, 110 Ind. 294, 11 N. E. 238; Case *v.* Johnson, 91 Ind. 477; Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127. A member of a city board of health is an officer, within the meaning of an act providing that no city officer shall be a party to or interested in any contract or agreement creating an indebtedness against the city. Ft. Wayne *v.* Rosenthal, *supra*. Under a statute prohibiting any officer of a city from contracting therewith, a city judge cannot recover for the rent of a court-room hired of him by the city. McGregor *v.* Logansport, 79 Ind. 166.

Kentucky.— Nunemacher *v.* Louisville, 98 Ky. 334, 32 S. W. 1091, 17 Ky. L. Rep. 933.

Minnesota.— Stone *v.* Bevans, 88 Minn. 127, 92 N. W. 520, 97 Am. St. Rep. 506; Macy *v.* Duluth, 68 Minn. 452, 71 N. W. 687.

Nebraska.— Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242. Where the council of a city of the second class enters into a contract in which one of the members of the council is interested, such contract may be avoided by the city. McElhinney *v.* Superior, 32 Nebr. 744, 49 N. W. 705 [*following* Grand Island Gas Co. *v.* West, *supra*].

New Hampshire.— A selectman cannot act

modified so as to permit such contracts on certain conditions, such as approval by a

for the town in making a loan of its money to himself. Holderness *v.* Baker, 44 N. H. 414.

New Jersey.— Brown *v.* Street Lighting Dist. No. 1, 71 N. J. L. 79, 58 Atl. 115; Harrison *v.* Elizabeth, 70 N. J. L. 591, 57 Atl. 132; Foster *v.* Cape May, 60 N. J. L. 78, 36 Atl. 1089. An ordinance adopted by the board of public works giving a street railway company license to lay tracks in any street is voidable if one of such board participating in the adoption was specially interested therein. West Jersey Traction Co. *v.* Camden, 56 N. J. L. 431, 29 Atl. 163 [*affirmed* in 57 N. J. L. 710, 34 Atl. 1134 (*affirmed* in 58 N. J. L. 362, 33 Atl. 996)].

New York.— Smith *v.* Albany, 61 N. Y. 444. Where, by the charter of a city, the members of the common council were prohibited from being interested in any contract for which payment must be made under any ordinance of the common council, and a member of the council, by a secret arrangement with a contractor, became interested in such contract, it was held that a note given by the contractor to such member for his share of the profits of the contract was void, and, being void, an assignee thereof could not recover upon it. Bell *v.* Quin, 2 Sandf. (N. Y.) 146. *Compare* Matter of Plattsburgh, 157 N. Y. 78, 51 N. E. 512 [*reversing* 27 N. Y. App. Div. 353, 50 N. Y. Suppl. 356].

North Carolina.— Snipes *v.* Winston, 126 N. C. 374, 35 S. E. 610, 78 Am. St. Rep. 666.

Ohio.— Findley *v.* Parker, 17 Ohio Cir. Ct. 294, 9 Ohio Cir. Dec. 710; Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

Pennsylvania.— Com. *v.* De Camp, 177 Pa. St. 112, 35 Atl. 601; Milford *v.* Milford Water Co., 124 Pa. St. 610, 17 Atl. 185, 3 L. R. A. 122.

South Carolina.— Duncan *v.* Charleston, 60 S. C. 532, 39 S. E. 265. *Compare* Albright *v.* Chester, 9 Rich. 399.

Texas.— Where plaintiff, through its agent, sold goods to a city, and, after plaintiff forbade the agent to collect the pay therefor, he sold the claim to an alderman, payment by the city to such alderman was no defense to a suit by plaintiff for the price of the goods; the purchase of the claim by the alderman being invalid, under Pen. Code, art. 264, which imposes a penalty on any officer of a city who shall purchase any claim against the city, and the city charter providing that no member of the city council shall be interested in any contract, the consideration of which is to be paid from the city treasury. Texas Anchor Fence Co. *v.* San Antonio, 30 Tex. Civ. App. 561, 71 S. W. 301.

Washington.— Under a statute providing that any contract with the city in which any city officer is interested shall be void, it is the duty of the court of its own motion to declare any such contract void whenever it so appears to be. Northport *v.* Northport Townsite Co., 27 Wash. 543, 68 Pac. 204.

United States.— American Emigrant Co. *v.* Wright County, 97 U. S. 339, 24 L. ed. 912; Santa Ana Water Co. *v.* San Buenaventura, 65 Fed. 323.

Canada.— Collins *v.* Swindle, 6 Grant Ch. (U. C.) 282, where a bill for an accounting was dismissed, being based upon a contract between the complainant, who was a member of a municipal corporation, and defendant, under which contract the complainant agreed to take a contract from the corporation for the execution of certain works in defendant's name, the profits whereof were to be divided, and it was held that such a contract was in contravention of the statute and the court refused to enforce the partnership agreement.

See 36 Cent. Dig. tit. "Municipal Corporations," § 657 *et seq.*

Improvement contracts in which councilmen or officers are directly or indirectly interested are voidable at the option of the corporation or any one directly affected thereby. Macon *v.* Huff, 60 Ga. 221; Benton *v.* Hamilton, 110 Ind. 294, 11 N. E. 238 (holding that a legalizing act which assumed to legalize contracts made by an incorporated town did not validate a contract made by the town with its treasurer for the improvement of a street at the expense of property-owners); Case *v.* Johnson, 91 Ind. 477; Stone *v.* Bevans, 88 Minn. 127, 92 N. W. 520, 97 Am. St. Rep. 506; Northport *v.* Northport Townsite Co., 27 Wash. 543, 68 Pac. 204; and other cases above cited. But see Albright *v.* Chester, 9 Rich. (S. C.) 399.

An allowance to a public officer by a contractor or employee, however small, is such evidence of fraud as will invalidate the contract. Lindsey *v.* Philadelphia, 2 Phila. (Pa.) 212.

State officers.— The office of election commissioner of St. Louis being created by act of the legislature, the incumbents being appointees of the governor, and their functions applying to all elections, such a commissioner is not a city officer, so as to prevent the corporation of which he is president making a contract with the city, under a city charter providing that city officers shall not be interested in a contract with the city. State *v.* Meier, 96 Mo. App. 160, 69 S. W. 668.

Penal statute.— See Com. *v.* Witman, 15 Pa. Dist. 210, holding that section 66 of the act of March 31 1860, forbidding officers to have any interest in municipal contracts under the penalty of forfeiting their offices, applied to a councilman who was not a member, officer, or agent of a corporation. Under a statute which did not prohibit the making of a contract but imposed a penalty for acting or voting subsequently thereto, it was held that where a municipal officer did certain work repairing a stone crusher for which he was voted a certain sum, an action brought to recover such sum as an illegal payment in contravention of the statute was not maintainable; that all such contracts are not void in equity, although a contract by which it is intended that the officer should reap a profit at the expense of the municipality

financial officer;[66] and in some cases the courts without legislation have assumed authority to give judicial approval to fair municipal contracts made with officers or councilmen, not prejudicial to the corporation.[67] And generally the rules do not invalidate separate contracts with officers' kinsmen, or their general partners; nor those in which the interest of the officer is acquired by assignment;[68] nor those entered into before he became an officer.[69]

2. Purchase or Conveyance of Property. The doctrine above stated applies to the purchase and conveyance of real property by or from municipal officers, and contracts and conveyances by or to them have been held void, solely because of the relation, although they took no active part in negotiating or concluding the purchase.[70] In other cases the transaction has been treated as valid, unless the

might or might not be void in equity depending on the circumstances; that the action could not be maintained upon equitable grounds in this case because the pleading contained nothing more than an allegation that there was a contract under which a certain sum was paid and sought recovery on the ground that the statute made it illegal. South Vancouver *v.* Rae, 12 Brit. Col. 184.

Profit.— A resolution ordering payment of a fire association's hill was held not illegal because it was passed by the vote of three members of the council who at the same time were members of the association, since the rule of council applied only to members who had "a personal or private interest," and these members had neither, the fire association being organized for the public welfare and not for profit, and further such resolution was not illegal under the act of March 31, 1860, since that was a penal statute having for its object the deterring of officers therein designated from using their official position for private gain and to punish those who should violate its provisions. Crawford *v.* Clifton Heights Borough, 11 Pa. Dist. 630.

66. Matter of Clamp, 33 Misc. (N. Y.) 250, 68 N. Y. Suppl. 345.

67. Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175, 56 Pac. 887. See also Albright *v.* Chester, 9 Rich. (S. C.) 399. An ordinance prohibiting a municipal officer from being interested in any city contract, or receiving any compensation, except his salary, for services rendered the city, will not prevent him from recovering for services rendered altogether outside the line of his official employment, under a contract made with the city, and for a compensation fixed therein. Klemm *v.* Newark, 61 N. J. L. 112, 38 Atl. 692.

68. *California.*—Beaudry *v.* Valdez, 32 Cal. 269.

Michigan.— Lewick *v.* Glazier, 116 Mich. 493, 74 N. W. 717.

New Jersey.— Moreland *v.* Passaic, 63 N. J. L. 208, 42 Atl. 1058.

Oregon.— Stott *v.* Franey, 20 Oreg. 410, 26 Pac. 271, 23 Am. St. Rep. 132.

Pennsylvania.—Com. *v.* Hilibish, 1 Pa. Dist. 703, 12 Pa. Co. Ct. 25.

See 36 Cent. Dig. tit. "Municipal Corporations," § 657 *et seq.*

69. Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587.

70. Pratt *v.* Luther, 45 Ind. 250; Wood *v.* Elliot, 26 Pittsb. Leg. J. N. S. (Pa.) 334. Under the former New York City Charter (Laws (1849), p. 483, § 19), prohibiting the members of the common council, the heads of departments, chiefs of bureaus, and any other officers of the corporation, from being interested in the purchase of any real property belonging to the corporation, a governor of the almshouse was one of the heads of the department and an officer of the city, who was prohibited from being interested in the purchase of any realty belonging to the corporation. Roosevelt *v.* Draper, 23 N. Y. 318 [*affirming* 12 How. Pr. 469].

Under Ohio Rev. St. § 6069, prohibiting any public officer from becoming interested in any contract for the purchase of property by the state, county, or any municipal corporation, the acceptance by a village of a conveyance of property, subject to a mortgage, in which the village solicitor owns an interest, which involves the assumption and payment of the mortgage by the village, constitutes the making of an illegal contract by the village, which will be enjoined. Marsh *v.* Hartwell, 4 Ohio S. & C. Pl. Dec. 64, 2 Ohio N. P. 389.

Sham conveyance to intermediate transferee.— In Tyrrell *v.* New York, 94 N. Y. Suppl. 951, the mayor of a city, who was also a member of the board of health, conveyed to another, by a sham transfer, a dilapidated building in the city, the rental value of which was not more than four hundred dollars a year, at the outside. This conveyance was made while the board of health was considering the matter of acquiring a pest-house, and a few months later, during the closing days of the mayor's administration, the board of health leased the property from the transferee for a pest-house at an annual rental of three thousand dollars. It was held that the lease was a fraud on the city.

Sale to city of property purchased from it. — Where the common council of the city of New York directed the controller to carry out and complete a purchase of real estate on behalf of the city, by issuing the corporate bonds of the city for the purchase-money, it was no excuse for the non-performance of this duty by the controller, on mandamus against him, that the title was derived from one who had purchased the property from the city, and had taken a conveyance of it while he was an officer of the corporation. People *v.* Brennan, 39 Barb. (N. Y.) 522.

officer's vote or signature to the deed was requisite to complete the conveyance ;[71] and even the doctrine of strict construction has been applied to give validity to the transaction.[72]

3. Officer Interested as Partner, Stock-Holder, or Employee. Cases are numerous wherein a municipality was brought into contractual relation with firms or companies, of which a councilman or other city officer was a member, shareholder, or employee, and the courts have usually applied the general doctrines to the undoing of such contracts, just as though the officers were individually interested.[73] Such contracts have been sustained, however, in some instances, where the officer was only conditionally interested[74] or not active in procuring the contract ;[75] and in some, even where the interest was direct and the votes of those interested were controlling.[76]

71. San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106; Tucker *v.* Howard, 122 Mass. 529.

72. Trainer *v.* Wolfe, 140 Pa. St. 279, 21 Atl. 391.

73. *Georgia.*— Hardy *v.* Gainesville, 121 Ga. 327, 48 S. E. 921.

Kentucky.— Nunemacher *v.* Louisville, 98 Ky. 334, 32 S. W. 1091, 17 Ky. L. Rep. 933.

Louisiana.— McManus *v.* Scheele, 116 La. 72, 40 So. 535, where one who had entered into a contract with the city of New Orleans thereafter entered into a contract with a partnership to execute the first contract and one of the partners was a councilman of the city, and it was held that the contract was void under the statute.

Maine.— Goodrich *v.* Waterville, 88 Me. 39, 33 Atl. 659.

New Jersey.— Stroud *v.* Consumers' Water Co., 56 N. J. L. 422, 28 Atl. 578. A contract awarded to a private corporation by commissioners of a municipal corporation, one of whom was a stock-holder in the private corporation, will be set aside on application of a taxpayer. Brown *v.* Woodbridge Tp. Street Lighting Dist. No. 1, 71 N. J. L. 79, 58 Atl. 115. A determination by the city council in a specific case, based on a finding of that body in a matter in which discretionary judgment was reposed in it, is so far judicial as to be voidable, if any of the quasi-judges who participated were disqualified by private interests, and the award of the public printing to a publishing company in which the councilmen or their wives owned stock renders such award void. Drake *v.* Elizabeth, 69 N. J. L. 190, 54 Atl. 248.

Ohio.— State *v.* Funk, 16 Ohio Cir. Ct. 155, 8 Ohio Cir. Dec. 782; Grant *v.* Brouse, 2 Ohio S. & C. Pl. Dec. 24, 1 Ohio N. P. 145. Where some of the gas trustees of a city owning and operating a natural gas plant were beneficially interested in a contract to supply gas to certain manufacturers at a nominal consideration, the contract cannot be enforced. Dalzell, etc., Co. *v.* Findlay, 5 Ohio Cir. Ct. 435, 3 Ohio Cir. Dec. 214; Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

Pennsylvania.— The secretary, who is also a stock-holder, of a corporation having a contract for the lighting of a city, is within the prohibition of Crimes Act (1860), § 66, prohibiting any councilman from being interested in any contract with the city, although he was elected councilman after the execution of the contract. Com. *v.* De Camp, 177 Pa. St. 112, 35 Atl. 601. A contract entered into by a borough council with an electric light company, two of the directors of which are members of the council, is invalid, although such members voted against the contract. Kennett Electric Light Co. *v.* Kennett Square, 4 Pa. Dist. 707, 8 Kulp 105.

South Carolina.— Duncan *v.* Charleston, 60 S. C. 532, 39 S. E. 265.

Tennessee.— A firm of attorneys cannot recover for legal services performed for a city where one of such firm was a member of the board of aldermen, and voted for the employment of the firm, and it required his vote to constitute a majority in favor of the measure, since an interested member has no right to participate in the proceedings. Burkett *v.* Athens, (Ch. App. 1900) 59 S. W. 667.

United States.— Santa Ana Water Co. *v.* San Buenaventura, 65 Fed. 323.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 661, 662.

Stock held as collateral.— Under the charter of the city of Cape May, providing that no member of the city council shall be interested in any contract, the expense of which shall be paid by the city, a member who held, as collateral security, a share of the stock of an electric light company, was disqualified to vote to authorize a contract with such company to light the city, although the value of the stock was slight. Foster *v.* Cape May, 56 N. J. L. 78, 36 Atl. 1089.

74. Broken Bow *v.* Broken Bow Waterworks Co., 57 Nebr. 548, 77 N. W. 1078.

75. Macy *v.* Duluth, 68 Minn. 452, 71 N. W. 687; Foster *v.* Cape May, 60 N. J. L. 78, 36 Atl. 1089; Marshal *v.* Ellwood City, 189 Pa. St. 348, 41 Atl. 994.

76. *Alabama.*— Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410.

Indiana.— Kokomo *v.* State, 57 Ind. 152.

New York.— Nicoll *v.* Sands, 131 N. Y. 19, 29 N. E. 818 [*affirming* 14 N. Y. Suppl. 448].

Pennsylvania.— Dunlap *v.* Philadelphia, 13 Wkly. Notes Cas. 98.

England.— London Electric Lighting Co. *v.* London, 82 L. T. Rep. N. S. 530.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 661, 662.

4. Resignation of Officer. An officer may not validate a void contract by resignation after assuming the contractual relation;[77] but it seems that he may by resignation qualify himself to bid for a contract authorized by his vote while a member of the council.[78]

5. Recovery on Implied Contract. Whether a municipal officer, whose express contract with the corporation for sale or service would be invalid, may recover in assumpsit on an implied contract, seems to depend upon the special circumstances of the particular case, in some instances the equities being allowed to prevail,[79] and in others the courts refusing to imply a contract between parties when the law forbids it.[80]

E. Binding Successors and Duration of Contract — 1. Power to Bind Successors. The power of a municipal council to bind successors in office by a contract for a term of years has been repeatedly recognized with regard to water and light supply,[81] street car fares,[82] the disposal of sewage and garbage,[83] and the issuance of municipal bonds.[84] But they may not bind either themselves or their successors to forego their legislative functions;[85] nor are such contracts for per-

77. Dwight *v.* Palmer, 74 Ill. 295.

78. White *v.* Alton, 149 Ill. 626, 37 N. E. 96.

79. Capital Gas Co. *v.* Young, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463; Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242. Although an express contract between a city and one of its councilmen for the performance of services for the city, when executory, will not be enforced, yet if the work has been done by the councilman in good faith, and the benefits thereof received by the city, a recovery may be had on the *quantum meruit*. Concordia *v.* Hagaman, 1 Kan. App. 35, 41 Pac. 133. Considerations of public policy will not prevent the recovery by a corporation, one of whose stock-holders is a member of a city council, on a *quantum meruit* for printing done for the city, where such councilman had no power to direct or control the expenditure of the city for such printing. Call Pub. Co. *v.* Lincoln, 29 Nebr. 149, 45 N. W. 245. The fact that plaintiff, who seeks to recover for repairs made to the streets of a town, was, at the time the contract for such repairs was made, an officer of such town, does not preclude his recovering for his services. Albright *v.* Chester, 9 Rich. (S. C.) 399. A claim for work on a reclamation improvement performed by one of the district trustees is not invalid, where the work was recommended by the engineer as necessary and approved by him as excellent, and there is no evidence that it was otherwise, or that the trustee derived profit therefrom, although such trustee voted with the other two in favor of approving the claim. Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175, 56 Pac. 887.

80. Berka *v.* Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Winchester *v.* Frazer, 43 S. W. 453, 19 Ky. L. Rep. 1366; Macy *v.* Duluth, 68 Minn. 452, 71 N. W. 687. The mayor of a town, the charter of which forbids that he shall "be interested directly or indirectly in any contract, office, or appointment in said town" cannot lawfully charge the municipality fees for services rendered by him as an attorney at law in cases before the courts to which the municipal corporation is a party, whether the services are rendered under an express or an implied contract. West *v.* Berry, 98 Ga. 402, 25 S. E. 508.

81. *Illinois.*— Carlyle Water, etc., Co *v.* Carlyle, 31 Ill. App. 325.

Indiana.— Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

Louisiana.— New Orleans Gas-Light Co. *v.* New Orleans, 42 La. Ann. 188, 7 So. 559.

Minnesota.— State *v.* McCardy, 62 Minn. 509, 64 N. W. 1133.

Mississippi.— Light, etc., Co. *v.* Jackson, 73 Miss. 598, 19 So. 771.

Montana.— State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15.

Washington.— Tanner *v.* Auburn, 37 Wash. 38, 79 Pac. 494.

United States.— In contracting for the enlargement of its water system, for electric lights for municipal use, and for the use of conduits and poles to carry its wires, a municipality is exercising its proprietary or business powers, is subject to the same rules of law that govern the agreements of private corporations, and its contracts bind its successive sets of officers. Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333. But see Garrison *v.* Chicago, 10 Fed. Cas. No. 5,255, 7 Biss. 480, holding that the municipal officers of Chicago were not authorized to bind the city by a ten-year contract for lighting the streets with gas, although the charter did not expressly limit their right to make such a contract.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 665, 666. And see *infra* IX, E, 2.

82. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592.

83. McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794.

84. Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274.

85. New York, etc., R. Co. *v.* New Rochelle, 29 Misc. (N. Y.) 195, 60 N. Y. Suppl. 904; Waterbury *v.* Laredo, 68 Tex. 535, 5 S. W.

sonal or professional services to the corporation binding on the corporation after the expiration of the official term of the contracting members.[86] And in some states power to bind successors in any municipal contract is conditioned upon the same going into full operation during the official term of the contracting members.[87]

2. Term or Duration of Contract. The time limit for contracts to furnish utilities is sometimes fixed in the municipal charter,[88] or by statutory and constitutional provisions.[89] In the absence of such limitation either by charter or gen-

81. A contract of a city to pay a water company annually for a number of years for a water-supply — not a definite amount, but the proceeds of an annual tax of a certain per cent on all the assessed property in the city — is invalid for unreasonableness, and as an abdication of the city's legislative power. Westminster Water Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630.

A city cannot make an agreement with landowners to maintain a drain for the benefit of their lands within or without the city limits, which it cannot afterward repudiate if it chooses. Peru *v.* Gleason, 91 Ind. 568.

86. Emmert *v.* De Long, 12 Kan. 67; Mack *v.* New York, 37 Misc. (N. Y.) 371, 75 N. Y. Suppl. 809 [*affirmed* in 82 N. Y. App. Div. 637, 80 N. Y. Suppl. 1139]; Wilmington *v.* Bryan, 141 N. C. 666, 54 S. E. 543. Where the board of commissioners of the almshouse of a city, a department of the city government, employed plaintiff, by contract for two years, to perform surgical and medical services, and the duration of the office or employment of a physician was not provided for by the constitution of the state nor declared by law, and at the end of the first year the incoming board employed another physician, and plaintiff sued to recover his salary for the remainder of his term under the contract, it was held that the contract of the outgoing board was not binding on the succeeding board. Connelly *v.* Kingston Almshouse, 32 Misc. (N. Y.) 489, 66 N. Y. Suppl. 194.

Period covering construction of building.— An architect may be employed for the purpose of preparing plans and specifications and supervising the construction of a public building. Such employment would necessarily terminate upon the completion of the building, and is not unauthorized because such work is liable to extend beyond the term of office of the individual members of the board empowered to make the contract. Withers *v.* New York, 92 N. Y. App. Div. 147, 86 N. Y. Suppl. 1105.

87. Kerling Bros. Co. *v.* Toledo, 10 Ohio S. & C. Pl. Dec. 509, 8 Ohio N. P. 62. Ohio Rev. St. § 1691, providing that a city council shall not enter into any contract not going into operation during the term for which all its members are elected, does not apply to the full performance of every part of a contract to lay pipes and furnish gas, so as to render the contract void, where such full performance would require much time. Chillicothe *v.* Logan Natural Gas, etc., Co., 11 Ohio S. & C. Pl. Dec. 24, 8 Ohio N. P. 88.

88. Denver *v.* Hubbard, 17 Colo. 346, 68 Pac. 993.

Continuance by requisitions after expiration of term.— Where, after due advertisement for proposals as required by statute, plaintiffs contracted with the city of New York to furnish plank, timber, and logs for the use of the department of docks, on requisitions to be made by it, the contract being dated July 29, 1873, and to continue for one year, it was held that the department had no power, by mere requisitions, to continue the contract in force after it expired by its own terms, and that no recovery could be had thereunder for materials furnished in compliance with requisitions made after the expiration of the year. Bigler *v.* New York, 9 Hun (N. Y.) 253.

89. Cartersville Water-Works Co. *v.* Cartersville, 89 Ga. 689, 16 S. E. 70; Cartersville Imp., etc., Co. *v.* Cartersville, 89 Ga. 683, 16 S. E. 25 (in which cases it is held that without a popular vote, as required by the constitution, a municipal corporation cannot contract for gas or water on the credit of the city for more than one year; and a contract which is to run for a longer term is operative from year to year only, so long as neither of the parties renounces or repudiates it; but, so long as it stands and is complied with by one party, the other party is bound by it); Jersey City Bd. of Finance *v.* Jersey City St., etc., Com'rs, 55 N. J. L. 230, 26 Atl. 92 [*reversed* in 57 N. J. L. 452, 31 Atl. 625] (holding that the effect of a contract between a city and a gas company which provided that the latter should furnish gas for a certain number of lamps for five years, and that it might be required to lay one mile of new mains in each year during the continuance of the contract, in consideration of which the board should pay for a certain number of lamps along the line of the new mains, at the rate then in force, for a period of five years from the date upon which such lamps should first be lighted, was to bind the city to pay for lamps for a period which might reach to ten years, if the new lamps were first lighted near the end of the period of five years, contrary to the statute which provides that the board of street and water commissioners shall have power to make contracts for lighting streets for a term not exceeding five years). Under authority to contract for a water-supply for ten years, a town cannot, as a condition to its grant of authority to a company to lay pipes, require the company to furnish water for twenty years, and bind itself to take the water at a specified rate for that time. Davis *v.* Harrison, 46 N. J. L. 79.

eral statute, such contracts have been sustained as valid when made for a term of years,[90] twenty,[91] twenty-one,[92] twenty-five,[93] and even thirty[94] years being held not unreasonable in view of the expense of preparation; but not *in perpetuo*.[95] But twenty-five or thirty years have been held an unreasonable term for a grant of

Provision for payment.— A city has no power to make a contract for lighting streets for a period of five years, when no provision is made to meet the obligations of the city to pay the price named in such contract for that period. Humphreys *v.* Bayonne, 55 N. J. L. 241, 26 Atl. 81. And under a statute giving to the common council of any city power to order any public street to be lighted, and to make and enter into contracts therefor with any other parties, "and to cause the annual expense thereof" to be certified, etc., contracts for lighting the cities are limited to one year. Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809. But under an act authorizing cities of the third class incorporated thereunder to provide for and regulate the lighting of their streets, and to maintain plants for furnishing light for their own use and that of their citizens, or contract with others for furnishing such light for a period not exceeding ten years, it was held that a third-class city, without any plant of its own, may make a five-year contract for the lighting of its streets; and that the period for which such a contract could be made was not impliedly limited to one year by another provision requiring the controller to certify on the contract the estimated amount of expenditure thereunder chargeable against the item of appropriation on which it is founded, nor by a provision therein requiring the council to make appropriation and fix the rate annually. Black *v.* Chester, 175 Pa. St. 101, 34 Atl. 354.

N. Y. Laws (1865), c. 300, authorizing the board of town auditors of the town of Middletown to cause the streets to be lighted by gas, did not confer the power to make a valid contract for a term of years, but only during the pleasure of the legislature. Richmond County Gas-Light Co. *v.* Middletown, 59 N. Y. 228 [*affirming* 1 Thomps. & C. 433].

90. Capital City Water Co. *v.* Montgomery, 92 Ala. 366, 9 So. 343; New Orleans Gas-Light Co. *v.* New Orleans, 42 La. Ann. 188, 7 So. 559; Reid *v.* Trowbridge, 78 Miss. 542, 29 So. 167; Smith *v.* Avon-by-the-Sea, 68 N. J. L. 243, 52 Atl. 226; Van Giesen *v.* Bloomfield, 47 N. J. L. 442, 2 Atl. 249; Seitzinger *v.* Tamaqua, 187 Pa. St. 539, 41 Atl. 454. Under the Atlantic City Charter of 1866, authorizing the city council to provide by ordinance for the supply of water for the city, the council was authorized to enter into a contract for the supplying of such water for a specified sum annually as long as the contractor should comply with its obligations, although such charter further provided that the council should levy taxes annually for the purpose of supplying the city with water. Atlantic City Water-Works Co. *v.* Atlantic City, 48 N. J. L. 378, 6 Atl. 24. Under Pa. Incorporation Act, art. 5, § 2, giving cities of the third class power to provide for and regulate the lighting of cities with gas or electric lights or other means, to have the exclusive right at all times to supply the city with gas or other light, and such persons, etc., as may desire the same, at such price as may be agreed upon, and at all times to have the unrestricted right to make, erect, and maintain the necessary buildings and apparatus for manufacturing and distributing the same, or, in any territory not supplied with light, to make contracts with any person, association, or company so to do, and to give such person, company, or association the privilege of supplying gas or other light, for any length of time not exceeding ten years, a city of the third class may contract with an electric light company for lighting the streets of the city for a term of five years. Edison Electric Illuminating Co. *v.* Jacobs, 8 Kulp (Pa.) 120.

Officer's authority restricted by ordinance. — Where an ordinance authorized the board of public works to make a contract for the period of ten years, providing for placing receptacles for waste paper at street corners, and reserved the right to terminate the contract on sixty days' notice, and a ten-year contract, entered into in pursuance of the ordinance, was terminated at the end of two years, the commissioner had no authority to enter into a new contract for the same purpose for a period of ten years from the expiration of the first contract. Buffalo Clean St. Co. *v.* Buffalo, 113 N. Y. App. Div. 887, 98 N. Y. Suppl. 784 [*affirmed* in 188 N. Y. 604, 81 N. E. 1161].

91. McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794; Light, etc., Co. *v.* Jackson, 73 Miss. 598, 19 So. 771.

92. Carlyle Water, etc., Co. *v.* Carlyle, 31 Ill. App. 325.

93. Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

94. Carlyle *v.* Carlyle Water, etc., Co., 52 Ill. App. 577. Thirty years is not such an unreasonable length of time for the running of a contract for supplying a city or village with water as will entitle the municipality to avoid it on that ground, where it involves the erection and maintenance of an expensive plant by the other party. Little Falls Electric, etc., Co. *v.* Little Falls, 102 Fed. 663.

95. Westminster Water Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630. A city has not power to enter into a contract with a railroad by which it binds itself to maintain and keep in repair "for all future time" a bridge built jointly by the railroad and the city on a highway, and over tracks belonging to the railroad, and agrees to allow no grade cross-

exclusive privilege by a municipality;[96] and it may not bind itself by contract to furnish from its plant water at a fixed annual rate for a term of years,[97] or to take over a water or gas plant after a certain period.[98]

3. Sustaining Contracts For Unlawful Period. The courts have expressed contrary views as to the validity of municipal contracts for a period exceeding what is statutory or reasonable, some maintaining the rigid doctrine that the contract being *ultra vires* is void, and will support no action whatever;[99] while others hold them good for the statutory period,[1] or for a reasonable time.[2]

F. Proposals and Bids — 1. Contracts Requiring Competition.[3] Any municipal officer authorized to make contracts for the corporation may resort of his own choice to the competitive method to obtain the most favorable results for the public.[4] But municipal contracts made without this precaution are valid, unless statute, charter, or ordinance prescribes its use,[5] which they do in many instances;

ings to be established at such point. State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

96. Long *v.* Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143. A contract by a city council with a water company to furnish water for the city for thirty years is unreasonable as to time, and beyond the power of the city to make. Flynn *v.* Little Falls Electric, etc., Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

97. Illinois Cent. Hospital for Insane *v.* Jacksonville, 61 Ill. App. 199.

98. Long *v.* Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547.

99. *Indiana.*— Gas Light, etc., Co. *v.* New Albany, 156 Ind. 406, 59 N. E. 176, holding that under Acts (1883), p. 85 (Burn Rev. St. (1894) § 4301), authorizing a city council to contract for the lighting of the city for such time, not exceeding ten years, as may be agreed on, a contract for a longer period is wholly invalid, and cannot stand for a period of ten years.

Kentucky.— Somerset *v.* Smith, 105 Ky. 678, 49 S. W. 456, 20 Ky. L. Rep. 1488.

Missouri.— Kirkwood *v.* Meramec Highlands Co., 94 Mo. App. 637, 68 S. W. 761.

Ohio.— Wellston *v.* Morgan, 59 Ohio St. 147, 52 N. E. 127, holding that where a corporation undertakes by ordinance to contract with an electric light company for an exclusive privilege for the lighting of its streets for ninety-nine years at a given price per month, the corporation having no power to contract for a longer period than ten years under the statute, such contract is *ultra vires*, and void, and no recovery whatever may be had.

United States.— Manhattan Trust Co. *v.* Dayton, 59 Fed. 327, 8 C. C. A. 140 [*affirming* 55 Fed. 181].

1. Defiance Water Co. *v.* Defiance, 90 Fed. 753. Where a city has power to contract for water to be used in flushing sewers and extinguishing fires, an action lies to recover the agreed price for water supplied and used in any one year, although the contract was for twenty years, and the city had power to contract for but one year. Montgomery *v.* Montgomery Waterworks, 79 Ala. 233. A contract by a municipal corporation to pay a certain price for gas for a period longer than its charter authorizes it to agree on a price is valid only for the period allowed by its charter, and does not preclude it, after purchasing gas for such period at the price fixed, from refusing thereafter to pay such price. State *v.* Ironton Gas Co., 37 Ohio St. 45.

Water contract for excessive term.— A contract between a city and a water company for the furnishing by the latter to the city of water and fire hydrants, for which the city agreed to pay an annual rental in semiannual instalments, when made in good faith and carried out by the company by furnishing the water and hydrants, is valid and binding upon the city, at least so long as it has taken no action to rescind the same, notwithstanding it was to remain in force by its terms for thirty years, while the power of the city was limited by statute to the making of contracts for not exceeding twenty years. McGonigale *v.* Defiance, 140 Fed. 621 [*affirmed* in 150 Fed. 689].

2. Columbus Water-Works Co. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354.

3. Contracts for public improvements see *infra*, XIII, C, 2.

4. Brevoort *v.* Detroit, 24 Mich. 322.

5. Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Yarnold *v.* Lawrence, 15 Kan. 126; Elliot *v.* Minneapolis City, 59 Minn. 111, 60 N. W. 1081; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Trenton *v.* Shaw, 49 N. J. L. 638, 10 Atl. 273. Section 11 of the Illinois act to create sanitary districts, etc. (Hurd Rev. St. (1898) p. 322, § 353), providing that all contracts for work to be done by such municipality, the expense of which will exceed five hundred dollars, shall be let to the lowest responsible bidder, has no application to a hiring by the sanitary district of Chicago of pumps and employees to be used by its chief engineer in the doing of work which it had directed the engineer to do. George F. Blake Mfg. Co. *v.* Chicago Sanitary Dist., 77 Ill. App. 287. N. Y. Acts (1870–1871), authorizing the commissioner of public works to purchase, in his discretion, water meters for New York city, authorized him to contract for the purchase of such meters,

and as a rule contracts made in violation of these requirements are illegal,[6] and impose no obligation or liability on the corporation.[7] But many judicial exceptions have been made to the statute; for example, in the case of contracts for carriage hire,[8] for lease of the recorder's office,[9] for street lighting,[10] for municipal

without advertising and awarding the contract to the lowest bidder; Laws (1861), c. 308, requiring all contracts on behalf of the corporation to be let to the lowest bidder, not being applicable. Baird *v.* New York, 96 N. Y. 567. See also People *v.* Van Nort, 64 Barb. (N. Y.) 205. An agreement by the city of New York for the use of gas belonging to a gaslight company, which was in the enjoyment of a practical legislative monopoly, was held not within the provisions of the city charter requiring contracts for supplies involving expenditures beyond two hundred and fifty dollars to be made in writing with the lowest bidder, on an advertisement for sealed proposals. Harlem Gaslight Co. *v.* New York, 33 N. Y. 309 [*affirming* 3 Rob. 100].

The Philadelphia gas works were not a department of the city government, within the proviso of the Pennsylvania act of May 13, 1856, relating to the letting of contracts for supplies, so as to render it necessary that such contracts should be let only after advertisement and bids. Hacker *v.* Philadelphia, 6 Phila. (Pa.) 94.

Commissioners of charities.— New York City Charter (1873), § 91, requiring that contracts for supplies furnished for the corporation should be made after public advertisements for bids and proposals, was held not to apply to repairs on a schoolship, pursuant to a contract with the commissioners of the department of charities and correction, as such contract did not involve supplies furnished for the corporation, that is, for the mayor, aldermen, and commonalty of New York city; the management of their department by the commissioners of charities being wholly independent of the common council. Lawrence *v.* New York, 54 How. Pr. (N. Y.) 255.

6. Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. 706, where an ordinance of a city council required the mayor, controller, and superintendent of lights to advertise for proposals for lighting certain streets and buildings with electric lights, to open the proposals at twelve o'clock, June 1, and to award the contract to the lowest responsible bidder. They advertised for bids to be so filed in the office of the superintendent. A bid was filed in the office of the mayor, and at six minutes after twelve he and the controller, in the absence of the superintendent, opened said bid and awarded the contract. Four minutes later the superintendent appeared with a bid filed in his office before twelve o'clock, but the others refused to consider it. It was held that the award was illegal, as violating both the letter and spirit of the ordinance, and the city will be restrained from entering into the contract, or paying money under it.

7. *Illinois.*— Chicago Sanitary Dist. *v.* McMahon, etc., Co., 110 Ill. App. 510.

Iowa.— Weitz *v.* Des Moines Independent Dist., 79 Iowa 423, 44 N. W. 696.

Missouri.— State *v.* Butler, 178 Mo. 272, 77 S. W. 560.

Montana.— Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

Nevada.— Sadler *v.* Eureka County, 15 Nev. 39.

New Jersey.— Van Reipen *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; Jersey City Bd. of Finance *v.* Jersey City, 57 N. J. L. 452, 31 Atl. 625.

New York.— Phelps *v.* New York, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626; Walton *v.* New York, 26 N. Y. App. Div. 76, 49 N. Y. Suppl. 615; McSpedon *v.* New York, 7 Bosw. 601, 20 How. Pr. 395.

Ohio.— Newton *v.* Toledo, 18 Ohio Cir. Ct. 756, 8 Ohio Cir. Dec. 607. Where a board authorized to make contracts for less than five hundred dollars without advertising, but bound to advertise for bids for contracts amounting to a larger sum, had advertised for bids for fire department hose amounting to four thousand dollars, and on being enjoined from entering into any contract under the advertisement on the ground that it was not specific enough, the board, at the advice of the city solicitor, contracted with the same parties for the hose in successive purchases of less than five hundred dollars each, it was held that this was a violation of the injunction, and unlawful. Wing *v.* Cleveland, 9 Ohio Dec. (Reprint) 551, 15 Cinc. L. Bul. 50. *Compare* Walsh *v.* Columbus, 36 Ohio St. 169.

See 36 Cent. Dig. tit. "Municipal Corporations," § 669.

Liability on quantum valebat.— But while a contract not made in compliance with such statutory requirements is void, yet if it has been performed to the extent that the municipality has received something of value thereunder, it will be held liable for the reasonable value of what it had so received. Providence *v.* Providence Electric Light Co., 91 S. W. 664, 28 Ky. L. Rep. 1015; Nicholasville Water Co. *v.* Nicholasville, 36 S. W. 549, 18 Ky. L. Rep. 592, 38 S. W. 430. See *infra*, IX, G, 3, b.

8. Charter provisions requiring that work required to be done for a municipal corporation shall be employed by contract founded on bids and proposals upon public notice do not apply to a contract for carriage hire of aldermen or councilmen while engaged in public duties. Smith *v.* New York, 21 How. Pr. (N. Y.) 1.

9. Davies *v.* New York, 83 N. Y. 207, holding that it was not a contract "for work or supplies."

10. Atlantic Gas, etc., Co. *v.* Atlantic City,

printing,[11] for engineer's supervision,[12] for removal of garbage,[13] and for services depending for their value on scientific knowledge and personal skill.[14]

2. Information to Bidders. It is not only proper but necessary that bidders shall be duly informed by the officer soliciting bids as to the nature, quality, and quantity of the article to be purchased or the work to be done for the municipality to the end that they may bid intelligently, and binding contracts may result therefrom.[15] And to this end also the same information should be given to all that there may be fair competition.[16] The bidders may also be required to submit with their bids a detailed plan and explanation as to the *modus operandi*.[17] And the officer calling for bids may and should publish any lawful restrictions by

73 N. J. L. 360, 63 Atl. 997 (holding that the term "public works" in the statute does not apply to a lighting contract); North River Electric Light, etc., Co. *v.* New York, 48 N. Y. App. Div. 14, 62 N. Y. Suppl. 726 (holding that where it was absolutely necessary for a city to obtain street lighting at once, the fact that it contracted therefor at a reasonable price, without first advertising for bids, as required by its charter, does not preclude the contractor from recovery, since such charter provision is only to insure economy and exclude favoritism and corruption in furnishing labor, etc., and does not apply where the delay occasioned thereby would work irreparable mischief).

11. Under the act creating the taxing district of Memphis and providing that the fire and police commissioners shall in every case, before entering into any contract for any purpose, advertise for proposals for the work to be done, material to be furnished, or services to be performed, and award the contract, if at all, to the lowest bidder, etc., it was held that such commissioners could designate some newspaper in which the city would insert its advertisements, notices, etc., for a year, and agree with such proprietor that the printing thus done should be at a stated price per line, square, or column, but in no event exceed by a specified sum the cost of the preceding year, without previous advertisement, and the reception of bids. Public Ledger Co. *v.* Memphis, 93 Tenn. 77, 23 S. W. 51.

12. A provision of a city charter that "all contracts for the erection and construction of public improvements shall be let to the lowest responsible bidder" has no application to the employment of an engineer to supervise the work of a contractor or to repair and complete work only partially completed by the contractor, where such work is done at the contractor's expense, and the city may obligate itself by implication to pay for the services so rendered. Newport News *v.* Potter, 122 Fed. 321, 58 C. C. A. 483.

13. Swift *v.* New York, 83 N. Y. 528.

14. Horgan *v.* New York, 114 N. Y. App. Div. 555, 100 N. Y. Suppl. 68, services of an architect. So a contract for furnishing fireworks for a Fourth of July celebration is not within a statute requiring contracts for services, supplies, etc., to be advertised and given to the lowest bidder, for the reason that the articles are of a peculiar character, depending for their value upon the personal skill of the manufacturer. Detwiller *v.* New York, 1 Thomps. & C. (N. Y.) 657, 46 How. Pr. 218.

15. Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622. Under a statute providing that the city council shall not enter into any contract in the purchase of city supplies involving the expenditure of more than five hundred dollars, without first receiving proposals therefor, and requiring the publication of a notice soliciting proposals for such supplies, a city is not authorized to enter into a contract for the purchase of fire department hose on a bid made pursuant to an advertisement for proposals, which does not specify the kind or quality of hose required other than the dimensions thereof. Wing *v.* Cleveland, 9 Ohio Dec. (Reprint) 507, 14 Cinc. L. Bul. 190. There can be no objection to the provision in a contract as to alternative bidding, nor to the provisions therein by which alterations and modifications in the contract are provided for. In practice, such changes have always been found necessary, and, in the nature of things, must be. Ampt *v.* Cincinnati, 17 Ohio Cir. Ct. 516, 9 Ohio Cir. Dec. 690.

16. Ely *v.* Grand Rapids, 84 Mich. 336, 47 N. W. 447; Barber Asphalt Paving Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110; Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693. Since the kind of beef and mutton to be used in his department is left to the discretion of the commissioner of the department of correction of the city of New York, he has the right to restrict bidders for supplies to the use of animals killed and dressed within the state, such restriction being no limitation on the right of citizens to compete. Matter of Rooney, 26 Misc. (N. Y.) 73, 56 N. Y. Suppl. 483. Under a statute requiring a city to advertise for bids for materials which it wishes to buy, the advertisement being for new iron pipes, a bid for second-hand pipe cannot be considered, without notice to the other bidders allowing them to bid on that basis. Lake Shore Foundry *v.* Cleveland, 8 Ohio Cir. Ct. 671, 4 Ohio Cir. Dec. 230.

17. Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32. A statute requiring commissioners to prepare forms of bids for the construction of waterworks in Cincinnati does not preclude the commissioners from requiring each bidder to submit a full detailed plan, to advise the city of the interpretation of its

which he intends to exercise his discretion in awarding the contract, as to size, form, color, material, and domesticity of product.[18] But a contract awarded upon private information given only to the successful bidder is unfair, illegal, and void.[19]

3. PROPOSAL OR ADVERTISEMENT. The requirements of a valid proposal or advertisement are: (1) That the published proposal shall advertise the contract authorized and with sufficient fullness and particularity to show it to be legal and valid;[20] (2) that it shall be published in the number of papers and for the length of time required by the law or ordinance;[21] and (3) that it shall be in such terms as to invite bids and not to repel competition.[22] Lacking any of these the advertisement is void.[23] But courts have held competitive contracts good without publication of proposal for bids, when the material sought is a utility or patented article purchasable at only one place;[24] when a place leased has unrivaled advantages for the desired purpose;[25] when emergency demands immediate action;[26] and in certain other cases.[27]

own plans by the bidders and their method of execution; such a requirement not rendering the bids non-competitive. Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 6 Ohio N. P. 208.

18. Advertisements for bids by the commissioners of the new East river bridge properly restricted bids for work to parties having the requisite plant and facilities in successful operation for at least a year on work of a similar character, and required that the steel should contain specified elements, which, in the judgment of the commissioners, were best suited for the work, since the act prescribing their duties does not require them to advertise for bids or let their contracts to the lowest bidder. Meyers *v.* New York, 58 N. Y. App. Div. 534, 69 N. Y. Suppl. 529 [*reversing* 32 Misc. 522, 66 N. Y. Suppl. 755]. A statute requiring commissioners to prepare forms of bids for the construction of waterworks in Cincinnati does not preclude the preparation of forms permitting alternative bidding. Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 6 Ohio N. P. 208.

19. Ryan *v.* Ashbridge, 10 Pa. Dist. 153.

20. A requirement of the city charter for the letting of contracts by advertisement is not complied with if the contract as advertised is on its face null and void. State *v.* King, 109 La. 799, 33 So. 776.

21. Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809. Under Ky. St. § 3450, part of charter of cities of the third class, providing that the mayor shall advertise the letting of contracts for street improvements "in some newspaper published in said city, for at least ten days," insertion of notice in a newspaper for one time ten days before the letting is sufficient. Woodward *v.* Collett, 48 S. W. 164, 20 Ky. L. Rep. 1066.

22. The New York Revised Charter, § 1554 (Laws (1901), p. 642, c. 466), providing that no patented article shall be advertised for or purchased by the city, except under such circumstances that there can be a fair and reasonable opportunity for competition, is violated by the limitation of bids for the furnishing of water meters to a certain type and size, and in such manner as to call for bids only upon a patented article, under conditions calculated to practically exclude competition. Kay *v.* Monroe, 93 N. Y. App. Div. 484, 87 N. Y. Suppl. 831.

23. Woodward *v.* Collett, 48 S. W. 164, 20 Ky. L. Rep. 1066; State *v.* King, 109 La. 799, 33 So. 776; Kay *v.* Monroe, 93 N. Y. App. Div. 484, 87 N. Y. Suppl. 831.

24. Hobart *v.* Detroit, 17 Mich. 246, 97 Am. Dec. 185; *In re* Dugro, 50 N. Y. 513; Silsby Mfg. Co. *v.* Allentown, 153 Pa. St. 319, 26 Atl. 646. In Yarnold *v.* Lawrence, 15 Kan. 126, the court considered but did not decide the question whether a city expressly required to let all contracts to the lowest bidder may not let a valid contract for improving its streets by process covered by a patent and subject to a monopoly. Judge Brewer, who wrote the opinion, was inclined to favor the view expressed in the above cases. Statutes requiring that contracts for municipal supplies must be founded on sealed bids, after public advertisement, do not apply where the subject-matter of the contract is such that competitive proposals work an incongruity, and are unavailing as affecting the final result, or where they do not produce any advantage, but the nature of the supply requires that it be determined from inspection and test, which are made up from present examination and trial, and depend upon special knowledge and judgment, or where the thing to be obtained is a monopoly, or the requirement is of personal skill or professional service, or it is practically impossible to observe the statutory form and obtain what is required. Gleason *v.* Dalton, 28 N. Y. App. Div. 555, 51 N. Y. Suppl. 337 [*reversing* 23 Misc. 18, 50 N. Y. Suppl. 90].

25. Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80.

26. North River Electric Light, etc., Co. *v.* New York, 48 N. Y. App. Div. 14, 62 N. Y. Suppl. 726.

27. Under a city ordinance providing that all "contracts for city work in excess of $500 shall be publicly advertised," it was held that a contract exceeding five hundred dollars, with the only electric light company in the city, for the lighting of the city, was not rendered void by the failure to advertise. Hartford *v.* Hartford Electric Light Co., 65 Conn. 324, 32 Atl. 925.

4. DEPOSIT OR OTHER SECURITY. A requirement of a cash deposit by the bidder is satisfied by certified check or certificate of deposit;[28] and on rejection of a bid an injunction will lie to prevent the use of the check or certificate by the city.[29] An injunction will not lie to prevent acceptance of the lowest bid, without deposit, unless fraud or collusion is charged.[30] If, however, the bidder fails to give bond within the required time, the bid may be re-awarded without notice to him.[31] Materialmen[32] and laborers[33] may recover on the contractors' bonds to the city for material furnished for the contract; and neither payment of the contractor's claim nor changes in specifications, under reserved power to make them, will discharge the sureties from liability on the bond;[34] nor will the invalidity of the contract or the non-approval of the bond defeat equitable relief.[35]

5. WITHDRAWAL OF BID. A bidder has no right at law, nor have municipal officers power to permit him, to withdraw his bid and deposit.[36] But equity will permit such withdrawal on a bill showing mistake filed seasonably and before the city has taken any steps to alter its condition.[37]

6. ACCEPTANCE OR REJECTION OF BID. Municipal contracts, like those of natural persons, are based upon the entire agreement of the parties as to terms and conditions.[38] If the purpose of the municipality is sufficiently definite and specific, it is possible that the bid may amount to an unqualified acceptance of the offer, and the contract be thus concluded without further negotiation or action by either party.[39] Usually, however, the definite conclusion of the contract is marked by

28. People *v.* Contracting Bd., 27 N. Y. 378.

Ordinance inapplicable.— An ordinance providing that "when any work or improvement, local or general, is proposed to be done, or any materials are to be supplied, bids or proposals for which are required by statute," a provision may be inserted in the advertisement inviting the proposals that each must be accompanied by a certified check or bond conditioned on the performance of the work or the furnishing of the goods according to the terms of the proposal, was held not to require publishers of newspapers to submit a certified check or bond with proposals to do the city printing, as to which the city charter provided that on a certain day in each year notice shall be given to the publishers of daily papers in the city that sealed proposals for the city printing will be received, and that the council "shall award the contract to the lowest responsible bidder." People *v.* Buffalo, 5 Misc. (N. Y.) 36, 25 N. Y. Suppl. 50.

29. Brush Electric Light Co. *v.* Cincinnati, 11 Ohio Dec. (Reprint) 581, 28 Cinc. L. Bul. 29.

30. Smith *v.* Philadelphia, 2 Brewst. (Pa.) 443.

31. Barrett *v.* Ocean City, 62 N. J. L. 588, 41 Atl. 946.

32. Lancaster *v.* Frescoln, 22 Pa. Co. Ct. 225.

33. Philadelphia *v.* McLinden, 11 Pa. Dist. 128, 26 Pa. Co. Ct. 287, holding that in a penal bond for the execution of a municipal contract a condition for the payment of all sums of money which may be due for "labor and materials furnished and supplied or performed" includes the wages of laborers.

34. The fact that, on suit being brought against the city by the contractor, the city had settled all matters then at issue between it and the contractor, by paying the contractor a sum of money agreed upon, does not affect the right of materialmen to recover subsequently under the contractor's bond to the city. Lancaster *v.* Frescoln, 22 Pa. Co. Ct. 225.

35. Swenson *v.* Bird Island, 93 Minn. 336, 101 N. W. 495.

36. Kimball *v.* Hewitt, 2 N. Y. Suppl. 697 [*affirmed* in 15 Daly 124, 3 N. Y. Suppl. 756].

37. A city cannot claim that a bidder who has made a mistake in his proposals did not intend to give the executive board of the city an opportunity to correct the mistake, where, before the time expressed in the resolutions of the board for the bidder to appear and execute a contract or be regarded as abandoning any intention to do so, the bidder filed a bill in a court of equity to determine the rights of the parties, and the city made a reformation of the proposals impossible by letting the contract to another party. Moffett *v.* Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 L. ed. 1108 [*reversing* 91 Fed. 28, 33 C. C. A. 319].

38. Fuller *v.* Scranton, 2 Pa. Cas. 61, 4 Atl. 467; People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844. See also *infra*, IX, H, 1.

39. Where, after certain negotiations between C, plaintiff's vice-president, who was authorized to solicit business for plaintiff, and the city street cleaning department, with reference to the removal of snow by plaintiff, the commissioner of street cleaning directed C to put his offer in writing, whereupon he addressed a letter to the department, offering to remove snow from such sections of the city as might be designated by the department at a certain price per cubic yard, the

the action of the municipality in accepting or rejecting a bid.[40] If, under the terms of the proposal, full power of rejection is reserved, then no contractual rights can be acquired till due acceptance of a bid.[41] If under valid advertisement no discretion is reserved to the municipal officers, then it only remains to perform the ministerial function of opening the bids, ascertaining the lowest, and complying with formal requisites.[42] But if conditional discretion to reject is either expressly or impliedly reserved, then it is competent for the municipal authority to exercise the measure of discretion reserved and reject any bid.[43] This discretion, however, is not arbitrary,[44] and must not transgress the limits of reservation.[45] The discretion may be exercised only by the board or officer to whom it is committed,[46] and in the manner prescribed by law.[47] It cannot extend to a change in the published proposal or specifications.[48] The definite acceptance or rejection of a bid concludes negotiations, and makes or unmakes the proposed contract.[49] But it seems that the action is not final if it is competent for the council, under parliamentary law, to reconsider its rejection of all bids, and exercise its discretion to accept, provided no rights have vested meanwhile.[50]

allowance for shrinkage to be decided by the department, the latter was entitled to treat the letter as an offer, the acceptance of which would constitute a contract binding on the parties. Snow Melting Co. *v.* New York, 88 N. Y. App. Div. 575, 85 N. Y. Suppl. 168.

After determination to award a contract to one whose bid is not the lowest, in a case in which this may properly be done, it is not an abuse of discretion for the officer who awards the contract to withhold his decision and bargain with the bidder for a lower price. Louchheim *v.* Philadelphia, 15 Pa. Dist. 311.

40. Main *v.* Ft. Smith, 49 Ark. 480, 5 S. W. 801.

Acceptance by vote.— Under a statute providing that, on the passage or adoption of an order or resolution of a municipal corporation, the yeas and nays shall be called and recorded, and that a majority of all the members elected to the council must concur therein, an order accepting a bid for street work, the record not showing the concurrence of such majority, nor the call of the yeas and nays, is invalid, and a contract for such work based thereon not binding on the city. Sullivan *v.* Leadville, 11 Colo. 483, 18 Pac. 736.

41. Anderson *v.* St. Louis Public Schools, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707. See also Batt *v.* New Orleans, 26 La. Ann. 754.

42. If the law requires that contracts shall be made by advertising for proposals for the work to be done, and by giving the contract to the lowest bidder, the city officers have no authority, after the bids have been opened, to alter the contract materially, and then award it to one of the original bidders, without a new advertisement. Dickinson *v.* Poughkeepsie. 7 Hun (N. Y.) 1 [*affirmed* in 75 N. Y. 65].

43. Erie *v.* Bier, 10 Pa. Super. Ct. 381.

44. *Illinois.*— People *v.* Kent, 160 Ill. 655, 43 N. E. 760, discretion not interfered with by court in absence of fraud.

New Jersey.— McGovern *v.* Trenton Bd. of Public Works, 57 N. J. L. 580, 31 Atl. 613.

New York.— People *v.* Troy, 78 N. Y. 33, 34 Am. Rep. 500.

Ohio.— Hubbard *v.* Sandusky, 9 Ohio Cir. Ct. 638, 6 Ohio Cir. Dec. 786.

Washington.— Berry *v.* Tacoma, 12 Wash. 3, 40 Pac. 414.

See 36 Cent. Dig. tit. "Municipal Corporations," § 672.

45. New York, etc., Gas-Coal Co. *v.* Pittsburg, 28 Pittsb. Leg. J. N. S. (Pa.) 162.

46. Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32.

47. Barrett *v.* Ocean City, 62 N. J. L. 588, 41 Atl. 946.

Written contract see *infra*, IX, G, 3, a.

48. A borough ordinance which provides for the letting of a contract for a building to the lowest responsible bidder, at the discretion of the council, does not clothe the council with power, of itself, to modify the plans and specifications mentioned therein, and to accept bids, and to award the contract on such modified plans and specifications. Winton *v.* Mulherin, 3 Lack. Leg. N. (Pa.) 264. Where an ordinance provides that all contracts shall be awarded after due public notice on such specifications as shall be approved by the department of awards, a contract is illegal which is based on specifications entirely different from those on file. Mazet *v.* Pittsburgh, 6 Pa. Co. Ct. 599. Alteration and material changes in the specifications, without notice or approval by the surety, would not relieve the surety from liability to the materialmen, when the contract between the contractor and the city provided for subsequent alterations and changes. Lancaster *v.* Frescoln, 22 Pa. Co. Ct. 225.

49. Brush Electric Light Co. *v.* Cincinnati, 11 Ohio Dec. (Reprint) 581, 28 Cinc. L. Bul. 29.

50. A city council has the power, after having once voted to reject all bids offered for a public contract, to reconsider its action and accept one of the bids, where no rights have vested under the first action of the council, or where its first action has not so fully disposed of the matter that the council could

7. Award to Lowest Bidder. The right of the lowest bidder to the proposed municipal contract has been held to be absolute in a few cases, in which the statute or ordinance was imperative.[51] Where the municipality uses this method of negotiation experimentally;[52] where the right to reject all bids is expressly reserved;[53] or where the proposal is to the "lowest and best bidder,"[54] the "lowest responsible bidder,"[55] or other similar qualification is employed,[56] the award of the contract within the discretion of the municipal authority may be made *bona fide*[57] to another bidder than the lowest; and the lowest bidder will have no right to demand the award to him.[58] So the quality of materials to be furnished as well as the price bid may be taken into consideration in determining which of several bids is the lowest.[59] But under all circumstances the lowest bidder has the right to fair consideration and treatment;[60] and an award of a contract to

not take any further action in the matter. McClain *v.* McKisson, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357. See *supra*, V, B, 4, g; *infra*, XIII, B, 9.

51. State *v.* Barlow, 48 Mo. 17. *Compare* State *v.* Trenton, 49 N. J. L. 638, 10 Atl. 273 [*reversing* 49 N. J. L. 339, 12 Atl. 902].

A bidder for public printing need not be a publisher of a newspaper at the time of the bidding, under a charter which provides that the city council shall annually let the public printing to the lowest bidder, and, after letting the contract, designate the newspaper published by the party receiving said contract as the official newspaper of said city. State *v.* Milligan, 3 Wash. 144, 28 Pac. 369.

52. Elliot *v.* Minneapolis, 59 Minn. 111, 60 N. W. 1081.

Complaint by higher bidder.— In Atlantic Gas, etc., Co. *v.* Atlantic City, 73 N. J. L. 360, 63 Atl. 997, it was held that the action of a municipal council clearly in the interests of the taxpayers will not be set aside upon a doubtful point of procedure at the suit of one who has suffered no special injuries of which he can be heard to complain. This was applied to one whose bid for the lighting of streets was higher than another and accepted bid, who, on certiorari, complained that a statute under which the contract was awarded had been adopted by the city and that it required the enactment of an ordinance preceding the letting of the contract, and it was held that assuming that the statute was operative it was no ground of complaint by the higher bidder, because as an unsuccessful bidder, all that he lost, was an illegal award; that as a taxpayer, while his standing is different, he was in no better position because the interests of the taxpayers would not apparently be advanced by the success of his attack.

53. Brown *v.* Huston, (Tex. Civ. App. 1898) 48 S. W. 760.

54. State *v.* Hermann, 63 Ohio St. 440, 59 N. E. 104.

55. *Illinois.*— Johnson *v.* Chicago Sanitary Dist., 163 Ill. 285, 45 N. E. 213.

Michigan.— Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914.

Missouri.— State *v.* McGrath, 91 Mo. 386, 3 S. W. 846.

New York.— People *v.* Gleason, 121 N. Y. 631, 25 N. E. 4 [*reversing* 51 Hun 643, 4 N. Y. Suppl. 383]. See Kronsbein *v.* Rochester, 76 N. Y. App. Div. 494, 78 N. Y. Suppl. 813.

Pennsylvania.— Interstate Vitrified Brick, etc., Co. *v.* Philadelphia, 164 Pa. St. 477, 30 Atl. 383; Findley *v.* Pittsburgh, 82 Pa. St. 351; Com. *v.* Mitchell 82 Pa. St. 343; McCallin's Appeal, 1 Mona. 596; Safford *v.* Pittsburgh, 6 Pa. Co. Ct. 107; Gutta Percha Co. *v.* Stokely, 11 Phila. 219. Since the act of May 23, 1874, prescribing that a contract for work to be done for a city shall be given to the lowest responsible bidder, requires a free and open competition, the councils of a city cannot provide that each bidder shall agree not to employ or allow the employment of any one not belonging to organizations approved by a certain building trades council, and that a contract shall be forfeited upon failure of the contractor to comply with such agreement. Elliott *v.* Pittsburgh, 6 Pa. Dist. 455.

56. *In re* Emigrant Industrial Sav. Bank, 75 N. Y. 388; Cleveland Fire Alarm Tel. Co. *v.* Metropolitan Fire Com'rs, 55 Barb. (N. Y.) 288, 7 Abb. Pr. 49.

57. A township, in contracting under the New Jersey act of May 22, 1894, for the lighting of streets, need not award a contract to the lowest bidder, but is bound to award it in a *bona fide* manner for the benefit of the township. Shefbauer *v.* Kearney Tp. Committee, 57 N. J. L. 588, 31 Atl. 454.

58. Chicago Sanitary Dist. *v.* McMahon, etc., Co., 110 Ill. App. 510, holding that it is not unlawful, where the lowest bidder has not conformed to the advertised requirements, to let the contract to the next lowest bidder at a price less than its bid, without any readvertising.

59. State *v.* Cincinnati Bd. of Public Affairs, 4 Ohio Cir. Ct. 76, 2 Ohio Cir. Dec. 428; Lauchheim *v.* Philadelphia, 15 Pa. Dist. 311, holding that a contract may be awarded to a person not the lowest bidder if the standard of materials provided by the specifications is unavoidably elastic, embracing two kinds of material and the officer who awards the contract deems the grade of material offered by the successful bidder better adapted to the work than that offered by a lower bidder.

60. State *v.* Barlow, 48 Mo. 17. An ordinance of the city of Philadelphia, by which

another by corruption,[61] by collusion,[62] or for any other than legal and just considerations,[63] will be voidable at his option; and action will lie in his favor to enforce his contract.[64]

G. Mode of Contracting and Formal Requisites — 1. In General. If no formal mode of making a municipal contract is prescribed by charter, statute, or ordinance, then the contract may be made in the method common to all corporations.[65] But if the method of contracting is prescribed by valid law, that method must be observed, and a contract unexecuted in whole or in part, made in any other method, or defectively made by the prescribed method, may not be enforced at the suit of either party.[66] This rule does not require literal, but only substantial,

the city reserved the right to reject any bid at public sale not deemed satisfactory or for the best interests of the city, was held not to entitle the city to refuse the lease of a wharf let at public auction to the highest bidder, because a higher offer was made after the sale. Kerr *v.* Philadelphia, 8 Phila. (Pa.) 292.

Where a lower bidder has violated the ordinance inviting bids the municipal corporation will not be enjoined against awarding the contract to a higher bidder. Wiggins *v.* Philadelphia, 2 Brewst. (Pa.) 444.

61. Madison *v.* Baltimore Harbor Bd., 76 Md. 395, 25 Atl. 337.

62. Nelson *v.* New York, 1 Silv. Sup. (N. Y.) 471, 5 N. Y. Suppl. 688 [*affirmed* in 131 N. Y. 4, 29 N. E. 814].

63. Wilson *v.* Gabler, 11 S. D. 206, 76 N. W. 924.

64. Times Printing Co. *v.* Seattle, 25 Wash. 149, 64 Pac. 940.

65. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; Ryan *v.* Paterson, 66 N. J. L. 533, 49 Atl. 587; Pullman *v.* New York, 54 Barb. (N. Y.) 169; Dunlap *v.* Erie Water Com'rs, 151 Pa. St. 477, 25 Atl. 60. See also Fitton *v.* Hamilton City, 6 Nev. 196; Burlington *v.* Dennison, 42 N. J. L. 165. A contract which the water commissioners of a city have authority to make, and which they do make as a board and not as individuals, is binding on the city, in the absence of a statute defining the mode of making such contracts, although it is not made at their office in the presence of their secretary, and has not been reduced to writing and entered in the minutes kept by him of their proceedings. Dunlap *v.* Erie Water Com'rs, *supra*. Where a city passed an ordinance authorizing a certain firm to construct waterworks upon terms fully set out, and this was accepted by the firm, and a memorandum of the acceptance was attached to a copy of the ordinance and signed in behalf of the city by the mayor and clerk thereof under its corporate seal, and by the firm and each member thereof under their individual seals, it was held that this constituted a binding contract. Goldsboro *v.* Moffatt, 49 Fed. 213.

66. *Alabama.*— Montgomery County *v.* Barber, 45 Ala. 237.

California.— Los Angeles Gas Co. *v.* Toberman, 61 Cal. 199; McCoy *v.* Briant, 53 Cal. 247; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Fountain *v.* Sacramento, 1 Cal. App. 461, 82 Pac. 637.

Colorado.— Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14.

Georgia.— Hudson *v.* Marietta, 64 Ga. 286.

Indiana.— Terre Haute *v.* Lake, 43 Ind. 480.

Kansas.— State *v.* Marian County Com'rs, 21 Kan. 419.

Kentucky.— Worthington *v.* Covington, 82 Ky. 265.

Louisiana.— White *v.* New Orleans, 15 La. Ann. 667.

Maryland.— Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

Massachusetts.— Littlefield *v.* Boston, etc., R. Co., 146 Mass. 268, 15 N. E. 648.

Michigan.— Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525.

Minnesota.— State *v.* Jones, 98 Minn. 6, 106 N. W. 963 (under charter provisions which required that the award of a contract for lighting should be made by ordinance or resolution approved by the mayor or passed over his veto); Starkey *v.* Minneapolis, 19 Minn. 203.

Missouri.—Rumsey Mfg. Co. *v.* Schell City, 21 Mo. App. 175.

Nebraska.— Fulton *v.* Lincoln, 9 Nebr. 358, 2 N. W. 724.

New Jersey.— Moreland *v.* Passaic, 63 N. J. L. 208, 42 Atl. 1058; Van Reipen *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; Terhune *v.* Passaic, 41 N. J. L. 90; Jersey City Water Com'rs *v.* Brown, 32 N. J. L. 504; Carron *v.* Martin, 26 N. J. L. 594, 69 Am. Dec. 584.

New York.— Francis *v.* Troy, 74 N. Y. 338; McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144.

Ohio.— While there is implied municipal liability at common law, the statutes provide the manner in which contracts shall be made and entered into by municipalities, and they cannot be entered into otherwise than as provided by statute. Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127.

Pennsylvania.— Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837; Press Pub. Co. *v.* Pittsburgh, 207 Pa. St. 623, 57 Atl. 75; Smart *v.* Philadelphia, 205 Pa. St. 329, 54 Atl. 1025; McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 320; Hepburn *v.* Philadelphia, 149 Pa. St. 335, 24 Atl. 279; Ross *v.* Philadelphia, 115 Pa. St. 222, 8 Atl. 398; O'Rourke *v.* Philadelphia, 13 Pa. Dist. 379; Com. *v.* Morrow, 23 Pittsb. Leg. J. N. S. 287.

Texas.—Bryan *v.* Page, 51 Tex. 532, 32 Am. Rep. 637; Ferguson *v.* Halsell, 47 Tex. 421.

compliance with even a peremptory statute.[67] And where the statute is only directory in whole or in part, as where it prescribes that the contract shall be executed in duplicate, the omission to pursue directions will not render the contract void.[68] Nor, it seems, may either party avoid a merely irregular or voidable contract, which has been performed *bona fide* by the other party.[69] Formerly the municipality could make a valid contract only under its corporate seal;[70] but this

Washington.— Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

Wisconsin.— Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

United States.— Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; Goldsboro *v.* Moffett, 49 Fed. 213.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 675, 678, 679.

The party dealing with a municipal body is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer and must suffer the consequences. McCoy *v.* Briant, 53 Cal. 247; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14; Murphy *v.* Louisville, 9 Bush (Ky.) 189; Steckert *v.* East Saginaw, 22 Mich. 104; Starkey *v.* Minneapolis, 19 Minn. 203; Smith *v.* Newburgh, 77 N. Y. 130; Brady *v.* New York, 20 N. Y. 312.

Requirement of ordinance or resolution.— Where the legislature authorized the municipal corporation to issue bonds "at such time or times, as said Board of Trustees may by resolution, direct," and bonds of the city were issued under the corporate seal, but without the passage of a resolution authorizing the issue, it was held that the bonds were void. McCoy *v.* Briant, 53 Cal. 247. That an ordinance or resolution or something equivalent thereto is necessary see Alton *v.* Mulledy, 21 Ill. 76; Dey *v.* Jersey City, 19 N. J. Eq. 412. Where a town was organized under Mo. Rev. St. c. 89, art. 6, its power to contract was derived altogether from section 5010 thereof, which provided that the "board of trustees shall have power to pass by-laws and ordinances," to do various acts, and perform certain functions; and it could only be exercised in the manner therein prescribed. Rumsey Mfg. Co. *v.* Schell City, 21 Mo. App. 175.

Publication of ordinance.—Where a borough ordinance incorporates a contract with an individual, and the ordinance is not published, as required by the Pennsylvania act of April 3, 1851, § 3 (Pamphl. Laws 323), the contract is not complete or binding on either the borough or the other party to the contract. Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837.

Executed contracts.— Dalles City Charter, § 128, providing that the city is not bound by any contract unless the same is authorized by ordinance, and made in writing and by order of the council, signed by the mayor or recorder on behalf of the city, is to be limited to executory contracts, and can have no application to a contract which has been completely executed on one side. Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835.

An order by a city council, awarding a contract for the year's printing, is not an ordinance or resolution such as the city charter requires to be placed in the clerk's office, and there remain three days before going into effect. Galveston *v.* Morton, 58 Tex. 409.

67. Taylor *v.* Palmer, 31 Cal. 240.

Corporate name.— Where the corporate name of a village is "the president and trustees of the village of Greenbush," a contract reciting that it was made by the president and trustees of the "corporation" of G warrants a finding that the contract was made by the board officially. Parr *v.* Greenbush, 72 N. Y. 463.

The order in which formalities are observed has been held immaterial. Thus under a provision that the city shall not be bound by any contract "unless the same is made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and he, signed by the mayor, or some other person authorized thereto in behalf of the city," etc., it was held that the fact that the city clerk was ordered to sign a contract for public printing by the city before the contract was prepared, and in fact signed the draft before it was approved by the council, did not invalidate the same; the approval by the council, with the clerk's signature attached, being equivalent to the council's approval of the contract before the clerk signed. Earl *v.* Bowen, 146 Cal. 754, 81 Pac. 133. See also Goodyear Rubber Co. *v.* Eureka, 135 Cal. 613, 67 Pac. 1043.

68. Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769.

69. Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659. A municipal corporation cannot retain the fruits of a contract and escape its liability, on the ground that its officers neglected to pursue the particular mode of contracting required by the statute. Drainage Com'rs *v.* Lewis, 101 Ill. App. 150.

70. 1 Blackstone Comm. 475, where it was said: "A corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

ancient common-law requirement is no longer enforced by the courts.[71] It is essential, however, to the validity of a municipal contract that it shall be made on the part of the corporation by a duly authorized agent or officer.[72] A contract is not necessarily invalid because not made in the proper name of the corporation;[73] and contracts within the scope of municipal powers and objects, duly authorized by the corporation, and made by the officer or agent thereunto appointed in good faith and for the municipality, and so understood by the other party, are given effect as municipal contracts, although made in the name of the officer.[74] Unless the charter requires an ordinance to authorize a contract the council may act by motion or resolution.[75] Statutes sometimes require certain municipal contracts to be authorized or ratified by the voters of the municipality at an election held for that purpose, and such requirement must be observed.[76]

2. Countersigning. Where a mandatory statute requires a contract to be countersigned by a particular officer,[77] or where payment out of the municipal treasury is forbidden without such counter signature,[78] this is essential to its validity; but when the statute is merely directory the omission to comply with it is not necessarily fatal to the contract.[79]

3. Parol or Written and Implied Contracts — a. Parol and Written. Except in so far as it is restricted by charter or statute, a municipality may by its duly authorized officer or agent enter into a valid parol contract which is not required by statute to be in writing.[80] It is otherwise, however, where writing is expressly

71. *Alabama.*— Alabama University *v.* Moody, 62 Ala. 389.

Arkansas.— Halbut *v.* Forrest City, 34 Ark. 246.

Indiana.— Over *v.* Greenfield, 107 Ind. 231, 5 N. E. 872; Sheffield School Tp. *v.* Andress, 56 Ind. 157; Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Massachusetts.— Rumford Fourth School Dist. *v.* Wood, 13 Mass. 193.

United States.— Draper *v.* Springport, 104 U. S. 501, 26 L. ed. 812.

See 36 Cent. Dig. tit. "Municipal Corporations," § 675 *et seq.*

72. Seibrecht *v.* New Orleans, 12 La. Ann. 496; Butler *v.* Charlestown, 7 Gray (Mass.) 12; Argus Co. *v.* Albany, 7 Lans. (N. Y.) 264 [*affirmed* in 55 N. Y. 495, 14 Am. Rep. 296]. See *supra*, IX, B, C.

A lease between a private individual as lessor and the city of Chicago as lessee, executed under the corporate seal of the city, signed by the mayor in his official capacity and approved by the chairman of the finance committee, was sufficiently executed for and on behalf of the municipality, and was binding on the city. Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711].

The council may authorize the city clerk to sign a contract for public printing under a statute providing that the city shall not be bound by any contract, "unless the same is made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and be, signed by the mayor, or some other person authorized thereto in behalf of the city." Earl *v.* Bowen, 146 Cal. 754, 81 Pac. 133.

73. Harrodsburg *v.* Harrodsburg Water Co., 64 S. W. 658, 23 Ky. L. Rep. 956.

74. Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711. *Compare*, however, Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453.

75. Jersey City *v.* Harrison, 71 N. J. L. 69, 58 Atl. 100. See *supra*, V, B, 1, d.

76. Hudson *v.* Marietta, 64 Ga. 286; Harrodsburg *v.* Harrodsburg Water Co., 64 S. W. 658, 23 Ky. L. Rep. 956; Niles Water-Works Co. *v.* Niles, 59 Mich. 311, 26 N. W. 525. See also *infra*, XV, A, 4, c. Where a statute providing for the ratification of a contract by the voters of a city required the election for that purpose to be held in the four wards of the city at a voting place in each ward, the fact that the election was held at only two voting places did not invalidate it, provided the election was held there upon due notice, and the voters generally participated therein. Harrodsburg *v.* Harrodsburg Water Co., *supra*.

77. Press Pub. Co. *v.* Pittsburgh, 207 Pa. St. 623, 57 Atl. 75; Superior *v.* Norton, 63 Fed. 357, 12 C. C. A. 469. The provision of a city's charter that it shall not be bound by or liable on any contract, unless made in writing by order of the council, and the draft thereof approved by the city attorney and the council, and signed by the mayor, is valid. Times Pub. Co. *v.* Weatherby, 139 Cal. 618, 73 Pac. 465. Under such a provision it is immaterial whether the city attorney's approval is obtained before or after the mayor signs. Goodyear Rubber Co. *v.* Eureka, 135 Cal. 613, 67 Pac. 1043.

78. Lee *v.* Racine, 64 Wis. 231, 25 N. W. 33.

79. Goodyear Rubber Co. *v.* Eureka, 135 Cal. 613, 67 Pac. 1043.

80. *Alabama.*— Selma *v.* Mullen, 46 Ala. 411; Montgomery County *v.* Barber, 45 Ala. 237.

Illinois.— New Athens *v.* Thomas, 82 Ill. 259.

Indiana.— Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361; Reed *v* Orleans, 1 Ind. App. 25, 27 N. E. 109.

required by charter or statute.[81] But even when required to be written it is sufficient if the contract is entered in writing on the minutes of the council or other governing body, and accepted by the contractor in writing,[82] or by actual performance of his part of the contract.[83]

b. Implied Contract. A municipal corporation may also, like a private corporation or individual, become liable on implied contract;[84] but it has been held

Iowa.— Duncombe *v.* Ft. Dodge, 38 Iowa 281; Baker *v.* Johnson County, 33 Iowa 151; Indianola *v.* Jones, 29 Iowa 282.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

Mississippi.— See Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Nevada.— Fitton *v.* Hamilton City, 6 Nev. 196.

New York.— Peterson *v.* New York, 17 N. Y. 449; Horgan *v.* New York, 114 N. Y. App. Div. 555, 100 N. Y. Suppl. 68.

North Carolina.— Wade *v.* Newbern, 77 N. C. 460.

Pennsylvania.— Dunlap *v.* Erie Water Com'rs, 151 Pa. St. 477, 25 Atl. 60.

Vermont.— A contract enforceable against a municipal corporation may be proved by circumstances and acts of its officers having authority to bind it. Hardwick School Dist. *v.* Wolcott, 78 Vt. 23, 61 Atl. 471.

United States.— Fanning *v.* Gregoire, 16 How. 524, 14 L. ed. 1043.

See 36 Cent. Dig. tit. "Municipal Corporations," § 677.

81. Starkey *v.* Minneapolis, 19 Minn. 203; Jersey City Water Com'rs *v.* Brown, 32 N. J. L. 504; O'Rourke *v.* Philadelphia, 13 Pa. Dist. 379. Pa. Act, June 1, 1885, art. 14, relating to the city of Philadelphia, and which requires that "all contracts relating to city affairs shall be in writing, signed and executed in the name of the city," is not merely directory, but mandatory, and unless it is strictly complied with no liability can be imposed upon the city. Smart *v.* Philadelphia, 205 Pa. St. 329, 54 Atl. 1025; McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 320; Hepburn *v.* Philadelphia, 149 Pa. St. 335, 24 Atl. 279. Where a municipal contractor submits a bid to the city of Philadelphia, and the bid is accepted, but the city subsequently refuses to enter into a written contract in the matter, the contractor can maintain no suit against the city for a breach of contract. Smart *v.* Philadelphia, *supra*. And where the work for which plaintiff seeks compensation is included in the work which he agreed to do in his written contract for the compensation therein named, which he has received, this is a complete defense to an action for extra compensation for work done by him and claimed not to have been embraced in the specification upon which his bid was based. O'Rourke *v.* Philadelphia, 211 Pa. St. 79, 60 Atl. 499. Under the provisions of a city charter that the city is not bound by any contract unless authorized by an ordinance, and in writing, and, by order of the council, signed by the city clerk or some other person authorized by the city, officers of the city cannot bind it by a contract not in writing. Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063. See also Chapman *v.* Brooklyn, 40 N. Y. 372. And see *supra*, IX, G, 1.

Statute of frauds.— A resolution or ordinance may bind the corporation as a contract, when so intended, in any matters not required to be attested in some different form; but a resolution approving a contract which the statute of frauds requires to be in writing and signed does not constitute a signing. Wade *v.* Newbern, 77 N. C. 460.

Statute not requiring writing.— The charter of the city of Hamilton, providing that "all script and bonds issued and contracts and agreements made shall be signed by the president and countersigned by the clerk," did not prohibit parol contracts by the city, but merely designated the manner in which written contracts should be executed. Fitton *v.* Hamilton City, 6 Nev. 196.

82. Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946; Argus County *v.* Albany, 7 Lans. (N. Y.) 264 [*affirmed* in 55 N. Y. 495, 14 Am. Rep. 296].

83. Baxter Springs *v.* Baxter Springs Light, etc., Co., 64 Kan. 591, 68 Pac. 63; Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835.

84. *Alabama.*— Montgomery Brush Electric Light, etc., Co. *v.* Montgomery, 114 Ala. 433, 21 So. 960; Montgomery County *v.* Barber, 45 Ala. 237.

California.— Brown *v.* Pomona Bd. of Education, 103 Cal. 531, 37 Pac. 503.

Illinois.— New Athens *v.* Thomas, 82 Ill. 259.

Kentucky.— Fox *v.* Richmond, 40 S. W. 251, 19 Ky. L. Rep. 326, holding that one who has been compelled by the officers of a city to perform labor for the city in payment of a void judgment for a fine may require the city to pay him therefor.

Maine.— Farwell *v.* Rockland, 62 Me. 296.

Michigan.— Central Bitulithic Paving Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Bodewig *v.* Port Huron, 141 Mich. 564, 104 N. W. 769; Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Endriss *v.* Chippewa County, 43 Mich. 317, 5 N. W. 632.

Nebraska.— Rogers *v.* Omaha, (1906) 107 N. W. 214.

Nevada.— Fitton *v.* Hamilton City, 6 Nev. 196; Tucker *v.* Virginia City, 4 Nev. 20, holding that where the general power is given to a municipal corporation "to make all necessary contracts and agreements for the benefit of the city," it is as well bound by implied as by written contracts, while acting within the scope of its powers.

New York.— Harlem Gaslight Co. *v.* New York, 33 N. Y. 309 [*affirming* 3 Rob. 100]; Messenger *v.* Buffalo, 21 N. Y. 196; Peterson

in a number of cases that a contract will not be implied which is *ultra vires*,[85] or

v. New York, 17 N. Y. 449; Port Jervis Water Works Co. *v.* Port Jervis, 71 Hun 66, 24 N. Y. Suppl. 497 [*affirmed* in 151 N. Y. 111, 45 N. E. 388]; Kramrath *v.* Albany, 53 Hun 206, 6 N. Y. Suppl. 54 [*affirmed* in 127 N. Y. 575, 28 N. E. 400]; Leonard *v.* Long Island City, 20 N. Y. Suppl. 26.

Ohio.— A municipality having received work which has been in public use since its completion cannot avoid liability for payment on the ground that the work was not done according to contract, and that part was unauthorized. Boeres *v.* Cincinnati, 3 Ohio Dec. (Reprint) 45.

Rhode Island.— Valley Falls Co. *v.* Taft, 27 R. I. 136, 61 Atl. 41.

Tennessee.— Memphis Gas-Light Co. *v.* Memphis, 93 Tenn. 612, 30 S. W. 25.

Texas.— Granting that a contract for a city water-supply was void as creating a monopoly, the city is nevertheless liable for what it received under the contract. Tyler *v.* Jester, 97 Tex. 344, 78 S. W. 1058 [*affirming* (Civ. App. 1903) 74 S. W. 359].

Vermont.— Hardwick Town School Dist. *v.* Wolcott Town Dist., 78 Vt. 23, 61 Atl. 471.

Wisconsin.— Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

United States.— Austin *v.* Bartholomew, 107 Fed. 349, 46 C. C. A. 327; Burrill *v.* Boston, 4 Fed. Cas. No. 2,198, 2 Cliff. 590.

Canada.— Bernardin *v.* North Dufferin, 19 Can. Sup. Ct. 581.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 697, 698. See also *infra*, IX, M, 1, b.

The doctrine of implied municipal liabilities "applies to cases where money or other property of a party is received under such circumstances that the general law, independent of the express contract, imposes the obligation upon the city to do justice with respect to the same." Argenti *v.* San Francisco, 16 Cal. 255.

Implied contract to pay attorneys for services.— Where attorneys, at the request of a town council, addressed a meeting of the citizens and explained the terms upon which the holders of the bonds of the town proposed to cancel them, and the proposition was accepted by the meeting, and the attorneys directed to prepare an ordinance for the purpose of consummating a settlement, which they did, and the town council afterward adopted the ordinance, and the bonds were taken up in pursuance thereof, and the whole matter adjusted with the assistance of the attorneys, it was held that they were entitled to recover pay from the town for their services. New Athens *v.* Thomas, 82 Ill. 259.

Acceptance and use of goods or services.— A city, having accepted and used hose carriages purchased by the fire commissioners, became liable therefor upon a *quantum meruit*; there being no limitation on the power of the commissioners to purchase the same. Leonard *v.* Long Island City, 20 N. Y. Suppl. 26. And where a contract for gas to light the public buildings and streets of the city of New York is within the authority of the municipal corporation, if a gas company has furnished, and the city has used, gas for the lighting of streets, the former, in the absence of a specific agreement as to price or rate of payment, is entitled to a reasonable compensation. Harlem Gas Light Co. *v.* New York, 33 N. Y. 309 [*affirming* 3 Rob. 100]. So where a city has enjoyed the benefit of work performed and goods purchased, it is liable therefor on *quantum meruit*, even though the order was given by a single member of the committee authorized to make such contracts. Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54]. And although a street commissioner of a city had no authority to purchase stone, yet where stone furnished under a contract with him was used on the streets of the city, it was liable to the seller for the value. Central Bitulithic Paving Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888.

Implied renewal of written contract.— In 1856 a gaslight company entered into a written contract, whereby it agreed to furnish a city with gas for one year. From time to time new contracts were made, and they were each for the same term, but were not always renewed in writing. The company, however, continued to furnish the gas, and the city to pay therefor, according to the terms of the last written contract, from the time of expiration of such contract to the formation of a new one. The last written contract was made in 1884, and expired Oct. 1, 1885, but according to the custom, the company continued to furnish the city with gas, and to receive pay therefor in accordance with its terms until February, 1887, when, without any notice of the termination of the contract on the part of either, the city made a five-year contract with another company. It was held that, in view of the manner in which the contracts had been made for a long period of years, the company was bound to furnish gas for one year from Oct. 1, 1886, and that the city was bound to pay in accordance with the terms of the last written contract, and could not make a contract with another company for gas during the same time. Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809.

85. Citizens' Bank *v.* Spencer, 126 Iowa 101, 101 N. W. 643; Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525; Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602 [*affirming* 31 Pa. Co. Ct. 609]; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; Burrill *v.* Boston, 4 Fed. Cas. No. 2,198, 2 Cliff. 590. *Compare* Garrison *v.* Chicago, 10 Fed. Cas. No. 5,255, 7 Biss. 480.

Use and occupation see *infra*, this section, text and note 95.

forbidden by law,[86] or made by an unauthorized person,[87] or in a manner unauthorized.[88] On the other hand it has been held that when a municipality receives benefits under an informal or *ultra vires* contract, which cannot be specifically enforced, it cannot escape liability in an action of assumpsit for *quantum valebat* or *quantum meruit*.[89] A contract will not be implied where there is an express contract or condition of a grant excluding liability,[90] where property is used by mistake,[91] or where the evidence does not clearly show the facts neces-

86. Fountain *v.* Sacramento, 1 Cal. App. 461, 82 Pac. 637; Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525; Detroit *v.* Robinson, 38 Mich. 108; Detroit *v.* Michigan Paving Co., 36 Mich. 335; Cheeney *v.* Brookfield, 60 Mo. 53; Mister *v.* Kansas City, 18 Mo. App. 217. Where an act requires that a certain contract for a municipality be let only on sealed bids, but a party furnishes work and material under a contract not so awarded, there can be no recovery on the ground that defendant city having accepted the work was bound to pay what it was reasonably worth, notwithstanding the nullity of the contract, as the city authorities could make no contract, express or implied, except in the manner, and with all the formalities, prescribed by statute. McSpedon *v.* New York, 7 Bosw. (N. Y.) 601, 20 How. Pr. 395.

87. Fountain *v.* Sacramento, 1 Cal. App. 461, 82 Pac. 637; Condran *v.* New Orleans, (La. 1891) 9 So. 31; Park *v.* Laurens, 68 S. C. 212, 46 S. E. 1012. Where the legislature established a court to be held "at such place as the city shall provide," and upon the failure of the city to provide a place, the judge hired a room in which he held court, it was held that there was no implied promise upon the part of the city to pay the rent of such room. French *v.* Auburn, 62 Me. 452. Where the board or body of a municipal corporation is not shown to have known that goods were requisitioned by one employee and accepted by another employee without precedent authority, and used by such employee, the fact of such acceptance and use will not raise an implied contract on the part of the municipal corporation to pay for such goods. New Jersey Car Spring, .etc., Co. *v.* Jersey City, 64 N. J. L. 544, 46 Atl. 649. So where a sidewalk was ordered to be built without authority, hut through the mistake of an employee delegated by the superintendent of streets, it was held that his action in so ordering the walk built did not operate to bind the city, so as to render it liable to respond on a *quantum valebat*. Chicago *v.* A. R. Beck Lumber Co., 93 Ill. App. 70. See also *supra*, IX, C.

88. Fountain *v.* Sacramento, 1 Cal. App. 461, 82 Pac. 637; Brazil *v.* McBride, 69 Ind. 244; Belleview *v.* Hohn, 82 Ky. 1; Schell City *v.* L. M. Rumsey Mfg. Co., 39 Mo. App. 264; O'Rourke *v.* Philadelphia, 13 Pa. Dist. 379. See *supra*, IX, G, 1. Where a contract for printing one thousand five hundred copies of the "City Charters" was void, not being made as required by N. Y. Laws (1853), c. 217, § 12, the fact that these books were accepted and used by the corporation was held not to raise a liability to pay for them what they were worth. McSpedon *v.* New York, 7 Bosw. (N. Y.) 601, 20 How. Pr. 395. But it has been held that, although a city charter requires all contracts with the city to be in writing, a gas company which has furnished gas for several years under a written contract may recover from the city for gas furnished after the expiration of such contract on the basis of an implied contract or *quantum valebat*. Memphis Gas-Light Co. *v.* Memphis, 93 Tenn. 612, 30 S. W. 25.

89. Higgins *v.* San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Lincoln Land Co. *v.* Grant, 57 Nebr. 70, 77 N. W. 349; Harlem Gaslight Co. *v.* New York, 33 N. Y. 309 [*affirming* 3 Rob. 100]; Kramrath *v.* Albany, 53 Hun (N. Y.) 206, 6 N. Y. Suppl. 54 [*affirmed* in 127 N. Y. 575, 28 N. E. 400]; Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996. Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received. Rogers *v.* Omaha, (Nebr.) 107 N. W. 214. Where a contract within the power of a public corporation is set aside for irregularity, there may be a recovery as on a *quantum meruit* against such corporation for work and material furnished under the contract before legal attack, and the recovery may include expenditure to secure such materials pending the proceedings attacking the contract. Wentink *v.* Passaic County, 66 N. J. L. 65, 48 Atl. 609. See also *supra*, IX, G, 1, note 7.

90. Thus, where a charter to a gas company is granted on condition that a city be furnished a certain quantity of gas, there is no implied promise on the part of the city to pay therefor. Virginia City Gas Co. *v.* Virginia City, 3 Nev. 320. No recovery can be had on a *quantum meruit* on an implied contract for extra excavation where the work was done at a fixed price per cubic yard pursuant to an ordinance. Booser *v.* Steelton Borough, 25 Pa. Co. Ct. 320, 4 Dauph. Co. Rep. 119.

91. The use, by the fire department of a town, of a person's hose, which had gotten mixed with the hose of the town, under the belief that it belonged to the town, does not render the town liable to the owner for its use. Dolloff *v.* Ayer, 162 Mass. 569, 39 N. E. 191.

sary to give rise to the liability.[92] A municipal corporation may be held liable in an action for money had and received to the use of another entitled thereto.[93] And if a municipal corporation, by its own act, causes the work done by a contractor to be more expensive than it otherwise would have been, according to the terms of the original contract, it is liable to him on implied contract for the extra work.[94] A municipal corporation as a lessee is capable of holding over after the expiration of its term, and then becomes just such a tenant as a natural person being under like conditions, and it may become liable on implied contract for use and occupation.[95]

H. Validity and Sufficiency — 1. IN GENERAL. As a rule a contract entered into on behalf of a municipal corporation is void if it is *ultra vires*, or if it is illegal because in violation of a charter or statutory prohibition,[96] or if, not being in terms authorized, it is against public policy.[97] And the same is true of contracts not

92. Mott *v.* Utica, 114 N. Y. App. Div. 736, 100 N. Y. Suppl. 150, holding the evidence too indefinite to support a judgment for the reasonable value of a contractor's services, as extra compensation, in removing material under a street cleaning contract.

93. Valley Falls Co. *v.* Taft, 27 R. I. 136, 61 Atl. 41, holding that where a town council had laid out a highway on behalf of the town, and had agreed to construct it on condition of the advancement of certain moneys to pay therefor, and, after payment of the sums agreed upon, abandoned the work, without having constructed a passable way, the money paid could be recovered back from the town, regardless of whether the council had power to bind it in the premises or not.

Assessments paid into treasury.— A municipal board of health, without authority, contracted for the removal of certain nuisances. There was an insufficient appropriation to pay for the work. Assessments on property were made, and a portion of them paid into the city treasury. It was held that in equity the money belonged to the contractor, who could recover it from the city, on the ground that it was received for his use. Parker *v.* Philadelphia, 92 Pa. St. 401.

Unexpended appropriations turned over to city.— Plaintiff was employed by the police department of New York city to remove garbage from the streets at a stipulated sum per month. When the employment ceased, the police department held an unexpended balance of appropriations, more than enough to pay the claim. It was held that an action was not maintainable against the police department, but that, said unexpended balance having been paid into the city treasury, where it remained, was impressed with a trust in favor of plaintiff; and, the city having received the fund with notice of plaintiff's claim, an action might be maintained against it therefor. Swift *v.* New York, 83 N. Y. 528 [*reversing* 17 Hun 518].

94. Messenger *v.* Buffalo, 21 N. Y. 196.

95. Witt *v.* New York, 6 Rob. (N. Y.) 441. Thus a city which by its charter is required to provide a pest-house or hospital, and which makes use of a private dwelling for a hospital, must pay the owner of such dwelling a reasonable sum for the use thereof, although the city obtained possession by a trick or trespass committed by its officer or agent. Bodewig *v.* Port Huron, 141 Mich. 564, 104 N. W. 769. And a municipal corporation entering upon and holding premises under a lease renewal describing it and signed by the lessor is estopped from taking advantage of the fact that it was not correctly named in the lease and will be liable in an action in the nature of assumpsit for rent thereunder. Fitton *v.* Hamilton City, 6 Nev. 196.

Ultra vires.— But where a municipal corporation takes an *ultra vires* lease and enters into possession, no recovery can be had from it for use and occupation. Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602 [*affirming* 31 Pa. Co. Ct. 609].

96. Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118 (holding that all contracts of municipal corporations, which are not necessary and proper in order to carry into effect the powers expressed in their charters, and which are not germane to the governmental purpose for which such corporations may have been organized, are *ultra vires*); Higgins *v.* San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Coker *v.* Atlanta, etc., R. Co., 123 Ga. 483, 51 S. E. 481 (equitable relief to a citizen whose rights will be infringed if the terms of an *ultra vires* contract are carried out); Tucker *v.* Grand Rapids, 104 Mich. 621, 62 N. W. 1013; Sillcocks *v.* New York, 11 Hun (N. Y.) 431; Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602; Shroder *v.* Lancaster, 6 Lanc. Bar (Pa.) 201; Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822. See also *infra*, IX, H, 4.

Power to contract see *supra*, IX, A.

Notice of limitations upon the municipal power must be taken by those who deal with the corporation. McCoy *v.* Briant, 53 Cal. 247; Citizens' Bank *v.* Spencer, 126 Iowa 101, 101 N. W. 643; Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746, 118 Iowa 234, 91 N. W. 1081; Raton Waterworks Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898; Matter of Niland, 113 N. Y. App. Div. 661, 99 N. Y. Suppl. 914.

97. Eufaula *v.* McNab, 67 Ala. 588, 42

made by an authorized officer or agent or not duly made or authorized by the common council or other board or department whose action is necessary,[98] and of contracts not entered into in the manner and form prescribed by mandatory charter or statutory provision.[99] So also a municipal contract may be voidable and set aside on the ground of fraud.[1] Municipal contracts are, equally with other contracts, subject to the principle that, to constitute a contract, the minds of the parties must meet both as to the subject-matter and as to the terms.[2] Therefore a binding contract on which action will lie is not made where the price is not fixed,[3] or where, although there has been substantial agreement, the parties recognize something remaining to complete its execution.[4] But, unless an ordinance

Am. Rep. 118. See also Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 64 Atl. 602.

98. Seibrecht *v.* New Orleans, 12 La. Ann. 496; Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219; Indiana Road-Mach. Co. *v.* Sulphur Springs, (Tex. Civ. App. 1901) 63 S. W. 908; State Trust Co. *v.* Duluth, 104 Fed. 632. See *supra*, IX, B, 1; IX, C. The common council of a city can only contract by an order, resolution, or ordinance, passed in the manner required by statute, and when thus made, it can be repealed or annulled only by a vote of the council. Terre Haute *v.* Lake, 43 Ind. 480.

Where ordinance and contract differ.— When a stipulation in an ordinance and a covenant in a contract, drawn in pursuance of such ordinance, differ, the stipulation in the ordinance only is of binding effect. Dime Deposit, etc., Bank *v.* Scranton, 4 Lack. Jur. (Pa.) 109.

Contract made, not by council, but by individual members see *supra*, IX, B, 1.

99. Los Angeles Gas Co. *v.* Toberman, 61 Cal. 199; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Van Reipen *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837. See *supra*, IX, F, G. A municipal corporation cannot be held bound by either an express or an implied contract in defiance of express restrictions imposed by law as limitations upon the powers of the corporate agents through whose instrumentality the contract is sought to be derived. Jersey City Supply Co. *v.* Jersey City, 71 N. J. L. 631, 60 Atl. 381.

1. Where a party, by procuring persons who were his agents or conspirators with him to be elected to a board of trustees of a city having power to regulate all streets, ferries, wharves, etc., for the purpose of getting them to defraud the city for his benefit of certain property and franchises, obtained the exclusive privilege of laying out and establishing and regulating the wharves of the city for a certain time, a court of equity will hold him responsible and set aside such contract. Oakland *v.* Carpentier, 13 Cal. 540. But the fact that a manufacturing company paid the expenses to the Atlanta Exposition of a commission appointed to contract for the construction of a jail for a county, and that said company was afterward granted the contract, was held not to show fraud or collusion, where it appeared that the purpose was to have the commission examine a modern jail exhibited at that place. Byers *v.* Manley Mfg. Co., (Tenn. Ch. App. 1898) 46 S. W. 547.

Agreement between bidders.— It has been held that an agreement between competitors in business that one of them shall make a bid for both, the work to be divided between them, is not a fraudulent combination to prevent competitive bidding which will render void a contract awarded to such bidder. Woodward *v.* Collett, 48 S. W. 164, 20 Ky. L. Rep. 1066.

2. McCotter *v.* New York, 37 N. Y. 325 [*affirming* 35 Barb. 609].

Acceptance varying from offer or proposal. — Where a resolution of a town council directed the president to contract with a city for a supply of water on certain terms, and the city, learning of the resolution, caused to be executed by its officials and tendered to the town council a paper which was claimed to accord to the terms of the agreement, it was held to create no contract where the paper thus executed did not conform to the resolution. Jersey City *v.* Harrison, 72 N. J. L. 185, 62 Atl. 765, 65 Atl. 507.

Revocation of offer.— Where a deputy commissioner of docks of a city addressed to plaintiff a request to deliver sixty days' use of horse, cart, and driver, a letter from the secretary of the department of docks and ferries requesting the return of the order, sent before any work had been performed or tendered, was a complete revocation of the order. Durkin *v.* New York, 49 Misc. (N. Y.) 114, 96 N. Y. Suppl. 1059.

Acceptance or rejection of bid see *supra*, IX, F, 6.

3. McCotter *v.* New York, 37 N. Y. 325 [*affirming* 35 Barb. 609].

4. Santa Rosa Lighting Co. *v.* Woodward, 119 Cal. 30, 50 Pac. 1025; Fleming Mfg. Co. *v.* Franklin, (Iowa 1905) 103 N. W. 997. Although a contract for advertising had been let by a city under Pa. Act, March 7, 1901, art. 15 (Pamphl. Laws 36), as amended by the act of June 20, 1901 (Pamphl. Laws 592), and the award had been accepted and the contract reduced to writing, and accepted by the successful bidder, and delivered by him to the city, it was held that no contract existed where such contract was unsigned by the recorder, although his failure to sign was due to his sudden death immediately

or other formality is required, the contract is binding when there is a resolution approving its execution,[5] or other informal action to the same effect.[6]

2. Appropriations or Provision For Payment. Under various statutory or constitutional provisions municipal contracts involving the creation of debts cannot be made without some provision for payment, such as a levy or appropriation by the proper authorities.[7] These provisions have been declared manda-

after the delivery of the contract to him and before he could affix his signature. Press Pub. Co. *v.* Pittsburgh, 207 Pa. St. 623, 57 Atl. 75. So, where bids for the building of a street railroad were invited by a city, and in response thereto an unincorporated company submitted proposals, and the city accepted them subject to a modification which the company agreed to, but no formal contract was signed, and a resolution was then passed by the city enabling the company to become incorporated, and declaring that the "proposals heretofore made and accepted" by the parties respectively should not thereby be changed, it was held that there was no perfected contract between the city and the unincorporated company. People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844.

Ordinance not acted on.— A city ordinance authorizing the mayor to contract with a third person, if not acted on by the mayor, does not of itself create a contract. Baltimore *v.* New Orleans, 45 La. Ann. 526, 12 So. 878.

Completed contracts.— A contract is entered into between two corporations when one of them, by some proper corporate action, proposes terms to the other, and this other, a municipal corporation, thereupon passes an ordinance embracing them; and it cannot be objected to such a contract that it is not signed by the party to be charged, or that the ordinance is nothing more than a declaration of intention. People *v.* San Francisco, 27 Cal. 655. And an ordinance providing that "the city does hereby assume and become responsible for the faithful performance of all and every portion of the lease now held by" another, followed by a delivery of a copy thereof to the lessee, and an assignment by the lessee to the city, and a delivery of the assignment to the city clerk, constitutes a completed contract between the parties. Curtis *v.* Portsmouth, 67 N. H. 506, 39 Atl. 439.

5. San Francisco Gas Co. *v.* San Francisco, 6 Cal. 190; Argus Co. *v.* Albany, 55 N. Y. 495, 14 Am. Rep. 296 [*affirming* 7 Lans. 264]. See *supra*, V, B, 1, d.

6. Booth *v.* Shreveport, 29 La. Ann. 581; Argus Co. *v.* Albany, 55 N. Y. 495, 14 Am. Rep. 296 [*affirming* 7 Lans. 264].

Designation of newspapers for advertisements.— Under N. Y. Laws (1863), c. 227, § 2, requiring the mayor and controller to designate four daily papers, and authorizing them, in their discretion, to designate others in which to publish advertisements, the designation of certain papers for the publication of proceedings of the council in reference to local improvements is an employment by the corporation, in the absence of evidence that the service was declined by the papers designated. *In re* Phillips, 60 N. Y. 16 [*reversing* 2 Hun 212].

7. Green *v.* Everett, 179 Mass. 147, 60 N. E. 490 (under a statute providing that the city council can incur no liability in behalf of a city unless such council has duly voted an appropriation sufficient to meet the liability, the court holding that where one's land was taken by a city to widen a street, and some two years after the taking he made an offer to settle his claim for damages, which was accepted by the council, such proposal and acceptance did not constitute a completed settlement, so as to be competent evidence in subsequent proceedings on a petition for damages); Com. *v.* Foster, 215 Pa. St. 177, 64 Atl. 367 (holding that a prior appropriation by a city of the third class is essential to every contract entered into by it, in which "the appropriation of money" is involved, and that mandamus will not be granted against a controller to certify a contract for furnishing electric lights, where no appropriation has ever been made, either by resolution or by ordinance, for the payment of any moneys under the contract); McNeal *v.* Waco, 89 Tex. 83, 33 S. W. 322; Terrell *v.* Dessaint, 71 Tex. 770, 9 S. W. 593; Mineralized Rubber Co. *v.* Cleburne, 22 Tex. Civ. App. 621, 56 S. W. 220; Noel *v.* San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263 (the last four cases being under a constitutional provision). No appropriation having been made by the city council of the city of Detroit, for the use of the park board, to pay for water for the operation of drinking fountains, hydrants, etc., it was held that the Detroit waterworks was not entitled to recover from the park board for water so furnished. Detroit Water Com'rs *v.* Parks, etc., Com'rs, 126 Mich. 459, 85 N. W. 1132.

Necessity for appropriation before incurring debt see *infra*, XV, B, 1, g.

Certificate of auditor or clerk.— Under a statute requiring as a condition to entering into a municipal contract that the auditor or clerk must certify that the money required for the contract is in the treasury to the credit of the particular fund, a contract with attorneys for legal services is void where such certificate was not filed. Findlay *v.* Pendleton, 62 Ohio St. 80, 56 N. E. 649.

Repeal pro tanto.— Where an act prohibits the officers of a city from making any contract to bind the city, without a previous appropriation being made therefor, and a later act requires such officers to furnish certain books, papers, etc., although no appropriation has been made therefor, the later act is a repeal *pro tanto* of the former act.

tory;[8] and contracts made without compliance with them are *ultra vires* and void.[9] Nor may limitations as to amount be avoided by splitting an entire contract into pieces,[10] or stretching it over two administrations.[11] And it is not competent under these provisions for a municipality authorized to levy a certain rate for a public utility to contract that the company supplying it shall receive annually a sum equal to that produced on the existing assessment.[12] Under these requirements contracts have been upheld, where the appropriation followed the contract,[13] or only covered it by implication,[14] or by departmental provision.[15] And contracts for municipal utilities for a term of years are so construed as to fix the amount of the contract by the annual payment to be made.[16]

3. Partial Invalidity. The general law of contracts with regard to partial invalidity is applicable to municipal contracts with the result that if the invalid portion of the contract can be severed from the rest without impairing the valid parts, they will be sustained and the contract enforced *pro tanto*;[17] but if by such separation violence is done to the entire contract then it is void *in toto*.[18]

Philadelphia *v.* Philadelphia Com'rs, 3 Brewst. (Pa.) 333.

The board of guardians of the poor of Philadelphia ceased, under the Consolidation Act of 1854, to have a distinct corporate existence, and was made a department of the city, and became subject to the provisions of the Pennsylvania act of April 21, 1858, so that they could not make a contract binding the city, in the absence of an appropriation by the councils for its payment. Mathews *v.* Philadelphia, 93 Pa. St. 147.

8. Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 92 N. W. 643; Roberts *v.* Fargo, 10 N. D. 230, 86 N. W. 726. See also cases cited in the last preceding note.

Bidder need not perform.— Where a bidder for a contract for cleaning streets of one of six districts of a city has his bid accepted subject to a sufficient appropriation to cover the work, and at the time the bid is accepted an appropriation has been made for cleaning streets of the whole city, but this appropriation falls short of the aggregate of the contracts awarded for the six districts, the bidder is under no duty to execute a contract with the city or to clean the streets of the district for which he bid. Hinkle *v.* Philadelphia, 214 Pa. St. 126, 63 Atl. 590.

9. Hurley *v.* Trenton, 67 N. J. L. 350, 51 Atl. 1109; Roberts *v.* Fargo, 10 N. D. 230, 86 N. W. 726.

10. May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465; Wing *v.* Cleveland, 9 Ohio Dec. (Reprint) 551, 15 Cinc. L. Bul. 50; Fire Extinguisher Mfg. Co. *v.* Perry, 8 Okla. 429, 53 Pac. 635.

11. May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465.

12. Westminster Water Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630.

13. Cain *v.* Wyoming, 104 Ill. App. 538.

14. Denver *v.* Hubbard, 17 Colo. App. 346, 68 Pac. 993.

15. Louisville *v.* Gosnell, 60 S. W. 411, 22 Ky. L. Rep. 1524, holding the under St. § 2820, providing that the executive boards of cities of the first class and their officers shall not have power to bind the city to any extent beyond the amount of money at the time "already appropriated" by ordinance for the purpose of the department under the control of said board, a levy ordinance which, in subdividing the tax rate, designates a certain part of it "for street repairs," constitutes an appropriation of that part of the tax rate for the purpose designated.

Subsequent exhausting of fund.— Where, at the time of ordering certain photographs for the city attorney's office for the use of the law department of the city of Chicago, there was more than enough of the proper appropriation unexpended to pay for them, the city will be liable, notwithstanding such appropriation is subsequently exhausted. Chicago *v.* Berger, 100 Ill. App. 158.

16. Maine Water Co. *v.* Waterville, 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294. A contract entered into between a city and a water company, by which the city agrees to pay hydrant rentals for water for fire purposes for thirty years, is not void on the ground that no certificate was made by the clerk that there are funds in the city treasury sufficient to satisfy the amount falling due under the contract for the full period of thirty years. Defiance *v.* Defiance, 23 Ohio Cir. Ct. 96.

17. Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870. Thus where a city, in consideration of its agreement to make certain street improvements, has obtained a deed of land from plaintiff for a street, and has drawn therefrom a large amount of materials for its streets, and plaintiff cannot be placed *in statu quo*, the fact that an insignificant part of the contract is void because *ultra vires* will not defeat the whole contract. Spier *v.* Kalamazoo, 138 Mich. 652, 101 N. W. 846. And where a city, in extending its sewer, has contracted with a landowner, whereby it was permitted to extend its sewer through his land, the fact that an insignificant part of the contract is void, because *ultra vires*, will not defeat the whole contract, where the same is easily severable, and the landowner has suffered an injury, and cannot be placed *in statu quo*. Coit *v.* Grand Rapids, 115 Mich. 493, 73 N. W. 811.

18. Nicholasville Water Co. *v.* Nicholasville, 36 S. W. 549, 18 Ky. L. Rep. 592;

4. Estoppel to Deny Validity. Municipal corporations, like private corporations and persons, may be estopped by conduct to deny the validity of their contracts.[19] In actions on municipal contracts it is generally held that, as against the party which has performed its part of the contract, the other party, having received the benefits, is thereby estopped to avoid just liability by asserting that the contract was invalid for irregularity or want of authority,[20] unless it tenders a full return of the consideration received.[21] But the doctrine of *ultra vires* has been applied with peculiar strictness in favor of municipal corporations,[22] especially

New Orleans *v.* New Orleans Sugar Shed Co., 35 La. Ann. 548; Austin *v.* McCall, (Tex. Civ. App. 1902) 67 S. W. 192; Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

19. New Orleans *v.* Crescent City R. Co., 41 La. Ann. 904, 6 So. 719; State *v.* Cockrem, 25 La. Ann. 356 (holding that the civil government of the city of New Orleans could not be permitted to deny the rights derived by the relators from their contract with said city on the ground that it was under military authority at the time, where, after the cessation of that military authority, those rights had been, in part, frequently recognized and ratified by its ordinances); Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238; The Maggie P., 25 Fed. 202 (estoppel to deny that the municipal officers acted without authority).

20. *Arkansas.*— Monticello *v.* Cohn, 48 Ark. 254, 3 S. W. 30; Helena *v.* Turner, 36 Ark. 577, holding that where one has taken a lease of public grounds from a municipal corporation, and has had the full enjoyment thereof, he is estopped, in an action on a bond executed for the payment of the lease, to deny the power of the corporation to make it.

California.— Argenti *v.* San Francisco, 16 Cal. 255.

Mississippi.— Natchez *v.* Mallery, 54 Miss. 499.

New Jersey.— Where ordinances of a city gave a street railway company permission to construct lines of railway in the streets and to operate cars thereon, on payment of annual license-fees for each car, and the company accepted the ordinances on those conditions, and constructed its lines and for many years operated cars thereon, the company and its successors, who acquired the lines and assumed the obligations, are estopped from setting up that the terms imposed by the ordinances were *ultra vires*. Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95.

Ohio.— Cincinnati *v.* Cincinnati Southern R. Co., 6 Ohio Cir. Ct. 247, 3 Ohio Cir. Dec. 438.

Pennsylvania.— Ephrata Water Co. *v.* Ephrata Borough, 16 Pa. Super. Ct. 484, 18 Lanc. L. Rev. 169.

See 36 Cent. Dig. tit. "Municipal Corporations," § 682.

Where the contract of a municipal corporation has no element of illegality, the objection made to it only alleging a defect of power in respect to the term of its duration, the doctrine that where a corporation has received benefits under a contract which is merely *ultra vires*, it shall pay for those benefits, should apply to the municipal corporation with equal force as in case of a private corporation. East St. Louis *v.* East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97; State *v.* McCardy, 62 Minn. 509, 64 N. W. 1133. So a municipal corporation, which has retained the benefits of a contract invalid not because it was beyond the scope of its powers but because in the making or performance of the agreement the power of the municipality was illegally exercised may be estopped from denying the validity of the contract as against an innocent party, who has changed his position in reliance upon the action of the municipality; but on the other hand, no such estoppel can arise in favor of one who has knowingly agreed to assist the municipality in the illegal exercise of its power. Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

21. Turner *v.* Cruzen, 70 Iowa 202, 30 N. W. 483; Natchez *v.* Mallery, 54 Miss. 499; Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242.

22. *Alabama.*—Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862 (holding that where a city had no power to execute a note binding its general revenues for the payment of furniture purchased for use in a school building, the retention and use of the furniture in the school did not estop the city from denying the holder's right to recover on the note); Eufaula *v.* McNab, 67 Ala. 588, 42 Am. Rep. 118 (holding that where a corporation makes an *ultra vires* contract, the fact that interest has been paid on the debt created by the contract, either by the corporation itself, or by the beneficiary of the contract with the concurrence of the corporation, will not affect the case and cannot work an estoppel).

California.— Higgins *v.* San Diego, (1896) 45 Pac. 824.

Illinois.— Hope *v.* Alton, 116 Ill. App. 116 [*affirmed* in 214 Ill. 102, 73 N. E. 406], holding that a city is not estopped to set up an ordinance prohibiting the incurring of an obligation, when suit is brought against it on account thereof, merely because it has accepted the benefit of the services made the basis of the contract.

Iowa.— Citizens' Bank *v.* Spencer, 126 Iowa 101, 101 N. W. 643.

Maryland.— Meally *v.* Hagerstown, 92 Md. 741, 48 Atl. 746.

where the contractor was aware of the municipal incapacity;[23] and the corporate seal affixed to the contract does not conclude the question.[24]

5. Presumption of Validity. The invariable rule of the courts in considering questions of validity in fair municipal contracts is to indulge every legal presumption in their support, *ut res magis valeat quam pereat.*[25]

I. Validating Unauthorized or Invalid Contracts — 1. Ratification[26] — a. Power to Ratify. An illegal or *ultra vires* municipal contract, being void, is not susceptible of validation, unless meanwhile the legislature has conferred upon the corporation power to ratify or to make such contracts.[27] But contracts made by a municipality without authority may be afterward ratified by it when it has acquired authority from the legislature;[28] and an *intra vires* contract void or voidable because not authorized by the municipality, or made by an officer, board, committee, or agent, not duly appointed or empowered to act,[29] or defectively exe-

Minnesota.— Newbery *v.* Fox, 37 Minn. 141, 33 N. W. 333, 5 Am. St. Rep. 830, a suit by taxpayers.

Missouri.— State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369.

Wisconsin.— Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

See 36 Cent. Dig. tit. "Municipal Corporations," § 682.

Authority of officer.— Where a person entered into a contract with a public officer undertaking to act for and to bind a city, the city was not estopped from showing that the officer had no authority to make the contract by mere proof that the same officer had previously made similar contracts which the municipality had recognized as binding. Wormstead *v.* Lynn, 184 Mass. 425, 68 N. E. 841.

Recovery on implied contract see *supra*, IX, G, 3, b.

23. Atlantic City Water-Works Co. *v.* Read, 50 N. J. L. 665, 15 Atl. 10 [*affirming* by a tie vote 49 N. J. L. 558, 9 Atl. 759].

24. Leavenworth *v.* Rankin, 2 Kan. 357.

25. Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981; Meyers *v.* New York, 58 N. Y. App. Div. 534, 69 N. Y. Suppl. 529; Memphis *v.* Brown, 20 Wall. (U. S.) 289, 22 L. ed. 264; Lincoln *v.* Sun Vapor Street-Light Co., 59 Fed. 756, 8 C. C. A. 253. Thus the question whether the necessities of a municipality justify a contract for light and water for a period of thirty-one years, and the fairness and reasonableness of the terms thereof, are addressed to the sound judgment of the municipal officers; and, as such officers are presumed to act within the scope of their authority, and for the best interests of the municipality they represent, the burden to impeach the contract is on the person who calls it in question. Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981. So where a contract, by which a city issued bonds for the benefit of a railroad company, and the latter issued stock to the city and guaranteed a certain income thereon, was executed and acted upon for thirty years, it was presumable that the municipal authorities did their duty in accepting the contract and requiring the observance of the statutory conditions essential to its validity. Marklove *v.* Utica, etc., R. Co., 48 Misc. (N. Y.) 258, 96 N. Y. Suppl. 795.

When a corporation seeks to avoid its contract on the ground of its want of power to contract, where the contract is not upon its face necessarily beyond the scope of its authority, it will, in the absence of proof, be presumed to be valid, and it is held that the corporation must make good its defense of *ultra vires* by plea and proof. Brown *v.* Pomona Bd. of Education, 103 Cal. 531, 37 Pac. 503.

26. Ratification of bonds see *infra*, XV, C, 13, b.

Ratification of conveyances see *supra*, VIII, D, 7.

27. *California.*— Higgins *v.* San Diego, (1896) 45 Pac. 824; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746, 118 Iowa 234, 91 N. W. 1081.

Kansas.— Leavenworth *v.* Rankin, 2 Kan. 357.

Maryland.— Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32; Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

Missouri.— Savage *v.* Springfield, 83 Mo. App. 323.

New York.— Boom *v.* Utica, 2 Barb. 104.

Washington.— Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

Wisconsin.— Trester *v.* Sheboygan, 87 Wis. 496, 58 N. W. 747.

See 36 Cent. Dig. tit. "Municipal Corporations," § 684.

28. Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721. See *infra*, IX, I, 2.

29. *Connecticut.*— Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

Illinois.— Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435.

Iowa.— Dubuque Fern College *v.* Dubuque Dist. Tp., 13 Iowa 555.

Maine.— Hanson *v.* Dexter, 36 Me. 516.

Massachusetts.— Nelson *v.* Georgetown, 190 Mass. 225, 76 N. E. 606; Roberts *v.* Cambridge, 164 Mass. 176, 41 N. E. 230; Emerson *v.* Newbury, 13 Pick. 377.

Minnesota.— State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625.

New Hampshire.— Hett *v.* Portsmouth, 73 N. H. 334, 61 Atl. 596.

cuted,[30] may in reason and by the great weight of authority be ratified by a municipality as well as by a private person. But the ratification, to be effectual, must be by the municipal body or officer originally empowered to make or authorize the contract.[31]

b. Ratification Where Officer Is Interested. Contracts voidable because of the adverse interest of a councilman or other officer or agent acting for the corporation[32] are validated by ratification by a board or council free from interest;[33] but ratification of such contract will not be presumed from mere payments made or authorized thereon.[34]

c. Sufficiency of Ratification. A subsequent ratification of an invalid municipal contract may be express or implied.[35] If express, then, in order to make it

New Jersey.— Green *v.* Cape May, 41 N. J. L. 45.

New York.— Peterson *v.* New York, 17 N. Y. 449; Squire *v.* Cartwright, 67 Hun 218, 22 N. Y. Suppl. 899.

Pennsylvania.— Philadelphia *v.* Hays, 93 Pa. St. 72; Shrober *v.* Lancaster, 6 Lanc. Bar 201.

United States.— Little Rock *v.* Merchants Nat. Bank, 98 U. S. 308, 25 L. ed. 108; Hill *v.* Indianapolis, 92 Fed. 467; Findlay *v.* Pertz, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 684, 685.

Illustrations.— A committee of a town does not bind the town by a contract unless a majority concur, but a contract made by a minority may be ratified by the majority; and, when so ratified, it has the same force to bind the town as it would have had if the majority had originally concurred in making it. Hanson *v.* Dexter, 36 Me. 516. And see *infra*, IX, I, 1, c.

30. Sandy Lake Borough *v.* Sandy Lake, etc., Gas Co., 16 Pa. Super. Ct. 234. Whenever a corporation has power originally to do a particular thing, it may ratify and make valid an attempt to do such thing, although it may be done ever so defectively, informally, or fraudulently in the first instance. State *v.* Pawnee County, 12 Kan. 426.

Invalid contract partly executed.— A city council may ratify the executed part of an invalid contract for lighting the streets, and order warrants to issue to pay for lights furnished, even though it has declared the contract under which such lights were furnished invalid. Frederick *v.* People, 83 Ill. App. 89.

31. See *infra*, IX, I, 1, c.

32. **Personal interest of officers** see *supra*, IX, D.

33. Ft. Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, 32 N. E. 215, 32 Am. St. Rep. 277, 18 L. R. A. 367; Cady *v.* Watertown, 18 Wis. 322.

34. Milford *v.* Milford Water Co., 124 Pa. St. 610, 17 Atl. 185, 3 L. R. A. 122.

35. Conyers *v.* Kirk, 78 Ga. 480, 3 S. E. 442; Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435; State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625; Tarentum Borough *v.* Moorhead, 26 Pa. Super. Ct. 273. *Compare* Burns *v.* New York, 3 Hun (N. Y.) 212, 5 Thomps. & C. 371; Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80. See also *infra*, this section text and note 38.

Illustrations.— Every resolution or order to enter into a contract by a board of town trustees required the concurrence, by a yea and nay vote, of four of the six members of the council. A resolution authorizing an attorney to appear as special counsel for the town in annexation proceedings received only three votes to two against it. At the same meeting, and immediately after the first resolution, the clerk was instructed, by four yeas and one nay vote, to send a certified copy of the resolution to the attorneys who appeared before the council, and advised with them as to the proposed proceeding, and, by four yeas to two nays, a warrant was ordered drawn in favor of the attorney for an amount to apply on costs and fees in the suit. It was held that if an express contract was not properly entered into, the subsequent acts of the council ratified the contract of employment. Denver *v.* Webber, 15 Colo. App. 511, 63 Pac. 804. So, where the trustees of a town library exceeded their authority in executing contracts and making a payment thereon, and the town at an annual meeting, with knowledge of the facts, accepted and approved the report of the trustees, it was held that the town ratified the acts of the trustees, and the contracts became binding on it as if originally authorized. Nelson *v.* Georgetown, 190 Mass. 225, 76 N. E. 606. So, under N. H. Pub. St. (1901) c. 46, § 2, c. 48, § 14, and Laws (1899), p. 264, c. 29, § 3, vesting in the board of mayor and aldermen of cities the duty of carrying into effect a vote of the city councils for the repair of streets, a formal vote of the board of mayor and aldermen adopting a contract made by a special committee for the improvement of streets constitutes a ratification of the contract, and makes it valid and binding upon the city, although the appointment of the special committee which originally entered into the contract was illegal. Hett *v.* Portsmouth, 73 N. H. 334, 61 Atl. 596. And an objection to the action of a board of park commissioners accepting an offer to sell lands, on the ground that a sufficient number of the members of the board were not present, is cured by a subsequent resolution, supported by the vote of a sufficient number, confirming the purchase. State *v.* Hennepin County Dist. Ct., 33 Minn. 252, 22 N. W. 632.

equivalent to original authorization, it must have the essential elements thereof; that is, it must be by the body or officer thereunto authorized,[36] and in the method required by law.[37] But ratification may be implied from acts done or omitted by the municipal authority duly empowered in the premises, unless the contract is one which can only be made in writing or in some other particular mode.[38] Acts

Where an electric light company furnished light for lighting the streets of a city, and presented its claims therefor, and the city council audited them, knowing that the claimant had furnished the lights for the time in question under a contract with the city, and ordered warrants issued for the payment of such claims, it was held the duty of the mayor to sign such orders, even if the original contract for such lighting was invalid. Frederick *v.* People, 83 Ill. App. 89. And an incorporated village is liable for services rendered at the request of the president of the board of trustees, which the village subsequently accepted, and for which it agreed to pay a sum named. Kent *v.* North Tarrytown, 50 N. Y. App. Div. 502, 64 N. Y. Suppl. 178 [*affirming* 26 Misc. 86, 56 N. Y. Suppl. 885].

Ratification of representations of committee.— Sharp *v.* New York, 40 Barb. (N. Y.) 256, 25 How. Pr. 389.

36. *Iowa.*— Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786, holding that the street commissioner of a city, unless clothed with power to bind the city by contract, could not ratify an agreement made by the chairman of the street committee.

Michigan.— Spitzer *v.* Blanchard, 82 Mich. 234, 46 N. W. 400.

Minnesota.— State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625.

Mississippi.— Jackson Electric R., etc., Co. *v.* Adams, 79 Miss. 408, 30 So. 694.

New Jersey.— New Jersey Car Spring, etc., Co. *v.* Jersey City, 64 N. J. L. 544, 46 Atl. 649.

New York.—Withers *v.* New York, 92 N. Y. App. Div. 147, 86 N. Y. Suppl. 1105; Miller *v.* New York, 3 Hun 35, 5 Thomps. & C. 219.

Texas.— Tyler *v.* Adams, (Civ. App. 1901) 62 S. W. 119.

Illustrations.— Where bonds for the purchase of a fire apparatus are issued by a village without authority, and it appears that the village authorities have refused to accept and have housed the apparatus, subject to the vendor's orders, no implied liability to pay therefor will arise by reason of a resolution of acceptance passed at a special meeting of the council not legally called. Spitzer *v.* Blanchard, 82 Mich. 234, 46 N. W. 400. Where horses were kept on hand in open sight at an engine house in a city fire department, in accordance with the directions of the chairman of the council committee on that department and the engineer, it may reasonably be inferred that the committee had notice thereof, and, if more was wanting to make a valid contract with the city for their use, a subsequent vote of the committee, ratifying the same, would be sufficient, the committee being authorized to contract for their employment. May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465.

37. *California.*— People *v.* Swift, 31 Cal. 26; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McCracken *v.* San Francisco, 16 Cal. 591.

Colorado.— Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14.

Kansas.— Newman *v.* Emporia, 32 Kan. 456, 4 Pac. 815.

Missouri.— Unionville *v.* Martin, 95 Mo. App. 28, 68 S. W. 605. The only way a city can ratify an act of its officers is by ordinance; and evidence that the parties employed in changing the grade of a street were paid by the city is incompetent to prove ratification. Kroffe *v.* Springfield, 86 Mo. App. 530.

Nebraska.— A contract entered into by a city in violation of an amendatory provision of its charter is void and can be ratified only by an observance of the conditions necessary to a valid agreement in the first instance. Plattsmouth *v.* Murphy, (1905) 105 N. W. 293.

New Jersey.— Cory *v.* Somerset County, 44 N. J. L. 445.

Tennessee.— A failure on the part of the municipal government to disaffirm, within a reasonable time, the contract of the waterworks committee for an expensive system of waterworks, does not operate as a ratification. A ratification could only be by formal action, and individual members of the city government could not, by expressions or by their conduct, so bind the city as to estop it from contesting the validity of such contract. Nashville *v.* Hagan, 9 Baxt. 495.

Washington.— Paul *v.* Seattle, 40 Wash. 294, 82 Pac. 601.

Wisconsin.— Where a contract by a city is invalid for want of substantial compliance with charter provisions, it cannot be made valid by acts of ratification short of such as would render a new contract valid. Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

See 36 Cent. Dig. tit. "Municipal Corporations," § 686.

38. Chicago *v.* McKechney, 91 Ill. App. 442; Albany City Nat. Bank *v.* Albany, 92 N. Y. 363. See also Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; Roberts *v.* Cambridge, 164 Mass. 176, 41 N. E. 230. A municipal corporation may ratify the unauthorized contracts of its officers and agents which are within its corporate powers, and the principle that ratification may be inferred from acquiescence after knowledge of the material facts, or from acts inconsistent with any other supposition, is as applicable to municipal corporations as to individuals. Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435.

done by unauthorized officers cannot amount to an implied ratification.[39] Knowledge of the contract claimed to have been ratified is essential.[40]

2. Curative Acts.[41] Subject to constitutional restrictions, the legislature in virtue of its sovereign power to control municipal affairs may validate an irregular or void contract of a municipality by an act expressly ratifying or validating it,[42] or conferring on the corporation power to ratify it or to make such con-

Illustrations.— Where a city contracts to receive its water-supply from one who agrees to build the water plant according to the contract, and after the completion of the plant the council appoints a committee to inspect it, and the committee reports favorably thereon, the council, by receiving water through the plant, and paying an instalment due under the contract, ratifies the report of the committee. Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946. Where goods are illegally purchased by the town agent, assuming the right to pledge the town's credit for the price, and the town afterward receives them with knowledge of the manner in which they were purchased, and applies them to its use, there is a ratification of the agent's authority, authorizing a recovery against the town. Backman *v.* Charlestown, 42 N. H. 125. Possession by town officers of premises which the town has contracted to purchase is insufficient to make such contract, otherwise unauthorized, binding on the town. Barker *v.* Floyd, 32 Misc. (N. Y.) 474, 66 N. Y. Suppl. 216 [*affirmed* in 61 N. Y. App. Div. 92, 69 N. Y. Suppl. 1109]. An action by a city on notes given by the city treasurer as security or payment for a defalcation is sufficient to indicate a ratification of the act of the committee appointed by the city council to examine into the defalcation and to receive the notes in payment thereof. Buffalo *v.* Bettinger, 76 N. Y. 393. Where the law agent of a town purchased a half interest of a claim against the town, on which the town claimed to have a right of recovery over against him, in his individual capacity, and afterward, without disclosing to the selectmen his half interest, negotiated a settlement and discharge of the town, received the money therefor from the town funds, and paid the claimant one half and kept the other, it was held that the town's long acquiescence after the facts became known was a ratification of the contract of settlement, and precluded a recovery of the consideration paid for the discharge, but that, as an agent should not be permitted to make private gain with funds, nor in matters of business, intrusted to his care, defendant might adopt plaintiff's contract of purchase of an interest in the claim, and recover, under its plea, whatever plaintiff had left of his half after reimbursing him for his actual trouble and expense. Judevine *v.* Hardwick, 49 Vt. 180.

Particular mode required.— Durango *v.* Pennington, 8 Colo. 257, 7 Pac. 14; Plattsmouth *v.* Murphy, (Nebr. 1905) 105 N. W. 293; Smith *v.* Newburgh, 77 N. Y. 130; Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

Contract requiring writing.—A city cannot, by acquiescence, ratify a contract which is not in writing, where its charter provides that it can be bound only by a written contract. Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

Ordinance required.— Under Seattle City Charter, art. 4, §§ 27, 28, providing that no obligation of any kind against the city shall be created except by ordinance, a contract alleged to have been entered into by the city without the passage of an ordinance can be ratified only by ordinance. Paul *v.* Seattle, 40 Wash. 294, 82 Pac. 601.

39. La France Fire Engine Co. *v.* Syracuse, 33 Misc. (N. Y.) 516, 68 N. Y. Suppl. 894.

40. Barton *v.* Pittsford, 44 Vt. 371.

41. Validating bonds see *infra*, XV, C, 13, c.

Validating conveyances see *supra*, VIII, D, 13.

42. *Illinois.*— Butler *v.* Dubois, 29 Ill. 105.

Indiana.— Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

Maryland.— Smith *v.* Stephan, 66 Md. 381, 7 Atl. 561, 10 Atl. 671.

Missouri.— State *v.* Miller, 66 Mo. 328.

New York.— Brown *v.* New York, 63 N. Y. 239.

North Carolina.— Belo *v.* Forsyth County Com'rs, 76 N. C. 489.

Ohio.— Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833.

Wisconsin.— Knapp *v.* Grant, 27 Wis. 147.

United States.— Steele County *v.* Erskine, 98 Fed. 215, 39 C. C. A. 173.

See also *supra*, IV, H, 2; VIII, D, 13; *infra*, XV, C, 13, c.

Illustration.— Mo. Act, December, 1855, provided that "all contracts made by the trustees of the town of New Franklin for the purpose of raising the amount authorized in the act of incorporation . . . be, and the same are, hereby declared to be legal." At the date of the act, but two contracts had been made by the trustees, one in 1842, which had been declared valid by the supreme court, and the other in 1849. It was held that the act amounted to a ratification of the contract of 1849. State *v.* Miller, 66 Mo. 328.

Acts not validating.—A contract for water-supply, invalid under N. J. Act, Feb. 7, 1876, which makes it criminal for councils to incur obligations in excess of the limit of expenditure, and the appropriation provided by law, is not cured by Pub. Laws (1881), p. 118, and Pub. Laws (1884), p. 194, which authorize cities not already supplied with water to contract for such supply for a term not exceeding ten years. Atlantic City Water-Works Co. *v.* Read, 50 N. J. L. 665, 15 Atl. 10. And Act, May 1, 1894, § 2 (Pub. Laws 170), validating prior city contracts for

tracts,[43] under which the council may ratify or repudiate an *ultra vires* contract.[44] But a contract void for fraud will not be validated by such curative act, unless the act was passed with full knowledge of the fraud.[45]

J. Construction and Operation — 1. In General. The valid contracts of a municipality are subject to the same canons of construction and general rules of operation as to rights and liabilities, as those governing the contracts of private corporations and individuals.[46] The court will look to the surrounding circumstances at the date of the contract,[47] and to the objects sought to be attained by the contract, and the intention of the parties in making it,[48] the words of the

street lighting, made without legislative authority, does not validate contracts made in disregard of Act, March 31, 1871, § 159 (Pub. Laws (1871), p. 1160), requiring the city of Jersey City to advertise for proposals for such contracts for street lighting as involve an expense of more than five hundred dollars. Jersey City Bd. of Finance *v.* Jersey City, 57 N. J. L. 452, 31 Atl. 625.

43. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

Act not validating.— An act of the legislature which merely authorizes the city authorities to carry out a contract which they had previously made, whereby they agreed, in consideration of the erection of a commodious hotel within the corporate limits, to grant to the owner the exclusive right to retail spirituous liquors for five years at the lowest rate of license, to renew the same, etc., for five years, does not *per se* validate the contract; and therefore, if the corporate authorities choose to repudiate the contract, they may insist on its illegality, notwithstanding the passage of the act. Jackson *v.* Bowman, 39 Miss. 671.

44. Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833; Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

45. Santa Ana Water Co. *v.* San Buenaventura, 65 Fed. 323.

46. Touchard *v.* Touchard, 5 Cal. 306; Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Penn Iron Co. *v.* Lancaster, 25 Pa. Super. Ct. 478.

Lessor.— When a city becomes a lessor, it is subjected to the same obligations as are imposed by law on others who enter into contracts of lease; hence, if the lessee from the city of the revenues of the public markets is deprived of part of the revenues because a portion of the space on which the stalls in the market are erected is taken for a public necessity, as for the widening of a street, the city must allow the lessee a diminution of rent. Hinrichs *v.* New Orleans, 50 La. Ann. 1214, 24 So. 224.

A person not a party to a contract has no right to intervene and establish a meaning contrary to the intention of the contracting parties, and upon this substituted meaning acquire and enforce rights. Clark *v.* Maryland Inst. for Promotion of Mechanic Arts, 87 Md. 643, 41 Atl. 126.

47. Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

The history of proceedings of a city council pending the consideration of an ordinance, which is but a proposition, and is of no effect unless accepted by the party to whom it is made, cannot be used to give force or meaning to the contract so made. Chicago, etc., R. Co. *v.* Chicago, 35 Ill. App. 206 [*affirmed* in 134 Ill. 323, 25 N. E. 514].

48. Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253 (holding that a proposition of the state to a city contained in a statute and the city's acceptance of the proposition, by which it engaged to construct and "continue" a railroad to be built by the state up to a certain point, was not an agreement to maintain the railroad but to "extend" it); Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. The grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights. Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650.

As to payments.— A waterworks contract, whereby the village agreed to cause an estimate of the value of the labor and materials on all work completed up to the first day of the month to be made on the tenth of each month, and to then pay ninety per cent of the contract price of such completed work, means the materials furnished in the preceding month, although not put in place, and the work done, although the entire job on which it is done is not completed. Delafield *v.* Westfield, 41 N. Y. App. Div. 24, 58 N. Y. Suppl. 277 [*affirmed* in 169 N. Y. 582, 62 N. E. 1095].

Statutory right not provided for in contract.— Lima Gas Co. *v.* Lima, 4 Ohio Cir. Ct. 22, 2 Ohio Cir. Dec. 396, holding that under a statute restricting the right of a city council to make any agreement with a gas company for supplying the corporation with gas, which contract shall not secure to the council the right to purchase the gas works at any time within the existence of the contract, and further that the council shall have power to erect gas works or to purchase any gas works already erected, where a contract with a gas company is silent as to the right of the city to purchase the works the right still remains in the city to be exercised whenever the council deems it expedient, and therefore the contract is legal, although it fails to secure to the city the right to purchase.

contract being given their common meaning with respect to the particular subject-matter.[49]

2. Contracts For Public Utilities. The corporation in contracting with and granting franchises to others for furnishing light and water, for example, does not exercise its governmental or legislative functions as respects the rates and charges to be paid, and the rules of law applicable to contracts between individuals apply.[50]

3. Stipulation For Reference. The stipulation usually inserted in modern construction contracts, referring all questions arising on the execution thereof to the engineer, architect, or other expert for final decision, does not, it seems, include the legal question whether the contractor has become liable to the municipality for the liquidated damages provided in the contract.[51]

4. Construction by Parties. The general rule holding parties to that construction of a doubtful clause of a contract placed upon it, and acted upon, by themselves, has been applied to municipal contracts,[52] although it has been held that the court is free to construe the contract without being influenced by such considerations in cases involving the public interests.[53]

49. Capital City Gaslight Co. *v.* Des Moines, 93 Iowa 547, 61 N. W. 1066 (where by ordinance a city contracted to use gas furnished by a gaslight company for ten years, provided that at any time after three years from the adoption of the ordinance the council might order the discontinuance of all or any street lamps within the "business section" of the city and substitute electric lights therefor without liability for lamps so discontinued, and it was held that the words "business section" meant that part of the city which was chiefly devoted to business purposes and in which stores, factories, offices, shops, and the like predominated in contradistinction to those parts chiefly used for resident and dwelling purposes or which were vacant or unoccupied); Saltsburg Gas Co. *v.* Saltsburg, 138 Pa. St. 250, 20 Atl. 844, 10 L. R. A. 193 (holding that under a contract to furnish natural gas "for all street lamps" the kind of lamps intended must be determined by the common use of the word where natural gas is used for street lighting, and that where open lights only are used for such purposes, the gas company cannot require the municipality to use inclosed lights in order to reduce the amount of gas consumed).

50. Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981. A city in making a contract for the purpose of supplying gas to its inhabitants acts as a private corporation, and is subject to the same duties, liabilities, and disabilities. Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

The grant of a franchise is liberally construed in favor of public right. Indiana R. Co. *v.* Hoffman, 161 Ind. 593, 69 N. E. 399; Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963 [*affirming* 37 Fed. 832]. And a monopoly is to be sustained only upon plain and unambiguous terms of unequivocal grant of such power. Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

51. King Iron Bridge, etc., Co. *v.* St. Louis, 43 Fed. 768, 10 L. R. A. 826.

Inspection and approval.— Where a contract to furnish materials for the use of a particular department on requisitions to be made by it provided that all materials were "to be subject to the inspection of the superintendent of repairs and supplies" of such department, and no other provision rendered his certificate conclusive or made it the basis of payment, it was held that the only effect of the provision recited was to subject the materials furnished to the inspection of and approval of such superintendent and that neither party was concluded thereby. Bigler *v.* New York, 9 Hun (N. Y.) 253.

52. Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229; St. Louis *v.* Laclede Gas Light Co., 155 Mo. 1, 55 S. W. 1003 (where defendant had contracted to do certain street lighting for a city, the contract containing provisions which the city claimed required defendant to pay it semiannually a certain per cent of gross receipts, which construction defendant denied, and it appearing that for five years the parties had failed to comply with or take steps to enforce such provision, it was held that such failure might be regarded as an interpretation by the parties that defendant was not required to make such payment and that therefore the city was estopped to maintain an action for its collection); St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121.

53. National Waterworks Co. *v.* School District No. 7, 48 Fed. 523, holding that the reason of the rule under which the construction of a doubtful provision by the parties to a contract, affecting their interest only, may influence the court in its judgment, upon the reasonable presumption that the parties are in a condition to best know what was meant or intended by the contract, is weakened when applied to municipal corporations because they must of necessity have their affairs conducted by persons selected according to law who often have but a general public interest in the matters intrusted to them, are frequently changed, and not always the best qualified to construe contracts made by their predecessors.

5. Amount or Rate of Compensation. Rates for municipal service stipulated in a municipal contract must be observed by both parties,[54] but not for a longer period than allowed by law.[55] A contract fixing a rate for a particular year is not in the nature of an agreement running from year to year, and cannot be held to fix the rate for subsequent years;[56] and in the absence of special provision the corporation is entitled to the same rates and customs enjoyed by private corporations and persons.[57]

K. Modification and Rescission — 1. In General. Municipal contracts may not be modified or rescinded by unauthorized officers, but only by corporate action,[58] and in the manner prescribed for their execution.[59] But it seems that waiver of conditions may be made by implication.[60] A municipal contract will not be rescinded in equity merely because of excessive consideration,[61] irregularity in payment,[62] or unproven charges of fraud.[63] And the federal courts will not inquire into the motives of the council in passing an ordinance which is the basis of a contract.[64] But in some states municipal contracts, whether based on ordinance or otherwise authorized, are held to be administrative and not legisla-

54. Decatur Gaslight, etc., Co. *v.* Decatur, 24 Ill. App. 544 [*affirmed* in 120 Ill. 67, 11 N. E. 406], holding that where an ordinance granted certain privileges to a gas company in consideration that the latter should "furnish gas . . . at rates as favorable as that furnished by" another company named, and after the passage of the ordinance the company named therein reduced its rates, the city was not liable to pay any higher price than such reduced rate.

Effect given to entire contract.— Where a lighting company contracts with a city to light its streets at a stipulated sum for each lamp per year, and to keep all lamps lighted every night in the year, except when the moon gives sufficient light, and a proviso is added thereto that the city shall not be liable for rent for any lamp for any night when lamps are not lighted, full force and effect must be given to the entire contract, including the proviso, and the city is not liable for rent of lamps on moonlight nights, when lamps are not lighted. Winfield *v.* Winfield Gas Co., 37 Kan. 24, 14 Pac. 499.

Price not fixed.— Where the publisher of a German newspaper, under the direction of municipal officers but without any contract as to price to be paid, published certain advertisements in the newspaper, the matter of which was sent to him in English in a larger size type than was ordinarily used in his paper, and in endeavoring to imitate it in German text he caused the advertisements to occupy a larger space in the paper than they would have occupied if printed in his ordinary type, it was held that he was entitled to payment for space that would have been occupied if the matter had been printed in the ordinary type of the paper and at the rates ordinarily charged by him for such space, but not for the space actually occupied. Mierson *v.* New York, 6 Daly (N. Y.) 74.

55. State *v.* Ironton Gas Co., 37 Ohio St. 45.

Duration of contract see *supra*, IX, E, 2.

56. Harlem Gaslight Co. *v.* New York, 33 N. Y. 309.

57. Touchard *v.* Touchard, 5 Cal. 306.

58. Terre Haute *v.* Lake, 43 Ind. 480; United States Electric Fire-Alarm Co. *v.* Big Rapids, 78 Mich. 67, 43 N. W. 1030.

Verbal instructions by members of a city council to the city marshal to notify a waterworks company to discontinue its supply of water to the city, and evidence of the marshal's having accordingly done so, are incompetent to prove a discontinuance of the contract existing between the city and the company for the supplying of water to the former, since corporate action alone could discontinue such contract, and this could only be proved by written minutes and records of the council. Greenville *v.* Greenville Water-Works Co., 125 Ala. 625, 27 So. 764.

Authority conferred on officer.— Where a contract for street cleaning provided that the work should be done according to specifications, declaring that the roadway should be cleaned from curb to curb, and that the work should be performed under the supervision and direction, and subject to the approval, of the city surveyor, the surveyor had authority to extend the work of cleaning beyond what was required by the contract. Mott *v.* Utica, 114 N. Y. App. Div. 736, 100 N. Y. Suppl. 150.

59. Sacramento *v.* Kirk, 7 Cal. 419.

Ordinance.— A city contract specially authorized by ordinance can only be altered by ordinance or some other properly authenticated act. Sacramento *v.* Kirk, 7 Cal. 419.

60. Newport News *v.* Potter, 122 Fed. 321, 58 C. C. A. 483.

61. Denver *v.* Hubbard, 17 Colo. App. 346, 68 Pac. 993.

62. Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

63. Madden *v.* Van Wyck, 35 Misc. (N. Y.) 645, 72 N. Y. Suppl. 135. If a city would repudiate a contract made by its agent, on the ground of fraud, the fraud must be clearly proved. If circumstances are relied on to prove it, such circumstances must be reconcilable with no other theory than that of fraud. Baird *v.* New York, 96 N. Y. 567.

64. New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96.

tive in character, and therefore subject to judicial investigation on charges of fraud in making and modification.[65]

2. Power to Modify or Rescind. Municipal corporations do not possess sovereign power to abrogate or change contracts at will and pleasure;[66] but may repudiate, modify, or rescind them only under the same conditions and for the same causes as private corporations or persons,[67] as when the contract is void,[68] or the right to revoke is reserved.[69] Even if a municipality has the right to rescind a contract it can only do so by giving notice of the rescission to the other party,[70]

65. Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678.

66. *California.*— Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682, holding that where the board of supervisors of a city authorized the committee on health to purchase certain land, and the deed was delivered to the committee and presented to the board, and directed by it to be held "in escrow" till the consideration therefor should be allowed, and a warrant for the consideration was issued and ordered by the board to be paid, and was duly audited and delivered to the grantor, the board could not, by repealing its action as to the purchase, divest the grantor of his right to collect the warrant.

Illinois.— Quincy *v.* Bull, 106 Ill. 337.

Indiana.— Vincennes *v.* Citizens Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485. A contract with a gas company, whereby the city expressly reserves its administrative authority to keep the posts, lamps, and burners in good repair, if the company should fail to do so, and the right to test the quality of the gas furnished and the capacity of the burners at all times, also to establish additional lamps and get gas from other works as the public interests may require, is valid, and cannot be repealed, impaired, or changed by the city by ordinance or otherwise. Indianapolis *v.* Indianapolis Gas-Light, etc., Co., 66 Ind. 396.

Iowa.— Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Louisiana.— State *v.* Heath, 20 La. Ann. 172, 96 Am. Dec. 390, holding that the city of New Orleans in her corporate capacity must be regarded and treated as an individual person, and when she enters into a contract with a third party through her officers by authority of the ordinance of the common council, she is not at liberty to annul the contract so made by an ordinance repealing the ordinance authorizing the contract.

Massachusetts.—Hudson Electric Light Co. *v.* Hudson, 163 Mass. 346, 40 N. E. 109.

Missouri.— Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61.

Nebraska.— Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 3 N. W. 870.

New Jersey.— Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809.

Ohio.— Where a city contracted with a company to light the city, and the company lighted a portion, but delayed lighting the balance by reason of the submission of certain disputed questions to arbitration, as the contract provided, and because of a suit brought to determine the validity of the contract, and undertook to perform the contract as soon as notified by the city authorities, such delay was not unreasonable, and did not authorize the city to rescind the contract, the city having made no previous objection thereto. Cincinnati *v.* Edison Electric Co., 9 Ohio S. & C. Pl. Dec. 438, 6 Ohio N. P. 416.

Pennsylvania.— Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

Texas.— Galveston *v.* Morton, 58 Tex. 409.

United States.— A city cannot avoid a contract with a water company, which was ratified by its electors, after it has been accepted and performed by the company and has also been complied with by the city for a number of years, on the ground that a number of ballots cast at the election for the ratification of such contract were defective, where the rejection of such defective ballots would not have affected the result of the election. Crebs *v.* Lebanon, 98 Fed. 549.

Canada.—Macartney *v.* Haldimand County, 10 Ont. L. Rep. 668.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 692, 693.

License and grant or contract distinguished. — Where a city, by ordinance, grants the right to a party to construct waterworks at his expense to supply the city and its inhabitants with water, with the right to lay water pipes under the surface of the streets and alleys, for a period of years, and the grant is accepted and the work partially performed, the privilege of the use of the streets is not a mere license, revocable at the pleasure of the city council, but it is a grant under an express contract, for an adequate consideration, and is binding as a contract. When there is power in a city to make a contract, there is power to make one that will bind the parties. Quincy *v.* Bull, 106 Ill. 337.

67. Whenever a municipal corporation engages in things not public in their nature, it acts as a private individual; it no longer legislates, but contracts, and is as much bound by its engagements as is a private person. Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

68. East St. Louis Gas Light, etc., Co. *v.* East St. Louis, 47 Ill. App. 411.

69. Newport *v.* Phillips, 40 S. W. 378, 19 Ky. L. Rep. 352; Leader *v.* Austin, 1 Tex. App. Civ. Cas. § 439.

70. Allen *v.* Taunton, 19 Pick. (Mass.) 485, holding that where a contract was made

particularly where the contract itself requires notice.[71] Immaterial modifications may be made by the council, even of contracts let on biddings,[72] although not without the assent of the contractor;[73] nor may the price of such contract be increased.[74] But it seems that the legislature may under the police power[75] authorize the revocation of a municipal covenant for quiet enjoyment of lands as a cemetery.[76] The common council has power to bind a municipality by modification of a contract between it and another.[77]

3. LIABILITY ON RESCINDED CONTRACT. After effectual revocation of a voidable contract no action can be maintained upon it;[78] but an ineffectual effort to revoke does not affect the right of action.[79] If after revocation the city continues to take benefits under the contract, it is liable in assumpsit.[80]

L. Performance and Breach. Municipal contracts, being upon the same footing as those of natural persons,[81] may not be breached with impunity,[82] even when the legislature has assumed to authorize it.[83] And statutory requirements may not be waived or departed from for the accommodation of either party;[84] but the merely contractual conditions are subject to waiver,[85] and estoppel;[86] and the rules of mutual performance and liability are generally identical in municipal and private contracts.[87] It seems, however, that where the indebtedness of a city

in pursuance of a vote of a town, but before the contract was performed the vote was rescinded, that the person with whom the contract was made was not affected by the rescission, not having had notice thereof. The court did not decide as to whether it would have been otherwise if notice had been given.

71. Indianapolis *v.* Bly, 39 Ind. 373, holding that in an action against a city on a contract employing plaintiff for one year to light street lamps, and authorizing defendant to terminate the contract by giving one month's notice in writing, where the evidence showed that defendant's authorities undertook to terminate the contract for the reason that they had made, or could make, a contract with others more advantageous to the city, or supposed to be so, and without giving plaintiff thirty days' notice in writing, a judgment for plaintiff was proper.

72. Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 6 Ohio N. P. 208.

73. Middletown Drainage Co. *v.* Middletown, 1 Dauph. Co. Rep. (Pa.) 105. Where two municipalities have been empowered by law to supply one another with water by agreement, and have made a contract for ten years, in the absence of a limitation on their power to contract they may modify such contract, or substitute a new one, provided the modification or new contract is reasonable and proper. Arnold *v.* Pawtucket, 21 R. I. 15, 41 Atl. 576.

74. People *v.* Clarke, 79 N. Y. App. Div. 78, 79 N. Y. Suppl. 1111 [*reversed* on other grounds in 174 N. Y. 259, 66 N. E. 819].

75. Police power see *infra*, XI, A.

76. Brick Presb. Church Corp. *v.* New York, 5 Cow. (N. Y.) 538.

77. Weston *v.* Syracuse, 82 Hun (N. Y.) 67, 31 N. Y. Suppl. 186 [*reversed* on other grounds in 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678].

78. East St. Louis Gas Light, etc., Co. *v.* East St. Louis, 47 Ill. App. 411; East St. Louis *v.* East St. Louis Gaslight, etc., Co., 19 Ill. App. 44; Newport *v.* Phillips, 40 S. W. 378, 19 Ky. L. Rep. 352.

79. Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764; and other cases cited *supra*, IX, K, 2.

80. State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15; U. S. Water Works Co. *v.* Du Bois, 176 Pa. St. 439, 35 Atl. 251. Where, after a city let a contract for its printing to a newspaper, the paper was leased, and the contract assigned to the lessee, who continued to publish the paper, and performed work under the contract, the city, by accepting such work, waived its right to declare the contract forfeited by reason of the assignment. Norton *v.* Roslyn, 10 Wash. 44, 38 Pac. 878.

81. Jersey City *v.* Harrison, 71 N. J. L. 69, 58 Atl. 100.

82. New Orleans *v.* St. Louis Church, 11 La. Ann. 244.

83. Western Saving Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730.

84. Carpenter *v.* Yeadon Borough, 208 Pa. St. 396, 57 Atl. 837.

85. Creston Waterworks Co. *v.* Creston, 100 Iowa 687, 70 N. W. 739. Where, after a city let a contract for its printing to a newspaper, the paper was leased, and the contract assigned to the lessee, who continued to publish the paper, and performed work under the contract, the city, by accepting such work, waived its right to declare the contract forfeited by reason of the assignment. Norton *v.* Roslyn, 10 Wash. 44, 38 Pac. 878.

86. Schliess *v.* Grand Rapids, 131 Mich. 52, 90 N. W. 700; Kennedy *v.* New York, 99 N. Y. App. Div. 588, 91 N. Y. Suppl. 252.

87. Kaukauna Electric Light Co. *v.* Kaukauna, 114 Wis. 327, 89 N. W. 542. See Toomey *v.* Bridgeport, 79 Conn. 229, 64 Atl. 215, holding that where a contract for the removal of the sewage of a city for a term of years provided that the sum payable thereunder in any year should not exceed the amount appropriated for the use of the board

incurred under a contract already exceeds the constitutional limit, and the fund appropriated for the purpose of the contract is exhausted, damages cannot be recovered for a breach of the contract by the city.[88] A municipality, to the same extent as an individual, may rely on a provision in a contract that performance by the other party shall be approved by or satisfactory to it, or a particular officer, board, or committee.[89]

M. Rights and Remedies on Municipal Contracts[90] — **1. Contractor's Remedies — a. In General.** Remedies to contractors under municipal contracts are those ordinary ones open to parties to private contracts: (1) Actions to recover damages for breach of contract;[91] (2) assumpsit, general or special, to recover the sum justly due from the municipality, on the facts of the case;[92] and (3) replevin or detinue to recover chattels delivered under a void contract.[93] Mandamus also lies when the municipality, or any officer or board thereof, is refusing or culpably

of health for the city for that year, the city could not compel the contractors to perform their part of the contract in case no appropriation should be made to meet the payments nor could the contractors sue the city for breach of contract.

Interference by unauthorized officer or board.— Where a board of health, which was not subordinate to the city authorities who made a contract for the construction of a sewer, interrupted the work of the contractor causing him to suffer loss, the city was not liable for the effect of such interference. Jones *v.* New York, 9 N. Y. St. 247. See also Ready *v.* Tuskaloosa, 6 Ala. 327.

Acceptance of inferior or less valuable articles.— Where contracts are made by the city on sealed bids and proposals under the statutes, specifying with particularity the articles to be delivered, there is no power in any board or officer to receive in compliance therewith inferior or less valuable articles under the pretext that they will answer the purposes of the city as well or better than those specified. Bigler *v.* New York, 9 Hun (N. Y.) 253.

Option to purchase gas plant.— Where a city grants to a company the exclusive privilege of laying gas pipes under its streets, for a term of years, on condition that the city shall have the privilege of purchasing the plant at the expiration of twenty-five years, at such price as may be determined by five disinterested men, two of whom are to be chosen by the city, two by the company, and the fifth by those four, the city must make its election as to the purchase at a price to be thereafter determined by appraisers to be thereafter appointed, and until it exercises such option the company is not bound to proceed with the appraisement; and its refusal to appoint two appraisers after the city has appointed two is not a breach of its contract. Montgomery Gas Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

88. Drbew *v.* Altoona City, 121 Pa. St. 401, 15 Atl. 636.

Limitation of indebtedness see *infra*, XV, A, 3.

89. Silsby Mfg. Co. *v.* Chico, 24 Fed. 893.

Change of committee after contract.— Where a steam engine satisfactory to a committee of a town is furnished, and after the contract is made, and before tender of the engine, the members of the committee are changed, the committee to be satisfied is the committee existing when the contract is performed and the tender made. Silsby Mfg. Co. *v.* Chico, 24 Fed. 893.

90. **Actions** generally see *infra*, XVII.

91. Newport *v.* Newport Light Co., 30 S. W. 606, 17 Ky. L. Rep. 31; Hallock *v.* Lebanon, 215 Pa. St. 1, 64 Atl. 362. See, generally, Contracts. Where a borough entered into a valid contract with a water company to supply it with water for twenty years, and the water company accepted the terms and completed its works, and continued to operate them and comply in all respects with the ordinance, a subsequent erection by the borough of waterworks to supply the inhabitants in opposition to the duly authorized company renders the borough liable to such company for the ensuing damages. Bennett Water Co. *v.* Millvale, 200 Pa. St. 613, 50 Atl. 155, 202 Pa. St. 616, 51 Atl. 1098.

92. Farwell *v.* Rockland City, 62 Me. 296; Bigelow *v.* Perth Amboy, 25 N. J. L. 297; Nashville *v.* Toney, 10 Lea (Tenn.) 643; Johnson *v.* Alderson, 33 W. Va. 473, 10 S. E. 815. And see Brown *v.* Pomona Bd. of Education, 103 Cal. 531, 37 Pac. 503; Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Endriss *v.* Chippewa County, 43 Mich. 317, 5 N. W. 632. And see, generally, Assumpsit, Action of.

Action on order or warrant.— There can be no doubt as to the right of the holder of a corporation order or warrant to maintain an ordinary civil action upon it; nor can there be any doubt that he is not bound to resort to the extraordinary remedy of mandate. Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184.

Action for materials furnished.— The right of a creditor to recover for materials furnished to a city at the instance of its common council, and which it had the power to purchase, does not depend on the use to which they were applied. Bigelow *v.* Perth Amboy, 25 N. J. L. 297.

Action on implied contract see *infra*, IX, M, 1, b.

93. La France Fire Engine Co. *v.* Syracuse, 33 Misc. (N. Y.) 516, 68 N. Y. Suppl. 894. See, generally, Detinue; Replevin.

neglecting to perform a ministerial duty owing to the relator, such as levying a tax,[94] or paying a warrant under appropriation.[95] And when the remedy at law is inadequate, equity affords relief by specific performance,[96] or, in case of irreparable injury threatened, by injunction.[97] But it seems that a contractor for city improvements has not such a vested right in the special assessment as to prevent its impairment by subsequent legislation.[98]

b. Implied Contracts. Municipal corporations, like individuals and private corporations, may be liable to action on implied contracts.[99]

c. Recovery of Unliquidated Sum. Whether a recovery may be had of *quantum meruit* or *quantum valebant* for work done or articles furnished for a municipality under a void contract or no contract seems to be dependent upon the peculiar merits of each case; in some the law being allowed to prevail and defeat the claim;[1] and in others equity asserting its authority to prevent a miscarriage of justice under the rigid rules of law and allowing it.[2]

d. Defenses. In addition to the usual defenses of *non assumpsit*,[3] illegality,[4] plaintiff's non-performance,[5] statute of limitations,[6] and statute of frauds,[7] to actions on contracts, a municipality may rely upon the peculiar defenses of *ultra vires*,[8] fatal informality,[9] non-compliance with statutes,[10] and want of authority on the part of the officer or board making the contract.[11] But the doctrine of estoppel has been successfully applied in some cases,[12] and in others the rule as to

94. State *v.* Helena, 24 Mont. 521, 63 Pac. 99; State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15. See, generally, MANDAMUS.

95. Mandamus, not assumpsit, is the remedy against the board of directors of the Chicago public library, to enforce payment on its contracts; such board being only a department of the city with power to draw vouchers on a special fund in the city treasury. Chicago Public Library *v.* Arnold, 60 Ill. App. 328. And see, generally, MANDAMUS.

96. Buck *v.* Lockport, 43 How. Pr. (N. Y.) 361. See, generally, SPECIFIC PERFORMANCE.

97. Walla Walla Water Co. *v.* Walla Walla, 60 Fed. 957. See, generally, INJUNCTIONS.

98. Palmer *v.* Danville, 166 Ill. 42, 46 N. E. 629.

99. Montgomery Brush Electric Light, etc., Co. *v.* Montgomery, 114 Ala. 433, 21 So. 960; Montgomery County *v.* Barber, 45 Ala. 237; Farwell *v.* Rockland, 62 Me. 296; Port Jervis Water Works Co. *v.* Port Jervis, 71 Hun (N. Y.) 66, 24 N. Y. Suppl. 497 [*affirmed* in 151 N. Y. 111, 45 N. E. 388]; Austin *v.* Bartholomew, 107 Fed. 349, 46 C. C. A. 327. See also Brown *v.* Pomona Bd. of Education, 103 Cal. 531, 37 Pac. 503.

Implied contracts see *supra*, IX, G, 3.

1. McSpedon *v.* New York, 7 Bosw. (N. Y.) 601, 20 How. Pr. 395. See *supra*, IX, G, 3.

2. Condran *v.* New Orleans, 43 La. Ann. 1202, 9 So. 31; Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54]; Harlem Gas Light Co. *v.* New York, 3 Rob. (N. Y.) 100; Leonard *v.* Long Island City, 20 N. Y. Suppl. 26; Memphis Gas-Light Co. *v.* Memphis, 93 Tenn. 612, 30 S. W. 25. See *supra*, IX, G, 3.

3. 3 Blackstone Comm. 305; Gould Pl. 285; Stephen Pl. 160. See, generally, ASSUMPSIT, ACTION OF.

4. Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 32 S. E. 907.

5. Withers *v.* New York, 92 N. Y. App. Div. 147, 86 N. Y. Suppl. 1105. And see *supra*, IX, L; and, generally, CONTRACTS.

6. Nashville *v.* Toney, 10 Lea (Tenn.) 643. See, generally, LIMITATIONS OF ACTIONS.

7. Wade *v.* Newbern, 77 N. C. 460. And see, generally, FRAUDS, STATUTE OF.

8. Miller *v.* Goodwin, 70 Ill. 659; New Jersey, etc., Tel. Co. *v.* Jersey City Fire Com'rs, 34 N. J. Eq. 117 [*affirmed* in 34 N. J. Eq. 580]. See *supra*, III, H; IX, A, 5; IX, H, 1.

9. Los Angeles Gas Co. *v.* Toberman, 61 Cal. 199. See *supra*, IX, G, H.

10. Savage *v.* Springfield, 83 Mo. App. 323; Suburban Electric Light Co. *v.* Hempstead, 38 N. Y. App. Div. 355, 56 N. Y. Suppl. 443. See *supra*, IX, E, F, G, H.

N. Y. Building Code, § 155, provides that, if it be determined that a building is unsafe, the justice trying the cause shall issue a precept to the commissioner of buildings, commanding him to take down the building, and that he shall execute it by employing such labor and assistance, etc., as may be necessary. He is then required to make a return to the justice with an indorsement of the costs and expenses, whereupon the justice shall tax and adjust the amount indorsed, and provision is made for subsequent payment by the controller. It was held that a contractor employed by the commissioner of buildings, acting under a precept, cannot recover on the contract until the precept has been returned by the building commissioner and an adjustment made, as directed by the statute. John H. Parker Co. *v.* New York, 110 N. Y. App. Div. 360, 97 N. Y. Suppl. 200.

11. See *supra*, IX, B, C; IX, H, 1.

12. Estoppel to deny validity of contract see *supra*, IX, H, 4.

a recovery *pro tanto* on a partially invalid contract.[13] A city cannot receive gas from certain gas works, and then refuse to pay for it, on the ground that the works are a nuisance, when they have never been properly declared to be so.[14] In an action against a municipality to recover for the full amount of a contract, as damages for breach, it is no defense that payments were to be made in instalments and that an appropriation has been made to cover the amount of the first payment only, and not for the full amount of the contract.[15]

e. Pleading and Evidence — (I) *Pleading.*[16] The mode of pleading upon actions brought on municipal contracts depends upon the local statutes, and varies greatly under the common-law and code systems; but there is an apparent inclination in all states to enforce the rules more rigidly than in actions between private parties.[17] Thus it is ruled that in an action against a city for annulment of a contract plaintiffs must set out *in hæc verba* the orders of the council making and annuling the contract;[18] must allege that a contract sued on was made in the manner and form provided by statute;[19] that it has been ratified by the electorate, where this is required;[20] that there were revenues to pay the instalment;[21] and, if not made by the council, the contract may not be sued on as the contract of the municipality.[22]

(II) *Evidence.*[23] The general rules of evidence are applicable in all actions on municipal contracts, those most frequently invoked being the ones determining the admissibility of acts done, or words written or spoken by municipal officers or agents.[24] The general rule upon this subject is that if the offered act or word was done or spoken by an officer or agent to whom the subject was committed,[25] or in the line and scope of official duty,[26] it is admissible; otherwise it is incompetent.[27]

f. Power of Council to Provide New Remedy. Where a legislature has withheld from contractors and subcontractors not only the right to a lien on public buildings, but also the right to attach money in the hands of the city, the common council of a city has no authority to provide a new remedy in the nature of an attachment, lien, or trust of any kind, whereby subcontractors may enforce payment of their claim out of money due the principal contractor from the city.[28]

2. Municipal Rights and Remedies.[29] The rules of *in pari delicto* and *potior est conditio defendentis* are not applicable against the public,[30] and will not defeat a bill by a municipality for restoration to rights lost under an *ultra vires* contract;[31] and a light company is not absolved from its contract obligations by a

13. Effect of partial invalidity of contract see *supra*, IX, H, 3.

14. Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

15. Hallock *v.* Lebanon, 215 Pa. St. 1, 64 Atl. 362.

16. See also *infra*, XVII, M.

17. Toledo *v.* Libbie, 19 Ohio Cir. Ct. 704, 8 Ohio Cir. Dec. 589; Norton *v.* Roslyn, 10 Wash. 44, 38 Pac. 878; La France Fire Engine Co. *v.* Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Herman *v.* Oconto, 100 Wis. 391, 76 N. W. 364.

18. Terre Haute *v.* Lake, 43 Ind. 480.

19. Goodyear Rubber Co. *v.* Eureka, 135 Cal. 613, 67 Pac. 1043; Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127.

20. Harrodsburg *v.* Harrodsburg Water Co., 64 S. W. 658, 23 Ky. L. Rep. 956.

21. Waterworks Co. *v.* San Antonio, (Tex. Civ. App. 1898) 48 S. W. 205.

22. Damon *v.* Granby, 2 Pick. (Mass.) 345.

23. See also *infra*, XVII, N.

24. Howell Electric Light, etc., Co. *v.* Howell, 132 Mich. 117, 92 N. W. 940; St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495 [*affirming* 12 Mo. App. 573]; Nelson *v.* New York, 1 Silv. Sup. (N. Y.) 471, 5 N. Y. Suppl. 688 [*affirmed* in 131 N. Y. 4, 29 N. E. 814].

25. Nelson *v.* New York, 1 Silv. Sup. (N. Y.) 471, 5 N. Y. Suppl. 688 [*affirmed* in 131 N. Y. 4, 29 N. E. 814].

26. In support of the defense that by collusion between the contractor and the city officers the contract on which suit was brought was intentionally let to the highest instead of the lowest bidder, cards in which the contractor offered to sell material like that furnished the city at lower prices than those named in his bid are admissible in evidence. Nelson *v.* New York, 1 Silv. Sup. (N. Y.) 471, 5 N. Y. Suppl. 688 [*affirmed* in 131 N. Y. 4, 29 N. E. 814].

27. Halbut *v.* Forrest City, 34 Ark. 246.

28. Lesley *v.* Kite, 192 Pa. St. 268, 43 Atl. 959.

29. Debt due municipality not discharged in bankruptcy see Bankruptcy, 5 Cyc. 400.

30. Detroit *v.* Detroit City R. Co., 56 Fed. 867.

31. The rule that both parties to an *ultra*

municipal advertisement for a substitute contract;[32] nor a sewage contractor by the emergent use of the defective plant put in by him.[33] But a city which has authorized its stock in a private corporation to be transferred by the private contract of the mayor, as his own, may not sue on said contract as undisclosed principal.[34] Nor may it sue on a contract made by it to recover damages sustained by private persons;[35] nor on an *ultra vires* contract.[36] A municipality may maintain a bill for rescission of a contract procured by bribery of the alderman making it.[37]

3. Rights and Remedies of Third Persons. A third person, for whose benefit or protection a contract has been made by a municipality with a private corporation or company, may maintain an action thereunder in his own name to recover damages or *quantum meruit* against either party to the contract.[38]

X. Municipal Expenses.[1]

A. In General. Municipal expenses include all such items as are incidental to the proper exercise of corporate functions in administering the government of the municipality.[2]

B. Discretion to Incur and Allow. Municipal expenses are generally committed to the discretion of the municipal council,[3] but in some instances to that of special officers.[4] If the expenses are *intra vires* their allowance by the municipal authority is conclusive of their validity,[5] but if *ultra vires* they are subject to challenge before the courts.[6] Similarly, if the expenses be not vitally necessary but wholly in the discretion of the municipality, then the refusal or failure of the governing body to authorize or approve them is conclusive of the claim, and the courts will not revise the municipal action;[7] but not so with expenses for work or materials required by statute or charter to be provided or furnished to the corporation.[8]

vires contract are *in pari delicto*, and therefore a court of equity will not interpose to restore to one of them rights which it has thus parted with, is inapplicable to a municipal corporation whose trustees attempt to make an invalid grant, and in such case the right of the public to equitable relief is not prejudiced. Detroit *v.* Detroit City R. Co., 56 Fed. 867.

32. Lansdowne *v.* Citizens' Electric Light, etc., Co., 206 Pa. St. 188, 55 Atl. 919.

33. Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

34. Huntsville *v.* Huntsville Gaslight Co., 70 Ala. 190.

35. New Haven *v.* New Haven, etc., R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256.

36. Portland *v.* Bituminous Paving Co., 33 Oreg. 307, 52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527.

37. Seltzer *v.* Metropolitan Electric Co., 199 Pa. St. 100, 48 Atl. 861.

38. Gorrell *v.* Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513; Nashville *v.* Toney, 10 Lea (Tenn.) 643.

1. **Contracts of city** see *supra*, IX.

Expenses of or for: County see Counties, 11 Cyc. 325. District of Columbia, see District of Columbia, 14 Cyc. 526. Improvements see *infra*, XIII. Support of pauper see Paupers.

Liability for acts of mob see *infra*, XIV, A, 5, f.

Liability within statute of limitations see Limitations of Actions, 25 Cyc. 963.

Statute of limitations affecting liability for municipal expenses see Limitations of Actions, 25 Cyc. 963.

2. See Ingersoll Pub. Corp. 454. See also cases cited *infra*, note 3 *et seq.*

3. White *v.* Decatur, 119 Ala. 476, 23 So. 999; Kendall *v.* Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118.

4. Frank *v.* St. Louis, 145 Mo. 600, 47 S. W. 508, holding that a city ordinance providing that, when a physician is called on by the coroner to conduct a *post-mortem* examination, the mayor shall be authorized to allow such physician a fee not to exceed twenty-five dollars, gives the mayor a discretion, which having been exercised by refusal of allowance is conclusive. See also Ingersoll Pub. Corp. 65, 201, 454. *Compare* James *v.* Seattle, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957.

5. Chicago *v.* Williams, 80 Ill. App. 33; Frank *v.* St. Louis, 145 Mo. 600, 47 S. W. 508.

6. Claflin *v.* Hopkinton, 4 Gray (Mass.) 502; Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110. See also Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547.

7. Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219.

8. Tucker *v.* Rochester, 7 Wend. (N. Y.) 254.

C. Classification[9] — **1. In General.** It has been said that the details of municipal administration are so varied and numerous as to render classification impossible.[10] However, such expenses have been divided into two distinct heads: (1) Ordinary or current expenses;[11] and (2) extraordinary expenses.[12]

2. Ordinary. In the ordinary expenses of a municipality may be included all those incidental items of municipal expenditure which arise casually in the usual discharge of corporate functions,[13] or are referable to some express municipal contract or undertaking,[14] or to the authorized operations of some established plant or department of the corporation, and therefore based upon an implied contract for *quantum meruit* or *quantum valebant*.[15] They are properly called "current expenses" and are therefore payable out of current revenues.[16]

3. Extraordinary. To this class may be assigned all those unusual expenditures presented for allowance or payment out of the municipal treasury, made for the corporation without authority in cases of emergency, not foreseen or contemplated, as a great conflagration or flood or a sudden epidemic;[17] or arising in the course of construction of some extraordinary municipal improvement under contract, but not provided for therein;[18] or those of doubtful character, assumed to be incurred on the municipal credit, either with or without the action of the council, and questionable as *ultra vires* or non-municipal.[19] They are not properly within the term "current expenses" or "incidental expenses" and are not payable out of the fund appropriated therefor.[20] Payment of those even clearly within municipal purposes and powers may not safely be made without special authority from the governing body;[21] and their validity may be challenged in the courts by any interested party.[22]

D. Validity. In order to constitute a valid claim against the municipality,

The New York charter, providing that no expenses shall be incurred by any department or officers without an appropriation previously made, and that no charge shall exist against the city in excess of the amount appropriated for the several purposes, does not apply to services rendered for the city, where the charter contains a mandatory provision that the municipal assembly shall make an appropriation for the payment of such services, although in fact no appropriation is made. Dixon *v.* New York, 31 Misc. (N. Y.) 102, 63 N. Y. Suppl. 794.

9. Expenses for particular purposes see *infra*, X, E.

10. Ingersoll Pub. Corp. 454.

11. See *infra*, X, C, 2.

12. See *infra*, X, C, 3.

By statute in Georgia extraordinary expenses include expenses for education, for paving and macadamizing the streets, and for payment of the public debt. All others are ordinary current expenses. Rome *v.* McWilliams, 67 Ga. 106, 112.

13. McGowan *v.* Windham, 25 Conn. 86; 1 Blackstone Comm. 475.

14. Alexander *v.* Cincinnati, 2 Handy (Ohio) 183, 12 Ohio Dec. (Reprint) 393.

15. White *v.* Decatur, 119 Ala. 476, 23 So. 999; Malone *v.* Pittsburgh, 14 Pa. Co. Ct. 125; Denison *v.* Foster, (Tex. Civ. App. 1896) 37 S. W. 167 [*following* Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294].

16. Foland *v.* Frankton, 142 Ind. 546, 41 N. E. 1031; Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416; Fowler *v.* F. C. Austin Mfg. Co., 5 Ind. App. 489, 32 N. E. 596; Coffin *v.* Davenport, 26 Iowa 515; Coy *v.* Lyons City, 17 Iowa 1, 85 Am. Dec. 539; Laycock *v.* Baton Rouge, 35 La. Ann. 475.

17. These cataclysms, epidemics, and conflagrations call appropriately for state aid and relief; but because of their urgency and local operation they form necessarily items of municipal expenditure within the corporate functions in the exercise of the police power of the municipality. See *infra*, XI.

18. All municipal expenditures of this kind are usually required to be made upon popular vote of authority; but in such operations often arise unforeseen emergencies demanding expenditures not provided for, but requiring prompt action to prevent great loss, and thus causing extraordinary expenses. See *infra*, XI, A, 8.

19. See State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359. See also *infra*, X, D.

20. See Foland *v.* Frankton, 142 Ind. 546, 41 N. E. 1031.

21. Discretion as to payment of municipal claims, however proper, does not rest with the disbursing officer but with the council or board clothed with the corporate powers and functions. See *supra*, V.

22. Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660. *Compare* State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593, where, however, the appropriation was authorized. See also *infra*, X, D, text and note 26.

municipal expenses must be authorized,[23] *intra vires*,[24] and within the proper limit as to amount;[25] hence claims for such expenses when unauthorized,[26] excessive,[27] or *ultra vires*,[28] whenever lawfully challenged by the municipality or a proper officer,[29] or a taxpayer thereof,[30] or by the state,[31] will be disallowed by the courts, even though the governing body may have expressly authorized or approved them.[32]

E. For Particular Purposes — 1. Education. Expenses necessarily incurred on the part of the municipality in the maintenance of its schools and the promotion of public education, although entitled to favorable consideration because of the importance of the object,[33] stand upon no higher ground than other lawful municipal expenses, and cannot be paid out of the municipal treasury, if incurred

23. See cases cited *infra*, note 26.

24. See cases cited *infra*, note 28.

25. See cases cited *infra*, note 27.

26. Tucker *v.* Grand Rapids, 104 Mich. 621, 62 N. W. 1013, holding that an unauthorized agreement by police commissioners to pay the board of one waiting to testify in a criminal case and of a convicted felon remanded to the city prison under suspended sentence so as to be used as a witness will not be enforced against the municipality under the charter authorizing such commissioners to provide for a preservation of the public peace, prevention of crime, arrest of all offenders against the city, and providing that they should not incur any indebtedness or enter into a contract not included in the estimate for the fiscal year, unless specially authorized by the council.

Expenses for printing ordinances cannot be recovered by a newspaper when such printing was not authorized by the municipal authorities or by an officer empowered to give such authority. Thornton *v.* Sturgis, 38 Mich. 639.

No estoppel.— The fact that a city, for twenty years after the adoption of a state constitution prohibiting municipal corporations from making donations to private corporations, continued to make annual payments to an inebriate asylum, does not estop it from resisting further payments as unconstitutional. Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

Ratification of unauthorized contracts see *supra*, IX, I, 1.

27. Dixon *v.* New York, 31 Misc. (N. Y.) 102, 63 N. Y. Suppl. 794, holding that expenses in all other respects lawful and proper will be disallowed by the courts, if the entire sum appropriated or allowed by law to be appropriated for the department or service in which they are incurred has been expended. See also Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660, to the effect that if there be money to the credit of such fund, not equal in amount to the claim, the excess of the claim over the fund will be adjudged invalid.

28. See cases cited *infra*, this note.

For other than public purposes.— Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413; Jenkins *v.* Andover, 103 Mass. 94; Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366; Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6; State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896; Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; Citizens Sav., etc., Assoc. *v.* Topeka, 87 U. S. 655, 22 L. ed. 455.

In exercise of functions not municipal.— Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 458; New London *v.* Brainard, 22 Conn. 552; Westbrook *v.* Deering, 63 Me. 231; Baker *v.* Windham, 13 Me. 74; Waters *v.* Bonvouloir, 172 Mass. 286, 52 N. E. 500; Greenough *v.* Wakefield, 127 Mass. 275; Hood *v.* Lynn, 1 Allen (Mass.) 103; Fuller *v.* Groton, 11 Gray (Mass.) 340; Claflin *v.* Hopkinton, 4 Gray (Mass.) 502; Vincent *v.* Nantucket, 12 Cush. (Mass.) 103; Tash *v.* Adams, 10 Cush. (Mass.) 252; Babbitt *v.* Savoy, 3 Cush. (Mass.) 530; Bancroft *v.* Lynnfield, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; Nelson *v.* Milford, 7 Pick. (Mass.) 18; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660; Merrill *v.* Plainfield, 45 N. H. 126; Gove *v.* Epping, 41 N. H. 539; Halstead *v.* New York, 3 N. Y. 430; Morris *v.* People, 3 Den. (N. Y.) 381; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110; Martin *v.* Brooklyn, 1 Hill (N. Y.) 545; Lunkenheimer *v.* Hewitt, 10 Ohio Dec. (Reprint) 798, 23 Cinc. L. Bul. 433; Com. *v.* Gingrich, 10 Pa. Dist. 747, 25 Pa. Co. Ct. 579, 8 Del. Co. 331, 17 Montg. Co. Rep. 205; Com. *v.* Erie City, 15 York Leg. Rec. (Pa.) 117; Sherman *v.* Carr, 8 R. I. 431; Fiske *v.* Hazard, 7 R. I. 438; Briggs *v.* Whipple, 6 Vt. 95; James *v.* Seattle, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957.

Ultra vires contracts see *supra*, III, H; IX.

29. Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660.

30. Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648.

31. State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

32. Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648; James *v.* Seattle, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957.

33. See U. S. Rev. St. (1878) §§ 516–519 [U. S. Comp. St. (1901) 279–280]. *Compare* Port Arthur High School Bd. *v.* Ft. William, 25 Ont. App. 522, construing 60 Vict. c. 14, § 73.

or even warranted contrary to the constitution,[34] or incurred by a distinct corporation.[35]

2. Sanitation. Expenses which are necessarily incurred pursuant to statute in the preservation of the municipal health, whether in the treatment of patients in the municipal hospital,[36] or a statistical registration of the municipality by the board of health,[37] constitute valid claims against the municipality. Expenses of this character, ordinary and extraordinary, are often incurred in the exercise of the police power[38] and are chargeable to the corporation as matters of prime municipal necessity.[39]

3. Elections. All election expenses accruing within municipal boundaries, including registration expenses,[40] are, under statutes or equitable rulings of the courts, generally to be borne by the state, county, town, or municipality, according to the nature of the election;[41] and where the expenses are incurred for or are necessary to them all or to more than one, then they are equitably apportioned among them.[42] But it seems that in some states under special statutes or customs certain municipal election expenses are borne by town or county,[43] and the expenses of certain non-municipal elections within the corporate boundaries are paid by the municipality.[44]

4. Litigation — a. Attorneys' Fees. Amongst the items of costs of litigation chargeable against a municipality are fees of special attorneys, who without express contract have rendered valuable services to the corporation in actions brought by or against it.[45] But it seems that the corporation is not liable for a

34. Labatt *v.* New Orleans, 38 La. Ann. 283.

35. Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219. But *compare* Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573, where the municipality and the school-district being coterminous, expenses incurred by the school-board for education were deemed valid municipal obligations.

36. Alexander *v.* Cincinnati, 2 Handy (Ohio) 183, 12 Ohio Dec. (Reprint) 393.

37. People *v.* New Lots, 34 Hun (N. Y.) 336.

38. See *infra*, XI, A, 8.

39. People *v.* New Lots, 34 Hun (N. Y.) 336; Alexander *v.* Cincinnati, 2 Handy (Ohio) 183, 12 Ohio Dec. (Reprint) 393.

Expenses of municipal health boards see Health, 21 Cyc. 391.

40. State *v.* Newark, 53 N. J. L. 534, 22 Atl. 55.

41. Bingham *v.* Camden, 29 N. J. Eq. 464.

Ill. Rev. St. (1885) c. 46, created election commissioners and gave them power to incur debts for necessary expenses in behalf of the city adopting the same. It was held that the commissioners were corporate authorities, that the expenses were for corporate purposes and were imposed with the consent of the people of whatever city adopted the act, and that the act itself was constitutional. Wetherell *v.* Devine, 116 Ill. 631, 6 N. E. 24, construing Const. art. 9, §§ 9, 10, prohibiting the legislature from granting the right to assess and collect taxes to any other than the corporate authorities of the municipalities to be taxed, and requiring the taxation to be for corporate purposes and not to be imposed without the consent of the taxpayers to be affected.

The city of New Haven is not bound to pay the rent of a place hired by the police commissioners in said city, to be used only as a voting place at a meeting of the electors to pass upon the adoption of a constitutional amendment, and for a state and national election. Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

In Pennsylvania, under the provisions of the constitution and statutes, the expenses of city and ward elections held annually in February in the city of Meadville are payable by the city, and not by Crawford county. Crawford County *v.* Meadville, 101 Pa. St. 573.

42. State *v.* Newark, 53 N. J. L. 534, 22 Atl. 55.

Villages organized under Wis. Rev. St. c. 40, are not liable to the towns in which they are situated for a proportionate share of assessment, election, and town-meeting expenses incurred by the town; towns, through their officers, are bound to render services for such villages in these matters without compensation. Plainfield *v.* Plainfield, 67 Wis. 526, 30 N. W. 672.

43. Johnstown *v.* Cambria County, 21 Pa. Co. Ct. 199.

Respective liability of borough and municipality for election expenses see Gaskins *v.* Montour County, 8 Luz. Leg. Reg. (Pa.) 270; Wilkesbarre *v.* Luzerne County, 5 Luz. Leg. Reg. (Pa.) 75.

44. Brown *v.* New York, 6 Daly (N. Y.) 497; Com. *v.* Weir, 15 Pa. Co. Ct. 425.

45. Buck *v.* Eureka, 124 Cal. 61, 56 Pac. 612; Harvey *v.* Wilson, 78 Ill. App. 544; Squire *v.* Preston, 82 Hun (N. Y.) 88, 31 N. Y. Suppl. 174. See *supra*, IX, A, 6, o.

Services of a village attorney who was unsuccessful in prosecuting a mandamus issued

reasonable fee to the attorney of a relator in a mandamus proceeding to compel the collection of municipal taxes by the corporation.[46]

b. Officers' Fees and Expenses. A municipal corporation is liable under the law for fees of officers just as other parties to actions, and not otherwise;[47] and no promise to pay the costs of the unsuccessful party in the action will be implied in favor of an officer against a municipality,[48] nor judgment over be given against it unless so provided by statute;[49] nor is the municipality liable for the rentals of an office for a police justice.[50]

c. Other Law Expenses.[51] A city succeeding to the functions of a county and embracing all its territory becomes liable for legal expenses.[52] And the general rules of law regarding costs and expenses of litigation prevail in cases affecting the municipality.[53]

5. Prison Expenses. The municipality is liable for jail fees and other prison expenses of prisoners committed for violation of municipal ordinances,[54] but not for offenses against the state.[55]

F. Special Statutory Expenses. Under the head of municipal expenses may be included those items of liability not recognized by the corporation but imposed upon it by the state in the exercise of its sovereign power, either by general or special statutes.[56] But such acts of legislation are ineffectual, when, ignoring constitutional provisions, the legislature seeks to enforce payment by the

at the instance of a city council against the president and clerk of the village who refused to give orders for the amounts allowed by councilmen who were disqualified by pecuniary interest to allow the claims do not constitute a proper charge against the city. Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547.

46. Milster *v.* Spartanburg, 68 S. C. 243, 47 S. E. 141.

47. Carlisle *v.* Tulare County, (Cal. 1897) 49 Pac. 3.

48. Cobb *v.* Lincoln, 15 Nebr. 86, 17 N. W. 365. *Compare* Gibson *v.* Zanesville, 31 Ohio St. 184, holding that the fact that a sentence for violating an ordinance has, in default of payment of the fine and costs, been worked out by the convict in the city workhouse, does not constitute an appropriation by the city of the costs taxed in favor of the mayor, from which the law will imply a promise by the city to pay the amount of the costs to the mayor.

49. Carlisle *v.* Tulare County, (Cal. 1897) 49 Pac. 3.

50. People *v.* Nyack, 18 N. Y. App. Div. 318, 46 N. Y. Suppl. 218.

51. Payment of jurors by city see Juries.

Reimbursement of officer for expenses incurred in actions against them see *supra*, VIII, A, 13, a, (I), (L), (4).

52. Philadelphia *v.* Com., 52 Pa. St. 451.

53. See Costs, 11 Cyc. 1 *et seq.*

Costs of an arbitration authorized by law, in which the municipality is a party, is an item of legal expense to the corporation, even though the statute contains no provision for compensation. Malone *v.* Pittsburgh, 14 Pa. Co. Ct. 125.

Stenographer's fees.—Fees for services rendered by a stenographer on trial of a case, whether against the municipality or its officers, are valid municipal charges, when rendered at the request of the corporation attorney in the proper exercise of his official discretion. Chicago *v.* Williams, 80 Ill. App. 33.

A privilege tax on each case before a city court cannot be charged against a municipality, where defendant is committed to work out a fine and costs. Eastman *v.* Nashville, 13 Lea (Tenn.) 717.

The municipality having no power to assume the defense of suits cannot be held liable upon drafts for the payment of judgments and costs therein. Halstead *v.* New York, 3 N. Y. 430 [*affirming* 5 Barb. 218].

Where defendant is committed to work out a fine and costs the municipality is not liable for the payment of such fine and costs. Gibson *v.* Zanesville, 31 Ohio St. 184; Eastman *v.* Nashville, 13 Lea (Tenn.) 717.

54. Sonoma County *v.* Santa Rosa, 102 Cal. 426, 36 Pac. 810; Tippecanoe County *v.* Chissom, 7 Ind. 688; Strafford County *v.* Dover, 61 N. H. 617; Strafford County *v.* Somersworth, 38 N. H. 21; Merrimack County *v.* Concord, 30 N. H. 299; Waukesha County *v.* Waukesha, 78 Wis. 434, 47 N. W. 831. But see People *v.* Columbia County, 67 N. Y. 330, holding the county, not the city, liable for such fees.

55. Adams *v.* Wiscasset, 5 Mass. 328. *Compare* Labour *v.* Polk County, 70 Iowa 568, 31 N. W. 873, where the commitment is ordered under statute by a police justice.

56. Oram *v.* New Brunswick, 64 N. J. L. 19, 44 Atl. 883. See also Bowen *v.* Minneapolis, 47 Minn. 115, 49 N. W. 683, 28 Am. St. Rep. 333; Wood *v.* New York, 7 Hun (N. Y.) 164. See *supra*, IV, H, 2.

Expense of keeping bastard as a public charge see Bastards, 5 Cyc. 638; Paupers.

Maintenance of pupils.—In Ontario under 60 Vict. c. 14, § 73, enacting that "the municipal council . . . shall pay for the maintenance of pupils," it was held that the municipal corporation and not the individual

municipality of private claims;[57] and in some states they are void as usurpations of the municipal right of home rule.[58] Nor will they be so construed as to deprive the municipality of the police power,[59] or to legalize illegal demands.[60] And an existing statute, requiring payment of a certain class of claims by a city, has been held to be converted by subsequent constitutional provision from a mandatory into a purely permissive statute.[61]

XI. POLICE POWER AND REGULATION.[62]

A. Delegation, Extent, and Exercise of Power — 1. NATURE AND SCOPE OF POWER. The police power[63] of the state,[64] being an expression of the instinct of self-preservation and protection characteristic of every living creature, is an inherent faculty and function of life, attributed to all self-governing bodies as indispensable to their healthy existence and to the public welfare.[65] It embraces all rules and regulations for the protection of the lives, limbs, health, comfort, and quiet

members of the council are liable. Port Arthur High School Bd. *v.* Ft. William, 25 Ont. App. 522.

Rent of court-house.— In Aull *v.* Field, 119 Mo. 593, 24 S. W. 752, it was held that the act of April 7, 1892, providing that the expense of renting a building for a court-house in Higginsville should be paid by the city of Higginsville, was not in contravention of Const. art. 10, § 11. But *compare* People *v.* Nyack, 18 N. Y. App. Div. 318, 46 N. Y. Suppl. 218.

Support of inebriates' home see White *v.* Kings County Inebriates' Home, 141 N. Y. 123, 35 N. E. 1092 [*affirming* 74 Hun 39, 26 N. Y. Suppl. 294], holding that Laws (1877), providing for the payment out of the excise money of Brooklyn for the support of the Inebriates' Home, did not violate either Const. art. 8, § 11, or Laws (1888), c. 583, tit. 22, § 35.

57. Chicago *v.* Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695, 89 Am. St. Rep. 243; Jackson Square *v.* New Orleans, 112 La. 957, 36 So. 817. *Compare* Bush *v.* Orange County, 13 Misc. (N. Y.) 707, 35 N. Y. Suppl. 167 [*affirmed* in 10 N. Y. App. Div. 542, 42 N. Y. Suppl. 417], holding that Laws (1892), c. 664, providing for the refunding of money paid by drafted men in order to avoid military service, etc., violates Const. art. 8, § 11.

58. Chapman *v.* New York, 168 N. Y. 80, 61 N. E. 108, 85 Am. St. Rep. 661, 56 L. R. A. 846. See *supra*, IV, H, 2.

59. Police power of municipal corporations see *infra*, XI.

60. Chicago *v.* Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695, 89 Am. St. Rep. 243; Ouachita *v.* Monroe, 42 La. Ann. 782, 7 So. 717. See also People *v.* Green, 63 Barb. (N. Y.) 390, where it was held that Acts (1872), c. 375, § 2, requiring the controller of New York city to allow and pay the bills of the several newspaper proprietors in said city, for all city advertisements actually done prior to Jan. 1, 1872, did not in effect legalize all previous illegal demands and require the payment of the bills of mere volunteers the same as those of persons publishing under legal authority.

61. People *v.* Kings County, 12 Misc. (N. Y.) 187, 33 N. Y. Suppl. 602.

62. Police power: In general, see CONSTITUTIONAL LAW, 8 Cyc. 863 *et seq.* As to license, see LICENSES, 25 Cyc. 593; and *infra*, XI, A, 8, c. Compared with deprivation of property see CONSTITUTIONAL LAW, 8 Cyc. 864 note 64. Distinguished from eminent domain see ACTIONS, 1 Cyc. 655; EMINENT DOMAIN, 15 Cyc. 557; LEVEES, 25 Cyc. 191.

Regulation of: Market, market places, and the like see *infra*, XI, A, 7; XII, C, 3. Particular occupations or business see *infra*, XI, A, 7, b, (VII). Particular things see *infra*, XI, A, 7. Public property in general see *infra*, XI, A, 7, b, (VIII). Streets and other ways see *infra*, XII, A. Water frontage, landings, docks, and wharves see *infra*, XII, C, 2.

Special or class legislation see CONSTITUTIONAL LAW, 8 Cyc. 1036 *et seq.*

63. Police power defined and explained generally see CONSTITUTIONAL LAW, 8 Cyc. 863 *et seq.*

64. The state necessarily enjoys the fullest measure of the police power. Taylor *v.* Nashville, etc., R. Co., 6 Coldw. (Tenn.) 646, 98 Am. Dec. 474; Ingersoll Pub. Corp. 345. See CONSTITUTIONAL LAW, 8 Cyc. 863 *et seq.*

65. Ingersoll Pub. Corp. 343, 344; 4 Blackstone Comm. 162. See also *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

This "law of overruling necessity" is not of constitutional origin or grant, but is rather institutional and vital (Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698; Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178; Taylor *v.* Nashville, etc., R. Co., 6 Coldw. (Tenn.) 646, 98 Am. Dec. 474, where it was said that without the exercise of this police power, a nation cannot exist); and as remarked by Judge Shaw, "it is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise" (Com. *v.* Alger, 7 Cush. (Mass.) 53, 85). See also Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394; Cooley Const. Lim. (6th ed.) 704.

of persons, and the preservation and security of property.[66] The municipality, as a governmental agency, must of course have such measure of the power as is necessary to enable it to perform its governmental functions;[67] and also those municipal functions which are "necessarily and inseparably incident" to its existence as a corporation.[68] The power is usually conferred on municipalities in express terms of constitution or statute;[69] and unless otherwise expressed it is always construed as limited to corporate boundaries,[70] and consistent with general statutes and the constitution, both federal and state.[71] The municipality is thus restrained from entering the field of general legislation,[72] or making declaration of public policy,[73] and limited in the exercise of the power to matters local and municipal.[74]

2. Delegation of Power of State.[75] After repeated challenge of municipal authority to exercise the police power, on the ground that it is a sovereign power and therefore non-delegable, the doctrine is firmly established and now well recognized that the legislature may expressly or by implication delegate to municipal corporations the lawful exercise of police power within their boundaries;[76] the measure of power thus conferred is subject to the legislative dis-

66. *Alabama.*— Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130.

Colorado.— Ouray *v.* Corson, 14 Colo. App. 345, 59 Pac. 876.

Illinois.— Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631. See also Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698.

Louisiana.— O'Rourke *v.* New Orleans, 106 La. 313, 30 So. 837.

New York.— Carthage *v.* Frederick, 122 N. Y. 268, 277, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178.

Tennessee.— Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1308.

The police power extends to all regulations which affect the life, health, comfort, good order, morals, peace, and safety of the community. Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854.

The true purpose of the police power is the preservation of the health, morals, and safety of the community. An ordinance based upon the police power of a municipality must appear to have been enacted in order to preserve the health, morals, or safety of the community. Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230].

67. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; Vionet *v.* First Municipality, 4 La. Ann. 42; Judy *v.* Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

68. 1 Blackstone Comm. 475.

69. Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Carey *v.* Washington, 5 Fed. Cas. No. 2,404, 5 Cranch C. C. 13.

Delegation of power see *infra*, XI, A, 2.

70. **Territorial jurisdiction** see *infra*, XI, A, 5.

71. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

California.— Sacramento *v.* Crocker, 16 Cal. 119.

Georgia.— Lanier *v.* Macon, 59 Ga. 187; Savannah *v.* Hines, 53 Ga. 616.

Louisiana.— State *v.* Von Sachs, 45 La. Ann. 1416, 14 So. 249.

Missouri.— American Union Express Co. *v.* St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; St. Louis *v.* Anchor L. Ins. Co., 47 Mo. 176; St. Louis *v.* Associated Firemen's Ins. Co., 47 Mo. 168; St. Louis *v.* Independent Ins. Co., 47 Mo. 146.

Pennsylvania.—Johnson *v.* Philadelphia, 60 Pa. St. 445.

Texas.— Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124.

See also *infra*, XI, A, 4, c; and *supra*, VI, G.

72. See Collins *v.* Hall, 92 Ga. 411, 17 S. E. 622; Adams *v.* Albany, 29 Ga. 56; Owensboro *v.* Sparks, 99 Ky. 351, 36 S. W. 4, 18 Ky. L. Rep. 269; State *v.* Horne, 115 N. C. 739, 20 S. E. 443.

73. See Hoffman *v.* Jersey City, 34 N. J. L. 172; New York *v.* Nichols, 4 Hill (N. Y.) 209; Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465; Marietta *v.* Fearing, 4 Ohio 427.

74. See New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532; Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725.

Confined to purely municipal functions.— Horn *v.* People, 26 Mich. 221; Bregguglia *v.* Vinemond, 53 N. J. L. 168, 20 Atl. 1082.

75. **Delegation of power to license** see Licenses, 25 Cyc. 600 *et seq.*

Special and local laws see Statutes.

76. *Alabama.*— Nashville, etc., R. Co. *v.* Attalla, 118 Ala. 362, 24 So. 450; Goldthwaite *v.* Montgomery, 50 Ala. 486.

California.— Denninger *v.* Pomona Recorders Ct., 145 Cal. 629, 79 Pac. 360. See also *Ex p.* Newton, 53 Cal. 571; *Ex p.* Shrader, 33 Cal. 279.

Colorado.— Keilkopf *v.* Denver, 19 Colo. 325, 35 Pac. 535.

cretion.[77] It may be full or partial,[78] regular or summary;[79] but it is never exclusive,[80] as the legislature has no authority to divest itself of any of its sovereign functions or powers.[81] In the absence, however, of an express delegation or of a necessary conferment resulting from some inherent or given express power, the municipality cannot lawfully act.[82]

3. Delegation or Surrender of Power by Municipality — a. In General. *Potestas delegata non est delegari* is a general maxim applicable with peculiar force to any form of sovereign power,[83] and operates to prevent the governing

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Georgia.—Cranston *v.* Augusta, 61 Ga. 572; Perdue *v.* Ellis, 18 Ga. 586. See also Morris *v.* Columbus, 102 Ga. 792, 30 S. E. 850, 66 Am. St. Rep. 243, 42 L. R. A. 175.

Illinois.— Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201.

Indiana.— Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830.

Iowa.— Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Kentucky.— Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522; McKee *v.* McKee, 8 B. Mon. 433.

Louisiana.— Lamaque *v.* New Orleans, McGloin 28.

Massachusetts.— New England Tel., etc., Co. *v.* Boston Terminal Co., 182 Mass. 397, 65 N. E. 835; Bancroft *v.* Cambridge, 126 Mass. 438.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

Minnesota.— St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278.

Missouri.— Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855; State *v.* Cowan, 29 Mo. 330; Metcalf *v.* St. Louis, 11 Mo. 102.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New York.— People *v.* Pierce, 85 N. Y. App. Div. 125, 83 N. Y. Suppl. 79.

North Carolina.— Louisburg *v.* Harris, 52 N. C. 281.

Ohio.— Burckholter *v.* McConnellsville, 20 Ohio St. 308.

South Carolina.— Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854.

Tennessee.—Nashville *v.* Linck, 12 Lea 499.

Virginia.— Danville *v.* Hatcher, 101 Va. 523, 44 S. E. 723.

United States.— See Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585 [*reversing* 9 Fed. 743, 4 Woods 96].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1309. See also Constitutional Law, 8 Cyc. 866; Licenses, 25 Cyc. 600.

Territorial jurisdiction see *infra*, XI, A, 5.

77. Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698.

It is for legislative discretion to determine within the limitations of the constitution to what extent city or town councils shall be invested with power of local legislation. Burckholter *v.* McConnellsville, 20 Ohio St. 308.

78. Danville *v.* Hatcher, 101 Va. 523, 44 S. E. 723.

When any part of the police power, which resides primarily in the state, is conferred on a municipality, no more is presumed to have been granted than is expressly stated in the words of the grant. The rule of construction in regard to such grants is to be neither too strict nor too liberal, but fair and reasonable, to effectuate the intention of the legislature. Taylor *v.* District of Columbia, 24 App. Cas. (D. C.) 392.

79. The regular method is by the enactment of ordinances, and their enforcement by due process of law. See *infra*, XI, A, 8; XI, B, 4.

The summary method is that permitted to be used only in cases of emergency, when it becomes necessary to destroy individual property or even take individual life, as the only apparent means of protecting the public and preventing still greater calamities. See *infra*, XI, A, 8, h, k.

80. Spring Valley *v.* Spring Valley Coal Co., 71 Ill. App. 432.

81. Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698. See also Constitutional Law, 8 Cyc. 865, 866.

The state may resume the authority or power delegated to the municipality. Cranston *v.* Augusta, 61 Ga. 572; Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698; New England Tel., etc., Co. *v.* Boston Terminal Co., 182 Mass. 397, 65 N. E. 835.

82. St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89; State *v.* Godfrey, 54 W. Va. 54, 46 S. E. 185; Carey *v.* Washington, 5 Fed. Cas. No. 2,404, 5 Cranch C. C. 13.

Although it is reasonable, just, and proper in itself, and even necessary for the preservation of peace and good order, when the municipal authorities have no power to make a municipal regulation, it is void. Taylor *v.* District of Columbia, 24 App. Cas. (D. C.) 392.

The governing body of a city does not represent the city, in attempting to legislate on matters beyond its jurisdiction, and does not act as its agent, or by color of its authority. Wabaska Electric Co. *v.* Wymore, 60 Nebr. 199, 82 N. W. 626.

83. *Alabama.*— Dillard *v.* Webb, 55 Ala. 468.

body of a municipal corporation, intrusted by the state with the police power, from delegating its high functions to any other body or officer — even to the mayor or other member of the body;[84] the trust is official and personal and may be discharged only by those to whom the state commits it.[85] But this doctrine is not so construed and applied as to require the entire council to engage personally in every step necessary for the exercise of the function;[86] they may fully discharge their official duty and exhaust the municipal discretion by enacting by-laws or ordinances to be executed by the proper board or officer.[87] And it seems that under express statutory authority they may delegate a portion of

Illinois.—Carbondale *v.* Wade, 106 Ill. App. 654; Cairo *v.* Coleman, 53 Ill. App. 680.

Louisiana.— Capdevielle *v.* New Orleans, etc., R. Co., 110 La. 904, 34 So. 868.

Maryland.— See State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639.

Missouri.— St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776.

New Jersey.— Young, etc., Amusement Co. *v.* Atlantic City, 60 N. J. L. 125, 37 Atl. 444; Slocum *v.* Ocean Grove Camp Meeting Assoc., 59 N. J. L. 110, 35 Atl. 794. See also Lambertville *v.* Applegate, 73 N. J. L. 110, 62 Atl. 270.

New York.— Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

Pennsylvania.— Kittanning Electric Light, etc., Co. *v.* Kittanning Borough, 11 Pa. Super. Ct. 31; McKeesport *v.* McKeesport, etc., Pass. R. Co., 2 Pa. Super. Ct. 242.

Texas.— Lufkin *v.* Galveston, 56 Tex. 522.

United States.— Clark *v.* Washington, 12 Wheat. 40, 6 L. ed. 544.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1310.

84. *Florida.*— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Illinois.— Chicago *v.* Stratton, 162 Ill. 494, 44 N. E. 853, 53 Am. St. Rep. 325, 35 L. R. A. 84 [*affirming* 58 Ill. App. 539]; Kinmundy *v.* Mahan, 72 Ill. 462. See also East St. Louis *v.* Wehrung, 50 Ill. 28; McGregor *v.* Lovington, 48 Ill. App. 211.

Indiana.— Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

Kentucky.— Franke *v.* Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432, 718, 4 L. R. A. 265.

Massachusetts.—Day *v.* Green, 4 Cush. 433.

Minnesota.— *In re* Wilson, 32 Minn. 145, 19 N. W. 723.

Missouri.—Trenton *v.* Clayton, 50 Mo. App. 535.

New Jersey.— Lambertville *v.* Applegate, 73 N. J. L. 110, 62 Atl. 270.

Ohio.— State *v.* Jacob, 8 Ohio Dec. (Reprint) 23, 5 Cinc. L. Bul. 73.

Rhode Island.— State *v.* Fiske, 9 R. I. 94.

Texas.— Lufkin *v.* Galveston, 56 Tex. 522. But *compare* Batsel *v.* Blaine, (App. 1891) 15 S. W. 283.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1310. See also *infra*, XI, A, 8, a, b.

85. Hengst *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 730, 7 Ohio N. P. 1; *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526.

86. See New Orleans Gas-Light Co. *v.* Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544; *In re* White, 43 Minn. 250, 45 N. W. 232.

87. St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; Batsel *v.* Blaine, (Tex. App. 1891) 15 S. W. 283. See Bliss *v.* Kraus, 16 Ohio St. 54, holding that under a resolution of a city council directing certain lot owners "to fill and drain their lots in such manner as shall be necessary to remove all stagnant water," a reasonable construction of the resolution required, not merely the removal of water then on the lots, but the work to be so done as to prevent the recurrence of stagnant water from the same causes; and where the work to be done is clearly defined in general terms, the fact of leaving to the owner, who bears the expense, the choice of means, will not invalidate the resolution. In Patterson *v.* Taylor, 51 Fla. 275, 40 So. 493, it was held that an ordinance of a city, designed to separate the two races in the street cars in the city, requiring the companies operating the cars to effect such separation by providing separate cars, or by division of the car, when the same is assigned to the two races, is not an unauthorized delegation of authority to the carrier.

Judicial question.—Where the fixing of the amount of a penalty presents a judicial question arising from the circumstances of each case which calls for its imposition, the exercise of such right by a magistrate within the limits prescribed by the legislative body of a municipality cannot be deemed a delegation by such body of its authority but only a mode for its more efficient exercise. Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176. See also Atlantic City *v.* Crandol, 67 N. J. L. 488, 51 Atl. 447.

Legislative question.—When the question is purely a legislative one, the power with respect thereto cannot be delegated by the city, but must be exercised by the common council alone. Young, etc., Amusement Co. *v.* Atlantic City, 60 N. J. L. 125, 37 Atl. 444; Slocum *v.* Ocean Grove Camp Meeting Assoc., 59 N. J. L. 110, 35 Atl. 794. When the authority to impose a penalty, conferred upon the legislative body of a municipality, involves a purely legislative discretion, such body itself must exercise such discretion by fixing the precise sum of such penalty. Lambertville *v.* Applegate, 73 N. J. L. 110, 62 Atl. 270.

their discretion to the mayor or other officer,[88] or in some cases even without this express permission sustain such delegation.[89]

b. By Contract or License. As the state may not, by any law or contract, surrender or restriet any portion of the sovereignty which it holds in sacred trust for the public weal,[90] so a municipality, as a governmental agency,[91] acting and bound always to act as trustee of the powers delegated to it, may not, by contract, license, or by-law, surrender or restriet any portion of the police power conferred upon it.[92]

c. Delegation of Power to License. Where the power is conferred on a municipal corporation to license any calling or business, it cannot delegate such power to any person or authority.[93] Nor can the municipal council, where the power to license is given by statute directly to it, delegate such power to any city official.[94] But the common council, where the city charter so authorizes, may delegate the power to license to the mayor.[95]

4. Double Exercise of Police Power by State and Municipality — a. In General. The legislature may confer police power upon a municipality over subjects within the provisions of existing state laws.[96]

88. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; Bradley *v.* Rochester, 54 Hun (N. Y.) 140, 7 N. Y. Suppl. 237; *Ex p.* Ryan, 8 Ohio Dec. (Reprint) 299, 7 Cinc. L. Bul. 50.

City councils may delegate to the mayor or like officer authority to carry out the police regulations of the city. Wilkes-Barre *v.* Garabed, 11 Pa. Super. Ct. 355.

89. People *v.* Rochester, 45 Hun (N. Y.) 102; Batsel *v.* Blaine, (Tex. App. 1891) 15 S. W. 283.

90. Coates *v.* New York, 7 Cow. (N. Y.) 585; Brick Presby. Church *v.* New York, 5 Cow. (N. Y.) 538; East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511, 541, 13 L. ed. 518, 531. See *supra*, XI, A, 2.

91. See Schultes *v.* Eberly, 82 Ala. 242, 245, 2 So. 345.

As a governmental agency see *supra*, I, A, 4, m; I, C, 1, b; III, C, 2, b; *infra*, XIV, A, 2.

92. *Florida.*— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69, where it is said that firmly set is the rule that the police power cannot be parted with or impaired by contract or barter.

Illinois.— Carbondale *v.* Wade, 106 Ill. App. 654; Marshall *v.* Cleveland, etc., R. Co., 80 Ill. App. 531.

Indiana.— Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

Minnesota.—State *v.* Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; State *v.* St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261.

Missouri.— State *v.* Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; Kansas City *v.* Corrigan, 18 Mo. App. 206.

Pennsylvania.—McKeesport *v.* McKeesport, etc., Pass. R. Co., 2 Pa. Super. Ct. 242; Norristown *v.* Keystone Tel., etc., Co., 15 Montg. Co. Rep. 9.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1375.

Campare New York Fire Dept. *v.* Atlas Steamship Co., 106 N. Y. 566, 13 N. E. 329, holding that the fire department of New York city in the enforcement of the provisions of the building laws applicable to the city is not estopped by the fact that the dock department of New York city made an illegal lease to defendant of the property sought to be subjected to the lawful regulations.

93. Walsh *v.* Denver, 11 Colo. App. 523, 53 Pac. 458; East St. Louis *v.* Wehrung, 50 Ill. 28; Trenton *v.* Clayton, 50 Mo. App. 535; State *v.* Jacob, 8 Ohio Dec. (Reprint) 23, 5 Cinc. L. Bul. 73. See also Licenses, 25 Cyc. 593.

A mere ministerial act, however, like issuing the license certificate may be delegated to a city official. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; Swarth *v.* People, 109 Ill. 621; Baker *v.* Lexington, 53 S. W. 16, 21 Ky. L. Rep. 809; State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442; State *v.* Fleischer, 41 Minn. 69, 42 N. W. 696; State *v.* Thompson, 160 Mo. 333, 60 S. W. 1077, 83 Am. St. Rep. 468, 54 L. R. A. 950; St. Louis *v.* Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; Ould *v.* Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139.

94. State *v.* Glavin, 67 Conn. 29, 34 Atl. 708; Kinmundy *v.* Mahan, 72 Ill. 462; Driscoll *v.* Salem, 67 N. J. L. 113, 50 Atl. 475; Thurlow Medical Co. *v.* Salem, 67 N. J. L. 111, 50 Atl. 475; *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526.

95. People *v.* Mulholland, 82 N. Y. 324, 37 Am. Rep. 568; Brooklyn *v.* Breslin, 57 N. Y. 591; People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088.

Power to fix amount.— Under a statute authorizing the city council to license, it may delegate to the mayor the power to fix the amount of license-fees within limits fixed by the council. Decorah *v.* Dunstan, 38 Iowa 96; *Ex p.* Ryan, 8 Ohio Dec. (Reprint) 299, 7 Cinc. L. Bul. 50.

96. *Alabama.*— Mobile *v.* Allaire, 14 Ala. 400; Mobile *v.* Rouse, 8 Ala. 515.

Arkansas.— Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

b. Acts Prohibited Both by Statute and Ordinance — (i) *In General.* Accordingly, unless it is prohibited by some express constitutional or statutory

Colorado.— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Hughes *v.* People, 8 Colo. 536, 9 Pac. 50.

Dakota.—Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214; Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234.

Georgia.— Littlejohn *v.* Stells, 123 Ga. 427, 51 S. E. 390.

Idaho.— State *v.* Quong, 8 Ida. 191, 67 Pac. 491; State *v.* Preston, 4 Ida. 215, 38 Pac. 694.

Illinois.— McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857; Hankins *v.* People, 106 Ill. 628; Robbins *v.* People, 95 Ill. 175; Seibold *v.* People, 86 Ill. 33; Baldwin *v.* Murphy, 82 Ill. 485; Chicago *v.* Brownell, 41 Ill. App. 70. See Byers *v.* Olney, 16 Ill. 35. And *compare* Fant *v.* People, 45 Ill. 259.

Indiana.— Williams *v.* Warsaw, 60 Ind. 457; Waldo *v.* Wallace, 12 Ind. 569.

Iowa.—Bloomfield *v.* Trimble, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212. *Compare* New Hampton *v.* Conroy, 56 Iowa 498, 9 N. W. 417.

Kansas.— Kansas City *v.* Grubel, 57 Kan. 436, 46 Pac. 714; *In re* Jahn, 55 Kan. 694, 41 Pac. 956; *In re* Thomas, 53 Kan. 659, 37 Pac. 171; Rice *v.* State, 3 Kan. 141.

Kentucky.— Com. *v.* Steffee, 7 Bush 161; March *v.* Com., 12 B. Mon. 25. *Compare* Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 561.

Louisiana.— New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532; Amite *v.* Holly, 50 La. Ann. 627, 23 So. 746; State *v.* Morris, 47 La. Ann. 1660, 18 So. 710; Opelousas Bd. of Police *v.* Giron, 46 La. Ann. 1364, 16 So. 190; Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696; State *v.* Clifford, 45 La. Ann. 980, 13 So. 281; State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249. *Compare* State *v.* People's Slaughterhouse, etc., Co., 46 La. Ann. 1031, 15 So. 408.

Maryland.— Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 656.

Massachusetts.— Com. *v.* Goodnow, 117 Mass. 114.

Michigan.— People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Fennell *v.* Bay City, 36 Mich. 186. See also People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751. But see Slaughter *v.* People, 2 Dougl. 234 note.

Minnesota.— State *v.* Lee, 29 Minn. 445, 13 N. W. 913; State *v.* Oleson, 26 Minn. 507, 5 N. W. 959; State *v.* Ludwig, 21 Minn. 202; State *v.* Crummey, 17 Minn. 72; State *v.* Charles, 16 Minn. 474.

Mississippi.— *Ex p.* Bourgeois, 60 Miss. 663, 45 Am. Rep. 420; Johnson *v.* State, 59 Miss. 543.

Missouri.— State *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791; State *v.* Wister, 62 Mo. 592; State *v.* Gordon, 60 Mo. 383; State *v.* Harper, 58 Mo. 530; State *v.* De Bar, 58 Mo. 395; St. Charles *v.* Meyer, 58 Mo. 86; State *v.* Clark, 54 Mo. 17, 14 Am. Rep. 471; State *v.* Thornton, 37 Mo. 360; Independence *v.* Moore, 32 Mo. 392; Zimmerman *v.* Owens, 24 Mo. 97; St. Louis *v.* Cafferata, 24 Mo. 94; St. Louis *v.* Bentz, 11 Mo. 61; State *v.* Ledford, 3 Mo. 102; Lebanon *v.* Gordon, 99 Mo. App. 277, 73 S. W. 222; Glasgow *v.* Bazan, 96 Mo. App. 412, 70 S. W. 257; Kansas City *v.* Neal, 49 Mo. App. 72; Plattsburg *v.* Trimble, 46 Mo. App. 459; De Soto *v.* Brown, 44 Mo. App. 148; Chillicothe *v.* Brown, 38 Mo. App. 609; Linneus *v.* Dusky, 19 Mo. App. 20. But see State *v.* Cowan, 29 Mo. 330; Jefferson City *v.* Courtmire, 9 Mo. 692.

Nebraska.— Brownville *v.* Cook, 4 Nebr. 101.

New Jersey.— Riley *v.* Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352; Howe *v.* Plainfield, 37 N. J. L. 145; State *v.* Plunkett, 18 N. J. L. 5. *Compare* Wyse *v.* New Jersey Police Com'rs, 68 N. J. L. 127, 52 Atl. 281; State *v.* Plunkett, 18 N. J. L. 5.

New York.— Polinsky *v.* People, 11 Hun 390 [*affirmed* in 73 N. Y. 65]; Brooklyn *v.* Toynbee, 31 Barb. 282; New York *v.* Hyatt, 3 E. D. Smith 156; Blatchley *v.* Moser, 15 Wend. 215; People *v.* Stevens, 13 Wend. 341; Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

Ohio.— Canton *v.* Nist, 9 Ohio St. 439; Wightman *v.* State, 10 Ohio 452. See also State *v.* Ulm, 8 Ohio S. & C. Pl. Dec. 677, 7 Ohio N. P. 659.

Oregon.— Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295; State *v.* Bergman, 6 Oreg. 341. *Compare* State *v.* Sly, 4 Oreg. 277.

Pennsylvania.— See Easton *v.* Kemmerer, 3 Pa. Dist. 220, 13 Pa. Co. Ct. 522.

South Carolina.— McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539; State *v.* Williams, 11 S. C. 288; State *v.* Charleston, 12 Rich. 480; State *v.* Columbia, 6 Rich. 404. *Compare* Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725; Schroder *v.* Charleston, 3 Brev. 533.

South Dakota.— Yankton *v.* Douglass, 8 S. D. 441, 66 N. W. 923.

Tennessee.— State *v.* Mason, 3 Lea 649; Greenwood *v.* State, 6 Baxt. 567, 32 Am. Rep. 539. See also Hoggatt *v.* Bigley, 6 Humphr. 236.

Texas.— *Ex p.* Henson, (Cr. App. 1905) 90 S. W. 874. *Compare* Davis *v.* State, 2 Tex. App. 425. And Texas cases cited *infra*, notes 97, 9.

Utah.— See *Ex p.* Douglass, 1 Utah 108.

Wisconsin.— Ogden *v.* Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506; State *v.* Newman, 96 Wis. 258, 71 N. W. 438;

provision,[97] by the great weight of authority municipal corporations may, by ordinance, prohibit and punish acts which are also prohibited and punishable as misdemeanors under the general statutes of the state,[98] or which may involve a common-law offense;[99] and while many such ordinances contain provisions for matters peculiar to communities of dense population, which are not noticed by the general law,[1] many others are mere municipal repetitions or reënactments of state statutes.[2] The latter, after much strenuous contention, are now generally recognized as valid ordinances;[3] although some cases declare them non-enforceable as being a secondary exercise of a sovereign power,[4] which may not be employed by a municipality

Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798.

United States.— McLaughlin *v.* Stephens, 17 Fed. Cas. No. 8,874, 2 Cranch C. C. 148; U. S. *v.* Holly, 26 Fed. Cas. No. 15,381, 3 Cranch C. C. 656; U. S. *v.* Wells, 28 Fed. Cas. No. 16,662, 2 Cranch C. C. 45.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1311, 1312. See also *infra*, XI, A, 4, b.

97. State *v.* Tyrrell, 73 Conn. 407, 47 Atl. 686; Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759; Indianapolis *v.* Higgins, 141 Ind. 1, 40 N. E. 671; Indianapolis *v.* Huegele, 115 Ind. 581, 18 N. E. 172; Frankfort *v.* Aughe, 114 Ind. 77, 600, 15 N. E. 802, 804; Zeller *v.* Crawfordsville, 90 Ind. 262; Loeb *v.* Attica, 82 Ind. 175, 42 Am. Rep. 494; State *v.* McCulla, 16 R. I. 196, 14 Atl. 81; *In re* Baxter, 12 R. I. 13; State *v.* Pollard, 6 R. I. 290; *Ex p.* Wickson, (Tex. Cr. App. 1898) 47 S. W. 643; Ballard *v.* Dallas, (Tex. Cr. App. 1898) 44 S. W. 864; *Ex p.* Coombs, 38 Tex. Cr. 648, 44 S. W. 854; *Ex p.* Fagg, 38 Tex. Cr. 573, 44 S. W. 294. But see *Ex p.* Freeland, 38 Tex. Cr. 321, 42 S. W. 295 [*distinguishing* Leach *v.* State, 36 Tex. Cr. 248, 36 S. W. 471]; Hamilton *v.* State, 3 Tex. App. 643.

98. See cases cited *supra*, note 96. *Compare Ex p.* Siebenhauer, 14 Nev. 365; Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324.

Opposed to this view see *Ex p.* Solomon, 91 Cal. 440, 27 Pac. 757; *In re* Ah You, 88 Cal. 99, 25 Pac. 974, 22 Am. St. Rep. 280, 11 L. R. A. 408; *In re* Sic, 73 Cal. 142, 14 Pac. 405; State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Welch, 36 Conn. 215; Southport *v.* Ogden, 23 Conn. 128; State *v.* McCoy, 116 N. C. 1059, 21 S. E. 690; State *v.* Keith, 94 N. C. 933; State *v.* Brittain, 89 N. C. 574; State *v.* Langston, 88 N. C. 692; Washington *v.* Hammond, 76 N. C. 33. See also *infra*, XI, A, 4, b, (II).

Indictable offenses.—Although by the general law of the state, persons charged with certain offenses of the grade of misdemeanors must be proceeded against criminally by indictment, yet the general assembly may grant to municipal corporations the power to ordain that persons charged with such offenses may be proceeded against criminally by information. State *v.* Cowan, 29 Mo. 330. *Compare*, however, Slaughter *v.* People, 2 Dougl. (Mich.) 334 note; Jefferson City *v.* Courtmire, 9 Mo. 692, where, under the general "power to regulate the police of the city" given to the mayor and aldermen by the city charter, it was held that this power did not authorize them to provide by ordinance for the punishment of indictable offenses.

The power delegated to the city does not narrow the application of the general law (State *v.* Oleson, 26 Minn. 507, 5 N. W. 959; State *v.* Charles, 16 Minn. 474; State *v.* Plunkett, 18 N. J. L. 5); nor abrogate or suspend the common law in regard to such offenses within the city (State *v.* Crummey, 17 Minn. 72). But see *In re* Snell, 58 Vt. 207, 1 Atl. 566, holding that where a general law gives the selectmen of a town the power to permit or prohibit the use of billiard tables in a town, and a village charter, enacted subsequently, gives the village within such town the power to pass by-laws to suppress and restrain all description of gaming, the provisions in the charter derogate from, and are inconsistent with, the general law, and the legislature must have intended by the charter to repeal the general law as to the territory embraced in the village limits.

Concurrent or exclusive operation.— The general state law and the municipal ordinance may have concurrent operation. State *v.* Cowan, 29 Mo. 330. When the power to hear and determine statutory misdemeanors is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the state and the corporation will be construed to be concurrent; but, where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail. State *v.* Gordon, 60 Mo. 383. The municipal authorities have not exclusive jurisdiction in proceedings against the keepers of bawdy houses. State *v.* Wister, 62 Mo. 592.

99. State *v.* Williams, 11 S. C. 288. See also State *v.* Crummey, 17 Minn. 72.

1. Many municipal ordinances are passed regulating markets, liquor-selling, occupations, amusements, etc., and providing for the comfort, safety, peace, and good order of the inhabitants. Ingersoll Pub. Corp. 352–371. See *infra*, XI, A, 7.

Additional regulation by ordinance see *infra*, XI, A, 4, c.

2. Rosedale *v.* Hanner, 157 Ind. 390, 61 N. E. 792. See also cases cited *supra*, note 96.

3. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252; State *v.* Callac, 45 La. Ann. 27, 12 So. 119. See also cases cited *supra*, note 96.

4. *In re* Sic, 73 Cal. 142, 14 Pac. 405; Jen-

without express authority.[5] Other cases favor the implication of police power in

kins *v.* Thomasville, 35 Ga. 145; State *v.* McCoy, 116 N. C. 1059, 21 S. E. 690; State *v.* Keith, 94 N. C. 933; Washington *v.* Hammond, 76 N. C. 33; *Ex p.* Smith, 22 Fed. Cas. No. 12,967*a*, Hempst. 201.

In California a municipality is not authorized to prohibit and punish by ordinance the very same act which is already prohibited and punishable under the general laws. *Ex p.* Stephen, 114 Cal. 278, 46 Pac. 86; *Ex p.* Mansfield, 106 Cal. 400, 39 Pac. 775; *Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747; *In re* Sic, 73 Cal. 142, 14 Pac. 405.

Mere petty offenses, so called, seem to constitute an exception to the rule against ordinances punishing the same act already punishable under the general law. Taylor *v.* Sandersville, 118 Ga. 63, 44 S. E. 845; *Ex p.* Freeland, 38 Tex. Cr. 321, 42 S. W. 295. A statute which prohibits towns or cities from making acts punishable by ordinance which are made public offenses and punishable by the state does not apply to an ordinance making it an offense to sell intoxicating liquors witbin the limits of the city without first obtaining a city license. Frankfort *v.* Aughe, 114 Ind. 77, 600, 15 N. E. 802, 804.

5. *Arkansas.*—Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

Colorado.— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

Connecticut.— State *v.* Tyrrell, 73 Conn. 407, 47 Atl. 686; State *v.* Welch, 36 Conn. 215.

Georgia.— Lockwood *v.* Muhlberg, 124 Ga. 660, 53 S. E. 92; Thrower *v.* Atlanta, 124 Ga. 1, 52 S. E. 76, 110 Am. St. Rep. 147, 1 L. R. A. N. S. 382; Littlejohn *v.* Stells, 123 Ga. 427, 51 S. E. 390; Penniston *v.* Newman, 117 Ga. 700, 45 S. E. 65; Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. 564; Jenkins *v.* Thomasville, 35 Ga. 145; Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452. See also Odell *v.* Atlanta, 97 Ga. 670, 25 S. E. 173 [*explained* in Thrower *v.* Atlanta, *supra*, and in Thrower *v.* State, 117 Ga. 753, 45 S. E. 126].

Idaho.— *In re* Ridenbaugh, 5 Ida. 371, 49 Pac. 12.

Illinois.— Gardner *v.* People, 20 Ill. 430.

Indiana.— Loeb *v.* Attica, 82 Ind. 175, 42 Am. Rep. 494.

Iowa.— New Hampton *v.* Conroy, 56 Iowa 498, 9 N. W. 417.

Mississippi.— *Ex p.* Bourgeois, 60 Miss. 663, 45 Am. Rep. 420.

North Carolina.—State *v.* McCoy, 116 N. C. 1059, 21 S. E. 690; State *v.* Keith, 94 N. C. 933; Washington *v.* Hammond, 76 N. C. 33. See also State *v.* Langston, 88 N. C. 692.

Oregon.— See Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134.

Tennessee.— Robinson *v.* Franklin, 1 Humphr. 156, 34 Am. Dec. 625.

Texas.— Clark *v.* State, 46 Tex. Cr. 566, 81 S. W. 722; *Ex p.* Ogden, 43 Tex. Cr. 531, 66 S. W. 1100; *Ex p.* Powell, 43 Tex. Cr. 391, 66 S. W. 298; *Ex p.* Wickson, (Cr. App. 1898) 47 S. W. 643.

West Virginia.— State *v.* Godfrey, 54 W. Va. 54, 46 S. E. 185; Judy *v.* Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

United States.— *Ex p.* Smith, 22 Fed. Cas. No. 12,967*a*, Hempst. 201.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1311.

Conflict of authorities.— In *Ex p.* Bourgeois, 60 Miss. 663, 670, 45 Am. Rep. 420, it was said: "Whether this power to declare acts criminal by the general laws of the State punishable also under town ordinances and thus inflict double punishment for the same offence can be deduced from a grant in a city charter of authority to make by-laws and ordinances for the welfare and good government of the city, or other general words of similar import, is a question upon which the authorities are in hopeless conflict. The various cases are collected and grouped in the note to 1 Dillon Mun. Corp. (3d ed.) § 368. An examination of them leads the author to the conclusion, expressed with some diffidence, that this power of double punishment for a single act on this delegation of authority to a local municipality to punish acts which are crimes against the State, by a mode of procedure and degree of punishment unknown to the State law, cannot be inferred from a mere general authority to legislate for the good government of the municipality, but must be clearly given, and if not so given does not exist."

In Georgia it is well settled that a municipal corporation cannot by ordinance provide for the punishment of an act which constitutes a criminal offense under the general law of the state, in the absence of express legislative authority conferring this power upon the municipality. Moran *v.* Atlanta, 102 Ga. 840, 30 S. E. 298; Rothschild *v.* Darien, 69 Ga. 503; Adams *v.* Albany, 29 Ga. 56; Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452. Prior to the adoption of the present constitution, the general assembly could confer this power upon municipalities, either by general or special law. Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. 564. The present constitution prohibits the general assembly from passing special laws upon this subject. Aycock *v.* Rutledge, 104 Ga. 533, 30 S. E. 815. But the power to pass a general law still exists. Littlejohn *v.* Stells, 123 Ga. 427, 51 S. E. 390. The general assembly cannot, however, delegate to a municipality the authority to punish in a municipal court a state offense as such. Grant *v.* Camp, 105 Ga. 428, 31 S. E. 429. But it may authorize the punishment of an act as a city offense, which could also be a state offense, provided the terms of the act conferring the authority are clear and unequivocal and manifest a legislative intent to confer authority for the

the municipality under authority to pass laws for the public peace, safety, etc.,[6] where the offense does not vitally affect the public interests, but specially concerns the municipal welfare.[7]

(11) *Effect Upon Former Jeopardy Doctrine.*[8] When the same act is made an offense both by statute and ordinance, it has been held that it contravenes the constitutional provision against putting a citizen twice in jeopardy for the same act to prosecute and punish the offender under both laws; and that a conviction under either may be pleaded in bar of prosecution under the other;[9] but the weight of authority would seem to be opposed to this holding, upon the rather specious distinction that one prosecution is for violation of the state law, and the other for breach of the municipal ordinance and only quasi-criminal.[10]

punishment of such act. Hood *v.* Von Glahn, *supra*.

So far as such a general statute covers the same ground as a city by-law authorized by statute, both cannot be enforced so as to subject a party to a double penalty. But the operation of the city by-law would not be affected as to any ground not covered by the statute. State *v.* Welch, 36 Conn. 215.

6. See *infra*, XI, A, 7, a, (I).

7. *Alabama.*— Mobile *v.* Allaire, 14 Ala. 400; Mobile *v.* Rouse, 8 Ala. 515.

Iowa.— Bloomfield *v.* Trimble, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212. See also Avoca *v.* Heller, 129 Iowa 227, 105 N. W. 444.

Missouri.— St. Louis *v.* Bentz, 11 Mo. 61. See also State *v.* Gordon, 60 Mo. 383.

Nebraska.— Brownville *v.* Cook, 4 Nebr. 101.

New York.— Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

Compare Amboy *v.* Sleeper, 31 Ill. 499 [*following* Petersburg *v.* Metzker, 21 Ill. 205].

8. **Former jeopardy** generally see CRIMINAL LAW, 12 Cyc. 259 *et seq.*

9. *California.*— *In re* Sic, 73 Cal. 142, 14 Pac. 405.

Connecticut.— State *v.* Flint, 63 Conn. 248, 28 Atl. 28; Southport *v.* Ogden, 23 Conn. 128. *Compare* State *v.* Welch, 36 Conn. 215.

Georgia.— Jenkins *v.* Thomasville, 35 Ga. 145. See also Strauss *v.* Waycross, 97 Ga. 475, 25 S. E. 329. But *compare* Taylor *v.* Sandersville, 118 Ga. 63, 44 S. E. 845; Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559; McRae *v.* Americus, 59 Ga. 168, 27 Am. Rep. 390.

Kentucky.— See Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 361.

North Carolina.—Washington *v.* Hammond, 76 N. C. 33.

Texas.— *See Ex p.* Freeland, 38 Tex. Cr. 321, 42 S. W. 295 [*distinguishing* Leach *v.* State, 36 Tex. Cr. 248, 36 S. W. 471]. But see Texas cases cited *supra*, notes 96, 97. *Contra*, Hamilton *v.* State, 3 Tex. App. 643.

West Virginia.— Judy *v.* Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1312.

Strict construction of identity clause.— Those courts applying the jeopardy provision of the constitution incline to a strict construction of the identity clause of the plea of former jeopardy, so as to permit the double punishment if there are distinguishing elements in the offense denounced alike by ordinance and statute or common law. Taylor *v.* Sandersville, 118 Ga. 63, 44 S. E. 845; Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559; Mayson *v.* Atlanta, 77 Ga. 662; Hill *v.* Dalton, 72 Ga. 314; Rothschild *v.* Darien, 69 Ga. 503; McRae *v.* Americus, 59 Ga. 168, 27 Am. Rep. 390; Frankfort *v.* Aughe, 114 Ind. 77, 600, 15 N. E. 802, 804; Centerville *v.* Miller, 57 Iowa 56, 225, 10 N. W. 293, 639. If the acts charged in both proceedings were the same, the judgment in the first would be a bar to the second. Southport *v.* Ogden, 23 Conn. 128. If they were different, defendant could be rightfully punished for both offenses. State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Welch, 36 Conn. 215; Cooley Const. Lim. (6th ed.) 239.

10. *Alabama.*— Mobile *v.* Allaire, 14 Ala. 400.

Arkansas.— Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

Colorado.— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Hughes *v.* People, 8 Colo. 536, 9 Pac. 50.

Georgia.— McRae *v.* Americus, 59 Ga. 168, 27 Am. Rep. 390.

Illinois.— Hankins *v.* People, 106 Ill. 628; Robbins *v.* People, 95 Ill. 175; Wragg *v.* Penn Tp., 94 Ill. 11, 34 Am. Rep. 199; Amboy *v.* Sleeper, 31 Ill. 499; Gardner *v.* People, 20 Ill. 430.

Indiana.— Waldo *v.* Wallace, 12 Ind. 569; Ambrose *v.* State, 6 Ind. 351; Levy *v.* State, 6 Ind. 281.

Kansas.— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Louisiana.— Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696.

Maryland.— Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 656.

Minnesota.— State *v.* Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305; State *v.* Lee, 29 Minn. 445, 13 N. W. 913.

Mississippi.— Johnson *v.* State, 59 Miss. 543. *Compare Ex p.* Bourgeois, 60 Miss. 663, 45 Am. Rep. 420.

Missouri.— State *v.* Muir, 164 Mo. 610, 65 S. W. 285 [*affirming* 86 Mo. App. 642]; State *v.* Gustin, 152 Mo. 108, 53 S. W. 421; St.

c. **Conflicting Ordinances and Statutes** — (I) *In General.* Such ordinances must not directly or indirectly contravene the general law.[11] Hence ordinances which assume directly or indirectly to permit acts or occupations, which the state statutes prohibit,[12] or to prohibit acts permitted by statute or constitution,[13] are, under the familiar rule for validity of ordinances,[14] uniformly declared to be null and void. Additional regulation by the ordinance does not render it void.[15] And the rule of construction *ut res magis valeat quam pereat* is uniformly applied by the courts[16] to sustain, as being consistent with the general laws and constitu-

Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; *Ex p.* Boenninghausen, 91 Mo. 301, 1 S. W. 761; State *v.* Cowan, 29 Mo. 330; St. Louis *v.* Cafferata, 24 Mo. 94; St. Louis *v.* Bentz, 11 Mo. 61; Lebanon *v.* Gordon, 99 Mo. App. 277, 73 S. W. 222.

New Jersey.—Howe *v.* Plainfield, 37 N. J. L. 145.

New York.— New York *v.* Hyatt, 3 E. D. Smith 156; Blatchley *v.* Moser, 15 Wend. 215; People *v.* Stevens, 13 Wend. 341; Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

Oregon.— Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295; State *v.* Sly, 4 Oreg. 277.

Tennessee.— State *v.* Mason, 3 Lea 649; Greenwood *v.* State, 6 Baxt. 567, 32 Am. Rep. 539.

Wisconsin.—State *v.* Newman, 96 Wis. 258, 71 N. W. 438.

United States.— Cross *v.* North Carolina, 132 U. S. 131, 10 S. Ct. 47, 33 L. ed. 287; McLaughlin *v.* Stephens, 16 Fed. Cas. No. 8,874, 2 Cranch C. C. 148.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1312. See also CRIMINAL LAW, 12 Cyc. 288; and cases cited *supra*, note 96.

11. *Ex p.* Kearny, 55 Cal. 212; Williamson *v.* Com., 4 B. Mon. (Ky.) 146; People *v.* Pratt, 22 Hun (N. Y.) 300; *In re* Baxter, 12 R. I. 13. See also Kansas City *v.* Neal, 49 Mo. App. 72; *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333; and *supra*, text and note 71; *infra*, XI, A, 8, i.

12. *Alabama.*— Hewlett *v.* Camp, 115 Ala. 499, 22 So. 137.

Louisiana.— State *v.* Caldwell, 3 La. Ann. 435.

New Jersey.— See Wyse *v.* New Jersey Police Com'rs, 68 N. J. L. 127, 52 Atl. 281.

Pennsylvania.— Port Clinton Borough *v.* Shafer, 5 Pa. Dist. 583.

Texas.— Joske *v.* Irvine, (Civ. App. 1897) 43 S. W. 278; Bohmy *v.* State, 21 Tex. App. 597, 2 S. W. 886; Flood *v.* State, 19 Tex. App. 584. See also Fay *v.* State, 44 Tex. Cr. 381, 71 S. W. 603; Lynn *v.* State, 33 Tex. Cr. 153, 25 S. W. 779. But see Davis *v.* State, 2 Tex. App. 425, holding that the power conferred by the special act of 1871 on the corporate authorities of Waco to license houses of prostitution operates to exempt holders of licenses granted under it from punishment under the provisions of Pen. Code (1856), making the keeping of such houses a misdemeanor.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1314.

13. *Georgia.*— Hofmayer *v.* Blakely, 116 Ga. 777, 43 S. E. 69.

Idaho.— *In re* Ridenbaugh, 5 Ida. 371, 49 Pac. 12.

Minnesota.— State *v.* Oleson, 26 Minn. 507, 5 N. W. 959; State *v.* Charles, 16 Minn. 474.

New York.— Wood *v.* Brooklyn, 14 Barb. 425.

Tennessee.— Robinson *v.* Franklin, 1 Humphr. 156, 34 Am. Dec. 625.

Texas.— Curtis *v.* Gulf, etc., R. Co., 26 Tex. Civ. App. 304, 63 S. W. 149; *Ex p.* Ogden, 43 Tex. Cr. 531, 66 S. W. 1100; *Ex p.* Powell, 43 Tex. Cr. 391, 66 S. W. 298.

West Virginia.— State *v.* Godfrey, 54 W. Va. 54, 46 S. E. 185.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1314.

Compare Easton *v.* Kemmerer, 3 Pa. Dist. 220, 13 Pa. Co. Ct. 522.

14. Cooley Const. Lim. 198, 199; Ingersoll Pub. Corp. 237, 238. See also *supra*, VI, G.

15. *California.*— *Ex p.* Hong Shen, 98 Cal. 681, 33 Pac. **799.**

Idaho.— State *v.* Preston, 4 Ida. 215, 38 Pac. 694.

Minnesota.—State *v.* Ludwig, 21 Minn. 202.

Nebraska.—Brownville *v.* Cook, 4 Nebr. 101.

New York.— Polinsky *v.* People, 11 Hun 390 [*affirmed* in 73 N. Y. 65]; Brooklyn *v.* Toynbee, 31 Barb. 282.

North Carolina.—State *v.* Wilson, 106 N. C. 718, 11 S. E. 254.

Texas.— Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246.

United States.— McLaughlin *v.* Stephens, 16 Fed. Cas. No. 8,874, 2 Cranch C. C. 148.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1311.

Express authority may be given to impose new and additional penalties. State *v.* Ludwig, 21 Minn. 202; Brooklyn *v.* Toynbee, 31 Barb. (N. Y.) 282; State *v.* Newman, 96 Wis. 258, 71 N. W. 438.

16. See cases cited *infra*, note 17.

Favorable construction.— Where the authority granted a municipal board to make rules for the government of the police department is limited to the making of rules and regulations not in conflict with the constitution and laws of the state, rules formulated to promote the health of the city, when their validity is challenged, will receive a favorable construction and be sustained by the court, unless their invalidity clearly appears. Wyse *v.* Jersey City Police Com'rs, 68 N. J. L. 127, 52 Atl. 281. So a statute or regulation looking to the public interest and safety will be upheld by the courts, unless it is plain

tion, such wholesome by-laws enacted to suppress disorderly conduct, provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of the municipality.[17] In many instances, however, such valid by-laws have been held to be repealed by implication by subsequent statutes, indicating an intention to withdraw the municipal authority;[18] but other cases indicate a contrary inclination.[19]

(II) *Difference in Penalty, Punishment, or License-Fees.* In view of constitutional provisions,[20] many ordinances have been declared void for assuming to impose a greater or less penalty, punishment, or license-fee than that fixed by statute,[21] or annexing different rates or conditions,[22] even when expressly author-

that it has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law. Macfarland *v.* Washington, etc., R. Co., 18 App. Cas. (D. C.) 456.

17. *Arkansas.*— Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214. *Compare* Lewis *v.* State, 21 Ark. 209, holding that the provision of a statute that the city authorities of Little Rock should have the exclusive power to license the retail sale of spirituous liquors within the city did not exempt the inhabitants from the operation of the general law prohibiting the desecration of the Sabbath.

California.— Odd Fellows' Cemetery Assoc. *v.* San Francisco, 140 Cal. 226, 73 Pac. 987.

Idaho.— State *v.* Preston, 4 Ida. 215, 38 Pac. 694.

Iowa.— Centerville *v.* Miller, 57 Iowa 56, 225, 10 N. W. 293, 639; Bloomfield *v.* Trimble, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212.

Louisiana.— Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696.

Michigan.— *In re* Stegenga, 133 Mich. 55, 94 N. W. 385, 61 L. R. A. 763.

Minnesota.— Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

Missouri.—St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791; Glasgow *v.* Bazan, 86 Mo. App. 412, 70 S. W. 257.

Nebraska.— See *In re* Anderson, 69 Nebr. 686, 96 N. W. 149, holding that a police regulation, not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exercise of some right guaranteed by the constitution.

Pennsylvania.— See Easton *v.* Kemmerer, 3 Pa. Dist. 220, 13 Pa. Co. Ct. 522, holding that an act providing that every resident and honorably discharged soldier, etc., who is unable to procure a livelihood by manual labor, may hawk, peddle, and vend any goods and wares, or solicit trade within the commonwealth by procuring a license for that purpose, does not exempt a milk vendor who holds such license from payment of a license-tax on milk vendors imposed by a city ordinance.

Texas.— *Ex p.* Boland, 11 Tex. App. 159.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1323 *et seq.*

18. *Connecticut.*— Southport *v.* Ogden, 23 Conn. 128.

Georgia.— Strauss *v.* Waycross, 97 Ga. 475, 25 S. E. 329.

Minnesota.— St. Paul *v.* Byrnes, 38 Minn. 176, 36 N. W. 449.

New Jersey.— Elizabeth *v.* Dunning, 58 N. J. L. 554, 34 Atl. 752; Mulcahy *v.* Newark, 57 N. J. L. 513, 31 Atl. 226.

Pennsylvania.—Com. *v.* Gillam, 8 Serg. & R. 50.

19. State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249; State *v.* Labatut, 39 La. Ann. 513, 2 So. 550; State *v.* Monroe, 16 La. Ann. 395; *Ex p.* Schmidt, 24 S. C. 363; Yankton *v.* Douglass, 8 S. D. 441, 66 N. W. 923. And see State *v.* People's Slaughter House, etc., Co., 46 La. Ann. 1031, 15 So. 408.

20. State *v.* Chase, 33 La. Ann. 287; State *v.* Oleson, 26 Minn. 507, 5 N. W. 959. See also New Orleans *v.* Graves, 34 La. Ann. 840.

The Kentucky constitution prohibiting municipal corporations from fixing by ordinance a penalty for a violation thereof less than that imposed by the statute for the same offense does not prohibit the municipality from increasing the minimum penalty fixed by statute. Owensboro *v.* Sparks, 99 Ky. 351, 36 S. W. 4, 18 Ky. L. Rep. 269. But a constitutional provision of this character has no application to fines imposed by a municipality for violation of a purely local ordinance upon a subject not covered by the general law. Carlisle *v.* Heckinger, 103 Ky. 381, 45 S. W. 358, 20 Ky. L. Rep. 74.

21. Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 361; State *v.* Burns, 45 La. Ann. 34, 11 So. 878; *Ex p.* Cross, 44 Tex. Cr. 376, 71 S. W. 289; Horn *v.* Chicago, etc., R. Co., 38 Wis. 463. See also Petersburg *v.* Metzker, 21 Ill. 205; State *v.* Chase, 33 La. Ann. 287.

22. *Ex p.* Solomon, 91 Cal. 440, 27 Pac. 757; *In re* Ah You, 88 Cal. 99, 25 Pac. 974, 22 Am. St. Rep. 280, 11 L. R. A. 408; State *v.* Elofson, 86 Minn. 103, 90 N. W. 309; Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185; Horn *v.* Chicago, etc., R. Co., 38 Wis. 463.

An ordinance is not in conflict with a general law, similar except in making an exception in the case of one whose life has been threatened. Linneus *v.* Dusky, 19 Mo. App. 20.

Minimum penalty under general law cannot be increased by ordinance. Petersburg *v.* Metzker, 21 Ill. 205 [*distinguished* in

ized by the charter.[23] But it has been held that where a general statute merely provides that the penalty shall not exceed a certain amount, an ordinance prescribing a penalty less than such amount is not invalid as being repugnant to the general law.[24]

5. TERRITORIAL JURISDICTION.[25] The corporation boundaries usually mark the limit for the exercise of the police power by the municipality;[26] but in many instances because essential to the statutory performance of police functions,[27] and especially for the preservation of the public health,[28] the municipality is granted

Quincy *v.* O'Brien, 24 Ill. App. 591]. *Compare* Owenboro *v.* Sparks, 99 Ky. 351, 36 S. W. 4, 18 Ky. L. Rep. 269.

23. Petersburg *v.* Metzker, 21 Ill. 205. *Compare* Matter of Bayard, 25 Hun (N. Y.) 546, 63 How. Pr. 73 [*reversing* 61 How. Pr. 294].

Where a special charter of a town, granted before the adoption of the present constitution, confers power upon the corporate authorities to impose fines or penalties for the unauthorized sale of intoxicating liquors, they are not limited or restricted to the same penalties imposed by the general law. Baldwin *v.* Murphy, 82 Ill. 485.

24. St. Joseph *v.* Vesper, 59 Mo. App. 459 [*following* Kansas City *v.* Hallett, 59 Mo. App. 160].

A minimum penalty may be provided in the ordinance, although the general law does not contain such a provision. Opelousas Police Bd. *v.* Giron, 46 La. Ann. 1364, 16 So. 190.

Both minimum and maximum penalties may be provided for in the ordinance, although the general law provides only for a maximum penalty. St. Joseph *v.* Vesper, 59 Mo. App. 459; Kansas City *v.* Hallett, 59 Mo. App. 160.

25. **Restriction of powers generally to territorial limits** see *supra*, III, B, 4.

Property see *supra*, VIII, A, 2.

26. *Alabama.*— Bates *v.* Mobile, 46 Ala. 158.

California.— South Pasadena *v.* Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093. See also Odd Fellows' Cemetery Assoc. *v.* San Francisco, 140 Cal. 226, 73 Pac. 987.

Georgia.— Gunn *v.* Macon, 84 Ga. 365, 10 S. E. 972.

Indiana.— Begein *v.* Anderson, 28 Ind. 79. See Robb *v.* Indianapolis, 38 Ind. 49, holding that under Indianapolis charter, providing for the removal and abatement of nuisances and for the apprehension of disorderly persons and common prostitutes within two miles of the city limits, the city has no power to pass an ordinance making it an offense to visit or be an occupant of a house of ill fame outside the city limits.

Louisiana.— See New Orleans *v.* Anderson, 9 La. Ann. 323, holding that the ordinance of the city of New Orleans of March 19, 1834, which makes it unlawful to build any stable in the interior of the city or any of the incorporated suburbs, does not apply to such additions to the limits of the city as subsequent legislation might make.

Missouri.— St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679 [*affirmed* in 194 U. S. 361, 24 S. Ct. 673, 48 L. ed. 1018]; St. Louis *v.* Howard, 119 Mo. 46, 24 S. W. 770, 41 Am. St. Rep. 630. *Compare* Lamar *v.* Weidman, 57 Mo. App. 507.

Pennsylvania.— McKeesport *v.* Mayhugh, 14 Pa. Dist. 224; Gettysburg *v.* Zeigler, 2 Pa. Co. Ct. 326.

South Carolina.—Jarvis *v.* Pinckney, 3 Hill 123.

Tennessee.— Gass *v.* Greeneville Corp., 4 Sneed 62, holding that the power and jurisdiction of a municipal corporation are confined to its own limits and to its own internal concerns, and its by-laws are binding upon none but its own members and those persons within its jurisdiction.

Texas.— See Victoria *v.* Victoria County, (Civ. App. 1906) 94 S. W. 368, holding that a municipal corporation has authority to abate nuisances erected by the county within the city's limits on land occupied by county buildings.

United States.— Lenox *v.* Georgetown, 15 Fed. Cas. No. 8,245, 1 Cranch C. C. 608. See Ward *v.* Washington, 29 Fed. Cas. No. 17,163, 4 Cranch C. C. 232, holding that an ordinance prohibiting the erection of a brick or lime kiln under a certain penalty, when not in terms restricted to the city, is void as beyond the power of the corporation to make it.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1319. See also *infra*, XI, A, 6.

Cemetery outside of limits is not within the control of the city see CEMETERIES, 6 Cyc. 710 note 10.

27. *Alabama.*—Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85.

Connecticut.— Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354.

Idaho.— Willson *v.* Boise City, 6 Ida. 391, 55 Pac. 887.

Illinois.— Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528.

Kansas.— State *v.* Franklin, 40 Kan. 410, 19 Pac. 801.

Maryland.— Harrison *v.* Baltimore, 1 Gill 264.

Michigan.— Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

Pennsylvania.— Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697 [*affirming* 27 Pa. Super. Ct. 485].

28. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545; and cases cited *supra*, note 27.

Under Kan. Comp. Laws (1885), c. 19, § 61, the police power of the city can only be ex-

police power beyond its boundaries. Thus it has been held that the grant of power to acquire territory for water-supply beyond the limits of a municipality is within the competency of the legislature,[29] and that the municipality may exercise police power in the protection of the territory thus acquired to insure cleanliness, and prevent any business and conduct likely to corrupt the fountain of water-supply for the city.[30] So likewise it may acquire outside territory for sewerage purposes, and exercise police power over the same;[31] and also, it would seem, establish quarantine beyond the municipal boundaries and thus protect the citizens from epidemic or any contagious or infectious disease,[32] as well as locate and regulate houses of detention and hospitals for infectious and contagious diseases beyond the city limits.[33]

6. Persons and Things Bound by Regulations.[34] The police power of a municipality may be applied not only to residents, but to all persons and things coming or brought within the municipal boundaries.[35] To this reasonable and wholesome rule exception has been made in a few cases under peculiar legislation to estrays found in the limits of the corporation.[36]

tended outside the corporate limits and within five miles therefrom over such lands as are necessary for hospital purposes and water-works; and the police judge has no power to hear and determine a complaint for maintaining a nuisance outside of the city limits, that is not alleged to be on such lands. State *v.* Franklin, 40 Kan. 410, 19 Pac. 801.

29. Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758; Martin *v.* Gleason, 139 Mass. 183, 29 N. E. 664; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601; New York *v.* Bailey, 2 Den. (N. Y.) 433. See also West Hartford *v.* Hartford Water Com'rs, 44 Conn. 360.

30. Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

31. Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601. And see *supra*, VIII, A, 2.

32. See Anderson *v.* O'Conner, 98 Ind. 168; Harrison *v.* Baltimore, 1 Gill (Md.) 264; Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484; Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697 [*affirming* 27 Pa. Super. Ct. 485]; Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

33. See Anderson *v.* O'Conner, 98 Ind. 168; Aull *v.* Lexington, 18 Mo. 401; Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697 [*affirming* 27 Pa. Super. Ct. 485]; Hazen *v.* Strong, 2 Vt. 427.

In Canada under 45 Vict. c. 29, § 12 (O.), the corporation of one municipality cannot erect or establish a smallpox hospital within the limits of another, either of a temporary or permanent character, without the sanction of the corporation of the latter. Elizabethtown Tp. *v.* Brockville, 10 Ont. 372.

34. Bastardy laws see Constitutional Law, 8 Cyc. 870 note 2.

35. *Alabama.*— Folmar *v.* Curtis, 86 Ala. 354, 5 So. 678, holding that an ordinance providing for the impounding of animals running at large is operative as to all animals coming within the corporate limits, whether owned by persons residing within the same or not. See also Clark *v.* Mobile, 67 Ala. 217.

Illinois.— Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201.

Indiana.— Horney *v.* Sloan, 1 Ind. 266. See also Huntington *v.* Cheesbro, 57 Ind. 74.

Iowa.— Gosselink *v.* Campbell, 4 Iowa 296.

Kentucky.— McKee *v.* McKee, 8 B. Mon. 433.

Maryland.— Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136.

Massachusetts.— Gilmore *v.* Holt, 4 Pick. 258.

Missouri.— Spitler *v.* Young, 63 Mo. 42. *Compare* Lamar *v.* Weidman, 57 Mo. App. 507.

New York.— Buffalo *v.* Webster, 10 Wend. 99.

North Carolina.— Whitfield *v.* Longest, 28 N. C. 268. See also Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41; Edenton *v.* Capeheart, 71 N. C. 156; Worth *v.* Fayetteville, 60 N. C. 70; Wilmington *v.* Roby, 30 N. C. 250; Plymouth Com'rs *v.* Pettijohn, 15 N. C. 591; Watts *v.* Scott, 12 N. C. 291.

Pennsylvania.— Taylor Borough *v.* Postal Tel., etc., Co., 16 Pa. Super. Ct. 344.

South Carolina.— Charleston *v.* Pepper, 1 Rich. 364; Kennedy *v.* Sowden, 1 McMull. 323. But *compare* State *v.* Charleston, 2 Speers 719, holding that under the Charleston city charter of 1783 and 1836, confining the taxing power to the inhabitants of the city at discretion, to the taxable property of non-residents within the city, and to the income of non-residents from professions carried on within the city, the city cannot impose a tax on the vehicles of persons not residing within the corporate limits of the city, and carrying on a business within the city, and which were probably used or kept without the city, and in going to and from their place of business.

Tennessee.— Knoxville *v.* King, 7 Lea 441.

Texas.— Moore *v.* Crenshaw, 1 Tex. App. Civ. Cas. § 264.

Virginia.— Frommer *v.* Richmond, 31 Gratt. 646, 31 Am. Rep. 746.

England.— Pierce *v.* Bartrum, Cowp. 269. See 36 Cent. Dig. tit. "Municipal Corporations," § 1320. See also *supra*, XI, A, 5.

36. Plymouth *v.* Pettijohn, 15 N. C. 591;

7. Subjects of Regulation — a. In General — (I) *Public Safety and Welfare*[37] — *"General Welfare Clause"*[38] — (A) *In General.* The safety of life, limb, and property being one of the prime objects of municipal incorporation, all appropriate regulations tending to promote this object are within the police power delegated to a municipality.[39] The enumeration of special powers in a municipal charter is often concluded with a clause conferring general authority to pass all ordinances which may be necessary for the promotion of the public safety and general welfare of the municipality, and are not inconsistent with the constitution and general laws of the state.[40] In some special charters there is no enumeration of the subjects upon which the corporation shall have power to legislate, but only a general grant of power to pass all ordinances which are necessary to the good order and well being of the corporation.[41] In either case this "general welfare clause" must be construed as conferring no other powers than such as are within the ordinary scope of municipal authority,[42] or which are necessary to accomplish municipal purposes.[43]

(B) *Powers Conferred.* Under a general grant of authority to pass such by-laws as shall be needful to the good order of the city, power has been upheld to "establish all suitable ordinances for administering the government of the city, the preservation of the health of its inhabitants, and the convenient transaction of business, within its limits."[44] The general welfare clause has also been held to confer power to prevent the keeping of bawdy-houses;[45] the feeding of cows on distillery slops, and selling their milk within the city;[46] the public exposure for sale, or sale of merchandise on Sunday;[47] the sale of liquor on Sunday;[48] the keeping of saloons, restaurants, and other places of public enter-

Marietta *v.* Fearing, 4 Ohio 427. But see *infra*, XI, A, 7, b, (VIII), (C), (2), (b); and XI, A, 8, h, (II).

The limitation in the estray act which restrains the operation of town ordinances to animals owned by the citizens of the town applies to town charters granted after the passage of the act. Dodge *v.* Gridley, 10 Ohio 173.

37. See also *supra*, III, B, 2, c, (II); and *infra*, XII; XIII.

38. **Constitutionality** of regulations in interest of public safety see CONSTITUTIONAL LAW, 8 Cyc. 866, 871, 874.

39. Easton *v.* Covey, 74 Md. 262, 22 Atl. 266; 2 Bacon Abr. 147; 2 Kent Comm. 239. See also State *v.* McMahon, 76 Conn. 97, 55 Atl. 591; Osburn *v.* Chicago, 105 Ill. App. 217.

40. Fairmont *v.* Meyer, 83 Minn. 456, 86 N. W. 457; Ingersoll Pub. Corp. 173.

41. Brooklyn *v.* Furey, 9 Misc. (N. Y.) 193, 30 N. Y. Suppl. 349; Nashville *v.* Linck, 12 Lea (Tenn.) 499.

42. Watson *v.* Thomson, 116 Ga. 546, 42 S. E. 747, 94 Am. St. Rep. 137, 59 L. R. A. 602.

43. Leavenworth *v.* Norton, 1 Kan. 432; New Orleans *v.* Philippi, 9 La. Ann. 44. And see Spaulding *v.* Lowell, 23 Pick. (Mass.) 71.

Under this power the municipality may prohibit all things hurttul to the comfort, safety, and welfare of society (Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71), or that are hurtful to the public interest (Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698).

Particular matters within power conferred under "general welfare clause" see *infra*, XI, A, 7, a, (I), (B).

Particular matters not within the power conferred under the "general welfare clause" see *infra*, XI, A, 7, a, (I), (C).

44. State *v.* Merrill, 37 Me. 329.

45. State *v.* Williams, 11 S. C. 288; Childress *v.* Nashville, 3 Sneed (Tenn.) 347. *Compare* McAlister *v.* Clark, 33 Conn. 91. See also *infra*, XI, A, 7, b, (III); and, generally, DISORDERLY HOUSES.

46. Johnson *v.* Simonton, 43 Cal. 242.

Dealing in food articles generally see *infra*, XI, A, 7, b, (VII), (N), (2); and, generally, FOOD.

Public health generally see *infra*, XI, A, 7, a, (III).

47. Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; Chebanse *v.* McPherson, 15 Ill. App. 311 [*affirmed* in 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857]; Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496; Charleston *v.* Benjamin, 2 Strobh. (S. C.) 508, 49 Am. Dec. 606.

Sunday observance generally see *infra*, XI, A, 7, b, (IX); and, generally, SUNDAY.

48. State *v.* Welch, 36 Conn. 215; Megowan *v.* Com., 2 Metc. (Ky.) 3. See Bagwell *v.* Lawrenceville, 94 Ga. 654, 21 S. E. 903, holding that under a statutory power "to protect the health, property and person of the citizens of the town, and to preserve peace and good order therein," a municipal corporation may pass an ordinance prohibiting the keeping of a "blind tiger," or keeping for sale, barter, or exchange any vinous, spirituous, or malt liquors, within

tainment open after ten o'clock at night;[49] the carrying on of the laundry business in a certain portion of the city;[50] to forbid all disorderly shouting, dancing, etc., in streets and public places;[51] to require all elevators inside all stores to be inclosed;[52] to prohibit the throwing of heavy or dangerous articles from upper stories of buildings into streets and open spaces near them used as public passways;[53] to establish fire limits, and to prevent the erection therein of wooden buildings;[54] to prohibit cruelty to animals;[55] to fix the time and places of holding public markets for the sale of food, and regulating the same;[56] and divers other similar acts and practices.[57]

(c) *Powers Not Conferred.* On the other hand, it has been held that the general welfare clause does not authorize a city to aid in constructing a plank road or toll bridge by a private company beyond the corporate limits;[58] nor to require the proprietor of a theater, circus, or other licensed place of exhibition to pay a police officer for attendance upon the place;[59] nor to subject to a fine "any

the corporate limits of the town. See also, generally, INTOXICATING LIQUORS.

Sunday observance generally see *infra*, XI, A, 7, b, (IX); and, generally, SUNDAY.

49. Morris *v.* Rome, 10 Ga. 532; State *v.* Freeman, 38 N. H. 426; Platteville *v.* Bell, 43 Wis. 488.

50. *In re* Hang Kie, 69 Cal. 149, 10 Pac. 327.

Laundry generally see *infra*, XI, A, 7, b; (VII), (H).

51. St. Charles *v.* Meyer, 58 Mo. 86; Washington *v.* Frank, 46 N. C. 436. See also McCaffrey *v.* Thomas, 4 Pennew. (Del.) 437, 56 Atl. 382; State *v.* Earnhardt, 107 N. C. 789, 12 S. E. 426. But see cases cited *infra*, note 65.

Protection of morals generally see *infra*, XI, A, 7, a, (IV).

52. New York *v.* Williams, 15 N. Y. 502.

Use of property generally see *infra*, XI, A, 7, b, (VIII), (C).

53. Charleston *v.* Elford, 1 McMull. (S. C.) 234.

54. King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Knoxville *v.* Bird, 12 Lea (Tenn.) 121, 49 Am. Rep. 326.

Fire regulations generally see *infra*, XI, A, 7, b, (VIII), (B), (D).

55. St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791.

General powers fairly include the power to pass an ordinance against cruelty to animals, although cruelty to animals is not one of the enumerated subjects of the police power. Porter *v.* Vinzant, 49 Fla. 213, 38 So. 607, 111 Am. St. Rep. 93.

Cruelty to animals generally see ANIMALS, 2 Cyc. 341 *et seq.*

Keeping and use of animals see *infra*, XI, A, 7, b, (VIII), (C), (2).

56. Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260; Ketchum *v.* Buffalo, 14 N. Y. 356.

Dealing in food articles see *infra*, XI, A, 7, b, (VII), (N), (2).

Market regulation see *infra*, XII, C, 3.

57. *Connecticut.*— State *v.* McMahon, 76 Conn. 97, 55 Atl. 591, removing snow and ice or covering the same with sand within a reasonable time.

Illinois.— Osburn *v.* Chicago, 105 Ill. App. 217, elevation of tracks, so as to avoid grade crossings over public streets.

Iowa.— Bloomfield *v.* Trimble, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212, intoxication.

Kentucky.— Chesapeake, etc., R. Co. *v.* Maysville, 69 S. W. 728, 24 Ky. L. Rep. 615, 63 L. R. A. 193, erection of safety gates at street crossings.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, placing telegraph and telephone wires under ground.

Missouri.— Green City *v.* Holsinger, 76 Mo. App. 567, drunkenness. *Compare* St. Louis *v.* Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474, holding that an ordinance prohibiting the owners of steam boilers from employing as engineer any person who has not first obtained a permit from the boiler inspector, or a license from the board of engineers, and providing for the appointment of such officers and for the punishment of violations thereof, are regulations for the public safety, which the city has a right to pass under a charter giving it power to regulate the carrying on of any dangerous business, to make provision for the inspection of steam boilers, to license engineers using such boilers, and to provide for the election or appointment of officers required by the charter or authorized by ordinance.

New York.— Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673 (height of hill boards); State *v.* Buffalo, 2 Hill 434 (authorizing the mayor to take measures for the safety and defense of the city by hiring arms and giving a bond for their safe return).

Pennsylvania.— Scranton City *v.* Straff, 28 Pa. Super. Ct. 258, operation of a merry-go-round within a thousand feet of any public city park.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1321.

58. Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76.

Territorial jurisdiction see *supra*, XI, A, 5.

59. Waters *v.* Leech, 3 Ark. 110.

person whose known character is that of a prostitute";[60] nor to levy taxes upon retailers of ardent spirits;[61] nor to require druggists to furnish verified statements quarterly of the kind and quantity of intoxicating liquors sold, and to whom;[62] nor to exact a license-fee from peddlers in the discretion of the mayor;[63] nor to require cotton merchants to keep a record of their purchases of loose cotton;[64] nor to prohibit street processions, with musical instruments, banners, torches, singing, and shouting;[65] nor to require a license-tax for a temporary stand for the sale of lemonade, cake, etc.;[66] nor to prescribe a different mode of trial and punishment, in addition to that provided by the state law, for enticing and harboring seamen;[67] nor to regulate and license the sale of liquors, in addition to the state regulation and license;[68] nor to prohibit the retail of liquors by one duly licensed by the state;[69] nor to forbid it during any divine service held within the corporate limits;[70] nor to make it unlawful to carry on a lawful trade or business in a lawful manner;[71] nor to attempt similar excess of municipal authority.[72]

(II) *Public Peace and Order*[73] — (A) *In General.* The preservation of the public peace and order is the primary police function of a municipality.[74] Whatever contention may have arisen over municipal police power, the authority to preserve the peace and order of the municipality, to prevent the exercise of unlawful violence, and to compel citizens and sojourners to abstain from riot, rout, and unlawful assembly is regarded as an inherent municipal power essential to municipal life;[75] and so, whenever the authority has been mooted, it has been uniformly sustained,[76] in some cases even to the extent of the doubtful power of double pun-

60. Buell *v.* State, 45 Ark. 336.

Public morals see *infra*, XI, A, 7, a, (IV).

61. *Ex p.* Burnett, 30 Ala. 461; Asheville *v.* Means, 29 N. C. 406.

Sale of liquor generally see INTOXICATING LIQUORS.

62. Clinton *v.* Phillips, 58 Ill. 102, 11 Am. Rep. 52. See, generally, DRUGGISTS; INTOXICATING LIQUORS.

63. State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652.

Hawkers and peddlers see *infra*, XI, A, 7, b, (VII), (B); and, generally, HAWKERS AND PEDDLERS.

64. Long *v.* Shelby County Taxing Dist., 7 Lea (Tenn.) 134, 40 Am. Rep. 55.

Mercantile business in general see *infra*, XI, A, 7, b, (VII), (M).

65. *In re* Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310. See also Reg. *v.* Nunn, 10 Ont. Pr. 395. But see cases cited *supra*, note 51.

66. Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576. See, generally, LICENSES.

Peddlers see *infra*, XI, A, 7, b, (VII), (B); XI, A, 8, c.

67. Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452.

Seamen generally see SEAMEN.

68. Loeb *v.* Attica, 82 Ind. 175, 42 Am. Rep. 494. See, generally, INTOXICATING LIQUORS.

69. *Ex p.* Burnett, 30 Ala. 461. See, generally, INTOXICATING LIQUORS; and *supra*, XI, A, 4, c, (I).

70. Gilham *v.* Wells, 64 Ga. 192.

Liquor-selling generally see INTOXICATING LIQUORS.

71. Cosgrove *v.* Augusta, 103 Ga. 835, 31 S. E. 445, 68 Am. St. Rep. 149, 42 L. R. A. 711.

72. *Alabama.*— Withers *v.* Coyles, 36 Ala. 320, requiring bond for behavior of slave.

Georgia.— Augusta *v.* Clark, 124 Ga. 254, 52 S. E. 881, penalty for usury.

Louisiana.— State *v.* Robertson, 45 La. Ann. 954, 13 So. 164, 40 Am. St. Rep. 272, providing for the inspection of steam boilers and creating a board of examiners therefor.

Michigan.— Grand Rapids *v.* Newton, 111 Mich. 48, 69 N. W. 84, 66 Am. St. Rep. 387, 35 L. R. A. 226.

North Carolina.— State *v.* Clay, 118 N. C. 1234, 24 S. E. 492.

Pennsylvania.— *In re* Pennsylvania R. Co., 213 Pa. St. 373, 62 Atl. 986, 3 L. R. A. N. S. 140 [*reversing* 27 Pa. Super. Ct. 113].

Tennessee.— Raleigh *v.* Dougherty, 3 Humphr. 11, 39 Am. Dec. 149.

Texas.— Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497.

Virginia.— Wallace *v.* Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1321.

73. **Constitutionality** of regulations in interest of public order see CONSTITUTIONAL LAW, 8 Cyc. 871.

74. See State *v.* Sherrard, 117 N. C. 716, 23 S. E. 157; Wilkes-Barre *v.* Garebed, 9 Kulp (Pa.) 273; and cases cited *infra*, note 75 *et seq.*

Mutilation of ornamental tree may be prohibited under this power. State *v.* Merrill, 37 Me. 329.

75. Love *v.* Judge Recorder's Ct., 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618; Vicksburg *v.* Briggs, 102 Mich. 551, 61 N. W. 1; State *v.* Bruckhauser, 26 Minn. 301, 3 N. W. 695. See also cases cited *infra*, note 76.

76. *Colorado.*— People *v.* Croot, 20 Colo. App. 256, 78 Pac. 310.

ishment.[77] For even those decisions which hold such double punishment to be violative of constitutional provision are not based upon the want of municipal authority, but upon the positive prohibition against putting a person twice in jeopardy.[78] Municipal regulations preservative of peace and order do not assume to punish crime against the state,[79] but are confined to small offenses and lighter demonstrations of violence and disorder tending to crime.[80] They are essentially means for the prevention of crime as well as the preservation of peace and order.[81] Such regulations are indispensable to municipalities in those states which, as a measure of public policy, declare public corporations responsible for the public peace and preservation of private property,[82] and make them absolutely liable for damages done by a mob within the corporate boundaries.[83]

(B) *Assault.* The punishment of an assault, an offense at common law,[84] is not within the police power of a municipality,[85] unless it is committed publicly so as to disturb the public peace and order,[86] or unless under authority expressly delegated by the charter of the corporation.[87]

Georgia.— Fitts *v.* Atlanta, 121 Ga. 567, 49 S. E. 793, 104 Am. St. Rep. 167, 67 L. R. A. 803.

Illinois.—Saxton *v.* Peoria, 75 Ill. App. 397.

Iowa.— Bloomfield *v.* Trimble, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212.

Kentucky.— Mt. Sterling *v.* Holly, 108 Ky. 621, 57 S. W. 491, 22 Ky. L. Rep. 358; Williamson *v.* Com., 4 B. Mon. 146.

Maine.— State *v.* Merrill, 37 Me. 329.

Massachusetts.— Com. *v.* Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712.

Michigan.— *In re* Bushey, 105 Mich. 64, 62 N. W. 1036; Vicksburg *v.* Briggs, 102 Mich. 551, 61 N. W. 1.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458. See also State *v.* Stone, 96 Minn. 482, 105 N. W. 187.

Missouri.— Independence *v.* Moore, 32 Mo. 392; Green City *v.* Holsinger, 76 Mo. App. 567.

New York.— People *v.* Pierce, 85 N. Y. App. Div. 125, 83 N. Y. Suppl. 79.

North Carolina.— State *v.* Earnhardt, 107 N. C. 789, 12 S. E. 426; State *v.* Cainan, 94 N. C. 880.

Ohio.— Esch *v.* Elyria, 27 Ohio Cir. Ct. 446.

Oregon.— See Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. Rep. 134.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1323. See also Ingersoll Pub. Corp. 352; and *infra*, note 77.

77. *Illinois.*— Hankins *v.* People, 106 Ill. 628.

Indiana.— Williams *v.* Warsaw, 60 Ind. 457.

Michigan.— See People *v.* Bay City, 36 Mich. 186.

Missouri.— St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791; Lebanon *v.* Gordon, 99 Mo. App. 277, 73 S. W. 222; State *v.* Muir, 86 Mo. App. 642; Kansas City *v.* Hallett, 59 Mo. App. 160.

New York.— Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

Tennessee.— Greenwood *v.* State, 6 Baxt. 567, 32 Am. Rep. 539.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1323.

Former jeopardy rule see *supra*, XI, A, 4, b, (II).

78. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; *Ex p.* Bourgeois, 60 Miss. 663, 45 Am. Rep. 420; State *v.* Keith, 94 N. C. 933. See also *supra*, XI, A, 4, b, (II).

79. See *supra*, XI, A, 4, b, (II), text and note 10.

80. *Ex p.* Slattery, 3 Ark. 484; Ingersoll Pub. Corp. 352. See also *Ex p.* Freeland, 38 Tex. Cr. 321, 42 S. W. 295 [*distinguishing* Leach *v.* State, 36 Tex. Cr. 248, 36 S. W. 471].

Petty offenses see *supra*, XI, A, 4, b, (II), note 4.

81. Vason *v.* Augusta, 38 Ga. 542. See also New Orleans *v.* Miller, 7 La. Ann. 651; Jefferson City *v.* Courtmire, 9 Mo. 692.

A charter right of control over highways, streets, alleys, and public grounds authorizes an ordinance forbidding the making of any public address in a public place within a half mile circle of the city hall, without first obtaining permission from the mayor. Love *v.* Judge Recorder's Ct., 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618. See also Fitts *v.* Atlanta, 121 Ga. 567, 49 S. E. 793, 104 Am. St. Rep. 167, 67 L. R. A. 803; Lincoln *v.* Boston, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257; Grand Rapids *v.* Newton, 111 Mich. 48, 69 N. W. 84, 66 Am. St. Rep. 387, 35 L. R. A. 226; Wilkes-Barre *v.* Garebed, 9 Kulp (Pa.) 273. See further *infra*, XI, A, 7, b, (VII).

82. See *infra*, XIV. But see Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656.

83. Liability for acts of mob see *infra*, XIV, A, 5, f.

84. Bass *v.* State, 6 Baxt. (Tenn.) 579; 1 Bacon Abr. 322; 3 Blackstone Comm. 120. See also ASSAULT AND BATTERY, 3 Cyc. 1070 *et seq.*

85. Walsch *v.* Union, 13 Oreg. 589, 11 Pac. 312; People *v.* Brown, 2 Utah 462.

86. Amboy *v.* Sleeper, 31 Ill. 499; Petersburg *v.* Metzker, 21 Ill. 205; State *v.* Bruckhauser, 26 Minn. 301, 3 N. W. 695. See also Mobile *v.* Allaire, 14 Ala. 400.

87. Avoca *v.* Heller, 129 Iowa 227, 105 N. W. 444.

(III) *PUBLIC HEALTH*[88] — (A) *In General.* The preservation of the health of the population is uniformly recognized as a most important municipal function; and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality.[89] Congested populations tend to breed disease as well as disorder, and since health as well as order is an essential condition of good living, and one of the primary purposes of municipal incorporation, sanitary powers may not only be expressly conferred by the charter,[90] or implied therefrom,[91] but they have been judicially declared to be inherent in a municipality as a necessary attribute thereof,[92] and are favored in American courts.[93] These powers have been exercised in ways innumerable.[94] However, authority given to pass ordinances to preserve health will not authorize ordinances for entirely different purposes.[95]

(B) *Powers Conferred.* It has been accordingly held that a city may make such regulations as will insure pure milk.[96] So also it may regulate the cultivation of crops, such as rice, within the corporate limits;[97] the cleaning and care of sinks and cesspools;[98] the burial of the dead;[99] and the location and operation of

88. **Constitutionality** of regulations in interest of public health see CONSTITUTIONAL LAW, 8 Cyc. 868.

Health generally see HEALTH, 21 Cyc. 384.

Vaccination regulations see HEALTH, 21 Cyc. 393.

89. Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354; Kennedy *v.* Phelps, 10 La. Ann. 227. See also Vason *v.* Augusta, 38 Ga. 542.

"The law of overruling necessity" is the term sometimes applied to the police power with respect to health. Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71.

Rights, whether tenable or untenable, are held subject to police power with reference to health and things hurtful to the public. Northwestern Fertilizing Co. *v.* Hyde Park, 70 Ill. 634.

90. New Orleans *v.* Hop Lee, 104 La. 601, 29 So. 214; Sprigg *v.* Garrett Park, 89 Md. 406, 43 Atl. 813.

A statute is constitutional which confers authority upon the supervisors of San Francisco to make all regulations which may be necessary or expedient for the preservation of the public health. Johnson *v.* Simonton, 43 Cal. 242.

91. Anderson *v.* O'Conner, 98 Ind. 168.

Under general welfare clause see *supra*, XI, A, 7, a, (I), (B), text and note 44.

92. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230. See also Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130; Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; Butler's Appeal, 1 Pa. Cas. 219, 1 Atl. 604.

A municipal corporation has incidental power to enact sanitary regulations, but if an ordinance goes beyond or outside of this power it cannot be sustained thereunder. St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

93. Ingersoll Pub. Corp. 354.

It is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

94. State *v.* Davidson, 50 La. Ann. 1297, 24 So. 324, 69 Am. St. Rep. 478; Com. *v.* Huhley, 172 Mass. 58, 51 N. E. 448, 70 Am. St. Rep. 242, 42 L. R. A. 403; State *v.* McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; Cartwright *v.* Cohoes, 39 N. Y. App. Div. 69, 56 N. Y. Suppl. 731 [*affirmed* in 165 N. Y. 631, 59 N. E. 1120]. See also Bissell *v.* Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251.

Particular matters within or not within such power see *infra*, XI, A, 7, b.

As the exigencies of each case are varying, the cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

95. Raleigh *v.* Dougherty, 3 Humphr. (Tenn.) 11, 39 Am. Dec. 149, such as a breach of the peace. See *supra*, XI, A, 7, a, (I), (A), text and notes 42, 43.

96. State *v.* Dupaquier, 46 La. Ann. 577, 15 So. 502, 49 Am. St. Rep. 334, 26 L. R. A. 162; People *v.* Vandecarr, 81 N. Y. App. Div. 128, 80 N. Y. Suppl. 1108 [*affirmed* in 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 791]. See also Johnson *v.* Simonton, 43 Cal. 242; St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872, 99 Am. St. Rep. 614, 64 L. R. A. 679.

Dealing in food products see *infra*, XI, A, 7, b. (VII), (N), (2).

97. Green *v.* Savannah, 6 Ga. 1; Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854.

98. State *v.* McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513.

Removal of filth, etc., see *infra*, XI, A, 7, b, (VI).

99. *Ex p.* Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618; Graves *v.* Bloomington, 17 Ill. App. 476; Coates *v.* New York, 7 Cow. (N. Y.) 585; Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

slaughter-houses.[1] It is competent also for the city to establish quarantine regulations,[2] pest-houses and places of detention,[3] and to exclude, remove, or detain persons affected with, or who have been exposed to, contagious or infectious diseases.[4] It may regulate also the removal of dead bodies,[5] dead animals, and garbage,[6] and compel citizens to prepare the same for removal at minimum expense;[7] and generally may suppress nuisances to the public health.[8]

(IV) *PUBLIC MORALS*[9] — (A) *In General.* Municipalities are not general guardians of the public morals,[10] and therefore may not unduly interfere with the

Burials see *infra*, XI, A, 7, b, (II).

1. *Ex p.* Heilbron, 65 Cal. 609, 4 Pac. 648; Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694.

Slaughter-houses generally see *infra*, XI, A, 7, b, (VII), (J).

2. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113. *Compare* Waters *v.* Townsend, 65 Ark. 613, 47 S. W. 1054.

Quarantine regulations see HEALTH, 21 Cyc. 391.

3. See Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 18 Am. St. Rep. 296, 51 L. R. A. 306; Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]; Clinton *v.* Clinton County, 61 Iowa 205, 16 N. W. 87; Elliot *v.* Kalkaska, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706. But *compare* Mitchell *v.* Rockland, 45 Me. 496.

Hospitals generally see *infra*, XI, A, 7, b, (VII), (G).

4. Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L. R. A. 306; Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]; Anderson *v.* O'Conner, 98 Ind. 168; Harrison *v.* Baltimore, 1 Gill (Md.) 264. See also Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484; Levin *v.* Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396.

Ordinance requiring boats coming from any place infected with malignant or contagious disease to anchor in the middle of the stream and stay there until inspected by the municipal health officer is a valid exercise of police power. Dubois *v.* Augusta, Dudley (Ga.) 30.

5. Wyse *v.* New Jersey Bd. Police Com'rs, 68 N. J. L. 127, 52 Atl. 281, holding that a municipal board, invested with authority by a city charter to make rules for the government of the police department, may lawfully adopt rules regulating the removal of dead bodies from the streets and public places by delivery to friends or relatives claiming them, or to the morgue.

Burials generally see *infra*, XI, A, 7, b, (II).

6. *California.*— *Ex p.* Casinello, 62 Cal. 538.

Georgia.— Schoen *v.* Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804.

Massachusetts.— *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351.

Michigan.— Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269.

Nebraska.— Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895; Smiley *v.* MacDonald, 42 Nebr. 5, 60 N. W. 355, 47 Am. St. Rep. 684, 27 L. R. A. 540.

United States.— Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1325.

Removal of dead animals see *infra*, XI, A, 7, b, (VI), (D).

Removal of garbage see *infra*, XI, A, 7, b, (VI), (C).

7. Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269; San Francisco Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693.

8. *Alabama.*— Ferguson *v.* Selma, 43 Ala. 398.

Arkansas.— Waters *v.* Townsend, 65 Ark. 613, 47 S. W. 1054; Harvey *v.* Dewoody, 18 Ark. 252.

Connecticut.— Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354.

Georgia.— Smith *v.* Collier, 118 Ga. 306, 45 S. E. 417; Vason *v.* Augusta, 38 Ga. 542.

Louisiana.— Kennedy *v.* Phelps, 10 La. Ann. 227; Municipality No. 1 *v.* Wilson, 5 La. Ann. 747.

Massachusetts.— Baker *v.* Boston, 12 Pick. 184, 22 Am. Dec. 421.

Mississippi.— Lake *v.* Aberdeen, 57 Miss. 260.

New Jersey.— Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251.

North Carolina.— Hellen *v.* Noe, 25 N. C. 493.

United States.— *In re* Ah Lung, 45 Fed. 684, forbidding sale of opium, etc.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1325.

Cigarettes see CONSTITUTIONAL LAW, 8 Cyc. 868 note 86. Power to require license for sale of cigarettes is given cities by a statute authorizing them to regulate inspection of tobacco, to pass all necessary police ordinances, and make regulations for promotion of health. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

Nuisances generally see *infra*, XI, A, 7, b, (VI).

9. **Constitutionality** of regulations in interest of public morals see CONSTITUTIONAL LAW, 8 Cyc. 870.

10. See Poyer *v.* Des Plaines, 18 Ill. App. 225; Chariton *v.* Barber, 54 Iowa 360, 6

liberty of the citizen by ordinances forbidding acts not unlawful or harmful *per se*.[11] Even express authority for such ordinances must be strictly construed in passing upon their validity.[12]

(B) *Obscenity.* Nevertheless a municipality may enact ordinances forbidding particular acts of obscenity which are unlawful,[13] or which tend to corrupt the public morals.[14]

N. W. 528, 37 Am. Rep. 209; State *v.* Wister, 62 Mo. 592.

11. *Arkansas.*— Buell *v.* State, 45 Ark. 336 [*following* Paralee *v.* Camden, 49 Ark. 165, 4 S. W. 654, 4 Am. St. Rep. 35], holding that under its power to suppress bawdy-houses, etc., to prevent indecent and disorderly conduct, to punish lewd behavior in public places, and to make ordinances to promote morals, etc., a municipal corporation cannot declare one "whose known character is that of a prostitute" guilty of an offense.

Kentucky.— McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430; Gastenau *v.* Com., 108 Ky. 473, 56 S. W. 705, 22 Ky. L. Rep. 157, 94 Am. St. Rep. 386, 49 L. R. A. 111, holding that a city ordinance declaring that it shall be unlawful for any woman to go in and out of a building where a saloon is kept for the sale of liquor, or "to frequent, loaf, or stand around said building within fifty feet thereof," and providing for the punishment of any saloonkeeper who shall permit a violation of the provision of the ordinance, is void as being an unreasonable interference with individual liberty. *Compare* Hechinger *v.* Maysville, 57 S. W. 619, 22 Ky. L. Rep. 486, 49 L. R. A. 114, holding that a city ordinance that it shall be unlawful for any person, "other than the husband, father, brother or male relative, to associate, escort, converse or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city," is invalid, as "male relatives" other than the husband, father, or brother should not be excepted, and a mother or sister should not be excepted, and any person should be allowed to converse with such prostitute long enough to transact any necessary and legitimate business; but with these exceptions the ordinance is a proper exercise of the police power.

Minnesota.— State *v.* Hammond, 40 Minn. 43, 41 N. W. 243, holding that that part of an ordinance which imposes a penalty upon "any person who commits any act of lewdness or indecency within the limits of said city" to be void, because it is in excess of the power vested in the city council.

North Carolina.— State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920, holding that authority to suppress bawdy-houses does not include power to provide by ordinance that "circumstances from which it may reasonably be inferred that any house is inhabited or frequented by disorderly persons, or persons of notorious bad character, shall be sufficient to establish that such house is a disorderly house, or house of ill fame."

Ohio.— Cady *v.* Barnesville, 4 Ohio Dec. (Reprint) 396, 2 Clev. L. Rep. 100 (holding that a statute giving power to punish lewd conduct on the street and in other public places does not authorize a municipal ordinance against walking, riding, standing, or conversing on any public ground within the corporation with a lewd woman); O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

Utah.— Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721, holding that neither the charter of Ogden, giving it power to punish prostitutes, nor Comp. Laws, p. 697, § 9, giving power to the city to suppress bawdy-houses, and punish the keepers thereof, authorizes an ordinance making it an offense to resort to a house of ill fame for lewdness.

Legislating on weight and sufficiency of evidence.— An ordinance, in declaring that the entrance or exit of any person from any saloon during the hours specified that same should be closed should be *prima facie* evidence of its violation is invalid, as an attempt to legislate on the weight and effect of evidence. McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430. To the same effect see State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

Where an act is not essentially criminal under the law of the state, a municipal ordinance will not make it so. Huron *v.* Carter, 5 S. D. 4, 57 N. W. 947.

12. *Arkansas.*— Buell *v.* State, 45 Ark. 336.

Minnesota.— State *v.* Hammond, 40 Minn. 43, 41 N. W. 243.

North Carolina.— State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

Ohio.— Cady *v.* Barnesville, 4 Ohio Dec. (Reprint) 396, 2 Clev. L. Rep. 100.

Utah.— Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1326.

Particular matters within or not within such power see *infra*, XI, A, 7, b.

13. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100. See also Shreveport *v.* Roos, 35 La. Ann. 1010. But *compare* State *v.* Hammond, 40 Minn. 43, 41 N. W. 243.

Obscene literature see CONSTITUTIONAL LAW, 8 Cyc. 871 note 2. See also, generally, OBSCENITY.

14. Grand Rapids *v.* Bateman, 93 Mich. 135, 53 N. W. 6.

Sale or distribution of literature tending to affect the public morals see CONSTITUTIONAL LAW, 8 Cyc. 870. Under Ohio Rev. St. § 1692, it is within the power of a mu-

(c) *Profanity.* A power to prohibit practices which are against good morals and public decency will authorize an ordinance prohibiting and punishing profanity.[15]

b. Particular Subjects — (i) *Introductory Statement.* In addition to what has already been said as to its police power, either under its general powers with respect to the public safety and welfare,[16] the public peace and order,[17] the public health,[18] or the public morals,[19] or under some power expressly delegated or granted by necessary implication to it for that purpose,[20] a more detailed discussion seems necessary with respect to some of the particular subjects of municipal regulation,[21] under the proper exercise of its police power.[22]

(ii) *Burials and Cemeteries.* Under the general powers as to public safety, welfare, health, etc.,[23] or under an express or implied grant of power for the purpose,[24] it is within the power of the municipality to regulate burials and burial places within its limits.[25]

(iii) *Disorderly Houses.*[26] Disorderly houses[27] may become a proper subject for municipal police regulation,[28] sometimes under its general powers as to public safety, welfare, health, etc.,[29] and sometimes under an express or implied grant of power for the purpose.[30] Such express or implied power may include

nicipal corporation to prohibit by ordinance the publication of obscene matter. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

15. *Ex p.* Delaney, 43 Cal. 478, holding this to be true whether the language is uttered frequently or upon one occasion only. See also Profanity.

16. See *supra*, XI, A, 7, a, (i).

17. See *supra*, XI, A, 7, a, (ii).

18. See *supra*, XI, A, 7, a, (iii).

19. See *supra*, XI, A, 7, a, (iv).

20. See *supra*, XI, A, 2.

21. See *infra*, XI, A, 7, b.

22. **Exercise of police power** see *infra*, XI, A, 8.

23. Graves *v.* Bloomington, 17 Ill. App. 476. See also *supra*, XI, A, 7, a, (i), (b).

24. People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, (1892) 30 N. E. 64; Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114. See also *supra*, XI, A, 2, 4.

25. *California.—Ex p.* Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618.

Illinois.— Graves *v.* Bloomington, 17 Ill. App. 476.

New Jersey.— Wyse *v.* New Jersey Police Com'rs, 68 N. J. L. 127, 52 Atl. 281.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 30 N. E. 64; Coates *v.* New York, 7 Cow. 585.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1343; and Cemeteries, 6 Cyc. 709 *et seq.*

Must be reasonable.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

26. **Constitutionality of regulations** see Constitutional Law, 8 Cyc. 870.

27. **Disorderly house** generally see Disorderly Houses.

28. See cases cited *infra*, note 29 *et seq.*

Keeping a disorderly house is an offense at the common law (Childress *v.* Nashville, 3 Sneed (Tenn.) 347; 4 Blackstone Comm. 29, 64, 168. See also Disorderly Houses, 14 Cyc. 479 *et seq.*); and therefore peculiarly amenable to police regulations (People *v.* Miller, 38 Hun (N. Y.) 82; State *v.* Williams, 11 S. C. 288; Childress *v.* Nashville, *supra*).

Regulation.— The law empowering the city of St. Louis, "by ordinance not inconsistent with any law of the state . . . to regulate bawdy houses," is not void as against public policy or good morals. State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Suppression.— The legislature has the constitutional power to confer upon the common council of a city authority to prohibit, prevent, and suppress the keeping and leasing of houses of ill fame, and to restrain, suppress, and punish the keepers thereof, and the owners and lessors of such premises. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

29. State *v.* Williams, 11 S. C. 288; Childress *v.* Nashville, 3 Sneed (Tenn.) 347. See also *supra*, XI, A, 7, a, (i), (b), text and note 45.

30. *Connecticut.*— McAlister *v.* Clark, 33 Conn. 91.

Iowa.— State *v.* Botkin, 71 Iowa 87, 32 N. W. 185, 60 Am. Rep. 780; Chariton *v.* Barber, 54 Iowa 360, 6 N. W. 528, 37 Am. Rep. 209.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

Missouri.— State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Nebraska.— Perry *v.* State, 37 Nebr. 623, 56 N. W. 315.

New York.— People *v.* Miller, 38 Hun 82.

North Carolina.— State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

Utah.— Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721.

keepers,[31] inmates,[32] and owners[33] or lessors[34] of bawdy-houses,[35] and other places of resort habitually disorderly.[36] But the municipality may not under mere power to suppress declare these acts misdemeanors and punishable by imprisonment.[37]

(IV) *Explosives, Etc.*[38] Under its general powers as to public safety, welfare, health, etc.,[39] or under an express or implied grant of power for the purpose,[40] a municipality may regulate the keeping, using, and selling of explosives, etc., within the corporate limits.[41] It may prescribe the maximum quantity of gunpowder, dynamite, nitroglycerin, hay, excelsior, or other combustible or inflammable material which may be stored in one place or kept in one house in the city;[42] and may forbid any person to discharge any fire-arm in the streets or any public place,[43] to carry a concealed pistol or weapon,[44] or to blast rock with explosives in the limits of the corporation.[45]

(V) *Gaming.*[46] The existence and extent of municipal police power over

See 36 Cent. Dig. tit. "Municipal Corporations," § 1327. See also *supra*, XI, A, 2, 4.

Power to suppress bawdy-house does not carry with it the power to regulate morals. See *supra*, XI, A, 7, (IV), (A).

31. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; People *v.* Miller, 38 Hun (N. Y.) 82; State *v.* Williams, 11 S. C. 288. *Compare* Shreveport *v.* Roos, 35 La. Ann. 1010, holding that the ordinance of Shreveport forbidding any one to "conduct a house of ill fame in an indecent manner" is not invalid for uncertainty, although it does not specify the acts of indecency which will render its keeper liable.

32. Perry *v.* State, 37 Nebr. 623, 56 N. W. 315; People *v.* Miller, 38 Hun (N. Y.) 82.

But not frequenters see Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721.

33. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; Childress *v.* Nashville, 3 Sneed (Tenn.) 347. See also McAlister *v.* Clark, 33 Conn. 91.

34. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

35. But not every house or room in which prostitution is permitted see State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

36. State *v.* Botkin, 71 Iowa 87, 32 N. W. 185, 60 Am. Rep. 780.

37. Chariton *v.* Barber, 54 Iowa 360, 6 N. W. 528, 37 Am. Rep. 209. See State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920; Ogden City *v.* McLaughlin, 5 Utah 387, 16 Pac. 721.

38. Regulating explosives see Constitutional Law, 8 Cyc. 868.

Regulating the keeping, use, and sale of explosives see Explosives, 19 Cyc. 3.

39. *California.*—*Ex p.* Cheney, 90 Cal. 617, 27 Pac. 436.

Georgia.— Williams *v.* Augusta, 4 Ga. 509.

Indiana.— Richmond *v.* Dudley, (1891) 26 N. E. 184.

Massachusetts.— Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174.

Missouri.— St. Louis *v.* Vert, 84 Mo. 204.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1322. See also *supra*, XI, A, 7, a, (I), (B).

40. Cottonwood Falls *v.* Smith, 36 Kan. 401, 13 Pac. 576; Scranton *v.* Jermyn Oil Co., 5 Lanc. L. Rev. (Pa.) 277; Washington *v.* Eaton, 29 Fed. Cas. No. 17,228, 4 Cranch C. C. 352. See also *supra*, XI, A, 2, 4.

41. Frederick *v.* Augusta, 5 Ga. 561. See, generally, Explosives.

42. *California.*— Dobbins *v.* Los Angeles, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95; Harley *v.* Heyl, 2 Cal. 477.

Georgia.— Frederick *v.* Augusta, 5 Ga. 561; Williams *v.* Augusta, 4 Ga. 509.

Illinois.— Standard Oil Co. *v.* Danville, 199 Ill. 50, 64 N. E. 1110; Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 289, 19 Am. St. Rep. 34, 7 L. R. A. 262; Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200.

Indiana.— Richmond *v.* Dudley, (1891) 26 N. E. 184; Clark *v.* South Bend, 85 Ind. 276, 44 Am. Rep. 13.

Louisiana.— Waters Pierce Oil Co. *v.* New Iberia, 47 La. Ann. 863, 17 So. 343.

Massachusetts.— See Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174.

Missouri.— Centralia *v.* Smith, 103 Mo. App. 438, 77 S. W. 488.

Montana.— Cameron *v.* Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508.

New York.— Metropolitan Bd. of Health *v.* Schmades, 3 Daly 282.

Ohio.— Cotter *v.* Doty, 5 Ohio 393.

Pennsylvania.— Scranton *v.* Jermyn Oil Co., 5 Lanc. L. Rev. 277.

Virginia.— See Davenport *v.* Richmond City, 81 Va. 636, 59 Am. Rep. 694.

United States.— Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1322.

43. Cottonwood Falls *v.* Smith, 36 Kan. 401, 13 Pac. 576; Washington *v.* Eaton, 29 Fed. Cas. No. 17,228, 4 Cranch C. C. 352.

44. *Ex p.* Cheney, 90 Cal. 617, 27 Pac. 436; Orrick *v.* Akers, 109 Mo. App. 662, 83 S. W. 549; St. Louis *v.* Vert, 84 Mo. 204 (brass knuckles); Abbeville *v.* Leopard, 61 S. C. 99, 39 S. E. 248. See, generally, Weapons.

45. Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174.

46. Gaming generally see Gaming, 20 Cyc. 873 *et seq.*

gaming and gambling houses is wholly and peculiarly dependent upon the charter or general laws, gaming not being an offense at the common law,[47] while keeping a gambling house is.[48] What is unlawful gaming is to be determined by statute.[49] The municipality may not regulate but may suppress unlawful practices, including lotteries,[50] book-making,[51] pool-selling,[52] gambling and keeping gambling houses or devices,[53] visiting at gambling houses,[54] but not billiard or pool tables and the like,[55] unless expressly authorized by statute.[56] A license-fee on a tenpin alley or the like cannot be imposed by ordinance without legislative authority.[57] The power given to regulate[58] does not necessarily carry the power to suppress.[59]

47. See GAMING, 20 Cyc. 878.

48. Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729; Rex *v.* Rogier, 1 B. & C. 272, 2 D. & R. 431, 25 Rev. Rep. 393, 8 E. C. L. 117; Rex *v.* Higginson, 2 Burr. 1232; Rex *v.* Dixon, 10 Mod. 335; 4 Blackstone Comm. 168; Roscoe Cr. Ev. 743. See also GAMING, 20 Cyc. 893.

49. See Mt. Pleasant *v.* Breeze, 11 Iowa 399; Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678; Plattsburg *v.* Trimble, 46 Mo. App. 459.

A grant of power "to suppress gaming and gambling houses" includes the power to suppress "gaming"; but when the crime of gaming is defined, and the punishment therefor prescribed by the law of the state, the city is not authorized to suppress any game not prohibited by such law, or to punish any person playing thereat; but it is confined to the use of such means as may be within its power to enforce the state law within its limits. *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.

50. Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706, 102 Am. St. Rep. 633. See also Kansas City *v.* Hallett, 59 Mo. App. 160; and CONSTITUTIONAL LAW, 8 Cyc. 870.

51. Chicago *v.* Brownell, 41 Ill. App. 70.

52. Louisville *v.* Wehmoff, 79 S. W. 201, 25 Ky. L. Rep. 1924. See also Chicago *v.* Brownell, 41 Ill. App. 70.

Under the California constitution authorizing the city and county of San Francisco to make and enforce within its limits such police regulations as are not in conflict with general laws, an ordinance prohibiting the sale of pools, etc., on horse-races, "except within the inclosure of a race-track where such trial or contest is to take place," is valid, since, although its incidental effect may be to confer special privileges on the owners of race tracks, its purpose is to restrain gambling of the character mentioned, which is a proper subject of police regulation. *Ex p.* Tuttle, 91 Cal. 589, 27 Pac. 933.

53. Chicago *v.* Brownell, 41 Ill. App. 70; White *v.* Com., 92 S. W. 285, 28 Ky. L. Rep. 1312; State *v.* Grimes, 49 Minn. 443, 52 N. W. 42; Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 79 Am. St. Rep. 843, 50 L. R. A. 725. See also CONSTITUTIONAL LAW, 8 Cyc. 870.

Policy.— Under Conn. Gen. St. § 2573, empowering common councils of cities to make ordinances to suppress gaming, an ordinance punishing any person managing a place or shop for the purpose of playing or allowing others to play the game or scheme commonly known as "policy" is not invalid on the ground that said statute does not create or define the offense prohibited in the ordinance, prescribe the penalty, make the acts described criminal, or empower common councils to make them so; the power granted being adequate, and "policy playing" being a phrase in such current use as to need no definition. State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Telegraph bets on races.— To maintain a place of any character where persons are allowed to bet on telegraph bets on races of any sort is an act prohibited by Pen. Code (1895), § 398, and such act cannot, in the absence of express legislative authority, be made penal by a municipal ordinance. Thrower *v.* Atlanta, 124 Ga. 1, 52 S. E. 76, 110 Am. St. Rep. 147, 1 L. R. A. N. S. 382.

54. *Ex p.* Lane, 76 Cal. 587, 18 Pac. 677.

55. Breninger *v.* Belvidere, 44 N. J. L. 350.

56. Burlingame *v.* Thompson, 74 Kan. 393, 86 Pac. 449; Clearwater *v.* Bowman, 72 Kan. 92, 82 Pac. 526.

Under the charter of the city of Madison, approved Feb. 14, 1848, it was held that the council had a right by ordinance to suppress bowling saloons, or to permit them to exist under such restraints as the council might see fit to impose. Smith *v.* Madison, 7 Ind. 86.

57. Goetler *v.* State, 45 Ark. 454. See, generally, LICENSES.

58. State *v.* Hay, 29 Me. 457, valid ordinance.

59. *In re* McMonies, (Nebr. 1906) 106 N. W. 456; State *v.* McMonies, (Nebr. 1906) 106 N. W. 454.

Regulation by license.— Where the only legislative authority conferred by the charter of a city with reference to billiard saloons and pool-rooms is to license such places by ordinance, the power to license is to be construed as a power to regulate through the license ordinance, and the city council may thereby impose such reasonable terms and conditions as may be necessary to make the license issued in pursuance thereof efficacious as a police regulation; but in the absence of further authority to regulate or control such places, the council would not be authorized, as against existing licensees at least, to impose new or additional conditions, not required or contemplated by the ordinances under which the licenses were issued, or to

(VI) *NUISANCE, GARBAGE, REFUSE, ETC.*[60] — (A) *In General.* While municipal charters usually contain the necessary grants of power over nuisances, including authority to declare, prevent, and remove the same,[61] it is primarily within the power of a municipality under its general grants of power to determine and declare what is a nuisance to health; and the courts will not interfere with this discretion except in case of obvious abuse.[62] A municipality cannot, however, make a thing a nuisance by merely declaring it to be such;[63] but it is limited to such things as the common law or statute declares to be nuisances,[64] and perhaps

provide and enforce penalties for the violation thereof. State *v.* Pamperin, 42 Minn. 320, 44 N. W. 251. A provision in a village charter giving it authority to pass by-laws to suppress and restrain all description of gaming, such as billiard tables, etc., confers a power to license. *In re* Snell, 58 Vt. 207, 1 Atl. 566.

60. Exercise of power and abatement of nuisance see *infra*, XI, A, 8, e.

Regulation of noises see CONSTITUTIONAL LAW, 8 Cyc. 875.

61. *Colorado.*— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Illinois.— Northwestern Fertilizing Co. *v.* Hyde Park, 70 Ill. 634; Block *v.* Jacksonville, 36 Ill. 301.

Indiana.— Rushville Natural Gas Co. *v.* Morristown, 30 Ind. App. 455, 66 N. E. 179.

Louisiana.— Municipality No. 1 *v.* Wilson, 5 La. Ann. 747. See also New Orleans *v.* Lambert, 14 La. Ann. 247.

Minnesota.—St. Paul *v.* Haugbro, 93 Minn. 59, 100 N. W. 470, 106 Am. St. Rep. 427, 66 L. R. A. 441. *Compare* St. Paul *v.* Gilfillan, 36 Minn. 298, 31 N. W. 49.

Missouri.— St. Louis *v.* Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

New York.— Rogers *v.* Barker, 31 Barb. 447; Hickok *v.* Plattsburgh, 15 Barb. 427; Clark *v.* Syracuse, 13 Barb. 32; Lewis *v.* Dodge, 17 How. Pr. 237.

Pennsylvania.— Philadelphia *v.* Brabender, 17 Pa. Super. Ct. 331; Butler's Appeal, 1 Pa. Cas. 219, 1 Atl. 604.

Texas.— *Ex p.* Glass, (Cr. App. 1905) 90 S. W. 1108.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1338.

Legislation creating or fixing the powers of county boards of health should not be construed as intended to detract from the powers of a municipal government to make ordinances for the regulation and suppression of nuisances. Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513.

62. *Alabama.*— Ferguson *v.* Selma, 43 Ala. 398.

Arkansas.— Waters *v.* Townsend, 65 Ark. 613, 47 S. W. 1054; Harvey *v.* Dewoody, 18 Ark. 252.

Connecticut.— Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354.

Georgia.— Smith *v.* Collier, 118 Ga. 306, 45 S. E. 417; Vason *v.* Augusta, 38 Ga. 542.

Illinois.— Langel *v.* Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266; Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

Louisiana.—Kennedy *v.* Phelps, 10 La. Ann. 227.

Maryland.— Harrison *v.* Baltimore, 1 Gill 264.

Massachusetts.— Baker *v.* Boston, 12 Pick. 184, 22 Am. Dec. 421.

Mississippi.— Lake *v.* Aberdeen, 57 Miss. 260.

New Jersey.— Manhattan Mfg., etc., Co. *v.* Von Keuren, 23 N. J. Eq. 251.

New York.— Rochester *v.* Simpson, 134 N. Y. 414, 31 N. E. 871 [*reversing* 57 Hun 36, 10 N. Y. Suppl. 499]; Hart *v.* Albany, 9 Wend. 571, 24 Am. Dec. 165.

North Carolina.— Hellen *v.* Noe, 25 N. C. 493.

Pennsylvania.— Shrack *v.* Coatesville, 6 Pa. Dist. 425, 19 Pa. Co. Ct. 334.

Under general health provision see *supra*, XI, A, 7, a, (III).

Right to enumerate and declare nuisances with regard to public health see HEALTH, 21 Cyc. 393 *et seq.*

Open cattle yards and pens within the corporate limits, where cattle in numbers are congregated and kept for feeding and fattening purposes, belong to that class of things which "must necessarily" become nuisances, and may be abated under a general prohibitive ordinance declaring it a nuisance to so keep cattle within the corporate limits. Opelousas *v.* Norman, 51 La. Ann. 736, 25 So. 401.

Must be reasonable.—*In re* Vandine, 6 Pick. (Mass.) 187, 17 Am. Dec. 351.

63. Arkadelphia *v.* Clark, 52 Ark. 23, 11 S. W. 957, 20 Am. St. Rep. 154; and cases cited *infra*, notes 64–69.

A by-law to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb, is *ultra vires* and invalid; and the refusal to receive evidence on the prisoner's behalf is a valid ground for her discharge. Reg. *v.* Nunn, 10 Ont. Pr. 395.

64. *Colorado.*— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Illinois.—Des Plaines *v.* Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25.

Iowa.— Everett *v.* Council Bluffs, 46 Iowa 66.

Kentucky.— Krickle *v.* Com., 1 B. Mon. 361.

Louisiana.—Laviosa *v.* Chicago, etc., R. Co., McGloin 299.

Mississippi.— Quintini *v.* Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62.

New Jersey.—Hutton *v.* Camden, 39 N. J. L.

those things which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.[65] A municipality cannot arbitrarily and without support of reason or fact declare that which is harmless a nuisance;[66] nor, although empowered by law declare what shall constitute a nuisance, can it declare that to be a nuisance which is not such in fact.[67] Again,

122, 23 Am. Rep. 203; New Jersey R., etc., Co. *v.* Jersey City, 29 N. J. L. 170.

Ohio.—Whitcomb *v.* Springfield, 3 Ohio Cir. Ct. 244, 2 Ohio Cir. Dec. 138.

Pennsylvania.— Com. *v.* Yost, 11 Pa. Super. Ct. 323.

West Virginia.— Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906.

United States.— Yates *v.* Milwaukee, 10 Wall. 497, 19 L. ed. 984.

Canada.— See Reg. *v.* Nunn, 10 Ont. Pr. 395.

Unless the particular use of property comes within the common-law or statutory idea of a nuisance, the municipality cannot declare it to be a nuisance, although its charter purports to confer upon it power to prevent and restrain nuisances and declare what shall be and constitute a nuisance. Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 332, 36 L. R. A. 593.

Obstructions of navigation and the like may be declared to be nuisances. Rogers *v.* Barker, 31 Barb. (N. Y.) 447; Hickok *v.* Plattsburgh, 15 Barb. (N. Y.) 427; Clark *v.* Syracuse, 13 Barb. (N. Y.) 32; Lewis *v.* Dodge, 17 How. Pr. (N. Y.) 229; Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

65. Laugel *v.* Bushnell, 96 Ill. App. 618 [*affirmed* in 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266]; Pittsburg *v.* W. H. Keech Co., 21 Pa. Super. Ct. 548, holding that the corporate officers of a city, having power "to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the corporation and the inhabitants thereof," may by ordinance duly enacted, not manifestly unreasonable or oppressive, nor unwarrantably discriminatory, prohibit things which were not public nuisances at common law; and that the fact that it declares the thing prohibited a public nuisance would be no ground for denying validity to the penal provision of the ordinance.

In Illinois the rule has been well stated in Laugel *v.* Bushnell, 197 Ill. 20, 26, 63 N. E. 1086, 58 L. R. A. 266 [*distinguishing* and *explaining* Harmison *v.* Lewistown, 153 Ill. 313, 36 N. E. 628, 46 Am. St. Rep. 893; Em ons *v.* Lewiston, 132 Ill. 380, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328; Des Plaines *v.* Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524; North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788]. In that case Boggs, J., said: "Nuisances may thus be classified: first, those which in their nature are nuisances *per se* or are so denounced by the common law or by statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so. With these distinctions kept clearly in view no difficulty will be found in harmonizing the decisions in question."

Drum-beating and horn-blowing in the street may be restrained. *In re* Gribben, 5 Okla. 379, 47 Pac. 1074. See also cases cited *supra*, notes 51, 65.

Forbidding carpet cleaning in certain locality is allowable. *Ex p.* Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640.

Rock-crushing machines.— Under Kansas City charter, giving the council power by ordinance to define what shall be nuisances, and to prevent, abate, and remove them, an ordinance is valid by which operating a rock-crushing machine in any block wherein there are three dwellings occupied is declared to be a nuisance; and it is no defense that the machine was in operation before the ordinance passed, and is of the most modern kind, and as complete as possible. Kansas City *v.* McAleer, 31 Mo. App. 433.

66. *Arkansas.*— Ward *v.* Little Rock, 41 Ark. 526, 48 Am. Rep. 46.

Illinois.— Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Poyer *v.* Des Plaines, 18 Ill. App. 225.

Iowa.— Everett *v.* Council Bluffs, 46 Iowa 66.

Kentucky.— Boyd *v.* Frankfort, 117 Ky. 199, 77 S. W. 669, 25 Ky. L. Rep. 1311, 111 Am. St. Rep. 240.

New Jersey.— New Jersey R., etc., Co. *v.* Jersey City, 29 N. J. L. 170.

Oregon.— Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593.

Pennsylvania.— Bryan *v.* Chester, 212 Pa. St. 259, 61 Atl. 894, 108 Am. St. Rep. 870.

Canada.— Reg. *v.* Nunn, 10 Ont. Pr. 395.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1338.

67. *Arkansas.*— Arkadelphia *v.* Clark, 52 Ark. 23, 11 S. W. 957, 20 Am. St. Rep. 154; Ward *v.* Little Rock, 41 Ark. 526, 48 Am. Rep. 46.

Colorado.— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

the power to regulate not giving the power to prohibit,[68] a municipality may not absolutely forbid the sale of meat or second-hand clothing, or other lawful business not in itself necessarily a nuisance.[69]

(B) *Smoke and Offensive Odors.* Within the general rules just stated,[70] the "smoke nuisance" is firmly established by repeated decisions as within the police power of the municipality over nuisances;[71] and it seems that it is competent for a municipality to prescribe what fuel may be used;[72] and its power to legislate against the noxious and offensive effects of smoke is generally sustained,[73] although some cases deny it.[74]

(C) *Filth, Garbage, and Refuse.* Garbage, refuse, and filth[75] are also within

Illinois.— Carthage *v.* Munsell, 203 Ill. 474, 67 N. E. 831; Des Plaines *v.* Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524; Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Carthage *v.* Duvall, 105 Ill. App. 123; Munsell *v.* Carthage, 105 Ill. App. 119.

Indiana.— Evansville *v.* Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

Iowa.— Everett *v.* Council Bluffs, 46 Iowa 66.

Kentucky.— Boyd *v.* Frankfort, 117 Ky. 199, 77 S. W. 669, 25 Ky. L. Rep. 1311, 111 Am. St. Rep. 240.

Louisiana.— Opelousas *v.* Norman, 51 La. Ann. 736, 25 So. 401.

Maryland.— State *v.* Mott, 61 Md. 297, 48 Am. Rep. 105.

Michigan.— Wreford *v.* People, 14 Mich. 41.

Mississippi.— Comfort *v.* Kosciusko, 88 Miss. 611, 41 So. 268; *Ex p.* O'Leary, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640.

New Jersey.— State *v.* Jersey City, 29 N. J. L. 170.

Ohio.— Cincinnati *v.* Miller, 11 Ohio Dec. (Reprint) 788, 29 Cinc. L. Bul. 364.

Oregon.— Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593.

Pennsylvania.— Pittsburg *v.* W. H. Keech Co., 21 Pa. Super Ct. 548. See also Bryan *v.* Chester, 212 Pa. St. 259, 61 Atl. 894, 108 Am. St. Rep. 870.

United States.— Yates *v.* Milwaukee, 10 Wall. 497, 505, 19 L. ed. 984, where it is said: "This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

See 36 Cent. Dig. tit. "Municipal Corporations," § 1338; and CONSTITUTIONAL LAW, 8 Cyc. 872.

What constitutes a nuisance and whether a question of law or of fact see NUISANCES.

Prohibiting the building of a fence along the side of any railroad within that part of the city which is laid out in lots and blocks and declaring that any such fence so built will be a nuisance is void. Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593.

68. State *v.* Mott, 61 Md. 297, 48 Am. Rep. 105; State *v.* Taft, 118 N. C. 1190, 23 S. E. 970, 54 Am. St. Rep. 768, 32 L. R. A. 122.

69. *Alabama.*— Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130.

Georgia.— Harrison *v.* Brooks, 20 Ga. 537.

Iowa.— Shiras *v.* Olinger, 50 Iowa 571, 33 Am. Rep. 138.

Louisiana.— Crowley *v.* West, 52 La. Ann. 526, 27 So. 53, 78 Am. St. Rep. 355, 47 L. R. A. 652.

Maryland.— State *v.* Mott, 61 Md. 297, 48 Am. Rep. 105.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1338.

70. See *supra*, XI, A, 7, b, (VI), (A).

71. St. Paul *v.* Haugbro, 93 Minn. 59, 100 N. W. 470, 106 Am. St. Rep. 427, 66 L. R. A. 441; New York Health Dept. *v.* Ebling Brewing Co., 78 N. Y. Suppl. 11. But *compare* St. Paul *v.* Gilfillan, 36 Minn. 298, 31 N. W. 49, where there was no delegation of authority over nuisances.

Regulation of dust see CONSTITUTIONAL LAW, 8 Cyc. 875.

Regulation of smoke see CONSTITUTIONAL LAW, 8 Cyc. 873.

Must be reasonable.— St. Louis *v.* Heitzeberg Packing, etc., Co., 141 Mo. 375, 42 S. W. 954, 64 Am. St. Rep. 516, 39 L. R. A. 551.

72. Brooklyn *v.* Nassau Electric R. Co., 44 N. Y. App. Div. 462, 61 N. Y. Suppl. 33.

73. St. Paul *v.* Haugbro, 93 Minn. 59, 100 N. W. 470, 106 Am. St. Rep. 427, 66 L. R. A. 441; People *v.* Horton, 41 Misc. (N. Y.) 309, 84 N. Y. Suppl. 942; New York Health Dept. *v.* Ebling Brewing Co., 78 N. Y. Suppl. 11; Glucose Refining Co. *v.* Chicago, 138 Fed. 209.

Regulation of offensive odors see CONSTITUTIONAL LAW, 8 Cyc. 873.

Prohibition of tobacco-smoking in street cars is a reasonable exercise of the police power by a municipality. State *v.* Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. Rep. 388.

74. Jersey City *v.* Abercrombie, (N. J. Sup. 1904) 58 Atl. 73; Sigler *v.* Cleveland, 4 Ohio S. & C. Pl. Dec. 166, 3 Ohio N. P. 119; Pittsburg *v.* W. H. Keech Co., 21 Pa. Super. Ct. 548.

75. *California.*— *Ex p.* Gughmini, (1905) 81 Pac. 958; *In re* Zhizhuzza, 147 Cal. 328, 81 Pac. 955; *Ex p.* Casinello, 62 Cal. 538.

Illinois.— Chicago *v.* Stratton, 58 Ill. App. 539, forbidding livery stable in certain locality.

the rules relating to municipal police power over nuisances.[76] Under its power not only to abate, but to prevent, nuisances,[77] a municipality may by contract provide for removal,[78] or may require owners to care for or remove garbage, offal, and filth,[79] or to deposit the same at stated time and places for removal by employees;[80]

Indiana.— Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Louisiana.— State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390, vegetable and animal matter.

Maryland.— Boehm *v.* Baltimore, 61 Md. 259.

Massachusetts.— Haley *v.* Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. N. S. 1005; Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146.

Michigan.— People *v.* Bennett, 83 Mich. 457, 47 N. W. 250; People *v.* Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524.

Missouri.— St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; State *v.* Beattie, 16 Mo. App. 131, offensive stable.

Nebraska.— Coombs *v.* MacDonald, 43 Nebr. 632, 62 N. W. 41.

New Jersey.— Atlantic City *v.* Abbott, 73 N. J. L. 281, 62 Atl. 999.

New York.— New Rochelle *v.* Clark, 65 Hun 140, 19 N. Y. Suppl. 989. See also Cartwright *v.* Cohoes, 39 N. Y. App. Div. 69, 56 N. Y. Suppl. 731 [*affirmed* in 165 N. Y. 631, 59 N. E. 1120], offensive vaults.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1341. See also cases cited *infra*, notes 77 *et seq.*

Under general health provision see *supra*, XI, A, 2, c, text and notes 9, 15.

Filth defined see 19 Cyc. 532.

Garbage defined see 20 Cyc. 967. An ordinance providing that no person other than the city contractor or its agents shall convey or transport through the streets or public places of the city any garbage, dead animals, etc., found within the city limits, and that the word "garbage" shall include all refuse of animal and vegetable matter which has been used for food, and all the refuse animal and vegetable matter which was intended to be so used, and includes condemned food, is unconstitutional, being repugnant to U. S. Const. Amendm. 14. Bauer *v.* Casey, 26 Ohio Cir. Ct. 598.

No conflict in several ordinances.— An ordinance regulating the keeping and removal of "garbage, grease, offal and other refuse matter composed of either animal or vegetable matter," is not in conflict with a prior one declaring that "the word 'garbage' shall be construed to mean kitchen offal and other refuse matter composed of either animal or vegetable substances," or one making it include "every accumulation of both animal and vegetable matter, liquid or otherwise, that attends the preparation, decay, and dealing in or storage of meats, fish, fowls, birds or vegetables," so as to render applicable a city charter provision that no ordinance conflicting with a previous ordinance shall be valid until the prior ordinance is expressly repealed. St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045.

76. See *supra*, XI, A, 7, b, (VI), (A).

77. Balch *v.* Utica, 168 N. Y. 651, 61 N. E. 1127 [*affirming* 42 N. Y. App. Div. 562, 59 N. Y. Suppl. 513]. See also St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045.

78. *Connecticut.*— State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

Indiana.— Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Louisiana.— State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390.

Nebraska.— Coombs *v.* MacDonald, 43 Nebr. 632, 62 N. W. 41.

New Jersey.— Atlantic City *v.* Abbott, 73 N. J. L. 281, 62 Atl. 999.

New York.— Balch *v.* Utica, 42 N. Y. App. Div. 562, 59 N. Y. Suppl. 513 [*affirmed* in 168 N. Y. 651, 61 N. E. 1127].

United States.— California Reduction Co. *v.* San Francisco Sanitary Reduction Works, 126 Fed. 29, 61 C. C. A. 91 [*affirmed* in 199 U. S. 306, 26 S. Ct. 100, 50 L. ed. 204].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1341.

79. Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146; Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269.

Manure.— The provision that "the keeper of any livery or other stable shall keep the stable and stable-yard clean, and shall not permit, between the first day of June and the first day of November, more than two cart-loads of manure to accumulate in or near the same at any one time" relates only to stable and stable-yards, and gives no right to deposit manure in alleys. People *v.* Bennett, 83 Mich. 457, 47 N. W. 250.

On land abutting on a private way.— A city ordinance providing that no owner or occupant of land abutting on a private way shall suffer any filth to remain on that part of the way adjoining his land is not indefinite because it attaches a penalty, if one "shall suffer any filth . . . to remain" in the way, rather than provide a time beyond which it should not be allowed to remain. Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146.

Prohibiting throwing into street.— Both under the constitution and under the act of April 25, 1863, the San Francisco board of supervisors have power to make it an offense to throw garbage, etc., into the public streets, etc. *Ex p.* Casinello, 62 Cal. 538.

80. Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269.

Placing in boxes.— An ordinance providing that garbage shall be collected only by the city's licensed agent, and that the parties producing garbage shall place it in boxes for removal by such agent at their expense, and a contract empowering the contractor to col-

and it may prescribe the times and mode of removal and disposition,[81] forbid removal by unlicensed persons,[82] and give a monopoly thereof by contract for a period of years.[83]

lect such garbage and to charge a specified price per pound, are a valid sanitary regulation. Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

81. Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269; People *v.* Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524. See also *Ex p.* Gughmini, (Cal. 1905) 81 Pac. 958; *In re* Zhizhuzza, 147 Cal. 328, 81 Pac. 955; Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Exclusive right of city to remove.— The city of Oakland, having charter power to declare what shall constitute a nuisance and abate the same, and to regulate business of every description that may endanger the public safety, health, and comfort, had jurisdiction to pass an ordinance providing that the city should have the exclusive right to remove garbage, and providing for a small fee for the removal thereof, recoverable by civil action. *Ex p.* Gughmini, (Cal. 1905) 81 Pac. 958; *Ex p.* Zhizhuzza, 147 Cal. 328, 81 Pac. 955.

Difference in charges for removal.— A city ordinance providing that the city should have exclusive charge of the removal of garbage and providing a different charge for garbage removed from a private dwelling-house from that removed from any shop, store, or business house was not thereby rendered invalid for non-uniformity. *Ex p.* Gughmini, (Cal. 1905) 81 Pac. 958; *Ex p.* Zhizhuzza, 147 Cal. 328, 81 Pac. 955.

Manner and vehicles to be used in removing garbage, etc., and the place of depositing it and the method of disposing of it may be prescribed by the city. State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390; People *v.* Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524; Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895.

Removal in open wagon.— A conviction for removing garbage in an open wagon, contrary to an ordinance of the city of Detroit, which provides that all garbage shall be collected in water-tight, closed carts, will be affirmed, as the restrictions imposed by the ordinance are reasonable, and authorized by the city charter (Loc. Acts 1889) giving the council power to regulate the handling of garbage. People *v.* Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524.

Time for burning rubbish.— A village ordinance providing that no rubbish "shall be set on fire or burnt in any street, at any time, or in any lot of the village, except between the rising and setting of the sun," forbids fires in the streets at all times, but permits them in a lot between sunrise and sunset. New Rochelle *v.* Clark, 65 Hun (N. Y.) 140, 19 N. Y. Suppl. 989.

82. *Connecticut.*— State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

Indiana.— Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Maryland.— Boehm *v.* Baltimore, 61 Md. 259.

Massachusetts.— Haley *v.* Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. N. S. 1008; *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351.

Michigan.— De Lano *v.* Doyle, 120 Mich. 258, 79 N. W. 188.

Nebraska.— Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1341.

But *compare* Bauer *v.* Casey, 26 Ohio Cir. Ct. 598.

Duly authorized contractor.— An ordinance which limits the use of the public streets for the collection of garbage or refuse matter that may become dangerous to the public health to the duly authorized contractor of the city is a valid exercise of the police power, if passed in good faith to safeguard the public health. Atlantic City *v.* Abbott, 73 N. J. L. 281, 62 Atl. 999.

Permit to remove ashes.— Boston City Ordinances, c. 38, § 1, declaring that the street department shall remove from yards and areas, when so placed as to be easily removed, all ashes accumulated from the burning of materials for heating buildings or for domestic purposes, and all noxious and refuse substances, and chapter 47, section 18, that no person other than employees of the city engaged in public work shall in any street, carry house dirt, house offal, or other refuse matter, except in accordance with a permit from the board of health, in so far as it applies to ashes, relates only to house ashes as distinguished from steam-engine ashes coming from factories or similar sources. Haley *v.* Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. N. S. 1005.

83. *Colorado.*— Ouray *v.* Corson, 14 Colo. App. 345, 59 Pac. 876.

Connecticut.— State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

Maryland.— Boehm *v.* Baltimore, 61 Md. 259.

Massachusetts.— *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351.

Michigan.— Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269.

Nebraska.— Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895; Coombs *v.* MacDonald, 43 Nebr. 632, 62 N. W. 41; Smiley *v.* MacDonald, 42 Nebr. 5, 60 N. W. 355, 47 Am. St. Rep. 684, 27 L. R. A. 540.

United States.— California Reduction Co. *v.* San Francisco Sanitary Reduction Works, 199 U. S. 306, 26 S. Ct. 100, 50 L. ed. 204 [*affirming* 126 Fed. 29, 61 C. C. A. 91]; San

(D) *Dead Animals.* The death of a domestic animal does not terminate the owner's property in it,[84] and the municipal authorities cannot arbitrarily deprive him of his property by giving it to another.[85] While he may be required to dispose of the carcass so that it will not become a nuisance,[86] he is entitled to a reasonable time for the removal of the carcass.[87] He may remove the carcass by the agency of others as well as by himself.[88] The carcass may be seized by the municipality only when it is about to become, and to prevent it from becoming, a nuisance;[89] but to this end it may regulate, license, and contract for removal of all carcasses of animals not slaughtered for food,[90] even though it thereby creates a temporary monopoly.[91]

(VII) *Occupations and Businesses*[92] — (A) *In General.* The only regula-

Francisco Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693.

Contra.— Knauer *v.* Louisville, 45 S. W. 510, 46 S. W. 701, 20 Ky. L. Rep. 193, 41 L. R. A. 219, holding that an ordinance of this kind is void as unreasonable and confiscatory.

Grant of exclusive privilege see CONSTITUTIONAL LAW, 8 Cyc. 1039; and, generally, LICENSES.

A city cannot grant an exclusive privilege to one person to enter private premises for the purpose of gathering and removing, at the owner's expense, rubbish and waste materials which, unless they are allowed to accumulate in unreasonable quantities, are not *per se* nuisances. Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895.

Monopoly to remove dead animals see *infra*, XI, A, 7, b, (VI), (D).

84. Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131.

85. Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131; Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

86. Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131; Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

Under general health provision see *supra*, XI, A, 2, c, text and note 15.

87. Alpers *v.* Brown, 60 Cal. 447; Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131; Meyer *v.* Jones, 49 S. W. 809, 20 Ky. L. Rep. 1632; State *v.* Morris, 47 La. Ann. 1660, 18 So. 710; Underwood *v.* Green, 42 N. Y. 140.

Where time allowed to remove is reasonable, an ordinance granting an exclusive privilege to another for removing the same is not invalid as creating a monopoly or depriving the owner of his property without due process of law. National Fertilizer Co. *v.* Lambert, 48 Fed. 458.

88. Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131.

This includes the right to dispose of it by sale and the removal of the dead carcass by the vendee. Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131.

89. State *v.* Morris, 47 La. Ann. 1660, 18 So. 710; River Rendering Co. *v.* Behr, 77 Mo. 91, 46 Am. Rep. 6 [*reversing* 7 Mo. App. 345]; Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005; National Fertilizer Co. *v.* Lambert, 48 Fed. 458.

90. Morgan *v.* Cincinnati, 9 Ohio Dec. (Reprint) 280, 12 Cinc. L. Bul. 41; Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005. See also Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130; *Ex p.* Casinello, 62 Cal. 538; Alpers *v.* Brown, 60 Cal. 447; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131; Schoen *v.* Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804; Vantreese *v.* McGee, 26 Ind. App. 525, 60 N. E. 318; Knauer *v.* Louisville, 45 S. W. 510, 46 S. W. 701, 20 Ky. L. Rep. 193, 41 L. R. A. 219; State *v.* Morris, 47 La. Ann. 1660, 18 S. W. 710; *In re* Vandine, 6 Pick. (Mass.) 187, 17 Am. Dec. 351; Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269; River Rendering Co. *v.* Behr, 77 Mo. 91, 46 Am. Rep. 6; Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895; Smiley *v.* MacDonald, 42 Nebr. 5, 60 N. W. 355, 47 Am. St. Rep. 684, 27 L. R. A. 540; Underwood *v.* Green, 42 N. Y. 140; Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631.

Permit from board of health may be required for the removing or carrying through its streets of the bodies of dead animals. Morgan *v.* Cincinnati, 9 Ohio Dec. (Reprint) 280, 12 Cinc. L. Bul. 41.

91. Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605, 8 Ky. L. Rep. 361; River Rendering Co. *v.* Behr, 77 Mo. 91, 46 Am. Rep. 6 [*reversing* 7 Mo. App. 345] (holding, however, that a municipal ordinance conferring upon one person the right to remove and appropriate all carcasses of animals found in the city and not slain for food, to the exclusion of the owners, is void as to carcasses which have not become a nuisance); State *v.* Fisher, 52 Mo. 174; Morgan *v.* Cincinnati, 9 Ohio Dec. (Reprint) 280, 12 Cinc. L. Bul. 41; National Fertilizer Co. *v.* Lambert, 48 Fed. 458; Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631.

Monopoly to remove garbage, etc., see *supra*, XI, A, 7, b, (VI), (C).

92. **Constitutionality** of regulations see CONSTITUTIONAL LAW, 8 Cyc. 872.

tions[93] which a municipality may make in respect to business, trade, or occupation, under its inherent police power, being such as it has authority to make under its general powers as to public safety, welfare, health, etc.,[94] power to make any other rule or regulation[95] is not inherent,[96] but must be granted by the state either expressly or by obvious implication.[97] In the exercise of its authorized police power to that

Occupation as nuisance see *infra*, XI, A, 7, b, (VII), (B)-(N); and *supra*, XI, A, 7, b, (VI). City may regulate a business when that business may be regarded as a nuisance. See CONSTITUTIONAL LAW, 8 Cyc. 872.

Particular occupations and businesses subject to regulation: Auctions and auctioneers and the like see *infra*, XI, A, 7, b, (VII), (B). Bridges see *infra*, IX, A, 7, b, (VII), (E). Brokers and their business see FACTORS AND BROKERS, 19 Cyc. 187 *et seq.* Commission merchants and their business see FACTORS AND BROKERS, 19 Cyc. 116. Dealers in food articles see *infra*, XI, A, 7, b, (VII), (N). Dealers in intoxicating liquors see INTOXICATING LIQUORS, 23 Cyc. 43. Disorderly houses see *supra*, XI, A, 7, b, (III). Druggists see DRUGGISTS. Entertainments, amusements, etc., see CONSTITUTIONAL LAW, 8 Cyc. 870; THEATERS AND SHOWS. Factors and their business see FACTORS AND BROKERS, 19 Cyc. 116. Ferries see *infra*, XI, A, 7, b, (VII), (E). Gaming see *supra*, XI, A, 7, b, (V). Hackmen and the like see *infra*, XI, A, 7, b, (VII), (F). Hawkers and the like see *infra*, XI, A, 7, b, (VII), (B). Hospitals see *infra*, XI, A, 7, b, (VII), (G). Hotel runners see *infra*, XI, A, 7, b, (VII), (F). Inns and innkeepers see INNKEEPERS, 22 Cyc. 1386 *et seq.* Laundries see *infra*, XI, A, 7, b, (VII), (H). Livery-stable keeper see LIVERY-STABLE KEEPERS, 25 Cyc. 1504 *et seq.* Mercantile business in general see *infra*, XI, A, 7, b, (VII), (M). Notary see NOTARIES. Particular dealers see *infra*, XI, A, 7, b, (VII), (N). Pawnbrokers see PAWNBROKERS; and *infra*, XI, A, 7, b, (VII), (B). Railroads see *infra*, XI, A, 7, b, (VII), (I). Slaughter-houses see *infra*, XI, A, 7, b, (VII), (J). Storage houses see *infra*, XI A, 7, b, (VII), (K). Street railroads see *infra*, XI, A, 7, b, (VII), (I). Telegraph business see TELEGRAPHS AND TELEPHONES; and *infra*, XI, A, 7, b, (VII), (D). Telephone business see TELEGRAPHS AND TELEPHONES; and *infra*, XI, A, 7, b, (VII), (D). Theater business see THEATERS AND SHOWS. Transportation see *infra*, XI, A, 7, b, (VII), (L). Vehicles see *infra*, XI, A, 7, b, (VII), (L). Warehousemen see CONSTITUTIONAL LAW, 8 Cyc. 875; WAREHOUSEMEN; and *infra*, XI, A, 7, b, (VII), (K). Wharfingers see CONSTITUTIONAL LAW, 8 Cyc. 875; and WHARVES. See also LICENSES, 25 Cyc. 614 *et seq.*

93. An express grant of power is usually given for making such regulations. See cases cited *infra*, note 97 *et seq.* See also LICENSES, 25 Cyc. 600.

94. *Georgia.*— Odell *v.* Atlanta, 97 Ga. 670, 25 S. E. 173.

Louisiana.— New Orleans *v.* Costello, 14 La. Ann. 37.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

New Jersey.— Muhlenbrinck *v.* Long Branch Com'rs, 42 N. J. L. 364, 36 Am. Dec. 518.

United States.—Ward *v.* Washington, 29 Fed. Cas. No. 17,163, 4 Cranch C. C. 232.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1344 *et seq.* See also *supra*, XI, A, 7, a.

Against imposition and fraud.— The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency, and laws providing for the detection and prevention of imposition and fraud as a general rule are free from constitutional objection. People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286.

A so-called "business," conducted for the purpose of enabling persons to bet upon horse-races, although not made criminal by any statute, is contrary to public policy, and is not such a useful or necessary occupation as that a city may not, by appropriate ordinance, make penal and prevent the carrying on of the same. Odell *v.* Atlanta, 97 Ga. 670, 25 S. E. 173.

95. See cases cited *infra*, note 97 *et seq.*

96. See cases cited *infra*, note 97.

Power is not inherent see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1039; HAWKERS AND PEDDLERS, 21 Cyc. 366.

97. *Arkansas.*— Mena *v.* Smith, 64 Ark. 363, 42 S. W. 831; *Ex p.* Martin, 27 Ark. 467.

Illinois.— Chicago *v.* Phœnix Ins. Co., 126 Ill. 276, 18 N. E. 668 [*affirming* 26 Ill. App. 650]; Cairo *v.* Coleman, 53 Ill. App. 680; Keim *v.* Chicago, 46 Ill. App. 445; McKinney *v.* Alton, 41 Ill. App. 508.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528; Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Shuman *v.* Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; Smith *v.* Madison, 7 Ind. 86.

Iowa.— Burlington *v.* Lawrence, 42 Iowa 681; State *v.* Smith, 31 Iowa 493.

Kentucky.— Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556.

Louisiana.— State *v.* Itzcoviteh, 49 La. Ann. 366, 21 So. 544, 62 Am. St. Rep. 643, 37 L. R. A. 673; New Iberia *v.* Migues, 32 La. Ann. 923; Plaquemine *v.* Roth, 29 La. Ann. 261.

Maryland.—Cambridge *v.* Cambridge Water Co., 99 Md. 501, 58 Atl. 442.

Michigan.— See People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286.

Minnesota.— State *v.* McMahon, 69 Minn.

effect a municipality may regulate an occupation or business[98] which it may not prohibit;[99] and for this purpose it may require a license where it has no power of taxation;[1] or, when authorized to do so, it may impose an occupation or license-tax,[2] or both require such a license and impose such a tax.[3] Such regulations, however, are void if they are unreasonable,[4] and they must not be

265, 72 N. W. 79, 38 L. R. A. 675; St. Paul *v.* Stoltz, 33 Minn. 233, 22 N. W. 634.

Missouri.— Dunlap *v.* Canton, 35 Mo. 189; Knox City *v.* White, 19 Mo. App. 528; Knox City *v.* Thompson, 19 Mo. App. 523.

New York.— Dunham *v.* Rochester, 5 Cow. 462.

Ohio.— White *v.* Kent, 11 Ohio St. 550; Frank *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 544, 5 Ohio N. P. 520, 7 Ohio N. P. 146.

Pennsylvania.— Warren *v.* Geer, 117 Pa. St. 207, 11 Atl. 415; Com. *v.* Wagner, 9 Pa. Co. Ct. 625; Gettysburg *v.* Zeigler, 2 Pa. Co. Ct. 326.

Tennessee.— Long *v.* Shelby County Taxing Dist., 7 Lea 134, 40 Am. Rep. 55.

Texas.— *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

Vermont.—Winooski *v.* Gokey, 49 Vt. 282.

Canada.— Jonas *v.* Gilbert, 5 Can. Sup. Ct. 356; Merritt *v.* Toronto, 25 Ont. 256.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1344 *et seq.*

Power must be expressly conferred by the state see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1039; HAWKERS AND PEDDLERS, 21 Cyc. 366. See also cases cited *infra*, note 99 *et seq.*

Power to prohibit, remove, and regulate any business or occupation carries with it the power to impose any conditions whatever. St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872, 99 Am. St. Rep. 614, 64 L. R. A. 679 [*affirmed* in 194 U. S. 361, 24 S. Ct. 673, 48 L. ed. 1018]; St. Louis, etc., R. Co. *v.* Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300; St. Louis *v.* Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630.

98. Particular occupations, etc., see *infra*, XI, A, 7, b, (VII), (B) *et seq.*

99. *California.*—Addison *v.* Saulnier, 19 Cal. 82.

Connecticut.—Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383.

Georgia.— Morton *v.* Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485; Johnston *v.* Macon, 62 Ga. 645; Hill *v.* Decatur, 22 Ga. 203.

Illinois.—Wiggins *v.* Chicago, 68 Ill. 372; East St. Louis *v.* Wehrung, 46 Ill. 392; Chicago *v.* Hardy, 66 Ill. App. 524.

Indiana.— Goshen *v.* Kern, 63 Ind. 468, 30 Am. Rep. 234; Sweet *v.* Wabash, 41 Ind. 7.

Michigan.—Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740; Chilvers *v.* People, 11 Mich. 43.

Missouri.— St. Louis *v.* St. Louis Mar. Ins. Co., 47 Mo. 163; St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150; St. Louis *v.* Bircher, 7 Mo. App. 169.

New Jersey.— Passaic *v.* Paterson Bill Posting, etc., Co., 71 N. J. L. 75, 58 Atl. 343; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; State *v.* Hoboken, 33 N. J. L. 280; Kip *v.* Paterson, 26 N. J. L. 298.

New York.— New York *v.* Second Ave. R. Co., 32 N. Y. 261; People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596; Cushing *v.* Buffalo Bd. of Health, 13 N. Y. St. 783; People *v.* New York, 7 How. Pr. 81.

Pennsylvania.— Johnson *v.* Philadelphia, 60 Pa. St. 445.

Wisconsin.— Carter *v.* Dow, 16 Wis. 298.

Canada.— Merritt *v.* Toronto, 25 Ont. 256.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1344 *et seq.* See also LICENSES, 25 Cyc. 602.

1. *Arkansas.*— Russellville *v.* White, 41 Ark. 485.

California.— Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

Illinois.— U. S. Distilling Co. *v.* Chicago, 112 Ill. 19; Chicago *v.* Bartee, 100 Ill. 57; Ballard *v.* Chicago, 69 Ill. App. 638.

Indiana.— Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Michigan.— Van Baalen *v.* People, 40 Mich. 258; Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740.

Missouri.— See Kansas City *v.* Grush, 151 Mo. 128, 52 S. W. 286; St. Louis *v.* Green, 70 Mo. 562.

Nebraska.— Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588.

Pennsylvania.—Brownback *v.* North Wales, 44 Wkly. Notes Cas. 258.

Vermont.— State *v.* Bevins, 70 Vt. 574, 41 Atl. 655; St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

Virginia.— See Neal *v.* Com., 21 Gratt. 511.

United States.— Ward *v.* Washington, 29 Fed. Cas. No. 17,163, 4 Cranch C. C. 232.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1344; and LICENSES, 25 Cyc. 600 *et seq.*

Amount of license-fee see *infra*, XI, A, 8, c, (VI); and HAWKERS AND PEDDLERS, 21 Cyc. 366 notes 17, 18.

Fees to cover license expenses see *infra*, XI, A, 8, c, (VI).

2. Hot Springs *v.* Rector, (Ark. 1903) 76 S. W. 1056; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

License-tax see *infra*, XI, A, 8, c, (VI); and LICENSES, 25 Cyc. 600 *et seq.*

Upon particular occupations see *infra*, XI, A, 7, b, (B) *et seq.*

Taxation for revenue see *infra*, XV, D.

3. Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

4. *Alabama.*— Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

District of Columbia.— District of Colum-

unconstitutional,[5] or in restraint of trade;[6] nor can they be applied to an occupation, employment, or business not carried on within the municipal boundaries.[7]

(B) *Auctioneers, Peddlers, Canvassers, and the Like.* In accordance with the general rules which have just been discussed[8] auctioneers, hawkers, peddlers, and the like[9] may be licensed under special charter or statutory or reasonably implied authority given for this purpose,[10] but not otherwise.[11] Book

bia *v.* Saville, 1 MacArthur 581, 29 Am. Rep. 616.

Illinois.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 552; Wiggins *v.* Chicago, 68 Ill. 372. See also Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802.

Iowa.—State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652.

Massachusetts.— Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969.

Minnesota.— St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554; Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361.

Mississippi.— Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367.

Ohio.— White *v.* Kent, 11 Ohio St. 550.

Pennsylvania.—See Densmore *v.* Erie, 7 Pa. Dist. 355, 20 Pa. Co. Ct. 513.

See also *supra*, VI, G, 4; *infra*, XI, A, 8, i; and LICENSES, 25 Cyc. 603 *et seq.*

5. *Alabama.*— Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

California.— Sacramento *v.* Crocker, 16 Cal. 119.

Georgia.—Lanier *v.* Macon, 59 Ga. 187; Savannah *v.* Hines, 53 Ga. 616; Home Ins. Co. *v.* Augusta, 50 Ga. 530.

Louisiana.— State *v.* Von Sachs, 45 La. Ann. 1416, 14 So. 249.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289; American Union Express Co. *v.* St. Joseph, 66 Mo. 675.

Texas.— Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124.

See also *supra*, VI, G, 2; *infra*, XI, A, 8, i; FACTORS AND BROKERS, 19 Cyc. 117; and LICENSES, 25 Cyc. 603 *et seq.*

6. St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; White *v.* Kent, 11 Ohio St. 550; Warren *v.* Lewis, 16 Pa. Co. Ct. 176. See also *supra*, VI, G; *infra*, XI, A, 8, i; LICENSES, 25 Cyc. 603 *et seq.*

Manufactures.—Acts authorizing cities of the third class to impose an occupation tax on "manufacturing and other corporations and institutions" does not authorize them to levy a tax on natural persons engaged in the manufacturing business. Joplin *v.* Leckie, 78 Mo. App. 8.

7. Bates *v.* Mobile, 46 Ala. 158. See *supra*, XI, A, 5.

For example under a charter giving the municipal authorities the right to impose a business tax on all persons doing business in the city, and to impose this tax by requiring owners of wagons engaged in carrying on the owner's business in the city to take out a license therefor, the owner of woodland near the city, which he is clearing up, who hauls the wood into the city and sells it, having no office or woodyard, cannot be required to pay a license-tax, as he is not engaged in business in the city. Gunn *v.* Macon, 84 Ga. 365, 10 S. E. 972.

Residence immaterial.— Corporate power of a municipality to tax vocations may properly be extended equally to all persons plying the vocation within the corporate limits, whether they reside within them or not. Edenton *v.* Capeheart, 71 N. C. 156.

Discrimination in favor of or against nonresident see LICENSES, 25 Cyc. 610; and *supra*, VI, G, 4; *infra*, XI, A, 8, i.

8. See *supra*, XI, A, 7, b, (VII), (A).

9. See AUCTIONS AND AUCTIONEERS; CONSTITUTIONAL LAW, 8 Cyc. 875; HAWKERS AND PEDDLERS.

A corporation may be included within the term "auctioneer." People *v.* Scully, 23 Misc. (N. Y.) 732, 53 N. Y. Suppl. 125.

10. *Iowa.*— State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652.

Massachusetts.—Com. *v.* Fenton, 139 Mass. 195, 29 N. E. 653.

New York.— Buffalo *v.* Marion, 13 Misc. 639, 34 N. Y. Suppl. 945.

Ohio.— White *v.* Kent, 11 Ohio St. 550.

Pennsylvania.— Warren *v.* Geer, 117 Pa. St. 207, 11 Atl. 415.

Texas.— *Ex p.* Henson, (Cr. App. 1905) 90 S. W. 874.

United States.— Fowle *v.* Alexandria, 3 Pet. 398, 7 L. ed. 719.

Defining a peddler.— Under the power conferred by its charter to define and restrain peddlers, the city of St. Paul is limited and restricted in defining such term to the generally accepted meaning and scope of the law relating thereto. St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554.

Licensing itinerant dealers.—*Ex p.* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

Exempting home producers from peddler's license see People *v.* Sawyer, 106 Mich. 428, 64 N. W. 333. See also LICENSES.

11. *Arkansas.*— *Ex p.* Martin, 27 Ark. 467.

Indiana.— Shuman *v.* Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378.

Minnesota.— St. Paul *v.* Stoltz, 33 Minn. 233, 22 N. W. 634.

Mississippi.— Temple *v.* Sumner, 51 Miss. 13, 24 Am. Rep. 615.

New York.— Rochester *v.* Close, 35 Hun 208.

United States.— Fowle *v.* Alexandria, 3 Pet. 398, 7 L. ed. 719.

Canada.— Merritt *v.* Toronto, 25 Ont. 256.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1345.

agents[12] and pawnbrokers,[13] it seems, are embraced in this class, but not insurance agents.[14] Furthermore a city may be vested with power to regulate peddling on the streets and may compel peddlers and hawkers to stay within due bounds and not to act in a manner that renders their occupation a public nuisance.[15]

(c) *Charges and Prices and Weights and Measures.* Generally speaking the municipality, under its properly delegated police power, may prescribe rates for carriage by cab, hack, coach, omnibus, car, or other vehicle, whether propelled by animal, steam, gasoline, or electricity;[16] and for water, gas, and light;[17] and also, it seems, if authorized, for common carriers of news and intelligence;[18] but all

Under general welfare clause see *supra*, XI, A, 2, a, (I), text and note 73.

Must be reasonable.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734; State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652. See also VI, G, 4; *infra*, XI, A, 8, i.

12. Warren *v.* Geer, 117 Pa. St. 207, 11 Atl. 415.

13. Launder *v.* Chicago, 111 Ill. 291, 53 Am. Rep. 625; Shuman *v.* Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; St. Paul *v.* Lytle, 69 Minn. 1, 71 N. W. 703. See also CONSTITUTIONAL LAW, 8 Cyc. 876; and, generally, PAWNBROKERS.

14. Chicago *v.* Phœnix Ins. Co., 126 Ill. 276, 18 N. E. 668 [*affirming* 26 Ill. App. 650]; McKinney *v.* Alton, 41 Ill. App. 508; State *v.* Smith, 31 Iowa 493; Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556.

But under express authority "to license and tax all exchange, loan and brokers' offices, agencies of insurance offices," etc., each insurance agent within the city may be required to procure a separate license for each company he represents. Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556. Requiring license-tax on insurance agents or brokers see INSURANCE, 22 Cyc. 1394.

Requiring license-tax of insurance companies see Van Inwagen *v.* Chicago, 61 Ill. 31; Illinois Mut. F. Ins. Co. *v.* Peoria, 29 Ill. 180; Kansas City *v.* Oppenheimer, 100 Mo. App. 527, 75 S. W. 174; Farmington *v.* Rutherford, 94 Mo. App. 328, 68 S. W. 83; Lamar *v.* Adams, 90 Mo. App. 35; Hunter *v.* Memphis, 93 Tenn. 571, 26 S. W. 828. Power must be expressly delegated for this purpose. Chicago *v.* Case, 26 Ill. App. 654; Chicago *v.* Phœnix Ins. Co., 26 Ill. App. 650 [*affirmed* in 126 Ill. 276, 18 N. E. 668]. One company cannot be compelled to pay more than one license for its business within the city, although it may have more than one office therein. Merchants' Mut. Ins. Co. *v.* Blandin, 24 La. Ann. 112.

15. New Orleans *v.* Fargot, 116 La. 369, 40 So. 735. See also *infra*, XII, A.

16. Bray *v.* State, 140 Ala. 172, 37 So. 250; Com. *v.* Gage, 114 Mass. 328; Com. *v.* Duane, 98 Mass. 1; Fonsler *v.* Atlantic City, 70 N. J. L. 125, 56 Atl. 119.

17. See GAS, 20 Cyc. 1166 *et seq.*; WATERS.

Power must be expressly delegated and cannot be implied from the grant of other powers. Lewisville Natural Gas Co. *v.* State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734; State *v.* Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Tacoma Gas, etc., Co. *v.* Tacoma, 14 Wash. 288, 44 Pac. 655. See also GAS, 20 Cyc. 1166 *et seq.*

Municipality cannot extend its own charter powers so as to regulate the price of gas, but the power must be conferred upon it by the legislature. Tacoma Gas, etc., Co. *v.* Tacoma, 14 Wash. 288, 44 Pac. 655.

What companies.— Under power to regulate the price of gas in the city limits, a municipal corporation may pass reasonable regulations for all gas companies, old as well as new, and those holding special charters as well as those organized under general laws. State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262.

18. See Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; State *v.* Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570.

Express authority necessary.— Neither under its authority to regulate the use of streets, nor section 26, art. 3, of its charter, empowering the mayor and assembly "to license, tax, and regulate" various professions and businesses, nor the general welfare clause permitting the passage of all such ordinances, not inconsistent with the provisions of the charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufacture, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company. St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278. The ordinary police power of a municipality includes the power to regulate the planting of telephone poles and wires, etc., or to require the wires to be put under ground, or to do anything within reason to render the use of the street by the telephone company as little injurious to the public as may be; but it does not confer on the city power to regulate the prices to be charged by the telephone company for its service to the inhabitants. State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41.

subject to the general rule that the rate must not be confiscatory,[19] or unreasonable.[20] Likewise, under the usual municipal police power, it is competent to provide by ordinance that the standard weights and measures for coal, hay, cotton, corn, and the like shall be observed in all sales within the corporate limits, by test upon the public scales provided by the municipality,[21] and prescribe what fee shall be paid for weighing,[22] and that the same shall be paid in halves by seller and buyer.[23] The municipality may also provide for public weighmasters[24] or a sealer of weights and measures.[25] In some cases, however, it is held that, although the weight of the public scales is conclusive, it is not exclusive,[26] and that the

19. State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Cotting *v.* Godard, 183 U. S. 79, 91, 22 S. Ct. 30, 46 L. ed. 92.

20. Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6.

The maximum rates and charges for supplying water, under an express power to fix the same, must be reasonable. Chicago *v.* Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375, holding also that a city seeking to fix water rates under such a power was bound to investigate the reasonableness of the rates before their adoption by an ordinance.

21. *Alabama.*— Mobile *v.* Yuille, 3 Ala. 137, 36 Am. St. Rep. 441.

Arkansas.— Taylor *v.* Pine Bluff, 34 Ark. 603.

Illinois.— See Cairo *v.* Coleman, 53 Ill. App. 680, for statute relating to the inspection and weighing of brick.

Iowa.— Davis *v.* Anita, 73 Iowa 325, 35 N. W. 244.

Kentucky.— Collins *v.* Louisville, 2 B. Mon. 134.

Louisiana.— See Guillotte *v.* New Orleans, 12 La. Ann. 432.

Michigan.— People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286.

Missouri.— St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. 291.

New York.— Paige *v.* Fazackerly, 36 Barb. 392, holding that a city ordinance regulating the weight of bread is a valid police regulation. See also *supra*, XI, A, 7, b, (VII), (D), text and note.

North Carolina.— See Raleigh *v.* Sorrell, 46 N. C. 49.

Ohio.— See Huddleson *v.* Ruffin, 6 Ohio St. 604.

Pennsylvania.— Gaghaghan *v.* Begley, 32 Pa. Co. Ct. 377.

Wisconsin.— Yates *v.* Milwaukee, 12 Wis. 673.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1360.

Full weights and measures.— State *v.* Smith, 123 Iowa 654, 96 N. W. 899; New York *v.* Hewitt, 91 N. Y. App. Div. 445, 86 N. Y. Suppl. 832.

But the regulation must be reasonable.— Taylor *v.* Pine Bluff, 34 Ark. 603; Davis *v.* Anita, 73 Iowa 325, 35 N. W. 244.

Limited to articles intended for market.— Cons. Mun. Act (1903), 3 Edw. VII, c. 19, § 280, subs. 9, whereby municipalities are empowered to pass by-laws "for regulating, measuring or weighing (as the case may be) of lime, shingles, laths, cord-wood, coal and other fuel," must be read as limited to such articles as are marketed or exposed for sale within the limits of the municipality. It cannot have been intended by the legislature that where such articles have been the subject of a complete contract of sale made beyond the limits of the municipality, and the only act done within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles so sold. Rex *v.* Woollatt, 11 Ont. L. Rep. 544.

22. Wills *v.* Ft. Smith, 70 Ark. 221, 66 S. W. 922; State *v.* Tyson, 111 N. C. 687, 16 S. E. 238; O'Maley *v.* Freeport, 96 Pa. St. 24, 42 Am. Rep. 527; Yates *v.* Milwaukee, 12 Wis. 673.

Fees for weight certificates.— The city of St. Louis, under art. 3, § 26, of its charter, authorizing it to "license, tax, and regulate retailers," and "to provide for the inspection and weighing of coal," etc., had power to pass and enforce an ordinance requiring coal dealers to furnish to consumers certificates showing official weights of the coal sold, which certificates the dealers were required to purchase from the city at the maximum rate of ten dollars per one hundred. Sylvester Coal Co. *v.* St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566.

23. State *v.* Tyson, 111 N. C. 687, 16 S. E. 238.

24. *Kentucky.*— Collins *v.* Louisville, 2 B. Mon. 134.

Minnesota.— Lehigh Coal, etc., Co. *v.* Capehart, 49 Minn. 539, 52 N. W. 142.

Missouri.— Lamar *v.* Weidman, 57 Mo. App. 507.

New York.— Stokes *v.* New York, 14 Wend. 87.

North Carolina.— Raleigh *v.* Sorrell, 46 N. C. 49.

Ohio.— Cincinnati *v.* Broadwell, 3 Ohio Dec. (Reprint) 286.

Pennsylvania.— Gaghaghan *v.* Begley, 32 Pa. Co. Ct. 377.

South Carolina.— Sumter *v.* Deschamps, 4 Rich. 297.

Wisconsin.— Yates *v.* Milwaukee, 12 Wis. 673.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1360.

25. People *v.* Rochester, 45 Hun (N. Y.) 102; Huddleson *v.* Ruffin, 6 Ohio St. 604.

26. Sumter *v.* Deschamps, 4 Rich. (S. C.) 297.

weight may be taken on any scales duly tested and sealed, but the authorities on this proposition are not unanimous.[27]

(D) *Corporate Franchises and Privileges.* In the exercise of the police power a municipality may not impose a license-tax;[28] but it may by ordinance regulate by license-fees or otherwise telegraph,[29] telephone,[30] and electric light,[31] water,[32] and gas plants and operations,[33] and may, for cause, even prohibit the continuance of their operations.[34]

(E) *Ferries and Bridges.* Under legislative authority a municipality may regulate and license ferries in the exercise of the police power.[35] Likewise, it seems, it may regulate bridges and their use.[36]

(F) *Hackmen and Hotel Runners at Depots.*[37] Police ordinances requiring hacks and omnibuses to occupy designated stands at a railway station,[38] and the drivers to obey the directions of officers doing duty there,[39] and not to enter the depots or go upon the platforms to solicit customers,[40] are valid; but they may not be used to interfere with lawful arrangements made by a railway company

By the appointment of a city weigher in pursuance of an ordinance creating the office, the city does not have the right to forbid persons from carrying on the business of weighing. Cincinnati *v.* Broadwell, 3 Ohio Dec. (Reprint) 286.

27. Lehigh Coal, etc., Co. *v.* Capehart, 49 Minn. 539, 52 N. W. 142. *Contra*, Lamar *v.* Weidman, 57 Mo. App. 507.

28. Cape May *v.* Cape May Transp. Co., 64 N. J. L. 80, 44 Atl. 948; Memphis *v.* American Express Co., 102 Tenn. 336, 52 S. W. 172.

29. Allentown *v.* Western Union Tel. Co., 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; Western Union Tel. Co. *v.* Philadelphia, 9 Pa. Cas. 300, 12 Atl. 144; Chester *v.* Western Union Tel. Co., 3 Lanc. L. Rev. (Pa.) 164.

Notwithstanding telegraph lines are instruments of commerce, a city has the right to determine how, in what manner, and upon what condition a telegraph company shall enter the city and pass through it for the purpose of communication, or allowing the citizens of the country to communicate by telegraph one with another. Mutual Union Tel. Co. *v.* Chicago, 16 Fed. 309, 11 Biss. 539.

30. Wichita *v.* Missouri, etc., Tel. Co., 70 Kan. 441, 78 Pac. 886; Rochester *v.* Bell Tel. Co., 52 N. Y. App. Div. 6, 64 N. Y. Suppl. 804. See Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, requiring underground wires. See also TELEGRAPHS AND TELEPHONES.

Must be reasonable.—Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23.

31. Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 178. See also ELECTRICITY.

Must be reasonable.— Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6.

32. Cambridge *v.* Cambridge Water Co., 99 Md. 501, 58 Atl. 442, holding, however, that under a city charter conferring power to pass ordinances to regulate water pipes, to open and repair streets, and to require licenses to be obtained by persons engaged in certain occupations, and omitting any reference to water companies, an ordinance requiring water companies to pay certain fees for each plug, and imposing a penalty for failure to comply therewith, is not valid as being a legitimate exercise of the police power.

33. Pittsburgh's Appeal, 115 Pa. St. 4, 7 Atl. 778. See also GAS.

34. Butler's Appeal, 1 Pa. Cas. 219, 1 Atl. 604.

35. Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560; Chilvers *v.* People, 11 Mich. 43. See also CONSTITUTIONAL LAW, 8 Cyc. 874; FERRIES, 19 Cyc. 506 *et seq.*

36. See Stanislaus Bridge Co. *v.* Hornsley, 46 Cal. 108; Macon *v.* Macon, etc., R. Co., 7 Ga. 221; Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295; Des Moines *v.* Chicago, etc., R. Co., 41 Iowa 569; Hearst *v.* Shea, 156 N. Y. 169, 50 N. E. 788 [*affirming* 24 N. Y. App. Div. 73, 49 N. Y. Suppl. 49]; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679, 12 S. Ct. 114, 35 L. ed. 900. *Compare* Newport *v.* Newport, etc., Bridge Co., 90 Ky. 193, 13 S. W. 720, 12 Ky. L. Rep. 39, 8 L. R. A. 484. See, generally, BRIDGES.

37. **Regulation** of: Cab drivers see CONSTITUTIONAL LAW, 8 Cyc. 875. Hackmen see CONSTITUTIONAL LAW, 8 Cyc. 875. Vehicles see *infra*, XI, A, 7, b, (VII), (L).

38. Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; Ottawa *v.* Bodley, 67 Kan. 178, 72 Pac. 545. See also Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95; Com. *v.* Matthews, 122 Mass. 60.

39. Colorado Springs *v.* Smith, 19 Colo. 554, 36 Pac. 540; St. Paul *v.* Smith, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296.

40. Chillicothe *v.* Brown, 38 Mo. App. 609. See also Hot Springs *v.* Curry, 64 Ark. 152, 41 S. W. 55; Laddonia *v.* Poor, 73 Mo. App. 465.

Effect of change of ownership.— Where an ordinance prohibited hack and bus men from soliciting custom on the platform of the depot of a certain railroad company, mere change of ownership, or in the name of the owner, of the depot, did not suspend the operation of the ordinance. Emporia *v.* Shaw, 6 Kan. App. 808, 51 Pac. 237.

for the receipt and discharge of passengers and freight on its own premises.[41] Decisions differ, however, as to the power of the company to nullify such ordinances by its own contract[42] or consent,[43] general or special. But a contract for such exclusive privilege "so far as lawful" has been held to be abrogated by a subsequent ordinance of inhibition.[44]

(G) *Hospitals.*[45] A municipality may be specially authorized to erect, control, and regulate hospitals.[46] Power to regulate hospitals gives no authority over private hospitals;[47] but it seems that, under municipal power to maintain cleanliness and salubrity, the council may prohibit the erection of a private hospital.[48]

(H) *Laundries.*[49] Under power to regulate laundries[50] municipalities may require as police regulations that laundries shall be confined to certain parts of the city,[51] and that they shall be carried on only in buildings of brick or stone,[52] and within certain reasonable hours.[53] But it seems that an ordinance is invalid which requires the consent of a certain number of taxpayers and citizens of the vicinity for the establishment of the business.[54] A city may also pass an ordinance requiring the inspection of laundries and provide for a reasonable fee to cover the expenses of such inspection.[55]

(I) *Railroads and Street Railways.*[56] Municipal regulations of the use of streets by a street railroad are an exercise of the police powers of the city, and

41. Napman *v.* People, 19 Mich. 352.

42. See Kalamazoo Hack, etc., Co. *v.* Sootzma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819; Chillicothe *v.* Brown, 38 Mo. App. 609; Montana Union R. Co. *v.* Langlois, 9 Mont. 419, 24 Pac. 209, 18 Am. St. Rep. 745, 8 L. R. A. 753.

43. Cosgrove *v.* Augusta, 103 Ga. 835, 31 S. E. 445, 68 Am. St. Rep. 149, 42 L. R. A. 711.

44. Lindsay *v.* Anniston, 104 Ala. 257, 16 So. 545, 53 Am. St. Rep. 44, 27 L. R. A. 436.

45. **Asylum** generally see ASYLUMS.

Hospital generally see HOSPITALS.

46. Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L. R. A. 306; Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]; Clinton *v.* Clinton County, 61 Iowa 205, 16 N. W. 87; Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697 [*affirming* 27 Pa. Super. Ct. 485]. But *compare* Mitchell *v.* Rockland, 45 Me. 496.

For contagious diseases.— The establishment of such hospitals is within the police power of the municipality, and the city and village act specially authorizing municipalities to erect and establish hospitals and control and regulate the same. Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L. R. A. 306. Under a statute empowering cities and villages to do all acts and make regulations which may be necessary or expedient for the promotion of health or the suppression of disease, the city of Chicago may lease property and locate a smallpox hospital thereon. Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]. See also Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697 [*affirming* 27 Pa. Super. Ct. 485].

Where a vessel is subject to quarantine regulations, the officers of the town are not authorized to appropriate any part thereof for a hospital, or to exclude the owners from the possession or control of any part of the vessel. Mitchell *v.* Rockland, 45 Me. 496.

47. Bessonies *v.* Indianapolis, 71 Ind. 189.

Regulation of hospitals see HOSPITALS, 21 Cyc. 1110.

48. Milne *v.* Davidson, 5 Mart. N. S. (La.) 409, 16 Am. Dec. 189.

49. See CONSTITUTIONAL LAW, 8 Cyc. 874 note 21.

50. See cases cited *infra*, note 51 *et seq.*

Must be reasonable.— Shreveport *v.* Robinson, 51 La. Ann. 1314, 26 So. 277.

51. Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

Under the California constitution which provides that any city may make such local, police, sanitary, and other regulations as are not in conflict with general laws, a city may prohibit the conduct of the business of a public laundry or washhouse in the city except within certain prescribed limits. *In re* Hang Kie, 69 Cal. 149, 10 Pac. 327.

Under general welfare clause see *supra*, XI, A, 2, a, (I).

52. *In re* Yick Wo, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12; *Ex p.* White, 67 Cal. 102, 7 Pac. 186, holding that a city ordinance providing that all buildings used as laundries within its corporate limits shall be constructed in a designated manner is constitutional. Building regulations generally see *infra*, XI, A, 7, b, (VIII), (B).

53. Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145.

54. *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526.

55. New Orleans *v.* Hop Lee, 104 La. 601, 29 So. 214.

56. See, generally, RAILROADS; STREET RAILROADS.

Compelling free transportation of policemen see CONSTITUTIONAL LAW, 8 Cyc. 874 note 23.

will be upheld if reasonable.[57] The power of the municipality to regulate the running of cars or railways, standard, street, or inter-urban, within the corporate limits, has been sustained by numerous decisions.[58] It is competent for a municipality to regulate, restrict, or prohibit the use of steam power on railroads and street railways,[59] and to regulate the speed of trains or cars;[60] but it has been

57. Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Chest. Co. Rep. (Pa.) 333. See also Osburn *v.* Chicago, 105 Ill. App. 217; Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; Chesapeake, etc., R. Co. *v.* Maysville, 69 S. W. 728, 24 Ky. L. Rep. 615.

Must be reasonable.— Yonkers *v.* Yonkers R. Co., 51 N. Y. App. Div. 271, 64 N. Y. Suppl. 955.

Regulation of railroads in cities see CONSTITUTIONAL LAW, 8 Cyc. 871, 874.

Operating a street railroad by horse or steam is a business, within the meaning of the law, which can be subjected to the payment of a license-tax, under La. Acts (1886), No. 101. New Orleans *v.* New Orleans City, etc., R. Co., 40 La. Ann. 587, 4 So. 512.

A legislative franchise to run street cars, prescribing certain conditions to be performed by the grantees, does not exempt the occupation of operating the road from lawful police regulations and municipal taxation. San Jose *v.* San Jose, etc., R. Co., 53 Cal. 475.

Joint use of tracks.— Where one street railway company appropriates for joint use and occupation the tracks of another company, necessary rules and regulations for the protection of the public may be provided in part by the city council under its police power. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493 [*affirmed* in 50 Ohio St. 603, 36 N. E. 312].

58. *Alabama.*— Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141.

Georgia.— Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Illinois.— Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791; Chicago, etc., R. Co. *v.* Haggerty, 67 Ill. 113; Lake Shore, etc., R. Co. *v.* Probeck, 33 Ill. App. 145.

Indiana.— Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37.

Iowa.— Meyers *v.* Chicago, etc., R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50, where, however, the ordinance was held to be unreasonable.

Louisiana.— See State *v.* Miller, 41 La. Ann. 53, 5 So. 258, 7 So. 672, holding that police juries cannot regulate speed in cities.

Minnesota.— Duluth *v.* Mallett, 43 Minn. 204, 45 N. W. 154.

Missouri.— Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382.

New Jersey.— Trenton Horse R. Co. *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

New York.— Buffalo *v.* New York, etc., R. Co., 6 Misc. 630, 27 N. Y. Suppl. 297 [*affirmed* in 152 N. Y. 276, 46 N. E. 496].

South Carolina.— Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1358.

Implied power.— The delegation to a city of the power to regulate the speed of trains need not be in express terms, but may be implied from the power of the city to abate nuisances and provide for the general welfare. Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

The ordinance will apply to the private yards of a railroad company within the city limits (Gruhe *v.* Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 14 Am. St. Rep. 645, 4 L. R. A. 776), or to the uninclosed private property of the company (Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382).

59. North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788.

An ordinance may regulate the mode of running, whether by steam or horse power. Donnaher *v.* State, 8 Sm. & M. (Miss.) 649; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

General charter power is sufficient to support such an ordinance. North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788; Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209.

Whether the use of steam on streets is a nuisance is a question of fact. Vason *v.* South Carolina R. Co., 42 Ga. 631.

60. *Georgia.*—Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Illinois.—Chicago, etc., R. Co. *v.* Haggerty, 67 Ill. 113. See also Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268.

Indiana.—Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; Whitson *v.* Franklin, 34 Ind. 392.

Minnesota.— Knobloch *v.* Chicago, etc., R. Co., 31 Minn. 402, 18 N. W. 106.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382; Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119.

New Jersey.— New Jersey R., etc., Co. *v.* Jersey City, 29 N. J. L. 170.

Pennsylvania.— Lancaster *v.* Railroad Co., 12 Lanc. Bar 99; Pennsylvania R. Co. *v.* James, 6 Leg. Gaz. 389, 31 Leg. Int. 372.

Virginia.— Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1358.

In the absence of a legislative grant of power to that end, the police juries have no authority to pass an ordinance prohibiting the running of railroad trains through the

held that when the state by statute prescribes the maximum speed in cities and towns, the municipality cannot lower the limit by ordinance,[61] and also that, when it has power to prescribe maximum speed within municipal boundaries, it cannot so frame its ordinance as to injure the railway company and the public by requiring low speed for miles through the unpopulated portion of the city.[62] The municipality may also regulate the blowing of whistles,[63] and the use of grade crossings;[64] and require gates, guards, signal lights, or flagmen at street crossings.[65] So it may forbid the obstruction of streets by trains standing across them,[66] so as to prevent the blocking of a street crossing by engine or cars more than a few minutes;[67] require another employee than the motorman on a street car;[68] and require pilot-baskets or fenders in front of every car,[69] and other similar precautions to be taken.[70] Furthermore the municipality may require transfers given

villages of their parish at a greater speed than six miles an hour. State *v.* Miller, 41 La. Ann. 53, 5 So. 258, 7 So. 672.

61. Horn *v.* Chicago, etc., R. Co., 38 Wis. 463, holding that where a general statute law limits the rate of speed in all incorporated places to six miles an hour, an ordinance fixing the limit at five miles an hour in certain parts of the city is void.

62. Zumault *v.* Kansas City, etc., Air Line R. Co., 71 Mo. App. 670, holding that an ordinance limiting the speed at which trains may run to six miles per hour through agricultural lands where there are no streets and little travel is unreasonable, in restraint of suburban travel and cannot be upheld.

Where the right of way is fenced on both sides, and the locality is sparsely settled, and no platted streets have been opened across the track, an ordinance limiting the rate of speed to six miles an hour has been held unreasonable as applied to that part of the road. Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419.

63. Ingersoll Pub. Corp. 363.

64. Chicago, etc., R. Co. *v.* State, 158 Ind. 189, 63 N. E. 224.

Compelling elevation or lowering of track see RAILROADS. A city has been held to have the right of legal exercise of the police power for the purpose of requiring a railroad company to raise its tracks so as to do away with grade crossings. Osburn *v.* Chicago, 105 Ill. App. 217.

65. Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Chesapeake, etc., R. Co. *v.* Maysville, 69 S. W. 728, 24 Ky. L. Rep. 615; Delaware, etc., R. Co. *v.* East Orange Tp., 41 N. J. L. 127.

Must be reasonable.— Pittsburgh, etc., R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

Whatever precautions are reasonably incident to the danger from the passing to and fro of trains in a crowded community may be lawfully adopted. Textor *v.* Baltimore, etc., R. Co., 59 Md. 63, 43 Am. Rep. 540.

Without express grant of authority gates or flagman may not be required. Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118, 12 N. E. 445; Mansfield *v.* Baltimore, etc., R. Co., 9 Ohio Dec. (Reprint) 572, 15 Cinc. L. Bul. 145; Archbald Borough *v.* Delaware, etc., Canal Co., 3 Lack. Jur. (Pa.) 189.

66. *Alabama.*— Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141.

Delaware.— McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. 599.

Minnesota.— Duluth *v.* Mallett, 43 Minn. 204, 45 N. W. 154.

Missouri.— Burger *v.* Missouri, etc., R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379.

New Jersey.— State *v.* Jersey City, 37 N. J. L. 348.

Operation of a railroad over a street so narrow that such use would necessarily destroy it as a public way may be either a public or a private nuisance. It is a universal rule that the city cannot create a nuisance in its streets or devote them or any part of them to a purpose inconsistent with the rights of the public or abutting property-owners. Lockwood *v.* Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 43 Am. St. Rep. 547, 24 L. R. A. 516; Schopp *v.* St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783.

67. McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. (Del.) 599.

As a nuisance.—An ordinance declaring the running of a train beyond a certain rate of speed, or the stopping of it on a public street beyond a certain time, a removable nuisance, is invalid. New Jersey R., etc., Co. *v.* Jersey City, 29 N. J. L. 170. See also *supra*, XI, A, 7 b, (VI), (A).

68. South Covington, etc., R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. 1026, 13 Ky. L. Rep. 943, 40 Am. St. Rep. 161, 15 L. R. A. 604; State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410. But see Thornhill *v.* Cincinnati, 4 Ohio Cir. Ct. 354, 2 Ohio Cir. Dec. 592, holding that two employees may not be required on each street car.

Ordinance sustained under general power which required a conductor and driver on each car, and provided, in the event of failure, that police should cause all cars to be returned to stables. South Covington, etc., R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. 1026, 13 Ky. L. Rep. 943, 40 Am. St. Rep. 161, 15 L. R. A. 604.

69. Platt *v.* Albany R. Co., 170 N. Y. 115, 62 N. E. 1071; Henderson *v.* Durham Traction Co., 132 N. C. 779, 44 S. E. 598. See also Hogan *v.* Citizens' R. Co., 150 Mo. 36, 51 S. W. 473.

70. Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209; Hayes *v.* Michigan Cent. R.

on change of passengers from one line to another;[71] and require the railroad company to pave streets over which its cars run;[72] and also to sprinkle[73] or water its track so as to lay the dust.[74] Again the municipality may provide for the separation of races on the street cars operated within the city.[75] And it seems that street cars are subject to omnibus regulations;[76] and transfers on them may be required;[77] but a requirement for vestibules on street cars is not warranted by the inherent police power of a municipality.[78]

(J) *Slaughter-Houses.* The slaughter within the city of animals for food, and particularly the houses and equipments for such purposes, are within the police regulation of a municipality.[79] For the sake of public health and com-

Co., 111 U. S. 228, 4 S. Ct. 369, 28 L. ed. 410; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

Danger signals.— Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, 1 S. W. 384; Merz *v.* Missouri Pac. R. Co., 14 Mo. App. 459.

Ringing of the bell while the locomotive is in motion may be required. Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185.

Requiring lights on railroad tracks.— Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422.

71. Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Time limit of transfers.— *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55.

72. Philadelphia *v.* Empire Pass. R. Co., 7 Phila. (Pa.) 321.

73. Chester *v.* Chester Traction Co., 5 Pa. Dist. 609.

74. City, etc., R. Co. *v.* Savannah, 77 Ga. 731, 4 Am. St. Rep. 106.

75. Patterson *v.* Taylor, 51 Fla. 275, 40 So. 493, holding that, although the municipality was not by its charter expressly authorized to provide by ordinance for such separation, yet it had such authority in its general welfare clause enabling it "to pass all ordinances necessary for the health, convenience and safety of the citizens, and to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation. But even without such general welfare clause, or other express authorization, the design of such an ordinance being to safeguard the peace and good order of society within such city, its enactment and enforcement is within the incidental police powers of the city directly resulting from its incorporation into a municipality." See also Roberts *v.* Boston, 5 Cush. (Mass.) 198.

Discretion as to one of two methods.— An ordinance of a city, designed to separate two races upon street cars in the city, which requires the companies operating such cars to effect such separation in one or the other of two clearly defined modes: (1) By providing separate cars for the two races; or (2) by division of the car when the same car is assigned to the two races — leaving it discretionary with the carrier as to which one of the two prescribed modes of separation it will adopt, is not an unauthorized delegation of authority or discretion to such carriers. Patterson *v.* Taylor, 51 Fla. 275, 40 So. 493.

Reasonableness of regulation.— The separation of the races on street cars, under a municipal ordinance to that effect, has been held to be a reasonable precaution against breaches of the peace and disturbance of the good order of society. Roberts *v.* Boston, 5 Cush. (Mass.) 198. An ordinance designed to effect a separation of the races on street cars, by which the seats in the rear ends of the cars are assigned to the use of passengers of the colored race, and the seats in the front end of the car to the white race or *vice versa* is not an unreasonable regulation or an unlawful discrimination between the races. Patterson *v.* Taylor, 51 Fla. 275, 40 So. 493.

76. Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Frankford, etc., Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Railway Co. *v.* Philadelphia, 6 Phila. (Pa.) 238; Allerton *v.* Chicago, 6 Fed. 555, 9 Biss. 552.

77. Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

78. Yonkers *v.* Yonkers R. Co., 51 N. Y. App. Div. 271, 64 N. Y. Suppl. 955.

79. *Alabama.*— Boyd *v.* Montgomery, 117 Ala. 677, 23 So. 663.

California.— *Ex p.* Heilbron, 65 Cal. 609, 4 Pac. 648; *Ex p.* Shrader, 33 Cal. 279.

Illinois.— Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893; Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; Tugman *v.* Chicago, 78 Ill. 405; Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

Indiana.— Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528; Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Rund *v.* Fowler, 142 Ind. 214, 41 N. E. 456.

Louisiana.— Darcantel *v.* People's Slaughterhouse, etc., Co., 44 La. Ann. 632, 11 So. 239; Villavasco *v.* Barthet, 39 La. Ann. 247, 1 So. 599.

Massachusetts.— Sawyer *v.* State Bd. of Health, 125 Mass. 182; Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694.

Michigan.— Wreford *v.* People, 14 Mich. 41.

Minnesota.— See St. Paul *v.* Byrnes, 38 Minn. 176, 36 N. W. 449, statute superseding charter power.

fort therefore a municipality, in the exercise of its police power, may prescribe the character of buildings and equipment for slaughter-houses,[80] and the limits within which they may be erected and maintained.[81] So too, under the rules already given as to its authority over nuisances,[82] the municipality may declare them nuisances,[83] and entirely exclude them from the corporate boundaries.[84]

(K) *Storage Houses.* The storage of offensive or noxious substances within the corporate limits is subject to the discretion of the municipality,[85] unless specially governed by the superior power of a state statute.[86]

(L) *Vehicles and Transportation.*[87] The municipal regulation of vehicles of all sorts, commonly used within the corporate limits, is a valid exercise of the

Missouri.— St. Louis *v.* Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630.

New York.— Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564; Brooklyn *v.* Cleves, Lalor 231.

Oregon.— Portland *v.* Meyer, 32 Oreg. 368, 52 Pac. 21, 67 Am. St. Rep. 538.

Washington.— Spokane *v.* Robinson, 6 Wash. 547, 33 Pac. 960.

Wisconsin.— Milwaukee *v.* Cross, 21 Wis. 241, 91 Am. Dec. 472.

United States.—Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. 36, 21 L. ed. 394.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1348.

Under general health provision see *supra*, XI, A, 2, c.

80. Boyd *v.* Montgomery, 117 Ala. 677, 23 So. 663; Portland *v.* Meyer, 32 Oreg. 368, 52 Pac. 21, 67 Am. St. Rep. 538; and cases cited *supra*, note 79.

81. Cronin *v.* People, 20 Hun (N. Y.) 137 [*affirming* 82 N. Y. 318, 37 Am. Rep. 564]; and cases cited *supra*, note 79.

Consent of adjacent owners or occupants.— An ordinance is invalid which purports to make it unlawful to operate a slaughter-house within a distance of two hundred feet of any dwelling-house without the consent of the owner and occupant of every such house. St. Louis *v.* Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630.

Prior location under constitutional or statutory authority.— The city authorities were not entitled to order a change of location of the grand slaughter-house after it had been permanently located under a statute which did not expressly give any power to change it, and the butchers had established their business arrangements conformably. Berthin *v.* Crescent City Live Stock Landing, etc., Co., 28 La. Ann. 210. The limits within which the business of slaughtering cattle may be carried on having been fixed by the city of New Orleans in pursuance of article 248 of the state constitution, the city is without power to pass an ordinance requiring its consent to be given to a person before he can proceed with his business at the place selected, and already built upon by him, within the said limts. Barthet *v.* New Orleans, 24 Fed. 563.

82. See *supra*, XI, A, 7, b, (VI).

83. Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893; St. Louis *v.* Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep 630.

84. *Ex p.* Heilbron, 65 Cal. 609, 4 Pac. 648; St. Paul *v.* Smith, 25 Minn. 372; Coden *v.* Gettysburg, 8 Leg. Gaz. (Pa.) 167. In St. Paul *v.* Smith, *supra*, where only one beef animal was killed, the rule was held to be inapplicable.

It was competent for the legislature, by statute, to delegate to the board of supervisors of the city and county of San Francisco power to make an order that "no person shall establish or maintain any slaughter house; keep herds of more than five swine; cure or keep hides . . . slaughter cattle, . . . pursue or maintain, or carry on any other business or occupation offensive to the senses or prejudicial to the public health or comfort, in any part of this city and county, after the 1st day of August, 1866." *Ex p.* Shrader, 33 Cal. 279.

Must be nuisance in fact.— Where a city charter gave power to the council to "prohibit and prevent within certain limits . . . the location or construction of buildings for . . . slaughter-houses," etc., it was held that the council had no right to put an end to any existing business so long as it was not a nuisance in fact. Wreford *v.* People, 14 Mich. 41. See also *supra*, XI, A, 7, b, (VI), (A).

Burns Annot. St. (1901) § 3616 (and statutes of similar effect), authorizing cities to make other ordinances than those specifically prescribed by statute, not inconsistent with state law, and necessary to carry out the objects of the corporation, does not recognize an implied power in such corporations to prohibit slaughter-houses within the territory over which the city has police power, as such an attempt is not essential to the accomplishment by the city of the objects of its creation, nor to its continued existence. Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528 [*overruling* Rund *v.* Fowler, 142 Ind. 214, 41 N. E. 456]. See also Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272.

85. May *v.* People, 1 Colo. App. 157, 27 Pac. 1010. See also *supra*, XI, A, 7, b, (IV).

86. Athens *v.* Georgia R. Co., 72 Ga. 800.

87. Regulation of: Charges see *supra*, XI, A, 7, h, (VII), (C). Hackmen and hotel runners at depots see *supra*, XI, A, 7, b, (VII), (F). Railroads see *supra*, XI, A, 7, b, (VII), (I). Use of street in general see *infra*, XII, A.

police power,[88] not inherent,[89] but granted to the corporation.[90] Vehicles merely passing through the city may not be included;[91] but those may which belong to non-residents if publicly used in the municipality,[92] or if the route terminus is within it.[93] The city may prescribe what style of vehicles shall be used for public passenger service,[94] but not for private use;[95] what streets they must travel, if regular lines;[96] and where hacks must stand;[97] whether the driver may leave them;[98] and what mark of distinction he shall wear.[99] It may also prohibit fast driving,[1] but not slow driving;[2] may require license for each vehicle;[3] and may assess a penalty against a public conveyance for refusal to carry a passenger.[4]

88. Bowser *v.* Thompson, 103 Ky. 331, 45 S. W. 73, 20 Ky. L. Rep. 31; Kittanning *v.* Montgomery, 5 Pa. Super. Ct. 196. See also Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221; Com. *v.* Harney, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; Harris *v.* Atlantic City, 73 N. J. L. 251, 62 Atl. 995; Atlantic City *v.* Brown, 72 N. J. L. 207, 62 Atl. 428; Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176; Gagnier *v.* Fargo, 11 N. D. 73, 88 N. W. 1030, 95 Am. St. Rep. 705; Samson *v.* Montreal, 14 Quebec K. B. 461.

Regulating hackney coaches.— Com. *v.* Robertson, 5 Cush. (Mass.) 438.

Exclusive use of hotel cab stands may be given. Samson *v.* Montreal, 14 Quebec K. B. 461.

Ten-cent fare for omnibus passenger may be prescribed. Atlantic City *v.* Brown, 72 N. J. L. 207, 62 Atl. 428.

Time of standing in one place by huckster wagon may be limited. Com. *v.* Brooks, 109 Mass. 355.

Weight of load passing over street.— Com. *v.* Mulhall, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387.

Employment of slaves.— The authority given by law to the mayor and aldermen of St. Louis to regulate, by ordinance, drays, etc., did not empower them to prevent slaves from being employed in driving them. St. Louis *v.* Hempstead, 4 Mo. 242.

Must be reasonable.— Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Com. *v.* Harney, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; *Ex p.* Battis, 40 Tex. Cr. 112, 48 S. W. 513, 76 Am. St. Rep. 708, 43 L. R. A. 863.

89. New Iberia *v.* Migues, 32 La. Ann. 923; Com. *v.* Wagner, 9 Pa. Co. Ct. 625; Gettysburg *v.* Zeigler, 2 Pa. Co. Ct. 326. See *supra*, text and note 88.

90. Knox City *v.* White, 19 Mo. App. 528; Knox City *v.* Thompson, 19 Mo. App. 523. See *supra*, text and note 88.

91. Bennett *v.* Birmingham, 31 Pa. St. 15.

92. Tomlinson *v.* Indianapolis, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413; Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136; Gibson *v.* Coraopolis, 22 Pittsb. Leg. J. N. S. (Pa.) 64; Charleston *v.* Pepper, 1 Rich. (S. C.) 364.

93. Sacramento *v.* California Stage Co., 12 Cal. 134. *Compare* East St. Louis *v.* Bux, 43 Ill. App. 276, holding that the tax may not be imposed by one terminal city when paid in the other.

94. Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679. See also Snyder *v.* North Lawrence, 8 Kan. 82.

95. See Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

96. Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

97. *District of Columbia.*—Stephens *v.* District of Columbia, 16 App. Cas. 279.

Kansas.— Ottawa *v.* Bodley, 67 Kan. 178, 72 Pac. 545.

Massachusetts.— Com. *v.* Matthews, 122 Mass. 60.

New Jersey.— Combs *v.* Lakewood Tp., 68 N. J. L. 582, 53 Atl. 697.

New York.— Masterson *v.* Short, 7 Rob. 241; New York *v.* Reesing, 38 Misc. 129, 77 N. Y. Suppl. 82 [*affirmed* in 77 N. Y. App. Div. 417, 79 N. Y. Suppl. 331].

Texas.— *Ex p.* Vance, 42 Tex. Cr. 619, 62 S. W. 568.

Canada.— See Samson *v.* Montreal, 14 Quebec K. B. 461.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1350.

98. *Ex p.* Vance, 42 Tex. Cr. 619, 62 S. W. 568.

99. Atlantic City *v.* Feretti, 70 N. J. L. 489, 57 Atl. 259.

1. *Indiana.*— Nealis *v.* Heyward, 48 Ind. 19.

Massachusetts.— Com. *v.* Roy, 140 Mass. 432, 4 N. E. 814; Com. *v.* Worcester, 3 Pick. 462. See also Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670, holding that a city may pass an ordinance regulating the rate of speed at which horses may be driven across bridges which is binding on its members and all other persons.

Michigan.— People *v.* Little, 86 Mich. 125, 48 N. W. 693.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

South Carolina.— City Council *v.* Dunn, 1 McCord 333.

2. Stephens *v.* District of Columbia, 16 App. Cas. (D. C.) 279.

3. Knox City *v.* Thompson, 19 Mo. App. 523. See also Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136; Combs *v.* Lakewood Tp., 68 N. J. L. 582, 53 Atl. 697; New York *v.* Reesing, 77 N. Y. App. Div. 417, 79 N. Y. Suppl. 331.

4. Fonsler *v.* Atlantic City, 70 N. J. L. 125, 56 Atl. 119.

A municipality may not levy a tax under guise of exercising police power,[5] but may charge a reasonable license-fee.[6]

(M) *Mercantile Business in General.* As matters of public policy are not subject to municipal police regulation,[7] unless the power is specially delegated,[8] arbitrary ordinances interfering with freedom of trade,[9] or discriminating between residents and non-residents,[10] or unreasonably limiting hours of sale,[11] are void. But licenses and other reasonable regulations may be ordained under general police authority.[12]

(N) *Particular Dealers and Dealing in Particular Articles* — (1) IN GENERAL. Municipalities may be authorized under their police powers to regulate dealers and dealings in particular articles of commerce and trade.[13] The courts have upheld ordinances forbidding sales of watches at auction after six o'clock P. M.,[14] and the keeping of bucket shops,[15] as well as ordinances requiring license for sales by throwing at a dummy,[16] and "gift, fire and bankrupt" sales;[17] but it seems not a by-law requiring lists and reports of articles handled by pawnbrokers.[18]

5. Memphis *v.* American Express Co., 102 Tenn. 336, 52 S. W. 172.

6. Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136.

7. Long *v.* Shelby County Taxing Dist., 7 Lea (Tenn.) 134, 40 Am. Rep. 55. See *supra*, XI, A, 1.

8. Long *v.* Shelby County Taxing Dist., 7 Lea (Tenn.) 134, 40 Am. Rep. 55.

9. Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130.

Inspection.— Ill. Incorp. Act (1872), c. 24, pt. 1, art. 5, § I, authorizing cities to regulate the inspection and weighing of "brick, lumber, firewood, coal, hay, and any article of merchandise," does not authorize them to provide for the inspection of the articles of merchandise of a stationery store. Cairo *v.* Coleman, 53 Ill. App. 680. See also, generally, INSPECTION.

10. People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596. See also *infra*, XI, A, 8, j.

11. State *v.* Ray, 131 N. C. 814, 42 S. E. 960, 92 Am. St. Rep. 795, 60 L. R. A. 634; Coaticook *v.* Lothrop, 22 Quebec Super. Ct. 225.

12. New Orleans *v.* Guillotte, 14 La. Ann. 875.

13. *California.*— Johnson *v.* Simonton, 43 Cal. 242.

Illinois.— Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260. See also Kappes *v.* Chicago, 119 Ill. App. 436, holding that where a city council has power to pass an ordinance plainly intended to restrict and discourage, as well as to regulate, the sale of a given article — an ordinance forbidding its sale altogether in certain places and to certain persons — it likewise has power to add by amendment to that ordinance a simple provision preventing its evasion and practical abrogation.

Kansas.— Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

Louisiana.— See State *v.* Duharry, 46 La. Ann. 33, 14 So. 298.

Missouri.— St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679.

New York.— Ketchum *v.* Buffalo, 14 N. Y. 356; People *v.* Vandecarr, 81 N. Y. App. Div. 128, 80 N. Y. Suppl. 1108 [*affirmed* in 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781]; Buffalo *v.* Marion, 13 Misc. 639, 34 N. Y. Suppl. 945; Buffalo *v.* Schleifer, 2 Misc. 216, 21 N. Y. Suppl. 913.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1355 *et seq.* See also, generally, LICENSES; and *infra*, XI, A, 8, c.

Must be reasonable.—Frost *v.* Chicago, 178 Ill. 250, 52 N. E. 869, 69 Am. St. Rep. 301, 49 L. R. A. 657; Kosciusko *v.* Slomberg, 68 Miss. 469, 9 So. 297, 24 Am. St. Rep. 281, 13 L. R. A. 528. See also *infra*, XI, A, 8, i.

Destruction of long-established business.— The legislature has the power to delegate to a municipal corporation the power to establish public markets, and to confine the sale of commodities, which, in consideration of public health, require police inspection and supervision, to such markets, even if a result of the exercise of this power should be the destruction of an existing and long-established business. *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

So far as any limitations in the federal constitution are concerned, the legislature has the power to authorize the passage by city councils of ordinances prohibiting the sale of certain commodities, either generally or beyond specified limits, or within certain hours of the day. *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

Regulation of junk-shop keeper see CONSTITUTIONAL LAW, 8 Cyc. 875.

Regulation of second-hand dealers see CONSTITUTIONAL LAW, 8 Cyc. 875.

Regulating the sale of tobacco and cigarettes see CONSTITUTIONAL LAW, 8 Cyc. 868.

14. Buffalo *v.* Marion, 13 Misc. 639, 34 N. Y. Suppl. 945.

15. Hot Springs *v.* Rector, (Ark. 1903) 73 S. W. 1056.

16. Jones *v.* Foster, 43 N. Y. App. Div. 33, 59 N. Y. Suppl. 738.

17. State *v.* Schoenig, 72 Minn. 528, 75 N. W. 711.

18. State *v.* Itzcovitch, 49 La. Ann. 366, 21 So. 544, 62 Am. St. Rep. 648, 37 L. R. A. 673.

(2) DEALING IN FOOD AND DRINK ARTICLES.[19] Accordingly in the exercise of its authorized police power a municipality may by ordinance prohibit hawking and peddling of meat, game, and poultry;[20] the sale of adulterated[21] or impure milk,[22] skim milk,[23] or milk from cows fed on still slops;[24] of oysters away from oyster stands;[25] of any unwholesome food;[26] of short-weight bread;[27] of less than a quarter of meat outside of market stalls;[28] the peddling of fruits or vegetables anywhere between five o'clock A. M. and one o'clock P. M.;[29] or at any time within six squares of a public market;[30] any sale of corn or food outside of the market,[31] or of uninspected and untagged meat;[32] the sale of anything but fruit by keepers of fruit stands within two thousand one hundred feet of the market;[33] the sale of cider in less quantities than a gallon, and any drinking on the premises;[34] but not the sale of meat, fish, butter, and other food articles in a general store.[35] By the weight of authority police license may be required for the sale of meat,[36] or for the sale of salt meat, and fish outside the

19. **Regulation of:** Adulterations see ADULTERATION, 1 Cyc. 941; CONSTITUTIONAL LAW, 8 Cyc. 866. Food products and the sale thereof see CONSTITUTIONAL LAW, 8 Cyc. 866 *et seq.*; FOOD, 19 Cyc. 1090 *et seq.* Liquor traffic see INTOXICATING LIQUORS, 23 Cyc. 66. Market see *infra*, XII, C, 3.

20. Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143; Caldwell *v.* Alton, 33 Ill. 416, 75 Am. Dec. 282; Bowling Green *v.* Carson, 10 Bush (Ky.) 64; St. Louis *v.* Weber, 44 Mo. 547. In Buffalo *v.* Webster, 10 Wend. (N. Y.) 99, the court sustained an ordinance making it unlawful for any person within the limits of a corporation, during certain months, to hawk about or sell by retail any kind of fish, beef, pork, lamb, or mutton, except at the public markets, or within certain limits around the same. See also *supra*, XI, A, 7, b, (VII), (B).

Repeal by implication.— Although the ordinance of the borough of Sharon, Mercer county, prohibiting the selling or hawking, within said borough, of any garden, farm, or dairy products, was expressly authorized by the borough law (act April 3, 1851), this part of that law was, as applied to Mercer county, impliedly repealed by the act of April 13, 1869, which provides that any citizen of that county "may, without other than a United States license, peddle farm, garden, and dairy products within said county." Sharon Borough *v.* Hawthorne, 123 Pa. St. 106, 16 Atl. 835.

21. State *v.* Stone, 46 La. Ann. 147, 15 So. 11.

22. Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L. R. A. 541. *Compare* State *v.* Dupaquier, 46 La. Ann. 577, 15 So. 502, 49 Am. St. Rep. 334, 26 L. R. A. 162; St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679 [*affirmed* in 194 U S. 361, 24 S. Ct. 673, 48 L. ed. 1018].

23. Kansas *v.* Cook, 38 Mo. App. 660.

24. Johnson *v.* Simonton, 43 Cal. 242.

25. Morano *v.* New Orleans, 2 La. 217.

26. People *v.* Brill, 120 Mich. 42, 78 N. W. 1013, holding that under Detroit City Charter (1893), p. 73, § 136, authorizing the council to punish persons "knowingly" selling unwholesome food, an ordinance then existing providing punishment for such offense, although it was not done "knowingly," became inoperative.

Pure food.— State *v.* Stone, 46 La. Ann. 147, 15 So. 11.

27. People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286. See also Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441. *Contra*, Buffalo *v.* Collins Baking Co., 39 N. Y. App. Div. 432, 57 N. Y. Suppl. 347.

La. Act No. 164 of 1856, amending Act No. 71 of 1852, providing for the government and administration of the affairs of the city of New Orleans, does not purport to reënact or publish at length any portion of section 22 thereof, empowering the municipality to regulate the weight and price of bread; and hence, not being inconsistent with such section, it does not repeal the same. Guillotte *v.* New Orleans, 12 La. Ann. 432.

28. St. Louis *v.* Jackson, 25 Mo. 37.

29. Buffalo *v.* Schleifer, 2 Misc. (N. Y.) 216, 21 N. Y. Suppl. 913.

30. State *v.* Namias, 49 La. Ann. 618, 21 So. 852, 62 Am. St. Rep. 657. See also Mt. Carmel *v.* Fisher, 21 Pa. Super. Ct. 643.

31. State *v.* Smith, 123 Iowa 654, 96 N. W. 899; Crowley *v.* Rucker, 107 La. 213, 31 So. 629; Newson *v.* Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797.

32. New Orleans *v.* Lozes, 51 La. Ann. 1172, 25 So. 979.

33. New Orleans *v.* Graffina, 52 La. Ann. 1082. 27 So. 590, 78 Am. St. Rep. 387.

34. Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520, holding that a city ordinance regulating the sale of cider which is not intoxicating by prohibiting its sale in less quantities than a gallon, and forbidding the drinking of the same at the place of sale, violates no private right, and does not unreasonably restrain trade.

35. Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 75 Am. St. Rep. 93, 48 L. R. A. 261. See also Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260.

36. Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260; Porter *v.* Water Valley, 70 Miss. 560, 12 So. 828; St. Joseph *v.* Dye, 72 Mo. App. 214; Buffalo *v.* Hill, 79 N. Y. App.

market;[37] milk,[38] groceries, and victuals,[39] and other articles of food;[40] or for the wholesaling of beer,[41] although ordinances of this kind have been held void in a few cases.[42] A grant to a municipal corporation of power to regulate by ordinance the vending of meat, poultry, fish, fruits, and vegetables gives authority to prescribe by ordinance the times and places of their sale, and to prohibit the sale of them elsewhere.[43]

(VIII) *PROPERTY*—(A) *In General.* The owners of city lots or other property in a city may keep them and use them as they wish, free from interference on the part of the municipality, provided that in so doing they do not create and maintain a nuisance or cause inconvenience, damage, or harm to others.[44]

Div. 402, 79 N. Y. Suppl. 449; State *v.* Charleston, 2 Speers (S. C.) 623.

37. Buffalo *v.* Hill, 79 N. Y. App. Div. 402, 79 N. Y. Suppl. 449.

38. Chicago *v.* Bartee, 100 Ill. 57; People *v.* Mulholland, 82 N. Y. 324, 37 Am. Rep. 568.

39. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

Hotels.— Power to regulate hotels given to municipal corporations by the act of March 9, 1875, includes the power to license as a means of regulating. Russellville *v.* White, 41 Ark. 485. See also INNKEEPERS, 22 Cyc. 1072.

Victualing shops.— Under a charter which authorizes a village by its by-laws to "regulate" its victualing shops, to restrain nuisances, to exercise other police powers, and to impose penalties, etc., a by-law conferring power upon the trustees of the village to license persons to keep such shops for a year or less time under such regulations as the trustees may prescribe, and providing a penalty of ten dollars for keeping such shops without a license is a reasonable regulation, and not contrary to common right. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

40. Thomas *v.* Mt. Vernon, 9 Ohio 290.

41. Daus *v.* Macon, 103 Ga. 774, 30 S. E. 670.

42. *Connecticut.*—State *v.* Smith, 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301, requiring regular milkmen to be licensed.

Michigan.— Chaddock *v.* Day, 75 Mich. 527, 42 N. W. 977, 13 Am. St. Rep. 468, 4 L. R. A. 809, imposing a license-fee on persons selling fresh meats in less than specified quantities.

New York.— Rochester *v.* Rood, Lalor 146, imposing a fine for the sale of "putrid meat, poultry, or other provisions."

Pennsylvania.— Com. *v.* Wormser, 7 Pa. Dist. 318, requiring transient retail merchants to take out licenses.

Wisconsin.— Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576, prohibiting the sale, without a license at temporary stands, of lemonade, etc.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1356.

43. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Reasonableness.— The restrictions as to such times and places must, however, be reasonable with reference to the welfare of the community, and not from any general restriction of trade. Under this grant sales may be restricted, under the same limitations, to markets duly established under a grant of power to establish and regulate markets. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Inspection fee not a tax.— The grant of authority to regulate the vending of meats, etc., does not give power to tax, for purposes of revenue, the occupation of vending any of the articles named; but, in connection with the grant of power to regulate inspection, it justifies the imposition of fees and charges covering the expense of both inspecting the articles offered for sale and of the police supervision of the business necessary to prevent its becoming harmful to the community. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

44. *Alabama.*— Costello *v.* State, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303.

California.— San Francisco *v.* Buckman, 111 Cal. 25, 43 Pac. 396.

Indiana.— Evansville *v.* Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Iowa.— Bush *v.* Dubuque, 69 Iowa 233, 28 N. W. 542; Centerville *v.* Miller, 57 Iowa 56, 10 N. W. 293.

Louisiana.— State *v.* Schuchardt, 42 La. Ann. 49, 7 So. 67.

Mississippi.— *Ex p.* O'Leary, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640.

Missouri.— Hisey *v.* Mexico, 61 Mo. App. 248.

New York.— Hudson *v.* Thorne, 7 Paige 261.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1330; and cases cited *infra*, note 46.

Compare Chicago *v.* Ferris Wheel Co., 58 Ill. App. 625.

Nuisance see *supra*, XI, A, 7, b, (VI).

In order to justify an interference with the enjoyment of private property two facts must be established: (1) That the property, either *per se* or in the manner of using it, is a nuisance; and (2) that the interference does not extend beyond what is necessary to correct the evil. Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035].

(B) *Building Regulations.*[45] A municipal corporation has no inherent power to interfere arbitrarily with the common-law rights of real estate proprietors in the use and improvement of their property.[46] But under the police power some measure of authority for building regulations is found to reside in nearly every municipality.[47] The power of regulation extends to erection, alteration, and repair;[48] and whenever the owner's right to pursue his own plans in building, altering, or repairing is challenged, it is determined by two tests: (1) Has the municipality power to forbid the contemplated erection, alteration, or repair?[49]

Mo. Acts (1891), p. 47, empowering cities of a certain population to exclude any business vocation on property fronting on a boulevard, deprives the owners of their constitutional right to the enjoyment thereof without just compensation, and is therefore void. St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

Quarry.— In *In re* Kelso, 147 Cal. 609, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. N. S. 683, it was held that the San Francisco city ordinance prohibiting the maintenance or operation of any rock or stone quarries within a prescribed portion of the city was not a proper exercise of police power, but was void as an unlawful interference with property rights.

Theater.— A statute to the effect that "no proprietor of a theater shall, after the door of such theater is open for the reception of spectators, sell tickets so as to reserve particular seats, or to mark or describe as reserved or taken, any seats which have not been reserved by the sale of tickets therefor previous to the opening of such exhibition," cannot be sustained as a police regulation, but, on the contrary, is an unwise, vexatious, and unlawful interference with the rights of private property. District of Columbia *v.* Saville, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616.

45. Duty to comply with building regulation see BUILDERS AND ARCHITECTS, 6 Cyc. 52 note 39.

Fire regulations see *infra*, XI, A, 3, c.

Violation of building regulation see *infra*, XI, B, 1, b.

46. Chicago *v.* Ferris Wheel Co., 58 Ill. App. 625; State *v.* Schuchardt, 42 La. Ann. 49, 7 So. 67. See Hudson *v.* Thorne, 7 Paige (N. Y.) 261, holding that the charter of the city of Hudson did not empower the city corporation to restrict the erection of wooden buildings within the city, or to limit the size of buildings which any person might erect upon his own land; and that a city ordinance prohibiting the erection of a hay press within certain limits was void. See also cases cited *supra*, note 39.

Every citizen has the common-law right of acquiring title to a tract of land in a city, and to build thereon as his taste, convenience, or interest suggests or his means justify, without taking into consideration whether his building will conform in general character and appearance to others previously erected in the same locality. Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665, 93 Am. St. Rep. 394, holding that an ordinance authorizing the withholding of a permit for the erection of a building if it does not conform in general character to the buildings previously erected in the same locality, and will tend to diminish the value of the surrounding improved or unimproved property, is not justified by a grant to the municipality of power to regulate buildings and pass ordinances for the preservation of order, and securing property and persons from danger and maintaining the peace, good government, health, and welfare of the city.

47. See King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Easton *v.* Covey, 74 Md. 262, 22 Atl. 266; Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548; Com. *v.* La Bar, 5 Lack. Leg. N. (Pa.) 229; Knoxville *v.* Bird, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; and cases cited *infra*, note 49 *et seq.*

48. *California.*— *Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310.

Connecticut.— Tuttle *v.* State, 4 Conn. 68. *Compare* Stamford *v.* Studwell, 60 Conn. 85, 21 Atl. 101.

Indiana.— Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

Massachusetts.— See Greene *v.* Damrell, 175 Mass. 394, 56 N. E. 707. *Compare* Newton *v.* Belger, 143 Mass. 598, 10 N. E. 464.

New York.— New York Fire Dept. *v.* Wendell, 13 Daly 427, 430; People *v.* Crain, 47 Misc. 281, 95 N. Y. Suppl. 906 [*affirmed* in 95 N. Y. Suppl. 1164], construing the Tenement House Act of 1901.

Pennsylvania.— Brice's Appeal, 89 Pa. St. 85. See also Philadelphia *v.* Coulston, 13 Phila. 182. *Compare* Bowers *v.* Wright, 4 Wkly. Notes Cas. 460, as to approval of plans by building inspectors.

Virginia.— Carroll *v.* Lynchburg, 84 Va. 803, 6 S. E. 133.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1333.

49. *Indian Territory.*— *In re* English, 3 Indian Terr. 523, 61 S. W. 992.

Louisiana.— New Orleans *v.* Danneman, 51 La. Ann. 1093, 25 So. 931.

Maryland.— Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665, 93 Am. St. Rep. 394.

Minnesota.— State *v.* Starkey, 49 Minn. 503, 52 N. W. 24.

New Jersey.— Hubbard *v.* Paterson, 45 N. J. L. 310, 46 Am. Rep. 772.

Ohio.— Bedford *v.* Tarbell, 10 Ohio S. & C. Pl. Dec. 337, 7 Ohio N. P. 411.

(2) Has it lawfully exercised the power by enacting a prohibitory ordinance?[50] An affirmative answer to both questions is essential to sustain the municipal authority.[51] To decide the question the courts employ the familiar canons of statutory construction.[52]

Pennsylvania.— See Borough of Stevenson, 2 Del. Co. 399.

Wisconsin.— Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1333.

Mass. St. (1894) c. 481, § 11, authorizing a town to pass by-laws "for the prevention of fires and the preservation of life," and to "regulate the inspection, materials, construction, alteration, and use of buildings and other structures," has nothing to do with the regulation of offensive trades, but confers authority to regulate the things therein named only so far as may be reasonably necessary to prevent fire and preserve life. Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969.

N. Y. Laws (1874), c. 547 § 8, confers on the building department of New York city authority to modify or vary the provisions of the building acts to meet the requirements of a particular case, but declares that no such modifications shall be permitted, except a record of the same be kept by the department and a certificate be first issued to the party applying for the same, but that such certificate should be issued only on an application setting forth the facts sworn to by the applicant, "after the application shall have been passed on favorably by the board of examiners." It was held that the assent of the board of examiners was made necessary before the department of buildings could modify the provisions of the acts in a particular case; but where, on application, a department refuses to make such modification, the board of examiners has no power to review its action. People *v.* Esterbrook, 26 Hun 401.

N. Y. Laws (1885), c. 456, § 21, requires certain buildings, or alterations thereof, thereafter constructed, to be made in a manner which would render them fireproof. Section 31 declares that in cases in which it is claimed by an owner that the provisions of this title do not directly apply, or that "an equally good and more desirable form of construction could be employed in his case, such person may present a petition to the board of examiners stating the facts, which they shall grant or reject, and their decision shall be final." It was held that the power to permit "an equally good or more desirable form of construction" did not authorize the board to allow wood to be used in the place of the incombustible substances mentioned in the act, but only to permit some other substances to be used which should appear to be equally as good and more desirable than that required. People *v.* D'Oench, 44 Hun 33.

Under the New York Tenement House Act the building superintendent was held not to be authorized to determine that movable trade fixtures in a department store were part of the construction of the building and must conform to the requirements of the building code. New York *v.* A. T. Stewart Realty Co., 109 N. Y. App. Div. 702, 96 N. Y. Suppl. 513.

The division of the city of Philadelphia into rural and urban inspection districts related to the duties of inspection only, and had no application to the enforcement of penalties for violation of building regulations. Singer *v.* Philadelphia, 112 Pa. St. 410, 4 Atl. 28. The word "rural" is not construed as in the Tax Act of 1854. Whenever the neighborhood is so compactly built up as to give it the character of the built-up portion of the city, the building inspection will apply and be enforced. Hancock *v.* Thayer, 10 Phila. 25. The division of the city of Philadelphia into rural and urban inspection districts by the act of May 7, 1855, relates to the performance of the duties of the building inspectors, and the act of April 21, 1855, prescribing penalties for violating building laws, contains no such distinction, and applies equally to both kinds of districts. Singer *v.* Philadelphia, *supra.*

50. Hasty *v.* Huntington, 105 Ind. 540, 5 N. E. 559; State *v.* Rice, 97 N. C. 421, 2 S. E. 180; Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621; Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Irrespective of materials used.— An ordinance which provides that no person shall erect, add to, or generally change any building, without first obtaining the permission of the board of aldermen, is void in prohibiting the erection of buildings, irrespective of the materials to be used. State *v.* Tenant, 110 N. C. 609, 14 S. E. 387, 28 Am. St. Rep. 715, 15 L. R. A. 423.

51. New York *v.* Williams, 4 E. D. Smith (N. Y.) 516 [*affirmed* in 15 N. Y. 502]. See *supra*, note 50.

52. See cases cited *supra*, notes 49, 50; and *supra*, VI, L, 2. See also Com. *v.* Prescott, Thach. Cr. Cas. (Mass.) 507; Com. *v.* Cutler, Thach. Cr. Cas. (Mass.) 137; Willow Springs *v.* Withaupt, 61 Mo. App. 275; Philadelphia *v.* Neumann, 16 Phila. (Pa.) 99, 13 Wkly. Notes Cas. 11.

The word "block," used in an ordinance prohibiting the erection of a blacksmith's shop in any block in which two thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property-owners, provided "that in determining whether two-thirds of the buildings . . are used exclusively for residence purposes, any building fronting upon another street and lo-

(c) *Keeping and Use of Property* — (1) In General. It is competent for a municipal corporation in the exercise of the police function to reasonably regulate the use of property within the city limits.[53] Thus it has been held proper to regulate the amount and character of crop growing by each family within the corporate limits;[54] and to regulate the construction, erection, or maintenance of awnings, bill boards, or signs near the streets;[55] fences;[56] fire-escapes;[57] floor open-

cated upon a corner lot shall not be considered," means merely the part of the street upon which the blacksmith's shop is to be located, which lies between two cross streets, and does not mean the square surrounded by four streets. Patterson *v.* Johnson, 214 Ill. 481, 73 N. E. 761 [*affirming* 114 Ill. App. 329].

Erection on vacant land.— The prohibition of the Philadelphia ordinance of June 6, 1796, "for preventing the erection of wooden buildings," is not confined to the erection of such buildings on vacant land. Douglass *v.* Com., 2 Rawle (Pa.) 262.

53. *Connecticut.*— State *v.* McMahon, 76 Conn. 97, 55 Atl. 591.

Georgia.— Green *v.* Savannah, 6 Ga. 1.

Maine.— Wadleigh *v.* Gilman, 12 Me. 403, 28 Am. Dec. 188.

Minnesota.— State *v.* McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675.

Missouri.— St. Louis *v.* F. Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474.

New Jersey.— Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513.

New York.— New York *v.* Williams, 15 N. Y. 502.

Pennsylvania.— Scranton City *v.* Straff, 28 Pa. Super. Ct. 258.

South Carolina.— Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854; Charleston *v.* Elford, 1 McMull. 234.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1331 *et seq.* See also cases cited *infra*, note 54 *et seq.*

Under general welfare clause see *supra*, XI, A, 2, a, (I).

Must be reasonable.— Waters *v.* Leech, 3 Ark. 110; Corrigan *v.* Gage, 68 Mo. 541.

Notwithstanding they may in some measure interfere with private rights, without providing for compensation, police regulations to direct the use of private property so as to prevent its proving pernicious to the citizens at large are not void. Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349.

54. Green *v.* Savannah, 6 Ga. 1; Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854, in which it was held that an ordinance limiting the maximum quantity of land which it should be lawful for any person or family to cultivate within the corporate limits of the town is valid under a charter which gives the town authorities power to pass any ordinance they may deem necessary for the preservation of the health, good order, etc., of the town.

55. *Connecticut.*— State *v.* Wightman, 78 Conn. 86, 61 Atl. 56. But *compare* State *v.* Clarke, 69 Conn. 371, 37 Atl. 975, 61 Am. St. Rep. 45, 39 L. R. A. 670, holding that an ordinance prohibiting the erection or use of "any awning, except the same be upon a suitable frame and attached entirely to the building, and which awning shall not when extended be less than six feet from the sidewalk," is void for uncertainty, because the word "suitable" has no definite meaning in the connection in which it is used.

Illinois.— Chicago *v.* Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230 [*affirming* 114 Ill. App. 377].

Kansas.— Crawford *v.* Topeka, 51 Kan. 756, 33 Pac. 476, 37 Am. St. Rep. 323, 20 L. R. A. 692.

New York.— Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548; Gunning System *v.* Buffalo, 75 N. Y. App. Div. 31, 77 N. Y. Suppl. 987.

Pennsylvania.— Frey *v.* Norristown, 22 Montg. Co. Rep. 118.

United States.— Whitmier, etc., Co. *v.* Buffalo, 118 Fed. 773; *In re* Wilshire, 103 Fed. 620.

Ordinance must be reasonable.— An ordinance declaring that no sign or bill board shall be erected on any boulevard or pleasure drive, or in any street where three fourths of the buildings are devoted to residence purposes, without written consent of at least three fourths of the residents and property-owners on both sides of the street in the block where it is desired to erect such board is an arbitrary and unreasonable exercise of legislative power. Chicago *v.* Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230 [*affirming* 114 Ill. App. 377]. So an ordinance requiring sign or bill boards to be constructed not less than ten feet from the street is a regulation not necessary for public safety, and cannot be justified as an exercise of the police power. Passaic *v.* Paterson Bill Posting, etc., Co., 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676. See also Crawford *v.* Topeka, 51 Kan. 756, 33 Pac. 476, 37 Am. St. Rep. 323, 20 L. R. A. 692.

56. Jackson *v.* Miller, 69 N. J. Eq. 182, 60 Atl. 1019.

57. De Ginther *v.* New Jersey Home for Education, etc., Feeble-Minded Children, 58 N. J. L. 354, 33 Atl. 968, holding, however, that under the New Jersey act of March 24, 1890, relating to fire-escapes, it is not obligatory on an owner of a building to erect a fire-escape thereon until precedent action is taken by the municipality in which the building is located prescribing the number,

ings and railings;[58] leaders for conducting water from roofs of buildings;[59] sidewalks;[60] and the use of bicycles.[61] The municipality may also require the removal, within a reasonable time, of snow from or the covering of ice upon walks by persons owning or having control of the property.[62]

(2) ANIMALS[63]—(a) IN GENERAL. Ordinances have been generally sustained which forbid keeping in the corporate limits, or within the "settled portion of the city," certain animals,[64] such as hogs,[65] donkeys,[66] stallions,[67] and chickens;[68] but some have been held unreasonable and void.[69]

(b) RUNNING AT LARGE.[70] Animals running at large[71] within the city limits,[72] according to the great weight of authority, are proper subjects for municipal

dimensions, character, manner of construction, and erection of the fire-escapes.

58. New York *v.* Williams, 15 N. Y. 502 [*affirming* 4 E. D. Smith 516].

59. New York Fire Dept. *v.* Wendell, 13 Daly (N. Y.) 427, holding that under Laws (1885), c. 456, § 22, requiring buildings to be kept provided with metallic leaders for conducting the water from the roof, and that in no case shall the water from the leader be allowed to flow on the sidewalk, but shall be conducted by pipes to the sewer, an owner of a building erected prior to such act, who permits water from the roof to be discharged from the mouth of the leader on the public highway, is liable to the penalty imposed for the violation of such act.

60. Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225, but must be reasonable. See also, *infra*, XII, A.

61. Emporia *v.* Wagoner, 6 Kan. App. 659, 49 Pac. 701; Massinger *v.* Millville, 63 N. J. L. 123, 43 Atl. 443, holding, however, that under the New Jersey act of March 3, 1896, which requires all city ordinances regulating the use of bicycles to be in conformity therewith, and which provides that the penalty for riding at night without a lamp shall be within the discretion of the magistrate, not to exceed five dollars, an ordinance fixing a uniform penalty of five dollars is void. See also *supra*, XI, A, 7, b, (VII), (H).

62. State *v.* McMahon, 76 Conn. 97, 55 Atl. 591.

63. **Cruelty to animal** see ANIMALS, 2 Cyc. 341; and *supra*, XI, A, 2, a, (I), text and note.

Killing unlicensed animals see ANIMALS, 2 Cyc. 419.

Non-resident bound by ordinance see *supra*, XI, A, 5, 6.

Violation of regulation as to keeping or use of animal see *infra*, XI, B, 1, c.

64. See cases cited *infra*, note 70 *et seq.*

The reason for this is that large discretion is necessarily vested in a municipal council to determine and declare what is a nuisance; and the courts will interfere with that discretion only in case of its obvious abuse. See *supra*, XI, A, 7, b, (VI), (A).

Under general welfare clause see *supra*, XI, A, 2, a, (I).

65. Smith *v.* Collier, 118 Ga. 306, 45 S. E. 417; Com. *v.* Patch, 97 Mass. 221.

Keeping must constitute nuisance.—Under Miss. Annot. Code (1892), § 2928, empowering municipalities to make regulations to secure the general health, to prevent and abate nuisances, and to suppress hog pens, it is only when the keeping of hogs in a city is a nuisance that the city may prevent their being kept therein, so that an ordinance providing generally that hogs may not be kept in the city, without reference to whether they are or are not a nuisance, is invalid. Comfort *v.* Kosciusko, 88 Miss. 611, 41 So. 268. Under a statute which authorizes the city council to abate nuisances which may become injurious to the public health and to pass ordinances for the preservation of health, the council of a city extending one and one-half miles in each direction from the court-house may adopt an ordinance forbidding the keeping of hogs within one mile of the court-house; the ordinance not being unreasonable merely because it permits the keeping of hogs outside the one-mile limit. *Ex p.* Glass, (Tex. Cr. App. 1905) 90 S. W. 1108. See also *Ex p.* Robinson, 30 Tex. App. 493, 17 S. W. 1057.

66. *Ex p.* Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63.

67. Hoops *v.* Ipava, 55 Ill. App. 94; Nolin *v.* Franklin, 4 Yerg. (Tenn.) 163.

68. People *v.* Davis, 78 N. Y. App. Div. 570, 79 N. Y. Suppl. 747.

69. *Ex p.* O'Leary, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640 (too sweeping in its provisions); *Ex p.* Robinson, 30 Tex. App. 493, 17 S. W. 1057 (not a nuisance *per se*).

70. **Exercise of this power** see *infra*, XI, A, 8, h, (II).

71. **Animals running at large generally** see ANIMALS, 2 Cyc. 437.

Ordinances relating to animals running at large see ANIMALS, 2 Cyc. 437.

What is "running at large" see ANIMALS, 2 Cyc. 443.

72. **Fixing certain limits.**—Under a city ordinance prohibiting cattle from running at large within such city limits as may from time to time be designated by the common council by resolution, cattle may run at large anywhere in the city until the limits have been designated by the common council as provided in the ordinance. Lenz *v.* Sherrott, 26 Mich. 139.

On owner's own land.—A by-law of a town requiring that "all hogs shall be kept up" applies only to restrain swine from running at large on the highway, and not to prevent the owner from allowing his swine to run at

police regulation either under its general powers as to public safety, welfare, health, etc., or under an express or implied grant of power for this specific purpose.[73]

(c) Dogs. This favorite companion of man is subject not only to many general ordinances against animals,[74] but has also been made the subject of many special by-laws,[75] which have evoked much incongruous judicial opinion, with the general result that, under the police power, unless otherwise provided by statute or constitution, ordinances are valid which regulate the keeping of dogs in town,[76] require license and fees therefor,[77] and authorize summary killing of dogs not

large on his own land. Shepherd *v.* Hees, 12 Johns. (N. Y.) 433.

73. *California.*— Amyx *v.* Taber, 23 Cal. 370.

Colorado.— Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399.

Georgia.— Crum *v.* Bray, 121 Ga. 709, 49 S. E. 686.

Illinois.— Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201; Chamberlain *v.* Litchfield, 56 Ill. App. 652.

Louisiana.— See New Orleans Third Municipality *v.* Blanc, 1 La. Ann. 385.

Maryland.—Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649; Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728.

Massachusetts.— Com. *v.* Curtis, 9 Allen 266; Com. *v.* Bean, 14 Gray 52.

Missouri.—Jeans *v.* Morrison, 99 Mo. App. 208, 73 S. W. 235; McVey *v.* Barker, 92 Mo. App. 498.

North Carolina.— Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41; Hellen *v.* Noe, 25 N. C. 493. See also State *v.* Tweedy, 115 N. C. 704, 20 S. E. 183; Plymouth Com'rs *v.* Pettijohn, 15 N. C. 591.

Ohio.— Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465.

Tennessee.— Chattanooga *v.* Norman, 92 Tenn. 73, 20 S. W. 417.

Texas.—Waco *v.* Powell, 32 Tex. 258. See Heath *v.* Hall, (Civ. App. 1894) 27 S. W. 160, holding that an ordinance prohibiting running at large of "horses, mules, cattle, burros, or other animals," passed under the authority of Rev. St. art. 400, which empowers cities to prevent the running at large of "horses, mules, cattle, burros, sheep, swine, and goats," makes it unlawful to allow swine to run at large, although they are not especially enumerated in the ordinance.

Virginia.— Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

Wisconsin.— Miles *v.* Chamberlain, 17 Wis. 446.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1336; and ANIMALS, 2 Cyc. 437. See also *supra*, XI, A, 7, a.

An express grant of power for this purpose seems to be necessary in some states. See McKee *v.* McKee, 8 B. Mon. (Ky.) 433; Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465; Wilson *v.* Beyers, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858, holding that under Hill Annot. St. Wash. §§ 558, 636, subd. 20, and § 673, subd. 16, towns of the fourth class have no authority to enact an ordinance prohibiting the running at large of animals in the streets.

Nuisance.— Domestic animals running at large within the streets of a town, in such numbers and under such circumstances as to be a source of discomfort and danger to the inhabitants, are a nuisance which it is the duty of the municipal authorities to abate under charter power to remove nuisances. Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728. And cases cited *supra*, this note. See also *infra*, XI, A, 8, e, (I).

Penning up cattle at night.— A municipal ordinance directing, under a penalty, that cattle be penned up at night, applies only to residents of the municipality; not to those living beyond the corporation limits, although their cattle may stray into the town. Plymouth Com'rs *v.* Pettijohn, 15 N. C. 591, where the court merely construed the ordinance and expressly declined to pass upon the question whether the city could have made it applicable to persons beyond its limits.

74. Washington *v.* Lynch, 29 Fed. Cas. No. 17,231, 5 Cranch C. C. 498.

75. Com. *v.* Chase, 6 Cush. (Mass.) 248; Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449; Carthage *v.* Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352.

Validity of ordinance relating to dogs running at large see ANIMALS, 2 Cyc. 439.

"Dog or other animal" in a by-law to prevent disturbance by noise does not include a horse. People *v.* Edelstein, 91 N. Y. App. Div. 447, 86 N. Y. Suppl. 861.

76. Com. *v.* Dow, 10 Metc. (Mass.) 382. See also Com. *v.* Steffee, 7 Bush (Ky.) 161.

77. *District of Columbia.*— Washington *v.* Meigs, 1 MacArthur 53, 29 Am. Rep. 578.

Georgia.— Griggs *v.* Macon, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134.

Kansas.— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Massachusetts.— Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94. *Compare* Com. *v.* Bean, Thach. Cr. Cas. 85.

Minnesota.— Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

Missouri.— Carthage *v.* Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352.

South Carolina.— Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1337.

muzzled.[78] Some cases denounce[79] and others sustain[80] ordinances assessing fines against owners for non-compliance with the ordinances of regulation and license.

(D) *Protection of Property*[81] — (1) IN GENERAL. A municipality may undoubtedly exercise the police power for the protection of its own or other public property,[82] or property in public places.[83] But whether it may protect private property from encroachment is disputed, some courts maintaining the municipal power,[84] and others holding this to be a function of the state.[85]

(2) FIRE REGULATIONS.[86] The prevention of and protection against conflagration is generally recognized as an appropriate exercise of the police power by municipalities;[87] and the enactment of ordinances establishing fire limits,[88] and forbidding the use of inflammable materials in buildings or in the erection

78. Gibson *v.* Harrison, 69 Ark. 385, 63 S. W. 999, 54 L. R. A. 268; Walker *v.* Towle, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; Haller *v.* Sheridan, 27 Ind. 494. But see Stebbins *v.* Mayer, 38 Kan. 573, 16 Pac. 745, holding that where the mayor directs the marshal to post notices requiring the owners of dogs to keep them muzzled, and directs that all dogs found running at large without muzzles shall be killed, such direction does not, in the absence of an ordinance authorizing such regulation, give the marshal authority to kill dogs found running at large in violation of said notice.

Where a dog had bitten a person, it was proper for the police department to order it to be killed or brought to the station house. People *v.* Metropolitan Police Bd., 15 Abb. Pr. (N. Y.) 167, 24 How. Pr. 481.

79. Washington *v.* Meigs, 1 MacArthur (D. C.) 53, 29 Am. Rep. 578.

80. Sibley *v.* Lastrico, 122 Iowa 211, 97 N. W. 1074; New Orleans Third Municipality *v.* Blanc, 1 La. Ann. 385.

81. Protection against fire see *infra*, XI, A, 7, b, (VIII), (D), (2).

82. State *v.* Merrill, 37 Me. 329. See also King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Knoxville *v.* Bird, 12 Lea (Tenn.) 121, 49 Am. Rep. 326.

Artificial canal.— A grant of power to a mayor and common council of a city to secure the protection of persons and property therein authorizes such officers to construct an artificial canal, although partly outside of the city, to carry the waters of a natural stream which flowed through the city, and often overflowed, injuring the property of the city. Wilson *v.* Boise City, 6 Ida. 391, 55 Pac. 887.

Digging in streets.— Springfield Water Co. *v.* Darby, 199 Pa. St. 400, 49 Atl. 275.

Combustibles and explosions see *supra*, XI, A, 7, b, (IV).

83. Consolidated Traction Co. *v.* East Orange Tp., 63 N. J. L. 669, 44 Atl. 1099.

84. Brownville *v.* Cook, 4 Nebr. 101.

85. Horn *v.* People, 26 Mich. 221; Bregguglia *v.* Vineland, 53 N. J. L. 168, 20 Atl. 1082, 11 L. R. A. 407.

86. Building regulations generally see *supra*, XI, A, 3, d.

Explosives see *supra*, XI, A, 7, b, (IV); XI, A, 7, b, (VII), (K).

Regulation of fire protection see CONSTITUTIONAL LAW, 8 Cyc. 872.

87. *California.*— McCloskey *v.* Kreling, 76 Cal. 511, 18 Pac. 433; *Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310; *In re* Newell, 2 Cal. App. 767, 84 Pac. 226.

Connecticut.—Hine *v.* New Haven, 40 Conn. 478. *Compare* Pratt *v.* Litchfield, 62 Conn. 112, 25 Atl. 461.

Georgia.— Ford *v.* Thralkill, 84 Ga. 169, 10 S. E. 600.

Louisiana.— State *v.* O'Neil, 49 La. Ann. 1171, 22 So. 352.

Maine.— Wadleigh *v.* Gilman, 12 Me. 403, 28 Am. Dec. 188.

Massachusetts.— Salem *v.* Maynes, 123 Mass. 372.

Michigan.—Micks *v.* Mason, 145 Mich. 212, 108 N. W. 707.

New Jersey.— Jackson *v.* Miller, 69 N. J. Eq. 182, 60 Atl. 1019.

New York.— Troy *v.* Winters, 4 Thomps. & C. 256; Brunner *v.* Downs, 17 N. Y. Suppl. 633.

North Carolina.— State *v.* Johnson, 114 N. C. 846, 19 S. E. 599.

Pennsylvania.— Douglass *v.* Com., 2 Rawle 262.

Tennessee.— Knoxville *v.* Bird, 12 Lea 121, 49 Am. Rep. 326.

Texas.— Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.

Utah.— Eureka City *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904.

Virginia.— Roanoke *v.* Bolling, 101 Va. 182, 43 S. E. 343.

Washington.— Baxter *v.* Seattle, 3 Wash. 352, 28 Pac. 537.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1334.

Compare Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 28 Am. St. Rep. 180, 13 L. R. A. 587.

88. *Alabama.*— Canepa *v.* Birmingham, 92 Ala. 358, 9 So. 180.

Georgia.— Ford *v.* Thralkill, 84 Ga. 169, 10 S. E. 600.

New York.— Brunner *v.* Downs, 17 N. Y. Suppl. 633.

Oregon.— Hubbard *v.* Medford, 20 Oreg. 315, 25 Pac. 640.

Tennessee.— Knoxville *v.* Bird, 12 Lea 121, 49 Am. Rep. 326.

Washington.— Olympia *v.* Mann, 1 Wash. 389, 25 Pac. 337, 12 L. R. A. 150.

thereof within such limits[89] have been uniformly sustained as proper methods of its exercise. While some courts hold that this power is inherent in a municipality,[90] it nevertheless usually exists only by reason of an express grant or a necessarily implied statutory or constitutional delegation.[91] Such ordinances cannot be retroactive and require the removal of existing buildings from the fire limits;[92] but may prevent removal of forbidden structures into or even within

See 36 Cent. Dig. tit. "Municipal Corporations," § 1334; and cases cited *supra*, note 87.

Compare Pratt *v.* Litchfield, 62 Conn. 112, 25 Atl. 461, holding that Litchfield borough charter, which provides that "the burgesses are empowered . . . to provide adequate protection against fire," does not authorize the enactment of a by-law establishing "fire limits," within which "all new buildings or extensions of buildings therein shall be constructed of brick, stone, iron, or concrete, with fireproof roof, upon plans to be approved of by the burgesses."

A firewarden has no authority to give permission for the erection of a building in violation of the fire law. New York Fire Dept. *v.* Buffum, 2 E. D. Smith 511.

The common council of Brooklyn, whose only authority under the city charter (Laws (1888), c. 583, tit. 14, § 3) in regard to the fire limits was to extend them, could not grant a permit to erect a frame structure within the established fire limits. Brooklyn *v.* Furey, 9 Misc. (N. Y.) 193, 30 N. Y. Suppl. 349.

89. King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; Eureka City *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904.

"Combustible" and "fireproof."— An ordinance prohibiting the erection within certain limits of buildings constructed of combustible materials, or any material not fireproof, is not uncertain and obscure because of failure to define "combustible" and "fireproof." Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.

"Interior finish" relates to the permanent structure, and does not require trade fixtures used in a fireproof building to be covered with metal or treated with a fireproofing process. New York *v.* A. T. Stewart Realty Co., 109 N. Y. App. Div. 702, 96 N. Y. Suppl. 513.

The keeping of more than five tons of straw on one block, unless protected by a fireproof inclosure, may be prohibited. Clark *v.* South Bend, 85 Ind. 276, 44 Am. Rep. 13.

Tent or movable structure.— Under Cal. Const. art. 11, § 11, authorizing cities to enforce such police regulations as are not in conflict with general laws, it is competent for a city to declare it unlawful for any person to erect or maintain any tent or movable structure within the fire limits of the city. *In re* Newell, 2 Cal. App. 767, 84 Pac. 226.

Using shingles.— A provision in a city charter authorizing the municipality to prevent the reconstruction in wood of old buildings, within certain limits, does not include the power to prevent the repairing with shingles the roofs of buildings originally covered with similar materials. State *v.* Schnchardt, 42 La. Ann. 49, 7 So. 67.

90. *Indiana.*— Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368. See also Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Clark *v.* South Bend, 85 Ind. 276, 44 Am. Rep. 13.

Louisiana.— Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345.

Maine.— Wadleigh *v.* Gilman, 12 Me. 403, 28 Am. Dec. 188.

Massachusetts.—See Com. *v.* Tewksbury, 11 Metc. 55.

Michigan.—Brady *v.* Northwestern Ins. Co., 11 Mich. 425.

Under general welfare clause see *supra*, XI, A, 2, (I).

The reasonable view is that like other municipal powers it may be implied. Ford *v.* Thralkill, 84 Ga. 169, 10 S. E. 600; Alexander *v.* Greenville, 54 Miss. 659.

91. *California.*—*Ex p.* Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640; *Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310; *In re* Newell, 2 Cal. App. 767, 84 Pac. 226.

Connecticut.— Pratt *v.* Litchfield, 62 Conn. 112, 25 Atl. 461.

Illinois.— King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89.

Iowa.— Des Moines *v.* Gilchrist, 67 Iowa 210, 25 N. W. 136, 56 Am. Rep. 341; Keokuk *v.* Scroggs, 39 Iowa 447.

Missouri.— Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

Pennsylvania.— Respublica *v.* Duquet, 2 Yeates 493 [*distinguished* in Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 384]. *Compare* Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555.

Texas.— Pye *v.* Peterson, 45 Tex. 312, 23 Am. Rep. 608.

West Virginia.— Charleston *v.* Reed, 27 W. Va. 681, 55 Am. Rep. 336.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1334.

92. Buffalo *v.* Chadeayne, 134 N. Y. 163, 31 N. E. 443. See also Berthin *v.* Crescent City Live Stock Landing, etc., Co., 28 La. Ann. 210; Jackson *v.* Miller, 69 N. J. Eq. 182, 60 Atl. 1019; Cleveland *v.* Lenze, 27 Ohio St. 383; Barthet *v.* New Orleans, 24 Fed. 563. But see Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; New York Fire Dept. *v.* Wendell, 13 Daly (N. Y.) 427.

The fact that one had already dug the cellar and contracted for the materials and erection of a wooden building was held not to exempt him from the operation of an ordinance forbidding the erection of such build-

such limits from one lot to another;[93] and may authorize the summary demolition of buildings erected in violation of law.[94] That a wooden structure ceases to be such when encased with iron has been held by some courts,[95] but this view has not been generally accepted.[96]

(IX) *SUNDAY OBSERVANCE.* Sunday observance[97] may become a proper subject for municipal police regulation,[98] either under the general powers as to public safety, welfare, health, etc.,[99] or under an express or implied grant of power for the purpose.[1] The general statutes of the state on this subject fix the limit and measure of municipal police power,[2] unless the charter expressly confers more.[3] But the municipality need not cover the entire field of the statute;[4] and an

ings in certain limits, including the site. Salem *v.* Maynes, 123 Mass. 372.

93. Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; Griffin *v.* Gloversville, 67 N. Y. App. Div. 403, 73 N. Y. Suppl. 684. Where an ordinance prohibits the erection of buildings of combustible material within certain limits other than such as are provided for in the ordinance, the removal of a building constructed of combustible materials from some portion of the fire limits to another place within such limits is unlawful. Eureka City *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904.

A permit to remove a wooden building from one point to another within the fire limits may, however, be granted. State *v.* Kearney, 25 Nebr. 262, 41 N. W. 175, 13 Am. St. Rep. 493.

94. *Arkansas.*— McKibbin *v.* Ft. Smith, 35 Ark. 352.

Connecticut.— Hine *v.* New Haven, 40 Conn. 478.

Louisiana.— See Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345.

Michigan.— Micks *v.* Mason, 145 Mich. 212, 108 N. W. 707.

New York.— New York Fire Dept. *v.* Buhler, 35 N. Y. 177, 33 How. Pr. 378 [*reversing* 1 Daly 391].

Pennsylvania.— Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555; Ellwood City *v.* Mani, 16 Pa. Co. Ct. 474.

Washington.— Baxter *v.* Seattle, 3 Wash. 352, 28 Pac. 537.

Summary abatement of nuisance see NUISANCES.

Summary destruction of property see *infra*, XI, B, 8, k.

95. Montgomery *v.* Louisville, etc., R. Co., 84 Ala. 127, 4 So. 626.

96. Charleston *v.* Reed, 27 W. Va. 681, 55 Am. Rep. 336. See Sylvania *v.* Hilton, 123 Ga. 754, 51 S. E. 744, 107 Am. St. Rep. 162, 2 L. R. A. N. S. 483 (holding that a building constructed by erecting a wooden frame and covering it on the outside with corrugated iron, the interior, including the flooring and ceiling, being entirely of wood, is not in compliance with an ordinance declaring that within fire limits all buildings shall be constructed of incombustible material and covered with fire proofing); Com. *v.* Prescott, Thach. Cr. Cas. (Mass.) 507 (holding that under a statute regulating the size of wooden buildings to be erected in the city of Boston, it is not lawful to erect a building ten feet on the ground in length, by five in width, and forty-two feet in height, three sides of which are wood, against the wall of a brick dwelling-house, to be used as a staircase, although such building be covered with zinc).

97. Sunday generally see SUNDAY.

Sale of liquor on Sunday see INTOXICATING LIQUORS, 23 Cyc. 190.

98. *Connecticut.*—State *v.* Welch, 36 Conn. 215.

Florida.— Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234.

Georgia.— Bagwell *v.* Lawrenceville, 94 Ga. 654, 21 S. E. 903.

Illinois.— Chebanse *v.* McPherson, 15 Ill. App. 311 [*affirmed* in 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857].

Iowa.— Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496.

Kentucky.— Megowan *v.* Com., 2 Metc. 3.

South Carolina.— Charleston *v.* Benjamin, 2 Strobh. 508, 49 Am. Dec. 606.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1329; and cases cited *infra*, note 99 *et seq.*

99. Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857 [*affirming* 15 Ill. App. 311]; *Ex p.* Abram, 34 Tex. Cr. 10, 28 S. W. 818. See also *supra*, XI, A, 7, a.

Under general welfare clause see *supra*, XI, A, 2, a, (I).

1. See St. Louis *v.* Cafferata, 24 Mo. 94. See also *supra*, XI, A, 2, 4.

2. McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857 [*affirming* 15 Ill. App. 311]. See also Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; Rothschild *v.* Darien, 69 Ga. 503; Canton *v.* Nist, 9 Ohio St. 439; *Ex p.* Abram, 34 Tex. Cr. 10, 28 S. W. 818, holding that the aldermen of a town having less than one thousand inhabitants may, under Tex. Rev. St. art. 520, which empowers it to enact ordinances not inconsistent with the laws of the state, incorporate into an ordinance Pen. Code, arts. 186, 186*a*, prohibiting bartering and selling on Sunday.

3. St. Louis *v.* Cafferata, 24 Mo. 94. See also McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857 [*affirming* 15 Ill. App. 311].

4. Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234.

ordinance forbidding only a portion of the acts denounced by statute may yet be valid.[5]

8. Exercise of Power[6] — a. In General. While the state may prescribe by law (1) over what subjects the municipality may exercise the police power,[7] (2) in what mode or manner it shall be exercised,[8] and (3) what officer or department shall perform the functions,[9] a general grant of the police power leaves it to the discretion of the municipality what, and how, and by whom it will exercise the power.[10] The power must not be exercised arbitrarily, irregularly, or tyrannically.[11] The regular municipal method of exercising police functions is by the enactment of ordinances of regulation or prohibition, the former usually prescribing fees and licenses,[12] and the latter penalties for violation of the ordinance;[13] and the enforcement of these police ordinances exhibits the police power of a munici-

5. Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857 [*affirming* 15 Ill. App. 311].

6. **Reward** for apprehension of criminal see *infra*, XV, A, 1, c, (IV).

Workhouse, power to establish and maintain, see *supra*, XI. B, 4, q, (IX).

7. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; State *v.* Noyes, 30 N. H. 279; Mills *v.* Chicago, 127 Fed. 731.

Persons and things bound by police regulations see *infra*, XI, A, 6.

The courts are the final judges as to what are proper subjects of the police power, and the law-making power cannot arbitrarily make that a subject of its exercise, which, from its nature, is not one. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

8. Bancroft *v.* Cambridge, 126 Mass. 438.

Exclusive of other methods.— Where a city corporation is empowered by its charter to make by-laws, and to enforce them by a certain penalty, no other method of enforcing obedience to its by-laws can be adopted. Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

Under Miller Code Iowa, § 457, which authorizes a city to prohibit the erection of wooden buildings within certain limits as a precaution against fires, on petition of certain of the owners of property, such petition is a necessary prerequisite to the exercise of the power; and an ordinance to that effect, passed without a petition therefor, is void. Des Moines *v.* Gilchrist, 67 Iowa 210, 25 N. W. 136, 56 Am. Rep. 341.

Tex. Const. art. 16, § 23, providing that the legislature may regulate live stock in the stock-raising portions of the state, and pass general or special laws for the inspection of cattle, "provided that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby," does not require a municipal ordinance forbidding cattle to run at large in the city to be submitted to and approved by the freeholders of the city. Batsel *v.* Blaine, (App. 1891) 15 S. W. 283.

9. Louisburg *v.* Harris, 52 N. C. 281.

10. See New Orleans Gas Light Co. *v.* Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544; St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278; Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854. *Compare* Odd Fellows' Cemetery Assoc. *v.* San Francisco, 140 Cal. 226, 73 Pac. 987 (holding that where a city was given power by its charter to make necessary local police, sanitary, and other laws and regulations, the insertion of the word "necessary" did not limit or restrict the power given to the city); Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69 (holding that where the language of a statute authorizing an exercise of the police power is so broad as to include things which are not, as well as those which are, the subject of the power, the exercise of the power will be confined to things which are legally the subjects of such power).

When a city council is vested with full power over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient. Danville *v.* Hatcher, 101 Va. 523, 44 S. E. 723.

11. Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130; Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367; Hayes *v.* Appleton, 24 Wis. 542. See also Berthin *v.* Crescent City Livestock-Landing, etc., Co., 28 La. Ann. 210.

12. *Alabama.*— Carroll *v.* Tuskaloosa, 12 Ala. 173.

Arkansas.— Ft. Smith *v.* Ayers, 43 Ark. 82.

Connecticut.—Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383.

Illinois.— Bull *v.* Quincy, 9 Ill. App. 127 [*affirmed* in 106 Ill. 337].

Indiana.—American Furniture Co. *v.* Batesville, 139 Ind. 77, 38 N. E. 408; Ridgeway *v.* West, 60 Ind. 371.

United States.— Barthet *v.* New Orleans, 24 Fed. 563; Ward *v.* Washington, 29 Fed. Cas. No. 17,163, 4 Cranch C. C. 232.

Licenses and fees for same see *infra*, XI, A, 8, c, (I)–(VII).

13. *Georgia.*— Vason *v.* Augusta, 38 Ga. 542.

Illinois.— Ewbanks *v.* Ashley, 36 Ill. 177.

Missouri.— State *v.* Gordon, 60 Mo. 383; *In re* Jones, 90 Mo. App. 318; De Soto *v.* Brown, 44 Mo. App. 148; *In re* Miller, 44 Mo. App. 125.

New York.— Coates *v.* New York, 7 Cow. 585; Hart *v.* Albany, 9 Wend. 571, 24 Am. Dec. 165.

pality in its ordinary operation.[14] What these ordinances shall be rests in the legislative discretion of the council;[15] and with this the courts will not assume to interfere, if the ordinance respects the constitutional and inherent rights of the citizen,[16] and is obviously adapted to accomplish the end designed.[17]

b. Particular Boards and Officers. The measure of police power delegated by the state to the municipality may be exercised only by the governing body.[18] Neither the board of health nor any other board or officer of a municipality may exercise the municipal discretion, except under express charter authority,[19] or by-law ordained by the council,[20] under which their functions are ministerial.

c. Licenses and Permits[21] — (I) *In General.* Licenses or permits may be made applicable to all persons, resident or non-resident, who practice the acts permitted or engage in the occupations licensed.[22]

(II) *Power to Grant.*[23] As shown by numerous adjudications, municipal power to grant a license or permit may exist under either the police power[24] or

North Carolina.— Washington *v.* Hammond, 76 N. C. 33.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1312; and *supra*, XI, A, 4, b, c.

Power to punish violations of regulations see *infra*, XI, A, 8, g.

Prohibitory ordinances see *infra*, XI, A, 8, d.

14. See *supra*, notes 12, 13.

15. Campion *v.* Buffalo, 8 N. Y. St. 329.

16. See Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131.

17. Waters Pierce Oil Co. *v.* New Iberia, 47 La. Ann. 863, 17 So. 343.

18. See *supra*, V, A, 1, 2, 3.

When by charter or statute police power is delegated to the city, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee the power to determine the mode, manner, or plan of exercising the police power. Lufkin *v.* Galveston, 56 Tex. 522.

19. Walsh *v.* Denver, 11 Colo. App. 523, 53 Pac. 458; Fowle *v.* Alexandria, 3 Pet. (U. S.) 398, 7 L. ed. 719 [*affirming* 9 Fed. Cas. No. 4,993, 3 Cranch C. C. 70]

Under the Arkansas statute (Sandels & H. Dig. § 5132) giving municipal corporations power to prevent nuisances from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated, within the jurisdiction given to the board of health, and section 5203, giving the city council power to establish a board of health, and to invest it with such powers and impose such duties on it as are necessary to secure the city from "contagious, malignant and infectious diseases," the city council had authority to confer power on the board of health to abate a house infected with smallpox, as a nuisance dangerous to the public health. Waters *v.* Townsend, 65 Ark. 613, 47 S. W. 1054.

Delegation of municipal police power see *supra*, XI, A, 3.

20. Cambridge *v.* Munroe, 126 Mass. 496.

21. **Licenses in general** see LICENSES, 25 Cyc. 593 *et seq.*

License to remove garbage, etc., see *supra*, XI, A, 7, b, (VI), (C), (D).

Particular subjects of license see *supra*, XI, A, 7, b.

Surrender of power by contract or license see *supra*, XI, A, 3, b.

22. Huntington *v.* Cheesbro, 57 Ind. 74; Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136; Taylor Borough *v.* Postal Tel., etc., Co., 16 Pa. Super. Ct. 344; Frommer *v* Richmond, 31 Gratt. (Va.) 646, 31 Am. Rep. 746. See also LICENSES, 25 Cyc. 610; and *supra*, XI, A, 5, 6

23. **Power to license** see CONSTITUTIONAL LAW, 8 Cyc. 876.

24. *Alabama.*— Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Arkansas.— Russellville *v.* White, 41 Ark. 485.

California.— Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

Georgia.— Fitts *v.* Atlanta, 121 Ga. 567, 49 S. E. 793, 104 Am. St. Rep. 167, 67 L. R. A. 803; Daus *v.* Macon, 103 Ga. 774, 30 S. E. 670.

Illinois.— Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260; U. S. Distilling Co. *v.* Chicago, 112 Ill. 19; Chicago *v.* Bartee, 100 Ill. 57; Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545; Ballard *v.* Chicago, 69 Ill. App. 638; Bull *v.* Quincy, 9 Ill. App. 127 [*affirmed* in 106 Ill. 337].

Indiana.— Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857; Huntington *v* Cheesbro, 57 Ind. 74.

Iowa.— Burlington *v.* Lawrence, 42 Iowa 681; Burlington *v.* Kellar, 18 Iowa 59.

Louisiana.— New Orleans *v.* New Orleans City, etc., R. Co., 40 La. Ann. 587, 4 So. 512; New Orleans *v.* Guillotte, 14 La. Ann. 875.

Massachusetts.— Lincoln *v.* Boston, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257.

Michigan.— Love *v.* Judge Recorder's Ct., 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618; Grand Rapids *v.* Newton, 111 Mich. 48, 69 N. W. 84, 66 Am. St. Rep. 387, 35 L. R. A. 226; Van Baalen *v.* People, 40 Mich. 258.

Minnesota.— State *v.* Schoenig, 72 Minn. 528, 75 N. W. 711.

Mississippi.— Porter *v.* Water Valley, 70 Miss. 560, 12 So. 828.

Missouri.— St. Louis *v.* F. Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; Eichenlaub *v.* St. Joseph, 113

the power of taxation,[25] or under both;[26] but, on the other hand, revenue may

Mo. 395, 21 S. W. 8, 18 L. R. A. 590; St. Joseph *v.* Dye, 72 Mo. App. 214.

Nebraska.— Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588; State *v.* Kearney, 25 Nebr. 262, 41 N. W. 175, 13 Am. St. Rep. 493.

New York.—People *v.* Mulholland, 82 N. Y. 324, 37 Am. Rep. 568; Buffalo *v.* Hill, 79 N. Y. App. Div. 402, 79 N. Y. Suppl. 449; Jones *v.* Foster, 43 N. Y. App. Div. 33, 59 N. Y. Suppl. 738.

Ohio.— Thomas *v.* Mt. Vernon, 9 Ohio 290.

Pennsylvania.— Beaver Valley Water Co. *v.* Conway Borough, 213 Pa. St. 225, 62 Atl. 844; Wilkes-Barre *v.* Garebed, 9 Kulp 273; Mahonoy City *v.* Pennsylvania Theater Co., 3 Schuylkill Leg. Rec. 160; Brownbach *v.* North Wales, 44 Wkly. Notes Cas. 258.

South Carolina.— State *v.* Charleston, 2 Speers 623.

Vermont.— State *v.* Bevins, 70 Vt. 574, 41 Atl. 655; St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *In re* Snell, 58 Vt. 207, 1 Atl. 566; Winooski *v.* Gokey, 49 Vt. 282.

United States.— Laundry License Case, 22 Fed. 701; Ward *v.* Washington, 29 Fed. Cas. No. 17,163, 4 Cranch C. C. 232.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1364; and LICENSES, 25 Cyc. 599 *et seq.*

Power must be plainly conferred.— The power of a municipality to license or give a permit must be plainly conferred by the legislature, or it will not be held to exist. Gettysburg *v.* Zeigler, 2 Pa. Co. Ct. 326. See also Sanction Express Co. *v.* R. M. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. N. S. 619; New York Fire Dept. *v.* Buffum, 2 E. D. Smith (N. Y.) 511; Brooklyn *v.* Furey, 9 Misc. (N. Y.) 193, 30 N. Y. Suppl. 349; and *supra*, XI, A, 7, b, (VII), (A).

25. *Alabama.*— *Ex p.* Montgomery, 64 Ala. 463.

Arkansas.— Hot Springs *v.* Rector, (1903) 76 S. W. 1056.

Illinois.— Van Inwagen *v.* Chicago, 61 Ill. 31; Illinois Mut. F. Ins. Co. *v.* Peoria, 29 Ill. 180.

Louisiana.— Merchants' Mut. Ins. Co. *v.* Blandin, 24 La. Ann. 112.

Missouri.— Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; St. Louis *v.* Sternberg, 69 Mo. 289; Kansas City *v.* Oppenheimer, 100 Mo. App. 527, 75 S. W. 174; Farmington *v.* Rutherford, 94 Mo. App. 328, 68 S. W. 83; Lamar *v.* Adams, 90 Mo. App. 35.

New Jersey.— North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71.

South Carolina.— Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

Tennessee.— Hunter *v.* Memphis, 93 Tenn. 571, 26 S. W. 828; Columbia *v.* Beasly, 1 Humphr. 232, 34 Am. Dec. 646.

United States.— Western Union Tel. Co. *v.* Charleston, 56 Fed. 419 [*affirmed* in 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871].

See also LICENSES, 25 Cyc. 599 *et seq.*

Illustrations.— Under an authority to collect taxes on auctioneers, a municipal corporation may impose the tax either on the amount of the sales or in the form of a license to the auctioneer. Carroll *v.* Tuskaloosa, 12 Ala. 173. Under a charter authorizing a corporation to suppress and restrain bowling saloons, etc., the implied power to tax and license is conferred. Smith *v.* Madison, 7 Ind. 86. The corporation of the town of Nashville, under a grant of power to "license, regulate, and restrain theatrical amusements," may exercise the taxing power as a means of effecting this object. Hodges *v.* Nashville, 2 Humphr. (Tenn.) 61.

Express power necessary.— The power of municipal corporations to tax or license callings or occupations must be expressly conferred by law. Delcambre *v.* Clere, 34 La. Ann. 1050. Mass. Acts (1847), c. 224, does not authorize the mayor and aldermen of Boston to require the payment of money to the city by persons resident in Roxbury who may set up and drive omnibuses and stage coaches from Roxbury to Boston, and from Boston to Roxbury, for the conveyance of persons for hire, as a tax or duty upon such vehicles before so using the same. Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679. Carbondale City Charter March 15, 1851 (Pub. Laws, p. 165, § 6), empowering the city council to make such ordinances as shall be necessary or convenient for the government and welfare of the city, does not authorize the city to impose a license-tax on places maintained merely for amusement. Carbondale *v.* Vail, 2 Del. Co. Ct. (Pa.) 387. See also *supra*, XI, A, 7, b, (VII), (A); *infra*, XV, D.

A subsequent special act conferring a direct grant of power prevails over a prior act refusing such power. So held as to the power in the amended charter of St. Louis of 1870 to tax insurance companies, notwithstanding the exemption in the general law of 1869 (Wagner St. p. 752, § 40). St. Louis *v.* Life Assoc. of America, 53 Mo. 466. See also St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

26. *California.*— Los Angeles County *v.* Eikenberry, 131 Cal. 461, 63 Pac. 766; Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

Kentucky.— Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556.

Missouri.— Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

Tennessee.—Hodges *v.* Nashville, 2 Humphr. 61.

Texas.— Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124.

New Whatcom city charter authorizes the city to license all lawful kinds of business for regulation and revenue purposes, and to fix the license-fee, and provide for its collection. The city council passed an ordinance forbidding auction sales except by duly licensed auctioneers, and fixed the license-fee for auction sales of stocks of merchandise, dress goods, jewelry, etc., at twenty-five dol-

not be raised by police license;[27] nor police license be granted under the power of taxation;[28] nor may the municipality or any officer thereof license things forbidden by common or statute law — such as bawdy-houses, gambling houses, and saloons.[29] The power to regulate, however, necessarily implies the power to license, that is, to permit conditionally the doing of a thing.[30]

(III) *Proceedings For and Issuance of License.* Under an ordinance requiring license, the fee may be fixed by resolution,[31] the council may retain discretion as to the issuance of licenses,[32] and all applicants must comply with the conditions prescribed.[33]

lars a day, payable in advance. It was held that, although such ordinance was unreasonable, and therefore could not be sustained under the city's power to "regulate" the business of auctioneers, it was nevertheless within the city's taxing power conferred by the charter. Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892.

Tax and license distinguished.— The distinction is well recognized. Imposing licenses for regulating business, etc., is an exercise of the police power, while imposing them for revenue purposes is an exercise of the taxing power. Matter of Guerrero, 69 Cal. 88, 91, 10 Pac. 261; Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69. A license-fee imposed by a city or village in pursuance of the section of the statute cited, upon certain avocations, trades, business, or occupations carried on within the corporate limits of such city or village, is not a tax, in the constitutional sense of that term. U. S. Distilling Co. *v.* Chicago, 112 Ill. 19, 22. See also Licenses, 25 Cyc. 602.

27. Cape May *v.* Cape May Transp. Co., 64 N. J. L. 80, 44 Atl. 948; Memphis *v.* American Express Co., 102 Tenn. 336, 52 S. W. 172; Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892. See also Licenses, 25 Cyc. 602.

28. Burlington *v.* Bumgardner, 42 Iowa 673; New Orleans *v.* Costello, 14 La. Ann. 37; Leonard *v.* Canton, 35 Miss. 189. See also Licenses, 25 Cyc. 602.

29. *California.*— *Ex p.* Tuttle, 91 Cal. 589, 27 Pac. 933; *Ex p.* Lane, 76 Cal. 587, 18 Pac. 677.

Connecticut.— State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Illinois.—Chicago *v.* Brownell, 41 Ill. App. 70.

Kentucky.— Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924; White *v.* Com., 92 S. W. 285, 28 Ky. L. Rep. 1312.

Minnesota.—State *v.* Grimes, 49 Minn. 443, 52 N. W. 42.

Oregon.— Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706.

South Carolina.— Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 79 Am. St. Rep. 843, 50 L. R. A. 725.

Texas.— *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

See also Licenses, 25 Cyc. 624; and *supra*, XI, A, 7, b, (III), (V).

Boarding house kept for prostitutes.— La. Acts (1855), p. 144, relative to crimes and offenses, does not prevent the city from levying a tax on boarding houses kept for prostitutes, provided they do not license houses of this class. New Orleans *v.* Costello, 14 La. Ann. 37.

Permit for wooden building within fire limits see *supra*, XI, A, 7, b, (VIII), (D), (2).

30. *Arkansas.*— Russellville *v.* White, 41 Ark. 485.

District of Columbia.— Washington *v.* Meigs, 1 MacArthur 53, 29 Am. Rep. 578.

Georgia.— Griggs *v.* Macon, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134.

Indiana.— Huntington *v.* Cheesbro, 57 Ind. 74.

Kansas.— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

Minnesota.— Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

Missouri.— Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Carthage *v.* Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352.

South Carolina.— Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *In re* Snell, 58 Vt. 207, 1 Atl. 566.

Wisconsin.— Lessey *v.* Green Bay, 1 Pinn. 486.

United States.— Laundry License Case, 22 Fed. 701.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1361. See also *supra*, XI, A, 7, b, (VII), (A); and Licenses, 25 Cyc. 602.

"License, tax, and regulate."— St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278.

31. Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 19 S. W. 1053.

32. State *v.* Schoenig, 72 Minn. 528, 75 N. W. 711. See also Licenses, 25 Cyc. 622. *Compare* Matter of O'Rourke, 9 Misc. (N. Y.) 564, 30 N. Y. Suppl. 375.

Presumption upon refusal.— The action of a city council in refusing a license or permit will be presumed to have been intended for the public's benefit, and to have been based on reasons deemed adequate. Buffalo *v.* Hill, 79 N. Y. App. Div. 402, 79 N. Y. Suppl. 449. Only when the discretion vested in the officers is arbitrarily, improperly, or fraudulently exercised will the courts interfere. Shrack *v.* Coatesville, 6 Pa. Dist. 425, 19 Pa. Co. Ct. 334.

33. See Licenses, 25 Cyc. 622. See also

(iv) *Form, Sufficiency, and Construction.* The provisions of the statute authorizing the granting of a license may also govern its form and sufficiency.[34] Only a single license may be demanded for a second-hand store;[35] but one license will not cover three stationary engines,[36] nor the machinery attached to one.[37] A license will be construed with reference to the application,[38] and the ordinance with reference to the corporate boundaries.[39]

(v) *Transfer and Revocation.* An occupation license being personal is not transferable;[40] but a permit to erect and maintain a plant at a fixed place may be transferred with the realty and business as an appurtenance.[41] A license may be revoked for cause, if both charter and ordinance provide therefor;[42] but it seems not otherwise.[43]

St. Louis *v.* Knox, 6 Mo. App. 247; People *v.* Moore, 78 N. Y. App. Div. 28, 79 N. Y. Suppl. 7, for effect of state relating to examining boards for plumbers.

The power conferred upon a city by its charter to issue licenses can only be exercised after the passage of an ordinance specifying the details necessary to be pursued. Bull *v.* Quincy, 9 Ill. App. 127 [*affirmed* in 106 Ill. 337].

Application must be made to the town council and not to the burgess under an ordinance requiring a water company to obtain a permit from the town council before proceeding to lay its mains through the streets. Beaver Valley Water Co. *v.* Conway Borough, 213 Pa. St. 225, 62 Atl. 844.

The object in giving notice of an application for a license is that persons interested may have an opportunity to be heard thereon. Quinn *v.* Middlesex Electric Light Co., 140 Mass. 109, 111, 3 N. E. 204, where it was said: "Plaintiff in the present case had actual notice, and attended the hearing, and, by making no objection to the insufficiency of the notice, he waived longer notice to himself. Under these circumstances, it is nothing to him whether other persons had due notice or not. He cannot be heard to object that they did not."

34. Alter *v.* Dodge, 140 Mass. 594, 5 N. E. 504, holding that under Mass. Pub. St. c. 102, § 47, providing for the licensing by the aldermen of towns of steam engines, the license to prescribe the situation of the building to be erected for a steam engine, the construction thereof, and height of flues, a location is sufficiently described in a license as "A.'s shoe manufactory on Prince street"; and that if the license does not provide for height of flues, it will not be invalid, as that is discretionary with the aldermen. See also Licenses, 25 Cyc. 623.

One who, under a permit illegally granted by city officers, constructs a building on his own land, cannot, by lapse of time, acquire a vested right to maintain the same, as he never had a right to vest. Brooklyn *v.* Furey, 9 Misc. (N. Y.) 193, 30 N. Y. Suppl. 349.

35. Hotelling *v.* Chicago, 66 Ill. App. 289.

36. Quinn *v.* Middlesex Electric Light Co., 140 Mass. 109, 3 N. E. 204.

37. Quinn *v.* Lowell Electric Light Corp., 140 Mass. 106, 3 N. E. 200.

38. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672.

39. Norfolk *v.* Flynn, 101 Va. 473, 44 S. E. 717, 99 Am. St. Rep. 918, 62 L. R. A. 771. See also Licenses, 25 Cyc. 624.

40. Mayes *v.* Erwin, 8 Humphr. (Tenn.) 290. See also Licenses, 25 Cyc. 625.

41. Quinn *v.* Middlesex Electric Light Co., 140 Mass. 109, 3 N. E. 204.

42. Towns *v.* Tallahassee, 11 Fla. 130; Child *v.* Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57. See Boehm *v.* Baltimore, 61 Md. 259, holding that a municipal ordinance providing that no person shall remove the contents of any privy within the city without having obtained a license to do so, and every person who may obtain such license shall be considered as subject to the orders of the board of health in all matters relating to the opening and cleaning of privies, and for any neglect or refusal to obey the orders of the board the controller, on the written request of the commissioner of health, may revoke his license, is a lawful exercise of the power to pass ordinances to preserve the health of the city. See also Licenses, 25 Cyc. 625.

No cause of action arises against a city for the revocation of a permit to erect a building within the fire limits, where it appears that an express condition in the permit, forbidding the erection on the sidewalk of any obstructions, or of a structure of a certain kind, was broken by the contractor. Harper *v.* Jonesboro, 94 Ga. 801, 22 S. E. 139.

43. Smith *v.* Major, 16 Ohio Cir. Ct. 362, 8 Ohio Cir. Dec. 649. See also Licenses, 25 Cyc. 625.

Building permit.—Where a general municipal ordinance, applying to all citizens and property holders, provided for the granting of permits for the erection of buildings, the city council could not, during the life of the ordinance, cancel a permit duly granted in conformity with its provisions. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672. Where a city council has granted a permit to build frame buildings within the fire limits, and excavations for the cellars have been made, and materials contracted for, and partly delivered, and the work of building is in progress, a resolution of the council, rescinding its former action, without notice to defendant or opportunity given him to be heard, is, in the absence of any public necessity for such

(VI) *LICENSE-FEES AND TAXES.*[44] Ordinances with either the purpose or effect of providing municipal revenue cannot be sustained or enforced under the police power,[45] but under the taxing power ordinances may provide either for an *ad valorem* tax or a license-tax.[46] Police license-fees, however, may be collected by a municipality sufficient to cover all expenses of license, inspection, and police supervision incident to the occupation;[47] but unreasonable charges invalidate the

action, void, as taking property without due process of law. Buffalo *v.* Chadeayne, 7 N. Y. Suppl. 501.

Forfeiture of license.— Under an authority to impose fine or imprisonment as a penalty for violation of an ordinance, an ordinance cannot prescribe, as the penalty, fine and forfeiture of license. Staates *v.* Washington, 44 N. J. L. 605, 43 Am. Rep. 402.

44. See, generally, LICENSES, 25 Cyc. 593 *et seq.*

45. *Louisiana.*— Delcambre *v.* Clere, 34 La. Ann. 1050. See also New Orleans *v.* Great Southern Tel., etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502; Vermilionville *v.* Mouton, 28 La. Ann. 586.

Mississippi.— Pitts *v.* Vicksburg, 72 Miss. 181, 16 So. 418.

Missouri.— Kansas City *v.* Corrigan, 18 Mo. App. 206.

New York.— New York *v.* Second Ave. R. Co., 32 N. Y. 261. See also New York *v.* Third Ave. R. Co., 33 N. Y. 42.

Pennsylvania.—Philipsburg *v.* Central Pennsylvania Tel., etc., Co., 22 Wkly. Notes Cas. 572. See also Carbondale *v.* Vail, 2 Del. Co. 387.

Washington.—Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892.

Wisconsin.— Wisconsin Tel. Co. *v.* Milwaukee, 126 Wis. 1. 104 N. W. 1009, 110 Am. St. Rep. 886, 1 L. R. A. N. S. 581.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1368; cases cited *supra*, note 27; and LICENSES, 25 Cyc. 602.

Compare Com. *v.* Markham, 7 Bush (Ky.) 486, holding that an ordinance requiring the owner of a dog to apply to a city clerk to register and procure a stamped collar for each dog, and to pay to the city clerk at the time of the registry a certain sum for every dog so owned and registered, which tax shall be paid into the treasury, is not invalid on the ground that it is a tax for revenue, and, not being *ad valorem*, is unauthorized, as such ordinance is a license-tax and valid as a police regulation.

46. St. Joseph *v.* Ernst, 95 Mo. 360, 8 S. W. 558. See also New Orleans *v.* Costello, 14 La. Ann. 37; and LICENSES, 25 Cyc. 609.

Ad valorem taxation does not interfere with the right to impose a license-tax. See LICENSES, 25 Cyc. 609.

47. *Arkansas.*— Ft. Smith *v.* Ayers, 43 Ark. 82.

California.— Los Angeles County *v.* Eikenberry, 131 Cal. 461, 63 Pac. 766.

Connecticut.—Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383.

District of Columbia.— Washington *v.* Meigs, 1 MacArthur 53, 29 Am. Rep. 578.

Florida.— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Georgia.— Griggs *v.* Macon, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134.

Kansas.— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Louisiana.— New Orleans *v.* Hop Lee, 104 La. 601, 29 So. 214.

Maryland.— Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136; Postal Tel. Cable Co. *v.* Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161.

Massachusetts.— Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; Boston *v.* Schaffer, 9 Pick. 415.

Michigan.— Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740.

Minnesota.— St. Paul *v.* Dow, 37 Minn. 20, 32 N. W. 860, 5 Am. St. Rep. 811; Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

Missouri.— Carthage *v.* Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352.

New York.— New York *v.* Miller, 12 Daly 496.

Pennsylvania.— Chester *v.* Western Union Tel. Co., 154 Pa. St. 464, 25 Atl. 1134.

South Carolina.— Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1368; and LICENSES, 25 Cyc. 611.

License plate on vehicle.—A city may require a license plate to be placed on a vehicle licensed to be used in a certain occupation, although it already has a license plate for street use attached, and may charge for the same the reasonable expense of furnishing it. St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045.

Underground wires.— The ordinance under which license charges were imposed by a city on telegraph poles and wires within its limits recited that great inconvenience had been occasioned to property-owners by the placing of telegraph poles in front of their premises, that the lives and property of citizens traveling about the city were imperiled by the maintenance of unsound telegraph poles, and that it was necessary to establish a system for the inspection and regulation of the maintenance of such poles. A subsequent ordinance was entitled "An ordinance to regulate the introduction and use of underground conduits, wires, and cables for electrical conductors in the streets of Philadelphia," etc. It also appeared that all charges were removed from wires placed underground. It was held that it clearly appears from the ordinance set forth, in the fact that charges were removed from wires placed underground, that such charge was not a tax, but merely an exercise of police power

ordinance.[48] The sum required may be fixed fees,[49] or a percentage of business receipts;[50] or it seems both;[51] and graduation is lawful.[52] Foreign companies paying home license are not thereby exempted from municipal charges;[53] nor, unless the statute so expressly provides, does payment of state and county license-fees or charges exempt any one from a municipal license charge;[54] often indeed the municipality may collect license only on those privileges taxed by the state.[55] Whether license-fees are valid depends, (1) upon the municipal power to charge them,[56] and (2) the approximation of expenses to fees.[57] The latter will be presumed,[58] as well as the lawful purpose.[59]

(VII) *Refund or Recovery of Fees.*[60] An ordinance to refund a voluntary payment of license-fees is invalid;[61] but not so of one passed pursuant to municipal promise.[62] Nor may there be a recovery of license-fees voluntarily paid;[63] but it seems that in some states money so paid may be recovered in whole or in part when the license is unauthorized,[64] or is revoked by local option.[65]

d. Prohibitory Ordinances.[66] While power to license includes power to regu-

by the city to reimburse itself for its expense in discharging its duty in furthering the public safety and convenience. Philadelphia *v.* Postal Tel. Cable Co., 67 Hun (N. Y.) 21, 21 N. Y. Suppl. 556.

48. New Haven *v.* New Haven Water Co., 44 Conn. 105; Ford *v.* Standard Oil Co., 32 N. Y. App. Div. 596, 53 N. Y. Suppl. 48; Ft. Pitt Gas Co. *v.* Sewickley, 198 Pa. St. 201, 47 Atl. 957. In Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6, it was held that an ordinance of a city charging an electric light company with fifty cents per annum for each pole maintained by it, to cover the costs of inspection by the city, is unreasonable, where the actual cost of such inspection is five cents per pole. See LICENSES, 25 Cyc. 611. *Compare Ex p.* Gregory, 1 Tex. App. 753.

49. Allerton *v.* Chicago, 6 Fed. 555, 9 Biss. 552. See also LICENSES, 25 Cyc. 627.

50. Oshkosh Fire Dept. *v.* Tuttle, 48 Wis. 91, 4 N. W. 134. In Walker *v.* Springfield, 94 Ill. 364, it was held that a sum required by a city to be paid by a foreign insurance company for the privilege of doing business within the city limits is not rendered a tax by the fact that it requires the payment of a certain percentage on the amount of its gross receipts, instead of a gross sum. *Compare* Moss *v.* St. Paul, 21 Minn. 421; Prince *v.* St. Paul, 19 Minn. 267; Densmore *v.* Erie, 7 Pa. Dist. 355, 20 Pa. Co. Ct. 513. See also LICENSES, 25 Cyc. 627.

51. Humphreys *v.* Norfolk, 25 Gratt. (Va.) 97.

52. Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486. See also LICENSES, 25 Cyc. 627.

A classification of merchants in a city for license taxation according to their sales was proper and reasonable. Com. *v.* Clark, 21 Pa. Co. Ct. 495.

53. Clark *v.* Mobile, 67 Ala. 217. See also INSURANCE, 22 Cyc. 1394; LICENSES, 25 Cyc. 627.

54. Los Angeles County *v.* Eikenberry, 131 Cal. 461, 63 Pac. 766; Rutledge *v.* Brown, 14 Lea (Tenn.) 124. See also LICENSES, 25 Cyc. 609.

55. International Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600.

La. Acts (1882), No. 20, conferring on the city of New Orleans the power to impose a license-tax, and Acts (1882), No. 119, conferring the power to enforce the collection of any and all taxes due to any political corporation, carry with them necessarily the power to impose just such a penalty as may be imposed by state laws, and further authorize the city council to adopt the state license law as its own. New Orleans *v.* Firemen's Ins. Co., 41 La. Ann. 1142, 7 So. 82.

56. People *v.* Hotchkiss, 118 Mich. 59, 76 N. W. 142; New York *v.* Reesing, 77 N. Y. App. Div. 417, 79 N. Y. Suppl. 331 [*affirming* 38 Misc. 129, 77 N. Y. Suppl. 82]. See cases cited *supra*, note 45 *et seq.* See also New Orleans *v.* Great Southern Tel., etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502.

57. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; St. Paul *v.* Dow, 37 Minn. 20, 32 N. W. 860, 5 Am. St. Rep. 811. See also LICENSES, 25 Cyc. 611.

58. Philadelphia *v.* Postal Tel. Cable Co., 67 Hun (N. Y.) 21, 21 N. Y. Suppl. 556. See also LICENSES, 25 Cyc. 612.

59. Johnson *v.* Philadelphia, 60 Pa. St. 445.

60. Recovery of money paid generally see LICENSES, 25 Cyc. 631; MONEY PAID, 27 Cyc. 832; PAYMENT.

Recovery by society against municipality for fines and penalties collected for infraction of ordinance against cruelty to animals see ANIMALS, 2 Cyc. 352.

61. Rooney *v.* Snow, 131 Cal. 51, 63 Pac. 155.

62. Columbia City *v.* Anthes, 84 Ind. 31, 43 Am. Rep. 80.

63. Americus First Nat. Bank *v.* Americus, 68 Ga. 119, 45 Am. Rep. 476; Ligonier *v.* Ackerman, 46 Ind. 552, 15 Am. Rep. 323. See also LICENSES, 25 Cyc. 631.

64. Leonard *v.* Canton, 35 Miss. 189.

65. Sharp *v.* Carthage, 48 Mo. App. 26.

66. Prohibiting animals from running at large see *supra*, XI, A, 7, b, (VIII), (C), (2), (B).

late,[67] power to regulate does not include power to prohibit or suppress.[68] Prohibition, total or partial, is not the equivalent of regulation;[69] and ordinances of prohibition, direct or indirect,[70] enacted under power of regulation only, are therefore *ultra vires* and void, as unwarranted assumption of municipal authority.[71] So also it seems is an ordinance to prevent a nuisance, under charter power to abate and remove only;[72] and a by-law preventing suburban dealers in staple commodities from supplying their urban customers, as being in restraint of trade.[73] But under charter power to prohibit, such ordinances are valid.[74]

Prohibiting lawful acts or acts permitted by statute see *supra*, XI, A, 4, c.

Prohibition of erection of building see *supra*, XI, A, 7, b, (VIII), (B).

67. State *v.* Pamperin, 42 Minn. 320, 44 N. W. 251.

68. *California.*— Addison *v.* Saulnier, 19 Cal. 82.

Connecticut.—Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383.

Georgia.— Morton *v.* Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485; Johnson *v.* Macon, 62 Ga. 645; Hill *v.* Decatur, 22 Ga. 203.

Illinois.— Wiggins *v.* Chicago, 68 Ill. 372; East St. Louis *v.* Wehrung, 46 Ill. 392; Chicago *v.* Hardy, 66 Ill. App. 524.

Indiana.— Goshen *v.* Kern, 63 Ind. 468, 30 Am. Rep. 234; Sweet *v.* Wabash, 41 Ind. 7.

Maine.— State *v.* Hay, 29 Me. 457.

Michigan.— Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740; Chilvers *v.* People, 11 Mich. 43.

Missouri.— St. Louis *v.* Marine Ins. Co., 47 Mo. 163; St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150; St. Louis *v.* Bircher, 7 Mo. App. 169.

Nebraska.— *In re* McMonies, (1906) 106 N. W. 456; State *v.* McMonies, (1906) 106 N. W. 454.

New Jersey.— Passaic *v.* Paterson Bill Posting, etc., Co., 71 N. J. L. 75, 58 Atl. 343; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; State *v.* Hoboken, 33 N. J. L. 280.

New York.— New York *v.* Second Ave. R. Co., 32 N. Y. 261; Cushing *v.* Buffalo, 13 N. Y. St. 783; People *v.* New York, 7 How. Pr. 81.

Pennsylvania.—Johnson *v.* Philadelphia, 68 Pa. St. 445.

Wisconsin.— Carter *v.* Dow, 16 Wis. 298.

Canada.— Merritt *v.* Toronto, 25 Ont. 256.

Extent of rule.— While the power to "regulate" does not necessarily imply power to "prohibit" or "suppress" (*In re* McMonies, (Nebr. 1906) 106 N. W. 456; State *v.* McMonies, (Nebr. 1906) 106 N. W. 454; and cases cited *supra*), it confers authority to confine the business referred to to certain hours of the day, to certain localities or buildings in the city, and to prescribe rules for its prosecution within those hours, localities, and buildings (*Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; and *supra*, XI, A, 7, b, (VII). See also Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; State *v.* St. Paul, 32 Minn. 329, 20 N. W. 243).

69. State *v.* Mott, 61 Md. 297, 48 Am. Rep. 105; Richmond Safety Gate Co. *v.* Ashbridge, 116 Fed. 220; and cases cited *infra* note 70 *et seq.*

70. Crowley *v.* West, 52 La. Ann. 526, 27 So. 53, 78 Am. St. Rep. 355, 47 L. R. A. 652; Toronto *v.* Virgo, [1896] A. C. 88, 65 L. J. P. C. 4, 73 L. T. Rep. N. S. 449.

71. Ordway *v.* Cornelius, 23 Pa. Co. Ct. 281; *Ex p.* Patterson, 42 Tex. Cr. 256, 58 S. W. 1011, 51 L. R. A. 654.

Burns Annot. St. Ind. (1901) § 3616, authorizing cities to make other ordinances than those specifically prescribed by statute, not inconsistent with state law, and necessary to carry out the objects of the corporation, does not recognize an implied power in such corporations to prohibit slaughter-houses within the territory over which the city has police power, as such an attempt is not essential to the accomplishment by the city of the objects of its creation, nor to its continued existence. Elkhart *v.* Lipschitz, 164 Ind. 671, 74 N. E. 528.

Under a Massachusetts statute authorizing the selectmen of a municipal corporation to appoint and locate the places where the dead may be buried in the town, to make regulations for funerals and the interment of the dead, and to prescribe penalties for the violation of such regulations, an ordinance by the selectmen that no person, without written leave from a majority of the selectmen, should bring into the town any dead body, or bury any dead body so brought into the town in any part of his own premises or elsewhere within the town, is void, as it is not a regulation, but a prohibition. Austin *v.* Murray, 16 Pick. (Mass.) 121.

72. Cleveland *v.* Malm, 7 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 203. A provision in the charter of the city of Rochester authorizing the common council to enact by-laws to abate and remove nuisances gives it no power to pass an ordinance to prevent nuisances. Rochester *v.* Collins, 12 Barb. (N. Y.) 559.

Prohibitory ordinances against nuisances see *supra*, XI, A, 7, b, (VI).

73. Com. *v.* Hepner, 22 Pa. Co. Ct. 630.

74. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143; Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Arkansas.— Hot Springs *v.* Rector, (1903) 76 S. W. 1056; *Ex p.* Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63.

California.— *Ex p.* Tuttle, 91 Cal. 589, 27

e. Nuisances and Abatement Thereof[75] — (I) *In General.* The police power in respect to nuisances is exercised by enacting ordinances declaratory of the municipal judgment of the things and acts which amount to a nuisance,[76] and

Pac. 933; *Ex p.* Cheney, 90 Cal. 617, 27 Pac. 436; *Ex p.* Lane, 76 Cal. 587, 18 Pac. 677; *Ex p.* Heilbron, 65 Cal. 609, 4 Pac. 648; *Ex p.* Casinello, 62 Cal. 538; Johnson *v.* Simonton, 43 Cal. 242; *Ex p.* Shrader, 33 Cal. 279; *In re* Newell, 2 Cal. App. 767, 84 Pac. 226.

Connecticut.— State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Georgia.— Smith *v.* Collier, 118 Ga. 306, 45 S. E. 417.

Illinois.— North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788; King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Caldwell *v.* Alton, 33 Ill. 416, 75 Am. Dec. 282; Kappes *v.* Chicago, 119 Ill. App. 436; Hoops *v.* Ipava, 55 Ill. App. 94; Chicago *v.* Brownell, 41 Ill. App. 70.

Indiana.— Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; Clark *v.* South Bend, 85 Ind. 276, 44 Am. Rep. 13.

Iowa.— State *v.* Smith, 123 Iowa 654, 96 N. W. 899.

Kansas.—Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; Cottonwood Falls *v.* Smith, 36 Kan. 401, 13 Pac. 576.

Kentucky.— Louisville *v.* Wehmoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 1924; White *v.* Com., 92 S. W. 285, 28 Ky. L. Rep. 1312.

Louisiana.— Crowley *v.* Rucker, 107 La. 213, 31 So. 629; New Orleans *v.* Graffina, 52 La. Ann. 1082, 27 So. 590; New Orleans *v.* Lozes, 51 La. Ann. 1172, 25 So. 979; Opelousas *v.* Norman, 51 La. Ann. 736, 25 So. 401; State *v.* Namias, 49 La. Ann. 618, 21 So. 852, 62 Am. St. Rep. 657; State *v.* Stone, 46 La. Ann. 147, 15 So. 11; State *v.* Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. Rep. 388; Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; Morano *v.* New Orleans, 2 La. 217; Milne *v.* Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189.

Maryland.— Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L. R. A. 541.

Massachusetts.— Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146; Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174; Com. *v.* Patch, 97 Mass. 221.

Michigan.— People *v.* Brill, 120 Mich. 42, 78 N. W. 1013; People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286; People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; Lenz *v.* Sherrott, 26 Mich. 139.

Minnesota.— State *v.* Grimes, 49 Minn. 443, 52 N. W. 42; St. Paul *v.* Smith, 25 Minn. 372.

Missouri.— St. Louis *v.* Vert, 84 Mo. 204; St. Louis *v.* Jackson, 25 Mo. 37; Orrick *v.* Akers, 109 Mo. App. 662, 83 S. W. 549; Kansas City *v.* Cook, 38 Mo. App. 660.

New York.— Balch *v.* Utica, 168 N. Y. 651, 61 N. E. 1127 [*affirming* 42 N. Y. App. Div. 562, 59 N. Y. Suppl. 513]; People *v.* Davis, 78 N. Y. App. Div. 570, 79 N. Y. Suppl. 747; Griffin *v.* Gloversville, 67 N. Y. App. Div. 403, 73 N. Y. Suppl. 684; Buffalo *v.* Marion, 13 Misc. 639, 34 N. Y. Suppl. 945; Buffalo *v.* Schleifer, 2 Misc. 216, 21 N. Y. Suppl. 913; Buffalo *v.* Webster, 10 Wend. 99.

Oregon.— Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706.

Pennsylvania.— Sharon Borough *v.* Hawthorne, 123 Pa. St. 106, 16 Atl. 835; Philadelphia *v.* Brabender, 9 Pa. Dist. 697; Schrack *v.* Coatesville, 19 Pa. Co. Ct. 334; Coden *v.* Gettysburg, 8 Leg. Gaz. 167.

South Carolina.— Abbeville *v.* Leopard, 61 S. C. 99, 39 S. E. 248; Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725.

Tennessee.— Nolin *v.* Franklin, 4 Yerg. 163.

Texas.— Newson *v.* Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.

Utah.— Eureka City *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904.

Virginia.— Mayo *v.* James, 12 Gratt. 17.

United States.— *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333; Washington *v.* Eaton, 29 Fed. Cas. No. 17,228, 4 Cranch C. C. 352.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1370.

Compare Comfort *v.* Kosciusko, 88 Miss. 611, 41 So. 268.

Power to restrict and regulate carries power to prohibit. Kappes *v.* Chicago, 119 Ill. App. 436.

The power to remove includes the power to prevent by reasonable regulations which do not conflict with any provision of the federal or state constitution. Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220.

During certain hours.— An act empowering a city to pass an ordinance to establish markets, etc., and to restrain and prohibit "during market hours" the sale at any other place, of meats, vegetables, etc., except by regular licensed dealers, etc., does not authorize a general prohibition by ordinance of vegetables and farm products, except by licensed vendors, but authorizes such prohibition during market hours only. State *v.* St. Paul Municipal Ct., 32 Minn. 329, 20 N. W. 243. See also cases cited *supra*, note 68.

75. See also *supra*, XI, A, 7, b, (VI).

76. *Illinois.*— Nazworthy *v.* Sullivan, 55 Ill. App. 48.

Louisiana.— Crowley *v.* Ellsworth, 114 La. 308, 38 So. 199, 108 Am. St. Rep. 353, 69 L. R. A. 276; Municipality No. 1 *v.* Wilson, 5 La. Ann. 747.

Mississippi.— Green *v.* Lake, 60 Miss. 451.

Missouri.—Kansas City *v.* McAleer, 31 Mo. App. 433.

New Jersey.— Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513.

New York.— Rochester *v.* Simpson, 134

providing penalty for causing or maintaining the same,[77] and in special instances commanding summary removal or abatement thereof.[78]

(II) *Abatement of Nuisances*[79]—(A) *In General.* Municipalities are usually authorized and bound so far as they can to abate every nuisance dangerous to public health.[80] The right to abate a nuisance, however, is limited to the removal of that in which the nuisance consists.[81] The right to abate is derived from necessity; the necessity must be present in order to justify the exercise

N. Y. 414, 31 N. E. 171 [*reversing* 57 Hun 36, 10 N. Y. Suppl. 499].

Pennsylvania.— Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220 [*distinguishing* People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721]; Butler's Appeal, 1 Pa. Cas. 219, 1 Atl. 604; Pittsburg *v.* W. H. Keech Co., 21 Pa. Super. Ct. 548.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1363 *et seq.*

In the interest of public health municipal corporations may be empowered to pass ordinances, either for the filling up or draining of excavations upon land within the corporate limits, which are filled with foul or stagnant water. Rochester *v.* Simpson, 134 N. Y. 414, 31 N. E. 871.

Necessity of ordinance.— Any ordinance or law which authorizes the authorities of a town to close a saloon or grocery by force, without having it first judicially declared a nuisance, and ordered to be abated, is unconstitutional. Baldwin *v.* Smith, 82 Ill. 162. Where a charter confers upon municipal authorities the power to prevent and remove all nuisances, it does not confer the right to declare that a particular structure or business, not condemned by any ordinance, is a nuisance, and to abate it. Lake *v.* Aberdeen, 57 Miss. 260. An ordinance is not illegal because it punishes as a nuisance what neither by it nor by another ordinance is specially declared to be such. Crowley *v.* Ellsworth, 114 La. 308, 38 So. 199, 108 Am. St. Rep. 353, 69 L. R. A. 276. Buffalo city charter empowers the council to prescribe the limits within which wooden buildings shall not be erected, and the manner and the materials of which all buildings shall be constructed within such limits, and that every building erected or placed contrary to any ordinance shall be deemed a common nuisance and may be abated. City ordinances pursuant to such provision provide that in certain portions of the city no wooden buildings shall be erected, and in a certain other portion none without the permission of the common council. It was held that, a structure in violation of the ordinance having been by the statute declared a nuisance and subject to abatement as such, it was not necessary that an ordinance to that effect should be passed by the council. Campion *v.* Buffalo, 8 N. Y. St. 329. Acts of assembly authorized the councils of Philadelphia by ordinance to require owners of docks in the Delaware and Schuylkill to cleanse them, and on default, after thirty days' notice, the city was to do the work and apportion the expense on owners of adjoining wharves, etc., according to the extent of the wharves, and to enter liens for the expense. The act of May 20, 1864, vested these powers in the port wardens, the liens to be collected by the city solicitor and claims filed to be governed by the same rules of evidence as those for removal of nuisances by the board of health. It was held that the wardens were not required to pass ordinances or exercise legislative authority. Easby *v.* Philadelphia, 67 Pa. St. 337. See also De Ginther *v.* New Jersey Home for Education, etc., of Feeble-Minded Children, 58 N. J. L. 354, 33 Atl. 968.

77. Centerville *v.* Miller, 57 Iowa 56, 10 N. W. 293.

78. Kennedy *v.* Phelps, 10 La. Ann. 227 [*distinguishing* New Orleans First Municipality *v.* Blineau, 3 La. Ann. 688]; Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649; Red Wing *v.* Guptil, 72 Minn. 259, 75 N. W. 234, 71 Am. St. Rep. 485, 41 L. R. A. 321; Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593; Huron *v.* Volga Bank, 8 S. D. 449, 66 N. W. 815, 59 Am. St. Rep. 769. See also Waggoner *v.* South Gorin, 88 Mo. App. 25; and *infra*, XI, A, 8, e, (II).

79. **Abatement of nuisances** see Constitutional Law, 8 Cyc. 872; Nuisances.

80. Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421. See also Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728.

What is a nuisance see, generally, Nuisances.

What may be declared a nuisance by the municipality see *supra*, XI, A, 7, b, (VI).

81. Babcock *v.* Buffalo, 56 N. Y. 268 [*affirming* Sheld. 317]; Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 46 N. Y. Suppl. 204 [*affirmed* in 156 N. Y. 658, 50 N. E. 1116]; Buffalo Union Iron Works *v.* Buffalo, Sheld. (N. Y.) 244 [*affirmed* in 47 N. Y. 671]; Corcy *v.* Edgewood Borough, 18 Pa. Super. Ct. 216, holding that the fact that a private railroad on a private way in a borough is negligently operated by the obstruction of streets with standing cars, and by the accumulation of rubbish and waste material in the private way, does not give the borough the right to destroy the railroad as a nuisance *per se*.

Must be nuisance in fact see *supra*, XI, A, 7, b, (VI), (A).

A city has no right, without the owner's consent, to raise the grade of a lot higher than is necessary for the abatement of the nuisance caused by water stagnating there. Bush *v.* Dubuque, 69 Iowa 233, 28 N. W. 542.

of the right, and no wanton or unnecessary injury to the property or rights of individuals must be committed.[82]

(B) *Methods.* It being the duty of a municipality to remove nuisances,[83] it has the power of deciding how this shall be done.[84] Four methods of abating municipal nuisances, two ordinary and two summary, are recognized: (1) By criminal prosecution[85] or a proceeding in the nature thereof;[86] (2) by proceeding in equity[87] or a proceeding in the nature thereof;[88] (3) by order of council, or

82. Bush *v.* Dubuque, 69 Iowa 233, 28 N. W. 542; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21; Babcock *v.* Buffalo, 56 N. Y. 268 [*affirming* Sheld. 317]; Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 46 N. Y. Suppl. 204 [*affirmed* in 156 N. Y. 658, 50 N. E. 1116]; Buffalo Union Iron Works *v.* Buffalo, Sheld. (N. Y.) 244 [*affirmed* in 47 N. Y. 671]; Ryan *v.* Jacob, 8 Ohio Dec. (Reprint) 167, 6 Cinc. L. Bul. 139, holding that, although municipal authorities have the right, under Ohio Rev. St. §§ 1992, 2669, to arrest the proprietor of a variety show for exhibiting without a license, they cannot close up the place or abate the business, at least not before conviction; and although an injunction will not be granted against a threatened illegal arrest in such case, there being a remedy at law, an illegal interference with the enjoyment of property will be enjoined.

Actual nuisances may be abated. Rogers *v.* Barker, 31 Barb. (N. Y.) 447; Hickok *v.* Plattsburgh, 15 Barb. (N. Y.) 427; Clark *v.* Syracuse, 13 Barb. (N. Y.) 32; Lewis *v.* Dodge, 17 How. Pr. (N. Y.) 229; *Ex p.* Glass, (Tex. Cr. App. 1905) 90 S. W. 1108.

Erection of a building on land dedicated to public use is not such a nuisance as a municipal officer can abate at common law. Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21.

A fence, constituting a nuisance *per se,* might be removed by borough authorities under the powers conferred on them by the general borough law. Bower *v.* Watsontown Borough, 11 Pa. Co. Ct. 110.

Obstructions.— The city of New Orleans, in the exercise of its police power, has the right of removing obstructions for public convenience and benefit. New Orleans Gas-Light Co. *v.* Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544.

Shanty boat.— The owner or occupant of a shanty boat located below low water mark, which constitutes a public nuisance, having refused, after notice, to remove it, the municipal authorities may demolish and remove it. Dzik *v.* Bigelow, 27 Pittsb. Leg. J. N. S. (Pa.) 360.

83. See *supra,* XI, A, 8, e, (II), (A).

84. Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

85. Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012 [*cited* with approval in Ottumwa *v.* Chinn, 75 Iowa 405, 39 N. W. 670]. See *infra,* XI, B, 4.

86. Monroe *v.* Gerspach, 33 La. Ann. 1011. See *infra,* XI, B, 4.

87. *Colorado.*— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Indiana.—American Furniture Co. *v.* Batesville, (1893) 35 N. E. 682; Cheek *v.* Aurora, 92 Ind. 107.

Iowa.— Waterloo *v.* Union Mill Co., 72 Iowa 437, 34 N. W. 197.

Louisiana.— New Orleans *v.* Lambert, 14 La. Ann. 247.

Massachusetts.— Taunton *v.* Taylor, 116 Mass. 254.

Minnesota.— Redwing *v.* Guptil, 72 Minn. 259, 75 N. W. 234, 71 Am. St. Rep. 485, 41 L. R. A. 321; Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931; Pine City *v.* Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763.

South Dakota.— Huron *v.* Volga Bank, 8 S. D. 449, 66 N. W. 815, 59 Am. St. Rep. 769.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1371; and *infra,* XI, A, 8, f.

88. See NUISANCES. See also Hempstead *v.* Ball Electric Light Co., 9 N. Y. App. Div. 48, 41 N. Y. Suppl. 124, holding that poles, wires, and lamps placed in the streets of a village for the purpose of lighting them, but no longer used, are a nuisance, and their removal may be compelled at the suit of the village.

Common-law right.— The power of towns, under Ind. Rev. St. (1881) § 3333, subd. 1, "to declare what shall constitute a nuisance, and to prevent, abate, and remove the same," is by proceeding *in rem,* and must be exercised by and through general ordinances, affecting alike all property or business under like conditions, in like situations, and conducted in like manner, and the possession of such power does not exclude the common-law right of the town to resort to the courts to abate a nuisance. American Furniture Co. *v.* Batesville, (Ind. 1893) 35 N. E. 682.

Parties plaintiff.— A municipality as the representative of the public is entitled to sue. Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694; Pine City *v.* Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21 [*affirmed* in 58 N. J. Eq. 586, 47 Atl. 113], 51 L. R. A. 657]; Newark Aqueduct Bd. *v.* Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55; Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106; Woodbridge Tp. *v.* Inslee, 37 N. J. Eq. 397; Easton, etc., R. Co. *v.* Greenwich Tp., 25 N. J. Eq. 565; Watertown *v.* Cohen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; London *v.* Bolt, 5 Ves. Jr. 129, 31 Eng. Reprint 507. But see Ottumwa *v.* Chinn, 75 Iowa 405, 39 N. W. 670 (holding that a statute defining a nuisance, and providing that a civil action may be brought by

the proper municipal authorities after notice and hearing;[89] and (4) by due enforcement of an ordinance, resolution, or order on the common knowledge of the council or other proper municipal authorities without a hearing.[90] All or several of these methods of abatement may concur and be open at once to use by the municipality, but it seems that the election of any previous remedy constitutes a waiver of any later one.[91] The last method may be employed only in emergency,[92] and especially may it not be resorted to when the nuisance arises from municipal fault or negligence.[93] Ordinarily, however, the municipality must resort to the usual process of law to abate a health nuisance;[94] but the state may confer upon it the power of summary abatement in case of emergency.[95]

any person injured, in which action the nuisance may be abated, does not authorize an action to abate a nuisance to be brought by a city, on the ground that the nuisance is of general harm to the public); Stilwell *v.* Buffalo Riding Academy, 4 N. Y. Suppl. 414, 21 Abb. N. Cas. 472 (holding that under a city charter and ordinances prohibiting the erection of wooden structures within certain limits, and declaring such buildings nuisances which may be abated, an adjacent owner cannot institute proceedings to abate, unless the right is conferred by the charter and ordinances); U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788 (holding that uninsulated electric wires constitute a public nuisance, which the commissioner of public works, both as a private citizen and as a public official charged by the duties of his office with the removal of obstructions from the streets, may abate.

Defenses.— In U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788, it was held that plaintiffs, the conduct of whose business requires the use of wires as conductors of electric currents, which are dangerous to human life unless perfectly insulated, are not excused for failure to keep such wires in a perfect and safe condition by the refusal of the board of electrical control to grant permits to repair the same, when they have taken no steps to compel the granting of such permits.

89. *Iowa.*— Independence *v.* Purdy, 46 Iowa 202.

Maine.— Swett *v.* Sprague, 55 Me. 190.

Maryland.— Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649.

Missouri.— St. Louis *v.* Stern, 3 Mo. App. 48.

New York.— See Clark *v.* Syracuse, 13 Barb. 32, holding that where a person erects a dam within a city across a creek pursuant to a legislative grant, and constructs a ditch to conduct the water from the dam to his mill, the mayor and council of such city cannot, in exercise of their municipal powers, without trial, on notice to the owners of such dam, direct it to be torn down and removed, on the pretense that it is a nuisance endangering the health of the city.

Pennsylvania.—Bower *v.* Watsontown Borough, 11 Pa. Co. Ct. 110; Dzik *v.* Bigelow, 27 Pittsb. Leg. J. N. S. 360.

West Virginia.— Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 916.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1371.

90. McLean *v.* Mathews, 7 Ill. App. 599; New Orleans Gas-Light Co. *v.* Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544; Kennedy *v.* Phelps, 10 La. Ann. 227; Sprigg *v.* Garrett Park, 89 Md. 406, 43 Atl. 813; Waggoner *v.* South Gorin, 88 Mo. App. 25; Allison *v.* Richmond, 51 Mo. App. 133; Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

Judicial proceedings not necessary.— The Arkansas act of March 9, 1875, section 13, gives a town council power to prohibit the erection of wooden buildings in certain districts of the town as a precaution against fire; and, if such building be erected in violation of an ordinance inhibiting it, the council may promptly remove it, without any prosecution or judicial proceedings of any kind against the owner. McKibbin *v.* Ft. Smith, 35 Ark. 352.

91. American Furniture Co. *v.* Batesville, (Ind. 1893) 35 N. E. 682.

92. King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Waggoner *v.* South Gorin, 88 Mo. App. 25; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21 [*affirmed* in 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657].

The power of a municipal officer to abate a public nuisance without statutory or judicial process stands upon the same footing as the power of a citizen. Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21 [*affirmed* in 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657].

93. Hannibal *v.* Richards, 82 Mo. 330.

94. Ottumwa *v.* Chinn, 75 Iowa 405, 39 N. W. 670; Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55]; Clark *v.* Syracuse, 13 Barb. (N. Y.) 32. *Compare* Baldwin *v.* Smith, 82 Ill. 162, holding that where an ordinance of a town provides that in certain cases the town council may revoke licenses granted by them to keep dramshops, and it shall be the duty of the town constable to immediately close up the grocery of the licensee, the town authorities have no power to oust the keeper of the dram-shop from his premises by force, take and hold possession of the same, and thus deprive him of the use of his property. Baldwin *v.* Smith, 82 Ill. 162.

95. Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201; King *v.* Davenport, 98 Ill. 305,

Reasonable notice of summary removal must be given to authorize municipal abatement of nuisance.[96] But when the conditions of the ordinance are complied with no liability ensues from such summary removal.[97] And injunction lies at the suit of an adjacent owner in special peril.[98]

(c) *Expense of Abatement and Assessment Therefor*[99]—(1) In General. The cost and expense of an authorized abatement by a municipality of a nuisance on private premises may ordinarily be charged against the premises,[1] or their

38 Am. Rep. 89; Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906; and cases cited *supra*, notes 90, 92. See also McLaren *v.* New York, 40 N. Y. 273 [*reversing* 1 Daly 243]; Tripp *v.* Goff, 15 R. I. 299, 3 Atl. 591; Charleston *v.* Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776. And *compare* Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165, holding that the corporation of a city may abate a public nuisance erected within its jurisdiction, although no authority for that purpose is expressly given by the charter.

The mayor and council of the city of Americus, upon recommendation of the board of health, have full power in a summary manner to abate a nuisance. Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201.

Nuisances per se may be summarily abated. Easton Pass. R. Co. *v.* Easton, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. Rep. 658; New Castle *v.* Raney, 130 Pa. St. 546, 18 Atl. 1066, 6 L. R. A. 737; Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555. A municipal corporation having authority to prevent obstructions in a river may summarily remove such obstructions as a public nuisance. Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165. Abatement of health nuisance in a summary manner. Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201.

This summary power may be exercised by an ordinance which directs the officers of the corporation to remove the nuisance. Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

Proceed at peril.— But when the municipal authorities proceed summarily to abate a nuisance, they do so at their peril, and if the owner can establish the fact that the thing was not a nuisance, he may recover from the municipality the damages which he has sustained. Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201. See also *infra*, XIV, A.

96. Ward *v.* Murphysboro, 77 Ill. App. 549, holding that under an ordinance requiring notice, before a city, or any one representing it, can legally remove a building in process of erection within the fire limits, it must give to the owner notice to remove it himself; and if it fails to do so, and proceeds to abate and remove the same, it will be liable to the owner for such damages as he may sustain. See also Shannon *v.* Omaha, 72 Nebr. 281, 100 N. W. 298. *Compare* Swett *v.* Sprague, 55 Me. 190, holding that under Laws (1860), c. 177, and Laws (1863), c. 187, providing that whenever the mayor and aldermen of any city, or the selectmen of any town, after due notice to the owner of any burnt, dilapidated, or dangerous buildings, shall adjudge the same to be a nuisance, upon failure to give notice as ordered at the time of the adjudication, a new notice may be ordered to be given without commencing proceedings.

Reasonable time to remove nuisance.— Alpers *v.* Brown, 60 Cal. 447; Mann *v.* District of Columbia, 22 App. Cas. (D. C.) 138; Campbell *v.* District of Columbia, 19 App. Cas. (D. C.) 131; State *v.* Morris, 47 La. Ann. 1660, 18 So. 710; Underwood *v.* Green, 42 N. Y. 140. After the passage of a city ordinance prohibiting the erection of wooden buildings more than ten feet high within certain prescribed limits, the owner of such a building previously erected within these limits agreed to make it conform in all respects to the requirements of the ordinance. It was held that he was entitled to a reasonable time in which to perform such act. Cleveland *v.* Lenze, 27 Ohio St. 383.

"Three weeks successively."— When notice of a hearing in proceedings to abate nuisances is required to be published "three weeks successively," the last publication need not be a week before the hearing. Swett *v.* Sprague, 55 Me. 190.

97. Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830. See *infra*, XI, A, 8, k.

98. Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330. *Compare* Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361, holding that a fire-limit ordinance which permits the erection of veneered buildings without first obtaining a permit, but which authorizes the town to remove a building in conflict with the ordinance on two days' notice, does not render invalid an injunction restraining the town from interfering for eight days with a building which the owner intends to veneer, since he is entitled to reasonable time to erect the kind of building authorized by the ordinance. See *infra*, XI, B, 5.

99. Amendment of assessment record see *infra*, XI, A, 8, e, (II), (C), 3, note 12.

1. Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269; *In re* Tappan, 54 Barb. (N. Y.) 225, 36 How. Pr. 390; Philadelphia *v.* Goudey, 36 Wkly. Notes Cas. (Pa.) 246; San Francisco Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693; and cases cited *infra*, note 2 *et seq.* But *compare* Palmyra *v.* Warren, 114 Ill. App. 562, holding that where a village notifies the owners of certain premises located therein that such premises constitute a nuisance, and are in fact a nuisance, and directs such owners to abate the same, and where such owners fail so to abate such nuisance, and the au-

owner, subject to such limitation in respect of the amount as may be imposed by the act providing for the abatement.[2]

(2) Notice and Hearing. Due notice to a proprietor of a declared nuisance on his premises must precede any charge for removal or abatement made by the municipality.[3] And he is entitled to a fair hearing and determination of the matters.[4] And he may exonerate himself by showing either that the matter complained of is not a nuisance,[5] that it was caused by the corporation itself,[6] or that the expenditure was unnecessary.[7]

thorities of such village in consequence proceed to abate the same, and in so doing expend a sum of money to the benefit of such premises, a lien against such premises does not arise in favor of such village.

2. Charleston *v.* Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776.

Amount of charge.— Fees charged against the owner for removal of carcasses must be reasonable in amount. Knauer *v.* Louisville, 45 S. W. 510, 46 S. W. 701, 20 Ky. L. Rep. 194, 41 L. R. A. 219. In Charleston *v.* Werner, 46 S. C. 323, 24 S. E. 207, it was held that Charleston city charter, authorizing the city to fill up low lots declared to be nuisances, and to recover the cost from the owner, if it does not exceed one half the value, and its amendments, uniformly use the term "lots or grounds," without reference to a portion of a lot or the buildings; and therefore, in proceedings, under the amendment of 1883, to condemn a lot whose cost of filling is in excess of one half its value, the entire lot where held in one title, as well as the buildings, must be considered.

Local improvement compared and distinguished.— In Charleston *v.* Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776, it was held that the filling up, by the city of Charleston, of a low lot which has been declared a public nuisance by the board of health, and ordered to be filled, is not a "local improvement," within the meaning of the tax laws applicable to that subject, but is an exercise of the police power granted to the city council. In Heidenheimer *v.* Galveston, 2 Tex. Unrep. Cas. 153, it was held that the abatement of a nuisance by the filling of ponds in a city by order of its board of health, having power to do so, is not a local improvement, and the city cannot be prevented from paying therefor because the preliminary proceedings necessary to authorize the city to pay for street improvements were not taken. In Smith *v.* Milwaukee, 18 Wis. 63 [*explaining* Weeks *v.* Milwaukee, 10 Wis. 242], it was held that where, by a neglect to provide proper sewerage in the grading of a street, a nuisance is created on a private lot, the city may provide for abating it as for other similar improvements; and where the work for that purpose has been done by contract, in a regular manner, an assessment upon the lot of the cost of the work is valid at law; and although the owner may prevent its being enforced by an application to a court of equity, until he has done so the contractor cannot recover the amount of such assessment from the city directly.

Leasing property.— Ala. Sess. Acts (1830–1831), p. 54, amending the city charter of Mobile, authorized the corporate authorities to require lots to be cleansed and nuisances removed therefrom, and, in case the owner of any lot could not be found, to cause such cleansing to be done and lease the lot for the purpose of paying the expenses thereof. It was held that a lease executed under such power, although describing the lot with enlarged boundaries, passes to the lessee the lot according to its boundaries when cleansed. Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480.

3. Independence *v.* Purdy, 46 Iowa 202; Shannon *v.* Omaha, 72 Nebr. 281, 100 N. W. 298; Lasbury *v.* McCague, 56 Nebr. 220, 76 N. W. 862; Patrick *v.* Omaha, 1 Nebr. (Unoff.) 250, 95 N. W. 477; Philadelphia *v.* O'Reilly, 32 Wkly. Notes Cas. (Pa.) 166. *Compare* Grace *v.* Newton Bd. of Health, 135 Mass. 499, holding that a city board of health, having given notice of a hearing of a proceeding to abate a nuisance, under St. (1868) c. 160, § 3, need not, under section 5, give a new notice of its intention to make an assessment to pay the expenses incurred in abating the nuisance.

Injunction.— Collection of a tax properly assessed to reimburse the city for the expense of filling lots, to abate a nuisance caused by stagnant water thereon, will not be enjoined when it appears that the owner, after due notice, failed to abate such nuisance. Patrick *v.* Omaha, 1 Nebr. (Unoff.) 250, 95 N. W. 477.

4. Bush *v.* Dubuque, 69 Iowa 233, 28 N. W. 542; Joyce *v.* Woods, 78 Ky. 386. See also Savannah *v.* Savannah, etc., Canal Co., 9 Ga. 281.

5. Joyce *v.* Woods, 78 Ky. 386.

6. Hannibal *v.* Richards, 35 Mo. App. 15 (holding that the cost of filling lots in a city, for the purpose of abating nuisances thereon, cannot be recovered by the city from the owner, where the raising of an embankment by the city itself was a substantial cause creating such nuisances, although other causes may have contributed thereto); Patrick *v.* Omaha, 1 Nebr. (Unoff.) 250, 95 N. W. 477; Weeks *v.* Milwaukee, 10 Wis. 242 [*explained* in Smith *v.* Milwaukee, 18 Wis. 63] (holding that a tax assessed upon an individual for the expenses of abating a nuisance upon his land, which has been created by the wrongful act of the city itself in so constructing a street that the water flowed from it and remained upon the lots, is invalid).

7. Hannibal *v.* Richards, 82 Mo. 330; Philadelphia *v.* Hopple, 2 Pa. Co. Ct. 543.

(3) LIEN. The lawful charge for a valid abatement forms a lien upon the premises of equal dignity with municipal taxes,[8] which may be enforced under general law,[9] or in the special manner pointed out by statute,[10] subject of course to the usual and proper defenses in such proceedings.[11] But to gain a lien the proceeding must have been conducted regularly and with due formality.[12] To whomsoever the claim is due action should be brought in the name of the municipality.[13]

(D) *Surrender of Property Assessed.* Under statutes permitting surrender

Cost of filling.— In a suit by the city to recover the cost of filling a lot on the owner's default, based on a city charter, authorizing such a lot to be filled at the owner's expense, an issue may be made as to the cost of filling. Hannibal *v.* Richards, 82 Mo. 330.

8. Nickerson *v.* Boston, 131 Mass. 306.

Priority over ground-rent.— In Delaware county a municipal claim for work done by a borough in abating a nuisance on lands is payable out of the proceeds of a sheriff's sale, in priority to arrears of ground-rent secured by a deed executed subsequently to the passage of the act of 1843, executing the provisions of the act of 1824, making municipal taxes a first lien, to Delaware county. South Chester *v.* Harvey, 1 Del. Co. (Pa.) 62.

9. Kennedy *v.* Board of Health, 2 Pa. St. 366; Board of Health *v.* Hubert, 1 Phila. (Pa.) 280, 9 Leg. Int. 2. See also, generally, LIENS; MECHANICS' LIENS.

10. Buffalo Union Iron Works *v.* Buffalo, 13 Abb. Pr. N. S. (N Y.) 141 [*affirmed* in 47 N. Y. 671].

11. See, generally, LIENS; MECHANICS' LIENS; and cases cited *infra*, this note.

No defense except that the work was improperly or negligently done can be made under the Pennsylvania act of March 22, 1869, where the city council has altered a street in such manner as to interfere with the surface drainage of adjoining lands and to create a nuisance thereon, and the nuisance is abated by the city, and a claim for costs is entered against the lot owner. Broomall *v.* Chester, 2 Del. Co. (Pa.) 251.

Denial of ownership.—Notwithstanding the statute of March 11, 1846, providing for the recovery, from the owner, or reputed owner, of the expense of removing nuisances, prohibits "any plea touching the question of ownership," it was competent for defendants, in an action under this statute, to deny that they were the owners of the premises, and to allege that the soil had been dedicated to the public for over seventy years. Board of Health *v.* Gloria Dei Church, 23 Pa. St. 259.

No appropriation made for the purpose.— The city of Philadelphia claimed to recover a sum for expense incurred in removing a nuisance from the property of B. It was contended that, as no appropriation had been made for this purpose, the city had incurred no obligation, and should not be allowed to collect from B. It was held that the city could not recover. Philadelphia *v.* Wister, 17 Phila (Pa.) 13.

12. Erwin's Succession, 16 La. Ann. 132 (holding that a contractor has no right of action against the proprietor for filling up lots in the city of New Orleans, unless he shows that the contract was adjudicated to him as the lowest bidder, in pursuance of Act March 21, 1850, § 22); Hannibal *v.* Richards, 35 Mo. App. 15 (holding that a city suing to establish a lien under its charter for the cost of filling separate lots of land must show how much was done on each lot, where nothing in the charter indicates a purpose to allow a lien on several lots for the whole aggregate amount); Philadelphia *v.* Dungan, 124 Pa. St. 52, 16 Atl. 524 (holding that the city is bound to put on record every averment necessary to sustain its lien against property for the cost of removing a nuisance therefrom, and, if the owner's deed was not registered at the time the notice to remove the nuisance was given, the claim must so allege); Board of Health *v.* Pennock, 1 Pa. L. J. Rep. 323 (holding that in an action by a board of health for the expense of removing a nuisance on defendant's property, plaintiff is bound to prove that the work was done); Board of Health *v.* Jones, 1 Miles (Pa.) 28 (holding that under an act providing that, where the owner of unoccupied property is a non-resident, the board of health may remove a nuisance from such property, and the expenses of such removal shall constitute a lien on the premises, for which the board may file a claim against a reputed owner and proceed by scire facias to enforce collection, where proceedings for the collection of the expenses of removing a nuisance from unoccupied property of a non-resident were carried on against a person who was not the owner, the sheriff's sale under execution on a judgment obtained in such proceedings was invalid and would be set aside).

Amendments.— In Philadelphia *v.* Laughlin, 10 Pa. Co. Ct. 49, it was held that after a delay of ten years a city will not be permitted to amend a return of a claim for removing a nuisance, so as to show the full name of the owner of the property affected, whose surname only was stated in the return, and to show that such person was the "registered owner" of the property. In Philadelphia *v.* O'Reilly, 32 Wkly. Notes Cas. (Pa.) 166, it was held that where a lien for the removal of a nuisance correctly names the registered owner of the property, but recites notice to the agent of the property, and not to the owner, an amendment will be allowed of such recital of notice to allow the substitution of the owner's name.

13. Easby *v.* Philadelphia, 67 Pa. St. 337.

by the dissatisfied owner to the municipality of any lot filled up to abate nuisance, and consequent escape from liability for expense thereof, such surrender may be made by a tenant in common of his individual interest,[14] or by a mortgagee to whom title comes by foreclosure after the assessment but within the statutory time for notice.[15]

f. Injunction.[16] As equity will aid a municipality upon the same grounds as any other person, and upon no other,[17] injunction will not be granted on its application where it has a clear, adequate, and unembarrassed remedy by suit at law,[18] or by exercising its own legislative or summary authority to abate a nuisance.[19] But lacking such measure of remedy at law or within itself a municipality may, if irreparable injury is menaced to the peace, comfort, health, or safety of the community, invoke the aid of equity to suppress or remove the cause of such public peril by injunction.[20]

g. Power to Punish Violations of Regulations.[21] As every delegated power carries with it such implied powers as are essential and necessary to effectively enforce such delegated power,[22] a municipality has implied power to impose fines and penalties for breaches of its police regulations,[23] but not of its revenue ordi-

14. Leavitt *v.* Cambridge, 120 Mass. 157.

15. Barnstable Sav. Bank *v.* Boston, 127 Mass. 254.

16. **Injunction** generally see INJUNCTIONS, 22 Cyc. 724 *et seq.*

Injunction at suit of private person to abate nuisance see NUISANCES.

17. See Cincinnati *v.* Moorman, 11 Ohio Dec. (Reprint) 162, 25 Cinc. L. Bul. 126; Bowers *v.* Supplee, 3 Wkly. Notes Cas. (Pa.) 22.

Injunction refused.— Where, after an ordinance established a fire limit, an inspector of buildings issued a building permit, but prior to the publication of the ordinance revoked such permit on the ground that the building covered thereby was within such fire limit, equity will not enjoin the holder of the permit from completing the building, it having been substantially erected before the ordinance became operative. Reynolds *v.* Harris, 11 Ohio Dec. (Reprint) 509, 27 Cinc. L. Bul. 229. Defendant was the owner of a lot of land within the fire limits of a city, containing a frame barn, which was destroyed by fire. On bill to restrain defendant from erecting a wooden building on said lot, contrary to law, he claimed in defense that a bill did not lie for the mere enforcement of an ordinance or by-law. An injunction was dissolved. Williamsport *v.* McFadden, 15 Wkly. Notes Cas. (Pa.) 269.

18. New Rochelle *v.* Lang, 75 Hun (N. Y.) 608, 27 N. Y. Suppl. 600; Brockport *v.* Johnston, 13 Abb. N. Cas. (N. Y.) 468; Ellwood City *v.* Mani, 16 Pa. Co. Ct. 474; Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808; Waupun *v.* Moore, 34 Wis. 450, 17 Am. Rep. 446.

19. St. Johns *v.* McFarlan, 33 Mich. 72, 20 Am. Rep. 671.

20. Huron *v.* Volga Bank, 8 S. D. 449, 66 N. W. 815, 59 Am. St. Rep. 769; Belton *v.* Central Hotel Co., (Tex. Civ. App. 1895) 33 S. W. 297; Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008. See also American Furniture Co. *v.* Balesville, (Ind. 1893) 35 N. E. 682; New Orleans *v.* Lambert, 14 La. Ann. 247; Pine City *v.* Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763.

21. **Acts punishable both by ordinance and by statute** see *supra*, XI, A, 4, b.

Difference in penalty, punishment, or license-fee see *supra*, XI, A, 4, c, (II).

Sentence and punishment see *infra*, XI, B, 4, q.

22. Cline *v.* Springfield, 10 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 626.

No other powers implied.— Under Code, § 456, providing that incorporated towns shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated, a city has no authority to pass an ordinance imposing a fine for the maintenance of a nuisance. Knoxville *v.* Chicago, etc., R. Co., 83 Iowa 636, 50 N. W. 61, 32 Am. St. Rep. 321.

The legislature may vest power in municipalities to make ordinances and by-laws for the preservation of good order, and confer power upon them to enforce the same. Williamson *v.* Com., 4 B. Mon. (Ky.) 146.

23. *Alabama.*— Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Georgia.— Little *v.* Ft. Valley, 123 Ga. 503, 51 S. E. 501; Chambers *v.* Barnesville, 89 Ga. 739, 15 S. E. 634.

Illinois.— Korah *v.* Ottawa, 32 Ill. 121, 83 Am. Dec. 255; Chamberlain *v.* Litchfield, 56 Ill. App. 652.

Iowa.— Sibley *v.* Lastrico, 122 Iowa 211, 97 N. W. 1074.

Kentucky.—Williamson *v.* Com., 4 B. Mon. 146.

Louisiana.— New Orleans Third Municipality *v.* Blanc, 1 La. Ann. 385.

Maryland.—Cambridge *v.* Cambridge Water Co., 99 Md. 501, 58 Atl. 442; Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 656.

Missouri.— St. Louis *v.* Green, 70 Mo. 562; St. Louis *v.* Sternberg, 69 Mo. 289.

New Jersey.— Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176.

North Carolina.— Jones *v.* Duncan, 127 N. C. 118, 37 S. E. 135; Broadfoot *v.* Fay-

nances.[24] But the power to punish violation of police ordinances by imprisonment or forfeiture must be expressly conferred by the legislature;[25] nor may imprisonment be used to enforce payment of a fine unless specially authorized by law.[26] The legislature has full discretion within constitutional limitations to confer upon a municipal corporation such measure of punitive authority as it deems wise for violation of police regulations.[27] Because of constitutional differences the decisions as to validity of penal ordinances are variant and conflicting, extending from those holding that if revenue is an object of the license or ordinance no penalty can be imposed,[28] to those authorizing and sustaining a sentence to imprisonment and hard labor;[29] but corporal punishment is not sustained as a municipal power.[30] In some states a municipality may enforce its own contract rights by penal ordinance;[31] in some it may assess no other penalty than the state;[32] generally it may punish peccadilloes, not offenses by the state code or the common

etteville, 121 N. C. 418, 28 S. E. 515, 61 Am. St. Rep. 668, 39 L. R. A. 245; State *v.* Tweedy, 115 N. C. 704, 20 S. E. 183.

Ohio.— Cline *v.* Springfield, 10 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 626.

Pennsylvania.— Reading City *v.* Reading Steam Heat, etc., Co., 20 Pa. Co. Ct. 411; Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 178.

South Carolina.— McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539.

Wisconsin.— Miles *v.* Chamberlain, 17 Wis. 446.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1375.

24. State *v.* Patamia, 34 La. Ann. 750; Municipality No. 1 *v.* Pance, 6 La. Ann. 515. See St. Louis *v.* Green, 6 Mo. App. 591, 7 Mo. App. 468, where provisions of a city ordinance for imposing a fine for nonpayment of a license upon a private vehicle, which, if not paid, would lead to imprisonment, were held to be void for want of power in the municipal assembly to make the nonpayment of a purely revenue tax a misdemeanor.

Under power to "license, tax, and regulate."— A charter power to "license, tax, and regulate . . . dramshop keepers" authorizes a city to pass an ordinance making any person selling liquor in any quantity less than one gallon within the city, without taking out a dram-shop keeper's license, guilty of a misdemeanor. Schweitzer *v.* Liberty, 82 Mo. 309.

25. *Georgia.*— Carr *v.* Conyers, 84 Ga. 287, 10 S. E. 630, 20 Am. St. Rep. 357.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Louisiana.— State *v.* Bright, 38 La. Ann. 1, 58 Am. Rep. 155.

Oregon.— Ah Hoy *v.* Spencer, 23 Oreg. 89, 31 Pac. 220.

Pennsylvania.— Pittsburgh *v.* Young, 3 Watts 363; *In re* Yard, 48 Leg. Int. 228.

Rhode Island.— Farnsworth *v.* Pawtucket, 13 R. I. 82.

Virginia.— Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1375.

Without special authority, a city council cannot make violations of city ordinances misdemeanors. Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

Power to suppress confers no power to punish by imprisonment. Chariton *v.* Barber, 54 Iowa 360, 6 N. W. 528, 37 Am. Rep. 209.

No authority under general welfare clause. —A municipality cannot, in the absence of express legislative authority so to do, enact a valid ordinance for the punishment of an act which constitutes an offense against a penal statute; and such authority cannot be inferred from the "general welfare clause," of the charter. Moran *v.* Atlanta, 102 Ga. 840, 30 S. E. 298. But *compare* Korah *v.* Ottawa, 32 Ill. 121, 129, 83 Am. Dec. 255, where it is said: "There can scarcely be a doubt, that under the authority to regulate the police of the city, they may impose fines and forfeitures for injury to public property within the city limits."

26. *Ex p.* Bollig, 31 Ill. 88; Barter *v.* Com., 3 Penr. & W. (Pa.) 253. *Contra,* Hoggatt *v.* Bigley, 6 Humphr. (Tenn.) 236.

27. Denninger *v.* Pomona Recorders' Ct., 145 Cal. 629, 79 Pac. 360; *Ex p.* Green, 94 Cal. 387, 29 Pac. 783; Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988; People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

28. New Hampton *v.* Conroy, 56 Iowa 498, 9 N. W. 417; State *v.* Patamia, 34 La. Ann. 750; State *v.* Mannessier, 32 La. Ann. 1308; Butler's Appeal, 73 Pa. St. 448; Egger *v.* Stine, 12 Pa. Co. Ct. 316.

29. *Ex p.* Montgomery, 64 Ala. 463.

30. *Ex p.* Deane, 7 Fed. Cas. No. 3,712, 2 Cranch C. C. 125.

31. People *v.* Detroit Citizens' St. R. Co., 116 Mich. 132, 74 N. W. 520.

32. *Ex p.* Reynolds, 87 Ala. 138, 6 So. 335; Monett *v.* Beaty, 79 Mo. App. 315.

The Kentucky constitution providing that "no municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense" does not apply to fines imposed by a city for violation of an ordinance as to licenses for peddlers and itinerant merchants, since such ordinance is merely local in its operation. Carlisle *v.* Heckinger, 103 Ky. 381, 45 S. W. 358, 20 Ky. L. Rep. 74.

law;[33] but it cannot by ordinance or otherwise confer jurisdiction on its courts or officers to inflict penalty or punishment not already conferred by statute.[34] And no forfeiture may be adjudged without due process of law.[35]

h. Seizure, Impound, Sale, or Forfeiture of Property[36] — (I) *In General.* Seizure may not be made unless statutory power therefor is given to the municipality;[37] but under such authority animals estray,[38] and gambling devices[39] used in violation of ordinance, may under its provisions be summarily seized, and the gaming implement be delivered to the court for judgment,[40] or summarily destroyed.[41] An ordinance is void if it affixes forfeiture as a penalty unless under express legislative authority.[42]

(II) *Impounding Animals.*[43] In some states the doctrine is held that without express grant a municipality has not the power to seize and impound vagrant animals within its boundaries.[44] But the current of judicial opinion is that under the usual grant of municipal powers[45] animals[46] found running at large[47] within the corporate limits,[48] may, under ordinance to that effect,[49] be seized and impounded,[50]

33. Vason *v.* Augusta, 38 Ga. 542; Ayres *v.* Dallas, 32 Tex. Cr. 603, 25 S. W. 631.

34. Pittsburgh *v.* Young, 3 Watts (Pa.) 363.

35. Rosebaugh *v.* Saffin, 10 Ohio 31.

36. Deprivation of property without due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1080 *et seq.*

Destruction of dogs see *supra*, XI, A, 7, b, (VIII), (C), (2), (c).

Killing diseased animals see ANIMALS, 2 Cyc. 239 *et seq.*

37. Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

Seizure of the carcass of a dead animal is justified only in case it becomes an actual nuisance. State *v.* Morris, 47 La. Ann. 1660, 18 So. 710; Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005. See also National Fertilizer Co. *v.* Lambert, 48 Fed. 458.

38. See *infra*, XI, A, 8, h, (II).

39. See GAMING, 20 Cyc. 919.

40. Baltimore Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775.

41. See GAMING, 20 Cyc. 919.

Statutory authority for such proceeding is indispensable. Baltimore Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775, holding that such authority is included in the obligation to prevent crime, where the article in question can be used only for a criminal purpose.

42. Coonley *v.* Albany, 132 N. Y. 145, 30 N. E. 382 [*affirming* 57 Hun 327, 10 N. Y. Suppl. 512], holding that an ordinance providing for sale and thus creating a forfeiture is invalid in the face of a provision that the city shall enforce its ordinances by means of fines and penalties.

Fruit baskets.— Under a city ordinance requiring that baskets used for the sale of fruit and vegetables should have the fractional parts of a bushel contained in each marked or stamped thereon, or else to be forfeited, with contents, the clerk of the city market seized several baskets of apples and forfeited them as offered for sale in unmarked baskets. In replevin therefor, it was held that, as no act of the legislature expressly authorized the forfeiture, the city councils had no power to inflict that penalty for the violation of the ordinance. Phillips *v.* Allen, 41 Pa. St. 481, 82 Am. Dec. 486.

43. Regulations as to animals running at large see *supra*, XI, A, 7, b, (VIII), (C), (2).

44. Slessman *v.* Crozier, 80 Ind. 487; Collins *v.* Hatch, 18 Ohio 523, 51 Am. Dec. 465.

45. Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728; Com. *v.* Bean, 14 Gray (Mass.) 52.

46. Jeans *v.* Morrison, 99 Mo. App. 208, 73 S. W. 235.

47. *California.*— Amyx *v.* Taber, 23 Cal. 370.

Georgia.— Crum *v.* Bray, 121 Ga. 709, 49 S. E. 686.

Illinois.— Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201.

Kentucky.— See McKee *v.* McKee, 8 B. Mon. 433.

Louisiana.— See New Orleans Third Municipality *v.* Blanc, 1 La. Ann. 385.

Maryland.—Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649; Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728.

Massachusetts.— Com. *v.* Curtis, 9 Allen 266.

Michigan.— See Lenz *v.* Sherrott, 26 Mich. 139.

North Carolina.— Hellen *v.* Noe, 25 N. C. 493. See also State *v.* Tweedy, 115 N. C. 704, 20 S. E. 183.

Tennessee.— Chattanooga *v.* Norman, 92 Tenn. 73, 20 S. W. 417.

48. Jeans *v.* Morrison, 99 Mo. App. 208, 73 S. W. 235.

49. McVey *v.* Barker, 92 Mo. App. 498; Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41; Waco *v.* Powell, 32 Tex. 258. See also Amyx *v.* Taber, 23 Cal. 370; Hellen *v.* Noe, 25 N. C. 493.

Validity of ordinance for sale or impounding of animals see ANIMALS, 2 Cyc. 438.

50. *Alabama.*— Folmar *v.* Curtis, 86 Ala. 354, 5 So. 678.

Colorado.— Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399.

Connecticut.— Whitlock *v.* West, 26 Conn. 406.

and after due notice,[51] unless redeemed,[52] may be sold at public auction[53] to repay expenses;[54] even though the owner be a non-resident[55] and without fault in the matter.[56] The ordinance is of course void if it contravenes the constitution,[57] or if it affixes forfeiture as a penalty,[58] or directs sale without due notice.[59] Moreover the municipality may provide a penalty for the violation of such an ordinance;[60] but some courts hold that the penalty may not be taken out of the proceeds of sale.[61]

i. Reasonableness of Regulation[62] — (i) *In General.* All ordinances must

Missouri. — Jeans *v.* Morrison, 99 Mo. App. 208, 73 S. W. 235; McVey *v.* Barker, 92 Mo. App. 498.

North Carolina. — Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41.

South Carolina. — Crosby *v.* Warren, 1 Rich. 385.

Texas. — Moore *v.* Crenshaw, 1 Tex. App. Civ. Cas. § 264.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1376.

But see Miles *v.* Chamberlain, 17 Wis. 446.

Impounding animals see ANIMALS, 2 Cyc. 452 *et seq.*

Pounds and pound-keepers see ANIMALS, 2 Cyc. 452 *et seq.*

Duty of taker-up of estrays see ANIMALS, 2 Cyc. 360 *et seq.*

Liability of taker-up of estrays see ANIMALS, 2 Cyc. 364 *et seq.*

51. Gosselink *v.* Campbell, 4 Iowa 296; Varden *v.* Mount, 78 Ky. 86, 39 Am. Rep. 208; Thompson *v.* Millen, 74 S. W. 288, 24 Ky. L. Rep. 2479.

Notice of impounding see ANIMALS, 2 Cyc. 438.

52. Crum *v.* Bray, 121 Ga. 709, 49 S. E. 686; Gosselink *v.* Campbell, 4 Iowa 296.

53. Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399; Gilchrist *v.* Schmidling, 12 Kan. 263; Hellen *v.* Noe, 25 N. C. 493; Moore *v.* State, 11 Lea (Tenn.) 35.

54. Cartersville *v.* Lanham, 67 Ga. 753; Burdett *v.* Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337.

Not a forfeiture. — A city ordinance prohibiting hogs from running at large, and imposing a fine therefor, and making it the duty of a marshal to take up hogs running at large, advertise and sell the same if the owner does not within three days pay the fine and costs, and from the proceeds take the fine and costs, giving to owner the balance, is not objectionable, as imposing a forfeiture, but is in the nature of an abatement of a nuisance. Gosselink *v.* Campbell, 4 Iowa 296.

55. Jeans *v.* Morrison, 99 Mo. App. 208, 73 S. W. 235; Crosby *v.* Warren, 1 Rich. (S. C.) 385; Knoxville *v.* King, 7 Lea (Tenn.) 441. In Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41, it was held that an ordinance prohibiting swine from running at large and providing for the impounding of them, and a penalty against the owner, is applicable to a non-resident who permits his hogs to run in the town limits. But *compare supra*, XI, A, 6; and Dodge *v.* Gridley, 10 Ohio 173.

Animal of non-resident may be impounded see ANIMALS, 2 Cyc. 447.

56. *Alabama.* — Folmar *v.* Curtis, 86 Ala. 354, 5 So. 678.

Indiana. — Horney *v.* Sloan, 1 Ind. 266.

Kentucky. — McKee *v.* McKee, 8 B. Mon. 433; Thompson *v.* Millen, 74 S. W. 288, 24 Ky. L. Rep. 2479.

Massachusetts. — Gilmore *v.* Holt, 4 Pick. 258.

Missouri. — Dorton *v.* Burks, 99 Mo. App. 165, 73 S. W. 239; McVey *v.* Barker, 92 Mo. App. 498.

North Carolina. — Whitfield *v.* Longest, 28 N. C. 268.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1336.

57. Bullock *v.* Geomble, 45 Ill. 218; Donovan *v.* Vicksburg, 29 Miss. 247, 64 Am. Dec. 143.

58. White *v.* Tallman, 26 N. J. L. 67. See also Johnson *v.* Daw, 53 Mo. App. 372.

59. Rosebaugh *v.* Saffin, 10 Ohio 31.

60. Chamberlain *v.* Litchfield, 56 Ill. App. 652 (holding that an ordinance making it unlawful for the owner or any person having control of cattle, horses, etc., to permit the same to run at large, or to drive or permit the same to be driven on any street which the residents have improved unless such animals shall be under the care of some competent person, and secured by rope or halter, etc., and imposing fines for its violation, is valid); New Orleans Third Municipality *v.* Blanc, 1 La. Ann. 386; State *v.* Tweedy, 115 N. C. 704, 20 S. E. 183 (whether the owner is a resident or non-resident). *Compare* Miles *v.* Chamberlain, 17 Wis. 446, holding that under Rev. St. c. 15, § 3, towns may make by-laws to restrain animals from running at large, and enforce them by penalties, but have no authority to provide for the impounding and sale of animals found running at large.

Resident owners of stock found running at large in a city may be compelled to pay a higher penalty than non-resident owners. Jones *v.* Duncan, 127 N. C. 118, 37 S. E. 135; Broadfoot *v.* Fayetteville, 121 N. C. 418, 28 S. E. 515, 61 Am. St. Rep. 668, 37 L. R. A. 245.

61. Gosselink *v.* Campbell, 4 Iowa 296; Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

62 **Reasonableness of:** License-tax see LICENSES, 25 Cyc. 593 *et seq.* Regulation of railroad in general see RAILROADS. Regulation of street railroad in general see STREET RAILROADS.

be reasonable,[63] and not unreasonable as an interference with private legal rights[64]

63. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Arkansas.— Taylor *v.* Pine Bluff, 34 Ark. 603.

Connecticut.— New Haven *v.* New Haven Water Co., 44 Conn. 105.

District of Columbia.— District of Columbia *v.* Saville, 1 MacArthur 581, 29 Am. Rep. 616.

Florida.— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Illinois.— Chicago *v.* Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230 [*affirming* 114 Ill. App. 377]; Chicago *v.* Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375; Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; Carrolton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 552; Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Wiggins *v.* Chicago, 68 Ill. 372; Chicago *v.* Ferris Wheel Co., 58 Ill. App. 625.

Indiana.—Pittsburgh, etc., R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

Iowa.— Davis *v.* Anita, 73 Iowa 325, 35 N. W. 244; State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652.

Louisiana.— State *v.* Itzcovitch, 49 La. Ann. 366, 21 So. 544, 62 Am. St. Rep. 648, 37 L. R. A. 673; State *v.* Schuchardt, 42 La. Ann. 49, 7 So. 67.

Maryland.— See Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665, 93 Am. St. Rep. 394.

Massachusetts.—Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969.

Michigan.— Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6.

Minnesota.— St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554; St. Paul *v.* Dow, 37 Minn. 20, 32 N. W. 860, 5 Am. St. Rep. 811; Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361.

Mississippi.— *Ex p.* O'Leary, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640; Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367.

Missouri.— St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; St. Louis *v.* Weber, 44 Mo. 547; Lamar *v.* Weidman, 57 Mo. App. 507.

New Jersey.— Passaic *v.* Paterson Bill Posting, etc., Co., 72 N. J. L. 285, 62 Atl. 267.

New York.— Ford *v.* Standard Oil Co., 32 N. Y. App. Div. 596, 53 N. Y. Suppl. 48; Dunham *v.* Rochester, 5 Cow. 462; Shepherd *v.* Hees, 12 Johns. 433; Hudson *v.* Thorne, 7 Paige 261.

North Carolina.— State *v.* Ray, 131 N. C. 814, 42 S. E. 960, 92 Am. St. Rep. 795, 60 L. R. A. 634.

Ohio.— White *v.* Kent, 11 Ohio St. 550.

Pennsylvania.— Ft. Pitt Gas Co. *v.* Sewickley, 198 Pa. St. 201, 47 Atl. 957; Densmore *v.* Erie, 7 Pa. Dist. 355, 20 Pa. Co. Ct. 513; Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 178; Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Chest. Co. Rep. 333; Ridley Park Borough *v.* United Tel., etc., Co., 10 Del. Co. 101; Plains Tp. *v.* Lehigh Valley R. Co., 13 Luz. Leg. Reg. 24.

Texas.— *Ex p.* Glass, (Cr. App. 1905) 90 S. W. 1108; *Ex p.* Battis, 40 Tex. Cr. 112, 48 S. W. 513, 76 Am. St. Rep. 708, 43 L. R. A. 863; *Ex p.* Robinson, 30 Tex. App. 493, 17 S. W. 1057.

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

Canada.— Coaticook *v.* Lothrop, 22 Quebec Super. Ct. 225; *Re* Nash, 33 U. C. Q. B. 181.

64. *Alabama.*— Costello *v.* State, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303.

California.— *In re* Kelso, 147 Cal. 609, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. N. S. 796; San Francisco *v.* Buckman, 111 Cal. 25, 43 Pac. 396.

District of Columbia.— District of Columbia *v.* Saville, 1 MacArthur 581, 29 Am. Rep. 616.

Georgia.— Bethune *v.* Hughes, 28 Ga. 560, 73 Am. Dec. 789.

Illinois.— Clinton *v.* Phillips, 58 Ill. 102, 11 Am. Rep. 52; Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Caldwell *v.* Alton, 33 Ill. 416, 75 Am. Dec. 282; Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230]; Chicago *v.* Ferris Wheel Co., 58 Ill. App. 625. See also Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

Indiana.— Evansville *v.* Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Iowa.— Bush *v.* Dubuque, 69 Iowa 233, 28 N. W. 542; Centerville *v.* Miller, 57 Iowa 56, 10 N. W. 293.

Kansas.— Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

Louisiana.— State *v.* Schuchardt, 42 La. Ann. 49, 7 So. 67.

Maryland.— Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665, 93 Am. St. Rep. 394; State *v.* Mott, 61 Md. 297, 48 Am. Rep. 105.

Michigan.— Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740.

Minnesota.— St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Mississippi.— *Ex p.* O'Leary, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640.

Missouri.— St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; Hisey *v.* Mexico, 61 Mo. App. 248.

New York.— Hudson *v.* Thorne, 7 Paige 261. But *compare* Stuyvesant *v.* New York, 7 Cow. 588; Vanderbilt *v.* Adams, 7 Cow. 349.

Pennsylvania.— Phillips *v.* Allen, 41 Pa. St. 481, 82 Am. Dec. 486.

or in restraint of trade;[65] but whether a police ordinance is reasonable is not a question for the courts, when it is enacted in pursuance of express legislative authority,[66] and although if obviously within implied power every presumption is indulged in favor of its reasonableness;[67] yet details of the ordinance, not mentioned in the statute of authority, may invalidate it;[68] so also of the declaration of a thing to be a nuisance, which is not so in fact.[69]

(II) *ILLUSTRATIONS*—(A) *Reasonable.* Under these rules[70] the courts have sustained as reasonable ordinances establishing hack stands;[71] exempting home-producers from peddler's license;[72] forbidding carpet cleaning in a certain district,[73] the keeping of livery stables in a certain locality,[74] and vehicles carrying more than three tons to pass over streets unless the load is indivisible;[75] limiting the speed of trains;[76] making stringent provisions for pure food,[77] and for clean markets[78] and streets;[79] making provisions for full weights and measures,[80] and

Vermont.— St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

Wisconsin.— Hayes *v.* Appleton, 24 Wis. 542. See also Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

Canada.—*Re* Nash, 33 U. C. Q. B. 181.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1378.

65. *Alabama.*— Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130; Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143.

Illinois.— Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 75 Am. St. Rep. 93, 48 L. R. A. 261; Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260.

Kansas.— Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

Minnesota.— St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Mississippi. — Kosciusko *v.* Slomberg, 68 Miss. 469, 9 So. 297, 24 Am. St. Rep. 281, 12 L. R. A. 528.

Missouri.—Joplin *v.* Leckie, 78 Mo. App. 8.

New York.— Dunham *v.* Rochester, 5 Cow. 462.

Ohio.— White *v.* Kent, 11 Ohio St. 550.

Pennsylvania.— Com. *v.* Hepner, 22 Pa. Co. Ct. 630; Warren *v.* Lewis, 16 Pa. Co. Ct. 176.

Wisconsin.— Hayes *v.* Appleton, 24 Wis. 542.

Canada.— *Re* Nash, 33 U. C. Q. B. 181.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1378; and *supra*, XI, A, 7, b, (VII), (A).

66. *Indiana.*— Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

Kentucky.— Chesapeake, etc., R. Co. *v.* Maysville, 69 S. W. 728, 24 Ky. L. Rep. 615.

New Jersey.— Raffetto *v.* Mott, 60 N. J. L. 413, 38 Atl. 857.

South Carolina.— Darlington *v.* Ward, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326.

Texas.— Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1378.

67. *Arkansas.*— Hot Springs *v.* Curry, 64 Ark. 152, 41 S. W. 55.

California.— *In re* Newell, 2 Cal. App. 767, 84 Pac. 226.

New Jersey.— Ivins *v.* Trenton, 69 N. J. L. 451, 55 Atl. 1132.

Oregon.—Portland *v.* Montgomery, 38 Oreg. 215, 62 Pac. 755.

Utah.— Ogden City *v.* Crossman, 17 Utah 66, 53 Pac. 985.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1378.

Police ordinances should be interpreted and construed with reference to the purposes of the incorporation. Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234. An ordinance, general in its scope, may be adjudged reasonable as applied to one state of facts, and unreasonable as applied to another. Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513. An ordinance in harmony with the general laws of the state is not *per se* oppressive. State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390.

Burden of proof.— When the unreasonableness of a municipal ordinance is not apparent on its face, the burden of proof will be upon the party attacking the ordinance to establish its unreasonableness. New York *v.* Dry Dock, etc., R. Co., 15 N. Y. Suppl. 297.

68. Lane *v.* Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643. *Compare* State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076.

69. Munsell *v.* Carthage, 105 Ill. App. 119.

70. See *supra*, XI, A, 8, i, (I).

71. Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95.

72. People *v.* Sawyer, 106 Mich. 428, 64 N. W. 333.

73. *Ex p.* Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640.

74. Chicago *v.* Stratton, 58 Ill. App. 539.

75. Com. *v.* Mulhall, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387.

76. Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

77. State *v.* Stone, 46 La. Ann. 147, 15 So. 11.

78. State *v.* Dubarry, 46 La. Ann. 33, 14 So. 298.

79. Chicago *v.* Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666.

80. State *v.* Smith, 123 Iowa 654, 96 N. W. 899; People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 24 Am. St. Rep. 141, 13 L. R. A. 286; New York *v.* Hewitt, 91 N. Y. App. Div. 445, 86 N. Y. Suppl. 832.

for inoffensive vaults[81] and stables;[82] prohibiting hotel porter from soliciting on railroad premises;[83] protecting the quiet and comforts of residence;[84] providing for a driver and conductor on every car,[85] and that huckster wagons shall not stand in the market place longer than a prescribed time;[86] regulating or relating to bill boards[87] and fire limits,[88] digging in streets,[89] drum beating and horn blowing in streets,[90] fresh meat trade,[91] hackney coaches,[92] handling of trains,[93] hotel drumming business,[94] keeping of dogs,[95] license-fee of itinerant peddlers,[96] playing of games,[97] railing of floor openings,[98] sale of meats,[99] speed of trains,[1] time limits of street car transfers,[2] trains,[3] the use of bicycles,[4] and the use of streets by stages and other vehicles;[5] requiring companies to pave the streets over which their cars run[6] and to sprinkle their tracks;[7] requiring flagmen at dangerous crossings,[8] and vehicles for hire to occupy designated stands;[9] and restricting peddlers[10] and others.[11]

(B) *Unreasonable.* On the other hand, among others,[12] certain ordinances forbidding the covering of packages of fruit with colored netting,[13] driving faster than an ordinary walk,[14] and the running of cars during the winter without vestibules;[15] imposing a tax of fifty cents a pole on an electric company;[16] licensing removal

81. Cartwright *v.* Cohoes, 39 N. Y. App. Div. 69, 56 N. Y. Suppl. 731.
82. State *v.* Beattie, 16 Mo. App. 131.
83. Laddonia *v.* Poor, 73 Mo. App. 465.
84. *Ex p.* Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640, limiting use of machines.
85. State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.
86. Com. *v.* Brooks, 109 Mass. 355.
87. Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548.
88. Chimenie *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.
89. Springfield Water Co. *v.* Darby, 199 Pa. St. 400, 49 Atl. 275.
90. *In re* Gribben, 5 Okla. 379, 47 Pac. 1074.
91. Bowling Green *v.* Carson, 10 Bush (Ky.) 64.
92. Com. *v.* Robertson, 5 Cush. (Mass.) 438.
93. Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141.
94. Hot Springs *v.* Curry, 64 Ark. 152, 41 S. W. 55.
95. Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.
96. *Ex p.* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.
97. Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.
98. New York *v.* Williams, 15 N. Y. 502 [*affirming* 4 E. D. Smith 516].
99. St. Louis *v.* Weber, 44 Mo. 547.
1. Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.
2. *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55.
3. Duluth *v.* Mallett, 43 Minn. 204, 45 N. W. 154.
4. Emporia *v.* Wagoner, 6 Kan. App. 659, 49 Pac. 701.
5. Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.
6. Philadelphia *v.* Empire Pass. R. Co., 7 Phila. (Pa.) 321.
7. Chester *v.* Chester Traction Co., 5 Pa. Dist. 609.
8. Delaware, etc., R. Co. *v.* East Orange Tp., 41 N. J. L. 127.
9. Com. *v.* Matthews, 122 Mass. 60.
10. Com. *v.* Fenton, 139 Mass. 195, 29 N. E. 653.
11. Bearden *v.* Madison, 73 Ga. 184 (holding that a city ordinance annexing a penalty to the offense of persons other than passengers getting on or off of engines and cars is reasonable and valid); State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390 (an ordinance adopted in order to remove and destroy animal and vegetable matter); Atlantic City *v.* Brown, 72 N. J. L. 207, 62 Atl. 428 (an ordinance permitting an omnibus driver to charge only ten cents for carrying a passenger, irrespective of the distance).
12. Waters *v.* Leech, 3 Ark. 110 (an ordinance declaring that the city constable "shall be entitled to receive of the owners or exhibitors of every theatre, &c., for each night of his attendance the sum of two dollars"); State Center *v.* Barenstein, 66 Iowa 249, 23 N. W. 652 (an ordinance requiring a peddler to pay as a license "not less than one nor more twenty-five dollars for a fixed time, in the discretion of the mayor").
Ordinance requiring the consent of certain individuals to the exercise of a specified business is void, although the municipality had power to regulate such business. St. Louis *v.* Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630; *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526.
13. Frost *v.* Chicago, 178 Ill. 250, 52 N. E. 869, 69 Am. St. Rep. 301, 49 L. R. A. 657.
14. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.
15. Yonkers *v.* Yonkers R. Co., 51 N. Y. App Div. 271, 64 N. Y. Suppl. 955.
16. Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6.

of dirt, offal, etc., from the city;[17] prohibiting laundries except in brick or stone buildings;[18] prescribing the kind of sidewalk;[19] regulating burials;[20] the location of telegraph poles,[21] markets,[22] stage coaches in streets,[23] the time within which cars may be distributed,[24] and the use of carriages;[25] and requiring the building of sidewalks in an uninhabited part of the city,[26] a license of itinerant merchants only,[27] and a watchman at each railway crossing[28] have been held to be unreasonable as unduly restricting trade or traffic,[29] manufactures[30] and transportation,[31] and tyrannically invading personal liberty,[32] imposing impossible requirements upon business,[33] or tending to monpoly.[34]

(III) *Excessive Penalty or Unreasonable Punishment.*[35] Penalties prescribed and punishments provided for by ordinances must not be excessive or unreasonable.[36] To be reasonable a penalty must be certain.[37] A by-law inflicting a penalty wholly disproportionate to the offense,[38] or beyond the statutory limit,[39] is void. So also is one obviously prescribed to humiliate or disgrace a class

17. *In re* Vandine, 6 Pick. (Mass.) 187, 17 Am. Dec. 351.

18. Shreveport *v.* Robinson, 51 La. Ann. 1314, 26 So. 277.

19. Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373. 30 L. R. A. 225.

20. Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

21. Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23.

22. Lamar *v.* Weidman, 57 Mo. App. 507.

23. Com. *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

24. Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141.

25. *Ex p.* Battis 40 Tex. Cr. 112, 48 S. W. 513, 76 Am. St. Rep. 708, 43 L. R. A. 863.

26. Corrigan *v.* Gage, 68 Mo. 541.

27. Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

28. Pittsburgh, etc., R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

29. State *v.* Rohart, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947.

Must not be in restraint of trade see *supra*, XI, A, 8, i, (I), text and note 65.

30. St. Louis *v.* Heitzberg Packing, etc., Co., 141 Mo. 375, 42 S. W. 954, 64 Am. St. Rep. 516, 39 L. R. A. 551, holding that a smoke ordinance of a city which provides, "The emission into the open air of dense black or thick gray smoke within the corporate limits of the city of St. Louis is thereby declared a nuisance," exceeds the powers of the city under its charter "to declare, prevent and abate nuisances," and is unreasonable and void.

31. Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352, forbidding steamboats in harbor without spark arresters.

32. Chicago *v.* Gunning System, 114 Ill. App. 377 [*affirmed* in 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230]; Hayes *v.* Appleton, 24 Wis. 542.

Must not infringe private rights see *supra*, XI, A, 8, i, (I), text and note 64.

33. Crawford *v.* Topeka, 51 Kan. 756, 33 Pac. 476, 37 Am. St. Rep. 323, 20 L. R. A. 692. See also Chicago *v.* Gunning System Co., 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230 [*affirming* 114 Ill. App. 377], where a city ordinance provided that the owners of bill boards erected prior to the passage of the ordinance exceeding certain dimensions should pay an annual license-fee of fifty cents per square foot, and in default of such payment the boards should be torn down. In a suit to have the ordinance declared void it was proved that thereunder complainant would be required to pay an annual license-fee of two hundred and ten thousand dollars, when its gross income was but one hundred and twenty thousand dollars; that all of complainant's signs on which a license would have to be paid were erected under the ordinances of the city as they existed at the time the boards were built, and that in some instances the city received a license for the privilege of erecting them. It was held that such ordinance was not only void for unreasonableness, but as prohibitive of complainant's business. *Compare* District of Columbia *v.* Saville, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616.

34. Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; *Re* Nash, 33 U. C. Q. B. 181.

35. **Conflicting ordinances and statutes** see *supra*, XI, A, 4, c.

Difference in penalty, punishment, or license-fee see *supra*, XI, A, 4, c, (II).

Sentence and punishment see *infra*, XI, B, 4, q.

36. See cases cited *infra*, note 37 *et seq.*

37. Mobile *v.* Yuille, 3 Ala. 137.

38. See *Ex p.* Miller, 89 Cal. 41, 26 Pac. 620, holding that the question as to whether the punishment is disproportionate to the offense is one for the court and not to be determined upon habeas corpus proceedings.

39. *Louisiana.*— New Orleans *v.* Costello, 14 La. Ann. 37.

New Jersey.— Leland *v.* Long Branch Com'rs, 42 N. J. L. 375. See also Haynes *v.* Cape May, 50 N. J. L. 55, 13 Atl. 231 [*affirmed* in 52 N. J. L. 180, 19 Atl. 176]. *Compare* Landis *v.* Vineland, 54 N. J. L. 75, 23 Atl. 357, holding that under the borough act allowing a borough to pass ordinances punishing disorderly conduct, and declaring that the mayor may commit any person violating such an ordinance to the lockup for any time in his discretion, not exceeding ten

of persons.[40] When a course of action is the thing prohibited a penalty may not be affixed to each evidential act.[41] The law has no general standard for a reasonable fine, fifty dollars being denounced as unreasonable in one case,[42] and five hundred dollars as reasonable in another[43] for a small offense.

j. Discrimination.[44] Ordinances and by-laws contravening constitutional requirements of equality or uniformity of legislation are void for such discrimination.[45] To this class belong ordinances denying to hack drivers privileges

days, or impose a fine "not exceeding $20," or both, a borough cannot pass an ordinance providing that, if any person disturb an assembly, he shall pay a fine of "not less than $3 nor more than $10" for each offense.

New York.— New York *v.* Ordrenan, 12 Johns. 122.

Ohio.— Belle Centre *v.* Welsh, 11 Ohio Dec. (Reprint) 41, 24 Cinc. L. Bul. 176.

South Carolina.— Zylstra *v.* Charleston, 1 Bay 382.

Texas.— McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1379.

Compare Chicago *v.* Quimby, 38 Ill. 274 (holding that an ordinance of the city of Chicago of Aug. 24, 1863, imposing a fine of five dollars a barrel for each barrel of certain provisions sold without inspection, was, so far as it operated to impose a penalty beyond one hundred dollars, repugnant to the charter, and it was to that extent inoperative); Greenfield *v.* Mook, 12 Ill. App. 281 (holding that where the charter of a town prohibited the imposition of fines for more than fifty dollars for the violation of ordinances, an ordinance which fixed the penalty for its violation at from twenty dollars to one hundred dollars was void as to the excess above fifty dollars, and valid as to the residue). See also Eureka Springs *v.* O'Neal, 56 Ark. 350, 19 S. W. 969; Com. *v.* Wilkins, 121 Mass. 356.

Ordinances prescribing penalties within the limit designated by the legislature cannot be set aside as unreasonable. Patterson *v.* Taylor, 51 Fla. 275, 40 So. 493; Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678. A city ordinance prescribing a term of imprisonment which may, but does not necessarily, exceed that authorized by the constitution, may be enforced within the constitutional limit. Keokuk *v.* Dressell, 47 Iowa 597.

40. Ho Ah Kow *v.* Nunan, 12 Fed. Cas. No. 6,546, 5 Sawy. 552, 20 Alb. L. J. 250.

41. See Eureka Springs *v.* O'Neal, 56 Ark. 350, 19 S. W. 969 (holding that where the thing prohibited by ordinance is continuous, as the keeping of a dram-shop without a license, if the ordinance attempts to make each sale a different offense it is invalid as the aggregate punishment might be in excess of the maximum penalty which the city might inflict); Com. *v.* Wilkins, 121 Mass. 356 (holding that an ordinance prescribing a penalty of from one to five dollars for every hour of keeping a wagon in a market without a license, etc., is void where the statute only permits a penalty of twenty dollars for one offense).

42. Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509.

43. *Ex p.* Cheney, 90 Cal. 617, 27 Pac. 436.

For illustrations of fines, penalties, and license-fees or taxes held not to be unreasonable or excessive see Patterson *v.* Taylor, 51 Fla. 275, 40 So. 493; Perdue *v.* Ellis, 18 Ga. 586; Tarkio *v.* Coke, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678; Atlantic City *v.* Brown, (N. J. 1905) 62 Atl. 428; Alliance *v.* Joyce, 49 Ohio St. 7, 30 N. E. 270; Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210, 7 Ohio N. P. 435; Pottsville Borough *v.* Pottsville Gas Co., 32 Pa. Co. Ct. 17, 3 Schuyler Co. Ct. 91; Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 506; Mahanoy City *v.* Pennsylvania Theatre Co., 3 Schuyler Co. Ct. (Pa.) 160; McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539; Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124; St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

44. Discrimination in imposition of license-tax see LICENSES, 25 Cyc. 593.

45. *California.*—*Ex p.* Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618.

Illinois.— Chicago *v.* Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225.

Indiana.— Plymouth *v.* Schulteis, 135 Ind. 339, 36 N. E. 12, 135 Ind. 701, 35 N. E. 14; Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 28 Am. St. Rep. 180, 13 L. R. A. 587.

Kansas.— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Louisiana.— State *v.* Deffes, 45 La. Ann. 658, 12 So. 241; State *v.* Du Barry, 44 La. Ann. 1117, 11 So. 718.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289; Lamar *v.* Weidman, 57 Mo. App. 507; Kansas City *v.* Corrigan, 18 Mo. App. 206.

New York.— People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596; Brooklyn *v.* Furey, 9 Misc. 193, 30 N. Y. Suppl. 349.

North Carolina.—State *v.* Tenant, 110 N. C. 609, 14 S. E. 387, 28 Am. St. Rep. 715, 15 L. R. A. 423.

Ohio.— Canton *v.* Nist, 9 Ohio St. 439.

Pennsylvania.— Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220; Densmore *v.* Erie City, 7 Pa. Dist. 355, 20 Pa. Co. Ct. 513.

Canada.— *Re* Nash, 33 U. C. Q. B. 181.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1380.

Conflicting ordinances and statutes see *supra*, XI, A, 4, c.

Must not be unconstitutional see *supra*, XI, A, 7, b, (VII), (A).

allowed to competing street cars;[46] allowing to keepers of two cows or sellers of less than twenty quarts of milk per day privileges denied to other milk dealers;[47] forbidding fruit packages to be covered with colored netting;[48] denying privileges to laundrymen allowed to similar operators of machinery;[49] discriminating between vendors of or canvassers for articles made without and within the state,[50] and against merchants using trading stamps;[51] permitting to one citizen a privilege denied to his neighbor;[52] forbidding one railroad to do what it permits to another;[53] and permitting one and refusing another the right of Sunday selling.[54] To this class also belong ordinances directed at a single person,[55] or transient dealers only;[56] and it seems making the right to a license or permit to depend on the consent of adjacent proprietors,[57] or upon the arbitrary will or uncontrolled discretion of the city council, or other body or board.[58] But ordinances discrimi-

There is no discrimination impairing equal rights in an ordinance prohibiting the casting of advertisements in vestibules of dwellings, although newspapers and addressed envelopes are excepted. Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220.

46. *Ex p.* Vance, 42 Tex. Cr. 619, 62 S. W. 568, holding that a city ordinance establishing a hack stand at a depot at a greater distance therefrom than the place at which street cars are permitted to stop is not a discrimination, and hence does not render the ordinance void.

47. Gray *v.* Wilmington, 2 Marv. (Del.) 257, 43 Atl. 94; Pierce *v.* Aurora, 81 Ill. App. 670.

48. Frost *v.* Chicago, 178 Ill. 250, 52 N. E. 869, 69 Am. St. Rep. 301, 49 L. R. A. 657.

49. Shreveport *v.* Robinson, 51 La. Ann. 1314, 26 So. 277.

50. *Ex p.* Clamp, 9 Ohio Dec. (Reprint) 672, 16 Cinc. L. Bul. 229.

51. *Ex p.* McKenna, 126 Cal. 429, 58 Pac. 916.

52. Tugman *v.* Chicago, 78 Ill. 405; Hudson *v.* Thorne, 7 Paige (N. Y.) 261. In Tugman *v.* Chicago, *supra*, it was held that where a city ordinance is passed, prohibiting the carrying on of a particular business in a certain locality, the fact that certain persons were engaged in such business within the district designated in the ordinance at the time of its adoption does not authorize the corporation, by the ordinance, to permit such persons to continue their business while it prohibits others from engaging therein in the same locality.

53. Lake View *v.* Tate, 33 Ill. App. 78 [*affirmed* in 130 Ill. 247, 22 N. E. 791]. *Compare* Buffalo *v.* New York, etc., R. Co., 6 Misc. (N. Y.) 630, 27 N. Y. Suppl. 297 [*affirming* 23 N. Y. Suppl. 303], where the ordinance was valid.

54. Shreveport *v.* Levy, 26 La. Ann. 671, 21 Am. Rep. 553; Canton *v.* Nist, 9 Ohio St. 439.

55. Canajoharie *v.* Buel, 43 How. Pr. (N. Y.) 155.

56. McRoberts *v.* Sullivan, 67 Ill. App. 435; Wormser *v.* Allentown, 8 Pa. Dist. 649, 7 North. Co. Rep. 38. Discrimination between temporary and permanent residence invalidates the ordinance. Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

57. St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

58. Plymouth *v.* Schultheis, 135 Ind. 339, 701, 35 N. E. 12, 14 (holding that an ordinance making it unlawful to carry on the business of a tannery within one mile of the city limits without a permit from the city council, and which does not define any of the conditions on which tanneries may be conducted or on which such permit shall issue, but leaves the propriety of granting such permit to the uncontrolled discretion of the board of health and common council, is invalid); Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 28 Am. St. Rep. 180, 13 L. R. A. 587 (holding that an ordinance prohibiting the storage by any person within the city limits of inflammable oils, except upon permission from the common council, leaving it to the common council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to whom to grant permission, and allowing the permission to be revoked at the will of the council, is invalid, because of the power of arbitrary discrimination it vests in the council); State *v.* Deffes, 45 La. Ann. 658, 12 So. 841; State *v.* Dubarry, 44 La. Ann. 1117, 11 So. 718 (holding that an ordinance, which declares that it shall not be lawful for any one to establish a private market for the sale of meats, fish, vegetables, etc., without permission of the city council, is illegal and void, since the discretion vested by such an ordinance in the city council is in no way regulated or controlled, leaving it within the power of the city council to grant or refuse the privilege at pleasure); State *v.* Tenant, 110 N. C. 609, 14 S. E. 387, 28 Am. St. Rep. 715, 15 L. R. A. 423 (holding that an ordinance which provides that no person shall erect, add to, or generally change any building, without first obtaining the permission of the board of aldermen, is void in reserving to the board the arbitrary power to refuse the application of one person and grant that of another); *Re* Nash, 33 U. C. Q. B. 181 (holding that a by-law that no person shall keep a slaughter-house within the city, without special resolution of the council, was not within the power given to the corporation because it would permit favoritism by the

nating between different streets or sections of the municipality,[59] or different occupations, classes, or articles,[60] provided the same rules are applied to all of the same class, are valid.

k. Destruction of or Injury to Property[61] — (i) *In General.* Under the maxim *salus populi suprema lex* municipal authorities not only may but must in the exercise of police power destroy private property to save human life,[62] to protect public health,[63] to preserve property,[64] and to safeguard the public safety.[65] And this they may do with impunity, in the face of imminent peril;[66] or in the

council and might be exercised in restraint of trade or used for the purpose of granting a monopoly).

59. Chicago *v.* Brownell, 146 Ill. 64, 34 N. E. 595 [*reversing* 41 Ill. App. 70] (holding that an ordinance which imposes a penalty for book-making and pool-selling within the city limits, except in certain enumerated localities, is not void for unreasonableness, since the discrimination is not between people, but between places, and the exception of certain localities does not authorize book-making and pool-selling at such places); Ivins *v.* Trenton, 69 N. J. L. 451, 55 Atl. 1132 [*affirming* 68 N. J. L. 501, 53 Atl. 202] (holding that an ordinance, prohibiting the erection of any stationary or swinging sign, or any stationary awning shed, across the whole or any portion of the sidewalks, is not necessarily invalid, as being special in character and discriminating in its effects, because it is limited in its operation to a portion of the city only); Chattanooga *v.* Norman, 92 Tenn. 73, 20 S. W. 417 (holding that an ordinance prohibiting stock from running at large is not objectionable on the ground that it applies to only a part of the city).

60. *Georgia.*— Savannah City, etc., R. Co. *v.* Savannah, 77 Ga. 731, 4 Am. St. Rep. 106, holding that an ordinance requiring all railway companies in the city to water their tracks is not invalid as being special, for it applies generally to all railway companies that use the streets.

Louisiana.— Crowley *v.* Ellsworth, 114 La. 308, 38 So. 199, 108 Am. St. Rep. 353, 69 L. R. A. 276, holding that an ordinance which applies alike to all persons, firms, or corporations engaged in the business legislated against is not discriminatory.

Michigan.— People *v.* Lewis, 86 Mich. 273, 49 N. W. 140, holding that a smoke ordinance which exempts dwelling-houses and steamboats from its operation is not invalid on the ground that it unreasonably discriminates between classes.

Missouri.— Kansas City *v.* Sutton, 52 Mo. App. 398, holding that an ordinance fixing the maximum load of a two-horse team and wagon, and prescribing a penalty against a contractor employing a team for a load in excess of such maximum, is not void on the ground of partiality.

South Carolina.— Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1380.

61. **Deprivation of property without due process of law** see CONSTITUTIONAL LAW, 8 Cyc. 1080 *et seq.*

Distinguished from law of eminent domain see ACTIONS, 1 Cyc. 655; EMINENT DOMAIN, 15 Cyc. 562.

Summary destruction of dogs see *supra*, XI, A, 7, b, (VIII), (C), (2), (c).

62. Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830 (holding that in case of a great conflagration the municipality may lawfully blow up buildings owned by private citizens in order to arrest the progress of the flames); Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613 (destruction of property to prevent spread of conflagration). See also People *v.* Metropolitan Bd. of Police, 15 Abb. Pr. (N. Y.) 167, 24 How. Pr. 481; White *v.* Charleston, 2 Hill (S. C.) 571; and ACTIONS, 1 Cyc. 653 *et seq.*

63. Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L. R. A. 541. See also ACTIONS, 1 Cyc. 654.

64. Baumgartner *v.* Hasty, 100 Ind. 575, 50 Am. Rep. 830; Conwell *v.* Emrie, 2 Ind. 35; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Aitken *v.* Wells River, 70 Vt. 308, 40 Atl. 829, 67 Am. St. Rep. 672, 41 L. R. A. 566. See ACTIONS, 1 Cyc. 655.

65. Fields *v.* Stokley, 99 Pa. St. 306, 44 Am. Rep. 109, holding that the mayor of a city is, by virtue of his official position, justified in demolishing a wooden building which, by reason of its construction, position, and use, is dangerous to the public safety.

Summary destruction of building.— McKibbin *v.* Ft. Smith, 35 Ark. 352; Hine *v.* New Haven, 40 Conn. 478; Micks *v.* Mason, 145 Mich. 212, 108 N. W. 707; Russell *v.* New York, 2 Den. (N. Y.) 461; Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Baxter *v.* Seattle, 3 Wash. 352, 28 Pac. 537.

Where private property is destroyed by military operations in the field, or by measures necessary for their safety and efficiency, no compensation can be claimed, and this is upon the application of the maxim *salus populi suprema lex.* Chicago League Ball Club *v.* Chicago, 77 Ill. App. 124, 97 Ill. App. 637 [*reversed* on other grounds in 196 Ill. 54, 63 N. E. 695].

66. McDonald *v.* Red Wing, 13 Minn. 38; White *v.* Charleston, 2 Hill (S. C.) 571; Aitken *v.* Wells River, 70 Vt. 308, 40 Atl. 829, 67 Am. St. Rep. 672, 41 L. R. A. 566; Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980. See ACTIONS, 1 Cyc. 653.

execution of a valid ordinance.[67] But the property itself not the occupants must constitute the nuisance to warrant such summary action.[68] Emergency, it seems, may warrant destruction of contents as well as buildings.[69]

(II) *Compensation.*[70] At the common law no recovery can be had against any one for property so injured or destroyed under the police power.[71] Statutes

Compensation see *infra*, XI, A, 8, k, (II).

Although a city has the authority to have a building demolished as unsafe, on judicial investigation, it must sustain the order to tear down the building by sufficient evidence. O'Rourke *v.* New Orleans, 106 La. 313, 30 So. 837.

67. Miller *v.* Valparaiso, 10 Ind. App. 22, 37 N. E. 418; Pieri *v.* Shieldsboro, 42 Miss. 493, holding that it cannot be done in the execution of an arbitrary ordinance. In Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555, plaintiff, in violation of an ordinance prohibiting the erection of a frame building, being warned by the council of a borough not to put it up, began to do so, and the high constable and defendants pulled it down, under the order of the council. It was held that the act of defendants was lawful, and no action lay against them. But in Northern Pac. R. Co. *v.* Spokane, 52 Fed. 428, it was held that a city has no right to destroy a wooden building within the fire limits because it is maintained in violation of the permit granted for its erection, and an injunction to restrain such destruction is proper.

Granting discretion to certain officers.—An ordinance that authorizes fire masters, or the intendant, to pull down such houses, blow up such buildings, etc., as may be judged necessary in time of fire, gives these officers the right to judge whether it is necessary so to do. White v. Charleston, 2 Hill (S. C.) 571.

Invalid ordinance.— The Richmond charter in force on April 2, 1865, provided that the council could pass all ordinances necessary for public order or safety; and that the council should not take private property for any purposes, without compensation to the owner; and that where the city could, by agreement, "obtain title to the grounds necessary for such purposes," it might apply for leave to condemn it. It was held that, since the power of eminent domain was confined to the taking of land, a resolution of the council adopted on such date, in expectation of the entry of the federal army, ordering the destruction of all intoxicating liquor within the city, and pledging the city to pay therefor, could not be sustained as an exercise of eminent domain in aid of the police power of the city, but was *ultra vires*. Wallace *v.* Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554. See also Pieri *v.* Shieldsboro, 42 Miss. 493.

68. Welch *v.* Stowell, 2 Dougl. (Mich.) 332; Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242; Bristol Door, etc., Co. *v.* Bristol, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783.

69. See Dupree *v.* Brunswick, 82 Ga. 727, 9 S. E. 1085 (holding that a city charter which authorizes the mayor and council "to remove any forge, smith-shop or other structure within the city, where in their opinion it shall be necessary to insure against fire," confers a power which can only be used in case of absolute necessity or grave emergency; and it authorizes the mayor and council to remove a dangerous forge, but not the building in which it is situated, unless it appears that the building is of itself dangerous, or that the owner persists in using it as a blacksmith shop); American Print Works *v.* Lawrence, 23 N. J. L. 9 [*affirmed* in 23 N. J. L. 590, 57 Am. Dec. 420] (holding that when, by a statute, a particular officer is authorized to destroy buildings when he shall believe it necessary to prevent the spread of a conflagration, and the same statute gives compensation for the buildings destroyed, it is a sufficient justification of the destruction of goods contained in such building, for which no compensation is provided, to allege that the building was destroyed according to such authority, and that it was absolutely necessary, for the purpose of averting the conflagration, to destroy the building without waiting to remove the goods). See also Dawson *v.* Kuttner, 48 Ga. 133; New York *v.* Stone, 20 Wend. (N. Y.) 139 [*affirmed* in 25 Wend. 157]; New York *v.* Lord, 17 Wend. (N. Y.) 285 [*affirmed* in 18 Wend. 126]. But see Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190, holding that the statute of New York, passed April 9, 1813, relative to the city of New York, which authorized the mayor, in case of fire, to destroy buildings to prevent the spread of conflagration, did not authorize him to destroy the goods in such building, and that the statute therefore was no justification in an action for the loss of goods occasioned by such justifiable destruction of the building in which they were.

Bedding used by scarlet fever patients may be destroyed. Savannah *v.* Mulligan, 95 Ga. 323, 22 S. E. 621, 51 Am. St. Rep. 86, 29 L. R. A. 303.

70. **Liability for reasonable act of officer** see *infra*, XIV.

71. Russell *v.* New York, 2 Den. (N. Y.) 461; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Bowditch *v.* Boston, 3 Fed. Cas. No. 1,718, 11 Alb. L. J. 342 [*affirmed* in 3 Fed. Cas. No. 1,719, 4 Cliff, 323 (*affirmed* in 101 U. S. 16, 25 L. ed. 980)].

At common law the state might destroy, although it could not take, private property without compensation. White *v.* Charleston, 2 Hill (S. C.) 571; Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980. See also ACTIONS, 1 Cyc. 653 *et seq.*

imposing liability in such cases,[72] being in derogation of the common law, are strictly construed,[73] and compensation is adjudged only on proof of a case clearly within the provisions and conditions of the statute,[74] and to no one except the owner[75] or persons having an estate or interest in the property destroyed,[76] and in

Where a wooden building is erected within fire limits after they have been established, the city may destroy it without incurring any liability. Miller *v.* Valparaiso, 10 Ind. App. 22, 37 N. E. 418.

Unless by express statute, a city is not liable for the destruction of a building torn down to arrest the progress of a fire, no matter whether done under the direction of the city officials, who had no authority so to direct, or by the bystanders of their own motion. McDonald *v.* Red Wing, 13 Minn. 38. See also Dunbar *v.* San Francisco, 1 Cal. 355; Chicago League Ball Club *v.* Chicago, 77 Ill. App. 124; Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46; McDonald *v.* Red Wing, 13 Minn. 38.

But in Quebec it seems that the municipality exercises this high act of discretion at its peril and must pay in case of mistake of judgment. Quebec *v.* Mahoney, 10 Quebec Q. B. 378, holding the city liable for destruction of building which would not have been reached by the fire.

The contrary doctrine would strike at the root of all police regulations.— The order of the mayor and aldermen stands on the same footing as quarantine and fire regulations, and if by such regulation an individual receives some damage it is considered as *damnum absque injuria.* The law presumes he is compensated by sharing in the advantages resulting from such beneficial regulations. Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421. See also British Cast Plate Manufacturers *v.* Meredith, 4 T. R. 794; Dore *v.* Gray, 2 T. R. 358, 1 Rev. Rep. 494.

72. See ACTIONS, 1 Cyc. 656. See also Chicago League Ball Club *v.* Chicago, 77 Ill. App. 124, 97 Ill. App. 637 [*reversed* on other grounds in 196 Ill. 54, 63 N. E. 695]; Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46; Stone *v.* New York, 25 Wend. (N. Y.) 157; New York *v.* Lord, 17 Wend. (N. Y.) 285 [*affirmed* in 18 Wend. 126] (holding that where buildings are destroyed by order of the magistrates to prevent the spreading of a fire, the city is liable to tenants for merchandise and other personal effects, the property of the occupant, as well as for the building itself); Russell *v.* New York, 2 Den. (N. Y.) 461; Jones *v.* Richmond, 18 Gratt. (Va.) 517, 98 Am. Dec. 695 (holding that the city of Richmond was responsible for the value of the liquor destroyed under the order and pledge of the common council, passed April 2, 1865, in anticipation of the evacuation by the Confederate army). Bowditch *v.* Boston, 101 U. S. 16. 25 L. ed. 980.

73. Correas *v.* San Francisco, 1 Cal. 452; Dunbar *v.* San Francisco, 1 Cal. 355; Savannah *v.* Mulligan, 95 Ga. 323, 22 S. E. 621, 51 Am. St. Rep. 86, 29 L. R. A. 303 (holding that since Code, § 2226, requiring compensation to be made to the owner of property destroyed by municipal authorities for the public good, does not apply to property destroyed by such authorities under power in the charter, on the ground that it constitutes a nuisance endangering the public health or safety, a city having such power by its charter was not liable for the destruction, by its sanitary officers, of bedding which had been used by one sick with the scarlet fever); Taylor *v.* Plymouth, 8 Metc. (Mass.) 462 (holding that the provision in Rev. St. c. 18, § 7, that, when the pulling down of a building by direction of fire wards shall be the means of stopping a fire, the owner of such building shall be entitled to recover reasonable compensation therefor from the town, does not apply to a building which is pulled down by such order after it is so far burnt that it is impossible to save it from destruction by fire).

74. Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed 980 [*affirming* 3 Fed. Cas. No. 1,719, 4 Cliff. 323]. See also Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46; Taylor *v.* Plymouth, 8 Metc. (Mass.) 462; Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433.

Question for jury.— In an action against a city to recover for the destruction of plaintiff's building, on the ground that it was a nuisance subject to abatement, it was in evidence that the building was an old frame structure. It was held that plaintiff's contentions that the city had not established the fire limits, and that her building had stood for seventeen years without complaint, and that there were others of like character within the same boundary, and that, even if it were within such limits, she was entitled to five days' notice before its condemnation, were questions for the jury. Frank *v.* Atlanta, 72 Ga. 428.

A building so far burned that it cannot be saved when ordered to be destroyed cannot be included within the compensation recoverable. Taylor *v.* Plymouth, 8 Metc. (Mass.) 462.

Goods destroyed within the building may be included within the compensation recoverable. New York *v.* Lord, 18 Wend. (N. Y.) 126.

Goods in storage within a building thus destroyed, belonging neither to the owner nor to the tenant thereof, cannot be included in the compensation recoverable. Stone *v.* New York, 25 Wend. (N. Y.) 157.

75. New York *v.* Stone, 20 Wend. (N. Y.) 139 [*affirmed* in 25 Wend. 157].

76. Dawson *v.* Kuttner, 48 Ga. 133; New York *v.* Stone, 20 Wend. (N. Y.) 139 [*affirmed* in 25 Wend. 157].

A tenant or lessee may recover. Dawson *v.* Kuttner, 48 Ga. 133; New York *v.* Stone,

the mode prescribed.[77] But the right of such statutory compensation is not lost by insurance effected by the owner.[78] A municipal promise to pay made before destruction is valid and binding;[79] but the corporation is not liable for error of judgment of officers in the exercise of official discretion.[80]

l. **Prerequisite Notice to Corporate Action.**[81] Notice is not at common law a prerequisite to the exercise of the police power in case of emergency.[82] But in the absence of an actual emergency it seems that some notice is always required,[83] and indeed notice as a prerequisite to the exercise of police power is often required by statute or ordinance.[84] Notice pursuant to requirement of statute or by-law must be given by the prescribed authority,[85] and in the prescribed time and man-

20 Wend. (N. Y.) 139 [*affirmed* in 25 Wend. 157]. A tenant of a building thus destroyed is entitled to recover for his interest in the building. New York *v.* Lord, 18 Wend. (N. Y.) 126.

A person having no interest whatever in the building cannot recover. Russell *v.* New York, 2 Den. (N. Y.) 461.

77. Dunbar *v.* Augusta, 90 Ga. 390, 17 S. E. 907; Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433.

78. New York *v.* Stone, 20 Wend. (N. Y.) 139 [*affirmed* in 25 Wend. 157]. See also City F. Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Greenwald *v.* Insurance Co., 3 Phila. (Pa.) 323; and, generally, FIRE INSURANCE.

79. Richmond *v.* Smith, 15 Wall. (U. S.) 429, 21 L. ed. 200. See also Jones *v.* Richmond, 18 Gratt. (Va.) 517, 98 Am. Dec. 695.

Implied promise to pay.—The village would not be liable on the ground of an implied assumpsit. Aitken *v.* Wells River, 70 Vt. 308, 40 Atl. 829, 67 Am. St. Rep. 672, 41 L. R. A. 566.

80. O'Rourke *v.* New Orleans, 106 La. 313, 30 So. 837; White *v.* Charleston, 2 Hill (S. C.) 571.

81. Notice in proceeding to: Abate nuisance see *supra*, XI, A, 8, e, (II), (B), (C). Enforce ordinance see *infra*, XI, B.

82. Miller *v.* Valparaiso, 10 Ind. App. 22, 37 N. E. 418; Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361; Cole *v.* Kegler, 64 Iowa 59, 19 N. W. 843; Com. *v.* Cutler, Thach. Cr. Cas. (Mass.) 137; U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282, 34 How. Pr. 147. See *supra*, XI, A, 8, e, (II), (B).

83. See Louisville *v.* Webster, 108 Ill. 414; Cole *v.* Kegler, 64 Iowa 59, 19 N. W. 843; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282, 304, 34 How. Pr. 147, where it is said: "It may be considered a matter of grave doubt whether the legislature can constitutionally authorize any person or body, either upon their private opinion or *ex parte* evidence, to destroy property even under the pretext of the public good, without either providing for a hearing before condemnation or compensation."

"**Even in the case of a conflagration** raging so as to threaten to destroy property not yet on fire, it has been deemed necessary, in order to protect public officers, authorized to blow up intermediate buildings to prevent its spread, from the burden of establishing its necessity, to provide compensation for the owners of the property destroyed." Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282, 304, 34 How. Pr. 147.

84. *Illinois.*— Ward *v.* Murphysboro, 77 Ill. App. 549.

Maine.— Swett *v.* Sprague, 55 Me. 190.

Michigan.— People *v.* Bennett, 83 Mich. 457, 47 N. W. 250. See also Stretch *v.* Cassopolis, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 567, 51 L. R. A. 345.

Missouri.— Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; St. Louis *v.* Goebel, 32 Mo. 295.

New York.— New York Fire Dept. *v.* Williamson, 1 Rob. 476, 16 Abb. Pr. 402; Cushing *v.* Buffalo Bd. of Health, 13 N. Y. St. 783; Matter of Unsafe Bldg., 1 Abb. N. Cas. 464.

Pennsylvania.— Philadelphia *v.* Dungan, 124 Pa. St. 52, 16 Atl. 524; Easby *v.* Philadelphia, 67 Pa. St. 337.

Vermont.— Verder *v.* Ellsworth, 59 Vt. 354, 10 Atl. 89.

West Virginia.—Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1383.

Notice to remove trees.— A village, acting under the General Incorporation Act (Comp. Laws, c. 87), providing that villages may remove, cut down, or trim shade trees standing within the highway when public necessity demands, must give notice to an abutting owner that public necessity requires the removal of such trees, and give him an opportunity to transplant or remove them, before it can itself cut down and remove them. Stretch *v.* Cassopolis, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 567, 51 L. R. A. 345.

85. Vason *v.* Augusta, 38 Ga. 542. *Compare* State *v.* Ford, 36 La. Ann. 903, holding that where a police regulation empowers the mayor of a city to order the summary removal of an occupant from a house for certain causes, an occupant was not brought within the jurisdiction of the police court by failing to comply with an order of removal issued by a sergeant of police.

Need not run in name of state.— A summons in the nature of an order to show cause, issued by a town council to one charged with keeping a nuisance, not being a writ of process within the meaning of the constitution, need not run in the name of the

ner.[86] It must point out specifically the acts to be done or the defect to be remedied.[87] If essentials are not prescribed by law, then reasonable notice is sufficient.[88] The notice must be to the owner,[89] and records will control.[90] Only those notified will be bound.[91] Oral notice has been held sufficient in some cases;[92] so also notice posted on the premises;[93] but generally written notice served in person is required.[94]

m. Effect of Municipal Decisions and Acts, and Review Thereof — (I) *In General.* The effect of decisions and acts of municipal boards and officers in police regulation and the jurisdiction of courts to review and control them depends upon the nature of the power exercised, of the decisions made, and the acts done.[95]

(II) *In Exercise of Legislative Function Pursuant to Express Authority.* If it is a decision made or act done in the exercise of the legislative function pursuant to express authority, the discretion of the governing body to which the power is delegated is conclusive of the validity of the act or the decision, if duly performed or given, and the courts have no jurisdiction whatever in the premises.[96]

state. Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906.

86. New York Fire Dept. *v.* Williamson, 1 Rob. (N. Y.) 476, 16 Abb. Pr. 402.

87. Louisville *v.* Webster, 108 Ill. 414; Verder *v.* Ellsworth, 59 Vt. 354, 10 Atl. 89. See also Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; New York Fire Dept. *v.* Sturtevant, 33 Hun (N. Y.) 407; Matter of Unsafe Bldg., 1 Abb. N. Cas. (N. Y.) 464.

New notice.— If, pending proceedings to compel the erection of five fire-escapes, it is concluded that two are enough, a new notice must be given. New York Fire Dept. *v.* Sturtevant, 33 Hun (N. Y.) 407. Under N. Y. Laws (1871), p. 1334, c. 625, as amended by Laws (1874), p. 734, c. 547, the preliminary notice of the survey of an unsafe building, served on the owner, is the foundation of the jurisdiction of the court. Hence, on the trial of the truth of a report of the survey, which, in addition to the defect mentioned in the notice, embraced many particulars showing the general unsafe condition of the building, it was held that only the truth as to the defect mentioned in the notice could be tried, and that to compel repairs in other respects a new survey upon proper notice must be had. Matter of Unsafe Bldg., 1 Abb. N. Cas. (N. Y.) 464.

88. New York Fire Dept. *v.* Williamson, 1 Rob. (N. Y.) 476, 16 Abb. Pr. 402. See also Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906.

89. Portsmouth *v.* Snell, 8 N. H. 338, to "all owners residing in the town." See also Ward *v.* Murphysboro, 77 Ill. App. 549, holding that notice cannot be waived by the owner.

90. Philadelphia *v.* Dungan, 124 Pa. St. 52, 16 Atl. 524. In Swett *v.* Sprague, 55 Me. 190, it was held that the order of notice provided by statute relating to dangerous buildings, passed at a legal meeting of the mayor and aldermen, is legal, when the record shows that the mayor was present and participated in the proceedings; no separate action of the mayor being necessary. See also Easby *v.* Philadelphia, 67 Pa. St. 337, where it was said that the acts of assembly authorized the councils of Philadelphia by ordinance to require owners of docks in the Delaware and Schuylkill to cleanse them, and on default, after thirty days' notice, the city was to do the work and apportion the expense on owners of adjoining wharves, etc., according to the extent of the wharves, and to enter liens for the expense. The act of May 20, 1864, vested these powers in the port wardens, the liens to be collected by the city solicitor and claims filed to be governed by the same rules of evidence as those for the removal of nuisances by the board of health. It was held that the recital, in a claim for such work, that notice of an order by the wardens to cleanse the docks had been given was *prima facie* evidence that the order had been made.

91. Portsmouth *v.* Snell, 8 N. H. 338.

92. Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590, where verbal direction or written instruction to the fire chief constituted a sufficient order of removal to that official.

93. Cushing *v.* Buffalo Bd. of Health, 13 N. Y. St. 783.

94. St. Louis *v.* Goebel, 32 Mo. 295.

95. See *infra*, XI, A, 8, m, (II)-(IV).

96. Spring Valley Water Works *v.* Bryant, 52 Cal. 132; *Ex p.* Delaney, 43 Cal. 478; Rund *v.* Fowler, 142 Ind. 214, 41 N. E. 456; New York Fire Dept. *v.* Atlas Steamship Co., 106 N. Y. 566, 13 N. E. 329; Lancaster *v.* Telegraph Co., 3 Lanc. L. Rev. (Pa.) 164. *Compare* Childs *v.* Napheys, 112 Pa. St. 504, 4 Atl. 488.

In doubtful cases depending upon a variety of circumstances requiring judgment and discretion, the action of a municipality in declaring a thing to be a nuisance is conclusive. Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893; Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

(III) *Pursuant to General or Implied Power, Whether Legislative or Otherwise.* If the act or decision is in pursuance of general or implied power only, whether legislative or otherwise, the courts have jurisdiction to inquire into its reasonableness or validity;[97] but they indulge every presumption in favor thereof.[98]

(IV) *Under Either Express or Implied Power, But Not Legislative in Character.* Whenever the act or decision, whether under express or implied power, is not legislative in its character and is not made conclusive by statute, the courts have jurisdiction to examine and decide upon its validity, either on statutory review or appeal, if given,[99] or by certiorari at common law,[1] under the same favorable presumptions.[2]

(V) *Want of Jurisdiction and Unconstitutionality.* In all cases the courts may inquire and decide by certiorari whether the decision or act is lawful, that is, whether given or made by an officer or body having jurisdiction,[3] and in the manner required,[4] and whether it contravenes constitution, statute, or charter.[5]

(VI) *Injunction.* Injunction may be invoked under the rules hereinbefore given.[6]

The decision as to how a nuisance shall be removed is conclusive, unless the powers conferred by the city charter are transcended or the constitution is violated. Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

Decision of building inspectors.— Pa. Act, May 20, 1857 (Pamphl. Laws 590), provides that it shall be the duty of the inspectors of buildings of the city of Philadelphia, upon the application of any person about to erect on his lot any new building, to examine all party or division walls upon or adjoining the lot, and, if deemed insufficient and unfit for the purpose of such new building about to be erected, such party or division walls shall be taken down by the last builder. A wall was condemned by the inspectors under this act, but the owner refusing to take it down or permit the new builder to do so, the latter applied to the common pleas court for an order to enforce the decision of the inspectors. The owner objected that there was no proof of the allegations of fact contained in the application, and no affidavits of the inspectors setting out a violation of their order. It was held that the court had power, under its general equity jurisdiction, to enforce compliance with the order of the inspectors, and the remedy under the act of 1857 being summary, and the inspectors' decision final and conclusive, it could not be reviewed in the common pleas, and therefore proof of the facts on which the inspectors had acted, and their affidavit as to the violation of their order, were unnecessary. Childs *v.* Napheys, 112 Pa. St. 504, 4 Atl. 488.

97. Chamber *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768.

98. Montgomery *v.* Hutchinson, 13 Ala. 573; Burlington *v.* Putnam Ins. Co., 31 Iowa 102.

99. Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203; New York City Fire Dept. *v.* Gilmour, 149 N. Y. 453, 44 N. E. 177, 52 Am. St. Rep. 748 [*affirming* 4 Misc. 202, 23 N. Y. Suppl. 1022].

Appeal generally see Appeal and Error, 2 Cyc. 474.

Charter or statutory power must be strictly pursued.— Where a city charter authorized the council to refuse a license to keep an ordinary, and authorized a party to whom a license was refused to apply to the county court for the same, it was held that where the council laid a tax which was unjust, excessive, and illegal, such act must be considered as an exercise of its charter power, and that the exercise of such power cannot be controlled by the circuit court by mandamus, or otherwise, the only remedy in such a case being by an application made to the county court. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292.

1. Cole *v.* Kegler, 64 Iowa 59, 19 N. W. 843; Matter of Lauterjung, 48 N. Y. Super. Ct. 308.

Certiorari generally see Certiorari, 6 Cyc. 730.

2. See *supra*, note 98.

3. Cole *v.* Kegler, 64 Iowa 59, 19 N. W. 843.

Certiorari: Generally see Certiorari, 6 Cyc. 730. To review proceedings to enforce ordinances see *infra*, XI, B, 4, s.

4. Matter of Lauterjung, 48 N. Y. Super. Ct. 308.

5. Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

6. See *supra*, XI, A, 8, f. See also Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361; Jackson *v.* Miller, 69 N. J. Eq. 182, 60 Atl. 1019; Tribune Assoc. *v.* Sun Printing, etc., Assoc., 7 Hun (N. Y.) 175. But *compare* Aronheimer *v.* Stokley, 11 Phila. (Pa.) 293, 2 Wkly. Notes Cas. 723, where on a bill for an injunction to prevent the mayor from tearing down certain buildings, it appearing that the complainants had erected wooden buildings in a portion of the city where such buildings were prohibited by ordinance; that the mayor and chief of police gave notice that, unless the buildings were taken down, they would be torn down and that such remedy was not

B. Violation and Enforcement of Ordinances and Regulations[7] — **1. What Constitutes a Violation — a. In General.** Under the rules of strict construction applicable to penal ordinances,[8] it is essential to recovery or conviction that the person and the act shall both be brought by proof within the letter as well as the spirit of the by-law.[9] Intent when essential must be proved and proved as charged.[10] But the charges and proof of the facts in the terms of the

expressly provided for in the ordinances, injunction was refused.

7. Violation of: Market regulations see *infra*, XII, A, 3. Ordinances as conclusive evidence or strong evidence of negligence see *infra*, XI, B, 5; and also *infra*, XIV, D, 7, d.

Use of false weights, etc., see Weights and Measures.

8. See *supra*, VI, L.

9. *Delaware.*— Homewood *v.* Wilmington, 5 Houst. 123.

District of Columbia.— Barnes *v.* District of Columbia, 24 App. Cas. 458.

Georgia.— Kahn *v.* Macon, 95 Ga. 419, 22 S. E. 641. See also Savannah Lighterage, etc., Co. *v.* Savannah, 112 Ga. 189, 37 S. E. 424.

Indiana.— See Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 246, 39 N. E. 943; Goshen *v.* Crary, 58 Ind. 268. See also Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759.

Iowa.— See State *v.* Smith, 123 Iowa 654, 96 N. W. 899.

Kentucky.— See Stromburg *v.* Earick, 6 B. Mon. 578.

Louisiana.— State *v.* Finnegan, 52 La. Ann. 694, 27 So. 564, holding that the conviction of defendant under a city ordinance for peddling vegetables within six blocks of the market square, and for keeping a private market, was erroneous where there was no evidence that he was a peddler, and where he did not keep a private market. Duncan *v.* Labouisse, 9 La. Ann. 49.

Missouri.— See St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731, holding that under St. Louis Rev. Ord. art. 17,188, § 981, one could not be held liable for a trespass committed within a building, since the provisions of the ordinance plainly showed that it applied to land, and not to buildings.

New Jersey.— Atlantic City *v.* Turner, 67 N. J. L. 520, 51 Atl. 691; Hoffman *v.* Jersey City, 34 N. J. L. 172. See also Harris *v.* Atlantic City, 73 N. J. L. 251, 62 Atl. 995; Glen Ridge *v.* Werner, 67 N. J. L. 103, 50 Atl. 585.

New York.— Buffalo *v.* Mulchady, Sheld. 431. See also Niagara Falls *v.* Salt, 45 Hun 41; New York Fire Dept. *v.* Braender, 14 Daly 53, 3 N. Y. St. 580; Sturgis *v.* Grau, 39 Misc. 330, 79 N. Y. Suppl. 843; New York *v.* Staples, 6 Cow. 169.

North Carolina.—See Washington *v.* Frank, 46 N. C. 436.

North Dakota.—Gagnier *v.* Fargo, 11 N. D. 73, 88 N. W. 1030, 95 Am. St. Rep. 705.

Ohio.— Heminger *v.* Cleveland, 2 Ohio Dec. (Reprint) 428, 3 West. L. Month. 46. See also Kraft *v.* Cincinnati, 6 Ohio S. & C. Pl. Dec. 8, 3 Ohio N. P. 195.

Pennsylvania.— Northern Liberties *v.* O'Neill, 1 Phila. 427. See also Heidenwag *v.* Philadelphia, 168 Pa. St. 72, 31 Atl. 1063; Philadelphia *v.* Costello, 17 Pa. Super. Ct. 339; Lancaster *v.* Baer, 5 Lanc. Bar Dec. 6, 1873.

South Carolina.— See Charleston *v.* Elford, 1 McMull. 234.

Tennessee.— Gass *v.* Greeneville, 4 Sneed 62.

United States.— Washington *v.* Wheat, 29 Fed. Cas. No. 17,238, 1 Cranch C. C. 410.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1386.

Advertising by circulars is not prohibited by an ordinance forbidding the casting thereof in vestibules of dwellings, addressed envelopes being expressly excepted, and delivery to individuals not being forbidden. Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220; Philadelphia *v.* Costello, 17 Pa. Super. Ct. 339.

An ordinance prohibiting the firing of guns within a city is not violated by firing for the protection of life, person, or property. Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

Escape of smoke.— In an action to recover the penalty provided by Greater New York Charter, § 1222, for the violation of Sanitary Code, § 134, by allowing smoke to escape or be discharged from defendant's premises, recovery cannot be had on simple proof that smoke did escape, where it is not shown that it was detrimental or annoying to any person. New York Health Dept. *v.* Philip, etc., Brewing Co., 38 Misc. (N. Y.) 537, 78 N. Y. Suppl. 13.

Violation of state statute.— A municipal corporation cannot maintain a suit for the violation of one of the criminal statutes of the state. McMinnville *v.* Stroud, 109 Tenn. 569, 72 S. W. 949.

Where license has expired.— Under a municipal ordinance, requiring that each vendor of milk take out a certificate and post the number thereof on his vehicle, and penalizing any person who held himself out as possessing such certificate without having taken out the same or after the same had expired or been revoked, no penalty could be inflicted on one whose certificate had expired, and who continued the sale of milk without holding himself out as having taken out a certificate, but denying that he could be compelled to secure a certificate. Gloversville *v.* Enos, 70 N. Y. App. Div. 326, 75 N. Y. Suppl. 245 [*reversing* 35 Misc. 724, 72 N. Y. Suppl. 398].

10. Kansas City *v.* Young, 85 Mo. App. 381, holding that where an ordinance prohibits the erection of a fence or structure for

ordinance is sufficient,[11] although a single act is not sufficient to prove that the actor is "engaging in or doing business."[12]

b. Of Building Regulations[13] — (I) *In General.* Two distinct lines of cases are traceable on violations of building regulations: (1) The rule of strict construction;[14] and (2) the rule of liberal construction.[15]

(II) *Strict Construction Rule.* The Connecticut rule is the rule of strict construction under which "erect" or "build" does not include rebuilding, addition, removal, or conversion,[16] and repair is not the equivalent of change, rebuild, or addition,[17] for repairing, being an inherent right, cannot be prohibited.[18]

(III) *Liberal Construction Rule.* The Pennsylvania rule is the rule of liberal interpretation, whereby any material change in structure, either in substance or appearance, is held to amount to erection or building.[19] Repairs, how-

the purpose of annoyance or injury to another, it is not sufficient to prove the erection of the structure, but the evidence must show the specific intent to make out the offense. See also Koppersmith *v.* State, 51 Ala. 6.

Intent not necessary.—Where an ordinance prescribes a penalty for the use of a false balance, without any requirement of proof of intent or guilty knowledge, such proof is not essential in an action to recover the penalty. New York *v.* Hewitt, 91 N. Y. App. Div. 445, 86 N. Y. Suppl. 832.

11. Northern Liberties *v.* O'Neill, 1 Phila. (Pa.) 427. See also Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200; Charleston *v.* Elford, 1 McMull. (S. C.) 234.

Illustrations.— One who, acting for a corporation, collects more than the maximum rate fixed by ordinance for gas service, is guilty of a violation of the ordinance declaring it a misdemeanor to "collect or receive" a sum in excess of the prescribed rate. Denninger *v.* Pomona Recorder's Ct., 145 Cal. 629, 79 Pac. 360. To warrant a conviction under an ordinance for loitering on the streets, it is not necessary to prove that accused is without property or means of support. Taylor *v.* Sandersville, 118 Ga. 63, 44 S. E. 845. Where corn was sold for grinding at a roller mill within the corporate limits of a city, it was within a city ordinance requiring corn sold for consumption within the city to be weighed on the city scale. State *v.* Smith, 123 Iowa 654, 96 N. W. 899. An ordinance prohibited collecting a crowd in the streets, to the hindrance of free and unmolested travel. Accused drew a crowd of from fifty to seventy people to hear him deliver a public speech. The street was about sixty-five feet wide. The crowd mostly collected at one side, leaving a passageway wide enough for a horse and carriage on the other. It was held that the evidence supported a finding of a violation of the ordinance. People *v.* Pierce, 85 N. Y. App. Div. 125, 83 N. Y. Suppl. 79.

12. East St. Louis *v.* Bux, 43 Ill. App. 276; St. Paul *v.* Smith, 25 Minn. 372.

13. **Violation of building regulations by contract** see Builders and Architects; Contracts.

14. See *infra*, XI, B, 1, b, (II).

15. See *infra*, XI, B, 1, b, (III).

16. Brown *v.* Hunn, 27 Conn. 332, 71 Am. Dec. 71; Booth *v.* State, 4 Conn. 65; Daggett *v.* State, 4 Conn. 60, 10 Am. Dec. 100.

Right to remove building erected prior to ordinance.— Where a city has by ordinance prohibited the erection of a wooden building over ten feet high within certain prescribed boundaries, the owner of such a building, erected within the limits fixed prior to the passage of the ordinance, may lawfully move it from one lot to another within the prescribed boundaries. Cleveland *v.* Lenze, 27 Ohio St. 383.

Placing brick wall around wooden frame.— Where an addition to a building is constructed by erecting a wooden frame, and then placing a wall of brick around the frame, with piers and layers of brick, by which the wall is strengthened and the roof supported, such addition is within the statute prohibiting the erection of wooden buildings, so as to secure the city of New Haven from damages by fire. Tuttle *v.* State, 4 Conn. 68.

17. Stamford *v.* Studwell, 60 Conn. 85, 21 Atl. 101; Tuttle *v.* State, 4 Conn. 68.

18. Tuttle *v.* State, 4 Conn. 68. See also Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

House accidentally destroyed in part.— Under laws providing that no building or premises should be altered or enlarged without the consent of the selectmen, the owner of a slaughter-house, which had been occupied as such prior to the passage of the statute, and a part of which had been accidentally destroyed by fire after the passage of such statute, may rebuild the part destroyed without consent of the selectmen. Watertown *v.* Sawyer, 109 Mass. 320.

19. Brice's Appeal, 89 Pa. St. 85; Douglass *v.* Com., 2 Rawle (Pa.) 262; Morrow *v.* Lancaster, 10 Lanc. Bar (Pa.) 193; Shultz *v.* Wireman, 4 Phila. (Pa.) 121. See also Delione *v.* Long Branch Com'rs, 55 N. J. L. 108, 25 Atl. 274.

Building a new kitchen in the rear of, and as an addition to, an old dwelling may be deemed a violation of an ordinance forbidding the "erection of a building" in certain localities. Delione *v.* Long Branch Com'rs, 55 N. J. L. 108, 25 Atl. 274.

Adding a story to a house heretofore erected is erecting a building, within the meaning of an ordinance providing that no

ever, do not constitute a material change even within the liberal construction rule.[20]

(iv) *Question of Fact For Jury.* Other cases between these extremes make it a question of fact for the jury to decide whether what has been done amounts to an "erection" or a "building" contrary to law.[21]

(v) *Miscellaneous.* Among other things concerning violations of building regulations,[22] as to which there seems to be no conflict of authority, the decisions agree that completion of the structure is not essential to the offense, but that the law is violated when the building has proceeded so far as by actual erection to demonstrate the doing of the act forbidden;[23] but that plans approved are not equivalent to work begun;[24] and that any material departure from the terms imposed by the ordinance will constitute a violation thereof.[25] A requirement of a front space of certain dimensions is satisfied by such open space on any public place;[26] but it must be entirely free from the building.[27] A compliance with a

person shall erect any building in the city outside the fire limits, and within thirty feet of any building not his own, except of such materials as are allowed for building within the limits. Carroll *v.* Lynchburg, 84 Va. 803, 6 S. E. 133.

Material alterations in a wooden building located within fire limits, so as to enlarge its dimensions, was within the provisions of the New York act of April 9, 1823, providing for more effectual prevention of fire in New York. People *v.* Marley, 2 Wheel. Cr. (N. Y.) 74.

20. Contas *v.* Bradford, 206 Pa. St. 291, 55 Atl. 989, holding that where a city ordinance provided that within certain limits no buildings should be "constructed or reconstructed," except of incombustible materials, a change in a wooden building by putting in a new front of galvanized iron and ceiling of steel and roof of slate, and an increase of height of six feet and two inches, is not affected thereby, the words "constructed or reconstructed" not prohibiting an owner from repairing his wooden buildings standing within such fire limits.

Where an ordinance prohibited the repair of frame buildings with materials or in a manner making them more susceptible to fire, the alteration of a straight glass front in a frame store building so as to make an alcove or vestibule entrance, and change of a side composed of board siding to plate glass, was not a violation of the ordinance. O'Brien *v.* Louer, 158 Ind. 211, 61 N. E. 1004.

21. Glenn *v.* Baltimore, 5 Gill & J. (Md.) 424. See also Delione *v.* Long Branch Com'rs, 55 N. J. L. 108, 25 Atl. 274.

22. See cases cited *infra*, this note.

Awnings.— A city ordinance provided that "no areas, steps, courtyards, or other projections, except show windows, not exceeding eighteen inches in width, and signs not projecting more than twelve inches from the house line shall hereafter be built" on a certain street. It was held that a stationary ornamental awning, projecting five feet from the house line, was within the inhibition of the ordinance. New York *v.* Otto Sarony Co., 42 Misc. (N. Y.) 547, 86 N. Y. Suppl. 27.

Making entrance from store to adjoining theater.— Where the proprietor of a store cuts a door in a partition wall between his store and the entrance of an adjoining theater, without applying for or obtaining a permit from the building inspector, he is properly convicted in the police court of violating Building Regulations (1897), § 182, relating to theater entrances and their construction, and is also guilty of violating section 20 of the same regulations, which requires the building inspector to determine whether an intended repair to a building is such as to require a formal permit. Mertz *v.* District of Columbia, 18 App. Cas. (D. C.) 434.

23. Com. *v.* Cutler, Thach. Cr. Cas. (Mass.) 137; Langdon *v.* New York Fire Dept., 17 Wend. (N. Y.) 234; Philadelphia *v.* Coulston, 13 Phila. (Pa.) 182.

24. New York *v.* Herdje, 68 N. Y. App. Div. 370, 74 N. Y. Suppl. 104.

25. Campion *v.* Buffalo, 8 N. Y. St. 329.

Requirement of entrance on street.— A house consisting of two stories, eight rooms in each, with separate flues and no cellar, the rooms being about ten feet square and opening upon a hallway, the hallway, as well as one of the rooms, opening upon the street, is not an evasion of the act of April 21, 1851, requiring every dwelling-house to have an entrance on the street. *In re* Building Inspectors, 4 Pa. Co. Ct. 477.

26. Garrett *v.* Janes, 65 Md. 260, 3 Atl. 597.

27. Philadelphia *v.* Brown, 9 Pa. Co. Ct. 670.

Under the Pennsylvania act of April 21, 1855, which requires that no new dwelling-house or other structure within the city of Philadelphia shall front on any street, alley, or court which shall be of less width than twenty feet, and that every new dwelling-house shall have an open space to it in the rear or at the side equal to at least twelve feet square, cannot be evaded by building a house with an alley at the side, but so divided and arranged as to constitute in reality a row of houses, fronting on the alley. Eichel *v.* Zimmerman, 17 Phila. (Pa.) 290. An alley connecting with the lot at its end, and having its main uses as a passageway to another alley, cannot be included in computing the twelve feet square of open space as required

previous by-law is no excuse for non-compliance with a new building regulation.[28] Hotels are not "dwelling-houses,"[29] but dwelling-houses are none the less such for being used in part as stores.[30] A building with a chimney and fireplace therein does not include a carriage house.[31] Buildings having trussed roofs, such as churches, public halls, and the like, include a rolling mill with a trussed roof.[32] A mere roof on posts is not a "building,"[33] and it seems that a building part wood and part brick is not a wooden building.[34]

c. Of Regulations as to Keeping and Use of Animals. A dog or a horse is "at large" if loose in a public place out of the immediate presence of his owner or keeper;[35] or it seems if tied at a stake in the street to graze;[36] but negligence of the owner is not the equivalent of permission.[37] Cattle or other animals herded on private premises are not "running at large";[38] nor are they so even though loose on the street, if under the control of their owner, a shepherd, or herdsman.[39]

2. Who Liable. All persons participating in the breach of a municipal ordinance are guilty as principals,[40] and are jointly and severally liable, whether the action is civil or criminal.[41] For nuisances on premises, the lessor or lessee is

by such act. Zimmerman *v.* Heid, 5 Pa. Co. Ct. 520. "Front," in the act, did not extend to a building which had its front on the main street, with a side on the alley, and the act did not include private alleys. Guarantee Trust, etc., Co. *v.* Philadelphia, 30 Leg. Int. (Pa.) 240. A building erected on a corner lot "fronts upon" both streets or alleys on which it bounds, and such streets or alleys must be of the width required. Philadelphia *v.* Michener, 10 Phila. (Pa.) 30. A tenement divided by partitions into several separate buildings, one fronting on a street and the others on an alley of not more than seven feet wide, with no space in the rear and only one of which has a side open space, is erected in violation of such provisions. Schultz *v.* Doak, 4 Phila. (Pa.) 151.

28. New York Fire Dept. *v.* Chapman, 10 Daly (N. Y.) 377.

29. People *v.* D'Oench, 111 N. Y. 359, 18 N. E. 862, within the meaning of N. Y. Laws (1885), c. 454, providing that "the height of all dwelling houses, and of all houses used or intended to be used as dwellings for more than one family," thereafter to be erected in New York city, shall not exceed eighty feet in streets exceeding sixty feet in width.

30. New York Fire Dept. *v.* Buhler, 1 Daly (N. Y.) 391.

31. Townsend *v.* Hoadley, 12 Conn. 541.

32. Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 11 Atl. 189, (1887) 8 Atl. 368.

33. Zimmerman *v.* Saam, 6 Pa. Co. Ct. 318, within the meaning of an ordinance prohibiting the erection of a wooden, frame, or other building, the walls whereof are not composed wholly of incombustible materials, within certain designated wards and districts.

34. Stewart *v.* Com., 10 Watts (Pa.) 306.

35. Com. *v.* Dow, 10 Metc. (Mass.) 382; Allen *v.* Hazzard, 33 Tex. Civ. App. 523, 77 S. W. 268; Moore *v.* Crenshaw, 1 Tex. App. Civ. Cas. § 264.

A horse returning to its stable, unattended, is "running at large," within the meaning of an ordinance making it unlawful for horses to run at large, notwithstanding the horse has been accustomed and trained to return to the stable after being turned loose. Allen *v.* Hazzard, 33 Tex. Civ. App. 523, 77 S. W. 268.

36. Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732.

37. Decker *v.* McSorley, 116 Wis. 643, 93 N. W. 808, holding that under an ordinance providing that "no horse shall be permitted to run at large in the city," and that any person "who shall permit the same" to so run at large shall be punished, negligence in not securing the horse from escape does not constitute a violation of the ordinance, but the horse must be at large with the knowledge and assent or permission of the owner.

38. State *v.* Johnson, 41 Minn. 111, 42 N. W. 786.

"Domestic animals" as used in an ordinance which required every person keeping certain domestic animals named "within the limits of the town" to keep them on his own premises, except when temporarily passing through the streets, etc., was held to have no application to animals running at large on the common range outside the limits of the town which might stray within such limits. Red Lodge *v.* Maryott, 33 Mont. 299, 83 Pac. 485.

39. Spect *v.* Arnold, 52 Cal. 455.

40. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731. *Compare* Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29.

41. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731. See Douglass *v.* Com., 2 Rawle (Pa.) 262 (holding that indictment against tenant need not be against the owner of the wooden building); Charleston *v.* England, 3 Hill (S. C.) 56 (holding that the owner of slaves was not released by reason of the fact that he had hired them to another). See also Criminal Law, 12 Cyc. 183 *et seq.*

This rule applies to actions for penalties for breaches of ordinances, although recoverable, by force of the statute, only by a civil action. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

liable according as it is of permanent or temporary nature.[42] But a contractor is not liable for a penalty denounced against the owner.[43]

3. DEFENSES.[44] Neither violations by others with impunity,[45] nor belief that a by-law was invalid,[46] or unwise, inexpedient, or unnecessary,[47] nor ignorance of it,[48] nor the order of a superior,[49] nor negligence of the corporation,[50] nor a subsequent permit,[51] nor an invalid or fraudulent one,[52] nor compliance with a previous by-law relating to the same subject,[53] nor the smallness of the violation [54] is a valid defense. Defendant in a proceeding to enforce a penalty annexed to the violation of an ordinance prohibiting a nuisance cannot defend on the ground that it

42. Shields *v.* Savannah, 20 Ga. 57; St. Louis *v.* Kaime, 2 Mo. App. 66; New York *v.* Corlies, 2 Sandf. (N. Y.) 301. *Compare* Charleston *v.* Blake, 12 Rich. (S. C.) 66. See also, generally, LANDLORD AND TENANT, 24 Cyc. 845; NUISANCES.

43. Glen Ridge Bd. of Health *v.* Werner, 67 N. J. L. 103, 50 Atl. 585, holding that an ordinance which imposes a penalty for failure to file with the secretary of the board of health a plan of the contemplated plumbing work, "signed by the owner," will not be held to impose a liability to such a penalty on the plumber who may be engaged by the owner to do the work.

44. Answer, plea, or demurrer see *infra*, XI, B, 4, k.

45. People *v.* Gardner, 143 Mich. 104, 106 N. W. 541; Centralia *v.* Smith, 103 Mo. App. 438, 77 S. W. 488; Port Jervis *v.* Close, 2 Silv. Sup. (N. Y.) 501, 6 N. Y. Suppl. 211; Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330; Charleston *v.* Reed, 27 W. Va. 681, 55 Am. Rep. 336.

That the city officers have failed in some instances to enforce an ordinance licensing hawkers and peddlers is no defense to a charge of violating the ordinance. People *v.* Baker, 115 Mich. 199, 73 N. W. 115.

Participation or authorization of mayor of the city has been held to be no excuse. Centralia *v.* Smith, 103 Mo. App. 438, 77 S. W. 488; Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.

Ambiguity of ordinance.— Where a municipal ordinance prohibiting buildings of a certain character from being erected within the fire limits is of ambiguous meaning, it is competent to show the ordinary construction placed upon it to aid in its construction, but if its meaning is unambiguous, that it may have been repeatedly violated without objection will furnish no defense to one who violates it. Sylvania *v.* Hilton, 123 Ga. 754, 51 S. E. 744, 107 Am. St. Rep. 162, 2 L. R. A. N. S. 483.

46. Gilberts *v.* Rabe, 49 Ill. App. 418. *Compare* Centralia *v.* Smith, 103 Mo. App. 438, 77 S. W. 488, where it was held to be no defense to a prosecution for violating a city ordinance, prohibiting the explosion of firecrackers, that the citizens advertised and had a Fourth of July celebration on the occasion of defendant's violation of the ordinance, and defendant thought that shooting firecrackers was in keeping with the occasion.

47. Pittsburg *v.* W. H. Keech Co., 21 Pa. Super. Ct. 548. See Westmount *v.* McKim, 5 Quebec Pr. 134, holding that the fact that a by-law was enacted against the advice of the corporation council was immaterial.

48. Centralia *v.* Smith, 103 Mo. App. 438, 77 S. W. 488.

49. Duluth *v.* Mallett, 43 Minn. 204, 45 N. W. 154.

50. People *v.* Gardner, 143 Mich. 104, 106 N. W. 541; Alexander *v.* Greenville, 54 Miss. 659. See also People *v.* Baker, 115 Mich. 199, 73 N. W. 115. But *compare infra*, text and note 60.

Other ordinance imposing duty on city.— It was no defense to a prosecution, under a city ordinance providing that no owner or occupant of land abutting on a private way shall suffer any filth to remain on that part of the way adjoining his land, that another ordinance forbids any one removing filth or refuse matter through the streets without a permit from the board of health, as Rev. Ord. (1890) c. 19, makes it the duty of the sanitary police to remove "all noxious refuse substances from yards and areas, when so placed as to be easily removed." Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146.

51. Clark *v.* Elizabeth Fire Dept., 43 N. J. L. 172.

52. Grayson *v.* Gas Co., 4 Lanc. L. Rev. (Pa.) 41. See Troy *v.* Winters, 4 Thomps. & C. (N. Y.) 256, which was an action by a city for violation of an ordinance forbidding the erection of wooden buildings within certain limits. Defendant claimed that he had the consent of the common council to erect such building. It appeared that notice of defendant's application for consent had not been published in the manner required. Defendant offered to show that his application had been referred by the common council to a committee with power; but the consent given by the committee was not signed by all the members of the committee. It was held that the offer was properly rejected. Troy *v.* Winters, 4 Thomps. & C. (N. Y.) 256.

Order of mayor and aldermen.— In an action by the fire department to recover a penalty for keeping gunpowder, an order of the mayor and two aldermen, directing it to be restored to the owner, is not such an adjudication as may be given in evidence in bar of the suit. Talmage *v.* New York Fire Dept., 24 Wend. (N. Y.) 235.

53. New York Fire Dept. *v.* Chapman, 10 Daly (N. Y.) 377.

54. Charleston *v.* Palmer, 1 McCord (S. C.) 342.

was not a nuisance in fact;[55] nor can a licensee in an action to recover a license-fee defend on the ground that the inspection, supervision, or police surveillance for which the fee was imposed had caused no expense to the municipality.[56] On the other hand, the following among others[57] have been held to be valid defenses: That the act complained of was not within the prohibition of the ordinance[58] or was expressly excepted therefrom;[59] the failure of the municipality to do its duty in the premises whereby defendant is denied power to comply with the ordinance;[60] the fire commissioners' certificate of approval to a prosecution for insufficient fire-escapes;[61] a valid dram-shop license to an action for unlawful liquor selling, although revoked;[62] and a contravening statute, although not a justification for the act.[63] And it seems that the silence and tacit consent of the municipality while defendant was incurring great expense in erecting the building for the forbidden purpose defeats the prosecution.[64] The validity of the ordinance may, however, always be contested.[65]

4. Proceedings to Enforce[66] — a. In General. As has been seen violations of police regulations are usually punished by fine,[67] imprisonment,[68] or both fine and imprisonment,[69] or by the imposition of some penalty,[70] for violations of the ordinances. Municipal penalties for violation of police regulations may be imposed directly by charter or statute,[71] or by ordinance under delegated power.[72] And

55. Pittsburg *v.* W. H. Keech Co., 21 Pa. Super. Ct. 548, nor on the ground that the enactment of the ordinance was unwise, inexpedient, or unnecessary.

56. New Hope Borough *v.* Western Union Tel. Co., 16 Pa. Super. Ct. 306.

57. Defenses in: Action for fine or penalty generally see FINES; PENALTIES. Prosecution for crime generally see CRIMINAL LAW.

58. See *supra*, XI, B, 1, 2. See also Savannah Lighterage, etc., Co. *v.* Savannah, 112 Ga. 189, 37 S. E. 424; Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759.

59. See *supra*, XI, B, 1, 2. See also Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220; Philadelphia *v.* Costello, 17 Pa. Super. Ct. 339.

60. Savannah Lighterage, etc., Co. *v.* Savannah, 112 Ga. 189, 37 S. E. 424; Kraft *v.* Cincinnati, 6 Ohio S. & C. Pl. Dec. 8, 3 Ohio N. P. 195.

Unreasonable order of policeman.— Where the driver of a public vehicle, while in front of a hotel, was not disorderly and not obstructing the street, but was ordered by a policeman to remove his vehicle to the opposite side of the street, although two hotel carriages also standing in front of the hotel were not required to move, and the only reason given by the policeman for the order was "complaints of the management of the hotel of hacks in general, and the driver in question in particular," it was held that a conviction of the driver in the police court was improper; the order to move being arbitrary and unreasonable. Barnes *v.* District of Columbia, 24 App. Cas. (D. C.) 458.

Mere negligence of municipality will not suffice. See *supra*, text and note 50.

61. Com. *v.* Emsley, 5 Pa. Co. Ct. 476.

62. Martel *v.* East St. Louis, 94 Ill. 67.

63. State *v.* Morris, 47 La. Ann. 1660, 18 So. 710.

64. Athens *v.* Georgia R. Co., 72 Ga. 800.

65. State *v.* Morris, 47 La. Ann. 1660, 18 So. 710; State *v.* Earle, 66 S. C. 194, 44 S. E. 781.

Validity of ordinance see *supra*, VI, G; XI, A, 8, m.

66. Enforcement in admiralty see ADMIRALTY.

Injunction to restrain enforcement see INJUNCTIONS, 22 Cyc. 891.

Liability for failure to enforce see *infra*, XIV, A, 5, b.

Liability for tortious enforcement see *infra*, XIV, A.

Mandamus to compel enforcement see, generally, MANDAMUS.

67. See *supra*, XI, A, 8, g; *infra*, XI, B, 4, q, (II)–(IV).

By fine see FINES, 19 Cyc. 544 *et seq.*

Recovery and imposition of fines generally see FINES, 19 Cyc. 545 *et seq.*

68. See *supra*, XI, A, 8, g; *infra*, XI, B, 4, q, (III)–(V).

By imprisonment see FINES, 19 Cyc. 551.

Imprisonment for non-payment of fine see FINES, 19 Cyc. 551 *et seq.*

69. See *supra*, XI, A, 8, g; *infra*, XI, B, 4, q, (III).

By both fine and imprisonment see FINES, 19 Cyc. 553.

70. See *supra*, XI, A, 8, g; *infra*, XI, B, 4, q.

Penalty generally see PENALTIES.

Recovery of penalty see PENALTIES; and *infra*, XI, B, 4, h, *et seq.*

71. Harris *v.* Augusta, 100 Ga. 382, 28 S. E. 161. See also State *v.* McCulla, 16 R. I. 196, 14 Atl. 81; and *supra*, XI, A, 8, g.

72. King *v.* Jacksonville, 3 Ill. 305. *Compare* New York *v.* Third Avenue R. Co., 33 N. Y. 42, holding that the penalty imposed by a city council for non-compliance with an ordinance requiring city railroad companies to pay a license-fee on each car cannot be enforced where the ordinance requiring the fee was not authorized by the city charter. See also *supra*, XI, A, 8, g.

within reasonable limits discretion as to amount may be allowed to the court.[73] But an unauthorized penalty is void.[74] And in some states the penalty must be certain and fixed.[75] A penalty cannot arise by implication, however obvious, but must be expressly imposed;[76] but the ordinance cannot prescribe a greater punishment than authorized by statute or charter;[77] and this inhibition includes the imprisonment for non-payment of fine.[78] However, no judgment can be pronounced *in personam*,[79] either for the recovery of the penalty affixed or for the infliction of the punishment imposed, except through some judicial proceeding.[80] Police ordinances may not be otherwise enforced than is plainly authorized and provided;[81] and when the charter prescribes the particular manner in which ordinances are to be enforced that method is exclusive.[82] Where the same act is punishable both by statute and a void by-law a conviction under the latter has been held to be good under the former.[83] So where a void by-law has been validated by statute the prosecution should be under the former, not the latter.[84]

b. Nature and Form of Proceeding. The proceedings for violation of municipal ordinances are variously viewed in the courts of the several states.[85] The pre-

73. Atlantic City *v.* Crandol, 67 N. J. L. 488, 51 Atl. 447. See *infra*, XI, B, 4, q, (VII).

Delegation of judicial discretion see *supra*, XI, A, 3, a.

74. Ford *v.* Denver, 10 Colo. App. 500, 51 Pac. 1015; *In re* Semple, 10 Kan. App. 155, 62 Pac. 534. See *supra*, XI, A, 8, g; *infra*, XI, B, 4, q.

75. State *v.* Babcock, 112 Iowa 250, 83 N. W. 908; State *v.* Irvin, 126 N. C. 989, 35 S. E. 430. See *supra*, XI, A, 8, g.

76. New York Fire Dept. *v.* Braender, 14 Daly (N. Y.) 53, 3 N. Y. St. 580. See also Singer *v.* Philadelphia, 112 Pa. St. 410, 4 Atl. 28. See also *supra*, XI, A, 8, g.

77. State *v.* Voss, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653; State *v.* Arnauld, 49 La. Ann. 104, 21 So. 177. See also *supra*, XI, A, 8, g.

78. Ogden *v.* Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506. See also Thomas *v.* Ashland, 12 Ohio St. 124, where the sentence to imprisonment by the mayor was held to be illegal.

Right to arrest.—A law authorizing a municipal corporation to recover a fine for breach of a police regulation does not, without express provision therefor, authorize the arrest and criminal prosecution of the offender. State *v.* Ruff, 30 La. Ann. 497.

79. **Summary exercise of police power** see *supra*, XI, A, 8, e, h, k.

80. Ingersoll Pub. Corp. 371. See also Brookville *v.* Gagle, 73 Ind. 117; Lanfear *v.* New Orleans, 4 La. 97, 23 Am. Dec. 477; Meaher *v.* Chattanooga, 1 Head (Tenn.) 74; State *v.* Lockwood, 43 Wis. 403; and cases cited *infra*, XI, B, 4, p, (I).

81. Clark *v.* New Brunswick, 43 N. J. L. 175; Newark *v.* Murphy, 40 N. J. L. 145, 148 (where it is said: "The charter has designated a method for the enforcement of these ordinances, and that method must be pursued"); Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873. See also Rex *v.* Croke, Cowp. 27.

Action not known to the law.—A judgment for a penalty will be reversed when the action, as by the return, is "a plea of violation of city ordinance"; there being no such action known to the law. Lancaster *v.* Hirsh, 1 Lanc. L. Rev. (Pa.) 209.

82. *Missouri.*— Moberly *v.* Wight, 19 Mo. App. 269.

New Hampshire.— State *v.* Ferguson, 33 N. H. 424.

New York.— Hart *v.* Albany, 9 Wend. 571, 588, 24 Am. Dec. 165, where it is said: "It has been laid down as a general proposition, that when a corporation is empowered to enforce its ordinances by fine or in any other prescribed manner, it is by implication precluded from adopting any other method of punishing disobedience to them."

Pennsylvania.— Barter *v.* Com., 3 Penr. & W. 253; Southwark Dist. Com'rs *v.* Neil, 3 Yeates 54, holding that in proceedings under a by-law it must appear that the special authority of the municipality was strictly pursued.

Virginia.— Blanchard *v.* Bristol, 100 Va. 469, 41 S. E. 948.

England.— Kirk *v.* Nowill, 1 T. R. 118, 1 Rev. Rep. 160.

But one proceeding is provided by an ordinance authorizing the arrest of gambling-house keepers and the seizure of gambling implements, and providing that complaint shall be made against the persons arrested, "which shall be considered a part of the action or proceeding," and that, after a conviction of the person charged as keeper, the court "shall immediately proceed, on the return of the officer making the arrest," his schedule of the implements seized, and any answer the keeper may make thereto, to try whether such implements are in fact gambling implements, and, if so, to order their destruction. State *v.* Newman, 96 Wis. 258, 71 N. W. 438.

83. Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 361.

84. Charleston *v.* Truchelut, 1 Nott & M. (S. C.) 227.

85. Ingersoll Pub. Corp. 371.

The confusion and discord in the rulings and opinions in regard to actions to enforce po-

vailing rule is that penalties for violation of municipal ordinances are recoverable by civil action;[86] but some courts still adhere to the old rule that such

lice ordinances are fundamental, inherent, and ineradicable, arising from the governmental and municipal aspects of the municipality, the elusive nature of the police power, and the various points of view assumed by courts and legislatures. Regarding the corporation in its municipal aspect as a person, as treated by Blackstone, with certain special franchises and powers, we see no remedy so appropriate as debt or assumpsit to recover a fine accruing to it from the violation of one of its ordinances by another person. But considering it as one arm of the government clothed with sovereign power and endowed with the function of enacting and enforcing laws for the preservation of the public peace and health, the protection of life and property, even to the limit of punishment by forfeiture and imprisonment for the public weal — debt and assumpsit seem alien and vain remedies, and nothing but criminal procedure suggests itself as proper and efficient. Few, if any, states, although showing decided leanings, have consistently occupied in all cases either of these extremes. The practical Anglo-Saxon habit has usually controlled, in legislation and decision, and the result has been an illogical compromise upon a working hypothesis, with the general conclusion in respect of constitutional guaranties that, if the end sought is only a money recovery by ordinary process a civil action, regular or summary, may be pursued; but if forfeiture or imprisonment, direct or incidental, is the penalty then criminal procedure is necessary. For example see Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 52, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660, where Gray, J., says: "When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual." See also *supra*, III, C; *infra*, XIV, A.

86. *California.*— Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143. But see Santa Barbara *v.* Sherman, 61 Cal. 57.

Colorado.— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. 820; Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1; Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460; Deitz *v.* Central, 1 Colo. 323.

Georgia.— Floyd *v.* Eatonton, 14 Ga. 354, 58 Am. Dec. 559; Williams *v.* Augusta, 4 Ga. 509.

Illinois.— Kinmundy *v.* Mahan, 72 Ill. 462; Hoyer *v.* Mascoutah, 59 Ill. 137; Willis *v.* Legris, 45 Ill. 289; Jacksonville *v.* Block, 36 Ill. 507; Ewbanks *v.* Ashley, 36 Ill. 177; Anderson *v.* Schubert, 55 Ill. App. 227; Chicago *v.* Kenney, 35 Ill. App. 57; Knowles *v.* Wayne City, 31 Ill. App. 471.

Indiana.— Clevinger *v.* Rushville, 90 Ind. 258; Miller *v.* O'Reilly, 84 Ind. 168; Brookville *v.* Gagle, 73 Ind. 117; Greenburgh *v.* Corwin, 58 Ind. 518; Quigley *v.* Aurora, 50 Ind. 28.

Massachusetts.— Com. *v.* Dow, 10 Metc. 382. But see Com. *v.* Bean, 14 Gray 52, indirectly criminal.

Missouri.— St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050; St. Louis *v.* Vert, 84 Mo. 204; St. Louis *v.* Knox, 74 Mo. 79; Memphis *v.* O'Connor, 53 Mo. 468; Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505; Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322; *In re* Jones, 90 Mo. App. 318; Monett *v.* Beaty, 79 Mo. App. 315; Kansas City *v.* Neal, 49 Mo. App. 72; De Soto *v.* Brown, 44 Mo. App. 148; *In re* Miller, 44 Mo. App. 125. But see Lexington *v.* Curtin, 69 Mo. 626; Kansas City *v.* Clark, 68 Mo. 588; *Ex p.* Kiburg, 10 Mo. App. 442. And *compare* Glenwood *v.* Roberts, 59 Mo. App. 169, holding that, although a proceeding in a municipal court to recover a penalty is a civil action, it nevertheless partakes of the nature of a criminal prosecution if it has to do with the liberty of a citizen and that his guilt must be proved beyond a reasonable doubt.

Nebraska.— See Peterson *v.* State, (1907) 112 N. W. 306, 310.

New Jersey.— White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378; State *v.* Clinton, 53 N. J. L. 329, 21 Atl. 304; Brophy *v.* Perth Amboy, 44 N. J. L. 217; State *v.* Passaic, 42 N. J. L. 429.

New York.— People *v.* Sloane, 98 N. Y. App. Div. 450, 90 N. Y. Suppl. 762; Buffalo *v.* Schliefer, 25 Hun 275; Colton *v.* Maurer, 5 Thomps. & C. 575. But see New York cases cited *infra*, notes 87, 88.

North Carolina.— Edenton *v.* Wool, 65 N. C. 379; Wilmington *v.* Davis, 63 N. C. 582. But see North Carolina cases cited *infra*, note 87.

Ohio.— See Markle *v.* Akron, 14 Ohio 586. But *compare* Larney *v.* Cleveland, 34 Ohio St. 599.

Oregon.— Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

Pennsylvania.— Milton Borough *v.* Hoagland, 3 Pa. Co. Ct. 283; Lemon *v.* Reidel, 1 Lanc. L. Rev. 3. See also Philadelphia *v.* Junker, 9 Pa. Dist. 673; Pittston Borough *v.* Dimond, 7 Kulp 431; Plymouth Borough *v.* Penkok, 7 Kulp 101; Pottsville *v.* Marburger, 1 Leg. Chron. 60; Philadelphia *v.* Duncan, 4 Phila. 145.

South Carolina.— Charleston *v.* Kleinback, 2 Speers 418.

South Dakota.— Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896; Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621; Huron *v.* Carter, 5 S. D. 4, 57 N. W. 947.

Tennessee.— Sparta *v.* Lewis, 91 Tenn. 370,

actions are criminal,[87] or at least quasi-criminal[88] in their nature. On the other hand, where the act denounced by ordinance is also a misdemeanor under the

23 S. W. 182; Bristol *v.* Burrow, 5 Lea 128; Wood *v.* Grand Junction, 5 Heisk. 440; Meaher *v.* Chattanooga, 1 Head 74.

Wisconsin.— Ogden *v.* Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506; Chafin *v.* Waukesha County, 62 Wis. 463, 22 N. W. 732; Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414; Platteville *v.* Bell, 43 Wis. 488; Ives *v.* Jefferson County Sup'rs, 18 Wis. 166; Carter *v.* Dow, 16 Wis. 298. See also Wisconsin cases cited *infra*, note 88.

Wyoming.— Jenkins *v.* Cheyenne, 1 Wyo. 287.

United States.— See Virginia *v.* Howard, 28 Fed. Cas. No. 16,963, 1 Cranch C. C. 61.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1391; and, generally, FINES; PENALTIES.

At common law, and independent of statutory enactments, punishments for the violation of municipal ordinances were treated in the light of civil actions. Peterson *v.* State, (Nebr. 1907) 112 N. W. 306.

The general doctrine appears to be that, where an act is not criminal under the laws of the state, a municipal ordinance will not make it so, and that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action. Peterson *v.* State, (Nebr. 1907) 112 N. W. 306 [*citing* Huron *v.* Carter, 5 S. D. 4, 57 N. W. 947], holding that an ordinance of the character of the one in question, forbidding the doing of an act that is not *per se* criminal or immoral, that is not made a crime or misdemeanor by any law of the state, is a mere rule or regulation for the government of the community within the municipal limits, and does not come within the category of acts considered criminal.

There are many, both common law and statutory, offenses, which are quasi-criminal actions and which incur criminal consequences, which are nevertheless to be proceeded in as civil actions. Jenkins *v.* Cheyenne, 1 Wyo. 287.

87. *California.*— Santa Barbara *v.* Sherman, 61 Cal. 57. But see Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143.

Connecticut.— State *v.* Keenan, 57 Conn. 286, 18 Atl. 104. *Compare* State *v.* Decker, 46 Conn. 241.

Iowa.— Creston *v.* Nye, 74 Iowa 369, 37 N. W. 777; State *v.* Vail, 57 Iowa 103, 10 N. W. 297; Jaquith *v.* Royce, 42 Iowa 406; Goodrich *v.* Brown, 30 Iowa 291.

Kansas.—*In re* Jahn, 55 Kan. 694, 41 Pac. 956; State *v.* Topeka, 36 Kan. 76, 12 Pac. 310. 59 Am. Rep. 529; Neitzel *v.* Concordia, 14 Kan. 446.

Minnesota.— State *v.* West, 42 Minn. 147, 43 N. W. 845.

New Hampshire.— State *v.* Stearns, 31 N. H. 106.

New York.— People *v.* Garahed, 20 Misc. 127, 45 N. Y. Suppl. 827. But see New York cases cited *supra*, note 86.

North Carolina.— State *v.* Powell, 97 N. C. 417, 1 S. E. 482; State *v.* Cainan, 94 N. C. 880. But see North Carolina cases cited *supra*, note 86.

West Virginia.— Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1391.

88. *Alabama.*— Camden *v.* Bloch, 65 Ala. 236; Goldthwaite *v.* Montgomery, 50 Ala. 486; Mobile *v.* Jones, 42 Ala. 630; Withers *v.* State, 36 Ala. 252; Brown *v.* Mobile, 23 Ala. 722.

Arkansas.— Taylor *v.* Pine Bluff, 34 Ark. 603.

Colorado.— Noland *v.* People, 33 Colo. 322, 80 Pac. 887.

Kentucky.— Williamson *v.* Com., 4 B. Mon. 146; Lynch *v.* Com., 35 S. W. 264, 18 Ky. L. Rep. 145.

Louisiana.— State *v.* Lochte, 45 La. Ann. 1405, 14 So. 215. *Compare* Monroe *v.* Meuer, 35 La. Ann. 1192.

Michigan.— Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625; People *v.* Vinton, 82 Mich. 39, 46 N. W. 31; Northville *v.* Westfall, 75 Mich. 603, 42 N. W. 1068. *Compare* Grand Rapids *v.* Roberts, 48 Mich. 198; Cooper *v.* People, 41 Mich. 403, 2 N. W. 51; People *v.* Manistee County, 26 Mich. 422.

Minnesota.— State *v.* Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; State *v.* Lee, 29 Minn. 445, 13 N. W. 913.

Nebraska.— Brownville *v.* Cook, 4 Nebr. 101.

New York.— People *v.* Van Houten, 13 Misc. 603, 35 N. Y. Suppl. 186, holding that under Laws (1870), c. 291, tit. 8, § 7, providing that the first process in a suit by a village for a penalty under an ordinance adopted pursuant to the act shall be a summons or warrant, the proceeding therefor is criminal, or quasi-criminal; it being further provided that the penalty may be enforced by imprisonment, in default of payment.

Ohio.— Larney *v.* Cleveland, 34 Ohio St. 599. But *compare* Markle *v.* Akron, 14 Ohio 586.

Vermont.— State *v.* Bacon, 40 Vt. 456.

Wisconsin.—State *v.* Newman, 96 Wis. 258, 71 N. W. 438; Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798; Boscobel *v.* Bugbee, 41 Wis. 59. See, however, Wisconsin cases cited *supra*, note 86.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1391.

Compare Philadelphia *v.* Junker, 9 Pa. Dist. 673.

In Kentucky proceedings for violation of ordinance punishable by fine only are quasi-civil in their nature. Montee *v.* Com., 3 J. J. Marsh. 132. The proceeding has been regarded as rather penal than criminal in that nature. Williamson *v.* Brown, 4 B. Mon.

general laws, and the penalty imposed by the ordinance is a fine or imprisonment, or both, the proceeding is generally regarded as criminal in its nature.[89] Where the proceeding is considered civil in its nature the rules of civil procedure prevail.[90] On the other hand, where the proceeding is regarded as criminal in its nature, the rules of criminal procedure are applied.[91] Where the proceeding is quasi-criminal in its nature the courts generally declare that the criminal rules need not be followed, but that the proceedings must necessarily be stricter than in civil cases.[92] At common law, when a penalty was incurred for violation of a municipal ordinance, it might be recovered by an action of debt or assumpsit in any court of jurisdiction.[93] But by statute in many jurisdictions provision is

146; Brown *v.* Com., 6 J. J. Marsh. 635; Com. *v.* Brown, 3 J. J. Marsh. 597; Montee *v.* Com., 3 J. J. Marsh. 132.

Where a civil action has been held to be the proper mode for the enforcement of a fine, the cases have regarded the proceeding as quasi-criminal in its character. Mobile *v.* Jones, 42 Ala. 630.

89. *California.*— Santa Barbara *v.* Sherman, 61 Cal. 57.

Connecticut.— State *v.* Keenan, 57 Conn. 286, 18 Atl. 104.

Georgia.— Mohrman *v.* Augusta, 103 Ga. 841, 30 S. E. 95.

Iowa.— Jaquith *v.* Royce, 42 Iowa 406.

Kansas.— Neitzel *v.* Concordia, 14 Kan. 446.

Maine.— See O'Malia *v.* Wentworth, 65 Me. 129.

Massachusetts.— *In re* Goddard, 16 Pick. 504, 28 Am. Dec. 259.

Nebraska.— Peterson *v.* State, (1907) 112 N. W. 306; Brownville *v.* Cook, 4 Nebr. 101.

New Hampshire.— State *v.* Stearns, 31 N. H. 106.

New York.— Buffalo *v.* Preston, 81 N. Y. App. Div. 480, 80 N. Y. Suppl. 85; People *v.* Garabed, 20 Misc. 127, 45 N. Y. Suppl. 827. *Compare* Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564.

North Carolina.— State *v.* Powell, 97 N. C. 417, 1 S. E. 482.

West Virgina.— Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1400; and cases cited *supra*, notes 87, 88.

Contra.— St. Louis *v.* Vert, 84 Mo. 204. In Bristol *v.* Burrow, 5 Lea (Tenn.) 128, 129, it is said: "A civil action, in the nature of an action of debt, lies at the suit of the mayor and aldermen to recover penalties for violating town ordinances and by-laws, and the acts prohibited by the ordinance and by-laws may be such as are also criminal offenses against the State." See also Wood *v.* Grand Junction, 5 Heisk. (Tenn.) 440; Meaher *v.* Chattanooga, 1 Head (Tenn.) 74.

"Quasi-civil-criminal proceedings" see Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855, where it is said that the ordinance "creates a municipal misdemeanor."

In Wisconsin where the offense is also one against the general law, the prosecution of such an offense is a quasi-criminal prosecution and is not a summary proceeding (State *v.* Milwaukee Municipal Ct., 89 Wis. 358, 61 N. W. 1100; State *v.* Grove, 77 Wis. 448, 46 N. W. 532; Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798; Boscobel *v.* Bugbee, 41 Wis. 59); but actions for such violation of municipal ordinances as are not also misdemeanors are civil actions (State *v.* Milwaukee Municipal Ct., *supra*; Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552; Platteville *v.* Bell, 43 Wis. 488), and are within summary jurisdiction (State *v.* Milwaukee Municipal Ct., *supra*).

90. St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050; Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505; Keeler *v.* Milledge, 24 N. J. L. 142; Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414; and cases cited *supra*, note 86. See also *infra*, XI, B, 4, i, (II).

Wis. Rev. St. (1898) § 3294, provides that an act or omission punishable by "fine and imprisonment" or by "fine or imprisonment" shall be deemed a misdemeanor. It was held that the word "fine" does not include penalties imposed for the violation of municipal ordinances, so as to require the procedure employed in misdemeanor cases to be used in punishing the violation of a city ordinance, punishable by fine only. Ogden *v.* Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506.

91. State *v.* Keenan, 57 Conn. 286, 18 Atl. 104; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186; and cases cited *supra*, note 87. See also *infra*, XI, B, 4, i, (II).

The court has no jurisdiction in a criminal or quasi-criminal case, unless the punishment for the offense is exclusively and purely penal. Williamson *v.* Com., 4 B. Mon. (Ky.) 146; Brown *v.* Com., 6 J. J. Marsh. (Ky.) 635; Com. *v.* Brown, 3 J. J. Marsh. (Ky.) 597; Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132.

Change of action.— Where the action was prosecuted criminally, it was held that it could not be considered a civil proceeding on appeal. Webster *v.* Lansing, 47 Mich. 192, 10 N. W. 196.

92. Furhman *v.* Huntsville, 54 Ala. 263; Goshen *v.* Croxton, 34 Ind. 239; Emporia *v.* Volmer, 12 Kan. 622; Ingersoll Pub. Corp. 251; and cases cited *supra*, note 88. See also *infra*, XI, B, 4, i, (II).

93. *Colorado.*— Deitz *v.* Central, 1 Colo. 323.

Illinois.—Jacksonville *v.* Block, 36 Ill. 507;

made for summary proceedings to convict and punish violators of municipal ordinances.[94]

c. Jurisdiction[95] — (I) *In General.* While it is settled that the authority to confer on a tribunal jurisdiction to enforce penal ordinances or to recover penalties for their violation rests in the state and not in the municipality,[96] nevertheless the jurisprudence of several states permits the delegation of this power to the municipality and the exercise of this sovereign function by the agency of the corporation.[97] Whether a given tribunal has jurisdiction of such proceedings is

Ewbanks *v.* Ashley, 36 Ill. 177; Israel *v.* Jacksonville, 2 Ill. 290.

Indiana.— Brookville *v.* Gagle, 73 Ind. 117, 118 [*citing* Dillon Mun. Corp. § 342].

New Jersey.—State *v.* Clinton, 53 N. J. L. 329, 21 Atl. 304.

Tennessee.— Wood *v.* Grand Junction, 5 Heisk. 440.

England.— London Barber Surgeons *v.* Pelson, 2 Lev. 252; London *v.* Goree, 2 Lev. 174, 1 Vent. 298.

On appeal from a mayor's judgment the municipality may declare in debt. Markle *v.* Akron, 14 Ohio 586.

Debt as the proper form of action see ACTIONS, 1 Cyc. 732; DEBT, ACTION OF, 13 Cyc. 402; PENALTIES.

94. See People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 36 N. Y. Suppl. 1130]; Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873; State *v.* Milwaukee Municipal Ct., 89 Wis. 358, 61 N. W. 1100. See also cases cited *supra*, notes 87, 88; and *infra*, XI, B, 4, o.

Exclusive remedy.— The ordinance of the city of Lancaster of March 1, 1825, forbidding the firing of firearms within the city limits, can be enforced only by process of summary conviction, as directed by Ord. June 3, 1834, § 4; and an action of debt for the penalty cannot be sustained. Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

Nature of summary trial see CRIMINAL LAW, 12 Cyc. 321 *et seq.*

Incidents of summary trial see CRIMINAL LAW, 12 Cyc. 321 *et seq.*

Offenses summarily punishable see CRIMINAL LAW, 12 Cyc. 321.

Trial and conviction without a jury is generally denominated a summary proceeding. Ingersoll Pub. Corp. 372. See also Byers *v.* Com., 42 Pa. St. 89; and *infra*, XI, B, 4, o, (IV).

Jurisdiction to hear and determine offenses must be exercised in strict conformity to the statute. Edina *v.* Brown, 19 Mo. App. 672.

95. See also FINES; PENALTIES.

Concurrent and conflicting exercise of power by state and municipality see *supra*, XI, A, 4.

Criminal jurisdiction of municipal courts see CRIMINAL LAW, 12 Cyc. 201, 321.

Jurisdiction of offenses against state and municipality see CRIMINAL LAW, 12 Cyc. 204, 321.

Jurisdiction of summary trial see CRIMINAL LAW, 12 Cyc. 321.

96. *Colorado.*—People *v.* Curley, 5 Colo. 412.

Illinois.— Wiggins *v.* Chicago, 68 Ill. 372.

Indiana.— Madison *v.* Hatcher, 8 Blackf. 341.

Kentucky.— Owensboro *v.* Simms, 99 Ky. 49, 34 S. W. 1085, 17 Ky. L. Rep. 1393.

Louisiana.—State *v.* Carreau, 45 La. Ann. 1446, 14 So. 292.

Missouri.—Willis *v.* Boonville, 28 Mo. 543; Kansas City *v.* Neal, 49 Mo. App. 72.

New Jersey.— Vineland *v.* Kelk, 73 N. J. L. 285, 63 Atl. 5; Pell *v.* Newark, 49 N. J. L. 594, 9 Atl. 778; State *v.* Washington, 45 N. J. L. 318.

Pennsylvania.—Deel *v.* Pittsburgh, 3 Watts 363; Gettysburg *v.* Zeigler, 2 Pa. Co. Ct. 326.

Wisconsin.— See State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1393, 1402.

Delegation of power by municipality see *supra*, XI, A; XI, A, 3.

In Georgia, where the offense, described in Code, § 4478, providing that any person who shall erect or continue, after notice to abate, any nuisance which tends to annoy the community, etc., shall be indicted and punished, is made complete by notice to abate, an offender maintaining a nuisance in the city, violative of the city ordinance, may not be punished thereunder, but must be bound over for trial in the court having jurisdiction of the offense. Vason *v.* Augusta, 38 Ga. 542.

Mo. Rev. St. § 4982, giving mayors of fourth class cities jurisdiction to hear and determine offenses against city ordinances, gives them no jurisdiction to try a civil action to recover a penalty for violating a city ordinance. Edina *v.* Brown, 19 Mo. App. 672.

97. Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461; Guillotte *v.* New Orleans, 12 La. Ann. 432; State *v.* Wood, 94 N. C. 855; State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004. See also State *v.* Johnson, 17 Ark. 407; State *v.* Zeigler, 32 N. J. L. 262. *Compare Ex p.* Levine, 46 Tex. Cr. 364, 81 S. W. 1206, holding that, although a provision in a city charter to constitute a corporation court a state court was futile and without effect, it had jurisdiction to punish one on conviction of a municipal offense provided for by city ordinance.

Municipality must exercise its delegated authority in order to confer jurisdiction. Goodrich *v.* Brown, 30 Iowa 291, holding that a justice of the peace has no jurisdiction to hear a criminal prosecution for the violation of city ordinances unless the city council has made provision for the immediate arrest and examination of the accused before the justice, pursuant to Revision, § 1088.

matter for constitutional and statutory provision and construction,[98] the tendency, it seems, being to require express words of authorization,[99] and in cases of doubt to prefer the municipal to the general courts.[1]

(II) *Particular Tribunals.* Accordingly either by statutory provision [2] or by ordinance,[3] as the case may be, jurisdiction, which is sometimes exclusive,[4] and sometimes concurrent[5] with some other tribunal or tribunals, has been conferred variously upon chief officers of municipal corporations,[6] justices of the peace,[7] mayors,[8] mayors' courts,[9] members of municipal councils,[10] police courts,[11] police judges,[12]

98. Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460; Robinson *v.* Americus, 121 Ga. 180, 48 S. E. 924; *In re* Yard, 48 Leg. Int. (Pa.) 288.

99. Spencer *v.* Cline, 28 Ind. 51.

1. Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

2. See *supra*, text and note 96.

3. See *supra*, text and note 97.

4. *Colorado.*— People *v.* Second Judicial Dist. Ct., 33 Colo. 328, 333, 80 Pac. 888, 890, 108 Am. St. Rep. 98.

Indiana.— McNulty *v.* Connew, 50 Ind. 569. See also Chicago, etc., R. Co. *v.* Salem, 162 Ind. 428, 70 N. E. 530.

Iowa.— Lansing *v.* Chicago, etc., R. Co., 85 Iowa 215, 52 N. W. 195.

Kentucky.— Owensboro *v.* Simms, 99 Ky. 49, 34 S. W. 1085, 17 Ky. L. Rep. 1393.

Missouri.— Louisiana *v.* Hardin, 11 Mo. 551; Kansas City *v.* Neal, 49 Mo. App. 72.

New York.— People *v.* Horton, 41 Misc. 309, 84 N. Y. Suppl. 942; People *v.* Van Houten, 13 Misc. 603, 35 N. Y. Suppl. 186 [*affirmed* in 36 N. Y. Suppl. 1130].

North Carolina.— State *v.* Threadgill, 76 N. C. 17; State *v.* White, 76 N. C. 15.

Magistrate himself defendant see Reg. *v.* Chipman, 5 Brit. Col. 349, where the justice of the peace was held to have jurisdiction of an information against the police magistrate for a violation of a city by-law, there being no police magistrate before whom the information could be laid.

5. *Colorado.*— Metcalf *v.* People, 2 Colo. App. 262, 30 Pac. 39.

Indiana.— Brookville *v.* Gagle, 73 Ind. 117.

Iowa.— Finch *v.* Marvin, 46 Iowa 384; Jaquith *v.* Royce, 42 Iowa 406.

New Jersey.— State *v.* Zeigler, 32 N. J. L. 262.

North Carolina.— State *v.* Cainan, 94 N. C. 880.

The circuit court of Rock county has jurisdiction to enforce penalties imposed by an ordinance of a city situated in such county. Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

6. State *v.* Threadgill, 76 N. C. 17; State *v.* White, 76 N. C. 15.

7. *Colorado.*— People *v.* Second Judicial Dist. Ct., 33 Colo. 328, 333, 80 Pac. 888, 890, 108 Am. St. Rep. 98; Metcalf *v.* People, 2 Colo. App. 262, 30 Pac. 39.

Illinois.— Jacksonville *v.* Block, 36 Ill. 507; Ewbanks *v.* Ashley, 36 Ill. 177; Windsor *v.* Cleveland, etc., R. Co., 105 Ill. App. 46, justice of the peace.

Indiana.— Brookville *v.* Gagle, 73 Ind. 117; Redden *v.* Covington, 29 Ind. 118; Spencer *v.* Cline, 28 Ind. 51.

Iowa.— Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734; Jaquith *v.* Royce, 42 Iowa 406.

North Carolina.— State *v.* Wood, 94 N. C. 855.

Pennsylvania.— Com. *v.* Thompson, 110 Pa. St. 297, 1 Atl. 375.

Wisconsin.— State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

See also Justices of the Peace, 24 Cyc. 383.

"Any one of the justices" cannot exercise jurisdiction under a law authorizing the common council of a town to pass an ordinance that penalties may be enforced by a summary conviction before the "mayor or justice of the peace of the town." State *v.* Zeigler, 32 N. J. L. 262.

8. *Alabama.*— Mobile *v.* Barton, 47 Ala. 84, mayor.

Georgia.— Robinson *v.* Americus, 121 Ga. 180, 48 S. E. 924.

Indiana.— McNulty *v.* Connew, 50 Ind. 569.

Iowa.— Jaquith *v.* Royce, 42 Iowa 406.

Missouri.— Willis *v.* Boonville, 28 Mo. 543; Fayette *v.* Shafroth, 25 Mo. 445.

New Jersey.— State *v.* Zeigler, 32 N. J. L. 262.

North Carolina.— State *v.* Wilson, 106 N. C. 718, 11 S. E. 254.

Ohio.— Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92; Ward *v.* State, 5 Ohio S. & C. Pl. Dec. 230, 5 Ohio N. P. 81.

West Virginia.— Flack *v.* Fry, 32 W. Va. 364, 9 S. E. 240.

Mayor and wardens.— Under 20 S. C. St. at L. p. 912, the mayor of the town of Clinton, if he deems advisable, may call to his aid the wardens of such town in the trial of any offender charged with violating the ordinances of the town. Clinton *v.* Leake, 71 S. C. 22, 50 S. E. 541.

9. Barter *v.* Com., 3 Penr. & W. (Pa.) 253.

10. Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461.

11. Bass *v.* Lawrence, 124 Ga. 75, 52 S. E. 296; Owensboro *v.* Simms, 99 Ky. 49, 34 S. W. 1085, 17 Ky. L. Rep. 1393; State *v.* Mack, 41 La. Ann. 1079, 6 So. 808; Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295. See also Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92.

The mayor may be a police court *de facto.* Stroup *v.* Pruden, 104 Ga. 721, 30 S. E. 948.

12. *In re* Hagan, (Kan. 1902) 68 Pac. 1104; Brookfield *v.* Tooey, 141 Mo. 619, 43

police justices,[13] police magistrates,[14] recorders or recorders' courts,[15] town-clerks,[16] town councils,[17] and the like.[18]

(III) *Affected by Interest in Fine or Penalty.* The municipal interest in the penalty is not a bar to the jurisdiction of a municipal court.[19]

(IV) *Dependent Upon Amount in Controversy.* As in the case of other inferior courts, the jurisdiction may depend upon the amount in controversy; that is, the amount of the fine imposed or the penalty sought to be recovered.[20]

S. W. 387; Kansas City *v.* Neal, 49 Mo. App. 72.

"Recorder" and "police judge" may be identical. Brookfield *v.* Tooey, 141 Mo. 619, 43 S. W. 387. But see Vineland *v.* Kelk, 73 N. J. L. 285, 63 Atl. 5, holding that a conviction for violation of a borough ordinance had before a justice of the peace, who is described as acting recorder of the borough, is void for want of jurisdiction, Pub. Laws (1897), p. 285, relating to boroughs, making no provision for such an officer.

13. People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 36 N. Y. Suppl. 1130].

14. Metcalf *v.* People, 2 Colo. App. 262, 30 Pac. 39; Hensoldt *v.* Petersburg, 63 Ill. 157; Windsor *v.* Cleveland, etc., R. Co., 105 Ill. App. 46, police magistrate.

15. *Alabama.*— Bray *v.* State, 140 Ala. 172, 37 So. 250.

Georgia.— Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 751; Reeves *v.* Atlanta, 114 Ga. 851, 40 S. E. 1003.

Louisiana.— State *v.* Lochte, 45 La. Ann. 1405, 14 So. 215; State *v.* Mack, 41 La. Ann. 1079, 6 So. 808; Guillotte *v.* New Orleans, 12 La. Ann. 432.

Missouri.— Kansas City *v.* O'Connor, 36 Mo. App. 594.

New Jersey.—Hutchings *v.* Scott, 9 N. J. L. 218.

16. Chicago, etc., R. Co. *v.* Salem, 166 Ind. 71, 703, 76 N. E. 631, 634.

17. Lexington *v.* Wise, 24 S. C. 163.

The city council of Columbus has no jurisdiction over a prosecution for keeping open a saloon on Sunday, as it is an offense against the laws of the state, and not a mere breach of the city ordinance. Reich *v.* State, 53 Ga. 73, 21 Am. Rep. 265.

18. Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460 (special criminal court); Lewis *v.* State, 124 Ga. 62, 52 S. E. 81 (city court); Hood *v.* Griffin, 113 Ga. 190, 38 S. E. 409 (city criminal court); Stokes *v.* Schlacter, 66 N. J. L. 247, 49 Atl. 556 (court for trial of small causes); People *v.* Horton, 41 Misc. (N. Y.) 309, 84 N. Y. Suppl. 942 (court of special sessions); Lancaster *v.* Reese, 14 Pa. Dist. 447 (an alderman); Philadelphia *v.* Junker, 9 Pa. Dist. 673 (alderman); Plymouth *v.* Williams, 8 Kulp (Pa.) 167 (burgess); Pittston Borough *v.* Dimond, 7 Kulp (Pa.) 431 (burgess); State *v.* Williams, 11 S. C. 288 (intendant).

The chief burgess of the borough has jurisdiction under the Pennsylvania act of June, 1897, of prosecutions for the violation of borough ordinances for which fines or penalties are imposed. Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171. In the absence of a borough ordinance declaring the act to be an offense, the burgess has no jurisdiction to try and sentence a person therefor. Com. *v.* Bowman, 29 Pa. Co. Ct. 635.

The portion of the Bullit bill of June 1, 1885, for the better government of cities of the first class, which gives to the courts of Philadelphia alone the power to punish for disobedience of an order made under the provisions of the bill, is not in conflict with Const. art. 5, § 26, requiring that the jurisdiction and powers of all courts of the same class shall be uniform. *In re* Yard, 48 Leg. Int. (Pa.) 288.

19. Deetz *v.* Central, 1 Colo. 323; Corwein *v.* Hames, 11 Johns. (N. Y.) 76; Charleston *v.* Pepper, 1 Rich. (S. C.) 364; Charleston *v.* King, 4 McCord (S. C.) 487; Jonesborough *v.* McKee, 2 Yerg. (Tenn.) 167. See Com. *v.* Bean, Thach. Cr. Cas. (Mass.) 85, where upon a trial under the ordinance of the city council of the city of Boston of 1824, regulating the keeping of dogs, and directing one half the amount paid for a license to be paid to the city clerk, and one half of the penalty for the violation of the ordinance to be paid to the prosecutor, without declaring to what use the other half should be applied, it was held that it could not be inferred that any sum inured to the city, although it was stated in the original complaint that the other half of the penalty was for the use of the city, and consequently that the justices of the police and municipal courts, and the jurors, were not interested by reason of being paid by the city.

Pecuniary interest as disqualifying a judge see JUDGES, 23 Cyc. 575 *et seq.*

20. See COURTS, 11 Cyc. 714. See also Hensoldt *v.* Petersburg, 63 Ill. 157; McNulty *v.* Wilson, 4 Strobh. (S. C.) 231.

Several penalties for several violations.— Each violation of an ordinance confers a distinct cause of action, and independent proceedings may be instituted for penalties which, combined, would exceed the amount within which the justice has jurisdiction. Whitehall *v.* Meaux, 8 Ill. App. 182. Suits to recover several penalties for numerous violations of a city ordinance are within the jurisdiction of an alderman when the penalty in each case is under one hundred dollars, that being the amount fixed by the statute conferring jurisdiction in such cases. Lancaster *v.* Railroad Co., 12 Lanc. Bar (Pa.) 99. Const. art. 1, § 11, prohibiting prosecutions for misdemeanors in which the punishment exceeds a fine of one hundred dollars to be tried before a justice of the peace, does not deprive the justice of jurisdiction of a

(v) *Waiver by Appearance.* Under the rule regarding a prosecution of a suit against a person to enforce a fine, penalty, or forfeiture for the violation of a city ordinance as a civil proceeding, jurisdiction of the person can be obtained by his voluntary appearance in the suit.[21]

d. Venue and Change Thereof.[22] As the authority of the municipality and the binding effect of its police regulations are merely coextensive with the city limits,[23] an action or proceeding instituted for the enforcement or punishment of a violation of an ordinance must be brought before a properly authorized and constituted tribunal sitting within the territorial limits of the municipality.[24] Inasmuch as a change of venue is almost wholly a creature of statute,[25] a change of venue in proceeding to enforce a municipal ordinance, it seems, can be asked and allowed when and in the manner authorized by statute,[26] but not otherwise.[27]

e. Parties Plaintiff — (i) *In General.* The general rule of procedure that a civil action should be brought in the name of the party injured[28] applies to actions for the recovery of penalties, with the result that the municipality is usually plaintiff.[29] But it seems that where the statute or by-law prescribes that the action

prosecution under an ordinance providing that any number of violations thereof may be included in the same information, and that a fine of from five dollars to fifty dollars may be imposed for each, although the aggregate may thus exceed one hundred dollars. Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734.

The mayor of Boonville under the act amending the charter of the city (Mo. Acts (1847), p. 183), had jurisdiction of all cases arising under the charter and ordinances of the city, whatever the amount of the fine involved. Willis *v.* Boonville, 28 Mo. 543.

The mayor of Fayette has jurisdiction in cases where the penalty is less than ninety dollars, and an ordinance of the city giving him jurisdiction when the penalty is one hundred dollars is void. Fayette *v.* Shafroth, 25 Mo. 445.

21. Baldwin *v.* Murphy, 82 Ill. 485; *In re* Jones, 90 Mo. App. 318, holding that appearance by defendant before a tribunal to which the action has been removed at his own request is a waiver of jurisdiction.

Appearance without arrest waives process. Ewbanks *v.* Ashley, 36 Ill. 177.

22. **Territorial jurisdiction** as dependent upon city limits see *supra*, XI, A, 5.

23. See *supra*, XI, A, 5.

24. Hershoff *v.* Beverly, 43 N. J. L. 139, holding that the court could not sit outside the limits of the city to try such causes. See also Lewis *v.* State, 124 Ga. 62, 52 S. E. 81 (where the evidence sufficiently established the venue); Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; People *v.* Montgomery C. Pl., 18 Wend. (N. Y.) 633; CRIMINAL LAW, 12 Cyc. 229; VENUE.

Under the charter of New York city (Laws (1901), c. 466, §§ 1, 2) the outlying municipalities were consolidated with the old city of New York as it existed on the first day of January, 1898, and the East river, as it flows between the former cities of New York and Brooklyn, was a part of the city of New York as existing prior to the consolidation, and therefore the court of special sessions of the city of New York has jurisdiction to try defendant, charged with a misdemeanor in operating a steam boiler on the East river without a certificate. People *v.* Prillen, 173 N. Y. 67, 65 N. E. 947 [*reversing* 73 N. Y. App. Div. 207, 76 N. Y. Suppl. 821].

25. See CRIMINAL LAW, 12 Cyc. 242; VENUE.

26. Finch *v.* Marvin, 46 Iowa 384 (where it is held that a change of venue might be taken from the court of a mayor of a city or incorporated town to that of a justice of the peace); Puyallup *v.* Snyder, 13 Wash. 572, 43 Pac. 635 (where it is held, under the statutes, that a change of venue would lie from a police justice of the third class to the nearest justice of the peace in the same county).

Under the St. Louis Mun. Code (1901), § 1236, providing that the police justices, in all matters pertaining to the duties of their offices concerning which there is no specific provision by ordinance, shall be governed by the state laws regulating proceedings in justices' courts, a change of venue may be awarded from the first to the second district police court of the city of St. Louis. *In re* Jones, 90 Mo. App. 318.

Appearance after erroneous award of change. — Where a police court in a prosecution to recover a penalty for violating a city ordinance, awards a change of venue to a person not entitled to it, such person, by appearing in the police court to which the venue has been erroneously awarded, waives the error, and confers on the latter justice jurisdiction over his person. *In re* Jones, 90 Mo. App. 318.

Overruling a motion for change of venue, although error, will not deprive a court of jurisdiction to proceed in the enforcement of an ordinance. Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529.

27. Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264 [*distinguishing* Finch *v.* Marvin, 46 Iowa 384; Jaquith *v.* Royce, 42 Iowa 406], holding that the statute did not apply to cities of the first class.

28. 1 Bacon Abr. 56; 1 Chitty Pl. 61, 64; 1 Tidd Pr. 9; and, generally, PARTIES.

29. *Illinois.*— Chicago *v.* Kenney, 35 Ill. App. 57.

shall be brought by a certain person or in a certain name such method is exclusive.[30] A *de facto* corporation may enforce police penalties.[31]

(II) *State or Municipality.* However, prosecutions for violation of police ordinances are conducted as provided by local legislation in some states in the name of the corporation,[32] in others in the name of the state, commonwealth, or people.[33]

Indiana.— Greenburgh *v.* Corwin, 58 Ind. 518.

Louisiana.— State *v* Faber, 50 La. Ann. 952, 24 So. 662.

Michigan.—Cooper *v.* People, 41 Mich. 403, 2 N. W. 51; Romeo *v.* Chapman, 2 Mich. 179.

Mississippi.— Alexander *v.* Greenville, 54 Miss. 659.

Missouri.— St. Louis *v.* Vert, 84 Mo. 204; *Ex p.* Hollwedell, 74 Mo. 395.

Pennsylvania.— Lemon *v.* Reidel, 1 Lanc. L. Rev. 3.

Texas.— Smith *v.* Marston, 5 Tex. 426.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1392; and, generally, Penalties.

30. *Connecticut.*— Townsend *v.* Hoadley, 12 Conn. 541.

Kentucky.— Williamson *v.* Com., 4 B. Mon. 146, holding that where a statute directs the proceeding to be had in the name of the city, it is error to proceed in the name of the commonwealth.

Massachusetts.— Com. *v.* Fahey, 5 Cush. 408.

New York.— Yonkers Excise Com'rs *v.* Glennon, 21 Hun 244.

North Carolina.— Watts *v.* Scott, 12 N. C. 291.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1392.

31. Hamilton *v.* Carthage, 24 Ill. 22.

32. *Arkansas.*— Graham *v.* State, 1 Ark. 79.

Colorado.— People *v.* George, 26 Colo. 475, 58 Pac. 598 (holding, however, that Laws (1885), pp. 287, 290, requiring the action to be brought in the corporate name of the city, does not apply to incorporated towns, but only to cities of the first and second classes); Garland *v.* Denver, 11 Colo. 434, 19 Pac. 460.

Illinois.— Partridge *v.* Snyder, 78 Ill. 519; Chicago *v.* Kenney, 35 Ill. App. 57, in name of city.

Iowa.— Centerville *v.* Miller, 51 Iowa 712, 2 N. W. 527; Davenport *v.* Bird, 34 Iowa 524.

Kansas.— Emporia *v.* Volmer, 12 Kan. 622.

Kentucky.— Williamson *v.* Com., 4 B. Mon. 146. See also Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924.

Louisiana.— State *v.* Faber, 50 La. Ann. 952, 24 So. 662.

Michigan.—Cooper *v.* People, 41 Mich. 403, 2 N. W. 51.

Mississippi.— Chrisman *v.* Jackson, 84 Miss. 787, 37 So. 1015.

Montana.— Helena *v.* Kent, 32 Mont. 279, 80 Pac. 258.

New Jersey.—Greely *v.* Passaic, 42 N J. L. 429.

Pennsylvania.— Philadelphia *v.* Nell, 3 Yeates 475; Morgan *v.* Fisher, 1 Just. L. Rep. 108.

Texas.— Bautsch *v.* State, 27 Tex. App. 342, 11 S. W. 414.

Washington.—Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960.

Wyoming.— Jenkins *v.* Cheyenne, 1 Wyo. 287, in name of city.

Canada.— Cleveland Tp. *v.* Ledoux, 22 Quebec Super. Ct. 85.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1401.

The legislature may give the power to proceed in the name of a city against offenders for violation of its ordinances, which are punishable by fine. Williamson *v.* Com., 4 B. Mon. (Ky.) 146.

Under the S. C. Const. art. 5, § 31, providing that all writs and processes shall run and all prosecutions shall be conducted in the name of the state, a prosecution for the violation of a city ordinance by the city council is not prohibited. Abbeville *v.* Leopard, 61 S. C. 99, 39 S. E. 248.

In Texas, although all prosecutions for crime against the laws of the state must be in the name of the state, nevertheless a city or town incorporated under the general law may ordain that offenders against its penal ordinance shall be prosecuted in the name of the municipality. *Ex p.* Boland, 11 Tex. App. 159 [*quoted* in Bautsch *v.* State, 27 Tex. App. 342, 346, 11 S. W. 414, where it is said: "We think the distinction sought to be drawn and made between 'criminal actions' and 'offenses' or 'petty offenses' is hypercritical and not maintainable"].

Wash. Const. art. 4, § 27, which requires all prosecutions to be conducted in the name of the state refers to prosecutions for violation of state laws and not to prosecutions under municipal ordinances. Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324; Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960. But *compare* State *v.* Fountain, 14 Wash. 236, 44 Pac. 270.

Change of style on appeal see *infra,* XI, B, 4, s, (VI), (A), note 24.

33. *California.*— Santa Barbara *v.* Sheiman, 61 Cal. 57.

Massachusetts.— *In re* Goddard, 16 Pick. 504, 28 Am. Dec. 259; Com. *v.* Worcester, 3 Pick. 462.

Michigan.— Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625.

Minnesota.— Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

Nebraska.— Brownville *v.* Cook, 4 Nebr. 101

Pennsylvania.— Van Swartow *v.* Com., 24 Pa. St. 131.

(III) *Officers, Informers, Etc.* In some states the action may be brought in the name of the officer to whom the penalty is payable,[34] in the name of the informer,[35] in the names of both the informer and the officer,[36] or in the names of both the informer and the municipality.[37]

f. Parties Defendant. Persons joining in an offense may be joined in the complaint.[38]

g. Process — (I) *In General.* Prosecution for violation of police ordinances may not be inaugurated except in compliance with the constitutional provisions against summary search and seizure,[39] and also with the charter or statute authorizing municipal legislation.[40] "Due process of law" is required for police prosecutions.[41] Except therefore where arrest without warrant is authorized,[42] some notice of proceedings instituted to recover or enforce a penalty for the violation of a municipal ordinance must be given to the accused;[43] in other words, he must be properly brought before the proper tribunal on due and valid process,[44]

South Carolina.— *In re* Oliver, 21 S. C. 318, 53 Am. Rep. 681.

Washington.— State *v.* Fountain, 14 Wash. 236, 44 Pac. 270. But *compare* Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324; Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960.

See 36 Cent. Dig. tit. "Municipal Corporations." § 1401.

34. Townsend *v.* Hoadley, 12 Conn. 541; Com. *v.* Fahey, 5 Cush. (Mass.) 408; Yonkers Excise Com'rs *v.* Glennon, 21 Hun (N. Y.) 244; Watts *v.* Scott, 12 N. C. 291.

Abolition of office.— When the office of overseer of the poor was abolished in the city of Auburn, and the board of charities and police was substituted in its place, there was, within the meaning of the act of 1878, no overseer of the poor in the city, and an action to recover penalties for the violation of the excise law should be brought in the name of the board of commissioners of excise. Auburn Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; Auburn Excise Com'rs *v.* Burtis, 103 N. Y. 136, 8 N. E. 482. See also Yonkers Excise Com'rs *v.* Glennon, 21 Hun (N. Y.) 244.

In British Columbia any person may properly lay an information for the infraction of a city by-law, although the fine goes to the city. Reg. *v.* Chipman, 5 Brit. Col. 349.

35. See Penalties.

36. Bradley *v.* Baldwin, 5 Conn. 288.

37. Lancaster *v.* Hirsh, 1 Lanc. L. Rev. (Pa.) 209.

For the use of the informer.— Where a penalty for the violation of a municipal ordinance goes to the person suing, the corporate name of the city or borough, for the use of the informer, naming him, must appear as plaintiff. Lemon *v.* Reidel, 1 Lanc. L. Rev. (Pa.) 3.

38. Philadelphia *v.* Kitchen, 2 Phila. (Pa.) 44; Clark Cr. L. § 43; 1 McClain Cr. L. §§ 195, 212, 217. See also Criminal Law, 12 Cyc. 183 *et seq.*; Indictments and Informations, 22 Cyc. 373 *et seq.*

39. U. S. Const. Amendm. 4.

40. Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604.

41. State *v.* Savannah, T. U. P. Charlt. (Ga.) 235, 4 Am. Dec. 708.

Due process of law generally see Constitutional Law, 8 Cyc. 1080 *et seq.*

Arrest of the keeper of a gambling house and destruction of implements found on the premises may be effected, under a single process. State *v.* Newman, 96 Wis. 258, 71 N. W. 438.

42. See Arrest, 3 Cyc. 877 *et seq.*

Arrest without warrant.— Municipal peace officers were sometimes authorized, either by general statute, municipal charter, or the terms of a particular ordinance, to arrest without warrant persons whom they find violating municipal ordinances; but at common law no such authority existed. See Arrest, 3 Cyc. 883; Oran *v.* Bles, 52 Mo. App. 509, where arrest was made without warrant when the offense was committed in the presence of the officer. See also State *v.* Fisher, 50 La. Ann. 45, 23 So. 92, holding that no affidavit or warrant need precede an arrest and trial before a mayor's court for violation of municipal ordinances. But *compare* Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604, in which case it was held that under power conferred by the charter of a municipal corporation only to pass laws for arrest without warrant of persons against whom charges have been made by citizens, an ordinance undertaking to authorize such arrest in all cases, regardless of charges being made, is void.

43. State *v.* Savannah, T. U. P. Charlt. (Ga.) 235, 4 Am. Dec. 708; Alexandria Tp. *v.* Bethlehem Tp., 29 N. J. L. 375; Keeler *v.* Milledge, 24 N. J. L. 142. In State *v.* Savannah, *supra*, a conviction and infliction of a fine on a defendant, without citing him before the council, or giving him notice of their proceedings, was quashed, as being "not only a violation of the most obvious dictates of common law, but it is destitute of every principle by which the social compact is supported."

Notice or summons for summary trial see Criminal Law, 12 Cyc. 322.

Each defendant is entitled to notice. St. Louis *v.* Flynn, 128 Mo. 413, 31 S. W. 17; Alexandria Tp. *v.* Bethlehem Tp., 29 N. J. L. 375.

44. See *infra*, XI, B, 4, g, (II).

usually a summons in civil proceedings,[45] or a warrant[46] or capias ad respondendum,[47] in criminal proceedings or proceedings in the nature of criminal proceedings.

(II) *Summons or Warrant*—(A) *In General.* Whether warrant,[48] summons,[49] or other notice or process[50] is the proper method of bringing into court one accused of violating a municipal ordinance depends upon the local laws and practice.[51] So too the rules of local procedure govern the regularity and validity of the process,[52] including the power and authority to issue,[53] the

Necessity of being before the court to sustain a summary conviction see CRIMINAL LAW, 12 Cyc. 321.

Process generally see PROCESS.

45. See *infra*, XI, B, 4, g, (II), text and note 48.

46. See *infra*, XI, B, 4, g, (II), text and note 49.

47. See *infra*, XI, B, 4, g, (II), text and note 50.

48. *Georgia.*— Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732; Hood *v.* Griffin, 113 Ga. 190, 38 S. E. 409.

Illinois.— Ewbanks *v.* Ashley, 36 Ill. 177. See also Schweitzer *v.* Boettcher, 84 Ill. 289.

Indiana.— Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759; Bogart *v.* New Albany, 1 Ind. 38.

Michigan.— Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625; Sheldon *v.* Hill, 33 Mich. 171.

Minnesota.— St. Peter *v.* Bauer, 19 Minn. 327.

Missouri.— Kansas *v.* Zahner, 73 Mo. App. 396.

New Jersey.— Newark *v.* Murphy, 40 N. J. L. 145.

North Carolina.— State *v.* Cainan, 94 N. C. 880; State *v.* Merritt, 83 N. C. 677.

Ohio.— O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

Pennsylvania.— Hanover *v.* O'Bold, 11 York Leg. Rec. 131.

South Carolina.— Clinton *v.* Leake, 71 S. C. 22, 50 S. E. 541.

Tennessee.— McMinnville *v.* Stroud, 109 Tenn. 569, 72 S. W. 949; Bristol *v.* Burrow, 5 Lea 128; Meaher *v.* Chattanooga, 1 Head 74.

West Virginia.— Beasley *v.* Beckley, 28 W. Va. 81.

United States.— Barney *v.* Washington City, 2 Fed. Cas. No. 1,033, 1 Cranch C. C. 248; Delany *v.* Washington, 7 Fed. Cas. No. 3,755, 2 Cranch C. C. 459; McGunnigle *v.* Washington, 16 Fed. Cas. No. 8,818, 2 Cranch C. C. 460.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1394, 1404.

Compare Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604.

Either warrant or summons see Missouri *v.* Hutchinson, 71 Mo. 46; Peterson *v.* State, (Nebr. 1907) 112 N. W. 306; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414; Pittston *v.* Rosenthal, 9 Kulp (Pa.) 547, warrant or summons at the discretion of the mayor. In Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552, it is said: "The prosecution were at liberty to proceed by summons without oath, or by warrant with oath."

49. *Colorado.*— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Georgia.—Rothschild *v.* Darien, 69 Ga. 503.

Illinois.— Schweitzer *v.* Boettcher, 84 Ill. 289.

Kentucky.— Com. *v.* Price, 94 S. W. 32, 29 Ky. L. Rep. 593.

Missouri.— *In re* Jones, 90 Mo. App. 318.

New Jersey.— White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378.

New York.— New York *v.* Eisler, 10 Daly 396.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1394, 1404.

50. Alton *v.* Kirsch, 68 Ill. 261 (capias); State *v.* Perth Amboy, 51 N. J. L. 406, 17 Atl. 971 (process in the nature of summons, or warrant, etc.); Keeler *v.* Milledge, 24 N. J. L. 142 (notice required by ordinance); Milton Borough *v.* Hoagland, 3 Pa. Co. Ct. 283 (writ of summons or capias).

The capias may operate as a summons only. Alton *v.* Kirsch, 68 Ill. 261; Wann *v.* McGoon, 3 Ill. 74.

51. See cases cited *supra*, notes 48–50; *infra*, notes 52–60.

52. See cases cited *infra*, notes 53–60. See Sheldon *v.* Hill, 33 Mich. 171, holding that, under a village charter contemplating process for arrest substantially like a warrant for offenses triable by justices of the peace, a warrant commanding the officer to arrest the person named and to bring him before the justice to answer complaint filed against him, etc., "in a plea of debt for the penalty to their damage of fifty dollars," etc., was irregular.

Amendment see *infra*, XI, B, 4, l.

Presumption favors the regularity of official action. State *v.* Earle, 66 S. C. 194, 44 S. E. 781.

53. *Georgia.*— Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732, holding that the mayor may issue a warrant, although the charter does not in express terms authorize him to do so.

Illinois.— Schweitzer *v.* Boettcher, 84 Ill. 289.

Missouri.— Missouri *v.* Hutchinson, 71 Mo. 46.

Pennsylvania.— Pittston *v.* Rosenthal, 9 Kulp 547.

Tennessee.—Meaher *v.* Chattanooga, 1 Head 74, holding that the mayor, recorder, or other officer charged with the enforcement of ordi-

style[54] and signing of the process,[55] its service,[56] the laying of the venue[57] and the necessary and requisite statements and allegations of the accusation made,[58] as

nances may issue warrants for their violation.

Upon oath or affirmation.— A complaint under oath or affirmation is often required in order to procure a warrant for the arrest of a person for violating an ordinance. Schweitzer *v.* Boettcher, 84 Ill. 289; Pittston *v.* Rosenthal, 9 Kulp (Pa.) 547; Philadelphia *v.* Campbell, 33 Leg. Int. (Pa.) 12. See *infra*, XI, B, 4, i, (III), (E).

Upon written or printed statement.— The recorder of Missouri City has no power to issue a warrant of arrest or summons against a person charged with an offense before a written or printed statement of the charge has been filed. Missouri *v.* Hutchinson, 71 Mo. 46. See *infra*, XI, B, 4, j.

Upon personal knowledge of mayor, etc.— Although the city ordinance of 1852, imposing a penalty, directs that upon "complaint" being made to a certain officer "on oath" he "shall" issue a warrant for the arrest of the offender, he may nevertheless issue it without such oath or upon his own knowledge. Mealer *v.* Chattanooga, 1 Head (Tenn.) 74.

54. Scranton *v.* Frothingham, 5 Pa. Dist. 639 (holding that the summons should be in the name of the commonwealth to the use of the municipality); Nashville *v.* Pearl, 11 Humphr. (Tenn.) 249 (holding that a provision of the state constitution that all writs and other processes shall run in the name of the state of Tennessee applies to a distress warrant issued by a recorder of a municipal corporation, and that a warrant in the name of the "corporation of Nashville" is void). *Compare* Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906, holding that a summons in the nature of an order to show cause, issued by a town council to a person charged with keeping a nuisance, not being a writ of process, need not run in the name of the state.

A warrant is irregular which is issued at the instance of the city commissioner. Scranton *v.* Frothingham, 5 Pa. Dist. 639.

55. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

By clerk.— A warrant from a police court may be signed by the clerk of the police judge; this is an issuing of it by the judge through his clerk. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

56. White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378, holding that summons must be served upon the person designated therein.

57. Beasley *v.* Beckley, 28 W. Va. 81, holding that where the venue is otherwise properly laid, the offense need not be alleged as having been committed in the county in which the municipality is situated.

58. See cases cited *infra*, this note.

The warrant should set forth with reasonable certainty a substantial breach or violation of the ordinance. Hood *v.* Griffin, 113 Ga. 190, 38 S. E. 409; Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759; Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625; Sheldon *v.* Hill, 33 Mich. 171; Kansas *v.* Zahner, 73 Mo. App. 396; State *v.* Beverly, 43 N. J. L. 139; Keeler *v.* Milledge, 24 N. J. L. 142; State *v.* Merritt, 83 N. C. 677; Hanover *v.* O'Bold, 11 York Leg. Rec. (Pa.) 131. Clinton *v.* Leake, 71 S. C. 22, 50 S. E. 541; Charleston *v.* Seeba, 4 Strobh. (S. C.) 319; Barney *v.* Washington City, 2 Fed. Cas. No. 1,033, 1 Cranch C. C. 248; McGunnigle *v.* Washington, 16 Fed. Cas. No. 8,818, 2 Cranch C. C. 460; Washington *v.* Lynch, 29 Fed. Cas. No. 17,231, 5 Cranch C. C. 498; White *v.* Washington, 29 Fed. Cas. No. 17,560, 2 Cranch C. C. 337.

"Wrongfully" or "unlawfully." — The warrant, it seems, need not allege that the act was done wrongfully or unlawfully, unless such manner is an essential element of the offense. See People *v.* Garrabed, 20 Misc. (N. Y.) 127, 45 N. Y. Suppl. 827 [*reversed* without opinion in 25 N. Y. App. Div. 624, 49 N. Y. Suppl. 1141].

Sufficient statements of offense see Hood *v.* Griffin, 113 Ga. 190, 38 S. E. 409 (allegation that accused did, on a certain day in the city named, keep for sale spirituous liquors, sufficiently charged the offense of a violation of an ordinance making it unlawful for any person to keep for sale any spirituous or vinous liquor within the city limits); Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625 (setting out the particulars of the offense, stating that it was done "contrary" to the provisions of ordinance No. 6 of said village, entitled "an ordinance relative to disturbances and breaches of the peace"); Keeler *v.* Milledge, 24 N. J. L. 142 (a notice that set out with clearness the offense charged, and the substance of the ordinance which had been violated, with reference to the title, date, and section); State *v.* Merritt, 83 N. C. 677 (setting out "that on or about May 9th, 1880, the defendants [named them] did while driving out of town act in a disorderly manner by driving at a furious rate, etc., contrary to law and in violation of the sixth ordinance of said town and against the peace and dignity of the state"); Clinton *v.* Leake, 71 S. C. 22, 50 S. E. 541 (charging that defendant wilfully cut a person named with a knife and otherwise abused him on the streets of the town named); Clinton *v.* Leake, *supra* (charging that defendant wilfully abused and shot at a person named on the streets of the town named, without provocation); Clinton *v.* Leake, *supra* (allegation that defendant wilfully struck and abused one C on the streets of the town, without provocation and in violation of the ordinances of the town, sufficiently sets forth the offense); Charleston *v.* Seeba, 4 Strobh. (S. C.) 319 (holding that under an ordinance providing that no negro or person of color shall be permitted to assemble or loiter in any liquor store, and the owner or keeper of such store shall forfeit

well as reference to the particular ordinance of the municipality which is alleged to have been violated.[59] The requirements for valid process in such prosecutions are neither more nor less stringent than those of ordinary actions or prosecutions.[60]

(B) *Defects and Variance.* For lack of any essential ingredient the process may be quashed.[61] The court may, however, disregard all such defects in process as would be disregarded after verdict in an action of debt or information upon a penal statute.[62] Objections to process may be waived.[63] A variance, however, between summons or warrant and the complaint, when material, will not give the court complete jurisdiction.[64]

h Institution of Proceeding and Filing of Document of Prosecution. It is moreover held to be necessary that the prosecution shall be instituted and conducted by some person who has been duly authorized or permitted by law to do so,[65]

a certain sum in every case where such negroes shall be found assembled in his or her store, the summary process need not state the names or sexes of such negroes or the names of their owners).

Insufficient statements of offense see Delany *v.* Washington, 7 Fed. Cas. No. 3,755, 2 Cranch C. C. 459 (too vague and uncertain to support a conviction); Washington *v.* Lynch, 29 Fed. Cas. No. 17,231, 5 Cranch C. C. 498 (vague and uncertain).

59. See cases cited *infra*, this note.

Must show the existence of the ordinance alleged to have been violated. McMinnville *v.* Stroud, 109 Tenn. 569, 72 S. W. 949.

Must refer to the ordinance in some way. Keeler *v.* Milledge, 24 N. J. L. 142; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 91 Hun 638, 36 N. Y. Suppl. 1130].

Need not set out the ordinance in terms.— State *v.* Cainan, 94 N. C. 880.

Reference by name, number, title, page, or section may be required. White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378; Keeler *v.* Milledge, 24 N. J. L. 142; Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356.

Indorsed on process.— New York *v.* Eisler, 10 Daly (N. Y.) 396, holding that where a statute directs that, in actions to recover penalties, "a general reference to the statute" must be indorsed on the copy of the summons, such indorsement must be made when the action is brought to recover a penalty for a violation of a municipal ordinance.

Authority to pass an ordinance need not be alleged in the process. State *v.* Merritt, 83 N. C. 677, holding that it is not necessary, since the passage of the general law for the government of towns, to allege the authority of the town to pass the ordinance, as the court will take judicial notice of that fact.

60. State *v.* Cainan, 94 N. C. 880.

61. State *v.* Goulding, 44 N. H. 284.

62. McGunnigle *v.* Washington, 16 Fed. Cas. No. 8,818, 2 Cranch C. C. 460.

63. Ewbanks *v.* Ashley, 36 Ill. 177, holding that such objections are waived by appeal.

64. White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378, reference to a section in the complaint different from the section referred to in the summons is a material variance. See also Lesterjelle *v.* Columbus, 30 Ga. 936, holding that a party summoned to answer for an offense committed against one ordinance cannot be proceeded against and punished by another and different ordinance. See *infra*, XI, B, 4, m.

Certiorari will lie to review a conviction based upon proceedings in which there is a material variance between the summons and the complaint. White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378.

65. Com. *v.* Cutler, Thach. Cr. Cas. (Mass.) 137 (holding that any citizen may prefer a complaint to the grand jury, or to the public prosecutor, who is authorized to proceed on such information, against a person erecting a building in the city of Boston with walls less thick than the statute prescribes); State *v.* Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33 (holding that a city may provide that no prosecution for violation of an ordinance shall be commenced except on complaint of a police officer of the city); Kansas City *v.* Flanagan, 69 Mo. 22 (on information of city attorney); Kinksville *v.* Munyon, 114 Mo. App. 567, 91 S. W. 57 (holding that where a municipal ordinance of a city of the third class, with the violation of which defendant was charged, provided that he should be entitled to a trial by jury as in prosecutions before justices of the peace, "and all trials before the recorder shall be conducted in like manner as cases before the justice of the peace," it did not render applicable to such proceedings the practice regulating the procedure in misdemeanor cases before justices of the peace, requiring the filing of an information, signed and verified by the prosecuting attorney, in the police court of the city, but that defendant could be properly proceeded against under the statute applicable to cities of the third class on the filing of a sworn complaint by any person); Meaher *v.* Chattanooga, 1 Head (Tenn.) 74 (upon information of judge or trial court); Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960 (holding that the provision of 1 Hill Code Oreg. § 533, that prosecutions for violation of a city ordinance may be on complaint of any person, does not conflict with a charter provision that the city attorney shall conduct all prosecutions for offenses against ordinances).

At the instance of a municipal officer.— In Singer *v.* Philadelphia, 112 Pa. St. 410,

and that the document of prosecution shall be presented to or filed in the proper court.[66]

i. Declaration, Complaint, Affidavit, or Information — (1) *In General.* Prosecutions or proceedings which are brought for the violation of municipal ordinances are usually based upon complaints[67] or informations[68] on oath or

4 Atl. 28, it was held that, the city of Philadelphia being clothed with a right of action to recover the penalty imposed by the act of April 21, 1855, for the violation of building regulations, it was no concern of defendant, in an action to recover the penalty, whether the suit was brought at the instance of the city solicitor or the building inspector.

66. State *v.* Mack, 41 La. Ann. 1079, 6 So. 808. See Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496, holding that an information sworn to before the mayor, left with him and treated by him as an information, and upon which a conviction was subsequently had, was sufficiently filed, although it was never marked "filed."

To give the justice's court complete jurisdiction in proceedings under the statute, there must be filed in the court a complaint, on oath or affirmation, that a person designated has violated a certain section of an ordinance passed under authority of the act, and a summons, stating what section of the ordinance has been violated, must be served upon the person designated. White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378.

67. *Alabama.*— Case *v.* Mobile, 30 Ala. 538.

California.— Denninger *v.* Pomona, 145 Cal. 628, 79 Pac. 364.

Colorado.— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Indiana.— Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759.

Kansas.—Johnson *v.* Winfield, 48 Kan. 129, 29 Pac. 559; Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527; Smith *v.* Emporia, 27 Kan. 528.

Maine.— Lewiston *v.* Fairfield, 47 Me. 481; Portland *v.* Rolfe, 37 Me. 400.

Massachusetts.— Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146; Com. *v.* Bean, 14 Gray 52; Com. *v.* Rice, 9 Metc. 253; Com. *v.* Gay, 5 Pick. 44.

Michigan.— *In re* Bushey, 105 Mich. 64, 62 N. W. 1036.

Minnesota.— State *v.* Marciniak, 97 Minn. 355, 105 N. W. 965; State *v.* Gill, 89 Minn. 502, 95 N. W. 449; State *v.* Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

Missouri.— St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731; Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750; St. Louis *v.* Dorr, 136 Mo. 370, 37 S. W. 1108; State *v.* Baker, 74 Mo. 394; Memphis *v.* O'Connor, 53 Mo. 468; Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505; Orrick *v.* Akers, 109 Mo. App. 662, 83 S. W. 649; Tarkio *v.* Loyd, 109 Mo. App. 171, 82 S. W. 1127; Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322; Green City *v.* Holsinger, 76 Mo. App. 567; Columbia *v.* Johnson, 72 Mo. App. 232; Lamar *v.* Hewitt, 60 Mo. App. 314; Clarence *v.* Patrick, 54 Mo. App. 462; Marshall *v.* Standard, 24 Mo. App. 192.

New Hampshire.— State *v.* Goulding, 44 N. H. 284; Stevens *v.* Dimond, 6 N. H. 330.

New Jersey.— Bray *v.* Damato, 70 N. J. L. 583, 57 Atl. 394; Atlantic City *v.* Crandol, 67 N. J. L. 488, 51 Atl. 447; Osborne *v.* Spring Lake, 64 N. J. L. 362, 46 Atl. 164; Schafer *v.* Atlantic City, 58 N. J. L. 131, 32 Atl. 133; White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378; Keeler *v.* Milledge, 24 N. J. L. 142, complaint in the nature of an information at common law.

Oregon.— Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111.

Pennsylvania.— Philadelphia *v.* Campbell, 11 Phila. 163. See also Pittston *v.* Rosenthal, 9 Kulp 547.

South Dakota.— Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896.

Vermont.— State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423; State *v.* Soragan, 40 Vt. 456.

Washington.—Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960.

Wisconsin.— State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004; Fink *v.* Milwaukee, 17 Wis. 26.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

68. *Delaware.*— Pratesi *v.* Wilmington, 4 Pennew. 258, 54 Atl. 694.

Iowa.— Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496; State *v.* Wilson, 109 Iowa 93, 80 N. W. 230; Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818; State *v.* Smouse, 49 Iowa 634.

Louisiana.— Minden *v.* McCrary, 108 La. 518, 32 So. 468.

Massachusetts.— Com. *v.* Cutler, Thach. Cr. Cas. 137.

Missouri.— St. Louis *v.* Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. N. S. 936; St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918; Kansas City *v.* Flanagan, 69 Mo. 22; Kirksville *v.* Munyon, 114 Mo. App. 567, 91 S. W. 57; Kansas City *v.* Zahner, 73 Mo. App. 396; St. Joseph *v.* Dye, 72 Mo. App. 214; Kansas City *v.* Whitman, 70 Mo. App. 630; Kansas City *v.* O'Connor, 36 Mo. App. 594.

New York.— People *v.* Garabed, 20 Misc. 127, 45 N. Y. Suppl. 827 [*reversed* without opinion in 25 N. Y. App. Div. 624, 49 N. Y. Suppl. 1141].

Ohio.— O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

South Carolina.—*In re* Oliver, 21 S. C. 318, 53 Am. Rep. 681.

Texas.— Curry *v.* State, (Cr. App. 1893) 24 S. W. 516.

affirmation;[69] but they may be based upon affidavit[70] or indictment,[71] or even upon the written report of designated officials,[72] the proper method of instituting the proceedings depending upon local laws and rules of practice.[73]

(II) *Rules of Procedure Governing.* Generally speaking the sufficiency of the complaint or information, where the proceeding is civil in its nature, is to be determined by the rules applicable in other civil cases.[74] Where the proceeding is criminal or quasi-criminal in its nature the proceeding is governed by the rules of criminal procedure rather than by the rules of civil procedure,[75] usually the rules governing summary trials and conviction in criminal cases.[76]

(III) *Formal Requisites* — (A) *In General.* Neither the same[77] nor a greater

Canada.— *In re* Fisher, 15 Manitoba 475.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

An information is the proper paper to be filed in a municipal court for the violation of a municipal ordinance in a criminal proceeding. Pratesi *v.* Wilmington, 4 Pennew. (Del.) 258, 54 Atl. 694.

On appeal from the municipal court in a criminal proceeding for violating a city ordinance, an information is the proper paper to be filed. Pratesi *v.* Wilmington, 4 Pennew. (Del.) 258, 54 Atl. 694. See *infra*, XI, B, 4, s, (VII), (E), (2).

In civil actions in the nature of debt, for the recovery of penalties, no written complaint or information may be required. See *infra*, notes 74, 80.

69. See *infra*, XI, B, 4, i, (III), (E).

70. *Louisiana.*— State *v.* Thompson, 111 La. 315, 35 So. 582; State *v.* Baker, 44 La. Ann. 79, 10 So. 405; State *v.* Dunbar, 43 La. Ann. 836, 9 So. 492.

Mississippi.— Telheard *v.* Bay St. Louis, 87 Miss. 580, 40 So. 326.

New Jersey.— Dunn *v.* Perth Amboy, 51 N. J. L. 406, 17 Atl. 971, oath or affirmation or affidavit.

North Carolina.— State *v.* Wilson, 106 N. C. 718, 11 S. E. 254.

Ohio.— Neifeld *v.* State, 23 Ohio Cir. Ct. 246 (affidavit or information); Jefferies *v.* Defiance, 11 Ohio Dec. (Reprint) 144, 25 Cinc. L. Bul. 68.

Pennsylvania.— See Pittston *v.* Rosenthal, 9 Kulp 547, affirmation or oath.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

71. State *v.* Moultrieville, Rice (S. C.) 158.

72. See *infra*, XI, B, 4, j.

The requirement for complaint on oath is complied with by the official report of an officer acting on his oath of office. St. Louis *v.* Vert, 84 Mo. 204. See also *infra*, XI, B, 4, i, (III), (E); XI, B, 4, j.

73. See Ingersoll Pub. Corp. 249, where it is said: "The nature and form of complaint, evidence, and trial for violation of municipal ordinances are so varied in the several states by constitutions, statutes, and decisions therein as to be regarded as matters of local rather than of general law, and therefore are not susceptible of general statement and treatment."

74. Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505. See also *supra*, XI, B, 4, b; and *infra*, note 77 *et seq.*

In actions to recover penalties for breach of municipal ordinances the general rules of pleading in civil actions rather than criminal prosecutions in the state are applicable. Springfield *v.* Ford, 40 Mo. App. 586.

Thus no complaint or information may be required in a civil action in the nature of debt to recover a penalty for breach of an ordinance. Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76 (holding that under 2 Mills Annot. St. Colo. § 4435, a complaint is not necessary); Chicago *v.* Kenney, 35 Ill. App. 57 (holding that in a civil action in form of debt, under City and Village Act, §§ 84, 278, relating to the arrest and prosecution of persons breaking the peace or violating municipal ordinances, an affidavit or complaint is not necessary to the jurisdiction of a justice); Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322 (holding that where the proceeding is of a civil character it is not necessary that an information be filed by the city attorney or any other person). *Compare* Deitz *v.* Central, 1 Colo. 323. And see *infra*, note 80.

75. See *supra*, XI, B, 4, b; and cases cited *infra*, note 77 *et seq.*

Where the proceeding is criminal in its nature a formal complaint under oath is necessary, and all pleadings required must be both formal and particular. Campbell *v.* Thompson, 16 Me. 117; Kansas City *v.* Flanagan, 69 Mo. 22.

76. See CRIMINAL LAW, 12 Cyc. 321 *et seq.*

Form and requisites of complaint or information for summary trial see CRIMINAL LAW, 12 Cyc. 323 *et seq.*

77. State *v.* Baker, 44 La. Ann. 79, 10 So. 405; State *v.* Dunbar, 43 La. Ann. 836, 9 So. 492; Memphis *v.* O'Connor, 53 Mo. 468; Springfield *v.* Ford, 40 Mo. App. 586. But see Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115, where it is said that the complaint must set out matters constituting the offense as fully as is required for a similar offense in an indictment.

Less formality required than in indictments see CRIMINAL LAW, 12 Cyc. 324.

Charges before recorders for violation of the laws or ordinances do not require the precision of indictments. State *v.* Finnegan, 50 La. Ann. 549, 23 So. 621.

The statute may require less formality. See Aderhold *v.* Anniston, 99 Ala. 521, 12

degree of strictness[78] can be required than is required in indictments. Regardless of its form if it notifies defendant of the particular ordinance which he is charged with violating, and states facts sufficient to bar another prosecution for the same offense, the complaint is sufficient.[79]

(B) *Written or Oral.* Although a written declaration may not always be necessary,[80] generally a complaint in writing and sometimes a written complaint verified by oath is required.[81]

(C) *Entitling and Venue.* The complaint or other document of prosecution should be properly entitled,[82] and must contain a sufficient statement as to the venue.[83]

(D) *Conclusion.*[84] The complaint need not as a rule conclude "against the peace and dignity of the state,"[85] nor even with "against the form of the statute

So. 472; Ala. Code, § 3405; Shannon Code Tenn. §§ 4873, 4878.

78. State *v.* Finnegan, 50 La. Ann. 549, 23 So. 621; State *v.* Reckards, 21 Minn. 47.

Greater particularity is not demanded than is required in a state prosecution for misdemeanor. Minden *v.* McCrary, 108 La. 518, 32 So. 468; State *v.* Baker, 44 La. Ann. 79, 10 So. 405; St. Louis *v.* Smith, 10 Mo. 438; Keeler *v.* Milledge, 24 N. J. L. 142.

Liberal rules should be applied to complaints filed in police courts for the violation of municipal ordinances, and the same strictness is not required in such cases as in prosecutions for public offenses in the name of the state by information or indictment. Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527.

79. Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505. See also Goshen *v.* Croxton, 34 Ind. 239; St. Louis *v.* Smith, 10 Mo. 438. See also *infra*, XI, B, 4, i, (V), (A); XI, B, 4, i, (VI).

Although not drawn in regular form an affidavit may be sufficient to sustain proceedings in the mayor's court for the violation of an ordinance. Minden *v.* McCrary, 108 La. 518, 32 So. 468.

Reasonable notice to defendant is all that is required. State *v.* Finnegan, 50 La. Ann. 549, 23 So. 621.

80. Deitz *v.* Central, 1 Colo. 323 (holding that where a city charter provided that to recover a penalty it shall be sufficient to declare generally, in debt, it is not necessary in an action for the penalty to file a written declaration as in a common-law action for debt); Alton *v.* Kirsch, 68 Ill. 261; Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29; Green City *v.* Holsinger, 76 Mo. App. 567. See *supra*, note 74..

If defendant is present complaint may be oral. Green City *v.* Holsinger, 76 Mo. App. 567; Oran *v.* Bles, 52 Mo. App. 509.

Oral complaint is sufficient in some jurisdictions. See CRIMINAL LAW, 12 Cyc. 323.

When made by a police officer or town marshal the complaint need not be in writing, if defendant is present in court and in custody. Mo. Rev. St. (1889) § 1685 [*quoted* in Oran *v.* Bles, 52 Mo. App. 509, 510].

81. See CRIMINAL LAW, 12 Cyc. 323; *infra*, XI, B, 4, i, (III), (E).

Complaint should be in writing unless defendant is in court. Oran *v.* Bles, 52 Mo. App. 509.

82. State *v.* Wilson, 109 Iowa 93, 80 N. W. 230; State *v.* Smouse, 49 Iowa 634; Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

An erroneous entitling may, however, be immaterial. State *v.* Wilson, 109 Iowa 93, 80 N. W. 230, where the information was entitled in the name of the state instead of the city. So an erroneous entitling of subsequent papers has been held to constitute a mere immaterial irregularity. Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449. In State *v.* Smouse, 49 Iowa 634, where the information was entitled "The State of Iowa, City of Washington," the words "State of Iowa" were treated as surplusage, the information showing that the prosecution was by and in the name of the city.

83. Smith *v.* Emporia, 27 Kan. 528; State *v.* Baker, 74 Mo. 394. See also Barton *v.* Le Grande, 17 Oreg. 577, 22 Pac. 111.

Statement of venue in complaints for summary trial see CRIMINAL LAW, 12 Cyc. 323.

Name of county need not be stated. See Beasley *v.* Beckley, 28 W. Va. 81.

The words "town" and "village" may be used interchangeably, and where a complaint so uses them it has been held to constitute a harmless defect. Orrick *v.* Akers, 109 Mo. App. 662, 83 S. W. 549.

Where the caption contains the names of the state, county, and city, and the body of the complaint states the name of the city; that it is of the second class and is duly organized under the laws of the state; and that defendant did on a day named, within its corporate limits, commit an offense prohibited by its ordinance, the complaint in a police court by a city of the second class sufficiently sets forth the venue. Smith *v.* Emporia, 27 Kan. 528.

84. **Proper conclusion in summary proceedings** see CRIMINAL LAW, 12 Cyc. 326.

85. State *v.* Marciniak, 97 Minn. 355, 105 N. W. 965 (holding that in a complaint the words "against the peace and dignity of the state of Minnesota" must be considered as surplusage, and that their use cannot be construed as making the charge against defendant of violating any criminal statute of the state); Curry *v.* State, (Tex. Cr. App. 1893)

in such case made and provided," [86] unless the prosecution can only be maintained by virtue of a statute,[87] in which case it seems it must conclude *contra formam statuti*.[88] However, it usually does conclude "contrary to the ordinance," etc., or with words to like effect,[89] and it should do so or at least refer to and identify the ordinance with an allegation that the same has been violated.[90]

(E) *Signature and Verification.* By the weight of authority the complaint is required to be subscribed [91] and sworn to [92] by the complainant. Upon such

24 S. W. 516. See CRIMINAL LAW, 12 Cyc. 326. But see *In re* Oliver, 21 S. C. 318, 53 Am. Rep. 681, where information concluding "against the peace and dignity of the state" was sustained. *Contra*, State *v.* Soragan, 40 Vt. 450, holding that a complaint for violation of a municipal ordinance should conclude against the statute and also against the peace and dignity of the state.

86. State *v.* Gill, 89 Minn. 502, 95 N. W. 449. See CRIMINAL LAW, 12 Cyc. 326. *Contra*, State *v.* Cruickshank, 71 Vt. 94, 42 Atl. 983; State *v.* Soragan, 40 Vt. 450.

A declaration for a penalty imposed by a village ordinance need not conclude *contra formam statuti*. Winooski *v.* Gokey, 49 Vt. 282.

87. See State *v.* Gill, 89 Minn. 502, 95 N. W. 449, holding that since the repeal of the common law the conclusion "contrary to the statute" is functionless, except where the same acts are declared to be an offense punishable both by statute and by municipal ordinance.

88. Com. *v.* Gay, 5 Pick. (Mass.) 44; Com. *v.* Worcester, 3 Pick. (Mass.) 462; State *v.* Gill, 89 Minn. 502, 95 N. W. 449; Stevens *v.* Dimond, 6 N. H. 330.

89. Com. *v.* Gay, 5 Pick. (Mass.) 44; *In re* Bushey, 105 Mich. 64, 62 N. W. 1036; Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449; Stevens *v.* Dimond, 6 N. H. 330; and cases cited *supra*, notes 85–88.

90. Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449. See also *infra*, XI, B, 4, i, (VI).

91. Kansas City *v.* Flanagan, 69 Mo. 22; Oran *v.* Bles, 52 Mo. App. 509 (unless defendant is in court and in custody); Curry *v.* State, (Tex. Cr. App. 1893) 24 S. W. 516.

Signing of complaint for summary trial see CRIMINAL LAW, 12 Cyc. 325.

An information of a city attorney cannot be signed by his deputy. Kansas City *v.* Flanagan, 69 Mo. 22, must be signed by the city attorney.

92. *Alabama.*— Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415.

Iowa.— Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496.

Massachusetts.— Com. *v.* Cutler, Thach. Cr. Cas. 137.

Missouri.—Clarence *v.* Patrick, 54 Mo. App. 462 (where the complaint was verified by the marshal); Oran *v.* Bles, 52 Mo. App. 509 (unless defendant is in court and in custody); Edina *v.* Brown, 19 Mo. App. 672.

New Jersey.— State *v.* Perth Amboy, 51 N. J. L. 406, 17 Atl. 971. See White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378, must be sworn to or affirmed.

Pennsylvania.— Philadelphia *v.* Campbell, 33 Leg. Int. 12.

Texas.— Curry *v.* State, (Cr. App. 1893) 24 S. W. 516.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

Verification of complaint for summary trial see CRIMINAL LAW, 12 Cyc. 325.

The prosecuting attorney or prosecuting officer need not swear to an information filed by him. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100; *In re* Jager, 29 S. C. 438, 7 S. E. 605. See Kansas City *v.* O'Connor, 36 Mo. App. 594, where, by provisions of a city charter, a warrant for violation of any ordinance might issue on the oath of any person, or upon information of the city attorney; and the recorder was made *ex-officio* justice of the peace within the city. The city ordinances provided that all cases triable before the recorder should be proceeded with in the same manner as trials before justices of the peace for misdemeanors, and that the city attorney should prepare all complaints for violation of city ordinances and prosecute all such offenses. It was held that as under the general statutes misdemeanors were to be prosecuted before justices of the peace by information, after an arrest for violation of an ordinance on warrant issued on oath of a private person, there could be no trial therefor before the recorder until an information based on such oath had been filed by the city attorney; such information to be signed by him, instead of by the prosecuting attorney, as required in respect of informations before justices.

Where the statute does not require the complaint to be supported by affidavit or oath it is immaterial whether the complaint as filed conforms to the affidavit upon which it purports to be based (Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505), or, it seems, whether the verification is good or bad as such (Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322).

On information and belief.—In some states a verification merely on information and belief is insufficient (see CRIMINAL LAW, 12 Cyc. 325), while in others it is sufficient (see CRIMINAL LAW, 12 Cyc. 326). An affidavit made before the mayor of a municipality, in which the affiant states that he "has probable cause for believing, and does believe," that a specific offense prohibited by an ordinance of the municipality has been committed by defendant, is sufficient as a complaint for the violation of a municipal ordinance. Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415.

verified allegations the criminal process may issue, directing the arrest of the person charged with violating the ordinance.[93]

(IV) *DESCRIPTION OF PARTIES AND AUTHORITY TO SUE.* The parties should be properly named and described in the complaint.[94] The person charged should be identified with certainty.[95] So plaintiff's right to sue for the penalty must be alleged.[96]

(V) *ALLEGING BREACH OF ORDINANCE OR CHARGING THE OFFENSE*[97]— (A) *In General.* The complaint or information must of course show all the facts necessary to give the court or tribunal jurisdiction,[98] and state such facts as would render a judgment thereon a bar to a subsequent judgment.[99] The accused having the right to demand the nature and cause of the accusation,[1] the complaint or information must state sufficient facts to notify him of the offense with which he is charged[2] and is called upon to answer,[3] as well as the ordinance which he is accused of violating.[4] It should contain all the averments of fact essential to con-

Immaterial defects in jurat.— Where the police judge before whom the complaint was made signed the jurat, but did not include the name of his office in the signature, this did not invalidate the complaint, where it appeared from the transcript of the case brought to the district court upon which an appeal was founded that the person who signed the jurat was police judge of the city. Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527. "J. P." instead of "P. J." or the words "police judge" in the name of the police judge who signs the jurat does not vitiate the complaint. Cherokee *v.* Fox, 34 Kan. 16, 17 Pac. 625. Where the jurat was signed by the mayor in his own name individually, without any reference to his title of office, but was sealed with his official seal which bore the name of the city and the words "mayor's office," the verification was sufficient. Clarence *v.* Patrick, 54 Mo. App. 462. Where the charter of the city provides that the recorder shall have jurisdiction, on oath, affirmation, or affidavit made according to law that any one has been guilty of a violation of an ordinance, to issue process in the nature of a summons or warrant, etc., a complaint under oath of the violation of an ordinance was not insufficient because the jurat was not signed by the police magistrate until the return-day of the summons. State *v.* Perth Amboy, 51 N. J. L. 406, 17 Atl. 971. Attestation by a clerk *pro tempore* is *prima facie* sufficient. See CRIMINAL LAW, 12 Cyc. 326. See Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496, holding that it will be presumed that a mayor of a municipality, before whom an information was verified, was within his jurisdiction when he administered the oath.

93. Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415.

Process see *supra*, XI, B, 4, g, (II), text and note 53.

94. Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896; Curry *v.* State, (Tex. Cr. App. 1893) 24 S. W. 516.

The name of complainant need not be set out in the body of the complaint, it being sufficient that he sign and swear to the same. Curry *v.* State, (Tex. Cr. App. 1893) 24 S. W. 516.

That defendant was a resident of the city need not be alleged. State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004, holding this to be true in a prosecution for owning or having in possession in a city an unlicensed dog, as a violation of an ordinance denouncing the same, although another section of the ordinance licensing dogs confined that right to residents.

95. Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896, holding that where the caption of the complaint reads, "The City of Lead *v.* J. Klatt & L. Klatt," and the accompanying affidavit refers to them as "said defendants," the complaint sufficiently stated with certainty the persons charged with the offense.

96. Case *v.* Mobile, 30 Ala. 538.

By Me. St. (1851) c. 211, § 5, the mayor and aldermen, etc., are required to commence prosecutions for certain offenses on being informed of the commission of the same and being furnished with proof. It was held that being furnished with the proof was not a preliminary necessary to be shown in evidence of the authority of the prosecutors to bring the suit. Portland *v.* Rolfe, 37 Me. 400.

97. **Allegation of offense in complaint for summary trial** see CRIMINAL LAW, 12 Cyc. 324.

98. See CRIMINAL LAW 12 Cyc. 323.

99. St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731; Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505. See *supra*, text and note 79.

Every element necessary to constitute the violation should be alleged. Tyler *v.* Lawson, 30 N. J. L. 120.

1. Telheard *v.* Bay St. Louis, 87 Miss. 580, 40 So. 326.

2. Neifeld *v.* State, 23 Ohio Cir. Ct. 246.

3. Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; St. Louis *v.* Smith, 10 Mo. 438.

4. State *v.* Thompson, 111 La. 315, 35 So. 582; Marshall *v.* Standard, 24 Mo. App. 192. See also *supra*, text and note 79; and *infra*, XI, B, 4, i, (VI).

The complaint or information is sufficient if it informs defendant what acts of his are complained of and what ordinance he has violated. State *v.* Thompson, 111 La. 315, 35 So. 582.

stitute the violation charged,[5] and state the essential facts constituting such violation.[6] The breach of the ordinance must be set forth with sufficient certainty[7] to enable the court to see a valid cause of action or defense.[8]

(B) *Following Language of Ordinance.* Charging the offense in the same terms or in substantially the same terms as those used in the ordinance is generally sufficient.[9]

5. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

6. Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115.

7. *Alabama.*— Case *v.* Mobile, 30 Ala. 538.

California.— Denninger *v.* Pomona, 145 Cal. 638, 79 Pac. 364.

Colorado.— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Indiana.— Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759; Greenburgh *v.* Corwin, 58 Ind. 518.

Kansas.— Johnson *v.* Winfield, 48 Kan. 129, 29 Pac. 559; Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527.

Louisiana.— State *v.* Thompson, 111 La. 315, 35 So. 582; New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 184; State *v.* Baker, 44 La. Ann. 79, 10 So. 405; State *v.* Dunbar, 43 La. Ann. 836, 90 So. 492.

Massachusetts.— Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146; Com. *v.* Rice, 9 Metc. 253; Com. *v.* Cutler, Thach. Cr. Cas. 137.

Michigan.— Napman *v.* People, 19 Mich. 352.

Mississippi.— Telheard *v.* Bay St. Louis, 87 Miss. 580, 40 So. 326.

Missouri.— St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918; St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731; St. Louis *v.* Dorr, 136 Mo. 370, 37 S. W. 1108; State *v.* Baker, 74 Mo. 394; Memphis *v.* O'Connor, 53 Mo. 468; St. Louis *v.* Smith, 10 Mo. 438; Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322; St. Joseph *v.* Dye, 72 Mo. App. 214; Lamar *v.* Hewitt, 60 Mo. App. 314.

New Jersey.— Bray *v.* Damato, 70 N. J. L. 583, 57 Atl. 394; Osborne *v.* Spring Lake, 64 N. J. L. 362, 46 Atl. 164; Schafer *v.* Atlantic City, 58 N. J. L. 131, 32 Atl. 133; Roberson *v.* Lambertville, 38 N. J. L. 69; Tyler *v.* Lawson, 30 N. J. L. 120.

North Carolina.— State *v.* Wilson, 106 N. C. 718, 11 S. E. 254.

Ohio.— Jeffreys *v.* Defiance, 11 Ohio Dec. (Reprint) 144, 25 Cinc. L. Bul. 68.

Oregon.— Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115.

Pennsylvania.— Com. *v.* Cane, 2 Pars. Eq. Cas. 265.

South Carolina.— State *v.* Moultrieville, Rice 158.

Vermont.— State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423.

Wisconsin.— State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

Canada.— Reg. *v.* Roche, 4 Can. Cr. Cas. 64, 32 Ont. 20 (holding that the pleading must show by clear affirmative allegation a violation of the ordinance or by-law before conviction can be had); *In re* Fisher, 50 Manitoba 475.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1395, 1406.

8. *Alabama.*— Case *v.* Mobile, 30 Ala. 538.

Indiana.— Long *v.* Brookston, 79 Ind. 182; Greenburgh *v.* Corwin, 58 Ind. 518; Huntington *v.* Pease, 56 Ind. 305.

Missouri.— Columbia *v.* Johnson, 72 Mo. App. 232; St. Joseph *v.* Dye 72 Mo. App. 214.

New Jersey.— Tyler *v.* Lawson, 30 N. J. L. 120.

South Dakota.— Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1395, 1406.

For sufficient allegations see Denninger *v.* Pomona Recorders' Ct., 145 Cal. 638, 79 Pac. 364; Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; Greenburgh *v.* Corwin, 58 Ind. 518; Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527; State *v.* Thompson, 111 La. 315, 35 So. 582; State *v.* Baker, 44 La. Ann. 79, 10 So. 405; State *v.* Dunbar, 43 La. Ann. 836, 9 So. 492; Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146; Com. *v.* Rice, 9 Metc. (Mass.) 253; Com. *v.* Cutler, Thach. Cr. Cas. (Mass.) 137; St. Joseph *v.* Dye, 72 Mo. App. 214; Keeler *v.* Milledge, 24 N. J. L. 142; State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

For insufficient allegations see Johnson *v.* Winfield, 48 Kan. 129, 29 Pac. 559; Com. *v.* Bean, 14 Gray (Mass.) 52; Telheard *v.* Bay St. Louis, 87 Miss. 580, 40 So. 226; St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731; St. Louis *v.* Dorr, 136 Mo. 370, 37 S. W. 1108; Memphis *v.* O'Connor, 53 Mo. 468; Lamar *v.* Hewitt, 60 Mo. App. 314; Osborne *v.* Spring Lake, 64 N. J. L. 362, 46 Atl. 164; Schafer *v.* Atlantic City, 58 N. J. L. 131, 32 Atl. 133; Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115; State *v.* Soragan, 40 Vt. 450; *In re* Fisher, 15 Manitoba 475.

9. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; St. Louis *v.* Knox, 74 Mo. 79 [*affirming* 6 Mo. App. 247]; Kansas City *v.* Zahner, 73 Mo. App. 396; Columbia *v.* Johnson, 72 Mo. App. 232; De Soto *v.* Brown, 44 Mo. App. 148; Woods *v.* Prineville, 19 Oreg. 108, 23 Pac. 880. See CRIMINAL LAW, 12 Cyc. 324. See also San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797. But see State *v.* Goulding, 44 N. H. 284, holding that a complaint should be

(c) *Allegations of Time, Place, Intent, Etc.* The particulars in which defendant has violated the ordinance, which should be stated,[10] include proper allegations as to time[11] and place[12] of commission, and the motive and intent[13] or knowledge[14] with which the act was committed by defendant, as well as other special circumstances, when these constitute essential ingredients of the offense charged;[15] but

quashed, although it pursue the very language of the ordinance, if it does not in fact allege such an illegal act as the ordinance was intended to prohibit.

Merely stating that defendant's act was contrary to the ordinance of the city is insufficient. Memphis *v.* O'Connor, 53 Mo. 468; Marshall *v.* Standard, 24 Mo. App. 192.

10. New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 484; Horn *v.* People, 26 Mich. 221; St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918. See also *supra*, XI, B, 4, j, (v), (A); and cases cited *infra*, notes 11–17.

11. St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918; State *v.* Cadwalader, 36 N. J. L. 283; Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960; *In re* Fisher, 15 Manitoba 475, time of the commission should be sufficiently stated. But *compare* State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

12. St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. N. S. 918; St. Louis *v.* Babcock, 156 Mo. 148, 56 S. W. 732; Anderson *v.* Camden, 52 N. J. L. 289, 19 Atl. 539; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111 (holding that a complaint under a city ordinance, against disorderly conduct "in any street, home, or place within the city," is bad unless it shows that the act was committed in a street, house, or other definite locality within the city); Philadelphia *v.* Hughes, 4 Phila. (Pa.) 148.

13. Intent when essential must be proved as charge see *supra*, XI, B, 1, a. See also *Ex p.* Casinello, 62 Cal. 538; Case *v.* Hall, 21 Ill. 632.

Malice, carelessness, or wantonness need not be alleged unless they constitute an essential ingredient of the offense. State *v.* Merrill, 37 Me. 329.

Unless intent is an essential ingredient of the offense the information or complaint need not allege its existence. People *v.* Garabed, 20 Misc. (N. Y.) 127, 45 N. Y. Suppl. 827 [*reversed* without opinion in 25 N. Y. App. Div. 624, 49 N. Y. Suppl. 1141]. See also Com. *v.* Derby, 162 Mass. 183, 38 N. E. 440.

14. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

15. *In re* Fisher, 15 Manitoba 475. See State *v.* Moultrieville, Rice (S. C.) 158, holding that an indictment under an ordinance providing that it shall not be lawful to cut down and "make use of the cedars, or other trees," etc., should allege, not only that defendant cut down such trees, but that he made use of them, as the offense under the ordinance does not consist merely in cutting down, but in cutting down and making use of, the trees.

Annoyance and request to desist.— In an action to recover a fine for the violation of an ordinance making it unlawful for any person to burn tar in propelling machinery, or for any other purpose, to the annoyance and discomfort of any one residing in his vicinity, and subjecting him to said fine if he does so burn tar and does not immediately desist upon the request of any citizen annoyed thereby, or if he is guilty of any subsequent violation of the ordinance, the state of demand should aver a burning after a request to desist, and should give the names of the persons annoyed. Tyler *v.* Lawson, 30 N. J. L. 120. Under Ohio Rev. St. § 2108, providing that the city council may provide for the punishment of persons disturbing the good order and quiet of the corporation by intoxication, to the annoyance of the citizens, an averment in the affidavit of prosecution for violation of an ordinance passed under such statute, that such intoxication resulted in the disturbance of the good order and quiet of the corporation, is necessary to authorize a conviction, since the statute only authorized ordinances prohibiting breach of the peace by intoxicated persons, and not against mere intoxication. Jefferies *v.* Defiance, 11 Ohio Dec. (Reprint) 144, 25 Cinc. L. Bul. 68.

Failure to procure license.— A complaint which charges defendant with having sold whisky in the city, in quantities prohibited by ordinance, but which fails to charge that defendant sold the whisky without having first obtained a license as required by the ordinance, does not state facts sufficient to constitute an offense. Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115.

Grazing on public way.— Under an ordinance which prohibits permitting any cattle to go at large or "stop to feed" on any highway, a complaint which avers that defendant suffered two cows "to stop and feed" on certain highways is bad even after verdict, the object of the ordinance being to prevent grazing. Com. *v.* Bean, 14 Gray (Mass.) 52.

Inspection of building and notice.— Where an ordinance prescribed that the building inspector should inspect buildings, and that, if he deemed any building unsafe, he should notify the owner, who should be liable to prosecution for failure to remedy the defects, a complaint against an owner for violating the ordinance should have alleged a personal inspection of the building by the inspector, and notice by him to the owner. Schafer *v.* Atlantic City, 58 N. J. L. 131, 32 Atl. 133.

Ownership or control.—Under an ordinance imposing on "owners or drivers" of vehicles a penalty for not keeping a number conspicuously fixed on the vehicle, a complaint that defendant was engaged in carrying passengers for hire, not alleging that he was either owner

the rule against technicalities[16] should always be observed when such observance is practicable.[17]

(D) *Negativing Statutory Provisions.* While in a proper case negativing allegations are necessary,[18] provisions or exceptions of an ordinance need not be

or driver, was insufficient. Osborne *v.* Spring Lake, 64 N. J. L. 362, 46 Atl. 164. In St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731, the complaint was held to be insufficient in alleging an unlawful trespass, for failure to state the *locus in quo* and the names of the owners of the property trespassed upon. But under Mass. Acts (1817), c. 71, prescribing the thickness of the walls of buildings to be erected in the city of Boston, an information charging, in the words of the statute, the erection of a building complained of, by a certain person, is sufficiently certain without stating that he was the owner. Com. *v.* Cutler, Thach. Cr. Cas. (Mass.) 137.

Resisting officer see Lamar *v.* Hewitt, 60 Mo. App. 314, holding that a complaint for resisting a night watchman in making an arrest was fatally defective in not alleging that the watchman was authorized by law to make such arrest.

Service of order.— Nor is it an averment that the order was served; it is an assumption, and not an averment, of the fact of service. State *v.* Soragan, 40 Vt. 450. An averment, in a criminal complaint, which merely states that the respondent "did disobey a lawful order of the health officer . . . after the same had been duly served upon him," etc., and then proceeds to give the substance of the order, but does not state in what the act or neglect of the respondent consists, is insufficient.

Tender.— A complaint in the police court, charging defendant with a violation of an ordinance, by wilfully refusing, as the agent of a water company, to supply complainant with water, a tender being made in actual money for that purpose, is bad, and should be quashed if it does not state that the water company was under a legal obligation by ordinance to supply such water, and does not, in express words or by fair implication, allege that the tender was sufficient. Johnson *v.* Winfield, 48 Kan. 129, 29 Pac. 559.

16. See *supra*, B, 4, i, (III), (A).

17. See People *v.* Garabed, 20 Misc. (N. Y.) 127, 45 N. Y. Suppl. 827 [*reversed* without opinion in 25 N. Y. App. Div. 624, 49 N. Y. Suppl. 1141], holding that in a proceeding to enforce payment of a fine for violation of an ordinance the warrant and information need not allege that defendant wrongfully and unlawfully did the act charged.

Charging that one assisted in the violation of an ordinance does not prevent conviction of committing the offense unaided. Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29, for the reason that there are no accessaries in misdemeanors.

Occupying stand in market.— A complaint for violation of an ordinance regulating Faneuil Hall market is sufficient if it alleges that defendant, without satisfying the clerk, etc., occupied a stand within the limits of the market with a box for the purpose of vending articles there, without alleging that the box was of such a size as to be capable of being used as a stand. Com. *v.* Rice, 9 Metc. (Mass.) 253.

Residence.—Where an ordinance denounced a penalty against every person who should own or have in his possession in the city an unlicensed dog, it was not necessary to allege in a complaint in an action for violation of the ordinance that defendant was a resident of the city, although another section of the same ordinance, which authorized licensing of dogs, confined that right to residents. State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

Right to use of way.— In a prosecution under an ordinance providing that no owner or occupant of land abutting on a private way shall suffer any filth to remain on that part of the way adjoining his land, it was not necessary to set out in the complaint the nature of defendant's right to the use of the way. Com. *v.* Cutter, 156 Mass. 52, 29 N. E. 1146.

To the damage of complainant.— Where a complaint, in an action to recover a penalty for a violation of the ordinance of a city existing under the general charter provided for by Wis. Rev. St. (1898) § 925, charged that the offense was to the damage of the affiant, who was not a city officer, the mistake was immaterial, since the form of complaint prescribed by section 925–69 contains no allegation as to who is damaged by the offense, and the specification as to who was damaged was mere surplusage. State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

"Unlawfully" may be equivalent to "wilfully." Savannah *v.* Dickey, 33 Mo. App. 522.

"Wilfully" and "unlawfully" may be equivalent to "knowingly." Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

18. Whiting *v.* Dooh, 152 Ind. 157, 52 N. E. 759 (holding that a complaint for violating an ordinance against riding a bicycle on sidewalks, which is valid only so far as concerns sidewalks other than "brick, stone, plank, or gravel," should show that the sidewalk ridden on was not composed of one of those materials); Tarkio *v.* Loyd, 109 Mo. App. 171, 82 S. W. 1127 (holding that a complaint for soliciting orders for merchandise, without a license, was bad for not negativing the exception as to certain persons who might sell and solicit certain articles without a license); Roberson *v.* Lambertville, 38 N. J. L. 69.

Where the proviso is not a part of the definition of the offense the complaint need not negative it. Kansas City *v.* Garnier, 57 Kan. 412, 46 Pac. 707, where the clause containing the proviso was distinct and subsequent to the clause defining the offense.

negatived in the complaint, where defendant is not prejudiced in his substantial rights by failure to do so.[19]

(VI) *REFERENCE TO ORDINANCE VIOLATED.* The municipal court being bound to take judicial cognizance of municipal ordinances as the peculiar law of the forum as shown in other chapters of this treatise,[20] it is not usually necessary in proceedings or prosecutions in a municipal court to plead the ordinance *in hæc verba* or in terms.[21] However, the complaint should properly refer to and identify the ordinance alleged to have been violated,[22] as by referring to it by

19. Martinsville *v.* Frieze, 33 Ind. 507; Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322; Neifeld *v.* State, 23 Ohio Cir. Ct. 246; Polk *v.* Cincinnati, 3 Ohio Cir. Ct. 497, 2 Ohio Cir. Dec. 285.

An exception need not be negatived where it may be shown under the general issue as a matter of defense. Cleveland Tp. *v.* Ledoux, 22 Quebec Super. Ct. 85.

20. See *supra*, VI, N, 1; EVIDENCE, 16 Cyc. 898. See also *infra*, XI, B, 4, n, (V).

21. *Alabama.*— Goldthwaite *v.* Montgomery, 50 Ala. 486.

California.— *Ex p.* Davis, 115 Cal. 445, 47 Pac. 258.

Indiana.— Elkhart *v.* Calvert, 126 Ind. 6, 25 N. E. 807; Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

Kansas.— West *v.* Columbus, 20 Kan. 633 (holding that no part of the ordinance need be copied into the complaint, nor express reference made thereto by date, number, or otherwise, if the acts in violation of the ordinance are clearly and fully charged); Emporia *v.* Volmer, 12 Kan. 622.

Massachusetts.— Com. *v.* Derby, 162 Mass. 183, 38 N. E. 440.

Michigan.— Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625.

Minnesota.— Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449.

Montana.— Miles City *v.* Kern, 12 Mont. 119, 29 Pac. 720.

New Jersey.— Kip *v.* Paterson, 26 N. J. L. 298.

New York.— See New York *v.* Eisler, 2 N. Y. Civ. Proc. 125.

North Carolina.— State *v.* Cainan, 94 N. C. 880; State *v.* Merritt, 83 N. C. 677.

Oregon.— Woods *v.* Prineville, 19 Oreg. 108, 23 Pac. 880.

Texas.— Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70.

Washington.— Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960.

Wisconsin.— Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552; Fink *v.* Milwaukee, 17 Wis. 26.

See also *supra*, VI, N, 1.

In other courts see State *v.* Edens, 85 N. C. 522, in which the court held that upon an indictment for violating a city ordinance the terms of the ordinance must be set out in the indictment. See also *supra*, VI, N, 1.

22. *Alabama.*— Case *v.* Mobile, 30 Ala. 538.

Colorado.— Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1.

Georgia.— McDonald *v.* Lane, 80 Ga. 497, 5 S. E. 628.

Indiana.—Whitson *v.* Franklin, 34 Ind. 392. *Compare* Green *v.* Indianapolis, 22 Ind. 192.

Iowa.— Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818; Goodrich *v.* Brown, 30 Iowa 291.

Louisiana.— New Orleans *v.* Labatt, 33 La. Ann. 107.

Maine.— Lewiston *v.* Fairfield, 47 Me. 481, holding that a complaint, in no manner alluding to the by-laws of the town, cannot be sustained by virtue of those by-laws. But see O'Malia *v.* Wentworth, 65 Me. 129, holding that a complaint made to the city court of the city of Portland need contain no recital of the ordinance violated.

Massachusetts.— Com. *v.* Odenweller, 156 Mass. 234, 30 N. E. 1022, holding that an allegation in an indictment that the acts are contrary to the form of a city ordinance will allow proof of the ordinance in the ordinary way, and that it is immaterial that the bound volume in which the ordinance appears was not referred to in the indictment.

Minnesota.— Winona *v.* Burke, 23 Minn. 254.

New Jersey.— White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378; Keeler *v.* Milledge, 24 N. J. L. 142.

New York.— See Harker *v.* New York, 17 Wend. 199.

North Carolina.—See Hendersonville *v.* McMinn, 82 N. C. 532; Greensboro *v.* Shields, 78 N. C. 417.

Oregon.— Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115, holding that in a complaint for the violation of a city ordinance the facts constituting the offense must be set out in the complaint as fully as they are required to be stated in an indictment for a similar offense against the state.

South Carolina.— Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845.

Texas.—Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70.

Vermont.— State *v.* Soragan, 40 Vt. 450.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

If no ordinance is set out in the proceedings as having been violated, a prosecution under a town ordinance must fail. Hendersonville *v.* McMinn, 82 N. C. 532; Greensboro *v.* Shields, 78 N. C. 417.

Under a reënacted ordinance.— Where an ordinance contained a clause imposing a penalty for retailing without a license, and another ordinance reënacted this clause but reduced the penalty and contained no provision for granting license, it was held, in an

number,[23] number and date of passage and adoption,[24] number and the number and subject of the section thereof,[25] number and title or name,[26] title or name,[27] title or name and date of passage and adoption,[28] title or name and section,[29] or title or name, date and section.[30] Nevertheless in some cases it has been held that the ordinance must be pleaded;[31] that it must be set out in full,[32] or at least the section or part thereof alleged to have been violated;[33] and that it had been duly passed and adopted by the municipality.[34]

(VII) *JOINDER OF OFFENSES OR BREACHES*;[35] *DUPLICITY.* At common law, as well as under most modern codes, several penalties for breach of municipal ordinances may be joined in one action.[36] So also a license-fee, and a pen-

action to recover the penalty, to be sufficient to charge the offense as a violation of the latter ordinance only. Charleston *v.* Chur, 2 Bailey (S. C.) 164.

Where the offense is created by several sections of an ordinance reference should be made to each of such sections by the number and date of their adoption. Whitson *v.* Franklin, 34 Ind. 392.

23. Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

24. Whitson *v.* Franklin, 34 Ind. 392; Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

25. Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449. See New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 484, holding that the initiatory affidavit may be sufficient if it sets forth the ordinance and the particular section thereof claimed to have been violated. *Compare* Telheard *v.* Bay St. Louis, 87 Miss. 580, 40 So. 326.

Where the section referred to defines several distinct offenses the rule does not apply. Fink *v.* Milwaukee, 17 Wis. 26, holding that an act providing that a complaint in the police court of Milwaukee for the breach of a city ordinance need only state the number and section of the ordinance violated does not apply to such a case.

26. Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625.

27. Columbia *v.* Johnson, 72 Mo. App. 232.

Reference to an ordinance "as revision of the ordinances of the city of Kansas City, Missouri," is bad as it refers to the whole book of ordinances, and not to the special ordinance or ordinances violated. Kansas City *v.* Whitman, 70 Mo. App. 630.

28. Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625.

29. Philipsburg *v.* Weinstein, 21 Mont. 146, 53 Pac. 272, under Pen. Code, § 2680.

30. Keeler *v.* Milledge, 24 N. J. L. 142.

31. Fink *v.* Milwaukee, 17 Wis. 26, as where the section of the ordinance defines several distinct offenses.

Copy of ordinance.— In Green *v.* Indianapolis, 22 Ind. 192, it was held that in an action to recover a penalty for the violation of a by-law or ordinance, a copy of the by-law or ordinance should be made a part of the complaint and filed therewith.

32. Stuyvesant *v.* New York, 7 Cow. (N. Y.) 608 (holding that in an action of debt for the violation of a by-law the time when it was made, the parties by whom it was made, their authority and the by-law itself, must be set forth so that the court may judge whether or not the by-law was valid); State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423; State *v.* Cruickshank, 71 Vt. 94, 42 Atl. 983 (holding that reference to an ordinance by chapter and section is insufficient as in setting out the ordinance itself of which the court will not take judicial notice).

33. Case *v.* Mobile, 30 Ala. 538; Ganaway *v.* Mobile, 21 Ala. 577; Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706 (holding that only so much of the ordinance as relates to the action or prosecution need be set out); Nodine *v.* Union, 13 Oreg. 587, 11 Pac. 298. *Compare* People *v.* Justices Ct. Spec. Sess., 12 Hun (N. Y.) 65, where the violation was of a regulation of the board of health.

34. Coates *v.* New York, 7 Cow. (N. Y.) 585, 608; State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423, holding that the complaint must allege that the ordinance was adopted for the court cannot take judicial notice of the fact. But see Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818, holding that an information for breach of an ordinance, which fails to state in express words that the city had passed it, was nevertheless sufficient where any person of ordinary understanding upon reading the information would have no doubt as to that point.

Charging that an act was done contrary to an ordinance does not constitute a sufficient allegation that such ordinance had in fact been passed. State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423.

35. **Joinder of offenses in complaint for summary trial** see CRIMINAL LAW, 12 Cyc. 326.

Consolidation of suits.—Although suits to recover penalties for violations of a city ordinance are not strictly civil suits, the court may, where there is no legal prohibition, exercise its discretion in consolidating them. Lancaster *v.* Railroad Co., 12 Lanc. Bar (Pa.) 99.

36. Hampton *v.* Chicago, etc., R. Co., 118 Ill. App. 621; Brooklyn *v.* Cleves, Lalor (N. Y.) 231.

But the daily penalty, it has been held, for keeping a faro table, contrary to an ordinance, can only be recovered by issuing warrants for the offense daily. Dixon *v.* Washington, 7 Fed. Cas. No. 3,935, 4 Cranch C. C. 114. In Lead *v.* Klatt, 13 S. D. 140, 82 N. W.

alty;[37] but separate penalties may not be recovered for a continued act of omission in a prescribed course of action; but only one for the whole neglect.[38] However, separate offenses, even under the same ordinance, may not be joined against one person,[39] unless authorized by ordinance, statute, or general practice.[40] And in some states the practice is to strike out as surplusage all but one charge,[41] or to compel the prosecution to elect upon which count it will proceed.[42] An offense under different conditions or environments may be charged conjunctively.[43] Charging two or more offenses in the alternative is duplicitous;[44] but several modes of committing the same offense may, however, be charged.[45]

(VIII) *Second or Subsequent Offense.* Where a greater punishment may be inflicted on conviction for a subsequent violation of an ordinance than for the first, the fact that the offense charged is a subsequent offense must be alleged in the information in order to justify the imposition of the increased punishment.[46]

(IX) *Defects and Objections.*[47] For material defects and insufficiency the complaint or information may be objected to,[48] and where the defect is fatal the

391, however, it was held that where defendant is charged in the same complaint with violations on divers days of a city ordinance, a motion to quash on the ground that several offenses are charged therein, made after defendant has pleaded, comes too late, whether the action be treated as a civil or a criminal action.

37. Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509, holding that the two causes of action; namely, the one to recover the amount of the license-fee fixed by an ordinance, and the other to recover the penalty prescribed by the same ordinance for failure to take out the license, may be joined in one suit.

But separate suits will not lie for these. Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509.

38. Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 178.

39. Tiedke *v.* Saginaw, 43 Mich. 64, 4 N. W. 627.

Infractions of two separate and distinct ordinances should not be joined in one action. Kensington *v.* Glenat, 1 Phila. (Pa.) 393.

Sales to "persons unknown."—An information charging that defendant "did unlawfully sell beer to persons unknown" was held in effect to charge one sale to several persons jointly, and hence not bad for duplicity under an ordinance making each separate act of selling an offense. State *v.* King, 37 Iowa 462.

40. Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148; Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734.

A statute or ordinance may allow any number of violations of an ordinance to be included in one complaint or information. Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148.

41. Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148, holding that where an information under a town ordinance charged an offense punishable under the ordinance, and also one punishable only under statute, it was not bad for duplicity, as the charge of the statutory offense might be omitted as surplusage.

42. Tiedke *v.* Saginaw, 43 Mich. 64, 4 N. W. 627.

43. Com. *v.* Curtis, 9 Allen (Mass.) 266; Atlantic City *v.* Crandol, 67 N. J. L. 488, 51 Atl. 447, holding that the complaint charging that defendant obstructed a highway by leaving his wagon standing there when not in use, and interfered with public travel, charges a single offense. See St. Louis *v.* Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. N. S. 936, holding that where a section of an ordinance makes several provisions and declares a violation of any one of them an offense, and prescribes the same penalty for all of them, an information in a single count alleging breaches of all the provisions could not be quashed as to the whole case, even if some of the provisions in the section are invalid, if some of them are actually valid.

Charging disorderly conduct on the streets and on the sidewalks and in the business houses of a city is not bad for duplicity where the ordinance makes them punishable disjunctively, but imposes a like penalty in each case. Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750, in which it was held that in such a case but one offense is charged which will be supported by any one of the breaches alleged.

44. St. Paul *v.* Marvin, 16 Minn. 102.

45. Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818, where it was held that the information did not charge two offenses, and was direct and certain; the charge being that defendant "did then and there let or try to let a stallion serve a mare," for the reason that such acts do not constitute any offense unless the same was done at a prohibited place, which it is not claimed is not properly charged in the information.

46. Larney *v.* Cleveland, 34 Ohio St. 599 [*quoting* 1 Bishop Cr. L. (6th ed.) § 961].

47. Defects in and objections to complaint for summary trial see CRIMINAL LAW, 12 Cyc. 326.

48. Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509 (failure to join causes of action in one suit); St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045 (separate and dis-

complaint or information may be quashed or dismissed,[49] either before or after plea.[50] Objections to the information, complaint, or other documents of prosecution may be made by demurrer;[51] by plea in abatement;[52] or by motion to quash or dismiss,[53] motion to strike out,[54] or even motion in arrest of judgment.[55] However, defects or irregularities in an affidavit or information or complaint which do not prejudice the substantial rights of defendant on the merits are not fatal;[56] hence mere surplusage will be disregarded.[57] So also the defects or errors may

tinct offenses are joined in one count). See cases cited *infra*, notes 49–60.

49. *California.*— Eureka *v.* Diaz, 89 Cal. 467, 26 Pac. 961.

Kansas.— Johnson *v.* Winfield, 48 Kan. 129, 29 Pac. 559.

Massachusetts.— Com. *v.* Bean, 14 Gray 52.

Mississippi.— Giardina *v.* Greenville, 70 Miss. 896, 13 So. 241.

Missouri.— St. Louis *v.* Dorr, 136 Mo. 370, 37 S. W. 1108; State *v.* Baker, 74 Mo. 394; Memphis *v.* O'Connor, 53 Mo. 468; Lamar *v.* Hewitt, 60 Mo. App. 314; Salisbury *v.* Patterson, 24 Mo. App. 169.

New Hampshire.— State *v.* Goulding, 44 N. H. 284.

New Jersey.— Schafer *v.* Atlantic City, 58 N. J. L. 131, 32 Atl. 133; White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378; Keeler *v.* Milledge, 24 N. J. L. 142.

Vermont.— State *v.* Soragan, 40 Vt. 450.

Wisconsin.— Fink *v.* Milwaukee, 17 Wis. 26.

United States.— Delany *v.* Washington, 7 Fed. Cas. No. 3,755, 2 Cranch C. C. 459; Washington *v.* Lynch, 29 Fed. Cas. No. 17,231, 5 Cranch C. C. 498.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

50. Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391.

51. State *v.* Reckards, 21 Minn. 47.

Demurrer see *infra*, XI, B, 4, k.

52. Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509, holding that where two causes of action must be joined in one suit, and are not, the proper way to raise this question is by a plea in abatement.

Plea or answer see *infra*, XI, B, 4, k.

53. Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322; Salisbury *v.* Patterson, 24 Mo. App. 169; Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391.

Where the ordinance or its validity is in question, on a motion to dismiss, the motion cannot properly be disposed of unless the ordinance itself is before the court. Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322.

A motion to dismiss is not the proper remedy with respect to defects in the form of indictment under the Minnesota statute. State *v.* Reckards, 21 Minn. 47.

54. St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045.

55. Lippman *v.* South Bend, 84 Ind. 276; Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391.

56. *Colorado.*— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Illinois.— Alton *v.* Kirsch, 68 Ill. 261.

Iowa.— State *v.* King, 37 Iowa 462.

Louisiana.— Minden *v.* McCrary, 108 La. 518, 32 So. 468.

Michigan.— People *v.* Vinton, 82 Mich. 39, 46 N. W. 31.

Missouri.— Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505; Orrick *v.* Akers, 109 Mo. App. 662, 83 S. W. 549.

New Jersey.— See White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378, holding that the jurisdiction of a justice's court was not impaired by the fact that the acts charged were in contravention of a section entirely different from that referred to in the complaint and summons.

Ohio.— Neifeld *v.* State, 23 Ohio Cir. Ct. 246.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

Conducting a proceeding in the name of the state as plaintiff, instead of the city or town, is not a material defect, especially where the objection was not raised until after appeal. State *v.* King, 37 Iowa 462.

Partially invalid ordinance.— Where a section of an ordinance makes several provisions and declares violation of any one of them an offense, and prescribes the same penalty for all of them, and an information in a single count alleges breaches of all the provisions, it is error to quash the whole case, even if some of the provisions of such section are invalid; certain of them being valid. St. Louis *v.* Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. N. S. 936.

Slight irregularities in jurat or signature may be disregarded. See CRIMINAL LAW, 12 Cyc. 325.

Variance between affidavit and complaint see Mexico *v.* Harris, 115 Mo. App. 707, 92 S. W. 505, holding that where a statute does not require the complaint to be supported by an affidavit or oath, it is immaterial whether the complaint as filed conforms to the affidavits which it purports to be based upon or not.

Where no complaint is required or necessary a defect in such complaint when made will not vitiate the proceeding, providing the justice or other trial tribunal has jurisdiction of the subject-matter. Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; Alton *v.* Kirsch, 68 Ill. 261.

57. *Iowa.*— Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148, holding that where the complaint alleged an offense punishable under the state statute together with one punishable under the ordinance, the allegations as to the state offense might be regarded as mere surplusage.

be cured[58] or waived,[59] as by failing to make the objection within the proper time.[60]

(x) *Defendant's Right to Copy.* Defendant has no constitutional privilege to demand a copy of the information or affidavit before pleading,[61] as in prosecutions by the state.[62]

j. Report of Police Officer — (i) *In General.* In some jurisdictions it is provided by statute or ordinance that a trial may be had upon the written report of a designated police officer.[63] And where provisions of this character are in

Michigan.— *In re* Bushey, 105 Mich. 64, 62 N. W. 1036, holding that a complaint, under an ordinance providing for the punishment of any person who shall make any disturbance by which the peace of the neighborhood is disturbed, alleging that defendant is a "disorderly person, for that said defendant was disturbing the peace, contrary to the form of the ordinance," etc., is sufficient, as the words "disorderly person" will be treated as surplusage.

Minnesota.— State *v.* Marciniak, 97 Minn. 355, 105 N. W. 965, holding that where a complaint charges a violation of a city ordinance forbidding the sale of liquors on Sunday, the concluding words of the complaint, "against the peace and dignity of the state of Minnesota," are surplusage, and the complaint does not therefore charge defendant with the violation of any criminal statute of the state.

North Carolina.—State *v.* Wilson, 106 N. C. 718, 11 S. E. 254, where the words "thereby damaging said street by ponding the water thereon, which became foul and malarious," etc., were considered to be mere surplusage.

South Dakota.— Deadwood *v.* Allen, 8 S. D. 618, 67 N. W. 835.

Vermont.— State *v.* Soragan, 40 Vt. 450.

Wisconsin.— State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004, holding that an allegation charging that the offense was to the damage of affiant who was not a city officer was immaterial since the form of complaint prescribed by the statute contained no allegation as to who was damaged by the offense, and that specifications as to who was damaged could only be regarded as surplusage.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1406.

58. Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527 (cured by verdict); McGunnigle *v.* Washington, 16 Fed. Cas. No. 8,818, 2 Cranch C. C. 460 (cured by verdict).

The affidavit and warrant may be construed together in determining the sufficiency and validity of the proceedings. State *v.* Wilson, 106 N. C. 718, 11 S. E. 254.

But a warrant issued upon a defective complaint does not cure defects in the latter. State *v.* Baker, 74 Mo. 394.

59. Pitts *v.* Opelika, 79 Ala. 527.

An appeal usually vacates judgment and waives errors. Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76. See *infra*, XI, B, 4, s, (VII), (E), (1).

60. State *v.* Reckards, 21 Minn. 47; Rochester *v.* Upman, 19 Minn. 108; Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014; Bedford *v.* Rice, 58 N. H. 227. See also Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527, where the only objection made was by a motion in arrest of judgment after a verdict of guilty.

An objection to indefiniteness in the warrant's reference to the ordinance cannot be raised for the first time on appeal to the supreme court. Rochester *v.* Upman, 19 Minn. 108 [*followed* in State *v.* Reckards, 21 Minn. 47].

Misdirection of a warrant to the sheriff or constable of the county instead of to the marshal or any constable of the city, as required by the charter, cannot be made for the first time in the supreme court. Rochester *v.* Upman, 19 Minn. 108.

A motion to quash the complaint for insufficiency may be made either before or after plea. Lead *v.* Klatt, 11 S. D. 109, 75 N. W. 896.

61. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100. See CRIMINAL LAW, 12 Cyc. 322 note 30.

62. See CRIMINAL LAW, 12 Cyc. 511 *et seq.*

63. St. Louis *v.* Vert, 84 Mo. 204; *Ex p.* Hollwedell, 74 Mo. 395; St. Joseph *v.* Harris, 59 Mo. App. 122; Oran *v.* Bles, 52 Mo. App. 509; *Ex p.* Washington, 10 Mo. App. 495. See also State *v.* Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; Morgengroth *v.* Milwaukee, 125 Wis. 663, 105 N. W. 47.

In Wisconsin Rev. St. (1878) § 2501, provides that the judge of the municipal court shall have jurisdiction of prosecutions for breaches of ordinances, and shall hear in a summary way all cases brought before him by the police officers. Laws (1895), p. 15, c. 7, vests in the police court jurisdiction of all prosecutions for the breach of any ordinance, and provides that complaints shall conform to those formerly used in the municipal court, and in the city prosecutions the clerk of the court shall enter on the court records a statement of the offense charged, which shall stand as the complaint, unless the court shall direct the making of a formal complaint. Laws (1899), p. 358, c. 218, abolishes the police court, establishes a district court and grants it jurisdiction to try offenders against the ordinances, and provides that the complaints shall conform to those formerly used in the police and municipal courts. It was held that the making of a formal complaint by a police officer charging a violation of an ordinance relating to gambling is a compliance with the statutes and is sufficient, although the ordinance provides that the complaints for a violation thereof

force, a subordinate officer in charge of the office may act for the chief in such cases.[64]

(II) *SIGNATURE.* The report may be signed by the designated police officer or someone authorized by him.[65]

(III) *SUFFICIENCY.* The report must show the statutory requisites to constitute an offense.[66] The report need not ask judgment for any sum or amount of penalty.[67] The proceeding instituted upon the report, being civil and not criminal in its nature,[68] may be amended by the city.[69]

k. Demurrer, Plea, or Answer. Defendant in a proper case may demur to the information or complaint,[70] or interpose a plea or answer in abatement,[71] or a plea or answer in bar;[72] and he may, if he chooses, enter a plea of guilty;[73] but a plea of guilty may under proper circumstances be withdrawn.[74] Formal pleading,

may be made by the city attorney. Morgengroth *v.* Milwaukee, 125 Wis. 663, 105 N. W. 47.

64. St. Louis *v.* Vert, 84 Mo. 204; *Ex p.* Hollwedell, 74 Mo. 395; *Ex p.* Washington, 10 Mo. App. 495.

65. *Ex p.* Hollwedell, 74 Mo. 395; *Ex p.* Washington, 10 Mo. App. 495. See St. Louis *v.* Vert, 84 Mo. 204, holding that the written report of the chief of police signed with defendant's name, by his subordinate, is sufficient.

Failure of the police officer to sign the report has been held to be insufficient as a ground upon which to dismiss the proceedings thereunder. St. Louis *v.* Vert, 84 Mo. 204.

66. St. Joseph *v.* Harris, 59 Mo. App. 122.

An information by the city attorney cannot be based upon an invalid report of the police officer, as where the report fails to show the statutory requisites to constitute an offense. St. Joseph *v.* Harris, 59 Mo. App. 122.

67. St. Louis *v.* Vert, 84 Mo. 204, where the maximum and minimum penalty was fixed by the ordinance, and the penalty to be imposed within the statutory limits was within the discretion of the court.

68. St. Louis *v.* Vert, 84 Mo. 204. See *supra*, XI, B, 4, b.

69. St. Louis *v.* Vert, 84 Mo. 204.

Amendment generally see *infra*, XI, B, 4, l.

70. Pitts *v.* Opelika, 79 Ala. 527; State *v.* Reckards, 21 Minn. 47.

71. Carrollton *v.* Rhomberg, 78 Mo. 547; Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509; Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373. See CRIMINAL LAW, 12 Cyc. 348; PLEADING.

Abatement by death of parties see ABATEMENT AND REVIVAL, 1 Cyc. 69; Carollton *v.* Rhomberg, 78 Mo. 547.

Matter in abatement must be pleaded.— Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373.

A plea in abatement is a proper way in which to raise the question where the objection is that separate actions have been improperly sought to be maintained. Lansdowne *v.* Springfield Water Co., 7 Del. Co. (Pa.) 509.

Substantially raising guilt or innocence.— It is proper for the district court to overrule a plea to the jurisdiction of the court which substantially raises the guilt or innocence of the accused. Salina *v.* Cooper, 45 Kan. 12, 25 Pac. 233.

72. Noland *v.* People, 33 Colo. 322, 80 Pac. 887; Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373. See CRIMINAL LAW, 12 Cyc. 348; PLEADING.

Acquittal or conviction of offense against either state or municipal law as bar to prosecution for offense against the other see CRIMINAL LAW; and *supra*, XI, A, 4, b, (II).

In quasi-criminal proceeding.—An action brought by a city for breach of an ordinance forbidding the erection or removal within the fire limits of wooden buildings is quasi-criminal, and hence a plea of former acquittal is to be determined by the rule applicable to criminal cases, rather than by the doctrine of *res judicata* as applied in cases strictly civil. Noland *v.* People, 33 Colo. 322, 80 Pac. 887.

Limitations of actions to enforce penalties, fines, or forfeitures for violation of municipal ordinance see LIMITATIONS OF ACTIONS, 25 Cyc. 1054. See also State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004. Statute of limitations must be pleaded. Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373.

Set-off must be pleaded.— Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373.

73. Collins *v.* Hall, 92 Ga. 411, 17 S. E. 622; Oran *v.* Bles, 52 Mo. App. 509, holding that a conviction may be based upon a plea of guilty made in open court.

When an ordinance prohibits, under the same penalty, each of several distinct acts, some of which are within the corporate power to punish, and some are not, a plea of guilty on an accusation which merely charges generally a violation of the ordinance, without specifying any act whatever, cannot be applied to one class of the acts embraced in the ordinance, rather than to the other, and no punishment can be inflicted as a result of the proceeding. Collins *v.* Hall, 92 Ga. 411, 17 S. E. 622.

74. Salina *v.* Cooper, 45 Kan. 12, 25 Pac. 233, holding that under the facts disclosed by the record in this case, it was clearly the duty of the court to accord such right to defendant. Defendant was without counsel, and there was a question whether he intended to plead guilty or not.

however, is not usually necessary in summary proceedings.[75] Dilatory pleadings must be filed *in limine*,[76] and are waived by pleas in bar.[77] If defendant predicates his defense on the invalidity of the ordinance he must plead it.[78]

l. Amendments. Where the proceeding is civil in its nature the same liberal rule as to amendment applies as in other civil cases.[79] Where, however, the proceeding is criminal in its nature stricter rules are followed;[80] as to matters of form merely amendments may be allowed,[81] but as to matters of substance affecting substantial rights of the accused no amendments will be allowed.[82]

m. Issues, Proof, and Variance. The proof must be confined to the issues made by the pleadings,[83] except as to such matters as are properly admissible under the plea of not guilty, whether pleaded or not.[84] The usual rules of variance apply; where the variance between the pleading and proof is material it is fatal,[85] but an immaterial variance is not fatal.[86]

75. Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373, holding that a conviction for a violation of an ordinance of a municipal corporation will not be reversed for want of a plea by defendant, since under the laws formal pleadings are not necessary before a justice.

All defenses except the statute of limitations, set-off, and matter in abatement may be given in evidence without plea, in an action before the mayor to recover a penalty for a violation of a penal ordinance. Zorger *v.* Greensburgh, 60 Ind. 1, holding that where in an action before a mayor to recover a penalty for violation of a penal ordinance matter pleaded specially may be given in evidence without plea, the sustaining of a demurrer to such a plea, although erroneous, is harmless.

Arraignment and plea of not guilty do not seem to be necessary in a civil proceeding to recover penalty for violation of an ordinance. St. Louis *v.* Knox, 74 Mo. 79; Lexington *v.* Curtin, 69 Mo. 626.

76. Bedford *v.* Rice, 58 N. H. 227, holding that a plea to the jurisdiction of the police court is filed too late after a transfer of the case to another court upon demand for a jury trial.

77. Pipps *v.* Opelika, 79 Ala. 527, holding that in a quasi-criminal prosecution for violation of a municipal ordinance, where defendant demurs to the complaint, and afterward before any action is had on the demurrer, pleads not guilty, the demurrer is waived.

78. Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

79. *Iowa.*— Lovilia *v.* Cobb, 126 Iowa 557, 102 N. W. 496.

Kentucky.— Com. *v.* Price, 94 S. W. 32, 29 Ky. L. Rep. 593.

North Carolina.— Washington *v.* Frank, 46 N. C. 436.

Tennessee.— Childress *v.* Nashville, 3 Sneed 347.

United States.—Virginia *v.* Smith, 28 Fed. Cas. No. 16,965, 1 Cranch C. C. 22, holding that an information may be amended by stating that penalty accrued to the town instead of the commonwealth.

Amendment of report of police officer see *supra*, XI, B, 4, j, (III).

The process may be amended. Com. *v.* Price, 94 S. W. 32, 29 Ky. L. Rep. 593; Washington *v.* Frank, 46 N. C. 436; Bristol *v.* Burrow, 5 Lea (Tenn.) 128 (holding that a warrant charging defendant with an affray may be amended so as to show that the offense committed was disorderly conduct); Childress *v.* Nashville, 3 Sneed (Tenn.) 347; McGunnigle *v.* Washington, 16 Fed. Cas. No. 8,818, 2 Cranch C. C. 460.

Even after certiorari or appeal amendments may be allowed. Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496; Bristol *v.* Burrow, 5 Lea (Tenn.) 128.

80. Kansas City *v.* Whitman, 70 Mo. App. 630..

Amendment of complaint for summary trial see CRIMINAL LAW, 12 Cyc. 326.

81. See CRIMINAL LAW, 12 Cyc. 326.

82. Kansas City *v.* Whitman, 70 Mo. App. 630; St. Joseph *v.* Harris, 59 Mo. App. 122; Kansas City *v.* O'Connor, 36 Mo. App. 594. See CRIMINAL LAW, 12 Cyc. 326. *Compare* St. Louis *v.* Babcock, 156 Mo. 154, 56 S. W. 731, where a verbal amendment by the city favoring defendant was allowed.

To correct jurisdictional defects and validate what was void from the beginning, a complaint cannot be amended on appeal. Edina *v.* Brown, 19 Mo. App. 672.

83. See cases cited *infra*, notes 85, 86.

84. See Zorger *v.* Greensburgh, 60 Ind. 1; Cleveland *v.* Ledoux, 22 Quebec Super. Ct. 85.

85. Columbus *v.* Arnold, 30 Ga. 517; Alexandria *v.* Brockett, 1 Fed. Cas. No. 181, 1 Cranch C. C. 505.

Defendant must be convicted, if at all, of the offense charged. Lesterjelle *v.* Columbus, 30 Ga. 936; Columbus *v.* Arnold, 30 Ga. 517; Gates *v.* Aurora, 44 Ill. 121; People *v.* Miller, 38 Hun (N. Y.) 82.

86. State *v.* King, 37 Iowa 462; Hershoff *v.* Beverly, 45 N. J. L. 288. See also Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750.

Under an information charging a sale to "persons unknown," under an ordinance making each separate act of selling an offense, the evidence having established a sale to one person only, it was held that the variance between the proof and the allegation was not fatal. State *v.* King, 37 Iowa 462.

n. Evidence — (I) *In General.* On trial for violation of police ordinances the general rules of evidence as to burden of proof,[87] presumptions,[88] judicial notice,[89] admissibility,[90] and probative force[91] prevail,[92] due regard being paid in the various jurisdictions to the different *quantum* necessary in civil and criminal cases.[93]

(II) *Presumptions and Burden of Proof.* Applying the general rule as to burden of proof[94] plaintiff must establish at least a *prima facie* case of violation of the ordinance;[95] but defendant, especially where the proceeding is civil in its nature,[96] may have the burden of showing an affirmative defense of which he may attempt to avail himself.[97] Moreover, it seems, that it is competent for a municipality in adopting an ordinance to provide what shall be a *prima facie* case of a violation thereof, and to place on the accused charged with such violation the burden of showing that the case falls within an exception named in the ordinance.[98] The fact that smoke was injurious and constituted an annoyance may be presumed.[99]

(III) *Admissibility.*[1] Similarly applying the general rules as to admissibility of evidence,[2] plaintiff is entitled to adduce any competent evidence tending to show that defendant is within the provisions of the ordinance alleged to have been violated and that he has actually committed a breach thereof.[3] On the other

87. See *infra*, XI, B, 4, n, (II).
88. See *infra*, XI, B, 4, n, (II).
89. See *infra*, XI, B, 4, n, (V).
90. See *infra*, XI, B, 4, n, (III).
91. See *infra*, XI, B, 4, n, (IV).
92. See Raker *v.* Maquon, 9 Ill. App. 155; Columbia *v.* Johnson, 72 Mo. App. 232; Charleston *v.* Schroeder, 4 Rich. (S. C.) 296. See also Criminal Law, 12 Cyc. 379 *et seq.*; Evidence, 16 Cyc. 821 *et seq.*, 17 Cyc. 1 *et seq.*
93. Brown *v.* Mobile, 23 Ala. 722; Ruth *v.* Abingdon, 80 Ill. 418; Sparta *v.* Lewis, 91 Tenn. 370, 23 S. W. 182. See *infra*, XI, B, 4, n, (IV).
94. See Criminal Law, 12 Cyc. 379 *et seq.*; Evidence, 16 Cyc. 926 *et seq.*
95. See *infra*, XI, B, 4, n, (IV).
96. See *supra*, XI, D, 4, b.
97. Cleveland *v.* Ledoux, 22 Quebec Super. Ct. 85. See Evidence, 16 Cyc. 926. *Compare* Criminal Law, 12 Cyc. 379.

Burden of showing defendant in exception. — In a suit by a municipality to recover the penalty imposed by a by-law requiring all residents to exhibit by a specified date a certificate from the secretary of the board of health showing that they had been vaccinated, the complaint need not allege that defendant never had smallpox, which fact would exempt him from the operation of the by-law, but the burden is on defendant to make satisfactory proof of this fact. Cleveland Tp. *v.* Ledoux, 22 Quebec Super. Ct. 85.

98. Com. *v.* Price, 94 S. W. 32, 29 Ky. L. Rep. 593.
99. Field *v.* Chicago, 44 Ill. App. 410, holding that in a prosecution for a violation of the "smoke ordinance," an instruction that the city must prove that the smoke issuing from defendant's chimney was detrimental to property close enough to be affected by it injuriously, or was personally annoying to the public at large, is properly refused, since the fact that the smoke was injurious and annoying may be presumed.

1. **Acts and declarations of third persons** see Criminal Law, 12 Cyc. 435.
2. See Criminal Law, 12 Cyc. 390 *et seq.*; Evidence, 16 Cyc. 938 *et seq.*, 17 Cyc. 1 *et seq.*
3. Byars *v.* Mt. Vernon, 77 Ill. 467; Weinberg *v.* Augusta, 116 Ill. App. 423; Com. *v.* Matthews, 122 Mass. 60.

Book of instructions to officer. — On trial of a complaint for violation of a city ordinance forbidding drivers of hackney carriages to stand with their carriages in any other public place than those assigned to them, respectively, by the board of aldermen, a book prepared by the mayor and aldermen for the guidance of the superintendent of hacks, and containing a list of the owners of such carriages and the places assigned them, is admissible to show that defendant was assigned elsewhere than where his carriage was found. Com. *v.* Matthews, 122 Mass. 60.

Ordinance violated. — It is proper to admit the entire ordinance where such practice will aid the jury in a fair understanding of the particular section forming the basis of the prosecution. Weinberg *v.* Augusta, 116 Ill. App. 423. But such ordinance is not admissible in evidence unless legally authenticated. Lanesboro *v.* Perrine, 2 Just. L. Rep. (Pa.) 254. See also *supra*, VI, O.

Other offenses. — While it is usually error to permit the city to prove other offenses than that with which defendant is charged (Columbia *v.* Johnson, 72 Mo. App. 232), if a complaint for the violation of an ordinance is not limited to a single offense, but charges a violation generally, proof may be admitted of any number of offenses, provided the aggregate of the fines assessed do not exceed the magistrate's jurisdiction (Byars *v.* Mt. Vernon, 77 Ill. 467).

Proof of personal commission unaided is admissible in a charge of assisting in the

hand defendant may introduce expert[4] as well as other competent testimony to sustain his defense.[5]

(IV) *Weight and Sufficiency.* Where the action is civil, a preponderance of evidence is usually controlling;[6] but where the suit is treated as a criminal, or quasi-criminal case, mere preponderance is not sufficient.[7] More than facts necessary to constitute the offense need not be proven.[8] The evidence must, however, always be sufficient to show that the acts of the accused are within the terms of the ordinance as well as a *prima facie* case of violation of the same by him.[9] In all cases police regulations may be proved by copies purporting to be issued by municipal authority;[10] but on the other hand the ordinance[11] as well

commission of an offense. Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29.

4. People *v.* Wilson, 16 N. Y. Suppl. 583, 10 N. Y. Cr. 79; Clason *v.* Milwaukee, 30 Wis. 316. See Frank *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 544, 5 Ohio N. P. 520, holding this to be true even after a plea of guilty under an invalid ordinance.

5. Moore *v.* District of Columbia, 12 App. Cas. (D. C.) 537, 41 L. R. A. 208; Cincinnati *v.* Kraft, 8 Ohio S. & C. Pl. Dec. 672; State *v.* Earle, 66 S. C. 194, 44 S. E. 781.

Invalidity of ordinance.— Defendant may introduce evidence to show that the regulation is unreasonable and void (Moore *v.* District of Columbia, 12 App. Cas. (D. C.) 537, 41 L. R. A. 208); that it is so unreasonable as to amount to a confiscation of property under the guise of regulation (State *v.* Earle, 66 S. C. 194, 44 S. E. 781), as well as such facts as may tend to invalidate the ordinance in its operation against him (Cincinnati *v.* Kraft, 8 Ohio S. & C. Pl. Dec. 672).

Evidence inadmissible.— On a prosecution for violation of an ordinance prohibiting the collection and removal of garbage without a license, evidence that defendant had been for many years engaged in the business of collecting and removing garbage in the city, in carts so constructed as to satisfy the requirements of the ordinance, and that he had applied to the clerk of the board for a license or permit, and met with a refusal, is inadmissible. State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279. It was not error to exclude evidence that permits had been previously issued to others, but, before defendant applied, the board had instructed its clerk to issue no more to any one. State *v.* Orr, *supra*. Nor was it error to exclude evidence to show that all the garbage collected by defendant came from certain restaurants with the proprietors of which he had contracted for its removal. State *v.* Orr, *supra*. On the trial of a complaint charging the violation of a certain ordinance by the maintenance of a slaughter-house within the city limits on a certain day, evidence as to the boundary of the city on another day was properly rejected. Spokane *v.* Robison, 6 Wash. 547, 33 Pac. 960.

6. Sparta *v.* Lewis, 91 Tenn. 370, 23 S. W. 182. See Evidence, 17 Cyc. 754 *et seq.*

7. Ruth *v.* Abingdon, 80 Ill. 418. See Criminal Law, 12 Cyc. 490 *et seq.*

8. State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004.

Malice, carelessness, or wantonness need not be proved unless they constitute an essential ingredient of the offense and have been specifically charged in the complaint or information. State *v.* Merrill, 37 Me. 329.

9. *District of Columbia.*— Shoemaker *v.* Entwisle, 3 App. Cas. 252.

Georgia.— Edwards *v.* Atlanta, 124 Ga. 78, 52 S. E. 297; Starr *v.* Atlanta, 124 Ga. 78, 52 S. E. 298; Taylor *v.* Americus, 39 Ga. 59.

Illinois.— Raker *v.* Maquon, 9 Ill. App. 155.

Louisiana.—State *v.* Finnegan, 52 La. Ann. 694, 37 So. 564.

Missouri.— St. Louis *v.* Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778; Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750; St. Louis *v.* Door, 136 Mo. 370, 37 S. W. 1108; St. Louis *v.* Howard, 119 Mo. 47, 24 S. W. 772; Oran *v.* Bles, 52 Mo. App. 509.

New York.— Watertown *v.* Rodenbaugh, 112 N. Y. App. Div. 723, 98 N. Y. Suppl. 885.

South Carolina.— Charleston *v.* Schroeder, 4 Rich. 296.

Vermont.— State *v.* Cruickshank, 71 Vt. 94, 42 Atl. 983.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1410.

No evidence of material averment.— The conviction of defendant under a city ordinance for peddling vegetables within six blocks of the market square, and for keeping a private market, was erroneous where there was no evidence that he was a peddler, and where he did not keep a private market. State *v.* Finnegan, 52 La. Ann. 694, 27 So. 654.

10. See Com. *v.* Matthews, 122 Mass. 60. See also *supra*, VI.

11. People *v.* Weiss-Chapman Drug Co., 5 Colo. App. 153, 33 Pac. 334, holding that where, on a prosecution for violation of an ordinance, only one section of the ordinance was introduced, and this did not define the offense, but merely the penalties, a judgment of nonsuit was properly rendered. Raker *v.* Maquon, 9 Ill. App. 155; Joske *v.* Irvine, 91 Tex. 574, 44 S. W. 1059.

Not only the ordinance, but authority to enact it must, it has been held, be proven by competent evidence. Dunham *v.* Rochester, 5 Cow. (N. Y.) 462.

as the corporate limits,[12] and the particular act within them, must be duly proven to warrant conviction.[13]

(v) *Judicial Cognizance.* Under the general rules of judicial cognizance[14] a municipal court takes judicial notice of an ordinance.[15]

o. Trial — (i) *In General.* Where the proceedings are civil in their nature,[16] especially where the action is one of debt or assumpsit for the recovery of a penalty,[17] the trial should be conducted according to the rules governing civil actions.[18] But where the proceedings are criminal or quasi-criminal in their character they should ordinarily be conducted according to the rules applicable to indict-

Publication.— The certificate of the clerk of the due publication of the ordinance is sufficient proof thereof. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100. See *supra*, VI, O.

That ordinance was in force.—The evidence should show that the ordinance was in force at the time the act complained of was committed. Raker *v.* Maquon, 9 Ill. App. 155.

12. Starr *v.* Atlanta, 124 Ga. 78, 52 S. E. 298; Edwards *v.* Atlanta, 124 Ga. 78, 52 S. E. 297; Taylor *v.* Americus, 39 Ga. 59.

Territorial jurisdiction see *supra*, XI, A, 5.

13. Shoemaker *v.* Entwisle, 3 App. Cas. (D. C.) 252; St. Louis *v.* Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

Breach of building regulations.— On information filed in the police court by the building inspector against a property-owner refusing to comply with notice from the inspector to tear down a wall as dangerous, the notice is not conclusive proof that the wall was dangerous. Shoemaker *v.* Entwisle, 3 App. Cas. (D. C.) 252. An ordinance provided that no person should commence any building without a permit. Defendant procured a permit for a brick building "to be used as a dwelling," and erected the building in accordance with the specifications submitted to the commissioner, but purposed to carry on business on the lower floor, occupying the second floor as a residence. It was held that a complaint for the penalty for violating the ordinance, alleging the erection of a building "without having first obtained a written permission," could not be sustained. St. Louis *v.* Dorr, 136 Mo. 370, 37 S. W. 1108.

Charge of sale to Miss Mary Bates is not supported by proof of sale to Miss Bates. Charleston *v.* Schroeder, 4 Rich. (S. C.) 296.

Distribution of sample packages without license.— In a prosecution for violation of an ordinance forbidding the distribution of sample packages of merchandise without a license, but providing that it should not apply to merchants and other residents of the city distributing bills or advertising the business in which they were engaged, evidence that defendant distributed packages, stating that she was doing the work for the local groceries, did not support a conviction. Watertown *v.* Rodenbaugh, 112 N. Y. App. Div. 723, 98 N. Y. Suppl. 885.

Erection and maintenance of nuisance.— In a prosecution under an ordinance forbidding the erection of a slaughter-house in certain limits without permission, proof that accused occupied a newly-built house for a slaughter-house, without proof that he built it, caused it to be built, or owned the land, is insufficient. St. Louis *v.* Howard, 119 Mo. 47, 24 S. W. 772. Evidence that there were weeds on defendant's premises from four to five feet high, and about one third were sunflowers, is sufficient to sustain his conviction for violation of an ordinance forbidding any one to allow a growth of weeds on his premises over one foot high, and providing that the term "weeds" shall include all rank vegetable growth which exhales unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits. St. Louis *v.* Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

Proof of one breach.—Where a complaint for drunkenness charged defendant with being drunk on the streets and on the sidewalks and in the business houses of the city, which are disjunctively made punishable by the same ordinance, imposing a like penalty in each case, there is but one offense charged, which will be supported by proof of any one of the breaches alleged. Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750.

14. See Evidence, 16 Cyc. 898.

15. *Ex p.* Davis, 115 Cal. 445, 47 Pac. 258; State *v.* Merritt, 83 N. C. 677; Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373. See Evidence, 16 Cyc. 898. *Contra*, State *v.* Bosworth, 74 Vt. 315, 52 Atl 423; State *v.* Cruickshank, 71 Vt. 94, 42 Atl. 983.

On appeal to the circuit court from a conviction before a mayor under the West Virginia statute, the circuit court will take judicial notice of the ordinance. Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373.

In other courts the rule is that the ordinance must be pleaded and proved, although the court may take judicial notice of a municipal charter. See also *supra*, VI, N.

16. See *supra*, XI, B, 4, b.

17. People *v.* Vinton, 82 Mich. 39, 46 N. W. 31.

18. People *v.* Vinton, 82 Mich. 39, 46 N. W. 31. See also *supra*, XI, B, 4, b.

In some jurisdictions, however, where the proceedings have always been regarded as civil actions, yet where, under the statutes, the enforcement is sought by a resort to proceedings which are carried on in all respects as criminal cases are prosecuted, by complaint and warrant, and where the court is author-

ments for misdemeanors,[19] and, in case of summary proceedings, according to summary trials in criminal cases.[20] A municipality cannot proceed against defendant on an ordinance other than the one named in the summons or warrant.[21]

(II) *Right of Accused to Be Present.* The right of the accused to be present at the trial is a personal right of his own and may be waived by him.[22]

(III) *Dismissal Before Trial.* For sufficient cause in a proper case the proceedings may be quashed or dismissed before trial.[23]

(IV) *Right to Jury Trial; Summary Trial.* Express authority is essential to the validity of any summary proceedings.[24] But when they are duly authorized a jury is unnecessary.[25] And a jury may not be called by the recorder or mayor unless specially authorized by statute.[26]

(V) *Questions of Law and Fact.* The jury are the judges of the facts in these just as in other cases.[27] So too the effect of the proof admitted is for the jury.[28] But the jury are not, as sometimes in criminal cases, judges of both the

ized to inflict upon the offender not only fine and imprisonment for its non-payment, but also imprisonment aside from a pecuniary fine, such proceedings should conform to the proceedings in criminal cases cognizable before justices of the peace. People *v.* Vinton, 82 Mich. 39, 46 N. W. 31; Northville *v.* Westfall, 75 Mich. 603, 42 N. W. 1068. See also People *v.* Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524. But see Webster *v.* Lansing, 47 Mich. 192, 10 N. W. 196; Cooper *v.* People, 41 Mich. 403, 2 N. W. 51.

19. Brown *v.* Mobile, 23 Ala. 722; Lexington *v.* Wise, 24 S. C. 163; and *supra*, XI, B, 4, b.

Proceedings by whom conducted see *supra*, XI, B, 4, h. See also People *v.* Vinton, 82 Mich. 39, 46 N. W. 31, holding that the employment by a village attorney of an attorney at law to conduct a prosecution for violating a village ordinance affords no ground of objection to defendant, where the village attorney is present at the trial, supervising the case, and the attorney employed has no interest or prejudice against defendant, although the village attorney is not an attorney of the court, and although the village council has not authorized such action.

Taking testimony.—Where the charter of a town confers on the town council the general power and jurisdiction of trial justices, one prosecuted for violation of the town ordinances may require that the testimony shall be taken down in writing and subscribed by the witnesses. Lexington *v.* Wise, 24 S. C. 163.

20. Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696; St. Peter *v.* Bauer, 19 Minn. 327; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 91 Hun 638, 36 N. Y. Suppl. 1130].

Mode and conduct of a summary trial see CRIMINAL LAW, 12 Cyc. 327.

21. Gates *v.* Aurora, 44 Ill. 121, holding that proceeding thus against defendant would be shifting the cause of action without his consent.

22. State *v.* Reckards, 21 Minn. 47, at least when the counsel of accused is present for him.

Necessity of presence of accused see CRIMINAL LAW, 12 Cyc. 321, 528.

23. See *supra*, XI, B, 4, i, (IX).

24. Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696. See People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 91 Hun 638, 36 N. Y. Suppl. 1130].

Right to jury trial see JURIES, 24 Cyc. 145. See Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425, holding that a suit to recover a fine for violation of a municipal ordinance may be had before a jury.

Summary trial without jury see CRIMINAL LAW, 12 Cyc. 321 *et seq.*

Waiver of right to jury trial see JURIES, 24 Cyc. 149 *et seq.*

25. Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 91 Hun 638, 36 N. Y. Suppl. 1130].

If the accused may obtain a jury trial on appeal, without oppressive restriction, the proceeding is valid. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516. See also Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223.

26. St. Peter *v.* Bauer, 19 Minn. 327, holding that sentence passed by defendant, upon conviction on trial by jury, was illegal. But see State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531 [*following* Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305], as to the right of trial by jury in prosecution for violation of ordinance under charter authorizing summary trial.

27. Wettengel *v.* Denver, 20 Colo. 552, 39 Pac. 343 (question whether hand bills distributed were within the ordinance); Walton *v.* Cañon City, 13 Colo. App. 77, 56 Pac. 671; Pennsylvania Co. *v.* Chicago, 107 Ill. App. 37 (question whether the smoke issuing from a locomotive was dense smoke); Glenn *v.* Baltimore, 5 Gill & J. (Md.) 424 (whether a prohibition in an ordinance was calculated to prevent danger from fires); Sparks *v.* Stokes, 40 N. J. L. 487 (question whether a sale was made in good faith for medicinal purposes).

28. Washington *v.* Frank, 46 N. C. 436. See also Brown *v.* Mobile, 23 Ala. 722, holding that where in a quasi-criminal proceeding for the violation of a city ordinance, the evidence before the jury is entirely circum-

law and facts.[29] On the other hand all questions of law,[30] including validity,[31] and reasonableness and scope of the ordinance,[32] and the meaning of writings[33] are for the court to decide.

(VI) *Instructions, Verdict, and Findings.* Instructions[34] as well as the verdict[35] and findings[36] are governed by rules of civil procedure or of criminal procedure according as the proceedings are civil or criminal in their nature.[37]

p. Judgment and Record — (I) *In General.* In no case can a judgment of conviction be rendered except upon sufficient legal testimony on a public trial or upon a plea of guilty in open court.[38] The form of the judgment need not be strictly and technically correct.[39] But unless the proceedings be in a court of record, the judgment alone, or the warrant and judgment, must show the facts

stantial, the court may refuse to charge upon a portion of the testimony, and should refer the whole of it to the jury.

29. People *v.* Gardner, 136 Mich. 693, 100 N. W. 126.

30. See cases cited *infra*, note 31 *et seq.*

31. People *v.* Second Judicial Dist. Ct., 33 Colo. 328, 80 Pac. 888, 108 Am. St. Rep. 98, 33 Colo. 333, 80 Pac. 890 (the constitutionality of an ordinance); Peoria *v.* Calhoun, 29 Ill. 317, holding that it is for the court, and not for the jury, to pronounce upon the legality of an ordinance regulating the sale of fresh meats.

32. State *v.* Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750; Com. *v.* Worcester, 3 Pick. (Mass.) 462; *Ex p.* Vance, 42 Tex. Cr. 619, 62 S. W. 568. But see Glenn *v.* Baltimore, 5 Gill & J. (Md.) 424, where the court properly submitted to the jury the question of whether a prohibition in an ordinance against the carrying on of any distillery of spirits of turpentine was calculated to prevent danger from fires.

What is a device.— The question whether a stick or whip in the hands of a driver riding or walking behind a domestic animal is such a "device" for controlling it as is contemplated by an ordinance prohibiting animals from being driven on streets unless under the care of some competent person, and secured by some suitable device to properly control the same, is not one of fact for the jury, but of law for the court. Chamberlain *v.* Litchfield, 56 Ill. App. 652.

33. Chamberlain *v.* Litchfield, 56 Ill. App. 652.

34. Brown *v.* Mobile, 23 Ala. 722; Peoria *v.* Calhoun, 29 Ill. 317; People *v.* Gardner, 143 Mich. 104, 106 N. W. 541; State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423.

Improper instruction.—Where an action is brought for violating a city ordinance regulating the sale of fresh meats, it is erroneous to instruct the jury that such an ordinance may be passed if not unlawful, as being in restraint of trade, since, if the power existed, the trade in violation of the ordinance could not be lawful. Peoria *v.* Calhoun, 29 Ill. 317. Where, in a quasi-criminal proceeding for the violation of a city ordinance, the evidence before the jury is entirely circumstantial, the court may refuse to charge upon a portion of the testimony, and should refer the whole of it to the jury Brown *v.* Mobile, 23 Ala. 722.

Direction of verdict.—Where, on a prosecution for violation of an ordinance requiring that all drain pipes when within a building, and for a distance of five feet outside the foundation thereof, should be constructed in a certain manner, where the proof showed that the pipe constructed by accused was in violation of the ordinance, an instruction that there was nothing in the case to show that the pipe was ever outside the wall was not prejudicial to respondent. State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423.

Direction of verdict.—Where, on a prosecution for the violation of a valid municipal ordinance, the violation was admitted, and the only questions on which a verdict was sought by defendant involved the validity of the ordinance, the court properly directed a verdict of guilty. People *v.* Gardner, 143 Mich. 104, 106 N. W. 541.

35. Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29, where a verbal complaint for carrying on a liquor nuisance charged that defendant assisted in committing the nuisance in a back room on the first floor of a two-story building, No. 708 K avenue. The verdict found defendant guilty of maintaining a nuisance at 708 K avenue, "as claimed in the prosecution." The particular room was described by witnesses, and the court referred to it in the instructions as the place described in the evidence. It was held that in the absence of a written complaint the court was justified in the reference made to the place where the offense was committed, and the verdict was responsive to the charge.

36. Glen Ridge Bd. of Health *v.* Werner, 67 N. J. L. 103, 50 Atl. 585, holding that a conviction of a defendant in a proceeding for the violation of a borough ordinance, which finds him "guilty of violating section seventy-six of the ordinance," is not good as the conviction must be of the thing interdicted and made an offense by the ordinance, not of violating the ordinance itself.

37. See *supra*, XI, B, 4, b.

38. Oran *v.* Bles, 52 Mo. App. 509.

39. Wiggins *v.* Chicago, 68 Ill. 372.

In an action to recover a penalty, whether commenced either by summons or warrant, the pleadings and judgment are the same. Peterson *v.* State, (Nebr. 1907) 112 N. W.

necessary to give jurisdiction to the tribunal;[40] and in most of the non-code states the common-law rules as to summary proceedings obtain, requiring that the record shall show by exhibit or recital all matter of fact and law, other than public, essential to establish the jurisdiction of the court,[41] due process of law,[42] the regular trial and legal conviction of defendant,[43] and his unlawful act and guilt in violation of the ordinance.[44] But the court has no discretion to refuse judgment

306; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414.

Judgment must be signed by judge or other trial officer see CRIMINAL LAW, 12 Cyc. 330.

40. Lancaster *v.* Hirsch, 1 Lanc. L. Rev. (Pa.) 209; Philadelphia *v.* Hughes, 4 Phila. (Pa.) 148.

Where the police officer made oral complaint only to the police court the record must recite the presence of defendant and not merely his custody, and his plea of not guilty. Green City *v.* Holsinger, 76 Mo. App. 567.

41. Jersey City *v.* Neihaus, 66 N. J. L. 554, 49 Atl. 444; Jones *v.* Wilkes-Barre, 2 Kulp (Pa.) 68; Philadelphia *v.* Roney, 2 Phila. (Pa.) 43. See also CRIMINAL LAW, 12 Cyc. 329.

Judgment in summary trial see CRIMINAL LAW, 12 Cyc. 328.

Record on summary conviction see CRIMINAL LAW, 12 Cyc. 328.

Issuance of summons directed to accused, containing a notice of the charge with an opportunity to him to make defense, must appear of record. Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

An information laid should be shown. Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

A specific charge against defendant must appear. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682.

Commission within the jurisdiction must be shown. Philadelphia *v.* Roney, 2 Phila. (Pa.) 43.

The ordinance violated (Com. *v.* Hill, 3 Pa. Dist. 216, 12 Pa. Co. Ct. 559; Com. *v.* Scranton, 2 Just. L. Rep. (Pa.) 106; Lancaster *v.* Hirsh, 1 Lanc. L. Rev. (Pa.) 209; Hanover *v.* O'Bold, 11 York Leg. Rec. (Pa.) 131; Joske *v.* Irvine, 91 Tex. 574, 44 S. W. 1059; Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356), or so much thereof as prohibits acts for which defendant was convicted (Com. *v.* Hill, 3 Pa. Dist. 216, 12 Pa. Co. Ct. 559), or at least the substance thereof (Hanover *v.* O'Bold, 11 York Leg. Rec. (Pa.) 131) must appear. If the ordinance is not set out *in hæc verba* it should be designated by number, section, or date of passage. Lancaster *v.* Hirsh, 1 Lanc. L. Rev. (Pa.) 209. Reference in proper terms to the ordinance violated must at least appear of record. Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356. But see Lanesboro *v.* Perrine, 2 Just. L. Rep. (Pa.) 254, holding that the entire ordinance, and not merely the sections violated, should appear on the record.

Ordinance which authorizes a summary proceeding must be shown. Com. *v.* Hill, 3 Pa. Dist. 216, 12 Pa. Co. Ct. 559.

That accused was arrested or appeared before the court must appear. Philadelphia *v.* Roney, 2 Phila. (Pa.) 43.

The evidence taken at the hearing should appear of record. Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873. Evidence *in extenso* must be set forth upon the record. Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265. Where, however, the proceedings are not summary the evidence on which the conviction was based need not be set out in the record or judgment. Philadelphia *v.* Duncan, 4 Phila. (Pa.) 145.

Arraignment or plea of not guilty need not appear of record where the prosecution is to recover a penalty and is not considered as a criminal proceeding. St. Louis *v.* Knox, 74 Mo. 79 [*affirming* 6 Mo. App. 247].

Illustrations of insufficient record.—A record of conviction for the violation of a city ordinance which contains only the following, viz.: "Witnesses, Officer Rooney, Sergeant Snow, Officer Graf; Defence, Christopher Neihaus, guilty, $25 fine," is bad, even under the statute simplifying what the record need show in police courts of cities. Jersey City *v.* Neihaus, 66 N. J. L. 554, 49 Atl. 444. A record reciting, "Judgment Aug. 17th. City of Elizabeth in the case of violation of city ordinance, section 187 . . . on hearing the evidence of plaintiff and defendant, held the Central railroad guilty, by obstructing said Broadway . . . imposed fine of $25.00," is insufficient. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682.

42. Gallitzen Borough *v.* Gains, 15 Pa. Co. Ct. 337, 7 Kulp 479; Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

43. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682; Keeler *v.* Milledge, 24 N. J. L. 142; Gallitzen *v.* Gains, 15 Pa. Co. Ct. 337, 7 Kulp 479; Jones *v.* Wilkes-Barre, 2 Kulp (Pa.) 68; Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873; Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265; Philadelphia *v.* Cohan, 13 Wkly. Notes Cas. (Pa.) 468.

Everything necessary to sustain a lawful summary conviction must appear upon the face of the record. Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

44. Com. *v.* Hill, 3 Pa. Dist. 216, 12 Pa. Co. Ct. 559; Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356.

The offense committed by defendant should be described. Com. *v.* Scranton, 2 Just. L. Rep. (Pa.) 106. The specific act committed by defendant should appear of record and should be so described or defined as to

when the case is duly charged and proved, and as a matter of benignity suspend the operation of the statute.[45]

(II) *Judgment by Default.* Judgment by default on a defective warrant is void.[46]

(III) *Joint or Several Judgment.* Where two persons are jointly indicted for the violation of an ordinance and only one is convicted, judgment against him alone is irregular and cannot be sustained.[47]

(IV) *Amount of Judgment.* At common law the judgment is invalid unless for the exact sum of the penalty.[48]

(V) *Vacating Judgment.* Power to release from imprisonment is not power to vacate or satisfy judgment.[49]

q. Sentence and Punishment[50] — (I) *In General.* Three fundamental and elementary rules for punishment of violators of municipal by-laws and ordinances have been recognized and established by repeated adjudications: (1) The court can impose no sentence greater or less than that authorized by the by-law or statute,[51] and if no penalty is prescribed, then no sentence can be pronounced;[52] (2) penalties may be imposed by municipal ordinance and by-law only when, and to the extent, expressly authorized by charter or general law;[53] all other penalties are *ultra vires* and void;[54] but the legislature may impose such penalties by direct legislation;[55] (3) the legislature has plenary power,[56] within constitutional limitations, to authorize

individuate it and to show that it falls within a class of unlawful acts. Com. *v.* Scranton, 2 Just. L. Rep. (Pa.) 106.

Every essential ingredient of the offense must be shown. Lanesboro *v.* Perrine, 2 Just. L. Rep. (Pa.) 254; Philadelphia *v.* Hughes, 4 Phila. (Pa.) 148.

The fact of violation of the ordinance should be shown. Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356.

The manner of violating the ordinance should appear of record. Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356.

Finding of guilty must appear. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682.

A specific finding of the nature of the offense committed should be contained in the record. Smith *v.* Pittsburgh, 35 Pittsb. Leg. J. N. S. (Pa.) 7.

45. New York *v.* Hewitt, 91 N. Y. App. Div. 445, 86 N. Y. Suppl. 832.

46. McMinnville *v.* Stroud, 109 Tenn. 569, 72 S. W. 949.

47. Philadelphia *v.* Kitchen, 2 Phila. (Pa.) 44.

48. Manayunk *v.* Davis, 2 Pars. Eq. Cas. (Pa.) 289, holding that where there are two penalties imposed by an ordinance, the judgment must be certain for which penalty it is rendered; and a judgment for too small a sum is as fatal as if for a larger sum than is given by the ordinance.

49. Newton *v.* Bergbower, 63 Ill. App. 201, construing Rev. St. c. 24, art. 2, § 9.

50. **Ordinances:** Prescribing excessive or unreasonable punishment see *supra*, XI, A, 8, i, (III). Relating to punishment generally see *supra*, XI, A, 8, g. Uncertainty as to punishment see *supra*, XI, A, 8, g.

Power of municipality to punish generally see *supra*, XI, A, 8, g.

Punishment to enforce ordinance see *supra*, XI, B, 4, a.

Summary proceeding: Extent of jurisdiction as to punishment see CRIMINAL LAW, 12 Cyc. 330. Sentence and punishment upon conviction see CRIMINAL LAW, 12 Cyc. 330, 331.

51. See *infra*, XI, B, 4, q, (VII).

52. Smith *v.* Gouldy, 58 N. J. L. 562, 34 Atl. 748.

A penalty is not recoverable where none is provided by the ordinance. Ford *v.* Denver, 10 Colo. App. 500, 51 Pac. 1015.

Uncertainty.— A town ordinance imposing a fine of "not more than fifty dollars" for its violation is void for uncertainty in the amount of the fine to be imposed. State *v.* Irvin, 126 N. C. 989, 35 S. E. 430.

53. Brieswick *v.* Brunswick, 51 Ga. 639, 21 Am. Rep. 240; State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Power to impose fines and penalties is implied from the power to pass the ordinance see *supra*, XI, A, 8, g, text and note 23. And ordinances prescribing punishment may be authorized by charter or statute see *supra*, XI, B, 4, a, text and note 72.

54. Merkee *v.* Rochester, 13 Hun (N. Y.) 157.

55. *Colorado.*— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Georgia.— Kinney *v.* Blackshear, 115 Ga. 810, 42 S. E. 231.

Kansas.— Miltonvale *v.* Lanoue, 35 Kan. 603, 12 Pac. 12.

Michigan.— See Matter of Way, 41 Mich. 299, 1 N. W. 1021.

New York.— Polinsky *v.* People, 73 N. Y. 65, 11 Hun 390; Brunner *v.* Downs, 17 N. Y. Suppl. 633.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1375.

Punishment may be directly imposed by charter or statute see *supra*, XI, B, 4, a, text and note 71.

56. The legislature has full discretion

municipalities to punish persons violating their ordinances or by-laws, by fine,[57] imprisonment,[58] fine or imprisonment,[59] or both fine and imprisonment,[60] or to enforce payment of fine by imprisonment and labor.[61] Revocation of a license under express authority to revoke cannot be considered as punishment.[62]

(II) *Fine.* Authority may be given to punish by fine.[63]

(III) *Fine and Imprisonment.* Authority may be given to punish by fine and imprisonment.[64]

(IV) *Fine or Imprisonment.* Authority may be given to punish by fine or imprisonment.[65]

(V) *Imprisonment*—(A) *As Punishment.* Authority may be given to punish by imprisonment, under which such punishment may be inflicted;[66] but power

within the constitutional limitations to confer upon the municipality such power as to punishment as it may deem wise see *supra*, XI, A, 8, g, text and note 27.

57. See *infra*, XI, B, 4, q, (II). See *supra*, XI, B, 4, a, text and note 72.

58. See *infra*, XI, B, 4, q, (V).

Imprisonment for non-payment of fine see *infra*, XI, B, 4, q, (V), (B).

59. See *infra*, XI, B, 4, q, (IV).

60. See *infra*, XI, B, 4, q, (III).

61. See *infra*, XI, B, 4, q, (V), (C).

62. State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531, so as to remove the case beyond the jurisdiction of the justice of the peace.

63. *Alabama.*— Harper *v.* Attalla, 123 Ala. 524, 26 So. 128; Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461.

Colorado.— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Georgia.— Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183; Little *v.* Ft. Valley, 123 Ga. 503, 51 S. E. 501; Lewis *v.* Forehand, 117 Ga. 798, 45 S. E. 68; Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363; Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; Harris *v.* Augusta, 100 Ga. 382, 28 S. E. 361.

Kentucky.— Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717.

Louisiana.— State *v.* Fisher, 50 La. Ann. 45, 23 So. 92; State *v.* Voss, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653.

Minnesota.— State *v.* Grimes, 83 Minn. 460, 86 N. W. 449.

Nebraska.— Peterson *v.* State, (1907) 112 N. W. 306, 310; Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233; Bayonne *v.* Herdt, 40 N. J. L. 264; State *v.* New Brunswick, 2 N. J. L. J. 240.

New York.—Vance *v.* Hadfield, 51 Hun 620, 643, 4 N. Y. Suppl. 112; Roderick *v.* Whitson, 51 Hun 620, 4 N. Y. Suppl. 112.

North Carolina.— State *v.* Irvin, 126 N. C. 989, 35 S. E. 430.

Ohio.— Alliance *v.* Joyce, 49 Ohio St. 7, 30 N. E. 270; Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210, 7 Ohio N. P. 435.

South Carolina.— McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539; State *v.* Beaufort, 2 Rich. 496.

Texas.— McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1375, 1416. See also *supra*, XI, B, 4, a, text and note 67.

Power to impose fine is implied from power to enact police ordinances. Coonley *v.* Albany, 132 N. Y. 145, 30 N. E. 382; Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382. See *supra*, XI, A, 8, g, text and note 23.

Fine and imprisonment see *infra*, XI, B, 4, q, (III).

Fine or imprisonment see *infra*, XI, B, 4, q, (IV).

64. *Georgia.*— Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183.

Kentucky.— Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717.

Louisiana.— State *v.* Voss, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653; State *v.* Arnauld, 49 La. Ann. 104, 21 So. 177.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1375, 1416. See also *supra*, XI, B, 4, a, text and note 69.

Fine see *supra*, XI, B, 4, q, (II).

Imprisonment see *infra*, XI, B, 4, q, (V).

65. *Connecticut.*—State *v.* Tryon, 39 Conn. 183.

Georgia.— Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183.

Kentucky.— Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717.

Massachusetts.— See Heland *v.* Lowell, 3 Allen 407, 81 Am. Dec. 670.

Minnesota.— State *v.* Grimes, 83 Minn. 460, 86 N. W. 449.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233; State *v.* New Brunswick, 2 N. J. L. J. 240.

Ohio.— Markle *v.* Akron, 14 Ohio 586.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1375, 1416.

Alternative sentence see *infra*, XI, B, 4, q, (VI).

Fine see *infra*, XI, B, 4, q, (II).

Imprisonment see *infra*, XI, B, 4, q, (V).

66. *Alabama.*— Bray *v.* State, 140 Ala. 172, 37 So. 250; Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461.

Kentucky.— Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717.

to imprison for any purpose or to sentence to labor may not be implied but must be expressly granted.[67]

(B) *For Non-Payment of Fine.* Authority may be specially given to imprison for non-payment of fine.[68] Imprisonment for non-payment of fine is not both a fine and imprisonment for the offense, as the imprisonment is merely to enforce the collection of the fine and not to punish for the offense.[69] Defendant upon conviction must be given an opportunity to pay fine before being committed to jail.[70]

(C) *With Sentence to Labor.* Sentence to imprisonment at labor,[71] or

Louisiana.— State *v.* Voss, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653.

Minnesota.— State *v.* Grimes, 83 Minn. 460, 86 N. W. 449; State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531; State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

New Jersey.— State *v.* New Brunswick, 2 N. J. L. J. 240.

South Carolina.— McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539.

Texas.— McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1375, 1416. See also *supra*, XI, B, 4, a, text and note 68.

Sentence to imprisonment in summary trial in general see CRIMINAL LAW, 12 Cyc. 330.

That the ordinance has in fact been violated by defendant must be judicially ascertained to sustain the legality of the imprisonment. Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461.

67. *In re* Semple, 10 Kan. App. 155, 62 Pac. 534; Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208; Breggulia *v.* Vineland, 53 N. J. L. 168, 20 Atl. 1082, 11 L. R. A. 407. See also *supra*, XI, A, 8, g, text and note 25.

Corporal punishment cannot be sustained as a municipal power see *supra*, XI, A, 8, g, text and note 30.

68. *Alabama.*—Harper *v.* Attalla, 123 Ala. 524, 26 So. 128.

Arkansas.— *Ex p.* Slatterly, 3 Ark. 484.

Colorado.— Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76.

Georgia.— Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183; Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732; Lewis *v.* Forehand, 117 Ga. 798, 45 S. E. 68; Kinney *v.* Blackshear, 115 Ga. 810, 42 S. E. 231; Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363; Calhoun *v.* Little, 106 Ga. 270, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; Harris *v.* Augusta, 100 Ga. 382, 28 S. E. 161.

Indiana.— Flora *v.* Sachs, 64 Ind. 155.

Louisiana.— State *v.* Fisher, 50 La. Ann. 45, 23 So. 92.

Missouri.— *In re* Miller, 44 Mo. App. 125; *Ex p.* Kiburg, 10 Mo. App. 442.

Nebraska.— Peterson *v.* State, (1907) 112 N. W. 306, 310; Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233; Belmar *v.* Barkalow, 67 N. J. L. 504, 52 Atl. 157; Bayonne *v.* Herdt, 40 N. J. L. 264.

New York.— Roderick *v.* Whitson, 51 Hun 620, 4 N. Y. Suppl. 112; Vance *v.* Hadfield, 51 Hun 620, 643, 4 N. Y. Suppl. 112.

South Carolina.—State *v.* Beaufort, 2 Rich. 496.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1416.

Imprisonment as means of enforcing payment of fine in summary trial see CRIMINAL LAW, 12 Cyc. 330.

Power to collect fines by capias ad satisfaciendum warrants imprisonment in the county jail. State *v.* Beaufort, 2 Rich. (S. C.) 496.

Power must be specially authorized by the legislature see *supra*, XI, A, 8, g, text and note 26.

69. Harper *v.* Attalla, 123 Ala. 524, 26 So. 128; State *v.* Fisher, 50 La. Ann. 45, 23 So. 92; Peterson *v.* State, (Nebr. 1907) 112 N. W. 306, 310; People *v.* Garabed, 20 Misc. (N. Y.) 127, 45 N. Y. Suppl. 827 [*reversed* without opinion in 25 N. Y. App. Div. 624, 49 N. Y. Suppl. 1141]. See also FINES, 19 Cyc. 553.

A fine is not a debt within the meaning of the constitutional provision referred to. Peterson *v.* State, (Nebr. 1907) 112 N. W. 306, 310; *In re* Beall, 26 Ohio St. 195.

70. Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363; Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; State *v.* Fisher, 50 La. Ann. 45, 23 So. 92, holding that where on refusal to pay a fine imposed by the mayor's court for which defendant was sentenced to jail, he offered to pay the fine, a refusal to allow him to do so was error. But see Kinney *v.* Blackshear, 115 Ga. 810, 42 S. E. 231, for power to sentence to labor without an opportunity to pay a fine.

Payment will supersede mittimus.— State *v.* Fisher, 50 La. Ann. 45, 23 So. 92.

71. Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183; Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 751; Lewis *v.* Forehand, 117 Ga. 798, 45 S. E. 68; Kinney *v.* Blackshear, 115 Ga. 810, 42 S. E. 231; Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717.

For the purpose of upholding the validity of an ordinance authorizing sentence to labor on the street or public works, several ordinances relating to the subject may be construed together. Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183.

Opportunity to pay fine see *supra*, XI, B, 4, q, (V), (B).

Retrospective operation.— Statutory authority to impose a sentence to work in a chain gang on the streets and public works

at hard labor,[72] may be imposed when expressly authorized by law, but not otherwise.[73]

(VI) *ALTERNATIVE SENTENCE.* In the absence of express authority therefor an alternative sentence cannot be imposed.[74] Both fine and imprisonment may not be imposed, where the by-law affixes them as alternative penalties.[75] So the imposition of a fine and the sentence to hard labor is erroneous where the by-law affixes them as alternative punishments or penalties.[76]

(VII) *AMOUNT OF FINE AND TERM OF IMPRISONMENT.* The fine or term of imprisonment being prescribed by law, the court can impose no sentence greater or less than that authorized by the by-laws or statute,[77] either as to the amount of fine[78]

of a municipality, during incarceration, does not operate retrospectively. Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717.

The constitutional inhibition against involuntary servitude save as a punishment for crime after legal conviction thereof is not violated by an ordinance or a punishment thereunder, which confines the offender convicted of violating a municipal ordinance to labor under municipal control. Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 751.

72. See Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732; Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391. See also *supra*, XI, A, 8, g, text and note 29; and CRIMINAL LAW, 12 Cyc. 781.

73. Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732; Carr *v.* Conyers, 84 Ga. 287, 10 S. E. 630, 20 Am. St. Rep. 357; Brieswick *v.* Brunswick, 51 Ga. 639, 21 Am. Rep. 240; Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391, holding that such a sentence is unauthorized under S. D. Laws (1890), c. 37, art. 5, § 4, prescribing that the municipality may provide that persons committed to jail shall be required "to work at such labor as their strength permits."

74. See CRIMINAL LAW, 12 Cyc. 330.

An alternative sentence may be imposed under a statute or ordinance authorizing the imposition of two or more kinds of punishment for the violation of an ordinance. Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732; Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363; Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

75. *Ex p.* Anniston, 84 Ala. 21, 3 So. 910; Mcluerney *v.* Denver, 17 Colo. 302, 29 Pac. 516. *Compare* State *v.* New Brunswick, 2 N. J. L. J. 240, holding that an ordinance prescribing punishment by fine or imprisonment, or both, is violative of a charter providing that violations of the city ordinances may be punished either by fine or imprisonment, and that a conviction thereunder sentencing an accused to both fine and imprisonment is void.

76. *Ex p.* Anniston, 84 Ala. 21, 3 So. 910, holding this to be true unless the labor is for the purpose of working out the fine which defendant is unable to or refused to pay. But see Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732, where a judgment imposing a sentence that accused pay a fine in a given amount, and, in default of the payment of the same within ten days that he work at hard labor in the streets, is not a judgment imposing an alternative sentence, but one imposing a fine with a provision that its payment shall be enforced by labor, and not authorized by law.

77. *Alabama.*— *Ex p.* Moore, 62 Ala. 471.

Illinois.— See Carson *v.* Bloomington, 6 Ill. App. 481.

Louisiana.— State *v.* Boneil, 42 La. Ann. 1207, 8 So. 300; State *v.* Boneil, 42 La. Ann. 1110, 8 So. 298, 21 Am. St. Rep. 413, 10 L. R. A. 60; State *v.* Bringier, 42 La. Ann. 1095, 8 So. 298.

Minnesota.—State *v.* Grimes, 83 Minn. 460, 86 N. W. 449.

Missouri.— See Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233; Brown *v.* Asbury Park, 44 N. J. L. 162.

New York.— Merkee *v.* Rochester, 13 Hun 157.

Pennsylvania.— See Gallitzen Borough *v.* Gains, 15 Pa. Co. Ct. 337, 7 Kulp 479.

South Carolina.— Smith *v.* Hutchinson, 8 Rich. 260.

Wisconsin.— Taylor *v.* State, 35 Wis. 298.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1375.

In Ohio it has been held that where a city ordinance imposes a greater penalty than it has power to impose, a sentence thereunder which is within the amount of punishment allowed by the state law is, under section 106 of the code, valid. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

Express charter provision may warrant the imposition of a greater fine or a sentence for a longer term than that prescribed for such cases generally. McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393.

Sentence above maximum punishment allowed by law see CRIMINAL LAW, 12 Cyc. 782.

Sentence below minimum punishment allowed by law see CRIMINAL LAW, 12 Cyc. 783.

78. *Alabama.*— Craig *v.* Burnett, 32 Ala. 728 (not exceeding fifty dollars); *Ex p.* Burnett, 30 Ala. 461.

Georgia.— Little *v.* Ft. Valley, 123 Ga. 503, 51 S. E. 501 (not exceeding fifty dollars); Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363 (not exceeding one hundred dollars together with costs).

Kentucky.— Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717, not less than that imposed by statute for the same offense.

or as to the term of imprisonment, and any erroneous exercise of authority in this regard will be corrected in the ordinary modes.[79]

(VIII) *UNUSUAL PUNISHMENT.* The constitutional inhibition against assessing unreasonable penalties and unusual punishments prevents the accumulation of penalties for repeated violation of a single ordinance, prosecuted under one complaint so as to impose an unreasonable fine or imprisonment by a single sentence;[80] and it is doubted whether, without express statutory provision therefor, a court may, on a single complaint, transcend the limit of single penalties fixed by the ordinance.[81]

(IX) *PLACE OF IMPRISONMENT.* The place of imprisonment is usually desig-

Louisiana.—State *v.* Voss, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653, not exceeding twenty-five dollars.

Minnesota.—State *v.* Grimes, 83 Minn. 460, 86 N. W. 449, not exceeding one hundred dollars and not less than ten dollars.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233, not exceeding one hundred dollars.

Ohio.— See Alliance *v.* Joyce, 49 Ohio St. 7, 30 N. E. 270 (not more than fifty dollars, or more than double that sum for each repetition of the offense); Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210, 7 Ohio N. P. 435.

South Carolina.— McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539, not exceeding one hundred dollars.

Texas.— McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393, not more than one hundred dollars.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1375, 1416.

It is within the discretion of the court what amount of fine to impose so long as it is within the maximum and minimum amount authorized. State *v.* Grimes, 83 Minn. 460, 86 N. W. 449.

Power to reduce.— In Ohio, in some cases, where the fine imposed is greater than the amount prescribed by law, the judge or magistrate is empowered to reduce the same to such amount as may be deemed reasonable and proper. Alliance *v.* Joyce, 49 Ohio St. 7, 30 N. E. 270; Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210, 7 Ohio N. P. 435.

79. *Alabama.*—*Ex p.* Burnett, 30 Ala. 461, not more than thirty days.

Georgia.— Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363, not to exceed one day for every dollar of fine and costs assessed.

Louisiana.—State *v.* Voss, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653 (not exceeding thirty days); State *v.* Arnauld, 49 La. Ann. 104, 21 So. 177 (not exceeding thirty days).

Minnesota.— State *v.* Grimes, 83 Minn. 460, 86 N. W. 449, not less than ten days nor exceeding ninety days.

New Jersey.— Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233, holding that a judgment by a city court, providing that a person convicted of violating a city ordinance should pay a fine of fifteen dollars or stand committed to the county jail for forty days is illegal, under a provision of the city charter that for violation of a city ordinance the penalty shall not exceed one hundred dollars, or sixty days' imprisonment, or both; and, if the fine be not paid, the party convicted may be committed for a period not exceeding twenty days.

New York.— Roderick *v.* Whitson, 51 Hun 620, 4 N. Y. Suppl. 112 (imprisonment for non-payment of fine so long as the fine is not paid); Vance *v.* Hadfield, 51 Hun 620, 643, 4 N. Y. Suppl. 112 (imprisonment for non-payment of fine to be until the fine is paid); People *v.* Garabed, 20 Misc. 127, 45 N. Y. Suppl. 827 [*reversed* without opinion in 25 N. Y. App. Div. 624, 49 N. Y. Suppl. 1141] (imprisonment for non-payment of fine until such fine is paid, not exceeding ten days).

South Carolina.— McCormick *v.* Calhoun, 30 S. C. 93, 8 S. E. 539, not exceeding thirty days.

Texas.— McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393, not more than fifteen days.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1375, 1416.

It is within the discretion of the court to imprison for a term within the maximum and minimum term prescribed by the ordinance. State *v.* Grimes, 83 Minn. 460, 86 N. W. 449. An ordinance directing that a person sentenced to pay a fine for violating it on failure to do so may be sentenced for thirty days, but that the magistrate may in his discretion for such default sentence to imprisonment for a less time, will support a sentence for thirty days. Belmar *v.* Barkalow, 67 N. J. L. 504, 52 Atl. 157.

80. Phillips *v.* Atlanta, 87 Ga. 62, 13 S. E. 201; State *v.* Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561. See also CRIMINAL LAW, 12 Cyc. 963 *et seq.*

For example commitment for a period of two thousand one hundred and sixty days in default of making payment of fines aggregating seven hundred and twenty dollars in amount for each and costs of prosecutions, for violating a city ordinance, was held to be unusual and unreasonable punishment in the sense of the constitution. State *v.* Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561, where it further appeared that upon essentially one complaint defendant was found guilty of seventy-two distinct violations of one ordinance within one hour and forty minutes, each one of such offenses succeeding the other and only one and one-half minutes intervening between the commencement of any two of them.

81. State *v.* Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561.

nated by the local statute or the ordinance itself.[82] Power to sentence to a certain jail or prison gives no warrant for imprisonment elsewhere.[83]

(x) *By Whom Assessed.* Whether the court or a jury must fix and assess the punishment depends upon the statutory provisions or the local practice.[84] The statute may invest the magistrate with power to fix the penalty, when not fixed by ordinance, without the intervention of a jury;[85] but where a jury is called and they find defendant guilty they must also fix his fine where it is not fixed by the ordinance.[86]

(xi) *Separate Sentences.* A separate sentence should be imposed for each offense.[87]

(xii) *Suspension of Sentence or Dispensing With Penalty.* Where the proceeding is criminal in its nature it seems that sentence may be suspended as in other summary trials of such cases;[88] but where the proceeding is civil in its nature it has been held that the court cannot dispense with the imposition of the penalty as a matter of grace, where the violation of the ordinance was proved.[89]

(xiii) *Amendment of Sentence.* Where upon conviction defendant is sentenced to pay a fine it has been held that the court may during the same term amend the sentence by adding an alternative sentence to a term on the public works.[90]

(xiv) *Commitment and Binding Over.* Where one charged with an offense against a municipal ordinance is on trial, and the evidence shows a violation of a penal statute, he should be committed to jail or bound over to the proper criminal court.[91]

r. Costs.[92] Whether the proceedings be considered as civil or criminal the municipality is not liable for costs, no matter whether defendant prevails or not,[93]

82. Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76 (in the town jail, or, if there is no such jail, in the county jail); Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183 (in the station house); Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 751 (not in the chain gang of the county where prisoners convicted of misdemeanors against the state and felons whose punishment has been reduced are confined); State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531 (in the city work-house); State *v.* Beaufort, 2 Rich. (S. C.) 496 (in the county jail). See Criminal Law, 12 Cyc. 969 *et seq.*

To work on public streets or public works see Lyons *v.* Collier, 125 Ga. 231, 54 S. E. 183; Stone *v.* Paducah, 120 Ky. 322, 86 S. W. 531, 27 Ky. L. Rep. 717 (in a chain gang); State *v.* Grimes, 83 Minn. 460, 86 N. W. 449 (in the work-house).

Power to collect fine by capias ad satisfaciendum will authorize imprisonment in the county jail for that purpose. State *v.* Beaufort, 2 Rich. (S. C.) 496.

83. Merkee *v.* Rochester, 13 Hun (N. Y.) 157.

84. See Criminal Law, 12 Cyc. 772, 776. See also Walton *v.* Cañon City, 13 Colo. App. 77, 56 Pac. 671.

85. Walton *v.* Cañon City, 13 Colo. App. 77, 56 Pac. 671, where the action was a civil one in the form of debt.

86. Walton *v.* Cañon City, 13 Colo. App. 77, 56 Pac. 671.

87. El Dorado *v.* Beardsley, 53 Kan. 363, 36 Pac. 746. See Criminal Law, 12 Cyc. 774.

88. See Criminal Law, 12 Cyc. 772.

89. New York *v.* Hewitt, 91 N. Y. App. Div. 445, 86 N. Y. Suppl. 832.

90. Lewis *v.* Forehand, 117 Ga. 798, 45 S. E. 68, such sentence being within the provision of the law under which accused was convicted.

91. Newton *v.* Fain, 114 Ga. 833, 40 S. E. 993.

92. **Liability for sheriffs' compensation** in criminal cases see Sheriffs and Constables.

93. Princeville *v.* Hitchcock, 101 Ill. App. 588; People *v.* Chapin, 48 Ill. App. 643; Sparta *v.* Boorom, 129 Mich. 555, 89 N. W. 435, 90 N. W. 681. See Kokomo *v.* Wells, 34 Ind. 48, 49, where it is said: "We understand that the practice is, in the mayors' courts of the various cities which are living and acting under this general law, to tax no costs against the city in cases for violations of the ordinances, when the case is decided against the city." See also Costs, 11 Cyc. 278.

On grounds of public policy costs cannot be taxed against a municipal corporation when proceedings had before the mayor's court for violation of an ordinance are removed by certiorari to the circuit court and there quashed. Camden *v.* Bloch, 65 Ala. 236; Montgomery *v.* Foster, 54 Ala. 62.

Cost bonds were not necessary in suits before justices of the peace for violation of municipal ordinances, under a statute requiring bonds to be given in actions on penal statutes, as such ordinances are not penal statutes within the meaning of the act. Jacksonville *v.* Block, 36 Ill. 507 [*following* Lewiston *v.* Proctor, 23 Ill. 533]; Quincy *v.* Ballance, 30 Ill. 185 [*following* Lewiston *v.*

unless there is a statutory provision imposing such liability.[94] The costs are no part of the penalty,[95] unless so provided by law.[96] The costs of amendments[97] and continuances[98] may be taxed against the party on whose application they are allowed.

s. Review — (i) *Right of Defendant to Review.*[99] Under the various provisions of law which govern the subject, defendant in an action or prosecution for violating an ordinance or regulation of a municipal corporation is generally given the right to have the judgment reviewed by some form of procedure;[1]

Proctor, 23 Ill. 533], where plaintiff was not required to give security on appeal from the judgment of the police magistrate.

Even upon appeal to a superior court of record the municipality is not liable for costs. Montgomery *v.* Foster, 54 Ala. 62; Petersburg *v.* Whitnack, 48 Ill. App. 663; Nokomis *v.* Harkey, 31 Ill. App. 107. *Contra*, Kokomo *v.* Wills, 34 Ind. 48, where the city was held liable for costs in the appellate court where it was unsuccessful.

Execution cannot be issued against the municipality on a judgment for costs. Kinmundy *v.* Mahan, 72 Ill. 462; Odell *v.* Schroeder, 58 Ill. 353, execution cannot issue against city for costs on enforcement of ordinance.

Invalidity of the ordinance under which the proceeding was prescribed does not affect the rule. See Costs, 11 Cyc. 278.

Working out his costs on the streets does not affect the rule of the text. Gibson *v.* Zanesville, 31 Ohio St. 184; Eastman *v.* Nashville, 13 Lea (Tenn.) 717. See Costs, 11 Cyc. 279.

Mandamus will not lie to compel a municipality to pay costs on proceedings to enforce ordinances. People *v.* Chapin, 48 Ill. App. 643.

Discretion of council.— By statute it is sometimes provided that the municipality may in its discretion pay the costs of prosecutions for violation of municipal ordinances, where the prosecution fails. People *v.* Chapin, 48 Ill. App. 643.

94. See Costs, 11 Cyc. 279. See also Mariner *v.* Mackey, 25 Kan. 669 (holding that where on appeal appellant defendant was acquitted and a judgment entered that he recover of the city his costs in a certain amount and an execution issued therefor, such judgment for costs was not a nullity, but that until reversed or modified was a valid judgment in favor of defendant against the city and could be enforced by execution, although he had not in fact paid any of the costs); Horn *v.* People, 26 Mich. 221 (where costs were awarded against the city as a real party in interest on whose behalf the prosecution was brought); Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552 (where defendant, under the charter power to that effect, recovered costs against the city upon acquittal, the action being civil in its nature).

Attorney's fees may be included in the costs recoverable against the city upon acquittal of defendant. Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552.

The amount claimed in plaintiff's complaint will govern the amount of attorney's fees, recoverable by defendant upon acquittal. Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552.

The fees of the police judge and of witnesses subpœnaed to testify in behalf of the municipality should be taxed as costs against the city, unless such costs for sufficient reasons are adjudged against the prosecutor, where the prosecution resulted in favor of defendant on appeal to the district court. Iola *v.* Harris, 40 Kan. 629, 20 Pac. 521.

95. Bayonne *v.* Herdt, 40 N. J. L. 264. *Compare* Moody *v.* Williamsburg, 88 S. W. 1075, 28 Ky. L. Rep. 60, holding that St. (1903) c. 47, prescribing a schedule of fees and costs in judicial proceedings; section 3637, subs. 5, conferring on councils the right to impose fines for violation of ordinances; and section 3623, providing that the city attorney shall receive a compensation to be fixed by ordinance by the council — do not authorize a municipality to adopt an ordinance providing that, when a judgment for a fine is less than ten dollars, a fee of two dollars and fifty cents for the city attorney shall be taxed as costs.

Advancing costs for appeal.—A prosecution for keeping a bowling alley without a license, in violation of a city ordinance, is a criminal proceeding; and hence defendant, on appeal from the police court, cannot be required to advance the costs of copies and entry in the court of common pleas. State *v.* Stearns, 31 N. H. 106.

Attorney's fees cannot be taxed as costs against defendant upon conviction, where not authorized by law. Gipps Brewing Co. *v.* Virginia, 32 Ill. App. 518 [*affirmed* in 136 Ill. 616, 27 N. E. 196].

96. State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458, holding that the costs of prosecution are not a part of the penalty and that an ordinance to that effect, unless authorized by law, is void.

Retaxation.— The clerk of the common pleas has no authority to revise the taxation of costs by a justice of the peace by any retaxation thereof. Any error in such taxation should be brought to the notice of the court for correction upon rehearing of appeal from the judgment. State *v.* Reckards, 21 Minn. 47.

97. Washington *v.* Frank, 46 N. C. 436.

98. Boscobel *v.* Bugbee, 41 Wis. 59.

99. Right of accused to review summary conviction in general see Criminal Law, 12 Cyc. 333.

1. *Colorado.*—Tracey *v.* People, 6 Colo. 151.

but the particular remedy and court whose jurisdiction is invoked will depend upon the particular statute except where certiorari may lie under general rules.[2]

(II) *Right of Plaintiff to Review.* Generally in criminal or quasi-criminal proceedings the municipality can have no right to review in any manner a judgment of acquittal,[3] unless such right is given by statute;[4] but the rule is otherwise in civil proceedings.[5] It is to be observed, however, that the authorities are not in accord as to whether a proceeding for the violation of an ordinance is civil or criminal in character.[6]

(III) *Form of Remedy.*[7] In the absence of other prescribed method of procedure the validity of the judgment may as a rule be inquired into by certiorari.[8] But under the general rule that where particular jurisdiction is conferred upon an inferior court its decision within that jurisdiction is final without right to an appeal or writ of error therefrom, unless provision is made therefor by law,[9]

Illinois.— Knowles *v.* Wayne City, 31 Ill. App. 471.

Iowa.— Conboy *v.* Iowa City, 2 Iowa 90; Dubuque *v.* Rebman, 1 Iowa 444.

Minnesota.— St. Peter *v.* Bauer, 19 Minn. 327.

Missouri.— St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050; Poplar Bluff *v.* Hill, 92 Mo. App. 17.

Ohio.—Miller *v.* Bellefountaine, 2 Ohio Cir. Ct. 139, 1 Ohio Cir. Dec. 407.

Oregon.— Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593; Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115.

South Carolina.— Charleston *v.* Brown, 42 S. C. 184, 20 S. E. 56.

West Virginia.— Ridgway *v.* Hinton, 25 W. Va. 554.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1399, 1412.

Form of remedy see *infra*, XI, B, 4, s, (III).

2. Warner *v.* Porter, 2 Dougl. (Mich.) 358.

3. *Georgia.*— Hawkinsville *v.* Ethridge, 96 Ga. 326, 22 S. E. 985; Cranston *v.* Augusta, 61 Ga. 572.

Iowa.—State *v.* Vail, 57 Iowa 103, 10 N. W. 297.

Kansas.— Lyons *v.* Wellman, 56 Kan. 285, 43 Pac. 267; Salina *v.* Wait, 56 Kan. 283, 43 Pac. 255.

Michigan.— Northville *v.* Westfall, 75 Mich. 603, 42 N. W. 1068.

Mississippi.— Water Valley *v.* Davis, 73 Miss. 521, 19 So. 235.

Missouri.— St. Louis *v.* White, 99 Mo. 477, 12 S. W. 1050 (holding that the right to appeal when an indictment is quashed or judgment thereon is arrested, under Rev. St. (1879) § 1986, does not apply to appeals from municipal courts for violation of police ordinances); St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050 (holding that the municipality cannot appeal where the proceeding is criminal or quasi-criminal in the absence of statutory authority to do so; and that the only means of review given plaintiff is by writ of error).

New York.— Hudson *v.* Granger, 23 Misc. 401, 52 N. Y. Suppl. 9.

Wisconsin.— Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1413.

Contra.— Camden *v.* Bloch, 65 Ala. 236, where the proceeding is only quasi-criminal.

4. Com. *v.* Ingraham, 7 Bush (Ky.) 106; Water Valley *v.* Davis, 73 Miss. 521, 19 So. 235; St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050; Poplar Bluff *v.* Hill, 92 Mo. App. 17; State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59; Van Wert *v.* Brown, 47 Ohio St. 477, 25 N. E. 59.

5. Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. 820; Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1; Knowles *v.* Wayne City, 31 Ill. App. 471; St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878; St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050 (holding that an action by the city of St. Louis to recover a penalty for a violation of an ordinance thereof is a civil action, so far as concerns plaintiff's right to a review of the judgment); Kansas City *v.* Clark, 68 Mo. 588.

6. See *supra*, XI, B, 4, b.

7. **Appeal or writ of error to review summary conviction** in general see CRIMINAL LAW, 12 Cyc. 331.

Injunction against prosecution see INJUNCTIONS, 22 Cyc. 903.

Review upon habeas corpus see HABEAS CORPUS, 21 Cyc. 279.

8. Denninger *v.* Pomona Recorders' Ct., 145 Cal. 629, 79 Pac. 360; Simpson *v.* Lumpkin, 121 Ga. 167, 48 S. E. 904; East Orange *v.* Richardson, 71 N. J. L. 458, 59 Atl. 897; White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378; Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171; Plymouth Borough *v.* Penkok, 7 Kulp (Pa.) 101; Lancaster *v.* Hirsch, 1 Lanc. L. Rev. (Pa.) 209.

Where defendant has no statutory right of review of a judgment of conviction, his remedy is by the common-law writ of certiorari to test the validity of the judgment. Camden *v.* Bloch, 65 Ala. 236; Mowery *v.* Camden, 49 N. J. L. 106, 6 Atl. 438; West Pittston Borough *v.* Dymond, 8 Kulp (Pa.) 12. And see CERTIORARI, 6 Cyc. 738 *et seq.*; CRIMINAL LAW, 12 Cyc. 332.

9. See CRIMINAL LAW, 12 Cyc. 332.

Reserved questions.— Under the statute conferring on circuit judges the power to reserve for the opinion of the supreme court questions arising on the trial of offenses un-

the judgment in the absence of statute cannot be reviewed by appeal[10] or writ of error,[11] although in the various jurisdictions provision is usually made by statute for appeals[12] or writs of error.[13] In some states the proper proceeding is by writ of review.[14] Where an appeal is provided for, a writ of error will not lie.[15]

(iv) *APPELLATE JURISDICTION.* The superior courts to which appeals on writs of error may be taken from judgment of municipal courts are designated by the local statutes which vary in the several jurisdictions.[16] A case involving the validity of a municipal ordinance is appealable irrespective of the amount

der the general laws of the state, the recorder of Detroit, when trying complaints for breach of city ordinances, has no authority so to reserve questions. People *v.* Jackson, 8 Mich. 78.

10. St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050; Holzworth *v.* Newark, 50 N. J. L. 85, 11 Atl. 131 (no appeal in civil cases); Greeley *v.* Passaic, 42 N. J. L. 87 [*reversed* on other grounds in 42 N. J. L. 429]; Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; Corvallis *v.* Stock, 12 Oreg. 391, 7 Pac. 524; La Fayette *v.* Clark, 9 Oreg. 225; Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798.

Charter prohibition.— The charter may provide that no appeal shall be taken from convictions in certain cases. McGarty *v.* Deming, 51 Conn. 422.

Statutes relating to appeals from justices of the peace have been held inapplicable to proceedings before city tribunals. McGarty *v.* Deming, 51 Conn. 422; St. Peter *v.* Bauer, 19 Minn. 327; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111. But *compare* Sellers *v.* Corvallis, 5 Oreg. 273; Charleston *v.* Brown, 42 S. C. 184, 20 S. E. 56.

11. Jackson *v.* People, 8 Mich. 262; Canfield *v.* Brobst, 71 Ohio St. 42, 72 N. E. 459 [*reversing* 24 Ohio Cir. Ct. 555].

12. *Colorado.*— Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. 820; Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1.

Connecticut.—McGarty *v.* Deming, 51 Conn. 422.

Indiana.— Miller *v.* O'Reilly, 84 Ind. 168.

Iowa.— Conboy *v.* Iowa City, 2 Iowa 90; Dubuque *v.* Rebman, 1 Iowa 444.

Kentucky.— Payne *v.* Com., 14 Ky. L. Rep. 302.

Louisiana.— Homer *v.* Brown, 117 La. 425, 41 So. 711; State *v.* Judge Orleans Parish Cr. Dist. Ct., 105 La. 758, 30 So. 105; New Orleans *v.* Chappuis, 105 La. 179, 29 So. 721.

Minnesota.— St. Peter *v.* Bauer, 19 Minn. 327.

Missouri.— St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788; St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878; St. Louis *v.* White, 99 Mo. 477, 12 S. W. 1050; St. Louis *v.* Marchel, 99 Mo. 475, 12 S. W. 1050; Kansas City *v.* Clark, 68 Mo. 588; Tarkio *v.* Loyd, 109 Mo. App. 171, 82 S. W. 1127; De Soto *v.* Merciel, 53 Mo. App. 57.

New Jersey.—Bayonne *v.* Herdt, 40 N. J. L. 264.

West Virginia.— Ridgeway *v.* Hinton, 25 W. Va. 554.

13. Van Buskirk *v.* Newark, 26 Ohio St. 37 (holding that a petition in error was not proper); Frank *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 544, 5 Ohio N. P. 520.

14. Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115 (holding that an appeal does not lie unless expressly given by charter or statute); La Fayette *v.* Clark, 9 Oreg. 225.

Absence of other remedy.— Where an ordinance fixed the punishment of disorderly persons at fine "or" imprisonment, the remedy of one sentenced by the municipal court to imprisonment "and" a fine was by appeal, under Laws (1891), p. 111, c. 64, § 11, providing for an appeal to the superior court from the judgment of the municipal court, and not by writ of review, under Sess. Laws (1895), p. 115, § 4 (2 Ballinger Code, § 5741), providing for writ of review when there is no appeal, nor any plain, speedy, and adequate remedy at law. Falsetto *v.* Seattle, 18 Wash. 509, 52 Pac. 250.

Waiver.— Defendant, by pleading guilty in a prosecution under a city ordinance, does not waive his right to attack the validity of the ordinance on writ of review. Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593.

15. Ridgway *v.* Hinton, 25 W. Va. 554. *Compare* Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621, where it is said that an action to recover a penalty for an act that is not made criminal by general law, but is forbidden by city ordinance, is a civil action, reviewable on appeal rather than on writ of error.

16. See the statutes of the several states. And see CRIMINAL LAW, 12 Cyc. 333.

For illustrations see Huer *v.* Central, 14 Colo. 71, 23 Pac. 323 (holding an appeal to lie to the district court); Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529 (to the district court); Dubuque *v.* Rebman, 1 Iowa 444 (to the district court); Burlington *v.* Stockwell, 56 Kan. 208, 42 Pac. 826 (to the court of appeals from the district court); Leavenworth *v.* Weaver, 26 Kan. 392 (holding that no appeal lay directly from a decision of the police judge on a motion to quash the complaint to the supreme court, but only to the district court); Com. *v.* Ingraham, 7 Bush (Ky.) 106 (holding that under Lexington City Charter, § 51, appeals may be taken directly to the court of appeals from judgments of Lexington city court when the decision is against the validity of any ordinance or by-law of

involved.[17] However, unless the ordinance is the primary subject of inquiry no appeal will lie.[18] Jurisdiction attaches in the superior court where the proper steps are taken to perfect the appeal from the municipal court.[19]

(v) *Waiver or Loss of Right to Review.* The right to test the validity of an ordinance in a higher court has been held not to be waived by a plea of guilty in the trial court;[20] and it has been held also that a judgment may be reviewed on certiorari, although defendant has voluntarily paid a fine imposed.[21]

(vi) *Proceedings to Secure Review*—(a) *Generally.* In the absence of contrary statutory provision, proceedings to procure review are governed by the rules generally applicable to the review of civil[22] or criminal[23] proceedings, the applicability of the rules of civil or criminal procedure being of course determined by the character of the proceeding upon the ordinance.[24] The procedure

said city, but in no other case); Payne *v.* Com., 14 Ky. L. Rep. 302 (to the circuit court); *Ex p.* Travers, 3 La. Ann. 693 (to the supreme court); Bayonne *v.* Herdt, 40 N. J. L. 264 (to the common pleas court); Miller *v.* Bellefountaine, 2 Ohio Cir. Ct. 139, 1 Ohio Cir. Dec. 407 (to the court of common pleas); Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171 (to the court of common pleas).

Exclusive jurisdiction.— Where the charter of a city gives an appeal to the circuit court for the revision of judgments of its officers against those charged with the violation of its ordinances, the remedy so given is exclusive, and an appeal cannot be taken to the city court. Montgomery *v.* Belser, 53 Ala. 379.

Further review.— Under Ohio Rev. St. § 7356 (2 Smith & B. Rev. St. p. 2123), providing that "in any criminal case, including a conviction for a violation of an ordinance of a municipal corporation," the judgment, or final order of the circuit court, in cases of conviction of a felony or misdemeanor, "and the judgment of the circuit court in any other case involving the constitutionality of a statute," may be reviewed by the supreme court, the supreme court has jurisdiction to review a judgment of the circuit court acquitting a defendant charged with violating an ordinance based on the Local Option Law (85 Ohio Laws, p. 55), where such judgment is placed on the ground that the statute is unconstitutional. State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59; Van Wert *v.* Brown, 47 Ohio St. 477, 25 N. E. 59.

Kansas court of appeals did not have jurisdiction over appeals for violation of city ordinances. Burlington *v.* Stockwell, 1 Kan. App. 414, 41 Pac. 221.

17. Homer *v.* Brown, 117 La. 425, 41 So. 711; Eureka City *v.* Wilson, 15 Utah 53, 67, 48 Pac. 41, 150, 62 Am. St. Rep. 904. See Appeal and Error, 2 Cyc. 585.

18. Cairo *v.* Bross, 99 Ill. 521; North Manchester *v.* Oustal, 132 Ind. 8, 31 N. E. 450; Griffee *v.* Summitville, 10 Ind. App. 332, 37 N. E. 280, 1068; Homer *v.* Brown, 117 La. 425, 41 So. 711; New Orleans *v.* Reems, 49 La. Ann. 792, 21 So. 599; Parish *v.* Broussard, 42 La. Ann. 841, 8 So. 590; *Ex p.* Travers, 3 La. Ann. 693. And see Wertheimer *v.* Boonville, 29 Mo. 254. See also Appeal and Error, 2 Cyc. 585.

19. Hamersley *v.* Blair, 48 Conn. 58; Holton *v.* Stanley, 6 Kan. App. 103, 49 Pac. 679. See Criminal Law, 12 Cyc. 233.

20. Frank *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 544, 5 Ohio N. P. 520; Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593.

21. Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171.

22. Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472; Hoyer *v.* Mascoutah, 59 Ill. 137; Miller *v.* O'Reilly, 84 Ind. 168; Fortune *v.* Wilburton, 5 Indian Terr. 251, 82 S. W. 738, holding that a prosecution for being drunk and disorderly in violation of an ordinance of an incorporated town is a civil proceeding, and the filing of the statutory affidavit is a condition precedent to defendant's appeal from a conviction therein.

Appeals generally see Appeal and Error.

Penalties.—The statutes and procedure governing appeals in other civil actions apply to actions to recover penalties. See Appeal and Error, 2 Cyc. 542. See also, generally, Penalties.

23. See People *v.* Jackson, 8 Mich. 110 (holding that convictions in the recorder's court of Detroit for offenses against city ordinances cannot be brought before the supreme court for review on exceptions before sentence, under chapter 197 of the Compiled Laws); Golden City *v.* Hall 68 Mo. App. 627. See also Criminal Law, 12 Cyc. 331.

24. See Miller *v.* O'Reilly, 84 Ind. 168; Fortune *v.* Wilburton, 5 Indian Terr. 251, 82 S. W. 738.

Character of proceeding as civil or criminal see *supra*, XI, B, 4, b.

Change in style of case on appeal.— Where plaintiff in error was prosecuted in a justice's court for violation of a city ordinance, and upon conviction sentenced to pay a fine within two hours, or in default be imprisoned, but upon appeal the prosecution was carried on by and in the name of the city as a civil cause, the alteration in the title of the cause was fatal. Webster *v.* Lansing, 47 Mich. 192, 10 N. W. 196. But see People *v.* Vinton, 82 Mich. 39, 46 N. W. 31, holding that the fact that a suit was begun in the name of a village as plaintiff and on appeal was docketed in the circuit court in the name of the people of the state was not ground for reversal in the supreme court especially

may, however, be regulated by specific charter or statutory provisions.[25] Since the proceedings are had usually before police judges and similar inferior tribunals,[26] the rules governing appeals from justices of the peace and other magistrates[27] are usually applicable, and it is indeed sometimes provided by statute that the same procedure shall be followed.[28] By some statutes leave of the appellate court is necessary before an appeal may be taken.[29] The cause must be transferred to the appellate court upon the notice[30] and in the manner[31] prescribed by statute.

where objection was not made until after verdict.

25. Conboy *v.* Iowa City, 2 Iowa 90; Payne *v.* Com., 14 Ky. L. Rep. 302; St. Peter *v.* Bauer, 19 Minn. 327.

26. See *supra*, XI, B, 4, c, (II).

27. **Review of civil proceedings before justices of the peace** see JUSTICES OF THE PEACE, 24 Cyc. 638 *et seq.*

Review of summary conviction before magistrate see CRIMINAL LAW, 12 Cyc. 331 *et seq.*

28. See the statutes of the several states. And see St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788 (holding that St. Louis Charter, art. 4, § 25, providing that appeals may be taken from the police justice, in prosecutions for the violation of an ordinance, to the court of criminal correction, "in like manner as provided by law for appeals from justices of the peace in criminal cases to their appellate court," means that such appeals shall conform to the law governing appeals from justices as it stands at the time an appeal is taken); Tarkio *v.* Loyd, 109 Mo. App. 171, 82 S. W. 1127 (holding that under the express terms of Rev. St. (1899) § 5937, appeals from convictions under section 5934 in police courts of fourth-class cities for violation of ordinances are to be taken in the manner provided by the statutes relative to appeals from justices of the peace in misdemeanor cases, and not under the provisions relative to civil cases, nor under section 5929, relative to appeals from judgments on forfeited recognizances); Golden City *v.* Hall, 68 Mo. App. 627; Centerville *v.* Olson, 16 S. D. 526, 94 N. W. 414.

29. See the statutes of the several states. And see Canfield *v.* Brobst, 71 Ohio St. 42, 72 N. E. 459 [*reversing* 24 Ohio Cir. Ct. 555], holding that one convicted before the mayor of a village for violation of an ordinance, who applies, under Rev. St. (1892) § 1752, to a court of common pleas for leave to file a petition in error to review the judgment, on refusal of such leave, cannot bring error in the circuit court to review such order); Miller *v.* Bellefountaine, 2 Ohio Cir. Ct. 139, 1 Ohio Cir. Dec. 407 (holding that under Rev. St. § 1752, leave to file is a condition precedent to the right to have a conviction under an ordinance of any municipal corporation reviewed by the court of common pleas; hence, where a petition in error has been filed without such leave, the common pleas does not obtain jurisdiction); Mahanoy City *v.* Bissell, 9 Pa. Co. Ct. 469; Wilkes-Barre *v.* Stewart, 10 Kulp (Pa.) 28. See, generally, CRIMINAL LAW, 12 Cyc. 333.

30. Graham *v.* State, 1 Ark. 79 (holding that under the city charter of Little Rock, providing that the full amount of all sums arising from the taxes on all licenses of the city and from fines shall be paid into the treasury of the city, the city was a proper party to a prosecution for gaming, instead of the state; and on error from a judgment of the city court a summons to hear errors must be served on the corporate authorities of the city); Centerville *v.* Olson, 16 S. D. 526, 94 N. W. 414 (holding that a proceeding on behalf of a city against a defendant arrested for violation of a city ordinance was quasi-criminal in its nature, and hence an oral notice of appeal authorized in criminal cases before justices of the peace by Comp. Laws (1887), § 6177, was sufficient).

31. See cases cited *infra*, this note.

Affidavit for appeal and time of filing same. — An affidavit for an appeal from a conviction for violation of a city ordinance must be filed with the justice before whom defendant was convicted, and not with the court to which the appeal was taken. Fortune *v.* Wilburton, 5 Indian Terr. 251, 82 S. W. 738; Mo. Rev. St. (1899) § 340, providing that no appeal from a justice of the peace shall be dismissed for want of affidavit on appeal, if one is filed in the appellate court before the determination of a motion to dismiss, does not apply to an order to appeal from the recorder's court in an action for violation of an ordinance. De Soto *v.* Merciel, 53 Mo. App. 57.

Parties. — Where one accused of violating a city ordinance was tried and convicted in a municipal court presided over by a person acting as mayor of the city, and a certiorari was sued out by the accused to set the conviction aside, the municipal corporation, and not the individual acting as mayor, was the proper party defendant in error to a bill of exceptions brought to the supreme court for the purpose of reviewing a judgment of the superior court overruling the certiorari. Stroup *v.* Pruden, 104 Ga. 721, 30 S. E. 948.

Docket fee. — One who has been convicted before a justice of the peace of violating a city ordinance, and has appealed therefrom to the criminal court of Cook county, where the case is triable *de novo*, cannot be compelled to pay a docket fee in the criminal court, as a condition precedent to having his case docketed in that court. Anderson *v.* Schubert, 158 Ill. 75, 41 N. E. 853 [*revers-*

(B) *Time of Taking.* The appeal must be perfected within the period prescribed by statute.[32]

(C) *Bond.* Any statutory provision as to the security to be given on appeal must be complied with.[33] An appeal on a defective appeal-bond will not be allowed.[34]

(D) *Transcript of Record.* Upon certiorari the record must show everything necessary to constitute a legal conviction;[35] for example, it must show the affidavit and warrant upon which the prosecution was commenced,[36] a valid arrest,[37] that defendant had an opportunity of being heard,[38] and that the judgment was duly entered;[39] it must find that the specific act charged has been performed by defendant,[40] and describe and define such act so as to show that it was unlawful,[41] and must show that the offense was committed after the passage of the ordi-

ing 55 Ill. App. 227, and *distinguishing* McArthur *v.* Artz, 129 Ill. 352, 21 N. E. 802].

Certiorari.— Failure to deliver a writ of certiorari and a copy of the petition to the officer whose decision is sought to be reviewed, as required by Civ. Code (1895), § 4643, does not render the proceeding void, so that the suit cannot be renewed under section 3786, authorizing such renewal, unless the original petition was void for any reason. Bass *v.* Milledgeville, 121 Ga. 151, 48 S. E. 919.

32. Conboy *v.* Iowa City, 2 Iowa 90; St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788; De Soto *v.* Merciel, 53 Mo. App. 57, holding that a delay of nine days in filing an affidavit for appeal from a recorder's court was fatal.

Extension of time.— The mayor of a municipality has no authority to allow ten days after the overruling of a motion for a new trial in which to prepare and file a bill of exceptions, and, if an appeal is desired, it must be taken at the time of the decision. Bradner *v.* Grundetisch, 15 Ohio Cir. Ct. 32, 8 Ohio Cir. Dec. 122.

33. See cases cited *infra*, this and following note.

To whom given.— On appeal from a conviction of violating a town ordinance, the bond may be made payable to the town, when the forbidden act is not prohibited by any state law. Irish *v.* State, (Tex. Cr. App. 1893) 24 S. W. 516. See also Centerville *v.* Olson, 16 S. D. 526, 94 N. W. 414.

How proceeding should be regarded.— For the purpose of determining the character of bond required to be given in appeal, a prosecution for the violation of a city ordinance is considered as a civil action. Miller *v.* O'Reilly, 84 Ind. 168. But see Mohrman *v.* Augusta, 103 Ga. 841, 31 S. E. 95, holding that section 4639 of the civil code applies exclusively to civil cases; and therefore the provision therein which declares that a party applying for the writ of certiorari "shall give bond and good security, conditioned to pay the adverse party in the cause the eventual condemnation money" is not applicable where one convicted in a municipal court of a violation of a city ordinance is seeking to obtain a writ of certiorari.

Enforcement.— Where one fined before the mayor for violation of a municipal ordinance appealed to the circuit court, giving bond to satisfy the judgment which might be rendered against him on the appeal, instead of a bond to appear at the term to which the appeal was taken, he was not, on being again convicted in the circuit court, prejudiced by judgment being entered against him and his sureties on the bond for the assessed penalty and costs instead of being fined, since execution may issue for an unpaid fine in the circuit court as in civil cases, under Code (1896), § 5424 (Code (1886), § 4534). Goldsmith *v.* Huntsville, 120 Ala. 182, 24 So. 509.

34. Centerville *v.* Olson, 16 S. D. 526, 94 N. W. 414.

35. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682; Jersey City *v.* Neihaus, 66 N. J. L. 554, 49 Atl. 444; Keeler *v.* Milledge, 24 N. J. L. 142; Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171.

Essentials of record.— Where the proceeding under an ordinance for the violation thereof is summary in its character, it must be in conformity with the statute, and the conviction must set forth the offense with which the offender is charged, the names of the witnesses, sufficient of the evidence to show what offense was committed, of what offense there was a conviction, and the judgment thereon. Without these essentials, the conviction is a nullity. A mere transcript of the proceedings before the magistrate is not sufficient. Massinger *v.* Millville, 63 N. J. L. 123, 43 Atl. 443; Salter *v.* Bayonne, 59 N. J. L. 128, 36 Atl. 667.

36. Camden *v.* Bloch, 65 Ala. 236, holding that on certiorari the record should show the affidavit and warrant on which prosecutin was commenced, and that a failure to show this cannot be cured by extrinsic parol evidence to aid the record.

37. Pittston Borough *v.* Dimond, 4 Pa. Dist. 200, 15 Pa. Co. Ct. 543, 7 Kulp 431.

38. Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171.

39. Bolivar Borough *v.* Coulter, 10 Pa. Dist. 171.

40. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682; Reid *v.* Wood, 102 Pa. St. 312.

41. Salter *v.* Bayonne, 59 N. J. L. 128, 36 Atl. 667 (holding that it must be definitely shown of what offense the violator of the

nance,[42] and within the jurisdiction of the court.[43] A technical mistake in the record may be amended.[44] As a general rule it is held necessary that the ordinance, or at least such part thereof as is involved in the proceedings, must be incorporated in the record.[45] Where, however, it is held that the trial court may take judicial notice of city ordinances it has been held further that the reviewing court may take notice of the same facts.[46] Under some statutes a certified copy of the docket entries, together with a certificate of the recognizance, is all that is necessary to confer jurisdiction upon the appellate court.[47]

(VII) *Hearing and Determination* — (A) *Generally.* The rules governing appeals generally,[48] particularly those governing appeals from justices of the peace[49] and from summary convictions,[50] in the absence of contrary statutory provision, govern the hearing and determination of appeals in proceedings based upon violations of municipal ordinances.

(B) *Extent of Review.* Under some statutes the questions reviewable are confined to the legality and constitutionality of the ordinance involved and the fine imposed.[51] In any event questions which have not been properly presented for review will not be considered.[52] Hence as a general rule matters which have not been raised in the court below cannot be presented upon appeal.[53] It may, however, be urged for the first time on appeal that the affidavit or warrant charges

ordinance was convicted); Reid *v.* Wood, 102 Pa. St. 312; Philadelphia *v.* Hughes, 4 Phila. (Pa.) 148.

42. Pittston Borough *v.* Dimond, 4 Pa. Dist. 200, 15 Pa. Co. Ct. 543, 7 Kulp 431; Reading *v.* O'Reilly, 1 Woodw. (Pa.) 408.

43. Plymouth Borough *v.* Penkok, 7 Kulp (Pa.) 101.

44. Reid *v.* Wood, 102 Pa. St. 312, holding that where proceedings before a chief burgess were brought in the name of the commonwealth, while the certiorari to the common pleas was directed to the chief burgess of the borough, the writ might be amended in the supreme court.

45. Hill *v.* Atlanta, 125 Ga. 697, 54 S. E. 354; Davis *v.* Rome, 89 Ga. 724, 15 S. E. 632; Phillips *v.* Atlanta, 78 Ga. 773, 3 S. E. 431 (holding that where the recorder rested his judgment overruling a demurrer upon an ordinance of the city, he must return such ordinance in answer to a writ of certiorari); State *v.* Marmouget, 110 La. 191, 34 So. 408; State *v.* Judge Orleans Parish Cr. Dist. Ct., 105 La. 758, 30 So. 105 (holding that it was the duty of the recorder, if requested, to furnish a copy of the ordinance for the purpose of an appeal and send it up as a part of the record); New Orleans *v.* Chappuis, 105 La. 179, 29 So. 721; State *v.* Clesi, 44 La. Ann. 85, 10 So. 409; Baton Rouge *v.* Cremonini, 35 La. Ann. 366; New Orleans *v.* Labatt, 33 La. Ann. 107; New Orleans *v.* Boudro, 14 La. Ann. 303; Lancaster *v.* Hirsch, 1 Lanc. L. Rev. (Pa.) 209. But see Goldthwaite *v.* Montgomery, 50 Ala. 486, holding that on an appeal from the decision of the mayor in a quasi-criminal proceeding for the violation of a municipal ordinance, it was not necessary that the complaint or statement of facts should set out the ordinance alleged to have been violated, but that it was sufficient to state its date and purpose so as to identify it and to allege a violation of it.

46. Keck *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 324, 3 Ohio N. P. 253.

47. See Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29.

48. See Appeal and Error.

49. See Justices of the Peace, 24 Cyc. 638 *et seq.*

50. See Criminal Law, 12 Cyc. 336 *et seq.*

51. New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 484 (holding that the facts would not be reviewed); State *v.* Hohn, 50 La. Ann. 432, 23 So. 966.

52. New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 484 (holding that where the appeal was not from a notice alleged to have been given under a certain ordinance, but from a judgment rendered for violation of the ordinance, the sufficiency of the notice would not be reviewed); State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004 (holding that an appeal from a judgment of the justice of a city, imposing a penalty for the violation of a city ordinance, did not raise the question of whether the justice would have power to enforce such judgment by imprisonment).

Necessity of declarations of law.— The supreme court may review the finding on agreed facts of the intermediate appellate court, although no declarations of law were asked or given during the trial. St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878, where in a prosecution for violation of an ordinance the party submitted the case on a statement of admitted facts and the prosecution moved for a new trial, asserting that the verdict and judgment in favor of defendant were against the law, etc., and excepted to the overruling of this motion.

53. Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814 (holding that neither the supreme court nor the circuit court could upon certiorari to a mayor's court consider questions not before the trial court); Doyle *v.* Bradford, 90 Ill. 416; State *v.* Hennessey, 44 La. Ann. 805, 11 So. 39; State *v.* Tsni Ho, 37

no offense.[54] When the final judgment is on its face erroneous no exception is necessary to present the question of review.[55] It has been held in some cases that the sufficiency of evidence may be reviewed.[56] Where the facts upon which the question depends are not in the record, the reasonableness of the ordinance will not be considered.[57] Certiorari cannot be employed to test the legal existence of the court to which it is directed.[58]

(c) *Presumptions.* Every reasonable presumption in favor of the validity of the proceedings below will be indulged.[59]

(d) *Determination.* The judgment in the appellate court may be one of affirmance,[60] or reversal,[61] in the proper case. Or under some statutes the sentence may be modified.[62] The judgment will not be reversed for an error which was not prejudicial.[63] Where defendant fails to appear in the appellate court and prosecute his appeal, in some jurisdictions the appeal will be dismissed and *procedendo* issued to the municipal court.[64]

(e) *Trial De Novo*—(1) GENERALLY.[65] In many jurisdictions the proceed-

La. Ann. 50. See also Tracey *v.* People, 6 Colo. 151, holding that an objection to the validity of an ordinance was sufficiently raised by defendant's evidence.

54. Goshen *v.* Crary, 58 Ind. 268. See CRIMINAL LAW, 12 Cyc. 337.

Error in overruling demurrer to warrant.— Under Ky. Cr. Code, § 349, a judgment cannot be reversed for an error in overruling a demurrer to a warrant, in a prosecution for the violation of a city ordinance. Megowan *v.* Com., 2 Metc. (Ky.) 3.

55. Pope *v.* Cincinnati, 3 Ohio Cir. Ct. 497, 2 Ohio Cir. Dec. 285, so holding where a fine in excess of that authorized by the ordinance was imposed.

56. Flatau *v.* Mansfield, 14 Ohio Cir. Ct. 592, 7 Ohio Cir. Dec. 39, so holding of a judgment of conviction by a mayor of an offense punishable by municipal ordinance. And see Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373, holding that on appeal to the circuit court from a conviction before a mayor, where the appeal is tried by the court in lieu of a jury, a review of the case upon the evidence by the circuit court will be treated as a demurrer to the evidence and the appellant regarded as a demurrant to the evidence. *Compare* Bellefontaine *v.* Vassaux, 55 Ohio St. 323.

57. Com. *v.* Patch, 97 Mass. 221.

58. Bass *v.* Milledgeville, 122 Ga. 177, 50 S. E. 59.

59. *Alabama.*— Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252.

Georgia.— Benson *v.* Carrollton, 96 Ga. 761, 22 S. E. 303; Chambers *v.* Barnesville, 89 Ga. 739, 15 S. E. 634.

Illinois.— Alton *v.* Kirsch, 68 Ill. 261.

Iowa.— Lovilla *v.* Com., 126 Iowa 557, 102 N. W. 496.

Missouri.— Tarkio *v.* Lloyd, 109 Mo. App. 171, 82 S. W. 1127.

New Jersey.— Sparks *v.* Stokes, 40 N. J. L. 487.

Ohio.— Keck *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 324, 3 Ohio N. P. 253.

South Carolina.— State *v.* Earle, 66 S. C. 194, 44 S. E. 781.

South Dakota.— See Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391.

For example.— Where the ordinance of a city, for the violation of which a prosecution was instituted, was read in evidence, but not set out in the bill of exceptions, the appellate court will presume the complaint follows the language of the ordinance, which is all that is required, the same strictness not being required as in criminal prosecutions. Trenton *v.* Devorss, 70 Mo. App. 8. The court will presume that the ordinance passed by a municipality conformed to the statutory authority and will modify a merely irregular judgment to conform to the statute. Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391, where the sentence was to imprisonment at hard labor and the statute merely authorized the sentence to work at such labor as the strength of the prisoner permitted.

Matters essential to the jurisdiction cannot be presumed. Pittston Borough *v.* Dimond, 4 Pa. Dist. 200, 15 Pa. Co. Ct. 543, 7 Kulp 431.

60. Reading *v.* O'Reilly, 1 Woodw. (Pa.) 408. See also Sparks *v.* Stokes, 40 N. J. L. 487.

61. Reading *v.* O'Reilly, 1 Woodw. (Pa.) 408.

62. Greenville *v.* Eichelberger, 44 S. C. 351, 22 S. E. 345.

63. East Orange *v.* Richardson, 71 N. J. L. 458, 59 Atl. 897 (holding that the fact that a judgment of conviction was entered in figures and not in words at length was not prejudicial to defendant); State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423; Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373 (holding that a conviction would not be reversed for want of a plea by defendant).

Refusal of subpœna.— While a subpœna applied for in a prosecution for violating a city ordinance should issue, if, on appeal, it appears that the testimony of the witnesses would not in any manner have served to sustain defendant's theory, the judgment will not be annulled. New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 484.

64. Henning *v.* Greenville, 69 Miss. 214, 12 So. 559. See CRIMINAL LAW, 12 Cyc. 339.

65. Trial de novo upon appeal from summary conviction see CRIMINAL LAW, 12 Cyc. 340 *et seq.*

ings are triable *de novo* upon appeal,[66] in which case the appeal waives or renders immaterial all irregularities and informalities in the proceedings before the municipal court except jurisdictional defects.[67]

(2) PLEADINGS OR STATEMENTS. Although the trial below has been without written pleadings, it has been held the proper practice in some jurisdictions to require plaintiff to file statements of the case in order that any objection as to its legal sufficiency or as to jurisdiction may be raised by demurrer.[68] This statement or complaint may be filed at any time before trial *de novo*.[69] Like other pleadings it is not vitiated by matter which is mere surplusage,[70] but where it is insuffi-

66. See the statutes of the several states. And see the following cases:

Alabama.— Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415; Selma *v.* Stewart, 67 Ala. 338; Mobile *v.* Barton, 47 Ala. 84.

Illinois.— Alton *v.* Kirsch, 68 Ill. 261.

Iowa.— Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529.

Louisiana.— State *v.* Miller, 109 La. 704, 33 So. 739. See also New Orleans *v.* Rinaldi, 105 La. 183, 29 So. 484.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

Tennessee.— Memphis *v.* Schade, 12 Heisk. 579; Wood *v.* Grand Junction, 5 Heisk. 440.

67. Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472; Selma *v.* Stewart, 67 Ala. 338; Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; Byars *v.* Mt. Vernon, 77 Ill. 467; Jacksonville *v.* Block, 36 Ill. 507; McGregor *v.* Lovington, 48 Ill. App. 202, holding that since Rev. St. c. 24, § 69, gives justices jurisdiction of prosecutions under village ordinances, and Rev. St. c. 79, § 72, provides that appeals from justices shall be heard and determined summarily according to the justice of the case, and without exception to any proceeding before the justice, unless it be for his lack of jurisdiction of the subject-matter, one convicted of violation of an ordinance, by appealing, waives his objection that the justice was disqualified by his membership in the village board of trustees. See CRIMINAL LAW, 12 Cyc. 336.

Objections to process.— On appeal no advantage can be taken of any irregularity in the process issued by the justice or magistrate, or of any irregularity in its service. Selma *v.* Stewart, 67 Ala. 338; Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; Alton *v.* Kirsch, 68 Ill. 261; Ewbanks *v.* Ashley, 36 Ill. 177.

Jurisdiction over the person.— Objection as to the jurisdiction of the person cannot be raised for the first time in the appellate court. Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472; Byars *v.* Mt. Vernon, 77 Ill. 467. See CRIMINAL LAW, 12 Cyc. 336.

Formal defects in the complaint or affidavit cannot be raised for the first time upon appeal. Byars *v.* Mt. Vernon, 77 Ill. 467. See CRIMINAL LAW, 12 Cyc. 337. Where a complaint in writing is not required by statute a defect in the original complaint will not prevent the appellate court from trying the cause upon the merits. Alton *v.* Kirsch, 68 Ill. 261.

Where affidavit was insufficient.— On a prosecution for the violation of a municipal ordinance, an affidavit or complaint made before the mayor of a municipality, although subject to demurrer for too meager description of the offense charged, is sufficient to support a declaration filed by the municipality on appeal by defendant to the circuit court; and the trial on appeal being *de novo*, it is of no consequence if a demurrer interposed to the complaint in the mayor's court had been improperly overruled. Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415.

68. Selma *v.* Stewart, 67 Ala. 338.

Complaint or accusation on trial de novo in summary proceedings generally see CRIMINAL LAW, 12 Cyc. 340.

69. Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472, in which it was held that where the complaint charged defendant with participating in a fight, and the summons issued by the recorder was to answer for disorderly conduct and fighting, the variance was immaterial.

Sufficiency of complaint.— On an appeal to the circuit court by a defendant from a judgment of conviction by the mayor for violating a municipal ordinance, a complaint filed in the circuit court which charges that "the defendant, being a lawyer engaged in the business or profession of practicing law in said city, without having procured and paid for a license therefor, a license to carry on such business or profession being required by ordinance of said city, duly adopted," etc., is sufficient, and therefore not subject to demurrer. Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415.

Conformity with affidavit.— Where an affidavit made before the mayor of a city charges that the affiant believes that "the offense of engaging in the business of practicing law in said city for which a license is required, without having first procured and paid for such license and contrary to law, was committed by" defendant, on appeal by defendant to the circuit court, a complaint filed by the city, which charges that "the defendant engaged in the business or profession of practicing law without having first procured and paid for a license thereof, a license to carry on such business being required by ordinance duly adopted," etc., is not a departure from the cause tried by the mayor. Ahlrichs *v.* Cullman, 130 Ala. 439, 30 So. 415.

70. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252.

cient as being indefinite, vague, and uncertain, a motion to dismiss should be granted.[71]

(3) Amendments. The right to amend an information upon trial *de novo* is dependent upon the procedure of the particular jurisdiction.[72]

(4) Submission on Admitted Facts. The parties may submit the case on a statement of admitted facts as in other actions or prosecutions.[73]

(5) New Sentence. A new sentence may be imposed by the appellate court.[74]

(6) New Trial. A motion for new trial may be made as in other actions or prosecutions.[75]

5. Civil Liability.[76] Municipal corporations, as already shown in another chapter, being creatures of the state for certain local and public purposes, and not for the declaring of public policy or private right,[77] have no authority, it would seem, by ordinance or by-law to give a right of private action to any one,[78] not even to

71. Salisbury *v.* Patterson, 24 Mo. App. 169.

72. See Lovilla *v.* Cobb, 126 Iowa 557, 102 N. W. 496 (where amendment was allowed); Kansas City *v.* Whitman, 70 Mo. App. 630 (where the right was denied).

73. St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878.

74. Elbow Lake *v.* Holt, 69 Minn. 349, 72 N. W. 564, holding that the sentence of the appellate court is not limited by the sentence below, but any sentence may be imposed within the limits of the penalty prescribed by the ordinance. And see Carson *v.* Bloomington, 6 Ill. App. 481 (holding that where the ordinance provides for imprisonment only in case there is no appeal taken, it is error for the court upon conviction on appeal to order defendant to be committed to prison under the ordinance); Belmar *v.* Barkalow, 67 N. J. L. 504, 52 Atl. 157 (holding that where a proper judgment is rendered upon new trial an error in the judgment below is immaterial).

Imposition of sentence on trial de novo in appellate court generally see Criminal Law, 12 Cyc. 343.

75. St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878, where the overruling of a motion for a new trial was assigned as error on appeal. See, generally, Criminal Law, 12 Cyc. 701 *et seq.*; New Trial.

76. What constitutes a violation of an ordinance, see *supra*, XI, B, 1.

77. See *supra*, I, C; XI, A, 1; XI, B, 4, b; *infra*, XIV, A, 2.

78. *Iowa.*— Keokuk *v.* Keokuk Independent Dist., 53 Iowa 352, 5 N. W. 503, 36 Am. Rep. 226.

Kansas.— Jansen *v.* Atchison, 16 Kan. 358.

Maryland.— Flynn *v.* Canton Co., 40 Md. 312, 17 Am. Rep. 603.

Massachusetts.— Kirby *v.* Boylston Market Assoc., 14 Gray 249, 74 Am. Dec. 682. See also Jenks *v.* Williams, 115 Mass. 217.

Michigan.— Taylor *v.* Lake Shore, etc., R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457.

Missouri.— Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855; Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755; St. Louis *v.* Connecticut Mut. L. Ins. Co., 107 Mo. 92, 17 S. W. 637, 28 Am. St. Rep. 402 [*distinguishing* Brookville Borough *v.* Arthurs, 130 Pa. St. 501, 18 Atl. 1076]; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242; Jelly *v.* Pieper, 44 Mo. App. 380. See also Eisenberg *v.* Missouri Pac. R. Co., 33 Mo. App. 85.

New York.— Moore *v.* Gadsden, 93 N. Y. 12; Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488. See also Russell *v.* Canastota, 98 N. Y. 496.

Ohio.— Vandyke *v.* Cincinnati, 1 Disn. 532, 12 Ohio Dec. (Reprint) 778; Chambers *v.* Ohio L. Ins., etc., Co., 1 Disn. 327, 12 Ohio Dec. (Reprint) 650.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Ervin, 89 Pa. St. 71, 33 Am. Rep. 726.

Rhode Island.— Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1418.

Other statements of the doctrine.— In Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 427, 48 S. W. 855, it is said: "Police regulations control the citizen in respect to his relations to the city, representing the public at large, and for this reason are enforcible by fine and imprisonment, but laws controlling the liability of the citizen *inter sese*, must emanate from the legislature alone." In Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 650, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755, it is said: "A municipal ordinance can not *create* a civil liability against a person violating it and in favor of persons injured by its violation, for this is a power which belongs alone to the sovereign power of the state." In Jelly *v.* Pieper, 44 Mo. App. 380, 382, it is said: "We believe it to be a correct legal proposition that the violation of a municipal ordinance . . . can only be made the basis of an action between third parties, when the ordinance or regulation rests upon, and has for its object, the enforcement (in a particular way) of an obligation imposed by the general law." In Chambers *v.* Ohio L. Ins., etc., Co., 1 Disn. (Ohio) 327, 336, 12 Ohio Dec. (Reprint) 650, it is said: "It is sufficient to say that, as to any liability in a civil action, these ordinances have no controlling application. The city has no au-

themselves,[79] for injuries caused by violations of ordinances or by the infraction of municipal regulations. But their police ordinances may and often do operate to provide rules for ascertaining and determining liability in civil actions brought to recover damages for breach of an obligation imposed by general law,[80] as for negligence in failing to close hatchways,[81] or to guard excavations,[82] as and when required by ordinance. So too a proprietor in special peril may invoke injunction to prevent private injury by violation of a police ordinance.[83]

thority, by an ordinance, to authorize a nuisance, so as to protect a party from liability for it in a civil action, nor to subject a party to liability, in a civil action, for an act from which, but for the ordinance, no liability would arise. No such power is conferred on the municipal authority of a city; it belongs to the general legislation of the State. The city has power to prohibit nuisances, and may declare an act to be a nuisance, and impose a penalty. He who does the act may incur the penalty; but it would not follow that such an act, if not in itself injurious and a wrong to a private citizen, could be made the ground of a liability in a civil action." In Philadelphia, etc., R. Co. *v.* Ervin, 89 Pa. St. 71, 33 Am. Rep. 726, it is held that a municipality cannot by ordinance *create* a civil duty enforceable at common law; that power reposes in the legislature, and that a non-compliance with an ordinance imposing a duty, whereby an injury results, does not render defendant liable to the party injured as for negligence. In Heeney *v.* Sprague, 11 R. I. 456, 462, 23 Am. Rep. 502, it is said: "The power to enact ordinances is granted for particular local purposes. It includes or is coupled with a power to prescribe limited punishments by fine, penalty, or imprisonment for disobedience. No power is given to annex a civil liability. The power, being delegated, should be strictly construed. It would seem, therefore, that the mere neglect of a duty prescribed in the exercise of such a power should not be held to *create*, as a legal consequence, a liability which, within the power, could not be directly imposed." But *compare* McCloskey *v.* Kreling, 76 Cal. 511, 512, 18 Pac. 433 (where it is said: "If we assume that the ordinance gives a right of action by private persons, it can only be to those who suffer damage by reason of its violation. And this damage must be special, and not such as is common to the public"); Osborne *v.* McMasters, 40 Minn. 103, 104, 41 N. W. 543, 12 Am. St. Rep. 698 (where it is said: "It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent"); Bott *v.* Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47 (holding that where a city ordinance in pursuance of the charter makes it unlawful to leave a team standing unfastened or unguarded in a street, any one injured by a violation thereof may maintain an action against the wrong-doer). And see Cooley Torts (3d ed.), p. 1318, where it is said: "A city may impose the duty of making and keeping the sidewalks in repair upon the adjoining owners; but doing so does not relieve the city itself from responsibility to perform the duty imposed upon it by law; and if the duty fails in performance, the city and the individual in default may be united in a suit for the injury caused by the nuisance;" but see note to 63 Am. Dec. 357, criticizing this statement and saying that the principal case relied upon by the author does not seem to warrant such a broad proposition.

79. See Hartford *v.* Talcott, 48 Conn. 525, 40 Am. Rep. 189; Goshen *v.* Crary, 58 Ind. 268 (holding that a city cannot *create* an action in favor of the city for an injury to property of individuals, the court saying: "The ordinance would not, nor do we know any law that would, authorize the city . . to maintain a civil action for an injury to the private property of one of her citizens"); Keokuk *v.* Keokuk Independent Dist., 53 Iowa 352, 5 N. W. 503, 36 Am. Rep. 226; Jansen *v.* Atchison, 16 Kan. 358.

80. Jelly *v.* Pieper, 44 Mo. App. 380; Nutter *v.* Chicago, etc., R. Co., 22 Mo. App. 328; and cases cited *supra*, note 78; and *infra*, notes 81, 82, 83. See also *infra*, XII.

Liability of persons causing defects in streets see *infra*, XIV, D, 7.

Negligence of public porter.— One whose baggage is lost through the negligence of a public porter licensed as such by the city may, under the laws relating to official bonds, maintain an action on the porter's bond. Chillicothe *v.* Raynard, 80 Mo. 185.

Violation of speed ordinances see RAILROADS; STREET RAILROADS.

81. Oldstein *v.* Firemen's Bldg. Assoc., 44 La. Ann. 492, 10 So. 928; Jelly *v.* Pieper, 44 Mo. App. 380; Ryan *v.* Thomson, 38 N. Y. Super. Ct. 133.

82. Jelly *v.* Pieper, 44 Mo. App. 380.

83. Oldstein *v.* Firemen's Bldg. Assoc., 44 La. Ann. 492, 10 So. 928; Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330. See *supra*, XI, A, 8, f, m, (VI). *Compare* McCloskey *v.* Kreling, 76 Cal. 511, 18 Pac. 433. But see Hutchins *v.* Munn, 22 App. Cas. (D. C.) 88, holding that where the owner of a city lot has let a contract for building thereon, and construction thereunder has been begun in strict accordance with a building permit issued by the municipal authorities, an adjoining lot owner, who has sustained no

XII. STREETS, SEWERS, PUBLIC BUILDINGS, AND PLACES.[84]

A. Streets, Avenues, and Alleys[85] — **1. Definitions — a. In General.** Strictly speaking a street is a paved way or road,[86] but the term is ordinarily used to mean a public way or road in a city or village.[87] It is a public thoroughfare and highway;[88] and all streets are highways, although all highways are not

legal injury by reason of such construction, is not entitled to an injunction restraining it on the grounds that the application for the permit was made by, and the permit issued to, the husband of the owner, instead of to her, and that the permit allows a construction in violation of a provision of the building regulations, requiring that ten per cent of the lot be left free from all construction, for the purpose of light and ventilation.

Failure or refusal of city to abate the nuisance cannot preclude an adjacent owner from restraining the erection of a building of combustible materials. Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330, that allegations setting up such failure and refusal may be stricken out.

The erection of other buildings of combustible materials in established fire limits in violation of a municipal ordinance cannot preclude an adjacent owner from restraining the construction of such a building contiguous to his property. Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330, holding that allegations in the answer that other buildings in the vicinity were not constructed of proper materials, and that defendants had been informed by experts that the building was very substantial, are properly stricken out.

Evidence.— In a suit to restrain the erection of a building of combustible material within the established fire limits in violation of an ordinance, evidence that the mayor had authorized the building, and that other buildings were not fireproof, is properly excluded. Chimene *v.* Baker, 32 Tex. Civ. App. 520, 75 S. W. 330.

84. **In District of Columbia** see DISTRICT OF COLUMBIA, 14 Cyc. 532–534.

Regulations as to bridges see BRIDGES, 5 Cyc. 1055 *et seq.*

As property in general see *supra*, VIII, B, 2, c.

85. See also TOLL ROADS.

Country roads see STREETS AND HIGHWAYS.

Streets as subject to condemnation by railroad companies see EMINENT DOMAIN, 15 Cyc. 626.

Improvement of streets see *infra*, XIII.

Abolition of grade crossings see RAILROADS.

86. Brace *v.* New York Cent. R. Co., 27 N. Y. 269, 271; Hutson *v.* New York, 5 Sandf. (N. Y.) 289, 312; U. S. *v.* Bain, 24 Fed. Cas. No. 14,496, 3 Hughes 593, 600.

87. *Indiana.*— Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Debolt *v.* Carter, 31 Ind. 355; Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597.

Iowa.— Sachs *v.* Sioux City, 109 Iowa 224, 80 N. W. 336.

Massachusetts.— See Com. *v.* Thompson, 12 Metc. 231, holding that a statute imposing a penalty on "any person who shall smoke, or have in his possession, any lighted pipe or cigar, in any street, lane or passage way" in Boston, applies to all open ways, used as such, although they may not be legally established as public ways.

Minnesota.—Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

Mississippi.— Mobile, etc., R. Co. *v.* State, 51 Miss. 137 [*citing* Webster Dict.].

New Hampshire.— State *v.* Stevens, 36 N. H. 59.

New York.— *In re* Woolsey, 95 N. Y. 135; Brace *v.* New York Cent. R. Co., 27 N. Y. 269.

Oregon.— Heiple *v.* East Portland, 13 Oreg. 97, 8 Pac. 907.

Compare Chicago *v.* Gosselin, 4 Ill. App. 570, holding that an ordinance prohibiting the placing of any building upon any street, alley, or other public ground contemplates such as are, in fact as well as in law, public streets and alleys, or those which have been opened to public use.

Other definitions are: "A road or public way in a city, town, or village, laid out and opened for travel by the public." Robins *v.* McGehee, 127 Ga. 431, 56 S. E. 461. A public highway in a town between houses or lots for travel of all persons, on foot or on horseback, or in carriages. Reed *v.* Erie, 79 Pa. St. 346, 352.

It is not every strip of land over which certain individuals and the public have a right to travel, even if the strip is laid out for travel and kept in repair by public officials, that in any sense fairly can be called a street, even if the strip serves as a means of communication between public highways. Perry *v.* Com., 188 Mass. 457, 74 N. E. 661.

88. *California.*— Bituminous Lime Rock Paving, etc., Co. *v.* Fulton, (1893) 33 Pac. 1117.

Colorado.— Denver *v.* Clements, 3 Colo. 484.

Connecticut.— Hamlin *v.* Norwich, 40 Conn. 13.

Indiana.— State *v.* Moriarty, 74 Ind. 103; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178.

Kansas.— Ottawa *v.* McCreery, 10 Kan. App. 443, 61 Pac. 986.

Mississippi.— Theobold *v.* Louisville, etc., R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L. R. A. 735.

streets.[89] The term does not include a private road,[90] nor toll roads or turnpikes,[91] nor other roads owned by a private corporation,[92] nor a park.[93] It includes sidewalks,[94] cross walks,[95] a connecting bridge over a stream crossing a street,[96] a *cul-de-sac*,[97] boulevards,[98] gutter ways,[99] and also, it has been held, a public pier.[1]

b. Alleys. An alley is a narrow passage or way in a city or village, not meant as a substitute for a street but only as a local accommodation to a limited neighborhood.[2] It is not intended for general travel or passage like streets,[3] and in many instances is not governed by the rules applicable to streets.[4] Generally the term, as used in the statutes, does not embrace streets.[5]

c. Sidewalks. The sidewalk is the part of the street set apart for pedestrians.[6] The word "street," as ordinarily used, includes a sidewalk,[7] although it is sometimes used in its restricted sense as including only the roadway.[8]

Oregon.—Heiple *v.* East Portland, 13 Oreg. 97, 8 Pac. 907.

Pennsylvania.— *In re* Penny Lot Landing, 16 Pa. St. 79.

Vermont.— State *v.* Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

Road on university campus.— A street located on the campus of a university, and on ground owned and controlled by the university, the use of which by the university has not been inconsistent with the university's private ownership thereof, is not a public street. Bolster *v.* Ithaca St. R. Co., 79 N. Y. App. Div. 239, 79 N. Y. Suppl. 597 [*affirmed* in 178 N. Y. 554, 70 N. E. 1096].

89. Indianapolis *v.* Croas, 7 Ind. 9; Chrisman *v.* Omaha, etc., R., etc., Co., 125 Iowa 133, 100 N. W. 63; Sachs *v.* Sioux City, 109 Iowa 224, 80 N. W. 336.

90. Com. *v.* Boston, etc., R. Co., 135 Mass. 550. See PRIVATE ROADS.

91. Quinn *v.* Paterson, 27 N. J. L. 35; Wilson *v.* Allegheny City, 79 Pa. St. 272. See TOLL ROADS.

92. Quinn *v.* Paterson, 27 N. J. L. 35.

93. Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

94. See *infra*, XII, A, 1, c.

95. Hines *v.* Lockport, 60 Barb. (N. Y.) 378 [*affirmed* in 50 N. Y. 236].

96. Floyd County *v.* Rome St. R. Co., 77 Ga. 614, 3 S. E. 3; Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883; Read *v.* Camden, 54 N. J. L. 347, 24 Atl. 549; Pittsburg, etc., Pass. R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323. *Compare* Langlois *v.* Cohoes, 58 Hun (N. Y.) 226, 11 N. Y. Suppl. 908.

97. Bartlett *v.* Bangor, 67 Me. 460; People *v.* Jackson, 7 Mich. 432, 74 Am. Dec. 729; People *v.* Kingman, 24 N. Y. 559 [*criticizing* Holdane *v.* Cold Spring, 23 Barb. 103 (*affirmed* in 21 N. Y. 474)]. See 12 Cyc. 988.

98. West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427. But see People *v.* Green, 52 How. Pr. (N. Y.) 440.

99. City St. Imp. Co. *v.* Taylor, 138 Cal. 364, 71 Pac. 446.

1. Gluck *v.* Ridgewood Ice Co., 9 N. Y. Suppl. 254.

2. See ALLEY, 2 Cyc. 133.

3. Face *v.* Ionia, 90 Mich. 104, 51 N. W. 184; Paul *v.* Detroit, 32 Mich. 108.

4. Face *v.* Ionia, 90 Mich. 104, 51 N. W. 184; Bagley *v.* People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192, holding that an alley is not a public highway so that an obstruction thereof can be regarded as a public nuisance. But see Kalteyer *v.* Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288.

Right of public to use.—An "alley" is not necessarily a street, and the public have not necessarily a right to its use. Milliken *v.* Denny, 135 N. C. 19, 47 S. E. 132.

5. *In re* Woolsey, 95 N. Y. 135.

6. Bloomington *v.* Bay, 42 Ill. 503; Heineck *v.* Grosse, 99 Ill. App. 441; Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964.

7. *Alabama.*— Montgomery *v.* Foster, 133 Ala. 587, 32 So. 610.

Arkansas.— Little Rock *v.* Fitzgerald, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496.

California.— Marini *v.* Graham, 67 Cal. 130, 7 Pac. 442.

Colorado.— Denver Bd. of Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201.

Illinois.— Bloomington *v.* Bay, 42 Ill. 502.

Indiana.— Wiles *v.* Hoss, 114 Ind. 371, 16 N. E. 800; Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; Taber *v.* Grafmiller, 109 Ind. 206, 9 N. E. 721; Kokomo *v.* Mahan, 100 Ind. 242; State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; Rosedale *v.* Ferguson, 3 Ind. App. 596, 30 N. E. 156.

Iowa.— Perry *v.* Castner, 130 Iowa 703, 107 N. W. 940.

Michigan.— Brevoort *v.* Detroit, 24 Mich. 322.

Missouri.— Knapp *v.* St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627.

New York.— Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; *In re* Burmeister, 76 N. Y. 174, 26 How. Pr. 416.

North Carolina.— Hester *v.* Durham Traction Co., 138 N. C. 288, 50 S. E. 711, 1 L. R. A. N. S. 981.

Oregon.— Heiple *v.* East Portland, 13 Oreg. 97, 8 Pac. 907.

Pennsylvania.— Provost *v.* New Chester Water Co., 162 Pa. St. 275, 29 Atl. 914; McDevitt *v.* People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948.

8. *Arkansas.*— Little Rock *v.* Fitzgerald, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496.

Massachusetts.— Dickinson *v.* Worcester, 138 Mass. 555.

d. "Highway" as Including Streets. The term "highway," as used in the statutes, is generally held to include streets,[9] unless the statute itself indicates a different intention.[10]

2. Establishment, Existence, and Legality — a. In General.[11] Streets may be established by the state in the direct exercise of its sovereign function,[12] or by the municipality as its agent.[13] A street may be established as a public way by dedication,[14] prescription,[15] or statutory proceedings.[16] In no other way can a street be established as a public highway,[17] but it is not necessary that the statutory course

Missouri.— Knapp *v.* St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627.

New York.— *In re* Burmeister, 76 N. Y. 174, 26 How. Pr. 416.

Pennsylvania.— Philadelphia *v.* Lea, 9 Phila. 106.

Washington.— Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707.

9. *Illinois.*— Ohio, etc., R. Co. *v.* People, 39 Ill. App. 473.

Indiana.— Indianapolis *v.* Higgins, 141 Ind. 1, 90 N. E. 671; Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175; State *v.* Mathis, 21 Ind. 277; Boyer *v.* State, 16 Ind. 451.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; State *v.* Eisele, 37 Minn. 256, 33 N. W. 785.

New York.— Brace *v.* New York Cent. R. Co., 27 N. Y. 269.

Pennsylvania.— Com. *v.* Wentworth, Brightly 318.

Texas.— Texas, etc., R. Co. *v.* Self, 2 Tex. App. Civ. Cas., § 439.

Wisconsin.— State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

United States.— Abbott *v.* Duluth, 104 Fed. 833 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

Traveled street.— The term "highway," in Code, § 919, providing that any part of a plat may be vacated by the proprietor thereof, but nothing therein contained shall authorize the closing or obstruction of the highways, means a traveled street, as distinguished from a mere space laid out between lots. Chrisman *v.* Omaha, etc., Bridge Co., 125 Iowa 133, 100 N. W. 63.

10. Indianapolis *v.* Higgins, 141 Ind. 1, 40 N. E. 671; Tucker *v.* Conrad, 103 Ind. 349, 2 N. E. 803; Cleaves *v.* Jordan, 34 Me. 9; Mobile, etc., R. Co. *v.* State, 51 Miss. 137. See also Decatur *v.* Stoops, 21 Ind. App. 397, 52 N. E. 623; Abbott *v.* Duluth, 104 Fed. 833 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

11. Power of municipality to open streets see *infra*, XIII, A, 2, c, (1).

Necessity for and right to compensation where land taken for streets see Eminent Domain, 15 Cyc. 639.

Mandamus to compel opening see Mandamus, 26 Cyc. 296.

Liability for injuries as dependent upon existence of street see *infra*, XIV, D, 2.

12. Daley *v.* St. Paul, 7 Minn. 390; Simon *v.* Northrup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; Baird *v.* Rice, 63 Pa. St. 489. See also *supra*, IV, C.

The legislature may, in granting a charter to a town, set aside for public use places designated as streets on a map of the town. Aiken *v.* Lythgoe, 7 Rich. (S. C.) 435.

13. Sinton *v.* Ashbury, 41 Cal. 525; Terre Haute *v.* Turner, 36 Ind. 522; Atken *v.* Lythgoe, 7 Rich. (S. C.) 435; City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114.

Public lands.—A municipality has no right to open a street through land of the federal government. U. S. *v.* Chicago, 7 How. (U. S.) 185, 12 L. ed. 660.

Purchase by municipality.—A town may, it seems, purchase land for the purpose of constructing a highway over it, or for the purpose of obtaining material for the construction and repair of its highways. Com. *v.* Wilder, 127 Mass. 1.

Estoppel.—A grant of land by a city does not estop it from afterward taking proceedings to open a street through it. *In re* Albany St., 6 Abb. Pr. (N. Y.) 273.

14. See Dedication, 13 Cyc. 447 *et seq.*

Sufficiency of acceptance of dedication of street by municipality see Dedication, 13 Cyc. 469 *et seq.*

15. See *infra*, XII, A, 2, b.

16. Cohoes *v.* Delaware, etc., Canal Co., 134 N. Y. 397, 31 N. E. 887. See also *infra*, XII, A, 2, c.

What constitutes laying out of street see Perry *v.* Com., 188 Mass. 457, 74 N. E. 661.

Sufficiency of laying out of street see Townsend *v.* Hoyle, 20 Conn. 1.

Construction of statutes as laying off or extending streets see People *v.* Dana, 22 Cal. 11; People *v.* Kruger, 19 Cal. 411.

Opening streets through cemetery.—A statute giving the right to open streets through a cemetery does not necessarily give the right to go beyond. Naglee *v.* Philadelphia, 10 Phila. (Pa.) 121.

17. Lighton *v.* Syracuse, 48 Misc. (N. Y.) 134, 96 N. Y. Suppl. 692 [*affirmed* in 112 N. Y. App. Div. 589, 98 N. Y. Suppl. 792]. See also Oliver *v.* Pitman, 98 Mass. 46.

The mere declaration by a town council that a certain street exists, and directing its officers to open same, cannot operate to give the right of entry to its agents for that purpose, as against private rights asserted on the basis of ownership and actual physical possession. State *v.* Judge Civ. Dist. Ct., 51 La. Ann. 1768, 26 So. 374.

A street commissioner of a city has no power to appropriate and take charge of land for a sidewalk for the city. Cannady *v.* Durham, 137 N. C. 72, 49 S. E. 50.

be pursued.[18] A street is not actually established, it seems, until it is opened for public use.[19] Equity cannot compel a city to keep open and maintain streets, that being a discretionary function of the municipality.[20]

b. Prescription.[21] A street or an alley may be established by prescription or long usage from which alone dedication and acceptance may both be presumed.[22] At common law the period of user necessary to establish a public easement was twenty years,[23] but in some jurisdictions a less time is now prescribed in certain cases.[24] The user must be under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which the street or alley is claimed.[25] Neither trespass nor user under a license

Plotting.— Unless the statutes so provide, the plotting of a street by the board of surveyors and placing it on a plan of public streets does not make it a public street in effect or intent. MacKellar *v.* Seeds, 10 Pa. Super. Ct. 167, 44 Wkly. Notes Cas. 182.

Title.— Until established in some authorized mode, the title and right of possession remains in the owner of the land. Harelson *v.* Elsey, 33 S. W. 91, 17 Ky. L. Rep. 924.

18. Rose *v.* St. Charles, 49 Mo. 509. See also Cohoes *v.* Delaware, etc., Canal Co., 134 N. Y. 397, 31 N. E. 887.

19. State *v.* Whitaker, 66 N. C. 630.

Until an alley is opened for public use, occupation or obstruction of it is not punishable under municipal by-laws. Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; Hunter *v.* Weston, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633.

20. Raht *v.* Southern R. Co., (Tenn. Ch. App. 1897) 50 S. W. 72.

21. See also DEDICATION, 13 Cyc. 478.

22. *Arkansas.*— Waring *v.* Little Rock, 62 Ark. 408, 36 S. W. 24.

Connecticut.— New Haven *v.* New York, etc., R. Co., 72 Conn. 225, 44 Atl. 31.

Georgia.— Carlisle *v.* Wilson, 110 Ga. 860, 36 S. E. 54.

Illinois.— Lee *v.* Harris, 206 Ill. 428, 69 N. E. 230; Chicago *v.* Sawyer, 166 Ill. 290, 46 N. E. 759; Manley *v.* Gibson, 13 Ill. 308.

Iowa.— Burlington, etc., R. Co. *v.* Columbus Junction, 104 Iowa 110, 73 N. W. 501.

Kansas.— Raymond *v.* Wichita, 70 Kan. 523, 79 Pac. 323.

Missouri.— See St. Louis, etc., R. Co. *v.* Lindell R. Co., 190 Mo. 246, 88 S. W. 634; Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111, holding that, although an alley has been legally vacated, its use by the public for ten years with the knowledge and consent of the city and the owners of abutting lots will constitute it a public alley again.

Oregon.— Sheridan *v.* Empire City, 45 Oreg. 296, 77 Pac. 393.

Wisconsin.— Milwaukee Boiler Co. *v.* Wadhams Oil, etc., Co., 126 Wis. 32, 105 N. W. 312.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1421.

Extent of use.— The fact that a street was used by only a limited number of people after it was opened will not prevent it from becoming a highway by user, where it is traveled as much as the circumstances of the surrounding population and their business require. Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600, 86 Mich. 567, 49 N. W. 544.

23. Chicago *v.* Wright, 69 Ill. 318; McLemore *v.* McNelly, 56 Mo. App. 556; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52.

In Pennsylvania the use of a street which will establish a right in the public must be defined, uniform, adverse, and under claim of right, and must have continued for twenty-one years, although when a dedication to public use and the opening of a street for public travel by the owner are followed by its actual use by the public as a highway, the right in the public may become complete and absolute within a much shorter period than twenty-one years. Coward *v.* Llewellyn, 209 Pa. St. 582, 58 Atl. 1066; Washington *v.* Steiner, 25 Pa. Super. Ct. 392.

24. Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111; Matter of Hand Street, 52 Hun (N. Y.) 206, 5 N. Y. Suppl. 158, 55 Hun 132, 8 N. Y. Suppl. 610 (holding, however, that charter provision did not apply where the owner had not, by some act on his part, dedicated the premises to public use); McMannis *v.* Butler, 49 Barb. (N. Y.) 176.

25. Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560 (holding that a mere user by the public without the knowledge of the owner is insufficient); Millikin *v.* Bowling Green, 9 Ohio Cir. Ct. 493, 6 Ohio Cir. Dec. 483; San Antonio *v.* Sullivan, 4 Tex. Civ. App. 451, 23 S. W. 307. See also Monterey *v.* Malarin, 99 Cal. 290, 33 Pac. 840; Mitchell *v.* Denver, 33 Colo. 37, 78 Pac. 686; Leonard *v.* Detroit, 108 Mich. 599, 66 N. W. 488; Mott *v.* Eno, 97 N. Y. App. Div. 580, 90 N. Y. Suppl. 608 [*reversed* on other grounds in 181 N. Y. 346, 74 N. E. 229]; Watkins *v.* Welch Grape Juice Co., 96 N. Y. App. Div. 114, 89 N. Y. Suppl. 47.

Possession by a town, under an agreement between a railway company and the owner of land taken for the right of way that part of such land shall be given for street purposes, is such adverse possession, distinct from, and independent of, the use, as will give the town title to the land by prescription. Burlington, etc., R. Co. *v.* Columbus Junction, 104 Iowa 110, 73 N. W. 501.

Ordinary use of land by a city as a public street is a sufficient adverse possession by the city for the purposes of the statute of limi-

is sufficient.[26] At common law a grant was presumed,[27] and the right may be as firmly established by prescription and user as by formal dedication.[28] A street created by prescription is limited in extent to the portion actually used.[29]

c. Statutory Establishment.[30] By provisions of the charter or other statutes, it is provided in many jurisdictions that streets may be established by municipal proceedings based generally upon the consent of the property-owners or a majority thereof manifested by petition or election, or by other proceedings initiated by the municipality.[31] Substantial compliance with the statutes is required to make the establishment valid.[32] The proceeding is void where it does not definitely locate the street,[33] and orders for improvement along a new street are applicable only to such parts thereof as are really opened.[34] In the absence of any statute fixing the time within which a street shall be constructed after it is laid out and has been begun, the most that an abutter can claim is that it shall be built within a reasonable time or abandoned.[35]

tations. Moore *v.* Waco, 85 Tex. 206, 20 S. W. 61.

A street located on the campus of a university and on ground owned and controlled by the university, the use of which by the public has not been inconsistent with the university's private ownership thereof, is not a public street. Bolster *v.* Ithaca St. R. Co., 79 N. Y. App. Div. 239, 79 N. Y. Suppl. 597 [*affirmed* in 178 N. Y. 554, 70 N. E. 1096].

The mere use of a way for public travel, however extensive that use may be, is not sufficient to constitute such way a street, so as to impose upon the municipality the duty to repair it, where there is no evidence of some act of the municipality recognizing it as a street. Tower *v.* Rutland, 56 Vt. 28.

26. Mitchell *v.* Denver, 33 Colo. 37, 78 Pac. 686.

27. Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662.

28. Kentucky Cent. R. Co. *v.* Paris, 95 Ky. 627, 27 S. W. 84, 16 Ky. L. Rep. 170; Stetson *v.* Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123.

29. Lighton *v.* Syracuse, 48 Misc. (N. Y.) 134, 96 N. Y. Suppl. 692 [*affirmed* in 112 N. Y. App. Div. 589, 98 N. Y. Suppl. 792].

30. See, generally, *infra*, XIII, A, 2, c.

By condemnation proceedings see EMINENT DOMAIN, 15 Cyc. 543.

Measure of damages in condemnation proceedings where street is opened see EMINENT DOMAIN, 15 Cyc. 709.

Injunction to restrain opening of highways see INJUNCTIONS, 22 Cyc. 835.

31. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Wolcott, 162 Ind. 399, 69 N. E. 451.

Massachusetts.— Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336.

Missouri.— Seventeenth St. *v.* Kansas City, etc., R. Co., 189 Mo. 245, 88 S. W. 45.

New Jersey.— New Jersey Junction R. Co. *v.* Jersey City, 70 N. J. L. 826, 59 Atl. 1117.

New York.— Matter of New York, 107 N. Y. App. Div. 22, 94 N. Y. Suppl. 838 [*affirmed* in 183 N. Y. 571, 76 N. E. 1094]; *In re* New York, 94 N. Y. Suppl. 841 [*affirmed* in 183 N. Y. 571, 76 N. E. 1107].

Pennsylvania.—*In re* Whitby Ave., 22 Pa. Super. Ct. 526; Morrison *v.* Conshohocken, 17 Montg. Co. Rep. 47. See also Com. *v.* Kline, 162 Pa. St. 499, 29 Atl. 799; Ross *v.* Malcom, 40 Pa. St. 284.

Rhode Island.— See Simmons *v.* Mumford, 2 R. I. 172.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1423.

A city is not required to accept a street dedicated by map, so as to prevent the city from opening a street over the line of the proposed street as shown on the alleged dedication map. New Jersey Junction R. Co. *v.* Jersey City, 68 N. J. L. 108, 52 Atl. 352 [*affirmed* in 70 N. J. L. 826, 59 Atl. 1117].

When street opened.— Under the act of March 22, 1870 (Pamphl. Laws 522), relating to streets in the borough of Conshohocken, a street is not opened until the possession of the landowner is disturbed or some act is done appropriating the land of the owner. Morrison *v.* Conshohocken, 17 Montg. Co. Rep. (Pa.) 47.

Constitutionality of statutes.— Pittsburgh, etc., R. Co. *v.* Wolcott, 162 Ind. 399, 69 N. E. 451.

Sufficiency of ordinance fixing street.— Grace *v.* Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

Right to appeal and review.— Sowers *v.* Cincinnati, etc., R. Co., 162 Ind. 676, 71 N. E. 134; Seventeenth St. *v.* Kansas City, etc., R. Co., 189 Mo. 245, 88 S. W. 45.

32. See Pittsburgh, etc., R. Co. *v.* Wolcott, 162 Ind. 399, 69 N. E. 451; Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Jersey City *v.* National Docks R. Co., 55 N. J. L. 194, 26 Atl. 145; Grace *v.* Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

33. Hinckley *v.* Hastings, 2 Pick. (Mass.) 162.

34. Com. *v.* Royce, 152 Pa. St. 88, 25 Atl. 162.

35. McCarthy *v.* Boston St. Com'rs, 188 Mass. 338, 74 N. E. 659.

Under Mass. Rev. Laws, c. 48, § 92, providing that the laying out of a street shall be void as against the owner of any land taken, unless possession is taken to construct the same within two years after the right to take possession accrues, it is only necessary that an entry to construct the street be made within the prescribed time, and it is not necessary

d. Municipal Recognition. While direct ordinance is the usual and proper form for establishing a street,[36] it may be effected indirectly by ordinance or resolution recognizing the dedication or existence of the street,[37] or by making repairs or improvements thereon.[38] But where such evidence is relied on it must be clear and unmistakable.[39]

e. General Plan, Maps, Etc. Maps, plans, and plats, adopted, filed, or recorded, showing the location of streets, generally fix the existence and location thereof.[40] In some jurisdictions the plat must be recorded in the proper records.[41]

f. Existence Before Incorporation or Annexation of Territory. A public highway *in rure*, upon its inclusion by incorporation or annexation, within municipal boundaries, becomes *ipso facto* a street, and subject to municipal control.[42] The municipality, however, takes the land and corporate responsibility

that it be completed within that time, but the most that an abutting property-owner can claim is that it shall be built within a reasonable time or abandoned. McCarthy *v.* Boston St. Com'rs, 188 Mass. 338, 74 N. E. 659.

36. Lewis *v.* Germantown, etc., R. Co., 15 Phila. (Pa.) 621.

37. Lewis *v.* Germantown, etc., R. Co., 15 Phila. (Pa.) 621; Columbia, etc., R. Co. *v.* Seattle, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725.

38. Columbia, etc., R. Co. *v.* Seattle, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725.

39. Pierce *v.* Lutesville, 25 Mo. App. 317; Hickok *v.* Plattsburgh, 41 Barb. (N. Y.) 130. See also Hosmer *v.* Gloversville, 27 Misc. (N. Y.) 669, 59 N. Y. Suppl. 559.

40. See San Francisco *v.* Center, 133 Cal. 673, 66 Pac. 83, (1900) 63 Pac. 35; Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Belleville *v.* Stookey, 23 Ill. 441 (holding that, to pass the title to a way to the town by the plat, the plat must conform to the statutes, and must clearly designate the land to be used as a street); Atty.-Gen. *v.* Old Colony, etc., R. Co., 12 Allen (Mass.) 404; Glover *v.* Boston, 14 Gray (Mass.) 282; Henshaw *v.* Hunting, 1 Gray (Mass.) 203; Owen *v.* Moreland, 132 Mich. 477, 93 N. W. 1068; State *v.* Chase, 42 Mo. App. 343 (platting of alleys); Gernert *v.* Union Tp., (N. J. Ch. 1899) 44 Atl. 145; Underwood *v.* Stuyvesant, 19 Johns. (N. Y.) 181, 10 Am. Dec. 215 (plan as conclusive on city); Morris *v.* Bowers, Wright (Ohio) 749; Wright *v.* Oberlin, 23 Ohio Cir. Ct. 509; Merchant *v.* Waterman, 2 Ohio Dec. (Reprint) 429, 3 West. L. Month. 48 (necessity of acceptance by ordinance of street laid out by landowner); Sheridan *v.* Empire City, 45 Oreg. 296, 77 Pac. 393 (ratification of plat); Hobson *v.* Monteith, 15 Oreg. 251, 14 Pac. 740 (effect of subsequent plats); Com. *v.* Philadelphia, etc., R. Co., 135 Pa. St. 256, 19 Atl. 1051; Hillman *v.* Seattle, 33 Wash. 14, 73 Pac. 791; State *v.* Forrest, 12 Wash. 483, 41 Pac. 194; McClellan *v.* Weston, 49 W. Va. 669, 39 S. E. 670, 55 L. R. A. 898; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,579, Deady 39, 1 Oreg. 397. See also Municipality No. 3 *v.* Levee Steam Cotton Press Co., 7 La. Ann. 270 (effect of new plan); Aiken *v.* Lythgoe, 7 Rich. (S. C.) 435; Hillman *v.* Seattle, 33 Wash. 14, 73 Pac. 791; Emmons *v.* Milwaukee, 32 Wis. 434.

Effect of payment of taxes and assessments.— In a suit against a city to recover possession of real estate which was claimed by the city as part of its streets, the mere payment, without objection or protest, of taxes and assessments levied by the city thereon, is no proof of an adoption or ratification of the plat of the city with reference to which the levies and assessments were made. Sheridan *v.* Empire City, 45 Oreg. 296, 77 Pac. 393.

Approval.—A municipal ordinance directing that no plat of any addition to the city shall be approved when any part of the land is subject to a lien for city taxes or assessment is not an unreasonable regulation. Hillman *v.* Seattle, 33 Wash. 14, 73 Pac. 791.

Construction of reservations in plat.— The reservation in a plat of an addition to a city of the right to occupy streets for railroad purposes is only a reservation as against the city and cannot be used for purposes inconsistent with the dedication or which would modify it so far as purchasers of lands are concerned. Ward *v.* Detroit, etc., R. Co., 62 Mich. 46, 28 N. W. 785; Riedinger *v.* Marquette, etc., R. Co., 62 Mich. 29, 28 N. W. 775.

Timely modifications of such plats are permissible at any time before actual work to open the street is commenced. San Francisco *v.* Center, 133 Cal. 673, 66 Pac. 83. See also Seaman *v.* Hicks, 8 Paige (N. Y.) 655.

41. Townsend *v.* Hoyle, 20 Conn. 1. But see Sower *v.* Philadelphia, 35 Pa. St. 231, holding that the statutory provision therefor was merely directory.

42. *Alabama.*— McCain *v.* State, 62 Ala. 138.

Georgia.— Almand *v.* Atlanta Consol. St. R. Co., 108 Ga. 417, 34 S. E. 6.

Illinois.— Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952.

Indiana.— Brown *v.* Hines, 16 Ind. App. 1, 44 N. E. 655.

Kansas.— Raymond *v.* Wichita, 70 Kan. 523, 79 Pac. 323; McGrew *v.* Stewart, 51 Kan. 185, 32 Pac. 896.

Kentucky.— Park *v.* Orth, 73 S. W. 1015, 24 Ky. L. Rep. 2209; Louisville *v.* Brewer, 72 S. W. 9, 24 Ky. L. Rep. 1617. See also

therefor in its condition in fact and law existing at the date of its inclusion in the corporation.[43]

g. Location and Extent — (i) *In General.* The original survey and plan made or adopted by competent authority fixes the location and extent of the street,[44] and not the actual public use,[45] nor the arbitrary relocation by the municipality.[46] In some jurisdictions statutory proceedings are provided for to determine the courses and lines of streets.[47] Low water mark of navigable water is the usual terminus of a street on the water,[48] although a street bounded by a navigable stream is in some jurisdictions held to extend to the middle of the stream.[49] The right of the public to an easement for a highway cannot be divested by the municipality by submitting the extent of the easement to arbitration.[50] A statute providing that in all streets of a certain width sidewalks shall be constructed of a certain width not only prescribes the width of the sidewalk but by mere arithmetical computation prescribes the width of the roadway of such streets.[51]

(ii) *Extension Beyond Shore Line.* When streets run to navigable water, the extension of the shore front by accretions or otherwise generally extends the street to the new water line;[52] and this is so even when the street terminates in a bulkhead.[53]

(iii) *Change of Course or Width.*[54] Municipal authority to alter the

Danville *v.* Boyle County Fiscal Ct., 106 Ky. 608, 51 S. W. 157, 21 Ky. L. Rep. 196 [*withdrawing* opinion 49 S. W. 458, 20 Ky. L. Rep. 1495].

Montana.— Cascade County *v.* Great Falls, 18 Mont. 537, 46 Pac. 437.

Ohio.— Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89 [*affirming* 10 Ohio Cir. Ct. 27, 8 Ohio Cir. Dec. 703].

South Dakota.— Great Northern R. Co. *v.* Viborg, 17 S. D. 374, 97 N. W. 6.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1420.

Effect of stipulations in contract for annexation.—A stipulation in the contract by which a village is annexed to a city, to the effect that all street grades previously established by the village authorities shall be respected, but may be altered, with the consent of the property-owners, upon payment of damages, only puts such street grades upon the same legal basis as those established by city authorities; and such grades are subject to change in the same manner, and upon the same conditions, as if they had been established in the first place by the city authorities. Corry *v.* Cincinnati, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194; Thale *v.* Cincinnati, 3 Ohio S. & C. Pl. Dec. 131, 1 Ohio N. P. 427.

Discretion.— When a rural district is made the site of an incorporated town, it rests within the discretion of the corporate authorities to determine whether they will use as streets what were formerly public roads and highways situated within their limits. McCain *v.* State, 62 Ala. 138.

There is no provision in the charter of Greater New York authorizing a proceeding to acquire and open as a street in the borough of Brooklyn a preëxisting town highway. Matter of New York, 45 Misc. (N. Y.) 162, 91 N. Y. Suppl. 894.

43. Maysville *v.* Stanton, 14 S. W. 675, 12 Ky. L. Rep. 586.

44. Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90. See also Hellman *v.* Los Angeles, 125 Cal. 383, 58 Pac. 10.

45. Hamlin *v.* Norwich, 40 Conn. 13.

46. Washington Female Seminary *v.* Washington Borough, 18 Pa. Super. Ct. 555.

47. Lathrop *v.* Morristown, 67 N. J. L. 247, 51 Atl. 852 [*affirming* 65 N. J. L. 467, 47 Atl. 450]; Washington Female Seminary *v.* Washington Borough, 18 Pa. Super. Ct. 555.

In ascertaining the true location of streets, in the absence of any original monuments which can be ascertained, location and occupancy of lots in immediate blocks, and the lines and corners of adjoining streets and blocks, indicated by old fences, old buildings, and the streets as so laid out and used for many years, and stakes and monuments established by former surveyors, are competent evidence to prove the actual location. Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635.

48. Wayzata *v.* Great Northern R. Co., 50 Minn. 438, 52 N. W. 913. See, generally, Navigable Waters.

49. Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952; Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90.

Where a street is bounded on one side by a river, it extends to the center of the river, although the plat gives the width thereof. Chicago, etc., R. Co. *v.* People, 222 Ill. 427, 78 N. E. 790.

50. State *v.* Peckham, 9 R. I. 1.

51. Asphalt, etc., Constr. Co. *v.* Haeussler, (Mo. App. 1904) 80 S. W. 5.

52. Wood *v.* San Francisco, 4 Cal. 190; Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540; *In re* Wells Ave., 4 N. Y. Suppl. 301. But see Tyler *v.* Hammond, 11 Pick. (Mass.) 193; *In re* Yonkers, 117 N. Y. 564, 23 N. E. 661.

53. *In re* Brooklyn, 73 N. Y. 179; People *v.* Lambier, 5 Den. (N. Y.) 9, 47 Am. Dec. 273.

54. Power of municipality to alter course

course or width of a street is dependent upon the charter or general statutes.[55] Under many charters such changes may be made only by consent of the adjacent property-owners, or a certain majority thereof.[56] Straightening a curb line and setting back a pavement is not a change of location.[57] An ordinance is void which merely reduces the width of a street without designating what part shall remain.[58]

h. Establishment and Change of Grade.[59] The grade of streets is fixed by the act of the council or other governing body authorized by charter.[60] In some states it may be fixed by mere resolution,[61] while in others only by ordinance.[62] In still other jurisdictions a street grade may be established by use alone without formal adoption by resolution or ordinance.[63] The grade of the traveled portion of a street controls for its entire width;[64] and when necessary all parts may be reduced to that grade without liability for injury to abutters.[65] Whether the municipality is liable for damage resulting to abutting owners from change of grade depends largely upon the charter and general statutes and the purpose of such change.[66] The manner in which changes of grade may be made is generally fixed by the provisions of the charter or other statutory provisions.[67] An ordinance establishing grades is not void for uncertainty if the grade so established can be ascertained without difficulty,[68] but an ordinance altering grades which does

or width of street see *infra*, XIII, A, 2, c, (III).

55. Florida Cent., etc., R. Co. *v.* Ocala St., etc., R. Co., 39 Fla. 306, 22 So. 692; Buchholz *v.* New York, etc., R. Co., 71 N. Y. App. Div. 452, 75 N. Y. Suppl. 824 [*affirmed* in 177 N. Y. 550, 69 N. E. 1121]; Scott *v.* Marlin, 25 Tex. Civ. App. 353, 60 S. W. 969. See also Bornot *v.* Bonschur, 202 Pa. St. 463, 52 Atl. 44.

What constitutes.—A mere resolution of a borough council, adopting a plan of a borough upon which the streets are represented, will not have the effect of widening or narrowing a street, where the existing lines do not conform to those laid down on the plot. Washington Borough *v.* Steiner, 25 Pa. Super. Ct. 392. Where a borough ordinance widening a street is so vague in its language as to leave it uncertain whether the center line of the street was changed or not, but the evidence shows that the borough and its officials, and viewers appointed in damage proceedings, considered the line as unchanged and acted on that supposition, a finding by the court below that the line was in fact unchanged will not be reversed by the appellate court. Bieber *v.* Kutztown Borough, 27 Pa. Super. Ct. 436. A municipal ordinance establishing building lines, on both sides of a public street, ten feet outside of the lines of the street as opened, is in effect a widening of the street by twenty feet. Chester *v.* Higham, 16 Lanc. L. Rev. (Pa.) 326.

56. Lowe *v.* Lawrenceburg Roller Mills Co., 161 Ind. 495, 69 N. E. 148. *Compare* Chicago *v.* Larned, 203 Ill. 290, 67 N. E. 789.

A petition for laying out a public road cannot be used to widen or alter a road or street in a village, such widening only being possible under Gen. St. p. 2838, § 167, by the consent of three fourths of the owners in interest of the lands fronting on the road to be affected. Norton *v.* Truitt, 70 N. J. L. 611, 57 Atl. 130.

57. Washington Female Seminary *v.* Washington, 23 Pa. Co. Ct. 545.

58. Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275.

59. Power to grade and pave streets see *infra*, XIII, A, 2, c.

Power of municipality to change grade of street see *infra*, XIII, A, 2, c, (IV).

60. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383 (holding that a city ordinance making it the duty of the committee on streets and alleys to have the line of the sidewalk required by the ordinance surveyed, and the grade line thereof established, should be construed as empowering such committee to properly designate the grade points previously established by ordinance); Knoxville *v.* Harth, 105 Tenn. 436, 58 S. W. 650, 80 Am. St. Rep. 901. See also Kelley *v.* Cedar Falls, 123 Iowa 660, 99 N. W. 556 (grade of alleys).

61. Hosmer *v.* Gloversville, 27 Misc. (N. Y.) 669, 59 N. Y. Suppl. 559, holding a certain resolution not a recognition of an established grade.

62. McDowell *v.* People, 204 Ill. 499, 68 N. E. 379; Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Steubner *v.* St. Joseph, 81 Mo. App. 273.

63. Stenson *v.* Mt. Vernon, 104 N. Y. App. Div. 17, 93 N. Y. Suppl. 309.

64. Cincinnati *v.* Roth, 20 Ohio Cir. Ct. 317, 11 Ohio Cir. Dec. 95.

65. Cincinnati *v.* Roth, 20 Ohio Cir. Ct. 317, 11 Ohio Cir. Dec. 95. See also *infra*, XIII, A, 2, c, (IV).

66. See *infra*, XIII, D, 2, c; and EMINENT DOMAIN, 15 Cyc. 663.

67. Stenson *v.* Mt. Vernon, 104 N. Y. App. Div. 17, 93 N. Y. Suppl. 309, holding that the mere leveling of a rough road by making slight cuts and fills necessary to make the surface smooth and uniform, without making any general change in the height of the roadway, is not a change of grade.

68. Pearson *v.* Chicago, 162 Ill. 383, 44 N. E. 739; Burr *v.* Newcastle, 49 Ind. 322.

not specify how, nor refer to maps or profiles, or any order or proceeding by which it could be ascertained how the grading was to be done is not enforceable.[69]

i. Vacation and Abandonment[70] — (i) *VACATION.*[71] Generally a municipality has the power to vacate existing streets and avenues.[72] Whether such power will be exercised is generally discretionary with the municipality,[73] and such discretion will not be interfered with by the courts except where abused,[74] or the act is fraudulent,[75] or the proceedings are without jurisdiction.[76] The procedure to vacate must be in strict compliance with the statutory provisions relating thereto.[77] In some jurisdictions the procedure is by petition or consent of all or

69. Kearney *v.* Andrews, 10 N. J. Eq. 70.

70. **Acquisition of easement as against the public right in a street** see EASEMENTS, 14 Cyc. 1182.

71. **Power to sell streets** see *supra*, VIII, D, 3, b.

Right of abutting owner to compensation see EMINENT DOMAIN, 15 Cyc. 665.

Title to fee as reverting to abutter see *infra*, XII, A, 3, b.

72. See *infra*, XIII, A, 2, c, (v).

73. Detroit Real Estate Inv. Co. *v.* Wayne Cir. Judge, 137 Mich. 108, 100 N. W. 271; Atty.-Gen. *v.* Shepard, 23 R. I. 9, 49 Atl. 39.

74. Gray *v.* Iowa Land Co., 26 Iowa 387; Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002; Kakeldy *v.* Columbia, etc., R. Co., 37 Wash. 675, 80 Pac. 205. See also Atty.-Gen. *v.* Shepard, 23 R. I. 9, 49 Atl. 39.

Motives.— Where the legislature has vested in a village board discretionary power to vacate streets and alleys of the village, the court will not ordinarily look into the motives influencing such board in doing a discretionary act. Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002.

For benefit of abutting owners.—That vacation proceedings are had by a village board at the instance and request and primarily for the benefit of abutting owners, whose property would be benefited by such vacation, is not ground for declaring such vacation void. Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002.

For depot purposes.— Where a city vacates certain streets and alleys for the purpose of conveying the land to a railroad company for depot purposes, in consideration of the company's abolishing certain grade crossings, the action of the city will not be disturbed where the vacation is ostensibly for the public good and no fraud is charged. Spitzer *v.* Runyan, 113 Iowa 619, 85 N. W. 782.

Mere inconvenience to a property-owner from the vacation of a street, which will also result to the general public, does not warrant injunctive relief. Hall *v.* Lebanon, 31 Ind. App. 265, 67 N. E. 703.

75. Knapp *v.* St. Louis, 156 Mo. 343, 56 S. W. 1102, holding that the vacation of a portion of a street by a municipality at the instigation of a private corporation, that the corporation may use such vacated portion in the extension of their premises, is not such fraud as will authorize the courts to invalidate the ordinance.

76. Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002.

77. St. Louis, etc., R. Co. *v.* Belleville, 122 Ill. 376, 12 N. E. 680. See also Fitchburg *v.* Fitchburg R. Co., 180 Mass. 535, 62 N. E. 989; *In re* Albers, 113 Mich. 640, 71 N. W. 1110; Price *v.* Stagray, 68 Mich. 17, 35 N. W. 815; Wilder *v.* St. Paul, 12 Minn. 192; Atty.-Gen. *v.* Shepard, 23 R. I. 9, 49 Atl. 39; Johnston *v.* Lonstorf, 128 Wis. 17, 107 N. W. 459; Ashland *v.* Chicago, etc., R. Co., 105 Wis. 398, 80 N. W. 1101; James *v.* Darlington, 71 Wis. 173, 36 N. W. 834.

When complete.— The legal vacation of a street is complete when, in pursuance of an ordinance of councils properly authorizing the same, a new plan from which the street is omitted is duly confirmed. *In re* Butler St., 25 Pa. Super. Ct. 357.

Estoppel to rely on irregularity.—Although proceedings by a city to vacate an alley are not strictly regular, the city is thereafter estopped to claim title to the alley against one improving it in reliance on such vacation. Blennerhassett *v.* Forest City, 117 Iowa 680, 91 N. W. 1044.

Notice to abutters.— Lincoln *v.* Warren, 150 Mass. 309, 23 N. E. 45; People *v.* Shaw, 34 N. Y. App. Div. 61, 54 N. Y. Suppl. 218. That certain abutting property-owners affected by the vacation of a street, who have acquiesced in such vacation, were not given notice of the proposed vacation, is not ground for holding the ordinance vacating the street void. Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002.

Second petition.— Where the common council of a city has, on a petition to vacate a street, vacated it on certain conditions, there is no ground for another petition to the circuit court, in the absence of any change in the condition of affairs subsequent to the making of the order by the common council. Detroit Real Estate Inv. Co. *v.* Wayne Cir. Judge, 137 Mich. 108, 100 N. W. 271.

Appeal.— Under the act of May 16, 1891 (Pamphl. Laws 75), relating to the laying out, opening, widening, straightening, etc., of the streets in the several municipalities of the commonwealth, an appeal will not lie to the common pleas from a petition for an ordinance for the vacation of a street or from the decision of the council that the petition is insufficient. Ebe's Appeal, 10 Pa. Dist. 370.

Who may object.— Hall *v.* Lebanon, 31 Ind. App. 265, 67 N. E. 703; Bentel *v.* Bay Cir. Judge, 124 Mich. 521, 83 N. W. 278; Mathew-

a majority of the abutting owners along the line of the street or alley.[78] Generally the vacation is properly effected by statute or ordinance,[79] although a resolution has been held a sufficient exercise of the legislative power.[80] But a street or alley is not vacated merely because of an ordinance declaring it vacated,[81] since the abutting owners have property rights therein which cannot be taken from them by the mere passage of such an ordinance.[82] Striking a street off the city plan and confirming a new plan on which the street is omitted has been held to constitute a legal vacation of the street.[83] The vacation of a county road, making a street a *cul-de-sac*, does not destroy the street as a highway.[84] A statute vacating certain streets with a proviso that certain streets in the addition named should not be affected does not have the effect of vacating the entire addition or detaching it from the city.[85]

(II) *ABANDONMENT.* The public rights in a street used as a public highway may be lost by abandonment.[86] But, except where it is otherwise provided by statute,[87]

son St. M. E. Church *v.* Shepard, 22 R. I. 112, 46 Atl. 402.

78. Baudistel *v.* Michigan Cent. R. Co., 113 Mich. 687, 71 N. W. 1114; State *v.* St. Paul, 98 Minn. 232, 107 N. W. 1129; Ponischil *v.* Hoquiam Sash, etc., Co., 41 Wash. 303, 83 Pac. 316; Rapp *v.* Stratton, 41 Wash. 263, 83 Pac. 182. See also *In re* Dunmore, etc., Road, 3 Lack. Jur. (Pa.) 165.

Constitutionality of statutes.— Inasmuch as a city has no proprietary interest in land embraced in a street, Howell Annot. St. § 1476 *et seq.*, providing for the vacation of plats, at the instance of abutting owners, is not unconstitutional as permitting the taking of property of the city without compensation. *In re* Albers, 113 Mich. 640, 71 N. W. 1110.

79. San Francisco *v.* Burr, 108 Cal. 460, 41 Pac. 482.

Validity of ordinance.— The ordinance vacating a street was not void as a grant or sale, instead of a vacation, because it contained a provision: "There shall be and is hereby granted," etc., "to the railroad company that portion of the street vacated for depot purposes." Columbus *v.* Union Pac. R. Co., 137 Fed. 869, 70 C. C. A. 207.

80. See Allen County *v.* Silvers, 22 Ind. 491; Indianapolis *v.* Imberry, 17 Ind. 175; State *v.* Elizabeth, 37 N. J. L. 432; Sower *v.* Philadelphia, 35 Pa. St. 231.

81. Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

82. Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

Vacation or change of street as taking or injuring property see EMINENT DOMAIN, 15 Cyc. 665.

83. Carpenter *v.* Pennsylvania R. Co., 195 Pa. St. 160, 45 Atl. 685; Wetherill *v.* Pennsylvania R. Co., 195 Pa. St. 156, 45 Atl. 658; *In re* Butler St., 25 Pa. Super. Ct. 357; *In re* William St., 43 Wkly. Notes Cas. (Pa.) 7. See also San Francisco *v.* Center, 133 Cal. 673, 66 Pac. 83, (1900) 63 Pac. 35 (holding that, although the publication of maps by a city as official maps, on which the location and directions of streets are materially changed from those shown on a prior map, may be considered an abandonment of all those streets and parts thereof marked on such prior map and not included in the later maps, the city will not lose title thereto, in the absence of an adverse possession sufficient to give a prescriptive right in another); San Francisco *v.* Burr, 108 Cal. 460, 41 Pac. 482; *In re* New York, 166 N. Y. 495, 60 N. E. 180 [*affirming* 56 N. Y. App. Div. 122, 67 N. Y. Suppl. 603]. But see People *v.* Hibernia Sav., etc., Soc., 84 Cal. 634, 24 Pac. 295; Lansdowne *v.* Hoffman, 8 Del. Co. (Pa.) 149.

84. Chrisman *v.* Omaha, etc., R., etc., Co., 125 Iowa 133, 100 N. W. 63.

85. Atchison, etc., R. Co. *v.* Lyon County, 72 Kan. 13, 82 Pac. 519, 84 Pac. 1031.

86. See New York, etc., R. Co. *v.* New Haven, 46 Conn. 257; Hewes *v.* Crete, 175 Ill. 348, 51 N. E. 696; Weber *v.* Iowa City, 119 Iowa 633, 93 N. W. 637; St. Vincent Female Orphan Asylum *v.* Troy, 12 Hun (N. Y.) 317 [*reversed* on other grounds in 76 N. Y. 108, 32 Am. Rep. 286]; Lake Shore, etc., R. Co. *v.* Cleveland, 1 Ohio S. & C. Pl. Dec. 1, 1 Ohio N. P. 1, 32 Cinc. L. Bul. 206. See also Hartford *v.* New York, etc., R. Co., 59 Conn. 250, 22 Atl. 37.

An order by a board of street commissioners extending an avenue so as to include a certain street, widening the latter, and changing its name to that of the avenue, did not work a discontinuance of the street. Jones *v.* Boston, 188 Mass. 53, 74 N. E. 295.

87. See the statutes of the several states.

In Indiana, a statute as to non-user within six years, expressly providing that it is not applicable to streets and alleys in any town, etc., has been held not to apply to a country road afterward included within corporate limits. Lake Shore, etc., R. Co. *v.* Whiting, 161 Ind. 76, 67 N. E. 933; Baltimore, etc., R. Co. *v.* Whiting, 30 Ind. App. 182, 65 N. E. 759.

In New York a highway, although dedicated and accepted, ceases to be such where the public authorities fail to open or work it within six years. Excelsior Brick Co. *v.* Haverstraw, 142 N. Y. 146, 36 N. E. 819; Cohoes *v.* Delaware, etc., Canal Co., 54 Hun (N. Y.) 558, 7 N. Y. Suppl. 885 [*reversed* on other grounds in 134 N. Y. 397, 31 N. E.

mere non-user by the public,[88] or the payment of taxes on such property by an individual,[89] or delay in opening[90] or improving[91] the street, or a lease of the street,[92] or permitting a steam railroad to occupy a part of the street,[93] or continued encroachments on the streets by structures,[94] or the inclosure of the street or a part thereof,[95] is ordinarily not sufficient of itself to show an abandonment. So mere obstruction of a highway excluding the public from it does not

887]; Vanderbeck *v.* Rochester, 46 Hun (N. Y.) 87 [*affirmed* in 122 N. Y. 285, 25 N. E. 408] (holding statute not applicable to streets laid out in cities the fee of which is acquired by the city); Ludlow *v.* Oswego, 25 Hun (N. Y.) 260; Matter of Beck St. Opening, 19 Misc. (N. Y.) 571, 44 N. Y. Suppl. 1087 [*affirmed* in 54 N. Y. App. Div. 479, 67 N. Y. Suppl. 57]; Buffalo *v.* Hoffeld, 6 Misc. (N. Y.) 197, 27 N. Y. Suppl. 869, holding that where a street in which the city has acquired only an easement, and not the fee, is laid out as an entirety, and opened and worked only in part, the public loses its right therein after the lapse of six years. Other statutes provide that highways not traveled or used as such for six years shall cease to be a highway for any purpose, and they have been held applicable to a street in a village incorporated under the general act for the incorporation of villages. Excelsior Brick Co. *v.* Haverstraw, 142 N. Y. 146, 36 N. E. 819.

In Massachusetts if, after the laying out of a way, nothing more is done by the municipality within two years, the previous possession taken and the work done are of no effect. Wilcox *v.* New Bedford, 140 Mass. 570, 5 N. E. 507.

In Ohio the mere failure to keep open a road to its full width for a term of eighteen years does not affect the unused part, under the statute that any part of a country road unopened for seven years shall be affected. Dodson *v.* Cincinnati, 5 Ohio Dec. (Reprint) 295, 4 Am. L. Rec. 312.

88. *Illinois.*— People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179; Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193.

Indiana.— Lawrenceburgh *v.* Wesler, 10 Ind. App. 153, 37 N. E. 956.

Iowa.— Chicago, etc., R. Co. *v.* Council Bluffs, 109 Iowa 425, 80 N. W. 564. But see Simplot *v.* Dubuque, 49 Iowa 630, holding that a city which has permitted a party under claim of right to occupy for thirty years land granted to it for a street will be presumed to have abandoned its right thereto.

Louisiana.— Sheen *v.* Stothart, 29 La. Ann. 630; Thibodeaux *v.* Maggioli, 4 La. Ann. 73; New Orleans *v.* Magnon, 4 Mart. 2.

Pennsylvania.— Barter *v.* Com., 3 Penr. & W. 253; *In re* Gay St., 6 Pa. Co. Ct. 187. But see *In re* William St., 43 Wkly. Notes Cas. 7.

Rhode Island.— Greene *v.* O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800; Crocker *v.* Collins, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752.

Wisconsin.— Arnold *v.* Volkman, 123 Wis. 54, 101 N. W. 158; Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635; Reilly *v.* Racine, 51 Wis. 526, 8 N. W. 417.

United States.— Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113 [*reversed* on other grounds in 147 Fed. 171, 77 C. C. A. 467].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1429.

But see Lake Shore, etc., R. Co. *v.* Cleveland, 1 Ohio S. & C. Pl. Dec. 1, 1 Ohio N. P. 1, 32 Cinc. L. Bul. 206.

89. Beebe *v.* Little Rock, 68 Ark. 39, 56 S. W. 791; Wilder *v.* St. Paul, 12 Minn. 192.

The rule that levying and enforcing the payment of taxes estops the municipality to claim the property applies when the absolute ownership of the property is involved when it is a contest between two conflicting titles, but does not apply when the rights of a third person, such as the public in its right to an easement, is involved, and hence a city cannot create an estoppel which will defeat the easement in a street belonging to the public by the levy and collection of a sewer tax upon the land as private property. Busse *v.* Central Covington, 38 S. W. 865, 39 S. W. 848, 19 Ky. L. Rep. 157.

90. Beebe *v.* Little Rock, 68 Ark. 39, 56 S. W. 791; Reilly *v.* Racine, 51 Wis. 526, 8 N. W. 417. See also King *v.* Lewiston, 70 Me. 406, holding that a city may build a county road wholly within its limits, when it connects with other county roads, any time within six years after the time allowed therefor by the county commissioners. But see Seventeenth St. *v.* Kansas City, etc., R. Co., 189 Mo. 245, 88 S. W. 45, holding that where it does not appear that a city took any steps to continue street opening proceedings after the passage of an ordinance confirming a verdict of viewers, and the city did not appear in a subsequent appeal taken by a property-owner, it will be presumed that the city abandoned the improvement.

91. Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193; Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21.

92. Beebe *v.* Little Rock, 68 Ark. 39, 56 S. W. 791.

93. Corcoran *v.* Chicago, etc., R. Co., 37 Ill. App. 417 [*affirmed* in 149 Ill. 291, 37 N. E. 68].

94. Pettit *v.* Grand Junction, 119 Iowa 352, 93 N. W. 381; Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600, 86 Mich. 567, 49 N. W. 544.

95. Wolfe *v.* Sullivan, 133 Ind. 331, 32 N. E. 1017; Henshaw *v.* Hunting, 1 Gray (Mass.) 203; Seabright *v.* Central R. Co., 73 N. J. L. 625, 64 Atl. 131; Nail, etc., Co. *v.* Furnace Co., 46 Ohio St. 544, 22 N. E. 639.

destroy it as a highway.[96] In some states adverse possession by an individual or private corporation will bar the public rights in the street, the same as in the case of private ownership of private property;[97] but in a majority of jurisdictions the maxim *nullum tempus occurrit regi* exempts a municipality as a governmental trustee of public rights from the operation of the statute of limitations.[98] In some cases the possession of all or a part of a street by private persons has been protected on the theory of an estoppel of the municipality by acquiescence,[99] although in many other cases the doctrine of estoppel has been held not applicable.[1]

j. Pleading.[2] The existence of a street may be pleaded without referring to the mode of its establishment;[3] but, if pleaded as established in one way, proof is not admissible to show its establishment in another.[4] The pleading must be definite and certain,[5] but reasonable certainty is sufficient.[6] The proof must correspond with the allegations and be confined to the point in issue.[7]

k. Evidence as to Existence or Location.[8] Generally the burden of proof as to the existence or location of a street or alley rests upon the party having the affirmative of the issue as determined by the pleadings or the nature of the investigation.[9] It is presumed that officers performed their sworn duty and that a street dedicated and used has been accepted,[10] that a street was not widened before

96. Chrisman *v.* Omaha, etc., Bridge Co., 125 Iowa 133, 100 N. W. 63.

97. See ADVERSE POSSESSION, 1 Cyc. 1118.

98. See ADVERSE POSSESSION, 1 Cyc. 1118.

99. Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193 (holding, however, that no equitable estoppel can be based upon a temporary permissive use); Piatt County *v.* Goodell, 97 Ill. 84; Chicago, etc., R. Co. *v.* Elgin, 91 Ill. 251; Corey *v.* Ft. Dodge, 118 Iowa 742, 92 N. W. 704; St. Vincent Female Orphan Asylum *v.* Troy, 12 Hun (N. Y.) 317 [*reversed* on other grounds in 76 N. Y. 108, 32 Am. Rep. 286]; Lane *v.* Kennedy, 13 Ohio St. 42; Ebens *v.* Cincinnati, 2 Handy (Ohio) 236, 12 Ohio Dec. (Reprint) 420.

Intention to abandon.— The abandonment of a city street, or a portion thereof, can only be established as creating an estoppel against the city in favor of a property-owner claiming a portion of the street, by clear and satisfactory evidence showing an actual intention to abandon on the part of the city; and an apparent abandonment by acts of the city authorities, although expressly declared to be an abandonment, does not constitute an abandonment, as such act is beyond the power of the municipal authorities. Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193.

1. *Colorado.*— Denver *v.* Girard, 21 Colo. 447, 42 Pac. 662.

Indiana.— Lawrenceburgh *v.* Wesler, 10 Ind. App. 153, 37 N. E. 956.

Iowa.— Solberg *v.* Decorah, 41 Iowa 501.

Louisiana.— Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21.

Mississippi.— Witherspoon *v.* Meridian, 69 Miss. 288, 13 So. 843.

Wisconsin.— State *v.* Leaver, 62 Wis. 387, 22 N. W. 576.

United States.— Simplot *v.* Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1429.

2. See, generally, PLEADING.

3. Bituminous Lime Rock Paving, etc., Co. *v.* Fulton, (Cal. 1893) 33 Pac. 1117; State *v.* Mathis, 21 Ind. 277.

4. Benson *v.* St. Paul, etc., R. Co., 62 Minn. 198, 64 N. W. 393.

5. Hellman *v.* Los Angeles, 125 Cal. 383, 58 Pac. 10.

Dedication.— In a suit to enjoin a city from using a strip of ground as a street, a complaint alleging that defendants threaten to appropriate the lands and lots of plaintiff, without any grant from plaintiff or proceedings being had to condemn the land, is not sufficient, without also averring that there has been no dedication. Faust *v.* Huntington, 91 Ind. 493.

6. See Latonia *v.* Hall, 83 S. W. 556, 26 Ky. L. Rep. 1125.

7. See Hall *v.* St. Paul, 56 Minn. 428, 57 N. W. 928; Sterling *v.* Pearson, 25 Nebr. 684, 41 N. W. 653.

8. Judicial notice of location, see EVIDENCE, 16 Cyc. 862.

In actions for injuries from defects see *infra*, XIV, E, 7, d, (II).

9. Demartini *v.* San Francisco, 107 Cal. 402, 40 Pac. 496; Washington Borough *v.* Steiner, 25 Pa. Super. Ct. 392 (holding that a resolution of a borough council adopting a plan of a borough on which the streets are represented, without more, will not cast on one whose dwelling has set in the same place for years before the resolution was adopted, and probably before the borough was created, the burden of proving that when it was built it did not encroach upon the existing highway); Washington Female Seminary *v.* Washington Borough, 18 Pa. Super. Ct. 555. See, generally, EVIDENCE, 16 Cyc. 926.

The burden of showing that a street was not properly opened is on the party alleging it. Ross *v.* Malcom, 40 Pa. St. 284.

Abandonment, if alleged, must be proved. Cohoes *v.* Delaware, etc., Canal Co., 134 N. Y. 397, 31 N. E. 887.

10. Blackman *v.* Riley, 138 N. Y. 318, 34

it was legally authorized,[11] and that a street used by the public for five years is one of the public streets of the municipality.[12] The lines originally established are, unless duly changed by legal proceedings,[13] conclusive evidence both as against the public and the abutter,[14] provided the public has not acquired additional width by continuous, adverse, and exclusive use for the requisite period to establish its easement.[15] But an ordinance establishing the street is only *prima facie* evidence that it was established for public use as such, and the fact may be shown to be otherwise.[16] Of course documentary evidence is admissible;[17] and, where title is not involved, deeds, plats, and maps are admissible to show the extent of defendant's possession.[18] Any proof which tends to show that a highway is used and called or recognized as a public street is competent to prove its existence, and it is not necessary to introduce a plat or other documentary evidence that the street has been legally laid out and opened or that it has been established by dedication or prescription.[19] And in determining the length as well as width of a street evidence of user and acts and declarations of the owner are admissible, as well as the records.[20] On an issue as to the width of a street, evidence as to its breadth as it was actually opened many years before, with the assent of all the parties interested, is admissible.[21] General understanding of the community, accompanying user, is admissible to show establishment;[22] as is evidence that the land had not been taxed on the ground that it was a highway.[23] But an award of damages to abutting owners is not of itself sufficient to prove the existence of a street,[24] although evidence thereof is admissible as a circumstance.[25] Evidence of an ex-mayor as to the real intent and purpose of the council in passing an ordinance in establishing a street has been held admissible.[26] Proof of the work done upon a street by an officer whose duty it was to repair such street, together with evidence of user by the public, is sufficient to establish the public character of the street.[27] Fixed monuments, whether natural or artificial, control course and

N. E. 214. See also Scranton City *v.* Scranton Steel Co., 154 Pa. St. 171, 26 Atl. 1, holding that where streets are opened, and traveled by the public, and the city claims control over them, and defendant does not allege or attempt to show any right to obstruct them, evidence of a formal acceptance of the streets by the city is unnecessary.

11. Barker *v.* Fogg, 34 Me. 392.

12. Zwack *v.* New York, etc., R. Co., 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821 [*affirmed* in 160 N. Y. 362, 54 N. E. 785].

13. Blackman *v.* Riley, 138 N. Y. 318, 34 N. E. 214.

14. Hellman *v.* Los Angeles, 125 Cal. 383, 58 Pac. 10; Walsh *v.* Hopkins, 22 R. I. 418, 48 Atl. 390.

Resurveys of an alley in a city, made without any original monuments or other positive evidence of the true lines, are not of convincing weight as to the location of the true lines. Milwaukee Boiler Co. *v.* Wadhams Oil, etc., Co., 126 Wis. 32, 105 N. W. 312.

15. Washington Borough *v.* Steiner, 25 Pa. Super. Ct. 392.

16. Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

17. Stone *v.* Cambridge, 6 Cush. (Mass.) 270.

18. Bloomington *v.* Graves, 28 Ill. App. 614.

19. Union Stock Yards, etc., Co. *v.* Karlik, 170 Ill. 403, 48 N. E. 1008. See also Com. *v.* Matthews, 122 Mass. 60.

But the mere statement of a member of a town council that a *locus in quo* was part of a highway is not probative of that fact. Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832.

20. Bloomington *v.* Graves, 28 Ill. App. 614; Driscoll *v.* Smith, 184 Mass. 221, 68 N. E. 210.

Records.— In a controversy between a municipality and a property-owner as to the line of a road, records of the court relating to the laying out and location of the road are admissible in evidence, where, although imperfect and fragmentary, they show the origin and location of the road. Athens Borough *v.* Carmer, 169 Pa. St. 426, 32 Atl. 422.

21. Athens Borough *v.* Carmer, 169 Pa. St. 426, 32 Atl. 422.

22. Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600, 86 Mich. 567, 49 N. W. 544.

23. Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600, 86 Mich. 567, 49 N. W. 544.

24. Henderson *v.* Davis, 106 N. C. 88, 11 S. E. 573.

25. Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582.

26. Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

27. Campbell *v.* Elkins, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. N. S. 159.

To establish the recognition of a street by a municipality by proof of work done on it by an officer of the municipality, the amount of the work is immaterial if it shows clearly that it was for the public benefit. Campbell

distance in ascertaining boundaries.[28] Of course the evidence must be applicable to the issues.[29] In proceedings to perpetuate testimony in relation to streets, notice by publication in pursuance of an order of court has been held sufficient.[30] The weight and sufficiency of the evidence is governed by the rules applicable to weight and sufficiency in civil actions generally.[31]

3. Ownership and Title to Streets — a. In General. Except where it is provided by statute or provisions of the charter that the fee of the street or alley shall vest in the municipality,[32] the fee remains in the abutting owners and the public takes only an easement,[33] the title of the abutters extending to the middle of the

v. Elkins, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. N. S. 159.

28. Racine *v.* J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599.

Where no fixed monuments.— In ascertaining the true location of streets, in the absence of any original monuments which can be ascertained, location and occupancy of lots in immediate blocks, and the lines and corners of adjoining streets and blocks, indicated by old fences, old buildings, and the streets as so laid out and used for many years, and stakes and monuments established by former surveyors, are competent evidence to prove the actual location. Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635.

29. Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953.

Evidence of the character of buildings erected and business done on lots abutting an open space, resembling a street, adjoining a railroad's right of way, was immaterial to the question of a prescriptive right of the public to use such right of way as a highway. Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953.

30. Birmingham *v.* Anderson, 40 Pa. St. 506.

31. See Evidence, 17 Cyc. 753 *et seq.*

Evidence held sufficient to show passage way not a public street or alley see Gilfillan *v.* Shattuck, 142 Cal. 27, 75 Pac. 646; Irving *v.* Ford, 65 Mich. 241, 32 N. W. 601; Sterling *v.* Pearson, 25 Nebr. 684, 41 N. W. 653.

Evidence held sufficient to show way a public street see Stapleton *v.* Newburgh, 9 N. Y. App. Div. 39, 41 N. Y. Suppl. 96; Scranton City *v.* Scranton Steel Co., 154 Pa. St. 171, 26 Atl. 1. Evidence of a resolution, passed by a city twenty-four years before action brought, directing an ordinance to be drawn for the purpose of opening a street, and that the street had been used as a highway for more than twenty-one years, was sufficient to take the question as to whether it was a public street to the jury. Rusterholtz *v.* New York, etc., R. Co., 191 Pa. St. 390, 43 Atl. 208.

Weight and sufficiency of evidence of possession see Bloomington *v.* Graves, 28 Ill. App. 614.

Weight of evidence as to boundary line between street and abutting owner see Eldora *v.* Edgington, 130 Iowa 151, 106 N. W. 503.

Sufficiency of evidence to show improper change of location of street see Latonia *v.* Hall, 83 S. W. 556, 26 Ky. L. Rep. 1125.

32. *Colorado.*— Denver, etc., R. Co. *v.* Domke, 11 Colo. 247, 17 Pac. 777; Denver *v.* Clements, 3 Colo. 472.

Illinois.— Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193; Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90; Chicago *v.* Rumsey, 87 Ill. 348; Gebhardt *v.* Reeves, 75 Ill. 301; Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516; Rockford, etc., R. Co. *v.* Keyt, 117 Ill. App. 32.

Iowa.— Emerson *v.* Babcock, 66 Iowa 257, 23 N. W. 656, 55 Am. Rep. 273; Milburn *v.* Cedar Rapids, 12 Iowa 246.

Missouri.— Reid *v.* Edina Bd. of Education, 73 Mo. 295.

Nebraska.— Lindsay *v.* Omaha, 30 Nebr. 512, 46 N. W. 627, 27 Am. St. Rep. 415; Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797. See also Bellevue Imp. Co. *v.* Kayser, 1 Nebr. (Unoff.) 63, 95 N. W. 499.

New York.— Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864; De Witt *v.* Elmira Transfer R. Co., 134 N. Y. 495, 32 N. E. 42 [*affirming* 5 Silv. Sup. 568, 9 N. Y. Suppl. 149]; Kane *v.* New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640 [*affirming* 15 Daly 294, 6 N. Y. Suppl. 526]; Hoag *v.* Pierce, 65 Hun 424, 20 N. Y. Suppl. 224; Bartow *v.* Draper, 5 Duer 130; People *v.* New York, 20 How. Pr. 144 [*affirmed* in 27 N. Y. 188, 37 Barb. 357, 25 How. Pr. 258]. But see Wallace *v.* Fee, 50 N. Y. 694; Mott *v.* New York, 2 Hilt. 358.

Ohio.— Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

Oklahoma.— Guthrie *v.* Nix, 5 Okla. 555, 49 Pac. 917; Guthrie *v.* Beamer, 3 Okla. 652, 41 Pac. 647.

South Dakota.— Lovejoy *v.* Campbell, 16 S. D. 231, 92 N. W. 24.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1438.

In Kansas the title is in the county. Smith *v.* Leavenworth, 15 Kan. 81.

33. *Connecticut.*— Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

Georgia.— Smith *v.* Rome, 19 Ga. 89, 63 Am. Dec. 298.

Indiana.— Cox *v.* Louisville, etc., R. Co., 48 Ind. 178.

Iowa.— Day *v.* Schroeder, 46 Iowa 546; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358. But see Blennerhassett *v.* Forest City, 117 Iowa 680, 91 N. W. 1044.

Kentucky.— West Covington *v.* Freking, 8 Bush 121.

Michigan.— *In re* Albers, 113 Mich. 640, 71

street.[34] Where the street is owned by abutting owners, transfer of the abutting land transfers the grantor's title in the street,[35] except in so far as title thereto is reserved by the terms of conveyance.[36] Irrespective of whether the municipality has an absolute title, it is held that it holds the property in trust for the public use.[37] Where the abutting owner retains the fee, the right to the possession, use, and control of the street is regarded as a legal and not a mere equitable right.[38]

b. On Vacation or Abandonment. Generally the title to a street or alley,

N. W. 1110. See also Cooper *v.* Alden, Harr. 72.

Minnesota.— Rich *v.* Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208.

New Jersey.— Friedman *v.* Snare, etc., Co., 71 N. J. L. 605, 61 Atl. 401, 70 L. R. A. 147.

North Dakota.— Donovan *v.* Allert, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775.

Oregon.— Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

Pennsylvania.— Barnes *v.* Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84.

South Dakota.— Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783; Edmison *v.* Lowry, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275.

Virginia.— Page *v.* Belvin, 88 Va. 985, 14 S. E. 843.

Washington.— Schwede *v.* Hemrick Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362.

Wisconsin.— Johnston *v.* Lonstorf, 128 Wis. 17, 107 N. W. 459; Lius *v.* Seefeld, 126 Wis. 610, 105 N. W. 917; Burbach *v.* Schweinler, 56 Wis. 386, 14 N. W. 449.

United States.— Barney *v.* Keokuk, 2 Fed. Cas. No. 1,032, 4 Dill. 593 [*affirmed* in 94 U. S. 324, 24 L. ed. 224].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1438.

Dutch law.— Where the court, on the evidence, finds that a street was not a public highway, prior to 1664, at the time of the capitulation by the Dutch to the English, it is a finding that the Dutch law, which placed the title of the street in the public and not in the abutting owner, does not apply to such street. Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213 [*modifying* 84 N. Y. App. Div. 91, 82 N. Y. Suppl. 192].

The abutters are presumed to own the fee. — Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512; Terre Haute, etc., R. Co. *v.* Rodel, 89 Ind. 128, 46 Am. Rep. 164; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Vaughn *v.* Stuzaker, 16 Ind. 338; Rice *v.* Worcester County, 11 Gray (Mass.) 283 note; Mott *v.* New York, 2 Hilt. (N. Y.) 358; Willoughby *v.* Jenks, 20 Wend. (N. Y.) 96.

34. *Kentucky.*— West Covington *v.* Freking, 8 Bush 121.

Missouri.— Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857.

New York.— Wallace *v.* Fee, 50 N. Y. 694; Willoughby *v.* Jenks, 20 Wend. 96.

North Dakota.— Donovan *v.* Allert, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775.

United States.— Banks *v.* Ogden, 2 Wall. 57, 17 L. ed. 818.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1438.

35. See BOUNDARIES, 5 Cyc. 906.

36. New York *v.* Law, 125 N. Y. 380, 26 N. E. 471; New York *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 324, 23 N. Y. Suppl. 562 [*affirmed* in 147 N. Y. 710, 42 N. E. 724]; Hamilton County *v.* Rape, 101 Tenn. 222, 47 S. W. 416; Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622; Harris *v.* Elliott, 10 Pet. (U. S.) 25, 9 L. ed. 333.

The owner of land conveyed by metes and bounds, without reference to any streets, acquires no title to the soil in any adjoining street subsequently dedicated by his grantor. Knott *v.* Jefferson St. Ferry Co., 9 Oreg. 530.

Construction of particular deeds see Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Stetson *v.* French, 16 Me. 204. A deed conveying land in a town, but "reserving streets and alleys, according to recorded plat of the town," passes the fee in such streets when such fee was at the time held by the grantor subject to the easement of the public therein. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602. Where there is in a deed an exception or reservation of a street for the use of the public, this is not a reservation to the grantor, and the fee of the grantor passes to the grantee, subject to this right of way. Cincinnati *v.* Newell, 7 Ohio St. 37. A deed calling for the side of the street excludes the fee of the highway, the grantee taking but a mere easement therein. Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

37. *Colorado.*— Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714.

Illinois.— Chicago *v.* Wright, 69 Ill. 318.

Missouri.— Glasgow *v.* St. Louis, 87 Mo. 678 [*affirming* 15 Mo. App. 112].

New York.— Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864 [*affirming* 85 N. Y. App. Div. 530, 83 N. Y. Suppl. 469]; People *v.* Kerr, 27 N. Y. 188; People *v.* New York, 20 How. Pr. 144 [*affirmed* in 27 N. Y. 188, 37 Barb. 357, 25 How. Pr. 258].

Tennessee.— Nashville *v.* Brown, 9 Heisk. 1, 24 Am. Rep. 289.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1438.

38. Chicago *v.* Wright, 69 Ill. 318.

after it is vacated or abandoned, vests in the abutting owners free from any lien.[39] Under some statutes, however, it reverts to the original owner at the time the street was established rather than the abutting owner at the time of the vacation.[40]

c. Right to Soil and Materials and Removal Thereof. The title of the abutting owner, subject only to the easement, remains perfect not only to the land covered by the highway, but to all the material within its boundaries, except such as may be needed to build or to maintain the road.[41] While a municipality may remove the soil of a street in connection with improving it, and where so removed as a necessary part of the improvement may use it in improving the street in other places or other streets,[42] yet it cannot remove or use the soil except for such purposes.[43] The municipality cannot take the soil from a street for use on other parts of the street or on another street except where its removal is compelled by the

39. *Arkansas.*— Beebe *v.* Little Rock, 68 Ark. 39, 56 S. W. 791.

Georgia.— Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; Cincinnati, etc., R. Co. *v.* Mims, 71 Ga. 240.

Illinois.— Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373.

Indiana.— Decker *v.* Evansville, etc., R. Co., 133 Ind. 493, 33 N. E. 349.

Iowa.— Day *v.* Schroeder, 46 Iowa 546. *Compare* Brown *v.* Taber, 103 Iowa 1, 72 N. W. 416. *Contra,* Harrington *v.* Iowa Cent. R. Co., 126 Iowa 388, 102 N. W. 139.

Kansas.— Showalter *v.* Southern Kansas R. Co., 49 Kan. 421, 32 Pac. 42; Atchison, etc., R. Co. *v.* Patch, 28 Kan. 470.

Minnesota.— Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

Missouri.— Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857 (statute); Mitchell *v.* St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

Nebraska.— Bellevue *v.* Bellevue Imp. Co., 65 Nebr. 52, 90 N. W. 1002. *Contra,* Lindsay *v.* Omaha, 30 Nebr. 512, 46 N. W. 627, 27 Am. St. Rep. 415.

New York.— Heard *v.* Brooklyn, 60 N. Y. 242; Mott *v.* Eno, 97 N. Y. App. Div. 580, 90 N. Y. Suppl. 608 [*reversed* on other grounds in 181 N. Y. 346, 74 N. E. 229]; Van Amringe *v.* Barnett, 8 Bosw. 357; *In re* John, etc., St., 19 Wend. 659. But see Watson *v.* New York, 67 N. Y. App. Div. 573, 73 N. Y. Suppl. 1027 [*affirmed* in 175 N. Y. 475, 67 N. E. 1091].

Ohio.— Kinnear Mfg. Co. *v.* Beatty, 65 Ohio St. 264, 62 N. E. 341; State *v.* Pittsburg, etc., R. Co., 53 Ohio St. 189, 41 N. E. 205; Price *v.* Toledo, 25 Ohio Cir. Ct. 617; Stevens *v.* Shannon, 6 Ohio Cir. Ct. 142, 3 Ohio Cir. Dec. 386.

Oregon.— Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

Pennsylvania.—Barnes *v.* Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84.

Washington.— Burmeister *v.* Howard, 1 Wash. Terr. 207.

United States.— Wirt *v.* McEnery, 21 Fed. 233.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1439.

Building over abandoned street.— When a public street has been vacated by law, the owner of the soil has the right to build over it, without regard to injury thereby caused to other property situated on the same street. Paul *v.* Carver, 24 Pa. St. 207, 64 Am. Dec. 649.

Illegal vacation.— Where a public alley is vacated, the right of an abutting owner to the portion adjoining his land is not, as against an abutting owner on the opposite side of the alley, affected by the fact that the vacation was unlawful. Bigelow *v.* Ballerino, (Cal. 1895) 41 Pac. 14.

If the land has been purchased with public funds and converted into a street the municipality owns the title absolutely on vacation. Godley *v.* Philadelphia, 7 Phila. (Pa.) 637.

40. Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Helm *v.* Webster, 85 Ill. 116; Gebhardt *v.* Reeves, 75 Ill. 301; St. John *v.* Quitzow, 72 Ill. 334; Wirt *v.* McEnery, 21 Fed. 233.

41. Platt *v.* Oneonta, 88 N. Y. App. Div. 192, 84 N. Y. Suppl. 699.

42. New Haven *v.* Sargent, 38 Conn. 50, 9 Am. Rep. 360; Delphi *v.* Evans, 36 Ind. 90, 10 Am. Rep. 12; Griswold *v.* Bay City, 35 Mich. 452 (holding also that where abutting owners did not want the soil the city had a right to sell it); Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217. To the contrary, however, see Smith *v.* Rome, 19 Ga. 89, 63 Am. Dec. 298.

In Indiana the rule is declared to be that the city can remove the natural soil from one street to another only when the improvement of the two streets is embraced in one and the same general plan of improvement. Haas *v.* Evansville, 20 Ind. App. 482, 50 N. E. 46.

43. Viliski *v.* Minneapolis, 40 Minn. 304, 41 N. W. 1050, 3 L. R. A. 831; Rich *v.* Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; Platt *v.* Oneonta, 88 N. Y. App. Div. 192, 84 N. Y. Suppl. 699; Deverell *v.* Bauer, 41 N. Y. App. Div. 53, 58 N. Y. Suppl. 413. See also Cuming *v.* Prang, 24 Mich. 514 [*distinguished* in Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217].

The consent of the municipality will justify the opening the surface of the street as against the public, but not as against the owners of the soil, when done for matters unconnected with the repair or improvement

process of construction or repair of the street.[44] While the abutting owner has title to the soil and minerals in a street, where the streets are not owned by the municipality, subject only to the right of way possessed by the public,[45] he has no right, notwithstanding such ownership, to remove the soil or minerals for his own use,[46] except where excavated by the municipality for the purpose of improving the street and not used in improving the street or other streets.[47] A third person has no right to take minerals from beneath a street, where the title to the street is in the municipality, without the consent of the municipality; but where the municipality owns the street it may permit entry under its streets, provided such contracts do not impair their usefulness or render them dangerous, and in point of time do not exceed the legal existence of any street or alley.[48] But where the title to the street is in the abutting owner, the municipal authorities have no power to confer on a third person the right to take soil from the street for his use against the objections of the abutting owners.[49] Whether the materials used in paving a sidewalk belong to the municipality or to the abutting owners has been held to be dependent upon the facts or circumstances of the particular case.[50]

d. Trees.[51] Trees in the street belong to the abutting owner where he is the owner of the fee,[52] who may remove them at his pleasure,[53] and is liable for injuries resulting from the existence thereof.[54] Where the municipality owns the fee in the streets it is the owner of trees therein.[55]

4. Power to Control and Regulate — a. In General.[56] A municipality has no inherent power over streets,[57] but the legislature may delegate control over

of the highway. Glasby *v.* Morris, 18 N. J. Eq. 72.

44. Macon *v.* Hill, 58 Ga. 595; Delphi *v.* Evans, 36 Ind. 90, 10 Am. Rep. 12; Robert *v.* Sadler, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498. *Contra*, Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Huston *v.* Ft. Atkinson, 56 Wis. 350, 14 N. W. 444, where decision based largely on statutory provisions.

45. Rich *v.* Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861.

46. New Haven *v.* Sargent, 38 Conn. 50, 9 Am. Rep. 360; Palatine *v.* Kreuger, 121 Ill. 72, 12 N. E. 75 [*reversing* 20 Ill. App. 420].

The possibility of a reverter of the fee of the street conferred on the abutting owner does not give him the right to take minerals from the street. Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81 [*affirming* 16 Ill. App. 69].

47. Haas *v.* Evansville, 20 Ind. App. 482, 50 N. E. 46, holding, however, in such a case, that the abutter cannot compel the city to remove the materials to a place designated by him, and that if he fails to take steps to remove it within a reasonable time the city may treat it as abandoned and use it as it sees fit.

48. Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326 [*affirming* 34 Ill. App. 93].

49. Althen *v.* Kelly, 32 Minn. 280, 20 N. W. 188.

50. Leonard *v.* Cincinnati, 26 Ohio St. 447 [*reversing* 5 Ohio Dec. (Reprint) 333, 4 Am. L. Rec. 668].

Where a village lays stones in the soil in front of a lot, for the purpose of using them as a permanent sidewalk, they become a part of the lot owner's real property, and having been removed by the village, merely because he would not pay an assessment therefor, it is liable to him therefor. Platt *v.* Oneonta, 88 N. Y. App. Div. 192, 84 N. Y. Suppl. 699 [*reversing* 40 Misc. 42, 81 N. Y. Suppl. 161]. *Compare* Snyder *v.* Lexington, 49 S. W. 765, 20 Ky. L. Rep. 1562.

51. Control of municipality in general see *infra*, XII, A, 4, a.

Removal by municipality as obstructions see *infra*, XII, A, 9, f, (II), (A).

Action by abutter for injuries to see *infra*, XII, A, 7, h.

Cutting branches by traveler where interfering with travel see *infra*, XII, A, 9, f, (II), (B).

52. Atlanta *v.* Holliday, 96 Ga. 546, 23 S. E. 509; Avis *v.* Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L. R. A. 685 (unless planted by public authorities); Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136; Ellison *v.* Allen, 30 N. Y. Suppl. 441.

53. Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136.

54. Weller *v.* McCormick, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798. See also *infra*, XIV, D, 7.

55. Mt. Carmel *v.* Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L. R. A. 580; Baker *v.* Normal, 81 Ill. 108.

56. Use as highway see *infra*, XII, A, 10.

Grants of privileges in streets see *infra*, XII, A, 8, a.

Control and regulation of bridges see BRIDGES.

Power of municipality to keep sidewalks in repair see *infra*, XIII, A, 2, d.

Police regulations of vehicles and means of transportation see *supra*, XI, A, 7, b, (VII), (L).

57. Polack *v.* San Francisco Orphan Asy-

public streets within its limits to the municipality[58] or to a particular city board,[59] and in such case the extent of the power depends upon charter or other statutory provisions.[60] When opened,[61] streets are usually subject to the control and regulation of the municipality,[62] subject to the paramount authority of the state.[63] But this does not preclude the paramount authority of the state to resume its power at will.[64] This municipal power, however, is liberally construed so as to effect the object of the grant,[65] and authorizes control of the entire length and breadth of the street;[66] also above and below the surface as far as any proper

lum, 48 Cal. 490; Newark *v.* Delaware, etc., R. Co., 42 N. J. Eq. 196, 7 Atl. 123; Jersey City *v.* Central R. Co., 40 N. J. Eq. 417, 2 Atl. 262; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659; Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215. See also Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193; McGrew *v.* Stewart, 51 Kan. 185, 32 Pac. 896; Kean *v.* Elizabeth, 55 N. J. L. 337, 26 Atl. 939; Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715.

58. *Alabama.*— Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95.

California.— Brook *v.* Horton, 68 Cal. 554, 10 Pac. 204.

Indiana.— Spiegel *v.* Gansberg, 44 Ind. 418.

Iowa.— Gray *v.* Iowa Land Co., 26 Iowa 387.

Maine.— Pillsburg *v.* Augusta, 79 Me. 71, 8 Atl. 150.

Michigan.— Riggs *v.* Detroit Bd. of Education, 27 Mich. 262; Hinchman *v.* Detroit, 9 Mich. 103.

Nebraska.— Lindsay *v.* Omaha, 30 Nebr. 512, 46 N. W. 627, 27 Am. St. Rep. 415.

New York.— Coster *v.* New York, 43 N. Y. 399; People *v.* Hair, 29 Hun 125.

Pennsylvania.— *In re* McGee, 114 Pa. St. 470, 8 Atl. 237.

Wisconsin.— Kimball *v.* Kenosha, 4 Wis. 321.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1432. See also *supra*, IV, C.

59. See *infra*, XII, A, 4, b.

60. Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95; Texarkana *v.* Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; Louisville *v.* Bannon, 99 Ky. 74, 35 S. W. 120, 18 Ky. L. Rep. 10; State *v.* Jersey City, 37 N. J. L. 348; Jersey City *v.* Central R. Co., 40 N. J. Eq. 417, 2 Atl. 262.

Exclusive right to control.— In some jurisdictions, under particular charters or statutes, the city is given the exclusive right to control and regulate the use of the streets therein. Kerney *v.* Barber Asphalt Paving Co., 86 Mo. App. 573; Milhau *v.* Sharp, 17 Barb. (N. Y.) 435; Cincinnati Inclined-Plane R. Co. *v.* Cincinnati, 5 Ohio S. & C. Pl. Dec. 562, 7 Ohio N. P. 541. A municipal corporation which is empowered by its charter to regulate its streets, and to prescribe the manner of their use by any person or corporation, has exclusive power to determine in the first instance how the space within the bounds of the highway shall be appropriated to the varied uses of the highway. Butt *v.* Camden Horse R. Co., 61 N. J. L. 543, 48 Atl. 1028 [*affirmed* in 63 N. J. Eq. 804, 52 Atl. 1130]. But the fact that a city is charged with the duty of keeping its streets in repair, and that the cost of maintaining them is raised by public taxation within the city, does not give it jurisdiction over them exclusive of that of the legislative assembly. State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758.

New uses.— The general power to regulate the use of streets is not confined to public uses common and known at the time of the dedication but extends to new uses as they spring into existence. St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278.

Injunction as dispossessing city of its streets.— A temporary order of injunction, restraining a city and its officers from interfering with a telephone company or from obstructing or prohibiting the sending of messages over its wires until the further order of the court, is not void on the ground that it dispossesses the city of its streets or takes from it the authority to regulate and control the use thereof. State *v.* Baker, 62 Nebr. 840, 88 N. W. 124.

A municipality may abolish a public well in a street. Ferrenbach *v.* Turner, 86 Mo. 416, 56 Am. Rep. 437.

61. Metropolitan Exhibition Co. *v.* Newton, 4 N. Y. Suppl. 593, holding that where land has been taken for a public street in New York city by process recognized as legal, the street is said to be open whether it is regulated and graded or not.

62. Branson *v.* Philadelphia, 47 Pa. St. 329; Southwark R. Co. *v.* Philadelphia, 47 Pa. St. 314; Edgewood *v.* Scott, 29 Pa. Super. Ct. 156; Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

63. Branson *v.* Philadelphia, 47 Pa. St. 329; Southwark R. Co. *v.* Philadelphia, 47 Pa. St. 314.

64. United R., etc., Co. *v.* Jersey City, 71 N. J. L. 80, 58 Atl. 71; Harrisburg R. Co. *v.* Harrisburg, 2 Dauph. Co. Rep. (Pa.) 182.

65. Drew *v.* Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814.

66. Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412.

Sidewalks.— The authority of a city over the streets extends over the sidewalks as a part thereof. Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412. The council of a city may prescribe by resolution that portion of the street which shall be used as a sidewalk. Cox *v.* Lancaster,

street use may require,[67] but not beyond the street line.[68] And this is not limited by the *habendum* clause of a deed conveying land for street purposes,[69] nor the omission to enact proper by-laws.[70] The power is preventive and punitive as well as permissive,[71] but must be retained and used for the public good.[72]

b. Municipal Boards and Officers.[73] Control and regulation of streets may be conferred upon particular municipal boards or officers either by direct legislative action,[74] or municipal ordinance under charter power.[75] The authority thus conferred may be plenary or partial;[76] but it is not delegable and must be exercised personally by the board or officer;[77] and assumption by another is invalid.[78] Over some spaces, such as the crossing of streets and boulevards, there may be double jurisdiction by separate boards or officers.[79] Where control of a street is relinquished by a city to certain officers, who are not thereafter disturbed in their possession and the making of improvements for many years, their right is not subject to attack on the ground that the transfer by the city was informal.[80]

c. Particular Regulations — (i) *Prohibiting Obstructions in General.*[81] A municipality ordinarily has the power to prohibit the obstruction of streets,[82]

24 Ohio Cir. Ct. 265; Com. *v.* Beaver Borough, 171 Pa. St. 542, 33 Atl. 112. Boroughs may, by ordinance, or its equivalent, define the limits of sidewalks and curbs thereon, leaving sufficient space for travel. Com. *v.* Beaver Borough, *supra*.

67. Kittaning Borough *v.* Kittaning Consol. Natural Gas Co., 26 Pa. Super. Ct. 355.

68. Brooklyn *v.* New York Ferry Co., 23 Hun (N. Y.) 277 [*affirmed* in 87 N. Y. 204]; Chester *v.* Higham, 16 Lanc. L. Rev. (Pa.) 326.

69. Murphy *v.* Chicago, 29 Ill. 279, 81 Am. Dec. 307.

70. Bowers *v.* Barrett, 85 Me. 382, 27 Atl. 260.

71. Williams *v.* New York Cent. R. Co., 18 Barb. (N. Y.) 222 [*reversed* on other grounds in 16 N. Y. 97, 69 Am. Dec. 651]. See also State *v.* Jersey City, 37 N. J. L. 348.

72. Chicago *v.* Wright, 69 Ill. 318; North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318; Glasgow *v.* St. Louis, 87 Mo. 678 [*affirming* 15 Mo. App. 112]; Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 85 N. Y. App. Div. 530, 83 N. Y. Suppl. 469 [*affirmed* in 176 N. Y. 408, 68 N. E. 864].

73. Power to make improvements see *infra*, XIII, A, 1, c.

74. Bullock *v.* Wilmington City R. Co., 5 Pennew. (Del.) 209, 64 Atl. 242; Drew *v.* Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Wormser *v.* Brown, 149 N. Y. 163, 43 N. E. 524 [*affirming* 72 Hun 93, 25 N. Y. Suppl. 553]; Broadbelt *v.* Loew, 15 N. Y. App. Div. 343, 44 N. Y. Suppl. 159 [*affirmed* in 162 N. Y. 642, 57 N. E. 1105], holding the power of the department of public parks to control surface constructions on streets within three hundred and fifty feet of a "public park" (Consolidation Act (Laws (1882), c. 410, § 688), does not apply to a street within that distance of a tract of land the taking of which for a park has been authorized by statute, but the area and boundaries of which have not been settled by the commissioners appointed for that purpose by the statute.

75. Haller *v.* St. Louis, 176 Mo. 606, 75 S. W. 613; Ghee *v.* Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692. See also McCaffrey *v.* Cavanac, 30 La. Ann. 882.

76. Noyes *v.* Ward, 19 Conn. 250; McCormick *v.* South Park Com'rs, 150 Ill. 516, 37 N. E. 1075; Metropolitan Exhibition Co. *v.* Newton, 4 N. Y. Suppl. 593; Therrien *v.* St. Paul, 23 Can. Sup. Ct. 248.

77. Chicago *v.* Trotter, 136 Ill. 430, 26 N. E. 359 [*affirming* 33 Ill. App. 206]; Clothier *v.* Philadelphia, 22 Pa. Super. Ct. 608. But see West Chicago Park Com'rs *v.* Chicago, 170 Ill. 618, 48 N. E. 1066, holding that where the park commissioners of a city, to whom a plat had been submitted for approval, as required by law, referred it to a subcommittee, who are not shown to have had power to act or to have acted, but the commissioners recognized the streets laid out and the rights acquired therein by the public for eight years, they cannot then question their legal existence.

78. Clotbier *v.* Philadelphia, 22 Pa. Super. Ct. 608.

79. West Chicago Park Com'rs *v.* Chicago, 170 Ill. 618, 48 N. E. 1066.

80. Chicago, etc., R. Co. *v.* West Chicago Park Com'rs, 151 Ill. 204, 37 N. E. 1079, 25 L. R. A. 300.

81. See also *infra*, XII, A, 7, b.

82. Terre Haute *v.* Turner, 36 Ind. 522; Duluth *v.* Mallett, 43 Minn. 204, 45 N. W. 154 (holding that a charter authorizing ordinances to prevent the encumbering of streets with carriages authorized an ordinance to prevent the obstruction by railroad cars); Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379 (holding that under charter power to control streets and to pass any ordinance usual or necessary for the well being of the inhabitants, the municipality had power to limit the time trains might block a street crossing).

Awnings.— Municipal power to prevent the encumbrance of streets includes power to

and to fix a penalty for violation thereof;[83] and ordinarily the determination of the common council that certain things are obstructions cannot be reviewed.[84] The municipal power to prevent the obstruction of streets and alleys does not extend, however, to settling the title to lands or fixing the proper location of the street lines.[85]

(II) *Trees.*[86] The municipality has control over trees in the streets,[87] which is not divested by a license to abutters to set out and care for shade trees,[88] nor by permission given a street car company to operate its cars through the streets.[89] And abutters are not bound to care for the trees planted on the sidewalk by the municipality, in the absence of any statute or municipal regulation imposing that duty upon them.[90] Injuries to trees may be prohibited by the municipality,[91] but power to regulate the planting and protection of shade trees does not include the power to compel an abutter to cut down and remove them.[92]

(III) *Regulation of Use by Franchise-Holding Corporation.*[93] The measure of municipal power to regulate the use of streets by quasi-public corporations, chartered by the state to supply the public with water, light, conveyance, heat, information, and other conveniences, depends largely upon the construction of charters and statutes, by which the state confers such franchises on the companies and delegates its own power of regulation thereof to the municipalities.[94] Three fundamental principles are recognized as the basis of settlement of the frequent contentions arising over such regulation, viz.: (1) The state has plenary power to regulate all quasi-public corporations, after as well as before their organization, in the exercise of their public functions;[95] (2) this power may be delegated to municipalities either by charter or general law;[96] and (3) the power to regulate does not authorize prohibition,[97] although a license-fee may be charged to compensate for regulation.[98] Under these rules a municipality may enact and enforce all reasonable regulations for the protection of the public as to the manner in which the streets shall be used.[99] For instance it has been held that a munici-

prohibit as well as remove awnings over a sidewalk or posts to support them. Fox *v.* Winona, 23 Minn. 10.

Excavations.— The municipality may forbid excavations in any street without a permit from the municipality. Edgewood Borough *v.* Scott, 29 Pa. Super. Ct. 156. See also French *v.* Jones, 191 Mass. 522, 78 N. E. 118, 7 L. R. A. N. S. 525.

Placing articles on sidewalk.— The placing of any articles or material upon a sidewalk, and suffering them to remain there, which interferes with the right to use it, or any part of it, constitutes a violation of an ordinance prohibiting the placing of any articles or materials on any sidewalk so as to incommode or obstruct the free passage or use thereof, and proof that any person had been actually interfered with or obstructed in his use of the sidewalk is unnecessary. People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 91 Hun 638, 36 N. Y. Suppl. 1130].

83. Shinkle *v.* Covington, 83 Ky. 420. See also *infra*, XII, A, 9, h.

84. Vanderhurst *v.* Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267.

85. Beecher *v.* People, 38 Mich. 289, 31 Am. Rep. 316; Dawes *v.* Highstown, 45 N. J. L. 501.

86. See also *supra*, XII, A, 3, d.

87. Consolidated Traction Co. *v.* East Orange Tp., 61 N. J. L. 202, 38 Atl. 803.

88. Baker *v.* Normal, 81 Ill. 108.

89. Consolidated Traction Co. *v.* East Orange Tp., 61 N. J. L. 202, 38 Atl. 803.

90. Weller *v.* McCormick, 47 N. J. L. 397, 1 Atl. 516, 54 Am. Rep. 175.

91. Consolidated Traction Co. *v.* East Orange Tp., 61 N. J. L. 202, 38 Atl. 803.

92. Sproul *v.* Stockton, 73 N. J. L. 158, 62 Atl. 275.

93. See also *infra*, XII, A, 8.

Police regulations in general see *supra*, XI, A, 7, b, (VII), (D), (L).

94. See Allegheny *v.* Chartiers Valley Gas Co., 9 Pa. Cas. 22, 11 Atl. 658.

95. Skaneateles Water Works Co. *v.* Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659; Adamson *v.* Nassau Electric R. Co., 89 Hun (N. Y.) 261, 34 N. Y. Suppl. 1073. See also Tomlin *v.* Cape May, 63 N. J. L. 429, 44 Atl. 209.

96. Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616 [*affirming* 27 Ill. App. 346].

97. Madison *v.* Morristown Gaslight Co., 63 N. J. Eq. 120, 52 Atl. 158 [*reversed* on other grounds in 65 N. J. Eq. 356, 54 Atl. 439].

98. Harrisburg City *v.* Pennsylvania Tel. Co., 15 Pa. Co. Ct. 518.

99. Waterloo *v.* Waterloo St. R. Co., 71 Iowa 193, 32 N. W. 329.

pality may prohibit a company from laying pipes in the street without the consent of the municipality,[1] or during the winter months;[2] may regulate the limits in a street where the track of a railroad company shall be laid,[3] make any reasonable and necessary regulation as to the manner in which the tracks of the railroad company shall be constructed and the condition in which they shall be maintained,[4] or prohibit the use of steam power for railroads along the streets;[5] or may prohibit the erection of poles in the street without obtaining authority from the council,[6] or require all work of construction and repair to be done under municipal direction and supervision.[7] On the other hand, municipal regulations must not unreasonably interfere with the exercise of the company's franchise;[8] and it has been held that prohibiting the digging up of the surface of any street except by permission of the council, as applied to a railroad company laying its track across a street within its located right of way;[9] or prohibiting a gas company from laying its pipes along the city street,[10] or from opening a paved street to lay pipes from the main to the opposite side of the street;[11] or limiting the time within which such work shall be done,[12] is unreasonable and invalid.

d. Reasonableness. The power to regulate does not authorize prohibition,[13] and failure to enforce a by-law against an offender does not render it invalid as to another.[14] Ordinances forbidding the removal of earth from any street for personal use without consent of the board of trustees,[15] or providing penalties for permitting water from an overflowing well or spring to flow on any street or alley,[16] or forbidding the display of boards, placards, or signs on the sidewalks of a populous city,[17] or prohibiting the exposure of produce and commodities on a sidewalk,[18] have been held valid. Under statutory authority delegated to a municipality to make rules for the regulation of carriages, the municipality may provide that no

1. Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616 [*affirming* 27 Ill. App. 346]; Brooklyn *v.* Jourdan, 7 Abb. N. Cas. (N. Y.) 23; Allegheny *v.* Chartiers Valley Gas Co., 9 Pa. Cas. 22, 11 Atl. 658; Forty Fort *v.* Forty Fort Water Co., 9 Kulp (Pa.) 241 (holding that in the act of July 2, 1895, providing that a water company may develop electricity by water power and sell the same, but cannot enter upon streets for this purpose without municipal consent, the prohibition relates only to entry on streets for the purpose of distributing electricity, and does not affect the right to such entry to supply water); Philadelphia Steam Supply Co. *v.* Philadelphia, 17 Phila. (Pa.) 110.

2. Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa. St. 318.

3. Cain *v.* Chicago, etc., R. Co., 54 Iowa 255, 3 N. W. 736, 6 N. W. 268.

4. Waterloo *v.* Waterloo St. R. Co., 71 Iowa 193, 32 N. W. 329; Allen *v.* Jersey City, 53 N. J. L. 522, 22 Atl. 257. See also RAILROADS; STREET RAILROADS.

5. Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83.

6. Western Union Tel. Co. *v.* Philadelphia, 9 Pa. Cas. 300, 12 Atl. 144; Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455. See also Toledo Electric St. R. Co. *v.* Western Electric Light, etc., Co., 10 Ohio Cir. Ct. 531, 4 Ohio Cir. Dec. 43; Auerbach *v.* Cuyahoga Tel. Co., 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633.

7. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327.

8. Allen *v.* Jersey City, 53 N. J. L. 522, 22 Atl. 257; Reading *v.* Consumers' Gas Co., 2 Del. Co. (Pa.) 437.

Municipalities cannot prohibit or prevent entry upon streets by water companies having the right of entry by statute, but may only regulate the work with regard to grades and convenience of public travel. Forty Fort *v.* Forty Fort Water Co., 9 Kulp (Pa.) 241.

9. Allen *v.* Jersey City, 53 N. J. L. 522, 22 Atl. 257.

10. Reading *v.* Consumers' Gas Co., 2 Del. Co. (Pa.) 437; Chartiers Valley Gas Co. *v.* Pittsburg, 34 Pittsb. Leg. J. (Pa.) 240.

11. Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa. St. 318.

12. Chartiers Valley Gas Co. *v.* Pittsburg, 17 Pittsb. Leg. J. N. S. (Pa.) 240.

13. Madison *v.* Morristown Gaslight Co., 63 N. J. Eq. 120, 52 Atl. 158 [*reversed* on other grounds in 65 N. J. Eq. 356, 54 Atl. 439].

14. Denver *v.* Girard, 21 Colo. 447, 42 Pac. 662.

15. Palatine *v.* Kreuger, 121 Ill. 72, 12 N. E. 75 [*reversing* 20 Ill. App. 420].

16. Skaggs *v.* Martinsville, 140 Ind. 476, 39 N. E. 241, 49 Am. St. Rep. 209, 33 L. R. A. 781.

17. Com. *v.* McCafferty, 145 Mass. 384, 14 N. E. 451.

18. State *v.* Summerfield, 107 N. C. 895, 12 S. E. 114.

Twenty minutes is an unreasonable time for a peddler to expose his goods for sale at one place on the sidewalk. State *v.* Messolongitis, 74 Minn. 165, 77 N. W. 29.

person having charge of any hackney carriage shall stand with it to solicit passengers in any place other than the place assigned to it;[19] and the use of streets by hucksters and other vendors may be limited to certain streets.[20] An ordinance is not unreasonable which prohibits any person from making excavations in a highway until he has obtained a permit from the authorities, where it imposes no unreasonable conditions as to the manner in which the excavations shall be made and the street repaired, and imposes no charge for such permit not grossly disproportionate to the expense of issuing it and the probable expense of proper inspection and police surveillance.[21] Reasonableness is for the judge and not the jury to decide.[22]

e. Conflicting Jurisdiction of Counties.[23] Except where otherwise provided by statute,[24] county authorities have no jurisdiction over streets in a city.[25]

f. Names of Streets. In some jurisdictions it has been held that a city council cannot change the name of a street where no good cause exists therefor except upon the petition of abutting property-owners.[26]

5. Use by Municipality For Purpose Other Than Highway.[27] A municipality may use a street for any purpose not inconsistent with its use as a highway.[28] For instance it may lawfully use the streets for the construction of sewers,[29] or for drainage,[30] or to lay gas or water pipes,[31] or to erect poles and string wires for electric lights,[32] or construct a wharf at the terminus of a street,[33] or convert a promenade into wharves,[34] or set apart for a boulevard a portion of a street not devoted to business purposes.[35] But it cannot appropriate the street for any use entirely inconsistent with street purposes;[36] and hence it cannot construct buildings in a street which materially interfere with its use as a highway,[37] such as a public market,[38] nor rent out a space along the curb to the obstruction of travel

19. Com. *v.* Matthews, 122 Mass. 60.

20. Tomlin *v.* Cape May, 63 N. J. L. 429, 44 Atl. 209.

21. Edgewood Borough *v.* Scott, 29 Pa. Super. Ct. 156.

22. Emporia *v.* Wagoner, 6 Kan. App. 659, 49 Pac. 701.

23. See also *infra*, XIII, A, 1, d.

24. Deering *v.* Cumberland County Com'rs, 87 Me. 151, 32 Atl. 797.

25. Cook County *v.* Great Western R. Co., 119 Ill. 218, 10 N. E. 564. See also Waynesville *v.* Satterthwait, 136 N. C. 226, 48 S. E. 661; Cuyahoga County *v.* Akron, etc., R. Co., 21 Ohio Cir. Ct. 769, 11 Ohio Cir. Dec. 664; Arbuckle *v.* Woolson Spice Co., 21 Ohio Cir. Ct. 347, 11 Ohio Cir. Dec. 743.

26. Miller *v.* Cincinnati, 10 Ohio Dec. (Reprint) 423, 21 Cinc. L. Bul. 121.

27. Grants or licenses interfering with abutting owner see *infra*, XII, A, 8.

28. See cases cited *infra*, this section.

29. *Indiana.*— Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

New Jersey.— Traphagen *v.* Jersey City, 29 N. J. Eq. 206 [*affirmed* in 29 N. J. Eq. 650]. See Glasby *v.* Morris, 18 N. J. Eq. 72.

New York.— Kelsey *v.* King, 32 Barb. 410, 11 Abb. Pr. 180.

Ohio.— Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73.

Pennsylvania.— North Pennsylvania R. Co. *v.* Stone, 8 Am. L. Reg. 112.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1431.

30. Stoudinger *v.* Newark, 28 N. J. Eq. 446.

31. Kelsey *v.* King, 32 Barb. (N. Y.) 410, 11 Abb. Pr. 180.

32. Meyers *v.* Hudson County Electric Co., 63 N. J. L. 573, 44 Atl. 713 [*reversing* 60 N. J. L. 350, 37 Atl. 618]; Consumers' Gas, etc., Light Co. *v.* Congress Spring Co., 61 Hun (N. Y.) 133, 15 N. Y. Suppl. 624. *Contra*, Prentiss *v.* Cleveland Tel. Co., 1 Ohio S. & C. Pl. Dec. 97, 32 Cinc. L. Bul. 13.

33. Doe *v.* Jones, 11 Ala. 63. See also Gates *v.* Kansas City Bridge, etc., R. Co., 111 Mo. 28, 19 S. W. 957. But see Russel *v.* The Empire State, 21 Fed. Cas. No. 12,145, Newb. 541.

34. Memphis *v.* Wright, 6 Yerg. (Tenn.) 497, 27 Am. Dec. 489.

35. McDonald *v.* St. Paul, 82 Minn. 308, 84 N. W. 1022, 83 Am. St. Rep. 428.

36. Lackland *v.* North Missouri R. Co., 31 Mo. 180; Strader *v.* Cincinnati, 1 Handy (Ohio) 446, 12 Ohio Dec. (Reprint) 229. See also Kimball *v.* Kenosha, 4 Wis. 321.

37. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

Florida.— Lutterloh *v.* Cedar Keys, 15 Fla. 306.

Georgia.— Savannah *v.* Wilson, 49 Ga. 476; Columbus *v.* Jaques, 30 Ga. 506, holding that a city council has no power to obstruct streets by erecting buildings no matter how essential and important it may be to the benefit and welfare of the city.

Michigan.— Cooper *v.* Alden, Harr. 72.

New Jersey.— Atty.-Gen. *v.* Heishon, 18 N. J. Eq. 410.

38. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

or of access to abutting property,[39] nor erect a stand-pipe or water-tank.[40] So a municipality has no right to erect on a street a permanent structure not aiding public travel and which injuriously affects the beneficial enjoyment of his premises by an abutter.[41] Injunction is the proper remedy to prevent an improper use of the streets by the municipality.[42]

6. Care of Streets — a. In General.[43] Notwithstanding the irreconcilable difference of opinion as to municipal liability to private action for negligence in performance of its function as keeper of highways, all courts agree that the common law requires every municipal corporation to exercise reasonable care to make and keep its streets safe for all ordinary uses for which they are open to the public.[44] What is reasonable care is a question of fact dependent upon the character and situation of the street or alley, and the standard of repair for it and for the vicinity,[45] and must necessarily depend, within proper limits, largely upon the municipal discretion.[46] Being taken for streets, they must be made and kept suitable for their primary use as public highways,[47] even though subject to a superior servitude,[48] to the end that the public may enjoy its rights.[49]

b. Street Work by Inhabitants.[50] Generally a municipality may compel road

Florida.— Lutterloh *v.* Cedar Keys, 15 Fla. 306.

New Jersey.— Atwater *v.* Newark, 7 N. J. L. J. 176.

Ohio.— Hites *v.* Dayton, 8 Ohio Dec. (Reprint) 170, 6 Cinc. L. Bul. 142.

Pennsylvania.— Wartman *v.* Philadelphia, 33 Pa. St. 202; Harrisburg's Appeal, 7 Pa. Cas. 322, 10 Atl. 787. But see Denehey *v.* Harrisburg, 2 Pearson 330.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1431.

But see Henkel *v.* Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464.

39. Hites *v.* Dayton, 8 Ohio Dec. (Reprint) 170, 6 Cinc. L. Bul. 142.

40. Barrows *v.* Sycamore, 150 Ill. 588, 37 N. E. 1096, 41 Am. St. Rep. 400, 25 L. R. A. 535; Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515, holding that a city has no right to erect and maintain a water-tank or other permanent structure on a street which does not aid public travel, and which injuriously affects the beneficial enjoyment of the premises of an abutter, or his means of ingress or egress.

Waterworks.—A municipality cannot appropriate the street for the purpose of erecting waterworks. O'Neal *v.* Sherman, 77 Tex. 182, 14 S. W. 31, 19 Am. St. Rep. 743; Odneal *v.* Sherman, (Tex. Civ. App. 1894) 25 S. W. 57.

41. Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515.

42. Hites *v.* Dayton, 8 Ohio Dec. (Reprint) 170, 6 Cinc. L. Bul. 142; Harrisburg's Appeal, 7 Pa. Cas. 322, 10 Atl. 787; Com. *v.* Kepner, 1 Pearson (Pa.) 182.

43. Injuries from defects and obstructions see *infra*, XIV, D.

Care of trees see *supra*, XII, A, 4, c, (II).

Removal of ice and snow by abutters see *infra*, XII, A, 6, e.

Indictment for failure to keep in repair see *infra*, XVIII.

44. *Georgia.*— Massey *v.* Columbus, 75 Ga. 658.

Illinois.— Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883; Aurora *v.* Pulfer, 56 Ill. 270.

Indiana.—Indianapolis *v.* Cook, 99 Ind. 10.

Massachusetts.—Macomber *v.* Taunton, 100 Mass. 255; Alger *v.* Lowell, 3 Allen 402; Raymond *v.* Lowell, 6 Cush. 524, 53 Am. Dec. 57.

Minnesota.— Furnell *v.* St. Paul, 20 Minn. 117.

Missouri.— Jordan *v.* Hannibal, 87 Mo. 673; Blake *v.* St. Louis, 40 Mo. 569.

New York.— Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Hunt *v.* New York, 109 N. Y. 134, 16 N. E. 320; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; McCarthy *v.* Syracuse, 46 N. Y. 194.

Tennessee.— State *v.* Murfreesboro, 11 Humphr. 217; State *v.* Barksdale, 5 Humphr. 154.

Compare McGowan *v.* Windham, 25 Conn. 86.

And see *supra*, III, C, 2, c, (I).

A city has a right to erect a barrier across the entrance of a passageway which opens upon and is below the level of a street, if it is necessary to do so in order to make the street safe and convenient for travelers. Alger *v.* Lowell, 3 Allen (Mass.) 402.

45. See *infra*, XIV, D.

46. Leverich *v.* New York, 66 Barb. (N. Y.) 623. See also *infra*, XIV, D.

47. Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136.

48. Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693, holding that superior servitude must not be interfered with.

49. See Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528; McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

50. Right or duty of property-owner to make improvements in general see *infra*, XIII, A, 3, c.

By railroads see RAILROADS; STREET RAILROADS.

Compelling repair of sidewalks see *infra*, XIII, B, 14.

work by its inhabitants or the payment of money in lieu thereof;[51] and may provide for the imposition of a fine or imprisonment in case of default on the part of able-bodied male inhabitants.[52] Statutes or ordinances, in some jurisdictions, exempt certain persons because of age, bodily infirmity, or other reasons, from the duty to perform such labor.[53] And the propriety of requiring persons not able-bodied to perform street labor or pay money in lieu thereof in common with other citizens is a question of policy to be settled by the legislative department.[54] One who claims an exemption must prove his immunity.[55]

c. Cleaning Streets. Statutes are in force in some states regulating municipal contracts for street cleaning.[56] Generally, by statute or ordinance, the contract must be let to the lowest bidder after advertising for proposals.[57] The expense may be assessed on the abutting owners as a special benefit;[58] but the city is liable for the labor done by employees of its street inspector.[59]

d. Street Sprinkling. The sprinkling of streets, materially conducing to health and comfort, is an appropriate municipal function; but there is a considerable conflict of opinion as to whether the sprinkling is a "local improvement" so as to be chargeable upon the property by special assessment.[60] An ordinance requiring

51. Fox *v.* Rockford, 38 Ill. 451; Wapella *v.* Davis, 39 Ill. App. 592; *In re* Dassler, 35 Kan. 678, 12 Pac. 130. See also Moore *v.* Jonesboro, 107 Ga. 704, 33 S. E. 435. *Contra*, Galloway *v.* Tavares, 37 Fla. 58, 19 So. 170, holding that a provision that a city shall regulate the construction and repair of streets does not grant authority for the passage of an ordinance requiring citizens to labor on streets.

Involuntary servitude.— Such statutes and ordinances are not unconstitutional as being involuntary servitude imposed upon persons not convicted of crime. State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Validity of ordinance.— Where the charter authorized the council to require the citizens to work on the streets not exceeding ten days in each year, an ordinance is not void as delegating legislative power in not failing to fix the number of days that each man should work, but leaving that matter to the overseer of streets. So an ordinance imposing the duty only upon citizens between the ages of twenty-one and forty-five years is valid, although the charter gave the municipality authority to require all male citizens between the ages of twenty-one and fifty to work on the streets. Tipton *v.* Norman, 72 Mo. 380.

Municipalities to which statute applicable. — The act of Illinois of May 31, 1879, providing for labor in the streets and alleys of "all cities and villages" in the state, applies to those organized under special charters, and repeals the provisions of special charters inconsistent therewith. Wahl *v.* Nanvoo, 64 Ill. App. 17.

Defenses.— In a proceeding by a town against a resident for failure to work on the streets of the town when summoned, or to pay the commutation tax, that defendant paid the tax to his employer, who had a contract with the town whereby the town was to allow him the tax from a certain number of his employees in consideration of his keeping a certain street in repair, defendant being aware that the town had refused to be bound by the contract, is no defense. Morris *v.* Greenwood, 73 Miss. 430, 19 So. 105.

52. Tipton *v.* Norman, 72 Mo. 380; State *v.* Halifax, 15 N. C. 345; *Ex p.* Bowen, 34 Tex. Cr. 107, 29 S. W. 269 [*distinguishing Ex p.* Campbell, (Cr. App. 1893) 22 S. W. 1020; *Ex p.* Grace, 9 Tex. App. 381]. See also Cobb *v.* Dalton, 53 Ga. 426.

Conditions precedent.— Where the charter provided that any person required to work may relieve himself therefrom by paying not more than one dollar for each day of work required and imposes a penalty for failure to work and pay, the municipality must prescribe the sum which the citizen should pay not to exceed one dollar a day before any penalty could be imposed for default. Baader *v.* Cullman, 115 Ala. 539, 22 So. 19.

53. McBoyle *v.* Hanks, 46 N. C. 133; *Ex p.* Taylor, (Tex. Cr. App. 1896) 37 S. W. 422.

54. Macomb *v.* Twaddle, 4 Ill. App. 254.

55. Hill *v.* Birmingham, 73 Ala. 74.

56. McCafferty *v.* Steel, 12 Phila. (Pa.) 236; McKinley *v.* Philadelphia, 6 Phila. (Pa.) 123; City Sewage Utilization Co. *v.* Davis, 1 Leg. Gaz. (Pa.) 402.

Statute as mandatory.— The statute providing that "the Board of Supervisors are hereby authorized and empowered to have the streets of said city and county [of San Francisco] kept clean in the following manner," is not mandatory, as making it the absolute duty of the board to adopt the system which they are therein authorized to inaugurate. Weed *v.* Maynard, 52 Cal. 459.

57. State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114.

Construction of contract see Mott *v.* Utica, 96 N. Y. App. Div. 495, 89 N. Y. Suppl. 168.

58. See *infra*, XIII, E, 4, a.

59. Hecker *v.* New York, 18 Abb. Pr. (N. Y.) 369.

60. See *infra*, XIII, E, 4, b, (III).

Where the vote of a town appropriating money for watering streets contains an express reference to St. (1895) c. 186, authorizing such an appropriation, and states that the money is appropriated under that act,

street car companies to sprinkle so that no dust will be raised by a passing car is invalid where it requires sprinkling in all seasons and fixes an oppressive penalty for failure so to do.[61]

e. Removal of Ice and Snow. Ordinances requiring abutters under penalty to remove ice and snow from their sidewalks are held invalid in some jurisdictions,[62] while in others they are sustained.[63] Such provisions, where proper, may be confined to sidewalks of a certain class, although but a small part of the sidewalks in the municipality.[64] Where the statute authorizes a municipality to establish such rules and regulations as to the removal of snow and ice from the tracks of street railways as in their judgment the convenience of the public may require, the municipality may prohibit the removal of snow and ice from any part or the whole of the road, although such prohibition compels the temporary disuse of the tracks.[65]

7. Abutting Owners[66] — a. In General. An abutting owner has two distinct kinds of rights in the street — the public one which he enjoys in common with all citizens,[67] and private rights which arise from his ownership of contiguous property.[68] Among the private rights are the right of free and unimpeded ingress

the plain meaning of the vote is that the provisions of the act are to be applied in regard to the expenditure that is authorized, and, in the absence of anything limiting the amount of the assessment, the fair inference is that the whole cost is to be assessed on the estates which abut upon the streets that are watered. Phillips Academy *v.* Andover, 175 Mass. 118, 55 N. E. 841, 48 L. R. A. 550.

61. Chester Traction Co.'s Appeal, 40 Wkly. Notes Cas. (Pa.) 183. See also Street Railroads.

62. Chicago *v.* O'Brien, 111 Ill. 532, 53 Am. Rep. 640; Gridley *v.* Bloomington, 88 Ill. 554, 30 Am. Rep. 566; Chicago *v.* McDonald, 111 Ill. App. 436; State *v.* Jackman, (N. H. 1898) 41 Atl. 347, 42 L. R. A. 438. See also McGuire *v.* District of Columbia, 24 App. Cas. (D. C.) 22.

63. Com. *v.* Goddard, Thach. Cr. Cas. (Mass.) 420; Helena *v.* Kent, 32 Mont. 279, 80 Pac. 258; Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 19 Am. St. Rep. 490, 10 L. R. A. 178; Vandyke *v.* Cincinnati, 1 Disn. (Ohio) 532, 12 Ohio Dec. (Reprint) 778, holding that where a penalty is prescribed for non-performance of the duty, it does not subject the party to a civil action at the suit of a private owner. See also People *v.* Mattimore, 45 Hun (N. Y.) 448.

The duty may be imposed upon tenants as well as owners. Easthampton *v.* Hill, 162 Mass. 302, 38 N. E. 502; Com. *v.* Watson, 97 Mass. 562. Where the tenants of two tenement buildings agree with the owner to clear snow from the sidewalk, and no limits are fixed as to how much each shall attend to, the removal of one tenant does not impose upon the remaining one the duty of attending to the sidewalk in front of the tenement so vacated; the town by-law providing that if there be no tenant of premises it shall be the duty of the owner to clear the sidewalk. Easthampton *v.* Hill, *supra*.

Applicability to cross walks.— The walk in front of an alley way is a cross walk, and hence a city ordinance requiring persons to remove snow and ice from a sidewalk in front of premises owned or occupied by them within four hours after the fall thereon has no application thereto. Moran *v.* New York, 98 N. Y. App. Div. 301, 90 N. Y. Suppl. 596.

Real estate agents whose agency is restricted to the collection of rents of property or the soliciting and submission of offers to purchase are not within a statute requiring the owner, agent, or tenant of real estate to remove snow and ice from paved sidewalks in front of their property, and are therefore not liable to the penalties of that statute. Holtzman *v.* U. S., 14 App. Cas. (D. C.) 454.

64. Clinton *v.* Welch, 166 Mass. 133, 43 N. E. 1116.

A sidewalk is "flagged," within a penal ordinance, requiring the removal of snow from sidewalks except on streets in certain wards which have not been flagged, where it is covered with bluestone four feet in width, providing an adequate way for pedestrians, although the whole surface of the sidewalk is not covered. New York *v.* Brown, 27 Misc. (N. Y.) 218, 57 N. Y. Suppl. 742.

65. Union R. Co. *v.* Cambridge, 11 Allen (Mass.) 287.

66. **Title to fee of street** see *supra*, XII, A, 3, a.

Reversion of title on vacation of street see *supra*, XII, A, 3, b.

Grants or licenses by city interfering with right of abutting owner see *infra*, XII, A, 8.

Obstructions and encroachments in general see *infra*, XII, A, 9.

Liability for defects and obstructions see *infra*, XIV, D, 7.

Right to compensation for land taken, or property rights injured, in connection with municipal improvements, see Eminent Domain, 15 Cyc. 638 *et seq.* And see also *infra*, XIII, D.

67. Bailey *v.* Culver, 12 Mo. App. 175 [*affirmed* in 84 Mo. 531].

68. *Illinois.*— Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157.

Indiana.— Cummins *v.* Seymour, 79 Ind.

and egress to and from his property for himself and animals and goods;[69] an easement of light, air, and view of which he cannot be deprived by an encroachment upon the street;[70] and the right to have the street kept open and continued as a public street for the benefit of his contiguous property.[71] Even where the abut-

491, 41 Am. Rep. 618; Ross *v.* Thompson, 78 Ind. 90.

Minnesota.— Wilder *v.* De Cou, 26 Minn. 10, 1 N. W. 48.

Missouri.— Dries *v.* St. Joseph, 98 Mo. App. 611, 73 S. W. 723.

New York.— Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661; Drake *v.* Hudson R. Co., 7 Barb. 508.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1441.

Compare Kittle *v.* Pfeiffer, 22 Cal. 484; Breed *v.* Cunningham, 2 Cal. 361.

There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways. Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L. R. A. 602; Auerbach *v.* Cuyahoga Tel. Co., 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633.

The proprietors of town lots bounded on a dedicated street have a private right in the street distinct from the claim of the public, which even the legislature cannot take away, unless to appropriate to a public use and with compensation, and for an obstruction or injury of which such proprietors may have an action. Tate *v.* Ohio, etc., R. Co., 7 Ind. 479; Haynes *v.* Thomas, 7 Ind. 38; Indianapolis *v.* Croas, 7 Ind. 9.

Effect of transfer.—A conveyance of lots to a railway company "for railway purposes" is not to be construed as covenanting that the street on which the lots abut, to the center line thereof, may be used for such purposes, while it remains a street, so as to interfere with any easement constituting a private right of property which the grantor may have therein, appurtenant to other property abutting on the same street. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

The city of New York, although occupied by the Dutch, was always English territory; and hence the "Bowery," a street alleged to have been dedicated during the Dutch occupancy, is governed by the rules of the common law, and not by the civil law, as to the rights of abutting owners. Hine *v.* New York El. R. Co., 54 Hun 425, 7 N. Y. Suppl. 464; Mortimer *v.* New York El. R. Co., 57 N. Y. Super. Ct. 244, 6 N. Y. Suppl. 898; Kernochan *v.* New York El. R. Co., 8 N. Y. Suppl. 648 [*affirmed* in 59 N. Y. Super. Ct. 561, 13 N. Y. Suppl. 624].

Comparative rights.— The rights of the lot owners in an addition, on the plat of which the streets and alleys are indicated as dedicated to public use, are no greater than, nor different from, the rights of other lot owners on other streets of the city. Kinnear Mfg. Co. *v.* Beatty, 65 Ohio St. 264, 62 N. E. 341.

69. See *infra*, XII, A, 7, f.

70. *Alabama.*— Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

Illinois.— Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L. R. A. 406.

Maryland.— Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409.

New Jersey.— Dill *v.* Camden Bd. of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; Barnett *v.* Johnson, 15 N. J. Eq. 481.

United States.— New York El. R. Co. *v.* Fifth Nat. Bank, 135 U. S. 432, 10 S. Ct. 743, 34 L. ed. 231.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1441 *et seq.* See also EMINENT DOMAIN.

But see Jenks *v.* Williams, 115 Mass. 217. *Compare* Marshall *v.* Wenninger, 23 N. Y. App. Div. 275, 48 N. Y. Suppl. 229 [*affirmed* in 163 N. Y. 579, 57 N. E. 1117].

The occupants of a building abutting upon a sidewalk are entitled to have the light and air pass unobstructed across the open space between the surface of the sidewalk and the sky. John Anisfield Co. *v.* Grossman, 98 Ill. App. 180.

Extent of right of view.—An owner of property abutting on a street has a right of view, not only in front of his property, but as to the entire length of the street. Montgomery First Nat. Bank *v.* Tyson, 144 Ala. 457, 39 So. 560.

A structure connecting two buildings on opposite sides of a street, built so far above the street as not to interfere with traffic thereon, is a nuisance as to adjacent property-owners, whose light it obstructs. Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409.

The easement of view from every part of a public street, as well as that of light and air, belongs, as a valuable right, to one owning property abutting on the street. And an abutting owner, even where he owns the fee in the street, cannot interfere with the view of an adjacent owner by encroachments on the street. Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

71. Leech *v.* Waugh, 24 Ill. 228; Longworth *v.* Sedevic, 165 Mo. 221, 65 S. W. 260; Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Beatty *v.* Kinnear, 21 Ohio Cir. Ct. 384, 12 Ohio Cir. Dec. 68. See also *infra*, XIII, A, 2, c, (v).

Extent of right.— Purchasers of lots with reference to a plat showing certain streets are not limited to the portion in front of the lots purchased by them with reference to their right to have such streets kept open. In-

ting owner has no title to the land in the street, he has an easement therein.[72] An abutter's particular proprietary rights begin with those of the public when the street is opened to use.[73] On the other hand, to protect the public easement in streets and alleys, certain restrictions are necessarily imposed upon abutters. The general rule is that while they may use the street in any manner not inconsistent with the right of the public,[74] they cannot so use it as to interfere with the public easement,[75] or unreasonably interfere with the rights of an adjacent property-owner.[76] The right of the public to use the streets for purposes of travel

dianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

72. Carter *v.* New York El. R. Co., 14 N. Y. St. 859.

Extent of easement.— The abutter is entitled to an easement in the street to its full length, and not merely to that part of the street directly in front and between the lines of the lot. Healey *v.* Kelly, 24 R. I. 581, 54 Atl. 588.

73. *Illinois.*—Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370.

Indiana.— Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225.

Louisiana.— Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647.

New York.— Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724; People *v.* Moore, 50 Hun 356, 3 N. Y. Suppl. 159.

United States.— Hetzel *v.* Baltimore, etc., R. Co., 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648; Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1.

74. Adair *v.* Atlanta, 124 Ga. 288, 52 S. E. 739; Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906.

Where the abutting owner has title to the center of the street he may use such part of the street subject to the public easement, the same as other parts of his property. McCarthy *v.* Syracuse, 46 N. Y. 194; Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783.

Where the fee is in the municipality or in the county, it has been held that an abutting owner has no right to use the street or any portion thereof for any purpose except travel. Smith *v.* Leavenworth, 15 Kan. 81; Guthrie *v.* Nix, 5 Okla. 555, 49 Pac. 917.

In the absence of municipal regulation, lot owners may, for purposes of necessity, ornament, or convenience, partially obstruct a highway in a reasonable manner, so as not to prevent the use of the highway by the public. Com. *v.* West Newton First Nat. Bank, 207 Pa. St. 255, 56 Atl. 437.

In some jurisdictions statutes prohibit the use of streets except for such temporary purposes as the municipal authorities may grant. Bates *v.* Holbrook, 171 N. Y. 460, 64 N. E. 181 [*affirming* 67 N. Y. App. Div. 25, 73 N. Y. Suppl. 417], 171 N. Y. 688, 64 N. E. 753.

75. *Alabama.*— Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

Indiana.— Mordhurst *v.* Ft. Wayne, etc., Traction Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L. R. A. 105.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667.

Louisiana.— Dudley *v.* Tilton, 14 La. Ann. 283; Parish *v.* Municipality No. 2, 8 La. Ann. 145.

New York.— New York *v.* Kniekerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937; Drake *v.* Hudson R. Co., 7 Barb. 508.

Ohio.— *In re* Pavement, 5 Ohio S. & C. Pl. Dec. 573, 36 Cinc. L. Bul. 174.

Oklahoma.— Culbertson *v.* Alexander, 17 Okla. 370, 87 Pac. 863.

West Virginia.— McClellan *v.* Weston, 49 W. Va. 669, 39 S. E. 670, 55 L. R. A. 898.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1441 *et seq.*

The proprietor of a hotel who owns the fee to the middle of the street has no right to the exclusive use of the street next to the sidewalk for his private hacks and those of his guests. Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95.

Grant by abutters.— Property-owners abutting on a public street cannot by consent or lease grant to private individuals the right to occupy any portion of such street in such manner as substantially and permanently to obstruct travel thereon. Pagames *v.* Chicago, 111 Ill. App. 590.

Who may question.— Whether an abutter's use of a street in which he owns the fee impairs the right of the public is primarily a question for the corporate authorities granting him the privilege; and their discretion, if not abused, will not be controlled by injunction at suit of a citizen not owning property abutting on the street. Hanbury *v.* Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477. The appropriation, by custom or ordinance, of a street near a railroad freight house to the use of teams in loading and unloading merchandise is a proper public use of the street of which a mere trespasser cannot complain. General Electric R. Co. *v.* Chicago, etc., R. Co., 107 Fed. 771, 46 C. C. A. 629.

An abutter cannot close the street.— Griffiths *v.* Galindo, 86 Cal. 192, 24 Pac. 1025.

Collecting crowd.—An abutting owner is liable as for a nuisance, where he gives away refuse causing the street to be obstructed by teams remaining there for an unreasonable time to obtain a load, although the abutter is not the owner and has no control over such teams. People *v.* Cunningham, 1 Den. (N. Y.) 524, 43 Am. Dec. 709.

76. Culbertson *v.* Alexander, 17 Okla. 370, 87 Pac. 863.

and transportation is the paramount one and that of the abutter to occupy them for other purposes is a permissive and subordinate one.[77] Appropriation by a municipality of an easement in land abutting on the street does not divest the owner of his dominion over the property subject to the easement.[78]

b. Use of Sidewalk.[79] The sidewalk is a part of the street,[80] and an abutter has no more rights therein than in the roadway.[81] His right to use the sidewalk is limited to such use as will not obstruct its use by the public as a thoroughfare,[82] and must not only be reasonable and consistent with the rights of the public,[83] but must also not injure the property of an adjoining owner.[84] The use may be specifically regulated by reasonable ordinances.[85] And a by-law forbidding the use of more than a specified number of feet of sidewalk in any way is a license to the abutter for that width.[86]

c. Building Lines and Character of Buildings.[87] Building lines fixed by lawful authority must be observed by an abutting owner;[88] and, unless authorized by statute or ordinance, he cannot build beyond the street line.[89] The right to build up to the line is subject to the police power of the municipality,[90] under which a building line back from the street may for sufficient cause be established by reasonable ordinance on due notice.[91] The maximum height of buildings may also be fixed by statute or ordinance.[92] An ordinance prohibiting the use of barbed-wire fences on any street or alley has been held unreasonable as to an abutter whose fence was built back of the street line a considerable time before the passage of the ordinance.[93]

d. Structures and Projections Over Streets. A street, whether the fee is in

77. Brauer *v.* Baltimore Refrigerating, etc., Co., 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403.

78. Dodson *v.* Cincinnati, 34 Ohio St. 276.

79. See also *infra*, XII, A, 7, e, g.

80. See *supra*, XII, A, 1, c.

81. Hester *v.* Durham Traction Co., 138 N. C. 288, 50 S. E. 711, 1 L. R. A. N. S. 981.

82. Staples *v.* Dickson, 88 Me. 362, 34 Atl. 168; Jorgensen *v.* Squires, 144 N. Y. 280, 34 N. E. 373.

83. Hobart *v.* Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

84. Perry *v.* Castner, 130 Iowa 703, 107 N. W. 940.

85. Philadelphia *v.* Sheppard, 158 Pa. St. 347, 27 Atl. 972.

Construction of ordinance providing that no person shall obstruct any sidewalk so as to interfere with its convenient use and that everyone should keep around every flight of stairs descending from the sidewalk to the basement a fence or railing at least two feet high see Morrison *v.* McAvoy, (Cal. 1902) 70 Pac. 626.

Liability as between landlord and tenant see Morrison *v.* McAvoy, (Cal. 1902) 70 Pac. 626.

86. Philadelphia *v.* Sheppard, 158 Pa. St. 347, 27 Atl 972.

87. **Police regulations in general** see *supra*, XI, A, 7, b, (VIII), (B).

88. U. S. *v.* Cole, 7 Mackey (D. C.) 504; Philadelphia *v.* Clare, 17 Phila. (Pa.) 59; *In re* Chestnut St., 11 Phila. (Pa.) 411; Philadelphia *v.* Presbyterian Bd. of Publication, 9 Phila. (Pa.) 499; Times Pub. Co. *v.* Ladomus, 5 Wkly. Notes Cas. (Pa.) 33; Philadelphia *v.* Johnson, 2 Wkly. Notes Cas. (Pa.) 533; Horner *v.* Craig, 2 Wkly. Notes Cas. (Pa.) 11.

Adoption and alteration of line.— The street commissioner cannot merely by virtue of his office adopt by agreement with an owner the conventional line as the boundary of a street; but where a line has been recognized on the faith of former surveys as the true boundary by persons building on the street, it will not be altered upon the authority of a subsequent survey in an individual case. Vicksburg *v.* Marshall, 59 Miss. 563.

Establishment.— Where a building line on a certain street was established by a common council under authority of the charter, and no appeal was taken therefrom by any of the property-owners, but the same was recognized by the inhabitants as valid for ten years, a presumption arises that the line was properly established. State *v.* Hurley, 73 Conn. 536, 48 Atl. 215.

89. Philadelphia *v.* Clare, 17 Phila. (Pa.) 59.

90. See *supra*, XI, A, 7, b, (VIII), (B).

91. Byrnes *v.* Riverton, 64 N. J. L. 210, 44 Atl. 857, holding, however, that an ordinance establishing a street building line encroaching on private lands cannot be sustained if passed without notice, actual or constructive, to the owners of the land fronting on such street.

92. Williams *v.* Boston, 190 Mass. 541, 77 N. E. 509, holding that statute limiting height of buildings in a parkway does not limit height of buildings on parkway on which no building line had been established.

93. Mason City *v.* Barngrove, 26 Ill. App. 296.

the municipality or in the abutters, extends as far above the surface as the public use demands;[94] and the municipality, as trustee for the public, must protect that use,[95] and cannot surrender or grant to any private person the right to obstruct it,[96] although temporary and small encroachments are held to be properly permitted under certain restrictions, where authorized by, and not in conflict with, statutory or charter provisions.[97] It follows that an abutting owner cannot ordinarily erect and maintain permanent structures encroaching on the street, such as awnings, bay windows, stairways, porches, etc.[98] A by-law restricting such encroachments is in effect a license *pro tanto*.[99] But a license from the city, being a declaration of merely public right, is no protection to a licensee encroaching upon private rights of abutting or adjacent owners.[1] Nor does mere acquiescence, or lapse of time, confer a license.[2] Summary removal or demolition of mere encroachments cannot ordinarily be effected by ordinance.[3] Under these general rules

94. *Indiana.*— Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175; Grove *v.* Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262.

Massachusetts.— Jones *v.* Housatonic R. Co., 107 Mass. 261; Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Pedrick *v.* Bailey, 12 Gray 161.

Michigan.— Hawkins *v.* Sanders, 45 Mich. 491, 8 N. W. 98.

New Hampshire.— Garland *v.* Towne, 55 N. H. 55, 20 Am. Rep. 164.

New York.— Hume *v.* Mayor, 74 N. Y. 264.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1443.

95. Chicago *v.* Wright, 69 Ill. 318; North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318; Glasgow *v.* St. Louis, 87 Mo. 678; Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 85 N. Y. App. Div. 530, 83 N. Y. Suppl. 469 [*affirmed* in 176 N. Y. 408, 68 N. E. 864].

96. Jenks *v.* Williams, 115 Mass. 217; Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373. See also *infra*, XII, A, 8, a, (v).

97. Com. *v.* Goodnow, 117 Mass. 114; Hoey *v.* Gilroy, 129 N. Y. 132, 29 N. E. 85; Livingston *v.* Wolf, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936. See also Farnsworth *v.* Rockland, 83 Me. 508, 22 Atl. 394; Brigantine *v.* Holland Trust Co., (N. J. Ch. 1897) 37 Atl. 438; Henry *v.* Cincinnati, 25 Ohio Cir. Ct. 178; State *v.* Tooker, 9 Ohio Cir. Ct. 558, 6 Ohio Cir. Dec. 562; Philadelphia *v.* Presbyterian Bd. of Publication, 9 Phila. (Pa.) 499.

Construction.— An ordinance providing that steps projecting beyond line of street and descending into cellar, where "same shall be covered," shall be inclosed with rails, with gate or chains across entrance, does not apply where steps are covered with a set of doors. Schroeck *v.* Reiss, 46 N. Y. App. Div. 502, 61 N. Y. Suppl. 1054.

98. See *infra*, XII, A, 9, c.

99. Livingston *v.* Wolfe, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936.

Placing restrictions on the construction of encroaching or overhanging structures impliedly authorizes the erection thereof if legal prohibitions are respected. Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299.

1. *California.*— Southern Pac. R. Co. *v.* Reed, 41 Cal. 256.

Connecticut.— Imlay *v.* Union Branch R. Co., 26 Conn. 249, 68 Am. Dec. 392.

Georgia.— South Carolina R. Co. *v.* Steiner, 44 Ga. 546.

Illinois.—Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624.

Iowa.— Enos *v.* Chicago, etc., R. Co., 78 Iowa 28, 42 N. W. 575.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

Minnesota.—Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L. R. A. 493.

New York.— Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651.

Wisconsin.— Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1443.

The right of abutters to unobstructed light and air across the open space between the sidewalk and the sky cannot be abridged by an ordinance authorizing a private company to construct and maintain a bay window in connection with its building extending along the front and in width a distance of eighteen inches over the sidewalk adjoining such building. John Anisfield Co. *v.* Grossman, 98 Ill. App. 180.

The municipality has no power to authorize a stairway or other projection into the street or alley to the detriment of the traveling public or to the permanent injury to the rights of other abutting owners. Pettis *v.* Johnson, 56 Ind. 139.

2. McCormick *v.* South Park Com'rs, 150 Ill. 516, 37 N. E. 1075; Broadbelt *v.* Loew, 15 N. Y. App. Div. 343, 44 N. Y. Suppl. 159 [*affirmed* in 162 N. Y. 642, 57 N. E. 1105].

Where the true line of building conforms strictly to the line of the street, but the ornamental parts encroach on the street, an injunction will not be granted to restrain such building, especially where this has been the custom for years, and councils have not legislated on the subject. Philadelphia *v.* Presbyterian Bd. of Publication, 9 Phila. (Pa.) 499.

3. Cushing *v.* Boston, 128 Mass. 330, 35 Am. Rep. 383, holding that the city has no power to prohibit maintenance of doorsteps within the limits of a highway where such doorsteps are lawfully there.

ordinances authorizing,[4] or regulating,[5] awnings, or prohibiting the erection of signs or awning sheds across the whole or any portion of sidewalks;[6] or permitting,[7] prohibiting,[8] or regulating,[9] bay, bulk, and oriel windows; or permitting projecting stoops or verandas,[10] have been held valid. An ordinance forbidding the hanging out of goods, wares, and merchandise has been held not to apply to a temporary scaffold a considerable distance back from the street.[11]

e. Excavations, Vaults, and Other Substructures. Ordinarily excavations, vaults, cellar ways, areas, and the like are an obstruction and a nuisance,[12] and the municipality has no authority to license such use.[13] The authority to construct vaults under sidewalks, or to make openings therein for a cellar way, or to include an area within the line of a street, is not an incident of ownership of the adjacent premises, or implied from such ownership, however convenient or even necessary the exercise of such an authority may be to their full enjoyment.[14] An abutting owner has no special rights below the surface in streets the fee of which is held by the municipality.[15] But there are cases where such a use of the street by an abutter is held proper where he owns the fee of the street and the use does not interfere in any way with travel upon the roadway or sidewalk.[16] Where,

But an ordinance revoking a license authorizing awnings over a sidewalk, where they have existed for many years, is *prima facie* valid. Augusta *v.* Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340.

4. Hoey *v.* Gilroy, 129 N. Y. 132, 29 N. E. 85 [*reversing* 14 N. Y. Suppl. 159].

An application for a permit to erect in a street an awning with an iron frame and covered with iron and luxfer prisms is not within an ordinance authorizing the inspector of buildings to grant a permit to erect an awning covered with wood, iron, tin, or canvass. Preston *v.* Likes, 103 Md. 191, 62 Atl. 1024.

5. Pedrick *v.* Bailey, 12 Gray (Mass.) 161, holding that an ordinance forbidding awnings except with the consent of particular officers was reasonable.

6. Ivins *v.* Trenton, 68 N. J. L. 501, 53 Atl. 202 [*affirmed* in 69 N. J. L. 451, 55 Atl. 1132].

7. Broadbelt *v.* Loew, 15 N. Y. App. Div. 343, 44 N. Y. Suppl. 159 [*affirmed* in 162 N. Y. 642, 57 N. E. 1105].

Projection of bay windows.— The board of aldermen of the city of New York had no power to pass General Ordinance 1303, authorizing the projection of bay windows attached to buildings beyond the "set-back" line, in violation of an agreement of property-owners establishing such line for the purpose of widening the sidewalk and street. Williams *v.* Robert M. Silverman Realty, etc., Co., 111 N. Y. App. Div. 679, 97 N. Y. Suppl. 945.

8. Com. *v.* Goodnow, 117 Mass. 114.

Reasonableness.—Prohibiting the construction of any jut or bulk window projecting into the street more than twenty-eight inches has been held reasonable. Livingston *v.* Wolf, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936.

Construction.— Prohibiting the erection of bulk or bay windows extending beyond a fixed front line has been held not to apply to an oriel window projecting from the side of a house several feet above the sidewalk. Hess *v.* Lancaster, 4 Pa. Dist. 737.

9. Livingston *v.* Wolf, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936.

10. Broadbelt *v.* Loew, 15 N. Y. App. Div. 343, 44 N. Y. Suppl. 159 [*affirmed* in 162 N. Y. 642, 57 N. E. 1105]. But see Caldwell *v.* Galt, 27 Ont. App. 162, holding that the town council has no power to permit the erection of a veranda projecting over a street.

Construction.— A by-law of a town, permitting the proprietor of a hotel to complete a veranda with wood, does not authorize the completion of a veranda which projects some distance over one of the streets of the town. Caldwell *v.* Galt, 27 Ont. App. 162.

11. Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

12. See *infra*, XII, A, 9, c.

13. See *infra*, XII, A, 8, a, (v).

14. Jorgensen *v.* Squires, 144 N. Y. 280, 39 N. E. 373.

15. Gregsten *v.* Chicago, 40 Ill. App. 607 [*reversed* on other grounds in 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496].

16. Farnsworth *v.* Rockland, 83 Me. 508, 22 Atl. 394; Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423; Gorden *v.* Peltzer, 56 Mo. App. 599; Babbage *v.* Powers, 4 Silv. Sup. (N. Y.) 211, 7 N. Y. Suppl. 306 [*affirmed* in 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398], holding, where an excavation under a sidewalk in a city is made by the owner of the abutting premises, and the excavation is covered with flagstones, with the consent of the municipal authorities, the owner is not guilty of maintaining a nuisance so long as the space is securely covered. See also Fisher *v.* Thirkell, 21 Mich. 1, 4 Am. Rep. 422, holding that excavations properly constructed under the public streets in cities for the convenience of the owners of adjoining premises are not nuisances, if kept in repair, where the use of the street is not interrupted for an unreasonable time.

Liability for injury to city.— One who, by excavating beneath the sidewalk opposite to his lot, injures a cistern under the public highway, cannot be held liable in an action by the city to recover damages. Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

by legislative authority, such use may be granted by the municipality,[17] the municipality may impose reasonable conditions and forbid such excavations or occupation until such conditions are fully complied with.[18] An abutting owner cannot, by mere user, acquire a vested right therein against the public;[19] but the lapse of time may raise a presumption of a license,[20] which, however, may be rebutted by proof.[21] Where a company holding a franchise injures the authorized underground construction of an abutting owner, the company is ordinarily liable in damages.[22] Of course prohibiting construction and excavation except under certain conditions impliedly authorizes the construction where not in violation of such ordinance.[23]

17. Jorgensen *v.* Squires, 144 N. Y. 280, 39 N. E. 373 [*affirming* 21 N. Y. Suppl. 383].

Exclusive use.—One who, on being required to drain his lot, lays a sewer along the street with the permission of the municipality, has a right to the exclusive use of the sewer, and other property-owners have no right to make connections therewith. Carroll *v.* Connor, 93 N. Y. Suppl. 1077.

Repairs.— Where an abutter has obtained a permit to construct a vault under a sidewalk, he has the right to repair it without an additional permit or further compensation, provided its continuance will not affect the use of the street by the public. Deshong *v.* New York, 176 N. Y. 475, 68 N. E. 880 [*affirming* 74 N. Y. App. Div. 234, 77 N. Y. Suppl. 563].

18. Davis *v.* Clinton, 50 Iowa 585. See also New York *v.* Beuk, 43 Misc. (N. Y.) 663, 88 N. Y. Suppl. 180, holding that an opening under a lawful stoop was not a vault or cistern within an ordinance providing that no person shall cause any vault or cistern in any street to be constructed without the written permission of the commissioner.

Assessments.— An ordinance directing that applicants should be assessed a certain amount for the privilege of building vaults in front of their dwellings is not within police powers of a municipality nor within the charter provisions authorizing the regulation of the building of vaults. Benson *v.* Hoboken, 33 N. J. L. 280.

License.— A coal hole in a sidewalk, unless licensed, is a nuisance. Clifford *v.* Dam, 44 N. Y. Super. Ct. 391 [*affirmed* in 81 N. Y. 52].

Construction of ordinance.— Ordinances requiring depressions and excavations within a city which are below the natural or artificial grades of the surrounding or adjacent streets to be filled or fenced, and prescribing penalties for failure to comply with other requirements, apply only to places that are in such close proximity to the highway as to endanger the safety of travelers thereon. A municipal ordinance requiring persons making, or causing to be made, excavations in or adjoining any street, alley, or public place to fence them does not apply to one who purchases property with excavations already upon it. Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755.

Duty of abutter.— A person constructing and maintaining an area in front of a building in accordance with an ordinance authorizing the construction of areas under certain prescribed conditions is under an obligation to use reasonable care to provide against accidents to persons using the street, and this duty requires not only that the area be properly constructed in the first instance, but that it be inspected and repaired. Devine *v.* National Wall Paper Co., 95 N. Y. App. Div. 194, 88 N. Y. Suppl. 704 [*affirmed* in 182 N. Y. 565, 75 N. E. 1127].

19. Patten *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 306.

Revocable license.— One, by constructing a vault into a street, and maintaining it without a permit, when ordinances require one, acquires, against the public, only a revocable license. Deshong *v.* New York, 74 N. Y. App. Div. 234, 77 N. Y. Suppl. 563 [*affirmed* in 176 N. Y. 475, 68 N. E. 880].

20. Deshong *v.* New York, 176 N. Y. 475, 68 N. E. 880 [*affirming* 74 N. Y. App. Div. 234, 77 N. Y. Suppl 563], holding that the presumption that a vault under a sidewalk was constructed with the assent of the public authorities arises where the vault has existed for more than twenty years without objection, both as between the owner and a third person, and also as between the owner and the municipality, if there is no proof to overcome it.

Length of time.— The consent of a city to the construction of a vault under the sidewalk in front of a business block may be inferred from the acquiescence for nine years of the public officers in charge of the streets. Babbage *v.* Powers, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398.

21. Deshong *v.* New York, 176 N. Y. 475, 68 N. E. 880 [*affirming* 74 N. Y. App. Div. 234, 77 N. Y. Suppl. 563], holding that any presumption of a permit from construction of a vault into a street, when the ordinances permitted it only on a written permit after a written application, is overcome by the records of the departments authorized to issue permits failing to show such permit.

22. Kankakee Water Works Co. *v.* Irwin, 56 Ill. App. 510. But see Wright *v.* Woodcock, 86 Me. 113, 29 Atl. 953, 25 L. R. A. 499, holding that a water company authorized to lay its pipes in a street is not liable because a pipe under a sidewalk prevents plaintiff from building steps leading to his cellar.

23. Jorgensen *v.* Squires, 144 N. Y. 280,

f. Access to Roadway. Abutting owners have an indefeasible right of access to and from their property to the street.[24] This right is held subject only to the power of eminent domain.[25] But this right extends no further than until the street upon which the property abuts reaches some other connecting street or

39 N. E. 373 [*affirming* 21 N. Y. Suppl. 383]; Devine *v.* National Wall Paper Co., 95 N. Y. App. Div. 194, 88 N. Y. Suppl. 704 [*affirmed* in 182 N. Y. 565, 75 N. E. 1127].

24. *Colorado.*— Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Illinois.— Chicago *v.* Union Bldg. Assoc., 102 Ill. 379, 40 Am. Rep. 598.

Indiana.— Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Indianapolis *v.* Croas, 7 Ind. 9.

Kansas.— Highbarger *v.* Milford, 71 Kan. 331, 80 Pac. 633; Smith *v.* Leavenworth, 15 Kan. 81.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667; Transylvania University *v.* Lexington, 3 B. Mon. 25, 38 Am. Dec. 173.

Missouri.— Lackland *v.* North Missouri R. Co., 31 Mo. 180; Dries *v.* St. Joseph, 98 Mo. App. 611, 73 S. W. 723.

New York.— Fanning *v.* Osborne, 34 Hun 121 [*reversed* on other grounds in 102 N. Y. 441, 7 N. E. 307]; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80.

North Carolina.— Hester *v.* Durham Traction Co., 138 N. C. 288, 50 S. E. 711, 1 L. R. A. N. S. 981, holding right of egress and ingress not damaged by street car curve near curb.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1445.

The closing of an unimproved street, which is impassable for vehicles, so as to compel an abutting landowner to take a circuitous route to reach his premises, is actionable. Sheedy *v.* Union Press Brick Works, 25 Mo. App. 527.

Dumping slag causing circuitous travel.— The owner of property abutting on a street, who is compelled by reason of the dumping of slag in the street to take a circuitous route along other streets in traveling between his property, is entitled to injunctive relief as suffering special damages from a public nuisance. Sloss-Sheffield Steel, etc., Co. *v.* Johnson, 147 Ala. 384, 41 So. 907, 8 L. R. A. N. S. 226.

To entitle a lessee of property bounded on a street to recover for obstruction of the street, his lease need not extend to the middle of the street. All that is required is his right to have the street kept open and unobstructed to afford means of access to his building and the enjoyment of light and air from the unobstructed street. Newman *v.* Metropolitan El. R. Co., 10 N. Y. St. 12.

Streets included.— Where one purchased a plotted parcel of land bounded by laid out and dedicated streets, such streets as he obtains the right to the use of are those which bound the block in which the land is situated, or such as furnish access to the same from either direction. Highbarger *v.* Milford, 71 Kan. 331, 80 Pac. 633.

Closing street.— Purchasers of lots sold with reference to a plat showing certain streets are not entitled to enjoin the closing of streets by the owner of the land, in the absence of a showing that they would be specially injured by such action. Thorpe *v.* Clanton, (Ariz. 1906) 85 Pac. 1061. So a property-owner on a street or alley, a portion of which, other than the part on which he abuts, is vacated by the city council, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access to his property by other streets and alleys, although the distance he may have to travel in some directions may be greater than before the vacation. Kinnear Mfg. Co. *v.* Beatty, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600.

Grants to railroad company.— As against an objecting abutter, a city cannot grant to a railroad company the right to lay its tracks in an alley twenty feet wide, and stand cars thereon for twelve hours at a time, for the convenience of the other abutters, since it would unreasonably interfere with the use of the alley by the public in general, and with the right of access of the objecting abutter. Corby *v.* Chicago, etc., R. Co., 150 Mo. 457, 52 S. W. 282.

Duty of municipality to construct approaches.— This right of access does not, however, require municipalities to construct approaches from the houses or lots of the abutters to the traveled part of the street or to grade the street up to the lines of the abutting property. Atty.-Gen. *v.* Boston, 186 Mass. 209, 71 N. E. 574; Metcalf *v.* Boston, 158 Mass. 284, 33 N. E. 586.

An abutter has no right to use the sidewalk to show or store his goods so as to deprive an adjoining owner of light, air, and access. Lavery *v.* Hannigan, 52 N. Y. Super. Ct. 463.

The use of a sidewalk by the owner of a lot for purposes of communicating with the street is equally legitimate, and equally an ordinary use, as that of passing longitudinally along it. Schindler *v.* Schroth, 146 Cal. 433, 80 Pac. 624.

The municipality has no right to obstruct such right of access.— Stack *v.* East St. Louis, 85 Ill. 377, 28 Am. Rep. 619.

A city is liable for injury to abutting property caused by making an excavation in a street, and leaving the street in that condition for an unreasonable time, whereby water is caused to accumulate so as to deprive the owner of access to his premises. Louisville *v.* Seibert, 51 S. W. 310, 21 Ky. L. Rep. 328.

25. Highbarger *v.* Milford, 71 Kan. 331, 80

way.[26] And the special right to use the street does not ordinarily include a right to obstruct the highway.[27] For instance, an abutter has no right to store property that is likely to frighten horses between the sidewalk and the gutter.[28] So the abutting owner has no right, as against a street car company, to interfere with the use of the street, by allowing teams to stand transversely on the street while discharging goods.[29] And the proprietor of a hotel has no more right to use the street fronting his house as a carriage stand for hire than a hackman.[30]

g. Temporary Use of Roadway and Sidewalk From Necessity. The courts have repeatedly recognized the rights of the owners of land abutting on a street to encroach upon the primary right of the public to a limited extent and for a temporary purpose.[31] In order to justify the encroachment by one in possession of land abutting upon the street, such encroachment must be reasonably necessary and it must not unreasonably interfere with the rights of the public.[32] For example, the right to temporarily use a part of the street for building operations is sustained on the ground of reasonable necessity, irrespective of ownership of the fee in the street;[33] and the extent of the necessity[34] and what is a reasonable time[35] is to be determined by the circumstances of each case, in the absence of municipal regulations.[36] So he may temporarily use the sidewalk, even to the

Pac. 633; Branahan *v.* Cincinnati Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457.

26. Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 674, 7 Ohio N. P. 640.

27. Rutter *v.* Fidler, 11 Pa. St. 181.

28. Stewart *v.* Porter Mfg. Co., 13 N. Y. St. 220.

29. Hobart *v.* Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

30. Odell *v.* Bretney, 38 Misc. (N. Y.) 603, 78 N. Y. Suppl. 67.

31. Gassenheimer *v.* District of Columbia, 25 App. Cas. (D. C.) 179.

32. Gassenheimer *v.* District of Columbia, 25 App. Cas. (D. C.) 179; Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

Question of fact.— Whether an obstruction in the street is necessary and reasonable is generally a question of fact. Gassenheimer *v.* District of Columbia, 25 App. Cas. (D. C.) 179; Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

33. *Indiana.*— Wood *v.* Mears, 12 Ind. 515, 74 Am. Dec. 222.

Missouri.— Hesselbach *v.* St. Louis, 179 Mo. 505, 78 S. W. 1009.

New Jersey.— Friedman *v.* Snare, etc., Co., 71 N. J. L. 605, 61 Atl. 401, 108 Am. St. Rep. 764, 70 L. R. A. 147.

New York.— Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

Oklahoma.— Culbertson *v.* Alexander, 17 Okla. 370, 87 Pac. 863.

Wisconsin.— Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

An excavation for an area extending to a reasonable distance into the street in front of a lot upon which the owner is about to erect a house, if properly guarded and not continued for an unreasonable length of time, is not a nuisance and no license from the city authorities is requisite to legalize it. Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

Municipal permission.— Especially is such a use proper where with the consent of the proper public authorities. Malkan *v.* Carlin, 93 N. Y. Suppl. 378. In order to justify the placing of business materials in a public street under an ordinance permitting a party to use part of a street adjacent and opposite to his premises for the purpose of placing building materials thereon, whenever such use should be necessary during the continuous construction of a building on his premises, it must appear that the material occupied no greater part of the street than allowed by the ordinance, and that such materials were so placed when such use of the street was necessary during the continuous construction of the building. Martin *v.* Chicago, etc., R. Co., 87 Ill. App. 208.

Negligence and unreasonable delay.—Where earth excavated from the building site and deposited in an adjoining street to be subsequently removed is dangerously extended or insufficiently guarded or allowed to remain in the street for an unreasonable time, it becomes as much a nuisance as if originally placed there without color of right. Hundhausen *v.* Bond, 36 Wis. 29.

34. Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

35. Hesselbach *v.* St. Louis, 179 Mo. 505, 78 S. W. 1009.

36. McCarthy *v.* Chicago, 53 Ill. 38 (holding that inasmuch as the obstruction of streets with building material and the sinking of deep pits in the sidewalk for the purpose of erecting houses are always attended with inconvenience to the public and are usually not free from danger, the municipality has the power to regulate and control the use for such purposes); Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643; Hundhausen *v.* Bond, 36 Wis. 29 (holding that a charter provision prohibiting the placing in the street, without permission, materials for buildings, does not apply to earth excavated for the pur-

inconvenience of pedestrians, in the necessary transporting of goods from curbing to warehouse or store;[37] but he cannot so obstruct the sidewalk several hours each day.[38] So it has been held that an abutter cannot continuously obstruct the walk by teams and wagons in loading and unloading goods, notwithstanding trucks cannot be backed at right angles to the walk because of the street cars.[39] An innkeeper has a right to keep his carriages for the use of his guests only, in the adjoining street, in reasonable number and in a reasonable manner subject to immediate call, when so to keep them is a necessity of his business.[40]

h. Remedies. An abutting owner may sue in his own name for any unlawful obstruction or abuse of the street which injures his property by reducing its value or obstructing access thereto.[41] This includes the right to sue to abate or enjoin the obstruction where he is specially injured thereby,[42] as well as an action to recover damages.[43] So an abutter may sue for damages for injury to his sidewalk.[44] And the owner of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same.[45] If the owner of the fee of the street, he may sue for an injury to or

pose of preparing a lot for the erection of a building thereon and placed in an adjoining street for removal elsewhere).

37. Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Welsh *v.* Wilson, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698; Hand *v.* Klinker, 54 N. Y. Super. Ct. 433; Gates, etc., Co. *v.* Richmond, 103 Va. 702, 49 S. E. 965. *Compare* Rex *v.* Russell, 6 East 420, 2 Smith K. B. 424, 8 Rev. Rep. 506.

38. Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Atty.-Gen. *v.* Brighton, etc., Supply Assoc., [1900] 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. Rep. N. S. 762, 48 Wkly. Rep. 314.

39. Richardson *v.* Barstow Stove Co., 11 N. Y. Suppl. 935, 26 Abb. N. Cas. 150 [*affirmed* in 13 N. Y. Suppl. 358].

40. Willard Hotel Co. *v.* District of Columbia, 23 App. Cas. (D. C.) 272.

41. *California.*— McLean *v.* Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085.

Iowa.— Cain *v.* Chicago, etc., R. Co., 54 Iowa 255, 3 N. W. 736, 6 N. W. 268.

Minnesota.— Kaje *v.* Chicago, etc., R. Co., 57 Minn. 422, 59 N. W. 493, 47 Am. St. Rep. 627; Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41, 11 N. W. 124; Wilder *v.* De Cou, 26 Minn. 10, 1 N. W. 48.

New Jersey.—Runyon *v.* Bordine, 14 N. J. L. 472; Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 [*reversed* in mem. 19 N. J. Eq. 575].

West Virginia.— Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275.

United States.— Pennsylvania Co. *v.* Donovan, 116 Fed. 907 [*affirmed* in 124 Fed. 1016, 60 C. C. A. 168].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1447.

But where the other abutters on the street suffer equally in kind with an abutting owner no action lies because no special damage results to him therefrom. Hogan *v.* Central Pac. R. Co., 71 Cal. 83, 11 Pac. 876; McDonald *v.* English, 85 Ill. 232; State *v.* Omaha, 14 Nebr. 265, 15 N. W. 210, 45 Am. St. Rep. 108. See also *infra*, XII, A, 9, f, g.

Remedy against municipality.— Where a municipal corporation having exclusive control of its streets constructs a sewer in front of an individual's lot, which renders access thereto difficult and dangerous, he cannot fill up the sewer, although it is improperly constructed, as his remedy is by action against the city for damages. McGregor *v.* Boyle, 34 Iowa 268.

A person in possession, although not the owner, may sue for personal annoyance from a nuisance in the unlawful use of the street on which the property abuts. Hopkins *v.* Baltimore, etc., R. Co., 6 Mackey (D. C.) 311.

Right to have vehicles stop.— The right which the owner of a lot fronting on a street has to have vehicles stop in front of the lot and stand there for the time necessary for the letting out and taking in of persons or goods is a right in that part of the street different from the right of the public, and any encroachment of the street opposite his premises which abrogates that right or takes it away is an injury for which he may have redress by suit in his own name. Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 [*reversed* in mem. 19 N. J. Eq. 575].

42. See *infra*, XII, A, 9, f, (III), (B), (2).

43. See *infra*, XII, A, 9, g.

44. Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724.

Injury to sidewalk and arches.— A lot owner can maintain an action against one who negligently injures the sidewalk in a public street in front of his premises, and the foundation arches built over an area way thereunder, maintained by him as an appurtenance to his premises, and extending under the street by consent of the municipality, where he is primarily liable for its construction and maintenance. Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724.

45. Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; French *v.* Robb, 67 N. J. L. 260, 51 Atl. 509, 91 Am. St. Rep. 433, 57 L. R. A. 956; Redfield *r.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54; Northern Pac. R. Co. *v.* Lake, 10 N. D. 541, 88 N. W. 461.

removal of the soil, vegetation, minerals, and rock.[46] So trees on a public street become a part of the land on which they are planted and the abutter may recover damages for injuries thereto,[47] even though his title does not include any part of the street.[48] No action can be maintained where the way obstructed has not been actually opened for use by the public as a street.[49]

8. Grants of Rights to Use Streets[50] — **a. Power** — (i) *In General.* The legislature has power to authorize structures in the street for business conveniences that, in the absence of such authority, would be considered obstructions,[51] and may directly exercise the power,[52] or may delegate such power to the municipality,[53] or to a particular municipal board or officer.[54] A municipality, however, has no inherent power to grant privileges in its streets, but any power which it exercises must be derived from the legislature either expressly or by fair or necessary implication.[55] A grant by a municipality without legislative authority

Grant of right to use.— But the owner of the soil in a public street cannot maintain ejectment against a public service corporation occupying the street within the limits of the public right. French *v* Robb, 67 N. J. L. 260, 51 Atl. 509, 91 Am. St. Rep. 433, 57 L. R. A. 956.

46. Woodruff *v.* Neal, 28 Conn. 165; Overman *v.* May, 35 Iowa 89; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358; Clark *v.* Dasso, 34 Mich. 86.

47. L'Hussier *v.* Brosseau, 20 Quebec Super. Ct. 170.

48. Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300; Donahue *v.* Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 90 L. R. A. 761 [*affirming* 90 N. Y. App. Div. 386, 85 N. Y. Suppl. 478]; Osborne *v.* Auburn Tel. Co., 111 N. Y. App. Div. 702, 97 N. Y. Suppl. 874 [*reversed* on other grounds in 189 N. Y. 393, 82 N. E. 428]; Lovejoy *v.* Campbell, 16 S. D. 231, 92 N. W. 24.

Where a gas company allowed gas to escape after notice, thereby destroying shade trees in front of the lot of an abutting owner, although the city might have a right of action for their destruction, it did not affect the right of the abutting owner to recover, as the damages were distinct; the cause of action of the owner being limited to his special rights, and the cause of action of the city to its general rights. Donahue *v.* Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 70 L. R. A. 761 [*affirming* 90 N. Y. App. Div. 386, 85 N. Y. Suppl. 478].

49. George *v.* North Pac. Transp. Co., 50 Cal. 589.

50. See also Electricity, 15 Cyc. 469; Gas, 20 Cyc. 1155; Railroads; Street Railroads; Telegraphs and Telephones; Waters.

New use of street as constituting additional servitude for which abutting owner must be compensated see Eminent Domain, 15 Cyc. 670.

Constitutionality of provisions see Constitutional Law, 8 Cyc. 902, 947, 1103.

51. Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438; Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99. See also *supra*, IV, D.

Power of legislature to grant use of streets to gas company see Gas, 20 Cyc. 1155.

52. Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438. See also *supra*, IV, D.

53. *California.*—Sinton *v.* Ashbury, 41 Cal. 525.

Louisiana.— Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438.

Ohio.— Kumler *v.* Silsbee, 38 Ohio St. 445.

Pennsylvania.— Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99.

Washington.— State *v.* Spokane, 24 Wash. 53, 63 Pac. 1116.

United States.— City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114; Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336; Barns *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Knoxville *v.* Africa, 77 Fed. 501, 23 C. C. A. 252.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1459.

54. See *infra*, XII, A, 8, a, (II).

55. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740.

Colorado.— Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

Florida.— Florida Cent., etc., R. Co. *v.* Ocala St., etc., R. Co., 39 Fla. 306, 22 So. 692.

Georgia.— Kavanagh *v.* Mobile, etc., R. Co., 78 Ga. 271, 2 S. E. 636.

Illinois.— People *v.* Chicago, Tel. Co., 220 Ill. 238, 77 N. E. 245.

Indiana.— New Castle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516.

Maryland.— Purnell *v.* McLane, 98 Md. 589, 56 Atl. 830.

New Jersey.— State *v.* Newark, 54 N. J. L. 102, 23 Atl. 284; State *v.* Trenton, 54 N. J. L. 92, 23 Atl. 281.

New York.— Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Rhinehart *v.* Redfield, 93 N. Y. App. Div. 410, 87 N. Y. Suppl. 789 [*affirmed* in 179 N. Y. 569, 72 N. E. 1150]; Milhau *v.* Sharp, 17 Barb. 435; Matter of Fiegle, 36 Misc. 27, 72 N. Y. Suppl. 438.

Ohio.—Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215.

Pennsylvania.— Oglevee *v.* Quaker City

is void.[56] Where power has been delegated, the municipality may authorize a use of the street not inconsistent with the right of the public or abutting owners,[57]

Electric R. Co., (1894) 29 Atl. 111; Potts *v.* Quaker City El. R. Co., 161 Pa. St. 396, 29 Atl. 108; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Wisconsin.— Allen *v.* Clausen, 114 Wis. 244, 90 N. W. 181; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1459.

Railroads.— Denver Circle R. Co. *v.* Bigler, 10 Colo. 428, 15 Pac. 726; Denver Circle R. Co. *v.* Clark, 10 Colo. 427, 15 Pac. 726; Denver Circle R. Co. *v.* Wiggins, 10 Colo. 426, 15 Pac. 726; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Daly *v.* Georgia, etc., R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286 [*followed* in Davis *v.* East Tennessee, etc., R. Co., 87 Ga. 605, 13 S. E. 567]; Ruttle *v.* Covington, 10 S. W. 644, 10 Ky. L. Rep. 766; People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471. Power of a municipality to lay out, establish, alter, and open streets, etc., does not include converting a street or part of it into a railway. Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186. An ordinance granting a railroad company the right to use a street for switch or sidewalk purposes or depot stations is void. Stevenson *v.* Missouri Pac. R. Co., (Mo. 1895) 31 S. W. 793.

Street railroads.— Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673; Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562; Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215; People's Pass. R. Co. *v.* Memphis, (Tenn. 1875) 16 S. W. 973; Allen *v.* Clausen, 114 Wis. 244, 90 N. W. 181.

Gas pipes.— Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242; Ransberry *v.* Keller, 9 Pa. Co. Ct. 299.

Poles and wires.— Domestic Tel. Co. *v.* Newark, 49 N. J. L. 344, 8 Atl. 128 (telegraph poles); Brush Electric Light Co. *v.* Jones Bros. Electric Co., 5 Ohio Cir. Ct. 340, 3 Ohio Cir. Dec. 168 [*affirmed* in 29 Cinc. L. Bul. 72]; McLean *v.* Brush Electric Light Co., 8 Ohio Dec. (Reprint) 619, 9 Cinc. L. Bul. 65.

A charter of a street railway granting to it certain powers and privileges and "such other privileges as may be granted by the municipal authorities" gives the city no new power but merely authorizes it to exercise such power as it has under its charter for the furtherance of the objects of the railway. Asheville St. R. Co. *v.* West Asheville, etc., R. Co., 114 N. C. 725, 19 S. E. 697.

Use for street fair.— Municipal authority to remove obstructions from the street and prevent them from being encumbered or obstructed does not confer power to permit a corporation organized for the purpose of giving a street fair to erect a structure obstructing travel in a public street. Richmond *v.* Smith, 101 Va. 161, 43 S. E. 345. See also Augusta *v.* Reynolds, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 69 L. R. A. 564.

The power to vacate streets does not include power to lease a portion of a street for a term of years (Glasgow *v.* St. Louis, 15 Mo. App. 112 [*affirmed* in 87 Mo. 678]), nor power to authorize permission to a street railroad company to build a short elevated railroad from its terminus at the foot of one of the city streets along a public landing, it being a joint occupation with the public. McAboy's Appeal, 107 Pa. St. 548.

Steam motors.— In the absence of express statutory authority, a municipality has no power to authorize the use of steam motors upon its streets either upon ordinary railroads or street railways. Stanley *v.* Davenport, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

Power to control and govern streets by implication includes the power to grant a franchise for the use of the streets except where a different legislative intent is apparent. Stillwater *v.* Lowry, 83 Minn. 275, 86 N. W. 103; Atchison St. R. Co. *v.* Missouri Pac. R. Co., 31 Kan. 660, 3 Pac. 284.

Under the power to "regulate" the use of streets, municipal authorities may permit their use for railroad tracks, poles, wires, pipes, etc., of a public nature not inconsistent with the public uses to which the streets were dedicated. State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658; State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369; Schopp *v.* St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

Pneumatic tubes.— A statute authorizing cities to grant the use of streets for light, heat, and electric power does not authorize a municipality to grant to a company the right to use streets for laying pneumatic tubes therein for the purpose of carrying packages by means of compressed air and for supplying compressed air. Ampt *v.* Cincinnati, 21 Ohio Cir. Ct. 300, 11 Ohio Cir. Dec. 805; Ampt *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 394, 6 Ohio N. P. 401.

56. Brush Electric Light Co. *v.* Jones Bros. Electric Co., 5 Ohio Cir. Ct. 340, 3 Ohio Cir. Dec. 168.

57. Quincy *v.* Bull, 106 Ill. 337; Palmer *v.* Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672 [*reversing* 6 N. Y. App. Div. 12, 39 N. Y. Suppl. 522].

The fact that a street has been paved with asphalt whose cost was authorized against the abutting owners does not affect the right of the municipal authorities to consent to the laying of street-car tracks in such street. Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26.

Incidental power.— Where the charter or

as by granting the right to use the streets to a steam railroad company,[58] or to a street railroad company,[59] or to a telegraph or telephone company or electric light and power company or the like to use the streets for the purpose of poles and

other statute in terms gives a municipality the power to supply some article, such as gas, electric light, or water, the municipality may, as an incidental power, permit the use of the streets for such purposes by a public service corporation furnishing such articles. Quincy *v.* Bull, 106 Ill. 337; Levis *v.* Newton, 75 Fed. 884.

Power does not extend to streets not yet open.— Wichita, etc., R. Co. *v.* Fechheimer, 36 Kan. 45, 12 Pac. 362.

In making a grant, the municipal officers act as the servants and agents of the municipality. People *v.* Dwyer, 27 Hun (N. Y.) 548, 63 How. Pr. 115 [*affirmed* in 90 N. Y. 402].

58. *California.*— Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676; People *v.* Rich, 54 Cal. 74.

Colorado.— Denver, etc., R. Co. *v.* Domke, 11 Colo. 247, 17 Pac. 777.

Illinois.— Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; Bullen *v.* Higgins, 115 Ill. 155, 3 N. E. 456; Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448; Chicago City R. Co. *v.* People, 73 Ill. 541; Murphy *v.* Chicago, 29 Ill. 279, 81 Am. Dec. 307; Parlin *v.* Mills, 11 Ill. App. 396.

Indiana.— New Castle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516.

Iowa.— Cook *v.* Burlington, 36 Iowa 357.

Kentucky.— Wolfe *v.* Covington, etc., R. Co., 15 B. Mon. 404.

Louisiana.— Capdevielle *v.* New Orleans, etc., R. Co., 110 La. 904, 34 So. 868; Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438. See also State *v.* King, 104 La. 735, 29 So. 359; East Louisiana R. Co. *v.* New Orleans, 46 La. Ann. 526, 15 So. 157.

New York.— Reining *v.* New York, etc., R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133 [*affirming* 13 N. Y. Suppl. 238]; Clarke *v.* Blackmar, 47 N. Y. 150; People *v.* Dwyer, 27 Hun 548, 63 How. Pr. 115 [*affirmed* in 90 N. Y. 402]; Williams *v.* New York Cent. R. Co., 18 Barb. 222 [*reversed* on other grounds in 16 N. Y. 97, 69 Am. Dec. 651]; Milhau *v.* Sharp, 15 Barb. 193 [*affirmed* in 27 N. Y. 611, 84 Am. Dec. 314].

Ohio.— Wabash R. Co. *v.* Defiance, 10 Ohio Cir. Ct. 27, 8 Ohio Cir. Dec. 703, holding, however, that the municipality has no power to cede its right to change the grade of the street within its discretion.

Pennsylvania.— Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99.

Texas.— Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525; Laager *v.* San Antonio, (Civ. App. 1900) 57 S. W. 61.

West Virginia.— Yates *v.* West Grafton, 34 W. Va. 783, 12 S. E. 1075.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1464. And see RAILROADS.

59. *Georgia.*— Coast Line R. Co. *v.* Cohen, 50 Ga. 451.

Iowa.— Stange *v.* Dubuque, 62 Iowa 303, 17 N. W. 518.

Louisiana.— Brown *v.* Duplessis, 14 La. Ann. 842.

New Jersey.— Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61 [*reversed* on other grounds in 21 N. J. Eq. 550].

Ohio.— Cincinnati, etc., R. Co. *v.* Cumminsville, 14 Ohio St. 523. See also Cincinnati *v.* Cincinnati St. R. Co., 1 Ohio S. & C. Pl. Dec. 591, 31 Cinc. L. Bul. 308.

Texas.— Houston *v.* Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1465.

But see Stillwater *v.* Lowry, 83 Minn. 275, 86 N. W. 103, holding that villages having less population than three thousand, incorporated under Gen. St. (1894) tit. 3, c. 10, have no authority to authorize the construction and operation, for a definite term of years, of street railways in the streets of such villages.

The usual powers conferred by its charter on a municipal corporation over its streets are sufficient to authorize it to permit their use for horse railways. New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586; St. Louis, etc., R. Co. *v.* Lindell R. Co., 190 Mo. 246, 88 S. W. 634 (holding that a city may permit a street railway company to construct and operate a line on a public highway, although it crosses the right of way and tracks of another railway company, Const. art. 12, § 20, reserving to a city the right to permit the operation of street railroads on its streets); State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361; Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848]; Detroit Citizens' St. R. Co. *v.* Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667. See also STREET RAILROADS.

Extension of franchise.— Under a statute giving a city power to grant the use of its streets to street railway companies on such terms as the proper authorities shall determine, a city may extend existing franchises before the expiration thereof. And where a street railway company owns numerous franchises, some of which expire in 1924, and some in succeeding years, an ordinance extending such franchises until 1934 is not so unreasonable as to invalidate it. Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

Delegation of power to grant franchises to certain corporations and individuals referred to in the statute excludes the power of granting them to any one else. Allen *v.* Clausen, 114 Wis. 244, 90 N. W. 181.

The authority of a general nature to regulate and control the streets of a municipality usually granted to such bodies is generally deemed sufficient to clothe the municipality

wires,[60] or to a gas or water company or the like to use the street for pipes or other underground conduits.[61] However, a municipality cannot license the use of a street for a purely private purpose whether or not the resulting disturbance of the public right therein is serious.[62]

(II) *Particular Boards or Officers.* The power to authorize privileges in the use of streets may be delegated by the legislature to particular boards or officers of the municipality.[63] Where the grant or license must come from a particular board or officer, a grant or license by others does not constitute legal authority,[64] and it is immaterial that such unauthorized licenses may have been

with the power to grant or refuse, or otherwise to regulate the use of the streets for the street railways operated by a horse power. State *v.* Jacksonville, etc., R. Co., 29 Fla. 590, 10 So. 590.

60. *Illinois.*— McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 67 N. E. 9 [*affirming* 104 Ill. App. 479]; Dickson *v.* Kewanee Electric Light, etc., Co., 53 Ill. App. 379.

Indiana.— Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647.

Iowa.— Hanson *v.* Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

Kansas.— Wichita *v.* Missouri, etc., Tel. Co., 70 Kan. 441, 78 Pac. 886.

Michigan.— Wyandotte Electric-Light Co. *v.* Wyandotte, 124 Mich. 43, 82 N. W. 821.

Missouri.— Western Union Tel. Co. *v.* Guernsey, etc., Electric Light Co., 46 Mo. App. 120. See also Lancaster *v.* Briggs, 118 Mo. App. 570, 96 S. W. 314.

Montana.— Hershfield *v.* Rocky County Bell Tel. Co., 12 Mont. 102, 29 Pac. 883.

New Jersey.—East Orange Tp. *v.* Suburban Electric Light, etc., Co., 59 N. J. Eq. 563, 44 Atl. 628 (holding that words "city or town" in statute did not include townships); Domestic Tel., etc., Co. *v.* Citizens' Tel. Co., 9 N. J. L. J. 210.

New York.— Johnson *v.* Thomson-Houston Electric Co., 54 Hun 469, 7 N. Y. Suppl. 716; Tuttle *v.* Brush Electric Illuminating Co., 50 N. Y. Super. Ct. 464; People *v.* Thompson, 65 How. Pr. 407 [*affirmed* in 32 Hun 93].

Pennsylvania.— New Castle City *v.* Central District, etc., Printing Tel. Co., 207 Pa. St. 371, 56 Atl. 931.

Wisconsin.— State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

United States.— Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1463. See also Electricity, 15 Cyc. 469; Eminent Domain, 15 Cyc. 627; Telegraphs and Telephones.

Excuses.— Where the law requires the city council, on the request of an electric company, to control the placing and erection of wires and fixtures in the streets, it is no excuse for failure to act that the company has not obtained the consent of adjoining owners, as required by law, to a proposed change. Norwalk, etc., Electric Light Co. *v.* South Norwalk, 71 Conn. 381, 42 Atl. 82.

61. Quincy *v.* Bull, 106 Ill. 337; Smith *v.* Metropolitan Gas-Light Co., 12 How. Pr. (N. Y.) 187; Kumler *v.* Cincinnati, 6 Ohio Dec. (Reprint) 1018, 9 Am. L. Rec. 547; Edison Gen. Electric Co. *v.* Cincinnati, Ohio Prob. 304; Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333. See also Gas, 20 Cyc. 1154; Waters.

Where a corporation has acquired the private right to lay a pipe for the transportation of oil through land which is traversed by a public street, the city council may, by ordinance, prescribe the manner in which the pipe shall be laid and used, and permit the corporation to dig the necessary trench across the street. Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683 [*affirmed* in 61 N. J. L. 693, 40 Atl. 1132].

62. See *infra*, XII, A, 8, a, (v).

63. Turl *v.* New York Contracting Co., 46 Misc. (N. Y.) 164, 93 N. Y. Suppl. 1103; Sheehy *v.* Clausen, 26 Misc. (N. Y.) 269, 55 N. Y. Suppl. 1000 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1114].

Exclusive power conferred on a board to grant permits for buildings and for the moving of houses, and to regulate such business according to the municipal ordinances, gives no authority to grant permits to occupy the streets with building material and to make excavations, except as regulated by the ordinance. McCarthy *v.* Chicago, 53 Ill. 38.

Effect where part of board are stockholders of grantee of franchise see Hough *v.* Smith, 37 Misc. (N. Y.) 363, 75 N. Y. Suppl. 451.

64. *Maine.*— Veazie *v.* Mayo, 45 Me. 560, consent of city council as equivalent to consent of mayor and aldermen.

Maryland.— Preston *v.* Likes, etc., Co., 103 Md. 191, 62 Atl. 1024; Brauer *v.* Baltimore Refrigerating, etc., Co., 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403.

Massachusetts.— Lowell *v.* Simpson, 10 Allen 88.

Missouri.— Lockwood *v.* Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 43 Am. St. Rep. 547, 24 L. R. A. 516; Union Depot Co. *v.* St. Louis, 76 Mo. 393, county court held not included in phrase "proper authorities of the city."

New York.— Ghee *v.* Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692 [*reversing* on other grounds 34 N. Y. App. Div. 551, 56 N. Y. Suppl. 450]; Naylor *v.* Glasier, 4 Duer 161.

Ohio.— Cincinnati *v.* Cincinnati Edison Electric Co., 11 Ohio Dec. (Reprint) 315, 26 Cinc. L. Bul. 104.

given customarily and acted upon.[65] A board on whom is conferred merely supervisory functions has no power to grant a right to use the streets.[66]

(III) *Power to Refuse Where Right to Use Granted by Legislature.* Where a company is given a charter by the legislature with the proviso that, where its right of way is within the corporate limits of a city, consent of the city shall be obtained before its streets can be used, it has been held that a municipality has not only authority to establish reasonable and proper regulations as to the use of its streets, but may absolutely refuse to permit the use of its streets by the company.[67] However, there are decisions holding the contrary on the theory that if the municipality had the power to absolutely forbid the use of its streets by the company it would practically have the power to nullify what the legislature has expressly authorized.[68] In any event a municipality cannot lie by and see a public service company expend large sums in preparation and then refuse the company the right to use the streets.[69]

(IV) *Delegation of Power by Municipality.*[70] A municipality which is given power to regulate the use of streets and grant privileges therein cannot delegate that power.[71]

(V) *Private Use.* Except where the use is temporary or the power has been delegated by the legislature,[72] a municipality has no power to authorize the

Pennsylvania.— Boyle *v.* Hazleton Borough, 171 Pa. St. 167, 33 Atl. 142.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1460.

65. Concord *v.* Burleigh, 67 N. H. 106, 36 Atl. 606; Boyle *v.* Hazleton Borough, 171 Pa. St. 167, 33 Atl. 142.

66. Trenton Presb. Church *v.* Electrical Subway Com'rs, 55 N. J. L. 436, 27 Atl. 809.

67. State *v.* Spokane, 24 Wash. 53, 63 Pac. 1116; Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147.

Revocation of prohibition.— Where an act of the legislature incorporating a public service corporation provided that the consent of the city councils should be first obtained before the company should construct their tracks, the privilege is annulled by an ordinance declining to allow the streets to be so used so that no subsequent ordinance of the city council's consent to the use of the streets upon certain conditions can ratify the privilege. Musser *v.* Fairmount, etc., R. Co., 5 Pa. L. J. Rep. 466.

68. State *v.* Shehoygan, 111 Wis. 23, 86 N. W. 657; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828. See also Louisville *v.* Louisville Water Co., 105 Ky. 754, 49 S. W. 766, 20 Ky. L. Rep. 529; Madison *v.* Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439 [*reversing* 63 N. J. Eq. 120, 52 Atl. 158]; Rochester, etc., Water Co. *v.* Rochester, 176 N. Y. 36, 68 N. E. 117 [*affirming* 84 N. Y. App. Div. 71, 82 N. Y. Suppl. 455]; Forty Fort *v.* Forty Fort Water Co., 9 Kulp (Pa.) 241.

In other words a municipality may regulate the mode of doing business in the streets with reference to the comfort, welfare, and safety of society, but cannot, under the pretense of regulating, take away any of the essential rights and privileges which the charter confers. State *v.* Shehoygan, 111 Wis. 23, 86 N. W. 657.

69. Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106.

70. See, generally, *supra*, III, G.

71. *California.*— *In re* Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529.

Illinois.— Chicago *v.* Trotter, 136 Ill. 430, 26 N. E. 359 [*affirming* 33 Ill. App. 206]; Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172.

Louisiana.— Board of Liquidation, etc. *v.* New Orleans, 32 La. Ann. 915.

Missouri.— Lockwood *v.* Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 43 Am. St. Rep. 547, 24 L. R. A. 516.

New Jersey.— See Beecher *v.* Newark St., etc., Com'rs, 64 N. J. L. 475, 46 Atl. 166 [*affirmed* in 65 N. J. L. 307, 47 Atl. 466]; Trenton Presb. Church *v.* Electrical Subway Com'rs, 55 N. J. L. 436, 27 Atl. 809.

New York.— People *v.* Willis, 9 N. Y. App. Div. 214, 41 N. Y. Suppl. 168.

Ohio.— State *v.* Bell, 34 Ohio St. 194.

Washington.— Schwede *v.* Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1460.

What constitutes delegation.— The granting by a city council to a railroad company of permission to construct its road across streets at any point to be selected by the company within a given district is not a delegation of the powers of the city council. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110. But see Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172.

72. Kirtland *v.* Macon, 66 Ga. 385; People *v.* Keating, 62 N. Y. App. Div. 348, 71 N. Y. Suppl. 97 [*reversed* on other grounds in 168 N. Y. 390, 61 N. E. 637]; Sautter *v.* Utica City Nat. Bank, 45 Misc. (N. Y.) 15, 90 N. Y. Suppl. 838 [*affirmed* in 119 N. Y. App. Div. 898, 104 N. Y. Suppl. 1139].

Ordinarily some necessity must exist to authorize a permit to erect an obstruction. Odell *v.* Bretney, 62 N. Y. App. Div. 595,

use of streets for a private purpose,[73] that is, one from which neither the municipality nor its citizens derive any consideration or benefit.[74] For instance, it is

71 N. Y. Suppl. 449. Mere necessity for the purpose of conducting business does not justify the obstruction of the public streets except for temporary purposes (Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831), but the owner of property has the right to its benefit, use, and enjoyment, and in order that such result may be obtained the municipality has authority to allow a temporary occupation of the streets where the privilege granted is reasonable and does not unnecessarily interfere with the use of the streets by the public. Odell *v.* Bretney, 62 N. Y. App. Div. 595, 71 N. Y. Suppl. 449.

A municipality may authorize a temporary but not a permanent obstruction of a street by a private person. Pettis *v.* Johnson, 56 Ind. 139.

News stands under elevated railroad stairs. — A municipality may, where authorized, grant permits for the erection and maintenance of news stands under stairways of elevated railroad structures. People *v.* Keating, 168 N. Y. 390, 61 N. E. 637 [*reversing* on other grounds 62 N. Y. App. Div. 348, 71 N. Y. Suppl. 97].

Space under sidewalk.— A municipal corporation may authorize the use of space underneath sidewalks providing it does not by doing so impair the use of the street in all its parts by the public. Heineck *v.* Grosse, 99 Ill. App. 441.

73. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902.

California.— Wood *v.* San Francisco, 4 Cal. 190.

Georgia.— Macon *v.* Harris, 73 Ga. 428.

Illinois.— People *v.* Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; Pennsylvania Co. *v.* Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; Snyder *v.* Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407 [*affirming* 69 Ill. App. 474]; Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Chicago *v.* Verdon, 119 Ill. App. 494; Pew *v.* Litchfield, 115 Ill. App. 13; Pagames *v.* Chicago, 111 Ill. App. 590; Winnetka *v.* Chicago, etc., R. Co., 107 Ill. App. 117 [*affirmed* in 204 Ill. 297, 68 N. E. 407]; Chicago Tel. Co. *v.* Northwestern Tel. Co., 100 Ill. App. 57 [*affirmed* in 199 Ill. 324, 65 N. E. 329]; John Anisfield Co. *v.* Grossman, 98 Ill. App. 180; Chicago Gen. R. Co. *v.* Chicago City R. Co., 62 Ill. App. 502; Chicago, etc., R. Co. *v.* Quincy, 32 Ill. App. 377.

Iowa.— Bennett *v.* Mt. Vernon, 123 Iowa 537, 100 N. W. 349; Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 15 N. W. 573.

Kansas.— Mikesell *v.* Durkee, 34 Kan. 509, 9 Pac. 278; Smith *v.* Leavenworth, 15 Kan. 81.

Kentucky.— Com. *v.* Frankfort, 92 Ky. 149, 17 S. W. 287, 13 Ky. L. Rep. 705; Labry *v.* Gilmour, 89 S. W. 231, 28 Ky. L. Rep. 311.

Maryland.— Brauer *v.* Baltimore Refrigerating, etc., Co., 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403; Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409.

Minnesota.— Gustafson *v.* Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565.

Missouri.— State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369; Glaessner *v.* Anheuser-Busch Brewing Assoc., 100 Mo. 508, 13 S. W. 707; State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009; Berry-Horn Coal Co. *v.* Scruggs-McClure Coal Co., 62 Mo. App. 93.

New Jersey.— Montgomery *v.* Trenton, 36 N. J. L. 79; Van Duyne *v.* Knox Hat Mfg. Co., (Ch. 1906) 64 Atl. 149; Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456.

New York.— People *v.* Keating, 62 N. Y. App. Div. 348, 71 N. Y. Suppl. 97 [*reversed* on other grounds in 168 N. Y. 390, 61 N. E. 637]; Ely *v.* Campbell, 59 How. Pr. 333.

Ohio.— Ampt *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 394, 6 Ohio N. P. 401.

Washington.— Schwede *v.* Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362.

United States.— Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1466.

Presumptions.— If an ordinance granting the use of city streets for gas or electric lighting does not disclose whether the use is for public or private purposes, the court will presume, in favor of the validity of the ordinance, that the use is for public, and not private, purposes. Levis *v.* Newton, 75 Fed. 884.

No portion of a street can be granted to any person for private use to the exclusion of the public. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470].

Effect of like privileges granted to others. — It is immaterial with respect to a person seeking the right to use a portion of a public street for a private purpose that a like privilege has been granted to others. Chicago *v.* Verdon, 119 Ill. App. 494.

Advertising on streets.— An ordinance requiring the board of public improvements to erect boxes on the streets as receptacles for litter, and to contract with a contractor to erect such boxes in consideration of the exclusive privilege of posting advertisements thereon, is invalid as an attempt to subject the public streets to a purely private use. State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658.

74. Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

While the general rule is that it is no objection to a public franchise that its owner

generally held that a municipality cannot authorize the construction of a purely private railroad upon the public streets.[75] So a municipality has no power to authorize a private person to bridge over a portion of a street, leaving merely a tunnel for the passage of vehicles and pedestrians,[76] nor to construct and maintain a bridge or other structure over a street so as to connect buildings on both sides.[77] And a municipality has no power to grant to an abutting owner the right to so construct his building as to encroach on the street,[78] nor to use the streets for stands or booths for business purposes,[79] nor to use a street for the erection of private scales;[80] nor has the municipality the power to grant the right to use a

may derive a private gain therefrom, such rule is to be confined to where the use is public and the gain arises out of that use, as in the case of use by street cars, telegraph and telephone lines, etc.; but where the pecuniary profits arise from a source wholly distinct from any public use, the rule does not apply. State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658.

Under a charter vesting a city with power "to regulate" the use of streets, an ordinance which grants a private corporation the right to occupy the street by subways and paraphernalia therein necessary to conduct electricity, without imposing on the company any obligation to maintain them, or requiring it to allow all the public to use them, and which reserves to the city no control over the works or business of the company, is for private purposes, and therefore *ultra vires*. State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369.

A city has authority, under its general powers, to grant to private parties for public purposes reasonable rights and privileges in its water system, its streets, its public grounds, and its other public utilities, provided that such grant and its exercise do not materially impair the usefulness of these utilities for the public purposes for which they were acquired or dedicated. Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

Tanks erected on the streets to supply water for street sprinkling are for a public purpose and it is within the power of the council to license the erection thereof. Savage *v.* Salem, 23 Oreg. 381, 31 Pac. 832, 37 Am. St. Rep. 688, 24 L. R. A. 787.

75. *Georgia.*—Macon *v.* Harris, 73 Ga. 428.
Iowa.— Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 15 N. W. 573.
Kansas.— Mikesell *v.* Durkee, 34 Kan. 509, 9 Pac. 278.
Kentucky.— Com. *v.* Frankfort, 92 Ky. 149, 17 S. W. 287, 13 Ky. L. Rep. 705.
Minnesota.— Gustafson *v.* Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565.
Missouri.— Glaessner *v.* Anheuser-Busch Brewing Assoc., 100 Mo. 508, 13 S. W. 707.
New Jersey.— Montgomery *v.* Trenton, 36 N. J. L. 79.
Washington.— Schwede *v.* Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362.
See 36 Cent. Dig. tit. "Municipal Corporations," § 1466.

License as void.— Permission by a city to a private individual to occupy a public street with a railroad switch to be used for his private business is void, and a provision for notice by the city before its removal cannot be enforced. Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456.

But permitting abutters owning the fee in a street to lay a railroad track across the street to connect their premises is not an abuse of discretion of the corporate authorities, where such use of the street is not inconsistent with the right of way of the public. Hanbury *v.* Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477.

When not for private use.—Railroad tracks laid with private means and for the express purpose of directly benefiting the builder, but with no design to exclude the public from the equal right to the use of them, are not within the private control of the builder nor for private use in a legal sense. Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448. See also People *v.* Blocki, 203 Ill. 363, 67 N. E. 809. So an ordinance granting permission for a switch on a street for the use of a stock-yards company, created for "the convenience of drovers, dealers and the public at large," is not invalid as for private purposes. Knapp *v.* St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627. And it has been held that a municipality may consent to the laying of a branch track along a street occupied by a manufacturing concern, and branches therefrom to the private property of such manufacturers, on the ground that such track is not for traveling on the company's general lines but rather in the nature of the use thereof for street purposes in order to make transfers by cars instead of by drays or wagons. Pittsburg, etc., R. Co. *v.* Cincinnati, 9 Ohio Dec. (Reprint) 695, 16 Cinc. L. Bul. 367.

76. Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

77. Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409; Beecher *v.* Newark St., etc., Com'rs, 65 N. J. L. 307, 47 Atl. 466 [*affirming* 64 N. J. L. 475, 46 Atl. 166].

78. People *v.* Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304, bay window.

79. Costello *v.* State, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303; Pagames *v.* Chicago, 111 Ill. App. 590; Heineck *v.* Grosse, 99 Ill. App. 441; State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658; People *v.* Willis, 9 N. Y. App. Div. 214, 41 N. Y. Suppl. 168.

80. Tell City *v.* Bielefeld, 20 Ind. App. 1,

part of a street for hack stands,[81] or to authorize awnings obstructing the public use of the way.[82]

(VI) *EXTENT OF USE.* Except where authorized by the legislature,[83] a municipality has no power to grant the right to use a street in a manner inconsistent with the right of travel,[84] or with the rights of abutting owners.[85] And this rule

49 N. E. 1090; Berry-Horn Coal Co. *v.* Scruggs-McClure Coal Co., 62 Mo. App. 93. But see Spencer *v.* Andrew, 82 Iowa 14, 47 N. W. 1007, 12 L. R. A. 115, holding that under a statute conferring power to provide for the weighing of coal, etc., the municipality may authorize the erection of scales in one of its streets by a property-owner in front of his property in such a way as not to be an obstruction to travel.

81. Pennsylvania Co. *v.* Chicago, 181 Ill. 289, 54 N. E. 825; Odell *v.* Bretney, 38 Misc. (N. Y.) 603, 78 N. Y. Suppl. 67. But see Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95.

82. Trenor *v.* Jackson, 15 Abb. Pr. N. S. (N. Y.) 115. But see *supra*, XII, A, 7, d.

83. Barney *v.* Keokuk, 2 Fed. Cas. No. 1,032, 4 Dill. 593 [*affirmed* in 94 U. S. 324, 24 L. ed. 224]. See also Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610.

84. *Alabama.*— Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

Illinois.— Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; Chicago, etc., R. Co. *v.* People, 120 Ill. App. 306; Winnetka *v.* Chicago, etc., Electric R. Co., 107 Ill. App. 117 [*affirmed* in 204 Ill. 297, 68 N. E. 407]; Chicago, etc., R. Co. *v.* Quincy, 32 Ill. App. 377 [*reversed* on other grounds in 136 Ill. 489, 27 N. E. 232].

Iowa.— Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

Kentucky.— Labry *v.* Gilmour, 89 S. W. 231, 28 Ky. L. Rep. 311.

Maryland.— Brauer *v.* Baltimore Refrigerating, etc., Co., 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403.

Minnesota.— St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184, holding that a city has no authority to grant to a railroad company the right to use streets as sites for depots, freight houses, or other like structures.

Missouri.— State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369; Knapp *v.* St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627; Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483, 1 S. W. 86; State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009; Morie *v.* St. Louis Transit Co., 116 Mo. App. 12, 91 S. W. 962; Burnes *v.* St. Joseph, 91 Mo. App. 489.

New Jersey.— State *v.* Jersey City, 52 N. J. L. 65, 18 Atl. 586, 696 (holding that a municipality had no power to confer upon a railroad company a right to occupy exclusively twelve feet of a street by the erection thereon of a freight platform and roof); Camden M. E. Church *v.* Pennsylvania R. Co., 48 N. J. Eq. 452, 22 Atl. 183.

New York.— Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510]; New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937; Broadbelt *v.* Loew, 15 N. Y. App. Div. 343, 44 N. Y. Suppl. 159 [*affirmed* in 162 N. Y. 642, 57 N. E. 1105]; New York *v.* Heft, 13 Daly 301. See also Hough *v.* Smith, 37 Misc. 363, 75 N. Y. Suppl. 451.

Ohio.— Lake Shore, etc., R. Co. *v.* Elyria, 69 Ohio St. 414, 69 N. E. 738.

Tennessee.— Tennessee Brewing Co. *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

Texas.— San Antonio, etc., R. Co. *v.* Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1467.

Secondary use.— The use of streets for water mains, gas pipes, telephone and telegraph lines, etc., is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of the street, that is, the convenience of public travel. State *v.* Spokane, 24 Wash. 53, 63 Pac. 1116.

What constitutes unreasonable obstructions.— The fact that, while cars are passing along a railroad laid in a public alley four hundred feet long and sixteen feet wide, the passage of vehicles drawn by horses is totally obstructed, although only for a few minutes at a time, renders the use of the alley by the company an "unreasonable" obstruction. Com. *v.* Frankfort, 92 Ky. 149, 17 S. W. 287, 13 Ky. L. Rep. 705.

85. *Georgia.*—Daly *v.* Georgia, etc., R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286.

Missouri.—Lockwood *v.* Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 43 Am. St. Rep. 547, 24 L. R. A. 516; Schopp *v.* St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783, produce dealers' stands in front of business houses.

New Jersey.— Atwater *v.* Newark, 7 N. J. L. J. 176 (public market); McDonald *v.* Newark, 42 N. J. Eq. 136, 7 Atl. 855.

New York.— Masterson *v.* Short, 7 Rob. 299, 35 How. Pr. 169.

Ohio.— Mantell *v.* Bucyrus Tel. Co., 20 Ohio Cir. Ct. 345, 11 Ohio Cir. Dec. 274; Pruden *v.* Cincinnati, 2 Ohio S. & C. Pl. Dec. 114, 1 Ohio N. P. 340, market.

Tennessee.— Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

Utah.— Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610.

United States.— Barney *v.* Keokuk, 2 Fed.

applies to grants to abutting owners.[86] A grant is invalid where it restricts the municipality in the future exercise of its legislative powers.[87]

(VII) *EXCLUSIVE PRIVILEGES.*[88] Except where authorized by the legislature, either expressly or by necessary implication,[89] the power conferred upon a municipality to grant certain rights in streets does not authorize it to grant an exclusive privilege or franchise in the streets.[90] So a municipality cannot grant an exclusive right in its streets in the sense that every other company is excluded from the use of its pipes, etc., to whom similar rights might be granted by the municipality.

Cas. No. 1,032, 4 Dill. 593 [*affirmed* in 94 U. S. 324, 24 L. ed. 224].

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1449, 1467. See also EMINENT DOMAIN, 15 Cyc. 670–684.

Hacks.— Neither the legislature nor municipal authorities can license the standing of hacks in a public street in front of the premises of the owner of the fee without his consent. McCaffrey *v.* Smith, 41 Hun (N. Y.) 117. A municipal ordinance authorizing the owners and drivers of coaches to use a street adjacent to the store of an abutting owner as a stand is an unlawful interference with the use and occupation of such adjacent owner's premises, where it is constantly used so as to render access to such adjacent property impossible. Branahan *v.* Cincinnati Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457 [*affirming* 8 Ohio Dec. (Reprint) 305, 7 Cinc. L. Bul. 57, 9 Ohio Dec. (Reprint) 22, 10 Cinc. L. Bul. 69].

But the right of an abutter as conferred by an ordinance to build steps, cellar doors, etc., on the sidewalk, is subject to a prior right of a service franchise company to lay its pipes under the sidewalk, and no cause of action accrues on behalf of the abutter against the company where the laying of pipes interferes with such use of the sidewalk. Provost *v.* New Chester Water Co., 162 Pa. St. 275, 29 Atl. 914.

Erection of monument.— However, the trustees of a village may authorize the erection of a soldiers' monument in one of the public streets without the consent of the owner of the fee. Tompkins *v.* Hodgson, 4 Thomps. & C. (N. Y.) 435.

Certiorari.— An abutter owning to the middle of a street may prosecute certiorari to test the validity of an ordinance purporting to confer power to place obstructions upon his land lying in the street. Beecher *v.* Newark St., etc., Com'rs, 64 N. J. L. 475, 46 Atl. 166 [*affirmed* in 65 N. J. L. 307, 47 Atl. 466]; Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; Halsey *v.* Newark, 54 N. J. L. 102, 23 Atl. 284; Green *v.* Trenton, 54 N. J. L. 92, 23 Atl. 281.

86. Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

87. State *v.* New York, 3 Duer (N. Y.) 119.

88. See also *supra*, IX, A, 6, i; *infra*, XIII, A, 3, e, (II). And see CONSTITUTIONAL LAW, 8 Cyc. 1039.

Construction of grant see *infra*, XII, A, 8, e, (III).

Power to grant monopoly of streets to gas company see GAS, 20 Cyc. 1157.

89. Truesdale *v.* Newport, 90 S. W. 589, 28 Ky. L. Rep. 840; Covington Gas Light Co. *v.* Covington, 58 S. W. 805, 22 Ky. L. Rep. 796; Lake Shore, etc., R. Co. *v.* Elyria, 69 Ohio St. 414, 69 N. E. 738; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Water, etc., Co. *v.* Hutchinson, 144 Fed. 256. See also Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61; Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525; Memphis *v.* Dean, 8 Wall. (U. S.) 64, 19 L. ed. 326; Citizens' St. R. Co. *v.* Jones, 34 Fed. 579.

Territorial provisions.— An ordinance granting an exclusive franchise to supply a city and its inhabitants with gas for twenty years is not invalid because it provides that the franchise shall be in force in the corporate limits of the city as they then exist or as they may thereafter be enlarged. Truesdale *v.* Newport, 90 S. W. 589, 28 Ky. L. Rep. 840.

90. *Alabama.*— Montgomery Light, etc., Co. *v.* Citizens' Light, etc., Co., 142 Ala. 462, 38 So. 1026.

California.— Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61.

Connecticut.— Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

District of Columbia.— Curry *v.* District of Columbia, 14 App. Cas. 423.

Florida.— Capital City Light, etc., Co. *v.* Tallahassee, 42 Fla. 462, 28 So. 810; Florida Cent. R. Co. *v.* Ocala St. R., etc., Co., 39 Fla. 306, 22 So. 692.

Illinois.— Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; Chicago *v.* Verdon, 119 Ill. App. 494; Chicago *v.* Pooley, 112 Ill. App. 343; Chicago Tel. Co. *v.* Northwestern Tel. Co., 100 Ill. App. 57 [*affirmed* in 199 Ill. 324, 65 N. E. 329]; St. Louis, etc., R. Co. *v.* Belleville, 20 Ill. App. 580.

Indiana.— Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624.

Iowa.— Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756; Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261.

Kansas.— Coffeyville Min., etc., Co. *v.* Citizens' Natural Gas, etc., Co., 55 Kan. 173, 40 Pac. 326.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 728, 11 So. 78.

Maine.— Green *v.* Portland, 32 Me. 431.

Michigan.— Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; People *v.* Carpenter, 1 Mich. 273.

Missouri.— State *v.* St. Louis, 161 Mo. 371,

pality.[91] For instance a franchise conferred upon a street railroad company which provides that no other company shall use its track without the grantee's consent is exclusive and void.[92] However the mere fact that the grant is made exclusive does not render it void *in toto* but merely in so far as it confers exclusive rights.[93]

(VIII) *DURATION OF GRANT.* A municipality has no power to grant a perpetual franchise,[94] except where such grant is expressly authorized by the legis-

61 S. W. 658; Julia Bldg. Assoc. *v.* Bell Tel. Co., 13 Mo. App. 477.

New York.— Parfitt *v.* Furguson, 159 N. Y. 111, 53 N. E. 707 [*affirming* 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 466]; Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Rhinehart *v.* Redfield, 93 N. Y. App. Div. 410, 87 N. Y. Suppl. 789 [*affirmed* in 179 N. Y. 569, 72 N. E. 1150]; Milhau *v.* Sharp, 17 Barb. 435; Metropolitan Exhibition Co. *v.* Newton, 4 N. Y. Suppl. 593.

Ohio.— Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89; Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493; Morrow County Illuminating Co. *v.* Mt. Gilead, 10 Ohio S. & C. Pl. Dec. 235, 8 Ohio N. P. 669; Cleveland, etc., R. Co. *v.* Cincinnati, Ohio Prob. 269.

Pennsylvania.— Olyphant Sewage Drainage Co. *v.* Olyphant Borough, 211 Pa. St. 526, 61 Atl. 72; Meadville Fuel Gas Co.'s Appeal, 2 Pa. Cas. 549, 4 Atl. 733. *Compare* Meadville Natural Gas Co. *v.* Meadville Fuel Gas Co., 1 Pa. Co. Ct. 448.

Tennessee.— Memphis City R. Co. *v.* Memphis, 4 Coldw. 406.

West Virginia.— Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650.

United States.— Water, etc., Gas Co. *v.* Hutchinson, 144 Fed. 256; Logansport R. Co. *v.* Logansport, 114 Fed. 688; Cunningham *v.* Cleveland, 98 Fed. 657, 39 C. C. A. 211; Grand Rapids, etc., Co. *v.* Grand Rapids, etc., Co., 33 Fed. 659; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. 529; Jackson County Horse R. Co. *v.* Interstate Rapid Transit R. Co., 24 Fed. 306; New Orleans City R. Co. *v.* Crescent City R. Co., 12 Fed. 308.

Canada.— Ottawa Electric Co. *v.* Hull Electric Co., 10 Quebec Q. B. 34.

See 36 Cent. Dig tit. "Municipal Corporations," § 1468.

See also MONOPOLIES, 27 Cyc. 892–898.

Effect of want of power.— Where a municipal corporation had no power to grant a franchise involving the vesting of an exclusive interest in its streets in the grantees, the fact that such grantees discharged the obligations imposed on them by the ordinance and paid taxes on their possessions, and that the granting of the franchise would be beneficial, was no ground for requiring the city to comply with such franchise. Rhinehart *v.* Redfield, 93 N. Y. App. Div. 410, 87 N. Y. Suppl. 789 [*affirmed* in 179 N. Y. 569, 72 N. E. 1150].

Construction of contract.— A contract between a city and an electrical subway company, by which the city grants to the company the right to construct subways in the streets, and to lease space therein to persons operating the electrical conductors, and providing that the contract is to be without prejudice to the rights of the city to enter into such other, further, and different contracts as shall be necessary to carry out the intent of the laws relating to electrical conductors, and that nothing in the contract shall be construed as granting any exclusive privileges, does not give any company an exclusive right to maintain subways in the streets. Empire City Subway Co. *v.* Broadway, etc., R. Co., 87 Hun (N. Y.) 279, 33 N. Y. Suppl. 1055 [*affirmed* in 159 N. Y. 555, 54 N. E. 1092].

A statute providing that any corporation organized and put into successful operation under a certain chapter of the statutes should have exclusive privileges for the purposes of its creation for twenty years does not confer on the municipality power to grant exclusive privileges for the use of their streets to such companies. Capital City Light, etc., Co. *v.* Tallahassee, 42 Fla. 462, 28 So. 810.

If a franchise is granted which is agreed to be exclusive, the municipality cannot thereafter grant another like franchise on the ground that the agreement for an exclusive franchise was *ultra vires*. Atlantic City Water Works Co. *v.* Atlantic City, 39 N. J. Eq. 367.

91. Ampt *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 394, 6 Ohio N. P. 401.

92. Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291.

93. Quincy *v.* Bull, 106 Ill. 337; Carlyle Water, etc., Co. *v.* Carlyle, 31 Ill. App. 325. See also *supra*, IX, H, 3.

94. Ampt *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 394, 6 Ohio N. P. 401; Philadelphia, etc., R. Co. *v.* Chester, 3 Del. Co. (Pa.) 18; Logansport R. Co. *v.* Logansport, 114 Fed. 688. See also Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Pettis *v.* Johnson, 56 Ind. 139; State *v.* New York, 3 Duer (N. Y.) 119; Detroit *v.* Detroit City R. Co., 56 Fed. 867. But see Seattle *v.* Columbia, etc., R. Co., 6 Wash. 379, 33 Pac. 1048; Baltimore Trust, etc., Co. *v.* Baltimore, 64 Fed. 153. See also *supra*, IX, E.

Likewise a common council cannot invade the legislative power of their successors by conferring perpetual privileges upon the company as by a resolution declaring that no regulations shall be made as to fares to be charged by a street railway company. Milhau

lature.[95] The power to fix the terms and conditions upon which a public service company with a fixed corporate life shall occupy streets includes the power to fix the term of such occupation.[96] So it is competent for a city, in granting a franchise, to make the grant terminable after a specified term or whenever, after a stated number of years, it shall elect to purchase the company's plant at an appraised valuation.[97] However, a perpetual grant is not invalid even though the provision that such grant shall be perpetual is itself invalid.[98] And another reason suggested why such a franchise is not void is that there is always recourse to the power of eminent domain.[99] The duration of the grant, so long as it does not create a perpetuity, is a matter for the exclusive determination of the municipality,[1] except where it is otherwise provided by statute or charter;[2] and grants for thirty years have been upheld where the charter did not expire until thereafter.[3] So the easement of way in the streets need not necessarily be limited to the duration of the franchise of the grantee.[4]

(IX) *IMPOSING CONDITIONS.*[5] On granting the privilege to use a street, the municipality ordinarily has the power, in its legislative discretion, to impose conditions.[6] The law contemplates that the privilege will not be unreasonably

v. Sharp, 17 Barb. (N. Y.) 435. *Contra*, see Baltimore Trust, etc., Co. *v.* Baltimore, 64 Fed. 153. See also *supra*, IX, E, 1.

95. Philadelphia, etc., R. Co. *v.* Chester, 3 Del. Co. (Pa.) 18.

Presumptions.— A license by a state and a municipality to string and maintain telephone wires will be presumed to be perpetual and irrevocable. Suburban Electric Light, etc., Co. *v.* East Orange Tp., (N. J. Ch. 1898) 41 Atl. 865.

96. Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

97. Indianapolis *v.* Consumers' Gas Trust Co., 144 Fed. 640, 75 C. C. A. 442. See also *supra*, IX, E, 2.

The power to purchase is assignable.— Covington Gas Light Co. *v.* Covington, 58 S. W. 805, 22 Ky. L. Rep. 796.

98. Levis *v.* Newton, 75 Fed. 884.

In New York city, however, a perpetual grant of rights in a street, made after the approval of the Greater New York charter, which limits the duration of such grants to twenty-five years, is not valid as a grant for that period. Blaschko *v.* Wurster, 156 N. Y. 437, 51 N. E. 303.

99. Seattle *v.* Columbia, etc., R. Co., 6 Wash. 379, 33 Pac. 1048.

1. Houston *v.* Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127. See *supra*, IX, E, 2.

2. Sullivan *v.* Bailey, 125 Mich. 104, 83 N. W. 996. See also the statutes of the several states; and *supra*, IX, E, 2.

In New York city, under the Greater New York charter, twenty-five years is the limit. Blaschko *v.* Wurster, 156 N. Y. 437, 51 N. E. 303; Gusthal *v.* Strong, 23 N. Y. App. Div. 315, 48 N. Y. Suppl. 652; Norris *v.* Wurster, 23 N. Y. App. Div. 124, 48 N. Y. Suppl. 656.

3. Houston *v.* Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127. But see Detroit *v.* Detroit City R. Co., 56 Fed. 867. See also *supra*, IX, E, 2.

4. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592 [*affirming* 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667 (*reversing* 60 Fed. 161, 56 Fed. 867)].

5. Acceptance of conditions see *infra*, XII, A, 8, b, (IV).

6. *Illinois.*— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

Indiana.— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Kansas.— Eureka Light, etc., Co. *v.* Eureka, 5 Kan. App. 669, 48 Pac. 935.

Maryland.— Northern Cent. R. Co. *v.* Baltimore, 21 Md. 93.

New Jersey.— Cook *v.* North Bergen Tp., 72 N. J. L. 119, 59 Atl. 1035; Stowe *v.* Kearny, 72 N. J. L. 106, 59 Atl. 1058.

New York.— New York, etc., R. Co. *v.* New York, 1 Hilt. 562. See also *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18.

Ohio.— Toledo Electric St. R. Co. *v.* Western Electric Light, etc., Co., 10 Ohio Cir. Ct. 531, 4 Ohio Cir. Dec. 43; Cincinnati *v.* Cincinnati St. R. Co., 1 Ohio S. & C. Pl. Dec. 591, 31 Cinc. L. Bul. 308.

Texas.— Taylor *v.* Dunn, 80 Tex. 652, 16 S. W. 732; Indianola *v.* Gulf, etc., R. Co., 56 Tex. 594.

United States.— Pacific R. Co. *v.* Leavenworth, 18 Fed. Cas. No. 10,649, 1 Dill. 393.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1470.

But see Frayser *v.* State, 16 Lea (Tenn.) 671.

The state's power to attach conditions beneficial to the public to the charter of a quasi-public corporation may be exercised by a municipality, as within its delegated power to permit the use of streets and public places by the corporation. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

Joint use of tracks.— There is no objection to a city ordinance, granting the right to a railroad company to construct its road within the city limits, stipulating that two other companies, not then having the right to enter

refused or unreasonably burdened, although it regards the municipality as competent to determine the proper conditions for itself.[7]

b. Proceedings to Obtain, Contents, and Validity of Grant — (i) *In General.*[8] The legislature may prescribe the manner in which a municipal license to use streets shall be granted,[9] and such a statute is usually mandatory and exclusive;[10] and a license otherwise granted is invalid.[11] Generally a grant or license to use the streets is properly conferred by ordinance.[12] Where the charter or statute gives power to grant franchises in its streets by ordinance, the right cannot be conferred by resolution;[13] but where the statute authorizes action by the municipal legislative body without referring to ordinances the grant or license may be conferred by a vote upon motion or by the passage of a resolution as well as by an ordinance.[14] If the charter or statute specially provides as to how the ordinance must be introduced, advertised, passed, rejected, or the like, such provisions

the city, shall jointly use the main track of the first company. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110.

License-fee for excavation.— A township may properly, in the exercise of its power to repair streets and highways, require persons desiring to excavate the streets to obtain a permit from the township committee and deposit ten dollars for security for the restoration of the street to its natural condition. Cook *v.* North Bergen Tp., 72 N. J. L. 119, 59 Atl. 1035 [*affirmed* in 73 N. J. L. 818, 65 Atl. 885]. Under Pub. Laws (1895), p. 223, § 10, a town council may appoint a street commissioner and provide that the fees to be paid for permits in the opening of streets may be fixed by him. Stowe *v.* Kearny, 72 N. J. L. 106, 59 Atl. 1058.

The power to regulate charges of a public service corporation is not included in or incidental to the municipal power to regulate the manner of using the streets. State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

7. People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154.

A municipal permit to a water company that has the right, under statute, to enter upon streets, is unreasonable if granted on condition that the company shall supply the municipality with water and twenty-five water plugs free of charge for all time. Forty Fort *v.* Forty Fort Water Co., 9 Kulp (Pa.) 241.

8. See also Railroads; Street Railroads.

Compelling grant by mandamus see Mandamus, 26 Cyc. 299.

9. People *v.* Green, 116 Mich. 505, 74 N. W. 714.

10. Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146; People's Gaslight Co. *v.* Jersey City, 46 N. J. L. 297; Hunt *v.* Lambertsville, 45 N. J. L. 279.

11. People's Gaslight Co. *v.* Jersey City, 46 N. J. L. 297; Hunt *v.* Lambertsville, 45 N. J. L. 279.

12. *Illinois.*— Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516.

Indiana.— Indianapolis *v.* Miller, 27 Ind. 394.

Kansas.— Atchison, etc., R. Co. *v.* Garside, 10 Kan. 552.

Kentucky.— Louisville, etc., R. Co. *v.* Brown, 17 B. Mon. 763.

Louisiana.—Strohmeyer *v.* Consumers' Electric Co., 111 La. 506, 35 So. 723.

Massachusetts.— Com. Co. *v.* Boston, 97 Mass. 555.

New York.— Johnson *v.* Thomson-Houston Electric Co., 54 Hun 469, 7 N. Y. Suppl. 716.

Pennsylvania.— McHale *v.* Easton, etc., Transit Co., 169 Pa. St. 416, 32 Atl. 461 (special, as distinguished from general, ordinance held sufficient); Philadelphia *v.* Western Union Tel. Co., 11 Phila. 327, 2 Wkly. Notes Cas. 455.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1471.

When grant complete.— Where a city, by ordinance in due form and by contract in pursuance thereof, agrees to vacate a street, and nothing remains but the formal action of the council declaring the street vacated, and the railroad company with whom the contract was made has performed all the conditions, its right to occupy the street will not be defeated. McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237.

13. West Jersey Traction Co. *v.* Shivers, 58 N. J. L. 124, 33 Atl. 55; State *v.* Newark, 54 N. J. L. 102, 23 Atl. 284; People's Gaslight Co. *v.* Jersey City, 46 N. J. L. 297; Hunt *v.* Lambertsville, 45 N. J. L. 279; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132; Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. See also Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146; Indianapolis *v.* Miller, 27 Ind. 394. See also *supra*, V, B, 1, d.

Resolution and deed.— But charter power to make "ordinances" is sufficiently exercised by a deed of the streets to a railroad company, made in pursuance of a resolution of the council. Quincy *v.* Chicago, etc., R. Co., 92 Ill. 21.

14. *Iowa.*— Merchants' Union Barb Wire Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494.

Missouri.— See State *v.* Cowgill, etc., Mill Co., 156 Mo. 620, 57 S. W. 1008, holding that where the franchise was not required by statute to be granted by ordinance it could be modified by resolution.

New Jersey.— Stowe *v.* Kearny, 72 N. J. L. 106, 59 Atl. 1058; State *v.* Jersey City, 27 N. J. L. 493; Suburban Electric Light, etc.,

must be followed in order to make the grant or license valid;[15] but presumptions favor official compliance with sworn duty.[16] Statutes providing for a petition by abutting owners,[17] or public notice of the petition for leave to use the streets,[18] are generally construed as mandatory; and licenses granted without substantial compliance with such requirements are void.[19] So statutory or charter provisions as to the application for the right to use the street,[20] publication of the proposed ordinance,[21] etc., must be strictly followed. In many jurisdictions the grant or license must be based upon a consideration.[22] And in some jurisdictions a franchise can be granted only by award to the highest and best bidder,[23] after

Co. *v.* East Orange Tp., (Ch. 1898) 41 Atl. 865.

Pennsylvania.— Babcock *v.* Scranton Traction Co., 1 Lack. Leg. N. 223.

United States.— Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

See 36 Cent. Dig. tit. "Municipal Corporations." § 1471. And see *supra*, V, B, 1, d.

Custom.— Although the authority to grant telephone privileges in streets is usually exercised by ordinance, there is no decision in this state holding that such a license can be granted in no other mode. London Mills *v.* Fairview-London Tel. Circuit, 105 Ill. App. 146 [*affirmed* in 208 Ill. 289, 70 N. E. 313].

Signature of resolution.— A resolution of the common council of a borough approving a plan provided for in an ordinance granting the right to lay street railway tracks does not require the signature of the burgess. Condon *v.* Wilkinsberg, etc., R. Co., 30 Pittsb. Leg. J. N. S. (Pa.) 289.

15. Rough River Tel. Co. *v.* Cumberland Tel., etc., Co., 119 Ky. 470, 84 S. W. 517, 27 Ky. L. Rep. 32; Strohmeyer *v.* Consumers' Electric Co., 111 La. 506, 35 So. 723.

The number necessary to adopt an ordinance granting a waterworks franchise has been held to be governed by the statute applicable to ordinances in general, and not to one which provides the means by which the erection of waterworks may be authorized by a city council. Marion Water Co. *v.* Marion, 121 Iowa 306, 96 N. W. 883.

16. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333. See *supra*, V, B, 6, c.

17. McGann *v.* People, 194 Ill. 526, 62 N. E. 941; Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448; North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318.

Genuineness of signatures.— The granting of a license does not bar a subsequent inquiry into the genuineness of petitioners' signatures. Beeson *v.* Chicago, 75 Fed. 880.

It will not be presumed that the city council acted without the consent of the property-owners where it was necessary to be obtained. Cincinnati College *v.* Nesmith, 2 Cinc. Super. Ct. (Ohio) 24. See *supra*, V, B, 6, c.

18. Metropolitan City R. Co. *v.* Chicago, 96 Ill. 620.

19. McGann *v.* People, 194 Ill. 526, 62 N. E. 941; Metropolitan City R. Co. *v.* Chicago, 96 Ill. 620.

20. Klosterman *v.* Chesapeake, etc., R. Co., 56 S. W. 820, 22 Ky. L. Rep. 192 (holding that it must be presumed that the application was abandoned where after its reference to a committee which brought in both a majority and minority report, there was never any action taken upon either report); Belington, etc., R. Co. *v.* Alston, 54 W. Va. 597, 46 S. E. 612 (holding that an assent of a town council to the occupation of the streets of such town by a railroad company is not a franchise within a statute providing that no franchise shall hereafter be granted by the council of any city or town unless the application has been filed for a certain time and notice thereof given).

21. Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146 (holding that the emergency provision in a statute obviating the necessity of publication in cases of emergency has no application to an ordinance granting a franchise for the establishment of a lighting plant); Manhattan, etc., Electric Co. *v.* Fornes, 47 Misc. (N. Y.) 209, 95 N. Y. Suppl. 851; Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369 (holding that publication of a proposed ordinance was sufficient, although it did not contain the names of the actual grantees of the franchise or the amount of the bid for the franchise).

22. See New Haven *v.* New Haven, etc., R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; Daly *v.* Georgia, etc., R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; Board of Liquidation *v.* New Orleans, 32 La. Ann. 915; Stuyvesant *v.* Pearsall, 15 Barb. (N. Y.) 244. See also Covington St. R. Co. *v.* Covington, 9 Bush (Ky.) 127.

Sufficiency of consideration.—The provision in a bond for keeping an alley in repair is a sufficient consideration for a permit given by a city to a lot owner to construct, maintain, and use a vault under the alley in the rear of his lot. Gregsten *v.* Chicago, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496.

23. Thompson *v.* Alameda County, 111 Cal. 553, 44 Pac. 230 (holding that statutory provisions that franchises must be awarded to the highest bidder requires the franchise to be sold for cash); People's Electric Light, etc., Co. *v.* Capital Gas, etc., Light Co., 116 Ky. 76, 75 S. W. 280, 25 Ky. L. Rep. 327; Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215; Pacific Electric Co. *v.* Los Angeles, 118 Fed. 746 [*affirmed* in 194 U. S. 112, 24 S. Ct. 586, 48 L. ed. 896]. See also California *v.* Bunceton Tel. Co., 112 Mo. App. 722, 87 S. W. 604. And see *supra*, IX, F.

Provision for arbitration.—A provision in an ordinance establishing a street route, under

advertising for bids, although this rule has not been enforced where it would entail the doing of a useless thing.[24]

(II) *Submission to Vote.* In some jurisdictions ordinances authorizing certain uses of streets by specified public service corporations are required to be submitted to a vote of the people.[25]

(III) *Form, Contents, and Validity.*[26] A grant by ordinance is the act of the state.[27] The grant or license must be in strict conformity with the provisions of the statute or charter authorizing it,[28] and where based upon the petition of property-owners it must not exceed the privilege sought by the petition.[29] Generally the privilege may be given to individuals as well as to a corporation.[30] An ordinance granting the right to use certain tracks may provide for the appointment of arbitrators to determine any questions arising with other roads in regard to rules and regulations relative to the movement of trains on such tracks.[31] So it is sometimes provided by charter that the franchise shall incorporate therein efficient provisions for the compulsory arbitration of all disputes arising between the grantees of the franchise and its employees, as to any matter of employment or wages.[32] A grant to an intended corporation of a street franchise for public use is valid notwithstanding at its date the corporation is not chartered, where it is later chartered and accepts the grant.[33] A franchise to use the streets to

Ohio Rev. St. § 2501, which determines the method in which differences between any street railway company constructing a road over such route and the employees thereof shall be settled is contrary to the spirit of the section, as tending to keep persons from bidding and to increase the rate of fare bid. Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215.

24. See Capdevielle *v.* New Orleans, etc., R. Co., 110 La. 904, 34 So. 868, holding that a city, under certain conditions and restrictions, may grant the use of certain tracks to a railroad, without first advertising it for sale to the highest bidder. See also *supra*, IX, F.

Effect of failure to advertise.— Where a franchise was granted to a telegraph company without limit as to term, for the purpose of avoiding Ky. Const. § 164, requiring municipalities before granting a franchise for a term of years to first advertise for public bids, such franchise was void. Merchants' Police, etc., Tel. Co. *v.* Citizens' Tel. Co., 93 S. W. 642, 29 Ky. L. Rep. 512.

25. Keokuk *v.* Ft. Wayne Electric Co., 90 Iowa 67, 57 N. W. 689; Hanson *v.* Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

Resubmission.— The fact that after the voters of a city have sanctioned the grant of a franchise the city council makes certain modifications in the specifications as to matters of detail, which do not fatally change the nature and object of the franchise, and accept a bid without resubmitting the amendment to the voters, does not invalidate the franchise. Johnson *v.* Rock Hill, 57 S. C. 371, 35 S. E. 568.

26. **Bribery.**— Consent of borough authorities to the use of its streets by an electric railway company obtained by bribery is invalid. Keogh *v.* Pittston, etc., R. Co., 5 Lack. Leg. N. (Pa.) 242.

27. City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114.

28. Aberdeen *v.* Honey, 8 Wash. 251, 35 Pac. 1097 (holding that where an ordinance required the execution of a bond for the completion of the railway within a year, a bond executed by individuals and not by the railroad company is not such a bond as is required); Pacific Electric Co. *v.* Los Angeles, 118 Fed. 746 [*affirmed* in 194 U. S. 112, 24 S. Ct. 586, 48 L. ed. 896].

Failure to designate streets.—An ordinance authorizing a gas company to lay pipes in "the streets" is not void for failure to designate streets. Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. 811. A designation of all the streets in a city, contained in the ordinance conferring the license, is equivalent to a designation of each and every street by name and satisfies a statutory requirement that the streets be named. Meyers *v.* Hudson County Electric Co., 63 N. J. L. 573, 44 Atl. 713.

Execution of conveyance.— Where a statute authorizes a city council to grant a certain right in a highway, such a right is obtained by a conveyance executed by the mayor and two of four aldermen of a city whose charter makes the mayor and aldermen the common council. People *v.* Green, 116 Mich. 505, 74 N. W. 714.

29. Chester *v.* Wabash, etc., R. Co., 182 Ill. 382, 55 N. E. 524.

30. Citizens' Electric Light, etc., Co. *v.* Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411.

31. Capdevielle *v.* New Orleans, etc., R. Co., 110 La. 904, 34 So. 868.

32. Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369, holding that a provision in an ordinance granting a street railway franchise that, if any dispute shall arise between the grantees and their employees as to any matter of employment or wages, such dispute shall be submitted to arbitration, is an "efficient provision" for compulsory arbitration.

33. Clarksburg Electric Light Co. *v.* Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

furnish gas and other illuminating light is void as to the latter where the charter of the company only authorizes it to furnish gas.[34] The grant of privileges has been held invalid where the ordinance failed to reserve to the municipality the privilege of regulating charges from time to time and to fix a limit for charges.[35] The invalidity of an ordinance carries with it a provision requiring the municipality to take and pay for certain things to be furnished it.[36] The validity of an ordinance granting the use of streets is not affected by the fact that the exercise of such right may impose an additional burden on the fee of the streets, since if such burden is imposed the person exercising the franchise may be required to pay damages therefor.[37] Where the ordinance granting a franchise requires the permission of certain officials to be first obtained such requirement may be waived by the municipality.[38]

(IV) *ACCEPTANCE BY LICENSEE.* If a license with conditions is accepted the conditions are binding upon the licensee,[39] unless they are unlawful,[40] notwithstanding a declaration in the instrument of acceptance that the licensee waives none of its vested rights under its charter.[41] The company cannot modify the terms and conditions except with the consent of the municipality.[42] If a permit amounts to no more than a municipal license, it becomes binding upon the municipality when acted upon by the licensee by constructing its structures in the streets.[43] The breach by the municipality of terms for the benefit of both parties releases a licensee from the duty to comply with such conditions.[44]

(V) *RIGHT TO QUESTION VALIDITY*—(A) *In General.* The vacating of a franchise granted by the state can be accomplished only by a proceeding in the nature of quo warranto in the name of the state.[45] And a court of equity, at the suit of a private individual, cannot question the regularity of the proceedings by which a municipality has, under duly delegated authority, granted a franchise of which the grantee is in *de facto* exercise and enjoyment.[46] Nor can he question the expediency of the grant.[47] So the question of consideration for the franchise and the injuries and expenses which it will impose upon the city are discretionary

34. People's Electric Light, etc., Co. *v.* Capital Gas, etc., Light Co., 116 Ky. 76, 75 S. W. 280, 25 Ky. L. Rep. 327.

35. Ampt *v.* Cincinnati, 21 Ohio Cir. Ct. 300, 11 Ohio Cir. Dec. 805.

36. Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146.

37. Patton *v.* Chattanooga, 108 Tenn. 197, 65 S. W. 414.

38. McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 67 N. E. 9 [*affirming* 104 Ill. App. 479].

39. New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562; Chicago, etc., R. Co. *v.* Hamilton, 3 Ohio Cir. Ct. 455, 2 Ohio Cir. Dec. 259; Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 291; Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147; Pacific R. Co. *v.* Leavenworth, 18 Fed. Cas No. 10,649, 1 Dill. 393.

Particular conditions.— Where, as a condition precedent to the right of laying pipes in the streets of a city, a party is required to have one or more gas wells in operation within one year, his right to lay such pipes does not accrue until the performance of such condition. Newark Gas, etc., Co. *v.* Newark, 8 Ohio S. & C. Pl. Dec. 418, 7 Ohio N. P. 76

40. Sewickley M. E. Church *v.* Independent Natural Gas Co., 22 Pittsb. Leg. J. N. S. (Pa.) 274.

But a company is bound by conditions accepted even though the common council was unauthorized to exact them, but was empowered to give or refuse its unconditional consent, leaving the rights of the company in case consent was given to be determined by the statute. Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147 [*affirming* 98 Fed. 671].

41. Trenton *v.* Trenton Horse R. Co., (N. J. Ch. 1890) 19 Atl. 263.

42. Allegheny City *v.* People's Natural Gas, etc., Co., 172 Pa. St. 632, 33 Atl. 704.

43. People *v.* Blocki, 203 Ill. 363, 67 N. E. 809.

44. Newark Gas, etc., Co. *v.* Newark, 8 Ohio S. & C. Pl. Dec. 418, 7 Ohio N. P. 76.

45. Allen *v.* Clausen, 114 Wis. 244, 90 N. W. 181.

But it has been held that the state cannot bring quo warranto proceedings against a public service corporation authorized by a municipality to use a street. People *v.* Ft. Wayne, etc., R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752.

46. Allen *v.* Clausen, 114 Wis. 244, 90 N. W. 181; Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851. See also Sommers *v.* Cincinnati, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612.

47. Lange *v.* La Crosse, etc., R. Co., 118 Wis. 558, 95 N. W 952.

questions not reviewable by the courts at the instance of a taxpayer.[48] But equity may, at the suit of a private individual, enjoin the operation of a public service corporation in the streets where the municipality had no power whatever to confer the grant or license.[49] The validity of, and the authority to, grant an exclusive right cannot be attacked by a suit brought by a private individual unless he claims the right to something contrary to such exclusive feature.[50] Taxpayers may sue for an injunction to prevent the occupation of the street by a public service company where the municipal grant was to a company offering less advantageous terms than those offered by other companies;[51] but they cannot sue to prevent the city from granting a franchise unless it constitutes such a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby.[52] So the act of a municipality in making a grant or license cannot be attacked collaterally.[53] A municipality or an officer representing it is the proper party to sue to test the right to maintain an obstruction in the nature of a public improvement placed in the streets by permission of the city.[54] A municipality cannot enjoin the construction of a railroad in a street because of irregularities in the grant where no wrong or injury to the city is shown to have resulted therefrom.[55]

(B) *Estoppel.*[56] A municipality may be estopped to question the validity of a grant or license.[57] But where the grant is void, the municipality is not estopped by its acquiescence.[58] So where the municipality has no power to authorize the

48. Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

49. Allen *v.* Clausen, 114 Wis. 244, 90 N. W. 181. See also State *v.* Morgan's Louisiana, etc., R., etc., Co. *v.* Judge Div. A Civ. Dist. Ct., 52 La. Ann. 1065, 27 So. 580.

50. Patton *v.* Chattanooga, 108 Tenn. 197, 65 S. W. 414. See also Chicago Tel. Co. *v.* Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329; Coffeyville Min., etc., Co. *v.* Citizens' Natural Gas, etc., Co., 55 Kan. 173, 40 Pac. 326; New Orleans Gas Light Co. *v.* Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544.

No one who does not infringe or threaten to infringe the exclusiveness of a grant by a city of the exclusive right to use its streets can be heard to allege the invalidity of the grant by reason of the exclusiveness after works have been constructed thereunder, and the contract has been substantially performed by the grantee. Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. So a street railway corporation which has not obtained the consent of the council to occupy certain streets has no standing in court to complain of an exclusive right granted to another company to lay its tracks on certain streets, although the grant of such exclusive right is void. Larimer, etc., St. R. Co. *v.* Larimer St. R. Co., 137 Pa. St. 533, 20 Atl. 570.

51. Milhau *v.* Sharp, 15 Barb. (N. Y.) 193 [*affirmed* in 27 N. Y. 611, 84 Am. Dec. 314].

52. Clark *v.* Interstate Independent Tel. Co., 72 Nebr. 883, 101 N. W. 977; Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

53. Vicksburg, etc., R. Co. *v.* Monroe, 48 La. Ann. 1102, 20 So. 664; Consumers' Gas, etc., Light Co. *v.* Congress Spring Co., 61 Hun (N. Y.) 133, 15 N. Y. Suppl. 624.

54. Chicago Tel. Co. *v.* Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329 [*affirming* 100 Ill. App. 57].

Where the municipality has title to the fee of the street an abutter cannot prevent its use for a railway when permitted by the municipality and authorized by an act of the legislature. Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74 [*followed* in Patterson *v.* Chicago, etc., R. Co., 75 Ill. 588].

55. Sloane *v.* People's Electric R. Co., 7 Ohio Cir. Ct. 84, 3 Ohio Cir. Dec. 674.

Where a village is annexed to a city, the city has no more or greater rights than the village to enjoin the operation of a railroad on the ground that the consent of the municipal authorities had not been obtained. Cincinnati *v.* Columbia, etc., R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc. L. Bul. 192.

56. See, generally, ESTOPPEL, 16 Cyc. 781.

Prescriptive right to maintain obstructions see *infra*, XII, A, 9, d, (II).

57. Union Depot Co. *v.* St. Louis, 8 Mo. App. 412 [*affirmed* in 76 Mo. 393]; Hestonville, etc., R. Co. *v.* Philadelphia, 89 Pa. St. 210; Spokane St. R. Co. *v.* Spokane Falls, 6 Wash. 521, 33 Pac. 1072; City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114.

Extension of franchise.—A city which extends the duration of a street railway franchise in order to enable the railway company to refund its bonded indebtedness is estopped, after negotiation of the new bonds, from attacking the validity of the extension for want of consideration. City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114.

58. Bennett *v.* Mt. Vernon, 124 Iowa 537, 100 N. W. 349; Brush Electric Light Co. *v.* Jones Bros. Electric Co., 5 Ohio Cir. Ct. 340, 3 Ohio Cir. Dec. 168.

Extension of franchise.—A municipality is not estopped from denying a valid grant in

use of its streets for a certain purpose, the doctrine of estoppel cannot be applied to validate a grant for such purposes.[59] Likewise where a railroad company occupied a street without either a parol or written license from the municipality, the fact that the municipality sit by in silence while the company expends money in constructing the road in the street does not estop the municipality,[60] although it has been held that acquiescence for more than forty years barred, by the statute of limitations, the right of the city to object.[61] A property-owner may be estopped by his acquiescence during the expenditure of large sums of money.[62] And an abutter who petitions for the allowance of the use of a street by a public service company is estopped from asserting that the petition was not sufficiently signed where the company has incurred large expense in consequence of the passage of the ordinance allowing such use of the streets.[63] Likewise the beneficiary of a grant or license who has acquiesced therein and received valuable property under it cannot deny its validity as against the municipal authorities and another beneficiary.[64]

(VI) *Curative Statutes.* Licenses invalid either from want of power in the licensor or from irregularity may be validated by subsequent curative statutes.[65]

(VII) *Judicial Control and Review.* Where a municipality is given control of its streets, the courts will not ordinarily interfere with the exercise of its discretion in granting privileges in the use of the streets, unless the exercise of such power is abused or is fraudulent or grossly wrong or unjust.[66] For instance, a grant is not ordinarily subject to review by the courts as to expediency,[67] or favoritism,[68] nor to determine if the compensation was fair and reasonable.[69] But when abused, or an attempt is made to abuse or illegally exercise such discretion, and especially when the municipality claims the right to exercise powers which it does not possess, the courts may interfere at the suit of proper parties.[70]

c. Construction and Operation — (I) *In General.* Grants of rights in streets

the streets where the extension of a franchise is void because it exceeds the normal life of the company on the ground that the company has performed new obligations at great expense. Detroit *v.* Detroit City R. Co., 56 Fed. 867, 60 Fed. 161.

Effect of good faith of grantee.—A town is not estopped to take advantage of the incapacity of its council to make a contract granting the exclusive right to lay pipes in the streets, because the grantee acted in good faith, and fulfilled all its obligations. Smith *v.* Westerly, 19 R. I. 437, 35 Atl. 526.

59. State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369.

60. Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

61. Cincinnati *v.* Columbia St. R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc. L. Bul. 192.

62. Daflinger *v.* Pittsburg, etc., Tel. Co., 31 Pittsb. Leg. J. N. S. (Pa.) 37, 14 York Leg. Rec. 46.

63. Joyce *v.* East St. Louis Electric St. R. Co., 43 Ill. App. 157.

64. Kirkland *v.* Macon, 66 Ga. 385.

65. Nash *v.* Lowry, 37 Minn. 261, 33 N. W. 787; Kumler *v.* Silsbee, 38 Ohio St. 445 [*affirming* 6 Cinc. L. Bul. 82, 6 Ohio Dec. (Reprint) 1018, 9 Am. L. Rec. 547].

66. *Georgia.*— Dannenberg *v.* Macon, 114 Ga. 174, 39 S. E. 880; Macon Consol. St. R. Co. *v.* Macon, 112 Ga. 782, 38 S. E. 60.

Illinois.— Chicago Tel. Co. *v.* Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329; Cairo, etc., R. Co. *v.* People, 92 Ill. 170.

Iowa.— Platt *v.* Chicago, etc., R. Co., (1887) 31 N. W. 883; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Louisiana.— Forman *v.* New Orleans, etc., R. Co., 40 La. Ann. 446, 4 So. 246.

Missouri.— Atkinson *v.* Wykoff, 58 Mo. App. 86.

New York.— See Hoey *v.* Gilroy, 129 N. Y. 132, 29 N. E. 85 [*reversing* 14 N. Y. Suppl. 159].

Ohio.— Sargent *v.* Ohio, etc., R. Co., 1 Handy 52, 12 Ohio Dec. (Reprint) 23; Auerbach *v.* Cuyahoga Tel. Co., 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1480.

67. Lange *v.* La Crosse, etc., R. Co., 118 Wis. 558, 95 N. W. 952.

68. Adamson *v.* Nassau Electric R. Co., 89 Hun (N. Y.) 261, 34 N. Y. Suppl. 1073 [*reversing* 12 Misc. 600, 33 N. Y. Suppl. 732].

69. Adamson *v.* Nassau Electric R. Co., 89 Hun (N. Y.) 261, 34 N. Y. Suppl. 1073 [*reversing* 12 Misc. 600, 33 N. Y. Suppl. 732]; Brush Electric Illuminating Co. *v.* Consolidated Tel., etc., Subway Co., 15 N. Y. Suppl. 81.

70. Negus *v.* Brooklyn, 10 Abb. N. Cas. (N. Y.) 180, 62 How. Pr. 291. See also Cooper *v.* Alden, Harr. (Mich.) 72; Green *v.* Trenton, (N. J. Sup. 1894) 29 Atl. 1043; Philadelphia, etc., R. Co. *v.* Chester, 3 Del.

are not to be extended by construction beyond the reasonable meaning of the language in which they are expressed.[71] Where in derogation of the right to the public to free and unobstructed use of the streets they will be construed strictly against the grantee and liberally in favor of the public.[72] Where an ordinance gives the right to use the streets to a public service company, subject to certain restrictions and limitations, the acceptance by the company makes the ordinance as binding upon the company as a statute,[73] and constitutes a contract.[74] So if the company petitions for the right to use a street on certain terms and the terms are accepted by the city, it constitutes a contract.[75] Acts in regard to the same subject-matter, although of different dates and by different general assemblies, are *pari materia* and must be construed together.[76]

(II) *NATURE AND EXTENT OF RIGHT.*[77] A license to use a street is not an estate but rather a franchise or an easement,[78] and does not include permission to

Co. (Pa.) 18. *Compare* Simmons *v.* Toledo, 5 Ohio Cir. Ct. 124, 3 Ohio Cir. Dec. 64.

Right of city solicitor to sue see Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291.

71. Ransom *v.* Citizens' R. Co., 104 Mo. 375, 16 S. W. 416; People's Pass. R. Co. *v.* Marshall St. R. Co., 20 Phila. (Pa.) 203. And see FRANCHISES, 19 Cyc. 1459.

Construction of particular grants.— Spitzer *v.* Runyan, 113 Iowa 619, 85 N. W. 782; Worcester Gas Light Co. *v.* Worcester, 110 Mass. 353 (condition allowing gas company to lay pipes that it furnishes gas as cheap as furnished in three specified cities construed as meaning that company should at any time furnish gas as cheaply as furnished at the same time in those cities and not merely at the passage of the ordinance); Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. 811 (requirement that trenches be filled so as to leave streets in as good condition as they were before); National Subway Co. *v.* St. Louis, 169 Mo. 319, 69 S. W. 290 (right to semiannual payments from grantee of franchise during time company was deprived of its rights); Consolidated Traction Co. *v.* East Orange Tp., 63 N. J. L. 669, 44 Atl. 1099 [*affirming* 61 N. J. L. 202, 38 Atl. 803] (holding that permission given to an electric street railway company to operate its cars through the streets is not a grant *ipso facto* of the right of the township to the trees standing in such streets, nor does it divest the municipal authorities of the power to control the company in the use of such trees in the operation of the street railway); Electric Power Co. *v.* New York, 29 Misc. (N. Y.) 48, 60 N. Y. Suppl. 590; Crebs *v.* Lebanon, 98 Fed. 549 (requirement that grantee leave streets in as good condition as before, on removal or change of trackage); Stewart *v.* Ashtabula, 98 Fed. 516 [*reversed* on other grounds in 107 Fed. 857, 47 C. C. A. 21] (reservation of right to remove tracks from streets in case grantee fails to comply with certain conditions). Where a city ordinance, granting a franchise to a gas company to use the city streets to furnish gas to the city and its inhabitants, provides that the city council shall determine the quantity of gas to be used by the city, the city is under no obligation to continue to use such gas. Gaslight, etc., Co. *v.* New Albany, 156 Ind. 406, 59 N. E. 176.

Platform.—A city ordinance prohibiting the construction in a street of any platform of greater width than is necessary for a convenient passageway into the building gives no power to one to build a platform more than six feet wide and extending seventy feet along his building, there being but two doors opening on the said platform. Murphy *v.* Leggett, 29 N. Y. App. Div. 309, 51 N. Y. Suppl. 472 [*affirmed* in 164 N. Y. 121, 58 N. E. 42].

Right of municipality to purchase.—A municipal right to purchase a utility plant after twenty-five years cannot be enforced before the expiration of the period. Montgomery Gas-Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Long existing custom dominates statutory words of indefinite meaning or doubtful application. Buek *v.* Collis, 17 N. Y. App. Div. 465, 45 N. Y. Suppl. 291.

72. *Maryland.*— Baltimore *v.* Chesapeake, etc., Tel. Co., 92 Md. 692, 48 Atl. 465.

Massachusetts.— Worcester Gas Light Co. *v.* Worcester, 110 Mass. 353.

Missouri.— Ransom *v.* Citizens' R. Co., 104 Mo. 375, 16 S. W. 416.

New York.— Bates *v.* Holbrook, 171 N. Y. 460, 688, 64 N. E. 181, 64 N. E. 753; Murphy *v.* Leggett, 29 N. Y. App. Div. 309, 51 N. Y. Suppl. 472 [*affirmed* in 164 N. Y. 121, 58 N. E. 42].

Ohio.— Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1481.

73. Tudor *v.* Chicago, etc., R. Co., 154 Ill. 129, 39 N. E. 136. See also *supra*, XII, A, 8, b, (IV).

74. Chicago Tel. Co. *v.* Northwestern Tel. Co., 100 Ill. App. 57 [*affirmed* in 199 Ill. 324, 65 N. E. 329]; Troy *v.* Troy, etc., R. Co., 49 N. Y. 657.

75. Barr *v.* New Brunswick, 58 N. J. L. 255, 33 Atl. 477.

76. Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146.

77. See also RAILROADS; STREET RAILROADS.

78. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

do acts outside of the rights conferred;[79] but the express grant of a distinct right or privilege implies license to do whatever is reasonably necessary to its enjoyment.[80] An ordinance granting the use of streets to a company only gives such rights as the common council has power to grant, and does not affect the rights of the abutting lot owners where they own the fee to the center of the street.[81] A grant of a privilege to two separate railroad companies to connect their tracks with a street track is a joint license.[82] The grantee of a franchise from a municipality, where the laying of pipes in the street is necessary, takes the franchise subject to delay or refusal on the part of the common council in which is vested control of the streets to grant a permit to lay such pipes.[83] The grade of a street is not altered by authorizing a railroad company to lay its tracks in a street on condition that it pay all damages occasioned by any change of grade.[84] A valid license granted by a village is not lost by its annexation to a city.[85]

79. New Orleans Gas-Light Co. *v.* Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544 (holding that license to lay a gas main in certain streets does not imply the necessity of erecting lamp posts at the corners of such streets and of maintaining them there indefinitely, although the right so to do would exist if the licensee was furnishing, or under contract to furnish, street lighting); Glasby *v.* Morris, 18 N. J. Eq. 72 (holding that permission from a city to open a street for the purpose of laying a private drain is a mere grant of permission to open a street, and does not confer power to build a sewer); Galveston Wharf Co. *v.* Gulf, etc., R. Co., 81 Tex. 494, 17 S. W. 57.

A license to alter or change the grade of a public street confers no power to appropriate a portion to exclusive and permanent private use. Wilmette Iron Works *v.* Oregon R., etc., Co., 26 Oreg. 224, 37 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88.

Drain.— Where a city gives a private person permission merely to open a street for the purpose of laying a drain, and such person lays a drain in another's land, he is a trespasser. Glasby *v.* Morris, 18 N. J. Eq. 72.

Pipes.—A provision in an ordinance granting a company the right to lay pipes that they shall be at least a certain number of feet below the street grade is not a permission to lay the pipes at that depth if they thereby pass through open sewers and obstruct the flow of water. Montgomery *v.* Capital City Water Works, 92 Ala. 361, 9 So. 339.

Change in mode of lighting.— Granting the right to use streets for gas apparatus and fixtures does not include the right, on changing the mode of lighting to electricity as authorized by the original ordinance, to erect poles, etc., without the consent of the municipality. Newport *v.* Newport Light Co., 89 Ky. 454, 12 S. W. 1040, 11 Ky. L. Rep. 840.

Territorial extent.— Where a company is authorized to furnish electricity within the limits of the village in which it is located, the subsequent annexation of such village to the city does not extend the field of its operations. Chicago *v.* Mutual Electric Light, etc., Co., 55 Ill. App. 429.

Time when privilege may be exercised.— Permission to erect poles in a street cannot be first exercised twelve years thereafter. McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 67 N. E. 9 [*affirming* 104 Ill. App. 479].

Retroactive effect.—An ordinance granting the right to use a street does not operate to justify wrongful acts of such company as trespassers prior to the passage of such ordinance. Southern California R. Co. *v.* Southern R. Co., (Cal. 1896) 43 Pac. 1123.

80. Dodd *v.* Consolidated Traction Co., 57 N. J. L. 482, 31 Atl. 980, holding that a company authorized by a municipality to erect trolley wires has the right to top branches of trees when it is reasonably necessary for the passage of its wires. See also Quincy *v.* Bull, 106 Ill. 337 [*affirming* 9 Ill. App. 127]; Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610. *Compare* French *v.* Robb, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956.

Where gas mains in a street are authorized to be laid in a prudent and lawful manner with the right from time to time to take them up and repair them, the fact that macadam pavement was afterward laid does not restrict the right of the licensee in so far as making repairs is concerned. Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Where municipal permission is given to a railroad company to construct its track or tracks on a certain street, and the ordinance contains no limitation as to the number of tracks which may be laid, the construction of one track in the street does not preclude the right to thereafter construct another track. Workman *v.* Southern Pac. R. Co., 129 Cal. 536, 62 Pac. 185, 316.

81. Lange *v.* La Crosse, etc., R. Co., 118 Wis. 558, 95 N. W. 952.

82. Philadelphia *v.* River Front R. Co., 173 Pa. St. 334, 34 Atl. 60.

83. New York *v.* New York Refrigerating Constr. Co., 8 Misc. (N. Y.) 61, 28 N. Y. Suppl. 614.

84. Little Miami R. Co. *v.* Martin, 1 Ohio Dec. (Reprint) 440, 10 West. L. J. 54.

85. People *v.* Blocki, 203 Ill. 363, 67 N. E. 809. See *supra*, II, B, 2, g, (I).

(III) *Exclusiveness of Right*[86]—(A) *In General.* A grant or license to use streets will be construed as exclusive only where an exclusive right is granted by clear and explicit terms or by necessary implication.[87] But a void grant of an exclusive privilege does not give another company a right to use the streets without the consent of the municipality.[88] Conferring an exclusive privilege does not deprive the municipality of the right to subscribe to the stock of a new company whose object is to compete with the company granted an exclusive privilege.[89] A valid exclusive license will be protected by the courts.[90]

(B) *Conditions and Reservations as to Use by Others.* Grants to a public service corporation of the right to use the streets are often made conditional on the allowing other like companies to use the grantee's track, conduits, poles, etc., as the case may be.[91] Such a condition is not a contract with the latter companies, but only between the first company and the municipality,[92] which the municipality may release the first company from;[93] and the right of the other companies to use such tracks, etc., is dependent upon the consent of the municipality.[94] A subsequent grant by the municipality to a new company of the right to use the poles of another company is unreasonable and void where the limits of such use are not fixed.[95]

86. See, generally, MONOPOLIES, 27 Cyc. 897.

87. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Empire City Subway Co. *v.* Broadway, etc., R. Co., 87 Hun (N. Y.) 279, 33 N. Y. Suppl. 1055 [*affirmed* in 159 N. Y. 555, 54 N. E. 1092]; Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 11 S. Ct. 892, 35 L. ed. 622; Central Transp. Co *v.* Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Chenango Bridge Co. *v.* Binghamton, 3 Wall. (U. S.) 51, 18 L. ed. 137; Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147; Dubuque, etc., R. Co. *v.* Litchfield, 23 How. (U. S.) 66, 16 L. ed. 500; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; Mills *v.* St. Clair County, 8 How. (U. S.) 569, 581, 12 L. ed. 1201; Citizens' St. R. Co. *v.* Jones, 34 Fed. 579. See also People's Electric Light, etc., Co. *v.* Capital Gas, etc., Co., 116 Ky. 76, 75 S. W. 280, 25 Ky. L. Rep. 327; Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 26 S. Ct. 224, 50 L. ed. 353.

Exclusive user.—A gas company's use of the streets of a city for twenty years for the purpose of laying down pipes for conveying gas to be used in lighting the city does not bar an inquiry into the right of the company to their exclusive use. It is not inconsistent with the use of unoccupied portions of the same streets by others for a like purpose; and the fact that others have not made such use of the streets does not make its user the exercise of a right to exclude others. State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262.

The naked grant of permission to use streets to lay sewer pipes confers no exclusive rights. Olyphant Sewage Drainage Co. *v.* Olyphant Borough, 211 Pa. St. 526, 61 Atl. 72.

88. Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624.

89. Memphis *v.* Dean, 8 Wall. (U. S.) 64, 19 L. ed. 326.

90. Newport *v.* Newport Light Co., 84 Ky. 166; Atty.-Gen. *v.* Walworth Light, etc., Co., 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398.

91. See cases cited *infra*, this note.

Construction of conditions.—An ordinance giving a railroad a right of way on condition that it allow other roads the use of its tracks within the city limits does not bind it to allow another road the use of tracks laid, since the ordinance went into effect beyond the right of way granted thereby, but is binding in respect to tracks on such right of way. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 52 Fed. 178.

Objections which first company may urge.—The grantee of a franchise conditioned that the poles should be used by other companies to whom permits to occupy portions of the same territory had been granted cannot be heard to complain that such other companies were not authorized by their charter to furnish electric light and use the poles. Brush Electric Light Co. *v.* Jones Bros. Electric Co., 5 Ohio Cir. Ct. 340, 3 Ohio Cir. Dec. 168 [*affirmed* in 29 Cinc. L. Bul. 72].

92. Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61 [*reversed* on other grounds in 21 N. J. Eq. 550].

93. Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61 [*reversed* on other grounds in 21 N. J. Eq. 550].

94. Hauss Electric Lighting Power Co. *v.* Jones Bros. Electric Co., 10 Ohio Dec. (Reprint) 709, 23 Cinc. L. Bul. 137.

95. Citizens' Electric Light, etc., Co. *v.* Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411.

(c) *Conflicting Grants or Licenses.*[96] A municipality cannot impair the vested rights given a public service corporation in its streets by permitting a use of the streets inconsistent with such rights.[97] A license to use a street must not conflict with a grant of the use of the street to another company engaged in the same line of business.[98] For instance, where a city authorizes a railroad to lay a track in a street, it cannot thereafter, without the consent of such railroad, authorize another railroad to use the tracks.[99] But where the grant to one company of a right to use the streets does not necessarily interfere with or impair a prior grant to another company, it cannot be objected to by the first company.[1] Thus the granting a right of way over one side of a street does not ordinarily preclude the right to subsequently grant a right of way over the other side.[2] So legislative power conferred upon a municipality to authorize street railroads to be laid down in streets does not prohibit it, where there is one track in the street, from granting the right to construct another in the same street.[3] And licenses are not invalid for slight incidental interferences with a prior privilege granted another.[4] As between two corporations exercising similar franchises upon the same street, priority, although it does not create monopoly, carries superiority of rights, and equity will adjust conflicting interests, as far as possible, so that each company may exercise its own franchise as fully as is compatible with the necessary rights of another; but, where interference is unavoidable, the later occupant must give way.[5] Where a grant is invalid for want of authority, the grantee cannot complain of an ordinance authorizing the occupation of its property by another company upon payment of a fair proportion of the original cost and a monthly rental.[6] Where an exclusive right is granted, injunction lies as against a subsequent competing company to preserve the franchise granted to the first company.[7]

(iv) *Effect on Subsequent Exercise of Municipal Power.*[8] All grants or licenses to use streets to carry on business are made upon the implied condition

96. See also Railroads; Street Railroads; Telegraphs and Telephones; Waters.

97. Northwestern Tel. Exch. Co. *v.* Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 5 L. R. A. 771, holding that the use of a street for moving a house may be permitted, but not so as to destroy the use of a street for travel or necessary public purposes, or so as to destroy or impair vested rights. See also Constitutional Law, 8 Cyc. 902.

98. Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687. See also New Orleans Waterworks Co. *v.* Louisiana Sugar Refinery Co., 35 La. Ann. 1111. *Compare,* however, Toledo Electric St. R. Co. *v.* Western Electric Light, etc., Co., 10 Ohio Cir. Ct. 531, 4 Ohio Cir. Dec. 43, holding that municipal power to make reasonable regulations is a continuing power under which a municipality may grant a permit to a new company to use the poles of an old one, under certain regulations, and to fix the compensation, without condemnation proceedings.

99. Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525. See also Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158. *Contra,* Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493 [*affirmed* in 50 Ohio St. 603, 36 N. E. 312].

1. Savannah, etc., R. Co. *v.* Coast-Line R. Co., 49 Ga. 202.

2. Merchants' Union Barb Wire Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494, (1886) 29 N. W. 822.

3. Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181.

4. Western Union Tel. Co. *v.* Syracuse Electric Light, etc., Co., 178 N. Y. 325, 70 N. E. 866.

5. Northwestern Tel. Exch. Co. *v.* Twin City Tel. Co, 89 Minn. 495, 95 N. W. 460; Rutland Electric Light Co. *v.* Marble City Electric Light Co., 65 Vt. 377, 26 Atl. 635, 36 Am. St. Rep. 868, 20 L. R. A. 821.

6. Brush Electric Light Co. *v.* Jones Bros. Electric Co., 5 Ohio Cir. Ct. 340, 3 Ohio Cir. Dec. 168.

7. Newport *v.* Newport Light Co., 84 Ky. 166. See also Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158.

As affected by possession.— Where an exclusive franchise has been granted and another company also claims such right, injunction to restrain the second company from setting up such exclusive right has been held the proper remedy, although the first company is not in possession of the streets. People's Electric Light, etc., Co. *v.* Capital Gas, etc., Co., 116 Ky. 76, 75 S. W. 280, 25 Ky. L. Rep. 327.

8. See also Constitutional Law, 8 Cyc. 1103.

that they shall be subject to such reasonable restrictions and regulations as the municipality may think it necessary to enact for the protection and general welfare of its citizens.[9] The privilege is subject not only to subsequent proper police regulations,[10] but also to prior general ordinances respecting the use of the streets.[11] In other words the permission given to use the streets is subordinate to the general municipal powers as to the use, control, and regulation of streets.[12] But the regulations must be reasonable,[13] and not prohibit, annul, or destroy rights grow-

Improvements interfering with franchises see *infra*, XIII, A, 2, m.

9. Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906 [*affirmed* in 61 N. J. L. 693, 40 Atl. 1132]; Suburban Electric Light, etc., Co. *v.* East Orange, (N. J. Ch. 1898) 41 Atl. 865; Landsdowne Borough *v.* Springfield Water Co., 16 Pa. Super. Ct. 490, 8 Del. Co. 175 [*affirming* 7 Del. Co. 506]; Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455.

10. *Alabama.*—Montgomery *v.* Capital City Water Works, 92 Ala. 361, 9 So. 339.

Illinois.— St. Louis, etc., R. Co. *v.* Belleville, 122 Ill. 376, 12 N. E. 680; Quincy *v.* Bull, 106 Ill. 337.

Indiana.— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Kansas.— Wyandotte *v.* Corrigan, 35 Kan. 21, 10 Pac. 99.

Kentucky.—Louisville City R. Co. *v.* Louisville, 8 Bush 415.

Maryland.— O'Brien *v.* Baltimore Belt R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

Missouri.— State *v.* Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798 [*affirmed* in 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955]; Springfield R. Co. *v.* Springfield, 85 Mo. 674; Westport *v.* Mulholland, 84 Mo. App. 319.

New Jersey.— Jersey City Water Com'rs *v.* Hudson, 13 N. J. Eq. 420, holding that a water company granted the right to use soil under streets for constructing their works may be compelled to lower pipes so to conform to a new grade established by municipal authorities.

New York.— Delaware, etc., R. Co. *v.* Buffalo, 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510 [*affirmed* in 158 N. Y. 266, 53 N. E. 44]; New York, etc., R. Co. *v.* New York, 1 Hilt. 562, holding that permission to lay a railroad track in a street did not take away the power to thereafter prohibit the use of steam in the streets.

North Carolina.—State *v.* Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290, forbidding engine or train to stop on street.

Pennsylvania.— Frankfort, etc., Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Dauph. Co. Rep. 182. See also Branson *v.* Philadelphhia, 47 Pa. St. 329. *Compare* West Philadelphia Pass. R. Co. *v.* Perkins, 10 Phila. 20; Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. 563.

West Virginia.— Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

United States.— State *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955 [*affirming* 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798]; Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87.

Canada.— Montreal Park, etc., R. Co. *v.* St. Louis, 17 Quebec Super. Ct. 545, holding that a municipality, granting to an electric railway company the right to operate its road within the municipal limits, but reserving the right to take possession of the streets when necessary for the purpose of changing the level or making other specified improvements, cannot be enjoined from taking such possession for such purpose, thereby preventing for a time the operation of the railroad, although by taking a more lengthy and expensive method the work might have been done by the city without suspending such operation.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1486.

For instance, where an elevated road has acquired a franchise for the use of certain streets, the city still retains the right to make use of the street for proper purposes, and is not compelled to consult the convenience of the railroad company in such use, but can only be required not to unreasonably interfere with the structure of the elevated road. Interborough Rapid Transit Co. *v.* Gallagher, 44 Misc. (N. Y.) 536, 90 N. Y. Suppl. 104 [*affirmed* in 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 152].

A reservation in the grant of the right to impose further conditions confers the right to provide for the enforcement of such conditions by fine for disobedience thereof. Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 546, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79.

11. Macon Consol. St. R. Co. *v.* Macon, 112 Ga. 782, 38 S. E. 60; McKeesport *v.* Citizens' Pass. R. Co., 2 Pa. Super. Ct. 249; Wilkinsburg Gas Co. *v.* Wilkinsburg, 25 Pittsb. Leg. J. N. S. (Pa.) 42.

12. Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688; San Antonio *v.* San Antonio St. R. Co., 15 Tex. Civ. App. 1, 39 S. W. 136, holding that the franchise of a street railway company is subordinate to the right conferred on the city by its charter to control the streets, construct sewers, etc.; and the city may, in the honest exercise of its discretion, locate a sewer in the center of a street, so as to suspend the operation of a street railway, without paying compensation for consequent pecuniary loss to the company.

13. Macon Consol. St. R. Co. *v.* Macon, 112 Ga. 782, 38 S. E. 60; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Pittsburgh's Appeal, 115 Pa. St. 4, 7 Atl. 778.

ing out of a valid contract.[14] For instance, the municipality may require a change of the location of gas pipes[15] or tracks;[16] may compel a railroad company to relay its tracks flush with the street;[17] may compel a change of location or total removal of a side-track materially impairing the use of the street by rendering the part assigned for public passage too narrow;[18] may prohibit or prescribe the kind of propelling power which may be used;[19] or may suspend operations for important municipal improvements, although such powers were not expressly allowed in the grant.[20] Where the original franchise was granted by ordinance but was not required by statute to be so granted, it may be modified by resolution.[21]

(v) *Assignment of Right.*[22] A license to a particular person or company is ordinarily not assignable,[23] especially when the ordinance expressly so provides,[24] but may pass to the successor of a corporation.[25] When granted to the licensee or its assigns, then either or both may use the license.[26]

(vi) *Rental or Fee For Use of Streets.*[27] It has been held that a municipality has the right to impose a reasonable charge as compensation for the space occupied in its streets by a public service corporation,[28] but that the reason-

14. Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514. See also Constitutional Law, 8 Cyc. 948.

The fact that the municipal requirements do impair the obligations does not relieve the company from offering to do those things which it was lawfully bound to do in order to obtain the right to use the streets. State *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955.

Fixing charges.—Where an ordinance granting a franchise allowed the company to charge a certain price and there was no provision in the charter or other statutes giving the council power to repeal or alter the grant, a subsequent ordinance reducing the price one half and making it unlawful for the company to exact an amount in excess of such reduced price is void. Ashland *v.* Wheeler, 88 Wis. 607, 60 N. W. 818. See also Jersey City *v.* Lehigh Valley Terminal R. Co., 55 N. J. L. 203, 26 Atl. 148; Jersey City *v.* National Docks R. Co., 55 N. J. L. 194, 26 Atl. 145; West Philadelphia Pass. R. Co. *v.* Perkins, 10 Phila. (Pa.) 20.

15. Jersey City Water Com'rs *v.* Hudson, 13 N. J. Eq. 420; *In re* Deering, 93 N. Y. 361; Wilkinsburg Gas Co. *v.* Wilkinsburg, 25 Pittsb. Leg. J. N. S. (Pa.) 42. See also Pittsburgh's Appeal, 115 Pa. St. 4, 7 Atl. 778.

Change of grade.— The grant of a franchise to lay pipes in streets does not preclude the municipality from the right to afterward change the grade of the streets, although by so doing the pipes may become exposed or obstructed, in which case the municipality may require the company to remove them or have it done by its own agents. Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665.

16. Atlantic, etc., R. Co. *v.* Cordele, 125 Ga. 373, 54 S. E. 155; Macon Consol. St. R. Co. *v.* Macon, 112 Ga. 782, 38 S. E. 60; New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562. See also Branson *v.* Philadelphia, 47 Pa. St. 329.

17. Albany *v.* Watervliet Turnpike, etc., Co., 108 N. Y. 14, 13 N. E. 370 [*affirming* 45 Hun 442].

18. Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

19. New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562.

20. San Antonio *v.* San Antonio St. R. Co., 15 Tex. Civ. App. 1, 39 S. W. 136.

21. State *v.* Cowgill, etc., Mill Co., 156 Mo. 620, 57 S. W. 1008.

22. See, generally, Assignments.

23. Brooklyn *v.* Fulton Municipal Gas Co., 7 Abb. N. Cas. (N. Y.) 19.

24. Taylor *v.* Dunn, 80 Tex. 652, 16 S. W. 732, holding, however, that, where a city granted the right to build a railroad to be used by the grantee while building a state capitol, with the restriction that the privilege conferred should not be sold or transferred, an agreement giving a subcontractor a right to use the road while engaged in erecting such building was not a violation of the condition, so as to forfeit the privilege and render the road a nuisance.

25. Quincy *v.* Chicago, etc., R. Co., 94 Ill. 537, holding that where the grant of the privilege to a company contains no clause restricting such use to that particular company, it may be exercised by another company succeeding to all the grantee's rights and franchises, where the law in force expressly authorizes such a grant and also authorizes one company to succeed to the rights and the franchises of another.

26. Newman *v.* Avondale, 1 Ohio S. & C. Pl. Dec. 356, 31 Cinc. L. Bul. 123.

27. See also Railroads; Street Railroads; Telegraphs and Telephones.

28. Lancaster *v.* Briggs, 118 Mo. App. 570, 96 S. W. 314; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380 [*reversing* 39 Fed. 59], 149 U. S. 465, 13 S. Ct. 990, 37 L. ed. 810; Memphis *v.* Postal Tel. Cable Co., 145 Fed. 602, 76 C. C. A. 292 [*reversing* 139 Fed. 707]. See also Philadelphia *v.* Atlantic, etc., Tel. Co., 102 Fed. 254, 42 C. C. A. 325 [*reversed* on other grounds in 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995].

ableness of such charge is reviewable by the courts.[29] But where a grant is made to use the streets, by an ordinance containing no reservations respecting tolls or other charges, the municipality cannot by a subsequent ordinance impose such charges.[30] Where the charter of a public service corporation subjected the use of its track to the assent of the common council upon such terms and conditions as it might impose the municipality could exact a money payment for the use of the streets.[31]

d. Termination — (I) *In General.* A license for a limited period terminates with the expiration of the time fixed by the ordinance granting the use of the streets,[32] and the failure of the municipality to fulfil its contract to take and pay for the plant of the company at the expiration of such time does not prolong the franchise.[33] But where the municipality had no power to authorize the use of any street for a railroad, the mere use by a railroad under an ordinance for the period limited thereby does not estop the railroad company from thereafter using the streets under its general powers.[34] Where an exclusive privilege in the streets for a term of years is granted on condition that the municipality shall have the right to purchase the plant at a certain time, the municipality may treat the contract as annulled so far as the grant of exclusive privileges is concerned upon the refusal by the company to sell at the specified time.[35] A grant of privileges in streets does not become extinguished through the failure of the grantees to exercise privileges which they are not required to exercise by the terms of the grant.[36]

(II) *Revocation* — (A) *License.*[37] A mere license to use a street is revocable by the municipality in the exercise of its legislative discretion.[38] Pursuant to

In Pennsylvania boroughs have equal powers with cities to impose a license-tax for the poles of electric light companies erected in the borough streets, and an ordinance requiring an electric light company to pay a fixed sum for each of its poles comes within the police powers over the streets. Landsdowne *v.* Delaware County, etc., Electric R. Co., 9 Pa. Super. Ct. 621, 7 Del. Co. 398; Lansdowne *v.* Citizens' Electric Light, etc., Co., 9 Pa. Super. Ct. 620, 7 Del. Co. 399; Ridley Park *v.* Citizen's Electric Light, etc., Co., 9 Pa. Super. Ct. 615, 7 Del. Co. 395.

29. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 380, 37 L. ed. 380 [*reversing* 39 Fed. 59].

Reasonableness of particular ordinances.— Lansdowne Borough *v.* Springfield Water Co., 16 Pa. Super. Ct. 490, 8 Del. Co. 175 [*affirming* 7 Del. Co. 506] (holding that an ordinance fixing a fee for a permit to open a street to make repairs of any underground service at two dollars for an unpaved street, six dollars for a street paved with Belgian block or macadamized, and eight dollars for a street paved with asphalt was reasonable); Ft. Pitt Gas Co. *v.* Sewickley, 30 Pittsb. Leg. J. N. S. (Pa.) 419 (holding that an ordinance requiring a deposit of ten dollars as a condition to grant of permit to make any excavation in the street was unreasonable). An ordinance requiring a payment in the nature of a rental for the use of its streets for a telegraph company's poles of five dollars a pole was unreasonable where enormously greater than the value of the average adjoining property. St. Louis *v.* Western Union Tel. Co., 63 Fed. 68.

30. Des Moines *v.* Chicago, etc., R. Co., 41 Iowa 569; New Orleans *v.* Great Southern Tel., etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502; St. Louis *v.* Western Union Tel. Co., 63 Fed. 68. But see Wyandotte *v.* Corrigan, 35 Kan. 21, 10 Pac. 99; New Orleans *v.* New Orleans City, etc., R. Co., 40 La. Ann. 587, 4 So. 512.

31. Providence *v.* Union R. Co., 12 R. I. 473.

32. Keokuk Gas-Light, etc., Co. *v.* Keokuk, 80 Iowa 137, 45 N. W. 555; Canal, etc., R. Co. *v.* New Orleans, 39 La. Ann. 709, 2 So. 388; Louisville Trust Co. *v.* Cincinnati, 73 Fed. 716 (city held not estopped to assert its right to terminate at termination of the limited period); Mutual Union Tel. Co. *v.* Chicago, 16 Fed. 309, 11 Biss. 539 (holding, however, that after such time the mayor has no power, of his own motion and without any express direction from the city council, and without notice to the company, to cut and remove the wires of the company, and he is liable as a trespasser for so doing).

33. Canal, etc., St. R. Co. *v.* New Orleans, 39 La. Ann. 709, 2 So. 388.

34. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228 [*reversing* 3 Mo. App. 315].

35. Montgomery Gas-Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

36. Cincinnati *v.* Covington, etc., Bridge Co., 20 Ohio Cir. Ct. 390, 10 Ohio Cir. Dec. 792.

37. See, generally, Licenses, 25 Cyc. 625.

38. *Alabama.*— Winter *v.* Montgomery, 83 Ala. 589, 3 So. 235.

Illinois.— Snyder *v.* Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407.

Indiana.— Coverdale *v.* Edwards, 155 Ind. 374, 58 N. E. 495; Indianapolis *v.* Miller, 27 Ind. 394.

this rule it is proper to revoke licenses to use sidewalks,[39] to maintain awnings,[40] drain pipes,[41] walls,[42] bay windows,[43] or house steps;[44] or to deposit material in the street;[45] or a right given to an abutter to lay pipes.[46] In some jurisdictions, however, the doctrine of equitable estoppel has been held to preclude the right to order the removal of structures in a street.[47]

(B) *Grants and Franchises.*[48] While, consistently with the rules which have been referred to herein, a municipality may reasonably regulate the exercise of a franchise to use the streets,[49] yet a grant of a right to use the streets is generally considered a grant of a vested right which the municipality cannot revoke,[50]

Louisiana.—Shepherd *v.* New Orleans Third Municipality, 6 Rob. 349, 41 Am. Dec. 269.

New York.—See Lincoln Safe Deposit Co. *v.* New York, 96 N. Y. App. Div. 624, 88 N. Y. Suppl. 912.

Texas.—Galveston City R. Co. *v.* Galveston City St. R. Co., 63 Tex. 529.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1490.

Where the licensee is not engaged in a business devoted to a public purpose but it is merely personal, and no property rights in the street are conferred, the city may revoke the license. So held where a wall was erected in the street. South Highland Land, etc., Co. *v.* Kansas City, 100 Mo. App. 518, 75 S. W. 383. So a resolution of a city council authorizing a private person to erect a permanent structure on a street, amounting to an encroachment, confers no vested right, when the construction is made under such consent. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470].

Right of licensee to compensation on revocation.— Ordinarily the licensee has no right to compensation where his license is revoked. South Highland Land, etc., Co. *v.* Kansas City, 100 Mo. App. 518, 75 S. W. 383. Especially is this so where the work in the streets was done after notice that the mayor would recommend the passage of a repealing ordinance as soon as possible. Lake Roland El. R. Co. *v.* Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126. But when a city has granted a license or franchise to a private person for a public purpose, it cannot, after he has expended money on the faith thereof, revoke his license without compensating him, unless such obstruction become by subsequent use an actual nuisance. Savage *v.* Salem, 23 Oreg. 381, 31 Pac. 832, 37 Am. St. Rep. 688, 24 L. R. A. 787.

Effect.— Revocation of a license to appropriate part of a street to private use does not immediately make the licensee a wrong-doer. Everett *v.* Marquette, 53 Mich. 450, 19 N. W. 140.

39. Winter *v.* Montgomery, 83 Ala. 589, 3 So. 235; Denver *v.* Girard, 21 Colo. 447, 42 Pac. 662, holding that an ordinance declaring that no person shall place merchandise on a sidewalk beyond three feet from the front line of the lot does not vacate the three feet of the sidewalk, but merely grants a revocable license.

40. Augusta *v.* Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340; Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470].

41. Cumberland County *v.* Vale, 18 Pa. Super. Ct. 501; Eddy *v.* Granger, 19 R. I. 105, 31 Atl. 831, 28 L. R. A. 517.

42. South Highland Land, etc., Co. *v.* Kansas City, 100 Mo. App. 518, 75 S. W. 383.

43. Forbes *v.* Detroit, 139 Mich. 280, 102 N. W. 740.

44. Norfolk City *v.* Chamberlaine, 29 Gratt. (Va.) 534.

45. Indianapolis *v.* Miller, 27 Ind. 394.

46. Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. 274.

47. Dickerson *v.* Le Roy, 72 Ill. App. 588.

When compensation is required for a permit to use the streets for a private purpose and it is accepted and acted upon by the holder by making costly improvements required, and the municipality acts in its private corporate capacity as distinguished from its political or governmental capacity, it is irrevocable. Gregsten *v.* Chicago, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496 [*reversing* 40 Ill. App. 607].

But where the municipality had no power to grant a permanent use, there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the municipal authorities done without authority of law. Snyder *v.* Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407.

48. See also CONSTITUTIONAL LAW, 8 Cyc. 902, 947.

49. See *supra*, XII, A, 8, c, (IV).

50. *California.*—Workman *v.* Southern Pac. R. Co., 129 Cal. 536, 62 Pac. 185, 316; Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676.

Illinois.— People *v.* Blocki, 203 Ill. 363, 67 N. E. 809; Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616; Quincy *v.* Bull, 106 Ill. 337 [*affirming* 9 Ill. App. 127]; London Mills *v.* Fairview-London Tel. Cir., 105 Ill. App. 146 [*affirmed* in 208 Ill. 289, 70 N. E. 313]; Dickerson *v.* Le Roy, 72 Ill. App. 588.

Indiana.— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

Michigan.— Stevens *v.* Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777, sewer for public use.

after acceptance,[51] except for failure to comply with the terms of the grant,[52] or for other good cause,[53] or where expressly authorized by statute.[54] Such contracts, however, are made upon the implied condition, understood and accepted by the grantee, that if the safety, health, or morals of the public shall require the rescission or modification of such contract, it may be rescinded or modified, under the police power of the state or of the city, where the city has been vested by the state with such power.[55] In any event, revocation is improper without giving the grantee notice and an opportunity for a hearing,[56] and observing other charter or statutory requirements.[57] Where the right is derived not from the municipality but from the legislature, it cannot be revoked by the municipality.[58] Where a company abandons the use of a street on acquiring a right to elevate its road, the land in the street reverts to the municipality for street purposes without a formal release from the company.[59] Acquiescence for many years

New Jersey.— Phillipsburg Electric Lighting, etc., Co. *v.* Phillipsburg, 66 N. J. L. 505, 49 Atl. 445 (notwithstanding council may have been misled in passing ordinance); Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; Suburban Electric Light, etc., Co. *v.* East Orange Tp., (Ch. 1898) 41 Atl. 865.

New York.— *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18; Delaware, etc., R. Co. *v.* Buffalo, 65 Hun 464, 20 N. Y. Suppl. 448; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 358; Milhau *v.* Sharp, 17 Barb. 435.

Ohio.— Cincinnati *v.* Cincinnati Edison Electric Co., 11 Ohio Dec. (Reprint) 315, 26 Cinc. L. Bul. 104. See also Cincinnati, etc., R. Co. *v.* Carthage, 36 Ohio St. 631, holding that an ordinance which was inoperative, without the assent of the company, to rescind the grant of the right of way, was also inoperative to release the company from its obligation to grade and gravel streets.

Oregon.— Savage *v.* Salem, 23 Oreg. 381, 31 Pac. 832, 37 Am. St. Rep. 688, 24 L. R. A. 787.

Pennsylvania.— Avoca *v.* Pittston, etc., St. R. Co., 7 Kulp 470; Philadelphia Steam Supply Co. *v.* Philadelphia, 17 Phila. 110.

Texas.— Houston *v.* Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127; Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88.

United States.— Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132; Baltimore Trust, etc., Co. *v.* Baltimore, 64 Fed. 153.

Canada.— See Bannan *v.* Toronto, 22 Ont. 274.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1490.

The repeal of the ordinance, in pursuance whereof a street railway was built, does not render the railway a nuisance. Ingram *v.* Chicago, etc., R. Co., 38 Iowa 669.

51. East St. Louis Union R. Co. *v.* East St. Louis, 39 Ill. App. 398 (holding that a municipality may revoke an ordinance granting the right of way before the same has been accepted); Waukesha Hygeia Mineral Spring Co. *v.* Waukesha, 83 Wis. 475, 53 N. W. 675; Logansport R. Co. *v.* Logansport, 114 Fed. 688.

52. Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676.

53. Spencer *v.* Andrew, 82 Iowa 14, 47 N. W. 1007, 12 L. R. A. 115, holding that the privilege granted to but one member of a firm as an individual will not be revoked because it is being used by the firm of which he is a member in its business, where it was granted with the knowledge and expectation that it would be so used.

Grounds.—After the company has erected poles and strung wires in the streets pursuant to permission granted by an ordinance, the grant cannot be revoked on the ground that the corporation is violating its charter or the laws of the state. So the fact that the officers, managers, and stock-holders of the company are different individuals from those who were stock-holders when the permission was granted by a city council to an electric light company to use the city's streets gives no ground for the repeal of the ordinance after the streets have been so occupied. Phillipsburg Electric Lighting, etc., Co. *v.* Phillipsburg, 66 N. J. L. 505, 49 Atl. 445.

54. Medford, etc., R. Co. *v.* Somerville, 111 Mass. 232.

55. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Lake Roland El. R. Co. *v.* Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126. See also Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. 274; Cumberland County *v.* Vale, 18 Pa. Super. Ct. 501.

56. Vicksburg, etc., R. Co. *v.* Monroe, 48 La. Ann. 1102, 20 So. 664; United Electric Co. *v.* Bayonne, 73 N. J. L. 410, 63 Atl. 996; Jersey City, etc., St. R. Co. *v.* Passaic, 68 N. J. L. 110, 52 Atl. 242; Newark, etc., Traction Co. *v.* North Arlington, 67 N. J. L. 161, 50 Atl. 345; Cape May, etc., R. Co. *v.* Cape May, 58 N. J. L. 565, 24 Atl. 307 [*reversed* on other grounds in 60 N. J. L. 224, 37 Atl. 892, 39 L. R. A. 609].

57. Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19 [*modifying* 123 Fed. 762].

58. Delaware, etc., R. Co. *v.* Buffalo, 65 Hun (N. Y.) 464, 20 N. Y. Suppl. 448; Philadelphia Steam Supply Co. *v.* Philadelphia, 17 Phila. (Pa.) 110.

59. Tocci *v.* New York, 73 Hun (N. Y.) 46, 25 N. Y. Suppl. 1089.

may estop the municipality to revoke a franchise on the ground that the municipality had no authority to grant the franchise.[60] Of course the privilege may be revoked where the right to so do is specially reserved by the municipality,[61] and such reservation may be enforced, although the licensee will sustain a considerable loss without fault on his part.[62]

(III) *FORFEITURE.* Failure of the grantee to perform the conditions upon which the grant is based operates as a forfeiture of the privilege or franchise.[63] But where the breach is of a condition subsequent, after the privilege becomes vested, the privilege or franchise cannot be revoked by ordinance but only by a resort to the courts.[64] So a breach of a condition subsequent does not *ipso facto* terminate the right of way so as to entitle one other than the municipality to sue the company as for an unlawful occupation of the street.[65] The forfeiture may be waived by the municipality;[66] and the municipality is estopped to claim that a change in the location of the company's plant operated as a forfeiture of the company's rights in certain streets where the municipality has acquiesced in such change for many years.[67] Where, after municipal revocation for breach of condition, the company proceeds with the use of the streets, the municipality may enjoin further operations.[68]

9. OBSTRUCTIONS AND ENCROACHMENTS — a. General Rules.[69] The general rule is that any obstruction of a street or encroachment thereon which interferes with

60. Wyandotte Electric-Light Co. *v.* Wyandotte, 124 Mich. 43, 82 N. W. 821.

61. Coverdale *v.* Edwards, 155 Ind. 374, 58 N. E. 495; Troy *v.* Troy, etc., R. Co., 49 N. Y. 657 (holding that such reservation of power does not affect the liability of the company while operating its road under the license); Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147 [*affirming* 98 Fed. 671].

Construction of ordinance.— In an ordinance granting certain privileges to a corporation, a proviso that the acts of the company under the ordinance shall be subject to any ordinances thereafter passed does not convert the grant into a mere revocable permit, but only subjects the company to future regulations, not inconsistent with the ordinance itself. New Orleans *v.* Great Southern Tel., etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502.

62. Forbes *v.* Detroit, 139 Mich. 280, 102 N. W. 740.

63. Pacific R. Co. *v.* Leavenworth, 18 Fed. Cas. No. 10,649, 1 Dill. 393.

What constitutes breach.— Chicago Municipal Gas Light, etc., Co. *v.* Lake, 27 Ill. App. 346 [*affirmed* in 130 Ill. 42, 22 N. E. 616], failure to furnish gas within one year.

Excuses.— Where the licensee has been prevented by the injunction of a third person from performing his agreement within the time limited, however, there is no forfeiture. State *v.* Cockrem, 25 La. Ann. 356.

Removal as obstruction.— Where a street railway company has been granted by a borough the right to use a street on the condition that such right shall be forfeited if it does not within a year build a certain extension, the borough can remove the track from the street if the extension is not constructed within a year. Minersville Borough *v.* Schuylkill Electric R. Co., 205 Pa. St. 394, 54 Atl. 1050.

64. Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388 [*affirmed* in 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681]; Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632. See also Foster *v.* Joliet, 27 Fed. 899; Chicago, etc., R. Co. *v.* Minnesota Cent. R. Co., 14 Fed. 525, 4 McCrary 606.

For instance, where a company is authorized to lay a cable railway, the mere fact that it lays a track adapted only for use as a horse railway does not give to the city the right to abate it as a nuisance, but it must take action to compel the company to operate a cable line. Spokane St. R. Co. *v.* Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

65. Knight *v.* Kansas City, etc., R. Co., 70 Mo. 231.

66. Chicago City R. Co. *v.* People, 73 Ill. 541.

What constitutes laches.— Where a street railroad has failed to build an extension, which was the condition of its obtaining the use of the streets, indulgence by the borough in commencing proceedings to compel removal of the tracks, where the delay leads to no change in the situation, is not laches on the part of the borough. Minersville Borough *v.* Schuylkill Electric R. Co., 205 Pa. St. 394, 54 Atl. 1050.

67. Columbus *v.* Union Pac. R. Co., 137 Fed. 869, 70 C. C. A. 207.

68. Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 168 Pa. St. 181, 32 Atl. 19.

69. **On country highways** see STREETS AND HIGHWAYS.

By railroad companies see RAILROADS; STREET RAILROADS.

By telegraph and telephone companies see TELEGRAPHS AND TELEPHONES.

Power to prohibit in general see *supra*, XII, A, 4, c, (I).

Obstruction considered as a taking or injuring of property see EMINENT DOMAIN, 15 Cyc. 662.

its use for travel is a public nuisance,[70] except where duly authorized by the state or municipality,[71] regardless of the question of the comparative benefit to the public of the obstruction and the street.[72] And an obstruction of the use of a sidewalk is as much a nuisance as the obstruction of any other part of the street.[73] But acts which would constitute a nuisance in connection with public highways are not necessarily a nuisance in a street of a municipality.[74]

b. Exceptions to Rule. The rule that any obstruction of or encroachment on a street is a nuisance is subject to certain exceptions resulting from necessity and justified by public convenience.[75] In addition to the rights of abutting owners to encroach upon the street to a limited extent and for a temporary purpose, as in the course of erecting a building or removing goods from a store,[76] other persons may also temporarily obstruct the street in the course of their business where such obstruction is not unreasonable.[77] For instance, a reasonable use of the street for the purpose of delivering guests at and taking them from a hotel by means of cabs, carriages, and other vehicles is permissible.[78] And a coach or omnibus may stop in the street to take up or set down passengers,[79] and the use of a street for public travel may be temporarily interfered with in a variety of ways without the creation of a nuisance.[80]

c. Illustrations. Among obstructions and encroachments held unlawful are

Mandamus as remedy to compel removal of obstructions and encroachments see MANDAMUS, 26 Cyc. 300.

70. *Alabama.*— Weiss *v.* Taylor, 144 Ala. 440, 39 So. 519; State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

California.— San Francisco *v.* Buckman, 111 Cal. 25, 43 Pac. 396.

Connecticut.— State *v.* Merrit, 35 Conn. 314.

Delaware.— Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

Georgia.— Columbus *v.* Jaques, 30 Ga. 506.

Idaho.— Boise City *v.* Boise Rapid Transit Co., 6 Ida. 779, 59 Pac. 716.

Indiana.— Hall *v.* Breyfogle, 162 Ind. 494, 70 N. E. 883.

Iowa.— Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

New York.— Cohen *v.* New York, 113 N. Y. 532, 21 N. E. 700, 10 Am. St. Rep. 506, 4 L. R. A. 406; Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Clifford *v.* Dam, 81 N. Y. 52; New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937; People *v.* Cunningham, 1 Den. 524, 43 Am. Dec. 729.

North Dakota.— Northern Pac. R. Co. *v.* Lake, 10 N. D. 541, 88 N. W. 461.

Pennsylvania.— New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.

Virginia.— Yates *v.* Warrenton, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860.

United States.— Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643.

England.— Atty.-Gen. *v.* Brighton, etc., Co-operative Supply Assoc., [1900] 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. Rep. N. S. 762, 48 Wkly. Rep. 314.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1492 *et seq.*

Alley.— The obstruction of a public alley is a public nuisance. Harniss *v.* Bulpitt, 1 Cal. App. 140, 81 Pac. 1022.

The public right goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon said limits by any person by any means by which the enjoyment of said public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous. Wheeler *v.* Ft. Dodge, 131 Iowa 566, 108 N. W. 1057.

71. Marini *v.* Graham, 67 Cal. 130, 7 Pac. 442; Everett *v.* Marquette, 53 Mich. 450, 19 N. W. 140; People *v.* New York, 20 Misc. (N. Y.) 189, 45 N. Y. Suppl. 900.

72. West Seattle *v.* West Seattle Land, etc., Co., 38 Wash. 359, 80 Pac. 549.

73. Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175; New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937. See also City Council *v.* Truchelut, 1 Nott & M. (S. C.) 227.

74. Haight *v.* Keokuk, 4 Iowa 199.

75. Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

76. See *supra*, XII, A, 7, g.

77. Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351, holding that a city contractor, in constructing a sewer, may temporarily use the street in a reasonably careful manner for the piling thereon of dirt taken from the excavation.

78. People *v.* Brookfield, 6 N. Y. App. Div. 398, 39 N. Y. Suppl. 673.

79. Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

Persons engaged in transferring passengers and baggage to and from a railroad station have a right to occupy the sidewalk and street adjoining the main entrance in so far as necessary for the transaction of their business but not for the purpose of soliciting business. Donnovan *v.* Pennsylvania Co., 124 Fed. 1016, 60 C. C. A. 168 [*affirming* 116 Fed. 907].

80. Callanan *v.* Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

the following: Awnings;[81] bay and oriel windows;[82] bill boards;[83] bridges or other overhead passageways over the street;[84] buildings inclosing the greater portion of the width of a street for the storage of tools and machinery used in the construction of a subway and for the generation of compressed air power for use along the whole line of the work;[85] dangerous opening in a frequented street;[86] flag-staff;[87] ice chute across the street;[88] mill-dam;[89] outside stairs;[90] overhanging roof;[91] pile of lumber in the street;[92] pillars of a building;[93] platform scales;[94] railroad constructed without authority of law;[95] round-house and turn-table;[96] stands on the sidewalk;[97] steps;[98] trees on the sidewalk;[99] unbridged ditch;[1] and a wire across the street.[2] On the other hand, the following have been held not nuisances: Area way;[3] bridge approach;[4] market cart standing in the street for over an hour;[5] mill-race built before platting of an addition of the city;[6] platform

81. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470]; Pedrick *v.* Bailey, 12 Gray (Mass.) 161; Brinkman *v.* Eisler, 16 N. Y. Suppl. 154 [*affirming* 7 N. Y. Suppl. 193]; Hoey *v.* Gilroy, 14 N. Y. Suppl. 159 [*reversed* on other grounds in 129 N. Y. 132, 29 N. E. 85]; Farrell *v.* New York, 5 N. Y. Suppl. 672. *Contra*, Hawkins *v.* Sanders, 45 Mich. 491, 8 N. W. 98.

82. Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373; Hess *v.* Lancaster, 4 Pa. Dist. 737. *Contra*, see Jenks *v.* Williams, 115 Mass. 217; State *v.* Tooker, 9 Ohio Cir. Ct. 558, 6 Ohio Cir. Dec. 562.

83. Wilkes-Barre *v.* Burgunder, 7 Kulp (Pa.) 63.

84. Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175; Knox *v.* New York, 55 Barb. (N. Y.) 404, 38 How. Pr. 67. But see Frostburg *v.* Hitchins, 99 Md. 617, 59 Atl. 49, over alley.

85. Bates *v.* Holbrook, 171 N. Y. 460, 688, 64 N. E. 181, 64 N. E. 753 [*affirming* 67 N. Y. App. Div. 25, 73 N. Y. Suppl. 417].

86. Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

87. Dreher *v.* Yates, 43 N. J. L. 473. But see Allegheny *v.* Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649.

88. Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

89. New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.

90. McCormick *v.* Weaver, 144 Mich. 6, 107 N. W. 314; People *v.* Carpenter, 1 Mich. 273.

91. Garland *v.* Towne, 55 N. H. 55, 20 Am. Rep. 164. But see Beecher *v.* People, 38 Mich. 289, 31 Am. Rep. 316.

92. Pittsburgh, etc., Bridge Co. *v.* Com., 4 Pa. Cas. 153, 8 Atl. 217.

93. Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

94. Emerson *v.* Babcock, 66 Iowa 257, 23 N. W. 656, 55 Am. Rep. 273.

95. Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

96. Platt *v.* Chicago, etc., R. Co., 74 Iowa 127, 37 N. W. 107, (1887) 31 N. W. 883.

97. *Alabama.*— Costello *v.* State, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303.

Illinois.— Chicago *v.* Pooley, 112 Ill. App. 343.

Indiana.— State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

Louisiana.— Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175.

Pennsylvania.— Com. *v.* Wentworth, Brightly 318. But see Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

98. New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937; Molhumes *v.* Cleveland, 4 Ohio Dec. (Reprint) 488, 2 Clev. L. Rep. 236.

Where a statute forbids affirmatively the erection of steps beyond the building line, but provides that, outside of a certain district, steps beyond the building line may be permitted where there are other such steps in existence within two hundred feet, the proviso is void as an arbitrary classification. Storck *v.* Baltimore City, 101 Md. 476, 61 Atl. 330.

99. Vanderhurst *v.* Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553. See also *infra*, XII, A, 9, f, (II), (A).

But shade trees are not a nuisance *per se*, and only become so when they obstruct or interfere with the use of the highway or street. Frostburg *v.* Wineland, 98 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 399, 64 L. R. A. 627.

1. Boise City *v.* Boise Rapid Transit Co., 6 Ida. 779, 59 Pac. 716.

2. Wheeler *v.* Ft. Dodge, 131 Iowa 566, 108 N. W. 1057; Lundeen *v.* Livingston Electric Light Co., 17 Mont. 32, 41 Pac. 995. But see Brigantine *v.* Holland Trust Co., (N. J. Ch. 1897) 37 Atl. 438; Henry *v.* Cincinnati, 25 Ohio Cir. Ct. 178.

3. Com. *v.* West Newton First Nat. Bank, 207 Pa. St. 255, 56 Atl. 437; Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783. See also Buek *v.* Collis, 17 N. Y. App. Div. 465, 45 N. Y. Suppl. 291. But see New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937.

4. Com. *v.* Pittston Ferry Bridge Co., 148 Pa. St. 621, 24 Atl. 87.

5. State *v.* Edens, 85 N. C. 522.

6. Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

in an alley at the rear of a store;[7] signs suspended over the sidewalk not interfering with the use of the walk by the general public;[8] stepping stone on the sidewalk near the curb;[9] temporary deposit of goods in their transit to a storehouse or for wharfage;[10] and water-pipes already laid under the soil.[11] So the use of a steam traction engine and trailers in the streets of a city is not a public nuisance *per se*,[12] nor is the moving of a building through the streets.[13]

d. Defenses — (I) *In General.* Ordinarily it is a good defense to a claim that an encroachment or obstruction is unlawful, and that it is a nuisance that the municipality has licensed such use of the street;[14] but an unauthorized or invalid license is no defense.[15] It is no defense that the obstructor is a common carrier,[16] or an officer removing goods from a house in obedience to an execution;[17] that permission was given by the abutting owner;[18] that other persons are violating the ordinance;[19] that the act was upon the advice of third persons;[20] or that the municipality had refused to fulfil another agreement.[21] So where an ordinance is violated and the encroachment is a purpresture, it is no defense that the encroachment does no injury.[22] An unauthorized agreement between the municipality and the obstructor is no defense.[23] A trespasser on a street as dedicated cannot defend on the ground that the city had not opened the street to its full width.[24] So an obstruction cannot be justified upon the ground of necessity where there are other methods, although more expensive.[25] Mere lapse of time and payment of personal taxes on the structure constituting the obstruction, where there is no element of estoppel except mere lapse of time, is no defense.[26] It is a defense that the municipality has neither a fee nor an easement in the alleged street claimed to be obstructed.[27] Where the title to the property is in a married woman, her husband is not liable, although he acted as the agent of his wife.[28]

(II) *Prescription and Limitation.* The right to maintain a nuisance in a street cannot be acquired by prescription.[29] But authority to use the street may

7. Bagley *v.* People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192.

8. State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446, holding also that a city has not the power, by virtue of its ownership of the fee in the streets of the city, to require an abutting property-owner to remove a sign suspended over the sidewalk, unless it interferes with the use of the sidewalk by the general public, or endangers the safety of pedestrians.

9. Wolff *v.* District of Columbia, 196 U. S. 152, 25 S. Ct. 198, 49 L. ed. 426 [*affirming* 21 App. Cas. (D. C.) 464, 69 L. R. A. 83].

10. Haight *v.* Keokuk, 4 Iowa 199.

11. Brigantine *v.* Holland Trust Co., (N. J. Ch. 1897) 37 Atl. 438.

12. McCarter *v.* Ludlum Steel, etc., Co., (N. J. Ch. 1906) 63 Atl. 761.

13. See *infra*, XII, A, 10, c.

14. People *v.* New York, 20 Misc. (N. Y.) 189, 45 N. Y. Suppl. 900; Echols *v.* State, 12 Tex. App. 615. See also Newcastle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516; Pickup *v.* Philadelphia, etc., R. Co., 29 Pa. Super. Ct. 631.

Revocation of license.— One authorized by city ordinance to maintain an obstruction in a public street is merely protected, during the continuance of the license, against a penalty, but upon the city's demand for the removal of such obstruction it becomes a purpresture, and, in law, a nuisance. Snyder *v.* Mt. Pulaski, 176 Ill. 397, 53 N. E. 62, 44 L. R. A. 407.

15. Snyder *v.* Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; Hoey *v.* Gilroy, 14 N. Y. Suppl. 159; Mahanoy City *v.* Bissell, 9 Pa. Co. Ct. 469.

16. Hoey *v.* Gilroy, 14 N. Y. Suppl. 158 [*reversed* on other grounds in 129 N. Y. 132, 29 N. E. 85].

17. Com. *v.* Lennon, 172 Mass. 434, 52 N. E. 521.

18. Hontros *v.* Chicago, 113 Ill. App. 318; Chicago *v.* Pooley, 112 Ill. App. 343; Monmouth *v.* Gardiner, 35 Me. 247; Com. *v.* Smyth, 14 Gray (Mass.) 33.

19. Concord *v.* Burleigh, 67 N. H. 106, 36 Atl. 606; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186 [*affirmed* in 36 N. Y. Suppl. 1130].

20. Chute *v.* State, 19 Minn. 271.

21. Com. *v.* Smyth, 14 Gray (Mass.) 33.

22. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470].

23. Mahanoy *v.* Bissell, 9 Pa. Co. Ct. 469.

24. Atlantic City *v.* Snee, 68 N. J. L. 39, 52 Atl. 372.

25. Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

26. West Seattle *v.* West Seattle Land, etc., Co., 38 Wash. 359, 80 Pac. 549.

27. Smith *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1901) 64 S. W. 943.

28. Cook *v.* Bellack, 109 Wis. 391, 85 N. W. 325.

29. *Alabama.*— Harn *v.* Dadeville, 100 Ala.

be presumed from municipal acquiescence therein for many years,[30] and the municipality may be estopped by its acquiescence or conduct from compelling the removal of the obstruction.[31]

e. Ejectment.[32] A municipality may maintain ejectment to recover possession of a street,[33] without having previously passed an ordinance relating to the removal of the obstructions therein.[34]

f. Removal — (I) *In General.*[35] As trustee of streets for the use of the public a municipality is in duty bound to remove all obstructions and encroachments which materially disturb the public user;[36] and the prevailing doctrine holds it liable in damages to any person sustaining injury from its refusal or neglect to perform this function.[37] Any ordinary method of exercising this power, prescribed by the statute conferring it, is exclusive and must be followed;[38] but if not specially prescribed, then the municipality should under its general powers pursue such course consistent with fundamental law as is adequate and best adapted, with respect to the rights of persons interested, to effect the desired result, and protect the rights of the public in the street.[39] All methods may be classified under two heads — ordinary and summary; the former being those invoking judicial power on due notice and hearing,[40] the latter being by rapid and forcible means without hearing and judgment.[41] A suit to compel specific performance of a contract to open a street is not the proper proceeding to remove an obstruction thereon.[42]

199, 14 So. 9; Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161.

Idaho.— Lewiston *v.* Booth, 3 Ida. 692, 34 Pac. 809.

Illinois.— Lee *v.* Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; Chicago *v.* Pooley, 112 Ill. App. 343.

Iowa.— Waterloo *v.* Union Mill Co., 72 Iowa 437, 34 N. W. 197; Cain *v.* Chicago, etc., R. Co., 54 Iowa 255, 3 N. W. 736, 6 N. W. 268.

Massachusetts.— Holyoke *v.* Hadley Water-Power Co., 174 Mass. 424, 54 N. E. 889.

New York.— Simis *v.* Brookfield, 13 Misc. 569, 34 N. Y. Suppl. 695. But see Boyer *v.* Little Falls, 5 N. Y. App. Div. 1, 38 N. Y. Suppl. 1114.

Ohio.— Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. 274. But see Cincinnati *v.* Columbia, etc., St. R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc. L. Bul. 192.

Pennsylvania.— Com. *v.* Alburger, 1 Whart. 469; Com. *v.* McDonald, 16 Serg. & R. 390; Wakeling *v.* Cocker, 23 Pa. Super. Ct. 196; Philadelphia *v.* Friday, 6 Phila. 275. *Compare* Conestoga, etc., Turnpike Road Co. *v.* Lancaster City, 151 Pa. St. 543, 24 Atl. 1092.

Wisconsin.—Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1496.

But see Bryans *v.* Almand, 87 Ga. 564, 13 S. E. 554; Big Rapids *v.* Comstock, 65 Mich. 78, 31 N. W. 811.

30. Gregsten *v.* Chicago, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496 [*reversing* 40 Ill. App. 607]; Gridley *v.* Bloomington, 68 Ill. 47.

31. Chicago, etc., R. Co. *v.* People, 91 Ill. 251; Chicago *v.* Pooley, 112 Ill. App. 343.

32. See also Ejectment, 15 Cyc. 27.

By abutting owner see *supra*, XII, A, 7, h.

33. *California.*—San Francisco *v.* Sullivan, 50 Cal. 603.

Georgia.— Savannah *v.* Georgia Steam Boat Co., R. M. Charlt. 342.

Illinois.— Chicago *v.* Wright, 69 Ill. 318.

Kentucky.— Augusta *v.* Perkins, 3 B. Mon. 437.

New Jersey.— Hawkshurst *v.* Asbury Park, 65 N. J. Eq. 496, 56 Atl. 697. *Compare* Chambersburg *v.* Manko, 39 N. J. L. 496.

New York.— New York *v.* Law, 125 N. Y. 380, 26 N. E. 471 [*affirming* 6 N. Y. Suppl. 628].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1497.

Contra.— Grand Rapids *v.* Whittlesey, 33 Mich. 109.

The fact that streets and alleys have never been improved, and have been for some years within the inclosure of private persons, does not prevent their recovery by the village. Lee *v.* Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176.

34. Hawkshurst *v.* Asbury Park, 65 N. J. Eq. 496, 56 Atl. 697.

35. See, generally, Nuisances.

36. Sheen *v.* Stothart, 29 La. Ann. 630; Ely *v.* Campbell, 59 How. Pr. (N. Y.) 333; Compton *v.* Waco Bridge Co., 62 Tex. 715. See also *infra*, XIV.

37. See *infra*, XIV.

38. Avis *v.* Vineland, 55 N. J. L. 285, 26 Atl. 149; Brigantine *v.* Holland Trust Co., (N. J. Ch. 1896) 35 Atl. 344.

39. Hawley *v.* Harrall, 19 Conn. 142; Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665.

40. White *v.* Godfrey, 97 Mass. 472.

41. Bitzer *v.* Leverton, 9 Kan. App. 76, 57 Pac. 1045.

42. Mather *v.* Simonton, 73 Ind. 595.

(II) *Summary Removal*—(A) *By Municipality.* A municipality, as public trustee and governmental agent, may in a proper case summarily abate a nuisance on a public street by itself removing it.[43] But a municipality cannot, by a mere declaration that a structure is a nuisance, subject it to removal by any person supposed to be aggrieved or by the municipality itself, where it is in fact not

43. *Georgia.*— Robins *v.* McGehee, 127 Ga. 431, 56 S. E. 461.

Kansas.— Bitzer *v.* Leverton, 9 Kan. App. 76, 57 Pac. 1045.

New York.— Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44; Coudert *v.* Underhill, 107 N. Y. App. Div. 335, 95 N. Y. Suppl. 134; Electric Power Co. *v.* New York, 29 Misc. 48, 60 N. Y. Suppl. 590; Ely *v.* Campbell, 59 How. Pr. 333. See also Lincoln Safe Deposit Co. *v.* New York, 96 N. Y. App. Div. 624, 88 N. Y. Suppl. 912.

Ohio.— Evens *v.* Cincinnati, 2 Handy 236, 12 Ohio Dec. (Reprint) 420.

Texas.— Compton *v.* Waco Bridge Co., 62 Tex. 715.

Virginia.— Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1498.

Effect of intention as to use after removal. — An owner of property who has deposited and keeps it upon a public street is not justified in resisting the efforts of the city authorities to remove it, although they intend to make an illegal use of it after its removal. Bierwith *v.* Pieronnet, 65 Mo. App. 431.

Trees.— A municipality may have trees cut down in order to make room for a sidewalk, even though the fee of the street does not belong to the city. Mt. Carmel *v.* Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L. R. A. 580 [*reversing* 52 Ill. App. 429]. However such trees cannot be removed arbitrarily. Avis *v.* Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L. R. A. 685; Ellison *v.* Allen, 30 N. Y. Suppl. 441. They cannot be removed unless an actual obstruction to travel. Everett *v.* Council Bluffs, 46 Iowa 66; Hildrup *v.* Windfall, 29 Ind. App. 592, 64 N. E. 942. See also Atlanta *v.* Holliday, 96 Ga. 546, 23 S. E. 509. Trees may be removed by a street commissioner where reasonably necessary to the proper construction of a sidewalk which the council has directed him to build. Wilson *v.* Simmons, 89 Me. 242, 36 Atl. 380. Where an obstruction, they may be removed without a hearing or notice to the abutting owner. Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

Awnings.— Summary removal of awnings is proper where erected in contravention of, or without conformity to, an ordinance, or under a void license. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470]; Simis *v.* Brookfield, 13 Misc. (N. Y.) 569, 34 N. Y. Suppl. 695; Hoey *v.* Gilroy, 14 N. Y. Suppl. 159 [*reversed* on other grounds in 129 N. Y. 132, 29 N. E. 85]. See also Bitzer *v.* Leverton, 9 Kan. App. 76, 57 Pac. 1045. But it has been held that power to regulate does not authorize removal of a safe structure which does not materially interfere with the free use and enjoyment of the sidewalk by the public; that an awning cannot be removed merely because it is an encroachment on the street, and that a municipality cannot direct the removal of all awnings on streets without regard to whether they are a nuisance in fact. Hisey *v.* Mexico, 61 Mo. App. 248.

A railway track in a street cannot be forcibly torn up, where it does not obstruct passage on the street, until declared by the council to be a nuisance because laid without municipal permission. Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334. It has been held that, although a city under a general ordinance might abate an unauthorized street railway without proceedings in court, it cannot do it under a mere resolution aimed at the particular railway. Spokane St. R. Co. *v.* Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

Buildings and fences.— Hatton *v.* Chatham, 24 Ill. App. 622; Daublin *v.* New Orleans, 1 Mart. (La.) 184; Mussey *v.* Cahoon, 34 Me. 74; Concord *v.* Burleigh, 67 N. H. 106, 36 Atl. 606; Walker *v.* Caywood, 31 N. Y. 51; Yost *v.* South Bethlehem, 4 Lanc. L. Rev. (Pa.) 62; Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587. But see Frostburg *v.* Hitchins, 99 Md. 617, 59 Atl. 49; Sheldon *v.* Kalamazoo, 24 Mich. 383; Manko *v.* Chambersburgh, 25 N. J. Eq. 168. A building will not ordinarily be summarily removed on the mere ground that it encroaches on the street. Dawes *v.* Highstown, 45 N. J. L. 127; Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802.

Telegraph poles see East Tennessee Tel. Co. *v.* Russellville, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. Rep. 305; Com. *v.* Boston, 97 Mass. 555; Delaware, etc., Tel. Co. *v.* Pensauken Tp., 67 N. J. L. 91, 50 Atl. 452. Where poles are erected under lawful authority but afterward the authority is legally revoked the municipality may summarily remove the poles on the failure or refusal of the company so to do after notice given. Coverdale *v.* Edwards, 155 Ind. 374, 58 N. E. 495. But a municipality cannot compel removal of poles upon a street, when erected under a lawful authority from the state, where the poles do not interfere with travel. Abbott *v.* Duluth, 104 Fed. 833 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

Extent of power.— Power to remove from streets all obstructions and encroachments implies power to employ any appropriate means to ascertain and locate the street lines and boundaries and the existence and extent of such encroachments and obstructions. Lathrop *v.* Morristown, 65 N. J. L. 467, 47 Atl. 450.

a nuisance;[44] and ordinarily the power to summarily remove an obstruction can be legally exercised only where the right so to do is clear and from the nature of the obstruction it need not first be determined by resort to the courts.[45] Summary removal is not proper where the legal existence of the street is in dispute.[46] Encroachments are to be distinguished from obstructions;[47] and a mere encroachment not actually interfering with travel cannot be summarily removed except where there is charter or statutory authority therefor,[48] or where the city owns the fee of the street.[49] The particular municipal officer who may remove or order the removal of an obstruction depends upon charter or other statutory provisions.[50] Notice to remove should usually be first given,[51] and also an opportunity to be heard in defense of the right to maintain the alleged obstruction.[52] However, obstructions, as distinguished from mere encroachments, may generally be removed without notice to the owner thereof.[53] In some jurisdictions a resolution directing a removal of obstructions is insufficient, the power being exercisable only by ordinance.[54] Whether a thing is an obstruction is generally a question for the proper city authorities, and their determination cannot be reviewed except where an abuse of discretion is shown.[55] An ordinance for the removal of obstructions from the sidewalks must be of general application.[56] Equity will not ordinarily restrain the removal of an obstruction.[57]

(B) *By Private Person.*[58] One who is specially injured by an obstruction on a street or alley may himself remove it,[59] but not before the street or alley is

44. Frostburg *v.* Hitchins, 99 Md. 617, 59 Atl. 49; Frostburg *v.* Wineland, 98 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 399, 64 L. R. A. 627; New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596; Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984.

45. State *v.* Jersey City, 34 N. J. L. 31.

Permanent and valuable improvements, made within a street or upon public grounds in good faith, and where the right was at least doubtful, and summary removal would result in great damage, and such like encroachments, are not subject to summary removal. Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587.

46. New York, etc., R. Co. *v.* South Amboy, 57 N. J. L. 252, 30 Atl. 628.

47. Stockton *v.* Freeman, 1 Mich. N. P. 232.

48. State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446; Pauer *v.* Albrecht, 72 Wis. 416, 39 N. W. 771.

A charter provision merely giving power to the municipality to prevent the obstruction or encumbering of streets does not confer authority to require the removal of mere encroachments. Stockton *v.* Freeman, 1 Mich. N. P. 232.

49. Philbrick *v.* University Place, 88 Iowa 354, 55 N. W. 345. But see State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

50. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Pedrick *v.* Bailey, 12 Gray (Mass.) 161; Naylor *v.* Glasier, 5 Duer (N. Y.) 161.

51. Laing *v.* Americus, 86 Ga. 756, 13 S. E. 107; United New Jersey R., etc., Co. *v.* Jersey City, 72 N. J. L. 233, 61 Atl. 460 [*affirming* 71 N. J. L. 80, 58 Atl. 71].

What constitutes notice.— Where an order of the common council directing a street railway company to remove a cross-over from a street was made on the recommendation of the board of street commissioners after a hearing by such board, at which defendant was represented, such order was not passed without a reasonable notice to defendant, or an opportunity on its part to be heard. Hartford *v.* Hartford St. R. Co., 73 Conn. 327, 47 Atl. 330.

Mode of giving notice.— Where the statutes do not provide the manner in which an order of the common council directing a street railway company to remove obstructions from the street shall be brought to the company's notice, the mailing of a copy of the order to the company by the city clerk, and oral notice of its passage by the person on whose complaint the order was made, is sufficient. Hartford *v.* Hartford St. R. Co., 73 Conn. 327, 47 Atl. 330.

52. Chase *v.* Lowell, 149 Mass. 85, 21 N. E. 233; White *v.* Godfrey, 97 Mass. 472; Delaware, etc., Tel. Co. *v.* Pensauken Tp., 67 N. J. L. 91, 50 Atl. 452 [*affirmed* in 67 N. J. L. 531, 52 Atl. 482]; Cape May *v.* Cape May, etc., R. Co., 60 N. J. L. 224, 37 Atl. 892, 39 L. R. A. 609 [*affirming* 58 N. J. L. 565, 34 Atl. 397].

53. Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

54. Avis *v.* Vineland, 55 N. J. L. 285, 26 Atl. 149.

55. Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

56. Gitt *v.* Hanover Borough, 4 Pa. Dist. 606.

57. Pagames *v.* Chicago, 111 Ill. App. 590.

58. See, generally, NUISANCES.

59. Hitchner *v.* Richman, (N. J. Sup. 1907) 65 Atl. 856; Paterson R. Co. *v.*

opened for public use.[60] If not specially injured a private person cannot remove the obstruction.[61]

(c) *Damages or Compensation to Owner.* The owner of property removed is entitled to recover compensation, if taken under the power of eminent domain,[62] but nothing if properly removed under the police power.[63] However, if a municipality assumes to exercise the summary power of removal it does so at its own risk and is liable in damages if the removal was unauthorized.[64] So a municipality is liable to the owner for a wanton or unnecessary injury in removing a nuisance, taking into consideration the kind of property removed and the attending circumstances.[65]

(d) *Expense of Removal.* The lawful expense incurred by a municipality in removing obstructions is chargeable to the obstructor or encroacher.[66]

(iii) *Action For Abatement or Injunction*—(a) *In General.*[67] An obstruction constituting a nuisance may be abated and enjoined by action,[68] but it must clearly appear to be a nuisance.[69] An attorney-general may sue in the name of the state,[70] or an action may be brought in the name of the people of the state.[71] So the municipality may itself sue to restrain the continuance of an obstruction of a street,[72] notwithstanding it has power to summarily remove the

Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Electric Constr. Co. *v.* Heffernan, 12 N. Y. Suppl. 336; Wolfe *v.* Pearson, 114 N. C. 621, 19 S. E. 264.

60. Haramon *v.* Krause, 93 Minn. 455, 101 N. W. 791; Maffatt *v.* Perry, 3 Pittsb. (Pa.) 8.

61. Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299 (holding that the fact that an awning is erected by a citizen in violation of a city ordinance does not authorize another of his own motion to demolish it); Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

Cutting branches of trees.— In some jurisdictions, one using the highway cannot cut branches from trees located between the sidewalk and the curb, where interfering with travel, except when authorized by a certain board or officer; and this is so even where the municipality has granted a permit to move a building through the streets and such cutting is necessary to move the building. State *v.* Pratt, 90 Minn. 66, 95 N. W. 589.

62. See Eminent Domain, 15 Cyc. 638 *et seq.*

63. Tell City *v.* Bielefeld, 20 Ind. App. 1, 49 N. E. 1090; Philbrick *v.* University Place, 88 Iowa 354, 55 N. W. 345; Thibodeaux *v.* Maggioli, 4 La. Ann. 73; Murray *v.* Norfolk County, 149 Mass. 328, 21 N. E. 757. See also Walker *v.* Caywood, 31 N. Y. 51. See, generally, Nuisances.

64. Howard *v.* Robbins, 1 Lans. (N. Y.) 63. See also Frostburg *v.* Hitchins, 99 Md. 617, 59 Atl. 49.

Amount of damages see Peters *v.* New York, 8 Hun (N. Y.) 405.

65. Indianapolis *v.* Miller, 27 Ind. 394.

66. Hawley *v.* Harrall, 19 Conn. 142; Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786; Concord *v.* Burleigh, 67 N. H. 106, 36 Atl. 606. See also Centerville *v.* Woods, 57 Ind. 192.

67. See, generally, Injunctions; Nuisances.

68. Stamford *v.* Stamford, etc., R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; Moyamensing *v.* Long, 1 Pars. Eq. Cas. (Pa.) 143; Philadelphia *v.* Lombard St., etc., Pass. R. Co., 5 Phila. (Pa.) 248; Atty.-Gen. *v.* Brighton, etc., Co-operative Supply Assoc., [1900] 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. Rep. N. S. 762, 48 Wkly. Rep. 314.

The removal of earth and stone by an abutter may be enjoined. Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635.

69. Richardson, etc., Co. *v.* Barstow Stove Co., 11 N. Y. Suppl. 935, 26 Abb. N. Cas. 150 [*affirmed* in 13 N. Y. Suppl. 358]; Hamilton *v.* New York, etc., R. Co., 9 Paige (N. Y.) 171.

70. People *v.* Beaudry, 91 Cal. 213, 27 Pac. 610; Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Atty.-Gen. *v.* Lombard St., etc., Pass. R. Co., 10 Phila. (Pa.) 352. But see People *v.* Equity Gas Light Co., 141 N. Y. 232, 36 N. E. 194, in which case it was held that a suit cannot be maintained in equity by the attorney-general of the state to restrain the tearing up of streets where the municipal authorities have ample power to protect the streets.

71. People *v.* Metropolitan Tel., etc., Co., 31 Hun (N. Y.) 596. But see People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. 109.

72. *Alabama.*— Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161.

California.— San Francisco *v.* Buckman, 111 Cal. 25, 43 Pac. 396; Visalia *v.* Jacob, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303.

Georgia.— Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601.

Illinois.— Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 489, 27 N. E. 232; Metropolitan City R. Co. *v.* Chicago, 96 Ill. 620.

Indiana.— Cheek *v.* Aurora, 92 Ind. 107.

Louisiana.— New Orleans *v.* New Orleans Jockey Club, 115 La. 911, 40 So. 331.

Michigan.— Mt. Clemens *v.* Mt. Clemens

obstruction,[73] or to impose a penalty for violation of ordinances prohibiting encroachment;[74] and suit may be brought by it even before the acceptance in the statutory form of a street whose dedication has been tendered to the public.[75] The mere existence of a legal remedy will not preclude equitable relief where the legal remedy is inadequate,[76] and in some cases equity will relieve without inquiring whether the injury will be irreparable.[77] But generally relief will not be awarded where there is an adequate remedy at law,[78] and where title to the land is in dispute it must be determined at law before a court of equity will interfere.[79] Insolvency of defendant is not necessary to authorize equitable relief.[80] A preliminary injunction will not ordinarily be granted except in case of necessity to prevent an irreparable injury,[81] and this is especially true as to a mandatory interlocutory injunction.[82] The relief granted must be in proportion to the nature or extent of the injury done or likely to be sustained and not in

Sanitarium Co., 127 Mich. 115, 86 N. W. 537.

Minnesota.— Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931.

Nebraska.— Ray *v.* Colby, 5 Nebr. (Unoff.) 151, 97 N. W. 591.

New York.—Oxford *v.* Willoughby, 181 N. Y. 155, 73 N. E. 677 [*affirming* 87 N. Y. App. 609, 83 N. Y. Suppl. 1118]; New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937; Hempstead *v.* Ball Electric Light Co., 9 N. Y. App. Div. 48, 41 N. Y. Suppl. 124.

Ohio.— Lake Shore, etc., R. Co. *v.* Elyria, 69 Ohio St. 414, 69 N. E. 738.

Pennsylvania.— Moyamensing *v.* Long, 1 Pars. Eq. Cas. 143; Philadelphia *v.* Friday, 6 Phila. 275.

Wisconsin.— Eau Claire *v.* Matzke, 86 Wis. 291, 56 N. W. 874, 39 Am. St. Rep. 900; Waukesha Hygeia Mineral Spring Co. *v.* Waukesha, 83 Wis. 475, 53 N. W. 675.

United States.— Detroit *v.* Detroit City R. Co., 56 Fed. 867, 60 Fed. 162 [*reversed* on other grounds in 64 Fed. 628, 12 C. C. A. 365 (*affirmed* in 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592)].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1502.

Particular officers.—But the mayor and the common council, where charged with the duty of keeping the streets of the city in a condition fit for safe and convenient use, are the proper persons to file a bill to prevent either the obstruction or destruction of a street. Newark *v.* Delaware, etc., R. Co., 42 N. J. Eq. 196, 7 Atl. 123. The fact that the wharves of a city were, by an act of the legislature, authorized to be placed in the hands of a trustee for the benefit of certain holders of its bonds does not preclude a city charged with the duty of removing all nuisances from its streets from filing a bill to remove obstructions from such streets down to the wharf line. Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902.

Conditions precedent.— A municipal corporation may maintain an action in equity to obtain a mandatory injunction compelling the removal of an encroachment on one of its public streets, and need not first give to the wrong-doer an opportunity to remove it without suit, pursuant to an order made and served on him in accordance with Wis. Rev. St. (1898) § 1330, which provides that in every case where any highway shall be encroached on the supervisors of the town shall make an order requiring its removal, etc. Wauwatosa *v.* Dreutzer, 116 Wis. 117, 92 N. W. 551.

A resolution of a city council authorizing the city attorney to commence action against H for removal of an obstruction placed by him across "extension of G. street" applies to an unnamed highway branching off from G street; the proceedings for the extension of G street from the point where such highway branched off having been fatally defective, and the extension having been closed up a year before. Chippewa Falls *v.* Hopkins, 109 Wis. 611, 85 N. W. 553.

73. Hoole *v.* Atty.-Gen., 22 Ala. 190; Stamford *v.* Stamford, etc., R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; American Furniture Co. *v.* Batesville, 139 Ind. 77, 38 N. E. 408; Cheek *v.* Aurora, 92 Ind. 107. *Contra*, Waterloo *v.* Waterloo St. R. Co., 71 Iowa 193, 32 N. W. 329.

Charter provisions.— Where, by its charter, a municipality is given power to pass ordinances declaring what shall be considered a nuisance in the street, and to remove nuisances and obstructions therein, it must exercise such power in the manner prescribed before suit is brought to enjoin the erection of an obstruction. Brigantine *v.* Holland Trust Co., (N. J. Ch. 1896) 35 Atl. 344.

74. New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937.

75. Winslow *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 89, 6 Ohio N. P. 47.

76. Demopolis *v.* Webb, 87 Ala. 659, 6 So. 408; Garvey *v.* Harbison-Walker Refractories Co., 213 Pa. St. 177, 62 Atl. 778.

77. Carter *v.* Chicago, 57 Ill. 283.

78. Brigantine *v.* Holland Trust Co., (N. J. Ch. 1897) 37 Atl. 438.

79. Coward *v.* Llewellyn, 209 Pa. St. 582, 58 Atl. 1066.

80. Ellison *v.* Louisville, 31 S. W. 723, 17 Ky. L. Rep. 593.

81. Whitman *v.* Hubbell, 42 Fed. 633. See also Clifton Heights Borough *v.* Thomas Kent Mfg. Co., 212 Pa. St. 117, 61 Atl. 817.

82. Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

excess thereof, and must be consistent with the theory of the bill as established by the proofs.[88]

(B) *Suit of Private Person* — (1) IN GENERAL. An individual may maintain an action to enjoin or abate a nuisance if he has sustained or will sustain a special injury;[84] but not otherwise.[85] The injury, to sustain a private action, must be not merely greater in degree than that sustained by others of the general public, but also special and different in kind.[86] The injury must be irreparable,[87] and the remedy at law inadequate;[88] and if complainant is the real obstructor he has no standing to invoke equitable aid in his behalf.[89] A person sustaining a peculiar injury may enjoin such nuisance without first applying to the city authorities for relief.[90] A temporary injunction may be granted in a proper case,[91] although the evidence is conflicting as to whether plaintiff will sustain special

83. Big Rapids *v.* Comstock, 65 Mich. 78, 31 N. W. 811.

84. *Alabama.*— Weiss *v.* Taylor, 144 Ala. 440, 39 So. 519.

Kentucky.—Louisville, etc., R. Co. *v.* Sonne, 53 S. W. 274, 21 Ky. L. Rep. 848.

Louisiana.— New Orleans *v.* Gravier, 11 Mart. 620.

Mississippi.— Illinois Cent. R. Co. *v.* Thomas, 75 Miss. 54, 21 So. 601.

New York.— Bates *v.* Holbrook, 171 N. Y. 460, 688, 64 N. E. 181, 64 N. E. 753 [*affirming* 67 N. Y. App. Div. 25, 73 N. Y. Suppl. 417]; Crooke *v.* Anderson, 23 Hun 266; Callanan *v.* Gilman, 52 N. Y. Super. Ct. 112, loss of trade because of obstruction.

Ohio.— Herrick *v.* Cleveland, 7 Ohio Cir. Ct. 470, 4 Ohio Cir. Dec. 684.

Pennsylvania.— Barker *v.* Hartman Steel Co., 6 Pa. Co. Ct. 183.

Tennessee.— Leake *v.* Cannon, 2 Humphr. 169.

Texas.— Kalteyer *v.* Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288.

United States.— Donnovan *v.* Pennsylvania Co., 124 Fed. 1016, 60 C. C. A. 168 [*affirming* 116 Fed. 907]; Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1503.

Anticipated obstruction.— An injunction may be granted without waiting until the actual commission of the acts. Brauer *v.* Baltimore Refrigerating, etc., Co., 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403.

Prior recovery at law.— The right to sue for an injunction is not precluded by the fact that there has been a recovery at law. Canton Cotton Warehouse Co. *v.* Potts, 69 Miss. 31, 10 So. 448.

Laches.— An action by an individual may be barred by laches. Washington Lodge No. 54 I. O. O. F. *v.* Frelinghuysen, 138 Mich. 350, 101 N. W. 569.

85. *Arkansas.*— Ruffner *v.* Phelps, 65 Ark. 410, 46 S. W. 728.

California.— Marini *v.* Graham, 67 Cal. 130, 7 Pac. 442.

Georgia.— Coker *v.* Atlanta, etc., R. Co., 123 Ga. 483, 51 S. E. 481; Ison *v.* Manley, 76 Ga. 804.

Idaho.— Stufflebeam *v.* Montgomery, 3 Ida. 20, 26 Pac. 125.

Illinois.— Guttery *v.* Glenn, 201 Ill. 275, 66 N. E. 305; Aurora Electric Light, etc., Co. *v.* McWethy, 104 Ill. App. 479 [*affirmed* in 202 Ill. 218, 67 N. E. 9].

Minnesota.— Johnson *v.* Andengaard, 100 Minn. 130, 110 N. W. 369; Gundlach *v.* Hamm, 62 Minn. 42, 64 N. W. 50; Ofstie *v.* Kelly, 33 Minn. 440, 23 N. W. 863.

Nebraska.— Ray *v.* Colby, 5 Nebr. (Unoff.) 151, 97 N. W. 591.

New Jersey.— Morris, etc., R. Co. *v.* Newark Pass. R. Co., 51 N. J. Eq. 379, 29 Atl. 184 [*affirmed* in 52 N. J. Eq. 340, 31 Atl. 383].

New York.—Gallagher *v.* Keating, 40 N. Y. App. Div. 81, 57 N. Y. Suppl. 1123; Spader *v.* New York El. R. Co., 3 Abb. N. Cas. 467; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 41 N. Y. Super. Ct. 489, 3 Abb. N. Cas. 372. See also Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. 364, holding that if the acts of either of two companies constructing a railroad through the same street amount to a public nuisance or obstruction of the way, it is for the public and not for the other company to complain.

Pennsylvania.— Seitz *v.* Lafayette Traction Co., 5 Pa. Co. Ct. 469.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1503.

A **taxpayer** cannot sue to restrain an illegal erection merely because the municipal officers improperly failed to do so. Gallagher *v.* Keating, 40 N. Y. App. Div. 81, 57 N. Y. Suppl. 1123.

86. Pittsburgh, etc., R. Co. *v.* Cheevers, 44 Ill. App. 118 [*affirmed* in 149 Ill. 430, 37 N. E. 49, 24 L. R. A. 156]; Billard *v.* Erhart, 35 Kan. 611, 12 Pac. 39; Chas. H. Heer Dry Goods Co. *v.* Citizens R. Co., 41 Mo. App. 63.

87. Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399; McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 67 N. E. 9 [*affirming* 104 Ill. App. 479].

88. Canton Cotton Warehouse Co. *v.* Potts, 69 Miss. 31, 10 So. 448; Herbert *v.* Pennsylvania R. Co., 43 N. J. Eq. 21, 10 Atl. 872.

89. Price *v.* Stratton, 45 Fla. 535, 33 So. 644.

90. Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

91. Southern Cotton Oil Co. *v.* Bull, 116 Ga. 776, 43 S. E. 52.

damages;[92] but it should be denied where the granting thereof would work greater hardship to defendant than its refusal would to plaintiff.[93]

(2) ABUTTING OWNER.[94] An abutter may ordinarily enjoin the obstruction of a street in front of or near his property where he suffers special injury therefrom different from that suffered by the public in general, as where his easement of access or the value of his property or possession is impaired.[95] This is so even

92. Savannah, etc., R. Co. *v.* Woodruff, 86 Ga. 94, 13 S. E. 156.

93. New York *v.* Knickerbocker Trust Co., 41 Misc. (N. Y.) 17, 83 N. Y. Suppl. 576.

94. See, generally, INJUNCTIONS; NUISANCES.

Restraining improvements see *infra*, XIII, B, 15.

95. *Alabama.*— Roberts *v.* Mathews, 137 Ala. 523, 34 So. 624, 97 Am. St. Rep. 56; Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399; Montgomery *v.* Parker, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95.

Arkansas.— See Dickinson *v.* Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

California.—Harniss *v.* Bulpitt, 1 Cal. App. 140, 81 Pac. 1022.

Georgia.— Coker *v.* Atlanta, etc., R. Co., 123 Ga. 483, 51 S. E. 481; Cohen *v.* Georgia Bank, 81 Ga. 723, 7 S. E. 811; Macon *v.* Harris, 75 Ga. 761.

Illinois.— Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L. R. A. 406; Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370.

Indiana.— Williams *v.* Citizens' R. Co., 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64; Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759; Pettis *v.* Johnson, 56 Ind. 139.

Iowa.— Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

Kansas.— Highbarger *v.* Milford, 71 Kan. 331, 80 Pac. 633; Mikesell *v.* Durkee, 34 Kan. 509, 9 Pac. 278.

Kentucky.— Bourbon Stock Yards Co. *v.* Wooley, 76 S. W. 28, 25 Ky. L. Rep. 477; Alexander *v.* Tebeau, 71 S. W. 427, 24 Ky. L. Rep. 1305; Gibson *v.* Black, 9 S. W. 379, 10 Ky. L. Rep. 373.

Maryland.— Brauer *v.* Baltimore Refrigerating, etc., Co., 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403; Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409; Roman *v.* Strauss, 10 Md. 89; White *v.* Flannigain, 1 Md. 525, 54 Am. Dec. 668.

Michigan.— Wilkinson *v.* Dunkley-Williams Co., 139 Mich. 621, 103 N. W. 170; Forbes *v.* Detroit, 139 Mich. 280, 102 N. W. 740; Pratt *v.* Lewis, 39 Mich. 7.

Minnesota.— Gustafson *v.* Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59.

Mississippi.— Biloxi City R. Co. *v.* Maloney, (1896) 19 So. 832; Canton Cotton Warehouse Co. *v.* Potts, 69 Miss. 31, 10 So. 448.

Missouri.— Longworth *v.* Sedevic, 165 Mo. 221, 65 S. W. 260; Glaessner *v.* Anheuser-Busch Brewing Assoc., 100 Mo. 508, 13 S. W. 707.

New Jersey.— Van Duyne *v.* Knox Hat Mfg. Co., (Ch. 1906) 64 Atl. 149.

New York.— Flynn *v.* Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556 [*affirming* 53 Hun 167, 6 N. Y. Suppl. 96]; Odell *v.* Bretney, 93 N. Y. App. Div. 607, 87 N. Y. Suppl. 655 [*modifying* 38 Misc. 603, 78 N. Y. Suppl. 67]; Wetmore *v.* Story, 22 Barb. 414, 3 Abb. Pr. 262; Hersee *v.* Buffalo, Sheld. 445; Porth *v.* Manhattan R. Co., 58 N. Y. Super. Ct. 366, 11 N. Y. Suppl. 633 [*affirmed* in 134 N. Y. 615, 32 N. E. 649]; Wilcken *v.* West Brooklyn R. Co., 1 N. Y. Suppl. 791; Elias *v.* Sutherland, 18 Abb. N. Cas. 126; Jaques *v.* National Exhibit Co., 15 Abb. N. Cas. 250; Callanan *v.* Gilman, 67 How. Pr. 464 [*affirmed* in 52 N. Y. Super. Ct. 112].

Ohio.— Root *v.* Pennsylvania Co., 5 Ohio S. & C. Pl. Dec. 315, 7 Ohio N. P. 337.

Pennsylvania.— Thomas *v.* Inter-County St. R. Co., 167 Pa. St. 120, 31 Atl. 476; Oglevee *v.* Quaker City El. R. Co., (1894) 29 Atl. 111; Potts *v.* Quaker City El. R. Co., 161 Pa. St. 396, 29 Atl. 108; Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246; Daflinger *v.* Pittsburg, etc., Tel. Co., 31 Pittsb. Leg. J. N. S. 37, 14 York Leg. Rec. 46.

Tennessee.—Tennessee Brewing Co. *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864; Perkins *v.* Ross, (Ch. App. 1896) 42 S. W. 58.

West Virginia.—Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275.

Wisconsin.— Milwaukee Boiler Co. *v.* Wadhams Oil, etc., Co., 126 Wis. 32, 105 N. W. 312; Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1448.

But see Garnett *v.* Jacksonville, etc., R. Co., 20 Fla. 889, holding that the maintenance of a public nuisance, such as a railroad built along a street without authority, will not be enjoined at the instance of an abutter.

Statutory provisions.—McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 67 N. E. 9 [*affirming* 104 Ill. App. 479].

Against adjoining owner.— The occupant of a store is entitled to have the occupant of an adjoining store enjoined from obstructing light and view by a show case, sign, and fence on the sidewalk. Hallock *v.* Scheyer, 33 Hun (N. Y.) 111. *Compare* Wormser *v.* Brown, 72 Hun (N. Y.) 93, 25 N. Y. Suppl. 553 [*affirmed* in 149 N. Y. 163, 43 N. E. 524]. One removing rock from a lot will be enjoined from unnecessarily obstructing the street in front of the adjoining premises.

though the abutter is not the owner of the fee in the street.[96] But the act complained of must be clearly shown to be an obstruction.[97] On the other hand an abutter is not entitled to an injunction where he is merely injured in common with the rest of the community even though in a greater degree.[98] Remote danger will not suffice, but it must be threatened and probable.[99] The injury must be material,[1] and the remedy at law must be inadequate.[2] Equity will not interfere to prevent slight injuries to technical rights but only serious damage to substantial rights.[3] The easements of an abutter in the street are appurtenant to the land and cannot be reserved to him on a sale of the property so as to enable

Stevenson *v.* Pucci, 32 Misc. (N. Y.) 464, 66 N. Y. Suppl. 712.

Presumptions.— Where it is attempted to vacate a portion of a street on which a parcel of land is situated, but not abutting so as to prevent access all around the block in which such parcel lies, the court will assume as a matter of law that the owner of such parcel sustains damages by such vacation of a different kind from that sustained by the general public, and he may maintain injunction to prevent such vacation and obstruction. Highbarger *v.* Milford, 71 Kan. 331, 80 Pac. 633.

96. Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1. See also Donahue *v.* Keystone Gas Co., 90 N. Y. App. Div. 386, 85 N. Y. Suppl. 478 [*affirmed* in 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 70 L. R. A. 761].

97. Cunningham *v.* Entrekin, 3 Pa. Dist. 291, 34 Wkly. Notes Cas. 353.

98. *Arizona.*— Thorpe *v.* Clanton, (1906) 85 Pac. 1061.

California.— Hogan *v.* Central Pac. R. Co., 71 Cal. 83, 11 Pac. 876.

Illinois.—Pittsburg, etc., R. Co. *v.* Cheevers, 149 Ill. 430, 37 N. E. 49, 24 L. R. A. 156 [*affirming* 44 Ill. App. 118].

Iowa.— Ingram *v.* Chicago, etc., R. Co., 38 Iowa 669.

Kentucky.— Labry *v.* Gilmour, 89 S. W. 231, 28 Ky. L. Rep. 311.

Maryland.— Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 444, 52 L. R. A. 409.

Missouri.— Charles H. Heer Dry Goods Co. *v.* Citizens R. Co., 41 Mo. App. 63.

New York.— Adler *v.* Metropolitan El. R. Co., 138 N. Y. 173, 33 N. E. 935 [*reversing* 61 N. Y. Super. Ct. 85, 18 N. Y. Suppl. 858, 28 Abb. N. Cas. 198]; Wormser *v.* Brown, 72 Hun 93, 25 N. Y. Suppl. 553 [*affirmed* in 149 N. Y. 163, 43 N. E. 524]; Sautter *v.* Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. Suppl. 838 [*affirmed* in 119 N. Y. App. Div. 898, 104 N. Y. Suppl. 1139].

Ohio.— Harrison *v.* Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265 (holding that a property-owner cannot enjoin the construction of a street cable railway company one half a mile distant from his property on the ground that his access is impaired); Webb *v.* Ohio Gas Fuel Co., 9 Ohio Dec. (Reprint) 662, 16 Cinc. L. Bul. 121.

United States.— Currier *v.* West-Side El. Patent R. Co., 6 Fed. Cas. No. 3,493, 6 Blatchf. 487.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1448.

Mere inconvenience.— The closing of a public street not adjacent to complainant's property nor affording direct access thereto, merely causing him inconvenience in going from his premises to a certain part of the town, is not such special injury as entitles him to an injunction. Guttery *v.* Glenn, 201 Ill. 275, 66 N. E. 305.

Obstruction of vacated portion of street.— A property-owner on a street or alley, a portion of which, other than the part on which he abuts, is vacated by the city council, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access to his property by other streets and alleys, although the distance he may have to travel in some directions may be greater than before the vacation. Kinnear Mfg. Co. *v.* Beatty, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600.

99. Corcoran *v.* Chicago, etc., R. Co., 149 Ill. 291, 37 N. E. 68.

Apprehended injury.— Owners of property on a public highway may maintain injunction to prevent apprehended injury from a public nuisance, such as an erection of a passenger railroad on a street in front of their property contrary to law. Faust *v.* Passenger R. Co., 3 Phila. (Pa.) 164.

1. Pittsburg, etc., R. Co. *v.* Cheevers, 149 Ill. 430, 37 N. E. 49, 24 L. R. A. 156; Hyland *v.* Short Route R. Transfer Co., 11 S. W. 79, 10 Ky. L. Rep. 900; Loeber *v.* Butte Gen. Electric Co., 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468.

2. *Connecticut.*— Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

Georgia.— Kavanagh *v.* Mobile, etc., R. Co., 78 Ga. 271, 2 S. E. 636.

Illinois.— Parlin *v.* Mills, 11 Ill. App. 396.

New Jersey.— Roake *v.* American Tel. Co., 41 N. J. Eq. 35, 2 Atl. 618.

West Virginia.— Ohio River R. Co. *v.* Gibbens, 35 W. Va. 57, 12 S. E. 1093.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1448.

Insolvency.— It is not necessary to show that defendants were insolvent to entitle plaintiff to an injunction against the raising of the level of the street in front of his hotel. Schaufele *v.* Doyle, 86 Cal. 107, 24 Pac. 834.

3. Adler *v.* Metropolitan El. R. Co., 138 N. Y. 172, 33 N. E. 935; Wormser *v.* Brown, 72 Hun (N. Y.) 93, 25 N. Y. Suppl. 553 [*affirmed* in 149 N. Y. 163, 43 N. E. 524].

him to enjoin the commission of trespass thereon or to recover damages which accrued after the sale.[4]

(c) *Parties.*[5] Adjoining owners may join as plaintiffs,[6] but property-owners on one street cannot join the property-owners on another street to enjoin a use of the street by a public service corporation.[7] Where the action is brought by the municipality the state need not be joined as a party,[8] but any property holders injuriously affected may be joined as plaintiffs.[9] Where an abutting owner sues he need not join the municipality as a plaintiff,[10] and no one need be joined as defendants other than the alleged trespassers.[11]

(d) *Procedure and Relief.* The complaint must set forth the facts showing the obstruction,[12] but need not state whether the dedication of the street was effected in the manner prescribed by statute or as at common law.[13] If the complaint is not sufficiently definite in its statements as to special damages, objections thereto must be raised before trial.[14] The prayer for relief may be general or special.[15] The answer must meet the allegation of the complaint.[16] Generally the question whether a certain thing is an obstruction is a question of fact for the jury.[17] Findings as to the existence of a nuisance must be consistent.[18] The judgment is governed by the rules applicable to judgments in civil actions in general,[19] such as that the judgment must conform to the verdict.[20] Where, after the decree is rendered, a state of facts arises which renders the maintenance of the obstruction lawful, the decree may be declared to be no longer binding.[21]

g. Action For Damages.[22] An obstruction in a street gives a cause of action for damages to the municipality.[23] Likewise a private individual may sue for

4. Pegram *v.* New York El. R. Co., 147 N. Y. 135, 41 N. E. 424 [*affirming* 8 Misc. 425, 28 N. Y. Suppl. 592].

5. See, generally, INJUNCTIONS; NUISANCES; PARTIES.

6. Atchison St. R. Co. *v.* Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800; Palmer *v.* Waddell, 22 Kan. 352; Harrison *v.* Pike, 7 Ohio Dec. (Reprint) 607, 4 Cinc. L. Bul. 156.

7. Glidden *v.* Cincinnati, 11 Ohio Dec. (Reprint) 853, 30 Cinc. L. Bul. 213.

8. Philadelphia *v.* Crump, 1 Brewst. (Pa.) 320.

9. Maywood Co. *v.* Maywood, 118 Ill. 61, 6 N. E. 866; Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 8 Phila. (Pa.) 648.

10. Debolt *v.* Carter, 31 Ind. 355.

11. Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1. See also Philadelphia *v.* River Front R. Co., 133 Pa. St. 134, 19 Atl. 356.

12. Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399.

Street or alley as public.— The complaint must allege that the street or alley was a public one. Milliken *v.* Denny, 135 N. C. 19, 47 S. E. 132.

Ownership.— A bill by an abutting landowner to enjoin an obstruction must allege that plaintiff owned the fee in the walk or the street, or that the walk or street was dedicated to the public by one who at the time owned the fee. Erwin *v.* Central Union Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663 [*overruling* Terre Haute, etc., R. Co. *v.* Rodel, 89 Ind. 128, 46 Am. Rep. 164; Terre Haute, etc., R. Co. *v.* Scott, 74 Ind. 29].

Variance.— In a suit by a private person to enjoin the obstruction of a street, the fact that the bill alleged several grounds of special injury, while the proof established only one, did not constitute a variance. Montgomery First Nat. Bank *v.* Tyson, 144 Ala. 457, 39 So. 560.

13. Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931.

14. Callanan *v.* Gillman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

15. See Kavanagh *v.* Mobile, etc., R. Co., 78 Ga. 303, 4 S. E. 113.

16. Newcastle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516.

17. San Francisco *v.* Clark, 1 Cal. 386.

18. Fresno *v.* Fresno Canal, etc., Co., 98 Cal. 179, 32 Pac. 943.

19. See JUDGMENTS.

Construction.— An injunction restraining the use of a certain portion of a street by a railroad for unloading cars and as a switching yard will affect that portion of the street only and will not prevent its use as a connecting link between the railroads concerned. Kavanagh *v.* Mobile, etc., R. Co., 78 Ga. 803, 4 S. E. 113.

20. People *v.* Metropolitan Tel., etc., Co., 31 Hun (N. Y.) 596.

Where the complaint and verdict is so uncertain as to the location of the obstruction that no definite order of abatement can be based thereon, the decree cannot order any abatement. American Furniture Co. *v.* Batesville, 139 Ind. 77, 38 N. E. 408.

21. Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156.

22. See, generally, NUISANCES.

23. Monmouth *v.* Gardiner, 35 Me. 247; New Salem *v.* Eagle Hill Co., 138 Mass. 8 (holding that no demand is necessary and that a subsequent lease to or occupation by

damages, but only where the injury to him is one not in common with the general public and the damages suffered by him are different in kind and not merely different in degree.[24] For instance, an abutting owner whose right of ingress and egress, or other private property rights in the street, is injured, may sue.[25] A county cannot sue for the obstruction of a city street over which the city is vested with authority and control.[26] Where the nuisance is a continuing one, successive actions may be maintained by persons specially injured so long as it continues.[27] The right to sue is not barred by the abatement of the nuisance.[28] All persons are liable who cause or maintain such a nuisance,[29] and an action may be

others is no defense, especially where such lease is merely colorable); Shrewsbury *v.* Brown, 25 Vt. 197.

24. *Colorado.*— Jackson *v.* Kiel, 13 Colo. 378, 22 Pac. 504, 16 Am. St. Rep. 207, 6 L. R. A. 254.

Georgia.— East Tennessee, etc., R. Co. *v.* Boardman, 96 Ga. 356, 23 S. E. 403.

Minnesota.— Guilford *v.* Minneapolis, etc., R. Co., 94 Minn. 108, 102 N. W. 365; Shaubut *v.* St. Paul, etc., R. Co., 21 Minn. 502.

Missouri.—Dries *v.* St. Joseph, 98 Mo. App. 611, 73 S. W. 723.

Ohio.— Pittsburg, etc., R. Co. *v.* Hambleton, 6 Ohio Dec. (Reprint) 721, 7 Am. L. Rec. 561.

Texas.— See Heard *v.* Connor, (Civ. App. 1905) 84 S. W. 605.

Washington.— Wilson *v.* West, etc., Mill Co., 28 Wash. 312, 68 Pac. 716.

Canada.— Williams *v.* Cornwall, 32 Ont. 255.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1506.

Compare Malkan *v.* Carlin, 93 N. Y. Suppl. 378.

But where a block of ground has been subdivided into lots, one acquiring the ownership of all of such lots cannot recover damages to the block as an entirety by reason of the obstruction of an adjoining street which does not affect the use or value of some of the lots. Hetzel *v.* Baltimore, etc., R. Co., 7 App. Cas. (D. C.) 524.

The obstruction of a street not legally vacated renders the obstructor liable therefor. St. Louis, etc., R. Co. *v.* Belleville, 122 Ill. 376, 12 N. E. 680.

A contractor cannot maintain an action against a third person for damages to streets which he is under contract to keep in repair, because of the want of privity. Daly *v.* Cincinnati St. R. Co., 8 Ohio Dec. (Reprint) 742, 9 Cinc. L. Bul. 270.

Measure of damages see Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381; Schleicher *v.* Mt. Vernon, 107 N. Y. App. Div. 584, 95 N. Y. Suppl. 326.

Excessive damages see Bannon *v.* Rohmeiser, 34 S. W. 1084, 35 S. W. 280, 17 Ky. L. Rep. 1378.

25. *California.*— Schulte *v.* Northern Pac. Transp. Co., 50 Cal. 592.

Colorado.— Jackson *v.* Kiel, 13 Colo. 378, 22 Pac. 504, 16 Am. St. Rep. 207, 6 L. R. A. 254.

District of Columbia.— Trook *v.* Baltimore, etc., R. Co., 3 MacArthur 392.

Indiana.— Musselman *v.* Manly, 42 Ind. 462.

Kentucky.— Bannon *v.* Rohmeiser, 34 S. W. 1084, 35 S. W. 280, 17 Ky. L. Rep. 1378.

Massachusetts.— Stetson *v.* Faxon, 19 Pick. 147, 31 Am. Dec. 123.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Missouri.—Dries *v.* St. Joseph, 98 Mo. App. 611, 73 S. W. 723.

New York.— Flynn *v.* Taylor, 53 Hun 167, 6 N. Y. Suppl. 96 [*affirmed* in 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556].

Ohio.— Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624.

Texas.— Shephard *v.* Barnett, 52 Tex. 638.

Canada.— Macarthur *v.* Rex, 8 Can. Exch. 245.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1447.

Amount of recovery.— The damages recoverable by a property-owner for the unlawful obstruction of a street in front of it are such as will compensate for the loss which, in the judgment of the jury, directly and naturally resulted from the injury, and are the same without regard to the form of action. Hetzel *v.* Baltimore, etc., R. Co., 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648 [*reversing* 7 App. Cas. (D. C.) 524]. The measure of damages recoverable by an abutter from one unlawfully using or obstructing a street is the special damage suffered by the abutter before bringing the suit (Hopkins *v.* Western Pac. R. Co., 50 Cal. 190; Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512; Advance Elevator, etc., Co. *v.* Eddy, 23 Ill. App. 352; Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661), and not the depreciation of the value of the lot (Hopkins *v.* Western Pac. R. Co., *supra*; Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41; 11 N. W. 124; Baugh *v.* Texas, etc., R. Co., 80 Tex. 56, 15 S. W. 587).

26. Powell County *v.* Kentucky Lumber Co., 24 S. W. 114, 15 Ky. L. Rep. 577.

27. Cain *v.* Chicago, etc., R. Co., 54 Iowa 255, 3 N. W. 736, 6 N. W. 268. See also Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381.

28. Pierce *v.* Dart, 7 Cow. (N. Y.) 609.

29. Wilson *v.* West, etc., Mill Co., 28 Wash. 312, 68 Pac. 716.

One to whom a municipal corporation has delegated the right to close a street for the purpose of constructing a new bridge is liable for injuries caused by such closing only when the municipality itself would be.

brought against the municipality in a proper case for the damages thereby caused and for the abatement of the nuisance.[30]

h. Penalties and Actions Therefor.[31] In many jurisdictions statutes and ordinances fix a penalty for obstructing a street.[32] Municipal power to impose penalties for encroachments and obstructions is not inherent;[33] but municipalities, in connection with their general delegated power to control streets and prohibit obstructions therein, ordinarily have power to prescribe punishment by fine or imprisonment for the violation of ordinances relating to obstructions.[34] Statutes and ordinances imposing a penalty afford no right of action to a private individual where the act does not amount to a nuisance.[35] Such penal ordinances are strictly construed,[36] although ordinances subjecting "any person" to a penalty are held to include a corporation.[37] A licensee is not liable for such penalties where the work is being done by an independent contractor,[38] nor where he has been granted a temporary private use of a street, although it amounts to a temporary obstruction, at least until a demand by the municipality to relinquish the use.[39] So a municipal servant acting under charter power is not liable to the statutory penalty for obstructing streets.[40] Proof of all the elements of the offense must be made to warrant a recovery,[41] and the burden of showing the encroachment is on the municipality.[42] A judgment against defendant without stating on which charge judgment was given is void for uncertainty where there are two distinct charges.[43]

i. Criminal Responsibility.[44] Any encroachment or obstruction amounting to a nuisance is indictable at common law,[45] and in many jurisdictions by express

Lund *v.* St. Paul, etc., R. Co., 31 Wash. 286, 71 Pac. 1032, 96 Am. St. Rep. 906, 61 L. R. A. 506.

30. Pettit *v.* Greene County Grand Junction. 119 Iowa 352, 93 N. W. 381.

A municipality has no more right to erect and maintain an obstruction than a private individual possesses, and an action may be maintained against the corporation for damages occasioned by such a nuisance, for which it is responsible, in any case in which, under like circumstances, an action could have been maintained against an individual under similar circumstances. Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381; Redford *v.* Coggeshall, 19 R. I. 313, 36 Atl. 89.

31. See, generally, PENALTIES.

32. Com. *v.* Robertson, 5 Cush. (Mass.) 438 (construction of by-laws as to hacks standing in street); Carlisle *v.* Baker, 1 Yeates (Pa.) 471 (holding, however, that an ordinance inflicting a penalty on persons "placing goods on their porches, or cellar doors, projecting more than six inches into the street" was invalid); Williamsport *v.* Williamsport Water Co., 7 Pa. Dist. 206; State *v.* Leaver, 62 Wis. 387, 22 N. W. 576 (holding that provisions of a statute prescribing a penalty for obstructing a highway are applicable to the streets within a village, the charter of which has made no inconsistent provision). See also Warwick *v.* Mayo, 15 Gratt. (Va.) 528.

33. Grand Rapids *v.* Hughes, 15 Mich. 54, holding that power to impose penalties for "cumbering" streets did not include the power to impose penalties for encroachments on the streets.

Municipal power to abate nuisances does not include authority to fine a person for obstructing a street. Nevada *v.* Hutchins, 59 Iowa 506, 13 N. W. 634.

34. Toledo, etc., R. Co. *v.* Chenoa, 43 Ill. 209; State *v.* Lochte, 45 La. Ann. 1405, 14 So. 215.

35. Jenks *v.* Williams, 115 Mass. 217.

36. Giardina *v.* Greenville, 70 Miss. 896, 13 So. 241; Gates, etc., Co. *v.* Richmond, 103 Va. 702, 49 S. E. 965.

Construction of ordinance imposing penalty for spreading an awning see State *v.* Cleaveland, 3 R. I. 117.

37. Illinois Cent. R. Co. *v.* Galena, 40 Ill. 344.

38. Williamsport *v.* Williamsport Water Co., 7 Pa. Dist. 206.

39. Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470].

40. Bisbee *v.* Mansfield, 6 Johns. (N. Y.) 84.

41. State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

42. New York *v.* Childs, 84 N. Y. Suppl. 164.

43. Carlisle *v.* Baker, 1 Yeates (Pa.) 471.

44. See, generally, *supra*, XI, B; *infra*, XVIII.

45. Clark *v.* Com., 14 Bush (Ky.) 166; Com. *v.* Passmore, 1 Serg. & R. (Pa.) 217 (holding that an auctioneer has no right to place goods intended for sale in the public streets because there is no necessity therefor; and if he does he is indictable for a nuisance); Com. *v.* Wentworth, Brightly (Pa.) 318.

Persons affected.— To make an obstruction an indictable offense, it must injuriously affect some public right — some right in

statute.[46] An indictment lies, although the street obstructed has not been entirely opened and made fit for all uses,[47] but not where it has never been opened or is not used by the public.[48] Obstructions which are misdemeanors are punishable, under indictment, information, or complaint, brought in the name of the state;[49] and it must include all the elements of the offense.[50] Proof must be introduced to show that the way obstructed was a public street or alley,[51] and the findings must include every essential ingredient of the offense.[52] Questions of boundary or servitude are not involved so as to deprive inferior courts of jurisdiction.[53] Where the structure is shown to be on defendant's private property no costs are taxable against him.[54]

10. Use of Highway — a. In General.[55] The primary and paramount use of the street is public travel for man and beast, and carriage for goods;[56] and this use everyone enjoys upon terms of equality with others.[57] The right to travel on and along the streets of a municipality applies to the general public and does not apply to its citizens alone.[58] A municipality, however, may enact such ordinances relating to the use of a street as a highway by the public as are reasonable and within the power conferred upon it by its charter or other statutory provisions.[59] But the power conferred on a municipality to regulate the use of its

which the public, in their aggregate capacity, have a common interest, as distinguished from a mere individual or private right. If it affect only the rights of an individual, or of a definite number of persons less than the whole in their individual capacity, the several persons actually injured have their remedy by private action, but no indictment lies. People *v.* Jackson, 7 Mich. 432, 74 Am. Dec. 729.

Persons liable.— Where an officer, in executing a writ of restitution, places on the sidewalk goods removed from the premises, allowing them to remain there is the offense of the owner of the goods and not of the officer. Williams *v.* District of Columbia, 22 App. Cas. (D. C.) 471.

The existence of other like obstructions is no defense. Com. *v.* Kembel, 30 Pa. Super. Ct. 199.

Evidence.— Upon the trial of an indictment for a nuisance in maintaining a building dangerous to the public, resolutions of the common council of the city, passed when defendant, who was a member, was present, declaring the building unsafe and a nuisance, are not competent evidence. Chute *v.* State, 19 Minn. 271.

46. Garland *v.* Towne, 55 N. H. 55, 20 Am. Rep. 164; State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

47. State *v.* Lythgoe, 6 Rich. (S. C.) 112.

48. People *v.* McNamara, 143 Mich. 71, 106 N. W. 698; People *v.* Wolverine Mfg. Co., 141 Mich. 455, 104 N. W. 725, 113 Am. St. Rep. 544.

49. *Ex p.* Rinaldo, (Cal. 1890) 25 Pac. 260; *Ex p.* Taylor, 87 Cal. 91, 25 Pac. 258; Dover *v.* Tawressey, 2 Marv. (Del.) 285, 43 Atl. 170; State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

50. Giardina *v.* Greenville, 70 Miss. 896, 13 So. 241; State *v.* Junker, 37 Tex. 478, holding, however, that the information need not allege that the town in which the street lay was an incorporated town.

Fact of obstruction.— It is not sufficient to merely aver as a conclusion of law that a railroad track in a street was an obstruction. Wabash, etc., R. Co. *v.* People, 12 Ill. App. 448.

51. Mexico *v.* Jones, 27 Mo. App. 534.

52. Philadelphia *v.* Hughes, 4 Phila. (Pa.) 148.

53. State *v.* Lochte, 45 La. Ann. 1405, 14 So. 215.

54. Com. *v.* Weaver, 2 Pa. Co. Ct. 455.

55. See also Constitutional Law, 8 Cyc. 1070.

Country highways see Streets and Highways.

Regulation of automobiles see Motor Vehicles.

Regulation of use by, and liability of, railroads see Railroads; Street Railroads.

Right of way over railway tracks see Railroads; Street Railroads.

Animals running at large see *supra*, XI, A, 7, b, (viii), (c), (2), (b).

56. Grand Rapids Electric Light, etc., Co. *v.* Grand Rapids Edison Electric Light, etc., Co., 33 Fed. 659.

All parts of street.— All persons have a right to pass along and use the streets and alleys of a municipality in all their parts, the full width and length thereof. Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

57. Chicago Union Traction Co. *v.* Stanford. 104 Ill. App. 99.

58. Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

59. See cases cited *infra*, this note.

Distribution of hand bills.—It has been held that a municipality, in the exercise of its police power, may forbid the distribution of hand bills which will naturally be thrown by the receiver into the streets and tend to frighten horses. Wettengel *v.* Denver, 20 Colo. 552, 39 Pac. 343. On the other hand, it has been held that a municipal charter

streets and alleys does not include authority to deprive the public of the right to use the streets for travel by any ordinary or reasonable method of locomotion.[60] All ordinances as to the use of streets are to be construed with reference to changing methods of locomotion,[61] and environment,[62] and the constraint of overpowering necessity.[63]

b. Processions, and Unusual Noises and Performances. The ordinary obstruction of a street by a parade does not of itself constitute a nuisance.[64] But a municipality has power to prohibit public meetings or gatherings in its streets without a permit from a specified municipal officer,[65] although prohibiting all per-

giving power to clean the streets and prevent their encumbrance or obstruction, and regulating the manner of use, and to prevent all amusements and practices having a tendency to frighten horses or which are dangerous to life or property, did not authorize an ordinance prohibiting the distribution of hand hills or advertising cards upon any of the public streets or alleys of the city. People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721.

Driving cattle.—An ordinance prohibiting any person from permitting cattle under his care to go upon the sidewalk is not void for unreasonableness because a driver is thereby bound at all hazards to prevent their going on the sidewalk and is not excused by the exercise of reasonable care. Com. *v.* Curtis, 9 Allen (Mass.) 266. Charter power to "regulate and control" the driving of cattle through the streets will not sustain an ordinance effectually prohibiting such driving. McConvill *v.* Jersey City, 39 N. J. L. 38.

Carrying placard or sign.— An ordinance providing that no person should place or carry on any sidewalk any show board, placard, or sign for the purpose of display is violated by a person walking on a sidewalk having over his shoulder a piece of oilcloth worn like a vest or coat on which was printed a strikers' notice. Com. *v.* McCafferty, 145 Mass. 384, 14 N. E. 451.

Exhibition of stud horses.— Under power to prevent and remove nuisances, a municipality is authorized to prohibit as a nuisance the showing or exhibiting of stud horses on the streets. Nolin *v.* Franklin, 4 Yerg. (Tenn.) 163.

Peddlers.—An ordinance providing that "no person shall place or suffer to be placed upon or over any sidewalk . . . goods, wares or merchandise . . . beyond the front line of the lot where such goods may be placed" applies to peddlers exposing their goods for sale on the sidewalk for an unreasonable time. And twenty minutes is an unreasonable time for a peddler to expose his goods for sale at one place on the sidewalk. State *v.* Messolongitis, 74 Minn. 165, 77 N. W. 29.

Lamps on bicycles.— Power to provide for the safety of its inhabitants gives authority to pass an ordinance requiring bicycles on the street after dark to carry lights. Des Moines *v.* Keller, 116 Iowa 648, 88 N. W. 827, 93 Am. St. Rep. 268. See also Massinger *v.* Millville, 63 N. J. L. 123, 43 Atl. 443.

Ringing bicycle bell on approaching crossing.—An ordinance requiring every person using a bicycle to ring an alarm bell upon approaching any and all crossings or cross walks is not, as a matter of law, unreasonable. Emporia *v.* Wagoner, 6 Kan. App. 659, 49 Pac. 701.

Right of way to fire patrol.—An ordinance giving the fire insurance patrol right of way in the streets over all vehicles except those carrying mail, and making it a misdemeanor to refuse to accord such right of way, is a valid police regulation, not in conflict with the constitution. Duffghe *v.* Metropolitan St. R. Co., 109 N. Y. App. Div. 603, 96 N. Y. Suppl. 324 [*affirmed* in 187 N. Y. 522, 79 N. E. 1104].

Imposing conditions.— Where discretionary power is vested in a certain municipal officer to grant permits to drive or back vehicles across sidewalks for certain purposes, the officer has no implied authority to impose conditions as to sprinkling streets by the person given the permit. Whalen *v.* Willis, 18 N. Y. App. Div. 350, 46 N. Y. Suppl. 52.

60. Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

The right of the public to use the streets for purposes of travel is not limited to any particular method of travel but includes the right to travel by any ordinary method of locomotion or even an extraordinary method if it is not of itself calculated to prevent a reasonably safe use of the streets by others. Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

Traction engines.— Exclusive power over streets conferred on a municipality does not include power to prohibit the running of a traction engine on the streets. Bogue *v.* Bennett, 156 Ind. 478, 60 N. E. 143, 83 Am. St. Rep. 212.

61. Frank Bird Transfer Co. *v.* Morrow, 36 Ind. App. 305, 72 N. E. 189.

62. Frank Bird Transfer Co. *v.* Morrow, 36 Ind. App. 305, 72 N. E. 189.

63. Indianapolis St. R. Co. *v.* Slifer, (Ind. App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19.

64. State *v.* Hughes, 72 N. C. 25.

A singing salvation army procession, marching on Sunday through city streets, is not a nuisance. People *v.* Rochester, 44 Hun (N. Y.) 166.

65. Bloomington *v.* Richardson, 38 Ill. App. 60.

Construction of ordinance.—An ordinance prohibiting "public meetings" on the streets

sons or associations from parading the streets with flags or music unless a permit has been secured is invalid because unreasonable,[66] and also because its enforcement is left merely to unregulated discretion.[67] A cornet player in a salvation army parade is an "itinerant musician" within an ordinance prohibiting itinerant musicians from playing on the streets.[68] A statute providing that any person using a traction or road engine on a street shall send a person in advance to warn approaching teams does not apply to a steam roller used in making or repairing city streets.[69]

c. Moving Buildings on Streets. A citizen has a common-law right to the reasonable use of streets for the purpose of moving buildings,[70] subject to reasonable restrictions which the municipality may impose.[71] Generally a permit must first be obtained from the municipal authorities.[72] The owner of a building who seeks and obtains permission of the municipality to move it through the city streets is under an obligation to complete the removal within a reasonable time,[73] and if he fails to do so and the building is allowed to obstruct travel and become a public nuisance, the municipality may, after notice to the owner, destroy or

without a permit applies only to meetings held pursuant to some notice intended and adapted to reach the general public for the purpose of considering some object of interest to the public, and does not apply to a salvation army which stops to sing, pray, and testify. Bloomington *v.* Richardson, 38 Ill. App. 60.

Making a speech in a street is not *per se* a nuisance. Fairbanks *v.* Kerr, 70 Pa. St. 86, 10 Am. Rep. 664.

66. Rich *v.* Naperville, 42 Ill. App. 222; Anderson *v.* Wellington, 40 Kan. 173, 19 Pac. 719, 10 Am. St. Rep. 175, 2 L. R. A. 110; *In re* Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310. See also Trotter *v.* Chicago, 33 Ill. App. 206 [*affirmed* in 136 Ill. 430, 25 N. E. 359]; *In re* Gribben, 4 Okla. 379, 47 Pac. 1074. *Contra*, see Charlton *v.* Frazier, 87 Iowa 226, 54 N. W. 146.

In New York, however, it is held that the legislature may delegate to municipalities the power to make a by-law declaring it unlawful to go upon the streets beating a drum or tambourine or making any noise with any instrument without the written permission of a specified municipal officer; and that such an ordinance is authorized by statutes giving power to make ordinances for the preservation of the public peace and to regulate and prevent on the streets any act endangering person or property. Roderick *v.* Whitson, 51 Hun 620, 4 N. Y. Suppl. 112.

Unreasonable discriminations.—*A fortiori* the forbidding marching on streets accompanied by shouting, singing, or music without the consent of a specified officer, but exempting therefrom fire companies and state militia, and providing that political organizations need not obtain a permit, is void as making unreasonable discrimination and conferring arbitrary power upon municipal officers. State *v.* Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. Rep. 948, 19 L. R. A. 858.

Salvation army.—An ordinance forbidding noise in any street, or any assemblage of persons in the streets to the annoyance or disturbance of others, is not violated by a salvation army parade. People *v.* Rochester, 44 Hun (N. Y.) 166, 8 N. Y. St. 291.

67. Chicago *v.* Trotter, 136 Ill. 430, 26 N. E. 359 [*affirming* 33 Ill. App. 206]; Rich *v.* Naperville, 42 Ill. App. 222.

On the other hand, it has been held that ordinances conferring on an officer the right in his discretion to permit the beating of drums in the traveled streets of the city, although forbidding it when such permission is not granted, are not invalid as a derogation of the legislative power of control. *In re* Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529.

68. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

69. New Albany *v.* Stier, 34 Ind. App. 615, 72 N. E. 275.

70. Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Hinman *v.* Clark, 51 Misc. (N. Y.) 252, 100 N. Y. Suppl. 1068 [*affirmed* in 105 N. Y. Suppl. 725]. See also Toronto St. R. Co. *v.* Dollery, 12 Ont. App. 679. *Contra*, Dickson *v.* Kewanee Electric Light, etc., Co., 53 Ill. App. 379.

Cutting wires.— The moving of a building along a highway when permission is obtained from the proper authorities is a use of the highway within Pub. St. (1882) c. 109, § 17, providing for the necessary cutting, disconnecting, or removing of electric wires in the necessary use of streets. A. M. Richards Bldg. Moving Co. *v.* Boston Electric Light Co., 188 Mass. 265, 74 N. E. 350.

71. Hinman *v.* Clark, 51 Misc. (N. Y.) 252, 100 N. Y. Suppl. 1068 [*affirmed* in 105 N. Y. Suppl. 725].

72. Day *v.* Green, 4 Cush. (Mass.) 433; Concord *v.* Burleigh, 67 N. H. 106, 36 Atl. 606.

The municipality may prohibit the moving of buildings without a permit. Eureka City *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904.

73. Keating *v.* Macdonald, 73 Conn. 125, 46 Atl. 871.

remove the building without liability therefor, unless its action is so unreasonable or unjust as to be inconsistent with legal principles.[74]

d. Stopping or Standing in Streets.[75] Regulations as to stopping or standing in streets are in force in many municipalities.[76] An ordinance prohibiting vehicles from stopping in the streets for more than twenty minutes has been held valid,[77] and applicable to licensed peddlers as well as to others;[78] and to a voluntary as distinguished from an involuntary stoppage.[79] So an ordinance prohibiting persons "idly standing, loafing or congregating" on streets is within the municipal police power.[80]

e. Regulation of Speed. Ordinances restraining fast riding and driving in the streets have been uniformly sustained as valid; and limitations of speed to from six to eight miles an hour,[81] to "an ordinary trot,"[82] or "a moderate foot pace"[83] have been held reasonable. So a municipality has the power to regulate the speed of automobiles and to require the use of reasonable safety appliances.[84] Such speed limit ordinances have been held applicable to ambulances,[85] but not to the vehicles of the fire department,[86] nor salvage corps.[87] An ordinance regulating the speed of vehicles is not invalid because different rates of speed are allowed in different portions of the prescribed territory.[88]

f. Prohibiting or Limiting Kinds of Vehicles — (1) *In General.* The power of a municipal corporation "to regulate traffic" on its streets does not include the power to prohibit the use of vehicles on parts of certain streets,[89] except perhaps in a case of emergency, such as a conflagration or abnormal congestion of traffic.[90] But the power to authorize a municipality to vacate one of its streets includes the power to authorize it to limit the use of a street to a particular purpose benefiting the public,[91] and, under authority conferred upon it by a general

74. Keating *v.* Macdonald, 73 Conn. 125, 46 Atl. 871.

75. See, generally, *supra*, XI.

76. See cases cited *infra*, this note.

Leaving or placing carts in streets.—An ordinance prohibiting the leaving or placing any carts in the street is not violated by a duly licensed push-cart peddler remaining half an hour with his cart at one place on a busy street for the purpose of selling his wares. State *v.* Rayantis, 55 Minn. 126, 56 N. W. 586.

A hotel omnibus is not a "public conveyance" within an ordinance prohibiting the standing in certain places of public conveyances. Oswego *v.* Collins, 38 Hun (N. Y.) 171.

Cab stands.—An ordinance providing that cabs shall stand on certain parts of certain streets and that any violation thereof shall be a misdemeanor has been held not to make a person standing a cab elsewhere than as provided guilty of a misdemeanor. Helena *v.* Gray, 7 Mont. 486, 17 Pac. 564.

77. Com. *v.* Fenton, 139 Mass. 195, 29 N. E. 653.

78. Com. *v.* Brooks, 99 Mass. 434.

79. Com. *v.* Brooks, 99 Mass. 434.

80. Com. *v.* Challis, 8 Pa. Super. Ct. 130.

81. U. S. Brewing Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081 [*affirming* 113 Ill. App. 435]; Com. *v.* Crowinshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245; People *v.* Little, 86 Mich. 125, 48 N. W. 693; Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531.

82. Nealis *v.* Hayward, 48 Ind. 19.

83. Com. *v.* Worcester, Thach. Cr. Cas. (Mass.) 100. See also Com. *v.* Worcester, 3 Pick. (Mass.) 462.

But under a statute authorizing a city to prohibit persons under a penalty from riding or driving in the streets faster than the rate of speed fixed by the statute, it cannot pass a valid ordinance prohibiting the riding or driving of any horse in its streets at "a moderate gait." Com. *v.* Roy, 140 Mass. 432, 4 N. E. 814.

84. See Motor Vehicles.

85. People *v.* Little, 86 Mich. 125, 48 N. W. 693.

86. Farley *v.* New York, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511. *Contra*, Morse *v.* Sweenie, 15 Ill. App. 486.

87. State *v.* Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305.

88. Chittenden *v.* Columbus, 26 Ohio Cir. Ct. 531.

89. Peace *v.* McAdoo, 110 N. Y. App. Div. 13, 96 N. Y. Suppl. 1039 [*affirming* 46 Misc. 295, 92 N. Y. Suppl. 368].

90. Peace *v.* McAdoo, 110 N. Y. App. Div. 13, 96 N. Y. Suppl. 1039 [*affirming* 46 Misc. 295, 92 N. Y. Suppl. 368].

91. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

Reasonableness.—A statute authorizing a municipality to designate not to exceed two streets as public driveways for pleasure driving only is not unreasonable in providing for the exclusion of traffic teams from such highways. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

act of the legislature, a municipality has the power to limit the use of a street to a pleasure driveway.[92]

(II) *Weight of Loads.* A municipality authorized to regulate the use of its streets may prohibit the hauling of heavy loads weighing more than a certain number of pounds on wagons having tires less than a certain width.[93] So it has been held that the weight of the load may be limited to three tons where the load consists of an article which can be divided,[94] and that the municipality may prohibit drawing a load weighing over a certain amount over any paved street of the city.[95] Whether a by-law restricting heavy loads to a certain portion of the street is reasonable and valid with reference to the way and locality in dispute depends on whether the portion of the street which may be used by heavily loaded vehicles is reasonably suitable for the purpose.[96]

g. Use of Sidewalk — (I) *In General.* An ordinance forbidding driving "along" a sidewalk does not apply to passing "across,"[97] and even if it did it would be unreasonable so far as applicable to an abutting owner's rights of ingress or egress.[98] An ordinance prohibiting the driving, backing, or leaving of any horse or vehicle on a sidewalk does not prohibit the carting of dirt from excavations across the sidewalk.[99] Ordinances have been enacted allowing an abutting owner to drive on the sidewalk to a limited extent where railroad tracks in the street prevent him from keeping a vehicle in front of his store without interference with the passage of cars.[1]

(II) *Bicycles.* Riding a bicycle upon a sidewalk is not an unlawful act at common law,[2] but is prohibited in many jurisdictions.[3] Municipalities generally

92. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; Brodbine *v.* Revere, 182 Mass. 598, 66 N. E. 607. But see State *v.* Waddell, 49 Minn. 500, 52 N. W. 213.

Delegation of power.— However, an ordinance forbidding the use of heavy vehicles on a driveway except "upon special permission" of a board without prescribing any general conditions upon which such permission shall be granted is unreasonable and invalid as vesting the board with arbitrary power. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

93. Harrison *v.* Elgin, 53 Ill. App. 452; Utica *v.* Blakeslee, 46 How. Pr. (N. Y.) 165.

94. Com. *v.* Mulhall, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387.

95. People *v.* Wilson, 16 N. Y. Suppl. 583.

96. State *v.* Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750.

97. Philadelphia *v.* Wright, 4 Phila. (Pa.) 138.

Construction of statutes and ordinances.— The statute making it unlawful to drive on any sidewalk by the side of any public highway includes streets in cities. Indianapolis *v.* Higgins, 141 Ind. 1, 40 N. E. 671.

98. Philadelphia *v.* Wright, 4 Phila. (Pa.) 138. See also *supra*, XII, A, 7.

99. *In re* O'Keefe, 19 N. Y. Suppl. 676.

1. Merritt *v.* Fitzgibbons, 102 N. Y. 362, 7 N. E. 179.

2. Lee *v.* Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308. See also Custer *v.* New Philadelphia, 20 Ohio Cir. Ct. 177, 11 Ohio Cir. Dec. 9.

Velocipede.—As a matter of law, any and every use of a velocipede upon a sidewalk is not unlawful. Purple *v.* Greenfield, 138 Mass. 1.

3. Com. *v.* Forrest, 170 Pa. St. 40, 32 Atl. 652, 29 L. R. A. 365.

Prohibiting riding on sidewalks includes bicycle riding except in the necessary act of crossing. Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221.

Wilful act.— Intentionally riding a bicycle on a sidewalk is doing it wilfully and wrongfully, within N. Y. Pen. Code, § 652, providing that any person who wilfully and without authority drives any bicycle on a sidewalk is punishable by a fine, etc. People *v.* Meyer, 26 Misc. (N. Y.) 117, 56 N. Y. Suppl. 1097.

Location of sidewalk.— On a prosecution under N. Y. Pen. Code, § 652, prohibiting any person from riding a bicycle on a sidewalk wilfully and without authority, the people must prove that the sidewalk was upon and along a public highway. People *v.* Meyer, 26 Misc. (N. Y.) 117, 56 N. Y. Suppl. 1097.

Construction of ordinances.—An ordinance making it unlawful to drive or propel any wagon or other vehicle on a sidewalk, amended by the provision, "but nothing herein contained shall be construed to include the conveyance of children on sidewalks in small carriages . . . or the riding of bicycles on any street . . . within the following described district," neither affirmatively permits nor prohibits the riding of bicycles on sidewalks. Rogers *v.* Binghamton, 101 N. Y. App. Div. 352, 92 N. Y. Suppl. 179 [*affirmed* in 186 N. Y. 595, 79 N. E. 1115]. An ordinance forbidding riding a bicycle on "any sidewalk in the city of . . or across the Kansas river bridge" does not apply to riding on the

have power to permit the riding of bicycles on the sidewalk,[4] but have no power to forbid bicycle riding on that part of a street devoted to the use of vehicles.[5]

h. Liabilities of Persons Using Streets — (i) *In General.*[6] Without considering the liability of the municipality,[7] or of an abutting owner,[8] for injuries to persons using the street, the rule is that a person is liable for his negligence or other wrongful act in using a street where it results in an injury to another person using the street,[9] subject of course to the rule that there can be no recovery if plaintiff was guilty of contributory negligence.[10] Foot passengers and drivers of vehicles have equal rights on the streets and both are bound to exercise commen-

bridge on the part thereof used for vehicles. Swift *v.* Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772.

Tricycles.—An ordinance forbidding bicycles on the sidewalk does not include tricycles. Wheeler *v.* Boone, 108 Iowa 235, 78 N. W. 909, 44 L. R. A. 821.

4. Lechner *v.* Newark, 19 Misc. (N. Y.) 452, 44 N. Y. Suppl. 556.

Municipal power to regulate the use of sidewalks includes power to authorize the riding of bicycles on sidewalks within limits where the conditions are such that the use of bicycles will not amount to a nuisance, or where, owing to the condition of the streets, they are impassable for a bicycle. Lee *v.* Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308.

5. Swift *v.* Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772.

6. See, generally, NEGLIGENCE.

Liability of railroad company see RAILROADS; STREET RAILROADS.

7. See *infra*, XIV, D.

8. See *infra*, XIV, D, 7.

9. Bostock-Ferari Amusement Co. *v.* Brocksmith, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 260; Boston *v.* Abraham, 91 N. Y. App. Div. 417, 86 N. Y. Suppl. 863; Kern *v.* Snider, 145 Fed. 327, 76 C. C. A. 201. See also Ensley Mercantile Co. *v.* Otwell, 142 Ala. 575, 38 So. 839; Lopes *v.* Sahuque, 114 La. 1004, 38 So. 810.

One riding a bicycle on a sidewalk is liable for injuries to a person properly using the walk, although the injury was not intended. Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221.

Leaving a horse standing in a street unhitched and unattended has been held to constitute negligence. Acker *v.* Stern, 49 Misc. (N. Y.) 650, 97 N. Y. Suppl. 1041. See also NEGLIGENCE.

Delivery wagon proceeding without driver. — Where the driver of an ice wagon permitted his horses to proceed along the street without guidance, while he was preparing ice for delivery men, by reason whereof the horses ran against plaintiff, a street sweeper, such facts authorized a finding of negligence on the part of the driver. Turtenwald *v.* Wisconsin Lakes Ice, etc., Co., 121 Wis. 65, 98 N. W. 948.

Backing a truck without warning across a sidewalk when pedestrians are passing is negligence. Goff *v.* Akers, 1 Misc. (N. Y.) 468, 21 N. Y. Suppl. 454 [*affirmed* in 139 N. Y. 653, 35 N. E. 207].

Taking vicious cow through streets.— Where a vicious cow is to be conducted through a city street, it is the duty of the owner to make adequate provision to prevent injury to passers-by, and he is liable for any resulting injury to a passer exercising ordinary care. O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764.

Leading bear along street.— It is not negligence *per se* to lead a bear along a public street for a lawful purpose. Bostock-Ferari Amusement Co. *v.* Brocksmith, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 260.

Sliding down-hill.— An averment that defendant, by sliding in the street in a boisterous manner contrary to an ordinance, and to the damage and common nuisance of the public, frightened plaintiff's horses, whereby they ran away and were injured, states no cause of action. Jackson *v.* Castle, 82 Me. 579, 20 Atl. 237.

Excavation as nuisance.— In an action for injuries sustained by one while at work in a hole excavated in a street for the purpose of laying water mains, the jury might properly find that such excavation did not constitute a common-law nuisance. Boston *v.* Abraham, 91 N. Y. App. Div. 417, 86 N. Y. Suppl. 863.

Right of way given to fire department.— A statute giving to a fire company, its officers and men, the right of way through the streets of a city while going to a fire does not relieve the department from liability for negligence. Newcomb *v.* Boston Protective Dept., 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Muhs *v.* Brooklyn F. Ins. Salvage Corps, 89 N. Y. App. Div. 389, 85 N. Y. Suppl. 911.

Defenses.— Where a horse was negligently left untied in the street, and he ran away and injured plaintiff, it was no defense that the horse was ordinarily gentle, and that the possible cause of his running away was his being stung by bees in the street. Healy *v.* Johnson, 127 Iowa 221, 103 N. W. 92.

Admissibility of evidence.— In an action for injuries to plaintiff by defendant's runaway horse negligently left unsecured in a city street, evidence that the street where plaintiff was injured was much frequented by children, and that defendant's employee had knowledge thereof was admissible. Healy *v.* Johnson, 127 Iowa 221, 103 N. W. 92.

Evidence held not sufficient to go to jury see Dennison *v.* North Penn Iron Co., 22 Pa. Super. Ct. 219.

10. See *infra*, XII, A, 10, h, (II).

surate care to avoid injury.[11] Negligence of the driver of a vehicle in driving carelessly is actionable where it results in a collision with other vehicles,[12] or injury to a pedestrian using the streets[13] or on street cars.[14] The law of the road, as applied to driving on country roads,[15] governs the question as to which side of the street it is proper to drive on.[16] Generally the question of negligence is one of fact for the jury.[17]

(II) *Contributory Negligence.*[18] Contributory negligence of plaintiff precludes his right to recover,[19] but whether or not plaintiff was guilty of contributory negligence is generally a question of fact for the jury.[20] The burden is generally

11. Richardson *v.* Davis, 94 Minn. 315, 102 N. W. 868; Brooks *v.* Schwerin, 54 N. Y. 343.

12. Potter *v.* Moran, 61 Mich. 60, 27 N. W. 854; May *v.* Hahn, (Tex. Civ. App. 1904) 80 S. W. 262.

13. Warren *v.* Porter, 144 Mich. 699, 108 N. W. 435; Potter *v.* Moran, 61 Mich. 60, 27 N. W. 854; Sandifer *v.* Lynn, 52 Mo. App. 553; Charters *v.* Palmer, 113 N. Y. App. Div. 108, 98 N. Y. Suppl. 887 (driver looking backward); Muhs *v.* Brooklyn F. Ins. Salvage Corps, 89 N. Y. App. Div. 389, 85 N. Y. Suppl. 911; American Tobacco Co. *v.* Polisco, 104 Va. 777, 52 S. E. 563.

On approaching a street crossing, the driver is bound to anticipate that pedestrians may be at the crossing, and if he fails to look for them and does not, so far as in his power, avoid them, he is guilty of negligence. Murphy *v.* Orr, 96 N. Y. 14; Lahne *v.* Seaich, 83 N. Y. App. Div. 636, 82 N. Y. Suppl. 67. He is bound to exercise such reasonable caution as an ordinarily careful and prudent person would exercise in like circumstances. Robinson *v.* Huber, (Del. 1906) 63 Atl. 873.

Driving a team at a "lively trot" is not negligence *per se,* and one so driving is not limited to any particular rate of speed but is bound simply to use proper care not to injure other persons lawfully upon the streets. Crocker *v.* Knickerbocker Ice Co., 92 N. Y. 652.

Unbroken horses.—A purchaser of unbroken horses is bound to apprehend the exhibition of want of restraint during process of training, whatever assurances of docility may have accompanied the sale; and, when it is made apparent on a trial that a horse is not kind and gentle, he must exercise caution commensurate with the danger, while driving it through the streets. Conway *v.* Rheims, 107 N. Y. App. Div. 289, 95 N. Y. Suppl. 119.

Evidence held sufficient to go to jury see Meyer *v.* Lewis, 43 Mo. App. 417; Rush *v.* Joseph H. Bauland Co., 82 N. Y. App. Div. 506, 81 N. Y. Suppl. 830; Schwartz *v.* London, 90 N. Y. Suppl. 449. Where plaintiff was injured by a team, and there was some evidence that such team belonged to defendant, the fact that the wagon was partially on the sidewalk at the time was a circumstance from which negligence might be inferred, and the granting of a nonsuit was error. Franolich *v.* Metropolitan Express Co., 90 N. Y. Suppl. 386.

14. Frank Bird Transfer Co. *v.* Morrow, 36 Ind. App. 305, 72 N. E. 189; McCormack *v.* Boston El. R. Co., 188 Mass. 342, 74 N. E. 599; Brand *v.* Borden's Condensed Milk Co., 89 N. Y. App. Div. 188, 85 N. Y. Suppl. 755; Sondheim *v.* Nassau Brewing Co., 60 N. Y. App. Div. 463, 69 N. Y. Suppl. 880; Wilson *v.* Union Transfer Co., 30 Pa. Super. Ct. 70.

Failure to carry light.— The owners of a heavy truck carrying heavy machinery at night in a sparsely settled portion of the city are not negligent because they do not carry a light to warn a rapidly approaching street car of its presence. Regan *v.* McCarthy, 119 Ill. App. 578.

15. See, generally, Streets and Highways.

16. See cases cited *infra,* this note.

Excuses for using wrong side of road.—A person leading a horse along a street sufficiently excused his keeping on the left side of the street by showing that the right side was crowded with cars, trucks, and other vehicles. Mooney *v.* Trow Directory, etc., Co., 2 Misc. (N. Y.) 238, 21 N. Y. Suppl. 957. One driving on the left-hand side of the street because the right-hand side was in such condition as to render it impracticable or unsafe to travel thereon does not violate an ordinance requiring drivers "to keep as nearly as practicable to the right of such street." Indianapolis St. R. Co. *v.* Slifer, (Ind. App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19. An ordinance requiring persons to drive on the right side of the street does not forbid persons so driving from crossing the street to avoid danger. Streeter *v.* Marshalltown, 123 Iowa 449, 99 N. W. 114.

Instructions.— Where plaintiff was injured in a collision between a street car and a vehicle approaching each other at right angles, it was proper to charge that the question of the right-hand side or the wrong side of the street did not enter into the case. Iaquinto *v.* Bauer, 104 N. Y. App. Div. 56, 93 N. Y. Suppl. 388.

17. St. Louis Brewing Assoc. *v.* Hamilton, 41 Ill. App. 481; McCormack *v.* Boston El. R. Co., 188 Mass. 342, 74 N. E. 599; Richardson *v.* Davis, 94 Minn. 315, 102 N. W. 868; Sondheim *v.* Nassau Brewing Co., 60 N. Y. App. Div. 463, 69 N. Y. Suppl. 880.

18. See, generally, Negligence.

19. Richardson *v.* Davis, 94 Minn. 315, 102 N. W. 868; McMahon *v.* Pacific Express Co., 132 Mo. 641, 34 S. W. 478.

20. Johnson *v.* Thomas, (Cal. 1896) 43 Pac. 578; Dorr *v.* Schenck, 187 Mass. 542, 73 N. E. 532; Richardson *v.* Davis, 94 Minn. 315, 102 N. W. 868; Sondheim *v.* Nassau

on plaintiff to show that he was not guilty of contributory negligence.[21] What constitutes contributory negligence as a matter of law is largely determined by the particular circumstances of each case.[22] A person crossing a street must exercise his faculties to look for approaching vehicles,[23] but it is not negligence as a matter of law for a pedestrian to cross a public street at a point where there is no cross walk.[24]

(III) *Violation of Ordinance as Affecting Liability*— (A) *By Defendant.* Evidence that the act or conduct causing the injury was in violation of a

Brewing Co., 60 N. Y. App. Div. 463, 69 N. Y. Suppl. 880.

21. Perez *v.* Sandrowitz, 180 N. Y. 397, 73 N. E. 228. See also Negligence.

22. See Dennison *v.* North Penn Iron Co., 22 Pa. Super. Ct. 219.

Leaving a horse and wagon in the street while loading or unloading goods is not contributory negligence *per se* so as to prevent a recovery for injuries to the horse caused by the reckless driving of defendant. Rohde *v.* Mantell, 107 N. Y. App. Div. 621, 95 N. Y. Suppl. 5.

Persons on street cars.— It is negligence *per se* for a motorman to run his car at such a high rate of speed that he cannot stop it within the distance at which he can see an obstruction ahead of him on the track. Regan *v.* McCarthy, 119 Ill. App. 578. But it is not negligence *per se* for a passenger to stand on the running board of an electric car. Frank Bird Transfer Co. *v.* Morrow, 36 Ind. App. 305, 72 N. E. 189. So where a person driving a team alongside a street car did not attempt to check them when the car was being stopped, a passenger getting off was not guilty of contributory negligence in not looking back before stepping off the car. Sandifer *v.* Lynn, 52 Mo. App. 553. A street car conductor, whose duties require him to go from the forward end of the car to the rear, and who chooses the street as a means of so doing, has a right to rely upon the exercise of reasonable care by drivers of vehicles to avoid causing injury to persons in the street, and is not guilty of contributory negligence in failing to anticipate the omission of such care. Caesar *v.* Fifth Ave. Coach Co., 45 Misc. (N. Y.) 331, 90 N. Y. Suppl. 359.

Driving between van and curb.— A person driving a light wagon at a moderate gait, with his horse under full control, was guilty of contributory negligence in endeavoring to drive between a large van driven by a fellow servant and the curb, toward which the van was backing, when he could and should have driven out and passed in front of the van. Roe *v.* Standard Furniture Co., 41 Wash. 546, 83 Pac. 1109.

Running into danger.—A pedestrian who, in the effort to escape a collision with a galloping horse, first observed when but fourteen or fifteen feet away, really runs into the danger, is not guilty of contributory negligence, as a matter of law. Rush *v.* Joseph H. Bauland Co., 82 N. Y. App. Div. 506, 81 N. Y. Suppl. 830.

A policeman's attempt to save a woman and child from injury by a fire patrol wagon being driven through the street, whereby he was injured, was not contributory negligence as a matter of law, it being his duty to make the attempt. Muhs *v.* Brooklyn F. Ins. Salvage Corps, 89 N. Y. App. Div. 389, 85 N. Y. Suppl. 911.

Injury to street cleaner.— Where a street cleaner was injured by being run into by a team attached to an ice wagon permitted to pass along the street without being guided, the fact that the street cleaner did not keep constantly on the alert to keep out of the way of teams, and while at his work stepped aside from a direct course to go to the side of the street to empty his shovel without looking behind him, by reason of which he was injured, did not constitute contributory negligence as a matter of law. Turtenwald *v.* Wisconsin Lakes Ice, etc., Co., 121 Wis. 65, 98 N. W. 948.

23. Mead *v.* Otto Huber Brewery, 104 N. Y. App. Div. 10, 93 N. Y. Suppl. 244; Rush *v.* Joseph H. Bauland Co., 82 N. Y. App. Div. 506, 81 N. Y. Suppl. 830.

Right to assume that driver will lessen his speed.—A pedestrian about to cross a street in front of an approaching vehicle is not negligent in assuming that the driver would lessen his speed as an alternative to a collision. Schwartz *v.* London, 90 N. Y. Suppl. 449. But the existence of an ordinance against fast driving will not authorize a person crossing a street to presume that it will be obeyed if he knows that a team is being driven at a forbidden rate of speed. Baker *v.* Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620.

A person seventy-two years old, who, when crossing an icy street, sees a sleigh approaching at a distance, is not guilty of negligence in failing to watch the sleigh and keep out of its way, the street being otherwise occupied. McCrohan *v.* Davison, 187 Mass. 466, 73 N. E. 553.

24. Southern Bell Tel., etc., Co. *v.* Howell, 124 Ga. 1050, 53 S. E. 577; Coombs *v.* Purrington, 42 Me. 332.

One who steps from the curb of a street at a distance of seventy-five feet from the corner of another street to cross just as a two-horse team turns the corner into the street, and proceeds to cross, but after passing in front of the horse nearest to him at a distance of fifteen feet from the curb is struck by the other horse, cannot be held guilty of negligence as a matter of law. Gerber *v.* Boorstein, 113 N. Y. App. Div. 808, 99 N. Y. Suppl. 1091.

street ordinance is admissible to show negligence,[25] and as bearing upon the contributory negligence of plaintiff,[26] and generally makes out a *prima facie* case of negligence *per se*,[27] which may be defeated by the contributory negligence of plaintiff.[28]

(B) *By Plaintiff.* The fact that one is injured while violating an ordinance regulating the use of streets, through the negligence of another, does not defeat his right to recovery unless his unlawful act was a contributing cause to the injury;[29] but where the violation of an ordinance contributes directly and proximately to cause the injury no recovery can be had.[30]

i. Actions and Prosecutions For Violation of Ordinances — (1) *In General.* An ordinance prohibiting certain use of the streets under a penalty of a fixed sum does not authorize the arrest and criminal prosecution of a person for violating the ordinance.[31]

25. *California.*—Johnson *v.* Thomas, (1896) 43 Pac. 578.

Illinois.— Lind *v.* Beck, 37 Ill. App. 430.

Indiana.— Simons *v.* Gaynor, 89 Ind. 165.

Iowa.— Eaton *v.* Cripps, 94 Iowa 176, 62 N. W. 687.

Missouri.— Sandifer *v.* Lynn, 52 Mo. App. 553, holding that an ordinance regulating the speed of teams is admissible in an action for injuries from the rapid driving of a team in a street as bearing on the negligence of the driver and the contributory negligence of plaintiff.

New York.— Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488; Williams *v.* O'Keefe, 9 Bosw. 536, 24 How. Pr. 16; Grinnell *v.* Taylor, 85 Hun 85, 32 N. Y. Suppl. 684 [*affirmed* in 155 N. Y. 653, 49 N. E. 1097].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1516.

Contra.— Dolfinger *v.* Fishback, 12 Bush (Ky.) 474.

An ordinance prohibiting fast driving is admissible to show negligence in an action for injuries due to fast driving. Johnson *v.* Thomas, (Cal. 1896) 43 Pac. 578; Lind *v.* Beck, 37 Ill. App. 430; Eaton *v.* Cripps, 94 Iowa 176, 62 N. W. 687; Sandifer *v.* Lynn, 52 Mo. App. 553; Williams *v.* O'Keefe, 9 Bosw. (N. Y.) 536, 24 How. Pr. 16.

Where a horse being led along a sidewalk kicked a pedestrian, an ordinance forbidding any one to lead a horse on a sidewalk is admissible. Grinnell *v.* Taylor, 85 Hun (N. Y.) 85, 32 N. Y. Suppl. 684 [*affirmed* in 155 N. Y. 653, 49 N. E. 1097].

26. Sandifer *v.* Lynn, 52 Mo. App. 553; Williams *v.* O'Keefe, 9 Bosw. (N. Y.) 536, 24 How. Pr. 16.

27. *Delaware.*— Robinson *v.* Simpson, 8 Houst. 398, 32 Atl. 287.

Illinois.— U. S. Brewing Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081 [*affirming* 113 Ill. App. 435]; Lind *v.* Beck, 37 Ill. App. 430.

Iowa.— Healy *v.* Johnson, 127 Iowa 221, 103 N. W. 92.

Minnesota.— Bott *v.* Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47.

Missouri.— See Sandifer *v.* Lynn, 52 Mo. App. 553.

New York.—See Sondheim *v.* Nassau Brewing Co., 60 N. Y. App. Div. 463, 69 N. Y. Suppl. 880.

Texas.— May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1516.

But see Lopes *v.* Sahuque, 114 La. 1004, 38 So. 810.

So where an ordinance forbids the leaving a team standing unfastened or unguarded in a public street, one injured by reason of a violation of such ordinance may recover damages from the person through whose default the injury occurred. Bott *v.* Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47. An ordinance prohibiting such act is admissible, although not conclusive. Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488. *Contra*, Dolfinger *v.* Fishback, 12 Bush (Ky.) 474.

28. Lind *v.* Beck, 37 Ill. App. 430; McMahon *v.* Pacific Express Co., 132 Mo. 641, 34 S. W. 478.

29. Ensley Mercantile Co. *v.* Otwell, 142 Ala. 575, 38 So. 839; Newcomb *v.* Boston Protective Dept., 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Hall *v.* Ripley, 119 Mass. 135; Kearns *v.* Sowden, 104 Mass. 63 note; Steele *v.* Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; McCarragher *v.* Proal, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208, holding that the mere fact that one operating a vehicle violates a municipal ordinance prescribing the rights of way at street intersections does not of itself constitute contributory negligence. See also Gannon *v.* Wilson, 1 Pa. Cas. 422, 5 Atl. 381; Dennison *v.* Miner, 1 Pa. Cas. 399, 2 Atl. 561.

30. Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Newcomb *v.* Boston Protective Dept., 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354.

31. Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109 [*reversed* on other grounds in 13 N. Y. App. Div. 61, 43 N. Y. Suppl. 96].

Persons liable.— Where a day hack-driver, without the authority of the owner, used the hack in the night-time without observing an ordinance directing him to keep two lighted lamps on his carriage, the owner was not liable to the penalty. Campbell *v.* Providence, 9 R. I. 262.

(II) *Defenses.* It is no defense to a prosecution for unlawful riding on a sidewalk that others did likewise without complaint,[32] nor that the informer contributed nothing to the original construction of the sidewalk or did not aid in keeping it in repair,[33] nor that the abutting owner consented to such use of the sidewalk,[34] nor that the street was muddy where with full notice of the state of the street the driver loads his wagon and drives along to the dangerous point.[35] It is no defense to a complaint for fast driving that the mayor and city marshal had given oral permission,[36] nor that no person was endangered by such driving,[37] nor that defendant had a reputation as a careful driver;[38] but defendant may prove his motive where a discretion is allowed to the jury in fixing the imprisonment.[39] It is no defense that there was no actual disturbance or breach of the peace on the particular occasion.[40] So it is generally no defense that the intention was good,[41] nor that efforts were made by defendant to prevent a breach of the ordinance,[42] nor that obedience to the ordinance would raise the price of necessaries.[43] Where an ordinance imposed a penalty on the owner of a vehicle kept for hire for neglect to light the lamps of his vehicle at night, it is no defense that such owner was not present and had no knowledge of such violation.[44] A driver of a cab left standing on the street is to be deemed personally with the cab, although actually out of sight in a railroad station soliciting passengers, so as to preclude him from denying that he was standing in a place different from that assigned him by the municipal officers.[45] Where an ordinance vacating the street obstructed is relied upon, it must be presumed that defendant knew of the invalidity of the ordinance where it was not passed as required by the statute.[46]

(III) *Complaint, Information, Indictment, or Warrant.*[47] A complaint for violating an ordinance which uses substantially the words of the by-law or regulation is sufficient.[48] Where wilfulness [49] or unreasonableness [50] is a necessary element to constitute the offense, such words must be used in the complaint. A conviction for a common-law nuisance cannot be had under a complaint for violating a by-law.[51] Where a given act is made by ordinance an offense in itself without reference to actual obstruction of public travel or expressed intent to obstruct, the complaint need not allege that the public travel was obstructed and that defendant intended to so do.[52]

(IV) *Evidence and Proof.* The admissibility of evidence is governed by the rules relating to the admissibility of evidence in civil actions and criminal prosecutions in general.[53] In an action or prosecution for fast driving, it is not

32. Com. *v.* Forrest, 170 Pa. St. 40, 32 Atl. 652, 29 L. R. A. 365.
33. Com. *v.* Forrest, 170 Pa. St. 40, 32 Atl. 652, 29 L. R. A. 365.
34. Com. *v.* Forrest, 170 Pa. St. 40, 32 Atl. 652, 29 L. R. A. 365.
35. State *v.* Brown, 109 N. C. 802, 13 S. E. 940.
36. Com. *v.* Worcester, 3 Pick. (Mass.) 462; Com. *v.* Worcester, Thach. Cr. Cas. (Mass.) 100.
37. Com. *v.* Worcester, 3 Pick. (Mass.) 462.
38. Com. *v.* Worcester, 3 Pick. (Mass.) 462.
39. Morton *v.* Princeton, 18 Ill. 383.
40. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 24 Am. St. Rep. 566, 2 L. R. A. 142.
41. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.
42. Com. *v.* Curtis, 9 Allen (Mass.) 266.
43. Com. *v.* Worcester, Thach. Cr. Cas. (Mass.) 100.
44. Dane *v.* Mobile, 36 Ala. 304.
45. Com. *v.* Matthews, 122 Mass. 60.
46. St. Louis, etc., R. Co. *v.* Belleville, 122 Ill. 376, 12 N. E. 680.
47. See, generally, Criminal Law; Indictment and Information; Penalties.
48. Com. *v.* Lagorio, 141 Mass. 81, 6 N. E. 546 [*followed* in Com. *v.* Rowe, 141 Mass. 79, 6 N. E. 545].
49. See Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109 [*reversed* on other grounds in 13 N. Y. App. Div. 61, 43 N. Y. Suppl. 96].
50. State *v.* Bacon, 40 Vt. 456.
51. Com. *v.* Harding, Thach. Cr. Cas. (Mass.) 270.
52. Com. *v.* Derby, 162 Mass. 183, 38 N. E. 440.
53. See Criminal Law; Evidence.

Different and distinct acts.— Under a complaint based on an ordinance providing that no person shall permit any cattle under his care to go upon any sidewalk, evidence was admissible of different and distinct acts. Com. *v.* Curtis, 9 Allen (Mass.) 266.

necessary to prove that any person was endangered by such driving, where this is not required by the ordinance or by-law.[54]

(v) *Questions of Law and Fact.* Whether a nuisance at common law was committed by using a street as a stand for hourly coaches is a question of fact for the jury;[55] but whether an ordinance prohibiting driving on streets faster than a rapid walk is reasonable is a question of law.[56]

B. Sewers, Drains, and Watercourses — 1. In General. A municipality, in the exercise of its discretionary powers as to the necessity or propriety of establishing a drainage or sewerage system, and deciding upon the plan and character of the work, acts in a legislative or quasi-judicial capacity,[57] and in the actual work of construction or repairing the system in a ministerial capacity;[58] but the construction and maintenance of municipal drains and sewers is a corporate or municipal as distinguished from a governmental function,[59] and the system when constructed is the property of the municipality,[60] and the general public of the state at large have no interest therein.[61] Unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of drains or sewers,[62] and also as to the nature, extent, capacity, and cost of the system,[63] and a mere statutory authority to construct does not impose any duty to exercise such authority.[64] While the general rule is that municipal corporations may exercise their powers only within their corporate limits,[65] they are sometimes expressly authorized to go beyond such limits for drainage or sewerage purposes;[66] and if authorized to construct such a system they have implied authority when necessary to go beyond their limits and acquire property or make suitable contracts to obtain an outlet for the system so as to make it effective.[67] The municipality may of course use the streets for the construction of a sewerage system,[68] and may be authorized by the legislature to condemn other property for this purpose.[69] Authority to construct and maintain sewers gives no right to create a nuisance,[70] or to construct sewers or discharge sewage upon private lands or into private watercourses without permission or

54. Com. *v.* Worcester, 3 Pick. (Mass.) 462.

55. Com. *v.* Harding, Thach. Cr. Cas. (Mass.) 270.

56. Com. *v.* Worcester, 3 Pick. (Mass.) 462.

57. Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Mills *v.* Brooklyn, 32 N. Y. 489; Springfield *v.* Spence, 39 Ohio St. 665; Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455.

58. Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135.

59. Ostrander *v.* Lansing, 111 Mich. 693, 70 N. W. 332; Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78; Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571.

60. Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78; Fergus Falls *v.* Boen, 78 Minn. 186, 80 N. W. 961; Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571.

61. Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78; Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571.

62. Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322; Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342; St. Albans *v.* Noble, 56 Vt. 525; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

63. Mills *v.* Brooklyn, 32 N. Y. 489; Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455; Horton *v.* Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1.

64. Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342; St. Albans *v.* Noble, 56 Vt. 525.

65. Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601; South Orange *v.* Whittingham, 58 N. J. L. 655, 35 Atl. 407.

66. Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

67. Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Shreve *v.* Cicero, 129 Ill. 226, 21 N. E. 815; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601. See *supra*, III, B, 4; VIII, A, 2.

68. Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73.

Highways outside the corporate limits of a municipality may be used for drainage purposes where the municipality is authorized to go beyond its limits for such purposes. Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

69. Hildreth *v.* Lowell, 11 Gray (Mass.) 345. See, generally, Eminent Domain, 15 Cyc. 568, 569.

70. Waycross *v.* Houk, 113 Ga. 963, 39 S. E. 577; Atlanta *v.* Warnock, 91 Ga. 210, 18 S. E. 135, 44 Am. St. Rep. 17, 23 L. R. A. 301; Sammons *v.* Gloversville, 175 N. Y. 346, 67 N. E. 622.

acquiring the right to do so by lawful means and making due compensation to the landowner for the injuries sustained,[71] and a municipal corporation having constructed a sewer must see that it is kept in a proper state of repair.[72] Soil taken from one part of a sewerage system may be removed to another,[73] and the surface of lands acquired for sewerage purposes may be also used for school purposes.[74] A sewer is an interest in land, subject to registration laws;[75] and when constructed or adopted by the municipality is a public sewer, although the proceedings were irregular;[76] but occupation by permission does not give title by prescription,[77] or a license for branch connections.[78]

2. PRIVATE SEWERS AND DRAINS. The municipality has control of the space below the surface of the street, whenever and so far as public user requires,[79] and may regulate or prevent its use for private drains or sewers,[80] or it may permit an individual to construct under proper circumstances and restrictions a private drain or sewer in its streets,[81] without the consent of the abutting owner,[82] to the use of which when constructed he will have the exclusive right.[83] A license for this purpose is usually revocable,[84] but the right to construct a private sewer may be so granted as to give the owner a vested right therein which the city cannot revoke.[85] A drain neither constructed nor controlled by the municipality is not a public sewer,[86] but one constructed by private persons may pass to the public by dedication and acceptance.[87] Private sewers cannot be taken or destroyed by

71. Waycross *v.* Houk, 113 Ga. 963, 39 S. E. 577; Nevins *v.* Fitchburg, 174 Mass. 545, 55 N. E. 321, 47 L. R. A. 312; Chillicothe *v.* Bryan, 103 Mo. App. 409, 77 S. W. 465; Sammons *v.* Gloversville, 175 N. Y. 346, 67 N. E. 622. See *infra*, XIV, C.

Remedy of landowner.— Whatever remedies the landowner may have against a municipality for flooding his land without acquiring any right or permission to do so, he cannot himself abate the injury by obstructing the flow of drainage so as to create a nuisance in the street, and if he does so he will be liable under an ordinance prohibiting any person from obstructing the flow of water through or from the streets. State *v.* Wilson, 107 N. C. 865, 12 S. E. 320.

72. Kankakee *v.* Illinois Eastern Hospital, 66 Ill. App. 112; Taylor *v.* Austin, 32 Minn. 247, 20 N. W. 157; Burnett *v.* New York, 36 N. Y. App. Div. 458, 55 N. Y. Suppl. 893; Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883. See also *infra*, XIV, C.

But commissioners for construction only cannot bind the municipality by a contract for water for flushing sewers. Pine Bluff Water Co. *v.* Sewer Dist., 56 Ark. 205, 19 S. W. 576.

73. Titus *v.* Boston, 149 Mass. 164, 21 N. E. 310.

74. Winkler *v.* Summers, 5 N. Y. Suppl. 723, 22 Abb. N. Cas. 80.

75. Toronto *v.* Jarvis, 25 Can. Sup. Ct. 237.

76. Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

77. Chillicothe *v.* Bryan, 103 Mo. App. 409, 77 S. W. 465.

78. State *v.* Ramsey County Dist. Ct., 90 Minn. 540, 97 N. W. 425.

79. Kittanning Borough *v.* Kittanning Consol. Natural Gas Co., 26 Pa. Super. Ct. 355.

80. Belding *v.* Northampton Sewer Com'rs, 177 Mass. 39, 58 N. E. 156.

81. Boyden *v.* Walkley, 113 Mich. 609, 71 N. W. 1099; Wood *v.* McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L. R. A. 715. But see Hutchinson *v.* Trenton Bd. of Health, 39 N. J. Eq. 569.

82. Wood *v.* McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L. R. A. 715.

83. Boyden *v.* Walkley, 113 Mich. 609, 71 N. W. 1099.

84. Ainley *v.* Hackensack Imp. Commission, 64 N. J. L. 504, 45 Atl. 807; Camp *v.* Barre, 66 Vt. 563, 29 Atl. 1022.

85. Stevens *v.* Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 77.

86. Kansas City *v.* Ratekin, 30 Mo. App. 416; Com. *v.* Yost, 11 Pa. Super. Ct. 323.

Cost of construction.— Where a municipality is authorized but not compelled to construct sewers, if a private person, without taking any steps to have the municipality do so, constructs a sewer, which is never accepted by the municipality, he alone is liable for the cost of construction. St. Albans *v.* Noble, 56 Vt. 525.

87. Springmyer *v.* State, 1 Ohio Cir. Ct. 501, 1 Ohio Cir. Dec. 279 [*affirmed* in 23 Cinc. L. Bul. 281]. See, generally, DEDICATION.

Proof of dedication must be such as to leave no reasonable doubt of the owner's intention and consent to a divestiture of his rights in favor of the public. Kansas City *v.* Ratekin, 30 Mo. App. 416.

Drains originally constructed under township authority for the drainage of surface water merely may, after the territory has been added to a city, be adopted by the city as common sewers, after which householders using them without the consent or approval of the city are not responsible for nuisance at the outlet. Lewis *v.* Alexander, 24 Can. Sup. Ct. 551 [*affirming* 21 Ont. App. 613].

a municipality in its construction of public sewers without making compensation to the owner for their value, as in the case of other private property taken for public use.[88]

3. Power to Control and Regulate. The right of a municipality to regulate and control the use of its drains and sewers is a necessary incident of their ownership,[89] and such right may be protected and enforced by injunction,[90] or the imposition of proper penalties.[91] The municipality may also, in so far as the public necessities require, regulate the use of private drains and sewers;[92] but it cannot under its police power invade or impair private rights, unless the public welfare and safety demands it;[93] and where regulation is necessary, as to prevent a nuisance, the power should be reasonably exercised and private rights not be impaired further than the circumstances require.[94]

4. Connections. Property-owners have no right to make connections with a municipal sewer without the consent of the municipality;[95] but the municipality may in the interest of the public health and welfare require them to do so,[96] at their own expense,[97] although the sewer runs through private property.[98] The municipality may also impose any reasonable conditions and regulations in regard to making such connections,[99] and fix and determine the fees and charges therefor,[1] and it is not prevented from so doing by the fact that it has for a number of years permitted connections to be made without charge;[2] but the regulations must be reasonable,[3] and the charges uniform and without discrimination against particular property-owners.[4] The municipality may require as conditions for permitting the connection a written application with description of the property,[5] the prepayment

88. Wright *v.* Mt. Vernon, 44 N. Y. App. Div. 574, 60 N. Y. Suppl. 1017 [*affirmed* in 167 N. Y. 541, 60 N. E. 1123].

89. Melrose *v.* Cutter, 159 Mass. 461, 34 N. E. 695; Fergus Falls *v.* Boen, 78 Minn. 186, 80 N. W. 961; Fisher *v.* Harrisburg, 2 Grant (Pa.) 291.

Where a portion of territory is transferred from one municipality to another the right to regulate the use of sewers and hydrants within such territory passes to the new government. Bloomfield Tp. *v.* Glen Ridge, 54 N. J. Eq. 276, 33 Atl. 925 [*affirmed* in 55 N. J. Eq. 505, 37 Atl. 63].

90. Melrose *v.* Cutler, 159 Mass. 461, 34 N. E. 695, holding that where municipal authorities have a right to construct either an open or closed drain and construct the former, they may enjoin adjacent landowners from building over the drain.

91. Fisher *v.* Harrisburg, 2 Grant (Pa.) 291.

92. Rodwell *v.* Newark, 34 N. J. L. 264.

93. Platte, etc., Canal, etc., Co. *v.* Lee, 2 Colo. App. 184, 29 Pac. 1036.

94. Rodwell *v.* Newark, 34 N. J. L. 264.

95. Livingstone *v.* Taunton, 155 Mass. 363, 29 N. E. 635; Ranlett *v.* Lowell, 126 Mass. 431.

Where it is discretionary with the board of public works of a city as to permitting sewers to be tapped for private drainage purposes, and they are merely authorized to permit the same to be done, they cannot be compelled to do so by mandamus or otherwise. State *v.* Board of Public Works, 4 Cinc. L. Bul. 293, 6 Ohio Dec. (Reprint) 769, 8 Am. L. Rec. 24.

The municipality may sever a connection illegally made. Assay *v.* Baldwin, 7 Wkly. Notes Cas. (Pa.) 160.

96. Com. *v.* Abbott, 160 Mass. 282, 35 N. E. 782; Hill *v.* St. Louis, 159 Mo. 159, 60 S. W. 116; Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922.

The Arkansas statute, Mansfield Dig. § 873, providing that the board of health may require owners of property near or adjacent to sewers constructed under the statute to make connections therewith, is not limited to property situated within the sewer district, but persons who are required to connect with such sewers cannot be compelled to prepay any part of the cost of their construction. Martin *v.* Hilb, 53 Ark. 300, 14 S. W. 94.

97. Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922.

98. Com. *v.* Abbott, 160 Mass. 282, 35 N. E. 782.

99. Ranlett *v.* Lowell, 126 Mass. 431; Hill *v.* St. Louis, 159 Mo. 159, 60 S. W. 116; Hermann *v.* State, 54 Ohio St. 506, 43 N. E. 990, 32 L. R. A. 734.

1. Hill *v.* St. Louis, 159 Mo. 159, 60 S. W. 116; Hermann *v.* State, 54 Ohio St. 506, 43 N. E. 990, 32 L. R. A. 734; Fisher *v.* Harrisburg, 2 Grant (Pa.) 291.

2. Fisher *v.* Harrisburg, 2 Grant (Pa.) 291.

3. Springmyer *v.* State, 1 Ohio Cir. Ct. 501, 1 Ohio Cir. Dec. 279 [*affirmed* in 23 Cinc. L. Bul. 281].

4. Mobile *v.* Bienville Water Supply Co., 130 Ala. 379, 30 So. 445; State *v.* Graydon, 6 Ohio Cir. Ct. 634, 3 Ohio Cir. Dec. 621; Springmyer *v.* State, 1 Ohio Cir. Ct. 501, 1 Ohio Cir. Dec. 279 [*affirmed* in 23 Cinc. L. Bul. 281].

5. Evans *v.* Portland, 97 Me. 509, 54 Atl. 1107.

of a local assessment, if valid,[6] and the obtaining of a written permit.[7] It may also require the connection to be made by a licensed tapper,[8] and that the materials used shall be suitable for the purpose,[9] and the work done under the supervision or subject to the inspection and approval of a municipal officer,[10] or it may itself do the actual work of connection at the cost of the property-owner;[11] but it cannot require that the property-owner shall purchase the necessary materials from the municipality,[12] or permit it to do at his expense the work upon his own premises incidental to the connection which he might do himself or procure others to do.[13] A strict compliance with the prescribed conditions may be waived by the municipality,[14] or irregularities in the proceedings of the municipal authorities may be waived by a property-owner,[15] and a connection made without permit makes one liable for the prescribed fees and charges.[16] A permit for a sewer connection runs with the land if issued to the owner,[17] but is good only for the sewer and premises described.[18] A property-owner who has paid for his permit and established his connection according to the requirements may sue to enjoin the municipality from cutting off the connection;[19] but property-owners of a particular sewer district who have been assessed for the construction of sewers have no vested property rights in them, and cannot sue to enjoin persons whose property is outside of the district from making connections under license from the municipality, unless they can show that their private property will be materially injured thereby.[20] Under a statute requiring that district sewers shall connect with public sewers or natural course of drainage, the connection need not be direct but may be by means of another intermediate district sewer;[21] but "the natural course of drainage" does not mean any natural course of drainage but the natural receptacle of the general sewerage system or some part thereof.[22]

6. Ranlett *v.* Lowell, 126 Mass. 431; Hill *v.* St. Louis, 159 Mo. 159, 60 S. W. 116.

But if the local assessment is void the municipality cannot compel its payment as a condition precedent to making a connection with a sewer. Meyler *v.* Meadville, 23 Pa. Co. Ct. 119.

A statute giving a lien upon the premises for a sewer assessment does not apply to a fee prescribed for permitting a connection therewith. Bumstead *v.* Cook, 169 Mass. 410, 48 N. E. 767, 61 Am. St. Rep. 293.

7. Ranlett *v.* Lowell, 126 Mass. 431.

8. Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

House connections.— An ordinance providing that the line of sewerage may be laid to within three feet of the foundation of the building by a licensed sewer tapper, but that all connections with any part of the house drainage must be made by a licensed plumber, is invalid where it is expressly provided by statute that licensed sewer tappers may make such connections. State *v.* Tooker, 6 Ohio S. & C. Pl. Dec. 464, 5 Ohio N. P. 122.

Bond of sewer tapper.— Where persons engaged in the work of making sewer connections are required to give a bond conditioned to comply with all regulations of the sewer commissioner and ordinance requirements, the connection of premises other than those for which a permit was granted is a breach of the conditions of the bond. St. Louis *v.* Thierry, 100 Mo. 176, 13 S. W. 344.

9. Ranlett *v.* Lowell, 126 Mass. 431; Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

10. Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

11. Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922, holding further that the municipality, in order to protect the streets and pavements and prevent their obstruction, may tap the sewer and put in the necessary connections from the sewer to the curb line of the abutting property at the time of the construction of the sewer, and charge the cost thereof to the property-owner.

12. Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

13. Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

14. Sheridan *v.* Salem, 148 Mass. 196, 19 N. E. 172, holding that the requirement as to obtaining a permit in writing may be waived and oral permission for a connection given.

15. Fergus Falls *v.* Boen, 78 Minn. 186, 80 N. W. 961.

16. Fergus Falls *v.* Edison, 94 Minn. 121, 102 N. W. 218, 70 L. R. A. 238; Fergus Falls *v.* Boen, 78 Minn. 186, 80 N. W. 961.

17. Evans *v.* Portland, 97 Me. 509, 54 Atl. 1107.

18. Evans *v.* Portland, 97 Me. 509, 54 Atl. 1107.

19. Allen *v.* Swartmore Borough, 25 Pa. Super. Ct. 410.

20. Springer *v.* Walters, 139 Ill. 419, 28 N. E. 761.

21. Eyerman *v.* Blaksley, 78 Mo. 145; Heman *v.* Payne, 27 Mo. App. 481.

22. Bayha *v.* Taylor, 36 Mo. App. 427.

An abandoned creek bed dammed up by the construction of roads and streets is not a

5. Manner of Use. Unless restrained by statute a municipal corporation may permit any appropriate use to be made of its sewers,[23] or drains and gutters.[24] A license to a landowner to connect with a sewer authorizes him to use it only for such purposes as are legitimate and proper,[25] and an open drain or gutter designed for carrying off surface waters must not be used for purposes which will create a nuisance.[26]

6. Natural Watercourses. Natural watercourses running through a municipal corporation, if not navigable waters, belong to the riparian owners,[27] who may use them for any legitimate purpose which will not affect the rights of other riparian owners or create a nuisance.[28] Where a natural watercourse is not a sewer the city has no control over it except the power to keep it cleaned out as a health measure,[29] and prevent its being obstructed so as to overflow or injure the public streets,[30] unless the power of control is conferred by statute.[31] It has no right to divert water from such a stream to the detriment of lower proprietors,[32] nor to so exercise a power of control conferred by its charter as to deprive persons who have acquired a vested water right in the stream of their property without due process of law,[33] nor to authorize a person to construct a private sewer discharging into an open watercourse which is not a public sewer so as to create a nuisance,[34] nor can it compel one landowner to remove an obstruction from the stream merely on the ground of protecting the property of another landowner;[35] but it may prevent an obstruction which will cause a stream to flood or injure the public streets,[36] or require

natural course of drainage. Kansas City *v.* Swope, 79 Mo. 446.

23. Springer *v.* Walters, 37 Ill. App. 326 [*affirmed* in 139 Ill. 419, 28 N. E. 761].

A drain or sewer constructed to protect streets and property from damage by overflow from a stream is not necessarily limited in its use to the conducting of water from the property which it is constructed to protect, but the city may permit the owners of other property through which it passes to connect their private drains therewith on paying a reasonable compensation, and this source of revenue should be considered in determining the apportionment of the cost of construction between the municipality and the property-owners who are assessed. Patton *v.* Springfield, 99 Mass. 627.

24. Municipality No. 1 *v.* Gas-Light Co., 5 La. Ann. 439.

25. New York *v.* Baumberger, 30 N. Y. Super. Ct. 219, holding that the use of a sewer for carrying away the refuse mash from a brewery is not a legitimate or proper use.

26. Municipality No. 1 *v.* Gas-Light Co., 5 La. Ann. 439, holding that an open drain or gutter should not be used for carrying off noxious and poisonous by-products from gas works, where such use will create a nuisance.

27. Schenectady *v.* Furman, 61 Hun (N. Y.) 171, 15 N. Y. Suppl. 724.

28. A. L. Lakey Co. *v.* Kalamazoo, 138 Mich. 644, 101 N. W. 841, 110 Am. St. Rep. 338, 67 L. R. A. 931; Schenectady *v.* Furman, 61 Hun (N. Y.) 171, 15 N. Y. Suppl. 724.

But riparian owners have no right to obstruct such streams so as to overflow or damage other property or create a nuisance. Com. *v.* Stevens, 178 Pa. St. 543, 36 Atl. 166; Flynn *v.* Shenandoah, 19 Pa. Co. Ct. 622.

29. A. L. Lakey Co. *v.* Kalamazoo, 138 Mich. 644, 101 N. W. 841, 110 Am. St. Rep. 338, 67 L. R. A. 931.

30. Scranton *v.* Scranton Steel Co., 154 Pa. St. 171, 26 Atl. 1.

31. Rochester *v.* Osborn, 5 Lans. (N. Y.) 37, holding that where the common council of a city is authorized by statute to prevent "the construction of any encroachment upon, or obstructions in the bed" of a certain stream within the city limits, it may prohibit absolutely the erection of any encroachment or obstruction whatever, regardless of whether it might or might not retard the flow of water through the arches of a bridge below.

32. Sparks Mfg. Co. *v.* Newton, 60 N. J. Eq. 399, 45 Atl. 596.

Diversion of sewerage.— The owner of a water privilege for manufacturing purposes on a stream in a city has no usufructuary right in the sewerage of the city which has been discharged into a stream above his property and cannot prevent the city from diverting it elsewhere. Fisk *v.* Hartford, 69 Conn. 375, 37 Atl. 983, 38 L. R. A. 474.

33. Fisher *v.* Bountiful City, 21 Utah 29, 59 Pac. 520.

34. Hutchinson *v.* Trenton Bd. of Health, 39 N. J. Eq. 569.

35. Scranton *v.* Scranton Steel Co., 154 Pa. St. 171, 26 Atl. 1.

Obstructions in lake.— A city has no proprietary or corporate interest in a lake or shore of a lake outside of the limits of a street, and cannot enjoin a person from putting stones, earth, or other materials in its waters beyond such limits. Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635.

36. Scranton *v.* Scranton Steel Co., 154 Pa. St. 171, 26 Atl. 1.

the removal of an obstruction or deposit injurious to health.[37] Where a municipality which has adopted a natural watercourse for drainage purposes changes its course and permits a landowner for a consideration to fill up the abandoned channel, it cannot subsequently reopen it without instituting proceedings *de novo* for the condemnation of the property.[38] The legislature may authorize a municipality to use tidal streams below high water level as an outlet for sewers.[39]

C. Public Buildings, Property, Water Fronts, Markets, and Parks — 1. Public Buildings and Property — a. In General.[40] Municipal corporations may ordinarily, under their charter provisions, regulate and control the use of their public buildings.[41] Property held under grant for a specific municipal use may not be perverted to any other use;[42] but a municipal building such as a town house may be used for any municipal purposes for which it is suited and for which the municipality might provide buildings,[43] and although a building was erected or acquired primarily for a special purpose it may be used incidentally for other municipal purposes not exclusive of the primary use.[44] A municipality may also either gratuitously or for compensation [45] permit buildings erected for a municipal purpose to be used incidentally for private purposes, which will not interfere with public use,[46] such as the use of a city hall for lectures, entertainments, or theatrical performances;[47] and where in constructing such a building provision is made for future necessities, the municipality may rent temporarily such portions of the building as are not needed for the time being.[48] Personal property owned absolutely by a municipality may be used by the municipal authorities in their discretion in any manner which is not fraudulent or unlawful.[49] Unless expressly empowered towns or cities have no control over or right in

37. Schenectady *v.* Furman, 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624 [*affirming* 78 Hun 87, 29 N. Y. Suppl. 269], holding, however, that a municipality in requiring the removal of obstructions or deposits in a stream, which are detrimental to health, cannot require the owner to do more than clean out the stream to the natural and normal banks and bed thereof.

38. Strohl *v.* Ephrata, 178 Pa. St. 50, 35 Atl. 713.

39. Marcus Sayre Co. *v.* Newark, 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L. R. A. 722 [*reversing* 58 N. J. Eq. 136, 42 Atl. 1068].

40. Condemnation of land for sites for public buildings see Eminent Domain, 15 Cyc. 602.

41. Jones *v.* Sanford, 66 Me. 585; Stone *v.* Oconomowoc, 71 Wis. 155, 36 N. W. 829; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

Removal of buildings.— Under a city charter which imposes upon the common council the duty to manage, regulate, and control the property of the city, an order made by the council for the destruction and removal of a city building is not invalidated by the fact that a majority of the voters of the city have expressed themselves against the destruction under an order of a prior council submitting the question to them, since the executive power to determine such questions is in the council itself. Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666.

A city may establish a hack stand in front of a public building. Pennsylvania Co. *v.* Chicago, 181 Ill. 289, 54 N. E. 825.

Right of different departments to occupancy.— Although one department of a city government may be entitled to the use of a particular building it cannot forcibly eject another department which has been permitted to enter and occupy the same with the consent of the city authorities. New York Health Dept. *v.* Van Cott, 51 N. Y. Super. Ct. 413.

42. Rees *v.* West Pennsylvania Exposition Soc., 2 Pa. Co. Ct. 385.

43. French *v.* Quincy, 3 Allen (Mass.) 9.

44. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; French *v.* Quincy, 3 Allen (Mass.) 9; Spaulding *v.* Lowell, 23 Pick. (Mass.) 71.

45. Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

46. Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

47. Jones *v.* Sanford, 66 Me. 585; Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Stone *v.* Oconomowoc, 71 Wis. 155, 36 N. W. 829; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

A private citizen cannot maintain an action to enjoin city officers from allowing the use of the city auditorium for entertainments for private profit, even if such use be wrongful, there being no damage peculiar to him in kind but only in degree from that sustained by the general public, notwithstanding he is the owner of an opera-house the profits of which may be lessened thereby. Amusement Syndicate Co. *v.* Topeka, 68 Kan. 801, 74 Pac. 606.

48. French *v.* Quincy, 3 Allen (Mass.) 9. See also *supra*, VIII, B, 2, a.

49. Morton *v.* Philadelphia, 4 Pa. Dist. 523, holding that the city authorities of

county buildings,[50] but they are in some cases authorized by statute to use certain county buildings, such as jails or court-houses,[51] or to contract with the county for their use.[52]

b. Means of Public Transportation. The legislature may authorize a municipal corporation to acquire and operate a public ferry;[53] but without such authority it has no right to do so,[54] and when so authorized it must regulate and operate it in accordance with the statutory or charter provision.[55] Where a city has by legislative authority constructed a line of railroad which is an independent road and its exclusive property, it may exercise all the ordinary rights of proprietorship therein.[56]

2. Water Frontage, Landings, Docks, and Wharves — a. In General.[57] The state may delegate its public trusts with regard to the control of water frontage and submerged lands under navigable waters to a municipal corporation,[58] subject to the paramount authority of the federal government over interstate and foreign commerce,[59] and subject, as regards any merely administrative powers delegated by the state, to be revoked by it at any time;[60] but in the absence of statute a municipal corporation has no control over navigable waters.[61] When duly authorized by charter or statute a municipal corporation may by ordinance control and regulate the construction, maintenance, and use of wharves, docks, and piers within the corporate limits,[62] and it may monopolize its water front, and require all

Philadelphia have authority to send the liberty bell to be exhibited in another state.

50. *In re* Carleton County, 24 Ont. App. 409 [*affirmed* in 28 Can. Sup. Ct. 606].

51. Tippecanoe County *v.* Lafayette, 7 Ind. 614; York *v.* Toronto, 21 U. C. C. P. 95.

52. Wentworth *v.* Hamilton, 34 U. C. Q. B. 585.

53. Atty.-Gen. *v.* Boston, 123 Mass. 460.

54. Millsaps *v.* Monroe, 37 La. Ann. 641.

55. Atty.-Gen. *v.* Boston, 123 Mass. 460.

56. Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253, holding that when the object and purposes of its construction have been subserved and notoriously ended the municipality may take up and remove the road from its streets.

57. Condemnation of land for wharves and docks see Eminent Domain, 15 Cyc. 600.

Title to land under navigable waters see Navigable Waters.

58. Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018; Coffin *v.* Portland, 27 Fed. 412.

59. Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018.

60. New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015.

61. Mayville *v.* Wilcox, 61 Hun (N. Y.) 223, 16 N. Y. Suppl. 15.

62. *Indiana.*— Jeffersonville *v.* Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495.

Iowa.— Dubuque *v.* Stout, 32 Iowa 47, 7 Am. Rep. 171.

Louisiana.— Watson *v.* Turnbull, 34 La. Ann. 856; Tourne *v.* Lee, 8 Mart. N. S. 548, 20 Am. Dec. 260.

New York.— Ogdensburgh *v.* Lyon, 7 Lans. 215; Hart *v.* Albany, 9 Wend. 571, 24 Am. Dec. 165 [*affirming* 3 Paige 213].

Oregon.—Portland *v.* Montgomery, 38 Oreg. 215, 62 Pac. 755.

Pennsylvania.— Tatham *v.* Philadelphia Wardens, 5 Am. L. Reg. 378.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1529.

The city of New Orleans has under its charter and the general statutes the right to control, manage, and administer the use of the river banks within the corporate limits for the public use and convenience (Watson *v.* Turnbull, 34 La. Ann. 856); and the municipal authorities may demolish structures which tend to obstruct their use (Henderson *v.* New Orleans, 3 La. 563).

Under the Washington constitution providing for the appointment of commissioners to establish harbor lines in navigable waters in front of cities, the term "cities" is construed as also including towns. State *v.* Harbor Line Com'rs, 4 Wash. 6, 29 Pac. 938.

Location of deep water line.— Under the North Carolina statute of 1893, it is the duty of the authorities of incorporated towns situated on navigable waters, upon the application of riparian owners, to regulate the line on deep water to which wharves may be built. Wool *v.* Edenton, 117 N. C. 1, 23 S. E. 40.

A court of equity cannot interfere with discretionary powers vested in a municipal corporation by statute in regard to the control of public landings, and will not enjoin a municipality from removing a building constituting an obstruction upon a public landing, although it was erected in good faith by a person who believed himself to be the owner of the land on which it was erected. Sayers *v.* Lyons, 10 Iowa 249.

Particular ordinances construed.— A sale of a cargo of flour by the barrel and of hams by the single ham is a sale by retail, within the meaning of an ordinance to prevent a levee from being obstructed by boats tarrying to effect a sale of cargo by retail. Griffin *v.* New Orleans, 5 Mart. N. S. (La.) 279. By extending the privilege of breaking up flat-

vessels to land at its wharves and landings and pay wharfage.[63] But the statute is the measure of its authority,[64] and any provisions as to how the rights conferred shall be exercised must be complied with.[65] The municipality must also exercise its powers with due regard to the private rights of littoral or riparian proprietors,[66] and of the proprietors of private wharves[67] and ferries;[68] and power to establish dock and wharf lines and to restrain encroachments and prevent obstructions to navigation does not authorize a municipality to declare a structure a nuisance which in fact is not a nuisance,[69] or to prohibit the erection of warehouses or other appropriate structures upon private wharves above high water level.[70] A legislative grant of power to a municipality to make improvements in its water fronts or harbor is not obligatory but optional,[71] and the probability that the municipality may at some future time condemn certain property for public purposes is no ground for enjoining the owner from constructing a permanent improvement thereon.[72] The municipality may enact such ordinances as are necessary to carry into effect the powers granted, provided they do not conflict with any existing constitutional or statutory provisions;[73] and the fact that some provisions of an ordinance are invalid will not necessarily prevent the enforcement of other provisions which are not in conflict with paramount law.[74]

b. Powers of Particular Officers. The powers of particular officers, boards, or commissioners invested with the regulation and control of the public water front, docks, wharves, and piers are ordinarily regulated by statutory or charter provisions,[75] and such officers cannot exceed the powers which are conferred upon

boats in a certain part of a levee, it does not follow that the prohibition to do so in any other part of the city has been withdrawn. An extension of a privilege in one place does not yield it in another. Ursuline Nuns *v.* Fresch, 16 La. Ann. 359. An ordinance prohibiting a boat from lying within a certain basin for more than twenty-four hours during any one week is not violated unless the boat continues in the basin for twenty-four hours in succession, the ordinance not being intended to prohibit a *bona fide* withdrawal and return of the same boat at a different time within the same week. Larned *v.* Syracuse, 5 Wend. (N. Y.) 166.

63. Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 196; Dubuque *v.* Stout, 32 Iowa 80, 7 Am. Rep. 171; Dubuque *v.* Stout, 32 Iowa 47; Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169.

64. *Alabama.*— Mobile *v.* Moog, 53 Ala. 561.

California.— Oakland *v.* Carpentier, 13 Cal. 540.

Indiana.— Evansville *v.* Martin, 41 Ind. 145.

New York.— Brooklyn *v.* New York Ferry Co., 87 N. Y. 204.

Pennsylvania.— Southwark Dist. Com'rs *v.* Neil, 3 Yeates 54.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1529.

Use of pier by street cleaning department. —A statute authorizing the department having control of public piers to set apart suitable piers for the use of the street cleaning department contemplates merely the shipment of the refuse by water and the use of piers for this purpose, and does not authorize the selection of half a pier owned by the city, which will expose the owner of the other half to inevitable injury or authorize the erection of a permanent structure thereon which interferes with its use by the public or the use of the pier as a storehouse for refuse. Hill *v.* New York, 139 N. Y. 495, 34 N. E. 1090 [*reversing* 18 N. Y. Suppl. 399 (*affirming* 15 N. Y. Suppl. 393)].

65. Chester *v.* Hagan, 116 Fed. 223.

66. Martin *v.* Evansville, 32 Ind. 85; Duverge *v.* Salter, 6 La. Ann. 450; Grand Rapids *v.* Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984.

67. Brooklyn *v.* New York Ferry Co., 87 N. Y. 204; Vandewater *v.* New York, 2 Sandf. (N. Y.) 258; Southwark Dist. Com'rs *v.* Neil, 3 Yeates (Pa.) 54.

68. Vallejo Ferry Co. *v.* Vallejo, 146 Cal. 392, 80 Pac. 514.

69. Grand Rapids *v.* Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 505, 19 L. ed. 984, where the court said: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself."

70. Martin *v.* Evansville, 32 Ind. 85.

71. Goodrich *v.* Chicago, 20 Ill. 445.

72. Chicago *v.* Reed, 27 Ill. App. 482.

73. Municipality No. 1 *v.* Kirk, 5 La. Ann. 34; People *v.* Bryan, 46 Barb. (N. Y.) 355.

74. Duryee *v.* New York, 96 N. Y. 477.

75. Oakland *v.* Carpentier, 13 Cal. 540; New Orleans *v.* New Orleans, etc., R. Co., 112

them;[76] and where the statute is not imperative but permissive, their discretion must be exercised with due regard to private rights.[77] Any person seeking privileges from the municipality with respect to such property must see to it that he obtains them from the proper source.[78]

c. Power to Exact or Regulate Wharfage. The right to collect wharfage may exist either as a franchise granted by the state or as a property right incident to the ownership of riparian property and subject to reasonable legislative regulation.[79] Municipalities may by ordinance under express statutory or charter authority establish wharves and docks, regulate landing places, and fix the rate of wharfage, dockage, and landing;[80] but unless expressly authorized by statute a municipal corporation has no right to exact and collect wharfage for the use of a public wharf,[81] and where such authority is granted and the manner of its exercise prescribed, the provisions of the statute must be followed.[82] Although a municipality is authorized to collect wharfage it will be presumed that a public wharf is to be used free of charge in the absence of any ordinance to the con-

La. 1011, 36 So. 837; New York Fire Dept. *v.* Atlas Steamship Co., 106 N. Y. 566, 13 N. E. 329; Coleman *v.* New York, 70 N. Y. App. Div. 218, 75 N. Y. Suppl. 342 [*reversing* 35 Misc. 664, 72 N. Y. Suppl. 359]; Hoeft *v.* Seaman, 38 N. Y. Super. Ct. 62.

The New York Police Law of 1853, declaring police captains to be dock masters within their respective limitations, was abrogated by the Metropolitan Police Act of 1857. New York *v.* Tucker, 1 Daly 107.

The duty of the port wardens of Philadelphia, under the act of 1851 to define the low water mark upon application of landowners on the Delaware river, was not affected by the Consolidation Act requiring the council to fix wharf lines. Tatham *v.* Philadelphia Wardens, 5 Am. L. Reg. (Pa.) 378.

Approval of plans and specifications.— The statutory right of a dock department to regulate and control dock property, wharves and piers, and structures thereon does not give it the exclusive power to determine and approve the plans and specifications for such structures to the exclusion of the rights of the building and fire departments. New York Fire Dept. *v.* Atlas Steamship Co., 106 N. Y. 566, 13 N. E. 329.

76. Oakland *v.* Carpentier, 13 Cal. 540; Vilias *v.* Featherson, 94 N. Y. App. Div. 259, 87 N. Y. Suppl. 1094.

Damages for unauthorized use.— Where a city pier is unlawfully occupied by defendant for dumping purposes under a permit by the dock department, subsequently revoked as being unauthorized, and the claim for damages by the city is based solely on such use, and defendants have incurred a large expense in adapting the pier to such use, the measure of damages is the annual rental of the pier for dumping purposes, deducting therefrom the expense of such construction. New York *v.* Brown, 179 N. Y. 303, 72 N. E. 114.

77. Cornell *v.* New York, 20 N. Y. Suppl. 314.

78. Duryea *v.* New York, 2 Hun (N. Y.) 293 [*reversed* on other grounds in 62 N. Y. 592].

79. Demopolis *v.* Webb, 87 Ala. 659, 6 So. 408.

80. *Indiana.*— Coal-Float *v.* Jeffersonville, 112 Ind. 15, 13 N. E. 115.

Iowa.— Muscatine *v.* Keokuk Northern Line Packet Co., 45 Iowa 185; Muscatine *v.* Hershey, 18 Iowa 39.

Louisiana.— Ellerman *v.* McMains, 30 La. Ann. 190, 31 Am. Rep. 218; First Municipality *v.* Pease, 2 La. Ann. 538.

New York.— Marshall *v.* Guion, 11 N. Y. 461.

United States.— Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. ed. 688; Northwestern Union Packet Co. *v.* Clarksville, 18 Fed. Cas. No. 10,342, 4 Dill. 18 note; Northwestern Union Packet Co. *v.* Louisiana, 18 Fed. Cas. No. 10,344, 4 Dill. 17 note.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1531.

Under the charter of Baltimore, Maryland, the municipal authorities may construct wharves adjacent to public streets and charge wharfage for their use, and the right is not affected by whether the city owns the fee in the street or it has been condemned or dedicated for the purposes of a public highway. McMurray *v.* Baltimore, 54 Md. 103.

Suits for the collection of wharfage must be brought in the corporate name. Albany *v.* Trowbridge, 5 Hill (N. Y.) 71 [*affirmed* in 7 Hill 429].

81. St. Martinsville *v.* The Mary Lewis, 32 La. Ann. 1293; The Wharf Case, 3 Bland (Md.) 361; Elizabeth *v.* The Geneva, 3 Lanc. L. Rev. (Pa.) 134; Chester *v.* Hagan, 116 Fed. 223; The Geneva, 16 Fed. 874. But see Murphy *v.* Montgomery, 11 Ala. 586, in which case it is held that a city holding the title to a wharf may without express authority in its charter but as a property right collect wharfage.

The legislature may authorize a municipality to demand wharfage from those engaged in commerce for use of a public wharf, but the privilege being in derogation of common right the municipality must show a plain legislative grant of the franchise. The Geneva, 16 Fed. 874.

82. Chester *v.* Hagan, 116 Fed. 223.

trary,[83] and ordinances regulating wharfage are strictly construed.[84] A municipality cannot, under the guise of its authority to collect wharfage, levy any tax or duty of tonnage,[85] or charge for entering or leaving the port or remaining therein without regard to the place of mooring or landing,[86] or collect wharfage where no wharfage facilities are in fact furnished or where, if provided, they are not used;[87] but it may, where it owns and maintains the wharves, charge such reasonable fees as will fairly remunerate it for the use of its property,[88] and the fact that the charges for what are properly wharfage facilities actually furnished are fixed upon a tonnage basis will not constitute them a tonnage tax within the prohibition of the federal constitution,[89] and the persons paying such reasonable charges have no legal concern as to how they are expended by the municipality.[90] Wharf owners have the exclusive power to impose and collect wharfage at private wharves,[91] and they do not forfeit their right to wharfage by dedicating a part of the wharf space to street purposes.[92]

d. Leases and Grants of Franchises and Privileges. The powers of a municipality with regard to the making of leases or grants of franchises and privileges depends upon whether it is invested with the whole power of disposing of water fronts, docks, and wharves or merely a limited right of regulation and control.[93] The state may delegate its powers with regard to such property to a municipal corporation,[94] and municipalities are frequently authorized by charter or statutory provisions to make leases or grants of certain franchises or privileges pertaining

83. Muscatine *v.* Keokuk Northern Line Packet Co., 45 Iowa 185.

84. Cincinnati *v.* Walls, 1 Ohio St. 222, holding that an ordinance requiring every "steamboat, barge, keelboat, and flatboat" to pay wharfage does not authorize the collection of wharfage from a ferry-boat.

85. Cannon *v.* New Orleans, 20 Wall. (U. S.) 577, 22 L. ed. 417.

86. Cannon *v.* New Orleans, 20 Wall. (U. S.) 577, 22 L. ed. 417; Northwest Union Packet Co. *v.* St. Louis, 18 Fed. Cas. No. 10,345, 4 Dill. 10.

87. Muscatine *v.* Hershey, 18 Iowa 39; Shreveport *v.* Red River, etc., Line, 37 La. Ann. 562, 55 Am. Rep. 521; St. Martinsville *v.* The Mary Lewis, 32 La. Ann. 1293; New Orleans *v.* Wilmot, 31 La. Ann. 65; St. Louis *v.* Schulenburg, etc., Lumber Co., 13 Mo. App. 56; The Lizzie E., 30 Fed. 876.

The mere use of the natural and unimproved shore of a navigable river for landing cannot be made the basis of a charge for wharfage. Shreveport *v.* Red River, etc., Line, 37 La. Ann. 562, 55 Am. Rep. 521; The Lizzie E., 30 Fed. 876.

Where the municipality may control the places of landing within its limits and is authorized to collect wharfage, it may require that all vessels shall land at its wharves and may collect wharfage from vessels which fail to do so and land elsewhere (Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 196), unless the municipality has failed to provide wharves and landing places (Dubuque *v.* Stout, 32 Iowa 47).

88. Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 196; First Municipality *v.* Pease, 2 La. Ann. 538; Sterrett *v.* Houston, 14 Tex. 153; Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. ed. 688; Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. ed. 377; Leathers *v.* Aiken, 9 Fed. 679; Northwestern Union Packet Co. *v.* St. Louis, 18 Fed. Cas. No. 10,345, 4 Dill. 10.

Reasonable wharfage fees are not a tax but are to be regarded simply as compensation for the use of the wharves. Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 196; Sterrett *v.* Houston, 14 Tex. 153.

Rates of wharfage.— Where a municipality is authorized to impose a wharfage charge in order to keep the wharves in a proper condition, the court will not determine the reasonableness of the amount, as it is an administrative act, over which the city government exercises discretionary power. First Municipality *v.* Pease, 2 La. Ann. 538.

A failure to keep a wharf in repair, although it might render a municipality liable in damages occasioned by its neglect, will not affect its right to collect wharfage from one who voluntarily uses the wharf. Jeffersonville *v.* Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495.

89. Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 196; Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. ed. 688; Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. ed. 377; Leathers *v.* Aiken, 9 Fed. 679; Northwestern Union Packet Co. *v.* St. Louis, 18 Fed. Cas. No. 10,345, 4 Dill. 10.

90. Leathers *v.* Aiken, 9 Fed. 679.

91. Demopolis *v.* Webb, 87 Ala. 659, 6 So. 408; Grant *v.* Davenport, 18 Iowa 179; Dugan *v.* Baltimore, 5 Gill & J. (Md.) 357.

92. Verplanck *v.* New York, 2 Edw. (N. Y.) 220.

93. Reighard *v.* Flinn, 189 Pa. St. 355, 42 Atl. 23, 43 L. R. A. 502.

94. Reichard *v.* Flinn, 20 Pa. Co. Ct. 129.

to the public water front, wharves and piers;[95] but they cannot make any lease or grant which is expressly prohibited,[96] or which will constitute an obstruction to navigation in waters under the control of the congress of the United States,[97] and they must conform to any limitations or restrictions in the statute from which their powers are deprived.[98] A right to regulate and control does not authorize a conveyance of the right of use either by lease or deed,[99] or the grant of an exclusive right to construct wharves and regulate their use and the charges therefor;[1] and unless expressly authorized municipalities cannot abandon or delegate to individuals their right of regulation and control over public property of this character,[2] and so they cannot lease absolutely to individuals the exclusive right to use public wharves or piers;[3] nor can they so lease to individuals the exclusive right to use

95. *California.*— Pacific Coast Steamship Co. *v.* Kimball, 114 Cal. 414, 46 Pac. 275.

Louisiana.— Morgan City *v.* Dalton, 112 La. 9, 36 So. 208; Schwartz *v.* Thirty-two Flatboats, 14 La. Ann. 243.

Maryland.— Baltimore *v.* White, 2 Gill 444.

Michigan.— Kemp *v.* Stradley, 134 Mich. 676, 97 N. W. 41.

Minnesota.— St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184.

Missouri.— Cummings *v.* Huse, etc., Ice, etc., Co., 156 Mo. 28, 56 S. W. 282; Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801.

New York.— New York *v.* Sonneborn, 113 N. Y. 423, 21 N. E. 121; Langdon *v.* New York, 93 N. Y. 129 [*affirming* 28 Hun 158); Hecker *v.* New York Balance Dock Co., 24 Barb. 215; Hoeft *v.* Seaman, 38 N. Y. Super. Ct. 62.

Pennsylvania.— Richardson's Appeal, 14 Leg. Int. 197.

Wisconsin.— Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751.

United States.— Murray *v.* Allegheny, 136 Fed. 57, 69 C. C. A. 65; Barney *v.* Keokuk, 2 Fed. Cas. No. 1032, 4 Dill. 593 [*affirmed* in 94 U. S. 324, 24 L. ed. 224].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1532.

Under Maryland statutes of 1783 and 1796, the municipal authorities of the city of Baltimore might refuse their assent to the erection of a wharf or might grant it with such conditions, limitations, and restrictions as they should deem most beneficial to the navigation and use of the port of that city. Baltimore *v.* White, 2 Gill 444.

Where a city is expressly authorized to lease a water front granted to it by the state and on such terms as it may deem advantageous, it may lease a portion thereof to a steamboat company to construct a private wharf for its own use, and a provision in the lease limiting the charges which it may exact from others does not obligate it to permit others to use the wharf upon tendering the amount specified. Pacific Coast Steamship Co. *v.* Kimball, 114 Cal. 414, 46 Pac. 275.

96. Brown *v.* New York, 78 N. Y. App. Div. 361, 79 N. Y. Suppl. 943 [*affirmed* in 176 N. Y. 571, 68 N. E. 1115]; Reighard *v.* Flinn, 189 Pa. St. 355, 42 Atl. 23, 43 L. R. A. 502.

97. Texas, etc., R. Co. *v.* New Orleans, 40 Fed. 111.

98. Reighard *v.* Flinn, 189 Pa. St. 355, 42 Atl. 23, 43 L. R. A. 502.

Lease of wharf with ferry franchise.— The New York statute of 1882 authorizing the leasing of ferry franchises and wharves to be used in connection therewith contemplates that both shall be leased as an entire piece of property to a single bidder, and in conducting such sale the commissioners may fix the rental of the wharf at a certain amount and make the award to the person making the highest bid for the franchise in addition to the sum named. Starin *v.* New York, 112 N. Y. 206, 19 N. E. 670 [*reversing* 42 Hun 549].

Granting private owners interest in pier.— The authority of the city of New York to grant an interest to private owners in the building of a pier is confined to grants to owners of land opposite the place where the pier is to be sunk. Marshall *v.* Vultee, 1 E. D. Smith (N. Y.) 294.

99. Reighard *v.* Flinn, 189 Pa. St. 355, 42 Atl. 23, 43 L. R. A. 502.

1. Oakland *v.* Carpentier, 13 Cal. 540.

2. *California.*— Oakland *v.* Carpentier, 13 Cal. 540.

Louisiana.— Louisiana Constr., etc., Co. *v.* Illinois Cent. R. Co., 49 La. Ann. 527, 21 So. 891, 37 L. R. A. 661.

Missouri.— Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776.

Pennsylvania.— Reichard *v.* Flinn, 20 Pa. Co. Ct. 129.

Texas.— Corpus Christi *v.* Central Wharf, etc., Co., 8 Tex. Civ. App. 94, 27 S. W. 803.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1532.

3. Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Corpus Christi *v.* Central Wharf, etc., Co., 8 Tex. Civ. App. 94, 27 S. W. 803; Russel *v.* The Empire State, 21 Fed. Cas. No. 12,145, Newb. Adm. 541.

Although the city limits the rates of wharfage which may be charged it cannot lease its public wharves for a term of years to a private wharf company, since it should at all times be free to alter such regulations or make others as the necessity of the public may demand. Corpus Christi *v.* Central

public landings or water fronts,[4] or a portion thereof,[5] or lease or farm out its wharfage revenues,[6] or empower any one else to fix the rates of wharfage.[7] They may, however, in the interest of commerce and navigation, make temporary leases or grants of privileges,[8] such as the right to construct a private pier upon the public water front, which at the termination of the lease shall become the property of the municipality,[9] or permit an individual to construct such a pier upon condition that it shall be used in part by the public,[10] and a temporary lease of land dedicated for navigation purposes to be used for a different purpose will not work a forfeiture of the interest of the municipality.[11] A mere license to use a dock or wharf,[12] or to erect a shed or structure thereon not authorized by law, is revocable at the pleasure of the municipality;[13] but the rule is otherwise with regard to a valid lease,[14] or right to construct a shed or structure on a pier granted pursuant to legislative authority.[15]

e. **Purposes of Grant.** A municipality invested with the regulation and control of riparian property, docks, and wharves may, unless expressly restricted, permit the same to be used for any purposes consistent with the objects for which the property was dedicated or acquired,[16] and permit the erection of structures properly incidental to such uses,[17] such as a grain elevator,[18] platform scales,[19] or storage warehouse on a wharf for goods discharged or awaiting shipment,[20] which

Wharf, etc., Co., 8 Tex. Civ. App. 94, 27 S. W. 803.

In New York city the department of docks has authority by statute to lease piers, slips, or basins for private use, provided it does not interfere with the public or individual rights. Hoeft *v.* Seaman, 38 N. Y. Super. Ct. 62.

4. Louisiana Constr., etc., Co. *v.* Illinois Cent. R. Co., 49 La. Ann. 527, 21 So. 891, 37 L. R. A. 661; Reighard *v.* Flinn, 189 Pa. St. 355, 42 Atl. 23, 43 L. R. A. 502.

5. Reichard *v.* Flinn, 20 Pa. Co. Ct. 129.

6. Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776. But see Schwartz *v.* Thirty-two Flatboats, 14 La. Ann. 243, holding that the city of Jackson, Mississippi, has under its charter the right to lease to an individual the right to collect for his own use and benefit the revenues of its port for a term of years.

7. Oakland *v.* Carpentier, 13 Cal. 540; Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776.

8. Morgan City *v.* Dalton, 112 La. 9, 36 So. 208; Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751.

9. Morgan City *v.* Dalton, 112 La. 9, 36 So. 208.

10. Baltimore *v.* White, 2 Gill (Md.) 444; Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751.

11. Hardy *v.* Memphis, 10 Heisk. (Tenn.) 127.

12. Brown *v.* New York, 78 N. Y. App. Div. 361, 79 N. Y. Suppl. 943 [*affirmed* in 176 N. Y. 571, 68 N. E. 1115].

13. Kingsland *v.* New York, 110 N. Y. 569, 18 N. E. 435 [*affirming* 45 Hun 198].

14. New York Contracting, etc., Co. *v.* New York, 42 Misc. (N. Y.) 425, 87 N. Y. Suppl. 100, holding that a provision in the lease of a pier that it might be terminated by the city if necessary for the purpose of making alterations in the wharves or water front does not authorize the city to terminate the lease if the proposed alteration is one which it has no authority to make.

15. Matter of Pier 15 East River, 95 N. Y. App. Div. 501, 88 N. Y. Suppl. 906.

16. St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; Illinois, etc., R., etc., Co. *v.* St. Louis, 14 Fed. Cas. No. 7,007, 2 Dill. 70.

Filling in for railroad track.— The city of Dubuque under its statutory authority to establish and vacate wharves and public landings and change the channel of watercourses may authorize a non-navigable slough of the Mississippi river to which it holds title to be filled in and railroad tracks laid thereon. Ingraham *v.* Chicago, etc., R. Co., 34 Iowa 249.

Purposes and uses of wharf.— A wharf differs in many respects from a street. It is intended to afford convenience for the landing of vessels, loading and unloading of cargoes, and to supply a place where wares discharged from vessels or awaiting shipment may be deposited. Illinois, etc., R., etc., Co. *v.* St. Louis, 14 Fed. Cas. No. 7,007, 2 Dill. 70.

17. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; Illinois, etc., R., etc., Co. *v.* St. Louis, 14 Fed. Cas. No. 7,007, 2 Dill. 70.

18. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; Illinois, etc., R., etc., Co. *v.* St. Louis, 14 Fed. Cas. No. 7,007, 2 Dill. 70.

19. Kendig *v.* New Orleans, 26 La. Ann. 357, holding that where a city council grants a person the right to erect platform scales at a coal landing, injunction will lie to prevent the city from removing it, in the absence of any ordinance specially revoking the permission granted.

20. Belcher Sugar Refining Co. *v.* St. Louis

may be owned by private parties, provided the use is of a public character and the municipality retains its right of regulation and control;[21] but the municipality cannot authorize a use inconsistent with the nature and purposes of the property,[22] or expressly prohibited by statute,[23] or obstructions to the rights of the public,[24] or a purpresture or public nuisance,[25] or under a power to regulate and control surrender a portion of a wharf to private persons without reserving the right to resume possession and regulate the charges.[26] So also where the statutes require that public docks and piers shall remain unencumbered so as to preserve the character of public highways, the municipal authorities cannot authorize the erection of sheds or other structures thereon;[27] but they may authorize a floating bath at the side of a pier which will not interfere with the navigation.[28]

f. Ownership of Land.[29] An act extending the boundary of a municipal corporation over adjacent navigable waters does not grant the land covered by the waters to the municipality, but is merely for purposes of civil and criminal jurisdiction;[30] nor does a statute authorizing the municipality to construct piers and collect wharfage vest in it any title to the land under water between the piers.[31] In some cases, however, the title to adjacent submerged lands within certain limits is vested by statute in the municipality,[32] subject to the rights of the public for purposes of navigation,[33] or the municipality is given the exclusive right to construct and regulate wharves within the corporate limits below high water level.[34]

Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801.

21. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801.

22. St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121 [*reversing* 10 Mo. App. 401].

23. Brown *v.* New York, 78 N. Y. App. Div. 361, 79 N. Y. Suppl. 943 [*affirmed* in 176 N. Y. 571, 68 N. E. 1115]; People *v.* Mallory, 2 Thomps. & C. (N. Y.) 76, 46 How. Pr. 281.

24. Shepherd *v.* New Orleans Third Municipality, 6 Rob. (La.) 349, 41 Am. Dec. 269.

25. People *v.* Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351, 26 N. Y. 287 [*affirming* 38 Barb. 282, 24 How. Pr. 301]; Frankford *v.* Lennig, 1 Am. L. Reg. (Pa.) 357.

26. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121 [*reversing* 10 Mo. App. 401]; Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70.

27. New York *v.* Cunard Steamship Co., 61 Hun (N. Y.) 346, 15 N. Y. Suppl. 904; People *v.* Mallory, 2 Thomps. & C. (N. Y.) 76, 46 How. Pr. 281.

In New York city the statute of 1875 amended by the statute of 1883 authorizes the department of docks subject to certain restrictions to license the owner or lessee of a pier to erect sheds thereon for the protection of property received or discharged at such pier. People *v.* Baltimore, etc., R. Co., 117 N. Y. 150, 22 N. E. 1026 [*reversing* 50 Hun 192, 3 N. Y. Suppl. 29]; Matter of Pier 15 East River, 95 N. Y. App. Div. 501, 88 N. Y. Suppl. 906.

28. Hoeft *v.* Seaman, 46 How. Pr. (N. Y.) 24, holding that the commissioners of the department of docks of New York city have authority to grant a permit for a floating bath and to carry on the business of a bathing establishment on the side of a pier in the city, provided it does not interfere with the rights of the public in navigation.

29. Title to land under navigable waters see NAVIGABLE WATERS.

30. Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489; Palmer *v.* Hicks, 6 Johns. (N. Y.) 133.

31. Walsh *v.* New York Floating Dry Dock Co., 77 N. Y. 448 [*affirming* 8 Daly 387].

32. Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864 [*affirming* 85 N. Y. App. Div. 530, 83 N. Y. Suppl. 469]; Furman *v.* New York, 10 N. Y. 567 [*affirming* 5 Sandf. 16]; Norfolk City *v.* Cooke, 27 Gratt. (Va.) 430; Mobile *v.* Sullivan Timber Co., 129 Fed. 298, 63 C. C. A. 412 [*modifying* 124 Fed. 644].

The city of New York is the owner of tide-water lands within the municipal limits from high water mark to a distance of four hundred feet from low water mark (Furman *v.* New York, 10 N. Y. 567 [*affirming* 5 Sandf. 16]); and the municipality is not estopped to claim title to such land by having for a number of years designated it on its maps as the property of an individual and assessed it for taxation as his property (McFarlane *v.* Kerr, 10 Bosw. 249).

Where a city owns to low water mark it may use its property for extending a sewer to the low water mark. Boston *v.* Lecraw, 17 How. (U. S.) 426, 15 L. ed. 118.

33. Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864 [*affirming* 85 N. Y. App. Div. 530, 83 N. Y. Suppl. 469].

34. Ravenswood *v.* Flemings, 22 W. Va. 52, 46 Am. Rep. 485, holding that since as against the state a riparian owner has no rights below high water level, such a statute is not unconstitutional.

A municipality is also a riparian owner of waters within the limits of an abutting street where it owns the fee in the street and may use the same in its discretion so long as it does not obstruct navigation or injure the rights of others.[35]

g. Accretion and Batture. Alluvion or land formed by accretion, although within municipal limits, belongs to the riparian proprietors,[36] and if the municipality is a riparian proprietor, as where it owns the fee in a street bounded by a stream, accretions thereto belong to the municipality.[37] In Louisiana municipal corporations have control over the batture within their limits, subject to the servitude for public use,[38] and prior to the act of 1853 they had the exclusive right to determine when and to what extent it might be occupied by the riparian owners,[39] and, under that statute which permits such owners to recover so much as is not necessary for public use,[40] they must leave open without charge whatever is necessary for navigation and public uses, such as streets and highways,[41] and cannot recover from the city revenues received by it for privileges of occupation for a use of a public character.[42] Where the municipality is itself the riparian proprietor it may withdraw from public use what is not needed therefor and lease it for private purposes.[43]

3. Markets and Market Places — a. In General. The authority to establish and regulate markets falls within the police power of the states,[44] which may be delegated to municipal corporations,[45] and is a particularly appropriate subject for municipal regulation.[46] This power may be exercised either under statutory or charter provisions relating expressly to the establishment and regulation of markets,[47] or the vending of meat and other commodities usually sold at such places,[48] or under the general police powers ordinarily possessed by municipal corporations;[49] and they may adopt and enforce any reasonable and proper rules

35. Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295; Norfolk City *v.* Cooke, 27 Gratt. (Va.) 430.

If the fee to the street is not in the city but in the abutting property-owners the city is not a riparian owner, and it is held that the port wardens cannot authorize the city to build a wharf as an extension of a street for the purpose of protecting a sewer leading into the stream. *In re* Cramp, 13 Phila. (Pa.) 16.

36. Lovingston *v.* St. Clair County, 64 Ill. 56, 16 Am. Rep. 516; Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002; Prior *v.* Comstock, 17 R. I. 1, 19 Atl. 1079. See also, generally, Navigable Waters; Waters.

37. St. Louis *v.* Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202; St. Louis *v.* Lemp, 93 Mo. 477, 6 S. W. 344.

38. Shreveport *v.* St. Louis Southwestern R. Co., 115 La. 885, 40 So. 298; Remy *v.* Municipality No. 2, 12 La. Ann. 500; New Orleans *v.* Morris, 18 Fed. Cas. No. 10,183, 3 Woods 115.

39. Remy *v.* Municipality No. 2, 12 La. Ann. 500; New Orleans *v.* Morris, 18 Fed. Cas. No. 10,183, 3 Woods 115.

40. Donovan *v.* New Orleans, 35 La. Ann. 461.

41. Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21; Sarpy *v.* New Orleans, 13 La. Ann. 349.

42. Leonard *v.* Baton Rouge, 39 La. Ann. 275, 4 So. 241.

43. New Orleans *v.* Morris, 18 Fed. Cas. No. 10,183, 3 Woods 115.

44. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; Petz *v.* Detroit, 95 Mich. 169, 54 N. W. 644.

45. *Florida.*— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Kentucky.— Bowling Green *v.* Carson, 10 Bush 64.

Louisiana.— Lamarque *v.* New Orleans, McGloin 28.

Michigan.— Petz *v.* Detroit, 95 Mich. 169, 54 N. W. 644.

United States.— Natal *v.* Louisiana, 139 U. S. 621, 11 S. Ct. 636, 35 L. ed. 288 [*affirming* 39 La. Ann. 439, 1 So. 923].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1536.

But municipal authorities cannot delegate to others the powers delegated to them by the legislature. State *v.* Garibaldi, 44 La. Ann. 809, 11 So. 36.

46. Wartman *v.* Philadelphia, 33 Pa. St. 202.

47. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; Gall *v.* Cincinnati, 18 Ohio St. 563; Wartman *v.* Philadelphia, 33 Pa. St. 202; Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269.

48. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

49. First Municipality *v.* Cutting, 4 La. Ann. 335; Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706; Wartman *v.* Philadelphia, 33 Pa. St. 202.

The courts are the final judges as to what are the proper subjects of the exercise of the municipal police power. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

and regulations in regard to the market and the business transacted there,[50] such as regulating market hours, the place within market limits where certain articles shall be sold, and prohibiting sales upon the sidewalks about the markets.[51] They may also enact ordinances to prevent forestalling and regrating,[52] and are in some cases expressly authorized to do so.[53] The right to establish and regulate public markets cannot be used to create a monopoly of the right to sell,[54] or so as to deny the right of consumers and producers of market supplies to deal with each other directly,[55] and all regulations must be reasonable, uniform, and not in restraint of trade.[56] Any ordinance relating to the regulation of markets is invalid if in conflict with a valid statutory provision,[57] and a statute expressly limiting the powers of municipal authorities in regard to markets is not repealed by a general statute authorizing them to enact all ordinances necessary for the general welfare of the municipality.[58] The ordinary rules of construction apply to the construction of statutes,[59] ordinances,[60] and contracts relating to the establishment and regulation of markets.[61] A municipality which voluntarily accepts a partnership with an individual in the profits to be derived from a market house must accord to him the ordinary rights of a partner with regard to financial administration of property.[62] Where land is purchased under a statute authorizing its acquisition for the purpose of a public market, the municipality, although acquiring the fee to such land, cannot permit its use for other than market purposes;[63] but where a statute authorizes the construction of a market house and grants to the munici-

50. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; State *v.* Sarradat, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584; First Municipality *v.* Cutting, 4 La. Ann. 335; Com. *v.* Brooks, 109 Mass. 355; Com. *v.* Rice, 9 Metc. (Mass.) 253; *In re* Nightingale, 11 Pick. (Mass.) 168; Com. *v.* Nightingale, Thach. Cr. Cas. (Mass.) 251; Wartman *v.* Philadelphia, 33 Pa. St. 202.

Regulations held valid.—A municipality may, under its power to regulate markets, prohibit the sale of groceries in meat and vegetable markets (First Municipality *v.* Cutting, 4 La. Ann. 335); prohibit the slaughter of poultry in public markets (Loewenstein *v.* Myers, 20 N. Y. Suppl. 761); prohibit the standing of wagons containing perishable produce within the market limits for over twenty minutes between the hours of eleven A. M. and four P. M. unless permitted by the market superintendent (Com. *v.* Brooks, 109 Mass. 355); and may designate a portion of the market which shall be free to citizens coming to vend the produce of their own farms and exclude from such portion persons not answering this description (Com. *v.* Nightingale, Thach. Cr. Cas. (Mass.) 251).

51. State *v.* Fried, 46 La. Ann. 1418, 15 So. 88; State *v.* Sarradat, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584.

In the absence of any ordinance so providing it is not an offense for the lessee of a stall in a market house to sell meats outside of regular market hours, and an ordinance requiring stalls to be cleaned after market hours cannot be construed as making it an offense to sell after such hours. Atlanta *v.* White, 33 Ga. 229.

52. Com. *v.* Nightingale, Thach. Cr. Cas. (Mass.) 251.

53. Louisville *v.* Roupe, 6 B. Mon. (Ky.) 591. See also Mays *v.* Cincinnati, 1 Ohio St. 268; Wilson *v.* St. Catharines, 21 U. C. C. P. 462.

54. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

55. Hughes *v.* Detroit, 75 Mich. 574, 42 N. W. 984, 13 Am. St. Rep. 475, 4 L. R. A. 863.

56. Bloomingdale *v.* Wahl, 46 Ill. 489.

Use of telephone.— While the city council has broad discretion in controlling public markets, it has no right to prevent the lessee of a stall in such a market from employing telephonic services for his account, provided the rights of others are not affected and legitimate ordinances of the municipality are not violated. Swayze *v.* Monroe, 116 La. 643, 40 So. 926.

57. Haywood *v.* Savannah, 12 Ga. 104; Mays *v.* Cincinnati, 1 Ohio St. 268.

58. Haywood *v.* Savannah, 12 Ga. 404.

59. Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269.

60. Atlanta *v.* White, 33 Ga. 229.

61. Harney *v.* St. Louis, 90 Mo. 214, 2 S. W. 271, holding that where a public market was constructed by a city on private property, under a contract with the owner, providing for a division of the rents and profits after the city had been reimbursed thereby for the cost of construction, the city was entitled to reimbursement from the rents and profits of the market building alone exclusive of any amounts received for stands and wagons in the adjacent streets, before the owner of the land would be entitled to participate in such profits.

62. New Orleans *v.* Guillotte, 12 La. Ann. 818.

63. Bird *v.* Grout, 106 N. Y. App. Div. 159, 94 N. Y. Suppl. 127, holding that a lease of such land by the municipal authorities for

pality in fee certain lands on which it is constructed, but which are more than are necessary for such purpose, the remainder may, in the absence of any restriction in the grant, be used for other purposes;[64] and where a city purchases land in fee the fact that it was intended and subsequently used for market purposes will not constitute a dedication of the property for market purposes so as to prevent the municipality from removing the market to another locality and appropriating the old location to a different municipal use.[65]

b. Powers of Particular Officers or Boards. Where the statute authorizing the establishment and regulation of markets expressly provides how and by whom these powers shall be exercised, they cannot be exercised in any other manner or delegated to any other officers than those specified;[66] but a municipal corporation authorized to establish and regulate markets and market houses may permit an individual to construct a market house on private property and declare it a public market, and permit the owner to rent stalls therein and protect him against competition, the municipality retaining the right to regulate the manner of conducting the market and the rates charged.[67] The fact that a board of health is authorized to regulate markets in regard to their "cleanliness, ventilation and drainage," and is the supreme authority in regard to matters affecting the public health, does not prevent the department having the general control of markets from making regulations in furtherance of the same objects;[68] but a board of health invested only with powers necessary to the preservation of the public health and life cannot, irrespective of these considerations, order the removal of stands or stalls attached to the public market on the ground that they are obstructions upon the public street.[69]

c. Leases, Licenses, and Sales of Stalls or Privileges. Municipalities ordinarily have power to lease[70] or sell stalls in public markets,[71] or to prohibit the occupancy of a stall without procuring a lease;[72] and they may require the payment of a reasonable amount as a license-fee from those occupying stands or stalls in a public market,[73] even under the general power of regulation and control,[74] unless restricted by statute.[75] Charges for licenses or market privileges must, however, be reasonable,[76] and without discrimination,[77] and cannot be imposed as a means of raising revenue;[78] but the requirement of a reasonable license-fee

use as an abattoir or slaughter-house is not a market purpose but an unauthorized use which a taxpayer may prevent by injunction.

64. Dugan *v.* Baltimore, 5 Gill & J. (Md.) 357.

65. Gall *v.* Cincinnati, 18 Ohio St. 563.

66. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

67. Le Claire *v.* Davenport, 13 Iowa 210 [*overruling* Davenport *v.* Kelley, 7 Iowa 102].

68. Loewenstein *v.* Myers, 20 N. Y. Suppl. 761.

69. Hoffman *v.* Schultz, 31 How. Pr. (N. Y.) 385, holding further that the commissioners of a sinking fund who are intrusted with the collection and disposition of the revenues from markets may sue to enjoin the board of health from destroying without authority property from which such revenues are derived.

70. Dubuque *v.* Miller, 11 Iowa 583; Wartman *v.* Philadelphia, 33 Pa. St. 202.

71. Rose *v.* Baltimore, 51 Md. 256, 34 Am. Rep. 307.

72. State *v.* Leiber, 11 Iowa 407.

73. *Florida.*— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Louisiana.— Barthel *v.* New Orleans, 26 La. Ann. 340.

Missouri.— St. Louis *v.* Freivogel, 95 Mo. 533, 8 S. W. 715.

Ohio.— Cincinnati *v.* Buckingham, 10 Ohio 257.

Texas.— *Ex p.* Canto, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1538.

74. *Ex p.* Canto, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

75. Mays *v.* Cincinnati, 1 Ohio St. 268, where the statute prohibited the levying of any charge upon wagons or other vehicles bringing produce to market or for occupying a place within the same.

76. State *v.* Rowe, 72 Md. 548, 20 Atl. 179.

77. Vosse *v.* Memphis, 9 Lea (Tenn.) 294; Georgia Packing Co. *v.* Macon, 60 Fed. 774, 22 L. R. A. 775.

78. Mestayer *v.* Corrigé, 38 La. Ann. 707; State *v.* Blaser, 36 La. Ann. 363; State *v.* Rowe, 72 Md. 548, 20 Atl. 179; Mays *v.* Cincinnati, 1 Ohio St. 268.

An ordinance is invalid as attempting to raise revenue under the guise of an exercise of the police power which requires the payment of one hundred dollars per year for a

is not objectionable as a tax for revenue,[79] or as tending to create a monopoly.[80] The statutes and ordinances in force at the time of the lease or license become a a part of the contract and are binding upon the lessee or licensee,[81] and all occupants must be considered as holding subject to the market regulations of the municipality and not adversely to its authority.[82] The lessee of a market or its revenues also takes subject to the provisions of existing ordinances,[83] and the rights of the municipality to make necessary public improvements.[84] The licensed occupant of a stall or stand in a market has no such interest in the stall as the lessee of a store or dwelling;[85] and the purchaser of a stall under a statute authorizing a municipality to sell stalls in a market does not acquire an absolute property but only a qualified right to the occupancy of the stall for market purposes.[86] The lease of a market stall does not imply a contract on the part of the municipality to protect the lessee against competition by unlicensed vendors,[87] nor does a lease of the revenues of an established market prevent the municipality from establishing another market and leasing it to a different person,[88] or require it to protect the lessee against competition by unauthorized private markets, unless the contract so provides,[89] or give such lessee any right of action against a person maintaining a competing and unauthorized private market.[90] Payment of the required license-fee gives the payee a right of occupancy, although his license has not been issued,[91] and a person in possession of the stall under a verbal lease from the market master, although the latter had no authority to make it, is not a trespasser so as to authorize a forcible seizure and removal of his property,[92] nor can the lessee and collector of market revenues summarily eject the occupant of a stall admitted by his predecessor in office who has tendered the required dues and conformed to the market regulations;[93] but the municipality may provide by ordinance that a lease or license for occupying a market stall shall be revocable in the discretion of the authorities in charge of the market,[94] in which case a licensee who refuses to vacate after the expiration or revocation of his license is a trespasser and may be ejected, no greater force than necessary being used.[95] The occupant of a market stall who sells his rights to another is not bound in warranty to his vendee in case of an eviction or disturbance of the latter by the

license for carrying on business in a wholesale fish and crab market (State *v.* Rowe, 72 Md. 548, 20 Atl. 179); or requires the payment of twenty-five cents for each load of supplies conveyed to the public market to be sold by persons not occupying a stand or stall in the market (State *v.* Blaser, 36 La. Ann. 363).

79. Blanchard *v.* Ivers, 40 Fla. 117, 24 So. 66; Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

80. *Ex p.* Canto, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

81. Economides *v.* Hinrichs, 48 La. Ann. 370, 19 So. 124; Barthel *v.* New Orleans, 26 La. Ann. 340; Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706; Charleston *v.* Goldsmith, 2 Speers (S. C.) 428.

82. Economides *v.* Hinrichs, 48 La. Ann. 370, 19 So. 124; Hatch *v.* Pendergast, 15 Md. 251; Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706.

83. Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175.

84. Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175, holding that the lessee of market revenues has no cause of action against a city for loss due to a temporary obstruction of access to the market, caused by the making of street improvements.

85. Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706.

86. Rose *v.* Baltimore, 51 Md. 256, 34 Am. Rep. 307.

87. Peck *v.* Austin, 22 Tex. 261, 73 Am. Dec. 261, holding that a failure of the municipality to enforce an existing ordinance against unlicensed selling is no defense to an action for stall rent.

88. Cougot *v.* New Orleans, 16 La. Ann. 21.

A municipality has no right to bind itself on leasing a market, or the right to receive its revenues, not to permit any other public market, or that it will confine all sales of market produce to the market building. Gale *v.* Kalamazoo, 1 Mich. N. P. 5.

89. Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175.

90. Jacobs *v.* Levy, 27 La. Ann. 619.

91. Hatch *v.* Pendergast, 15 Md. 251.

92. San Antonio *v.* Royal, (Tex. 1891) 16 S. W. 1101.

93. Douat *v.* Beombay, 15 La. Ann. 377.

94. Charleston *v.* Goldsmith, 2 Speers (S. C.) 428.

95. Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706.

municipality itself, but would be liable only for his own acts which interfere with the enjoyment of what he sells.[96]

d. Change of Location or Discontinuance. In the absence of any restriction as to place,[97] the power to establish and regulate a market includes the right to change its location as the convenience and necessities of the public demand,[98] and to abolish a previously existing market and establish another in a different part of the municipality,[99] but not to abolish a duly authorized and existing public market which is the only one in the municipality.[1]

e. Prohibition or Regulation of Sales Outside of Market. The legislature may authorize municipal corporations to prohibit the sale of meats and other commodities requiring police inspection and regulation outside of the public markets,[2] at least during the market hours,[3] and to regulate private markets,[4] or to prohibit the maintenance of private markets within certain distances of a public market.[5] So municipalities may, when duly authorized, prohibit the selling of meats, poultry, and the like outside of public markets,[6] or outside of markets during market hours,[7] or the maintenance of private markets within a certain distance from a public market,[8] or prescribe such regulations as to the time and

96. Barrere *v.* Bartet, 23 La. Ann. 722.

97. Rex *v.* Cotterill, 1 B. & Ald. 67, 2 Chit. 487, 18 L. ed. 750.

98. *Florida.*— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Michigan.— Petz *v.* Detroit, 95 Mich. 169, 54 N. W. 644.

Ohio.— Gall *v.* Cincinnati, 18 Ohio St. 563.

Pennsylvania.— Wartman *v.* Philadelphia, 33 Pa. St. 202.

England.— Rex *v.* Cotterill, 1 B. & Ald. 67, 2 Chit. 487, 18 E. C. L. 750.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1539.

99. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; Petz *v.* Detroit, 95 Mich. 169, 54 N. W. 644 [*distinguishing* Taggart *v.* Detroit, 71 Mich. 92, 38 N. W. 714]; Wartman *v.* Philadelphia, 33 Pa. St. 202.

The rights of tenants of stalls in a market are subject to the municipality's right of removal. Petz *v.* Detroit, 95 Mich. 169, 54 N. W. 644.

A statute which authorizes an enlargement or extension of an existing market is merely permissive and not obligatory, and does not prevent the abandonment of the market and the establishment of a different market elsewhere. Wartman *v.* Philadelphia, 33 Pa. St. 202.

1. Taggart *v.* Detroit, 71 Mich 92, 38 N. W. 714.

2. *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; State *v.* Pendergrass, 106 N. C. 664, 10 S. E. 1002.

3. Henry *v.* Macon, 91 Ga. 268, 18 S. E. 143; Bowling Green *v.* Carson, 10 Bush (Ky.) 64.

In Georgia it is held that a statute authorizing a municipality to prohibit sales except at the public market will not be construed literally but simply as authorizing it to prohibit such sales during market hours, since unless so limited the regulation would be invalid. Henry *v.* Macon, 91 Ga. 268, 18 S. E. 143.

4. Lamarque *v.* New Orleans, McGloin (La.) 28.

5. New Orleans *v.* Stafford, 27 La. Ann. 417, 21 Am. Rep. 563; Natal *v.* Louisiana, 139 U. S. 621, 11 S. Ct. 636, 35 L. ed. 288 [*affirming* 39 La. Ann. 439, 1 So. 923].

6. Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143; Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; New Orleans *v.* Kientz, 52 La. Ann. 950, 27 So. 344.

7. Henry *v.* Macon, 91 Ga. 268, 18 S. E. 143; Badkins *v.* Robinson, 53 Ga. 613.

8. State *v.* Berard, 40 La. Ann. 172, 3 So. 463; Lamarque *v.* New Orleans, McGloin (La.) 28; Natal *v.* Louisiana, 139 U. S. 621, 11 S. Ct. 636, 35 L. ed. 288 [*affirming* 39 La. Ann. 439, 1 So. 923].

Computation of distance by blocks or squares.—A "radius of six squares," within the application of an ordinance prohibiting private markets within a radius of six squares from a public market, includes both the length of the squares and the width of the streets, and not merely the distance which would be occupied by six squares exclusive of streets (State *v.* Berard, 40 La. Ann. 172, 3 So. 463); the squares to be estimated not by an air line distance but by the route which a person walking could take in going six squares from the public market in all directions in the nearest way (Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175; State *v.* Barthe, 41 La. Ann. 46, 6 So. 531; State *v.* Schmidt, 41 La. Ann. 27, 6 So. 530); and the term "six blocks" in a similar ordinance will be similarly construed (State *v.* Deffes, 44 La. Ann. 164, 10 So. 597; State *v.* Natal, 42 La. Ann. 612, 7 So. 781).

The sale of fruits as well as the sale of meats, fish, and vegetables may be prohibited within the prescribed distance of a public market. Gossiggi *v.* New Orleans, 41 La. Ann. 522, 6 So. 534.

A public market may include one constructed by an individual upon land conveyed by him to the municipality in con-

place of selling outside of the market limits as the general welfare of the municipality may demand.[9] While there is some conflict as to what grant of authority will justify particular regulations,[10] it seems to be uniformly held that under a power to regulate the vending of meats, etc., a municipality may prevent their being retailed outside of the public markets.[11] It is also ordinarily held that such restrictive regulations as to selling outside of market limits may be made under a general power to establish and regulate markets,[12] and that where adequate market facilities are furnished such regulations are not unreasonable or in restraint of trade but a proper regulation of it,[13] although the rule is otherwise where market facilities are not furnished.[14] There are decisions, however, which deny the right of a municipality to prohibit selling outside of the public markets, under a general power to regulate and control markets.[15] A municipality may also, under a power to prevent the obstruction of streets, prohibit the standing of wagons for the sale of market produce within certain limits,[16] or prevent any street vending without a permit.[17]

4. Parks, Public Squares, and Places — a. In General.[18] The legislature may delegate to municipal corporations the regulation and control of property held for public uses within their limits, such as parks, public squares, and commons,[19]

sideration of his being permitted to construct a market thereon and collect its revenues for a term of years, under the supervision and control of the municipality, after which the buildings as well as the ground are to become the absolute property of the municipality and any private market within the prohibited distance therefrom is unauthorized. State *v.* Natal, 41 La. Ann. 887, 6 So. 722.

9. Mt. Carmel Borough *v.* Fisher, 21 Pa. Super. Ct. 643.

10. Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; St. Louis *v.* Weber, 44 Mo. 547.

11. Blanchard *v.* Ivers, 40 Fla. 117, 24 So. 66; Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; State *v.* McMahon, 62 Minn. 110, 64 N. W. 92; St. Louis *v.* Weber, 44 Mo. 547; St. Louis *v.* Jackson, 25 Mo. 37.

12. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

Iowa.— Davenport *v.* Kelley, 7 Iowa 102.

Kentucky.— Bowling Green *v.* Carson, 10 Bush 64.

Louisiana.— Crowley *v.* Rucker, 107 La. 213, 31 So. 629.

New York.— Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 418.

North Carolina.—State *v.* Pendergrass, 106 N. C. 664, 10 S. E. 1002.

South Carolina.— Winnsboro *v.* Smart, 11 Rich. 551.

Texas.— *Ex p.* Canton, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1540.

An ordinance is invalid which prohibits all street vending without reference to the character of the goods sold; but an ordinance prohibiting peddling meat, poultry, and vegetables from wagons on the streets, except after market hours, on market days, is a valid regulation. Milton Borough *v.* Hoagland, 3 Pa. Co. Ct. 283.

13. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

Florida.— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Iowa.— Davenport *v.* Kelley, 7 Iowa 102.

New York.— Buffalo *v.* Webster, 10 Wend. 99.

North Carolina.—State *v.* Pendergrass, 106 N. C. 664, 10 S. E. 1002.

South Carolina.— Winnsboro *v.* Smart, 11 Rich. 551.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1540.

14. Burlington *v.* Dankwardt, 73 Iowa 170, 34 N. W. 801, holding that a municipality cannot, under a power to establish and regulate markets, prohibit the peddling of meats on the street until it has established a meat market.

15. Bloomington *v.* Wahl, 46 Ill. 489; Caldwell *v.* Alton, 33 Ill. 416, 75 Am. Dec. 282; St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89; Kinghorn *v.* Kingston, 26 U. C. Q. B. 130.

Under a power to "establish and keep up" a market a municipality cannot prohibit the sale of articles usually sold at markets within the city except at the public market. Bethune *v.* Hughes, 28 Ga. 560, 73 Am. Dec. 789.

Authority to prohibit "during market hours" does not authorize a general prohibition against selling without a license outside of the public market. State *v.* St. Paul, 32 Minn. 329, 20 N. W. 243.

16. People *v.* Keir, 78 Mich. 98, 43 N. W. 1039.

17. Com. *v.* Ellis, 158 Mass. 555, 33 N. E. 651.

18. **Power to dedicate** squares, parks, and public common see Dedication, 13 Cyc. 448.

Power to condemn lands for parks, reservations, etc. see Eminent Domain, 15 Cyc. 601.

Loss of title to public square, park, etc., by adverse possession see Adverse Possession, 1 Cyc. 1119.

19. Brodhine *v.* Revere, 182 Mass. 598, 66 N. E. 607; Com. *v.* Davis, 162 Mass. 510, 39

and such delegation is both usual and proper.[20] In such cases the municipality holds the property in trust for the use of the public,[21] and cannot use or permit its use for purposes other than that for which it was dedicated or acquired and appropriated.[22] Even the legislature cannot authorize a municipality to permit property dedicated for a particular public purpose to be used for other purposes,[23] but may grant such authority with regards to lands owned by the municipality absolutely in fee.[24] Where property is dedicated or set apart without restriction merely for public uses, the municipal authorities may determine for what use it is appropriate and shall be used,[25] and if not irrevocably dedicated or appropriated by them to any particular public use, its uses may be changed as the public convenience and necessities require.[26] Property constituting parks, public squares, and commons may, in the absence of express restriction, be used in such manner as will promote the public interest and is not inconsistent with the purpose for which it was intended.[27] So the municipal authorities may permit the erection of statues and monuments in public parks,[28] whether they are purely ornamental or include the idea of a memorial,[29] and park commissioners having full power to lay out and govern parks may construct a speedway in a park.[30] A public square intended for ornamentation, recreation, and pleasure may be improved and

N. E. 113, 44 Am. St. Rep. 389, 26 L. R. A. 712.

20. Hurd *v.* Harvey County, 40 Kan. 92, 19 Pac. 325.

21. Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237; Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540; Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 272.

22. *Alabama.*— Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376.

Colorado.— McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237.

Illinois.— Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849; Princeville *v.* Auten, 77 Ill. 325; Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540.

Missouri.— Price *v.* Thompson, 48 Mo. 361.

New Jersey.—Seward *v.* Orange, 59 N. J. L. 331, 35 Atl. 799; Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 272.

Pennsylvania.— Com. *v.* Alburger, 1 Whart. 469.

Texas.— Compton *v.* Waco Bridge Co., 62 Tex. 715.

Wisconsin.— Gilman *v.* Milwaukee, 55 Wis. 328, 13 N. W. 266.

Canada.— *In re* Peck, 46 U. C. Q. B. 211.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1542.

See also, generally, DEDICATION, 13 Cyc. 498.

Application of rule.— Where land is dedicated as an open park, square, or pleasure ground, the municipal authorities have no right to erect a public building thereon (Princeville *v.* Auten, 77 Ill. 325; Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 272), or permit its use as a highway (Seward *v.* Orange, 59 N. J. L. 331, 35 Atl. 799), or to open up a public street through it (Price *v.* Thompson, 48 Mo. 361).

A municipality cannot enjoin the removal of buildings constructed by the United States government for military purposes on land dedicated "to be kept as an open common," on the ground that they are fixtures and have become the property of the municipality, since it could not have authorized their construction. Meigs' Appeal, 62 Pa. St. 28, 1 Am. Rep. 372.

23. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540.

24. Hartford *v.* Maslen, 76 Conn. 599, 57 Atl. 740; McNeil *v.* Hicks, 34 La. Ann. 1090; Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725; Seattle Land, etc., Co. *v.* Seattle, 37 Wash. 274, 79 Pac. 780.

25. Sargent *v.* Cleveland, 4 Ohio Dec. (Reprint) 213, 1 Clev. L. Rep. 122.

26. Pettitt *v.* Macon, 95 Ga. 645, 23 S. E. 198.

27. *Connecticut.*— Hartford *v.* Maslen, 76 Conn. 599, 57 Atl. 740.

Louisiana.—Stevens *v.* Walker, 15 La. Ann. 577.

Michigan.— Abrey *v.* Parks, etc., Com'rs, 95 Mich. 181, 54 N. W. 714.

New Hampshire.— Sherburne *v.* Portsmouth, 72 N. H. 539, 58 Atl. 38.

Ohio.— Langley *v.* Gallipolis, 2 Ohio St. 107.

Pennsylvania.— Com. *v.* Beaver Borough, 171 Pa. St. 542, 33 Atl. 112.

Parade grounds.— Land set apart by the legislature as a parade ground for a certain county and declared to be a public place and put in charge of park commissioners is not necessarily restricted to the use of the military organizations of that county, but the commissioners may permit its use by other military organizations and may exclude such as they think could not be prudently admitted to use it. People *v.* Prospect Park, 58 Barb. (N. Y.) 638.

28. Hartford *v.* Maslen, 76 Conn. 599, 57 Atl. 740; Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329, 67 N. Y. Suppl. 1054.

29. Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329, 67 N. Y. Suppl. 1054.

30. Holtz *v.* Diehl, 26 Misc. (N. Y.) 224, 56 N. Y. Suppl. 841.

beautified;[31] and, in the absence of any restriction in the grant or dedication, may be inclosed by a fence or railing so as to prevent its being used for a general public highway, provided the public is not excluded for the purposes for which it was intended,[32] and although a public square in a city is subject to the right of the county to maintain a court-house thereon, the city may prevent the county from so using it as to create a nuisance.[33] The municipal authorities may make all necessary and proper regulations with regard to the government and management of the property,[34] and how it shall be used by the public,[35] such as are necessary to preserve the public peace and safety,[36] the protection of the property from injury,[37] and to secure to the public its common enjoyment;[38] and so long as they act within the legitimate scope of their authority their discretion is not subject to outside interference,[39] or judicial revision or reversal.[40] They may prohibit public speaking or preaching in the parks,[41] may regulate the speed at which persons may ride or drive in parks or parkways,[42] and exclude therefrom wagons and other vehicles for carrying merchandise and the like,[43] or the use of bicycles or tricycles therein.[44] Even the public right of access may be reasonably restricted,[45] and whether a portion of a park may be set aside temporarily for the use of a particular portion of the public rests in the discretion of the authorities;[46] but the general public cannot be excluded for an unreasonable length of time.[47] A power conferred upon a park board to regulate, control, and protect the use of parks, parkways, and public places gives no authority over

31. Guttery *v.* Glenn, 201 Ill. 275, 66 N. E. 305; Langley *v.* Gallipolis, 2 Ohio St. 107; Com. *v.* Beaver Borough, 171 Pa. St. 542, 33 Atl. 112.

The making of a pleasure driveway around a large public square upon the borders of the square is held not to be an improper exercise of the power to regulate its use. Com. *v.* Beaver Borough, 171 Pa. St. 542, 33 Atl. 112.

32. Guttery *v.* Glenn, 201 Ill. 275, 66 N. E. 305; Pickett *v.* Mercer, 106 Mo. App. 689, 80 S. W. 285; Langley *v.* Gallipolis, 2 Ohio St. 107; State *v.* Charleston Neck Cross Roads Com'rs, Riley (S. C.) 146, 3 Hill 149.

Where a public square is bounded by private property on one side the owner cannot require that the municipal authorities when the square is inclosed shall leave a space for a public way between the inclosure and the line of his property. Leftwich *v.* Plaquemine, 14 La. Ann. 152.

33. Samuels *v.* Nashville, 3 Sneed (Tenn.) 298; Llano *v.* Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

34. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

Reasonableness of regulations.— Rules and regulations provided by park commissioners for the use of parkways are only valid in so far as they are reasonable under the conditions existing at the time they are attacked. Whitney *v.* Com., 190 Mass. 531, 77 N. E. 516.

35. Municipality No. 1 *v.* Municipality No. 2, 12 La. 49; Com. *v.* Davis, 162 Mass. 510, 39 N. E. 113, 44 Am. St. Rep. 389, 26 L. R. A. 712; Com. *v.* Abrahams, 156 Mass. 57, 30 N. E. 79.

The cutting of ice from a stream within a public park may be prohibited by the park commissioners. Des Moines Park Com'rs *v.* Diamond Ice Co., 130 Iowa 603, 105 N. W. 203, 3 L. R. A. N. S. 1103.

36. Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577; Ewing *v.* Minneapolis, 86 Minn. 51, 90 N. W. 10.

37. Municipality No. 1 *v.* Municipality No. 2, 12 La. 49; Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577.

38. Municipality No. 1 *v.* Municipality No. 2, 12 La. 49; Ewing *v.* Minneapolis, 86 Minn. 51, 90 N. W. 10.

39. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

40. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47; Holtz *v.* Diehl, 26 Misc. (N. Y.) 224, 56 N. Y. Suppl. 841.

41. Com. *v.* Davis, 162 Mass. 510, 39 N. E. 113, 44 Am. St. Rep. 389, 26 L. R. A. 712; Com. *v.* Abrahams, 156 Mass. 57, 30 N. E. 79; Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577.

The words "any public address," in an ordinance providing that no persons shall make any public address in the public grounds of a city without permission of the mayor, include sermons. Com. *v.* Davis, 162 Mass. 510, 39 N. E. 113, 44 Am. St. Rep. 389, 26 L. R. A. 712.

42. Com. *v.* Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245.

43. Brodbine *v.* Revere, 182 Mass. 598, 66 N. E. 607.

44. *In re* Wright, 29 Hun (N. Y.) 357, 65 How. Pr. 119 [*affirming* 63 How. Pr. 345].

45. Scranton *v.* Minneapolis, 58 Minn. 437, 60 N. W. 26, holding that the municipal authorities may maintain a fence with openings at suitable intervals between an ordinary highway and a parkway.

46. Com. *v.* Abrahams, 156 Mass. 57, 30 N. E. 79.

47. Sherburne *v.* Portsmouth, 72 N. H. 539, 58 Atl. 38.

private property adjacent to but outside of the limits of such parks and the streets and highways surrounding them.[48]

b. Conveyances, Leases, and Grants of Privileges. Under a power to control and regulate parks the municipal authorities may provide for the pleasure, amusement, comfort, and refreshment of persons frequenting them,[49] which in their discretion they may do by granting privileges to private persons to furnish food or refreshments,[50] or means of innocent entertainment, with the right to erect necessary structures incident thereto which will not interfere with the rights of the public,[51] and may give a license to use a building in a park for the purpose of a restaurant,[52] which rights and privileges may be made exclusive,[53] the municipality in all cases retaining the right of regulation and control over the manner of conducting the business;[54] but they have no right to grant a special privilege on such terms and conditions as to impair the rights of the public in the use of the park,[55] or to sell or lease such property or permit its use for purposes inconsistent with those for which it was intended or the rights of the public therein.[56] Ordinarily the municipal authorities have no right to permit the construction of a railroad or street railway on a public park or square,[57] but they may permit the construction of a street railroad across public lands belonging to the city and not appropriated

48. People *v.* Green, 85 N. Y. App. Div. 400, 83 N. Y. Suppl. 460, holding further that a statute authorizing a park board to control the exhibition of advertisements on property adjacent to public parks is unconstitutional as interfering with the use of private property, except in so far as interference may be justified under the police power, where such use is dangerous to the public health or safety or the property used for advertising of an immoral character.

49. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47; Gushee *v.* New York, 42 N. Y. App. Div. 37, 58 N Y. Suppl. 967 [*affirming* 26 Misc. 287, 56 N. Y. Suppl. 1002].

50. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47; Gushee *v.* New York, 42 N. Y. App. Div. 37, 58 N. Y. Suppl. 967 [*affirming* 26 Misc. 287, 56 N. Y. Suppl. 1002].

Sale of intoxicating liquors.—A statute prohibiting the sale of any intoxicating liquors "within the limits of eight hundred feet outside of the out boundary of said park" does not prohibit an ordinance authorizing the sale of liquors inside of the park itself. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

51. Sherburne *v.* Portsmouth, 72 N. H. 539, 58 Atl. 38.

52. Gushee *v.* New York, 42 N. Y. App. Div. 37, 58 N. Y. Suppl. 967 [*affirming* 26 Misc. 287, 56 N. Y. Suppl. 1002].

53. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

54. Gushee *v.* New York, 40 N. Y. App. Div. 37, 58 N. Y. Suppl. 967 [*affirming* 26 Misc. 287, 56 N. Y. Suppl. 1002].

55. Krutz *v.* Clausen, 38 Misc. (N. Y.) 105, 77 N. Y. Suppl. 97, holding that a park commissioner has no right to grant a special privilege for maintaining and renting chairs in a park under an agreement by which the public benches are removed from the shady places and persons compelled to rent chairs or sit in the sun.

56. Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Sherburne *v.* Portsmouth, 72 N. H. 539, 58 Atl. 38; Gilman *v.* Milwaukee, 55 Wis. 328, 13 N. W. 266; *In re* Peck, 46 U. C. Q. B. 211.

Application of rule.— Where land is dedicated as a public square a part of it cannot be granted to a religious corporation for the purpose of a burying ground (Com. *v.* Alburger, 1 Whart. (Pa.) 469), or sold to the trustees of a church for church purposes (*In re* Peck, 46 U. C. Q. B. 211), or leased to a private corporation for the purpose of holding an exposition (Gilman *v.* Milwaukee, 55 Wis. 328, 13 N. W. 266); nor can the municipal authorities permit a square dedicated for use as a park to be used by a county for the purpose of erecting a court-house (McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237), or permit an abutting owner to construct a building so that it extends into a public park (Ackerman *v.* True, 31 Misc. (N. Y.) 597, 66 N. Y. Suppl. 140 [*reversed* on other grounds in 56 N. Y. App. Div. 54, 66 N. Y. Suppl. 6]) or permit the use of fences in the public parks for advertising purposes (Tompkins *v.* Pallas, 47 Misc. (N. Y.) 309, 95 N. Y. Suppl. 875), or permit a public common to be inclosed and used as a private baseball park from which the public are excluded except on paying admission (Sherburne *v.* Portsmouth, 72 N. H. 539, 58 Atl. 38); but under a full power to regulate and control a park it is not a diversion of a park from its legitimate use to lease a portion thereof on which a race-track and grand stand is located to a driving club for the purpose of racing horses, the public being not wholly excluded therefrom but only on certain days (Bryant *v.* Logan, 56 W. Va. 141, 49 S. E. 21).

57. Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553.

A statute prohibiting the construction of a street railroad in any park does not apply where the park is laid out after the railroad company has acquired its franchises and right to construct its road. Coney Island,

to any particular use if conducive to the public convenience;[58] and park commissioners, when expressly authorized by statute, may permit the construction of a passenger railway within a large park to facilitate the public in its use and enjoyment.[59] The legislature may authorize a municipality to make a conveyance of lands where it holds the absolute title in fee,[60] or to lease the same,[61] although they have been previously used as a park,[62] and they may include in the lease or conveyance a clause of forfeiture for non-payment of rent,[63] or right to annul the sale for non-payment of interest on the purchase-money,[64] which, when declared in proper form, cannot be relieved against by the courts;[65] but to make the forfeiture effective the ordinance or resolution declaring the same must be enacted in accordance with the charter requirements.[66]

c. Rights of Residents and Abutting Owners.[67] By the weight of authority a private citizen or resident of a municipality has no right of action by reason of the diversion or appropriation of public property, such as parks and squares, to other uses, where he has not sustained or is not threatened with any special injury peculiar to himself as distinguished from the rest of the public;[68] but he has such right of action where he does sustain a special injury,[69] and ordinarily the owners of property abutting on a park or square have such a special right to insist that it shall not be appropriated to other uses,[70] and the owner of a lot in the immediate vicinity of a park, although not abutting thereon, but who is an adjacent proprietor in that he has an unobstructed view from his property, may sustain such an

etc., R. Co. *v.* Kennedy, 15 N. Y. App. Div. 588, 44 N. Y. Suppl. 825.

An entrance for a subway may be constructed on a public square or park when authorized by statute and the statute is assented to by a majority of the voters of the municipality. Price *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

58. Pettitt *v.* Macon, 95 Ga. 645, 23 S. E. 198.

59. Philadelphia *v.* McManes, 175 Pa. St. 28, 34 Atl. 331 [*affirming* 4 Pa. Dist. 445, 16 Pa. Co. Ct. 625], holding that park commissioners appointed by the state may, when expressly authorized by statute, permit the construction of a passenger railway in a park for the convenience of those frequenting it, even without the consent of the municipal authorities of the city in which the park is located, such a railway not being a street railway within the application of a constitutional provision that no street passenger railway shall be constructed within the limits of any city without the consent of its local authorities.

60. McNeil *v.* Hicks, 34 La. Ann. 1090; Woodson *v.* Skinner, 22 Mo. 13; Brooklyn *v.* Copeland, 106 N. Y. 496, 13 N. E. 451; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725.

61. Carondelet *v.* Lannan, 26 Mo. 461; Taylor *v.* Carondelet, 22 Mo. 105.

62. Brooklyn *v.* Copeland, 106 N. Y. 496, 13 N. E. 451; Clark *v.* Providence, 16 R. I. 237, 15 Atl. 763, 1 L. R. A. 725.

63. Carondelet *v.* Lannan, 26 Mo. 461; Taylor *v.* Carondelet, 22 Mo. 105.

64. Woodson *v.* Skinner, 22 Mo. 13.

65. Carondelet *v.* Lannan, 26 Mo. 461; Taylor *v.* Carondelet, 22 Mo. 105.

66. Lewis *v.* St. Louis, 69 Mo. 595; Carondelet *v.* Wolfert, 39 Mo. 305; Graham *v.* Carondelet, 33 Mo. 262.

The lessee may tender the rent before the forfeiture is completed by the approval by the mayor of the resolution of the council and thereby avoid the forfeiture. Carondelet *v.* Wolfert, 39 Mo. 305.

67. See, generally, DEDICATION, 13 Cyc. 500; INJUNCTIONS, 22 Cyc. 898.

68. *Delaware.*— Bayard *v.* Bancroft, (1905) 62 Atl. 6.

Florida.— Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489.

New York.— Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. 553.

Texas.— San Antonio *v.* Strumberg, 70 Tex. 366, 7 S. W. 754.

West Virginia.— Bryant *v.* Logan, 56 W. Va. 141, 49 S. E. 21.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1542, 1543.

But see McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237.

Under N. Y. St. (1892), authorizing a suit by a taxpayer to prevent any illegal official act or to prevent waste or injury to the public property or funds, a taxpayer may sue to restrain the use of fences in public parks for advertising purposes, although it is not shown that there has been any waste of the city's money or actual injury to its property. Tompkins *v.* Pallas, 47 Misc. (N. Y.) 309, 95 N. Y. Suppl. 875.

69. Douglass *v.* Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 272 [*affirmed* in 68 N. J. Eq. 657, 60 Atl. 1134].

70. *Illinois.*— Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849.

Missouri.—Price *v.* Thompson, 48 Mo. 361.

New Jersey.— Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 272 [*affirmed* in 68 N. J. Eq. 657, 60 Atl. 1134], where it is said that the owners of lots bounding on a square dedi-

injury by reason of its diversion to other uses as to give him a right of action to enjoin the diversion and abandonment by the city of the grounds as a public park.[71] And in the case of the dedication of a square to the public use, it has been said that the legislature has no power to alter or extend such dedication as against one who owns lots bordering thereon and purchased by him with reference thereto.[72] But not even an abutting owner can object to a sale or appropriation to other uses of property to which the municipality has an absolute title in fee and which is made pursuant to legislative authority,[73] a clear distinction being drawn between the case where the fee of the property is acquired by purchase, condemnation, or otherwise, and that wherein the city obtains an easement, as well as between the case where the full purchase-price is paid by the city from its general fund and that wherein the property is dedicated or donated for some specific use, or conveyed with some restriction, or where payment is provided by assessment upon neighboring property specially benefited by the contemplated use.[74]

cated to the public had a private right, over and above that of the public at large, to have the square kept open; that the right is of the same nature as it would be if the original dedicator in making conveyance to the owners of those lots bounding on the square had covenanted that the square should be for public use, and that no buildings should be erected thereon; that the dedication of the square in the case at bar was for the purpose of use by the public as an open pleasure ground — a ground with trees and a small lake, if the latter was found desirable and practicable, and did not include the use of it for a public building, and that the municipality had no right under the original dedication to erect any building upon it.

Texas.— Seguin *v.* Ireland, 58 Tex. 183.

Wisconsin.— Gilman *v.* Milwaukee, 55 Wis. 328, 13 N. W. 266.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1542, 1543.

Acquiescence on the part of an abutting owner in the erection of one building upon a public park or square is not a consent for the erection of another in a different place. Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 272 [*affirmed* in 68 N. J. Eq. 657, 60 Atl. 1134].

If the abutting owner sustains no special damage by the use permitted to be made of a public park or square, he is not entitled to an injunction. Bayard *v.* Bancroft, (Del. 1905) 62 Atl. 6; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553.

Adverse possession by one abutting owner of an inclosed lot which encroaches upon public ground for over twenty years is a bar to an action by another abutting owner to compel the removal of a building thereon. Broad *v.* Beatty, 73 Ark. 106, 83 S. W. 339.

71. Douglass *v.* Montgomery, 118 Ala. 599, 611, 613, 24 So. 745, 43 L. R. A. 376, where it was said: "Ordinarily, the city is the proper party to redress a wrong of the character here complained of; but in this instance it is the main actor in the commission of the wrongs complained of, for the abandonment and destruction of the park. It is to be presumed, it would not file a bill to declare void an act which, by solemn ordinance, it had itself just done. Individuals damaged by such action, therefore, were driven to private action for the maintenance of any rights they had in the premises . . we find no difficulty in holding, that the complainant in this case is in reason, and for the purposes of this case, an adjacent proprietor to the said park, and occupies such a position as entitles him to maintain this bill. He can look out from the front of one of his houses, with an unobstructed view, on to the park, a distance of only 110 feet from him. This gives him the attitude of an adjacent proprietor. From his other lot, the view is obstructed, though it is only 250 feet from the park. For the purposes of air and recreation, he has shown he has a direct and special interest against its proposed destruction."

72. Fessler *v.* Union, 67 N. J. Eq. 14, 56 Atl. 273 [*affirmed* in 68 N. J. Eq. 657, 60 Atl. 1134].

73. Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725; Seattle Land, etc., Co. *v.* Seattle, 37 Wash. 274, 79 Pac. 780.

74. Seattle Land, etc., Co. *v.* Seattle, 37 Wash. 274, 276, 79 Pac. 780, where it is said: "It is doubtless the law that, where a person dedicates or donates to a city a tract of land, with a restriction upon its use — as for instance, where it is so dedicated or donated solely for a park or a public street — the city can not legally divert the use of such property to uses and purposes inconsistent with the purpose of such grant; and, in cases where a city has acquired property for the purpose of a public park, and the payment thereof is made by means of special assessments, levied upon neighboring property specially benefited by reason of the acquiring and using of said property for such purposes, that the owners of said property, thus specially assessed, may in a proper case, prevent such property from being used in a manner that would destroy its use and enjoyment for the purposes for which it was acquired. But where property is taken, and paid for from the general fund, with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest."

XIII. PUBLIC IMPROVEMENTS.

A. Power to Make Improvements — 1. In General — a. Nature of Power. A municipal corporation usually receives from its charter, either expressly or by necessary implication, ample powers to make public improvements. Hence the power of a particular corporation, in the matter of improvements, depends, in most cases, upon a proper construction of its charter.[1] In the absence of such express or implied power, a municipal corporation is held to possess inherent power to make such improvements as are necessary or proper to carry out the objects of its incorporation.[2] This not only includes the power to provide suitable public buildings,[3] but since the amelioration of urban conditions is the paramount object of municipal incorporation, it includes also the power to grade and pave streets,[4] lay sidewalks, keep the same in repair,[5] furnish an adequate water-supply,[6] and provide for the lighting of streets and public places.[7] It has been held that an improvement may be limited to one piece of property.[8] The power to make improvements is held in trust for the public and cannot be relinquished without legislative authority,[9] and the exercise of the power to any extent deemed proper is a governmental act to be exercised under legislative discretion; but when the work is determined upon, the construction thereof is merely ministerial.[10]

b. Constitutional and Statutory Provisions. The right to decide upon the making of improvements, in pursuance of power given, belongs absolutely to municipal corporations in those states whose constitutions expressly secure to them the right of local self-government.[11] The legislature may leave to the council the determination of the question whether a proposed local improvement shall be made, without violating the constitutional right of the property-owner to protection from taxation by assessment for such improvement exceeding the special benefit therefrom;[12] and an act authorizing the municipality to take land for the purpose of widening a street and to assess the cost, including damages, upon the abutting owners, saving to any person aggrieved the right to be heard, is a valid exercise of legislative power.[13] Nor is the fact that the charter of a city provides that the improvement shall not be made if two thirds of the persons assessed dissent open to the objection that the power so conferred is judicial, and one with which the legislature cannot invest interested persons.[14] In general, unless restricted by constitutional provisions, a state may exercise absolute and direct control over the streets or public highways within as well as beyond municipal boundaries, determining when and in what manner streets shall be opened, graded, and improved.[15] The power to make local improvements is usually delegated to the municipality by charter or by general statute,[16] or it may be implied either from some express power given,[17] or from the very fact of the

1. **Construction of charters in general** see *supra*, III.
2. Ingersoll Pub. Corp. 318. And see cases cited *infra*, XIII, A, 2.
3. See *infra*, XIII, A, 2, b.
4. See *infra*, XIII, A, 2, c.
5. See *infra*, XIII, A, 2, d.
6. See *infra*, XIII, A, 2, f.
7. See *infra*, XIII, A, 2, g.
8. Hazelgreen *v.* McNabb, 64 S. W. 431, 23 Ky. L. Rep. 811, holding that where it appears that it was the purpose of a municipal governing body to order a specific improvement, and that notice of it was given to the property-owner, and such owner declines and fails to comply with the ordinance, the city will not be restrained from executing the judgment of its trustees.
9. Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89; Olyphant Sewage Co. *v.* Borough, 4 Lack. Jur. (Pa.) 369.
10. Fuller *v.* Atlanta, 66 Ga. 80. See also *supra*, III, C.
11. State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79. See *supra*, IV, G.
Right of self-government in general see *supra*, IV.
12. Redersheimer *v.* Bruning, 113 La. 343, 36 So. 990; Rogers *v.* St. Paul, 22 Minn. 494.
13. Dorgan *v.* Boston, 12 Allen (Mass.) 223.
14. Wilson *v.* Trenton, 55 N. J. L. 220, 26 Atl. 83.
15. See *supra*, IV, C.
16. See cases cited *infra*, XIII, A, 2.
17. Heilbron *v.* Cuthbert, 96 Ga. 312, 23 S. E. 206.

creation of the corporation, in which last event it is sometimes designated inherent.[18] A city may by special statute be authorized,[19] or, in those jurisdictions in which the legislature may exercise control over the municipality, compelled[20] to make improvements. Statutes providing for the making of improvements are in effect amendments of municipal charters and the corporations must act in accordance with them.[21] Acts of this sort are to be strictly construed,[22] and a statute providing for the construction of trunk sewers was held not to apply to lateral or branch sewers,[23] and an act authorizing the extension of a street under certain restrictions, and providing that the city authorities at their discretion might extend other streets was held to confer power to extend such other streets only in the same way and subject to the same restrictions.[24]

c. Power of Particular Officers or Boards. The power to determine upon improvements may be vested by charter or statute in the city council,[25] in boards of public works,[26] or in distinct quasi-corporations such as boards of park commissioners;[27] or the council may provide by by-laws for the creation of an officer or board[28] to act in its behalf, but only with its sanction and approval.[29] A provision in the charter vesting the council with power to make improvements will be repealed by a subsequently passed statute giving this power exclusively to a board of commissioners, even though its members are to be appointed by the council;[30] and in like manner power vested by an early act in a board or com-

Implied powers see, generally, *supra*, III, B, 2, d.

18. Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885.

Inherent powers see, generally, *supra*, III, B, 2, b.

19. See the statutes of the several states. And see Staples *v.* Bridgeport, 75 Conn. 509, 54 Atl. 194; Maddux *v.* Newport, 14 S. W. 957, 12 Ky. L. Rep. 657.

20. See People *v.* San Francisco, 36 Cal. 595; and *supra*, IV, G.

21. *California.*— Byrne *v.* Drain, 127 Cal. 663, 60 Pac. 433; Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771.

Colorado.— Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825.

Illinois.— Halsey *v.* Lake View, 188 Ill. 540, 59 N. E. 234.

Indiana.— See Welch *v.* Roanoke, 157 Ind. 398, 61 N. E. 791.

South Dakota.— See Heyler *v.* Watertown, 16 S. D. 25, 91 N. W. 334.

If the act purports to be a grant of power to the city, not a limitation upon its existing power, it will not limit or repeal the general powers given by the charter. Roundtree *v.* Galveston, 42 Tex. 612. See also Reid *v.* Trowbridge, 78 Miss. 542, 29 So. 167.

22. Quincy *v.* Boston, 148 Mass. 389, 19 N. E. 519.

23. Cincinnati *v.* McDuffie, 1 Ohio S. & C. Pl. Dec. 88, 1 Ohio N. P. 53.

24. Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247.

25. Hall *v.* Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 112; Cincinnati, etc., R. Co. *v.* Carthage, 36 Ohio St. 631; Brickwell *v.* Hamele, 57 Wis. 490, 15 N. W. 190.

Town meeting.— Under a statute providing that no town way should be laid out until approved by a town meeting, it has been held that a city council having the same power that a town meeting possesses may accept a report locating a street. Preble *v.* Portland, 45 Me. 241.

26. Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771 (holding that an act relating to street improvements is not unconstitutional as delegating municipal functions to a special commission, where the commissioners therein provided for are merely the agents of the municipality, and their acts in reporting as to the necessity of the improvement are not binding or effective until they are approved and confirmed by the city council); Hartford *v.* Hartford Electric Light Co., 65 Conn. 324, 32 Atl. 925; South Highland Land, etc., Co. *v.* Kansas City, 100 Mo. App. 518, 75 S. W. 383; Sheer *v.* Cincinnati, 6 Ohio Dec. (Reprint) 1233, 14 Cinc. L. Bul. 111.

27. West Chicago Park Com'rs *v.* Western Union Tel. Co., 103 Ill. 33; *In re* Central Park Com'rs, 51 Barb. (N. Y.) 277, 35 How. Pr. 255.

28. Noyes *v.* Ward, 19 Conn. 250.

29. Chicago *v.* Fraser, 60 Ill. App. 404; Dorey *v.* Boston, 146 Mass. 336, 15 N. E. 897; Nashville *v.* Hagan, 9 Baxt. (Tenn.) 495.

30. *Georgia.*— Wells *v.* Atlanta, 43 Ga. 67.

Massachusetts.— See Woodbridge *v.* Cambridge, 114 Mass. 483.

New Jersey.— Grant *v.* Newark, 28 N. J. L. 491.

New York.—*In re* Watertown Public Works, 144 N. Y. 440, 39 N. E. 387; *In re* Zborowski, 68 N. Y. 488; Brooklyn *v.* Meserole, 26 Wend. 132.

Pennsylvania.— See Sewickley Waterworks Com'rs *v.* Sewickley Borough, 159 Pa. St. 194, 28 Atl. 169, holding, however, that the creation by statute of a board of commissioners to superintend the construction and operation of waterworks will give the commissioners no right to control the council in making a moderate use of water to carry out its charter duty of furnishing a sufficient water-sup-

mission may by subsequent legislation be transferred to the council,[31] or from one board or commission to another.[32] The extent of such transfer of power, whether it be partial or complete, depends of course upon the wording and construction of the statute.[33] Where the authority is vested in the mayor and one branch of the council, it has been held that their action upon an improvement is not invalidated by the superfluous assent of the other branch of the council.[34]

d. Power as Between Municipal and Other Officers and Courts. The power to make improvements is in its nature legislative, not judicial; hence an action to change the location of a street, as fixed by the authorities of a city, cannot be sustained, for the courts do not possess such jurisdiction.[35] Powers relative to improvements may be conferred upon a court;[36] but in such case the proceedings are "special," and the court possesses jurisdiction only by virtue of the authority conferred by the legislature.[37] General statutes frequently give to some county board or corresponding body power to control all highways within its jurisdiction, without excepting streets.[38] It is well settled, however, that if a city be given power to control streets, its exercise of that power is exclusive, and a county board acting under a general road law will have no jurisdiction within its borders.[39] But in the absence of charter or statutory provision which expressly

ply for extinguishing fires, cleansing the streets, and for other public purposes.

See 36 Cent. Dig. tit. "Municipal Corporations," § 713.

Before election of board.—An act providing that cities acting under special charters may provide for the election of park commissioners, who shall have exclusive power over public parks, and authorizing the councils of such cities to submit to a vote the question whether there shall be levied a tax for the purpose of purchasing real estate for parks and their improvement, merely vests in such cities discretion to elect such commissioners and levy such tax, and does not divest their common councils of power, when no such commissioners have been elected, to "purchase or condemn, and pay for out of the general fund, lands . . . for the use of public squares, streets, parks," etc. *In re* Cedar Rapids, 85 Iowa 39, 51 N. W. 1142.

Effect of transfer of power on unfinished proceedings.—An act which organizes boards of public works in certain cities, and transfers to such boards all the power which before had been in the common council to open and lay out streets, includes in the power thus transferred the right to continue all unfinished proceedings which had been commenced by the common council at the date of the approval of the act. Wilson *v.* Trenton, 55 N. J. L. 220, 26 Atl. 83.

31. *In re* Roberts, 25 Hun (N. Y.) 371 [*affirmed* in 89 N. Y. 618].

32. Barney *v.* New York, 78 Hun (N. Y.) 336, 29 N. Y. Suppl. 178 [*affirmed* in 146 N. Y. 364, 41 N. E. 88]; *In re* Wheelock, 3 N. Y. Suppl. 890 [*affirmed* in 121 N. Y. 664, 24 N. E. 380].

Discontinuance of proceedings.— Where a resolution declaring the necessity of the improvement of an alley is made by the proper board of a city, a subsequent amendment of the law, conferring on another board the power to make such improvements to alleys generally, does not work a discontinuance of the pending proceeding, and the improvement should be prosecuted to completion by the board that adopted the resolution. Cincinnati *v.* Davis, 58 Ohio St. 225, 50 N. E. 918.

33. Brunswick *v.* King, 91 Ga. 522, 17 S. E. 940; *In re* Deering, 85 N. Y. 1; King *v.* Brooklyn, 42 Barb. (N. Y.) 627; Rounds *v.* Mumford, 2 R. I. 154.

34. Hamlin *v.* Biddeford, 95 Me. 308, 49 Atl. 1100; Woodbridge *v.* Cambridge, 114 Mass. 483.

35. De Witt *v.* Duncan, 46 Cal. 342.

36. See Pancoast *v.* Troth, 34 N. J. L. 377, holding that under a general power to lay out highways a county court had jurisdiction over highways within a city where no charter authority to lay out, alter, or vacate highways was vested in the city.

37. De Witt *v.* Duncan, 46 Cal. 342. And see *In re* Kutztown, 2 Woodw. (Pa.) 373.

38. People *v.* Queens County, 16 N. Y. Suppl. 705.

Effect of exercise of power by one of several bodies with concurrent jurisdiction see *infra*, XIII, B, 1, f.

39. *California.*— Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014.

Idaho.— Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701.

Illinois.— Shields *v.* Ross, 158 Ill. 214, 41 N. E. 985; People *v.* Chicago, etc., R. Co., 118 Ill. 520, 8 N. E. 824.

Indiana.— Anderson *v.* Endicutt, 101 Ind. 539. See also Sparling *v.* Dwenger, 60 Ind. 72, holding that the city had exclusive jurisdiction as to drainage within its limits.

Iowa.— Gallaher *v.* Head, 72 Iowa 173, 33 N. W. 620.

Mississippi.— Blocker *v.* State, 72 Miss. 720, 18 So. 388.

New Jersey.—*In re* Public Road, 54 N. J. L. 539, 24 Atl. 759; Cherry *v.* Keyport, 52 N. J. L. 544, 20 Atl. 970 [*affirming* 51 N. J. L. 417, 18 Atl. 299]; Cross *v.* Morristown, 18 N. J. Eq. 305.

or impliedly gives power over its streets to a city, such streets will be subject as other highways to the terms of the general law.[40] If a road law states in terms that its provision shall or shall not apply to municipalities, the extent to which it is operative within them becomes of course a matter of statutory construction.[41]

e. Duration of Power and Extinction by Exercise. When special power is given by the legislature to make improvements of a particular character, such power is not necessarily exhausted by a single exercise of it,[42] nor need it be exercised within a limited time.[43]

2. Nature and Purpose of Improvements — a. In General.[44] The nature and purpose of the improvements that a municipality may make depend upon the construction of its charter or of general statutes.[45] The words "public improvements" are taken to mean such improvements only as are the proper subject of police and municipal regulation,[46] and can be extended only by express provision to include commercial enterprises.[47] An act empowering cities to make improvements does not authorize them to erect a railway bridge across a street,[48] to bridge railway tracks for a street crossing,[49] to maintain such a viaduct,[50] or to construct a viaduct over a canal.[51] The right to construct a levee is not implied from

Pennsylvania.— *In re* Osage St., 90 Pa. St. 114; *In re* South Chester Road, 80 Pa. St. 370; Matter of Harrisburg, 1 Pearson 87; *In re* Downingtown, 3 Pa. Co. Ct. 455.

Texas.— Norwood *v.* Gonzales County, 79 Tex. 218, 14 S. W. 1057; State *v.* Jones, 18 Tex. 874.

See 36 Cent. Dig. tit. "Municipal Corporations," § 714.

40. Norwich *v.* Story, 25 Conn. 44; Washington *v.* Fisher, 43 N. J. L. 377; Pancoast *v.* Troth, 34 N. J. L. 377; *In re* Callowhill St., 32 Pa. St. 361; Bennington *v.* Smith, 29 Vt. 254.

41. *Indiana.*—State *v.* Mainey, 65 Ind. 404.

Iowa.— Knowles *v.* Muscatine, 20 Iowa 248.

Kansas.— Ottawa *v.* Rohrbough, 42 Kan. 253, 21 Pac. 1061.

Maine.— *In re* Hanson, 51 Me. 193.

Michigan.— Paw Paw Highway Com'rs *v.* Willard, 41 Mich. 627, 3 N. W. 164.

New Jersey.— Carroll *v.* Irvington, 50 N. J. L. 361, 12 Atl. 712; Campbell *v.* Hale, 25 N. J. L. 324.

Pennsylvania.— *In re* Greenough St., 169 Pa. St. 210, 32 Atl. 427; *In re* Burnish St., 140 Pa. St. 531, 21 Atl. 500; *In re* Union St., 140 Pa. St. 525, 21 Atl. 406; *In re* Henry St., 123 Pa. St. 346, 16 Atl. 785; *In re* Sterrett Tp. Road, 123 Pa. St. 231, 16 Atl. 777; *In re* Twenty-Eighth St., 102 Pa. St. 140; *In re* Jackson St., 83 Pa. St. 328; *In re* Mercer, 14 Serg. & R. 447; Sewickley Borough *v.* Jennings, 12 Pa. Co. Ct. 75.

Wisconsin.— Brandt *v.* Milwaukee, 69 Wis. 386, 34 N. W. 246.

See 36 Cent. Dig. tit. "Municipal Corporations," § 714.

42. West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215, where it was held that the power to take a street to connect a park with the city was not exhausted by one exercise.

Power to construct, improve, or repair street see *infra*, XIII, A, 2, c, (II).

43. Foster *v.* Worcester, 164 Mass. 419, 41 N. E. 654; Stevenson *v.* New York, 1 Hun (N. Y.) 51, 3 Thomps. & C. 133; Smedley *v.* Erwin, 51 Pa. St. 445, holding that when an act directs the street commissioner, within thirty days of its passage, to open a street, he is not without authority to open it because he has neglected to do so within the prescribed time, especially when the delay works no injury to the complainants. But see *In re* Rochester, 10 N. Y. Suppl. 436, holding that an act providing that, before land can be taken by the city of Rochester for park purposes, the common council "shall," at its next regular meeting after the map of the land to be taken has been filed, as required by the act, "by resolution declare that the city intends to take" the land, is mandatory, and the power to pass such resolution expires with the next regular meeting held after the filing of the map.

44. **Establishment and erection of bridges** see Bridges, 5 Cyc. 1055 *et seq.*

Purposes of special assessments see *infra*, XIII, E, 4.

45. Atlanta *v.* Smith, 99 Ga. 462, 27 S. E. 696; Conde *v.* Schenectady, 29 N. Y. App. Div. 604, 51 N. Y. Suppl. 854.

46. Low *v.* Marysville, 5 Cal. 214.

47. Linn *v.* Chambersburg Borough, 160 Pa. St. 511, 28 Atl. 842, 25 L. R. A. 217; Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736.

Private hospital.— Under a general power to establish hospitals the city has no power to establish a private hospital. Bessonies *v.* Indianapolis, 71 Ind. 189.

Auditorium.— Where, by the constitution, a city is given every power possessed by the legislature, it is within the power of such city to provide by charter for the erection of an auditorium, to purchase a site therefor and to issue bonds to discharge the indebtedness. Denver *v.* Hallett, 34 Colo. 393, 83 Pac. 1066.

48. Bloomington *v.* Chicago, etc., R. Co., 134 Ill. 451, 26 N. E. 366.

49. Phelps *v.* Detroit, 120 Mich. 447, 79 N. W. 640; Schneider *v.* Detroit, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54.

50. Vandalia R. Co. *v.* State, 166 Ind. 219, 76 N. E. 980.

51. Morris *v.* Sault Ste. Marie, 143 Mich.

express grant of such powers as are essential to the declared objects of incorporated towns,[52] although protection of lands subject to overflow is a proper object of local improvement that may be effected under proper authority from the legislature.[53] A municipality may require a railway company to bridge tracks and bind itself to pay a share of the cost.[54]

b. Public Buildings. The right to erect and maintain buildings for the transaction of city business is a necessary incident to the administration of municipal affairs,[55] and although its charter gives it no express power to do so a municipality may erect and maintain buildings for such purpose,[56] such as a city hall,[57] or fire-engine house,[58] or city jail,[59] or a city school building.[60]

c. Streets and Other Ways — (i) *Opening of Streets.* A city is usually given power by its charter or general statutes to open streets;[61] but this power standing alone does not include power to condemn land for this purpose,[62] although it does include the right to construct streets;[63] and a city in the exercise of a right to take land for street purposes is not limited to the amount actually needed for travel.[64] A city has no power to condemn land for a street for the purpose of giving a railway the sole use of it,[65] or to give such use to a private individual,[66] nor has it power to vacate a street for such purpose.[67] An act authorizing cities to extend their streets authorizes merely the extension of existing streets in the same direction and with the same width;[68] but in extending a street a set-off at an intersecting avenue may be made without its constituting the opening of a new street.[69] An act authorizing the laying out of driveways along the "beach or ocean front" was held to include the beach of an inlet.[70] Under a power to acquire land to protect the view oceanward from a walk upon the beach a city may acquire land under water.[71] And under a power to open a street upon the

672, 107 N. W. 443; Ranson *v.* Sault Ste. Marie, 143 Mich. 661, 107 N. W. 439.

52. Newport *v.* Batesville, etc., R. Co., 58 Ark. 270, 24 S. W. 427.

53. Daily *v.* Swope, 47 Miss. 367.

Construction of levees generally see LEVEES.

54. Argentine *v.* Atchison, etc., R. Co., 55 Kan. 730, 41 Pac. 946, 30 L. R. A. 255; Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 886.

55. People *v.* Harris, 4 Cal. 9; Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715; Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

56. See cases cited in notes following. And see *supra*, VIII, B, 2, c.

57. Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715; Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406; Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166. See also Foster *v.* Worcester, 164 Mass. 419, 41 N. E. 654.

58. Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715; Clarke *v.* Brookfield, 81 Mo. 503, 51 Am. Rep. 243.

59. Long *v.* Elberton, 109 Ga. 28, 34 S. E. 333, 77 Am. St. Rep. 363, 46 L. R. A. 428.

60. Cartersville *v.* Baker, 73 Ga. 686.

61. See the statutes of the several states. And see Cohen *v.* Alameda, 124 Cal. 504, 57 Pac. 377; Barr *v.* New Brunswick, 58 N. J. L. 255, 33 Atl. 477; Keene *v.* Bristol, 26 Pa. St. 46.

62. Tacoma *v.* State, 4 Wash. 64, 29 Pac. 847. See, generally, EMINENT DOMAIN, 15 Cyc. 568.

63. Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247.

64. Taylor *v.* Bloomington, 186 Ill. 497, 58 N. E. 216; Matter of Curran, 38 N. Y. App. Div. 82, 55 N. Y. Suppl. 1018; Hannibal *v.* Campbell, 86 Fed. 297, 30 C. C. A. 63.

65. Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; Kansas City *v.* Hyde, 196 Mo. 515, 96 S. W. 206; Kansas City *v.* Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766, 7 L. R. A. N. S. 639.

66. Kansas City *v.* Hyde, 196 Mo. 515, 96 S. W. 206; Kansas City *v.* Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766, 7 L. R. A. N. S. 639.

67. People *v.* Atchison, etc., R. Co., 217 Ill. 594, 75 N. E. 573; Kansas City *v.* Hyde, 196 Mo. 515, 96 S. W. 206; Kansas City *v.* Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766, 7 L. R. A. N. S. 639.

68. Ilwaco *v.* Ilwaco R., etc., Co., 17 Wash. 652, 50 Pac. 572; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; Columbia, etc., R. Co. *v.* Seattle, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725. But see People *v.* Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277, holding that an act authorizing the board of commissioners for Lincoln park to extend its driveway over and upon the bed of Lake Michigan did not require the extension to be joined to the end of the original driveway, nor to run in the same direction.

69. Culver *v.* Chicago, 171 Ill. 399, 49 N. E. 573; *In re* Locust St., 153 Pa. St. 276, 25 Atl. 816.

70. State *v.* Wright, 54 N. J. L. 130, 23 Atl. 116.

71. Murphy *v.* Long Branch, (N. J. Sup. 1905) 61 Atl. 593.

ocean front for the erection of an elevated walk more than one street may be opened.[72] But an act extending the limits of a borough and authorizing commissioners to lay out within said limits such streets as they shall deem proper does not suspend a general law forbidding the opening of a street through any burial ground.[73]

(II) *Construction, Improvement, or Repair.* Power to improve streets is usually delegated to municipalities.[74] It is a legislative function, and, except for gross abuse, is not subject to judicial review.[75] It is a continuing power,[76] not exhausted by a single exercise,[77] nor limited as to time.[78] A street must have been lawfully established before it can become subject to municipal improvement.[79] The extent of the power depends of course upon the construction of charter or statutory provisions.[80] Under a power to build highways a city may build a highway that will support street-car traffic, although a heavier pavement is needed than ordinary traffic requires.[81] Under authority to improve streets and to make by-laws for the regulation of the city, a municipality is without power to erect a toll bridge;[82] and a charter provision authorizing the construction of streets and bridges does not empower the city to construct a bridge over a mill race, which under the general statutes it is the duty of the mill owner to maintain.[83] The power to repair streets does not include power to make original improvements or repairs of a character essentially different from the work originally done.[84] Nor does the power to regulate and grade, standing alone,

72. Murphy *v.* Long Branch, (N. J. Sup. 1905) 61 Atl. 593.

73. *In re* Egypt St., 2 Grant (Pa.) 455.

74. See the statutes of the several states. And see Barter *v.* Com., 3 Penr. & W. (Pa.) 253, holding that every incorporated town may improve its streets for public purposes, whether as highways or places for cisterns and wells. See also Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208.

75. *Illinois.*— Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003.

Indiana.— McKee *v.* Pendleton, 154 Ind. 652, 57 N. E. 532.

Iowa.— Kemp *v.* Des Moines, 125 Iowa 640, 101 N. W. 474; Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605.

Kentucky.— Dumesnil *v.* Louisville Artificial Stone Co., 109 Ky. 1, 58 S. W. 371, 22 Ky. L. Rep. 503, holding that the action of the general council in ordering the reconstruction of a sidewalk which had been down for twenty-two years would not be disturbed, although the preponderance of the evidence showed that the sidewalk was not in a bad condition.

Louisiana.— Schmitt *v.* New Orleans, 48 La. Ann. 1440, 21 So. 24.

New York.— Matter of North Third Ave., 32 N. Y. App. Div. 394, 53 N. Y. Suppl. 46.

Pennsylvania.— *In re* Wabash Ave., 26 Pa. Super. Ct. 305; Dobson *v.* Philadelphia, 7 Pa. Dist. 321.

United States.— Field *v.* Barber Asphalt Paving Co., 117 Fed. 925 [*modified* as to other matters in 194 U. S. 618, 24 S. Ct. 784, 48 L. ed. 1142].

Replacing good pavement.— Where a macadam pavement had been in place less than four years, was in good condition, and no reason for removing it appeared, a city ordinance requiring it to be torn up and replaced by an asphalt pavement was held void, as unreasonable and oppressive. Chicago *v.* Brown, 205 Ill. 568, 69 N. E. 65.

76. Estes *v.* Owen, 90 Mo. 113, 2 S. W. 133. See Flickinger *v.* Fay, 119 Cal. 590, 51 Pac. 855.

77. San Francisco Paving Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076; Blanchard *v.* Beideman, 18 Cal. 261; Kokomo *v.* Mahan, 100 Ind. 242; Wistar *v.* Philadelphia, 80 Pa. St. 505, 21 Am. Rep. 112; Mead *v.* Portland, 200 U. S. 148, 26 S. Ct. 171, 50 L. ed. 413.

78. *In re* Akron St., 5 Ohio S. & C. Pl. Dec. 697, 7 Ohio N. P. 454.

79. Parker *v.* New Brunswick, 32 N. J. L. 548; Culver *v.* Yonkers, 180 N. Y. 524, 72 N. E. 1141; Wishy *v.* Bonte, 19 Ohio St. 238. See also *infra*, XIII, E, 3, b.

Effect of subsequent dedication.— Where there is no jurisdiction to order improvement of a street, because it is for the greater part held in private ownership, jurisdiction cannot be established by subsequent dedication of the street to public use. Spaulding *v.* Wesson, 115 Cal. 441, 47 Pac. 249.

80. Taylor *v.* Patton, 160 Ind. 4, 66 N. E. 91; Altman *v.* Duhuque, 111 Iowa 105, 82 N. W. 461.

81. Detroit *v.* Detroit United R. Co., 133 Mich. 608, 95 N. W. 736.

82. Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

83. Merrill *v.* Kalamazoo, 35 Mich. 211.

84. *California.*— Santa Cruz Rock Pavement Co. *v.* Broderick, 113 Cal. 628, 45 Pac. 863.

Georgia.— Burckhardt *v.* Atlanta, 103 Ga. 302, 30 S. E. 32; Regenstein *v.* Atlanta, 98 Ga. 167, 25 S. E. 428.

Illinois.— Scammon *v.* Chicago, 42 Ill. 192.

Massachusetts.— Draper *v.* Fall River, 185 Mass. 142, 69 N. E. 1068.

Minnesota.— State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183.

authorize the setting of curb and gutter stones, and the flagging of sidewalks;[85] but under a power to macadamize and to order any other work to be done necessary to complete the street, a city may lay rock gutter-ways.[86] Under a general power to improve, a city may remove trees[87] and sidewalks;[88] and under a power to build bridges it may construct approaches in the streets to bridges built by the city.[89] Under a power to pave park roads it has been held that a board of park commissioners may require outside work to be done on the streets leading into such roads necessary to render the approaches safe.[90] A city, acting under general power, is not required to improve a street throughout its entire length[91] or width,[92] or between street railway tracks,[93] and it may provide for boulevarding a street that is being paved;[94] and under authority to acquire by contract the portions of a turnpike within its borders, it may also construct and improve such road in the same manner as its other streets.[95]

(III) *ALTERATION OF COURSE OR WIDTH.* A municipal corporation may not alter the location or width of a street unless expressly or by necessary implication authorized to do so.[96] The power to vacate streets has been held to include power to narrow them.[97]

(IV) *CHANGE OF GRADE.* The power to grade streets, although coupled with power to improve and repair, may be exercised independently.[98] In the absence

Nebraska.— McCaffrey *v.* Omaha, 72 Nebr. 583, 101 N. W. 251.

New Jersey— Hurley *v.* Trenton, 66 N. J. L. 538, 49 Atl. 518 [*affirmed* in 67 N. J. L. 350, 51 Atl. 1109]; Watson *v.* Passaic, 46 N. J. L. 124.

Pennsylvania.— Pittsburg, etc., Pass R. Co. *v.* Pittsburg, 80 Pa. St. 72.

See 36 Cent. Dig. tit. "Municipal Corporations," § 719.

85. Brown *v.* New York, 1 Hun (N. Y.) 30, 3 Thomps. & C. 155 [*reversed* on other grounds in 63 N. Y. 239].

86. Burk *v.* Altschul, 66 Cal. 533, 6 Pac. 393.

87. Scott *v.* Marshall, 110 Mo. App. 178, 85 S. W. 98.

88. Scott *v.* Marshall, 110 Mo. App. 178, 85 S. W. 98.

89. Home Bldg., etc., Co. *v.* Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

90. Kittinger *v.* Buffalo, 148 N. Y. 332, 42 N. E. 803.

91. Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 22 Ky. L. Rep. 139.

Making improvements uniform.— Under an act authorizing a city council to order the whole or any portion of the street macadamized, the ordering of the macadamizing and improving of specifically described portions of a single street, which portion included the whole of the street between certain points, except certain portions which had already been improved and macadamized, so as to make the whole improvement uniform, is not in excess of the authority of the board. Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534, 12 Pac. 530.

92. Indianapolis, etc., R. Co. *v.* Capitol Paving, etc., Co., 24 Ind. App. 114, 54 N. E. 1076.

93. Springfield *v.* Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

94. Thompson *v.* Highland Park, 187 Ill. 265, 58 N. E. 328. But see Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797.

95. Mackin *v.* Wilson, 45 S. W. 663, 20 Ky. L. Rep. 218; Kearns *v.* Covington, 16 S. W. 94, 12 Ky. L. Rep. 981; Cassidy *v.* Covington, 16 S. W. 93, 12 Ky. L. Rep. 980; Providence, etc., Turnpike, etc., Road Co. *v.* Scranton, 175 Pa. St. 290, 34 Atl. 637.

96. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

Michigan.— Pratt *v.* Lewis, 39 Mich. 7.

New York.— St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286; Lawrence *v.* New York, 2 Barb. 577.

Pennsylvania.— Com. *v.* Miltenberger, 7 Watts 450; Philadelphia County Com'rs *v.* Spring Garden Com'rs, 6 Serg. & R. 522; *In re* Thirty-Fourth St., 10 Phila. 197; Paynter *v.* Young, 4 Phila. 153.

Tennessee.— State *v.* Taylor, 107 Tenn. 455, 64 S. W. 766.

See 36 Cent. Dig. tit. "Municipal Corporations," § 720.

Special assessments see *infra*, XIII, E, 4, c.

97. Brown *v.* San Francisco, 124 Cal. 274, 57 Pac. 82; Mt. Carmel *v.* Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L. R. A. 580 [*reversing* 52 Ill. App. 429]. But *compare* Dorsch *v.* Beaumont Glass Co., 74 Ohio St. 208, 78 N. E. 215.

98. Himmelmann *v.* Hoadley, 44 Cal. 213; Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118; People *v.* Asten, 49 How. Pr. (N. Y.) 405 [*affirmed* in 62 N. Y. 623]; Wolfe *v.* Pearson, 114 N. C. 621, 19 S. E. 264. But *compare* Manufacturers' Land, etc., Co. *v.* Camden, 71 N. J. L. 490, 59 Atl. 1, holding that a power to alter a street did not include a power to change the grade.

Delegation of power.— A street committee of a city council has no authority to authorize a railroad company to change the grade of a street, unless conferred by charter or by the council. Denison, etc., Suburban R.

of express restriction,[99] it is a continuing power, and a grade once established may, within legislative discretion,[1] be changed.[2]

(v) *Vacation.* It has been held that the state legislature, as the representative of the public, has full power over the streets and alleys of a city to vacate them.[3] The power to vacate streets may be delegated to the municipality;[4] such power must be expressly given[5] and may be exercised within legislative

Co. *v.* James, (Tex. Civ. App. 1899) 49 S. W. 660.

99. People *v.* San Francisco, 43 Cal. 91; Moore *v.* Atlanta, 70 Ga. 611; State *v.* Bayonne, 54 N. J. L. 293, 23 Atl. 648; Oakley *v.* Williamsburgh, 6 Paige (N. Y.) 262.

1. State *v.* Bayonne, 54 N. J. L. 293, 23 Atl. 648.

2. *California.*— Shaw *v.* Crocker, 42 Cal. 435.

Illinois.— Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146.

Indiana.— Mattingly *v.* Plymouth, 100 Ind. 545; Macy *v.* Indianapolis, 17 Ind. 267.

Iowa.— Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; Creal *v.* Keokuk, 4 Greene 47.

Maryland.— Kelly *v.* Baltimore, 65 Md. 171, 3 Atl. 594.

Minnesota.—Rakowsky *v.* Duluth, 44 Minn. 188, 46 N. W. 338; Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118.

New Jersey.— Trenton *v.* McQuade, 52 N. J. Eq. 669, 29 Atl. 354.

New York.—Archer *v.* Mt. Vernon, 63 N. Y. App. Div. 286, 71 N. Y. Suppl. 571; Waddell *v.* New York, 8 Barb. 95. And see *In re* Mutual L. Ins. Co., 89 N. Y. 530 [*affirming* 27 Hun 22].

United States.—Smith *v.* Washington City, 20 How. 135, 15 L. ed. 858; Goszler *v.* Georgetown, 6 Wheat. 593, 5 L. ed. 339; Smoot *v.* Washington, 22 Fed. Cas. No. 13,133*a*, 2 Hayw. & H. 122.

See 36 Cent. Dig. tit. "Municipal Corporations," § 721.

Power of council to bind successors.—A city council cannot, by the exercise of the power conferred upon it to grade and improve streets, abridge the capacity of its successors to perform their duties in that regard. Columbus Gaslight, etc., Co. *v.* Columbus, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510. Where a village had been annexed to a city, and the annexation agreement provided that all grades of streets established by the village authorities should be respected, but the same might be altered with the consent of the property holders, or upon payment of damages, it was held that the city could not bind itself by an agreement not to change an established grade, and that the only effect of the agreement was to put the grades established by the village authorities on the same basis as grades established by the city authorities, and subject to change in like manner. Corry *v.* Cincinnati, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194.

3. Eudora *v.* Darling, 54 Kan. 654, 39 Pac. 184.

Legislative control of streets see *supra*, IV, C.

4. *Alabama.*—McCain *v.* State, 62 Ala. 138.

California.— Brook *v.* Horton, 68 Cal. 554, 10 Pac. 204; Polack *v.* San Francisco Orphan Asylum, 48 Cal. 490.

Iowa.— Williams *v.* Carey, 73 Iowa 194, 34 N. W. 813; Gray *v.* Iowa Land Co., 26 Iowa 387.

Nebraska.— Lindsay *v.* Omaha, 30 Nebr. 512, 46 N. W. 627, 27 Am. St. Rep. 415.

New Jersey.— United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 57 N. J. L. 523, 31 Atl. 981; State *v.* Camden, 53 N. J. L. 322, 21 Atl. 565 [*reversed* on other grounds in 54 N. J. L. 347, 24 Atl. 549].

Pennsylvania.— See Wetherill *v.* Pennsylvania R. Co., 195 Pa. St. 156, 45 Atl. 658.

Wisconsin.— Kimball *v.* Kenosha, 4 Wis. 321.

See 36 Cent. Dig. tit. "Municipal Corporations," § 722.

5. *Alaska.*— Macintosh *v.* Nome, 1 Alaska 492.

Florida.— Florida Cent., etc., R. Co. *v.* Ocala St., etc., R. Co., 39 Fla. 306, 22 So. 692.

Georgia.—Coker *v.* Atlanta, etc., R. Co., 123 Ga. 483, 51 S. E. 481; Georgia Southern, etc., R. Co. *v.* Harvey, 84 Ga. 372, 10 S. E. 971.

Illinois.— See Pew *v.* Litchfield, 115 Ill. App. 13.

Kentucky.— Louisville *v.* Bannon, 99 Ky. 74, 35 S. W. 120, 18 Ky. L. Rep. 10.

Massachusetts.— Loring *v.* Boston, 12 Gray 209.

New Jersey.— Kean *v.* Elizabeth, 55 N. J. L. 337, 26 Atl. 939; Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540.

Wisconsin.— Baines *v.* Janesville, 100 Wis. 369, 75 N. W. 404.

See 36 Cent. Dig. tit. "Municipal Corporations," § 722.

Discontinuance of railroad crossing.—An act which authorizes the common council to discontinue and close a portion of Liberty street, in the city of Schenectady, for the purposes of a railroad depot, "to the passage of vehicles, horses, and cattle," is sufficient authority for an ordinance of such council authorizing the railroad company to construct and maintain an iron foot-bridge for pedestrians over the railroad track on the discontinued portion of the street, and to close the surface of the street to pedestrians by the erection of a fence. Weinckie *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 689 [*affirmed* in 133 N. Y. 656, 31 N. E. 625].

Conditional vacation.— In the absence of express authority it has been held that an ordinance vacating a street, but to become effective only upon the performance of certain conditions, is invalid. Hammer *v.* Elizabeth, 67 N. J. L. 129, 50 Atl. 451.

discretion [6] but not solely for private benefit.[7] The vacation of a street being in the nature of the exercise of a political function will not be reviewed by the court, except on a clear showing of collusion or fraud.[8] A power to vacate streets may be exercised whether the public acquired the street to be vacated by condemnation or by dedication.[9] The rescission of a resolution vacating a street is equivalent to an opening of such street and must be accompanied by the same formalities necessary to the opening of a street in the first instance.[10]

d. Sidewalks, Footways, or Cross Walks — (I) *CONSTRUCTION.* The word street is generic and includes sidewalks [11] and cross walks;[12] and the power to improve streets includes the power to lay sidewalks.[13] The municipality may require abutting owners to build sidewalks in accordance with prescribed specifications,[14] and within its discretion may order a repavement.[15] In ordering reconstruction of sidewalks in a block, lots in front of which sidewalks already exist may be excepted.[16] Under the general police power of a city it may repair sidewalks.[17] Under a general power to grade and pave sidewalks the city may alter the width of the space so graded and paved.[18]

(II) *REMOVAL.* General power over streets and sidewalks authorizes the removal of a sidewalk when the public good requires it.[19]

e. Sewers, Drains, and Watercourses. The power to construct sewers is usually held to depend on express grant,[20] although some cases hold that it is

6. *In re* Swanson St., 163 Pa. St. 323, 30 Atl. 207; Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275; Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

7. *Illinois.*— Parker *v.* Chicago Catholic Bishop, 146 Ill. 158, 34 N. E. 473.

Maryland.— Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

Michigan.— Dean *v.* Ann Arbor R. Co., 137 Mich. 459, 100 N. W. 773.

New Jersey.— State *v.* Elizabeth, 54 N. J. L. 462, 24 Atl. 495 [*affirmed* in 55 N. J. L. 337, 26 Atl. 939].

New York.— *In re* New York, 157 N. Y. 409, 52 N. E. 1126.

West Virginia.— Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275.

See 36 Cent. Dig. tit. "Municipal Corporations," § 722.

8. Ponischil *v.* Hoquiam Sash, etc., Co., 41 Wash. 303, 83 Pac. 316, holding that the fact that a petitioner for the vacation of a street would be benefited thereby was not sufficient to render the vacating ordinance invalid.

9. Glasgow *v.* St. Louis, 107 Mo. 198, 17 S. W. 743.

10. Schafhaus *v.* New York, 28 N. Y. App. Div. 475, 51 N. Y. Suppl. 114.

11. Boals *v.* Bachmann, 201 Ill. 340, 66 N. E. 336; Taber *v.* Grafmiller, 109 Ind. 206, 9 N. E. 721. And see Bonnet *v.* San Francisco, 65 Cal. 230, 3 Pac. 815, holding that under a statute providing that a board of supervisors may accept a street, but shall not accept any portion of it less than the entire width of the roadway, it may accept a street including the sidewalks, thereby making the city liable for their repairs.

Curbing may be included as part of a sidewalk. Draper *v.* Fall River, 185 Mass. 142, 69 N. E. 1068.

12. Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 2 N. E. 943.

13. Keith *v.* Wilson, 145 Ind. 149, 44 N. E. 13; Wiles *v.* Hoss, 114 Ind. 371, 16 N. E. 800; Hazelgreen *v.* McNabb, 64 S. W. 431, 23 Ky. L. Rep. 811; Pittsburg *v.* Daly, 5 Pa. Super. Ct. 528.

Raising sidewalk.— Under charter power to widen or narrow, lay out, graduate, curb, and pave, and otherwise improve streets and sidewalks, a city may raise a sidewalk along its streets, although such work may damage the owner of an adjacent lot. Harrisonburg *v.* Roller, 97 Va. 582, 34 S. E. 523. But the fact that a borough has established a paper grade confers no right on an abutting owner to elevate his sidewalk above the natural grade to conform to the paper grade, where the sidewalk if so raised would be a dangerous public nuisance. Kittanning Borough *v.* Thompson, 211 Pa. St. 169, 60 Atl. 584.

14. *In re* O'Brien, 119 Mich. 540, 79 N. W. 1070.

15. Hazelgreen *v.* McNabb, 64 S. W. 431, 23 Ky. L. Rep. 811; Reading *v.* Heilman, 19 Pa. Super. Ct. 422.

16. Barrett *v.* Falls City Artificial Stone Co., 52 S. W. 947, 21 Ky. L. Rep. 669.

17. Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59 [*reversing* (Civ. App. 1902) 69 S. W. 166]. See also *In re* First St., 66 Mich. 42, 33 N. W. 15.

18. Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

19. Scott *v.* Marshall, 110 Mo. App. 178, 85 S. W. 98.

20. Gray *v.* Cicero, 177 Ill. 459, 53 N. E. 91; Atwood *v.* Biddeford, 99 Me. 78, 58 Atl. 417; Brunswick Gas Light Co. *v.* Brunswick Village Corp., 92 Me. 493, 43 Atl. 104; Peck *v.* Grand Rapids, 125 Mich. 416, 84 N. W. 614; Kelsey *v.* King, 32 Barb. (N. Y.) 410, 11 Abb. Pr. 180 [*affirmed* in 1 Transcr. App. 133, 33 How. Pr. 39].

Entry on private property.—A city cannot

inherent in the municipality,[21] or that it may be implied from the power to control streets[22] or to protect the public health.[23] The power is usually expressly given by charter or statute;[24] the latter frequently superseding charter provisions,[25] and it may be exercised within legislative discretion.[26] In the absence of statutory authority a city cannot contract for the erection and maintenance of a sewerage system in the manner of waterworks.[27] Under an authority to construct a sewerage system a municipal corporation is not bound to construct sewers in all parts of its territory at the same time.[28] A municipality may utilize for drainage a creek running through its borders,[29] and under a power to repair may widen a drain.[30] An ordinance ordering the construction of a sewer is not invalid because the outlet of the sewer passes through private land.[31]

f. Water-Supply. A municipal corporation is usually regarded as having implied power to provide a water-supply,[32] and such power may be derived from the power to make contracts necessary to the welfare of the city,[33] although the

enter on or take the land of a citizen for the purpose of laying or digging a sewer thereon, in the absence of any authority in its charter or other act of the legislature. Butler *v.* Thomasville, 74 Ga. 570.

21. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Fisher *v.* Harrisburg, 2 Grant (Pa.) 291.

22. *Connecticut.*— Cone *v.* Hartford, 28 Conn. 363.

Illinois.— Charleston *v.* Johnston, 170 Ill. 336, 48 N. E. 985; Maywood County *v.* Maywood, 140 Ill. 216, 29 N. E. 704.

Indiana.— Kirkland *v.* Indianapolis Public Works, 142 Ind. 123, 41 N. E. 374; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135.

New York.— *In re* Leake, etc., Orphan Home, 92 N. Y. 116; Kelsey *v.* King, 32 Barb. 410, 11 Abb. Pr. 180 [*affirmed* in 1 Transcr. App. 133, 33 How. Pr. 39].

Ohio.— Taylor *v.* Wapakoneta, 26 Ohio Cir. Ct. 285.

See 36 Cent. Dig. tit. "Municipal Corporations," § 725.

23. Valparaiso *v.* Parker, 148 Ind. 379, 47 N. E. 330; Ingersoll Pub. Corp. 393.

24. Boyce *v.* Tuhey, 163 Ind. 202, 70 N. E. 531; Kennedy *v.* Belmar, 61 N. J. L. 20, 38 Atl. 756. See also *In re* De Peyster, 80 N. Y. 565 [*affirming* 18 Hun 445].

Between city and park commissioners.— The power to place a sewer in a boulevard belongs to the city council, and not to the park commissioners authorized by Ill. Act, June 24, 1895, to have control of boulevards for the purpose of improving the same by adding to their utility as driveways or streets. Lingle *v.* Chicago, 172 Ill. 170, 50 N. E. 192.

Revocation of power.— Where the authority of a municipality to empty sewage into a stream amounts merely to a legislative license, it may be revoked at the will of the legislature whenever the public health and safety require. Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, 58 Atl. 571.

Authority to construct house connections.— A statute which permits a city, on constructing a sewer, to lay necessary pipes for house connections from the sewer to the curb line of the abutting lot, and authorizing the charge of the costs to the abutting premises, is not for such reason unconstitutional. Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922.

25. Herbert *v.* Bayonne, 64 N. J. L. 548, 46 Atl. 608; Hartwell *v.* Cincinnati, etc., R. Co., 40 Ohio St. 155; Matter of Plattsburgh, 27 N. Y. App. Div. 353, 50 N. Y. Suppl. 356.

26. Bickerdike *v.* Chicago, 185 Ill. 280, 56 N. E. 1096; Cincinnati *v.* McDuffie, 1 Ohio S. & C. Pl. 88, 1 Ohio N. P. 53; Betterly *v.* Scranton, 5 Lack. Leg. N. (Pa.) 179.

27. Olyphant Sewerage Drainage Co. *v.* Olyphant Borough, 211 Pa. St. 526, 61 Atl. 72.

28. St. Joseph *v.* Owen, 110 Mo. 445, 19 S. W. 713; Juneau *v.* La Ville de Levis, 14 Quebec Q. B. 104.

29. Washburn, etc., Mfg. Co. *v.* Worcester, 116 Mass. 458; Butler *v.* Worcester, 112 Mass. 541; Bennett *v.* New Bedford, 110 Mass. 433. See also McGuire *v.* Rapid City 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752.

30. Melrose *v.* Hiland, 163 Mass. 303, 39 N. E. 1031.

31. South Highland Land, etc., Co. *v.* Kansas City, 172 Mo. 523, 72 S. W. 944. See also Haskell *v.* New Bedford, 108 Mass. 208.

32. Livingston *v.* Pippin, 31 Ala. 542 (holding that the supply of water was a proper sanitary and police regulation); Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885 (holding that a waterworks and electric-lighting plant might be built under the general power in respect of police regulations, the preservation of the public health and the general welfare). But see White *v.* Meadville, 177 Pa. St. 643, 35 Atl. 695, 34 L. R. A. 567, holding that in the absence of a legislative grant a city had no implied power to engage in the business of supplying its citizens with water for pay.

33. Rome *v.* Cabot, 28 Ga. 50; Dyer *v.* Newport, 94 S. W. 25, 29 Ky. L. Rep. 656, holding that power to contract for a water-supply existed under the general welfare clause. But see Greenville Water-Works Co. *v.* Greenville, (Miss. 1890) 7 So. 409, where it was held that the municipal authorities had no power to enter into a contract by

power is ordinarily expressly conferred by statute or by charter.[34] Under a power to provide a water-supply, a city may build and operate a plant for such purpose,[35] and this, although a private water company has been permitted to construct its works and lay pipes;[36] and the plant may be used for the purpose of supplying water to the inhabitants of the city, as well as for public purposes.[37] But in the absence of express authority a municipal corporation cannot become a stock-holder in a private water-supply corporation,[38] or enter into a contract for the purchase of water from a private corporation, which amounts in effect to a pledge of the municipal credit for the support of a private enterprise.[39] Under a power to construct waterworks[40] or to purchase waterworks with their privileges,[41] a city may contract for the purchase of a supply of water. But where a city has purchased a supply of water for its own use, it has no power to contract to furnish water to another municipality.[42] In connection with a power to establish waterworks the legislature may authorize a city to construct and maintain a dam;[43] and the city may lease any surplus water-power.[44] But a municipal corporation cannot maintain a dam for the purpose of leasing water to private persons for private uses.[45] In case a city has acquired the use of water for its public water-supply, it is entitled to restrain the diversion of such water by individuals.[46] A city which is the owner of a water right may lease such right to a corporation which undertakes a public water-supply.[47]

g. Lighting. A municipality has implied power to light its streets,[48] and there are cases holding that this includes power to erect a plant for that purpose.[49] On the other hand it has been held that even under an express power to light its streets, a city has no right, by implication, to erect a lighting plant.[50] The better rule would seem to be that if a city is expressly authorized to light its streets, it

which a monopoly for a long series of years was conferred upon a water company.

Delegation of governmental function.—The letting of a contract for the construction and operation of waterworks for the supply of water for public and private use within the city has been held to be an incidental power of the city and not a delegation of the governmental function. Gadsden *v.* Mitchell, 145 Ala. 137, 40 So. 557, 6 L. R. A. N. S. 781.

34. See the statutes of the several states. And see Murphy *v.* Waycross, 90 Ga. 36, 15 S. E. 817; Dutton *v.* Aurora, 114 Ill. 138, 28 N. E. 461; Walter *v.* McClellan, 113 N. Y. App. Div. 295, 99 N. Y. Suppl. 78.

Revocation of charter power.— An unexecuted charter power of a municipal corporation to supply its inhabitants with water is impliedly revoked by a law conferring the exclusive right of furnishing it to them, upon a corporation. Downingtown Gas, etc., Co. *v.* Downingtown, 175 Pa. St. 341, 34 Atl. 799.

35. Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870 [*overruling* Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163]. *Compare* People *v.* McClintock, 45 Cal. 11, holding power to incur debt for site must be expressly conferred. See also *supra*, VIII, B, 2, e.

36. Hughes *v.* Parnassus Borough, 23 Pa. Co. Ct. 196; Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 26 S. Ct. 224, 50 L. ed. 353; Colby University *v.* Canandaigua, 69 Fed. 671.

37. Scott *v.* Laporte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

Irrigation ditches may be maintained. Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702.

38. Voss *v.* Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 106 Am. St. Rep. 201, 66 L. R. A. 95, holding further that it could not borrow money or issue bonds to pay for such stock.

39. Scott *v.* Laporte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

40. Fremont *v.* June, 8 Ohio Cir. Ct. 124, 4 Ohio Cir. Dec. 326.

41. Hackensack Water Co. *v.* Hoboken, 51 N. J. L. 220, 17 Atl. 307.

42. Rehill *v.* Jersey City, 71 N. J. L. 109, 58 Atl. 175.

43. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

44. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

45. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

46. Springfield *v.* Fullmer, 7 Utah 450, 27 Pac. 577.

47. Ogden City *v.* Bear Lake, etc., Water-Works, etc., Co., 28 Utah 25, 76 Pac. 1069.

48. Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870 [*overruling* Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163]; Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959.

49. Blanchard *v.* Benton, 109 Ill. App. 569; Hay *v.* Springfield, 64 Ill. App. 671; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885. See also *supra*, VIII, B, 2, e.

50. Carthage *v.* Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936; Howell *v.* Millville, 60 N. J. L. 95, 36 Atl. 691; Stehmeyer *v.* Charleston, 53 S. C. 259, 31 S. E. 322.

may execute that power either by contract[51] or by the erection[52] or the purchase of a plant;[53] but that it must have express authorization to maintain a plant for furnishing light for private as well as public use.[54] But the city council has no power to appropriate public money, under a contract made by private persons, to aid in the erection of a lighting plant.[55] A city is not prevented from maintaining its own plant by the fact that it has granted a franchise to a private company,[56] although it is sometimes provided by statute that if a city wishes to maintain its own plant it must purchase the existing plant of a private company.[57]

51. Davenport Gas, etc., Co. *v.* Davenport, 124 Iowa 22, 98 N. W. 892; Newport *v.* Newport Light Co., 89 Ky. 454, 12 S. W. 1040, 11 Ky. L. Rep. 840; Newport *v.* Newport Light Co., 84 Ky. 166; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680.

Sale of franchise.— Under a power to provide by ordinance for the lighting of municipal streets, the city may provide for the sale to the highest bidder of the exclusive franchise of supplying it with gas for a period not in excess of the legislative limitation of the duration of franchises. Truesdale *v.* Newport, 90 S. W. 589, 28 Ky. L. Rep. 840.

Loan of municipal credit.—A contract by a city for the electric lighting of streets for an extended period by a corporation does not amount to an appropriation or loan of the city's credit to such corporation. Reid *v.* Trowbridge, 78 Miss. 542, 29 So. 167.

The contract must be reasonable.— Le Feber *v.* West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

Discretion of council.— It is within the discretion of a city council to select any system that will furnish lights of the required brilliancy at the lowest rates. Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622. A contract for the lighting of the streets with electricity will not be enjoined, although it may render useless an oil lighting equipment owned by the city. McMaster *v.* Waynesboro, 122 Ga. 231, 50 S. E. 122.

Effect of prior contract.—Under Mich. Comp. Laws, § 2908, providing that the council of an incorporated village may contract for any period not exceeding ten years for gas, electric, or other lights, the council has no power to enter into such contract during the life of a valid contract previously entered into, covering the period of ten years. Morrice *v.* Sutton, 139 Mich. 643, 103 N. W. 188.

Street fixtures.— The authority conferred on the common council of La Porte by section 68 of the act of 1867, to contract "for lighting such streets according to the general plan of such improvements in said city," embraces the street fixtures necessary for the purpose referred to, including gas pipes and lamp-posts. Nelson *v.* La Porte, 33 Ind. 258.

52. State *v.* Hiawatha, 53 Kan. 477, 36 Pac. 1119; Christensen *v.* Fremont, 45 Nebr. 160, 63 N. W. 364; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870 [*overruling* Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163].

Discretion as to management.— In the management and operation of an electric plant a city is not exercising governmental or legislative powers, but mere business powers, and it may conduct such plant in the manner which, in the judgment of the city council, promises the greatest benefit to the city and its inhabitants, and courts will not interfere with the reasonable discretion of the council in such matters. Henderson *v.* Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152.

53. Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Connor *v.* Marshfield, 128 Wis. 280, 107 N. W. 639; Indianapolis *v.* Consumers' Gas Trust Co., 144 Fed. 640, 75 C. C. A. 472.

Purchase of engine.—A contract by a city to buy an engine to operate the city lighting plant is within the general powers of the council. Arbuckle-Ryan Co. *v.* Grand Ledge, 122 Mich. 491, 81 N. W. 358.

54. *California.*— Hyatt *v.* Williams, 148 Cal. 585, 84 Pac. 41.

Illinois.— Ladd *v.* Jones, 61 Ill. App. 584.

Indiana.— Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268.

Massachusetts.— Spaulding *v.* Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; *In re* Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487.

Nebraska.— Christensen *v.* Fremont, 45 Nebr. 160, 63 N. W. 364.

New York.— Potsdam Electric Light, etc., Co. *v.* Potsdam, 49 Misc. 18, 97 N. Y. Suppl. 190.

Pennsylvania.— Titusville Electric Light, etc., Co. *v.* Titusville, 196 Pa. St. 3, 46 Atl. 195.

South Carolina.— Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

See 36 Cent. Dig. tit. "Municipal Corporations," § 727.

But see Jacksonville Electric Light Co. *v.* Jacksonville, 36 Fla. 229, 18 So. 677, 51 Am. St. Rep. 24, 30 L. R. A. 540; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723.

55. Morrice *v.* Sutton, 139 Mich. 643, 103 N. W. 188.

56. State *v.* Hamilton, 47 Ohio St. 52, 23 N. E. 935; Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723. See also Findlay Gaslight Co. *v.* Findlay, 2 Ohio Cir. Ct. 237, 1 Ohio Cir. Dec. 463.

57. See the statutes of the several states. And see Norwich Gas, etc., Co. *v.* Norwich, 76 Conn. 565, 57 Atl. 746.

h. Conduits and Subways. The power to construct conduits and subways must be granted expressly or by necessary implication.[58]

i. Water Frontage, Landings, Wharves, and Docks. A municipality may not erect wharves and docks or engage in wharfing unless expressly authorized by charter or statute,[59] although a town will not be restrained from grading a street to a river, merely because a wharf may be incidentally formed thereby.[60] The power to erect wharves and docks does not include power to create or improve harbors.[61] But in the exercise of its general powers a city may build a breakwater to protect its streets.[62] An express authority to erect, repair, and regulate public wharves and docks implies a power to extend or diminish,[63] and under a power to make additions and alterations a city may construct new docks.[64] It has been held, however, that an authority to enlarge public slips does not authorize the making of a slip in the first instance.[65] It has been held that a city has a general power to fill up a slip in the extension of a street,[66] although on the contrary, it has been held that such power is not possessed under an authority to construct and keep in repair canals and slips for the accommodation of commerce.[67] A city is not authorized to discontinue a public landing place under authority to discontinue a way.[68]

j. Markets. The establishment of markets is within the general powers of a municipality.[69] The power is frequently expressly given and implies authority to build market houses.[70]

k. Parks and Other Public Places. Unless expressly authorized, a municipality may not acquire land for the establishment of a park.[71] This power is conferred sometimes upon the city[72] and sometimes upon special boards of park commissioners.[73] A city has power to set aside portions of its streets or sidewalks for the construction of boulevards, grass plots, or other purposes, useful or ornamental only, and to protect the same from the encroachments of travel.[74] Under

58. Chicago *v.* Rumsey, 87 Ill. 348.

59. *Alabama.*—Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

Arkansas.— Newport *v.* Batesville, etc., R. Co., 58 Ark. 270, 24 S. W. 427.

California.— San Pedro *v.* Southern Pac. R. Co., 101 Cal. 333, 35 Pac. 993.

Louisiana.— St. Martinsville *v.* The Mary Lewis, 32 La. Ann. 1293; Shepherd *v.* New Orleans Third Municipality, 6 Rob. 349, 41 Am. Dec. 269.

New York.— Marshall *v.* Union, 11 N. Y. 461.

See 36 Cent. Dig. tit. "Municipal Corporations," § 729. And see *supra*, VIII, B, 2, c.

But *compare* Backus *v.* Detroit, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447; Galveston *v.* Menard, 23 Tex. 349.

Power to purchase or condemn wharf.— Under the act of 1871, authorizing the department of docks of New York city to acquire title to docks, where the city had no title, either by agreement or condemnation, the city, through its department of docks, had authority to purchase the interest of a person in a wharf. Bell *v.* New York, 77 N. Y. App. Div. 437, 79 N. Y. Suppl. 347. Statutory power in a city to construct wharves, docks, piers, etc., does not imply power to condemn for public use an existing private wharf. Madison *v.* Daley, 58 Fed. 751.

60. Snyder *v.* Rockport, 6 Ind. 237.

61. Spengler *v.* Trowbridge, 62 Miss. 46.

62. Miller *v.* Milwaukee, 14 Wis. 642.

63. Hannibal *v.* Winchell, 54 Mo. 172.

64. Dyer *v.* Baltimore, 140 Fed. 880.

65. Verplanck *v.* New York, 2 Edw. (N. Y.) 220. And see Thompson *v.* New York, 3 Sandf. (N. Y.) 487 [*affirmed* in 11 N. Y. 115], holding that under the statute of April, 1806, the city of New York had full power to enlarge slips, in connection with the proprietors, by extending piers.

66. See New York *v.* Whitney, 7 Barb. (N. Y.) 485.

67. Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

68. Com. *v.* Tucker, 2 Pick. (Mass.) 44.

69. Congot *v.* New Orleans, 16 La. Ann. 21; First Municipality *v.* Cutting, 4 La. Ann. 335; Spaulding *v.* Lowell, 23 Pick. (Mass.) 71.

Regulation of market see *supra*, XII, C.

70. St. John *v.* New York, 6 Duer (N. Y.) 315, 13 How. Pr. 527; Smith *v.* Newbern, 70 N. C. 14, 16 Am. Rep. 766; Fenton *v.* Cheseldine, 11 Ohio Dec. (Reprint) 649, 28 Cinc. L. Bul. 223. See also *supra*, VIII, B, 2, c.

71. Vaughn *v.* Greencastle, 104 Mo. App. 206, 78 S. W. 50; Graeff *v.* Felix, 24 Pa. Co. Ct. 657. *Compare supra*, VIII, A, 2, c.

72. Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; Riggs *v.* Detroit Bd. of Education, 27 Mich. 262.

73. People *v.* Ennis, 188 Ill. 530, 59 N. E. 236. See *supra*, IV, E, G.

74. Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729; Dougherty *v.* Horseheads, 159 N. Y. 154, 53 N. E. 799; Martin *v.* Williamsport, 208 Pa. St. 590, 57 Atl. 1063.

a power to improve public parks, buildings for public purposes may be erected in a park.[75] Under a power vested in park commissioners to take a street for the purpose of connecting a public boulevard or driveway with any park of the city or town within its jurisdiction, the board is not limited to the taking of a street connecting two parks.[76]

l. Improvements Beyond Boundaries of Municipalities. Although a municipality has usually no authority outside its own limits,[77] yet authority to act beyond its boundaries is sometimes implied on grounds of special necessity.[78] A city may acquire land beyond its limits for obtaining an outlet for its sewerage system,[79] or contract for the disposition of its discharge,[80] or agree to maintain a ditch.[81] It may improve a road leading to a gravel bank which belongs to the corporation.[82] It is competent for the legislature, in the absence of constitutional restraint,[83] to grant a municipality extraterritorial jurisdiction, such as the right to maintain a park[84] or a pest-house,[85] or to construct an outlet for its sewage system in the limits of adjoining municipalities,[86] or to improve roads[87] beyond its boundaries.[88]

m. Improvements Interfering With Franchises in Streets. The power of a

75. Ross *v.* Long Branch, 73 N. J. L. 292, 63 Atl. 609. And see Riggs *v.* Detroit Bd. of Education, 27 Mich. 262, holding that the city of Detroit had power to vacate a public park for the purpose of the erection of a public library thereon.

76. Com. *v.* Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245.

77. Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76; Georgetown *v.* U. S., 30 Fed. Cas. No. 18,281, 2 Hayw. & H. 302. See Municipality No. 1 *v.* Young, 5 La. Ann. 362; Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686 (holding that independently of the act of 1856, chapter 164, the city authorities of Baltimore had no power to grade an avenue, one side of which lay in Baltimore county); Cambridge *v.* Railroad Com'rs Bd., 153 Mass. 161, 26 N. E. 241 (holding that under the statute authorizing Boston and Cambridge to construct a bridge and avenue across the Charles river, neither city had any voice in the location or construction of that portion of the avenue lying within the other's limits). See also *supra*, III, B, 4.

Where the boundary line of a city is uncertain, improvements may be made with reference to any recognized city limits. Bloomington Cemetery Assoc. *v.* People, 139 Ill. 16, 28 N. E. 1076.

Construction of gas well.— Under a general power to construct gas works, a city has no power to drill or purchase gas wells at a distance, and to construct or purchase pumping stations and pipe-lines to bring natural gas within its limits for consumption and sale to its inhabitants. Quinby *v.* Consumers' Gas Trust Co., 140 Fed. 362.

Water-supply.—As a general rule it is held that a municipality cannot furnish water to parties outside the municipal limits (Dyer *v.* Newport, 94 S. W. 25, 29 Ky. L. Rep. 656; Stauffer *v.* East Stroudsburg Borough, 215 Pa. St. 143, 64 Atl. 411; Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217), although it has been held that it may dispose of its surplus to outsiders (Dyer *v.* Newport, *supra*; Rogers *v.* Wickliffe, 94 S. W. 24, 29 Ky. L. Rep. 587).

Electric light service.— It has been held that a city may extend its electric light service to points beyond the city limits, when it can do so with very little additional expense and in such a way as to result in advantage to the city and its inhabitants. Henderson *v.* Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152.

78. Dively *v.* Cedar Falls, 27 Iowa 227; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

79. Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Callon *v.* Jacksonville, 147 Ill. 113, 35 N. E. 223; Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Cochran *v.* Park Ridge, 138 Ill. 295, 27 N. E. 939 [*following* Shreve *v.* Cicero, 129 Ill. 226, 21 N. E. 815]; Minnesota, etc., Land, etc., Co. *v.* Billings, 111 Fed. 972, 50 C. C. A. 70. *Compare* South Orange *v.* Whittingham, 58 N. J. L. 655, 35 Atl. 407.

80. McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794.

81. Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

82. Matter of East Syracuse, 20 Abb. N. Cas. (N. Y.) 131.

83. See State *v.* Leffingwell, 54 Mo. 458.

84. Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180. But *compare* State *v.* Leffingwell, 54 Mo. 458.

85. Lorain *v.* Rolling, 24 Ohio Cir. Ct. 82.

86. Butler *v.* Montclair, 67 N. J. L. 426, 51 Atl. 494. *Compare* Haskell *v.* New Bedford, 108 Mass. 208.

87. Hagood *v.* Hutton, 33 Mo. 244.

88. *Illinois.*— Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048.

Indiana.— Voss *v.* Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 106 Am. St. Rep. 201, 66 L. R. A. 95.

Kansas.— Vail *v.* Attica, 8 Kan. App. 668, 57 Pac. 137.

Texas.— Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

United States.— Fidelity Trust, etc., Co. *v.* Lawrence County, 92 Fed. 576, 34 C. C. A. 553.

See 36 Cent. Dig. tit. "Municipal Corporations," § 732. And see *supra*, III, B, 4.

municipality over its streets cannot be alienated, and all franchises are subject to its exercise.[89] Hence a franchise to lay railway tracks,[90] water,[91] or gas[92] mains in a street, or to erect poles and string wires,[93] does not prevent a municipality from changing the grade, improving, laying sewers in, or otherwise controlling the streets, provided it does so in a reasonable manner.[94]

3. Exercise of Power — a. In General — (I) *Validity.* An ordinance for the improvement of a street is not void because of possible injury to vested rights under a grant from the city,[95] nor because it provides that the outlet of a sewer shall pass over private property;[96] and in opening a street it is not necessary to condemn a public alley that crosses it.[97]

(II) *Public Convenience or Necessity, or Other Considerations.* The power to make improvements is usually vested in the council and its decision as to the necessity of an improvement, except in extreme cases, is final.[98] Under this general rule it is held that a question cannot be raised as to the need of paving,[99] repairing,[1] widening,[2] opening,[3] or vacating,[4] streets; laying sewers,[5]

89. Townsend *v.* Jersey City, 26 N. J. L. 444.

90. *Illinois.*— Chicago, etc., R. Co. *v.* Quincy, 139 Ill. 355, 28 N. E. 1069. See also Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

Maryland.— Kirby *v.* Citizens' R. Co., 48 Md. 168, 30 Am. Rep. 455.

New York.— Dry Dock, etc., R. Co. *v.* New York, 55 Barb. 298.

Ohio.— Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89.

Pennsylvania.— North Pennsylvania R. Co. *v.* Stone, 3 Phila. 421.

Washington.— Spokane St. R. Co. *v.* Spokane, 5 Wash. 634, 32 Pac. 456.

See 36 Cent. Dig. tit. "Municipal Corporations," § 733.

91. Rockland Water Co. *v.* Rockland, 83 Me. 267, 22 Atl. 166; National Waterworks Co. *v.* Kansas City, 20 Mo. App. 237; National Waterworks Co. *v.* Kansas City, 28 Fed. 921.

92. Columbus Gaslight, etc., Co. *v.* Columbus, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510; Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665.

93. Monongahela *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529.

94. Des Moines City R. Co. *v.* Des Moines, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767; Seattle *v.* Columbia, etc., R. Co., 6 Wash. 379, 33 Pac. 1048; Clapp *v.* Spokane, 53 Fed. 515.

95. Chicago, etc., R. Co. *v.* Quincy, 139 Ill. 355, 28 N. E. 1069.

96. Burhans *v.* Norwood Park, 138 Ill. 147, 27 N. E. 1088.

97. Scotten *v.* Detroit, 106 Mich. 564, 64 N. W. 579.

98. *Illinois.*— Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369; Chicago *v.* Norton Milling Co., 196 Ill. 580, 63 N. E. 1043 [*affirming* 97 Ill. App. 651]; Chicago Terminal Transfer R. Co. *v.* Chicago, 184 Ill. 154, 56 N. E. 410, holding that the fact that the walls of a viaduct crossing a street are too weak to support an improvement will not invalidate an ordinance ordering the same.

Iowa.— Coates *v.* Dubuque, 68 Iowa 550, 27 N. W. 750.

Kentucky.— Louisville *v.* Bitzer, 115 Ky. 359, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434.

Massachusetts.— Worcester *v.* Worcester County, 167 Mass. 565, 46 N. E. 383.

Missouri.— Saxton *v.* St. Joseph, 60 Mo. 153.

New York.— Kelsey *v.* King, 32 Barb. 410, 11 Abb. Pr. 180.

Ohio.— Ford *v.* Toledo, 64 Ohio St. 92, 59 N. E. 779.

Pennsylvania.— Commonwealth's Appeal, (1887) 9 Atl. 524.

99. *Georgia.*— Bacon *v.* Savannah, 105 Ga. 62, 31 S. E. 127.

Illinois.— McChesney *v.* Chicago, 171 Ill. 253, 49 N. E. 548; Holdom *v.* Chicago, 169 Ill. 109, 48 N. E. 164.

Iowa.— Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605.

Kentucky.— Bullitt *v.* Selvage, 47 S. W. 255, 20 Ky. L. Rep. 599.

Missouri.— Morse *v.* Westport, (1895) 33 S. W. 182.

See 36 Cent. Dig. tit. "Municipal Corporations," § 735.

1. Burckhardt *v.* Atlanta, 103 Ga. 302, 30 S. E. 32; Regenstein *v.* Atlanta, 98 Ga. 167, 25 S. E. 428; Galt *v.* Chicago, 174 Ill. 605, 51 N. E. 653; Marionville *v.* Henson, 65 Mo. App. 397.

2. Meyer *v.* Covington, 103 Ky. 546, 45 S. W. 769, 20 Ky. L. Rep. 239.

3. Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574; Curry *v.* Mt. Sterling, 15 Ill. 320; Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43.

4. Meyer *v.* Teutopolis, 131 Ill. 552, 23 N. E. 651; Marshalltown *v.* Forney, 61 Iowa 578, 16 N. E. 740.

5. *California.*— Harney *v.* Benson, 113 Cal. 314, 45 Pac. 687.

Illinois.— Shannon *v.* Hinsdale, 180 Ill. 202, 54 N. E. 181; Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821.

Indiana.— Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342.

Michigan.— Parsons *v.* Grand Rapids, 141 Mich. 467, 104 N. W. 730.

Ohio.— Johnson *v.* Avondale, 1 Ohio Cir. Ct. 229, 1 Ohio Cir. Dec. 124.

establishing parks,[6] markets,[7] or waterworks,[8] unless the discretion vested in the municipal authorities has been grossly abused[9] and their power exercised in an arbitrary manner without regard to public interests and private rights.[10] A court will not declare an improvement ordinance unreasonable merely because a number of witnesses think the improvement unnecessary.[11]

(III) *Offer to Share Expense by Persons Desiring Improvements.* A municipality may accept aid from individuals in laying out and improving its streets, and may enter into a contract for that purpose.[12]

(IV) *Conditions Precedent*—(A) *In General.* Under an act directing that the city be divided into sewerage districts, sewers may be laid in each district as completed and the devising of a plan for the drainage of the entire city is not a condition precedent.[13] It is not necessary that sewerage commissioners apply, under an act so providing, for the opening of a street before constructing a sewer therein.[14] A charter provision that water and gas pipes shall be laid at least a year before a street shall be paved is invalid as being inconsistent with the general power to pave streets;[15] and an act providing that the council shall

Pennsylvania.— Oil City *v.* Oil City Boiler Works, 152 Pa. St. 348, 25 Atl. 549.

Texas.— Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 690; Nalle *v.* Austin, (Civ. App. 1893) 21 S. W. 375.

See 36 Cent. Dig. tit. "Municipal Corporations," § 735.

6. *In re* Cedar Rapids, 85 Iowa 39, 51 N. W. 1142.

7. Miller *v.* Webster City, 94 Iowa 162, 62 N. W. 648.

8. Linck *v.* Litchfield, 31 Ill. App. 118; Burnett *v.* Boston, 173 Mass. 173, 53 N. E. 379; Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375.

9. *Illinois.*— Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359; Title Guarantee, etc., Co. *v.* Chicago, 162 Ill. 505, 44 N. E. 832; Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

Kentucky.— Louisville *v.* Bannon, 99 Ky. 74, 35 S. W. 120, 18 Ky. L. Rep. 10.

Maine.— Pillsbury *v.* Augusta, 79 Me. 71, 8 Atl. 150.

Michigan.— Horton *v.* Williams, 99 Mich. 423, 58 N. W. 369; Grand Rapids *v.* Grand Rapids, etc., Co., 66 Mich. 42, 33 N. W. 15.

Missouri.— Morse *v.* Westport, 136 Mo. 276, 37 S. W. 932 (holding that where a city council has unlimited power, under the charter, in respect to street improvements, the mere passage of a large number of ordinances for the macadamizing of many streets, in anticipation of a proposed change of law requiring the consent of a majority of the property-owners, is not of itself proof of fraud in enacting such ordinances); *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773.

New York.— St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286.

Pennsylvania.— *In re* Fountain St., 6 Pa. Dist. 337.

Determination of question of safety.— Where a city charter authorizes the improvement of a street only on petition of adjoining owners, unless the street is unsafe, the question of safety is a jurisdictional one, on which the findings of the council are not conclusive. Smith *v.* Minto, 30 Oreg. 351, 48 Pac. 166.

10. *California.*— Jacobus *v.* Oakland, 42 Cal. 21.

Colorado.— Whitsett *v.* Union Depot, etc., Co., 10 Colo. 243, 15 Pac. 339.

Kentucky.— Allen *v.* Woods, 45 S. W. 106, 20 Ky. L. Rep. 59.

Michigan.— Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

New Jersey.—See Read *v.* Camden, 54 N. J. L. 347, 24 Atl. 549 [*reversing* 53 N. J. L. 322, 21 Atl. 565], holding that where an ordinance, which is intended to change the grade of a street so as to carry the way over an intersecting railroad by means of a bridge and approaches, contains a clause vacating a part of the street on which the approach is to rest, it thereby defeats its main object, and it will be set aside as unreasonable.

Oregon.— Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673.

See 36 Cent. Dig. tit. "Municipal Corporations," § 735.

11. Jones *v.* Chicago, 213 Ill. 92, 72 N. E. 798.

12. Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031; Atkinson *v.* Newton, 169 Mass. 240, 47 N. E. 1029; Crocket *v.* Boston, 5 Cush. (Mass.) 182; Parks *v.* Boston, 8 Pick. (Mass.) 218, 19 Am. Dec. 322. See also Kramer *v.* Los Angeles, 147 Cal. 668, 82 Pac. 334.

Public policy.—A promise made by a citizen to pay a part of the expense of opening a street is not opposed to public policy, and an ordinance passed by a common council to open such street will not, upon that ground, be set aside. State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

13. *In re* New York Protestant Episcopal Public School, 47 N. Y. 556; Matter of Protestant Episcopal Public School, 40 How. Pr. (N. Y.) 198.

14. *In re* Fowler, 53 N. Y. 60.

15. English *v.* Danville, 150 Ill. 92, 36 N. E. 994; Goodwillie *v.* Detroit, 103 Mich. 283, 61 N. W. 526.

prescribe general rules as to the manner of all subsequent street paving is not mandatory.[16]

(B) *Establishment of Grade Before Permanent Improvements.* Unless otherwise provided by charter or statute,[17] a municipality need not establish the permanent grade of a street before improving it.[18]

b. Vote, Petition, or Recommendation — (I) *Submission of Question to Popular Vote.* A municipality is frequently required by charter or statute to submit to popular vote the question of making improvements of a particular character,[19] and unless such provision is strictly complied with the improvement cannot be made.[20] Only those matters may be lawfully submitted which are

16. Santa Cruz Rock Pavement Co. *v.* Heaton, 105 Cal. 162, 38 Pac. 693; Coles *v.* Williamsburgh, 10 Wend. (N. Y.) 659.

17. Hubbell *v.* Bennett, 130 Iowa 66, 106 N. W. 375; State *v.* Judges Dist. Ct., 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; *In re* Delaware, etc., Canal Co., 8 N. Y. Suppl. 352 [*reversed* on other grounds in 60 Hun 204, 14 N. Y. Suppl. 585]. See also German Sav., etc., Soc. *v.* Ramish, (Cal. 1902) 69 Pac. 89; Blanden *v.* Ft. Dodge, 102 Iowa 441, 71 N. W. 411 (holding that a resolution of a city council "that a permanent grade be, and the same is, hereby established" on a certain street, "except where already established, and the committee on streets and alleys is hereby authorized to employ a competent engineer at once to establish said permanent grade as above described," is not an establishment of the grade, but is merely a provision for establishing it in the future); Wingate *v.* Astoria, 39 Oreg. 603, 65 Pac. 982; Philipsburg *v.* Way, 12 Pa. Dist. 173, 27 Pa. Co. Ct. 533; Jermyn *v.* Stocker, 7 Lack. Leg. N. (Pa.) 163.

Necessity of actual grading.— Where the board of supervisors order the whole or any part of a street macadamized, and may order the work to be done after notice of their intention has been published as therein required, they can authorize a contract for macadamizing a street after a contract for grading has been entered into, but before grading has been done. Dyer *v.* Hudson, 65 Cal. 374, 4 Pac. 231. See also Knowles *v.* Seale, 64 Cal. 377, 1 Pac. 159.

18. Knowles *v.* Seale, 64 Cal. 377, 1 Pac. 159; Challiss *v.* Parker, 11 Kan. 384, 394; State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 23 N. W. 222; Weber *v.* Johnson, 37 Mo. App. 601.

What constitutes establishment of grade.— The fixing of a definite height of a street at two points does not establish the official grade between such points on an arbitrary straight line drawn between them. Dorland *v.* Bergson, 78 Cal. 637, 21 Pac. 537. But *compare* Gafney *v.* San Francisco, 72 Cal. 146, 13 Pac. 467.

19. See the statutes of the several states. And see Park Ecclesiastical Soc. *v.* Hartford, 47 Conn. 89; Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848; Belding Land, etc., Co. *v.* Belding, 128 Mich. 79, 87 N. W. 113; Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014. See also Citizens' Gas Light Co. *v.* Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.

Constitutionality of provision.—A provision that the question of the erection of public improvements shall be submitted to popular vote is not rendered unconstitutional by the fact that the general assembly of the state is not allowed to submit to the people the question of whether an act shall become a law. Taylor *v.* McFadden, 84 Iowa 262, 50 N. W. 1070, sustaining a statute conferring upon cities the power to erect waterworks, when a majority of the voters of the city should approve the same.

New project.— The building of a city hall upon a site which has already been purchased is a new project within the meaning of a charter forbidding the city council to make an appropriation for any new project without approval of a majority of the electors. Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

Municipal buildings.—A fire-house is a municipal building within a requirement that the erection of municipal buildings shall be submitted to popular vote. Lockwood *v.* East Orange, 73 N. J. L. 518, 64 Atl. 144.

20. *Iowa.*— Brown *v.* Carl, 111 Iowa 608, 82 N. W. 1033.

Kansas.— State *v.* Kansas City, 60 Kan. 518, 57 Pac. 118.

Louisiana.— Byrne *v.* East Carroll, 45 La. Ann. 392, 12 So. 521.

Minnesota.— Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

Missouri.— Carthage *v.* Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936.

New Jersey.— Marcellus *v.* Garfield, 71 N. J. L. 373, 58 Atl. 1099.

New York.— Matter of Le Roy, 35 N. Y. App. Div. 177, 55 N. Y. Suppl. 149.

Washington.— State *v.* Pullman, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836; Thompson *v.* Sumner, 9 Wash. 310, 37 Pac. 450; Seymour *v.* Tacoma, 6 Wash. 138, 32 Pac. 1077.

See 36 Cent. Dig. tit. "Municipal Corporations," § 739.

Registration of voters.— Where a statute providing for the establishment of public schools in a city, provided for an election under a constitutional requirement that the proposition be approved by a two-thirds vote of the persons qualified to vote, but made

directed to be submitted by the legislature,[21] and where the improvement is one which does not fall within the statutory or charter requirements of a popular vote, a vote is not necessary.[22] The question submitted must be the one which is involved in the making of the improvement,[23] although it has been held that a modification by the council of a detail of the specifications relating to a public improvement will not demand resubmission.[24] It is not necessary to pass an ordinance providing for the improvement before submitting the question to vote.[25] A vote in favor of the improvement binds the city.[26]

(II) *Necessity For Application or Consent of Owners of Property Affected*—(A) *In General.* Petition or consent of the property-owners to be assessed is frequently required by charter or statute as a condition precedent to the making of improvements by the municipality.[27] The provisions of such charters or statutes must be complied with,[28] or it will result that an order to make the improvement,[29] or an assessment to pay for the same is

no provision for ascertaining the persons qualified to vote, it was held that an election was void where there was no previous registration of voters. Decatur *v.* Wilson, 96 Ga. 251, 23 S. E. 240.

Invalidity of election.— Where the vote for the erection of an improvement is illegally taken in certain precincts containing a majority of all the legal voters of the district, a provision that the proposition shall be submitted to a vote of the legal voters of the district and approved by a majority of the votes cast is not complied with. People *v.* Salomon, 46 Ill. 415.

21. Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014, holding that the rate of interest which bonds should bear, their sale at par, and the place of payment, need not be submitted to the electors.

22. East Jordan Lumber Co. *v.* East Jordan, 100 Mich. 201, 58 N. W. 1012 (holding that a village might make a valid contract for a supply of water by individuals, without a vote of the electors, although by statute it was provided that before any money should be borrowed or expended for the construction of waterworks, the question of raising the amount required should be submitted to the electors); Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715 (holding submission of the question of building a city hall and fire-engine house unnecessary); Connor *v.* Marshfield, 128 Wis. 280, 107 N. W. 639; Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333 (holding that a statute providing that a city council should have power to erect water, gas, or electric light works, or to authorize their erection by others, only when such works should be erected or authorized pursuant to a favorable vote of the taxpayers of the city, applied only to works erected by the cities themselves, or by others, under contracts with or for the cities, and not to such works erected by private parties for their own use). See also McMaster *v.* Waynesboro, 122 Ga. 231, 50 S. E. 122.

23. Brown *v.* Carl, 111 Iowa 608, 82 N. W. 1033 (holding a proposition "shall the town issue bonds, not to exceed the sum of $3,500, for the purpose of erecting, maintaining, and operating a system of waterworks" misleading in that it limited the amount to be used for maintaining as well as constructing the waterworks); Matter of Le Roy, 23 Misc. (N. Y.) 53, 50 N. Y. Suppl. 611 [*affirmed* in 35 N. Y. App. Div. 177, 55 N. Y. Suppl. 149] (in which it was held that the proceedings for establishing an electric lighting system were void).

Erection of electric plant and sale of bonds. — Where it is intended to pay for an electric plant by the issuance and sale of bonds, the entire matter of erecting the plant and issuing the bonds may be submitted in one proposition. Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723.

24. Johnson *v.* Rock Hill, 57 S. C. 371, 35 S. E. 568, so holding with reference to a franchise to construct and operate waterworks.

25. Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723.

26. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; George *v.* Wyandotte Electric Light Co., 105 Mich. 1, 62 N. W. 985.

27. See the statutes of the several states. And see Warren *v.* Russell, 129 Cal. 381, 62 Pac. 75; Givins *v.* Chicago, 186 Ill. 399, 57 N. E. 1045; Omaha *v.* Gsantner, 4 Nebr. (Unoff.) 52, 93 N. W. 407.

28. Mulligan *v.* Smith, 59 Cal. 206; Hornby *v.* Beverly, 48 N. J. L. 110, 2 Atl. 637; *In re* Banta, 60 N. Y. 165; People *v.* Rochester, 21 Barb. (N. Y.) 656.

Sufficiency of petition or application see *infra*, XIII, B, 2.

29. *California.*—Turrill *v.* Grattan, 52 Cal. 97.

Illinois.— L'Hote *v.* Milford, 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234; Hammond *v.* Leavitt, 181 Ill. 416, 54 N. E. 982; Whaples *v.* Waukegan, 179 Ill. 310, 53 N. E. 618.

Kentucky.— Covington *v.* Brinkman, 79 S. W. 234, 25 Ky. L. Rep. 1949.

Maine.— Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

Missouri.— St. Louis *v.* Gleason, 93 Mo. 33, 8 S. W. 348, holding that when in a proceeding to establish a street it becomes necessary to appropriate private property and the

void.[30] Such requirements are to be strictly construed,[31] and since the right of petition or consent depends solely upon legislative grant it will not be extended beyond the clear implication of the charter or statute.[32] And a grant of power to "pave" or otherwise "improve" streets on petition does not include the construction of sidewalks or sewers[33] or the repair of streets.[34] A petition for an improvement is sufficient evidence of consent to its being made as required by statute.[35]

(B) *Streets and Other Ways.* The petition or consent of property-owners is not a condition precedent to the opening or improvement of streets[36] unless

city counselor applies to the circuit court, by petition therefor, if it does not appear from such petition, or from the ordinance therein recited, that such ordinance was passed "either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting on the proposed street," the court has no jurisdiction to condemn the land.

New Jersey.— App *v.* Stockton, 61 N. J. L. 520, 30 Atl. 921.

Presumption as to proper origin of proceeding.— Since the board of local improvements of the city of Chicago has exclusive jurisdiction to originate a scheme for local improvements without petition, and the recommendation of an ordinance to the city council for an improvement creates a conclusive presumption that the board acted on its own motion, the fact that the city council ordered the board to submit an ordinance for the paving of a street between certain limits with asphalt, after which the board submitted such a resolution with the recommendation that the improvement be made, did not show that the improvement originated with the city council instead of the board of local improvements. Gage *v.* Chicago, 207 Ill. 56, 69 N. E. 588.

30. Tarman *v.* Atchison, 69 Kan. 483, 77 Pac. 111; Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231; Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524; Orr *v.* Omaha, 2 Nebr. (Unoff.) 771, 90 N. W. 301. See, generally, *infra*, XIII, E, 6, e.

Repair of street.— Where a contemplated improvement of a street already paved is essentially a repaving instead of a repairing, it can be engaged in by the city, only on a petition of the abutting property-owners, when it is proposed to tax back to them the costs of such improvement. McCaffrey *v.* Omaha, 72 Nebr. 583, 101 N. W. 251.

31. Ganson *v.* Buffalo, 2 Abb. Dec. (N. Y.) 236, 1 Keyes 454; Jessing *v.* Columbus, 1 Ohio Cir. Ct. 90, 1 Ohio Cir. Dec. 54. See also People *v.* Kingston, 114 N. Y. App. Div. 326, 99 N. Y. Suppl. 657; Philadelphia *v.* Tryon, 35 Pa. St. 401, holding that an act by which a general sewerage system was provided for, and the enlarged city of Philadelphia, and the administration thereof, committed wholly to the consolidated city, necessarily took away the control of local majorities of lot owners as it before existed in an annexed municipal district; and hence a petition for the construction of a culvert is no longer necessary in such a part of the consolidation, such a restriction not being contained in that act.

Repeal.—A provision in a city charter authorizing the city council to ordain a street improvement only on petition of a majority of the property-owners on the street to be improved was not repealed by an amended charter empowering the council to ordain improvements by a vote of two thirds of the council without petition; but a repeal would have been implied if the two modes had been repugnant, or if the latter act had contained the words, "and not otherwise," as did an act supplementary thereto. Erie *v.* Bootz, 72 Pa. St. 196.

32. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Crown Point, 150 Ind. 536, 50 N. E. 741.

Minnesota.— Wolfe *v.* Morehead, 98 Minn. 113, 107 N. W. 728.

Nebraska.— Orr *v.* Omaha, 2 Nebr. (Unoff.) 771, 90 N. W. 301.

New York.—Farrington *v.* Mt. Vernon, 166 N. Y. 233, 59 N. E. 826.

Pennsylvania.— *In re* Greenfield Ave., 191 Pa. St. 290, 43 Atl. 225.

Wisconsin.— Kersten *v.* Milwaukee, 106 Wis. 200, 81 N. W. 948, 1103, 48 L. R. A. 851.

33. Marionville *v.* Henson, 65 Mo. App. 397; Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

34. State *v.* Ramsey County Dist. Ct., 89 Minn. 292, 94 N. W. 870.

35. Jones *v.* Tonawanda, 158 N. Y. 438, 53 N. E. 280.

36. *California.*— Spaulding *v.* Wesson, 84 Cal. 141, 24 Pac. 377; Napa *v.* Easterby, 76 Cal. 222, 18 Pac. 253.

Indiana.— Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768; De Puy *v.* Wabash, 133 Ind. 336, 32 N. E. 1016.

Louisiana.— New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586.

Missouri.— St. Louis *v.* Clemens, 36 Mo. 467.

New Jersey.— Jelliff *v.* Newark, 48 N. J. L. 101, 2 Atl. 627 [*affirmed* in 49 N. J. L. 239, 12 Atl. 770]; Malone *v.* Jersey City, 28 N. J. L. 500; Mann *v.* Jersey City, 24 N. J. L. 662.

New York.— Granger *v.* Syracuse, 38 How. Pr. 308.

Pennsylvania.— *In re* Greenfield Ave., 191 Pa. St. 290, 43 Atl. 225; Beaumont *v.* Wilkes Barre, 142 Pa. St. 198, 21 Atl. 888; Spring Garden *v.* Wistar, 18 Pa. St. 195; Philadelphia *v.* Hinckley, 9 Pa. Dist. 125.

See 36 Cent. Dig. tit. "Municipal Corporations," § 741.

expressly made so by charter or statute.[37] Such provisions are frequently found in acts providing for improvements by special assessment, and a failure to comply with them is a good defense against the collection of an assessment.[38] Provisions of this nature, unless so stated,[39] do not apply to the laying of sidewalks[40] or to the repairing of streets.[41] And a statute requiring the consent of abutting owners to the grant of a franchise for the laying of water or gas mains does not require such consent before the city can compel the laying of service pipes as a preliminary to paving.[42] The council's finding of the assent of the necessary number of property-owners is not conclusive.[43] The improvement must conform to the petition.[44] It has been held that an ordinance may be operative against abutting owners who have consented, although other owners have withheld their consent.[45]

(c) *Alteration or Vacation of Streets or Other Ways.* A municipality ordinarily has the power to alter or vacate its streets,[46] but the exercise of this power

37. *California.*—Gately *v.* Leviston, 63 Cal. 365; Dyer *v.* Miller, 58 Cal. 585.

Colorado.— Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825.

Indiana.— Case *v.* Johnson, 91 Ind. 477; Covington *v.* Nelson, 35 Ind. 532.

Kansas.— Steinmuller *v.* Kansas City, 3 Kan. App. 45, 44 Pac. 600.

Louisiana.— McGuinn *v.* Peri, 16 La. Ann. 326.

Maryland.— Baltimore *v.* Eschbach, 18 Md. 276; Bouldin *v.* Baltimore, 15 Md. 18; Henderson *v.* Baltimore, 8 Md. 352.

Michigan.—People *v.* Judge Recorder's Ct., 40 Mich. 64.

Minnesota.— Bradley *v.* West Duluth, 45 Minn. 4, 47 N. W. 166.

Nebraska.— State *v.* Birkhauser, 37 Nebr. 521, 56 N. W. 303; Von Steen *v.* Beatrice, 36 Nebr. 421, 54 N. W. 677.

New Jersey.— Woodruff *v.* Elizabeth, 30 N. J. L. 176.

New York.— Jex *v.* New York, 103 N. Y. 536, 9 N. E. 39; *In re* Delaware, etc., Canal Co., 8 N. Y. Suppl. 352; Brooklyn *v.* Patchen, 8 Wend. 47. See also Elwood *v.* Rochester, 43 Hun 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238].

Pennsylvania.— Pittsburg *v.* Walter, 69 Pa. St. 365; *In re* Frederick St., 11 Pa. Co. Ct. 114; Spring Garden Com'rs *v.* Wistar, 9 Leg. Int. 102.

United States.— Liebman *v.* San Francisco, 24 Fed. 705.

See 36 Cent. Dig. tit. "Municipal Corporations," § 741.

Who may consent.— The lessee for ninety-nine years, or for ninety-nine years renewable forever and not the owner of the fee, has been held the owner or proprietor whose assent to the paving of unpaved streets was necessary. Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195.

Extension of street.— Where a provision of a charter required the trustees to lay out and establish a street, on the application of a majority of the lot owners, "such applicants being also the owners of more than one-half of the land to be taken," and the words so quoted were omitted in a provision with relation to the discontinuance or maintenance of the street, they will not be construed to be applicable in the case of an extension as well as of a laying out. People *v.* Port Jervis, 100 N. Y. 283, 3 N. E. 194.

Connection of pavements.— Under the statutes of some states authority to pave, without petition, is granted only in case it is necessary to connect streets or portions of streets theretofore paved and improved. *In re* Queen St., 18 Pa. Super. Ct. 241, holding that an ordinance passed without petition was invalid where it failed to provide for the paving of a portion of a street which was intersected by the tracks of a railroad company, and an alley alongside of the same, although by direction of the street committee the alley was paved at the same time.

38. Farraher *v.* Keokuk, 111 Iowa 310, 82 N. W. 773; Henderson *v.* South Omaha, 60 Nebr. 125, 82 N. W. 315; Pell *v.* New York, 31 Misc. (N. Y.) 664, 65 N. Y. Suppl. 34; Miller *v.* Amsterdam, 149 N. Y. 288, 43 N. E. 632 [*affirming* 78 Hun 609, 28 N. Y. Suppl. 1021]; Philadelphia *v.* Lea, 5 Phila. (Pa.) 77. See also Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195.

39. *In re* Smith, 99 N. Y. 424, 2 N. E. 52; *In re* Garvey, 77 N. Y. 523; Dean *v.* Madison, 9 Wis. 402.

40. Shrum *v.* Salem, 13 Ind. App. 115, 39 N. E. 1050; Wilkin *v.* Houston, 48 Kan. 584, 30 Pac. 23; Huling *v.* Bandera Flag Stone Co., 87 Mo. App. 349.

41. Auditor-Gen. *v.* Chase, 132 Mich. 630, 94 N. W. 178; Goodwillie *v.* Detroit, 103 Mich. 283, 61 N. W. 526; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916.

42. Donovan *v.* Oswego, 90 N. Y. App. Div. 397, 86 N. Y. Suppl. 155 [*reversing* 39 Misc. 291, 76 N. Y. Suppl. 562].

43. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

44. Watkins *v.* Griffith, 59 Ark. 344, 27 S. W. 234, holding that where the petition was simply that a street be graded and graveled at a total cost of not more than seven hundred and fifty dollars, the board of improvement could not change the work to macadamizing and guttering the street at a cost of five thousand three hundred and fifty-nine dollars.

45. Grace *v.* Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482 [*modifying* (Civ. App. 1901) 61 S. W. 1103].

46. Lafayette *v.* Fowler, 34 Ind. 140; Read *v.* Camden, 54 N. J. L. 347, 24 Atl. 549; State *v.* Camden, 53 N. J. L. 322, 21 Atl. 565 [*reversed* on other grounds in 54 N. J.

is sometimes made to depend on petition or consent of the persons affected.[47] Where the consent of abutting owners is required to change a grade, a further consent is not necessary to render valid slight changes and modifications in the grade during the course of paving, where one consent has been obtained.[48] Where the owners of land abutting upon a proposed improvement are required to consent to the vacation of a street, the consent of owners further along the street is not necessary.[49] When powers have been conferred upon park commissioners, by statute, it has been held that such powers are not limited by the limitations imposed by another statute upon the council in changing the grade of a street, without the consent of abutting owners.[50]

(D) *Construction of Sewers and Drains.* In the absence of express provision to the contrary,[51] a municipality may construct sewers, even under a special assessment act, without regard to the wishes of abutting property-owners.[52]

(III) *Recommendation by Particular Officers or Boards.* The duty of recommending improvements is sometimes imposed by charter or statute upon a designated board, but ordinarily such recommendation is not a condition precedent to action by the council.[53]

c. Right or Duty of Property-Owner to Make Improvement — (I) *In General.*[54] Although it is usual for the municipality to undertake the work of improvement and simply assess the costs upon the property benefited,[55] property-owners who are interested may, without violation of public policy, be permitted to do the work themselves.[56] So in some jurisdictions it is provided by statute that abutting

L. 347, 24 Atl. 549]; State *v.* Jersey City, 52 N. J. L. 490, 19 Atl. 1096; Excelsior Brick Co. *v.* Haverstraw, 142 N. Y. 146, 36 N. E. 819; *In re* Buhler, 32 Barb. (N. Y.) 79, 19 How. Pr. 317; Corry *v.* Cincinnati, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194. See also *supra*, XIII, A, 2, c, (v). But see Rogers *v.* Attica, 113 N. Y. App. Div. 603, 98 N. Y. Suppl. 665, holding that a statute requiring that no road shall be altered unless all the claims for damages shall be released did not cover a change in grade.

47. Gargan *v.* Louisville, etc., R. Co., 89 Ky. 212, 12 S. W. 259, 6 L. R. A. 340; Carron *v.* Den, 26 N. J. L. 594, 69 Am. Dec. 584; Mott *v.* New York, 2 Hilt. (N. Y.) 358; James *v.* Darlington, 71 Wis. 173, 36 N. W. 834; Warren *v.* Wausau, 66 Wis. 206, 28 N. W. 187; Pettibone *v.* Hamilton, 40 Wis. 402. See also Folmsbee *v.* Amsterdam, 142 N. Y. 118, 36 N. E. 821 [*affirming* 66 Hun 214, 21 N. Y. Suppl. 42].

A permissive statute which authorizes municipal corporations to widen streets, on the petition of a majority of the owners of abutting property, does not repeal by implication a statute authorizing borough councils, of their own motion, to pass ordinances for widening streets. *In re* Frederick St., 150 Pa. St. 202, 24 Atl. 669.

48. O'Reilley *v.* Kingston, 114 N. Y. 439, 21 N. E. 1004 [*affirming* 39 Hun 285].

49. Grant's Appeal, 23 Pittsb. Leg. J. N. S. (Pa.) 219.

50. *In re* Walter, 83 N. Y. 538 [*affirming* 21 Hun 533].

51. Bacon *v.* Nanny, 5 Silv. Sup. (N. Y.) 1, 7 N. Y. Suppl. 804.

52. Park Ecclesiastical Soc. *v.* Hartford, 47 Conn. 89; St. Louis *v.* Œters, 36 Mo. 456; Brewster *v.* Syracuse, 19 N. Y. 116; Erie *v.* Flint, 8 Pa. Co. Ct. 482. But see Van Brunt *v.* Flatbush, 128 N. Y. 50, 27 N. E. 973 [*reversing* 59 Hun 192, 13 N. Y. Suppl. 545], holding that where a trunk sewer was solely for the benefit of the inhabitants of the town of Flatbush, it could not be constructed through a street of the town of Flatlands, without the consent of the owners of the soil, or in the absence of such consent, without the condemnation of such owners' rights as provided in the act authorizing its construction.

Private drain.— Under a charter which empowers the council of a borough to authorize the construction of sewers in the streets, it may authorize a citizen to construct a private underdrain along a public street, without the consent of the abutting landowners. Wood *v.* McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L. R. A. 715.

53. *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; St. Louis *v.* Œters, 36 Mo. 456; Toledo *v.* Lake Shore, etc., R. Co., 4 Ohio Cir. Ct. 113, 2 Ohio Cir. Dec. 450; Longworth *v.* Cincinnati, 10 Ohio Dec. (Reprint) 683, 23 Cinc. L. Bul. 100. But see Brophy *v.* Landman, 28 Ohio St. 542; Stephan *v.* Daniels, 27 Ohio St. 527; Reynolds *v.* Schweinefus, 27 Ohio St. 311.

54. Liability of street railroad for maintenance and repair of street see STREET RAILROADS.

55. See *infra*, XIII, E.

56. Springfield *v.* Harris, 107 Mass. 532; Bergen *v.* State, 32 N. J. L. 490. See McKeesport *v.* Wood, 160 Pa. St. 113, 28 Atl. 574; Burton *v.* Laing, (Tex. Civ. App. 1896) 36 S. W. 298.

Delegation of police power.—An ordinance providing for the construction of a sewer does not, by authorizing property-owners within the district assessed for its construction to make connections therewith, the right

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held under them that a landowner cannot be required to cut down an embankment.[64] The power to require the building of sidewalks includes the power to compel their repair or rebuilding,[65] but such power cannot be exercised in the absence of necessity.[66] A requirement that property-owners shall lay a water pipe under a public street, at their own expense, is not a valid exercise of the police power.[67] But a requirement that persons desiring to use city water shall construct the necessary service pipes at their own expense is just and reasonable.[68] The owner of a private drain may by statute be made liable for its repairs.[69] A private individual engaged in improving streets for the benefit and convenience of his own property cannot cut down the grade of an existing street, to the detriment of an abutting owner.[70] Where work has been done under authority of the proper municipal officers, the act of the property-owner is regarded as the act of the city and is subject to such changes as the city may require.[71]

(II) *Opportunity as Prerequisite to Award of Contract or Assessment.* If it is provided by statute that the abutting owner be given an opportunity to make an improvement before the same be made by the city and the cost assessed to him, failure by the city to give the property-owner an opportunity to make a proposed improvement will defeat an assessment levied against him[72] or may invalidate the contract for the improvement;[73] but if being notified the

478, 90 Am. St. Rep. 922; Greendale *v.* Suit, 163 Ind. 282, 71 N. E. 658; Clay City *v.* Bryson, 30 Ind. App. 490, 66 N. E. 498; Charlestown *v.* Stone, 15 Gray (Mass.) 40; Milesburg *v.* Green, 10 Pa. Cas. 372, 14 Atl. 256.

Property subject.— The word "lot" in a charter which authorizes a city to require the owners of lots to pave, etc., is applicable to a piece of land which has not been platted and recorded. Buell *v.* Ball, 20 Iowa 282.

Persons liable.—A mortgagee out of possession is not the proprietor of the mortgaged premises within a charter providing that the council may order the proprietor of the land fronting on sidewalks and gutters to level, raise, or form such sidewalks or gutters. Norwich *v.* Hubbard, 22 Conn. 587.

64. Little Rock *v.* Fitzgerald, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496; Hillhouse *v.* New Haven, 62 Conn. 344, 26 Atl. 393; Chester *v.* Lane, 24 Pa. Super. Ct. 359.

65. Heath *v.* Manson, 147 Cal. 694, 82 Pac. 331; Emporia *v.* Gilchrist, 37 Kan. 532, 15 Pac. 532; Walker *v.* Detroit, 143 Mich. 427, 106 N. W. 1123; Smith *v.* Kingston Borough, 120 Pa. St. 357, 14 Atl. 170. See also Woodward *v.* Boscobel, 84 Wis. 226, 54 N. W. 332.

66. Reading City *v.* Heilman, 19 Pa. Super. Ct. 422, holding that the city had no power where the curb and pavement was in good condition to require property-owners to recurb a street, without regard to existing conditions, and in a manner which was a departure from preëxisting regulations.

67. Doughten *v.* Camden, 72 N. J. L. 451, 63 Atl. 170, 111 Am. St. Rep. 680, 3 L. R. A. N. S. 817.

68. Prindiville *v.* Jackson, 79 Ill. 337.

69. Bangor *v.* Lansil, 51 Me. 521, holding that where in filling up a lot an owner constructed a drain for the flow of surface water from the highway, it was not a private drain which the street commissioners were authorized to repair at the expense of the owners.

70. Cunningham *v.* Fitzgerald, 138 N. Y. 165, 33 N. E. 840, 20 L. R. A. 244; Swan *v.* Colville, 19 R. I. 161, 32 Atl. 854.

71. South Highland Land, etc., Co. *v.* Kansas City, 100 Mo. App. 518, 75 S. W. 383, so holding where a property-owner graduated a street in a city and constructed a wall as a part of the work under authority of the city board of public works. See also Brown *v.* Turtle Creek, 33 Pittsb. Leg. J. N. S. (Pa.) 117, 16 York Leg. Rec. 102.

72. *California.*— Burke *v.* Turney, 54 Cal. 486; Cochran *v.* Collins, 29 Cal. 129.

Colorado.— Denver *v.* Dunning, 33 Colo. 487, 81 Pac. 259.

Missouri.— Leach *v.* Cargil, 60 Mo. 316.

New York.— Cowen *v.* West Troy, 43 Barb. 48.

Pennsylvania.— Chester City *v.* Lane, 24 Pa. Super. Ct. 359; Allentown *v.* Light, 15 Pa. Dist. 619; Philadelphia *v.* Meighan, 15 Pa. Dist. 10; Manheim *v.* Cogley, 4 Lanc. L. Rev. 297; Bridgeport *v.* Bate, 22 Montg. Co. Rep. 87.

South Carolina.— Columbia *v.* Hunt, 5 Rich. 550.

See 36 Cent. Dig. tit. "Municipal Corporations," § 746.

Construction of sidewalk.— California Imp. Co. *v.* Quinchard, 119 Cal. 87, 51 Pac. 24; Storrs *v.* Chicago, 208 Ill. 364, 70 N. E. 347; Western Springs *v.* Hill, 177 Ill. 634, 52 N. E. 959; Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933; Hawley *v.* Ft. Dodge, 103 Iowa 573, 72 N. W. 756; Horbach *v.* Omaha, 54 Nebr. 83, 74 N. W. 434.

Requirement of patented material.—A requirement in a paving contract that the material to be used shall be bituminous rock does not render such contract void, as preventing property-owners from doing the work themselves, as provided by statute, although all the modes of preparing such paving material are covered by patents. N. P. Perine Contracting, etc., Co. *v.* Quackenbush, 104 Cal. 684, 38 Pac. 533.

73. State *v.* Foster, 94 Minn. 412, 103

property-owner does not avail himself of the opportunity, he cannot afterward object that a contract was let before the expiration of the time allowed him to make the improvement.[74]

(III) *Notice to Improve.* Notice to property-owners to make the proposed improvement is usually required, and is a condition precedent to letting a contract by the city.[75] And where an improvement has been ordered without notice to the property-owner, it has been held that he may recover the difference between the amount charged by the city and the amount which it would have cost him to construct it.[76] And it has also been held that he is not estopped to object to paying the cost of the improvement by the fact that he sees it being constructed and makes no objection.[77] The character of the notice depends largely upon the wording of the statute or ordinance,[78] as does the manner of service.[79] The notice must contain specifications of the improvement,[80] and must identify the

N. W. 14; Newbery *v.* Fox, 37 Minn. 141, 33 N. W. 333, 5 Am. St. Rep. 830.

74. Springfield *v.* Mills, 99 Mo. 141, 72 S. W. 462; Galveston *v.* Heard, 54 Tex. 420.

75. *California.*— Manning *v.* Den, 90 Cal. 610, 27 Pac. 435.

Louisiana.— Redersheimer *v.* Bruning, 113 La. 343, 36 So. 990.

Nebraska.— Lincoln *v.* Janesch, 63 Nebr. 707, 89 N. W. 280; Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45, holding that where a statute provided that the owner should be notified and allowed to construct a sidewalk ordered, the council was without jurisdiction to assess the property unless such notice and privilege were given.

Pennsylvania.— Angle *v.* Stroudsburg Borough, 29 Pa. Super. Ct. 601; Pittsburg *v.* Biggert, 23 Pa. Super. Ct. 540; Philadelphia *v.* Donath, 13 Phila. 4.

Wisconsin.— Johnston *v.* Oshkosh, 21 Wis. 184; Rogers *v.* Milwaukee, 13 Wis. 610.

United States.— Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,534, 3 Woods 287.

See 36 Cent. Dig. tit. "Municipal Corporations," § 747.

76. Philadelphia *v.* Meighan, 159 Pa. St. 495, 28 Atl. 304.

77. Clay City *v.* Bryson, 30 Ind. App. 490, 66 N. E. 498.

78. Carroll *v.* Irvington, 50 N. J. L. 361, 12 Atl. 712.

Period of notice.—Where an ordinance fixes sixty days as the period of notice to lay sidewalks, a subsequent ordinance fixing thirty days is bad, although the first ordinance applied to certain streets only. Angle *v.* Stroudsburg Borough, 29 Pa. Super. Ct. 601.

Ordinance as notice.— Under a city ordinance providing that the city council might cause the construction of certain sidewalks along the street line of lots belonging to non-residents and assess the costs thereof to the property, if the same were not constructed by the owner within fifteen days after the publication of a notice to him, the city council obtained the right to construct such improvements and assess the costs thereof, even though the notice named a date for the construction thereof by the owner less than fifteen days subsequent to the last publication. The provisions of the city charter and ordinances become a part of the notice, and the property-owner is bound thereby. State *v.* Several Parcels of Land, (Nebr. 1906) 107 N. W. 566.

79. See the cases cited *infra*, this note.

Sufficiency of service.—A provision in the charter that notice shall be served upon the owner or his agent requires personal service, not notice through the mail. Rathbun *v.* Acker, 18 Barb. (N. Y.) 393. An advertisement for bids will not be construed as notice. Leach *v.* Cargill, 60 Mo. 316. It is not sufficient to serve one having charge of realty under a power of attorney, whereby he is empowered to sell the same and generally "to do, exercise, execute, proceed and finish in all things in as ample manner as we might do if personally present." Hanover *v.* Ebert, 17 York Leg. Rec. (Pa.) 146. Nor is a notice directed to the heirs of George Ebert, without naming them, sufficient. Hanover *v.* Ebert, *supra*. A notice to pave a sidewalk by the municipal authorities, given to "Patrick Fay's estate, per Mrs. B. Fay," is sufficient, even though "Patrick Fay" had been long dead, and never owned the property in question, but it was actually, and had been, the property of "Mrs. B. Fay." Pittsburg *v.* Fay, 8 Pa. Super. Ct. 269, 43 Wkly. Notes Cas. 78. A notice to a non-resident owner by means of a letter sent through the post-office, without any service on the occupant, is sufficient. Black *v.* Roebuck, 8 Del. Co. (Pa.) 57. Where personal service is required, it is not sufficient to leave a notice at the owner's boarding-house in his absence. Simmons *v.* Gardiner, 6 R. I. 255. A requirement that notice be left or placed upon the premises is not satisfied by placing a notice on the premises, but under a stone which covers it entirely. Philadelphia *v.* Edwards, 78 Pa. St. 62.

Proof of notice.— The fact that a city ordinance requires proof by affidavit of the publication of a notice to non-resident property-owners, to construct sidewalks, does not prevent the fact of publication being proved by other evidence. State *v.* Several Parcels of Land, (Nebr. 1906) 107 N. W. 566.

80. Tufts *v.* Charlestown, 98 Mass. 583; Myrick *v.* La Crosse, 17 Wis. 442. See also Heath *v.* Manson, 147 Cal. 694, 82 Pac. 331.

property.[81] In the absence of legislative requirement, the municipality need not give actual notice.[82]

(iv) *Compliance With Order.* When an improvement or repair is made by a property-owner, the sufficiency of the work is a question for the city authorities.[83]

(v) *Time Allowed For Making Improvements.* The time allowed for making an improvement is usually fixed by ordinance,[84] and it is no defense that it was insufficient;[85] but an ordinance requiring a lot owner to build a sidewalk within five days and on his default ordering the same to be built at his expense is void for unreasonableness,[86] and if a city be required by charter to establish the permanent grade of a street before directing abutting owners to lay sidewalks, such owners need not comply with an order to construct sidewalks until after the grade has been so established by the city.[87]

d. Basis or Plan of Improvement, and Mode and Time of Doing Work — (i) *General Basis or Plan of Improvement* — (a) *In General.* Under a general power to construct an improvement it is usually held that the plan of the improvement is to some extent discretionary.[88] So under power to improve streets, a municipality may exercise reasonable discretion as to the plan of improvement,[89] unless the same be specified by charter or statute,[90] and a property-

But see Moore *v.* Fairport, 11 Misc. (N. Y.) 146, 32 N. Y. Suppl. 633, holding that where the village trustees established a line for a new sidewalk and directed plaintiff to construct a sidewalk on such line, and he, notwithstanding, located it on a different line, a notice to him to remove it to the established line need not give a specific description of the sidewalk.

Variance.—A pier ninety feet long is improperly constructed under a notice contemplating one seventy-two feet long. Marshall *v.* Guion, 4 Den. (N. Y.) 581.

81. Simmons *v.* Gardiner, 6 R. I. 255.

82. Shrum *v.* Salem, 13 Ind. App. 115, 39 N. E. 1050; Galveston *v.* Heard, 54 Tex. 420.

83. Covington *v.* Bishop, 11 S. W. 199, 10 Ky. L. Rep. 939; Cincinnati *v.* Longworth, 10 Ohio Dec. (Reprint) 598, 22 Cinc. L. Bul. 153.

Infirmities which avoid an ordinance to compel the construction of sidewalks will not warrant an abutting owner in constructing them in a way and of material different from that prescribed. Drew *v.* Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814. But where the proceedings of a town council with reference to requiring the construction of a sidewalk were irregular and insufficient, and the walk actually constructed by a lot owner was not in accordance with such requirements, he could not be compelled to construct another walk until there was a further resolution, and a further notice thereunder, as required by the ordinance. Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933.

84. Loughridge *v.* Huntington, 56 Ind. 253; Nugent *v.* Jackson, 72 Miss. 1040, 18 So. 493.

85. Fass *v.* Seehawer, 60 Wis. 525, 19 N. W. 533.

86. Auditor-Gen. *v.* Hoffman, 129 Mich. 541, 89 N. W. 348.

87. Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933; Chester City *v.* Lane, 24 Pa. Super. Ct. 359; Waukesha *v.* Randles, 120 Wis. 470, 98 N. W. 237.

88. See Walter *v.* McClellan, 48 Misc. (N. Y.) 215, 96 N. Y. Suppl. 479.

89. Lightner *v.* Peoria, 150 Ill. 80, 37 N. E. 69; Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656, 25 N. E. 962; Brown *v.* Barstow, 87 Iowa 344, 54 N. W. 241; Franklin Wharf Co. *v.* Portland, 67 Me. 46, 24 Am. Rep. 1; Koch *v.* Milwaukee, 89 Wis. 220, 62 N. W. 918.

Improvement of one side of street.— Under a power to order an improvement of a street, or part of a street, an order for the construction of a sidewalk upon one side only of the street is good. State *v.* Portage, 12 Wis. 562.

Parking center of street.— Under the general power to improve streets, the city council have a discretionary power to sod and park the center of a street, where it is not needed for travel. Murphy *v.* Peoria, 119 Ill. 509, 9 N. E. 895.

90. Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933; State *v.* Trenton Bd. of Public Works, (N. J. Sup.) 29 Atl. 158; Mills *v.* Norwood, 6 Ohio Cir. Ct. 305, 3 Ohio Cir. Dec. 465; Kensington Com'rs *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582; Matter of Fairmount Place, 12 Phila. (Pa.) 586.

Drainage.— Where an act of the legislature contemplates a plan of draining the territory embraced within the map therein referred to, by a main sewer running through certain streets in said act designated, with such lateral sewers as the commissioners of sewers may deem necessary for the proper drainage of the said territory, the said commissioners have no right to abandon the single sewer and adopt a plan substituting therefor two main sewers. Hoboken *v.* Chamberlain, 37 N. J. L. 51.

Retroactive effect of statute.—An act prohibiting the construction of a sewer in the city of New York unless in accordance with

owner by voluntarily making an improvement in the street cannot preclude the city from carrying out a general improvement in the same street.[91]

(B) *Width and Grade of Streets.* Unless restricted by charter or statute,[92] a municipality, in the exercise of general power over its streets, may, at its discretion, change the width or grade.[93]

(II) *Material For Construction.*[94] The right to determine upon the material to be used in an improvement is usually vested in the council and its decision, except in extreme cases,[95] is final.[96] Although the power to open, grade, and pave streets is legislative, it is held that selection of the kind of a pavement to be laid is ministerial and may be intrusted to an officer under whose direction the opening, grading, and paving of the street is placed by law.[97] A statute or charter providing that the property-owners shall have the right to select the material for an improvement from not less than two kinds designated does not contemplate that there shall be a right of selection between kinds, qualities, or makes of the material specified.[98] Where property-owners are given the right to choose the material with which a street shall be paved, but no mode is prescribed for ascertaining their wishes, the city authorities may assume that they have waived their rights in case they do not move in the matter.[99]

a general plan applies to cases where proposals have been advertised for and bids opened before the passage of such act. *In re* New York Protestant Episcopal Public School, 46 N. Y. 178 [*reversing* 58 Barb. 161, 40 How. Pr. 139].

91. Parsons *v.* Columbus, 50 Ohio St. 460, 34 N. E. 677.

92. Napa *v.* Easterby, 61 Cal. 509; *In re* Drum St., 6 Phila. (Pa.) 84.

93. Himmelmann *v.* Hoadley, 44 Cal. 213; Thibodeaux *v.* Maggioli, 4 La. Ann. 73; Taintor *v.* Morristown, 33 N. J. L. 57.

Fixing different grades for opposite sides of street.—A city council having general authority to establish the grades of streets may, under peculiar circumstances, fix the grade for one side of a street on a materially different level or plane from that of the other side, and, if necessary, construct a retaining wall along the center of the street, to support the earth on the higher grade; such an exercise of public rights not being an infringement of the rights of an adjacent proprietor, whose property may be injured thereby. Yanish *v.* St. Paul, 50 Minn. 518, 52 N. W. 925.

94. Designation of material in petition for improvement see *infra*, XIII, B, 2, a.

Provisions in contract for monopolized or patented articles or materials see *infra*, XIII, C, 1, f.

95. Burlington, etc., R. Co. *v.* Spearman, 12 Iowa 112; Hood *v.* Lebanon, 15 S. W. 516, 12 Ky. L. Rep. 813 (holding that the improvement required by a town must be useful and reasonable in character, but that within such limits the town may regulate the material to be used); Huling *v.* Bandera Flag Stone Co., 87 Mo. App. 349; Oxford Borough *v.* Alexander, 2 Chest. Co. Rep. (Pa.) 265.

Street crossings.— In the absence of a provision in an act providing for the paving of streets with granite blocks, as to the materials of which cross walks are to be made, the commissioners may select the material from which the crossings may be best made, and the act is not invalid for that reason. Berg *v.* Grace, 1 N. Y. St. 418.

96. *Illinois.*—Cram *v.* Chicago, 138 Ill. 506, 28 N. E. 757.

Louisiana.— Gunning Gravel, etc., Co. *v.* New Orleans, 45 La. Ann. 911, 13 So. 182.

Michigan.— Grand Rapids *v.* Grand Rapids Public Works, 99 Mich. 392, 58 N. W. 335 (holding that where a city charter permitted streets to be paved, either upon petition of a majority of the abutting owners or by a five-sixths vote of the common council, the council's designation of material in the latter case was binding on the board of public works); Grand Rapids *v.* Grand Rapids Public Works, 87 Mich. 113, 49 N. W. 481.

Missouri.— Kansas City *v.* Askew, 105 Mo. App. 84, 79 S. W. 483.

New York.— Schenectady *v.* Union College, 66 Hun 179, 21 N. Y. Suppl. 147.

Pennsylvania.— Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. 200; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Wisconsin.— Benson *v.* Waukesha, 74 Wis. 31, 41 N. W. 1017.

See 36 Cent. Dig. tit. "Municipal Corporations," § 752.

Different pavements upon opposite sides of street.— Where the charter provides that the city may pave one side of a street where the other has been improved before, it may require a pavement different in kind and cost from the one on the opposite side of the street. O'Brien *v.* Markland, 6 S. W. 713, 9 Ky. L. Rep. 773.

97. Loughry *v.* Pittsburgh, 29 Pittsb. Leg. J. N. S. (Pa.) 426.

98. Ross *v.* Gates, 183 Mo. 338, 81 S. W. 1107, holding that an ordinance was valid which specified the kind of asphalt, the kind of brick, and the kind of macadam which might be used, and it was not necessary to designate two kinds of macadam for selection.

99. Moale *v.* Baltimore, 61 Md. 224.

(III) *Mode of Doing Work* — (A) *In General.* Unless expressly provided for by statute or charter,[1] the manner of making improvements lies within the discretion of the municipality,[2] and when the mode of doing the work is designated by ordinance, it must be followed, except in minor details, by the ministerial officers who are charged with carrying it out.[3] In case it is necessary that there be an attempt made to agree with the owners of property as to how the work shall be done, the making of such attempt is sufficiently shown by the fact that notice is given to the persons interested, of a time and place at which they may be heard.[4]

(B) *Contract or Work Under Direct Supervision of City.* It is usually provided by charter or statute that work of any magnitude be let by competitive contract;[5] and unless such provision is followed an assessment to pay for the work is invalid;[6] but in the absence of such requirement, a city need not let public work to contractors.[7]

(IV) *Time For Doing Work.* Selection of time for doing the work is within the discretion of the municipality, and this discretion will not be interfered with merely because in the season selected the cost of making an improvement is greater than it would be at another time.[8]

e. Delegation of Power and Grant of Franchise — (I) *Delegation of Power by Municipality.* The power to make improvements is usually vested in the council and may not be delegated.[9] So a council committee or other board or officer may not be empowered by ordinance to exercise discretion as to the opening,[10]

1. See Thomson *v.* Boonville, 61 Mo. 282, holding that where a city charter gave the mayor and city council authority to regulate, pave, and improve its streets, the mode prescribed by the charter for the performance of such work must be strictly pursued.

2. Boyce *v.* Tuhey, 163 Ind. 202, 70 N. E. 531; Downing *v.* Des Moines, 124 Iowa 289, 99 N. W. 1066; Barber Asphalt Paving Co. *v.* Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227; Hood *v.* Lebanon, 15 S. W. 516, 12 Ky. L. Rep. 813.

3. Martin *v.* Oskaloosa, 126 Iowa 680, 102 N. W. 529; Barber Asphalt Paving Co. *v.* Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227.

4. Lawrence *v.* Webster, 167 Mass. 513, 46 N. E. 123, where the city council ordered that certain lands should be filled to abate a nuisance and gave notice to the owners that at a time and place named it would order the lands to be filled and would assess the expense of such filling, or a portion of it, to the owners.

5. See the statutes of the several states. And see *In re* Weil, 83 N. Y. 543; *In re* Emigrant Industrial Sav. Bank, 75 N. Y. 388; Boas *v.* New York, 85 Hun (N. Y.) 311, 32 N. Y. Suppl. 967; Smith *v.* New York, 82 Hun (N. Y.) 570, 31 N. Y. Suppl. 783 [*affirmed* in 145 N. Y. 641, 41 N. E. 90]; *In re* Newton, 19 Hun (N. Y.) 470.

6. *In re* Blodgett, 91 N. Y. 117; *In re* Robbins, 82 N. Y. 131; Matter of New York Presbytery, 9 Daly (N. Y.) 116.

7. Geiger *v.* Filor, 8 Fla. 325; People *v.* Peyton, 214 Ill. 376, 73 N. E. 768; Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618; Monroe *v.* Johnson, 106 La. 350, 30 So. 840. And see Home Bldg., etc., Co. *v.* Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551, holding that a city charter requiring all contracts for public improvements to be let to the lowest responsible bidder does not prohibit the city from constructing approaches to a bridge under direction of its own engineers and officers.

Repairs.— Substantial repair of a pavement falls within a city ordinance requiring repairs to be done by the supervisors of the highways, by means of labor, and not by contract when it is not a renewal or second construction. Lea *v.* Philadelphia, 32 Leg. Int. (Pa.) 292.

8. Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. 200.

9. Kreigh *v.* Chicago, 86 Ill. 407; Hydes *v.* Joyes, 4 Bush (Ky.) 464, 96 Am. Dec. 311; Scofield *v.* Lansing, 17 Mich. 437; Whyte *v.* Nashville, 2 Swan (Tenn.) 364, holding that the city of Nashville had no power to delegate to any one or more members of the board of aldermen authority to give notice to such citizens as they might select to construct foot pavements in front of their lots, and in the event of the failure to make such pavements within the time fixed by a by-law of the corporation to have them made at the expense of the owner of the lot. And see Baltimore *v.* Clunet, 23 Md. 449, holding that under a provision in an ordinance for opening a street the ordinance shall not take effect until certain things therein specified shall be done, and parties have given their written assent to the provision of the fourth section, it is not a valid objection to these provisions that they "delegate this legislative power over the subject, and make the Ordinance depend for its force and efficacy upon the will of others." And see *supra*, V, A, 1, b.

10. Bodine *v.* Trenton, 36 N. J. L. 198.

Under a constitutional provision authorizing a city to make its own charter in har-

grading,[11] improving,[12] or lighting[13] of streets, laying of sewers,[14] or determining upon costs,[15] or material,[16] or manner,[17] or place of doing the work,[18] nor may the council empower a ministerial officer to extend the time fixed by ordinance for the completion of an improvement.[19] The ministerial function may be validly imposed by the council upon a committee or subordinate officer or board,[20] and an ordinance ordering an improvement is not void because it leaves certain minor details to the discretion of ministerial officers.[21] Hence an ordi-

mony with the constitution and laws of the state, and subject thereto, it has been held that a city might by its charter confer upon a court special jurisdiction in street opening proceedings. St. Louis *v.* Gleason, 15 Mo. App. 25 [*reversed* on other grounds in 89 Mo. 67, 14 S. W. 768].

11. *Michigan.*—Chilson *v.* Wilson, 38 Mich. 267.

Missouri.—Koeppen *v.* Sedalia, 89 Mo. App. 648.

Ohio.— Lippleman *v.* Cincinnati, 10 Ohio Dec. (Reprint) 825, 21 Cinc. L. Bul. 216.

Pennsylvania.— Scranton *v.* McDonough, 1 Lack. Leg. N. 177.

Rhode Island.—Rounds *v.* Mumford, 2 R. I. 154.

See 36 Cent. Dig. tit. "Municipal Corporations," § 756.

Delegation to a railroad company for its private advantage, at the expense of property-owners, is unlawful. Egbert *v.* Lake Shore, etc., R. Co., 6 Ind. App. 350, 33 N. E. 659.

12. Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794; Merrill *v.* Abbott, 62 Ind. 549; Murray *v.* Tucker, 10 Bush (Ky.) 240; Haag *v.* Ward, 186 Mo. 325, 85 S. W. 391; Thomson *v.* Boonville, 61 Mo. 282; Sheehan *v.* Gleeson, 46 Mo. 100; Ruggles *v.* Collier, 43 Mo. 353; Young *v.* Kansas City, 27 Mo. App. 101.

Sidewalks.— Discretion as to the construction and maintenance of sidewalks cannot be delegated. Macon *v.* Patty, 57 Miss. 378, 34 Am. Rep. 451; Ramsey *v.* Field, 115 Mo. App. 620, 92 S. W. 350; Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105 [*reversing* 7 Hun 351]; McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653. See also Gallaher *v.* Smith, 55 Mo. App. 116, holding that an ordinance providing that a sidewalk might at the option of the contractor be constructed of pine, white, or burr oak of certain dimensions, did not delegate legislative authority, and was valid.

Correction of description.— A committee estimating the cost of improving a street, as provided for by ordinance, has no discretion to omit from the estimate any part of the improvement so as to remedy an insufficient description in the ordinance. Illinois Cent. R. Co. *v.* Effingham, 172 Ill. 607, 50 N. E. 103.

13. Minneapolis Gas Light Co. *v.* Minneapolis, 36 Minn. 159, 30 N. W. 450; Gulf, etc., R. Co. *v.* Riordan, (Tex. 1893) 22 S. W. 519.

14. Weaver *v.* Canon Sewer Co., 18 Colo. App. 242, 70 Pac. 953; St. Louis *v.* Clemens, 52 Mo. 133.

15. Merritt *v.* Portchester, 29 Hun (N. Y.) 619.

16. St. Joseph *v.* Wilshire, 47 Mo. App. 125; Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

17. Grant *v.* Barber, 135 Cal. 188, 67 Pac. 127; Moore *v.* Chicago, 60 Ill. 243; Foss *v.* Chicago, 56 Ill. 354; People *v.* Haverstraw, 137 N. Y. 88, 32 N. E. 1111; Phelps *v.* New York, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626; Tappan *v.* Young, 9 Daly (N. Y.) 357; Matter of New York Presbytery, 57 How. Pr. (N. Y.) 500.

18. Richardson *v.* Heydenfeldt, 46 Cal. 68.

19. McQuiddy *v.* Brannock, 70 Mo. App. 535.

20. Dorman *v.* Lewiston, 81 Me. 411, 17 Atl. 316; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916. See also Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794 (holding that an ordinance giving the city engineer supervision of an improvement to see that the work done and the material used are in accordance with the ordinance did not delegate a power vested in the council); Page *v.* Chicago, 60 Ill. 441 (holding that an ordinance for the curbing of a street "with curb walls where curb walls are not already built" did not confer any discretion on the board of public works and was valid); Burchell *v.* New York, 9 N. Y. Suppl. 196 (holding that an ordinance for the paving of an avenue, which provided for the relaying of cross walks which, in the opinion of the commissioner of public works, should be found not to be in good repair or not on a grade adapted to the new pavement, was not such an unlawful delegation of authority as to vitiate an assessment made under it).

Making of contract.— Where a city council is vested with power to cause sidewalks in the city to be constructed, it may authorize the mayor and the chairman of the committee on streets and alleys to make in its behalf and pursuant to its directions a contract for doing the work. Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

Change in specifications.— The fact that there are filed with the specifications for a proposed sewer provisions that all work shall be done as directed by the commissioner of public works, and that he reserves the right to change the specifications, does not render the ordinance invalid as delegating to the commissioner power to change the specifications, since the provisions form no part of the ordinance or of the specifications. Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255.

21. Swift *v.* St. Louis, 180 Mo. 80, 79 S. W. 172. See also Guyer *v.* Rock Island, 215 Ill. 144, 74 N. E. 105; Gross *v.* People, 172 Ill.

nance providing for the improvement of a street may direct the city engineer to fix the grade,[22] or intrust to a commissioner the execution of the work,[23] and the estimate and apportionment of the cost,[24] or within specified limitations, the amount of work to be done.[25]

(II) *Power to Grant Franchise or Privilege in General.* It is usually held that a city council has no power to confer an exclusive franchise, unless such power is delegated in clear and unmistakable terms;[26] but where a city, in addition to a grant of general powers, was expressly given the right to erect waterworks, it was held to possess power to grant a corporation a franchise to supply the inhabitants with water.[27] Under charter power to grant a franchise, a municipality may give a corporation the exclusive privilege of maintaining waterworks for a period of years, as against any other company;[28] but the grant of a waterworks franchise will not be construed by implication to divest the municipality of its power to construct an independent waterworks system of its own,[29] although by its contract the city may exclude itself from constructing and operating waterworks of its own for the term covered by the contract.[30] Although a contract with a water company may be void in so far as it attempts to create an exclusive privilege, it will bind the city to pay the price stipulated in the contract as long as it accepts the service offered in pursuance of the contract.[31] A city owning a ferry franchise may convert it into a bridge privilege by permitting the erection of a bridge and agreeing not to exercise the ferry privilege in consideration of annual payments.[32]

f. Mode and Means of Defraying Expenses[33] — (I) *In General.* A municipality, subject to the ordinary legislative limitations as to expenditures and indebtedness, may improve its streets and pay for the same out of its general funds;[34] and a charter or statutory provision allowing special assessments does not

571, 50 N. E. 334 (holding that an ordinance providing that a street to be laid out should be graded according to stakes to be set by the engineer who was required to make the necessary profiles and see that the work was executed according to the specifications in the ordinance gave no discretion to the engineer to determine on the nature of the improvement); Bradley *v.* Van Wyck, 65 N. Y. App. Div. 293, 72 N. Y. Suppl. 1034 (holding that a provision in a specification to the effect that quarries from which the contractor proposed to take stone would be inspected by the architect, and that if the deposit and facilities for quarrying the same were satisfactory to the architect and commissioners of parks they would issue an approval of the same, was in no way illegal or beyond the power of the officers of the city to prescribe).

22. Lake *v.* Decatur, 91 Ill. 596; Taber *v.* New Bedford, 135 Mass. 162.

23. Bowers *v.* Barrett, 85 Me. 382, 27 Atl. 260; Northern Cent. R. Co. *v.* Baltimore, 21 Md. 93; Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908; Atty.-Gen. *v.* Boston, 142 Mass. 200, 7 N. E. 722; Charleston *v.* Pinckney, 3 Brev. (S. C.) 217.

24. Moale *v.* Baltimore, 61 Md. 224; Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1.

25. Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737; Baltimore *v.* Stewart, 92 Md. 535, 48 Atl. 165; Matter of Eager, 46 N. Y. 100, 12 Abb. Pr. N. S. 151.

26. Illinois Trust, etc., Bank *v.* Arkansas City Water Co., 67 Fed. 196. See also *supra*, IX, A, 6, i.

Power to grant exclusive privileges in streets and other public places see *supra*, XII, A, 8, a.

27. Andrews *v.* National Foundry, etc., Works, 61 Fed. 782, 10 C. C. A. 60.

28. Tahlequah *v.* Guinn, 5 Indian Terr. 497, 82 S. W. 886; Palestine *v.* Barnes, 50 Tex. 538; Fergus Falls Water Co. *v.* Fergus Falls, 65 Fed. 586.

29. Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 26 S. Ct. 224, 50 L. ed. 353.

30. Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 26 S. Ct. 660, 50 L. ed. 1102; Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 26 S. Ct. 224, 50 L. ed. 353; Walla Walla Water Co. *v.* Walla Walla, 60 Fed. 957. But see Oakland *v.* Carpentier, 13 Cal. 540.

31. Illinois Trust, etc., Bank *v.* Arkansas City Water Co., 67 Fed. 196.

32. Laredo *v.* International Bridge, etc., Co., 66 Fed. 246, 14 C. C. A. 1.

33. **Assessments for benefits and special taxes** see *infra*, XIII, E.

34. Morrison *v.* King, 100 Ga. 357, 28 S. E. 108; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Memphis *v.* Brown, 20 Wall. (U. S.) 289, 22 L. ed. 264; Dupont *v.* Pittsburgh, 69 Fed. 13; Fergus Falls Water Co. *v.* Fergus Falls, 65 Fed. 586.

Diversion of funds.— The trustees of the village of Lowville, incorporated under the general act for the incorporation of villages,

necessarily deprive the city of this power;[35] but in the absence of express direction,[36] it leaves to the discretion of the municipal authorities the choice of modes for defraying expenses.[37] This right of choice is sometimes expressly given, but under such grant the city may not combine general taxation and special assessment in making a single improvement;[38] and if the city be limited by express provision to the assessment plan, it cannot of course pay for the improvement out of its general fund.[39] In order to make improvements, a municipality may exercise its ordinary power to incur indebtedness;[40] but when following the special assessment method it cannot pledge the general credit of the city,[41] unless expressly authorized.[42]

(II) *Requirement of Means of Payment.* Constitutional or legislative requirements as to the means of paying for an improvement must be observed, before the same may be lawfully made;[43] and it has been held that a city is not liable on a contract for improvements when there is no provision at the date of execution for its payment as required by law,[44] or no appropriation for the purpose

have no power under that act to appropriate the moneys raised for highway purposes to making or repairing sidewalks in that village. Ellis *v.* Lowville, 7 Lans. (N. Y.) 434.

35. *California.*— Chambers *v.* Satterlee, 40 Cal. 497.

Indiana.— Evansville *v.* Summers, 108 Ind. 189, 9 N. E. 81.

Kansas.— Garden City *v.* Trigg, 57 Kan. 632, 47 Pac. 524.

Kentucky.— Guffield *v.* Bowlinggreen, 6 B. Mon. 224.

New Jersey.— Tappan *v.* Long Branch Police Sanitary, etc., Commission, 59 N. J. L. 371, 35 Atl. 1070.

Pennsylvania.— Com. *v.* George, 148 Pa. St. 463, 24 Atl. 59, 61.

Wisconsin.— McCullough *v.* Campbellsport, 123 Wis. 334, 101 N. W. 709.

See 36 Cent. Dig. tit. "Municipal Corporations," § 758.

36. Louisville *v.* Hexagon Tile Walk Co., 103 Ky. 552, 45 S. W. 667, 20 Ky. L. Rep. 236; Covington *v.* Nadaud, 103 Ky. 455, 45 S. W. 498, 20 Ky. L. Rep. 151. See also Central Covington *v.* Weighaus, 44 S. W. 985, 19 Ky. L. Rep. 1979.

37. *Illinois.*— Ricketts *v.* Hyde Park, 85 Ill. 110; Fagan *v.* Chicago, 84 Ill. 227.

Indiana.— Indianapolis *v.* Imberry, 17 Ind. 175.

Iowa.—Shelby *v.* Burlington, 125 Iowa 343, 101 N. W. 101.

Kentucky.— Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 22 Ky. L. Rep. 139; Cassidy *v.* Covington, 16 S. W. 93, 12 Ky. L. Rep. 980.

Missouri.— Kolkmeyer *v.* Jefferson, 75 Mo. App. 678.

New York.— *In re* Turfler, 44 Barb. 46, 19 Abb. Pr. 140.

North Dakota.— Pine Tree Lumber Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

38. Kuehner *v.* Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774.

39. North Pacific Lumbering, etc., Co. *v.* East Portland, 14 Oreg. 3, 12 Pac. 4; Findley *v.* Hull, 13 Wash. 236, 43 Pac. 28.

40. Bigelow *v.* Perth Amboy, 25 N. J. L. 297; Ketchum *v.* Buffalo, 14 N. Y. 356 [*affirming* 21 Barb. 294]; Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

41. Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605; Davies *v.* New Orleans, 40 La. Ann. 806, 6 So. 100; Matter of Drake, 69 Hun (N. Y.) 95, 23 N. Y. Suppl. 264.

Repairs.— Where a city charter provided that "repairs" on streets should be made at the public expense, and it also provided for macadamizing and paving by special assessments, it was held that macadamizing and paving could not be done at the general expense, as "repairs." Murtaugh *v.* Paterson, 45 N. J. L. 267.

42. Argenti *v.* San Francisco, 16 Cal. 255; Perkinson *v.* Schnaake, 108 Mo. App. 255, 83 S. W. 301; Mt. Adams, etc., R. Co. *v.* Cincinnati, 11 Ohio Dec. (Reprint) 149, 25 Cinc. L. Bul. 91; Galveston *v.* Heard, 54 Tex. 420.

43. Noel *v.* San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

Illegal plan.—An act authorizing the making of a public avenue, and directing the commissioners to have a map made of such avenue, and which then provides a specified mode by which the moneys to pay for the expense of the project are to be raised, will not be sustained if the plan for providing such moneys turns out to be illegal. Gaines *v.* Hudson County Ave. Com'rs, 37 N. J. L. 12.

44. Kuhls *v.* Laredo, (Tex. Civ. App. 1894) 27 S. W. 791; Berlin Iron Bridge Co. *v.* San Antonio, 62 Fed. 882. See also Emmert *v.* Elyria, 74 Ohio St. 185, 78 N. E. 269; Lehigh Coal, etc., Co.'s Appeal, 112 Pa. St. 360, 5 Atl. 231, holding that the limitation imposed by the constitution on the authority of municipalities, requiring them to provide means in advance for the payment of their indebtedness, applies only to interest-bearing and other express contract obligations, and not to the ordinary expenses incurred for road repairs.

What constitutes provision.— Where the commissioner of city works has made the requisition on which the mayor, controller, and city clerk are required to borrow money on bonds of the city to pay for certain public improvements, the "means" to pay for such

made.[45] General restrictions of this nature, however, are not applicable when the city is acting under a special improvement law.[46]

(III) *Certificate of Officers as to Sufficiency of Funds.* It is sometimes provided by charter or statute that no obligation for the expenditure of money shall be entered into unless certification be made that the necessary funds are available;[47] but such a provision is not applicable to proceedings in eminent domain for the purpose of street improvements;[48] nor to a contract under a special assessment act for the paving of sidewalks.[49]

(IV) *Assessment Prerequisite to Performance of Work or Letting Contract.* Unless expressly required by constitutional[50] or statutory[51] provision, assessment need not be made before a contract is let or the work performed.[52]

B. Preliminary Proceedings and Ordinances or Resolutions — 1. In General — a. Necessity and Nature of Proceedings in General. Special proceedings for laying out a street or making improvements therein are usually provided for by charter or statute;[53] and unless followed the action of the municipality is void.[54]

b. Constitutional and Statutory Provisions — (I) *In General.* Proceedings to improve streets must be in strict compliance with the legislative provision under which the city acts;[55] and such provision in turn must of course conform

improvements are provided in the meaning of a city charter which says that no contract shall be binding against the city unless the controller shall certify "that the means required to make the payments under such contract are provided and applicable thereto"; and it is immaterial that the bonds have not been sold and the proceeds paid into the treasury. People *v.* Palmer, 13 Misc. (N. Y.) 727, 35 N. Y. Suppl. 231.

45. Tennant *v.* Crocker, 85 Mich. 328, 48 N. W. 577; Cincinnati *v.* Cincinnati, 11 Ohio Cir. Ct. 309, 5 Ohio Cir. Dec. 372; Lowry *v.* Cincinnati, 7 Ohio Dec. (Reprint) 81, 1 Cinc. L. Bul. 102; Harrison *v.* Philadelphia, 3 Phila. (Pa.) 138.

When cost exceeds appropriation.— Under an act limiting the liability of the city to contracts for which sufficient appropriations shall have been previously made by ordinance, the city of Philadelphia is not liable on a contract for the construction of a bridge, not made by any express authority from the councils, for a greater sum than has been appropriated by councils for such work. Continental Bridge Co. *v.* Philadelphia, 34 Leg. Int. (Pa.) 185.

46. *California.*— Rice *v.* Haywards, 107 Cal. 398, 40 Pac. 551.

Connecticut.— Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

Iowa.— *In re* Cedar Rapids, 85 Iowa 39, 51 N. W. 1142.

New Jersey.— Dixey *v.* Atlantic City, 71 N. J. L. 120, 58 Atl. 370.

New York.— Boots *v.* Washburn, 79 N. Y. 207; *In re* Lewis, 51 Barb. 82.

See 36 Cent. Dig. tit. "Municipal Corporations," § 759.

47. See the statutes of the several states. And see Braman *v.* Elyria, 26 Ohio Cir. Ct. 731; Pullen *v.* Smith, 26 Ohio Cir. Ct. 549; Holmes *v.* Avondale, 11 Ohio Cir. Ct. 430, 1 Ohio Cir. Dec. 188.

48. Tyler *v.* Columbus, 6 Ohio Cir. Ct. 224, 3 Ohio Cir. Dec. 427. But see Rhoades *v.* Toledo, 6 Ohio Cir. Ct. 9, 3 Ohio Cir. Dec. 325.

49. Trowbridge *v.* Hudson, 24 Ohio Cir. Ct. 76; Cincinnati *v.* McErlane, 7 Ohio Dec. (Reprint) 535, 3 Cinc. L. Bul. 843.

50. Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860; Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615; Hilton *v.* Heverin, (Cal. 1886) 11 Pac. 27; Thomason *v.* Ruggles, 69 Cal. 465, 11 Pac. 20; Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3; Donahue *v.* Graham, 61 Cal. 276; McDonald *v.* Patterson, 54 Cal. 245.

51. State *v.* Ashland, 88 Wis. 599, 60 N. W. 1001. And see Bork *v.* Buffalo, 127 N. Y. 64, 27 N. E. 355 [*affirming* 2 N. Y. Suppl. 559], holding that a charter prohibiting the city from contracting for any work or improvement "until the assessment therefor has been confirmed" by the common council does not apply to contracts for paving streets made by the board of park commissioners, organized as an independent department of the city government, and given "sole and exclusive power by contract or otherwise to open, grade, construct, repair and maintain" the roadways and approaches to the parks.

52. Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615; Lefevre *v.* Detroit, 2 Mich. 586; Laimbeer *v.* New York, 4 Sandf. (N. Y.) 109; Wetmore *v.* Campbell, 2 Sandf. (N. Y.) 341.

53. See the statutes of the several states. And see Northampton *v.* Abell, 127 Mass. 507; Jersey City *v.* National Docks R. Co., 55 N. J. L. 194, 26 Atl. 145.

54. Improvement Dist. No. 60 *v.* Cotter, 71 Ark. 556, 76 S. W. 552; Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369; State *v.* Lambertville, (N. J. Sup. 1886) 6 Atl. 432; Pooley *v.* Buffalo, 122 N. Y. 592, 26 N. E. 16.

55. Chicago Union Traction Co. *v.* Chicago, 209 Ill. 444, 70 N. E. 659; Case *v.* Johnson,

to the constitution;[56] but a constitutional provision that municipal officers shall be elected by the people does not prevent the legislature from appointing commissioners to widen a street in a city by special proceedings.[57] Different acts unless repugnant will be construed together *in pari materia* as providing two methods of improvement.[58]

(II) *STATUTES APPLICABLE.* Determination of the applicability of statutes is a matter of construction, the tendency being, in the absence of a clear intent to the contrary, to construe separate acts together,[59] and not to extend the application of a statute beyond necessary limits.[60] Hence the provisions of an act relating to paving streets do not apply to the construction of sewers;[61] nor of an act providing for the method of erecting public buildings "and making public improvements," to the establishment of streets.[62]

e. Improvements That May Be Included in One Proceeding. The municipality is usually prohibited from providing for more than one improvement in a single proceeding;[63] and unless empowered by the terms of its charter to do so[64]

91 Ind. 477; State *v.* Jersey City, 54 N. J. L. 49, 22 Atl. 1052; Hawthorne *v.* East Portland, 13 Oreg. 271, 10 Pac. 342.

Proceedings under inoperative statute.— When a municipal corporation proceeds to construct a sewer under the provisions of a law which has ceased to exist, its doings are valid if in accordance with the provisions of existing laws. Van Vorst *v.* Jersey City, 27 N. J. L. 493.

Work incidental to improvement.— The power to build bridges, granted in general terms to a municipality, includes of necessity the power to make such approaches to them as are necessary to their convenient use; and therefore, if it entails the grading of streets, it is not necessary that such grading is done in compliance with the general requirements of the charter or statute relating thereto. Gray *v.* Brooklyn, 7 Hun (N. Y.) 632.

56. *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193.

57. *In re* Woolsey, 95 N. Y. 135; People *v.* McDonald, 69 N. Y. 362.

58. *Arkansas.*— Improvement Dist. No. 60 *v.* Cotter, 71 Ark. 556, 76 S. W. 552.

California.— Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661.

Massachusetts.—Ryan *v.* Boston, 118 Mass. 248.

Missouri.— Roth *v.* Forsee, 107 Mo. App. 471, 81 S. W. 913.

New York.— *In re* Brooklyn, 73 N. Y. 179.

Pennsylvania.— *In re* West Chester Alley, 160 Pa. St. 89, 28 Atl. 506; Johnson's Appeal, 75 Pa. St. 96; New Castle *v.* Rearic, 18 Pa. Super. Ct. 350; *In re* Pulaski Ave., 5 Pa. Dist. 1, 17 Pa. Co. Ct. 391. See also Erie *v.* Bootz, 72 Pa. St. 196.

See 36 Cent. Dig. tit. "Municipal Corporations," § 763.

Continuation of proceedings under new law.— Under an act providing that "the proceedings in any work or improvement . . . already commenced and now progressing under any other act . . . may from any stage of such proceedings . . . be continued under this act, by resolution" declaring "an election or intention to have said work or improvement cease under such other act . . . and continue under this," it is not necessary immediately on the passage of the act to declare the intention of proceeding thereunder, but discretion may be used in determining the stage at which the change should be made. Heffernan *v.* San Francisco Super. Ct., (Cal. 1893) 33 Pac. 725; San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720.

59. *California.*— Heffernan *v.* San Francisco Super. Ct., (1893) 33 Pac. 725; San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720; Anderson *v.* De Uriose, 96 Cal. 404, 31 Pac. 266.

Massachusetts.— Barnes *v.* Springfield, 4 Allen 488.

Michigan.— Trowbridge *v.* Detroit, 99 Mich. 443, 58 N. W. 368.

New York.— *In re* Beekman St., 20 Johns. 269.

Pennsylvania.— *In re* Frederick St., 150 Pa. St. 202, 24 Atl. 669; *In re* East Grant St., 121 Pa. St. 596, 16 Atl. 366.

See 36 Cent. Dig. tit. "Municipal Corporations," § 764.

60. Taber *v.* New Bedford, 135 Mass. 162; *In re* Chestnut St., 10 Pa. Co. Ct. 661; *In re* Forty-Second St., 11 Phila. (Pa.) 437; Heidenheimer *v.* Galveston, 2 Tex. Unrep. Cas. 153.

61. Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605.

62. Baldwin *v.* Bangor, 36 Me. 518.

63. Boorman *v.* Santa Barbara, 65 Cal. 313, 4 Pac. 31; Weckler *v.* Chicago, 61 Ill. 142 (holding that an ordinance requiring the widening of an alley running north and south through a block, and the opening of a new alley running east and west through the same block, and also the condemnation of two triangular pieces of land at the intersection of these alleys, for the purpose of improving the ingress and egress to and from the alleys, provided for distinct improvements which could not be united in one proceeding); Oregon Transfer Co. *v.* Portland, 47 Oreg. 1, 81 Pac. 575, 82 Pac. 16.

64. Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071.

a city may not provide in one ordinance for separate and distinct improvements;[65] but in determining what constitutes a single improvement the tendency of the courts is toward liberality.[66] It has been held that where the original resolution is sufficiently broad, and but a single improvement is made, there may be more than one contract and assessment.[67] Provision may be made in one ordinance for paving different streets in the same manner,[68] for grading, draining, and sodding,[69] for running sewers along different streets,[70] and for building a bridge and constructing a sewer when the latter is necessary for the proper drainage of the bridge.[71] An ordinance will not be regarded as invalid as providing for two independent improvements, by the fact that in providing for the construction of a sewer it requires it to be laid so as to discharge from either way into a sewer in an intersecting street.[72] But where the power to widen and to grade was given in different sections of an act, it was held that the widening and grading of a street could not be ordered in a single proceeding.[73]

d. Division of Improvement. Separate ordinances authorizing parts of a continuous improvement cannot be sustained, where the only apparent purpose of the division of the improvement is to evade the provisions of a statute which require particular formalities to be observed in the case of improvements exceeding in cost a certain sum.[74] And where two ordinances are passed which are dependent upon each other, as providing for parts of a single or entire scheme, they are to be treated as one ordinance and as providing for a single improvement.[75] So where different streets are to be paved, if they are similarly situated with respect to the improvement and each to be paved with like material and in the same way, the paving of each may be regarded as part of a common enterprise and the whole constitutes a single improvement.[76] But the fact that a single ordinance might be upheld on the ground that all improvements contemplated by several ordinances constitute a single system will not demand that separate ordinances be declared void.[77] Under some statutes a separate order for construction

65. People *v.* Latham, 203 Ill. 9, 67 N. E. 403; Church *v.* People, 179 Ill. 205, 53 N. E. 554.

66. San Francisco Paving Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076 (holding that the fact that the resolution and intention to improve a street includes work of various kinds does not render it invalid); Emery *v.* San Francisco Gas Co., 28 Cal. 345. See Enos *v.* Springfield, 113 Ill. 65.

67. Cincinnati *v.* Shaw, 7 Ohio Dec. (Reprint) 500, 3 Cinc. L. Bul. 556, holding that where a street improvement had been contracted for and partly finished, and it was found necessary to erect a retaining wall, such wall might be constructed by a separate contract and a separate assessment levied for it on the abutting property, without the passage of another resolution.

68. Savannah *v.* Weed, 96 Ga. 670, 23 S. E. 900; Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Wilbur *v.* Springfield, 123 Ill. 395, 14 N. E. 871; Springfield *v.* Green, 120 Ill. 269, 11 N. E. 261; Burlington *v.* Quick, 47 Iowa 222; Cincinnati *v.* Corry, 7 Ohio Dec. (Reprint) 415, 2 Cinc. L. Bul. 337.

69. Murphy *v.* Peoria, 119 Ill. 509, 9 N. E. 895.

70. Hinsdale *v.* Shannon, 182 Ill. 312, 55 N. E. 327; Walker *v.* People, 170 Ill. 410, 48 N. E. 1010; Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105; Beach *v.* People, 157 Ill. 659, 41 N. E. 1117; Ricketts *v.* Hyde Park, 85 Ill. 110.

71. People *v.* Yonkers, 39 Barb. (N. Y.) 266.

72. Church *v.* People, 179 Ill. 205, 53 N. E. 554.

73. Mendenhall *v.* Clugish, 84 Ind. 94. But see State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 23 N. W. 222, holding that where the improvement by grading and filling of a street, authorized by special act, included an embankment which, at its base, necessarily extended beyond the limits of the street, that proceedings to widen the street, under the city charter, were not necessary, as the provisions of the special act for the acquisition of the rights required were valid and sufficient. And that the land was mortgaged was not material as ground of objection, it not being suggested that the security was or could be impaired by the improvement.

74. Nelson *v.* Chicago, 196 Ill. 390, 63 N. E. 738; Kerfoot *v.* Chicago, 195 Ill. 229, 63 N. E. 101.

75. Kerfoot *v.* Chicago, 195 Ill. 229, 63 N. E. 101; Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

76. Kerfoot *v.* Chicago, 195 Ill. 229, 63 N. E. 101; Springfield *v.* Green, 120 Ill. 269, 11 N. E. 261.

77. Ton *v.* Chicago, 216 Ill. 331, 74 N. E. 1044, holding that to so construe ordinances would be to ignore the discretion of the city

may be made and it need not be included in the order determining that the improvement shall be made.[78]

e. Parties to Proceedings. Property-owners affected are not necessary parties to a proceeding to determine merely the necessity of opening a street.[79]

f. Proceedings by County Officers or Courts. In addition to the right of a municipality to open streets, the power is occasionally conferred upon some county officer or court; but when either the city or county has acted, the jurisdiction of the other is excluded.[80]

2. Petition or Other Application — a. Form and Requisites. The petition or other application for an improvement, when required by statute,[81] must be sufficiently definite to be notice to parties interested,[82] and to give the municipal authorities jurisdiction;[83] and it must be in writing,[84] and signed unconditionally,[85] and in such a way as to fully and legally bind the petitioners.[86] All statutory requirements as to form must be complied with, and a petition lacking in essential averments is tantamount to no petition,[87] and an ordinance void because of an insufficient petition is not validated by a subsequent ratification by the signers.[88] Where the proceedings upon a petition have been invalid, a new petition must be filed in order to validate a new ordinance, and a refiling of the original petition is not sufficient.[89] Where the petition embodies several improvements, it would seem that a portion of the petition may be granted and the remaining portion refused.[90] Under the provisions of some statutes a petition for a street improve-

council as to the time when improvements should be made, or deprive it of the power of exercising such discretion.

78. New England Hospital *v.* Boston Street Com'rs, 188 Mass. 88, 74 N. E. 294.

79. Brown *v.* Saginaw, 107 Mich. 643, 65 N. W. 601; St. Louis *v.* Ranken, 96 Mo. 497, 9 S. W. 910.

Persons entitled to notice see *infra*, XIII, B, 4, f.

80. Monroe *v.* Danbury, 24 Conn. 199; Powers *v.* Springfield, 116 Mass. 84; Mason *v.* St. Albans, 68 Vt. 66, 33 Atl. 1068; Landon *v.* Rutland, 41 Vt. 681.

Power as between municipal and other officers and courts see *supra*, XIII, A, 1, d.

81. See *supra*, XIII, A, 3, b, (II).

82. Wirth *v.* Jersey City, 56 N. J. L. 216, 27 Atl. 1065; Cronin *v.* Jersey City, 38 N. J. L. 410; Havermans *v.* Troy, 50 How. Pr. (N. Y.) 510. See also Wiles *v.* Hoss, 114 Ind. 371, 16 N. E. 800 (holding that a petition for the improvement of "Hope street, between Willow and Schofield streets" sufficiently asked for the work ordered by an ordinance for the improvement of "that portion of Hope street, and sidewalks thereof, lying between Schofield and Willow streets"); State *v.* Jersey City, 30 N. J. L. 148 (holding a petition for a public sewer sufficiently definite which stated the termini of the sewer, its connections, the mode of finishing and lateral sewers, and asked that the whole might be done according to the general plan of sewerage, a general plan having been adopted by the city).

A petition for one improvement cannot be made the basis of another.—App *v.* Stockton, 61 N. J. L. 520, 39 Atl. 921.

83. Kansas City *v.* Breyfogle, 8 Kan. App. 276, 55 Pac. 508; St. Louis *v.* Frank, 9 Mo. App. 579 [*affirmed* in 78 Mo. 41]; *In re* Merchant St., 9 Phila. (Pa.) 590.

Matters not part of the substance.— A suggestion in a petition to a city council asking for the construction of a bridge that certain territory named in the petition ought to be embraced in the levy forms no part of the substance of the petition and is in no way binding on the council. People *v.* Rochester, 21 Barb. (N. Y.) 656.

84. Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. 867; Tone *v.* Columbus, 1 Ohio Cir. Ct. 305, 1 Ohio Cir. Dec. 168. But see Stretch *v.* Hoboken, 47 N. J. L. 268, holding that the consent of abutters to a change of grade need not be in writing where the statute did not so require.

85. Von Steen *v.* Beatrice, 36 Nebr. 421, 54 N. W. 677; Norwood *v.* Mills, 8 Ohio S. & C. Pl. Dec. 669, holding that the signature of the owner of the fee to a petition for a street improvement conditioned on a tenant's agreement to pay the costs was not such a signing as would bind the owner for the assessment.

86. Batty *v.* Hastings, 63 Nebr. 26, 88 N. W. 139.

87. *In re* Grove St., 61 Cal. 438; St. Louis *v.* Cruikshank, 16 Mo. App. 495; People *v.* Whitney's Point, 32 Hun (N. Y.) 508; *In re* Henry St., 123 Pa. St. 346, 16 Atl. 785. See also Wahlgren *v.* Kansas City, 42 Kan. 243, 21 Pac. 1068, holding that a petition to grade and pave a street was valid, although it did not contain a request for grading and paving street intersections.

88. Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. 867.

89. Vennum *v.* Milford, 202 Ill. 423, 66 N. E. 1040, so holding for the reason that between the two filings the ownership of the property affected might have materially changed.

90. Marshall *v.* Rainey, 78 Mo. App. 416.

ment must describe the materials specifically.[91] But unless especially provided, the petitioners cannot determine the material to be used,[92] nor the time within which the improvement shall be made.[93] Where the statute requires that the petition shall so describe the material as to permit a general competition between contractors, it has been held that a petition for asphalt from a particular locality may be upheld.[94] Action upon the petition of the property-owners for a particular kind of pavement is not invalid, although taken before the expiration of the time for filing such petitions, where no other petition is in fact filed.[95]

b. Number and Qualification of Petitioners — (I) *Number.* The number of petitioners necessary to authorize an improvement is fixed by the charter or statute under which the proceedings are had, and a failure of the required number to sign invalidates the proceeding.[96] Although the right of petition is usually limited to abutting owners,[97] it is sometimes extended to owners of property adjoining the proposed improvement, provided it be near enough to be affected physically or commercially to a degree in excess of the effect on property in the city generally.[98] Owners of a majority of frontage along the street or part thereof to be improved are usually required to sign;[99] but sometimes a majority

91. See the statutes of the several states. And see National Surety Co. *v.* Kansas City Hydraulic Press Brick Co., 73 Kan. 196, 84 Pac. 1034, holding a petition sufficient which employed the words "vitrified brick," with words describing the quality and standard required.

92. Patterson *v.* Macomb, 179 Ill. 163, 53 N. E. 617; Smith *v.* Syracuse Imp. Co., 161 N. Y. 484, 55 N. E. 1077; Terwilliger *v.* Pittston, 9 Kulp (Pa.) 517.

Right to determine material see *supra*, XIII, A, 3, d, (II).

93. Hay *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 128, 6 Ohio N. P. 22.

Right to determine time of improvement see *supra*, XIII, A, 3, d, (IV).

94. Rhodes *v.* Denver Bd. of Public Works, 10 Colo. App. 99, 49 Pac. 430, sustaining a petition for Trinidad Lake asphalt, although there was only one dealer in such asphalt.

Provision for selection from two kinds of material.— Where a charter provides that property-owners shall select the paving material from not less than two kinds of material to be designated by the board of public works, the board may designate asphalt from a particular district as one of the kinds. Barber Asphalt Paving Co. *v.* Field, 188 Mo. 182, 86 S. W. 860.

In case of two petitions seeking pavements of different kinds, the council may ignore the petition having the fewer signatures and pass an ordinance in conformity with the other petition. Cunningham *v.* Peoria, 157 Ill. 499, 41 N. E. 1014.

Contract provisions see *infra*, XIII, C, 1, *f*.

95. Eddy *v.* Omaha, 72 Nebr. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692.

96. Hawkins *v.* Horton, 91 Minn. 285, 97 N. W. 1053; Pope *v.* Union, 32 N. J. L. 343, holding under a charter providing for the laying out of new streets "on the application of some of the owners of the land" that the application must be signed by at least two landowners.

97. Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848. And see *In re* Union Alley, 9 Pa. Dist. 209.

98. Little Rock *v.* Katzenstein, 52 Ark. 107, 12 S. W. 198. *Compare* Baudistel *v.* Michigan Cent. R. Co., 113 Mich. 687, 71 N. E. 1114.

Petition by adjacent owners alone.— Under a statute authorizing a petition by landowners for opening a street through their property and other property adjacent thereto, setting forth the description of the adjacent property and the owners thereof, some of the signers must possess a portion of the land through which the street is to be opened. *In re* New Orleans, 16 La. Ann. 393.

99. Ready *v.* New Orleans, 27 La. Ann. 169; Baltimore *v.* Bouldin, 23 Md. 328; Matter of Washington St., 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 470 [*affirmed* in 133 N. Y. 620, 30 N. E. 1150]; People *v.* Rochester, 21 Barb. (N. Y.) 656; Mocker *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 161, 5 Ohio N. P. 242, 7 Ohio N. P. 279.

Computation of total frontage.— In computing the total frontage included in a proposed street improvement, the width of intersecting streets should not be counted. People *v.* Syracuse, 30 Misc. (N. Y.) 409, 63 N. Y. Suppl. 878; Wright *v.* Tacoma, 3 Wash. Terr. 410, 19 Pac. 42. And where the property-owners upon the north side only of a proposed street petitioned for its opening, and it appeared that by reason of the angle between the streets intended to be connected that the frontage on the north side was twelve feet less than on the other side, the deficiency could not be supplied by making the north boundary irregular so as to increase the frontage of the petitioning owners and thereby validate the petition. Taylor *v.* Bloomington, 186 Ill. 497, 58 N. E. 216.

Duration of ownership.— The signers of the petition must be abutting owners at the time of passage of the ordinance. Tone *v.* Columbus, 1 Ohio Cir. Ct. 305, 1 Ohio Cir. Dec. 168. But see Laird *v.* Cincinnati, 6 Ohio Dec. (Reprint) 1006, 9 Am. L. Rec. 479,

of individual owners as well as owners of a major portion of the property must join;[1] sometimes a majority in each block[2] or on each side of the street[3] is necessary; and occasionally value of property is made the test.[4] Property belonging to the city is usually not reckoned;[5] but if reckoned, the city may signify its consent by signing the petition.[6] Two petitions asking for different sorts of pavement will be taken as one when the council has power to determine finally the character of the improvement;[7] but a petition cannot be made the basis for an improvement essentially different from the one asked for;[8] nor may the names of original petitioners be added to those subscribed to a subsequent petition for the same improvement.[9] In case an improvement is not properly authorized because of a failure to obtain the proper number of signatures, a contract in the petition by which the signers agreed to indemnify the city from losses on account of non-signers does not impose liability upon the abutting and signing property-owners.[10]

(II) *Qualification.* In determining the qualification of petitioners a strict rule obtains, and it has accordingly been held that a tenant in common cannot sign in behalf of his cotenants,[11] nor one partner in behalf of another,[12] nor an administrator in behalf of the estate,[13] nor a life-tenant;[14] but a lessee in possession

5 Cinc. L. Bul. 903, holding that the fact that an abutting owner who signed a petition for a street improvement afterward conveyed the property did not take away the jurisdiction of the city to act on the petition.

Majority abutting on improvement.—Under a statute authorizing public improvements on petition of a majority in interest and number of abutting owners on the line of improvement, a majority in interest and number of owners of property abutting on the part to be opened, and not on the entire street, is necessary to authorize the extension of an existing street. Speer *v.* Pittsburg, 166 Pa. St. 86, 30 Atl. 1013.

1. Trah *v.* Grant Park, 192 Ill. 351, 61 N. E. 442; Patterson *v.* Macomb, 179 Ill. 163, 53 N. E. 617; Kyle *v.* Malin, 8 Ind. 34. See also Speer *v.* Pittsburg, 166 Pa. St. 86, 30 Atl. 1013.

Non-residents.—Where the statute requires the signatures of the resident owners of more than half the property fronting upon the proposed improvements, it will be regarded as requiring merely a majority of the property represented by resident owners. Wright *v.* Tacoma, 3 Wash. Terr. 410, 19 Pac. 42.

2. Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. 278.

3. Mobile *v.* Dargan, 45 Ala. 310.

4. Ahern *v.* Texarkana Dist. No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575.

5. Ahern *v.* Texarkana Dist. No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575; Atlanta *v.* Smith, 99 Ga. 462, 27 S. E. 696; Armstrong *v.* Ogden City, 12 Utah 476, 43 Pac. 119. See also Herman *v.* Omaha, (Nebr. 1906) 106 N. W. 593.

6. People *v.* Syracuse, 30 Misc. (N. Y.) 409, 63 N. Y. Suppl. 878.

7. Wamelink *v.* Cleveland, 4 Ohio Dec. (Reprint) 572, 2 Clev. L. Rep. 394 [*affirmed* in 40 Ohio St. 381].

8. Lathrop *v.* Buffalo, 3 Abb. Dec. (N. Y.) 30.

9. Auditor-Gen. *v.* Fisher, 84 Mich. 128, 47 N. W. 574; State *v.* Bayonne, 54 N. J. L. 293, 23 Atl. 648.

10. Goodall *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 528, 5 Ohio N. P. 428.

11. Ahern *v.* Texarkana Dist. No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575 (holding that only one half of property belonging to two tenants in common and signed for by only one of them should be counted); Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. 867. But see Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509, holding that the signing of a petition for a public improvement by the owners of an undivided two thirds of a lot was sufficient to warrant the counting of the entire lot in estimating the aggregate of the property petitioning for the improvement.

12. Earl *v.* Morrilton Bd. of Imp., 70 Ark. 211, 67 S. W. 312; Andrew *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 242, 5 Ohio N. P. 123.

13. Mobile *v.* Dargan, 45 Ala. 310; Ahern *v.* Texarkana Dist. No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575; Rector *v.* Board of Improvement, 50 Ark. 116, 6 S. W. 519; Kahn *v.* San Francisco, 79 Cal. 388, 21 Pac. 849, (1890) 25 Pac. 403. But see Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231, holding that where property has been devised to executors and trustees jointly, to be held and managed during the lifetime of testator's wife, with full discretion in management and control of said property, such trustees and executors are the owners within the meaning of the statute applicable.

Unintentional signature as administratrix.—Where the owner in fee signs as administratrix, the words other than her name may be treated as *descriptio personæ*. Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509.

14. Baltimore *v.* Boyd, 64 Md. 10, 20 Atl. 1028. But *compare* Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509, holding that one who has a life-estate in one-half of a tract of land, and who is intrusted with the sole and unrestricted management of it during the

under a ninety-nine-year lease renewable forever was held to be the owner,[15] as was a mortgagor after foreclosure, since he had the right to redeem.[16] A board of education may sign if they have power to hold and dispose of property.[17] A widow may, with the assent of the heirs, sign for property belonging to her deceased husband.[18] The owner need not yet have received the deed in order to validate his signature.[19] The wife of an owner in fee need not join in signing the petition.[20] Where a conveyance has been merely nominal for the purpose of throwing protesting property-owners into the minority, it has been held that it is not proper to count the signatures of such nominal grantees.[21] The signature of a corporation must be by its duly authorized officers;[22] but an unauthorized signing may be ratified by the board of directors.[23]

(III) *Presumption of Sufficiency.* An order or ordinance based on a petition will raise a presumption that the petition is sufficient;[24] and unless so provided,[25] the petition need not show on its face that the required number have signed it.[26]

c. Signature by Attorney or Agent. Signature to the petition may be by agent, and the authority of such agent will be presumed or may be proved by evidence *dehors* the record.[27] But an unauthorized signature by one assuming to act as agent cannot be counted.[28]

d. Withdrawal of Consent. Unless otherwise provided by charter or statute,[29] signers of a petition are free to withdraw their names up until the time that the municipality has acted upon the same.[30] It has been held that a petition for a

minority of a child then thirteen years of age, is the owner within the meaning of a statute requiring the petition of owners of the property affected.

15. St. Bernard *v.* Kemper, 60 Ohio St. 244, 54 N. E. 267, 45 L. R. A. 662. But see Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195.

16. Ahern *v.* Texarkana Dist. No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575. See also Laird *v.* Cincinnati, 6 Ohio Dec. (Reprint) 1006, 9 Am. L. Rec. 479, 5 Cinc. L. Bul. 903.

17. Becker *v.* Columbus, 18 Ohio Cir. Ct. 888, 9 Ohio Cir. Dec. 271.

18. Corry *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 615, 6 Ohio N. P. 325.

19. Ahern *v.* Texarkana Dist. No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575.

20. Morse *v.* Omaha, 67 Nebr. 426, 93 N. W. 734.

21. Forbis *v.* Bradbury, 58 Mo. App. 506.

22. Kahn *v.* San Francisco, 79 Cal. 388, 21 Pac. 849, (1890) 25 Pac. 403; Morse *v.* Omaha, 67 Nebr. 426, 93 N. W. 734; Minor *v.* Hamilton, 20 Ohio Cir. Ct. 4, 11 Ohio Cir. Dec. 16; Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509.

Religious corporation.— Where the name of a corporation is "Rector, Wardens, and Vestrymen of Trinity Parish, Portland," a signature "Wardens and Vestry of Trinity Parish, by James Laidlaw, Clerk," is sufficient where the clerk was duly authorized by resolution to sign the petition. Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509.

Signature of corporation generally see CORPORATIONS.

23. Day *v.* Fairview, 62 N. J. L. 621, 43 Atl. 578.

24. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; McManus *v.* People, 183 Ill. 391, 55 N. E. 886; Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. 278; South Omaha *v.* Tighe, 67 Nebr. 572, 93 N. W. 946; Farrell *v.* West Chicago Park Com'rs, 181 U. S. 404, 21 St. Ct. 609, 645, 45 L. ed. 919, 924.

25. Kent *v.* Enosburg Falls, 71 Vt. 255, 44 Atl. 343.

26. Kansas City *v.* Kimball, 60 Kan. 224, 56 Pac. 78; Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509; Wright *v.* Tacoma, 3 Wash. Terr. 410, 19 Pac. 42.

27. Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231; Columbus *v.* Slyh, 44 Ohio St. 484, 8 N. E. 302; Columbus *v.* Sohl, 44 Ohio St. 479, 8 N. E. 299; Tone *v.* Columbus, 1 Ohio Cir. Ct. 305, 1 Ohio Cir. Dec. 168; Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509.

28. State *v.* Bayonne, 54 N. J. L. 293, 23 Atl. 648.

29. Smith *v.* Syracuse, 17 N. Y. App. Div. 63, 44 N. Y. Suppl. 852 [*reversed* on other grounds in 161 N. Y. 484, 55 N. E. 1077]; People *v.* Syracuse, 30 Misc. (N. Y.) 409, 63 N. Y. Suppl. 878.

30. *Alabama.*— Irwin *v.* Mobile, 57 Ala. 6.
Indiana.— Noble *v.* Vincennes, 42 Ind. 125.
New York.— White *v.* Buffalo, Sheld. 180.
Ohio.— Andrew *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 242, 5 Ohio N. P. 123.
Texas.— Waco *v.* Chamberlain, (Civ. App. 1898) 45 S. W. 191.

Conditional action.— A petition for a street improvement, remaining in the hands of the board of administration at the time the ordinance to improve is passed, binds the signers thereof, although it is not indorsed or "filed until signers agree to pay deficiency." Bush *v.* Cincinnati, 18 Ohio Cir. Ct. 605, 10 Ohio Cir. Dec. 816.

street improvement is a continuing one, and the signers under an existing law are liable under the law as it may be amended.[31]

3. PRELIMINARY RESOLUTION OR OTHER ACTION ON APPLICATION — a. In General. It is a frequent statutory requirement that the municipality pass a preliminary resolution of intention to make an improvement, which shall describe the work to be done. Failure to pass such resolution[32] or to describe therein the character of the work will invalidate the proceedings;[33] nor may the city combine with such preliminary resolution an order to make the improvement.[34] But an ordinance is not invalid for the reason that it recites that it is in accordance with a resolution of intention, although it includes for assessment property not included in the resolution, where no resolution of intention is required by charter or general ordinance.[35]

b. As to Necessity of Improvement. A preliminary resolution declaring the necessity of an improvement is often required by charter or statute;[36] and where so required such resolution is regarded as a condition precedent.[37] The declara-

31. *In re* Goodwin St., 8 Ohio S. & C. Pl. Dec. 693. See also Hay *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 128, 6 Ohio N. P. 22.

32. Bates *v.* Twist, 138 Cal. 52, 70 Pac. 1023; McDonnell *v.* Gillon, 134 Cal. 329, 66 Pac. 314; Pacific Paving Co. *v.* Reynolds, (Cal. 1900) 62 Pac. 212; Columbia Bank *v.* Portland, 41 Oreg. 1, 67 Pac. 1112.

Approval of mayor.— A resolution appointing a time for the hearing of objections to an improvement petition need not be presented to the mayor for his approval, under a provision of the charter that every resolution shall be so presented, as such provision includes only final resolutions such as one authorizing an improvement to be made. Howeth *v.* Jersey City, 30 N. J. L. 93 [*reversed* on other grounds in 30 N. J. L. 521].

Signature.— Where the statute requires the signature of the clerk to a resolution of intention to make improvements, a printed signature upon a blank is sufficient. Williams *v.* McDonald, 58 Cal. 527.

33. Dowling *v.* Hibernia Sav., etc., Soc., 143 Cal. 425, 77 Pac. 141; Williamson *v.* Joyce, 137 Cal. 107, 69 Pac. 854; Piedmont Paving Co. *v.* Allman, 136 Cal. 88, 68 Pac. 493; Fay *v.* Reed, 128 Cal. 357, 60 Pac. 927; Schwiesau *v.* Mahon, 128 Cal. 114, 60 Pac. 683; Clarke *v.* Chicago, 185 Ill. 354, 57 N. E. 15; Owosso *v.* Richfield, 80 Mich. 328, 45 N. W. 129; People *v.* Utica Bd. of Assessors, 50 N. Y. App. Div. 54, 63 N. Y. Suppl. 445.

Sufficiency of description.— A resolution which describes the improvement in a general way with such certainty, when considering the estimate, as to reasonably advise the property-owners as to the nature of the improvement, is sufficient without containing all the details required in an ordinance. McLennan *v.* Chicago, 218 Ill. 62, 75 N. E. 762. But where the estimate of the cost of the proposed improvement is required to be made a part of the record of the first resolution, it is not sufficiently incorporated by reference where it is not transcribed upon any record of the board having jurisdiction of the matter. Chicago Union Traction Co. *v.* Chicago, 209 Ill. 444, 70 N. E. 659. Plans and specifications may be incorporated in a resolution of intention by reference, although not physically annexed to it. Haughawout *v.* Raymond, 148 Cal. 311, 83 Pac. 53. It has been held that a description of an improvement as "a brick sewer, with man-holes and catch-basins" is sufficient. Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369. But that a resolution of intention merely declaring that gutters shall be concrete gutters four feet wide is defective. Lambert *v.* Cummings, 2 Cal. App. 642, 84 Pac. 266. A direction that a sidewalk be constructed "upon the northeast side of Fourth street from Locust street to Main street" is a sufficient description of the property along which the sidewalk is to be built. Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

Variance.— A resolution describing a sewer improvement as a system of "brick and vitrified tile-pipe sewer" does not substantially vary from an ordinance describing the improvement as a "system of brick and vitrified tile-pipe sewers." Washington Park Club *v.* Chicago, 219 Ill. 323, 76 N. E. 383. A first resolution for a public improvement, stating that the right of way of a street railway in a street to be improved was excepted from the improvement, does not materially vary from a notice of public hearing which fails so to state. McLennan *v.* Chicago, 218 Ill. 62, 75 N. E. 762.

Aider by reference.— A resolution of intention for a public improvement may be aided by reference to the plans and specifications. Haughawout *v.* Bonynge, (Cal. 1905) 83 Pac. 54; Haughawout *v.* Raymond, 148 Cal. 311, 83 Pac. 53.

34. San Jose Imp. Co. *v.* Auzerais, 106 Cal. 498, 39 Pac. 859.

35. Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707.

36. See the statutes of the several states. And see the cases cited in the following note.

37. McLauren *v.* Grand Forks, 6 Dak. 397, 43 N. W. 710; Hoyt *v.* East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; Stephen *v.* Daniels, 27 Ohio St. 527; Michigan Cent. R. Co. *v.* Huehn, 59 Fed. 335. See also Cassidy *v.* Bangor, 61 Me. 434, holding that the council

tion upon the records of the council that a proposed improvement is necessary has, however, been held not to be jurisdictional, where upon the filing of proper petitions the making of the improvement is mandatory.[38]

4. Notice of Proposed Improvement or Resolution[39] — **a. In General.** For the purpose of giving property-owners affected a chance to be heard, provision is frequently made by charter or statute for notice of intention to make an improvement, and unless complied with the improvement may not be made.[40]

b. Constitutional and Statutory Provisions. Although there are cases to the contrary,[41] the better rule is that a city cannot be empowered to make improvements by special assessment without giving due notice to the property-owners to be assessed.[42]

c. Necessity of Notice — (I) *In General.* Failure to give notice as provided by charter or statute will invalidate proceedings for improvements and assessments to pay for the same;[43] but it has been held that notice, as required by statute, of

was not required to enter upon such records an adjudication that the widening of a way was of common convenience and necessity, before the subject was submitted to the consideration and action of the board of street engineers.

As condition precedent to issue of bonds.— A city charter making a resolution declaring the necessity of a public improvement, cost of any portion of which is to be assessed against the locality of the improvement, a prerequisite to a valid assessment does not render such a resolution a condition precedent to the issue of bonds by a city to pay its proportion of the cost of the improvement. Naegely *v.* Saginaw, 101 Mich. 532, 60 N. W. 46.

Delegation of authority.— The determination of whether the convenience and necessity of individuals and the public good demand a contemplated improvement is judicial and the council cannot delegate the authority to determine such question with regard to pavement, to a board of street commissioners. Blanchard *v.* Barre, 77 Vt. 420, 60 Atl. 970.

The kind of pavement should be stated in the resolution. Kirksville *v.* Coleman, 103 Mo. App. 215, 77 S. W. 120.

Qualifications of freeholders.— A statute conferring upon the trustees of a village the powers of highway commissioners does not require that the freeholders certifying to the necessity of an improvement shall be drawn and assembled in the manner required by the highway laws of the state. Matter of Main St., 30 Hun (N. Y.) 424 [*affirmed* in 98 N. Y. 454].

Formalities of passage.— Under an Ohio statute a preliminary resolution declaring a proposed street improvement necessary is not a resolution of either a general or permanent nature within the meaning of a statute requiring such resolution to be read three different days, unless three fourths of all the members shall dispense with the rule. Upington *v.* Oviatt, 24 Ohio St. 232.

In Indiana the resolution has been held not to be jurisdictional. Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Pennsylvania Co. *v.* Cole, 132 Fed. 668.

In Ohio a provision requiring a preliminary resolution of necessity has been held not to apply to an appropriation of land for widening a street. Caldwell *v.* Carthage, 49 Ohio St. 334, 31 N. E. 602; Krumberg *v.* Cincinnati, 29 Ohio St. 69; Longworth *v.* Cincinnati, 10 Ohio Dec. (Reprint) 683, 23 Cinc. L. Bul. 100. Nor does it apply to a contract for the enlargement of a waterworks system. Fergus *v.* Columbus, 8 Ohio S. & C. Pl. Dec. 290, 6 Ohio N. P. 82.

38. Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231.

39. **Collateral attack upon notice of proceedings** see *infra*, XIII, B, 16, c.

Notice of making assessments see *infra*, XIII, E, 7, f.

Notice of proceedings by commissioners or other officers or boards see *infra*, XIII, B, 5, c.

Publication of ordinance see *infra*, XIII, B, 8, c.

40. Kundinger *v.* Saginaw, 59 Mich. 355, 26 N. W. 634; Osborne *v.* Detroit, 32 Mich. 282; *In re* Central Park, 51 Barb. (N. Y.) 277, 35 How. Pr. 255; *In re* Apple St., 6 Pa. Dist. 63. See also cases cited *infra*, XIII, B, 4, c.

41. Hawley *v.* Harrall, 19 Conn. 142; Clark *v.* Lyon, 68 N. Y. 609; *In re* Zborowski, 68 N. Y. 88; Lake Shore, etc., Co. *v.* Dunkirk, 65 Hun (N. Y.) 494, 20 N. Y. Suppl. 596 [*affirmed* in 143 N. Y. 660, 39 N. E. 21]; Stevenson *v.* New York, 1 Hun (N. Y.) 51; Connor *v.* Paris, 87 Tex. 32, 27 S. W. 88; Highland *v.* Galveston, 54 Tex. 527; Davis *v.* Lynchburg, 84 Va. 861, 6 S. E. 230.

42. Chesapeake, etc., R. Co. *v.* Mullins, 94 Ky. 355, 22 S. W. 558, 15 Ky. L. Rep. 139; Sears *v.* Atlantic City, 72 N. J. L. 435, 60 Atl. 1093; Locker *v.* South Amboy, 62 N. J. L. 197, 40 Atl. 637; Landis *v.* Vineland, 60 N. J. L. 264, 37 Atl. 625; State *v.* Fon du Lac, 42 Wis. 287.

Where there has been a refusal.— An act providing for sidewalk assessments is not unconstitutional for failure to prescribe notice to the owner, where the assessment is imposed before the owner's refusal to have the work done, since the refusal implies a notice. Richter *v.* New York, 24 Misc. (N. Y.) 613, 54 N. Y. Suppl. 150.

43. *Indiana.*— Barber Asphalt Paving Co. *v.* Edgerton, 125 Ind. 455, 25 N. E. 436;

a preliminary resolution declaring the necessity of an improvement is not essential to give the council jurisdiction.[44] Where a board does not adopt a final resolution at the first meeting for the public hearing, but adjourns from time to time to regular fixed dates, no further notices need be given.[45] And notice to parties to appear and be heard before a committee of the council has been held sufficient without notice to the parties to appear and be heard before the city council, in its action with regard thereto.[46] A notice of a hearing before commissioners to assess benefits after the completion of a municipal improvement does not take the place of notice to be given property-owners liable to be affected by such improvement, before it is made.[47]

(II) *Notice of Street Improvement.* Notice of intention to improve a street is usually required by charter or statute.[48] Such requirement is mandatory, and unless followed, proceedings and assessments are void.[49] So an ordinance which directs that a street shall be paved and the cost assessed upon the property benefited has been held to be a judicial act requiring that notice be given and an opportunity for hearing afforded the property-owners liable to be affected, although the city charter does not expressly require such notice.[50] Under statutes author-

Kiphart *v.* Pittsburgh, etc., R. Co., 7 Ind. App. 122, 34 N. E. 375.

Michigan.— Mills *v.* Detroit, 95 Mich. 422, 54 N. W. 897.

Nebraska.— Eddy *v.* Omaha, 72 Nebr. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692; Ives *v.* Irey, 51 Nebr. 136, 70 N. W. 961.

New Jersey.— Ackerman *v.* Nutley, 70 N. J. L. 438, 57 Atl. 150.

New York.— *In re* Anderson, 60 N. Y. 457.

Ohio.— Joyce *v.* Barron, 67 Ohio St. 264, 65 N. E. 1001.

Oregon.— Columbia Bank *v.* Portland, 41 Oreg. 1, 67 Pac. 1112.

Pennsylvania.— *In re* Beaty's Plan, 42 Leg. Int. 6.

See 36 Cent. Dig. tit. "Municipal Corporations," § 778.

44. Pittsburgh, etc., R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454; Spaulding *v.* Baxter, 25 Ind. App. 485, 58 N. E. 551; Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071; Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042. But see Anderson *v.* Cincinnati, 10 Ohio Dec. (Reprint) 794, 23 Cinc. L. Bul. 430.

45. McChesney *v.* Chicago, 201 Ill. 344, 66 N. E. 217.

46. Prehle *v.* Portland, 45 Me. 241.

47. Sears *v.* Atlantic City, 72 N. J. L. 435, 60 Atl. 1093.

48. See the statutes of the several states. And see New Orleans Second Municipality *v.* Botts, 8 Rob. (La.) 198; Stone *v.* Boston, 2 Metc. (Mass.) 220, holding that the mayor and aldermen of Boston cannot legally lay out a street or determine upon the safety and convenience of it, without first giving notice to all persons interested of their intention so to do.

Where expense is not imposed.— While notice of a resolution ordering the expense of grading a sidewalk, to be imposed upon an abutting owner is necessary, it is unnecessary to establish the right to grade without imposing expense. Fritts *v.* Somerville, 7 N. J. L. J. 90.

49. *Iowa.*— Roche *v.* Dubuque, 42 Iowa 250.

Louisiana.— Fayssoux De Chaurand, 36 La. Ann. 547.

Maryland.— Baltimore *v.* Scharf, 54 Md. 499; Baltimore *v.* Grand Lodge I. O. O. F., 44 Md. 436.

Michigan.— Powers' Appeal, 29 Mich. 504.

New Jersey.— State *v.* Long Branch Com'rs, 54 N. J. L. 484, 24 Atl. 368, holding that where a city charter provided that public notice should be given of the introduction of all ordinances for street improvements, an ordinance introduced without notice was void and would be set aside.

New York.— *In re* Little, 60 N. Y. 343; Matter of Ludlow St., 59 N. Y. App. Div. 180, 68 N. Y. Suppl. 1046 [*affirmed* in 172 N. Y. 542, 65 N. E. 494]; People *v.* Whitney's Point, 32 Hun 508.

Pennsylvania.— *In re* Wilbur St., 8 Pa. Co. Ct. 477; Hammel *v.* Morrisville Borough, 3 Pa. Co. Ct. 185; Large *v.* Philadelphia, 3 Phila. 382; Tyler *v.* Bowen, 1 Pittsb. 225.

See 36 Cent. Dig. tit. "Municipal Corporations," § 779.

Repairs.— Under a statute requiring ten days' notice of improvements to be charged against adjacent property, notice of repairs as well as improvements is necessary when the repairs are to be charged against adjacent property. Cook *v.* Portland, 35 Oreg. 383, 58 Pac. 353.

A change in the curb of a sidewalk, by which at the corner of two streets it was altered from a square to a curve with a radius of the same length as the uniform width of the sidewalk, has been held not such a proceeding as requires notice to the property-owners. Condon *v.* Wilkinsburg, etc., St. R. Co., 30 Pittsb. Leg. J. N. S. (Pa.) 289.

50. Sears *v.* Atlantic City, 72 N. J. L. 435, 60 Atl. 1093. But see Bolton *v.* Cleveland, 35 Ohio St. 319, holding that where no damages resulted to abutting lots from a street

izing improvements upon petition of the property-owners interested, it is usually held that notice to the property-owners in addition to the petition is not required.[51]

(III) *ALTERATION OR VACATION.* Property-owners affected are usually held to be entitled to notice of intention to widen or vacate a street or to change the grade thereof,[52] although it is sometimes held that in the absence of legislative requirement such notice need not be given.[53]

(IV) *SEWERS.* Unless required by charter or statute,[54] notice of intention to build a sewer and assess the cost to abutting owners need not be given.[55]

d. Form, Requisite, and Validity in General. Statutory requirements as to the form of notice must be complied with to render proceedings for improvements valid.[56] Publication of an ordinance or resolution declaring intention to make an improvement may of itself constitute sufficient notice, if the statute so provides.[57] In the absence of express requirements as to form, a liberal test of sufficiency is applied;[58] but the notice must reasonably inform the property-owners that they are to be assessed,[59] must describe generally the nature of the improvement,[60] and must set a time when they may be heard.[61] Where the power to compel sewer, gas, and water connections has been delegated to a board of

improvement, publication of notice by the city of its determination to improve the street was not a condition precedent to the authority of the city to make an assessment to defray the costs.

51. See Winans *v.* Cranford Tp. Highway Com'rs, 57 N. J. L. 71, 29 Atl. 429; Oil City *v.* Lay, 164 Pa. St. 370, 30 Atl. 289; Jones *v.* Seattle, 19 Wash. 669, 53 Pac. 1105.

52. Lambert *v.* Paterson, 72 N. J. L. 437, 60 Atl. 1131; Stretch *v.* Hoboken, 47 N. J. L. 268; Cook *v.* Chambersburg, 39 N. J. L. 257; Vanatta *v.* Morristown, 34 N. J. L. 445; *In re* Lincoln St., 18 Pa. Co. Ct. 410.

53. Denver *v.* Campbell, 33 Colo. 162, 80 Pac. 142; Dempsey *v.* Burlington, 66 Iowa 687, 24 N. W. 508; Marsh *v.* Oregon, 105 Mo. 226, 16 S. W. 896.

54. Brinley *v.* Perth Amboy, 29 N. J. L. 259; Weeks *v.* Middletown, 107 N. Y. App. Div. 587, 95 N. Y. Suppl. 352.

55. Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342; Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908; Nitzel *v.* St. Bernard, 3 Ohio S. & C. Pl. Dec. 703, 3 Ohio N. P. 317; Cincinnati *v.* Honningfort, 1 Ohio S. & C. Pl. Dec. 563, 32 Cinc. L. Bul. 32; Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673.

56. *Illinois.*— Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369; Gage *v.* Chicago, 201 Ill. 93, 66 N. E. 374.

Iowa.— Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933.

Maryland.— Baltimore *v.* Bouldin, 23 Md. 328.

Michigan.— Specht *v.* Detroit, 20 Mich. 168.

Washington.— Buckley *v.* Tacoma, 9 Wash. 253, 37 Pac. 441.

See 36 Cent. Dig. tit. "Municipal Corporations," § 782.

57. Hoover *v.* People, 171 Ill. 182, 49 N. E. 367; State *v.* Pillsbury, 82 Minn. 359, 85 N. W. 175; Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231; Strauss *v.* Cincinnati, 11 Ohio Dec. (Reprint) 92, 24 Cinc. L. Bul. 422.

58. *California.*— Schmidt *v.* Market St., etc., R. Co., 90 Cal. 37, 27 Pac. 61.

Illinois.— Lanphere *v.* Chicago, 212 Ill. 440, 72 N. E. 426, holding that a notice of a public hearing was sufficient where it contained the substance of the resolution and estimate, although the preamble and engineer's signature to the estimate was omitted.

Maine.— Dorman *v.* Lewiston, 81 Me. 411, 17 Atl. 316; Jones *v.* Portland, 57 Me. 42, petition with reference to straightening and improving a street.

New Jersey.— Woodruff *v.* Orange, 32 N. J. L. 49; Peters *v.* Newark, 31 N. J. L. 360.

New York.— Delaware, etc., Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 56 N. Y. Suppl. 976 [*affirmed* in 167 N. Y. 589, 60 N. E. 1119]; Hendrickson *v.* New York, 38 N. Y. App. Div. 480, 56 N. Y. Suppl. 580 [*affirmed* in 160 N. Y. 144, 54 N. E. 680], holding that a notice that a board has received a petition for improvement is sufficient to comply with a requirement that notice of the filing of a petition be given.

Pennsylvania.— Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888.

Utah.— Armstrong *v.* Ogden City, 9 Utah 255, 34 Pac. 53.

See 36 Cent. Dig. tit. "Municipal Corporations," § 782.

Under a statute requiring a description of bonds and the rate of interest, it is not necessary that the notice should state that a bond will issue for each assessment over a certain amount. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

59. Clark *v.* Elizabeth, 32 N. J. L. 357.

60. See *infra*, XIII, B, 4, e.

61. Boice *v.* Plainfield, 38 N. J. L. 95; Brinley *v.* Perth Amboy, 29 N. J. L. 259; *In re* Delaware, etc., Canal Co., 8 N. Y. Suppl. 352 [*reversed* on other grounds in 60 Hun 204, 14 N. Y. Suppl. 585].

public works, notice by such board is sufficient to sustain a special assessment to cover the cost of such connections.[62]

e. Description of Improvement. Property-owners to be assessed should be apprised by notice of the character and extent of the improvement;[63] hence the notice must specify the street or portions thereof to be improved,[64] the material to be used,[65] and in case of sewers, the diameter.[66] But notice of intention to pave a street need not include notice that water, gas, and sewer connections with abutting property will be made;[67] or that gutters will be constructed.[68] And although the charter provides that the notice must specify the character of the improvement, it is sufficient to refer therein to plans and specifications that are on file.[69] A notice is not invalidated as to property which has been properly described by the fact that in a second publication it includes an additional improvement which does not affect such property.[70]

f. Persons Served or Entitled to Notice. Notice of intention to open a street need not be given to owners of land which does not adjoin or lie near the proposed street,[71] but it must be given to persons liable to pay for the improvement as well as to those whose land will be taken.[72] Notice to an administrator of a proposed improvement is not notice to the heirs;[73] but notice to a life-tenant is sufficient,[74] as is also a notice through the mail to a non-resident owner, although the occupant of the premises has not been served;[75] and the owner of a fractional interest in property is liable for his proportion, although notice was served on him alone.[76] Under some statutes it is provided that notice shall be sent to the persons who paid the general taxes upon the property for the last ensuing year.[77]

g. Time of Notice in General. The time allowed property-owners to appear

Time of notice see *infra*, XIII, B, 4, g.

62. Gleason *v.* Waukesha County, 103 Wis. 225, 79 N. W. 249.

63. City St. Imp. Co. *v.* Taylor, 138 Cal. 364, 71 Pac. 446; State *v.* Long Branch Com'rs, 54 N. J. L. 484, 24 Atl. 368; Canton *v.* Wagner, 54 Ohio St. 329, 45 N. E. 953; Cincinnati *v.* Corry, 10 Ohio Dec. (Reprint) 783, 23 Cinc. L. Bul. 359; Cincinnati *v.* Blymier Mfg. Co., 8 Ohio Dec. (Reprint) 288, 7 Cinc. L. Bul. 30; Hawthorne *v.* East Portland, 13 Oreg. 271, 10 Pac. 342.

Ordinary acceptation of terms.—A notice will be held sufficient when, giving the words their ordinary popular signification and referring them to the context, they are particular as to the commencement, termination, or route of a proposed street, although the description is somewhat confused if the words are given their strict literal sense. Woodruff *v.* Orange, 32 N. J. L. 49.

Preparation and signature.— An assessment is not invalid because a notice was not prepared or signed by the city clerk, but was prepared by the city engineer and signed by him in the clerk's name, where it does not appear that the clerk objected or that any person was injured. Loomis *v.* Little Falls, 66 N. Y. App. Div. 299, 72 N. Y. Suppl. 774.

64. *California.*— White *v.* Harris, 116 Cal. 470, 48 Pac. 382.

Colorado.— Denver *v.* Dunning, 33 Colo. 487, 81 Pac. 259.

Connecticut.— See Angus *v.* Hartford, 74 Conn. 27, 49 Atl. 192.

Illinois.— Owen *v.* Chicago, 53 Ill. 95.

Indiana.— Stephenson *v.* Salem, 14 Ind. App. 386, 42 N. E. 44, 943.

Missouri.— Shaffner *v.* St. Louis, 31 Mo. 264.

New York.— Matter of Orange St., 50 How. Pr. 244.

Rhode Island.— *In re* Mt. Pleasant Ave., 10 R. I. 320.

Sufficiency of description.— A notice that the improvement is to be of "the westerly portion of Congress street" is sufficient. Jones *v.* Portland, 57 Me. 42.

65. Verdin *v.* St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52, (1894) 27 S. W. 447; Ladd *v.* Spencer, 23 Oreg. 193, 31 Pac. 474.

66. Atlanta *v.* Gabbett, 93 Ga. 266, 20 S. E. 306.

67. Donovan *v.* Oswego, 90 N. Y. App. Div. 397, 86 N. Y. Suppl. 155.

68. City St. Imp. Co. *v.* Taylor, 138 Cal. 364, 71 Pac. 446.

69. Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407; Felker *v.* New Whatcom, 16 Wash. 178, 47 Pac. 505. But see Chase *v.* Trout, 146 Cal. 350, 80 Pac. 81, holding that plans and specifications must be published.

70. Felker *v.* New Whatcom, 16 Wash. 178, 47 Pac. 505.

71. Kidder *v.* Peoria, 29 Ill. 77.

72. Paul *v.* Detroit, 32 Mich. 108.

73. Boonville *v.* Ormrod, 26 Mo. 193.

74. Peck *v.* Bridgeport, 75 Conn. 417, 53 Atl. 893.

75. Black *v.* Roebuck, 17 Pa. Super. Ct. 324.

76. Louisiana *v.* McAllister, 104 Mo. App. 152, 78 S. W. 314.

77. See Field *v.* Chicago, 198 Ill. 224, 64 N. E. 840.

and be heard is usually provided for by charter or statute, and the provision is mandatory;[78] but it has been held that an ordinance ordering an improvement was valid, although passed before the expiration of the time, when the work was not begun until after the period allowed in the notice had elapsed without protest being made.[79] Where the statute merely requires that notice be given, but does not require that it be given by the council, the clerk may fix the time and place.[80] If no time is fixed, the length of notice is discretionary with the municipality,[81] and five days' notice has been held to be reasonable.[82] It has been held that a publication of notice for the prescribed period is sufficient, although not for the period named in the order of publication,[83] and that a provision that fifteen days must elapse after the posting of a notice before the improvement could be ordered meant fifteen days after the first posting.[84]

h. Service. The manner of service is usually provided for by charter or statute, but under a provision that the council shall give notice, it may delegate the duty to a ministerial officer to be exercised under its direction;[85] and when the charter does not in terms make notice by publication the exclusive mode, notice personally served upon the property-owner is sufficient.[86]

i. Publication and Posting. Personal notice is not always required,[87] it being frequently provided by charter or statute that notice by publication or posting will be sufficient; but the terms of such provision must be complied with.[88] It has been held that the notice may be printed, in English, in a German paper;[89] in only one edition[90] of a daily paper, or in the supplement thereof;[91]

78. *Delaware.*— Fulton *v.* Dover, 8 Houst. 78, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974.

Michigan.— Auditor-Gen. *v.* Calkins, 136 Mich. 1, 98 N. W. 742.

New Jersey.— Milner *v.* Trenton, 66 N. J. L. 150, 48 Atl. 531.

New York.— Astor *v.* New York, 37 N. Y. Super. Ct. 539 [*reversed* on other grounds in 39 N. Y. Super. Ct. 120 (*affirmed* in 62 N. Y. 580)].

Tennessee.— Washington *v.* Nashville, 1 Swan 177.

See 36 Cent. Dig. tit. "Municipal Corporations," § 785.

79. Burnett *v.* Sacramento, 12 Cal. 76, 73 Am. Dec. 518; Springfield *v.* Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

80. Malone *v.* Jersey City, 28 N. J. L. 500; State *v.* Jersey City, 25 N. J. L. 309.

81. Dyker Meadow Land, etc., Co. *v.* Cook, 3 N. Y. App. Div. 164, 38 N. Y. Suppl. 222 [*affirmed* in 159 N. Y. 6, 53 N. E. 690].

82. McChesney *v.* Chicago, 201 Ill. 344, 66 N. E. 217; Field *v.* Chicago, 198 Ill. 224, 64 N. E. 840; Gage *v.* Chicago, 196 Ill. 512, 63 N. E. 1031.

83. Chambers *v.* Satterlee, 40 Cal. 497.

84. Oakland Sav. Bank *v.* Sullivan, 107 Cal. 428, 40 Pac. 546; *In re* Bassford, 63 Barb. (N. Y.) 161 [*affirmed* in 50 N. Y. 509].

85. Hand *v.* Elizabeth, 31 N. J. L. 547; Ladd *v.* Spencer, 23 Oreg. 193, 31 Pac. 474.

86. Peck *v.* Bridgeport, 75 Conn. 417, 53 Atl. 893. See also Hildreth *v.* Lowell, 11 Gray (Mass.) 345.

87. Boice *v.* Plainfield, 38 N. J. L. 95; *In re* Amsterdam, 126 N. Y. 158, 27 N. E. 272; *In re* Womelsdorf Alley, 8 Pa. Co. Ct. 207. See also Cleneay *v.* Norwood, 137 Fed. 962.

Publication on Sunday.— The fact that an ordinance creating an improvement district was published on Sunday does not render the publication illegal. Denver *v.* Londoner, 33 Colo. 104, 80 Pac. 117; Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114. See, generally, SUNDAY.

88. Haskell *v.* Bartlett, 34 Cal. 281; Columbia Bank *v.* Portland, 41 Oreg. 1, 67 Pac. 1112 (holding that the posting of a notice of an improvement with a heading printed in smaller type than the statute calls for will be sufficient); Olds *v.* Erie City, 79 Pa. St. 380.

Impossibility of compliance.— In case a statute requiring publication in two newspapers cannot be complied with by reason of the fact that there is but one paper in the city, publication in such paper has been held sufficient in conjunction with actual notice. Darlington *v.* Com., 41 Pa. St. 68.

Where five days' notice is required before an ordinance may be passed, a notice must be published five days before the passage of the ordinance, but not necessarily five days before its introduction. Merrifield *v.* Scranton City, 5 Pa. Co. Ct. 388.

89. Richardson *v.* Tobin, 45 Cal. 30. See, generally, NEWSPAPERS.

Where it is required that notice shall be published in a German newspaper, the publication must be in German. State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

90. Guest *v.* Brooklyn, 9 Hun (N. Y.) 198 [*reversed* on other grounds in 73 N. Y. 611].

91. Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71; Lent *v.* Tillson, 140 U. S. 316, 11 S. Ct. 825, 35 L. ed. 419 [*affirming* 72 Cal. 404, 14 Pac. 71].

in a paper that has no Sunday edition[92] or is not issued on Monday;[93] and a publication on Saturday and Sunday will be a publication for two consecutive days,[94] as required by statute; nor is the validity of the notice affected by a change in the name of a paper during its publication therein.[95] An act requiring a stated number of days' notice has been held to require in terms but one publication.[96] The designation of a newspaper in which the resolution shall be published may be embodied in the resolution itself.[97] Where the charter requires publication in but one newspaper, a proper publication in one official newspaper will not be invalidated by a defective publication in another paper.[98] A statutory provision for notice by publication "and" posting was held to require the latter mode only when publication could not be had.[99] When the resolution of intention included improvements in different parts of the city it was held not necessary to post in one street notice of improvements in another;[1] and a provision that the council's resolution to make an improvement must be published does not require a verbatim copy of the resolution in the notice.[2] If specifications are referred to they must be on file at the day of publication.[3] Where it is required that a resolution of intention shall be posted, it is not necessary to post the names of those voting for and against the resolution.[4] Where an act requiring notice of an application to the court for the appointment of assessors fixes no time for the publication of such notice, an appointment made by the court after a publication amounts to an implied approval of such publication equivalent to a previous order.[5]

j. Return or Proof of Service or Publication. Where service is actually made it has been held that it will be sufficient regardless of defects in its return, or in the absence of return;[6] and where proof of publication is defective, parol evidence is admissible to supply the defect.[7] A deputy engineer posting notices of a street improvement may make the required affidavit of such posting, where the deputies are clothed with the powers of the engineer.[8]

5. Particular Officers, Boards, or Commissioners, and Proceedings and Reports Thereof — a. Reference or Submission to Particular Officers or Boards.[9] A provision requiring reference of a proposed improvement to a designated board is mandatory and limits the general power of the council to control streets;[10] such

92. Perine *v.* Lewis, 128 Cal. 236, 60 Pac. 422, 772; Columbia Bank *v.* Portland, 41 Oreg. 1, 67 Pac. 1112.

93. Trenton *v.* Collier, 68 Mo. App. 483, holding that the publication of a resolution providing for a street improvement in a daily newspaper for two consecutive weeks, as from June 1 to June 15, was sufficient, although there intervened Mondays when there were no issues of such paper, and in fact there were only thirteen insertions.

94. Smith *v.* Hazard, 110 Cal. 145, 42 Pac. 465.

95. Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407.

96. Central Sav. Bank *v.* Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283. But *compare* Olds *v.* Erie City, 79 Pa. St. 380.

97. King *v.* Lamb, 117 Cal. 401, 49 Pac. 561.

Manner and sufficiency of designation of official newspaper in general see Newspapers.

98. Gilmore *v.* Utica, 15 N. Y. Suppl. 274 [*affirmed* in 131 N. Y. 26, 29 N. E. 841].

99. Gill *v.* Dunham, (Cal. 1893) 34 Pac. 68; Washburn *v.* Lyons, 97 Cal. 314, 32 Pac. 310.

1. Dowling *v.* Hibernia Sav., etc., Soc., 143 Cal. 425, 77 Pac. 141; Bates *v.* Twist, 138 Cal. 52, 70 Pac. 1023; Sacramento Paving Co. *v.* Anderson, 1 Cal. App. 672, 82 Pac. 1069.

2. Columbia Bank *v.* Portland, 41 Oreg. 1, 67 Pac. 1112.

3. Loomis *v.* Little Falls, 66 N. Y. App. Div. 299, 72 N. Y. Suppl. 774.

4. King *v.* Lamb, 117 Cal. 401, 49 Pac. 561.

5. State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 252, 22 N. W. 625, 632.

6. Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624. But see State *v.* St. Louis, 1 Mo. App. 503, holding that a return of the marshal, in proceedings before a land commissioner to open a street, must show the manner of service.

7. Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407.

8. Columbia Bank *v.* Portland, 41 Oreg. 1, 67 Pac. 1112.

9. **Commissioners or committee to make improvement** see *infra*, XIII, B, 8, c, (VI).

Commissioners to assess damages see *infra*, XIII, D, 9, h.

Officers and commissioners to assess benefits see *infra*, XIII, E, 7, d.

10. *Illinois.*— Middaugh *v.* Chicago, 187 Ill. 230, 58 N. E. 459.

provision does not violate a constitutional requirement that the corporate authorities be vested with power to make local improvements;[11] and an ordinance giving the board of public works authority to investigate and report as to the material to be used in a street improvement is not invalid as delegating legislative power belonging to the general council.[12]

b. Appointment of Commissioners, Viewers, or Jury. If the charter does not provide for the manner of appointment, the council may exercise its discretion in the choice of commissioners;[13] but under the power to appoint a jury to decide on the necessity of taking land for a street, it may not select persons directly interested.[14] When the charter directs the appointment of a special committee to lay out a street reference to a standing committee is not authorized,[15] nor may the council itself act in the stead of such committee.[16] Where the authority of a committee to estimate the cost of a proposed improvement is derived from statute and not from the resolution of the council, it is not necessary that the mayor shall have signed the ordinance providing for the improvement before the committee is appointed and makes its report.[17]

c. Notice of Proceedings. A board or commissioners acting in the matter of improvements are usually required by charter or statute to give notice of their proceedings, and a failure to comply substantially with such requirement invalidates their acts.[18] The rules governing the sufficiency of notice already stated[19] apply generally to notice by such board or commissioners, and a requirement that notice be published for six days in a daily paper is complied with, although there be an intervening Sunday on which no paper is issued.[20]

d. Preliminary Investigation and Report — (i) *In General.* It is frequently provided by charter or statute that the council refer to a special committee or board the question of the necessity and cost of a proposed improvement and the determination of the probable benefit to the property to be assessed. Such provisions are mandatory, and failure to comply with them will invalidate proceedings.[21] The time within which such committee must make report of its

Indiana.— Alley *v.* Lebanon, 146 Ind. 125, 44 N. E. 1003; Anderson *v.* Bain, 120 Ind. 254, 22 N. E. 323.

Michigan.— Butler *v.* Detroit, 43 Mich. 552, 5 N. W. 1078; People *v.* Detroit, 29 Mich. 343.

Minnesota.— Althen *v.* Kelly, 32 Minn. 280, 20 N. W. 188.

Missouri.—Shoenberg *v.* Field, 95 Mo. App. 241, 68 S. W. 945.

New Jersey.—White *v.* Bayonne, 49 N. J. L. 311, 8 Atl. 295.

Oregon.— Ladd *v.* East Portland, 18 Oreg. 87, 22 Pac. 533.

See 36 Cent. Dig. tit. "Municipal Corporations," § 789.

Number of commissioners.— Where a statute directed streets to be extended in a city in a manner directed by a road law requiring six viewers, and a subsequent statute authorized the court of quarter sessions within the county to appoint three viewers for the road, it was proper that the appointment of viewers for streets within the city should conform to the later statute and that they should be three in number. *In re* Lancaster County, 68 Pa. St. 396.

11. Givins *v.* Chicago, 188 Ill. 348, 58 N. E. 912.

Legislative control over local improvements in general see *supra*, IV, G.

12. *Ex p.* Paducah, 89 S. W. 302, 28 Ky. L. Rep. 412.

13. Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688.

14. Lumsden *v.* Milwaukee, 8 Wis. 485.

15. Gregory *v.* Bridgeport, 52 Conn. 40.

16. Gregory *v.* Bridgeport, 52 Conn. 40.

17. Galesburg *v.* Searles, 114 Ill. 217, 29 N. E. 686 [*following* Gurnee *v.* Chicago, 40 Ill. 165].

18. Kidder *v.* Peoria, 29 Ill. 77; Hendrickson *v.* New York, 38 N. Y. App. Div. 480, 56 N. Y. Suppl. 580 [*reversing* 24 Misc. 231, 52 N. Y. Suppl. 790]; Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888.

19. See *supra*, XIII, B, 4, d.

20. California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802. See also *supra*, XIII, B, 4, i, text and note 92.

21. *Illinois.*— Galesburg *v.* Searles, 114 Ill. 217, 29 N. E. 686.

Maine.— Wilson *v.* Simmons, 89 Me. 242, 36 Atl. 380.

Michigan.— Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

New Jersey.— Onderdonk *v.* Plainfield, 42 N. J. L. 480.

New York.— Havermans *v.* Troy, 50 How. Pr. 510.

Pennsylvania.—Greenleaf Ct. Case, 4 Whart. 514.

See 36 Cent. Dig. tit. "Municipal Corporations," § 792.

Change of grade.— Laying a pavement on an alley, although making the alley somewhat

investigation is sometimes expressly stated and has likewise been held mandatory;[22] but the failure of commissioners to complete proceedings for the extension of a street within the time fixed by law does not, in the absence of express provision, invalidate the proceedings.[23] A report signed by only two of the three commissioners appointed is nugatory.[24] It has, however, been held that an ordinance authorizing an improvement is not void because of the absence of the street commissioner when final action is taken by the board of improvement of which the commissioner is a member;[25] and that since the commissioners act in an official capacity a change in the *personnel* of the board, pending proceedings, will not affect the validity thereof.[26] A certificate may properly be made by a person who is out of office at the time of making it, where he was an officer at the time the proceedings were had.[27] Where commissioners are required to decide upon the land to be taken, they cannot leave the determination thereof to the jury summoned to assess damages.[28]

(II) *Estimate of Cost and Reports of Property Liable to Assessment.* An estimate of the costs of improvements and of assessments to pay for the same is frequently required by charter or statute; and such estimate becomes a condition precedent to the making of improvements by the municipality.[29] In

higher, is not a change of grade within the meaning of an ordinance requiring the same reports, etc., in case of a change of grade, as in case of the original establishment. Bogard *v.* O'Brien, 20 S. W. 1097, 14 Ky. L. Rep. 648.

Determination of benefit.— An allegation in the petition for improvement that the proposed improvements will benefit the whole corporation relieves the commissioners from the duty of inquiry into such fact, and binds the municipality ordering them, toward the petitioners, in the same manner as if the commissioners had expressly so declared. *In re* Barrack St., 2 Rob. (La.) 491.

The certificate of a city engineer, as to a proposed pavement, is not necessary unless required by statute. San Francisco Paving Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076, holding, however, that if such a certificate were required, his certificate that he has examined the work described in a resolution of intention and has found it practically the same to an official line and grade, and stating the area of the pavement made and the length of the curb constructed, is sufficient.

22. Van Anglen *v.* Bayonne, 56 N. J. L. 463, 29 Atl. 168; Semon *v.* Trenton, 47 N. J. L. 489, 4 Atl. 312. But see *In re* Broadway, 63 Barb. (N. Y.) 572.

In Pennsylvania under the act of May 1, 1876, Pamphl. Laws 94, it is not necessary to the validity of an ordinance authorizing a street improvement that the report be made before the hearing of the property-owners. Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888.

Report as to part of improvement.— Where a jury appointed to view and report as to the necessity of opening a street between two points, reports in favor of opening it only from one of such points to any intermediate point, and assesses the damages, the report should be set aside. *In re* Twenty-eighth St., 11 Phila. (Pa.) 436.

Change of grade.— Where an officer is entitled to establish a change of grade upon giving notice to those interested, it is not necessary that he announce his determination of such change or establishment at the time of the meeting. Kelly *v.* Baltimore, 65 Md. 171, 3 Atl. 594, holding further that no other announcement of his determination was required than the recording of the grade as finally calculated and determined upon, in the record book in his office, to which all parties interested could have access.

23. Kingston *v.* Terry, 24 Misc. (N. Y.) 616, 53 N. Y. Suppl. 652.

24. Dodge *v.* Chicago, 201 Ill. 68, 66 N. E. 367; Murphy *v.* Chicago, 186 Ill. 59, 57 N. E. 847; Phelps *v.* Mattoon, 177 Ill. 169, 52 N. E. 288; Markley *v.* Chicago, 170 Ill. 358, 48 N. E. 952; Hinkle *v.* Mattoon, 170 Ill. 316, 48 N. E. 908; Moore *v.* Mattoon, 163 Ill. 622, 45 N. E. 567; *In re* Newland Ave., 15 N. Y. Suppl. 63.

25. Heman Constr. Co. *v.* Loevy, 64 Mo. App. 430.

26. Central Sav. Bank *v.* Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283.

27. *In re* Locust St., 153 Pa. St. 276, 25 Atl. 816, so holding where the report of the viewers in a proceeding to lay out a road was certified to by the person who was clerk of the borough at the date of the proceeding, although it was not made until after the borough became a city of the third class and such clerk was out of office.

28. People *v.* Haverstraw, 137 N. Y. 88, 32 N. E. 1111.

29. *Kansas.*— Hentig *v.* Gilmore, 33 Kan. 234, 6 Pac. 304; Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781.

Michigan.— Baisch *v.* Grand Rapids, 84 Mich. 666, 48 N. W. 176.

Missouri.— Boonville *v.* Stephens, (App. 1906) 95 S. W. 314 (holding that an estimate of the cost of paving that the work "should be done at a cost not to exceed $1.47 per square yard" was indefinite); Kirksville *v.* Coleman, 103 Mo. App. 215, 77 S. W. 120.

Nebraska.— John *v.* Connell, 61 Nebr. 267, 85 N. W. 82.

the absence of legislative requirement, such estimate need not be made.[30] A statute requiring an estimate by the city engineer as a prerequisite to any contract for public improvements is not applicable to a contract for street lighting;[31] nor does a provision calling for an estimate of the cost of street improvements include an alteration of grade,[32] or construction of a sewer;[33] and statutes applicable to improvements by construction have been held inapplicable to those relating to proceedings for the appropriation of land.[34] The character of the estimate and report is usually prescribed by charter or statute, and such provision must be substantially complied with.[35] Hence an estimate of gross cost is not sufficient when the statute calls for a detailed estimate,[36] but an itemized estimate of the cost of

New Jersey.— Paterson, etc., R. Co. *v.* Nutley, 72 N. J. L. 123, 59 Atl. 1032; Pope *v.* Union, 32 N. J. L. 343.

Texas.— Frosh *v.* Galveston, 73 Tex. 401, 11 S. W. 402; Dallas *v.* Atkins, (Civ. App. 1895) 32 S. W. 780; Dallas *v.* Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128.

Wisconsin.— Pound *v.* Chippewa County Sup'rs, 43 Wis. 63.

See 36 Cent. Dig. tit. "Municipal Corporations," § 793.

Appointment of committee.—Where a charter provides that the city council shall appoint a committee of three disinterested, judicious freeholders to estimate the cost of any projected improvement, and to assess the expense upon the lands benefited, such committee need not be appointed by the ordinance for making the improvement. Scovill *v.* Cleveland, 1 Ohio St. 126.

A second estimate may be made without invalidating the proceedings, upon discovery that the original estimate of the expense is not sufficient to complete the work, if the formalities attendant upon the original proceedings are observed. Denver *v.* Kennedy, 33 Colo. 80, 80 Pac. 122, 467, so holding where a new estimate of the cost of a viaduct was made by the city engineer, and such proceedings had that notice was again given the owners of property in the district, of the estimated cost, the boundaries of the district, and other details as required by the charter provisions on the subject of notice. In case, after the introduction of an ordinance for a street improvement, it is submitted to the board of public improvements and amended, it is not necessary that the indorsement of the estimated cost as made on the original draft be amended. Bambrick *v.* Campbell, 37 Mo. App. 460.

In case of dismissal of proceedings by reason of the invalidity of an ordinance, a new ordinance cannot be adopted until the board of public works makes a new estimate of cost and holds another public hearing. Bass *v.* Chicago, 195 Ill. 109, 62 N. E. 913.

Where the improvement forms a part of a general system it has been held that the estimate of cost may have been made as preliminary to the adoption of the system. Cheney *v.* Beverly, 188 Mass. 81, 74 N. E. 306, holding that where an estimate of the cost of a sewer system made by an eminent engineer was submitted to the town and was in the custody of the town-clerk for the town's use when the system was adopted, and plans referred to in the town committee's reports constituted the system of sewers mentioned in the vote of the town, and the requisites, levels, distances, directions, and locations were shown with sufficient fullness on such plans, an assessment founded on such estimate of cost was not objectionable because the system was adopted without an estimate of the cost of the sewers to be included in it.

30. Sacramento Paving Co. *v.* Anderson, 1 Cal. App. 672, 82 Pac. 1069 (holding that under the Vrooman Act, Cal. Pol. Code (1866), § 4409, it was not necessary that the city council should have an estimate unless it was desirous of issuing serial bonds for the work or of placing the work in a district); Ronan *v.* People, 193 Ill. 631, 61 N. E. 1042; Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215; Hubbard *v.* Norton, 28 Ohio St. 116.

31. Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870.

32. Waddell *v.* New York, 8 Barb. (N. Y.) 95.

33. Herbert *v.* Bayonne, 63 N. J. L. 532, 42 Atl. 833.

34. Longworth *v.* Cincinnati, 10 Ohio Dec. (Reprint) 683, 23 Cinc. L. Bul. 100.

35. O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Lusk *v.* Chicago, 211 Ill. 183, 71 N. E. 878; Madderom *v.* Chicago, 194 Ill. 572, 62 N. E. 846; Harts *v.* People, 171 Ill. 373, 49 N. E. 539; McKernan *v.* Indianapolis, 38 Ind. 223; Reno Water, etc., Co. *v.* Osburn, 25 Nev. 53, 56 Pac. 945.

Who may make.— Where the charter requires the estimate to be made by the board of public works, the board may adopt an estimate made by a city surveyor. Cuming *v.* Grand Rapids, 46 Mich. 150, 9 N. W. 141. The city engineer may prepare such maps or surveys as will be of aid to the commissioners in making their estimate. Humphreys *v.* Bayonne, 60 N. J. L. 406, 38 Atl. 761. Where the statute provides that an estimate of cost shall be made by the city engineer or other proper officer, it has been held that a street commissioner may be regarded as a proper officer. Bevier *v.* Watson, 113 Mo. App. 506, 87 S. W. 612, so holding where a street commissioner was directed to make an estimate of the cost of a sidewalk.

36. *Illinois.*— Jones *v.* Chicago, 213 Ill. 92, 72 N. E. 798.

Kansas.— Argentine *v.* Simmons, 54 Kan.

component elements of an improvement is sufficient.[37] The estimate should be based upon cost for cash,[38] and may include items which are not specifically enumerated in the ordinance for the improvement, if they are properly incident to the improvement;[39] hence the report may take into consideration all such items as reasonably enter into consideration in determining the amount of the estimate and the cost of levy and collection of a special tax.[40] It is not necessary that the plans and specifications be as full as it is possible to make them, in case they are sufficiently definite for practical purposes.[41]

(III) *Construction and Operation.* Where an estimate has been furnished and the council acts upon such estimate without calling for further plans, it has been held that it must be assumed that the information was sufficiently specific to enable the council to act intelligently.[42] Errors in a report that do not affect it essentially will not invalidate it;[43] hence the report of an estimate is not void for uncertainty by reason of an omission which may be clearly supplied from the context;[44] and where a specific portion only of an improvement is such as may be paid for by general taxation, a report which divides the cost of improvement between that payable by general taxation and that payable by specific taxation is equivalent to a report finding separate costs of the two portions of the improvement.[45] When a board recommends the improvement of a street to the full width of sixty feet, such recommendation will embrace a part of the street less than sixty feet in width.[46] A report of an estimate of cost when adopted by the city council becomes as much the act of the council as if it had itself made the estimate.[47]

(IV) *Proceedings on Report.* A report of commissioners relative to the laying out or improvement of streets has no force until accepted and acted on by the council.[48] A report cannot be accepted in part if such partial report would

699, 39 Pac. 181; Olsson *v.* Topeka, 42 Kan. 709, 21 Pac. 219, holding that under a statute requiring a detailed estimate of the cost of paving and curbing it is sufficient if the estimate states the surface to be paved, the kind of pavement, the cost per yard and the aggregate cost of the same, the number of lineal feet of curbing, its character, and the cost per foot and the aggregate cost.

Maryland.— Friedenwald *v.* Shipley, 74 Md. 220, 21 Atl. 790, 24 Atl. 156.

Ohio.— Wewell *v.* Cincinnati, 45 Ohio St. 407, 15 N. E. 196.

Pennsylvania.— Erie *v.* Brady, 150 Pa. St. 462, 24 Atl. 641.

See 36 Cent. Dig. tit. "Municipal Corporations," § 793.

37. Chicago Union Traction Co. *v.* Chicago, 215 Ill. 410, 74 N. E. 449; Clark *v.* Chicago, 214 Ill. 318, 73 N. E. 358; Hulbert *v.* Chicago, 213 Ill. 452, 72 N. E. 1097; Jones *v.* Chicago, 213 Ill. 92, 72 N. E. 798.

38. Kansas Town Co. *v.* Argentine, 5 Kan. App. 50, 47 Pac. 542 [*affirmed* in 59 Kan. 779, 54 Pac. 1131], holding, however, that subsequent proceedings would not be held void merely because an estimate was based upon payment in street bonds at ninety cents on the dollar.

39. Gage *v.* Chicago, 162 Ill. 313, 44 N. E. 729, holding that commissioners might include an estimate of the cost of adjustment of sewers under an ordinance providing for the paving and curbing of a street.

40. Cramer *v.* Charleston, 176 Ill. 507, 52 N. E. 73, holding that a report was not invalid because it included items for contingencies, for contractors' margins for curbing and profit on same, and for collection.

41. Jenney *v.* Des Moines, 103 Iowa 347, 72 N. W. 550. See also Olsson *v.* Topeka, 42 Kan. 709, 21 Pac. 219, holding that an estimate which provides that the paving of a street shall be stone and asphalt sufficiently describes the material.

42. Cass Farm Co. *v.* Detroit, 124 Mich. 433, 83 N. W. 108; Goodwillie *v.* Detroit, 103 Mich. 283, 61 N. W. 526.

43. Walsh *v.* Ansonia, 69 Conn. 558, 37 Atl. 1096; People *v.* Gravesend, 154 N. Y. 381, 48 N. E. 813; Matter of New York, 20 N. Y. App. Div. 356, 46 N. Y. Suppl. 855 [*affirmed* in 156 N. Y. 688, 50 N. E. 1117].

44. McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191, holding that a report of the estimated cost of improving "65th —" sufficiently designated the locality, where the ordinance was recited and showed that 65th street was meant.

45. Callon *v.* Jacksonville, 147 Ill. 113, 35 N. E. 223.

46. Krumberg *v.* Cincinnati, 29 Ohio St. 69.

47. Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819; *Ex p.* Paducah, 89 S. W. 302, 28 Ky. L. Rep. 412.

48. Elkhart *v.* Simonton, 71 Ind. 7.

Rejection.— A report of a jury of view will not be confirmed where it appears that the widening of a street would involve great expense to the city, and is sought only by a few private individuals. *In re* Chestnut St., 11 Phila. (Pa.) 411.

provide for an improvement essentially different from that originally ordered;[49] but on recommittal of a report for errors the filing of an amended report relates back to the filing of the original.[50] Where the notice of the public hearing upon an improvement is required to contain an estimate of the cost thereof, an increased estimate cannot be arbitrarily adopted after such hearing and an ordinance based upon such estimate.[51] Provision is sometimes made by charter or statute for the modification of a report at the instance of property-owners affected;[52] but a statute which provides that the report of a commission of estimate and assessment shall not be confirmed in case of objection by a majority of the abutting owners does not apply to proceedings to open streets which are needed for the convenience of the general public.[53] The report of a referee who has been directed, in street opening proceedings, to take proof as to the title of persons objecting to the opening and to report his opinion thereon, may be objected to, although no exception to the report has been filed.[54]

e. Compensation or Fees, and Expenditures. Although there is a case to the contrary,[55] the rule would seem to be that a municipality is not liable for expenses incurred by commissioners in having maps and surveys prepared for their use;[56] but provision for such expense is usually made by statute.[57]

6. Remonstrance or Objections — a. In General. It is frequently provided by charter or statute that an improvement by special assessment shall not be made if a certain portion of the property-owners to be assessed file remonstrances or objections. Such provisions are mandatory,[58] but their terms must be strictly complied with;[59] and a protest or remonstrance to be effective must be unqualified,[60]

49. Clarke *v.* Newport, 5 R. I. 333; Gilman *v.* Milwaukee, 61 Wis. 588, 21 N. W. 640.

50. Billings *v.* Providence, (R. I. 1895) 32 Atl. 855.

51. Chicago *v.* Wilder, 184 Ill. 397, 56 N. E. 395.

52. *In re* Board of Street Opening, etc., 20 N. Y. Suppl. 563; Lincoln *v.* Birdsboro, 7 Pa. Co. Ct. 539.

53. *In re* Alexander Ave., 17 N. Y. Suppl. 933.

54. *In re* Board of Street Opening, 15 N. Y. Suppl. 865.

55. Onderdonk *v.* Plainfield, 42 N. J. L. 480.

56. People *v.* Green, 1 Hun (N. Y.) 1, 3 Thomps. & C. 90.

57. Blunt *v.* New York, 9 Hun (N. Y.) 330; People *v.* Green, 1 Hun (N. Y.) 1, 3 Thomps. & C. 90. And see *In re* Public Parks, 27 Hun (N. Y.) 305, holding that commissioners are entitled to reasonable compensation for laying out a parkway, such compensation not being mere costs under the various statutes prescribing a fixed sum therefor. *Compare* Harrisburg City *v.* Eby, 4 Dauph. Co. Rep. (Pa.) 278.

58. *California.*— Thomason *v.* Carroll, 132 Cal. 148, 64 Pac. 262; Girvin *v.* Simon, 127 Cal. 491, 59 Pac. 945.

Indiana.— Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397; Spiegel *v.* Gansberg, 44 Ind. 418.

Mississippi.— Nugent *v.* Jackson, 72 Miss. 1040, 18 So. 493.

Missouri.— Forbis *v.* Bradbury, 58 Mo. App. 506.

New Jersey.— Jersey City Brewery Co. *v.* Jersey City, 42 N. J. L. 575.

Oregon.— Portland *v.* Oregon Real Estate Co., 43 Oreg. 423, 72 Pac. 322; Oregon Real Estate Co. *v.* Portland, 40 Oreg. 56, 66 Pac. 442.

See 36 Cent. Dig. tit. "Municipal Corporations," § 797.

Exemption of particular improvements from the rule.— A charter providing that the construction of storm-sewers, in contradistinction to certain other improvements, shall not be subject to petition or remonstrance by the property-owner, is not subject to any constitutional objection. Spalding *v.* Denver, 33 Colo. 172, 80 Pac. 126.

59. Maley *v.* Clark, 33 Ind. App. 149, 70 N. E. 1005.

An act providing for remonstrances when the improvement extends a block or more along a street does not apply to an improvement of the crossing of two streets. City St. Imp. Co. *v.* Laird, 138 Cal. 27, 70 Pac. 916.

In New York an act allowing abutting owners to file objections to the opening of streets was construed to apply only to proceedings based on petition and not to the opening of a street by a municipal board *sua sponte* when in its opinion the public interest required it. *In re* Board of Street Opening, etc., 133 N. Y. 436, 31 N. E. 316; Matter of Board of Street Opening, etc., 82 Hun 580, 31 N. Y. Suppl. 732 [*affirmed* in 148 N. Y. 764, 43 N. E. 985]. A statute providing for remonstrance, in case the construction is based upon an assessment of benefits, is inapplicable where there is no such assessment. *In re* Board of Street Opening, 1 N. Y. Suppl. 145.

60. McMillan *v.* Butte, 30 Mont. 220, 76 Pac. 203, holding that an alleged protest to

must be presented within the time[61] and signed,[62] as required by the charter or statute. The signatures must be made by the persons whose names are used,[63] or by an authorized agent.[64] The remonstrance must purport to be signed by the requisite number,[65] and although not so in fact it will be effective until disallowed by the council.[66] If the requisite number fail to remonstrate all will be bound by the assessment.[67] In estimating whether owners of a required amount of frontage have remonstrated, city property should not be considered.[68] Where persons representing a majority in amount of assessments may prevent the making of an improvement, mortgaged property to the extent of the mortgage should be omitted;[69] and in estimating such majority an award to a person who has sold his property before the hearing of the application for confirmation of the report of the commissioner must be rejected.[70] A protest against an improvement is sufficient for the work objected to, although it does not include all the work enumerated in the resolution of the council.[71] The council may set aside proceedings pending on a remonstrance and order the improvement *de novo*, and make the same unless a new remonstrance is filed.[72] An order of the council directing a

street paving, filed by abutting owners, stating the reasons why they did not desire the paving done during the year 1898, and stating that they were willing to have the street paved during the year 1900, and that payment therefor should be required in three annual instalments, was not an unqualified protest.

61. Burnett *v.* Sacramento, 12 Cal. 76, 73 Am. Dec. 518; McKee *v.* Pendleton, 162 Ind. 667, 69 N. E. 997; Loomis *v.* Little Falls, 66 N. Y. App. Div. 299, 72 N. Y. Suppl. 774.

Premature filing.— Where it is provided that objection shall be filed within ten days from the expiration of the time of publication of notice of intention, the protest is not invalid as prematurely filed, because it is filed before the last day of the publication. Thomason *v.* Carroll, 132 Cal. 148, 64 Pac. 262.

Indorsement.— Where it is provided that a clerk of the council shall indorse the protest with the date of its reception, the failure of the clerk to sign the indorsement of filing will not render the objection insufficient. City Street Imp. Co. *v.* Babcock, 139 Cal. 600, 73 Pac. 666.

62. House *v.* Greensburg, 93 Ind. 533, holding that only owners of property that lies within the borders of the city could protest.

Resident owners only may be qualified under the statute. Kirkland *v.* Indianapolis Bd. of Public Works, 142 Ind. 123, 41 N. E. 374; Marshall *v.* Leavenworth, 44 Kan. 459, 24 Pac. 975.

The administrator of a deceased owner cannot protest, as the owner of land, against the improvement of a street. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

Officers of a corporation cannot make a protest unless specially authorized by the directors. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

A person who will not be subject to an assessment of benefits, it has been held, cannot object to an improvement on the ground that his land will not be benefited. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590.

63. Matter of Tompkins Square, 17 Abb. Pr. (N. Y.) 324 note, holding also that they must be duly authenticated.

64. Los Angeles Lighting Co. *v.* Los Angeles, 106 Cal. 156, 39 Pac. 535; Frnin-Bambrick Constr. Co. *v.* Geist, 37 Mo. App. 509.

Evidence of authority need not accompany the remonstrance. Sedalia *v.* Scott, 104 Mo. App. 595, 78 S. W. 276.

65. Pacific Paving Co. *v.* Mowbray, 127 Cal. 1, 59 Pac. 205.

Remonstrances filed at separate times.— In reckoning the number of remonstrants all remonstrances presented after the proceeding is commenced, and up to and on the day fixed for the hearing, are to be considered. Green *v.* Jersey City, 42 N. J. L. 565.

66. Pacific Paving Co. *v.* Gallett, 137 Cal. 174, 69 Pac. 985; Pacific Paving Co. *v.* Geary, 136 Cal. 373, 68 Pac. 1028; McChesney *v.* Chicago, 205 Ill. 611, 69 N. E. 82.

67. Daniel *v.* New Orleans, 26 La. Ann. 1.

68. Armstrong *v.* Ogden City, 12 Utah 476, 43 Pac. 119.

69. *In re* Board of Street Opening, 15 N. Y. Suppl. 865.

70. *In re* Board of Street Opening, 15 N. Y. Suppl. 865.

71. Los Angeles Lighting Co. *v.* Los Angeles, 106 Cal. 156, 39 Pac. 535.

72. Greendale *v.* Suit, 163 Ind. 282, 71 N. E. 658; Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407.

Further proceedings.—Under a statute providing that a written objection by a majority of the owners shall be a bar for six months to any further proceedings, the objection not only suspends the right to make improvements, but precludes subsequent construction after the expiration of six months, without a repetition and notice of intention. Thomason *v.* Carroll, 132 Cal. 148, 64 Pac. 262. And the board is divested of jurisdiction to proceed further without a new resolution of

board to proceed with an improvement notwithstanding a remonstrance may be in the form of a resolution; but not of *viva voce* vote to adopt report.[73] When the report of a committee to which has been referred a remonstrance is received by the council and ordered filed, such action amounts to an adoption of the report and the same becomes a part of the record.[74] So when a remonstrance is referred to a committee, and the council or board in disregard of the remonstrance authorizes the improvement, such action amounts to a decision against the remonstrance and it is not necessary that a formal order be entered for that purpose.[75] The adoption of a report that a certain remonstrance is effective, when in fact it is not, does not deprive the council of authority.[76]

b. Withdrawal of Protest. After jurisdiction to proceed with an improvement has been ousted by the filing of a remonstrance, it cannot be restored by a withdrawal of the remonstrance, or of signatures therefrom.[77]

7. Hearing and Determination — a. Hearing of Persons Interested. It is usually provided by charter or statute that before an improvement be made, an opportunity to be heard shall be given to objecting property-owners; such provisions are mandatory,[78] but in their absence a hearing is not necessary.[79] In the absence of express legislative authority,[80] an ordinance changing the character of an improvement and increasing its cost, passed after a hearing, is void as to such increase unless a rehearing be had.[81] But final action need not be taken on the day named for a hearing,[82] and the fact that the council confirmed a report of the engineer on a proposed improvement the same evening set for a hearing has been held not necessarily to have deprived the property-owners of their right to be heard.[83] Where at the hearing of property-owners the improvement is not altered or modified, and it is determined to construct the improvement in accordance with the original resolution, it is sufficient that the board of local improvements to whom the matter is intrusted pass a resolution adhering to the prior resolution.[84] It has been held that by the passage of an ordinance for an improvement, after the report of a committee upon the sufficiency of remonstrance against the improvement, the council in effect adopts the report as if it had taken formal

intention. Pacific Paving Co. *v.* Sullivan Estate Co., 137 Cal. 261, 70 Pac. 86.

73. Buckley *v.* Tacoma, 9 Wash. 269, 37 Pac. 446.

74. Knopfi *v.* Gilsonite Roofing, etc., Co., 92 Mo. App. 279.

75. Harney *v.* Heller, 47 Cal. 15.

76. City St. Imp. Co. *v.* Laird, 138 Cal. 27, 70 Pac. 916.

77. Sedalia *v.* Scott, 104 Mo. App. 595, 78 S. W. 276; Knopfi *v.* Gilsonite Roofing, etc., Co., 92 Mo. App. 279; Roebling *v.* Trenton, 58 N. J. L. 40, 32 Atl. 685; Vanderbeck *v.* Jersey City, 44 N. J. L. 626; Armstrong *v.* Ogden City, 12 Utah 476, 43 Pac. 119. But see New Orleans *v.* Stewart, 18 La. Ann. 710; Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014, holding, upon the theory that jurisdiction was not ousted until the expiration of the time within which remonstrances might be filed, that until the expiration of such time remonstrances might be withdrawn.

78. See the statutes of the several states. And see Gray *v.* Burr, 138 Cal. 109, 70 Pac. 1068; Girvin *v.* Simon, 127 Cal. 491, 59 Pac. 945; State *v.* Jersey City, 25 N. J. L. 309.

Hearing upon final order.—Where objectors to the laying out of a street were afforded several opportunities to be heard in the course of the proceedings, they were not entitled to another hearing on final adoption by the city council of the order laying out the street. Taintor *v.* Cambridge, 192 Mass. 522, 78 N. E. 545.

79. Parsons *v.* Grand Rapids, 141 Mich. 467, 104 N. W. 730; Van Reypen *v.* Jersey City, 48 N. J. L. 428, 6 Atl. 23.

Objections to assessment see *infra*, XIII, E, 7, g.

80. Chicago *v.* Kerfoot, 208 Ill. 387, 70 N. E. 349; McChesney *v.* Chicago, 205 Ill. 611, 69 N. E. 82; Washburn *v.* Chicago, 198 Ill. 506, 64 N. E. 1064 (holding that an act authorizing the board of local improvements, at a public hearing, to adopt a new resolution changing the former proposed scheme without a further public hearing, provided the change does not increase the estimated cost to exceed twenty per cent, was within the power of the general assembly); People *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

81. Chicago *v.* Walsh, 203 Ill. 318, 67 N. E. 774.

82. Ireland *v.* Rochester, 51 Barb. (N. Y.) 414; Matter of Board of Street Opening, 12 Misc. (N. Y.) 535, 33 N. Y. Suppl. 599.

83. Brown *v.* Central Bermudez Co., 162 Ind. 452, 69 N. E. 150.

84. Hulbert *v.* Chicago, 213 Ill. 452, 72 N. E. 1097.

action thereon.[85] Publication of notice of a hearing may be made by the clerk under the council's instructions;[86] and under a statutory requirement that the council give notice of a proposed improvement, stating a time and place for hearing objections, it need not appoint a committee to hear such objections, but may order them filed with the clerk.[87] An express finding that the cost is such as to justify the issuance of bonds is unnecessary, where the cost is set out and the issuance of bonds ordered.[88]

b. Determination as to Necessity and Utility of Improvement. The right to determine upon the necessity of an improvement is usually vested in the council, and its decision, except in extreme cases,[89] is final.[90] In determining such necessity the council may act on the report of a committee;[91] and the acceptance of an offer by an individual to open a street is sufficient declaration of its necessity as a public improvement;[92] nor is it necessary to find that the cost of opening and grading a street will exceed the value of the benefit to the public.[93]

8. Ordinance, Resolution, or Order For Improvement — a. Necessity — (I) *In General.* When the power to make improvements is conferred in general terms, the municipality may exercise the same only by formal legislative action on the part of the city council,[94] it being frequently provided by charter or statute that an ordinance shall be necessary,[95] in which case it becomes a condition

85. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

86. Auditor-Gen. *v.* Calkins, 136 Mich. 1, 98 N. W. 742.

87. Quill *v.* Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681.

88. Chase *v.* Trout, 146 Cal. 350, 80 Pac. 81.

89. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383; Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369; Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128; Duker *v.* Barber Aspbalt Co., 75 S. W. 744, 25 Ky. L. Rep. 135; Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536; Shannon *v.* Portland, 38 Oreg. 382, 62 Pac. 50. See also *supra*, XIII, A, 3, a, (II).

90. *Illinois.*— Ton *v.* Chicago, 216 Ill. 331, 74 N. E. 1044. See also Chicago Union Traction Co. *v.* Chicago, 202 Ill. 576, 67 N. E. 383 (holding that an ordinance passed on recommendation of the board of improvements, for the paving of four blocks of a street, was not invalidated because the board had previously recommended paving two of the blocks and the council had deferred the action on the ordinance); Givins *v.* Chicago, 188 Ill. 348, 58 N. E. 912 (holding that in a special assessment proceeding an instruction that the city improvement board was the sole judge of the necessity for the improvement, and the jury were not to consider any question for the necessity of the improvement, although erroneous in unduly magnifying the board's power over the council, correctly informed the jury as to the limits of their power).

Indiana.— Holden *v.* Crawfordsville, 143 Ind. 558, 41 N. E. 370.

Kentucky.— Mudge *v.* Walker, 90 S. W. 1046, 28 Ky. L. Rep. 996.

Minnesota.— Diamond *v.* Mankato, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448.

Missouri.— Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562.

Nebraska.— Morse *v.* Omaha, 67 Nebr. 426, 93 N. W. 734.

Pennsylvania.— Fyfe *v.* Turtle Creek Borough, 22 Pa. Super. Ct. 292.

91. Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737; Taintor *v.* Cambridge, 192 Mass. 522, 78 N. E. 545.

Where the charter requires that objections to a change of the lines of the street shall be considered by the board of aldermen, consideration by a committee is not sufficient. Lambert *v.* Paterson, 72 N. J. L. 437, 60 Atl. 1131.

92. Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384.

93. Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635.

94. Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Zalesky *v.* Cedar Rapids, 118 Iowa 714, 92 N. W. 657; Eckert *v.* Walnut, 117 Iowa 629, 91 N. W. 929; Thompson *v.* Sumner, 9 Wash. 310, 37 Pac. 450, holding that an ordinance for the construction of waterworks in a city of the fourth class, which postpones its taking effect until its adoption by the qualified voters of the town, is void, although Laws (1893), p. 12, § 2, requires an approval by popular vote of the plan proposed by the council, since the ordinance itself must be a law in force independently of the popular vote.

95. See the statutes of the several states. And see the following cases:

Illinois.— Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596.

Kansas.— Sloan *v.* Beebe, 24 Kan. 343.

Maryland.— Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686.

Missouri.— Clay *v.* Mexico, 92 Mo. App. 611; Kolkmeyer *v.* Jefferson, 75 Mo. App. 678.

New Jersey.—State *v.* Brigantine Borough, 54 N. J. L. 476, 24 Atl. 481; Taylor *v.* Lambertville, 43 N. J. Eq. 407, 10 Atl. 809; Cross *v.* Morristown, 18 N. J. Eq. 305.

precedent to the making of improvements,[96] or levying a tax to pay for the same.[97] But where the entire procedure for the construction of an improvement is regulated by statute, and nothing is left to be determined by a general ordinance, the adoption of a general ordinance is unnecessary and an assessment may be made in the mode prescribed by the statute.[98] The rule requiring improvements to be ordered by either ordinance or resolution will not operate to prevent temporary or ordinary work upon the streets being done without specific authority.[99] And where injury might result from the delay attendant upon the procedure by ordinance, municipal authorities are sometimes given the power to act without ordinance or resolution.[1] In case repairs, as distinguished from reconstruction, may be made without ordinance, the real character of the work cannot be controlled by a rule adopted by the street commissioner.[2]

(II) *Resolution or Ordinance.* Unless an ordinance is required by charter or statute a resolution ordering an improvement is usually held to be sufficient.[3] If the charter requires an improvement to be ordered by ordinance, a resolution is not sufficient,[4] unless it be passed with the formalities of an ordinance and is

Pennsylvania.—Riebe *v.* Lansford Borough, 5 Pa. Dist. 555, 18 Pa. Co. Ct. 289; Scranton *v.* McDonough, 1 Lack. Leg. N. 177. See also *In re* Powelton Ave., 11 Phila. 447, holding that the opening and the widening of a street are recognized as separate and distinct acts; that where a street before being opened is to be widened, the council should by resolution or ordinance set forth the fact.

Texas.— Noel *v.* San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

See 36 Cent. Dig. tit. "Municipal Corporations," § 802.

Sufficiency of resolution see *infra*, XIII, B, 8, a, (II).

96. *Illinois.*— Paxton *v.* Bogardus, 201 Ill. 628, 66 N. E. 853.

Iowa.— Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; McManus *v.* Hornaday, 99 Iowa 507, 68 N. W. 812.

Missouri.— Wheeler *v.* Poplar Bluff, 149 Mo. 36, 49 S. W. 1088; Springfield *v.* Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; Graden *v.* Parkville, 114 Mo. App. 527, 90 S. W. 115.

Nebraska.— Themanson *v.* Kearney, 35 Nebr. 881, 53 N. W. 1009; Fulton *v.* Lincoln, 9 Nebr. 358, 2 N. W. 724.

New Jersey.— Bourgeois *v.* Ocean City, 70 N. J. L. 622, 57 Atl. 262; Ware *v.* Rutherford, 55 N. J. L. 450, 26 Atl. 933; Cross *v.* Morristown, 18 N. J. Eq. 305. But see Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651.

New York.— Blank *v.* Kearney, 28 Misc. 383, 59 N. Y. Suppl. 645.

Pennsylvania.— Bridgeport *v.* Bate, 22 Montg. Co. Rep. 87.

Texas.— Waco *v.* Prather, 90 Tex. 80, 37 S. W. 312; Waco *v.* Chamberlain, (Civ. App. 1898) 45 S. W. 191 [*reversed* on other grounds in 92 Tex. 207, 47 S. W. 527].

97. East St. Louis *v.* Albrecht, 150 Ill. 506, 37 N. E. 934; Carlyle *v.* Clinton County, 140 Ill. 512, 30 N. E. 782; Altman *v.* Dubuque, 111 Iowa 105, 82 N. W. 461; Kaye *v.* Hall, 13 B. Mon. (Ky.) 455; Nevada *v.* Eddy, 123 Mo. 546, 27 S. W. 471; Louisiana *v.* Miller, 66 Mo. 467. See also Mitchell *v.* Titus, 33 Colo. 385, 80 Pac. 1042; Alton *v.* Job, 103 Ill. App. 378.

98. Martin *v.* Oskaloosa, 126 Iowa 680, 102 N. W. 529. See also Quarles *v.* Sparta, 2 Tenn. Ch. App. 714.

99. Cooper *v.* Cedar Rapids, 112 Iowa 367, 83 N. W. 1050, holding that a street commissioner might, without specific authority, construct a temporary open sewer for surface drainage.

1. See Weber *v.* Gill, 98 Cal. 462, 33 Pac. 330, holding that the department of streets and wards might remove obstructions from a watercourse, without a specific ordinance.

2. Ritterskamp *v.* Stifel, 59 Mo. App. 510.

3. *California.*— Haughawout *v.* Bonynge, (1905) 83 Pac. 54; Haughawout *v.* Raymond, 148 Cal. 311, 83 Pac. 53; Santa Cruz Rock Pavement Co. *v.* Heaton, 105 Cal. 162, 38 Pac. 693.

Dakota.— National Tube-Works Co. *v.* Chamberlain, 5 Dak. 54, 37 N. W. 761.

Indiana.—Indianapolis *v.* Imberry, 17 Ind. 175.

Iowa.— Shelby *v.* Burlington, 125 Iowa 343, 101 N. W. 101; Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330. But see McManus *v.* Hornaday, 99 Iowa 507, 68 N. W. 812, holding that under a charter providing that the council might pass such ordinances if they should be necessary, and conferring authority to establish the grade of certain streets and alleys, the power of the council to establish and change the grade of streets could be exercised only by ordinance.

New Jersey.— Van Vorst *v.* Jersey City, 27 N. J. L. 493.

New York.— *In re* Knaust, 101 N. Y. 188, 4 N. E. 338.

Texas.— Waco *v.* Prather, 90 Tex. 80, 37 S. W. 312.

See 36 Cent. Dig. tit. "Municipal Corporations," § 809.

4. Barron *v.* Krebs, 41 Kan. 338, 21 Pac. 335; Graden *v.* Parkville, 114 Mo. App. 527, 90 S. W. 115; State *v.* Bayonne, 54 N. J. L. 474, 24 Atl. 448; Story *v.* Bayonne, 35 N. J. L. 335; Hoboken Land, etc., Co. *v.* Hoboken,

such in all but name.[5] And where by statute it is provided that action shall be by general or special ordinance, the council cannot by ordinance confer upon itself the right to proceed by resolution.[6] If the charter permits a resolution, an ordinance will be a compliance.[7] A resolution is sometimes expressly authorized in lieu of an ordinance.[8] It has been held that, where a city has power under its charter to build and maintain a system of waterworks and contract for that purpose, the power may be exercised by resolution, and that an ordinance need not be passed;[9] and a provision requiring formal ordinance in making contracts for gas or electric works does not require an ordinance in making a contract with a private company for lighting the city, but the same may be made by resolution.[10] Although an ordinance may be necessary to establish a grade, it is not necessary, where no change of grade is entailed by an improvement, that the grade be reëstablished by ordinance, although originally fixed by resolution.[11]

b. Enactment — (I) *In General.* In the absence of special provision, ordinances for the authorization of improvements are subject to the general provisions relating to the passage of other ordinances.[12] Special provisions prescribing the mode of passing such ordinances are, however, frequently found in charters or statutes and must be complied with.[13] But the provisions of a statute relating to street improvements have been held inapplicable to an ordinance for the reconstruction of an improvement.[14] Proceedings which are begun before one council may be continued before succeeding councils, and finally completed by a council composed of different members from that before which the proceedings were instituted and by which the parties have been heard.[15]

(II) *At Special Meeting.*[16] Unless otherwise provided by a charter or statute the action of the council, with regard to an improvement, may be taken at a special, as well as at a general, meeting.[17] And charter provisions relating to the passage of ordinances at special meetings apply generally to ordinances for

35 N. J. L. 205; Packard *v.* Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227; Buckley *v.* Tacoma, 9 Wash. 253, 37 Pac. 441.

5. Springfield *v.* Knott, 49 Mo. App. 612; Sower *v.* Philadelphia, 35 Pa. St. 231; *In re* Seventh St., 5 Pa. Dist. 591.

6. Sproul *v.* Stockton, 73 N. J. L. 158, 62 Atl. 275.

7. Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; Los Angeles *v.* Waldron, 65 Cal. 283, 1 Pac. 883, 3 Pac. 890.

8. Langan *v.* Bitzer, 82 S. W. 280, 26 Ky. L. Rep. 579; Trephagen *v.* South Omaha, 69 Nebr. 577, 96 N. W. 248, 111 Am. St. Rep. 570; Matter of Schreiber, 3 Abb. N. Cas. (N. Y.) 68. See also Cincinnati *v.* Mathers, 6 Ohio Dec. (Reprint) 755, 7 Am. L. Rec. 734, 4 Cinc. L. Bul. 273.

Change of grade.— Under an act providing that after a public improvement has been instituted by an ordinance any further acts or proceedings necessary to complete the improvement shall be by resolution, a change in grade may be effected by resolution where the improvement of a street has been inaugurated by ordinance. Sate *v.* Rutherford, 52 N. J. L. 499, 19 Atl. 972.

9. National Tube-Works Co. *v.* Chamberlain, 5 Dak. 54, 37 N. W. 761.

10. Lincoln *v.* Sun Vapor Street-Light Co., 59 Fed. 756, 8 C. C. A. 253.

11. Langan *v.* Bitzer, 82 S. W. 280, 26 Ky. L. Rep. 579.

12. Reed *v.* Woodcliff, (N. J. Sup. 1905) 60 Atl. 1128. See, generally, *supra*, VI, B.

13. *Illinois.*— Berry *v.* Chicago, 192 Ill. 154, 61 N. E. 498.

Iowa.— Marion Water Co. *v.* Marion, 121 Iowa 306, 96 N. W. 883.

Kentucky.— Louisville *v.* Gast, 118 Ky. 564, 81 S. W. 693, 26 Ky. L. Rep. 412; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238.

Missouri.— Irvin *v.* Devors, 65 Mo. 625; Saxton *v.* Beach, 50 Mo. 488.

New York.— See Hildreth *v.* New York, 111 N. Y. App. Div. 63, 97 N. Y. Suppl. 582.

Ohio.— Corry *v.* Campbell, 25 Ohio St. 134; McGuire *v.* East Cleveland, 25 Ohio Cir. Ct. 497.

Rhode Island.— *In re* Canal St., etc., 18 R. I. 129, 25 Atl. 975.

Texas.— Hutcheson *v.* Storrie, (Civ. App. 1898) 48 S. W. 785.

Washington.— Jones *v.* Seattle, 19 Wash. 669, 53 Pac. 1105.

Wisconsin.— Hall *v.* Racine, 81 Wis. 72, 50 N. W. 1094.

See 36 Cent. Dig. tit. "Municipal Corporations," § 803.

14. Mackin *v.* Wilson, 45 S. W. 663, 20 Ky. L. Rep. 218.

15. Taintor *v.* Cambridge, 192 Mass. 522, 78 N. E. 545.

16. Special meetings in general see *supra*, V, B, 3, b.

17. Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071.

making improvements[18] which it has been held may be so passed when exigency or expediency so demands.

(III) *NOTICE OF MEETING.*[19] Where all members of the council or board have been present at a meeting at which the improvement is considered, and an adjournment is taken to a fixed date, further notice is unnecessary.[20]

(IV) *NUMBER OF MEETINGS AND TIME FOR VOTE.*[21] Where no time is provided within which the council must act upon an ordinance presented by the board of local improvements, accompanied by a recommendation and an estimate of cost, such a limitation cannot be imposed by the courts.[22] Under some charters and statutory provisions, however, it is provided that resolutions for the purpose of authorizing improvements cannot be voted on within a prescribed period after their presentation.[23] So resolutions of a permanent nature may be required to be read on three different days unless three fourths of the members elected dispense with the rule.[24] In the absence of statutory regulation the council may suspend its rules and pass an ordinance on the same day that it is presented.[25] An ordinance is not affected by an objection that it was voted on before the hearing of the report of a committee to which a remonstrance against its passage was referred, where the ordinance was presented by one member of the committee and voted for by all the other members.[26] Where a council is required to determine, before ordering the construction of an improvement, both that the public convenience will be promoted by the construction thereof, and that the expense will not be disproportionate to the benefits, they need not take action separately upon each of such questions.[27] In the absence of the adoption of any special rule, proceedings for the construction of an improvement are not terminated by the fact that they are laid upon the table until the next meeting of the board and are not taken up

18. Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946; Dollar Sav. Bank *v.* Ridge, 62 Mo. App. 324. See also Smith *v.* Tobener, 32 Mo. App. 601, holding that under a charter providing that whenever a special session of common council should be called by the mayor he should state to them when assembled the cause for which they were convened, and their action should be confined to such cause or causes, the common council had power at a special session called for the purpose of acting upon a special ordinance to pave a street, to enact another ordinance for paving the same street, their action not being limited to the ordinance mentioned in the mayor's message, but extending over the subject-matter of the ordinance.

19. Call and notice of meetings generally see *supra*, V, B, 3, d.

20. Tonawanda *v.* Price, 171 N. Y. 415, 64 N. E. 191.

21. Ordinances generally see *supra*, VI, B, 3, c.

22. McLaughlin *v.* Chicago, 198 Ill. 518, 64 N. E. 1036, holding that the mere lapse of a year between the introduction of an ordinance and its passage would not render the ordinance void. See also Hay *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 128, 6 Ohio N. P. 22.

23. See Friedrich *v.* Milwaukee, 114 Wis. 304, 90 N. W. 174 (holding that under a charter providing a limitation of four weeks, a resolution May 14 might be adopted on June 11); Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52 (holding that where a resolution was required to lie over at least four weeks, a resolution introduced on Monday might properly be acted upon on the fourth Monday thereafter).

24. Campbell *v.* Cincinnati, 49 Ohio St. 463, 31 N. E. 606 (holding that an ordinance to condemn property, or opening and extending a street, or to improve by grading, curbing, and macadamizing a street so opened and extended, was an ordinance of a permanent nature); Thatcher *v.* Toledo, 19 Ohio Cir. Ct. 311, 10 Ohio Cir. Dec. 272 (holding that a resolution providing for and ordering the construction of a stone or artificial sidewalk along a street was one of a permanent nature); Elyria Gas, etc., Co. *v.* Elyria, 14 Ohio Cir. Ct. 219, 7 Ohio Cir. Dec. 527 (holding that a resolution declaring it necessary to build waterworks was not of such nature).

25. Schroder *v.* Overmann, 6 Ohio S. & C. Pl. Dec. 133, 5 Ohio N. P. 392; Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

26. People *v.* Albany, 39 N. Y. App. Div. 30, 56 N. Y. Suppl. 334, holding that the action of the committee on the passage of the law was in effect a report in its favor and was sufficient if the council chose to so consider it; and holding further that the proceeding was not in violation of a charter provision which forbade any committee to report any decision upon the same day upon which it was made, where from the record it did not appear but that the committee decided against the remonstrance several days before the meeting at which the law was enacted.

27. State *v.* Armstrong, 54 Minn. 457, 56 N. W. 97.

for consideration at such next meeting.[28] An ordinance is not invalidated because passed before the expiration of the time for filing claims for damages which the council must consider before it may determine upon the improvement, if no claims for damages have been presented.[29]

(v) *Voting on More Than One Improvement at a Time.* In case no formalities are prescribed with regard to the passage of ordinances, the fact that several ordinances for different sewers are voted on and passed together does not invalidate them.[30] The fact that a resolution to improve a street was voted on at the same time that a vote was had on other resolutions reported by the same committee will not invalidate it.[31]

(vi) *Number of Votes Required.* The authorization of a public improvement is frequently made to depend upon the vote of two thirds,[32] three fourths,[33] or even a greater proportion[34] of the municipal legislative body, this requirement in some cases furnishing a distinction between improvement ordinances and ordinances of a general nature. In the absence of statute or charter provisions the usual rules apply.[35] A statute requiring the calling of the ayes and noes has been held to be merely directory.[36] But where a fixed proportion of the members must vote to sustain an ordinance, an order adopted by a *viva voce* vote is void.[37] The fact that the requisite majority by which an improvement was authorized is based upon the votes of councilmen who are members *de facto*

28. Cornell *v.* New Bedford, 138 Mass. 588.

29. Toledo *v.* Lake Shore, etc., R. Co., 4 Ohio Cir. Ct. 113, 2 Ohio Cir. Dec. 450.

30. Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

31. Cincinnati *v.* Anderson, 52 Ohio St. 600, 43 N. E. 1040; Bode *v.* Cincinnati, 9 Ohio Cir. Ct. 382, 6 Ohio Cir. Dec. 56; Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

32. Logansport *v.* Legg, 20 Ind. 315 (holding, where the charter provided that an improvement ordinance must receive the vote of two thirds of the council, that a two-thirds vote of those present was not sufficient); Tennant *v.* Crocker, 85 Mich. 328, 48 N. W. 577 (holding that a resolution authorizing the mayor and clerk to contract for the purchase of a tract of land for the purpose of widening a street could not be passed by the council by a bare majority).

In the absence of petition.—It is frequently provided by charter that in the absence of petition the council may order an improvement only by a two-thirds vote; such provision is mandatory (Covington *v.* Casey, 3 Bush (Ky.) 698; Bradford *v.* Fox, 171 Pa. St. 343, 33 Atl. 85; Lowry *v.* Scranton, 4 Lack. Leg. N. (Pa.) 317; Dieckmann *v.* Sheboygan County, 89 Wis. 571, 62 N. W. 410), and is held to mean two-thirds of the entire council, not merely of the members present at the meeting (Matter of Mt. Vernon, 34 Misc. (N. Y.) 225, 68 N. Y. Suppl. 823 [*affirmed* in 64 N. Y. App. Div. 619, 72 N. Y. Suppl. 1097]). If the council acts on an insufficient petition but orders the improvement by a two-thirds vote the provision is complied with. McEneney *v.* Sullivan, 125 Ind. 407, 25 N. E. 540.

33. See Covington *v.* Sullivan, 44 S. W. 630, 19 Ky. L. Rep. 1884.

Repeal.— A statute providing that a majority vote of each board of a council shall be necessary to pass any ordinance in which the expenditure of money is involved does not repeal an earlier act which requires a three-fourths vote in case of street improvements. Covington *v.* Sullivan, 44 S. W. 630, 19 Ky. L. Rep. 1884.

34. See the statutes of the several states.

Unanimous vote.— Where an act provides that a common council may by unanimous vote of all the members of the council determine that it is to the interest of the town to lay a sidewalk, the unanimous vote of a quorum merely, or of all the members present, if less than the whole council, is not sufficient. Crickenberger *v.* Westfield, 71 N. J. L. 467, 58 Atl. 1097.

35. Marion Water Co. *v.* Marion, 121 Iowa 306, 96 N. W. 883 (holding that where a majority of all the trustees is required, an ordinance adopted unanimously at a meeting of a council at which eight out of nine members were present was valid); Reed *v.* Woodcliff, (N. J. Sup. 1905) 60 Atl. 1128 (holding that where it is provided that no ordinance shall be finally passed, except by vote of the majority of the whole council, an ordinance was void where it was passed by a vote of three to two in a council composed of six members, the sixth member being absent).

Number of votes required in general see *supra*, V, B, 4, d.

Where benefits are assessed.— Where the damages paid to owner's land, upon a change of grade, are required to be assessed upon the lands benefited, it has been held that an ordinance for a change of grade is not subject to the restrictions, as to the vote required, applicable to ordinances for the expenditure of the public moneys. Clark *v.* Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737.

36. Striker *v.* Kelly, 7 Hill (N. Y.) 9.

37. Buckley *v.* Tacoma, 9 Wash. 269, 37 Pac. 446.

only, and not *de jure*, will not invalidate the ordinance.[38] The mere fact that a member of the council has signed a petition for an improvement will not prevent him from voting upon the ordinance, where he has no personal or private interest.[39]

(VII) *Approval of Mayor or Presiding Officer.*[40] Whether the mayor's signature is essential to the validity of an ordinance depends upon the charter or the act authorizing the organization of the corporation, but unless it is made essential a requirement of such signature has generally been held merely directory.[41] Where, under the statute, the power to decide upon an improvement is vested in the council, it has been held that the approval of the mayor is not necessary.[42] A statute requiring the approval of the mayor to a resolution authorizing a public improvement, or in case his approval is withheld the repassage of the resolution, is inapplicable to a resolution authorizing a local improvement.[43] Where it is provided that the action of the board of aldermen with relation to street improvements shall be subject to the approval of the mayor, the mayor has not an absolute veto power.[44]

c. Form and Contents — (I) *In General.* Special provisions relating to form and validity of improvement ordinances as usually found must be complied with;[45] but an ordinance will not be set aside for uncertainty if it is a compliance, although a loose one, with the requirements of the law.[46] The rules requiring conformity between the subject-matter of an ordinance and the title thereof[47] are applicable

38. Simpson *v.* McGonegal, 52 Mo. App. 540.

39. Erie City *v.* Grant, 24 Pa. Super. Ct. 109, holding that such a member might cast the deciding vote.

Disqualification by interest see, generally, *supra*, V, B, 4, d, (II).

40. **Approval or veto of ordinances and by-laws in general** see *supra*, VI, C.

41. Martindale *v.* Palmer, 52 Ind. 411, holding that the fact that an ordinance under which a street improvement was made was not signed at the time the contract was made did not invalidate an assessment against property for such improvement.

42. Clarke *v.* Jennings, (Cal. 1893) 32 Pac. 1049; McDonald *v.* Dodge, 97 Cal. 112, 31 Pac. 909 (so holding where, under the law authorizing the improvement, a distinction was made between the city council and the mayor, and independent duties and powers were assigned and given to each); State *v.* Armstrong, 54 Minn. 457, 56 N. W. 97. See Becker *v.* Henderson, 100 Ky. 450, 38 S. W. 857, 18 Ky. L. Rep. 881.

A report of a committee in favor of laying out a street, when accepted by the council, need not be approved by the mayor. Beaudry *v.* Valdez, 32 Cal. 269; Taylor *v.* Palmer, 31 Cal. 240; Wilson *v.* Simmons, 89 Me. 242, 36 Atl. 380.

43. Kinsella *v.* Auburn, 4 Silv. Sup. (N. Y.) 101, 7 N. Y. Suppl. 317, holding that the distinction between public and local improvements might be so construed as to embrace within the former those which are charged upon all the taxable property within the municipality, while the fund to pay the expense of the latter is raised by means of local assessments upon the property supposed to be benefited by them.

44. Doty *v.* Lyman, 166 Mass. 318, 44 N. E. 337, holding that where the mayor retained an order longer than the time prescribed by the general provision of the charter within which he might veto it, such order became effective.

45. Masonic Bldg. Assoc. *v.* Brownell, 164 Mass. 306, 41 N. E. 306; Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914; Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56; Kline *v.* Tacoma, 11 Wash. 193, 39 Pac. 453, 12 Wash. 657, 40 Pac. 418; State *v.* La Crosse, 107 Wis. 654, 84 N. W. 242. See also Gardiner *v.* Johnston, 16 R. I. 94, 12 Atl. 888.

An ordinance authorizing construction of waterworks, which does not direct the giving of notice of an election as required by statute, is void, although the city clerk gave notice and the election was actually held. Thompson *v.* Sumner, 9 Wash. 310, 37 Pac. 450.

Order. — Under a statute providing that upon compliance with certain prescribed formalities, the council may order the making of an improvement, no particular form of expression is required in the order. Stutsman *v.* Burlington, 127 Iowa 563, 103 N. W. 800, holding that an order in the language of the resolution of a necessity, saving that it omitted the recitals in regard to the time when the resolution would be considered for passage, etc., was sufficient.

46. Sheehan *v.* Gleeson, 46 Mo. 100; Boice *v.* Plainfield, 38 N. J. L. 95. See also Davies *v.* Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145, holding that where the council accepted a report of the probable cost of a proposed improvement and referred the same to a committee, with instructions to advertise for bids, and authorized the committee to accept one of the bids and enter into a contract, the action was equivalent to an ordinance ordering the improvement.

47. See *supra*, VI, H, 2.

to ordinances authorizing local improvements.[48] In determining whether an ordinance is valid on its face, the question of whether or not it has been followed in making the improvement is immaterial.[49] An ordinance is not invalidated by an unnecessary statement in the preamble.[50] An ordinance need not indicate the act in the execution of which it was passed;[51] and a special ordinance ordering a particular improvement may incorporate by reference the terms of a general improvement ordinance.[52] To rescind a resolution closing a street is virtually to adopt a resolution opening it; and to make the rescission effective the same formalities must be observed as would be necessary to open a street in the same locality in the first instance.[53]

(II) *Description of Improvement*—(A) *In General.* A requirement that an ordinance shall specify the nature, character, locality, and description of an improvement is mandatory.[54] Particularity in this regard may be furnished by reference to plans and specifications upon file,[55] or reference may be made to some

48. See the cases cited *infra*, this note.

Variance between title and subject-matter. — There is no inconsistency where the title of an ordinance is for the improvement, curbing and paving of a street, and the section of the ordinance ordering the same relates to the same matter. Chicago Terminal Transfer R. Co. *v.* Chicago, 178 Ill. 429, 53 N. E. 361. An ordinance for the grading, macadamizing, and curbing of a street authorizes the laying of sidewalks. *In re* Beechwood Ave., 194 Pa. St. 86, 45 Atl. 127. There is no variance between the caption of an ordinance "for the improvement, plastering curb walls, resetting curb-stones, constructing a granite concrete combined curb and gutter, grading and paving of the roadway," and an ordinance providing that the curb walls then in place should be plastered on their face for a certain space, and providing also how they should be reset and for the construction of concrete gutter flags of certain dimensions. Chicago Union Traction Co. *v.* Chicago, 207 Ill. 544, 69 N. E. 849.

49. Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747.

50. Bohle *v.* Stannard, 7 Mo. App. 51, so holding where the preamble to an ordinance recited that a majority of the resident owners had petitioned for the improvement, but the jurisdiction of the council did not in any way depend upon such fact.

51. Methodist Protestant Church *v.* Baltimore, 6 Gill (Md.) 391, 48 Am. Dec. 540; Jones *v.* Boston, 104 Mass. 461; Cape Girardeau *v.* Houck, 129 Mo. 607, 31 S. W. 933.

52. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383; Hoover *v.* People, 171 Ill. 182, 49 N. E. 367; Alberger *v.* Baltimore, 64 Md. 1, 20 Atl. 988.

53. Schafhaus *v.* New York, 28 N. Y. App. Div. 475, 51 N. Y. Suppl. 114 [*affirmed* in 159 N. Y. 557, 54 N. E. 1094].

54. Otis *v.* Chicago, 161 Ill. 199, 43 N. E. 715; Sterling *v.* Galt, 117 Ill. 11, 7 N. E. 471.

Statement that improvement is within city. — An ordinance providing for a local improvement need not state that the proposed improvement is within the city limits, since it will be presumed that the city council did not exceed its powers. Illinois Cent. R. Co. *v.* Chicago, 169 Ill. 329, 48 N. E. 492; Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335; Delamater *v.* Chicago, 158 Ill. 575, 42 N. E. 444; Andrews *v.* People, 158 Ill. 477, 41 N. E. 1021; Beach *v.* People, 157 Ill. 659, 41 N. E. 1117; Chicago *v.* Silverman, 156 Ill. 601, 41 N. E. 162; Bliss *v.* Chicago, 156 Ill. 584, 41 N. E. 160; Wisner *v.* People, 156 Ill. 180, 40 N. E. 574; Ziegler *v.* People, 156 Ill. 133, 40 N. E. 607; West Chicago St. R. Co. *v.* People, 155 Ill. 299, 40 N. E. 599; Young *v.* People, 155 Ill. 247, 40 N. E. 604; Meadowcroft *v.* People, 154 Ill. 416, 40 N. E. 442; Stanton *v.* Chicago, 154 Ill. 23, 39 N. E. 987; Wheeler *v.* People, 153 Ill. 480, 39 N. E. 123.

55. Alton *v.* Middleton, 158 Ill. 442, 41 N. E. 926; Callon *v.* Jacksonville, 147 Ill. 113, 35 N. E. 223; Steele *v.* River Forest, 141 Ill. 302, 30 N. E. 1034; Barber Asphalt Paving Co. *v.* Garr, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227; Becker *v.* Washington, 94 Mo. 375, 7 S. W. 291; Reading *v.* O'Reilly, 169 Pa. St. 366, 32 Atl. 420. See also Galbreath *v.* Newton, 30 Mo. App. 380.

Further reference. — An ordinance which refers to plans and specifications on file with the city clerk is not invalidated by the fact that one section of such specifications refers to plans and specifications on file in the office of the city engineer. Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794.

Datum established by ordinance. — If a datum for a city or village has been established by an ordinance, subsequent ordinances providing for public improvements may adopt and refer to such datum as a standard of measurement, without setting forth or reciting the ordinance by which the datum was established. Kunst *v.* People, 173 Ill. 79, 50 N. E. 168.

Where the ordinance is complete in itself. — Where the ordinance by its own terms fully specifies the nature, character, and locality of the proposed improvement, the fact that it also refers to documents on file in the department of public works does not render it invalid. Cunningham *v.* Peoria, 157 Ill. 499, 41 N. E. 1014.

specific object or thing.[56] A substantial compliance with the requirements of the statute is sufficient,[57] and a minor error of description will not invalidate an ordinance.[58] The description must be consistent with the improvement named in the title and with the provisions of the ordinance.[59]

(B) *Streets and Other Ways* — (1) IN GENERAL. The character and amount of work to be done must be specified in an improvement ordinance,[60] and may not be left to the discretion of a ministerial officer.[61]

(2) LOCATION. The description of a street improvement must include first of all specifications of its location;[62] but the ordinance need not state in terms that the improvement is within the corporation limits.[63] A provision for improving a

In case plans and specifications are not filed.— An ordinance is not void by reason of the fact that it directs works to be done in accordance with plans and specifications on file, and there are in fact no such plans and specifications on file, in case the ordinance is sufficient without reference to them. Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917; Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176.

56. Gage *v.* Chicago, 216 Ill. 107, 74 N. E. 726 (holding that the description of catch-basins as "of the same size and pattern as those used in new work by the city of Chicago during the year 1902" was sufficient); Lanphere *v.* Chicago, 212 Ill. 440, 72 N. E. 426; Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478 (holding that a provision that an electric power plant should be located at the "water-works pump house" was sufficiently definite).

57. Wells *v.* Wood, 114 Cal. 255, 46 Pac. 96 (holding that the description of a street improvement in a resolution of intention in subsequent proceedings as "grading and macadamizing" was sufficient to authorize a regrading and remacadamizing where the street for a part of its width had been graded and macadamized some fifteen years previously); Chicago Union Traction Co. *v.* Chicago, 215 Ill. 410, 74 N. E. 449.

A resolution of intention to improve a street by a board of supervisors need not describe the work with any more exactness than the law itself does. Harney *v.* Heller, 47 Cal. 15.

A provision that certain portions of an improvement shall be of "not less than" certain dimensions does not invalidate the ordinance. Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311.

58. Chicago Union Traction Co. *v.* Chicago, 215 Ill. 410, 74 N. E. 449; Lanphere *v.* Chicago, 212 Ill. 440, 72 N. E. 426; Chicago *v.* Hulbert, 205 Ill. 346, 68 N. E. 786; Field *v.* Chicago, 198 Ill. 224, 64 N. E. 840; Steenberg *v.* People, 164 Ill. 478, 45 N. E. 970; Chicago *v.* Habar, 62 Ill. 283; Poland *v.* Connolly, 16 Ohio St. 64.

Surplusage.— A faulty description may be rejected as surplusage, if without it the ordinance in itself and by reference to the annexed plan contains a sufficiently definite description. Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335.

59. Smith *v.* Chicago, 169 Ill. 257, 48 N. E. 445, holding that where the improvement directed in an ordinance and referred to in the title was "lamp posts" only, the fact that the description included conduits, cables, and switches would not authorize an assessment for such appliances.

60. *California.*— King *v.* Lamb, 117 Cal. 401, 49 Pac. 561; Deady *v.* Townsend, 57 Cal. 298.

Illinois.— Wells *v.* Chicago, 202 Ill. 448, 66 N. E. 1056; Gage *v.* Chicago, 196 Ill. 512, 63 N. E. 1031; Ronan *v.* People, 193 Ill. 631, 61 N. E. 1042; Trimble *v.* Chicago, 168 Ill. 567, 48 N. E. 416; Kimble *v.* Peoria, 140 Ill. 157, 29 N. E. 723.

Indiana.— Smith *v.* Duncan, 77 Ind. 92. But see Taber *v.* Grafmiller, 109 Ind. 206, 9 N. E. 721, holding that it is not necessary for an ordinance directing the improvement of a street to describe the improvement in detail, but that it is sufficient if it gives a general direction as to the plan of the work.

Kentucky.— Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917.

Missouri.— Springfield *v.* Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

Texas.— Waco *v.* Chamberlain, (Civ. App. 1898) 45 S. W. 191.

See 36 Cent. Dig. tit. "Municipal Corporations," § 812.

Construction of description.— A municipal ordinance authorizing a "widening to be made twenty feet eastwardly from the eastern side of" a street refers to the state of things existing at the date of the ordinance, and not at the date of a prior statute providing for a highway. Hazlehurst *v.* Baltimore, 37 Md. 199.

61. See *supra*, XIII, A, 3, e, (I).

62. See the cases cited *infra* this section. And see McChesney *v.* Chicago, 171 Ill. 253, 49 N. E. 548; Sanger *v.* Chicago, 169 Ill. 286, 48 N. E. 309; Hays *v.* Vincennes, 82 Ind. 178; Browne *v.* Boston, 166 Mass. 229, 44 N. E. 127.

Sidewalk crossings.— An ordinance for the construction of sidewalks which requires property crossings for the use of property-owners is not void for failure to designate the location, number, or method of construction of such crossings. People *v.* Burke, 206 Ill. 358, 69 N. E. 45.

63. Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597. See also *supra*, XIII, B, 8, c, (II), (A), note 54.

certain street between two streets that intersect it,[64] or from its terminus to a point named,[65] is sufficiently definite; and reference may be made to a plat that is on file.[66] The description may properly make exceptions,[67] and a resolution may provide for curbing such parts of the streets as are not already curbed;[68] but if certain portions of a street are to be excepted from the improvement they must be definite.[69]

(3) GRADE. An ordinance to improve a street must provide a grade to which it shall be brought;[70] this may be done by specification[71] or by reference to an established grade.[72] And if the reference is so made that the determination of

64. *California.*— Thomason *v.* Cuneo, 119 Cal. 25, 50 Pac. 846; Emery *v.* San Francisco Gas Co., 28 Cal. 345.

Illinois.— Gage *v.* Chicago, 196 Ill. 512, 63 N. E. 1031; Rawson *v.* Chicago, 185 Ill. 87, 57 N. E. 35; McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191; Nicholls *v.* People, 171 Ill. 376, 49 N. E. 574; Sargent *v.* Evanston, 154 Ill. 268, 40 N. E. 440; Newman *v.* Chicago, 153 Ill. 469, 38 N. E. 1053.

Indiana.— Pittsburgh, etc., R. Co. *v.* Crown Point, 150 Ind. 536, 50 N. E. 741.

Kentucky.— Dumesnil *v.* Hexagon Tile Walk Co., 58 S. W. 705, 23 Ky. L. Rep. 144; Louisville *v.* Western Bank, 54 S. W. 15, 21 Ky. L. Rep. 1075.

New York.— Broezel *v.* Buffalo, 2 Silv. Sup. 375, 6 N. Y. Suppl. 723.

Texas.— Waco *v.* Chamberlain, 92 Tex. 207, 47 S. W. 527.

See 36 Cent. Dig. tit. "Municipal Corporations," § 812.

65. Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478 (holding that where the evidence showed that a continuous street through a village was known as a certain boulevard part of the distance, and also by its street name through the whole distance, an improvement ordinance was not indefinite where it described certain other streets as running to such street instead of to the boulevard); Danville *v.* McAdams, 153 Ill. 216, 38 N. E. 632; People *v.* Delaware, etc., R. Co., 11 N. Y. App. Div. 280, 42 N. Y. Suppl. 1011 (holding that a resolution laying out a street from a certain point "south to the track of the D., L. & W. Railroad Company, and thence to the south line" of the city meant that the street should extend from the point of beginning across the track to the south line of the city).

66. Stone *v.* Cambridge, 6 Cush. (Mass.) 270; Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204. See, generally, *supra*, XIII, B, 8, c, (II), (A).

Uncertainty as to reference.— A resolution directing the opening of a street is fatally defective where it fails to specify according to which of two plans then on file a street is to be laid out, and the defect is not cured by the action of the city clerk in afterward attaching to the resolution a map not before the council at the time, nor by parol evidence of the aldermen as to what map they had in mind. Copcutt *v.* Yonkers, 83 Hun (N. Y.) 178, 31 N. Y. Suppl. 659.

Variance.— An ordinance to condemn land and open a street may refer to a plat, and if there is a variance between the courses and distances set forth in the ordinance and those in the plat, the latter will govern. Burk *v.* Baltimore, 77 Md. 469, 26 Atl. 868; Woodruff *v.* Orange, 32 N. J. L. 49.

67. Cohen *v.* Alameda, 124 Cal. 504, 57 Pac. 377, holding that in a resolution of intention to open a street, a description clearly defining the boundaries of the land necessary to be taken was sufficient, although excepting therefrom all land held by the city and state as open ways.

68. Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432.

69. Andrews *v.* Chicago, 57 Ill. 239, holding that where it was not intended to repave such portions of a street as were regarded as already suitably paved such portions must be described.

70. McDowell *v.* People, 204 Ill. 499, 68 N. E. 379; McChesney *v.* Chicago, 201 Ill. 344, 66 N. E. 217; Biggins *v.* People, 193 Ill. 601, 61 N. E. 1124; Brewster *v.* Peru, 180 Ill. 124, 54 N. E. 233; Joyes *v.* Shadburn, 13 S. W. 361, 11 Ky. L. Rep. 892. See also Job *v.* People, 193 Ill. 609, 61 N. E. 1079, holding that a street ordinance ordering the construction of a sidewalk to be laid on an even grade, and containing no other specification as to the grade, was sufficient, the words "even grade" having no special and well-established meaning. But see Parker *v.* New Brunswick, 30 N. J. L. 395 [*affirmed* in 32 N. J. L. 548], holding that an ordinance providing for the grading and paving of a street was not uncertain because it did not prescribe the grade of such street when it provided in accordance with the charter that the work should be done under the superintendence of the city paver or other person appointed by the common council.

71. Rollo *v.* Chicago, 187 Ill. 417, 58 N. E. 355; Mead *v.* Chicago, 186 Ill. 54, 57 N. E. 824; Gross *v.* People, 172 Ill. 571, 50 N. E. 334; Cunningham *v.* Peoria, 157 Ill. 499, 41 N. E. 1014.

72. Durand *v.* Ansonia, 57 Conn. 70, 17 Atl. 283; Gage *v.* Chicago, 201 Ill. 93, 66 N. E. 374; Claflin *v.* Chicago, 178 Ill. 549, 53 N. E. 339; Cramer *v.* Charleston, 176 Ill. 507, 52 N. E. 73; Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596; Chicago, etc., R. Co. *v.* Chicago, 172 Ill. 66, 49 N. E. 1006; Carlinville *v.* McClure, 156 Ill. 492, 41 N. E. 169; Whaples *v.* Waukegan, 95 Ill. App. 29; De Soto *v.* Showman, 100 Mo. App. 323, 73 S. W. 257; Mann *v.* Jersey City, 24 N. J. L. 662. But see Morton *v.* Burlington, 106

the grade involved is a mere matter of mathematical calculation it is sufficient.[73] If the ordinance contains no reference to a prior general ordinance establishing the grade, the same will not be read into it;[74] but the fact that the ordinance to which reference is made was passed the same day as the improvement ordinance and had not been actually recorded at the time of the latter's passage will not invalidate it.[75] A provision that the street shall be filled to the "highest grade" is not sufficient.[76] In reconstructing a sidewalk the grade need not be prescribed, as by necessary inference it is left the same as before.[77] An ordinance establishing the grade of a street will include the grade of a sidewalk;[78] and such ordinance must contain a description of the work of bringing the street to grade.[79] Words of well defined local meaning, such as "filling," may be used in such descriptions;[80] and where no filling is called for, it will be presumed that none is required to graduate the street.[81]

(4) WIDTH. The width of an improvement must be sufficiently defined to be easily ascertained;[82] but unless expressly required,[83] it need not be specified in terms;[84] nor need the width of the street be stated.[85] An ordinance providing for paving a street together with the wings of all intersecting streets is not defective in failing to state the width of such wings;[86] and a provision that curb-

Iowa 50, 75 N. W. 662, holding that an ordinance establishing the grade of two streets intersecting a third cannot be extended to include by implication the intersected street between two intersections.

A line to be drawn between established grades at street intersections is a sufficient designation of a grade. Connecticut Mut L. Ins. Co. *v.* Chicago, 217 Ill. 352, 75 N. E. 365.

Where no grade has been established, an ordinance requiring an improvement to conform to the established grade is insufficient. Craig *v.* People, 193 Ill. 199, 61 N. E. 1072.

73. Chicago Union Traction Co. *v.* Chicago, 215 Ill. 410, 74 N. E. 449; Guyer *v.* Rock Island, 215 Ill. 144, 74 N. E. 105.

74. Job *v.* People, 193 Ill. 609, 61 N. E. 1079.

75. People *v.* Burke, 206 Ill. 358, 69 N. E. 45.

76. Stretch *v.* Hoboken, 47 N. J. L. 268.

77. Augusta *v.* McKibben, 60 S. W. 291, 22 Ky. L. Rep. 1224.

78. Gallaher *v.* Jefferson, 125 Iowa 324, 101 N. W. 124.

79. Kansas City *v.* Askew, 105 Mo. App. 84, 79 S. W. 483.

80. Levy *v.* Chicago, 113 Ill. 650.

81. Rollo *v.* Chicago, 187 Ill. 417, 58 N. E. 355; Hardin *v.* Chicago, 186 Ill. 424, 57 N. E. 1048; Givins *v.* Chicago, 186 Ill. 399, 57 N. E. 1045.

82. Perry *v.* People, 206 Ill. 334, 69 N. E. 63; Houston *v.* Chicago, 191 Ill. 559, 61 N. E. 396; Lehmers *v.* Chicago, 178 Ill. 530, 53 N. E. 394. See also Hyman *v.* Chicago, 188 Ill. 462, 59 N. E. 10, holding that a sidewalk ordinance calling for a fourteen-foot sidewalk was not invalid by reason of the fact that owing to a building being somewhat over the lot line it was not quite fourteen feet from the building to the curb.

An ordinance sufficiently specifies the width of roadways to be paved which declares that such roadways comprise a specified number of feet upon each side of the center line of the streets which are named. McChesney *v.* Chicago, 201 Ill. 344, 66 N. E. 217.

83. People *v.* Hills, 193 Ill. 281, 61 N. E. 1061; Chariton *v.* Holliday, 60 Iowa 391, 14 N. W. 775. See also Mansfield *v.* People, 164 Ill. 611, 45 N. E. 976, holding that under a statute providing that an ordinance authorizing the construction of a sidewalk should prescribe its width and the material of which it should be constructed, an ordinance which provided that a walk should be not less than a specified width and should be built of brick of given dimensions, or of paving tile, etc., was fatally defective.

A requirement that the sidewalk shall be not less than a certain width has been held sufficient. Ramsey *v.* Field, 115 Mo. App. 620, 92 S. W. 350.

84. People *v.* Markley, 166 Ill. 48, 46 N. E. 742; Harrison *v.* Chicago, 163 Ill. 129, 44 N. E. 395. See also Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334; Burghard *v.* Fitch, 72 S. W. 778, 24 Ky. L. Rep. 1893.

Exclusion.— Where a street railway company is required to keep a portion of the street occupied by its tracks in repair, the council may exclude from the resolution of intention to pave the roadway where not already paved, "that portion required by law to be kept in order by the railroad company having tracks thereon." San Francisco Paving Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076.

85. Jones *v.* Chicago, 213 Ill. 92, 72 N. E. 798; Dickey *v.* Chicago, 164 Ill. 37, 45 N. E. 537 [*distinguishing* Gage *v.* Chicago, 143 Ill. 157, 32 N. E. 264] (holding that an ordinance for paving a street, failing to specify the width of the street, was sufficient, unless some uncertainty as to the width of the street was shown); Woods *v.* Chicago, 135 Ill. 582, 26 N. E. 608; Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155.

86. Givins *v.* Chicago, 188 Ill. 348, 58 N. E. 912.

ing shall be laid along the roadway a stated distance from its center sufficiently defines the width of such roadway.[87] A provision for improving an alley of a certain width directs the improvement for the whole width of the alley.[88]

(5) Curbing. Description of an improvement, required by charter or statute, includes specifications of the curbing,[89] as, for example, of its height.[90] But an ordinance providing for improving existing curbing need not describe the same;[91] and a provision that the top of the curbing shall be on a line with the center of the street sufficiently specifies its height.[92] If an ordinance provides that curbing be bedded upon flat stones, failure to specify the kind of flat stones will render the description insufficient;[93] but the number of flat stones to be used need not be stated,[94] nor need their quality and dimensions be specified.[95]

(6) Lamp Posts. An ordinance which requires the erection of lamp-posts should specify the nature of the light for which they are to be adapted,[96] and should also prescribe the manner in which they are to be located.[97]

(7) Material. It has been held that, in the absence of express provision, an ordinance determining upon a municipal improvement need not specify the material of which the improvement shall be constructed.[98] But it is usually required by charter or statute that such specifications be made, and such a provision is mandatory.[99] It is sufficient to designate the material in general

87. McChesney *v.* Chicago, 201 Ill. 344, 66 N. E. 217.

88. Jones *v.* Chicago, 213 Ill. 92, 72 N. E. 798.

89. See King *v.* Lamb, 117 Cal. 401, 49 Pac. 561, holding that a specification that the curbing should be securely nailed at each stake, such stakes to be of a certain material and size, "three feet long, or longer, if required, and to be not over four feet long," was sufficiently definite.

90. Markley *v.* Chicago, 190 Ill. 276, 60 N. E. 512; Willis *v.* Chicago, 189 Ill. 103, 59 N. E. 543; Fehringer *v.* Chicago, 187 Ill. 416, 58 N. E. 303; Libbey *v.* Chicago, 187 Ill. 189, 58 N. E. 310; Hardin *v.* Chicago, 186 Ill. 424, 57 N. E. 1048; Essroger *v.* Chicago, 185 Ill. 420, 56 N. E. 1086; Sawyer *v.* Chicago, 183 Ill. 57, 55 N. E. 645; Mills *v.* Chicago, 182 Ill. 249, 54 N. E. 987; Cruickshank *v.* Chicago, 181 Ill. 415, 54 N. E. 997; Jarrett *v.* Chicago, 181 Ill. 242, 54 N. E. 946; Dickey *v.* Chicago, 179 Ill. 184, 53 N. E. 395; Lingle *v.* Chicago, 178 Ill. 628, 53 N. E. 366; Jacobs *v.* Chicago, 178 Ill. 560, 53 N. E. 363; Holden *v.* Chicago, 172 Ill. 263, 50 N. E. 181. See also Mead *v.* Chicago, 186 Ill. 54, 57 N. E. 824 (holding an ordinance sufficient where the description fixed the height of the curb, both at the back and from the inside of the gutter, at certain points and provided for a uniform slope between such points); Chicago, etc., R. Co. *v.* Chicago, 172 Ill. 66, 49 N. E. 1006 (holding an ordinance sufficient which provided that curbstones should be set on either side of a certain roadway).

91. Chicago Terminal Transfer Co. *v.* Chicago, 178 Ill. 429, 53 N. E. 361.

92. Fay *v.* Chicago, 194 Ill. 136, 62 N. E. 530; Rollo *v.* Chicago, 187 Ill. 417, 58 N. E. 355; Hardin *v.* Chicago, 186 Ill. 424, 57 N. E. 1048; Claflin *v.* Chicago, 178 Ill. 549, 53 N. E. 339. See also Lehmers *v.* Chicago, 178 Ill. 530, 53 N. E. 394, holding that an ordinance which provided that the top of the curb should be at the established grade of the street and referred to the ordinance establishing the grade was sufficient.

93. Moll *v.* Chicago, 194 Ill. 28, 61 N. E. 1012; Beach *v.* Chicago, 193 Ill. 369, 61 N. E. 1015; Kelly *v.* Chicago, 193 Ill. 324, 61 N. E. 1009; Nichols *v.* Chicago, 192 Ill. 290, 61 N. E. 435; Rose *v.* Chicago, 188 Ill. 347, 58 N. E. 933; Kuester *v.* Chicago, 187 Ill. 21, 58 N. E. 307; Davidson *v.* Chicago, 178 Ill. 582, 53 N. E. 367; Lusk *v.* Chicago, 176 Ill. 207, 52 N. E. 54.

94. Houston *v.* Chicago, 191 Ill. 559, 61 N. E. 396; White *v.* Chicago, 188 Ill. 392, 58 N. E. 917.

95. Johnson *v.* People, 189 Ill. 83, 59 N. E. 515.

96. Otis *v.* Chicago, 161 Ill. 199, 43 N. E. 715.

97. Halsey *v.* Lake View, 188 Ill. 540, 59 N. E. 234, holding it proper to provide that lamp-posts be set "about" three hundred feet apart.

98. Main *v.* Ft. Smith, 49 Ark. 480, 5 S. W. 801 (holding that an ordinance might leave the determination of material to the mayor); Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580 (holding that under the statute the council might leave the question of material to be determined by a resolution which required only a majority of a quorum in attendance, not a two-thirds vote); Waco *v.* Chamberlain, 92 Tex. 207, 47 S. W. 527 [*reversing* (Civ. App. 1898) 45 S. W. 191].

99. *California.*— Bay Rock Co. *v.* Bell, 133 Cal. 150, 65 Pac. 299; Bolton *v.* Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

Illinois.— Jones *v.* Chicago, 213 Ill. 92, 72 N. E. 798; People *v.* Birch, 201 Ill. 81, 66 N. E. 358; Illinois Cent. R. Co. *v.* Effingham, 172 Ill. 607, 50 N. E. 103.

Indiana.— Bluffton *v.* Miller, 33 Ind. App. 521, 70 N. E. 989.

terms,[1] and it is not necessary to state the proportion and quantity of each article that shall be used in the construction of the work.[2] It has also been held that the description of the material may be in the alternative.[3] Reference may be made to specifications that are on file[4] or to a general ordinance.[5]

(c) *Sewers, Drains, and Watercourses.* A sewer is of course an improvement within the meaning of an act requiring description of improvements, and an ordinance for the construction of a sewer must adequately describe the same.[6] Such

Kentucky.— Frankfort *v.* Murray, 99 Ky. 422, 36 S. W. 180, 18 Ky. L. Rep. 279.

Massachusetts.— Lowell *v.* Wheelock, 11 Cush. 391.

Missouri.— Verdin *v.* St. Louis, (1894) 27 S. W. 447; Rich Hill *v.* Donnan, 82 Mo. App. 386, holding that an ordinance which provided that there should be wooden, stone, or brick sidewalks, and that those constructed of wood should be of two-inch lumber, hard wood, or pine, number one quality, was void for insufficiency, since it did not designate of what kind of material any particular walk was to be constructed.

See 36 Cent. Dig. tit. "Municipal Corporations," § 812.

Repairs.— Under a charter providing that in constructing or repairing public works the material to be used must be specified with an estimate of the cost, an ordinance specifying the material to be used in paving a street, but not providing for the character of the material to be used in repairing it, was not invalid. Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285.

Contradictory description.— An ordinance for a sidewalk which in one part directs the sidewalk to be constructed of plank, and in another part directs it to be built of stone with specifications in detail is too uncertain and contradictory to support a special assessment. Hull *v.* Chicago, 156 Ill. 381, 40 N. E. 937.

1. *California.*— Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877, sustaining an ordinance requiring granite curbs and pavement of basalt blocks.

Illinois.— Chicago Union Traction Co. *v.* Chicago, 222 Ill. 144, 78 N. E. 54 (asphaltum cement); Gage *v.* Chicago, 201 Ill. 93, 66 N. E. 374; Gage *v.* Chicago, 196 Ill. 512, 63 N. E. 1031 (holding that an ordinance providing for the construction of a cement sidewalk was not invalid as calling for two kinds of sidewalks, because the sidewalk was described in another part of the same section as a cement, concrete, sand and gravel walk); Hyman *v.* Chicago, 188 Ill. 462, 59 N. E. 10 (holding that in a sidewalk ordinance supporting columns were sufficiently described "as four inch cast iron" columns); Shannon *v.* Hinsdale, 180 Ill. 202, 54 N. E. 181 (holding a requirement of stone cross walks sufficient).

Kentucky.— Hackworth *v.* Louisville Artificial Stone Co., 106 Ky. 234, 50 S. W. 33, 20 Ky. L. Rep. 1789 (granitoid); Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176 (vitrified brick).

Minnesota.— Rogers *v.* St. Paul, 22 Minn. 494, wooden blocks.

New York.— Conde *v.* Schenectady, 164 N. Y. 258, 58 N. E. 130, asphaltum sheet pavement.

2. Chicago Union Traction Co. *v.* Chicago, 222 Ill. 144, 78 N. E. 54 (holding that an ordinance requiring asphalt and cement need not show definitely how the cement was to be made, or the ingredients required); Woods *v.* Chicago, 135 Ill. 582, 26 N. E. 608 (holding that the number of cedar blocks to a square yard need not be specified, nor the precise quantity of paving composition that should be used to the square yard).

3. *California.*— Lambert *v.* Marcuse, 137 Cal. 44, 69 Pac. 620, permission to use class A or class B rock.

Illinois.— Jacksonville R. Co. *v.* Jacksonville, 114 Ill. 562, 2 N. E. 478, provision that foundation of pavement was to be laid of cinders, sand, or gravel.

Indiana.— Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112, provision that sidewalk should be made of "free or lime stone flagging."

Kentucky.— *Ex p.* Paducah, 89 S. W. 302, 28 Ky. L. Rep. 412, where the reconstruction of streets with "vitrified brick, bithulithis, bituminous macadam, or other improved material" was directed.

Nebraska.— Richardson *v.* Omaha, (1905) 104 N. W. 172, where sidewalks were ordered of stone or artificial stone.

Ohio.— Emmert *v.* Elyria, 74 Ohio St. 185, 78 N. E. 269, sustaining an ordinance providing for a pavement of asphalt, brick, or other material as might thereafter be determined.

4. Grant *v.* Barber, 135 Cal. 188, 67 Pac. 127; Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; Greensburg *v.* Zoller, (Ind. App. 1901) 60 N. E. 1007; Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917; Barber Asphalt Paving Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458; Roth *v.* Hax, 68 Mo. App. 283; Galbreath *v.* Newton, 30 Mo. App. 380.

5. Gallaher *v.* Smith, 55 Mo. App. 116.

6. Williamson *v.* Joyce, 140 Cal. 669, 74 Pac. 290; McChesney *v.* Chicago, 213 Ill. 592, 73 N. E. 368; Lanphere *v.* Chicago, 212 Ill. 440, 72 N. E. 426; Washburn *v.* Chicago, 202 Ill. 210, 66 N. E. 1033; Gage *v.* Chicago, 191 Ill. 210, 60 N. E. 896; People *v.* Warneke, 173 Ill. 40, 50 N. E. 221; Walker *v.* People, 170 Ill. 410, 48 N. E. 1010; People *v.* Hurford, 167 Ill. 226, 47 N. E. 368; O'Neil *v.* People, 166 Ill. 561, 46 N. E. 1096; Alton *v.* Middleton, 158 Ill. 442, 41 N. E. 926;

descriptions must indicate with reasonable certainty the location of the sewer;[7] but the location of manholes need not be specified;[8] they may be left largely to the discretion of ministerial officers;[9] nor need their height be stated when it can readily be determined by the distance between the sewer and the surface of the ground.[10] Specification of size and material is usually required;[11] but reference may be made to plans that are on file,[12] or to a general ordinance.[13] An ordinance requiring the laying of service pipes must contain specifications as to such pipe or the material thereof.[14]

(III) *Declarations of Necessity and Utility.* Where the council is authorized to order improvements when the same shall be deemed necessary, an express declaration of such necessity is usually not required, but such necessity may be implied from the action of the council in ordering the improvement.[15] Where the charter authorizes the making of an improvement when public

Hyde Park *v.* Carton, 132 Ill. 100, 23 N. E. 590; Kankakee *v.* Potter, 119 Ill. 324, 10 N. E. 212; Hyde Park *v.* Spencer, 118 Ill. 446, 8 N. E. 846; St. Joseph *v.* Landis, 54 Mo. App. 315.

Clerical error.— Where an ordinance providing for a drain specifies that the drain shall fall uniformly at a given rate from a point which is the outlet of the drain, the ordinance will be construed as though it read "rise" instead of "fall" where it is evident there is a clerical mistake. Steele *v.* River Forest, 141 Ill. 302, 30 N. E. 1034.

7. Duance *v.* Chicago, 198 Ill. 471, 64 N. E. 1033; Church *v.* People, 179 Ill. 205, 53 N. E. 554; Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821; Stanton *v.* Chicago, 154 Ill. 23, 39 N. E. 987; Com. *v.* Abbott, 160 Mass. 282, 35 N. E. 782; Bennett *v.* New Bedford, 110 Mass. 433; State *v.* St. Louis, 56 Mo. 277.

Radii of curves.— The fact that the radii of curves in the sewer is not given will not invalidate an ordinance, where the curves are only for short distances and can be located without difficulty. Hyde Park *v.* Borden, 94 Ill. 26.

8. Walker *v.* People, 166 Ill. 96, 46 N. E. 761; Springfield *v.* Sale, 127 Ill. 359, 20 N. E. 86; Pearce *v.* Hyde Park, 126 Ill. 287, 18 N. E. 824; Springfield *v.* Mathers, 124 Ill. 88, 16 N. E. 92.

9. Hinsdale *v.* Shannon, 182 Ill. 312, 55 N. E. 327; Barber *v.* Chicago, 152 Ill. 37, 38 N. E. 253; Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255; Cochran *v.* Park Ridge, 138 Ill. 295, 27 N. E. 939.

10. Bickerdike *v.* Chicago, 185 Ill. 280, 56 N. E. 1096.

11. Peters *v.* Chicago, 192 Ill. 437, 61 N. E. 438; Bickerdike *v.* Chicago, 185 Ill. 280, 56 N. E. 1096; Shannon *v.* Hinsdale, 180 Ill. 202, 54 N. E. 181; St. Louis *v.* Œters, 36 Mo. 456; Rickcords *v.* Hammond, 67 Fed. 380.

Thickness.— An ordinance providing that a sewer shall be constructed of vitrified tile pipe a certain number of inches in diameter is not objectionable as not designating the thickness of the tile pipe. Hynes *v.* Chicago, 175 Ill. 56, 51 N. E. 705. And where the specifications for house slants required pipe of a specified internal diameter it was necessarily understood, in the absence of further specifications, that the house slants were to be constructed of the same thickness as the sewer pipe. Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539.

Manholes.— Where a charter requires that the size of a sewer shall be prescribed by ordinance, but contains no such requirement in regard to inlets or manholes, it is not necessary to specify in the ordinance matters of detail relating thereto. St. Joseph *v.* Owen, 110 Mo. 445, 19 S. W. 713.

12. Steele *v.* River Forest, 141 Ill. 302, 30 N. E. 1034; Ogden *v.* Lake View, 121 Ill. 422, 13 N. E. 159; Bowditch *v.* Boston, 168 Mass. 239, 46 N. E. 1026; Dickey *v.* Holmes, 109 Mo. App. 721, 83 S. W. 982. See also Connecticut Mut. L. Ins. Co. *v.* Chicago, 217 Ill. 352, 75 N. E. 365.

13. Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

14. Cass *v.* People, 166 Ill. 126, 46 N. E. 729.

15. *California.*— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309, holding that the fact that a resolution of intention to construct a sewer did not state that the work was necessary did not invalidate the resolution.

Indiana.— Spaulding *v.* Baxter, 25 Ind. App. 485, 58 N. E. 551.

Maine.— Dorman *v.* Lewiston, 81 Me. 411, 17 Atl. 316.

Maryland.— Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1.

Massachusetts.— Com. *v.* Abbott, 160 Mass. 282, 35 N. E. 782; Wright *v.* Boston, 9 Cush. 233.

Michigan.— Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667. See White *v.* Saginaw, 67 Mich. 33, 34 N. W. 255.

Missouri.— Taylor *v.* St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Miller *v.* Anheuser, 2 Mo. App. 168.

New Jersey.— See Northern R. Co. *v.* Englewood, 62 N. J. L. 188, 40 Atl. 653.

New York.— Elwood *v.* Rochester, 43 Hun 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238].

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Texas.— Connor *v.* Paris, 87 Tex. 32, 27

convenience requires it, this question is it seems jurisdictional and its decision by the council must appear.[16] But where the method of proceeding for the establishment of a parkway is discretionary with the council, the ordinance need not recite that the council deems it best to acquire the land by condemnation.[17]

(iv) *Provisions as to Time and Mode of Doing Work.* The ordinance must contain directions as to the manner of doing the work,[18] but the time within which it shall be done need not be specified;[19] and reference may be made to another ordinance for the manner of doing the work.[20]

(v) *Provisions as to Contracts For Work.* Any charter or statutory requirements as to the character of the contract must be complied with to render the same valid;[21] such requirements may not be dispensed with because the expense of the improvement is to be borne by the contractor in consideration of a privilege granted him;[22] and under a charter provision requiring the date for receiving bids to be fixed, the date left blank in an ordinance may not be filled in by a ministerial officer.[23] The ordinance may require that samples of paving be submitted,[24] and that the same be guaranteed for a period of years.[25] If the ordinance does not specify the time for completion of the work, such specification may not be written into the contract by a ministerial officer;[26] and a general ordinance restricting the hiring of labor to members of labor unions will not invalidate an improvement ordinance into which it is not incorporated.[27] It has been held that an ordinance is not void because it provides for a single contract to improve upon both sides of the street, although it was urged that there could be no proper apportionment of the cost.[28]

(vi) *Appointment of Commissioners or Committee.* A provision that a committee shall be appointed to execute an improvement is mandatory;[29] but the council may appoint one of its standing committees a special committee for this purpose,[30] unless the manner of appointment be otherwise provided for.[31] The committee acts in an executive capacity and must be governed by the ordinance,[32] but may exercise discretion as to minor details.[33] The action of a committee need not be in session as an organized body.[34]

(vii) *Order or Permission For Making Improvement by Property-Owner.* Under a special assessment act, an ordinance is not invalid because it

S. W. 88; Kerr *v.* Corsicana, (Civ. App. 1895) 35 S. W. 694.

Wisconsin.— Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603.

See 36 Cent. Dig. tit. "Municipal Corporations," § 810.

Determination of necessity see *supra*, XIII, A, 3, a, (II).

16. Hudson Electric Light Co. *v.* Hudson, 163 Mass. 346, 40 N. E. 109; Hinchman *v.* Detroit, 9 Mich. 103; Kent *v.* Enosburg Falls, 71 Vt. 255, 44 Atl. 343. See also Blanchard *v.* Barre, 77 Vt. 420, 60 Atl. 970.

17. Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037.

18. Haegele *v.* Mallinckrodt, 46 Mo. 577.

19. St. Louis *v.* Bressler, 56 Mo. 350; Carlin *v.* Cavender, 56 Mo. 286; Strassheim *v.* Jerman, 56 Mo. 104; Allen *v.* La Force, 95 Mo. App. 324, 68 S. W. 1057; Mann *v.* Jersey City, 24 N. J. L. 662.

20. Williams *v.* Bisagno, (Cal. 1893) 34 Pac. 640.

21. Himmelman *v.* Byrne, 41 Cal. 500; Bambrick *v.* Campbell, 37 Mo. App. 460.

22. Belt *v.* St. Louis, 161 Mo. 371, 61 S. W. 658.

23. Pennsylvania Co. *v.* Cole, 132 Fed. 668.

24. Chicago *v.* Singer, 202 Ill. 75, 66 N. E. 874; Halsey *v.* Lake View, 188 Ill. 540, 59 N. E. 234.

25. Halsey *v.* Lake View, 188 Ill. 540, 59 N. E. 234.

26. Hilgert *v.* Barber Asphalt Paving Co., 107 Mo. App. 385, 81 S. W. 496.

27. Treat *v.* People, 195 Ill. 196, 62 N. E. 891.

Contracts see *infra*, XIII, C.

28. Elder *v.* Cassilly, 54 S. W. 836, 21 Ky. L. Rep. 1274.

29. McKeesport *v.* Harrison, 27 Pittsb. Leg. J. (Pa.) 57.

30. Hough *v.* Bridgeport, 57 Conn. 290, 18 Atl. 102.

31. State *v.* Kirkley, 29 Md. 85; Matter of Mt. Vernon, 64 N. Y. App. Div. 619, 72 N. Y. Suppl. 1097; *In re* New York, 72 N. Y. Suppl. 378.

32. Sheehan *v.* Gleeson, 46 Mo. 100.

33. Shea *v.* Milford, 145 Mass. 528, 14 N. E. 764.

34. Shea *v.* Milford, 145 Mass. 528, 14 N. E. 764, holding that a committee appointed by a town to take charge of the erection of a building are agents of the town, and can act by agreement of the members separately obtained.

gives an opportunity to abutting owners to make the improvement themselves before it is let by contract.[35]

(VIII) *Provisions For Defraying Expenses and For Levying Assessment.* Although it has been held that in the absence of a requirement in the statute the ordinance or resolution need not state how the improvement shall be paid for,[36] it would seem that property-owners affected must be advised of the manner in which the expense of an improvement will be defrayed and what portion of it is to be paid for by special assessment;[37] hence an ordinance for an improvement must prescribe whether it is to be paid for by general or special tax;[38] but reference to an act under which the city is proceeding and in which the manner of defraying expenses is provided is sufficient;[39] and when the manner of paying for an improvement is specified in an ordinance, it need not be repeated in a resolution passed in pursuance thereof.[40] If the franchise of a street railway requires it to keep the space between its tracks paved, provision need not be made for an assessment for paving such part of the street;[41] and where an ordinance for improving "streets and alleys" provided only for an assessment on property abutting on said "streets," an assessment for paving the streets alone could be levied.[42] A provision that the cost shall be paid by special assessment is sufficiently definite;[43] and where the territory is not divided into squares, the ordinance may prescribe the depth on either side of the improvement to be assessed.[44] The ordinance need not show on its face that the improvement will benefit the property to be assessed,[45] or that the benefit of an improvement will equal the

35. Western Springs *v.* Hill, 177 Ill. 634, 52 N. E. 959; Zalesky *v.* Cedar Rapids, 118 Iowa 714, 92 N. W. 657; Frankfort *v.* Murray, 99 Ky. 422, 36 S. W. 180, 18 Ky. L. Rep. 279.

Right or duty of property-owners to make improvement see *supra*, XIII, A, 3, c.

36. Ziegler *v.* Chicago, 213 Ill. 61, 72 N. E. 719; Terrell *v.* Paducah, 92 S. W. 310, 28 Ky. L. Rep. 1237, 5 L. R. A. N. S. 289.

37. Greenville *v.* Harvie, 79 Miss. 754, 31 So. 425.

The term "special improvements" in a city ordinance providing for the same does not of itself import that the owners of abutting lots shall bear the whole expense thereof. Greenville *v.* Harvie, 79 Miss. 754, 31 So. 425.

38. *Illinois.*— Kimble *v.* Peoria, 140 Ill. 157, 29 N. E. 723; Dolese *v.* McDougall, 78 Ill. App. 629.

New Jersey.— Locker *v.* South Amboy, 62 N. J. L. 197, 40 Atl. 637.

New York.— Ellis *v.* Lowville, 7 Lans. 434.

Pennsylvania.— *In re* Titusville St., 3 Pa. Dist. 752.

Wisconsin.— Drummond *v.* Eau Claire, 79 Wis. 97, 48 N. W. 244 [*following* Hall *v.* Chippewa Falls, 47 Wis. 267, 2 N. W. 279].

See 36 Cent. Dig. tit. "Municipal Corporations," § 818.

Commingling of systems.— Ordinances for the construction of a sidewalk on a street for a number of blocks, which specifies that the walk for the length of one block may be built by special assessment, while the rest is to be done by taxation, are not void as requiring the construction of the walk partly by each system of payment, as there is no commingling of systems as to any part of the walk. Ronan *v.* People, 193 Ill. 631, 61 N. E. 1042.

39. Hurd *v.* People, 221 Ill. 398, 77 N. E. 443; Lawrence *v.* People, 188 Ill. 407, 58 N. E. 991; Newman *v.* Chicago, 153 Ill. 469, 38 N. E. 1053; Green *v.* Springfield, 130 Ill. 515, 22 N. E. 602; Sterling *v.* Galt, 117 Ill. 11, 7 N. E. 471; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Gleason *v.* Wankesha County, 103 Wis. 225, 79 N. W. 249. See also Scott County *v.* Hinds, 50 Minn. 204, 52 N. W. 523, holding that where a city charter provides that the expense of constructing sidewalks, where the owners of the adjoining property fail to do so on notice, shall be assessed against the adjoining lots, it is unnecessary for the city council when directing that the walk be constructed, the lot owners having failed to build, to specially direct that such construction shall be "at the expense of the" lots adjoining the walks.

40. Chariton *v.* Holliday, 60 Iowa 391, 14 N. W. 775; Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330. See also Cincinnati *v.* Goodman, 5 Ohio Dec. (Reprint) 365, 5 Am. L. Rec. 153.

41. Billings *v.* Chicago, 167 Ill. 337, 47 N. E. 731; Storrie *v.* Houston City St. R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

42. Wilhur *v.* Springfield, 123 Ill. 395, 14 N. E. 871.

43. Dehail *v.* Morford, 95 Cal. 457, 30 Pac. 593; Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580; Cramer *v.* Charleston, 176 Ill. 507, 52 N. E. 73; Burhans *v.* Norwood Park, 138 Ill. 147, 27 N. E. 1088; Baltimore *v.* Stewart, 92 Md. 535, 48 Atl. 165; Moale *v.* Baltimore, 61 Md. 224.

44. Barber Asphalt Paving Co. *v.* Garr, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227.

45. Culver *v.* Chicago, 171 Ill. 399, 49

cost.[46] Mere irregularities that do not essentially affect the proceedings will not invalidate the same.[47] When the act provides the manner in which assessments shall be made, it is not necessary that a resolution of intention to make an improvement should state the manner of assessment.[48] Reference to a plat on file complies with a requirement that the council designate the lots to be assessed.[49] If the statute requires the estimate of cost to be made a part of the record, reference to such estimate is not sufficient.[50]

(IX) *PROVISIONS FOR DAMAGES.* Unless required by charter or statute,[51] an ordinance for improving a street need not provide for assessment of damages.[52]

d. Records and Minutes. Proceedings of the council in making improvements are usually required to be entered upon its records,[53] and all jurisdictional requirements must appear therein.[54] But when a resolution to make an improvement is not required by charter or statute to be recorded, failure to record it will not invalidate proceedings.[55] An ordinance need not be spread in full upon the journal;[56] and a defective record may be amended.[57]

e. Publication. A charter or statutory provision that an ordinance, declaring the necessity of an improvement or ordering the same made, shall be published is mandatory.[58] It has been held, however, that the failure to give a required notice

N. E. 573; Beecher *v.* Detroit, 92 Mich. 268, 52 N. W. 731; Cook *v.* Slocum, 27 Minn. 509, 8 N. W. 755.

46. Graham *v.* Chicago, 187 Ill. 411, 58 N. E. 393; Middaugh *v.* Chicago, 187 Ill. 230, 58 N. E. 459; Pfeiffer *v.* People, 170 Ill. 347, 48 N. E. 979; McQuiddy *v.* Smith, 67 Mo. App. 205; *In re* Roberts, 81 N. Y. 62.

47. *Illinois.*— Danforth *v.* Hinsdale, 177 Ill. 579, 52 N. E. 877.

Indiana.— Helm *v.* Witz, 35 Ind. App. 131, 73 N. E. 846.

Kentucky.— Gleason *v.* Barnett, 106 Ky. 125, 50 S. W. 67, 20 Ky. L. Rep. 1694.

New York.— Butts *v.* Rochester, 1 Hun 598, 4 Thomps. & C. 89.

Pennsylvania.— *In re* Wheeler Ave. Sewer, 214 Pa. St. 504, 63 Atl. 894.

48. Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309.

49. Auditor-Gen. *v.* Calkins, 136 Mich. 1, 98 N. W. 742.

50. Kilgallen *v.* Chicago, 206 Ill. 557, 69 N. E. 586.

51. Holden *v.* Crawfordsville, 143 Ind. 558, 41 N. E. 370; McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543; State *v.* Long Branch Com'rs, 54 N. J. L. 484, 24 Atl. 368.

52. Prince *v.* Boston, 111 Mass. 226; Gibson *v.* Owens, 115 Mo. 258, 21 S. W. 1107; McMicken *v.* Cincinnati, 4 Ohio St. 394.

53. Matter of Schreiber, 53 How. Pr. (N. Y.) 359.

Engineer's estimate.—A requirement that the estimate of the city engineer as to the cost of the improvement shall be incorporated in the record of the first resolution for the improvement is sufficiently complied with, although the preamble to the estimate and the engineer's signature are omitted therefrom (Lanphere *v.* Chicago, 212 Ill. 440, 72 N. E. 426), and although two motions are previously adopted by the board of public works resolving to make the improvement and calling upon the engineer to make and report an estimate (Heiple *v.* Washington, 219 Ill. 604, 76 N. E. 854).

Minutes and records of council in general see *supra*, V, B, 6.

54. *Connecticut.*— Hough *v.* Bridgeport, 57 Conn. 290, 18 Atl. 102.

Kentucky.— Lexington *v.* Headley, 5 Bush 508.

Missouri.— Sedalia *v.* Scott, 104 Mo. App. 595, 78 S. W. 276; Knopfi *v.* Gilsonite Roofing, etc., Co., 92 Mo. App. 279.

New York.— *In re* Buffalo, 78 N. Y. 362; People *v.* Whitney's Point, 32 Hun 508.

Ohio.— Tyler *v.* Columbus, 6 Ohio Cir. Ct. 224, 3 Ohio Cir. Dec. 427.

But see Hand *v.* Elizabeth, 30 N. J. L. 365 [*affirmed* in 31 N. J. L. 547], holding that it need not appear from the minutes of the city council that they appointed a day for a hearing in regard to a proposed improvement on a street, in order to give them jurisdiction, when it otherwise appears that the city charter was complied with.

55. Darlington *v.* Com., 41 Pa. St. 68.

56. Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819.

57. New Albany *v.* Endres, 143 Ind. 192, 42 N. E. 683; Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690; Chase *v.* Springfield, 119 Mass. 556.

58. *California.*— San Francisco *v.* Buckman, 111 Cal. 25, 43 Pac. 396.

Illinois.— See Enos *v.* Springfield, 113 Ill. 65, holding that in case only ordinances which appropriate money need be published, it is not necessary to publish an ordinance for an improvement, the cost of which is to be defrayed by the levy of special taxes upon abutting property.

Indiana.— Meyer *v.* Fromm, 108 Ind. 208, 9 N. E. 84.

Kentucky.— Fox *v.* Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776, 16 Ky. L. Rep. 455.

New Jersey.— See Barr *v.* New Brunswick, 58 N. J. L. 255, 33 Atl. 477, holding that a charter provision requiring publication of improvement ordinances does not apply to an ordinance permitting a railway company to

of the passage of an ordinance does not invalidate an assessment for the cost of the improvement, but simply renders the assessment non-conclusive.[59] An ordinance duly passed and published is constructive notice of a proposed improvement;[60] and to constitute such notice the ordinance need not be published *verbatim*.[61] In case the parties interested have already been brought before the board of public works, an order to construct a sidewalk need not be served on the owner, but it is sufficient if such order be entered upon the record.[62] A certificate by the city clerk, under the corporate seal of the city, stating that ordinances were passed and approved on a certain date and published in a specified paper in a specified city on a certain date, is sufficient proof of publication.[63]

f. Construction as to Improvements Authorized. The question of what improvements are authorized under an ordinance frequently becomes one of construction[64] to which the rules governing the construction of ordinances in general may be applied.[65] An ordinance providing for a street improvement prevails over a previous ordinance in conflict therewith.[66] An improvement must conform to the description in the ordinance,[67] and a part only of the improvement ordered

alter streets at its own expense for the relocation of its tracks.

New York.— Astor's Petition, 2 Thomps. & C. 488 [*affirmed* in 56 N. Y. 625].

Oregon.— Grafton *v.* Sellwood, 24 Oreg. 118, 32 Pac. 1026, holding that where an ordinance could not take effect until five days after its publication a contract executed before the expiration of the five days was void.

Pennsylvania.— Allegheny's Petition, 8 Pa. Super. Ct. 104, 43 Wkly. Notes Cas. 223.

A resolution or order relating to an improvement need not be published when the requirements of publication relate only to ordinances. Napa City *v.* Easterby, 76 Cal. 222, 18 Pac. 253.

If the council be required to designate the papers in which publication shall be had, their failure to do so invalidates proceedings. *In re* Burmeister, 76 N. Y. 174, 56 How. Pr. 416 [*reversing* 9 Hun 613]; *In re* Phillips, 60 N. Y. 16; *In re* Smith, 52 N. Y. 526 [*reversing* 65 Barb. 283].

Sufficiency of publication.— The publication of a resolution of intention or ordinance is sufficient if made under the statute providing for the improvement, without regard to the provision of the city charter as to the publication of other ordinances. Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. Where the statute does not require that an ordinance shall be published in full, it is sufficient that a resolution distinctly specifying the improvement and stating that an ordinance therefor was adopted be published. Haven *v.* New York, 67 N. Y. App. Div. 90, 73 N. Y. Suppl. 678 [*affirmed* in 173 N. Y. 611, 66 N. E. 1110]. The publication of a resolution is not invalidated by the fact that from a clerical error it fails to contain the estimated cost of the improvement, where such cost could be ascertained by persons interested by an examination of the estimates on file. North Yakima *v.* Scudder, 41 Wash. 15, 82 Pac. 1022. A provision that publication be made for five days exclusive of Sundays is not complied with by five publications if the last is had on Sunday. People *v.* McCain, 50 Cal. 210. A single publication of a resolution two days before its adoption complies with a provision which prohibits the passage of such resolutions until they have been published at least two days. *In re* Bassford, 50 N. Y. 509.

Time of posting.— Under a statute providing that a resolution of intention shall be posted and published for a period of two days, and that thereupon the street superintendent shall post a more particular notice along the line of the contemplated improvement, it is sufficient if the latter notice be posted within a reasonable time, "thereupon" not being used in the sense of "immediately thereafter." Porphyry Paving Co. *v.* Ancker, 104 Cal. 340, 37 Pac. 1050.

59. Duquesne Borough *v.* Keeler, 213 Pa. St. 518, 62 Atl. 1071; Pittsburg *v.* Coursin, 74 Pa. St. 400; Erie City *v.* Willis, 26 Pa. Super. Ct. 459.

60. Chesapeake, etc., R. Co. *v.* Mullins, 94 Ky. 355, 22 S. W. 558, 15 Ky. L. Rep. 139.

In the absence of express requirement of other notice, the publication of an ordinance requiring a property-owner to construct a sidewalk is sufficient notice to him. Marshall *v.* People, 219 Ill. 99, 76 N. E. 70.

61. Seymour *v.* Tacoma, 6 Wash. 138, 32 Pac. 1077.

62. Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

63. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383.

64. See Somerville *v.* Middlesex, 122 Mass. 292, holding that an order of the city council directing a committee to remove all fences and structures encroaching upon the limits of a certain street, as shown by a certain plan, was not an order for laying out or widening a street.

65. **Rules of construction of ordinances in general** see *supra*, VI, L.

66. Holdom *v.* Chicago, 169 Ill. 109, 48 N. E. 164.

67. *Illinois.*— St. John *v.* East St. Louis, 136 Ill. 207, 27 N. E. 543.

Maryland.— Smyrk *v.* Sharp, 82 Md. 97, 33 Atl. 411.

may not be lawfully made.[68] In the construction of particular ordinances and orders it has been held that an order to improve a street does not include sidewalks,[69] but does authorize the laying of gutters,[70] and setting of curbs,[71] or curbing and guttering[72] and the adjustment of sewers;[73] and that placing of catch-basins may be considered a necessary part of a street improvement;[74] but that authority to pave a street that approaches a public square does not authorize paving the square,[75] although it will apply to short semicircular arms extending out from the street.[76] An ordinance providing for paving a street from one intersecting street to another does not necessarily mean from the nearest lines of such intersecting streets.[77]

g. Variance Between Notice or Petition and Ordinance or Order. When a street is opened or improved on petition and notice, the extent of the opening or the character of the improvement must substantially comply with the terms of such petition or notice;[78] nor may substantial variance from the resolution of intention be made in the final ordinance.[79] A slight variance from the petition or notice will not invalidate the ordinance;[80] thus, where the notice calls for the covering of crushed rock, the ordinance may substitute gravel.[81] The terms "grading and paving" as used in the petition include the incidental details of the work which may be provided for in the ordinance.[82]

Massachusetts.— Atty.-Gen. *v.* Old Colony, etc., R. Co., 12 Allen 404.

New York.— People *v.* Brooklyn, 89 Hun 241, 35 N. Y. Suppl. 91.

Pennsylvania.— Hershberger *v.* Pittsburgh, 115 Pa. St. 78, 8 Atl. 381.

See 36 Cent. Dig. tit. "Municipal Corporations," § 814.

68. Stockton *v.* Whitmore, 50 Cal. 554.

69. Dyer *v.* Chase, 52 Cal. 440; McAllister *v.* Tacoma, 9 Wash. 272, 37 Pac. 447, 658.

70. Scranton *v.* Blair, 2 C. Pl. (Pa.) 231.

71. Spokane *v.* Browne, 8 Wash. 317, 36 Pac. 26.

72. Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

73. Delamater *v.* Chicago, 158 Ill. 575, 42 N. E. 444.

74. Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901.

75. Johnson *v.* District of Columbia, 6 Mackey (D. C.) 21.

76. Cuming *v.* Grand Rapids, 46 Mich. 150, 9 N. W. 141.

77. *In re* Murphy, 20 Hun (N. Y.) 346; Pittsburg *v.* Cluley, 74 Pa. St. 259.

78. *Maine.*— Cassidy *v.* Bangor, 61 Me. 434.

Maryland.—Baltimore *v.* Grand Lodge I. O. O. F., 44 Md. 436.

Massachusetts.— Dwight *v.* Springfield, 4 Gray 107.

New Jersey.— Doyle *v.* Newark, 30 N. J. L. 303.

New York.— People *v.* Whitney's Point, 102 N. Y. 81, 6 N. E. 895; Matter of Drake, 69 Hun 95, 23 N. Y. Suppl. 264.

Ohio.— Minor *v.* Hamilton, 20 Ohio Cir. Ct. 4, 11 Ohio Cir. Dec. 16; Fenner *v.* Cincinnati, 6 Ohio S. & C. Pl. Dec. 244, 4 Ohio N. P. 182.

A notice is sufficient if it states work to be done on curbs and sidewalks, although the resolution in addition to the work described stated that a portion of the roadway would be paved. Perine *v.* Erzgraber, 102 Cal. 234, 36 Pac. 585. That a recommendation and estimate describe only a "cement sidewalk" does not render invalid an ordinance based thereon, providing for a cinder, cement, concrete, torpedo sand, and limestone walk. Storrs *v.* Chicago, 208 Ill. 364, 70 N. E. 347.

79. Kutchin *v.* Engelbret, 129 Cal. 635, 62 Pac. 214; Smith *v.* Chicago, 214 Ill. 155, 73 N. E. 346; Whittaker *v.* Deadwood, 12 S. D. 608, 82 N. W. 202.

Reduction of improvement.— Where the ordinance which constitutes the contract between the city and the contractor reduces the extent of the improvement and the work to be done materially, as compared with the preliminary resolution and the notice, the contract is vitiated and the tax bills issued thereon are void. Trenton *v.* Collier, 68 Mo. App. 483.

80. Woodruff *v.* Orange, 32 N. J. L. 49; Ogden *v.* Hudson, 29 N. J. L. 104 [*reversed* on other grounds in 29 N. J. L. 475]; Havermans *v.* Troy, 50 How. Pr. (N. Y.) 510. See also Jersey City *v.* State, 30 N. J. L. 521, holding that a notice of intention to pave a street refers to the street as it is *de jure*, and it is no objection that the ordinance ordering the improvement differs from such notice by giving the legal width of the street.

Where petitioner is benefited.— An abutter who joins in a petition to change the grade of the street is not injuriously affected, or in any way aggrieved, or deprived of any constitutional right, because the order for the change of grade included a larger district than that contemplated by the petition, it appearing that his burdens were lightened, in that the order as changed compelled others to share in the expense, if any, incident to the change. O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020.

81. Barkley *v.* Oregon City, 24 Oreg. 515, 33 Pac. 978.

82. Malone *v.* Jersey City, 28 N. J. L. 500.

h. Illegality of Part of Ordinance.[83] The fact that an improvement ordinance is void in part does not necessarily invalidate the whole ordinance.[84] Hence in particular cases it has been held that an erroneous assessment;[85] a nugatory clause;[86] or a commingling of two improvements, one of which cannot be ordered,[87] will not vitiate the ordinance; but where an ordinance provides for paving two streets as one improvement, failure of abutting owners on one of the streets to petition for the improvement as required by statute will invalidate the whole ordinance.[88]

9. Reconsideration, Amendment, or Repeal of Ordinance, and Discontinuance of Proceedings[89] — **a. Reconsideration.** A negative vote upon an improvement ordinance may be reconsidered,[90] and upon such reconsideration it may be passed without a rehearing of interested property-owners.[91] The action of a board of public works in recommending that action upon an improvement be deferred does not amount to an abrogation of its prior action, in fixing a grade upon which the improvement shall be based.[92]

b. Amendment of Ordinance, Resolution, or Order.[93] A defective ordinance may be validated by amendment.[94] Where an estimate of cost is required, an ordinance cannot be amended so as to increase the extent of an improvement unless a further estimate is had;[95] and after the completion of an improvement the method of assessment cannot be changed.[96] Several special ordinances, based on petitions, for grading parts of a street may be superseded by one general ordinance;[97] and the passage of an amendment decreasing the extent of an improvement will not of itself abrogate a contract for the improvement as originally ordered.[98] An amendment extending the length of a street to be paved is not to be regarded as changing the original purpose of the ordinance as within a statutory prohibition.[99] Where the council has amended an ordinance as submitted by a board of local improvements, such board may adopt it as amended and recommend its passage without the preparation of a new ordinance.[1]

c. Repeal of Ordinance, Resolution, or Order.[2] An ordinance providing for the construction of an improvement may be repealed expressly[3] or by necessary

83. Partial illegality generally see *supra*, VI, I, 5.

84. Bitzer *v.* Dinwiddie, 45 S. W. 1049, 20 Ky. L. Rep. 298. See also Shannon *v.* Hinsdale, 180 Ill. 202, 54 N. E. 181; Com. *v.* Abbott, 160 Mass. 282, 35 N. E. 782.

85. Freeport St. R. Co. *v.* Freeport, 151 Ill. 451, 38 N. E. 137; Chicago *v.* Cummings, 144 Ill. 446, 33 N. E. 34; State *v.* Portage, 12 Wis. 562.

86. Walker *v.* People, 170 Ill. 410, 48 N. E. 1010; Cole *v.* People, 161 Ill. 16, 43 N. E. 607.

87. Gafney *v.* San Francisco, 72 Cal. 146, 13 Pac. 467.

88. Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. 278.

89. Suspension, expiration, and revival of ordinances in general see *supra*, VI, K.

90. Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; Jersey City *v.* State, 30 N. J. L. 521.

91. People *v.* Rochester, 5 Lans. (N. Y.) 11.

92. Cuming *v.* Gleason, 140 Mich. 195, 103 N. W. 537.

93. Amendment of ordinances in general see *supra*, VI, H.

94. Johnson *v.* People, 202 Ill. 306, 66 N. E. 1081; Sands *v.* Richmond, 31 Gratt. (Va.) 571, 31 Am. Rep. 742. See also North Yakima *v.* Scudder, 41 Wash. 15, 82 Pac. 1022.

95. Kinealy *v.* Gay, 7 Mo. App. 203.

96. Dick *v.* Toledo, 11 Ohio Cir. Ct. 349, 5 Ohio Cir. Dec. 157.

97. Ogden *v.* Hudson, 29 N. J. L. 104 [*reversed* on other grounds in 29 N. J. L. 475].

98. Ottendorfer *v.* Fortunato, 56 N. Y. Super. Ct. 495, 4 N. Y. Suppl. 629; Bigler *v.* New York, 5 Abb. N. Cas. (N. Y.) 51.

99. Merrifield *v.* Scranton City, 5 Pa. Co. Ct. 388.

1. Bambrick *v.* Campbell, 37 Mo. App. 460.

2. Repeal of ordinances in general see *supra*, VI, J.

3. *Louisiana.*— Stewart *v.* Pointe Coupée Police Jury, 14 La. Ann. 69.

Massachusetts.— New Bedford *v.* Bristol County Com'rs, 9 Gray 346.

Minnesota.— Kelly *v.* Minneapolis City, 57 Minn. 294, 59 N. W. 304, 47 Am. St. Rep. 605, 26 L. R. A. 92.

Missouri.— Kaime *v.* Harty, 4 Mo. App. 357, holding that the fact that an ordinance directing a certain street improvement to be made was repealed entitled the city to a perpetual injunction restraining proceedings.

New York.—Ashton *v.* Rochester, 133 N. Y.

implication,[4] regard being had to vested rights acquired under it.[5] If an ordinance to abandon proceedings for opening a street provides that it shall not apply to any part of the proposed street of which possession has been taken, the original ordinance will remain in full force so far as such parts of the street are concerned;[6] and an ordinance for paving a street and its intersections may be repealed so far as it relates to intersections, without affecting the rest of the ordinance.[7]

d. Additional Notice or Publication. Under an act requiring notice of intention to make an improvement, a substantial change in the character of the work may not be ordered except upon due notice.[8]

e. Discontinuance of Proceedings or Abandonment of Improvement. Proceedings to make improvements may be abandoned by the municipality;[9] but proceedings before a court to open a street may not be discontinued after confirmation of the estimate and assessment.[10] An ordinance directing abutting owners to make improvements is not abrogated by declarations of individual members of a committee that the improvement need not be made.[11] Where the council ordered a pavement to be laid by lot owners within a specified time, or the same to be let by contract, its failure to proceed upon the expiration of the time did not waive the right to do so thereafter.[12] Upon a motion for leave to discontinue street opening proceedings, affidavits showing the impolicy and injustice of granting the motion have been held inadmissible.[13] Where the city council has directed an attorney to ask leave for the city to withdraw from the condemnation proceedings, the city is not bound by such direction until the application has been granted by the court.[14]

10. Surveys, Plans, Specifications, and Estimates — a. Surveys, Plans, and Specifications. For the purpose of advising property-owners of the character of an improvement, and enabling bidders to bid intelligently upon the same, plans and specifications are frequently required. A charter or statutory provision

187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619.

See 36 Cent. Dig. tit. "Municipal Corporations," § 824.

4. Thompson *v.* Highland Park, 187 Ill. 265, 58 N. E. 328; McPike *v.* Alton, 187 Ill. 62, 58 N. E. 301; Belleville *v.* Hallowell, 41 Kan. 192, 21 Pac. 105; St. Joseph *v.* Farrell, 106 Mo. 437, 17 S. W. 497.

5. *Arkansas.*—Morrilton Waterworks Imp. Dist. *v.* Earl, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666.

Connecticut.— Staples *v.* Bridgeport, 75 Conn. 509, 54 Atl. 194.

Illinois.— See Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693, holding that where the charter of a village provided that ordinances should not take effect until ten days after posting, an ordinance might be repealed within such time without depriving any one of vested rights.

Kansas.— Carey Salt Co. *v.* Hutchinson, 72 Kan. 99, 82 Pac. 721.

Ohio.— Strader *v.* Cincinnati, 1 Handy 446, 12 Ohio Dec. (Reprint) 229.

Pennsylvania.— *In re* Seventieth St., 7 Pa. Dist. 113.

See 36 Cent. Dig. tit. "Municipal Corporations," § 824.

6. Pardridge *v.* Hyde Park, 131 Ill. 537, 23 N. E. 345; Hyde Park *v.* Corwith, 122 Ill. 441, 12 N. E. 238.

7. Noonan *v.* People, 183 Ill. 52, 55 N. E. 679.

8. Schenectady *v.* Furman, 78 Hun (N. Y.) 87, 29 N. Y. Suppl. 269 [*affirmed* in 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624]; Schenectady *v.* Furman, 61 Hun (N. Y.) 171, 15 N. Y. Suppl. 724; Reich *v.* Ashley, 7 Kulp (Pa.) 163. See also Bogard *v.* O'Brien, 20 S. W. 1097, 14 Ky. L. Rep. 648, holding that a change in a paving ordinance, requiring certain stones which were to be set to protect abutting walls from injury by wagon hubs to be eight inches square instead of six, was not sufficient to require republication.

9. Black *v.* Baltimore, 50 Md. 235, 33 Am. Rep. 320; *In re* Military Parade Ground, 60 N. Y. 319 [*affirming* 4 Thomps. & C. 671]; Martin *v.* Brooklyn, 1 Hill (N. Y.) 545; Toledo *v.* Jacobson, 11 Ohio Cir. Ct. 220, 5 Ohio Cir. Dec. 137; *In re* Sandusky St., 165 Pa. St. 367, 30 Atl. 983.

Effect on assessment see *infra*, XIII, E, 6, i.

10. *In re* Roffignac St., 4 Rob. (La.) 357; People *v.* Brooklyn, 22 Barb. (N. Y.) 404; *In re* Canal St., 11 Wend. (N. Y.) 154; *In re* Beekman St., 20 Johns. (N. Y.) 269; Reymer's Appeal, 91 Pa. St. 354.

11. Chester *v.* Eyre, 181 Pa. St. 642, 37 Atl. 837.

12. Augusta *v.* McKibben, 60 S. W. 291, 22 Ky. L. Rep. 1224.

13. *In re* Anthony St., 20 Wend. (N. Y.) 618, 32 Am. Dec. 608.

14. Brady *v.* Atlantic City, 53 N. J. Eq. 440, 32 Atl. 271.

directing the preparation of such plans and specifications is mandatory;[15] but where a statute merely provides that an estimate shall be furnished if required, the failure to furnish such an estimate does not invalidate such an assessment unless it is shown that it has been required.[16] A provision in an ordinance that plans shall be prepared has been held to be directory;[17] and if the ordinance itself contains detailed descriptions, failure to prepare and file plans will not invalidate an assessment.[18] Under the provisions of some charters the council may accept plans upon which the board of public works has failed to report for a specified time after the reference of such plans to them.[19] The plans must be sufficiently specific to permit intelligent bidding.[20] If deposited at the proper office they need not be marked "filed."[21] An adoption of plans on file has been held equivalent to a prior direction to the proper officer to prepare such plans.[22] And a resolution to make an improvement according to plans to be prepared by the

15. *California.*— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309; Bolton *v.* Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

Minnesota.— Rogers *v.* St. Paul, 22 Minn. 494.

Missouri.— De Soto *v.* Showman, 100 Mo. App. 323, 73 S. W. 257.

New Jersey.— Coar *v.* Jersey City, 35 N. J. L. 404.

Ohio.— *In re* Akron St., 5 Ohio S. & C. Pl. Dec. 697.

Pennsylvania.— Verona Borough *v.* Allegheny Valley R. Co., 152 Pa. St. 368, 25 Atl. 518; Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693.

Wisconsin.— State *v.* Burzenberg, 108 Wis. 435, 84 N. W. 858; Ricketson *v.* Milwaukee, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685 (holding that the filing of mere general specifications as to the location and capacity of a proposed garbage crematory, without plans, leaving bidders to specify the system of incineration to be used and to submit plans describing the dimensions of the building, machinery, etc., was not sufficient); Wells *v.* Burnham, 20 Wis. 112; Kneeland *v.* Milwaukee, 18 Wis. 411; Myrick *v.* La Crosse, 17 Wis. 442.

See 36 Cent. Dig. tit. "Municipal Corporations," § 827.

But *compare In re* Upson, 89 N. Y. 67; Roosevelt Hospital *v.* New York, 84 N. Y. 108; *In re* New York Protestant Episcopal Public School, 47 N. Y. 556.

Immediate preparation.—A requirement of an ordinance that the city engineer shall file immediately full specifications is substantially complied with, where the preparation and filing of the specifications is done as soon as practicable. Galveston *v.* Heard, 54 Tex. 420.

Definiteness.—Specifications are sufficiently definite where the officer in charge of the work, although empowered to decide whether the contract has been performed, and decide as to minor details, cannot require more or accept less than the specifications require. Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309.

Sufficiency of description of material.— A clause requiring bids to be accompanied by special blocks of granite from a certain quarry is not inconsistent with another clause stating that the blocks required must be equal in quality to a certain granite named. Cincinnati *v.* Folz, 9 Ohio Dec. (Reprint) 665, 16 Cinc. L. Bul. 211.

Plans in alternative.— The fact that plans for an improvement are in the alternative has been held immaterial in the absence of proof that any one was misled or prevented from bidding, or that the cost of the work done was enhanced thereby. Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841 [*affirming* 15 N. Y. Suppl. 274].

Requirement of bond.— A clause attached to plans and specifications, requiring a bond from the contractor, is not regarded as a part of the plan or specification. Cole *v.* People, 161 Ill. 16, 43 N. E. 607.

Evidence of authenticity.—Where the statute does not specify the mode in which plans and specifications shall be prepared, the fact that they are prepared by the engineer and are on file and approved by the city council is sufficient evidence of their authenticity. Gill *v.* Dunham, (Cal. 1893) 34 Pac. 68.

16. Haughawout *v.* Raymond, 148 Cal. 311, 83 Pac. 53.

17. Kelso *v.* Boston, 120 Mass. 297; Sheehan *v.* Owen, 82 Mo. 458; Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,534, 3 Woods 287.

18. White *v.* Alton, 149 Ill. 626, 37 N. E. 96; Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

19. Houston *v.* Glover, (Tex. Civ. App. 1905) 89 S. W. 425.

20. Peru, etc., R. Co. *v.* Hanna, 68 Ind. 562; Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914; Bradley *v.* Van Wyck, 65 N. Y. App. Div. 293, 72 N. Y. Suppl. 1034; Houghton *v.* Burnham, 22 Wis. 301.

Must require competition.— Plans and specifications must be of sufficient definiteness to require competition on other material items, and must state the quantity of work required as definitely as practicable. Gage *v.* New York, 110 N. Y. App. Div. 403, 97 N. Y. Suppl. 157.

21. Barrett *v.* Falls City Artificial Stone Co., 52 S. W. 947, 21 Ky. L. Rep. 669; Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536; Houghton *v.* Burnham, 22 Wis. 301.

22. Stockton *v.* Skinner, 53 Cal. 85.

engineer is not invalid because passed before the plans are prepared and filed.[23] Specifications appended to a contract are controlled by specifications upon file, where such specifications are referred to in the advertisement for bids.[24]

b. Change of Plans. At any time prior to its execution, a plan for improvement may be changed by the council.[25] But it has been held that where an ordinance states that the right is reserved in the commissioner of public works to change plans and specifications, the ordinance does not sufficiently describe the proposed improvement.[26]

c. Estimates of Cost of Work. A charter or statutory provision that an estimate of the cost of an improvement shall be made is mandatory,[27] and such estimate becomes a condition precedent to the letting of a contract[28] or a levy of assessment;[29] but not necessarily to the passage of an ordinance.[30] The character of such estimate must be in compliance with the legislative enactment;[31] and must be made by the designated officer.[32]

11. Defects and Objections — a. In General. A general objection to the sufficiency of an ordinance ordering an improvement is sufficient where the city fails to require the objections to be definitely stated.[33] Upon objection to the award of a contract under an ordinance, upon the ground that the ordinance was irregularly passed, it will, in the absence of proof, be presumed that the proceedings were regular and valid.[34]

b. Persons Who May Question Validity of Proceedings. Objection to irregularities in proceedings may be made only by persons whose property will be affected directly by the improvement.[35] Hence a person whose property is not

23. Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841 [*affirming* 15 N. Y. Suppl. 274].

24. Gage *v.* Chicago, 220 Ill. 561, 77 N. E. 145.

25. *Indiana.*—State *v.* Miles, 138 Ind. 692, 38 N. E. 400.

Kansas.— Argentine *v.* Simmons, 53 Kan. 491, 37 Pac. 14.

Michigan.— Fuller *v.* Grand Rapids, 105 Mich. 529, 63 N. W. 530; Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667.

South Dakota.— Mason *v.* Sioux Falls, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802.

Wisconsin.— Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885.

See 36 Cent. Dig. tit. "Municipal Corporations," § 828.

26. Illinois Cent. R. Co. *v.* Chicago, 144 Ill. 392, 33 N. E. 602; Lake Shore, etc., R. Co. *v.* Chicago, 144 Ill. 391, 33 N. E. 602.

27. Barber *v.* Chicago, 152 Ill. 37, 38 N. E. 253.

Preliminary estimate see *supra*, XIII, B, 5, d, (II).

28. *Missouri.*— De Soto *v.* Showman, 100 Mo. App. 323, 73 S. W. 257; Independence *v.* Briggs, 58 Mo. App. 241.

Nebraska.—Moss *v.* Fairbury, 66 Nebr. 671, 92 N. W. 721.

New York.— Reilly *v.* New York, 54 N. Y. Super. Ct. 463.

Texas.— Corsicana *v.* Kerr, 89 Tex. 461, 35 S. W. 794 [*affirming* (Civ. App. 1895) 35 S. W. 694].

United States.— Edgar *v.* Pittsburg, 114 Fed. 586.

See 36 Cent. Dig. tit. "Municipal Corporations," § 829.

Compare Griggs *v.* St. Paul, 11 Minn. 308.

29. Weller *v.* St. Paul, 5 Minn. 95; Matter of Feust, 5 Silv. Sup. (N. Y.) 427, 8 N. Y. Suppl. 420 [*affirmed* in 121 N. Y. 299, 24 N. E. 479]. But *compare* Pabst Brewing Co. *v.* Milwaukee, 126 Wis. 110, 105 N. W. 563.

30. Wadlow *v.* Chicago, 159 Ill. 176, 42 N. E. 866; Kansas City *v.* Cullinan, 65 Kan. 68, 68 Pac. 1099; People *v.* New York, 5 Barb. (N. Y.) 43.

31. Connecticut Mut. L. Ins. Co. *v.* Chicago, 217 Ill. 352, 75 N. E. 365 (holding that where the estimate gives the property-owners a general idea of the cost of the substantial elements of the improvement, it is sufficiently itemized); Peoria *v.* Ohl, 209 Ill. 52, 70 N. E. 632; Independence *v.* Briggs, 58 Mo. App. 241; *In re* Anderson, 109 N. Y. 554, 17 N. E. 209 [*affirming* 47 Hun 203]; Buckley *v.* Tacoma, 9 Wash. 253, 37 Pac. 441.

32. Rich Hill *v.* Donnan, 32 Mo. App. 386.

33. Davidson *v.* Chicago, 178 Ill. 582, 53 N. E. 367.

34. People *v.* Albany Bd. of Contract, etc., 39 N. Y. App. Div. 30, 56 N. Y. Suppl. 334.

35. Symons *v.* San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Holler *v.* Atchison, etc., R. Co., 28 Kan. 625.

Widening of navigable river.— Any property-owner affected by the proposed widening of a navigable river of the United States, by a city, may object on the ground of the city's want of power, although the United States makes no complaint. Chicago *v.* Law, 144 Ill. 569, 33 N. E. 855.

A mere trespasser on land dedicated as a street cannot complain of the action of the city in improving the street, on the ground that a part thereof is not within the street limits. Backman *v.* Oskaloosa, 130 Iowa 600, 104 N. W. 347.

damaged or assessed may not enter objection.[36] Irregularity of notice to one person may not be complained of by another.[37]

c. Waiver of Objections. Objections must be made at the time and in the manner required by law.[38] After the completion of an improvement it is usually regarded as too late to raise objection to irregularities in the proceedings.[39] If a person acts upon an insufficient notice he waives objection to its insufficiency.[40] A defect in a notice, however, cannot be waived as to the others by a portion of the persons affected.[41] Property-owners by appearing and filing objections to an improvement do not waive the question of jurisdiction;[42] nor do they prejudice their rights by neglecting to have an illegal ordinance set aside until after an assessment has been made under it;[43] and acquiescence in an illegal ordinance does not render it valid.[44] Where the proceedings must be in pursuance of the requirements of a statutory enactment, the act of the city, even to the extent of accepting payments of special assessments, will not cure substantial defects.[45]

d. Estoppel to Attack Proceedings. The doctrine of estoppel is frequently invoked to save invalid improvement proceedings,[46] and a property-owner who stands by and permits an improvement to be made is usually held to be estopped from attacking the proceedings,[47] although it has been held that an estoppel will not arise when the proceedings are without jurisdiction *ab initio*.[48] So also one who aids in the passage of an improvement ordinance is estopped from objecting

A lot owner chargeable with the expense of construction is an interested party and entitled to insist that the proceedings shall conform to the city's charter and to statutory provisions regulating the subject. Waukesha *v.* Randles, 120 Wis. 470, 98 N. W. 237.

36. *Illinois.*— Bell *v.* Alton, 152 Ill. 170, 38 N. E. 556; White *v.* Alton, 149 Ill. 626, 37 N. E. 96.

Kansas.— Arnold *v.* Weiker, 55 Kan. 510, 40 Pac. 901.

New Jersey.— Kean *v.* Bronson, 35 N. J. L. 468.

New York.— *In re* Woolsey, 95 N. Y. 135; Moore *v.* New York, 73 N. Y. 238, 29 Am. Rep. 134.

Wisconsin.— State *v.* Fond du Lac, 42 Wis. 287.

See 36 Cent. Dig. tit. "Municipal Corporations," § 831.

37. Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761.

A resident personally served with notice of a resolution for the building of a sidewalk cannot complain of the failure to publish the same as required by the general ordinance for constructing sidewalks. Chariton *v.* Holliday, 60 Iowa 391, 14 N. W. 775.

38. Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794; McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769; Du Bois Opera House Co. *v.* Du Bois Borough, 16 Pa. Co. Ct. 210. See also *In re* Marshall Ave., 213 Pa. St. 516, 62 Atl. 1085.

39. Fehler *v.* Cosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238; Cunningham *v.* Merchantville, 61 N. J. L. 466, 39 Atl. 639; Youngster *v.* Paterson, 40 N. J. L. 244; Skinkle *v.* Clinton Tp., 39 N. J. L. 656; Vanatta *v.* Morristown, 34 N. J. L. 445; Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407.

40. Auditor-Gen. *v.* Hoffman, 132 Mich. 198, 571, 93 N. W. 259; Forbes *v.* Elizabeth, 42 N. J. L. 56; Townsend *v.* Jersey City, 26 N. J. L. 444; Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888; *In re* Walnut St., 7 Kulp (Pa.) 562; Heyl *v.* Philadelphia, 12 Phila. (Pa.) 291; Tingley *v.* Providence, 9 R. I. 388.

41. State *v.* West Hoboken, 53 N. J. L. 64, 20 Atl. 737.

42. Dehail *v.* Morford, 95 Cal. 457, 30 Pac. 593; State *v.* West Hoboken, 53 N. J. L. 64, 20 Atl. 737; *In re* Central Park, 51 Barb. (N. Y.) 277, 35 How. Pr. 255.

43. Mulligan *v.* Smith, 59 Cal. 206; Ogden *v.* Hudson, 29 N. J. L. 475.

44. Woodward *v.* Boscobel, 84 Wis. 226, 54 N. W. 332.

45. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

46. Keifer *v.* Bridgeport, 68 Conn. 401, 36 Atl. 801; *In re* Flushing Ave., 101 N. Y. 678, 5 N. E. 561; Huntingdon Borough *v.* Foster, 14 Pa. Co. Ct. 292; Ziegler's Case, 12 York Leg. Rec. (Pa.) 158 (holding that a borough cannot attack the regularity of its own proceedings to open streets); Illinois Trust, etc., Bank *v.* Arkansas City Water Co., 67 Fed. 196.

47. *Indiana.*—Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723.

Massachusetts.— Towne *v.* Newton, 169 Mass. 240, 47 N. E. 1029.

New Jersey.— Rosell *v.* Neptune City, 68 N. J. L. 509, 53 Atl. 199; Young *v.* Phillipsburg, 6 N. J. L. J. 213.

New York.— People *v.* Utica, 65 Barb. 9, 45 How. Pr. 289.

Ohio.— Tone *v.* Columbus, 1 Ohio Cir. Ct. 305, 1 Ohio Cir. Dec. 168. But *compare* Sprague *v.* Linwood, 7 Ohio Dec. (Reprint) 123, 1 Cinc. L. Bul. 133.

See 36 Cent. Dig. tit. "Municipal Corporations," § 833.

48. Strout *v.* Portland, 26 Oreg. 294, 38 Pac. 126.

to technical irregularities,[49] but a person does not waive his right to object to irregularities by joining in a petition for an improvement.[50] The appearance of a person to protest against the improvement of a certain street will not estop him to dispute the validity of the improvement of another street which was not embraced in the proceedings remonstrated against, although attempted to be embraced therein.[51]

12. Curing Defects or Irregularities — a. In General. A jurisdictional defect in the proceedings cannot be cured by subsequent action with relation to matters in which such defect is not necessarily a question involved.[52] An improvement which has been authorized by a valid ordinance, but not yet constructed, cannot be regarded as an existing improvement for the purpose of validating an ordinance, the right to enact which is dependent upon such an existence.[53]

b. Curative Statutes. The legislature by subsequent enactment may legalize defective improvement proceedings;[54] but the defect or want of compliance with the law must relate to a requirement that might have been dispensed with in the first instance;[55] hence a failure to give notice to property-owners is a defect that cannot be cured.[56] An amendment to a charter providing that all ordinances theretofore made should remain in force will not invalidate an ordinance which is void because unauthorized.[57]

c. Ordinances and Resolutions. An improvement proceeding, invalid because of failure to comply with legislative requirements, cannot be validated by the passage of a subsequent ordinance;[58] but unauthorized acts of ministerial officers

49. St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684; Rowe *v.* East Orange, 69 N. J. L. 600, 55 Atl. 649; Moran *v.* Hudson, 34 N. J. L. 531; *In re* Cooper, 93 N. Y. 507; Lewis *v.* Utica, 67 Barb. (N. Y.) 456; Bradford City *v.* Fox, 171 Pa. St. 343, 33 Atl. 85. But see Quinn *v.* Paterson, 27 N. J. L. 35, holding that when injury is done to a petitioner in the course of the repaving of a street, he will not be estopped to show in an action of trespass that the repaving was done out of the limits of the streets.

50. People *v.* Maher, 9 N. Y. Suppl. 124; Andrew *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 242, 5 Ohio N. P. 123; Locke *v.* Cincinnati, 2 Ohio S. & C. Pl. Dec. 549, 7 Ohio N. P. 318; Strout *v.* Portland, 26 Oreg. 294, 38 Pac. 126.

51. Stephenson *v.* Salem, 14 Ind. App. 386, 42 N. E. 44, 934.

52. People *v.* Brooklyn, 89 Hun (N. Y.) 241, 35 N. Y. Suppl. 91, holding that where a whole street was ordered opened but grading commissioners were appointed for only a part thereof, the defect was not cured by a confirmation of such commissioner's report.

Defective assessment see *infra*, XIII, E, 23.

53. Atlanta *v.* Smith, 99 Ga. 462, 27 S. E. 696.

54. *California.*— Himmelmann *v.* Hoadley, 44 Cal. 213.

Iowa.— Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. 431.

Ohio.— Becher *v.* McCloud, 4 Ohio Cir. Ct. 305, 2 Ohio Cir. Dec. 561.

Oregon.— Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Pennsylvania.— *In re* Marshall Ave., 213 Pa. St. 516, 62 Atl. 1085 (holding that a statute providing that improvements shall be valid and binding where they have been made under the provisions of invalid laws or ordinances is sufficient to cover a failure to advertise a grading ordinance); Gray *v.* Pittsburgh, 147 Pa. St. 354, 23 Atl. 395; Donley *v.* Pittsburgh, 147 Pa. St. 348, 23 Atl. 394, 30 Am. St. Rep. 738; Com. *v.* Marshall, 69 Pa. St. 328; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; *In re* Queen St., 18 Pa. Super. Ct. 241.

Wisconsin.— Blount *v.* Janesville, 31 Wis. 648.

See 36 Cent. Dig. tit. "Municipal Corporations," § 835.

55. Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. 431.

56. Boice *v.* Plainfield, 38 N. J. L. 95; Joyce *v.* Barron, 67 Ohio St. 264, 65 N. E. 1001.

57. Red Wing *v.* Chicago, etc., R. Co., 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 482.

58. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 51 N. E. 596.

Indiana.— Busenbark *v.* Clements, 22 Ind. App. 557, 53 N. E. 665.

Maryland.— Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686.

Massachusetts.— Sheehan *v.* Fitchburg, 131 Mass. 523.

Missouri.—Dickey *v.* Holmes, 109 Mo. App. 721, 83 S. W. 982; Clay *v.* Mexico, 92 Mo. App. 611.

New York.— People *v.* Brooklyn, 89 Hun 241, 35 N. Y. Suppl. 91.

Pennsylvania.— Scranton City *v.* Barnes, 147 Pa. St. 461, 23 Atl. 777.

Texas.— Norwood *v.* Gonzales County, 79 Tex. 218, 14 S. W. 1057; Waco *v.* Prather, (Civ. App. 1896) 35 S. W. 958.

Virginia.— Page *v.* Belvin, 88 Va. 985, 14 S. E. 843.

may usually be ratified by ordinance.[59] Where an action is unauthorized because not based upon an ordinance, it cannot be ratified unless by the passage of an ordinance.[60]

13. Review of Proceedings and Decisions — a. Right to Review — (i) *In General.* When the municipality is vested with power to make improvements, and all charter and statutory requirements have been complied with,[61] its exercise of the power will not be reviewed by the courts,[62] except for flagrant abuse amounting practically to fraud.[63]

(ii) *As to Necessity or Utility.* Determination of the necessity or utility of an improvement is a question for the proper municipal authorities, and their decision will not be reviewed,[64] unless the discretion vested in them has been so

Washington.— Buckley *v.* Tacoma, 9 Wash. 253, 37 Pac. 441.

Wisconsin.— Dullanty *v.* Vaughn, 77 Wis. 38, 45 N. W. 1128.

See 36 Cent. Dig. tit. "Municipal Corporations," § 836.

59. St. Louis *v.* Schoenemann, 52 Mo. 348; Kolkmeyer *v.* Jefferson, 75 Mo. App. 678; *In re* Millvale Borough No. 2, 14 Pa. Co. Ct. 82; Koch *v.* Milwaukee, 89 Wis. 220, 62 N. W. 918.

60. Maudlin *v.* Trenton, 67 Mo. App. 452.

61. Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132 [*reversing* 8 Paige 198]; Champlin *v.* New York, 3 Paige (N. Y.) 573; Merrill *v.* Brooklyn, 3 Edw. (N. Y.) 421.

62. *Iowa.*— Platt *v.* Chicago, etc., R. Co., (1887) 31 N. W. 883.

Kansas.— Topeka *v.* Huntoon, 46 Kan. 634, 26 Pac. 488; Emporia *v.* Gilchrist, 37 Kan. 532, 15 Pac. 532.

Louisiana.— New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586.

Michigan.— Bauman *v.* Detroit, 58 Mich. 444, 25 N. W. 391.

New Jersey.— Suburban Land, etc., Co. *v.* Vailsburg, 67 N. J. L. 461, 51 Atl. 469 [*affirmed* in 68 N. J. L. 311, 53 Atl. 388]; Atlantic City Water-Works Co. *v.* Atlantic City, 48 N. J. L. 378, 6 Atl. 24; Stoudinger *v.* Newark, 28 N. J. Eq. 187 [*affirmed* in 28 N. J. Eq. 446].

New York.— Lynch *v.* New York, 76 N. Y. 60, 32 Am. Rep. 271; Lawrence *v.* Freeland, 5 Silv. Sup. 492, 8 N. Y. Suppl. 807; Patchin *v.* Brooklyn, 2 Wend. 377; Van Doren *v.* New York, 9 Paige 388; Wiggin *v.* New York, 9 Paige 16; Whitney *v.* New York, 1 Paige 548.

Ohio.— Toledo *v.* Grasser, 5 Ohio S. & C. Pl. Dec. 178, 7 Ohio N. P. 396.

Pennsylvania.— McHale *v.* Easton, etc., Transit Co., 169 Pa. St. 416, 32 Atl. 461; Robinson *v.* Norwood Borough, 27 Pa. Super. Ct. 481; Bates *v.* Titusville, 29 Leg. Int. 277.

United States.— Shumate *v.* Heman, 181 U. S. 402, 21 S. Ct. 645, 45 L. ed. 916, 922.

See 36 Cent. Dig. tit. "Municipal Corporations," § 837.

63. *Illinois.*—Bloomington *v.* Chicago, etc., R. Co., 134 Ill. 451, 26 N. E. 366.

Indiana.—Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

Louisiana.— Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21.

Missouri.— Heman *v.* Allen, 156 Mo. 534, 57 S. W. 559; Morse *v.* Westport, (1895) 33 S. W. 182.

New York.— *In re* New York, 49 N. Y. 150.

Ohio.— Johnson *v.* Avondale, 1 Ohio Cir. Ct. 229, 1 Ohio Cir. Dec. 124.

United States.— Field *v.* Barber Asphalt Paving Co., 117 Fed. 925.

See 36 Cent. Dig. tit. "Municipal Corporations," § 837.

64. *California.*— Symons *v.* San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

Illinois.— Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656, 25 N. E. 962.

Indiana.— Greencastle *v.* Hazelett, 23 Ind. 186; Coburn *v.* Bossert, 13 Ind. App. 359, 40 N. E. 281.

Iowa.— Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737.

Kansas.— State *v.* Neodesha, 3 Kan. App. 319, 45 Pac. 122; Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423.

Kentucky.— Henderson *v.* Sandefur, 11 Bush 550.

Maryland.— Alberger *v.* Baltimore, 64 Md. 1, 20 Atl. 988; Methodist Protestant Church *v.* Baltimore, 6 Gill 391, 48 Am. Dec. 540.

Michigan.— Hinchman *v.* Detroit, 9 Mich. 103, holding that a jury impaneled to assess injuries or benefits to neighboring landowners in a recorder's court had no authority to determine the necessity of the improvement.

Minnesota.— Janeway *v.* Duluth, 65 Minn. 292, 68 N. W. 24. But see Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167, holding that where the council claims the right to lay out a street, not by virtue of an express grant of power, but by virtue of the existence of a necessity from which such power is implied, its decision upon the existence of such necessity is not conclusive upon the courts.

Missouri.— St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298; Glasgow *v.* St. Louis, 107 Mo. 198, 17 S. W. 743; State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759.

New Jersey.— Piard *v.* Jersey City, 30 N. J. L. 148; Pope *v.* Union, 18 N. J. Eq. 282. See also State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

New York.— Brady *v.* New York, 112 N. Y. 480, 20 N. E. 390, 2 L. R. A. 751; Goff *v.* Nolan, 62 How. Pr. 323.

abused as to render the order or ordinance for an improvement void for unreasonableness.[65]

b. Appeal. Appeal from an ordinance ordering an improvement may not be had unless expressly allowed by charter or statute;[66] and if the right be given in general terms, the only question that can be raised is the jurisdiction of the council and the regularity of its proceedings.[67] The appeal may be taken only from a final order,[68] by the parties designated in the statute;[69] and when decision by a particular court is made final and conclusive, further appeal under general statute may not be had.[70] The procedure is, unless otherwise provided by statute, governed by the usual rules of appellate practice.[71]

Pennsylvania.— Clopper *v.* Greensburg Borough, 9 Pa. Dist. 598.

Texas.— Adams *v.* Fisher, 75 Tex. 657, 6 S. W. 772.

See 36 Cent. Dig. tit. "Municipal Corporations," § 838. See also *supra*, XIII, A, 3, a, (II).

65. Marshall *v.* People, 219 Ill. 99, 76 N. E. 70; Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369; Field *v.* Western Springs, 181 Ill. 186, 54 N. E. 929; Brush *v.* Carbondale, 78 Ill. 74; Dunham *v.* Hyde Park, 75 Ill. 371; Keith *v.* Wilson, 145 Ind. 149, 44 N. E. 13; Snyder *v.* Rockport, 6 Ind. 237; Baltimore *v.* Stewart, 92 Md. 535, 48 Atl. 165; Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89.

66. *Indiana.*— Logansport *v.* Shirk, 129 Ind. 352, 28 N. E. 538.

Maine.— Biddeford *v.* York County, 78 Me. 105, 3 Atl. 36.

Massachusetts.— Lockwood *v.* Charlestown, 114 Mass. 416.

Missouri.— Kansas City *v.* Duncan, 135 Mo. 571, 37 S. W. 513.

New York.— *In re* Kingsbridge Road, 4 Hun 599; Matter of One Hundred and Thirty-eighth St., 61 How. Pr. 284.

Pennsylvania.— Chartiers' Appeal, 4 Pa. Cas. 464, 8 Atl. 181; *In re* Reynoldsville Borough, 22 Pa. Co. Ct. 461.

See 36 Cent. Dig. tit. "Municipal Corporations," § 839.

67. *In re* Southworth, 5 Hun (N. Y.) 55.

68. St. Louis *v.* Thomas, 100 Mo. 223, 13 S. W. 685; *In re* Grab, 157 N. Y. 69, 51 N. E. 398; *In re* Frederick St., 155 Pa. St. 623, 26 Atl. 773; Dubring's Appeal, 10 Phila. (Pa.) 181; Ferree *v.* Surveyors Bd., 9 Phila. (Pa.) 518.

As proceeding relating to freehold.— An appeal will lie from an order of court confirming condemnation of land for widening a street, although the act of incorporation is silent upon such point as such appeal is within a statute authorizing appeals in cases relating to freeholds. Morris *v.* Chicago, 11 Ill. 650.

69. Lexington *v.* Long, 31 Mo. 369; Riebe *v.* Lansford Borough, 8 Pa. Dist. 356, 22 Pa. Co. Ct. 40, 7 Del. Co. 443.

70. Houghton's Appeal, 42 Cal. 35; *In re* Central Park, 50 N. Y. 493; *In re* Diamond St., 196 Pa. St. 254, 46 Atl. 428; Rogers' Appeal, 138 Pa. St. 264, 22 Atl. 22; Chartiers' Appeal, 4 Pa. Cas. 464, 8 Atl. 181.

71. See, generally, APPEAL AND ERROR.

Presumptions.— Where a property-owner on appeal from establishment of a highway waived all objections except as to damages, and the city refused to accept appellant's admission that the highway was necessary, the city could not disaffirm its record and it will be presumed that the highway was necessary. Bosworth *v.* Providence, 17 R. I. 58, 20 Atl. 97. Although an ordinance for a sidewalk cannot be passed by a city in the absence of an estimate of cost, it will be presumed that such estimate was furnished where it appeared that it was filed with the clerk of the board of aldermen. Marshall *v.* Rainey, 78 Mo. App. 416.

Demurrer.— Under a statute providing that on appeal from proceedings of the city council the transcript shall be considered as the complaint to which appellant must in the form of answer or demurrer state the grounds of his objection, a demurrer on the ground that the court had no jurisdiction to try the cause did not sufficiently indicate wherein the council acted without jurisdiction. Powell *v.* Greensburg, 150 Ind. 148, 49 N. E. 955. See also Hays *v.* Vincennes, 82 Ind. 178.

Notice of appeal.— In proceedings for opening streets a city which seeks to acquire title to land and make assessments thereon is the adverse party in respect of all persons affected by the proceedings, and the several persons whose property is taken or assessed are not in a legal sense adverse parties to each other; hence service of notice of appeal on the clerk of court and the corporation counsel is sufficient. *In re* Kingsbridge Road, 4 Hun (N. Y.) 599.

Saving questions for review.— The qualifications of petitioners will not be considered, in the absence of a specific exception to such qualifications, in the trial court. *In re* Swanson St., 163 Pa. St. 323, 30 Atl. 207. An objection to the confirmation of a report to a jury of view in a proceeding to open streets which, if it had been presented in the original court, would have avoided the entire proceedings, will not be considered as an assignment of error by the appellate court. *In re* Troubat Ave., 10 Pa. Super. Ct. 27, 44 Wkly. Notes Cas. 53.

Records.— If the statute does not make it the duty of the common council to furnish a return of the papers on the appeal, the general rule requires the appellant to fur-

c. Certiorari. Certiorari may be employed to determine questions of jurisdiction[72] and validity of improvement proceedings.[73] If a petition or notice be required by charter or statute and the same is not had, proceedings may be set aside on certiorari;[74] but if authority to pass upon the sufficiency of a petition be vested in the council, its decision will be held conclusive.[75] The writ must be sued out within a reasonable time;[76] and it has been held that it cannot be brought after the completion of an improvement.[77] An act requiring certiorari to be brought before the letting of a contract is valid;[78] but under such an act certiorari will be allowed after the letting of a contract when the application shows *prima facie* that a sufficient remonstrance has been filed, since, if such remonstrance was in fact made, the city was without power to enter into a contract.[79] Certiorari may be sued out against a municipal board or official exercising judicial functions where no appeal will lie;[80] but the proceedings of an improvement commission may not be reviewed by certiorari before the assessment of a tax.[81] A defect in the record, which is amendable, has been held no ground for certiorari.[82] A county board which has graded a road entering into a city, in conformity with the established grade of a street of the city, has such an interest as will entitle it to maintain certiorari to test the validity of an ordinance of the city changing the grade of the street.[83] Where, under the statute, the judges of the supreme court act as commissioners in highway proceedings, certiorari should issue to them and not to the municipal corporation.[84]

14. Compelling Improvements. Where the duty to construct a public improvement or to perform any specific act with relation to such construction is clear and mandatory, it may be enforced by mandamus; but the remedy by mandamus is not available to control a discretion vested in municipal officers except so far as to compel its exercise.[85]

15. Restraining Making of Improvements, and Alteration or Vacation of Streets — a. In General.[86] Injunction may be invoked to prevent abuse of municipal power or the exercise of it in an unreasonable manner to the irreparable injury of property.[87] Property-owners may restrain an improvement if the

nish them. *In re* Southworth, 5 Hun (N. Y.) 55.

Disposition of appeal.— A finding of the trial court based upon a preponderance of the evidence will be sustained. McLennan *v.* Chicago, 218 Ill. 62, 75 N. E. 762.

72. Pillsbury *v.* Augusta, 79 Me. 71, 8 Atl. 150; Starr *v.* Rochester, 6 Wend (N. Y.) 564.

73. Dwight *v.* Springfield, 4 Gray (Mass.) 107; Stone *v.* Boston, 2 Metc. (Mass.) 220; Hancock *v.* Boston, 1 Metc. (Mass.) 122; Fredericks *v.* Hoffmeister, 62 N. J. L. 565, 41 Atl. 722; Read *v.* Camden, 54 N. J. L. 347, 24 Atl. 549; People *v.* New York, 5 Barb. (N. Y.) 43; Bogert *v.* New York, 7 Cow. (N. Y.) 158. See Ingersoll Pub. Corp. 508.

74. Beam *v.* Paterson, 47 N. J. L. 15; Pope *v.* Union, 32 N. J. L. 343; Woodruff *v.* Elizabeth, 30 N. J. L. 176.

75. Spaulding *v.* North San Francisco Homestead, etc., Assoc., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; People *v.* Rochester, 21 Barb. (N. Y.) 656; *In re* Diamond St., 196 Pa. St. 254, 46 Atl. 428.

76. Noyes *v.* Springfield, 116 Mass. 87; Powers *v.* Springfield, 116 Mass. 84; Dwight *v.* Springfield, 4 Gray (Mass.) 107; Hopewell *v.* Flemington, 69 N. J. L. 597, 55 Atl. 653; People *v.* Brooklyn, 8 Hun (N. Y.) 56.

77. State *v.* Rutherford, 52 N. J. L. 499, 19 Atl. 972.

78. Rosell *v.* Neptune City, 68 N. J. L. 509, 53 Atl. 199.

79. Green *v.* Jersey City, 42 N. J. L. 118.

80. Devlin *v.* Dalton, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379; Morse *v.* Norfolk County, 170 Mass. 555, 49 N. E. 925; People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163.

81. People *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802; People *v.* Gilon, 121 N. Y. 551, 24 N. E. 944.

82. Chase *v.* Springfield, 119 Mass. 556.

83. State *v.* Bayonne, 54 N. J. L. 293, 23 Atl. 648.

84. Bogert *v.* New York, 7 Cow. (N. Y.) 158.

85. Mandamus to compel special assessments see Mandamus, 26 Cyc. 337.

Mandamus with reference to public works and improvements see Mandamus, 26 Cyc. 294.

Compelling levy of taxes for public buildings, work, and other improvements see Mandamus, 26 Cyc. 330.

86. Injunction generally see Injunctions.

87. Danbury, etc., R. Co. *v.* Norwalk, 37 Conn. 109; McGourin *v.* De Funiak Springs, 51 Fla. 502, 41 So. 541; Covington *v.* Sim-

proceedings for making the same are invalid;[88] so it has been held in particular cases that a municipality may be enjoined from discharging a sewer on private land;[89] from laying out a toll bridge as a highway;[90] from permanently obstructing access to a lot;[91] and, in the absence of express statutory authority, from extending a street through railway yards if it will render them useless.[92] But the city may not be enjoined from properly exercising its functions because of incidental inconvenience to property-owners;[93] or because of damage to property where there is adequate remedy at law.[94] Hence a property-owner may not

rall, 14 Ky. L. Rep. 896; Baldwin *v.* Buffalo, 29 Barb. (N. Y.) 396 [*affirmed* in 35 N. Y. 375]. But see Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132 [*reversing* 8 Paige 198].

Where injury is only threatened.— When the city has done nothing further than to pass a resolution directing the mayor and clerk to take steps for the letting of a contract, an injunction will not lie. Pedrick *v.* Ripon, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269.

88. *Illinois.*— Wells *v.* People, 201 Ill. 435, 66 N. E. 210.

Indiana.— Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797; Bluffton *v.* Miller, 33 Ind. App. 521, 70 N. E. 989.

Iowa.— Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933.

Missouri.— Dennison *v.* Kansas City, 95 Mo. 416, 8 S. W. 429.

New York.— Copcutt *v.* Yonkers, 83 Hun 178, 31 N. Y. Suppl. 659, holding that where land benefited by an improvement is excluded from the assessment district the owner of land included in the district may enjoin the work as creating a cloud upon his title.

Ohio.— McGuire *v.* East Cleveland, 25 Ohio Cir. Ct. 497; Moore *v.* Cincinnati, 9 Ohio Dec. (Reprint) 587, 15 Cinc. L. Bul. 196.

Pennsylvania.— Carroll *v.* Philadelphia, 6 Pa. Dist. 397.

See 36 Cent. Dig. tit. "Municipal Corporations," § 842.

But *compare* Sperry *v.* Albina, 17 Oreg. 481, 21 Pac. 453, holding that proceedings for the improvement of a street upon which a lot abuts cannot be enjoined upon apprehension that there will be an attempt to charge a part of the expense of the improvement on the lot, but that such suit can be maintained only where there has been an attempt under the proceedings to sell the lot, or the proceedings are of such character that they will necessarily cast a cloud upon the title of the lot owner.

Mere possession in the absence of proof of ownership is insufficient. Gleason *v.* Jefferson, 78 Ill. 399.

Interest in old material.— The fact that owners of property bordering upon a street which is about to be repaved have paid an assessment to defray the cost of an original pavement does not give them such an interest in the material of the old pavement as will entitle them to restrain the city from removing such material. Burckhardt *v.* Atlanta, 103 Ga. 302, 30 S. E. 32.

89. Butler *v.* Thomasville, 74 Ga. 570; Woodward *v.* Worcester, 121 Mass. 245; Morgan *v.* Binghamton, 102 N. Y. 500, 7 N. E. 424; Schull *v.* Norristown, 6 Leg. Gaz. (Pa.) 157.

90. Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474.

91. McGuire *v.* East Cleveland, 25 Ohio Cir. Ct. 497.

92. Ft. Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, 32 N. E. 215, 32 Am. St. Rep. 277, 18 L. R. A. 367; Long Island R. Co. *v.* Silverstone, 19 N. Y. Suppl. 140.

93. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Dennison, 3 MacArthur 245.

Georgia.— Americus *v.* Eldridge, 64 Ga. 524, 37 Am. Rep. 89.

Indiana.— Mitchell *v.* Peru, 163 Ind. 17, 71 N. E. 132; Everett *v.* Deal, 148 Ind. 90, 47 N. E. 219; Columbus *v.* Storey, 33 Ind. 195.

Iowa.— Collins *v.* Keokuk, 91 Iowa 293, 59 N. W. 200.

New York.— Ely *v.* Rochester, 26 Barb. 133.

Pennsylvania.— McHale *v.* Easton, etc., Transit Co., 169 Pa. St. 416, 32 Atl. 461; Goulden *v.* Scranton City, 121 Pa. St. 97, 15 Atl. 483; Philadelphia, etc., Pass. R. Co. *v.* Philadelphia, 11 Phila. 358 (holding that private individuals residing on the line of a street railway and using it, although greatly inconvenienced by the stopping of cars during repairs to the street, are not entitled to an injunction restraining such repairs); McCune *v.* McKeesport, 30 Pittsb. Leg. J. N. S. 145.

See 36 Cent. Dig. tit. "Municipal Corporations," § 842.

94. *Indiana.*— Taylor *v.* Crawfordsville, 155 Ind. 403, 58 N. E. 490; De Puy *v.* Wabash, 133 Ind. 336, 32 N. E. 1016; McEneney *v.* Sullivan, 125 Ind. 407, 25 N. E. 540.

Kansas.— Dever *v.* Junction City, 45 Kan. 417, 25 Pac. 861.

Kentucky.— Hazelgreen *v.* McNabb, 64 S. W. 431, 23 Ky. L. Rep. 811.

New Jersey.— Holmes *v.* Jersey City, 12 N. J. Eq. 299.

New York.— Blake *v.* Brooklyn, 26 Barb. 301. See also Shulz *v.* Albany, 42 N. Y. App. Div. 437, 59 N. Y. Suppl. 235 [*affirming* 27 Misc. 51, 57 N. Y. Suppl. 963].

Ohio.— See *In re* Pavement, 5 Ohio S. & C. Pl. Dec. 573, holding that a property-owner's remedy for injuries resulting from the construction of a sewer under the sidewalk in front of his premises was a suit for damages.

enjoin the city from placing a grating at the opening of a drain, on the ground that the accumulation of leaves at such grating causes an overflow on his land;[95] an improvement may not be restrained on the ground of inexpediency or inutility;[96] or because the contract varies in minor details from the specifications originally adopted;[97] or because of unreasonable delay in completing it;[98] or because the work is being defectively done.[99] Where work has been practically completed, an improvement will not be enjoined on the ground of invalidity of the contract unless the city has acted *ultra vires*.[1] A municipality may invoke injunction to restrain a property-owner from constructing a sidewalk according to specifications different from those provided in an ordinance.[2]

b. Defects in, and Objection to, Preliminary Proceedings. Injunction will not lie to prevent the making of an improvement on the ground of mere irregularity of proceedings;[3] especially if the rights of the party can be otherwise protected,[4] or in the advance of the levy of a tax or assessment.[5] If the proceedings are fatally defective, the improvement may be restrained;[6] and injunction is the proper remedy to restrain a municipality from opening a street through private land without first condemning it pursuant to law.[7]

c. Restraining Vacation. The power to vacate streets may be exercised at the discretion of a municipality, and will not be restrained in the absence of a manifest abuse of discretion;[8] and a wrongful vacation may be restrained only at the instance of a property-owner who will suffer an injury distinct from that which results to the public.[9] The fact that the vacation of a street, under a pending

Pennsylvania.— Camp *v.* Port Allegany, 11 Pa. Co. Ct. 122.

See 36 Cent. Dig. tit. "Municipal Corporations," § 842.

95. Paine *v.* Delhi, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797 [*distinguishing* Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664]; Heth *v.* Fond du Lac, 63 Wis. 228, 23 N. W. 495, 53 Am. Rep. 279.

96. *Illinois.*— Walker *v.* Morgan Park, 175 Ill. 570, 51 N. E. 636.

Indiana.— Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768; Bluffton *v.* Silver, 63 Ind. 262.

Iowa.—Shelby *v.* Burlington, 125 Iowa 343, 101 N. W. 101.

Kansas.— Soden *v.* Emporia, 7 Kan. App. 583, 52 Pac. 461; Stewart *v.* Neodesha, 3 Kan. App. 330, 45 Pac. 110.

Kentucky.— Hazelgreen *v.* McNabb, 64 S. W. 431, 23 Ky. L. Rep. 811.

Michigan.— Irving *v.* Ford, 65 Mich. 241, 32 N. W. 601.

Vermont.— Lucia *v.* Montpelier, 60 Vt. 537, 15 Atl. 321, 1 L. R. A. 169.

See 36 Cent. Dig. tit. "Municipal Corporations," § 842.

97. Major *v.* Aldan Borough, 209 Pa. St. 247, 58 Atl. 490.

98. Nichols *v.* Salem, 14 Gray (Mass.) 490; Morris *v.* Bayonne, 25 N. J. Eq. 345.

99. Dever *v.* Junction City, 45 Kan. 417, 25 Pac. 861.

1. Peckham *v.* Watsonville, 138 Cal. 242, 71 Pac. 169; Fisher *v.* Georgia Vitrified Brick, etc., Co., 121 Ga. 621, 49 S. E. 679; Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; Patterson *v.* Barber Asphalt Paving Co., 94 Minn. 39, 101 N. W. 1064, 102 N. W. 176.

2. Drew *v.* Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814.

3. *Indiana.*— Balfe *v.* Lammers, 109 Ind. 347, 10 N. E. 92.

Iowa.— Dodge *v.* Council Bluffs, 57 Iowa 560, 10 N. W. 886.

Maine.— Baldwin *v.* Bangor, 36 Me. 518.

New Jersey.— Cross *v.* Morristown, 18 N. J. Eq. 305.

New York.— Patterson *v.* New York, 1 Paige 114.

See 36 Cent. Dig. tit. "Municipal Corporations," § 843.

4. Rockwell *v.* Bowers, 88 Iowa 88, 55 N. W. 1.

5. Ballard *v.* Appleton, 26 Wis. 67, holding that a non-compliance with the charter in ordering the work done on a street, and in advertising for bids, would not entitle an adjoining lot owner to an injunction.

6. Miller *v.* Mobile, 47 Ala. 163, 11 Am. Rep. 768; Covington *v.* Nelson, 35 Ind. 532; Dennison *v.* Kansas City, 95 Mo. 416, 8 S. W. 429; Buchanan *v.* Beaver Borough, 171 Pa. St. 567, 33 Atl. 115; Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693.

7. Curwensville Borough's Appeal, 129 Pa. St. 74, 18 Atl. 561; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

8. Stubenrauch *v.* Neyenesch, 54 Iowa 567, 7 N. W. 1; Atkinson *v.* Wykoff, 58 Mo. App. 86; Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351, 11 Atl. 751 [*affirmed* in 45 N. J. Eq. 366, 19 Atl. 622].

9. *Colorado.*— Whitsett *v.* Union Depot, etc., Co., 10 Colo. 243, 15 Pac. 339.

Illinois.— Hesing *v.* Scott, 107 Ill. 600; Chicago *v.* Union Bldg. Assoc., 102 Ill. 379, 40 Am. Rep. 598; Holm *v.* Windsor, 38 Ill. App. 650.

Indiana.— House *v.* Greensburg, 93 Ind. 533; Spiegel *v.* Gansberg, 44 Ind. 418.

ordinance, will damage a property-owner does not entitle him to an injunction restraining the passage of the ordinance.[10]

d. Restraining Alteration of Width or Grade of Streets. In the absence of gross abuse of discretion, a municipality may not be restrained from exercising its power to alter the width or grade of streets;[11] but a property-owner injured is usually left to his remedy at law;[12] and when injunction does lie, it will be issued only at the instance of one who will suffer irreparable damage.[13] In any event a property-owner cannot maintain an injunction against the invasion of a right which he holds in common with other residents of the street and the public.[14]

e. Proceedings.[15] The petition for injunction must disclose the facts entitling the applicant thereto,[16] for example it must show that plaintiff is the owner of the land affected;[17] must allege specifically any defect in proceedings relied upon to defeat jurisdiction;[18] and if abuse of discretion be relied on, the same must be

Iowa.— Gray *v.* Iowa Land Co., 26 Iowa 387.

Missouri.— Glasgow *v.* St. Louis, 107 Mo. 198, 17 S. W. 743.

Nebraska.— Kittle *v.* Fremont, 1 Nebr. 329.

Washington.— Ponischil *v.* Hoquiam Sash, etc., Co., 41 Wash. 303, 83 Pac. 316.

See 36 Cent. Dig. tit. "Municipal Corporations," § 844.

Vacation of alley.—A property-owner whose only injury resulting from the vacation of an alley is the making of access to the rear of his lot less convenient has no ground for enjoining the vacation, since his injury differs from that of the general public only in degree. Parker *v.* Chicago Catholic Bishop, 146 Ill. 158, 34 N. E. 473; Christian *v.* St. Louis, 127 Mo. 109, 29 S. W. 996.

10. Atkinson *v.* Wykoff, 58 Mo. App. 86.

11. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

California.— Schaufele *v.* Doyle, 86 Cal. 107, 24 Pac. 834.

Minnesota.— Wilkin *v.* St. Paul, 33 Minn. 181, 22 N. W. 249.

Missouri.— Armstrong *v.* St. Louis, 3 Mo. App. 151.

Ohio.— Leonard *v.* Cassidy, 8 Ohio Cir. Ct. 529, 4 Ohio Cir. Dec. 480; Corry *v.* Cincinnati, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194.

Pennsylvania.— Ridge Ave. Pass. R. Co. *v.* Philadelphia, 10 Phila. 37. But *compare* Dymond *v.* Kingston Borough, 12 Luz. Leg. Reg. 209, holding that where an ordinance authorizes the paving of a street to its full width the authorities will be restrained from setting curbs and paving the street so that it will be less than the full width.

Texas.— Wootters *v.* Crockett, 11 Tex. Civ. App. 474, 33 S. W. 391, holding that citizens cannot enjoin the alteration of a street on the ground that it will injure their property and business and inconvenience the public, where the proposed change does not deprive plaintiffs of ingress and egress.

See 36 Cent. Dig. tit. "Municipal Corporations," § 845.

Where the change would be unjust, as where a street has been laid out for a long time and valuable improvements have been made with reference thereto, it has been held that a change may be enjoined. Lull *v.* Chicago, 68 Ill. 518; Delashmut *v.* Oskaloosa, 94 Iowa 722, 62 N. W. 16.

To authorize an injunction on the ground of fraud the plaintiff should be able to point out some particular act of fraud or *prima facie* corruption on the part of the members of the corporation who voted for the ordinance. Champlin *v.* New York, 3 Paige (N. Y.) 573.

12. Fellowes *v.* New Haven, 44 Conn. 240, 26 Am. Rep. 447; Moore *v.* Atlanta, 70 Ga. 611; Markham *v.* Atlanta, 23 Ga. 402.

13. *Indiana.*—Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; Kokomo *v.* Mahan, 100 Ind. 242.

Iowa.—Burlington Gaslight Co. *v.* Burlington, etc., R. Co., 91 Iowa 470, 59 N. W. 292.

New Jersey.— Cross *v.* Morristown, 18 N. J. Eq. 305; Kearney *v.* Andrews, 10 N. J. Eq. 70.

New York.— Lawrence *v.* New York, 2 Barb. 577.

United States.— McElroy *v.* Kansas City, 21 Fed. 257.

See 36 Cent. Dig. tit. "Municipal Corporations," § 845.

14. Mitchell *v.* Peru, 163 Ind. 17, 71 N. E. 132, holding that where the city attempted to widen a sidewalk and boulevard of a street, within a certain half block, owners of property further up the street could not enjoin such action.

15. Proceedings for injunction in general see INJUNCTIONS.

16. Brush *v.* Carbondale, 78 Ill. 74, holding that a bill which failed to show whether the city was incorporated, and made no reference to its charter, was demurrable.

Sufficiency of application for injunction in general see INJUNCTIONS.

17. *Georgia.*— Shields *v.* Savannah, 55 Ga. 150.

Illinois.— Gleason *v.* Jefferson, 78 Ill. 399.

Missouri.— Knapp *v.* St. Louis, 153 Mo. 560, 55 S. W. 104.

New Hampshire.— Union School-Dist. *v.* Keene, 63 N. H. 623, 7 Atl. 380.

Oregon.—Schooling *v.* Harrisburg, 42 Oreg. 494, 71 Pac. 605.

See 36 Cent. Dig. tit. "Municipal Corporations," § 846.

18. Huntington *v.* Griffith, (Ind. 1895) 41

specifically alleged.[19] It has been held that where the allegations of the complaint are denied by a verified answer which shows compliance with the statute authorizing the proceedings, a temporary injunction should be dissolved.[20] The rules as to admissibility of evidence, applicable to injunction proceedings generally, apply to proceedings for an injunction against a public improvement.[21]

16. Conclusiveness and Collateral Attack — a. In General. If the municipality in making improvements fails to follow the provisions of its charter or the statute under which it acts, the defect is jurisdictional, and the proceedings are void and subject to collateral attack;[22] but mere irregularities cannot be questioned collaterally,[23] especially if the record shows compliance with legislative requirements;[24] and in the absence of proof to the contrary municipal authorities will be presumed to have complied with the law;[25] nor is the question of the necessity of an improvement open to review for attack collaterally except for fraud.[26] In a proceeding to levy a special tax, a property-owner may question the validity of the ordinance upon which it is based only when application is made for judgment of sale against his property.[27] A judgment of condemnation in

N. E. 8; Bluffton *v.* Silver, 63 Ind. 262; Kemper *v.* Campbell, 45 Ind. 529, 26 Pac. 53; Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Strauss *v.* Dallas, 73 Tex. 649, 11 S. W. 872.

Excess of debt limit.—A complaint which alleges that the city is already indebted beyond the constitutional limit, but which fails to show that the city will be unable to pay out of the current revenues its ordinary current expenses as well as its part of the expense of the improvement of the street, is sufficient. Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768.

19. Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768; Knapp *v.* St. Louis, 153 Mo. 560, 55 S. W. 104; Seattle Transfer Co. *v.* Seattle, 27 Wash. 520, 68 Pac. 90.

The question of good faith, power, and public policy in the execution of a contract are questions of law which are sufficiently raised by setting out a copy of the contract and alleging that it is void under the charter of the city. Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680.

20. Knoblauch *v.* Minneapolis, 56 Minn. 321, 57 N. W. 928, so holding with reference to condemnation proceedings for widening a public alley.

21. See Everett *v.* Deal, 148 Ind. 90, 47 N. E. 219, holding that defendant might introduce town maps with the names of streets and their dedication to the public to inform the court.

Evidence admissible in injunction proceedings generally see INJUNCTIONS, 22 Cyc. 937 *et seq.*

Evidence generally see EVIDENCE.

22. Keifer *v.* Bridgeport, 68 Conn. 401, 36 Atl. 801; St. Louis *v.* Franks, 78 Mo. 41 [*affirming* 9 Mo. App. 579]; Knopfi *v.* Gilsonite Roofing, etc., Co., 92 Mo. App. 279, holding that, although the ordinance recites all jurisdictional facts the same may be disputed by property-owners.

23. *Indiana.*— Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

Iowa.— Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

Maine.— Gay *v.* Bradstreet, 49 Me. 580, 77 Am. Dec. 272.

Massachusetts.— Fisk *v.* Springfield, 116 Mass. 88; Brimmer *v.* Boston, 102 Mass. 19.

Michigan.— Scotten *v.* Detroit, 106 Mich. 564, 64 N. W. 579.

Minnesota.— Carpenter *v.* St. Paul, 23 Minn. 232.

Missouri.— Leonard *v.* Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646.

New Jersey.—Martin *v.* Carron, 26 N. J. L. 228; Camden *v.* Mulford, 26 N. J. L. 49.

Pennsylvania.— Hogsett's Appeal, 2 Pa. Super. Ct. 265.

Rhode Island.— Hunt *v.* Gorton, 20 R. I. 163, 37 Atl. 706.

See 36 Cent. Dig. tit. "Municipal Corporations," § 847.

24. Pittsburgh, etc., R. Co. *v.* Crown Point, 150 Ind. 536, 50 N. E. 741; New Albany Gas Light, etc., Co. *v.* Crumbo, 10 Ind. App. 360, 37 N. E. 1062; Buell *v.* Lockport, 8 N. Y. 55. And see Parker *v.* Catholic Bishop, 146 Ill. 158, 34 N. E. 473.

25. *Illinois.*—Harris *v.* People, 218 Ill. 439, 75 N. E. 1012, holding that where two ordinances have been passed for the same improvement, one of which is valid and the other invalid, the law will presume that the improvement was made under the valid ordinance.

Indiana.— Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

Louisiana.— Webber *v.* Gottschalk, 15 La. Ann. 376.

New York.— Matter of New York, 95 N. Y. App. Div. 533, 88 N. Y. Suppl. 769.

Ohio.— Tone *v.* Columbus, 1 Ohio Cir. Ct. 305, 1 Ohio Cir. Dec. 168.

Texas.— Davies *v.* Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145.

26. James *v.* Pine Bluff, 49 Ark. 199, 4 S. W. 760; Bass *v.* Ft. Wayne, 121 Ind. 389, 23 N. E. 259; Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725.

27. People *v.* Birch, 201 Ill. 81, 66 N. E. 358; Goodwillie *v.* Lake View, 137 Ill. 51, 27 N. E. 15; Brown *v.* Saginaw, 107 Mich. 643, 65 N. W. 601.

street opening proceedings is conclusive as to the previous dedication of the property as a highway.[28]

b. Sufficiency of Petition or Assent of Property-Owners. If the municipal authorities are empowered, either expressly or by fair implication, to determine whether the requisite number of property-owners have assented to an improvement, their action in ordering the improvement is a conclusive determination of that question;[29] but where this power is not conferred, the courts may inquire whether the requisite number have so assented.[30]

c. Notice of Proceedings. Regularity of notice will be presumed in the absence of proof to the contrary;[31] and irregularity of notice does not open proceedings to collateral attack.[32] A provision in a city charter that the finding of the council by ordinance that any improvement provided for was ordered after notice duly given shall be conclusive is not invalid as infringing upon the rights of property-owners.[33]

C. Contracts — 1. In General — a. Constitutional and Statutory Provisions. The method in which the municipality shall enter into a contract for a public improvement, and the elements essential to the validity of such contract, are usually expressly defined by statute or charter provisions.[34] Different statutes relating to this subject-matter will be construed together unless repugnant.[35]

b. Authority to Contract in General. Power to make improvements, given

28. Newman *v.* Chicago, 153 Ill. 469, 38 N. E. 1053, so holding where it was sought to raise the objection upon a supplemental petition to assess the cost upon adjoining property.

29. *California.*— Spaulding *v.* North San Francisco Homestead, etc., Assoc., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [*distinguishing* Kahn *v.* San Francisco, 79 Cal. 388, 21 Pac. 849; Mulligan *v.* Smith, 59 Cal. 206].

Illinois.— Kirchman *v.* West, etc., St. R. Co., 58 Ill. App. 515.

Indiana.— McEneney *v.* Sullivan, 125 Ind. 407, 25 N. E. 540.

Louisiana.— O'Hara *v.* Blood, 27 La. Ann. 57.

New York.— *In re* Kiernan, 62 N. Y. 457; People *v.* Rochester, 21 Barb. 656; Mansfield *v.* Lockport, 24 Misc. 25, 52 N. Y. Suppl. 571.

Pennsylvania.— Scranton *v.* Jermyn, 156 Pa. St. 107, 27 Atl. 66.

See 36 Cent. Dig. tit. "Municipal Corporations," § 848.

Constitutionality of charter provision.— A charter provision that the finding of the city council by ordinance that the petition was signed by the required number of owners shall be conclusive is not unconstitutional as depriving the owners of any rights under the fundamental law. Denver *v.* Londoner, 33 Colo. 104, 80 Pac. 117.

30. *California.*— Kahn *v.* San Francisco, 79 Cal. 388, 21 Pac. 849, (1890) 25 Pac. 403; Mulligan *v.* Smith, 59 Cal. 206 [*distinguished* in Spaulding *v.* North San Francisco Homestead, etc., Assoc., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249].

Maryland.—Henderson *v.* Baltimore, 8 Md. 352.

Michigan.— Collins *v.* Grand Rapids, 108 Mich. 675, 66 N. W. 586.

Missouri.— Fruin-Bambrick Constr. Co. *v.* Geist, 37 Mo. App. 509.

New York.— Miller *v.* Amsterdam, 149 N. Y. 288, 43 N. E. 632 [*affirming* 78 Hun 609, 28 N. Y. Suppl. 1021].

Utah.— Armstrong *v.* Ogden City, 12 Utah 476, 43 Pac. 119 [*affirmed* in 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444].

United States.— Ogden City *v.* Armstrong, 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444 [*affirming* 12 Utah 476, 43 Pac. 119]; Zeigler *v.* Hopkins, 117 U. S. 683, 6 S. Ct. 919, 29 L. ed. 1019.

See 36 Cent. Dig. tit. "Municipal Corporations," § 848.

31. Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

32. West Chicago St. R. Co. *v.* People, 156 Ill. 18, 40 N. E. 605; Lowell *v.* Hadley, 8 Metc. (Mass.) 180; Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

33. Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114, so holding where the hearing afforded owners of property in the district, by virtue of the notice, was not final or conclusive, but an opportunity was afforded the owner to be heard thereafter.

34. See the statutes of the several states. And see also the cases cited *infra*, this section.

Contracts generally see *supra*, IX.

35. *California.*— Ede *v.* Cogswell, 79 Cal. 278, 21 Pac. 767.

Illinois.— Chicago *v.* Hanreddy, 211 Ill. 24, 71 N. E. 834.

Missouri.— Pryor *v.* Kansas City, 153 Mo. 135, 54 S. W. 499.

New York.— Guidet *v.* New York, 12 Hun 566; Brown *v.* New York, 3 Thomps. & C. 155 [*reversed* on other grounds in 63 N. Y. 239].

Ohio.— Hubbard *v.* Norton, 28 Ohio St. 116.

Pennsylvania.— Saltsman *v.* Olds, 215 Pa.

in general terms, carries with it implied authority to make contracts therefor.[36] The authority to make such contracts is usually regarded as vested in the council;[37] and to be exercised either by ordinance or resolution.[38] Authority to make improvements and to bind the city by contract therefor is sometimes vested by charter or statute in a particular municipal board;[39] and unless so provided, such contracts do not require the approval of the council.[40] The power of such a board to bind the city depends on express grant;[41] and a person dealing with it is bound to take notice of the limits of its authority.[42] The council unless restricted by statute may empower a board or committee to make a contract, and within the scope of its authority, the action of such board or committee will bind the city.[43] Any charter or statutory limitation upon the power to contract is mandatory;[44] but if a department of a city forms an independent governmental agency it is not subject to provisions of the charter.[45] Any direction in an improvement ordinance as to the execution of a contract must be complied with.[46]

St. 336, 64 Atl. 552; McCafferty *v.* Steel, 12 Phila. 236.

Utah.— Nelden *v.* Clark, 20 Utah 382, 59 Pac. 524, 77 Am. St. Rep. 917.

See 36 Cent. Dig. tit. "Municipal Corporations," § 850.

36. *Alabama.*— Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764.

Massachusetts.— Webb Granite, etc., Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639.

Missouri.— Carthage *v.* Cowgill, etc., Milling Co., 156 Mo. 620, 57 S. W. 1008; Seaboard Nat. Bank *v.* Woesten, 147 Mo. 39, 48 S. W. 939, 48 L. R. A. 279.

New Jersey.— Schefbauer *v.* Kearney, 57 N. J. L. 588, 31 Atl. 454; Hackensack Water Co. *v.* Hoboken, 51 N. J. L. 220, 17 Atl. 307.

New York.— Brundage *v.* Portchester, 31 Hun 129 [*affirmed* in 102 N. Y. 494, 7 N. E. 398].

Oklahoma.— Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511.

Pennsylvania.— Hummelstown *v.* Brunner, 2 Dauph. Co. Rep. 376.

United States.— Cunningham *v.* Cleveland, 98 Fed. 657, 39 C. C. A. 211.

See 36 Cent. Dig. tit. "Municipal Corporations," § 851.

37. Stockton *v.* Creanor, 45 Cal. 643; State *v.* Michigan. 138 Ind. 455, 37 N. E. 1041; Starkey *v.* Minneapolis, 19 Minn. 203.

38. Keator *v.* Dalton, 29 Misc. (N. Y.) 692, 62 N. Y. Suppl. 878.

But it is proper for a city to advertise for bids and contract for an improvement before passing an ordinance ordering the work to be done. Smith *v.* Westport, 105 Mo. App. 221, 79 S. W. 725.

Necessity of record.—The passage of a resolution of a borough council awarding a lighting contract being a ministerial and not a legislative act, the resolution is not invalid because it has not been recorded in the ordinance book, or advertised. Seitzinger *v.* Tamaqua, 187 Pa. St. 539, 41 Atl. 454.

39. See the statutes of the several states. And see Walter *v.* McClellan, 113 N. Y. App. Div. 295, 99 N. Y. Suppl. 78; Bradley *v.* Van Wyck, 65 N. Y. App. Div. 293, 72 N. Y. Suppl. 1034; Ellis *v.* New York, 1 Daly (N. Y.) 102; Potts *v.* Philadelphia, 8 Pa. Dist. 728.

Constitutionality of statute.—An act authorizing a board of works to contract for improvements, without restrictions as to price, is not unconstitutional as leading to excessive taxation. Rogers *v.* St. Paul, 22 Minn. 494.

40. Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605; Detroit *v.* Public Lighting Commission, 101 Mich. 362, 59 N. W. 654; Nelson *v.* New York, 63 N. Y. 535.

Interference with discretion.— Under a charter authorizing a board of public works to advertise for bids for public improvements, open and approve the same and let contracts to the lowest bidder, the council has no authority to instruct the board to enter into a contract or otherwise to interfere with its discretion in such matters. Moran *v.* Thompson, 20 Wash. 525, 56 Pac. 29.

41. Hartford *v.* Hartford Electric Light Co., 65 Conn. 324, 32 Atl. 925; State *v.* Ramsey County Dist. Ct., 32 Minn. 181, 19 N. W. 732; Blank *v.* Kearney, 44 N. Y. App. Div. 592, 61 N. Y. Suppl. 79; Saltsman *v.* Olds, 215 Pa. St. 236, 64 Atl. 552.

42. Murphy *v.* Louisville, 9 Bush (Ky.) 189; Lincoln County, etc., Irr. Dist. *v.* McNeal, 60 Nebr. 613, 83 N. W. 847; Hurley *v.* Trenton, 67 N. J. L. 350, 51 Atl. 1109; Keeney *v.* Jersey City, 47 N. J. L. 449, 1 Atl. 511.

43. Donovan *v.* New York, 33 N. Y. 291 [*reversing* 44 Barb. 180, 19 Abb. Pr. 58]; Press Pub. Co. *v.* Holahan, 29 Misc. (N. Y.) 684, 62 N. Y. Suppl. 872; Walsh *v.* Columbus, 36 Ohio St. 169; Potts *v.* Philadelphia, 23 Pa. Co. Ct. 212.

44. Strack *v.* Ratterman, 18 Ohio Cir. Ct. 36, 9 Ohio Cir. Dec. 862. See also Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

Certificate of funds.—A certificate of a city auditor, showing that there is sufficient money to pay for an improvement, may be made after the council proceedings are all had and the contract for the improvement is about to be let. Emmert *v.* Elyria, 27 Ohio Cir. Ct. 353.

45. Bigler *v.* New York, 5 Abb. N. Cas. (N. Y.) 51.

46. Ferree's Appeal, 88 Pa. St. 440; Phila-

c. Necessity For Special Contract. It is sometimes provided by ordinance or statute that all public work shall be done by contract.[47] And where an exception to such a provision is extended in those cases where work is necessary to be done to complete or perfect the particular job, it cannot be construed to include work of a general character not necessary to the completion of work which is partly finished.[48]

d. Implied Contracts. It is usually regarded as necessary that a contract for a local improvement be express.[49] And a municipality will not be bound by implied contract to pay for an improvement voluntarily made.[50]

e. Necessity For Submission to Competition in General. A provision in a charter, statute, or ordinance requiring a contract to be let by competitive bidding is mandatory,[51] and unless complied with, the contract is void.[52] In the

delphia *v.* Philadelphia, etc., R. Co., 88 Pa. St. 314 [*affirming* 12 Phila. 479]; Monaghan *v.* Philadelphia, 17 Leg. Int. (Pa.) 349.

Selection of contractor by owners.— Where an ordinance authorized a street to be paved by the contractor selected by a majority of the owners of the adjacent premises, a lien will not be sustained unless such selection was made. Reilly *v.* Philadelphia, 6 Phila. (Pa.) 228.

47. See the statutes of the several states. And see Haughwout *v.* New York, 2 Abb. Dec. (N. Y.) 344, 2 Keyes 419.

48. Haughwout *v.* New York, 2 Abb. Dec. (N. Y.) 344, 2 Keyes 419.

49. McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144.

50. Jeffersonville *v.* Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495; South Bellevue Lot Assoc. *v.* Bellevue, 58 S. W. 443, 22 Ky. L. Rep. 541; Detroit *v.* Robinson, 38 Mich. 108; Springfield Milling Co. *v.* Lane County, 5 Oreg. 265.

51. *California.*— Hewes *v.* Reis, 40 Cal. 255.

Nebraska.— Fairbanks *v.* North Bend, 68 Nebr. 560, 94 N. W. 537.

New York.— Mutual L. Ins. Co. *v.* New York, 144 N. Y. 494, 39 N. E. 386; *In re* Emigrant Industrial Sav. Bank, 75 N. Y. 388. And see People *v.* New York, 32 Barb. 35, holding that an act providing that work necessary to complete a particular job might be done by contract made in the discretion of a board did not include work forming part of a job which was purposely excluded from the first contract in order to be let in the future or to be otherwise done.

Ohio.— McCloud *v.* Columbus, 54 Ohio St. 439, 44 N. E. 95; Cincinnati *v.* Anchor White Lead Co., 6 Ohio Dec. (Reprint) 1188, 12 Am. L. Rec. 235; Miller *v.* Pearce, 2 Cinc. Super. Ct. 44.

Texas.— Ardrey *v.* Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726.

See 36 Cent. Dig. tit. "Municipal Corporations," § 854.

But see Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702, holding that under a statute providing that boards of improvement might advertise for proposals for doing any work by contract, and might accept or reject any proposals, it was not mandatory that proposals be advertised for.

Where nature of improvement is fixed by petition.— Under a statute giving the property-owners the right to petition for a particular kind of pavement, and prohibiting the board from using any other kind of material unless specifically directed by ordinance, the effect of another statute requiring the board to let the contract to the lowest bidder is not nullified. Monaghan *v.* Indianapolis, 37 Ind. App. 280, 76 N. E. 424.

Exceptions.—A requirement that public work shall be let to the lowest bidder does not apply to a contract for supervision of the construction of a public improvement (Houston *v.* Potter, (Tex. Civ. App. 1906) 91 S. W. 389), nor to the employment of an architect to prepare plans for a public building (Houston *v.* Glover, (Tex. Civ. App. 1905) 89 S. W. 425).

52. *Indiana.*— McEwen *v.* Gilker, 38 Ind. 233.

Louisiana.— Fox *v.* New Orleans, 12 La. Ann. 154, 68 Am. Dec. 766.

Michigan.— Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184.

Nebraska.— Fulton *v.* Lincoln, 9 Nebr. 358, 2 N. W. 724.

New Jersey.— Hampson *v.* Paterson, 36 N. J. L. 159.

New York.— People *v.* Stout, 23 Barb. 338; Christopher *v.* New York, 13 Barb. 567; Greene *v.* New York, 1 Hun 24, 3 Thomps. & C. 753 [*reversed* on other grounds in 60 N. Y. 303]; Smith *v.* Buffalo, Sheld. 493; Ellis *v.* New York, 1 Daly 102.

Pennsylvania.— Addis *v.* Pittsburgh, 85 Pa. St. 379.

United States.—Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,534, 3 Woods 287.

See 36 Cent. Dig. tit. "Municipal Corporations," § 854.

Fixing a minimum price to be paid for labor, and awarding a contract on the basis of such specification, is a violation of a provision requiring the letting of the work to the lowest responsible bidder. Frame *v.* Felix, 167 Pa. St. 47, 31 Atl. 375, 27 L. R. A. 802.

A reservation of the general power to change materials and work in a contract has been held to render it violative of a requirement that work be let by contract to the lowest bidder. Gage *v.* New York, 110 N. Y. App. Div. 403, 97 N. Y. Suppl. 157.

absence of such provision bids need not be called for;[53] and the requirement is to be strictly construed and not extended beyond its clear implication;[54] hence a provision that "street work" be done by competitive contract has been held not to apply to a contract for lighting streets[55] or improving parks;[56] but it will apply to unfinished work abandoned by a contractor.[57] The term "work" used in this connection includes buildings and bridges,[58] and repairs or cleaning of streets.[59] Where bidding may be dispensed with by approval of the mayor, such approval comes too late if given after the contract is let.[60]

f. Provisions For Monopolized or Patented Articles or Materials. Under a provision that the contract be let to the lowest responsible bidder, it has frequently been held that the city, in its specifications, may not prevent competition by restricting the use of material to that manufactured by a particular firm.[61]

53. Kingsley *v.* Brooklyn, 78 N. Y. 200, 7 Abb. N. Cas. 28 [*affirming* 5 Abb. N. Cas. 1].

54. Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914; Brady *v.* New York, 112 N. Y. 480, 20 N. E. 390, 2 L. R. A. 751 [*reversing* 55 N. Y. Super. Ct. 45]; *In re* Weil, 83 N. Y. 543; Parr *v.* Greenbush, 72 N. Y. 463; Greene *v.* New York, 60 N. Y. 303; Findley *v.* Pittsburgh, 9 Pa. Cas. 1, 11 Atl. 678; Worthington *v.* Boston, 152 U. S. 695, 14 S. Ct. 737, 38 L. ed. 603 [*reversing* 41 Fed. 23]; Lake *v.* Hequembourg, 14 Fed. Cas. No. 7,994, 6 Biss. 325.

Completion of work.— Where the council having advertised for bids for paving a specified distance, contracted with the lowest bidder to pave a portion only of the distance, "or further if ordered," and after that was completed ordered the remainder to be done by the same contractor, it was not necessary to advertise for proposals a second time. Brevoort *v.* Detroit, 24 Mich. 322.

55. *California.*— Electric Light, etc., Co. *v.* San Bernardino, 100 Cal. 348, 34 Pac. 819.

Indiana.—Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

Mississippi.— Reid *v.* Trowbridge, 78 Miss. 542, 29 So. 167.

New Jersey.— Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651.

Washington.—Tanner *v.* Auburn, 37 Wash. 38, 79 Pac. 494.

56. Walsh *v.* Columbus, 36 Ohio St. 169.

57. Chicago *v.* Hanreddy, 211 Ill. 24, 71 N. E. 834.

58. Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

59. Santa Cruz Rock Pavement Co. *v.* Broderick, 113 Cal. 628, 45 Pac. 863; Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114; Morris *v.* Barber Asphalt Paving Co., 5 Lack. Leg. N. (Pa.) 129, 7 North. Co. Rep. 5.

60. Warren *v.* Boston, 181 Mass. 6, 62 N. E. 951; Bowditch *v.* Boston, 168 Mass. 239, 46 N. E. 1026.

61. *California.*— Nicolson Pavement Co. *v.* Painter, 35 Cal. 699; Nicolson Pavement Co. *v.* Fay, 35 Cal. 695.

Illinois.— Fishburn *v.* Chicago, 171 Ill. 338, 49 N. E. 532, 63 Am. St. Rep. 236, 39 L. R. A. 482.

Indiana.— Monaghan *v.* Indianapolis, 37 Ind. App. 280, 76 N. E. 424, (App. 1905) 75 N. E. 33, holding that a contract for paving a street with patented paving material, which the patentee controls and retains absolutely the right to use and to sell to others, is violative of a requirement that the contract shall be let to the lowest and best bidder, although the patentee agrees to furnish the paving material to a contractor who will equip himself with the necessary appliances.

Kansas.— National Surety Co. *v.* Kansas City Hydraulic Press Brick Co., 73 Kan. 196, 84 Pac. 1034, holding that a petition, ordinance, and contract for paving a street with vitrified brick of a particular brand sold by one company only was void, where other kinds of vitrified brick equally good were sold in the vicinity by other companies.

Louisiana.— Burgess *v.* Jefferson, 21 La. Ann. 143.

New York.— Smith *v.* Syracuse Imp. Co., 161 N. Y. 484, 55 N. E. 1077; *In re* Eager, 46 N. Y. 100, 12 Abb. Pr. N. S. 151; Larned *v.* Syracuse, 17 N. Y. App. Div. 19, 44 N. Y. Suppl. 857; Dolan *v.* New York, 4 Abb. Pr. N. S. 397. But *compare* Gage *v.* New York, 110 N. Y. App. Div. 403, 97 N. Y. Suppl. 157 (holding that a contract by the city for construction of a bridge was not, as a matter of law, illegal because a particular kind of steel was specified, and all bidders were required to purchase the materials from a certain producer); People *v.* Van Nort, 65 Barb. 331; *In re* McCormack, 60 Barb. 128; Greaton *v.* Griffin, 4 Abb. Pr. N. S. 310 (holding that where a statute authorizes public officers to use an article which is in fact patented, the legislature must be presumed to have known the rights of the patentee and that any provisions in the act requiring the officers to advertise for proposals and employ the lowest bidder must be construed so as to preserve and not defeat the authority conferred).

Ohio.— Tucker *v.* Newark, 19 Ohio Cir. Ct. 1, 10 Ohio Cir. Dec. 437.

Pennsylvania.— Carroll *v.* Philadelphia, 6 Pa. Dist. 397.

Wisconsin.—Dean *v.* Charlton, 23 Wis. 590, 99 Am. Dec. 205.

See 36 Cent. Dig. tit. "Municipal Corporations," § 855.

Other cases, however, modify the doctrine, and hold that the city may, in good faith, avail itself of superior material notwithstanding such material is the product of exclusive manufacture.[62] It has been held also that the city may restrict the kind of material to be used to a patented article "or material of equal quality";[63] and that the specification of a patented article is not objectionable unless it results in stifling competition.[64]

2. Proposals or Bids — a. Request or Advertisement For Proposals or Bids — (i) *In General.* A provision requiring notice of an improvement and advertisement for bids is mandatory;[65] and unless bids be called for in substantial compliance with the terms of such provision, the contract is void.[66] Any requirement as to the time and manner of publication must be complied with;[67] and in the absence of such requirement reasonable notice and publication must be had.[68] A

Effect of petition.— The council may be enjoined from making a contract for paving streets with a specified material which is the subject of a monopoly, although two thirds of the abutting property-owners petition for the use of such material, and the city charter in such case provides that the council has no power to contract for a different kind of pavement. Boon *v.* Utica, 5 Misc. (N. Y.) 391, 26 N. Y. Suppl. 932.

Provision for payment of royalty.—A provision in a charter that a contract may be made with the patentee to use a patent or patented article, process, combination, or work for the city at a stipulated sum or royalty for the use thereof, contemplates the acquisition of a right to operate under a patent for a royalty and then letting the actual work to the lowest bidder, and is not complied with by a contract with the patentee of a street pavement that an amount nearly equal to two thirds of the whole cost of the paving shall go to the patentee, and for which price the patentee agrees to supply other material and do part of the work in making the improvement. Allen *v.* Milwaukee, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. 680.

62. Holmes *v.* Detroit, 120 Mich. 226, 79 N. W. 200, 77 Am. St. Rep. 587, 45 L. R. A. 121; Hobart *v.* Detroit, 17 Mich. 246, 97 Am. Dec. 185; Verdin *v.* St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 22 S. W. 490; Barber Asphalt Paving Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110; Kansas City Transfer Co. *v.* Huling, 22 Mo. App. 654; Newark *v.* Bonnell, 57 N. J. L. 424, 31 Atl. 408, 51 Am. St. Rep. 609 [*distinguishing* Kean *v.* Elizabeth, 35 N. J. L. 351]; Field *v.* Barber Asphalt Paving Co., 117 Fed. 925. But *compare* Shoenberg *v.* Field, 95 Mo. App. 241, 68 S. W. 945.

63. Mulrein *v.* Kalloch, 61 Cal. 522; Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

64. Rose *v.* Low, 85 N. Y. App. Div. 461, 83 N. Y. Suppl. 598; Smith *v.* Syracuse, 17 N. Y. App. Div. 63, 44 N. Y. Suppl. 852; Kilvington *v.* Superior, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45.

65. *In re* Colling, 108 N. Y. 666, 15 N. E. 894; *In re* Pennie, 108 N. Y. 364, 15 N. E. 611 [*affirming* 45 Hun 391]; Upington *v.* Oviatt, 24 Ohio St. 232.

Lighting contracts.—Under a constitutional provision providing that before making any contract with reference to a franchise or privilege, the municipality shall receive bids and award the contract to the highest and best bidder, such action must be taken with reference to a contract with a lighting company for lighting. Providence *v.* Providence Electric Light Co., 91 S. W. 664, 28 Ky. L. Rep. 1015. But it has been held that where it is absolutely necessary for a city to obtain street lighting at once, it may contract therefor at a reasonable price, without first advertising for bids, although the charter requires such advertisement. North River Electric Light, etc., Co. *v.* New York, 48 N. Y. App. Div. 14, 62 N. Y. Suppl. 726.

Publication of notice in general see Notice.

66. *California.*— Brooks *v.* Satterlee, 49 Cal. 289; Himmelmann *v.* Cahn, 49 Cal. 285.
Indiana.— Kretsch *v.* Helm, 45 Ind. 438.
Iowa.— Polk *v.* McCartney, 104 Iowa 567, 73 N. W. 1067.
Missouri.—Elsberry *v.* Black, 120 Mo. App. 20, 96 S. W. 256.
Texas.— Breath *v.* Galveston, 92 Tex. 454, 49 S. W. 575; Waco *v.* Chamberlain, (Civ. App. 1898) 45 S. W. 191.

67. *California.*— Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301.
Minnesota.— Carpenter *v.* St. Paul, 23 Minn. 232.
Missouri.— Roth *v.* Forsee, 107 Mo. App. 471, 81 S. W. 913.
New Jersey.— Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651.
New York.— Tifft *v.* Buffalo, 25 N. Y. App. Div. 376, 49 N. Y. Suppl. 489; *In re* Pennie, 45 Hun 391.
Ohio.— Fath *v.* Clifton, 5 Ohio S. & C. Pl. Dec. 567, 7 Ohio N. P. 534.
Pennsylvania.— Darlington *v.* Com., 41 Pa. St. 68.
United States.— Newport News *v.* Potter, 122 Fed. 321, 58 C. C. A. 483.
See 36 Cent. Dig. tit. "Municipal Corporations," § 856.

68. *Indiana.*— Yeakel *v.* Lafayette, 48 Ind. 116; Logansport *v.* Puterbaugh, 46 Ind. 550.
Kentucky.— Augusta *v.* McKibben, 60 S. W. 291, 22 Ky. L. Rep. 1224.

requirement that notices for bids upon a paving contract shall be posted at public places within the city for five days is not unreasonable.[69]

(11) *Form, Requisite, and Sufficiency of Advertisement.*[70] The advertisement for bids must emanate from the council or proper municipal board,[71] and must be published in accordance with the statute or ordinance relating to the subject.[72] The advertisement must specify the character and amount of work to be done;[73] but reference may be made to specifications on file for detailed description of the work.[74] It must designate a time for receiving bids;[75] and a state-

Missouri.— Galbreath *v.* Newton, 45 Mo. App. 312.

Nebraska.— State *v.* Birkhauser, 37 Nebr. 521, 56 N. W. 303.

Wisconsin. — Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

See 36 Cent. Dig. tit. "Municipal Corporations," § 856.

69. Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 22 S. W. 490.

70. Selection of official newspaper see NEWSPAPERS.

71. Beniteau *v.* Detroit, 41 Mich. 116, 1 N. W. 899.

72. See the cases cited *infra*, this note.

Length of publication.— A provision that publication be made for a stated number of days is complied with, although there be an intervening Sunday on which no publication is had. Bradley *v.* Van Wyck, 65 N. Y. App. Div. 293, 72 N. Y. Suppl. 1034; Galveston *v.* Heard, 54 Tex. 420. The fact that an advertisement does not appear until two days after the time fixed for the first publication is not fatal, where proposals are received and acted upon. Duffy *v.* Saginaw, 106 Mich. 335, 64 N. W. 581.

Number of newspapers.—Although the ordinance provides that publication shall be made in two newspapers, publication in one newspaper, in conformity with the statutory provision on the subject, is sufficient. Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112. But where the ordinance contains the entire provision for publication, a publication in two newspapers, instead of three as required by the ordinance, is insufficient. Baltimore *v.* Johnson, 62 Md. 225.

Bulletin boards in the court-house and city hall, and at the corner of two public streets, are public places within the meaning of a charter requiring notices to be posted in public places. Roach *v.* Eugene, 23 Oreg. 376, 31 Pac. 825.

Proof of publication.— In the absence of evidence that a notice was not published the requisite number of days, the sufficiency of publication will be presumed. Arnold *v.* Ft. Dodge, 111 Iowa 152, 82 N. W. 495. The introduction of a copy of a newspaper purporting to have been published on one of the days specified in the publisher's affidavit is insufficient to overcome the *prima facie* proof of the publication, where it is not shown whence the paper was procured or that it was a copy of the regular edition. Ross *v.* Gates, 117 Mo. App. 237, 93 S. W. 856; Ross *v.* Oglebay, 117 Mo. App. 236, 93 S. W. 859.

73. Jenney *v.* Des Moines, 103 Iowa 347, 72 N. W. 550; Windsor *v.* Des Moines, 101 Iowa 343, 70 N. W. 214; Coggeshall *v.* Des Moines, 78 Iowa 235, 41 N. W. 617, 42 N. W. 650; Morley *v.* Weakley, 86 Mo. 451; Tifft *v.* Buffalo, 25 N. Y. App. Div. 376, 49 N. Y. Suppl. 489 [*affirmed* in 164 N. Y. 605, 58 N. E. 1093]; Bigler *v.* New York, 5 Abb. N. Cas. (N. Y.) 51; Kneeland *v.* Furlong, 20 Wis. 437.

Trifling omission.— The omission of a specification of the number and size of manholes from an advertisement for proposals for a sewer contract is not fatal where the expense is so trifling, as compared with that of the whole work, that the omission will not affect the bids. Houghton *v.* Burnham, 22 Wis. 301.

Where it is impossible to determine accurately the exact amount of work or materials which will be required, the bids may be required to be either for the entire work at a lump sum or for a specified price based upon estimated quantities, by which the contractor agrees to do all the work for separate prices bid by him per unit of measurement. Walter *v.* McClellan, 113 N. Y. App. Div. 295, 99 N. Y. Suppl. 78.

Alternative bids.— The advertisement may call for bids on different kinds of pavement. Barber Asphalt Paving Co. *v.* Garr, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227; Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622; Atty.-Gen. *v.* Detroit, 26 Mich. 263.

74. Stockton *v.* Clark, 53 Cal. 82; Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381; Arnold *v.* Ft. Dodge, 111 Iowa 152, 82 N. W. 495; Berg *v.* New York, 1 N. Y. St. 418.

Necessity and sufficiency of specifications see *supra*, XIII, B, 10, a.

Specifications must be filed a reasonable time before the bids are to be received so as to secure free competition among bidders. Smith *v.* Syracuse, 17 N. Y. App. Div. 63, 44 N. Y. Suppl. 852.

75. Case *v.* Fowler, 65 Ind. 29; Cass Farm Co. *v.* Detroit, 124 Mich. 433, 83 N. W. 108.

Authority to fix time.—A notice is not invalid because the clerk, not the council, fixed the time for presenting proposals. Belser *v.* Allman, 134 Cal. 399, 66 Pac. 492.

Conformity with resolution or ordinance.— Where the resolution provided that bids for work would be received up to six o'clock October 30, and ordered the clerk to give

ment of the time within which the work must be completed is sometimes expressly required,[76] as is also the estimate of cost.[77] But the price to be paid for specified kinds of work may not be fixed,[78] although the city authorities may advise contractors that bids in excess of a valid amount will not be considered.[79] A municipal officer in a notice calling for proposals cannot dispense, in favor of any contractor, with requirements which the ordinances have made imperative.[80] The fact that an officer makes a mistake in his attempt to publish a notice does not deprive him of further power.[81]

b. Form and Requisites of Bids. Any provision of statute or ordinance as to the form of bids must be complied with to render the same a valid basis of contract.[82] Hence a bid may not be accepted if it fails to comply with a requirement that all bids shall be signed and certified;[83] that the names of persons interested in a bid shall appear therein;[84] or that bids shall be accompanied by specifications,[85] or samples of material.[86] Bids must be in compliance with the specifications upon which proposals were invited;[87] and may not be modified after expiration of the time fixed for receiving them.[88] Acceptance of a bid which contains no agreement to perform the work according to specifications does not constitute a valid contract.[89] If the record is silent as to when bids were presented, the presumption is that they were received at the proper time;[90] and a bid is not defective because it makes no separation of the part of the work that is to be paid for by the city and that to be paid for by abutting owners.[91] A bidder is under no obligation to give the city the benefit of his knowledge as to the cost of constructing the proposed work, although the means of such knowledge may not be within the city's reach.[92]

notice of the letting of the contract for three weeks before October 6, a notice by publication, the first of which was on October 1, and the last on October 22, and which stated that bids would be received up to five o'clock October 30, was sufficient. Shirk *v.* Hupp, (Ind. 1906) 78 N. E. 242.

Final day on Sunday.— It has been held that an advertisement for bids stating that they would be received up to "Saturday, September 19th" was sufficient, although the nineteenth was Sunday. Case *v.* Johnson, 70 Ind. 31.

76. Osburn *v.* Lyons, 104 Iowa 160, 73 N. W. 650; Roach *v.* Eugene, 23 Oreg. 376, 31 Pac. 825.

77. Brady *v.* New York, 20 N. Y. 312, 18 How. Pr. 343 [*affirming* 2 Bosw. 173].

78. California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802; *In re* Merriam, 84 N. Y. 596; *In re* Manhattan Sav. Inst., 82 N. Y. 142; *In re* Mahn, 20 Hun (N. Y.) 301.

79. Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279.

80. Smith *v.* New York, 10 N. Y. 504 [*affirming* 4 Sandf. 221].

81. Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841 [*affirming* 15 N. Y. Suppl. 274].

82. Leflore *v.* Cannon, 81 Miss. 334, 33 So. 81; *In re* Marsh, 83 N. Y. 431 [*affirming* 21 Hun 582]; Brady *v.* New York, 20 N. Y. 312, 18 How. Pr. 343 [*affirming* 2 Bosw. 173]; *In re* Paine, 26 Hun (N. Y.) 431; People *v.* Croton Aqueduct Bd., 26 Barb. (N. Y.) 240, 6 Abb. Pr. 42; Matter of Clamp, 33 Misc. (N. Y.) 250, 68 N. Y. Suppl. 345; Boyle *v.* Grant, 12 N. Y. Suppl. 801; State *v.* Cincinnati, 3 Ohio S. & C. Pl. Dec. 48, 1 Ohio N. P. 377; Gallagher *v.* Johnson, 1 Ohio S. & C. Pl. Dec. 264; Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

83. Williams *v.* Bergin, 129 Cal. 461, 62 Pac. 59; Matter of Clamp, 33 Misc. (N. Y.) 250, 68 N. Y. Suppl. 345.

A mere irregularity in the verification of an affidavit may be waived. Gage *v.* New York, 110 N. Y. App. Div. 403, 97 N. Y. Suppl. 157.

84. Strack *v.* Ratterman, 18 Ohio Cir. Ct. 36, 9 Ohio Cir. Dec. 862.

85. Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914; Moreland *v.* Passaic, 63 N. J. L. 208, 42 Atl. 1058.

86. Dixey *v.* Atlantic City, 71 N. J. L. 120, 58 Atl. 370; Berghoffen *v.* New York, 31 Misc. (N. Y.) 205, 64 N. Y. Suppl. 1082; Many *v.* Cleveland, 19 Ohio Cir. Ct. 58, 10 Ohio Cir. Dec. 157.

87. Moreland *v.* Passaic, 63 N. J. L. 208, 42 Atl. 1058; State *v.* Nieman, 8 Ohio S. & C. Pl. Dec. 662, 6 Ohio N. P. 419; Colorado Paving Co. *v.* Murphy, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630.

88. Chicago *v.* Mohr, 216 Ill. 320, 74 N. E. 1056 [*affirming* 114 Ill. App. 283]; Diamond *v.* Mankato, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448; Fairbanks *v.* North Bend, 68 Nebr. 560, 94 N. W. 537.

89. Overshiner *v.* Jones, 66 Ind. 452.

90. Williams *v.* Bergin, 129 Cal. 461, 62 Pac. 59.

91. Beniteau *v.* Detroit, 41 Mich. 116, 1 N. W. 899.

92. McMullen *v.* Hoffman, 75 Fed. 547.

c. Deposit or Other Security on Making Bids.[93] A requirement that bids be accompanied by a deposit or bond is mandatory;[94] and if such requirement be made in general terms, regulations as to the amount of security and the manner of its filing or deposit may be made by the officers who receive the bid;[95] ordinarily the purpose of such a provision is to guarantee the making of a contract by the successful bidder;[96] but it has been construed to call for a bond securing the proper performance of the work should the contract be let.[97] The awarding of a contract is sufficient approval of a bond filed with a bid.[98] The fact that a bidder who was unable to furnish security when bids were asked for is afterward able to do so is not ground for reopening the bids.[99] Failure of a bidder to advance incidental costs as required by statute is not ground for enjoining the work, if the persons to whom such costs would accrue waived them in writing.[1]

d. Time For Opening Bids and Making Award. Bids must be opened on the day named in the notice or on a subsequent day to which adjournment is taken.[2]

e. Acceptance or Rejection of Bids. Any charter or statutory requirement as to the manner of accepting bids must be complied with;[3] hence a failure to call the roll as required by statute on a resolution to accept a bid will invalidate the acceptance.[4] The right to reject all bids is often expressly secured to the municipality by charter;[5] but even in the absence of such express grant, it is very generally held that the proper municipal authorities may, at their discretion, reject all bids, especially if the right to do so has been reserved in the advertisement;[6] and no right of action will lie against the city for anticipated profits of the contract.[7] The discretion of the council in rejecting any or all bids will not be controlled by the courts when exercised with prudence in the public interest;[8] and the fact that the lowest bid was largely in excess of the estimated

93. Bond for performance of contract see *infra*, XIII, C, 4.

94. May *v.* Detroit, 2 Mich. N. P. 235; Walsh *v.* New York, 55 N. Y. Super. Ct. 535, 11 N. Y. St. 728; People *v.* Thompson, 11 N. Y. St. 730. See also People *v.* Green, 52 How. Pr. (N. Y.) 304 [*affirmed* in 11 Hun 56].

95. Selpho *v.* Brooklyn, 5 N. Y. App. Div. 529, 39 N. Y. Suppl. 520 [*affirmed* in 158 N. Y. 673, 52 N. E. 1126].

96. Fairbanks *v.* North Bend, 68 Nebr. 560, 94 N. W. 537; Philadelphia *v.* Wood, 15 Wkly. Notes Cas. (Pa.) 94.

97. Selpho *v.* Brooklyn, 5 N. Y. App. Div. 529, 39 N. Y. Suppl. 520 [*affirmed* in 158 N. Y. 673, 52 N. E. 1126].

98. Baird *v.* New York, 83 N. Y. 254.

99. State *v.* Jersey City, (N. J. Sup. 1899) 42 Atl. 845.

1. Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658.

2. Lilienthal *v.* Yonkers, 6 N. Y. App. Div. 138, 39 N. Y. Suppl. 1037; People *v.* Yonkers, 39 Barh. (N. Y.) 266.

3. Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432; Donnelly *v.* Marks, 47 Cal. 187; People *v.* Coler, 35 N. Y. App. Div. 401, 54 N. Y. Suppl. 785; Pennell *v.* New York, 17 N. Y. App. Div. 455, 45 N. Y. Suppl. 229; Terrell *v.* Strong, 14 Misc. (N. Y.) 258, 35 N. Y. Suppl. 1000; Hamilton *v.* Chopard, 9 Wash. 352, 37 Pac. 472.

4. Sullivan *v.* Leadville, 11 Colo. 483, 18 Pac. 736; Cincinnati *v.* Bickett, 26 Ohio St. 49.

5. Irondale Chert Paving, etc., Co. *v.* New Orleans, 48 La. Ann. 643, 19 So. 690; People *v.* Willis, 6 N. Y. App. Div. 231, 39 N. Y. Suppl. 987.

6. *Delaware.*— Keogh *v.* Wilmington, 4 Del. Ch. 491.

Kansas.— Yarnold *v.* Lawrence, 15 Kan. 126.

Kentucky.—Trapp *v.* Newport, 115 Ky. 840, 74 S. W. 1109, 25 Ky. L. Rep. 224.

Minnesota.— Starkey *v.* Minneapolis, 19 Minn. 203.

New York.— Walsh *v.* New York, 113 N. Y. 142, 20 N. E. 825; People *v.* Croton Aqueduct Bd., 49 Barb. 259.

Pennsylvania.— Murphy *v.* Philadelphia, 25 Leg. Int. 333.

Wisconsin.— Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

United States.— Colorado Paving Co. *v.* Murphy, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630.

See 36 Cent. Dig. tit. "Municipal Corporations," § 861.

7. Palmer *v.* Haverhill, 98 Mass. 487; Talbot Paving Co. *v.* Detroit, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604.

8. *California.*— Girvin *v.* Simon, 116 Cal. 604, 48 Pac. 720; Rice *v.* Haywards, 107 Cal. 398, 40 Pac. 551.

Illinois.— Johnson *v.* Chicago Sanitary Dist., 163 Ill. 285, 45 N. E. 213.

Louisiana.— Gunning Gravel, etc., Co. *v.* New Orleans, 45 La. Ann. 911, 13 So. 182.

New Jersey.—Wilson *v.* Trenton, 60 N. J. L. 394, 38 Atl. 635.

New York.—Bradley *v.* Van Wyck, 65 N. Y.

cost of the work does not warrant the inference that its acceptance was fraudulent.[9] A charter provision that no contract for improvements shall be let at a price higher than the estimate thereof means that the work included in an estimate shall not be let at a higher price than is specified therein.[10] The work may be divided into different parts and let to different bidders.[11] A condition imposed upon the acceptance of bids will not invalidate an actually executed contract, where it does not appear that the bids were influenced by such condition.[12]

f. Award as Between Competitive Bids. A requirement of charter or statute that the contract be awarded to the lowest responsible bidder is mandatory;[13] hence a provision in an improvement ordinance reserving to the city the right to arbitrarily reject any bid is nugatory;[14] and a division of work between the highest and lowest bidder is illegal.[15] In determining, however, who is the lowest responsible bidder, the proper municipal authorities have a wide discretion,[16] which will not be controlled by the courts except for arbitrary exercise,[17] collusion, or fraud;[18] and they need not be guided in this determination solely by the question

App. Div. 293, 72 N. Y. Suppl. 1034; Terrell *v.* Strong, 14 Misc. 258, 35 N. Y. Suppl. 1000.

Ohio.— Coppin *v.* Hermann, 9 Ohio S. & C. Pl. Dec. 146, 6 Ohio N. P. 452; Fergus *v.* Columbus, 8 Ohio S. & C. Pl. Dec. 290, 6 Ohio N. P. 82.

See 36 Cent. Dig. tit. "Municipal Corporations," § 861.

9. Booth *v.* Bayonne, 56 N. J. L. 268, 28 Atl. 381; Shannon *v.* Portland, 38 Oreg. 382, 62 Pac. 50.

10. Ireland *v.* Rochester, 51 Barb. (N. Y.) 414.

11. State *v.* Marion County Com'rs, 39 Ohio St. 188; Jones *v.* Seattle, 19 Wash. 669, 53 Pac. 1105. But see Kneeland *v.* Furlong, 20 Wis. 437, holding that where a city charter provides that all work for the city shall be let by contract to the lowest bidder, the street commissioners by whom such contracts are to be let cannot preserve the right to divide the work after the bids are received, but that such division must be made previously so that the bids may be made with reference to it.

12. Rice *v.* Hayward, 107 Cal. 398, 40 Pac. 551, so holding of the act of a board in directing a town engineer to reject bids for public improvements unless accompanied by an offer to purchase bonds.

13. *Alabama.*— Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

California.— Carter *v.* Kalloch, 56 Cal. 335.

Florida.—Anderson *v.* Fuller, (1906) 41 So. 684.

Kentucky.— Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 21 Ky. L. Rep. 1454.

Ohio.— State *v.* Cincinnati, 3 Ohio S. & C. Pl. Dec. 48, 1 Ohio N. P. 377.

Pennsylvania.— Frame *v.* Felix, 167 Pa. St. 47, 31 Atl. 375, 27 L. R. A. 802; Inter-State Brick Co. *v.* Philadelphia, 3 Pa. Dist. 544.

See 36 Cent. Dig. tit. "Municipal Corporations," § 862.

When the work is to be done under a patent a provision which entitles the person making the lowest estimate to have a contract awarded to him does not apply to estimates for patented articles or modes of work. People *v.* Van Nort, 65 Barb. (N. Y.) 331.

14. Walker *v.* People, 170 Ill. 410, 48 N. E. 1010; Illinois Cent. R. Co. *v.* Chicago, 144 Ill. 392, 33 N. E. 602; Lake Shore, etc., R. Co. *v.* Chicago, 144 Ill. 391, 33 N. E. 602.

15. McDermott *v.* Jersey City Street, etc., Com'rs, 56 N. J. L. 273, 28 Atl. 424.

16. Atty.-Gen. *v.* Detroit, 26 Mich. 263; Moran *v.* White Plains, 12 N. Y. Suppl. 61 [*affirmed* in 128 N. Y. 578, 28 N. E. 250]; Trowbridge *v.* Hudson, 24 Ohio Cir. Ct. 76; Hermann *v.* State, 11 Ohio Cir. Ct. 503, 5 Ohio Cir. Dec. 266; Potts *v.* Philadelphia, 195 Pa. St. 619, 46 Atl. 195.

Where the lowest bidder is released at his own request, the acceptance of a higher bid is within the discretion of a board of improvements. Cincinnati *v.* Goodman, 5 Ohio Dec. (Reprint) 365, 5 Am. L. Rec. 153; Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

Unbalanced bid.— It is within the discretion of a board of public works to accept a bid based upon nominal prices for some work and enhanced prices for other work, where it is shown to have been no material enhancement of the gross price and the items are fairly identified. Walter *v.* McClellan, 48 Misc. (N. Y.) 215, 96 N. Y. Suppl. 479.

17. Murray *v.* Bayonne, 73 N. J. L. 313, 63 Atl. 81; McGovern *v.* Trenton Bd. of Public Works, 57 N. J. L. 580, 31 Atl. 613; Coppin *v.* Hermann, 9 Ohio S. & C. Pl. Dec. 146, 6 Ohio N. P. 452.

Mere technical informalities or irregularities in the form of a bid will not defeat the right of the lowest bidder to have the contract awarded to him, and authorize a municipal body to award the contract to a higher bidder. Faist *v.* Hoboken, 72 N. J. L. 361, 60 Atl. 1120.

18. Peckham *v.* Watsonville, 138 Cal. 242, 71 Pac. 169; Riehl *v.* San Jose, 101 Cal. 442, 35 Pac. 1013; Clapton *v.* Taylor, 49 Mo. App. 117; Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814 [*affirming* 1 Silv. Sup. 471, 5 N. Y. Suppl. 688]; Terrell *v.* Strong, 14 Misc. (N. Y.) 258, 35 N. Y. Suppl. 1000; *In re*

of the pecuniary responsibility of a bidder,[19] but may consider his ability to respond to the requirements of the contract,[20] and his general qualifications to properly execute the work;[21] and no right of action lies against the municipality or officers in control of the bidding for an honest mistake in the exercise of this discretion.[22] And it is held that such irregularity will not defeat the contract, although it will prevent the contractor from recovering more than a fair value for his work.[23]

g. Reconsideration After Acceptance or Rejection. When the lowest bid has been accepted, the city is under legal obligation to execute a contract with the bidder,[24] unless the ordinance upon which proceedings were based is invalid;[25] and, after acceptance of a bid, conditions may not be inserted in the contract which were not contained in the advertisement for proposal.[26] Although the council has rejected all bids, it may reconsider its action and accept one of them without a new advertisement;[27] but not if it has also repealed the ordinance.[28]

h. Failure of Bidder to Enter Into Contract — (i) *In General.* A bid for public work may be withdrawn at any time before acceptance,[29] and upon failure of a successful bidder to enter into a contract, the city may readvertise for bids without repeating the steps necessary to acquire jurisdiction;[30] but authority may not be conferred on the clerk by general resolution to readvertise in all cases where a bidder fails to make a contract.[31] If the council releases the lowest bidder from his offer it should advertise again;[32] but it is held that upon the failure of the lowest bidder, the contract may be awarded to the next lowest without readvertisement,[33] although the second bidder is not entitled, as a matter of right, to the contract.[34]

(ii) *Forfeiture of Deposit or Other Security.* If bids are required to be accompanied by a deposit or bond to secure the making of a contract, failure

Delaware, etc., Canal Co., 8 N. Y. Suppl. 352; Hay's Case, 14 Abb. Pr. (N. Y.) 53; Horn's Case, 12 Abb. Pr. (N. Y.) 124; Hubbard *v.* Sandusky, 9 Ohio Cir. Ct. 638, 6 Ohio Cir. Dec. 786; Cincinnati *v.* Kemper, 9 Ohio Dec. (Reprint) 742, 17 Cinc. L. Bul. 116.

19. Philadelphia *v.* Pemberton, 208 Pa. St. 214, 57 Atl. 516; Philadelphia *v.* Pemberton, 25 Pa. Super. Ct. 323.

Quality of materials.—A bid may be rejected, although it is the lowest and the bidder is able to give the required bond, if, in the judgment of the authorities who are intrusted with letting of the contract, the materials exhibited by the bidder are poor and unsatisfactory. People *v.* Kent, 160 Ill. 655, 43 N. E. 760.

Agreement to employ home labor.— The rejection of the lowest bid and the acceptance of a higher bid, because the latter will employ home labor, is unfair and against public policy. McDonough *v.* Washington Borough, 20 Pa. Co. Ct. 345.

20. Walter *v.* McClellan, 113 N. Y. App. Div. 295, 99 N. Y. Suppl. 78; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916.

21. Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114; Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841 [*affirming* 15 N. Y. Suppl. 274]; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916.

Hearing.— Before the bid of the lowest bidder for a municipal contract can be rejected on an allegation that he is not responsible, or that other causes exist for the rejection of his bid, he is entitled to a hearing. Faist *v.* Hoboken, 72 N. J. L. 361, 60 Atl. 1120.

22. Jordon *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508; Reilly *v.* New York, 111 N. Y. 473, 18 N. E. 623; Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

23. Cincinnati *v.* Hopple, 7 Ohio Dec. (Reprint) 91, 1 Cinc. L. Bul. 104.

24. People *v.* Mooney, 4 N. Y. App. Div. 557, 38 N. Y. Suppl. 495; Lynch *v.* New York, 2 N. Y. App. Div. 213, 37 N. Y. Suppl. 798; Campbell *v.* Philadelphia, 10 Wkly. Notes Cas. (Pa.) 221; Safety Insulated Wire, etc., Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375.

25. Baird *v.* New York, 83 N. Y. 254.

26. Campbell *v.* Philadelphia, 10 Wkly. Notes Cas. (Pa.) 221.

27. Ross *v.* Stackhouse, 114 Ind. 200, 16 N. E. 501.

28. State *v.* Cincinnati, 3 Ohio Cir. Ct. 542, 2 Ohio Cir. Dec. 312.

29. Moffett Co. *v.* Rochester, 82 Fed. 255.

30. Meuser *v.* Risdon, 36 Cal. 239; Himmelman *v.* Oliver, 34 Cal. 246; Dougherty *v.* Foley, 32 Cal. 402.

31. Meuser *v.* Risdon, 36 Cal. 239.

32. Twiss *v.* Port Huron, 63 Mich. 528, 30 N. W. 177.

33. Gibson *v.* Owens, 115 Mo. 258, 21 S. W. 1107; Kinsella *v.* Auburn, 4 Silv. Sup. (N. Y.) 101, 7 N. Y. Suppl. 317; State *v.* Licking County, 26 Ohio St. 531.

34. Murphy *v.* Philadelphia, 25 Leg. Int. (Pa.) 333.

of the successful bidder to enter into a contract will forfeit the security,[35] such a provision is penal in nature and is to be strictly construed, hence a forfeiture may not be enforced if proceedings are invalid,[36] or if the award has not been made and notice of it given in strict compliance with law or ordinance;[37] but a contractor who put in separate bids for different sewers, as called for in the advertisement, one of which was accepted, cannot defend against a forfeiture on the ground that he was told that all or none would be accepted.[38] Failure to sign a contract will not forfeit the bond if the conditions therein are more burdensome than were the specifications in the advertisement;[39] but a charter provision empowering the mayor to remit fines and forfeitures does not authorize him to return to a bidder a deposit forfeited for failure to make a contract.[40]

3. FORM, REQUISITES, AND VALIDITY — a. Formal Requisites of Contracts.[41] Any charter or statutory requirement as to the form of contract must be complied with to render the same valid.[42] Writing is usually regarded as necessary,[43] hence it has been held that a contract reciting that the work shall be done according to specifications annexed thereto, but to which such specifications were not annexed, was not sufficient.[44] But if a contract has been duly fulfilled, the fact that it was not in writing, as required by charter, will not preclude the contractor's right of recovery.[45] When the council awards a contract and directs a ministerial officer to execute the written evidence of it, the same is complete, although such officer fails to execute the written agreement.[46] So when the work to be done is fully described in specifications referred to in the advertisement, acceptance of a bid in writing entered of record has been held to constitute a contract.[47] Where it is provided that work shall be done by contract, a board of public works has no authority to make a contract which is of such nature that it affords no measure of the expense to be incurred.[48]

b. Execution and Approval. Any legislative requirement as to the mode of

35. Morgan Park *v.* Gahan, 136 Ill. 515, 26 N. E. 1085; Mutchler *v.* Easton City, 9 Pa. Co. Ct. 613.

36. N. P. Perine Contracting, etc., Co. *v.* Pasadena, 116 Cal. 6, 47 Pac. 777.

37. Erving *v.* New York, 131 N. Y. 133, 29 N. E. 1101; Mutchler *v.* Easton, 148 Pa. St. 441, 23 Atl. 1109 [*following* Philadelphia, etc., R. Co. *v.* Waterman, 54 Pa. St. 337; Berks County *v.* Pile, 18 Pa. St. 493].

38. Langley *v.* Harmon, 97 Mich. 347, 56 N W. 761.

39. Cotter *v.* Casteel, (Tex. Civ. App. 1896) 37 S. W. 791.

40. Jackson Electric R., etc., Co. *v.* Adams, 79 Miss. 408, 30 So. 694.

41. Municipal contracts in general see *supra*, IX.

42. Emery *v.* San Francisco Gas Co., 28 Cal. 345; Schenck *v.* Olyphant Borough, 181 Pa. St. 191, 37 Atl. 258; Erie *v.* Land on Eighteenth St., 176 Pa. St. 478, 35 Atl. 136; Harrisburg *v.* Trego, 7 Pa. Super. Ct. 511; Moffett *v.* Goldsborough, 52 Fed. 560, 3 C. C. A. 202 [*reversing* 49 Fed. 213].

Itemization.— It is held, under some statutes, that the contract must be so itemized that the preparation of an itemized bill of cost, as required by statute, may be made directly from the contract itself. People *v.* McDermott, 214 Ill. 562, 73 N. E. 770; People *v.* Borman, 214 Ill. 416, 73 N. E. 770; People *v.* Peyton, 214 Ill. 376, 73 N. E. 768, all holding that a contract for construction of a sidewalk, which provided for construction by the square foot, could not be made the basis of a special tax against the property-owners.

43. Logansport *v.* Blakemore, 17 Ind. 318; Starkey *v.* Minneapolis, 19 Minn. 203. But see Leverich *v.* New York, 66 Barb. (N. Y.) 623, holding that where an agreement for street cleaning had been originally entered into by a written contract it might be continued by a verbal agreement.

44. Schwiesau *v.* Mahon, 110 Cal. 543, 42 Pac. 1065.

45. Carey *v.* East Saginaw, 79 Mich. 73, 44 N. W. 168; North River Electric Light, etc., Co. *v.* New York, 48 N. Y. App. Div. 14, 62 N. Y. Suppl. 726.

46. Hersee *v.* Buffalo, Sheld. (N. Y.) 445.

47. Ft. Madison *v.* Moore, 109 Iowa 476, 80 N. W. 527. But see Hamilton *v.* Chopard, 9 Wash. 352, 37 Pac. 472, holding that evidence that the council opened bids and awarded the work was not sufficient to show a contract.

48. Walter *v.* McClellan, 48 Misc. (N. Y.) 215, 96 N. Y. Suppl. 479, holding that a contract providing for the payment of certain sums for certain work to be done in the form of excavating, construction, or otherwise, making the compensation of the contractor depend upon the amount of work done at the specified rates, but stating that the quantities set forth were not the actual quantities within the scope of the work, but were employed as a matter of comparison, and reserving to the commissioners the right to increase or

execution must be complied with.[49] But in determining the sufficiency of the execution of an improvement contract liberal rules prevail,[50] hence it has been held that a contract is valid, although the corporate seal is not affixed,[51] or it is not signed by the mayor,[52] or is signed and sealed by the mayor, but the name of the city is not subscribed.[53] But the signature of individual members of the council is not sufficient,[54] and a committee empowered to make a contract cannot authorize its chairman to do so.[55] If the council employs an agent to contract in its behalf, property-owners will not be bound, unless the authority of such agent appears of record.[56] Where an officer was empowered by the council to make a contract for certain repairs such contract was binding, although not made in the name of the city.[57] A contract is not invalidated by the fact that the name of one commissioner was signed by another, if the signature is ratified.[58] Unless expressly required,[59] a contract made by a municipal board in pursuance of power given by law need not be presented to the council for approval.[60] A contract made at a special meeting of the council of which some members had no notice is invalid.[61] The fact that a contract in pursuance of ordinance was made before the expiration of time allowed the mayor to veto the ordinance will not render it invalid.[62] Contracts for improvements need not be spread in full upon the journal of the council.[63] If the statute provides for commissioners to certify that a contract is free from fraud, their certification is conclusive for purposes of an assessment.[64] A provision for reference of matters of public improvements to a board of public works, before final approval by the council, does not require reference of a subsidiary contract for the supervision of the construction of an improvement.[65]

c. Validity and Sufficiency in General. A municipality may not by contract

diminish the quantities as they might see fit in the course of the work, was invalid.

49. McBean *v.* San Bernardino, 96 Cal. 183, 31 Pac. 49.

50. State *v.* Ramsey County Dist. Ct., 32 Minn. 181, 19 N. W. 732; Smith *v.* New York, 10 N. Y. 504; Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835. See also Chase *v.* Trout, 146 Cal. 350, 80 Pac. 81, holding that where a session is adjourned until the following day at ten o'clock, but the adjourned session is called to order and begins its session at nine o'clock and the contract is awarded on the same day, the contract is not invalid unless it affirmatively appears that it was awarded before ten o'clock.

Signature.— Under a statute directing city contracts to be signed by the officer authorized to make them, and when not otherwise directed by the mayor, a contract for a public improvement is not invalid because signed by the mayor, although an ordinance authorized the director of the department of public works to contract for public improvements, where it did not direct such officer to sign contracts. Philadelphia *v.* Gorgas, 180 Pa. St. 296, 36 Atl. 868.

51. Guffield *v.* Bowlinggreen, 6 B. Mon. (Ky.) 224.

52. Gibson *v.* O'Brien, 6 S. W. 28, 9 Ky. L. Rep. 639; Dallas Electric Co. *v.* Dallas, 23 Tex. Civ. App. 323, 58 S. W. 153. See also Sheehan *v.* Owen, 82 Mo. 458, holding that a contractor with a city for macadamizing a street was not deprived of the right to recover by the fact that the mayor's concurrence in the award was not shown by writing.

53. Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238.

54. Hall *v.* Cockrell, 28 Ala. 507.

Where a board of water commissioners is not a corporation and are manifestly the agents of a village, they may bind the village by their contract for waterworks, whether they contract in the name of the village, in their own names as commissioners, or as a board. Fleming *v.* Suspension Bridge, 92 N. Y. 368.

55. Curtis *v.* Portland, 59 Me. 483.

56. Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796.

57. Robinson *v.* St. Louis, 28 Mo. 488.

58. Boots *v.* Washburn, 79 N. Y. 207.

59. Greenwood *v.* Morrison, 128 Cal. 350, 60 Pac. 971; Murphy *v.* Louisville, 9 Bush (Ky.) 189; Chicago Bridge, etc., Co. *v.* West Bay City, 129 Mich. 65, 87 N. W. 1032.

60. Louisville Bd. of Public Works *v.* Selvage Constr. Co., 79 S. W. 1182, 25 Ky. L. Rep. 2098; Joyce *v.* Falls City Artificial Stone Co., 64 S. W. 912, 23 Ky. L. Rep. 1201.

61. London, etc., Land Co. *v.* Jellico, 103 Tenn. 320, 52 S. W. 995.

62. Harris *v.* St. Joseph, 99 Fed. 246.

63. Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819.

64. Matter of Johnson, 2 N. Y. St. 98.

The act of such commissioner in certifying that a contract is free from fraud is not affected by the fact that he has neglected to take the oath of office. *In re* Kendall, 85 N. Y. 802.

65. Houston *v.* Potter, (Tex. Civ. App. 1906) 91 S. W. 389.

divest itself of governmental authority,[66] nor may it delegate discretionary power to a ministerial officer;[67] but a provision of the charter that improvements must be made by or under the direction of a particular officer is not violated by a contract for improvements which expressly provides that the work shall be done under the supervision of such officer.[68] A contract is not binding where, in consequence of a misunderstanding between the parties, their minds did not agree on the work which was to be performed.[69] It is not necessarily a fraud on a city to obtain public work in the name of another,[70] or by employment of a lobbyist.[71] A contract is not unreasonable because a large portion of the city's revenue will be devoted to its payment.[72] The contract is not invalidated by the fact that the municipality intended to refuse to carry out a previous contract for the same purpose, which was still in force.[73] A temporary injunction restraining a city from entering into any contract whereby any pecuniary liability will be incurred by or in behalf of said city did not render invalid a contract for an improvement which expressly provided that it should be paid for out of money lawfully raised by special assessment.[74]

d. Conditions and Restrictions. Reasonable provisions, limiting the rights and duties of the contractor, may be incorporated in a contract for improvements when not violative of law, prejudicial to property-owners, or so onerous as to deter competition in bidding;[75] hence it has been held that a provision requiring the contractor to take certain material from the city is not objectionable;[76] so likewise of a requirement that the contractor shall meet all losses arising from the nature of the work,[77] shall restrict the hours of labor to eight per day,[78] shall have adequate facilities for performing the work,[79] and shall conform the grade to

66. Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80.

67. Chase *v.* Scheerer, 136 Cal. 248, 68 Pac. 768; Stansbury *v.* White, 121 Cal. 433, 53 Pac. 940; Bluffton *v.* Miller, 33 Ind. App. 521, 70 N. E. 989.

68. Schenectady *v.* Union College, 66 Hun (N. Y.) 179, 21 N. Y. Suppl. 147 [*reversed* on other grounds in 144 N. Y. 241, 39 N. E. 67, 26 L. R. A. 614].

69. La Compagnie du Pacifique Canadian *v.* Montreal, 21 Quebec Super. Ct. 225.

70. Cummings *v.* Ruckert, 14 Mo. App. 557; Herman *v.* Oconto, 100 Wis. 391, 76 N. W. 364.

71. Barber Asphalt Paving Co. *v.* Field, 188 Mo. 182, 86 S. W. 860.

72. Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

73. Cox *v.* Jones, 73 N. H. 504, 63 Atl. 178.

74. Mankato *v.* Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439.

75. *California.*— Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337.

Illinois.— Wells *v.* People, 201 Ill. 435, 66 N. E. 210; Givins *v.* People, 194 Ill. 150, 62 N. E. 534, 88 Am. St. Rep. 143.

Iowa.— Ottumwa Brick, etc., Co. *v.* Ainley, 109 Iowa 386, 80 N. W. 510.

Kentucky.— Louisville *v.* Henderson, 5 Bush 515.

Louisiana.— Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

See 36 Cent. Dig. tit. "Municipal Corporations," § 868.

A reasonable degree of latitude essential to an intelligent and practical administration of public affairs is allowed in matters of detail involved in the execution of powers clearly conferred by fundamental law. Mankato *v.* Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439.

Shipment of materials.— The fact that a city agreed to bind contractors to ship material for street improvements over a certain railway does not invalidate the contract and proceedings for such improvement, if they are free from and independent of such agreement. Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768.

Reservation of power to add to or diminish the work called for by the specifications will not in itself invalidate the contract. *In re* Wabash Ave., 26 Pa. Super. Ct. 305. Reservation of right to increase or diminish length of sewers does not in the absence of fraud invalidate a contract for their construction. *In re* Merriam, 84 N. Y. 596.

76. *In re* Merriam, 84 N. Y. 596; Berg *v.* New York, 1 N. Y. St. 418.

77. Diver *v.* Keokuk Sav. Bank, 126 Iowa 691, 102 N. W. 542. But see *infra*, text and note 86.

78. De Wolf *v.* People, 202 Ill. 73, 66 N. E. 868; Wells *v.* People, 201 Ill. 435, 66 N. E. 210; St. Louis Quarry, etc., Co. *v.* Frost, 90 Mo. App. 677; People *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802; Knowles *v.* New York, 37 Misc. (N. Y.) 195, 75 N. Y. Suppl. 189. See also Gies *v.* Broad, 41 Wash. 448, 83 Pac. 1025.

79. Meyers *v.* Pennsylvania Steel Co., 77 N. Y. App. Div. 307, 79 N. Y. Suppl. 199; Knowles *v.* New York, 37 Misc. (N. Y.) 195, 75 N. Y. Suppl. 189.

that of adjoining streets should the latter be changed during the progress of the work,[80] or that in constructing sidewalks he shall receive a uniform price per yard irrespective of locality.[81] The city may stipulate that it will not be liable for payment until the proper funds are in the treasury,[82] or until all claims against the contractor for material or labor have been settled.[83] But on the other hand the city may not require a contractor to furnish a patented article;[84] to employ union labor exclusively;[85] or to assume liability for all damages arising from the improvement.[86] Where illegal or unauthorized conditions or obligations upon the contract are incorporated into the advertisement for bids or the specifications upon which the bids are based, compliance with which will necessarily and illegally increase the cost of the work, it has been held that the contract is not let to the lowest responsible bidder.[87]

e. Conformity to Provisions of Charter, Act, or Ordinance Authorizing Improvement. The contract must conform to the terms of the act, charter, or ordinance authorizing the improvement;[88] hence a failure to set a time for completion or commencement of the work as required by charter will invalidate a contract;[89] and a contract is invalid if it changes the assessment district contemplated by the ordinance,[90] or provides for an improvement different in character from that ordered therein.[91] Hence an ordinance for macadamizing a street will

80. *In re* Blodgett, 27 Hun (N. Y.) 12.

81. Galveston *v.* Heard, 54 Tex. 420.

82. Kronsbein *v.* Rochester, 76 N. Y. App. Div. 494, 78 N. Y. Suppl. 813.

83. State *v.* Liebes, 19 Wash. 589, 54 Pac. 26.

84. Rose *v.* Low, 85 N. Y. App. Div. 461, 83 N. Y. Suppl. 598.

85. Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Lewis *v.* Detroit Bd. of Education, 139 Mich. 306, 102 N. W. 756.

86. Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Blochman *v.* Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213.

87. Anderson *v.* Fuller, 51 Fla. 380, 41 So. 684.

Where a requirement that work be done within the state has the effect of restricting bidding, it violates a provision that work shall be let by contract to the lowest responsible bidder. St. Louis Quarry, etc., Co. *v.* Von Versen, 81 Mo. App. 519, so holding where a street improvement contract required the dressing of rock used to be done in the state.

Requirement that work be done within the city is not in violation of a provision requiring work to be let to the lowest bidder, unless it is in fact a restriction of the right of competition or an increase in the price of the improvements. Allen *v.* Labsap, 188 Mo. 692, 87 S. W. 926.

88. *California.*—City St. Imp. Co. *v.* Laird, 138 Cal. 27, 70 Pac. 916; Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; Smith *v.* Luning Co., 111 Cal. 308, 43 Pac. 967.

Missouri.— Boonville *v.* Stephens, (App. 1906) 95 S. W. 314.

New York.— People *v.* Van Nort, 65 Barb. 331; Paul *v.* New York, 46 N. Y. App. Div. 69, 61 N. Y. Suppl. 570.

Ohio.— Cincinnati *v.* Board of City Affairs, 10 Ohio S. & C. Pl. Dec. 104.

United States.— Johnston *v.* Philadelphia, 113 Fed. 40.

Reservations.— Where the statute requires that in the contract powers shall be reserved to the board of public works, the contract must contain an express reservation of such powers. Ricketson *v.* Milwaukee, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685.

89. McQuiddy *v.* Brannock, 70 Mo. App. 535.

A requirement that the contract fix a time for commencing the work is complied with by a provision therein that the work shall be commenced within a certain time. Williams *v.* Bergin, 127 Cal. 578, 60 Pac. 164; McDonald *v.* Mezes, 107 Cal. 492, 40 Pac. 808; White *v.* Harris, 103 Cal. 528, 37 Pac. 502; Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658.

Where a contract must state the time of completion of the work, the same is valid if it merely provides that the work shall be commenced within ten or fifteen days from date thereof and completed one hundred and eighty or two hundred and forty days thereafter. Ramish *v.* Hartwell, 126 Cal. 443, 58 Pac. 920; Palmer *v.* Burnham, (Cal. 1897) 47 Pac. 599.

90. Haisch *v.* Seattle, 10 Wash. 435, 38 Pac. 1131.

91. *California.*— Partridge *v.* Lucas, 99 Cal. 519, 33 Pac. 1082; McBean *v.* Redick, 96 Cal. 191, 31 Pac. 7; Nicolson Pavement Co. *v.* Painter, 35 Cal. 699; Dougherty *v.* Hitchcock, 35 Cal. 512.

Illinois.— Young *v.* People, 196 Ill. 603, 63 N. E. 1075.

Maryland.— Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

Massachusetts.— Palmer *v.* Haverhill, 98 Mass. 487.

New York.— Bonesteel *v.* New York, 20 How. Pr. 237.

See 36 Cent. Dig. tit. "Municipal Corporations," § 869.

not authorize a contract for setting curbs,[92] or improving sidewalks;[93] and where the ordinance provides that a contract shall be let after the expiration of the time allowed property-owners to make the improvement, a contract which includes portions of the work which have been contracted for by property-owners is void.[94] It has been held, however, that unless property-owners are prejudiced, it is immaterial that all work specified in an ordinance is not let,[95] that the contract contains restrictions as to the employment of labor not found in the ordinance or advertisement,[96] or that the specifications in the contract differ in minor details from those of the ordinance.[97] So the contract may provide for minor modifications of the original plan of improvement;[98] and if such variance is material, but the contract is divisible, it will be valid to the extent that it is authorized.[99] The fact that an order of the council contains an estimate of cost does not preclude the making of a contract for the construction of the improvement at a cost slightly in excess of such estimate.[1] If specifications are not sufficiently definite to enable the contractor to proceed with the work, it is the duty of the city to furnish additional plans, although the contract may not so provide.[2] When the statute states the proportion of cost to be borne by abutting owners and the city, the same need not be specified in the contract.[3]

f. Conformity to Request For Bids. The contract must conform to the terms of the advertisement for bids;[4] both as to the time for completion of the work[5] and the plans and specifications thereof;[6] but if a contract which includes more work than was specified in the advertisement is divisible it will be sustained to the extent of the advertised specifications,[7] and a minor variance in the contract not prejudicial to the rights of interested parties will not necessarily invalidate it.[8]

g. Stipulations Requiring Contractor to Keep Streets in Repair. Power to make improvements by special assessment does not imply authority to levy such assessments for repairs;[9] hence a stipulation in a contract that the contractor shall keep the street in repair imposes an additional burden on the property-owners and is usually held to invalidate the assessment.[10] Such a stipulation, how-

92. Beaudry *v.* Valdez, 32 Cal. 269.

93. Himmelmann *v.* Satterlee, 50 Cal. 68.

94. Childers *v.* Holmes, 95 Mo. App. 154, 68 S. W. 1046.

95. Joyce *v.* Falls City Artificial Stone Co., 64 S. W. 912, 23 Ky. L. Rep. 1201; Voght *v.* Buffalo, 133 N. Y. 463, 31 N. E. 340 [*reversing* 14 N. Y. Suppl. 759].

96. Givins *v.* People, 194 Ill. 150, 62 N. E. 534, 88 Am. St. Rep. 143; Hamilton *v.* People, 194 Ill. 133, 62 N. E. 533.

97. Martindale *v.* Palmer, 52 Ind. 411; Baltimore *v.* Raymo, 68 Md. 569, 13 Atl. 383; Cole *v.* Skrainka, 105 Mo. 303, 16 S. W. 491. See also Emery *v.* San Francisco Gas Co., 28 Cal. 345.

98. Chicago *v.* McKechney, 91 Ill. App. 442.

99. Chambers *v.* Satterlee, 40 Cal. 497; Eyermann *v.* Provenchere, 15 Mo. App. 256.

1. Webb Granite, etc., Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639. But see Irwin *v.* Shumann, (Mo. App. 1903) 63 S. W. 257.

2. Delafield *v.* Westfield, 41 N. Y. App. Div. 24, 58 N. Y. Suppl. 277 [*affirmed* in 169 N. Y. 582, 62 N. E. 1095].

3. Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

4. Wickwire *v.* Elkhart, 144 Ind. 305, 43 N. E. 216; Patterson *v.* Barber Asphalt Paving Co., 96 Minn. 9, 104 N. W. 566; Nash *v.* St. Paul, 11 Minn. 174; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Smith *v.* Portland, 25 Oreg. 297, 35 Pac. 665.

5. Brock *v.* Luning, 89 Cal. 316, 26 Pac. 972; State *v.* Trenton Bd. of Public Works, (N. J. Sup. 1894) 29 Atl. 158.

6. People *v.* Union St., 43 N. Y. 227; Bonesteel *v.* New York, 22 N. Y. 162 [*affirming* 6 Bosw. 550]; People *v.* Van Nort, 65 Barb. (N. Y.) 331; Kinsella *v.* Auburn, 4 Silv. Sup. (N. Y.) 101, 7 N. Y. Suppl. 317; Pease *v.* Ryan, 7 Ohio Cir. Ct. 44, 3 Ohio Cir. Dec. 654; Miller *v.* Pearce, 2 Cinc. Super. Ct. 44; Texas Transp. Co. *v.* Boyd, 67 Tex. 153, 2 S. W. 364.

7. Texas Transp. Co. *v.* Boyd, 67 Tex. 153, 2 S. W. 364.

8. Lutes *v.* Briggs, 64 N. Y. 404 [*reversing* 5 Hun 67]; People *v.* Yonkers, 39 Barb. (N. Y.) 266; Mankato *v.* Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439; Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,534, 3 Woods 287.

9. Bullitt *v.* Selvage, 47 S. W. 255, 20 Ky. L. Rep. 599. See *infra*, XIII, E, 4, b, (VI).

10. *California.*—Alameda Macadamizing Co. *v.* Pringle, 130 Cal. 226, 62 Pac. 394, 80 Am. St. Rep. 124, 52 L. R. A. 264; Excelsior Paving Co. *v.* Leach, (1893) 34 Pac. 116; Excelsior Paving Co. *v.* Pierce, (1893) 33 Pac. 727; Burnett *v.* Llewelyn, (1893) 32 Pac. 702; Brown *v.* Jenks, 98 Cal. 10, 32 Pac. 701.

Kentucky.— Gosnell *v.* Louisville, 104 Ky.

ever, has been sustained, when it could be construed into a mere guaranty of the quality of the work;[11] and some cases hold that such a provision will not render the contract or assessment void, but will merely preclude recovery by the contractor to the extent that the assessment has been increased by reason of the guaranty.[12] If the city be expressly empowered to assess the cost of repairs upon abutting owners, a stipulation for repairs in a contract for improvement is usually sustained;[13] but some cases hold that the repairs contemplated by such a grant of power are those whose present necessity exists, and that the council cannot thus provide for future repairs,[14] and a board of works may not incorporate such a provision in a contract where it is not required by the resolution of intention.[15] Notice, as provided by a street-paving contract, should be given to the contractor in case repairs are required, although he has become insolvent.[16]

h. Separate Contracts For Parts of Improvements. Unless the charter or

201, 46 S. W. 722, 20 Ky. L. Rep. 519; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238.

Missouri.— Verdin *v.* St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Verdin *v.* St. Louis, (1894) 27 S. W. 447.

New York.— People *v.* Maher, 56 Hun 81, 9 N. Y. Suppl. 94.

Oregon.— Portland *v.* Bituminous Paving Co., 33 Oreg. 307, 52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527.

Wisconsin.— Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603.

See 36 Cent. Dig. tit. "Municipal Corporations," § 871.

11. *Illinois.*— Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311; Cole *v.* People, 161 Ill. 16, 43 N. E. 607.

Iowa.— Osburn *v.* Lyons, 104 Iowa 160, 73 N. W. 650.

Kansas.— Kansas City *v.* Hanson, 60 Kan. 833, 58 Pac. 474.

Kentucky.— Barber Asphalt Paving Co. *v.* Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227. See Louisville *v.* Muldoon, 49 S. W. 791, 20 Ky. L. Rep. 1576, holding that in an action to recover part of the contract price retained by the city to secure a covenant by plaintiff to keep a street in repair for five years, defendant may rely upon defects in the original construction which he could not have discovered by the exercise of ordinary care prior to the acceptance of the work.

Louisiana.— Bacas *v.* Adler, 112 La. 806, 36 So. 739.

Missouri.— Barber Asphalt Paving Co. *v.* Munn, 185 Mo. 552, 83 S. W. 1062; Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Barber Asphalt Paving Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458; St. Louis Quarry, etc., Co. *v.* Frost, 90 Mo. App. 677.

Nebraska.— Robertson *v.* Omaha, 55 Nebr. 718, 76 N. W. 442, 41 L. R. A. 624.

New Jersey.—Wilson *v.* Trenton, 60 N. J. L. 394, 38 Atl. 635.

New York.— O'Keeffe *v.* New York, 173 N. Y. 474, 66 N. E. 194; People *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802; O'Keeffe *v.* New York, 73 N. Y. App. Div. 312, 76 N. Y. Suppl. 796; Schenectady *v.* Union College, 66 Hun 179, 21 N. Y. Suppl. 147 [*reversed* on other grounds in 144 N. Y. 241, 39 N. E. 67, 26 L. R. A. 614].

Oregon.—Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509.

Pennsylvania.— Williamsport *v.* Hughes, 21 Pa. Super. Ct. 443. See Leake *v.* Philadelphia, 150 Pa. St. 643, 24 Atl. 351 [*affirming* 10 Pa. Co. Ct. 263] (holding that the owners of property who are liable for the original paving cannot object because the contract for such paving required the contractor to keep it in repair for three years, such provision not being for repairs in the ordinary sense, but for the thorough execution of the original work); Morris *v.* Barber Asphalt Paving Co., 5 Lack. Leg. N. 129, 7 North. Co. Rep. 5.

United States.— French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879 [*affirming* 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492].

See 36 Cent. Dig. tit. "Municipal Corporations," § 871.

Maintenance of plant.— It is not unreasonable to require a contractor for paving to maintain a plant in the street during the period for which he is bound to maintain the pavement in repair. Barber Asphalt Paving Co. *v.* Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227.

12. Louisville *v.* Selvage, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809, 21 Ky. L. Rep. 349, 620; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238; Erie City *v.* Grant, 24 Pa. Super. Ct. 109.

13. Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Gibson *v.* Owens, 115 Mo. 258, 21 S. W. 1107; Morse *v.* West-Port, 110 Mo. 502, 19 S. W. 831.

14. Kansas City *v.* Hanson, 8 Kan. App. 290, 55 Pac. 513; Portland *v.* Bituminous Paving Co., 33 Oreg. 307, 52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527.

15. McAllister *v.* Tacoma, 9 Wash. 272, 37 Pac. 447, 658.

16. Southern Paving Co. *v.* Chattanooga, (Tenn. Ch. App. 1898) 48 S. W. 92, so holding where the contractor had assigned his interest in the balance of the contract price payable at the end of five years if repairs had been made as required, and the assignee had taken bond from him to make repairs if called on to do so.

statute directs that work be let by one contract[17] the council may provide for separate contracts for different parts of an improvement.[18] Where the character of an improvement on the crossing of a street is different from that on the rest of the street, separate contracts may be let, although both improvements were included in the same resolution of intention.[19]

i. Single Contract Including Different Improvements. Unless required by charter or statute to include different improvements in a single contract,[20] the municipality should make separate contracts for separate and distinct improvements;[21] but failure to do so has been held to be an irregularity that will not invalidate an assessment.[22] Where the improvement of a street is interrupted by a section between two cross streets, it is not improper to let both portions of the improvement in the same contract, where their character is the same.[23] Where similar materials will be required for several improvements authorized by distinct ordinances, it has been held that proposals to furnish the entire amount of materials may be advertised for.[24]

j. Effect of Defects in Preliminary Proceedings. Failure to comply with requirements of charter or statute in proceedings for improvements renders the same invalid, and contracts made in pursuance thereof are void,[25] and a person entering into a contract for performance of work is bound to see that the preliminary steps required by law have been taken;[26] and if he proceeds without doing so, he is not entitled to recover upon *quantum meruit* for work performed.[27] A technical irregularity in the notice required by charter, however, will not defeat a contract.[28] And the right of one who has furnished material to the city to recover therefor is not prejudiced by the fact that the council kept no minutes.[29]

4. Contractor's Bond[30] — a. In General. In the absence of legislative enactment, the municipality at its discretion may or may not require a bond;[31] and if

17. Treanor *v.* Houghton, 103 Cal. 53, 36 Pac. 1081; Boston Electric Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787.

18. Ede *v.* Cogswell, 79 Cal. 278, 21 Pac. 767; Cincinnati *v.* Goodman, 5 Ohio Dec. (Reprint) 365, 5 Am. L. Rec. 153 (holding that bids for a street improvement might be advertised for in two sections and let in one section to the contractor); Matter of Wabash Ave., 34 Pittsb. Leg. J. N. S. (Pa.) 218; Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

19. Bates *v.* Twist, 138 Cal. 52, 70 Pac. 1023.

20. Challiss *v.* Parker, 11 Kan. 394; State *v.* Ramsey County Dist. Ct., 47 Minn. 406, 50 N. W. 476.

21. Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 22 S. W. 490.

22. Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Gibson *v.* Owens, 115 Mo. 258, 21 S. W. 1107; People *v.* Kingston, 114 N. Y. App. Div. 326, 99 N. Y. Suppl. 657. But *compare* Kansas City *v.* O'Connor, 82 Mo. App. 655, holding that if a single contract be made for paving and sprinkling, to be paid for by assessment, but the charter does not permit a special tax for sprinkling, the entire contract will be void.

23. Sacramento Paving Co. *v.* Anderson, 1 Cal. App. 672, 82 Pac. 1069.

24. Alberger *v.* Baltimore, 64 Md. 1, 20 Atl. 988.

25. Citizens' Bank *v.* Spencer, 126 Iowa 101, 101 N. W. 643; Saxton *v.* St. Joseph, 60 Mo. 153; Perkinson *v.* St. Louis, 4 Mo. App. 322; Hali *v.* Chippewa Falls, 47 Wis. 267, 2 N. W. 279; Eno *v.* New York, 53 How. Pr. (N. Y.) 382 [*affirmed* in 7 Hun 320]. But see Keough *v.* St. Paul, 66 Minn. 114, 68 N. W. 843, holding that a contract for the grading of a street is not *ultra vires* merely because condemnation proceedings through which the city attempted to acquire an easement for slopes along such street were not consummated prior to the passage of an ordinance directing the street to be graded.

26. Johnson *v.* Indianapolis, 16 Ind. 227; Swift *v.* Williamsburgh, 24 Barb. (N. Y.) 427; Rork *v.* Smith, 55 Wis. 67, 12 N. W. 408.

27. Cowen *v.* West Troy, 43 Barb. (N. Y.) 48. See also *infra*, XIII, F, 5, a.

28. Portland Lumbering, etc., Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536, 6 L. R. A. 290.

29. Bigelow *v.* Perth Amboy, 25 N. J. L. 297.

30. Deposit or other security on making proposal or bid see *supra*, XIII, C, 2, c.

31. Tennessee Paving Brick Co. *v.* Barker, 119 Ky. 654, 59 S. W. 755, 22 Ky. L. Rep. 1069. See also Carey *v.* East Saginaw, 79 Mich. 73, 44 N. W. 163, holding that it is immaterial that no security was given by the contractor where the proper board required none, and the charter merely provided for "sufficient security as required by said board."

a bond is given its insufficiency will not invalidate an assessment.[32] A charter or statutory provision that the city shall require the successful bidder to execute a bond is mandatory, however, and no lien is acquired on abutting property if such bond is not given.[33] Where a bond contains all the provisions of a statute, its efficiency as a statutory bond is not lost by a recital that it was taken as a common-law bond.[34] An erroneous statement in the advertisement of the amount of security required by the ordinance does not preclude the city from demanding a bond of proper amount.[35] When an ordinance does not specify when bonds are to be given, and the first of the instalments of payment upon the work is not due until completion of the work, it has been held sufficient to give a bond on the completion of the work conditioned according to the terms of the contract.[36] And the fact that the ordinance fixed ten days as the time for filing a bond will not preclude the council from accepting a bond after the expiration of that time.[37] If a bond recites that it is of even date with a contract the fact that it is dated a day earlier is not sufficient to prove that it was in fact executed before the contract.[38] Commissioners are not obliged to accept a substitute for the sureties offered in the original proposal;[39] nor need the proper officer approve sureties offered by the successful bidder when the bids have been irregularly opened.[40] A bond conditioned to secure performance of the contract is equivalent to a bond conditioned to secure performance of the work contracted for.[41] A provision that the superintendent of streets shall not be liable for delinquency on his part, although against public policy, will not vitiate the entire contract.[42] A deposit made by the contractor to secure performance of the contract has been held to be an additional and cumulative security in addition to the bond for the performance of the contract.[43] Where a cash bond is required and the money is deposited by the treasurer in a bank that fails, the city is liable for its return to the contractor upon proper completion of the work.[44]

b. Securing Payment For Labor and Materials. Although ordinarily the purpose of a bond is to secure the proper performance of work, it is sometimes expressly required by charter or statute to be conditioned for payment of labor and material,[45] and such a requirement is a proper exercise of legislative power.[46] It has been held that in the absence of express authorization a bond so conditioned cannot be required;[47] but the weight of authority supports the proposition that a city in the exercise of its general powers may require contractors to furnish a bond to pay materialmen and laborers.[48] Although a bond exceeds the

32. Christ Church United Brethren *v.* Rausch, 122 Ind. 167, 23 N. E. 717; Dashiell *v.* Baltimore, 45 Md. 615.

33. Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796; Morton *v.* Power, 33 Minn. 521, 24 N. W. 194. See Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781, holding that legislature might require a surety company bond.

Failure of the proper officer to approve the bond will not invalidate an assessment. Miller *v.* Mayo, 88 Cal. 568, 26 Pac. 364.

34. Baum *v.* Whatcom County, 19 Wash. 626, 54 Pac. 29.

35. Smith *v.* New York, 10 N. Y. 504.

36. Hallock *v.* Lebanon, 215 Pa. St. 1, 64 Atl. 362.

37. Springfield *v.* Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

38. Byrne *v.* Luning Co., (Cal. 1894) 38 Pac. 454.

39. Adams *v.* Ives, 1 Hun (N. Y.) 457, 3 Thomps. & C. 471 [*affirmed* in 63 N. Y. 650]; People *v.* Green, 52 How. Pr. (N. Y.) 304 [*affirmed* in 11 Hun 56].

40. People *v.* Coler, 35 N. Y. App. Div. 401, 54 N. Y. Suppl. 785.

41. Ft. Madison *v.* Moore, 109 Iowa 476, 80 N. W. 527.

42. Byrne *v.* Luning Co., (Cal. 1894) 38 Pac. 454.

43. Com. *v.* Philadelphia, 211 Pa. St. 85, 60 Atl. 549.

44. McMahon *v.* Philadelphia, 41 Wkly. Notes Cas. (Pa.) 527.

45. Clough *v.* Spokane, 7 Wash. 279, 34 Pac. 934.

Where a mechanic's lien would not attach, it has been held that a bond from the contractor to secure a subcontractor need not be required. Eaton *v.* Monroe, 63 Mich. 525, 29 N. W. 885.

46. Wilson *v.* Wehber, 157 N. Y. 693, 51 N. E. 1094.

47. Park *v.* Sykes, 67 Minn. 153, 69 N. W. 712; Lyth *v.* Hingston, 14 N. Y. App. Div. 11, 43 N. Y. Suppl. 653.

48. Devers *v.* Howard, 144 Mo. 671, 46 S. W. 625; St. Louis *v.* Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695;

requirement of the ordinance it may be enforced according to its terms if voluntarily given.[49] Tools and appliances with which to construct an improvement are not "materials" within the meaning of a bond requiring a contractor to pay for all materials used in the execution of a contract.[50] Although the charter directs the taking of a bond for the security of laborers and materialmen, the city is not liable if the officers neglect to take such a bond.[51]

c. Liability of Sureties. The fact that a bond is more comprehensive than is required by the ordinance will not relieve the surety.[52] If the contract provides for changes in specifications the same may be made without exempting sureties from liability.[53] Where a city pays a balance due a contractor upon the execution of a bond securing it against judgments, and a judgment foreclosing a mechanic's lien under a statute is entered against the city, the sureties on the bond will be liable for such judgment;[54] but if a bond contains no reference to liquidated damages provided for in a contract the same may not be recovered against the sureties;[55] and under a bond for faithful performance of a contract in which the contractor undertakes to furnish all materials, the sureties are not liable to third parties for material used in the performance of the contract,[56] nor are they liable to the city for counsel fees in defending a garnishment proceeding when the bond merely indemnifies it against suits arising from injuries or damages.[57] Where the contract is void because opportunity for free competition in the purchase of materials was not given, persons furnishing labor or materials with knowledge of the facts cannot recover as against the surety of the contractor upon a bond furnished by him.[58] Settlement by the city with the contractor does not bar action by it for the benefit of materialmen.[59] Nor unless so provided by the contract is a certificate of the engineer as to fitness of the work conclusive.[60]

d. Persons Secured. A bond for faithful performance of an improvement contract is for the benefit of property-owners, and on non-fulfilment of the contract the city may be compelled to collect the bond and apply the funds to diminish the assessment.[61] A subcontractor has been held not to be a laborer or materialman within the meaning of a bond conditioned to secure payment of the claims of such persons;[62] nor is a manufacturer who furnishes material by

Devers *v.* Howard, 88 Mo. App. 253; American Radiator Co. *v.* American Bonding, etc., Co., 72 Nebr. 100, 100 N. W. 138; Doll *v.* Crume, 41 Nebr. 655, 59 N. W. 806; Lyman *v.* Lincoln, 38 Nebr. 794, 57 N. W. 531; American Surety Co. *v.* Raeder, 15 Ohio Cir. Ct. 47, 8 Ohio Cir. Dec. 684; Philadelphia *v.* Stewart, 195 Pa. St. 309, 45 Atl. 1056 [*distinguishing* Lancaster *v.* Frescoln, 192 Pa. St. 452, 43 Atl. 961; Lesley *v.* Kite, 192 Pa. St. 268, 43 Atl. 959].

49. Philadelphia *v.* Harry C. Nichols Co., 214 Pa. St. 265, 63 Atl. 886, so holding of a contractor's bond to secure subcontractors and materialmen.

50. Beals *v.* Fidelity, etc., Co., 178 N. Y. 581, 70 N. E. 1095.

51. Kettle River Quarries Co. *v.* East Grand Forks, 96 Minn. 290, 104 N. W. 1077; Ihk *v.* Duluth, 58 Minn. 182, 59 N. W. 960.

Where a common-law bond is taken a creditor of a city contractor cannot sue the aldermen for failure to take a statutory contractor's bond for the protection of material and labor claims, where the city took a valid common-law bond in its own name, and it does not appear that it refused plaintiff the right to sue thereon in its name. Stephenson *v.* Monmouth Min., etc., Co., 84 Fed. 114, 28 C. C. A. 292.

52. Bowditch *v.* Gourley, 24 Pa. Super. Ct. 342.

53. Philadelphia *v.* Stewart, 201 Pa. St. 526, 51 Atl. 348.

54. New York *v.* Crawford, 14 N. Y. St. 891 [*affirmed* in 111 N. Y. 638, 19 N. E. 501].

55. Winona *v.* Jackson, 92 Minn. 453, 100 N. W. 368.

56. Sterling *v.* Wolf, 163 Ill. 467, 45 N. E. 218.

57. Gastonia *v.* McEntee-Peterson Engineering Co., 131 N. C. 363, 42 S. E. 858.

58. National Surety Co. *v.* Kansas City Hydraulic Press Brick Co., 73 Kan. 196, 84 Pac. 1034.

59. Philadelphia *v.* Stewart, 201 Pa. St. 526, 51 Atl. 348.

60. Newark *v.* New Jersey Asphalt Co., 68 N. J. L. 458, 53 Atl. 294.

61. Eno *v.* New York, 68 N. Y. 214 [*reversing* 7 Hun 320 (*affirming* 53 How. Pr. 382)].

62. Kansas City *v.* McDonald, 80 Mo. App. 444; Philadelphia *v.* Madden, 23 Pa. Co. Ct. 39. See also Philadelphia *v.* Malone, 214 Pa. St. 90, 63 Atl. 539, holding that the signers of the bond were not liable upon a claim for coal furnished to a subcontractor and used in generating steam to use a steam shovel and locomotive used in making excavations.

contract.[63] But a person who supplies brick to a contractor is a materialman,[64] although the same is to be paid for in a gross sum.[65] A bond to secure payment to laborers and materialmen includes those employed by a subcontractor,[66] or an assignee of the original contractor.[67]

e. Actions. The time and manner of enforcing a bond conditioned for the payment of laborers and materialmen is sometimes prescribed by charter or statute and such requirements must be followed.[68] If the city be authorized to sue on such a bond, the parties for whose benefit it was made may not bring actions in their own name,[69] but, it has been held, may bring suit in the name of the city without its consent.[70] In the absence of legislative direction as to the proper party, a laborer or materialman for whose benefit a bond is given may maintain an action thereon in his own name;[71] and the recovery of one judgment does not prevent the maintenance of actions by other parties.[72] If, however, the bond be for the benefit of the city, such as a bond indemnifying it against damages, action thereon may not be maintained by a third party.[73] Where the contract is with a committee representing the city and has stipulated for liquidated damages on failure of timely completion, and the bond stipulates for the payment of damages of any

63. People *v.* Cotteral, 119 Mich. 27, 77 N. W. 312.

64. Staffon *v.* Lyon, 104 Mich. 249, 62 N. W. 354; Avery *v.* Ionia County, 71 Mich. 538, 39 N. W. 742; Philadelphia *v.* Neill, etc., Sav., etc., Co., 211 Pa. St. 353, 60 Atl. 1033.

65. People *v.* Collins, 112 Mich. 605, 71 N. W. 153; People *v.* Powers, 108 Mich. 339, 66 N. W. 215.

66. Combs *v.* Jackson, 69 Minn. 336, 72 N. W. 565; Pershing *v.* Swenson, 58 Minn. 310, 59 N. W. 1084; Sepp *v.* McCann, 47 Minn. 364, 50 N. W. 246; Salisbury *v.* Keigher, 47 Minn. 367, 50 N. W. 246; Bowditch *v.* Gourley, 24 Pa. Super. Ct. 342; Ihrig *v.* Scott, 5 Wash. 584, 32 Pac. 466.

67. French *v.* Powell, 135 Cal. 636, 68 Pac. 92; Hines *v.* Consolidated Coal, etc., Co., 29 Ind. App. 563, 64 N. E. 886.

68. *California.*—French *v.* Powell, 135 Cal. 636, 68 Pac. 92.

Iowa.— Whitehouse *v.* American Surety Co., 117 Iowa 328, 90 N. W. 727.

Minnesota.— Grant *v.* Berrisford, 94 Minn. 45, 101 N. W. 940, 1133; Tompkins *v.* Forrestal, 54 Minn. 119, 55 N. W. 813.

Missouri.— Kansas City *v.* McDonald, 73 Mo. App. 439.

Washington.— Huggins *v.* Sutherland, 39 Wash. 552, 82 Pac. 112.

Parties.— In an action on a bond given to secure payment for labor and material, plaintiff cannot join the city or creditors who are not parties to the bond as defendants. Spokane, etc., Lumber Co. *v.* Boyd, 28 Wash. 90, 68 Pac. 337.

Defenses.— In an action to recover for materials furnished in paving, an answer setting up facts which render the contract between the city and the contractor illegal, and stating that any material furnished by plaintiff was with full knowledge of such facts, constitutes a good defense. National Surety Co. *v.* Kansas City Hydraulic Press Brick Co., 73 Kan. 196, 84 Pac. 1034.

A plea averring a waiver of a breach must allege knowledge. Newark *v.* New Jersey Asphalt Co., 68 N. J. L. 458, 53 Atl. 294, holding a plea which simply alleged that the city had paid for the work insufficient.

Evidence.— Where sureties are present at the settlement between the city and their principal, their assenting to such settlement may be implied, but a recitation of their presence in the resolution of settlement passed by the council is *ex parte* and is not evidence of their presence. Devers *v.* Howard, 88 Mo. App. 253. Evidence of how many hours each laborer works in the quarry of the materialman, how much material was taken out and prepared during the entire time, what proportion of it was used on the contract, and the wages of each laborer is a sufficient basis for determination of how much each laborer is entitled to recover on the bond. Coombs *v.* Jackson, 69 Minn. 336, 72 N. W. 565.

69. State Bank *v.* Heney, 40 Minn. 145, 41 N. W. 411.

70. Stephenson *v.* Monmouth Min., etc., Co., 84 Fed. 114, 28 C. C. A. 292.

71. *Indiana.*— Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562.

Iowa.— See Hipwell *v.* National Surety Co., 130 Iowa 656, 105 N. W. 318.

Minnesota.— Salisbury *v.* Keigher, 47 Minn. 367, 50 N. W. 246; Sepp *v.* McCann, 47 Minn. 364, 50 N. W. 246; Morton *v.* Power, 33 Minn. 521, 24 N. W. 194; St. Paul *v.* Butler, 30 Minn. 459, 16 N. W. 362.

Missouri.— Devers *v.* Howard, 144 Mo. 671, 46 S. W. 625.

Nebraska.— Doll *v.* Crume, 41 Nebr. 655, 59 N. W. 806; Lyman *v.* Lincoln, 38 Nebr. 794, 57 N. W. 531.

New York.— Wilson *v.* Webber, 157 N. Y. 693, 51 N. E. 1094.

Oregon.— Parker *v.* Jeffery, 26 Oreg. 186, 37 Pac. 712.

Washington.— Baum *v.* Whatcom County, 19 Wash. 626, 54 Pac. 29.

72. Philadelphia *v.* Stewart, 198 Pa. St. 422, 48 Atl. 275.

73. Kansas City *v.* O'Connell, 99 Mo. 357, 12 S. W. 791.

kind resulting from failure, the city is the real party in interest and entitled to recover damages, if any, caused by delay.[74] The fact that the municipality has withheld sufficient funds to pay a materialman's claim is no defense to an action by it on the bond of the contractor for a sum due from him to one furnishing material.[75]

5. Unauthorized or Illegal Contracts — a. In General. The power of a municipality to contract for improvements is limited by the terms of the legislative enactment under which it proceeds, and failure to comply with the same in material matters will render a contract void;[76] those dealing with a city must see to it that its agents have power to act, and no liability will be incurred for work performed under a void contract.[77] If a contract is divisible, the part of it that is valid may be enforced;[78] hence where the statute limits the cost of an

74. Hipwell *v.* National Surety Co., 130 Iowa 656, 105 N. W. 318.

75. West Duluth *v.* Norton, 57 Minn. 72, 58 N. W. 829.

76. *New York.*—Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680; McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144 [*affirming* 1 Hun 719, 4 Thomps. & C. 177]; Donovan *v.* New York, 33 N. Y. 291 [*reversing* 44 Barb. 180, 19 Abb. Pr. 58]; Gage *v.* New York, 110 N. Y. App. Div. 403, 97 N. Y. Suppl. 157; Happel *v.* Blessing, 37 Misc. 47, 74 N. Y. Suppl. 801.

Ohio.— Lancaster *v.* Miller, 58 Ohio St. 558, 51 N. E. 52.

Pennsylvania.—Long *v.* Dickinson, 10 Phila. 108.

Texas.— Noel *v.* San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

Wisconsin.— Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

United States.— Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

See 36 Cent. Dig. tit. "Municipal Corporations," § 879.

But *compare* La Corporation de Notre-Dame de Bonsecours *v.* Bessette, 9 Quebec Q. B. 423.

Unconstitutional statute.— A contract entered into by a municipality under an unconstitutional statute cannot be enforced by the contractor or his assignee. Devlin *v.* New York, 48 How. Pr. (N. Y.) 457 [*reversed* on other grounds in 63 N. Y. 8].

77. *California.*—Daly *v.* San Francisco, 72 Cal. 154, 13 Pac. 321; *In re* Market St., 49 Cal. 546, holding that where lots fronting on a street cannot be assessed because the contract was illegal, the claim of the contractor, if he has one, is one affecting the public conscience and must be satisfied through the legislative power of appropriation of the moneys of the state or municipality.

Connecticut.— Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520.

Kansas.— National Surety Co. *v.* Kansas City Hydraulic Press Brick Co., 73 Kan. 196, 84 Pac. 1034.

Kentucky.— Belleview *v.* Hohn, 82 Ky. 1; Hahn *v.* Bellevue, 3 S. W. 132, 8 Ky. L. Rep. 696.

Louisiana.— Moylan *v.* New Orleans, 32 La. Ann. 673.

Maryland.— Baltimore *v.* Eschbach, 18 Md. 276, holding that a contract for grading and paving a street not formally condemned is invalid, and that the contractor cannot maintain an action against the city on the contract or for damages for violating or disregarding its provisions.

Massachusetts.— Boston Electric Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787.

Minnesota.—Sang *v.* Duluth City, 58 Minn. 81, 59 N. W. 878.

New Jersey.— Schumm *v.* Seymour, 24 N. J. Eq. 143.

New York.— McDonald *v.* New York, 68 N. Y. 23, 23 Am. Rep. 144.

United States.— Berlin Iron Bridge Co. *v.* San Antonio, 62 Fed. 882.

See 36 Cent. Dig. tit. "Municipal Corporations," § 879.

Quantum meruit.—One who performs labor and furnishes materials to a city under a void contract cannot recover on a *quantum meruit*. Keating *v.* Kansas City, 84 Mo. 415; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; Brady *v.* New York, 2 Bosw. (N. Y.) 173, 16 How. Pr. 432 [*affirmed* in 20 N. Y. 312]; Bigler *v.* New York, 5 Abb. N. Cas. (N. Y.) 51. But it has been held that where public lighting has been furnished under a void contract the city is liable for the reasonable value. Providence *v.* Providence Electric Light Co., 91 S. W. 664, 28 Ky. L. Rep. 1015. As to recovery upon *quantum meruit* in case of invalid assessment see *infra*, XIII, F, 5, a.

Lien.— As an *ultra vires* contract for the erection of waterworks creates no debt against a city, no lien, equitable or otherwise, can attach to said waterworks for the construction thereof as against the city or its vendee. Ellis *v.* Cleburne, (Tex. Civ. App. 1896) 35 S. W. 495.

78. Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520; Meyers *v.* Pennsylvania Steel Co., 77 N. Y. App. Div. 307, 79 N. Y. Suppl. 199.

Unauthorized provision for payment in bonds.— Where a contract provides that the work done shall be paid for in bonds of the corporation when such bonds are not authorized by law, the contract so far as it is valid in other respects remains in full force and the corporation is liable for a breach thereof. Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659.

improvement to a stated percentage of the value of the property assessed a contract that provides for the payment of a sum exceeding such limit is void only as to the illegal excess.[79] An *ultra vires* contract is not saved on the theory of part performance by the issuance of tax bills to pay the cost of the improvement.[80] Where, owing to an error in the assessor's map, it appears that the required number of property-owners have signed a petition, and a contract in pursuance thereof is made, the contractor may recover for his services, although the required number in fact have not signed;[81] and under a charter provision that improvements shall be made either on petition or on recommendation of a particular board, the passage of an ordinance at the recommendation of such board relieves the contractor from any obligation to inquire as to the ground upon which the work was ordered.[82]

b. Right to Deny Validity.[83] An *ultra vires* contract is incapable of ratification, and a municipality is never estopped from setting up its invalidity;[84] but if a city has received the benefits of a contract it will be estopped from asserting its invalidity on the ground of a defect or irregularity in its execution.[85] It has been held that a single property-owner cannot object to informalities of a contract;[86] and that a contract secured through corrupt means is voidable only at the election of the city.[87] The city cannot avoid a contract for street improvements because it imposes more rigid conditions on the contractor than are authorized by the ordinance under which it was made.[88]

c. Ratification.[89] An *ultra vires* contract cannot be validated by ratification;[90] but a municipality may ratify the unauthorized contracts made by its officers, provided it could have legally authorized such contracts.[91] The ratification must

79. Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702.

80. Kansas City *v.* O'Connor, 82 Mo. App. 655.

81. Schier *v.* Buffalo, 35 Hun (N. Y.) 564.

82. Sheehan *v.* Martin, 10 Mo. App. 285.

83. **Validating unauthorized contracts in general** see *supra*, IV, H, 2; IX.

84. Newport *v.* Batesville, etc., R. Co., 58 Ark. 270, 24 S. W. 427; Newman *v.* Sylvester, 42 Ind. 106; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State *v.* Pullman, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836.

Ratification see *infra*, XIII, C, 5, c.

Action for breach.— Where a city has paid a contractor for the performance of an *ultra vires* contract it cannot therefore sue the contractor for breach, but the remedy is to disaffirm the contract and sue for money had and received. Kansas City *v.* O'Connor, 82 Mo. App. 655.

85. *California.*— Argenti *v.* San Francisco, 16 Cal. 255.

Dakota.— McGuire *v.* Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752; National Tube-Works Co. *v.* Chamberlain, 5 Dak. 54, 37 N. W. 761.

Indiana.— New Albany *v.* Iron Substructure Co., 141 Ind. 500, 40 N. E. 44; Wren *v.* Indianapolis, 96 Ind. 206.

Iowa.— Cooper *v.* Cedar Rapids, 112 Iowa 367, 83 N. W. 1050.

Kansas.— Sleeper *v.* Bullen, 6 Kan. 300.

Michigan.— Ludington Water-Supply Co. *v.* Ludington, 119 Mich. 480, 78 N. W. 558.

Minnesota.— Pillager *v.* Hewett, 98 Minn. 265, 107 N. W. 815.

Missouri.— Wheeler *v.* Poplar Bluff, 149 Mo. 36, 49 S. W. 1088.

New Jersey.— Tappan *v.* Long Branch Police Sanitary, etc., Com., 59 N. J. L. 371, 35 Atl. 1070.

New York.— Moore *v.* New York, 73 N. Y. 238, 29 Am. Rep. 134.

Tennessee.— London, etc., Land Co. *v.* Jellico, 103 Tenn. 320, 52 S. W. 995.

Washington.— North Yakima *v.* Scudder, 41 Wash. 15, 82 Pac. 1022.

See 36 Cent. Dig. tit. "Municipal Corporations," § 880.

86. Kelsey *v.* King, 32 Barb. (N. Y.) 410, 11 Abb. Pr. 180 [*affirmed* in 1 Transcr. App. 133, 33 How. Pr. 39].

87. Devlin *v.* New York, 4 Misc. (N. Y.) 106, 23 N. Y. Suppl. 888.

88. Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,534, 3 Woods 287.

89. **Ratification of unauthorized contract in general** see *supra*, IV, H, 2; IX.

90. Indianapolis *v.* Wann, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; Ruggles *v.* Collier, 43 Mo. 353; Brady *v.* New York, 20 N. Y. 312, 18 How. Pr. 343; Ellis *v.* Cleburne, (Tex. Civ. App. 1896) 35 S. W. 495.

Estoppel to deny liability see *supra*, XIII, C, 5, b.

91. *Arkansas.*— Frick *v.* Brinkley, 61 Ark. 397, 33 S. W. 527.

Kentucky.— Gibson *v.* O'Brien, 6 S. W. 28, 9 Ky. L. Rep. 639.

Michigan.—Davis *v.* Jackson, 61 Mich. 530, 28 N. W. 526.

Missouri.— Carthage *v.* Cowgill, etc., Milling Co., 156 Mo. 620, 57 S. W. 1008.

New York.— Albany City Nat. Bank *v.* Albany, 92 N. Y. 363.

be by the municipal agency authorized to contract in the first instance;[92] and must be in accordance with the mode prescribed by law.[93] Ratification extends to such contract as an entirety and will validate a collateral bond for the benefit of laborers and materialmen.[94] Where a contract may be dispensed with by a two-thirds vote of the council, such vote comes too late if not had until after the performance of the work.[95] So where the question must be submitted to popular vote it has been held that a previous contract is not validated, as of its date, by a subsequent vote, but is merely rendered operative from the time thereof.[96]

d. Curative Statutes and Ordinances.[97] An invalid contract may be rendered enforceable against a municipality by curative statutes;[98] but where the city has no power to make improvements at the expense of property-owners, the latter cannot be made liable for such improvements by subsequent legislation validating a contract which imposes a lien on their property;[99] and a contract void because of contravention of the constitution is not validated by a subsequent constitutional amendment under the terms of which the contract could have been made.[1] Where a contract is void because made before the adoption of a sufficient ordinance, the passage of an ordinance confirming the contract does not validate it.[2]

6. Construction and Operation.[3] The general rules governing construction of contracts apply to municipal contracts for improvements;[4] such contracts are to be construed with reference to acts in force at the date of their execution,[5] and with regard to plans and specifications incorporated by reference.[6] Where the con-

Pennsylvania.— *In re* Brighton Road, 213 Pa. St. 521, 63 Atl. 124; *In re* Millvale Borough, 162 Pa. St. 374, 29 Atl. 641, 644; Philadelphia *v.* Jewell, 140 Pa. St. 9, 21 Atl. 239; Philadelphia *v.* Hays, 93 Pa. St. 72.

Wisconsin.— Hasbrouck *v.* Milwaukee, 21 Wis. 217.

See 36 Cent. Dig. tit. "Municipal Corporations," § 881.

Reduction in price.— Where a void paving contract is revived by a city as an act of grace, a reduction in the price to be paid for the work cannot be said to impair the obligation of the contract. Philadelphia *v.* Jewell, 135 Pa. St. 329, 19 Atl. 947.

92. People *v.* Swift, 31 Cal. 26; Chicago *v.* Galpin, 183 Ill. 399, 55 N. E. 731; North River Electric Light, etc., Co. *v.* New York, 48 N. Y. App. Div. 14, 62 N. Y. Suppl. 726.

93. Keeney *v.* Jersey City, 47 N. J. L. 449, 1 Atl. 511; Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814; Murphy *v.* Albina, 22 Oreg. 106, 29 Pac. 353, 29 Am. St. Rep. 578; Valentine Clark Co. *v.* Allegheny City, 143 Fed. 644. See also Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520, holding that the taking of possession and use by a town of a school-house erected on its land was not such a ratification of unauthorized expenditures in its erection as to make the town liable therefor.

94. Devers *v.* Howard, 88 Mo. App. 253.

95. Haughwout *v.* New York, 2 Abb. Dec. (N. Y.) 344.

96. Squire *v.* Preston, 82 Hun (N. Y.) 88, 31 N. Y. Suppl. 174.

97. Curative acts generally see *supra*, IX, I, 2.

98. *Iowa.*— McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979.

New York.— Matter of Johnson, 2 N. Y. St. 98; Matter of Eightieth St., 31 How. Pr. 99.

Ohio.— Cincinnati *v.* Goodman, 5 Ohio Dec. (Reprint) 365, 5 Am. L. Rec. 153.

Washington.— Abernethy *v.* Medical Lake, 9 Wash. 112, 37 Pac. 306.

United States.— Jarecki Mfg. Co. *v.* Toledo, 53 Fed. 329.

See 36 Cent. Dig. tit. "Municipal Corporations," § 882.

99. Bellevue *v.* Peacock, 89 Ky. 495, 12 S. W. 1042, 11 Ky. L. Rep. 702, 25 Am. St. Rep. 552.

1. Ellis *v.* Cleburne, (Tex. Civ. App. 1896) 35 S. W. 495.

2. Paxton *v.* Bogardus, 201 Ill. 628, 66 N. E. 853.

3. Construction and operation of contracts generally see *supra*, IX, J.

4. Chicago *v.* Sherwood, 104 Ill. 549; Leavenworth *v.* Rankin, 2 Kan. 357; Davies *v.* East Saginaw, 66 Mich. 37, 32 N. W. 919; Phelan *v.* New York, 119 N. Y. 86, 23 N. E. 175; Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246; Dillon *v.* Syracuse, 5 Silv. Sup. (N. Y.) 575, 9 N. Y. Suppl. 98; Voorhis *v.* New York, 46 How. Pr. (N. Y.) 116.

Oral agreements between the contractor and the city are merged in a subsequent written contract. Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

Evidence of custom.—Evidence of a custom prevailing when an ordinance for paving was adopted, defining dimensions of paving blocks as specified in the contract, is admissible for the purpose of explaining the intent of the parties. Cole *v.* Skrainka, 37 Mo. App. 427.

5. Piedmont Paving Co. *v.* Allman, 136 Cal. 88, 68 Pac. 493; Oster *v.* Jefferson, 57 Mo. App. 485; Philadelphia *v.* Jewell, 135 Pa. St. 329, 19 Atl. 947.

6. *Alabama.*— Ensley *v.* Moore, (1905) 39 So. 679.

tract provides that losses arising from the nature of the work shall be borne by the contractor the city is not liable;[7] but a provision that the contractor shall have no claim against the city for delay in delivering material will not apply to delays caused by defective material furnished by the city.[8] In case of uncertainty or ambiguity a contract is to be reasonably construed;[9] hence a contract for paving a street does not require the contractor to pave the part thereof used by a street railway when no liability for cost would arise against the company.[10] If no time is fixed for completion of an improvement, the same must be finished within a reasonable time.[11] When the time for commencing work is to be fixed by a municipal officer, and the same is to be finished within a stated time, the time does not begin to run under the contract until the date of commencement has been designated by such officer, even though the contractor has voluntarily proceeded with the work.[12] A provision that a municipal board shall adjudicate damages arising from non-performance of a contract does not necessitate such adjudication of the contractor's damages arising from the city's breach of the contract.[13] A provision that the contractor should make no claim for extra work will not apply to work arising from changes in the plans and specifications;[14] and in order to save the contract a provision for extra work will be construed to mean such necessary work as might be promptly required without opportunity for a formal letting as required by law.[15] The term "street," unqualified, means the whole area from lot line to lot line.[16]

Indiana.— State *v.* Michigan, 138 Ind. 455, 37 N. E. 1041.

Michigan.— Central Bitulithic Paving Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Fox *v.* Bay City, 122 Mich. 499, 81 N. W. 352; Campau *v.* Detroit, 106 Mich. 414, 64 N. W. 336.

New York.— Murphy *v.* Yonkers, 45 N. Y. App. Div. 621, 60 N. Y. Suppl. 940; Dean *v.* New York, 45 N. Y. App. Div. 605, 61 N. Y. Suppl. 374; Barry *v.* New York, 38 N. Y. App. Div. 632, 56 N. Y. Suppl. 1049; Kelly *v.* New York, 16 N. Y. App. Div. 296, 44 N. Y. Suppl. 628; Palladino *v.* New York, 56 Hun 565, 10 N. Y. Suppl. 66 [*affirmed* in 125 N. Y. 733, 26 N. E. 757].

Washington.— Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707.

United States.— Smith *v.* Salt Lake City, 83 Fed. 784.

See 36 Cent. Dig. tit. "Municipal Corporations," § 883.

7. Mairs *v.* New York, 52 N. Y. App. Div. 343, 65 N. Y. Suppl. 160; Murdock *v.* District of Columbia, 22 Ct. Cl. 464. See also *In re* Houghton, 20 Hun (N. Y.) 395, holding that a contract for constructing a sewer, stipulating that all damage arising from the nature of the work or from an unusual obstruction, etc., should be sustained by the contractor, he was liable for damage to gas pipes.

8. Wood *v.* Ft. Wayne, 119 U. S. 312, 7 S. Ct. 219, 30 L. ed. 416.

9. *Alabama.*— Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764.

Iowa.— McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979; Ryan *v.* Dubuque, 112 Iowa 284, 83 N. W. 1073.

Massachusetts.— Braney *v.* Millbury, 167 Mass. 16, 44 N. E. 1060.

Missouri.— Hund *v.* Rackliffe, 192 Mo. 312, 91 S. W. 500.

New York.— People *v.* Beck, 144 N. Y. 225, 39 N. E. 80; Delafield *v.* Westfield, 41 N. Y. App. Div. 24, 58 N. Y. Suppl. 277 [*affirmed* in 169 N. Y. 582, 62 N. E. 1095]; Delamater *v.* Folz, 50 Hun 528, 3 N. Y. Suppl. 711.

Pennsylvania.— Sheehan *v.* Pittsburg, 213 Pa. St. 133, 62 Atl. 642.

South Dakota.— Naughton *v.* Sioux Falls, 3 S. D. 90, 52 N. W. 324.

Tennessee.— Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 631.

See 36 Cent. Dig. tit. "Municipal Corporations," § 883.

10. Saxton Nat. Bank *v.* Haywood, 62 Mo. App. 550. See *infra*, note 16.

11. Hilgert *v.* Barber Asphalt Paving Co., 107 Mo. App. 385, 81 S. W. 496.

12. New York *v.* Reilly, 59 Hun (N. Y.) 501, 13 N. Y. Suppl. 521.

13. Markey *v.* Milwaukee, 76 Wis. 349, 45 N. W. 28.

14. Dwyer *v.* New York, 77 N. Y. App. Div. 224, 79 N. Y. Suppl. 17.

Drawing as warranty.— Where it is stipulated that the contractors shall satisfy themselves, by personal examination, of the accuracy of an engineer's estimate, the city is not bound by a drawing showing the probable location of rock along the line of a sewer, and the contractor cannot rely on the drawing as a warranty as to the depth at which rock will be found. Kelly *v.* New York, 87 N. Y. App. Div. 299, 84 N. Y. Suppl. 349.

15. Allen *v.* Rogers, 20 Mo. App. 290.

16. Denver Bd. of Public Works *v.* Haydon, 13 Colo. App. 36, 56 Pac. 201. See also Grant *v.* Detroit, 119 Mich. 43, 77 N. W. 307, holding that where the contract was for pav-

7. Assignment, Modification, and Rescission — a. Assignment. A contract awarded by municipal authorities in the exercise of a discretion as to what is for the best interest of the city cannot be assigned by the contractor without the sanction of the city;[17] but where such assignment has been made, the city has been held liable to the assignee for the reasonable value of work actually done.[18] A clause in a contract prohibiting assignment is for the benefit of the city and is available only when pleaded by the city.[19] The fact that a contract has been assigned is no defense to an action by the contractor against the city for actual damage for wrongfully compelling him to cease work.[20] A provision restricting the subletting of work will not be construed to forbid a contractor for the erection of a building from subcontracting the carpenter work.[21] In the absence of a statute providing to whom notice of the assignment of a contract shall be given, it has been held that notice may be given to any agent of the city whose duty it is to act upon it or communicate it to his principal in the proper discharge of his duty as agent.[22] And where the right to assign a contract is made by statute to depend on the consent of a particular officer, such consent may be implied.[23]

b. Modification.[24] A contract for improvements may be modified by the municipal officers authorized to make the same, provided such modification does not substantially change the character of the work;[25] but ministerial officers, empowered by the council to contract in its behalf or to direct the performance of the work, may not make a material modification in the terms of the contract.[26]

ing a street "40 feet wide, less car tracks, 15 feet" that a small place under the flanges of the outside rails was included in the contract.

17. Cook *v.* Menasha, 103 Wis. 6, 79 N. W. 26; Delaware County *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674. But *compare* Devlin *v.* New York, 63 N. Y. 8 [*reversing* 48 How. Pr. 457].

An assignment of the money to be earned under the contract is not regarded as in contravention of a provision against assignment. Hipwell *v.* National Surety Co., 130 Iowa 656, 105 N. W. 318; Dickson *v.* St. Paul, 97 Minn. 258, 106 N. W. 1053; Snyder *v.* New York, 74 N. Y. App. Div. 421, 77 N. Y. Suppl. 637. See Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677.

18. Dunkirk *v.* Wallace, 19 Ind. App. 298, 49 N. E. 463.

19. Episcopo *v.* New York, 35 Misc. (N. Y.) 623, 72 N. Y. Suppl. 140, holding that where a contractor took an assignment of a contract with a city from his former partner and assigned the reserved payments to a bank as collateral for his note, a clause in the contract prohibiting the assignment of it, unless the commissioner of street improvements consented thereto, was inapplicable where the reserve belonged to the contractor.

20. Tipton *v.* Jones, 77 Ind. 307.

21. Ocorr, etc., Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 79 N. Y. Suppl. 251 [*affirmed* in 178 N. Y. 622, 70 N. E. 1104].

22. Philadelphia *v.* Lockhardt, 73 Pa. St. 211.

23. Sims *v.* Hines, 121 Ind. 534, 23 N. E. 515; Ocorr, etc., Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 79 N. Y. Suppl. 251 [*affirmed* in 178 N. Y. 622, 70 N. E. 1104].

24. Modification of contracts generally see *supra*, IX, K.

25. *Arkansas.*— Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702.

California.— Doland *v.* Clark, 143 Cal. 176, 76 Pac. 958; Laver *v.* Ellert, 110 Cal. 221, 42 Pac. 806; Spaulding *v.* North San Francisco Homestead, etc., Assoc., 87 Cal. 40, 24 Pac. 600, 25 Pac. 249. See also Buckman *v.* Sanders, 111 Cal. 347, 43 Pac. 1125.

Indiana.— Allen County *v.* Silvers, 22 Ind. 491.

Michigan.— Ely *v.* Grand Rapids, 84 Mich. 336, 47 N. W. 447; Detroit *v.* Michigan Paving Co., 36 Mich. 335.

Nevada.— Reno Water, etc., Co. *v.* Osburn, 25 Nev. 53, 56 Pac. 945.

New Jersey.— McCartan *v.* Trenton, 57 N. J. Eq. 571, 41 Atl. 830.

New York.— Lutes *v.* Briggs, 64 N. Y. 404 [*reversing* 5 Hun 67]; Meech *v.* Buffalo, 29 N. Y. 198; Kingsley *v.* Brooklyn, 5 Abb. N. Cas. 1 [*affirmed* in 78 N. Y. 200, 7 Abb. N. Cas. 28]. And see Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246.

Pennsylvania.—Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545.

See 36 Cent. Dig. tit. "Municipal Corporations," § 886.

Where a resolution modifying the contract is corruptly procured, such fact affords a defense to the action upon the contract. Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678 [*reversing* 82 Hun 67, 31 N. Y. Suppl. 186].

26. *California.*— Warren *v.* Chandos, 115 Cal. 382, 47 Pac. 132.

Illinois.— People *v.* McDermott, 214 Ill. 562, 73 N. E. 770; People *v.* Borman, 214 Ill. 416, 73 N. E. 770; People *v.* Peyton, 214 Ill. 376, 73 N. E. 768.

Kentucky.— Murray *v.* Tucker, 10 Bush 240.

A charter or statutory provision authorizing a modification must be strictly complied with to render the same valid;[27] and where a contract is modified in violation of legislative restrictions, the fact that work under it has been performed will not estop the city from defending against a claim for an excess above the original contract price.[28]

c. Rescission or Cancellation.[29] The city may reserve the right to cancel a contract arbitrarily,[30] or for failure to properly perform the work,[31] or to finish the same within a stipulated time;[32] and in the absence of such reservation, a city may renounce a contract without liability, if proceedings for making the improvements were defective.[33] A stipulation for rescission is to be strictly construed;[34] action thereon may be taken only by the city,[35] and the power to annul may not be delegated to a ministerial officer.[36]

8. Performance of Work[37] **— a. In General.** The contractor, or one to whom he sublets a part of the work,[38] is bound by all the conditions of the contract,[39] and a failure to perform the work in compliance with the terms thereof will constitute a breach of contract,[40] and injunction will lie on behalf of abutting

Michigan.— Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78; Campau *v.* Detroit, 106 Mich. 414, 64 N. W. 336.

New York.— Bonesteel *v.* New York, 20 How. Pr. 237.

Oregon.— Murphy *v.* Albina, 22 Oreg. 106, 29 Pac. 353, 29 Am. St. Rep. 578.

Wisconsin.—Markey *v.* Milwaukee, 76 Wis. 349, 45 N. W. 28.

United States.— Smith *v.* Salt Lake City, 83 Fed. 784.

See 36 Cent. Dig. tit. "Municipal Corporations," § 886.

27. Nash *v.* St. Paul, 23 Minn. 132.

28. Gano *v.* Eshelby, 10 Ohio Dec. (Reprint) 442, 21 Cinc. L. Bul. 177.

29. Rescission or cancellation in general see *supra*, IX, K.

30. Bietry *v.* New Orleans, 24 La. Ann. 21; Jones *v.* New York, 9 N. Y. St. 247. But see Murray *v.* Kansas City, 47 Mo. App. 105, holding that where a city contracted for the construction of a street extension, and after failing to secure the right of way annulled the contract to the contractor's damage, it was no defense to an action therefor that the contract reserved to the city the right to annul the same at any time for any failure upon the part of the contractor or for the reason that the interest of said city may demand such annulment.

31. Powers *v.* Yonkers, 114 N. Y. 145, 21 N. E. 132.

32. Bietry *v.* New Orleans, 22 La. Ann. 149; McQuiddy *v.* Brannock, 70 Mo. App. 535, holding that where a duty to complete the work within a time specified was created by the contract, neither the fact that the contractor was enjoined, nor that he was delayed by bad weather, will excuse performance.

33. McKee *v.* Greensburg, 160 Ind. 378, 66 N. E. 1009; Jardine *v.* New York, 11 Daly (N. Y.) 116.

34. Cody *v.* New York, 71 N. Y. App. Div. 54, 75 N. Y. Suppl. 648, holding that where a contract for macadamizing required the entire work to be performed within a stipulated time, and each one thousand feet within a proportionate part of the time, under a penalty of fifty dollars a day for each day in excess of the agreed time, failure to perform the first one thousand feet of the work within the proportion of the time allotted to it did not justify abrogation of the entire contract.

35. People *v.* Coler, 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701.

36. Neill *v.* Gates, 152 Mo. 585, 54 S. W. 460.

37. Performance or breach of contracts generally see *supra*, IX, L.

38. Green *v.* Jackson, 66 Ga. 250.

39. Hostetter *v.* Pittsburgh, 107 Pa. St. 419. See also Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246.

40. McGovern *v.* Loder, (N. J. Ch. 1890) 20 Atl. 209; Schumm *v.* Seymour, 24 N. J. Eq. 143, holding that where a departure from a contract made by street commissioners under charter authority, and requiring that paving should be done in accordance with specifications, resulted in a large saving to the contractor, payment of the stipulated price would be restrained, although the substituted work was equally as good as that which the contract required.

A condition in a contract for the construction of waterworks, and the hiring thereof by a city, that "the payment of this sum of ten thousand dollars per annum to be dependent upon the said second party supplying wholesome water during all the term aforesaid, to wit, thirty years; . . . water to be taken from wells and springs sufficient to supply all the inhabitants of said city"; and further requiring that the contract shall be complied with and perfected in every respect before being accepted, or before liability for rent or water used shall attach, does not make the taking of water from springs and wells sufficient to supply the city for thirty years a condition precedent to the acceptance of the works, or the attaching of liability for rent; and a declaration in an action for breach of contract for refusal on the part of the city to accept the works is not demurrable for failure to allege a supply sufficient for all the inhabitants of the city for

owners to restrain the city from accepting the work,[41] or on behalf of a taxpayer to enjoin an assessment.[42] Where the city agrees to pay for work upon its completion and approval, it cannot avoid liability by delaying to approve the same when completed according to contract,[43] and it will be estopped from setting up a variance from the contract if such variance is due to the fact that the contractor was furnished with wrong plans and tracings,[44] or to other municipal act.[45] Where part of the material furnished the city does not meet the requirement of the specifications, the city is not justified in rejecting the whole lot, when the contractor stands ready to furnish proper material in the place of that rejected.[46] Where the contractor is stopped in his work by the city, his right to recover for the part that he has done is not precluded by the fact that the charter provides for the issuance of tax bills in payment for work only upon the completion thereof.[47]

b. Control and Inspection of Work. If a contract provides that work shall be done under charge of a particular officer, the contractor in the performance of work is obliged to follow the directions of such officer,[48] even as to details omitted in the contract,[49] and the city will also be bound by his decision.[50] If, however, such directions conflict with the plans and specifications according to which the work is being done, the contractor need not follow them;[51] but a decision by an inspector that material does not conform to specifications, if made in good faith, is conclusive against the contractor.[52] Failure of an engineer to give specific instructions does not impose liability on the village for damages suffered by the contractor because of such failure, unless specific instructions have been clearly demanded.[53]

c. Approval or Certification of Engineer or Other Officer. Certification by a designated officer that the work has been properly completed is frequently required by contract as a prerequisite to payment for an improvement. The certification must be made by the officer designated,[54] although he need not personally inspect the work;[55] and his decision is binding on the contractor[56] and on the city[57] unless

thirty years to come. Adrian Water-Works *v.* Adrian, 64 Mich. 584, 31 N. W. 529.

41. Wilkes-Barre *v.* McDermott, 6 Kulp (Pa.) 345. See also Walter *v.* McClellan, 48 Misc. (N. Y.) 215, 96 N. Y. Suppl. 479.

42. McCain *v.* Des Moines, 128 Iowa 331, 103 N. W. 979.

43. North Pac. Lumbering, etc., Co. *v.* East Portland, 14 Oreg. 3, 12 Pac. 4.

44. Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263.

45. Hund *v.* Rackliffe, 192 Mo. 312, 91 S. W. 500.

46. Loftus *v.* Riley, 83 Iowa 503, 50 N. W. 17.

47. Steffen *v.* St. Louis, 135 Mo. 44, 36 S. W. 31.

48. Chapman *v.* Lowell, 4 Cush. (Mass.) 378; Kulwicki *v.* Munro, 95 Mich. 28, 54 N. W. 703.

49. White *v.* New Orleans, 15 La. Ann. 667.

50. Blake *v.* Dubuque, 2 Iowa 492.

51. Burke *v.* Kansas City, 34 Mo. App. 570.

52. Montgomery *v.* New York, 9 Misc. (N. Y.) 331, 29 N. Y. Suppl. 687 [*affirmed* in 151 N. Y. 249, 45 N. E. 550, and *distinguishing* Pennell *v.* New York, 59 N. Y. Super. Ct. 279, 14 N. Y. Suppl. 376].

53. Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246.

54. Dowling *v.* Adams, (Cal. 1895) 41 Pac. 413 [*following* Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337]; Leeson *v.* New York, 65 N. Y. App. Div. 105, 72 N. Y. Suppl. 538; Worthington *v.* District of Columbia, 19 Ct. Cl. 123.

55. O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Jennings *v.* Le Breton, 80 Cal. 8, 21 Pac. 1127.

56. *California.*— Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661.

Kentucky.— Gosnell *v.* Louisville, 57 S. W. 476, 22 Ky. L. Rep. 365.

Michigan.— Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78.

Missouri.— McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

Pennsylvania.— Bowman *v.* Stewart, 165 Pa. St. 394, 30 Atl. 988; Hostetter *v.* Pittsburgh, 107 Pa. St. 419; Fisher *v.* South Williamsport, 1 Pa. Super. Ct. 386.

United States.— Guild *v.* Andrews, 137 Fed. 369, 70 C. C. A. 49.

See 36 Cent. Dig. tit. "Municipal Corporations." § 890.

57. *California.*— San Francisco Paving Co. *v.* Dubois, 2 Cal. App. 42, 83 Pac. 72.

Dakota.— McGuire *v.* Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752.

Indiana.— Darnell *v.* Keller, 17 Ind. App. 103, 45 N. E. 676.

New York.— Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678; People *v.* Syracuse, 144 N. Y. 63, 38 N. E. 1006; O'Brien *v.* New York, 139

arbitrary[58] or fraudulent,[59] when evidence may be introduced to determine whether the work has been properly performed in accordance with the terms of the contract.[60] If such certification be required by charter or statute, the same may not be dispensed with by the city.[61] Refusal by the proper officer to examine and approve the work will not preclude the contractor's right to recover the reasonable value of the same.[62]

d. Substantial Performance. A slight variance from specifications which does not affect the character of the work will not constitute a breach of the contract.[63]

e. Alteration and Additional or Extra Work — (I) *In General.* Extra work performed at the direction of properly authorized municipal officers must be paid for by the city;[64] but where the contract provides that extra work will not be compensated unless it was ordered in writing by a designated officer, the city is usually regarded as not liable for work done at the verbal direction of such

N. Y. 543, 35 N. E. 323, 142 N. Y. 671, 37 N. E. 465; Brady *v.* New York, 132 N. Y. 415, 30 N. E. 757; Quinn *v.* New York, 16 N. Y. App. Div. 408, 45 N. Y. Suppl. 7; People *v.* Coler, 26 Misc. 509, 57 N. Y. Suppl. 461; Cortwright *v.* Mt. Vernon, 3 N. Y. Suppl. 296.

Pennsylvania.— Com. *v.* Pittsburg, 204 Pa. St. 219, 53 Atl. 769; Malone *v.* Philadelphia, 12 Phila. 270.

United States.— Omaha *v.* Hammond, 94 U. S. 98, 24 L. ed. 70.

See 36 Cent. Dig. tit. "Municipal Corporations," § 890.

58. Gearty *v.* New York, 171 N. Y. 61, 63 N. E. 804; Elizabeth *v.* Fitzgerald, 114 Fed. 547, 52 C. C. A. 321.

59. Green *v.* Jackson, 66 Ga. 250; Darnell *v.* Keller, 17 Ind. App. 103, 45 N. E. 676; People *v.* Coler, 58 N. Y. App. Div. 131, 68 N. Y. Suppl. 448; Smith *v.* New York, 12 N. Y. App. Div. 391, 42 N. Y. Suppl. 522; Schmidt *v.* North Yakima, 12 Wash. 121, 40 Pac. 790.

Gross mistakes imply bad faith only when, all the circumstances duly considered, they cannot be reconciled with good faith, and then they not only imply but necessarily imply bad faith. Guild *v.* Andrews, 137 Fed. 369, 70 C. C. A. 49.

Alteration.— After certification is made it may not be altered because of defects subsequently discovered. Mercer Bd. of Internal Imp. *v.* Dougherty, 3 B. Mon. (Ky.) 446.

60. Rooney *v.* May, 23 La. Ann. 30; Brady *v.* New York, 132 N. Y. 415, 30 N. E. 757; Sherman *v.* New York, 1 N. Y. 316; Ross *v.* New York, 85 N. Y. App. Div. 611, 82 N. Y. Suppl. 920; Dean *v.* New York, 45 N. Y. App. Div. 605, 61 N. Y. Suppl. 374; Burke *v.* New York, 7 N. Y. App. Div. 128, 40 N. Y. Suppl. 81.

61. O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; People *v.* Coler, 69 N. Y. App. Div. 409, 75 N. Y. Suppl. 37.

62. Neenan *v.* Donoghue, 50 Mo. 493; Toop *v.* New York, 13 N. Y. Suppl. 280; Drhew *v.* Altoona City, 121 Pa. St. 401, 15 Atl. 636.

63. Shirk *v.* Hupp, (Ind. 1906) 78 N. E. 242; Middlesborough Town, etc., Co. *v.* Knoll, 55 S. W. 205, 21 Ky. L. Rep. 1399; Lincoln *v.* Worcester, 122 Mass. 119; Brady *v.* New York, 132 N. Y. 415, 30 N. E. 757.

64. *California.*—Keating *v.* Edgar, (1884) 3 Pac. 594.

Illinois.— Chicago *v.* McKechney, 91 Ill. App. 442.

Iowa.— Slusser *v.* Burlington, 47 Iowa 300.

Louisiana.— White *v.* New Orleans, 15 La. Ann. 667.

Massachusetts.— Allen *v.* Melrose, 184 Mass. 1, 67 N. E. 1060.

Minnesota.— O'Dea *v.* Winona, 41 Minn. 424, 43 N. W. 97.

Missouri.— Steffen *v.* St. Louis, 135 Mo. 44, 36 S. W. 31.

New Jersey.— Vanderbeck *v.* Jersey City, 29 N. J. L. 441.

New York.— Mulholland *v.* New York, 113 N. Y. 631, 20 N. E. 856; Fleming *v.* Suspension Bridge, 92 N. Y. 368; Kingsley *v.* Brooklyn, 78 N. Y. 200, 7 Abb. N. Cas. 28 [*affirming* 5 Abb. N. Cas. 11]; Messenger *v.* Buffalo, 21 N. Y. 196; Thilemann *v.* New York, 82 N. Y. App. Div. 136, 81 N. Y. Suppl. 773; Murphy *v.* Yonkers, 45 N. Y. App. Div. 621, 60 N. Y. Suppl. 940.

Oregon.— Murphy *v.* Albina, 20 Oreg. 379, 26 Pac. 234.

Texas.— Sherman *v.* Connor, (Civ. App. 1903) 72 S. W. 238.

United States.— Wood *v.* Ft. Wayne, 119 U. S. 312, 7 S. Ct. 219, 30 L. ed. 416.

See 36 Cent. Dig. tit. "Municipal Corporations," § 892.

Extra work occasioned by negligence of the city engineer should be borne by the city and not by the contractor. Chicago *v.* Duffy, 218 Ill. 242, 75 N. E. 912. And where a contractor is compelled by the city engineer to relay a pavement, on the ground that it has been improperly constructed, he does not by compliance with the order, after making an oral protest against tearing up his work but without demand for extra compensation, waive his claim therefor. Gearty *v.* New York, 171 N. Y. 61, 63 N. E. 804. But where, without objection, the contractor in grading uses grades furnished by the city engineer, he accepts him as his agent in establishing the grade and cannot recover for losses suf-

officer,[65] nor will the city be liable for additional work done at the direction of one of its officials without its consent.[66] Recovery may not be had for work not called for in the contract but which the contractor voluntarily performs;[67] and if the contract provides that in case any work is required to properly carry out the agreement which is not called for in the specifications, the same shall be done without extra compensation, the contractor cannot recover for extra work which reasonably comes within the terms of such provision.[68] Even in the absence of such a provision, extra compensation cannot be recovered for work which is a necessary incident to the performance of a contract.[69] The fact that work proves more expensive than was anticipated, owing to unforeseen obstacles, does not entitle a contractor to extra compensation.[70] And the municipality will not be bound

fered by reason of the surveyor's mistakes. Becker *v.* New York, 170 N. Y. 219, 63 N. E. 298. An allowance for delay to a contractor for the construction of a sewer, occasioned by the necessity of removing extra filling placed on the line of work by preceding grading contractors, does not constitute a defense to the contractor's right to recover for the extra work in removing the same. Thilemann *v.* New York, 82 N. Y. App. Div. 136, 81 N. Y. Suppl. 773.

65. *Illinois.*— Elgin *v.* Joslyn, 36 Ill. App. 301 [*affirmed* in 136 Ill. 525, 26 N. E. 1090].

Indiana.— Huntington *v.* Force, 152 Ind. 368, 53 N. E. 443.

Massachusetts.— Cashman *v.* Boston, 190 Mass. 215, 76 N. E. 671; Stuart *v.* Cambridge, 125 Mass. 102.

New Jersey.— Condon *v.* Jersey City, 43 N. J. L. 452.

New York.— Johnson *v.* Albany, 86 N. Y. App. Div. 567, 83 N. Y. Suppl. 1002; Abells *v.* Syracuse, 7 N. Y. App. Div. 501, 40 N. Y. Suppl. 233.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Pennsylvania.— McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 320.

See 36 Cent. Dig. tit. "Municipal Corporations," § 892.

Estoppel.— Where a contract with a board of commissioners provided that the contractor should make no claim for extra work, unless contracted for in writing, the board having ordered extra work are estopped from objecting that there was no written agreement regarding the change. Dwyer *v.* New York, 77 N. Y. App. Div. 224, 79 N. Y. Suppl. 17.

66. *California.*— J. M. Griffith Co. *v.* Los Angeles, (1898) 54 Pac. 383.

Indiana.— See Huntington *v.* Force, 152 Ind. 368, 53 N. E. 443.

Louisiana.— O'Hara *v.* New Orleans, 30 La. Ann. 152.

Missouri.— Leathers *v.* Springfield, 65 Mo. 504.

New York.— People *v.* Snedeker, 182 N. Y. 558, 75 N. E. 1133 [*affirming* 106 N. Y. App. Div. 89, 94 N. Y. Suppl. 319]; Horgan *v.* New York, 21 N. Y. App. Div. 405, 47 N. Y. Suppl. 580; Dillon *v.* Syracuse, 5 Silv. Sup. 575, 9 N. Y. Suppl. 98; Del Genovese *v.* New York, 55 N. Y. Super. Ct. 397.

Pennsylvania.— Farrell *v.* Coatesville Borough, 214 Pa. St. 296, 63 Atl. 742.

Texas.— Dallas *v.* Brown, 10 Tex. Civ. App. 612, 31 S. W. 298.

See 36 Cent. Dig. tit. "Municipal Corporations," § 892.

67. West Chicago Park Com'rs *v.* Kincade, 64 Ill. App. 113; Davies *v.* East Saginaw, 66 Mich. 37, 32 N. W. 919; O'Brien *v.* New York, 65 Hun (N. Y.) 112, 19 N. Y. Suppl. 793 [*affirming* 15 N. Y. Suppl. 520]; *In re* Wood, 51 Barb. (N. Y.) 275; McEwen *v.* Nashville, (Tenn. Ch. App. 1896) 36 S. W. 968.

68. Winona *v.* Jackson, 92 Minn. 453, 100 N. W. 368; Voorhis *v.* New York, 62 N. Y. 498; Voorhis *v.* New York, 46 How. Pr. (N. Y.) 116.

69. Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Abells *v.* Syracuse, 7 N. Y. App. Div. 501, 40 N. Y. Suppl. 233; Palladino *v.* New York, 56 Hun (N. Y.) 565, 10 N. Y. Suppl. 66 [*affirmed* in 125 N. Y. 733, 26 N. E. 757]. See also Ayers *v.* New Castle, 10 Pa. Super. Ct. 559.

Protection work.— Where a contractor in building a harbor constructed protection work under the direction of the city engineer and harbor committee whose business it was to oversee and direct the best execution of the contract, and it was necessary to the economical building of the harbor, the city should pay the reasonable cost of the protection work. Hasbrouck *v.* Milwaukee, 21 Wis. 217.

Where a contract was made to clean all the paved streets and alleys of a city during a certain period, the contractor is not entitled to additional compensation for cleaning streets which are paved during the period. Crocker *v.* Buffalo, 90 N. Y. 351.

70. Chicago *v.* Duffy, 179 Ill. 447, 53 N. E. 982; Chicago *v.* Weir, 165 Ill. 582, 46 N. E. 725; McCauley *v.* Des Moines, 83 Iowa 212, 48 N. W. 1028; Gartner *v.* Detroit, 131 Mich. 21, 90 N. W. 690; Kelly *v.* New York, 180 N. Y. 507, 72 N. E. 1144; Devlin *v.* New York, 4 Duer (N. Y.) 337; Benedict *v.* Cincinnati, 7 Ohio Dec. (Reprint) 261, 2 Cinc. L. Bul. 33. But see McManus *v.* Philadelphia, 211 Pa. St. 394, 60 Atl. 1001.

Under a constitutional provision prohibiting a city from giving extra compensation to a contractor, one who contracts to construct a sewer for a city is precluded from obtaining any compensation over the contract price for overcoming unexpected difficulties

by representations made by its engineer to a prospective bidder as to the nature of material to be excavated in the work.[71] So where the contractor is required to do certain excavating according to specifications, the fact that an erroneous drawing referred to in the specifications did not show as many cubic yards as were required to be taken out to complete the work does not render the city liable over the contract price for the value of the excavating other than shown by the plans.[72] But if measurements fixed in a contract are intended merely to approximate and not to affect the final estimate of the work, compensation for work in excess of the estimate in the contract may be recovered.[73]

(II) *Acceptance and Approval, or Certificate as to Extra Work.* If extra work is ordered by an unauthorized official, acceptance of the improvement by the city does not imply an agreement to pay for the extra work;[74] but a departure by a ministerial board from the order of the council in awarding a contract is ratified by the approval of such award.[75] If the contract provides that compensation for extra work shall be estimated by a particular officer, his estimate, in the absence of fraud, is binding on the parties.[76] But if the statute under which the city proceeds expressly directs that any estimate for additional work must be made beforehand in the contract, a provision therein which leaves the payment for extra work to be agreed on after it is done is void and the contractor cannot recover.[77] A requirement in the contract that a written statement of extra work done shall be furnished to the board of public works is not complied with by the contractor's appearing before such board with his books of account.[78]

f. Partial Performance. Entire performance of a contract is as a rule a condition precedent to a right of recovery therennder;[79] and where an improvement ordered constitutes a continuous system, the council has no power to accept a part performance;[80] but although the entire work is not completed, a contractor may recover the reasonable value of the part performed if the benefit of the same has been accepted by the city,[81] and where complete performance becomes physically impossible, the contractor may recover reasonable compensation for the work actually done.[82]

g. Delay. Under a contract invalid at the date of execution but subsequently ratified, the time for completion of the work should be computed from date of ratification.[83] If the contract provides that a particular officer shall fix the date for commencing the work, the contractor must be given actual notice of the date selected;[84] and if the term of such officer expires before the designation of a date the same may be fixed by his successor.[85] Where the contract contains a

caused by the fact that rocks are encountered in the ground. Gisel *v.* Buffalo, 15 N. Y. St. 561.

71. Chicago Sanitary Dist. *v.* Ricker, 91 Fed. 833, 34 C. C. A. 91.

72. Lentilhon *v.* New York, 102 N. Y. App. Div. 548, 92 N. Y. Suppl. 897 [*affirmed* in 185 N. Y. 549, 77 N. E. 1190].

73. Henderson *v.* Louisville, 4 Ky. L. Rep. 437; Burke *v.* New York, 7 N. Y. App. Div. 128, 40 N. Y. Suppl. 81.

74. Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Boston Electric Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787; Murphy *v.* Albina, 22 Oreg. 106, 29 Pac. 353, 29 Am. St. Rep. 578.

75. State *v.* Ramsey County Dist. Ct., 33 Minn. 164, 22 N. W. 295.

76. Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Smith *v.* Philadelphia, 13 Phila. (Pa.) 177; Hasbrouck *v.* Milwaukee, 17 Wis. 266.

77. McBrian *v.* Grand Rapids, 56 Mich. 95, 22 N. W. 206; Gano *v.* Eshelby, 10 Ohio Dec. (Reprint) 442, 21 Cinc. L. Bul. 177.

78. Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

79. Connolly *v.* San Francisco, (Cal. 1893) 33 Pac. 1109; Detroit *v.* Michigan Paving Co., 36 Mich. 335; Bonesteel *v.* New York, 20 How. Pr. (N. Y.) 237.

80. Henderson *v.* Lambert, 14 Bush (Ky.) 24; Berwind *v.* Galveston, etc., Inv. Co., 20 Tex. Civ. App. 426, 50 S. W. 413.

81. Sherman *v.* Connor, 88 Tex. 35, 29 S. W. 1053; Sherman *v.* Connor, (Tex. Civ. App. 1903) 72 S. W. 238.

82. City Sewage Co. *v.* Philadelphia, 1 Wkly. Notes Cas. (Pa.) 202.

83. Boulton *v.* Kolkmeyer, 97 Mo. App. 530, 71 S. W. 539.

84. New York *v.* Finn, 58 N. Y. Super. Ct. 360, 11 N. Y. Suppl. 580; Randolph *v.* New York, 53 How. Pr. (N. Y.) 68.

85. Buckman *v.* Ferguson, 108 Cal. 33, 40 Pac. 1057.

penalty clause for failure to complete the work within the time designated, it is sufficient that the work be done within a reasonable time, unless there is an ordinance or statute requiring the work to be completed within a definite time.[86] Where time is made the essence of a contract, failure to complete the work within the period specified in the contract will forfeit compensation,[87] unless the delay is caused by the city,[88] or the work is restrained by injunction.[89] If the delay was caused through no fault of the contractor, but was due to unusual weather, the contractor may recover for work performed.[90] A provision for stipulated damages in case of delay in the completion of the improvement is binding upon the contractor.[91] But a city cannot enforce a *per diem* penalty for delay caused by the suspension of work during litigation concerning the proper construction of the contract which terminates in favor of the contractor.[92] Where the city has contracted to have an improvement made upon default of the abutting owner to make it, the owner cannot set up the contractor's failure to complete the work within the time specified in the contract as against an attempt to collect the cost from him, without showing an injury from the delay.[93]

h. Extension of Time For Performance or Waiver of Delay. Forfeiture of a contract may be waived, and the time for completing an improvement extended by the council;[94] but such waiver will not be implied from an independent agreement allowing the same contractor to complete the work.[95] Where power to

86. Schibel *v.* Merrell, 185 Mo. 534, 83 S. W. 1069. See also Turner *v.* Springfield, 117 Mo. App. 418, 93 S. W. 867, holding that where the proposal for bids requires the work to be done within ninety days, the work was not completed within a reasonable time where not completed within a year.

87. *Louisiana.*— Carland *v.* New Orleans, 13 La. Ann. 43.

Maryland.— Baltimore *v.* Raymo, 68 Md. 569, 13 Atl. 383.

Missouri.—Springfield *v.* Schmook, 120 Mo. App. 41, 96 S. W. 257; Wheless *v.* St. Louis, 90 Mo. App. 106; McQuiddy *v.* Brannock, 70 Mo. App. 535; Rose *v.* Trestrail, 62 Mo. App. 352.

New Jersey.— Kohler *v.* Guttenberg, 38 N. J. L. 419.

Pennsylvania.— Chandley *v.* Cambridge Springs, 203 Pa. St. 139, 52 Atl. 87.

See 36 Cent. Dig. tit. "Municipal Corporations," § 894.

Provision for liquidated damages.—A stipulation for the payment of a fixed sum per day for delay in the completion of the work, as liquidated damages, is not inconsistent with and does not abrogate a further provision in the contract giving the city the power to declare it terminated for delay in the progress of the work before the time fixed for its completion, and in such case the city has its election. Boyce *v.* U. S. Fidelity, etc., Co., 111 Fed. 138, 49 C. C. A. 276.

88. Barber Asphalt Paving Co. *v.* Munn, 185 Mo. 552, 83 S. W. 1062; Hilgert *v.* Barber Asphalt Paving Co., 107 Mo. App. 385, 81 S. W. 496; Childers *v.* Holmes, 95 Mo. App. 154, 68 S. W. 1046; Thilemann *v.* New York, 82 N. Y. App. Div. 136, 81 N. Y. Suppl. 773; Mairs *v.* New York, 52 N. Y. App. Div. 343, 65 N. Y. Suppl. 160; Dady *v.* New York, 57 Hun (N. Y.) 456, 10 N. Y. Suppl. 819; Episcopo *v.* New York, 35 Misc. (N. Y.) 623, 72 N. Y. Suppl. 140. But see Heft *v.* Payne, 97 Cal. 108, 31 Pac. 844, holding that where in an action to foreclose a lien for a street assessment the complaint showed that the work was not completed within the time named in the contract, but alleged as an excuse that the city failed to furnish a steam roller, as provided in the specifications, until too late to do the work within the specified time, a demurrer to the complaint was properly sustained, the lot owner not being a party to the contract, and the city's failure to furnish the roller not being binding on him.

89. Webb Granite, etc., Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639; Mathewson *v.* Grand Rapids, 88 Mich. 558, 50 N. W. 651, 26 Am. St. Rep. 299.

90. Bietry *v.* New Orleans, 22 La. Ann. 149.

91. Central Bitulithic Paving Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888.

92. Chicago *v.* Duffy, 218 Ill. 242, 75 N. E. 912.

93. Fass *v.* Seehawer, 60 Wis. 525, 19 N. W. 533.

94. *California.*— Conlin *v.* Seamen, 22 Cal. 546.

Indiana.— Terre Haute, etc., R. Co. *v.* Nelson, 130 Ind. 258, 27 N. E. 486; Jenkins *v.* Stetler, 118 Ind. 275, 20 N. E. 788; Gulick *v.* Connely, 42 Ind. 134.

Missouri.— Hund *v.* Rackliffe, 192 Mo. 312, 91 S. W. 500; Childers *v.* Holmes, 95 Mo. App. 154, 68 S. W. 1046.

New York.— People *v.* Brennan, 18 Abb. Pr. 100.

Ohio.— Hubbard *v.* Norton, 28 Ohio St. 116.

See 36 Cent. Dig. tit. "Municipal Corporations," § 895.

95. Heft *v.* Payne, 97 Cal. 108, 31 Pac. 844; Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78; O'Connor *v.* New York, 174

extend the time for performance is expressly given by statute, the terms of such grant must be complied with,[96] hence where the statute is construed to mean that an extension must be granted before the time for performance has expired, an extension not granted until after the expiration of such time is void;[97] but failure to record a resolution of extension, as required by law, will not invalidate the same,[98] nor will an error in the description of the contract.[99] An act restricting the right of a city to extend the time for performance will not apply to an extension granted in pursuance of the terms of a contract entered into before the passage of such act.[1]

i. Defects. If the work is done in a defective manner or not in accordance with specifications, the city may refuse to accept the same and it will not be liable on *quantum meruit*;[2] and a person liable to assessment may restrain the city by injunction from paying for such improvement.[3] But the misfeasance or malfeasance of a public contractor will not release a party properly assessed for work done by such contractor from payment of the assessment.[4]

j. Excuses For Non-Performance or Defect. Where the contractor is prevented by the act of the city from completing the work, he may recover for the part thereof that he has performed;[5] and a delay caused by failure of the city to furnish materials as required by the contract will not constitute an abandonment thereof by the contractor.[6] The fact that an assessment was declared invalid is no excuse for abandoning a contract where the city has power to make a new assessment and stands ready to do so.[7]

k. Acceptance of Performance and Waiver of Defects. The city has power to waive strict compliance with the terms of a contract,[8] and such waiver may be implied from acceptance and payment for the work;[9] but waiver may not be made

N. Y. 517, 66 N. E. 1113; Hipp *v.* Houston, 30 Tex. Civ. App. 573, 71 S. W. 39.

96. Dougherty *v.* Nevada Bank, 81 Cal. 162, 22 Pac. 513; Taylor *v.* Palmer, 31 Cal. 240; Butler *v.* Detroit, 43 Mich. 552, 5 N. W. 1078.

Oral agreement of engineer.— Where the contract requires that the consent of an engineer to an extension of time must be in writing, he cannot extend it by an oral agreement. Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628.

97. Raisch *v.* San Francisco, 80 Cal. 1, 22 Pac. 22; Torrens *v.* Townsend, (Cal. 1885) 6 Pac. 423; Beveridge *v.* Livingstone, 54 Cal. 54; Turney *v.* Dougherty, 53 Cal. 619.

Double extension.—Under an act providing that the street superintendent shall fix a time for completion of work under any contract made with him, which may be extended from time to time, an extension may be granted before a previous extension has taken effect, to begin at the expiration of such previous extension. Buckman *v.* Cuneo, 103 Cal. 62, 36 Pac. 1025.

Time of indorsement.— An extension of a contract for street work need not be indorsed on the contract before the expiration of the time originally fixed therein for completion of the work. Buckman *v.* Landers, 111 Cal. 347, 43 Pac. 1125.

98. Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860; McVerry *v.* Boyd, 89 Cal. 304, 26 Pac. 885.

99. Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432; Anderson *v.* De Urioste, 96 Cal. 404, 31 Pac. 266.

1. Ede *v.* Cogswell, 79 Cal. 278, 21 Pac. 767; Oakland Paving Co. *v.* Barstow, 79 Cal. 45, 21 Pac. 544; Gafney *v.* San Francisco, 72 Cal. 146, 13 Pac. 467.

2. Denton *v.* Atchison, 34 Kan. 438, 8 Pac. 750; Traders' Bank *v.* Payne, 31 Mo. App. 512; Bonesteel *v.* New York, 6 Bosw. (N. Y.) 550 [*affirmed* in 22 N. Y. 162].

3. Lodor *v.* McGovern, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446.

4. Vanderbeck *v.* Jersey City, 29 N. J. L. 441.

5. Lake Erie, etc., R. Co. *v.* Walters, 13 Ind. App. 275, 41 N. E. 465. And see Philadelphia *v.* Fell, 9 Phila. (Pa.) 180 [*affirmed* in 81 Pa. St. 58], where completion was prevented by an act of the legislature acquiesced in by the city.

Excuses for delay see *supra*, XIII, C, 8, g, text and notes 88–90.

6. Parr *v.* Greenbush, 72 N. Y. 463.

7. Morgan Park *v.* Gahan, 136 Ill. 515, 26 N. E. 1085 [*reversing* 35 Ill. App. 646].

8. Chicago *v.* Murdoch, 212 Ill. 9, 72 N. E. 46 [*affirming* 113 Ill. App. 656]; Lake Erie, etc., R. Co. *v.* Walters, 13 Ind. App. 275, 41 N. E. 465; Whitefield *v.* Hipple, 12 S. W. 150, 11 Ky. L. Rep. 386; Philadelphia *v.* Brooke, 81 Pa. St. 23.

9. Chicago *v.* McKechney, 91 Ill. App. 442; Atkinson *v.* Davenport, 117 Iowa 687, 84 N. W. 689; Central Bitulithic Paving Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Davis *v.* Jackson, 61 Mich. 530, 28 N. W. 526; People *v.* Syracuse, 65 Hun (N. Y.) 321, 20 N. Y. Suppl. 236 [*affirmed* in 144 N. Y. 63, 38 N. E. 1006]; Brady *v.* New York,

by ministerial officers,[10] nor will it be implied from usage by the public,[11] and property-owners to be assessed are entitled to have the work done in substantial compliance with the terms of the contract.[12] Acceptance of an improvement by the proper municipal authorities is usually held, in the absence of fraud, to be conclusive evidence that the work was performed in accordance with the requirements of the contract;[13] but some cases hold that such acceptance is merely *prima facie* evidence of proper performance,[14] and although the municipal authorities were not guilty of fraud in accepting an improvement, the acceptance will be invalid if the work performed is greatly inferior to that called for by the contract.[15] The city will be estopped by using an improvement to set up its non-acceptance of the same.[16] Where a contract provides for referring disputes to a designated person for final decision, in the absence of fraud, the decision of such arbitrator will bar further action against the city;[17] but such a stipulation applies only to work included in the original estimate and not to extra work which the contractor is required to perform.[18]

l. Completion of Work by Municipality. When a contract is forfeited, the right of the municipality to complete the improvement is not limited to the ground upon which it was declared forfeited, but extends to all matters necessary to properly complete the work, including the perfecting of parts already done;[19] and the contractor, when the cost is to be charged to him, cannot object to the methods adopted by the city in carrying on the work,[20] or, if such right be secured to him by the contract, his failure to object to the methods followed, when informed of each step taken, will be a waiver of his right.[21] If the city in completing the work uses the contractor's tools and materials he may recover in assumpsit for the same.[22]

m. Completion of Work by Other Contractor. Where a contract is abandoned, a new contract for completion of the work may be let under the original ordi-

58 N. Y. Super. Ct. 184, 9 N. Y. Suppl. 893; Gilmore *v.* Utica, 15 N. Y. Suppl. 274.

10. Allen *v.* Cooper, 22 Me. 133; King Hill Brick Mfg. Co. *v.* Hamilton, 51 Mo. App. 120.

11. Veazie *v.* Bangor, 53 Me. 50.

12. Toledo *v.* Grasser, 5 Ohio S. & C. Pl. Dec. 178, 7 Ohio N. P. 396; Pepper *v.* Philadelphia, 114 Pa. St. 96, 6 Atl. 899; Brown *v.* Philadelphia, 3 Pa. Cas. 45, 6 Atl. 904; Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014. But see Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678, holding that if the council is vested with full power to make improvements, it may waive compliance with a requirement of the contract without consent of the property-owners.

Non-performance of contract as affecting validity of assessment see *infra*, XIII, E, 6, g.

13. *Arkansas.*— Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702.

California.— Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283; McVerry *v.* Kidwell, 63 Cal. 246; Cochran *v.* Collins, 29 Cal. 129; Walsh *v.* Mathews, 29 Cal. 123; Emery *v.* Bradford, 29 Cal. 75.

Kentucky.— Henderson *v.* Lambert, 14 Bush 24.

Michigan.— Dixon *v.* Detroit, 86 Mich. 516, 49 N. W. 628; Motz *v.* Detroit, 18 Mich. 495.

Minnesota.— State *v.* McCardy, 87 Minn. 88, 91 N. W. 263.

Ohio.— Mack *v.* Cincinnati, 7 Ohio Dec. (Reprint) 49, 1 Cinc. L. Bul. 84.

Oregon.— Chance *v.* Portland, 26 Oreg. 286, 28 Pac. 68.

See 36 Cent. Dig. tit. "Municipal Corporations," § 898.

Persons benefited.— The city council is the sole judge of whether work was done according to contract, and not the person for whose benefit the improvement was made. Joyes *v.* Shadburn, 13 S. W. 361, 11 Ky. L. Rep. 892.

14. Gulick *v.* Connely, 42 Ind. 134; New Orleans *v.* Halpin, 17 La. Ann. 185, 87 Am. Dec. 523; New Orleans *v.* Ferriere, 17 La. Ann. 183; Municipality No. 2 *v.* Guillotte, 14 La. Ann. 297; Bond *v.* Newark, 19 N. J. Eq. 376.

15. Mason *v.* Des Moines, 108 Iowa 658, 79 N. W. 389.

16. Neosho City Water Co. *v.* Neosho, 136 Mo. 498, 38 S. W. 89.

17. O'Connor *v.* New York, 174 N. Y. 517, 66 N. E. 1113; McManus *v.* Philadelphia, 201 Pa. St. 632, 51 Atl. 322.

18. Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637.

19. Powers *v.* Yonkers, 114 N. Y. 145, 21 N. E. 132.

20. Camden *v.* Ward, 67 N. J. L. 558, 52 Atl. 392; Milwaukee *v.* Shailer, 84 Fed. 106, 28 C. C. A. 286.

21. Camden *v.* Ward, 67 N. J. L. 558, 52 Atl. 392.

22. Elgin *v.* Joslyn, 36 Ill. App. 301 [*affirmed* in 136 Ill. 525, 26 N. E. 1090].

nance,[23] and without a new advertisement for bids;[24] but if a new contract is not let until a number of years after abandonment of the old one, it will not be considered a reletting or continuance of the original contract.[25] But a board by incurring an estoppel cannot create a greater obligation against the city than it could create by contract.[26]

n. Guarantees of Work and Stipulations For Repairs. If the contract provides that repairs may be made at the expense of the contractor should the improvement become defective from improper material or construction, no liability arises, unless it be shown that such defects were the result of improper material or construction;[27] nor will the contractor be liable, if the city in repairing the street substitutes a different kind of improvement.[28] If the city has permitted the street to fall into an abnormal condition of disorder, it must restore it to normal condition before calling upon the contractor to repair it.[29] Where a pavement has been constructed under contract with the abutting owners, and not with the city, it becomes their property and the city is not liable to the contractor for its negligent destruction of such pavement, notwithstanding he has assumed an obligation toward the property-owners to keep it in repair.[30]

9. Compensation — a. Payment of Compensation — (1) *In General.* When the conditions of the contract have been fulfilled, payment of compensation as provided for therein must be made by the municipality;[31] and an amendment of

23. Kemper *v.* King, 11 Mo. App. 116.

24. *In re* Leeds, 53 N. Y. 400; McChesney *v.* Syracuse, 22 N. Y. Suppl. 507 (holding that where contractors on a city building abandoned the work, the action of their surety in finishing the building, as agent for the city, is simply the completion of the original contract, and hence the letting of a new contract to the lowest bidder is unnecessary); Mitchell *v.* Milwaukee, 18 Wis. 92.

25. Ferdinand *v.* New York, 13 N. Y. Suppl. 226.

26. Clements *v.* Hamilton County, 5 Ohio Dec. (Reprint) 126, 2 Am. L. Rec. 729, holding that where county commissioners induced a subcontractor to finish a public building, by falsely representing that there was money enough due the chief contractor with which to finish it, no estoppel could arise in favor of the subcontractor against the county.

27. District of Columbia *v.* Clephane, 2 Mackey (D. C.) 155 [*affirmed* in 110 U. S. 212, 3 S. Ct. 568, 28 L. ed. 122]; Morley *v.* St. Joseph, 112 Mo. App. 671, 87 S. W. 1013. But see Riley *v.* Brooklyn, 46 N. Y. 444 [*reversing* 56 Barb. 559], holding that if a contractor agrees to pave a street in accordance with a designated profile, and to keep the same in order, and the profiles showed that the street crosses a swamp, the contractor is bound to restore the street if, after being paved, it sinks a number of feet into the swamp.

Damage caused by bursting water mains is not included in a provision of a paving contract obligating the contractor to maintain the pavement and keep it in repair. Green River Asphalt Co. *v.* St. Louis, 188 Mo. 576, 87 S. W. 985.

Resurfacing.— Where, by reason of bad workmanship in the asphalt coating, it is not sufficient to make a serviceable binding for repairs, the entire surface of a street may be relaid with an asphalt coating and such resurfacing is a repair. American Bonding Co. *v.* Ottumwa, 137 Fed. 572, 70 C. C. A. 270.

28. District of Columbia *v.* Clephane, 110 U. S. 212, 3 S. Ct. 568, 28 L. ed. 122.

29. State *v.* New Orleans, etc., R. Co., 52 La. Ann. 1570, 28 So. 111.

30. Green River Asphalt Co. *v.* St. Louis, 188 Mo. 576, 87 S. W. 985.

31. *Illinois.*— Chicago *v.* Stuart, 53 Ill. 83.

Kentucky.— Louisville *v.* Leatherman, 99 Ky. 213, 35 S. W. 625, 18 Ky. L. Rep. 124.

Minnesota.— Lowry *v.* Duluth, 94 Minn. 95, 101 N. W. 1059.

Missouri.— McQuiddy *v.* Brannock, 70 Mo. App. 535.

Montana.— State *v.* Webster, 20 Mont. 219, 50 Pac. 558.

New York.— Snyder *v.* New York, 74 N. Y. App. Div. 421, 77 N. Y. Suppl. 637; Jones *v.* New York, 60 N. Y. App. Div. 622, 70 N. Y. Suppl. 296 [*affirmed* in 171 N. Y. 628, 63 N. E. 1118]; People *v.* Coler, 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701; People *v.* Kelly, 5 Abb. N. Cas. 383.

North Dakota.— Pine Tree Lumber Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

Pennsylvania.— Philadelphia *v.* Bickley, 2 Pa. Cas. 214, 3 Atl. 586.

Texas.—Dallas *v.* Brown, 10 Tex. Civ. App. 612, 31 S. W. 298.

Wisconsin.— Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014; Silkman *v.* Milwaukee, 31 Wis. 555.

United States.— Key West *v.* Baer, 66 Fed. 440, 13 C. C. A. 572.

See 36 Cent. Dig. tit. "Municipal Corporations," § 902.

Agreement for paying in city orders.— The city may agree to pay in city orders, at par, that part of the cost of any improvement which is charged against the city. Allen County *v.* Silvers, 22 Ind. 491.

Excess payment.— One who is paid partly

the charter relating to payment of compensation will not affect the provisions of a contract which was executed prior to the adoption thereof.[32] The council cannot by mere resolution impose upon the city liability for work which has been done under a contract imposing no such liability, an attempt to do so being an attempt to make a contract without consideration.[33]

(II) *From General Fund.* In the absence of legislative provisions governing the making of improvements and the manner of paying for the same, the city in the exercise of its general powers may improve its streets and defray the cost from its general funds;[34] but ordinarily in making improvements a city proceeds under express legislative authority, in pursuance of which a special fund for the payment of improvements is provided.[35] Where an improvement ordinance provides for payment out of funds to be raised by general taxation, the contractor can enforce payment out of a general fund created by the sale of bonds, since the bonds are payable from funds derived from taxation.[36]

(III) *From Special Fund.* If the contract for an improvement provides that payment shall be made from a special fund raised by assessments, the city is held liable only to the extent of such special fund,[37] unless the right to raise the same has been lost by the negligence of the city,[38] or the assessment itself was

in money and partly in special tax bills, who has been improvidently paid more money than was due him, is not entitled to have issued to him special tax bills in excess of the residue, unless he first returns the money improvidently paid him. State *v.* Flad, 26 Mo. App. 500.

Failure to use work.— Where a city finally decided not to use plans of an architect, which had been accepted, it is nevertheless bound to pay him for them. Houston *v.* Glover, (Tex. Civ. App. 1905) 89 S. W. 425.

32. McGee *v.* San Jose, (Cal. 1885) 7 Pac. 189, 68 Cal. 91, 8 Pac. 641.

33. McBean *v.* San Bernardino, 96 Cal. 183, 31 Pac. 49.

34. Slusser *v.* Burlington, 42 Iowa 378; Detroit *v.* Detroit United R. Co., 133 Mich. 608, 95 N. W. 736; Woolsey *v.* Rondout, 4 Abb. Dec. (N. Y.) 639, 2 Keyes 603; Ingersoll Pub. Corp. 318.

Payment of commissioners and other officers.—A statute requiring a city to advance from its treasury money to pay for services of commissioners and others employed on the proposed extension of certain streets is not an unconstitutional diversion of general funds to a local purpose. Sinton *v.* Ashbury, 41 Cal. 525.

35. Lansing Second Nat. Bank *v.* Lansing, 25 Mich. 207; Goodrich *v.* Detroit, 12 Mich. 279; Thomas *v.* Olympia, 12 Wash. 465, 41 Pac. 191; Soule *v.* Seattle, 6 Wash. 315, 33 Pac. 384, 1080. *Compare* McHugh *v.* Boston, 173 Mass. 408, 53 N. E. 905.

36. Du Quoin First Nat. Bank *v.* Keith, 183 Ill. 475, 56 N. E. 179.

37. *Illinois.*— Park Ridge *v.* Robinson, 198 Ill. 571, 65 N. E. 104; Farrell *v.* Chicago, 198 Ill. 558, 65 N. E. 103; Chicago *v.* People, 48 Ill. 416; Dolese *v.* McDougall, 78 Ill. App. 629; Alton *v.* Foster, 74 Ill. App. 511.

Indiana.— Huntington *v.* Force, 152 Ind. 368, 53 N. E. 443; Porter *v.* Tipton, 141 Ind. 347, 40 N. E. 802.

New York.— Baldwin *v.* Oswego, 1 Abb. Dec. 62, 2 Keyes 132.

Washington.— Northwestern Lumber Co. *v.* Aberdeen, 20 Wash. 102, 54 Pac. 935; German-American Sav. Bank *v.* Spokane, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259; Thomas *v.* Olympia, 12 Wash. 465, 41 Pac. 191, holding that after an agreement that warrants should be paid from a special fund the contractor could not recover from the city for the negligence of its officers in failing to raise the fund.

Wisconsin.— Hoyt *v.* Fass, 64 Wis. 273, 25 N. W. 45.

United States.— Pontiac *v.* Talbot Paving Co., 96 Fed. 679, 37 C. C. A. 556.

See 36 Cent. Dig. tit. "Municipal Corporations," § 904.

Where the remedy to collect from the specific fund is lost, street grade warrants issued in payment of work done on a street by a contractor, payable out of the street grade fund, cannot be collected against the city generally. Rhode Island Mortg., etc., Co. *v.* Spokane, 19 Wash. 616, 53 Pac. 1104.

What constitutes fund.— Where by statute it is provided that the expense of street intersections and crossings in the street improvement shall be paid by the city, the cost of an improvement, the expense of which is to be met by special assessment, which is apportioned to a city, becomes part of a special fund which is chargeable with payment of warrants for the improvement. Hemen *v.* Ballard, 40 Wash. 81, 82 Pac. 277.

Reimbursement.— Where a city has advanced money to pay for a special improvement, it may reimburse itself from the special improvement fund, although the statute authorizing the special assessment requires the fund raised thereby to be used for no other purpose than for the payment of the improvement. Pine Tree Lumber Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

38. O'Hara *v.* Scranton City, 205 Pa. St. 142, 54 Atl. 713; Stephens *v.* Spokane, 14

illegal,[39] or the fund has been wrongfully diverted.[40] If a contractor accepts assessment certificates in payment for his work, his failure to collect the same will not always render the city liable.[41]

b. Rights and Remedies of Contractor Against the Municipality. Although a city is not liable for an improvement made in violation of the constitution, yet it must pay to the contractor money paid to it under an agreement to bear part of the cost of such improvement.[42] A charter or statutory provision that a city shall not be liable for the cost of street improvements, without having the right to enforce it against the property receiving the benefit thereof, applies only to cases in which the city has authority to make the improvement at the cost of those owning the property benefited, and it is liable to the contractor where it has authority to contract for a street improvement, but has no authority to make it a charge on abutting property.[43] The city is liable in damages to a contractor for preventing him from completing an improvement,[44] or for losses caused to him by its fault or neglect,[45] and, in case the contractor is delayed by the default of the city, he may abandon the work or claim damages caused by the city's fault.[46] Where the city has denied its liability under a contract and has refused to pay instalments there is a breach of the contract on its part.[47] If a contractor pays a license-fee in compliance with an invalid ordinance he may recover the same on demand.[48]

Wash. 298, 44 Pac. 541, 45 Pac. 31. And see Houston *v.* Potter, (Tex. Civ. App. 1906) 91 S. W. 389; Hemen *v.* Ballard, 40 Wash. 81, 82 Pac. 277.

39. *Iowa.*—Younker *v.* Des Moines, (1905) 101 N. W. 1129; Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568, 89 N. W. 7.

Kentucky.— Louisville *v.* Bitzer, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434.

Louisiana.— Tournier *v.* Municipality No. 1, 5 La. Ann. 298.

New York.— Bowery Nat. Bank *v.* New York, 8 Hun 224.

Pennsylvania.— Addyston Pipe, etc., Co. *v.* Corry, 197 Pa. St. 41, 46 Atl. 1035, 80 Am. St. Rep. 812.

United States.— Barber Asphalt Paving Co. *v.* Denver, 72 Fed. 336, 19 C. C. A. 139.

Opportunity to reassess.— After a city assessment has been judicially declared invalid, and the curative act has been passed purporting to cure such assessment, the city must be given an opportunity to reassess before instituting suit against it on an implied contract to pay for the cost of the improvement. Citizens' Bank *v.* Spencer, 126 Iowa 101, 101 N. W. 643.

40. Lansing *v.* Van Gorder, 24 Mich. 456 [*following* Chaffee *v.* Granger, 6 Mich. 51]; Houston *v.* Potter, (Tex. Civ. App. 1906) 91 S. W. 389; Hemen *v.* Ballard, 40 Wash. 81, 82 Pac. 277.

41. Lovell *v.* St. Paul, 10 Minn. 290; Dalton *v.* Poplar Bluff, 173 Mo. 39, 72 S. W. 1068; Roter *v.* Superior, 115 Wis. 243, 91 N. W. 651; Jenks *v.* Racine, 50 Wis. 318, 6 N. W. 818.

42. Dallas *v.* Brown, 10 Tex. Civ. App. 612, 31 S. W. 298.

43. Louisville *v.* Hexagon Tile Walk Co., 103 Ky. 552, 45 S. W. 667, 20 Ky. L. Rep. 236 (holding that a city cannot be held responsible for the cost of a street improvement until the abutting property is adjudged not liable for the improvement); Caldwell *v.* Rupert, 10 Bush (Ky.) 179; Terrell *v.* Paducah, 92 S. W. 310, 28 Ky. L. Rep. 1237, 5 L. R. A. N. S. 289; Covington *v.* Noland, 89 S. W. 216, 28 Ky. L. Rep. 314; Louisville *v.* Bitzer, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434; Gleason *v.* Barnett, 106 Ky. 125, 50 S. W. 67, 20 Ky. L. Rep. 1694; Louisville *v.* McNaughton, 44 S. W. 380, 19 Ky. L. Rep. 1695; Louisville *v.* Meyer, 32 S. W. 290, 17 Ky. L. Rep. 666. See also Louisville Steam Forge Co. *v.* Mehler, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. L. Rep. 1335; Craycraft *v.* Selvage, 10 Bush (Ky.) 696.

Reconstruction of street.— A charter provision that the city shall not be liable for the original improvement of public ways, without the right to enforce it against the property receiving the benefit thereof, has no application to the reconstruction of a street. Louisville *v.* Tyler, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125, 23 Ky. L. Rep. 827, 1609.

44. Brady *v.* St. Joseph, 84 Mo. App. 399; Gearty *v.* New York, 171 N. Y. 61, 63 N. E. 804; Jones *v.* New York, 57 N. Y. App. Div. 403, 68 N. Y. Suppl. 228 [*affirmed* in 170 N. Y. 580, 63 N. E. 1118]; Toledo *v.* Libbie, 19 Ohio Cir. Ct. 704, 8 Ohio Cir. Dec. 589; Ayers *v.* New Castle, 10 Pa. Super. Ct. 559.

45. Grant *v.* Detroit Water Com'rs, 122 Mich. 694, 81 N. W. 969; Ash *v.* Independence, 79 Mo. App. 70; Cody *v.* New York, 71 N. Y. App. Div. 54, 75 N. Y. Suppl. 648; Thilemann *v.* New York, 66 N. Y. App. Div. 455, 73 N. Y. Suppl. 352; O'Neill *v.* Milwaukee, 121 Wis. 32, 98 N. W. 963; Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

46. Sheehan *v.* Pittsburg, 213 Pa. St. 133, 62 Atl. 642.

47. Jones *v.* New York, 47 N. Y. App. Div. 39, 62 N. Y. Suppl. 284, where the denial was by a city controller and his deputy.

48. Barber Asphalt Paving Co. *v.* Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227.

c. Failure or Neglect to Levy or Collect Assessments or Issue Tax Bills. If warrants are issued in payment for an improvement the city is primarily liable on such warrants,[49] but ordinarily a city does not become liable for the cost of improvements until the assessments levied to pay for the same have been collected.[50] If, however, the city neglects to levy and collect an assessment to pay for an improvement it renders itself liable to the contractor for the cost thereof,[51] unless the contractor's rights with regard to an assessment may be enforced by mandamus[52] or the city has power and stands ready to levy a reassessment,[53] or is exempt from liability by express provision of charter or by contract.[54] If the contractor is prevented by the city from completing an improvement, and as a consequence the assessment cannot be collected, he may recover from the municipality the value of the work actually performed.[55] A failure to provide for collecting from a street railway its share of the cost of an improvement will not render the city liable for the same.[56]

d. Invalidity or Insufficiency of Special Assessment or Tax Bill. If an assessment proves invalid the city is liable to the contractor for the cost of the improve-

49. Atchison *v.* Leu, 48 Kan. 138, 29 Pac. 467; Belton *v.* Sterling, (Tex. Civ. App. 1899) 50 S. W. 1027.

50. Porter *v.* Tipton, 141 Ind. 347, 40 N. E. 802; Craycraft *v.* Selvage, 10 Bush (Ky.) 696; Saxton *v.* St. Joseph, 60 Mo. 153; Hunt *v.* Utica, 18 N. Y. 442; Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246; Beard *v.* Brooklyn, 31 Barb. (N. Y.) 142; Hunt *v.* Utica, 23 Barb. (N. Y.) 390 [*affirmed* in 18 N. Y. 442]. But see Little *v.* Union Tp. Committee, 40 N. J. L. 397, holding that a creditor of the municipality is not obliged to wait, before he sues, until the money can be collected from the landowners benefited and on whom the charter imposes the expense of the improvement when his claim accrued.

51. *District of Columbia.*— Lyon *v.* District of Columbia, 20 D. C. 484.

Iowa.— Morgan *v.* Dubuque, 28 Iowa 575.

Kansas.— Heller *v.* Garden City, 58 Kan. 263, 48 Pac. 841; Atchison *v.* Byrnes, 22 Kan. 65.

Missouri.— Oster *v.* Jefferson, 57 Mo. App. 485.

New Jersey.— Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283; Knapp *v.* Hoboken, 38 N. J. L. 371.

New York.— McCann *v.* Albany, 11 N. Y. App. Div. 378, 42 N. Y. Suppl. 94; Weston *v.* Syracuse, 82 Hun 67, 31 N. Y. Suppl. 186; Smith *v.* Buffalo, 44 Hun 156; Quin *v.* Buffalo, 26 Hun 234; Cumming *v.* Brooklyn, 11 Paige 596.

Oregon.— Jones *v.* Portland, 35 Oreg. 512, 58 Pac. 657; Little *v.* Portland, 26 Oreg. 235, 37 Pac. 911; Commercial Nat. Bank *v.* Portland, 24 Oreg. 188, 33 Pac. 532, 41 Am. St. Rep. 854; Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835; North Pac. Lumbering, etc., Co. *v.* East Portland, 14 Oreg. 3, 12 Pac. 4.

Washington.— Bowman *v.* Colfax, 17 Wash. 344, 49 Pac. 551; McEwan *v.* Spokane, 16 Wash. 212, 47 Pac. 433.

United States.— Peake *v.* New Orleans, 139 U. S. 342, 11 S. Ct. 541, 35 L. ed. 131.

See 36 Cent. Dig. tit. "Municipal Corporations," § 906.

Liability for interest.— Where the city council has directed the collection of a city assessment to be stayed, such act is not a tort rendering the city liable for interest on the assessments during the time of such stay. Vider *v.* Chicago, 164 Ill. 354, 45 N. E. 720.

Damages for delay.— A city which has agreed with a contractor for a public work to levy and collect an assessment without delay, and which through a mistake in the law fails to collect the assessment made, and has to resort to a reassessment, is liable to the contractor for damages caused by the delay as for loss of claims for benefits which have become outlawed. Denny *v.* Spokane, 79 Fed. 719, 25 C. C. A. 164.

52. Tipton *v.* Jones, 77 Ind. 307; Tone *v.* New York, 6 Daly (N. Y.) 343 [*affirmed* in 70 N. Y. 157]; German-American Sav. Bank *v.* Spokane, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259; Whalen *v.* La Crosse, 16 Wis. 271.

53. Alton *v.* Foster, 74 Ill. App. 511.

54. Wheeler *v.* Poplar Bluff, 149 Mo. 36, 49 S. W. 1088; Fletcher *v.* Oshkosh, 18 Wis. 228.

55. Dunkirk *v.* Wallace, (Ind. App. 1896) 45 N. E. 614; Chambers *v.* St. Joseph, 33 Mo. App. 536; Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678; Palmer *v.* Brooklyn, 146 N. Y. 379, 41 N. E. 90.

Where work has been discontinued the city may be liable for the breach of contract, although it has thereby disabled itself from collecting assessments upon the property benefited to pay for the work. Dunkirk *v.* Wallace, 19 Ind. App. 298, 49 N. E. 463.

Where a right of cancellation is reserved in the contract the contractor is entitled, after termination of the contract, to recover the value of the actual benefit the city received from the work. Lyman *v.* Lincoln, 38 Nebr. 794, 57 N. W. 531.

56. Barber Asphalt Paving Co. *v.* Denver, 67 Fed. 65.

ment[57] or the amount of the void assessment certificates[58] unless it is expressly exempt from such liability by charter or contract.[59] If the assessment exceeds the limit on the value of property fixed by law, the city will be liable for the illegal excess,[60] but it will not be liable for a deficiency arising from the fact that the value of property assessed does not equal the amount of the assessment.[61]

e. Amount of Recovery — (i) *In General.* If work is performed in compliance with the contract, the contractor is entitled to the amount of compensation agreed on therein notwithstanding he decreased the cost by adopting a more economical mode of performance than was stipulated in the contract;[62] and where the city accepts a less quantity of work than is required by the specifications of the contract as performance, the contractors may recover the contract price without deduction;[63] but if by collusion and fraud the contract is obtained at excessive rates, the city may defeat recovery for more than the value of the improvement.[64] In the absence of express stipulation, the city will not be liable beyond the contract price, although the unforeseen nature of the work increased the cost of the improvement.[65] A provision in the city charter which makes the board of public works the arbiter to adjust and determine all questions as to amounts earned under contracts with the city is valid,[66] and a valid award made under a contract subject to such provision is binding.[67] If the contract provides that compensation for material shall not be allowed in excess of the engineer's certificate as to the quantity furnished, such certification, in the absence of fraud,

57. *California.*— Gafney *v.* San Francisco, 72 Cal. 146, 13 Pac. 467.

Illinois.— Maher *v.* Chicago, 38 Ill. 266.

Kansas.— Leavenworth *v.* Stille, 13 Kan. 539.

Kentucky.— Louisville *v.* Leatherman, 99 Ky. 213, 35 S. W. 625, 18 Ky. L. Rep. 124; Guthrie *v.* Louisville, 6 B. Mon. 575; De Board *v.* Bowlinggreen, 6 B. Mon. 229.

Louisiana.— Tournier *v.* Municipality No. 1, 5 La. Ann. 298.

New Jersey.— Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283.

Ohio.— Harbeck *v.* Connelly, 11 Ohio St. 227; Folz *v.* Cincinnati, 2 Handy 261, 12 Ohio Dec. (Reprint) 433. See also Kirschner *v.* Cincinnati, 10 Ohio Dec. (Reprint) 288, 20 Cinc. L. Bul. 6, holding that a city must deliver a valid assessment for a street improvement, where the contractor agrees to take pay in assessments and not to look to the city.

Wisconsin.— Allen *v.* Janesville, 35 Wis. 403; Miller *v.* Milwaukee, 14 Wis. 642.

See 36 Cent. Dig. tit. "Municipal Corporations," § 907.

58. Iowa Pipe, etc., Co. *v.* Callanan, 125 Iowa 358, 101 N. W. 141, 106 Am. St. Rep. 311, 67 L. R. A. 408; Polk County Sav. Bank *v.* State, 69 Iowa 24, 28 N. W. 416; Scofield *v.* Council Bluffs, 68 Iowa 695, 28 N. W. 20; Bucroft *v.* Council Bluffs, 63 Iowa 646, 19 N. W. 807; Fisher *v.* St. Louis, 44 Mo. 482.

Estoppel.— Where a contractor for work on a street buys land assessed for the work and pays therefor by city warrants received for the work, he cannot recover from the city the amount of the warrants on the ground that it had no power to levy the assessment. Keenan *v.* Portland, 27 Oreg. 544, 38 Pac. 2.

59. *California.*— Connolly *v.* San Francisco, (1893) 33 Pac. 1109.

Minnesota.— Lovell *v.* St. Paul, 10 Minn. 290.

Missouri.— Keating *v.* Kansas City, 84 Mo. 415; Oster *v.* Jefferson, 57 Mo. App. 485.

Ohio.— Welker *v.* Toledo, 18 Ohio St. 452; Keszler *v.* Cincinnati, 3 Ohio Cir. Ct. 223, 2 Ohio Cir. Dec. 127; Cincinnati *v.* Crowley, 7 Ohio Dec. (Reprint) 596, 4 Cinc. L. Bul. 102.

Wisconsin.— Zwietusch *v.* Milwaukee, 55 Wis. 369, 13 N. W. 227.

United States.— Barber Asphalt Paving Co. *v.* Harrisburg, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401.

See 36 Cent. Dig. tit. "Municipal Corporations," § 907.

60. Chicago *v.* People, 56 Ill. 327; Cincinnati *v.* Diekmeier, 31 Ohio St. 242.

61. New Albany *v.* Sweeney, 13 Ind. 245; Creighton *v.* Toledo, 18 Ohio St. 447.

62. New Orleans *v.* Firemen's Charitable Assoc., 43 La. Ann. 447, 9 So. 486.

63. Kingsley *v.* Brooklyn, 78 N. Y. 200, 7 Abb. N. Cas. 28, so holding where piles for a dam were driven to a less depth than specified in the contract.

64. Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283.

65. See *supra*, XIII, C, 8, e.

66. Forristal *v.* Milwaukee, 57 Wis. 628, 15 N. W. 769.

67. Forristal *v.* Milwaukee, 57 Wis. 628, 15 N. W. 769.

Arbitration.— Where the board of public works is appointed, under a contract with the city for the construction of a sewer, to arbitrate the contractor's claim for extras, their finding on the matter submitted to them is final. Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

Certificate as to extra work see *supra*, XIII, C, 8, e, (II).

will be binding on the contractor.[68] An incorrect estimate may be corrected by a subsequent one.[69] If an assessment given a contractor is invalid, he may recover from the city the amount of the assessment,[70] but not the attorney's fees paid by him in attempting to collect the same against the property assessed.[71] Certificates for payment issued by an engineer are presumed to be valid.[72]

(11) *Interest.* Where money is withheld after it is payable under the terms of the contract, it will bear interest from the time when it is due.[73] In the absence of an express provision to the contrary the city becomes liable for an improvement upon its acceptance of the work, and the debt will bear interest from the date thereof;[74] but if in accordance with the terms of the contract, the city retains funds due the contractor until claims for material are paid, and the same becomes the subject of litigation, interest will be chargeable merely from the date of the judgment determining to whom the money should be paid.[75] If the city becomes liable to the contractor by reason of invalidity of the assessment, interest on the obligation accrues only from the date of the adjudication of invalidity,[76] nor is the city liable for interest for the time elapsing between the date of an illegal assessment and the date of a valid reassessment.[77] If under the contract the city is allowed a stated time within which to collect assessments, interest will not accrue until after the expiration of such time.[78] It has, however, been held that the city is not liable for interest upon money collected upon a special assessment because it is withheld from the contractor who does the work,[79] and that where the contractor is to be paid from special assessment when it is collected, he cannot recover interest as such on the contract price because of the delay of the city in collecting the assessment.[80]

f. Actions. In actions upon municipal contracts in the absence of contrary statutory provisions the usual rules governing the time to sue,[81] pleading,[82]

68. Thilemann *v.* New York, 66 N. Y. App. Div. 455, 73 N. Y. Suppl. 352.

69. West Chicago Park Com'rs *v.* Schillinger, 117 Ill. App. 525, holding also that the fact that contractors have not made repairs as provided by the contract to be made to the satisfaction of certain park commissioners does not justify their rejection of a claim for correction of an apparent mistake in the estimate, where there is no pleading or proof justifying a claim in the nature of a recoupment or set-off.

70. Kirschner *v.* Cincinnati, 10 Ohio Dec. (Reprint) 288, 20 Cinc. L. Bul. 6; Kirchner *v.* Cincinnati, 9 Ohio Dec. (Reprint) 463, 14 Cinc. L. Bul. 48.

71. Golden *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 32.

72. Chicago *v.* Duffy, 117 Ill. App. 261 [*affirmed* in 218 Ill. 242, 75 N. E. 912].

73. Murphy *v.* Omaha, 33 Nebr. 402, 50 N. W. 265.

74. J. D. Moran Mfg., etc., Co. *v.* St. Paul, 65 Minn. 300, 67 N. W. 1000; Murphy *v.* Omaha, 33 Nebr. 402, 50 N. W. 265; Fellows *v.* New York, 17 Hun (N. Y.) 249; Tacoma Bituminous Paving Co. *v.* Sternberg, 26 Wash. 84, 66 Pac. 121.

75. Merchants', etc., Nat. Bank *v.* New York, 97 N. Y. 355.

76. Gafney *v.* San Francisco, 72 Cal. 146, 13 Pac. 467.

77. Gosnell *v.* Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. Rep. 519; Louisville *v.* Selvage, (Ky. 1902) 66 S. W. 376; Louisville *v.* Nevin, 28 S. W. 499, 16 Ky. L. Rep. 438.

78. Booth *v.* Pittsburgh, 154 Pa. St. 482, 25 Atl. 803.

79. Hoblit *v.* Bloomington, 87 Ill. App. 479.

80. Vider *v.* Chicago, 164 Ill. 354, 45 N. E. 720 [*affirming* 60 Ill. App. 595]. See also Keigher *v.* St. Paul, 69 Minn. 78, 72 N. W. 54.

81. See Tone *v.* New York, 70 N. Y. 157.

Bar of action.— Where a contractor is to be paid by assessment and the supreme court decides that no legal assessment can be made, the personal liability of the city becomes fixed and the statute of limitations begins to run not later than the date of such decisions. Connolly *v.* San Francisco, (Cal. 1893) 33 Pac. 1109. An action on warrants drawn on a special street improvement fund, brought within three years after notice that the city had diverted the fund by paying subsequent warrants drawn thereon, is not barred by limitations. Hemen *v.* Ballard, 40 Wash. 81, 82 Pac. 277. See, generally, Limitation of Actions.

82. See, generally, Pleading.

Necessary allegations.— The allegations must show a valid contract (Tipton *v.* Jones, 77 Ind. 307; Nash *v.* St. Paul, 11 Minn. 174; Knapp *v.* Hoboken, 38 N. J. L. 371; Galveston *v.* Devlin, 84 Tex. 319, 19 S. W. 395), and the facts fixing the liability of the city (McBean *v.* San Bernardino, 96 Cal. 183, 31 Pac. 49; Louisville *v.* Muldoon, 94 Ky. 462, 22 S. W. 847, 15 Ky. L. Rep. 233), such as the illegality of the assessment (Kearney *v.* Covington, 1 Metc. (Ky.) 339) or the default

evidence,[83] instructions,[84] questions for jury,[85] etc., are applicable. If both the city and property-owners are liable, they may be joined in one action for the cost of an improvement.[86] If the ministerial officers of a city neglect to take the proper steps to lay and collect an assessment, the remedy of the contractor is as a rule mandamus to compel them to do so.[87]

10. Rights and Remedies of Third Persons — a. In General. Property-owners liable to assessment cannot sue to enforce a contract for improvements;[88] nor

of the city in collecting the same (Raisch *v.* San Francisco, 80 Cal. 1, 22 Pac. 22; Kearney *v.* Covington, *supra*). A complaint on a contract for labor and materials furnished in grading a street and constructing a gutter need not allege that the grading and construction had been authorized by law. Roehring *v.* Huebschmann, 34 Wis. 185. Nor is it necessary to allege that payment of plaintiff's compensation had been provided for as required by statute, where the contract is set out in full and shows the means by which plaintiff is to be paid. Houston *v.* Potter, (Tex. Civ. App. 1906) 91 S. W. 389. But it is necessary to show that a statutory notice has been given. Morgan *v.* Guttenburg, 40 N. J. L. 394. An allegation that certain work was performed with the "knowledge, consent and direction" of the city sufficiently states a cause of action. Nagle *v.* McMurray, 84 Cal. 539, 24 Pac. 107; Ryan *v.* Coldwater, 46 Kan. 242, 26 Pac. 675.

Common counts.—Where a public improvement has been completed and accepted and is in use, and nothing remains to be done under the contract except for the city to pay the amount due, a recovery of such amount may be had under the common counts, although special counts filed with the common counts are insufficient. Chicago *v.* Duffy, 218 Ill. 242, 75 N. E. 912.

Fraud.— Where the question of the amount due a contractor has been submitted for arbitration to a municipal board, it is proper to allege bad faith on the part of such board and to show facts substantiating such allegation. Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389.

Admissions.— In an action to recover sums of money due the contractor, as incident to the construction of a sewer, an allegation in the answer of a village that the contractor had been paid in full the amount due under his contract was not an admission that the necessary assessment had been levied and paid. Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246.

83. See, generally, Evidence. And see West Chicago Park Com'rs *v.* Barber, 62 Ill. App. 108 (holding the certificate of the engineer of a board of park commissioners admissible); Maier *v.* Evansville Bd. of Public Works, 151 Ind. 197, 51 N. E. 233; Detroit *v.* Robinson, 38 Mich. 108 (holding the advertisement, bid, contract, and previous correspondence, showing what the parties understood the amount to be withheld on the contract would be, were admissible); Goodrich *v.* Detroit, 12 Mich. 279 (holding evidence insufficient to show negligence in collecting an assessment); Mulholland *v.* New York, 113 N. Y. 631, 20 N. E. 856 (holding evidence sufficient to support verdict for partial compensation of an inspector); Weston *v.* Syracuse, 82 Hun (N. Y.) 67, 31 N. Y. Suppl. 186 (holding evidence as to bribery in securing the contract properly rejected where an investigation of the complaint of bribery had previously been made).

Burden of proof.— Plaintiff is bound to show performance. Hartupee *v.* Pittsburgh, 97 Pa. St. 107.

Excuse for non-production.—The obstinate refusal of an inspector to furnish certification of the completion of the work will excuse its non-production in an action against the city. Guidet *v.* New York, 36 N. Y. Super. Ct. 557.

Fraud.— In support of a defense that the letting of a contract was fraudulent, evidence may be admitted to show that the contract price was grossly in excess of the real value of the work. Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814. On an issue whether a contract for a municipal improvement was obtained through fraud, the opinion of a witness that the contract was not honest is inadmissible. Maier *v.* Evansville Bd. of Public Works, 151 Ind. 197, 51 N. E. 233.

84. See, generally, Trial. And see Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090 [*affirming* 36 Ill. App. 301] (holding that an instruction that a contractor who bids for work is bound only by the specifications shown him at the time he makes his bid upon which his estimates are based is not contradictory but is properly qualified by another instruction that if any general specifications were shown and he executed the contract and agreed thereto, they became part of his contract and he is bound thereby); Dady *v.* New York, 57 Hun (N. Y.) 456, 10 N. Y. Suppl. 819.

85. See, generally, Trial. And see Mulholland *v.* New York, 113 N. Y. 631, 20 N. E. 856; Phelan *v.* New York, 56 N. Y. Super. Ct. 523, 4 N. Y. Suppl. 631; Sheehan *v.* Pittsburg, 213 Pa. St. 133, 62 Atl. 642, holding that where there is a dispute between a city and a municipal contractor as to the amount due for grading a street, and the city agreed to settle the same by measuring and certifying the work, but did not do so, the question of the amount was for the jury.

86. Louisville *v.* Henderson, 5 Bush (Ky.) 515.

87. See Mandamus, 26 Cyc. 337.

88. Loeber *v.* New Orleans, etc., R. Co., 41 La. Ann. 1151, 5 So. 60.

may they enjoin a contractor from proceeding in violation of the terms of his contract.[89] A person injured through the negligence of a contractor is not entitled to a lien on funds retained by the city to indemnify it against possible suits for damages.[90] A contractor who conforms to the official grade in paving a street is not liable to abutting owners for damages caused thereby.[91] If a city releases an accepted bidder, and on readvertisement accepts a bid higher than that of the released contractor, property-owners assessed may recover from the city the difference between the first and subsequent bid.[92]

b. Sureties of Contractor. Where a contract is abandoned and the work is completed by sureties of the contractor, such sureties will be entitled, as against creditors of the contractor to be first paid, out of available funds, for the reasonable cost of the work.[93]

c. Subcontractors, Materialmen, and Laborers. A provision in a contract that the city may retain money due the contractor until claims for material and labor have been paid does not create a right of action in their favor against the city in case the contractor is paid in full;[94] but where funds are so retained by the city, the right of materialmen or laborers to claim the same is superior to that of the contractor or of other creditors.[95] If under the provision of the contract claims must be filed with a designated officer within a specified time, the city has no right to deduct from the contract price the amount of a claim filed after the expiration of such time,[96] or with other than the designated officer;[97] and unless the contract expressly provides for the application of such funds to the payment of claims, the same may not be made by the municipality.[98] Modern improvement statutes frequently provide that municipalities shall retain a stated percentage of the contract price until claims for labor and material are paid, such claims being made a lien on the funds so retained.[99] The vesting of a lien depends on

89. McCafferty *v.* McCabe, 4 Abb. Pr. (N. Y.) 57, 13 How. Pr. 275.

Injunction against improvements generally see *supra*, XIII, B, 15.

90. Mansfield *v.* New York, 15 N. Y. App. Div. 316, 44 N. Y. Suppl. 229.

91. Eachus *v.* Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147.

92. Louisville *v.* Kentucky, etc., Bridge Co., 70 S. W. 627, 24 Ky. L. Rep. 1087; Barfield *v.* Gleason, 64 S. W. 959, 23 Ky. L. Rep. 1102.

93. St. Louis *v.* O'Neil Lumber Co., 42 Mo. App. 586 [*reversed* on other grounds in 114 Mo. 74, 21 S. W. 484]; Port Clinton *v.* Cleveland Stone Co., 10 Ohio Cir. Ct. 1, 6 Ohio Cir. Dec. 218.

94. Columbia Brick Co. *v.* District of Columbia, 1 App. Cas. (D. C.) 351; Iowa Brick Co. *v.* Des Moines, 111 Iowa 272, 82 N. W. 922; Stewart *v.* Christy, 15 La. Ann. 325; Old Dominion Granite Co. *v.* District of Columbia, 20 Ct. Cl. 127.

95. St. Louis *v.* Keane, 27 Mo. App. 642; Luthy *v.* Woods, 6 Mo. App. 67.

Interest.— While the city may be ordered to pay claims which are properly established from money thus withheld, it cannot be required to pay interest. Merchants', etc., Nat. Bank *v.* New York, 97 N. Y. 355.

96. Merchants', etc., Nat. Bank *v.* New York, 97 N. Y. 355; Randolph *v.* New York, 53 How. Pr. (N. Y.) 68.

97. Mechanics', etc., Nat. Bank *v.* Winant, 1 N. Y. Suppl. 659; Thompson *v.* Milwaukee, 69 Wis. 492, 34 N. W. 402.

98. Quinlan *v.* Russell, 47 N. Y. Super. Ct. 212.

99. See the statutes of the several states. And see Callahan *v.* Boston, 175 Mass. 201, 55 N. E. 892; James P. Hall Incorporated Co. *v.* Jersey City, 64 N. J. Eq. 766, 53 Atl. 481.

Mechanics' liens generally see MECHANICS' LIENS.

Retroactive effect.—An act of this sort has been held to apply to contracts entered into before its passage. Smith *v.* Bell, 70 Ill. App. 490; Tompkins *v.* Forrestal, 54 Minn. 119, 55 N. W. 813.

Persons entitled to liens.—A manufacturer of iron who furnishes iron pipes to a contractor for the construction of city waterworks may be regarded as a "mechanic, merchant, or trader," who is employed on or furnishes material. Camden Iron Works *v.* Camden, 60 N. J. Eq. 211, 47 Atl. 220. In Ohio it is held that one who in another state sells and delivers to a contractor materials to be used by him in constructing a public improvement in Ohio is entitled to the same rights under the mechanic's lien laws of the state as one who sells and delivers materials within the state. Mack *v.* Degraff, etc., Quarries, 57 Ohio St. 463, 49 N. E. 697, 63 Am. St. Rep. 729. If the claim is assignable, the lien may be enforced by an assignee. James P. Hall Incorporated Co. *v.* Jersey City, 62 N. J. Eq. 489, 50 Atl. 603 [*affirmed* in 64 N. J. Eq. 766, 53 Atl. 481]; Episcopo *v.* New York, 35 Misc. (N. Y.) 623, 72 N. Y. Suppl. 140.

compliance with the terms of the statute,[1] more particularly with regard to the manner of filing claims,[2] and the giving of notice thereof.[3] Where liens are filed at the same time they are entitled to share *pro rata*.[4] A lien attaches from the filing of notice whether the work be completed by the contractor or not.[5] The assignee of the contractor may give a statutory undertaking to discharge liens.[6] Where a lien has expired it cannot be extended by any act of the municipality.[7] Although the statute provides that failure to retain money against which claims have been filed will render the responsible officer liable on his official bond, the statutory remedy is not exclusive, but the lien may be enforced in equity.[8]

Fund to which lien attaches.— In case nothing remains due a subcontractor at the time a lien for material furnished to him is filed, the lien attaches to no part of the contract price. Garrison *v.* Borio, 61 N. J. Eq. 236, 47 Atl. 1060. Where it is provided that final payment shall be made only on completion of the work, there is no indebtedness to which a lien of the contractor's creditors may attach until completion. Jones *v.* Savage, 24 Misc. (N. Y.) 158, 53 N. Y. Suppl. 308. A mechanic's lien for materials for walks laid or repaired under a general contract to lay all the sidewalks within a certain district only attaches to the fund which the lienor's material aided to create. Coney *v.* Dorsey, 8 Ohio S. & C. Pl. Dec. 642, 3 Ohio N. P. 162.

Nature of work.— A statute affording a lien to any person furnishing material or labor to any contractor for a public improvement has been held to apply to work done on a public school building. Spalding Lumber Co. *v.* Brown, 171 Ill. 487, 49 N. E. 725.

In case the city has paid invalid orders it is not entitled to the benefit of such a payment as against materialmen entitled to a lien on the fund due the contractor for materials furnished. Rockland Lake Trap Rock Co. *v.* Port Chester, 102 N. Y. App. Div. 360, 92 N. Y. Suppl. 631.

1. *Indiana.*— Attica Bridge, etc., Works *v.* Johnson, 29 Ind. App. 257, 64 N. E. 474.

Iowa.— Read *v.* American Surety Co., 117 Iowa 10, 90 N. W. 590.

Missouri.— Kansas City *v.* Walsh, 88 Mo. App. 271.

New Jersey.— Pierson *v.* Haddonfield, 66 N. J. Eq. 180, 57 Atl. 471.

New York.— Mertz *v.* Press, 99 N. Y. App. Div. 443, 91 N. Y. Suppl. 264; Brace *v.* Gloversville, 39 N. Y. App. Div. 25, 56 N. Y. Suppl. 331.

Oregon.— Hamilton *v.* Gambell, 31 Oreg. 328, 48 Pac. 433.

Wisconsin.— Klaus *v.* Green Bay, 34 Wis. 628.

See 36 Cent. Dig. tit. "Municipal Corporations," § 913.

Excessive claim.— Under some statutes a lien will be defeated where an untrue and excessive claim is knowingly and consciously made. Camden Iron Works *v.* Camden, 64 N. J. Eq. 723, 52 Atl. 477.

2. Smith *v.* Bell, 70 Ill. App. 490; James P. Hall Incorporated Co. *v.* Jersey City, 62 N. J. Eq. 489, 50 Atl. 603 [*affirmed* in 64 N. J. Eq. 766, 53 Atl. 481]; Hawkins *v.* Mapes-Reeve Constr. Co., 178 N. Y. 236, 70 N. E. 783; Seattle *v.* Turner, 29 Wash. 515, 69 Pac. 1083.

3. La Crosse Nat. Bank *v.* Petterson, 102 Ill. App. 501 [*affirmed* in 200 Ill. 215, 65 N. E. 687]; Swearingen Lumber Co. *v.* Washington School Tp., 125 Iowa 283, 99 N. W. 730; Garretson *v.* Clark, (N. J. Ch. 1904) 57 Atl. 414; McDonald *v.* New York, 170 N. Y. 409, 63 N. E. 437.

On whom served.— Where notice is required to be filed with the head department or bureau having charge of the construction of the improvement, a notice of lien for materials furnished in macadamizing a village avenue is properly served on the chairman of the committee of roads and bridges of the board of trustees of the village. Rockland Lake Trap Rock Co. *v.* Port Chester, 102 N. Y. App. Div. 360, 92 N. Y. Suppl. 631. Where a subcontractor under a contractor with the park commissioners of a city served a notice on the secretary of the board, which was actually brought to the notice of the commissioners at a meeting of the board, such notice was sufficient. West Chicago Park Com'rs *v.* Western Granite Co., 200 Ill. 527, 66 N. E. 37.

Contents of notice.— Where it is required that the notice shall state the residence of the claimant, and be accompanied by an affidavit, the place of residence may be stated in the affidavit instead of in the body of the notice. James P. Hall Incorporated Co. *v.* Jersey City, 62 N. J. Eq. 489, 50 Atl. 603 [*affirmed* in 64 N. J. Eq. 766, 53 Atl. 481].

4. Wilson *v.* Dietrich, (N. J. Ch. 1904) 59 Atl. 251.

5. Pierson *v.* Haddonfield, 66 N. J. Eq. 180, 57 Atl. 471. See also Rockland Lake Trap Rock Co. *v.* Port Chester, 102 N. Y. App. Div. 360, 92 N. Y. Suppl. 631, holding that the fact that the principal contractor unjustifiably abandoned the contract did not affect the right of subcontractors, materialmen, and laborers to enforce liens filed by them against funds in the hands of the village due the principal contractor.

6. Matter of Hudson Water Works, 111 N. Y. App. Div. 860, 98 N. Y. Suppl. 33.

7. Rosselle Park *v.* Montgomery, (N. J. Ch. 1905) 60 Atl. 954.

8. West Chicago Park Com'rs *v.* Western Granite Co., 200 Ill. 527, 66 N. E. 37; La Crosse Nat. Bank *v.* Petterson, 200 Ill. 215, 65 N. E. 687. See also Case *v.* McGill, 69 N. J. Eq. 354, 60 Atl. 569, holding that where a creditor, after securing judgment

Where a municipal lien has not been discharged when an action is brought by a subcontractor to foreclose the same, the court in such action, after the lien has been discharged, has jurisdiction to render a personal judgment in favor of plaintiffs against the contractor,[9] and where an action for the foreclosure of a mechanic's lien is dismissed on the ground that there was no lien to be foreclosed, for the reason that a bond had been given, the judgment of dismissal is not a bar to an action in equity by the lienor against the debtor and surety to enforce a money judgment against them for the amount of the claim.[10] Under a charter provision actions for the benefit of materialmen must be commenced within a certain time after acceptance of the work by the city. An action by a subcontractor is not prematurely brought, although the work has not been accepted, where the contractor has completed the contract and received his money.[11]

D. Damages — 1. Existence of Liability in General — a. General Rules.[12] In the absence of constitutional or legislative provisions a municipality is not liable for consequential injuries to property, resulting from the construction of duly authorized public improvements, where there has been no negligence or want of care or skill.[13] But in case the municipality fails to execute the work in a careful and skilful manner it is liable for negligence or unskilfulness resulting in damage to property, where no fault of the owner contributes thereto.[14] And the rule as to liability is the same as if the work were being constructed by an individual in

against a contractor for brick furnished him to fulfil his paving contract with the city, on which judgment execution was returned unsatisfied, filed his bill in the court of chancery, setting forth such facts and also that the city was indebted to such contractor on the contract, and praying for a discovery of the amount due and the application of the same so far as necessary to the payment of its judgments, such proceedings would be an equitable lien in his favor upon the money due such contractor from the city.

9. McDonald *v.* New York, 113 N. Y. App. Div. 625, 99 N. Y. Suppl. 122.

10. Mertz *v.* Press, 99 N. Y. App. Div. 443, 91 N. Y. Suppl. 264 [*affirmed* in 184 N. Y. 530, 76 N. E. 1100].

11. Kansas City *v.* Walsh, 88 Mo. App. 271.

12. Liability for torts in general see *infra*, XIV.

13. *Arkansas.*— Simmons *v.* Camden, 26 Ark. 276, 7 Am. Rep. 620.

California.— Houghton's Appeal, 42 Cal. 35.

Connecticut.—Durand *v.* Ansonia, 57 Conn. 70, 17 Atl. 283; Burritt *v.* New Haven, 42 Conn. 174.

Indiana.—Princeton *v.* Gieske, 93 Ind. 102; Platter *v.* Seymour, 86 Ind. 323; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135.

Louisiana.— Thibodeaux *v.* Maggioli, 4 La. Ann. 73.

Maryland.— Cumberland *v.* Willison, 50 Md. 138, 33 Am. Rep. 304.

Missouri.—Wegmann *v.* Jefferson, 61 Mo. 55.

New York.— Linton Pharmacy *v.* McDonald, 48 Misc. 125, 96 N. Y. Suppl. 675.

Ohio.— Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73.

Oregon.— Davis *v.* Silverton, 47 Oreg. 171, 82 Pac. 16.

Texas.— Taylor *v.* Houston, etc., R. Co., (Civ. App. 1904) 80 S. W. 260.

Wisconsin.— Alexander *v* Milwaukee, 16 Wis. 247.

England.— East Freemantle *v.* Annois, [1902] A. C. 213, 71 L. J. P. C. 39, 85 L. T. Rep. N. S. 732.

See 36 Cent. Dig. tit. "Municipal Corporations," § 914.

14. *Colorado.*— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729.

Illinois.— Bloomington *v.* Brokaw, 77 Ill. 194; Chicago *v.* McGraw, 75 Ill. 566; Chicago *v.* Norton Milling Co., 97 Ill. App. 651.

Indiana.—Princeton *v.* Gieske, 93 Ind. 102.

Louisiana.— See Reynolds *v.* Shreveport, 13 La. Ann. 426, holding that where it is alleged that a municipal corporation has executed a lawful power in an injurious and malicious manner, the presumption will be in favor of the propriety and good faith of the acts of the corporation, and complainant must make out a clear case of wilful oppression to obtain relief from the court.

Maryland.— Frostburg *v.* Hitchins, 70 Md. 56, 16 Atl. 380; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422.

Massachusetts.— Aldworth *v.* Lynn, 153 Mass. 53, 26 N. E. 229, 25 Am. St. Rep. 608, 10 L. R. A. 210; Perkins *v.* Lawrence, 136 Mass. 305; Mayo *v.* Springfield, 136 Mass. 10; Murphy *v.* Lowell, 128 Mass. 396, 35 Am. Rep. 381.

Missouri.— Werth *v.* Springfield, 78 Mo. 107; Wegmann *v.* Jefferson, 61 Mo. 55; Imler *v.* Springfield, 55 Mo. 119, 17 Am. Rep. 645; Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463.

North Carolina.— Meares *v.* Wilmington, 31 N. C. 73, 49 Am. Dec. 412.

Ohio.— Keating *v.* Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

Texas.— Wallace *v.* Dallas, 2 Tex. Unrep. Cas. 424.

United States.— Northern Transp. Co. *v.* Chicago, 18 Fed. Cas. No. 10,324, 7 Biss. 45

a similar case.[15] The rule that a municipal corporation is not impliedly liable for the incidental injuries to property resulting from the erection and maintenance of improvements where the premises are in no manner invaded does not, however, prevent liability for the direct injuries to private property caused by a corporate act in the nature of a trespass or nuisance.[16]

b. Constitutional and Statutory Provisions — (1) *In General.*[17] Where there has been an actual invasion of private property by a municipality, in the construction of a public improvement, damages therefor may be recovered under the provisions of the constitution of the United States, and of the several states, against the taking of property for public use without compensation.[18] And in some jurisdictions, under constitutional provisions providing for compensation where private property is injured or damaged, recovery may be had even for consequential injuries, although there is no taking.[19] Independent of these constitutional provisions with relation to the power of eminent domain, provision is frequently made by statute for the payment of damages to persons injured by the construction of public improvements, and a complete scheme provided both for the determination of the amount of such damages and for the raising of a fund from which they shall be paid, either by assessment upon the property benefited or otherwise.[20] Such statutes will be applied to improvements made under other acts, where both acts may be given full effect without conflicting with each other.[21] So in case the plans are not inconsistent it has been held that a special act for the improvement of specific streets, which provides a plan for making assessments and awards of damages, is not repealed by a general law providing a general plan for the improvement of streets generally.[22] A city charter conferring on the inhabitants the special franchise of making their own laws with regard to the opening and laying out of streets is, so far as it extends, a grant of sovereignty; and such laws, when in accordance with it, must prevail within the territorial limits of such city, to the exclusion of the general laws of the state, where they are repugnant.[23] Where a city has been incorporated by legislative act, and there is nothing to show that it has availed itself of the general laws regulating municipal corporations and their classifications, it must be presumed that the city is governed by its special charter, and proceedings by it to condemn private property for public use must conform to that charter.[24] A statute authorizing a public improvement,

[*affirmed* in 99 U. S. 635, 25 L. ed. 336]; Pritchard *v.* Georgetown, 19 Fed. Cas. No. 11,437, 2 Cranch C. C. 191.

Canada.— New Westminster *v.* Brighouse, 20 Can. Sup. Ct. 520; Reeves *v.* Toronto, 21 U. C. Q. B. 157.

See 36 Cent. Dig. tit. "Municipal Corporations," § 914.

15. Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729.

16. *Indiana.*— Platter *v.* Seymour, 86 Ind. 323.

Kentucky.— West Covington *v.* Schultz, 30 S. W. 410, 660, 16 Ky. L. Rep. 831.

Oklahoma.— Norman *v.* Ince, 8 Okla. 412, 58 Pac. 632.

Rhode Island.— O'Donnell *v.* White, 23 R. I. 318, 50 Atl. 333.

West Virginia.— Yeager *v.* Fairmont, 44 W. Va. 259, 27 S. E. 234.

Canada.— Chisholm *v.* Halifax, 29 Nova Scotia 402.

Liability for nuisance in general see *infra*, XIV, A, 5, b, c.

17. Change of grade see *infra*, XIII, D, 2, c, (I).

18. See EMINENT DOMAIN.

Taking of property without compensation in general see CONSTITUTIONAL LAW, 8 Cyc. 1094 *et seq.*

19. See EMINENT DOMAIN, 15 Cyc. 655 *et seq.*

20. See the statutes of the several states. And see the cases cited *infra*, this and following notes.

Assessment of benefits see *infra*, XIII, E.

In Pennsylvania all former acts relating to the opening of streets, widening or straightening the same, in all the cities of the state, were repealed by the act of May 16, 1891, Pub. Laws 75, providing that where private property is taken for street purposes the damages should be assessed by a jury of three freeholders. *In re* Market St., 2 Pa. Dist. 385; Whittaker *v.* Homestead Borough, 13 Pa. Co. Ct. 647.

21. Paris Mountain Water Co. *v.* Greenville, 53 S. C. 82, 30 S. E. 699.

22. Rehfeldt *v.* Brooklyn, 18 N. Y. Suppl. 750 [*affirmed* in 138 N. Y. 663, 34 N. E. 514].

23. State *v.* Clarke, 25 N. J. L. 54.

24. Springfield *v.* Whitlock, 34 Mo. App. 642.

which constitutes an exercise of the police power of the state, is not unconstitutional as depriving individuals of property without due process of law, for the reason that it does not provide compensation to individuals who may be inconvenienced.[25] Statutes which have reference to the recovery of damages for a lawful taking or injury of property and provide a method for the ascertainment of damages do not apply where the proceedings for the making of the improvement are unlawful.[26]

(II) *Retroactive Operation.*[27] A constitutional provision affording compensation for damages resulting from improvements may be made retroactive,[28] as may a statute for the same purpose, where the intent of the legislators is so expressed.[29] Where a city has not proceeded regularly as prescribed by law, and for that reason becomes liable for consequential damages caused by an improvement, the right to such damages cannot be taken away by a subsequent statute.[30] While the right to damages accruing from the failure of a city to proceed regularly in the construction of an improvement cannot be taken away by a subsequent statute, such a statute may provide for a reassessment of the amount of benefits secured to the lot owner and which he should pay to the city.[31]

c. Illegal or Unauthorized Improvements. Where the making of an improvement is not authorized either by statute or charter or as incident to the exercise of the corporate rights or performance of the corporate duties of the municipality the municipality is not liable in damages.[32] But where a municipal corporation acts unlawfully in the exercise of a power which it possesses it is liable for the resulting damages.[33] But a municipal corporation is not to be deemed a trespasser and liable as such when the improvement of a street is ordered pursuant to an accepted plan and by a duly enacted ordinance, because there is some defect in

25. Bancroft *v.* Cambridge, 126 Mass. 438, sustaining a statute which provided that a city might order the owners of lands to fill them to a certain grade to abate a nuisance, that on failure to comply with the order the mayor and aldermen might raise the grade as specified in the order and the expense might be made a lien on the land filled; and further that any one dissatisfied with the assessment of the expense of raising the grade of his land might give notice and the city should thereupon take the land, and in event of a disagreement as to the amount of damage done such amount should be assessed by a jury. See also Welch *v.* Boston, 126 Mass. 442 note.

Taking property without due process of law, through failure to provide for payment of consequential damages on making of improvement, see CONSTITUTIONAL LAW, 8 Cyc. 1127.

26. *In re* Shawmont Ave., 5 Pa. Dist. 190. But see Dore *v.* Milwaukee, 42 Wis. 108, holding that damages for an unauthorized action might be recovered in an ordinary civil action, although a statute affording compensation for injuries resulting from improvements provides a specific means for their recovery.

27. **Retroactive operation of statutes** generally see STATUTES.

28. Chicago *v.* Rumsey, 87 Ill. 348.

29. *In re* Andersen, 178 N. Y. 416, 70 N. E. 921; Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511; Fegley *v.* Easton, 2 Pa. Co. Ct. 505. But *compare* Craft *v.* South Chester, 2 Pa. Co. Ct. 508, holding, where the right to compensation was conferred by a constitutional provision, that a statute providing a remedy for such right was not retroactive farther than to the date of the adoption of the constitution.

Saving clause.— Rights to damages which have previously accrued are not taken away by the adoption of an amended charter prescribing the mode by which damages are to be ascertained, where existing rights are expressly excepted from the operation of the charter. McCarthy *v.* St. Paul, 22 Minn. 527.

30. Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578.

31. Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578. See, generally, *infra*, XIII, E, 22.

32. Loyd *v.* Columbus, 90 Ga. 20, 15 S. E. 818; Lemon *v.* Newton, 134 Mass. 476.

Ultra vires acts as imposing liability for tort generally see *infra*, XIV, A, 3, e, (II).

33. *Indiana.*— Delphi *v.* Evans, 36 Ind. 90, 10 Am. Rep. 12.

Iowa.— Millard *v.* Webster City, 113 Iowa 220, 84 N. W. 1044; Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920.

Massachusetts.— See Hildreth *v.* Lowell, 11 Gray 345.

New York.— Mott *v.* New York, 2 Hilt. 358.

Virginia.— Page *v.* Belvin, 88 Va. 985, 14 S. E. 843.

Wisconsin.— Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578; Dore *v.* Milwaukee, 42 Wis. 108; Crossett *v.* Janesville, 28 Wis. 420.

See 36 Cent. Dig. tit. "Municipal Corporations," § 917.

the manner of awarding and evidencing the contract.[34] A city cannot be liable for damages created by a street improvement, unless it is shown that it in some manner counseled or authorized the work or ratified it after it was done.[35] But where an act is simply an exercise of the authority of municipal officers, mere approval of the wrong is usually held sufficient.[36] Where there is power to pass an ordinance or undertake an improvement, an irregular or defective exercise of the power is not a protection to the city.[37]

d. Estoppel of Municipality to Deny Authority or Allege Irregularity. Where the authorities of a city construct an improvement and a right of action accrues to property-owners, the city may not defeat recovery by setting up defects and irregularities in its proceedings.[38]

e. Negligence as to Plans.[39] A municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement,[40] but in some jurisdictions it may be liable for negligence in devising a plan as well as for negligence in executing it.[41]

f. Agreements Between Officers and Owners. A municipality will not be bound by an unauthorized promise of its agents to compensate property-owners for damages arising from the construction of an improvement;[42] and where, to facilitate the extension of a street, repairs are made on a building by a municipal agent in pursuance of an unauthorized agreement, the municipality will not be liable in damages for the fall of the building through the unskilfulness of such agent;[43] but acting within its powers, the council may make binding

34. Aurora *v.* Fox, 78 Ind. 1.

35. Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070. See also Baltimore *v.* Musgrave, 48 Md. 272, 30 Am. Rep. 458, holding that a municipal corporation is not liable for damages occasioned by the acts of its agents, unless it manifestly appears that the agent is acting within the scope of his authority, or is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the municipality.

Facts held to show authorization.— Where a ditch was actually cut by the street force of a city, acting under instructions from a city engineer and the street committee of the city council, it was held sufficient to show that the cutting of the ditch was authorized by the city. Dallas *v.* Beeman, 23 Tex. Civ. App. 315, 55 S. W. 762.

36. Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070, holding, in an action for excavating a street, without following the statute as to the establishment of grades, evidence that the street commissioner did the work according to a grade fixed by a surveyor employed by the city, under the directions of the chairman of the committee on streets, and that the city paid the commissioner, the surveyor, and others during the work, that the street commissioner made monthly reports to the council, and that grade stakes were set with the aid of the chairman and other members of the street committee and of the council, and that nearly all the members of the council saw the work while it was being done, was sufficient to establish defendant's connection with the wrong done, although it was shown that the acts were done in the first instance without express authority.

37. Chicago *v.* Spoor, 190 Ill. 340, 60 N. E. 540, where damages were sought which arose from the construction of a viaduct.

38. *District of Columbia.*— Cahill *v.* District of Columbia, 3 MacArthur 419.

Massachusetts.— Saunders *v.* Lowell, 131 Mass. 387; Haskell *v.* Bristol County, 9 Gray 341.

Missouri.— Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299; Schumacher *v.* St. Louis, 3 Mo. App. 297.

Nebraska.— Omaha Second Cong. Church Soc. *v.* Omaha, 35 Nebr. 103, 52 N. W. 829.

Wisconsin.— Church *v.* Milwaukee, 31 Wis. 512.

See 36 Cent. Dig. tit. "Municipal Corporations," § 918.

39. **Negligence in plans of sewers and drains** see *infra*, XIV, C, 2.

Persons injured on highway by reason of defect in plan see *infra*, XIV, D.

40. Chicago *v.* Norton Milling Co., 97 Ill. App. 651; North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Rozell *v.* Anderson, 91 Ind. 591; Johnston *v.* Toronto, 25 Ont. 312.

41. North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Crawfordsville *v.* Bond, 96 Ind. 236; Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Indianapolis *v.* Tate, 39 Ind. 282; Indianapolis *v.* Lawyer, 38 Ind. 348; Indianapolis *v.* Huffer, 30 Ind. 235; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422. See, generally, *infra*, XIV, A, 5, a, (I).

42. Griggs *v.* Foote, 4 Allen (Mass.) 195; Nashville *v.* Sutherland, 92 Tenn. 335, 21 S. W. 674, 36 Am. St. Rep. 88, 19 L. R. A. 619.

43. Sceery *v.* Springfield, 112 Mass. 512.

agreements for compensating property-owners for injuries resulting from public works.[44]

g. Discontinuance or Abandonment of Improvement. If the city abandons an improvement, after all acts required for the taking of property have been performed, it will be liable to owners for the damages assessed;[45] but until final confirmation, the city may discontinue proceedings without liability;[46] except for loss caused by its wrongful acts or unreasonable delay.[47]

2. Kind of Improvement — a. Construction of Improvement or Repair of Streets and Ways in General. In the absence of constitutional or legislative provision, an action will not lie for consequential damages resulting to property from the improvement of streets, in a careful manner, pursuant to legal authority,[48] unless property be actually invaded or taken.[49]

b. Alteration of Course or Width of Street. By statute in some states provision is made for the compensation of any person damaged by the closing or alteration of streets,[50] but an act providing damages for laying out or vacating does not apply to widening streets.[51] A charter provision for payment of damages on the alteration of a street, to one through whose premises the street runs, does not give a right of action to owners of property which does not abut on the street.[52]

c. Change of Grade of Streets — (i) *In General.* A municipal corporation is not, in the absence of constitutional or legislative provision, liable for consequential injuries occasioned an adjoining owner by an alteration in the grade of a street, where it acts under proper authority and without negligence.[53] If, how-

44. Foster *v.* Boston, 22 Pick. (Mass.) 33.

A unilateral contract offering to the city favorable terms as to land damages may be considered by the board charged with the duty of dealing with such matters, and may be accepted and made binding by performance of that which is referred to in it as its consideration. Aspinwall *v.* Boston, 191 Mass. 441, 78 N. E. 103 [*citing* Bartlett *v.* Boston, 182 Mass. 460, 65 N. E. 827; Atkinson *v.* Newton, 169 Mass. 240, 47 N. E. 1029; Bell *v.* Boston, 101 Mass. 506; Boston *v.* Simmons, 9 Cush. (Mass.) 373; Crocket *v.* Boston, 5 Cush. (Mass.) 182; White *v.* Norfolk County, 2 Cush. (Mass.) 361].

45. Terre Haute *v.* Blake, 9 Ind. App. 403, 36 N. E. 932; Duncan *v.* Louisville, 8 Bush (Ky.) 98.

46. Shanfelter *v.* Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648; *In re* New York, 18 Johns. (N. Y.) 506; Hampton *v.* Com., 19 Pa. St. 329.

47. Hullin *v.* New Orleans Second Municipality, 11 Rob. (La.) 97, 43 Am. Dec. 202; Baltimore *v.* Black, 56 Md. 333; Black *v.* Baltimore, 50 Md. 235, 33 Am. Rep. 320.

48. *Alabama.*— Montgomery *v.* Townsend, 84 Ala. 478, 4 So. 780.

Indiana.— North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Terre Haute *v.* Turner, 36 Ind. 522; Snyder *v.* Rockport, 6 Ind. 237.

Iowa.— Creal *v.* Keokuk, 4 Greene 47.

Michigan.— Fuller *v.* Grand Rapids, 105 Mich. 529, 63 N. W. 530.

Missouri.— Tate *v.* Missouri, etc., R. Co., 64 Mo. 149; Wegmann *v.* Jefferson, 61 Mo. 55; Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463. *Compare* Naschold *v.* Westport, 71 Mo. App. 508.

New York.— Kavanagh *v.* Brooklyn, 38 Barb. 232.

Pennsylvania.— Green *v.* Reading, 9 Watts 382, 36 Am. Dec. 127.

Virginia.—Home Building, etc., Co. *v.* Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

Wisconsin.—Wallich *v.* Manitowoc, 57 Wis. 9, 14 N. W. 812.

See 36 Cent. Dig. tit. "Municipal Corporations," § 923.

In Ohio it is stated that where the municipal authorities have so appropriated or improved a street or alley as to indicate to a prudent and careful person that no further exercise of the power of appropriation or change in the improvement of the street or alley would be made, they cannot further exercise it to the injury of those who have acted upon the faith of their acts, without making compensation for such injury. Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73.

49. Munger *v.* St. Paul, 57 Minn. 9, 58 N. W. 601; Quinn *v.* Paterson, 27 N. J. L. 35; Hobson *v.* Philadelphia, 150 Pa. St. 595, 24 Atl. 1048; Gray *v.* Knoxville, 85 Tenn. 99, 1 S. W. 622.

Damages for taking under constitutional provisions see Eminent Domain.

50. See Paris Mountain Water Co. *v.* Greenville, 53 S. C. 82, 30 S. E. 699, holding that the term "alteration" included any change in the structural formation of a street, either by raising or lowering its surface or by changing its location.

51. *In re* Chestnut St., 8 Pa. Co. Ct. 55; Lucas *v.* Washington Borough, 2 Pa. Co. Ct. 630.

52. Cherry *v.* Rock Hill, 48 S. C. 553, 26 S. E. 798.

53. *Arkansas.*— Simmons *v.* Camden, 26 Ark. 276, 7 Am. Rep. 620.

ever, the city in changing a grade fails to proceed according to law,[54] or acts in an unskilful and careless manner,[55] a liability for the resulting damages arises. Express provision for damages resulting from a change of grade is frequently made by legislative enactment;[56] and a constitutional provision securing a right

Colorado.— Denver *v.* Vernia, 8 Colo. 399, 8 Pac. 656.

Connecticut.—Durand *v.* Ansonia, 57 Conn. 70, 17 Atl. 283.

Florida.— Selden *v.* Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L. R. A. 370.

Georgia.— Fuller *v.* Atlanta, 66 Ga. 80.

Illinois.— Murphy *v.* Chicago, 29 Ill. 279, 81 Am. Dec. 307; Roberts *v.* Chicago, 26 Ill. 249.

Indiana.—Aurora *v.* Fox, 78 Ind. 1; Macy *v.* Indianapolis, 17 Ind. 267; Baker *v.* Shoals, 6 Ind. App. 319, 33 N. E. 664.

Iowa.— Reilly *v.* Ft. Dodge, 118 Iowa 633, 92 N. W. 887; Farmer *v.* Cedar Rapids, 116 Iowa 322, 89 N. W. 1105; Burlington *v.* Gilbert, 31 Iowa 356, 7 Am. Rep. 143; Russell *v.* Burlington, 30 Iowa 262; Cole *v.* Muscatine, 14 Iowa 296.

Kansas.— Methodist Episcopal Church *v.* Wyandotte, 31 Kan. 721, 3 Pac. 527.

Kentucky.— Keasy *v.* Louisville, 4 Dana 154, 29 Am. Dec. 395.

Maine.— Hovey *v.* Mayo, 43 Me. 322.

Massachusetts.— Brown *v.* Lowell, 8 Metc. 172.

Michigan.— Cummings *v.* Dixon, 139 Mich. 269, 102 N. W. 751; Pontiac *v.* Carter, 32 Mich. 164.

Minnesota.— Abel *v.* Minneapolis, 68 Minn. 89, 70 N. W. 851.

Missouri.— Schattner *v.* Kansas City, 53 Mo. 162; Hoffman *v.* St. Louis, 15 Mo. 651.

New Jersey.— Plum *v.* Morris Canal, etc., Co., 10 N. J. Eq. 256.

New York.— Sauer *v.* New York, 90 N. Y. App. Div. 36, 85 N. Y. Suppl. 636; Matter of Ehrsam, 37 N. Y. App. Div. 272, 55 N. Y. Suppl. 942.

Oregon.— Davis *v.* Silverton, 47 Oreg. 171, 82 Pac. 16.

Pennsylvania.—Devlin *v.* Philadelphia, 206 Pa. St. 518, 56 Atl. 21; Allentown *v.* Kramer, 73 Pa. St. 406; *In re* Ridge St., 29 Pa. St. 391; O'Connor *v.* Pittsburgh, 18 Pa. St. 187.

Rhode Island.— O'Donnell *v.* White, 24 R. I. 483, 53 Atl. 633; Almy *v.* Coggeshall, 19 R. I. 549, 36 Atl. 1124.

Tennessee.—Humes *v.* Knoxville, 1 Humphr. 403, 34 Am. Dec. 657.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

Wisconsin.—Walish *v.* Milwaukee, 95 Wis. 16, 69 N. W. 818.

United States.—Smith *v.* Washington City, 20 How. 135, 15 L. ed. 858; Cheever *v.* Shedd, 5 Fed. Cas. No. 2,634, 13 Blatchf. 258.

England. — East Fremantle *v.* Annois, [1902] A. C. 213, 71 L. J. P. C. 39, 85 L. T. Rep. N. S. 732.

See 36 Cent. Dig. tit. "Municipal Corporations," § 925.

In Ohio a contrary rule prevails. Cohen *v.* Cleveland, 43 Ohio St. 190, 1 N. E. 589; Youngstown *v.* Moore, 30 Ohio St. 133; Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Cincinnati, etc., St. R. Co. *v.* Cumminsville, 14 Ohio St. 523; Crawford *v.* Delaware, 7 Ohio St. 459; Goodlae *v.* Cincinnati, 4 Ohio 500, 22 Am. Dec. 764; Ross *v.* Cincinnati, 24 Ohio Cir. Ct. 43. See Cincinnati *v.* Roth, 20 Ohio Cir. Ct. 317, 11 Ohio Cir. Dec. 95.

Where a city pledged its faith that a grade would not be altered without compensation for injuries, it was held liable in damages for a subsequent alteration. Goodall *v.* Milwaukee, 5 Wis. 32.

54. Delphi *v.* Evans, 36 Ind. 901, 10 Am. Rep. 12; Caldwell *v.* Nashua, 122 Iowa 179, 97 N. W. 1000; Wilber *v.* Ft. Dodge, 120 Iowa 555, 95 N. W. 186; Millard *v.* Webster City, 113 Iowa 220, 84 N. W. 1044 (holding that the city was liable for a change of grade, where no grade had been established or resolution adopted by the city council so ordering, although there was no trespass or direct encroachment on plaintiff's property); Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920 (so holding where a street was cut down without prior establishment of a grade or without any ordinance, resolution, or vote, authorizing it); Blanden *v.* Ft. Dodge, 102 Iowa 441, 71 N. W. 411; Fuller *v.* Mt. Vernon, 171 N. Y. 247, 63 N. E. 964; Mott *v.* New York, 2 Hill (N. Y.) 358; Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578; Meinzer *v.* Racine, 68 Wis. 241, 32 N. W. 139; Dore *v.* Milwaukee, 42 Wis. 108; Crossett *v.* Janesville, 23 Wis. 420.

In Missouri, however, it has been held that a municipal corporation can only be held responsible for the acts of its officers, agents, and servants, in changing the grade of a street, when such change is authorized by ordinance. Thompson *v.* Boonville, 61 Mo. 282; Gardner *v.* St. Joseph, 96 Mo. App. 657, 71 S. W. 63; Beatty *v.* St. Joseph, 57 Mo. App. 251.

55. Wegmann *v.* Jefferson, 61 Mo. 55; Meares *v.* Wilmington, 31 N. C. 73, 49 Am. Dec. 412; New Westminster *v.* Brighouse, 20 Can. Sup. Ct. 520. See also *infra*, XIV, D.

56. See the statutes of the several states. And see the following cases:

Massachusetts.— Underwood *v.* Worcester, 177 Mass. 173, 58 N. E. 589.

Michigan.— Cummings *v.* Dixon, 139 Mich. 269, 102 N. W. 751.

Minnesota.— McCarthy *v.* St. Paul, 22 Minn. 527.

Missouri.— Schrodt *v.* St. Joseph, 109 Mo. App. 627, 83 S. W. 543.

New York.— Matter of Comesky, 83 N. Y. App. Div. 137, 81 N. Y. Suppl. 1049; Matter

to damages for injury to property, although there be no actual taking, is to be found in a number of states, and may be invoked by one whose property is injured by a change of grade.[57] Such statutes will be construed with reference to other statutes upon the subject of public improvements,[58] and will not be given a retrospective operation in the absence of clear expression,[59] although damages may be claimed under the provisions of an act which went into effect after the adoption of an ordinance establishing a changed grade but before such change was actually made.[60] One asserting a right to damages from a change of grade must bring himself clearly within the terms of the statute affording such right.[61] A

of Greer, 39 N. Y. App. Div. 22, 56 N. Y. Suppl. 938; Matter of Grade-Crossing Com'rs, 17 N. Y. App. Div. 54, 44 N. Y. Suppl. 844; *In re* Church of Our Lady of Mercy, 10 N. Y. Suppl. 683, holding that a statute providing that whenever the grade of any street in an incorporated village shall be changed so as to injure or damage property situated thereon, the owner may apply to the supreme court for the appointment of commissioners, is applicable to a village, although inconsistent with the local village charter previously enacted.

Tennessee.— Knoxville *v.* Harth, 105 Tenn. 436, 58 S. W. 650, 80 Am. St. Rep. 901.

Vermont.— Fairbank *v.* Rockingham, 75 Vt. 221, 54 Atl. 186.

Canada.— *Re* Burnett, 31 Ont. 262.

See 36 Cent. Dig. tit. "Municipal Corporations," § 925.

Amendments of charter.—Although the charter of a city contains no provision for the payment of damages to those injured by the grading of streets, an amendment which provides for such damages and for their assessment is germane to the general purpose of the charter. Sligh *v.* Grand Rapids, 84 Mich. 497, 47 N. W. 1093.

General operation of law.— Where the charter of a city provides that the owner of any lot injured by the alteration of a grade shall be entitled to compensation, the city cannot be authorized by a special act to change the grade of streets within a limit of district, without compensation for consequential injuries. Anderton *v.* Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830, holding that such a statute was violative of the constitution of the United States in denying the lot owners in the specific district the equal protection of the laws.

Repeal.—A special act providing for damages is not repealed by a subsequent improvement statute in which no provision for damages is made. People *v.* Green, 64 N. Y. 606; *In re* Smiddy, 19 N. Y. Suppl. 949; Seaman *v.* Washington, 172 Pa. St. 467, 33 Atl. 756; Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578.

Abolition of grade crossing.—A statute providing for the determination of damages upon the separation of the grade of a street and a railroad, at a crossing, applies as well to a case where a highway is for the first time being extended across a railroad as to a case where the grades at an existing crossing are being altered. Harper *v.* Detroit, 110 Mich. 427, 68 N. W. 265. Where a statute providing damages upon a separation of grades, where a street crosses a railroad, contemplates an award of damages in gross and not merely those that have already accrued to the abutting owners, the same rule will be applied in an action against the city to recover damages for its failure to proceed in accordance with the statute. Harper *v.* Detroit, *supra*.

57. See EMINENT DOMAIN, 15 Cyc. 664.

58. Where there is no difficulty in the harmonious and concurrent working of both statutes, a general statute providing for the determination of damages to abutting owners, resulting from a change of the grade of a street, is not repealed or superseded by a law providing the procedure in such cases, when the grade of a street is changed by the authorities of a village. Torge *v.* Salamanca, 176 N. Y. 324, 68 N. E. 626, holding that Laws (1897), c. 414, §§ 159, 342, subd. 4, do not supersede or repeal Laws (1883), c. 113, as amended by Laws (1884), c. 281, and Laws (1894), c. 172.

Grade crossing acts.—A statute providing the procedure in case of a change of the grade or widening of a street incident to the abolition of a railroad grade crossing has been held not to interfere with the right of a property-owner, where part of a lot is taken to widen a street, to compensation for the damage to the residue of the lot, but the entire amount of compensation should be awarded in the proceedings by the grade crossing commissioners. Matter of Baltimore Grade Crossing Com'rs, 6 N. Y. App. Div. 327, 40 N. Y. Suppl. 520. See also Torge *v.* Salamanca, 176 N. Y. 324, 68 N. E. 626.

59. *In re* Andersen, 178 N. Y. 416, 70 N. E. 921; Folkenson *v.* Easton Borough, 116 Pa. St. 523, 8 Atl. 869. See also *supra*, XIII, D, 1, b, (II).

60. Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146 [*affirming* 38 Ill. App. 133]; St. Louis *v.* Lang, 131 Mo. 412, 33 S. W. 54. And see Healey *v.* New Haven, 49 Conn. 394.

61. *In re* Allen's Lane, 143 Pa. St. 414, 22 Atl. 673 (holding that a statute providing for damages in case of any alteration that may be made of the street grades of any portion of a city does not apply to alterations of grades which are established after its adoption); Walish *v.* Milwaukee, 95 Wis. 16, 69 N. W. 818 (holding that under a statute providing that where the grade of a street should thereafter be established and the street should have been actually graded, the owner of any lot damaged by a subsequent

municipality may so act in conjunction with a street railroad company as to render itself liable for an alteration in the grade made by the company.[62] But the act of a municipality in granting a street railroad company the right to build its railroad along certain streets is not an order for specific repairs or for a change of grade, within the meaning of a statute providing a right to damages in favor of a person injured in such cases.[63]

(II) *Nature and Extent of Change.* To render the city liable there must have been an actual physical change of grade;[64] and where a street has fallen away the city is not liable for raising it to the established grade;[65] or for subsequently bringing a street to the grade that had been established at the time of dedication.[66] It is no defense that a change brought the grade to a line with the natural surface of the street,[67] or that it enabled the city to construct a system of sewers calculated to abate a nuisance.[68] An act providing for compensation for injury resulting from a change of street grade will include a change in the grade of a sidewalk;[69] and liability will attach under such an act whether the entire width of the street or only a part thereof is graded.[70]

(III) *Establishment and Legality of Street or Grade.* It is sometimes held that if a street has never been legally laid or a grade thereof lawfully established, there can be no change of grade within the meaning of an act providing for damages;[71] but authority can be found for the doctrine that a grade may be sufficiently established by user to warrant award of damages for a formal

alteration of grade should be entitled to compensation, it was necessary that the street be actually graded to the established grade to entitle the owner to compensation). See also Bellis *v.* Flemington, 69 N. J. L. 349, 55 Atl. 300.

The erection of a building is under some statutes a condition to the right to damages resulting from a change in grade. Manufacturers' Land, etc., Co. *v.* Camden, 73 N. J. L. 263, 63 Atl. 5.

A change of grade by implication has been held sufficient to justify an award of damages. Conklin *v.* Keokuk, 73 Iowa 343, 35 N. W. 444, holding that where one of two parallel streets was lowered in grade, damages could be recovered for injuries to property fronting upon a cross street, since the lowering of one of the parallel streets had the effect of changing the grade of connecting streets between them.

62. Clark *v.* Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737; Lewis *v.* Homestead, 194 Pa. St. 199, 45 Atl. 123 (holding that an ordinance, although entitled as authorizing a railroad company to change the grade of its tracks across a street, was also an ordinance for a change in the grade of the street necessarily required by the change in the grade of the railroad); Denison, etc., Suburban R. Co. *v.* James, 20 Tex. Civ. App. 358, 49 S. W. 660 (holding that where a railroad company raises the grade of a street, through a contractor, pursuant to authority granted to it or to the contractor by a city, acting under the power conferred by charter to alter the grade of streets, the city alone is liable to an abutter for damages resulting from the change). But see Bancroft *v.* San Diego, 120 Cal. 432, 52 Pac. 712, holding that in an action expressly based on an alteration in the grade of a street made by the city, a recovery could not be had for damages resulting from the construction of a street railroad, although the railroad had constructed its road-bed in reference to a changed grade in compliance with a requirement that its track should be constructed on the official grade.

63. Laroe *v.* Northampton St. R. Co., 189 Mass. 254, 75 N. E. 255; Vigeant *v.* Marlborough, 175 Mass. 459, 56 N. E. 708.

64. McCarthy *v.* St. Paul, 22 Minn. 527; Whitmore *v.* Tarrytown, 137 N. Y. 409, 33 N. E. 489; *In re* L Street, 2 Pa. Dist. 179, 12 Pa. Co. Ct. 406.

65. Garrity *v.* Boston, 161 Mass. 530, 37 N. E. 672.

66. Lane *v.* Boston, 125 Mass. 519; Brady *v.* Fall River, 121 Mass. 262.

67. Ressegieu *v.* Sioux City, 94 Iowa 543, 63 N. W. 184, 28 L. R. A. 389.

68. Rudderow *v.* Philadelphia, 166 Pa. St. 241, 31 Atl. 53.

69. *Alabama.*— Montgomery *v.* Townsend, 84 Ala. 478, 4 So. 780.

Connecticut.— McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000.

Indiana.—Kokomo *v.* Mahan, 100 Ind. 242.

Massachusetts.— Fall River Print Works *v.* Fall River, 110 Mass. 428.

Wisconsin.—Church *v.* Milwaukee, 34 Wis. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 926.

70. Stickford *v.* St. Louis, 75 Mo. 309 [*affirming* 7 Mo. App. 217]; Dore *v.* Milwaukee, 42 Wis. 108.

71. *Iowa.*— Kepple *v.* Keokuk, 61 Iowa 653, 17 N. W. 140.

New York.— Fish *v.* Rochester, 6 Paige 268. See also Hosmer *v.* Gloversville, 27 Misc. 669, 59 N. Y. Suppl. 559.

Pennsylvania.— Huckestein *v.* Allegheny City, 165 Pa. St. 367, 30 Atl. 982.

Rhode Island.— Gardiner *v.* Johnston, 16

change of the same by the city.[72] Under the provisions of some statutes, in order that an abutting owner may recover damages from a change in grade, he must have made improvements with reference to an established grade thereafter changed.[73]

(iv) *Establishment, or Change From Natural Surface.* In the absence of constitutional or legislative provision a municipality will not be liable for establishing the grade of a street above or below the natural surface;[74] but an act providing damages for injury caused by a change of grade will usually apply to an original establishment of grade above or below the natural surface;[75] and in Ohio, where damages are allowed in the absence of statute, it is held that the city will be liable for injury caused by an original establishment of grade unless the grade is so reasonable that a property-owner might have anticipated its establishment and improved his property accordingly.[76]

d. Vacation of Streets. Property-owners injured by the vacation of a public street are usually regarded as having a remedy under the constitutional provisions relating to the exercise of the power of eminent domain.[77] But particular provision as to damages in such cases is sometimes made by statute.[78] Such a statute has been held inapplicable to streets which have never been laid out,[79] and will afford a remedy only from an injury which is a direct result of the vacation and which differs from that sustained by the general public.[80] The opening of a

R. I. 94, 12 Atl. 888; Aldrich *v.* Providence, 12 R. I. 241.

Washington.—Sargent *v.* Tacoma, 10 Wash. 212, 38 Pac. 1048.

See 36 Cent. Dig. tit. "Municipal Corporations," § 927.

72. Lambertville *v.* Clevinger, 30 N. J. L. 53; Folmsbee *v.* Amsterdam, 142 N. Y. 118, 36 N. E. 821; Bartlett *v.* Tarrytown, 55 Hun (N. Y.) 492, 8 N. Y. Suppl. 739; *In re* Church of Our Lady of Mercy, 10 N. Y. Suppl. 683; Chattanooga *v.* Geiler, 13 Lea (Tenn.) 611; Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852.

73. Reilly *v.* Ft. Dodge, 118 Iowa 633, 92 N. W. 887; Farmer *v.* Cedar Rapids, 116 Iowa 322, 89 N. W. 1105; People *v.* Muh, 101 N. Y. App. Div. 423, 92 N. Y. Suppl. 22; McGee *v.* Avondale, 1 Ohio S. & C. Pl. Dec. 379; Almy *v.* Coggeshall, 19 R. I. 549, 36 Atl. 1124.

The improvement of a lot "according to the grade" of the adjacent street does not require that the foundations of the building erected thereon should be exactly at grade, or at any invariable elevation above or below it. Stevens *v.* Cedar Rapids, 128 Iowa 227, 103 N. W. 363.

74. *Colorado.*— Leiper *v.* Denver, 36 Colo. 110, 85 Pac. 849, 7 L. R. A. N. S. 108.

Illinois.— Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392.

Indiana.— Keehn *v.* McGillicuddy, 15 Ind. App. 580, 44 N. E. 554.

Michigan.— Detroit *v.* Beckman, 34 Mich. 125, 22 Am. Rep. 507.

Minnesota.—Lee *v.* Minneapolis, 22 Minn. 13.

Pennsylvania.— Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342.

Rhode Island.— Rounds *v.* Mumford, 2 R. I. 154.

Texas.— Allen *v.* Paris, 1 Tex. App. Civ. Cas. § 885.

See 36 Cent. Dig. tit. "Municipal Corporations," § 928.

75. *California.*— Eachus *v.* Los Angeles Consol. Electric R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

Missouri.— Cole *v.* St. Louis, 132 Mo. 633, 34 S. W. 469; Smith *v.* St. Joseph, 122 Mo. 643, 27 S. W. 344; Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 41 Am. St. Rep. 684, 23 L. R. A. 658; Davis *v.* Missouri Pac. R. Co., 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 649; Fred *v.* Kansas City Cable R. Co., 65 Mo. App. 121.

Nebraska.— Harvard *v.* Crouch, 47 Nebr. 133, 66 N. W. 276.

New York.— McCall *v.* Saratoga Springs, 9 N. Y. Suppl. 170.

Pennsylvania.— Hendricks' Appeal, 103 Pa. St. 358; New Brighton *v.* United Presb. Church, 96 Pa. St. 331; Longstreth *v.* Phœnixville, 2 Chest Co. Rep. 86; Billingfelt *v.* Adamstown, 5 Lanc. L. Rev. 107.

Texas.— Ft. Worth *v.* Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059.

See 36 Cent. Dig. tit. "Municipal Corporations," § 928.

76. Akron *v.* Chamberlain County, 34 Ohio St. 328, 32 Am. Rep. 367; Crawford *v.* Delaware, 7 Ohio St. 459.

77. See EMINENT DOMAIN, 15 Cyc. 665 *et seq.*

78. See the statutes of the several states. And see Bachran *v.* Von Raden, 1 N. Y. Suppl. 533 [*affirmed* in 119 N. Y. 614, 23 N. E. 1143]; Peters *v.* Carleton, 1 N. Y. Suppl. 531 [*affirmed* in 124 N. Y. 637, 26 N. E. 759]; Johnston *v.* Lonstorf, 128 Wis. 17, 107 N. W. 459.

79. *In re* Barclay, 91 N. Y. 430; Matter of New York, 41 N. Y. App. Div. 586, 58 N. Y. Suppl. 736.

80. Natick Gas Light Co. *v.* Natick, 175 Mass. 246, 56 N. E. 292; Cram *v.* Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282;

street so as to include an alley cannot be regarded as damaging property-owners by depriving them of the use of the alley, where they have the free and uninterrupted use of the ground for the same purposes after the opening of the street as before.[81]

e. Structures or Other Works in Streets.[82] While the erection of structures and other works in public streets is in some jurisdictions regarded as imposing an additional servitude for which an adjoining property-owner may be compensated,[83] structures in the street which are such as a municipality has authority to make cannot be regarded as nuisances so as to afford a common-law right of action;[84] and in any event the property-owner cannot recover damages for an injury which he sustains in common with the public generally.[85] A city has been held not to be liable for damages resulting from the construction of approaches to an overhead railroad crossing,[86] or for obstructions of a street or river in constructing a tunnel to afford passage for the street.[87] But on the other hand the occupation of a street for its entire width by a viaduct approach on a higher grade than the street has been held equivalent to a change of grade.[88]

f. Sewers, Drains, and Watercourses.[89] Unless negligent in the prosecution of the work,[90] a municipality will not be liable for injury to property resulting from the construction of a sewer;[91] even though the same is constructed along a public way lying beyond the municipal borders.[92]

g. Levees and Dams. A city may protect its territory from overflow by construction of a levee, and in the absence of negligence will not be liable to one who owns a lot between the levee and the river.[93] So, where in the erection of an improvement the construction of a coffer-dam becomes necessary, the city is not liable for consequential damages, where the work is properly and expeditiously done.[94]

3. Elements and Measure of Damages — a. In General. The general rule as to the measure of damage, whether for a change of grade,[95] street open-

Chicago *v.* Baker, 98 Fed. 830, 39 C. C. A. 318.

81. Fagan *v.* Chicago, 84 Ill. 227.

82. **Use of street for non-highway purposes** see *supra*, XII, A, 5.

83. See Eminent Domain, 15 Cyc. 668 *et seq.*

84. Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336.

85. See Hobson *v.* Philadelphia, 155 Pa. St. 131, 25 Atl. 1046, holding that where, owing to the steepness of a street, the city erected, for the convenience of pedestrians, platforms and steps along the street on the side opposite plaintiff's property, and so obstructed the streets that it could not be used for wagons, plaintiff was not entitled to recover.

86. Burritt *v.* New Haven, 42 Conn. 174.

87. Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336.

88. Colclough *v.* Milwaukee, 92 Wis. 182, 65 N. W. 1039.

In Ohio it has been held that an abutting owner may recover damages occasioned by the construction of a viaduct over and along a street, resulting from the diversion of travel, noise, jarring, and obstruction of light and air. Cohen *v.* Cleveland, 43 Ohio St. 190, 1 N. E. 589.

89. **Liability for defects and obstructions in sewers, drains, and watercourses** see *infra*, XIV, C.

90. Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729; Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Cooper *v.* Cedar Rapids, 112 Iowa 367, 83 N. W. 1050; Arn *v.* Kansas City, 14 Fed. 236, 4 McCrary 558.

91. *Indiana.*— Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

Iowa.— Bennett *v.* Mt. Vernon, 124 Iowa 537, 100 N. W. 349.

Mississippi.— White *v.* Yazoo City, 27 Miss. 357.

Missouri.— Lambar *v.* St. Louis, 15 Mo. 610.

New York.— Kelsey *v.* King, 32 Barb. 410, 11 Abb. Pr. 180 [*affirmed* in 33 How. Pr. 39].

See 36 Cent. Dig. tit. "Municipal Corporations," § 931.

92. Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

93. Hoard *v.* Des Moines, 62 Iowa 326, 17 N. W. 527.

94. Atwater *v.* Canandaigua, 124 N. Y. 602, 27 N. E. 385.

95. *Alabama.*— Montgomery *v.* Maddox, 89 Ala. 181, 7 So. 433.

Connecticut.— New Haven Steam Saw Mill Co. *v.* New Haven, 72 Conn. 288, 44 Atl. 233; Platt *v.* Milford, 66 Conn. 320, 34 Atl. 82.

Georgia.— East Rome *v.* Lloyd, 124 Ga. 852, 53 S. E. 103; Roughton *v.* Atlanta, 113 Ga. 948, 39 S. E. 316.

Illinois.— Chicago *v.* Anglum, 104 Ill. App. 188; Barrington *v.* Meyer, 103 Ill. App. 124; Joliet *v.* Schroeder, 92 Ill. App. 68; Ross

ing,[96] or other improvement,[97] is that it consists of the difference in the value of the property affected immediately before and immediately after the making of the improvement, allowance being made for the particular use to which the property is adapted [98] and for direct benefit it has received by reason of the improvement;[99] and if land is rendered entirely useless by an improvement the owner should

v. Chicago, 91 Ill. App. 416; Joliet *v.* Adler, 71 Ill. App. 456; Jacksonville *v.* Loar, 65 Ill. App. 218.

Kansas.— Leavenworth *v.* Duffy, 10 Kan. App. 124, 62 Pac. 433.

Kentucky.— Henderson *v.* Winstead, 109 Ky. 328, 58 S. W. 777, 22 Ky. L. Rep. 828; Louisville *v.* Kaye, 92 S. W. 554, 29 Ky. L. Rep. 116; Henderson *v.* Crowder, 91 S. W. 1120, 28 Ky. L. Rep. 1255; Louisville *v.* Bohlsen, 61 S. W. 1014, 22 Ky. L. Rep. 1864; Louisville *v.* Harhin, 61 S. W. 1011, 22 Ky. L. Rep. 1865; Louisville *v.* Hegan, 49 S. W. 532, 20 Ky. L. Rep. 1532.

Maine.— Chase *v.* Portland, 86 Me. 367, 29 Atl. 1104.

Mississippi.— Warren County *v.* Rand, 88 Miss. 395, 40 So. 481.

Missouri.— Robinson *v.* St. Joseph, 97 Mo. App. 503, 71 S. W. 465; Taylor *v.* Jackson, 83 Mo. App. 641; Rives *v.* Columbia, 80 Mo. App. 173. But if it should appear that the cost of restoring the premises is less than the diminution of its market value, such cost is the proper measure of damages. If, however, the cost of restitution is more than the diminution the latter is generally the true measure of damages. Smith *v.* Kansas City, 128 Mo. 23, 30 S. W. 314; Stroker *v.* St. Joseph, 117 Mo. App. 350, 93 S. W. 860.

Nebraska.—Omaha *v.* Flood, 57 Nebr. 124, 77 N. W. 379; Harvard *v.* Crouch, 47 Nebr. 133, 66 N. W. 276.

Pennsylvania.—*In re* Sixty-Second St., 214 Pa. St. 137, 63 Atl. 426; Philadelphia Ball Club *v.* Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 73 Am. St. Rep. 835, 46 L. R. A. 724; Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171; Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409.

Texas.— Dallas *v.* Leake, (Civ. App. 1896) 34 S. W. 338; San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256; Ft. Worth *v.* Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059.

West Virginia.— McCrary *v.* Fairmont, 46 W. Va. 442, 33 S. E. 245; Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852.

See 36 Cent. Dig. tit. "Municipal Corporations," § 946.

Failure to keep the street in repair after change in grade cannot be considered as an element of damage for changing of grade. Henderson *v.* Winstead, 109 Ky. 328, 58 S. W. 777, 22 Ky. L. Rep. 828.

96. Darlington *v.* Allegheny, 189 Pa. St. 202, 42 Atl. 112.

Destruction of a well may afford a ground of recovery. Bickford *v.* Hyde Park, 173 Mass. 552, 54 N. E. 343, 73 Am. St. Rep. 520; Shuter *v.* Philadelphia, 3 Phila. (Pa.) 228. But see O'Neil *v.* Ben Avon Borough, 9 Pa. Dist. 130.

Injury to quarry.— In proceedings to assess damages from the construction of a street through a quarry, evidence may be introduced to show that the rock had been shattered by the use of dynamite in making the road. White *v.* Medford, 163 Mass. 164, 39 N. E. 997.

Difficulty of drainage may be asserted as an element of damage. Chicago *v.* Jackson, 88 Ill. App. 130; Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409; Whitehead *v.* Manor Borough, 23 Pa. Super. Ct. 314.

97. Heinrich *v.* St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490.

Trouble and expense.—Under a statute providing that one claiming damages for the laying out of a highway shall have indemnity for the trouble and expense to which he has been put, recovery cannot be had for disquietude, vexation, and annoyance, but the word "trouble" refers to trouble from which some damage or pecuniary loss results, involving labor and the expenditure of time or occasioning inconvenience to the owner in the use and occupation of the land, all of which may be estimated in damages by a standard common to all cases. Whitney *v.* Lynn, 122 Mass. 338.

98. *Iowa.*— Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

Massachusetts.— Dana *v.* Boston, 176 Mass. 97, 57 N. E. 325 [*citing* Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; Stone *v.* Heath, 135 Mass. 561; Marsden *v.* Cambridge, 114 Mass. 490; Hartshorn *v.* Worcester, 113 Mass. 111; Dickenson *v.* Fitchburg, 13 Gray 546].

Mississippi.— Warren County *v.* Rand, 88 Miss. 395, 40 So. 481.

Nebraska.— Lowe *v.* Omaha, 33 Nebr. 587, 50 N. W. 760.

Ohio.— Little Miami R. Co. *v.* Martin, 1 Ohio Dec. (Reprint) 440, 10 West. L. J. 54.

Pennsylvania.— *In re* Sixty-Second St., 214 Pa. St. 137, 63 Atl. 426; Dobson *v.* Philadelphia, 9 Pa. Dist. 139.

Canada.— Matter of Harvey, 16 Ont. App. 468.

99. *Kentucky.*—Louisville *v.* Kaye, 92 S. W. 554, 29 Ky. L. Rep. 116.

Massachusetts.— Garvey *v.* Revere, 187 Mass. 545, 73 N. E. 664; Dorgan *v.* Boston, 12 Allen 223.

Mississippi.— Warren County *v.* Rand, 88 Miss. 395, 40 So. 481.

Missouri.— Kent *v.* St. Joseph, 72 Mo. App. 42.

Canada.— *In re* Pryce, 20 Ont. App. 16.

Set-off of benefits see *infra*, XIII, D, 3, f.

receive the full value thereof.[1] On the opening of a street the jury may consider that the market value of land will be affected by reason of the cost of other street improvements likely to be charged upon it.[2] Where the rule is adopted that the measure of damages is the change in market value, specific items of injury can be considered only in determining the difference in market value, not as the basis of specific awards of damages.[3] An abutting owner has no right to damages for a change of grade where the property is left as convenient of access as before and there is no depreciation in its market value,[4] or in case the market value of the property, including the use to which it may be devoted, will be enhanced.[5]

b. Time of Estimation. The right to damages from the vacation of a street is fixed at the time of the vacation, and a person is not deprived of his rights by the fact that he afterward makes a subdivision of his property.[6] Damages to buildings occasioned by street-opening proceedings are to be determined as far as possible as to the time when the street is actually opened.[7] Under a statute permitting an owner to elect whether he will pay the expenses of an improvement and retain his property, or surrender his property to the city for a fair compensation, the owner is entitled only to the value of the land at the time of the taking, making due allowance for the improvement, and he cannot recover for previous loss or inconvenience.[8]

c. Speculative Damages. A person injured by a change of grade is not entitled to recover speculative damages,[9] and conjectural future profits may not be set up as an item of damage.[10] In assessing damages for the opening of streets, uncertainty concerning the city's future policy as to the opening of future streets and their grade cannot be considered.[11]

d. Remote Damages. The injuries which may be recovered must be the direct and proximate consequences of the improvement.[12] So in assessing the damages for an improvement, damages which result from the maintenance of such

1. Ft. Wayne *v.* Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263; Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635; Kingsland *v.* New York, 45 Hun (N. Y.) 198 [*affirmed* in 110 N. Y. 569, 18 N. E. 435].

Where the owner retains substantial rights in land appropriated by a city to make a sloping fill, he is not entitled to be allowed the value of the land in fee simple. Dodson *v.* Cincinnati, 34 Ohio St. 276.

2. De Benneville *v.* Philadelphia, 204 Pa. St. 51, 53 Atl. 521. See also EMINENT DOMAIN, 15 Cyc. 710 text and notes 47, 48.

3. Covington *v.* Taffee, 68 S. W. 629, 24 Ky. L. Rep. 373; Cincinnati *v.* Williams, 8 Ohio Dec. (Reprint) 718, 9 Cinc. L. Bul. 243; Mead *v.* Pittsburg, 194 Pa. St. 392, 45 Atl. 59; Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409; Whitehead *v.* Manor Borough, 23 Pa. Super. Ct. 314.

4. Lotze *v.* Cincinnati, 61 Ohio St. 272, 55 N. E. 828.

5. Seattle *v.* Methodist Protestant Church Bd. of Home Missions, 138 Fed. 307, 70 C. C. A. 597.

6. Chicago *v.* Burcky, 158 Ill. 103, 42 N. E. 178, 49 Am. St. Rep. 142, 29 L. R. A. 568 [*affirming* 57 Ill. App. 547].

7. Matter of Vyse St., 80 N. Y. App. Div. 622, 80 N. Y. Suppl. 842; Matter of Rogers Place, 65 N. Y. App. Div. 1, 72 N. Y. Suppl. 459; People *v.* Coler, 60 N. Y. App. Div. 77, 69 N. Y. Suppl. 863; Matter of West Farms Road, 47 Misc. (N. Y.) 216, 95 N. Y. Suppl. 894, holding that where the owner changed the position of his building to meet the change of grade in an intersecting street, after the establishment of the grade of a new street, he had no claim for damages in the proceedings for the opening of such new street.

8. Bancroft *v.* Cambridge, 126 Mass. 438.

9. Philadelphia Ball Club *v.* Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 73 Am. St. Rep. 835, 46 L. R. A. 724, holding that in determining damages to property which had been leased for use as a ball park, the profits of the lessees during the continuance of the lease could not be considered as an element. See also People *v.* Yonkers, 39 Barb. (N. Y.) 266.

10. Chicago Sanitary Dist. *v.* McGuirl, 86 Ill. App. 392.

11. J. G. Brill Co. *v.* Philadelphia, 167 Pa. St. 1, 31 Atl. 348.

12. *In re* Tucker, etc., Sts., 166 Pa. St. 336, 31 Atl. 117.

Grade crossing removal.— Where by agreement of a railroad company and a city a grade crossing is abolished, through the raising of the railroad tracks and lowering of the street, one whose property does not abut upon the street cannot recover as damages occasioned by the change of grade the increased cost of moving freight to and from his building and cars upon the railroad track, since such injury is effected wholly by the elevation of the tracks. *In re* Tucker, etc., Sts., 166 Pa. St. 336, 31 Atl. 117.

improvement in an improper manner cannot be recovered.[13] Upon a change of grade a lot owner cannot recover the depreciation by the effect upon the appearance of his building of changes wholly external to his premises.[14]

e. Particular Elements of Damage — (I) *Injuries to Buildings and Improvements.* Under the statutes of some jurisdictions damages will be awarded only with reference to the realty, without regard to the improvements erected thereon.[15] In other jurisdictions the improvements alone will be considered,[16] buildings only being regarded as improvements in some cases.[17] While in still other jurisdictions the depreciation of the entire value of the property including the improvements is held to be the measure of damages.[18] If a building or a part thereof projects into the street either wrongfully or under a revocable license it may be injured or ordered removed by the city without liability for compensation.[19] Damages to improvements are not necessarily proportionate to the damage to the land itself.[20]

(II) *Cost of Grading or Otherwise Adjusting Abutting Premises.* The fact that an abutting owner will be put to expense in cutting down or filling his lot to conform to a change of grade does not in itself create a right of action against the city;[21] but where damages are secured by statute, the cost of adjusting premises to the changed grade may be considered.[22]

(III) *Destruction of Sidewalks and Shade Trees.* The destruction of a sidewalk and of shade trees set out between the sidewalk and roadway should be considered in determining the decrease in value of property caused by a change of the grade of a street;[23] and in the construction of any improvement, the city will

13. Badger *v.* Boston, 130 Mass. 170.

14. Springfield *v.* Griffith, 21 Ill. App. 93.

15. Dale *v.* St. Joseph, 59 Mo. App. 566.

16. Cincinnati *v.* Williams, 8 Ohio Dec. (Reprint) 718, 9 Cinc. L. Bul. 243. See Seasongood *v.* Cincinnati, 5 Ohio Cir. Ct. 225, 3 Ohio Cir. Dec. 113 (holding that an improvement for which damages may be allowed may consist in the act of a property-owner in grading his property to conform to the established grade of the street as well as in erection of structures or buildings; and holding further that the measure of damage is the value of the improvement destroyed or rendered valueless, not exceeding the value of the lot); Chatfield *v.* Cincinnati, 7 Ohio Dec. (Reprint) 111, 1 Cinc. L. Bul. 125.

17. Newark *v.* Sayre, 41 N. J. L. 158; People *v.* Gilon, 76 Hun (N. Y.) 346, 27 N. Y. Suppl. 704 [*affirmed* in 148 N. Y. 763, 43 N. E. 989]. *Contra*, Chase *v.* Sioux City, 86 Iowa 603, 53 N. W. 333.

18. Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Hempstead *v.* Des Moines, 52 Iowa 303, 3 N. W. 123; Dalzell *v.* Davenport, 12 Iowa 437; Seattle *v.* Methodist Protestant Church Bd. of Home Missions, 138 Fed. 307, 70 C. C. A. 597.

19. Winter *v.* Montgomery, 83 Ala. 589, 3 So. 235; Shelton Co. *v.* Birmingham, 61 Conn. 518, 24 Atl. 978; Billinfelt *v.* Adamstown, 5 Lanc. L. Rev. (Pa.) 107. But see Seaman *v.* Washington, (Pa. 1896) 33 Atl. 756, holding that if a porch is erected over a sidewalk by permission of the city, an injury to the same must be considered in estimating the decrease in the value of the property caused by a change of grade.

20. Spokane Traction Co. *v.* Granath, 42 Wash. 506, 85 Pac. 261.

21. Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321; Springfield *v.* Griffith, 21 Ill. App. 93; Kelly *v.* Baltimore, 65 Md. 171, 3 Atl. 594; Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409; Greensburg *v.* Young, 53 Pa. St. 280; Cheever *v.* Shedd, 5 Fed. Cas. No. 2,634, 13 Blatchf. 258.

22. *Connecticut.*— Pickles *v.* Ansonia, 76 Conn. 278, 56 Atl. 552; Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

Georgia.— Augusta *v.* Schrameck, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146.

Illinois.— Springfield *v.* Griffith, 46 Ill. App. 246.

Iowa.— Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82.

Kansas.— Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775.

Maine.— Chase *v.* Portland, 86 Me. 367, 29 Atl. 1104.

Minnesota.— McCarthy *v.* St. Paul, 22 Minn. 527.

Missouri.— Stroker *v.* St. Joseph, 117 Mo. App. 350, 93 S. W. 860.

Wisconsin.— Tyson *v.* Milwaukee, 50 Wis. 78, 5 N. W. 914; French *v.* Milwaukee, 49 Wis. 584, 6 N. W. 244; Stowell *v.* Milwaukee, 31 Wis. 523.

United States.— Seattle *v.* Methodist Protestant Church Bd. of Home Missions, 138 Fed. 307, 70 C. C. A. 597.

See 36 Cent. Dig. tit. "Municipal Corporations," § 945.

23. *Connecticut.*— Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183; Holley *v.* Torrington, 63 Conn. 426, 28 Atl. 613; Shelton Co. *v.* Birmingham, 62 Conn. 456, 26 Atl. 348; Shelton Co. *v.* Birmingham, 61 Conn. 518, 24 Atl. 978.

be liable for unnecessarily removing or negligently injuring an adjoining owner's shade trees.[24] A statute awarding a right to damage for change of grade in a highway includes such as may result from a change of grade in sidewalks.[25]

(IV) *Interference With Access.* The fact that a change of grade renders access to abutting property difficult will not, in the absence of statute, create a right of action against the city;[26] but some cases hold that if the means of access are practically cut off the city will be liable.[27]

(V) *Removal of Lateral Support.* Although there are cases to the contrary,[28] the general rule seems to be that in constructing public improvements a municipality will not be liable for injury to adjoining property caused by the removal of lateral support,[29] unless such injury is due to negligence in the construction of the work;[30] but a city has been held liable for damages to adjoining land resulting from the withdrawal of quicksand from beneath its surface in the course of construction of a sewer.[31]

(VI) *Injury to Business or Temporary Loss of Use of Property.* Under some statutes recovery may be had for the loss of the rental value of buildings during the work of changing the grade or during the time taken to adjust buildings to a new grade.[32] But as a rule damages may not be recovered for injury to business or for the temporary loss of the use of property during the construction of a public improvement if the work is prosecuted with reasonable diligence;[33]

Florida.— Dorman *v.* Jacksonville, 13 Fla. 538, 7 Am. Rep. 253.

Iowa.— Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920.

Kentucky.— Ludlow *v.* Froste, 45 S. W. 661, 20 Ky. L. Rep. 216.

Missouri.— Walker *v.* Sedalia, 74 Mo. App. 70; Naschold *v.* Westport, 71 Mo. App. 508. But see Colston *v.* St. Joseph, 106 Mo. App. 714, 80 S. W. 590.

Pennsylvania.— Seaman *v.* Washington, (1896) 33 Atl. 756.

See 36 Cent. Dig. tit. "Municipal Corporations," § 941.

24. Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Kemp *v.* Des Moines, 125 Iowa 640, 101 N. W. 474.

25. McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000.

26. Randall *v.* Christiansen, 76 Iowa 169, 40 N. W. 703; Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322; Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409; *In re* Ruscomb St., 30 Pa. Super. Ct. 476.

27. *Colorado.*— Denver *v.* Vernia, 8 Colo. 399, 8 Pac. 656.

Illinois.— Joliet *v.* Blower, 49 Ill. App. 464 [*affirmed* in 155 Ill. 414, 40 N. E. 619].

Indiana.— Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1.

Kentucky.— West Covington *v.* Schultz, 30 S. W. 410, 660, 16 Ky. L. Rep. 831.

Missouri.— Heinrich *v.* St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490; Werth *v.* Springfield, 78 Mo. 107.

See 36 Cent. Dig. tit. "Municipal Corporations," § 942.

Under the Ohio rule a property-owner may recover for an interference with his means of access by a change of grade. Smith *v.* Wayne County, 50 Ohio St. 628, 35 N. E. 796, 40 Am. St. Rep. 699; Chatfield *v.* Cincinnati, 7 Ohio Dec. (Reprint) 111, 1 Cinc. L. Bul. 125.

28. Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Nichols *v.* Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; Dyer *v.* St. Paul, 27 Minn. 457, 8 N. W. 272; Pomroy *v.* Granger, 18 R. I. 624, 29 Atl. 690; Stearns *v.* Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758.

29. *Georgia.*— Mitchell *v.* Rome, 49 Ga. 19, 15 Am. Rep. 669; Rome *v.* Omberg, 28 Ga. 46, 73 Am. Dec. 748.

Illinois.— Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243.

New York.— Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357.

Ohio.— Cincinnati *v.* Keating, 6 Ohio Dec. (Reprint) 605, 7 Am. L. Rec. 15.

United States.— Cheever *v.* Shedd, 6 Fed. Cas. No. 2,634, 13 Blatchf. 258; Northern Transp. Co. *v.* Chicago, 18 Fed. Cas. No. 10,324, 7 Biss. 45 [*affirmed* in 99 U. S. 635, 25 L. ed. 336].

See 36 Cent. Dig. tit. "Municipal Corporations," § 944.

30. Parke *v.* Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. Rep. 839, 20 L. R. A. 68.

31. Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Columbus *v.* Williard, 7 Ohio Cir. Ct. 113, 7 Ohio Cir. Dec. 33.

32. Newark *v.* Weeks, 70 N. J. L. 448, 59 Atl. 901.

33. *Georgia.*— Tuggle *v.* Atlanta, 57 Ga. 114.

Illinois.— Osgood *v.* Chicago, 44 Ill. App. 532 [*affirmed* in 154 Ill. 194, 41 N. E. 40]; East St. Louis *v.* Wiggins Ferry Co., 11 Ill. App. 254.

Louisiana.— Vidalat *v.* New Orleans, 43 La. Ann. 1121, 10 So. 175.

Massachusetts.— Brooks *v.* Boston, 19 Pick. 174.

and in assessing damages for the appropriation of property the business good-will of the owner is not such property as may be included in the assessment.[34] Where there has been a wrongful delay in the execution of the work, an abutting owner may recover the loss of his rents during delay.[35] Diversion of traffic from a street is not an element of damage,[36] nor can loss of business be considered unless it affects the market value of the property;[37] but it is sometimes held that damages may be recovered for a permanent loss of business due directly to an obstruction in the street.[38]

(VII) *INTEREST.* As analogous to the rule in eminent domain proceedings[39] the owner of property injured by a street improvement is, in some jurisdictions, held to be entitled to interest from the time at which damage accrues.[40] But in other jurisdictions this rule is not followed and interest cannot be recovered where the damages remain unliquidated either by agreement or action.[41] By express provision in some statutes, in a suit upon an award of damages, plaintiff is entitled to recover interest from the date of the award.[42] In case the owner has remained in full possession of the rents and profits, it has been held that he is not entitled to interest upon damages in street opening proceedings, where there has been a delay in their payment.[43]

(VIII) *IN CASE OF NEGLIGENCE IN MAKING IMPROVEMENT.* Where grading and paving have been done in a negligent way, recovery may be had for injury to the use and occupation of abutting premises.[44] Where recovery is sought for the negligent way in which an improvement is constructed by a municipality, the person injured may recover the amounts paid by him for repairs in case such repairs are necessitated by the act of the city and are reasonable.[45] Where there has been negligence in the making of a permanent grade the measure of the owner's damages is the depreciation in the value of the property caused by the construction and permanent maintenance of the grade;[46] but where the injury is in the nature of a continuous trespass, such as piling dirt upon the land, the measure of damage is not the difference in value before and after the trespass, but only such damages may be recovered as have accrued at the commencement of the suit.[47]

f. Deduction or Set-Off of Benefits — (I) *IN GENERAL.* If the particular property is benefited as much as damaged there can be no recovery,[48] and benefits

Ohio.— Cincinnati *v.* Whetstone, 9 Ohio Dec. (Reprint) 368, 12 Cinc. L. Bul. 247.

Wisconsin.— Stadler *v.* Milwaukee, 34 Wis. 98.

See 36 Cent. Dig. tit. "Municipal Corporations," § 943.

34. Edmunds *v.* Boston, 108 Mass. 535; *Re* McCauley, 18 Ont. 416.

35. Montreal *v.* Gauthier, 7 Quebec Q. B. 100.

36. Chicago *v.* Spoor, 190 Ill. 340, 60 N. E. 540; Chicago *v.* Jackson, 88 Ill. App. 130.

37. Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409.

38. Aldrich *v.* Wetmore, 52 Minn. 164, 53 N. W. 1072; Lacour *v.* New York, 3 Duer (N. Y.) 407.

39. See EMINENT DOMAIN, 15 Cyc. 744.

40. Peabody *v.* New York, etc., R. Co., 187 Mass. 489, 73 N. E. 649; Hampton *v.* Kansas City, 74 Mo. App. 129; Cincinnati *v.* Whetstone, 47 Ohio St. 196, 24 N. E. 409. See Mooney *v.* Pittsburg, 30 Pittsb. Leg. J. N. S. (Pa.) 370.

41. Tyson *v.* Milwaukee, 50 Wis. 78, 5 N. W. 914. See also New Haven Steam Saw Mill Co. *v.* New Haven, 72 Conn. 276, 44 Atl. 229, 609, holding that upon proceedings to abolish a grade crossing the owner was entitled to interest on his damage from the time at which it was definitely ascertained, being in the case at bar the date when the committee's report was filed to the date of final judgment in the assessment proceedings.

42. Pepin *v.* Elizabeth, 57 N. J. L. 653, 32 Atl. 213. And see Beebe *v.* Newark, 24 N. J. L. 47.

43. *In re* Second St., 66 Pa. St. 132 [*distinguishing* Philadelphia *v.* Dyer, 41 Pa. St. 463].

44. Louisville *v.* Coleburne, 108 Ky. 420, 56 S. W. 681, 22 Ky. L. Rep. 64, where recovery was had for negligent construction of a gutter permitting an accumulation of surface water.

Liability for negligence in general see *infra*, XIV, D.

45. Chicago *v.* Norton Milling Co., 97 Ill. App. 651.

46. Omaha *v.* Flood, 57 Nebr. 124, 77 N. W. 379.

47. Mott *v.* Lewis, 52 N. Y. App. Div. 558, 65 N. Y. Suppl. 31.

48. Himes *v.* Pittsburg, 213 Pa. St. 362, 63 Atl. 126; Seattle *v.* Methodist Protestant

accruing to property by reason of an improvement may be set off against damages,[49] if such benefits are special and not in common with those resulting to property in general;[50] but where an abutting owner is assessed for the cost of the improvement, the only benefit that can be set off is that which is in excess of the assessment levied against him;[51] and the city is liable for damages caused by an improvement, even though subsequent improvements more than offset such damages;[52] and if in the construction of an improvement, abutting land is negligently injured, it is no defense that the property was benefited by the improvement.[53] Where the city is liable for interest on unpaid damages, it may set off interest due from property-owners on unpaid assessments for benefits.[54]

(II) *Nature of Benefit.* The benefit which may be made a matter of set-off or deduction from the damage must result directly from the improvement,[55]

Church Bd. of Home Missions, 138 Fed. 307, 70 C. C. A. 597.

49. *Connecticut.*— Terry *v.* Hartford, 39 Conn. 286.

Georgia.— Atlanta *v.* Word, 78 Ga. 276.

Illinois.— Joliet *v.* Schroeder, 92 Ill. App. 68; North Alton *v.* Dorsett, 59 Ill. App. 612.

Indiana.— Ft. Wayne *v.* Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263.

Iowa.— Meyer *v.* Burlington, 52 Iowa 560, 3 N. W. 558.

Minnesota.— Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325.

New York.— Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777; People *v.* New York Bd. of Assessors, 59 Hun 407, 13 N. Y. Suppl. 404; Lowerre *v.* New York, 46 Hun 253; Wyman *v.* New York, 11 Wend. 486. But see Watt *v.* New York, 1 Sandf. 23, holding that where the commissioners of estimate and assessment, on a street opening, omit to deduct the sums assessed for benefit from the amounts allowed for damage to and upon the same person, the corporation of the city has no power to make such set-off.

Ohio.— Lotze *v.* Cincinnati, 61 Ohio St. 272, 55 N. E. 828 [*affirming* 7 Ohio S. & C. Pl. Dec. 227, 4 Ohio N. P. 311].

Pennsylvania.—*In re* Howard St., 142 Pa. St. 601, 21 Atl. 974; Matter of Fairmont Park, 9 Phila. 553.

West Virginia.— Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852.

United States.— See Seattle *v.* Methodist Protestant Church Bd. of Home Missions, 138 Fed. 307, 70 C. C. A. 597, holding that while it was proper to set off benefits against damages, benefits which would result to a lot, as distinct from the building thereon, could not be set off since the land and building constituted but one piece of property and the benefits and damages could only be properly estimated by considering the effect upon the property as a whole.

Canada.— *Re* Richardson, 17 Ont. 491.

See 36 Cent. Dig. tit. "Municipal Corporations," § 949.

Where benefits are not a personal charge.— The exemption of owners of property benefited by street improvements from personal liability for the assessment does not conflict with the policy of charging the assessment against an award for property taken. Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777.

If the benefits equal the damage done to a city lot by a public improvement, the owner cannot recover for the damage. Hopkins *v.* Ottawa, 59 Ill. App. 288; Savanna *v.* Loop, 47 Ill. App. 214.

Foot frontage rule.— The foot frontage rule may be applied alike to the assessment of benefits and damages resulting from the establishment of a building line. Matter of New York, 106 N. Y. App. Div. 31, 94 N. Y. Suppl. 146.

50. Kansas City *v.* Morton, 117 Mo. 446, 23 S. W. 127; South Omaha *v.* Ruthjen, 71 Nebr. 545, 99 N. W. 240; Lowe *v.* Omaha, 33 Nebr. 587, 50 N. W. 760; Houston *v.* Bartels, (Tex. Civ. App. 1904) 82 S. W. 323; Spokane Traction Co. *v.* Granath, 42 Wash. 506, 85 Pac. 261. See also *infra*, XIII, D, 3, f, (II).

Increase in market value.—The measure of damages which may be recovered by a property-owner from a city for opening a street along her property is the difference in the market value of the property with the improvement and without it; and the city is not entitled to offset any future increase in the value of part of the property, in common with the public, because of the improvement. Meridian *v.* Higgins, 81 Miss. 376, 33 So. 1.

51. Grant Park *v.* Trah, 115 Ill. App. 291 [*affirmed* in 218 Ill. 516, 75 N. E. 1040]; Benton *v.* Brookline, 151 Mass. 250, 23 N. E. 846; Carroll *v.* Marshall, 99 Mo. App. 464, 73 S. W. 1102.

Where a benefit assessment is not made, although it might have been levied, the benefit nevertheless cannot be set off. Atkins *v.* Boston, 188 Mass. 77, 74 N. E. 292.

52. Bureky *v.* Lake, 30 Ill. App. 23.

53. Martinsville *v.* Shirley, 84 Ind. 546; Broadwell *v.* Kansas City, 75 Mo. 213, 42 Am. Rep. 406.

54. Matter of New York, 91 N. Y. App. Div. 553, 87 N. Y. Suppl. 123.

55. Pickles *v.* Ansonia, 76 Conn. 278, 56 Atl. 552; Garvey *v.* Revere, 187 Mass. 545, 73 N. E. 664; Cole *v.* St. Louis, 132 Mo. 633, 34 S. W. 469.

Improvements by lot owners.—In an action for damages for change of grade, evidence of benefit accruing from improvements made

and must differ from that received by property generally;[56] hence the city cannot set off a subsequent increase in value common to the entire neighborhood because of the abatement of a nuisance by the construction of an improvement;[57] but the fact that other lots are benefited in the same way does not prevent the benefit from being special;[58] and if the value of a lot is increased, although in common with other property, such increased value may be set off.[59] If property injured is the residence of the owner, benefits arising from its increased value for business purposes may not be considered;[60] nor may benefits accruing to one lot be offset against damages caused to another and separate lot of the same owner;[61] but a continuous tract of land belonging to one person, although on different sides of the street, is sometimes treated as one parcel in estimating damages and benefits.[62]

(III) *Invalidity of Proceedings For Improvement.* Where an improvement is made under void proceedings, actual damage to property may be recovered without regard to appreciation in value.[63]

g. Mitigation of Damages. In a suit for damages resulting from public improvements, the city may show facts in mitigation;[64] thus, where property is rendered inaccessible by a change of grade, the city may show that it has contracted for steps which will give access thereto;[65] but in an action for damages caused by construction of a bridge in the street, evidence of the pendency of a suit to widen the street was held inadmissible.[66]

h. Inadequate or Excessive Damages. Unless the damages assessed are palpably inadequate or excessive they will not be set aside on these grounds.[67]

4. Property With Reference to Which Recovery May Be Had — a. In General. Under a statute providing that all damages sustained by any person by the taking of land for a public way shall be paid by the city, no recovery may be had for an

by adjoining lot owners subsequent to the accrual of the cause of action is properly excluded. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

56. Cole *v.* St. Louis, 132 Mo. 633, 34 S. W. 469; Omaha *v.* Hansen, 36 Nebr. 135, 54 N. W. 83; Omaha *v.* Schaller, 26 Nebr. 522, 42 N. W. 721; Dallas *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 321. See also *supra*, XIII, D, 3, f, (I).

The special benefit which may be set off against the damages to abutting property by changing grade of street is the increased value of the property because of the improvement, rather than that which does not arise to other adjacent property. Barr *v.* Omaha, 42 Nebr. 341, 60 N. W. 591; Kirkendall *v.* Omaha, 39 Nebr. 1, 57 N. W. 752.

57. Rudderow *v.* Philadelphia, 166 Pa. St. 241, 31 Atl. 53.

58. *Maine.*— Chase *v.* Portland, 86 Me. 367, 29 Atl. 1104.

Massachusetts.— Abbott *v.* Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Cross *v.* Plymouth County, 125 Mass. 557; Donovan *v.* Springfield, 125 Mass. 371.

Missouri.— Rives *v.* Columbia, 80 Mo. App. 173.

Tennessee.— Chattanooga *v.* Geiler, 13 Lea 611.

Texas.— Dallas *v.* Kahn, 9 Tex. Civ. App. 19, 29 S. W. 98.

Wisconsin.— Church *v.* Milwaukee, 31 Wis. 512.

See 36 Cent. Dig. tit. "Municipal Corporations," § 950.

59. Stowell *v.* Milwaukee, 31 Wis. 523.

60. Dallas *v.* Kahn, 9 Tex. Civ. App. 19, 29 S. W. 98.

61. Chicago *v.* Spoor, 190 Ill. 340, 60 N. E. 540. See *In re* Main St., 27 Pa. Super. Ct. 570.

62. Peck *v.* Bristol, 74 Conn. 483, 51 Atl. 521.

63. Fisher *v.* Naysmith, 106 Mich. 71, 64 N. W. 19; Drummond *v.* Eau Claire, 85 Wis. 556, 55 N. W. 1028.

64. Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619.

65. Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619.

66. Slattery *v.* St. Louis, 120 Mo. 183, 25 S. W. 521.

67. *Illinois.* — Danville *v.* Bolton, 97 Ill. App. 94.

Iowa.— Howard *v.* Lamoni, 124 Iowa 348, 100 N. W. 62.

Kentucky.—Henderson *v.* Crowder, 91 S. W. 1120, 28 Ky. L. Rep. 1255.

Michigan.— Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525.

Missouri.— Sheehy *v.* Kansas City Cable R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396.

Nebraska.— Stanwood *v.* Omaha, 38 Nebr. 552, 57 N. W. 287.

New York.— Goetz *v.* State, 90 N. Y. App. Div. 616, 85 N. Y. Suppl. 739 [*affirmed* in 182 N. Y. 547, 75 N. E. 1129]; Matter of Buffalo Grade Crossing Com'rs, 52 N. Y. App. Div. 122, 64 N. Y. Suppl. 1074.

Wisconsin.— Meinzer *v.* Racine, 74 Wis. 166, 42 N. W. 230.

See 36 Cent. Dig. tit. "Municipal Corporations," § 952.

injury to land, no part of which is taken.[68] A statute, the peculiar nature of which awards damages which may be remote and consequential and which are produced by a cause operating only indirectly upon the property, will not justify an award of damages to property outside of the boundaries which it defines.[69] But it has been held that a statute providing that the grade of a street shall not be changed without assessment and tender of the damages occasioned refers to damages to property outside the city limits as well as to that inside.[70]

b. Non-Abutting Property. Under some statutes the right to damages is not confined to abutting owners but may be availed of by any person who sustains damage in his property.[71] So recovery may be had for a change of grade, although the grade of the street upon which the property abuts is not changed,[72] or where there has been a vacation of a street on which the property does not abut.[73] In other jurisdictions it is held that before a lot owner can recover damages for an obstruction or alteration in a street he must show that such obstruction or alteration is in that part of the street on which his lot abuts.[74] So where a lot owner

68. Rand *v.* Boston, 164 Mass. 354, 41 N. E. 484, holding that damages could not be recovered for diminishing the market value of petitioner's land, obstructing its light and air, and occasioning dust to be blown upon it by building an embankment and bridge upon land taken from a third person on the opposite side of the street from petitioner's land.

69. McNamara *v.* Com., 184 Mass. 304, 68 N. E. 332, so holding of St. (1895) c. 488, § 14, giving compensation to the owner of any real estate not taken, but directly or indirectly decreased in value by the doings of the metropolitan water board, situated between certain lines in the town of Clinton.

70. Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435.

71. See the statutes of the several states. And see Munn *v.* Boston, 183 Mass. 421, 67 N. E. 312 (holding that under a statute which provides that upon the laying out or construction of a street regard shall be had to all damages done to persons injured, whether by taking their property or injuring it in any manner, the fact that the property does not abut upon the public way will not bar a recovery); Dana *v.* Boston, 170 Mass. 593, 49 N. E. 1013; Burr *v.* Leicester, 121 Mass. 241 (holding under a statute affording compensation to an owner of land adjoining a highway, for damages sustained by reason of raising, lowering, or other act done for the purpose of repairing such way, that the injury to be compensated is an injury to the particular estate by the repairing of the way generally; and that the making of an excavation in front of plaintiff's estate for the purpose of using the materials upon another portion of the way not adjacent to the estate may be an injury to the estate for which compensation may be had); Matter of Buffalo Grade Crossing Com'rs, 46 N. Y. App. Div. 473, 61 N. Y. Suppl. 748; *In re* Cincinnati, etc., R. Co., 19 Ohio Cir. Ct. 308, 10 Ohio Cir. Dec. 286; Lewis *v.* Homestead, 194 Pa. St. 199, 45 Atl. 123; *In re* Chatham St., 191 Pa. St. 604, 43 Atl. 365; Mellor *v.* Philadelphia, 160 Pa. St. 614, 28 Atl. 991.

72. *In re* Chatham St., 191 Pa. St. 604, 43 Atl. 365; Mellor *v.* Philadelphia, 160 Pa. St. 614, 28 Atl. 991.

Removal of lateral support.—A person whose land does not abut upon the street, but which is so near to it that an excavation, by depriving it of lateral support, causes a portion of it to fall into the street, it has been held, may recover damages for the invasion of his property. Damkoehler *v.* Milwaukee, 124 Wis. 144, 101 N. W. 706. Where by the construction of a street a slide of land was occasioned which injured plaintiff, he may recover the damages occasioned, although his property does not abut immediately upon the street. Keating *v.* Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

73. Chicago *v.* Baker, 86 Fed. 753, 30 C. C. A. 364.

74. Rude *v.* St. Louis, 93 Mo. 408, 6 S. W. 257; Stephenson *v.* Missouri Pac. R. Co., 68 Mo. App. 642; Wallace *v.* Kansas City, etc., R. Co., 47 Mo. App. 491.

In street-opening proceedings, one whose land is affected by grade changes of an intersecting street upon which his land abuts, and not by the grade of the new street, is not entitled to an award of damages. Matter of West Farms Road, 47 Misc. (N. Y.) 216, 95 N. Y. Suppl. 894.

A person owning contiguous lots abutting on different streets may, in the case of change of grade of one of such streets, recover only the damages to the lots abutting on the street the grade of which is changed. Lawrence *v.* Philadelphia, 154 Pa. St. 20, 25 Atl. 1079.

Illegal improvement.— The rule that a failure upon the part of a city to follow the prescribed course of procedure in the exercise of a power to grade will not authorize one whose property does not abut upon the street to recover damages. Damkoehler *v.* Milwaukee, 124 Wis. 144, 101 N. W. 706, holding that since no liability for the expense of grading could attach to premises separated from the street by a strip some five feet in width, which was destroyed by the grading, the owner could not rely upon any defect or irregularity in the proceeding as a ground for the recovery of damages.

claims that his lot has been rendered inaccessible by reason of an excavation in the street he must show that his lot abuts on the part of the street excavated.[75] It should be noted, however, that a non-abutting owner cannot recover for injuries which he sustains in common with the public at large, and which are not of the nature which may be termed special.[76] As a general rule an interference with a non-abutting owner's right of access to the public streets is a general damage for which there can be no recovery.[77] So where the street vacated is not necessary for the purpose of access to plaintiff's property he cannot recover, although his inconvenience may be greater in degree than that occasioned to the general public.[78] But it has been held that owners of property abutting on a street, although not upon the part thereof which has been vacated, may recover for the damages sustained by them in being cut off from the general system of streets in one direction.[79]

e. Property of Persons Holding Licenses and Franchises to Use the Streets.[80] A company which has been authorized to lay its pipes in the streets of a city acquires no right to maintain them there, superior to the right of the city to construct public improvements, and the city is not liable in damages for interference with such pipes, where its rights are not unnecessarily, negligently, or unreasonably exercised.[81] And a mere permission granted by a municipality to a private corporation to use its streets for certain purposes does not constitute a contract so as to make the municipality liable for damages in case a loss should result to the private corporation by reason of the installation of a rival system.[82]

d. Buildings or Improvements Erected With Notice of Change of Grade. A city is not liable for injury caused to buildings by an establishment or change of grade if such buildings were erected after the decision to so establish or change the grade had become a matter of record.[83] Where the city is regarded as having

75. Gardner *v.* St. Joseph, 96 Mo. App. 657, 71 S. W. 63, holding that the fact that the lot cornered on the excavation was not sufficient.

76. *Illinois.*— East St. Louis *v.* O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795.

Massachusetts.— Davenport *v.* Hyde Park, 178 Mass. 385, 59 N. E. 1030; Davenport *v.* Dedham, 178 Mass. 382, 59 N. E. 1029.

Ohio.— Doppas *v.* Cincinnati, etc., R. Co., 19 Ohio Cir. Ct. 582, 10 Ohio Cir. Dec. 286.

Washington.— Ponischil *v.* Hoquiam Sash, etc., Co., 41 Wash. 303, 83 Pac. 316.

United States.— Chicago *v.* Baker, 86 Fed. 753, 30 C. C. A. 364.

A statute authorizing a recovery for special damages includes any direct damages peculiar to plaintiff. McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000.

77. Munn *v.* Boston, 183 Mass. 421, 67 N. E. 312 (holding, however, that the damage suffered by a landowner in being cut off from access to the public streets during the construction of a highway to which he owns a legal right of access over abutting property, although his own property is not abutting, is a special and peculiar damage for which he is entitled to compensation); Eagle White Lead Co. *v.* Cincinnati, 1 Cinc. Super. Ct. (Ohio) 154.

78. East St. Louis *v.* O'Flynn, 119 Ill. 200, 10 N. E. 395. 59 Am. St. Rep. 795.

79. In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275. See *contra*, Reis *v.* New York, 113 N. Y. App. Div. 464, 99 N. Y. Suppl. 291.

80. Construction of crossings over railroad: In general see RAILROADS. Award of damages in eminent domain proceedings see EMINENT DOMAIN.

81. Natick Gas Light Co. *v.* Natick, 175 Mass. 246, 56 N. E. 292; Portsmouth Gas-Light Co. *v.* Shanahan, 65 N. H. 233, 19 Atl. 1002. See also Sedalia Gaslight Co. *v.* Mercer, 48 Mo. App. 644; Chatfield *v.* Cincinnati, 7 Ohio Dec. (Reprint) 111, 1 Cinc. L. Bul. 125; Scranton Gas, etc., Co. *v.* Scranton, 214 Pa. St. 586, 64 Atl. 84, 112 Am. St. Rep. 1033. But see Paris Mountain Water Co. *v.* Greenville, 53 S. C. 82, 30 S. E. 699, holding that where a company laid water pipes in a street in pursuance of the contract with a municipal corporation, although it had knowledge of the corporation's right to change the grade, it was nevertheless entitled to damages on account of injuries sustained from such change.

82. Olyphant Sewage Drainage Co. *v.* Olyphant Borough, 211 Pa. St. 526, 61 Atl. 72, holding that where a sewer company had been permitted to construct a sewer system the city might afterward install a system of its own without becoming liable for indirect or consequential damages for the reduction of the earning power of the company's system.

Right to erect public plant after franchise to private corporation: For lighting see *supra*, XIII, A, 2, g. For water-supply see *supra*, XIII, A, 2, f.

83. *Colorado.*— Denver *v.* Vernia, 8 Colo. 399, 8 Pac. 656.

a right to discontinue the proceedings at any time prior to the confirmation of the report of commissioners appointed to carry it out, the mere adoption of a plan for an improvement will not prevent a property-owner from erecting a building upon his land without regard to such plan, and afterward insisting that the damage to his improvements be estimated as they stand at the time when proceedings are had to estimate the damages generally.[84] But where the lines or corners of a street are fixed by statute, a person erecting improvements without regard to such established lines cannot recover for damages incurred by improvements being subsequently made in conformity therewith.[85]

5. Persons Entitled to Damages — a. In General. In order to recover damages plaintiff must have either a legal or an equitable estate in the property injured.[86] The term "owner" in some statutes providing for damages is construed in a comprehensive sense to designate all parties interested.[87] Where land is taken for a street, the fact that the city pays part of the expense of the improvement does not deprive lot owners having an easement in the land from recovering compensation;[88] nor is it necessary to recovery that the lot owners' share of the cost has been fixed.[89]

b. Mortgagors. If an injury to mortgaged property is sustained before the date of foreclosing sale, damages accrue to the owner and not the foreclosure purchaser.[90]

c. Purchasers of Property Affected. A purchaser of property which has been damaged by an improvement is not entitled to recover if the injury had been sustained at the time of his purchase;[91] but the fact that the improvement had been

Iowa.— See Farmer *v.* Cedar Rapids, 116 Iowa 322, 89 N. W. 1105.

Missouri.— Clinkenbeard *v.* St. Joseph, 122 Mo. 641, 27 S. W. 521; Davis *v.* Missouri Pac. R. Co., 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648.

Nebraska.— Omaha *v.* Williams, 52 Nebr. 40, 71 N. W. 970.

New York.— Matter of New York, 84 N. Y. App. Div. 312, 82 N. Y. Suppl. 575; Matter of East One Hundred and Eighty-Seventh St., 78 N. Y. App. Div. 355, 79 N. Y. Suppl. 1031; Matter of Rogers Place, 65 N. Y. App. Div. 1, 72 N. Y. Suppl. 459; Matter of West Farms Road, 47 Misc. 216, 95 N. Y. Suppl. 894; *In re* Vyse St., 95 N. Y. Suppl. 893; People *v.* New York Bd. of Assessors, 58 How. Pr. 327; *In re* Furman St., 17 Wend. 649.

Pennsylvania.— Groff *v.* Philadelphia, 150 Pa. St. 594, 24 Atl. 1048; Axford *v.* Philadelphia, 6 Pa. Co. Ct. 246.

West Virginia.— Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852.

See 36 Cent. Dig. tit. "Municipal Corporations," § 949.

Defective map.— The rule that persons who erect buildings upon the line of a street after the filing of a map establishing the grade thereof are not entitled to recover any damage done to their buildings in consequence of the subsequent gradation of the street in accordance with the grade thus established does not apply, unless the map filed clearly and unmistakably indicates the grade of the street, and, where it only indicates such grade by way of possible inference to be drawn from the grade fixed at the intersection of the street with other streets, the recovery of damages is not precluded. Matter of New York, 84 N. Y. App. Div. 312, 82 N. Y. Suppl. 575.

84. *In re* Wall St., 17 Barb. (N. Y.) 617.

85. *In re* Wall St., 17 Barb. (N. Y.) 617.

86. Nebraska City *v.* Northcutt, 45 Nebr. 456, 63 N. W. 807 (holding that the fact that a husband erected a building on land belonging to his wife and was in possession does not give him a right to recover in his own name for injury to the same); People *v.* Lord, 24 N. Y. App. Div. 137, 48 N. Y. Suppl. 1065 (holding that an administrator of an owner who died before the enactment of the statute or the guardian of an infant owner was not entitled to damages).

87. Greiner *v.* Sigourney, (Iowa 1902) 89 N. W. 1103; Moritz *v.* St. Paul, 52 Minn. 409, 54 N. W. 370; *In re* Fifth St., 22 Pa. Super. Ct. 214.

88. *In re* Eleventh Ave., 81 N. Y. 436.

89. Roper *v.* New Britain, 70 Conn. 459, 39 Atl. 850.

90. *Iowa.*— Cotes *v.* Davenport, 9 Iowa 227.

Massachusetts.— Farnsworth *v.* Boston, 121 Mass. 173.

New York.— *In re* Buffalo Grade Crossing Com'rs, 64 N. Y. App. Div. 71, 71 N. Y. Suppl. 674 [*affirmed* in 169 N. Y. 605, 62 N. E. 1096].

Washington.— *In re* Seattle, 26 Wash. 602, 67 Pac. 250, holding that the right to damages done real estate by the regrading of a street is personal to the owner thereof, and will not pass by a subsequent sale of the premises under foreclosure, unless expressly so ordered by the decree.

Wisconsin.— Tyson *v.* Milwaukee, 50 Wis. 78, 5 N. W. 914.

91. *Indiana.*— Stein *v.* Lafayette, 6 Ind. App. 414, 33 N. E. 912.

ordered will not preclude a purchaser's right to recover for injury sustained from the construction of the improvement after title passed to him.[92] Where, however, a city engineer gave a property-owner an erroneous grade, and he built his house accordingly, it was held that the city was liable for damages caused by subsequently bringing the street to proper grade, only in favor of the owner to whom the erroneous information was given and not to a purchaser, even though he acquired title before the street was graded.[93]

d. Lessees. A lessee of property injured by an improvement may under the statute be entitled to damages for injury to his occupancy,[94] or to his buildings annexed to the soil.[95] So where part of a lot, under lease, is taken for opening a street both the lessor and lessee may be entitled to compensation for the damage sustained by each of them.[96]

e. Municipalities. A city cannot claim damages for injury caused by an improvement to property held by it for municipal purposes;[97] but it is proper to assess damages for land held by the city for school purposes,[98] and where streets were altered on petition of a county for the erection of a county building, the city was held entitled to damages for resulting injuries.[99]

6. Municipalities and Persons Liable For Damages — a. In General. Liability for damages resulting from a public improvement may be imposed upon the city by statute, although the improvement be ordered directly by the legislature.[1] It has been held that where a borough and a town have joined in making an improvement they may be liable for damages, either jointly or severally.[2] Under a statute providing that the cost of an improvement should be assessed on property benefited, damages may not be collected out of general municipal funds, but persons injured should compel collection of assessments to meet their claims.[3] It is competent for the legislature to direct payment for an improvement from a general fund, and, where a special assessment has been levied, direct that the amounts paid thereon be refunded.[4] If a change of grade is made by a railway company authorized to lay its tracks in a street, the city is sometimes held liable.[5] A private person may be relieved from liability for his acts in grading a street, by the subsequent ratification of such act by the city.[6] Where a city lowers a street to construct a subway under railroad tracks, it cannot defeat recovery on the

Maryland.— Ortwine *v.* Baltimore, 16 Md. 387.

New Hampshire.— Hodgman *v.* Concord, 69 N. H. 349, 41 Atl. 287.

Pennsylvania.— Losch's Appeal, 109 Pa. St. 72; Campbell *v.* Philadelphia, 108 Pa. St. 300; Robinson *v.* Norwood Borough, 27 Pa. Super. Ct. 481; Bauman *v.* New Castle, 2 Pa. Dist. 29, 12 Pa. Co. Ct. 22.

United States.— Chicago *v.* Baker, 86 Fed. 753, 30 C. C. A. 364.

92. Pickles *v.* Ansonia, 76 Conn. 278, 56 Atl. 552; Moore *v.* Lancaster, (Pa. 1904) 58 Atl. 890; Audet *v.* Quebec, 9 Quebec Super. Ct. 340. And see Uhle *v.* Philadelphia, 30 Pa. Super. Ct. 480, where recovery was allowed for change of grade.

93. Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582; Gilligan *v.* Providence, 11 R. I. 258; Highland *v.* Galveston, 54 Tex. 527.

94. Sheehan *v.* Fall River, 187 Mass. 356, 73 N. E. 544; Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582; Gilligan *v.* Providence, 11 R. I. 258. See Highland *v.* Galveston, 54 Tex. 527.

95. *In re* Reese, 32 Cal. 567; Parks *v.* Boston, 15 Pick. (Mass.) 198.

96. Cheshire *v.* Adams, etc., Reservoir Co., 119 Mass. 356; *In re* Buffalo Grade Crossing Com'rs, 171 N. Y. 685, 64 N. E. 1121.

97. Cheshire *v.* Adams, etc., Reservoir Co., 119 Mass. 356; Matter of Buffalo Grade Crossing Com'rs, 66 N. Y. App. Div. 439, 73 N. Y. Suppl. 10 [*affirmed* in 171 N. Y. 685, 64 N. E. 1121].

98. Fagan *v.* Chicago, 84 Ill. 227.

99. Cincinnati *v.* Hamilton County, 1 Disn. (Ohio) 4, 12 Ohio Dec. (Reprint) 451.

1. Sage *v.* Brooklyn, 89 N. Y. 189; Coster *v.* Albany, 52 Barb. (N. Y.) 276 [*reversed* on other grounds in 43 N. Y. 399].

2. Holley *v.* Torrington, 63 Conn. 426, 28 Atl. 613.

3. Matter of Bay Twenty-Third St., 20 N. Y. App. Div. 28, 46 N. Y. Suppl. 660; Seavey *v.* Seattle, 17 Wash. 361, 49 Pac. 517. See also Shaffner *v.* St. Louis, 31 Mo. 264.

4. People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099].

5. Bentley *v.* Atlanta, 92 Ga. 623, 18 S. E. 1013; Jarboe *v.* Carrollton, 73 Mo. App. 347. And see Spokane Traction Co. *v.* Granath, 42 Wash. 506, 85 Pac. 261.

6. Wolfe *v.* Pearson, 114 N. C. 621, 19 S. E. 264, holding that the ratification might take place even after suit was brought.

theory that it was acting within its police powers where the result would be to defeat an express constitutional provision.[7]

b. Liability Between City and County. Where the county has power over streets within an incorporated town it will be liable under the constitution or statute for damages resulting from the exercise of its powers.[8] In a few states the county is authorized by statute to lay out streets within municipal borders and to reimburse itself from the city for damages paid to property-owners,[9] and under such a statute it is held that in a suit by a county against a city the latter cannot set up that the damages paid were excessive.[10] But the fact that under a statute a county may be liable to the city for a portion of the cost of a street opening will not relieve the city from primary liability.[11] Nor will the fact that a county and not a borough was liable for the damages originally entailed in laying out a street prevent the borough from being liable in case it subsequently changes the grade thereof.[12]

c. Liability of Contractors. If the contractor keeps within the terms of his contract and performs the work with proper care and skill, he is not liable for damages resulting to contiguous property.[13]

7. Estoppel, Waiver, or Loss of Right — a. In General. A property-owner may by his acts be estopped to claim damages from a street improvement[14] or he may waive such right.[15] The mere fact that a plaintiff suffers work to proceed will not work an estoppel,[16] and where a city without authority changes the grade of a street, abutting owners will not be estopped from claiming damages by the fact that they stood by and saw the work done;[17] nor does the fact that an owner

7. Marshall *v.* Chicago, 77 Ill. App. 351.

8. Murray *v.* Norfolk County, 149 Mass. 328, 21 N. E. 757; *In re* Milton, 40 Pa. St. 300; *In re* Parkesburg Borough St., 4 Pa. Co. Ct. 273.

9. See Lancaster County *v.* Lancaster City, 160 Pa. St. 411, 28 Atl. 854.

10. Lancaster County *v.* Lancaster City, 170 Pa. St. 108, 32 Atl. 567.

11. Ricker *v.* Lancaster, 1 Lanc. L. Rev. (Pa.) 92.

12. Norristown's Appeal, 3 Walk. (Pa.) 146.

13. Shaw *v.* Crocker, 42 Cal. 435; Pearson *v.* Zable, 78 Ky. 170; St. Louis *v.* Clemans, 42 Mo. 69; Sedalia Gaslight Co. *v.* Mercer, 48 Mo. App. 644; Westliche Post Assoc. *v.* Allen, 26 Mo. App. 181. See also New Orleans *v.* Wire, 20 La. Ann. 500, holding that a contractor for making a street improvement is liable to a property holder on such street for the value of shade trees unnecessarily removed.

14. See cases cited *infra*, this note.

Request to finish work.— Where a city establishes the grade of a street and fills only a part of it to the grade line, a request by an abutting owner that the grading be finished does not estop him to recover damages caused by establishing the grade. Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 41 Am. St. Rep. 684, 23 L. R. A. 658; Herzel *v.* Milwaukee, 39 Wis. 360.

Defective work.— Where a contract under which plaintiff allowed a city to build a sewer through plaintiff's land provided that the city should condemn all unsuitable work or material, plaintiff is not estopped, by acquiescing in the judgment of the city engineer in such matters until after the completion of the work, from claiming damages caused by defects subsequently revealed by actual test. Nashville *v.* Sutherland, 94 Tenn. 356, 29 S. W. 228.

15. Lake Shore, etc., R. Co. *v.* Whiting, 161 Ind. 76, 67 N. E. 933, holding that where a property-owner waives damages on the laying out of a rural road, such waiver is effectual, even though the highway is not actually opened until after the territory embracing it has passed within the limits of an incorporated town.

Dedication of land for a street does not give the city the right to so construct it as to materially injure property. Louisville *v.* Harbin, 61 S. W. 1011, 22 Ky. L. Rep. 1865.

Failure to appear before viewers and except will be deemed a waiver of objections to an assessment. *In re* Frederick St., 155 Pa. St. 623, 26 Atl. 773.

Qualified waiver.— Where a lot owner is induced to waive objection to the progress of the work of grading a street on the condition that the work should be done in a certain manner, and the work is not done as promised, the measure of the lot owner's damages is the loss sustained by him on account of the work not being done as promised. Jeffersonville *v.* Myers, 2 Ind. App. 532, 28 N. E. 999.

16. Dallas *v.* Beeman, 23 Tex. Civ. App. 315, 55 S. W. 762.

17. Matter of Chesebrough, 56 How. Pr. (N. Y.) 460; *In re* Girard Ave., 44 Leg. Int. (Pa.) 166. But see Owens *v.* Milwaukee, 47 Wis. 461, 3 N. W. 3, holding that one cannot recover of a municipality damages for illegal acts of its officers in changing the grade of a street, if, with knowledge of their

might have foreseen the necessity of a change of grade and improved his property accordingly estop him to recover damages.[18] If an owner institutes suit against a lessee to recover an award paid the latter by the city, he thereby ratifies the action of the city in paying the award and is estopped from suing it for the same.[19]

b. Consent to Improvement. A property-owner who joins in a petition for an improvement is usually regarded as estopped from claiming damages resulting therefrom,[20] unless the injury is caused by negligence in the prosecution of the work,[21] or the improvement made differs materially from that to which he consented.[22] But the fact that an owner solicited the council to adopt certain methods in carrying on the work will not estop him from claiming damages for a wrongful grading,[23] and although an abutting owner secured such a modification of a grade as would cause less injury to his property, he will not be estopped to claim damages for the change actually made.[24]

c. Conveyances, Agreements, and Release of Damages. On the opening of a street, damages cannot be claimed for land which has been dedicated to the public as a street;[25] but a person who conveys land to a city for the purpose of opening a street is not estopped from claiming damages for injury to his property from the grading of such street.[26] A property-owner is not estopped to claim damages resulting from the erection of a viaduct by the fact that he sold part of his lot to a railroad company which raised an embankment upon the same, thus rendering the viaduct necessary,[27] and an agreement by a grantee of land that he will grade in front of his lot when the grantor shall direct does not bar his claim for damage from grading done by the city.[28] Where an owner formally releases the city from

illegality, he has assisted in their performance.

18. McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000.

19. Cassidy *v.* New York, 62 Hun (N. Y.) 358, 17 N. Y. Suppl. 71.

20. *Iowa.*— Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

Michigan.— Collins *v.* Grand Rapids, 95 Mich. 286, 54 N. W. 889; Hembling *v.* Big Rapids, 89 Mich. 1, 50 N. W. 741. But see Turner *v.* Stanton, 42 Mich. 506, 4 N. W. 204, holding that a landowner, who makes application to the city council to open a street through his land, does not thereby waive his right to compensation for land taken for the street.

Missouri.— Vaile *v.* Independence, 116 Mo. 333, 22 S. W. 695; Cross *v.* Kansas City, 90 Mo. 13, 1 S. W. 749, 59 Am. Rep. 1; Justice *v.* Lancaster, 20 Mo. App. 559. And see Fairbanks *v.* St. Joseph, 102 Mo. App. 425, 76 S. W. 718, holding that a petition for a change of grade as established did not prevent the recovery of damages on a subsequent grading of the street except in so far as they were increased by the change.

New York.— Matter of Tiffany St., 84 N. Y. App. Div. 525, 82 N. Y. Suppl. 852.

Texas.— Texarkana *v.* Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451.

Washington.— Ball *v.* Tacoma, 9 Wash. 592, 38 Pac. 133.

See 36 Cent. Dig. tit. "Municipal Corporations," § 959.

Contra.— Barker *v.* Taunton, 119 Mass. 392; Lewis *v.* Darby, 166 Pa. St. 613, 31 Atl. 335.

21. Jeffersonville *v.* Myers, 2 Ind. App. 532, 28 N. E. 999. A property-owner, by petitioning a city to grade and pave a street, is not estopped from claiming damages for the negligent omission of the city to provide suitable outlets for carrying off the water from a ditch dammed up by such grading. Beatrice *v.* Leary, 45 Nebr. 149, 63 N. W. 370, 50 Am. St. Rep. 546.

22. Burlington *v.* Gilbert, 31 Iowa 356, 7 Am. Rep. 143; Taylor *v.* Jackson, 83 Mo. App. 641; Jones *v.* Bangor, 144 Pa. St. 638, 23 Atl. 252. The fact that one signed a petition to the common council to change the grade of a street does not release his claim for damages to his land caused by the adoption of a new grade lower than that petitioned for. Luscombe *v.* Milwaukee, 36 Wis. 511.

23. Blanden *v.* Ft. Dodge, 102 Iowa 441, 71 N. W. 411.

24. Klaus *v.* Jersey City, 69 N. J. L. 127, 54 Atl. 220.

25. Pope *v.* Union, 18 N. J. Eq. 282; Righter *v.* Philadelphia, 161 Pa. St. 73, 28 Atl. 1015; *In re* Girard Ave., 44 Leg. Int. (Pa.) 166; *In re* Story St., 11 Phila. (Pa.) 456.

26. Bartlett *v.* Tarrytown, 55 Hun (N. Y.) 492, 8 N. Y. Suppl. 739; Houston *v.* Bartels, 36 Tex. Civ. App. 498, 82 S. W. 323, 469. An agreement of landowners not to require compensation for the taking of a portion of their land for a street does not preclude them from recovering damages, under the statute, for a change of grade made after the street had been opened. Fernald *v.* Boston, 12 Cush. (Mass.) 574.

27. Tinker *v.* Rockford, 137 Ill. 123, 27 N. E. 74 [*reversing* 36 Ill. App. 460].

28. Akron *v.* McComb, 18 Ohio 229, 51 Am. Dec. 453.

liability,[29] or impliedly does so by entering into an agreement with the contractor, he is usually held to have waived his claim against the city for damages.[30] A release of damages secured by misrepresentations on the part of city officials is not binding.[31]

d. Negligence of Owner in Protecting His Premises. If buildings on the line of an improvement are threatened with injury greatly in excess of the cost of protecting them, the owner is bound to make reasonable effort to protect them, and his damages should be measured by his expense in so doing.[32]

e. Omission to File Claim Within Time Prescribed.[33] In the absence of statutory requirement a landowner is not bound to give notice of a claim for damages when notified of a proposed change in grade.[34] But an omission to file a claim for damages when prescribed by statute will constitute a waiver of the claim,[35] unless the city has neglected to give notice of the improvement as required by statute.[36] In the absence of statutory requirement, failure to appear before commissioners of assessment will not estop a property-owner from objecting to the confirmation of their report;[37] but delay for nearly a year after commencement of work to appear before the proper board and demand assessment of damages was held to constitute waiver of right to damages under the statute.[38]

8. Necessity For Payment Before Making Improvement or Assessing Benefits — a. In General. It is sometimes held that payment of damages must precede the taking of property,[39] and that an owner is entitled to compensation as soon as the appropriation is decided on without waiting for the actual taking.[40] But where land is not taken,[41] damages resulting to property from the construction of public improvements need not be assessed until completion of the work,[42] unless the statute, as frequently is the case, provides for prepayment of damages.[43] Such a

29. Foster *v.* Boston, 22 Pick. (Mass.) 33; *In re* Reynolds, 21 N. Y. Suppl. 592; Baxter *v.* Tripp, 12 R. I. 310.

30. Carson *v.* St. Joseph, 91 Mo. App. 324.

31. *In re* Akron St., 5 Ohio S. & C. Pl. Dec. 697, 7 Ohio N. P. 454.

32. Kansas City *v.* Morton, 117 Mo. 446, 23 S. W. 127.

33. As condition precedent to action see *infra*, XIII, D, 11, b, (III).

34. Platt *v.* Milford, 66 Conn. 320, 34 Atl. 82.

35. Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661; German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Kansas City *v.* Duncan, 135 Mo. 571, 37 S. W. 513; Wabash R. Co. *v.* Defiance, 52 Ohio St. 262, 40 N. E. 89; Kreige *v.* Cincinnati, 7 Ohio Dec. (Reprint) 405, 2 Cinc. L. Bul. 333; Thackery *v.* Raleigh Tp., 25 Ont. App. 226.

36. Cincinnati *v.* Sherike, 47 Ohio St. 217, 25 N. E. 169; Toledo *v.* McMahon, 9 Ohio Cir. Ct. 194, 4 Ohio Cir. Dec. 3; Jacobs *v.* Cincinnati, 3 Ohio S. & C. Pl. Dec. 60, 2 Ohio N. P. 283

37. Matter of Opening of Tiffany St., 84 N. Y. App. Div. 525, 82 N. Y. Suppl. 852.

38. State *v.* Superior, 108 Wis. 16, 83 N. W. 1100.

39. Hirth *v.* Indianapolis, 18 Ind. App. 673, 48 N. E. 876; Moritz *v.* St. Paul, 52 Minn. 409, 54 N. W. 370. But see Rogers *v.* Attica, 113 N. Y. App. Div. 603, 98 N. Y. Suppl. 665.

40. Shannahan *v.* Waterbury, 63 Conn. 420, 28 Atl. 611; Ingersoll Pub. Corp. 334.

41. Platt *v.* Milford, 66 Conn. 320, 34 Atl. 82; Baltimore *v.* St. Agnes Hospital, 48 Md. 419; Goodnow *v.* Ramsey County, 11 Minn. 31; Sower *v.* Philadelphia, 35 Pa. St. 231.

42. *California.*— German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

Florida.— Dorman *v.* Jacksonville, 13 Fla. 538, 7 Am. Rep. 253.

Illinois.— Parker *v.* Chicago Catholic Bishop, 146 Ill. 158, 34 N. E. 473, [*affirming* 41 Ill. App. 74].

Indiana.— Lafayette *v.* Spencer, 14 Ind. 399.

Maine.— Hicks *v.* Ward, 69 Me. 436.

Massachusetts.— Brown *v.* Lowell, 8 Metc. 172.

Pennsylvania.— Devlin *v.* Philadelphia, 206 Pa. St. 518, 56 Atl. 21.

See 36 Cent. Dig. tit. "Municipal Corporations," § 965.

43. *Georgia.*—Patton *v.* Rome, 124 Ga. 525, 52 S. E. 742.

Indiana.— Lafayette *v.* Wortman, 107 Ind. 404, 8 N. E. 277; Logansport *v.* Pollard, 50 Ind. 151; Hirth *v.* Indianapolis, 18 Ind. App. 673, 48 N. E. 876; Keehn *v.* McGillicuddy, 15 Ind. App. 580, 44 N. E. 554.

Minnesota.— Overmann *v.* St. Paul, 39 Minn. 120, 39 N. W. 66.

Missouri.— Graden *v.* Parkville, 114 Mo. App. 527, 90 S. W. 115.

Nebraska.— Horford *v.* Omaha, 4 Nebr. 336.

Ohio.— Matthew *v.* Cincinnati, 1 Ohio Cir. Ct. 558, 1 Ohio Cir. Dec. 311.

provision is not impliedly repealed by a subsequent act relating to specific improvements in which no such requirement is found,[44] but it will apply to a change of grade only when the change is made from a grade previously established by the city;[45] and it was held that the requirement of prepayment need not be followed where a town having fixed the grade of a street afterward became a city and changed the grade.[46]

b. Effect of Appeal From Assessment of Damages. The effect of an appeal from an assessment of damages depends largely upon the provisions of the statute; where land is taken for an improvement an appeal sometimes vacates a decision to the extent that the owner is entitled to possession during his appeal;[47] but under other statutes the city may take possession upon giving bond;[48] and it has been held that no final assessment for benefits can be made while an appeal involving the question of damages is pending.[49]

c. Restraining Improvement Until Payment of Damages. Unless prepayment of damages for injury to property is required by statute,[50] the city may not be restrained from making an improvement until damages have been assessed and paid;[51] nor will injunction lie to restrain the use of land condemned for public purposes until compensation is paid if an adequate remedy exists at law;[52] but where municipal power of taxation was so limited as not to be adequate to pay within a reasonable time damages caused by the opening of a street, such opening was enjoined until security for payment was given.[53]

9. Proceedings For Assessment — a. In General. Where a specific mode of assessing damages for land taken or injured is prescribed by legislative enactment, the same must be pursued by the municipality;[54] but if the city and property-owners agree on the amount of damages there is no need to submit the matter to the tribunal provided by statute;[55] and if the council be empowered to fix damages summarily, a right of appeal being reserved, failure of a property-owner to

44. Phillips *v.* Council Bluffs, 63 Iowa 576, 19 N. W. 672.

45. Huntington *v.* Griffith, 142 Ind. 280, 41 N. E. 8, 589; Sargent *v.* Tacoma, 10 Wash. 212, 38 Pac. 1048.

46. Wabash *v.* Alber, 88 Ind. 428.

47. Kansas City *v.* Kansas Pac. R. Co., 18 Kan. 331.

48. Messer *v.* Wildman, 53 Conn. 494, 2 Atl. 705; Hennessy *v.* St. Paul, 44 Minn. 306, 46 N. W. 353.

49. Pittsburgh *v.* Eyth, 26 Pittsb. Leg. J. N. S. (Pa.) 316. See also *infra*, XIII, E, 6, j, k.

50. Phillips *v.* Council Bluffs, 63 Iowa 576, 19 N. W. 672; Graden *v.* Parkville, 114 Mo. App. 527, 90 S. W. 115; Sower *v.* Philadelphia, 35 Pa. St. 231.

51. Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777; Elkhart *v.* Simonton, 69 Ind. 196; Lafayette *v.* Bush, 19 Ind. 326; Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

52. Hammerslough *v.* Kansas, 57 Mo. 219; Jersey City *v.* Gardner, 33 N. J. Eq. 622.

53. Keene *v.* Bristol, 26 Pa. St. 46.

54. *Illinois.*— Grant Park *v.* Trah, 218 Ill. 516, 75 N. E. 1040.

Indiana.— Logansport *v.* Pollard, 50 Ind. 151.

Massachusetts.— Bemis *v.* Springfield, 122 Mass. 110; Riley *v.* Lowell, 117 Mass. 76; Allen *v.* Charlestown, 109 Mass. 243.

New Hampshire.— Sawyer *v.* Keene, 47 N. H. 173.

New Jersey.— Paret *v.* Bayonne, 39 N. J. L. 559 [*affirmed* in 40 N. J. L. 333].

New York.— Comesky *v.* Suffern, 179 N. Y. 393, 72 N. E. 320; Matter of Gilroy, 43 N. Y. App. Div. 359, 60 N. Y. Suppl. 200.

Pennsylvania.— *In re* Vernon Park, 163 Pa. St. 70, 29 Atl. 972; *In re* Sharett's Road, 8 Pa. St. 89.

See 36 Cent. Dig. tit. "Municipal Corporations," § 969.

Reassessment.— If an assessment of damages is void by reason of defective notice, the council of the following year may order a new assessment. Cassidy *v.* Bangor, 61 Me. 434.

In Michigan the proceeding for the opening of a street is not the act of the city as a governmental agency, but the municipal authorities appear before the jury in the character of plaintiffs or petitioners. People *v.* Brighton, 20 Mich. 57.

55. Shelby *v.* Burlington, 125 Iowa 343, 101 N. W. 101.

Attempt to agree.— Where the city charter required that the highway committee should, if they were able, agree on the damages with the party whose land should be taken before applying to the commissioners for compensation, and it appeared that the chairman applied for that purpose to the president and treasurer of a college whose land was taken, both of whom replied that they were not authorized to act in the matter, the requirement was sufficiently complied with. Trinity College *v.* Hartford, 32 Conn. 452.

appeal within the time fixed by statute will limit him to the amount assessed by the council.[56] All persons who sustain damages may usually be joined in one assessment,[57] but the damages and benefits resulting from separate works which do not form part of a continuous improvement cannot be assessed in the same proceeding;[58] and where the paving and grading of a street are separate acts the damages for each may be assessed at different times and the damages for grading may be assessed before the paving is done.[59] An assessment of damages and benefits should usually be made in the same proceeding.[60]

b. Authority of Officers. Authority to assess damages must be expressly conferred by legislative enactment,[61] and will not be implied from power to make improvements;[62] but where authority to make assessments is conferred on municipal officials, they act, in their proceedings, as the agents of the municipality,[63] and their decision is not reviewable by certiorari [64] except upon a question of jurisdiction.[65]

c. Jurisdiction. As a general rule it may be stated that a court, in appointing commissioners or otherwise proceeding for the assessment of damages, is acting under a special and limited jurisdiction,[66] which may be exercised only by a court which is authorized by statute to proceed,[67] and where the facts essential to jurisdiction under the statute are shown.[68]

d. Notice of Proceedings. Notice of proceedings to assess damages must be given to all parties interested or the assessment will be invalid.[69] Where the character of the notice is prescribed by statute the provision must be complied with,[70] and a notice which fails to state the place of meeting is insuffi-

56. Fulton *v.* Dover, 8 Houst. (Del.) 78, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974; *In re* House Ave., 67 Barb. (N. Y.) 350.

57. McKee *v.* St. Louis, 17 Mo. 184.

58. Kerrigan *v.* West Hoboken Tp., 37 N. J. L. 77.

59. *In re* Orchard Ave., 33 Pittsb. Leg. J. N. S. (Pa.) 194.

60. Rogge *v.* Elizabeth, 64 N. J. L. 491, 46 Atl. 164; Stewart *v.* Hoboken, 57 N. J. L. 330, 31 Atl. 278 [*affirmed* in 58 N. J. L. 696, 36 Atl. 1129]; Miller *v.* Asheville, 112 N. C. 769, 16 S. E. 765; Whittaker *v.* Deadwood, 12 S. D. 608, 82 N. W. 202. And see *In re* Penrose Ferry Ave., 27 Pa. Super. Ct. 341.

61. Brown *v.* Lowell, 8 Metc. (Mass.) 172; Stewart *v.* Hoboken, 57 N. J. L. 330, 31 Atl. 278 [*affirmed* in 58 N. J. L. 696, 36 Atl. 1129]; People *v.* Leonard, 87 N. Y. App. Div. 269, 84 N. Y. Suppl. 341; Collins *v.* Saratoga Springs, 70 Hun (N. Y.) 583, 24 N. Y. Suppl. 234; People *v.* New York, 53 How. Pr. (N. Y.) 280.

62. Kerrigan *v.* West Hoboken Tp., 37 N. J. L. 77.

63. Mallory *v.* Huntington, 64 Conn. 88, 29 Atl. 245.

64. People *v.* Phillips, 88 N. Y. App. Div. 560, 85 N. Y. Suppl. 200.

65. People *v.* Leonard, 87 N. Y. App. Div. 269, 84 N. Y. Suppl. 341.

66. Comesky *v.* Suffern, 179 N. Y. 393, 72 N. E. 320.

67. See the statutes of the several states. And see Betts *v.* Williamsburgh, 15 Barb. (N. Y.) 255; Campbell *v.* Philadelphia, 108 Pa. St. 300; *In re* Brady St., 99 Pa. St. 591; *In re* Ridge St., 29 Pa. St. 391; *In re* Spring Garden St., 4 Rawle (Pa.) 192; Schuler *v.* Philadelphia, 10 Pa. Cas. 357, 13 Atl. 947; *In re* Orthodox St., 11 Pa. Co. Ct. 154; *In re* Reynolds St., 6 Kulp (Pa.) 479.

68. Comesky *v.* Suffern, 179 N. Y. 393, 72 N. E. 320; Matter of Borup, 89 N. Y. App. Div. 183, 85 N. Y. Suppl. 828.

69. Brown *v.* Lowell, 8 Metc. (Mass.) 172; People *v.* Gilon, 121 N. Y. 551, 24 N. E. 944; People *v.* New York, 59 Hun (N. Y.) 407, 13 N. Y. Suppl. 404; Wright *v.* Georgetown, 30 Fed. Cas. No. 18,080, 4 Cranch C. C. 534.

Service by publication, as to the unknown owners, did not confer jurisdiction of an owner who was named in the petition, and expressly made a party defendant, and who was not shown by affidavit or the petition to reside out of the state. Dickey *v.* Chicago, 152 Ill. 468, 38 N. E. 932.

Notice to a mortgagee of a railroad may be dispensed with in a proceeding to take railroad property, where the mortgage is so insignificant in proportion to the value of the road that the lien will not be impaired in the slightest degree by the proceeding. Matter of Oneida St., 37 N. Y. App. Div. 266, 55 N. Y. Suppl. 959 [*reversing* 22 Misc. 235, 49 N. Y. Suppl. 828].

70. Logansport *v.* Pollard, 50 Ind. 151; Stewart *v.* Hoboken, 57 N. J. L. 330, 31 Atl. 278 [*affirmed* in 58 N. J. L. 696, 36 Atl. 1129].

An assessment on the property for the expense of the improvement is not notice of the determination of damages. People *v.* Gilon, 121 N. Y. 551, 24 N. E. 944.

Damages from negligence.— Notice by viewers to assess damages, to a person to appear before them, and appearance by him, give the viewers no authority to pass on questions of damage from negligence. Stork *v.* Philadelphia, 195 Pa. St. 101, 45 Atl. 678, 49 L. R. A. 600.

cient.[71] Failure to give notice merely affects the assessment of damages and does not invalidate the action of the city in making the improvement.[72] A property-owner who has received notice is in no position to complain that other owners were not notified.[73] Where notice is not given, interested parties may petition for viewers to assess damages and need not open up the proceedings to present their claims.[74]

e. Time For Proceedings. The time within which proceedings for assessment of damages may be begun is usually fixed by statute and a petition must be filed within that time;[75] but if no time is fixed by the statute, proceedings for damages will be barred only by force of the general statute of limitations.[76]

f. Application. An application for assessment of damages must state with reasonable certainty the jurisdiction of the city in making the improvement,[77] the nature of the same,[78] the fact that injury has been sustained,[79] and the ownership of property injured.[80] Such an application, it has been held, may be signed for the owner by an agent.[81]

g. Evidence. The general rules of evidence will be applicable in proceedings to ascertain damages from public improvements;[82] the burden is on the petitioner to prove his case,[83] and he may not do so by showing the damages allowed the same property for a prior improvement on a different street.[84] In estimating the difference in value before and after an improvement, witnesses may testify as to special items of damages, such as the cost of filling the lot,[85] or the expense of a retaining wall.[86] Evidence that buildings were erected with reference to a street as it was constructed is sufficient to show that they were erected to correspond to the established grade.[87]

h. Viewers, Jury, Commissioners, or Other Committee. The power to appoint commissioners to assess damages,[88] and the authority of such commissioners when

71. Logansport *v.* Pollard, 50 Ind. 151; McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543.

72. Cassidy *v.* Bangor, 61 Me. 434.

73. Kansas City *v.* Block, 175 Mo. 433, 74 S. W. 993. See also James *v.* St. Paul City, 58 Minn. 459, 60 N. W. 21.

74. *In re* Orthodox St., 169 Pa. St. 499, 32 Atl. 444.

75. Shute *v.* Boston, 99 Mass. 236; Revere *v.* Boston, 14 Gray (Mass.) 218; Erskine *v.* Boston, 14 Gray (Mass.) 216; Loring *v.* Boston, 12 Gray (Mass.) 209; Haskell *v.* Bristol County, 9 Gray (Mass.) 341; Russell *v.* New Bedford, 5 Gray (Mass.) 31; Philadelphia *v.* Wright, 100 Pa. St. 235; *In re* Ridge Ave., 99 Pa. St. 469; *In re* Tabor St., 25 Pa. Super. Ct. 355.

76. Eisenhart *v.* Philadelphia, 154 Pa. St. 393, 26 Atl. 367; Norristown's Appeal, 3 Walk. (Pa.) 146; *In re* Butler St., 25 Pa. Super. Ct. 357; Craft *v.* South Chester, 2 Pa. Co. Ct. 508; Fegley *v.* Easton, 2 Pa. Co. Ct. 505. Where lands have been taken for a street without legal authority, the owners may bring actions to recover possession, or may proceed by petition for a regular opening and the award of damages. Where they proceed by the latter remedy, their right should not be barred by the statute of limitations so long as the action of ejectment would still lie. *In re* Girard Ave., 44 Leg. Int. (Pa.) 166.

77. St. Louis *v.* Lang, 131 Mo. 412, 33 S. W. 54; *In re* Merchant St., 9 Phila. (Pa.) 590; Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

78. Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 518.

79. Sawyer *v.* Keene, 47 N. H. 173; Matter of Buffalo Grade Crossing Com'rs, 46 N. Y. App. Div. 473, 61 N. Y. Suppl. 748.

80. *In re* Sixteenth St., 4 Pa. Co. Ct. 124; Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 518.

81. *In re* Sharett's Road, 8 Pa. St. 89.

82. See, generally, EVIDENCE. And see Hubbard *v.* Webster, 118 Mass. 599; Chase *v.* Worcester, 108 Mass. 60; Wilson *v.* Scranton City, 141 Pa. St. 621, 21 Atl. 779.

Admissions.— An admission by the city that petitioner's land has been taken will not bar the introduction of evidence that the land taken was subject to a public easement for a highway, and that no damage was caused thereby. Potter *v.* Putnam, 74 Conn. 189, 50 Atl. 395.

Evidence of other awards.— On a petition for damages for land taken in widening a street, questions to a witness as to awards for land made by him as a selectman are improper. Benton *v.* Brookline, 151 Mass. 250, 23 N. E. 846.

83. Sexton *v.* North Bridgewater, 116 Mass. 200.

84. Bemis *v.* Springfield, 122 Mass. 110; Markle *v.* Philadelphia, 163 Pa. St. 344, 30 Atl. 149.

85. Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171.

86. Bemis *v.* Springfield, 122 Mass. 110.

87. Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82.

88. Albany *v.* Gilbert, 144 Mo. 224, 46 S. W. 157; Manufacturers' Land, etc., Co. *v.* Cam-

appointed, depends entirely upon legislative enactment.[89] Disinterested persons must be selected.[90] Failure to comply with the terms of the statute will invalidate assessment proceedings,[91] hence where the statute directs the appointment of commissioners by ordinance, their appointment by resolution is void;[92] but a requirement that the precept shall contain the names of all owners will be waived if the parties appear before the jury and make no objection to the irregularity.[93]

i. Report or Award. The essentials of the report or award of a jury or commission to assess damages are frequently prescribed by statute,[94] and the award must be in substantial compliance with them.[95] It must be limited to the amount

den, 71 N. J. L. 490, 59 Atl. 1; Howell *v.* Buffalo, 15 N. Y. 512; *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193. See also *In re* Sewer St., 8 Pa. Co. Ct. 226.

Implied provision.—An act is not inoperative because there is no express provision for the appointment of a jury in the case of vacating a street, as the express command of the act that "it shall be the duty of juries selected to assess damages for the opening, widening, or vacating roads or streets," by assimilating the duties of juries for the opening and vacation of streets, necessarily implies the appointment in the latter cases under the system established in the former cases. *In re* Howard St., 142 Pa. St. 601, 21 Atl. 974.

Upon failure of agreement.— Where the statute provides for the appointment of appraisers only upon failure of the city and landowners to agree on damages, appraisers should not be appointed except upon failure of the city and landowners to so agree. Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Constitutionality of provisions.—An act requiring the common council, in proceedings to take realty for the opening of streets, to nominate twelve freeholders, and to apply to the court for the appointment of three commissioners from the persons so nominated, and directing that the judge or recorder shall proceed to draw from the box containing, on separate ballots the names of the persons so nominated, the names of three persons, who shall be the commissioners, is violative of the constitutional provision that when private property is to be taken for public use compensation must be made by a jury or by not less than three commissioners appointed by a court of record. Menges *v.* Albany, 47 How. Pr. (N. Y.) 244.

89. Riker *v.* New York, 3 Daly (N. Y.) 174. And see *In re* New St., (Pa. 1887) 11 Atl. 410; *In re* Magnolia Ave., 117 Pa. St. 56, 11 Atl. 405, both holding that a street marked out or laid down upon a confirmed plan is to be regarded as established or located; and a jury appointed to report upon the necessity of opening such established or located street can only report upon that question and are without power to assess damages.

Continuance.—*A nunc pro tunc* continuance of a jury to assess damages for the opening of a street, made more than three months after their appointment or a previous continuance, is of no effect. *In re* Hansberry St., 21 Pa. Co. Ct. 590, 43 Wkly. Notes Cas. 13.

Refusal of damages.— Ordinarily omission by the city to pay damages is equivalent to a determination not to do so and entitles landowners to a jury. Sisson *v.* New Bedford, 137 Mass. 255.

90. Judson *v.* Bridgeport, 25 Conn. 426; People *v.* Brighton, 20 Mich. 57.

Where there is no special assessment district it has been held that a statute requiring the appointment of disinterested citizens is impracticable since all freeholders are interested. Montgomery Ave. Case, 54 Cal. 579.

In Minnesota residents and freeholders are regarded as not disqualified by interest. McKusick *v.* Stillwater, 41 Minn. 372, 46 N. W. 769; Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

91. Abel *v.* Minneapolis, 68 Minn. 89, 70 N. W. 851; Albany *v.* Gilbert, 144 Mo. 224, 46 S. W. 157; *In re* New York, 158 N. Y. 668, 52 N. E. 1125; People *v.* Fitch, 147 N. Y. 355, 41 N. E. 695.

Qualification.— The members of the board of assessors of New York city are not required to be sworn in a proceeding to assess damage caused by a change of street grade, but their general oath of office is sufficient. People *v.* Gilon, 76 Hun (N. Y.) 346, 27 N. Y. Suppl. 704 [*affirmed* in 148 N. Y. 763, 43 N. E. 989].

Reappointment.—Where an act authorizing the appointment of commissioners for awarding damages for changes in grade is amended by a subsequent act, merely increasing the amount of damages which may be allowed, commissioners duly appointed under the former need not be reappointed under the latter. People *v.* Fitch, 147 N. Y. 355, 41 N. E. 695.

92. Gleason *v.* Bergen, 33 N. J. L. 72.

93. Buel *v.* Lockport, 3 N. Y. 197.

94. See the statutes of the several states. And see the cases cited in the following notes.

95. Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761; State *v.* Keokuk, 9 Iowa 438, holding that a return of commissioners reporting a portion of the property of owners unknown is not defective.

Sufficiency in general.— Where a committee is required to report the names of abutting owners, together with the amount of damages allowed to each, a report of the names of all those owning land abutting on the improvement, without mention of damages, is a sufficient award that no one is en-

claimed in the petition[96] and to persons who join in the petition as required by statute.[97] Under some statutes separate findings of damages and benefits are required.[98] But it has been held that a bill of particulars of the items composing the aggregate award need not be furnished,[99] nor need the board state the methods by which they have arrived at their conclusion.[1] When a jury is appointed the amount of damages is a question for them rather than for the court;[2] their award must be based upon their own judgment, regard being had to the evidence and to the facts;[3] and it will not be disturbed unless some error of law is manifest or it is apparent that they adopted erroneous principles in reaching their conclusion.[4] It will not be set aside as contrary to the evidence, where there is a substantial conflict in the evidence.[5] In any event the power of the city to set aside an award is not to be drawn from a doubtful implication, but may arise only from an express grant or necessary inference,[6] and although there may be power to set aside a report, such power does not authorize the commission to be discharged and a new one appointed.[7] Where commissioners have viewed the property and damages have been established by competent evidence, the fact that some improper evidence had been admitted will not be ground for reversal of their award.[8] Nor where the assessors have considered all the evidence presented by a claimant before making their award will they be required to reopen the matter to hear further evidence.[9] The fact that borough officials have been negligent in not regarding a proper service of notice of the proceedings will not authorize them to have a report set aside.[10] The fact that one of several persons joined in an assessment of damages secures the assessment to be set aside as to him will not inure to the benefit of other persons joined in the assessment.[11]

j. Effect of Approval of Report. The acceptance of the report of the commissioners by the council[12] or other authorized body[13] has the effect of a judgment.

k. Defects and Objections and Waiver Thereof. Defects and irregularities in the proceedings are usually regarded as waived by failure to make timely objection thereto.[14] So where the city authorities act upon the assessment of damages

titled to damages. Hildreth *v.* Lowell, 11 Gray (Mass.) 345.

96. *In re* Beale St., 39 Cal. 495.

97. *In re* Beale St., 39 Cal. 495.

98. Duffield *v.* Detroit, 15 Mich. 474. See also McDermott *v.* New Castle, 3 Pa. Dist. 221, 13 Pa. Co. Ct. 474, holding that the report of viewers must show a schedule of benefits and damages, and a plan showing the improvement and the properties taken, injured, or benefited.

99. People *v.* Gilon, 22 N. Y. Suppl. 238.

1. People *v.* Gilon, 22 N. Y. Suppl. 238.

2. Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635; Matter of Brook Ave., 8 N. Y. App. Div. 294, 40 N. Y. Suppl. 949.

3. *In re* Wheeler Ave. Sewer, 214 Pa. St. 504, 63 Atl. 894, holding that where viewers adopted the estimate made by a city engineer their report should have been set aside.

The jury may be guided by their own knowledge and judgment as to damages and benefits as well as by testimony of witnesses. Kansas *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562.

4. Abel *v.* Minneapolis, 68 Minn. 89, 70 N. W. 851; Smith *v.* Omaha, 49 Nebr. 883, 69 N. W. 402; Kingston *v.* Terry, 24 Misc. (N. Y.) 616, 53 N. Y. Suppl. 652.

5. Brooke's Appeal, 32 Cal. 558; *In re* Piper, 32 Cal. 530.

6. State *v.* Keokuk, 9 Iowa 438.

7. Millisor *v.* Wagner, 133 Ind. 400, 32 N. E. 927; State *v.* Keokuk, 9 Iowa 438; *In re* Claiborne St., 4 La. Ann. 7.

8. Matter of Comesky, 83 N. Y. App. Div. 137, 81 N. Y. Suppl. 1049.

9. People *v.* Coler, 45 N. Y. App. Div. 463, 61 N. Y. Suppl. 345.

10. Bowers *v.* Braddock Borough, 172 Pa. St. 596, 33 Atl. 759.

11. McKee *v.* St. Louis, 17 Mo. 184.

12. Busenbark *v.* Crawfordsville, 9 Ind. App. 578, 37 N. E. 278 [*following* Terre Haute *v.* Blake, 9 Ind. App. 403, 36 N. E. 932]; Goddard *v.* Worcester, 9 Gray (Mass.) 88. *Compare* Matter of White Plains Road, 106 N. Y. App. Div. 133, 94 N. Y. Suppl. 110.

13. People *v.* Asten, 49 How. Pr. (N. Y.) 405 [*affirmed* in 62 N. Y. 623].

14. Terre Haute *v.* Blake, 9 Ind. App. 403, 36 N. E. 932; Worcester *v.* Keith, 5 Allen (Mass.) 17 (holding that after a jury had been appointed to determine damages and the trial had been had and their verdict set aside, the city, on an application for a new warrant for a jury, could not object to an irregularity in the address of the original petition); Russell *v.* New Bedford, 5 Gray (Mass.) 31 (holding that the objection that an application for a jury was not made

and approve the report of the commissioners, they will be held to have waived all antecedent irregularities.[15] An objection that the return does not show upon its face the qualification of the commissioners is waived by the city in admitting that commissioners have been appointed, since it will be presumed that the city appointed qualified persons.[16] Failure to urge a jurisdictional defect at the time of an application for the appointment of commissioners will not estop the city from urging such defect upon a motion to set aside an order of appointment, where it is not shown that all property-owners affected assented.[17] A petitioner cannot be affected by the failure of the municipal authorities to properly file his petition, where he has done all that it was possible for him to do to secure such filing.[18]

l. **Review.** Provision for review of the act of the board or commission in assessing damages,[19] or of an order confirming or rejecting their act,[20] is usually made by statute,[21] and review may be had only in the manner so provided,[22] and the procedure provided for by the statute must be followed.[23] Where the statute

within the time limited by law might first be made upon the return of the warrant and before the impaneling of the jury); People *v.* Coler, 45 N. Y. App. Div. 463, 61 N. Y. Suppl. 345 (holding that a defect in a notice was not fatal where it appeared that the property-owner understood the notice and appeared in pursuance thereof); People *v.* Gilon, 76 Hun (N. Y.) 346, 27 N. Y. Suppl. 704 [*affirming* 22 N. Y. Suppl. 238] (holding that failure to object that the board of assessors had not been sworn was waived where the property-owner submitted himself to the jurisdiction of such board); Wilson *v.* Scranton City, 141 Pa. St. 621, 21 Atl. 779 (holding that the appointment of three viewers under a void act, instead of seven as required by a previous valid act, was an irregularity which became immaterial after an appeal had been taken from the report of the viewers). See also Hendrickson *v.* Toledo, 23 Ohio Cir. Ct. 256.

15. Chicago *v.* Wheeler, 25 Ill. 478, 79 Am. Dec. 342.

16. State *v.* Keokuk, 9 Iowa 438.

17. *In re* Buffalo, 78 N. Y. 362.

18. Garvey *v.* Revere, 187 Mass. 545, 73 N. E. 664.

19. Hall *v.* Meriden, 48 Conn. 416; Hare *v.* Rice, 142 Pa. St. 608, 21 Atl. 976; *In re* C St., 118 Pa. St. 171, 12 Atl. 345; Church *v.* Milwaukee, 31 Wis. 512.

20. Hamilton *v.* Ft. Wayne, 73 Ind. 1.

21. See the statutes of the several states. And see cases cited *supra*, notes 19, 20.

Damages recoverable.— Under a statute providing for an appeal in proceedings to assess damages occasioned by the location of an improvement, damages resulting from the construction of the improvement cannot be recovered. Jackson *v.* Portland, 63 Me. 55.

22. People *v.* Muh, 101 N. Y. App. Div. 423, 92 N. Y. Suppl. 22 [*affirmed* in 183 N. Y. 540, 76 N. E. 1105] (holding that decisions of the board of revision of assessments on appeal from board of assessors under the Greater New York charter could not be reviewed by certiorari); Bowers *v.* Braddock Borough, 172 Pa. St. 596, 33 Atl. 759.

Attack on allowance of appeal.—An order allowing appeal must be challenged by certiorari or other direct proceedings. Murray *v.* Newark, (N. J. Sup. 1905) 60 Atl. 38.

23. St. Louis *v.* Lang, 131 Mo. 412, 33 S. W. 54, holding that exceptions filed after the time specified in the statute were properly stricken out.

Time for appeal.—An appeal must be taken within the time specified by statute. Sondley *v.* Asheville, 110 N. C. 84, 14 S. E. 514 (holding that under a statute providing that the appeal should lie to the next term of court after the date of the report, a postponement of the consideration of the report for one week did not prevent an appeal, although by reason of such postponement the appeal could not be taken to the next term of court); Bowers *v.* Braddock County, 172 Pa. St. 596, 33 Atl. 759 (holding that the appeal must be filed within thirty days from the filing of the report of damages).

Parties who may appeal.—Under a statute providing that either the parties to whom awards are given or those by whom the payments are to be made may appeal, it has been held that a city in its corporate capacity could not appeal. Matter of Nepperhan St., 71 N. Y. App. Div. 534, 75 N. Y. Suppl. 923.

Pleadings.— It has been held that on an appeal from an award of commissioners in street-opening proceedings, under the charter of the city of Newark, no answer was required to the petition of appeal; but that an issue should be framed in the words of the charter without any answer being filed and notwithstanding the allegations of the answer if one was filed. Miller *v.* Newark, 35 N. J. L. 460.

Amendments.— Where an appeal recited that it was taken from a decision assessing benefits to property in street opening, it was held that it might be amended by substituting the word "damages" for "benefits," where it appeared that no benefits had been assessed, but that damages had been awarded for taking the property. Farrell *v.* Baltimore, 75 Md. 493, 23 Atl. 1096.

Admissions.— Where the city has approved

provides only for a confirmation of a report or its reference back to the commissioners, the report cannot be modified on appeal.[24] But under the provisions of some statutes it is proper to readjust the assessment, and either increase or reduce it upon appeal.[25] An objection to the validity of the proceedings cannot be first raised on appeal.[26] A claim for damages which has not been presented to the lower tribunal cannot be considered.[27] An act providing for particular improvements and allowing an appeal from an assessment of damages does not deprive a person of an alternative remedy under the terms of a general statute;[28] but an act allowing appeal to a designated court vests such court with final jurisdiction.[29]

10. Payment or Recovery of Award — a. In General. The time for payment of awards is usually fixed by statute;[30] but where damages are not payable until benefits have been assessed, such assessment must be made within a reasonable time.[31] Deduction may be made by the city of sums due it for taxes which are liens on the land.[32] Where land is taken to open a street the title of all parties interested is divested, and the award is substituted in place thereof; hence whoever has an interest in the land is entitled to his proportionate share of its value.[33] If money has been paid into court for unknown owners, an applicant is not entitled to it until he has complied with the requirements of the statute.[34] Where land has been taken for a street and the owner has permitted the city to occupy it and place improvements thereon, he will be enjoined from closing up or obstructing the street, but the city will at the same time be compelled to give him just compensation for the payment of the award and interest thereon.[35]

b. Effect of Payment and Acceptance. Acceptance of payment of an award estops a property-owner from subsequently setting up its inadequacy[36] or objecting to a mere irregularity in the assessment of damages;[37] and where the part of

a report assessing damages to a certain person as owner of property, it cannot deny such ownership upon appeal. Wright *v.* Butler, 64 Mo. 165.

Presumptions.— An appellant will be presumed to have had notice of the hearing upon exceptions, where it is shown that an attorney appeared who had previously represented appellant as agent and who now represents him as trustee, in which capacity he appealed. *In re* Tioga St., 213 Pa. St. 345, 62 Atl. 926.

24. *In re* Roffignac St., 4 Rob. (La.) 357.

25. Hall *v.* Meriden, 48 Conn. 416.

26. Bartlett *v.* Tarrytown, 55 Hun (N. Y.) 492, 8 N. Y. Suppl. 739; *In re* Myrick, 13 N. Y. Suppl. 948.

27. Hinckley *v.* Franklin, 69 N. H. 614, 43 Atl. 643.

28. Coe *v.* Meriden, 45 Conn. 155; Grimshaw *v.* Fall River, 160 Mass. 483, 36 N. E. 494; Robinson *v.* St. Paul, 40 Minn. 228, 41 N. W. 950; Hare *v.* Rice, 142 Pa. St. 608, 21 Atl. 976.

29. *In re* Chestnut St., 128 Pa. St. 214, 18 Atl. 338. See also Millvale *v.* Poxon, 123 Pa. St. 497, 16 Atl. 781; *In re* Carpenter St., 3 Walk. (Pa.) 286.

30. See the statutes of the several states. And see Hawley *v.* Harrall, 19 Conn. 142; Fink *v.* Newark, 40 N. J. L. 11; Hammersley *v.* New York, 56 N. Y. 533 [*affirming* 67 Barb. 35].

Effect of appeal.— The provision of the statute that damages awarded for property taken shall be paid within six months from the confirmation by the board of park commissioners requires payment of each award within the time specified, although appeals from other awards for land taken for the same improvement are pending, and the act provides for an abandonment by the commissioners of any proposed improvement. State *v.* Minneapolis Park Com'rs, 33 Minn. 524, 24 N. W. 187.

31. Fink *v.* Newark, 40 N. J. L. 11; Pittsburgh *v.* Irwin, 85 Pa. St. 420.

32. Carpenter *v.* New York, 51 N. Y. App. Div. 584, 64 N. Y. Suppl. 839.

33. *In re* Eleventh Ave., 81 N. Y. 436.

34. *In re* De Wint, 1 Cow. (N. Y.) 595. On ordering a rule to pay out moneys which have been paid into the supreme court as belonging to unknown owners, under the powers of the corporation to enlarge and improve streets, the court will, if the claim be doubtful, require security to refund on the claims turning out to be unfounded. *In re* De Wint, 2 Cow. (N. Y.) 498.

35. Jersey City *v.* Fitzpatrick, 30 N. J. Eq. 97.

36. Keil *v.* St. Paul, 47 Minn. 288, 50 N. W. 83; Reinhardt *v.* Buffalo, 15 N. Y. Suppl. 844.

37. Hawley *v.* Harrall, 19 Conn. 142; Rentz *v.* Detroit, 48 Mich. 544, 12 N. W. 694, 911.

In case of void proceedings.— Where an assessment of damages for private property taken for public use was not made in conformity with the constitution, the fact that the owners of the land taken received the

the cost of an improvement to be borne by the city has been estimated by commissioners and their estimate accepted and paid, the city cannot subsequently assess part of its share upon the property-owners.[38]

c. Conflicting Claims. If the city has no notice of an adverse claim, it will not be liable for the amount of an award paid to a person holding the apparent title;[39] but if the funds are still held by the city, one claiming in opposition to the person named in the assessment list is entitled to the same upon establishing his right by a suit against such person,[40] and the city will be liable to the adverse claimant if it pays the award to the unsuccessful litigant after notice.[41]

d. Actions on Award. An action at law will usually lie against a municipality for the payment of an award of damages.[42] In such an action the city may not set up irregularities in its own proceedings,[43] and if the award was made to unknown owners, recovery may be had by one who can prove his right and title to the same.[44] The fact that some of the owners have appealed from the award does not bar an action by one who has not joined in the appeal;[45] and a person who has a lien upon the amount of an award made to another may maintain a joint suit against the city and the parties interested to obtain the sum to which he is entitled.[46] Any legislative provision as to the time of bringing suit must be complied with.[47] If damages are made payable out of a fund raised by assessment of benefits, and such assessments are not levied or collected, the city is sometimes held liable out of its general funds;[48] but where the statute provides that certificates of indebtedness for the award shall be paid from an assessment upon the property specially benefited, it has been held that an action will not lie, but that the proceeding must be by mandamus.[49] Where the award is to be paid from a special assessment it has been held that in order to support an action it must be alleged that the assessment has been paid.[50]

11. Remedies of Owners of Property — a. In General. The right to damages for consequential injuries to property, resulting from public improvements lawfully made, depends solely on constitutional or legislative provision,[51] and where a right to damages is created by statute the statutory mode of recovery must be pursued.[52] The fact that private property may be incidentally damaged in the

amounts so assessed and gave conveyances of the land cannot have a retroactive operation, so as to cure the defect and make valid a proceeding which was void. House *v.* Rochester, 15 Barb. (N. Y.) 517.

38. Norfolk *v.* Chamberlain, 89 Va. 196, 16 S. E. 730.

39. Cassidy *v.* New York, 62 Hun (N. Y.) 358, 17 N. Y. Suppl. 71.

40. Hatch *v.* Bowes, 43 N. Y. Super. Ct. 426.

41. Hatch *v.* New York, 82 N. Y. 436 [*reversing* 45 N. Y. Super. Ct. 599].

42. Mobile *v.* Richardson, 1 Stew. & P. (Ala.) 12; Bloomington *v.* Brokaw, 77 Ill. 194; Bragg *v.* Chicago, 73 Ill. 152; Wheeler *v.* Chicago, 24 Ill. 105, 76 Am. Dec. 736.

Where no appropriation has been made, a plea of no appropriation by the councils states no defense to an action against a city on a confirmed report of a road jury awarding damages for changing the grade of a street. Reimer *v.* Philadelphia, 12 Phila. (Pa.) 408.

43. Buell *v.* Lockport, 11 Barb. (N. Y.) 602 [*affirmed* in 8 N. Y. 55].

44. Fisher *v.* New York, 57 N. Y. 344 [*reversing* 4 Lans. 451].

45. Roper *v.* New Britain, 70 Conn. 459, 39 Atl. 850.

46. Youngs *v.* Stoddard, 27 N. Y. App. Div. 162, 50 N. Y. Suppl. 475. See also Seavey *v.* Seattle, 17 Wash. 361, 49 Pac. 517.

47. Chattanooga *v.* Neely, 97 Tenn. 527, 37 S. W. 281.

48. Clayburgh *v.* Chicago, 25 Ill. 535, 79 Am. Dec. 346; Chicago *v.* Smythe, 33 Ill. App. 28; Hempstead *v.* Des Moines, 52 Iowa 303, 3 N. W. 23. And see State *v.* Superior, 81 Wis. 649, 51 N. W. 1014, holding, however, that the city is liable primarily only out of the fund raised by special assessments.

49. Hopper *v.* Union Tp., 54 N. J. L. 243, 24 Atl. 387. *Compare* Rogers *v.* Omaha, (Nebr. 1905) 107 N. W. 212.

Mandamus to compel assessment see MANDAMUS, 26 Cyc. 337.

50. McCullough *v.* Brooklyn, 23 Wend. (N. Y.) 458.

51. See *supra*, XIII, D, 1, a.

52. *Indiana.*— Terre Haute *v.* Turner, 36 Ind. 522.

Iowa.— Cole *v.* Muscatine, 14 Iowa 296.

Kentucky.— Martin *v.* Louisville, 97 Ky. 30, 29 S. W. 864, 16 Ky. L. Rep. 786.

Massachusetts.— Garvey *v.* Revere, 187 Mass. 545, 73 N. E. 664; Sullivan *v.* Fall River, 144 Mass. 579, 12 N. E. 553; Thurston *v.* Lynn, 116 Mass. 544; Worcester *v.*

making of an improvement will not afford the owner a right to injunctive relief,[53] unless possibly in an extreme case.[54] Where damages are secured by the constitution, the provision is self-executing, and an action at law may be maintained, where no mode of recovery is prescribed,[55] and if damages result from an improvement unlawfully or negligently made, the remedy is by action of tort, not under the statute.[56] Where the right of the city to perform the act complained of is conceded, a property-owner has no remedy by certiorari.[57]

b. Actions For Damages — (1) *General Rule.* A municipality is liable for damages resulting from an improvement unlawfully made[58] or from negligence in the prosecution of work upon a lawful improvement,[59] and an action at law therefor may be maintained against it;[60] but where, by statute, a remedy is given for consequential damages resulting from the proper exercise by the city of its power to make improvements, the property-owner is confined to the statutory remedy, and may not, by virtue of the enactment, maintain an action of tort against the city.[61] But where the city has not proceeded in accordance with the statute the

Worcester County Com'rs, 100 Mass. 103; Dorgan *v.* Boston, 12 Allen 223. See also Stowell *v.* New Bedford Bd. of Public Works, 184 Mass. 416, 68 N. E. 675, holding that if it were conceded that by reason of failure to give notice to remove certain property in the laying out of a public street, the property-owner was entitled to recover its value, such damages were not recoverable in an action of tort, but only by a petition under the statute for the damages caused by the laying out of the street.

New York.— Bernstein *v.* Mt. Vernon, 109 N. Y. App. Div. 899, 96 N. Y. Suppl. 458; Torge *v.* Salamanca, 86 N. Y. App. Div. 211, 83 N. Y. Suppl. 672 [*reversed* on other grounds in 176 N. Y. 324, 68 N. E. 626].

Pennsylvania.— Fisher's Petition, 178 Pa. St. 325, 35 Atl. 922; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17, 22; Hoster *v.* Philadelphia, 12 Pa. Super. Ct. 224; McKee *v.* Pittsburgh, 7 Pa. Super. Ct. 397. "When the injury to property is such only as is the direct, immediate and necessary or unavoidable consequence of the act of eminent domain itself, irrespective of care or negligence in the manner of the execution of the work, a proceeding before viewers is the appropriate remedy." Cooper *v.* Scranton City, *supra* [*citing* Stork *v.* Philadelphia, 195 Pa. St. 101, 45 Atl. 678, 49 L. R. A. 600; Denniston *v.* Philadelphia Co., 161 Pa. St. 41, 28 Atl. 1007].

Rhode Island.— Almy *v.* Coggeshall, 19 R. I. 549, 36 Atl. 1124.

South Carolina.— Garraux *v.* Greenville, 53 S. C. 575, 31 S. E. 597.

Wisconsin.— Owens *v.* Milwaukee, 47 Wis. 461, 3 N. W. 3.

See 36 Cent. Dig. tit. "Municipal Corporations," § 989.

53. Fellowes *v.* New Haven, 44 Conn. 240, 26 Am. Rep. 447; Kirchman *v.* West, etc., Towns St. R. Co., 58 Ill. App. 515. *Compare* Ætna Iron Works *v.* St. Louis Transit Co., 95 Mo. App. 565, 69 S. W. 618 (holding that an injunction would not be granted on the ground that it was intended to change the grade of a street, without first paying the damages assessed, where the evidence did not show that the injury was threatened or about to be inflicted); Horton *v.* Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1; Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339.

54. Louisville *v.* Louisville Rolling Mills Co., 3 Bush (Ky.) 416, 96 Am. Dec. 243.

55. Householder *v.* Kansas City, 83 Mo. 488; Walker *v.* Sedalia, 74 Mo. App. 70.

56. Holleran *v.* Boston, 176 Mass. 75, 57 N. E. 220; Magee Furnace Co. *v.* Com., 166 Mass. 480, 44 N. E. 610; Folmsbee *v.* Amsterdam, 142 N. Y. 118, 36 N. E. 821; Seeley *v.* Amsterdam, 31 Misc. (N. Y.) 123, 64 N. Y. Suppl. 1036; Schan *v.* Uvalde Asphalt Paving Co., 88 N. Y. Suppl. 1045; Jorgenson *v.* Superior, 111 Wis. 561, 87 N. W. 565.

57. Borghart *v.* Cedar Rapids, 126 Iowa 313, 101 N. W. 1120, 68 L. R. A. 306.

58. See *supra*, XIII, D, 1, a.

59. See *infra*, XIV, A, 5, a, (1).

60. Bacon *v.* Boston, 154 Mass. 100, 28 N. E. 9.

The fact that the best plan has not been adopted will not render the municipality liable in an action of trespass. Robinson *v.* Norwood Borough, 27 Pa. Super. Ct. 481.

61. *Massachusetts.*— Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320.

Minnesota.— Taylor *v.* St. Paul, 25 Minn. 129; McCarthy *v.* St. Paul, 22 Minn. 527.

New York.— Heiser *v.* New York, 104 N. Y. 68, 9 N. E. 866.

Pennsylvania.— Power *v.* Ridgway Borough, 149 Pa. St. 317, 24 Atl. 307; Beltzhoover *v.* Gollings, 101 Pa. St. 293; McKee *v.* Pittsburgh, 7 Pa. Super. Ct. 397.

Wisconsin.— Benton *v.* Milwaukee, 50 Wis. 368, 7 N. W. 241.

See 36 Cent. Dig. tit. "Municipal Corporations," § 990. See also *supra*, XIII, D, 11, a.

Compare Healey *v.* New Haven, 49 Conn. 394; Atlanta *v.* Hunnicutt, 95 Ga. 138, 22 S. E. 130.

Owners of bounding and abutting property. — Where a viaduct is built in front of property forty-five feet above the surface of the street, the owner is not obliged to file a claim for damages under the statute because property forty-five feet below the viaduct is not "bounding" or "abutting" thereon, but

property-owner is not confined to the statutory remedy.[62] In case no special remedy is given by a statute imposing a liability to make compensation it is held that a common-law action of trespass will lie.[63]

(II) *When Cause of Action Accrues.* Where the statute imposing a liability provides how its amount shall be ascertained a cause of action for damages does not arise until the city has failed to perform its duty in ascertaining the damages.[64] While in some cases it has been held that the right to damages arising from an alteration of the grade accrues as soon as the grade becomes legally fixed and operative,[65] the more general rule in respect to damages from a change of grade is that a cause of action does not arise until there has been an actual physical change in the grade.[66] But it is not necessary that the grading be completed in order that the property-owner may recover for such injury as has been occasioned by the work already done.[67] As a general rule the right of action of a landowner for an injury resulting from the opening of a street is held to accrue so as to start the running of the statute of limitations at the time some act is done which disturbs the actual possession of the owner, and not merely at the completion of the proceedings through which the city obtains the right to appropriate the property.[68]

(III) *Filing Claim as Condition Precedent.* If the statute provides that claims for damages must be filed with the city, the filing of claims in the manner and time prescribed in the statute becomes a condition precedent to action;[69] but in the absence of such provision, or in cases to which it does not apply, claims need not be filed before bringing suit.[70] Where the statute requires the filing of

he may sue directly. Cohen *v.* Cleveland, 43 Ohio St. 190, 1 N. E. 589.

62. *Connecticut.*— Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777; Holley *v.* Torrington, 63 Conn. 426, 28 Atl. 613.

Iowa.— Noyes *v.* Mason City, 53 Iowa 418, 5 N. W. 593.

Kansas.— Topeka *v.* Sells, 48 Kan. 520, 29 Pac. 604.

Minnesota.— Overmann *v.* St. Paul, 39 Minn. 120, 39 N. W. 66.

New York.— Folmsbee *v.* Amsterdam, 66 Hun 214, 21 N. Y. Suppl. 42 [*affirmed* in 142 N. Y. 118, 36 N. E. 821].

Ohio.— Cincinnati *v.* Coombs, 16 Ohio 181.

Wisconsin.— Pittelkow *v.* Milwaukee, 94 Wis. 651, 69 N. W. 803.

See 36 Cent. Dig. tit. "Municipal Corporations," § 990. See also *supra*, note 56.

63. Bear *v.* Allentown, 148 Pa. St. 80, 23 Atl. 1062.

64. Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777.

65. McCarthy *v.* St. Paul, 22 Minn. 527; Matter of Fifth St., etc., 12 Phila. (Pa.) 587.

66. Hempstead *v.* Des Moines, 63 Iowa 36, 18 N. W. 676; Tyson *v.* Milwaukee, 50 Wis. 78, 5 N. W. 914.

The expenses previously incurred by the owner in changing the physical condition of his premises to conform with a paper grade as established by ordinance may be recovered by him upon the making of the physical change in the street. Witwer *v.* Cedar Rapids, (Iowa 1906) 107 N. W. 604; York *v.* Cedar Rapids, 130 Iowa 453, 103 N. W. 790.

Limitations.—A lot owner's action for damages caused by change of grade of a street accrues on completion of the change of grade and is barred in four years thereafter. Omaha *v.* Flood, 57 Nebr. 124, 77 N. W. 379. The statute of limitations as to the damages occasioned by a change of grade runs only from the date of the actual grading of the land by a borough, and not from the date of the resolution of the borough council authorizing the change of grade. North Chester Borough *v.* Eckfeldt, 1 Mona. (Pa.) 732.

67. Schumacher *v.* St. Louis, 3 Mo. App. 297.

68. *In re* Volkmar St., 124 Pa. St. 320, 16 Atl. 867.

The mere laying out of a street, without any action taken in reference to its opening, does not constitute such taking or injury as gives the court the power to assess damages therefor. Bush *v.* McKeesport, 166 Pa. St. 57, 30 Atl. 1023; *In re* Pittsburgh Dist., 2 Watts & S. (Pa.) 320. But see Philadelphia *v.* Dickson, 38 Pa. St. 247, holding that where the assessment of damages has been confirmed and the right to the use of property for a street is complete so that the public authorities may enter, the right of action of the owner of land for damages accruing from the opening of a street is complete.

69. Omaha *v.* Clarke, 66 Nebr. 33, 92 N. W. 146; Ernst *v.* Kunkle, 5 Ohio St. 520; Cleveland *v.* Hyland, 18 Ohio Cir. Ct. 868, 6 Ohio Cir. Dec. 242; Miller *v.* Cincinnati, 5 Ohio Dec. (Reprint) 472, 6 Am. L. Rec. 107; Anness *v.* Providence, 13 R. I. 17. See also Phipps *v.* North Pelham, 61 N. Y. App. Div. 442, 70 N. Y. Suppl. 630.

Since the right to damages is purely statutory, it is competent for the legislature to prescribe a limit of time within which claims for damages arising from the grading of streets shall be filed. People *v.* Stillings, 76 N. Y. App. Div. 143, 78 N. Y. Suppl. 942.

70. Dayton *v.* Lincoln, 39 Nebr. 74, 57 N. W. 754; Cohen *v.* Cleveland, 43 Ohio St.

a claim as a condition precedent to any suit against the city, a property-owner cannot file a claim to enforce a statutory obligation resulting from legal acts, and in his action recover damages resulting from tortious acts.[71]

(IV) *JOINDER OF CAUSES OF ACTION.*[72] Recovery must be sought in one action for all damages, past and prospective, resulting from a public improvement.[73] Hence, where the grade of a street from curb to curb has been altered, thus rendering necessary a change in the level of the sidewalk, recovery of damages for the alteration of the driveway will bar subsequent action on account of the grading of the sidewalk.[74] An action against a city for an injury to private property resulting from public improvement cannot be joined by an amendment with a cause of action against the officers of the city in their individual capacity for the same injury caused by their negligence.[75]

(V) *PLEADINGS*—(A) *In General.* In an action against the city for damages from public improvements, the sufficiency of the complaint or answer will be tested by the general rules of pleading.[76] If the action is predicated on negli-

190, 1 N. E. 589; Scherer *v.* City, 8 Ohio Dec. (Reprint) 552, 8 Cinc. L. Bul. 326; Cincinnati *v.* Kemper, 7 Ohio Dec. (Reprint) 245, 2 Cinc. L. Bul. 5; Seaman *v.* Washington, 172 Pa. St. 467, 33 Atl. 756.

71. Smith *v.* Eau Claire, 83 Wis. 455, 53 N. W. 744, holding that where a claim was filed for damages caused by a lawful change in the grade of a street, the claimant could not on appeal to the circuit court amend his complaint so as to claim for damages caused by an unlawful change of the grade. See also Drummond *v.* Eau Claire, 85 Wis. 556, 55 N. W. 1028, holding that where the claim was generally for damages from change of grade the claimant was not precluded from asserting an unlawful change of grade.

72. See, generally, JOINDER AND SPLITTING OF ACTIONS.

73. Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821.

74. Hempstead *v.* Des Moines, 63 Iowa 36, 18 N. W. 676.

75. Hancock *v.* Johnson, 1 Metc. (Ky.) 242.

76. See, generally, PLEADING. And see Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; Luse *v.* Des Moines, 22 Iowa 590; Cotes *v.* Davenport, 9 Iowa 227; Owensboro *v.* Brocking, 87 S. W. 1086, 27 Ky. L. Rep. 1086; Stickford *v.* St. Louis, 75 Mo. 309 [*affirming* 7 Mo. App. 217]; Hill *v.* St. Louis, 59 Mo. 412.

Authorization of improvement.— In an action against a city for injury to real estate, a complaint which alleges that a city wrongfully and unlawfully constructed, and caused to be constructed, the embankment that injured plaintiff's property, is not demurrable for want of an allegation that the alleged wrongful action of the city was authorized by its common council. Jeffersonville *v.* Myers, 2 Ind. App. 532, 28 N. E. 999. But see Dallas *v.* Ross, 2 Tex. App. Civ. Cas. § 279. It will be presumed as against plaintiff that an improvement was made in the exercise of the municipality's legitimate governmental powers, the contrary not being alleged. Huntsville *v.* Ewing, 116 Ala. 576, 22 So. 984. But see Hill *v.* St. Louis, 59 Mo. 412. An averment that in pursuance of the powers conferred by charter the warden and burgesses of a borough voted to change the grade of a street and did cause the grade to be changed is a sufficient allegation that the change in grade as made was the change voted to be made. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

Change of grade.— The complaint must show a prior established grade and that damage resulted by reason of a change. Anderson *v.* Bain, 120 Ind. 254, 22 N. E. 323. A complaint for damages occasioned by raising a street "above the established grade" is defective in not showing that the grade had been legally established. Valparaiso *v.* Adams, 123 Ind. 250, 24 N. E. 107.

Description of grade.— In an action for damages for change of grade the petition alleging an establishment of a grade, representations of the town in regard thereto, plaintiff's improvements relying thereon, but not describing the grade, or setting out the ordinances so establishing it, is sufficient on demurrer. Noyes *v.* Mason City, 53 Iowa 418, 5 N. W. 593. A complaint in an action for damages for wrongful change of grade under an ordinance is sufficient, even though it appears from a copy of the ordinance set out in the complaint that it fixed the grade at street crossings only, it being alleged that the street was graded in accordance with the ordinance. Keehn *v.* McGillicuddy, 15 Ind. App. 580, 44 N. E. 554.

Aider by verdict.— In an action against a town and a borough for changing the grade of a street, the failure of the complaint to aver that defendants did not give plaintiff notice or pay her damages, or to state any sum as damages, is cured by verdict. Holley *v.* Torrington, 63 Conn. 426, 28 Atl. 613.

Illustrations of sufficient complaints.— Wrongful excavation. Durango *v.* Luttrell, 18 Colo. 123, 31 Pac. 853. Negligent grading causing flooding. Dallas *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 321. A complaint, in an action for damages assessed to land in laying out a street, which alleges that all the acts required of the commissioners, under statute, were performed, setting them out in detail, and alleges further that the land was

gence in the prosecution of the work, or recovery is sought on the ground of illegality of the improvement, such negligence[77] or illegality[78] should be specially pleaded; and any special damages sustained cannot be recovered unless alleged.[79]

(B) *Amendments.* The general rules governing the amendment of pleadings apply in an action for damages resulting from public improvements.[80]

(VI) *ISSUES.* In an action for damages from public improvements, the authority of the city to make the improvement,[81] the ownership of property injured,[82] the time at which the injury was sustained,[83] and the nature of the injury[84] usually constitute the material issues.

(VII) *EVIDENCE.* The general rules governing the admissibility and competency of evidence[85] and the sufficiency of the same to sustain a verdict will apply in actions for damages from public improvement.[86] It will be presumed that the municipal authorities have acted in accordance with law.[87] Plaintiff is confined in his proof to the allegations of the complaint,[88] but it seems that evidence of

taken, is *prima facie* sufficient, and if the improvement has been abandoned and the land not in fact taken it should be set up in the answer. Daley *v.* St. Paul, 7 Minn. 390.

77. Healey *v.* New Haven, 47 Conn. 305; Cotes *v.* Davenport, 9 Iowa 227.

78. San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256.

Sufficiency of averment of illegality see Montgomery *v.* Townsend, 84 Ala. 478, 4 So. 780; State Diocese Trustees *v.* Anomosa, 76 Iowa 538, 41 N. W. 313, 2 L. R. A. 606, holding complaint sufficient to show grading not properly authorized.

79. Springfield *v.* Griffith, 21 Ill. App. 93; Doppas *v.* Cincinnati, etc., R. Co., 19 Ohio Cir. Ct. 582, 10 Ohio Cir. Dec. 286; Smith *v.* Eau Claire, 78 Wis. 457, 47 N. W. 830.

Sufficiency of averment.— Where sufficient facts to show special damage are alleged it is not necessary to aver the conclusion that plaintiff suffered special damage. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

80. Peterson *v.* Waltham, 150 Mass. 564, 23 N. E. 236; Brady *v.* Wilkes-Barre, 161 Pa. St. 246, 28 Atl. 1085. Plaintiff in an action to recover damages for injury to property from the grading of a street may amend his petition, and set up damages accruing after the suit was brought and before trial. Louisville *v.* McGill, 52 S. W. 1053, 21 Ky. L. Rep. 718.

Amendment of pleadings generally see PLEADING.

81. Philadelphia *v.* Randolph, 4 Watts & S. (Pa.) 514, 39 Am. Dec. 102.

82. Lafayette *v.* Wortman, 107 Ind. 404, 8 N. E. 277; Cotes *v.* Davenport, 9 Iowa 227.

83. Chicago *v.* Altgeld, 33 Ill. App. 23; Kortz *v.* Lafayette, 23 Ind. 382.

84. Pickles *v.* Ansonia, 76 Conn. 278, 56 Atl. 552; Mellor *v.* Philadelphia, 160 Pa. St. 614, 28 Atl. 991.

85. See, generally, EVIDENCE. And see the following cases:

Illinois.— Chicago *v.* McDonough, 112 Ill. 85; Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 198 Ill. 580, 63 N. E. 1043].

Massachusetts.— Garvey *v.* Revere, 187 Mass. 545, 73 N. E. 664; Dana *v.* Boston, 176 Mass. 97, 57 N. E. 325.

Ohio.— Youngstown *v.* Moore, 30 Ohio St. 133, holding that statements made to the lot owner by the city engineer in explanation of the profile of the grade, whereby the owner was induced to file no claim for damages, were admissible.

Texas.— San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256.

Wisconsin.— Meinzer *v.* Racine, 74 Wis. 166, 42 N. W. 230.

See 36 Cent. Dig. tit. "Municipal Corporations," § 996.

Nature and extent of injury to property.— Joliet *v.* Adler, 71 Ill. App. 456; Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070; Morton *v.* Burlington, 106 Iowa 50, 75 N. W. 662; Barker *v.* Taunton, 119 Mass. 392; Denise *v.* Omaha, 49 Nebr. 750, 69 N. W. 119; Matter of Buffalo Grade Crossing Com'rs, 17 N. Y. App. Div. 54, 44 N. Y. Suppl. 844; McCombs *v.* Pittsburg, 194 Pa. St. 348, 45 Atl. 60.

Prior proceedings.—Where proceedings have been discontinued and the appraisement set aside they will not be regarded as evidence of the value of the lot illegally taken. Lawrence *v.* New Orleans Second Municipality, 12 Rob. (La.) 453.

86. McCash *v.* Burlington, 72 Iowa 26, 33 N. W. 346; Sheehy *v.* Kansas City Cable R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; Svanson *v.* Omaha, 38 Nebr. 550, 57 N. W. 289; Friedrich *v.* Milwaukee, 118 Wis. 254, 95 N. W. 126.

Inferences from evidence.— The jury may from the facts and surrounding circumstances, without definite evidence, infer special benefits to set off damages. Kent *v.* St. Joseph, 72 Mo. App. 42.

87. Bernstein *v.* Mt. Vernon, 109 N. Y. App. Div. 899, 96 N. Y. Suppl. 458.

88. Russell *v.* Burlington, 30 Iowa 262; Gift *v.* Reading, 3 Pa. Super. Ct. 359, 40 Wkly. Notes Cas. 164, holding that in an action for damages on account of the construction of a sewer by a city, medical testimony as to impairment of the sanitary condition of the property was inadmissible, where there was no allegation that such condition had been impaired.

benefits which offset damages may be introduced by the city, although they have not been pleaded in a special defense.[89] Witnesses must state the facts upon which they base their estimate of damages.[90] A verdict upon conflicting evidence will not be disturbed.[91] If no evidence of injury to property has been produced, a judgment for damages will be set aside.[92]

(VIII) *QUESTIONS FOR JURY.* Whether an injury complained of comes within the provisions of a statute allowing damages is a mixed question of law and fact to be determined usually by the jury under proper instructions,[93] and it is for the jury to determine the extent of the injury sustained and to estimate damages for the same.[94] Where the jury have all the facts before them they are not bound to accept the estimate of witnesses as to the amount of damages.[95]

(IX) *INSTRUCTIONS.* The rules governing civil actions generally with regard to the necessity and sufficiency of instructions[96] are applicable to proceedings for the determination of damages for the construction of improvements. Instructions should be given as to the proper measure of damages,[97] as to the special items which may be considered,[98] and as to the applicability of special benefits as a set-off;[99] but immaterial matters need not be submitted.[1] If the jury have viewed the premises, it is proper to instruct that the testimony may be considered in the light of knowledge gained by their inspection.[2]

(X) *JUDGMENT AND ENFORCEMENT.*[3] The amount of the judgment cannot exceed that claimed in the petition.[4] Where the contractors are joined with the city in an action for the wrongful making of an improvement, it has been held

89. Pickles *v.* Ansonia, 76 Conn. 278, 56 Atl. 552.

90. Albertson *v.* Philadelphia, 185 Pa. St. 223, 39 Atl. 887.

General depression in trade as a cause for a diminution in value may be brought out on cross-examination. East St. Louis *v.* Wiggins Ferry Co., 11 Ill. App. 254.

Rental value.— Although the correct measure of damages is regarded as the difference in the market value of the property, the admission of evidence as to the rental value is held not to be fatal, where it is not offered for the purpose of a basis for the estimation of damages. Joliet *v.* Adler, 71 Ill. App. 456.

Damage to neighboring property.— In an action for damages to property by the closing of a street, proof of the decrease in rental value of neighboring property is not admissible. Chicago *v.* Baker, 86 Fed. 753, 30 C. C. A. 364.

Difference in value.— Proof may be admitted of the difference in price at which property was purchased shortly before the improvement was made and at which it was sold shortly after. Peabody *v.* New York, etc., R. Co., 187 Mass. 489, 73 N. E. 649.

91. East Rome *v.* Lloyd, 124 Ga. 852, 53 S. E. 103.

92. Texarkana *v.* Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451.

93. Montgomery *v.* Townsend, 84 Ala. 478, 4 So. 780; Montgomery *v.* Townsend, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112; Webster *v.* Melrose, 168 Mass. 5, 46 N. E. 393.

Nature of improvements.— The question of whether improvements have been made "according to the established grade" is one of fact for the jury. Conklin *v.* Keokuk, 73 Iowa 343, 35 N. W. 444.

94. Columbus *v.* McDaniel, 117 Ga. 823, 45 S. E. 59; Castleberry *v.* Atlanta, 74 Ga. 164; Morton *v.* Burlington, 106 Iowa 50, 75 N. W. 662; Frankfort *v.* Howard, 74 S. W. 703, 25 Ky. L. Rep. 111.

95. Princeton *v.* Gieske, 93 Ind. 102.

96. See TRIAL.

97. Stewart *v.* Council Bluffs, 84 Iowa 61, 50 N. W. 219; Markowitz *v.* Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498.

98. Springfield *v.* Griffith, 46 Ill. App. 246; Conklin *v.* Keokuk, 73 Iowa 343, 35 N. W. 444; Dana *v.* Boston, 176 Mass. 97, 57 N. E. 325.

Curing error.— A charge which directs the jury in estimating the damage caused to property by lowering the grade of a street to consider with other evidence the cost of adjusting the premises to the new grade is not error, where the measure of damages is fixed by other instructions as the difference between the market value before and after the change. Smith *v.* Kansas City, 128 Mo. 23, 30 S. W. 314.

99. Ficken *v.* Atlanta, 114 Ga. 970, 41 S. E. 58; Elgin *v.* McCallum, 23 Ill. App. 186; Omaha *v.* Schaller, 26 Nebr. 522, 42 N. W. 721; Fuller *v.* Mt. Vernon, 171 N. Y. 247, 63 N. E. 964.

1. Waldron *v.* Kansas City, 69 Mo. App. 50, holding that in an action for change of grade failure to require the jury to find that the natural grade of the street was materially changed was immaterial, where it was conceded that there had been a cut ten feet in depth.

2. Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82; Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775.

3. In actions against city generally see *infra*, XVII, P.

4. McCarthy *v.* St. Paul, 22 Minn. 527.

that the judgment may be against either the city or the contractors in accordance with the proof of responsibility for the injury.[5] Where a municipality incorporated under an act which is subsequently declared unconstitutional has taken property for public use a judgment for damages is a nullity.[6]

E. Assessment For Benefits and Special Taxes — 1. In General — a. Nature of Assessment. It is a fundamental doctrine of American jurisprudence that those receiving special benefits from the public should make compensation for them; upon this principle rests the theory of county, township, and municipal taxation;[7] and the levy upon property specially benefited of the cost of a local improvement is but a further application of this same doctrine.[8] Assessments, as distinguished from other kinds of taxation, are those special and local impositions on property in the immediate vicinity of a municipal improvement, laid for the purpose of paying for the same and with reference to the special benefit which the property derives from it.[9] An assessment for a public improvement is not a tax in the ordinary sense of the term,[10] but a charge for improvements, for the making of which for his benefit the property-owner should pay compensation.[11]

b. Power to Levy in General. In the exercise of its general powers the legislature may direct that the cost of local improvements be assessed upon property benefited,[12] and this power may be delegated to municipalities;[13] but the power of a municipality to levy assessments depends on express provision of charter or statute,[14] and the extent to which the power may be exercised is to be determined by the proper construction of such provision.[15] The fact that land specially

5. Jeffersonville *v.* Myers, 2 Ind. App. 532, 28 N. E. 999.

6. Colton *v.* Rossi, 9 Cal. 595.

7. Ingersoll Pub. Corp. 335.

8. Agens *v.* Newark, 37 N. J. L. 415.

9. Hale *v.* Kenosha, 29 Wis. 599. See also *infra*, XIII, E, 4, a.

10. People *v.* Austin, 47 Cal. 353; Bass *v.* South Park Com'rs, 171 Ill. 370, 49 N. E. 549; West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427; Chester *v.* Chester, etc., R. Co., 3 Del. Co. (Pa.) 389. See also Soens *v.* Racine, 10 Wis. 271, holding that the provision of a charter that no tax except for current expenses should be levied without a special vote of the property-owners did not apply to assessments.

A charge imposed by law upon the assessed value of all property, real and personal, in a district is a tax and not an assessment, although the purpose be to make a local improvement on a road. Williams *v.* Corcoran, 46 Cal. 553. See also Howes *v.* Racine, 21 Wis. 514.

11. McGuire *v.* Brockman, 58 Mo. App. 307. See also Pine Tree Lumber Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

The foundation of the power to lay a special tax is the benefit which the object of the tax confers on the owner of the property. Wistar *v.* Philadelphia, 80 Pa. St. 505, 21 Am. Rep. 112. See also Donohue *v.* Brotherton, 10 Ohio S. & C. Pl. Dec. 47, 7 Ohio N. P. 367.

12. *Colorado.*— Pueblo *v.* Robinson, 12 Colo. 593, 21 Pac. 899; Wolff *v.* Denver, 20 Colo. App. 135, 77 Pac. 364.

Kansas.— Atchison, etc., R. Co. *v.* Peterson, 5 Kan. App. 103, 48 Pac. 877, holding that it was within the power of the legislature to make assessments for local improvements a personal charge.

Kentucky.— Bradley *v.* McAtee, 7 Bush 667, 3 Am. Rep. 309.

Missouri.— State *v.* St. Louis, 62 Mo. 244.

Nebraska.— Hurford *v.* Omaha, 4 Nebr. 336.

New Jersey.—Wilson *v.* Trenton, 55 N. J. L. 220, 26 Atl. 83 [*affirmed* in 56 N. J. L. 716, 31 Atl. 775].

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Pennsylvania.— *In re* Centre St., 115 Pa. St. 247, 8 Atl. 56; Olyphant Borough *v.* Egreski, 29 Pa. Super. Ct. 116.

Texas.— Hutcheson *v.* Storrie, (Civ. App. 1898) 48 S. W. 785.

Washington.—Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332.

United States.— Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270, holding that it was within the power of the legislature to make the cost of highway improvements assessed upon real estate payable forthwith or an immediate lien thereon.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1002.

13. See *infra*, XIII, E, 1, c.

14. *Iowa.*— Fairfield *v.* Ratcliff, 20 Iowa 396.

Louisiana.— New Iberia *v.* Weeks, 104 La. 489, 29 So. 252.

Nebraska.— Trephagen *v.* South Omaha, 69 Nebr. 577, 96 N. W. 248, 111 Am. St. Rep. 570, holding that cities must have express power to levy a special tax on specific lots for the purpose of paying the cost of removing garbage therefrom.

Pennsylvania.— Philadelphia *v.* Greble, 38 Pa. St. 339.

West Virginia.— Cain *v.* Elkins, 57 W. Va. 9, 49 S. E. 898.

15. *Illinois.*— Adcock *v.* Chicago, 172 Ill. 24, 49 N. E. 1008.

assessed is also liable for its portion of a general tax levied in aid of the improvement does not render the assessment invalid;[16] nor will an assessment be invalidated by the fact that the city had exceeded its debt limit and did not have money on hand to pay its part of the cost of an improvement.[17]

c. Delegation or Grant of Power by Legislature. The legislature may confer on municipalities power to levy special assessments upon property benefited to pay the cost of local improvements,[18] and may leave to municipal officers the determination of what property is benefited and hence liable to assessment;[19] but such delegation must be expressly made.[20] It is not to be implied from a grant of power to make improvements or to levy taxes,[21] nor will a grant of power to open streets imply authority to pay for the same by special assessment.[22]

d. Constitutional Limitations — (i) *In General.* While there has been much variance and apparent inconsistency in the opinions of various courts, it seems well settled that a state legislature may create special taxing districts and charge the cost of a local improvement, in whole or in part, upon the property in such districts, either according to valuation or superficial area or frontage,[23] and that such a method of assessment is not prohibited by the fifth or fourteenth amendment of the constitution of the United States;[24] or, as the rule may be more

Indiana.— Spaulding *v.* Baxter, 25 Ind. App. 485, 58 N. E. 551.

Kansas.— Kansas City *v.* Hanson, 8 Kan. App. 290, 55 Pac. 513.

Missouri.— Poplar Bluff *v.* Hoag, 62 Mo. App. 672.

Wisconsin.— Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1001.

Duration of power.— Unless restrained by the charter under which the power to impose special assessments on property specially benefited thereby is conferred upon a municipal corporation, that power is not exhausted when one improvement is made. State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183.

16. Jelliff *v.* Newark, 48 N. J. L. 101, 2 Atl. 627 [*affirmed* in 49 N. J. L. 239, 12 Atl. 770].

17. Hughes *v.* Parker, 148 Ind. 692, 48 N. E. 243. See also Risley *v.* St. Louis, 34 Mo. 404.

18. *California.*— Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Illinois.— Chicago *v.* Brede, 218 Ill. 528, 75 N. E. 1044 (a constitutional provision authorizing the legislature to vest municipalities with power to make local improvements by special assessments means only such local improvements as may be made by special assessments); West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427; West Chicago Park Com'rs *v.* Sweet, 167 Ill. 326, 47 N. E. 728; Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 27 N. E. 203.

Iowa.— Warren *v.* Henly, 31 Iowa 31.

Kansas.— Burnes *v.* Atchison, 2 Kan. 454.

Massachusetts.— Masonic Bldg. Assoc. *v.* Brownell, 164 Mass. 306, 41 N. E. 306.

New Jersey.— Tusting *v.* Asbury Park, 73 N. J. L. 102, 62 Atl. 183.

South Carolina.— Mauldin *v.* Greenville, 42 S. C. 293, 20 S. E. 842, 46 Am. St. Rep. 723, 27 L. R. A. 284.

Texas.— Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; Taylor *v.* Boyd, 63 Tex. 533; Houston City St. R. Co. *v.* Storrie, (Civ. App. 1898) 44 S. W. 693.

Vermont.— Allen *v.* Drew, 44 Vt. 174.

Washington.— *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1002.

19. *In re* Piper, 32 Cal. 530; Smith *v.* Worcester, 182 Mass. 232, 65 N. E. 40, 59 L. R. A. 728; Howe *v.* Cambridge, 114 Mass. 388; *In re* Zborowski, 68 N. Y. 88. See also *infra*, XIII, E, 5, d.

20. Augusta *v.* Murphey, 79 Ga. 101, 3 S. E. 326; Alvord *v.* Syracuse, 163 N. Y. 158, 57 N. E. 310; Wilson *v.* Allegheny City, 79 Pa. St. 272; State *v.* Ashland, 71 Wis. 502, 37 N. W. 809.

21. Annapolis *v.* Harwood, 32 Md. 471, 3 Am. Rep. 161; Squire *v.* Cartwright, 67 Hun (N. Y.) 218, 22 N. Y. Suppl. 899.

22. Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487; Omaha *v.* State, 69 Nebr. 29, 94 N. W. 979; Krumberg *v.* Cincinnati, 29 Ohio St. 69.

23. **Apportionment of assessment** see *infra*, XIII, E, 10.

24. English *v.* Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158; Martin *v.* District of Columbia, 205 U. S. 135, 27 S. Ct. 440, 51 L. ed. 743 (holding that a statute would not be declared unconstitutional because in a particular instance the amount assessed under the strict letter of the statute might exceed the value of the property, but that the statute should be so interpreted that the apportionment of damages would be limited to the benefits); Webster *v.* Fargo, 181 U. S. 394, 21 S. Ct. 623, 45 L. ed. 912; Wight *v.* Davidson, 181 U. S. 371, 21 S. Ct. 616, 45 L. ed. 900.

Foot front rule.— Statutes which apportion assessments with regard to foot frontage of the property assessed are not regarded as subject to constitutional objection, either

broadly stated, an assessment of the cost of local improvements upon the property benefited is not a denial of the equal protection of the law.[25] Further, assessments for public improvements are not as a rule regarded as taxation within the meaning of the provisions common to state constitutions governing the manner of taxation,[26] or limiting the amount thereof.[27] It has been broadly stated that the assessment upon property benefited of the cost of an improvement does not constitute taking property without compensation.[28] This is of course true if the benefits equal the assessment;[29] but the rule supported by the weight of authority is that if the assessment exceeds the benefit there is *pro tanto* a taking of property without compensation;[30] and that, while the legislature or a municipality

under the fifth or the fourteenth amendments of the federal constitution. See Louisville, etc., R. Co. *v.* Barber Asphalt Paving Co., 197 U. S. 430, 25 S. Ct. 466, 49 L. ed. 819; Shumate *v.* Heman, 181 U. S. 402, 21 S. Ct. 645, 45 L. ed. 916, 922; French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879 [*distinguishing* Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443].

25. *Connecticut.*— State *v.* McMahon, 76 Conn. 97, 55 Atl. 591.

Iowa.— Owen *v.* Sioux City, 91 Iowa 190, 59 N. W. 3.

Massachusetts.— Holt *v.* Somerville, 127 Mass. 408.

Pennsylvania.— Wray *v.* Pittsburgh, 46 Pa. St. 365.

United States.— Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1003. And see CONSTITUTIONAL LAW, 10 Cyc. 1062.

Discrimination against non-resident.— A provision in a city charter authorizing assessments against all abutters where a street is graded, on the petition of a majority in frontage of the resident abutters, is not an unconstitutional discrimination against the non-resident abutters. Buchan *v.* Broadwell, 88 Mo. 31.

26. *California.*— Chambers *v.* Satterlee, 40 Cal. 497.

Georgia.— First M. E. Church *v.* Atlanta, 76 Ga. 181.

Illinois.— Wright *v.* Chicago, 46 Ill. 44.

Kentucky.— Hager *v.* Gast, 119 Ky. 502, 84 S. W. 556, 27 Ky. L. Rep. 129.

Maryland.— Brooks *v.* Baltimore, 48 Md. 265.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Missouri.— Meier *v.* St. Louis, 180 Mo. 391, 79 S. W. 955.

Ohio.— Dayton *v.* Bauman, 66 Ohio St. 379, 64 N. E. 433.

Oregon.— Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222.

Washington.— Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1003.

Double taxation.— Where the maintenance of the sewage system of a city is paid for by special taxation, an assessment on land within the city of special benefits derived from the construction of a particular sewer does not constitute double taxation. McChesney *v.* Hyde Park, (Ill. 1891) 28 N. E. 1102. A charter which provides that a percentage of the contract price of the public work may be levied to cover the expenses of service, plans, specifications, and superintendence is not invalid as imposing double taxation because the amount collected is placed in a special fund used for convenience in making local improvements, and largely supported by local assessments, while the actual expenses of the items were defrayed from another fund supported exclusively by general taxation. Burns *v.* Duluth, 96 Minn. 104, 104 N. W. 714. That property is assessed for special benefits of an improvement, and also subject to general taxation for the excess of cost of the improvement above the special assessments, is not illegal. *In re* Beechwood Ave., 194 Pa. St. 86, 45 Atl. 127.

27. *Alabama.*— Birmingham *v.* Klein, 89 Ala. 461, 7 So. 386, 8 L. R. A. 369.

Iowa.— Dittoe *v.* Davenport, 74 Iowa 66, 36 N. W. 895, holding that the limitation of two mills on the dollar of assessed value, prescribed by statute, applies only when the sewerage tax is levied on property without regard to its location, and does not prohibit a greater assessment against that fronting on the street where the sewer is laid.

Kentucky.— Gosnell *v.* Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. Rep. 519; Dyer *v.* Newport, 80 S. W. 1127, 26 Ky. L. Rep. 204.

Louisiana.— Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Ohio.— Raymond *v.* Cleveland, 42 Ohio St. 522.

Oklahoma.— Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511.

Pennsylvania.— Greensburg *v.* Laird, 8 Pa. Co. Ct. 608.

28. Martin *v.* Wills, 157 Ind. 153, 60 N. E. 1021; Springfield *v.* Baker, 56 Mo. App. 637; Litchfield *v.* Vernon, 41 N. Y. 123; Allen *v.* Drew, 44 Vt. 174. But *compare* Cincinnati, etc., R. Co. *v.* Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L. R. A. 566; Gaston *v.* Portland, 41 Oreg. 373, 69 Pac. 34, 445.

29. Chicago, etc., R. Co. *v.* Elmhurst, 165 Ill. 148, 46 N. E. 437; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

30. *Massachusetts.*— White *v.* Gove, 183 Mass. 333, 67 N. E. 359.

to which authority has been delegated has large discretion in defining territory to be deemed specially benefited by an improvement,[31] yet the property-owner is entitled to a hearing on the question as to whether the sum assessed upon him is in excess of the benefits received.[32] An additional assessment may be levied upon the same property for additional improvements without its constituting double assessment.[33]

(II) *EQUALITY AND UNIFORMITY.* An assessment for local improvements is not a tax within the meaning of a constitutional provision that all taxes must be equal and uniform,[34] or that no distinction shall be made in taxation between different kinds of property.[35] An assessment on vacant lots, in front of which water mains are laid, has, however, been held to be a general tax;[36] and a tax of a stated amount, in addition to the rates for the use of water, on all improved lots abutting on the street through which the mains ran, was held to contravene the constitutional requirement of uniformity of taxation.[37]

e. Statutory Provisions — (I) *IN GENERAL.* Since the power of a municipality to levy special assessments depends on express provisions of charter or

Michigan.— Detroit *v.* Chapin, 112 Mich. 588, 71 N. W. 149, 42 L. R. A. 638.

New Jersey.—Borton *v.* Camden, 65 N. J. L. 511, 47 Atl. 436; State *v.* Newark, 37 N. J. L. 415, 18 Am. Rep. 729; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634. See Smith *v.* Newark, 32 N. J. Eq. 1 [*affirmed* in 33 N. J. Eq. 545].

Ohio.— Dayton *v.* Bauman, 66 Ohio St. 379, 64 N. E. 433.

Pennsylvania.— Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

United States.— Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443.

See also CONSTITUTIONAL LAW, 8 Cyc. 1062 note 33.

31. *Indiana.*— Hibben *v.* Smith, 158 Ind. 206, 62 N. E. 447.

Kansas.— Atchison, etc., R. Co. *v.* Peterson, 5 Kan. App. 103, 48 Pac. 877.

Kentucky.— Abraham *v.* Louisville, 62 S. W. 1041, 23 Ky. L. Rep. 375.

Massachusetts.— White *v.* Gove, 183 Mass. 333, 67 N. E. 359.

Michigan.— Voigt *v.* Detroit, 123 Mich. 547, 82 N. W. 253.

Texas.— Kettle *v.* Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874.

West Virginia.— Parkersburg *v.* Tavenner, 42 W. Va. 486, 26 S. E. 179.

United States.— Williams *v.* Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047.

32. See *infra*, XIII, E, 7, g.

33. Halsey *v.* Lake View, 188 Ill. 540, 59 N. E. 234; Sedalia *v.* Coleman, 82 Mo. App. 560. And see Dunlop *v.* Gosnell, 35 S. W. 108, 18 Ky. L. Rep. 8.

34. *California.*— Emery *v.* San Francisco Gas Co., 28 Cal. 345.

Colorado.—Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135.

Florida.— Edgerton *v.* Green Cove Springs, 19 Fla. 140.

Georgia.— Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402.

Illinois.— Murphy *v.* People, 120 Ill. 234, 11 N. E. 202.

Indiana.— Reinken *v.* Fuehring, 130 Ind. 382, 30 N. E. 414, 30 Am. St. Rep. 247, 15 L. R. A. 624.

Iowa.—Warren *v.* Henly, 31 Iowa 31.

Minnesota.—State *v.* St. Louis County Dist. Ct., 61 Minn. 542, 64 N. W. 190.

Missouri.—Farrar *v.* St. Louis, 80 Mo. 379.

North Carolina.—Hilliard *v.* Asheville, 118 N. C. 845, 24 S. E. 738; Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Oregon.— Ladd *v.* Gambell, 35 Oreg. 393, 59 Pac. 113; Cook *v.* Portland, 20 Oreg. 580, 27 Pac. 263, 13 L. R. A. 533.

Pennsylvania.— Beaumont *v.* Wilkes Barre, 142 Pa. St. 198, 21 Atl. 888; Chester City *v.* Black, 132 Pa. St. 568, 19 Atl. 276, 6 L. R. A. 802.

Rhode Island.— Bishop *v.* Tripp, 15 R. I. 466, 8 Atl. 692.

Tennessee.—Arnold *v.* Knoxville, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. N. S. 837.

Virginia.— Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382. But see Fulkerson *v.* Bristol, 105 Va. 555, 54 S. E. 468 (holding that an assessment for a street improvement cannot be enforced against one property-owner of a class when all of a class originally liable to the assessment cannot be compelled to pay the assessment because of the failure of the corporate authorities to perfect the assessment against all the property before the adoption of the constitutional provision abolishing the right to make and levy such an assessment); Norfolk *v.* Chamberlain, 89 Va. 196, 16 S. E. 730.

Washington.— Austin *v.* Seattle, 2 Wash. 667, 27 Pac. 557.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1004.

Contra.— Mauldin *v.* Greenville, 42 S. C. 293, 20 S. E. 842, 46 Am. St. Rep. 723, 27 L. R. A. 284.

35. Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077. See also Harrigan *v.* Jacksonville, 220 Ill. 134, 77 N. E. 85.

36. Jones *v.* Detroit Water Com'rs, 34 Mich. 273.

37. Lemont *v.* Jenks, 197 Ill. 363, 64 N. E. 362.

statute, the extent of such power and the manner of its exercise is to be determined by the construction of the charter or statute.[38] The grant of power is to be strictly construed as against the city.[39] As a general rule a general law providing a complete system for the levy of assessments will repeal the provisions of a city charter or special acts upon the subject,[40] although it will not have such effect unless they are repugnant.[41] A charter provision that planking shall be paid for out of general funds does not preclude a city from including the cost of planking in an assessment for a general street improvement.[42]

(II) *Enactment, Amendment, or Repeal After Improvement.* The validity of an assessment must be determined by the law in force at the time the same was made;[43] and if, at the time an improvement is completed, property is not liable to assessment for its cost, such liability cannot be imposed by subsequent enactment.[44] But since the right to levy and collect betterment assessments is statutory, the legislature may repeal the law authorizing such assessments except so far as contractual obligations are involved.[45] The repeal or amendment of an assessment law will not affect proceedings already begun under it;[46] and the same should be continued pursuant to the terms of the original enactment.[47]

2. Purposes — a. In General. A city having power to make local improve-

38. Voris *v.* Pittsburg Plate Glass Co., 163 Ind. 599, 70 N. E. 249; Hart *v.* Omaha, (Nebr. 1905) 105 N. W. 546; Omaha *v.* Hodgskins, 70 Nebr. 229, 97 N. W. 346.

39. *Illinois.*— Chicago *v.* Nodeck, 202 Ill. 257, 67 N. E. 39.

Indiana.—Marion Trust Co. *v.* Indianapolis, 37 Ind. App. 672, 706, 75 N. E. 834, 836.

Kansas.— Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605, holding that the provisions of an act relating to the paving of streets do not apply to a levy of special assessments to pay for the construction of sewers.

Nebraska.— Batty *v.* Hastings, 63 Nebr. 26, 88 N. W. 139; Farmers' L. & T. Co. *v.* Hastings, 2 Nebr. (Unoff.) 337, 96 N. W. 104.

New York.— Gilfeather *v.* Grout, 101 N. Y. App. Div. 150, 91 N. Y. Suppl. 533.

Ohio.— Birdseye *v.* Clyde, 61 Ohio St. 27, 55 N. E. 169, holding that unless the contrary clearly appears, the statute relating to local assessments will be construed in view of the general policy to restrain the power of local assessments by fixing a limit on the amount that may be levied beyond which municipal corporations may not go.

Wisconsin.— Oshkosh City R. Co. *v.* Winnebago County, 89 Wis. 435, 61 N. W. 1107.

40. Post *v.* Passaic, 56 N. J. L. 421, 28 Atl. 553; Central New Jersey Land, etc., Co. *v.* Bayonne, 56 N. J. L. 297, 28 Atl. 713; Hoetzel *v.* East Orange, 50 N. J. L. 354, 12 Atl. 911; State *v.* Tenny, 58 S. C. 215, 36 S. E. 555.

41. State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 23 N. W. 222; Omaha *v.* Hodgskins, 70 Nebr. 229, 97 N. W. 346; Matter of New York, 95 N. Y. App. Div. 552, 89 N. Y. Suppl. 6; *In re* Mill Creek Sewer, 196 Pa. St. 183, 46 Atl. 312. See also *In re* Locust Ave., 185 N. Y. 115, 77 N. E. 1012 [*affirming* 110 N. Y. App. Div. 774, 97 N. Y. Suppl. 508].

42. Seattle *v.* Kelleher, 195 U. S. 351, 25 S. Ct. 44, 49 L. ed. 232.

43. Starr *v.* Burlington, 45 Iowa 87; Stone *v.* Boston St. Com'rs, 192 Mass. 297, 78 N. E. 478; *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

44. Kelly *v.* Luning, 76 Cal. 309, 18 Pac. 335; Holliday *v.* Atlanta, 96 Ga. 377, 23 S. E. 406. See also Philadelphia *v.* Bowman, 175 Pa. St. 91, 34 Atl. 353. But *compare* Warren *v.* Boston St. Com'rs, 187 Mass. 290, 72 N. E. 1022; Cleveland *v.* Trippe, 13 R. I. 50, holding that an act authorizing a city to make assessments upon estates abutting on that part of any street in which sewers had been or should be laid was not unconstitutional as being retrospective.

45. Stone *v.* Boston St. Com'rs, 192 Mass. 297, 78 N. E. 478.

The vested right of a property-owner to be assessed according to the method in force when the work is ordered can extend, however, only to the amount and time of payment, and he cannot complain of a change of method which does him no injury in these respects. Spokane *v.* Browne, 8 Wash. 317, 36 Pac. 26.

46. Martin *v.* Oskaloosa, (Iowa 1904) 99 N. W. 557; Cincinnati *v.* Seasongood, 46 Ohio St. 296, 21 N. E. 630; Dallas *v.* Dallas Consol. Traction R. Co., (Tex. Civ. App. 1895) 33 S. W. 757. But *compare* Palmer *v.* Danville, 166 Ill. 42, 46 N. E. 629; Illinois Cent. R. Co. *v.* Wenona, 163 Ill. 288, 45 N. E. 265 (both holding that an act regarding the procedure for the levy of assessments will, in the absence of a saving clause, apply to proceedings already begun); Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90 (holding that an assessment by a municipal corporation for a street improvement was invalid, where it was based upon an estimate of the city engineer, made pursuant to an act which was repealed prior to the filing of the estimate, since the repeal deprived the engineer of any authority with respect to the tax or estimate).

47. *Missouri.*— Risley *v.* St. Louis, 34 Mo. 404.

ments by special assessment possesses implied power to declare what are local improvements;[48] but such declaration is not necessarily conclusive,[49] and an assessment will not be upheld if its purpose is clearly improper;[50] hence an assessment to acquire land[51] or to improve a chartered toll road,[52] being unauthorized by statute, will be set aside.

b. Improvements Previously Constructed and Paid For. The fact that an improvement has been constructed and paid for does not preclude the city from reimbursing itself by assessing the cost upon property benefited, provided the improvement was made in contemplation of such assessment;[53] but where the assessment of cost upon adjoining property formed no part of the original plan, it is questionable whether the city, after constructing and paying for an improvement, can, on second thought, reimburse itself by assessment.[54] An ordinance for such purpose cannot operate as a ratification of illegal improvements previously made without ordinance.[55] It has been held, however, that where the city has purchased a private sewer and made it a part of the general system an assessment may be levied on abutting property to pay for it under a statute providing for assessments based not on the cost of the particular sewer but upon the cost of the entire system.[56] The fact that an abutter on a river has dredged a channel sufficient for his own use does not preclude the city from widening the channel and making an assessment therefor on his land.[57]

3. Authority to Make Improvements — a. In General. An assessment for the cost of an *ultra vires* improvement is void,[58] and if the city, in making an improvement, fails to comply with the essential requirements of the act under which it proceeds, an assessment to pay for the same is invalid;[59] but where municipal offi-

New York.— People *v.* Brooklyn, 23 Barb. 180.

North Carolina.— Greensboro *v.* McAdoo, 112 N. C. 359, 17 S. E. 178.

Ohio.— Shehan *v.* Cincinnati, 11 Ohio Dec. (Reprint) 198, 25 Cinc. L. Bul. 212.

Rhode Island.— *In re* Dyer St., 11 R. I. 166.

Texas.— Ardrey *v.* Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726; Dallas *v.* Atkins, (Civ. App. 1895) 32 S. W. 780; Dallas *v.* Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128.

Washington.—Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474.

United States.— Pennsylvania Co. *v.* Cole, 132 Fed. 668.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1006.

48. Illinois Cent. R. Co. *v.* Decatur, 154 Ill. 173, 38 N. E. 626.

49. Morgan Park *v.* Wiswall, 155 Ill. 262, 40 N. E. 611.

50. *In re* Market St., 49 Cal. 546.

51. Krumberg *v.* Cincinnati, 29 Ohio St. 69.

52. Wilson *v.* Allegheny City, 79 Pa. St. 272.

53. *Connecticut.*— Meriden *v.* Camp, 46 Conn. 284.

Illinois.— McChesney *v.* Chicago, 152 Ill. 543, 38 N. E. 767; Ricketts *v.* Hyde Park, 85 Ill. 110.

Indiana.— Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342.

New Jersey.— Jelliff *v.* Newark, 48 N. J. L. 101, 2 Atl. 627 [*affirmed* in 49 N. J. L. 239, 12 Atl. 770].

New York.— *In re* Sackett St., 74 N. Y. 95 [*affirming* 4 Hun 92, 6 Thomps. & C. 347]; Matter of Cullen, 53 Hun 534, 6 N. Y. Suppl. 625 [*affirmed* in 119 N. Y. 628, 23 N. E. 1144].

Ohio.— Cincinnati *v.* Wilder, 6 Ohio Dec. (Reprint) 1046, 9 Am. L. Rec. 727.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1008.

Reopening street.— Where a street has been vacated more than twenty years, the facts that such street once existed, that it was not entirely closed, and that persons occasionally traveled over it, cannot affect proceedings to lay out a street in the same place. *In re* Chestnut St., 3 Pa. Dist. 497, 15 Pa. Co. Ct. 115.

54. Weld *v.* People, 149 Ill. 257, 36 N. E. 1006; Peck *v.* Chicago, 22 Ill. 578; Alton *v.* Job, 103 Ill. App. 378; Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; Harper's Appeal, 109 Pa. St. 9, 1 Atl. 791; Alford *v.* Dallas, (Tex. Civ. App. 1896) 35 S. W. 816.

Work done under abortive contract.— Lots fronting on a street cannot be taxed by way of assessment to pay a person for grading done by him on the street some two or three years before, under an abortive contract made by him with the municipality. *In re* Market St., 49 Cal. 546.

55. Waco *v.* Prather, (Tex. Civ. App. 1896) 35 S. W. 958.

56. Slocum *v.* Brookline, 163 Mass. 23, 39 N. E. 351.

57. Delaware, etc., Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 56 N. Y. Suppl. 976 [*affirmed* in 167 N. Y. 589, 60 N. E. 1119].

58. Hazlehurst *v.* Baltimore, 37 Md. 199.

59. *In re* Decring, 85 N. Y. 1; Donovan *v.* Oswego, 39 Misc. (N. Y.) 291, 79 N. Y.

cers acted without authority of the council duly empowered to lay special assessments, it was held that the levy by the council of an assessment to pay for such unauthorized improvement ratified the same, and the assessment was valid.[60]

b. Existence or Legality of Way Improved. A street must have been actually established as such before it can become subject to improvement by special assessment;[61] but in those states in which statutory dedication is not exclusive the establishment of a street by use or prescription is sometimes held sufficient to warrant improvements.[62] Where a street is to be opened and improved, an assessment will not be void because levied before title to the soil over which it runs has been acquired.[63] And so it would seem an assessment may be made for the cost of a sewer that is to be laid through private land before right or title thereto has been obtained,[64] or an assessment may be made for a bridge before title to the land necessary has been acquired.[65]

c. Improvement Encroaching on Abutting Land. A municipality may not enforce an assessment for cost of that portion of an improvement which encroaches upon private land,[66] but such encroachment will not invalidate the entire assessment.[67] Nor can an owner of property assessed for a street improvement object to the confirmation of the assessment on the ground that part of the land occupied by the street belongs to him,[68] and if the appropriation was necessary and was made with the consent of the owner of the land, it will in no way affect an assessment.[69]

4. Nature of Improvement — a. In General. The power of a municipality to levy a special assessment is limited to those purposes which are expressly provided for in its charter or by statute.[70] But the question of what is an improvement within the meaning of charter or statutory provisions,[71] as also the question of whether a particular improvement is local or general,[72] is one of fact

Suppl. 562; Kensington Dist. Com'rs *v.* Keith, 2 Pa. St. 218.

60. Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737; *In re* Shiloh St., 165 Pa. St. 386, 30 Atl. 986.

61. *Kentucky.*— Dulaney *v.* Figg, 94 S. W. 658, 29 Ky. L. Rep. 678.

Louisiana.— De Grilleau *v.* Frawley, 48 La. Ann. 184, 19 So. 151.

Michigan.— Detroit, etc., R. Co. *v.* Detroit, 49 Mich. 47, 12 N. W. 904.

Minnesota.—Hennessy *v.* St. Paul, 44 Minn. 306, 46 N. W. 353.

New York.— Copcutt *v.* Yonkers, 59 Hun 212, 13 N. Y. Suppl. 452 [*affirmed* in 128 N. Y. 669, 29 N. E. 148].

Ohio.— Merchant *v.* Waterman, 2 Ohio Dec. (Reprint) 429, 3 West. L. Month. 48.

Oregon.— Heiple *v.* East Portland, 13 Oreg. 97, 8 Pac. 907.

Pennsylvania. — Philadelphia *v.* Thomas, 152 Pa. St. 494, 25 Atl. 873; Philadelphia *v.* Ball, 147 Pa. St. 243, 23 Atl. 564. See also Reed *v.* Erie, 79 Pa. St. 346.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1011.

62. Meriden *v.* Camp, 46 Conn. 284; Darlington *v.* Com., 41 Pa. St. 63; Mason *v.* Sioux Falls, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802.

Existence of street see *supra*, XII, A, 2.

63. Cochran *v.* Park Ridge, 138 Ill. 295, 27 N. E. 939; Leman *v.* Lake View, 131 Ill. 388, 23 N. E. 346; Holmes *v.* Hyde Park, 121 Ill. 128, 13 N. E. 540. See also Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071 (holding that the fact that the city does not own all of the street at the time the improvement is ordered will not prevent the enforcement of an assessment, particularly where the property of the person objecting abuts only upon the part of the street owned by the city); Connellsville Borough *v.* Hogg, 156 Pa. St. 326, 27 Atl. 25.

64. Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Hyde Park *v.* Borden, 94 Ill. 26; *In re* McGowan, 18 Hun (N. Y.) 434; Bishop *v.* Tripp, 15 R. I. 466, 8 Atl. 692.

65. People *v.* Rochester, 5 Lans. (N. Y.) 142.

66. Matter of Chesebrough, 56 How. Pr. (N. Y.) 460 [*affirmed* in 17 Hun 561]; Western Pennsylvania R. Co. *v.* Allegheny, 92 Pa. St. 100.

67. Johnson *v.* Duer, 115 Mo. 366, 21 S. W. 800; Athens Borough *v.* Carmer, 169 Pa. St. 426, 32 Atl. 422.

68. Hunerberg *v.* Hyde Park, 130 Ill. 156, 22 N. E. 486 [*following* Holmes *v.* Hyde Park, 121 Ill. 128, 13 N. E. 540].

69. Longworth *v.* Cincinnati, 34 Ohio St. 101. It is no objection to a suit to enforce a special tax lien for constructing a sewer that the sewer is built in part over private property, where it appears that the owner of said property approved and consented, since by such approval he is estopped from ejecting the city. St. Joseph *v.* Landis, 54 Mo. App. 315.

70. See *supra*, XIII, E, 1, b.

71. Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922. See also *supra*, XIII, E, 2, a.

72. Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922.

for the decision of the municipal authorities, such decision, however, being subject to review. The term "local improvements" as employed in provisions relating to the power of municipalities to make such improvements by special assessment is by common usage employed to signify improvements made in a particular locality by which real property adjoining such locality is specially benefited.[73] An improvement is not deprived of its local character by the fact that it affects the most public street in the city,[74] or that the improvement district embraces the entire city.[75] But an improvement which is not intended to benefit a locality specially, but is for the benefit of the public at large, cannot be regarded as a local improvement.[76]

b. Construction or Improvement of Streets or Other Ways — (i) *In General.* The power to construct or improve streets by special assessment depending on express legislative grant, the extent to which a municipality may exercise the same is to be determined by the charter or statutory provision under which it proceeds.[77] Authority to pave the roadway[78] or to construct gutters[79] is not to be implied from power to improve sidewalks. Planting shade trees[80] and boulevarding a street may be deemed an improvement thereof within the meaning of the statute.[81] The term "pave" has been held to include macadamizing a street[82] or flagging it,[83] and constructing gutters.[84] A provision for the building of streets includes paving.[85] By some statutes provision is made for the payment of consequential damages resulting from the change of grade, by the property holders benefited;[86] but under a power to pave, a city may not levy an assessment for a change of grade,[87] unless such change is a mere incident of the

73. Crane *v.* Siloam Springs, 67 Ark. 30, 55 S. W. 955; Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478; Rogers *v.* St. Paul, 22 Minn. 494. See also Charleston *v.* Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776.

As applied to streets.— "Local improvements," as applied to a street, mean the improvement of a street, as such, within the design of its creation, by reason of which the real property abutting or adjacent is especially benefited in its market value. New York L. Ins. Co. *v.* Prest, 71 Fed. 815 [*citing* Cooley Tax. 109, 110; Dillon Mun. Corp. 596, 597].

Taxation in aid of a railroad is public in its nature. Dyar *v.* Farmington Village Corp., 70 Me. 515.

A bridge crossing on a street at a public highway in a city is a public and not a local improvement, and its cost cannot be defrayed by special assessments. *In re* Saw-Mill Run Bridge, 85 Pa. St. 163.

74. Rogers *v.* St. Paul, 22 Minn. 494.

75. Crane *v.* Siloam Springs, 67 Ark. 30, 55 S. W. 955.

76. Chicago *v.* Law, 144 Ill. 569, 33 N. E. 855, holding that a city had no power to levy a special assessment for the widening of a navigable river of the United States, which was under the control of the federal government. *Compare* Soens *v.* Racine, 10 Wis. 271.

77. See Gibson *v.* O'Brien, 6 S. W. 28, 9 Ky. L. Rep. 639 (holding that under a charter permitting improvement of portions of a street not less than a block in length, at the expense of abutting owners, a portion of the length of at least two average blocks between two recognized streets appearing as such upon a recorded and recognized map, might be improved); State *v.* Smith, 99 Minn. 59, 108 N. W. 822 (holding that the cost of building and maintaining approaches to a bridge carrying a highway across railroad tracks cannot be assessed to property abutting on the approaches); Matter of One Hundred & Sixty-seventh St., 68 Hun (N. Y.) 158, 22 N. Y. Suppl. 604; Jessing *v.* Columbus, 1 Ohio Cir. Ct. 90, 1 Ohio Cir. Dec. 54 [*affirmed* in 22 Cinc. L. Bul. 453, 23 Cinc. L. Bul. 3].

78. Dickinson *v.* Worcester, 138 Mass. 555.

79. Wilson *v.* Chilcott, 12 Colo. 600, 21 Pac. 901; Kirkpatrick *v.* New Brunswick St., etc., Com'rs, 42 N. J. L. 510.

80. Heller *v.* Garden City, 58 Kan. 263, 48 Pac. 841.

81. Downing *v.* Des Moines, 124 Iowa 289, 99 N. W. 1066, holding that under the statute giving cities authority to improve any street by parking and curbing it, the city had authority to assess abutting lots for the expense of curbing a parkway reserved in the middle of a street.

82. Burnham *v.* Chicago, 24 Ill. 496; Warren *v.* Henly, 31 Iowa 31. *Contra*, see Leake *v.* Philadelphia, 150 Pa. St. 643, 24 Atl. 351.

83. *In re* Phillips, 60 N. Y. 16.

84. McNamara *v.* Estes, 22 Iowa 246; Omaha *v.* Gsantner, 4 Nebr. (Unoff.) 52, 93 N. W. 407.

85. Morse *v.* West-Port, 110 Mo. 502, 19 S. W. 831.

86. See the statutes of the several states. And see *In re* Wilmington Ave., 213 Pa. St. 238, 62 Atl. 848; Wray *v.* Pittsburgh, 46 Pa. St. 365.

87. Wilcoxon *v.* San Luis Obispo, 101 Cal. 508, 35 Pac. 988; Scofield *v.* Council Bluffs,

paving.[88] It has been held also, under particular statutes, that the cost of purchasing part of a toll road lying within the borders of a city might be assessed upon abutting property;[89] and that funds might be raised by assessment to compensate a railroad company for relinquishing its rights in a street.[90]

(II) *Lighting.* It has been held that the lights, poles, and wires of an electric lighting system constitute a local improvement for which the property benefited may be assessed.[91]

(III) *Street Sprinkling and Sweeping.* In some jurisdictions it has been held that street sprinkling is a local improvement which may be paid for from special assessments,[92] while other cases announce a contrary rule.[93] And likewise in some states a special assessment for street sweeping and cleaning may be imposed.[94]

(IV) *Sidewalks, Cross Walks, and Intersections.* The term "street" is generic, and power to improve streets implies authority to lay sidewalks as part of such improvement,[95] and in the exercise of power to improve streets by special assessment improvement of sidewalks may be included;[96] but power to levy a special assessment solely for the construction of sidewalks depends on express legislative grant,[97] and it has been held that in the exercise of such power a city may not include in an assessment the cost of constructing a grass plot between the sidewalk and roadway.[98] Cross walks form part of the improvement of a street and the cost of their construction may be included in an assessment.[99] The cost of paving an intersection cannot be assessed against a street that intersects the one that is being paved[1] on the theory of special benefit to adjoining property;

68 Iowa 695, 28 N. W. 20; Bucroft *v.* Council Bluffs, 63 Iowa 646, 19 N. W. 807. And see Hentig *v.* Gilmore, 33 Kan. 234, 6 Pac. 304, where provision was made by statute for payment of grading from general fund.

88. Dodsworth *v.* Cincinnati, 18 Ohio Cir. Ct. 288, 10 Ohio Cir. Dec. 177; Blount *v.* Janesville, 31 Wis. 648. See also McNair *v.* Ostrander, 1 Wash. 110, 23 Pac. 414.

89. Winslow *v.* Cincinnati, 10 Ohio Cir. Ct. 191, 6 Ohio Cir. Dec. 150.

90. People *v.* Lawrence, 36 Barb. (N. Y.) 177 [*affirmed* in 41 N. Y. 123].

91. Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478. But *compare* Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 330, holding otherwise of a system of electric light towers.

92. *Indiana.*— Reinken *v.* Fuehring, 130 Ind. 382, 30 N. E. 414, 30 Am. St. Rep. 247, 15 L. R. A. 624; Palmer *v.* Nolting, 13 Ind. App. 581, 41 N. E. 1045.

Massachusetts.—Stark *v.* Boston, 180 Mass. 293, 62 N. E. 375; Phillips Academy *v.* Andover, 175 Mass. 118, 55 N. E. 841.

Minnesota.— State *v.* Reis, 38 Minn. 371, 38 N. W. 97.

New York.— Tifft *v.* Buffalo, 7 N. Y. Suppl. 633 [*affirmed* in 130 N. Y. 695, 30 N. E. 68].

Washington.— Smith *v.* Seattle, 25 Wash. 300, 65 Pac. 612.

93. *Illinois.*— Chicago *v.* Blair, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412.

Missouri.— Kansas City *v.* O'Connor, 82 Mo. App. 655.

Utah.— Pettit *v.* Duke, 10 Utah 311, 37 Pac. 568.

Wisconsin.— Borgman *v.* Antigo, 120 Wis. 296, 97 N. W. 936.

United States.— New York L. Ins. Co. *v.* Prest, 71 Fed. 815.

94. Reinken *v.* Fuehring, 130 Ind. 382, 30 N. E. 414, 30 Am. St. Rep. 247, 15 L. R. A. 624.

95. O'Leary *v.* Sloo, 7 La. Ann. 25; Matter of Burmeister, 56 How. Pr. (N. Y.) 416.

96. Matter of Burmeister, 56 How. Pr. (N. Y.) 416.

Nature of walk.— Where a sidewalk is only in front of peculiarly laid out lots, the mere fact that it crosses running water will not make the act of the city in building it *ultra vires*, or destroy the liability of the lot owners to pay the assessments therefor. Challiss *v.* Parker, 11 Kan. 384.

Reconstruction.— A borough having authorized the laying of a sidewalk cannot, if the sidewalk is in good repair, require another to be laid. Colwyn *v.* Smith, 9 Del. Co. (Pa.) 297.

97. People *v.* Yancey, 167 Ill. 255, 47 N. E. 521. See Copeland *v.* Springfield, 166 Mass. 498, 44 N. E. 605; Mauldin *v.* Greenville, 53 S. C. 285, 31 S. E. 252, 69 Am. St. Rep. 855, 43 L. R. A. 101.

Grading.— An assessment for the cost of work done immediately in front of an abutting owner's land, in grading sidewalks to meet substantial changes in the grade of the cartway, is without authority of law. Philadelphia *v.* Weaver, 14 Pa. Super. Ct. 293.

98. People *v.* Field, 197 Ill. 568, 64 N. E. 544.

99. Powell *v.* St. Joseph, 31 Mo. 347; Gibson *v.* Kayser, 16 Mo. App. 404; *In re* Burke, 62 N. Y. 224.

1. Holt *v.* East St. Louis, 150 Ill. 530, 37 N. E. 927; Walters *v.* Lake, 129 Ill. 23, 21 N. E. 556; Smith *v.* Buffalo, 90 Hun (N. Y.) 118, 35 N. Y. Suppl. 635. See also Cunningham *v.* Peoria, 157 Ill. 499, 41 N. E. 1014.

but the cost of paving such intersections may be included in the assessment of property abutting the street that is being improved,[2] unless by express provision the city is made liable for such cost.[3] The validity of an ordinance ordering the construction of sidewalks as an entirety is not affected by the question whether the city or landowners must pay for intersections.[4]

(v) *Streets Occupied by Railways.* The fact that a steam railway company has a franchise in the street does not relieve an abutting owner from the obligation of an assessment for the improvement of such street,[5] even though under the terms of the franchise the city might levy part of the cost upon the railway but does not do so,[6] and although, by statute, a street railway company is required to pave between its tracks, the city may pave the rest of the street at the cost of abutters, whether the improvement required of the company has been made or not.[7] Where, under the terms of its franchise, the cost of paving the center of the street has been levied against a railway company, the same cannot, on default of the company, be collected from abutters;[8] but a voluntary paving by a railway company was held not to be such original paving as imposed upon the company the burden of thereafter repairing and repaving so as to relieve abutters of an assessment.[9]

(vi) *Reconstruction or Repair.* Acting under general power to improve its streets by special assessment, a city may, unless restrained by the provisions of its charter or by statute, order the reimprovement or repavement of a street;[10] and, except for gross abuse,[11] its discretion in so doing will not be reviewed by

One who owns the fee of a street where it intersects a paved street is not a lot owner, within an act which provides that the expense of paving in front of a lot may be recovered by a suit against the owner. Schenectady *v.* Union College, 144 N. Y. 241, 39 N. E. 67, 26 L. R. A. 614.

2. Wolf *v.* Keokuk, 48 Iowa 129; Motz *v.* Detroit, 18 Mich. 495; Creighton *v.* Scott, 14 Ohio St. 438; Young *v.* Tacoma, 31 Wash. 153, 71 Pac. 742.

3. Bacon *v.* Savannah, 91 Ga. 500, 17 S. E. 749; Moale *v.* Baltimore, 61 Md. 224; Pier *v.* Fond du Lac, 38 Wis. 470. *Compare* Button *v.* Kremer, 114 Ky. 463, 71 S. W. 332, 24 Ky. L. Rep. 1193.

Sidewalks.— An act providing that all improvements of the squares or areas formed by the crossing of streets were chargeable to the city at large included the sidewalks at the corners of these squares as well as the paving and macadamizing in the center. Lawrence *v.* Killam, 11 Kan. 499.

4. Hyman *v.* Chicago, 188 Ill. 462, 59 N. E. 10.

5. Chicago, etc., R. Co. *v.* Quincy, 139 Ill. 355, 28 N. E. 1069; Felix *v.* Atlantic City, 34 N. J. L. 99.

6. State *v.* Ensign, 54 Minn. 372, 56 N. W. 41; Philadelphia *v.* Bowman, 166 Pa. St. 393, 31 Atl. 142.

7. Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580.

8. State *v.* Michigan, 138 Ind. 455, 37 N. E. 1041; Philadelphia *v.* Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286.

Temporary removal of tracks.— That a street railroad company removed its tracks on a particular street when a sewer was built, and has not relaid them, does not show either a forfeiture of its franchise or a release of its obligations to bear its share of the burden of the street's improvement. Sawyer *v.* Chicago, 183 Ill. 57, 55 N. E. 645.

9. Leake *v.* Philadelphia, 150 Pa. St. 643, 24 Atl. 351. See also *In re* East St., 34 Pittsb. Leg. J. N. S. (Pa.) 371.

10. *Indiana.*— Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014; Yeakel *v.* Lafayette, 48 Ind. 116.

Kentucky.— Broadway Baptist Church *v.* McAtee, 8 Bush 508, 8 Am. Rep. 480.

Michigan.—Sbeley *v.* Detroit, 45 Mich. 431, 8 N. W. 52.

Minnesota.— State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183.

Missouri.— Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; Morley *v.* Carpenter, 22 Mo. App. 640.

Nebraska.— Robertson *v.* Omaha, 55 Nebr. 718, 76 N. W. 442, 44 L. R. A. 534.

New Jersey.— Jelliff *v.* Newark, 49 N. J. L. 239, 12 Atl. 770.

New York.— People *v.* Buffalo, 52 N. Y. App. Div. 157, 65 N. Y. Suppl. 163.

Wisconsin.—Adams *v.* Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441; Blount *v.* Janesville, 31 Wis. 648.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1017.

Regrading.— Where a statute gives the city authority to order a street "graded or regraded," it may order the regrading, although the property-owners have already borne the expense of grading. McVerry *v.* Boyd, 89 Cal. 304, 26 Pac. 885.

11. Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Wistar *v.* Philadelphia, 80 Pa. St. 505, 21 Am. Rep. 112. See also Philadelphia *v.* Henry, 161 Pa. St. 38, 28 Atl. 946.

the courts;[12] but power to improve a street by special assessment does not imply authority to assess the cost of repairing the same upon adjoining property.[13] This power, however, is sometimes expressly given by statute.[14] Where the city is authorized to levy a special tax for paving, it may sometimes be required to provide for the expense of repairs from the general fund;[15] and in some states the city is expressly prohibited from assessing the cost of a repavement or reconstruction upon the property benefited.[16] The distinction between "repavement" and

12. Hyman *v.* Chicago, 188 Ill. 462, 59 N. E. 10; Keith *v.* Wilson, 145 Ind. 149, 44 N. E. 13; Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. ed. 1142.

13. *Illinois.*— Crane *v.* West Chicago Park Com'rs, 153 Ill. 348, 38 N. E. 943, 26 L. R. A. 311.

Kentucky.— Louisville *v.* Mehler, 108 Ky. 436, 56 S. W. 712, 22 Ky. L. Rep. 62; Wymond *v.* Barber Asphalt Paving Co., 77 S. W. 203, 25 Ky. L. Rep. 1135. As abutting property cannot be charged with the cost of keeping a street in repair, a street assessment will not be enforced to the extent of ten per cent retained by the city as security for the contractor's undertaking to keep the street in repair for five years. Bullitt *v.* Selvage, 47 S. W. 255, 20 Ky. L. Rep. 599.

Missouri.— Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; O'Meara *v.* Green, 25 Mo. App. 198.

New Jersey.— Cronin *v.* Jersey City, 38 N. J. L. 410.

Ohio.—Watterson *v.* Bradley, 43 Ohio St. 456, 3 N. E. 372.

Pennsylvania.— Scranton City *v.* Sturges, 202 Pa. St. 182, 51 Atl. 764; Wistar *v.* Philadelphia, 111 Pa. St. 604, 4 Atl. 511.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1017.

But *compare* Adams *v.* Fisher, 75 Tex. 657, 6 S. W. 772.

14. Heman *v.* Gilliam, 171 Mo. 258, 71 S. W. 163; Oil City *v.* Marston, 24 Pa. Co. Ct. 645.

15. See the statutes of the several states. And see Koons *v.* Lucas, 52 Iowa 177, 3 N. W. 84. Where a street was paved at the expense of the abutters, and the pavement torn up in the construction of a sewer and relaid, the expense of repaving was not chargeable to the abutters, but was part of the expense of the sewer. Burlington *v.* Palmer, 67 Iowa 681, 25 N. W. 877. Under the provisions of Comp. St. (1891) § 69, c. 12*a*, the costs of making "ordinary repairs" in street pavements cannot be assessed against the abutting lot owner, but must be paid by the city. Robertson *v.* Omaha, 55 Nebr. 718, 76 N. W. 442, 44 L. R. A. 534.

16. Catlettsburg *v.* Self, 115 Ky. 669, 74 S. W. 1064, 25 Ky. L. Rep. 161; McHenry *v.* Selvage, 99 Ky. 232, 35 S. W. 645, 18 Ky. L. Rep. 473; Adams *v.* Ashland, 80 S. W. 1105, 26 Ky. L. Rep. 184; Wreford *v.* Detroit, 132 Mich. 348, 93 N. W. 876; Dickinson *v.* Detroit, 111 Mich. 480, 69 N. W. 728; Archer *v.* Mt. Vernon, 63 N. Y. App. Div. 286, 71 N. Y. Suppl. 571; Scranton City *v.* Sturges, 202 Pa. St. 182, 51 Atl. 764; Philadelphia *v.* Ehret, 153 Pa. St. 1, 25 Atl. 888; Williamsport *v.* Beck, 128 Pa. St. 147, 18 Atl. 329.

Repavement of macadamized street.—Where city councils appropriate a certain sum for the repairs of a street, and the highway department uses the money in macadamizing the street, there is no such original paving as will prevent a city contractor from subsequently recovering from a property-owner the contract price for laying a pavement of vitrified brick in accordance with an ordinance authorizing such pavement. Philadelphia *v.* Hill, 166 Pa. St. 211, 30 Atl. 1134.

Improved highway adopted as street.— Abutting property, being liable for the expense of the first paving only on a street, is not liable for further paving where a highway, having been macadamized, is assimilated with the rest of a city's streets, and for many years recognized and treated by it as a paved street. Leake *v.* Philadelphia, 171 Pa. St. 125, 32 Atl. 1110. But where municipal authorities do nothing more than keep a highway in ordinary repair, there is no change of it from an ordinary road to a city street, so as to relieve abutting property from liability for the cost of a subsequent paving as an original paving. Harrisburg *v.* Funk, 200 Pa. St. 348, 49 Atl. 992. See also *In re* East St., 34 Pittsb. Leg. J. N. S. (Pa.) 371. Although a road was improved by putting down macadam a foot deep for the width of eighteen feet, without curbing or guttering, the original dirt road remaining on each side of the macadam, the improvement being made by the abutting owners under a statute providing that after the improvement it should be a public road, and should be kept in repair as such by the county, the work done on it after it was taken into a city and the city built up along it, so that it became a street, of grading, curbing, and paving it from curb to curb, a width of forty feet, was original construction, and not reconstruction of the street, so that the abutting owners were liable therefor. Heim *v.* Figg, 89 S. W. 301, 28 Ky. L. Rep. 396.

Turnpike.— The paving by a turnpike company of a road that subsequently becomes a city street is not such an original pavement as to relieve an abutting owner from assessment for a second paving by the city. Dick *v.* Philadelphia, 197 Pa. St. 467, 47 Atl. 750; *In re* Lincoln Ave., 193 Pa. St. 435, 44 Atl. 498. But a city, by maintaining a condemned turnpike as a paved street, recognizes it as paved, so that it cannot afterward

"repairs" raises a mixed question of law and fact.[17] Generally the relaying of an entire pavement or a substantial part thereof will constitute a repavement,[18] while relaying small portions to an extent not amounting to a rebuilding will be repairs.[19]

c. Alteration or Vacation of Streets. In the absence of legislative enactment the cost of an alteration or vacation of a street cannot be assessed upon adjoining property,[20] but an act authorizing such an assessment is valid.[21]

d. Railings and Retaining Walls. Under power to grade and improve streets by special assessment, a city may not assess upon adjoining property the cost of railings[22] or retaining walls.[23]

e. Improvement of Toll Roads. The power to assess the cost of street improvements upon abutting property is confined to streets belonging to the city and will not extend to private toll roads;[24] but the fact that a toll-road company was authorized to use the street will not preclude the city from improving it by special assessment;[25] and the city may lay sidewalks on such road at the cost of abutting owners.[26]

f. Sewers and Drains — (i) *In General.* Power to construct sewers by special assessment is usually expressly given by charter or statute,[27] the terms and conditions of which must be complied with to render an assessment valid.[28] It has

charge abutting owners for new pavement. Philadelphia *v.* Gowen, 202 Pa. St. 453, 52 Atl. 3.

Where original cost was borne by public.— Abutting owners are not liable for the cost of repaving a street, merely because the expense of the original paving, nearly sixty years before, had not been paid by the then owners, but by the public. Boyer *v.* Reading, 151 Pa. St. 185, 24 Atl. 1075; Harrisburg *v.* Segelbaum, 151 Pa. St. 172, 24 Atl. 1070, 20 L. R. A. 834. See also *In re* Welsh, 30 Hun (N. Y.) 372.

17. O'Meara *v.* Green, 25 Mo. App. 198.

18. Dickinson *v.* Detroit, 111 Mich. 480, 69 N. W. 728; Barber Asphalt Paving Co. *v.* Muchenberger, 105 Mo. App. 47, 78 S. W. 280; *In re* Phillips, 60 N. Y. 16; People *v.* Buffalo, 52 N. Y. App. Div. 157, 65 N. Y. Suppl. 163 [*affirmed* in 166 N. Y. 604, 59 N. E. 1128].

Use of old material.— The rebuilding of a pavement, although done partly with the old material, constitutes a "reconstruction," and not merely a repair of the pavement. Levi *v.* Coyne, 57 S. W. 790, 22 Ky. L. Rep. 493.

19. *In re* Roberts, 25 Hun (N. Y.) 371 [*affirmed* in 89 N. Y. 618]; People *v.* Brooklyn, 21 Barb. (N. Y.) 484.

20. Philadelphia *v.* Weaver, 14 Pa. Super. Ct. 293; Philadelphia *v.* Goldbeck, 6 Pa. Dist. 420.

21. Cook *v.* Slocum, 27 Minn. 509, 8 N. W. 755; *In re* Barclay, 91 N. Y. 430; Matter of New York, 28 N. Y. App. Div. 143, 52 N. Y. Suppl. 588 [*affirmed* in 158 N. Y. 409, 52 N. E. 1126]; Cincinnati *v.* Gordon, 8 Ohio Dec. (Reprint) 317, 7 Cinc. L. Bul. 79; *In re* Howard St., 142 Pa. St. 601, 21 Atl. 974.

22. Williams *v.* Brace, 5 Conn. 190.

23. Armstrong *v.* St. Paul, 30 Minn. 299, 15 N. W. 174; *In re* Wick St., 184 Pa. St. 93, 39 Atl. 3; Steelton Borough *v.* Booser, 162 Pa. St. 630, 29 Atl. 654.

24. Breed *v.* Allegheny, 85 Pa. St. 214; Wilson *v.* Allegheny City, 79 Pa. St. 272.

25. Huelefeld *v.* Covington, 60 S. W. 296, 22 Ky. L. Rep. 1188.

26. Elmendorf *v.* Albany, 17 Hun (N. Y.) 81.

27. See the statutes of the several states. And see the following cases:

Connecticut.— Hungerford *v.* Hartford, 39 Conn. 279.

Illinois.— McChesney *v.* Hyde Park, 151 Ill. 634, 37 N. E. 858.

Kentucky.— Covington *v.* Noland, 89 S. W. 216, 28 Ky. L. Rep. 314.

Massachusetts.— Taylor *v.* Haverhill, 192 Mass. 287, 78 N. E. 475 (holding that there was power to levy an assessment for a sewer running mainly through private land); Hall *v.* Boston St. Com'rs, 177 Mass. 434, 59 N. E. 68.

Pennsylvania.— Lipps *v.* Philadelphia, 38 Pa. St. 503; Philadelphia *v.* Tryon, 35 Pa. St. 401.

Land damages.— It is held in Pennsylvania that there can be no assessment of the land damages occasioned by the construction of an improvement, but only the expenses and cost of the sewer. *In re* Mill Creek Sewer, 196 Pa. St. 183, 46 Atl. 312; Barnett's Case, 28 Pa. Super. Ct. 361.

Construction of a private sewer by a citizen will not relieve him from contribution on assessment for a public sewer when the latter is built. *In re* Broad St., 9 Kulp (Pa.) 37.

28. See McChesney *v.* Hyde Park, 151 Ill. 634, 37 N. E. 858; Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 71 S. W. 205; St. Joseph *v.* Dillon, 61 Mo. App. 317; Vanderbeck *v.* Jersey City, 29 N. J. L. 441.

Where the sewer is not laid in a public street there can be no recovery. Chester *v.* Thurlow Land Co., 9 Del. Co. (Pa.) 51. But see Untermyer *v.* Yonkers, 112 N. Y. App. Div. 308, 98 N. Y. Suppl. 563, where

been held also that a sewer is a local improvement within the meaning of an act authorizing cities to make special assessments;[29] but a park board acting under power to improve boulevards by special assessment may not assess upon adjoining property the cost of a sewer constructed for the benefit of the boulevards,[30] and power to improve streets by special assessment does not imply authority to build sewers at the expense of property benefited.[31] And while a board of health may have power to make a permanent improvement designed to prevent the recurrence of a nuisance, it cannot make such power a pretext, no other power being granted, for the construction of a sewer by the levy of assessments upon adjacent property.[32] A municipality has large discretion in determining the size and character of sewers which are to be constructed by special assessment,[33] but regard must be had to special benefits received by property assessed.[34] In constructing a sewer, provision may be made for projections or house slants opposite each lot.[35] An assessment is not invalidated by the fact that the ordinance fails to provide for the right to an outlet for the sewer[36] or that the outlet provided will be insufficient.[37]

(II) *Rebuilding and Repairs.* Power to construct sewers by special assess-

an assessment for benefits for the construction of a sewer under the tracks of a railroad company was sustained.

29. Fisher *v.* Chicago, 213 Ill. 268, 72 N. E. 680; Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821; Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105; Allen County *v.* Silvers, 22 Ind. 491.

Distinction between trunk and local sewers. — The fact that a sewer otherwise local also drains surface water from the street in front of abutting lots does not change its character as a local sewer. Cincinnati *v.* Standard Wagon Co., 3 Ohio S. & C. Pl. Dec. 79, 1 Ohio N. P. 387.

30. West Chicago Park Com'rs *v.* Dunne, 162 Ill. 87, 44 N. E. 404.

31. Clay *v.* Grand Rapids, 60 Mich. 451, 27 N. W. 596; Mauch Chunk *v.* Shortz, 61 Pa. St. 399.

32. Haag *v.* Mt. Vernon, 41 N. Y. App. Div. 366, 58 N. Y. Suppl. 581.

33. *Delaware.*— Murphy *v.* Wilmington, 6 Houst. 108, 22 Am. St. Rep. 345.

Illinois.— Drexel *v.* Lake, 127 Ill. 54, 20 N. E. 38.

Massachusetts.— Gray *v.* Boston, 139 Mass. 328, 31 N. E. 734.

Minnesota.— Sherwood *v.* Duluth, 40 Minn. 22, 41 N. W. 234.

Missouri.— Kansas City *v.* Richards, 34 Mo. App. 521.

New Jersey.— See Bayonne *v.* Morris, 61 N. J. L. 127, 38 Atl. 819.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1021.

Determination of reasonableness of system. — The reasonableness of an ordinance for a scheme or system of sewerage is to be determined from the consideration of the situation and condition of the whole of the territory to be reached thereby, and not merely by that of the property of persons objecting. Washburn *v.* Chicago, 198 Ill. 506, 64 N. E. 1064.

34. *Illinois.*— Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741; Springfield *v.* Sale, 127 Ill. 359, 20 N. E. 86.

Massachusetts.— Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339.

Missouri.— Heman *v.* Allen, 156 Mo. 534, 57 S. W. 559.

New Jersey.— McClosky *v.* Chamberlain, 37 N. J. L. 388.

Ohio.— McMakin *v.* Cincinnati, 1 Ohio S. & C. Pl. Dec. 141, 7 Ohio N. P. 203.

35. Smythe *v.* Chicago, 197 Ill. 311, 64 N. E. 361; Hinsdale *v.* Shannon, 182 Ill. 312, 55 N. E. 327.

Corner lots.— It may be provided that corner lots shall have two house slants for the connection of the sewers, one on each street. Duane *v.* Chicago, 198 Ill. 471, 64 N. E. 1033.

Where tracts vary in size.— An ordinance cannot be objected to on the ground that only one house slant is provided for each lot or parcel of land so that a large tract will have no more connection than a small lot. Gage *v.* Chicago, 195 Ill. 490, 63 N. E. 184.

Arbitrary subdivision.—A requirement that house slants shall be placed every twenty-five feet does not constitute an unreasonable or arbitrary subdivision of the property-owner's land. Washington Park Club *v.* Chicago, 219 Ill. 323, 76 N. E. 383.

Where lots connect with other sewers.— A lot is properly omitted from a benefited district if it already has access to a sewer and will not be benefited, although provision has been made for house slants in front of it on the supposition that the sewer will be a benefit. Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539.

36. Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105. And *compare* Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536, holding that an objection to a tax for a branch or district sewer that the sewer was not connected with any sewer established by ordinance was of no avail where the branch was connected with a sewer, in fact a public one.

37. Bickerdike *v.* Chicago, 185 Ill. 280, 56 N. E. 1096.

ment is usually held to imply authority to assess the cost of rebuilding or repairing the same upon adjoining property,[38] although in some jurisdictions it is held that the maintenance of a sewer, if it becomes a part of the general system of the city, is a subject for general taxation rather than for special assessment.[39]

g. Waterworks and Mains. Waterworks designed for the benefit of all the inhabitants of a municipality are not a local improvement for the cost of which special assessments may be levied;[40] but on the theory of special benefits, abutting property may be assessed for the cost of water mains along a street,[41] and it is competent for the legislature to direct that abutters be assessed for the cost of water connections with their lots.[42]

h. Parks and Other Public Places. It is within the power of the legislature to authorize assessments upon property benefited in aid of a public park.[43] But in the absence of statutory authorization a municipality cannot levy an assessment for the paving of a market place upon adjoining lots.[44] And where persons granting land for park purposes have also conveyed a strip surrounding such land, to be used for a highway upon condition that the city shall keep such highway in good order and repair at its expense, the lots abutting upon such strip cannot be assessed with the cost of sidewalks or any other work properly classed as a street improvement.[45]

5. Property Liable — a. Nature — (i) *In General.* The property which is subject to special assessments for public improvements is as a general rule confined to that which is specified in the particular charter or statutory provision under which the proceedings are had.[46] It is of course necessary that the property to be assessed shall be of such a nature that it is capable of actual enhancement in

38. McKevitt *v.* Hoboken, 45 N. J. L. 482; Denise *v.* Fairport, 11 Misc. (N. Y.) 199, 32 N. Y. Suppl. 97. But see State *v.* Jersey City, 34 N. J. L. 277, holding that under the statutes of New Jersey property-owners who have been assessed for the expense of building a sewer are not liable to another assessment on the principles applicable to assessment for new sewers, but that the proceedings should be for the taking up of the old sewer and its rebuilding.

39. Sears *v.* Boston St. Com'rs, 173 Mass. 350, 53 N. E. 876; Williamsport's Appeal, 187 Pa. St. 565, 41 Atl. 476; Erie *v.* Russell, 148 Pa. St. 384, 23 Atl. 1102.

40. Morgan Park *v.* Wiswall, 155 Ill. 262, 40 N. E. 611.

Stand pipes, reservoirs, and pumping apparatus which are erected in connection with a system of waterworks do not constitute a local improvement for which a special assessment may be made. Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478 [*citing* Harts *v.* People, 171 Ill. 458, 49 N. E. 538; Hughes *v.* Momence, 164 Ill. 16, 45 N. E. 302].

41. Ewart *v.* Western Springs, 180 Ill. 318, 54 N. E. 478; Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922; State *v.* Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639; Smith *v.* Seattle, 25 Wash. 300, 65 Pac. 612; Parsons *v.* District of Columbia, 170 U. S. 45, 18 S. Ct. 521, 42 L. ed. 943. *Contra*, Doughten *v.* Camden, 72 N. J. L. 451, 63 Atl. 170, 111 Am. St. Rep. 680, 3 L. R. A. N. S. 817; Lee *v.* Mellette, 15 S. D. 586, 90 N. W. 855, holding that the power to make such an assessment was excluded by the fact that the statute specifically designated other purposes for which assessments might be made.

42. Palmer *v.* Danville, 154 Ill. 156, 38 N. E. 1067; Donovan *v.* Oswego, 90 N. Y. App. Div. 397, 86 N. Y. Suppl. 155. And see Landon *v.* Syracuse, 19 N. Y. App. Div. 41, 46 N. Y. Suppl. 1053 [*affirmed* in 163 N. Y. 562, 57 N. E. 1114], holding that an assessment by a city on particular property-owners, made to cover the expense of water connections between their properties and the street main, put in by order of the common council without authority or request of the owners, is illegal, there being no provision for such taxation in the city charter.

43. *Massachusetts.*— Briggs *v.* Whitney, 159 Mass. 97, 34 N. E. 179 (holding that an assessment for betterments for laying out a park was not invalidated by the fact that the creation of the park had improved the sanitary condition of the district where the park was not laid out for sanitary purposes); Holt *v.* Somerville, 127 Mass. 408.

Minnesota.— State *v.* Ramsey County Dist. Ct., 75 Minn. 292, 77 N. W. 968.

Missouri.— Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860.

Nebraska.— Hart *v.* Omaha, (1905) 105 N. W. 546.

Pennsylvania.— *In re* Beechwood Ave., 194 Pa. St. 86, 45 Atl. 127.

United States.— Craighill *v.* Lambert, 168 U. S. 611, 18 S. Ct. 217, 42 L. ed. 599.

44. Ft. Wayne *v.* Shoaff, 106 Ind. 66, 5 N. E. 403.

45. Browne *v.* Palmer, 66 Nebr. 287, 92 N. W. 315.

46. Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077.

value in consequence of the improvement, and that it is possible to measure the extent of such enhancement with reasonable accuracy.[47]

(II) *Unoccupied or Unimproved Property.* The right to assess land for a local improvement does not depend upon the use to which the owner may choose to put it or whether he may see fit to put it to any use.[48] Hence unless exempt by express provision of charter or statute,[49] unoccupied or unimproved property is subject to assessment for local improvements,[50] although if total lack of benefit can be shown, the assessment should on that ground be set aside.[51] So water rates arbitrarily fixed on vacant lots have been held invalid as not made with regard to special benefits.[52]

(III) *Agricultural Land.* The mere fact that land lying within the city limits is used for agricultural purposes does not exempt it from assessment for local improvements,[53] even though as farming land it receives no betterment from the improvement,[54] and the statutory provision found in some states, limiting the liability of agricultural land to municipal taxation, is held not to apply to special assessment for local improvements.[55]

(IV) *Improvements.* Under some statutes improvements upon land are not to be assessed.[56]

(V) *Property Not Included in Preliminary Assessment.* Where a preliminary assessment is required, land not included therein is not liable to assessment;[57] but where under the statute the council may alter or amend an estimate of assessments, it may add property omitted from the original estimate.[58]

b. Ownership — (I) *In General.* The liability of property to assessment will not be affected by changes in the title after the work has been ordered.[59]

47. Matter of Anthony Ave., 46 Misc. (N. Y.) 525, 95 N. Y. Suppl. 77.

Necessity of benefit see *infra*, XIII, E, 5, d, (I).

48. Powers *v.* Grand Rapids, 98 Mich. 393, 57 N. W. 250, holding that the owner of lands in the bed of a river might be assessed where, although in their present condition the lands were not accessible by teams immediately from the street, they were accessible for foot passengers and the street was used in passing to and from them.

49. See Caldwell *v.* Rupert, 10 Bush (Ky.) 179, holding that where the charter provides that street improvements shall be made "at the exclusive cost of the owners of lots in each fourth of a square," taxation of adjacent property for street improvements could not be imposed on real estate that has not been laid out in squares.

50. *Massachusetts.*— Wright *v.* Boston, 9 Cush. 233.

Minnesota.— State *v.* Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639.

Missouri.— See State *v.* Kansas City, 89 Mo. 34, 14 S. W. 515.

Nebraska.— Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866.

New Jersey. — See Brown *v.* Union, 62 N. J. L. 142, 40 Atl. 632 [*affirmed* in 65 N. J. L. 601, 48 Atl. 562].

Ohio.— Ford *v.* Toledo, 64 Ohio St. 92, 59 N. E. 779.

Rhode Island.— Bishop *v.* Tripp, 15 R. I. 466, 8 Atl. 692.

51. Atlanta *v.* Gabbett, 93 Ga. 266, 20 S. E. 306 (holding that a strip of land lying between a sewer and the next proprietor's land, not available for any use, is not assessable for the building of the sewer); Warren *v.* Chicago, 118 Ill. 329, 11 N. E. 218; Stewart *v.* Philadelphia, 3 Pa. Cas. 137, 7 Atl. 192.

52. Vreeland *v.* Jersey City, 43 N. J. L. 135; Provident Sav. Inst. *v.* Allen, 37 N. J. Eq. 36 [*affirmed* in 37 N. J. Eq. 627].

53. Taber *v.* Grafmiller, 109 Ind. 206, 9 N. E. 721; Duker *v.* Barber Asphalt Paving Co., 74 S. W. 744, 25 Ky. L. Rep. 135; Central Covington *v.* Park, 56 S. W. 650, 21 Ky. L. Rep. 1847; Hood *v.* Lebanon, 15 S. W. 516, 12 Ky. L. Rep. 813; McKeesport *v.* Soles, 178 Pa. St. 363, 35 Atl. 927.

54. Leitch *v.* La Grange, 138 Ill. 291, 27 N. E. 917. But see Edwards *v.* Chicago, 140 Ill. 440, 30 N. E. 350, holding that farming lands, drained only by surface drainage, cannot be specially assessed for the construction of an underground city sewer, three miles away, where the ordinance for the construction of the sewer makes no provision for the connection of the surface drains with the sewer.

55. Dickerson *v.* Franklin, 112 Ind. 178, 13 N. E. 579; Kalbrier *v.* Leonard, 34 Ind. 497; Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63.

56. *In re* Piper, 32 Cal. 530; Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077.

Inclusion of value for purpose of apportionment see *infra*, XIII, E, 10, c, (II).

57. Anderson *v.* Passaic, 44 N. J. L. 580.

58. Sands *v.* Hatfield, 7 Ind. App. 357, 34 N. E. 654.

59. Douglass *v.* Cincinnati, 29 Ohio St. 165.

Conveyances to evade assessment see *infra*, XIII, E, 6, b.

Coverture of the owner is no reason why land should not be assessed for the cost of street improvement.[60] An assessment may properly be made for a sum in gross, although the property is subject to an undetermined life-estate.[61] Where premises are leased the benefits assessed cannot be apportioned against the leasehold and the remainder in fee as separate estates, and separate judgments entered.[62]

(II) *PUBLIC PROPERTY* — (A) *In General.* Public property of the state or national government cannot be assessed by a municipality for the cost of municipal improvements.[63]

(B) *State, County, and School Property.* In the absence of express legislative provision, the property of a state within the limits of a municipality is not liable to assessment for municipal improvements;[64] but such exemption is not always extended to county or school property,[65] it being frequently held that general exemption of such property from liability for taxes does not apply to special assessment for local benefits.[66] Other cases, however, maintain that unless expressly authorized a municipality may not assess the cost of local improvements upon the property of a county,[67] nor upon school property directly used for school purposes.[68] Property which an officer of the state holds in trust in his

60. Rose *v.* Balfe, 43 Ind. 353; Ball *v.* Balfe, 41 Ind. 221.

61. Busenbark *v.* Clements, 22 Ind. App. 557, 53 N. E. 665.

62. Chicago Union Traction Co. *v.* Chicago, 204 Ill. 363, 68 N. E. 519 [*followed* in Chicago Union Traction Co. *v.* Chicago, 207 Ill. 607, 69 N. E. 803].

63. *In re* Mt. Vernon, 147 Ill. 359, 35 N. E. 533, 23 L. R. A. 807; Fagan *v.* Chicago, 84 Ill. 227.

Public highway.— A city cannot assess for a street improvement, on the ground of benefit, lands which by long user or by dedication have become a public highway. Mansfield *v.* Lockport, 24 Misc. (N. Y.) 25, 52 N. Y. Suppl. 571.

Property of volunteer military organization.— The commanding officer of a volunteer corps, who acquires premises, by virtue of the Volunteer Act of 1863, for the use of the corps, is not liable as owner of the premises, to pay the apportioned part of the expense of sewering and paving the street upon which the premises abut, inasmuch as the premises are owned upon behalf of the crown. Hornsey Urban Dist. Council *v.* Hennell, [1902] 2 K. B. 73, 66 J. P. 613, 71 L. J. K. B. 479, 86 L. T. Rep. N. S. 423, 50 Wkly. Rep. 521.

The owner of wharf property cannot claim it as exempt from local assessment, as public property, where he retains the right to wharfage from those who land boats upon it. Boeres *v.* Strader, 1 Cinc. Super. Ct. (Ohio) 57.

64. *Connecticut.*— State *v.* Hartford, 50 Conn. 89, 47 Am. Rep. 622.

Iowa.— Polk County Sav. Bank *v.* State, 69 Iowa 24, 28 N. W. 416.

Kentucky.— Louisville *v.* McNaughten, 44 S. W. 380, 19 Ky. L. Rep. 1695.

Maryland.— Baltimore County Com'rs *v.* Maryland Insane Hospital, 62 Md. 127.

New York.— Elwood *v.* Rochester, 43 Hun 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238].

Ohio.— Poock *v.* Ely, 4 Ohio Cir. Ct. 41, 2 Ohio Cir. Dec. 408.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1036.

Canal lands granted by the state to the board of trustees cannot be regarded as the property of the state, so as to be exempt from assessments for opening streets and other improvements. Illinois, etc., Canal *v.* Chicago, 12 Ill. 403.

65. Chicago Bd. of Education *v.* People, 219 Ill. 83, 76 N. E. 75; Chicago *v.* Chicago, 207 Ill. 37, 69 N. E. 580; Edwards, etc., Constr. Co. *v.* Jasper County, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. Rep. 301; Franklin County *v.* Ottawa, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396; St. Louis Public Schools *v.* St. Louis, 26 Mo. 468.

The fact that lots are vacant and unoccupied does not exempt them from liability to special assessment for street improvements. Chicago *v.* Chicago, 207 Ill. 37, 69 N. E. 580.

66. Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; McLean County *v.* Bloomington, 106 Ill. 209; Sioux City *v.* Independent School Dist., 55 Iowa 150, 7 N. W. 488; Clinton *v.* Henry County, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415.

Exemption of school property in general see *infra*, XIII, E, 5, f, (IV).

67. Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159; Big Rapids *v.* Mecosta County, 99 Mich. 351, 58 N. W. 358; St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298; Von Steen *v.* Beatrice, 36 Nebr. 421, 54 N. W. 677; Harris County *v.* Boyd, 70 Tex. 237, 7 S. W. 713.

68. *Arkansas.*— Ft. Smith School Dist. *v.* Board of Improvement, 65 Ark. 343, 46 S. W. 418; Board of Improvement *v.* School Dist., 56 Ark. 354, 19 S. W. 969, 35 Am. St. Rep. 108, 16 L. R. A. 418.

California.—Witter *v.* Mission School Dist., 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33.

Connecticut.— Hartford *v.* West Middle Dist., 45 Conn. 462, 29 Am. Rep. 687.

Indiana.—Sutton *v.* Montpelier School City, 28 Ind. App. 315, 62 N. E. 710.

official capacity for the benefit of individuals is not regarded as exempt from assessment as state property.[69]

(c) *City Property.* City property contiguous to a local improvement may be assessed for its share of the cost of such improvement,[70] notwithstanding a portion of the total cost is to be paid out of the general municipal fund.[71] The intention to make such property assessable must be shown by the statute under which the assessment is made.[72] But public streets cannot be assessed as property benefited by improvements,[73] and a boulevard under control of park commissioners is not liable to assessment by the municipality.[74] Under a provision making lots and parcels of land assessable for local improvements, water mains and service pipes owned by the city cannot be assessed.[75] Under a statute providing that when the city is owner or occupant of any property fronting upon the street it should be chargeable with the expense of an improvement, a city cannot be charged as occupant of property fronting upon the street by reason of the fact that it has set aside a portion of the street as a stand for market wagons.[76] One who possesses a mere right of way over municipal lands cannot be assessed as owner.[77]

(III) *Public Service Corporations*—(A) *In General.* The proper general rule is, it seems, that equipment and fixtures in the soil of a street within the area of assessment for an improvement, owned and used by public service corporations under their rights and franchises, cannot be assessed for benefits unless it can be shown that such property is appreciably enhanced in value by a definite sum.[78]

(B) *Railway Property*—(1) In General. In the absence of legislative exemption, railway property that is benefited by an improvement may be included in an assessment for the cost thereof;[79] but if an improvement does not benefit or

Kentucky.— Louisville *v.* Leatherman, 99 Ky. 213, 35 S. W. 625, 18 Ky. L. Rep. 124.

Montana.— Butte *v.* School Dist. No. 1, 29 Mont. 336, 74 Pac. 869.

Ohio.— Board of Education *v.* Toledo, 48 Ohio St. 87, 26 N. E. 404; Toledo *v.* Board of Education, 48 Ohio St. 83, 26 N. E. 403. But see Cincinnati *v.* Board of Education, 7 Ohio Dec. (Reprint) 362, 2 Cinc. L. Bul. 184.

Pennsylvania.— Pittsburg *v.* Sterrett Subdistrict School, 204 Pa. St. 635, 54 Atl. 463, 61 L. R. A. 183.

69. State *v.* Elizabeth, 65 N. J. L. 483, 47 Atl. 455 [*affirmed* in 66 N. J. L. 688, 52 Atl. 1130]; State *v.* Elizabeth, 65 N. J. L. 479, 47 Atl. 454 [*affirmed* in 66 N. J. L. 687, 52 Atl. 1130], so holding with regard to land, the title of which was vested in the chancellor of the state in trust.

70. *Illinois.*— Scammon *v.* Chicago, 42 Ill. 192.

Louisiana.— Correjolles *v.* Foucher, 26 La. Ann. 362; Marquez *v.* New Orleans, 13 La. Ann. 319.

Missouri.— Barber Asphalt Paving Co. *v.* St. Joseph, 183 Mo. 451, 82 S. W. 64.

New York.— People *v.* Reis, 109 N. Y. App. Div. 748, 96 N. Y. Suppl. 597; *In re* Church St., 49 Barb. 455; *In re* Turfler, 44 Barb. 46. *Compare* People *v.* Gilon, 41 Hun 510.

Ohio.— Dick *v.* Toledo, 11 Ohio Cir. Ct. 349, 5 Ohio Cir. Dec. 157.

Wisconsin.— Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603.

United States.— New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96 [*modifying* 81 Fed. 645, 26 C. C. A. 508]; Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 508.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1037.

A city may contract to pay the proportion of the entire cost of street paving which would be assessable against its property if such property had been owned by private individuals. Harrisburg *v.* Shepler, 190 Pa. St. 374, 42 Atl. 893.

71. Ross *v.* New York, 3 Wend. (N. Y.) 333.

72. Green *v.* Hotaling, 44 N. J. L. 347 [*affirmed* in 46 N. J. L. 207].

73. Smith *v.* Buffalo, 159 N. Y. 427, 54 N. E. 62.

74. West Chicago Park Com'rs *v.* Chicago, 152 Ill. 392, 38 N. E. 697.

75. Elwood *v.* Rochester, 43 Hun (N. Y.) 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238].

76. Bixler *v.* Hagan, 42 Mo. 367.

77. Warren Borough *v.* Pleasant Bridge Co., 16 Pa. Co. Ct. 44, holding that a toll-bridge company could not be assessed with regard to land over which it held a right of way, while it maintained its bridge, the borough being the owner of the land in fee. See also Terrell *v.* Paducah, 92 S. W. 310, 28 Ky. L. Rep. 1237, 5 L. R. A. N. S. 289.

78. Matter of West Farms Road, 47 Misc. (N. Y.) 216, 95 N. Y. Suppl. 894; *In re* Anthony Ave., 46 Misc. (N. Y.) 525, 95 N. Y. Suppl. 77. See also Elwood *v.* Rochester, 43 Hun (N. Y.) 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238], holding such property not assessable as lots and parcels of land.

79. *California.*— *In re* North Beach, etc., R. Co., 32 Cal. 499.

Illinois.— Chicago, etc., R. Co. *v.* People, 120 Ill. 104, 11 N. E. 418. See also Chicago

enhance the value of property it has been held that no assessment can be made on it.[80]

(2) Steam or General Traffic Roads. Whether the track and right of way of a railroad company is subject to assessment for local improvements, on the ground of special benefits, under the language of statutes couched in general terms, providing for such assessments, is a question upon which the courts have not been agreed. The system and policy of each state enter largely into the question and give to it a local character.[81] And perhaps in the greater number of the states the right of way and tracks of a railroad company may be assessed for an improvement relatively situated,[82] such property being regarded as real estate and land[83] or contiguous property[84] within the meaning of such terms as used in statutes relating to local improvements. In several of the jurisdictions, however, the right to assess such tracks and right of way is denied,[85] either upon the ground

Terminal Transfer Co. *v.* Chicago, 178 Ill. 429, 53 N. E. 361.

Kentucky.— Louisville, etc., R. Co. *v.* Barber Asphalt Paving Co., 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. Rep. 1024.

New Jersey.— Erie R. Co. *v.* Paterson, 72 N. J. L. 83, 59 Atl. 1031; New Jersey Midland R. Co. *v.* Jersey City, 42 N. J. L. 97.

New York.— Lake Shore, etc., R. Co. *v.* Dunkirk, 65 Hun 494, 20 N. Y. Suppl. 596 [*affirmed* in 143 N. Y. 660, 39 N. E. 21].

Pennsylvania.— Philadelphia *v.* Philadelphia, etc., R. Co., 177 Pa. St. 292, 35 Atl. 610, 34 L. R. A. 564; Chester City *v.* Chester, etc., R. Co., 5 Pa. Co. Ct. 387, 3 Del. Co. 389.

Texas.—Storrie *v.* Houston City St. R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1031.

The corporate franchise of a railroad company may be assessed for benefits arising from the laying out of a new highway, where the franchise is directly and immediately benefited. Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

80. Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 23 Atl. 705. See Jones *v.* Chicago, 206 Ill. 374, 69 N. E. 64.

81. Chicago, etc., R. Co. *v.* Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249.

82. *Illinois.*— Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215; Illinois Cent. R. Co. *v.* Kankakee, 164 Ill. 608, 45 N. E. 971.

Indiana.— Pittsburgh, etc., R. Co. *v.* Taber, (1906) 77 N. E. 741 [*citing* Pittsburgh, etc., R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454; Peru, etc., R. Co. *v.* Hanna, 68 Ind. 562; Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Lake Erie, etc., R. Co. *v.* Bowker, 9 Ind. App. 428, 36 N. E. 864]. But see Indianapolis, etc., R. Co. *v.* Capitol Paving, etc., Co., 24 Ind. App. 114, 54 N. E. 1076, holding that a charter authorizing the assessment of lands "abutting" on a street for improvements thereof does not include a railroad right of way which lies wholly within the street.

Kentucky.— Orth *v.* Park, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251, 25 Ky. L. Rep. 1910, 26 Ky. L. Rep. 184, 342 [*citing* Louisville, etc., R. Co. *v.* Barber Asphalt Paving Co., 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. Rep. 1024; Figg *v.* Louisville, etc., R. Co., 116 Ky. 135, 75 S. W. 269, 25 Ky. L. Rep. 350].

New Jersey.— State *v.* Passaic, 54 N. J. L. 340, 23 Atl. 945 [*citing* State *v.* Jersey City, 42 N. J. L. 97; New Jersey R., etc., Co. *v.* Elizabeth, 37 N. J. L. 330].

North Carolina.— Chatham County *v.* Seaboard Air Line R. Co., 133 N. C. 216, 45 S. E. 566.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1033.

Purposes of assessment.— The right of way of a railroad company may be assessed for a sewer (Chicago, etc., R. Co. *v.* Joliet, 153 Ill. 649, 39 N. E. 1077; Atchison, etc., R. Co. *v.* Peterson, (Kan. 1897) 51 Pac. 290; State *v.* Passaic, 54 N. J. L. 340, 23 Atl. 945), for drainage (Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255), or for paving (Chicago, etc., R. Co. *v.* Moline, 158 Ill. 64, 41 N. E. 877). Where a street crosses a right of way, the right of way may be assessed for the expenses of sidewalks. Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215.

Where track is parallel to street.— The track of a railroad which is parallel to a street may be assessed for the cost of an improvement of such street (Peru, etc., R. Co. *v.* Hanna, 68 Ind. 562; Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597), such as paving (Chicago, etc., R. Co. *v.* Elmhurst, 165 Ill. 148, 46 N. E. 437; Illinois Cent. R. Co. *v.* Kankakee, 164 Ill. 608, 45 N. E. 971), or for the expense of grading and graveling a street and the construction of a sidewalk along the side of the street opposite the right of way (Pittsburgh, etc., R. Co. *v.* Hays, *supra*).

83. Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255.

84. Chicago, etc., R. Co. *v.* Moline, 158 Ill. 64, 41 N. E. 877; Chicago, etc., R. Co. *v.* Joliet, 153 Ill. 649. 39 N. E. 1077; Kuehner *v.* Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774.

85. See cases cited *infra*, this and following notes.

The right of way of a railroad parallel to a street cannot be assessed for an improvement (Chicago, etc., R. Co. *v.* Ottumwa, 112 Iowa

that the property is not benefited,[86] that it is property devoted to public use,[87] that the assessment cannot be enforced by sale,[88] or that the property does not fall within the terms of the statute,[89] as lots and land,[90] or real estate,[91] or abutting property.[92] In any event even in those jurisdictions where the right of way and tracks are assessable in a proper case, the assessment cannot be sustained in the absence of benefit.[93] A railroad company whose only interest in certain tracks is the right by contract to run its trains over such tracks has no title which may be subjected to special assessment for a local improvement.[94]

(3) STREET RAILROADS. It is generally held that the right of way, right of occupancy, or franchise of a street railway company to use a street may be assessed for an improvement beneficial to such property.[95] But on the contrary it has been held that a portion of a track of a street railroad is not real estate subject to a local assessment;[96] and that under a statute providing that an assessment may be levied on lots and parcels of land fronting on the highway, a street railroad operated upon a street cannot be assessed for the purposes of improvement;[97] and

300, 83 N. W. 1074, 51 L. R. A. 763, so holding where the company had only an easement), and it has been held that this is true whether the railroad owns a fee or an easement (Allegheny City *v.* Western Pennsylvania R. Co., 138 Pa. St. 375, 21 Atl. 763; Mt. Pleasant Borough *v.* Baltimore, etc., R. Co., 138 Pa. St. 365, 20 Atl. 1052, 11 L. R. A. 520. But see Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103).

86. See *supra*, XIII, E, 5, b, (III), (B), (1).

87. Boston *v.* Boston, etc., R. Co., 170 Mass. 95, 49 N. E. 95.

88. Southern California R. Co. *v.* Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79; McCutcheon *v.* Pacific R. Co., 72 Mo. App. 271; Sweaney *v.* Kansas City R. Co., 54 Mo. App. 265.

89. Chicago, etc., R. Co. *v.* Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249.

90. Chicago, etc., R. Co. *v.* Ottumwa, 112 Iowa 300, 83 N. W. 1074, 51 L. R. A. 763, so holding where the right of way was a mere easement. And see Muscatine *v.* Chicago, etc., R. Co., 88 Iowa 291, 55 N. W. 100.

But land owned in fee by a railroad company may be assessed, although the right of way is situate thereon. Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103.

91. Erie *v.* Piece of Land, 175 Pa. St. 523, 34 Atl. 808; Philadelphia *v.* Philadelphia, etc., R. Co., 15 Pa. Dist. 395, 32 Pa. Co. Ct. 534.

92. Chicago, etc., R. Co. *v.* South Park Com'rs, 11 Ill. App. 562.

93. *Connecticut.*— Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Illinois.— River Forest *v.* Chicago, etc., R. Co., 197 Ill. 344, 64 N. E. 364; Bloomington *v.* Chicago, etc., R. Co., 134 Ill. 451, 26 N. E. 366.

Massachusetts.— Boston *v.* Boston, etc., R. Co., 170 Mass. 95, 49 N. E. 95, sidewalk.

Michigan.— Detroit, etc., R. Co. *v.* Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 58 Am. St. Rep. 466, 28 L. R. A. 793, improvement of street crossing.

New Jersey.— New Jersey R., etc., Co. *v.* Elizabeth, 37 N. J. L. 330.

Wisconsin.— Chicago, etc., R. Co. *v.* Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249.

Improvements in a parallel street do not create benefit. Allegheny City *v.* Western Pennsylvania R. Co., 138 Pa. St. 375, 21 Atl. 763; Mt. Pleasant Borough *v.* Baltimore, etc., R. Co., 138 Pa. St. 365, 20 Atl. 1052, 11 L. R. A. 520.

Railroad carried through tunnel.— A railroad whose right of way is carried along the center of a street, through a tunnel, will not be regarded as benefited by the paving of the street. People *v.* Gilon, 41 Hun (N. Y.) 510.

94. Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656, 25 N. E. 962.

95. *In re* North Beach, etc., R. Co., 32 Cal. 499; Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 23 Atl. 705; New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399 (holding that the track of a street railroad company is real estate and as such subject to assessment); Chicago City R. Co. *v.* Chicago, 90 Ill. 573, 32 Am. Rep. 54; Little *v.* Chicago, 46 Ill. App. 534; Shreveport *v.* Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193.

Although a street railroad company does not have a fee, its franchise and right of user constitutes property which may be assessed in case of benefit. Cicero, etc., R. Co. *v.* Chicago, 176 Ill. 501, 52 N. E. 866.

Purposes.—A street railroad company may be assessed for the paving (New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399; Kenhner *v.* Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774), filling and grading (Little *v.* Chicago, 46 Ill. App. 534), or for the widening of a street (*In re* North Beach, etc., R. Co., 32 Cal. 499; Chicago City R. Co. *v.* Chicago, 90 Ill. 573, 32 Am. Rep. 54) or for the construction of a sewer (Cicero, etc., R. Co. *v.* Chicago, 176 Ill. 501, 52 N. E. 866).

96. State *v.* Ramsey County Dist. Ct., 31 Minn. 354, 17 N. W. 954.

97. Koons *v.* Lucas, 52 Iowa 177, 3 N. W. 84; People *v.* Gilon, 126 N. Y. 147, 27 N. E. 282; O'Reilley *v.* Kingston, 114 N. Y. 439, 21 N. E. 1004; Conway *v.* Rochester, 24 N. Y.

that where a street railroad company held title to a strip of land in the middle of a public street, the grading of the street afforded no benefit to such land which may be made a basis of assessment.[98] The fact that the track of a street railroad company may be required to be assessed as personal property for general taxation will not prevent its being assessed for a local improvement in those jurisdictions where such an assessment is sustained.[99] The right of way, franchise, and interest of an elevated railroad may be specially assessed for an improvement on the street above which it runs.[1]

(4) Depots, Yards, and Lands. Although its right of way be expressly exempt by statute, property of a railway used for depots,[2] yards,[3] or freight terminals[4] will be liable to assessment for local improvements, and this has been held notwithstanding its right of way traverses such land.[5] A general exemption from municipal assessment of lands used for railway purposes will not extend to such property of the company as is not in direct and immediate use for railway purposes.[6]

(5) Duty Under Statute, Charter, or Grant of Franchise. A duty imposed upon a railway company by legislative enactment or by its franchise to pave part of a street used for its tracks may be enforced by the municipality;[7] but such enforcement should be had in accordance with the terms of the provision imposing the duty, not by including the right of way in a general assessment of contiguous property.[8] A street railway that is required to pave the portion

App. Div. 489, 49 N. Y. Suppl. 244; Matter of West Farms Road, 47 Misc. (N. Y.) 216, 95 N. Y. Suppl. 894; Matter of Anthony Ave., 46 Misc. (N. Y.) 525, 95 N. Y. Suppl. 77; *In re* East One Hundred and Thirty-Third St., 95 N. Y. Suppl. 76; Houston City St. R. Co. *v.* Storrie, (Tex. Civ. App. 1898) 44 S. W. 693; Oshkosh City R. Co. *v.* Winnebago County, 89 Wis. 435, 61 N. W. 1107.

98. Davis *v.* Newark, 54 N. J. L. 144, 23 Atl. 276.

99. Cicero, etc., R. Co. *v.* Chicago, 176 Ill. 501, 52 N. E. 866. And see Chatham County Com'rs *v.* Seaboard Air Line R. Co., 133 N. C. 216, 45 S. E. 566.

1. Lake St. El. R. Co. *v.* Chicago, 183 Ill. 75, 55 N. E. 721, 47 L. R. A. 624.

2. Burlington, etc., R. Co. *v.* Spearman, 12 Iowa 112; Atchison, etc., R. Co. *v.* Peterson, 5 Kan. App. 103, 48 Pac. 877.

3. New York, etc., R. Co. *v.* New Britain, 49 Conn. 40; Nevada *v.* Eddy, 123 Mo. 546, 27 S. W. 471; Mt. Pleasant Borough *v.* Baltimore, etc., R. Co., 138 Pa. St. 365, 20 Atl. 1052, 11 L. R. A. 520.

Property intended for future use.— City lots owned by a railroad outside its right of way, and not necessary for the enjoyment of its franchises, are liable to assessment for street improvement, although such lots were purchased for an enlargement of the yards, as might become necessary at some future time. Morris, etc., R. Co. *v.* Jersey City, 65 N. J. L. 683, 48 Atl. 1117.

4. Philadelphia *v.* Philadelphia, etc., R. Co., 177 Pa. St. 292, 35 Atl. 610, 34 L. R. A. 564; Philadelphia *v.* North Pennsylvania R. Co., 1 Pa. Super. Ct. 254, 38 Wkly. Notes Cas. 22; Philadelphia *v.* Philadelphia, etc., R. Co., 4 Pa. Dist. 453, 16 Pa. Co. Ct. 624.

5. Chicago, etc., R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108; Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103; Philadelphia *v.* Philadelphia, etc., R. Co., 1 Pa. Super. Ct. 236, 38 Wkly. Notes Cas. 15.

6. Chicago Union Traction Co. *v.* Chicago, 204 Ill. 363, 68 N. E. 519; State *v.* Ramsey County Dist. Ct., 68 Minn. 242, 71 N. W. 27; Morris, etc., R. Co. *v.* Jersey City, 65 N. J. L. 683, 48 Atl. 1117; Chicago, etc., R. Co. *v.* Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249.

7. Schmidt *v.* Market St., etc., R. Co., 90 Cal. 37, 27 Pac. 61; Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 23 Atl. 705; Shreveport *v.* Shreveport City R. Co., 104 La. 260, 29 So. 129.

Water-pipes.—A requirement that the street railroad pave and keep in repair a certain width of all streets in which its tracks shall be laid does not impose liability to an assessment for the laying of a water-supply pipe on one side of the street. McChesney *v.* Chicago, 213 Ill. 592, 73 N. E. 368.

8. People *v.* Coffey, 66 Hun (N. Y.) 160, 21 N. Y. Suppl. 34; Oshkosh City R. Co. *v.* Winnebago County, 89 Wis. 435, 61 N. W. 1107. See also Harris *v.* Macomb, 213 Ill. 47, 72 N. E. 762, holding that a requirement that a street railroad should pave the street between its tracks did not apply to streets upon which the railroad had a right to lay tracks, but upon which the tracks had not yet been laid. But see Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 23 Atl. 705.

Sewers.—An ordinance requiring a street railroad company to pave, macadamize, plank, and repair a certain width in the streets occupied by it, and providing for an equivalent to special assessments for certain surface improvements, does not include sewers, and the railroad is liable for its proportionate cost of the same. Bickerdike *v.* Chicago, 185 Ill. 280, 56 N. E. 1096.

of the street between its tracks is not liable to an assessment for paving the rest of the street.[9]

c. Location — (i) *In General.* The municipality in determining the location of property liable to assessment must comply with the provisions of the enactment under which it proceeds;[10] but within such limitation, the city may exercise discretion in determining what property is likely to receive special benefit from an improvement.[11]

(ii) *Assessment or Taxing Districts.* In the absence of express authorization the city, in the exercise of general power to make improvements by assessments, has implied power to provide for assessment districts;[12] and the legislature may create or authorize the municipality to create a local taxing district for local improvement purposes which includes part only of the property within the municipality.[13] Where it is provided by charter or statute that the city form into an assessment district the property benefited by an improvement and limit the assessment to the property within such district,[14] such provision must be complied with to render an assessment valid;[15] but the boundaries of districts may be left to ministerial officers, subject to approval by the council,[16] and the proper municipal authorities have large discretion in determining what property is benefited,[17] subject, however, to review for fraud or demonstrable mistake.[18] An entire city may

9. Chicago, etc., R. Co. *v.* Chicago, (Ill. 1891) 27 N. E. 926; Conway *v.* Rochester, 24 N. Y. App. Div. 489, 49 N. Y. Suppl. 244.

10. People *v.* Buffalo, 39 N. Y. App. Div. 651, 57 N. Y. Suppl. 263.

11. *Illinois.*— Chicago Sanitary Dist. *v.* Joliet, 189 Ill. 270, 59 N. E. 566; McChesney *v.* Hyde Park, (1891) 28 N. E. 1102.

Michigan.— Powers *v.* Grand Rapids, 98 Mich. 393, 57 N. W. 250; Grand Rapids School Furniture Co. *v.* Grand Rapids, 92 Mich. 564, 52 N. W. 1028.

Missouri.— Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 71 S. W. 205; Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562.

New York.— Stevenson *v.* New York, 1 Hun 51, 3 Thomps. & C. 133. See J. & A. McKechnie Brewing Co. *v.* Canandaigua, 15 N. Y. App. Div. 139, 44 N. Y. Suppl. 317 [*affirmed* in 162 N. Y. 631, 57 N. E. 1113]; Dasey *v.* Skinner, 11 N. Y. Suppl. 821, 823.

Ohio.— Coates *v.* Norwood, 16 Ohio Cir. Ct. 196, 9 Ohio Cir. Dec. 78.

Pennsylvania.—See Aswell *v.* Scranton, 175 Pa. St. 173, 34 Atl. 656, 52 Am. St. Rep. 841.

Wisconsin.— Gilman *v.* Milwaukee, 55 Wis. 328, 13 N. W. 266.

12. Mason *v.* Chicago, 178 Ill. 499, 53 N. E. 354; Louisville Steam Forge Co. *v.* Anderson, 57 S. W. 617, 22 Ky. L. Rep. 397.

13. Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797. The legislature has power to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, on the property in such district by special assessments, either according to valuation, superficial area, or frontage. Meier *v.* St. Louis, 180 Mo. 391, 79 S. W. 955.

14. See the statutes of the several states.

15. O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Collier *v.* Western Paving, etc., Co., 180 Mo. 362, 79 S. W. 947. See Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725.

16. Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605; Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667; Hoyt *v.* East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; Bell *v.* Yonkers, 78 Hun (N. Y.) 196, 28 N. Y. Suppl. 947 [*affirmed* in 149 N. Y. 581, 43 N. E. 985]. See also Smith *v.* Buffalo, 159 N. Y. 427, 54 N. E. 62, holding that under an act declaring that the board of assessors shall assess the amount ordered to be assessed for local improvements upon land benefited thereby in proportion to such benefit, it is the duty of the assessor, and not of the common council, to define the assessment districts.

17. Grand Rapids School Furniture Co. *v.* Grand Rapids, 92 Mich. 564, 52 N. W. 1028; Beecher *v.* Detroit, 92 Mich. 268, 52 N. W. 731; Matter of Phelps, 110 N. Y. App. Div. 69, 96 N. Y. Suppl. 862.

Exercise of legislative power.—A city council, in establishing a sewer district and determining its boundaries, is exercising a legislative power, having its origin in the taxing power. Wolff *v.* Denver, 20 Colo. App. 135, 77 Pac. 364.

18. Little Rock *v.* Katzenstein, 52 Ark. 107, 12 S. W. 198; State *v.* Brill, 58 Minn. 152, 59 N. W. 989; Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410; Harriman *v.* Yonkers, 82 N. Y. App. Div. 408, 81 N. Y. Suppl. 823; People *v.* Buffalo, 52 N. Y. Suppl. 689.

Arbitrary determination.— Whether particular property is benefited, and to what extent it is benefited, must be left to the judgment of those whose duty it is to make the assessment, and when they have exercised their judgment, their determination, in the absence of fraud or demonstrable mistake of fact, is conclusive. But they must exercise their judgment, and, if it appears that they have not done so, but have substituted an arbitrary, inflexible rule instead of their judgment, their work cannot stand. State *v.* Judges Dist. Ct., 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; State *v.* Ramsey

be formed into an assessment district for the purpose of constructing an improvement of general benefit.[19] A resolution fixing the boundaries of a district may be amended and the area of the district enlarged[20] or reduced.[21] A district may be formed within a district,[22] and it is not objectionable to include in a district only such property as abuts the improvement,[23] or to divide the improvement into sections for the sake of uniformity in assessments.[24] In the absence of express authority several streets cannot be joined in a single improvement district, and owners whose property abuts upon one street charged with the expense of improving the other.[25] An assessment may be collected only from land that is included in the boundaries of the district as defined in the order creating it;[26] and it is improper to omit from an assessment land within the area of a district,[27] the description of which must be sufficiently definite to determine its boundaries with certainty.[28]

(III) *ABUTTING PROPERTY.* Where the statute limits the property which may be subjected to assessment to that which is abutting,[29] or contiguous,[30] or adjoin-

County Dist. Ct., 29 Minn. 62, 11 N. W. 133. The power "to lay off the city into suitable sewer districts for the purpose of establishing a system of sewerage and drainage" does not authorize the city council to form a sewerage district by arbitrary lines, and without regard to the topography or drainage of the city. Hanscom *v.* Omaha, 11 Nebr. 37, 7 N. W. 739.

19. Matthews *v.* Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; Kansas City, etc., R. Co. *v.* Siloam Springs Waterworks Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248; Crane *v.* Siloam Springs, 67 Ark. 30, 55 S. W. 955; Minnesota, etc., Land, etc., Co. *v.* Billings, 111 Fed. 972, 50 C. C. A. 70.

20. Trowbridge *v.* Detroit, 99 Mich. 443, 58 N. W. 368.

21. St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298.

22. South Highland Land, etc., Co. *v.* Kansas City, 172 Mo. 523, 72 S. W. 944; Shannon *v.* Omaha, 73 Nebr. 507, 103 N. W. 53, 106 N. W. 592.

23. See *infra*, XIII, E, 5, c, (III).

24. Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794.

25. Hutchinson *v.* Omaha, 52 Nebr. 345, 72 N. W. 218.

26. Prendergast *v.* Richards, 2 Mo. App. 187 (holding that where the contract on which a special tax bill is issued embraces work outside the sewer district, the city engineer can compute the whole cost of so much of the sewer as is within the district, assess it as a special tax, and issue tax bills against the respective lots in the district); Farrington *v.* Mt. Vernon, 166 N. Y. 233, 59 N. E. 826; Mansfield *v.* Lockport, 24 Misc. (N. Y.) 25, 52 N. Y. Suppl. 571 (holding that no error was committed by an assessor, assessing land for a street improvement, in omitting lands not described in the ordinance from which he gains his authority). But see McMillan *v.* Butte, 30 Mont. 220, 76 Pac. 203, holding that where a certain lot was assessed for municipal improvements for its entire area, the fact that only half of such lot was included in the description in the resolution creating the assessment district was immaterial.

Where commissioners are authorized to fix area.—Under Laws (1893), p. 189, c. 84, providing that all property benefited by a local improvement shall be assessed by commissioners appointed by the court, and imposing on the commissioners the duty to examine the locality where the improvement is proposed to be made and the parcels that will be benefited, the commissioners are authorized to determine what property is benefited, and the court appointing them cannot restrict the assessment to the property embraced in the district prescribed by the ordinance providing for the improvement, or set aside an assessment roll made by the commissioners because they assessed property not within the district created by the ordinance. *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

27. Harriman *v.* Yonkers, 181 N. Y. 24, 73 N. E. 493 [*affirming* 82 N. Y. App. Div. 408, 81 N. Y. Suppl. 823]; Ellwood *v.* Rochester, 122 N. Y. 229, 25 N. E. 238.

28. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Kalamazoo *v.* Francoise, 115 Mich. 554, 73 N. W. 801. See also Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184, holding that under an act providing that the council may levy a tax for paving streets on such premises as in its opinion are benefited, a resolution to pave part of a street, declaring that the real estate abutting or adjoining said street shall constitute the taxation district for such purpose, is illegal, in not specifying a definite district.

29. Perine *v.* Erzgraber, 102 Cal. 234, 36 Pac. 585; St. Louis *v.* Juppier, (Mo. 1887) 3 S. W. 401; Harriman *v.* Yonkers, 181 N. Y. 24, 73 N. E. 493.

Not assessable although benefited.—Property which does not abut upon the line of a public improvement is not subject to an assessment for benefits, even where there is no possible approach to or exit from such property except by the use of the said improvement. *In re* Fifty-Fourth St., 165 Pa. St. 8, 30 Atl. 503 [*following In re* Morewood Ave., 159 Pa. St. 20, 28 Atl. 123, 132].

30. Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332; Crane *v.* French, 50 Mo. App.

ing,[31] or fronting,[32] only property so situated with reference to the improvement may be assessed. It is competent, however, for the legislature to direct that adjacent property, although not abutting the improvement, be made liable for part of the cost thereof,[33] provided some benefit is received;[34] and if the city is authorized to assess the property benefited by an improvement, it may extend an assessment to property not contiguous,[35] or confine it to contiguous property.[36] Under some statutes a different rule is adopted as to the assessment of platted and unplatted property, the latter not being assessable unless it is abutting.[37] The fact that an unplatted or subdivided tract of ground is surrounded by streets will not render it assessable in the manner of platted property.[38] The entire cost of a sidewalk may usually, under the statutes, be assessed on the property abutting on it.[39] The cost of paving intersections may be included in an assessment of abutting property.[40]

(IV) *Adjacent Blocks and Squares.* By statute in some jurisdictions it is provided that the cost of certain improvements shall be assessed upon the lots or pieces of ground to the center of the blocks on either side of the street improved.[41] Under such a statute the same rule applies whether the improvement is of the

367; Cincinnati *v.* Anderson, 52 Ohio St. 600, 43 N. E. 1040.

A levy upon abutting property is justified under a constitutional provision authorizing assessment of contiguous property. Green *v.* Springfield, 130 Ill. 515, 22 N. E. 602 [*following* Springfield *v.* Greene, 120 Ill. 269, 11 N. E. 261].

In Illinois it is held that special assessments as well as special taxes may be levied upon the contiguous property only, and need not be levied upon all the property which is benefited. West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427; Farr *v.* West Chicago Park Com'rs, 167 Ill. 355, 46 S. E. 893.

31. Matthews *v.* Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; *In re* Ward, 52 N. Y. 395.

32. People *v.* Kingston, 114 N. Y. App. Div. 326, 99 N. Y. Suppl. 657; Wiler *v.* Griffith, 6 Pa. Co. Ct. 204, holding that the property must touch on the street.

33. *Illinois.*— Roberts *v.* Evanston, 218 Ill. 296, 75 N. E. 923; Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656, 25 N. E. 962.

Indiana.— See Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468; Frankfort *v.* State, 128 Ind. 438, 27 N. E. 1115.

Kansas.— Olsson *v.* Topeka, 42 Kan. 709, 21 Pac. 219.

Massachusetts.— Lincoln *v.* Boston St. Com'rs, 176 Mass. 210, 57 N. E. 356.

Nebraska.— McCormick *v.* Omaha, 37 Nebr. 829, 56 N. W. 626; Lamaster *v.* Lincoln, (1891) 49 N. W. 655; Lansing *v.* Lincoln, 32 Nebr. 457, 49 N. W. 650.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1040.

34. San Diego *v.* Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33; Dumesnil *v.* Shanks, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864, 17 Ky. L. Rep. 170; *In re* Morewood Ave., 159 Pa. St. 20, 28 Atl. 123, 132.

35. *Illinois.*— Shurtleff *v.* Chicago, 190 Ill. 473, 60 N. E. 870.

Michigan.— Goodrich *v.* Detroit, 123 Mich. 559, 82 N. W. 255.

New Jersey.— Allison Land Co. *v.* Tenafly, 68 N. J. L. 205, 52 Atl. 231.

New York.— *In re* Amsterdam, 126 N. Y. 158, 27 N. E. 272.

Ohio.— Meissner *v.* Toledo, 31 Ohio St. 387. See also Kelly *v.* Cleveland, 34 Obio St. 468.

36. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Hennessy *v.* Dougas County, 99 Wis. 129, 74 N. W. 983.

Under a charter provision that the cost of street improvements shall be paid by owners of property, no particular property being specified, an assessment upon abutting lots only cannot be upheld. El Paso *v.* Mundy, 85 Tex. 316, 20 S. W. 140.

37. See the statutes of the several states. And see McGrew *v.* Kansas City, 64 Kan. 61, 67 Pac. 438.

38. McGrew *v.* Kansas City, 64 Kan. 61, 67 Pac. 438, holding that such a tract was not assessable to its center, without regard to whether or not it abutted upon the improvement.

39. Marion Trust Co. *v.* Indianapolis, 37 Ind. App. 672, 706, 75 N. E. 834, 836; Mudge *v.* Walker, 90 S. W. 1046, 28 Ky. L. Rep. 996, holding that sidewalks do not fall within the provision of a statute requiring the expense of reconstructing public ways to be borne one half by the city and one half by abutting owners.

40. Conde *v.* Schenectady, 164 N. Y. 258, 58 N. E. 130.

41. See the statutes of the several states. And see Olsson *v.* Topeka, 42 Kan. 709, 21 Pac. 219 (holding that a block is a portion of a city inclosed by streets or avenues, and where such block is subdivided by alleys or lanes it still remains one block, and the parts thereof, although surrounded by public ways, are not made blocks thereby, but remain subdivisions of the block inclosed by streets or avenues); Blair *v.* Atchison, 40 Kan. 353, 19 Pac. 815.

streets upon which the lots front or of the streets to which they lie parallel.[42] Under other statutes internal improvements must be borne by all the property within the square.[43] Under a statute providing that the cost of improvements shall be assessed to the property-owners in each square, property to constitute a square must be bounded by regularly laid out streets.[44] Although the cross streets upon one side of an improved street have not been extended to intersect the streets upon the other side, they may be treated as extended for the purpose of assessment.[45]

(v) *What Constitutes Abutting, Contiguous, or Fronting Property.* In determining what property abuts a street, the municipal officials must be guided by the plats and records rather than by actual frontage.[46] Where only one of a tract of several lots owned by the same person abuts upon the street, an assessment can only be levied against the abutting lot, unless the whole tract is used by the owner in disregard of the lot lines.[47] In the construction of different statutes it has been held that property facing a public square does not abut on an avenue the lines of which, if extended, would intersect such square;[48] that property fronting on a street at the point where it forms the approach of a viaduct, which a railway company is bound to keep in repair, cannot be included in an assessment for the paving of such street;[49] that the fact that a parkway intervenes between a lot and the sidewalk does not prevent the lot from being classed as abutting;[50] nor the fact that a small strip of land is not included in the surface of the street,[51] that land may be regarded as contiguous to a street paved, where it is separated therefrom only by the sidewalk,[52] that property cannot be assessed as "fronting upon a street" where it is separated therefrom by a strip of ground no matter how narrow,[53] and that property which merely corners upon the improvement may be assessed as fronting.[54] The fact that a property-owner had dedicated one half the width of a street will not prevent his property from being regarded as fronting on the street when the residue is opened.[55] A strip lying outside of an abutting lot which is subject to a fence easement in favor of the other lot owners in the block cannot be separately sold for a special assessment.[56]

(vi) *Corner Lots.* A corner lot may be assessed for improvements made on either street upon which it abuts.[57] The fact that a corner lot has no opening on the side street does not exempt the owner from an assessment for a sidewalk upon

42. Attawa *v.* Barney, 10 Kan. 270.

43. Steinacker *v.* Gast, 89 S. W. 481, 28 Ky. L. Rep. 573, holding that the fact that a street does not traverse a block, but ends at an alley-way within the block, does not render it an alley-way or an internal improvement.

44. Caldwell *v.* Rupert, 10 Bush (Ky.) 179. See also Holt *v.* Figg, 94 S. W. 34, 29 Ky. L. Rep. 613.

45. Specht *v.* Barber Asphalt Paving Co., 80 S. W. 1106, 26 Ky. L. Rep. 193, so holding where streets were not extended because of an intervening railroad right of way.

46. Scott County *v.* Hinds, 50 Minn. 204, 52 N. W. 523.

47. Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332; Smith *v.* Des Moines, 106 Iowa 590, 76 N. W. 836; Barber Asphalt Paving Co. *v.* Peck, 186 Mo. 506, 85 S. W. 387; Wolfort *v.* St. Louis, 115 Mo. 139, 21 S. W. 912; Chester *v.* Eyre, 181 Pa. St. 642, 37 Atl. 837.

48. Johnson *v.* District of Columbia, 6 Mackey (D. C.) 21.

49. McFarlane *v.* Chicago, 185 Ill. 242, 57 N. E. 12.

50. Allman *v.* District of Columbia, 3 App. Cas. (D. C.) 8.

51. Richards *v.* Cincinnati, 31 Ohio St. 506.

52. Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

53. Crane *v.* French, 50 Mo. App. 367, holding that an unplatted piece of land cannot be assessed where it was separated from the street by a strip of land five feet in width.

54. Martin *v.* Wagner, 120 Cal. 623, 53 Pac. 167.

55. *In re* Thirteenth St., 16 Pa. Super. Ct. 127.

56. Woodruff Place *v.* Raschig, 147 Ind. 517, 46 N. E. 990.

57. *Illinois.*— Wilbur *v.* Springfield, 123 Ill. 395, 14 N. E. 871.

Iowa.— Morrison *v.* Hershire, 32 Iowa 271.

Kansas.— Lawrence *v.* Killam, 11 Kan. 499.

Kentucky.— Elder *v.* Cassilly, 54 S. W. 836, 21 Ky. L. Rep. 1274.

Michigan.— Nowlen *v.* Benton Harbor, 134 Mich. 401, 96 N. W. 450.

New York.— People *v.* Adams, 18 N. Y. Suppl. 443.

such street.[58] But the owner of a corner lot, who has paid for a water-pipe upon one front of his property, has been held not liable for the cost of a pipe laid without his consent along the other front.[59]

(VII) *Property Abutting on Street But Not on Improvement.* As a general rule it is held that where the statute provides that property abutting on the street shall be assessed for the improvement, that property which abuts on the improvement only may be assessed.[60] But when the assessment may be made on each block touching the improvement the improvement need not extend along the entire face of the block.[61] Where only one side of the street is improved, property on both sides may be assessed,[62] unless the unimproved side be beyond the municipal limits.[63] Where the city has power to assess the entire cost of the improvement upon the property abutting thereon, property which has already been assessed for an improvement upon which it abuts cannot be assessed for the improvement of another portion of the street, in the absence of an express provision in the charter or statute.[64] So where one side of a street has been improved at the expense of the property-owners upon the side improved the entire cost of improving the opposite side may be assessed upon the property on that side.[65] Under some statutes, where no buildings are taken for which compensation must be made, the assessment district for an improvement cannot extend beyond the center line of the block adjacent thereto, or beyond the end of the street or avenue or portions thereof sought to be opened.[66] Under other statutes the expense of opening a street may be assessed upon the property fronting the entire street and not merely the part opened.[67] Where the continuity of a street is broken so that it is separated into distinct parts it would seem that property abutting upon one part cannot be assessed for the expense of extending the other part.[68] In case the statute provides that upon the opening of an alley benefits shall be paid by the owners of the property in the block abutting on the pro-

58. Elder *v.* Cassilly, 54 S. W. 836, 21 Ky. L. Rep. 1274.

59. Baker *v.* Gartside, 86 Pa. St. 498.

60. *Indiana.*— Salem *v.* Henderson, 13 Ind. App. 563, 41 N. E. 1062, holding that land abutting on a bridge connecting the portions of the street improved is not liable for any part of the assessment.

Iowa.— Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78.

Missouri.— Smith *v.* Small, 50 Mo. App. 401.

Ohio.— Smith *v.* Toledo, 24 Ohio St. 126; Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159; Scoville *v.* Cleveland, 1 Ohio St. 126. See Klein *v.* Cincinnati, 7 Ohio Cir. Ct. 266, 4 Ohio Cir. Dec. 589.

Pennsylvania.— Com. *v.* Marshall, 69 Pa. St. 328. See Pittsburg *v.* Shaffer, 66 Pa. St. 454.

Washington.— Ryan *v.* Sumner, 17 Wash. 228, 49 Pac. 487, holding that where only a portion of a forty-acre tract abutted on a street a special assessment could not be levied against the land not so abutting, nor could the benefits such portion might derive from the improvement in front of the remainder be considered.

Under express statute.— It may be provided that where the council has ordered the improvement of a portion merely of the street between two street crossings, the assessment must be upon only the lots which front the portions of the work ordered. McDonald *v.* Conniff, 99 Cal. 386, 34 Pac. 71.

Where the improvement of two streets is authorized by one ordinance, the entire cost of improving one of the streets may be assessed to the property on it alone. Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071.

61. Boone *v.* Nevin, 23 S. W. 512, 15 Ky. L. Rep. 547.

62. Klein *v.* Nugent Gravel Co., 162 Ind. 509, 70 N. E. 801. And see Muscatine *v.* Chicago, etc., R. Co., 88 Iowa 291, 55 N. W. 100. Where a strip of ground from one side of a street is appropriated for the purpose of widening such street, the lots fronting on the opposite side will be deemed to abut on the improvement, although the street intervenes between them and the strip appropriated. Cincinnati *v.* Batsche, 52 Ohio St. 324, 40 N. E. 21.

63. Central Covington *v.* Busse, 80 S. W. 210, 25 Ky. L. Rep. 2179.

64. Halpin *v.* Campbell, 71 Mo. 493; *In re* Wabash Ave., 26 Pa. Super. Ct. 305.

65. Shirk *v.* Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490, so holding under a statute providing for assessment in proportion to benefits.

66. Matter of Board of St. Opening, etc., 64 Hun (N. Y.) 59, 18 N. Y. Suppl. 727, 940.

67. *In re* Chestnut Ave., 68 Pa. St. 81. See Brooks *v.* Chicago, 168 Ill. 60, 48 N. E. 136.

68. See Kuhns *v.* Omaha, 55 Nebr. 183, 75 N. W. 562, holding the evidence sufficient to

posed alley, all the lots in the block which abut on the alley may be assessed when an alley extending partially through the block is opened for the remainder of the distance.[69]

(VIII) *PROPERTY LIABLE TO ASSESSMENT FOR SEWERS AND DRAINS.* By statute it is frequently provided that contiguous[70] or approximate[71] property may be assessed for the expense of constructing a sewer. And as a general rule the statutes permit the assessment of property which is not contiguous or adjacent to the sewer,[72] provided there is not a total lack of benefit[73] present or future.[74] And where a local sewer has been constructed along a particular route, and the city afterward establishes a general system of sewerage, the property-owners along the route of the original sewer may be assessed for their share of the cost of the entire system.[75] But where a trunk sewer not only serves as an outlet for tributary sewers but is built primarily for the benefit of abutting property, no part of its cost need be assessed upon land along the line of the tributary sewers,[76] although

show that the continuity of the street had not been broken.

69. St. Louis *v.* Lane, 110 Mo. 254, 19 S. W. 533.

70. See English *v.* Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158 (holding that a statute providing that the cost of constructing a complete sewer system shall be assessed on all property adjoining a sewer, or with access thereto, at a fixed and uniform rate per foot of frontage and per square foot of area to a certain depth, is a valid exercise of legislative discretion in assessing benefits); Byram *v.* Foley, 17 Ind. App. 629, 47 N. E. 351.

Where a sewer has already been laid in the street it has been held that abutting property cannot be assessed for the cost of another sewer laid upon the other side of the street, although the first sewer was paid for by assessments against the abutters on the side on which it was laid, since the second sewer conferred no additional advantages of a different kind from that which the property already enjoyed. Philadelphia *v.* Meighan, 13 Pa. Dist. 407. But where a statute provides that the whole cost of a sewer shall be paid by the holders of property abutting on the street or alley in which it is constructed, an assessment for a sewer in an alley on which property abuts is not void, as being a double assessment, because of a previous assessment for a sewer constructed in a street on which the same property abuts. Byram *v.* Foley, 17 Ind. App. 629, 47 N. E. 351.

71. Monk *v.* Ballard, 42 Wash. 35, 84 Pac. 397, holding that under such a statute land was approximate to a sewer only where the property was so situated as to be capable of using the sewer or of deriving from its construction a special advantage different in character from that enjoyed by the public generally.

72. Kelly *v.* Chicago, 148 Ill. 90, 35 N. E. 752; Goodrich *v.* Minonk, 62 Ill. 121; Henderson *v.* Jersey City, 41 N. J. L. 489; People *v.* Buffalo, 52 N. Y. Suppl. 689; Bishop *v.* Tripp, 15 R. I. 466, 8 Atl. 692. *Contra*, see Witman *v.* Reading, 169 Pa. St. 375, 32 Atl. 576; Colwyn Borough *v.* Tarbottom, 7 Pa. Dist. 540, holding that a municipal lien for the construction of a sewer cannot be maintained against a lot abutting upon another than the sewer street, since the building of a sewer on such street would subject the lot to a double liability.

Continuations.— Property which has been assessed for an original sewer may be assessed for the continuation thereof, although the continuation begins at a point beyond such property. Green *v.* Hotaling, 46 N. J. L. 207 [*affirming* 44 N. J. L. 347].

73. *Kansas.*— Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781.

Minnesota.— State *v.* Ramsey County Dist. Ct., 90 Minn. 540, 97 N. W. 425.

Nebraska.— Hanscom *v.* Omaha, 11 Nebr. 37, 7 N. W. 739.

New Jersey.— King *v.* Reed, 43 N. J. L. 186 [*affirmed* in 48 N. J. L. 370]; New Jersey R., etc., Co. *v.* Elizabeth, 37 N. J. L. 330.

New York.— See Untermyer *v.* Yonkers, 112 N. Y. App. Div. 308, 98 N. Y. Suppl. 563.

Pennsylvania.— *In re* Beechwood Ave. Sewer, 179 Pa. St. 490, 36 Atl. 209.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1042.

Compare Walker *v.* Chicago, 202 Ill. 531, 67 N. E. 369.

Necessity of connections.— Under an act providing for assessing the cost of a sewer on the propery benefited, the cost of a main sewer cannot be assessed on property of non-abutters having no present sewer connections. *In re* Park Ave. Sewers, 169 Pa. St. 433, 32 Atl. 574.

The fact that the entire property is not susceptible of drainage into a sewer will not defeat an assessment. Hildebrand *v.* Toledo, 27 Ohio Cir. Ct. 427.

74. Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255; McKee Land, etc., Co. *v.* Williams, 63 N. Y. App. Div. 553, 71 N. Y. Suppl. 1141. See also Title Guarantee, etc., Co. *v.* Chicago, 162 Ill. 505, 44 N. E. 832.

75. Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690.

76. Ayer *v.* Somerville, 143 Mass. 585, 10 N. E. 457. See also McKevitt *v.* Hoboken, 45

such an assessment, if levied, will be sustained.[77] And if, under the statute, the city is divided into sewer districts, property in one district cannot be assessed for construction of sewers in another.[78]

(IX) *PROPERTY LIABLE TO ASSESSMENT FOR WATERWORKS.* Only such property as adjoins a street along which water mains are laid is as a rule liable to special assessment for waterworks.[79]

(X) *PROPERTY BEYOND BOUNDARIES OF MUNICIPALITY.* Unless expressly authorized,[80] a municipality may not assess property that lies beyond its limits;[81] but if, during the construction of an improvement, land abutting the same is annexed to the city it may be made liable for its share of the cost by means of a reassessment.[82]

d. Benefits to Property — (I) *NECESSITY.* In some cases it has been held that an assessment may be sustained, although it is not based upon a corresponding benefit,[83] but such decisions are in conflict with reason and the weight of authority.[84]

N. J. L. 482 (holding that where, after assessments for a sewer have been made, a branch sewer is connected therewith, this does not require that the property-owners on the branch sewer be assessed for the payment of the first sewer); Witman *v.* Reading, 169 Pa. St. 375, 32 Atl. 576.

77. De Witt *v.* Elizabeth, 56 N. J. L. 119, 27 Atl. 801; State *v.* Union, 53 N. J. L. 67, 20 Atl. 894.

78. Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605; Ft. Scott *v.* Kaufman, 44 Kan. 137, 24 Pac. 64. See also Clark *v.* Chicago, 214 Ill. 318, 73 N. E. 358; Duane *v.* Chicago, 198 Ill. 471, 64 N. E. 1033, holding that it is no objection to a sewer assessment that property outside the drainage district created by the ordinance authorizing the improvement was not assessed, the right to use the sewer being confined to property within the district.

79. Wheeler *v.* Muskingum County, 3 Ohio Cir. Ct. 596, 2 Ohio Cir. Dec. 345. And see McChesney *v.* Chicago, 213 Ill. 592, 73 N. E. 368, holding that where a city lot fronted two hundred and eighteen feet on another street, and was already furnished with water, and its frontage on C avenue was such that there would be no benefit from a water-pipe laid therein, it was not subject to assessment therefor.

80. Brooks *v.* Baltimore, 48 Md. 265; Colwyn *v.* Smith 9 Del. Co. (Pa.) 297, 18 York Leg. Rec. 65, sustaining the right of a borough to enforce a lien upon a lot in another borough for the expense of a sidewalk on which the lot fronted.

81. Hundley *v.* Lincoln Park Com'rs, 67 Ill. 559; Farlin *v.* Hill, 27 Mont. 27, 69 Pac. 237; *In re* Assessments of Lands, 60 N. Y. 398. A lien on land outside of an incorporated city for grading and curbing a street in front thereof can neither be acquired nor enforced under an act providing for a lien on a lot in front of which such work is done "in an incorporated city." Durrell *v.* Dooner, 119 Cal. 411, 51 Pac. 628.

82. *In re* Hollister, 180 N. Y. 518, 72 N. E. 1143.

83. *Iowa.*— Chicago, etc., R. Co. *v.* Phillips, 111 Iowa 377, 82 N. W. 787; Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605.

Kentucky.— Preston *v.* Rudd, 84 Ky. 150; Pearson *v.* Zable, 78 Ky. 170.

Missouri.— McQuiddy *v.* Smith, 67 Mo. App. 205.

New York.— J. & A. McKechnie Brewing Co. *v.* Canandaigua, 162 N. Y. 631, 57 N. E. 1113 [*affirming* 15 N. Y. App. Div. 139, 44 N. Y. Suppl. 317].

Ohio.— Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159.

84. *Arkansas.*— Kansas City, etc., R. Co. *v.* Siloam Springs Waterworks Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248.

California.— *In re* Market St., 49 Cal. 546; Taylor *v.* Palmer, 31 Cal. 240.

Colorado.— Denver *v.* Kennedy, 33 Colo. 80, 80 Pac. 122, 467, holding that a provision of a city charter that the cost of the construction of viaducts shall be assessed upon real estate in the districts "benefited" is not open to the objection of authorizing the assessment of the expense of a viaduct to particular property without regard to "special" benefits.

Georgia.— Atlanta *v.* Hanlein, 101 Ga. 697, 29 S. E. 14.

Illinois.— River Forest *v.* Chicago, etc., R. Co., 197 Ill. 344, 64 N. E. 364; McFarlane *v.* Chicago, 185 Ill. 242, 57 N. E. 12; Chicago *v.* Adcock, 168 Ill. 221, 48 N. E. 155; Illinois Cent. R. Co. *v.* Decatur, 154 Ill. 173, 38 N. E. 626; Wright *v.* Chicago, 46 Ill. 44.

Kentucky.— Louisville *v.* Bitzer, 115 Ky. 359, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434; Broadway Baptist Church *v.* McAtee, 8 Bush 508, 8 Am. Rep. 480.

Maryland.— Burns *v.* Baltimore, 48 Md. 198.

Massachusetts.—Stark *v.* Boston, 180 Mass. 293, 62 N. E. 375.

New Jersey.— State *v.* Bayonne, 53 N. J. L. 299, 21 Atl. 453; Reynolds *v.* Paterson, 48 N. J. L. 435, 5 Atl. 896.

New York.— People *v.* Brooklyn, 23 Barb. 166.

Pennsylvania.— Boyd *v.* Wilkinsburg Borough, 183 Pa. St. 198, 38 Atl. 592.

Canada.— Sutherland-Innes Co. *v.* Romney Tp., 30 Can. Sup. Ct. 495.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1051.

The municipal authorities have, however, large discretion in determining what property is benefited by an improvement.[85]

(II) *General or Special.* In determining whether property is benefited by an improvement only such benefit as differs from that received by the community at large is considered,[86] but the fact that other property along the line of the improvement is benefited does not prevent the benefit from being held special.[87] Ordinarily the question of special benefit is one of fact.[88]

(III) *Nature, Extent, and Amount.* The inclusion of property in an assessment district is *prima facie* evidence that it will be benefited by the improvement;[89] but the usual test of benefit is the increase of value,[90] for any use to which the land might be adapted.[91] The determination of benefit need not be based alone on an estimate of increase of value for the particular use to which the property is being put,[92] although such use may be considered.[93] Speculative benefits will not support an assessment,[94] although property has been held liable for benefits not immediate, but sure to be realized within a reasonable time.[95] Future and indirect benefits from the improvement of the surrounding premises may be considered,[96]

85. See *supra*, XIII, E, 5, c, (I).

86. Friedenwald *v.* Baltimore, 74 Md. 116, 21 Atl. 555; Lincoln *v.* Boston St. Com'rs, 176 Mass. 210, 57 N. E. 356; Smith *v.* St. Joseph, 122 Mo. 643, 27 S. W. 344; State *v.* West Hoboken, 51 N. J. L. 267, 17 Atl. 110.

87. Mock *v.* Muncie, 9 Ind. App. 536, 37 N. E. 281; Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600; Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852.

88. Hart *v.* Omaha, (Nebr. 1905) 105 N. W. 546, holding that the fact that real estate was three quarters of a mile distant from a boulevard would not enable the court to say, as a matter of law, that it was not specially benefited.

89. Matthews *v.* Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547. See also People *v.* Reis, 109 N. Y. App. Div. 748, 96 N. Y. Suppl. 597.

90. Chicago Union Traction Co. *v.* Chicago, 204 Ill. 363, 68 N. E. 519 [*followed* in Chicago Union Traction Co. *v.* Chicago, 207 Ill. 607, 69 N. E. 803].

Elements of benefits.— It has been held that a dominant estate receives a special benefit where, by the construction of a sewer, an injury to a servient estate through the wrongful casting of sewage upon such estate is obviated (Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 71 S. W. 205); that the fact that a cul-de-sac upon which property previously fronted has been turned into a continuous thoroughfare may be considered (Matter of Grant Ave., 34 Misc. (N. Y.) 724, 70 N. Y. Suppl. 1045); and that the improvement of a street in the rear of premises, but to which there was no access from the premises, would be a benefit (Johnson *v.* Tacoma, 41 Wash. 51, 82 Pac. 1092).

91. Chicago Sanitary Dist. *v.* Joliet, 189 Ill. 270, 59 N. E. 566; Clark *v.* Chicago, 166 Ill. 84, 46 N. E. 730.

92. Chicago Union Traction Co. *v.* Chicago, 207 Ill. 544, 69 N. E. 849; Chicago Union Traction Co. *v.* Chicago, 204 Ill. 363, 68 N. E. 519 [*followed* in Chicago Union Traction Co. *v.* Chicago, 207 Ill. 607, 69 N. E. 803]; Chicago Union Traction Co. *v.* Chicago, 202 Ill. 576, 67 N. E. 383; Mock *v.* Muncie, (Ind. 1892) 32 N. E. 718; State *v.* Ramsey County Dist. Ct., 68 Minn. 242, 71 N. W. 27; Morris, etc., R. Co. *v.* Jersey City, 36 N. J. L. 56.

93. Kankakee Stone, etc., Co. *v.* Kankakee, 128 Ill. 173, 20 N. E. 670; Cook *v.* Slocum, 27 Minn. 509, 8 N. W. 755; People *v.* Syracuse, 63 N. Y. 291; *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

94. Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63; Holdom *v.* Chicago, 169 Ill. 109, 48 N. E. 164 (holding that benefits from paving, based on the assumption that other improvements not provided for would be made on the street before it is paved, could not be considered); Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255; Friedenwald *v.* Baltimore, 74 Md. 116, 21 Atl. 555; Kellogg *v.* Elizabeth, 40 N. J. L. 274.

95. Hutt *v.* Chicago, 132 Ill. 352, 23 N. E. 1010; Matter of Whitlock Ave., 51 N. Y. App. Div. 436, 64 N. Y. Suppl. 717; *In re* New York, 3 Wend. (N. Y.) 452; Dickson *v.* Racine, 65 Wis. 306, 27 N. W. 58. See Downer *v.* Boston, 7 Cush. (Mass.) 277 (holding that the fact that a greater part of a lot assessed was lower than the bottom of the sewer was no objection to the assessment for the construction of the sewer, since the sewer might be rendered a benefit to the entire lot by grading); Chamberlain *v.* Cleveland, 34 Ohio St. 551 (holding that the fact that the opening of one street rendered practicable that of another contemplated street, which could not have been opened before, thus benefiting lots adjacent to the new street, might be considered in estimating the special benefits).

96. Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103. See also Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562, holding that a refusal to instruct the jury that, if the street when opened would be impassable for travel and use, then no benefits to adjoining land should be assessed, is not error where, although the street passes over a rough and broken country, there is

and the benefit of fire protection will support an assessment in the form of water rates against property upon which no water is taken or used.[97] The fact that water mains have not yet been laid in a street will not prevent a sewer from being of some benefit.[98] In case there has been a general and serious depression in the market value of real estate, the mere fact that property could not be sold for more after the improvement than before will not in itself show that there has been no benefit.[99] In case the city by its own wrongful act has depreciated the value of property, it cannot take advantage of such fact for the purpose of showing that there has been a benefit from the construction of an improvement.[1]

(IV) *Previous Existence of Similar Improvement*—(A) *In General.* An assessment for a public improvement upon an entire tract of land when part of it is separated from the improvement and adjoins a similar improvement by which only it is benefited is invalid as to that part.[2]

(B) *Existing Sewer.* The fact that property is sufficiently drained by an existing sewer, of either private or public construction, is no defense against an assessment for the construction of a new sewer,[3] if there is additional benefit,[4] unless such property be exempt by express provision of charter or statute.[5] So a corner lot already assessed for a sewer on one street may again be assessed for the construction of a sewer on the other,[6] but not for a parallel sewer on the same street.[7] The mere fact that a lot may have local drainage will not prevent its being liable for assessment for sewerage.[8] Under a charter provision that only those persons whose drains enter the common sewer shall be assessed therefor, a property-owner who had been assessed for the construction of a sewer was held not liable to an assessment for lowering the same in order to connect it with another sewer constructed to drain a different territory.[9]

e. Where Property Has Been Damaged by Improvement. Where there has been an award of damages based upon a consideration, both of the damages and the benefits accruing from the improvement, the general rule is that the property with reference to which the award has been made cannot be assessed for benefits.[10]

no evidence that the street cannot be made passable.

97. Dasey *v.* Skinner, 11 N. Y. Suppl. 821, 823.

98. Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741.

99. Borger *v.* Columbus, 27 Ohio Cir. Ct. 812.

1. Kummer *v.* Cincinnati, 27 Ohio Cir. Ct. 683.

2. People *v.* Buffalo, 36 N. Y. Suppl. 191.

3. Coburn *v.* Bossert, 13 Ind. App. 359, 40 N. E. 281; St. Joseph *v.* Owen, 110 Mo. 445, 19 S. W. 713; State *v.* Jersey City, 30 N. J. L. 148; Philadelphia *v.* Odd Fellows' Hall Assoc., 168 Pa. St. 105, 31 Atl. 917 [*affirming* 4 Pa. Dist. 3, 15 Pa. Co. Ct. 609]; *In re* Evans Avenue Sewer, 10 Pa. Dist. 633. See also Michener *v.* Philadelphia, 118 Pa. St. 535, 12 Atl. 174. But *compare* People *v.* Desmond, 186 N. Y. 232, 78 N. E. 857 [*reversing* 111 N. Y. App. Div. 757, 97 N. Y. Suppl. 795], holding that under a statute authorizing the assessment of the expense of local improvements upon the lands benefited in proportion to the benefit, property on one side of the street which was already adequately drained by a sewer constructed at the expense of the owners thereof was not subject to an equal assessment per front foot with undrained property on the other side of the street for a sewer there being constructed.

4. Sargent *v.* New Haven, 62 Conn. 510, 26 Atl. 1057; Park Ecclesiastical Soc. *v.* Hartford, 47 Conn. 89; Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605; Vanderbeck *v.* Jersey City, 29 N. J. L. 441; Matter of Fifth Ave. Sewer, 4 Brewst. (Pa.) 364.

5. Wewell *v.* Cincinnati, 45 Ohio St. 407, 15 N. E. 196.

6. Philadelphia *v.* Cadwallader, 3 Pa. Co. Ct. 203.

7. Philadelphia *v.* Verner, 8 Pa. Co. Ct. 97; Philadelphia *v.* Potter, 5 Pa. Co. Ct. 324.

8. Cincinnati *v.* Kasselmann, 10 Ohio Dec. (Reprint) 790, 23 Cinc. L. Bul. 392.

9. Boyden *v.* Brattleboro, 65 Vt. 504, 27 Atl. 164.

10. Leopold *v.* Chicago, 150 Ill. 568, 37 N. E. 892; Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487; Davis *v.* Newark, 54 N. J. L. 595, 25 Atl. 336; Rettinger *v.* Passaic, 45 N. J. L. 146; Freeman *v.* Hunter, 7 Ohio Cir. Ct. 117, 3 Ohio Cir. Dec. 689. *Compare* Grand Rapids School Furniture Co. *v.* Grand Rapids, 92 Mich. 564, 52 N. W. 1028.

Effect of laches.— The right to set off an award for property taken by the city for an improvement, against assessments for benefits derived therefrom, is not barred before six years, and laches within that period will not destroy the right. Van Buskirk *v.* Bayonne, (N. J. Ch. 1897) 38 Atl. 458.

But where the property-owner received no award by reason of a finding that his benefits exceeded his damages, it has been held that he may still be assessed for benefits, but only to the extent that such benefits exceed the amount already set off against the damages sustained.[11] So where a portion of a plot of ground has been taken for a street, the remainder of the ground may be assessed for the benefits.[12]

f. Exemptions — (I) *In General.* It is competent for the legislature to grant exemption from special assessment;[13] but the grant must be by clear expression.[14] A constitutional or statutory provision exempting property from taxation will not apply to assessments for local improvements.[15] But an exemption from taxes or assessments includes local assessments.[16] An exemption in the charter of a corporation will not be repealed by a general statute providing that assessments shall be levied on all land and property benefited.[17]

(II) *Effect of Dedication of Land For Street.* A property-owner who has dedicated land for a street cannot on that ground escape liability for his share of the cost of paving or improving such street.[18]

11. Rettinger *v.* Passaic, 45 N. J. L. 146.

12. Waggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485 [*distinguishing* Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487].

13. Dyker Meadow Land, etc., Co. *v.* Cook, 3 N. Y. App. Div. 164, 38 N. Y. Suppl. 222; Milwaukee Electric R., etc., Co *v.* Milwaukee, 95 Wis. 42, 69 N. W. 796. See also People *v.* Cummings, 166 N. Y. 110, 59 N. E. 703.

14. Kilgus *v.* Good Shepherd Orphanage, 94 Ky. 439, 22 S. W. 750, 15 Ky. L. Rep. 318. See also Paterson *v.* Useful Manufactures, etc., Soc., 24 N. J. L. 385.

15. *Kentucky.*— Zable *v.* Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668; Louisville *v.* McNaughten, 44 S. W. 380, 19 Ky. L. Rep. 1695.

Louisiana.— Lafayette *v.* Male Orphan Asylum, 4 La. Ann. 1.

Massachusetts.— Boston Seamen's Friend Soc. *v.* Boston, 116 Mass. 181, 17 Am. Rep. 153.

Missouri.—Kansas City Exposition Driving Park *v.* Kansas City, 174 Mo. 425, 74 S. W. 979; Sheehan *v.* Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412.

Nebraska.— Beatrice *v.* Brethren Church, 41 Nebr. 358, 59 N. W. 932.

New York.— Roosevelt Hospital *v.* New York, 84 N. Y. 108 [*affirming* 18 Hun 582]; Tucker *v.* Utica, 35 N. Y. App. Div. 173, 54 N. Y. Suppl. 855; Matter of Floyd, 24 Misc. 359, 53 N. Y. Suppl. 709. An act prohibiting an assessment on property for local improvements to an amount in excess of one half the value of such property, as valued by the general tax assessing officers, does not exempt from such assessments property exempt from taxation. *In re* St. Joseph's Asylum, 69 N. Y. 353.

Ohio.— Gilmour *v.* Pelton, 5 Ohio Dec. (Reprint) 447, 6 Am. L. Rec. 26.

Pennsylvania.— Northern Liberties *v.* St. John's Church, 13 Pa. St. 104.

Rhode Island.— Second Universalist Soc. *v.* Providence, 6 R. I. 235.

Wisconsin.— Yates *v.* Milwaukee, 92 Wis. 352, 66 N. W. 248.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1045.

16. Hudson County Catholic Protectory *v.* Kearney Tp., 56 N. J. L. 385, 28 Atl. 1043; State *v.* Newark, 36 N. J. L. 478, 13 Am. Rep. 464 [*reversing* 35 N. J. L. 157]; Oakland Cemetery *v.* Yonkers, 63 N. Y. App. Div. 448, 71 N. Y. Suppl. 783. See also Chicago *v.* Baptist Theological Union, 115 Ill. 245, 2 N. E. 254.

Exemption from public assessment.—A statute exempting certain associations from "all public taxes, rates, and assessments" does not extend to municipal assessments to defray the expenses of a local improvement. Such an assessment is not "public." Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506. *Contra,* State *v.* St. Paul, 36 Minn. 529, 32 N. W. 781.

17. Hudson County Catholic Protectory *v.* Kearney Tp., 56 N. J. L. 385, 28 Atl. 1043.

18. Terrell *v.* Hart, 90 S. W. 953, 28 Ky. L. Rep. 901; Moran *v.* Hudson, 34 N. J. L. 25 [*affirmed* in 34 N. J. L. 531]; Richards *v.* Cincinnati, 31 Ohio St. 506.

Street-opening proceedings.— Under N. Y. Laws (1901), c. 466, the owner of land within the lines of a street laid out on the city map may without compensation convey his title to the city, and if the title is good and the conveyance is accepted the land fronting on the portion of the street so conveyed is not chargeable with any of the expense of opening the residue of the street, except a fair proportion of the award that may be made for buildings. It has been held that this conveyance may be made after application of the city to open a street. Matter of Westminster Heights Co., 107 N. Y. App. Div. 577, 95 N. Y. Suppl. 247 [*affirmed* in 185 N. Y. 539, 77 N. E. 1198]. But the person who has made such a voluntary conveyance is not entitled to have the land entirely excluded from proceedings for appointment of commissioners of estimate and assessment, since the land is still liable for its proportion of the awards that may be made for buildings. Matter of Avenue L, 107 N. Y. App. Div. 581, 95 N. Y. Suppl. 245.

(III) *Property of Religious and Charitable Institutions.* Under some statutes the property of religious societies and churches is exempt from assessment.[19] But the exemption of the property of religious and charitable institutions from all state and municipal taxes will not, by implication, include special assessments for local improvements,[20] and although exemption from special assessment be granted it has been held that it will not apply to sidewalks, since their construction may be ordered in the exercise of municipal police power.[21]

(IV) *Schools and Colleges.* In the absence of clear expression,[22] an exemption of schools and colleges from all taxation will not imply exemption from liability for special assessments.[23]

(V) *Cemeteries.* Cemeteries, although exempt from taxes, are liable to assessment for local improvements[24] unless total lack of benefit can be shown[25] or express exemption be granted.[26]

(VI) *Homesteads.* The fact that property assessed for the cost of a local improvement is a homestead does not defeat the assessment lien nor prevent a sale in satisfaction thereof.[27]

19. See the statutes of the several states. And see Hudson County Catholic Protectory *v.* Kearney Tp., 56 N. J. L. 385, 28 Atl. 1043; Protestant Foster Home Soc. *v.* Newark, 36 N. J. L. 478, 13 Am. Rep. 464; Matter of Tremont Baptist Church, 36 Misc. (N. Y.) 590, 73 N. Y. Suppl. 1075; Harrisburg *v.* Ohei Sholem Congregation, 32 Pa. Co. Ct. 589, holding that if, however, any part of a church property is rented for religious and charitable purposes, and produces revenue in excess of taxes and repairs, such part is not exempt.

20. *Georgia.*— Atlanta *v.* First Presb. Church, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852.

Illinois.— Ottawa *v.* Free Church, 20 Ill. 423.

Kentucky.— Kilgus *v.* Good Shepherd Orphanage, 94 Ky. 439, 22 S. W. 750, 15 Ky. L. Rep. 318.

Michigan.— Lefevre *v.* Detroit, 2 Mich. 586.

Minnesota.— Washburn Memorial Orphan Asylum *v.* State, 73 Minn. 343, 76 N. W. 204.

Missouri.— Lockwood *v.* St. Louis, 24 Mo. 20.

New York.— See *In re* Second Ave. M. E. Church, 66 N. Y. 395; People *v.* Syracuse, 2 Hun 433, 5 Thomps. & C. 61.

Pennsylvania.— *In re* Broad Street, 165 Pa. St. 475, 30 Atl. 1007; Harrisburg *v.* St. Paul's Church, 5 Pa. Dist. 351.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1046.

21. Philadelphia *v.* Pennsylvania Hospital, 143 Pa. St. 367, 22 Atl. 744; Wilkinsburg Borough *v.* Home for Aged Women, 131 Pa. St. 109, 18 Atl. 937, 6 L. R. A. 531.

22. District of Columbia *v.* Sisters of Visitation, 15 App. Cas. (D. C.) 300; Harvard College *v.* Boston, 104 Mass. 470.

Constitutionality.—A charter exemption of the property of an educational institution from all taxation and assessments is unconstitutional, in so far as it attempts to exempt such property from assessment of benefits for local improvements. Chicago University *v.* People, 118 Ill. 565, 9 N. E. 189.

23. Boston Asylum, etc., *v.* Boston St. Com'rs, 180 Mass. 485, 62 N. E. 961; State *v.* Macalester College, 87 Minn. 165, 91 N. W. 484; State *v.* Robertson, 24 N. J. L. 504; *In re* College St., 8 R. I. 474. See also *supra*, XIII, E, 5, b, (II), (B).

24. *Illinois.*—Bloomington Cemetery Assoc. *v.* People, 139 Ill. 16, 28 N. E. 1076.

Maryland.— Baltimore *v.* Green Mount Cemetery, 7 Md. 517.

New York.— Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506; Batterman *v.* New York, 65 N. Y. App. Div. 576, 73 N. Y. Suppl. 44.

Ohio.— Lima *v.* Lima Cemetery Assoc., 42 Ohio St. 128, 51 Am. Rep. 809.

Pennsylvania.— Philadelphia *v.* Union Burial Ground Soc., 178 Pa. St. 533, 36 Atl. 172, 36 L. R. A. 263; Beltzhoover Borough *v.* Beltzhoover, 173 Pa. St. 213, 33 Atl. 1047; New Castle *v.* Stone Church Graveyard, 172 Pa. St. 86, 33 Atl. 236. *Contra*, Harrisburg *v.* Harrisburg Cemetery, 8 Dauph. Co. Rep. 267.

Rhode Island.— Swan Point Cemetery *v.* Tripp, 14 R. I. 199.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1048.

25. Mt. Auburn Cemetery *v.* Cambridge, 150 Mass. 12, 22 N. E. 66, 4 L. R. A. 836; Mt. Pleasant Cemetery Co. *v.* Newark, 50 N. J. L. 66, 11 Atl. 147.

26. Matter of White Plains Presb. Church, 112 N. Y. App. Div. 130, 98 N. Y. Suppl. 63; Oakland Cemetery *v.* Yonkers, 63 N. Y. App. Div. 448, 71 N. Y. Suppl. 783 [*affirmed* in 182 N. Y. 564, 75 N. E. 1132]. See State *v.* St. Paul, 36 Minn. 529, 32 N. W. 781.

27. Ahern *v.* District No. 3 Bd. of Imp., 69 Ark. 68, 61 S. W. 575; Perine *v.* Forbush, 97 Cal. 305, 32 Pac. 226; Todd *v.* Atchison, 9 Kan. App. 251, 59 Pac. 676; Nevin *v.* Allen, 26 S. W. 180, 15 Ky. L. Rep. 836. *Contra*, Higgins *v.* Bordages, 88 Tex. 458, 31 S. W. 52, 53 Am. St. Rep. 770 [*overruling* Lufkin *v.* Galveston, 58 Tex. 545]; Kettle *v.* Dallas,

(VII) *Railroad Property.* Unless expressly exempt[28] the property of a railway company is usually held liable for special assessments notwithstanding a general exemption from state and municipal taxes.[29]

6. Particular Acts or Omissions Affecting Assessments and Liabilities — a. In General. The city in making an improvement must comply with the provisions of the legislative enactment under which it proceeds,[30] but mere irregularities which do not essentially affect the proceedings will not invalidate an assessment.[31]

b. Conveyances to Evade Assessments. Liability of land for an assessment attaches from the passage of an ordinance ordering an improvement, and will not be affected by a subsequent conveyance;[32] and a colorable sale of the portion of a lot abutting an improvement, with intent to avoid an assessment, will not operate to exempt the part retained.[33]

c. Agreement Between Municipality and Owner. Unless expressly authorized by its charter or statute,[34] a city may not, by contract, exempt property from liability for assessment.[35] So in the absence of statute the city in accepting a deed

35 Tex. Civ. App. 632, 80 S. W. 874; Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024; Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726.

28. St. Paul *v.* St. Paul, etc., R. Co., 23 Minn. 469; First Div. St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526; Kent *v.* Binghamton, 94 N. Y. App. Div. 522, 88 N. Y. Suppl. 34.

29. *Illinois.*— Illinois Cent. R. Co. *v.* Decatur, 154 Ill. 173, 38 N. E. 626; Illinois Cent. R. Co. *v.* Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613 [*affirmed* in 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132]; Parmelee *v.* Chicago, 60 Ill. 267.

Kentucky.— Ludlow *v.* Cincinnati Southern R. Co., 78 Ky. 357.

Michigan.— Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195.

New Jersey.— Morris, etc., R. Co. *v.* Jersey City, 36 N. J. L. 56; New Jersey R., etc., Co. *v.* Newark, 27 N. J. L. 185. Where the charter of a railway corporation provided for the payment of a state tax, and contained a proviso "that no other tax or impost should be levied or assessed upon said company," the word "assessed" merely described the act of levying the tax or impost, and the company was not exempt from assessments for local improvements. New Jersey Midland R. Co. *v.* Jersey City, 42 N. J. L. 97.

Ohio.— Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 1 S. D. 46, 44 N. W. 1072.

Wisconsin.— Chicago, etc., R. Co. *v.* Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249.

United States.— Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132 [*affirming* 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1050.

Compare Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63, holding that under a statute imposing a tax on the franchises of railroad companies, payable directly to the state treasury in lieu of all other taxes, a municipal corporation could assess a railroad company for the benefits from opening a highway, since such assessment was not, in the general acceptation of the term, a tax.

30. Robertson *v.* Omaha, 55 Nebr. 718, 76 N. W. 442, 44 L. R. A. 534; App *v.* Stockton, 61 N. J. L. 520, 39 Atl. 921.

31. Dunne *v.* Altschul, 57 Cal. 472; Moore *v.* Albany, 98 N. Y. 396; Gilman *v.* Milwaukee, 55 Wis. 328, 13 N. W. 266. See Moffitt *v.* Jordan, 127 Cal. 622, 60 Pac. 173.

32. Dougherty *v.* Miller, 36 Cal. 83; *In re* Elizabeth Com'rs, 49 N. J. L. 488, 10 Atl. 363; Gobisch *v.* North Bergen Tp., 37 N. J. L. 402; Douglass *v.* Cincinnati, 29 Ohio St. 165.

33. St. Louis *v.* Meier, 77 Mo. 13; Stifel *v.* Brown, 24 Mo. App. 102. One who, in order to evade payment of an improvement tax, transfers a narrow strip abutting on the street with the understanding that it is to be reconveyed on request, thereby perpetrates a fraud on the city, and cannot benefit by his act. Fass *v.* Seehawer, 60 Wis. 525, 19 N. W. 533. See also Ransom *v.* Burlington, 111 Iowa 77, 82 N. W. 427; Eagle Mfg. Co. *v.* Davenport, 101 Iowa 493, 70 N. W. 707.

34. Bell *v.* Newton, 183 Mass. 481, 67 N. E. 599; Towne *v.* Newton, 169 Mass. 240, 47 N. E. 1029; Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893.

35. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Oglesby, 165 Ind. 542, 76 N. E. 165.

Massachusetts.— Whitcomb *v.* Boston, 192 Mass. 211, 78 N. E. 407; Boylston Market Assoc. *v.* Boston, 113 Mass. 528.

Missouri.— Vrana *v.* St. Louis, 164 Mo. 146, 64 S. W. 180.

New York.— J. & A. McKechnie Brewing Co. *v.* Canandaigua, 15 N. Y. App. Div. 139, 44 N. Y. Suppl. 317; Hooker *v.* Rochester, 30 N. Y. Suppl. 297.

Ohio.— Thale *v.* Cincinnati, 3 Ohio S. & C. Pl. Dec. 131, 1 Ohio N. P. 427.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1062.

Compare Dempster *v.* Chicago, 175 Ill. 278, 51 N. E. 710.

of land for part of a street has no power to agree in consideration therefor that other land of the grantor in the addition in which the land is deeded shall be exempt from any further assessment for opening or extending the street.[36] But under express statutory authority it has been held that a board of park commissioners may contract for the conveyance of land to the city for park purposes in consideration of the exemption of other contiguous land of the owner from assessments for park purposes to the amount agreed upon.[37] An ordinance allowing a railway company to lay its tracks along a street, provided it restores the pavement thereof, does not constitute a contract exempting the property of the company from assessment for paving such street;[38] and, where the liability of a railway company for the cost of street improvements is fixed by statute, such liability cannot be lessened by contract between the company and the municipality.[39]

d. Violation of Charter, Statute, or Ordinance Authorizing Improvement. A substantial violation of the legislative enactment under which the city proceeds will invalidate an assessment for a local improvement.[40] But failure to comply with provisions that are merely directory,[41] or a mere irregularity, will not invalidate an assessment.[42]

e. Defect in Preliminary Proceedings.[43] All preliminary proceedings required by charter or statute are essential steps to the validity of an improvement,[44] and omission of such proceedings or substantial defects therein will invalidate an

An agreement by which a city undertakes with the owners of land taken for a street to submit the assessment of damages and betterments to arbitration is *ultra vires* and void; and the city cannot maintain an action to enforce an award made under such submission. Somerville *v.* Dickerman, 127 Mass. 272.

36. Leggett *v.* Detroit, 137 Mich. 247, 100 N. W. 566.

37. State *v.* Fourth Judicial Dist. Ct., 83 Minn. 170, 86 N. W. 15.

38. Lake St. El. R. Co. *v.* Chicago, 183 Ill. 75, 55 N. E. 721, 47 L. R. A. 624; Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768.

39. Shreveport *v.* Shreveport City R. Co., 104 La. 260, 29 So. 129.

40. *California.*— Smith *v.* Cofran, 34 Cal. 310; Smith *v.* Davis, 30 Cal. 536. See also Gray *v.* Burr, 138 Cal. 109, 70 Pac. 1068; Gafney *v.* San Francisco, 72 Cal. 146, 13 Pac. 467.

Iowa.— Gallaher *v.* Garland, 126 Iowa 206, 101 N. W. 867. See also McManus *v.* Hornaday, 99 Iowa 507, 68 N. W. 812, holding that an assessment to defray the cost of improving a street at a grade other than established by ordinance was invalid.

Massachusetts.— Warren *v.* Boston St. Com'rs, 181 Mass. 6, 62 N. E. 951.

Missouri.— Smith *v.* Westport, 105 Mo. App. 221, 79 S. W. 725.

New York.— See Tredwell *v.* Brooklyn, 11 N. Y. App. Div. 224, 43 N. Y. Suppl. 458.

Oregon.— Portland *v.* Bituminous Paving, etc., Co., 33 Oreg. 307, 52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527, holding an assessment against property for the additional expense of street repairs unwarranted by the city charter void.

West Virginia.— Dancer *v.* Mannington, 50 W. Va. 322, 40 S. E. 475.

The fact that the cost of the improvements has not been increased through the disregard of a provision of the statute with relation to its construction does not authorize the assessment of the expenses so illegally incurred on the property benefited. Warren *v.* Boston St. Com'rs, 181 Mass. 6, 62 N. E. 951.

41. Frankfort *v.* Farmers' Bank, 61 S. W. 458, 22 Ky. L. Rep. 1738; Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908, holding the provisions of an ordinance requiring the superintendent of sewers to keep and submit to the board of aldermen an account of the cost of constructing sewers, and to report a list of persons deriving a benefit from them, merely directory.

42. *Illinois.*— Pierson *v.* People, 204 Ill. 456, 68 N. E. 383; Rawson *v.* Chicago, 185 Ill. 87, 57 N. E. 35; People *v.* McWethy, 177 Ill. 334, 52 N. E. 479.

Kentucky.—Lindenberger Land Co. *v.* Park, 85 S. W. 213, 27 Ky. L. Rep. 437. See also Gedge *v.* Covington, 80 S. W. 1160, 26 Ky. L. Rep. 273.

Minnesota.— State *v.* Blake, 86 Minn. 37, 90 N. W. 5.

Missouri.— Marionville *v.* Henson, 65 Mo. App. 397.

New York.— *Ex p.* Albany, 23 Wend. 277.

Pennsylvania.— Erie City *v.* Willis, 26 Pa. Super. Ct. 459. See also *In re* Maple Ave. Sewer, 30 Pittsb. Leg. J. N. S. 377.

Absence of funds to pay cost assessed to city will not relieve property-owners from liability for assessments. Risley *v.* St. Louis, 34 Mo. 404.

43. Regularity and sufficiency of proceedings see *supra*, XIII, B.

44. *California.*— California Imp. Co. *v.* Moran, 128 Cal. 373, 60 Pac. 969.

Dakota.— McLauren *v.* Grand Forks, 6 Dak. 397, 43 N. W. 710.

Illinois.— Pells *v.* Paxton, 176 Ill. 318, 52 N. E. 64.

Kentucky.— Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917.

assessment.[45] So where an ordinance is necessary, an improvement made in the absence of an ordinance will not support an assessment.[46] Or if a resolution of intention to make improvements,[47] or a resolution declaring the necessity thereof,[48] be required by charter or statute, such resolution is a condition precedent to a valid improvement. If an ordinance ordering an improvement is required to be passed by a stated majority,[49] or to be based upon the petition of property-owners,[50] such requirement must be complied with to render an assessment valid. Failure to give due notice,[51] or to make a proper preliminary estimate of the cost of an improvement, when the same is required by statute, will constitute a fatal defect in proceedings.[52] If the city, however, complies substantially with the requirements of the legislative enactment under which it proceeds, minor variance or mere irregularities will not invalidate an assessment.[53] Thus an abutter cannot

New York.— *In re* Manhattan R. Co., 102 N. Y. 301, 6 N. E. 590.

45. *Illinois.*—Lundberg *v.* Chicago, 183 Ill. 572, 56 N. E. 415; Thaler *v.* West Chicago Park Com'rs, 174 Ill. 211, 52 N. E. 116. And see People *v.* Smith, 201 Ill. 454, 66 N. E. 298.

Kentucky.— Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796.

Maryland.— Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686.

Missouri.— Leslie *v.* St. Louis, 47 Mo. 474; Keane *v.* Cushing, 15 Mo. App. 96; Perkinson *v.* McGrath, 9 Mo. App. 26.

Ohio.— Hays *v.* Cincinnati, 62 Ohio St. 116, 56 N. E. 658.

Washington.— Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1064.

46. Connecticut Mut. L. Ins. Co. *v.* Chicago, 185 Ill. 148, 56 N. E. 1071; Alton *v.* Foster, 74 Ill. App. 511; Martin *v.* Oskaloosa, 126 Iowa 680, 102 N. W. 529.

47. Piedmont Paving Co. *v.* Allman, 136 Cal. 88, 68 Pac. 493; Union Paving, etc., Co. *v.* McGovern, 127 Cal. 638, 60 Pac. 169; San Jose Imp. Co. *v.* Auzerais, 106 Cal. 498, 39 Pac. 859.

48. Welker *v.* Potter, 18 Ohio St. 85. But see Hughes *v.* Parker, 148 Ind. 692, 48 N. E. 243, holding that the failure to pass a resolution of necessity and give notice thereof as required by statute was not fatal, where proper notice and hearing was given to the property-owner before the making of the final assessment.

49. Albuquerque *v.* Zeiger, 5 N. M. 674, 27 Pac. 315.

50. *California.*—Mulligan *v.* Smith, 59 Cal. 206.

Illinois.— Brookfield *v.* Sterling, 214 Ill. 100, 73 N. E. 302. But *compare* Phillips *v.* People, 218 Ill. 450, 75 N. E. 1016, holding that the absence of a petition by property-owners for a local improvement does not affect the jurisdiction of the court to confirm an assessment for such improvement, and is no defense to an application for judgment of sale against delinquent property.

Iowa.— Hager *v.* Burlington, 42 Iowa 661.

Nebraska.— South Omaha *v.* Tighe, 67 Nebr. 572, 93 N. W. 946.

New Mexico.— Roswell *v.* Dominice, 9 N. M. 624, 58 Pac. 342.

51. *Colorado.*— Dumars *v.* Denver, 16 Colo. App. 375, 65 Pac. 580.

Iowa.— Starr *v.* Burlington, 45 Iowa 87.

Michigan.— Auditor-Gen. *v.* Calkins, 136 Mich. 1, 98 N. W. 742; Brush *v.* Detroit, 32 Mich. 43.

Nebraska.— Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45.

New York.— Ziegler *v.* Flack, 54 N. Y. Super. Ct. 69.

Oregon.— Ladd *v.* Spencer, 23 Oreg. 193, 31 Pac. 474.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1064.

52. *Illinois.*— Chicago *v.* Nodeck, 202 Ill. 257, 67 N. E. 39. But see Givins *v.* Chicago, 186 Ill. 399, 57 N. E. 1045.

Michigan.— Mills *v.* Detroit, 95 Mich. 422, 54 N. W. 897.

Minnesota.— Weller *v.* St. Paul, 5 Minn. 95.

Nebraska.— Moss *v.* Fairbury, 68 Nebr. 671, 92 N. W. 721.

Texas.— Ardrey *v.* Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726.

But see Strauss *v.* Cincinnati, 11 Ohio Dec. (Reprint) 92, 24 Cinc. L. Bul. 422 [*affirming* 10 Ohio Dec. (Reprint) 783, 23 Cinc. L. Bul. 359]; *In re* Brighton Road, 213 Pa. St. 521, 63 Atl. 124.

53. *California.*— Warren *v.* Riddell, 106 Cal. 352, 39 Pac. 781; Gill *v.* Dunham, (1893) 34 Pac. 68.

Illinois.— Heiple *v.* Washington, 219 Ill. 604, 76 N. E. 854.

Indiana.— Sands *v.* Hatfield, 7 Ind. App. 357, 34 N. E. 654.

Kansas.— Wahlgren *v.* Kansas City, 42 Kan. 243, 21 Pac. 1068. See also Kansas Town Co. *v.* Argentine, 59 Kan. 779, 54 Pac. 1131 [*affirming* 5 Kan. App. 50, 47 Pac. 542].

Kentucky.— Langan *v.* Bitzer, 82 S. W. 280, 26 Ky. L. Rep. 579.

Maryland.— Dashiell *v.* Baltimore, 45 Md. 615.

Michigan.— Borgman *v.* Detroit, 102 Mich. 261, 60 N. W. 696.

New York.— Knell *v.* Buffalo, 54 Hun 80, 7 N. Y. Suppl. 233.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1064.

assail an assessment on the ground that the published notice did not exactly conform to the specifications, unless he was prejudiced thereby;[54] nor can a misdescription of lands taken for a public improvement be urged as a defense against assessments for benefits by a person whose land was not taken.[55] So it has been held that it is not fatal that there has been a failure of the engineer to sign his estimate of cost,[56] or that there have been errors or mistakes in the estimate of cost, in the absence of fraud, collusion, or bad faith;[57] or errors in the ordinance in the statement of persons liable for the cost of the improvement and the manner of enforcing such liability, where the persons chargeable are not misled;[58] or that the time when interest should begin was fixed at a period later than provided by law.[59] An assessment is not invalid because the by-law ordering the improvement was passed before the expiration of the time allowed for filing a remonstrance, when no objection was made by property-owners until after the completion of the improvement.[60] It is sometimes provided by statute that an assessment shall not be set aside because of defect or irregularity in proceedings;[61] but such a provision will not save an assessment void because of failure to comply with a requirement essential to jurisdiction,[62] such as giving notice of an improvement.[63]

f. Invalidity of, or Irregularity in, Contract. A valid assessment cannot be made for work done under a void contract,[64] and failure by the city to comply with the substantial legislative provisions governing the letting of contracts will defeat an assessment to pay for the improvement.[65] Thus failure to advertise for bids,[66] to let the contract to the lowest bidder,[67] to open and award bids in accordance with the method prescribed by law,[68] or to annex specifications to the contract as required by charter or statute[69] will constitute a fatal irregularity and

54. Delaware, etc., Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 56 N. Y. Suppl. 976 [*affirmed* in 167 N. Y. 589, 60 N. E. 1119]. See also Duquesne Borough *v.* Keeler, 213 Pa. St. 518, 62 Atl. 1071.

55. Goodrich *v.* Detroit, 184 U. S. 432, 22 S. Ct. 397, 46 L. ed. 627.

56. Heiple *v.* Washington, 219 Ill. 604, 76 N. E. 854; Ziegler *v.* Chicago, 213 Ill. 61, 72 N. E. 719.

57. Gilmore *v.* Utica, 15 N. Y. Suppl. 274 [*affirmed* in 131 N. Y. 26, 29 N. E. 841].

58. Fox *v.* Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776, 16 Ky. L. Rep. 455.

59. Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794.

60. Kansas Town Co. *v.* Argentine, 5 Kan. App. 50, 47 Pac. 542.

61. Conde *v.* Schenectady, 164 N. Y. 258, 58 N. E. 130; *In re* New York Protestant Episcopal Public School, 8 Hun (N. Y.) 457.

62. Ottumwa Brick, etc., Co. *v.* Ainley, 109 Iowa 386, 80 N. W. 510.

63. Johnston *v.* Oshkosh, 21 Wis. 184.

64. Capron *v.* Hitchcock, 98 Cal. 427, 33 Pac. 431; Perine *v.* Forbush, 97 Cal. 305, 32 Pac. 226; Brock *v.* Luning, 89 Cal. 316, 26 Pac. 972; Worthington *v.* Covington, 82 Ky. 265; McManus *v.* Scheele, 116 La. 72, 40 So. 535; Allen *v.* Davenport, 132 Fed. 209, 65 C. C. A. 641.

65. *California.*— Perine *v.* Forbush, 97 Cal. 305, 32 Pac. 226. See also Capron *v.* Hitchcock, 98 Cal. 427, 33 Pac. 431; Oakland Paving Co. *v.* Rier, 52 Cal. 270.

Louisiana.— McKee *v.* Brown, 23 La. Ann. 306.

New York.— *In re* Pennie, 108 N. Y. 364, 15 N. E. 611.

Ohio.— See Hubbard *v.* Norton, 28 Ohio St. 116.

Pennsylvania.— Fell *v.* Philadelphia, 81 Pa. St. 58.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1065.

66. Tifft *v.* Buffalo, 25 N. Y. App. Div. 376, 49 N. Y. Suppl. 489 [*affirmed* in 164 N. Y. 605, 58 N. E. 1093]; Matter of Rosenbaum, 53 Hun (N. Y.) 478, 6 N. Y. Suppl. 184 [*affirmed* in 119 N. Y. 24, 23 N. E. 172]; *In re* Raymond, 21 Hun (N. Y.) 229; Mitchell *v.* Milwaukee, 18 Wis. 92. See also People *v.* Van Nort, 65 Barb. (N. Y.) 331 (holding that where a municipal board awards a contract for paving on proposals to do the work in a substantially different way from that which was contemplated when the notice was published for receiving such proposals, no assessment under it would be valid); Knecland *v.* Furlong, 20 Wis. 437. But see *In re* Johnson, 103 N. Y. 260, 8 N. E. 399, holding that a contract for a local improvement in the city of New York, originally invalid because of failure to comply with the provision of the charter of 1873 (Laws (1873), c. 335) requiring the advertisement for proposals and the letting of contracts to the lowest bidder, is validated by the certificate of the commissioners appointed under the act of 1872 (Laws (1872), c. 580), to the effect that the contract is free from fraud.

67. Brady *v.* Bartlett, 56 Cal. 350; Wells *v.* Burnham, 20 Wis. 112.

68. Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432.

69. Gray *v.* Richardson, 124 Cal. 460, 57 Pac. 385.

invalidate the assessment. Mere irregularities, however, that do not affect the jurisdiction,[70] or the insertion in the contract of improper conditions which in no way prejudice the rights of property-owners,[71] may not, after the completion of the work, be urged to defeat the assessment. And after the completion of the work a property-owner cannot question the sufficiency of a power of attorney under which the contract was entered into.[72]

g. Non-Performance of Contract. Failure to perform the work in substantial compliance with the terms of the contract will usually defeat an assessment;[73] but in the absence of fraud or collusion,[74] acceptance of the work by the city is conclusive.[75] Slight variation from the contract that does not affect the character of the work may not be urged as a defense against the assessment.[76] If the ordinance, ordering an improvement, fixes the time within which it shall be completed, failure to complete it within such time will defeat the assessment;[77] and a like result is usually held to follow from failure to complete the work within the period specified where time is of the essence of the contract,[78] although other cases hold that completion within a reasonable time will be sufficient performance to prevent forfeiture of an assessment.[79]

70. Bloomington *v.* Phelps, 149 Ind. 596, 49 N. E. 581; Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176; People *v.* Buffalo, 147 N. Y. 675, 42 N. E. 344; Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841; Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. ed. 1142.

71. McDonald *v.* Mezes, 107 Cal. 492, 40 Pac. 808; McChesney *v.* People, 200 Ill. 146, 65 N. E. 626; Treat *v.* People, 195 Ill. 196, 62 N. E. 891; Untermyer *v.* Yonkers, 112 N. Y. App. Div. 308, 98 N. Y. Suppl. 563. But *compare* People *v.* Maher, 56 Hun (N. Y.) 81, 9 N. Y. Suppl. 94, holding that, where a contract embodied a provision having the effect of throwing upon property-owners the expense of keeping the pavement in repair where such expense was properly chargeable to the city, it was void.

72. McVerry *v.* Boyd, 89 Cal. 304, 26 Pac. 885.

73. Heman *v.* Gerardi, 96 Mo. App. 231, 69 S. W. 1069.

Provision for proportionate assessment.—A statute providing that the council, instead of waiting until the completion of the improvement, may on completion of two blocks order an assessment for the proportionate amount of the contract completed, which may thereupon be collected, does not apply where the contract has been abandoned and the time for its completion has expired. Kelso C. Pl. Dec. 178, 7 Ohio N. P. 396.

74. Green *v.* Shanklin, 24 Ind. App. 608, 57 N. E. 269; Toledo *v.* Grasser, 5 Ohio S. & C. Pl. Dec. 178, 7 Ohio N. P. 396.

75. *California.*— Jennings *v.* Le Breton, 80 Cal. 8, 21 Pac. 1127.

Illinois.— Haley *v.* Alton, 152 Ill. 113, 38 N. E. 750.

Indiana.— Green *v.* Shanklin, 24 Ind. App. 608, 57 N. E. 269; Larned *v.* Maloney, 19 Ind. App. 199, 49 N. E. 278.

Kentucky.— Baldrick *v.* Gast, 79 S. W. 212, 25 Ky. L. Rep. 1977; Barker *v.* Tennessee Paving Brick Co., 71 S. W. 877, 24 Ky. L. Rep. 1524; Allen *v.* Woods, 45 S. W. 106, 20 Ky. L. Rep. 59.

Maryland.— Baltimore *v.* Raymo, 68 Md. 569, 13 Atl. 383.

New Jersey.— Liebstein *v.* Newark, 24 N. J. Eq. 200.

New York.— See *In re* Lewis, 51 Barb. 82.

Washington.— See Haisch *v.* Seattle, 10 Wash. 435, 38 Pac. 1131.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1066.

Unauthorized acceptance.— The fact that the work has been accepted by a board without authority to act in the premises will not render an assessment therefor enforceable. Haisch *v.* Seattle, 10 Wash. 435, 38 Pac. 1131.

76. People *v.* Church, 192 Ill. 302, 61 N. E. 496; Orth *v.* Park, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251, 25 Ky. L. Rep. 1910, 26 Ky. L. Rep. 184, 342; Watson *v.* Philadelphia, 93 Pa. St. 111.

77. Barber Asphalt Paving Co. *v.* Munn, 185 Mo. 552, 83 S. W. 1062; Springfield *v.* Schmook, 120 Mo. App. 41, 96 S. W. 257; Turner *v.* Springfield, 117 Mo. App. 418, 93 S. W. 867; Winfrey *v.* Linger, 89 Mo. App. 159; New England Safe Deposit, etc., Co. *v.* James, 77 Mo. App. 616. See also Neill *v.* Gates, 152 Mo. 585, 54 S. W. 460; Smith *v.* Westport, 105 Mo. App. 221, 79 S. W. 725, both holding that the city council had no power to waive the contractor's default by extending the time.

78. John Kelso Co. *v.* Gillette, 136 Cal. 603, 69 Pac. 296; Mappa *v.* Los Angeles, 61 Cal. 300; Spalding *v.* Forsee, 109 Mo. App. 675, 83 S. W. 540; Smith *v.* Westport, 105 Mo. App. 221, 79 S. W. 725; Shoenberg *v.* Heyer, 91 Mo. App. 389; Springfield *v.* Davis, 80 Mo. App. 574; Eno *v.* New York, 68 N. Y. 214. See also Hilgert *v.* Barber Asphalt Paving Co., 107 Mo. App. 385, 81 S. W. 496.

79. Heman *v.* Gilliam, 171 Mo. 258, 71 S. W. 163; Hill-O'Meara Constr. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318; Sparks *v.* Villa Rosa Land Co., 99 Mo. App. 489, 74 S. W. 120. And see Cass Farm Co. *v.* Detroit, 124 Mich. 433, 83 N. W. 108.

h. Departure From Ordinance or Resolution. The improvement must conform substantially to the ordinance or resolution authorizing it,[80] and a departure from such ordinance or resolution materially affecting the location,[81] nature,[82] or extent[83] of the improvement will invalidate the assessment. A minor variance, however, not prejudicial to property-owners, will be disregarded,[84] and, if more work is performed than was authorized, the cost of the authorized portion, if separable, may usually be assessed.[85] In case the work is intrusted to commissioners with power to make a change in the plan as it proceeds, it has been held that the fact that the work as completed is different from that described in the plan adopted by the council will not invalidate an assessment.[86]

i. Necessity of Completion Before Assessment. The time for making an assessment is usually fixed by the legislative enactment under which the city proceeds;[87] and while it seems that the assessment may be levied before the completion of the improvement,[88] it cannot be made until there has been an ascertainment

80. Eustace *v.* People, 213 Ill. 424, 72 N. E. 1089; Chicago *v.* Ayers, 212 Ill. 59, 72 N. E. 32; Cicero *v.* Green, 211 Ill. 241, 71 N. E. 884; Gage *v.* People, 193 Ill. 316, 61 N. E. 1045, 56 L. R. A. 916; Church *v.* People, 174 Ill. 366, 51 N. E. 747; Petter *v.* Allen, 54 S. W. 174, 21 Ky. L. Rep. 1122; Kansas City *v.* Askew, 105 Mo. App. 84, 79 S. W. 483; Matter of Turfler, 44 Barb. (N. Y.) 46, 19 Abb. Pr. 140.

A wrongful and unlawful encroachment by the officers or agents of the city upon the land of an abutter, which is done unintentionally and without design, will not invalidate otherwise valid proceedings or authorize the abutter to enjoin the collection of an assessment. Davis *v.* Silverton, 47 Oreg. 171, 82 Pac. 16.

Variance from petition.— Where the power to make the improvement is derived from a petition of the property-owners, the work must be done according to the petition in order to sustain a local assessment to pay therefor. Hutchinson *v.* Omaha, 52 Nebr. 345, 72 N. W. 218.

81. Shreve *v.* Cicero, 129 Ill. 226, 21 N. E. 815; Lowell *v.* Wheelock, 11 Cush. (Mass.) 391; Great Western Stock Co. *v.* Cincinnati, 7 Ohio Dec. (Reprint) 47, 1 Cinc. L. Bul. 84; Scranton City *v.* Kingsbury, 4 Pa. Dist. 555.

82. *District of Columbia.*— McClellan *v.* District of Columbia, 7 Mackey 94.

Kansas.— Hentig *v.* Gilmore, 33 Kan. 234, 6 Pac. 304.

Michigan.— See Gates *v.* Grand Rapids, 134 Mich. 96, 95 N. W. 998.

Missouri.— Barton *v.* Kansas City, 110 Mo. App. 31, 83 S. W. 1093.

New York.— *In re* Anderson, 57 Barb. 411.

Pennsylvania.— *In re* Scranton Sewer, 213 Pa. St. 4, 62 Atl. 173.

83. *Illinois.*— People *v.* McWethy, 177 Ill. 334, 52 N. E. 479.

Indiana.— Columbus *v.* Storey, 35 Ind. 97.

Missouri.— Brady *v.* Rogers, 63 Mo. App. 222.

New York.— Mitchell *v.* Lane, 62 Hun 253, 16 N. Y. Suppl. 707; *In re* Van Buren, 17 Hun 527 [*affirmed* in 79 N. Y. 384].

Washington.— Vancouver *v.* Wintler, 8 Wash. 378, 36 Pac. 278, 685.

84. *California.*— Warren *v.* Riddell, 106 Cal. 352, 39 Pac. 781; Williams *v.* Bisagno, (1893) 34 Pac. 640; Blair *v.* Luning, 76 Cal. 134, 18 Pac. 153.

Illinois.— Marshall *v.* People, 219 Ill. 99, 76 N. E. 70; Chicago *v.* Sherman, 212 Ill. 498, 72 N. E. 396; Rossiter *v.* Lake Forest, 151 Ill. 489, 38 N. E. 359; White *v.* Alton, 149 Ill. 626, 37 N. E. 96.

Massachusetts.—Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690.

Missouri.— Steffen *v.* Fox, 124 Mo. 630, 28 S. W. 70.

Ohio.— Wewell *v.* Cincinnati, 45 Ohio St. 407, 15 N. E. 196.

Pennsylvania.— Erie *v.* Piece of Land, 171 Pa. St. 610, 33 Atl. 378.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1067.

Construction of sidewalks.—Where an ordinance requires a sidewalk to be repaved with a brick pavement, one in front of whose property such a pavement was constructed cannot complain that other property-owners were permitted to put down a better pavement at their own expense. Anderson *v.* Bitzer, 49 S. W. 442, 20 Ky. L. Rep. 1450.

Variance caused by unlawful act of owner.—An assessment for paving is not affected by the fact that it is not as wide at one point as the notice to the lot owner required, where the difference has been caused by the unlawful act of the owner in placing his fence in the street. Hood *v.* Lebanon, 15 S. W. 516, 12 Ky. L. Rep. 813.

85. Webber *v.* Lockport, 43 How. Pr. (N. Y.) 368; Hutchinson *v.* Pittsburg, 72 Pa. St. 320; Mason *v.* Sioux Falls, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802, 2 S. D. 652, 51 N. W. 774.

86. Vanderbeck *v.* Jersey City, 29 N. J. L. 441.

87. See the statutes of the several states. And see Foster *v.* Boston Park Com'rs, 133 Mass. 321.

88. *In re* Adams, 165 Mass. 497, 43 N. E. 682; Kingman, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. See Weber *v.* Schergens, 59 Mo. 389; Kiley *v.* Cranor, 51 Mo. 541. But see Jones *v.* Metropolitan Park Com'rs, 181 Mass. 494, 64 N. E. 76, holding that the assessment could not be

of the cost,[89] and it is generally held that payment cannot be enforced until the improvement is completed,[90] or at least the part thereof for which the particular property is assessed.[91]

j. Invalidity of Assessment of Damages. The invalidity of an assessment of damages renders invalid an assessment of benefits for the payment of such damages.[92] So an assessment for benefits caused by raising the water of a lake was held invalid because no provision was made in the statute for compensating riparian owners for injuries to their land.[93]

k. Non-Payment of Damages. An assessment for benefits cannot be set aside on the ground that compensation for injuries has not been assessed or paid.[94]

l. Making of Part of Improvement by Property-Owners. In the absence of legislative provision to the contrary,[95] the fact that a property-owner has improved the street in front of his lot does not exempt him from liability to assessment for the cost of an improvement ordered by the city,[96] although it has been held that

levied until after completion where the statute so provided.

89. State *v.* Neodesha, 3 Kan. App. 319, 45 Pac. 122; Bellevue Imp. Co. *v.* Bellevue, 39 Nebr. 876, 58 N. W. 446, holding that an assessment for a sidewalk, made before its construction or ascertainment of its cost, is void.

90. *Illinois.*— People *v.* Grover, 203 Ill. 24, 67 N. E. 165; People *v.* Latham, 203 Ill. 9, 67 N. E. 403.

Iowa.— Sanborn *v.* Mason City, 114 Iowa 189, 86 N W. 286.

Kentucky.— Henderson *v.* Lambert, 14 Bush 24.

Missouri.— Independence *v.* Gates, 110 Mo. 374, 19 S. W. 728; Heman Constr. Co. *v.* Loevy, 64 Mo. App. 430.

Ohio.— Cincinnati *v.* Cincinnati, etc., Co., 26 Ohio St. 345, holding that where a street improvement was ordered to be paid by the abutting owners, and after it had been in part completed the work was abandoned, an assessment for that already done was unauthorized.

Compare Astoria Heights Land Co. *v.* New York, 89 N. Y. App. Div. 512, 86 N. Y. Suppl. 651, holding that the city of New York was, under Laws (1897), c. 378, liable for any damages resulting from the failure of the general improvement commission, created by the act of 1893, or from its own failure to complete the Grand avenue improvement; that this failure and consequent liability for damages did not entitle owners of property on Grand avenue, who did not claim that their assessments were unreasonable, to maintain an action in which the city of New York was the sole party defendant, to have the assessments canceled and annulled and to restrain defendant from taking any proceedings to collect the same.

A special tax in distinction from a special assessment for the construction of a sidewalk may, it has been held under the Illinois statute, be levied before the sidewalk is built. Mix *v.* People, 106 Ill. 425.

Effect of misconstruction of ordinance.— Where an ordinance imposed the duty of regulating and grading a street to a certain point, the omission of the commissioner of public works to complete the work for the whole distance, by reason of misconstruction of the ordinance, will not invalidate an assessment for the cost of the improvements. *In re* Pinckney, 22 Hun (N. Y.) 474 [*affirmed* in 84 N. Y. 645].

Where improvement is divided into sections. — The rule that assessments against adjoining property-owners for street improvements cannot be made, nor special tax bills therefor be enforced, till the contract for the improvement is fully completed, does not apply where the contract is for one kind of work, as curbing, guttering, etc., on one section of the street, and for another kind of work, as macadamizing, on another portion. Galbreath *v.* Newton, 45 Mo. App. 312.

Where work has been accepted.— Where work is accepted by the superintendent of streets before it is completed, the remedy of the property-owner liable to assessment is by applying to the city council. Smith *v.* Hazard, 110 Cal. 145, 42 Pac. 465.

Delay in making.— Great delay in completing work and improvements on a street, authorized by statute, is not good ground for vacating an assessment made to pay the expenses. The remedy of the property-owners against delay is by mandamus, compelling the authorities to expedite the work. Whiting *v.* Boston, 106 Mass. 89.

91. Tuttle *v.* Polk, 92 Iowa 433, 60 N. W. 733; St. Louis *v.* Clemens, 36 Mo. 467.

92. Judson *v.* Bridgeport, 25 Conn. 426.

93. Carpenter *v.* Hennepin County, 56 Minn. 513, 58 N. W. 295.

94. Hyde Park *v.* Borden, 94 Ill. 26; Springfield *v.* Baker, 56 Mo. App. 637; Ward *v.* New Brunswick, 49 N. J. L. 552, 10 Atl. 109; Vanderbeck *v.* Jersey City, 29 N. J. L. 441; *In re* Cruger, 84 N. Y. 619.

95. De Haven *v.* Berendes, 135 Cal. 178, 67 Pac. 786; Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014; Gleason *v.* Barnett, 61 S. W. 20, 22 Ky. L. Rep. 1660; Sanford *v.* Warwick, 181 N. Y. 20, 73 N. E. 490.

96. Louisville *v.* Gast, 91 S. W. 251, 28 Ky. L. Rep. 1256; Heman Constr. Co. *v.* McManus, 102 Mo. App. 649, 77 S. W. 310; Delaware, etc., Canal Co. *v.* Buffalo, 39 N. Y.

if the city accepts an improvement made by a property-owner, his land should be excluded from an assessment for improving the rest of the street.[97]

7. Levy and Assessment in General — a. What Constitutes Levy. Under an act allowing special assessment, the mere ordering of an improvement does not constitute a levy of assessment;[98] but where, by ordinance, the cost of an improvement is levied upon abutting property, to be assessed according to frontage, the mere computation of individual assessments may be left to ministerial officers,[99] the adoption of their report by the council constituting the assessment.[1]

b. Ordinance, Resolution, or Order For Levy. If the city be authorized to levy assessments by ordinance, a levy by resolution or order of the council will not be valid,[2] and all charter provisions as to the manner of passing ordinances must be complied with.[3] It is not, however, necessary that the ordinance be couched in the precise language of the charter[4] or that it set out its statutory authority.[5] Substantial compliance with charter or statute is usually held sufficient.[6] And an ordinance for the levy of an assessment is not invalid for failure

App. Div. 333, 56 N. Y. Suppl. 976 [*affirmed* in 167 N. Y. 589, 60 N. E. 1119]; Kennett Square *v.* Entriken, 7 Pa. Co. Ct. 469. But *compare* Johnson *v.* Tacoma, 41 Wash. 51, 82 Pac. 1092, holding that where the method of improvement of a street required the construction of retaining walls to support the lower side of the street, property-owners who had before the improvement of the street constructed retaining devices, or filled their lots so that no structure to retain the street was necessary, were entitled to be credited with the value which the structures added to the improvement district, and to have the assessments on other lots proportionately increased.

97. *In re* East Eighteenth St., 75 Hun (N. Y.) 603, 27 N. Y. Suppl. 591 [*affirmed* in 60 N. Y. St. 868 (*affirmed* in 142 N. Y. 645, 37 N. E. 568)].

98. Cummings *v.* West Chicago Park Com'rs, 181 Ill. 136, 54 N. E. 941; Trenton *v.* Coyle, 107 Mo. 193, 17 S. W. 643. See Hall *v.* Moore, 3 Nebr. (Unoff.) 574, 92 N. W. 294, holding that a levy of a special assessment for the construction of a sidewalk is necesary to the creation of a lien, so that, where no levy has in fact been made by the city council, no lien will be created by certifying the expenses of the improvement to the county board and extending it as a tax upon lots adjacent to the improvement.

99. Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821; Sears *v.* Boston, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834; Westport *v.* Jackson, 69 Mo. App. 148; Westport *v.* Mastin, 62 Mo. App. 647; Nevada *v.* Morris, 43 Mo. App. 586. *Contra*, see Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796, holding that the city council must fix the amount chargeable to the several abutting owners for the cost of a street improvement, and not leave the clerk to determine the amount from the number of feet, and the price per foot, reported by any agent or engineer.

1. Chicago, etc., R. Co. *v.* Huntington, 149 Ind. 518, 49 N. E. 379.

2. Westport *v.* Mastin, 62 Mo. App. 647. Taxes levied for street improvements, simply under a resolution by the city council and not under an ordinance passed by the mayor and council, are invalid, and cannot be validated by a subsequent ordinance. Newman *v.* Emporia, 32 Kan. 456, 4 Pac. 815.

3. Skinner *v.* Chicago, 42 Ill. 52; Auditor-Gen. *v.* Hoffman, 132 Mich. 198, 93 N. W. 259; Auditor-Gen. *v.* Maier, 95 Mich. 127, 54 N. W. 640; Beecher *v.* Detroit, 92 Mich. 268, 52 N. W. 731; State *v.* Dakota County Dist. Ct., 41 Minn. 518, 43 N. W. 389. Where a city charter provides that the resolutions of the council shall be submitted to the mayor for his approval before going into effect, an assessment for public improvements, undertaken in accordance with the provisions of a resolution which has not been so submitted, cannot be enforced. Twiss *v.* Port Huron, 63 Mich. 528, 30 N. W. 177.

Effect of fraud.—An ordinance providing for an assessment for a local street improvement is not invalid because three members of the council were influenced in its favor by fraud, where the number uncorrupted voting for it was more than sufficient to pass it under the city charter. Mansfield *v.* Lockport, 24 Misc. (N. Y.) 25, 52 N. Y. Suppl. 571.

4. Butts *v.* Rochester, 1 Hun (N. Y.) 598, 4 Thomps. & C. 89.

5. Andrews *v.* People, 173 Ill. 123, 50 N. E. 335.

6. *California.*— Moffitt *v.* Jordan, 127 Cal. 622, 60 Pac. 173.

Iowa.—Edwards, etc., Constr. Co. *v.* Jasper County, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. Rep. 301.

Massachusetts.— Fairbanks *v.* Fitchburg, 132 Mass. 42. It is no objection to the validity of a betterment assessment that the order levying it did not receive, in either branch of the city council, two several readings, as required by the rules. Holt *v.* Somerville, 127 Mass. 408.

Michigan.—See Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667.

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

Ohio.— See Meissner *v.* Toledo, 31 Ohio St. 387.

United States.— See Goodrich *v.* Detroit,

to describe the improvement, if it refers to the ordinance ordering the same[7] or to a plat[8] wherein there is a sufficient description. The assessing ordinance need not state the exact amount with which each lot is charged.[9] Where a portion of the ordinance is invalid it is void as a whole where the invalid portion is not distinct and severable.[10]

c. Notice of Establishment of Assessment District. Where notice of the establishment of an assessment district is required by charter or statute, the giving of such notice is a condition precedent to the legal establishment of such district;[11] but where due notice and a right to be heard has been given, failure of a property-owner to object amounts to a waiver and he is concluded by the decision of the council.[12]

d. Officers and Commissioners to Make Assessment — (i) *Authority of Council or Other Board or Officer to Make Assessment.* A municipality in making an assessment must follow the statute authorizing it.[13] Under some statutes the assessment is made by the city council,[14] and where the charter provides that an assessment shall be made by the council the power cannot be delegated to ministerial officers,[15] although the adoption by the council of the assessor's report has been held a sufficient compliance with such requirement,[16] and the mere calculation of the apportionment of an assessment may usually be made by subordinate officials.[17] It is competent for the legislature to impose upon municipal boards or officers, other than the council, the duty of making assessments,[18] and a

184 U. S. 432, 22 S. Ct. 397, 46 L. ed. 627.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1072.

Parol evidence.— Parol evidence is not admissible to show what property is referred to in a resolution levying an assessment for a local improvement. Higman *v.* Sioux City, 129 Iowa 291, 105 N. W. 524.

Evidence of assessment in fact.— Evidence in an action on a special assessment tax certificate, showing an assessment against a property-owner, is sufficient to sustain the action, although the recorded resolution of the city council levying such assessment does not show an assessment against the property-owner. Edwards, etc., Constr. Co. *v.* Jasper County, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. Rep. 301.

7. McManus *v.* People, 183 Ill. 391, 55 N. E. 886; West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427.

8. Dittoe *v.* Davenport, 74 Iowa 66, 36 N. W. 895.

9. Spalding *v.* Denver, 33 Colo. 172, 80 Pac. 126 (holding an assessment of a certain sum per square foot or lot of a given size sufficient); Higman *v.* Sioux City, 129 Iowa 291, 105 N. W. 524.

10. Cratty *v.* Chicago, 217 Ill. 453, 75 N. E. 343, so holding of an ordinance providing for interest on non-interest-bearing vouchers.

11. State *v.* Ramsey County Dist. Ct., 90 Minn. 294, 96 N. W. 737; State *v.* Otis, 53 Minn. 318, 55 N. W. 143; St. Louis *v.* Koch, 169 Mo. 587, 70 S. W. 143; Ireland *v.* Rochester, 51 Barb. (N. Y.) 414.

Error in notice.—A sewer assessment is not affected by obvious errors in the description of the assessment district contained in the printed notice of the meeting of the common council to act on the proposed sewer. Bell *v.* Yonkers, 78 Hun (N. Y.) 196, 28 N. Y. Suppl. 947 [*affirmed* in 149 N. Y. 581, 43 N. E. 985].

12. Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661.

13. Barber Asphalt Paving Co. *v.* Watt, 51 La. Ann. 1345, 26 So. 70.

14. See Davis *v.* Litchfield, 155 Ill. 384, 40 N. E. 354; Chicago, etc., R. Co. *v.* Joliet, 153 Ill. 649, 39 N. E. 1077 (both holding that in a proceeding by special taxation the benefits need not be assessed by a jury); Woodbridge *v.* Cambridge, 114 Mass. 483 (holding that where a sewer was laid out before the passage of an act conferring authority to make the assessment upon the mayor and aldermen they might thereafter make such assessment, although the city charter conferred power on the council).

15. Baltimore *v.* Scharf, 54 Md. 499; Woodbridge *v.* Cambridge, 114 Mass. 483; Sedalia *v.* Donohue, 190 Mo. 407, 89 S. W. 386; Westport *v.* Mastin, 62 Mo. App. 647; *In re* Hearn, 96 N. Y. 378; Davis *v.* Read, 65 N. Y. 566; Savage *v.* Buffalo, 59 Hun (N. Y.) 606, 14 N. Y. Suppl. 101 [*affirmed* in (1892) 30 N. E. 226].

16. Bartram *v.* Bridgeport, 55 Conn. 122, 10 Atl. 470; Smith *v.* Buffalo, 90 Hun (N. Y.) 118, 35 N. Y. Suppl. 635.

17. Walker *v.* District of Columbia, 6 Mackey (D. C.) 552; New Albany Gas Light, etc., Co. *v.* Crumbo, 10 Ind. App. 360, 37 N. E. 1062; Harrisburg *v.* Shepler, 190 Pa. St. 374, 42 Atl. 893. But see McQuiddy *v.* Vineyard, 60 Mo. App. 610, holding that where a city charter provides that the board of public works shall compute the costs of public improvements, and apportion the same, it has no authority to allow the clerk of the engineering department to make such apportionment.

18. Ray *v.* Jeffersonville, 90 Ind. 567. See also Pittsburgh, etc., R. Co. *v.* Oglesby, 165

constitutional provision that power to levy assessments shall be vested in municipal corporations does not preclude the legislature from delegating such power to a board of park commissioners.[19]

(II) *Commissioners or Others Specially Appointed to Make Assessment.* Provision is frequently made by charter or by statute for the appointment of commissioners to make assessment of benefits,[20] and such commissioners when appointed by a court are not agents of the city but officers of the court;[21] they must personally examine the work and property to be assessed,[22] and this function is not performed by signing an estimate and report made out by a third person;[23] nor should they be governed by directions of the council in making their assessment.[24] In the absence of fraud or mistake the action of such commissioners is conclusive,[25] although the council is usually given power to reject their report.[26] The appointment of commissioners must be made in compliance with the legislative enactment providing for the same;[27] and the passage of an ordinance ordering

Ind. 542, 76 N. E. 165, holding that an assessment made by the common council on the report of the city engineer, without reference to city commissioners, is void.

The supervisor and assessor of a town are its "corporate authorities," within the meaning of a constitutional provision authorizing special assessments to be made by such authorities. Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688.

19. Kedzie *v.* West Chicago Park Com'rs, 114 Ill. 280, 2 N. E. 182; Briggs *v.* Whitney, 159 Mass. 97, 34 N. E. 179; State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 252, 22 N. W. 625, 632.

20. See the statutes of the several states. And see Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782; Sumner *v.* Milford, 214 Ill. 388, 73 N. E. 742; Goodwillie *v.* Lake View, (Ill. 1889) 21 N. E. 817 [*distinguishing* Holmes *v.* Hyde Park, 121 Ill. 128, 13 N. E. 540]; State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625; *In re* Roberts, 17 Hun (N. Y.) 559 [*affirmed* in 81 N. Y. 62].

Separate commissions to assess damages and benefits.— Whether the estimate of damages and the assessment of benefits shall be by the same or different commissioners is a matter wholly within the discretion of the legislature, as justice and convenience appear to it to require. Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

21. Kimble *v.* Peoria, 140 Ill. 157, 29 N. E. 723; Chicago *v.* Weber, 94 Ill. App. 561.

22. Sinclaire *v.* West Hoboken, 58 N. J. L. 129, 32 Atl. 65, holding that the commissioners must exercise their own judgment.

23. Mann *v.* Jersey City, 24 N. J. L. 662. But see *In re* Scranton Sewer Dist., 7 Lack. Jur. (Pa.) 170, holding that viewers may after a hearing adopt an engineer's estimate.

24. Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725; Steckert *v.* East Saginaw, 22 Mich. 104; Alvord *v.* Syracuse, 27 Misc. (N. Y.) 392, 58 N. Y. Suppl. 854.

25. Jacksonville *v.* Hamill, 178 Ill. 235, 52 N. E. 949; Billings *v.* Chicago, 167 Ill. 337, 47 N. E. 731; Coward *v.* North Plainfield, 63 N. J. L. 61, 42 Atl. 805; Matter of Brook Ave., 8 N. Y. App. Div. 294, 40 N. Y. Suppl. 949.

Apportionment between city and property-owners.— The report of commissioners appointed to assess the cost of a street improvement is conclusive, in so far as it fixes the relative amount of the cost of the improvement to be respectively borne by the municipality and the owners of the property. Galt *v.* Chicago, 174 Ill. 605, 51 N. E. 653; *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

26. Schneider *v.* Rochester, 33 N. Y. App. Div. 458, 53 N. Y. Suppl. 931.

27. People *v.* Utica, 58 How. Pr. (N. Y.) 136; Greensboro *v.* McAdoo, 112 N. C. 359, 17 S. E. 178. See also State *v.* Bayonne, 51 N. J. L. 428, 17 Atl. 971, holding that the appointment of a special commissioner might be made immediately after the passage of the resolution.

Appointment by court.—Under an act which gives county courts jurisdiction of proceedings to levy and collect assessments, commissioners to assess benefits caused by improvements may be appointed at the probate term of the county court. Murphy *v.* Peoria, 119 Ill. 509, 9 N. E. 895. One appointed by the president of the board of local improvements of a city to make an assessment for a local improvement has authority to make an assessment, and the court need not make the appointment nor direct the making of the assessment. Harrigan *v.* Jacksonville, 220 Ill. 134, 77 N. E. 85.

Removal and reappointment.— After the common council has, by the ordinance for the construction of a sewer, appointed three persons to make the assessment, it has implied power afterward to remove them and appoint others in their places. People *v.* New York, 5 Barb. (N. Y.) 43; Laimbeer *v.* New York, 4 Sandf. (N. Y.) 109. When a common council, with power to remove one commissioner, improperly removes three and reappoints the two improperly removed, with an additional one, and the three proceed and make an assessment, it will not be affected by such improper removal of the two. Simmons *v.* Passaic, 42 N. J. L. 524.

De facto board.— On a proceeding to restrain the collection of an assessment for paving, the court will not consider whether

an improvement is usually a prerequisite to appointment.[28] Unless the statute so provides the city may not establish a general board to act in all cases, but must appoint for each separate case.[29]

(III) *QUALIFICATIONS.* The commissioners must possess the qualifications prescribed by the statute under which they are appointed.[30] They must be impartial and without pecuniary interest.[31] An owner of property affected is not a disinterested freeholder,[32] although a taxpayer may be eligible,[33] or residents of the city at large.[34] One who testified as an expert on a hearing of objections to an assessment is not incompetent to act as commissioner in making a second assessment as to persons who did not object to the first.[35] An employee of a firm who are merely agents for property, although assessed in their name, is not disqualified to act as commissioner for an assessment of benefits;[36] nor is an assessment for an improvement invalid because a person interested in the contract acted as commissioner in making the assessment.[37]

(IV) *OATH.* Failure of commissioners to take the oath, in substantial compliance with the terms of the statute,[38] will render their assessment void.[39] But where commissioners are ordered to recast the assessment they need not be resworn.[40] It is no valid objection that the oath was not taken until after the assessment, if taken before the report of the same to the council.[41] Commissioners may not

assessors who were certainly officers *de facto* were officers *de jure*. Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

28. Scranton *v.* Barnes, 147 Pa. St. 461, 23 Atl. 777.

29. Ogden *v.* Hudson, 29 N. J. L. 104 [*affirmed* in 29 N. J. L. 475].

30. See the statutes of the several states. And see the cases cited *infra*, this and following notes.

Disinterested freeholders.— The statute usually requires that commissioners shall be disinterested freeholders, and the order of appointment should state that they possess the statutory qualification. Brewer *v.* Elizabeth, 66 N. J. L. 547, 49 Atl. 480; Ryerson *v.* Passaic, 38 N. J. L. 171; Speer *v.* Passaic, 38 N. J. L. 168. *Compare* Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636. A person who holds title to land by an unrecorded deed is a freeholder. Brewer *v.* Elizabeth, *supra*.

31. Murr *v.* Naperville, 210 Ill. 371, 71 N. E. 380; Chase *v.* Evanston, 172 Ill. 403, 50 N. E. 241, holding that a person who is superintendent of special assessments and city collector is disqualified from acting as commissioner of assessments, where he receives a percentage on the amount of special assessments collected.

Membership in a church, the property of which lies within the district, has been held a disqualification. Hopkins *v.* Mason, 42 How. Pr. (N. Y.) 115.

32. Hunt *v.* Chicago, 60 Ill. 183; Bramhall *v.* Bayonne, 35 N. J. L. 476; *In re* Main St., 137 Pa. St. 590, 20 Atl. 711.

Close kinship to an owner of property liable to assessment will not disqualify a person under the statute. O'Reilley *v.* Kingston, 114 N. Y. 439, 21 N. E. 1004 [*affirming* 39 Hun 285]; Sowles *v.* St. Albans, 71 Vt. 418, 45 Atl. 1050. See also Rowe *v.* East Orange, 69 N. J. L. 600, 55 Atl. 649.

Relationship in business to interested persons does not disqualify commissioners appointed to open a proposed extension of a city street and assess benefits. Rowe *v.* East Orange, 69 N. J. L. 600, 55 Atl. 649.

33. Raymond *v.* Rutherford, 55 N. J. L. 441, 27 Atl. 172 [*affirmed* in 56 N. J. L. 340, 29 Atl. 156]; State *v.* Wright, 54 N. J. L. 130, 23 Atl. 116, holding that under an act authorizing cities on the ocean to lay out streets, drives, and walks on the beach or ocean front, the residents and freeholders in the city are not disqualified by interest to act in making the assessment.

34. McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769.

35. Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102.

36. Pearce *v.* Hyde Park, 126 Ill. 287, 18 N. E. 824.

37. Betts *v.* Naperville, 214 Ill. 380, 73 N. E. 752 [*overruling* in effect Murr *v.* Naperville, 210 Ill. 371, 71 N. E. 380].

38. See the statutes of the several states. And see Shreve *v.* Cicero, 129 Ill. 226, 21 N. E. 815; State *v.* West Hoboken, (N. J. Sup. 1899) 43 Atl. 535.

Sufficiency of oath see *In re* Lexington Ave., 17 N. Y. Suppl. 870.

39. Wheeler *v.* Chicago, 57 Ill. 415; Spear *v.* Perth Amboy, 38 N. J. L. 425; Hoxsey *v.* Paterson, 37 N. J. L. 409; Merritt *v.* Portchester, 71 N. Y. 309, 27 Am. Rep. 47 [*reversing* 8 Hun 40].

Where objection is not made promptly.— The fact that commissioners are sworn before a notary public, who is also the city attorney in charge of the proceedings, does not render the proceedings invalid, when objection on that account is made for the first time in the supreme court. Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123.

40. Schemick *v.* Chicago, 151 Ill. 336, 37 N. E. 888.

41. Laimbeer *v.* New York, 4 Sandf. (N. Y.) 109.

impeach their own report by testifying that the oath signed by them and duly certified was not in fact taken.[42]

(v) *Compensation.* The compensation of commissioners is usually made by statute a part of the expense to be assessed upon property benefited by an improvement,[43] but a promise by the city to pay commissioners their fees upon confirmation of their report is enforceable, although the assessments have not been collected.[44] If, however, their compensation is to be paid out of the assessment when collected, and the proceedings are dismissed and the improvement abandoned, no action will lie to the commissioners against the city for dismissing the proceedings.[45]

e. Proceedings For Assessment in General — (i) *Statutory Provisions.* A legislative enactment granting power to a municipality to levy an assessment and prescribing the mode of its exercise must be strictly complied with in all substantial particulars,[46] and the report of commissioners authorized to levy an assessment must show compliance with the law;[47] but such commissioners may not pass upon the regularity of proceedings or the constitutionality of an act under which proceedings are instituted.[48]

(ii) *Parties.* The lessee of property assessed is not a necessary party to assessment proceedings.[49]

(iii) *Petition.* If the statute requires a petition of property-owners for an assessment, the filing of the same is a condition precedent to a valid assessment.[50] The petition must comply with the requirements of the statute,[51] but a recital of the proper municipal authorities that the petition complies with the statute is *prima facie* evidence of its sufficiency,[52] and, although the statute requires a petition for an assessment to contain the ordinance for the proposed improvement, the ordinance need not be certified,[53] nor need the regularity of the council's proceedings be recited.[54]

(iv) *Time For Levy and Limitations.* Unless the time within which an

42. Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821.

43. Wiggin *v.* New York, 9 Paige (N. Y.) 16.

44. Payne *v.* Brooklyn, 52 Hun (N. Y.) 390, 5 N. Y. Suppl. 281.

45. Chicago *v.* Weber, 94 Ill. App. 561.

46. Hundley *v.* Lincoln Park Com'rs, 67 Ill. 559; Westport *v.* Mastin, 62 Mo. App. 647; Merrill *v.* Shields, 57 Nebr. 78, 77 N. W. 368; Equitable Trust Co. *v.* O'Brien, 55 Nebr. 735, 76 N. W. 417. See also Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342; Charleston *v.* Johnston, 170 Ill. 336, 48 N. E. 985; Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311; Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688.

47. Ogden *v.* Chicago, 22 Ill. 592; Matter of New York, 83 N. Y. App. Div. 513, 82 N. Y. Suppl. 417. See also Harwood *v.* Boston St. Com'rs, 183 Mass. 348, 350, 67 N. E. 362, where it was said that "there is no rational theory upon which it can be held that the street commissioners were acting under the later statute when their proceedings were in utter disregard of it, and were in the form prescribed by the earlier statutes."

48. *In re* Public Parks, 85 N. Y. 459. See also Wells *v.* Chicago, 202 Ill. 448, 66 N. E. 1056; Rich *v.* Chicago, 59 Ill. 286.

49. West Chicago St. R. Co. *v.* People, 156 Ill. 18, 40 N. E. 605.

50. Richards *v.* Jerseyville, 214 Ill. 67, 73 N. E. 370.

Modification of petition.—The fact that the estimate filed with a petition for a special assessment is permitted by the court to be withdrawn for correction, and that a modified petition, to conform to the corrected estimate, is filed, to which certain exhibits on file with the original petition are not attached, will not affect the jurisdiction of the court in the proceedings. Keeler *v.* People, 160 Ill. 179, 43 N. E. 342.

Petition for the improvement see *supra*, XIII, B, 2.

51. Adcock *v.* Chicago, 160 Ill. 611, 43 N. E. 589, holding that the statutory requirement that a petition for an assessment recite the report of the commissioners appointed to make an estimate of the cost of the improvement contemplated by the ordinance is not satisfied by a report signed by two only of the three commissioners, without any showing that the other took part in the proceedings.

52. Cummings *v.* West Chicago Park Com'rs, 181 Ill. 136, 54 N. E. 941.

53. Doremus *v.* People, 161 Ill. 26, 43 N. E. 701; Adcock *v.* Chicago, 160 Ill. 611, 43 N. E. 589. *Compare* Kimball *v.* People, 160 Ill. 653, 43 N. E. 710, holding that in a suit for judgment on a delinquent special assessment, the assessment, in the absence of fraud, cannot be attacked on the ground that the original petition for the assessment did not contain the ordinance.

54. Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741.

assessment must be levied is fixed by law,[55] the city is usually allowed to make the levy at any time it may select.[56] A statutory provision that the city must pay for land for improvements within two years may be waived by the landowner and also by the city,[57] and a provision that assessments shall be payable in instalments does not require separate assessments for each instalment.[58]

f. Notice of Assessment and Hearing Thereon — (i) *Necessity.* It is very generally held that property-owners are entitled to notice of an assessment and a hearing thereon,[59] and that an improvement statute which makes no provision for notice and hearing is unconstitutional,[60] although the validity of such a statute is sometimes

55. Quinn *v.* Cambridge, 187 Mass. 507, 73 N. E. 661; Hitchcock *v.* Springfield, 121 Mass. 382; Sedalia *v.* Donohue, 190 Mo. 407, 89 S. W. 386 (holding that the council must by ordinance levy the tax after the improvement has been completed and accepted); Dallas *v.* Emerson, (Tex. Civ. App. 1896) 36 S. W. 304.

Special tax.—A city council of a metropolitan city cannot lawfully pass an ordinance levying special taxes until, as a board of equalization, it has determined the sum to be assessed against the real estate as benefits. Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437.

56. Fairbanks *v.* Fitchburg, 132 Mass. 42; Matter of Deering, 14 Daly (N. Y.) 89, 3 N. Y. St. 593.

Mere delay in making an assessment does not constitute fraud or substantial error, within the meaning of the statute allowing vacation of the assessment for such causes. Matter of Deering, 14 Daly (N. Y.) 89, 3 N. Y. St. 593.

57. Harris *v.* Chicago, 162 Ill. 288, 44 N. E. 437.

58. *In re* One Hundred and Eighty-First St., 17 N. Y. Suppl. 917; People *v.* Gilon, 14 N. Y. Suppl. 75.

59. *Indiana.*— Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797. See Voris *v.* Pittsburg Plate Glass Co., 163 Ind. 599, 70 N. E. 249; Wray *v.* Fry, 158 Ind. 92, 62 N. E. 1004; Leeds *v.* Defrees, 157 Ind. 392, 61 N. E. 930.

Iowa.— Gatch *v.* Des Moines, 63 Iowa 718, 18 N. W. 310.

Louisiana.— See Shreveport *v.* Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193.

Maryland.— Ulman *v.* Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224.

Massachusetts.— See Stark *v.* Boston, 180 Mass. 293, 62 N. E. 375.

Michigan.—See Beecher *v.* Detroit, 92 Mich. 268, 52 N. W. 731.

Nebraska.— Shannon *v.* Omaha, (1906) 106 N. W. 592.

New Jersey.— Woodruff *v.* Elizabeth, 39 N. J. L. 55; Mann *v.* Jersey City, 24 N. J. L. 662.

New York.— McLaughlin *v.* Miller, 124 N. Y. 510, 26 N. E. 1104; Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

Ohio.— Knecht *v.* Cincinnati, 18 Ohio Cir. Ct. 875, 9 Ohio Cir. Dec. 392.

Pennsylvania.— McKeesport *v.* Dunshee, 29 Pittsb. Leg. J. N. S. 88.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1085.

Hearing before tribunal subject to revision. — The provision of a city charter giving property-owners an opportunity to be heard before the city council in relation to an assessment satisfies the constitutional requirements, although the judgment of the council is subject to revision by the board of public works. Denver *v.* Londoner, 33 Colo. 104, 80 Pac. 117.

60. *Colorado.*— Brown *v.* Denver, 7 Colo. 305, 3 Pac. 455.

Michigan.—Sligh *v.* Grand Rapids, 84 Mich. 497, 47 N. W. 1093.

New York.— Remsen *v.* Wheeler, 105 N. Y. 573, 12 N. E. 564; Seaman *v.* Dickinson, 1 N. Y. App. Div. 19, 36 N. Y. Suppl. 748; People *v.* New Rochelle, 83 Hun 185, 31 N. Y. Suppl. 592.

Virginia.— Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382.

Washington.— Alexander *v.* Tacoma, 35 Wash. 366, 77 Pac. 686.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1085. See also Constitutional Law, 8 Cyc. 1108 note 28.

Compare Law *v.* Johnston, 118 Ind. 261, 20 N. E. 745, holding that provisions of a charter and ordinance in reference to assessments for street improvements are not unconstitutional for failure to provide for notice, where the assessment can only be enforced in a legal proceeding in court, in which notice is required, and in which the validity of the proceedings may be questioned.

Where notice is in fact given.— While a statute allowing sewer assessments on abutting owners, without due notice to them, is unconstitutional, it does not follow that a valid assessment may not be made in pursuance of it, if due notice and due opportunity to be heard are provided by local ordinances. Griswold College *v.* Davenport, (Iowa 1884) 18 N. W. 314; Gatch *v.* Des Moines, 63 Iowa 718, 18 N. W. 310. Where a statute provides for an assessment to be made as provided in the city charter for assessing the expenses of street grading, and the charter provides for notice in such a case, the statute will not be held defective, as not providing for notice. Grand Rapids School Furniture Co. *v.* Grand Rapids, 92 Mich. 564, 52 N. W. 1028.

upheld on the theory that a requirement of notice is necessarily implied,[61] and the federal supreme court has decided that a municipality may be authorized to apportion the cost of a street improvement upon abutting lots, according to frontage, without a hearing as to benefits.[62]

(II) *Form, Requisites, and Validity.* Where no particular form is prescribed by statute, a notice that apprises interested parties of the location and nature of the improvement and the property to be assessed is sufficient,[63] and it is no objection that the notice fails to state that the street to be improved lies within the city,[64] or that in stating the names of commissioners appointed to make the assessment an immaterial error occurs.[65] Where the legislative enactment, under which the city proceeds, or the ordinance providing for assessments directs what notice shall be given, such provision must be complied with,[66] and no restric-

61. Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114; *In re* Amsterdam, 126 N. Y. 158, 27 N. E. 272; Paulsen *v.* Portland, 149 U. S. 30, 13 S. Ct. 750, 37 L. ed. 637. See also Auditor-Gen. *v.* Hoffman, 132 Mich. 198, 93 N. W. 259, holding that, although a city charter authorizing objections to a special assessment roll, and requiring the council to consider them, fails to specially provide for the hearing thereof, it will be presumed that the council will give a hearing suited in time and place to the exigencies of the situation.

62. French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879.

63. *Illinois.*— Hemingway *v.* Chicago, 60 Ill. 324.

Indiana.— Klein *v.* Tuhey, 13 Ind. App. 74, 40 N. E. 144.

Massachusetts.—Lawrence *v.* Webster, 167 Mass. 513, 46 N. E. 123. See also Quinn *v.* James, 174 Mass. 23, 54 N. E. 343, holding that a statement in the notice to a property-owner that the board of selectmen of a town intended to assess a portion of the expense of a public improvement on the estates benefited, according to law, sufficiently declares that the board acted under the law authorizing the assessment of betterments.

Michigan.—See Palmer *v.* Port Huron, 139 Mich. 471, 102 N. W. 996.

New Jersey.— State *v.* Bayonne, 52 N. J. L. 503, 20 Atl. 69. See also Kellogg *v.* Elizabeth, 37 N. J. L. 353.

Wisconsin.—See Hennessy *v.* Douglas County, 99 Wis. 129, 74 N. W. 983.

64. Wheeler *v.* People, 153 Ill. 480, 39 N. E. 123.

65. Harrison *v.* Chicago, 163 Ill. 129, 44 N. E. 395; Casey *v.* People, 159 Ill. 267, 42 N. E. 882.

66. *California.*— Gill *v.* Oakland, 124 Cal. 335, 57 Pac. 150.

District of Columbia.— Bensinger *v.* District of Columbia, 6 Mackey 285; McDonald *v.* Littlefield, 5 Mackey 574.

Illinois.— Michael *v.* Mattoon, 172 Ill. 394, 50 N. E. 155, holding substantial compliance with statutory form sufficient.

Indiana.— Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; Klein *v.* Tuhey, 13 Ind. App. 74, 40 N. E. 144, holding that a notice of hearing of complaints against an assessment which, upon its face, shows that it is the order of a city council, but is signed under direction of the council by the clerk, is sufficient under a statute requiring notice to be given by the city council.

Iowa.— Zelie *v.* Webster City, 94 Iowa 393, 62 N. W. 796; Dubuque *v.* Wooton, 28 Iowa 571.

Massachusetts.— Grace *v.* Newton Bd. of Health, 135 Mass. 490; Lowell *v.* Wentworth, 6 Cush. 221.

Minnesota.—State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 252, 22 N. W. 625, 632, holding that a more extended notice than that fixed by statute need not be given.

Missouri.— Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853; Shaffner *v.* St. Louis, 31 Mo. 264.

Nebraska.— Wakeley *v.* Omaha, 58 Nebr. 245, 78 N. W. 511.

New Jersey.— Central R. Co. *v.* Bayonne, 49 N. J. L. 313, 8 Atl. 296; White *v.* Bayonne, 49 N. J. L. 311, 8 Atl. 295; Malone *v.* Jersey City, 27 N. J. L. 536, holding that where an assessment was made for paving a street, but the notice given was of an assessment for repaving, the variance was material and fatal to the proceedings.

New York.— Adriance *v.* McCafferty, 2 Rob. 153, holding that where a statute provided that objections to assessments should be presented in writing to the chairman of the board of assessors and the published notice of an assessment directed that such objections should be presented to the assessors, such notice was insufficient.

North Dakota.— Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90.

Pennsylvania.— Hershberger *v.* Pittsburgh, 115 Pa. St. 78, 8 Atl. 381.

Texas.— See Adams *v.* Fisher, 63 Tex. 651; Taylor *v.* Boyd, 63 Tex. 533, holding that no notice of an assessment other than the charter provision that a roll showing the lots and owners shall be prepared by the city engineer and submitted to the council is necessary.

Washington.— Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474.

Wisconsin.— Hennessy *v.* Douglas County, 99 Wis. 129, 74 N. W. 983, holding that a city charter requiring a publication of a notice of the determination of the amount of assessments to be made against land to be benefited by proposed street improvements, without providing as to whom it shall be addressed, is substantially complied with by a

tions or limitations may be added thereto by the city.[67] The publication of a request for bids on a contract for an improvement is not a compliance with the statutory requirement of notice of hearing on an assessment,[68] but a general ordinance providing that the cost of street improvements shall be assessed upon abutting property has been held to constitute sufficient notice of such assessment.[69] Irregularities that in no way affect the rights of parties are not fatal;[70] and if a property-owner appears and is heard, he waives objection to irregularities in the notice.[71] There is no reason why different improvements may not be specified in one notice of assessment.[72]

(III) *TIME OF NOTICE.* Notice of an assessment may be given after the same has been levied without violating the constitutional rights of property-owners.[73] A statutory requirement as to the length of notice must be complied with to render the same valid,[74] and in the absence of such requirement reasonable notice must be given.[75]

(IV) *SERVICE.* Any legislative requirement as to service of notice must be complied with to render the same valid,[76] hence where the charter requires personal service upon property-owners, leaving a copy of the notice at their residence is not sufficient;[77] and a posted notice to "owners of abutting lots" will not, it seems, constitute notice to the owner of a lot that does not abut the street, although it is assessed as abutting thereon.[78] Notice to a life-tenant is not notice

notice directed to all the owners of land fronting, abutting, and adjacent to the street.

Conflict of laws.— Where an assessment for street improvements was made in pursuance of proceedings taken under the act of 1893 (Laws (1893), p. 103, c. 57) requiring a separate ordinance for each improvement, and a notice sufficient to constitute due process of law was given the property-owners, the fact that the notice given did not conform to the requirement of an ordinance passed under the act of 1890 (Laws (1889–1890), p. 131, c. 7), which contemplated a general ordinance under which all street improvements were to be made, did not deprive the city council of jurisdiction to confirm the assessment. Aberdeen *v.* Lucas, 37 Wash. 190, 79 Pac. 632.

67. Merritt *v.* Portchester, 71 N. Y. 309, 27 Am. Rep. 47 [*reversing* 8 Hun 40]; *In re* Delaware, etc., Canal Co., 8 N. Y. Suppl. 352. See also State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625.

68. Daly *v.* Gubbins, 35 Ind. App. 86, 73 N. E. 833.

69. Arnold *v.* Ft. Dodge, 111 Iowa 152, 82 N. W. 495; Monk *v.* Ballard, 42 Wash. 35, 84 Pac. 397. *Compare* Scott *v.* Toledo, 36 Fed. 385, 1 L. R. A. 688, holding that the notice required by statute, of the adoption of the preliminary resolution declaring the necessity of opening the street and appropriating the lands, having no reference to any assessment to defray the expenses, is not sufficient to make a subsequent assessment, without further notice, valid.

70. *In re* Ketteltas, 2 Hun (N. Y.) 221; Matter of Ferris, 10 N. Y. St. 480. See also West Chicago St. R. Co. *v.* People, 156 Ill. 18, 40 N. E. 605, holding that the fact that notice of assessment for local improvements was sent to the "W. Div. R. W. Co.," the owner being the "Chicago West Division Railway Company," did not invalidate the notice, as a notice so addressed might well be received by the proper corporation.

71. Barker *v.* Omaha, 16 Nebr. 269, 20 N. W. 382. See also Fair Haven, etc., R. Co. *v.* New Haven, 75 Conn. 442, 53 Atl. 960, holding that where a street railway company is duly notified of the inception of paving assessment proceedings before the city officials, which proceedings, from their beginning to their conclusion, form one continuous proceeding, and later becomes a party thereto, it cannot object that the assessment is without notice to it.

72. Iowa Pipe, etc., Co. *v.* Callanan, 125 Iowa 358, 101 N. W. 141, 106 Am. St. Rep. 311, 67 L. R. A. 408.

73. District of Columbia *v.* Burgdorf, 6 App. Cas. (D. C.) 465; Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819 (holding that a provision that a taxpayer shall be notified of an assessment, and that he may then appear and make known why he should not pay his proportion of the assessment, is valid, and properly provides for his "day in court"); Smith *v.* Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545.

74. Leonard *v.* Sparks, 63 Mo. App. 585. See also Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325.

75. Auburn *v.* Paul, 84 Me. 212, 24 Atl. 817. See also Jones *v.* Seattle, 19 Wash. 669, 53 Pac. 1105, holding that an act providing for notice by publication of a municipal assessment, and requiring objections to such assessment to be made within fifteen days after publication, does not prescribe an insufficient notice.

76. See the statutes of the several states. And see Jones *v.* Seattle, 19 Wash. 669, 53 Pac. 1105.

77. Wilson *v.* Trenton, 53 N. J. L. 645, 23 Atl. 278, 16 L. R. A. 200.

78. Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332.

to remainder-men;[79] but where sufficient notice is served on the executor of an estate who is also a life-tenant in possession, such notice is sufficient to bind him both as executor and as life-tenant.[80] Where the trustee of an estate received, in due time, a notice directed to the heirs, he was not heard to complain of the failure to address the notice to him as trustee.[81] Where the manner of service upon resident owners is not prescribed, it has been held that the notice may be sent by mail.[82]

(v) *Publication.* Notice by publication is frequently required by charter or statute and is sufficient.[83] When no particular mode of service is prescribed, the city may provide by ordinance for service by publication.[84] Any legislative requirement as to the time of publication,[85] or designation of papers in which the same shall be had, must be complied with;[86] but where no designation is made, the notice may be published in any newspaper of the city;[87] and where the notice is required to be published in the official paper, a town which by law has no official paper may substitute notice by personal notice.[88]

(vi) *Return or Proof of Notice.* The record of assessment proceedings must show by sufficient return that notice has been given as required by statute;[89] but a requirement of an affidavit that notice has been sent to property-

79. Chamberlin *v.* Gleason, 163 N. Y. 214, 57 N. E. 487.

80. Peck *v.* Bridgeport, 75 Conn. 417, 53 Atl. 893.

81. Beals *v.* James, 173 Mass. 591, 54 N. E. 245.

82. Lawrence *v.* Webster, 167 Mass. 513, 46 N. E. 123. But see Wilson *v.* Trenton, 53 N. J. L. 645, 23 Atl. 278, 16 L. R. A. 200, holding that where the statute requires notice to a non-resident to be published in a newspaper, the mailing of a copy thereof to his address is insufficient.

83. See the statutes of the several states. And see the following cases:

California.— Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Missouri.— Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600; Risley *v.* St. Louis, 34 Mo. 404.

Nebraska.— Cook *v.* Gage County, 65 Nebr. 611, 91 N. W. 559.

New York.— *In re* De Peyster, 80 N. Y. 565.

Ohio.— Emery *v.* Cincinnati, 6 Ohio S. & Pl. Dec. 411, 4 Ohio N. P. 220.

Pennsylvania.— Philadelphia *v.* Merz, 13 Pa. Dist. 307, holding that in the absence of an affidavit of record that the registered owner is a non-resident, or cannot be found, service by posting, etc., is bad.

Virginia.— Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382.

Impossibility of personal service.—A return by an officer, "I have made diligent search and failed to find" a person, is insufficient to justify notice by publication under a statute authorizing such notice in assessment proceedings when a party cannot be served within the city limits. Longwell *v.* Kansas City, 69 Mo. App. 177.

84. Lyman *v.* Plummer, 75 Iowa 353, 39 N. W. 527.

85. Andrews *v.* People, 84 Ill. 28; Pooley *v.* Buffalo, 122 N. Y. 592, 26 N. E. 16 [*reversing* 4 N. Y. Suppl. 450]. See also Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381.

For example, an act requiring notice to be given of the intended meeting of the council as a board of equalization "for at least six days prior" to such meeting, is not complied with by publishing a notice on the sixth day and the four succeeding days before said meeting. Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524.

Sunday publication.—A requirement that the notice be published for a stated number of days is complied with, although the notice is omitted from the Sunday edition of the paper. Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231; Voght *v.* Buffalo, 133 N. Y. 463, 31 N. E. 340. See *supra*, XIII, B, 4, i.

86. Adriance *v.* McCafferty, 2 Rob. (N. Y.) 153, holding that where an ordinance designated certain newspapers for the publication of notices of assessments during one year, and failed to make a further designation at the expiration of the year, a notice published in such papers after the year had expired was invalid.

87. State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625.

88. Tumwater *v.* Pix, 15 Wash. 324, 46 Pac. 388.

89. *Illinois.*— Evans *v.* People, 139 Ill. 552, 28 N. E. 1111; Butler *v.* Chicago, 56 Ill. 341.

Iowa.— See Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381, holding that under an act requiring notice to be given by the posting of hand-bills, a recital in the record of a special assessment resolution that the bills were posted as required by law is sufficient evidence of that fact.

Missouri.— State *v.* St. Louis, 67 Mo. 113.

New Jersey.—Semon *v.* Trenton, 47 N. J. L. 489, 4 Atl. 312; Van Solingen *v.* Harrison, 39 N. J. L. 51.

Pennsylvania.— Under an act requiring the city to notify property-owners benefited by

owners does not require the affidavit to state the contents of the notice,[90] hence an incorrect recital of the notice in such an affidavit is mere surplusage,[91] and if the affidavit shows in general terms that the statute was complied with it will be sufficient.[92]

g. Hearing and Determination — (i) *In General.* It is competent for the legislature to provide that the hearing on assessments shall be before a court to which commissioners make report instead of before the commissioners themselves.[93] An assessment of benefits is void if made arbitrarily and without view of the premises,[94] although the estimate of benefits need not be based solely on personal investigation,[95] and the commissioners may adopt such means as they deem necessary to obtain the necessary facts.[96]

(ii) *Time and Place of Meeting Specified in Notice.* Failure of commissioners to hold a meeting at the time and place specified in their notice will invalidate the assessment.[97]

(iii) *Notice of Postponement or Adjournment.* An additional notice is not necessary where an assessment is postponed from one meeting to another.[98]

8. Mode of Assessment — a. In General. Where the mode of making an assessment is provided by charter or statute, such provision must be complied with to render the assessment valid;[99] and a statute providing that errors in the levy of an assessment shall not invalidate the same refers to irregularities and not to a total failure to act under the law.[1] If no specific mode of assessment is prescribed, it is immaterial what system commissioners may adopt, provided property is not assessed more than it is benefited, and is not made to bear more than its just proportion of the cost of the improvements.[2] The assessment must

the opening of a street of the amount assessed against their property before the claim shall be a lien thereon, the actual owner must be notified; and a return showing that the owner, "or reputed owner," was notified is insufficient. White's Estate, 6 Pa. Co. Ct. 308.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1090.

Certificate of publication.—A certificate of publication of the notice of making a special assessment by the board of public works is fatally defective if it fails to show the dates of the first and last publication. Andrews *v.* Chicago, 57 Ill. 239. A publisher's certificate that a notice of a special assessment was published five successive days, giving the days of the first and last publications, is sufficient to show five successive days' publication, although the dates of the first and last publications are seven days apart. Perry *v.* People, 155 Ill. 307, 40 N. E. 468. Under an act providing that proceedings of the common council shall be matters of record, and shall not fail on account of any technical error unless the party complaining shall show affirmatively that he has been injured thereby, failure to record proof of publication of notice of hearing on assessments is immaterial, where it is shown that such publication was had. Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725.

Aider from presumption of official duty performed.— Under a statute requiring the mailing of a notice to each person paying taxes on the respective parcels during the last preceding year in which taxes were paid, the person to whom notice was given will be presumed to have been the last party to pay taxes. Roberts *v.* Evanston, 218 Ill. 296, 75 N. E. 923.

90. West Chicago St. R. Co. *v.* People, 156 Ill. 18, 40 N. E. 605; Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123.

91. Schemick *v.* Chicago, 151 Ill. 336, 37 N. E. 888.

92. Michael *v.* Mattoon, 172 Ill. 394, 50 N. E. 155.

93. Wilson *v.* Karle, 42 N. J. L. 612.

94. Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823. See also *supra*, XIII, E, 7, d, (II).

95. Wright *v.* Chicago, 48 Ill. 285; Hunt *v.* Rahway, 39 N. J. L. 646 [*affirmed* in 40 N. J. L. 615].

96. Matter of Ferris, 10 N. Y. St. 480.

97. Dunne *v.* West Chicago Park Com'rs, 159 Ill. 60, 42 N. E. 375 [*following* Derby *v.* West Chicago Park Com'rs, 154 Ill. 213, 40 N. E. 438]; Wheeler *v.* Chicago, 57 Ill. 415.

98. McAuley *v.* Chicago, 22 Ill. 563; People *v.* Rochester, 5 Lans. (N. Y.) 142.

99. *In re* Turfler, 44 Barb. (N. Y.) 46, 19 Abb. Pr. 140; Corry *v.* Folz, 29 Ohio St. 320. Where a municipality, in assessing property for a public improvement, attempts some other method than that provided by statute, or exceeds the authority given, it is without jurisdiction to that extent, and its acts are void. Bluffton *v.* Miller, 33 Ind. App. 521, 70 N. E. 989.

Time as of which assessment is made.— The benefit to land by the widening of the street is to be assessed as of the date the improvement was made. Treadwell *v.* Boston, 123 Mass. 23.

1. Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90.

2. Greenwood *v.* Morrison, 128 Cal. 350, 60 Pac. 971; Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Lincoln *v.* Boston, 176 Mass. 210, 57 N. E. 356.

Assessment of part of cost on city.— Under

be confined to the property located within the assessment district.[3] Whether a railway shall pay for paving between its tracks, as is sometimes done, or less or more, or whether the levy will be of a share or portion of the whole cost, and if so how much has been held to rest in the discretion of the municipal authorities to be reasonably exercised.[4]

b. Entire Tracts, or Parcels or Subdivisions Thereof. Where it is provided by charter that each tract of land or lot benefited by an improvement shall be separately assessed, the city may not assess in gross several lots, although they belong to the same owner;[5] nor may a single tract be subdivided into parcels and a separate assessment levied upon each.[6] What constitutes a single tract or lot is usually to be determined solely by official plats or records,[7] but a single tract actually divided by the opening of a street through it may be assessed as two separate tracts,[8] and where the owner of adjoining lots used them as one by erecting his house on the dividing line, a single assessment was held sufficient.[9] In the absence of legislative restriction, an assessment may be levied in gross upon several lots of the same owner.[10] The fact that the owner has different estates does not render separate assessments necessary.[11]

c. Assessment on Part of Tract. Where part only of a large tract of land is benefited by an improvement, the benefit may be assessed on that part instead of the entire tract;[12] but in the absence of legislative restriction,[13] the assessment will be valid, although levied upon the whole tract.[14]

the provision of a charter, requiring the commissioners to assess such part of the expenses of a street improvement "upon the city, and such part locally as they shall deem just," the commissioners are not imperatively required to assess any portion of the expense upon the city, but only in case it is, in their judgment, just to do so. An assessment therefore imposing the whole burden upon the property benefited is not for that reason invalid. People *v.* Syracuse, 63 N. Y. 291 [*reversing* 2 Hun 433, 5 Thomps. & C. 61].

3. See *supra*, XIII, E, 5, c, (II).

4. Kuehner *v.* Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774.

5. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Oglesby, 165 Ind. 542, 76 N. E. 165.

Iowa.— Gill *v.* Patton, 118 Iowa 88, 91 N. W. 904.

Massachusetts.— Nickerson *v.* Boston, 131 Mass. 306.

Missouri.— St. Louis *v.* Provenchere, 92 Mo. 66, 4 S. W. 410; Fowler *v.* St. Joseph, 37 Mo. 228; Sedalia *v.* Gallie, 49 Mo. App. 392.

New Jersey.— See Ackerson *v.* North Bergen Tp., 39 N. J. L. 694.

Texas.— Kerr *v.* Corsicana, (Civ. App. 1895) 35 S. W. 694.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1095.

6. Warren *v.* Chicago, 118 Ill. 329, 11 N. E. 218; Muller *v.* Bayonne, 55 N. J. L. 102, 25 Atl. 267.

Cemetery.— An assessment for local improvements against a cemetery association should be assessed against the entire association, and not against the individual lot owners. Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506.

Land divided by railroad.— It is not prejudicial error to assess separately the two sides of a lot divided by a railway, the whole lot belonging to the railway company. Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103. See also Chicago, etc., R. Co. *v.* Chicago, (Ill. 1891) 27 N. E. 926.

7. Cram *v.* Chicago, 139 Ill. 265, 28 N. E. 758; Atchison *v.* Price, 45 Kan. 296, 25 Pac. 605; Springer *v.* Avondale, 35 Ohio St. 620.

Effect of provision for sewer connections.— On an application for judgment on a sewer assessment, an objection that the property was an undivided tract, and that by the assessment the landowner's property was subdivided into twenty-foot lots, cannot be sustained, when based solely on the fact that the sewer ordinance provided for putting in "house-connection slants" every twenty feet on each side of the sewer, where the property is assessed according to its legal description. Vandersyde *v.* People, 195 Ill. 200, 62 N. E. 806.

8. De Koven *v.* Lake View, 129 Ill. 399, 21 N. E. 813; Younglove *v.* Hackman, 43 Ohio St. 69, 1 N. E. 230; Spangler *v.* Cleveland, 35 Ohio St. 469; *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

9. Kemper *v.* King, 11 Mo. App. 116.

10. *In re* Anderson, 57 Barb. (N. Y.) 411, 39 How. Pr. 184; Taylor *v.* Boyd, 63 Tex. 533.

11. Parsons *v.* Grand Rapids, 141 Mich. 467, 104 N. W. 730, so holding where a widow occupied two parcels of land, one of which she owned in fee and in the other of which she held a dower.

12. Barber *v.* Chicago, 152 Ill. 37, 38 N. E. 253 [*distinguishing* Cram *v.* Chicago, 139 Ill. 265, 28 N. E. 758; Warren *v.* Chicago, 118 Ill. 329, 11 N. E. 218]; Lumsden *v.* Cross, 10 Wis. 282.

13. See Voris *v.* Pittsburg Plate Glass Co., 163 Ind. 599, 70 N. E. 249; New Albany *v.* Cook, 29 Ind. 220.

14. Sheedy *v.* Chicago, 221 Ill. 111, 77

d. Division of Improvement Into Sections or Blocks. Unless restricted by express legislative provisions,[15] it is within municipal discretion to divide an improvement into sections and to assess the cost of each section upon the property benefited thereby.[16]

e. Inclusion of Different Improvements in One Assessment. Separate and distinct improvements may not be included in one assessment.[17] The question of what constitutes such improvements is largely one of fact.[18] Paving separate streets cannot be considered a single improvement,[19] nor the building of different sewers,[20] unless one is merely lateral to the other;[21] but where a sewer is a single one without branches a single assessment may be made therefor, although it extends along different streets.[22] Sidewalks built on different sides of a street may constitute a single improvement;[23] and where pumping works are a necessary part of a sewerage system, the cost of the same may be included in an assessment for the construction of such system.[24]

f. Personal Assessment. Unless expressly authorized, a municipality may

N. E. 539; Scott County *v.* Hinds, 50 Minn. 204, 52 N. W. 523.

15. Simpson *v.* Kansas City, 46 Kan. 438, 26 Pac. 721; Stengel *v.* Preston, 89 Ky. 616, 13 S. W. 839, 11 Ky. L. Rep. 976; Weber *v.* Schergens, 59 Mo. 389; Dunker *v.* Stiefel, 57 Mo. App. 379.

16. *Georgia.*— Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580.

Illinois.— Lightner *v.* Peoria, 150 Ill. 80, 37 N. E. 69.

New York.— Matter of Rogers Ave., 22 N. Y. Suppl. 27, 29 Abb. N. Cas. 361.

Ohio.— Findlay *v.* Frey, 51 Ohio St. 390, 38 N. E. 114.

Pennsylvania.— Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Washington.— Lewis *v.* Seattle, 28 Wash. 639, 69 Pac. 393.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1097.

17. *Georgia.*— Savannah *v.* Weed, 96 Ga. 670, 23 S. E. 900.

Illinois.— Haley *v.* Alton, 152 Ill. 113, 38 N. E. 750, holding, however, that several streets might be included in one improvement.

Kentucky.— Covington *v.* Matson, 34 S. W. 897, 17 Ky. L. Rep. 1323.

Minnesota.— Armstrong *v.* St. Paul, 30 Minn. 299, 15 N. W. 174; Mayall *v.* St. Paul, 30 Minn. 294, 15 N. W. 170.

New York.—See Matter of Female Academy of Sacred Heart, 3 N. Y. St. 307. But see Manice *v.* New York, 8 N. Y. 120, holding that where the same territory may be included in two distinct ordinances the expenses incurred under each of such ordinances may be collected under a single assessment.

But see Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78, holding that under an act providing that any informality, irregularity, or defect in the municipal corporation or any of its officers shall not defeat enforcement of the special tax, the fact that a gutter was constructed on two streets, and in making the assessment therefor the entire work on both streets was taken into consideration, does not render the tax illegal, or prevent its enforcement.

Inclusion of separate improvements in one proceeding see *supra*, XIII, B, 1, c.

18. State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 23 N. W. 222.

Effect of including non-abutting property. —An assessment for street improvement does not cease to be a single assessment for the work done under the contract because a portion of the cost of the work done on the street improvement was required to be assessed on a district embracing lands which did not front on the street by St. (1891) p. 204, c. 147, § 7. San Francisco Paving Co. *v.* Dubois, 2 Cal. App. 42, 83 Pac. 72.

19. Jones *v.* District of Columbia, 3 App. Cas. (D. C.) 26; Arnold *v.* Cambridge, 106 Mass. 352.

Omission of intermediate portion of street. —An ordinance to improve a street between designated points may properly except an intermediate portion thereof, which, by any existing contract, is to be contemporaneously improved, according to the plan and grade established, without expense to the city; and the separated parts may be improved and assessed as if they were contiguous. Wilder *v.* Cincinnati, 26 Ohio St. 284.

20. Brown *v.* Fitchburg, 128 Mass. 282; *In re* Van Buren, 79 N. Y. 384. See also Witman *v.* Reading, 169 Pa. St. 375, 32 Atl. 576, holding that property on a branch sewer cannot be assessed on the average cost of the several branches in the sewer district. But see Fairbanks *v.* Fitchburg, 132 Mass. 42, holding that it is no objection to a sewer assessment which recites that a certain sum was expended in constructing the sewer that in fact the one in question and one in another street were constructed together, if the cost was substantially the same by the linear foot, and the whole cost and the length of the one in question appear.

21. Oil City *v.* Oil City Boiler Works, 152 Pa. St. 348, 25 Atl. 549.

22. Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330.

23. Watson *v.* Chicago, 115 Ill. 78, 3 N. E. 430.

24. Drexel *v.* Lake, 127 Ill. 54, 20 N. E. 38.

never levy an assessment against a property-owner personally;[25] and it is a moot question whether it is within the power of the legislature to provide that a special assessment shall constitute a personal liability.[26]

9. Amount of Assessment — a. In General. In the absence of fraud or gross extravagance, the liability of property for the cost of municipal improvements is generally measured by the expense actually incurred rather than by the real value of the work;[27] and so where bonds were issued to meet the expense of an improvement, the fact that the bonds sold at a discount could not affect the amount of an assessment upon property benefited.[28] An assessment in excess of the benefits received is invalid as to such excess,[29] as is an assessment for an amount in excess of that provided for in the ordinance for improvement;[30] and a statutory provision that no general city tax shall be void because the amount levied exceeds the amount required has no application to a special assessment for local improvements.[31] Where it is provided that the expense of paving one half of the streets opposite the public grounds of the city shall be paid from the general funds of the city, an abutting owner can be charged only with the expense of paving the half of the roadway upon his side of the street, where a strip through the center of the street is maintained by the city as a park.[32] It would seem that the property-owners are not entitled to an allowance for the value of an old pavement which is replaced.[33]

b. Statutory Limitations. An assessment is not a tax within the meaning of a constitutional or statutory provision limiting the amount of taxation;[34] but the amount of an assessment for local improvements is frequently limited by statute to a certain percentage of the value of property assessed.[35] Where such limita-

25. Chicago, etc., R. Co. *v.* Phillips, 111 Iowa 377, 82 N. W. 787; Marvin *v.* Town, 56 Hun (N. Y.) 510, 10 N. Y. Suppl. 148.

26. See Creighton *v.* Manson, 27 Cal. 613 (holding that the assessment must be upon the property); *In re* Centre St., 115 Pa. St. 247, 8 Atl. 56 (holding that owner may be assessed).

27. Schenley *v.* Com., 36 Pa. St. 29, 62, 78 Am. Dec. 359. See also Untermyer *v.* Yonkers, 112 N. Y. App. Div. 308, 98 N. Y. Suppl. 563.

28. King *v.* Marvin, 51 N. J. L. 298, 17 Atl. 162; Hoboken Land, etc., Co. *v.* Marvin, 51 N. J. L. 285, 17 Atl. 158; Galveston *v.* Heard, 54 Tex. 420.

29. Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797; Allison Land Co. *v.* Tenafly, 68 N. J. L. 205, 52 Atl. 231; Walsh *v.* Barron, 61 Ohio St. 15, 55 N. E. 164, 76 Am. St. Rep. 354.

Necessity that statute limit assessment to benefit.— While an assessment for a local improvement should not exceed the benefits conferred thereby, and, if it does, may be enjoined, yet a statute authorizing such an improvement is not unconstitutional, because not prohibiting assessments in excess of the benefits. State *v.* Columbia Tp., 8 Ohio Cir. Ct. 691, 4 Ohio Cir. Dec. 389.

30. Jefferson County *v.* Mt. Vernon, 145 Ill. 80, 33 N. E. 1091; Haven *v.* New York, 67 N. Y. App. Div. 90, 73 N. Y. Suppl. 678 [*affirmed* in 173 N. Y. 611, 66 N. E. 1110]; Philadelphia *v.* Jewell, (Pa. 1890) 20 Atl. 281.

A trifling excess such as one dollar in a total amount of four hundred and fifty thousand will not invalidate the assessment. Workman *v.* Worcester, 118 Mass. 168.

31. Ankeny *v.* Palmer, 20 Minn. 477; Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 468.

32. Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603.

33. Schmitt *v.* New Orleans, 48 La. Ann. 1440, 21 So. 24.

Disposition of old material.—Where a street has been once improved at the expense of the city and private property, the city authorities may remove the old material and use it on other streets, especially when it would have been impossible to apportion the value of such material and it appears affirmatively that the cost of reimprovement was not affected by the removal. Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725.

34. See *supra*, XIII, E, 1, d, (I).

35. See the statutes of the several states. And see the following cases:

Illinois.— Andrews *v.* People, 84 Ill. 28, holding that in determining whether the cost of parks and boulevards exceeds the limit as to the amount fixed by statute, nothing should be considered except what is required to be actually paid; and, where damages and benefits have been assessed, the actual cost of the park is the amount that has to be paid after deducting the benefits.

Michigan.— Corliss *v.* Highland Park, 132 Mich. 152, 93 N. W. 610, 95 N. W. 416; Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

New York.— *In re* St. Mark's Church, 11 Hun 381.

North Carolina.— Hilliard *v.* Asheville, 118 N. C. 845, 24 S. E. 738.

tion applies in terms only to street improvements, an assessment for sewers will not be affected by it.[36] A corner lot may be assessed, for the improvement of each street, up to the statutory limit;[37] and the term "assessed value" refers to the value of the property as assessed for municipal taxation at the time the improvement is ordered.[38] If separate and distinct improvements are ordered, an assessment may be levied for each for any amount within the statutory limitations;[39] but the limitation may not be evaded by letting separate contracts for different parts of one improvement and basing a separate assessment on each,[40] and the corporation is always subject to the general principle that an assessment may not be made for an amount in excess of benefits.[41]

e. Matters Included in Assessment — (i) *In General.* All expenses necessarily incident to the making of improvements may be included in the assessment;[42] thus, the cost of surveys,[43] and of preliminary proceedings,[44] the expense of levying the assessment,[45] and the amount of damages paid for consequential injury to property, are proper items to be included.[46] On the other hand it has

Ohio.— Cincinnati *v.* Connor, 55 Ohio St. 82, 44 N. E. 582; Cherington *v.* Columbus, 50 Ohio St. 475, 34 N. E. 680; Cincinnati *v.* Oliver, 31 Ohio St. 371, holding that the limitation upon the power of making assessments applies to assessments which are levied upon the property abutting on the improvement in proportion to its frontage, as well as to assessments which are levied upon such property in proportion to its taxable valuation.

Value of improvement.—Under an act limiting assessments for public improvements to twenty-five per cent of "the value of the property assessed for taxation," in fixing the valuation of land for assessment, by the foot front or otherwise, the value of the improvements thereon must be considered, rather than the land alone. Findlay *v.* Frey, 51 Ohio St. 390, 38 N. E. 114.

36. Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342; Heman *v.* Wolff, 33 Mo. App. 200; Cincinnati *v.* Jung, 5 Ohio S. & C. Pl. Dec. 549, 7 Ohio N. P. 665.

37. Allen *v.* Krenning, 23 Mo. App. 561.

38. Nowlen *v.* Benton Harbor, 134 Mich. 401, 96 N. W. 450; Crossley *v.* Findlay, 10 Ohio Cir. Ct. 286, 6 Ohio Cir. Dec. 553; Ferry *v.* Tacoma, 34 Wash. 652, 76 Pac. 277.

39. Warren *v.* Postel, 99 Cal. 294, 33 Pac. 930; Hunt *v.* Hunter, 11 Ohio Cir. Ct. 69, 5 Ohio Cir. Dec. 90; Toledo *v.* Toledo Sav. Bank, etc., Co., 5 Ohio S. & C. Pl. Dec. 97, 7 Ohio N. P. 330.

40. Kreling *v.* Muller, 86 Cal. 465, 25 Pac. 10; *In re* Walter, 75 N. Y. 354. See also Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 21 Ky. L. Rep. 1454, holding that while the town authorities cannot improve a street by piecemeal, so as in all to exceed twenty-five per centum of the value of the property to be charged, that question cannot be raised unless it appears that the limit has in fact been exceeded.

41. Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Walsh *v.* Barron, 61 Ohio St. 15, 55 N. E. 164, 76 Am. St. Rep. 354. See, generally, *supra*, XIII, E, 5, d.

42. *Michigan.*— Beniteau *v.* Detroit, 41 Mich. 116, 1 N. W. 899.

New Jersey.— Robins *v.* New Brunswick, 44 N. J. L. 116 (holding that the expense of making a gutter may be assessed as part of the expense of constructing a sidewalk); Hand *v.* Elizabeth, 30 N. J. L. 365 [*affirmed* in 31 N. J. L. 547].

New York.— *In re* Johnson, 103 N. Y. 260, 8 N. E. 399.

Ohio.— Longworth *v.* Cincinnati, 34 Ohio St. 101, holding that the cost of lateral and cross drain-pipes, which are necessary to make an improvement in a good and workmanlike manner, may properly be assessed upon the abutting property as an item of necessary expenditure in making the improvement.

Virginia.— Groner *v.* Portsmouth, 77 Va. 488.

Washington.— Lewis *v.* Seattle, 28 Wash. 639, 69 Pac. 393, holding that the city may include the cost of grading the intersecting streets and alleys in assessing for the cost of grading a street.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1102.

43. Gibson *v.* Chicago, 22 Ill. 566; Cuming *v.* Grand Rapids, 46 Mich. 150, 9 N. W. 141; *In re* Johnson, 103 N. Y. 260, 8 N. E. 399.

44. Thayer *v.* Grand Rapids, 82 Mich. 298, 46 N. W. 228; St. Paul *v.* Mullen, 27 Minn. 78, 6 N. W. 424; Kohler *v.* Guttenberg, 38 N. J. L. 419; Adkins *v.* Toledo, 27 Ohio Cir. Ct. 417.

45. Dashiell *v.* Baltimore, 45 Md. 615; Porter *v.* Purdy, 29 N. Y. 106, 86 Am. Dec. 283; *In re* Tappan, 54 Barb. (N. Y.) 225, 36 How. Pr. 390.

46. Kelly *v.* Minneapolis City, 57 Minn. 294, 59 N. W. 304, 47 Am. St. Rep. 605, 26 L. R. A. 92; Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; *In re* New York, 183 N. Y. 571, 76 N. E. 1094 (holding that where title to property acquired for the opening of a street had been vested in the city prior to the date of the commissioners' report, the value of the property at the time it vested in the city, plus interest, at the legal rate until the date of the report, was properly assessed on

been held that damages paid to owners of property injured by a change of grade cannot be assessed upon the same property,[47] nor may expenses incurred in defending suits growing out of negligence in construction of an improvement be assessed as part of the cost thereof.[48] Items of work which were not submitted to competitive bidding, as required by statute, may not be included in an assessment,[49] nor may the salary paid to a regular city official whose duty it is to oversee the construction of the work.[50] The expense of collecting an assessment has been held an improper item,[51] and any additional expense incurred for the purpose of keeping the street in repair may not be included in the assessment.[52]

(II) *Interest.* An assessment may include interest upon money borrowed to make an improvement,[53] or interest on deferred instalments where the assessment is payable in instalments.[54]

d. Effect of Including Improper Items. The inclusion of an improper item will invalidate an assessment,[55] unless the item is of such a nature that it may be separated from those properly included.[56]

the lands and premises benefited); Matter of Miller, 3 N. Y. St. 337; Butler *v.* Toledo, 5 Ohio St. 225.

47. Goodrich *v.* Omaha, 10 Nebr. 98, 4 N. W. 424; McGlynn *v.* Toledo, 22 Ohio Cir. Ct. 34, 12 Ohio Cir. Dec. 15.

48. Gurnee *v.* Chicago, 40 Ill. 165 (holding that where a portion of an assessment for paving a street was levied to meet damages the city might have to pay in a suit against it for using, without authority, the patent for the Nicholson pavement, this portion of the assessment was illegal); De Witt *v.* Rutherford, 57 N. J. L. 619, 31 Atl. 228.

49. *In re* Pelton, 85 N. Y. 651; Matter of Van Buren, 55 How. Pr. (N. Y.) 513 [*affirmed* in 17 Hun 527]. See also Board *v.* Hoboken, 36 N. J. L. 378, holding that if a contractor under proposals is not held down to his bid, any excess thereof afterward received by him is an illegal charge against the landowners. But see Cincinnati *v.* Goodman, 5 Ohio Dec. (Reprint) 365, 5 Am. L. Rec. 153, holding that under the usual variations provided for in the contract for a street improvement more stone may be required to be put on the street than the contract calls for, and included in the assessment.

50. Matter of Fifth Ave., 4 Brewst. (Pa.) 364. And see Smith *v.* Portland, 25 Oreg. 297, 35 Pac. 665.

51. McChesney *v.* Chicago, 201 Ill. 344, 66 N. E. 217; Gage *v.* Chicago, 196 Ill. 512, 63 N. E. 1031; Higman *v.* Sioux City, 129 Iowa 291, 105 N. W. 524; *In re* Locust Ave., 185 N. Y. 115, 77 N. E. 1012; Spangler *v.* Cleveland, 35 Ohio St. 469.

52. Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128; Spangler *v.* Cleveland, 35 Ohio St. 469; Young *v.* Tacoma, 31 Wash. 153, 71 Pac. 742.

53. *In re* County Com'rs, 143 Mass. 424, 9 N. E. 756; Davis *v.* Newark, 54 N. J. L. 144, 23 Atl. 276; Skinkle *v.* Clinton Tp., 39 N. J. L. 656; Kohler *v.* Guttenberg, 38 N. J. L. 419; Baker *v.* Elizabeth, 37 N. J. L. 142; *In re* Pelton, 85 N. Y. 651; Kinsella *v.* Auburn, 4 Silv. Sup. (N. Y.) 101, 7 N. Y. Suppl. 317.

54. Steese *v.* Oviatt, 24 Ohio St. 248. See also Hulbert *v.* Chicago, 217 Ill. 286, 75 N. E. 486. But see Cratty *v.* Chicago, 217 Ill. 453, 75 N. E. 343, holding that a city has no authority to include interest on vouchers which are non-interest bearing.

55. Ryan *v.* Altschul, 103 Cal. 174, 37 Pac. 339; Partridge *v.* Lucas, 99 Cal. 519, 33 Pac. 1082; Randolph *v.* Plainfield, 38 N. J. L. 93; Folmsbee *v.* Amsterdam, 142 N. Y. 118, 36 N. E. 821 (holding that an assessment for sidewalks on a certain street is rendered void by the inclusion of the expenses of a sidewalk on another street, construction of which was not authorized by ordinance, and notice to construct which was not given the property-owner as required by city charter); *In re* Livingston, 121 N. Y. 94, 24 N. E. 290 (holding that the permitting by a city and its officers of extravagant or fictitious items to be included in the cost of an improvement amounts to a fraud which, under the statute, entitles a property-owner to have the assessment vacated or reduced); Squire *v.* Cartwright, 67 Hun (N. Y.) 218, 22 N. Y. Suppl. 899; People *v.* Yonkers, 39 Barb. (N. Y.) 266).

56. *California.*— McDonald *v.* Mezes, 107 Cal. 492, 40 Pac. 808; Dowling *v.* Conniff, 103 Cal. 75, 36 Pac. 1034; Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

District of Columbia.—Walker *v.* District of Columbia, 6 Mackey 352, holding that the whole of an assessment for a street improvement will not be quashed for an illegal portion which can be separated, but that part only.

New York.— Brennan *v.* Buffalo, 162 N. Y. 491, 57 N. E. 81; *In re* Pelton, 85 N. Y. 651. See also Lewis *v.* New York, 35 How. Pr. 162, holding that where assessors erroneously include a charge for making the assessment, if the amount is small, and the assessment otherwise valid, it will not be vacated on that account.

Ohio.— Cincinnati *v.* Anchor White Lead Co., 44 Ohio St. 243, 7 N. E. 11.

South Dakota.— Mason *v.* Sioux Falls, 2 S. D. 640, 652, 51 N. W. 770, 774, 39 Am. St. Rep. 802.

e. Final Estimate or Determination of Amount. Where the statute provides for a final estimate of the cost of an improvement, such provision must be complied with to render an assessment valid;[57] but a minor irregularity in the making of such estimate, if it in no way prejudices the rights of property-owners, will be disregarded.[58]

f. Variance From Preliminary Estimate. In the absence of express restriction, a variance in the final cost of an improvement from the preliminary estimate will not invalidate an assessment.[59]

g. Excessive Amount. Where the final estimate of the cost of an improvement has been made and approved, an assessment in excess of such estimate is invalid.[60] If the cost of the work proves to be less than such final estimate and assessment, the assessment should be reduced accordingly,[61] and if it can be shown that a contract was let at an unreasonably high price, collection of the entire amount of an assessment will sometimes be restrained.[62] An assessment in excess of benefits is non-enforceable to the extent of the excess,[63] and under guise of paying the cost of construction a city cannot collect a fund for repair or maintenance of an improvement;[64] but the fact that the city, without right, canceled a contract for an improvement and made a new contract at an increased price does not entitle a property-owner, as against the contractor, to an abatement of the amount assessed.[65]

10. Apportionment of Assessment — a. In General. Any statutory provision as to the method of apportionment must be complied with to render an assessment valid;[66] but in the absence of such provision, any mode of apportionment which is fair and legal may be adopted by the municipality;[67] and where, after the letting of a contract, the act under which the city proceeds is amended, the

See 36 Cent. Dig. tit. "Municipal Corporations," § 1104.

57. Klein *v.* Nugent Gravel Co., 162 Ind. 509, 70 N. E. 801; Duffy *v.* Saginaw, 106 Mich. 335, 64 N. W. 581; *In re* Cameron, 50 N. Y. 502.

Construction of report.— Where commissioners reported: "Total cost of the improvement, $4648.30; cost of making and levying the assessment therefor, $139.44," it was held that the cost of making and levying the assessment was not included in the "total cost" mentioned in the first item. McChesney *v.* Chicago, 152 Ill. 543, 38 N. E. 767.

58. Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825; New Albany Gas Light, etc., Co. *v.* Crumbo, 10 Ind. App. 360, 37 N. E. 1062; Topeka *v.* Gage, 44 Kan. 87, 24 Pac. 82.

59. Auditor-Gen. *v.* Chase, 132 Mich. 630, 94 N. W. 178; Kohler *v.* Guttenberg, 38 N. J. L. 419; *In re* Board of St. Opening, etc., 20 N. Y. Suppl. 563; Dodsworth *v.* Cincinnati, 18 Ohio Cir. Ct. 288, 10 Ohio Cir. Dec. 177.

60. Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105.

61. Mayer *v.* New York, 101 N. Y. 284, 4 N. E. 336; *In re* Upson, 89 N. Y. 67; Matter of Livingston, 4 N. Y. Suppl. 56.

62. Cook *v.* Racine, 49 Wis. 243, 5 N. W. 352.

63. Pfaffinger *v.* Kremer, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. Rep. 2368; Price *v.* Toledo, 25 Ohio Cir. Ct. 617.

64. Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238; State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183; Young *v.* Tacoma, 31 Wash. 153, 71 Pac. 742. But see Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176, holding that the entire cost of a street improvement may be assessed against abutting property-owners, although the contractor, by his contract, guaranteed the workmanship and materials, and may, by reason of that fact, have increased the contract price.

65. Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176.

66. *Illinois.*— Berdel *v.* Chicago, 217 Ill. 429, 75 N. E. 386; Espert *v.* Chicago, 201 Ill. 264, 66 N. E. 212; Ware *v.* Jerseyville, 158 Ill. 234, 41 N. E. 736; Lill *v.* Chicago, 29 Ill. 31.

Kentucky.— See Louisville Steam Forge Co. *v.* Mehler, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. L. Rep. 1335.

Louisiana.— Barber Asphalt Paving Co. *v.* Watt, 51 La. Ann. 1345, 26 So. 70.

Minnesota.— State *v.* Ramsey County Dist. Ct., 75 Minn. 292, 77 N. W. 968.

Missouri.— Independence *v.* Gates, 110 Mo. 374, 19 S. W. 728; Adams *v.* Green, 74 Mo. App. 125.

New Jersey.— Morris *v.* Jersey City, 40 N. J. L. 485; Cossitt *v.* Reimenschneider, 39 N. J. L. 625.

Ohio.— Chamberlain *v.* Cleveland, 34 Ohio St. 551; Creighton *v.* Scott, 14 Ohio St. 438.

Pennsylvania.— Scranton *v.* Bush, 160 Pa. St. 499, 28 Atl. 926.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1108.

67. Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781.

assessment should be collected under the old law, although levied after the passage of the amendatory act.[68] Under some statutes the city council is given sole authority to apportion the cost of an improvement between the property-owners benefited and the general public.[69] A statute providing for assessments for work done upon the crossings of streets is inapplicable where a street, instead of crossing, terminates in another.[70]

b. Benefit to Property. The legislature may exercise large discretion in determining the extent to which property may be assessed for local improvements,[71] subject, however, to the restriction that an assessment in excess of benefits cannot be enforced.[72] In some states, by statute, the benefit received by property becomes the sole measure of the amount of assessment levied thereon,[73] and this method of apportionment has been uniformly upheld by the courts.[74] The determination of benefits is largely a matter of legislative discretion;[75] but if it can be established that the cost of an improvement exceeds benefits, the excess must be borne by the city out of its general funds.[76]

c. Value of Property — (i) *In General.* It is competent for the legislature to provide that assessments shall be apportioned according to the value of the lots assessed,[77] and in the absence of a statutory mode this method of apportionment

68. Houston *v.* McKenna, 22 Cal. 550.

69. Watson *v.* Chicago, 115 Ill. 78, 3 N. E. 430.

70. See San Francisco Paving Co. *v.* Dubois, 2 Cal. App. 42, 83 Pac. 72, holding that where two streets terminated at the southerly line of a street to be improved, the assessment for work done on the southerly one half of such street opposite the street so terminated was properly made against the lands fronting on those streets respectively.

71. Wells *v.* Boston, 187 Mass. 451, 73 N. E. 554; Meier *v.* St. Louis, 180 Mo. 391, 79 S. W. 955. Where the legislature determines that a certain advantage arising from a public improvement is immediate enough to authorize a special assessment, the statute authorizing such improvement will not be construed to be invalid by reason of the remoteness of such advantage. Sears *v.* Boston, 180 Mass. 274, 62 N. E. 397, 62 L. R. A. 144.

72. *Illinois.*— Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

Massachusetts.— Cheney *v.* Beverly, 188 Mass. 81, 74 N. E. 306.

New York.— See People *v.* Buffalo, 52 N. Y. Suppl. 689.

Texas.— Kettle *v.* Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874.

United States.— See Louisville, etc., R. Co. *v.* Barber Asphalt Paving Co., 197 U. S. 430, 25 S. Ct. 466, 49 L. ed. 819.

73. Montgomery *v.* Foster, 133 Ala. 587, 32 So. 610; Owens *v.* Marion, 127 Iowa 469, 103 N. W. 381; Friedrich *v.* Milwaukee, 114 Wis. 304, 90 N. W. 174. See People *v.* Kingston, 114 N. Y. App. Div. 326, 99 N. Y. Suppl. 657.

74. Birmingham *v.* Klein, 89 Ala. 461, 7 So. 386, 3 L. R. A. 369; Harney *v.* Benson, 113 Cal. 314, 45 Pac. 687; *In re* North Beach, etc., R. Co., 32 Cal. 499; Auburn *v.* Paul, 84 Me. 212, 24 Atl. 817; Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922; Wetmore *v.* Elizabeth, 41 N. J. L. 152.

75. *Illinois.*— Gray *v.* Cicero, 177 Ill. 459, 53 N. E. 91.

Michigan.— Grand Rapids School Furniture Co. *v.* Grand Rapids, 92 Mich. 564, 52 N. W. 1028.

Missouri.— Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600.

New Jersey.— Vreeland *v.* Bayonne, 58 N. J. L. 126, 32 Atl. 68; State *v.* West Hoboken, 51 N. J. L. 267, 17 Atl. 110.

New York.— Matter of New York, 106 N. Y. App. Div. 31, 94 N. Y. Suppl. 146; Matter of Klock, 30 N. Y. App. Div. 24, 51 N. Y. Suppl. 897; Keller *v.* Mt. Vernon, 23 N. Y. App. Div. 46, 48 N. Y. Suppl. 370; *In re* Anderson, 57 Barb. 411; Mansfield *v.* Lockport, 24 Misc. 25, 52 N. Y. Suppl. 571; People *v.* Troy, 2 Abb. N. Cas. 86.

Ohio.— Kelly *v.* Cleveland, 34 Ohio St. 468.

Wisconsin.— Watkins *v.* Zwietusch, 47 Wis. 513, 3 N. W. 35; Johnson *v.* Milwaukee, 40 Wis. 315.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1109.

Classification by varying benefit.— As a convenient method of equitably adjusting sewer assessments, the members of a board of mayor and aldermen may divide them "into three classes, direct benefit, remote benefit, and more remote benefit." Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908.

76. Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

77. *California.*— *In re* Piper, 32 Cal. 530.

Connecticut.— Hunter's Appeal, 71 Conn. 189, 41 Atl. 557.

Michigan.— Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

Ohio.— Parmelee *v.* Youngstown, 43 Ohio St. 162, 1 N. E. 319; Maloy *v.* Marietta, 11 Ohio St. 636; Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159.

Washington.— Monk *v.* Ballard, 42 Wash. 35, 84 Pac. 397.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1110.

may be adopted by the municipality;[78] but a constitutional provision requiring taxes to be assessed on a cash valuation does not apply to special assessments.[79] Where the statute provides that the cost of an improvement shall be levied on the property to the center of the block upon each side of the street improved, the cost should not be levied one half upon the property on each side, but the property on both sides of the street should be assessed in proportion to its value for the entire cost of the work.[80]

(II) *Improvements on Property.* In estimating the value of property for the purpose of levying a special assessment, the value of improvements thereon should not be reckoned.[81] It has been held, however, that where a tax, as distinguished from special assessment, was levied upon a particular district for sewer purposes, improvements could not be excluded from the assessment without violating the requirement of equality and uniformity of taxation.[82]

d. Area. Although cases can be found to the contrary,[83] it is generally held that an apportionment of benefits according to the area of property is valid,[84] and it is frequently provided that the city may fix the depth of lots liable to assessment for an improvement.[85]

e. Frontage of Lots — (I) *In General.* The method of apportionment commonly in use is to assess the cost of an improvement upon abutting lots according to their respective frontage.[86] The validity of this mode of apportionment has been repeatedly attacked, but is sustained by the great weight of authority,[87]

Time as of which value is estimated.— An assessment on a lot for the opening of a street is properly based on its value as estimated by the tax commissioners for the year when the assessment was made up, and should not be altered because of later valuations. *In re* Department of Public Works, 19 N. Y. Suppl. 612.

Unplatted property.—The charter of a city, providing that the cost of street improvements shall be assessed upon the lots and parcels of land having a frontage upon the improved street, ratable according to the valuation of each, allows assessments only in such parts of the city as have been platted into lots and parcels extending back a uniform distance from the street. Griggs *v.* Tacoma, 3 Wash. 785, 29 Pac. 449; Howell *v.* Tacoma, 3 Wash. 711, 29 Pac. 447, 28 Am. St. Rep. 83.

78. Douglass *v.* Craig, 4 Kan. App. 99, 46 Pac. 197.

79. Motz *v.* Detroit, 18 Mich. 495.

80. Parker *v.* Atchison, 48 Kan. 574, 30 Pac. 20; Blair *v.* Atchison, 40 Kan. 353, 19 Pac. 815.

81. Newman *v.* Emporia, 41 Kan. 583, 21 Pac. 593; Mason *v.* Spencer, 35 Kan. 512, 11 Pac. 402; Hentig *v.* Gilmore, 33 Kan. 234, 6 Pac. 304; Snow *v.* Fitchburg, 136 Mass. 183; Hoffeld *v.* Buffalo, 130 N. Y. 387, 29 N. E. 747.

82. Primm *v.* Belleville, 59 Ill. 142.

83. Thomas *v.* Gain, 35 Mich. 155, 24 Am. Rep. 535; New Brunswick Rubber Co. *v.* New Brunswick, 38 N. J. L. 190, 20 Am. Rep. 380.

84. *Colorado.*— Denver *v.* Dumars, 33 Colo. 94, 80 Pac. 114; Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825. The apportionment of an improvement assessment according to area is *prima facie* valid; but where, in the particular instance, such method will work injustice, relief, under proper circumstances, may be granted. Spalding *v.* Denver, 33 Colo. 172, 80 Pac. 126.

Indiana.— Swain *v.* Fulmer, 135 Ind. 8, 34 N. E. 639.

Iowa.— Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103; Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330.

Missouri.— Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 71 S. W. 205; Johnson *v.* Duer, 115 Mo. 366, 21 S. W. 800; St. Joseph *v.* Farrell, 106 Mo. 437, 17 S. W. 497.

New York.— People *v.* Buffalo, 52 N. Y. Suppl. 689, holding that under Buffalo City Charter, § 145, providing that assessors, in making an assessment for local improvements, shall asess the whole amount "upon the parcels of land benefited by the work, act, or improvement, in proportion to such benefit," the cost of constructing a sewer may be assessed at a uniform rate per square foot over the entire assessment district.

United States.— Gillette *v.* Denver, 21 Fed. 822.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1112.

85. Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Niklaus *v.* Conkling, 118 Ind. 289, 20 N. E. 797; German Protestant Orphan Asylum *v.* Barber Asphalt Paving Co., 82 S. W. 632, 26 Ky. L. Rep. 805; Stifel *v.* Brown, 24 Mo. App. 102.

86. Marshall *v.* Barber Asphalt Paving Co., 66 S. W. 734, 23 Ky. L. Rep. 1971; Joyes *v.* Shadburn, 13 S. W. 361, 11 Ky. L. Rep. 892; Moody *v.* Spotorno, 112 La. 1008, 36 So. 836; Alberger *v.* Baltimore, 64 Md. 1, 20 Atl. 988; Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1; St. Louis *v.* Clemens, 49 Mo. 552; Ingersoll Pub. Corp. 338. And see cases cited in the following notes.

87. *California.*— German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac.

although there are cases holding to the contrary.[88] And while it has been held to be competent for the legislature to provide that the entire cost of an improvement shall be apportioned among abutting lots according to frontage,[89] even without a hearing as to benefits,[90] yet, if it can be shown that lots are so situated or are of such size that an assessment according to frontage will be grossly disproportionate to benefits, the assessment will sometimes be set aside as unreasonable.[91]

1067; Jennings *v.* Le Breton, 80 Cal. 8, 21 Pac. 1127.

Colorado.— Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135, holding that assessments for local improvements may be made upon the basis of frontage, where the lots abutting upon the improvement are of substantially equal depth; the same not being shown to be unfair.

Georgia.— Hayden *v.* Atlanta, 70 Ga. 817, holding that an act giving the city of Atlanta power to grade, pave, and improve its streets, and to assess the improvements to the abutting real estate in proportion to its frontage, is not in violation of a constitutional provision requiring that all taxation shall be *od valorem*, as such assessments are not taxes.

Illinois.— Chicago, etc., R. Co. *v.* Joliet, 153 Ill. 649, 39 N. E. 1077; Springfield *v.* Sale, 127 Ill. 359, 20 N. E. 86; Wilbur *v.* Springfield, 123 Ill. 395, 14 N. E. 871. See also Springfield *v.* Green, 120 Ill. 269, 11 N. E. 261.

Indiana.— Pittsburgh, etc., R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454; Kirkland *v.* Indianapolis Bd. of Public Works, 142 Ind. 123, 41 N. E. 374.

Kentucky.— Louisville *v.* Bitzer, 115 Ky. 359, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434.

Michigan.— Sheley *v.* Detroit, 45 Mich. 431, 8 N. W. 52.

Minnesota.— State *v.* Macalester College, 87 Minn. 165, 91 N. W. 484, holding that an act providing for water frontage assessments is not a violation either of the state or federal constitution.

Missouri.— Budd *v.* Deemar, 174 Mo. 122, 73 S. W. 469; Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249.

New Jersey.— Central New Jersey Land, etc., Co. *v.* Bayonne, 56 N. J. L. 297, 28 Atl. 713; Pudney *v.* Passaic, 37 N. J. L. 65.

New York.— People *v.* Pitt, 169 N. Y. 521, 62 N. E. 662; Batterman *v.* New York, 65 N. Y. App. Div. 576, 73 N. Y. Suppl. 44.

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

North Dakota.— Webster *v.* Fargo, 9 N. D. 208, 82 N. W. 732, 56 L. R. A. 156 [*following* Rolph *v.* Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646].

Ohio.— Cincinnati *v.* Batsche, 52 Ohio St. 324, 40 N. E. 21.

Oregon.— Wilson *v.* Salem, 24 Oreg. 504, 34 Pac. 9, 691.

Pennsylvania.— McCall *v.* Coates, 148 Pa. St. 462, 23 Atl. 1127; Hand *v.* Fellows, 148 Pa. St. 456, 23 Atl. 1126; Wray *v.* Pittsburgh, 46 Pa. St. 365.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 1 S. D. 46, 44 N. W. 1072.

Virginia.— Davis *v.* Lynchburg, 84 Va. 861, 6 S. E. 230.

Washington.— Austin *v.* Seattle, 2 Wash. 667, 27 Pac. 557.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1113.

88. Mobile *v.* Dargan, 45 Ala. 310; Monticello *v.* Banks, 48 Ark. 251, 2 S. W. 852; Peay *v.* Little Rock, 32 Ark. 31 (holding that a constitutional provision that taxes shall be imposed by a uniform rule upon all real and personal property according to its true value in money applies to municipal assessments for local improvements, and renders such an assessment upon lots laid proportionably to their frontage invalid); Cronin *v.* Jersey City, 38 N. J. L. 410; New Brunswick Rubber Co. *v.* New Brunswick, 38 N. J. L. 190, 20 Am. Rep. 380. See also Morse *v.* Omaha, 67 Nebr. 426, 93 N. W. 734, holding that the only foundation for special assessments rests in the special benefits conferred upon the property assessed, and therefore the frontage rule per foot cannot be adopted unless the benefits are equal and uniform.

Farm land in a rural district cannot be assessed under the "foot-front rule" for municipal improvements. Scranton *v.* Pennsylvania Coal Co., 105 Pa. St. 445; Seely *v.* Pittsburgh, 82 Pa. St. 360, 22 Am. Rep. 760; Allentown *v.* Adams, 5 Pa. Cas. 253, 8 Atl. 430; Philadelphia *v.* Keith, 1 Pa. Cas. 359, 2 Atl. 207; Wilson *v.* Allegheny, 25 Pittsb. Leg. J. N. S. (Pa.) 15.

89. *Alabama.*— Montgomery *v.* Moore, 140 Ala. 638, 37 So. 291.

Iowa.— Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

Missouri.— Barber Asphalt Paving Co. *v.* Munn, 185 Mo. 552, 83 S. W. 1062.

North Dakota.— Webster *v.* Fargo, 9 N. D. 208, 82 N. W. 732, 56 L. R. A. 156; Rolph *v.* Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646.

Texas.— Hutcheson *v.* Storrie, (Civ. App. 1898) 48 S. W. 785.

90. French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879.

91. Hadley *v.* Dague, 130 Cal. 207, 62 Pac. 500; Weed *v.* Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642. See also White *v.* Gove, 183 Mass. 333, 67 N. E. 359.

The circumstances and situation of the lands on the different sides of a city street may be such as to make the adoption of the foot frontage rule in the particular instance inconsistent with the observance of the proportionate benefit principle. People *v.* Des-

If it is clearly established that an assessment is in substantial excess of benefits, the collection of such excess would amount to confiscation and should be restrained,[92] but the fact that one lot receives more benefit proportionately than another does not invalidate an assessment.[93] Where the city is directed by charter or statute to levy assessments according to benefits, an assessment by frontage, without a view of the premises or consideration of benefits, will be invalid,[94] although it has been held that the adoption of the frontage rule will not necessarily raise a presumption that the assessment was laid without regard to benefits.[95]

(II) *Lots Varying in Depth or Value.* An assessment according to frontage is not of necessity void because abutting lots differ in depth,[96] or in value.[97]

(III) *Mode of Determining Frontage.* The term "front foot" is synonymous with abutting foot,[98] and for the purpose of determining the frontage of

mond, 186 N. Y. 232, 78 N. E. 857, holding that under Laws (1897), p. 993, c. 738, as amended by Laws (1898), p. 29, c. 15, and Laws (1901), p. 1054, c. 384, § 11, subd. 2, providing for the assessment of the expense of local improvements "upon the lands benefited by the local improvement in proportion to such benefit," property on one side of a street, and which is already adequately drained by a sewer constructed at the expense of the owners thereof, is not subject to an equal assessment per front foot with undrained property on the other side of the street for a sewer there being constructed.

92. Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 189, 43 L. ed. 443.

93. Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105; Matter of Phelps, 110 N. Y. App. Div. 69, 96 N. Y. Suppl. 862; Harrell *v.* Storrie, (Tex. Civ. App. 1898) 47 S. W. 838; Adams *v.* Roanoke, 102 Va. 53, 45 S. E. 881.

94. *Indiana.*—McKee *v.* Pendleton, 154 Ind. 652, 57 N. E. 532; Crawfordsville Music Hall Assoc. *v.* Clements, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752. *Compare* Pittsburgh, etc., R. Co. *v.* Taber, (1906) 77 N. E. 741, holding that an ordinance ordering a street improvement by providing that the "improvement shall be assessed per lineal foot against the real estate abutting" thereon, according to the provisions "of the act approved March, 1889, and all acts amendatory and supplemental thereto," does not attempt to prevent the assessment being made according to benefits.

Massachusetts.— Dexter *v.* Boston, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306.

Minnesota.— State *v.* Ramsey County Dist. Ct., 29 Minn. 62, 11 N. W. 133.

New Jersey.— Doughten *v.* Camden, 72 N. J. L. 451, 63 Atl. 170, 111 Am. St. Rep. 680, 3 L. R. A. N. S. 817; Woodruff *v.* Paterson, 36 N. J. L. 159. See also Hutton *v.* West Orange Tp., 39 N. J. L. 453.

New York.— Matter of Klock, 30 N. Y. App. Div. 24, 51 N. Y. Suppl. 897; Mansfield *v.* Lockport, 24 Misc. 25, 52 N. Y. Suppl. 571. But see People *v.* Kingston, 114 N. Y. App. Div. 326, 99 N. Y. Suppl. 657.

Ohio.— Nulsen *v.* Cincinnati, 27 Ohio Cir. Ct. 383.

Virginia.— Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382.

Washington.— Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707.

Wisconsin.— Kersten *v.* Milwaukee, 106 Wis. 200, 81 N. W. 948, 1103, 48 L. R. A. 851; Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1113.

95. Bassett *v.* New Haven, 76 Conn. 70, 55 Atl. 579; Dooling *v.* Ocean City, 67 N. J. L. 215, 50 Atl. 621; Raymond *v.* Rutherford, 55 N. J. L. 441, 27 Atl. 172 [*affirmed* in 56 N. J. L. 340, 29 Atl. 156]; Donovan *v.* Oswego, 90 N. Y. App. Div. 397, 86 N. Y. Suppl. 155; New Whatcom *v.* Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236.

Where injury does not result.— An assessment for street improvements, otherwise lawful, is not rendered invalid because assessed in terms by the abutting foot, where it appears that the amount of the assessment did not exceed the special benefit to the land. Shoemaker *v.* Cincinnati, 68 Ohio St. 603, 68 N. E. 1; Walsh *v.* Sims, 65 Ohio St. 211, 62 N. E. 120; Walsh *v.* Barron, 61 Ohio St. 15, 55 N. E. 164, 76 Am. St. Rep. 354; Schroder *v.* Overman, 61 Ohio St. 1, 55 N. E. 158, 47 L. R. A. 156.

96. Moale *v.* Baltimore, 61 Md. 224; Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888. Where lots of unequal depth, but of equal frontage, are assessed for the costs of a sewer, according to frontage, lots of equal frontage being assessed in the same amount, without regard to depth, the assessment is legal, provided it affirmatively appears that they receive an equal benefit. Van Solingen *v.* Harrison, 39 N. J. L. 51.

97. Witman *v.* Reading, 169 Pa. St. 375, 32 Atl. 576. In assessing on abutters the cost of paving a street, it is proper to assess in proportion to frontage, although the buildings on some lots are more valuable than those on others. O'Reilly *v.* Kingston, 39 Hun (N. Y.) 285 [*affirmed* in 114 N. Y. 439, 21 N. E. 1004].

98. Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014.

Where lots are not at right angle to street. —Where land adjoining a street was so situated that some of the building lots were laid

a lot, reference must be had to its situation at the time the improvement is made.[99]

f. Assessment of Each Lot For Work Done Adjoining. Although cases may be found to the contrary,[1] the rule sustained by the weight of authority is that each lot may not be assessed separately for the work done in front of it.[2]

g. Corner Lots. The assessment of a corner lot may usually be determined by the number of actual abutting feet,[3] although it has been held in at least one jurisdiction that where the statute requires assessment according to frontage regard must be had to what is the real front of the property, and if a lot abuts lengthwise on the improvement but fronts on another street, it may be assessed only for a number of feet equal to its real frontage.[4]

h. Deduction of Damages. In assessing benefits for opening a street damages

out at right angles to the street while others were necessarily at an acute angle with the street, making the street front longer on some lots than on others, although all were of the same width on the square, it was held that an assessment for sewers should be made on each lot according to its actual width, and not according to the length of front. *In re* Assessment for Sewers, 10 N. J. L. J. 25.

99. Sandrock *v.* Columbus, 51 Ohio St. 317, 42 N. E. 255 [*reversing* 8 Ohio Cir. Ct. 79, 6 Ohio Cir. Dec. 617]; Cincinnati *v.* Locke, 2 Ohio S. & C. Pl. Dec. 549, 7 Ohio N. P. 318. In determining the frontage of lots assessable for street improvements, the court may consider a lease of the lots containing a description which was recognized and acted on by the parties prior to the proceedings which declared the necessity of the improvements. Cincinnati *v.* James, 4 Ohio S. & C. Pl. Dec. 229, 2 Ohio N. P. 345.

1. Springfield *v.* Sale, 127 Ill. 359, 20 N. E. 86; Howe *v.* Cambridge, 114 Mass. 388 (holding that on certiorari to quash proceedings in assessment for street improvements, the court cannot say as a matter of law that an assessment upon the owner of each estate of the cost of the edge stones and covering materials laid down against that estate is an assessment made in unjust proportions); Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511 (holding that under an act providing that assessments for building of sewers shall be made according to the actual cost of labor or material, in constructing the sewer along the lots assessed there is no inference that the city council must apportion the assessment equally among such lots); Dallas *v.* Emerson, (Tex. Civ. App. 1896) 36 S. W. 304.

2. *Illinois.*— Davis *v.* Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563. The tax for connecting all the buildings on a street with the water and sewer mains must be levied on the adjoining property, on some principle of equality, and not assessed on each lot according to the cost of connections to that lot. Palmer *v.* Danville, 154 Ill. 156, 38 N. E. 1067.

Kentucky.— Lexington *v.* McQuillan, 9 Dana 513, 35 Am. Dec. 159.

Michigan.— Motz *v.* Detroit, 18 Mich. 495.

Minnesota.— Duluth *v.* Davidson, 97 Minn. 378, 107 N. W. 151; Morrison *v.* St. Paul, 5 Minn. 108; Weller *v.* St. Paul, 5 Minn. 95.

New Jersey.— Van Tassel *v.* Jersey City, 37 N. J. L. 128; Baxter *v.* Jersey City, 36 N. J. L. 188.

Pennsylvania.— Inequality in the surface of land abutting on a street does not authorize any departure from the front foot rule in assessments for street improvements, when that rule is expressly enjoined by the statute under which the improvements were made. McKeesport Borough *v.* Busch, 166 Pa. St. 46, 31 Atl. 49.

Washington.— New Whatcom *v.* Bellingham Bay Imp. Co., 9 Wash. 639, 38 Pac. 163; Seattle *v.* Yesler, 1 Wash. Terr. 571.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1117.

3. Rich *v.* Woods, 118 Ky. 865, 82 S. W. 578, 26 Ky. L. Rep. 799; Anderson *v.* Bitzer, 49 S. W. 442, 19 Ky. L. Rep. 1450. A lot may be assessed for a street improvement as "abutting property" to the full extent that it borders on the improved street, without reference to the extent of its frontage on another street. Meyer *v.* Covington, 103 Ky. 54, 45 S. W. 769, 20 Ky. L. Rep. 239.

What is a corner lot.— The fact that in front of his property the street turns at an obtuse angle does not make the owner, as a matter of law, entitled to the exemption allowed to property constituting a corner lot. Newell *v.* Bristol, 78 Conn. 571, 63 Atl. 355.

4. Toledo *v.* Sheill, 53 Ohio St. 447, 42 N. E. 323, 30 L. R. A. 598; Sandrock *v.* Columbus, 51 Ohio St. 317, 42 N. E. 255; Haviland *v.* Columbus, 50 Ohio St. 471, 34 N. E. 679. The owner of a corner lot having a frontage of nine feet on one street, and extending back on another street one hundred and thirty-five feet, can be assessed for improvements on the latter street only on the basis of nine front feet. Rooney *v.* Toledo, 9 Ohio Cir. Ct. 267, 4 Ohio Cir. Dec. 23.

A barn built on the rear of a corner lot as an incident to a house on the lot does not make a foot frontage on the side street, for the purpose of street assessments, although it has an entrance on such side street. Daiber *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 164, 7 Ohio N. P. 389.

resulting therefrom may usually be deducted,[5] but a sum awarded for the value of land taken for an improvement cannot be credited against an assessment;[6] and the fact that an abutter has a remedy against the city for damages from change of grade does not affect his liability for a paving assessment.[7]

i. Unequal Assessment. It is a general rule that assessments should be equal and uniform;[8] but where the same are apportioned according to benefits, the assessment of different lots may vary[9] according to their situation[10] and the nature of the work performed.[11] And where the cost of an improvement is apportioned according to frontage, the rate of assessment must be uniform, notwithstanding a variance in the cost of different parts of the work[12] or a difference in the depth of lots.[13] A special assessment upon the right of way of a railroad company in a street is not lacking in uniformity by reason of the fact that a gross sum is levied as the fair proportion of the tax to be borne by the railway, while other property is assessed by computation of frontage.[14]

j. Excessive Assessments. Although cases may be found to the contrary,[15] it is the general rule that the collection of an assessment will be enjoined if it is in clear excess of benefits,[16] or exceeds so grossly the value of the work to the

5. Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423; *In re* Oration St., 9 N. J. L. J. 346; Albany Canal Bank *v.* Albany, 9 Wend. (N. Y.) 244.

6. King *v.* Marvin, 51 N. J. L. 298, 17 Atl. 162; Hoboken Land, etc., Co. *v.* Marvin, 51 N. J. L. 285, 17 Atl. 158; Ryerson *v.* Passaic, 40 N. J. L. 118. See also Duquesne Borough *v.* Keeler, 213 Pa. St. 518, 62 Atl. 1071.

7. Lohrum *v.* Eyermann, 5 Mo. App. 481.

8. *Georgia.*— Bacon *v.* Savannah, 105 Ga. 62, 31 S. E. 127.

Kentucky.— Louisville *v.* Selvage, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809, 21 Ky. L. Rep. 349, 620; Baldrick *v.* Gast, 79 S. W. 212, 25 Ky. L. Rep. 1977.

Michigan.— Auditor-Gen. *v.* O'Neill, 143 Mich. 343, 106 N. W. 895; White *v.* Saginaw, 67 Mich. 33, 34 N. W. 255, holding that where an assessment for a sewer, made upon the basis that the property benefited should pay one half of such expense, was declared invalid, a subsequent assessment, on the basis that the property benefited should pay two thirds of such expense, and exempting those who had fully paid their former assessment, was unequal and void.

New York.— Ellwood *v.* Rochester, 122 N. Y. 229, 25 N. E. 238; People *v.* Reis, 109 N. Y. App. Div. 919, 96 N. Y. Suppl. 601; People *v.* Reis, 109 N. Y. App. Div. 748, 96 N. Y. Suppl. 597; Delaware, etc., Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 56 N. Y. Suppl. 976 [*affirmed* in 167 N. Y. 589, 60 N. E. 1119]; Monroe County *v.* Rochester, 88 Hun 164, 34 N. Y. Suppl. 533; Matter of Townsend Ave., 35 Misc. 65, 71 N. Y. Suppl. 201.

Pennsylvania.— Scranton *v.* Levers, 200 Pa. St. 56, 49 Atl. 980.

9. *Illinois.*— Chicago *v.* Baer, 41 Ill. 306.

Iowa.— Gilcrest *v.* Macartney, 97 Iowa 138, 66 N. W. 103.

Massachusetts.— Sears *v.* Boston, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834.

Minnesota.— State *v.* Ramsey County Dist. Ct., 68 Minn. 242, 71 N. W. 27.

New York.— Voght *v.* Buffalo, 133 N. Y. 463, 31 N. E. 340; *In re* Alexander Ave., 17 N. Y. Suppl. 933, holding that the lands of a railroad company, being the only property receiving a new frontage by the opening of a street, were properly assessed with a greater proportion of the expense thereof than adjacent property.

Texas.— Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024.

A uniform assessment on lots will be set aside where the advantages to the lots vary. Frevert *v.* Bayonne, 63 N. J. L. 202, 42 Atl. 773.

10. Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741.

Corner lots.— The higher assessment of corner lots than of outside lots, to meet the expense of street improvements, is valid. Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819.

11. McSherry *v.* Wood, 102 Cal. 647, 36 Pac. 1010.

12. Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796; State *v.* Robert P. Lewis Co., 72 Minn. 81, 75 N. W. 108, 42 L. R. A. 639; Jaeger *v.* Burr, 36 Ohio St. 164.

13. Long Branch Police, etc., Comm. *v.* Dobbins, 61 N. J. L. 659, 40 Atl. 599; Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447; Hutcheson *v.* Storrie, (Tex. Civ. App. 1898) 48 S. W. 785. See also *supra*, XIII, E, 10, e, (II).

14. Chicago, etc., R. Co. *v.* Moline, 158 Ill. 64, 41 N. E. 877.

15. Bullitt *v.* Selvage, 47 S. W. 255, 20 Ky. L. Rep. 599; Rolph *v.* Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646; Hutcheson *v.* Storrie, (Tex. Civ. App.) 48 S. W. 785.

The front foot rule of assessment for street improvements will be applied to a long narrow strip of property lying alongside a street, although the assessment will be greater than the value of the lot. Harrisburg *v.* McCormick, 129 Pa. St. 213, 18 Atl. 126.

16. Iowa Pipe, etc., Co. *v.* Callanan, 125 Iowa 358, 101 N. W. 141, 106 Am. St. Rep.

property as to amount to spoliation.[17] Where consent of property-owners is a condition to the ordering of an improvement, and such consent limits the cost thereof to a certain sum per running foot, an assessment cannot be laid in excess of such sum;[18] and a property-owner who has paid an assessment is entitled to a rebate when the actual cost of an improvement does not equal the estimate thereof.[19]

k. Omission to Assess Property Liable. Omission to assess property clearly liable for a portion of the cost of an improvement will usually invalidate an assessment;[20] but the city may exercise large discretion in determining what property is benefited and hence liable to assessment;[21] and it is sometimes held generally that omission to assess property liable cannot be urged against the validity of an assessment by one whose assessment is not increased by reason of such omission.[22] Where the road-bed of a railroad is not benefited by the improvement, a failure to assess it is no ground for an objection to confirmation of the assessment.[23]

l. Failure to Enforce Liability of Railway Company. Where a railroad company is under obligation to pave a portion of the street, failure by the city to

311, 67 L. R. A. 408; Morse *v.* Westport, 136 Mo. 276, 37 S. W. 932; Tyler *v.* St. Louis, 56 Mo. 60; Frevert *v.* Bayonne, 63 N. J. L. 202, 42 Atl. 773; Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443. But see Denver *v.* Londoner, 33 Colo. 104, 80 Pac. 117, holding that property-owners cannot escape assessment because the assessment against their lands is excessive, but are bound to pay what is equitable.

17. James *v.* Louisville, (Ky. 1897) 40 S. W. 912; Morse *v.* Westport, (Mo. 1895) 33 S. W. 182. And see Skinker *v.* Heman, 148 Mo. 349, 49 S. W. 1026.

What amounts to spoliation.— Where the salable value of property if subdivided into building lots running back a depth of one hundred and ninety-two feet is not less than ten dollars per front foot, a charge for a paving improvement slightly in excess of five dollars per front foot does not amount to spoliation. Duker *v.* Barber Asphalt Paving Co., 74 S. W. 744, 25 Ky. L. Rep. 135. Where a lot abutting on one street three feet, on another seven feet, and on yet another four hundred and seven feet, valued at the highest estimate at two hundred and sixty dollars, was assessed for the paving of the street on which it had the greatest frontage, with seven hundred and twenty-one dollars, the assessment was *prima facie* illegal, as amounting to a virtual confiscation of the lot. Atlanta *v.* Hamlein, 96 Ga. 381, 23 S. E. 408.

Attorney's fees for collection.— The attorney's fees allowed by section 9 of the Barrett Law in foreclosing a street assessment lien do not become a part of the assessment, but pertain to the remedy, and their allowance cannot make the assessment excessive. Pittsburgh, etc., R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454.

18. Barber Asphalt Paving Co. *v.* Watt, 51 La. Ann. 1345, 26 So. 70.

19. Billings *v.* Chicago, 167 Ill. 337, 47 N. E. 731.

20. Dyer *v.* Harrison, 63 Cal. 447; People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677; Helm *v.* Witz, 35 Ind. App. 131, 73 N. E. 846; People *v.* Buffalo, 159 N. Y. 571, 54 N. E. 1094; Savage *v.* Buffalo, 131 N. Y. 568, 30 N. E. 226; McKechnie Brewing Co. *v.* Canandaigua, 15 N. Y. App. Div. 139, 44 N. Y. Suppl. 317 [*affirmed* in 162 N. Y. 631, 57 N. E. 1113]; Masters *v.* Portland, 24 Oreg. 161, 33 Pac. 540.

21. *Colorado.*— Pueblo *v.* Robinson, 12 Colo. 593, 21 Pac. 899.

Connecticut.— Gilbert *v.* New Haven, 39 Conn. 467.

Illinois.— Holdom *v.* Chicago, 169 Ill. 109, 48 N. E. 164; Lake *v.* Decatur, 91 Ill. 596.

Massachusetts.— Fairbanks *v.* Fitchburg, 132 Mass. 42. The fact that a board of street commissioners omitted to include property benefited by a street improvement because of the adoption of a mistaken principle in determining the question of benefit will not invalidate the assessment on property benefited and assessed. Lincoln *v.* Boston, 176 Mass. 210, 57 N. E. 356.

New Jersey.— Hand *v.* Elizabeth, 31 N. J. L. 547.

22. *Connecticut.*— Gilbert *v.* New Haven, 39 Conn. 467.

Indiana.— Balfe *v.* Bell, 40 Ind. 337.

Iowa.— Ottumwa Brick, etc., Co. *v.* Ainley, 109 Iowa 386, 80 N. W. 510.

New Jersey.— Humphreys *v.* Bayonne, 60 N. J. L. 406, 38 Atl. 761; Davis *v.* Newark, 54 N. J. L. 144, 23 Atl. 276.

New York.— Hassan *v.* Rochester, 67 N. Y. 528, holding that where lots are unlawfully omitted, and the whole burden imposed upon other lots, it will not be presumed, in the absence of proof, that the taxes upon the owners of such other lands will not be increased above an amount so trifling as not to justify the interference by the court in their favor.

But see Masters *v.* Portland, 24 Oreg. 161, 33 Pac. 540, holding that a special assessment for a local improvement is void where a portion of the property benefited is arbitrarily and intentionally omitted from the assessment, and that too, although the property assessed is benefited the amount it is assessed.

Persons entitled to object see *infra*, XIII, E, 16, b.

23. *In re* Public Parks Com'rs, 47 Hun (N. Y.) 302.

enforce such obligation will usually constitute a valid objection to an assessment of the entire cost of improving such street upon abutting owners.[24] But in the absence of such obligation, failure to assess the tracks of a railway company will not as a rule invalidate an assessment,[25] especially in the absence of evidence that the railway will be benefited by the improvement,[26] and some cases hold that a property-owner will not be heard to complain of the city's failure to enforce against a railway company a contract obligation to bear the cost of paving the part of a street occupied by its tracks.[27]

m. Apportionment as Affected by Exemptions. Omission to assess property legally exempt does not of course invalidate an assessment.[28] It has been held, however, that where property exempt from assessment lies upon one side of the street improved the property opposite cannot be assessed with the entire cost.[29]

11. Determining Mode and Time of Payment — a. In General. Provision as to the time and manner of payment of assessments, if not made by statute, may be prescribed in the ordinance ordering an improvement.[30] Where by statute taxes and public dues are collectable in coin, a levy of assessment on a gold basis is authorized. [1]

b. Instalments. It is competent for the legislature to provide for collection of assessments in instalments;[32] but in the absence of such provision a city may not prescribe that an assessment be divided into instalments,[33] and it has been held that the city may disregard a statutory provision, requiring assessment instalments to be equal, without invalidating the assessment when injury is not shown.[34]

12. Form and Contents of Assessment — a. In General. Where the mode of making an assessment is prescribed by legislative enactment the assessment must show on its face that it was made in substantial compliance with the prescribed rule;[35]

24. American Hide, etc., Co. *v.* Chicago, 203 Ill. 451, 67 N. E. 979; Chicago *v.* Cummings, 144 Ill. 446, 33 N. E. 34; Philadelphia *v.* Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286. See also McVerry *v.* Boyd, 89 Cal. 304, 26 Pac. 885.

25. Bowditch *v.* New Haven, 40 Conn. 503; Baltimore *v.* Scharf, 54 Md. 499; Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204; State *v.* Ramsey County Dist. Ct., 32 Minn. 181, 19 N. W. 732.

26. Chicago, etc., R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108.

27. Gilmore *v.* Utica, 121 N. Y. 561, 24 N. E. 1009; People *v.* Brooklyn, 65 N. Y. 349; O'Reilly *v.* Kingston, 39 Hun (N. Y.) 285.

28. People *v.* Austin, 47 Cal. 353; Mansfield *v.* Lockport, 24 Misc. (N. Y.) 25, 52 N. Y. Suppl. 571. But see State *v.* Elizabeth, 40 N. J. L. 283, holding that, although some lots may be legally relieved from assessment by reason of their having already satisfied the claim, or otherwise, yet still the commissioners must ascertain the benefits accruing to such parcels, in order to fairly apportion the burdens which the other tracts are to bear.

29. Thornton *v.* Clinton, 148 Mo. 648, 50 S. W. 295, holding that under an act requiring improvement assessments to be made for each block separately, on all lots on either side of the street, in proportion to the front foot, one lot owner cannot be made to bear the burden of another's default or exemption. *Contra*, McGonigle *v.* Allegheny, 44 Pa. St. 118, holding that under the acts of assembly relating to grading and paving in the city of Allegheny, a lot owner on an avenue opposite a public common is liable for the costs of grading and paving the whole of the street in front of his lot, and not the half of its width only.

30. Sumner *v.* Milford, 214 Ill. 388, 73 N. E. 742; Pittsburgh, etc., R. Co. *v.* Taber, (Ind. 1906) 77 N. E. 741; Conde *v.* Schenectady, 164 N. Y. 258, 58 N. E. 130; Brewer *v.* Bowling Green, 7 Ohio Cir. Ct. 489, 4 Ohio Cir. Dec. 694. *Compare* Dodsworth *v.* Cincinnati, 18 Ohio Cir. Ct. 288, 10 Ohio Cir. Dec. 177, holding that the fact that the assessing ordinance does not provide for payment of the assessment in cash, if the abutting owner wishes so to pay, does not make the assessment absolutely null and void. The owner has his right, and may exercise it if he desires.

Necessity of provision for payment in ordinance see *supra*, XIII, B, 8, c, (VIII).

31. Beaudry *v.* Valdez, 32 Cal. 269.

32. See the statutes of the several states. And see Andrews *v.* People, 173 Ill. 123, 50 N. E. 335; English *v.* Danville, 150 Ill. 92, 36 N. E. 994; Lightner *v.* Peoria, 150 Ill. 80, 37 N. E. 69; Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112.

33. Farrell *v.* West Chicago, 162 Ill. 280, 44 N. E. 527; Culver *v.* People, 161 Ill. 89, 43 N. E. 812. See also Springfield Water Com'rs *v.* Conkling, 113 Ill. 340.

34. Glover *v.* People, 194 Ill. 22, 61 N. E. 1047.

35. *Georgia.*— Bacon *v.* Savannah, 91 Ga. 500, 17 S. E. 749.

but a defect in an order appointing commissioners or in the report of such commissioners is sometimes cured by reference therein to the ordinance directing the improvement.[36]

b. Description of Property, and Maps or Diagrams. Any legislative requirement as to the description of property must be complied with to render an assessment valid.[37] In the absence of express requirement as to description, the same will be sufficient if it identifies the property assessed with reasonable certainty,[38] and it has been held that in making an assessment real estate may be described as in a recorded deed,[39] and where the assessment is by frontage, if the frontage of a lot is correctly described, errors in interior lines are immaterial.[40] Slight errors or omissions in the recorded map or diagram of the property assessed, provided the property can be identified, are not fatal;[41] and a mistake in a published ordinance as to the number of a township will not invalidate an assessment, if it is

Illinois.— Ware *v.* Jerseyville, 158 Ill. 234, 41 N. E. 736.

Massachusetts.— *In re* De las Casas, 178 Mass. 213, 59 N. E. 664.

New Jersey.—Ryerson *v.* Passaic, 38 N. J. L. 171; Townsend *v.* Jersey City, 26 N. J. L. 444.

New York.— Stebbins *v.* Kay, 123 N. Y. 31, 25 N. E. 207.

Vermont.— Blanchard *v.* Barre, 77 Vt. 420, 60 Atl. 970.

Wisconsin.— Liebermann *v.* Milwaukee, 89 Wis. 336, 61 N. W. 1112.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1127.

Uncertainty.— A street assessment will not be deemed invalid for uncertainty when, the parts thereof being read together, no uncertainty appears. Dyer *v.* Martinovich, 63 Cal. 353.

36. McChesney *v.* Chicago, 152 Ill. 543, 38 N. E. 767; McChesney *v.* Hyde Park, (Ill. 1891) 28 N. E. 1102, 151 Ill. 634, 37 N. E. 858.

Variance.— That an ordinance and assessment roll differ in their descriptions of the termini of an improvement is immaterial, where the points described are the same in fact. Spokane *v.* Browne, 8 Wash. 317, 36 Pac. 26.

37. Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656, 25 N. E. 962; Cleveland, etc., R. Co. *v.* O'Brien, 24 Ind. App. 547, 57 N. E. 47; Stutsman *v.* Burlington, 127 Iowa 563, 103 N. W. 800.

Curing defect.— An insufficient description of property in an assessment by a city for street improvements against a railway company's right of way was not cured by a sufficient description of such property in the complaint to enforce the lien sought to be created thereby. Cleveland, etc., R. Co. *v.* O'Brien, 24 Ind. App. 547, 57 N. E. 47.

38. *District of Columbia.*— Bensinger *v.* District of Columbia, 6 Mackey 285, holding a description insufficient.

Illinois.— De Koven *v.* Lake View, 129 Ill. 399, 21 N. E. 813.

Indiana.— Richcreek *v.* Moorman, 14 Ind. App. 370, 42 N. E. 943.

Iowa.— Muscatine *v.* Chicago, etc., R. Co., 79 Iowa 645, 44 N. W. 909.

Massachusetts.— Masonic Bldg. Assoc. *v.* Brownell, 164 Mass. 306, 41 N. E. 306.

New York.— Morse *v.* Buffalo, 35 Hun 613. Where the parcels of real estate attempted to be assessed for the repair of a sewer are so imperfectly described that they cannot be sufficiently identified, such imperfection is fatal to the assessment. Webber *v.* Lockport, 43 How. Pr. 368.

United States.— Pennsylvania Co. *v.* Cole, 132 Fed. 668.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1128.

Illustrations.— An assessment of lots 41 and 42 of square 69 as lots 41 and 42, without designating the square, is unintelligible and void. McClellan *v.* District of Columbia, 7 Mackey (D. C.) 94. Where lands assessed were described as parts of lots in an assessor's plat, and it was shown that the surveyor who made such plat was not the county surveyor, as required by law, such description was insufficient. Upton *v.* People, 176 Ill. 632, 52 N. E. 358. The report of commissioners for the alteration of a street, which, after describing the value of part of a lot taken for street purposes, assesses benefits to "the remainder" of the lot, is sufficient. Hays *v.* Vincennes, 82 Ind. 178.

Street railroad.— Where property assessed to a railroad company was described as right of way, right of occupancy, franchise, and interest of the railway in and upon a certain avenue from a certain street to another street the description was sufficient. South Chicago City R. Co. *v.* Chicago, 196 Ill. 490, 63 N. E. 1046. But it was insufficient in the absence of limitation as to the extent of the right of way. Cleveland, etc., R. Co. *v.* O'Brien, 24 Ind. App. 547, 57 N. E. 47.

39. Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

40. Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283.

41. Blanchard *v.* Ladd, 135 Cal. 214, 67 Pac. 131; Labs *v.* Cooper, 107 Cal. 656, 40 Pac. 1042 (holding a description insufficient); Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860.

Location of work.— The diagram need not show on what portion of the street the work was done. McDonald *v.* Conniff, 99 Cal. 386, 34 Pac. 71.

apparent from a consideration of the whole ordinance that the error was a clerical one.[42]

c. Recitals as to Basis of Assessment or Apportionment. It is sometimes held that an assessment must show affirmatively full compliance with the terms of the legislative enactment under which the city proceeds;[43] and hence, that where the cost of an improvement is to be assessed according to benefits it must affirmatively appear both that this mode was followed,[44] and that the assessment does not exceed the benefits conferred.[45] Other cases, however, maintain that in the absence of evidence to the contrary it will be presumed that the proper mode of apportionment was adopted by the city and duly followed.[46]

d. Designation of Owners of Property. An assessment is usually required to be made in the name of the owner of property assessed,[47] and an assessment in the name of a person who does not hold the legal title is void,[48] unless by statute

42. Holland *v.* People, 189 Ill. 348, 59 N. E. 753.

43. Wright *v.* Chicago, 48 Ill. 285; Adams *v.* Bay City, 78 Mich. 211, 44 N. W. 138. See also *supra*, XIII, E, 12, a.

44. Crawford *v.* People, 82 Ill. 557; Nelson *v.* Saginaw, 106 Mich. 659, 64 N. W. 499; Warren *v.* Grand Haven, 30 Mich. 24; Simmons *v.* Passaic, 38 N. J. L. 60; Gleason *v.* Bergen, 33 N. J. L. 72; Bergen *v.* State, 32 N. J. L. 490; Malone *v.* Jersey City, 28 N. J. L. 500; State *v.* Hudson, 27 N. J. L. 214.

45. Rosell *v.* Neptune City, 68 N. J. L. 509, 53 Atl. 199; State *v.* West Hoboken, 51 N. J. L. 267, 17 Atl. 110; Bogart *v.* Passaic, 38 N. J. L. 57; Passaic *v.* State, 37 N. J. L. 538; Van Houten *v.* Paterson, 37 N. J. L. 412.

Construction of report.— Where the report of the commissioners making assessments for benefits is in regular and proper form, the fact that the schedule annexed thereto shows the assessment for pavement and curb in separate columns, with the total carried out opposite, will not invalidate the assessment. Dean *v.* Paterson, 67 N. J. L. 199, 50 Atl. 620.

46. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782; Dann *v.* Woodruff, 51 Conn. 203; *In re* Roberts, 81 N. Y. 62. *Contra*, Stebbins *v.* Kay, 123 N. Y. 31, 25 N. E. 207 [*reversing* 51 Hun 589, 4 N. Y. Suppl. 566].

47. Smith *v.* Davis, 30 Cal. 536; Sedalia *v.* Gallie, 49 Mo. App. 392.

Joint owners.— An assessment for street improvements cannot be made against one only of several joint owners of abutting property, for the benefits accruing to the whole property, but must be either separately against each owner or jointly against all. New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

Where the owner is deceased the assessment may be made to his estate. New Orleans *v.* Ferguson, 28 La. Ann. 240; Moale *v.* Baltimore, 61 Md. 224, so holding where the property was particularly described. *Contra*, Hawthorne *v.* East Portland, 13 Oreg. 271, 10 Pac. 342, holding that where a city charter requires an entry in the lien docket of the name of the owner of property assessed for a street improvement, it is not enough to describe the owner as the estate of a deceased person named.

48. *California.*— Himmelmann *v.* Steiner, 38 Cal. 175; Smith *v.* Cofran, 34 Cal. 310; Blatner *v.* Davis, 32 Cal. 328; Taylor *v.* Donner, 31 Cal. 480, holding that the designation must be of the owner by name or as "unknown."

Illinois.— White *v.* Alton, 149 Ill. 626, 37 N. E. 96.

Michigan.— Lefevre *v.* Detroit, 2 Mich. 586.

Minnesota.— Brennan *v.* St. Paul, 44 Minn. 464, 47 N. W. 55.

New York.— Chapman *v.* Brooklyn, 40 N. Y. 372; Felthousen *v.* Amsterdam, 69 Hun 505, 23 N. Y. Suppl. 424. *Contra, In re* Munn, 165 N. Y. 149, 58 N. E. 881.

Oregon.— Hawthorne *v.* East Portland, 13 Oreg. 271, 10 Pac. 342.

Assessment to the owner or occupant is proper under some statutes. Newell *v.* Wheeler, 48 N. Y. 486; Platt *v.* Stewart, 8 Barb. (N. Y.) 493. If the names of the owners and occupants of property assessed are the same in an assessment as upon the tax lists of previous years, this is all the law requires in respect to the mode of stating the names of owners and occupants. *In re* Tappan, 54 Barb. (N. Y.) 225, 36 How. Pr. 390. An unpaid assessment for street improvements against one who was the owner at the time the proceedings were commenced is *prima facie* valid, and a lien, although such assessments are required to be made "to the owner and occupant," and a change of ownership occurred, but of which the assessors had no notice prior to confirmation of the assessment. Morange *v.* Mix, 44 N. Y. 315.

Unknown owner.— The superintendent of streets, unless he is satisfied beyond all doubt as to the ownership of a lot, may assess it to "unknown owners"; and, when thus made, payment of an assessment on it for improving the street may be demanded publicly on the premises. Himmelmann *v.* Hoadley, 44 Cal. 213.

Non-residents.— Where the charter of a city provides that, when sewerage assessments are made upon any unoccupied lot of a non-resident owner, it shall be made in his name, entered in a list of non-resident owners, etc., an assessment made and entered on the resident owners' list is void as against such

an assessment is declared to be valid notwithstanding defects and irregularities in proceedings,[49] or, under the statute, the assessment may be levied and becomes a lien on the land itself.[50]

e. Designation of Amounts Assessed. The amount assessed upon each lot or parcel of land should appear in the assessment,[51] but failure to prefix the dollar sign to figures is not fatal if their meaning is clear.[52]

13. Assessment Rolls, Reports, and Record — a. In General. The statute usually requires a complete record of assessment proceedings, and any substantial omission or defect in such record invalidates an assessment.[53] But matters which are not essential to the record under the statutes governing the proceedings need not appear.[54] The record is not affected by matter which is mere surplusage.[55]

b. Qualification of Assessors or Commissioners. Where the legislative enactment under which the city proceeds requires that commissioners of assessment shall possess certain qualifications, it must appear on the face of the record that they possessed or were deemed to possess such qualifications.[56]

c. Making and Attestation. In the absence of statute no oath to a local assessment is required of the assessors who make it,[57] but a failure to verify an assessment as required by statute is fatal.[58]

non-resident. Hill *v.* Warrell, 87 Mich. 135, 49 N. W. 479.

Community property.— Street grade assessments made to the husband alone, on community property of himself and wife, are sufficient when the wife is made a party to the action to foreclose the liens. Elma *v.* Carney, 4 Wash. 418, 30 Pac. 732.

49. Chicago, etc., R. Co. *v.* Ottumwa, 112 Iowa 300, 83 N. W. 1074, 51 L. R. A. 763; Hamilton *v.* Fond du Lac, 25 Wis. 490.

50. Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78; Masonic Bldg. Assoc. *v.* Brownell, 164 Mass. 306, 41 N. E. 306 (holding that the fact that the land benefited by improvements was assessed in the name of the former owners will not defeat the assessment where it is not made to appear that any one was prejudiced thereby); Smith *v.* Carney, 127 Mass. 179; Auditor-Gen. *v.* Maier, 95 Mich. 127, 54 N. W. 640.

Where the property is properly described, error in the name of the owner is immaterial. Smith *v.* Des Moines, 106 Iowa 590, 76 N. W. 836.

51. Miservey *v.* People, 208 Ill. 646, 70 N. E. 678; Brown *v.* Joliet, 22 Ill. 123; Balfe *v.* Johnson, 40 Ind. 235.

Statement of proportion to value.—A city charter which provides that the commissioners of estimate and assessment shall in no case assess any real estate more than one half of the value of such property as valued by them does not require the commissioners in a proceeding to acquire title to lands for street purposes to state in their report the specific valuation of the different properties assessed. *In re* New York, 178 N. Y. 421, 70 N. E. 924 [*reversing* 90 N. Y. App. Div. 13, 85 N. Y. Suppl. 650].

52. Walker *v.* District of Columbia, 6 Mackey (D. C.) 352; Chicago *v.* Wheeler, 25 Ill. 478, 79 Am. Dec. 342. But see McClellan *v.* District of Columbia, 7 Mackey (D. C.) 94, holding that where the amount assessed for a street improvement is in figures only, without the dollar mark, or other mark to indicate their value, the assessment is void.

53. Hintrager *v.* Kiene, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910; New Brunswick Rubber Co. *v.* New Brunswick St., etc., Com'rs, 38 N. J. L. 190, 20 Am. Rep. 380; People *v.* Utica, 7 Abb. N. Cas. (N. Y.) 414.

54. San Francisco *v.* Certain Real Estate, 50 Cal. 188; Field *v.* Chicago, 198 Ill. 224, 64 N. E. 840 (holding that an assessment roll need not contain a specification of an improvement district); Ronan *v.* People, 193 Ill. 631, 61 N. E. 1042; Walker *v.* Detroit, 136 Mich. 6, 98 N. W. 744; Risley *v.* St. Louis, 34 Mo. 404 (holding that it is not necessary that the continuances of the assessment proceedings should be shown upon the record). See also Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741.

55. Roberts *v.* Evanston, 218 Ill. 296, 75 N. E. 923 (holding that a plat filed with an assessment roll and petition in paving assessment proceedings is mere surplusage, and the failure of such plat to show the lots of a certain objector does not affect the validity of the judgment of confirmation); Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721 [*reversing* 53 Hun 36, 6 N. Y. Suppl. 48].

56. Vreeland *v.* Bayonne, 54 N. J. L. 488, 24 Atl. 486; Little *v.* Newark, 36 N. J. L. 170; Ashley *v.* Newark, 25 N. J. L. 399.

57. Denise *v.* Fairport, 11 Misc. (N. Y.) 199, 32 N. Y. Suppl. 97.

58. Dougherty *v.* Hitchcock, 35 Cal. 512; Hendrickson *v.* Point Pleasant, 65 N. J. L. 535, 47 Atl. 465; Platt *v.* Stewart, 8 Barb. (N. Y.) 493; Matter of Albany R. Co., 8 N. Y. St. 486. See Washington Park Club *v.* Chicago, 219 Ill. 323, 76 N. E. 383; Hull *v.* West Chicago Park Com'rs, 185 Ill. 150, 57 N. E. 1, holding that under a particular statute certain park commissioners might make and certify the assessment roll to the court. But see Sorchan *v.* Brooklyn, 62 N. Y. 339 [*affirming* 3 Hun 562, 6 Thomps. & C. 316].

d. Return, Filing, and Recording. Where the statute provides for filing the record of assessment proceedings within a specified time, failure to comply therewith will usually invalidate the assessment;[59] but it has been held that the council may make reasonable extension of the time for filing such report.[60]

14. Presumptions as to Validity of Assessment, and Effect as Evidence — a. In General. An assessment is presumed to be valid until the contrary is shown.[61] But it has been stated that in order that an assessment roll be *prima facie* evidence of the regularity of the proceedings it must have on its face such authentication and certification as constitutes it a warrant for the collection of taxes.[62] And a certificate improperly signed is not sufficient under a statute making such certificate *prima facie* evidence of the regularity of an assessment.[63] Where an assessment roll shows that the commissioners were appointed to assess the cost of paving an entire street, it will not be presumed that they excluded

Signature by individual member of board. —Where the board of public works authorized its president to sign, and the clerk to attest, an assessment roll, and the roll was afterward confirmed by the council, and thereby, under a provision of the city charter, made final and conclusive, it was sufficient, although the individual members of the board did not sign it. Duffy *v.* Saginaw, 106 Mich. 335, 64 N. W. 581.

Affidavit required only where property is taken or damaged.— Local Improvement Act, June 14, 1897, § 19 (4 Starr & C. Annot. St. Suppl. (1902) p. 164), requiring an affidavit of the superintendent of assessments as to the making and filing of an assessment roll, stating that affiant examined the records for the names of owners of property against which benefits were assessed, that the names of such owners were correctly shown, and the residence correctly stated, etc., applies only to assessments for improvements which are such as to involve the taking or damaging of property. Roberts *v.* Evanston, 218 Ill. 296, 75 N. E. 923.

59. Himmelman *v.* Danos, 35 Cal. 441; Bacon *v.* Savannah, 91 Ga. 500, 17 S. E. 749 (holding that the report when ascertained to be correct should be entered on the minutes of the council or some other record designated by them); Morrison *v.* Chicago, 142 Ill. 660, 32 N. E. 172; People *v.* Springer, 106 Ill. 542; Sanderson *v.* La Salle, 57 Ill. 441 (holding that a provision of a city ordinance requiring the return of an assessment to the city clerk's office by a certain day is mandatory, and compliance is indispensable to the validity of the assessment); Central R. Co. *v.* Bayonne, 35 N. J. L. 332. But *compare* Bridgeport *v.* Giddings, 43 Conn. 304.

Filing of a special tax list is mandatory under some statutes. See People *v.* Record, 212 Ill. 62, 72 N. E. 7; Craig *v.* People, 193 Ill. 199, 61 N. E. 1072.

60. State *v.* Bayonne, 51 N. J. L. 428, 17 Atl. 971.

61. *California.*— Buckman *v.* Landers, 111 Cal. 347, 43 Pac. 1125, holding that *prima facie* evidence afforded by the assessment itself warrants a finding that the contractor performed the work to the satisfaction of the superintendent of streets, notwithstanding the certificate of the city engineer to the contrary.

Illinois.— Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539 (holding that the presumption arising from the report that omitted property was not benefited is not overcome by the fact that such property abuts on the proposed improvement); Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102 (holding that the fact that a second assessment makes the cost of collection much higher than the first one did, which was abandoned, does not render the second assessment roll incompetent as evidence under the statue); Waggeman *v.* North Peoria, 155 Ill. 545, 40 N. E. 485 (holding that where part of a lot is condemned for a street, it is to be presumed that both the commissioners and the jury, in estimating benefits to the lot, excluded that portion of it taken for the street); Chicago, etc., R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108; Pike *v.* People, 84 Ill. 80. See also Chicago Union Traction Co. *v.* Chicago, 207 Ill. 607, 69 N. E. 803.

Indiana.— Mock *v.* Muncie, (1892) 32 N. E. 718.

Michigan.—Auditor-Gen. *v.* Maier, 95 Mich. 127, 54 N. W. 640.

Montana.— Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410.

Nebraska.— Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866.

New York.— Garratt *v.* Canandaigua, 135 N. Y. 436, 32 N. E. 142; *In re* Brady, 85 N. Y. 268; Delaware, etc., Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 56 N. Y. Suppl. 976 [*affirmed* in 167 N. Y. 589, 60 N. E. 1119]; Matter of Ferris, 10 N. Y. St. 480.

Oregon.— Barkley *v.* Oregon City, 24 Oreg. 515, 33 Pac. 978.

Texas.— Nalle *v.* Austin, 23 Tex. Civ. App. 595, 56 S. W. 954.

Washington.— Seattle *v.* Smith, 8 Wash. 387, 36 Pac. 280.

Wisconsin.— Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1137.

62. Hamilton *v.* Chopard, 9 Wash. 352, 37 Pac. 472.

63. Warren *v.* Ferguson, 108 Cal. 535, 41 Pac. 417; Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337.

from their estimate the cost of paving that part of the street occupied by car tracks and which it was the duty of the car company to pave.[64]

b. Conclusiveness. Where a city is vested with power to determine what property is benefited by a local improvement and to assess the cost upon such property, its decision is conclusive,[65] except in case of fraud or mistake,[66] or where it appears that an illegal method or erroneous rule of law has been followed.[67] But an assessment in a proceeding not authorized by statute is not conclusive;[68] nor is a recital of ownership, in an assessment of property, a judicial determination that title is in the person named.[69]

c. Evidence Impeaching Assessment. The official certificates of commissioners of assessment are entitled to great weight as evidence and are held erroneous only upon convincing proof,[70] and such commissioners are not competent witnesses to impeach their own estimate,[71] nor are their declarations competent evidence for this purpose.[72]

15. Certificate or Special Tax Bill Against Specific Property — a. In General. A special tax bill is not invalidated by failure to literally comply with all the requirements of the ordinance ordering the improvement, when such non-compliance does not affect substantial rights of property-owners.[73]

64. Chicago *v.* Cummings, 144 Ill. 446, 33 N. E. 34; Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667.

65. *Illinois.*— Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747; People *v.* Ryan, 156 Ill. 620, 41 N. E. 180 [*following* Clark *v.* People, 146 Ill. 348, 35 N. E. 60] (holding that where the record of the special assessment proceedings shows on its face that proper notice was given, a property-owner cannot, on application for judgment for a delinquent instalment of such assessment, show that he did not in fact receive notice); Chicago, etc., R. Co. *v.* Joliet, 153 Ill. 649, 39 N. E. 1077; Walters *v.* Lake, 129 Ill. 23, 21 N. E. 556.

Indiana.— Jackson *v.* Smith, 120 Ind. 520, 22 N. E. 431.

Michigan.— Brown *v.* Saginaw, 107 Mich. 643, 65 N. W. 601; Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667.

Minnesota.— State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183 (holding that a finding that an assessment for street paving, made uniformly and at the same amount for each foot of lot frontage, was made according to benefits, will not be overturned by the mere fact that the board making the assessment ignored the fact that the improvement included paving the street intersections on only one half of the work); Carpenter *v.* St. Paul, 23 Minn. 232; Rogers *v.* St. Paul, 22 Minn. 494.

Missouri.— St. Louis *v.* Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477.

New Jersey.— New Jersey Midland R. Co. *v.* Jersey City, 42 N. J. L. 97.

New York.— *In re* Board of St. Opening, etc., 20 N. Y. Suppl. 563.

Pennsylvania.— Wray *v.* Pittsburgh, 46 Pa. St. 365; Lamberton *v.* Franklin, 15 Pa. Dist. 739. But see Carson *v.* Allegheny City, 213 Pa. St. 537, 62 Atl. 1070, holding that where a report of viewers assessing benefits and damages in a road case was appealed from, and the report was prepared in proceedings under Act May 16, 1891 (Pamphl. Laws 75), it cannot be received as *prima facie* evidence of the benefits therein mentioned, as provided by Act April 2, 1903 (Pamphl. Laws 124), for reports of viewers in proceedings under the latter act.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1138.

66. Ft. Wayne *v.* Cody, 43 Ind. 197; Heerman *v.* Municipality No. 2, 15 La. 597; Shimmons *v.* Saginaw, 104 Mich. 511, 62 N. W. 725; State *v.* Ramsey County Dist. Ct., 33 Minn. 164, 22 N. W. 295, 33 Minn. 295, 23 N. W. 222; State *v.* Ramsey County Dist. Ct., 29 Minn. 62, 11 N. W. 133; Rogers *v.* St. Paul, 22 Minn. 494.

67. Auditor-Gen. *v.* O'Neill, 143 Mich. 343, 106 N. W. 895; State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183; State *v.* Ramsey County Dist. Ct., 29 Minn. 62, 11 N. W. 133.

68. Armstrong *v.* St. Paul, 30 Minn. 299, 15 N. W. 174; Mayall *v.* St. Paul, 30 Minn. 294, 15 N. W. 170.

69. Jarvis *v.* Lynch, 91 Hun (N. Y.) 349, 36 N. Y. Suppl. 220.

70. Hegeman *v.* Passaic, 51 N. J. L. 109, 16 Atl. 62 [*reversed* on other grounds in 51 N. J. L. 544, 18 Atl. 776]; Jelliff *v.* Newark, 48 N. J. L. 101, 2 Atl. 627 [*affirmed* in 49 N. J. L. 239, 12 Atl. 770]; State *v.* Rahway, 39 N. J. L. 646 [*affirmed* in 40 N. J. L. 615].

71. Quick *v.* River Forest, 130 Ill. 323, 22 N. E. 816; Hegeman *v.* Passaic, 51 N. J. L. 109, 16 Atl. 62 [*reversed* on other grounds in 51 N. J. L. 544, 18 Atl. 778], holding that members of a city council are not competent as witnesses to contradict their votes in confirmation of the commissioners' report. See also Brethold *v.* Wilmette, 168 Ill. 162, 48 N. E. 38.

72. Quick *v.* River Forest, 130 Ill. 323, 22 N. E. 816.

73. Gillis *v.* Cleveland, 87 Cal. 214, 25 Pac. 351; Springfield *v.* Knott, 49 Mo. App. 612; Eyerman *v.* Blakesley, 13 Mo. App. 407, holding that a tax bill for the propor-

b. Form and Contents. All statutory provisions as to form and contents of certificates of assessment or special tax bills must be substantially complied with to render the same valid;[74] but as a rule it is not necessary that special tax bills shall show that every step necessary to their validity has been taken,[75] nor need they expressly show the computation upon which the tax was apportioned;[76] and it has been held that failure to state the name of the owner of the property, as required by statute, does not render the same invalid.[77]

c. Execution and Issuance. All legislative requirements as to the execution of special tax bills must be complied with.[78]

d. Amendment and Issue of New Bills. A special tax bill may usually be amended within the period of limitations whether it be void, voidable, or merely imperfect as originally issued.[79]

e. Conclusiveness and Effect as Evidence. A special tax bill, regular on its face, is *prima facie* evidence that the work charged for was performed,[80] and that

tionate cost which the lot ought to bear is not void, because the work was not let in one entire contract. *Compare* Heman Constr. Co. *v.* Loevy, 179 Mo. 455, 78 S. W. 613.

74. Jeffris *v.* Cash, 207 Ill. 405, 69 N. E. 904; St. Joseph *v.* Forsee, 110 Mo. App. 237, 84 S. W. 1138; Adkins *v.* Quest, 79 Mo. App. 36; Galbreath *v.* Newton, 30 Mo. App. 380; Carroll *v.* Eaton, 2 Mo. App. 479; Heman Constr. Co. *v.* Loevy, 64 Mo. App. 430. See Thornton *v.* Clinton, 148 Mo. 648, 50 S. W. 295. *Compare* Moody *v.* Sewerage, etc., Bd., 117 La. 360, 41 So. 649.

75. Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683.

76. St. Joseph *v.* Farrell, 106 Mo. 437, 17 S. W. 497; Creamer *v.* Allen, 3 Mo. App. 545; Haegele *v.* Mallinckrodt, 3 Mo. App. 329.

77. St. Joseph *v.* Forsee, 110 Mo. App. 127, 84 S. W. 98; Gallaher *v.* Bartlett, 64 Mo. App. 258; Galbreath *v.* Newton, 30 Mo. App. 380.

78. Brady *v.* St. Joseph, 84 Mo. App. 399; Stifel *v.* Southern Cooperage Co., 38 Mo. App. 340; Heman *v.* McLaren, 28 Mo. App. 654; Eyerman *v.* Payne, 28 Mo. App. 72. But see Field *v.* Barber Asphalt Paving Co., 117 Fed. 925, holding that the failure of the city clerk of a city to register tax bills for special assessments, as required by the Missouri statutes, is not a sufficient defense against the bills, the statute being directory merely.

Computation of amount.— Where, on the completion of a contract for street improvement, the clerk of the president of the board of public improvements figured the tax bill to be levied against each lot, and after making out the bill handed the same to the president, who signed it, such signing made the bill the act of the president, within an ordinance requiring the latter to compute the cost of the improvement, and levy and assess the same as a special tax. Heman Constr. Co. *v.* Loevy, 179 Mo. 455, 78 S. W. 613.

Issuance of new bills.— Where special tax bills to pay for a street improvement made under a valid ordinance have been issued, but are not enforceable because the assessment district was not defined and established according to the charter, the holder is entitled to new special tax bills, although the ordinance providing for the improvement undertook to define the assessment district, and in this respect only violated the charter. State *v.* St. Louis, 183 Mo. 230, 81 S. W. 1104. Where a city charter provided that a tax bill for a public improvement should be issued within twenty days from the completion and acceptance of the work, and provided that a failure to issue within such time should not affect the validity thereof, and the charter also required the board of public works to compute the cost of a public improvement, and apportion the same, and a tax bill was issued in due time after the completion of an improvement, and protracted litigation followed, in which it was decided that the tax bill was void because the board had not apportioned the cost, and the board subsequently apportioned the cost and issued a second tax bill, the fact that it was not issued until nearly five years after the completion of the improvement was no defense. Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56.

79. Stadler *v.* Roth, 59 Mo. 400; Kiley *v.* Oppenheimer, 55 Mo. 374; Vieths *v.* Planet, etc., Co., 64 Mo. App. 207; Riley *v.* Stewart, 50 Mo. App. 594; Galbreath *v.* Newton, 45 Mo. App. 312; Weber *v.* Schergens, 28 Mo. App. 587.

Amendment after expiration of term of office.— The officer who issued a tax bill may correct it even after the expiration of his term of office. Morley *v.* Weakley, 86 Mo. 451; Stadler *v.* Roth, 59 Mo. 400; Kiley *v.* Oppenheimer, 55 Mo. 374.

80. Nevada *v.* Morris, 43 Mo. App. 586; Adkins *v.* Chicago, etc., R. Co., 36 Mo. App. 652.

Sufficiency of bill.— The tax bill, which the statute makes *prima facie* evidence in an action to recover a special tax, must be definite, and show on its face that it was issued under some competent authority and for some specific purpose. Linneus *v.* Locke, 25 Mo. App. 407. A special tax bill under the charter of a city purporting to be for the repair of a sidewalk is not *prima facie*

the property charged was benefited,[81] and is liable for the tax;[82] and the court will presume in the absence of evidence to the contrary that all prerequisites to the issuance of such tax bill have been complied with,[83] although defendants, while having the burden of proof, may show the absence of material steps.[84] But a tax bill will not establish a *prima facie* case against owners whose names do not appear therein,[85] and where it purports on its face to have been issued for repairs on a street it will not establish a *prima facie* liability for reconstruction of the street.[86]

16. Defects and Irregularities, and Invalid Assessments — a. In General. An assessment will not as a rule be set aside for minor irregularities that in no way affect substantial rights of property-owners;[87] but on the other hand a statutory provision that assessments shall not be set aside for irregularities in their levy does not prevent property owners from asserting against an assessment any objection fatal to the proceedings.[88]

b. Who May Question Validity of Assessment. The validity of an assessment may be questioned only by persons whose rights are prejudiced thereby.[89] Hence

evidence of the validity of the charge, when the work for which it was issued was the reconstruction of the sidewalk. Farrell *v.* Rammelkamp, 64 Mo. App. 425.

81. Heman *v.* Wolff, 33 Mo. App. 200.

82. Tuttle *v.* Polk, 92 Iowa 433, 60 N. W. 733; Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683; St. Louis *v.* Armstrong, 38 Mo. 29; St. Louis *v.* Coons, 37 Mo. 44; Nevada *v.* Morris, 43 Mo. App. 586; Adkins *v.* Chicago, etc., R. Co., 36 Mo. App. 652; Heman *v.* Payne, 27 Mo. App. 481; Waud *v.* Green, 7 Mo. App. 82; Taylor *v.* Boyd, 63 Tex. 533.

83. Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848; Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683; Springfield *v.* Baker, 56 Mo. App. 637; Texas Transp. Co. *v.* Boyd, 67 Tex. 153, 2 S. W. 364.

84. Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

85. Heman Constr. Co. *v.* Loevy, 64 Mo. App. 430; Farrell *v.* Rammelkamp, 64 Mo. App. 425.

86. Farrell *v.* Rammelkamp, 64 Mo. App. 425.

87. *California.*— Bates *v.* Adamson, 2 Cal. App. 574, 84 Pac. 51.

Illinois.— Brethold *v.* Wilmette, 168 Ill. 162, 48 N. E. 38.

Indiana.— Pittsburgh, etc., R. Co. *v.* Taber, (1906) 77 N. E. 741.

Kansas.— See Parker *v.* Chelliss, 9 Kan. 155.

Massachusetts.— Keith *v.* Boston, 120 Mass. 108, holding that an overestimate of the number of square feet in the estate of a person benefited by the construction of a sewer does not make an assessment by the city thereon invalid, if the estate was assessed no more than its just proportion of the expense of constructing the sewer. See also Cheney *v.* Beverly, 188 Mass. 81, 74 N. E. 306.

New York.— Tifft *v.* Buffalo, 8 N. Y. St. 325; Rich's Case, 12 Abb. Pr. 118.

Fraud.— Under an act permitting assessments for municipal corporations to be set aside for fraud, it must be actual fraud intended by the parties, and not omissions or errors from which fraud might be inferred. Rich's Case, 12 Abb. Pr. (N. Y.) 118.

Defect in notice.— Where an assessment has been set aside and a new one ordered, complaint cannot be made of want of notice of the original assessment. Townsend *v.* Manistee, 88 Mich. 408, 50 N. W. 321.

88. Morrison *v.* St. Paul, 5 Minn. 108; Weller *v.* St. Paul, 5 Minn. 95; *In re* Astor, 53 N. Y. 617. *Compare* Matter of Burmeister, 56 How. Pr. (N. Y.) 416.

89. *Illinois.*— Birket *v.* Peoria, 185 Ill. 369, 57 N. E. 30, holding that a person could not object to a special assessment for street improvements on the ground that a tenant in common was not notified as required by statute, since he might pay his proportion of the assessment, and relieve his individual interest.

Kentucky.— Barber Asphalt Paving Co. *v.* Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227, holding that, unless it appears that under a different method of apportioning the cost of a street improvement the party complaining will be required to pay less, the apportionment made will not be disturbed.

Montana.— Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410, holding that one cannot set aside an assessment against him to pay for opening an alley on the ground that the land does not belong to the city, when he claims no right or interest in it.

New Jersey.— Hunt *v.* Rahway, 39 N. J. L. 646 [*affirmed* in 40 N. J. L. 615] (holding that one prosecuting a writ of certiorari to review a street assessment, who does not show any injury to himself, cannot complain that an injustice has been done to the city in making the assessment for such improvement); Parker *v.* New Brunswick, 30 N. J. L. 395 [*affirmed* in 32 N. J. L. 548]; Vanderbeck *v.* Jersey City, 29 N. J. L. 441.

New York.— *In re* Pennie, 108 N. Y. 364, 15 N. E. 611 (holding that where a person had purchased property assessed for public improvements, covenanting as part

the fact that part of the property assessed for an improvement is not benefited thereby cannot be urged against an assessment upon property benefited;[90] a landowner assessed for an improvement cannot object that other property was insufficiently assessed,[91] unless such irregularity increased his assessment,[92] nor may a lot owner object to any error in assessment which inures to his benefit.[93] But where an excessive assessment has been made, private abutting owners are not precluded from objecting to the same by the fact that only the fair cost of the work was assessed against their property and the remainder assessed on abutting public property.[94] A taxpayer cannot object to a local assessment in favor of a contractor on the ground of fraud on the part of municipal officers letting the contract, where the contract was not let in violation of the city charter and the contractor did not participate in the fraud.[95]

e. Estoppel to Object to Assessment — (i) *In General.* If the city acts within its powers,[96] and the assessment is not absolutely void,[97] property-owners will be estopped to object to an assessment if by their acts or omissions they have

of the consideration, to pay the assessment, which had not then been made, he is presumptively injured by an illegal assessment, his covenant imposing on him no liability beyond the payment of legal assessments, and can sue to vacate such assessment); *In re* Mutual L. Ins. Co., 89 N. Y. 530 (holding that an assessment will not be vacated because the commissioner, without authority, changed slightly a small section of a street; the petitioner's assessment not being increased thereby); *In re* Gantz, 85 N. Y. 536; *In re* Ingraham, 64 N. Y. 310; *In re* Colling, 45 Hun 391 [*affirmed* in 108 N. Y. 666, 15 N. E. 894]; People *v.* Brooklyn, 3 Hun 596 [*affirmed* in 60 N. Y. 642]; Pooley *v.* Buffalo, 15 Misc. 240, 36 N. Y. Suppl. 796.

Pennsylvania.— Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916; *In re* Meade Ave., 35 Pittsb. Leg. J. N. S. 38, holding that nonabutting property-owners cannot contest the validity of ordinances for street improvements for lack of proper petitions.

Party aggrieved.— One who at the time of laying an assessment was legally liable to pay it, and has so continued, is the "party aggrieved" within the meaning of the statute of 1856 (Laws (1856), § 1, c. 338), and as such authorized to institute proceedings to vacate the assessment. *In re* Burke, 62 N. Y. 224. A former owner of premises assessed, who is bound to indemnify his grantee against the assessment or to remove it as a cloud on title is a party legally aggrieved, and is entitled to apply for relief as prescribed by the act. *In re* Phillips, 60 N. Y. 16.

Failure to enforce assessment against others.—A property-owner's obligation to pay a tax for street improvements is not affected by the tax-collector's omission to enforce collection against other property. Phelan *v.* San Francisco, 120 Cal. 1, 52 Pac. 38.

90. Johnson *v.* Duer, 115 Mo. 366, 21 S. W. 800.

91. *In re* Piper, 32 Cal. 530; Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112.

92. McHenry *v.* Selvage, 99 Ky. 232, 35 S. W. 645, 18 Ky. L. Rep. 473; Righter *v.* Newark, 45 N. J. L. 104.

93. Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860; Illinois Cent. R. Co. *v.* Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613; Mock *v.* Muncie, 9 Ind. App. 536, 37 N. E. 281; Forry *v.* Ridge, 56 Mo. App. 615.

94. *In re* Livingston, 121 N. Y. 94, 24 N. E. 290.

95. Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279.

96. *California.*— Union Paving, etc., Co. *v.* McGovern, 127 Cal. 638, 60 Pac. 169.

Georgia.— Holliday *v.* Atlanta, 96 Ga. 377, 23 S. E. 406.

New Jersey.— Schumm *v.* Seymour, 24 N. J. Eq. 143.

Ohio.— Birdseye *v.* Clyde, 61 Ohio St. 27, 55 N. E. 169.

United States.— Cowley *v.* Spokane, 99 Fed. 840.

Unconstitutional statute.—Although an act authorizing street improvements is unconstitutional, lot owners who have caused a street to be improved under it and bonds of the city to be negotiated to pay for the improvement are estopped to deny the constitutionality of the act. Columbus *v.* Sohl, 44 Ohio St. 479, 8 N. E. 299; State *v.* Mitchell, 31 Ohio St. 592. See also Cluggish *v.* Koons, 15 Ind. App. 599, 43 N. E. 158. But mere acquiescence will not raise an estoppel. Perkinson *v.* Hoolan, 182 Mo. 189, 81 S. W. 407.

97. *California.*— Dougherty *v.* Fair, (1886) 10 Pac. 674; Dougherty *v.* Coffin, 69 Cal. 454, 10 Pac. 672.

Iowa.— Carter *v.* Cemansky, 126 Iowa 506, 102 N. W. 438, holding that where a municipal assessment was void, the payment of an instalment thereof by one under whom plaintiff claimed title would not create an estoppel against plaintiff.

Kansas.— Keys *v.* Neodesha, 64 Kan. 681, 68 Pac. 625.

Nebraska.— Morse *v.* Omaha, 67 Nebr. 426, 93 N. W. 734; Hall *v.* Moore, 3 Nebr. (Unoff.) 574, 92 N. W. 294.

New York.— Miller *v.* Amsterdam, 149 N. Y. 288, 43 N. E. 632.

acquiesced in the levy of the same;[98] but where the council over a statutory protest contracts for an improvement, the protesting property-owners are not estopped even as to the contractor to contest the assessment;[99] and payment by a portion of the persons assessed for an improvement does not prevent the maintenance of an action by the others to vacate the assessment.[1]

(II) *Petitioning For the Improvement.* A property-owner who joins in a petition for an improvement is usually regarded as estopped to object to the assessment on the ground of mere irregularity in proceedings,[2] but is not estopped

United States.— Pennsylvania Co. *v.* Cole, 132 Fed. 668.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1147.

98. *Arkansas.*— Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702.

California.— O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Harney *v.* Benson, 113 Cal. 314, 45 Pac. 687 (holding that a property-owner who does not protest and follow the special remedies given by statute cannot be relieved by the courts of the tax levied therefor); McSherry *v.* Wood, 102 Cal. 647, 36 Pac. 1010; Callender *v.* Patterson, 66 Cal. 356, 5 Pac. 610 (holding that property-owners who have taken a contract to improve the street adjoining their land, and who have assigned their interest in the assessment for benefits, are estopped to deny the validity of the assessment).

Georgia.— Collier *v.* Morrow, 90 Ga. 148, 15 S. E. 768.

Illinois.—Markley *v.* Chicago, 190 Ill. 276, 60 N. E. 512.

Kentucky.—Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917.

Louisiana.— Bacas *v.* Adler, 112 La. 806, 36 So. 739.

Missouri.— Louisiana *v.* McAllister, 104 Mo. App. 152, 78 S. W. 314.

New Jersey.— Brewer *v.* Elizabeth, 66 N. J. L. 547, 49 Atl. 480, holding that parties wishing to avail themselves of irregularities in public improvements must act promptly, and not wait until after contracts are awarded and the money expended.

New York.— Lewis *v.* Utica, 67 Barb. 456.

Ohio.— Corry *v.* Gaynor, 22 Ohio St. 584; Waldschmidt *v.* Bowland, 27 Ohio Cir. Ct. 782, holding that a purchaser of property taking a deed by which he assumes the payment of all assessments for a certain street improvement is estopped thereby to challenge the assessment as not benefiting the property.

Oregon.— Wingate *v.* Astoria, 39 Oreg. 603, 65 Pac. 982, 87 Am. St. Rep. 673, 54 L. R. A. 636.

Pennsylvania.— Pepper *v.* Philadelphia, 114 Pa. St. 96, 6 Atl. 899; McKnight *v.* Pittsburgh, 91 Pa. St. 273; Bidwell *v.* Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662; Brown *v.* Philadelphia, 3 Pa. Cas. 45, 6 Atl. 904; Montgomery *v.* Pittsburgh, 34 Pittsb. Leg. J. N. S. 397 [*affirmed* in 29 Pa. Super. Ct. 312].

Washington.— Ferry *v.* Tacoma, 34 Wash. 652, 76 Pac. 277; Barlow *v.* Tacoma, 12 Wash. 32, 40 Pac. 382.

Wisconsin.— Pabst Brewing Co. *v.* Milwaukee, 126 Wis. 110, 105 N. W. 563; Beaser *v.* Barber Asphalt Paving Co., 120 Wis. 599, 98 N. W. 525.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1147.

Recital in deed.— Where property was purchased before the assessing ordinance was passed, a provision in a deed assuming all assessments, without specifying any particular assessment for the improvement or any particular street, did not estop the grantee from challenging a particular assessment. Waldschmidt *v.* Bowland, 27 Ohio Cir. Ct. 782. The purchaser of abutting property, on which an assessment is imposed while the work is in progress, by a deed reciting that it was subject to whatever assessments should be made, is not estopped from disputing the validity of the assessment by such clause in his deed, as he did not assume to pay an illegal assessment. *In re* Pennie, 45 Hun (N. Y.) 391 [*affirmed* in 108 N. Y. 364, 15 N. E. 611].

Acts of predecessor in title.— The owner of a lot is estopped, in an action to enjoin the sale thereof for the amount due on a bond for street improvements, by the conduct of her predecessor in title, which, if allowed to be questioned, would work a fraud upon the owner of the bond. Cummings *v.* Kearney, 141 Cal. 156, 74 Pac. 759. The right of one claiming under a tax deed to object to prior special assessments on the property is not affected by the fact that owners prior to the tax-sale paid part of the assessments without objection. Fitzgerald *v.* Sioux City, 125 Iowa 396, 101 N. W. 268.

99. Forbis *v.* Bradbury, 58 Mo. App. 506.

1. Kennedy *v.* Troy, 14 Hun (N. Y.) 308 [*affirmed* in 64 N. Y. 638].

2. *Arkansas.*— Watkins *v.* Griffith, 59 Ark. 344, 27 S. W. 234.

Iowa.—Burlington *v.* Gilbert, 31 Iowa 356, 7 Am. Rep. 143.

New York.— People *v.* Clarke, 110 N. Y. App. Div. 28, 96 N. Y. Suppl. 1051.

Ohio.— Cincinnati *v.* Manss, 54 Ohio St. 257, 43 N. E. 687.

Pennsylvania.— *In re* Broad St., 165 Pa. St. 475, 30 Atl. 1007; Ferson's Appeal, 96 Pa. St. 140.

Washington.— Tacoma Land Co. *v.* Tacoma, 15 Wash. 133, 45 Pac. 733; Wingate *v.* Tacoma, 13 Wash. 603, 43 Pac. 874.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1148.

to deny the validity of an assessment on the ground that the statute was not substantially complied with.[3] And it has been held that one who petitions a council to pave a street and assess the cost according to the foot front rule is estopped from denying the power he induced the council to exercise.[4]

(III) *ACQUIESCENCE IN WORK.* Unless the city has so exceeded its power as to render its action absolutely void,[5] a property-owner who stands by and permits an improvement to be made cannot object to an assessment to pay for the same on the ground of irregularity in the proceedings.[6] And in some cases it is stated more broadly that he cannot deny the authority of such city to make the improvement.[7] Where the person is ignorant of the objection he is not estopped,[8] as where he does not know that it is intended to assess the cost of the work on his property.[9] So when notice is a statutory prerequisite to the creation of a lien for an assessment it is held that where notice is not given as required by statute

3. *Arkansas.*— Watkins *v.* Griffith, 59 Ark. 344, 27 S. W. 234.

Dakota.—McLauren *v.* Grand Forks, 6 Dak. 397, 43 N. W. 710.

Ohio.— Tone *v.* Columbus, 39 Ohio St. 281. 48 Am. Rep. 438; Borger *v.* Columbus, 27 Ohio Cir. Ct. 812. See also Hildebrand *v.* Toledo, 27 Ohio Cir. Ct. 427.

Pennsylvania.— Williamsport *v.* Hughes, 10 Pa. Dist. 607.

Texas.—Alford *v.* Dallas, (Civ. App. 1896) 35 S. W. 816; Ardrey *v.* Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726; Dallas *v.* Atkins, (Civ. App. 1895) 32 S. W. 780; Dallas *v.* Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128.

Washington.— Howell *v.* Tacoma, 3 Wash. 711, 29 Pac. 447, 28 Am. St. Rep. 83.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1148.

4. Murphy *v.* Sims, 27 Ohio Cir. Ct. 825; Harrisburg *v.* Baptist, 156 Pa. St. 526, 27 Atl. 8; Pepper *v.* Philadelphia, 114 Pa. St. 96, 6 Atl. 899; Bidwell *v.* Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662; Ebensburg Borough *v.* Little, 28 Pa. Super. Ct. 469; Williamsport *v.* Hughes, 10 Pa. Dist. 607.

5. *Colorado.*— Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825.

Iowa.— Coggeshall *v.* Des Moines, 78 Iowa 235, 41 N. W. 617, 42 N. W. 650; Starr *v.* Burlington, 45 Iowa 87; Tallant *v.* Burlington, 39 Iowa 543.

Missouri.— Perkinson *v.* Hoolan, 182 Mo. 189, 81 S. W. 407; Collier *v.* Western Paving, etc., Co., 180 Mo. 362, 79 S. W. 947.

Texas.— Corsicana *v.* Kerr, 89 Tex. 461, 35 S. W. 794.

Washington.— New Whatcom *v.* Bellingham Bay Imp. Co., 10 Wash. 378, 38 Pac. 1024.

Wisconsin.— Canfield *v.* Smith, 34 Wis. 381.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1149.

6. *California.*— Cummings *v.* Kearney, 141 Cal. 156, 74 Pac. 759.

Illinois.— Jenks *v.* Chicago, 48 Ill. 296.

Indiana.—Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014; Clements *v.* Lee, 114 Ind. 397, 16 N. E. 799.

Iowa.—Arnold *v.* Ft. Dodge, 111 Iowa 152, 82 N. W. 495; Muscatine *v.* Chicago, etc., R. Co., 79 Iowa 645, 44 N. W. 909.

Kansas.— Ritchie *v.* South Topeka, 38 Kan. 368, 16 Pac. 332; Sleeper *v.* Bullen, 6 Kan. 300.

Kentucky.— Barber Asphalt Paving Co. *v.* Garr, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227; Mudge *v.* Walker, 90 S. W. 1046, 28 Ky. L. Rep. 996.

Michigan.— Nowlen *v.* Benton Harbor, 134 Mich. 401, 96 N. W. 450; Tuller *v.* Detroit, 126 Mich. 605, 85 N. W. 1080; Fitzhugh *v.* Bay City, 109 Mich. 581, 67 N. W. 904; Lundbom *v.* Manistee, 93 Mich. 170, 53 N. W. 161.

Missouri.— Johnson *v.* Duer, 115 Mo. 366, 21 S. W. 800.

New Jersey.— Lord *v.* Bayonne, 65 N. J. L. 127, 46 Atl. 701 [*affirmed* in 65 N. J. L. 686, 48 Atl. 1118]; State *v.* Jersey City, 52 N. J. L. 490, 19 Atl. 1096; Jelliff *v.* Newark, 49 N. J. L. 239, 12 Atl. 770 [*affirming* 48 N. J. L. 101, 2 Atl. 627]; Dusenbury *v.* Newark, 25 N. J. Eq. 295.

Ohio.— Emmert *v.* Elyria, 27 Ohio Cir. Ct. 353.

Oregon.— Wilson *v.* Salem, 24 Oreg. 504, 34 Pac. 691.

Acts of predecessor in title may estop owner. Cummings *v.* Kearney, 141 Cal. 156, 74 Pac. 759.

7. Taylor *v.* Patton, 160 Ind. 4, 66 N. E. 91; Powers *v.* New Haven, 120 Ind. 185, 21 N. E. 1083 [*citing* Jenkins *v.* Stetler, 118 Ind. 275, 20 N. E. 788; Ross *v.* Stackhouse, 114 Ind. 200, 16 N. E. 501; Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; Johnson *v.* Allen, 62 Ind. 57; Evansville *v.* Pfister, 34 Ind. 36, 7 Am. Rep. 214]; People *v.* Many, 89 Hun (N. Y.) 138, 35 N. Y. Suppl. 78; People *v.* Rochester, 21 Barb. (N. Y.) 656.

The owner of land through which a street was illegally opened is estopped to urge the invalidity in defense to an action for an assessment for the improvement thereof, where he was served with the required notice of the improvement, and made no objection thereto. Busenbark *v.* Clements, 22 Ind. App. 557, 53 N. E. 665.

8. Steckert *v.* East Saginaw, 22 Mich. 104; Galbreath *v.* Newton, 30 Mo. App. 380; Keane *v.* Klausman, 21 Mo. App. 485; Perkinson *v.* McGrath, 9 Mo. App. 26; Teegarden *v.* Davis, 36 Ohio St. 601.

9. Hager *v.* Burlington, 42 Iowa 661.

the owner is not estopped by the fact that he has witnessed the progress of the work.[10]

(IV) *Accepting Benefit of Improvement.* Unless the action of the city is absolutely void,[11] acceptance by a property-owner of the benefits of an improvement will usually estop him from objecting to an assessment to pay for the same.[12]

d. Waiver of Objection to Assessment — (I) *In General.* Objections to an assessment are deemed to be waived if not presented at the time and in the manner prescribed by law,[13] unless the assessment is absolutely void.[14] A property-owner who appears at a hearing of objections waives any defect in the notice of

10. Fox *v.* Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776, 16 Ky. L. Rep. 455.

11. Sheehan *v.* Fitchburg, 131 Mass. 523; Harmon *v.* Omaha, 53 Nebr. 164, 73 N. W. 671.

12. Ross *v.* Stackhouse, 114 Ind. 200, 16 N. E. 501; Edwards, etc., Constr. Co. *v.* Jasper County, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. Rep. 301; Byram *v.* Detroit, 50 Mich. 56; 12 N. W. 912, 14 N. W. 698; Gibson *v.* Owens, 115 Mo. 258, 21 S. W. 1107. But see Crawfordsville Music Hall Assoc. *v.* Clements, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752; New Brunswick Rubber Co. *v.* New Brunswick St., etc., Com'rs, 38 N. J. L. 190, 20 Am. Rep. 380; Watertown *v.* Fairbanks, 65 N. Y. 588, both holding that a person is not estopped from questioning the legality of an assessment for building a sewer by connecting his lands assessed with his sewer.

13. *California.*—Haughawout *v.* Raymond, 148 Cal. 311, 83 Pac. 53; Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661; Warren *v.* Russell, 129 Cal. 381, 62 Pac. 75; McSherry *v.* Wood, 102 Cal. 647, 36 Pac. 1010; Fanning *v.* Leviston, 93 Cal. 186, 28 Pac. 943 (holding that a person who fails to appeal to the board of supervisors from a street assessment waives an objection that the assessment included a charge for work not authorized); Dyer *v.* Parrott, 60 Cal. 551; Taylor *v.* Palmer, 31 Cal. 240; Bates *v.* Adamson, 2 Cal. App. 574, 84 Pac. 51.

Colorado.— Spalding *v.* Denver, 33 Colo. 172, 80 Pac. 126; Denver *v.* Dumas, 33 Colo. 94, 80 Pac. 114.

Illinois.— Betts *v.* Naperville, 214 Ill. 380, 73 N. E. 752; Kirchman *v.* People, 159 Ill. 265, 42 N. E. 884; White *v.* Alton, 149 Ill. 626, 37 N. E. 96 (holding that filing objections to a special assessment on the merits is a waiver of defects in the assessment roll in stating the names of the objectors); Le Moyne *v.* West Chicago Park Com'rs, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48; Kedzie *v.* West Chicago Park Com'rs, 114 Ill. 280, 2 N. E. 182; Ottawa *v.* Chicago, etc., R. Co., 25 Ill. 43 (holding that where a party, having an opportunity to object before the city council to an assessment, fails to make the objection, he will in equity be held to have waived it).

Iowa.— Higman *v.* Sioux City, 129 Iowa 291, 105 N. W. 524; Marshalltown Light, etc., R. Co. *v.* Marshalltown, 127 Iowa 637, 103 N. W. 1005; Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103; Tuttle *v.* Polk, 92 Iowa 433, 60 N. W. 733.

Kansas.— Leavenworth *v.* Jones, 69 Kan. 857, 77 Pac. 273; Kansas City *v.* Gray, 62 Kan. 198, 61 Pac. 746.

Michigan.— Stewart *v.* Detroit, 137 Mich. 381, 100 N. W. 613; Auditor-Gen. *v.* Maier, 95 Mich. 127, 54 N. W. 640; Louden *v.* East Saginaw, 41 Mich. 18, 2 N. W. 182.

Minnesota.— State *v.* Norton, 63 Minn. 497, 65 N. W. 935; McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769; State *v.* Ramsey County Dist. Ct., 40 Minn. 5, 41 N. W. 235.

Missouri.— St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298.

Nebraska.— Morse *v.* Omaha, 67 Nebr. 426, 93 N. W. 734.

New Jersey.— Wilkinson *v.* Trenton, 35 N. J. L. 485 [*affirmed* in 36 N. J. L. 499].

New York.— Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841.

Pennsylvania.—*In re* Meade Ave., 35 Pittsb. Leg. J. N. S. 38. See Lamberton *v.* Franklin, 15 Pa. Dist. 739.

Wisconsin.— Pabst Brewing Co. *v.* Milwaukee, 126 Wis. 110, 105 N. W. 563, holding that one having paid taxes without protest cannot insist on irregularities in making the assessment.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1151.

Formal waiver.— A landowner who executed a written waiver of objections to the legality or regularity of an assessment for street improvements, in order to secure the right to pay the assessment in instalments, cannot assert that the council had no authority to order the improvements. Richcreek *v.* Moorman, 14 Ind. App. 370, 42 N. E. 943.

Effect of notice not required by statute.— A notice published by a city requiring all persons to appear and make any objections they may have to a proposed assessment for a sewer, not being required by statute, has no binding effect, so that one not then appearing may afterward object to the assessment when made. Monk *v.* Ballard, 42 Wash. 35, 84 Pac. 397.

Waiver by contractor.— The contractor is not a party to the assessment proceeding in the sense that not having made objection to it while in progress he may not urge its invalidity when tendered the bonds. State *v.* Seattle, 42 Wash. 370, 85 Pac. 11.

14. Partridge *v.* Lucas, 99 Cal. 519, 33 Pac. 1082; Manning *v.* Den. 90 Cal. 610, 27 Pac. 435; Breed *v.* Allegheny, 85 Pa. St. 214.

such hearing.[15] But appearance for the purpose of objecting to the defect in question is not a waiver.[16] An act relied upon as a waiver must, however, be done with knowledge of the facts and with intent to forego insisting on the right waived.[17] Property-owners who acquiesce in a partial assessment cannot contest the final assessment on grounds available when the first assessment was made.[18]

(II) *Erroneous Items of Expense.* Where an assessment shows on its face the inclusion of items of expense not authorized by statute, a property-owner may, without first appealing to the council, resist enforcement of the same;[19] but if the item of expense is such as might have been included in the contract without vitiating it, then failure to make objection to the council will be a waiver of the right to contest enforcement of the assessment.[20]

17. Objections and Exceptions to Assessment and Hearing Thereon. By statute provision is usually made for the hearing of objections and exceptions to the assessment.[21] Under the particular statute, however, this remedy may be by appeal rather than by exception.[22] Failure to afford an opportunity to object as required by statute will invalidate the assessment,[23] and conditions, not found in the statute, as to the mode of presenting objections may not be imposed by the city.[24] If the statutes prescribe the form in which objections shall be filed, such provision must be complied with,[25] and objections should always be sufficiently specific to apprise the city of the ground upon which they are made.[26]

18. Amendment or Correction — a. Amendments. Errors or irregularities in an estimate or assessment for an improvement may usually be corrected by amendment.[27]

b. Interlineations. An interlineation made in an assessment roll long after the same was completed and filed will not be counted a valid amendment.[28]

15. Lake Erie, etc., R. Co. *v.* Bowker, 9 Ind. App. 428, 36 N. E. 864; State *v.* Ramsey County Dist. Ct., 51 Minn. 401, 53 N. W. 714.

16. State *v.* Bayonne, 51 N. J. L. 428, 17 Atl. 971.

17. Pabst Brewing Co. *v.* Milwaukee, 126 Wis. 110, 105 N. W. 563.

18. State *v.* St. Louis County Dist. Ct., 61 Minn. 542, 64 N. W. 190.

19. Kenny *v.* Kelly, 113 Cal. 364, 45 Pac. 699; Donnelly *v.* Howard, 60 Cal. 291.

20. Perine *v.* Forbush, 97 Cal. 305, 32 Pac. 226.

21. See the statutes of the several states. And see the cases cited in the following notes.

Hearing must be at time specified in notice. Nashville *v.* Weiser, 54 Ill. 245.

Decision need not be given on day fixed for hearing. Ottawa *v.* Fisher, 20 Ill. 422.

22. *In re* Scranton Sewer Dist., 7 Lack. Jur. (Pa.) 170, holding that an exception to an assessment as being too high is not well taken; the remedy is by appeal.

23. Burton *v.* Chicago, 53 Ill. 87; *In re* Morewood Ave., 159 Pa. St. 39, 28 Atl. 130. See Pooley *v.* Buffalo, 15 Misc. (N. Y.) 240, 36 N. Y. Suppl. 796; Granger *v.* Buffalo, 6 Abb. N. Cas. (N. Y.) 238; Adams *v.* Roanoke, 102 Va. 53, 45 S. E. 881.

24. Merritt *v.* Portchester, 71 N. Y. 309, 27 Am. Rep. 47 [*affirming* 8 Hun 40].

A filing fee may be required as a condition precedent to the filing of objections. State *v.* Case, 42 Wash. 658, 85 Pac. 420.

25. See Belser *v.* Hoffschneider, 104 Cal. 455, 38 Pac. 312.

26. See Barber *v.* San Francisco, 42 Cal. 630 (holding that the strictness of a pleading at common law was not required); Brooks' Appeal, 32 Cal. 558; Jefferson County *v.* Mt. Vernon, 145 Ill. 80, 33 N. E. 1091.

Variance.— Where an objection to an assessment for a local improvement is that it was made under a mistake of fact, and it is not charged that there was any fraud or application of an illegal principle of assessment, the objector, to prevail, must show a mistake of fact, and is limited to that specification. State *v.* Ramsey County Dist. Ct., 47 Minn. 406, 50 N. W. 476.

27. *Illinois.*— Leman *v.* Lake View, 131 Ill. 388, 23 N. E. 346; Springfield *v.* Sale, 127 Ill. 359, 20 N. E. 86; Kilmer *v.* People, 106 Ill. 529 (affidavit of commissioners); Lehmer *v.* People, 80 Ill. 601.

Indiana.— Rose *v.* Balfe, 43 Ind. 353; Ball *v.* Balfe, 41 Ind. 221, 228.

Massachusetts.— Grace *v.* Newton, 135 Mass. 490; Foster *v.* Boston, 131 Mass. 225.

New York.— People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064; Broezel *v.* Buffalo, 2 Silv. Sup. 375, 6 N. Y. Suppl. 723; Hooker *v.* Rochester, 30 N. Y. Suppl. 297.

Texas.— Flewellin *v.* Proetzel, 80 Tex. 191, 15 S. W. 1043, substitution of correct roll for incorrect one.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1156.

28. Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899.

c. Notice of Alterations. Notice of alteration of an assessment has been held unnecessary to render the same effective.[29]

19. Revision by Jury. If the statute requires revision, by a jury, of assessments for public improvements, failure to provide for such revision will invalidate an assessment.[30]

20. Confirmation, Revision, or Vacation of Assessment — a. Confirmation or Revision. Where provision is made by statute for the revision of assessments the power of the council or commission to which the matter is intrusted is limited to that conferred by the statute,[31] and the proceedings must be in substantial compliance therewith.[32] Where the board has power to substantially alter an assessment it must investigate and adjudicate that the alteration is proper,[33] and where a special board of revision is created by statute, the assessment must be acted upon by a full board.[34] A provision requiring a majority of the council to assent to the ordering of a tax does not require a majority for the confirmation of the assessment roll prepared by an officer in accordance with a previous instruction of the council ordering the tax.[35] Ownership of property in the assessment district will not disqualify a member of the council from voting upon the confirmation of the assess-

29. Patterson *v.* New York, 1 Paige (N. Y.) 114. But see State *v.* Seattle, 42 Wash. 370, 85 Pac. 11, holding that notice that the assessment roll for the improvement of certain streets is on file and open to inspection, and that persons interested shall appear and make objections, after hearing which, and making such corrections as it deems just, the council shall approve the roll and assess the amounts thereof against each parcel shown in the roll, is not notice that the council may amend the roll, include other property therein, and assess it.

30. Culberton *v.* Cincinnati, 16 Ohio 574. *Compare In re* Thayer St., 9 R. I. 50.

Powers of jury.—A jury, in revising an assessment for widening a street, cannot alter the "proportional share" of the benefit assessed on the estate in common with the other estates benefited, unless they find the whole cost of the widening to be less than the amount of the assessment. Bancroft *v.* Boston, 115 Mass. 377.

Evidence.— On a betterment petition the petitioner cannot introduce evidence as to the proportion of the benefit to the land of himself and other abutters on the way as compared with the benefit to real estate generally in the city. Alden *v.* Springfield, 121 Mass. 27. Whether an assessment upon an estate for the construction of a sewer by a city is void, because the scheme adopted is not in accordance with the provisions of the St. (1878) c. 232, § 3, and whether the statute itself is constitutional, are not open upon the trial of a petition to the superior court for a jury to revise the assessment, and can properly be raised only on certiorari; and the rejection of evidence relating only to these questions is immaterial. Snow *v.* Fitchburg, 136 Mass. 179.

31. Jersey City *v.* Green, 42 N. J. L. 627; Ward *v.* Briant, 42 N. J. L. 625; Edwards *v.* Jersey City, 40 N. J. L. 176.

Authority to correct irregularities in proceedings of assessment commissioners does not imply power in the council to correct defects jurisdictional in character. California Imp. Co. *v.* Moran, 128 Cal. 373, 60 Pac. 969; Martin *v.* Oskaloosa, (Iowa 1904) 99 N. W. 557.

Time within which action must be taken. — An act which provides that assessments for local improvements shall be finally passed upon by the board for the revision and correction of assessments within six months is not mandatory, but merely directory, and a delay for longer than the period mentioned in the statute will not invalidate an assessment. Smith *v.* Buffalo, 90 Hun (N. Y.) 118, 35 N. Y. Suppl. 635; Matter of Deering, 14 Daly (N. Y.) 89, 3 N. Y. St. 593 [*affirmed* in 105 N. Y. 667].

32. John *v.* Connell, 71 Nebr. 10, 98 N. W. 457, holding that a levy of a special assessment of taxes for benefits received by reason of a public improvement is not invalidated because the city council sitting as a board of equalization under the provisions of Comp. St. (1893) § 132, c. 12*a*, after meeting in pursuance of a regularly published notice and organizing for the purpose of equalizing such special assessment, correcting errors, etc., takes a recess before the expiration of the time mentioned in the notice and prescribed by statute, provided the city clerk or some other member of such board shall be present to receive complaints, applications, etc., and give information, and providing no final action is taken except by a majority of the members of such board in open session.

Hearing before committee.— Where a committee appointed by the council investigated the assessment roll of benefits for a public improvement, before which the property-owners assessed were given a hearing, on the confirmation of the roll by the council on report of the committee, the action of the committee is the action of the council. Brown *v.* Saginaw, 107 Mich. 643, 65 N. W. 601.

33. Souther *v.* South Orange, 46 N. J. L. 317. See also White *v.* Saginaw, 67 Mich. 33, 34 N. W. 255.

34. *In re* Palmer, 31 How. Pr. (N. Y.) 42 [*affirming* 1 Abb. Pr. N. S. 30].

35. People *v.* Wright, 68 Hun (N. Y.) 264, 22 N. Y. Suppl. 961.

ment.[36] Where an assessment is approved but by clerical omission no order is entered on the minute book of the council the entry may be made *nunc pro tunc*.[37]

b. Notice. Where the statute requires notice of the confirmation of an assessment such notice is jurisdictional,[38] and unless given in substantial compliance with the provisions of the statute the assessment will be invalid.[39] But under some statutes the necessity of notice is confined to those who have objected to the assessment.[40]

c. Vacation or Disapproval and New Assessment. Under express provisions of the statute the council is sometimes authorized to vacate an assessment and order a new assessment.[41] Where, under the charter, the assessment of benefits must be made by the commission which assesses damages, the city in the absence of express authority cannot reject the report of such commission and refer the matter of benefits to a new commission.[42] Where the council has power to return the report to the commissioners, the commissioners on their report being returned must act in making a second report in the manner required of them in making a final report.[43] Where a new commission has been appointed further proceedings must be through it and action cannot be based upon a further report of the first commission.[44]

d. Amending, Vacating, or Setting Aside Order. Unless authorized by charter or statute,[45] a final order of the council, on appeal from an assessment, setting the same aside cannot be vacated at a subsequent meeting.[46] And after a lawful order of assessment has been passed and taken effect it cannot be rescinded or reconsidered at a subsequent meeting of the council.[47] Where a special assess-

36. Corliss *v.* Highland Park, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416.

37. Chamberlain *v.* Evansville, 77 Ind. 542.

38. Sewall *v.* St. Paul, 20 Minn. 511; Beach *v.* Jersey City, 71 N. J. L. 87, 58 Atl. 81. *Compare* Amery *v.* Keokuk, 72 Iowa 701, 30 N. W. 780.

39. Flint *v.* Webb, 25 Minn. 93; Sewall *v.* St. Paul, 20 Minn. 511; Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866; State *v.* Seattle, 42 Wash. 370, 85 Pac. 11. See Rue *v.* Chicago, 57 Ill. 435; Allen *v.* Chicago, 57 Ill. 264; Andrews *v.* Chicago, 57 Ill. 239; Spring Steel Fence, etc., Co. *v.* Anderson, 32 Ind. App. 138, 69 N. E. 404.

Length of notice.— Where the statute provides that notice be given for at least six days prior to the meeting of a city council as a board of equalization, notice must be given during the six days immediately prior to the date of the meeting. Shannon *v.* Omaha, 72 Nebr. 281, 100 N. W. 298.

Waiver of defects.— Where a person files a protest against a special assessment with the board of equalization before the time fixed in the published notice for the meeting of the board, he thereby waives any defect in the notice. Shannon *v.* Omaha, 73 Nebr. 507, 103 N. W. 53, 106 N. W. 592.

Effect of notice valid in part.—An assessment invalid as to certain tracts because of want of notice is valid as to tracts as to which notice was given. State *v.* Seattle, 42 Wash. 370, 85 Pac. 11.

40. Wetmore *v.* Elizabeth, 41 N. J. L. 152.

41. See the statutes of the several states. And see Creed *v.* McCombs, 146 Cal. 449, 80 Pac. 679; Townsend *v.* Manistee, 88 Mich. 408, 50 N. W. 321; Jersey City *v.* Carson, 43 N. J. L. 664; Watson *v.* Elizabeth, 42 N. J. L. 508.

Reassessment in general see *infra*, XIII, E. 22.

Vacation for minor error.—A local board, empowered to set aside a sewer assessment where "substantial injustice" has been done, may refuse to set it aside, although an item is wrongfully included, if the difference in the amount payable by the petitioner would be very little. People *v.* Kelly, 33 Hun (N. Y.) 389 [*affirmed* in 98 N. Y. 653].

42. Terhune *v.* Passaic, 41 N. J. L. 90.

43. Hegeman *v.* Passaic, 51 N. J. L. 644, 18 Atl. 776 [*reversing* 51 N. J. L. 109, 16 Atl. 62].

44. People *v.* Earl, 74 Hun (N. Y.) 81, 26 N. Y. Suppl. 382.

45. See Malone *v.* Jersey City, 27 N. J. L. 536.

46. Belser *v.* Hoffschneider, 104 Cal. 455, 38 Pac. 312.

47. Holt *v.* Somerville, 127 Mass. 408; Woodbridge *v.* Cambridge, 114 Mass. 483.

Stay of proceedings.— Under Acts 1871–1872, p. 257, § 49 (Rev. St. p. 239, c. 24, par. 163), providing that all persons taking any contract with a city, who agree to be paid from special assessments, shall have no claim or lien on the city or village except from the collection of the special assessments made for the work contracted for, the passage of an order by the council staying all proceedings on a certain municipal improvement, where a contract therefor has been duly let under an ordinance, and all the steps regularly taken to make an assessment in pursuance thereof, which has been confirmed by the county court does not operate to set aside

ment has been levied, the subsequent passage of an amendatory ordinance, providing that the assessment shall be paid in instalments does not vacate the original assessment.[48]

e. Conclusiveness and Effect of Order. Unless the assessment is void[49] an order of the council confirming the same is usually held to be conclusive.[50]

21. Judicial Proceedings Relating to Assessment — a. Jurisdiction of Courts. The necessity and reasonableness of an improvement and the question of benefits derived therefrom are matters of legislative discretion not to be inquired into by the courts except in cases of manifest abuse of authority.[51]

b. Confirmation, Revision, or Annulment — (i) *In General.* Jurisdiction is sometimes conferred on designated courts to confirm, revise, or annul an assessment for public improvements;[52] but since such jurisdiction is special, the enact-

the assessment or annul the contract. Clingman *v.* People, 183 Ill. 339, 55 N. E. 727.

48. Trimble *v.* Chicago, 168 Ill. 567, 48 N. E. 416.

49. Forsythe *v.* Chicago, 62 Ill. 304; Savage *v.* Buffalo, (N. Y. 1892) 30 N. E. 226 [*affirming* 59 Hun 606, 14 N. Y. Suppl. 101]; People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064 (holding that an act declaring an assessment that has been confirmed by the common council to be "final and conclusive" does not apply where the assessment is entirely void); *In re* Lange, 85 N. Y. 307; Doughty *v.* Hope, 1 N. Y. 79.

50. Lambert *v.* Bates, 148 Cal. 146, 82 Pac. 767; Dowling *v.* Altschul, (Cal. 1893) 33 Pac. 495; Brown *v.* Saginaw, 107 Mich. 643, 65 N. W. 601; Hooker *v.* Rochester, 30 N. Y. Suppl. 297; Hoffman *v.* New York, 13 N. Y. Suppl. 137; Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52. And see Johnson *v.* Tacoma, 41 Wash. 51, 82 Pac. 1092. But see Robert *v.* Kings County, 3 N. Y. App. Div. 366, 38 N. Y. Suppl. 521 [*affirmed* in 158 N. Y. 673, 52 N. E. 1126], holding that the power of local legislation in regard to opening, grading, construction, and improvement of streets, given a county board of supervisors, does not empower it to give an order of confirmation the effect of a judgment by declaring, in a resolution for opening, grading, and construction of a street, that such order shall have that effect.

51. *Colorado.*— Denver *v.* Kennedy, 33 Colo. 80, 80 Pac. 122, 467.

Georgia.— Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402.

Illinois.— Elliott *v.* Chicago, 48 Ill. 293.

Maryland.— Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1.

Michigan.— Powers *v.* Grand Rapids, 98 Mich. 393, 57 N. W. 250.

Minnesota.— State *v.* Ramsey County Dist. Ct., 95 Minn. 70, 103 N. W. 744; State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 23 N. W. 222.

New Jersey.— Simmons *v.* Passaic, 55 N. J. L. 485, 27 Atl. 909.

New York.— Elwood *v.* Rochester, 43 Hun 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238]; *In re* Voorhis, 3 Hun 212, 5 Thomps. & C. 345 [*affirmed* in 62 N. Y. 637]. And see *In re* Livingston, 121 N. Y. 94, 24 N. E. 290.

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Oregon.— Oregon, etc., R. Co. *v.* Portland, 25 Oreg. 229, 35 Pac. 452, 22 L. R. A. 713; Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673.

Vermont.— Allen *v.* Drew, 44 Vt. 174.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1166.

52. See the statutes of the several states. And see Leitch *v.* People, 183 Ill. 569, 56 N. E. 127; Murphy *v.* People, 183 Ill. 185, 55 N. E. 678; Haley *v.* Alton, 152 Ill. 113, 38 N. E. 750; Thorn *v.* West Chicago Park Com'rs, 130 Ill. 594, 22 N. E. 520 (holding that an act which provides that assessments made to improve boulevards shall be returned to the county court does not oust the circuit court of jurisdiction of an assessment for the original construction of a boulevard, under an act which provides that assessments to pay for lands taken or purchased for park purposes shall be returned to the circuit court); Pease *v.* Chicago, 21 Ill. 500; *In re* Pike St., 42 Wash. 551, 85 Pac. 45 (holding that inasmuch as the statute gives the court power to modify, change, alter, or annul an assessment of benefits on the widening of a street, the court has authority to order a per centum to be deducted from the amount originally assessed against property and make it a general charge against the municipality).

Effect of ordinance staying proceedings.— An ordinance directing the corporation counsel to stay proceedings on a special assessment does not, if not acted on by him, deprive the court of jurisdiction to confirm the assessment. Andrews *v.* People, 158 Ill. 477, 41 N. E. 1021; Wisner *v.* People, 156 Ill. 180, 40 N. E. 574.

In New York a designated court is given power to vacate an assessment upon showing of fraud or irregularity (*In re* Duffy, 133 N. Y. 512, 31 N. E. 517; *In re* Flower, 129 N. Y. 643, 29 N. E. 463; *In re* Union College, 129 N. Y. 308, 29 N. E. 460; *In re* Smith, 99 N. Y. 424, 2 N. E. 52; Matter of New York, 114 N. Y. App. Div. 519, 100 N. Y. Suppl. 140; Matter of Brainerd, 51 Hun 380, 3 N. Y. Suppl. 889 [*affirmed* in 117 N. Y. 623, 22 N. E. 1127]; *In re* Treacy, 59 Barb. 525; *In re* Buhler, 32 Barb. 79; Palmer's Petition, 1 Abb. Pr. N. S. 30 [*affirmed* in 31 How. Pr. 42]; Matter of Beek-

ment conferring the same must be strictly followed.[53] By acquiescence or failure to present objections a party may waive a question of jurisdiction growing out of the interpretation or construction of a statute.[54]

(II) *NOTICE OF PROCEEDINGS* — (A) *In General.* A legislative requirement of notice of proceedings to confirm an assessment must be strictly complied with to render the confirmation valid.[55]

(B) *Waiver.* Property-owners who appear in court and file objections to the confirmation of an assessment thereby waive any defect in the notice of the hearing.[56]

(III) *PETITION OR OTHER APPLICATION.* All statutory requirements as to the character and contents of the petition for confirmation must be substantially complied with to render the same valid.[57]

(IV) *OBJECTIONS.* Objections to the confirmation of an assessment should be sufficiently specific to indicate the ground upon which they are based,[58] and unless they clearly show fatal defect in proceedings or want of authority they should be disregarded.[59] But on the hearing of objections the court may in its discretion

man, 11 Abb. Pr. 164, 19 How. Pr. 518; Matter of Babcock, 23 How. Pr. 118), and the proceeding being statutory and special is governed by the peculiar terms of the act under which it is brought (People *v.* Buffalo, 147 N. Y. 675, 42 N. E. 344; *In re* Wheelock, 121 N. Y. 664, 24 N. E. 380; *In re* Livingston, 121 N. Y. 94, 24 N. E. 290; *In re* Leake, etc., Orphan Home, 92 N. Y. 116; *In re* Cruger, 84 N. Y. 619; *In re* Manhattan Sav. Inst., 82 N. Y. 142; *In re* Walter, 75 N. Y. 354; Hagemeyer *v.* Grout, 113 N. Y. App. Div. 472, 99 N. Y. Suppl. 369; Untermyer *v.* Yonkers, 112 N. Y. App. Div. 308, 98 N. Y. Suppl. 563; Harriman *v.* Yonkers, 109 N. Y. App. Div. 246, 95 N. Y. Suppl. 816; *In re* Hazleton, 58 Hun 112, 11 N. Y. Suppl. 557; *In re* Burke, 2 Hun 281; *In re* McCormack, 60 Barb. 128; *In re* Duffy, 18 N. Y. Suppl. 493; Matter of Keyser, 10 Abb. Pr. 481; Matter of Smith, 67 How. Pr. 501 [*affirmed* in 99 N. Y. 424, 2 N. E. 52]; Matter of Thayer, 30 How. Pr. 276).

53. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782; Mt. Carmel *v.* Friedrich, 141 Ill. 369, 31 N. E. 21; Municipality No. 1 *v.* Millaudon, 12 La. Ann. 769; *In re* New Orleans, 4 Rob. (La.) 357.

54. Matter of Spuyten Duyvil Parkway, 67 How. Pr. (N. Y.) 341.

55. Yaggy *v.* Chicago, 194 Ill. 88, 62 N. E. 316; White *v.* Chicago, 188 Ill. 392, 58 N. E. 917; Boynton *v.* People, 155 Ill. 66, 39 N. E. 622; McChesney *v.* People, 148 Ill. 221, 35 N. E. 739; McChesney *v.* People, 145 Ill. 614, 34 N. E. 431; Murphy *v.* Peoria, 119 Ill. 509, 9 N. E. 895; Stark *v.* West Chicago Park Com'rs, (Ill. 1886) 7 N. E. 261; Le Moyne *v.* West Chicago Park Com'rs, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48; Beygeh *v.* Chicago, 65 Ill. 189; Hemingway *v.* Chicago, 60 Ill. 324. See Brown *v.* Chicago, 117 Ill. 21, 7 N. E. 108.

Computation of time with regard to notice see TIME.

56. Haley *v.* Alton, 152 Ill. 113, 38 N. E. 750; Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255; Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741; Quick *v.* River Forest, 130 Ill. 323, 22 N. E. 816; Walters *v.* Lake, 129 Ill. 23, 21 N. E. 556; Gregory *v.* Ann Arbor, 127 Mich. 454, 86 N. W. 1013.

57. Ferris *v.* Chicago, 162 Ill. 111, 44 N. E. 436; Hull *v.* Chicago, 156 Ill. 381, 40 N. E. 937; Clark *v.* Chicago, 155 Ill. 223, 40 N. E. 495; White *v.* Alton, 149 Ill. 626, 37 N. E. 96; Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443.

Recital of ordinance.— The statute sometimes requires that the petition for confirmation of an assessment shall recite the ordinance under which the improvement is made. For cases in which the sufficiency of the recital has been considered see Heiple *v.* Washington, 219 Ill. 604, 76 N. E. 854; Ferris *v.* Chicago, 162 Ill. 111, 44 N. E. 436; Wadlow *v.* Chicago, 159 Ill. 176, 42 N. E. 866; Hull *v.* Chicago, 156 Ill. 381, 40 N. E. 937; Haley *v.* Alton, 152 Ill. 113, 38 N. E. 750; White *v.* Alton, 149 Ill. 626, 37 N. E. 96; Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443.

58. McLannan *v.* Chicago, 218 Ill. 62, 75 N. E. 762; Chicago *v.* Singer, 202 Ill. 75, 66 N. E. 874; Delamater *v.* Chicago, 158 Ill. 575, 42 N. E. 444, holding that an objection that a special "assessment, and all proceedings therein, are void" is not sufficient to raise the point that the commissioners did not properly divide the assessment into instalments. See Ayer *v.* Chicago, 149 Ill. 262, 37 N. E. 57, holding that an objection that a judgment of condemnation was void because of an amendment of the verdict is sufficiently raised by allegations that there is no authority of law for making the assessment and that it is wholly unconstitutional, inequitable, and void.

Effect of demurrer.— Since a demurrer is not authorized it will not be taken as admitting the truth of objections. Enos *v.* Springfield, 113 Ill. 65.

59. Chicago *v.* Singer, 202 Ill. 75, 66 N. E. 874. And see Rollo *v.* Chicago, 187 Ill. 417, 58 N. E. 355; Hull *v.* West Chicago Park Com'rs, 185 Ill. 150, 57 N. E. 1; Goodwillie *v.* Lake View, 137 Ill. 51, 27 N. E. 15; Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155.

allow amendments to be filed[60] and such discretion will not be interfered with unless it has been abused.

(v) *Evidence.* The burden of establishing the grounds of their objections to the confirmation of an assessment is upon the property-owners urging such objections,[61] but the burden is on the city to establish the ordinance under which the improvement is made.[62] The general rules of evidence applicable to civil proceedings govern the introduction and sufficiency of the evidence.[63]

(vi) *Hearing or Trial.* The hearing of objections to the confirmation of an assessment should be conducted in general according to the rules governing the trial of ordinary cases at law;[64] and, where a jury is provided for, questions of fact, such as the determination of benefits, should be left to the jury,[65] under proper instructions from the court.[66]

(vii) *Scope of Inquiry and Powers of Court.* The scope of the inquiry on motion to confirm an assessment is determined by the terms of the statute under which the proceeding is brought,[67] and unless expressly authorized the court has no authority to pass upon the expediency of the improvement,[68] or the qualification of a city engineer,[69] nor has it power to review the determination of the

60. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

61. Guyer *v.* Rock Island, 215 Ill. 144, 74 N. E. 105; Clark *v.* Chicago, 214 Ill. 318, 73 N. E. 358; Richards *v.* Jerseyville, 214 Ill. 67, 73 N. E. 370; McVey *v.* Danville, 188 Ill. 428, 58 N. E. 955; Fagan *v.* Chicago, 84 Ill. 227.

62. Springer *v.* Chicago, 159 Ill. 515, 42 N. E. 868, holding that where a special assessment was confirmed, without evidence of the passage or legal existence of the ordinance alleged to authorize it, after issue had been made thereon, the error could not be cured by a *nunc pro tunc* order, made at a subsequent term, authorizing the filing of a certificate of the city clerk as to the due passage of the ordinance.

63. See Evidence. And see Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747; Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755; Gordon *v.* Chicago, 201 Ill. 623, 66 N. E. 823; Topliff *v.* Chicago, 196 Ill. 215, 63 N. E. 692; Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102 (holding that where the extent to which the objector's property will be benefited by a proposed local improvement depends upon the question whether there is a bridge at a certain point, it is competent to show that the city has built such a bridge); Thorn *v.* West Chicago Park Com'rs, 130 Ill. 594, 22 N. E. 520; Green *v.* Springfield, 130 Ill. 515, 22 N. E. 602; Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443; Fagan *v.* Chicago, 84 Ill. 227; Kansas City *v.* Morton, 117 Mo. 446, 23 S. W. 127; *In re* Pike St., 42 Wash. 551, 85 Pac. 45; Ahrens *v.* Seattle, 39 Wash. 168, 81 Pac. 558.

Weight and sufficiency.— On the hearing of objections to the confirmation of an assessment, the fact that a larger number of witnesses have testified in favor of the objector does not necessarily determine the weight of evidence, especially where there is added to the testimony of the city the probative force of the commissioners' report and of the actual view of the premises taken by the court. Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335. In special assessment proceedings, the fact that an equal number of witnesses testify on each side on the question of benefits does not preclude the court from finding that there is a preponderance of evidence on the question in favor of the petitioner for the confirmation of the assessment. Conway *v.* Chicago, 219 Ill. 295, 76 N. E. 384.

64. Goodwillie *v.* Lake View, (Ill. 1889) 21 N. E. 817. See also Cody *v.* Cicero, 203 Ill. 322, 67 N. E. 859.

Argument.— On the hearing of objections to the confirmation of a special tax to pay for street improvements the city is entitled to open and close the argument. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

65. Clark *v.* Chicago, 214 Ill. 318, 73 N. E. 358; Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901; Gage *v.* Chicago, 146 Ill. 499, 34 N. E. 1034 [*following* Goodwillie *v.* Lake View, 137 Ill. 51, 27 N. E. 15]; Chicago, etc., R. Co. *v.* Chicago, 139 Ill. 573, 28 N. E. 1108; Watson *v.* Chicago, 115 Ill. 78, 3 N. E. 430; Mock *v.* Muncie, 9 Ind. App. 536, 37 N. E. 281. See also McLennan *v.* Chicago, 218 Ill. 62, 75 N. E. 762.

Special finding.— Objectors cannot demand a special finding on questions relating to the basis on which the assessment was made, since that is not an ultimate fact in the controversy. Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567.

66. Thomas *v.* Chicago, 152 Ill. 292, 38 N. E. 923; Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 509, 30 N. E. 1036; Walters *v.* Lake, 129 Ill. 23, 21 N. E. 556; Hyde Park *v.* Washington Ice Co., 117 Ill. 233, 7 N. E. 523. See Sweet *v.* West Chicago Park Com'rs, 177 Ill. 492, 53 N. E. 74.

67. Fagan *v.* Chicago, 84 Ill. 227; State *v.* Ensign, 55 Minn. 278, 56 N. W. 1006; State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 252, 22 N. W. 625, 632.

68. Houston *v.* Chicago, 191 Ill. 559, 61 N. E. 396. See, generally, *supra*, XIII, A, 3, a, (II).

69. Heiple *v.* Washington, 219 Ill. 604, 76 N. E. 854.

municipal authorities as to what proportion of the cost of an improvement shall be borne by the public.[70]

(VIII) *THE NATURE AND EXTENT OF RELIEF.* The nature and extent of relief that may be granted by the court depends upon the provision of the statute under which proceedings are brought.[71] Under some statutes the court must approve or reject an assessment *in toto*,[72] while by the terms of other acts the assessment may be modified or recast,[73] upon evidence that the same was improperly made,[74] or it may be referred to the same or new commissioners for revision or correction.[75]

(IX) *JUDGMENT OR ORDER*—(A) *In General.* Where separate objections to the confirmation of an assessment are filed it is proper to enter separate judgments of confirmation.[76] The judgment need not direct the clerk of the court to certify the assessment roll and judgment to the city clerk.[77]

(B) *Operation and Effect.* Where the record of assessment proceedings shows substantial compliance with the legislative enactment under which the city proceeded, a judgment of confirmation cannot be collaterally attacked,[78] except on the ground that it was without jurisdiction[79] or was based on a void ordinance.[80] A former judgment of confirmation under a former valid ordinance is

70. Leitch *v.* La Grange, 138 Ill. 291, 27 N. E. 917; Power v. Detroit, 139 Mich. 30, 102 N. W. 288.

71. See the statutes of the several states. And see the cases cited in the following notes.

72. *In re* Roffignac St., 4 Rob. (La.) 357.

73. Berdel *v.* Chicago, 217 Ill. 429, 75 N. E. 386; Connecticut Mut. L. Ins. Co. *v.* Chicago, 217 Ill. 352, 75 N. E. 365; Johnson *v.* People, 177 Ill. 64, 52 N. E. 308; Browning *v.* Chicago, 155 Ill. 314, 40 N. E. 565; Morrison *v.* Chicago, 142 Ill. 660, 32 N. E. 172; Springfield *v.* Green, 120 Ill. 269, 11 N. E. 261.

74. De Koven *v.* Lake View, 131 Ill. 541, 23 N. E. 240.

75. *In re* Roffignac St., 4 Rob. (La.) 357; State *v.* Hotaling, 44 N. J. L. 347 [*affirmed* in 46 N. J. L. 207]; *In re* Canal St., 8 Barb. (N. Y.) 505; *In re* Henry St., 7 Cow. (N. Y.) 400.

76. Delamater *v.* Chicago, 158 Ill. 575, 42 N. E. 444; Andrews *v.* People, 158 Ill. 477, 41 N. E. 1021; Wisner *v.* People, 156 Ill. 180, 40 N. E. 574; Zeigler *v.* People, 156 Ill. 133, 40 N. E. 607.

Separate tracts of land.— Separate judgments may be entered confirming the same assessment as to different pieces of land. Beach *v.* People, 157 Ill. 659, 41 N. E. 1117.

77. Zeigler *v.* People, 156 Ill. 133, 40 N. E. 607.

78. People *v.* Cohen, 219 Ill. 200, 76 N. E. 388 (holding that under section 84 of the Local Improvement Act (Hurd Rev. St. (1903) c. 24, § 590), providing for the trial of objections to the approval of the certificate of the board of local improvements showing the cost of the improvement, etc., and providing that the order of the court shall be conclusive on all parties, an order of the county court approving a certificate, which recites the completion of the improvement in substantial compliance with the terms of the ordinance, is conclusive on that question in a subsequent proceeding to collect the assessment); Chicago Bd. of Education *v.* People, 219 Ill. 83, 76 N. E. 75; People *v.* Illinois Cent. R. Co., 213 Ill. 367, 72 N. E. 1069; Dickey *v.* People, 160 Ill. 633, 43 N. E. 606; Kirchman *v.* People, 159 Ill. 321, 42 N. E. 883; West Chicago St. R. Co. *v.* People, 155 Ill. 299, 40 N. E. 599; Meadowcroft *v.* People, 154 Ill. 416, 40 N. E. 442; Chicago West. Div. R. Co. *v.* People, 154 Ill. 256, 40 N. E. 342; Derby *v.* West Chicago Park Com'rs, 154 Ill. 213, 40 N. E. 438.

79. Doremus *v.* People, 161 Ill. 26, 43 N. E. 701; Keeler *v.* People, 160 Ill. 179, 43 N. E. 342.

80. Shepard *v.* People, 200 Ill. 508, 65 N. E. 1068 (holding that where objections to the description of the improvement in a paving ordinance were not raised upon application for judgment of confirmation of the special assessments, they were not thereafter available as a defense to an application for judgment of sale for delinquent assessments); Blount *v.* People, 188 Ill. 538, 59 N. E. 241 (holding that failure of an improvement ordinance to state the height of the curb to be constructed on each side of the street is not a jurisdictional defect, making the judgment confirming a special assessment therefor subject to collateral attack, and hence is no defense to an application for judgment of sale for delinquent instalments); Culver *v.* People, 161 Ill. 89, 43 N. E. 812 (holding that confirmation of a special assessment may be attacked, on application for judgment and order of sale, on the ground that the ordinance authorizing the assessment provided, without authority, for payment of the assessment in instalments); Doremus *v.* People, 161 Ill. 26, 43 N. E. 701. See also People *v.* Colegrove, 218 Ill. 545, 75 N. E. 991; People *v.* Brown, 218 Ill. 375, 75 N. E. 989, both holding that failure of a special assessment ordinance to fix the grade of the street to be improved does not deprive the court of jurisdiction of the subject-matter, so as to render a judgment confirming the assessment

a complete defense to an application for confirmation of a special assessment,[81] but it cannot be pleaded in bar to an application for a judgment of sale on the second ordinance.[82] And if the former judgment was based on a void ordinance and has been set aside it is no defense to an application for confirmation under a valid ordinance.[83] A judgment or order confirming an assessment in a court of record is *prima facie* evidence of the existence of all jurisdictional facts.[84] A property-owner who appears in proceedings to confirm an assessment cannot, in the absence of fraud, afterward object to the collection of the same on the ground that the improvement was not made in accordance with the ordinance ordering it.[85] Where the court orders an assessment recast, as authorized by statute, it will be presumed that it acted upon sufficient cause and within its powers.[86]

(c) *Vacation of Judgment or Order.* The court may set aside an order of confirmation on the ground of irregularity, mistake, or fraud.[87] But it would seem that a court has no power to set aside a final judgment of confirmation at a subsequent term.[88]

(x) *Appeal.* The right to appeal from a judgment confirming or refusing to confirm an assessment depends on express statutory provision.[89] Objections not made in the lower court will not be considered on appeal,[90] and where the evidence is conflicting, a judgment of confirmation will not as a rule be reversed.[91] The existence of evidence supporting the judgment will be presumed where the entire evidence is not incorporated in the bill of exceptions;[92] and in such case

subject to attack on application for judgment of sale for the tax. But see Gage *v.* Parker, 103 Ill. 528.

81. People *v.* Fuller, 204 Ill. 290, 68 N. E. 371; Chicago *v.* Nicholes, 192 Ill. 489, 61 N. E. 434; People *v.* McWethy, 165 Ill. 222, 46 N. E. 187; McChesney *v.* Chicago, 161 Ill. 110, 43 N. E. 702.

82. People *v.* Fuller, 204 Ill. 290, 68 N. E. 371 [*followed* in Wagg *v.* People, 218 Ill. 337, 75 N. E. 977].

83. Chicago *v.* Nodeck, 202 Ill. 257, 67 N. E. 39; Gage *v.* Chicago, 193 Ill. 108, 61 N. E. 850.

84. Falch *v.* People, 99 Ill. 137.

85. Ryan *v.* People, 207 Ill. 74, 69 N. E. 638; Fisher *v.* People, 157 Ill. 85, 41 N. E. 615; Murphy *v.* People, 120 Ill. 234, 11 N. E. 202.

86. Schemick *v.* Chicago, 151 Ill. 336, 37 N. E. 888.

87. *In re* New York, 49 N. Y. 150. See also *In re* New York, 6 Cow. (N. Y.) 571, holding that in a proceeding under 1 Rev. St. 413, § 178, the order will not be opened in the absence of irregularity or surprise.

88. Keeler *v.* People, 160 Ill. 179, 43 N. E. 342.

89. See the statutes of the several states. And see *In re* Central Park, 61 Barb. (N. Y.) 40; Matter of One Hundred and Thirty-eighth St., 61 How. Pr. (N. Y.) 284.

Persons who may allege error.— Where, in proceedings for confirmation of a special tax, the owner of one lot files objections, which are sustained, the owners of other lots cannot assign such ruling as error, since the diminution of the tax on that lot does not increase the tax on theirs. Davis *v.* Litchfield, 155 Ill. 384, 40 N. E. 354.

Joint appeals.— Where there are numerous objectors to a special assessment, allowing them to appeal jointly is a matter of discretion with the trial court. Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102.

What law governs.—A writ of error to review a levy under a supplemental assessment, under Hurd Rev. St. (1903) c. 24, §§ 57, 58, will be dismissed, where the affidavit required by section 96 has not been filed, although the original assessment proceeding was begun before the provisions of chapter 24 went into effect. Stone *v.* Chicago, 218 Ill. 348, 75 N. E. 980.

90. Lamb *v.* Chicago, 219 Ill. 229, 76 N. E. 343; Chicago Terminal Transfer Co. *v.* Chicago, 178 Ill. 429, 53 N. E. 361; Thomas *v.* Chicago, 152 Ill. 292, 38 N. E. 923; Kelly *v.* Chicago, 148 Ill. 90, 35 N. E. 752; Hunerberg *v.* Hyde Park, 130 Ill. 156, 22 N. E. 486. See also Close *v.* Chicago, 217 Ill. 216, 75 N. E. 479, holding that an objection to an ordinance authorizing a special improvement that it does not specify the nature, character, locality, and description of the proposed improvement is not sufficiently specific; but where no objection is made the question raised thereby will be reviewed on appeal.

On second appeal objections to the sufficiency of the description of an improvement in an ordinance, which existed at the time the original judgment of confirmation of an assessment was appealed from and which were not then raised, cannot be considered. Beckett *v.* Chicago, 218 Ill. 97, 75 N. E. 747.

91. Lamb *v.* Chicago, 219 Ill. 229, 76 N. E. 343; Maywood Co. *v.* Maywood, 140 Ill. 216, 29 N. E. 704; Walters *v.* Lake, 129 Ill. 23, 21 N. E. 556.

92. Perry *v.* People, 155 Ill. 307, 40 N. E. 468.

also it will be presumed that the proposed improvement conformed substantially to the requirements of the ordinance.[93] Where the statute provides that an appeal shall not invalidate the judgment of confirmation except as to the property concerning which the appeal is taken, property-owners who fail to appeal cannot share in the benefits of a successful appeal by other owners.[94]

(xi) *Certiorari.* The confirmation of an assessment will not necessarily preclude a review of proceedings by certiorari.[95] Upon certiorari to review an order of confirmation the lot owner cannot be heard on any question of fact where he has not appeared and urged his objections below.[96]

c. Appeal From Assessment — (i) *Right to Appeal and Questions Reviewable.* Unless expressly authorized by statute,[97] an appeal may not be taken from the action of proper municipal authorities in levying an assessment.[98]

(ii) *Proceedings and Relief.*[99] On appeal, the right to make the assessment complained of may be considered as well as the manner in which it is apportioned.[1] The appellant must assign the grounds upon which he seeks relief,[2] and the burden is upon him to sustain the assignment.[3] But where on an appeal from commissioners the trial is to a jury, the burden is on the city to show the benefits resulting from the improvement.[4] An appeal from an assessment by one of several parties assessed does not bring up the whole apportionment for revision.[5] In case a reassessment is ordered the court should specify the defects in the original assessment.[6]

d. Certiorari to Review Assessments — (i) *In General.* The proceedings of a municipal corporation in making special assessments may be reviewed by certiorari;[7] but the writ as a rule will not be issued if the property-owners have other adequate remedy,[8] and its office is limited to a review of errors of law in the

93. Delamater *v.* Chicago, 158 Ill. 575, 42 N. E. 444.

94. *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279.

95. Sherwood *v.* Duluth, 40 Minn. 22, 41 N. W. 234; State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 252, 22 N. W. 625, 632.

96. *In re* Twenty-Eighth St. Sewer, 158 Pa. St. 464, 27 Atl. 1109.

97. See the statutes of the several states. And see the following cases:

Connecticut.— Velhage's Appeal, 78 Conn. 520, 63 Atl. 347.

Massachusetts.— Taylor *v.* Haverhill, 192 Mass. 287, 78 N. E. 475.

Mississippi.— Madison County *v.* Frazier, 78 Miss. 880, 29 So. 765.

Pennsylvania.— *In re* Scranton Sewer, 213 Pa. St. 4, 62 Atl. 173; *In re* Mt. Pleasant Ave., 171 Pa. St. 38, 32 Atl. 1122, 1124; Kelly *v.* Philadelphia, 6 Pa. Co. Ct. 243.

Wisconsin.— Dickson *v.* Racine, 61 Wis. 545, 21 N. W. 620.

98. Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468; Brown *v.* Grand Rapids, 83 Mich. 101, 47 N. W. 117; Oil City *v.* Oil City Boiler Works, 152 Pa. St. 348, 25 Atl. 549.

99. Appeal-bond on appeal from assessment see Appeal and Error, 2 Cyc. 828 note 92.

1. Boyden *v.* Brattleboro, 65 Vt. 504, 27 Atl. 164.

2. Bowditch *v.* New Haven, 40 Conn. 503, holding that the facts showing illegality of assessment must be stated.

3. Dickson *v.* Racine, 65 Wis. 306, 27 N. W. 58. See also Newell *v.* Bristol, 78 Conn. 571, 63 Atl. 355.

4. Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423.

5. Gilbert *v.* New Haven, 39 Conn. 467; Clapp *v.* Hartford, 35 Conn. 66.

6. State *v.* Ensign, 55 Minn. 278, 56 N. W. 1006.

7. Bensinger *v.* District of Columbia, 6 Mackey (D. C.) 285; Walls *v.* Jersey City, 55 N. J. L. 511, 26 Atl. 828; State *v.* Clinton Tp., 39 N. J. L. 656; Ashley *v.* Newark, 25 N. J. L. 399; Heywood *v.* Buffalo, 14 N. Y. 534; People *v.* New Rochelle, 83 Hun (N. Y.) 185, 31 N. Y. Suppl. 592; People *v.* Gravesend Bd. of Assessors, 4 N. Y. Suppl. 85; People *v.* Brooklyn, 9 Barb. (N. Y.) 535; Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474. *Contra*, Whitbeck *v.* Hudson, 50 Mich. 86, 14 N. W. 708, holding that certiorari will not lie to review the proceedings of a common council in ordering the streets of a town to be paved, and the costs assessed against the owners of abutting lots.

8. State *v.* Ramsey County Dist. Ct., 44 Minn. 244, 46 N. W. 349 (holding that certiorari to a district court will not lie before judgment to review proceedings to levy and collect special assessments for street improvements); Dousman *v.* St. Paul, 22 Minn. 387; People *v.* Lohnas, 54 Hun (N. Y.) 604, 8 N. Y. Suppl. 104. But see State *v.* Ashland, 71 Wis. 502, 37 N. W. 809, holding that certiorari will lie to prevent municipal authorities from levying unauthorized assessments, notwithstanding the city charter gives a remedy by appeal, as the jurisdiction of the circuit

assessment proceedings[9] under the rules generally applicable to proceedings upon certiorari.

(II) *Time For Proceedings.* Where the statute specifies the time within which certiorari proceedings may be brought, the writ will not be issued if proceedings are instituted after expiration of such time,[10] and even in the absence of such statutory limitation the right to certiorari may be lost by laches.[11] A statutory requirement that certiorari proceedings be begun within a prescribed time after confirmation of assessment does not apply to a void confirmation.[12]

(III) *Proceedings and Relief.* A writ of certiorari to correct an assessment should be directed to the council or the board having the matter in charge.[13] Ordinarily only errors of law apparent upon the record will be reviewed.[14] Errors which have not been presented at the proper time cannot be urged on certiorari.[15] Where the action taken by the board of assessors is not clear a rule may be granted before final determination to compel them to make a certificate to the court of matters omitted from their report to the council.[16] The determination of the court must be such as is prescribed by statute,[17] and ordinarily, where illegal only in part, the entire assessment need not be vacated.[18] Where the assess-

court to issue such writ is secured by the constitution.

9. Grace *v.* Newton Bd. of Health, 135 Mass. 490; State *v.* St. Paul Bd. of Public Works, 27 Minn. 442, 8 N. W. 161; Wilson *v.* Hudson, 32 N. J. L. 365; Ashley *v.* Newark, 25 N. J. L. 399; People *v.* Gilon, 126 N. Y. 147, 27 N. E. 282; People *v.* Gilon, 126 N. Y. 640, 27 N. E. 285.

10. Tusting *v.* Asbury Park, 73 N. J. L. 102, 62 Atl. 183; Stockton *v.* Newark, 58 N. J. L. 116, 32 Atl. 67; Traphagen *v.* West Hoboken Tp., 39 N. J. L. 232 [*affirmed* in 40 N. J. L. 193]; Bogart *v.* Passaic, 38 N. J. L. 57.

Premature application for writ.—Certiorari to review an assessment, before action thereon by the board of revision and correction, having power to revise, correct, and confirm such assessments, is premature. Newark *v.* Weeks, 70 N. J. L. 166, 56 Atl. 118; People *v.* Gilon, 60 Hun (N. Y.) 577, 14 N. Y. Suppl. 75 [*following* 13 N. Y. Suppl. 455].

11. Rentz *v.* Detroit, 48 Mich. 544, 12 N. W. 694, 911; Hayday *v.* Ocean City, 67 N. J. L. 155, 50 Atl. 584; Borton *v.* Camden, 65 N. J. L. 511, 47 Atl. 436; Carling *v.* Hoboken, 64 N. J. L. 223, 44 Atl. 950; Schulting *v.* Passaic, 47 N J. L. 273; State *v.* Union Tp., 44 N. J. L. 599; Kirkpatrick *v.* New Brunswick, 42 N. J. L. 510; Weart *v.* Jersey City, 41 N. J. L. 510; Wetmore *v.* Elizabeth, 41 N. J. L. 152.

Illustrations.— Where an abutting owner knew, while improvements on the street were in progress, that the grade was to be raised, and knew of the assessment shortly after it was made, yet waited nearly two years before suing out certiorari, the writ should be dismissed. Stewart *v.* Hoboken, 57 N. J. L. 330, 31 Atl. 278 [*affirmed* in 58 N. J. L. 696, 36 Atl. 1129]. Where no reassessment is provided for, a landowner should not be allowed a certiorari, if he has delayed his application therefor until the city has expended large sums of money on the improvement after the assessment was made. Wilkinson *v.* Trenton, 36 N. J. L. 499.

Errors prior to the assessment cannot be urged by a property-owner who has had notice but has failed to apply for a writ until the improvement was completed and the assessment levied. Tusting *v.* Asbury Park, 73 N. J. L. 102, 62 Atl. 183.

12. Meredith *v.* Perth Amboy, 63 N. J. L. 520, 44 Atl. 971; Evans *v.* North Bergen Tp., 39 N. J. L. 456.

13. People *v.* New York, 20 Hun (N. Y.) 73; State *v.* Milwaukee, 86 Wis. 376, 57 N. W. 45; State *v.* Fond du Lac, 42 Wis. 287.

14. Tileston *v.* Boston, 182 Mass. 325, 65 N. E. 380; Sears *v.* Boston, 180 Mass. 274, 62 N. E. 397, 62 L. R. A. 144; Lincoln *v.* Boston, 176 Mass. 210, 57 N. E. 356; Matter of Phelps, 110 N. Y. App. Div. 69, 96 N. Y. Suppl. 862, holding that on certiorari to review an assessment for a street improvement, the objection that the premises assessed were not benefited does not present a question of law, unless the determination fixing the assessment district was not supported by competent proof, or was opposed by a strong preponderance of the evidence; Code Civ. Proc. § 2140, providing that the questions to be determined by the court on the hearing shall be whether there was any competent proof authorizing the determination, or, if there was, whether there was a preponderance against it.

15. People *v.* Kingston, 114 N. Y. App. Div. 326, 99 N. Y. Suppl. 657, holding that objections to a special assessment for street improvements not made before the assessor on grievance day cannot be reviewed on certiorari.

16. Burnett *v.* Boonton, 73 N. J. L. 453, 63 Atl. 995.

17. People *v.* Buffalo, 39 N. Y. App. Div. 245, 57 N. Y. Suppl. 261 [*followed* in People *v.* Buffalo, 57 N. Y. Suppl. 1144 (*reversing* 52 N. Y. Suppl. 689)], holding that a special term of the superior court could not dismiss the petition without findings of fact or conclusions of law or decision directing the judgment to be entered.

18. Wakeman *v.* Jersey City, 35 N. J. L.

ment of the relator's property is unjust the court under some statutes may correct such assessment, although the rule or general principle upon which the assessment was made is not illegal or erroneous.[19] An order setting aside an assessment and directing a new assessment to be made does not determine that the amount of assessment on the property of any individnal should be set aside or reduced.[20]

e. Actions For Relief Against Assessment — (i) *Restraining Enforcement.* An injunction will lie to prevent the collection of a void assessment,[21] in case the complainant has no other adequate remedy;[22] but an injunction will be denied where the city has rightfully exercised its powers.[23] An injunction cannot be had on the ground that the contract was not properly performed where the work has been accepted by the city without fraud,[24] nor will an injunction issue where

455; People *v.* Buffalo, 36 N. Y. Suppl. 191 [*affirmed* in 147 N. Y. 675, 42 N. E. 344].

Amendment or correction.— When, on a proceeding by certiorari, under section 101 of the charter of the city of Buffalo, to review an assessment for a local improvement, it appears that through inadvertence or an error of judgment on the part of the assessor's property of the relator not benefited by the proposed improvement, and therefore not assessable, had been included in the assessment with benefited property belonging to him which was properly assessable, and no illegality is found going to the jurisdiction of the assessors to assess the benefited property, such inclusion is to be deemed a defect which will warrant the court in sending the assessment roll back to the common council "to amend or correct it according to law," as provided by subdivision 5 of said section, instead of ordering it to be canceled as illegal. People *v.* Buffalo, 147 N. Y. 675, 42 N. E. 344.

19. People *v.* Reis, 109 N. Y. App. Div. 919, 96 N. Y. Suppl. 601; People *v.* Reis, 109 N. Y. App. Div. 748, 96 N. Y. Suppl. 597.

20. Milton *v.* Stell, 73 N. J. L. 261, 62 Atl. 1133.

21. *Colorado.*—Dumars *v.* Denver, 16 Colo. App. 375, 65 Pac. 580.

Idaho.— Wilson *v.* Boise City, 7 Ida. 69, 60 Pac. 84, holding that it must issue on notice.

Indiana.— Terre Haute *v.* Mark, 139 Ind. 99, 38 N. E. 468; Ft. Wayne *v.* Shoaff, 106 Ind. 66, 5 N. E. 403.

Iowa.— Hubbell *v.* Bennett, 130 Iowa 66, 106 N. W. 375; Diver *v.* Keokuk Sav. Bank, 128 Iowa 691, 102 N. W. 542; Gallaher *v.* Garland, 126 Iowa 206, 101 N. W. 867; Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568, 89 N. W. 7; Chicago, etc., R. Co. *v.* Phillips, 111 Iowa 377, 82 N. W. 787.

Maryland.— Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195.

Michigan.— See Gates *v.* Grand Rapids, 134 Mich. 96, 95 N. W. 998.

Missouri.— Leslie *v.* St. Louis, 47 Mo. 474.

Montana.—Hensley *v.* Butte, 33 Mont. 206, 83 Pac. 481.

Nebraska.— Omaha *v.* Megeath, 46 Nebr. 502, 64 N. W. 1091. See Eddy *v.* Omaha, 72 Nebr. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692.

New Jersey.— Sherley *v.* Elizabeth, 4 N. J. L. J. 58.

New York.— Hassan *v.* Rochester, 67 N. Y. 528; Hassen *v.* Rochester, 65 N. Y. 516.

Oregon.— Oregon, etc., R. Co. *v.* Portland, 25 Oreg. 229, 35 Pac. 452, 22 L. R. A. 713.

South Dakota.— Lee *v.* Mellette, 15 S. D. 586, 90 N. W. 855.

Tennessee.— Arnold *v.* Knoxville, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. N. S. 837.

Texas.— Kerr *v.* Corsicana, (Civ. App. 1895) 35 S. W. 694.

West Virginia.— Cain *v.* Elkins, 57 W. Va. 9, 49 S. E. 898. But *compare* Wilson *v.* Philippi, 39 W. Va. 75, 19 S. E. 553, holding that the collection of an assessment on a lot for the construction of a sidewalk in front of the same ordered by the city will not be restrained in equity on the sole ground that the assessment is illegal.

Wisconsin.— Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500.

United States.— Lyon *v.* Tonawanda, 98 Fed. 361. See also Charles *v.* Marion, 98 Fed. 166.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1196.

Estoppel.—A property-owner who claims that an assessment for a local improvement is invalid cannot assert apparent validity as a ground to enjoin the making of a second assessment. Dyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

22. See *infra*, XIII, E, 21, e, (III).

23. Bagg *v.* Detroit, 5 Mich. 336; Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231; Parrotte *v.* Omaha, 61 Nebr. 96, 84 N. W. 602; Hildebrand *v.* Toledo, 27 Ohio Cir. Ct. 427; Adkins *v.* Toledo, 27 Ohio Cir. Ct. 417, holding that an assessment for a municipal improvement cannot be enjoined on the ground of the unconstitutionality of a provision of the law under which the assessment was made, if the proceedings are sustainable under the law without such provision.

24. Harper *v.* Grand Rapids, 105 Mich. 551, 63 N. W. 517. See also De Puy *v.* Wabash, 133 Ind. 336, 32 N. E. 1016 (holding that, in an action to enjoin the levy of an assessment for street improvements, the manner in which the work was performed cannot be considered, as it is not a jurisdictional question); Blanchard *v.* Columbus, 8 Ohio S. & C. Pl. Dec. 676.

the application is based solely on the ground that the proceedings of the council do not show that benefits to land were taken into consideration.[25] A person who purchases property before the confirmation of an assessment believing that the same has been levied and paid is not entitled to relief.[26]

(II) *Prevention of Cloud on Title.* Where existing invalidity does not appear upon the face of the record, a property-owner will usually be granted equitable relief on the ground of cloud on title.[27]

(III) *Existence of Legal or Statutory Remedy.* Equity will not grant relief against an assessment if the property-owner might have raised his objections to the same either in an action at law,[28] or by proceedings under the statute.[29]

25. Hoffeld *v.* Buffalo, 130 N. Y. 387, 29 N. E. 747; Elwood *v.* Rochester, 43 Hun (N. Y.) 102 [*affirmed* in 122 N. Y. 229, 25 N. E. 238]; Schroder *v.* Overman, 61 Ohio St. 1, 55 N. E. 158, 47 L. R. A. 735. But *compare* Portsmouth Sav. Bank *v.* Omaha, 67 Nebr. 50, 93 N. W. 231; Kummer *v.* Cincinnati, 27 Ohio Cir. Ct. 683; Nulsen *v.* Cincinnati, 27 Ohio Cir. Ct. 383; Lyon *v.* Tonawanda, 98 Fed. 361.

26. Matter of Brown, 14 Daly (N. Y.) 103, 3 N. Y. St. 582.

27. *California.*— Bolton *v.* Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

Minnesota.— Sewall *v.* St. Paul, 20 Minn. 511; Ankeny *v.* Palmer, 20 Minn. 477; Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 468.

Nebraska.— Hamilton *v.* Omaha, 25 Nebr. 826, 41 N. W. 799; Touzalin *v.* Omaha, 25 Nebr. 817, 41 N. W. 796.

New Mexico.— Albuquerque *v.* Zeiger, 5 N. M. 674, 27 Pac. 315.

New York.— Alvord *v.* Syracuse, 163 N. Y. 158, 57 N. E. 310; Astor *v.* New York, 37 N. Y. Super. Ct. 539; Tifft *v.* Buffalo, 7 N. Y. Suppl. 633 [*affirmed* in 130 N. Y. 695, 30 N. E. 68]; Sands *v.* New York, 13 N. Y. St. 61.

But *compare* Wilson *v.* Philippi, 39 W. Va. 75, 19 S. E. 553, holding that the fact that an assessment for constructing a sidewalk is made a lien on the lot in front of which the same is constructed does not create such a cloud on the title as to confer equitable jurisdiction to restrain the collection of an illegal assessment.

28. *California.*— Byrne *v.* Drain, 127 Cal. 663, 60 Pac. 433.

Connecticut.— Dodd *v.* Hartford, 25 Conn. 232.

Georgia.— Gainesville *v.* Dean, 124 Ga. 750, 53 S. E. 183, holding that the fact that a city is attempting to enforce two executions for assessments against two different parcels of land belonging to the same person, and that a third execution has been issued against the same person for an assessment, the levy of which is threatened, will not authorize an injunction on the ground of multiplicity of suits, or clouds on title.

Illinois.— Smith *v.* Kochersperger, 180 Ill. 527, 54 N. E. 614; Boynton *v.* People, 159 Ill. 553, 42 N. E. 842; Ottawa *v.* Chicago, etc., R. Co., 25 Ill. 43 (holding that where proper notice of the proceedings in relation to an assessment for a public improvement is not given, the party aggrieved thereby should bring the record of such proceedings before the circuit court by certiorari); Bloomington *v.* Blodgett, 24 Ill. App. 650.

Indiana.— Indianapolis *v.* Gilmore, 30 Ind. 414.

Massachusetts.— Norton *v.* Boston, 119 Mass. 194; Hunnewell *v.* Charlestown, 106 Mass. 350.

Michigan.— Byram *v.* Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; Williams *v.* Detroit, 2 Mich. 560.

Minnesota.— Fajder *v.* Aitkin, 87 Minn. 445, 92 N. W. 332, 934.

Missouri.— Vrana *v.* St. Louis, 164 Mo. 146, 64 S. W. 180; Michael *v.* St. Louis, (1891) 18 S. W. 967.

New Jersey.— Lanning *v.* Mercer County, 64 N. J. Eq. 161, 53 Atl. 556 (holding that an overassessment of a tract of land for a macadam road, resulting from a mistake by the commissioners as to the number of acres in the tract, is not such an accident as will warrant an injunction to restrain the collection of the excess); Watson *v.* Elizabeth, 35 N. J. Eq. 345; Smith *v.* Newark, 32 N. J. Eq. 1 [*affirmed* in 33 N. J. Eq. 545]; Liebstein *v.* Newark, 24 N. J. Eq. 200 (holding that a court of equity will not entertain an action for relief against an erroneous or illegal assessment, except where the enforcement of the assessment would lead to a multiplicity of suits, or where it would produce irreparable injury, or where the assessment, on the face of the proceedings, is valid, and extrinsic evidence is required to show its invalidity).

New York.— Kennedy *v.* Troy, 77 N. Y. 493 [*reversing* 14 Hun 308]; Crevier *v.* New York, 12 Abb. Pr. N. S. 340. See Astoria Heights Land Co. *v.* New York, 89 N. Y. App. Div. 512, 86 N. Y. Suppl. 651 [*affirmed* in 179 N. Y. 579, 72 N. E. 1139].

North Carolina.— Hilliard *v.* Asheville, 118 N. C. 845, 24 S. E. 738.

Vermont.— Blanchard *v.* Barre, 77 Vt. 420, 60 Atl. 970.

Washington.— Wright *v.* Tacoma, 3 Wash. Terr. 410, 19 Pac. 42.

Wisconsin.— Robinson *v.* Milwaukee, 61 Wis. 585, 21 N. W. 610.

United States.— Rickcords *v.* Hammond, 67 Fed. 380.

See 36 Cent. Dig. tit. "Muncipal Corporations," § 1198.

29. *Alabama.*— Strenna *v.* Montgomery, 86 Ala. 340, 5 So. 115.

California.— Mietzsch *v.* Berkhout, (1893)

So where the statute allows appeal from an assessment it is the proper remedy of landowners dissatisfied with the same.[30]

(IV) *PAYMENT OF AMOUNT DUE.* Where only part of an assessment is invalid, a bill to enjoin collection of the assessment cannot as a rule be maintained without prior tender of payment of the valid part.[31] And the same is true of an action in equity to cancel and set aside the assessment.[32] But where the assessment is void in its entirety there need be no tender.[33] An injunction will issue against the collection of a partly valid assessment without prior payment of the valid portion where the assessment was made upon a basis so false and unwarranted as to furnish no data for determining such valid portion.[34]

(V) *TIME TO SUE AND LIMITATIONS.* Injunction proceedings to restrain the collection of special assessments may be begun after the amount has been ascertained and notice given the property-owners.[35] Injunction will not issue where the parties have unreasonably delayed to ask relief.[36] Where the municipal authorities have jurisdiction to improve a street, a property-owner, who, with knowledge

35 Pac. 321; Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71.

Illinois.— Hewes *v.* Winnetka, 60 Ill. App. 654, holding that where every objection that is urged in a bill to enjoin collection of a special assessment could have been raised on the application for judgment, the bill will be dismissed.

Indiana.— Robinson *v.* Valparaiso, 136 Ind. 616, 36 N. E. 644.

Iowa.— Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103.

Michigan.— Nelson *v.* Saginaw, 106 Mich. 659, 64 N. W. 499.

Minnesota.— Kelly *v.* Minneapolis City, 57 Minn. 294, 59 N. W. 304, 47 Am. St. Rep. 605, 26 L. R. A. 92.

New York.— Eno *v.* New York, 68 N. Y. 214; Heckman *v.* New York, 22 Hun 590.

See 36 Cent. Dig. tit. "Muncipal Corporations," § 1198.

30. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782; Hazlehurst *v.* Baltimore, 37 Md. 199. But see Liebermann *v.* Milwaukee, 89 Wis. 336, 61 N. W. 1112, holding that where an assessment levied by the city is void, injunction will lie to restrain its enforcement, although the statute provides for appeals from assessments.

31. *California.*— Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 601; Esterbrook *v.* O'Brien, 98 Cal. 671, 33 Pac. 765.

Indiana.— Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342; Evansville *v.* Pfisterer, 34 Ind. 36, 7 Am. Rep. 214.

Kansas.— Ottawa *v.* Barney, 10 Kan. 270.

Nebraska.— Redick *v.* Omaha, 35 Nebr. 125, 52 N. W. 847. See also Darst *v.* Griffin, 31 Nebr. 668, 48 N. W. 819, holding that where objections are made to assessments for expenses of a local improvement, on the ground of irregularities, the court, as a condition of granting relief, may require the property-owner to do equity by paying the amount which his property is benefited by the improvement.

Ohio.— Ehni *v.* Columbus, 3 Ohio Cir. Ct. 493, 2 Ohio Cir. Dec. 283.

Pennsylvania.— Pittsburgh's Appeal, 118 Pa. St. 458, 12 Atl. 366, (1888) 12 Atl. 368.

Wisconsin.— Yates *v.* Milwaukee, 92 Wis. 352, 66 N. W. 248; Meggett *v.* Eau Claire, 81 Wis. 326, 51 N. W. 566; Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578.

United States.— Treat *v.* Chicago, 130 Fed. 443, 64 C. C. A. 645 [*affirming* 125 Fed. 644].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1200.

32. Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330.

33. *Iowa.*— Iowa Pipe, etc., Co. *v.* Callanan, 125 Iowa 357, 101 N. W. 141, 106 Am. St. Rep. 311, 67 L. R. A. 408.

New York.— Hassan *v.* Rochester, 67 N. Y. 528.

Oregon.— Ladd *v.* Spencer, 23 Oreg. 193, 31 Pac. 474, so holding where the abutting owner had protested at the inception of the proceedings.

Texas.— Ardrey *v.* Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726; Kerr *v.* Corsicana, (Civ. App. 1895) 35 S. W. 694.

United States.— Zehnder *v.* Barber Asphalt Paving Co., 106 Fed. 103; Bidwell *v.* Huff, 103 Fed. 362.

Validity of charter requiring payment.—A charter which provides that no action shall be brought to test the validity of any assessment unless plaintiff shall first tender and pay into court the amount of the assessed tax is unconstitutional. Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474.

34. Griggs *v.* Tacoma, 3 Wash. 785, 29 Pac. 449; Howell *v.* Tacoma, 3 Wash. 711, 29 Pac. 447, 28 Am. St. Rep. 83.

35. Andrews *v.* Love, 50 Kan. 701, 31 Pac. 1094, holding the action not premature. See also Kansas City *v.* Smiley, 62 Kan. 718, 64 Pac. 613.

36. Smith *v.* Kochersperger, 180 Ill. 527, 54 N. E. 614 (holding that where the alleged fraudulent proceedings on which complainant bases his right to have a sale of his property under a judgment for special assessments enjoined were matters of record before the judgment was obtained, his allegation that he did not know of such alleged grounds of defense until after the judgment is insufficient to en-

of such improvement, makes no objection until after the work has been completed, cannot enjoin the collection of the assessment on the ground that the proceedings have not been regular.[37] A statutory provision that suit to set aside or enjoin the making of an assessment shall be brought within a specified time is constitutional,[38] and an action brought after the expiration of such designated period will not be entertained;[39] but such statutory limitation will not apply where the assessment is based upon absolutely void proceedings,[40] nor will it apply to an action to set aside an assessment as a cloud on title because of illegal acts of officers in levying the same.[41]

(VI) *PARTIES.* One seeking to enjoin an assessment must show that he has sustained substantial injury.[42] By the weight of authority several property-owners whose land has been assessed may join in an action to restrain enforcement of a void assessment,[43] although it has been held that owners of several parcels of property wrongfully assessed because not benefited cannot join because several in interest.[44] Where the action is by the owner to enjoin collection of the assessment on the ground that it is unlawful as to him the contractors for the improvement need not be joined.[45] In an action to restrain the issuance of deeds upon certificates of sale the several holders of the certificates may be joined as defendants.[46] Where the city is not liable for damages in any event it has been held that it is not a necessary party to an injunction to restrain a tax-collector from the enforcement of assessments in street widening proceedings.[47]

(VII) *PLEADING.* In actions to enjoin or set aside assessment proceedings the rules of pleading governing civil actions prevail,[48] and particularly those governing injunctions apply.[49] So complainant must show affirmatively the defects in the

title him to relief); Gates *v.* Grand Rapids, 134 Mich. 96, 95 N. W. 998; Byram *v.* Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; Lewis *v.* Elizabeth, 25 N. J. Eq. 298. See also Monk *v.* Ballard, 42 Wash. 35, 84 Pac. 397 (holding that an action to annul an assessment for a sewer, commenced within thirty days from the time the ordinance approving the assessment roll went into effect, is seasonable); Ross *v.* Portland, 105 Fed. 682.

37. Wingate *v.* Astoria, 39 Oreg. 603, 65 Pac. 982 [*citing* Balfe *v.* Lammers, 109 Ind. 347, 10 N. E. 92; Strout *v.* Portland, 26 Oreg. 294, 38 Pac. 126; Barkley *v.* Oregon City, 24 Oreg. 515, 53 Pac. 978; Wilson *v.* Salem, 24 Oreg. 504, 34 Pac. 691]. See also Verdin *v.* St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

38. Wahlgren *v.* Kansas City, 42 Kan. 243, 21 Pac. 1068.

39. Union Pac. R. Co. *v.* Kansas City, 73 Kan. 571, 85 Pac. 603; Holmquist *v.* Anderson, 67 Kan. 861, 74 Pac. 227; Kansas City *v.* Cullinan, 65 Kan. 68, 68 Pac. 1099; Kansas City *v.* Gray, 62 Kan. 198, 61 Pac. 746; Doran *v.* Barnes, 54 Kan. 238, 38 Pac. 300; Hammerslough *v.* Kansas City, 46 Kan. 37, 26 Pac. 496; Marshall *v.* Leavenworth, 44 Kan. 459, 24 Pac. 975; Lynch *v.* Kansas City, 44 Kan. 452, 24 Pac. 973; Topeka *v.* Gage, 44 Kan. 87, 24 Pac. 82; Kansas City *v.* Trotter, 9 Kan. App. 222, 59 Pac. 679; Jersey City *v.* Green, 42 N. J. L. 627; Chilcott *v.* Buffalo, 7 N. Y. Suppl. 638.

40. Steinmuller *v.* Kansas City, 3 Kan. App. 45, 44 Pac. 600. See also Crane *v.* Siloam Springs, 67 Ark. 30, 55 S. W. 955.

41. Brennan *v.* Buffalo, 8 Misc. (N. Y.) 178, 29 N. Y. Suppl. 750.

42. Shannon *v.* Omaha, (Nebr. 1906) 106 N. W. 592. *Compare* Catlettsburg *v.* Self, 115 Ky. 669, 74 S. W. 1064, 25 Ky. L. Rep. 161.

Purchaser subject to assessment.— Where a purchaser of lands subject to an apparent lien for a special assessment procures title by a conveyance reciting that they are subject to the lien of such assessments, which, with interest, the purchaser assumes to pay, he cannot, in a suit in equity, set aside the tax as invalid. Eddy *v.* Omaha, 72 Nebr. 555, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692.

43. Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825; Upington *v.* Oviatt, 24 Ohio St. 232; Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673; Coleman *v.* Rathburn, 40 Wash. 303, 82 Pac. 540. But *compare* Bouton *v.* Brooklyn, 7 How. Pr. (N. Y.) 198; Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823; Barnes *v.* Beloit, 19 Wis. 93.

44. Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 540, 1 L. R. A. 673.

45. Chicago, etc., R. Co. *v.* Phillips, 111 Iowa 377, 82 N. W. 787.

46. Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823.

47. Cohn *v.* Parcels, 72 Cal. 367, 14 Pac. 26.

48. See, generally, PLEADING.

49. See INJUNCTIONS, 22 Cyc. 924 *et seq.*

Presumptions.— From an allegation in the complaint, in an action to enjoin the sale of plaintiff's lots for special assessments, that the lots were sold "for the amount of said assessments," it will be presumed that all other taxes thereon had been paid, and there-

proceedings,[50] and especially that he has been injured.[51] When the owners of several parcels of property join, the complaint should show that the cause of action is the same to all plaintiffs,[52] or that the action is properly brought to avoid a multiplicity of suits.[53] A complaint which alleges two grounds for relief, one of which is good, is not demurrable because of the insufficiency of the other.[54] The answer must deny the material allegations of the complaint.[55]

(VIII) *EVIDENCE.*[56] The burden is on complainant to establish the defects on which he relies.[57] The court will not set aside an assessment because there are

fore it is not necessary to allege such payment. Gilman *v.* Milwaukee, 61 Wis. 588, 21 N. W. 640. Where a bill to restrain the collection of a special sewer assessment alleged that the sewer subdistrict was established in June, 1899, that the ordinance authorizing the improvement was passed Jan. 15, 1900, and that the assessing ordinance was passed Dec. 3, 1900, it was held that it would be assumed, in the absence of a showing to the contrary on demurrer to the bill, that in the course of such proceedings the various steps required by Ohio Rev. St. (1892) §§ 2304, 2374–2376, and 2378, then in force, were duly complied with. Cleneay *v.* Norwood, 137 Fed. 962.

Inconsistency.— A complaint to cancel a special assessment and to restrain its perfection and enforcement is not demurrable because it shows that the assessment is void. Beaser *v.* Ashland, 89 Wis. 28, 61 N. W. 77. Where a complaint to obtain relief from a sidewalk assessment specifically alleged certain defects in the proceedings which it was conceived went to the right of the municipal authorities to make any assessment, a general averment that a certain assessment, made prior to the final assessment questioned by the complaint, "appears to be and remained a lien upon the plaintiff's said real estate," would not be considered as ground for canceling that particular assessment, or as asserting an obstacle to the making of the final assessment against which injunctive relief was specifically asked. Lyer *v.* Woods, 166 Ind. 44, 76 N. E. 624.

Division into paragraphs.— In a petition to enjoin the collection of an assessment it is improper to make allegations of regularity and irregularity in the proceedings in separate paragraphs styled different causes of action. Tyler *v.* Columbus, 6 Ohio Cir. Ct. 224, 3 Ohio Cir. Dec. 427.

Plea of tender.— A complaint in a suit to restrain a city from collecting a special assessment in excess of what plaintiff admits to be due is not bad for plaintiff's failure to keep good the tender of the amount admitted to be due in the absence of a demand to make the tender good at the time of entry of judgment. Coleman *v.* Rathbun, 40 Wash. 303, 82 Pac. 540.

50. *Illinois.*— Hewes *v.* Winnetka, 60 Ill. App. 654.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Missouri.— Michael *v.* St. Louis, 112 Mo. 610, 20 S. W. 666.

Montana.— Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410.

Ohio.— Bolton *v.* Cleveland, 35 Ohio St. 319.

Oregon.— Shannon *v.* Portland, 38 Oreg. 382, 62 Pac. 50.

South Dakota.— Phillips *v.* Sioux Falls, 5 S. D. 524, 59 N. W. 881, holding that a complaint to restrain the collection of an assessment for city improvements that merely alleges the assessment to be illegal and void, without specifying wherein it is defective, is insufficient, as the city officers are presumed to have performed every duty imposed on them.

United States.— Cleneay *v.* Norwood, 137 Fed. 962.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1204.

51. Slavin *v.* Greene, 4 Ohio S. & C. Pl. Dec. 99, 2 Ohio N. P. 39; Watkins *v.* Milwaukee, 55 Wis. 335, 13 N. W. 222; Owens *v.* Milwaukee, 47 Wis. 461, 3 N. W. 3.

52. Michael *v.* St. Louis, 112 Mo. 610, 20 S. W. 666.

53. Michael *v.* St. Louis, 112 Mo. 610, 20 S. W. 666.

54. Boyle *v.* Brooklyn, 71 N. Y. 1 [*reversing* 8 Hun 32], vacation as cloud on title.

A complaint asserting a single good ground of relief is good against demurrer. Armstrong *v.* Ogden City, 9 Utah 255, 34 Pac. 53; Rogers *v.* Milwaukee, 13 Wis. 610.

55. Gilmore *v.* Fox, 10 Kan. 509. See Alford *v.* Dallas, (Tex. Civ. App. 1896) 35 S. W. 816, holding an answer good as against a general demurrer.

Matter in estoppel.— On an issue whether a sewer was lawfully established, evidence offered by the city showing the ratification by the city of the unauthorized construction of the sewer was not matter in "estoppel" that should have been pleaded. Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

Waiver.— Where the charter and the ordinances of a city require notice to be given to property-owners for thirty days to designate material for paving, and notice is not duly given, and the city relies on a waiver of the failure to give notice, it should plead such waiver in a suit to enjoin the assessment, and where no waiver is pleaded the facts are outside the issues. Eddy *v.* Omaha, 72 Nebr. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692.

56. See, generally, EVIDENCE.

57. *Kansas.*— Argentine *v.* Simmons, 54 Kan. 699, 39 Pac. 181.

conflicting opinions concerning its justice or sufficiency, it must clearly appear that injustice has been done.[58]

(IX) *JUDGMENT AND RELIEF.* The rights of a person not a party to the suit cannot be adjudicated,[59] and if an assessment is declared invalid, its enforcement will not be restrained as against the property of persons not parties to the action.[60] Under some statutes the court in which proceedings are brought to enjoin the collection of an assessment may make such order in the premises as is just and equitable when error has been committed in the proceedings.[61] Where an assessment is illegal only in part, and the illegal part can be segregated, the whole assessment will not be vacated.[62] Where the collection of an assessment is enjoined the city should not be enjoined from collecting a further amount on account of the improvement, when it is entitled to make a reassessment.[63] And where an assessment is not entirely void, a general decree quieting title will not be granted, since a lien may be established on the land, although no title passes under the sale for the assessment.[64] In an action to restrain the sale of land to pay a special assessment, the city may set off the amount of the assessment, and if valid have judgment therefor;[65] but in case defendant does not ask affirmative relief the court cannot determine what amount of the expense of an improvement is properly chargeable to plaintiff.[66] In any event relief not sought or germane to that sought cannot be granted.[67] An injunction against the execution of a deed to a tax purchaser may be awarded as incidental to an action to annul an invalid assessment and cancel a certificate of sale.[68] Where the cost of work has fallen below the estimate upon a reduction of the assessment to conform to the actual cost, frontage actually assessable when the improvement was ordered should not be decreased by any part subsequently appropriated by the municipal corporation for streets.[69] Where an injunction restraining an assessment is dissolved a sale of the land on non-payment of the assessment cannot be ordered.[70]

Ohio.— Bolton *v.* Cleveland, 35 Ohio St. 319.

Oregon.—Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407.

Pennsylvania.— Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198, 21 Atl. 888, holding that in a suit by property-owners against a city to enjoin it from enforcing a lien for an improvement made pursuant to an ordinance valid on its face, the burden is on plaintiffs, who allege that the ordinance is void, to show wherein the city council omitted any essential prerequisite.

United States.— Lawrence *v.* New York, 15 Fed. Cas. No. 8,139*a*.

Ratification.— Where, in a suit by a taxpayer against a city, the answer denied that a certain sewer was not lawfully established, evidence to show ratification of unauthorized construction was admissible. Akers *v.* Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

58. State *v.* Passaic, 37 N. J. L. 65.

59. Bagg *v.* Detroit, 5 Mich. 336, holding that in a suit to enjoin a city from collecting an assessment for paving a street, which complainant alleged it was the duty of a plank-road company to pave, the rights of the plank-road company which was not a party to the bill would not be adjudicated.

60. Trimmer *v.* Rochester, 130 N. Y. 401, 29 N. E. 746; Knell *v.* Buffalo, 54 Hun (N. Y.) 80, 7 N. Y. Suppl. 233.

61. Thompson *v.* Andrew, 9 Ohio Cir. Ct. 581, 6 Ohio Cir. Dec. 451, holding that the action of an auditor in making an illegal addition to the amount of an assessment in placing the same upon the duplicate was within such a statute.

62. Kinsella *v.* Auburn, 4 Silv. Sup. (N. Y.) 101, 7 N. Y. Suppl. 317; Brennan *v.* Buffalo, 8 Misc. (N. Y.) 178, 29 N. Y. Suppl. 750; Griswold *v.* Pelton, 34 Ohio St. 482.

63. Lester *v.* Seattle, 42 Wash. 539, 85 Pac. 14.

Injunction without prejudice.— The collection of an assessment may be enjoined without prejudice to the rights of a city to make a reassessment and collect the same under statutory provisions. Upington *v.* Oviatt, 24 Ohio St. 232.

64. Jackson *v.* Smith, 120 Ind. 520, 22 N. E. 431.

65. Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78; Lake Shore, etc., R. Co. *v.* Dunkirk, 65 Hun (N. Y.) 494, 20 N. Y. Suppl. 596 [*affirmed* in 143 N. Y. 660, 39 N. E. 21].

66. Brewer *v.* Bowling Green, 7 Ohio Cir. Ct. 489, 4 Ohio Cir. Dec. 694, so holding in a proceeding to enjoin collection of an illegal assessment.

67. Wilson *v.* Boise City, 7 Ida. 69, 60 Pac. 84. See also Coleman *v.* Rathbun, 40 Wash. 303, 82 Pac. 540.

68. Kittle *v.* Bellegarde, 86 Cal. 556, 25 Pac. 55.

69. Spangler *v.* Cleveland, 35 Ohio St. 469.

70. Weber *v.* San Francisco, 1 Cal. 455.

(x) *APPEAL.*[71] It has been held that an action to set aside an assessment for a highway improvement is not appealable as one affecting title to land.[72] Errors which are not specifically assigned will not be considered on appeal.[73] The decision of a trial court upon a question of fact cannot be reviewed where the evidence is not preserved in the record.[74] A judgment sustaining an assessment will not be reversed because of the admission of immaterial evidence where it appears that the assessment is valid.[75] In case a decree has been rendered upon incomplete evidence it will be reversed.[76] Where the relief sought has become unavailing the appeal should be dismissed.[77]

22. REASSESSMENT, ADJUSTMENT OF ARREARAGES, AND ADDITIONAL ASSESSMENTS — a. Reassessment — (i) *IN GENERAL.* It would seem that in the absence of an express authorization by statute a reassessment may be made in place of an assessment void because of irregularity.[78] But the statutes generally provide for a reassessment where the prior assessment is void,[79] or is open to attack because of

71. Appeal, generally, see APPEAL AND ERROR.

72. Nichols *v.* Voorhis, 74 N. Y. 28.

73. Albrecht *v.* St. Paul, 56 Minn. 99, 57 N. W. 330, holding that an assignment of error in a finding that an allegation in the answer that an assessment appeared of record to be a valid lien on plaintiff's land was true was too general and did not reach a finding complained of that improvements were for a public and not a private use.

74. Parker *v.* Atchison, 48 Kan. 574, 30 Pac. 20.

Questions of fact.—The question of whether an improvement is temporary and such as may be done at the direction of the city engineer is one of fact (Russell *v.* Adkins, 24 Mo. App. 605); as is the question of whether a curbing is part of a street improvement or of a sidewalk improvement (Ehni *v.* Columbus, 3 Ohio Cir. Ct. 493, 2 Ohio Cir. Dec. 283).

75. Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782.

76. Wilkins *v.* Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427, holding that a decree declaring an assessment void would not be confirmed where the suit was heard on pleadings and stipulations which did not set out all the documents in the case.

77. Wilson *v.* Boise City, 7 Ida. 69, 60 Pac. 84.

78. Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327; Himmelmann *v.* Cofran, 36 Cal. 411; Pittsburgh, etc., R. Co. *v.* Taber, (Ind. 1906) 77 N. E. 741; State *v.* Seattle, 42 Wash. 370, 85 Pac. 11, holding that where an assessment for street improvements is invalid as to certain lots because of want of notice to their owners, a reassessment may be made as to them under the authority under which the city originally proceeded. But *compare In re* Mauger, 23 Hun (N. Y.) 658, holding that a statute validating a void contract for an improvement did not authorize a reassessment.

What constitutes reassessment.— An order that payment of part of the sum assessed within a specified time should be a discharge accompanied by a direction that the collector should enforce the original assessment after that time does not amount to a reassessment. Holt *v.* Somerville, 127 Mass. 408.

79. See the statutes of the several states. And see the following cases:

California.— Gray *v.* Richardson, (1898) 55 Pac. 603, holding that Street Improvement Act, § 9, authorizing a second assessment where a suit to foreclose a lien for street work has been defeated by some defect in the prior assessment, does not apply when such suit is defeated by any defects other than in making the assessment. See also City St. Imp. Co. *v.* Emmons, 138 Cal. 297, 71 Pac. 332.

Illinois.— Chicago *v.* Sherman, 212 Ill. 498, 72 N. E. 396; West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427; Pardridge *v.* Hyde Park, 131 Ill. 537, 23 N. E. 345; Wells *v.* Chicago, 66 Ill. 280; Laflin *v.* Chicago, 48 Ill. 449.

Kansas.— Kansas City *v.* Silver, 74 Kan. 851, 85 Pac. 805; Parker *v.* Atchison, 48 Kan. 574, 30 Pac. 20; Emporia *v.* Bates, 16 Kan. 495, holding that where an assessment had been enjoined for irregularity the injunction did not prevent collection of a valid reassessment.

Michigan.— People *v.* Lansing, 27 Mich. 131.

Minnesota.— State *v.* Ramsey County Dist. Ct., 97 Minn. 147, 106 N. W. 306; State *v.* Egan, 64 Minn. 331, 67 N. W. 77.

New Jersey.—Elizabeth *v.* Meeker, 45 N. J. L. 157; Righter *v.* Newark, 45 N. J. L. 104; State *v.* Plainfield, 38 N. J. L. 93; State *v.* Hoboken, 37 N. J. L. 406 (holding that under N. J. Pub. Laws, p. 1438, § 15, Act, April, 1871, a new assessment could not be made unless the old was set aside as an entirety); Bergen *v.* State, 32 N. J. L. 490 (holding that under a particular statute the power to decide whether there should be an entire or partial reassessment was vested in the corporate authorities). See also Post *v.* Passaic, 56 N. J. L. 421, 28 Atl. 553; Smith *v.* Newark, 33 N. J. Eq. 545.

Washington.— McNamee *v.* Tacoma, 24 Wash. 591, 64 Pac. 791; Cline *v.* Seattle, 13 Wash. 444, 43 Pac. 367.

irregularities in proceedings,[80] or because of an insufficiency or excess in amount realized as compared with the cost of the improvement.[81] Such statutes are not unconstitutional,[82] and may be given a retroactive operation as to defective assessments originating prior to their passage.[83] So after an improvement has been made under a void ordinance which assessed the expense upon property benefited, the legislature may authorize the city to levy an assessment against such property to the extent to which it has benefited.[84] But statutes which authorize the reassessment and relevy of special taxes upon irregularities in the original proceedings are to be strictly construed as in derogation of individual rights.[85] Such statutes have been held to apply only when the assessment is void because of irregularity and not because of lack of power.[86] And where an assessment is set aside because made under an invalid ordinance the defect cannot be cured by making a new assessment under the same ordinance.[87]

(II) *Necessity of Disposition of Original Assessment.* Proceedings for a reassessment cannot be had while the original assessment remains undisposed of.[88] But pendency of the original assessment proceedings at the time of a pro-

Wisconsin.— Sanderson *v.* Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1208.

80. *Illinois.*— West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 527.

Kansas.— Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844.

Kentucky.— Cooper *v.* Nevin, 90 Ky. 85, 13 S. W. 841, 11 Ky. L. Rep. 875.

Minnesota.— State *v.* Ramsey County Dist. Ct., 95 Minn. 183, 103 N. W. 881; St. Paul *v.* Mullen, 27 Minn. 78, 6 N. W. 424.

Nebraska.— S. D. Mercer Co. *v.* Omaha, (1906) 107 N. W. 565.

New York.—Jones *v.* Tonawanda, 158 N. Y. 438, 53 N. E. 280; Matter of Hollister, 96 N. Y. App. Div. 501, 89 N. Y. Suppl. 518.

Vermont.— Woodhouse *v.* Burlington, 47 Vt. 300.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1208.

81. Gill *v.* Oakland, 124 Cal. 335, 57 Pac. 150; Chicago *v.* Noonan, 210 Ill. 18, 71 N. E. 32; Kline *v.* Huntington County, 152 Ind. 321, 51 N. E. 476.

82. *Iowa.*— Tuttle *v.* Polk, 84 Iowa 12, 50 N. W. 38.

Kansas.— Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844; Newman *v.* Emporia, 41 Kan. 583, 21 Pac. 593.

Maryland.— Baltimore *v.* Ulman, 79 Md. 469, 30 Atl. 43.

Massachusetts.— Warren *v.* Boston St. Com'rs, 187 Mass. 290, 72 N. E. 1022.

Ohio.— Raymond *v.* Cleveland, 42 Ohio St. 522 [*affirming* 8 Ohio Dec. Reprint 123, 5 Cinc. L. Bul. 809].

Wisconsin.— Schintgen *v.* La Crosse, 117 Wis. 158, 94 N. W. 84, holding that the fact that the special assessment bonds issued against abutting property under an invalid assessment were purchased from the city by private parties, and were in their hands at the time the reassessment was made, did not render the reassessment law invalid, as imposing a tax for private use.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1208.

83. *In re* Piedmont Ave., 59 Minn. 522, 61 N. W. 678; Carpenter *v.* St. Paul, 23 Minn. 232. But *compare* St. Louis *v.* Clemens, 52 Mo. 133; Tingue *v.* Port Chester, 101 N. Y. 294, 4 N. E. 625.

84. *Maryland.*— Baltimore *v.* Ulman, 79 Md. 469, 30 Atl. 43.

Minnesota.—*In re* Piedmont Ave., 59 Minn. 522, 61 N. W. 678.

New Jersey.—Howard Sav. Inst. *v.* Newark, 52 N. J. L. 1, 18 Atl. 672.

Pennsylvania.— Chester City *v.* Pennell, 169 Pa. St. 300, 32 Atl. 408.

Wisconsin.— May *v.* Holdridge, 23 Wis. 93.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1208.

85. Dean *v.* Charlton, 27 Wis. 522.

86. Rork *v.* Smith, 55 Wis. 67, 12 N. W. 408; Dean *v.* Borchsenius, 30 Wis. 236; Dill *v.* Roberts, 30 Wis. 178.

87. Chicago *v.* Wright, 80 Ill. 579.

88. Goodrich *v.* Chicago, 218 Ill. 18, 75 N. E. 805, holding that under Laws (1871-1872), p. 256, art. 9, § 46, a judgment sustaining an assessment for special improvement has been set aside, so as to authorize a new assessment, where the ordinance under which the work was done has been held defective by the supreme court, but not void, and the original petition has been dismissed.

Pendency a question of fact.— Upon application for the confirmation of a reassessment the question whether the original confirmation proceeding is still pending is one of fact to be shown by the evidence. Cratty *v.* Chicago, 217 Ill. 453, 75 N. E. 343.

Estoppel.— Where an objection to the confirmation of a new assessment is based on the ground that the original proceedings were not pending in court when the improvement act of 1897 took effect, the objector is estopped to urge that the original proceedings were pending at such time. Cratty *v.* Chicago, 217 Ill. 453, 75 N. E. 343.

Dismissal of original petition as res adjudicata.— Under Laws (1871-1872), p. 256,

ceeding to confirm a new assessment is urged too late as a defense to an application for judgment of sale for the new assessment.[89]

(III) *Effect of Payment or Enforcement of First Assessment.* The general rule is that payment of a first assessment does not prevent the city from enforcing collection of a reassessment upon refunding the amount so paid.[90] But such amount must be refunded[91] or credited on the new assessment.[92]

(IV) *Operation and Effect.*[93] A reassessment under a new grant of authority is not a reopening of the judgment by which a former assessment was declared invalid and proceedings thereunder restrained.[94] In some jurisdictions the reassessment being merely supplementary to the regular proceedings is effective not only to secure a valid assessment of benefits but to validate improvement warrants issued under the original proceeding so far at least as the reassessed benefits are sufficient.[95] Where the power to make a reassessment is not impugned, objections to the prior assessment are irrelevant.[96]

b. Adjustment of Arrearages. By statute in some instances in order to obviate the difficulty which has arisen from the fact that taxes, assessments, and water rates in certain municipalities have fallen into arrears, and that the validity of some of such assessments is subject to question by reason of irregularities in procedure, or because of the unconstitutionality of the laws under which the proceedings have been had, provision has been made for the determination by a specified board of the amount of such arrearages as should in justice be charged against specific parcels of land, and for the making of such amount when so fixed as a charge upon the land in lieu of all arrearages of taxes, assessments, and rates,[97] and the validity of such statutes has been upheld.[98]

c. Additional Assessments — (I) *In General.* When an assessment proves insufficient, it may be provided by statute that an additional assessment may be levied.[99] Under some statutes on proceedings for a supplemental assessment, the

art. 9, § 46, authorizing a city to levy a new assessment for a municipal improvement where the original assessment has been set aside, the dismissal of the original petition by the county court because the city failed to make the proof required by the supreme court on remand is not *res judicata* as to the new assessment. Goodrich *v.* Chicago, 218 Ill. 18, 75 N. E. 805.

89. Wagg *v.* People, 218 Ill. 337, 75 N. E. 977.

90. Cody *v.* Cicero, 203 Ill. 322, 67 N. E. 859; Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 41 N. E. 1102; Freeport St. R. Co. *v.* Freeport, 151 Ill. 451, 38 N. E. 137. But *compare* Cross *v.* Hayes, 5 N. J. L. J. 368; Budge *v.* Grand Fork, 1 N. D. 309, 47 N. W. 390, 10 L. R. A. 165; Pittsburg *v.* Logan, 165 Pa. St. 516, 30 Atl. 1017.

91. Bayonne *v.* Morris, 61 N. J. L. 127, 38 Atl. 819.

92. West Chicago Park Com'rs *v.* Sweet, 167 Ill. 326, 47 N. E. 728; Bowen *v.* Chicago, 61 Ill. 268.

93. Relation back of lien see *infra*, XIII, E, 25, c.

94. Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578.

95. Duniway *v.* Portland, 47 Oreg. 103, 81 Pac. 945.

96. Brown *v.* South Orange, 49 N. J. L. 104, 6 Atl. 312.

97. See the statutes of the several states. And see Protestant Foster Home *v.* Newark, 52 N. J. L. 138, 18 Atl. 572; Norris *v.* Elizabeth, 51 N. J. L. 485, 18 Atl. 302; Elizabeth *v.* The Chancellor, 51 N. J. L. 414, 17 Atl. 942; Terrel *v.* Wheeler, 123 N. Y. 76, 25 N. E. 329 [*affirming* 49 Hun 262, 2 N. Y. Suppl. 86]; People *v.* McGuire, 12 N. Y. Suppl. 703.

98. *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363; Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285; Fithian *v.* Wheeler, 125 N. Y. 696, 26 N. E. 141; Terrel *v.* Wheeler, 123 N. Y. 76, 25 N. E. 329 [*affirming* 49 Hun 262, 2 N. Y. Suppl. 86]; Lamb *v.* Connolly, 122 N. Y. 531, 25 N. E. 1042 [*affirming* 3 N. Y. Suppl. 252]; White *v.* Wheeler, 51 Hun (N. Y.) 573, 4 N. Y. Suppl. 405 [*affirmed* in 123 N. Y. 627, 25 N. E. 952]; Wallerstein *v.* Bohanna, 1 Silv. Sup. (N. Y.) 363, 5 N. Y. Suppl. 319; Kelly *v.* Wheeler, 3 N. Y. Suppl. 289 [*affirmed* in 125 N. Y. 696, 26 N. E. 141].

99. Wickett *v.* Cicero, 152 Ill. 575, 38 N. E. 909; Chicago *v.* People, 56 Ill. 327; Ayer *v.* Lake, 11 Ill. App. 564; Meech *v.* Buffalo, 29 N. Y. 198.

Evidence of deficiency.—The commissioners' estimate of the amount which it is necessary to collect by supplemental assessment to pay the deficiency in an original improvement assessment, when approved by the town board of trustees, is *prima facie* proof of the amount of the deficiency. Cicero *v.* Skinner, 220 Ill. 82, 77 N. E. 137.

Matters included.— The expense of collecting and disbursing an original improvement assessment may be included in the estimate

sufficiency of the ordinance for the original assessment cannot be attacked.[1] An ordinance erroneously providing for interest on a supplemental assessment is not for that reason void *in toto* where the amount levied for the main deficit may be ascertained and the provision for interest rejected.[2]

(II) *Effect of Invalidity of Former Assessment.* Where an original assessment is void an additional assessment to make up its deficiency is likewise void.[3]

d. Notice of Relevy or New Assessment. Unless required by statute,[4] a city need not give notice of intention to levy reassessment or grant a hearing thereon.[5]

e. Time For Making New Assessment. Where an assessment for an improvement is invalid and is so declared, another assessment may be made after the work is completed.[6] The time within which a municipal corporation may be permitted or required to make a reassessment is limited by a statute barring an action to enforce the original assessment.[7] A statute providing that in certain contingencies a new assessment may be made within a stated time after confirmation of an original assessment does not impose a limitation where the original assessment has never been confirmed.[8]

f. Levy, Amount, and Apportionment of New Assessment. The rules governing the levy and apportionment of an original assessment apply generally to the levy of a reassessment.[9] But where in the making of a reassessment an arbitrary

for the supplemental assessment. Cicero *v.* Skinner, 220 Ill. 82, 77 N. E. 137.

Where original assessment was reduced.— A judgment confirming a special assessment after reducing the amount thereof is not conclusive against the right of the municipality to levy a supplemental assessment, in the absence of a finding that the property was assessed its full proportionate share of the actual cost of the improvement. Cicero *v.* Skinner, 220 Ill. 82, 77 N. E. 137. Where, on objections to a special assessment, the court reduces the assessment on certain property, without increasing the other assessments, and the sum raised is therefore too small, the municipality cannot, upon a supplemental assessment to meet the deficiency, have any part of such deficiency assessed upon the said property. Greeley *v.* Cicero, 148 Ill. 632, 36 N. E. 603.

1. Conway *v.* Chicago, 219 Ill. 295, 76 N. E. 384.

2. Conway *v.* Chicago, 219 Ill. 295, 76 N. E. 384.

3. Workman *v.* Chicago, 61 Ill. 463; Union Bldg. Assoc. *v.* Chicago, 61 Ill. 439; Bowen *v.* Chicago, 61 Ill. 268. And see Harrison *v.* Chicago, 61 Ill. 459.

4. People *v.* Pontiac, 185 Ill. 437, 56 N. E. 1114; State *v.* Ramsey County Dist. Ct., 95 Minn. 503, 104 N. W. 553.

Sufficiency of notice.— Where the board of public works of the city of St. Paul proceeded to make a reassessment, the giving of separate notices for two separate meetings for the purpose of determining at one meeting the new assessment district, and at the other adjusting the assessment on the property benefited, was a substantial compliance with the city charter. State *v.* Ramsey County Dist. Ct., 95 Minn. 503, 104 N. W. 553.

5. Newman *v.* Emporia, 41 Kan. 583, 21 Pac. 593; Baltimore *v.* Ulman, 79 Md. 469, 30 Atl. 43; Duniway *v.* Portland, 47 Oreg. 103, 81 Pac. 945.

6. Wood *v.* Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; Davis *v.* Litchfield, 155 Ill. 384, 40 N. E. 354; Freeport St. R. Co. *v.* Freeport, 151 Ill. 451, 38 N. E. 137.

7. Frye *v.* Mt. Vernon, 42 Wash. 268, 84 Pac. 864.

8. Pardridge *v.* Hyde Park, 131 Ill. 537, 23 N. E. 345, holding that an order for a new assessment, when made while the assessment proceedings are still pending, is not barred by the statute of limitations, although more than twelve years have elapsed since the original assessment roll was filed.

9. Brevoort *v.* Detroit, 24 Mich. 322; Brown *v.* South Orange, 49 N. J. L. 104, 6 Atl. 312; Ropes *v.* Essex County Public Road Bd., 40 N. J. L. 64. See Johnston *v.* Trenton, 43 N. J. L. 166 (holding that it was the duty of commissioners to ascertain what sum should have been assessed to each lot at the date of the first assessment); *In re* Shiloh St., 152 Pa. St. 136, 25 Atl. 530 (holding that viewers must ascertain what improvements were really worth and rely on a statement made by city officials); *In re* Westlake Ave., 40 Wash. 144, 82 Pac. 279 (holding that where the court, on appeal by some property-owners from an order confirming an assessment for the cost of a local improvement, reversed the order, the trial court must appoint new commissioners for the purpose of ascertaining how much real estate is benefited and preparing an assessment roll comprising the property of the owners who appealed, together with all property benefited and lying outside of the district formerly assessed, and the expenses of the former proceedings and the new assessment must, except what is assessed on the property of owners who did not appeal, be assessed upon land described in the new assessment roll, in

rule is adopted, the reassessment is void.[10] And an objection upon that ground may be made by a property-owner who has paid the original assessment and who seasonably interposes objection in the reassessment proceedings.[11] Under some statutes the boundaries of the assessment district may be changed upon the reassessment.[12]

23. Validating Void Assessments — a. Power of State. It has been broadly stated that the legislature cannot legalize a void assessment[13] apparently on the theory that the legislature cannot by direct act make an assessment within an incorporated city,[14] or, when the rights of the parties have been judicially determined, that it is an assumption of judicial power by the legislature;[15] but by the weight of authority it is regarded as within the power of the legislature to provide for validating an assessment void because of irregularities in proceedings,[16] provided such irregularities occurred in the exercise of a power conferred,[17] the general rule relative to curative statutes being that if the omission or irregularity is as to something the legislature might have dispensed with or authorized to

the proportion of the benefits received from the improvement).

What law governs.— Where a judgment of confirmation in a special assessment proceeding was entered in 1896, and reversed by the supreme court in 1898, and was pending when the local improvement act of 1897 (Laws (1897), p. 101) took effect, a new assessment is governed by the act of 1872 (Acts (1871–1872), p. 218), under which the original assessment was made, and not by the act of 1897. Goodrich *v.* Chicago, 218 Ill. 18, 75 N. E. 805. Where a special assessment to pay for a public improvement is invalid by reason of failure of defendant to give the notice required by statute, a new assessment should be made, as provided by law, at the time the contract was made, although meantime defendant's charter is amended according to frontage instead of valuation, and for payment by the city for street intersections. Soule *v.* Seattle, 6 Wash. 315, 33 Pac. 384, 1080.

Evidence of value of work.— Where the act contemplates that a reassessment shall be made on the basis of a *quantum meruit*, the contracts under which the work was done are competent evidence of the cost and may be considered in making the assessment. Bingaman *v.* Pittsburgh, 147 Pa. St. 353, 23 Atl. 395. An act providing for the completion of unauthorized street improvements, and assessment for their cost, contemplates that assessments be made on the basis of a *quantum meruit*; and an assessment based on the contract price of the work, as shown by the city books, without even a finding that the contract price was a fair one, is erroneous. *In re* Morewood Ave., 159 Pa. St. 39, 28 Atl. 130; *In re* Morewood Ave., 159 Pa. St. 20, 28 Atl. 123, 132; *In re* Tioga St., 152 Pa. St. 138, 25 Atl. 530; *In re* Shiloh St., 152 Pa. St. 136, 25 Atl. 530; *In re* Boggs Ave., 152 Pa. St. 135, 25 Atl. 529; *In re* Amberson Ave., 152 Pa. St. 134, 25 Atl. 529 [*following* Bingaman *v.* Pittsburgh, 147 Pa. St. 353, 23 Atl. 395]; *In re* Omega St., 152 Pa. St. 129, 25 Atl. 528.

10. State *v.* Ramsey County Dist. Ct., 95 Minn. 503, 104 N. W. 553, so holding where the board of public works assessed property upon which the original assessment had not been paid, at one dollar and twenty-five cents per front foot less than the property originally paid, without regard to benefits, and levied the amount of the difference upon new additional property.

11. State *v.* Ramsey County Dist. Ct., 95 Minn. 503, 104 N. W. 553.

12. State *v.* Ramsey County Dist. Ct., 95 Minn. 503, 104 N. W. 553. See also State *v.* Ramsey County Dist. Ct., 98 Minn. 63, 107 N. W. 726.

13. La Societe Francaise de Prevoyance et de Prevoyance Mutuelle *v.* Fishel, (Cal. 1886) 10 Pac. 395; Fanning *v.* Schammel, 68 Cal. 428, 9 Pac. 427; Schumacker *v.* Toberman, 56 Cal. 508.

14. Schumacker *v.* Toberman, 56 Cal. 508.

15. Baltimore *v.* Horn, 26 Md. 194.

16. *Connecticut.*— Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

Massachusetts.— Gardiner *v.* Boston St. Com'rs, 188 Mass. 223, 74 N. E. 341.

Michigan.— Smith *v.* Detroit, 120 Mich. 572, 79 N. W. 808.

New Jersey.— Bogart *v.* Passaic, 38 N. J. L. 57; Copeland *v.* Passaic, 36 N. J. L. 382.

New York.—Jones *v.* Tonawanda, 158 N. Y. 438, 53 N. E. 280; Tifft *v.* Buffalo, 82 N. Y. 204; Matter of Delaware, etc., Canal Co., 60 Hun 204, 14 N. Y. Suppl. 585 [*reversing* 8 N. Y. Suppl. 352]; Matter of Cullen, 53 Hun 534, 6 N. Y. Suppl. 625 [*affirmed* in 119 N. Y. 628, 23 N. E. 1144]; Astor *v.* New York, 37 N. Y. Super. Ct. 539.

Wisconsin.— Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578.

17. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672; Reading *v.* Savage, 120 Pa. St. 198, 13 Atl. 919. *Compare* Batten *v.* Newark, 32 N. J. L. 453.

Acts of de facto officer.— Where a person acting as an officer is not a usurper but holds under color of right his acts in making an assessment may be validated by the legisla-

be done in the way in which it was by a prior statute it may exercise the power by a later statute.[18] Statutes confirming assessments may be given retroactive operation.[19] Jurisdictional matters are frequently held not to be within the scope of curative statutes,[20] nor can the legislature validate an assessment void or voidable for fraud,[21] or which it could not have authorized in the first instance,[22] such as an assessment levied in violation of a constitutional rule of uniformity,[23] or laid without regard to benefits.[24] It is within the power of the legislature to impose liability upon property-owners for an improvement already completed.[25] A statute validating void assessments will not be construed to give effect to sales made under such assessments.[26]

b. Power of Municipal Corporation. Jurisdictional defects in assessment proceedings can be cured by subsequent action of the city only by express legislative authority.[27] Where an assessment is invalid through the failure of the municipal officers to have filed their certificates of election it may be validated by a subse-

ture. Adams *v.* Lindell, 5 Mo. App. 197 [*affirmed* in 72 Mo. 198].

18. Warren *v.* Boston St. Com'rs, 187 Mass. 290, 72 N. E. 1022; Hatzung *v.* Syracuse, 92 Hun (N. Y.) 203, 36 N. Y. Suppl. 521; People *v.* Wilson, 3 N. Y. Suppl. 326 (holding that a special assessment for street improvement, invalid only for the insufficiency of the petition, and of the number of signatures thereto required by the village charter, may be cured by act of the legislature, as the consent of the property-owners might have been dispensed with by the legislature in the first instance); Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

19. Lennon *v.* New York, 5 Daly (N. Y.) 347 [*affirmed* in 55 N. Y. 361]; Mann *v.* Utica, 44 How. Pr. (N. Y.) 334. *Compare* *In re* Peugnet, 67 N. Y. 441; Smith *v.* Buffalo, 90 Hun (N. Y.) 118, 35 N. Y. Suppl. 635 [*affirmed* in 159 N. Y. 427, 54 N. E. 62]; *In re* Hyde, 15 Hun (N. Y.) 477 [*reversed* on other grounds in 76 N. Y. 639]; Astor *v.* New York, 37 N. Y. Super. Ct. 539.

20. Merriam *v.* Passaic, 38 N. J. L. 171; People *v.* Brooklyn, 71 N. Y. 495; Kelly *v.* Cleveland, 34 Ohio St. 468; Sullivan *v.* Pausch, 5 Ohio Cir. Ct. 196, 3 Ohio Cir. Dec. 98. But see McKeesport *v.* Harrison, 10 Pittsb. Leg. J. N. S. (Pa.) 57.

Notice of proceedings.—A statute providing for the cure of irregularities has been held to include failure to give notice of the presentation of the petition. Astor *v.* New York, 62 N. Y. 580 [*affirming* 39 N. Y. Super. Ct. 120].

21. Selpho *v.* Brooklyn, 9 N. Y. St. 700.

22. *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363; *In re* Union College, 129 N. Y. 308, 29 N. E. 460; Whitney *v.* Pittsburgh, 147 Pa. St. 351, 23 Atl. 395, 30 Am. St. Rep. 740; Meadville *v.* Dickson, 129 Pa. St. 1, 18 Atl. 513.

23. Dean *v.* Borchsenius, 30 Wis. 236.

24. Copeland *v.* Passaic, 36 N. J. L. 382; Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222. See also Kelly *v.* Cleveland, 34 Ohio St. 468.

25. New Brighton *v.* Biddell, 201 Pa. St. 96, 50 Atl. 989.

26. Lennon *v.* New York, 5 Daly (N. Y.) 347 [*affirmed* in 55 N. Y. 361], holding that to give a statute such effect would be to render it unconstitutional as depriving persons of property without due process of law.

27. *California.*— Meuser *v.* Risdon, 36 Cal. 239, holding that where an assessment is invalid because of the failure of the city to act in accordance with the statute the city cannot validate it by any subsequent act; such power being in the legislature alone. See also California Imp. Co. *v.* Moran, 128 Cal. 373, 60 Pac. 969, holding that a council cannot validate a street assessment of a previous council, which is void for want of jurisdiction to make it, because of the clerk's failure to publish the notice awarding the contract for the work in the newspaper designated by the council.

Iowa.— See Hubbell *v.* Bennett, 130 Iowa 66, 106 N. W. 375, holding that, where a city had no power to levy an assessment for the improvement of an alley above the established grade, the subsequent passage of an ordinance changing the grade of the alley to conform to the improvement was ineffective to validate the assessment.

Minnesota.— State *v.* Ramsey County Dist. Ct., 95 Minn. 183, 103 N. W. 881.

Missouri.— Bayha *v.* Taylor, 36 Mo. App. 427, holding that a municipal council has no power by any subsequent proceeding to validate a void ordinance or give life to void tax bills.

Ohio.— Wewell *v.* Cincinnati, 45 Ohio St. 407, 15 N. E. 196.

United States.— Pennsylvania Co. *v.* Cole, 132 Fed. 668.

Validation by reincorporation.— Under a statute (Act March 27, 1890) which provides that nothing therein shall prevent the reincorporation thereunder of towns which had attempted to incorporate under the void act of Feb. 2, 1888, and empowers such towns to incorporate under section 4, relating to reincorporations, such incorporation will not validate a prior street-grading assessment, made under the supposed sanction of the act of 1888. Medical Lake *v.* Landis, 7 Wash. 615, 34 Pac. 836; Medical Lake *v.* Smith, 7 Wash. 195, 34 Pac. 835.

quent filing of the certificates.[28] When an ordinance prescribing the mode of making an assessment has not been substantially complied with the council cannot cure the defect by resolution.[29] Where an assessment is absolutely void it cannot be validated by a mere request by the property-owner for revision.[30]

24. Interest — a. In General. Assessments for public improvements do not bear interest[31] unless so provided by statute.[32]

b. Reassessments or Reduction of Amount. Where a reassessment is levied or a reduction in assessment is made, interest should be computed upon such reassessment or reduction, not on the original assessment.[33] Where a property-owner pays the amount of an assessment and does not resist proceedings to increase the assessment, interest should be allowed only from the date of judgment in such proceedings.[34]

28. Jennings *v.* Fisher, 103 Ind. 112, 2 N. E. 285.

29. Williams *v.* Detroit, 2 Mich. 560.

30. Bates *v.* District of Columbia, 7 Mackey (D. C.) 76.

31. *California.*— Himmelman *v.* Oliver, 34 Cal. 246.

Connecticut.— Sargent *v.* Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822.

Illinois.— Murphy *v.* People, 120 Ill. 234, 11 N. E. 202.

New Jersey.— Brennert *v.* Farrier, 47 N. J. L. 75.

New York.— Matter of Whitlock Ave., 51 N. Y. App. Div. 436, 64 N. Y. Suppl. 717.

But see Gest *v.* Cincinnati, 26 Ohio St. 275; Fricke *v.* Cincinnati, 1 Ohio S. & C. Pl. Dec. 671, 1 Ohio N. P. 98; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Northern Liberties *v.* St. John's Church, 13 Pa. St. 104; Galveston *v.* Heard, 54 Tex. 420, holding that a city may provide, for the purpose of fully reimbursing it for the expenses of constructing or improving sidewalks, that assessments therefor on abutting property shall bear interest.

Where payable in instalments.— The fact that an original assessment was made payable in instalments drawing interest as authorized by Local Improvement Act, § 42 (Hurd Rev. St. (1903) c. 24, § 548), does not empower the city, in levying a supplemental assessment payable in one payment, to provide that such assessment shall draw interest. Conway *v.* Chicago, 219 Ill. 295, 76 N. E. 384.

32. *Iowa.*— Des Moines Brick Mfg. Co. *v.* Smith, 108 Iowa 307, 79 N. W. 77.

Louisiana.— New Orleans *v.* McFarlane, 3 Rob. 406.

Minnesota.—Hennessy *v.* St. Paul, 54 Minn. 219, 55 N. W. 1123.

Missouri.— St. Louis *v.* Armstrong, 38 Mo. 167.

New Jersey.— Vreeland *v.* Bayonne, 60 N. J. L. 168, 37 Atl. 737; Hoboken Land, etc., Co. *v.* Marvin, 51 N. J. L. 285, 17 Atl. 158.

New York.— People *v.* Coler, 31 Misc. 211, 65 N. Y. Suppl. 44; Smith *v.* New York, 4 N. Y. Suppl. 449.

Oregon.— Mall *v.* Portland, 35 Oreg. 89, 56 Pac. 654.

Wisconsin.— Hoyt *v.* Fass, 64 Wis. 273, 25 N. W. 45.

Implied provision.— A statute providing that when an assessment shall be levied neither the principal nor any interest thereon shall be collected until the completion of the work does not impliedly authorize the collection of interest after such time. Sargent *v.* Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822.

Where interest authorized on ordinary taxes.— A provision for collection of interest on overdue ordinary taxes does not authorize the collection of interest on an assessment for a public improvement. Sargent *v.* Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822.

Assessment against municipality.— Assessments against a municipality for the benefit of the public, arising by reason of a special assessment, draw interest in like manner as do the assessments made against the private owners of property directly benefited by such assessment. Chicago *v.* People, 116 Ill. App. 564 [*affirmed* in 215 Ill. 235, 74 N. E. 137].

Where assessment is divided into instalments.— Under Laws (1893), p. 1447, c. 644, directing the assessors to divide the assessment imposed upon any lot for street improvements into twenty annual instalments, and each year thereafter for twenty years to assess an amount equal to one of said annual instalments with interest upon the lot, the interest to be added to the instalment is only the interest upon the instalment to be paid in the year during which the assessment is imposed, and not interest upon all the instalments remaining unpaid. Hagemeyer *v.* Grout, 113 N. Y. App. Div. 472, 99 N. Y. Suppl. 369.

33. U. S. *v.* Dent, 1 Mackey (D. C.) 463; Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Miller *v.* Love, 37 N. J. L. 261; *In re* Miller, 24 Hun (N. Y.) 637. But *compare* Mayer *v.* New York, 28 Hun (N. Y.) 587 [*affirmed* in 101 N. Y. 284, 4 N. E. 336], holding that where a property-owner obtained by suit a reduction of an assessment for widening a street, he was not entitled to any reduction upon the interest of the amount originally assessed.

34. Mackey *v.* Gleason, 38 S. W. 707, 18 Ky. L. Rep. 910. See also Louisville *v.* Selvage, 70 S. W. 276, 24 Ky. L. Rep. 947.

25. Liens and Priority — a. In General. Special assessments do not become liens save as made so by statutory authority,[35] and a legislative provision that municipal taxes shall constitute a lien upon property does not apply to local taxes for public improvement.[36] Statutes generally, however, make assessments for improvements a lien upon the property assessed.[37] Such statutes are not retroactive.[38] But a statute may provide a remedy to enforce existing liens as well as those afterward created.[39] A statute providing that special assessments shall be made a lien upon the land is not invalidated by the mere fact that as the improvement may never be completed the benefits may never accrue.[40] In order that a lien may be imposed the statute conferring it must be strictly followed.[41] Where the statute provides that assessments for public improvements shall be liens upon the property assessed, it is not necessary that the ordinance ordering an improvement declare that the assessment levied to pay for the same shall constitute a lien.[42] Where the city has a right to a lien for an improvement it has been held that a contractor may have a like lien for work which he has done under a contract with the property-owners and upon which the city is not liable.[43] A contractor may be entitled to a lien on completion of his contract, although his contract is not for all the work necessary for the completion of the improvement of the street.[44] Each lot or parcel of property is subject to a lien for the work done opposite to it, although several contiguous parcels may be owned by the same person.[45] An assessment upon public property does not create a lien upon such property.[46]

b. Perfecting and Filing. All statutory requirements as to the time and manner of filing[47] or otherwise perfecting a lien must be complied with to render

35. Cemansky *v.* Fitch, 121 Iowa 186, 96 N. W. 754; Eagle Mfg. Co. *v.* Davenport, 101 Iowa 493, 70 N. W. 707, 38 L. R. A. 480; Rousseau's Succession, 23 La. Ann. 1; Meadville *v.* Dickson, 129 Pa. St. 1, 18 Atl. 513; Berghaus *v.* Harrisburg, 122 Pa. St. 289, 16 Atl. 365, 366.

36. Augusta *v.* Murphey, 79 Ga. 101, 3 S. E. 326.

37. See the statutes of the several states. And see the following cases:

Iowa.— Burlington *v.* Quick, 47 Iowa 222, holding that an act making the liability for the special tax for a street improvement a lien on the property of the abutting owner does not contravene any provision of the constitution.

Maryland.— Eschbach *v.* Pitts, 6 Md. 71.

New York.— New York *v.* Colgate, 12 N. Y. 140; De Peyster *v.* Murphy, 39 N. Y. Super. Ct. 255; Gilbert *v.* Havemeyer, 2 Sandf. 506.

Pennsylvania.— Melan *v.* McNulty, 6 Kulp 522.

Wisconsin.— Hoyt *v.* Fass, 64 Wis. 273, 25 N. W. 45.

United States.— See American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. 610, 616, 32 C. C. A. 275, holding that a paving assessment under the provisions of a charter making such assessment a charge on the property without authority to sell the same for collection of the tax was in substance a lien.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1220.

38. Mechanics, etc., Bank *v.* Richardson, 12 Rob. (La.) 596.

39. Pray *v.* Northern Liberties, 31 Pa. St. 69; Council *v.* Moyamensing, 2 Pa. St. 224.

40. Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771.

41. *Iowa.*— Fitzgerald *v.* Sioux City, 125 Iowa 396, 101 N. W. 268.

Kentucky.— Fox *v.* Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776, 16 Ky. L. Rep. 455; Henderson *v.* Lambert, 14 Bush 24. But see Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128, holding that all the requirements of the statute necessary to create a lien having been complied with, the fact that the apportionment warrants were not approved by the mayor and council, as required by an ordinance, does not affect the validity of the lien.

Missouri.— West *v.* Porter, 89 Mo. App. 150; Guinotte *v.* Egelhoff, 64 Mo. App. 356; Rose *v.* Trestrail, 62 Mo. App. 352.

New Jersey.— Penwarden *v.* Dunellen, 50 N. J. L. 565, 15 Atl. 529, holding that the specific improvement must be ordered by ordinance.

United States.— Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899.

42. Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78.

43. Philadelphia *v.* Wistar, 35 Pa. St. 427. But *compare* McCausland *v.* Leuffer, 4 Whart. (Pa.) 175.

44. Fox *v.* Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776, 16 Ky. L. Rep. 455, so holding of a contract for grading and macadamizing, although the street was not curbed and guttered.

45. Pennell's Appeal, 2 Pa. St. 216.

46. West Chicago Park Com'rs *v.* Chicago, 152 Ill. 392, 38 N. E. 697; Dowdney *v.* New York, 54 N. Y. 186.

47. Meriden *v.* Camp, 46 Conn. 284;

the same valid.[48] But it has been held that the assessment lien not being a tax lien it is not required to be registered under a general tax law.[49] Under some statutes the engineer's certificates as to the performance of the work must be recorded as a prerequisite to the lien.[50] Under an ordinance providing that to

Youngsville *v.* Siggins, 110 Pa. St. 291, 2 Atl. 736.

48. *California.*— Buckman *v.* Cuneo, 103 Cal. 62, 36 Pac. 1025.

Indiana.— Laakmann *v.* Pritchard, 160 Ind. 24, 66 N. E. 153; Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797.

Iowa.— Demansky *v.* Fitch, 121 Iowa 186, 96 N. W. 754.

New Jersey.—Seaman *v.* Camden, 66 N. J. L. 516, 49 Atl. 977.

New York.— De Peyster *v.* Murphy, 66 N. Y. 622.

United States.— Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1221.

In Pennsylvania owing to the numerous and varying statutes relative to the enforcement of municipal claims for improvements no general rules can be deduced from the decisions. It has, however, been held that the claim must be filed within the time prescribed by statute (Pittsburgh *v.* Knowlson, 92 Pa. St. 116; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Manheim *v.* Cogley, 4 Lanc. L. Rev. 297); that it must be sufficiently specific to identify the property and to indicate the nature and amount of the work (Scranton *v.* Arnt, 148 Pa. St. 210, 23 Atl. 1121; Scranton *v.* Jones, 133 Pa. St. 219, 19 Atl. 347; Philadelphia *v.* Richards, 124 Pa. St. 303, 16 Atl. 802; Allentown *v.* Hower, 93 Pa. St. 332; Pittsburg *v.* Cluley, 66 Pa. St. 449; Philadelphia *v.* Steward, 31 Pa. Super. Ct. 72; Moyamensing *v.* Flanigan, 3 Phila. 458), although it need not set forth the kind and character of "materials" furnished (Philadelphia *v.* Meighan, 15 Pa. Dist. 10), or conform to the requisites of a mechanic's lien or give a bill of particulars (Pittsburg *v.* Cluley, *supra*; Schenley *v.* Com., *supra*; Greensburg *v.* Laird, 8 Pa. Co. Ct. 608. But see Philadelphia *v.* Sutter, 30 Pa. St. 53; Wilvurt *v.* Sunbury, 28 Leg. Int. 357); that it should state the date at which the work was done (City *v.* Wood, 4 Phila. 156. But see Philadelphia *v.* Gratz Land Co., 38 Pa. St. 359); that it must describe the property assessed (Scranton *v.* Jones, *supra*; Schenley *v.* Com., 36 Pa. St. 64), and state the name of the owner (Northern Liberties *v.* Coates, 15 Pa. St. 245; Northern Liberties *v.* Myers, 2 Pars. Eq. Cas. 239), or registered owner (Gans *v.* Philadelphia, 102 Pa. St. 97; McClurg's Estate, 4 Pa. Dist. 655; White's Estate, 6 Pa. Co. Ct. 308. See Pottsville *v.* Safe Deposit Bank, 2 Leg. Chron. 379); that it must aver prior notice to the property-owners to do the work where such notice is essential (Philadelphia *v.* Stevenson, 6 Pa. Co. Ct. 287. See also Allentown *v.* Light, 15 Pa. Dist. 619); that it need not specifically state when the assessment is due (Scranton *v.* Arnt, *supra*); that it need not set out the specific statutes or ordinances under which they are filed (Philadelphia *v.* Stevenson, 132 Pa. St. 103, 19 Atl. 70; Philadelphia *v.* Richards, *supra*); nor contain a copy of the ordinance authorizing the improvements (Allentown *v.* Light, *supra*); that it need not be signed by the party or his attorney (Rodney *v.* Philadelphia, 3 Walk. 505), but may be signed by attorney (Allentown *v.* Light, *supra*; Philadelphia *v.* Meighan, *supra*); that a separate lien may be filed against each parcel of property (Beltzhover Borough *v.* Maple, 130 Pa. St. 335, 18 Atl. 650); and that a claim defective in form or allegation may usually be amended in the discretion of the court (McKeesport Borough *v.* Busch, 166 Pa. St. 46, 31 Atl. 49; Mt. Pleasant Borough *v.* Baltimore, etc., R. Co., 138 Pa. St. 365, 20 Atl. 1052, 11 L. R. A. 520; Philadelphia *v.* Stevenson, *supra*; Philadelphia *v.* Richards, *supra*; Allentown *v.* Hower, *supra*; Philadelphia *v.* Kelly, 2 Pa. Dist. 143, holding that where a street assessment is by mistake filed against a lot adjoining the lot intended, and the lot intended still remains in the hands of the same party, the lien may be amended so as to transfer it to the proper lot; Oxford Borough *v.* Alexander, 2 Chest. Co. Rep. 265, holding that error in naming a municipality in a municipal lien is amendable under the act of April 21, 1858, permitting amendments of such claims).

What law governs.— Where a petition for a street improvement, the ordinance passed in pursuance thereof, and the claim of lien expressly purport to conform to the special act of 1867, the fact that the lien was filed in accordance with the general act of May 16, 1891 (Pamphl. Laws 69), does not vitiate the proceedings, since the act of 1891 does not repeal or change the provisions of the act of 1867, but provides somewhat more specifically for the practice in cases where final assessments have been made. McKeesport Borough *v.* Busch, 166 Pa. St. 46, 31 Atl. 49. The general act of May 16, 1891, did not repeal the act of May 23, 1889, relating to cities of the third class. Scranton *v.* Clark, 7 Lack. Jur. (Pa.) 84. But such claims should be filed under the act of May 16, 1891, and not under the act of May 23, 1889. Carbondale *v.* Gillis, 7 Lack. Jur. (Pa.) 97.

49. Pray *v.* Northern Liberties, 31 Pa. St. 69.

50. See Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337 (holding that a certificate as to the completion of street work, signed by a mere clerk, under a general direction of the city engineer to make out such certificates, is not sufficient, under St. (1891) p. 205, requiring

continue a lien for assessment there must be filed a certificate certified by the clerk of the board of street commissioners, no formal vote by such board authorizing the filing of such certificate is necessary.[51] The city need not pay the cost of filing a lien as long as the lien remains in force and the property is not sold.[52]

c. When Lien Attaches. The lien of an assessment must exist and attach according to the terms and conditions of the statute creating it,[53] such statutes usually fixing the time at which it shall attach.[54] As a general rule when no time is expressly fixed by the statute for the lien to take effect, it accrues upon the assessment of the tax.[55] Under particular statutes it has been held that the assessment must have been approved and recorded,[56] or confirmed after due notice,[57] or that the tax bills must have been delivered to the person entitled to receive them.[58] Under some statutes, however, the lien dates from the commencement of the work done.[59] An act validating an assessment makes it a lien only from the date of the act and does not relate back to the date of the assessment.[60] But on the contrary where a statute authorizing a reassessment contemplates that it shall be regarded as an original assessment the lien of the new assessment has been held to relate back to the date of the original assessment.[61]

d. Duration of Lien. The duration of a lien of an assessment is not limited in the absence of statute,[62] although it is of course discharged by payment.[63] By

such a certificate by the city engineer in order to make the amounts assessed a lien on the lands); Buckman *v.* Cuneo, 103 Cal. 62, 36 Pac. 1025 (holding that failure to record a diagram drawn on the back of such certificate, referred to therein, and a necessary part thereof, is fatal to the lien).

Sufficiency.— Under St. (1891) p. 205, requiring the assessment, warrant, diagram, and engineer's certificate to be recorded in the office of the superintendent of streets in order to render an assessment for street improvements a lien on the land, the engineer's certificate must be recorded as a part of the assessment record, and not in a separate book. Rauer *v.* Lowe, 107 Cal. 229, 40 Pac. 337.

51. Norwich Sav. Soc. *v.* Hartford, 48 Conn. 570.

52. Bradley *v.* Pittsburgh, 130 Pa. St. 475, 18 Atl. 730.

53. Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899.

54. See the statutes of the several states. And see Jones *v.* Schulmeyer, 39 Ind. 119; Haag *v.* Ward, 186 Mo. 325, 85 S. W. 391.

55. Dann *v.* Woodruff, 51 Conn. 203 (holding that under the charter of New Haven, which provides that assessments of benefits shall be deemed to have been made when the report of the board of compensation shall have been accepted by the council, and shall become a lien on the property, the lien attaches on the acceptance of the report, not when the improvement is ordered); Anderson *v.* Holland, 40 Mo. 600; Cleveland *v.* Cleveland, etc., R. Co., 4 Ohio Dec. (Reprint) 315, 1 Clev. L. Rep. 304; Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899.

56. Indiana Bond Co. *v.* Shearer, 24 Ind. App. 622, 57 N. E. 276; New Orleans City Bank *v.* Huie, 1 Rob. (La.) 236.

57. Flint *v.* Webb, 25 Minn. 93.

58. Mercantile Trust Co. *v.* Niggeman, 119 Mo. App. 56, 96 S. W. 293; Clemens *v.* Knox, 31 Mo. App. 185.

59. Norton *v.* South Easton, 1 Pa. Cas. 85, 1 Atl. 211.

60. Reis *v.* Graff, 51 Cal. 86.

61. Sinking Fund Com'rs *v.* Linden Tp., 40 N. J. Eq. 27.

62. Eschbach *v.* Pitts, 6 Md. 71.

Limitations of personal actions.— The lien created by the Pennsylvania acts of 1819–1820 on adjacent property, for curbing and paving, is not limited by the statute of limitations relating to personal actions, there being no personal liability therefor. Council *v.* Moyamensing, 2 Pa. St. 224.

63. See Williamson *v.* Baltimore, 19 Md. 413; Philadelphia *v.* Merz, 28 Pa. Super. Ct. 227; Philadelphia *v.* Dobbins, 5 Pa. Dist. 217, 18 Pa. Co. Ct. 63, holding that under the act of Feb. 21, 1862, providing, in regard to municipal liens, that property-owners shall have the right, "at any time" after the lien is filed, to make payment into court of the amount of lien, with interest and costs to abide the event of any proceeding thereon, in which event the claim shall cease to be a lien upon the land, the owner is entitled to make such payment into court even after scire facias has issued for the enforcement of the lien.

Partial payment.— Where tax assessments are levied on an alley, and the owner of a portion of the abutting property pays one third of the whole amount of the assessments, which payment the controller credits generally, without apportionment, as so much paid on the whole assessments, the lien of the tax for the unpaid balance may still be enforced as to the whole alley-way. Rosenberg *v.* Freeman, 2 Silv. Sup. (N. Y.) 189, 5 N. Y. Suppl. 891. Where an assessment for street improvement was to "unknown owners," the payment by one of several coöwners of his proportion does not release any part of a lot from the lien of the assessment. Williams *v.* Bergin, 127 Cal. 578, 60 Pac. 164, (1899) 57 Pac. 1072.

express statutory provision the lien is often made to continue until payment.[64] By other statutes the duration of the lien is limited to a definite period.[65] Such statutes do not have a retroactive effect.[66] A statute limiting the time within which a reassessment may be made does not limit the duration of the lien of the original assessment.[67] It has been held that where the statute provides for the payment of the assessment in instalments and that the lien shall continue for a specified time after the last instalment is due, the lien exists for such period after the last instalment is due on its face and the period is not shortened by the fact that the last instalment becomes due earlier by reason of default in the other instalments.[68] Where there is a specific limitation of the time within which the lien may be enforced a defective scire facias issued upon the lien will not have the effect of continuing it.[69] A sale of the land charged for the satisfaction of the lien extinguishes it,[70] as does a judicial sale for enough to pay the claim.[71] The

Effect of payment by mistake.— A valid special assessment levied on a village lot was erroneously assessed to an adjoining owner, who paid the assessment. On learning of the mistake, the amount of the assessment paid was refunded to the adjoining owner, and the indorsement on the tax warrant, showing the payment of the assessment, canceled, by resolution of the village authorities. It was held in an action against the lot for the assessment that, since a special assessment is a charge on land, and not against the owner, the payment of the assessment, although by mistake, discharged the land from further liability. Hudson *v.* People, 188 Ill. 103, 58 N. E. 964, 80 Am. St. Rep. 166.

64. See the statutes of the several states. And see Hartford *v.* Mechanics' Sav. Bank, 79 Conn. 38, 63 Atl. 658; Mecartney *v.* People, 202 Ill. 51, 66 N. E. 873; Brackett *v.* People, 115 Ill. 29, 3 N. E. 723; Bell *v.* New York, 66 N. Y. App. Div. 578, 73 N. Y. Suppl. 298, holding that the lien of a special assessment could not be discharged by a sale for subsequent taxes.

65. See the statutes of the several states. And see Page *v.* W. W. Chase Co., 145 Cal. 578, 79 Pac. 278; Security Sav. Trust Co. *v.* Donnell, 81 Mo. App. 147; Adkins *v.* Case, 81 Mo. App. 104; Philadelphia *v.* Scott, 93 Pa. St. 25; Philadelphia *v.* Steward, 31 Pa. Super. Ct. 72; Philadelphia *v.* Sciple, 31 Pa. Super. Ct. 64 [*affirming* 12 Pa. Dist. 582, 29 Pa. Co. Ct. 60]; Scranton City *v.* Stokes, 28 Pa. Super. Ct. 437.

66. Mecartney *v.* People, 202 Ill. 51, 66 N. E. 873.

67. Mecartney *v.* People, 202 Ill. 51, 66 N. E. 873.

68. Barber Asphalt Paving Co. *v.* Meservey, 103 Mo. App. 186, 77 S. W. 137.

69. Philadelphia *v.* Cooper, 212 Pa. St. 306, 61 Atl. 926 (holding that where the scire facias is defectively served and insufficient to obtain a judgment thereon, it does not continue the lien beyond the time of its expiration, so as to give validity to a judgment on an alias scire facias sued out after the expiration of the lien of the original claim); Scranton City *v.* Stokes, 28 Pa. Super. Ct. 437 (holding that a writ of scire facias which was issued more than five years after the entry of the lien would be quashed); Philadelphia *v.* Adams, 18 Pa. Super. Ct. 639.

70. Moyamensing *v.* Shubert, 11 Pittsb. Leg. J. N. S. (Pa.) 255; Smith *v.* Ludington, 17 Wis. 334; Smith *v.* Vandyke, 17 Wis. 208.

71. Allegheny City's Appeal, 41 Pa. St. 60; Philadelphia *v.* Cooke, 30 Pa. St. 56 (holding that if premises, subject to a municipal claim, are sold by a sheriff for arrears of ground-rent for a sum more than sufficient to pay the amount of the municipal claim, the sale operates as a discharge of the lien, but not of the debt unless the sheriff pay over the money to the parties entitled to receive it); Olypant Borough *v.* Eguski, 29 Pa. Super. Ct. 116; Moyamensing *v.* Shubert, 5 Pa. L. J. Rep. 114; Myer *v.* Burns, 4 Phila. (Pa.) 314; Moyamensing *v.* Shubert, 1 Phila. (Pa.) 256 (holding that a sale of land on execution in an action by the municipality on a street-paving assessment extinguished the municipal lien on the land, although the proceeds of the sale were insufficient to pay the municipality's claim, since the purchaser at such sale was in effect a purchaser from the corporation itself, and it could not disturb the title derived from it); Philadelphia *v.* Cox, 29 Wkly. Notes Cas. (Pa.) 519 (sheriff's sale). *Compare* Smith *v.* Phelps, 63 Mo. 585; Philadelphia *v.* Meager, 67 Pa. St. 345 [*reversing* 7 Phila. 309] (holding that under the act of 1846 (Pamphl. Laws 115), which provides that the lien of the city of Philadelphia upon property for improvements shall not be divested by any judicial sale, as respects so much thereof as the proceeds of such sale may be insufficient to discharge and pay, the city, by selling the property on one claim, does not thereby consent that the sale shall divest the lien of all other claims it may hold); Allegheny City's Appeal, 41 Pa. St. 60 (holding that under the special acts of April 5, 1849 (Pamphl. Laws 341), April 8, 1851 (Pamphl. Laws 371), and May 30, 1852 (Pamphl. Laws 204), the assessments therein authorized and made a lien upon abutting property for improvements are discharged by a judicial sale of the property, so far as the money realized from the sale will pay such assessments); Northern Liberties *v.* Swain, 13 Pa. St. 113;

lien of one of several tax bills against separate tracts of land may be released without affecting the others.[72]

e. Priorities. A lien upon land for special assessment levied against it may by statute be made paramount to all other claims or liens against the property.[73] For example, the lien of an assessment may be superior to a prior mortgage[74] or judgment[75] or mechanic's lien.[76] It is not, however, superior to a mortgage to an officer of a court of equity by which the property has been brought within the custody of the law[77] or to a judgment,[78] or a mortgage lien[79] created before the enactment of the statute conferring the assessment lien. Where the assessment lien is entitled to precedence over all other liens save taxes, it has precedence over prior similar assessment liens.[80]

26. Payment or Surrender of Property — a. In General. The time and manner of payment of assessments is usually prescribed by legislative enactment,[81] and the discretion of the legislature in making such provisions will not be reviewed

Spring Garden Com'rs' Appeal, 8 Watts & S. (Pa.) 444; Brinton *v.* Perry, 1 Phila. (Pa.) 436.

72. Ross *v.* Gates, 117 Mo. App. 237, 93 S. W. 856.

73. *Illinois.*— Wabash East R. Co. *v.* East Lake Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 731, 10 L. R. A. 285.

Louisiana.— See Moody *v.* Sewerage, etc., Bd., 117 La. 360, 41 So. 649.

Minnesota.— Morey *v.* Duluth, 75 Minn. 221, 77 N. W. 829.

Missouri.— Keating *v.* Craig, 73 Mo. 507.

New Jersey.— Hand *v.* Jersey City, 41 N. J. Eq. 663, 7 Atl. 565 [*affirming* 38 N. J. Eq. 115]; Thompson *v.* Thorp, 33 N. J. Eq. 401; Howell *v.* Essex County Road Bd., 32 N. J. Eq. 672; Hardenbergh *v.* Converse, 31 N. J. Eq. 500.

Pennsylvania.— Pittsburg's Appeal, 70 Pa. St. 142.

Washington.— Seattle *v.* Hill, 14 Wash. 487, 45 Pac. 17, 35 L. R. A. 372.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1225.

Encumbrance created before incorporation. — By virtue of the act of Feb. 3, 1824, applicable originally to Philadelphia, and extended by the act of 1843 to Delaware county, a borough claim for the cost of abating a nuisance takes priority over an encumbrance reserved by a deed executed before the incorporation of the borough. Subsequent acts do not affect the case. Harvey *v.* South Chester, 99 Pa. St. 565.

Property of the state.— Property of the state is not subject to the provisions of the charter of the city of Rahway (Pub. Laws (1865), p. 499, § 57), making assessments for city improvements a lien prior to any mortgage or encumbrance on the land; and it is immaterial that the complainants, assignees of such a mortgage, have never recorded the assignment, as the only penalties for failure to record an assignment are prescribed in the recording act (Rev. p. 708, pl. 32), which provides that the assignee shall be bound by proceedings and sale on foreclosure against any previous holder, and that payment made in good faith to the assignor, and without actual notice of the assignment, shall be good as against the assignee. Public School Trustees *v.* Shotwell, 45 N. J. Eq. 106, 16 Atl. 308.

74. Keating *v.* Craig, 73 Mo. 507; Hand *v.* Jersey City, 41 N. J. Eq. 663, 7 Atl. 565 [*affirming* 38 N. J. Eq. 115]; Thompson *v.* Thorp, 33 N. J. Eq. 401; Hardenbergh *v.* Converse, 31 N. J. Eq. 500; Toledo *v.* Barnes, 8 Ohio Cir. Ct. 684, 4 Ohio Cir. Dec. 195; Clifton *v.* Cincinnati, 5 Ohio Dec. (Reprint) 570, 6 Am. L. Rec. 687. See also Northern Liberties *v.* Swain, 13 Pa. St. 113.

75. Pittsburg's Appeal, 70 Pa. St. 142; Haus' Estate, 2 Pa. Dist. 88, 12 Pa. Co. Ct. 74; Pottsville *v.* Knecht, 1 Leg. Rec. (Pa.) 45. But *compare* Morris *v.* Hainer, 16 Pa. Co. Ct. 468.

76. Pittsburg's Appeal, 70 Pa. St. 142; Pennock *v.* Hoover, 5 Rawle (Pa.) 291.

77. Jersey City *v.* Foster, 32 N. J. Eq. 825.

78. Oil City Bldg., etc., Assoc. *v.* Shanfelter, 29 Pa. Super. Ct. 251. See also Reilly *v.* Elliott, 1 Del. Co. (Pa.) 77.

79. Pittsburgh's Appeal, 40 Pa. St. 455; Martin *v.* Greenwood, 27 Pa. Super. Ct. 245. *Compare* Kirby *v.* Waterman, 17 S. D. 314, 96 N. W. 129.

80. Burke *v.* Lukens, 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539.

81. See the statutes of the several states. And see Indiana Bond Co. *v.* Bruce, 13 Ind. App. 550, 41 N. E. 958; State *v.* Minneapolis, 65 Minn. 298, 68 N. W. 31; State *v.* Marvin, 51 N. J. L. 285, 17 Atl. 158; Reed *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

An act to authorize an extension of the time of payment which provides that the city council "may" grant relief by so doing is permissive and not mandatory. State *v.* Minneapolis, 65 Minn. 298, 68 N. W. 31.

Estoppel to deny validity of payment.— Where a property-owner, by direction of the proper authorities, pays the amount of a claim for the construction of a sewer to the contractor who did the work, the city, and all parties claiming in right of the city, are estopped from asserting that such payment was invalid, although regular assessment bills had not been issued to the person so paid. Philadelphia *v.* Gabell, 10 Pa. Dist. 526.

by the courts except upon showing of manifest abuse.[82] The validity of a payment is not affected by the failure of the receiving officer to make the proper entries and give the property-owner a voucher as required by statute.[83] Payment of a special assessment by check which is accepted by the proper officer and paid when presented is a valid payment as of the date the check was given;[84] but a note given in payment of the amount of an assessment erroneously computed does not constitute an accord and satisfaction of the entire amount assessed.[85] A receipt given for an assessment is not conclusive as to the property with reference to which payment is made.[86] If an assessment is erroneously discharged of record its lien cannot be restored as against persons who have acquired rights in reliance upon the truth of the record in good faith and in ignorance of the mistake.[87]

b. Instalments. It is competent for the legislature to provide for the payment of assessments in instalments,[88] and such a provision, although requiring interest on deferred payments, does not infringe the personal rights of property-owners by compelling them to pay interest, provided, under the statute, any instalment or the whole assessment may be paid at any time.[89] Where there is no statutory authority for the extension of an assessment over a period of years, such extension may not be made,[90] and the number of instalments and the time for their collection depend upon statutory provision;[91] but it has been held that where proceedings were had under an act making assessments payable in five instalments they would not be affected by a subsequent amendatory act providing for ten instalments.[92] Where instalments have been paid upon a special assessment which is afterward adjudged excessive, the excess over that properly assessable should be credited on the subsequent instalments in the order in which they fall due.[93] Where an instalment of an assessment exceeds the amount which may be levied

82. Ladd *v.* Gambell, 35 Oreg. 393, 59 Pac. 113.

83. Indiana Bond Co. *v.* Bruce, 13 Ind. App. 550, 41 N. E. 958.

84. Indiana Bond Co. *v.* Bruce, 13 Ind. App. 550, 41 N. E. 958.

85. Stengel *v.* Preston, 89 Ky. 616, 13 S. W. 839, 11 Ky. L. Rep. 976.

86. Wolf *v.* Philadelphia, 105 Pa. St. 25, holding that where a city employed a contractor to construct a sewer, and agreed to assign to him by way of payment assessment bills against estates benefited, and the owner of one of these estates paid his bill to the contractor, but by mistake the payment was described as being on account of other premises, and at the time of the payment the bill had not been in fact assigned by the city, in proceedings by the city to enforce a claim for the amount the facts constituted a sufficient defense.

87. Curnen *v.* New York, 79 N. Y. 511 [*reversing* 7 Daly 544].

88. Morgan Park *v.* Gahan, 35 Ill. App. 646; Ladd *v.* Gambell, 35 Oreg. 393, 59 Pac. 113; State *v.* Rathbun, 22 Wash. 651, 62 Pac. 85.

Rights of municipality.— Under an act authorizing the municipality to prescribe the mode in which the charge on lot owners shall be assessed for improvements, and made effective, it can prescribe a certificate of assessment payable in instalments conditioned on a waiver of irregularity or illegality of the assessment. Talcott *v.* Noel, 107 Iowa 470, 78 N. W. 39. Where a contract for public improvements provided for an assessment to pay the warrants drawn in favor of the contractor, the city council had no right to thereafter provide for the payment of the assessments in instalments extending over a period of years. German-American Sav. Bank *v.* Spokane, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259.

89. Gage *v.* Chicago, 216 Ill. 107, 74 N. E. 726. See also Heath *v.* McCrea, 20 Wash. 342, 55 Pac. 432, holding that an ordinance, by directing the payment of assessments in instalments, does not deprive the party assessed of the right to pay the assessment in full at once.

90. Charleston *v.* Cadle, 166 Ill. 487, 46 N. E. 1120; White *v.* West Chicago, 164 Ill. 196, 45 N. E. 495; Connor *v.* West Chicago, 162 Ill. 287, 44 N. E. 1118; Farrell *v.* West Chicago, 162 Ill. 280, 44 N. E. 527; Culver *v.* People, 161 Ill. 89, 43 N. E. 812; Corliss *v.* Highland Park, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416.

91. Gage *v.* Chicago, 195 Ill. 490, 63 N. E. 184; Andrews *v.* People, 164 Ill. 581, 45 N. E. 965; Richcreek *v.* Moorman, 14 Ind. App. 370, 42 N. E. 943; Power *v.* Detroit, 139 Mich. 30, 102 N. W. 288; Mall *v.* Portland, 35 Oreg. 89, 56 Pac. 654.

92. Merriam *v.* People, 160 Ill. 555, 43 N. E. 705.

93. Pike *v.* Cummings, 36 Ohio St. 213; Fricke *v.* Cincinnati, 1 Ohio S. & C. Pl. Dec. 671, 1 Ohio N. P. 98.

against the land under the statute in any one year the excess may be adjudged against the following years.[94]

c. Presumption of Payment. By statute in some jurisdictions the lien of an assessment is discharged under a presumption of payment arising after the lapse of a specified time,[95] but this presumption may be rebutted.[96]

d. Cancellation of Receipt or Satisfaction. Where a claim for improvements has been satisfied of record, the city is estopped as against a purchaser of the property to cancel the receipt or evidence of satisfaction.[97]

e. Refunding or Recovery of Assessment — (i) *On Failure to Complete Improvement.* Where an improvement is abandoned, an assessment paid for the same may be recovered.[98]

(ii) *When Assessment Is Invalid* — (A) *In General.* The rule supported by the great weight of authority is that a compulsory or involuntary payment of a void assessment may be recovered back;[99] but that no recovery may be had where the payment is voluntary,[1] although in some cases it is held that upon an

94. Hammond *v.* Pelton, 4 Ohio Dec. (Reprint) 132, 1 Clev. L. Rep. 59.

95. See the statutes of the several states. And see Daly *v.* Sanders, 9 N. Y. St. 794.

96. Fisher *v.* New York, 67 N. Y. 73 [*reversing* 6 Hun 64]; *In re* Serril, 9 Hun (N. Y.) 233; Dorgeloh *v.* Bassford, 50 N. Y. Super. Ct. 450.

97. Mason *v.* Chicago, 48 Ill. 420; Philadelphia *v.* Matchett, 116 Pa. St. 103, 8 Atl. 854. See also Curnan *v.* New York, 79 N. Y. 511 [*reversing* 7 Daly 544].

98. Bradford *v.* Chicago, 25 Ill. 411; Germania Bank *v.* St. Paul, 79 Minn. 29, 81 N. W. 542; McConville *v.* St. Paul, 75 Minn. 383, 77 N. W. 993, 74 Am. St. Rep. 508, 43 L. R. A. 584; San Antonio *v.* Walker, (Tex. Civ. App. 1900) 56 S. W. 952; San Antonio *v.* Peters, (Tex. Civ. App. 1897) 40 S. W. 827. See also Rogers *v.* St. Paul, 79 Minn. 5, 81 N. W. 539, 47 L. R. A. 537.

The fact that property has been sold under proceedings to enforce an assessment for benefits will not deprive its former owners of their right of action against the city, in case any exist, to recover the amount of the assessment because of the city's failure to complete the improvement. Rogers *v.* St. Paul, 79 Minn. 5, 81 N. W. 539, 47 L. R. A. 537.

99. Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Dexter *v.* Boston, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306 (holding that plaintiff's right to recover an assessment collected for improvements under a void statute was not affected by the fact that such assessment was collected by adding the same to plaintiff's general tax); Whitney *v.* Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291 (holding that a paving assessment, levied under a constitutional statute, but claimed to be illegal by reason of irregularities in the statutory proceedings, might be the subject of an involuntary payment); Louden *v.* East Saginaw, 41 Mich. 18, 2 N. W. 182; Nickodemus *v.* East Saginaw, 25 Mich. 456.

Defect in record.— Where a street has been properly laid out by competent authority and a tax assessed by the body authorized to levy it when the street is laid out, it cannot be recovered back, although the record fails to set forth all the facts, especially when the laches of petitioner have been such that he could not urge the objections on certiorari. Taber *v.* New Bedford, 135 Mass. 162.

Informality in enactment of law.— A party cannot recover back the amount paid where the property was liable to assessment, and the illegality of the tax depends upon an informality in the enactment of the law imposing it. New Orleans Bank *v.* New Orleans, 12 La. Ann. 421.

1. *Illinois.*— Bulkley *v.* Chicago, 61 Ill. 469 note; Chapman *v.* Chicago, 61 Ill. 449 note; Union Bldg. Assoc. *v.* Chicago, 61 Ill. 439; Foss *v.* Chicago, 56 Ill. 354.

Iowa.— Hawkeye Loan, etc., Co. *v.* Marion, 110 Iowa 468, 81 N. W. 718.

Louisiana.— New Orleans Canal, etc., Co. *v.* New Orleans, 30 La. Ann. 1371; Worsley *v.* New Orleans Second Municipality, 9 Rob. 324, 41 Am. Dec. 333.

New York.— Redmond *v.* New York, 125 N. Y. 632, 26 N. E. 727 [*reversing* 58 N. Y. Super. Ct. 348, 11 N. Y. Suppl. 782]; Van Nest *v.* New York, 113 N. Y. 652, 21 N. E. 414; Phelps *v.* New York, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626; Sandford *v.* New York, 33 Barb. 147, 12 Abb. Pr. 23, 20 How. Pr. 298.

Ohio.— McCarty *v.* Toledo, 11 Ohio Cir. Ct. 67, 5 Ohio Cir. Dec. 88.

Rhode Island.— Providence Second Universalist Soc. *v.* Providence, 6 R. I. 235.

Wisconsin.— Shirley *v.* Waukesha, 124 Wis. 239, 102 N. W. 576.

Form of action is not material.— The rule that a special improvement tax paid without protest as to certain irregularities in the assessment cannot be recovered back applies whether the action for the recovery is direct or the form of the relief sought will accomplish that result in effect. Pabst Brewing Co. *v.* Milwaukee, 126 Wis. 110, 105 N. W. 563.

The fact that others have failed to pay, or that the municipal authorities have aban-

assessment being set aside the money paid under it may be recovered, although the payment was in a legal sense voluntary.[2] The money must have come into the treasury of the corporation for its use or it must have had or been able to have the benefit thereof.[3] In case a reassessment is made the amount of which is less than the original assessment, one who has paid the original may recover the difference.[4] And it has been held that where an action is brought to recover an assessment on the ground that it is illegally apportioned, the property-owner can recover only the difference between the amount paid and that which he lawfully should have paid.[5] A payment may be recovered after the assessment has been vacated, although the payment would have been a ground for a refusal to vacate the assessment.[6] A person cannot recover back an assessment on the ground that the officers applied the payment by him to assessments on other property not owned by him, but his remedy is to enforce his payment as an exoneration of his land from the assessment.[7] A statute providing a specific remedy for vacating, correcting, or reducing assessments does not apply to an action to recover back the amount of an illegal assessment paid under coercion of law.[8]

(B) *Distinction Between Voluntary and Involuntary Payment.* In determining what is a voluntary payment the rule applicable to payments in general, that a payment to be involuntary must be under coercion of fact or law, to prevent an immediate seizure of goods or restraint of person or under such other circumstances as virtually destroy the free agency of the person making the payment,[9] is applicable to payments of local assessments.[10] A payment made without coercion in fact or law is voluntary.[11] So it has been held voluntary where made before process issues for collection,[12] before distraint under a warrant for collection,[13] before any threats or proceedings by the city,[14] or before sale is threatened.[15] Nor is a payment involuntary where made in order to effect a sale

doned the collection of, other special assessments in respect to the same improvement, will not aid one who has voluntarily paid in recovering back his money. Falls *v.* Cairo, 58 Ill. 403.

A stranger who has voluntarily paid an illegal assessment cannot recover it back. Hawkeye Loan, etc., Co. *v.* Marion, 110 Iowa 468, 81 N. W. 718.

2. Elizabeth *v.* Hill, 39 N. J. L. 555; Riker *v.* Jersey City, 38 N. J. L. 225, 20 Am. Rep. 386 [*followed* in Jersey City *v.* O'Callaghan, 41 N. J. L. 349].

3. Hawkeye Loan, etc., Co. *v.* Marion, 110 Iowa 468, 81 N. W. 718; Newcomb *v.* Davenport, 86 Iowa 291, 53 N. W. 232; Dewey *v.* Niagara County, 62 N. Y. 294 [*reversing* 2 Hun 392, 4 Thomps. & C. 606].

4. Jersey City *v.* Green, 42 N. J. L. 627; Gabler *v.* Elizabeth, 1 N. J. L. J. 156. *Compare* Campion *v.* Elizabeth, 2 N. J. L. J. 216.

5. Strickland *v.* Stillwater, 63 Minn. 43, 65 N. W. 131.

6. Jones *v.* New York, 37 Hun (N. Y.) 513.

7. Perdue *v.* New York, 12 Abb. Pr. (N. Y.) 31.

8. Poth *v.* New York, 151 N. Y. 16, 45 N. E. 372 [*affirming* 77 Hun 225, 28 N. Y. Suppl. 365]; De Montsaulnin *v.* New York, 46 Hun (N. Y.) 188, holding that Laws (1858), c. 338, as amended by Laws (1874), c. 312, which provides that no action shall lie to vacate an assessment in New York city, or to remove a cloud on title to land caused by an assessment, but that the owner shall be confined to the remedies given by said act, does not apply to an assessment which has been paid, but an action will lie to declare such assessment invalid, and to recover back the amount paid. See also Van Nest *v.* New York, 113 N. Y. 652, 21 N. E. 414; Diefenthaler *v.* New York, 111 N. Y. 331, 19 N. E. 48 [*affirming* 47 Hun 627, 1 N. Y. St. 912]; Zborowski *v.* New York, 1 N. Y. Suppl. 913.

9. See PAYMENT.

10. See cases cited in the following notes.

11. Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721; Vanderbeck *v.* Rochester, 122 N. Y. 285, 25 N. E. 408 [*affirming* 46 Hun 87]; Tripler *v.* New York, 17 N. Y. Suppl. 750.

12. Barrett *v.* Cambridge, 10 Allen (Mass.) 48; Nash *v.* New York, 9 Hun (N. Y.) 218; Palmer *v.* Syracuse, 26 Misc. (N. Y.) 561, 57 N. Y. Suppl. 600; Peebles *v.* Pittsburgh, 101 Pa. St. 304, 47 Am. Rep. 714.

13. Falls *v.* Cairo, 58 Ill. 403; Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512; New *v.* New Rochelle, 91 Hun (N. Y.) 214, 36 N. Y. Suppl. 211 [*distinguishing* Vaughn *v.* Port Chester, 135 N. Y. 460, 32 N. E. 137].

14. Vanderbeck *v.* Rochester, 46 Hun (N. Y.) 87 [*affirmed* in 122 N. Y. 285, 25 N. E. 408]; Smyth *v.* New York, 58 N. Y. Super. Ct. 357, 11 N. Y. Suppl. 583.

15. Decker *v.* Perry, (Cal. 1894) 35 Pac. 1017.

of the land,[16] or to secure a loan on the property.[17] Where payment of an apparently regular assessment is made with knowledge of facts rendering the assessment illegal and before any attempt has been made to enforce it, it cannot be regarded as an involuntary payment under coercion of law.[18] On the other hand a payment under coercion of a levy has been held involuntary,[19] as has payment after a threatened levy,[20] or after advertisement of sale,[21] or to prevent cloud upon title.[22] And a payment under direction of a judgment of foreclosure is under coercion.[23] When payment is made pending proceedings to vacate the assessment it has been held that it may be recovered after the assessment is set aside,[24] although it would seem that such recovery could not be had were payment made before institution of proceedings to vacate the assessment.[25]

(c) *Payment by Mistake or in Ignorance of Ground of Objection.* An assessment invalid by reason of facts *dehors* the record may be recovered, if paid in ignorance of the illegality,[26] and so of an assessment paid through ignorance of material facts[27] or of payment induced by fraud.[28] One who by mistake has voluntarily paid a paving assessment upon the property of another cannot recover the sum paid from the owner of the property.[29]

(d) *Payment Under Protest.* Payment of an assessment under protest is not in itself such an involuntary payment as to entitle the payer to recover the amount upon showing that the assessment was illegal;[30] but where a statute permits an

16. Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721. But *compare* Vaughn *v.* Port Chester, 43 Hun (N. Y.) 427 [*reversed* in 115 N. Y. 637, 21 N. E. 1116].

17. Redmond *v.* New York, 125 N. Y. 632, 26 N. E. 727 [*reversing* 58 N. Y. Super. Ct. 348, 11 N. Y. Suppl. 782].

18. Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721 [*distinguishing* Peyser *v.* New York, 70 N. Y. 497, 26 Am. Rep. 624]; Haven *v.* New York, 67 N. Y. App. Div. 90, 73 N. Y. Suppl. 678 [*affirmed* in 173 N. Y. 611, 66 N. E. 1110].

19. Union Steamboat Co. *v.* Buffalo, 82 N. Y. 351.

20. Bradford *v.* Chicago, 25 Ill. 411; Louden *v.* East Saginaw, 41 Mich. 18, 2 N. W. 182; Nickodemus *v.* East Saginaw, 25 Mich. 456; Stephan *v.* Daniels, 27 Ohio St. 527.

21. Vaughn *v.* Port Chester, 60 Hun (N. Y.) 401, 15 N. Y. Suppl. 474 [*affirmed* in 135 N. Y. 460, 32 N. E. 137].

22. Gill *v.* Oakland, 124 Cal. 335, 57 Pac. 150; Sands *v.* New York, 13 N. Y. St. 61.

23. Brehm *v.* New York, 39 Hun (N. Y.) 533 [*affirmed* in 104 N. Y. 186, 10 N. E. 158].

24. Purssell *v.* New York, 85 N. Y. 330 [*reversing* 43 N. Y. Super. Ct. 348].

25. Purssell *v.* New York, 85 N. Y. 330 [*reversing* 43 N. Y. Super. Ct. 348].

26 New York Mut. L. Ins. Co. *v.* New York, 144 N. Y. 494, 39 N. E. 386; Strusburgh *v.* New York, 87 N. Y. 452. See Covington *v.* Powell, 2 Metc. (Ky.) 226; Trimmer *v.* Rochester, 130 N. Y. 401, 29 N. E. 746; Redmond *v.* New York, 125 N. Y. 632, 26 N. E. 727 [*reversing* 58 N. Y. Super. Ct. 348, 11 N. Y. Suppl. 782]; Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721 [*reversing* 53 Hun 36, 6 N. Y. Suppl. 48].

Where irregularities appear on the face of the proceedings, payments of special assessments cannot be recovered back because of the invalidity alone. Redmond *v.* New York, 125 N. Y. 632, 26 N. E. 727 [*reversing* 58 N. Y. Super. Ct. 348, 11 N. Y. Suppl. 782]; Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721 [*reversing* 53 Hun 36, 6 N. Y. Suppl. 48]; Pooley *v.* Buffalo, 122 N. Y. 592, 26 N. E. 16.

27. Mayer *v.* New York, 63 N. Y. 455; Mayer *v.* New York, 4 Thomps. & C. (N. Y.) 488; Allen *v.* New York, 4 E. D. Smith (N. Y.) 404; Burchell *v.* New York, 9 N. Y. Suppl. 196. See also Bartlett *v.* Boston, 182 Mass. 460, 65 N. E. 827.

28. Richardson *v.* Denver, 17 Colo. 398, 30 Pac. 333; Harrison *v.* Milwaukee, 49 Wis. 247, 5 N. W. 326.

29. Hubbard *v.* Blanchard, 113 N. Y. App. Div. 788, 99 N. Y. Suppl. 262.

30. *California.*— Phelan *v.* San Francisco, 120 Cal. 1, 52 Pac. 38 (holding that one paying a tax for a street improvement, under protest, to prevent a sale of his land, does so voluntarily, where, under the act authorizing the improvement, a conveyance by the officer on such sale does not deprive the owner of any defense to the tax, or throw upon him the burden of showing its illegality); Easterbrook *v.* San Francisco, (1896) 44 Pac. 800; Bucknall *v.* Story, 46 Cal. 589, 13 Am. Rep. 220.

Georgia.— Hoke *v.* Atlanta, 107 Ga. 416, 33 S. E. 412.

Iowa.— Newcomb *v.* Davenport, 86 Iowa 291, 53 N. W. 232.

Massachusetts.— Foley *v.* Haverhill, 144 Mass. 352, 11 N. E. 554; Kelso *v.* Boston, 120 Mass. 297.

Montana.—Hopkins *v.* Butte, 16 Mont. 103, 40 Pac. 171.

assessment to be paid before delinquency under protest and gives the right to recover the same because of illegality, a property-owner who seeks to recover an assessment must pay the same before delinquency.[31] Such a statute, however, has been held not applicable to a case of want of jurisdiction to make the assessment.[32]

(E) *Necessity That Assessment Be Set Aside.* As a general rule money paid under an illegal assessment cannot be recovered without first setting the assessment aside,[33] although this rule is sometimes limited to cases in which the invalidity is not jurisdictional or constitutional;[34] and an exception is also made where the invalidity is latent and does not appear on the proof that must be made to sustain proceedings under the assessment.[35]

(III) *ACTIONS.* An action for the recovery of a special assessment must be brought within the time prescribed by statute,[36] and by the person entitled to repayment,[37] and is governed by the rules of pleading usually applicable to civil

Nebraska.— Omaha *v.* Kountze, 25 Nebr. 60, 40 N. W. 597.

New Jersey.— Fuller *v.* Elizabeth, 42 N. J. L. 427.

New York.— Peyser *v.* New York, 8 Hun 413 [*reversed* on other grounds in 70 N. Y. 497, 26 Am. Rep. 624]. *Compare* Commercial Bank *v.* Rochester, 42 Barb. 488; Schulz *v.* Albany, 27 Misc. 51, 57 N. Y. Suppl. 963 [*affirmed* in 42 N. Y. App. Div. 437, 59 N. Y. Suppl. 235].

Ohio.— Bepler *v.* Cincinnati, 10 Ohio Dec. (Reprint) 737, 23 Cinc. L. Bul. 229. But *compare* Higgins *v.* Pelton, 4 Ohio Dec. (Reprint) 521, 2 Clev. L. Rep. 306.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1235.

31. South Omaha *v.* McGavock, 72 Nebr. 382, 100 N. W. 805. See also Omaha *v.* Hodgskins, 70 Nebr. 229, 97 N. W. 346, holding that an act relating to the recovery of special taxes and assessments paid under protest applies to special assessments as well as taxes levied for general purposes.

32. Ogden City *v.* Armstrong, 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444.

33. Fuller *v.* Elizabeth, 42 N. J. L. 427; Davenport *v.* Elizabeth, 41 N. J. L. 362; Campion *v.* Elizabeth, 41 N. J. L. 355; Cross *v.* Hayes, 5 N. J. L. J. 368; Fuller *v.* Elizabeth, 2 N. J. L. J. 343; Turrell *v.* Elizabeth, 2 N. J. L. J. 342; Davenport *v.* Elizabeth, 1 N. J. L. J. 154.

34. New York Mut. L. Ins. Co. *v.* New York, 144 N. Y. 494, 39 N. E. 386; Trimmer *v.* Rochester, 130 N. Y. 401, 29 N. E. 746 [*affirming* 9 N. Y. Suppl. 695]; Burke *v.* New York, 4 N. Y. St. 643. See also Matter of New York, 114 N. Y. App. Div. 519, 100 N. Y. Suppl. 140 (holding that under Greater New York Charter, Laws (1901), p. 194, c. 466, tit. 3, precluding a court from annulling an assessment for municipal improvements on the ground that it was void, the party assessed may pay the assessment when enforcement thereof is threatened, and recover the amount so paid without first vacating the assessment); Strusburgh *v.* New York, 45 N. Y. Super. Ct. 508 (holding that a judgment in a suit by a city against a contractor, determining simply the fact of overpayment to him on his contract for a street improvement and the city's right to recover the sum overpaid, is not tantamount to a vacation of the assessment, enabling the lot owner to maintain suit against the city to recover money collected under the assessment, but merely furnishes a ground for reducing it on a proper application).

35. Horn *v.* New Lots, 83 N. Y. 100, 38 Am. Rep. 402.

36. Elizabeth *v.* Hill, 39 N. J. L. 555 (holding that section 5 of the supplement to the Elizabeth city charter of March 17, 1875, barring an action to recover back money paid on an old assessment for a public improvement, which has been set aside, until the making of a new assessment, applies only to assessments made after its passage); Trimmer *v.* Rochester, 134 N. Y. 76, 31 N. E. 255 [*affirming* 9 N. Y. Suppl. 695, and *following* Diefenthaler *v.* New York, 111 N. Y. 331, 19 N. E. 48]; Clowes *v.* New York, 47 Hun (N. Y.) 539 (holding that Code Civ. Proc. § 410, providing that when money is received in a fiduciary capacity the statute of limitations shall not begin to run until the person having the right to make the demand has actual knowledge of the facts giving that right, does not apply to an action to recover from a city an illegal excess collected on an assessment); Parsons *v.* Rochester, 43 Hun (N. Y.) 258; Groesbeck *v.* Cincinnati, 51 Ohio St. 365, 37 N. E. 707 [*reversing* 11 Ohio Dec. (Reprint) 819, 30 Cinc. L. Bul. 75] (holding that the fact that an excessive assessment for a public improvement, made by mistake in the calculation of the costs, was paid in ignorance of the mistake, does not affect the operation thereon of Rev. St. § 5848, barring an action to recover illegal taxes paid in one year from the date of payment).

37. See State *v.* Milwaukee, 15 Wis. 250, holding that where a resolution of the common council of the city of Milwaukee authorized the issue of city orders to the "owners" of certain lots for the amount of a special tax which had been paid on them for a purpose afterward abandoned by the city and at the time the tax was levied A

actions.[38] The burden is upon plaintiff to establish the illegality of the assessment,[39] as also ignorance of such illegality where essential to recovery.[40] An error in the instructions is not prejudicial where no ground of recovery has been established.[41] It has been held that in the same action a plaintiff may seek to have an assessment roll annulled and to recover the amount paid.[42] A property-owner entitled to a rebate on the amount of his assessment may recover it in an action of assumpsit.[43]

f. Penalties For Non-Payment. A penalty for non-payment of assessments cannot be imposed by the city unless the same is expressly authorized by statute,[44] and a statutory provision allowing imposition of penalties for non-payment of general taxes does not apply to special assessments.[45] But by statute a penalty is frequently provided in event of failure to make payment within a time specified.[46]

owned one of these lots, but soon sold it to B; requesting B to deduct the tax from the purchase-money, and to pay it to the city, which was done, the tax was paid by A, and B was not entitled to the city order for the amount under the resolution.

Where payment has been made to person not entitled.— Where a special city assessment tax, after being partly collected, was declared illegal, and an ordinance directed the mayor to take up all receipts for payments of such tax, and to issue certificates of the city's indebtedness for the amounts, it was held that the city was bound to issue such a certificate to B, although the mayor had already taken up B's receipt and issued a certificate to A, who had wrongfully obtained possession of the receipt, which bore no evidence of having been lawfully assigned to A, who transferred the certificate thus fraudulently obtained to an innocent third party for value. State *v.* Butler, 11 Lea (Tenn.) 418.

38. See PLEADING. And see Covington *v.* Powell, 2 Metc. (Ky.) 226 (holding answers equivocal, evasive, and insufficient on demurrer); Louisville *v.* Zanone, 1 Metc. (Ky.) 151 (holding that a party paying money for betterments under a void ordinance by mistake of law or fact, in order to recover, must aver that the betterment was made without his consent or approval, and was not beneficial, or was injurious, to his property); Higgins *v.* Pelton, 4 Ohio Dec. (Reprint) 521, 2 Clev. L. Rep. 306 (holding that an averment that the assessment was illegal and void is not demurrable as a legal conclusion; but it is a fact to be objected to by motion for indefiniteness).

An answer to a complaint to recover part of an assessment setting up the six-year limitation, and denying all plaintiff's allegations of facts *dehors* the record which render the assessment void, is good. Diefenthaler *v.* New York, 47 Hun (N. Y.) 627, 1 N. Y. Suppl. 912 [*affirmed* in 111 N. Y. 331, 19 N. E. 48]; Zborowski *v.* New York, 1 N. Y. Suppl. 913.

Presumptions.— Where it was not alleged by the complainant that he had not due notice of the proceedings in laying the assessment, or that they were irregular, the presumption was that he had notice and that the proceedings were regular. Sanford *v.* New York, 33 Barb. (N. Y.) 147, 12 Abb. Pr. 23, 20 How. Pr. 298.

39. Pooley *v.* Buffalo, 124 N. Y. 206, 26 N. E. 624; Remsen *v.* Wheeler, 121 N. Y. 685, 24 N. E. 704 [*affirming* 4 N. Y. Suppl. 350].

Conclusiveness of former judgment.— An assessment for a street improvement will not necessarily be declared void by the court of appeals, in a suit to recover back money collected under it, because the special term has declared it void in proceedings instituted by a stranger to the suit. Moore *v.* Albany, 98 N. Y. 396.

40. Tripler *v.* New York, 17 N. Y. Suppl. 750.

41. Louden *v.* East Saginaw, 41 Mich. 18, 2 N. W. 182, holding that under the provisions of a city charter that an action cannot be maintained against a city until the claim has been presented to the controller of council, there is no prejudicial error in an instruction that after money paid on an irregular assessment for street paving had been paid to the contractors, the city was not liable, where the claim with objections to the assessment had not been made to the proper officers.

42. Pooley *v.* Buffalo, 4 N. Y. Suppl. 450.

43. Chicago *v.* Singer, 116 Ill. App. 559.

44. Bucknall *v.* Story, 36 Cal. 67; Weber *v.* San Francisco, 1 Cal. 455; Power *v.* Detroit, 139 Mich. 30, 102 N. W. 288; State *v.* Norton, 63 Minn. 497, 65 N. W. 935.

45. Hosmer *v.* Hunt Drainage Dist., 134 Ill. 317, 25 N. E. 747; Ankeny *v.* Henningson, 54 Iowa 29, 6 N. W. 65.

46. See the statutes of the several states. And see Bristol *v.* Chicago, 22 Ill. 587 (holding that under Chicago Amended City Charter, 1857, providing that, when assessments are not paid by a certain time, ten per cent shall be collected as additional costs, and added to and collected with the other assessments and expenses authorized to be collected on the property assessed, such ten per cent so imposed as a penalty for failure to pay the assessment may be included in the judgment); Des Moines Brick Mfg. Co. *v.* Smith, 108 Iowa 307, 79 N. W. 77; Barber Asphalt Paving Co. *v.* Peck, 186 Mo. 506, 85 S. W. 387; Eyerman *v.* Blaksley, 78 Mo. 145 (holding that where the provision

g. Disposition of Funds. The proceeds of a special assessment must be applied as directed by law,[47] and where there are several improvements, a deficit in the fund for one cannot be made up from a surplus in the others,[48] although it may be provided that where improvements have been first paid for under a general tax the money raised from assessments for such improvements may be used in making other improvements.[49]

h. Surrender of Property Assessed. Under some statutes it is provided that in lieu of paying the assessment the property-owner may surrender the property to the city which shall pay him the value thereof determined in the manner provided by the statute.[50]

F. Enforcement of Assessments and Special Taxes — 1. In General. As a general rule a statute providing a specific method for the enforcement of assessments is held to supersede all other methods,[51] but under some statutes a

of the charter of the city of St. Louis, allowing the holder of a tax bill fifteen per cent per annum if payment of the bill be not made within the time payment is demanded or refused, is not interest, but of the nature of a penalty, and is valid); St. Joseph *v.* Forsee, 115 Mo. App. 510, 91 S. W. 445; Perkinson *v.* Schaake, 108 Mo. App. 255, 83 S. W. 301; Galbreath *v.* Newton, 45 Mo. App. 312; Bambrick *v.* Campbell, 37 Mo. App. 460 (holding that an action brought on a special tax bill dates from the time the petition is filed and summons issued; the right to penal interest under said tax bill dates from said filing thereon, even as against a non-resident, not served with process upon that summons, but subsequently brought in by publication); Baker *v.* French, 18 Ohio Cir. Ct. 420, 10 Ohio Cir. Dec. 222; Evans *v.* Cincinnati, 7 Ohio Dec. (Reprint) 540, 3 Cinc. L. Bul. 856; Toledo *v.* Platt, 4 Ohio S. & C. Pl. Dec. 28, 2 Ohio N. P. 304 (holding that under Rev. St. §§ 2285, 2286, providing that special assessments shall be payable at the time stipulated in the ordinance, and, if not paid when due, the amount thereof, with interest and penalty, may be recovered by suit, the penalty attaches on failure to pay when due, and not when suit is brought).

In case of excessive instalments.— Where assessments for street improvements payable in instalments are in excess of the rate limited by law, no penalty can be attached to unpaid instalments. Pike *v.* Cummings, 36 Ohio St. 213.

47. See the statutes of the several states. And see People *v.* Chicago, 152 Ill. 546, 38 N. E. 744, where it was held, under a statute permitting the division of special assessments into annual instalments bearing interest till paid, directing that out of the first instalments should be paid all costs, and the balance paid to the contractor, to whom should then be issued interest-bearing vouchers for the rest of the contract price, and providing that if, upon issuance of such vouchers, there remain any surplus, it should at once be credited on the unpaid instalments, that such credit need not be made until it was ascertained how much of the apparent surplus would be used to defray the cost of collecting the unpaid instalments and the loss of interest for the time the money paid remained in the hands of the tax-collectors before their settlement with the city.

Payment of contractor see *supra*, XIII, C, 9, a.

48. Thayer *v.* Grand Rapids, 82 Mich. 298, 46 N. W. 228.

49. Jelliff *v.* Newark, 48 N. J. L. 101, 2 Atl. 627 [*affirmed* in 49 N. J. L. 239, 12 Atl. 770].

50. See the statutes of the several states. And see Holt *v.* Somerville, 127 Mass. 408, holding that where part of an estate is taken by a city thereunder for a public park, and a betterment assessment is levied on the remainder, the owner cannot surrender such remainder, if he has settled for the part taken and conveyed it to the city by a warranty deed.

Property which may be surrendered.— Under Mass. St. (1874) c. 97, giving the right to the city of Somerville to take land for a public park, and to assess a proportionate share of the cost and expense upon real estate benefited thereby, and giving the same rights to owners to surrender their estates as is provided by St. (1871) c. 382, no surrender can be made of an estate not abutting on the park; and an estate separated from the park by a county road is not an abutting estate. Holt *v.* Somerville, 127 Mass. 408.

51. *California.*— Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52.

Illinois.— Chicago *v.* Colby, 20 Ill. 614.

Louisiana.— Municipality No. 1 *v.* Millaudon, 12 La. Ann. 769, holding that the confirmation of the tables of assessment against property-owners for their share of the benefit conferred by opening and improving streets will not authorize the ordinary writ of fieri facias to be issued against the party assessed.

Massachusetts.— Roxbury *v.* Nickerson, 114 Mass. 544.

Missouri.— Moberly *v.* Wight, 19 Mo. App. 269, holding that a charter, in declaring how recovery for the expense of street improvements named therein may be enforced by action against the owners and occupants of adjacent lots who fail to do the work, is exclusive, and cannot be enforced in any other manner, or by any other punishment, as by making such failure a misdemeanor.

Ohio.— Deatrick *v.* Defiance, 1 Ohio Cir. Ct. 340, 1 Ohio Cir. Dec. 189; Horn *v.*

choice of remedies is permitted.[52] The proceedings for the enforcement of assessments are usually regarded as *in rem*,[53] although in some jurisdictions a personal action is permitted.[54] It has been held that a remedy provided by statute for the recovery by the city for improvements notwithstanding irregularities may be adopted even after suit brought to recover taxes paid under protest.[55]

2. Constitutional and Statutory Provisions. Constitutional or statutory provisions governing the collection of general taxes are not in the absence of express provision applicable to special assessments.[56] An act changing the manner of enforcing assessments will not, in the absence of clear expression,[57] apply to assessments levied before its passage.[58] The legislature has no power to provide that assessments may be collected as against different citizens by different processes.[59]

3. Authority of Collectors and Other Officers. Power to collect special assessments rests solely in the officer authorized by statute.[60] It has been held

Columbus, 1 Ohio Cir. Ct. 337, 1 Ohio Cir. Dec. 187.

Pennsylvania.— *In re* Titusville St., 3 Pa. Dist. 752.

Personal actions see *infra*, XIII, F, 8, a.

52. Martin *v.* Wills, 157 Ind. 153, 60 N. E. 1021 (holding that where assessments have been levied on abutting property for expense of street improvements, under the act of 1889, known as the "Barrett Law," the assessments may be collected by a foreclosure of the lien and sale of the property, as provided in Burns Rev. St. (1894) § 4294 (Horner Rev. St. (1897) § 6777), as well as by precept issued by order of the city council, as provided in Burns Rev. St. (1894) § 4298); Talcott *v.* Noel, 107 Iowa 470, 78 N. W. 39 (holding that under Code (1873), § 481, authorizing a city to certify assessments to the county auditor for collection, such action is discretionary, since, under section 478, the city may proceed at law or in equity in its own name, or that of any person to whom payment is directed to be made, to enforce collection); Pittsburg *v.* Fay, 8 Pa. Super. Ct. 269, 43 Wkly. Notes Cas. 78 (holding that a municipal claim may be collected by assumpsit as well as enforced by a lien against the property affected); *In re* Harding St., 31 Pittsb. Leg. J. N. S. (Pa.) 147 (holding that a special municipal assessment against school property may be enforced by a mandamus execution or other remedy, since the levari facias is not the only writ which may be sued to collect a municipal assessment).

Remedies of contractor.—A contractor constructing a street improvement may choose between the remedies given by Ind. Acts (1901), p. 537, c. 231, § 6, providing that delinquent assessments for benefits shall be collected in the same manner that delinquent taxes are collected, or by a foreclosure of the lien, although the council in its order of assessment has provided that it should be collected as taxes are collected. Shirk *v.* Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490.

53. *Illinois.*— Hoover *v.* People, 171 Ill. 182, 49 N. E. 367; People *v.* Green, 158 Ill. 594, 42 N. E. 163.

Kentucky.— Orth *v.* Park, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251, 25 Ky. L. Rep. 1910, 26 Ky. L. Rep. 184, 342.

Louisiana.— Rosetta Gravel-Paving, etc., Co. *v.* Jollisaint, 51 La. Ann. 804, 25 So. 477.

Missouri.— Clinton *v.* Henry County, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415. But see Jaicks *v.* Sullivan, 128 Mo. 177, 30 S. W. 890, holding that a proceeding to enforce a lien for street paving against an abutting lot, under Kansas City Charter (Laws (1875), p. 252, art. 8, § 4), providing that only the right and title of parties shall be affected therehy, or by a proceeding therein, is not a proceeding strictly *in rem*.

Pennsylvania.— Salter *v.* Reed, 15 Pa. St. 260; Philadelphia *v.* Juvenal, 5 Pa. Dist. 631.

54. See *infra*, XIII, F, 8.

55. Dittoe *v.* Davenport, 74 Iowa 66, 36 N. W. 895.

56. Chicago *v.* Colby, 20 Ill. 614; Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137; Allen *v.* Galveston, 51 Tex. 302; Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726.

57. Gage *v.* People, 219 Ill. 424, 76 N. E. 583; Cummings *v.* People, 213 Ill. 443, 72 N. E. 1094; Dowell *v.* Talbot Paving Co., 138 Ind. 675, 38 N. E. 389; Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Bartlett *v.* Trenton, 38 N. J. L. 64.

58. *California.*— Dyer *v.* Pixley, 44 Cal. 153; Dyer *v.* Barstow, 53 Cal. 81.

Illinois.— Cummings *v.* People, 213 Ill. 443, 72 N. E. 1094; Murphy *v.* People, 120 Ill. 234, 11 N. E. 202.

Indiana.— Phillips *v.* Jollisaint, 7 Ind. App. 458, 34 N. E. 653, 847. *Compare* Palmer *v.* Stumph, 29 Ind. 329.

Missouri.— Fowler *v.* St. Joseph, 37 Mo. 228.

Pennsylvania.— Scranton City *v.* Stokes, 28 Pa. Super. Ct. 434. But *compare* Pray *v.* Northern Liberties, 31 Pa. St. 69; Council *v.* Moyamensing, 2 Pa. St. 224.

59. McComb *v.* Bell, 2 Minn. 295.

60. Pierson *v.* People, 204 Ill. 456, 68 N. E. 383; Webster *v.* Chicago, 62 Ill. 302; Chicago *v.* Rock Island R. Co., 20 Ill. 286; Challiss *v.* Parker, 11 Kan. 384; Central Ohio R. Co. *v.* Bellaire, 67 Ohio St. 297, 65 N. E. 1007; State *v.* Hobe, 106 Wis. 411, 82 N. W. 336.

that the legislature may confer the power of appointing a collector upon a corporation exclusively interested in the assessment.[61]

4. Property Which May Be Subjected — a. In General.[62] A city can enforce a local assessment only as against such property as it is authorized by statute to pursue.[63] Where the proceeding is regarded as strictly *in rem*, only the specific property against which the assessment is levied may be sold.[64] But where an assessment is regarded as a debt due from the owner it may be satisfied from the proceeds of the sale of his lands generally.[65] Where property subject to an assessment lien is taken for public use the lien may be satisfied from the award of damages.[66] But the amount of the assessment cannot be deducted from an award for the taking of other property of the owner where there is no personal liability.[67] Where the lien of an assessment is not removed by a judicial sale of the realty charged, the assessment is not entitled to participate in the distribution of the proceeds of such a sale.[68] Where lands encumbered by a tax lien are sold in separate parcels to different purchasers at different times, each paying full value without regard to the encumbrance, the separate parcels should be sold to satisfy the lien in the inverse order of alienation.[69]

b. Public Property. County property cannot be sold to enforce a special assessment,[70] but it has been held that land belonging to a school-district but not used for school purposes may be subjected.[71] Where a tax bill issues against the city for its proportionate part of the cost of improvements it is provided by statute, in some states, that the judgment thereon shall be the same as an ordinary judgment on contract.[72] Under such a statute a general judgment may be rendered.[73]

c. Railroad Property.[74] The rule generally recognized is that the road-bed or

61. Litchfield *v.* McComber, 42 Barh. (N. Y.) 288.

62. Enforcement against personal property see *infra*, XIII, F, 7.

Exemptions see *supra*, XIII, E, 5, f.

63. Indianapolis, etc., R. Co. *v.* Capitol Paving, etc., Co., 24 Ind. App. 114, 54 N. E. 1076.

64. Hoover *v.* People, 171 Ill. 182, 49 N. E. 367 (holding that a single judgment for the sum of the assessments against two or more separate parcels is an attempt to subject each lot to the payment of the taxes on both and is void); Dempster *v.* People, 158 Ill. 36, 41 N. E. 1022; Syenite Granite Co. *v.* Bobb, 37 Mo. App. 483; Younglove *v.* Hackman, 43 Ohio St. 69, 1 N. E. 230 (holding that where land on opposite sides of a street is assessed as two lots, and the assessments thus made are certified to the county auditor for collection, it is error to charge such assessments made on both sides of the street upon the land on one side of the street).

65. Gould *v.* Baltimore, 59 Md. 378, holding that where property assessed for a local improvement was sold by trustees under a will, and, the proceedings being in court, demand was made upon the trustees for the payment of the assessment before distribution, the fact that the trustees made a partial distribution among the parties entitled was no reason why a fund arising from the sale of other land of the estate, and which the same parties were entitled to, should not be subjected to the payment of the assessment. But see Hutchinson *v.* Rochester, 92 Hun (N. Y.) 393, 36 N. Y. Suppl. 766, holding that Rochester City Charter (Laws (1880), c. 14, § 209), providing for carrying forward into the assessment roll of the ensuing year unpaid special assessments, and creating a personal obligation therefor against the owner of the property, does not make such assessments a lien on other lands of such owner.

66. Fisher *v.* New York, 6 Thomps. & C. (N. Y.) 100.

67. Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777.

68. Bryant's Appeal, 104 Pa. St. 372.

69. Cincinnati *v.* Wynne, 19 Ohio Cir. Ct. 747, 10 Ohio Cir. Dec. 577, holding that where the lien for the improvement of a street attaches to a corner lot and the lot next adjoining, and these two lots are subsequently subdivided into three lots fronting on the cross street, and the inside lots are sold with a warranty against all encumbrances, and the corner lot is subsequently sold without such warranty, the city must exhaust the corner lot in the collection of the assessments before proceeding against the other lots.

70. McLean County *v.* Bloomington, 106 Ill. 209.

71. Ft. Smith School Dist. *v.* Board of Imp., 65 Ark. 343, 46 S. W. 418.

72. See the statutes of the several states.

73. Barber Asphalt Paving Co. *v.* St. Joseph, 183 Mo. 451, 82 S. W. 64.

Interest.— Under the direct provisions of Mo. Rev. St. (1899) § 5664, the judgment is properly made to bear interest at the rate of ten per cent per annum. Barber Asphalt Paving Co. *v.* St. Joseph, 183 Mo. 451, 82 S. W. 64.

74. General judgment against railroad see *infra*, XIII, F, 7, b.

right of way or other property so connected with the operation of a railroad that its loss by conveyance or sale would dismember the road as a line of travel cannot be sold to satisfy a local assessment,[75] but that other property of a railroad may be subjected in the same manner as property of individuals.[76]

5. Particular Methods of Procedure — a. Recovery on Quantum Meruit. An assessment for a local improvement must be enforced by means of valid proceedings authorizing the assessment, and as a general rule neither the contractor for the work[77] nor the city[78] can recover against the owner of the property upon a *quantum meruit* where the assessment is invalid.

b. Issuance of Certificates and Warrants For Collection. Provision is made in some jurisdictions for the issuance to the contractor of certificates or warrants, by virtue of which he enforces collection of assessments directly, in an action in

Liability to assessment see *supra*, XIII, E, 5, b, (III) (B).

75. Kansas City, etc., R. Co. *v.* Siloam Springs Waterworks Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248; Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103; Boston *v.* Boston, etc., R. Co., 170 Mass. 95, 49 N. E. 95; Detroit, etc., R. Co. *v.* Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 58 Am. St. Rep. 466, 28 L. R. A. 793 [*following* Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195]. *Contra*, Chicago, etc., R. Co. *v.* Elmhurst, 165 Ill. 148, 46 N. E. 437. And see Cleveland *v.* Cleveland, etc., R. Co., 4 Ohio Dec. (Reprint) 315, 1 Clev. L. Rep. 304, holding that where a street railway is bound to pave the track between the rails when required by the city, and the city by ordinance levies an assessment on the track and franchises of such railway for the cost of such work, which was done by the city at the request of the company, the indebtedness is not a mere contract debt, but is such a debt or tax as gives the city a lien on the franchise and track of the company for the payment thereof.

Terminal property of a railroad company, consisting of a freight house, road-bed, and right of way, cannot be sold, under the provisions of a city charter, for non-payment of assessments thereon for local improvements. Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195.

76. Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144, 93 N. W. 103; Philadelphia *v.* Philadelphia, etc., R. Co., 177 Pa. St. 292, 35 Atl. 610, 34 L. R. A. 564; Philadelphia *v.* Philadelphia, etc., R. Co., 1 Pa. Super. Ct. 236, 38 Wkly. Notes Cas. 15.

The personal property of a railroad company can be levied upon and sold under a treasurer's warrant to satisfy a tax assessment made upon its right of way and appurtenant yard tracks and other like grounds for the purpose of defraying the expense of a local improvement. Atchison, etc., R. Co. *v.* Peterson, 58 Kan. 818, 51 Pac. 290 [*affirming* 4 Kan. App. 103, 48 Pac. 877].

77. Galbreath *v.* Newton, 30 Mo. App. 380. See also Heman *v.* Larkin, 108 Mo. App. 392, 83 S. W. 1019 (holding that where plaintiff sued on a special tax bill to recover for constructing a sidewalk in front of defendant's premises, and tried the case on the theory that he had done the work called for in the bill, and in the manner and with the materials required, plaintiff could not after trial on this theory recover *pro tanto* for the value of work done; but recovery, if at all, must be for the full tax bill); Sedalia *v.* Abell, 103 Mo. App. 431, 76 S. W. 497 (holding that where an ordinance declared it necessary that a certain street be brought to the established grade and paved, and a contract was let under the provisions of such ordinance, but there was no ordinance declaring that in the opinion of the council the general revenue fund of the city was not in condition to pay the cost of bringing the street to the established grade, the contractor was not entitled to show, in a suit to recover a special assessment against the owners of the lots abutting on the street, that in fact the street was not brought to the established grade, and recover from the owner as for paving alone, in express contradiction of the ordinance and contract). But *compare* O'Connor *v.* Stewart, 19 La. Ann. 127, holding that where the lien of a contractor upon private land for the cost of public improvements placed thereon under a contract awarded him by an inspector at public sale is lost through failure of the inspector to comply with the requirements of law in making the award, the owner of the land will be liable to the contractor for the cost in an action of *quantum meruit*, if the work is necessary and beneficial to him.

78. Boston *v.* Shaw, 1 Metc. (Mass.) 130; Manistee *v.* Harley, 79 Mich. 238, 44 N. W. 603; Buckley *v.* Tacoma, 9 Wash. 253, 37 Pac. 441. But *compare* Nome *v.* Lang, 1 Alaska 593 (holding that where resident property-owners of a town petitioned the common council to improve the street in front of their property, specifying the kind and character of improvement, and saw the work and labor done and the materials furnished in compliance with their request, the town might recover the reasonable value of such work and materials in an action of assumpsit under their implied contract to pay); Jaeger *v.* Burr, 36 Ohio St. 164; Ridenour *v.* Saffin, 1 Handy (Ohio) 464, 12 Ohio Dec. (Reprint) 238.

the nature of a foreclosure.[79] The form of such warrants and the time and manner of their issuance must conform substantially to the requirements of the statute,[80] but mere irregularities will not invalidate the same.[81]

c. Issuance of Precept to Contractor. Under the statutes in some jurisdictions where the property-owners refuse for a specified length of time to pay assessments the contractor may upon affidavit of such fact secure the issuance to him of a precept for the amount of the assessment, and upon this precept after due notice and default a levy and sale of the land against which the assessment is made may be had.[82] Any person who is aggrieved by the issuance of such a precept may appeal by filing a sufficient bond with the city clerk, and the city clerk must thereupon certify the papers connected with the improvement to a designated court wherein they serve the purpose of a complaint to which the appellants shall answer upon rule, and in case it is found that the proceedings subsequent to the order directing the work to be done are regular, that the work has been performed in accordance with the contract, and that the estimate has been properly made thereon a sale is directed.[83] It is forbidden the property-owners upon such

79. See the statutes of the several states; and see the cases cited in the following notes.

Issuance of certificate or special tax bill against specific property see *supra*, XIII, E, 15.

80. Cotton *v.* Watson, 134 Cal. 422, 66 Pac. 490; Shipman *v.* Forbes, 97 Cal. 572, 32 Pac. 599.

Duty of officer to issue.— In Cal. Laws (1871–1872), p. 813, § 10, providing that the auditor must be satisfied, before countersigning a street assessment warrant, that the proceedings have been "legal and fair," as it could not have been intended to give the auditor power to refuse to sign on his own notion of fairness, although the proceedings may have been legal, the word "fair" is surplusage. Wood *v.* Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249.

Who may issue.— The general council of a city, under Ky. St. § 2834, has authority to direct apportionment warrants, liens for which are given on the property improved, to be issued by the clerk of the board of councilmen (who had authority to issue them when the contract for the improvement was made) instead of the board of public works, who are required by Ky. St. § 2839, to issue them. Isenberg *v.* Selvage, 103 Ky. 260, 44 S. W. 974, 19 Ky. L. Rep. 1963.

81. Beaudry *v.* Valdez, 32 Cal. 269 (holding that where the mayor of the city of Oakland became, prior to his election, the assignee of a contract for street improvement as collateral security, such fact did not affect the validity of the contract, or incapacitate the mayor from countersigning a warrant issued for the collection of the assessment); Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238; Langan *v.* Bitzer, 82 S. W. 280, 26 Ky. L. Rep. 579.

Amendment.— An error in the christian name of the owner of property sought to be charged by an apportionment warrant for a municipal improvement, not shown to have prejudiced such owner, was an amendable defect within Ky. St. (1903) § 2834, providing that no error in the proceedings of the general council shall exempt from payment for improvements after the work has been done, but that the council or court may make all corrections to do justice to the parties concerned. Langan *v.* Bitzer, 82 S. W. 280, 26 Ky. L. Rep. 579. Where an apportionment warrant for a municipal improvement was issued against the wrong person by mistake, the holder of the warrant was entitled to have it corrected by the city council within five years. Voris *v.* Gallaher, 87 S. W. 775, 27 Ky. L. Rep. 1001.

82. See the statutes of the several states. And see Burt *v.* Hasselman, 139 Ind. 196, 38 N. E. 598; Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Elkhart *v.* Wickwire, 121 Ind. 331, 22 N. E. 342; Crowell *v.* Jaqua, 114 Ind. 246, 15 N. E. 242; Goring *v.* McTaggart, 92 Ind. 200; Langohr *v.* Smith, 81 Ind. 495 (holding that a city clerk cannot issue a valid precept for the collection of an assessment for street improvements without an order of the common council; and a sale made under such precept is void); Jeffersonville *v.* Patterson, 32 Ind. 140 (holding that where the statute of incorporation of a city requires that a precept issued for the collection of assessments therein shall be signed by the mayor, a precept signed by a member of the common council acting temporarily as president thereof is void); Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

83. See the statutes of the several states. And see Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Sims *v.* Hines, 121 Ind. 534, 23 N. E. 515; Jenkins *v.* Stetler, 118 Ind. 275, 20 N. E. 788; Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; McGill *v.* Bruner, 65 Ind. 421; First Presby. Church *v.* Lafayette, 42 Ind. 115; Brookbank *v.* Jeffersonville, 41 Ind. 406; Lammers *v.* Balfe, 41 Ind. 218; Stewart *v.* Jeffersonville, 41 Ind. 153; Baker *v.* Tobin, 40 Ind. 310; Balfe *v.* Johnson, 40 Ind. 235; McEwen *v.* Gilker, 38 Ind. 233; Kretsch *v.* Helm, 38 Ind. 207; Moberry *v.* Jeffersonville, 38 Ind. 198; Romig *v.* Lafayette, 33 Ind. 30; Halstead *v.* Attica, 28 Ind. 378; Klein *v.* Tuhey, 13 Ind. App. 74, 40

appeal to urge any errors or irregularities in the making of the contract.[84] The affidavit required for the issuance of a precept under such statutes must be in substantial conformity with the statutory requirements.[85]

d. Collection as Delinquent Taxes — (I) *Advertisement and Sale.* In some jurisdictions assessments remaining unpaid after a specified time are collected in the same manner as delinquent taxes generally,[86] and a penalty for non-payment may be collected in the same manner.[87] In the absence of express statutory provision a city has no power to sell land for delinquent assessments.[88] But by statute such power is sometimes conferred.[89] Its exercise depends upon the fulfilment of conditions precedent imposed by the statute,[90] and the sale must be made

N. E. 144; Phillips *v.* Jollisaint, 7 Ind. App. 458, 34 N. E. 653, 847.

The costs of appeal, except the cost of sale, should be adjudged against the losing party personally. Brookbank *v.* Jeffersonville, 41 Ind. 406.

84. Boyd *v.* Murphy, 127 Ind. 174, 25 N. E. 702; Sims *v.* Hines, 121 Ind. 534, 23 N. E. 515; Jenkins *v.* Stetler, 118 Ind. 275, 20 N. E. 788; Wiles *v.* Hoss, 114 Ind. 371, 16 N. E. 800; McGill *v.* Bruner, 65 Ind. 421; Johnson *v.* Allen, 62 Ind. 57; Rose *v.* Balfe, 43 Ind. 353; Ball *v.* Balfe, 41 Ind. 221; Hellenkamp *v.* Lafayette, 30 Ind. 192; Crawfordsville Music Hall Assoc. *v.* Clements, (Ind. App. 1894) 38 N. E. 226.

85. Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Clements *v.* Lee, 114 Ind. 397, 16 N. E. 799; Balfe *v.* Johnson, 40 Ind. 235.

When there are joint contractors.— Under Rev. St. § 3165, providing that the contractor "shall file his affidavit," where several persons united as contractors, an affidavit made by one of them is sufficient. Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Jenkins *v.* Stetler, 118 Ind. 275, 20 N. E. 788. Where one of two joint contractors for improving streets dies after the improvement and assessment are made, a precept may be issued in favor of both, and the affidavit to obtain such precept may be made by the surviving partner. Ray *v.* Jeffersonville, 90 Ind. 567.

86. See the statutes of the several states. And see the following cases:

California.— Ramish *v.* Hartwell, 126 Cal. 443, 58 Pac. 920.

Colorado.— Highlands *v.* Johnson, 24 Colo. 371, 51 Pac. 1004.

Iowa.— Shaw *v.* Des Moines County, 74 Iowa 679, 39 N. W. 101, holding that under McClain Code, § 481, providing that any municipal corporation may, if by ordinance it so elects, cause all delinquent assessments and taxes to be certified to the county auditor for collection, a city council may order certified to the auditor for collection assessments for street improvements, completed at the time of the passage of the ordinance.

Kansas.— Sanger *v.* Rice, 43 Kan. 580, 23 Pac. 633; Challiss *v.* Parker, 11 Kan. 384.

New Jersey. — Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

New York.— People *v.* Bergen, 6 Hun 267.

Pennsylvania. — See South Chester *v.* Broomall, 1 Del. Co. 58.

Wisconsin.— State *v.* Hobe, 106 Wis. 411, 82 N. W. 336.

Application for judgment and sale of land see *infra*, XIII, F, 5, d, (II).

Collection of delinquent taxes generally see TAXATION.

Delinquent municipal taxes see *infra*, XV, D.

Payment from proceeds of judicial sale.— Instalments of assessments for public improvements should be collected the same as other taxes, and in case of a judicial sale of real estate, or a sale by administrators, executors, guardians, or trustees, made after the last day of September in any year, such instalments as stand unsatisfied upon such duplicate should be paid out of the proceeds of such sale, as required by Rev. St. § 2854, regulating payment of taxes on land sold at judicial sales. Makley *v.* Whitmore, 61 Ohio St. 587, 56 N. E. 461.

Necessity that other taxes be delinquent.— Comp. St. (1893) c. 12*a*, § 91, relating to the collection, by sale of real estate, of taxes and "assessments" in cities of the metropolitan class, confers authority on the county treasurer to sell real estate for the nonpayment of special paving assessments levied thereon by the city, although there are no delinquent state, county, or other general taxes against the same property. State *v.* Irey, 42 Nebr. 186, 60 N. W. 601.

87. Baker *v.* French, 18 Ohio Cir. Ct. 420, 10 Ohio Cir. Dec. 222.

88. *Iowa.*— Merriam *v.* Moody, 25 Iowa 163; McInerny *v.* Reed, 23 Iowa 410.

Kansas.— Paine *v.* Spratley, 5 Kan. 525.

Nebraska.— State *v.* Irey, 42 Nebr. 186, 60 N. W. 601.

New Jersey.— State *v.* Beverly, 53 N. J. L. 560, 22 Atl. 340.

New York.— Sharpe *v.* Speir, 4 Hill 76.

Texas.— Allen *v.* Galveston, 51 Tex. 302.

Contra.— Brooks *v.* Baltimore, 48 Md. 265.

89. Baltimore *v.* Ulman, 79 Md. 469, 30 Atl. 43; Rathbun *v.* Acker, 18 Barb. (N. Y.) 393. And see cases cited *supra*, note 86.

90. Tompkins *v.* Johnson, 75 Mich. 181, 42 N. W. 800, holding that to authorize a sale it is not sufficient for the marshal's certificate to recite that he can find no personal property on the premises; and that it may be shown to defeat a sale of the premises that the person chargeable with the assessment had personal property situate in another part of the city which might have been, but was not, levied upon by the marshal.

by the officer[91] in the manner[92] and upon the notice[93] prescribed. Where certificates have been issued representing the assessment fund the holder of such certificates is entitled to the funds paid in on such assessment or to the proceeds of sale to the amount of the certificates.[94]

(II) *Applications For Judgment*— (A) *In General.* By statute in some jurisdictions it is provided that upon special assessments remaining unpaid for a specified length of time the collector after publication of notice may apply for a judgment for the amount of the assessment and for an order of sale to satisfy such judgment.[95] To sustain such proceedings the statute must be substantially followed.[96] So, where such is the statutory method of procedure, the assessment roll must have been certified to the city collector[97] and a warrant issued to him[98]

91. Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

92. State *v.* Taylor, 59 Md. 338; Whittaker *v.* Deadwood, 12 S. D. 608, 82 N. W. 202 (holding that where a city charter provided for the sale of property of delinquent taxpayers on the first Mondays of March and December, a sale made on December 20 was invalid); State *v.* Hobe, 106 Wis. 411, 82 N. W. 336; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882.

Where tax lien is permanent.— Under the provisions of N. Y. Laws (1871), c. 381, § 1, carried into the Consolidation Act (Laws (1882), c. 410, § 915), and continued in Greater New York Charter (§ 1017), that all taxes and assessments made for city improvements should be and remain a lien until paid, a sale of property in New York in 1899 for unpaid assessments which were confirmed in 1875, 1877, and 1882, is valid. Bell *v.* New York, 66 N. Y. App. Div. 578, 73 N. Y. Suppl. 298.

Distribution of proceeds of sale see *infra*, XIII, F, 6, n.

93. *Georgia.*— Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580.

Maryland.— Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688.

Missouri.— Fowler *v.* St. Joseph, 37 Mo. 228.

New Jersey.— Hutchinson *v.* Trenton, 42 N. J. L. 72.

New York.—Tonawanda *v.* Price, 171 N. Y. 415, 64 N. E. 191 [*reversing* 57 N. Y. App. Div. 635, 68 N. Y. Suppl. 1150]; Sanders *v.* Leavey, 38 Barb. 70.

Sufficiency of notice of sale in general see *infra*, XIII, F, 6, a.

94. State *v.* Hobe, 106 Wis. 411, 82 N. W. 336, holding that under Superior City Charter, providing for special assessments, and for their enforcement as other city taxes are enforced, except that all money collected on account of special assessments by the city or county treasurer shall be paid to the owner on surrender of the certificate, where the money to discharge a special assessment lien is received by the county treasurer before the sale of the property to enforce it he thereby becomes a trustee thereof for the certificate holder.

95. See the statutes of the several states. And see the cases cited *infra*, this and following notes.

Jurisdiction.—Ill. Act, July 1, 1897, changing the methods of levying special assessments, and repealing certain provisions of the Cities and Village Act, art. 9, regulating such methods, did not deprive county courts of jurisdiction to enter judgment of sale of delinquent lots for special assessments levied prior to its passage, under the old law. Noonan *v.* People, 183 Ill. 52, 55 N. E. 679. The county court has jurisdiction under Local Improvement Act, § 51 (Hurd Rev. St. (1903) c. 24, § 557), and County Court Act, § 5 (Hurd Rev. St. (1903) c. 37, § 93), to confirm a special assessment or render judgment of sale thereunder at a probate term. People *v.* Colegrove, 218 Ill. 545, 75 N. E. 991; People *v.* Brown, 218 Ill. 375, 75 N. E. 989.

96. Gage *v.* People, 219 Ill. 634, 76 N. E. 834; Ottis *v.* Sullivan, 219 Ill. 365, 76 N. E. 487; Biggins *v.* People, 193 Ill. 601, 61 N. E. 1124.

Making of certified statement of delinquents.— Where, in proceedings under the charter of the city of Duluth pertaining to local improvements and assessments, the controller has failed to fully comply with the provision which requires him to "make up" and file a "certified statement" as to delinquents, such failure is a mere irregularity, and does not invalidate the judgment against delinquent property entered therein. Duluth *v.* Miles, 73 Minn. 509, 76 N. W. 259.

97. Doremus *v.* People, 173 Ill. 63, 50 N. E. 686; McChesney *v.* People, 171 Ill. 267, 49 N. E. 491.

98. Marshall *v.* People, 219 Ill. 99, 76 N. E. 70; People *v.* Record, 212 Ill. 62, 72 N. E. 7; Butler *v.* Nevin, 88 Ill. 575; Gurnee *v.* Chicago, 40 Ill. 165.

Alteration.— A warrant issued by the county clerk to a city collector for the collection of special assessments was not void because the collector placed upon it in red ink a memorandum showing that the property had been sold for taxes after the assessment was confirmed, together with the name of the purchaser. Noonan *v.* People, 221 Ill. 567, 77 N. E. 930.

Recall of warrant.— Under Hurd Rev. St. Ill. (1903) c. 24, § 61, in relation to warrants for the collection of special assessments for local improvements, providing that the court shall have power to recall such warrants as to all or any of the property affected at any time before payment or sale, if the proceedings be abandoned by the petitioner or the

upon which he must have made a demand [99] and return,[1] after which the delinquent assessments must have been reported to the county collector.[2]

(B) *Notice.* Notice of the application must be given as required by statute.[3]

judgment be vacated or modified in a material respect, an order recalling a warrant, where the proceedings were not abandoned and the judgment was not vacated or modified in any material respect, was a nullity, and had no effect on the warrant or the authority of the collector to proceed thereon. Noonan *v.* People, 221 Ill. 567, 77 N. E. 930.

99. Marshall *v.* People, 219 Ill. 99, 76 N. E. 70, holding that where a special tax warrant is issued against the property of a non-resident owner, demand for payment thereof need not be made personally, but it may be made by registered letter.

1. People *v.* Record, 212 Ill. 62, 72 N. E. 7 (holding that where a city marshal, attempting to collect a special tax, merely handed back the bill of costs to the clerk with the oral statement that he had made a demand for the amount of the tax and had been unable to collect it, this did not constitute a return, and the court, on application for judgment, properly refused to allow an amendment so as to show a return to the clerk within sixty days as required by law); Walker *v.* People, 75 Ill. 614; Smith *v.* People, 75 Ill. 36; Ottawa *v.* Macy, 20 Ill. 413.

2. Hurd *v.* People, 221 Ill. 398, 77 N. E. 443; Marshall *v.* People, 219 Ill. 99, 76 N. E. 70; Harris *v.* People, 218 Ill. 439, 75 N. E. 1012; Biggins *v.* People, 193 Ill. 601, 61 N. E. 1124; Craig *v.* People, 193 Ill. 199, 61 N. E. 1072; Steidl *v.* People, 173 Ill. 29, 50 N. E. 129; Hoover *v.* People, 171 Ill. 182, 49 N. E. 367; People *v.* Wadlow, 166 Ill. 119, 46 N. E. 775; McLean *v.* People, (Ill. 1891) 27 N. E. 601; Bowman *v.* People, 137 Ill. 436, 27 N. E. 598; People *v.* Pierce, 90 Ill. 85; Smith *v.* People, 87 Ill. 74; Chicago, etc., R. Co. *v.* People, 83 Ill. 467.

The authority of a city collector to apply for judgment upon a special assessment for local improvements was abrogated by the constitution of 1870. Honore *v.* Chicago, 62 Ill. 305; Forsythe *v.* Chicago, 62 Ill. 304; Otis *v.* Chicago, 62 Ill. 299; Brown *v.* Chicago, 62 Ill. 289; Burton *v.* Chicago, 62 Ill. 179; Marsh *v.* Chicago, 62 Ill. 115; Brown *v.* Chicago, 62 Ill. 106; Hills *v.* Chicago, 60 Ill. 86.

After reversal of confirmation.—The county court has no power to order a sale of property for a failure to pay an instalment of a special assessment, after the judgment of confirmation has been reversed. Such act is without the jurisdiction of the court. Glos *v.* Collins, 110 Ill. App. 121.

3. Hawes *v.* Fliegler, 87 Minn. 319, 92 N. W. 223; Alexandria *v.* Hunter, 2 Munf. (Va.) 228.

Sufficiency of notice.— The delinquent list on an application for judgment of sale for special assessment stands as a declaration, and the notice of process must conform thereto. Smythe *v.* People, 219 Ill. 76, 76 N. E. 82. The notice must describe the property (Gage *v.* People, 188 Ill. 92, 58 N. E. 947; Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215; Nicholes *v.* People, 165 Ill. 502, 46 N. E. 237; Dickey *v.* People, 160 Ill. 587, 43 N. E. 701), must state the name of the owner (Gage *v.* People, 205 Ill. 547, 69 N. E. 80), and must state the year or years for which the special assessments are due (Gage *v.* People, 205 Ill. 547, 69 N. E. 80; Gage *v.* People, 188 Ill. 92, 58 N. E. 947). The notice need not include unpaid taxes. McCauley *v.* People, 87 Ill. 123. A notice that the collector will apply for a judgment against property assessed for private drains does not authorize a judgment against the same lands for an assessment to grade, pave, and curb a street. Waller *v.* Chicago, 53 Ill. 88.

Filing of copy of newspaper.— The filing of a copy of a newspaper in which a list of delinquent lots and lands on which a lien for special assessments existed, with the certificate of the publisher, in the office of the county clerk of the county, as a part of the records of his office, did not constitute a compliance with Ill. Revenue Act, § 186 (Hurd Rev. St. (1903) c. 120), requiring that a copy of such newspaper, etc., "be filed as a part of the records of the county court." Nowlin *v.* People, 216 Ill. 543, 75 N. E. 209.

Certificate of publication.— The certificate of publication must be in conformity with the statute. Gage *v.* People, 213 Ill. 410, 72 N. E. 1084; Kimball *v.* People, 160 Ill. 653, 43 N. E. 710 [*following* Hertig *v.* People, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162]; Young *v.* People, 155 Ill. 247, 40 N. E. 604. It must be made by the person who is the publisher of the paper when the notice is published. Armstrong *v.* Chicago, 61 Ill. 352. A certificate of publication is sufficient where from the language used the court can ascertain the dates of the first and last papers containing the notice. Smith *v.* Chicago, 57 Ill. 497; Griffin *v.* Chicago, 57 Ill. 317. In the absence of any showing to the contrary, the "consecutive days" mentioned in a printer's certificate of publication of notice given by the collector on receipt of a warrant for collecting an assessment, over six, will be presumed to be secular days. Jenks *v.* Chicago, 48 Ill. 296.

As to non-resident.— Where, in proceedings for judgment for a local assessment, it appears that the court had jurisdiction of the subject-matter, and that the published notice provided by statute had been given, by which it acquired jurisdiction of the person, its judgment is valid as against a non-resident, who had no actual notice of the proceedings. Dousman *v.* St. Paul, 23 Minn. 394.

Waiver of defect.— A defect in the notice of application for a sale for an assessment is waived, and the court is given jurisdiction, by the property-owner filing objections to the

(c) *Parties.* A provision that the owner may appear and defend against the entry of judgment allows all persons interested in the land to appear.[4]

(d) *Petition or Other Application.* The form and contents of the petition or other application for judgment and order of sale must conform to the requirements of the statute under which proceedings are had.[5] And it must be at the time specified in the statute.[6]

(e) *Objections and Defenses.* The objections must state facts which if supported by sufficient evidence would be a bar to the judgment.[7] Objections arising anterior to the confirmation of the assessment cannot be considered[8] except

application which call for exercise of jurisdiction and a decision on the merits. Ottis *v.* Sullivan, 219 Ill. 365, 76 N. E. 487; Marshall *v.* People, 219 Ill. 99, 76 N. E. 70; Dickey *v.* People, 213 Ill. 51, 72 N. E. 791; McManus *v.* People, 183 Ill. 391, 55 N. E. 886. A general appearance may waive defects in description. Nicholes *v.* People, 165 Ill. 502, 46 N. E. 237.

4. Morey *v.* Duluth, 75 Minn. 221, 77 N. W. 829, holding that mortgagees were included.

5. People *v.* Colegrove, 218 Ill. 545, 75 N. E. 991 (holding a description too indefinite); Chicago, etc., R. Co. *v.* People, 83 Ill. 467; Bristol *v.* Chicago, 22 Ill. 587; Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271; Rogers *v.* Heyderstaedt, 65 Minn. 229, 68 N. W. 8.

Amendment.— Where, in a proceeding to procure a judgment against real estate for special taxes, the report of the city clerk is not accompanied by a copy of the ordinance authorizing the improvement (1 Starr & C. Annot. St. c. 24, par. 432) it is proper for the court, under Rev. St. c. 120, § 193, to allow the copy to be filed before the hearing as an amendment to the clerk's report. Hoover *v.* People, 171 Ill. 182, 49 N. E. 367.

6. Leindecker *v.* People, 98 Ill. 21; Hamilton *v.* Chicago, 22 Ill. 580.

Laches.— A municipality is not deprived of its right to collect a local assessment by laches of the county collector. Mecartney *v.* People, 202 Ill. 51, 66 N. E. 873.

Limitations.— An application for judgment of sale against realty for a delinquent street improvement special assessment is not a "civil action not otherwise provided for," so as to be barred after five years from the date of the judgment confirming the assessment. Shepard *v.* People, 200 Ill. 508, 65 N. E. 1068.

Continuance.— Under Ill. Gen. Rev. Law, § 185, requiring application for sale of property for special assessment to be made at June term, but providing, "if for any cause the collector is prevented from advertising and obtaining judgment at said term it shall be . . . legal to obtain judgment at any subsequent term," application being made at June term, but a wrong name therein being given the owner, and the owner not appearing, and the mistake being corrected by leave, and nothing further being done till the October term, to which proper notice is given, and application for judgment made, and continuance being had from time to time till the following April term, judgment for sale may then be rendered. Illinois Cent. R. Co. *v.* People, 189 Ill. 119, 59 N. E. 609.

7. Montgomery *v.* Birdsong, 126 Ala. 632, 28 So. 522 (holding that the objection that a paving assessment was not based on the benefit to the property assessed, and therefore violated the fourteenth amendment of the United States constitution and section 24 of the Alabama Declaration of Rights, was not open to demurrer for generality); Glover *v.* People, 201 Ill. 545, 66 N. E. 820 (holding that objections were sufficiently specific to show that bidding was upon the basis of specifications as to an eight-hour day and alien labor); Vennum *v.* People, 188 Ill. 158, 58 N. E. 979. See also Thompson *v.* People, 207 Ill. 334, 69 N. E. 842; Harris *v.* Chicago, 162 Ill. 288, 44 N. E. 437 (holding that where, in condemnation proceedings for local improvements, it was provided by stipulation that upon the payment of the amount awarded for damages the city might take possession at any time after the expiration of six years, such provision could be taken advantage of on the application of the collector for judgment of sale for non-payment of the assessment to pay for the improvement, on the ground that the money so collected would lie idle for the time stipulated); Mix *v.* People, 106 Ill. 425; Smith *v.* Chicago, 57 Ill. 497; Southeim *v.* Chicago, 56 Ill. 429 (holding that on an application for judgment on a special assessment for a public improvement, the property-owner may show as a defense that the commissioners in making the assessments knowingly assessed his property at more than its proportion of the benefits to be conferred by the improvement, and assessed certain property benefited for an amount less than it was benefited, and in so doing increased the benefits assessed against defendant's realty); Alexandria *v.* Mandeville, 1 Fed. Cas. No. 184, 2 Cranch C. C. 224 (holding that the court will not receive evidence that the pavement was badly done).

Payment.— The enforcement of an instalment of an assessment for a public improvement may be resisted on the ground that the prior instalments were sufficient to pay the cost of the improvement, although Ill. Rev. St. c. 24, art. 9, § 47, provides that, if too large a sum shall at any time be collected, the excess shall be refunded ratably to those by whom it was paid. People *v.* McWethy, 165 Ill. 222, 46 N. E. 187.

8. Noonan *v.* People, 221 Ill. 567, 77 N. E. 930; Gage *v.* People, 207 Ill. 377, 69 N. E. 840; Thompson *v.* People, 207 Ill. 334, 69 N. E.

where the court rendering the judgment of confirmation is shown to have been wanting in jurisdiction to do so.[9] It may be urged as an objection that the improvement was different from that provided for in the ordinance.[10] It cannot be urged that the improvement has not been completed.[11] Since the proceedings are *in rem*[12] lot owners cannot raise objections which affect the property of others only.[13]

(F) *Evidence.* On application for judgment, the record of proceedings is *prima facie* evidence of the validity of the assessment;[14] and the burden is on

842; Downey *v.* People, 205 Ill. 230, 68 N. E. 807; Fischback *v.* People, 191 Ill. 171, 60 N. E. 887; Fiske *v.* People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; Pipher *v.* People, 183 Ill. 436, 56 N. E. 84; Kunst *v.* People, 173 Ill. 79, 50 N. E. 168; Gross *v.* People, 172 Ill. 571, 50 N. E. 334; Nicholes *v.* People, 171 Ill. 376, 49 N. E. 574; People *v.* Sass, 171 Ill. 357, 49 N. E. 501; Walker *v.* People, 170 Ill. 410, 48 N. E. 1010; Pfeiffer *v.* People, 170 Ill. 347, 48 N. E. 979; Hull *v.* People, 170 Ill. 246, 48 N. E. 984; Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215; Walker *v.* People, 169 Ill. 473, 48 N. E. 694; People *v.* Markley, 166 Ill. 48, 46 N. E. 742; People *v.* Colvin, 165 Ill. 67, 46 N. E. 14; Steenberg *v.* People, 164 Ill. 478, 45 N. E. 970; Gage *v.* People, 163 Ill. 39, 44 N. E. 819; Boynton *v.* People, 159 Ill. 553, 42 N. E. 842; Hertig *v.* People, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162; People *v.* Green, 158 Ill. 594, 42 N. E. 163; People *v.* Ryan, 156 Ill. 620, 41 N. E. 180; Scott *v.* People, 142 Ill. 291, 33 N. E. 180; Duluth *v.* Dibblee, 62 Minn. 18, 63 N. W. 1117. *Compare* Pells *v.* People, 159 Ill. 580, 42 N. E. 784; Prout *v.* People, 83 Ill. 154. But see Montgomery *v.* Birdsong, 126 Ala. 632, 28 So. 522.

Waiver.— Where, on an application for judgment of sale to enforce an instalment of an assessment for local improvements, the landowner files objections, such act is a tacit admission that there are no other objections. Gross *v.* People, 193 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322. Under Ill. Local Impr. Act (1897), § 66, as amended by Laws (1901), providing that the voluntary payment of any instalment of any assessment by the owner shall be deemed an assent to the confirmation of the assessment roll, and shall be held a waiver of all objections to the application for judgment of sale, etc., where owners voluntarily paid one or more instalments of assessments for local improvements they thereby waived their right to object to a judgment and order for sale for non-payment of subsequent instalments. Downey *v.* People, 205 Ill. 230, 68 N. E. 807.

9. Phillips *v.* People, 218 Ill. 450, 75 N. E. 1016; Fiske *v.* People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; Hull *v.* People, 170 Ill. 246, 48 N. E. 984; O'Neil *v.* People, 166 Ill. 561, 46 N. E. 1096; Cass *v.* People, 166 Ill. 126, 46 N. E. 729; People *v.* Wadlow, 166 Ill. 119, 46 N. E. 775; People *v.* Eggers, 164 Ill. 515, 45 N. E. 1074; Boynton *v.* People, 155 Ill. 66, 39 N. E. 622. *Compare* Beygeh *v.* Chicago, 65 Ill. 189; Chicago *v.* Wright, 32 Ill. 192; Lill *v.* Chicago, 29 Ill. 31; Chicago *v.* Burtice, 24 Ill. 489.

10. People *v.* Lyon, 218 Ill. 577, 75 N. E. 1017; Phillips *v.* People, 218 Ill. 450, 75 N. E. 1016; Wells *v.* People, 201 Ill. 435, 66 N. E. 210. And see People *v.* Bridgeman, 218 Ill. 568, 75 N. E. 1057; Downey *v.* People, 205 Ill. 230, 68 N. E. 807; Wells *v.* People, 201 Ill. 435, 66 N. E. 210; Church *v.* People, 179 Ill. 205, 53 N. E. 554. But *compare* McManus *v.* People, 183 Ill. 391, 55 N. E. 886.

11. Lawrence *v.* People, 188 Ill. 407, 58 N. E. 991. *Compare* Phillips *v.* People, 218 Ill. 450, 75 N. E. 1016, holding that the fact that objectors to an application for judgment of sale in special assessment proceedings were overcharged in the assessment, for the reason that the number of square yards or lineal feet of pavement alleged to have been laid were not actually laid is not a valid objection to the application.

12. See *supra*, XIII, F, 1.

13. People *v.* Green, 158 Ill. 594, 42 N. E. 163. And see Gage *v.* People, 207 Ill. 377, 69 N. E. 840, holding that evidence that the assessment of other property-owners, amounting to one third of the whole assessment, had been reduced twenty per cent by agreement, after their appeal from the judgment of confirmation, is not admissible to defeat an application for judgment and order of sale.

14. Harrigan *v.* Jacksonville, 220 Ill. 134, 77 N. E. 85; People *v.* Smith, 201 Ill. 454, 66 N. E. 298; Sweet *v.* West Chicago Park Com'rs, 177 Ill. 492, 53 N. E. 74 (holding that in proceedings to collect a special assessment for the improvement of a street the commissioners need not introduce any proof except on the questions whether the benefit derived equaled the assessment, and whether the property was assessed more than its proportionate share); McChesney *v.* People, 171 Ill. 267, 49 N. E. 491; Walker *v.* People, 166 Ill. 96, 46 N. E. 761; Gage *v.* People, 163 Ill. 39, 44 N. E. 819 (holding that on application for judgment for a delinquent special assessment, presentation by the treasurer of his delinquent list, sworn to, with proof of publication and notice, makes out a *prima facie* case on his part); Illinois Cent. R. Co. *v.* People, 161 Ill. 244, 43 N. E. 1107; Wright *v.* Chicago, 48 Ill. 285. But see Jeffris *v.* Cash, 207 Ill. 405, 69 N. E. 904; Hoover *v.* People, 171 Ill. 182, 49 N. E. 367, both holding that it is essential to the right of a city to recover a judgment for a special tax for building a sidewalk that it should prove

objectors to show irregularities.[15] The proceedings are controlled by the general rules as to the admissibility[16] and sufficiency[17] of evidence.

(G) *Judgment or Order.* A judgment upon the application is a special judgment and must conform substantially to the provisions of the statute under which the proceedings are brought.[18] Such a judgment is not subject to collateral

affirmatively that the ordinance was complied with.

The collector's report is *prima facie* evidence of the amount due, if the owner of the lands is in default, and upon this judgment may be rendered. The report does not prejudice any party by any statement in it beyond what the law requires shall be stated. Nothing beyond is evidence. Ogden *v.* Chicago, 22 Ill. 592. The return of a city collector of no goods found to satisfy an assessment for a local improvement is conclusive on that question on the collector's application for judgment against the lot assessed. Ottawa *v.* Macy, 20 Ill. 413.

15. Hurd *v.* People, 221 Ill. 398, 77 N. E. 443; McManus *v.* People, 183 Ill. 391, 55 N. E. 886; State *v.* Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183.

16. See EVIDENCE. And see Sheedy *v.* Chicago, 221 Ill. 111, 77 N. E. 539; Gage *v.* People, 205 Ill. 547, 69 N. E. 80 (holding that where a special tax assessment collector omitted the name of the owner of property sought to be charged from the published notice of the assessment, such owner was entitled to introduce in evidence the delinquent list of the previous year on the same warrant for the collection of the same assessment, giving his name as the owner of the lots, to show that the collector had notice that he was the owner); People *v.* Smith, 201 Ill. 454, 66 N. E. 298; People *v.* McWethy, 177 Ill. 334, 52 N. E. 479; Goodrich *v.* Minonk, 62 Ill. 121.

17. Gage *v.* People, 213 Ill. 347, 72 N. E. 1062 (holding that the fact that the steps for letting the contract for a street improvement were not taken within fifteen days after the final determination of the appeal from the judgment of confirmation of the special assessment for the work, or the determination of any stay thereof by a supersedeas or other order of a court having jurisdiction, as provided by the Local Impr. Act (Laws (1897), p. 127), as amended by Laws (1901), p. 113, § 75, is not shown by evidence merely that six months after the affirmance of such judgment an order for an advertisement for bids was entered by the board of local improvements; there being no evidence that no previous step had been taken by it toward letting the contract, or that there had been no stay of proceedings after affirmance of the judgment of confirmation); Gage *v.* People, 200 Ill. 432, 65 N. E. 1084 (holding admissible the evidence to show that the improvement was of a different character than that ordered by the ordinance, in that a dirt road, instead of a macadam road, was made, so that an assessment therefor could not be enforced).

18. Ottis *v.* Sullivan, 219 Ill. 365, 76 N. E. 487; Gage *v.* People, 213 Ill. 347, 72 N. E. 1062; Gage *v.* People, 207 Ill. 377, 69 N. E. 840; Gage *v.* People, 207 Ill. 61, 69 N. E. 635; Gage *v.* People, 205 Ill. 547, 69 N. E. 80; Connecticut Mut. L. Ins. Co. *v.* People, 172 Ill. 31, 49 N. E. 989; Brown *v.* Joliet, 22 Ill. 123; Alexandria *v.* Chapman, 4 Hen. & M. (Va.) 270.

Apportionment of tax.— A lot owner, by appearing and defending an action for special taxes against two separate parcels of land, does not thereby subject himself to a judgment which charges on one of his lots the tax assessed or levied upon another lot or tract. Hoover *v.* People, 171 Ill. 182, 49 N. E. 367.

Fraction of instalment.— On application for judgment for a delinquent instalment on a local assessment, judgment may be rendered for a fractional part of the instalment, to meet remaining unpaid expenses, where the work has been completed, and the last payment made on the contract. People *v.* McWethy, 177 Ill. 334, 52 N. E. 479.

Default judgment.— Where the published notice of application for judgment against lands delinquent in the payment of a special assessment was defective, the fact that the judgment by default recited that due notice had been given, was not sufficient to sustain it, when attacked by writ of error, since the record in default cases must affirmatively show compliance with the statute. Gage *v.* People, 188 Ill. 92, 58 N. E. 947.

Vacation of judgment.— Under St. Paul City Charter, p. 42, c. 6, tit. 3, § 48, the purchaser or holder of the certificate of sale under assessment proceedings for the improvement of a street cannot appear in the original proceeding and have the judgment vacated, on the ground that it is void, as such judgment and sale are deemed valid between such purchaser and the city, and the purchase-price can be refunded only when the proceedings are adjudged void in an action between the purchaser and the owner of the land. National Bond, etc., Co. *v.* St. Paul, 91 Minn. 223, 97 N. W. 878. It is no ground for vacating a judgment in a proceeding to collect a city tax, where the motion was made fifteen months after the rendition of the judgment, that defendant was a non-resident, and did not know of the assessment till three months before moving to vacate; that his agents in the city, through whom he paid taxes, did not inform him of it; that he was advised that all assessments were payable at the county treasurer's office; and that he made inquiries there, and was not aware of the change in the law making assessments payable at the city controller's office. Duluth *v.* Dibblee, 62 Minn. 18, 63 N. W. 1117.

Entry of second judgment.— The power of

attack[19] unless void.[20] A judgment against the city on the ground that the action was prematurely brought is not a bar to a second suit.[21] A substantial defect in the proceedings cannot be cured by judgment.[22]

(H) *Review.* The right of appeal rests entirely upon statute.[23] Only such objections will be considered as were made on the hearing,[24] and the judgment

the court as to entering judgment against the same lots for the same assessment is exhausted, except as to amending or correcting the judgment during the term, by entry of a judgment for sale thereof for such assessment, although such judgment is erroneous because not signed by the judge; so that entry of a subsequent judgment against such lots for such assessment is error. Dickey *v.* People, 213 Ill. 51, 72 N. E. 791. Where a valid judgment for a street assessment was entered in 1890, and a second judgment for the same assessment in 1894 was entered by the clerk of the court without any order of the court so to do, and a tax-sale was made pursuant to the supposed second judgment, the second judgment was void; the court having exhausted its jurisdiction when it entered the first judgment, and a sale thereunder conveyed no title. Otis *v.* Weide, 98 Minn. 227, 107 N. W. 540.

Form and sufficiency.— For cases in which the form and sufficiency of tax judgments have been considered see Gage *v.* People, 219 Ill. 369, 76 N. E. 498; Cummings *v.* People, 213 Ill. 443, 72 N. E. 1094; Gage *v.* People, 213 Ill. 347, 72 N. E. 1062; Illinois Cent. R. Co. *v.* People, 189 Ill. 119, 59 N. E. 609; People *v.* McWethy, 177 Ill. 334, 52 N. E. 479; Steidl *v.* People, 173 Ill. 29, 50 N. E. 129; Pittsburgh, etc., R. Co. *v.* Chicago, 53 Ill. 80; State *v.* Pillsbury, 82 Minn. 359, 85 N. W. 175; Security Trust Co. *v.* Von Heyderstaedt, 64 Minn. 409, 67 N. W. 219.

Fees and costs.— The fees and costs allowed by law subsequent to the date of the advertisement may be properly added to the total amount due on a special assessment, and included in the judgment against the property on the delinquent list. Gage *v.* People, 205 Ill. 547, 69 N. E. 80. Judgment for delinquent special assessments may include in the costs the fee of two cents for entering judgment against each lot. McChesney *v.* People, 171 Ill. 267, 49 N. E. 491.

19. Mankato First Nat. Bank *v.* Hodapp, 98 Minn. 534, 107 N. W. 957; Willard *v.* Hodapp, 98 Minn. 269, 107 N. W. 954; Fitzhugh *v.* Duluth City, 58 Minn. 427, 59 N. W. 1041 (holding that a judgment on a special assessment cannot be collaterally attacked because of an omission to establish, as required by the city charter, the grade of a street for the improvement of which the assessment was levied); Hennessy *v.* St. Paul, 54 Minn. 219, 55 N. W. 1123; Dousman *v.* St. Paul, 23 Minn. 394.

20. Glos *v.* Collins, 110 Ill. App. 121, holding that where premises are not liable for an assessment for municipal improvements as levied, the owner is not barred by the judgment for sale from setting up the illegality of the assessment in a suit to set aside the tax-sale certificates.

Judgment for instalment.— On application for judgment of sale for the fourth instalment of an assessment, the validity of the judgment for the earlier instalments may not be questioned; the proceedings being independent. Gage *v.* People, 213 Ill. 410, 72 N. E. 1084. And see Treat *v.* Chicago, 125 Fed. 644.

21. Brackett *v.* People, 115 Ill. 29, 3 N. E. 723; Schertz *v.* People, 105 Ill. 27.

22. Holland *v.* People, 189 Ill. 348, 59 N. E. 753, holding that a final judgment ordering that any irregularity in an assessment roll or tax list, or omission or defective act of any officer connected with the assessment or levy of a special tax, "be, and the same are hereby, corrected, supplied, and made to conform with the law" cannot cure the defect in failing to certify the bill of costs as required by statute.

23. See St. Paul *v.* Rogers, 22 Minn. 492, holding that under St. Paul Charter, c. 7, § 70 (Spec. Laws (1874), c. 1), which prohibits the court, after ordering judgment upon a local assessment, from opening such judgment and granting a new trial, an order denying a motion for a new trial in such case after entry of judgment is not appealable.

24. Bass *v.* People, 203 Ill. 206, 67 N. E. 806; Fiske *v.* People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; Lingle *v.* People, 173 Ill. 121, 50 N. E. 205; Goudy *v.* People, 173 Ill. 107, 50 N. E. 193.

Saving question for review.— Where the record on appeal from a judgment for a delinquent special assessment shows that the appellant filed an objection in the county court on the ground that the assessment had never been confirmed on his land, that the court overruled such objection, and that the appellant assigned that ruling as error, the question of the confirmation of the assessment is properly raised in the supreme court. Dempster *v.* People, 158 Ill. 36, 41 N. E. 1022. In a case where judgment is sought on a new special assessment to make up the amounts which the city failed to collect, but the papers and proceedings on the original assessment are not introduced in evidence, the reviewing court cannot determine the validity of the proceeding so far as it depends on the character of such original proceedings, owing to the absence from the record of all evidence relating thereto. Beygeh *v.* Chicago, 65 Ill. 189.

Estoppel to allege error.— Where parties appealing from confirmation of a judgment against their property for delinquent special taxes agreed in open court to entry of an order setting aside a former confirmation, and to a submission of the controversy to the court, whereupon the assessment was reduced,

will not be reversed for errors which did not prejudice appellant.[25] When the contrary does not appear from the record the validity of the proceedings will be presumed on appeal.[26] Where the error is merely in the entry of judgment a new trial will not be ordered, but a correction of the judgment will be directed.[27] An appeal-bond may properly run to the city, when it alone is interested.[28] The reversal of a judgment as to one of several property-owners will have no effect as to the others.[29]

e. Scire Facias Upon Claims — (I) *In General.* When the filing of a municipal claim for an assessment creates a lien upon the property assessed,[30] such lien under some statutes may be enforced by scire facias.[31] In the absence of specific directions as to the enforcement of liens created by a special act, they may be enforced as liens under a general act.[32] Under a statute providing that liens shall be filed as mechanics' liens are filed, and writs of scire facias and levari facias issued, as in the case of mechanics' liens, the mechanics' lien law furnishes only a general, and not a specific, rule of procedure.[33]

(II) *Defenses.* Upon scire facias the confirmation of the viewers' report has the operation and effect of a judgment, and unless the acts of the municipality were void it cannot be questioned collaterally except for fraud or collusion.[34] The value of the work it seems is not in issue,[35] but defendant may show a mistake in

and judgment of confirmation entered, they cannot assign as error that their property was not bound because of defects in procedure, whereby the assessment was made void. Sheridan *v.* Chicago, 175 Ill. 421, 51 N. E. 898.

25. Gage *v.* People, 219 Ill. 634, 76 N. E. 834, holding that the failure of a city to comply with Local Impr. Act, § 42 (Hurd Rev. St. (1903) c. 24, § 548), requiring the board of local improvements to file in the office of the clerk of the court confirming the assessment a certificate of the date of the first voucher and the amount thereof within thirty days after the date of issue, and providing that all interest shall run from the date of the first voucher, was not prejudicial to the property-owner, in the absence of anything to show that he was charged with interest or from what date interest began to run.

26. Ottis *v.* Sullivan, 219 Ill. 365, 76 N. E. 487; People *v.* Lyon, 218 Ill. 577, 75 N. E. 1017 (holding that where the county court has certified that the bill of exceptions contains all the evidence at the time objections to the confirmation of a special assessment were disposed of, and the defense to the confirmation was that the improvement was not in accordance with the ordinance, and the ordinance is not in the record, the judgment for defendant will be reversed, as it could not be shown without such evidence that the improvement was not in accordance therewith); Gage *v.* People, 213 Ill. 468, 72 N. E. 1108; Gage *v.* People, 207 Ill. 61, 69 N. E. 635; De Wolf *v.* People, 202 Ill. 73, 66 N. E. 868; Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123. But see Phillips *v.* People, 218 Ill. 450, 75 N. E. 1016, holding that where it is objected, in opposition to an application for judgment of sale for delinquent special assessments, that no notices of application to confirm the assessment were mailed as required by statute, and the objection is stricken from the files, the supreme court cannot presume on appeal that the confirmation proceeding was regular and that the notices were properly mailed, from the fact that the record of the confirmation proceeding is not contained in the record brought before it.

27. Gage *v.* People, 213 Ill. 457, 72 N. E. 1099.

28. Nashville *v.* Weiser, 54 Ill. 245; Griffin *v.* Belleville, 50 Ill. 422.

29. Harman *v.* People, 214 Ill. 454, 73 N. E. 760.

30. See *supra*, XIII, E, 25, a.

31. See the statutes of the several states. And see the cases cited in the following notes.

Time within which scire facias must issue to preserve lien see *supra*, XIII, E, 25, d.

32. McKeesport Borough *v.* Leezer, 12 Pa. Co. Ct. 537.

33. Pittsburg *v.* Cluley, 66 Pa. St. 449.

34. Pittsburg *v.* Cluley, 74 Pa. St. 262 (holding that the fact that one of the viewers appointed was not a freeholder was no defense); Com. *v.* Woods, 44 Pa. St. 113 (holding that it was error for the court to allow evidence to be given that a sewer was of no benefit to the property, and to charge the jury that, if they should so believe, plaintiffs were not entitled to recover).

35. Schenley *v.* Com., 36 Pa. St. 62; Philadelphia *v.* Pemberton, 12 Pa. Dist. 743. See also Philadelphia *v.* Coates, 18 Pa. Super. Ct. 418, holding that in an action to recover sewer assessments, an affidavit of defense that the contractor had been paid by defendant the sum which he agreed to accept for the work done by him is insufficient, inasmuch as the actual cost of the improvement may include items besides the amount paid the contractor. *Compare* Philadelphia *v.* Jewell, 135 Pa. St. 329, 19 Atl. 947, holding that a property-owner in a city, although not a party to a paving contract, may defend an action for the price of the pavement, brought

the computation of the claim.[36] Defendant cannot inquire into equities between the contractor and the city,[37] and where the contract for an improvement has become valid as against the city by ratification, a property-owner has no greater right than the city to assert its invalidity.[38] One who has no notice of the proceeding for assessment may urge any objection he might then have urged as against a scire facias.[39] A statute limiting the defenses which may be urged to scire facias upon a municipal claim has been held not to apply to municipalities incorporated after its passage.[40] A defendant who has paid the money into court and had the property released from the lien may nevertheless urge as a defense the loss of a lien.[41]

(III) *Parties.* On scire facias the real owner may be made a party and his title will be bound without regard to who may be the registered owner, or whether the registered owner has been made a party.[42]

(IV) *Process.* Service of a scire facias must be made in strict accordance with the statute.[43]

(V) *Affidavit of Defense.* Under the court rules an affidavit of defense

against him by the city to the use of the contractor, on the ground that the price agreed to be paid by the city is excessive, as the act of April 19, 1843 (Pamphl. Laws 342), expressly gives him that right.

36. Thomas *v.* Northern Liberties, 13 Pa. St. 117, holding that where a lot was described as containing a certain frontage defendant might prove that the lot had a smaller frontage than described in the claim.

37. Brientnall *v.* Philadelphia, 103 Pa. St. 156.

38. Harrisburg *v.* Shepler, 190 Pa. St. 374, 42 Atl. 893; Fell *v.* Philadelphia, 81 Pa. St. 58; Wistar *v.* Philadelphia, 3 Grant (Pa.) 311; Reilly *v.* Philadelphia, 6 Phila. (Pa.) 228.

39. Hershberger *v.* Pittsburgh, 115 Pa. St. 78, 8 Atl. 381.

40. Pepper *v.* Philadelphia, 114 Pa. St. 96, 6 Atl. 899; Brown *v.* Philadelphia, 3 Pa. Cas. 45, 6 Atl. 904. See also Philadelphia *v.* Edwards, 78 Pa. St. 62.

41. Philadelphia *v.* Merz, 28 Pa. Super. Ct. 227. See Philadelphia *v.* Wellens, 19 Pa. Super. Ct. 379.

42. Philadelphia *v.* Kehoe, 22 Pa. Super. Ct. 320; Philadelphia *v.* Lukens, 22 Pa. Super. Ct. 298.

Amendment.— At the trial of a scire facias sur municipal lien for paving, it is not error for the court to amend the record of the judgment, so as to add as defendants the names of the actual owner of the land liened and a person who became a registered owner of a part of the land after the lien was filed. Philadelphia *v.* Kehoe, 22 Pa. Super. Ct. 320.

43. Philadelphia *v.* Merz, 16 Pa. Super. Ct. 332 (holding that a defective service of a scire facias sur municipal lien by posting and advertisement and *nihil habet* as to the registered owner, when the registered owner actually occupied the premises at the time the writ was returned, is not cured by the appearance of the registered owner entered over a year after he had been deprived of title by sheriff's sale; and, if judgment has been entered against him after such appearance, the purchaser of the premises at sheriff's sale has a standing to have such judgment stricken off); Philadelphia *v.* Merz, 9 Pa. Dist. 369, 24 Pa. Co. Ct. 269.

Service by advertisement see Ferguson *v.* Quinn, 123 Pa. St. 337, 16 Atl. 844; O'Byrne *v.* Philadelphia, 93 Pa. St. 225; Simons *v.* Kern, 92 Pa. St. 455; Wistar *v.* Philadelphia, 86 Pa. St. 215; Philadelphia *v.* Merz, 16 Pa. Super. Ct. 332.

Transfer or devolution of title pending proceedings.— Where, after a scire facias has been issued, the owner of the land dies, having devised it to another, judgment may be taken on the scire facias, without notice to the devisee, if the latter has failed to register his title as required by the act of March 14, 1865, and March 29, 1867. Philadelphia *v.* Smith, 29 Pa. Super. Ct. 450. See also Funk *v.* Harkness, 3 Pa. Dist. 423, 14 Pa. Co. Ct. 609, holding that the heir of a deceased owner, as well as his devisee or vendee, must register his title. Where a scire facias is issued by the city of Philadelphia on a claim for curbing and grading, and personal service of the writ is had on the registered owner, and judgment is entered for want of an affidavit of defense, the city, on a subsequent scire facias to revive, is not obliged to give notice to the owner who has succeeded to the title of the original defendant, although such owner may have registered his title. The Registry Acts of March 14, 1865, and March 29, 1867, and the act of June 1, 1887, relating to the duration of liens of judgment on realty, do not require such notice. Philadelphia *v.* Nell, 31 Pa. Super. Ct. 78.

Waiver.—The provision of the act of March 23, 1866, regulating the filing and collecting of municipal claims in Philadelphia, that, before scire facias shall issue on any such claim, written notice shall be given to the owner of the property liened, is not mandatory, in the sense that it cannot be waived by the owner; and an agreement by him with the city for an amicable scire facias on the claim is a waiver or admission of the service of the notice. Philadelphia *v.* Schofield, 166 Pa. St. 389, 31 Atl. 119.

may be required and judgment entered against defendant for want thereof.[44] The sufficiency of such an affidavit is determined by the rules usually applicable to such pleadings.[45]

(VI) *EVIDENCE.* Proceedings by scire facias are in general governed by the rules of evidence applicable to civil actions generally.[46] Under an act providing that municipal claims for improvements may in a suit on such claim be read in evidence of the facts therein pleaded, material statements contained in the claim are *prima facie* evidence of the facts set forth therein.[47]

44. Wilkes-Barre *v.* Felts, 134 Pa. St. 529, 19 Atl. 676, holding that a rule of court which requires an affidavit of defense "in all actions of scire facias" applies to scire facias on municipal lien. See also Yates *v.* Meadville, 56 Pa. St. 21, holding that a scire facias founded upon a municipal claim for the cost of paving, and a certain per cent advance, filed against the property under the borough law of 1851, did not fall within the rule of the court which required the filing of an affidavit of defense in all cases of scire facias upon mechanics' claims.

Where there is no rule of court providing that material averments of fact in the statement of claim for a municipal lien for a sewer not directly and specifically denied in the affidavit of defense shall be taken as admitted on the trial, the issue is made by the pleadings proper. Philadelphia *v.* Armstrong, 16 Pa. Super. Ct. 55.

A plea of nunquam indebitatus puts in issue whatever the city has to prove in order to support the assessment, including the jurisdictional prerequisite that the application for the grading was made by the number of lot holders required by law. Pittsburg *v.* Walter, 69 Pa. St. 365.

45. See Philadelphia *v.* Eddleman, 169 Pa. St. 452, 32 Atl. 639; Chester *v.* Eyre, 167 Pa. St. 308, 31 Atl. 634; Scranton City *v.* Bush, 160 Pa. St. 499, 28 Atl. 926; Harrisburg *v.* Baptist, 156 Pa. St. 526, 27 Atl. 8; Philadelphia *v.* Spring Garden Farmers' Market Co., 154 Pa. St. 93, 25 Atl. 1077; Erie *v.* Young Men's Christian Assoc., 151 Pa. St. 168, 24 Atl. 1094; Philadelphia *v.* Baker, 140 Pa. St. 11, 21 Atl. 238 (holding that where it is conceded that the city has the right to determine the mode and style of paving primarily, an affidavit which alleges that the street had been previously paved at the expense of the abutting property-owners, and that such paving was in good repair when the city had the street repaved, without alleging that the city had in any way recognized the previous paving, is bad); Greensburg *v.* Laird, 138 Pa. St. 533, 21 Atl. 96; Pittsburgh *v.* MacConnell, 130 Pa. St. 463, 18 Atl. 645 (holding that an affidavit which alleges that the contract was fraudulently let and the work badly done, without alleging any specific defect in the work, or any special injury which defendant suffered therefrom, is bad); Erie City *v.* Butler, 120 Pa. St. 374, 14 Atl. 153 (holding that an affidavit which gives defendant's opinion of the work at the time it was done, several months before, and states that it is not worth the price charged, but fails to say anything as to its present condition, or to deny that it is reasonably satisfactory, or to state what it is worth, is insufficient); Rodney *v.* Philadelphia, 3 Walk. (Pa.) 505; Tarentum Borough *v.* Dunlap, 26 Pa. Super. Ct. 281; Tarentum Borough *v.* Moorhead, 26 Pa. Super. Ct. 273; Philadelphia *v.* Adams, 18 Pa. Super. Ct. 639; Philadelphia *v.* Philadelphia, etc., R. Co., 1 Pa. Super. Ct. 236, 38 Wkly. Notes Cas. 15; Harrisburg *v.* Mateer, 4 Pa. Dist. 554; McKeesport *v.* Harrison, 27 Pittsb. Leg. J. N. S. (Pa.) 57.

Sufficiency of affidavit of defense in general see PLEADING.

Inconsistent defenses.—Where, in an action against a property-owner to recover a municipal claim for improvements, the affidavit of defense alleges that plaintiff city had no interest in the action, as it had limited its liability with the contractor to the amount of claims recovered, an objection that the contract was void, in that it was awarded by resolution, instead of by ordinance, will not be sustained. Scranton *v.* Jermyn, 156 Pa. St. 107, 27 Atl. 66.

46. See, generally, EVIDENCE.

Conformity with issues.— Where the pleas are *non assumpsit* and payment, but with no notice of special matter, it is error to require plaintiff to prove a direct contract between the city commissioner and the contractor for the execution of the work, especially after the work has been adopted, and also to reject evidence that the contractor was employed by one of the commissioners, and that defendant had waived his right to the notice required by ordinance. Philadelphia *v.* Burgin, 50 Pa. St. 539 [*reversing* 5 Phila. 84]. Where, on scire facias to revive a municipal lien, the claim of lien filed with the statement or claim alleged that all the requirements of law in regard to such liens had been complied with, and one of the rules of the court provided that "all items and material averments of fact in the affidavit of claim, which are not directly and specifically denied by the affidavit of defense, shall be taken as admitted," it was held that if the affidavit of defense did not traverse the averment of the claim of lien that notice was given to defendant of the work for which the lien is claimed, he could not introduce evidence for the purpose of showing that no such notice was given. South Bethlehem Borough *v.* Laufer, 11 Pa. Co. Ct. 65.

47. Scranton *v.* Jermyn, 156 Pa. St. 107, 27 Atl. 66; Thomas *v.* Northern Liberties, 13 Pa. St. 117.

(VII) *TRIAL.* On scire facias disputed questions of fact are for the jury,[48] under proper instructions,[49] while questions of law are for the court.[50] Where several liens are filed upon separate lots of defendant, the court may order the trial of one of the liens as the test of all.[51]

(VIII) *REVIEW.* Matters which should have been urged upon the trial cannot be first urged as a ground for review.[52]

f. Summary Execution. Provision is made under some statutes for the issuance of execution upon assessments without suit,[53] in defense to which an affidavit of illegality in the form provided by statute will put in issue all questions of law and open questions of fact involved.[54]

g. Actions For Sale of Land — (I) *NATURE OF PROCEEDINGS IN GENERAL.* Under some statutes special assessments are collected as other taxes by suit[55] or enforced in the same manner as a mortgage to the corporation.[56] Actions to enforce the payment of assessments are, in the absence of express statutory provisions, governed by the same rules as other actions.[57] Under some statutes the city is permitted to join proceedings against several property-owners subject to the right of the court in its discretion to compel a severance.[58] Where a valid

48. Altoona City *v.* Bowman, 171 Pa. St. 307, 33 Atl. 187; Wilvert *v.* Sunbury Borough, 81* Pa. St. 57 (proper notice to lot owners to do the work); Darlington *v.* Com., 41 Pa. St. 63 (dedication of highway); Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359 (whether or not curbstones are ordinarily used in paving sidewalks); Erie *v.* Grant, 21 Pa. Super. Ct. 461; Washington Borough *v.* Smith, 14 Pa. Super. Ct. 590; Jenkintown Borough *v.* Firmstone, 2 Pa. Dist. 124, 12 Pa. Co. Ct. 219 (holding that whether the description in a claim for a municipal lien corresponds sufficiently with the actual facts to identify the property, and prevent mistakes on the part of purchasers and creditors, is ordinarily a question for the jury).

Nature of property.— Whether property sought to be charged with a municipal lien for improvements is urban or rural is a question for the jury. McKeesport *v.* Soles, 165 Pa. St. 628, 30 Atl. 1019; South Chester Borough *v.* Garland, 162 Pa. St. 91, 29 Atl. 403; Norristown *v.* Fornance, 1 Pa. Super. Ct. 129, 12 Montg. Co. Rep. 37, 37 Wkly. Notes Cas. 574.

Right to jury trial on scire facias see JURIES, 24 Cyc. 130.

49. Philadelphia *v.* Gorgas, 180 Pa. St. 296, 36 Atl. 868 (holding that a charge on an issue as to whether certain property was farm land, or a city lot, and chargeable with municipal improvements, wherein the court called attention to the fact that the land comprised but one acre, on which the owner had a store and a stable necessary for her business, and that she had a small garden thereon, and authorized the jury to consider the character of the property in the same locality, fairly presented the issue); Philadelphia *v.* Macpherson, 140 Pa. St. 5, 21 Atl. 227 (holding that where the city has made out a *prima facie* case, instructions for defendant that plaintiff must show that the street was dedicated before the contract was awarded; that there was proper advertisement, and that the contract was awarded to the lowest bidder; that the charge therefor must not be more than the contract price, and must be uniform; that the work was in accordance with the ordinance directing it; and that the petition was signed by a majority of the property-owners, submit mere matters of defense, and, in the absence of evidence to support them, are properly refused). See also Philadelphia *v.* Meighan, 159 Pa. St. 495, 28 Atl. 304; Philadelphia *v.* Sheridan, 148 Pa. St. 532, 24 Atl. 80 (holding a charge upon whether a street was rural or urban proper); Philadelphia *v.* Monument Cemetery Co., 147 Pa. St. 170, 23 Atl. 400.

50. Harrisburg *v.* Funk, 200 Pa. St. 348, 49 Atl. 992, holding that the facts being undisputed, the question whether a paving is an original one, so as to render abutting property liable for the cost thereof, is for the court.

51. Beltzhoover Borough *v.* Maple, 130 Pa. St. 335, 18 Atl. 650.

52. Norristown *v.* Fornance, 1 Pa. Super. Ct. 129, 12 Montg. Co. Rep. 37, 37 Wkly. Notes Cas. 574, holding that it is too late, after verdict, for defendant to claim that the lien was defective in form in not stating the nature and value of the work and materials as distinct items.

53. See Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580.

54. Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580. See also Gainesville *v.* Dean, 124 Ga. 750, 53 S. E. 183.

55. See Auditor-Gen. *v.* Maier, 95 Mich. 127, 54 N. W. 640. And see cases cited *infra*, this section.

56. New York *v.* Colgate, 2 Duer (N. Y.) 1 [*affirmed* in 12 N. Y. 140].

57. Lexington *v.* Bowman, 119 Ky. 840, 84 S. W. 1161, 85 S. W. 1191, 27 Ky. L. Rep. 286, 651; Craycraft *v.* Salvage, 10 Bush (Ky.) 696, holding that where the charter of a city provides for suits to enforce liens for the cost of street improvements, without prescribing the mode of procedure, it will be presumed that the legislature intended such proceedings to be governed by the general law for the enforcement of liens.

58. Des Moines *v.* Stephenson, 19 Iowa 507.

and an invalid assessment are joined in the same action, the action may be sustained as to the valid assessment.[59]

(II) *Right to Sue* — (A) *Municipality.* The right of a municipality to maintain an action to enforce assessment liens depends on express statutory authority,[60] although it may provide for collection by suit under a power to levy assessments and direct the mode of collection.[61] In the absence of express authority the city cannot assign the right to collect a special assessment.[62] Where the president and trustees of a village are made a board of highway commissioners, they should sue in the name of such board, and not in the corporate name of the village, if their acts in their legislative capacity are distinct.[63]

(B) *Contractor or Assignee.* By statute the contractor is sometimes given the right to sue to enforce assessments,[64] and this right may be extended to an

See also Cleveland, etc., R. Co. *v.* Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319, holding that where it is provided by the statute that the lots bordering on a street shall be primarily liable for its improvement, and, if they are insufficient in value, that lots in the rear of those to the distance of one hundred and fifty feet shall be liable, the owners of both classes of lots may be joined in one suit to collect payment for the improvement; but a waiver of all defenses by the owners of lots primarily liable will not affect the rights of their co-defendants. But *compare* Dyer *v.* Barstow, 50 Cal. 652.

59. Parker *v.* Reay, 76 Cal. 103, 18 Pac. 124.

60. *California.*— Dyer *v.* North, 44 Cal. 157.

Iowa.— Talcott *v.* Noel, 107 Iowa 470, 78 N. W. 39.

New York.— Little Falls *v.* Cobb, 80 Hun 20, 29 N. Y. Suppl. 855, holding that Laws (1870), c. 291, tit. 6, § 9, providing that thirty days after the collector shall have returned an assessment unpaid the village trustees may sue the owner of the property assessed, and recover judgment for the assessment, with interest and costs, does not authorize an action by the village to have an assessment adjudged a lien and to foreclose, and holding further that Laws (1850), c. 330, § 64, providing that when an assessment which is a lien on a lot shall be returned unsatisfied it may be enforced by an order of the village trustees directing the lot to be leased for a time sufficient to pay the lien, does not authorize an action by the village to have an assessment adjudged a lien and to foreclose.

Ohio.— Fremont *v.* Hayes, 7 Ohio S. & C. Pl. Dec. 263, 4 Ohio N. P. 379, holding that, after certifying a delinquent assessment to the county auditor to be put on the general tax duplicate, the corporation can no longer sue to collect in its own name.

Texas.— San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496; Waco *v.* Chamberlain, 92 Tex. 207, 47 S. W. 527; Bennison *v.* Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613; Bonham *v.* Preston, (Civ. App. 1893) 23 S. W. 391.

Washington.— McEwan *v.* Spokane, 16 Wash. 212, 47 Pac. 433.

But *compare* Huff *v.* Jacksonville, 39 Fla. 1, 21 So. 776, holding that, under a city ordinance making the cost of constructing sidewalks by the city, on the failure of the lot owner to construct and maintain the same, as provided by the ordinance, a lien on the lots along which such sidewalks are made, the amount of the lien may be enforced in equity.

61. Dubuque *v.* Harrison, 34 Iowa 163; Paine *v.* Spratley, 5 Kan. 525; Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726.

62. McInerny *v.* Reed, 23 Iowa 410. See also Scully *v.* Ackmeyer, 2 Cinc. Super. Ct. 296. *Compare* Robb *v.* Potts, 2 La. Ann. 552.

63. Merrill *v.* Kalamazoo, 35 Mich. 211.

64. See the statutes of the several states. And see the following cases:

California.— Creighton *v.* Pragg, 21 Cal. 115.

Indiana.— Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879; Budd *v.* Kraus, 79 Ind. 137 (holding that an action by a contractor to recover against a landowner an assessment for improving a street must be founded on a written contract, and the bond given by the contractor to the town is not such written contract); Marion Bond Co. *v.* Blakely, 30 Ind. App. 374, 65 N. E. 291, 66 N. E. 71 (holding that the right of the holder of an assessment lien payable in instalments to foreclose for the entire amount on default in payment of any instalment, given by Burns Rev. St. (1901) § 3853, is not affected by the provision in section 3850 that the property-owner may pay the entire lien and stop the interest; but before he can do so he must give six months' notice in writing of intention to make such payment); Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042.

Iowa.— Risdon *v.* Shank, 37 Iowa 82.

Missouri.— Thornton *v.* Clinton, 148 Mo. 648, 50 S. W. 295, holding that where an ordinance provided that, if certain tax bills were not paid, the contractor could sue on them in the name of the city, and the contract provided that the city should issue the bills to the contractor, in form provided by the ordinance, "in full payment of the work done," the contractor could not object to the

assignee.[65] Where the contractor is given the right to enforce the assessment it is held under some statutes that the action must be in his name, and not that of the city,[66] while under other statutes the action may be in the name of the city to the use of the contractor.[67] The failure of an officer to cause the contract to be recorded will not affect the right of the contractor to enforce an assessment.[68] The neglect of the city to enforce the obligation of a street railroad to pave the portion of the street occupied by its tracks cannot be urged against a contractor seeking to recover for paving the sides of the street.[69] A charter conferring power on the courts to determine the rights of a contractor against a property-owner, under a city contract, when his claim is resisted on the ground of proceedings of the city council which are defective, although not necessarily invalid, does not authorize an assumption by the courts of legislative or executive functions.[70]

(c) *Conditions Precedent.* Conditions precedent to action imposed by statute must be complied with.[71] When the proceeding is under a specific statute

city's authority to issue the bills, or require it to collect the tax and pay it over.

Ohio.— Stimson *v.* Scott, 4 Ohio Dec. (Reprint) 37, Clev. L. Rec. 45.

Texas.— Taylor *v.* Boyd, 63 Tex. 533.

But see Louisiana Imp. Co. *v.* Baton Rouge Electric, etc., Co., 114 La. 534, 38 So. 444, holding that where a contractor for street improvements sues a street railway and a city on certificates of the city engineer that such railway owed certain sums for paving, and no ordinance is shown authorizing the transfer of such certificates to the contractor, his alternative demand against the city will be dismissed as in a case of nonsuit.

When city has paid contractor.— Ind. Rev. St. (1894) § 4292, in providing that a city may pay the contractor on estimates made for construction of street improvements, and assess and collect "the expenses as hereinafter provided when petition is made," authorizes the city to advance the money both for improvements made on petition and those ordered by the council under section 4289; and, when improvements have been paid for by a city, it may foreclose the lien of assessments therefor, as provided in section 4288, for its own benefit. Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112.

65. Warren *v.* Russell, 129 Cal. 381, 62 Pac. 75 (holding that where the original contractors assigned a contract for grading a street, the lien for the work passed to the assignee upon its completion); Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283 (holding that an action to foreclose an assessment for a street improvement is properly brought in the name of the person to whom it is assigned as security, and who is authorized by the assignment "to demand, sue for, settle, and compromise" the same); Hendrick *v.* Crowley, 31 Cal. 471 (holding that if the original contractor to make improvements in a city street owns a lot on the street where the improvements are made, and assigns his contract, the assignee may sue him for the assessment against the lot); Gill *v.* Dunham, (Cal. 1893) 34 Pac. 68 (holding a particular assignment sufficient to carry right to enforce a lien); Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; New Orleans *v.* Elliott, 10 La. Ann. 59; Kansas City *v.* Rice, 89 Mo. 685, 1 S. W. 749; Guinotte *v.* Ridge, 46 Mo. App. 254; Galbreath *v.* Newton, 45 Mo. App. 312; Bambrick *v.* Campbell, 37 Mo. App. 460.

66. Dyer *v.* North, 44 Cal. 157; Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

67. St. Louis *v.* Hardy, 35 Mo. 261; Gest *v.* Cincinnati, 26 Ohio St. 275, holding that Mun. Code, §§ 546, 547, authorizing suits in the name of the city for the collection of special assessments for the improvement of streets, are not repealed by section 562, clause 7, as amended, providing that the contract price may be paid in assessments as the council may determine. See also New Orleans *v.* Wire, 20 La. Ann. 509; Waco *v.* Chamberlain, 92 Tex. 207, 47 S. W. 527 [*reversing* (Civ. App. 1898) 45 S. W. 191].

Where a city constructs a sidewalk at its own expense, the tax bills are to be issued to the committee or officer designated by the city to take charge of and superintend the work, and suit should be in the name of the city, to the use of such committee or officer, as holder. Bevier *v.* Watson, 113 Mo. App. 506, 87 S. W. 612.

68. Wells *v.* Wood, 114 Cal. 255, 46 Pac. 96; Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283.

69. Stifel *v.* MacManus, 74 Mo. App. 558.

70. Hutcheson *v.* Storrie, (Tex. Civ. App. 1898) 48 S. W. 785.

71. People *v.* Reay, 52 Cal. 423 (holding that no action lies to enforce a lien for an assessment for a street improvement in San Francisco until the thirty days' notice required by the act of 1870, section 10, in that regard, has been given); Ross *v.* Van Natta, 164 Ind. 557, 74 N. E. 10 (holding that Burns Annot. St. (1901) § 3626*a*, providing that in an action to foreclose a lien for a municipal improvement it must be shown that ten days before suit the owner, if found or known, was notified of the assessment, including the amount thereof, with interest, and where payable, means a notice either verbal or written, and it may be given by any one interested in the claim, or by any municipal officer charged with a duty in connection with the making or collection of the assessment); Security Sav. Trust Co. *v.* Donnell, 1 Mo. App. Rep. 571 (holding that a failure to file notice of suit

conditions imposed with regard to proceedings under other statutes need not be complied with.[72] As to whether a demand is necessary before an action may be maintained seems to depend entirely upon the statute, it being regarded as necessary in some jurisdictions[73] and unnecessary in others.[74] The owner of improvement bonds who has a right to enforce an assessment for their payment need not first make a demand upon the city,[75] nor is a resolution of the council necessary to authorize suit.[76] Where demand is required by statute it must be made in strict compliance with such requirement.[77]

(III) *DEFENSES*—(A) *In General.* The general rule is that, in an action to enforce an assessment for a municipal improvement, where the proceedings are not void for want of authority on the part of the municipality or because of fraud or collusion, the property-owner cannot assert any defense which he might have urged prior to the confirmation of the assessment or upon the proceedings to confirm the assessment.[78] Under this rule it has been held that the property-owner cannot assert that his property has not been benefited,[79] that the improvement constructed was not necessary,[80] that the assessment has not been properly appor-

on a special tax bill with the city treasurer, as was required by charter at the time the suit was brought, instead of with the board of public works, as was required at the time the tax bill was issued, is fatal to plaintiff's case).

72. Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042, holding that Rev. St. (1894) § 4294, providing that assessments for street improvements may be collected according to the provisions of section 4298, or by foreclosure as a mortgage is foreclosed, does not require a contractor who has elected to proceed by foreclosure to file an affidavit for a precept to collect such assessments; nor does it require the issue of any bonds or certificates for or on account of such improvement.

Payment of taxes.— The word "tax," as used in Wash. Amend. Rev. L. (1899) p. 302, § 20, declaring that the holder of a general tax certificate, before bringing an action to foreclose the lien, shall "pay the taxes that have accrued on the property," does not include assessments for street improvements. McMillan *v.* Tacoma, 26 Wash. 358, 67 Pac. 68.

73. Engelbret *v.* McElwee, 122 Cal. 284, 54 Pac. 900; Himmelman *v.* Booth, 53 Cal. 50; Stifel *v.* McManus, 74 Mo. App. 558, holding that to entitle the holder of a tax bill to penal interest, the demand for payment must be personal.

74. Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071; Myers *v.* Indianapolis Union R. Co., 12 Ind. App. 170, 39 N. E. 907; Sloan *v.* Faurot, 11 Ind. App. 689, 39 N. E. 539.

75. Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879.

76. Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879.

77. San Francisco Paving Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076; Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309; Foley *v.* Bullard, 99 Cal. 516, 33 Pac. 1081; Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860; Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534, 12 Pac. 530; Schirmer *v.* Hoyt, 54 Cal. 280; Dyer *v.* Chase, 52 Cal. 440; Himmelmann *v.* Hoadley, 44 Cal. 213; Gaffney *v.* Gough, 36 Cal. 104; Guerin *v.* Reese, 33 Cal. 292.

78. See cases cited *infra*, this and following notes.

Estoppel to assert defects and objections in general see *supra*, XIII, E, 16, c.

Matters which should have been urged by appeal from the assessment cannot be relied upon as a defense. Petaluma Paving Co. *v.* Singley, 136 Cal. 616, 69 Pac. 426; Buckman *v.* Landers, 111 Cal. 347, 43 Pac. 1125; Shepard *v.* McNeil, 38 Cal. 72; Nolan *v.* Reese, 32 Cal. 484; Beaudry *v.* Valdez, 32 Cal. 269; Auburn *v.* Paul, 84 Me. 212, 24 Atl. 817. But *compare* Allegheny City *v.* McCaffrey, 131 Pa. St. 137, 18 Atl. 1001.

Failure to file objections to a tax bill as required by the Missouri statute will prevent the pleading of such objections upon a subsequent suit, although the tax bill is absolutely void. State *v.* Smith, 177 Mo. 69, 75 S. W. 625; Winfrey *v.* Linger, 89 Mo. App. 159.

79. Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014; St. Louis *v.* Ranken, 96 Mo. 497, 9 S. W. 910; Heman *v.* Ring, 85 Mo. App. 231; City *v.* McDermott, 5 Ohio Dec. (Reprint) 494, 6 Am. L. Rec. 285.

80. Crawfordsville Music Hall Assoc. *v.* Clements, (Ind. App. 1894) 38 N. E. 226; Purdy *v.* Drake, 32 S. W. 939, 17 Ky. L. Rep. 819; Heman *v.* Franklin, 99 Mo. App. 346, 73 S. W. 314; Mt. Joy Borough *v.* Harrisburg, etc., R. Co., 11 Pa. Dist. 765, 19 Lanc. L. Rev. 217. But *compare* Corrigan *v.* Gage, 68 Mo. 541, holding that in an action on a special tax bill for the construction of a sidewalk, it may be shown that the ordinance authorizing the improvement was unreasonable, in that the walk was located in an uninhabited part of the city, and disconnected with any other street or sidewalk.

In Indiana, under Burns Rev. St. (1897) § 3846, providing that a property-owner who has not signed a waiver, or exercised or claimed the option to pay in instalments, may contest his assessment in an action to foreclose the lien, in an action to foreclose the

tioned,[81] or other irregularities which are not jurisdictional.[82] Nor can defendant urge objections by which he has not been prejudiced.[83] But on the contrary the general rule is that the property-owner is not at any time debarred from asserting jurisdictional defects,[84] such as want of power in the city,[85] or from asserting fraud and collusion either in the passage of the ordinance,[86] or in the making of the contract for the improvement,[87] or other matters rendering the assessment wholly void.[88] Where the work has been accepted by the city, defective performance of the contract is not a defense in the absence of fraud or mistake.[89] A denial that an assessment

lien of an assessment on realty for street improvements, the owner can contest the amount of his assessment upon the question of special benefits. Marion Bond Co. *v.* Johnson, 29 Ind. App. 294, 64 N. E. 626.

Discretion of municipality as to necessity of improvement see *supra*, XIII, A, 3, a, (II).

81. Walsh *v.* Sims, 65 Ohio St. 211, 62 N. E. 120; Chester *v.* Bullock, 187 Pa. St. 544, 41 Atl. 452; Chester *v.* Cavanaugh, 8 Del. Co. (Pa.) 453.

82. *California.*— Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661 (holding that inasmuch as the street-work act makes no provision for damages and has no reference thereto, but the right to damages arises solely from the constitutional provision that private property cannot be damaged for public use without compensation, the non-payment of damages does not affect the right of the municipality to make the assessment to pay the cost of the work); Moffitt *v.* Jordan, 127 Cal. 622, 60 Pac. 173; Hornung *v.* McCarthy, 126 Cal. 17, 58 Pac. 303; Himmelmann *v.* Hoadley, 44 Cal. 276 [*following* Smith *v.* Cofran, 34 Cal. 310; Nolan *v.* Reese, 32 Cal. 484; Emery *v.* Bradford, 29 Cal. 75]; Flinn *v.* Peters, 3 Cal. App. 235, 84 Pac. 995 (clause in contract regulating pay and hours of labor of employees of contractor).

Indiana.— Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071; Dugger *v.* Hicks, 11 Ind. App. 374, 36 N. E. 1085.

Iowa.— Des Moines *v.* Casady, 21 Iowa 570.

Kentucky.— Louisville Steam Forge Co. *v.* Mehler, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. L. Rep. 1335 [*following* Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128] (holding that in an action by a contractor to enforce a lien for the cost of a street improvement, the fact that defendant has been damaged by a change in the grade of the street, and that no steps were taken to fix the damage before the injury was done, constitutes no defense); Woodward *v.* Collett, 48 S. W. 164, 20 Ky. L. Rep. 1066; Gibson *v.* O'Brien, 6 S. W. 28, 9 Ky. L. Rep. 639 (holding that the fact that an ordinance, under which a contract had been made to execute certain improvements, was repealed, and another contract for the work was made with other persons, was no defense to an action against abutting owners by the latter contractors).

Missouri.— Smith *v.* Tobener, 32 Mo. App. 601; Grimm *v.* Shickle, 4 Mo. App. 586.

Pennsylvania.— Chester *v.* Bullock, 187 Pa. St. 544, 41 Atl. 452.

83. *California.*— Duncan *v.* Ramish, 142 Cal. 686, 76 Pac. 661; Perine *v.* Forbush, 97 Cal. 305, 32 Pac. 226 (holding that it is no defense that the contract for the work contained a provision that there should be no assessment on the adjoining property for improving that part of the street occupied by a street-railway company, but that the company should pay therefor); Williams *v.* Savings, etc., Soc., 97 Cal. 122, 31 Pac. 908 (holding that in an action by the contractor to foreclose a street assessment for sewer building, the fact that the laborers worked ten hours per day, where the contract provided that eight hours should be a legal day's work for the employees, cannot be taken advantage of by defendants, it being no concern of theirs on what terms such laborers worked).

Kentucky.— Levi *v.* Coyne, 57 S. W. 790, 22 Ky. L. Rep. 493.

Ohio.— Toledo *v.* Barnes, 2 Ohio S. & C. Pl. Dec. 591, 1 Ohio N. P. 188.

Pennsylvania.— Swain *v.* Philadelphia, 10 Pa. Cas. 161, 13 Atl. 545.

Texas.— Galveston *v.* Heard, 54 Tex. 420, holding that an abutting lot owner cannot resist a suit to recover an assessment for a street improvement on the ground that the city has not paid the principal or provided for payment of the interest on its bonds for the cost of the improvement, where the city proposes to receive such bonds and coupons at par in payment therefor.

84. California Imp. Co. *v.* Moran, 128 Cal. 373, 60 Pac. 969.

85. New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399; Heman *v.* Ring, 85 Mo. App. 231.

86. Heman *v.* Ring, 85 Mo. App. 231.

87. Cincinnati *v.* Kemper, 9 Ohio Dec. (Reprint) 742, 17 Cinc. L. Bul. 116. But *compare* Himmelmann *v.* Hoadley, 44 Cal. 213; Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707, holding that where the town council's record of proceedings for a street improvement shows that the contract was let to the lowest bidder, a lot owner, in the absence of fraud or mistake, is concluded from denying such fact in an action to foreclose a lien for the assessment.

88. Carter *v.* Cemansky, 126 Iowa 506, 102 N. W. 438. But *compare* State *v.* Smith, 177 Mo. 69, 75 S. W. 625.

89. Darnell *v.* Keller, 18 Ind. App. 103, 45 N. E. 676; Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546, 9 Ky. L. Rep. 819; Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707. See Middlesborough Town, etc., Co. *v.* Knoll, 55 S. W. 505, 21 Ky. L. Rep. 1399. But *compare* Haisch *v.* Seattle, 10 Wash. 435, 38 Pac. 1131.

was made is a good defense,[90] as is also a showing of payment.[91] A mistake or error in the amount of the bill may under some statutes be urged as a defense.[92] Want of title to the premises is not a defense where defendant claims an interest therein, and under the statute a claim of title is sufficient to authorize making a person a defendant.[93] In defense of a contractor's action to foreclose an assessment lien the legality of the incorporation of the city cannot be attacked.[94]

(B) *Set-Off or Counter-Claim in General.* In an action to enforce a special assessment, defendant may not set up a counter-claim against the city or the contractor.[95]

(C) *Damages Caused by Construction of Improvements.* Damages for injury to property against which an assessment is levied may not be set up as a counter-claim in an action to enforce the assessment.[96]

(IV) *JURISDICTION.* Jurisdiction to entertain proceedings for the enforcement of an assessment is usually expressly conferred upon some designated court by statute.[97]

Failure to complete work in time.— Where the contract required the work to be completed within one month after the approval of the contract, "or within such time thereafter as shall be directed or allowed," it constitutes no defense to the assessment that the work was not completed within one month, the city authorities having waived the failure to complete the work within that time. Levi *v.* Coyne, 57 S. W. 790, 22 Ky. L. Rep. 493.

Improvement other than that authorized.— Ky. St. § 3453 (part of charter of cities of the third class), providing that, in an action to enforce a lien for the cost of a street improvement, "the defendant shall not be allowed to make the defense that the work was not done according to contract," does not preclude the defense that the improvement was made on a part of the street other than that provided by the ordinance. Petter *v.* Allen, 54 S. W. 174, 21 Ky. L. Rep. 1122.

In Missouri it is held under specific statutory provisions that defective workmanship may be shown in reduction of the amount recoverable on a tax bill. Creamer *v.* Bates, 49 Mo. 523; Hill-O'Meara Constr. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318.

90. San Francisco *v.* Eaton, 46 Cal. 100.

91. Adams *v.* Lewellen, 117 Mo. App. 319, 93 S. W. 874, holding that under a city charter providing that any person owning or interested in a specific lot may pay a special tax bill to the city treasurer who shall cancel the same and mark the tax paid on the record no recovery can be had on a tax bill which has been marked "paid" on the record, although an entry not shown to have been made by the treasurer was afterward indorsed on the record, stating that the bill was not paid, and that the satisfaction previously entered belonged to a different lot.

92. Kansas City First Nat. Bank *v.* Nelson, 64 Mo. 418.

93. Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683, holding that as the judgment on special tax bills for street improvements can be levied only on the land against which the special tax is a charge, it is no defense to the action that defendant does not own the land, or that an action of ejectment for the land is pending.

94. Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403.

95. Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014; Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Darnell *v.* Keller, 18 Ind. App. 103, 45 N. E. 676; Burlington *v.* Palmer, 67 Iowa 681, 25 N. W. 877; Wilson *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 242, 5 Ohio N. P. 68; Ulm *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 185, 7 Ohio N. P. 278. *Contra*, Bodley *v.* Finley, 111 Ky. 618, 64 S. W. 439, 23 Ky. L. Rep. 851.

96. *California.*— Hornung *v.* McCarthy, 126 Cal. 17, 58 Pac. 303; Himmelmann *v.* Spanagel, 39 Cal. 389.

Indiana.— Powers *v.* New Haven, 120 Ind. 185, 21 N. E. 1083; Darnell *v.* Keller, 18 Ind. App. 103, 45 N. E. 676.

Missouri.— Seibert *v.* Tiffany, 8 Mo. App. 33. *Compare* St. Louis *v.* Clemens, 36 Mo. 467, holding that when, in an action on a certified special tax bill for the cost of improving a street in the city of St. Louis, defendant set up as a counter-claim a demand for damages done to his property by reason of the improper manner in which the work on the street was done, and no reply or demurrer was made to it, he was entitled to judgment on it by default.

Ohio.— Mack *v.* Cincinnati, 7 Ohio Dec. (Reprint) 49, 1 Cinc. L. Bul. 84.

Pennsylvania.— Smith *v.* Allegheny, 92 Pa. St. 110; Philadelphia *v.* O'Conner, 9 Pa. Dist. 230, 23 Pa. Co. Ct. 653. And see Charlton *v.* Allegheny City, 1 Grant 208, holding that to a scire facias on a claim filed by a municipal corporation for grading and paving a certain street, it is no defense that the grading of another street did great damage to other lots of defendants.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1271.

97. See the statutes of the several states. And see Chicago *v.* Colby, 20 Ill. 614; Tackett *v.* Vogler, 85 Mo. 480 [*overruling* Williams *v.* Payne, 80 Mo. 409; Stamps *v.*

(v) *Time to Sue and Limitations.* The time within which an action may be brought to enforce an assessment lien is usually fixed by statute.[98] Such

Bridwell, 57 Mo. 22]; St. Louis *v.* Coons, 37 Mo. 44; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Com. *v.* Denny, 29 Pa. St. 380.

Amount in controversy.— Where the petition in an action on special tax bills contains separate counts upon several different bills, the aggregate amount of such bills must be considered in determining whether the amount in controversy is sufficient to give the court jurisdiction. Hunt *v.* Hopkins, 66 Mo. 98.

98. See the statutes of the several states. And see the following cases:

California.— Williamson *v.* Joyce, 140 Cal. 669, 74 Pac. 290.

Iowa.— Fitzgerald *v.* Sioux City, 125 Iowa 396, 101 N. W. 268.

Kentucky.— Lexington *v.* Bowman, 119 Ky. 840, 84 S. W. 1161, 85 S. W. 1191, 27 Ky. L. Rep. 286, 651; Voris *v.* Gallaher, 87 S. W. 775, 27 Ky. L. Rep. 1001; Lexington *v.* Crosthwait, 78 S. W. 1130, 25 Ky. L. Rep. 1898, holding that the five-year limitation for liability to pay for street improvements, provided by St. (1903) § 2515, applies to the collection thereof by distraint, authorized by the act of April 19, 1890 (2 Acts (1889–1890), p. 899, c. 902), as well as to the suit to enforce liens authorized by the act of March 19, 1894 (Acts (1894), p. 260, c. 100).

Missouri.— Ross *v.* Gates, 117 Mo. App. 237, 93 S. W. 856; Ross *v.* Oglebay, 117 Mo. App. 236, 93 S. W. 859 (both holding that Kansas City Charter, art. 9, § 23, providing that the lien of tax bills shall continue only for one year after the maturity of the last instalment, unless within the year suit shall have been instituted to collect the same and notice of the suit shall have been filed with the city treasurer, requires the bringing of a suit within one year after the maturity of the last instalment in order to preserve the lien); Heman *v.* Larkin, (App. 1902) 70 S. W. 907; Folks *v.* Yost, 54 Mo. App. 55.

England.—Montreal *v.* Cantin, [1906] A. C. 241, 75 L. J. P. C. 41, 94 L. T. Rep. N. S. 357, 22 T. L. R. 364.

Applicability of general statutes of limitation.—An action to enforce an assessment lien is not barred by a general limitation of actions of debt. Dickinson *v.* Trenton, 35 N. J. Eq. 416; New York *v.* Colgate, 12 N. Y. 140; Magee *v.* Com., 46 Pa. St. 358. But *compare* Galveston *v.* New York Guaranty Trust Co., 107 Fed. 325, 46 C. C. A. 319. A statute providing that an action upon a liability created by statute when no other time is fixed by the statute creating the liability shall be commenced within five years next after the cause of action accrued applies to an action to enforce a lien for the cost of a street improvement made when the statute was in force; and, more than five years having elapsed between the time the lien was perfected by the acceptance of the work by the council and the time the action was instituted, the action was barred, although no warrant was issued against the proper person until within five years. Kirwin *v.* Nevin, 111 Ky. 682, 64 S. W. 647, 23 Ky. L. Rep. 947. A local assessment for paving is not a tax within a statute limiting the time of bringing an action for the collection of taxes in a certain city to four years. Gould *v.* Baltimore, 59 Md. 378. A statute providing that liens for an assessment for benefits for a public work shall be foreclosed as provided by law for the foreclosure of tax liens does not impose on such actions the limitations fixed for the bringing of an action to foreclose a tax lien. Hartford *v.* Mechanics' Sav. Bank, 79 Conn. 38, 63 Atl. 658.

A provision denying any right of limitation against taxes does not apply to a special assessment against a street railroad company for improving the portion of the street occupied by its track. Galveston *v.* New York Guaranty Trust Co., 107 Fed. 325, 46 C. C. A. 319.

Tolling statute by promise to pay.—A promise to pay a tax bill, if the holder would carry it over the period of limitation, is an assumption of personal liability on the debt, and not an extension of time, preventing limitations running against the lien of the bill. Adkins *v.* Case, 81 Mo. App. 104.

Effect of change of boundaries and powers of municipality.— The running of the statute of limitations against certificates of assessments issued by a municipality, and collectable by foreclosure against the lots, is not suspended by subsequent legislation changing the boundaries and powers of the municipality. Barden *v.* Duluth, 28 Fed. 14.

Assessment payable in instalments.—Where a statute relative to street improvements provided that the cost of such an improvement was to be borne, two thirds by the owner of abutting property, and one third by the city, unless on request of the property-owner the "ten-year plan" was adopted, and in the latter event the property-owner paid the whole of the cost in ten equal instalments, for which the city issued its bonds and paid interest thereon, and another statute barred in five years a liability to pay for street improvements, it was held that, in the absence of a request by the abutting owner therefor, the adoption of such ten-year plan by the city did not operate to extend the period of limitations beyond five years from the completion and acceptance of the work. Lexington *v.* Crosthwait, 78 S. W. 1130, 25 Ky. L. Rep. 1898. But a property-owner who, knowing that the city is acting on the idea that he has requested such ten-year plan, fails to object, and who, after the city has issued its bonds and paid the entire cost of the improvement, pays without objection two annual instalments assessed on that basis, is estopped to deny that he made such request, and, after five years, rely on

statute does not begin to run until the cause of action accrues,[99] or, it is generally held, from the time the assessment becomes delinquent.[1] If suit is brought within the period of limitation judgment may be entered after its expiration.[2] Where a statute extending the period of limitations becomes effective before the claim is barred the period of limitations is extended for the term prescribed by the new statute.[3] Where the proceeding is to enforce a lien, the lien must exist when the action is begun.[4]

(VI) *PARTIES.* Where a particular person is required by statute to collect assessments, actions must be brought in his name.[5] As a general rule under the statutes an action to enforce an assessment must be brought against the owner of the property which it is sought to charge,[6] although under some statutes it is pro-

limitations as a bar to the enforcement of the lien for the balance of instalments. Lexington *v.* Bowman, 119 Ky. 840, 84 S. W. 1161, 85 S. W. 1191, 27 Ky. L. Rep. 286, 651.

Where money is set apart from the proceeds of a trustees' sale for the payment of assessments, should they be judicially held valid, the trustees cannot assert the bar of a statute of limitations as against a proceeding to collect the assessment. Gould *v.* Baltimore, 58 Md. 46.

99. State *v.* Ballard, 16 Wash. 418, 47 Pac. 970 (holding that no right of action existed in a city or town to enforce local assessments levied under the invalid act of March 27, 1890, until the taking effect, on June 7, 1893, of the legalizing act of March 9, 1893; hence the statutory period of limitation of two years had not expired at the time of the taking effect of the act of March 20, 1895, extending such period to ten years, which was passed with an emergency clause, and the extension applied to all such actions); Galveston *v.* New York Guaranty Trust Co., 107 Fed. 325, 46 C. C. A. 319 (holding that a cause of action against a city street railroad company on a special assessment for a street improvement accrued, within the meaning of the statute of limitations, when the improvement was completed and accepted by the city council, as the city charter expressly provided that assessment for such improvements should become due at that time). And *compare* Ballard *v.* West Coast Imp. Co., 15 Wash. 572, 46 Pac. 1055.

Necessity of valid assessment.— It has been held that a valid and enforceable assessment must have been made. Bowman *v.* Colfax, 17 Wash. 344, 49 Pac. 551, holding that if the statute commences to run against the city's right to compel property benefited by an improvement to pay the cost thereof from the time a cause of action could have been perfected by the exercise of reasonable diligence, the time during which the city was in good faith proceeding with an invalid assessment should be excluded, and the statute would not commence to run until the expiration of that time.

1. Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877; Reynolds *v.* Green, 27 Ohio St. 416; Seattle *v.* O'Connell, 16 Wash. 625, 48 Pac. 412; Barden *v.* Duluth, 28 Fed. 14.

2. Himmelman *v.* Carpentier, 47 Cal. 42; Dougherty *v.* Henarie, 47 Cal. 9; Randolph *v.* Bayue, 44 Cal. 366.

What constitutes commencement of action. — The provision in 64 Ohio Laws, p. 75, limiting the lien of an assessment for certain improvements to two years, unless "a proper action" to enforce the lien be brought within that period, should be construed not to imply an action wherein the owner of the premises was not made a party or served with process until the two years had expired. Bonte *v.* Taylor, 24 Ohio St. 628. Where a person other than the record owner is the real owner of the property to be charged, suit to enforce a special tax bill should be brought against such real owner, and it will not avail to bring the real owner in after the period of limitation for bringing suit has expired, although the action was originally instituted against the record owner within such period. St. Joseph *v.* Baker, 86 Mo. App. 310. Under an act providing that the lien of a street improvement assessment shall continue two years, the commencement of an action to foreclose within two years does not continue the lien after the expiration of two years as against a purchaser of the property not a party to the foreclosure action. Page *v.* W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

3. Young *v.* Tacoma, 31 Wash. 153, 71 Pac. 742 (holding that where an original assessment for a street improvement was confirmed at a time when the statute of limitations against an action to enforce the assessment was two years, and before the expiration thereof an act was passed providing a ten-year limitation, the latter statute applied to proceedings to enforce a reassessment for the cost of the improvement for which such original assessment was made); Bowman *v.* Colfax, 17 Wash. 344, 49 Pac. 551.

4. Reis *v.* Graff, 51 Cal. 86.

5. Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137, holding that under the provisions of a charter, the city treasurer was the officer in whose name suit must be brought.

6. See the statutes of the several states. And see Phelan *v.* Dunne, 72 Cal. 229, 13 Pac. 662 (holding that under the act of April 1, 1872, as to proper parties in action to enforce street assessments, such an action may be brought against a devisee of the fee of a lot fronting on the street improved, to enforce an assessment made after his testator's death under a contract made before his death, without joining his executors, although his estate has not been finally settled, where

vided that all persons interested in the property shall be made parties.[7] Where the enforcement is sought against community property the wife is a necessary party,[8] and the wife of a defendant property-owner is in any event a proper party.[9] Where the action is by the contractor the city is not a necessary party.[10]

(VII) *PROCESS.* Process must be served in the manner prescribed by statute.[11] Under the provisions of some statutes where the owner is a non-resident he may be brought in by attachment.[12]

(VIII) *PLEADING* — (A) *Petition or Complaint* — (1) IN GENERAL. The pleadings in actions to recover special assessments are governed by the rules applicable to civil actions in general.[13] It is as a general rule regarded as neces-

it is shown that there is sufficient personalty to pay all debts and claims); Louisville *v.* Hexagon Tile Walk Co., 103 Ky. 552, 45 S. W. 667, 20 Ky. L. Rep. 236; Kelly *v.* Mendelsohn, 105 La. 490, 29 So. 894 (holding that it is sufficient to make the person in possession of the premises under an apparent title defendant); Vance *v.* Corrigan, 78 Mo. 94 (holding that a requirement that a suit to enforce a special tax bill be brought against "the owner" of the land to be charged refers to the owner of record); Keating *v.* Craig, 73 Mo. 507 (holding that the trustee named in a deed of trust under which the land taxed has been conveyed is not a necessary party when the beneficiary is a party); Excelsior Springs *v.* Henry, 99 Mo. App. 450, 73 S. W. 944 (holding that a suit was properly brought against a purchaser of the land who acquired title under a tax deed after the city tax lien accrued); St. Joseph *v.* Baker, 86 Mo. App. 310; Heman *v.* McNamara, 77 Mo. App. 1; Schneider Granite Co. *v.* Taylor, 64 Mo. App. 37 (holding that a valid judgment may be rendered without making all the persons interested therein parties); Smith *v.* Barrett, 41 Mo. App. 460 (holding that the owner of the land contemplated by a statute was the owner at the time of the institution of the suit, and not at the time the tax bill was issued); Miller *v.* Anheuser, 4 Mo. App. 436 (holding that to an action on a special tax bill, if defendant owns only an undivided half of the property, the other half owner should be made a party).

Holder of legal title.— When the title to real estate stands in the name of a wife, she may properly intervene in an action to enforce a special assessment tax bill against the land, and move to have the judgment granting such relief set aside, although the consideration for the land was paid by the husband. Barber Asphalt Paving Co. *v.* Young, 94 Mo. App. 204, 68 S. W. 107, 1115.

Purchaser under foreclosure of prior assessment.— One who, without notice, takes title under foreclosure of a street assessment pending a suit to forclose junior assessment liens, is a necessary party to the latter suit, since he holds the legal title, and, if not so made, he is not bound by the decree. Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52.

7. See the cases cited *infra*, this note.

Mortgagee.— Where a mortgagee of property assessed is not joined, such mortgagee's rights are in no way affected by the foreclosure. Krutz *v.* Gardner, 25 Wash. 396, 65 Pac. 771. But he is not a necessary party. Krutz *v.* Gardner, 18 Wash. 332, 51 Pac. 397.

Admission of new defendants.— Before defendants having or claiming an interest in property assessed for street improvements can defend the action for the assessment, they must allege their interest. Himmelmann *v.* Spanagel, 39 Cal. 389.

Under an early California statute it was necessary in an action to foreclose a lien to make all the persons having an interest in the property parties. Wood *v.* Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599 (holding that the foreclosure of a junior street assessment lien does not extinguish prior liens of the same kind, if the holders of such prior liens are not made parties to the foreclosure suit); Driscoll *v.* Howard, 63 Cal. 438; Diggins *v.* Reay, 54 Cal. 525 [*followed* in Milliken *v.* Houghton, (1884) 4 Pac. 914]; Hancock *v.* Bowman, 49 Cal. 413; San Francisco *v.* Doe, 48 Cal. 560.

8. McNair *v.* Ingebrigtsen, 36 Wash. 186, 78 Pac. 789; Seattle *v.* Baxter, 20 Wash. 714, 55 Pac. 320.

9. Coburn *v.* Bossert, 13 Ind. App. 359, 40 N. E. 281.

10. Lake Erie, etc., R. Co. *v.* Bowker, 9 Ind. App. 428, 36 N. E. 864, holding that the property-owner cannot ask that the city be made a party, since the joinder of the city could have no effect on any right of defense he might have.

11. Greenstreet *v.* Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735, holding that Sandels & H. Dig. § 5344 *et seq.*, in proceedings to foreclose an assessment lien, only authorizes general notice to all parties interested in the lot assessed, where the owner is unknown, and such fact is stated in the complaint.

Statement of cause of action.— That the citation in an action on a street improvement certificate, in giving a brief statement of the cause of action, misstated the corporate name of the city, did not render the judgment void. Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838.

12. Syenite Granite Co. *v.* Bobb, 37 Mo. App. 483, holding that a general writ of attachment may issue.

13. Pleading generally see PLEADING.

Alternative allegations.—Where in an action against a front proprietor for his share of the expense of laying a pavement in front

sary that a petition or complaint in an action to enforce an assessment for a public improvement specifically aver the existence of all the facts and the taking of all the steps which under the statute are necessary to impose liability upon the property-owner,[14] although the taking of such steps need not be minutely pleaded.[15] Under some statutes dispensing with the necessity of pleading facts conferring

of his premises, plaintiff alleged that the contract was made and said paving done in accordance with and in pursuance of Act No. 20 of 1882, and Act No. 73 of 1876, and defendant excepted that plaintiff's reference to said acts, without specifying on which it relied as authority for its contract, made its petition vague, and that, as the provisions of those acts were inconsistent, it should be ordered to elect between them, and before trial plaintiff's counsel stated of record that plaintiff relied on Act No. 20 of 1882 as far as the validity of its contract in matter of form was concerned, and as for the proportion of payments and the remedies it relied on Act No. 73 of 1876, it was held that, as plaintiff believed the acts were not inconsistent, it had a right to urge them alternatively in pleading; and the right to do so could not be tested by dilatory exception, but was a matter for the merits. Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

Negativing defenses.—In a suit on a special tax bill, the petition need not anticipate and avoid defenses that the answer may set up. Barber Asphalt Paving Co. *v.* Lampton, 79 Mo. App. 286 [*following* Barber-Asphalt Paving Co. *v.* Sandford, 76 Mo. App. 355]; Barber Asphalt Paving Co. *v.* Young, 68 Mo. App. 175; Seaboard Nat. Bank *v.* Wright, 68 Mo. App. 144. Acts (1891), c. 97, § 75, providing that if, before an improvement is ordered, any lots have already an improvement conforming to the general plan, the board shall allow the owner for it, and deduct from the contract price, does not require a complaint to enforce an improvement lien to negative the preëxistence of a conformable improvement. Spades *v.* Phillips, 9 Ind. App. 487, 37 N. E. 297.

Curing defects.— In an action by a contractor to foreclose an assessment lien, error in a reply, in alleging that plaintiff did not make the contract for the improvement, is corrected by allegations that he began the improvement on a certain day according to his said contract. Willard *v.* Albertson, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446. Where there was no sufficient denial of the allegations of the petition, the proof of the facts required by statute entitled plaintiff to judgment thereunder. Gaertner *v.* Louisville Artificial Stone Co., 114 Ky. 160, 70 S. W. 293, 24 Ky. L. Rep. 940. See also Cabell *v.* Henderson, 88 S. W. 1095, 28 Ky. L. Rep. 89.

Amendments.— In an action on a street assessment, where the judgment recited that defendants sued by fictitious names were dismissed from the action, and the court found that defendant was at all times the owner of the land described in the complaint, the failure to amend the complaint by striking therefrom the names of the fictitious persons is not prejudicial. Belser *v.* Allman, 134 Cal. 399, 66 Pac. 492.

14. *California.*— Himmelman *v.* Danos, 35 Cal. 441; Blanchard *v.* Beideman, 18 Cal. 261.

Indiana.— Welch *v.* Roanoke, 157 Ind. 398, 61 N. E. 791; Overshiner *v.* Jones, 66 Ind. 452; Moore *v.* Cline, 61 Ind. 113; Anthony *v.* Williams, 47 Ind. 565; Burris *v.* Baxter, 25 Ind. App. 536, 58 N. E. 733; Cleveland, etc., R. Co. *v.* Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319.

Kentucky.— Johnson *v.* Ferrell, 1 S. W. 412, 541, 8 Ky. L. Rep. 216. See Middlesborough Town, etc., Co. *v.* Knoll, 55 S. W. 205, 21 Ky. L. Rep. 1399.

Louisiana.— See Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. 848.

Minnesota.— McComb *v.* Bell, 2 Minn. 295.

Missouri.— St. Louis *v.* Ranken, 96 Mo. 497, 9 S. W. 910.

Ohio.— See Burns *v.* Patterson, 2 Handy 270, 12 Ohio Dec. (Reprint) 438; Hartwell *v.* Hamilton County House Bldg. Assoc., 7 Ohio Dec. (Reprint) 397, 2 Cinc. L. Bul. 287.

But see Waterbury *v.* Schmitz, 58 Conn. 522, 20 Atl. 606; San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496 [*modifying* (Civ. App. 1898) 46 S. W. 273]; Elma *v.* Carney, 4 Wash. 418, 30 Pac. 732.

Sufficiency of petition upon tax bill see Hunt *v.* Hopkins, 66 Mo. 98; Carthage *v.* Badgley, 73 Mo. App. 123; Turner *v.* Patton, 54 Mo. App. 654.

Action upon void assessment.—Where in an action against an abutting owner for the amount of a void street assessment, the complaint alleged that the work was done with defendant's knowledge and consent; that it directly benefited his property, and that he received the benefit thereof; that the sum assessed and sued for was the reasonable value of the work, and was also the "value of the said benefit to defendant's said property," a sufficient consideration for defendant's promise to pay the sum assessed was alleged. Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557.

15. Highlands *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Harmon *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Slocum *v.* Dallas, 165 Ind. 710, 75 N. E. 823; Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822; Helm *v.* Witz, 35 Ind. App. 131, 73 N. E. 846; Spades *v.* Phillips, 9 Ind. App. 487, 37 N. E. 297; Breath *v.* Galveston, (Tex. Civ. App. 1898) 46 S. W. 903; Parkersburg *v.* Tavenner, 42 W. Va. 486, 26 S. E. 179. See Jager *v.* Burr, 36 Ohio St. 164.

Sufficiency of particular averments.— For cases in which the sufficiency of averments as to particular facts has been considered

jurisdiction it has been held sufficient to plead that work was duly ordered [16] or a contract duly awarded.[17] Under the general rule it has been held in specific cases that there must be an averment of the character of the improvement,[18] notice to property-owners of the improvement,[19] establishment of a grade,[20] notice of award of contract,[21] the making and apportionment of the assessment,[22] facts rendering the assessment due,[23] demand of payment,[24] facts showing the liability of the property sought to be charged,[25] ownership of the property which it is sought to

see: As to allegations that the cost of the improvement was to be borne by the abutting property (Deane *v.* Indiana Macadam, etc., Co., 161 Ind. 371, 68 N. E. 686); notice to owner to construct improvement (Shrum *v.* Salem, 13 Ind. App. 115, 39 N. E. 1050); meeting of the committee of the council to consider grievances (Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042); estoppel of owner (Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557; Willard *v.* Albertson, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071).

16. Buckman *v.* Hatch, (Cal. 1902) 70 Pac. 221, 139 Cal. 53, 72 Pac. 445; Williams *v.* Bergin, 127 Cal. 578, 60 Pac. 164, (1899) 57 Pac. 1072; Pacific Paving Co. *v.* Bolton, 97 Cal. 8, 31 Pac. 625. See also Doane *v.* Houghton, 75 Cal. 360, 17 Pac. 426. But see Buckman *v.* Hatch, 139 Cal. 53, 72 Pac. 445.

17. Culligan *v.* Studebaker, 67 Mo. 372.

18. Dugger *v.* Hicks, 11 Ind. App. 374, 36 N. E. 1085 (holding averment sufficient); Cincinnati *v.* McDuffie, 1 Ohio S. & C. Pl. Dec. 88, 1 Ohio N. P. 53.

Reference to contract.— In an action to collect a special assessment for street improvements it is not necessary for the complaint to show the depth and width of the improvement and the kind of material used, where the resolutions and ordinances and the contract and specifications fixing these particulars are referred to in the complaint. Deane *v.* Indiana Macadam, etc., Co., 161 Ind. 371, 68 N. E. 686.

19. California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802 (holding averment sufficient); Deane *v.* Indiana Macadam, etc., Co., 161 Ind. 371, 68 N. E. 686 (holding a petition sufficient); Sands *v.* Hatfield, 7 Ind. App. 357, 34 N. E. 654.

20. Bitzer *v.* O'Bryan, 107 Ky. 590, 54 S. W. 951, 21 Ky. L. Rep. 1307 (holding an averment sufficient); Zahle *v.* Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 Ky. L. Rep. 385, 13 L. R. A. 668.

21. Himmelmann *v.* Townsend, 49 Cal. 150.

22. Miller *v.* Mayo, 88 Cal. 568, 26 Pac. 364; Irvin *v.* Devors, 65 Mo. 625.

Assessment roll.—A complaint in an action to enforce an assessment for street improvements is demurrable, unless a copy of so much of the assessment roll as affects defendant's property is attached as an exhibit. Sloan *v.* Faurot, 11 Ind. App. 689, 39 N. E. 539.

Sufficiency of averment.— For cases in which the sufficiency of the averment of an assessment has been considered see Ede *v.* Cuneo, (Cal. 1898) 55 Pac. 388; Treanor *v.* Houghton, 103 Cal. 53, 36 Pac. 1081; Wray *v.* Fry, 158 Ind. 92, 62 N. E. 1004; Cleveland, etc., R. Co. *v.* Porter, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179; Tennessee Paving Brick Co. *v.* Barker, 59 S. W. 755, 22 Ky. L. Rep. 1069; Harris *v.* Houston, 21 Tex. Civ. App. 432, 52 S. W. 653.

23. Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071 (holding that a complaint which shows that the assessment was made, and that the time fixed by the statute for payment has passed, is sufficient); Dugger *v.* Hicks, 11 Ind. App. 374, 36 N. E. 1085 (holding that in an action by a contractor it is sufficient to aver that the assessments are due and unpaid, without alleging that the town has not paid plaintiff).

Assessment payable in instalments.—A complaint for the enforcement of a lien, which shows that the assessment is due, need not show that defendants were given time within which to elect whether they would pay the assessment in instalments or at once; but defendants, if they took the steps necessary to secure the right to pay the same by instalments, should allege the necessary facts by way of answer. Highlands *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Harmon *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Slocum *v.* Dallas, 165 Ind. 710, 75 N. E. 823; Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822.

24. Engelbret *v.* McElwee, 122 Cal. 284, 1898) 46 S. W. 903.

Sufficiency of averment.— For cases in which the sufficiency of an averment of demand has been considered see Williams *v.* Bergin, 127 Cal. 578, 60 Pac. 164, (1899) 57 Pac. 1072; McBean *v.* Martin, 96 Cal. 188, 31 Pac. 5; Coulin *v.* Seamen, 22 Cal. 546; Highlands *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Harmon *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Slocum *v.* Dallas, 165 Ind. 710, 75 N. E. 823; Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822; Bennison *v.* Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613.

25. Witter *v.* Mission School Dist., 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33; Butler *v.* Robinson, 75 Mo. 192.

Effect of including land not liable.— A petition in a suit to enforce a lien against real estate for a local improvement is good, although its prayer seeks to subject to the payment of the claim sued on more land than is within the taxing district. Holt *v.* Figg, 94 S. W. 34, 29 Ky. L. Rep. 613.

Sufficiency of averment.— For cases illustrative of the sufficiency of this averment see Deane *v.* Indiana Macadam, etc., Co., 161 Ind.

charge,[26] and facts showing the right to sue as assignee of the contract.[27] A petition which shows on its face that the cause of action is barred is insufficient.[28]

(2) AVERMENTS AS TO ORDINANCE OR RESOLUTION. The existence of an ordinance or resolution for the improvement must be averred;[29] but a general allegation that the council passed the ordinance[30] or resolution is usually regarded as sufficient;[31] nor need the ordinance be set out in full,[32] but it is sufficient to refer to it by title and date.[33]

(3) AVERMENTS AS TO CONTRACT AND PERFORMANCE. The making of a contract must be averred,[34] but as a general rule it is not regarded as necessary to set the contract out in full,[35] although in some cases of action by the contractor it is held necessary.[36] Under some statutes it must be alleged that the contract was in writing,[37] under others that it fixed the time for beginning and completing the work.[38] It is usually held necessary to aver completion of the work[39] and compliance with the contract,[40] although the specific time of completion need not

371, 68 N. E. 686; Mendenhall *v.* Clugish, 84 Ind. 94; Helm *v.* Witz, 35 Ind. App. 131, 73 N. E. 846; Lake Erie, etc., R. Co. *v.* Walters, 9 Ind. App. 684, 37 N. E. 295; Barber Asphalt Paving Co. *v.* Peck, 186 Mo. 506, 85 S. W. 387.

26. San Francisco *v.* Doe, 48 Cal. 560; Butler *v.* Robinson, 75 Mo. 192; Parks *v.* Campbell, 21 Ohio St. 280; Corry *v.* Gaynor, 21 Ohio St. 277.

27. Deffenbaugh *v.* Foster, 40 Ind. 382.

28. Bonte *v.* Taylor, 24 Ohio St. 628.

29. Stephens *v.* Guthrie, 4 Bush (Ky.) 462; Johnson *v.* Ferrell, 1 S. W. 541, 8 Ky. L. Rep. 216. See also Nevin *v.* Gaertner, 48 S. W. 153, 20 Ky. L. Rep. 1022; Stifel *v.* Dougherty, 6 Mo. App. 441.

Publication.— It is sufficient to allege, as to the publication of an ordinance, that after its approval by the mayor it was printed and published in two newspapers published in the city, one in the English and one in the German language, proper allegations being made as to the circulation of such newspapers, and as to their choice by the general council as official newspapers. Bitzer *v.* Dinwiddie, 45 S. W. 1049, 20 Ky. L. Rep. 298.

30. McHenry *v.* Selvage, 99 Ky. 232, 35 S. W. 645, 18 Ky. L. Rep. 473; Cabell *v.* Henderson, 88 S. W. 1095, 28 Ky. L. Rep. 89; Bitzer *v.* Dinwiddie, 45 S. W. 1049, 20 Ky. L. Rep. 298; Eyerman *v.* Payne, 28 Mo. App. 72; Jessing *v.* Columbus, 1 Ohio Cir. Ct. 90, 1 Ohio Cir. Dec. 54 [*affirmed* in 22 Cinc. L. Bul. 453, 23 Cinc. L. Bul. 3]. But see Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227.

31. Dyer *v.* North, 44 Cal. 157; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071; Sands *v.* Hatfield, 7 Ind. App. 357, 34 N. E. 654.

32. Leeds *v.* Defrees, 157 Ind. 392, 61 N. E. 930; Heman *v.* Payne, 27 Mo. App. 481; Carney *v.* Kirby, 1 Disn. (Ohio) 479, 12 Ohio Dec. (Reprint) 744.

33. Gaertner *v.* Louisville Artificial Stone Co., 114 Ky. 160, 70 S. W. 293, 24 Ky. L. Rep. 940; Kansas City *v.* American Surety Co., 71 Mo. App. 315.

34. McAboy *v.* Gosnell, 64 S. W. 961, 23 Ky. L. Rep. 1187; Breath *v.* Galveston, (Tex. Civ. App. 1898) 46 S. W. 903, holding an allegation that the contract for making the improvement was executed sufficient without alleging that it was signed by the mayor and clerk.

Sufficiency of allegations see Palmer *v.* Burnham, 120 Cal. 364, 52 Pac. 664; Spaulding *v.* Baxter, 25 Ind. App. 485, 58 N. E. 551; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071.

35. Van Sickle *v.* Belknap, 129 Ind. 558, 28 N. E. 305; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071; Dugger *v.* Hicks, 11 Ind. App. 374, 36 N. E. 1085; St. Louis *v.* Hardy, 35 Mo. 261.

Specifications.— A complaint in an action to foreclose a street assessment lien is sufficient, although it fails to set forth the specifications attached to and forming a part of the contract for the work. Greenwood *v.* Hassett, (Cal. 1900) 61 Pac. 173. But see Girvin *v.* Simon, 116 Cal. 604, 48 Pac. 720.

36. Logansport *v.* Blakemore, 17 Ind. 318.

37. Wiles *v.* Hoss, 114 Ind. 371, 16 N. E. 800 (holding averment sufficient); Overshiner *v.* Jones, 66 Ind. 452. But *compare* Drew *v.* Geneva, 159 Ind. 364, 65 N. E. 9.

38. Washburn *v.* Lyons, 97 Cal. 314, 32 Pac. 310 [*following* Libbey *v.* Elsworth, 97 Cal. 310, 32 Pac. 228].

39. California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802; Byrne *v.* Luning Co., (Cal. 1894) 38 Pac. 454; Auburn *v.* Eldridge, 77 Ind. 126; Sheehan *v.* Owen, 82 Mo. 458. But see Perine *v.* Lewis, 128 Cal. 236, 60 Pac. 422, 772, holding that where the complaint in an action for a street assessment alleged that the assessment was made under a resolution of the board of supervisors that certain street improvements be made where not already so done, and the lot described in the complaint was assessed to pay a portion of the expense of such work, it was not necessary that the complaint allege that the work authorized had not already been done in front of the lot in question.

40. Meyer *v.* Wright, 19 Mo. App. 283; Philadelphia *v.* Reilly, 6 Phila. (Pa.) 592; Reilly *v.* Philadelphia, 6 Phila. (Pa.) 528. See Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042.

be alleged especially where the petition otherwise contains full and specific averments.[41]

(B) *Answer.* The form and sufficiency of the answer is governed by the rules of pleading usually applicable to civil actions.[42] The facts constituting an affirmative defense must be pleaded,[43] and facts, not conclusions, must be alleged.[44] Hence an answer must aver the facts relied on to establish fraud,[45] or lack of due process

41. Breath *v.* Galveston, (Tex. Civ. App. 1898) 46 S. W. 903.

42. See PLEADING. And see City St. Imp. Co. *v.* Rontet, 140 Cal. 55, 73 Pac. 729 (holding that there was no denial of plaintiff's bid being signed); Shepard *v.* McNeil, 38 Cal. 72 (holding that an answer to a complaint seeking to enforce a lien for an assessment for street improvements, which denies that the superintendent of streets "originally" made the assessment in his official capacity, is evasive, and tenders an immaterial issue).

Inconsistent defense.— Where, after the reversal of a judgment in an action on a street assessment, a new assessment is made, and action brought thereon before the dismissal of the former action, defendant is not precluded from a defense that the subsequent assessment was not made within the time required, by setting up other inconsistent defenses, denying the making of such assessment, and that the former suit was still pending, no final judgment having been entered therein. Westall *v.* Atlschul, 126 Cal. 164, 58 Pac. 458.

Amendments. — Where a complaint was amended, on plaintiff's motion, by striking from its caption the names of some of the defendants, as to whom the action was dismissed, and the action was to enforce a street assessment against a lot, and the complaint averred that all the defendants were joint owners of the lot, and, as such, necessary parties to the suit, it was held that if the effect of the amendment was to show that defendants whose names were struck out had no interest in the lot, it was the right of those remaining to amend their answer and aver that the others did have an interest in the lot. Harney *v.* Applegate, 57 Cal. 205.

Presumptions.— Where an answer asserts the invalidity of a contract as providing for repairs but does not set out the contract it will be presumed as against the answer that the contract is one of guaranty. Shank *v.* Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564.

43. Brown *v.* Pomona Bd. of Education, 103 Cal. 531, 37 Pac. 503 (holding that as the authority of a municipal corporation to make a contract not void on its face will be presumed, the defense of *ultra vires*, in an action thereon, must be raised by answer); Shrum *v.* Salem, 13 Ind. App. 115, 39 N. E. 1050 (holding that an answer alleging that defendant was engaged in the construction of a sidewalk in front of his premises; that the town, without notice to him, took the work in charge, and prevented him from completing it, is insufficient as a bar to an action by the town to enforce its lien for the cost of the walk, as it does not show that defendant was constructing the walk according to the requirements of the ordinance); Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176 (holding that if defendant wishes to rely upon a failure to comply with a city ordinance requiring the apportionment to be approved by the council before the warrants are issued by the board, both the ordinance and the failure to comply with it must be alleged); Menefee *v.* Bell, 62 Mo. App. 659 (holding that failure to file notice of suit in the office of the board of public works, as required by the city charter, is new matter, and must be pleaded and proved); Guinotte *v.* Ridge, 46 Mo. App. 254.

An answer setting up a right to a reduction in an assessment because of a previous improvement made by the owner must set out all the facts necessary under the statute to entitle the owner to the reduction. Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014.

44. Highlands *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Harmon *v.* Dallas, 165 Ind. 710, 75 N. E. 824; Slocum *v.* Dallas, 165 Ind. 710, 75 N. E. 823; Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822 (all holding that, in an action to enforce a street assessment lien, an answer attacking the proceedings looking to the improvement on the ground that the town trustees who acted in the proceedings had not filed the certificate required by Burns' Annot. St. § 4331 (which applies only to the first election of trustees held upon the incorporation of a town), was insufficient, where it did not disclose when the town was incorporated, or when the trustees were elected or appointed, or by what authority they claimed to act); Shank *v.* Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564 (holding that an answer was insufficient, as failing to show by its averments whether a hearing was denied the property-owners).

45. Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403. See also Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014, holding averments insufficient.

Sufficiency of allegation.— In an action to recover an assessment for a street improvement, an answer alleging that defendants called the attention of the city engineer and the street committee in charge of the improvement to certain defects in the work, and, on a hearing, made proof of the same, but that the committee disregarded the evidence, and concealed the facts from the common council, and assured such council that the work had been done according to the contract, and that the civil engineer and the

of law,[46] or imperfect execution of the work,[47] or improper authorization of the work.[48]

(c) *Demurrer.* Where the facts alleged show that the law has not been complied with the petition is demurrable.[49] Objection to the form of allegations should be presented by special demurrer.[50]

(IX) *EVIDENCE*—(A) *Presumptions and Burden of Proof.* Proceedings for the collection of assessments are in the absence of special statutory provisions governed by the rules of evidence usually applicable to civil actions.[51] Thus the regularity of official acts will be presumed,[52] and in general presumptions will be indulged in favor of the validity of the assessment.[53] In some jurisdictions, however, it has been held that he who seeks the foreclosure or enforcement of the lien of a special assessment has the burden of proving its validity.[54] The burden

street committee combined and colluded with the contractor to do inferior work and to furnish inferior material and to deceive the common council, etc., was insufficient as an allegation of fraud in the acceptance of the work by the common council. Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014.

46. Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403.

47. Carthage *v.* Badgley, 73 Mo. App. 123; Vieths *v.* Planet Property, etc., Co., 64 Mo. App. 207. See also Hill-O'Meara Constr. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318, holding that where the petition in an action on a special tax bill alleged that the work was completed "in the manner" prescribed by the contract, a general denial was not sufficient to raise an issue that the work was not completed within the time required.

48. Carthage *v.* Badgley, 73 Mo. App. 123; Vieths *v.* Planet Property, etc., Co., 64 Mo. App. 207.

49. Perine Contracting, etc., Co. *v.* Quackbush, 104 Cal. 684, 38 Pac. 533 (holding that a complaint, in an action to foreclose an assessment lien, which alleges that bids to do the work for which the lien is claimed were to have been received until a certain day; that the bids were in fact opened, examined, and declared on the day before, and, in pursuance thereof, that plaintiff was awarded the contract is demurrable); Perine *v.* Forbush, 97 Cal. 305, 32 Pac. 226 (holding that where, in an action to enforce a street assessment, it appears from the complaint that the contract on which the assessment was based was not entered into within fifteen days after the posting of the notice of its award, as provided by St. (1885) p. 147, and there is no averment that this delay was not caused by the fault of plaintiff, the complaint is demurrable as failing to state a cause of action); Carthage *v.* Badgley, 73 Mo. App. 123 (holding that where plaintiff, in an action on a special tax bill, makes additional allegations to those required, stating facts which show an improper authorization of the work, such petition becomes demurrable). And see Bernard *v.* Green, 60 S. W. 631, 22 Ky. L. Rep. 1448, holding that in an action to enforce a lien for the cost of a street improvement, a demurrer to the petition does not lie on the ground that a certain part of the apportionment warrant sued on was for keeping the street in repair, where neither the petition nor the ordinance or contract shows that anything was included for repairs.

50. Williams *v.* Bergin, 127 Cal. 578, 60 Pac. 164, (1899) 57 Pac. 1072, holding that an objection to a complaint that it does not allege that the notice of an award of a contract was "conspicuously" posted, as required by Street Improvement Act, § 5, cannot be presented on general demurrer.

51. See, generally, EVIDENCE.

52. Fanning *v.* Leviston, (Cal. 1889) 21 Pac. 121; Fanning *v.* Bohme, 76 Cal. 149, 18 Pac. 158; Henning *v.* Stengel, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64, 23 Ky. L. Rep. 1793 (filing of drawings and specifications); New Orleans *v.* Halpin, 17 La. Ann. 185, 87 Am. Dec. 523 (making contract); Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683 (taking of receipt before delivery of tax bills).

53. Doane *v.* Houghton, 75 Cal. 360, 17 Pac. 426 (holding that it would not be presumed that work was erroneously included in the assessment); Grey *v.* People, 194 Ill. 486, 62 N. E. 894 (holding that where, in an action for a delinquent special assessment, it is not shown that an ordinance, invalid because restricting the hiring of labor to members of labor unions, was applied or enforced in any manner in the contract for the work or the proceeding for making of the improvement, it will be presumed that the invalid ordinance was not applied to the improvement and assessment); Bernet *v.* Shanks, 55 S. W. 690, 21 Ky. L. Rep. 1558 (establishment of grade); Risley *v.* St. Louis, 34 Mo. 404; Perkinson *v.* Schnaake, 108 Mo. App. 255, 83 S. W. 301 (holding that it could not be assumed, in the absence of evidence, that an item contained in the bills for "removing old pavement and repaving roadway" included the making or repairing of a concrete foundation for the pavement, which was paid for by the city).

54. McComb *v.* Bell, 2 Minn. 295; Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45, 57 Nebr. 673, 78 N. W. 314; Merrill *v.* Shields, 57 Nebr. 78, 77 N. W. 368; Equitable Trust Co. *v.* O'Brien, 55 Nebr. 735, 76 N. W. 417; Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524. *Compare* Little *v.* Chicago, 46 Ill. App.

is upon plaintiff to prove the material allegations of the complaint where such allegations have been placed in issue.[55] Under some statutes it is provided that the production of certain documentary evidence of the assessment shall establish a *prima facie* case;[56] and when a *prima facie* case is established by a proper complaint and the production of these documents, the burden is upon defendant to prove any defects or irregularities in the proceedings.[57] Plaintiff is not bound

534 (holding that, where a contractor agrees to take his pay out of the proceeds of special assessments, and the city levies an assessment on a street-railway property, and sells the same, but neglects to take out a deed therefor, the contractor cannot maintain a bill against the street railway to pay the amount of such assessment without showing that it was just and equitable, as well as properly and validly made); Lufkin *v.* Galveston, 56 Tex. 522.

55. Robinson *v.* Merrill, 87 Cal. 11, 25 Pac. 162 (holding that in an action to foreclose a street assessment lien upon a lot under St. (1871–1872) p. 816, it being required by the statute that the owners of the lot be sued, the burden of proof that defendants were the owners is upon plaintiff, although the answer alleges that the title was in certain persons, one of whom was not a party defendant); Santa Barbara *v.* Huse, 51 Cal. 217.

Material matters not denied are admitted and need not be proved. Oakland Sav. Bank *v.* Sullivan, 107 Cal. 428, 40 Pac. 546.

56. See the statutes of the several states. And see the cases cited *infra*, this note.

The warrant, assessment, certificate, and diagram, together with an affidavit of demand and non-payment, establishes a *prima facie* case, under the California Street Improvement Act, St. (1891) p. 204; St. (1889) p. 168, § 12. See also St. (1889) p. 157, § 8; St. (1885) p. 157, c. 153, § 12; Act, April 1, 1872. Raisch *v.* Hildebrandt, 146 Cal. 721, 81 Pac. 21; Dowling *v.* Hibernia Sav., etc., Soc., 143 Cal. 425, 77 Pac. 141; Blanchard *v.* Ladd, 135 Cal. 212, 67 Pac. 130 (fact that the width and grade of the street have been officially established); Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262 (that the person making the return of demand was duly authorized, that the secretary of a corporation contractor had authority to execute a contract for a street improvement, and that the duty imposed on the superintendent of streets of recording the contract in his office was properly performed); California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802 (publication of resolution of intention); Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585; Fanning *v.* Leviston, 93 Cal. 186, 28 Pac. 943 (that work was done on recommendation of superintendent of streets); Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860 (demand of payment and that contract has been duly and fully performed); Manning *v.* Den, 90 Cal. 610, 27 Pac. 435 (contract with street superintendent). But see Witter *v.* Bachman, 117 Cal. 318, 49 Pac. 202 (holding that, it being made a prerequisite to a right of action for assessment for street improvement that the superintendent of streets record the return of the warrant and sign the record (Act, March 18, 1885, § 10), the return of the warrant, showing on its face that this was not done, will prevent recovery, notwithstanding section 12 makes the assessment, warrant, diagram, certificate, and affidavit of demand and non-payment "*prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent . . . and city council, and like evidence of the right of the plaintiff to recover"); Dougherty *v.* Harrison, 54 Cal. 428 (holding that written objections to the making of the improvement displaced the *prima facie* case).

The ordinance, contract, and apportionment establish a *prima facie* case under the Kentucky statute (St. § 2838). Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128, 64 S. W. 959, 23 Ky. L. Rep. 1102; Richardson *v.* Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917 (so holding, although the apportionment be erroneous, and must be corrected); Louisville *v.* Cassady, 105 Ky. 424, 49 S. W. 194, 20 Ky. L. Rep. 1348; Elder *v.* Cassilly, 54 S. W. 836, 21 Ky. L. Rep. 1274 (that apportionment has been properly made); Caldwell *v.* Cornell, 53 S. W. 35, 21 Ky. L. Rep. 812 (establishment of grade); Barrett *v.* Falls City Artificial Stone Co., 52 S. W. 947, 21 Ky. L. Rep. 669 (establishment of grade). See also Bitzer *v.* O'Bryan, 107 Ky. 590, 54 S. W. 951, 21 Ky. L. Rep. 1307.

The tax bill is, under Mo. Rev. St. (1899) p. 2513, § 25, *prima facie* evidence of the liability of defendant. Heman *v.* Larkin. (Mo. App. 1902) 70 S. W. 907; Heman *v.* Ring, 85 Mo. App. 231; Adkins *v.* Quest, 79 Mo. App. 36 (holding that plaintiff is not required to prove the date of delivery to make a *prima facie* case); Stifel *v.* Dougherty, 6 Mo. App. 441 (holding that the ordinance authorizing such work need not be introduced in evidence, although it is pleaded). See also St. Joseph *v.* Anthony, 30 Mo. 537; Gibson *v.* Zimmerman, 27 Mo. App. 90. But although any person having an interest in property sought to be charged with a special tax bill may be sued to enforce the same, such bill is not *prima facie* evidence of liability against a person so sued who is not stated in the bill to be the owner of the property. St. Joseph *v.* Forsee, 110 Mo. App. 127, 84 S. W. 98.

57. City St. Imp. Co. *v.* Laird, 138 Cal. 27, 70 Pac. 916; Belser *v.* Allman, 134 Cal. 399, 66 Pac. 492; San Francisco Paving Co. *v.* Bates, 134 Cal. 39, 66 Pac. 2; Barrett *v.*

to prove strictly formal allegations which do not aver conditions precedent to the action.[58] Where work is not completed in the time specified in the contract the burden is on plaintiff to show that it was completed within a reasonable time.[59] The burden is upon defendant to establish an affirmative defense pleaded by him.[60]

(B) *Admissibility and Sufficiency.* The rules governing the admissibility[61] and

Falls City Artificial Stone Co., 52 S. W. 947, 21 Ky. L. Rep. 669; Haag *v.* Ward, 186 Mo. 325, 85 S. W. 391; Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56, that ordinance was not legally enacted.

58. Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879, holding that no proof of an averment in a complaint by owners of street improvement bonds issued under the Barrett Law (Burns Annot. St. (1894) § 4296) that the city issuing the bonds failed and refused to pay the amount of assessments is necessary, in an action to enforce the lien of the assessments.

59. Sparks *v.* Villa Rosa Land Co., 99 Mo. App. 489, 74 S. W. 120.

60. Kansas City, etc., R. Co. *v.* Siloam Springs Waterworks Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248 (that ordinance was not duly passed and published); McVerry *v.* Boyd, 89 Cal. 304, 26 Pac. 885 (that the expense of improving a portion of the street occupied by a railroad was included in the assessment against defendant); Dashiell *v.* Baltimore, 45 Md. 615 (invalidity of ordinance depending on matter *dehors* record); Yost *v.* Toledo, etc., R. Co., 24 Ohio Cir. Ct. 169 (that the assessment exceeded the special benefit accruing to its property).

61. See EVIDENCE. And see cases cited *infra*, this note.

Assignment of assessment.— In an action by an assignee to enforce an assessment for a public improvement, which was against a certain lot, but to an unknown owner, the fact that the assignment, which describes the lot, also states that the assessment was to a certain person as owner, does not render it inadmissible, as the name of the alleged owner may be rejected as surplusage. Gill *v.* Dunham, (Cal. 1893) 34 Pac. 68. In an action against an abutting owner for the amount of a void street assessment which he promised to pay the contractor, it was proper to admit in evidence the written assignment to plaintiff by the contractor of the assessment, as tending to show an assignment of the obligation sued on. Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557.

Value of property.— Evidence of the value of the abutting property assessed, in an action to recover an assessment thereon for paving, is admissible only where a personal judgment is sought, and then only to show the assessment to be so flagrant an abuse of legislative power as to authorize the courts to declare it void. Hutcheson *v.* Storrie, (Tex. Civ. App. 1898) 48 S. W. 785. *Compare* Burnham *v.* Chicago, 24 Ill. 496; Chicago *v.* Burtice, 24 Ill. 489.

Preliminary proof of plan.— To make a plan of a street legal evidence in a proceeding to enforce a lien for improvements, it must be supported by proof of the passage of the ordinance of councils whereby the plan was adopted. Oakdale *v.* Sterling, 8 Pa. Super. Ct. 428, 43 Wkly. Notes Cas. 123.

Publication of notice.— The publication of the notice required by an ordinance providing that within three days after filing the roll the clerk shall give notice by publication of such filing may be shown by any competent proof, where the clerk is not required to preserve the proof in any particular way. Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002.

Conformity with allegations.— In a city's action to recover a tax an allegation that the tax was "duly levied" authorizes the reception in evidence of the ordinance under which it was levied. Kansas City *v.* Johnson, 78 Mo. 661.

Evidence held admissible.—Written assignment of contract (Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262); the "certificate of the city engineer," "assessment, diagram, and warrant," and the "return" (Reid *v.* Clay, *supra*; Williams *v.* Bergin, 129 Cal. 461, 62 Pac. 59); a certificate of the city engineer (O'Connor *v.* Hooper, 102 Cal. 528, 36 Pac. 939); copies of contract (Manning *v.* Den, 90 Cal. 610, 27 Pac. 435); the affidavit of demand (Deady *v.* Townsend, 57 Cal. 298); Dyer *v.* Brogan, 57 Cal. 234); plans and specifications for street improvements, prepared by the civil engineer of a city in obedience to the duty imposed on him by statute (Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723); record of the proceedings of a city council containing the notice for bids and providing for assessment, and the affidavits for a precept to collect, and the precept itself (Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271); extracts from books of the controller relating to street improvements, in which claims for such improvements were recorded (O'Leary *v.* Sloo, 7 La. Ann. 25); the original record of the ordinance authorizing the improvement (Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249); evidence controverting the ownership and authority of the signers of a protest (Sedalia *v.* Montgomery, 109 Mo. App. 197, 88 S. W. 1014); evidence concerning the condition of the pavement during the first year after it was laid (Hill-O'Meara Constr. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318); an assessment certificate notwithstanding defect in description (Hutcheson *v.* Storrie, (Tex. Civ. App. 1898) 48 S. W. 785).

Evidence held inadmissible.—A certificate of an engineer not such as required by the statute (Obermeyer *v.* Patterson, 130 Cal. 531, 62 Pac. 926); private contracts between plaintiff and defendants, which included additional work never performed (San Fran-

sufficiency[62] of evidence in civil actions apply generally to proceedings to enforce assessments.

(x) *Trial or Hearing.* The trial of an action to enforce special assessments is in the absence of statutory provisions governed by the rules relating to civil actions generally.[63] Controverted questions of fact are for the jury, where a jury trial is had,[64] under proper instructions.[65] In case findings of facts are made by the court they should be of the ultimate and not the probative facts.[66]

cisco Paving Co. *v.* Dubois, 2 Cal. App. 42, 83 Pac. 72); the recitals in an ordinance declaring a new street open to public travel to establish the jurisdiction of the city council to levy a special tax (Merrill *v.* Shields, 57 Nebr. 78, 77 N. W. 368); evidence in an action to enforce an assessment for sidewalks that the city had not built all the walks ordered by the ordinance (Pierson *v.* People, 204 Ill. 456, 68 N. E. 383); statements made in connection with negotiations for a compromise and settlement of the contractor's claim (Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271); parol testimony that notices of award of contracts for public improvements were not published by order of the board of supervisors (Dorland *v.* McGlynn, 47 Cal. 47); ordinance providing for different improvements than that estimated (Chicago Terminal Transfer R. Co. *v.* Chicago, 184 Ill. 154, 56 N. E. 410). The county tax list is incompetent to prove a special assessment. Muscatine *v.* Chicago, etc., R. Co., 88 Iowa 291, 55 N. W. 100. Where the defense is alleged, in an action to recover a special assessment for a district sewer, that the sewer constructed was a public sewer, to be paid for by the municipality, and not by special assessments, evidence of the dimensions and material of the sewer, and evidence showing that it is larger than certain public sewers constructed by the city is not material. Hill *v.* Swingley, 159 Mo. 45, 60 S. W. 114.

62. See cases cited *infra*, this note.

Variance.— Proof of a joint assessment will not support an allegation of a several one. New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

Evidence held sufficient.— For cases in which the evidence has been held sufficient to establish particular facts see Greenwood *v.* Chandon, 130 Cal. 467, 62 Pac. 736 (that all the documents were duly recorded, and the record signed); Moffitt *v.* Jordan, 127 Cal. 622, 60 Pac. 173 (a compliance with a statute requiring the warrant, assessment, diagram, and certificate to be delivered to the contractor before making demand for payment of the assessment); Buckman *v.* Landers, 111 Cal. 347, 43 Pac. 1125 (demand publicly made on the lot); Baldrick *v.* Gast, 79 S. W. 212, 25 Ky. L. Rep. 1977 (that the proper authorities of a city accepted a public improvement); Button *v.* Gast, 73 S. W. 1014, 24 Ky. L. Rep. 2284 (that plans and specifications were on file before the contract was let); De Soto *v.* Showman, 100 Mo. App. 323, 73 S. W. 257 (that no estimate was ever submitted to the council).

Evidence held insufficient.— For cases illustrative of the insufficiency of evidence to establish particular facts see Witter *v.* Bachman, 117 Cal. 318, 49 Pac. 202 (holding that admission in evidence, without objection, of a warrant does not prove what is not shown thereby, but is alleged in the complaint, and is necessary to recovery, that the superintendent of streets recorded the return of the warrant and signed the record); Dorland *v.* Bergson, 78 Cal. 637, 21 Pac. 537 (establishment of grade); Pittsburgh, etc., R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454 (valid assessment which plaintiff had a right to enforce); Cincinnati *v.* Longworth, 10 Ohio Dec. (Reprint) 598, 22 Cinc. L. Bul. 153 (insufficiency of repairs).

63. See Trial. And see Gibson *v.* Chicago, 22 Ill. 566 (holding that a court had authority to continue an action to recover assessments for public improvements in the same manner as any other case within its general jurisdiction); Baltimore, etc., R. Co. *v.* Bellaire, 60 Ohio St. 301, 54 N. E. 263.

64. Hill-O'Meara Constr. Co. *v.* Hutchinson, 100 Mo. App. 294, 73 S. W. 318 (estoppel); Sparks *v.* Villa Rosa Land Co., 99 Mo. App. 489, 74 S. W. 120 (holding that the question whether a contract for grading a street has been performed within a reasonable time is one of fact, and holding also that where, under an ordinance and contract for grading a city street, the contractor is in effect given a reasonable time to complete the work, although a certain period is named, the question whether an extension of time, granted by ordinance after the named period had expired, was valid as against an abutting owner, is one of fact).

65. St. Louis *v.* Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477, holding that in a suit on a tax bill for an assessment for a local improvement, instructions given at the request of the city, based on the erroneous supposition that the jury can fix and assess the benefits, do not, as against the city, cure the error in an instruction to disregard the report of the commissioners, which is conclusive thereof.

66. City St. Imp. Co. *v.* Babcock, (Cal. 1902) 68 Pac. 584, holding that it was sufficient where in an action on a street assessment the court found that the board of supervisors did not duly pass a resolution ordering the work to be done, instead of finding the facts from which it might appear that the resolution was not duly passed. See also Dugger *v.* Hicks, 11 Ind. App. 374, 36 N. E. 1085, holding findings in respect to notice sufficient.

Scope of findings.— Where the validity of an assessment is put in issue by the plead-

(XI) *JUDGMENT*—(A) *In General.*[67] The judgment in proceedings to enforce a special assessment must conform to the pleadings,[68] proof,[69] and findings,[70] and must be entered only against persons properly made parties.[71] Where the city cannot be made liable for an improvement unless the property-owners are not liable,[72] a judgment cannot be rendered against the city in advance of a judgment against the lot owner;[73] but on a finding that the property is not liable judgment may be rendered against the city in a proper state of the pleadings.[74] A judgment for the sale of land must describe the property.[75] And where separate assessments are enforced against several lots the judgment should state the amount with which each is chargeable.[76] Under some statutes the court may in proceedings to enforce a lien correct any mistake of the council so as to do complete justice to all.[77] A

ings, any fact or facts going to show that no valid assessment was ever levied are within the issues, and properly included in the findings. Doane *v.* Barber, (Cal. 1885) 9 Pac. 89.

67. **Personal judgment** see *infra*, XIII, F, 8.

68. See Dorland *v.* Bergson, 78 Cal. 637, 21 Pac. 537 (holding that the amount due for curbing cannot be segregated from the total amount assessed in gross against a lot for street improvements, so as to recover for that item alone); Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595 (holding that where, in an action to recover taxes assessed for improvement of I street, the complaint alleged that the tax was levied for the improvement of J street, and service of process was obtained, and judgment rendered as required by law, such judgment was not void, but, if erroneous, was only liable to be reversed on appeal); Daly *v.* Gubbins, 35 Ind. App. 86, 73 N. E. 833 (holding that a judgment for the collection of a municipal assessment cannot be sustained where two paragraphs of the complaint are fatally defective, and the record does not affirmatively show that the judgment rests solely on the third paragraph).

69. Heman Constr. Co. *v.* Loevy, 179 Mo. 455, 78 S. W. 613; Yost *v.* Toledo, etc., R. Co., 24 Ohio Cir. Ct. 169. See also Harrisburg *v.* Mish, 14 Pa. Super. Ct. 496, holding that when a judgment rendered on a special assessment is invalid because the contract has not been certified, as required by the act of May 23, 1899, the defect is not cured by the contract being certified after verdict.

70. Seattle *v.* Whitworth, 18 Wash. 126, 51 Pac. 345, holding that a finding of fact that the cost of a municipal improvement, an assessment lien for which was sought to be foreclosed, was greater than necessary, owing to errors of the city engineer, but that the amount of the excess over the necessary cost thereof was not determinable, and that plaintiff was not entitled to recover any penalties, interest, or costs, would be construed in support of the decree for the amount of the assessment only, as a statement that the amount of the increased expense due to the errors could not be determined exactly, but was fairly equal to the amount of penalty, interest, and costs.

71. Barber Asphalt Paving Co. *v.* Peck, 186 Mo. 506, 85 S. W. 387. See also Diggins *v.* Reay, 54 Cal. 525, holding that there is no statutory authority for a decree to enforce the lien of a street assessment, in the absence of any of the parties interested.

72. See *supra*, XIII, C, 9, b.

73. Bitzer *v.* O'Bryan, 107 Ky. 590, 54 S. W. 951, 21 Ky. L. Rep. 1307.

74. Louisville *v.* Gosnell, 47 S. W. 211, 20 Ky. L. Rep. 539.

75. Meyer *v.* Covington, 103 Ky. 546, 45 S. W. 769, 20 Ky. L. Rep. 239.

76. Brady *v.* Kelly, 52 Cal. 371. See Sutton *v.* Louisville, 5 Dana (Ky.) 28. But see Gray *v.* Bowles, 74 Mo. 419.

77. Orth *v.* Park, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251, 25 Ky. L. Rep. 1910, 26 Ky. L. Rep. 184, 342; Loeser *v.* Redd, 14 Bush (Ky.) 18; Terrell *v.* Paducah, 92 S. W. 310, 28 Ky. L. Rep. 1237, 5 L. R. A. N. S. 289 (holding that where a city contracts for the improvement of a thoroughfare between high and low water mark on a navigable river, providing that the owners of the abutting property shall be liable for the cost, and the contract for the liability of the adjoining owners is invalid because the right in the land forming the bank of the river between high and low water mark is in the public, the court can enter judgment against the city for the contract price of the improvement); Specht *v.* Barber Asphalt Paving Co., 80 S. W. 1106, 26 Ky. L. Rep. 193; Louisville *v.* Clark, 49 S. W. 18, 20 Ky. L. Rep. 1265 (holding that where the contract price embraced the cost of repairs for five years the chancellor should have corrected the apportionment warrants, by deducting the amount intended to cover such repairs, and rendered a judgment against the lot owners for the actual cost of construction). *Compare* Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128, 64 S. W. 959, 23 Ky. L. Rep. 1102 (holding that, although the change in the grade was unnecessary, and might have been prevented by injunction, and although the excavations necessary to conform to the grade might have been prevented until compensation had been provided for the injury to be occasioned thereby, yet, as neither of these things was done, defendants in an action by the contractor to enforce his lien cannot have the cost of the excavation, which has been included in the assessment, apportioned among them, and recover against the city the

clerical error in the record of a judgment which does not render it misleading is not fatal.[78]

(B) *Conclusiveness and Effect.* Judgments enforcing assessments are open to collateral attack only on the grounds which may be urged against judgments in general.[79] The judgment is conclusive as to all defenses which might have been urged in opposition thereto.[80] The judgment is not binding upon the interests of persons not made parties.[81] An election to foreclose a lien upon property abutting on the improvement will, it seems, not estop the holder from a subsequent foreclosure for a balance unpaid upon back lying property.[82]

(C) *Lien and Satisfaction.* The lien of the judgment has been held limited by a provision applicable to judgments generally.[83] An assignment of a judgment to the holder of a void tax deed upon the premises does not amount to a satisfaction in the absence of evidence showing such intention.[84]

(D) *Setting Aside.* Where an assessment warrant has been issued by mistake against the wrong person the real party in interest may have a judgment thereon set aside.[85] The burden is on the person seeking to set aside the judgment to establish his right to equitable relief.[86] A judgment for want of an affidavit of defense may be stricken off when leave is granted to strangers to intervene and

amounts apportioned, the remedy being an action at law to recover the damages which have actually accrued from the change of grade); Walsh *v.* Sims, 65 Ohio St. 211, 62 N. E. 120; Jaeger *v.* Burr, 36 Ohio St. 164; Ridenour *v.* Saffin, 1 Handy (Ohio) 464, 12 Ohio Dec. (Reprint) 238.

In the absence of statute.—Where property is assessed for a street improvement which should not have been placed on the assessment roll, the court has no power, in a proceeding to enforce the collection of the assessments, to disregard it and let the assessment for the amount justly chargeable stand, as that would be equivalent to making a new roll and a new assessment, which is clearly beyond the province of the court. Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077. Although Laws (1889–1890), c. 7, § 124, as amended by Laws (1893), p. 159, permits recovery of street assessments notwithstanding irregularities and defects in the assessment proceedings, it has no application to cases where there has been no assessment. Vancouver *v.* Wintler, 8 Wash. 378, 36 Pac. 278, 685. *Compare* St. Joseph *v.* Dillon, 61 Mo. App. 317 (holding that if the proceedings leading up to the issue of tax bills are valid, it is proper to deduct that portion for which no legal claim can be made, and enforce the balance); Creamer *v.* McCune, 7 Mo. App. 91 (holding that in an action on a special tax bill, where there has been an overassessment from a failure to include certain property in the apportionment, the court may apply the proper correction in a reduction of the amount to be recovered).

78. Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283 (holding that the judgment must be limited to the description of the lot as found in the assessment); Bird *v.* McClelland, etc., Brick Mfg. Co., 45 Fed. 458 (holding that where four separate suits on four separate tax bills under the same grading contract were simultaneously brought against defendant, a clerical error by the clerk of the court in transposing the court numbers in two of the cases on entering judgment, so that they do not correspond with the numbers given in the orders, and proofs of publication, does not invalidate the judgment).

79. Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571; Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838.

Collateral attack upon judgment in general see JUDGMENTS, 23 Cyc. 1055 *et seq.*

80. Morey *v.* Duluth, 75 Minn. 221, 77 N. W. 829 (holding that conceding the assessment was prematurely made, it was a defense which, under the charter, should have been urged against the confirmation of the assessment and the entry of judgment against the land); Philadelphia *v.* Lukens, 22 Pa. Super. Ct. 298.

81. Barber Asphalt Paving Co. *v.* Young, 94 Mo. App. 204, 68 S. W. 107, 1115.

82. Cleveland, etc., R. Co. *v.* Porter, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179. See also Voris *v.* Pittsburg Plate Glass Co., 163 Ind. 599, 70 N. E. 249.

83. Hinckley *v.* Seattle, 37 Wash. 269, 79 Pac. 779, six years from date of entry. See also Dorland *v.* Smith, 93 Cal. 120, 28 Pac. 812, holding that an order that execution issue on a decree foreclosing a street assessment more than five years after the decree, and a sale under such execution, is void.

84. Barber Asphalt Paving Co. *v.* Kiene, 99 Mo. App. 528, 74 S. W. 872.

85. Voris *v.* Gallaher, 87 S. W. 775, 27 Ky. L. Rep. 1001, holding that where a city apportionment warrant was issued by mistake against the grantor of the record owner, and an action was brought thereon, the court had jurisdiction, at the instance of such owner, to set aside a judgment thereon against his grantor.

86. Philadelphia *v.* Unknown Owner, 149 Pa. St. 22, 24 Atl. 65 (holding that the granting of a rule to open a judgment, made by the actual owner of the premises more than ten years after the judgment was ob-

defend.[87] Where no notice has been served on the terre-tenant he may intervene and show a discharge of the lien on a rule to open the judgment.[88]

(XII) *REVIEW.* The right of appeal in proceedings to enforce special assessments rests entirely upon statute.[89] Where the contrary does not appear from the record the validity of the proceedings will be presumed,[90] and as a rule a finding based upon conflicting evidence will not be disturbed.[91] Objections first made on appeal where there has been an earlier opportunity to urge them cannot be considered.[92] A judgment will not be set aside except for substantial error prejudicial to the property-owner.[93]

tained, is within the discretion of the court); Philadelphia *v.* Lukens, 22 Pa. Super. Ct. 298 (holding that if the right is not clearly established, the chancellor, in the exercise of his equitable discretion, may refuse the application). See Philadelphia *v.* Adams, 15 Pa. Super. Ct. 483, holding that where a municipal claim has been filed in Philadelphia, and judgment obtained thereon and revived, the action of the court of common pleas in refusing to strike off the judgment, because it is alleged that there was a registered owner not served, will not be reversed on appeal.

87. Philadelphia *v.* Merz, 9 Pa. Dist. 369, 24 Pa. Co. Ct. 269.

88. Olyphant Borough *v.* Egreski, 29 Pa. Super. Ct. 116.

89. See the statutes of the several states. And see Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238; Martin *v.* Slaughter, 50 S. W. 27, 20 Ky. L. Rep. 1743 (holding that the failure to give time to redeem from a sale of property to satisfy a lien for street improvements renders the judgment erroneous, and not void, and therefore an appeal lies therefrom); Plaquemines Police Jury *v.* Mitchell, 37 La. Ann. 44; Skrainka *v.* Allen, 2 Mo. App. 387; Baltimore, etc., R. Co. *v.* Bellaire, 60 Ohio St. 301, 54 N. E. 263; Corry *v.* Gaynor, 21 Ohio St. 277; Toledo *v.* Barnes, 8 Ohio Cir. Ct. 684, 4 Ohio Cir. Dec. 195; Clifton *v.* Cincinnati, 5 Ohio Dec. (Reprint) 570, 6 Am. L. Rec. 687.

Costs.—A city of the first class is not liable for briefs, abstracts, printing, etc., used in prosecuting an appeal to the supreme court, in an action brought by contractors in the city's name against abutting property holders to enforce a claim for grading the streets of such city. Harkness *v.* Independence, 56 Mo. App. 527.

90. San Francisco Paving Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076; Blanchard *v.* Ladd, 135 Cal. 214, 67 Pac. 131; Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; Hadley *v.* Dague, 130 Cal. 207, 62 Pac. 500; Williams *v.* Bisagno, (Cal. 1893) 34 Pac. 640; Orth *v.* Park, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251, 25 Ky. L. Rep. 1910, 26 Ky. L. Rep. 184, 342.

91. Henning *v.* Stengel, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64, 23 Ky. L. Rep. 1793; Springfield *v.* Schmook, 120 Mo. App. 41, 96 S. W. 257. See Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557, holding that a judgment for plaintiff would not be reversed on account of failure to sufficiently prove the assignment of the obligation sued on.

92. Williams *v.* McDonald, 58 Cal. 527; Leeds *v.* Defrees, 157 Ind. 392, 61 N. E. 930; Auditor-Gen. *v.* Chase, 132 Mich. 630, 94 N. W. 178; Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014. See Barber Asphalt Paving Co. *v.* Ridge, 169 Mo. 376, 68 S. W. 1043, holding a constitutional question properly urged on motion for new trial. But see Bonte *v.* Taylor, 24 Ohio St. 628, holding that a judgment to enforce the lien of an assessment for a street improvement, rendered on a petition which shows on its face that the statutory period for the continuance of such lien had expired before the commencement of the suit, should be reversed; and the error is not waived by a failure to demur or answer.

Waiver of objections.— In an action to foreclose a street assessment lien, where no issue was made as to the validity of the contract, and defendant treated it as valid, and introduced it in evidence, he could not thereafter claim that it and the assessment were invalid. Ede *v.* Knight, 93 Cal. 159, 28 Pac. 860.

93. King *v.* Lamb, 117 Cal. 401, 49 Pac. 561 (holding that evidence that the owner of the property affected desired the work done was without prejudice); Ross *v.* Van atta, 164 Ind. 557, 74 N. E. 10; Snyder *v.* Barber Asphalt Paving Co., 73 S. W. 1118, 24 Ky. L. Rep. 2348 (holding that where defendants failed to prove that if the assessment had been on a different basis the assessment against their property would have been smaller than the assessment levied, judgment in favor of plaintiff would not be reversed, although it was doubtful whether the theory of the assessment was correct); Button *v.* Gast, 73 S. W. 1014, 24 Ky. L. Rep. 2284; Breath *v.* Galveston, (Tex. Civ. App. 1898) 46 S. W. 903.

Where city does not appeal.— Where, in an action by a contractor to enforce a lien for costs of a street improvement, a large part of the cost being for transforming the street into a subway under a railroad bridge, the court erred by adjudging the portion of the cost of the subway a charge against the abutting property-owners, charging ninety per cent of the entire cost against them, the fact that the court also erred in charging the remaining ten per cent against the city as for repairs, of which it did not complain, is no reason for not reversing the judgment against the property-owners, it appearing that the apportionment against them would have been

(XIII) *COSTS AND ATTORNEY'S FEES.* Under some statutes an attorney's fee may be allowed in actions to enforce assessments,[94] under others a collection fee may be recovered.[95]

h. Remedies Upon Assessment Bonds. Under some statutes bonds representing the amount of the assessment against the property benefited are issued to the contractor,[96] and provision is made for the sale of such property in the case of delinquency.[97] Under some statutes the contractor may enforce either the bonds or the assessment lien.[98]

6. SALE OF LAND — a. In General. Proceedings for the sale of land for the payment of special assessments must be conducted in strict accordance with the statute.[99] The sale must be made by the officer designated by statute, if such a

less if made on the proper basis of charging them with the excess over the cost of making the subway. Kreiger *v.* Gosnell, 70 S. W. 683, 24 Ky. L. Rep. 1095.

94. See the statutes of the several states. And see the following cases:

Arkansas.— Ft. Smith School Dist. *v.* Board of Imp., 65 Ark. 343, 46 S. W. 418.

California.— Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262; Gillis *v.* Cleveland, 87 Cal. 214, 25 Pac. 351.

Indiana.— Pittsburgh, etc., R. Co. *v.* Taber, (1906) 77 N. E. 741; Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879; Brown *v.* Central Bermudez Co., 162 Ind. 452, 69 N. E. 150; Cleveland, etc., R. Co. *v.* Porter, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179; Indiana Bond Co. *v.* Jameson, 24 Ind. App. 8, 56 N. E. 37; Palmer *v.* Nolting, 13 Ind. App. 581, 41 N. E. 1045.

Pennsylvania.— Ashley *v.* Smith, 8 Kulp 60.

Washington.— Montesano *v.* Blair, 12 Wash. 188, 40 Pac. 731.

95. See Tuttle *v.* Polk, 84 Iowa 12, 50 N. W. 38.

96. See the statutes of the several states. And see German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 (sustaining the validity of Street Bond Act, Feb. 27, 1893 (St. 1893), p. 33); Ramish *v.* Hartwell, 126 Cal. 443, 58 Pac. 920; Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879 (holding that where an ordinance, in directing the issuance of street improvement bonds under the Barrett Law (Burns Annot. St. (1894) § 4296), named the rate of interest they were to bear, there was a sufficient compliance with section 4294, authorizing the city council to fix the rate of interest).

97. See Ramish *v.* Hartwell, 126 Cal. 443, 58 Pac. 920, holding that the remedy under a statute providing that sale should be in the manner provided for the collection of delinquent taxes generally was not affected by a later statute changing the method of sale for taxes.

98. Shirk *v.* Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490, holding that under Acts (1901), p. 537, c. 231, § 6, declaring that assessments for a street improvement shall be a lien, authorizing an action to foreclose the lien on the non-payment of the assessments, and providing for the issuance of improvement bonds which may be delivered to the contractor in payment for the work, etc., a contractor constructing a street improvement may sue on the bonds issued by the city in anticipation of the assessments or on the lien created by the assessments for benefits. See Jessen *v.* Pierce, 25 Ind. App. 222, 57 N. E. 941, holding that where defendants, who had undertaken to pay their assessments by instalments, had paid the instalments due to the county treasurer, the holders of unpaid coupons were not entitled to foreclose the lien of the assessments, but must resort to the special fund in the hands of the treasurer, set apart for the payment of the cost of the improvement.

99. Brumby *v.* Harris, 107 Ga. 257, 33 S. E. 49; Royce *v.* Aplington, 90 Iowa 352, 57 N. W. 868; Cooper *v.* Brooklyn, 4 N. Y. St. 834; Sharpe *v.* Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; Sharpe *v.* Speir, 4 Hill (N. Y.) 76. See Moran *v.* January, 47 Mo. 166; Jordan *v.* Hyatt, 3 Barb. (N. Y.) 275, holding that a municipal corporation empowered by its charter to order lands directed to be sold for assessments to be sold for a term of years has no authority to direct the "undivided half" of a lot to be sold in that manner. But see Lexington *v.* Woolfolk, 117 Ky. 708, 78 S. W. 910, 25 Ky. L. Rep. 1817.

Demand.— Before a sale of the premises, the assessment should be demanded twice of the actual owner, and without evidence of such demand the corporation should be held to have no jurisdiction to sell the property for the non-payment of the assessment. Paillet *v.* Youngs, 4 Sandf. (N. Y.) 50; Bennett *v.* New York, 1 Sandf. (N. Y.) 485.

Conformity with execution.— A levy and sale of an entire forty-seven-foot lot, where the city tax fieri facias, issued on a local assessment for paving, directed a levy on only twenty feet, was illegal. Brumby *v.* Harris, 107 Ga. 257, 33 S. E. 49.

Applicability of general statute for sale of realty.—A statute providing that no sale of indivisible property shall be made until all debts that are a lien thereon are due does not apply to a proceeding to sell property to satisfy one of several instalments of an assessment for street improvements. Campbell County *v.* Schneider, 106 Ky. 605, 51 S. W. 13, 21 Ky. L. Rep. 212.

Property subject to remainder.—A statutory lien for a street improvement being

designation is made,[1] at the place designated,[2] and upon such notice as is prescribed.[3] In the absence of a statutory provision to the contrary a sale may be made before the improvement is completed.[4]

b. Report or Return. A statutory provision requiring a return of the amount for which each lot assessed was sold is mandatory, and a failure to make such return will invalidate the sale.[5]

c. Certificate of Sale. The giving and recording of a certificate of sale are, under some statutes, essential to the validity of the sale.[6] Unless the property be sufficiently described in the certificate of sale, as required by statute, the sale is void.[7] But unless expressly so provided, the certificate need not be under seal.[8]

d. Confirmation or Setting Aside of Sale. Under a power to confirm or set aside a sale the court cannot modify the sale or its terms.[9] A sale for an illegal charge will be set aside.[10] An order of confirmation may be set aside, where it erroneously fails to allow for redemption.[11]

e. Injunction Against Tax Deed or Lease. In a proper case the issuance of a tax deed may be restrained.[12] So the execution of a tax lease may be restrained, where it will be a cloud on title.[13] But as a general rule an injunction will not be granted for mere irregularities.[14]

against the land itself, and not against the owners, if the land is subjected to sale thereunder, the lien-holder is entitled to have his lien enforced against the entire lot, irrespective of the various interests of life-tenants and remainder-men therein. Duker *v.* Barber Asphalt Paving Co., 74 S. W. 744, 25 Ky. L. Rep. 135.

1. Hills *v.* Chicago, 60 Ill. 86.

The appointment of a commissioner to sell the property on foreclosure of the lien for the street assessment is not error, although the statute authorizing it was enacted at a later date than the Street Improvement Act. Crane *v.* Cummings, 137 Cal. 201, 69 Pac. 984.

2. See Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301.

3. Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301; Montford *v.* Allen, 111 Ga. 18, 36 S. E. 305; Boynton *v.* People, 166 Ill. 64, 46 N. E. 791 (holding that where a judgment for sale for delinquent assessment is appealed from and affirmed, and the time has passed for which the original notice of sale was given, without any sale, the county court cannot order sale without a new notice); London, etc., Mortg. Co. *v.* Gibson, 77 Minn. 394, 80 N. W. 205, 777 (holding that a publication of a notice of tax-sale is not invalid because such notice is embraced in an advertisement with other judgment notices of the tax-sale of different lots for non-payment of delinquent taxes).

4. Felker *v.* New Whatcom, 16 Wash. 178, 47 Pac. 505.

5. Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26.

6. Davis *v.* Evans, 174 Mo. 307, 73 S. W. 512, holding that where on a sale of land under special execution for non-payment of a special assessment made under the Kansas City Charter (1889), pp. 155, 156, as amended, the sheriff refused to issue to the purchaser a certificate of purchase as required by such charter, and the purchaser acquiesced in such refusal, he acquired no title.

7. Naltner *v.* Blake, 56 Ind. 127.

8. Mankato First Nat. Bank *v.* Hodapp, 98 Minn. 534, 107 N. W. 957; Willard *v.* Hodapp, 98 Minn. 269, 107 N. W. 954.

9. Ohio L. Ins., etc., Co. *v.* Goodin, 10 Ohio St. 557.

10. *In re* Willis, 30 Hun (N. Y.) 13, holding that a sale will be set aside, although the amount of illegal interest included in the assessment was only one dollar.

11. Barbee *v.* Fox, 79 Ky. 588.

12. Duncan *v.* Elizabeth, 25 N. J. Eq. 430 (holding that a city will be enjoined from executing and delivering a declaration of sale of the lands of a person on its appearing from his bill and affidavit, and not being contradicted, that his lands in the city have been sold by it for assessments, in connection with other lands not owned by him, and that the city has refused his offer to redeem his own lands unless the assessment on the lands not owned by him was also paid); Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823; Canfield *v.* Smith, 34 Wis. 381 (holding that in an action to restrain the issuance of a tax deed upon a tax certificate on the sale of plaintiff's lots for an improvement tax, it is no defense that the owner of the tax certificate was a stranger to the proceedings under which the improvement was made, and was ignorant of the defects in such proceedings at the time of his purchase); Foote *v.* Milwaukee, 18 Wis. 270.

13. Lennon *v.* New York, 5 Daly (N. Y.) 347 [*affirmed* in 55 N. Y. 361]; Matthews *v.* New York, 14 Abb. Pr. (N. Y.) 209.

14. Lawrence *v.* Killam, 11 Kan. 499, holding that where a partnership had made a contract with a city to build sidewalks, and thereafter one member of such partnership became a member of the city council, and while such member the sidewalks were built, accepted, and paid for by the city, a lot

f. Actions to Set Aside Sales. By statute provision is sometimes made for the vacation of illegal assessment sales upon petition to the court[15] or upon certiorari;[16] and, in the absence of statute, relief against a void sale may be had in equity,[17] in the absence of laches[18] or other remedy.[19] A provision for an appeal in the assessment proceedings is not, unless made so by statute, exclusive of a remedy by action to vacate a sale upon the assessment.[20] An action to set aside an assessment sale must be brought within the time prescribed by the statute,[21] it being sometimes held to be governed by a limitation referring to general tax certificates;[22] but it is not controlled by a limitation of proceedings to set aside assessments.[23] A sale will not be annulled for irregularity without payment of the sum due;[24] but such a condition is not imposed where the assessment is wholly void.[25] Where the deed is under a sale for an illegal and void tax, the tax purchaser will not be compelled to reconvey, but will be perpetually enjoined from asserting title.[26] The costs may be imposed on the holder of the tax deed, where he has

owner whose lot had been sold for non-payment of the special assessment for such sidewalks was not on that account entitled, under Gen. St. p. 389, § 4, to have the sale set aside and a tax deed enjoined.

15. Matter of Deering, 55 How. Pr. (N. Y.) 296 [*reversed* in 21 Hun 618].

16. McCarthy *v.* Jersey City, 44 N. J. L. 136 (holding that a declaration of sale should be set aside when the assessment upon which it is founded is illegal, as when the commissioners did not make a written report as required by the city charter); State *v.* Perth Amboy, 38 N. J. L. 425 (holding that the act of April 2, 1869, providing that the proceedings upon which municipal declarations of sale are founded shall not be liable to be questioned collaterally, but may be at any time reviewed by certiorari, does not entitle a person whose land has been sold to take advantage by certiorari of objections to the preliminary proceedings, which previously he would have been estopped from setting up, as against the assessment).

17. McClave *v.* Newark, 31 N. J. Eq. 472; Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823.

18. Guest *v.* Brooklyn, 9 Hun (N. Y.) 198 [*reversed* on other grounds in 73 N. Y. 611].

19. Guest *v.* Brooklyn, 9 Hun (N. Y.) 198 [*reversed* on other grounds in 73 N. Y. 611], holding that the conveyance made on a sale for an assessment for a street improvement is only evidence of the regularity of the proceedings had before the sale, and not of the assessment and other proceedings had before the right to sue for the land attached; and hence equity will not interpose in behalf of the owner of the property to annul the sale for irregularities in the proceedings leading up to the assessment, which may be used to defeat a recovery under the conveyance.

Where lease is conclusive.— A lease executed by the corporation of New York to the purchaser on a sale of lands for assessments is conclusive evidence that the sale was regularly made, according to the provisions of the statute; and therefore a court of equity has jurisdiction to relieve the owner on the ground that the assessment was illegal, that no demand was made upon him, that no warrant was issued for the collection of the assessment, and that the recitals in the lease are untrue. Masterson *v.* Hoyt, 55 Barb. (N. Y.) 520.

20. Morrison *v.* St. Paul, 5 Minn. 108; Weller *v.* St. Paul, 5 Minn. 95; Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823. And see Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213, holding that where, in a case of assessments for public improvements, the only relief authorized on an appeal from the assessment of benefits is that the difference between the benefits assessed and the benefits actually secured shall be paid by the city, a provision that the appeal shall be the only remedy of the owner of any parcel of land for the redress of any grievance he may have by reason of the making of such improvements does not prevent a property-owner from attacking a sale based on such assessment, on the ground that the assessment was unequal and void, as the appeal is no adequate remedy in such case.

21. Henningsen *v.* Stillwater, 81 Minn. 215, 83 N. W. 983.

22. Hamar *v.* Leihy, 124 Wis. 265, 102 N. W. 568; Levy *v.* Wilcox, 96 Wis. 127, 70 N. W. 1109 (holding that the joining of taxes void for defects going to the validity of the assessment, and affecting the groundwork thereof, with other taxes, which a court of equity will require paid as terms of granting relief against the illegal taxes, will not prevent the running of limitations as to such illegal taxes); Pratt *v.* Milwaukee, 93 Wis. 658, 68 N. W. 392; Dalrymple *v.* Milwaukee, 53 Wis. 178, 10 N. Y. 141.

23. Brennan *v.* Buffalo, 162 N. Y. 491, 57 N. E. 81 [*reversing* 13 N. Y. App. Div. 453, 43 N. Y. Suppl. 597].

24. Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301; Pratt *v.* Milwaukee, 93 Wis. 658, 68 N. W. 392.

25. Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213.

26. Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332.

made an unsuccessful defense.[27] especially where he refused to surrender his certificate of purchase before suit was brought.

g. Title and Rights of Purchaser — (i) *In General.* Where provision for redemption is made by statute, the purchaser acquires merely a defeasible title, and the legal title does not pass until the period of redemption expires.[28] Upon the execution of a sheriff's deed the title of the grantee relates back to the time at which the property is struck off to him.[29] The title of the purchaser is not affected by the inadequacy of the price for which the sale was made.[30] Where a purchaser of premises in good faith relies on the controller's certificate, which the city charter empowered him to give, that the taxes and assessments have been paid, the city cannot bind such purchaser by new assessments for work prior to the certificate.[31]

(ii) *Irregular and Invalid Sales.* Where the statute under which the sale is had has not been followed with regard to the steps necessary to a valid sale, the purchaser takes no title as against the owner.[32] But on the other hand the title of a purchaser at a sale under a judgment enforcing an assessment will not be affected by irregularities not invalidating the judgment.[33] Where the proper parties have not been brought into the proceedings their title will not be divested,[34] although under some statutes any irregularity or error in regard to the name of the owner is cured by sale.[35] One in whose favor a charge for ground-rent exists may by neglect be estopped to assert such claim against a purchaser on a claim filed against the occupant.[36] A void sale in proceedings to enforce an assessment is not a bar to a second proceeding to recover the assessment.[37]

27. Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332.

28. Hess *v.* Potts, 32 Pa. St. 407.

29. Howard *v.* Brown, 197 Mo. 36, 95 S. W. 191, holding that a deed made by the purchaser between that time and the time when he received the deed conveyed the title that he acquired by the sale.

30. O'Brien *v.* Bradley, 28 Ind. App. 487, 61 N. E. 942.

31. Elizabeth *v.* Shirley, 35 N. J. Eq. 515.

32. *California.*— Brady *v.* Burke, 90 Cal. 1, 27 Pac. 53.

Illinois.—Glos *v.* Collins, 110 Ill. App. 121.

Minnesota.— Security Trust Co. *v.* Von Heyderstaedt, 64 Minn. 409, 67 N. W. 219 (holding that if the treasurer sells a lot for less than the full amount of the judgment, as appears in the process, and the certificate of sale shows that fact, the purchaser acquires no right in the property); McComb *v.* Bell, 2 Minn. 295.

New Jersey.—Carron *v.* Martin, 26 N. J. L. 594, 69 Am. Dec. 584 [*reversing* 26 N. J. L. 228]; Kean *v.* Asch, 27 N. J. Eq. 57.

New York.— Doughty *v.* Hope, 1 N. Y. 79; Hopkins *v.* Mason, 61 Barb. 469, 42 How. Pr. 115; Franklin *v.* Pearsall, 53 N. Y. Super. Ct. 271. And see Jackson *v.* Healy, 20 Johns. 495.

Pennsylvania.—Ferguson *v.* Quinn, 123 Pa. St. 337, 16 Atl. 844; Simons *v.* Kern, 92 Pa. St. 455, holding that where an examination of the records would have informed a purchaser that a lot sold had a registered owner, and the record of the proceeding admonished him that there was no such service of the writ as the law required, and without which the sale was expressly forbidden, he took nothing by his purchase.

33. Dunn *v.* German Security Bank, 3 S. W. 425, 8 Ky. L. Rep. 777 (holding that the rights of a purchaser are not affected by the failure of the owner of the warrants to aver in his complaint that the provisions of the city charter with respect to the publication of the ordinance ordering the improvement had been complied with, where the court which decreed the sale had jurisdiction of the parties and the subject-matter); Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838 (holding that the fact that the purchaser at a sale under a judgment in an action on a street-improvement certificate, the citation in which case misstated the corporate name of the city, knew of the irregularity of the citation after the sale, but before he paid the purchase-money, did not affect the validity of the sale or of the deed to him).

34. Wood *v.* Curran, 99 Cal. 137, 33 Pac. 774; Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52; Perkinson *v.* Meredith, 158 Mo. 457, 59 S. W. 1099; Ferguson *v.* Quinn, 123 Pa. St. 337, 16 Atl. 844; Simons *v.* Kern, 92 Pa. St. 455; Delaney *v.* Gault, 30 Pa. St. 63. But *compare* Kelly *v.* Mendelsohn, 105 La. 490, 29 So. 894, holding that the purchaser at a sale of property pursued in enforcement of a local assessment acquires a good title by the adjudication; for it is a proceeding *in rem*, one to enforce a real charge, a debt on the property, irrespective of the person owning.

35. Emrick *v.* Dicken, 92 Pa. St. 78.

36. Salter *v.* Reed, 15 Pa. St. 260.

37. New York *v.* Colgate, 12 N. Y. 140 [*affirming* 2 Duer 1]. But *compare* Kirwin *v.* Nevin, 111 Ky. 682, 64 S. W. 647, 23 Ky. L. Rep. 947.

(III) *Effect Upon Other Liens and Encumbrances.* Where an assessment for improvements is a prior lien upon the property charged [38] a sale for the enforcement thereof passes title free from all encumbrances.[39] Sale on execution against the record owner passes title as against the grantee of an unrecorded deed of which the purchaser has no notice.[40] Under a tax lease the lessee of the city takes a perfect title for the term contained in the lease discharged of all claims of the owner during the term.[41]

(IV) *Refunding or Recovery of Money Paid by Purchaser at Illegal Sale.* In the absence of statutory provision to the contrary,[42] the doctrine of *caveat emptor* applies to sales upon assessments,[43] and the purchaser at an illegal sale cannot recover the money paid by him for the land either from the city [44] or

38. See *supra*, XIII, E.

39. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Wilson *v.* California Bank, 121 Cal. 630, 54 Pac. 119 (holding that the title acquired under the sale following a judgment based on a street assessment is not subject to a mortgage on the property, and cannot be litigated in an action to foreclose it); Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52; O'Brien *v.* Bradley, 28 Ind. App. 487, 61 N. E. 942; Bryan's Appeal, 101 Pa. St. 389 (holding that a testamentary charge on real estate situate in the city of Pittsburg is discharged by a judicial sale of the premises under a subsequent municipal lien for grading the street on which it abutted); Kirby *v.* Waterman, 17 S. D. 314, 96 N. W. 129.

40. St. Joseph *v.* Forsee, 110 Mo. App. 127, 84 S. W. 98.

41. Warner *v.* Van Alstyne, 3 Paige (N. Y.) 513.

42. See the statutes of the several states. And see Lynde *v.* Malden, 166 Mass. 244, 44 N. E. 227 (holding the facts not to show that the sale was void so as to authorize a recovery); Otis *v.* St. Paul, 94 Minn. 57, 101 N. W. 1066; Flanagan *v.* St. Paul, 65 Minn. 347, 68 N. W. 47; Concordia Loan, etc., Co. *v.* Douglas County, 2 Nebr. (Unoff.) 124, 96 N. W. 55; Phelps *v.* Tacoma, 15 Wash. 367, 46 Pac. 400.

Under power to correct errors.— A statute giving the council of metropolitan cities the power to correct an error in the assessment or listing of property for the purposes of taxation does not include the power to refund money received by the treasurer from the purchaser at a sale under an illegal assessment. McCague *v.* Omaha, 58 Nebr. 37, 78 N. W. 463.

Applicability of provision with reference to general taxes.—A statute providing that all general statutes shall apply to cities when not inconsistent with their charters does not render another statute providing that money paid on a void sale for general taxes shall be returned applicable to sales under special assessments. Heller *v.* Milwaukee, 96 Wis. 134, 70 N. W. 1111. Comp. St. (1889) c. 12*a*, § 94, giving the mayor and council of metropolitan cities the power to compromise or settle any action or litigation concerning the validity, legality, or regularity of any tax levied for city purposes, has no application to suits by a purchaser at a tax-sale under an illegal assessment to recover the amount paid to the city. McCague *v.* Omaha, 58 Nebr. 37, 78 N. W. 463.

Statutes relating to recovery of illegal assessments by the person paying them have no application to a purchaser at a tax-sale under an illegal assessment. McCague *v.* Omaha, 58 Nebr. 37, 78 N. W. 463.

Power to make retroactive provision.— Under power given a city by its charter to regulate the assessment and collection of taxes, it may legally enact by ordinance that, where certificates of purchase are issued on sales of property for municipal taxes which are illegal, the amount paid shall be refunded, with interest; but such power does not extend to cases of sales made prior to the passage of such ordinance, in which the purchasers bought at their own risk as to legality, and a provision authorizing the refunding of money paid on such sales is void. Phelps *v.* Tacoma, 15 Wash. 367, 46 Pac. 400.

Interest.— Under Laws (1884), c. 388, authorizing the controller of the city of Brooklyn to make a repayment on certificates of sales of real property for unpaid taxes which had been declared void, together with the amounts paid for taxes and assessments, he could not pay interest thereon. Macfarlane *v.* Brooklyn, 1 N. Y. St. 552.

43. Elder *v.* Fox, 18 Colo. App. 263, 71 Pac. 398; Churchman *v.* Indianapolis, 110 Ind. 259, 11 N. E. 301 [*following* Worley *v.* Cicero, 110 Ind. 208, 11 N. E. 227; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219].

44. *Colorado.*— Elder *v.* Fox, 18 Colo. App. 263, 71 Pac. 398.

Indiana.— Churchman *v.* Indianapolis, 110 Ind. 259, 11 N. E. 301.

Nebraska.— McCague *v.* Omaha, 58 Nebr. 37, 78 N. W. 463; Merril *v.* Omaha, 39 Nebr. 304, 58 N. W. 121; Pennock *v.* Douglas County, 39 Nebr. 293, 58 N. W. 117, 42 Am. St. Rep. 579, 27 L. R. A. 121.

North Dakota.— Budge *v.* Grand Forks, 1 N. D. 309, 47 N. W. 390, 10 L. R. A. 165.

Wisconsin.— Heller *v.* Milwaukee, 96 Wis. 134, 70 N. W. 1111.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1294.

Contra.— Wells *v.* Chicago, 66 Ill. 280. And *compare* Taylor *v.* People, 66 Ill. 322; Bernei *v.* Baltimore, 56 Md. 351; Germania Bank *v.* St. Paul, 79 Minn. 29, 81 N. W. 542; Phillips *v.* Hudson, 31 N. J. L. 143; Gardner *v.* Troy, 26 Barb. (N. Y.) 423.

from the owner.[45] Recovery from the city was permitted, however, where there was a mere declaration of sale but no formal conveyance.[46] Where a sale made upon an assessment bond is held invalid the holder of the certificate of sale becomes the equitable owner of the bond entitled to insist on full payment in the absence of any facts rendering it inequitable.[47]

h. Purchase by Municipality. Under the provision of some statutes the city may purchase the property at an assessment sale where there is no sufficient bid.[48] In case the city becomes the purchaser under such a provision it does not thereby become liable to pay the assessment.[49] Where the city bids in the property and assigns the certificates it is not bound to preserve the lien as against a subsequent tax lien.[50]

i. Redemption. The right to redeem from an assessment sale depends upon statute,[51] but is usually conferred.[52] Redemption must be in the manner[53] and

By express agreement.— Where it was published as conditions of the sale that, should any mistake or irregularities in the proceedings for the assessments, collections, or sales, on the part of the corporation be discovered so as to prevent the sale from being effectual, the sale was to be void, and the purchase-money, with interest, was to be returned, and after the execution of a lease to the purchaser on the owner's omission to redeem, a defect in the collection and another in the notice for redemption were discovered, it was held that the condition constituted a valid agreement between the corporation and the purchaser, and that it was operative after the completion of the purchase by the execution of the lease to him. Bennett *v.* New York, 1 Sandf. (N. Y.) 485.

45. Boals *v.* Bachmann, 201 Ill. 340, 66 N. E. 336 [*reversing* 103 Ill. App. 427]; Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332 (holding also that the holder of a void tax title cannot charge the owner of the fee with a sidewalk assessment which he has paid in order to protect his title); Glos *v.* Collins, 110 Ill. App. 121.

46. Phillips *v.* Hudson, 31 N. J. L. 143.

47. Ellis *v.* Witmer, 148 Cal. 528, 83 Pac. 800.

48. See the statutes of the several states. And see Sutphin *v.* Trenton, 31 N. J. Eq. 468 (holding that a purchase by the city is valid, although the power to make such purchase was not conferred until after the assessment had been laid); Columbus *v.* Schneider, 8 Ohio S. & C. Pl. Dec. 673, 7 Ohio N. P. 619; Heath *v.* McCrea, 20 Wash. 342, 55 Pac. 432 (holding that the purchase by a city of property at a sale to satisfy an assessment is not prejudicial to the owner); New Whatcom *v.* Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236 (holding that a city authorized by its charter to purchase and dispose of property for the public benefit may, where property is sold for municipal assessments, in the absence of other purchasers, bid up to the extent of its charges against the property); Potter *v.* Black, 15 Wash. 186, 45 Pac. 787; Hoyt *v.* Fass, 64 Wis. 273, 25 N. W. 45 (holding that the certificate of sale will be held by the city in trust for the owners of the unpaid certificate — that is, the contractors to whom the certificates of special tax on the lot were issued — on which it was sold, and the owners and holders of such certificate will become coöwners in equity of the lots so sold, and entitled to a deed; and such equitable title is superior to an outstanding legal title). *Compare* Krutz *v.* Gardner, 18 Wash. 332, 51 Pac. 397.

Power to purchase at tax-sale generally see *infra*, XV, D.

49. Finney *v.* Oshkosh, 18 Wis. 209.

50. Fletcher *v.* Oshkosh, 18 Wis. 232.

51. San Antonio *v.* Berry, (Tex. 1898) 48 S. W. 496 [*modifying* (Civ. App. 1898) 46 S. W. 273], holding that Const. art. 8, § 13, providing that the first legislature shall make provisions for the speedy sale of property for taxes due thereon, and allowing the owners to redeem within two years, applies only to land sold under the proceeding therein required by the legislature to be provided, and not to lands sold for delinquent municipal taxes by a municipality under charter authority.

52. See the statutes of the several states. And see Martin *v.* Slaughter, 50 S. W. 27, 20 Ky. L. Rep. 1743; Bryant *v.* Russell, 127 Mo. 422, 30 S. W. 107; Gault's Appeal, 33 Pa. St. 94 (holding that a statute is to be liberally construed in favor of the right of redemption); Philadelphia *v.* Lukens, 3 Phila. (Pa.) 333.

Where the city purchases, a property-owner has no right of redemption under a statute relating to redemption from sales of tax bills to the highest bidder. Lexington *v.* Woolfolk, 117 Ky. 708, 78 S. W. 910, 25 Ky. L. Rep. 1817.

53. See cases cited *infra*, this note.

Tender.— Where one seeks to redeem land for a certain sum from a sale under an order in an action by a city, he should tender the amount in order to reserve the right. Metz *v.* Dayton, 91 S. W. 745, 28 Ky. L. Rep. 1053. The owner of property sold for municipal claims may tender the redemption money to the purchaser at the sale. Hess *v.* Potts, 32 Pa. St. 407.

Persons entitled to redemption money.— Under the act of Jan. 23, 1849, giving the owner of property sold for municipal claims the right of redemption within one year, the right to the redemption money does not pass

within the time[54] prescribed by the statute, although in some cases in order to prevent injustice redemption has been allowed after expiration of the statutory period.[55] The equity of redemption may be transferred and a grantee may redeem,[56] and the right of redemption extends to a mortgagee.[57]

j. Recovery of Money Paid For Redemption From Illegal Sale. A property-owner may not recover money paid for redemption of his property from an illegal sale[58] unless he paid the same under coercion.[59]

k. Notice to Redeem. A statutory provision that notice to redeem be given is mandatory and, until the giving of such notice, the right of redemption remains.[60]

to the vendee of the purchaser by a deed for the premises. Hess *v.* Potts, 32 Pa. St. 407.

Redemption in improvement certificates.— Under a statute which authorized the issue of certain certificates in payment for local improvements, and provided that such certificates should be "receivable at all times in payment of any assessment" levied to pay for them, redemption from a sale made to enforce such assessment may be made in such certificates, since a tax-sale does not constitute payment of the tax, but is merely an assignment of the tax lien to the purchaser. People *v.* Bleckwenn, 126 N. Y. 654, 27 N. E. 378; People *v.* Bleckwenn, 126 N. Y. 310, 27 N. E. 376 [*affirming* 13 N. Y. Suppl. 487]; Nelson *v.* Bleckwenn, 19 N. Y. Suppl. 993 [*affirmed* in 137 N. Y. 565, 33 N. E. 338]; People *v.* Bleckwenn, 8 N. Y. Suppl. 638.

Accounting for rents and profits.— Where an assessment lien is foreclosed on mortgaged property without making the mortgagee a party thereto, the purchaser thereunder, who occupied a portion of the premises, need account in an action to redeem by the mortgagee only for the amount of the rents and profits received by him, and a fair rental value of that portion occupied by him, although by the exercise of greater diligence the profits and rents received might have been greater. Krutz *v.* Gardner, 25 Wash. 396, 65 Pac. 771.

54. O'Brien *v.* Bradley, 28 Ind. App. 487, 61 N. E. 942; Merchants' Realty Co. *v.* St. Paul, 77 Minn. 343, 79 N. W. 1040; Krutz *v.* Gardner, 25 Wash. 396, 65 Pac. 771.

Persons not made parties.— Sess. Acts (1871), p. 194, § 9, providing that the owner of lands sold on foreclosure of a special tax bill, who was not summoned, but notified by publication, and failed to appear, may redeem "within two years after the day of sale," does not bar an action brought after the lapse of this period to redeem from such a sale, where plaintiffs and those under whom they claim were not made parties, and did not appear. McKee *v.* Spiro, 107 Mo. 452, 17 S. W. 1013.

55. Bean *v.* Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. L. Rep. 739; Nevin *v.* Allen, 26 S. W. 180, 15 Ky. L. Rep. 836; Bryant *v.* Russell, 127 Mo. 422, 30 S. W. 107, holding that a motion by a landowner to be allowed to redeem from a sale for benefits made after he has tendered the necessary amount to the sheriff, who has refused to accept it and to allow him to redeem, should be granted, although made a few days after the sale, and before the term of court at which the special execution is made returnable.

56. Gault's Appeal, 33 Pa. St. 94.

57. O'Brien *v.* Bradley, 28 Ind. App. 487, 61 N. E. 942; McKee *v.* Spiro, 107 Mo. 452, 17 S. W. 1013; Krutz *v.* Gardner, 25 Wash. 396, 65 Pac. 771.

The purchaser of property at a foreclosure sale for street assessments in which a mortgagee was not joined as a party has a lien analogous to that of a senior mortgagee, from which such mortgagee can redeem as a junior mortgagee. Krutz *v.* Gardner, 25 Wash. 396, 65 Pac. 771.

58. Langevin *v.* St. Paul, 49 Minn. 189, 51 N. W. 817, 15 L. R. A. 766; Shane *v.* St. Paul, 26 Minn. 543, 6 N. W. 349; Wallace *v.* New York, 52 Hun (N. Y.) 587, 5 N. Y. Suppl. 705; Pinchbeck *v.* New York, 12 Hun (N. Y.) 556; Fleetwood *v.* New York, 2 Sandf. (N. Y.) 475.

Payment under agreement with corporation counsel.— Where the owners of city lots which had been sold for the non-payment of void assessments redeemed the same by paying the amount for which the lots were sold, they could not recover, although such payments were made on the promise of the counsel of the corporation that the payer's rights should be reserved, and the street commissioners assented thereto. Such officers had no authority to bind the corporation in such matter. Fleetwood *v.* New York, 2 Sandf. (N. Y.) 475.

59. Valentine *v.* St. Paul, 34 Minn. 446, 26 N. W. 457. Where a lot has been sold on foreclosure of an assessment lien for street improvements, and the owner redeems the property to avoid losing title pending a suit by him to have such judgment declared void, the payment of the money necessary to redeem is not voluntary, and he may recover it back on the judgment being adjudged void. Keehn *v.* McGillicuddy, 19 Ind. App. 427, 49 N. E. 609.

60. Gage *v.* Webb, 141 Ill. 533, 31 N. E. 130; Bergen *v.* Anderson, 62 Minn. 232, 64 N. W. 561; Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614; Doughty *v.* Hope, 1 N. Y. 79 [*affirming* 3 Den. 594 (*affirming* 3 Den. 249)]; Paillet *v.* Youngs, 4 Sandf. (N. Y.) 50; Bennett *v.* New York, 1 Sandf. (N. Y.) 485.

Error in notice.— The actual discrepancy, if any, in the statement of the amount necessary to be paid to effect a redemption from sale for local improvements of some thirty-

1. Conveyance to Purchaser — (I) *Execution.* The conveyance to the purchaser must be executed by the officer[61] and in the form[62] designated by statute. A notice to the person in whose name the land is assessed that a deed will be demanded is not necessary in the absence of statute.[63]

(II) *Operation and Effect.* In the absence of statute a conveyance to the purchaser upon a sale to enforce a special assessment is not *prima facie* evidence of the regularity of the proceedings or sale.[64] By statute, however, it is fre-

eight cents, did not render the notice void. Mankato First Nat. Bank *v.* Hodapp, 98 Minn. 534, 107 N. W. 957; Willard *v.* Hodapp, 98 Minn. 269, 107 N. W. 954.

Second notice.— Under the St. Paul city charter, providing that lands sold for special assessments may be redeemed at any time within five years after the sale, and that a three months' notice of the expiration of redemption shall be published six weeks where the notice attempted to be given was void, a new notice might be given after the expiration of the five years. Merchants' Realty Co. *v.* St. Paul, 77 Minn. 343, 79 N. W. 1040 (holding that the fact that the assignee from the city of a tax certificate received a deed, void because of insufficiency of the notice to the owner of expiration of redemption, retained it, and made no demand for a valid deed, and no objection to the void deed, until it commenced an action to recover back from the city the amount paid for the certificate, should be considered in determining what, under all the circumstances, is a reasonable time for the city to give a new notice of expiration of redemption, after the statutory five years, and to issue a new deed); Flanagan *v.* St. Paul, 65 Minn. 347, 68 N. W. 47.

Evidence of notice.— The certificate of the street commissioner that an affidavit of the service of the redemption notice required to be served on the occupant or person last assessed as owner has been filed with him, and that he is satisfied that such notice has been served, although it may be sufficient to afford *prima facie* evidence that such affidavit was filed with him, and that the money remained unpaid, furnishes no evidence that the act had been performed, which was necessary to give effect to the lease executed by the controller pursuant to a sale of realty for taxes. Sanders *v.* Leavey, 38 Barb. (N. Y.) 70.

61. Street *v.* Hughes, 20 Iowa 131 (holding that a statute providing that, in all cases of a sale of land by virtue of the ordinances of any municipal corporation, the purchaser shall receive a deed which shall have the same effect as the county treasurer's deed under sale made by him, does not require that any special officer shall execute the deed, but it is left to the provisions of the several charters of municipal corporations); Wright *v.* Leonard, 4 Gray (Mass.) 150; People *v.* Taylor, 9 Hun (N. Y.) 143 (holding that where the collector of assessments for the Brooklyn park commissioners has sold lands pursuant to Laws (1873), c. 789, providing that "upon a sale being made the said collector shall give certificates of sale to purchasers, and shall execute and deliver conveyances of the land so purchased, unless the same shall have been redeemed," and has issued certificates of sale to a purchaser, he must execute and deliver the conveyances thereof on the expiration of the redemption period, although he may have resigned before that time and another person been appointed).

62. Felker *v.* New Whatcom, 16 Wash. 178, 47 Pac. 505, holding that under Laws (1883), p. 153, § 13 (Charter of Whatcom), providing that proceedings for the assessment and sale of property for street improvements should be governed by the provisions of the code concerning the sale of real estate for delinquent taxes, a deed to property sold by the city for non-payment of such an assessment was properly made in the name of the territory.

Necessity of seal.—Although a statutory form of a deed conveying land for the non-payment of special assessments concludes: "In testimony whereof the city treasurer . . . has hereunto set his hand and seal," etc., and a statute provides that the deed shall be executed under the "hand" of the city treasurer, attested by the city auditor under the seal of the city, the omission of the seal to the signature of the city treasurer constitutes no defect in the deed. Kirby *v.* Waterman, 17 S. D. 314, 96 N. W. 129.

63. Kirby *v.* Waterman, 17 S. D. 314, 96 N. W. 129, holding that a statute requiring the holder of a tax certificate to give notice before obtaining a tax deed is not applicable to the sale of land for the non-payment of special assessments.

64. Haines *v.* Young, 132 Cal. 512, 64 Pac. 1079; Phelan *v.* San Francisco, 120 Cal. 1, 52 Pac. 38; Bucknall *v.* Story, 36 Cal. 67; Harkness *v.* District of Columbia, 1 MacArthur (D. C.) 121 (holding that a statute providing that the deed shall be a perfect title to the property does not change the principle of law that a purchaser at a tax-sale must prove the regularity of the proceedings from the beginning to the time of the sale, and that all the requirements of the statute have been complied with); Stebbins *v.* Kay, 123 N. Y. 31, 25 N. E. 207 [*reversing* 51 Hun 589, 4 N. Y. Suppl. 566]; Hilton *v.* Bender, 69 N. Y. 75 (holding also that the rule applicable to sales by executors, guardians, and other officers, that the lapse of thirty years' time raises a conclusive presumption that all legal formalities of the sale were observed, does not apply to sales made in derogation of the common law, as a sale to enforce an assessment, the proceedings for which are required to be evidenced

quently made presumptive evidence of such regularity,[65] or it may even be declared conclusive.[66] Since the land is sold as the property of another and not of the city, the city is not estopped by the deed, and its recitals from denying the regularity of the proceedings.[67]

m. Recovery of Land Sold. In case property is wrongfully sold under an assessment an action will lie for its recovery.[68]

n. Application of Proceeds. The proceeds of a sale to enforce a special assessment must be applied in the manner directed by the statute.[69] A statute providing that reassessment liens shall be enforced in the same manner as other assessments for improvements are collected, and that the proceeds of a resale shall be paid to the purchaser at the former sale, is invalid.[70]

by records and public documents which are supposed to remain in the custody of the officers charged with their preservation. These must be proved, or their loss accounted for and supplied by secondary evidence. If they cannot be found or their loss accounted for, the presumption is, in the absence of evidence, that they never existed); Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26.

65. See the statutes of the several states. And see Escondido High School Dist *v.* Escondido Seminary, 130 Cal. 128, 62 Pac. 401; Clarke *v.* Mead, 102 Cal. 516, 36 Pac. 862; McNamara *v.* Estes, 22 Iowa 246; Wales *v.* Warren, 66 Nebr. 455, 92 N. W. 590; Nichols *v.* Voorhis, 9 Hun (N. Y.) 171; Kirby *v.* Waterman, 17 S. D. 314, 96 N. W. 129.

Rebuttal of presumption.— In an action to quiet title under a tax deed, made pursuant to a sale for special city tax for a sidewalk, the presumption created by the tax deed, that the tax was duly levied, is rebutted by the fact that the legally appointed records of the city council, covering the period, and unmutilated, show a record of action by the council in reference to that sidewalk, but none of a levy of a tax. Hintrager *v.* Kiene, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910. It is not necessary to show that the "minute book" of the city council contains no record of the levy; that book being a mere private memorandum, not provided by law. Hintrager *v.* Kiene, *supra*.

66. See Tonawanda *v.* Price, 171 N. Y. 415, 64 N. E. 191 (holding irregularity of notice of hearing of objections cured); Doughty *v.* Hope, 3 Den. (N. Y.) 249 [*affirmed* in 3 Den. 594 (*affirmed* in 1 N. Y. 79)] (holding that the provision in the statute that the lease given upon a sale for taxes and assessments in the city of New York shall be conclusive evidence that the sale was regular refers only to the auction and notice of sale, and does not dispense with proof of the redemption notice); Striker *v.* Kelly, 7 Hill (N. Y.) 9 [*affirmed* in 2 Den. 323 (holding that lease, although conclusive evidence of the regularity of the sale, is not proof of authority to sell).

67. Roby *v.* Chicago, 64 Ill. 447.

Estoppel by deed generally see ESTOPPEL, 16 Cyc. 685 *et seq.*

68. Gaston *v.* Portland, 41 Oreg. 373, 69 Pac. 34, 445, holding that where property had been condemned for a street, and damages awarded the owner in excess of benefits to abutting property, and a part of the latter property was illegally sold for a benefit assessment, and warrants drawn in favor of the owner on the fund created by this sale and other assessments for the amount of her damages, the owner could accept her award out of the fund created, without impairing her remedy for the recovery of the property wrongfully sold.

Limitations.—An act providing that suit for recovery of land sold for taxes shall be commenced within a specified time after filing of tax deed has been held not applicable to sales for delinquent assessment. Meier *v.* Kelly, 20 Oreg. 86, 25 Pac. 73.

The complaint must show that defendants have been deprived of their property wrongfully. Metz *v.* Dayton, 91 S. W. 745, 28 Ky. L. Rep. 1053, holding that in an action against a city to recover land sold to the city under an order in a previous action by the city, a statement in the petition that, under the statute, the city had no authority to charge more than a certain amount for improvements such as those referred to in the previous case, was insufficient to show the nature of the claim adjudged in the previous case, so as to enable the court to determine whether the court erred in ordering the sale.

69. Brookbank *v.* Jeffersonville, 41 Ind. 406 (holding that where property is sold for street improvement the proceeds should be applied to the payment of the assessment, with such interest as the sheriff may compute from the findings of the court); Pfaffinger *v.* Kremer, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. Rep. 2368 (holding that in a proceeding for the sale of a lot for non-payment of an assessment, where a part of the lot was not within the area subjected by ordinance to the burden of the improvement, while the whole lot was properly ordered sold, it was error to adjudge that the proceeds of sale should be divided according to the proportion of the superficial area of the part of the lot in lien to that not in lien, instead of according to the proportionate values of the parts of the lot). *Compare* State *v.* Hobe, 106 Wis. 411, 82 N. W. 336.

70. Gaston *v.* Portland, 48 Oreg. 82, 84 Pac. 1040, so holding upon the ground that the effect was that if upon resale the property should sell for more than the original

7. Enforcement Against Personal Property — a. In General. Unless expressly authorized by charter or statute, the collection of an assessment cannot be enforced against personal property.[71] But under some statutes it has been held that personal property may be resorted to[72] in case the procedure prescribed by such statute is strictly followed.[73]

b. Railroad Companies.[74] When the property assessed is that of a railroad company and essential to the operation of the road, it will not be ordered sold to satisfy the lien, but the court will award a personal judgment to be collected as an ordinary judgment at law.[75]

8. Personal Liability and Enforcement Thereof — a. In General. The levy of an assessment to pay the cost of public improvements imposes no personal liability upon the owner of land assessed,[76] unless such liability is created by express statutory provision,[77] and there are cases holding that the legislature is without power

purchaser paid at the first sale, or for more than the amount of the reassessment, the purchaser would receive the entire proceeds of the resale, thus causing the owner of the property to pay him not only the amount of the original purchase but the excess of the second bid over such original price or reassessment, and in effect would be to sell the owner's property and give the proceeds to the former purchaser to whom neither the city nor owner owed any legal obligation to pay anything.

71. Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215; Mix *v.* Ross, 57 Ill. 121; Buell *v.* Ball, 20 Iowa 282; Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766; McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653; Green *v.* Ward, 82 Va. 324.

72. Martin *v.* Carron, 26 N. J. L. 228 [*reversed* on other grounds in 26 N. J. L. 594, 69 Am. Dec. 584]; Gilbert *v.* Havemeyer, 2 Sandf. (N. Y.) 506; Wetmore *v.* Campbell, 2 Sandf. (N. Y.) 341; Gouverneur *v.* New York, 2 Paige (N. Y.) 434. See also *infra*, note 75. *Compare* Gould *v.* Baltimore, 59 Md. 378; Tompkins *v.* Johnson, 75 Mich. 181, 42 N. W. 800.

73. See Manice *v.* New York, 8 N. Y. 120 (holding that before a levy of a warrant under an assessment for a public improvement, a personal demand must be made); Gilbert *v.* Havemeyer, 2 Sandf. (N. Y.) 506 (holding that a warrant should state when the assessment was confirmed by the supreme court, the names of the persons assessed, both owners and occupants, who have neglected to make payment, a description of the premises assessed, and the amount of the assessment, or these matters should be stated in the schedule forming a part of the warrant); Doughty *v.* Hope, 3 Den. (N. Y.) 249.

74. Liability of property: To assessment see *supra*, XIII, E, 5, b, (III), (B). To sale see *supra*, XIII, F, 4, c.

75. Pittsburgh, etc., R. Co. *v.* Taber, (Ind. 1906) 77 N. E. 741; Pittsburgh, etc., R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454; Pittsburgh, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Lake Erie, etc., R. Co. *v.* Bowker, 9 Ind. App. 428, 36 N. E. 864. *Compare* New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399.

76. *Indiana.*— Leeds *v.* Defrees, 157 Ind. 392, 61 N. E. 930.

Kentucky.— Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796.

Louisiana.— Moody *v.* Chadwick, 52 La. Ann. 1888, 28 So. 361.

Michigan.— Beecher *v.* Detroit, 92 Mich. 268, 52 N. W. 731.

Missouri.— Heman Constr. Co. *v.* Loevy, 179 Mo. 455, 78 S. W. 613.

Nebraska.— Omaha *v.* State, 69 Nebr. 29, 94 N. W. 979.

Pennsylvania.— Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644. See also Pittsburg *v.* Eyth, 201 Pa. St. 341, 50 Atl. 769.

Virginia.— Green *v.* Ward, 82 Va. 324.

77. *Iowa.*— Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63; Muscatine *v.* Chicago, etc., R. Co., 79 Iowa 645, 44 N. W. 909.

New York.— Matter of Elsner, 86 N. Y. App. Div. 207, 83 N. Y. Suppl. 670; Ithaca *v.* Babcock, 72 N. Y. App. Div. 260, 76 N. Y. Suppl. 49; Butts *v.* Rochester, 1 Hun 598, 4 Thomps. & C. 89; Hone *v.* Lockman, 4 Redf. Surr. 61.

Ohio.— Corry *v.* Gaynor, 21 Ohio St. 277.

Pennsylvania.— Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644.

Texas.— Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024.

As condition to right to pay in instalments. — Under Burns Rev. St. (1894) § 4294, enacting that if the owner of any lot or parcel of ground against which an assessment exceeding fifty dollars for street improvement has been made, within two weeks after the making of such assessment, agrees in writing, to be filed with the clerk of the city or town, in consideration of the right to pay his assessments in instalments, that he will not object to the assessments because of illegality or irregularity, and will pay the same, with interest thereon, he shall have the benefit of paying his assessments in ten annual instalments, one who executes the waiver and agreement provided for therein becomes personally liable on the instalments of his assessment as they become due. Edward C. Jones Co. *v.* Perry, 26 Ind. App. 554, 57 N. E. 583.

to make a special assessment a personal liability.[78] It follows that where no personal liability is imposed a personal judgment cannot be entered,[79] although of course such a judgment is proper where personal liability exists.[80] Where the only statutory remedy provided is a proceeding *in rem* an assessment cannot be recovered by a personal action,[81] such as assumpsit[82] or debt.[83] In case the legislature is regarded as having power to create a personal liability it may authorize the city to maintain a personal action,[84] and under such authority the city may bring

78. *California.*— Taylor *v.* Palmer, 31 Cal. 240 [*distinguishing* Emery *v.* Bradford, 29 Cal. 75].

Illinois.— Virginia *v.* Hall, 96 Ill. 278 (holding that under a constitutional power to authorize local improvements in cities, towns, and villages "by special taxation of contiguous property or otherwise," it is not competent for the legislature to enact that the cost of sidewalks may be recovered of the non-resident lot owners by action at law); Craw *v.* Tolono, 96 Ill. 255, 36 Am. Rep. 143.

Kentucky.— Meyer *v.* Covington, 103 Ky. 546, 45 S. W. 769, 20 Ky. L. Rep. 239; Woodward *v.* Collett, 48 S. W. 164, 20 Ky. L. Rep. 1066.

Minnesota.— See McComb *v.* Bell, 2 Minn. 295, holding a statute permitting different remedies against different persons for the collection of the same tax unconstitutional.

Missouri.— St. Louis *v.* Allen, 53 Mo. 44; Houstonia *v.* Grubbs, 80 Mo. App. 433.

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Virginia.— Asberry *v.* Roanoke, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636.

Washington.— See Seattle *v.* Yesler, 1 Wash. Terr. 571.

79. *California.*— Manning *v.* Den, 90 Cal. 610, 27 Pac. 435; Randolph *v.* Bayue, 44 Cal. 366; Coniff *v.* Hastings, 36 Cal. 292; Gaffney *v.* Gough, 36 Cal. 104; Beaudry *v.* Valdez, 32 Cal. 269.

Illinois.— Hoover *v.* People, 171 Ill. 182, 49 N. E. 367.

Indiana.— Leeds *v.* Defrees, 157 Ind. 392, 61 N. E. 930.

Kentucky.— Barker *v.* Southern Constr. Co., 47 S. W. 608, 20 Ky. L. Rep. 796.

Missouri.— Heman Constr. Co. *v.* Loevy, 179 Mo. 455, 78 S. W. 613; Louisiana *v.* Miller, 66 Mo. 467; Carlin *v.* Cavender, 56 Mo. 286; Strassheim *v.* Jerman, 56 Mo. 104; Neenan *v.* Smith, 50 Mo. 525; St. Louis *v.* De Noue, 44 Mo. 136.

Oregon.— Ivanhoe *v.* Enterprise, 29 Oreg. 245, 45 Pac. 771, 35 L. R. A. 58.

Texas.— Galveston *v.* Heard, 54 Tex. 420.

80. *California.*— Chase *v.* Christianson, 41 Cal. 253.

Iowa.— Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605.

Missouri.— St. Louis *v.* Clemens, 36 Mo. 467.

Ohio.— Toledo *v.* Barnes, 8 Ohio Cir. Ct. 684, 4 Ohio Cir. Dec. 195.

Texas.—San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496 [*modifying* (Civ. App. 1898) 46 S. W. 273]. And see Higgins *v.* Bordages, (Civ. App. 1894) 28 S. W. 350, holding that in a suit by a city to collect a sidewalk tax and to have the same adjudged a lien on property, a personal judgment against defendants is not necessary.

Right of improvement bondholders.—Under Burns Rev. St. (1894) §§ 4288–4294, authorizing cities to issue street-improvement bonds, and providing that the property-owners may pay their assessments in instalments on the execution of a written agreement that all irregularities and illegalities in the making of the assessments were waived, and a promise to pay all assessments against their property, the holders of such bonds were entitled to a personal judgment against property-owners, having executed the agreement, for the amount of their assessments remaining unpaid after the sale of the property on the foreclosure of the liens for the work. Wayne County Sav. Bank *v.* Gas City Land Co., 156 Ind. 662, 59 N. E. 1048.

General judgment against railroad see *supra*, XIII, F, 7, b.

81. West Roxbury *v.* Minot, 114 Mass. 546; Roxbury *v.* Nickerson, 114 Mass. 544; Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644 [*affirming* 18 Pa. Super. Ct. 398]; White *v.* Ballantine, 96 Pa. St. 186. See also Carondelet *v.* Picot, 38 Mo. 125. But *compare* New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399; Lowell *v.* Wyman, 12 Cush. (Mass.) 273.

82. Philadelphia *v.* Bradfield, 159 Pa. St. 517, 28 Atl. 360; Philadelphia *v.* Merklee, 159 Pa. St. 515, 28 Atl. 360; McKeesport *v.* Fidler, 147 Pa. St. 532, 23 Atl. 799. But *compare* Clemens *v.* Baltimore, 16 Md. 208 [*distinguishing* Baltimore *v.* Hughes, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243].

83. Pleasant Hill *v.* Dasher, 120 Mo. 675, 25 S. W. 566.

84. Ithaca *v.* Babcock, 72 N. Y. App. Div. 260, 76 N. Y. Suppl. 49; Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644 [*affirming* 18 Pa. Super. Ct. 398]. *Compare* Cincinnati *v.* U. S. Bank, 14 Ohio 605; Cincinnati *v.* Gwynne, 10 Ohio 192, both holding that an ordinance of Cincinnati, requiring the mayor to enforce the collection of a special tax by suit in the nature of an action of debt, is not violative of the city charter, conferring on the council the power to impose penalties on all persons offending against the ordinances of the city, and conferring on the mayor original jurisdiction of all cases for the violation of ordinances, on the ground that the mayor as a judicial officer has no jurisdiction except in cases of a criminal nature.

assumpsit.[85] Where the city is given a right of action to enforce the personal liability of the owner in addition to any other remedies provided by law for the enforcement of assessments, such right is not lost by the fact that another remedy is also resorted to;[86] but otherwise it would seem that a resort to a remedy against the land will extinguish the personal liability.[87] Where an assessment may be levied against property and the owner thereof personally, failure of the council to direct commissioners to assess the owners will not defeat personal liability for the assessment.[88] A property-owner who agrees with one having a contract with the city for the improvement of a street to pay his share of the cost of such improvement will be held personally liable to the contractor.[89]

b. Persons Liable.[90] As a general rule personal liability is imposed only upon the owner of the premises,[91] but where the liability has attached it is not divested by a transfer of the property.[92]

c. Enforcement. The court may in its discretion refuse to enter a personal judgment at the time of rendition of a decree foreclosing an assessment lien but may wait until after execution thereof.[93] Direct proceedings to enforce personal liability for assessments must conform to the statutes under which they are brought.[94] In order that a personal judgment may be recovered the facts show-

85. Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644 [*affirming* 18 Pa. Super. Ct. 398]; Pittsburgh *v.* Fay, 8 Pa. Super. Ct. 269, 43 Wkly. Notes Cas. 78; Scranton *v.* Smith, 6 Lack. Leg. N. (Pa.) 185. *Compare* Scranton City *v.* Sturges, 202 Pa. St. 182, 51 Atl. 764, holding that assumpsit will not lie on an unregistered assessment for street paving, an action at law being authorized by the act of May 23, 1889, only on a lien filed.

86. Rochester *v.* Rochester R. Co., 109 N. Y. App. Div. 638, 96 N. Y. Suppl. 152 (holding that the city's right of action for local assessments was not lost because they were added to the general city taxes); Matter of Elsner, 86 N. Y. App. Div. 207, 83 N. Y. Suppl. 670.

87. De Peyster *v.* Murphy, 39 N. Y. Super. Ct. 255.

88. Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644.

89. Burton *v.* Laing, (Tex. Civ. App. 1896) 36 S. W. 298.

90. General judgment against railroad see *supra*, XIII, F, 7, b.

91. Des Moines *v.* Casady, 21 Iowa 570 (holding that a personal judgment for a sidewalk tax cannot be rendered against a defendant who was not the owner of the land assessed at the time the order for the construction of the sidewalk was made and the work done); Wolff *v.* Baltimore, 49 Md. 446; Dashiell *v.* Baltimore, 45 Md. 615; Davis *v.* Cincinnati, 36 Ohio St. 24 (holding that it is error to render a personal judgment against a lessee for a term of ten years, although the lease provides for the payment by the lessee of all assessments upon the property); Boers *v.* Barrett, 2 Cinc. Super. Ct. (Ohio) 67 (holding that it is not chargeable against an ordinary tenant for years, although his lease may contain the privilege of purchasing the fee at a specified price); Pittsburg *v.* Eyth, 201 Pa. St. 341, 50 Atl. 769. *Compare* Coleman *v.* Poydras Asylum, 17 La. Ann. 325, holding that in New Orleans a person who enjoys the usufruct of land, and not the owner, is liable for repairs to the street in front of the property.

A perpetual lessee with privilege of purchase is an owner. Clements *v.* Norwood, 1 Ohio S. & C. Pl. Dec. 193, 32 Cinc. L. Bul. 201, 2 Ohio N. P. 274.

A reversioner whose reversion has many years to run will not be liable as owner for an assessment. Newark *v.* Edwards, 34 N. J. L. 523.

Reassessment.— The purchase of a lot between an assessment and a reassessment does not absolve the purchaser from paying such reassessment. Butler *v.* Toledo, 5 Ohio St. 225.

Owner or occupant.— Under certain early statutes it has been held that resort might be had to goods of the owner or occupant at the time the assessment was made. Martin *v.* Carron, 26 N. J. L. 228 [*reversed* on other grounds in 26 N. J. L. 594, 69 Am. Dec. 584]; Gilbert *v.* Havemeyer, 2 Sandf. (N. Y.) 506; Wetmore *v.* Campbell, 2 Sandf. (N. Y.) 341; Gouverneur *v.* New York, 2 Paige (N. Y.) 434.

92. McDowell *v.* Johnson, 48 Pa. St. 483.

93. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

94. See cases cited *infra*, this and following notes.

Conditions precedent.— An action of assumpsit cannot be maintained by a city to recover a paving assessment for which no specification of claim has been previously filed and entered as provided by Pa. Act, May 23, 1889, art. 15, § 21 (Pamphl. Laws 277); Scranton City *v.* Robertson, 28 Pa. Super. Ct. 55.

Permission of penalty to bring case within jurisdiction see JUSTICE OF THE PEACE, 24 Cyc. 474 note 63.

Who may sue.—Where power is given to certain officers of a town to construct certain

ing a personal liability for the debt secured by the lien must be alleged,[95] and the petition must show a compliance with conditions precedent to suit.[96] Defendant has the burden of proving the assessment wrongful.[97]

9. Wrongful Enforcement. An action is maintainable against a city for wrongful seizure and sale of property to pay an illegal assessment.[98] And it has been held that the mayor of the city was liable in trespass for property taken under a warrant signed by him at the direction of council for the collection of an illegal assessment.[99]

XIV. Torts.*

A. Nature and Extent of Liability — 1. In General. A municipality, being not only a public agency, but also a quasi-private individual, is therefore subject to the law;[1] for its wrong to the public it may be prosecuted,[2] and for its torts against individuals it may be sued in a civil action for damages like a private corporation.[3]

works and recover the expenses thereof from individuals in an action of debt, such action should be brought in the name of the town. Palmyra *v.* Morton, 25 Mo. 593.

Evidence.— In an action of assumpsit to recover a paving tax, proof that bills for paving, corresponding in amount with a sum found upon an inquisition to have been due, were shown to defendant, and that he promised to pay them, deducting about twenty-five dollars, is sufficiently definite to enable the jury to ascertain the amount due and to support a verdict for plaintiff. Clemens *v.* Baltimore, 16 Md. 208.

Judgment.— A judgment in an action for a local assessment payable in instalments properly included the instalments not due, where it provided that no execution should issue for the future instalments until due. Rochester *v.* Rochester, R. Co., 109 N. Y. App. Div. 638, 96 N. Y. Suppl. 152. Where a jury, in a statutory proceeding to ascertain the advantages or disadvantages to an individual that might result from a public improvement in a city, found that it would be a benefit of a certain value to a lot belonging to heirs and in which a widow had a dower interest, a joint judgment for that value against the widow and heirs, whose interests were different, could not be sustained. Sutton *v.* Louisville, 5 Dana (Ky.) 28. Where an owner of lands in a city of the third class sold the same, and the city, in an action in assumpsit, subsequently recovered a judgment against such owner for paving a street in front of the lands, such judgment, not being a lien against the lands, could not be revived against the grantee, the terre-tenant. Chester *v.* Scott, 8 Del. Co. (Pa.) 153.

Appeal.— Since under Ohio Rev. St. § 2285, an action for personal judgment for a street assessment, involving only an issue as to the validity of the assessment, is not appealable, such an action is not rendered appealable by making a mortgagee a party, in order to marshal liens, if the mortgagee claims merely a priority and the owners do not deny the mortgage. Toledo *v.* Barnes, 8 Ohio Cir. Ct. 684, 4 Ohio Cir. Dec. 195.

95. Corry *v.* Gaynor, 21 Ohio St. 277.

96. Philadelphia, etc., R. Co. *v.* Shipley, 72 Md. 88, 19 Atl. 1, notice.

Sufficiency.— A complaint in an action to recover a sewer assessment, alleging defendant's ownership of the property at the time of and since the assessment, and pleading the material acts of the board in relation to the assessment, and making an exhibit of that part of the assessment in question, is sufficient, without attaching copies of the various resolutions, orders, and ordinances adopted by the council in the proceedings pertaining to the improvement. Baltimore, etc., R. Co. *v.* Daegling, 30 Ind. App. 180, 65 N. E. 761.

97. Ithaca *v.* Babcock, 72 N. Y. App. Div. 260, 76 N. Y. Suppl. 49 [*affirming* 36 Misc. 49, 72 N. Y. Suppl. 519].

98. Howell *v.* Buffalo, 15 N. Y. 512; Durkee *v.* Kenosha, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480.

99. Williams *v.* Brace, 5 Conn. 190, holding that the mayor of a city, who by direction of the court of common council signed a warrant for the collection of an illegal assessment, was liable in trespass for the property taken under such warrant.

1. *Kansas.*— Leavenworth *v.* Casey, McCahon 124.

Kentucky.— Com. *v.* Hopkinsville, 7 B. Mon. 38.

New York.— Martin *v.* Brooklyn, 32 N. Y. App. Div. 411, 52 N. Y. Suppl. 1086.

Ohio.— Crawford *v.* Delaware, 7 Ohio St. 459; Akron *v.* McComb, 18 Ohio 229, 51 Am. Dec. 453; McCombs *v.* Akron, 15 Ohio 474.

Pennsylvania.—Com. *v.* Lansford Borough, 14 Pa. Co. Ct. 376.

Tennessee.— State *v.* Shelbyville, 4 Sneed 176.

2. See *infra*, XVIII.

3. *Alabama.*— Davis *v.* Montgomery, 51 Ala. 139, 23 Am. Rep. 545; Smoot *v.* Wetumpka, 24 Ala. 112.

Illinois.— Chicago *v.* Selz, etc., Co., 104 Ill. App. 376 [*affirmed* in 202 Ill. 545, 67 N. E. 386].

Iowa.—Freeland *v.* Muscatine, 9 Iowa 461.

Kansas.—Leavenworth *v.* Casey, 1 Kan. 544.

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2. Exercise of Governmental and Corporate Functions — a. Rules as to Liability and Non-Liability — (i) *In General.* It has been held that a municipal corporation, being a governmental agency, is not liable to an action for damages sustained by the tort of any of its officers or agents, unless it is made so by its charter or some statute to that effect.[4] But generally a municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions and duties.[5] The one class of its powers is of a public and general character, to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants or the general public; the other relates only to special or private corporate purposes, for the accomplishment of which it acts, not through its public officers as such, but through agents or servants employed by it. In the former case its functions are political and governmental, and no liability attaches to it at common law, either for non-user or misuser of the power or for the acts or omissions on the part of its officers or the agents through whom such governmental functions are performed,[6] or the

Louisiana.— Pontchartrain R. Co. *v.* New Orleans, 27 La. Ann. 162.

Maine.— Moulton *v.* Scarborough, 71 Me. 267, 36 Am. Rep. 308.

Maryland.— Cumberland *v.* Willison, 50 Md. 138, 33 Am. Rep. 304, negligence.

Massachusetts.— Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Anthony *v.* Adams, 1 Metc. 284; Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157.

Michigan.— Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844; Rowland *v.* Kalamazoo, 49 Mich. 553, 14 N. W. 494; Sheldon *v.* Kalamazoo, 24 Mich. 383; Pennoyer *v.* Saginaw, 8 Mich. 534.

Minnesota.— Kleopfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908.

Nebraska.— Goddard *v.* Lincoln, 69 Nebr. 594, 96 N. W. 273.

New York.— Lloyd *v.* New York, 5 N. Y. 369, 55 Am. Dec. 347.

North Carolina.— Meares *v.* Wilmington, 31 N. C. 73, 49 Am. Dec. 412.

Ohio.— Toledo *v.* Cone, 41 Ohio St. 149; Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82; Goodloe *v.* Cincinnati, 4 Ohio 500, 22 Am. Dec. 764.

Pennsylvania.— Allegheny County *v.* Rowley, 4 Pa. L. J. Rep. 379.

Tennessee.—Memphis *v.* Lasser, 9 Humphr. 756.

United States.— Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1545.

A constitutional inhibition against indebtedness does not affect the liability of a municipal corporation for its torts. Chicago *v.* Norton Milling Co., 196 Ill. 580, 62 N. E. 1043 [*affirming* 97 Ill. App. 651]; Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; Bloomington *v.* Perdue, 99 Ill. 329.

4. Little Rock *v.* Willis, 27 Ark. 572; Parks *v.* Greenville, 44 S. C. 168, 21 S. E. 540; Gibbes *v.* Beaufort, 20 S. C. 213, as to the maintenance of a free ferry under general powers contained in the charter, upon the theory that the state might have done it and therefore the city as an arm of the state may do the same thing.

5. Municipal corporation distinguished from mere political subdivisions.—Where the word "municipal" is applied to all subdivisions of the state, expressions as to municipal corporations which refer to mere political subdivisions of the state are inapplicable to cities and towns which are corporate bodies with many of the general powers of private corporations. Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476.

6. *Arkansas.*— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1; Helena *v.* Thompson, 29 Ark. 569.

California.— Sievers *v.* San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153, holding that in the performance of its governmental or public functions, the corporation is either deemed a public agency, a mandatary of the state, and therefore not liable to be sued civilly for damages, or it is considered, in the performance of these functions, to be clothed with sovereignty, and therefore not liable in an action.

Colorado.— Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705; Verazuth *v.* Denver, 19 Colo. App. 473, 76 Pac. 539.

Connecticut.— Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487; Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397; Mead *v.* New Haven, 40 Conn. 72, 16 Am. Rep. 14; Judge *v.* Meriden, 38 Conn. 90; Hewison *v.* New Haven, 37 Conn. 475, 9 Am. Rep. 342, holding that the acceptance of a special charter by a city or borough, authorizing the corporation to perform a strictly governmental duty, does not create a contract between the corporation and the state that it shall be performed, or make the city or borough liable for an omission to perform, or a negligent performance of it.

Georgia.— Dalton *v.* Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101; Wyatt *v.* Rone, 105 Ga. 312, 31 S. E. 188, 70 Am. St. Rep. 41, 42 L. R. A. 180; Bartlett *v.* Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795.

Illinois.— Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123; Kinnare *v.* Chicago, 171

servants employed by such agencies.[7] In its second character above mentioned, that is, in the exercise of its purely municipal functions, or the doing of those things which relate to special or private corporate purposes, the corporation stands upon the same footing with a private corporation, and will be held to the same responsibility with a private corporation for injuries resulting from its negligence, and will be liable for the torts of its officers, agents, or employees acting within the scope of such municipal power,[8] or of the servants employed by such

Ill. 332, 49 N. E. 536; Chicago *v.* McGraw, 75 Ill. 566.

Indiana.— Brinkmeyer *v.* Evansville, 29 Ind. 187.

Iowa.— Lahner *v.* Williams, 112 Iowa 428, 84 N. W. 507; Saunders *v.* Ft. Madison, 111 Iowa 102, 82 N. W. 428; Easterly *v.* Irwin, 99 Iowa 694, 68 N. W. 919; Calwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154.

Kansas.— La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Louisiana.— New Orleans *v.* Kerr, 50 La. Ann. 413, 23 So. 384, 69 Am. St. Rep. 442.

Maryland.— Anne Arundel County Com'rs *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

Massachusetts.— Clark *v.* Easton, 146 Mass. 43, 14 N. E. 795; Manners *v.* Haverhill, 135 Mass. 165; Haskell *v.* New Bedford, 108 Mass. 208; Hafford *v.* New Bedford, 16 Gray 297.

Michigan.— Corning *v.* Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; Stevens *v.* Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777; Amperse *v.* Kalamazoo, 75 Mich. 228, 42 N. W. 821, 13 Am. St. Rep. 432; Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844.

Minnesota.— Miller *v.* Minneapolis, 75 Minn. 131, 77 N. W. 788; Snider *v.* St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

Missouri.— Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168; Harman *v.* St. Louis, 137 Mo. 494, 38 S. W. 1102; Armstrong *v.* Brunswick, 79 Mo. 319; Murtaugh *v.* St. Louis, 44 Mo. 479.

New Hampshire.— Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32; Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464.

New Jersey.— Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649.

New York.— Quill *v.* New York, 36 N. Y. App. Div. 476, 55 N. Y. Suppl. 889; Brower *v.* New York, 3 Barb. 254; Doty *v.* Port Jervis, 23 Misc. 313, 52 N. Y. Suppl. 57; Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669.

North Carolina.— Hull *v.* Roxboro, 142 N. C. 453, 55 S. E. 351; Moffitt *v.* Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Ohio.— Frederick *v.* Columbus, 58 Ohio St. 538, 51 N. E. 35; Cincinnati *v.* Cameron, 33 Ohio St. 336; Western Homeopathic Medicine College *v.* Cleveland, 12 Ohio St. 375; Rose *v.* Toledo, 24 Ohio Cir. Ct. 540; Neil *v.* Barron, 8 Ohio S. & C. Pl. Dec. 424, 7 Ohio N. P. 84.

Oregon.— Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300; Esburg Cigar Co. *v.* Portland, 34 Oreg. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L. R. A. 435; Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

Pennsylvania.— Elliott *v.* Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591.

Rhode Island.— Wixon *v.* Newport, 13 R. I. 454, 43 Am. Rep. 35.

South Carolina.— Gibbes *v.* Beaufort, 20 S. C. 213, maintenance of free ferry.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

Tennessee.— Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. 419; Conelly *v.* Nashville, 100 Tenn. 262, 46 S. W. 565; Davis *v.* Knoxville, 90 Tenn. 599, 18 S. W. 254.

Texas.— Stinnett *v.* Sherman, (Civ. App. 1897) 43 S. W. 847; Bates *v.* Houston, 14 Tex. Civ. App. 287, 37 S. W. 383; Shanewerk *v.* Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918.

Vermont.—Stockwell *v.* Rutland, 75 Vt. 76, 53 Atl. 132; Welsh *v.* Rutland, 56 Vt. 228, 48 Am. Rep. 762.

Virginia.— Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294; Richmond *v.* Long, 17 Gratt. 375, 94 Am. Dec. 461.

Washington.— Lynch *v.* North Yakima, 37 Wash. 657, 80 Pac. 79; Simpson *v.* Whatcom, 33 Wash. 392, 74 Pac. 577, 99 Am. St. Rep. 951, 63 L. R. A. 815; Russell *v.* Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895.

West Virginia.— Wood *v.* Hinton, 47 W. Va. 645, 35 S. E. 824, 826; Bartlett *v.* Clarksburg, 45 W. Va. 393, 31 S. E. 918, 72 Am. St. Rep. 817, 43 L. R. A. 295; Brown *v.* Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Thomas *v.* Grafton, 34 W. Va. 282, 12 S. E. 478, 26 Am. St. Rep. 924; Mendel *v.* Wheeling, 28 W. Va. 233, 57 Am. Rep. 664.

Wisconsin.— Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Kuehn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030.

United States.— Kansas City *v.* Lemen, 57 Fed. 905, 6 C. C. A. 627; Hart *v.* Bridgeport, 11 Fed. Cas. No. 6,149, 13 Blatchf. 289.

Canada.— McCleave *v.* Moncton, 35 N. Brunsw. 296.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1545, 1568.

7. Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487; Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64. See also the cases cited in the last preceding note.

8. *Colorado.*—Veraguth *v.* Denver, 19 Colo. App. 473, 76 Pac. 539.

Connecticut.— Danbury, etc., R. Co. *v.* Norwalk, 37 Conn. 109.

officers.[9] The principal difficulty which courts have experienced has been in ascertaining, clearly and accurately, the line of demarcation between public or governmental duties and private or corporate duties, and not in the determination of the question, whether, for a refusal to discharge a public duty, or for the manner in which it is discharged, the corporation is or is not liable.[10]

(II) *Nature of Duties or Functions* — (A) *In General.* In some jurisdictions the rule is that a municipal corporation cannot be subjected to liability in a private action for neglect to perform or the negligent performance of corporate duties imposed upon it by the legislature unless such action has been given by statute,[11] where the statute does not purport to give the city any

Georgia.— Macon *v.* Harris, 75 Ga. 761.

Illinois.— Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392.

Indiana.— Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166; Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa.— McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143.

Kansas.— La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Kentucky.— McGraw *v.* Marion, 98 Ky. 673, 34 S. W. 18, 17 Ky. L. Rep. 1254, 47 L. R. A. 593.

Louisiana.— New Orleans *v.* Kerr, 50 La. Ann. 413, 23 So. 384, 69 Am. St. Rep. 442; Baumgard *v.* New Orleans, 9 La. 119, 29 Am. Dec. 437.

Maine.— Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252.

Maryland.—Anne Arundel County Com'rs *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

Massachusetts.—Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244; Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157.

Minnesota.— Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131; Kobs *v.* Minneapolis, 22 Minn. 159.

Missouri.—Armstrong *v.* Brunswick, 79 Mo. 319; Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299; Murtaugh *v.* St. Louis, 44 Mo. 479; Bullmaster *v.* St. Joseph, 70 Mo. App. 60; Whitfield *v.* Carrollton, 50 Mo. App. 98.

New Jersey.— Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170.

New York.— Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744; Howell *v.* Buffalo, 15 N. Y. 512; Quill *v.* New York, 36 N. Y. App. Div. 476, 55 N. Y. Suppl. 889 [*reversing* 21 Misc. 598, 48 N. Y. Suppl. 141]; Scott *v.* New York, 27 N. Y. App. Div. 240, 50 N. Y. Suppl. 191; Mahon *v.* New York, 10 Misc. 664, 31 N. Y. Suppl. 676, 1 N. Y. Annot. Cas. 361; Hurley *v.* Brooklyn, 8 N. Y. Suppl. 98; Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669.

North Carolina.— Moffitt *v.* Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Meares *v.* Wilmington, 31 N. C. 73, 49 Am. Dec. 412.

Ohio.— Toledo *v.* Cone, 41 Ohio St. 149; Birtwhistle *v.* Cincinnati, 8 Ohio Dec. (Reprint) 453, 8 Cinc. L. Bul. 25.

Oklahoma.—Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

Pennsylvania.— Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65.

Rhode Island.— Sprague *v.* Tripp, 13 R. I. 38, 43 Am. Rep. 11; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

Tennessee.— Memphis *v.* Kimbrough, 12 Heisk. 133; Memphis *v.* Lasser, 9 Humphr. 757.

Texas.— Ostrom *v.* San Antonio, 94 Tex. 523, 62 S. W. 909.

Vermont.— Welsh *v.* Rutland, 56 Vt. 228, 48 Am. Rep. 762; Winn *v.* Rutland, 52 Vt. 481.

Washington.—Normile *v.* Ballard, 33 Wash. 369, 74 Pac. 566; Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

Wisconsin.— Hillman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Durkee *v.* Kenosha, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480.

United States.—Denver *v.* Porter, 126 Fed. 288, 61 C. C. A. 168.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1545, 1568.

9. Lloyd *v.* New York, 5 N. Y. 369, 55 Am. Dec. 347. See also the cases cited in the last preceding note.

10. Hart *v.* Bridgeport, 11 Fed. Cas. No. 6,149, 13 Blatchf. 289, where the general distinction between public or governmental and corporate or private duties is stated: Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Private or corporate powers are those which the city is authorized to execute for its own emolument, or from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit.

11. Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180; Bulger *v.* Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205; Moulton *v.* Scarborough, 71 Me. 267, 36 Am. Rep. 308; Harrington *v.* Worcester, 186 Mass. 594, 72 N. E. 326 [*followed* in Rome *v.* Worcester, 188 Mass. 307, 74 N. E. 370]; Taggart *v.* Fall

privileges for its own benefit.[12] This rule is also stated so that to carry immunity the absolute duty imposed is that of performing some act which the state may lawfully perform and which pertains to the administration of government,[13] or the line is drawn between acts done in a public capacity in the discharge of duties absolutely imposed for the public benefit and other acts of a private nature, as in the management of property or rights voluntarily held for immediate profit or advantage.[14] On the other hand, whether the duty is imperatively imposed or voluntarily assumed,[15] immunity from liability is made to depend upon the condition that the acts or duties are public, as distinguished from such acts as inure to the special profit or advantage of the corporation rather than the general good;[16] or are legislative or discretionary, as distinguished from ministerial.[17] In other cases, and this seems to be the rule established by the weight of authority, as will be seen by reference to the cases relating to streets,[18] sewers, and drains,[19] a municipality, when charged in its corporate character with the performance of a municipal function in regard to governmental affairs is civilly liable for injuries resulting from misfeasance or nonfeasance with respect to such municipal duty,[20] the duty being absolute or imperative and not merely such as under a grant of authority is intrusted to the judgment and discretion of the municipal authorities;[21]

River, 170 Mass. 325, 49 N. E. 622; Pettingell *v.* Chelsea, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426; French *v.* Boston, 129 Mass. 592, 37 Am. Rep. 393; Muller *v.* Bayonne, 45 N. J. Eq. 237, 19 Atl. 614; Wixon *v.* Newport, 13 R. I. 454, 43 Am. Rep. 35.

Indictable wrong.— A municipal corporation is exempt from actions by individuals suffering special damages from its neglect to perform or its negligence in performing public duties whereby a public wrong is done for which an indictment will lie. Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170. But this rule is held not to extend to actions where the injury is the result of active wrong-doing chargeable to the corporation. Hart *v.* Union County, 57 N. J. L. 90, 29 Atl. 490.

12. Harrington *v.* Worcester, 186 Mass. 594, 72 N. E. 326 [*followed* in Rome *v.* Worcester, 188 Mass. 307, 74 N. E. 370].

13. Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

14. Taggart *v.* Fall River, 170 Mass. 325, 49 N. E. 622.

15. Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434; Curran *v.* Boston, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243; Benton *v.* Boston City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289 (holding that where a city undertakes the celebration of a holiday for the gratuitous amusement, entertainment, or instruction of the public, under the authority of a general law permitting all cities to appropriate money to a certain limited amount "for the celebration of holidays, and for other public purposes," it is not liable for injuries sustained through the negligence of its servants in discharging fireworks on such an occasion); Wixon *v.* Newport, 13 R. I. 454, 43 Am. Rep. 35 (no liability where the corporation voluntarily assumes to act under a general law of the state).

16. Taggart *v.* Fall River, 170 Mass. 325, 49 N. E. 622; Hafford *v.* New Bedford, 16 Gray (Mass.) 297; Corning *v.* Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526 (maintaining a bridge across a navigable stream, without any benefit to the corporation); Condict *v.* Jersey City, 46 N. J. L. 157; Muller *v.* Bayonne, 45 N. J. Eq. 237, 19 Atl. 614 (where it is indicated that the duty should be regarded as a public one where the corporation has no interest in its performance and no special profit or benefit from it). See also *infra*, XIV, A, 3, c.

17. Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 187, 66 L. R. A. 181, holding, upon the authority of Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289 (*supra*, note 15), that the city was liable for negligently maintaining a fire-engine house.

18. See *infra*, XIV, D.

19. See *infra*, XIV, C.

20. New York *v.* Furze, 3 Hill (N. Y.) 612; Martin *v.* Brooklyn, 1 Hill (N. Y.) 545; McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; Erie City *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87.

21. McMahon *v.* Dubnque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143; McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; Weightman *v.* Washington, 1 Black (U. S.) 39, 17 L. ed. 52. See also Lyme Regis *v.* Henley, 3 B. & Ad. 77, 23 E. C. L. 43, 5 Bing. 91, 15 E. C. L. 486, 6 L. J. C. P. O. S. 222, 3 M. & P. 278, 30 Rev. Rep. 542 [*affirmed* in 1 Bing. N. Cas. 222, 27 E. C. L. 614, 8 Bligh N. S. 690, 5 Eng. Reprint 1097, 2 Cl. & F. 331, 6 Eng. Reprint 1180, 1 Scott 29]. And see *infra*, XIV, A, 2 a, (II), (B); XIV, A, 5, b.

Permissive authority creating duty.—When a power is given to do an act which concerns the public interest, the execution of the power when applied to a public officer or body may be insisted upon as a duty, although the phraseology of the statute is permissive only, especially when there is

or, the duty being ministerial as distinguished from the legislative and discretionary functions of the governing officers, the municipality may become liable for damages resulting from neglect to perform it or from its performance in an improper manner,[22] and this, although the circumstances are such that an implied

nothing in the act save the permissive form of expression to denote that the legislature designed to lodge a discretionary power merely. New York *v.* Furze, 3 Hill (N. Y.) 612; McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342. And even though the exercise of a power under a permissive grant may be optional in the first instance, yet upon electing to act under it the corporation will be held to a complete and perfect execution. New York *v.* Furze, *supra*.

Acceptance of charter — grant charged with condition.— The foundation of the rule which makes a municipal corporation liable under the maxim *respondeat superior* is stated as follows: "Whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance." Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744 [*quoting* Weet *v.* Brockport, 16 N. Y. 161 note]. And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary quasi-corporations known as counties, towns, school-districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440, where it is said that the latter are auxiliaries of the state merely, and, when corporations, are of the very lowest grade, and invested with the smallest amount of power, and that accordingly, in Conrad *v.* Ithaca, 16 N. Y. 158, the village was held to be liable for the negligence of their trustees; while in Weet *v.* Brockport, *supra*, the town was said not to be liable for the same acts by their commissioners of highways. To the same effect see Kinnare *v.* Chicago, 171 Ill. 332, 49 N. E. 536; Chicago *v.* Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245; Cooney *v.* Hartland, 95 Ill. 516; Waltham *v.* Kemper, 55 Ill. 346, 8 Am. Rep. 652; Browning *v.* Springfield, 17 Ill. 143, 63 Am. Dec. 345; Backer *v.* West Chicago Park Com'rs, 66 Ill. App. 507; Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166; Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476; Bell *v.* West Point, 51 Miss. 262; Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302 (where the non-liability of a town for failure to perform a public duty is declared, and Lyme Regis *v.* Henley, 3 B. & Ad. 77, 23 E. C. L. 43, 5 Bing. 91, 15 E. C. L. 486, 6 L. J. C. P. O. S. 222, 3 M. & P. 278, 30 Rev. Rep. 542 [*affirmed* in 1 Bing. N. Cas. 222, 27 E. C. L. 614, 8 Bligh N. S. 690, 5 Eng. Reprint 1097, 2 Cl. & F. 331, 6 Eng. Reprint 1180, 1 Scott 29], which declares the liability of a borough upon the principle that the duty was imposed as a condition of the grant of corporate franchises, etc., is distinguished); Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; Noble *v.* Richmond, 31 Gratt. (Va.) 271, 31 Am. Rep. 726; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780. Where, however, the duties are regarded as of a public nature, the rule is confined to cases in which the city is merely authorized by way of special privilege to perform such an act, in part for its corporate benefit and the benefit of its inhabitants. Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487. And notwithstanding the particular act or duty is of the kind in respect of which the cases above cited declare liability when the corporation has accepted a charter imposing particular duties, yet where such act or duty is considered of a public nature, then under the rule that a municipality is not liable in the performance of public duties, it is held that the acceptance of a charter authorizing a city to discharge a duty of that kind neither creates a contract between it and the state nor renders the discharge of such duty the exercise of a special privilege for the non-performance or negligent performance of which the city would become liable. Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218. See also Mead *v.* New Haven, 40 Conn. 72, 16 Am. Rep. 14 (where it was held that the governmental character of particular duties had been recognized by the state by general legislation touching the performance in the congressional districts of the state of the same duties which were to be performed in the city by its appointee); Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533; Winn *v.* Rutland, 52 Vt. 481 (where defendant was by its charter empowered to make and maintain sewers, the charter having been sought and accepted with a view to the realization of benefits to the inhabitants of the village and not to the discharge of a public duty, and it was held that, the charter power being proprietary in its character, defendant was by implication bound so to exercise it as to work no unnecessary injury to persons or property thereby affected, and that for negligence or unskilfulness in the construction of a sewer, or want of care in keeping it in repair, an action would lie at suit of any person thereby injured).

22. *Georgia.*— Dalton *v.* Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101.

acceptance of the particular provisions of the statute may not be inferred,[23] and when duties, although imposed, relate to acts in the doing of which the city has some special interest,[24] and also where such duties arise by necessary implication.[25]

(B) *Ministerial, Discretionary, Legislative, and Judicial Functions.* The rule of an immunity from liability in the exercise of governmental functions extends to discretionary power, and generally there is no liability for damages either for the failure to exercise, for the manner of exercising, or for errors of judgment in the exercise of discretionary powers of a public nature,[26] embracing of course judicial and legislative functions.[27] A municipal corporation therefore

Indiana.— Brinkmeyer *v.* Evansville, 29 Ind. 187.

Kansas.— Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 187, 66 L. R. A. 181.

Louisiana.— O'Neill *v.* New Orleans, 30 La. Ann. 220, 31 Am. Rep. 221.

Michigan.— Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844.

New York.— New York, etc., Saw Mill, etc., Co. *v.* Brooklyn, 71 N. Y. 580.

North Carolina.— Meares *v.* Wilmington, 31 N. C. 73, 49 Am. Dec. 412.

Oregon.— Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

Tennessee.— Memphis *v.* Kimbrough, 12 Heisk. 133.

Virginia.— Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1545.

Whether there is income or profit is not material under the rule imposing liability for all ministerial acts. Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 187, 66 L. R. A. 181.

23. New York, etc., Saw Mill, etc., Co. *v.* Brooklyn, 71 N. Y. 580.

24. La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285. See also *infra*, XIV, A, 2, a, (II), (C).

25. Brinkmeyer *v.* Evansville, 29 Ind. 187. See also *infra*, XIV, A, 5, a, (I).

26. *Alabama.*— Dargan *v.* Mobile, 31 Ala. 469, 70 Am. Dec. 505.

Arkansas.— Little Rock *v.* Willis, 27 Ark. 572.

Georgia.— Duke *v.* Rome, 20 Ga. 635, in the absence of fraud or malice.

Indiana.— Brinkmeyer *v.* Evansville, 29 Ind. 187.

Kansas.— Smith *v.* Leavenworth, 15 Kan. 81.

Louisiana.— Bennett *v.* New Orleans, 14 La. Ann. 120; Stewart *v.* New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218.

Maine.— Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180.

Maryland.— Anne Arundel County Com'rs *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

Michigan.— Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844 (holding that it is only where corporations have been guilty of some positive mischief produced by active misconduct that they have been held liable, and not from mere nonfeasance, or for errors of judgment); Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552.

Missouri.— Carroll *v.* St. Louis, 4 Mo. App. 191.

New York.— O'Donnell *v.* Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1053.

North Carolina.— Rosenbaum *v.* Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123; Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Pennsylvania.— Smith *v.* Selinsgrove Borough, 199 Pa. St. 615, 49 Atl. 213; McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; Grant *v.* Erie, 69 Pa. St. 420, 8 Am. Rep. 272; Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342.

South Carolina.— See White *v.* Charleston, 2 Hill 571.

West Virginia.— Mendel *v.* Wheeling, 28 W. Va. 233, 57 Am. Rep. 664, discretionary power to establish waterworks.

United States.— Weightman *v.* Washington, 1 Black 39, 17 L. ed. 52.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1545, 1546.

27. *Alabama.*— Davis *v.* Montgomery, 51 Ala. 139, 23 Am. Rep. 545; Smoot *v.* Wetumpka, 24 Ala. 112.

Connecticut.— Jones *v.* New Haven, 34 Conn. 1.

Georgia.— Dalton *v.* Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101; Tarbutton *v.* Tennille, 110 Ga. 90, 35 S. E. 282; Rivers *v.* Augusta, 65 Ga. 376, 38 Am. Rep. 787.

Indiana.— Wheeler *v.* Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; Logansport *v.* Wright, 25 Ind. 512; Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476.

Kentucky.— James *v.* Harrodsburg, 85 Ky. 191, 3 S. W. 135, 8 Ky. L. Rep. 899, 7 Am. St. Rep. 589.

Massachusetts.— Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Child *v.* Boston, 4 Allen 41, 81 Am. Dec. 680.

Michigan.—Miller *v.* Kalamazoo, 140 Mich. 494, 103 N. W. 845.

Missouri.— Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168; Carroll *v.* St. Louis, 4 Mo. App. 191.

New York.— O'Donnell *v.* Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1053; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 53 Am.

is not liable for injuries caused by or resulting from the wrongful acts or omissions of its council or any of its boards or officers in the performance or non-performance of legislative or discretionary duties.[28] But such immunity does not extend to corporate acts of a purely ministerial character.[29]

(c) *Special Corporate Interest or Profit.* There is an implied or common-law liability for the negligence of municipal officers and employees in the performance of corporate acts, which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation, or for the acts or negligence in the exercise of corporate powers and duties for the peculiar benefit of the corporation in its local or special interest,[30] which of course includes the manage-

Dec. 316; Kavanagh *v.* Brooklyn, 38 Barb. 232; Wilson *v.* New York, 1 Den. 595, 43 Am. Dec. 719.

North Carolina.—Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Ohio.— Dayton *v.* Pease, 4 Ohio St. 80.

Wisconsin.— Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

United States.—Fowle *v.* Alexandria, 3 Pet. 398, 7 L. ed. 719.

Canada.— Rochon *v.* Montreal, 22 Quebec Super. Ct. 42, holding that in deciding upon the extension of streets the corporation acts judicially and is not responsible to private persons for damages caused by delay in resolving upon such works.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1545. And see *infra*, XIV, A, 5, b, c.

28. *Arkansas.*— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1, no liability for act of council in passing an illegal ordinance.

Colorado.— Irving *v.* Highlands, 11 Colo. App. 363, 53 Pac. 234, rejection of bond required by ordinance to entitle one to license to carry on particular business.

Georgia.— Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131 (judicial act of mayor in fixing amount of bond larger than the law required for release of one under arrest); Bartlett *v.* Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795.

Illinois.— Craig *v.* Charleston, 180 Ill. 154, 54 N. E. 184.

Louisiana.— New Orleans *v.* Kerr, 50 La. Ann. 413, 23 So. 384, 69 Am. St. Rep. 442.

Maine.— Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180; Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

Massachusetts.— McGinnis *v.* Medway, 176 Mass. 67, 57 N. E. 210.

Michigan.— Amperse *v.* Kalamazoo, 75 Mich. 228, 42 N. W. 821, 13 Am. St. Rep. 432, holding that a city is not liable for the wilful refusal of its common council to approve a liquor bond pursuant to statute.

New York.—Altemus *v.* New York, 6 Duer 446; McGuinness *v.* Allison Realty Co., 46 Misc. 8, 93 N. Y. Suppl. 267 (holding that a city cannot be held responsible for defects in a building code adopted by the board of aldermen); Russell *v.* New York, 2 Den. 461.

Pennsylvania.—McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681.

Texas.— Harrison *v.* Columbus, 44 Tex. 418.

Virginia.— Richmond *v.* Long, 17 Gratt. 375, 94 Am. Dec. 461.

Wisconsin.— Kempster *v.* Milwaukee, 103 Wis. 421, 79 N. W. 411.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1545.

29. *Alabama.*— Montgomery *v.* Gilmer, 33 Ala. 116, 130, 70 Am. Dec. 562.

Arkansas.— Little Rock *v.* Willis, 27 Ark. 572.

Colorado.— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729; Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632; Denver *v.* Densmore, 7 Colo. 328, 3 Pac. 705.

Connecticut.— Jones *v.* New Haven, 34 Conn. 1.

Indiana.— Logansport *v.* Wright, 25 Ind. 512; Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476.

Iowa.— Cotes *v.* Davenport, 9 Iowa 227.

Maryland.— Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Baltimore *v.* Pendleton, 15 Md. 12.

Minnesota.— Simmer *v.* St. Paul, 23 Minn. 408; Kobs *v.* Minneapolis, 22 Minn. 159; Furnell *v.* St. Paul, 20 Minn. 117.

Missouri.— Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168.

Nevada.— McDonough *v.* Virginia City, 6 Nev. 90.

New Hampshire.—Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464.

New York.— Saulsbury *v.* Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; McCarthy *v.* Syracuse, 46 N. Y. 194; Conrad *v.* Ithaca, 16 N. Y. 158; Kavanagh *v.* Brooklyn, 38 Barb. 232.

Ohio.— Dayton *v.* Pease, 4 Ohio St. 80; Evans *v.* Cincinnati, 1 Ohio Dec. (Reprint) 462, 10 West. L. J. 122.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1545.

30. *Connecticut.*— Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487; Weed *v.* Greenwich, 45 Conn. 170.

Idaho.— Wilson *v.* Boise City, 6 Ida. 391, 55 Pac. 887.

Illinois.— Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123.

Kentucky.— Twyman *v.* Frankfort, 117 Ky. 518, 78 S. W. 446, 25 Ky. L. Rep. 1620, 64 L. R. A. 572, which is an extreme application of the rule, liability being declared for an arrest under a void ordinance because the

ment of property for private gain or the engaging in any profit-making enter-

city was the sole beneficiary of the fine imposed thereunder.

Maine.— Woodcock *v.* Calais, 66 Me. 234.

Massachusetts.— St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447 (water commissioners held to act as the agents of the city); Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622 (where water commissioners were held to act as agents of city in digging a ditch in a street and leaving the excavation insufficiently guarded); Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218.

Missouri.— Bullmaster *v.* St. Joseph, 70 Mo. App. 60, negligence in construction and repair of electric light plant.

New Hampshire.— Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32.

New York.— Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744; Woodhull *v.* New York, 150 N. Y. 450, 44 N. E. 1038; Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131]; Quill *v.* New York, 36 N. Y. App. Div. 476, 55 N. Y. Suppl. 889 [*reversing* 21 Misc. 598, 48 N. Y. Suppl. 141]; Scott *v.* New York, 27 N. Y. App. Div. 240, 50 N. Y. Suppl. 191; Sharp *v.* New York, 40 Barb. 256, 25 How. Pr. 389 (false representations of agent appointed by municipality to conduct negotiations for a lease); New York v. Bailey, 2 Den. 433.

North Carolina.— Moffitt *v.* Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810.

Oklahoma.— Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

Oregon.— Esberg Cigar Co. *v.* Portland, 34 Oreg. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L. R. A. 435.

Texas.— Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

United States.— Denver *v.* Porter, 126 Fed. 288, 61 C. C. A. 168, loss by fire caused by negligent management of a municipal dump.

Canada.— Crawford *v.* St. John, 34 N. Brunsw. 560, holding that an action would lie against a city by one who had been deprived of his vote at an election by the negligent act of the city chamberlain in striking his name off the voters' list. This case is decided on the authority of McSorley *v.* St. John, 6 Can. Sup. Ct. 531, holding that an officer who issues a warrant and thus directs a distress or arrest to be made, which proceeding is founded upon a void assessment for improvements, is guilty of a trespass; and where he is an officer appointed specially to receive the moneys to be collected and levied under the statute, and the money so raised was to be paid to the city for the extension of a street, he acts as the agent of the city in a matter not for the benefit of the general public but for the peculiar benefit of the corporate body, and the corporation is liable on the principle *respondeat superior*.

As a mere owner of property a municipal corporation will be amenable to the law in respect of its proper use. Brower *v.* New York, 3 Barb. (N. Y.) 254, 258, where it is said: "As a lawgiver, a municipal corporation is irresponsible, and the court cannot interfere with its police regulations, which are ordained as laws for the observance of the citizen. But it can enforce the obligation which rests alike upon owners of land, whether corporations or individuals, so to use their property, as that adjacent proprietors shall be rendered secure in the enjoyment of their estates." See also *infra*, XIV, A, 5, c, (II).

Profits applied to maintenance of works.— A corporation uses works constructed for the public benefit for its corporate profit, when the profits are to be applied to the maintenance of the works and the reduction of the debt incurred by the corporation in their construction. Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487. But in Curran *v.* Boston, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243, it is held that if the duty is purely a public one the mere fact that there may be some revenue on account of which it may be said that the particular institution is not maintained entirely by taxation because the expense of maintaining may be reduced by the incidental profit arising from such revenue, will not render the city liable for acts of public officers in maintaining the institution, as in the case of a workhouse in the conduct of which revenue is derived from the labor of inmates.

Advantage to particular inhabitants.— In Weed *v.* Greenwich, 45 Conn. 170, where a borough asked for and obtained the power to remove all encroachments upon any of the public highways of the borough, the governmental duty (so considered) of keeping the highways being upon the town and not upon the borough, it was held that the power obtained was for the accomplishment of undertakings specially advantageous to the residents of the territorial limits of the borough, and that the borough would be responsible for wrongs upon private rights committed by its officers in exercising the power. So in Coan *v.* Marlborough, 164 Mass. 206, 41 N. E. 238, it was held that where private persons pay in part for an improvement and derive special advantage therefrom, and the building and maintaining of the improvement are not imposed by law without the assent of the municipality but are voluntarily assumed, the corporation will be liable for negligence in constructing and maintaining such improvement.

Mere intention to sell property held in public capacity will not create liability, where in the particular jurisdiction there would be no liability for the acts complained of aside from such intention. Stockwell *v.* Rutland, 75 Vt. 76, 53 Atl. 132.

Taxation to support enterprise.— The mere fact that the municipality is engaged in the performance of a public duty is not enough to free it from all common-law liability for its acts if the word "public" is to be taken

prise,[31] although the property may be used partly for public purposes and the profit or advantage inures ultimately to the benefit of the public.[32]

(III) *In Admiralty.* The theory of sovereign attribute does not control a maritime right and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so.[33]

(IV) *Statutory Regulations.* The legislature may exempt a municipality from liability for nonfeasance or misfeasance by its common council or officers, or an appointee of such council, of any duty imposed upon them by law,[34] or limit or remove the liability of a city resting upon duties imposed by its charter;[35] but such statutes are confined in their operation to the acts for which, when com-

in the broad sense of including every enterprise which may be supported by taxation. Rhobidas *v.* Concord, 70 N. H. 90, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381, referring to the maintenance of a waterworks system by a waterworks department.

Incidental benefit to public health see *infra*, XIV, A, 5, j.

31. *Georgia.*—Augusta *v.* Lombard, 99 Ga. 282, 25 S. E. 772; Savannah *v.* Collens, 38 Ga. 334, 95 Am. Dec. 398, maintenance of sidewalk in repair in front of market from the stalls of which the corporation derives revenue by way of rents.

Illinois.— Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386.

Maine.— Moulton *v.* Scarborough, 71 Me. 267, 36 Am. Rep. 308, poor farm.

Massachusetts.— Lynch *v.* Springfield, 174 Mass. 430, 54 N. E. 871; Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500 (poor farm); Oliver *v.* Worcester, 102 Mass. 489, 499, 3 Am. Rep. 485 (rents derived from public building).

Missouri.— Boothe *v.* Fulton, 85 Mo. App. 16 (maintenance of electric light and water plant); Whitfield *v.* Carrollton, 50 Mo. App. 98 (by receiving rents or otherwise).

Pennsylvania.— Bodge *v.* Philadelphia, 167 Pa. St. 492, 31 Atl. 728 (as to character of an electrical bureau which derived a revenue for the benefit of the city, its employees being held to be servants of the city); Kibele *v.* Philadelphia, 105 Pa. St. 41 (holding that a city as a manufacturer and vendor of gas is bound to know all about its character and to take care that through the default of its officers or agents the article which it makes and sells is the occasion of harm to no one); Philadelphia *v.* Gilmartin, 71 Pa. St. 140.

Rhode Island.— Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

Tennessee.— Memphis *v.* Kimbrough, 12 Heisk. 133.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1545 *et seq.*

Operating ferry.— Townsend *v.* Boston, 187 Mass. 283, 72 N. E. 991, holding that where in an action against the city for injuries from negligence in the operation of the ferry, it was admitted that the city was a common carrier, in the absence of other evidence the city must be held to the ordinary duties and liabilities of a carrier. See also Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65 (maintaining ferry and charging tolls); St. John *v.* Macdonald, 14 Can. Sup. Ct. 1.

Waterworks see *infra*, XIV, A, 5, a, (II).

32. Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487; Lynch *v.* Springfield, 174 Mass. 430, 54 N. E. 871; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485.

33. Workman *v.* New York, 179 U. S. 552, 21 S. Ct. 212, 45 L. ed. 314 [*reversing* 67 Fed. 347, 14 C. C. A. 530, and *affirming* 63 Fed. 298], holding that the relation between the city of New York and those in charge of a fire-boat under its fire department was that of master and servant, its ministerial officers being selected and paid by the city which was responsible for the expenses of the department and which owned all the property of the department, and that under the general maritime law the city as owner of an offending fire-boat which committed a maritime tort was responsible under the rule of *respondeat superior*, and this notwithstanding the doctrine in the state court that by reason of the public nature of the service which the vessel was performing when the tort was committed the city would be exempt from liability; further, conceding without deciding that the fire-boat could not be seized by process from a court of admiralty, nevertheless an action *in personam* to respond for the damages inflicted by the boat may lie against the owner. The same result was reached as to the remedy *in personam* in Henderson *v.* Cleveland, 93 Fed. 844; Thompson Nav. Co. *v.* Chicago, 79 Fed. 984; The F. C. Latrobe, 28 Fed. 377. But see Haight *v.* New York, 24 Fed. 93 [*affirmed* in 27 Fed. 230].

The rule that indictment only is the remedy where a public duty is violated by a municipal corporation, unless a private action is given by statute, as established in a state court, does not prevail in the court of admiralty. Boston *v.* Crowley, 38 Fed. 202, declaring liability for injury to a vessel on a navigable stream by reason of the city's failure to maintain a drawbridge of the required width. See French *v.* Boston, 129 Mass. 592, 27 Am. Rep. 393, and Corning *v.* Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526, where for similar acts the cities were held not liable under the state doctrine.

34. Gray *v.* Brooklyn, 2 Abb. Dec. (N. Y.) 267 [*affirming* 50 Barb. 365].

35. Goddard *v.* Lincoln, 69 Nebr. 594, 96 N. W. 273.

mitted by its officers, the city is relieved from liability;[36] and a charter provision exempting a city from liability for the misfeasance or nonfeasance of its officers does not apply to a failure to discharge a duty resting upon the city itself, and which has not devolved upon any of its officers.[37] Municipalities are sometimes made liable for default of their officers in the performance of governmental duties.[38]

b. Persons Entitled to Relief.[39] The rules of law as to persons entitled to maintain an action for tort committed by a municipality are those generally recognized and applied in such actions against other classes of defendants. One whose person or property is injured may bring the action, although he be a corporator.[40] A municipal corporation may be held liable for negligence at the suit of an employee,[41] and when acting in its quasi-private or ministerial capacity it owes its employees the same measure of duty, and will be liable to them for injuries in the same manner and to the same extent, as private corporations or individuals,[42] as in the case of an injury to one working on the street,[43] or of an injury to one work-

36. Bliss *v.* Brooklyn, 3 Fed. Cas. No. 1,544, 8 Blatchf. 533, liability declared for infringement of patent.

37. Bieling *v.* Brooklyn, 120 N. Y. 98, 24 N. E. 389; Hardy *v.* Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182 [*following* Fitzpatrick *v.* Slocum, 89 N. Y. 358]. See also Hurley *v.* Brooklyn, 8 N. Y. Suppl. 98.

38. Swan *v.* Bridgeport, 70 Conn. 143, 39 Atl. 110. See also *infra*, XIV, A, 5, f.

39. Parties see *infra*, XIV, E, 5.

40. Savannah *v.* Collens, 38 Ga. 334, 95 Am. Dec. 398.

41. Turner *v.* Indianapolis, 96 Ind. 51.

42. *Connecticut.*— Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

Kansas.— Winfield *v.* Peeden, 8 Kan. App. 671, 57 Pac. 131.

Massachusetts.— Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218 (where a city hired a railroad train, with its crew to operate it, which it used on a temporary track, laid on its own grounds, in grading and filling the same, and was in effect operating a railroad); Norton *v.* New Bedford, 166 Mass. 48, 43 N. E. 1034 (as to duty to furnish safe place to work, by officers acting as agents and not as public officers); Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

Ohio.— Toledo *v.* Cone, 41 Ohio St. 149.

Oregon.— Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300.

Wisconsin.— Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1561.

The fellow-servant doctrine, when applicable in other cases, is applicable to injuries to employees of a municipality. Sheffield *v.* Harris, 101 Ala. 564, 14 So. 357; Flynn *v.* Salem, 134 Mass. 351; McDermott *v.* Boston, 133 Mass. 349; McGough *v.* Bates, 21 R. I. 213, 42 Atl. 873. See also Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487. But see Turner *v.* Indianapolis, 96 Ind. 51, where there is a *dictum* to the contrary. And on the other hand municipal corporations are subject to an employers' liability act. Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218.

Proximate cause.— A municipal corporation is not liable if its negligence was not the proximate cause. McGough *v.* Bates, 21 R. I. 213, 42 Atl. 873.

For the risk assumed by such employee he cannot recover. Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300; Allen *v.* Logan City, 10 Utah 279, 37 Pac. 496.

In the execution of a public duty, where the rule is applied that in the absence of statute no action lies for negligence or omissions, an action will not lie for an injury to one engaged in work appertaining to the performance of such corporate duties. Taggart *v.* Fall River, 170 Mass. 325, 49 N. E. 622 (holding that the working of a street required for public convenience was not a business carried on by the city for profit, making it liable for negligently injuring laborers therein, although land belonging to the city in the neighborhood, together with other land, was increased in value, and the city had taken the work out of the hands of the officers upon whom the duty of performing it was caused by law was immaterial); Jensen *v.* Waltham, 166 Mass. 344, 44 N. E. 339. On the other hand it is held that notwithstanding the injury may be occasioned in the execution of a public duty there is a common-law liability. Rhobidas *v.* Concord, 70 N. H. 90, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381. And so it is also held with respect to the execution of governmental powers that after the legislative power, and the judgment and discretion have been exercised, then in the mere execution of the work or the maintenance of the institution, devised and constructed pursuant to such legislative and judicial action, is ministerial, and the municipality will be liable for any injury occurring to an employee through the negligence of the corporate officers in the performance of such ministerial duties. Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 187, 66 L. R. A. 181. See also *infra*, XIV, A, 5, a, (I).

43. Sheffield *v.* Harris, 101 Ala. 564, 14 So. 357; Barksdale *v.* Laurens, 58 S. C. 413,

ing in the construction of a sewer.[44] The duty of a municipal corporation to keep and maintain its streets in a reasonably safe condition for travel[45] extends to the protection of firemen and policemen while in the discharge of their duties as well as to others, and the municipality will be liable for an injury occasioned to such fireman by reason of a defect in a street.[46] But for injuries resulting from the

36 S. E. 661, under a statute providing for liability in favor of any one injured through a defect in any street, etc., or by reason of any defect or mismanagement of anything under the control of the corporation, etc., but holding that plaintiff could not recover in this case by reason of another provision of the act that required him to show affirmatively freedom from contributory negligence.

Working in gravel bank.— In Winfield *v.* Peeden, 8 Kan. App. 671, 57 Pac. 131, it was held that a workman in a gravel bank who was performing labor in lieu of poll tax, loading wagons of gravel for use in the streets, occupied the relation of servant, and while the duty of improving and repairing streets was imposed by the city by law, the action of the city in purchasing and using the gravel bank was not within the scope of the duty thus imposed, and in using the bank the street commissioner derived none of his powers from the express provisions of the statute but drew them all from the orders and directions of the city officers and acted as agent of the city.

In the absence of statute creating liability, where the duty in repairing streets is held to be governmental, an employee engaged in such work cannot recover for injuries sustained by the use of defective machinery or through the negligence of city officials in superintending such repairs. Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 52 L. R. A. 218.

44. Coan *v.* Marlborough, 164 Mass. 206, 41 N. E. 238 (for negligence whereby one employed to work in constructing a sewer is injured, upon the rule established in this state actions for negligence in building or maintaining sewers lie because sewers are built and maintained partly for the private benefit and advantage of the abutters, who pay in part for such advantage, and because the charge of sewers is voluntarily assumed by the municipality); Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571.

45. See *infra*, XIV, D.

46. *Indiana.*— Turner *v.* Indianapolis, 96 Ind. 51.

Kansas.— Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Michigan.— Coots *v.* Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

New Hampshire.— Palmer *v.* Portsmouth, 43 N. H. 265.

New York.— Farley *v.* New York, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1561.

Assumption of risk by policeman.— In Galveston *v.* Hemmis, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 828, while approving the doctrine that a police officer acts in the capacity of a public officer and not as an agent or servant of the city, and that the city is under the same duty to such officer as to other persons to keep its streets in a reasonably safe condition, it was held that a verdict for plaintiff was not at variance with an instruction that a supernumerary night policeman in the pay of the city is its employee and assumes all the risks ordinarily incidental to such employment and that where there may be an open defect in the approaches from the street to the sidewalk and such policeman knew thereof, or where the defect was open to ordinary observation and such policeman had been on the beat sufficiently long to have become aware of the defect, he is presumed to have assumed all the risks incident to such defect, inasmuch as the charge did not make the policeman assume the risk incident to the defect unless he knew of the defect, etc., there being evidence before the jury to sustain their finding under the charge, from which the jury might have properly concluded that the policeman had not been on the beat long enough to have discovered the defect.

The fellow-servant doctrine does not apply to prevent a recovery because a member of a fire department has no servitude connection with the repairing of the streets by the removal of obstructions therefrom and can in no sense be called a co-servant with the street commissioner or any other officer or agent of the city having charge of the streets. Turner *v.* Indianapolis, 96 Ind. 51; Coots *v.* Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315, where it is said that a fireman is in no sense an employee of the city but of the fire commission.

A violation of speed regulations will not avoid a recovery for injury to a fireman arising from a breach of the city's duty to keep its streets in a safe condition for travel. Such regulations do not apply to the fire department. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Farley *v.* New York, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511. But see Carswell *v.* Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169.

Rules of a fire department requiring its members to drive in the middle of the street when going to a fire are made for the safety of the men, teams, and vehicles; and a driver of a hook-and-ladder truck is charged with the use of no greater care and precaution for his safety by such rule than he would be if such rule did not exist. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Pension.— The liability of the city for an injury to a fireman by reason of defects in the street is not affected by reason of the

exercise of, and to those who are in the performance of, its governmental functions, no liability accrues, and the doctrine of *respondeat superior* is not applicable,[47] because while one is acting thus as a mere governmental agency, although the city pays for his services, the relation between him and the city is not the ordinary one of master and servant,[48] as in the case of a fireman injured by defective appliances of the department or by the negligence of others therein in the performance of his duties,[49] or of injury sustained by one aiding a police officer, on his summons, to preserve the peace,[50] or of injury to one employed by the municipality

fact that the fire commission is empowered by the charter to pension firemen who are totally disabled while acting in the line of their duty. Coots *v.* Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

Insurance.— The fact that the city procured an accident policy for a fireman under the provisions of a statute, which policy cost the city nothing, the premiums being paid by foreign insurance companies doing business in the state from a tax laid by the state on the premiums on policies written by such companies, and that the amount of such policy was paid to the fireman's widow, will not relieve the municipality from liability for injuries caused by a breach of its duty to keep its streets in a reasonably safe condition. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

47. *Connecticut.*— Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218.

Illinois.— Kinnare *v.* Chicago, 171 Ill. 332, 49 N. E. 536, injury to a workman while engaged in the building of a school-house which was being erected by a board of education with the concurrence of the city council, the charter of the city not investing it with power to construct school buildings or imposing such duty on it, the court holding that whatever connection the city had with the construction of the building was simply for the purpose of discharging a public duty, and the construction was of no benefit to the city as a municipality, the distinction being drawn between this case and that in which the city has voluntarily adopted an act and thereby assumes the burden of exercising the powers therein conferred.

Louisiana.— Spalding *v.* Jefferson, 27 La. Ann. 159, holding that damage done to a police officer in the discharge of his duties is a risk he assumes.

Michigan.— Nicholson *v.* Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

Washington.— Lynch *v.* North Yakima, 37 Wash. 657, 80 Pac. 79, holding that a city is not liable to a teamster in its fire department for injuries sustained while training horses, by reason of the negligence of the chief of the fire department.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1561.

48. Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218, employee engaged in repairing street.

49. *Massachusetts.*— Pettingell *v.* Chelsea, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426, injury, while performing duties as lineman, by the breaking of the pole.

New Jersey.—Wild *v.* Paterson, 47 N. J. L. 406, 1 Atl. 490.

New York.— Peaty *v.* New York, 33 Misc. 231, 67 N. Y. Suppl. 276, injury while performing duty of lineman by breaking of pole.

North Carolina.— Peterson *v.* Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959.

Texas.— Shanewerk *v.* Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1561. And see *infra*, XIV, A, 5, i.

A different rule seems to be applied in some cases. See Lafayette *v.* Allen, 81 Ind. 166 (where it was held that the city was liable to an engineer for its negligence in putting him to work upon a defective engine. This case was distinguished in Peterson *v.* Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959, in that at the time of the injury by the explosion of the engine it was not being used in the extinguishment of a fire but for the purpose of pumping water for ordinary city purposes. It may be remarked, however, that it does not appear from the report of the case that such was the fact or that it was the reason of the decision. It appears that the explosion occurred while water was being pumped into the city's pipes but it does not appear that the water was not for fire purposes); Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 187, 66 L. R. A. 181 (holding that in determining the necessity for a fire department, the number and location of fire stations, kind, quality, and number of fire extinguishers, and all matters involving the efficiency of the department, the city council exercises legislative power, judgment, and discretion, but that having determined these questions the execution of the work and the managing of the property are ministerial and that the corporation will be liable in damages to an employee for personal injuries sustained resulting from the neglect on the part of the corporation to furnish him a reasonably safe place in which to work, the cause of action in this case being injuries sustained by an employee of a city in charge of a fire station whose duty it was to clasp the collar on the horses when they came from their stalls to the tongue of the hose car upon an alarm of fire, by reason of the unsafe condition of the floor in such fire station); Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300; Lawson *v.* Seattle, 6 Wash. 184, 33 Pac. 347.

Injuries to others see *infra*, XIV, A, 5, i.

50. Cobb *v.* Portland, 55 Me. 381, 92 Am. Dec. 598, holding that there was no liability

in carrying out the provisions of law for the preservation of the public health.[51]

3. Acts or Omissions of Officers or Agents — a. Doctrine of Agency in General. A corporation can act only by its agents or servants.[52] This obvious truth does not imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent the more evident is the responsibility of the principal.[53]

b. Officer, Board, or Department as Agent of Corporation. To determine whether there is municipal responsibility, the inquiry must be whether the particular officer, board, or department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government; whether it was at the time engaged in the discharge of a duty or charged with the performance of a duty primarily resting upon the municipality, and if so, such officer, board, or department acts as the agent of the municipality;[54] or whether the agents or servants for whose acts or negligence it is sought to hold the corporation are its agents and servants for the performance of a public duty imposed by law,[55] or merely for the carrying out of private functions which are for its special benefit or advantage.[56] A board or department which is a part of the municipality, although having full and exclusive power in particular matters, and

on the theory of a compulsory agency without hire, since there was no physical compulsion, but at most only a moral compulsion arising from the alternative of compliance with the request of the officer or liability to a small pecuniary fine.

51. Nicholson *v.* Detroit, 129 Mich. 245, 88 N. W. 695, 56 L. R. A. 601, where the city failed to disinfect a pest-house which was being demolished in the course of the work of constructing a new hospital, and a workman engaged in such construction contracted smallpox and died.

52. Bieling *v.* Brooklyn, 120 N. Y. 98, 24 N. E. 389; Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

53. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440, holding that a municipal corporation may act through its mayor, through its common council, or its legislative department by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, and the like, provided the act is within the province committed to its charge.

Officer must qualify.— A city or town is not liable for the wrongful acts of one acting as poundkeeper, but who has never qualified by giving bonds as required by law. Rounds *v.* Bangor, 46 Me. 541, 74 Am. Dec. 469.

A city cannot deny the legality of the appointment of a superintendent which it has placed in charge of a gang of laborers in an action by one of the laborers for injuries through the superintendent's negligence. Sheffield *v.* Harris, 101 Ala. 564, 14 So. 357.

Parol authority.— In an action against a municipal corporation for negligence of its agents causing injury it is not necessary to prove that the agent had authority under the corporate seal or under an order entered on the books of the corporation. Hooe *v.* Alexandria, 12 Fed. Cas. No. 6,666, 1 Cranch C. C. 90. See also Akron *v.* McComb, 18 Ohio 229, 51 Am. Dec. 453.

Presumption of agency.— In the absence of showing to the contrary, it has been held that it will be presumed that persons doing municipal work are agents of the city. Chicago *v.* Brophy, 79 Ill. 277; Chicago *v.* Johnson, 53 Ill. 91; Elgin *v.* Goff, 38 Ill. App. 362.

54. *Indiana.*— Turner *v.* Indianapolis, 96 Ind. 51.

Maryland.—Anne Arundel County Com'rs *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

Minnesota.— St. Paul *v.* Seitz, 3 Minn. 297, 74 Am. Dec. 753, where a charter provision assigning to the aldermen of each ward in the city the duties and powers of street commissioners for their several wards and authorizing them to contract for the "making, grading," etc., of streets, etc., was held merely to distribute the exercise of the powers and duties of the corporation concerning its streets, etc.

New York.— Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442 (board of water commissioners); Walsh *v.* New York, 107 N. Y. 220, 13 N. E. 911; Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Deyoe *v.* Saratoga Springs, 1 Hun 341, 3 Thomps. & C. 504 (water commissioners); Richards *v.* New York, 48 N. Y. Super. Ct. 315; Mahon *v.* New York, 10 Misc. 664, 31 N. Y. Suppl. 676 (park commissioners subordinate to the municipal corporation).

Ohio.— Dayton *v.* Pease, 4 Ohio St. 80.

Canada.—Archibald *v.* Truro, 33 Nova Scotia 401 [*affirmed* in 31 Can. Sup. Ct. 380].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1565 *et seq.*

55. Sampson *v.* Boston, 161 Mass. 288, 31 N. E. 177; Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649.

56. See *supra*, XIV, A, 2, a, (I), (II).

whose duties are purely municipal and corporate, acts as an agent of the corporation,[57] although such board is created, or the particular work is provided for, by

57. *Colorado.*— Denver *v.* Peterson, 5 Colo. App. 41, 36 Pac. 1111, board of public works appointed by the governor having full and exclusive power to govern, manage, and direct all parks, boulevards, etc., within the limits of a city, which appoints and employs certain agents and servants and the salaries of whose members and employees are payable out of the city treasury, the city furnishing the board with office, stationery, and all facilities for the performance of its duties.

Connecticut.— Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

Minnesota.— Kleopfert *v.* Minneapolis, 93 Minn. 118, 100 N. W. 669, 90 Minn. 158, 95 N. W. 908.

New Hampshire.— Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32 [*overruling* Gross *v.* Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586]; Rhobidas *v.* Concord, 70 N. H. 90, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381, water commissioners, under an act authorizing a city to establish waterworks and place them under the direction of a board of water commissioners with such powers as the city council might prescribe.

New York.— Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744 (commissioner of street cleaning); Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453 (members of common council as commissioners of highway, the duty being imposed upon them to keep the streets in good order, were held to be agents of the city in respect to that function); Niven *v.* Rochester, 76 N. Y. 619 (commissioners of public works who had charge of the streets of the city); New York, etc., Saw Mill, etc., Co. *v.* Brooklyn, 71 N. Y. 580 (holding that when, by a municipal charter in the distribution of powers and duties among the different municipal officers, duties of a public character are imposed, the officers are regarded as agents of the corporation, and it is liable for their acts or omissions); Conrad *v.* Ithaca, 16 N. Y. 158 (holding that the trustees of a village who were by its charter made commissioners of highways were to be regarded in respect to that function, not as independent public officers but as the agents of the corporation); Quill *v.* New York, 36 N. Y. App. Div. 476, 55 N. Y. Suppl. 889; Groves *v.* Rochester, 39 Hun 5; Clark *v.* Lockport, 49 Barb. 580 (where in case of a village or city the trustees or common council being made commissioners of highways act as agents of the corporation); Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669 [*affirmed* in 2 Den. 433]. See also Walsh *v.* New York, 107 N. Y. 220, 13 N. E. 911, holding that the trustees of the Brooklyn bridge and those employed by such trustees are agents and servants of New York and Brooklyn under the statutes under which the bridge was constructed. But see Davidson *v.* New York, 24 Misc. 560, 54 N. Y. Suppl. 51, holding that the municipality was not liable for injuries caused by the driver of a cart in the street-cleaning department.

Ohio.— Johns *v.* Cincinnati, 45 Ohio St. 278, 12 N. E. 801 (as to the relation of a board of public works to the city, under a statute authorizing county commissioners to levy a tax upon the property of the county to be expended under the direction of said board in opening, grading, and completing an uncompleted highway wholly within the city limits); Dayton *v.* Pease, 4 Ohio St. 80 (duty to keep street in repair).

Oregon.— Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300, holding that the board of fire commissioners appointed under a city charter authorizing the mayor to appoint a board of fire commissioners, which board shall have exclusive power and authority to organize and control the fire department, is not an independent body, but its acts are those of the city.

Rhode Island.— Inman *v.* Tripp, 11 R. I. 520, 23 Am. Rep. 520 (holding that a city is presumably responsible for acts of highway commissioners, who are declared by statute to be subject to the orders of the city council); Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434 (water commissioners, under a statute enabling a city to introduce water, to elect water commissioners, to prescribe the duties and compensation of such commissioners, and to regulate the mode and causes of their removal from office).

United States.— Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440 [*followed* in District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472]; Barney Dumping-Boat Co. *v.* New York, 40 Fed. 50; Brickill *v.* New York, 7 Fed. 479, 18 Blatchf. 273 (holding a city liable for infringement by its fire department, although separately incorporated); Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1571.

The fact that such a board is independent of any control on the part of any other department of the municipality is immaterial if the duties relate solely to the purely corporate interest or special corporate affairs to be managed for private profit. Kleopfert *v.* Minneapolis, 93 Minn. 118, 100 N. W. 669, 90 Minn. 158, 95 N. W. 908 (park board having exclusive care of a parkway); Esberg Cigar Co. *v.* Portland, 34 Oreg. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L. R. A. 435. See also Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622, holding that under a section providing that commissioners of the department of public works shall have exclusive power to locate and lay out, construct and maintain all public parks, streets, roads, and avenues, and to devise plans for and to locate all bridges and tunnels, and shall have exclusive control of the maintenance and construction of all public parks, etc., exclusive

separate statute;[58] and where powers and duties of municipal officers in particular matters which they exercise as agents of the municipality, as distinguished from public duties or those which are exercised by persons acting as purely public officers, are by statute transferred to the exclusive jurisdiction of a particular board created by the statute, such board still acts in these matters as the agent of the municipality and not as a public officer.[59]

c. Public and Independent Officers, Boards, Etc. Where an injury results from the wrongful act or omission of an officer or independent board, commissioner, and the like, or their employees, charged with a duty prescribed and limited by law, and from which the municipality derives no special advantage in its corporate capacity,[60] such officer or the members of such board are not treated as the servants or agents of the corporation in the performance of these duties, but are held to be the servants and agents of and controlled by the law, for whose acts or omissions the corporation will not be held liable,[61] even though the duty

control given is not exclusive of the city, but is exclusive of any other officers of the city.

58. Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32; Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

59. Norton *v.* New Bedford, 166 Mass. 48, 43 N. E. 1034; Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32.

60. Haskell *v.* New Bedford, 108 Mass. 208; Murray *v.* Omaha, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

61. *California.*— Sievers *v.* San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

Indiana.— Williams *v.* Indianapolis, 26 Ind. App. 628, 60 N. E. 367.

Kentucky.— Prather *v.* Lexington, 13 B. Mon. 559, 56 Am. Dec. 585.

Louisiana.— Harrison *v.* New Orleans, 40 La. Ann. 509, 4 So. 133.

Maine.— Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900; Brunswick Gas Light Co. *v.* Brunswick, 92 Me. 493, 43 Atl. 104; Woodcock *v.* Calais, 66 Me. 234.

Maryland.—Altvater *v.* Baltimore, 31 Md. 462, independent board of police commissioners.

Massachusetts.— Murphy *v.* Needham, 176 Mass. 422, 57 N. E. 689; McGinniss *v.* Medway, 176 Mass. 67, 57 N. E. 210 (where a liquor licensing board was held to act as public officers, the license being granted by the state and not by the municipality, although the question whether the license should be granted was to be determined by the vote of the inhabitants of the municipality); McCarthy *v.* Boston, 135 Mass. 197.

Michigan.—Amperse *v.* Kalamazoo, 75 Mich. 228, 42 N. W. 821, 13 Am. St. Rep. 432; Detroit *v.* Laughna, 34 Mich. 402; Detroit *v.* Blackeby, 21 Mich. 84, 4 Am. Rep. 450.

Minnesota.— Bryant *v.* St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31.

Mississippi.— Sutton *v.* Carroll County Police, 41 Miss. 236.

Nebraska.— Murray *v.* Omaha, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

New Hampshire.— Felch *v.* Weare, 69 N. H. 617, 45 Atl. 591; Doolittle *v.* Walpole, 67 N. H. 554, 38 Atl. 19; Wakefield *v.* Newport, 62 N. H. 624. In Gross *v.* Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586, water commissioners were held not to act as agents of the city, being an independent board which the city could not direct in the discharge of their duties. But the powers involved in this case being conferred on the municipality and not of a governmental nature, the decision was overruled in Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32.

New York.— Terhune *v.* New York, 88 N. Y. 247 (fire commissioners); New York, etc., Saw Mill, etc., Co. *v.* Brooklyn, 71 N. Y. 580; Ham *v.* New York, 70 N. Y. 459 [*affirming* 37 N. Y. Super. Ct. 458] (department of public instruction of New York under the act of 1871); Tone *v.* New York, 70 N. Y. 157; Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468; Reynolds *v.* Union Free School Dist. Bd. of Education, 33 N. Y. App. Div. 88, 53 N. Y. Suppl. 75 (officer of board of education); Heiser *v.* New York, 29 Hun 446 [*affirmed* in 104 N. Y. 68, 9 N. E. 866] (where a board of assessors derived its authority wholly from statute and was not subjected to corporate control, and the city was held not liable for its fraudulent or negligent acts); Theall *v.* Yonkers, 21 Hun 265; Connors *v.* New York, 11 Hun 439 (where certain duties as to the examination and removal, if necessary, of dangerous structures which were imposed upon a department of buildings created by special statute, the municipality having no authority or supervisory control over the department); McGuinness *v.* Allison Realty Co., 46 Misc. 8, 93 N. Y. Suppl. 267 (holding that under the Greater New York charter the bureau of buildings of the borough of Manhattan was not an administrative department of the city rendering it liable for the default of a superintendent); Russell *v.* New York, 2 Den. 461; Martin *v.* Brooklyn, 1 Hill 545.

Ohio.— Diehn *v.* Cincinnati, 25 Ohio St. 305, school trustees.

Oregon.— Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

Pennsylvania.— Ashby *v.* Erie, 85 Pa. St. 286 (water commissioners under a statute creating such commissioners to erect and maintain waterworks); Alcorn *v.* Philadelphia, 44 Pa. St. 348.

is imposed upon the city government itself or the officers thereof who are designated by the state for the purpose of performing purely public duties and who

United States.— Haight *v.* New York, 24 Fed. 93 [*affirmed* in 27 Fed. 230].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1571.

Highway surveyors, street commissioners, or superintendents.— See as illustrating the rule, as applied to street commissioners, highway surveyors, or street superintendents the following cases: Judge *v.* Meriden, 38 Conn. 90; Bowden *v.* Rockland, 96 Me. 129, 51 Atl. 815; Woodcock *v.* Calais, 66 Me. 234; Small *v.* Danville, 51 Me. 359 (as to town officers whose duties are defined and imposed by statute); Tyler *v.* Revere, 183 Mass. 98, 66 N. E. 579; Butman *v.* Newton, 179 Mass. 1, 60 N. E. 401, 88 Am. St. Rep. 349; Collins *v.* Greenfield, 172 Mass. 78, 51 N. E. 454; Taggart *v.* Fall River, 170 Mass. 325, 49 N. E. 622; Manners *v.* Haverhill, 135 Mass. 165 (holding that if officers in performing their duty of removing obstructions from the public ways, under the general laws of the state, enter upon the land of an individual, under a mistaken belief that the land is a public way, the city will not be liable for the trespass); Conner *v.* Manchester, 73 N. H. 233, 60 Atl. 436; Hall *v.* Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455; Theall *v.* Yonkers, 21 Hun (N. Y.) 265. The rule is applied where the officers are acting under charter authority. Jensen *v.* Waltham, 166 Mass. 344, 44 N. E. 339; McCann *v.* Waltham, 163 Mass. 344, 40 N. E. 20 (assistant superintendent of streets acting under a board of street commissioners, under a charter giving the board of aldermen power to elect street commissioners, but denying the board of aldermen the right to direct such commissioners); Hennessey *v.* New Bedford, 153 Mass. 260, 26 N. E. 999; Prince *v.* Lynn, 149 Mass. 193, 21 N. E. 296; Barney *v.* Lowell, 98 Mass. 570; Bates *v.* Rutland, 62 Vt. 178, 20 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363, where maintaining and repairing streets under a charter making all territory within a village a highway district of the town, the money for such purposes being paid to the village treasurer and drawn out by the trustees and expended for such purposes by them in work done by a street commissioner appointed by them, is held to be public, not corporate or private.

Arrest by tax-collector.— A constable and deputy tax-collector in serving a warrant for the collection of taxes is a public officer and not a servant of the city, and if he, in excess of his authority, arrests the person named in the warrant the city is not liable. Dunbar *v.* Boston, 112 Mass. 75.

That the enforcement of municipal ordinances is one of the duties charged upon the board or officer is immaterial. Murray *v.* Omaha, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

Nature of duty and control of agency.— In many cases the liability or exemption from liability is placed upon the basic principle of the doctrine of *respondent superior*, which is the right of an employer to select and discharge his servants and direct and control them while in his employ. Woodcock *v.* Calais, 66 Me. 234; McCann *v.* Waltham, 163 Mass. 344, 40 N. E. 20 (where the charter gave the board of aldermen of the city power to elect street commissioners but denied it the right to superintend and direct them); Waldron *v.* Haverhill, 143 Mass. 582, 10 N. E. 481; Walcott *v.* Swampscott, 1 Allen (Mass.) 101; Sutton *v.* Carroll County Police, 41 Miss. 236; Connors *v.* New York, 11 Hun (N. Y.) 439; Ham *v.* New York, 37 N. Y. Super. Ct. 458 [*affirmed* in 70 N. Y. 459]; Hurley *v.* Brooklyn, 8 N. Y. Suppl. 98; Ashby *v.* Erie, 85 Pa. St. 286; Alcorn *v.* Philadelphia, 44 Pa. St. 348; Crawford *v.* St. John, 34 N. Brunsw. 560. See also Muller *v.* Bayonne, 45 N. J. Eq. 237, 19 Atl. 614. So where the act or duty is one for which, by reason of its nature, the municipality may be liable, the fact that the agencies through which the duty is performed are subject to the control and direction of the corporation is an element considered in determining whether the municipality is liable in the particular case for the acts of its agents, as where street commissioners who by the charter are subject to the control and direction of the common council of a city are regarded as agents of the city for whose default the city will be liable under the statute making cities liable for injuries resulting from insufficient highways. Kittredge *v.* Milwaukee, 26 Wis. 46. See also Kobs *v.* Minneapolis, 22 Minn. 159; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434. On the other hand, however, it is held that the rule for determining whether a municipality is responsible for the acts of any particular officer or agent is the character of the duty in the performance of which such officer or agent was engaged at the time of the injury. Butman *v.* Newton, 179 Mass. 1, 60 N. E. 401, 88 Am. St. Rep. 349 (where it was held that the exemption from liability for the acts of public officers in the performance of a public duty or in the performance of acts for the general good does not rest upon any idea of want of control by the corporation but upon the nature of the duty performed); Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32 [*overruling* Gross *v.* Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586]; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440 (where it is said that when the question is whether an individual is acting for himself or for another, the inquiry whether that other directed him to do the work and controlled its performance, and whether he promised to pay him for his services, may be important in determining that question, but that where all the actors are in some form under the same authority, where all are created by the same legislature, and it is a question of the distribution of

may be its agents or servants for other purposes.[62] But if such officer is employed by the corporation to carry out particular work on its own account and is not acting independently to perform the duty cast upon him by the law, he is held to act as the agent of the corporation and it will be responsible for his conduct;[63] and it is not material in such a case whether the undertaking in fact proved profitable.[64] And so if in exercising a power of a private nature the corporation employs as an agency a public body which itself is not vested with independent power in respect of the particular matter the corporation will be liable for the acts of such body.[65]

d. Manner of Appointment and Payment of Officer as Affecting Authority. As affecting the question of municipal responsibility for the acts of officers and agents under the rules above stated, the character of the officer's tenure — whether he is appointed by the municipality, even though the appointment is required, or is elected by the people or appointed by the governor is entirely immaterial.[66]

conceded power, these suggestions are unimportant).

That the cost of the particular work and improvement are paid out of the municipal treasury is not material. Gilpatrick *v.* Biddeford, 86 Me. 534, 30 Atl. 99.

Although the officer has corporate property in his charge, and the negligence imputed is in the use of such property, if the duty of the officer is independent of any relation as agent of the corporation and is laid on him as a public officer, the municipality will not be liable. Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468.

Firemen see *infra*, XIV, A, 5, i.

Health officers see *infra*, XIV, A, 5, j.

Police officers see *infra*, XIV, A, 5, h.

62. *Maine.*— Gilpatrick *v.* Biddeford, 86 Me. 534, 30 Atl. 99; Bulger *v.* Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205; Barbour *v.* Ellsworth, 67 Me. 294; Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252.

Massachusetts.— McGinnis *v.* Medway, 176 Mass. 67, 57 N. E. 210 (holding that where a license is granted by the city, whether the licensing board consists of the mayor and aldermen or of a special commission, they act as public officers and not as agents of the city or town); Jensen *v.* Waltham, 166 Mass. 344, 44 N. E. 339; McCann *v.* Waltham, 163 Mass. 344, 40 N. E. 20; Sampson *v.* Boston, 161 Mass. 288, 37 N. E. 177 (duty cast on city); Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289; McCarthy *v.* Boston, 135 Mass. 197; Manners *v.* Haverhill, 135 Mass. 165.

Michigan.— See also Detroit *v.* Laughna, 34 Mich. 402.

New Hampshire.— O'Brien *v.* Derby, 73 N. H. 198, 60 Atl. 843.

New York.— Russell *v.* New York, 2 Den. 461.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1571.

To illustrate, the city is not liable for delay or neglect of a city council and the mayor in the performance of a municipal duty imposed upon them. Gordon *v.* Omaha, 71 Nebr. 570, 99 N. W. 242. So where the mayor and aldermen were required to perform all duties, etc., of highway surveyors, commissioners, and the like, it was held that in the performance of such duties they acted in their official capacity as such surveyors of highways, etc., so that the municipality would not be liable for injuries suffered by reason of the manner of performance. Hennessey *v.* New Bedford, 153 Mass. 260, 26 N. E. 999; Theall *v.* Yonkers, 21 Hun (N. Y.) 265. See also Bates *v.* Rutland, 62 Vt. 178, 28 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363.

63. See *infra*, XIV, A, 3, e, (I).

Where the corporation is required to perform duties which it may perform by the employment of agents to execute certain work, and it does the work in this way, no question arises as to its liability for the acts of an officer who is required to be chosen and whose duties are defined by law. Deane *v.* Randolph, 132 Mass. 475.

64. Collins *v.* Greenfield, 172 Mass. 78, 51 N. E. 454.

65. Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131], as to constructing and maintaining by the city of a telegraph line used as a patrol line, the power to maintain such a line being in the city and not in the police commissioners. See also Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300, where the exclusive management and control of the fire department was in fire commissioners, who had, as incident to their duties and powers, the maintenance of a fire-alarm system owned by the city. One employed as groundman in repairing the line by the superintendent, who derived his authority from said board, being injured, as he alleged, through the negligence of the city, it was held that the city being engaged in the legal duty of repairing its fire-alarm system through private and corporate agencies was acting in its corporate capacity in the performance of ministerial acts, and was liable for injuries received by a workman therein.

66. *Colorado.*— Denver *v.* Peterson, 5 Colo. App. 41, 36 Pac. 1111, appointment by governor.

Connecticut.— Mead *v.* New Haven, 40 Conn. 72, 16 Am. Rep. 14.

Kentucky.— Prather *v.* Lexington, 13 B. Mon. 559, 56 Am. Dec. 585.

Maryland.—Anne Arundel County Com'rs *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

Nor is the question affected by any consideration of the source from which the officer's compensation is drawn.[67]

e. Scope of Authority or Employment and Ultra Vires Acts — (i) *In General.* In line with the general rules which have been stated above,[68] it is held that *prima facie* a municipal corporation is not responsible for the trespasses or wrongful acts of its officers, although done *colore officii*;[69] that it must appear that such acts were expressly authorized by the municipal government or were subsequently ratified and adopted by it,[70] or that they were done in pursuance of

Massachusetts.— McCann *v.* Waltham, 163 Mass. 344, 40 N. E. 20; Prince *v.* Lynn, 149 Mass. 193, 21 N. E. 296.

Minnesota.— Bryant *v.* St. Paul, 33 Minn. 289, 23 N. W. 220; Furnell *v.* St. Paul, 20 Minn. 117, holding that a city was liable for the result of a street commissioner's negligence, although he was elected by the people, the duty as to the repairing of streets being imposed upon the city as the officer acts as the agent of the city.

Mississippi.— Sutton *v.* Carroll County Police, 41 Miss. 236.

Nebraska.— Murray *v.* Omaha, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. Rep. 702, appointed by municipal government.

New Jersey.— Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649.

New York.— Woodhull *v.* New York, 150 N. Y. 450, 44 N. E. 1038; Niven *v.* Rochester, 76 N. Y. 619; New York, etc., Saw Mill, etc., Co. *v.* Brooklyn, 71 N. Y. 580; Connors *v.* New York, 11 Hun 439.

Ohio.— Dayton *v.* Pease, 4 Ohio St. 80.

Oregon.— Esberg Cigar Co. *v.* Portland, 34 Oreg. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L. R. A. 435, holding that it was immaterial that water commissioners are appointed by the legislature.

Rhode Island.— Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

United States.— Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440, where it is said that the people are the recognized source of all authority, state and municipal, and that to this authority it must come at last whether immediately or by a circuitous process.

67. Manners *v.* Haverhill, 135 Mass. 165; Hafford *v.* New Bedford, 16 Gray (Mass.) 297; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

68. See *supra*, XIV, A, 2, a, (I).

69. *Maine.*— Snow *v.* Brunswick, 71 Me. 580; Davis *v.* Bangor, 42 Me. 522; Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252.

Massachusetts.—Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157.

Mississippi.— Sherman *v.* Grenada, 51 Miss. 186.

New Jersey.— Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170.

New York.— Everson *v.* Syracuse, 100 N. Y. 577, 3 N. E. 784; Cuyler *v.* Rochester, 12 Wend. 165.

Ohio.— Columbus *v.* Dunnick, 41 Ohio St. 602; Smith *v.* Major, 16 Ohio Cir. Ct. 362, 8 Ohio Cir. Dec. 649.

Oregon.— Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

Pennsylvania.— Elliott *v.* Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591.

Rhode Island.— O'Donnell *v.* White, 24 R. I. 483, 53 Atl. 633; Horton *v.* Newell, 17 R. I. 571, 23 Atl. 910; Donnelly *v.* Tripp, 12 R. I. 97.

Texas.— Harrison *v.* Columbus, 44 Tex. 418.

United States.—Bowditch *v.* Boston, 3 Fed. Cas. No. 1,719, 4 Cliff. 323 [*affirmed* in 101 U. S. 16, 25 L. ed. 980].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1584.

70. *Illinois.*— Chicago *v.* McGraw, 75 Ill. 566; Chicago *v.* Hannon, 115 Ill. App. 183, where it was held that as there was no duty on a city to repair a road which was not a city street, it was not liable for an injury arising by reason of a defect in the road, although the city superintendent of street cleaning had assumed to give some directions as to dumping ashes along the road in question, the rule being that a municipal officer can exercise only such power as is conferred upon him by law or by ordinance passed in pursuance of law, and his acts in the absence of power so conferred do not bind the municipality.

Maine.— Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252, unauthorized possession of vessel in quarantine taken by health officers or their servants, under a statute authorizing such health officers to require the vessel to perform quarantine.

Massachusetts.—Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157.

Mississippi.—Sherman *v.* Grenada, 51 Miss. 186.

Missouri.— Stuebner *v.* St. Joseph, 81 Mo. App. 273.

New York.—Everson *v.* Syracuse, 100 N. Y. 577, 3 N. E. 784.

Pennsylvania.— Elliott *v.* Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591 (where it was considered that a city is not liable for the acts of police upon the theory that the doctrine *respondeat superior* does not apply when the officer's act is entirely outside the authority which the city has given him); Fox *v.* Northern Liberties, 3 Watts & S. 103. See also *infra*, XIV, A, 5, h, (I).

Rhode Island.— O'Donnell *v.* White, 24 R. I. 483, 53 Atl. 633; Horton *v.* Newell, 17 R. I. 571, 23 Atl. 910; Pierce *v.* Tripp, 13 R. I. 181; Donnelly *v.* Tripp, 12 R. I. 97.

United States.—Bowditch *v.* Boston, 3 Fed. Cas. No. 1,719, 4 Cliff. 323 [*affirmed* in 101 U. S. 16, 25 L. ed. 980].

Canada.— McCleave *v.* Moncton, 35 N. Brunsw. 296.

a general authority to act for the municipality on the subject to which they relate;[71] and an unofficial act on the part of an officer, at the instance of private persons, will not render the corporation liable.[72] So where the duty is put by law upon a public officer, by reason of which the corporation cannot be held responsible for his conduct,[73] municipal officers cannot act in such matters so as to bind the corporation, such act being beyond the scope of their authority;[74] but this does not mean that every excess of such officer is not actionable, for if the corporation authorizes action upon the general subject-matter, being within the scope of its corporate powers, the officer will in that case act as its agent and it will become responsible for his conduct, and that of his employees.[75] And if the acts, relating to the administration of local or internal affairs, as distinguished from public, governmental, legislative, or judicial duties,[76] are done by those having competent authority either by express action on the part of the municipal government or by the nature of the duties and functions with which they are charged by their offices or employment, to act upon the general subject-matter, the rule *respondeat superior* applies.[77] Express authority to do the specific unlawful act

See 36 Cent. Dig. tit. "Municipal Corporations," § 1584.

71. *California.*— Dunbar *v.* San Francisco, 1 Cal. 355, holding that where the alcalde and several members of the ayuntamiento of San Francisco blew up a building for the purpose of staying the progress of a conflagration, they were not acting within the scope of their authority, and the municipality was not liable for the destruction of the building.

Illinois.— Chicago *v.* McGraw, 75 Ill. 566. See also East St. Louis *v.* Klug, 3 Ill. App. 90, where in an action against a city to recover for injury from the careless felling of a tree, evidence that on the day before the tree was felled the mayor and city engineer were present with the person who felled the tree, examining it, does not establish that the latter acted as the agent of the city.

Massachusetts.— Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157.

Missouri.— Hilsdorf *v.* St. Louis, 45 Mo. 94, 100 Am. Dec. 352, where a city was not liable for damages resulting to another by reason of the acts of its mayor beyond his authority.

New York.— Lee *v.* Sandy Hill, 40 N. Y. 442.

Rhode Island.— O'Donnell *v.* White, 24 R. I. 483, 53 Atl. 633; Donnelly *v.* Tripp, 12 R. I. 97.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1584.

72. Kansas City *v.* Brady, 52 Kan. 297, 34 Pac. 884, 39 Am. St. Rep. 349, 53 Kan. 312, 36 Pac. 726; Gray *v.* Detroit, 113 Mich. 657, 71 N. W. 1107 (where a city treasurer attempted at the request of an individual and for his accommodation to give him certain information as to the amount of unpaid taxes on particular land hid in by the city); Hopkins *v.* Elmore, 49 Vt. 176 (under a statute making towns liable for damages occasioned by the neglect or default of their constables); Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415 (false representations of a town-clerk as to the records in his office, representations by such clerk as to such records not being official acts).

73. See *supra*, XIV, A, 3, c.

74. Bowden *v.* Rockland, 96 Me. 129, 51 Atl. 815; McCarthy *v.* Boston, 135 Mass. 197; Haskell *v.* New Bedford, 108 Mass. 208; Hall *v.* Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455.

75. Woodcock *v.* Calais, 68 Me. 244; Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244; Butman *v.* Newton, 179 Mass. 1, 60 N. E. 401, 88 Am. St. Rep. 349; Collins *v.* Greenfield, 172 Mass. 78, 51 N. E. 454; Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; Waldron *v.* Haverhill, 143 Mass. 582, 10 N. E. 481; Deane *v.* Randolph, 132 Mass. 475; Sprague *v.* Tripp, 13 R. I. 38, 43 Am. Rep. 11.

76. See *supra*, XIV, A, 2, a, (I).

77. *Connecticut.*— Danbury, etc., R. Co. *v.* Norwalk, 37 Conn. 109.

Indiana.— Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711.

Kansas.— Leavenworth *v.* Casey, McCahon 124.

Kentucky.— McGraw *v.* Marion, 98 Ky. 673, 34 S. W. 18, 17 Ky. L. Rep. 1254, 47 L. R. A. 593.

Massachusetts.—The fact that one who has been appointed superintendent of a waterworks construction is under the control of a board of water commissioners and cannot purchase or furnish anything except by their direction will not relieve the city from liability for his negligence in opening a trench because the proper materials for bracing it so as to insure the safety of the workmen were not at hand, and the argument is untenable that because neither the city nor the water commissioners furnished him with materials for bracing the trench or gave him authority to procure them, he had no right or power to do so, so that he cannot be personally charged with negligence, and that therefore as the superintendent's negligence alone is charged, the question whether the city is liable for not furnishing materials is not in issue, the court holding that the superin-

is not essential; it suffices that such act occurs in the course and as a part of the

tendent may be negligent in ordering work to be commenced or continued when the proper materials or appliances for insuring the safety of workmen are not at hand as well as in failing to use them when they are at hand. Connolly *v.* Waltham, 156 Mass. 368, 31 N. E. 302.

Minnesota.— Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Missouri.— Dooley *v.* Kansas City, 82 Mo. 444, 52 Am. Rep. 380; Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299; Soulard *v.* St. Louis, 36 Mo. 546.

New York.— Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744; Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Weed *v.* Brockport, 16 N. Y. 161 note; Seeley *v.* Amsterdam, 54 N. Y. App. Div. 9, 66 N. Y. Suppl. 221; Peters *v.* New York, 8 Hun 405; Witt *v.* New York, 5 Rob. 248. See also Walsh *v.* New York, etc., Bridge, 96 N. Y. 427.

Ohio.— Toledo *v.* Cone, 41 Ohio St. 149.

Rhode Island.— Willoughby *v.* Allen, 25 R. I. 531, 56 Atl. 1109 [*citing* Sprague *v.* Tripp, 13 R. I. 38, 43 Am. Rep. 11].

Tennessee.— Cole *v.* Nashville, 4 Sneed 162, holding that where a city, through its officer, issued a license to a lunatic to follow the business of a druggist, knowing his condition, and by reason of his incompetency injury is inflicted on another, the city is liable.

Texas.— Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702; Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012.

Wisconsin.— Bunker *v.* Hudson, 122 Wis. 43, 99 N. W. 448; Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Hamilton *v.* Fond du Lac, 40 Wis. 47.

United States.— Hooe *v.* Alexandria, 12 Fed. Cas. No. 6,667, 1 Cranch C. C. 98; Pritchard *v.* Georgetown, 19 Fed. Cas. No. 11,437, 2 Cranch C. C. 191, holding that it is not necessary that the act should have been ordered by by-law or by any written order to the agent.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1584.

Public administrator.— Under a statute in New York making the city of New York responsible for the faithful performance of the duties of the office, it was held that the city was liable for all moneys received by such administrator and for the faithful discharge of the duties of the office (Glover *v.* New York, 7 Hun (N. Y.) 232; Matthews *v.* New York, 1 Sandf. (N. Y.) 132; Douglass *v.* New York, 56 How. Pr. (N. Y.) 178); but not for acts illegal and done outside of his office, and hence where the public administrator, who had in certain cases authority to take charge of the goods, chattels, and personal effects of persons dying intestate, took into his possession money and property of a third person as being the effects of an intestate, the city was not liable therefor. (Douglass *v.* New York, *supra*).

Presumption.— It has been held that in the absence of a showing to the contrary it will be presumed that persons doing municipal work act within the scope of their authority. Elgin *v.* Goff, 38 Ill. App. 362; Kobs *v.* Minneapolis, 22 Minn. 159. But see Butler *v.* Oxford, 69 Miss. 618, 13 So. 626, where this rule appears not to be recognized.

Where the corporation itself is charged with the power and the duty of executing it is not delegated to any particular officer or agent so that the general subject-matter of the power cannot be acted upon at all until the corporation authorizes or directs such action through the legally constituted channel, any act with regard to such subject-matter in the absence of such direction is unauthorized and is beyond the scope of any authority of any other officer of the corporation. Morrison *v.* Lawrence, 98 Mass. 219. Thus where the grade of streets can be changed only by ordinance passed by a city council and approved by the mayor, so that there is no power on the part of the street commissioner or other officer in regard to the subject-matter in the absence of such action by the mayor and council, any act on the part of such street commissioner or officer in the absence of such legislative action is beyond the scope of their authority and cannot bind the corporation. Stewart *v.* Clinton, 79 Mo. 603; Werth *v.* Springfield, 78 Mo. 107; Rowland *v.* Gallatin, 75 Mo. 134, 42 Am. Rep. 395; Koeppen *v.* Sedalia, 89 Mo. App. 648; Stuebner *v.* St. Joseph, 81 Mo. App. 273; Beatty *v.* St. Joseph, 57 Mo. App. 251; Gehling *v.* St. Joseph, 49 Mo. App. 430; Thrush *v.* Cameron, 21 Mo. App. 394; Rumsey Mfg. Co. *v.* Schell City, 21 Mo. App. 175. And if the city council authorizes such work at a particular place this is held not to be authority to conduct the work any further or at a different place. Beatty *v.* St. Joseph, *supra*. So also under the rule that a municipal corporation is not liable for the acts of an independent officer, where the subject-matter is also within the authority of the corporation if it shall undertake the performance of the work on its own account, the acts of such officer upon such subject-matter are not as agent of the corporation but as a public officer where the corporation itself has not undertaken to do the work on its own account, and directions from other municipal officers in the absence of such action being taken by the corporation through the medium legally constituted for that purpose will not render him a corporate agent, since those giving directions are merely public officers themselves acting beyond the scope of their authority. Bowden *v.* Rockland, 96 Me. 129, 51 Atl. 815 [*distinguishing* Woodcock *v.* Calais, 66 Me. 234, in that the municipality, through its legislative body, voted to assume charge of the work]. See also the cases cited generally, *supra*, note 70. And see McDonald *v.* Lock-

performance of an authority to act for the city upon a general subject within the power of the city.[78]

(II) *ULTRA VIRES ACTS.*[79] A municipal corporation cannot confer upon its agents or officers lawful authority to represent it beyond the scope of its charter powers, and therefore is not civilly liable for damages suffered by individuals in person or property which are caused by the tortious acts of municipal agents or officers assuming to represent it in matters wholly *ultra vires*, whether such acts

port, 28 Ill. App. 157, as to the power of individual members of a board of village trustees to bind the village.

Concurring acts of agent and stranger.— Where a bridge tender employed by a city himself employs a helper without any authority from the city, and a child is injured by the concurring negligence of the helper and the bridge tender, operating as the proximate cause, in violation of the tender's duty to see after the safety of children on the bridge, the city will be liable and an instruction that the city is not liable for the acts of persons not in its employ is properly refused because it is misleading in that from it the jury might find that if the injuries were caused in part by the negligence of the helper the city could not be liable. Chicago *v.* O'Malley, 196 Ill. 197, 63 N. E. 652 [*affirming* 95 Ill. App. 355].

78. *Minnesota.*— Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Missouri.— Dooley *v.* Kansas, 82 Mo. 444, 52 Am. Rep. 380 (where it is said that if a city could be held liable for no act which it is not authorized to perform, then since no city charter authorizes it to perpetrate a wrong, no town or city could ever be held liable for a tort authorized by it); Barns *v.* Hannibal, 71 Mo. 449 (holding that where an agent of a corporation was authorized to open a new channel in order to change the course of a stream, this was sufficient to give him authority to construct a dam across the former bed of the stream to expedite the work); Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299.

New York.— Sharp *v.* New York, 40 Barb. 256, 25 How. Pr. 389 (holding that a principal is liable for the false representations of his agent, not on the ground of express authority given to the agent to make the statement, but on the ground that as to the particular matter for which the agent is appointed he stands in the place of the principal, and whatever he does or says in and about that matter is the act and declaration of the principal, for which the principal is just as liable as if he had personally done the act, or made the declaration); Mahon *v.* New York, 10 Misc. 664, 31 N. Y. Suppl. 676.

Texas.— Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702, wilful misconduct within the scope of employment.

Wisconsin.— Bunker *v.* Hudson, 122 Wis. 43, 99 N. W. 448.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1584. And see the cases cited *supra*, XIV, A, 1; XIV, A, 2, a, (I).

Authorized acts lawful in their nature.— It has been laid down as a general proposition that the corporation will be liable for an act done by its agents which is in its nature lawful and authorized, although done at an unauthorized place or in an unlawful manner, but not for an act which is in its nature unlawful or prohibited. Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299 [*distinguishing* Thompson *v.* Boonville, 61 Mo. 282, where an act injurious to plaintiff but within the power of the corporation was performed by persons who assumed to act by the authority of the city, but who were in fact without any lawful authority authorizing them to do the acts complained of]. So the laying out and construction of highways, being within the general powers of the municipal corporation, it is held liable in trespass for acts of its agents in entering upon land by order of its town council for the purpose of laying out a highway. Hathaway *v.* Osborne, 25 R. I. 249, 55 Atl. 700. And in Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030, it was held under an authority to lay out sewers along a city's streets, although the authority is exceeded by constructing the sewer through private grounds with the owners' consent, yet as the general purpose was to execute the power vested in the corporation it was chargeable with the injury resulting from the failure of its officers to properly perform the duty it had assumed to discharge, and so was chargeable because of the improper location of the outlet so as to cause sewage to be discharged on plaintiff's premises, at least for the damages resulting from the sewage entering the portion of the sewer constructed in the streets. But in Stanley *v.* Davenport, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216, where the injury was occasioned by the frightening of a horse by a steam motor used upon a street railway by permission of the city council, which had no power to authorize such use, it was held that the city had jurisdiction of the subject-matter, that is, the streets, and was liable, although the council mistakenly exceeded its authority by permitting a particular thing to be done which was illegal. See also Macon *v.* Harris, 75 Ga. 761. But see Hanvey *v.* Rochester, 35 Barb. (N. Y.) 177.

Disobedience of instructions by the agent will not relieve the principal. Barree *v.* Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 114 Am. St. Rep. 763, 6 L. R. A. N. S. 1090; Hooe *v.* Alexandria, 12 Fed. Cas. No. 6,667, 1 Cranch C. C. 98.

79. See also *supra*, III, H, 2.

are directed by the corporation or are done without express direction or corporate sanction.[80]

(III) *Performance of Services For Others Than Municipality.* So it is held that ordinarily municipalities are not liable for the wrongs of persons who may be in their employ if such employees are not in the performance of duties or services for the corporation,[81] or the relation of master and servant does not exist, with respect to the particular work being done and out of the doing of which the injury occurred.[82] And the same rule of non-liability is applied where a public

80. *California.*— Dunbar *v.* San Francisco, 1 Cal. 355.

Colorado.— Idaho Springs *v.* Filteau, 10 Colo. 105, 14 Pac. 48; Idaho Springs *v.* Woodward, 10 Colo. 104, 14 Pac. 49.

Georgia.— Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Roughton *v.* Atlanta, 113 Ga. 948, 39 S. E. 316; Augusta *v.* Mackey, 113 Ga. 64, 38 S. E. 339; Cooper *v.* Athens, 53 Ga. 638.

Illinois.— Chicago *v.* Turner, 80 Ill. 419.

Indiana.— Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711; Shelby County *v.* Deprez, 87 Ind. 509. See also Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618; Haag *v.* Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654; Browning *v.* Owen County, 44 Ind. 11.

Iowa.— Field *v.* Des Moines, 39 Iowa 575, 28 Am. Rep. 46. *Compare* Stanley *v.* Davenport, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216, *supra*, note 78.

Kentucky.— Arnold *v.* Stanford, 113 Ky. 852, 69 S. W. 726, 24 Ky. L. Rep. 626. The establishment of a pest-house by city officers within prohibited territory is not *ultra vires* in the sense that no liability is imposed on the city therefor. Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474. See also *infra*, XIV, A, 5, c.

Louisiana.— Hoggard *v.* Monroe, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477.

Maine.— Atwood *v.* Biddeford, 99 Me. 78, 58 Atl. 417; Brunswick Gas Light Co. *v.* Brunswick, 92 Me. 493, 43 Atl. 104; Seele *v.* Deering, 79 Me. 343, 10 Atl. 45, 1 Am. St. Rep. 314.

Maryland.— Horn *v.* Baltimore, 30 Md. 218.

Massachusetts.— Cavanagh *v.* Boston, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 716; McCarthy *v.* Boston, 135 Mass. 197; Lemon *v.* Newton, 134 Mass. 476.

Minnesota.— Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Missouri.— Stealey *v.* Kansas City, 179 Mo. 400, 78 S. W. 599; Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299.

New Hampshire.— Conner *v.* Manchester, 73 N. H. 233, 60 Atl. 436; Wakefield *v.* Newport, 60 N. H. 374.

New Jersey.—Wheeler *v.* Essex Public Road Bd., 39 N. J. L. 291.

New York.— O'Donnell *v.* Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1053; Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Smith *v.* Rochester, 76 N. Y. 506; Albany *v.* Cunliff, 2 N. Y. 165; Tilford *v.* New York, 1 N. Y. App. Div. 199, 37 N. Y. Suppl. 185 [*affirmed* in 153 N. Y. 671, 48 N. E. 1107]; Hanvey *v.* Rochester, 35 Barb. 177; Boyland *v.* New York, 1 Sandf. 27. While a display of fireworks in a city street may be in fact a nuisance, the city cannot relieve itself of liability for damages caused by such a display, licensed by the mayor under the authority of an ordinance, on the ground that the ordinance is *ultra vires*, since the council, admittedly, has regulating powers in the premises. Speir *v.* Brooklyn, 139 N. Y. 6, 34 N. E. 727, 36 Am. St. Rep. 664, 21 L. R. A. 641.

North Carolina.— Barger *v.* Hickory, 130 N. C. 550, 41 S. E. 708; Love *v.* Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192.

Pennsylvania.—Betham *v.* Philadelphia, 196 Pa. St. 302, 46 Atl. 448.

South Dakota.— Wilson *v.* Mitchell, 17 S. D. 515, 97 N. W. 741, 106 Am. St. Rep. 784, 65 L. R. A. 158.

Utah.— Royce *v.* Salt Lake City, 15 Utah 401, 49 Pac. 290.

United States.— Fowle *v.* Alexandria, 3 Pet. 398, 7 L. ed. 719; Kansas City *v.* Lemen, 57 Fed. 905, 6 C. C. A. 627; Hart *v.* Bridgeport, 11 Fed. Cas. No. 6,149, 13 Blatchf. 289.

Canada.— Pocock *v.* Toronto, 27 Ont. 635.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1546, 1584.

Action under void statute.— The rule of municipal non-liability applies also where the corporation is at the time of the injury acting under an unconstitutional statute, the duty then being neither imposed nor authorized. Albany *v.* Cunliff, 2 N. Y. 165.

Exception to the rule has been recognized, however. Thus it is held that a municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on the property whether acquired legally or illegally, and that it cannot make its want of legal authority to engage in a particular transaction or business a shelter from taxation imposed by the government on such business or transaction. Salt Lake City *v.* Hollister, 118 U. S. 256, 6 S. Ct. 1055, 30 L. ed. 176, which involved the liability of a municipal corporation for internal revenue tax for distilling of spirits.

81. Butler *v.* Oxford, 69 Miss. 618, 13 So. 626; Palmer *v.* St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125.

Unofficial acts see *supra*, XIV, A, 3, e, (I).

82. Harvey *v.* Hillsdale, 86 Mich. 330, 49 N. W. 141.

Obstructions in streets see *infra*, XIV, **A**, 4, a, (II), (C); XIV, **D**.

or municipal officer, as an engineer or surveyor, performs services for a private person and not for the corporation, and injury is occasioned by his carelessness or unskilfulness.[83]

(iv) *Ratification of Unauthorized Acts and Estoppel.* A municipal corporation may become liable by the adoption or ratification of acts which are beyond the powers of the agents but within the scope of the corporation;[84] and if the work done was within its power it may be estopped by its conduct to raise the defense of *ultra vires*, notwithstanding there has been a failure to comply with some regulation concerning the exercise of the power.[85] But if the subject-

83. Waller *v.* Dubuque, 69 Iowa 541, 29 N. W. 456; Kansas City *v.* Brady, 52 Kan. 297, 34 Pac. 884, 39 Am. St. Rep. 349, 53 Kan. 312, 36 Pac. 726; McCarty *v.* Bauer, 3 Kan. 237 (although it was the duty of the officer to act when his services were required by such private person); Snyder *v.* Lexington, 49 S. W. 765, 20 Ky. L. Rep. 1562; Alcorn *v.* Philadelphia, 5 Phila. (Pa.) 130 [*affirmed* in 44 Pa. St. 348]. And see also, generally, *supra*, XIV, A, 3, c.

84. *Louisiana.*— Wilde *v.* New Orleans, 12 La. Ann. 15; McGary *v.* Lafayette, 4 La. Ann. 440.

Michigan.— Davis *v.* Jackson, 61 Mich. 530, 28 N. W. 526.

Nebraska.— Omaha *v.* Croft, 60 Nebr. 57, 82 N. W. 120, holding that unauthorized acts may be ratified by other officers of such corporation, acting upon a matter or regarding a subject within the scope of their general powers and authority, although such unauthorized acts, in the manner performed, constituted a trespass.

Oklahoma.—Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242, by acceptance of benefits of trespass.

Rhode Island.— Willoughby *v.* Allen, 25 R. I. 531, 56 Atl. 1109.

Washington.— Commercial Electric Light, etc., Co. *v.* Tacoma, 20 Wash. 288, 55 Pac. 219, 72 Am. St. Rep. 103.

United States.— Pritchard *v.* Georgetown, 19 Fed. Cas. No. 11,437, 2 Cranch C. C. 191.

Canada.— See McSorley *v.* St. John, 6 Can. Sup. Ct. 531, where it was held by a divided court that an officer specially appointed to receive money for an improvement under a special assessment, pursuant to a statute providing therefor, was acting as the agent of the city, and one of the judges considered that the corporation had adopted the wrongful act of the officer who had caused the arrest of a party who had been assessed, by receiving and retaining the money paid and authorizing plaintiff's discharge from custody only after such payment.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1585.

Payment.— The fact that a change in the construction of a sewer was not authorized by the action of the common council will not relieve the city from liability for the insufficiency of the sewer as changed, when it appears that the change was directed by one of the aldermen and that the city ratified his act by paying for the additional work. Munk *v.* Watertown, 67 Hun (N. Y.) 261, 22 N. Y. Suppl. 227. To the same effect see Willoughby *v.* Allen, 25 R. I. 531, 56 Atl. 1109. But where highway commissioners of a city made excavations on a private way without direction from the city council and the cost of the work was paid by the city in the usual routine of payment for work done by the commissioners, it was held that as the payment was made without any special appropriation but out of the appropriation for highways, upon the expenditure having been vouched for by the chairman of the board of highway commissioners, examined by the auditor, and approved by the committee of accounts, none of which officers had power to act, it could not be regarded as a ratification by the city of the act of highway commissioners. Pierce *v.* Tripp, 13 R. I. 181.

85. *Georgia.*—Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133, holding that if the authorities of a city authorized to construct drains and sewers beyond its limits construct the same without complying with the formalities prescribed by the charter, or, after the drain or sewer is completed, take charge of the same, and regulate it as a part of the system of drainage and sewerage of the city, the city, when sued for an injury resulting from the construction and maintenance of such drain or sewer, cannot defend by alleging its want of authority to do the act complained of.

Illinois.— Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E. 1043].

Massachusetts.— Norton *v.* New Bedford, 166 Mass. 48, 43 N. E. 1034, holding that a city which is building a sewer, through its officials and with its money, cannot urge, as a defense to an action for personal injuries sustained by a workman therein, that through some irregularity in the proceedings of its officers or board the construction is without authority of law.

New York.— See Munk *v.* Watertown, 67 Hun 261, 22 N. Y. Suppl. 227, *supra* note 84.

Washington.— Collensworth *v.* New Whatcom, 16 Wash. 224, 47 Pac. 439.

United States.—New York City *v.* Sheffield, 4 Wall. 189, 18 L. ed. 416, holding that where a corporation is sued for an injury growing out of negligence of the corporate authorities, in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1585.

matter is beyond the scope of municipal authority the question of ratification cannot arise.[86]

4. Work Done by Contractor — a. Independent Contractors — (1) *Rules Stated.* In the ordinary instances of work performed for a municipal corporation, the general rule[87] is applied that where the relation between the corporation and the contractor is clearly that of employer and independent contractor, for injuries occurring in the progress of the work, the contractor alone is liable.[88] If, however, the municipality retains control over the manner of doing the work, or

86. Roughton *v.* Atlanta, 113 Ga. 948, 39 S. E. 316; Murray *v.* Omaha, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. Rep. 702 [*distinguishing* Omaha *v.* Croft, 60 Nebr. 57, 82 N. W. 120, in that the acts there complained of were in the line of the city's authority], holding that a municipality cannot be held liable for the acts of an independent board on the ground that it ratified and adopted them, where the matters involved are not within the scope of the powers conferred on the city by the charter, but are expressly confided to the board.

Acts of police or other public officers.— So, as police or other officers performing governmental duties are not the agents of the municipality (see *infra*, XIV, A, 5, b), it is held that the matters upon which they act are not within the scope of pure corporate duties and the corporation cannot ratify the unlawful acts of such officers in enforcing police regulations. Calwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154; Peters *v.* Lindsborg, 40 Kan. 654, 20 Pac. 490; Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721. Under this rule the assumption by the corporation of the defense of one of its officers in a matter involving such acts will not render the municipality liable. Buttrick *v.* Lowell, *supra*; Kelly *v.* Barton, 26 Ont. 608 [*affirmed* in 22 Ont. App. 522]. See also Mitchell *v.* Rockland, 52 Me. 118, where it was intimated that the city could not ratify acts committed under the authority of a health officer, but conceding for the purposes of the case that such acts might be ratified, it was held that payment by the city of a bill by one employed by the health officer, without knowledge that the services for which payment was made were so negligently performed as to injure others, was not a ratification of such acts. But see Wilde *v.* New Orleans, 12 La. Ann. 15, where the city was held responsible for damages occasioned by a trespass committed by a police officer, upon the ground that the acts were ratified by the city, in which case, however, it does not appear that the acts were not done in matters purely municipal, and it would seem to be that they were so committed, the case being decided upon the authority of McGary *v.* Lafayette, 4 La. Ann. 440, where the acts were of that character.

87. See Master and Servant, 26 Cyc. 1546 *et seq.*

88. *Illinois.*— Foster *v.* Chicago, 96 Ill. App. 4 [*affirmed* in 197 Ill. 264, 64 N. E. 322]; East St. Louis *v.* Giblin, 3 Ill. App. 219.

Indiana.—Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711.

Iowa.— Bennett *v.* Mt. Vernon, 124 Iowa 537, 100 N. W. 349.

Louisiana.— La Groue *v.* New Orleans, 114 La. 253, 38 So. 160.

Massachusetts.— Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Harding *v.* Boston, 163 Mass. 14, 39 N. E. 411.

Michigan.—Detroit *v.* Michigan Paving Co., 38 Mich. 358.

New Jersey.— Jansen *v.* Jersey City, 61 N. J. L. 243, 39 Atl. 1025.

New York.— Uppington *v.* New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Herrington *v.* Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; Kelly *v.* New York, 11 N. Y. 432 [*reversing* 4 E. D. Smith 291]; Pack *v.* New York, 8 N. Y. 222; Kelly *v.* New York, 106 N. Y. App. Div. 576, 94 N. Y. Suppl. 872; Haefelin *v.* McDonald, 96 N. Y. App. Div. 213, 89 N. Y. Suppl. 395; Jewell *v.* Mt. Vernon, 91 N. Y. App. Div. 578, 87 N. Y. Suppl. 120; Wood *v.* Watertown, 58 Hun 298, 11 N. Y. Suppl. 864; Herrington *v.* Lansingburgh, 36 Hun 598; Van Wert *v.* Brooklyn, 28 How. Pr. 451. See also Treadwell *v.* New York, 1 Daly 123. But see Delmonico *v.* New York, 1 Sandf. 222.

Ohio.— Circleville *v.* Neuding, 41 Ohio St. 465.

Pennsylvania.— White *v.* Philadelphia, 201 Pa. St. 512, 51 Atl. 332; Heidenwag *v.* Philadelphia, 168 Pa. St. 72, 31 Atl. 1063; Susquehanna Depot *v.* Simmons, 112 Pa. St. 384, 5 Atl. 434, 56 Am. Rep. 317; Harrisburg *v.* Saylor, 87 Pa. St. 216; Reed *v.* Allegheny, 79 Pa. St. 300; Painter *v.* Pittsburgh, 46 Pa. St. 213; Hookey *v.* Oakdale, 5 Pa. Super. Ct. 404.

Wisconsin.— Kuehn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030; Harper *v.* Milwaukee, 30 Wis. 365.

Canada.— Saunders *v.* Toronto, 26 Ont. App. 265, teamster hired by corporation by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings were to be taken, and the matter of complaint being an injury sustained by the teamster's negligently driving against one on the street.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1580.

Invalid contract.— Where the municipal charter required that all contracts relating

the men employed, the relation of master and servant arises between them, and the maxim *respondeat superior* applies in such cases;[89] and the same rule is applied where by charter provision or statute the work is required to be done under the charge of a particular officer of the municipality.[90] But on the other hand the corporation will not be liable for the negligent performance of a contract by an independent contractor or for the acts of his servants, even if the work is done under the direction of an official authorized to inspect it and vested with all powers necessary to secure compliance with the contract, but with no authority to control the men or the manner of their work, such power of direction referring merely to the result of the work.[91]

to city affairs should be in writing and countersigned by the controller, etc., and there was a failure to comply with such requirements, the city was held liable for injuries sustained by the negligent digging of a ditch in its streets by a contractor under a contract made in violation of such requirements. Hepburn *v.* Philadelphia, 149 Pa. St. 335, 24 Atl. 279.

Liability may be created by express contract, and the rule that a city is not responsible for the acts of an independent contractor cannot be invoked by a city which has made an express contract to pay the property-owner all damages that he may sustain. Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711.

Duty to servant of contractor.— A city which engages a contractor to deliver sand to it is under no obligation to a servant of the contractor, except the obligation that everyone is under to a person lawfully upon or adjacent to his premises — to use the care of an ordinary person to avoid injuring him. McMullen *v.* New York, 104 N. Y. App. Div. 337, 93 N. Y. Suppl. 772.

89. *Illinois.*— Chicago *v.* Murdock, 212 Ill. 9, 72 N. E. 46 [*affirming* 113 Ill. App. 656]; Chicago *v.* Dermody, 61 Ill. 431; Chicago *v.* Jones, 60 Ill. 383; East St. Louis *v.* Murphy, 89 Ill. App. 22.

Missouri.—Scott *v.* Springfield, 81 Mo. App. 212 [*distinguishing* Blumb *v.* Kansas City, 84 Mo. 112, 54 Am. Rep. 87, in that the right to control the workmen was only to the extent of compelling the contractor to discharge], holding that under a contract for putting in a sewer with a reservation in the city's engineer of the power to supervise the manner of the work and to discharge incompetent employees, the city was liable to a servant of the contractor injured by negligence in the conduct of the work.

New York.— Schumacher *v.* New York, 40 N. Y. App. Div. 320, 57 N. Y. Suppl. 968 [*affirmed* in 166 N. Y. 103, 59 N. E. 773]; Goldschmid *v.* New York, 14 N. Y. App. Div. 135, 43 N. Y. Suppl. 447.

Ohio.— Cincinnati *v.* Stone, 5 Ohio St. 38, under a provision in a contract for repaving a street, that the work be done under the direction of the city civil engineer, or agent appointed by the city council for the same, who shall have entire control over the manner of doing and shaping all or any part of the same, and whose directions must be strictly obeyed.

Pennsylvania.— Stork *v.* Philadelphia, 199 Pa. St. 462, 49 Atl. 236 (where the city retained the right to determine where underpinning or shoring up of foundations should be done, and in fact refused or neglected to authorize it, this omission being the negligence complained of); Harrisburg *v.* Saylor, 87 Pa. St. 216.

Washington.— Cooper *v.* Seattle, 16 Wash. 462, 47 Pac. 887, 58 Am. St. Rep. 46 (under a charter conferring on the board of public works the control of the streets and providing that improvements made thereon shall be made under the management of the board, a contract providing that the city engineer shall have superintendence of the improvement, and that any person employed on the work disobeying the city engineer shall be discharged); Seattle *v.* Buzby, 2 Wash. Terr. 25, 3 Pac. 180 (contractor acting under the supervision of the city surveyor).

Wisconsin.— Kuehn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1582.

90. Chicago *v.* Dermody, 61 Ill. 431; Harper *v.* Milwaukee, 30 Wis. 365. See also St. Paul *v.* Seitz, 3 Minn. 297, 76 Am. Dec. 753 (involving, however, the duty to keep streets in safe condition); Groves *v.* Rochester, 39 Hun (N. Y.) 5.

91. *Illinois.*— Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392 (unauthorized act by servant of contractor); Foster *v.* Chicago, 96 Ill. App. 4 (holding that, although the contractor agreed to perform all the work "under the immediate direction and superintendence of the commissioner of public works, and to his entire satisfaction, approval and acceptance," the work he agreed so to perform was that prescribed in the contract, and this direction and superintendence relate to results, to the character of the workmanship and not to methods, unless by the use of improper methods the character of the workmanship was rendered unsatisfactory); Cary *v.* Chicago, 60 Ill. App. 341.

Indiana.—Staldter *v.* Huntington, 153 Ind. 354, 55 N. E. 88.

Massachusetts.— Harding *v.* Boston, 163 Mass. 14, 39 N. E. 411, where the workmen were required to be residents of the city and the superintendent of sewers and inspector were authorized to give instructions so that certain results might be obtained.

Missouri.— Blumb *v.* Kansas City, 84 Mo.

(II) *Application and Exceptions*—(A) *In General.* The general rule of non-liability of the corporation for the acts of an independent contractor has no application where the work contracted to be performed will, in its progress, be necessarily or intrinsically dangerous,[92] however carefully or skilfully executed;[93] where the performance of the contract in the ordinary mode necessarily or naturally results in the injury complained of,[94] unless precautionary measures are taken;[95] where the corporation causes something to be done, the doing of which casts a duty on it,[96] as where the work is done pursuant to a special franchise or charter power;[97] or where the law imposes on it the duty to keep the place of the work in a safe condition.[98]

(B) *Acts Collateral to Contract.* The general rule that the independent contractor alone is liable is confined to the collateral acts or negligence of such con-

112, 54 Am. Rep. 87, where the reservation was of the right to annul a contract or suspend work under it, and to compel the contractor to discharge any workman disobeying certain directions of the city engineer.

New York.— Uppington *v.* New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Kelly *v.* New York, 11 N. Y. 432 (where a provision that "the whole work" was to be "under the direction and to the entire satisfaction," etc., was held to give the corporation no power to control the contractor in the choice of his servants, and merely gave power to direct as to the results of the work); Pack *v.* New York, 8 N. Y. 222 (contract to do work according to plan referred to therein, and to conform the work to such further directions as should be given by the street commissioner and one of the city surveyors). *Compare* Delmonico *v.* New York, 1 Sandf. 222.

Pennsylvania.— Erie *v.* Caulkins, 85 Pa. St. 247, 27 Am. Rep. 642 (where a stipulation that an engineer should have power to direct changes in the time and manner of conducting the work was held not such a reservation of power as would render the corporation liable); Ginther *v.* Yorkville, 3 Pa. Super. Ct. 403.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1582.

92. Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630 [*citing* Wood M. & S. (2d ed.) §§ 313, 314]; Bennett *v.* Mt. Vernon, 124 Iowa 537, 100 N. W. 349; Circleville *v.* Neuding, 41 Ohio St. 465. See also Master and Servant, 26 Cyc. 1559.

As applied to the duty to keep streets safe the municipality is held liable for injuries caused by excavations which are left unguarded. Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630; Anderson *v.* Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119; St. Paul *v.* Seitz, 3 Minn. 297, 74 Am. Dec. 753. See also *infra*, XIV, A, 4, a, (II), (C).

93. Chicago *v.* Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221 [*affirming* 113 Ill. App. 656]; Joliet *v.* Harwood, 86 Ill. 110, 29 Am. Rep. 17. See also *infra*, XIV, A, 4, a, (II), (B), note 1.

94. *Illinois.*— Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E. 1043]; East St. Louis *v.* Murphy, 89 Ill. App. 22.

Kentucky.— Pearson *v.* Zable, 78 Ky. 170; Louisville *v.* Shanahan, 56 S. W. 808, 22 Ky. L. Rep. 163, excavation in an alley in conformity with specifications under which the work was let.

Minnesota.—Rich *v.* Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; Sewall *v.* St. Paul, 20 Minn. 511.

Nebraska.— Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

Ohio.— Cincinnati *v.* Stone, 5 Ohio St. 38.

Pennsylvania.— Marsh *v.* Philadelphia, 8 Pa. Dist. 340, where, in the construction of a subway by a city, plaintiff's house was undermined and injured.

Wisconsin.— Kuehn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1580.

Interference with private use of a street by necessary destruction of a private drain under a contract for digging in the course of a public improvement imposes no liability. Bennett *v.* Mt. Vernon, 124 Iowa 537, 100 N. W. 349.

95. Louisville *v.* Shanahan, 56 S. W. 808, 22 Ky. L. Rep. 163; Broadwell *v.* Kansas City, 75 Mo. 213, 42 Am. Rep. 406, where in filling in a street a retaining wall was necessary to prevent injury to abutting land.

96. Cabat *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45.

Infringement of patent.— In Asbestine Tiling, etc., Co. *v.* Hepp, 39 Fed. 324, it was held that where a city authorizes a contractor to lay a sewer, and he infringes upon a patent for making sewer pipe, the city is liable for such infringement.

97. Savannah *v.* Waldner, 49 Ga. 316; Chicago *v.* Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221 [*affirming* 113 Ill. App. 656]. Where a city, in building a sewer under a canal by permission of the state, granted on condition that the city protect the canal and the rights of the lessee of the water power, let the work to an independent contractor, by whose negligence the flow of the water in the canal was interrupted, to the injury of the lessee, it was held that the city was liable for the contractor's negligence. Canal Elevator, etc., Co. *v.* Cincinnati, 9 Ohio Dec. (Reprint) 744, 17 Cinc. L. Bul. 117.

98. *Alabama.*— Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630.

tractor or his servant,[99] or as otherwise stated, as in cases involving liability for a breach of the municipal duty to keep streets in a condition of reasonable safety for travel, the exception to the general rule of non-liability for the acts or negligence of an independent contractor or his servant does not apply where the injury is caused by such collateral acts or negligence.[1]

Indiana.— Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166.

Nebraska.— Beatrice *v.* Reid, 41 Nebr. 214, 59 N. W. 770; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

New York.— Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453.

Ohio.— Cincinnati *v.* Stone, 5 Ohio St. 38.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1580. And see MASTER AND SERVANT, 26 Cyc. 1562.

Public duty.— Where the duty is a public one, so that there is no municipal liability for the acts of those through whom it is performed, then there is no liability if they contract for the work to be done in performance of such duty, for injury to one engaged in work under the contract. Sampson *v.* Boston, 161 Mass. 288, 37 N. E. 177.

99. Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392; Sterling *v.* Schiffmacher, 47 Ill. App. 141; East St. Louis *v.* Giblin, 3 Ill. App. 219; Circleville *v.* Neuding, 41 Ohio St. 465; Kuehn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030. See also *supra*, note 88.

In doing what the contract does not demand the contractor does not thereby render the city liable for an injury resulting from such act. Sievers *v.* San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153, where the contract required the grading of a street to the "official grade," and the contractor filled in several feet above that grade according to erroneous lines furnished by the city engineer and surveyor, whereby damage to land of an abutting owner was occasioned, the mistake of the engineer not being chargeable to the city.

Conversion.— In Detroit *v.* Michigan Paving Co., 38 Mich. 358, a paving company had forfeited its contract and left a quantity of sand in the street which it had agreed to pave, and thereafter, under another contract to finish the work, another contractor used such sand, and it was held that the city was not liable for the use of the sand made by the second contractor. But in Rich *v.* Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861, where the city made a contract for grading a street by the terms of which the contractors were to receive and appropriate to their own use all stone in the street, it was held that the city was liable to one owning land on both sides of the street, for the value of the stone removed from that part of the street in front of his property, upon the theory that the presumption of law was that the owner of the land was the owner of the fee in the street.

1. Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630; La Groue *v.* New Orleans, 114 La. 253, 38 So. 160 (where the planting of trees on neutral ground in an avenue was held not necessarily to constitute a defect in the street rendering it unsafe or dangerous for public travel and that the city was not liable for injuries to one falling at night into a hole carelessly left by the contractor); White *v.* New York, 15 N. Y. App. Div. 440, 44 N. Y. Suppl. 454 (accumulation of water, sewage, etc., by the negligence of the contractor in providing for drainage, causing injury to health); Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Application—*Injury to land.*— In construction of sewers not necessarily involving an injury to plaintiff's land the city will not be liable for the negligence of the contractor which causes such injury. Harding *v.* Boston, 163 Mass. 14, 39 N. E. 411; Uppington *v.* New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550, where the injury was to a house resulting from a trench in a street which caused the ground to settle in front of the house. So where the contractor, under a contract for improving a street, unnecessarily throws earth upon an abutting lot the city is not liable. Bloomington *v.* Wilson, 14 Ind. App. 476, 43 N. E. 37; Fuller *v.* Grand Rapids, 105 Mich. 529, 63 N. W. 530. See also Reed *v.* Allegheny City, 79 Pa. St. 300. And a diversion of water upon the land of an abutting owner in making street improvements is collateral to the contract and the city will not be liable therefor. Jewell *v.* Mt. Vernon, 91 N. Y. App. Div. 578, 87 N. Y. Suppl. 120; Harper *v.* Milwaukee, 30 Wis. 365, holding that a statute which makes a town liable for damages to person or property caused by insufficiency or want of repair of a highway refers only to damages sustained by a traveler using the highway and not to damages to adjoining property. But where a contract is abandoned after the digging of a deep trench in the street near an abutter's lot, the city will be liable for damages caused to such lot between the date of the abandonment of the contract and resumption of the work under another employment by the city, by the diversion of water from the channel in which it naturally ran before the excavation. Vogel *v.* New York, 92 N. Y. 10, 44 Am. Rep. 349.

Blowing off steam from a steam roller used by a contractor engaged in paving a street, whereby a horse is frightened and runs away causing injury, will not render the city liable. Cary *v.* Chicago, 60 Ill. App. 341.

An injury to the contractor's employee by the caving in of an excavation is one for which the city is not liable. Foster *v.* Chicago, 96 Ill. App. 4 [*affirmed* in 197 Ill. 264, 64 N. E. 322], where the court distinguishes the case from an injury to a traveler on the street. See also Staldter *v.* Huntington, 153 Ind. 354, 55 N. E. 88.

(c) *Work or Excavation in Street.* Under the rule sustained by the great weight of authority the duty of a municipality to keep its streets in a reasonably safe condition for travel cannot be delegated; and if a contractor, in the performance of a contract for the construction of sewers or other improvements in the streets, makes excavations or creates other obstructions in a street, the municipality will be liable for any injury sustained by reason of a failure to safeguard the public by barriers and lights, or otherwise.[2]

Blasting.— The same rule has been held to apply to injuries caused by blasting in the execution of a contract for the construction of public improvements. Blumb *v.* Kansas City, 84 Mo. 112, 54 Am. Rep. 87 (injuries to plaintiff from blasting in the construction of a sewer); Herrington *v.* Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348 (injury by reason of the frightening of a horse by blasting in the construction of a sewer); Kelly *v.* New York, 11 N. Y. 432 [*reversing* 4 E. D. Smith 291] (where a horse was injured by a stone thrown from a blast in opening and excavating a street while the owner was driving along another road); Pack *v.* New York, 8 N. Y. 222. There are cases to the contrary, however, based upon the theory of the intrinsic danger of the work (Chicago *v.* Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221 [*affirming* 113 Ill. App. 656]; Joliet *v.* Harwood, 86 Ill. 110, 29 Am. Rep. 17), as well as upon the duty to keep the streets in a safe condition (Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166). But *compare* Staldter *v.* Huntington, 153 Ind. 354, 55 N. E. 88. See also EXPLOSIVES, 19 Cyc. 9.

2. *Alabama.*— Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630.

District of Columbia.— Koontz *v.* District of Columbia, 24 App. Cas. 59.

Georgia.— Savannah *v.* Waldner, 49 Ga. 316.

Illinois.— Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*affirming* 27 Ill. App. 43]; Springfield *v.* Le Claire, 49 Ill. 476; Sterling *v.* Schiffmacher, 47 Ill. App. 141.

Indiana.— Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512; Park *v.* Adams County, 3 Ind. App. 536, 30 N. E. 147.

Kentucky.— Glasgow *v.* Gillen Waters, 113 Ky. 140, 67 S. W. 381, 23 Ky. L. Rep. 2375 (closing with barbed wire and without any other warning, a street undergoing repair); Frankfort *v.* Allen, 82 S. W. 292, 26 Ky. L. Rep. 581 (leaving dangerous obstruction in street).

Massachusetts.— Brooks *v.* Somerville, 106 Mass. 271, liability of town.

Michigan.— Beattie *v.* Detroit, 129 Mich. 20, 88 N. W. 71 (under statute requiring city to keep its ways in safe condition for travel, and a contract for paving requiring the street to be kept open, the city is bound to see that it is not left dangerous to travel); Southwell *v.* Detroit, 74 Mich. 438, 42 N. W. 118. In this state, where the excavation was made in the construction of a sewer the liability was placed on the ground of the duty as to sewers and not of the duty as to streets. Monje *v.* Grand Rapids, 122 Mich. 645, 81 N. W. 574; Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78.

Minnesota.— St. Paul *v.* Seitz, 3 Minn. 297, 74 Am. Dec. 753.

Missouri.— Hainford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753; Welsh *v.* St. Louis, 73 Mo. 71; Blake *v.* St. Louis, 40 Mo. 569 [which cases *disapprove* Barry *v.* St. Louis, 17 Mo. 121, on this point]; Ray *v.* Poplar Bluff, 70 Mo. App. 252.

Nebraska.— Beatrice *v.* Reid, 41 Nebr. 214, 59 N. W. 770; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432, where the charter required the contract to be let to the lowest bidder.

New York.— Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Brusso *v.* Buffalo, 90 N. Y. 679; Storrs *v.* Utica, 17 N. Y. 104, 72 Am. Dec. 437; Godfrey *v.* New York, 104 N. Y. App. Div. 357, 93 N. Y. Suppl. 899 [*affirmed* in 185 N. Y. 563, 77 N. E. 1187] (obstruction created by contractor paving a street, and failure to properly guard); Hawxhurst *v.* New York, 43 Hun 588 (failure to erect barrier to approach to bridge); Groves *v.* Rochester, 39 Hun 5; Dressell *v.* Kingston, 32 Hun 533; Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261]; Bauer *v.* Rochester, 12 N. Y. Suppl. 418.

Ohio.— Circleville *v.* Neuding, 41 Ohio St. 465.

Oregon.— McAllister *v.* Albany, 18 Oreg. 426, 23 Pac. 845.

Tennessee.— Nashville *v.* Brown, 9 Heisk. 1, 24 Am. Rep. 289, pile of sand left by contractor who was engaged in laying a pavement.

Washington.— Drake *v.* Seattle, 20 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

United States.— St. Paul Water Co. *v.* Ware, 16 Wall. 566, 21 L. ed. 485.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1580.

Contra.— James *v.* San Francisco, 6 Cal. 528, 65 Am. Dec. 526 (the decision being upon the theory that the obligation of the corporation to keep its streets in repair is necessarily suspended while they are undergoing alterations which for the time make them dangerous, and because the law compelled the municipality to give out the contract to the lowest bidder); Susquehanna Depot *v.* Simmons, 112 Pa. St. 384, 5 Atl. 434, 56 Am. Rep. 317; Erie *v.* Caulkins, 85 Pa. St. 247, 27 Am. Rep. 642; Painter *v.*

b. Stipulations as to Duties and Liabilities. It is immaterial, as respects the primary liability of the corporation, whether it has or has not stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and that he should be liable for accidents occasioned by his neglect. Such provisions will not relieve the corporation where it would be liable if they had been omitted;[3] and neither the omission[4] nor the insertion of such provisions will create liability.[5]

5. Liability With Respect to Particular Acts and Functions — a. Construction and Maintenance of Public Works and Improvements — (I) *In General.* In the making and adopting of a plan for a public work or improvement a municipal corporation acts in its judicial, discretionary, and legislative capacity,[6] and therefore for injuries which result only from a defect in such plan there is no liability,[7] at least where the defect arises from a mere error of judgment,[8] although

Pittsburgh, 46 Pa. St. 213; Hookey *v.* Oakdale, 5 Pa. Super. Ct. 404. But the municipality cannot shield itself indefinitely by a contract requiring the contractor to keep the street in repair after the municipality has resumed control of the street. Harvey *v.* Chester, 211 Pa. St. 563, 61 Atl. 118.

The principle underlying the decision in Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78, was that, if proceeded against by indictment for creating a public nuisance, the contractor could not justify in his own right, but only as agent of the corporation. See also Brooks *v.* Somerville, 106 Mass. 271. But in Beatrice *v.* Reid, 41 Nebr. 214, 59 N. W. 770, it was said that it was not necessary to invoke the doctrine of *respondeat superior*, or any exception to that doctrine, but that a corporation, charged by law with the performance of a public duty, when sued for an injury resulting from its failure to perform such duty, is estopped from saying that it had delegated to another the performance of such duty. See also Savannah *v.* Waldner, 49 Ga. 316.

Statute making others liable.— In Kollock *v.* Madison, 84 Wis. 458, 54 N. W. 725, it is held that a statute which provides that whenever any person is injured in a city by reason of any defect in any street, or for any other cause for which it would be liable, and such injury shall be caused by the negligence of any person, such person shall be primarily liable, is not limited to cases in which the person guilty of such negligence sustains no contract relation to such city, but applies where such person was grading a street under a contract with the city, and it is immaterial that he is not an independent contractor. So in Wright *v.* Muskegon, 140 Mich. 215, 103 N. W. 558, and Thompson *v.* West-Bay City, 137 Mich. 94, 100 N. W. 280, it is held that where the duty to build a sidewalk is on the abutting owner, although the work must be done under the supervision of the city engineer, and by statute it is made the duty of the city to keep its streets in a safe condition, the city will not be liable for an injury caused by the negligence of a contractor, under a contract with the abutting owner, in improperly constructing a barrier to prevent the use of a new cement sidewalk by the public.

3. *Massachusetts.*—Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45.

Michigan.— Beattie *v.* Detroit, 129 Mich. 20, 88 N. W. 71; Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78.

Nebraska.— Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

New York.— Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

Oregon.— McAllister *v.* Albany, 18 Oreg. 426, 23 Pac. 845.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

United States.— St. Paul Water Co. *v.* Ware, 16 Wall. 566, 21 L. ed. 485.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1581.

4. White *v.* New York, 15 N. Y. App. Div. 440, 44 N. Y. Suppl. 454.

5. Staldter *v.* Huntington, 153 Ind. 354, 55 N. E. 88; Heidenwag *v.* Philadelphia, 168 Pa. St. 72, 31 Atl. 1063.

After resuming control of a street, although a contractor was required to keep the street in repair for three years, the city is liable for an injury caused within one year by a defect in the street. Harvey *v.* Chester, 211 Pa. St. 563, 61 Atl. 118.

An indemnity bond taken by the city from the contractor to secure the city against damages resulting from a failure of the contractor to perform his duty will not create liability on the part of the city for the acts of the independent contractor. Erie *v.* Caulkins, 85 Pa. St. 247, 27 Am. Rep. 642.

6. See *supra*, XIV, A, 2, (II), (B).

Sewers and drains see *infra*, XIV, C.

Streets and sidewalks see *infra*, XIV, D.

7. Little Rock *v.* Willis, 27 Ark. 572; Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180; Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900; Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464. The doctrine that a city may be liable for injuries caused by the negligent manner in which public work is performed by its servants is held not to apply to cases of defective legislation. Saxton *v.* St. Joseph, 60 Mo. 153; Carroll *v.* St. Louis, 4 Mo. App. 191; Steinmeyer *v.* St. Louis, 3 Mo. App. 256.

8. Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E.

such exemption is not extended in some jurisdictions to instances where the lack of care and skill in devising the plan is so great as to constitute negligence.[9] But, while in the carrying out of a public improvement or work which is authorized by law, the municipality, acting in a lawful manner, will not be responsible for consequential damages,[10] in constructing and maintaining such works it acts ministerially, and, as it is bound to see that the work is done in a reasonably safe and skilful manner, will be liable for all injuries caused by the negligence or unskilfulness of its agents and servants.[11]

1043]; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; Rozell *v.* Anderson, 91 Ind. 591; Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618; Dayton *v.* Taylor, 62 Ohio St. 11, 56 N. E. 480.

9. Rome *v.* Baker, 107 Ga. 347, 33 S. E. 406; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Indianapolis *v.* Huffer, 30 Ind. 235; McDonald *v.* Duluth, 93 Minn. 206, 100 N. W. 1102 (holding that where there are obstacles to overcome in the construction of any public work, and reasonable minds might differ as to whether the plan adopted therefor by the municipality was the best and safest one, the decision of the municipality on the question cannot be reviewed by the courts, but a municipality is liable for an injury caused by an unsafe public structure, although the defect exists in the plan adopted for its construction, if there be no reasonable necessity for having the defect); Dayton *v.* Pease, 4 Ohio St. 80. See also Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Uppington *v.* New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Haefelin *v.* McDonald, 96 N. Y. App. Div. 213, 89 N. Y. Suppl. 395.

10. See *supra*, XIII, D, 1, a, *et seq.*

Nuisance see *infra*, XIV, A, 5, c, (II).

11. *Arkansas.*— Little Rock *v.* Willis, 27 Ark. 572.

District of Columbia.— Koontz *v.* District of Columbia, 24 App. Cas. 59.

Georgia.— Brown *v.* Atlanta, 66 Ga. 71, holding that in an action for damages for the overflow of land below the city's reservoir, the rule of liability and damages is the same as in the case of ordinary dams and the city is bound to use only the care which an ordinarily prudent man would exercise.

Illinois.— Chicago *v.* Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221 [*affirming* 113 Ill. App. 656]; Chicago *v.* Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245; Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E. 1043]; Champaign *v.* White, 38 Ill. App. 233.

Indiana.—Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93; Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166; Logansport *v.* Wright, 25 Ind. 512; Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa.— Hendershott *v.* Ottumwa, 46 Iowa 658, 26 Am. Rep. 182; Ellis *v.* Iowa City, 29 Iowa 229; Templin *v.* Iowa City, 14 Iowa 59, 81 Am. Dec. 455; Cotes *v.* Davenport, 9 Iowa 227; Wallace *v.* Muscatine, 4 Greene 373, 61 Am. Dec. 131.

Kansas.— Leavenworth *v.* Casey, McCahon 124 [*overruled* in Atchison *v.* Challis, 9 Kan. 603, in so far as it holds the city liable for the defect in a drain in that it was of insufficient capacity, etc.].

Kentucky.— Pearson *v.* Zable, 78 Ky. 170.

Massachusetts.— Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320; Murphy *v.* Lowell, 124 Mass. 564, holding that where under the charter and ordinances of the city, although the exclusive control of the construction of common sewers was delegated to the board of aldermen, the sewers, when constructed, became the property of the city, the board of aldermen acted merely as agents of the city, and therefore the city was liable for negligence in the course of construction by which an injury was caused plaintiff by a stone thrown against her from a blast in making excavations for construction of a sewer.

Minnesota.— Welter *v.* St. Paul, 40 Minn. 460, 42 N. W. 392, 12 Am. St. Rep. 752.

Mississippi.— Semple *v.* Vicksburg, 62 Miss. 63, 52 Am. Rep. 181.

Missouri.— Barree *v.* Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 114 Am. St. Rep. 763, 6 L. R. A. N. S. 1090; Gerst *v.* St. Louis, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580; Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571; Jordan *v.* Hannibal, 87 Mo. 673; Fink *v.* St. Louis, 71 Mo. 52, holding that under a municipal charter conferring exclusive control over sewers and a general law authorizing any railroad company to construct its road along any street of a city with the assent of the city, the city of St. Louis having assented to the construction of a subterranean railroad under a street reserving the right to supervise and control the removal and reconstruction of any sewer which it should become necessary to remove, the city is liable for the negligence of the railroad company's contractor in the reconstruction of a sewer which it became necessary to remove notwithstanding the municipal officers failed to exercise any supervision over the work which it was their duty to do.

New York.— Lloyd *v.* New York, 5 N. Y. 369, 55 Am. Dec. 347; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Dunstan *v.* New York, 91 N. Y. App. Div. 355, 86 N. Y. Suppl. 562; Kavanagh *v.* Brooklyn, 38 Barb. 232; Donohue *v.* New

(II) *WATERWORKS.* Under a legislative delegation to a municipality of a mere power to supply itself with water for fire and domestic uses, the supplying of water is a discretionary function.[12] Whenever voluntarily undertaken, if profit is the object or effect of the undertaking, either in whole or in part,[13] it becomes a quasi-private business, and the municipality is *quoad hoc* subject to the same rules of liability as water companies.[14] And so, while the municipality is not an insurer of the condition of the plant, and cannot be held liable except for such damages as result from its negligent construction or maintenance of the plant,[15] it has accordingly been held that the municipality is liable for injuries suffered by

York, 3 Daly 65; New York *v.* Bailey, 2 Den. 433.

North Carolina.— Willis *v.* Newbern, 118 N. C. 132, 24 S. E. 706.

Ohio.— Dayton *v.* Pease, 4 Ohio St. 80; Birtwhistle *v.* Cincinnati, 8 Ohio Dec. (Reprint) 453, 22 Cinc. L. Bul. 25.

Texas.— Gross *v.* Lampasas, 74 Tex. 195, 11 S. W. 1086, holding that it is the duty of the city to exercise at least ordinary skill and to make the work as little injurious as can be done consistently with the right to make the improvement.

Vermont.— Winn *v.* Rutland, 52 Vt. 481, construction of sewer under the proprietary power in a charter voluntarily accepted.

Virginia.— Powell *v.* Wytheville, 95 Va. 73, 27 S. E. 805.

Wisconsin.— Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Smith *v.* Milwaukee, 18 Wis. 63; Weeks *v.* Milwaukee, 10 Wis. 242; Milwaukee *v.* Davis, 6 Wis. 377.

United States.— District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 900, 34 L. ed. 472; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Boston *v.* Crowley, 38 Fed. 202.

Canada.— See McCann *v.* Toronto, 28 Ont. 650.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1547.

Public pleasure resort — bathing beach.— And under an act establishing a public bathing beach and conferring upon a municipality the privilege of carrying the act into effect by constructing and maintaining such institution, no liability can accrue toward individuals until the municipality has completed the work of construction and thrown the beach open to the public for the uses contemplated. McGraw *v.* District of Columbia, 3 App. Cas. (D. C.) 405, 25 L. R. A. 691, in which case the court seems further of the opinion, although the point was not decided, that even if the duty of establishing and maintaining the beach were conceded, the municipality could not be held responsible for its safety and the safe use of it by those who were likely to have recourse to it in the same manner that streets and highways are to be rendered safe, or even as parks and grounds kept for entertainment and amusement, without direct profit or advantage to the municipality, might have to be maintained in a condition of safety.

Buildings for public use.— But under the rule that there is no liability if the duty or service is performed for the public good, or is of a public nature, the rule of the text does not apply. Howard *v.* Worcester, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160.

For a tort outside of the scope of employment and in doing what is not a necessary or usual incident to the work of making the improvement the city will not be liable. Roughton *v.* Atlanta, 113 Ga. 948, 39 S. E. 316.

Steam roller without spark arrester.— In McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143, the municipality was held liable for damages caused by a fire set by sparks from a steam roller which did not have a spark arrester, over the objection that the use of the roller was for the benefit of the public.

Public buildings, etc., see *infra,* XIV, B.

12. Lucia *v.* Montpelier, 60 Vt. 537, 15 Atl. 321, 1 L. R. A. 169 (holding that the power is in the discretion of the voters in respect to the amount to be expended, if exercised in good faith and for a proper municipal purpose, and an injunction will not be granted to restrain the expenditure of money for an additional water main sanctioned by the voters); Mendel *v.* Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; U. S. *v.* Sault Ste. Marie, 137 Fed. 258.

13. Bailey *v.* New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669 [*affirmed* in 2 Den. 433]. But see *infra,* note 16.

14. Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376]; Aschoff *v.* Evansville, 34 Ind. App. 25, 72 N. E. 279; St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447; Lynch *v.* Springfield, 174 Mass. 430, 54 N. E. 871; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 185. See also Wilson *v.* New Bedford, 108 Mass. 261, 11 Am. Rep. 352.

Irrigation.— Where a city voluntarily undertakes to furnish water for irrigation to the public, and wrongfully withholds such water from a citizen, it is liable therefor in tort. Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702. See also Levy *v.* Salt Lake City, 3 Utah 63, 1 Pac. 160, holding a municipality liable for a negligent exercise of the power to manage, regulate, and control water flowing through the city, for irrigation purposes.

15. Jenney *v.* Brooklyn, 120 N. Y. 164, 24 N. E. 274.

others from negligence in the construction or maintenance of its reservoir, pipes, hydrants, etc., and in the conduct of the business,[16] but not from lateral service pipes attached by consumers,[17] at least until it has been duly notified of defects therein, when it becomes its duty to remedy the same,[18] or from impurities on account of contamination by such service pipes.[19] On the other hand, under a statute conferring the right to establish public waterworks to supply water to inhabitants and for fire protection, it is held that in respect merely of the furnishing of water-supply the function of the municipality is governmental, requiring the exercise of judgment and discretion, and carries with it no liability for negligence

16. *Connecticut.*— Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

Georgia.— Augusta *v.* Mackey, 113 Ga. 64, 38 S. E. 339; Augusta *v.* Lombard, 99 Ga. 282, 25 S. E. 772.

Illinois.— Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376].

Indiana.— Aschoff *v.* Evansville, 34 Ind. App. 25, 72 N. E. 279.

Massachusetts.— Watson *v.* Needham, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287; Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430.

Missouri.— Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932; Boothe *v.* Fulton, 85 Mo. App. 16; Whitfield *v.* Carrollton, 50 Mo. App. 98.

New Hampshire.— Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32 [*overruling* Gross *v.* Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586]; Rhobidas *v.* Concord, 70 N. H. 90, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381.

New York.— McAvoy *v.* New York, 54 How. Pr. 245; Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669 [*affirmed* in 2 Den. 433], the authority of which case, however, was much shaken if not entirely overthrown by the decision in Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 42 N. E. 405, 50 Am. St. Rep. 667, 30 L. R. A. 660, where it was held that in the construction and maintenance of a system of waterworks, the legislative grant of power to the municipal corporation is to be regarded as exclusively for public purposes and belonging to the corporation in its public character, the latter case being afterward distinguished from the former in Southeast *v.* New York, 96 N. Y. App. Div. 598, 89 N. Y. Suppl. 630, in that the action in Springfield F. & M. Ins. Co. *v.* Keeseville, *supra*, was not for damages resulting from the invasion and destruction of private property but for the non-user or misuser of the power conferred upon the corporation by its failure to keep the water system in an ample and effective condition, and that while on such grounds the doctrine of Bailey *v.* New York, *supra*, may be considered as overthrown, the municipality cannot escape liability for negligence in connection with the construction of a dam for damages from the invasion and destruction of private property in view of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law.

Ohio.— Ironton *v.* Kelley, 38 Ohio St. 50.

Oregon.— Esberg Cigar Co. *v.* Portland, 34 Oreg. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L. R. A. 435.

Pennsylvania.— Philadelphia *v.* Gilmartin, 71 Pa. St. 140. See also Rumsey *v.* Philadelphia, 171 Pa. St. 63, 32 Atl. 1133.

Rhode Island.— Aldritch *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

Texas.— Ennis *v.* Gilder, (Civ. App. 1903) 74 S. W. 585, holding that a municipal corporation in providing a reservoir cannot create a nuisance by flooding the land of a private citizen, although it had the right to condemn such land for public purposes, which power it did not exercise.

United States.— See U. S. *v.* Sault Ste. Marie, 137 Fed. 258, where the providing of a water-supply is considered as a governmental function in any event, although the general language is applied to facts which bring the case itself into accord with others cited below.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1548. And see *infra*, XIV, A, 5, i.

17. Terry *v.* New York, 8 Bosw. (N. Y.) 504.

The right to exercise legislative powers in other matters cannot be affected by any bargain to furnish water. Thus, since in changing the grade of a street the city exercises legislative power, it will not be liable to a property-owner for the freezing of a private service pipe caused by the lowering of such grade. Miller *v.* Kalamazoo, 140 Mich. 494, 103 N. W. 845.

18. Cincinnati *v.* Jacob, 10 Ohio Dec. (Reprint) 27, 18 Cinc. L. Bul. 65.

Where the water is furnished to the municipality for a fire hydrant under a contract with a water company which required the municipality to keep the water hydrant in repair, and the hydrant breaks by accident, the municipality is not responsible for the damage caused by the breaking, but after notice, or its equivalent, of the facts, it is its duty to regard the breaking as a source of danger, and where the president of the municipality diverts the escaping water to the ground of an adjoining owner the municipality will be liable for any damage which directly results therefrom. McHale *v.* Throop Borough, 13 Pa. Super. Ct. 394.

19. Milnes *v.* Huddersfield, 12 Q. B. D. 443, 53 L. J. Q. B. 12, 50 L. T. Rep. N. S. 73, 32 Wkly. Rep. 265, under an act which did not require the corporation to lay the service pipes, although it was entitled to prescribe

in its exercise or for misuser or non-user of the power,[20] as distinguished from an invasion or destruction of private property,[21] and that the extinguishment of a fire, being a purely governmental function, injuries arising from the negligent use of a water hydrant will not subject the municipality to damages.[22] But this exemption from liability is confined to the cases in which the injury occurs in the use or maintenance of the plant by the municipality as a purely governmental function, as above indicated, and it is held that where the municipality supplies water to its inhabitants, it is liable for damages directly resulting to persons and property by reason of the negligent conduct and maintenance of the system, except while so acting in its governmental capacity, because then it is considered to act in a private capacity notwithstanding the system may also be used for the extinguishment of fires.[23]

(III) *Public Wells.* When a municipality assumes control of a well as a source of supply of drinking water for the public it may become liable for its negligence, causing injury to a person using the well, either in failing to repair the covering of the well,[24] or to keep the water pure, but it is not an insurer of the purity of the water, and becomes liable to one using it for failing to cleanse it only after it knows, or with due diligence should know, of the impurity.[25]

b. Enactment and Enforcement of Ordinances and By-Laws. In applying the principle that where a municipality is acting in its governmental capacity it cannot be held civilly liable for any act or omission, it is held that there is no liability for a failure to pass ordinances, even though they would, if passed, preserve the public health or otherwise promote the public good, or for any omission to enforce such ordinances or to see that they are properly observed by its citizens or those who may be resident within the corporate limits,[26] or for injury occurring while the

the material to be used for such pipes and by its by-laws it prescribed lead or cast iron and plaintiff used leaden pipes which contaminated the water after leaving the main.

20. U. S. *v.* Sault Ste. Marie, 137 Fed. 258.

21. Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660; Southeast *v.* New York, 96 N. Y. App. Div. 598, 89 N. Y. Suppl. 630.

22. Failure to supply water for fire purposes see *infra*, XIV, A, 5, i.

23. Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376]; Aschoff *v.* Evansville, 34 Ind. App. 25, 72 N. E. 279. See also Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

24. Sherwood *v.* District of Columbia, 3 Mackey (D. C.) 276, 51 Am. Rep. 776, where the well was dug and excavated in the public highway, with a pump in it, yielding water for domestic purposes, and the inhabitants of the neighborhood were invited to go there and get their daily water-supply, citizens having no notice of a rotten platform beneath the covering of a brick roof, and it was held that they had a right to expect that the work was devised with a foundation of brick or material as imperishable, and being put there and covered by the municipality it was charged with knowledge of the condition of the structure; that the doctrine that in the absence of a statute making a corporation a guarantor of the condition of its highways it must appear that in some way it was advised of the condition which brought about the injury before it can be charged with negligence does not apply to require actual knowledge, since the corporation must be taken to know when it lays a wooden structure upon which a sidewalk is built that the wood is certain to decay.

25. Danaher *v.* Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592 [*affirming* 51 Hun 563, 4 N. Y. Suppl. 312]. *Compare* Mitnes *v.* Huddersfield, 12 Q. B. D. 443, 53 L. J. Q. B. 12, 50 L. T. Rep. N. S. 73, 32 Wkly. Rep. 265.

26. *Colorado.*— Veraguth *v.* Denver, 19 Colo. App. 473, 76 Pac. 539, as to an ordinance requiring the owners of buildings to provide receptacles for ashes and to empty the same, holding that it was for protection against fire and was public in character.

Georgia.— Tarbutton *v.* Tennille, 110 Ga. 90, 35 S. E. 282; Rivers *v.* Augusta, 65 Ga. 376, 38 Am. Rep. 787; Forsyth *v.* Atlanta, 45 Ga. 152, 12 Am. Rep. 576.

Indiana.— Wheeler *v.* Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837.

Kentucky.— Arnold *v.* Stanford, 113 Ky. 852, 69 S. W. 726, 24 Ky. L. Rep. 626; James *v.* Harrodsburg, 85 Ky. 191, 3 S. W. 135, 8 Ky. L. Rep. 899, 7 Am. St. Rep. 589.

Michigan.— Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844, holding that in the absence of any contractual or statutory liability a city which has by ordinance established fire limits is not responsible for loss caused by fire originating in a wooden building erected within the limits, in violation of the ordinance, although it had notice

operation of an ordinance is suspended under the action of the municipality.[27] This doctrine has been applied to actions brought to recover damages from the municipality for injuries both to person and property based upon failure to enact or to enforce ordinances with regard to the use of streets and sidewalks;[28] to injuries resulting from the firing of explosives or setting off of fireworks, even though the acts were permitted or participated in by the municipality through its officers;[29] to injuries caused from a conflagration of oils following the failure to enforce an ordinance regulating the storing of inflammable oils;[30] and for the failure of the municipality to carry out an ordinance for the projecting and laying out of new streets.[31] In some aspects of the subject, however, there is a conflict of authority, it being held in some jurisdictions that the duty of the municipality as to obstructions and nuisances in public highways is not affected by the failure to enact ordinances or to enforce those enacted, and that where, for example, the

that the building was to be erected, and took no steps to prevent it.

Missouri.— Harman *v.* St. Louis, 137 Mo. 494, 38 S. W. 1102; Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755; Armstrong *v.* Brunswick, 79 Mo. 319.

New York.—Landau *v.* New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709; Cain *v.* Syracuse, 95 N. Y. 83; Griffin *v.* New York, 9 N. Y. 456, 61 Am. Dec. 700; Rogers *v.* Binghamton, 101 N. Y. App. Div. 352, 92 N. Y. Suppl. 179 [*affirmed* in 186 N. Y. 595, 79 N. E. 1115]; Howard *v.* Brooklyn, 30 N. Y. App. Div. 217, 51 N. Y. Suppl. 1058; Levy *v.* New York, 1 Sandf. 465 (injury from attack of swine running at large in a street in violation of an ordinance); McGuinness *v.* Allison Realty Co., 46 Misc. 8, 93 N. Y. Suppl. 267.

North Carolina.— Hull *v.* Roxboro, 142 N. C. 453, 55 S. E. 351; Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Ohio.— Custer *v.* New Philadelphia, 20 Ohio Cir. Ct. 77, 11 Ohio Cir. Dec. 9.

Pennsylvania.— McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681.

South Carolina.— Bryant *v.* Orangeburg, 70 S. C. 137 49 S. E. 229.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

Virginia.— Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

Wisconsin.— See Kelley *v.* Milwaukee, 18 Wis. 83, as to permitting a hog to run at large.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1551.

Compare New Orleans *v.* Peyroux, 6 Mart. N. S. (La.) 155, where it was held that if a corporation neglects to enforce its ordinances whereby a farmer of revenue is injured he is entitled to damages.

Not insurers.— Municipal corporations, under their charters and ordinances, do not become insurers of the property within their corporate limits against destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances. Forsyth *v.* Atlanta, 45 Ga. 152, 12 Am. Rep. 576; Howe *v.* New Orleans, 12 La. Ann. 481; Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844.

27. Fifield *v.* Phœnix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430; Rivers *v.* Augusta, 65 Ga. 376, 38 Am. Rep. 787; Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

28. See *infra*, XIV, D.

29. *Arizona.*— Fifield *v.* Phœnix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430.

Indiana.— Wheeler *v.* Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837.

Iowa.— Ball *v.* Woodbine, 61 Iowa 83, 15 N. W. 846, 47 Am. Rep. 805.

Massachusetts.— Lincoln *v.* Boston, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257, under license sanctioned by ordinance.

North Carolina.—Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Ohio.— Robinson *v.* Greenville, 42 Ohio St. 625, 51 Am. Rep. 857, notwithstanding the council has the care and control of the streets.

Pennsylvania.— Norristown *v.* Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771, holding that even if an assemblage of persons in a public street, and the firing of a cannon, is a nuisance, it is one that cannot be abated by the use of ordinary appliances such as suffice for the removal of natural or material obstructions in or near a highway, and resort must be had to the police force, and for the doings or misdoings of those who compose such force the municipality is not liable. See also *infra*, XIV, A, 5, h, (I).

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

West Virginia.— Bartlett *v.* Clarksburg, 45 W. Va. 393, 31 S. E. 918, 72 Am. St. Rep. 817, 43 L. R. A. 295.

Wisconsin.— See Avon *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733, where, however, plaintiff sought to hold the municipality liable under a statute imposing liability for injuries occasioned by a mob, etc. See *infra*, XIV, A, 5, f.

Canada.— Brown *v.* Hamilton, 4 Ont. L. Rep. 249; Ratteau *v.* Drosse, 28 Quebec Super. Ct. 208.

30. Roberts *v.* Cincinnati, 5 Ohio Dec. (Reprint) 361, 5 Am. L. Rec. 73.

31. Collins *v.* Savannah, 77 Ga. 745.

discharge of fireworks in public streets is a public nuisance, the municipality may be liable for injuries occasioned thereby,[32] or that a municipality having the power to pass ordinances for the preservation of the public health and the prevention or abatement of nuisances is under a duty in that regard where the acts are nuisances; and such conduct in the public highways as amount to a nuisance will render the municipality liable if it does not exercise ordinary diligence to prevent them.[33]

c. Nuisances[34] — (i) *ABATEMENT IN GENERAL.* The power conferred upon a municipality to prevent, remove, or abate nuisances is held to be a power for the public good and not for private corporate advantage, and therefore the municipality cannot be held liable for the acts or omissions of its officers with respect to the enforcement of such ordinances,[35] or for their failure to enforce the power conferred by the charter, of a public nature as distinguished from a mere corporate duty.[36] And so a municipality cannot be held liable for injuries resulting from nuisances maintained by individuals on their own property, notwithstanding such nuisances might be abated or removed,[37] especially where the maintenance of

32. Landau *v.* New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709, where it is pointed out that the law is radically different in other jurisdictions, referring to cases cited *supra*, note 29, and indicating that this difference is owing possibly to the absence of large cities in such jurisdictions, and holding that where the setting off of fireworks is in a completely built-up section of a large city, under private management, and without any official responsibility or municipal or public interest, such acts constitute a public nuisance. To the same point see Speir *v.* Brooklyn, 139 N. Y. 6, 34 N. E. 727, 36 Am. St. Rep. 664, 21 L. R. A. 641. *Compare* Boyland *v.* New York, 1 Sandf. (N. Y.) 27. In Brown *v.* Hamilton, 4 Ont. L. Rep. 249, 251, while holding that there was no liability for failure to enforce a by-law against the setting off of fireworks on the streets it was said: "A different feature would be presented if the city authorities had by act or license sanctioned or encouraged this display of fireworks in the streets. In the case of a public nuisance, that might be regarded as an act of misfeasance. Such appears to be the case cited of Forget *v.* Montreal, 4 Montreal Super. Ct. 77." See also *infra*, XIV, A, 5, c.

33. Hagerstown *v.* Klotz, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940 (as to an injury from a bicycle ridden in violation of a speed ordinance); Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728 (as to an injury from cattle permitted to be at large, the city having failed to pass an ordinance touching such matters, the court holding that if the cattle were at large for so short a time that the municipal officers could not have prevented it by the exercise of ordinary diligence there would be no liability); Taylor *v.* Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759 (injury inflicted by using the public street for coasting which could be prevented by the use of ordinary diligence); Baltimore *v.* Marriott, 9 Md. 160, 66 Am. Dec. 326 (as to liability for an injury from snow and ice on the street). See also *infra*, XIV, D.

34. Defects and obstructions in streets see *infra*, XIV, D.

Coasting see *infra*, XIV, D.

Defects and obstructions in sewers, drains, etc., see *infra*, XIV, C.

Failure to enact and enforce ordinances see *supra*, XIV, A, 5, b.

Fireworks see *supra*, XIV, A, 5, b.

35. Ball *v.* Woodbine, 61 Iowa 83, 15 N. W. 846, 47 Am. Rep. 805; Arnold *v.* Stanford, 113 Ky. 852, 69 S. W. 726, 24 Ky. L. Rep. 626; James *v.* Harrodsburg, 85 Ky. 191, 3 S. W. 135, 8 Ky. L. Rep. 899, 7 Am. St. Rep. 589; Armstrong *v.* Brunswick, 79 Mo. 319; McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681, as to legislative authority to limit or prohibit the manufacture, sale, or exposure of fireworks within corporate limits.

Revoking permission to commit a nuisance, even if there is error in the action, being the exercise of a governmental function, cannot be made the basis of an action against the municipality. Even after works are fully erected and in operation they may be abated as a nuisance, in the exercise of such governmental powers. Wood *v.* Hinton, 47 W. Va. 645, 35 S. E. 824. *Compare* Atlanta *v.* Dooly, 74 Ga. 702, *infra*, note 46.

36. Wilmington *v.* Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047, 65 Am. St. Rep. 256, 25 L. R. A. 538; Morristown *v.* Fitzpatrick, 94 Pa. St. 121, 34 Am. Rep. 771; McCrowell *v.* Bristol, 5 Lea (Tenn.) 685, last two cases as to acts which it is the duty of the police to suppress.

37. *Alabama.*— Davis *v.* Montgomery, 51 Ala. 139, 23 Am. Rep. 545, holding that a municipal corporation is not liable for damages for the destruction of a house accidentally burned by sparks from a steam engine used by the proprietor of an adjoining lot, although the engine might have been abated as a nuisance and the corporate authorities have been notified of its dangerous character.

Colorado.— Veraguth *v.* Denver, 19 Colo. App. 473, 76 Pac. 539, where an ordinance required the owners of buildings to provide ash receptacles and empty them, and a pit

the nuisance, being upon private property, in no way amounts to an obstruction of a public street and in no way imperils the safety of travelers upon such street,[38] and noises outside of the limits of the highway amounting to a public nuisance are not defects in the highway.[39] So no liability can arise against a municipality or its officers for the destruction of property which is a nuisance, under an act or ordinance expressly authorized by statute,[40] although it is held on the other hand that the thing must be a nuisance in fact in order to justify the destruction of property under such summary power, and an inquiry as to its nature is not precluded by the order of the municipal authorities.[41]

was dug on the premises involved and filled with ashes by the occupants and it was held that aside from the question whether there could be any liability even if this were a nuisance, the injury in this case having been occasioned by the falling of the occupant's child into the ash pit through the violation of the ordinance, it cannot be called a nuisance within the clause of the charter empowering the city to declare, prevent, and abate nuisances.

Indiana.— Anderson *v.* East, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35, 2 L. R. A. 712, as to walls falling on adjoining property.

Iowa.— Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172.

Missouri.—Butz *v.* Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Harmon *v.* St. Louis, 137 Mo. 494, 38 S. W. 1102; Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755.

New York.— Cain *v.* Syracuse, 95 N. Y. 83, holding that failure to exercise the power to pass ordinances for demolishing buildings which may become dangerous will not render the city liable for injuries occurring by the falling of such buildings, nor will the failure to exercise the power by resolution to require the owner to render such buildings safe or remove them render the municipality liable, no power being given it to enter the premises and abate the nuisance itself, and the authorities not being shown to have had notice of the condition of the building.

North Carolina.— Hull *v.* Roxboro, 142 N. C. 453, 55 S. E. 351, as to the failure to abate a nuisance caused by a construction on a neighboring lot.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1552.

A license to carry on a business will not be construed to be a license to carry on the business in an improper place or in an improper manner so as to be a nuisance. Hubbell *v.* Viroqua, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 866.

38. Dalton *v.* Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101; Cain *v.* Syracuse, 95 N. Y. 83.

Nuisance in or near public street — *In general.*— The doctrine of the liability of a municipality for failure to abate a nuisance in or near a public street arises out of the rule enforced in those jurisdictions that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition and that failure to perform this duty constitutes a breach of ministerial duty and the liability does not rest upon a failure to perform the judicial duty of abating a nuisance. Dalton *v.* Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101. And upon this principle it is held that if the nuisance is in or near a public street so as to endanger the safety of travelers thereon, a municipality will be liable for any special damage suffered by reason of the existence of the nuisance and the failure to abate the same. Dalton *v.* Wilson, *supra*; Parker *v.* Macon, 39 Ga. 725, 99 Am. Dec. 486; Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880, where a ladder which was placed in the street and extended across the sidewalk and rested against a private building fell and injured a passer-by and the corporation was held liable. *Contra*, Howe *v.* New Orleans, 12 La. Ann. 481. See also Hubbell *v.* Viroqua, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 86, nonliability for injuries sustained by reason of the manner in which a shooting gallery was conducted.

Persons not using street.— This liability is enforced in favor of those who are injured while in the use of the highway as such, but is not extended to those who are not in such use of the highway, notwithstanding the injury may occur from a cause which also endangered travelers on the highway. See Butz *v.* Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755 (holding that a municipal corporation is not liable for failure to enforce ordinances requiring property-owners to fill excavations in adjacent streets); Kiley *v.* Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Bassett *v.* St. Joseph, 53 Mo. 290, 14 Am. Rep. 446.

Defect not in street itself.— On the other hand it is held that a failure to exercise legislative power to abate a nuisance in the street itself, which nuisance the municipality does not itself create or maintain and which does not render the street itself unsafe, gives rise to no liability on the part of the municipality. Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

39. Lincoln *v.* Boston, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257.

40. Theilan *v.* Porter, 14 Lea (Tenn.) 622, 52 Am. Rep. 173.

41. Americus *v.* Mitchell, 79 Ga. 807, 5

(II) *Nuisance Created or Permitted by Corporation.* If in the exercise of its corporate powers a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance it is guilty of tort, and like a private corporation or individual, and to the same extent, is liable to damages in a civil action to any person suffering special injury therefrom.[42] So a municipal corporation has no more right to erect and maintain a nuisance on its own land than a private individual would have to maintain such a nuisance on his land;[43] it is entitled to exercise the same rights in respect to the use of its property as an individual, and

S. E. 201; Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116, involving the liability of the officer carrying out the order. See also Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984.

Wanton injury or unnecessary destruction of property will not be justified where the nuisance might have been abated by other means. Waggoner *v.* South Gorin, 88 Mo. App. 25 (where it is held that in an action against a city for damages for filling a basement on plaintiff's premises which defendant claimed was a nuisance, under conflicting evidence of the practicability of abating the nuisance by draining the basement, it was proper to instruct that if the nuisance could have been abated by a drain the method adopted was unauthorized); Babcock *v.* Buffalo, 56 N. Y. 268 [*affirming* Sheld. 317] (where an injunction was granted to restrain abatement in a particular manner upon the principle that the power given to the municipality to abate nuisances in any manner it may deem expedient is not an unrestricted power but intends only that such means should be used as are necessary for the public good.

42. *Connecticut.*— Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703.

Illinois.— Kewanee *v.* Ladd, 68 Ill. App. 154; Champaign *v.* Forrester, 29 Ill. App. 117, permitting improper use of sewer.

Indiana.— Haag *v.* Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654; New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626, holding that a city is not absolved, as a governmental agency, from liability for a nuisance caused in cleaning streets by dumping unhealthy refuse near plaintiff's house, on the theory that street cleaning is a duty, and a public benefit in which plaintiff shared, and that a prompt abatement by the city does not prevent recovery for damages caused during the continuance of the nuisance.

Maine.— Cumberland, etc., Canal Corp. *v.* Portland, 62 Me. 504.

Michigan.— Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Pennoyer *v.* Saginaw, 8 Mich. 534.

Missouri.— Whitfield *v.* Carrollton, 50 Mo. App. 98.

New Jersey.— Hart *v.* Union County, 57 N. J. L. 90, 29 Atl. 490; Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170.

New York.— Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540; Bolton *v.* New Rochelle, 84 Hun 281, 32 N. Y. Suppl. 442.

North Carolina.—Downs *v.* High Point, 115 N. C. 182, 20 S. E. 385, liability for sickness caused by a drain maintained by a city which amounted to a public nuisance.

Tennessee.— Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

Texas.— Ft. Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; Sherman *v.* Langham, (1890) 13 S. W. 1042 (holding that the fact that plaintiff purchased and located on his land, after the city had established its dumping ground, will not preclude his recovering damages for the negligent manner in which it uses the place for that purpose, whereby it becomes a nuisance); Stephenville *v.* Bower, 29 Tex. Civ. App. 384, 68 S. W. 833; Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012 (which cases involve the dumping of garbage, etc., whereby a nuisance is created).

Wisconsin.— Harper *v.* Milwaukee, 30 Wis. 365.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1552.

Nuisance in street.— In Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712, upon the principle that a city is not liable for failure to exercise its legislative and discretionary powers to abate a nuisance which it does not create or maintain itself, it is held that a failure to abate a nuisance in a public street which does not render the street unsafe, as where one constructed a sewer on his premises through which was discharged filth into a city street which injured an adjacent lot, will not render the city liable. But in Little *v.* Madison, 42 Wis. 643, 24 Am. Rep. 435, liability is declared for injury caused by the exhibition of wild animals in the streets, under license from the city.

The damage must be actual and special to plaintiff. Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; Whitfield *v.* Carrollton, 50 Mo. App. 98; Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170. To render a city liable for the noxious smells arising from garbage deposited by it near plaintiff's home, they must be such as to produce physical discomfort such as would interfere with the enjoyment of the property, but need not be hurtful or unwholesome. Ft. Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840.

43. Brower *v.* New York, 3 Barb. (N. Y.) 254, holding that in owning the title to land a municipal corporation exercises a private function and in its use as incidental to such ownership it cannot maintain a nuisance and an injunction will be granted to prevent it.

any lawful use thereof,[44] or the doing of those things which the law authorizes, cannot, it is held, amount to a nuisance in itself, although the execution of the power may be in such a manner as to result in an actionable nuisance.[45]

44. Whitfield *v.* Carrollton, 50 Mo. App. 98, holding that the fact that a stand-pipe is liable to be struck by lightning or blown over because of its height and size does not give an adjoining owner a right to recover on the theory that such stand-pipe is a nuisance licensed by the city where there is nothing to show that it was negligently constructed.

45. Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166; Haag *v.* Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654; Brayton *v.* Fall River, 113 Mass. 218, 18 Am. Rep. 470; Strawbridge *v.* Philadelphia, 2 Pennyp. (Pa.) 419 [*affirming* 13 Phila. 173] (escape of gas from street mains); Suffolk *v.* Parker, 79 Va. 660, 52 Am. Rep. 640 (manner of maintaining a market).

The eminent domain clause of the constitution requiring compensation when private property is damaged for public uses does not create that a nuisance which was not before a nuisance. Atkinson *v.* Atlanta, 81 Ga. 625, 7 S. E. 692, injury to property from grading a street and building a sewer.

A sanitary excuse will suffice, as is sometimes held, if there is no alternative. Valparaiso *v.* Hagen, 153 Ind. 337, 54 N. E. 1062, 74 Am. St. Rep. 305, 48 L. R. A. 707 (holding that a city cannot be enjoined from discharging its sewage in a natural watercourse, where it acts skilfully and in conformity to the statute, and is free from negligence); Ft. Worth *v.* Crawford, 64 Tex. 202, 53 Am. Rep. 753 (holding that if a municipal corporation creates or fails to remove a nuisance, and such nuisance arises from acts done exclusively in the interest of the public, such as the improvement of the sanitary condition of the city, the corporation is liable only for a careless or negligent execution of the duty, but that if the injury arises from acts done for the private advantage or emolument of the corporation, it is liable, irrespective of the question of negligence). See also Ostrom *v.* San Antonio, 94 Tex. 523, 62 S. W. 909. And see INJUNCTIONS, 22 Cyc. 888. But on the other hand it is held that the fact that sewers are necessary to a city and that the statute directs that they shall follow as nearly as practicable the natural drainage of the country afford no justification for the action of a city in emptying its sewers on the land of an individual to his damage; that the legislature cannot confer on a city authority to injure private property for the public good without due compensation. Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711. See also Bolton *v.* New Rochelle, 84 Hun (N. Y.) 281, 32 N. Y. Suppl. 442; Jackson *v.* Rochester, 7 N. Y. St. 853, injunction against continuance of nuisance. And further that the immunity which extends to the consequences following the exercise of judicial or discretionary power, by a municipal body, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized; that such power can be exercised so as not to create a nuisance, and not to require the appropriation of private property to effectuate it. Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664 (damage from insufficient sewer system); Bolton *v.* New Rochelle, *supra*.

Dumping garbage see New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626 (where it is held that while a city has exclusive power over streets within the corporate limits, and the cleaning of its streets, when duly exercised, cannot be controlled by the courts, if unavoidable injury results in such work, no liability ensues, because the doing of what the law authorizes cannot be a nuisance so as to give a right of action, yet collecting garbage and filth from the streets, and depositing it in a mass upon some other street, may create a nuisance; and if it does the city must respond in damages); Denver *v.* Porter, 126 Fed. 288, 61 C. C. A. 168 (holding that the collection of refuse or waste materials of a city, and the deposit thereof by the city authorities on land with the consent of the owner, is the proper exercise of a municipal function, and hence the maintenance of such dump is not of itself a nuisance, but liability may arise for loss on account of its negligent management); Kuebn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030 (where after holding that the removal of garbage is the performance of a public service from which the corporation derives no special corporate advantage, it was held that the dumping of garbage upon Lake Michigan fifteen miles from shore is not *prima facie* a nuisance).

Hospitals.— So it is held that the establishment of a smallpox hospital cannot be a public nuisance in the absence of carelessness or negligence or an abuse of power in any way, nor a private nuisance unless it should become so in its subsequent use or unwarranted operation having in view the peculiar conditions under which it was established and maintained. Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L. R. A. 306. But a municipality, although possessing the right of eminent domain and the police power, may be held responsible, where a hospital is wrongfully located or conducted by it, or is operated in an unwarranted manner or without due care and skill. Deaconess Home, etc. *v.* Bontjes, 104 Ill. App. 484; Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474, holding that the establishment of a pest-house within prohibited territory will render the city liable for a nuisance, the city having the power to establish pest-houses generally. But in Arnold *v.* Stanford, 113 Ky. 852, 69 S. W. 726,

d. Trespass and Conversion. For misfeasance within the scope of its corporate powers, a municipality may be liable in an action of trespass for direct injury to property,[46] and when a municipality appropriates to its use the property of any person, otherwise than as authorized by law upon making compensation therefor, it becomes liable to an action for the conversion or use of such property.[47]

e. Infringement of Patent. A municipal corporation is liable for infringement of a patent in the course of the execution of its corporate powers and duties.[48]

f. Injuries by Mob Violence[49] — (I) *In General.* Actions to recover from municipal corporations damages resulting from the acts of mobs and riotous assemblages are actions to hold such corporations liable in damages for a failure

24 Ky. L. Rep. 626, it was held that where the power to establish a pest-house was not conferred upon a city of a particular class, from which the inference was drawn that such power was withheld, the establishment by ordinance of such an institution within the corporate limits of the city in violation of a general statute forbidding the location of a pest-house within the corporate limits of any incorporated city, etc., would be *ultra vires*, and would not subject such city to liability for injury to property. See also Haag *v.* Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654.

A fire-engine house is not a nuisance *per se*, although it may become a nuisance by reason of improper use, but that furnishes no ground for enjoining its erection. Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

A city prison is not *per se* a nuisance, and for its mere erection no recovery can be had against the corporation, but it may become liable to an adjoining proprietor for so negligently keeping the prison as to create a nuisance. Long *v.* Elberton, 109 Ga. 28, 34 S. E. 333, 77 Am. St. Rep. 363, 46 L. R. A. 428.

Ultra vires.— An action on the case will not lie against a municipal corporation for creating and continuing a nuisance where its act was *ultra vires*. Duncan *v.* Lynchburg, (Va. 1900) 34 S. E. 964, maintaining and operating a rock quarry beyond city limits. See also *supra*, XIV, A, 3, e, (II).

46. *Illinois.*— Allen *v.* Decatur, 23 Ill. 332, 76 Am. Dec. 692.

Louisiana.— Baumgard *v.* New Orleans, 9 La. 119, 29 Am. Dec. 437.

Michigan.— Rogers *v.* Randall, 29 Mich. 41; Sheldon *v.* Kalamazoo, 24 Mich. 383, 385.

Missouri.— Dooley *v.* Kansas City, 82 Mo. 444, 52 Am. Rep. 380; Allison *v.* Richmond, 51 Mo. App. 133.

Nebraska.— See Omaha *v.* Croft, 60 Nebr. 57, 82 N. W. 120.

Pennsylvania.— Brink *v.* Dunmore, 174 Pa. St. 395, 34 Atl. 598.

Rhode Island.— Willoughby *v.* Allen, 25 R. I. 531, 56 Atl. 1109.

Texas.— Ostrom *v.* San Antonio, 94 Tex. 523, 62 S. W. 909; San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760.

Wisconsin.— Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Hamilton *v.* Fond du Lac, 40 Wis. 47.

Canada.—Archibald *v.* Truro, 33 Nova Scotia 401 [*affirmed* in 31 Can. Sup. Ct. 380].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1553. And see the cases cited generally *supra*, XIV, A, 2, a, (I).

Destruction of property.— A city is liable in damages as for a tort where, after licensing plaintiffs to do business as bill-posters, it causes one of their bill boards to be torn down, despite their remonstrances and without hearing them. Atlanta *v.* Dooly, 74 Ga. 702. See also as to destruction of property under police regulations *supra*, XI, A, 8, e, k.

Eminent domain see EMINENT DOMAIN, 15 Cyc. 543..

Ultra vires see *supra*, XIV, A, 3, e, (II).

47. Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244 (holding that where a city takes and appropriates gravel to its own use without right, there is a conversion immediately upon its removal, and the owner of the land may elect to recover the value of the personal property after it had been separated from the land instead of seeking damages for the trespass upon the real estate); Napier *v.* Brooklyn, 41 N. Y. App. Div. 274, 58 N. Y. Suppl. 506. See also Elgin *v.* Goff, 38 Ill. App. 362; Canal, etc., Nav. Co. *v.* New Orleans First Drainage Dist., 26 La. Ann. 740 (liability for rent of property taken and used); Methodist Episcopal Church *v.* Vicksburg, 50 Miss. 601 (as to liability on implied contract for property used).

48. Asbestine Tiling, etc., Co. *v.* Hepp, 39 Fed. 324 (where a city council authorized a contractor to lay a sewer in one of its streets, in pursuance of a power contained in its act of incorporation, and in so doing the contractor infringed upon the patent of another for making sewer-pipe); Brickill *v.* New York, 7 Fed. 479, 18 Blatchf. 273; Munson *v.* New York, 3 Fed. 338, 5 Ban. & A. 486, 18 Blatchf. 237; Allen *v.* New York, 1 Fed. Cas. No. 232, 5 Ban. & A. 57, 17 Blatchf. 350; Bliss *v.* Brooklyn, 3 Fed. Cas. No. 1,544, 8 Blatchf. 533, 4 Fish. Pat. Cas. 596 (use of a patent for hose-coupling); Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252. But see Allen *v.* Brooklyn, 1 Fed. Cas. No. 218, 8 Blatchf. 535, 4 Fish. Pat. Cas. 598, where the city was held not liable for the act of the board of education.

49. **Mob defined** see MOB, 27 Cyc. 812.

Liability of counties see COUNTIES, 11 Cyc. 501.

to preserve the public peace,[50] and as the duty and power to preserve order and prevent mob violence are governmental,[51] the municipality is entitled to the same immunity from liability for injury resulting in consequence of mob violence as the sovereign granting the power, unless such liability is expressly declared by the sovereign.[52] Such liability, however, has been imposed by statute,[53] and can arise only in those instances which are thus prescribed.[54] The power of the legis-

50. New Orleans *v.* Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329.

Acts or omissions of police see *infra*, XIV, A, 5, h.

51. Chicago League Ball Club *v.* Chicago, 196 Ill. 54, 63 N. E. 695 [*reversing* on other grounds 97 Ill. App. 637, 77 Ill. App. 124].

52. *Kentucky.*— Ward *v.* Louisville, 16 B. Mon. 184; Prather *v.* Lexington, 13 B. Mon. 559, 56 Am. Dec. 585.

Maryland.— Baltimore *v.* Poultney, 25 Md. 107.

New York.— Davidson *v.* New York, 27 How. Pr. 342.

Ohio.— Western Homeopathic Medicine College *v.* Cleveland, 12 Ohio St. 375.

United States.— Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936 (containing a strong supporting *dictum*); New Orleans *v.* Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329; Gianfortone *v.* New Orleans, 61 Fed. 64, 24 L. R. A. 592; Hart *v.* Bridgeport, 11 Fed. Cas. No. 6,149, 13 Blatchf. 289.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1558.

53. See the statutes of the several states. See also Folson *v.* New Orleans, 28 La. Ann. 936; Fauvia *v.* New Orleans, 20 La. Ann. 410; Luke *v.* Brooklyn, 43 Barb. (N. Y.) 54 [*affirmed* in 1 Abb. Dec. 24, 3 Keyes 444, 3 Transcr. App. 305], holding that where piers and buildings on the Brooklyn shore of East river were taxed by said city, it was liable for their destruction by a mob or riot.

Indemnity.— The statute is one purely of indemnity. Pennsylvania Co. *v.* Chicago, 81 Fed. 317, as to statute in Illinois.

A statute creating a metropolitan police district for the city of New Orleans and taking away from the city authorities the management of the police force and vesting it in a board of metropolitan police was held not to repeal or modify the statute which made the city liable for property destroyed by a mob or riotous assembly, since the operation of the statute creating such liability did not depend upon the existence or non-existence of a police force but upon the aggregate responsibility of the inhabitants. Williams *v.* New Orleans, 23 La. Ann. 507. But on the last point see Street *v.* New Orleans, 32 La. Ann. 577.

Inability to prevent the injury, or diligence on the part of the municipality, is no defense under a statute which does not so provide. Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 69 Am. St. Rep. 321, 45 L. R. A. 848; Iola *v.* Birnbaum, 71 Kan. 600, 81 Pac. 198; Atchison *v.* Twine, 9 Kan. 350; Chadbourne *v.* Newcastle, 48 N. H. 196; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670; Chicago *v.* Pennsylvania Co., 119 Fed. 497, 57 C. C. A. 509, under the Illinois statute, where the defense was that the city exercised all its power to prevent the loss and that the state and federal governments were also engaged in protecting the property. In Maryland the rule was otherwise under a statute differing from those controlling the foregoing cases. Baltimore *v.* Poultney, 25 Md. 107; Duffy *v.* Baltimore, 7 Fed. Cas. No. 4,118, Taney 200.

54. Jolly *v.* Hawesville, 89 Ky. 279, 12 S. W. 313, 11 Ky. L. Rep. 477 (holding that as a general statute making a city liable for damages to property by riotous assemblages of people is expressly limited to injuries to property, it does not modify the rule that a city is not liable for injuries to the person resulting from malfeasance or negligence of its police officers); Duryea *v.* New York, 10 Daly (N. Y.) 300; New Orleans *v.* Abbagnot, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329; Gianfortone *v.* New Orleans, 61 Fed. 64, 24 L. R. A. 592 (the last two cases holding that the statute which provides for liability for damage to property does not embrace injuries to a person resulting in death, and that such liability cannot be declared under a general statute giving a right of action for wrongful death). But in Kansas under a statute providing for the recovery of damages against cities on account of mobs for loss of property or injury to life or limb, a recovery may be had for all bodily injuries and the statute is not limited to such injuries as result in death or in the loss of limb. Iola *v.* Birnbaum, 71 Kan. 600, 81 Pac. 198.

Nature of assemblage — *To the terror of the people.*— In Duryea *v.* New York, 10 Daly (N. Y.) 300, the element was required that the acts must have been "to the terror of the people" in order that there should have been a mob or riot, but this was in a case where boys tore down an old and unoccupied wooden house and it did not appear that the injury was with any purpose but was merely to gratify individual propensities and the offenders dispersed at the approach of a policeman.

But no actual fighting or unnecessary noise is necessary where a large number of people, with no other purpose than to destroy plaintiff's property, proceed to accomplish that purpose as peaceably as may be in the absence of any opposition, it appearing that there were no police present to oppose them, and such a case comes within the statute. Marshall *v.* Buffalo, 63 N. Y. App. Div. 603, 71 N. Y. Suppl. 719 [*affirmed* in 176 N. Y. 545, 68 N. E. 1119].

The original aim or purpose of the mob is

lature to pass such laws and their constitutionality have been recognized and upheld in many cases,[55] and, as has been said, the right to such reimbursement

not material if the other elements are present which would render a municipality liable. Madisonville *v.* Bishop, 113 Ky. 106, 67 S. W. 269, 57 L. R. A. 130; Solomon *v.* Kingston, 24 Hun (N. Y.) 562 [*affirmed* in 96 N. Y. 651].

Fireworks.— In Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733, it was held that under a statute which gives a remedy against a city for an injury sustained in consequence of any mob or riot and provides that any three or more persons who shall be assembled in a violent manner to do any unlawful act, etc., shall be guilty of riot, the three or more persons must have a common purpose to do the act in order to constitute it a riot, and therefore a complaint which shows that plaintiff was injured by a fire-cracker thrown by someone in a crowd of thirty or more people engaged in exploding fireworks does not state a cause of action. See also Boyland *v.* New York, 1 Sandf. (N. Y.) 27. But in Madisonville *v.* Bishop, 113 Ky. 106, 67 S. W. 269, 23 Ky. L. Rep. 2363, 57 L. R. A. 130, it was held that the words "any riotous or tumultuous assembly of people" cover an assembly of one thousand people in the main street of a city obstructing its use and discharging bombs, sky-rockets, etc., therein, at private property, and that if injury is thus inflicted liability arises under the statute. See also *supra*, XIV, A, 5, h.

Armed military force.— Where property is destroyed during a conflict, and as an inevitable result of a collision of arms between organized and contending forces, there is no liability as for injury inflicted by a mob. Street *v.* New Orleans, 32 La. Ann. 577.

That some of the mob resided out of the city is immaterial. Atchison *v.* Twine, 9 Kan. 350; Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605; Chadbourne *v.* Newcastle, 48 N. H. 196.

Property of non-resident.—It has also been held that the city is liable for the property of a non-resident (Williams *v.* New Orleans, 23 La. Ann. 507; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670); although it will be seen that sometimes the statute excepts property in transit (see Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 69 Am. St. Rep. 321, 45 L. R. A. 848).

Property taken and carried away comes within a statute providing indemnity for property injured or destroyed. Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571; Baltimore *v.* Poultney, 25 Md. 107; Solomon *v.* Kingston, 24 Hun (N. Y.) 562 [*affirmed* in 96 N. Y. 651]; Sarles *v.* New York, 47 Barb. (N. Y.) 447.

55. *Illinois.*— Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 69 Am. St. Rep. 321, 45 L. R. A. 848 (holding that the statute did not create an indebtedness for local or corporate purposes in violation of a provision against such enactment, nor did it violate the provision of the constitution that a municipality should not be allowed to become indebted beyond a certain per cent of its taxable property, as the act did not create a debt, or, conceding that it did, it could not be assumed that the city's indebtedness would thus be made to exceed the limit); Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571.

Louisiana.— Williams *v.* New Orleans, 23 La. Ann. 507.

New Hampshire.—Underhill *v.* Manchester, 45 N. H. 214.

New York.— Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352 (holding that such an act is not void as taking private property for public use without compensation); Sarles *v.* New York, 47 Barb. 447; Luke *v.* Brooklyn, 43 Barb. 54 [*affirmed* in 1 Abb. Dec. 24, 3 Keyes 444, 3 Transcr. App. 305]; Davidson *v.* New York, 27 How. Pr. 342 (holding that such a provision is not in violation of the due process of law clause, nor does it impair the obligation of a contract under the constitution of the United States).

Pennsylvania.— *In re* Pennsylvania Hall, 5 Pa. St. 204, upholding the statute over an objection that the right of trial by a jury of twelve men in court was violated because the provision substituted an increase of six men out of court.

United States.— Pennsylvania Co. *v.* Chicago, 81 Fed. 317, referring to the statute of Illinois. See also Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1558.

The principle upon which these laws are upheld as within the general scope of legislative power is stated thus in Allegheny County *v.* Gibson, 90 Pa. St. 397, 418, 35 Am. Rep. 670. "Formerly . . a person robbed had his remedy against any inhabitant of the hundred; that is to say, the inhabitants were jointly and severally liable. Then the law was so changed, that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterwards it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was that every political subdivision of the state should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent as well as to detect and punish crime. . . It was evidently a police regulation, based upon grounds of

may be entirely withdrawn or limited at any time at the pleasure of the legislature.[56]

(II) *Notice of Apprehended Danger.* Under various statutory provisions declaring municipal liability for damages from mob violence, the municipality must have notice of the impending danger or good reason to believe that a riot threatens,[57] or the party who would enforce such liability must have given notice of such danger to the municipal authorities if he had knowledge thereof.[58]

(III) *Conduct of Plaintiff.* So under various such statutes no recovery can be had against a municipality for injuries from mob violence if it appears that such injury was occasioned, aided, sanctioned, or permitted by the carelessness, neglect, or wrongful act of the person complaining or unless he shall have used all reasonable diligence to prevent the injury.[59] Generally under statutes of this nature it is established that the carelessness, negligence, or wrongful act referred to must be such as actually occasioned or proximately contributed to the injury or destruction on account of which liability is sought to be imposed, although the particular terms of the statute have sometimes been given a wider scope.[60]

public policy, and enforced without regard to the hardships of particular cases." See also Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 69 Am. St. Rep. 321, 45 L. R. A. 848; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352.

56. Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936. See also *In re* Pennsylvania Hall, 5 Pa. St. 204, holding further, however, that where the act is repealed the legislature may lawfully pass another act restoring to validity all proceedings had under the repealed statute.

57. See Madisonville *v.* Bishop, 113 Ky. 106, 67 S. W. 269, 23 Ky. L. Rep. 2363, 57 L. R. A. 130; Baltimore *v.* Poultney, 25 Md. 107; Duffy *v.* Baltimore, 7 Fed. Cas. No. 4,118, Taney 200.

58. Wing Chung *v.* Los Angeles, 47 Cal. 531; Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605; Chadbourne *v.* Newcastle, 48 N. H. 196.

Notice is excused where the party injured had no information on which to found the same, in time to give the notice. Ely *v.* Niagara County, 36 N. Y. 297 [*affirming* 46 Barb. 659]; Solomon *v.* Kingston, 24 Hun (N. Y.) 562 [*affirmed* in 96 N. Y. 651]; St. Michael's Church *v.* Philadelphia County, 4 Pa. L. J. Rep. 150. See also Allegheny *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670, mere apprehension of an attack is not sufficient to deprive an owner of the benefit of such act; but knowledge of a contemplated attack must be brought home to him. St. Michael's Church *v.* Philadelphia County, *supra*. And so such notice is held to be unnecessary where it appears that the mayor had notice from other sources of the existence of an organized mob and its attempts to destroy property generally in the city. Newberry *v.* New York, 1 Sweeny (N. Y.) 369.

59. Wing Chung *v.* Los Angeles, 47 Cal. 531 (holding that it is a good defense that plaintiff instigated and participated in the riot); Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571 [*adhered* to in 72 Ill. App. 629, and 96 Ill. App. 230] (holding that it is no defense under such statute that one's own employees formed a part of the mob, or that he did not act to protect his property to the extent of taking human life).

Notice by plaintiff see *supra*, XIV, A, 5, f, (II).

60. Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571 [*adhered* to in 72 Ill. App. 629, and 96 Ill. App. 230] (holding that the fact that plaintiff was carrying on a business not authorized by the law of its incorporation did not exempt the municipality from liability for the injuries occasioned by mob violence, since other remedies are provided for such excess of corporate powers and it does not authorize destruction by a mob); Brightman *v.* Bristol, 65 Me. 426, 20 Am. Rep. 711 (holding that where the use of a house is that which constitutes a nuisance, the abatement consists in putting a stop to such use and that *a fortiori* the law will not sanction a destruction of the house by individuals); Ely *v.* Niagara County, 36 N. Y. 297 [*affirming* 46 Barb. 659]; Blodgett *v.* Syracuse, 36 Barb. (N. Y.) 526 (the last two cases holding that it is no defense that the houses destroyed were kept by plaintiff as bawdy-houses, etc., the first case further illustrating the rule of the text by the opening of a window and its fireproof shutters in the house of one adjoining a conflagration at the time, through which burning embers enter and set fire to the house, in which case no action could be maintained under the act, although the adjoining house was fired by the mob, as the act of opening the window and shutters would be considered as occasioning or aiding the destruction of the property). And see Duryea *v.* New York, 10 Daly (N. Y.) 300, where it was held that the mere leaving of an old building unguarded and insufficiently secured on election day was not the act of a man of ordinary prudence and that in so doing he did not exercise reasonable diligence to prevent the damage complained of.

g. Care of Poor and Public Charities. The conduct of public charities and the disposition of the poor is considered of that public nature which carries immunity from liability for the acts or omissions of those through whom such duties are performed,[61] although in the conduct of a poor farm from which profit inures to the corporation it has been held otherwise.[62]

h. Police Powers and Officers — (i) *In General.* When, by the action of the state, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation *pro tanto* is charged with governmental functions in the public interest and for public purposes, and in the exercise of its powers and duties in respect of the enactment and enforcement of police regulations it is entitled to the same immunity as the sovereign granting the power unless such liability is expressly declared by the sovereign.[63] The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable therefore for the acts of its officers in attempting to enforce

Improper or illegal conduct.—In Allegheny *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670, under a provision that there shall be no liability where the injury "was caused" by the "improper conduct" of the party complaining, it is held that to defeat a recovery the improper conduct must have been the proximate cause of the destruction. But in New Hampshire under a provision against liability for the destruction of property "caused" by plaintiff's "illegal or improper conduct" it is held that "illegal" means "contrary to law" and "improper" means "not suitable," "unfit," "not suited to the character, time and place," and that the term "improper" is not to be construed as immoral, although not expressly forbidden by law (Chadbourne *v.* Newcastle, 48 N. H. 196); and that the publication of libelous articles is "illegal conduct," unless excused by facts sufficient to constitute a defense to an indictment for libel, so as to exempt from liability for mob violence caused by such publication (Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605). So also, under such provision, the keeper of a drinking and gambling house was held not entitled to recover for property destroyed therein in a riot growing directly out of a dispute there arising concerning a gambling transaction between the persons engaged therein, although he was not personally engaged in the dispute or transaction. Underhill *v.* Manchester, 45 N. H. 214.

61. Benton *v.* Boston City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468; Haight *v.* New York, 24 Fed. 93 [*affirmed* in 27 Fed. 230].

Non-paying patients in hospital cannot recover for injuries sustained by the negligence and misconduct of the hospital officials and servants. Murtaugh *v.* St. Louis, 44 Mo. 479. So in Williams *v.* Indianapolis, 26 Ind. App. 628, 60 N. E. 367, it is held that under a statute giving control of the department of health and charities to three commissioners, who shall be practising physicians, and placing in their charge the city hospital, and the efficient regulation and management thereof, the board acts for the public, and not as agent of the municipality in its corporate character; and hence a city is not liable to a patient, treated without charge at the city hospital, injured by the alleged unskilful treatment of a physician employed therein. See also Summers *v.* Daviess, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512.

Confinement in prison, etc., see *infra*, XIV, A, 5, h, (II).

Health officers see *infra*, XIV, A, 5, j.

Independent officers see *supra*, XIV, A, 3, c.

62. Moulton *v.* Scarborough, 71 Me. 267, 36 Am. Rep. 308; Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

63. *Arkansas.*— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1.

Illinois.— Robertson *v.* Marion, 97 Ill. App. 332 (no liability for malicious prosecution); Blake *v.* Pontiac, 49 Ill. App. 543.

Kansas.— La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Ohio.— Robinson *v.* Greenville, 42 Ohio St. 625, 51 Am. Rep. 857.

Texas.— Stinnett *v.* Sherman, (Civ. App. 1897) 43 S. W. 847.

United States.—New Orleans *v.* Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1573.

The appointment of an incompetent or vicious person as a police officer, even with knowledge of his incompetency or character, will not render the municipality liable for his wrongs. Craig *v.* Charleston, 180 Ill. 154, 54 N. E. 184 (holding that where the mayor of a city appointed a man of vicious character, as special policeman, to keep a street free from obstruction, and, while in the performance of his duties, the policeman committed an assault, the city was not liable on the ground that it created a nuisance or an obstruction in the street in placing an unfit person there as policeman); Doty *v.* Port Jervis, 23 Misc. (N. Y.) 311, 52 N. Y. Suppl. 57; Rusher *v.* Dallas, 83 Tex. 151, 18 S. W. 333.

such regulations,[64] and further because police officers can in no sense be regarded as servants or agents of the city. Their duties are of a public nature. Their appointment is devolved upon cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render the cities and towns liable for their assaults, trespasses, or negligent acts.[65] But this rule of

64. *District of Columbia.*— Grumbine *v.* Washington, 2 MacArthur 578, 29 Am. Rep. 626.

Illinois.— Odell *v.* Schroeder, 58 Ill. 353, non-liability where a town officer held one in custody who was committed by a verbal order for non-payment of a fine imposed for a breach of an ordinance, the magistrate having no jurisdiction to imprison.

Indiana.— Lafayette *v.* Timberlake, 88 Ind. 330; Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476.

Iowa.— Lahner *v.* Williams, 112 Iowa 428, 84 N. W. 507; Easterly *v.* Irwin, 99 Iowa 694, 68 N. W. 919; Caldwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154.

Pennsylvania.— Elliott *v.* Philadelphia, 7 Phila. 129, loss through the negligence of a police officer in caring for property taken into custody upon arresting one for violating a speed ordinance.

Texas.—Whitfield *v.* Paris, 84 Tex. 431, 19 S. W. 566, 31 Am. St. Rep. 69, 15 L. R. A. 783; Givens *v.* Paris, 5 Tex. Civ. App. 705, 24 S. W. 974.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1573.

Arrest under an illegal ordinance will not subject the municipality to liability either for the act of the council in passing the ordinance or for the act of the mayor in issuing and that of the marshal in executing the warrant of arrest under the ordinance. Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1. The same result was reached in Grumbine *v.* Washington, 2 MacArthur (D. C.) 578, 29 Am. Rep. 626; Caldwell *v.* Prunelle, 57 Kan. 511, 46 Pac. 949; Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 948, 56 Am. St. Rep. 361; Worley *v.* Columbia, 88 Mo. 106; Simpson *v.* Whatcom, 33 Wash. 392, 74 Pac. 577, 99 Am. St. Rep. 951, 63 L. R. A. 815 (void ordinance requiring license-fee to be paid for the use of bicycles on a city's streets); Masters *v.* Bowling Green, 101 Fed. 101; Trescott *v.* Waterloo, 26 Fed. 592. But see McGraw *v.* Marion, 98 Ky. 673, 34 S. W. 18, 17 Ky. L. Rep. 1254, 47 L. R. A. 593, holding that a void ordinance requiring a license-tax is for the sole benefit of the municipal corporation, and the corporation will be liable for its enforcement.

A void judgment enforcing an ordinance will not give rise to liability. Bartlett *v.* Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795; Fox *v.* Richmond, 40 S. W. 251, 19 Ky. L. Rep. 326.

65. *Alabama.*— Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656, failure of police to prevent violence.

Arkansas.— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1, illegal arrest.

Colorado.— McAuliffe *v.* Victor, 15 Colo. App. 337, 62 Pac. 231.

Connecticut.— Perkins *v.* New Haven, 53 Conn. 214, 1 Atl. 825.

Georgia.— Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131 (illegal arrest and consequent imprisonment); Moss *v.* Augusta, 93 Ga. 797, 20 S. E. 653 (holding that a "dog-killer," under an ordinance providing for the killing of all dogs found running at large, etc., except such as might wear collars provided by the city for their protection, was a police officer within the rule of the text, and that the city was not liable for his malicious act in killing a dog which was provided with and wearing a collar such as the ordinance prescribed); Attaway *v.* Cartersville, 68 Ga. 740; McElroy *v.* Albany, 65 Ga. 387, 38 Am. Rep. 791; Harris *v.* Atlanta, 62 Ga. 290; Cook *v.* Macon, 54 Ga. 468.

Illinois.—Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123; Craig *v.* Charleston, 180 Ill. 154, 54 N. E. 184 (holding that a municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the state and in excess of the legal powers of the city); Odell *v.* Schroeder, 58 Ill. 353; Culver *v.* Streator, 34 Ill. App. 77 [*affirmed* in 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270].

Indiana.— White *v.* Sullivan County, 129 Ind. 396, 28 N. E. 846; Laurel *v.* Blue, 1 Ind. App. 128, 27 N. E. 301.

Iowa.— Lahner *v.* Williams, 112 Iowa 428, 84 N. W. 507; Easterly *v.* Irwin, 99 Iowa 694, 68 N. W. 919; Calwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154.

Kansas.— Caldwell *v.* Prunelle, 57 Kan. 511, 46 Pac. 949; Peters *v.* Lindsborg, 40 Kan. 654, 20 Pac. 490.

Kentucky.— Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 361; Pollock *v.* Louisville, 13 Bush 221, 26 Am. Rep. 260 (arrest and removal of a person too sick to be removed, and in consequence of which he died); Bean *v.* Middlesborough, 57 S. W. 478, 22 Ky. L. Rep. 415.

Louisiana.— Howe *v.* New Orleans, 12 La. Ann. 481 (holding that the city is not responsible for the acts of third persons which under a more sagacious police might have been prevented); Stewart *v.* New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218.

Maryland.—Altvater *v.* Baltimore, 31 Md. 462, independent police department.

Massachusetts.— Butterick *v.* Lowell, 1 Allen 172, 79 Am. Dec. 721.

Minnesota.— Gullikson *v.* McDonald, 62 Minn. 278, 64 N. W. 812.

Missouri.— Worley *v.* Columbia, 88 Mo. 106.

immunity from liability cannot be invoked where a police officer is employed by the municipality in its corporate character or in the performance of a corporate duty.[66]

New York.— Woodhull *v.* New York, 150 N. Y. 450, 44 N. E. 1038 (declaring the non-liability of the city of New York for the acts of policemen appointed by the trustees of the Brooklyn bridge, notwithstanding the liability of the city for the acts of said trustees and persons employed in the maintenance of the bridge, as the agents or servants of the city, since the police, although so appointed, act in the same capacity as other policemen); McKay *v.* Buffalo, 9 Hun 401 [*affirmed* in 74 N. Y. 619] (injury to a person by the careless handling of a pistol by a policeman in shooting at a mad dog, the policeman being appointed under an act providing for the establishment of a police department and being an officer wholly independent of the city); Doty *v.* Port Jervis, 23 Misc. 313, 52 N. Y. Suppl. 57.

North Carolina.— McIlhenney *v.* Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482.

Ohio.— Alvord *v.* Richmond, 4 Ohio S. & C. Pl. Dec. 177, 3 Ohio N. P. 136, excessive force in making arrest and cruel treatment of the prisoner.

Pennsylvania.—Betham *v.* Philadelphia, 196 Pa. St. 302, 46 Atl. 448; Norristown *v.* Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771; Elliott *v.* Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591; Fox *v.* Northern Liberties, 3 Watts & S. 103; Miller *v.* Hastings Borough, 25 Pa. Super. Ct. 569.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

Tennessee.— Davis *v.* Knoxville, 90 Tenn. 599, 18 S. W. 254.

Texas.—Whitfield *v.* Paris, 84 Tex. 431, 19 S. W. 566, 31 Am. St. Rep. 69, 15 L. R. A. 783 (personal injuries inflicted by policeman in shooting at a dog in the attempted enforcement of an ordinance prohibiting the allowing of dogs to run at large); Rusher *v.* Dallas, 83 Tex. 151, 18 S. W. 333; Corsicana *v.* White, 57 Tex. 382 (wanton and unauthorized trespass); Harrison *v.* Columbus, 44 Tex. 418; Peck *v.* Austin, 22 Tex. 261, 73 Am. Dec. 261; Galveston *v.* Brown, 28 Tex. Civ. App. 274, 67 S. W. 156; McFadin *v.* San Antonio, 22 Tex. Civ. App. 140, 54 S. W. 48.

Utah.— Royce *v.* Salt Lake City, 15 Utah 401, 49 Pac. 290.

West Virginia.— Bartlett *v.* Clarksburg, 45 W. Va. 393, 31 S. E. 918, 72 Am. St. Rep. 817, 43 L. R. A. 295.

Wisconsin.—Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779.

United States.— Kansas City *v.* Lemen, 57 Fed. 905, 6 C. C. A. 627; Trescott *v.* Waterloo, 26 Fed. 592; Hart *v.* Bridgeport, 12 Fed. Cas. No. 6,149, 13 Blatchf. 289, failure to discharge duty to protect property against a known violation of the law.

Canada.—Woodforde *v.* Chatham, 37 N. Brunsw. 21; McCleave *v.* Moncton, 35 N. Brunsw. 296; Winterbottom *v.* London Police Com'rs, 1 Ont. L. Rep. 549 [*affirmed* in 2 Ont. L. Rep. 105]; Kelly *v.* Archibald, 26 Ont. 608, 22 Ont. App. 522; Ratteau *v.* Drosse, 28 Quebec Super. Ct. 208 (non-liability for tort committed on one of city's thoroughfares in breach of by-law); Tremblay *v.* Quebec, 23 Quebec Super. Ct. 266.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1573.

Destruction of property.— It has been accordingly held that municipal corporations are not liable for property negligently destroyed by the police themselves. Dargan *v.* Mobile, 31 Ala. 469, 70 Am. Dec. 505; Stewart *v.* New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37.

Destruction of property to prevent conflagration see *supra*, XI. And see ACTIONS, 1 Cyc. 653 *et seq.*

Ratification.— The acts of such officers in their public capacity cannot be ratified or adopted. Calwell *v.* Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. Rep. 154; Peters *v.* Lindsborg, 40 Kan. 654, 20 Pac. 490; Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721; Murray *v.* Omaha, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. Rep. 702; Kelly *v.* Archibald, 26 Ont. 608 [*affirmed* in 22 Ont. App. 522]. See also Columbus *v.* Dunnick, 41 Ohio St. 602.

Fireworks see *supra*, XIV, A, 5, b.

Mobs see *supra*, XIV, A, 5, f.

Nuisance see *supra*, XIV, A, 5, c.

66. Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108 [*distinguishing* Altvater *v.* Baltimore, 31 Md. 462, in that the non-liability of a city to remove a nuisance from a public street was based upon the ground that the power to remove was lodged in the police and not in the city and the police officers under the organization of the police department were not officers of the city] (as to the duty of a city to keep its streets and sidewalks in a reasonably safe condition for travel, although it performs this duty through its police, the police being expressly made agents of the city which is therefore held responsible for the acts of the police in the performance of corporate functions); Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131] (where it was held that when a patrol line, which is the result of a business arrangement on the business side of a municipal corporation, is constructed the municipality may use it for any legitimate purpose connected with its police without changing the thing from a private pecuniary matter to a public one and without affecting the city's duty to keep its streets in a safe condition, the power to create and operate such a line not being

(II) *Confinement of Prisoners.* The maintenance of a prison, workhouse, or other place of confinement of prisoners, is the exercise of a purely governmental power, and the corporation will not be liable for injuries resulting to prisoners confined in such places either by reason of the condition of the place itself,[67] or by reason of the acts or negligence of the officers or agents who are charged with the proper care of such persons while they are so confined.[68]

vested in the police department as an independent body but in the city, and it does not matter that the city permits the police to construct or use the line); Johnson City *v.* Wolfe, 103 Tenn. 277, 52 S. W. 991 (trespass at the direction of the city by pulling down a fence on land claimed to have been dedicated to the public use).

67. *Georgia.*— Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131, as to improper construction of prison.

Iowa.— Lahner *v.* Williams, 112 Iowa 428, 84 N. W. 507.

Kansas.— La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Minnesota.— Gullikson *v.* McDonald, 62 Minn. 278, 64 N. W. 812.

New York.— Eddy *v.* Ellicottville, 35 N. Y. App. Div. 256, 54 N. Y. Suppl. 800, where one arrested for violation of an ordinance was imprisoned in a place negligently permitted to become so dilapidated that in consequence of exposure therein he contracted a disease which caused his death.

Ohio.— Rose *v.* Toledo, 24 Ohio Cir. Ct. 540.

West Virginia.— Shaw *v.* Charleston, 57 W. Va. 433, 50 S. E. 527.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1550, 1573.

But see Edwards *v.* Pocahontas, 47 Fed. 268, where it was held that a town which used a jail of its own was liable for injuries to the health of a prisoner caused by its filthy condition, since under the state statute and a special provision of the town's charter, it might have used a county jail subject to inspection and control.

In North Carolina, the rule of liability in such cases was laid down in Lewis *v.* Raleigh, 77 N. C. 229, based upon the peculiar provisions of the constitution and statutes of the state, and in later cases while still upholding the doctrine of liability, it has been narrowed in its operation and effect so as to impose upon the city only the duty of properly constructing and furnishing the prison and exercising ordinary care in providing ordinary necessaries for the prisoners and supervising subordinates in charge of the prison, and it is held that the city is not liable for injuries resulting from negligence of those in charge of a prison in failing to make use of the improvements and appliances furnished unless the municipal authorities have had notice of such negligence and fail to remedy the evil. Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482; Shields *v.* Durham, 116 N. C. 394, 21 S. E. 402; Moffitt *v.* Ashville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810.

Public buildings see *infra*, XIV, B.

68. *Colorado.*— McAuliffe *v.* Victor, 15 Colo. App. 337, 62 Pac. 231.

Georgia.— Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Nisbet *v.* Atlanta, 97 Ga. 650, 25 S. E. 173; Wilson *v.* Macon, 88 Ga. 455, 14 S. E. 710 (holding that a city is not liable for personal injuries received by one prisoner at the hands of another confined in the same cell, although the officer may have been guilty of negligence in confining the injured person in the same cell with the other who was intoxicated and dangerous); Doster *v.* Atlanta, 72 Ga. 233 (holding that a municipal corporation is not liable for a tort committed by one convict, sentenced under a municipal ordinance, upon the person of another convict, nor for a tort committed upon him by the guard over such convicts).

Kansas.— La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Massachusetts.— Curran *v.* Boston, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243, injury sustained by one under a workhouse sentence, from negligence of officers in charge, although the duty of maintaining such an institution was not imperatively imposed on the city, the court holding that by the statute authorizing the erection and maintenance of such an institution a mode of performing a strictly public duty was provided from which there could be no pecuniary advantage to the city; that the fact that some revenue was derived from the labor of the inmates was no reason to hold the city liable, as, even though the entire expense was not met by taxation by reason of the profit thus derived, such profit was merely incidental; and further that recovery should be denied because under the public statutes when the city established the workhouse, the government, ordering, and inspection thereof were placed in the hands of a board of directors of public institutions which was a board of public officers whom the city council were required to elect, and which was an independent body in whom was vested the administration of the public institutions, and which was not the agent of the city.

Michigan.— Detroit *v.* Laughna, 34 Mich. 402.

Missouri.— Ulrick *v.* St. Louis, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372, where plaintiff was kicked by a mule which the superintendent of the workhouse had ordered him to harness, the city being held not liable for the injuries thus sustained, although the superintendent knew that the mule was vicious.

Ohio.— Green *v.* Muskingum County, 23 Ohio Cir. Ct. 43 (injury while operating a

i. Firemen and Loss by Fire. The power to organize and regulate a fire department and otherwise provide for the prevention of and guarding against damage by fire is generally held to be a legislative or judicial one, or a governmental as distinguished from a mere corporate one, and the failure of the corporate authorities to exercise the power to the full extent necessary to protect the citizens from such damage does not render the city liable to an action therefor.[69] Thus the municipality will not be liable for losses resulting from the neglect or failure to provide an adequate water-supply for the protection of property against damage by fire,[70] or from the failure of the municipality or its fire department to

machine); Alvord *v.* Richmond, 4 Ohio S. & C. Pl. Dec. 177, 3 Ohio N. P. 136.

Tennessee.— Davis *v.* Knoxville, 90 Tenn. 599, 18 S. W. 254, where one prisoner was assaulted by other prisoners confined in the same room, and it was held that a recovery could not be had on the ground of the negligence of officers in not taking proper measures to protect the prisoner from assault.

Texas.— Stinnett *v.* Sherman, (Civ. App. 1897) 43 S. W. 847, injury to one prisoner inflicted by another prisoner who was crazy and with whom plaintiff was negligently confined.

Utah.— Royce *v.* Salt Lake City, 15 Utah 401, 49 Pac. 290, *ultra vires* acts of the police officer.

West Virginia.— Brown *v.* Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121, injury to prison by burning of jail through the negligence of those in charge of the place.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1550, 1573.

Imprisonment of slaves in the nature of bailment.— Where the imprisonment of a slave was in the nature of a bailment, it was held that the loss of the slave must be traceable to negligence or misconduct on the part of defendant, as the natural and proximate cause, uncontrolled by the agency of the slave himself. Kelly *v.* Charleston, 4 Rich. (S. C.) 426. In order to entitle a corporation to exemption from liability for loss of a slave placed in jail for safekeeping, the city was required to give timely notice to the owner. Clague *v.* New Orleans, 13 La. Ann. 275. But if such notice was given there was no liability. Chase *v.* New Orleans, 9 La. 343. And under an act requiring the keeper of police jails to advertise runaway slaves, whose owners were unknown or resided out of the state, etc., a municipality was liable for failure to comply with such statute, in detaining a slave without proper care and attention which resulted in his death. Johnson *v.* Municipality No. 1, 5 La. Ann. 100.

69. *Connecticut.*— Jewett *v.* New Haven, 38 Conn. 368, 9 Am. Rep. 382.

Indiana.— Robinson *v.* Evansville, 87 Ind. 334, 44 Am. Rep. 770 (providing hose insufficient in quantity, and delay in reaching scene by reason of the balking of a horse hitched to a hose cart); Brinkmeyer *v.* Evansvills, 29 Ind. 187.

Louisiana.— Planters' Oil Mill *v.* Monroe Waterworks, etc., Co., 52 La. Ann. 1243, 27 So. 684.

Massachusetts.— Tainter *v.* Worcester, 123 Mass. 311, 25 Am. Rep. 90, under the power to maintain the waterworks system.

New York.— Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660, as to the power to establish and maintain waterworks.

Ohio.— Wheeler *v.* Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

United States.— U. S. *v.* Sault Ste. Marie, 137 Fed. 258.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1557, 1574.

70. *Georgia.*— Wright *v.* Augusta, 78 Ga. 241, 6 Am. St. Rep. 256.

Indiana.— Brinkmeyer *v.* Evansville, 29 Ind. 187.

Kentucky.— Patch *v.* Covington, 17 B. Mon. 722, 66 Am. Dec. 186.

Massachusetts.— Tainter *v.* Worcester, 123 Mass. 311, 25 Am. Rep. 90, where the municipality which operated the waterworks system cut off the water from plaintiff's building and from the street hydrant upon his failure to pay water rates.

Pennsylvania.— Grant *v.* Erie, 69 Pa. St. 420, 8 Am. Rep. 272, under a power to maintain reservoirs and supply water, a reservoir so established being defective, so that it would not hold water.

South Carolina.— Black *v.* Columbia, 19 S. C. 412, 45 Am. Rep. 785.

Texas.— Butterworth *v.* Henrietta, 25 Tex. Civ. App. 467, 61 S. W. 975, where the city owned and operated its waterworks. See also House *v.* Honston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532. *Contra*, Lenzen *v.* New Braunfels, 13 Tex. Civ. App. 335, 35 S. W. 341.

United States.— U. S. *v.* Sault Ste. Marie, 137 Fed. 258, where the municipality establishes its own waterworks system.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1557.

The payment of water rates or the levy of a water tax does not affect the rule. Wright *v.* Augusta, 78 Ga. 241, 6 Am. St. Rep. 256; Vanhorn *v.* Des Moines, 63 Iowa 447, 19 N. W. 293, 50 Am. Rep. 750; Planters' Oil Mill Co. *v.* Monroe Waterworks, etc., Co., 52 La. Ann. 1243, 27 So. 684; Yule *v.* New Orleans, 25 La. Ann. 394; Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660; Black *v.* Columbia, 19 S. C. 412, 45 Am. Rep. 785.

A water plant maintained by a municipality for the use of its fire department only

keep its waterworks, pumps, pipes, plugs, hose, carriages, etc., in repair.[71] Upon the same principle the municipality will not be liable for injuries caused by the wrongful or negligent acts of a fire department or of the firemen employed therein, while they are engaged in the performance of their functions,[72] or are

comes within the reason of the authorities which exclude liability of the municipality when it is acting in its purely governmental capacity so that it would not be liable for negligence in the maintenance of such a plant. Miller *v.* Minneapolis, 75 Minn. 131, 77 N. W. 788.

Where a water company under a contract with the city to supply water fails in such duty, the city cannot be held liable for a fire loss caused thereby (Vanhorn *v.* Des Moines, 63 Iowa 447, 19 N. W. 293, 50 Am. Rep. 750; Planters' Oil Mill Co. *v.* Monroe Waterworks, etc., Co., 52 La. Ann. 1243, 27 So. 684; Foster *v.* Lookout Water Co., 3 Lea (Tenn.) 42; House *v.* Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532); and this, although the water company has contracted to defend all suits against the corporation for such losses (Vanhorn *v.* Des Moines, *supra*). And so the failure of the municipality to continue a contract with a water company for the supply of water for fire purposes will not render the former liable for a fire loss. Sandusky *v.* Central City, 58 S. W. 516, 22 Ky. L. Rep. 669.

71. *Georgia.*— Wright *v.* Augusta, 78 Ga. 241, 6 Am. St. Rep. 256.

Indiana.— Robinson *v.* Evansville, 87 Ind. 334, 44 Am. Rep. 770.

Minnesota.— Miller *v.* Minneapolis, 75 Minn. 131, 77 N. W. 788.

New York.— Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660, under the power conferred to own and maintain waterworks.

Pennsylvania.— Grant *v.* Erie, 69 Pa. St. 420, 8 Am. Rep. 272.

South Carolina.— Black *v.* Columbia, 19 S. C. 412, 45 Am. Rep. 785.

West Virginia.— Mendel *v.* Wheeling, 28 W. Va. 233, 57 Am. Rep. 664.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1557.

72. Saunders *v.* Ft. Madison, 111 Iowa 102, 82 N. W. 428; Kies *v.* Erie, 135 Pa. St. 144, 19 Atl. 942, 20 Am. St. Rep. 867; Welsh *v.* Rutland, 56 Vt. 228, 48 Am. Rep. 762 (thawing out hydrant, whereby water was allowed to escape on the street and freeze, so that one slipped on the ice and was injured); Lynch *v.* North Yakima, 37 Wash. 657, 80 Pac. 79; Lawson *v.* Seattle, 6 Wash. 184, 33 Pac. 347.

Nature of department.— It is not material whether the fire department is established under a general law or special charter or act of the legislature (Fisher *v.* Boston, 104 Mass. 87, 6 Am. Rep. 196; Shanewerk *v.* Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918); or under a general permissive law (Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434); or that it is a volunteer department (Torbush *v.* Norwich, 38 Conn. 225, 9 Am. Rep. 395). So the duty being recognized as a public one, and the fire department being sometimes under the control of a board created by the legislature, in the performance of its duties the department and those employed by it are considered as public officers. Grube *v.* St. Paul, 34 Minn. 402, 26 N. W. 228; Terhune *v.* New York, 88 N. Y. 247 (fire commissioners of the city of New York are public officers and an action for damages for a wrongful dismissal by them of an inspector whom they appointed will not lie against the city); Thompson *v.* New York, 52 N. Y. Super. Ct. 427; Woolbridge *v.* New York, 49 How. Pr. (N. Y.) 67. They are likewise considered public officers under a statute providing that cities and towns may organize fire departments, etc. Burrill *v.* Augusta, 78 Me. 118, 3 Atl. 177, 57 Am. Rep. 788; Freeman *v.* Philadelphia, 13 Phila. (Pa.) 154. And in any event they sustain this character while in the performance of these public duties, although they are imposed upon the municipality itself. Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434; Robinson *v.* Evansville, 87 Ind. 334, 44 Am. Rep. 770; Davis *v.* Lebanon, 108 Ky. 688, 57 S. W. 471, 22 Ky. L. Rep. 384; Greenwood *v.* Louisville, 13 Bush (Ky.) 226, 26 Am. Rep. 263; Alexander *v.* Vicksburg, 68 Miss. 564, 10 So. 62; Heller *v.* Sedalia, 53 Mo. 159, 14 Am. Rep. 444. But see Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 178, 66 L. R. A. 181, where it was held that under a power to provide and maintain a fire department and appoint a fire marshal, prescribe his duties, fix his salary, and control him in the discharge of his duties, the fire marshal, while so acting, was the agent of the city; that in performing legislative or discretionary functions with regard to the organization of the fire department the city acted in its public character; but that for acts on the part of the city or its fire department, as in permitting a floor in a fire station to become out of repair, whereby an injury was occasioned, the city would be liable.

Negligent use of water hydrant.— Injuries arising from the use of a water hydrant will not subject a municipality to liability for damages. Aschoff *v.* Evansville, 34 Ind. App. 25, 72 N. E. 279.

For injuries to persons upon the public streets caused by the negligence of firemen driving carriages employed in the fire department, in the performance of his duties as a fireman, the municipality will not be liable. Howard *v.* San Francisco, 51 Cal. 52; Jewett *v.* New Haven, 38 Conn. 368, 9 Am. Rep. 382; Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434; Greenwood *v.* Louisville, 13 Bush (Ky.) 226, 26 Am. Rep. 263; Hafford *v.* New Bedford, 16 Gray (Mass.) 297;

actually in the discharge of their duties in and about the extinguishment of fires.[73]

j. Health. The performance of duties that relate to the preservation of the public health and the care of the sick is likewise of concern to the public as a whole; in executing this function the municipality and the officers through whom it acts perform governmental or public, as distinguished from mere corporate or private, duties for which there is no liability,[74] and the officers and agencies engaged in the performance of such duties are public officers for whose torts the municipal corporation is not responsible.[75] On the other hand it is held that

Alexander *v.* Vicksburg, 68 Miss. 564, 10 So. 62; McKenna *v.* St. Louis, 6 Mo. App. 320; Gillespie *v.* Lincoln, 35 Nebr. 34, 52 N. W. 811, 16 L. R. A. 349; O'Meara *v.* New York, 1 Daly (N. Y.) 425; Freeman *v.* Philadelphia, 13 Phila. (Pa.) 154. So for a like injury to property the city will not be liable. Grube *v.* St. Paul, 34 Minn. 402, 26 N. W. 228.

Firemen need not be actually engaged at a fire or in putting out a fire in order that the municipality shall be exempt from liability for their acts, as where the injury occurs by the negligent management of a fire apparatus in a practice drill on the street (Frederick *v.* Columbus, 58 Ohio St. 538, 51 N. E. 35; Thomas *v.* Findlay, 6 Ohio Cir. Ct. 241, 3 Ohio Cir. Dec. 435); or where a horse is frightened at a stream thrown while testing a hydrant used for fire pumps (Edgerly *v.* Concord, 62 N. H. 8, 13 Am. St. Rep. 533); or where the negligence is that of a fireman while in charge of a truck in the line of his duty, although not going to or coming from a fire (Lilly *v.* Scranton, 2 Lack. Leg. N. (Pa.) 175); or of a fireman in opening a door of an engine house so as to strike a passer-by on the sidewalk (Kies *v.* Erie, 135 Pa. St. 144, 19 Atl. 942, 20 Am. St. Rep. 867); or of a driver while exercising horses belonging to the fire department (Gillespie *v.* Lincoln, 35 Nebr. 34, 52 N. W. 811, 16 L. R. A. 349). So where fire is drawn from an engine in the street and steam is permitted to escape which causes a horse to become frightened and run away, whereby the occupant of the vehicle is thrown out and injured, the city is not liable. Burrill *v.* Augusta, 78 Me. 118, 3 Atl. 177, 57 Am. Rep. 788. And where the members of a fire department left a ladder truck so standing that a ladder projected across the sidewalk in front of an engine house, in consequence of which a passer-by was injured, it was held that the city was not liable. Dodge *v.* Granger, 17 R. I. 664, 24 Atl. 100, 33 Am. St. Rep. 901, 15 L. R. A. 781.

Fire department in parade.— The city is not liable for injuries caused by the members of the fire department in a public parade, and this without regard to whether the city authorities did or did not have the right to order the department to take part in the parade. Smith *v.* Rochester, 7 N. Y. 506; Blankenship *v.* Sherman, 33 Tex. Civ. App. 507, 76 S. W. 805.

Injuries to firemen see *supra*, XIV, A, 2, b.

In admiralty see *supra*, XIV, A, 2, a, (III).

73. *Connecticut.*— Torbush *v.* Norwich, 38 Conn. 225, 9 Am. Rep. 395, as to injury done by volunteer firemen to property in *bona fide* entering premises in the course of extinguishing a fire.

Kentucky.—Davis *v.* Lebanon, 108 Ky. 689, 57 S. W. 471, 22 Ky. L. Rep. 384, injury by water.

Louisiana.— Yule *v.* New Orleans, 25 La. Ann. 394, where the firemen were absent with the fire appliances, not attending a fire but engaged in their own private pursuits and amusements.

Minnesota.— Grube *v.* St. Paul, 34 Minn. 402, 26 N. W. 228.

Missouri.— Heller *v.* Sedalia, 53 Mo. 159, 14 Am. Rep. 444, where it was said that in conferring on a municipality the power to establish a fire department it was not the intention to render the municipality an insurer against loss by fire.

Ohio.— Wheeler *v.* Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

Tennessee.— Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. 419.

Wisconsin.— Hayes *v.* Oshkosh, 33 Wis. 314, 14 Am. Rep. 760, negligence in working engine.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1557, 1574.

74. Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 499; Murray *v.* Grass Lake, 125 Mich. 2, 83 N. W. 995; White *v.* San Antonio, 94 Tex. 313, 60 S. W. 426; Whitfield *v.* Paris, 84 Tex. 431, 19 S. W. 566, 31 Am. St. Rep. 69, 15 L. R. A. 783; Kempster *v.* Milwaukee, 103 Wis. 421, 79 N. W. 411.

75. *Georgia.*— Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64, duty to keep streets clean which devolved upon the board of health of the city.

Indiana.—Summers *v.* Daviess County, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512. But operators of an ambulance under a contract with the city, who are required by contract to answer all calls from the city dispensary, and are under the direction of the dispensary surgeon, are not municipal agents, and are personally liable for the negligent act of the driver. Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240.

Kentucky.— Having *v.* Covington, 78 S. W. 431, 25 Ky. L. Rep. 1617.

Maine.—Barbour *v.* Ellsworth, 67 Me. 294; Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Mitchell *v.* Rockland, 52 Me. 118.

Michigan.—Nicholson *v.* Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Webb

where the municipality is acting in the discharge of a special power granted to it in the exercise of which it acts as a legal individual, as distinguished from its governmental functions, it is liable for the acts of its employees, and the liability is not affected by the fact that the discharge of such duty might incidentally benefit the public health.[76]

k. Education. Education is a matter of purely public concern, and under the general rules already stated the municipality is not liable for the acts of its officers and agents in respect to the performance of the duties relating thereto,[77] or of independent officers in the performance of duties cast upon them by the statute.[78]

v. Detroit Bd. of Health, 116 Mich. 516, 74 N. W. 734, 72 Am. St. Rep. 541; Gilboy *v.* Detroit, 115 Mich. 121, 73 N. W. 128.

Minnesota.— Bryant *v.* St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31.

Missouri.— Murtaugh *v.* St. Louis, 44 Mo. 479.

New York.— Bamber *v.* Rochester, 26 Hun 587, 63 How. Pr. 103 [*affirmed* in 97 N. Y. 625].

Pennsylvania.— Lentz *v.* Philadelphia, 3 Pa. Co. Ct. 136.

Texas.— Bates *v.* Houston, 14 Tex. Civ. App. 287, 37 S. W. 383.

Washington.— Lynch *v.* North Yakima, 37 Wash. 657, 80 Pac. 79.

Wisconsin.—Lowe *v.* Conroy, 120 Wis. 151, 97 N. W. 942, 102 Am. St. Rep. 983, 66 L. R. A. 907.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1575. And see also HEALTH, 21 Cyc. 406.

Local health officers acting under a general statute of the state conferring their powers are not performing corporate functions, but are representatives of the state, and the municipality is not liable for the acts of such boards, either of misfeasance or nonfeasance. Murray *v.* Grass Lake, 125 Mich. 2, 83 N. W. 995 (flooding land by raising the level of a lake, by a village council acting on the advice of the board of health); White *v.* Marshfield, 48 Vt. 20; Forsyth *v.* Canniff, 20 Ont. 478. See also the cases cited above in this note.

Abatement of nuisance see *supra*, XIV, A, 5, c.

Hospitals.— Pursuant to the general rules stated in the text, it has been held that in the construction and maintenance of a public institution, as a hospital, by way of performing governmental functions, the corporation can be brought under no civil liability for private wrongs. Thus nonliability has been declared for injuries due to an improper exposure to disease of one engaged in the construction of a hospital. Nicholson *v.* Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601. The same rule is declared as to injuries caused by confining one who is affected with a particular disease in an improper place and by the improper treatment of him therein (Lexington *v.* Batson, 118 Ky. 489, 81 S. W. 264, 26 Ky. L. Rep. 363; Twyman *v.* Frankfort, 117 Ky. 518, 78 S. W. 446, 25 Ky. L. Rep. 1620, 64 L. R. A. 572; Having *v.* Covington, 78 S. W. 431, 25 Ky. L. Rep. 1617); or for negligence of the hospital authorities or servants in permitting a patient to escape and wander off, whereby he loses his life (Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461).

76. Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744; Quill *v.* New York, 36 N. Y. App. Div. 476, 55 N. Y. Suppl. 889 [*reversing* 21 Misc. 598, 48 N. Y. Suppl. 141]; Ostrom *v.* San Antonio, 94 Tex. 523, 62 S. W. 909; Denver *v.* Porter, 126 Fed. 288, 61 C. C. A. 168; Barney Dumping-Boat Co. *v.* New York, 40 Fed. 50, which cases involve the function of street cleaning and removal of garbage, which are held to be corporate powers in the exercise of which the city may become liable for the negligence or wrongful acts of its officers and agents. In other cases, however, similar functions are considered governmental and the rule of non-liability is applied. Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64 (where the duty to keep the streets clean devolved upon the board of health); Conelly *v.* Nashville, 100 Tenn. 262, 46 S. W. 565 (where the sprinkling of the streets was held to be a governmental duty for the promotion of general health, and both this and the last case are disapproved in Quill *v.* New York, *supra*). See also Kuehn *v.* Milwaukee, 92 Wis. 263, 65 N. W. 1030, where the removal of garbage is held to be a public duty.

77. Howard *v.* Worcester, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160; Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332, which cases involve the construction and care of school buildings. See also *infra*, XIV, B.

78. Diehm *v.* Cincinnati, 25 Ohio St. 305 [*affirming* 5 Ohio Dec. (Reprint) 215, 3 Am. L. Rec. 542]; Allen *v.* Brooklyn, 1 Fed. Cas. No. 218, 8 Blatchf. 535.

A quasi-municipal corporation, like a board of education, is not liable for the consequences of a breach of public duty or the neglect or wrongs of its officers unless the liability is imposed by statute. Rock Island Lumber, etc., Co. *v.* Elliott, 59 Kan. 42, 51 Pac. 894; Donovan *v.* New York Bd. of Education, 85 N. Y. 117; Reynolds *v.* Union Free School Dist. Bd. of Education, 33 N. Y. App. Div. 88, 53 N. Y. Suppl. 75; Cincinnati Bd. of Education *v.* Volk, 72 Ohio St. 469, 74 N. E. 646, holding that a board of education is not liable in its corporate capacity for injuries caused by negligently carrying an excavation for a school building below the

1. Acts by Licensees. In the absence of any want of care on the part of municipal officers to perform such duties as the corporation owes the public and for a breach of which it will be liable, as in the case of the duty to keep its streets in safe condition for public use,[79] the mere granting to another of a license to do work which in itself is not unlawful or dangerous will not render the municipality liable for injuries caused by the acts of those who perform the work.[80]

B. Condition or Use of Public Buildings or Other Property — 1. Nature and Ground of Liability as Proprietor. A municipality owning, leasing, or controlling lands or other premises as a private owner is under the same measure of duty and care in respect to their operation, or keeping them in a reasonably safe condition, as private owners or occupants,[81] and is liable for injuries caused by the unsafe condition of such premises, where it is chargeable with notice thereof,[82] and has a reasonable time in which to make them safe;[83] as in the case of its negligent operation of plants for providing water or light for the city,[84] or of its creating, or permitting to remain, other nuisances on such premises.[85] But a municipality is not required to keep such premises in a safe condition for the benefit of trespassers or those who come upon the premises without invitation either express or implied and merely to seek their own pleasure or gratify their own curiosity; and in this

statutory depth, and that a statute creating liability against an owner or possessor of premises whereon wrongful excavations are made, etc., does not apply to boards of education holding title to land being excavated for school purposes.

79. Warsaw *v.* Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; Masterton *v.* Mt. Vernon, 58 N. Y. 391. See also *infra*, XIV, D.

Exhibition of wild animals in streets.— Where the city licenses the exhibition of wild animals in the streets, knowing the dangerous character of the animals, it may be held liable for failure to keep its streets free from dangerous obstructions and nuisances and also for authorizing such exhibition. Little *v.* Madison, 42 Wis. 643, 24 Am. Rep. 435.

80. Schnurr *v.* Huntington County, 22 Ind. App. 188, 53 N. E. 425 (where a city consented to a county connecting its court-house with a city sewer, and it was held that the city was not liable for acts done by the licensee in the construction of the sewer); Masterton *v.* Mt. Vernon, 58 N. Y. 391; Dorlon *v.* Brooklyn, 46 Barb. (N. Y.) 604 (holding that a licensed plumber acting under a special permit to make private connections with a city sewer is not an agent or servant of the city). On the other hand it is held that under imperative duty on the municipal corporation to maintain its streets and sidewalks, while it may license private individuals to open a public street in order to connect private drains with public mains, it will still be liable for the manner in which the work is done as if its own servants were performing it, and if by the negligence of a plumber a cellar is flooded, the corporation will be liable for the damages occasioned thereby. Anderson *v.* Wilmington, 8 Houst. (Del.) 516, 19 Atl. 509.

Under a permit from the mayor to fire explosives it is said that the utmost that can be granted is that the act of the mayor constituted the wrong-doers licensees, and conceding without deciding this, the city would not be liable for injury to property caused by the negligent manner in which the explosives were fired because it was not shown that the act licensed was intrinsically dangerous. Wheeler *v.* Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; Lincoln *v.* Boston, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257, under license sanctioned by ordinance, such licensee not being the city's agent. See also *supra*, XIV, A, 5, b.

81. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 260 [*affirming* 53 Ill. App. 189]; Roberton *v.* New York, 7 Misc. (N. Y.) 645, 28 N. Y. Suppl. 13 [*affirmed* in 149 N. Y. 609, 44 N. E. 1128].

A city is estopped from denying its duty as to a dangerous pit on its land, where such city has passed an ordinance declaring pits of that character to be a nuisance. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206 [*affirming* 53 Ill. App. 189].

82. Chicago *v.* Smith, 95 Ill. App. 335, holding a city chargeable with notice of the unsafe condition of an arch constructed under the supervision of the commissioner of public works.

83. Chicago *v.* O'Brennan, 65 Ill. 160.

84. Boothe *v.* Fulton, 85 Mo. App. 16.

The power of a municipality to provide water for its inhabitants and to light streets is of a proprietary character for private advantage and in operating plants for such purposes it is entitled to all the rights and subject to all the liabilities that at common law attach to a natural person. Boothe *v.* Fulton, 85 Mo. App. 16.

85. Miles *v.* Worcester, 154 Mass. 511, 28 N. E. 676, 26 Am. St. Rep. 264, 13 L. R. A. 841 (allowing a retaining wall between a school lot and the land of an adjoining owner to remain upon such land, where it had come by the action of the elements or otherwise);

respect it is not liable for resulting injuries,[86] except in the case of children,[87] unless its negligence is of so gross a character as to amount to a wanton infliction of injury.[88] Nor is a municipality liable for its failure to do an act in regard to the condition of its premises, which in the absence of statute it is under no duty to do.[89]

2. Buildings — a. In General. A municipality in erecting and maintaining buildings for profit, utility, or pleasure is held to the same degree of care in the erection and maintenance thereof as a private person, and is liable for injuries resulting from its negligence in this respect;[90] and therefore where a city lets for hire a building erected for municipal purposes, it is liable for an injury caused by a defect or want of repair in the building, or for negligence of its agents or servants in the management of the building.[91] But it is not liable where the dangerous condition of the premises is the result of causes beyond its control, and it had not a reasonable time before the injury to make them safe.[92] Nor is it liable for negligence in the construction and maintenance of buildings or apparatus used for governmental purposes;[93] and in accordance with this rule it is held by

Ft. Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840.

86. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206 [*affirming* 53 Ill. App. 189]; Clark *v.* Manchester, 62 N. H. 577; Williams *v.* Nashville, 106 Tenn. 533, 63 S. W. 231.

87. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206 [*affirming* 53 Ill. App. 189]. But see Clark *v.* Manchester, 62 N. H. 577.

A deep pit in a populous city, wherein are water and floating timbers on which children are in the habit of playing, near a driveway across lots only partially inclosed, will render the city which owned the premises liable for the drowning of a child playing there, if found by the jury so attractive as to entice children into danger, and to suggest the probability of the accident. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206 [*affirming* 53 Ill. App. 189].

88. Clark *v.* Manchester, 62 N. H. 577.

89. Ewen *v.* Philadelphia, 194 Pa. St. 548, 45 Atl. 339, 75 Am. St. Rep. 712, holding that where a river flowing through a park has been made a slack-water navigation by a corporation authorized by statute, with power to erect dams and locks, a city in which is vested title to the park has no duty in the absence of a statutory requirement to maintain safeguards above a dam erected by such corporation within the park limits to prevent boats from drifting over the dam.

90. *Illinois.*— Chicago *v.* Smith, 95 Ill. App. 335.

Massachusetts.— Little *v.* Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417.

Michigan.— Barron *v.* Detroit, 94 Mich. 601, 54 N. W. 273, 34 Am. St. Rep. 366, 19 L. R. A. 452.

New York.— Vincent *v.* Brooklyn, 31 Hun 122.

Pennsylvania.— Glase *v.* Philadelphia, 169 Pa. St. 488, 32 Atl. 600.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1804.

Engine house.— Where a city so constructs the doors of an engine house that they open outward with springs, it is liable for injuries resulting, if the necessary operation of the doors is dangerous, although ordinary care is used by the employees. Kies *v.* Erie, 169 Pa. St. 598, 32 Atl. 621.

A city's part ownership of one part of a building does not render it responsible for the defective construction or maintenance of another part in which it has no interest. El Paso *v.* Causey, 1 Ill. App. 531.

A **statutory exemption** of a municipality from liability for the nonfeasance or misfeasance of its common council or of any officer appointed by it does not exempt it from liability for injuries caused to one lawfully in a public building, by the negligence of the keeper of the building. Vincent *v.* Brooklyn, 31 Hun (N. Y.) 122.

Where a board has no other duties or power than to erect and furnish a building and turn over to the city such parts of the building as they are made ready for occupancy, when parts are so completed and occupied the city will be held responsible for the management thereof. Fox *v.* Philadelphia, 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214.

91. Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

Illustrations.— Thus where a city rents its hall for a public entertainment, if it neglects to light the hall and stairs, it is liable for injuries to one attending the entertainment caused by her falling down the stairs because of the negligent failure to light the same, without regard to whether its business of renting is profitable. Little *v.* Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417. So if the letting of rooms in a public building includes heating, lighting, and the services of a janitor, the janitor is a servant of the city, and it is liable for an injury caused by his negligence to a person lawfully there by invitation of the lessee. Worden *v.* New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

92. Chicago *v.* O'Brennan, 65 Ill. 160.

93. Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Kelley *v.* Boston, 186

the weight of authority that, as the erection and maintenance of a city prison is a purely governmental function, a municipality is not liable to a person arrested and imprisoned therein, for injuries received by him while so confined, by reason of the improper construction and maintenance of such prison.[94]

b. School Buildings. Injuries caused by defects or negligence in or around a school-house or yard may not be redressed by a civil action against the municipality, as the maintenance of schools is a public function.[95]

3. Water Frontage, Landings, Wharves, and Docks. A municipality owning and controlling a public landing, wharf, or dock, with the right to charge wharfage, is bound to use at least ordinary care in keeping the water adjacent to such wharf or dock, in which vessels lie while moored thereto, safe from artificial obstructions, and is liable for any damage done to any such vessel by the neglect

Mass. 165, 71 N. E. 299, 6 L. R. A. 429 (city held not liable for injuries caused by snow and ice negligently thrown from the roof of the city hall by men employed by its superintendent of buildings, where the whole building is used and occupied for municipal purposes); Cunningham *v.* St. Louis, 96 Mo. 53, 8 S. W. 787 (negligence with respect to city court-house).

Providing and maintaining a city hall for the use of city officers, from which the city in its corporate capacity derives no pecuniary advantage, is a public and governmental function, for the negligence of its agents or servants in the discharge of which the city is not liable in a private action. Snider *v.* St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

94. *Georgia.*— Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131.

Illinois.—Blake *v.* Pontiac, 49 Ill. App. 543.

Kansas.— New Kiowa *v.* Craven, 46 Kan. 114, 26 Pac. 426; La Clef *v.* Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Minnesota.— Gullikson *v.* McDonald, 62 Minn. 278, 64 N. W. 812.

Ohio.— Conner *v.* Cleveland, 4 Ohio Dec. (Reprint) 302, Clev. L. Rep. 257, holding a city not liable for injuries to a convict in a workhouse caused by unsafe machinery with which he was compelled to work.

West Virginia.— Shaw *v.* Charleston, 57 W. Va. 433, 50 S. E. 527.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1804.

In North Carolina, however, it has been held under Const. art. 11, § 6, Battle Rev. c. 89, §§ 9, 10, that a municipality is liable for injuries to a prisoner by reason of the defective condition or negligent management of the city prison (Lewis *v.* Raleigh, 77 N. C. 229), except where the city has no notice of such defect or neglect, and is not negligent in overseeing the prison (Moffitt *v.* Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810); but that, if the city authorities have personal notice of such defect and neglect, they cannot escape liability therefor on the ground that it was never reported to them in their official capacity (Shields *v.* Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293).

Under Va. Code (1887), §§ 927-930, it has been held that a town using a jail of its own was liable for injuries to the health of the prisoner caused by its filthy condition, since under section 927 and a special provision of its charter it might have used a county jail, subject to inspection and control. Edwards *v.* Pocahontas, 47 Fed. 268.

95. *Kentucky.*— Ernst *v.* West Covington, 116 Ky. 850, 76 S. W. 1089, 25 Ky. L. Rep. 1027, 105 Am. St. Rep. 241, 63 L. R. A. 652; Clark *v.* Nicholasville, 87 S. W. 300, 27 Ky. L. Rep. 974.

Massachusetts.— Howard *v.* Worcester, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160; Sullivan *v.* Boston, 126 Mass. 540 (defective and dangerous yard); Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332 (unsafe staircase in school-house); Bigelow *v.* Randolph, 14 Gray 541 (excavation in yard).

New York.— Donovan *v.* New York Bd. of Education, 85 N. Y. 117.

Ohio.— Finch *v.* Toledo Bd. of Education, 30 Ohio St. 37, 27 Am. Rep. 414, holding that a board of education is not liable in its corporate capacity for injuries resulting to a pupil while attending a common school from its negligence in the discharge of its official duty in the erection and maintenance of a common school building in its charge in absence of a statute creating liability.

Pennsylvania.— Ford *v.* Kendall Borough School Dist., 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607. *Compare* Briegel *v.* Philadelphia, 135 Pa. St. 451, 19 Atl. 1038, 20 Am. St. Rep. 885; Powers *v.* Philadelphia, 18 Pa. Super. Ct. 621, holding that a city is liable for injuries to a school boy suffered by reason of negligence in the maintenance of a dangerous board walk running from a main school building to an annex on the property owned by the city, and devoted to the use of the public school.

Rhode Island.— Wixon *v.* Newport, 13 R. I. 454, 43 Am. Rep. 35, defective heating apparatus, whereby pupil was burned and scalded.

Wisconsin.— Folk *v.* Milwaukee, 108 Wis. 359, 84 N. W. 420, defective sewer in building.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1805.

Liability of board of education.— Although the board of education is vested with general control in the care of school buildings and property for the purposes of public education,

to do so,[96] even though the vessel injured had not in fact paid wharfage, and was not expected to do so;[97] or although statutory penalties are prescribed for such obstructions.[98] A municipality is also bound to exercise reasonable care and diligence to keep its wharf, dock, or bridge in proper repair;[99] to promptly open the toll draw in its bridge;[1] or to provide safe moorings.[2] But there is no liability on the city where the property belongs to the state,[3] where it is under the control of a corporate department,[4] or where a dike voluntarily erected is permitted to be destroyed,[5] or where the loss is the result of carelessness or inexperience on the part of the person damaged or his crew or agents.[6] Where the city has leased the wharf or dock to another, who has exclusive use thereof, it does not owe to such

where the special care and safekeeping of such buildings in the respective wards is committed to the ward trustees, who are not the agents of the board, but are independent public officers, the board is not liable for their negligence in respect to the care and safekeeping of such buildings. Donovan *v.* New York Bd. of Education, 85 N. Y. 117.

96. *Georgia.*— Augusta *v.* Hudson, 88 Ga. 599, 15 S. E. 678.

Maryland.— Garitee *v.* Baltimore, 53 Md. 422.

Missouri.— Whitfield *v.* Carrollton, 50 Mo. App. 98.

Pennsylvania.— Winpenny *v.* Philadelphia, 65 Pa. St. 135, under Act (1854), § 28.

Tennessee.— Memphis *v.* Kimbrough, 12 Heisk. 133, iron cylinder lying on wharf concealed by water.

Virginia.— Petersburg *v.* Applegarth, 28 Gratt. 321, 26 Am. Rep. 357, holding also that the fact that there are statutory provisions for the improvement of a river does not release a city from this liability.

United States.— Fahy *v.* New York, 61 Fed. 336, 9 C. C. A. 520; The Dave Mose, 49 Fed. 389; Manhattan Transp. Co. *v.* New York, 37 Fed. 160.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1806.

"**Obstructions**" as used in a statute requiring a city council to keep navigable waters free from obstructions does not include a rock forming part of the natural bed of the river. Snyder *v.* Philadelphia, 78 Pa. St. 23.

Possession of obstruction in another.— That the article causing the obstruction is constructively in the possession of the United States marshal under a libel, which does not prevent the city authorities from removing it above high water mark, does not relieve the city from liability to an owner of a vessel injured by striking against such article. Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133.

97. Petersburg *v.* Applegarth, 28 Gratt. (Va.) 321, 26 Am. Rep. 357.

98. Garitee *v.* Baltimore, 53 Md. 422.

99. *Indiana.*— Jeffersonville *v.* Gray, 165 Ind. 26, 74 N. E. 611 (under Burns Annot. St. (1901) § 3541); Jeffersonville *v.* The John Shallcross, 35 Ind. 19; Jeffersonville *v.* Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495.

Louisiana.— Fennimore *v.* New Orleans, 20 La. Ann. 124.

Massachusetts.— Nichols *v.* Boston, 98 Mass. 39, 93 Am. Dec. 132, allowing defect to continue, so as to amount to a nuisance to an adjoining dock owner, after notice of its existence and a request to repair.

New York.— Garrison *v.* New York, 5 Bosw. 497; McGuiness *v.* New York, 52 How. Pr. 450 [*reversed* on other grounds in 26 Hun 142].

United States.— Philadelphia, etc., R. Co. *v.* New York, 38 Fed. 159, holding the city liable for damages to a vessel owner by reason of a dock's lack of repair, although the dock is devoted solely to the department of charities and corrections.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1806.

Notice of defect.— In order to render it liable for resulting damages, a city must have had actual notice of the defect, or it must have been such a defect as to charge it with notice thereof without any particular examination. Garrison *v.* New York, 5 Bosw. (N. Y.) 497.

A grant of the wharfage to be collected at a public pier does not operate to relieve the municipality from its liability to repair. Taylor *v.* New York, 4 E. D. Smith (N. Y.) 559.

1. Van Etten *v.* Westport, 60 Fed. 579; Greenwood *v.* Westport, 60 Fed. 560.

2. Shinkle *v.* Covington, 1 Bush (Ky.) 617; Willey *v.* Allegheny City, 118 Pa. St. 490, 12 Atl. 453, 4 Am. St. Rep. 608; Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65. See Crawford *v.* Allegheny, (Pa. 1889) 16 Atl. 476.

3. New York, etc., Saw-Mill, etc., Co. *v.* Brooklyn, 8 Hun (N. Y.) 37 [*affirmed* in 71 N. Y. 580].

4. Coonley *v.* Albany, 132 N. Y. 145, 30 N. E. 382 [*affirming* 57 Hun 327, 10 N. Y. Suppl. 512] (street commissioners); Gottsberger *v.* New York, 9 Misc. (N. Y.) 349, 29 N. Y. Suppl. 592 (dock department).

5. Collins *v.* Macon, 69 Ga. 542, holding that where a city voluntarily erects a dike on corporate property to prevent the overflow of a natural stream, it may, in the absence of a statutory duty to maintain the dike, allow its destruction without liability to an adjacent landowner for consequent damage, although the dike had stood for a long time and had been relied on by the owner in making his original purchase and his improvements.

6. Smith *v.* Ivey, 18 La. Ann. 669.

lessee the same degree of care as is due from a wharfinger to navigators invited to a public wharf for safe mooring and using the same in the ordinary way;[7] and therefore, in the absence of notice, is not liable for injuries caused to such lessee's vessel by reason of the wharf being out of repair,[8] although it is otherwise if notice of the defect has been given to the city.[9] Nor where it has made such a lease, is it liable for defects or obstructions caused by such lessee,[10] unless it has notice thereof, express or implied,[11] particularly where the vessel injured is navigating in water which the city is under no duty to keep free from obstructions, and is not using such pier or wharf at the time.[12] In the absence of statute a city is under no duty to remove obstructions from or keep safe for navigation a navigable stream which is no part of the highway of the city.[13]

4. Markets and Market Places. The erection and maintenance of public markets by a city is a private or proprietary right, and it is held to the same degree of care in the preparation and adoption of plans and in the construction and maintenance of the market as a private corporation or individual;[14] and it is not exempted from liability in such case by a lease, under which the market remains subject to all the regulations, control, and authority of the city, applicable to every other market.[15] But the municipality is not liable for inevitable contamination of the air by live stock,[16] for the obstruction of a street appropriated to market purposes,[17] or for damages caused by *vis major*.[18] Nor is it liable if the person injured did not exercise ordinary care and diligence,[19] or met his accident at a place which at the time was not an authorized market place, although within the limits within which one was authorized, or where buying and selling were carried on against public authority.[20]

5. Parks, Public Squares, and Commons. Although there are some cases to the contrary,[21] the management and care of public squares, parks, and commons is ordinarily not a corporate duty, and therefore a city is liable for injuries resulting from its negligence in caring for them.[22] But where the city exercises ordi-

7. Jackson *v.* Allegheny, 41 Fed. 886.

8. Jackson *v.* Allegheny, 41 Fed. 886.

9. Allegheny *v.* Campbell, 107 Pa. St. 530, 52 Am. Rep. 478.

10. Seaman *v.* New York, 3 Daly (N. Y.) 147, 80 N. Y. 239, 36 Am. Rep. 612.

11. Seaman *v.* New York, 3 Daly (N. Y.) 147, 80 N. Y. 239, 36 Am. Rep. 612.

Where a city leases a slip and delivers exclusive possession to the lessee who covenants to repair, it is not liable for damages that happen from obstructions that arise subsequently, of which it has no notice. Moore *v.* Oceanic Steam Nav. Co., 24 Fed. 237.

12. Seaman *v.* New York, 3 Daly (N. Y.) 147, 80 N. Y. 239, 36 Am. Rep. 612.

13. Coonley *v.* Albany, 132 N. Y. 145, 30 N. E. 382 [*affirming* 57 Hun 327, 10 N. Y. Suppl. 512]; Seaman *v.* New York, 3 Daly (N. Y.) 147, 80 N. Y. 239, 36 Am. Rep. 612.

14. Savannah *v.* Collens, 38 Ga. 334, 95 Am. Dec. 398; Baltimore *v.* Brannon, 14 Md. 227; Barron *v.* Detroit, 94 Mich. 601, 54 N. W. 273, 34 Am. St. Rep. 366, 19 L. R. A. 452; Suffolk *v.* Parker, 79 Va. 660, 52 Am. Rep. 640.

Portion of market considered a public street and city held liable on that theory see Nitz *v.* Toledo, 22 Ohio Cir. Ct. 454, 12 Ohio Cir. Dec. 357, 23 Ohio Cir. Ct. 350.

Defects and obstructions in public streets generally see *supra*, XIV, D.

That the city has not sufficient funds in the treasury to make even more important repairs in the public streets does not excuse it from keeping the pavement of a market in a safe condition. Savannah *v.* Collens, 38 Ga. 334, 95 Am. Dec. 398.

15. Weymouth *v.* New Orleans, 40 La. Ann. 344, 4 So. 218, lease only of right to collect and appropriate the market revenues.

16. Miller *v.* Webster City, 94 Iowa 162, 62 N. W. 648.

17. Black *v.* Cleveland, 2 Ohio Dec. (Reprint) 438, 3 West. L. Month. 97.

18. Flori *v.* St. Louis, 69 Mo. 341, 33 Am. Rep. 504 [*affirming* 3 Mo. App. 231].

19. Baltimore *v.* Brannon, 14 Md. 227.

20. Baltimore *v.* Brannon, 14 Md. 227.

21. Steele *v.* Boston, 128 Mass. 583 (holding that the care of public parks and commons is a corporate duty for a breach of which no action lies by an individual who is injured unless the statute gives such action); Clark *v.* Waltham, 128 Mass. 567; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042 (holding that a city maintaining a public park for purposes other than business is not liable for an accident occurring on a parkway, which is not a public highway, through the negligence of itself or its employees, even though a purely incidental profit results to the city from the management of the park).

22. Jones *v.* New Haven, 34 Conn. 1 (injury caused by falling bough in public park); Carey *v.* Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65; Barthold *v.* Philadelphia,

nary care in this respect, its duty is performed; and it is not required to provide against unusual contingencies;[23] nor in such case is it liable for injury to a trespasser,[24] or to one accidentally injured by the act of a third person.[25]

6. Vehicles, Boats, Apparatus, Machinery, and Appliances. A municipal corporation is not liable for injuries caused by defects or insufficiency of any of its instrumentalities used for extinguishing fires.[26] But although the instrumentality may on grounds of public policy be exempt from legal process,[27] a city is liable *in personam* for injuries negligently caused by the operation of its ice-boat,[28] tug-boat,[29] or fire-tug,[30] even when working gratis;[31] and it is also liable for injuries caused by the negligent construction or operation of an elevator used for public purposes,[32] or of electrical appliances owned and used by the city whether for the purpose of telegraphing,[33] or of light.[34]

7. Fault of Third Person. A city is liable, as a private proprietor, for a nuisance maintained by its lessee on its property;[35] but not for the torts of a separate department not under municipal control.[36]

C. Sewers, Drains, and Watercourses — 1. Duty to Construct Sewers and Drains. In the absence of statutory requirement, a municipal corporation is not bound to construct sewers and drains, and no municipal liability follows failure to exercise the optional power to do so.[37] And where drainage which has been sup-

154 Pa. St. 109, 26 Atl. 304; Lowe *v.* Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708. See Ewen *v.* Philadelphia, 194 Pa. St. 548, 45 Atl. 339, 75 Am. St. Rep. 712.

It is ordinarily a question for the jury whether the city exercised proper care in maintaining such a public park or common. Barthold *v.* Philadelphia, 154 Pa. St. 109, 26 Atl. 304.

Erection of hitching racks on the sides of a public square in a city is not a nuisance as a matter of law. Harrison County Ct. *v.* Wall, 12 S. W. 130, 11 Ky. L. Rep. 223.

23. Schauf *v.* Paducah, 106 Ky. 228, 50 S. W. 42, 20 Ky. L. Rep. 1796, 90 Am. St. Rep. 220, holding that it is not negligence to fail to provide against the act of a boy in wading ten feet out into a pond in a public park.

24. Sheehan *v.* Boston, 171 Mass. 296, 50 N. E. 543, holding that where a city ordinance forbids walking on the grass in a public park and the public are warned by signs to keep off from it, the city is not liable to persons injured by falling into a trench, while walking on the grass, knowing that it was forbidden, although there were movable seats on the grass.

25. Rhine *v.* Philadelphia, 24 Pa. Super. Ct. 564.

26. McKenna *v.* St. Louis, 6 Mo. App. 320; Wild *v.* Paterson, 47 N. J. L. 406, 1 Atl. 490 (holding this rule to apply to a city fireman injured by negligence in the care of fire apparatus); Lawson *v.* Seattle, 6 Wash. 184, 33 Pac. 347. *Compare* Thompson Nav. Co. *v.* Chicago, 79 Fed. 984.

27. The F. C. Latrobe, 28 Fed. 377.

28. Guthrie *v.* Philadelphia, 73 Fed. 688 (while engaged in private service); The F. C. Latrobe, 28 Fed. 377.

29. Philadelphia *v.* Gavagnin, 62 Fed. 617, 10 C. C. A. 552 [*affirming* 59 Fed. 303].

30. Thompson Nav. Co. *v.* Chicago, 79 Fed. 984.

31. The F. C. Latrobe, 28 Fed. 377.

32. Fox *v.* Philadelphia, 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214, elevator used in carrying the public to the courts, and the operator being paid by the city.

33. Neuert *v.* Boston, 120 Mass. 338, telegraph wire owned and used by the city for the use of its fire department.

34. Owensboro *v.* Knox, 116 Ky. 451, 76 S. W. 191, 25 Ky. L. Rep. 680.

35. Whitfield *v.* Carrollton, 50 Mo. App. 98.

36. Ham *v.* New York, 70 N. Y. 459 [*affirming* 37 N. Y. Super. Ct. 458]; Brown *v.* New York, 32 Misc. (N. Y.) 571, 66 N. Y. Suppl. 382; Terry *v.* New York, 8 Bosw. (N. Y.) 504; Lawson *v.* Seattle, 6 Wash. 184, 33 Pac. 347. And see *supra*, XIV, B, 3, text and note 4.

37. *Colorado.*— Daniels *v.* Denver, 2 Colo. 669.

Illinois.— Chicago *v.* Rustin, 99 Ill. App. 47.

Indiana.— Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Monticello *v.* Fox, 3 Ind. App. 481, 28 N. E. 1025.

Iowa.— Morris *v.* Council Bluffs, 67 Iowa 343, 25 N. W. 274, 56 Am. Rep. 343.

Massachusetts.— Flagg *v.* Worcester, 13 Gray 601.

Minnesota.— Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322; McClure *v.* Redwing, 28 Minn. 186, 9 N. W. 767 [*followed* in St. Paul, etc., R. Co. *v.* Duluth, 56 Minn. 494, 58 N. W. 159, 45 Am. St. Rep. 491, 23 L. R. A. 88].

Missouri.— Woods *v.* Kansas, 58 Mo. App. 272.

New York.— Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636 [*reversing* 21 N. Y. App. Div. 311, 47 N. Y. Suppl. 235]; Byrnes *v.* Cohoes, 67 N. Y. 204; Mills *v.* Brooklyn, 32 N. Y. 489; Bedell *v.* Seacliff, 18 N. Y. App. Div. 261, 46 N. Y. Suppl. 226; Anchor Brewing Co. *v.* Dobbs Ferry, 84 Hun 274, 32 N. Y. Suppl. 371 [*affirmed* in 156 N. Y. 695, 50 N. E. 1115]; Barton *v.* Syra-

plied becomes useless through changes in the grade of the street the municipality is not liable for failure to provide new means for the same purpose.[38] Where, however, the necessity for drainage or an outlet for accumulated water arises through the acts of a municipality, it must remedy the evil which it has caused and is liable for damages resulting from its failure to do so.[39] But the law does not impose upon a municipal corporation the duty of providing drainage for private property within its limits to prevent an inundation caused by the owner of another lot obstructing a watercourse by filling his own lot to conform with the established grade of a street.[40]

2. **Liability For Defects in Plan.** The duties of municipal authorities in adopting a general plan of drainage, determining when and where, and of what size, and at what level, drains or sewers shall be built, or in fixing upon improvements of watercourses, are of a quasi-judicial nature, involving the exercise of deliberate judgment and wide discretion;[41] and the general rule is that the municipality is not liable for an error of judgment on the part of the authorities in locating or planning such an improvement.[42] But according to a number of authorities this

cuse, 37 Barb. 292 [*affirmed* in 36 N. Y. 54]; Wilson *v.* New York, 1 Den. 595, 43 Am. Dec. 719.

Ohio.— Springfield *v.* Spence, 39 Ohio St. 665.

Pennsylvania.— Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17. See also Lafferty *v.* Girardville, (1889) 17 Atl. 12.

Rhode Island.— Wakefield *v.* Newell, 12 R. I. 75, 34 Am. Rep. 598.

Tennessee.— Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814. See also Chattanooga *v.* Reid, 103 Tenn. 616, 53 S. W. 937.

Vermont.— Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1777.

A city which is given power to utilize and improve a stream as part of its sewerage system is not liable in damages merely for refusing or failing to exercise that power. Wilson *v.* Waterbury, 73 Conn. 416, 47 Atl. 687.

Highway improvements.— Where, by improvements on a highway, the land of an adjoining proprietor is in danger of being flooded, it is the duty of the city to construct temporary drains, if practicable, to protect him (Cotes *v.* Davenport, 9 Iowa 227, 237 [*followed* in Ross *v.* Clinton, 46 Iowa 606, 26 Am. Rep. 169], where it is said, however: "How far it would be the duty to keep up such drains or culverts permanently, and after the plaintiffs had had a reasonable opportunity or time to raise their lot to correspond with the grade, we do not undertake to say, for no such question is made"), but the city is not bound to provide permanent protection (Morris *v.* Council Bluffs, 67 Iowa 343, 25 N. W. 274, 56 Am. Rep. 343).

38. Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322.

39. Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Byrnes *v.* Cohoes, 67 N. Y. 204 [*affirming* 5 Hun 602]; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17. And see *infra*, XIV, C, 12.

Where a municipality collects a great body of water in one channel it must use reasonable care to provide an outlet. Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Carson *v.* Springfield, 53 Mo. App. 289.

40. Beatrice *v.* Knight, 45 Nebr. 546, 63 N. W. 838.

41. *Delaware.*— Hession *v.* Wilmington, (1893) 27 Atl. 830.

District of Columbia.— District of Columbia *v.* Cropley, 23 App. Cas. 232.

Illinois.— Chicago *v.* Northern Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E. 1043].

Louisiana.— See Thibodaux *v.* Thibodaux, 46 La. Ann. 1528, 16 So. 450.

Massachusetts.— Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Emery *v.* Lowell, 104 Mass. 13.

New Jersey.— Harrington *v.* Woolbridge Tp., 70 N. J. L. 28, 56 Atl. 141.

New York.— Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636 [*reversing* 21 N. Y. App. Div. 311, 47 N. Y. Suppl. 235]; Mills *v.* Brooklyn, 32 N. Y. 489.

United States.— Johnston *v.* District of Columbia, 118 U. S. 19, 6 S. Ct. 923, 30 L. ed. 75.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1772.

Where officers act judicially under authority given them by the state to lay out public drains and sewers, they are in no sense agents of the city, so as to render it liable for their acts. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900. See also Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180.

42. *California.*— De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

Colorado.— Denver *v.* Capelli, 4 Colo. 25, 34 Am. Rep. 62; Archer *v.* Denver, 10 Colo. App. 413, 52 Pac. 86.

Delaware.— Hession *v.* Wilmington, 1 Marv. 122, 40 Atl. 749, 27 Atl. 830; Har-

rule does not extend to exempt a municipality from liability for negligence in the adoption of a plan for such improvements, and where the municipal authorities negligently adopt or devise a plan or system which is obviously defective, the municipality is liable for the resulting damage.[43] It has also been laid down that the rule under discussion is subject to the distinction that where the plan adopted by a municipality must necessarily cause an injury to private property, equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable, but where the fault found is with the wisdom of the measure or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, then the municipality is not liable.[44] And it has been further

rigan *v.* Wilmington, 8 Houst. 140, 12 Atl. 779.

District of Columbia.— District of Columbia *v.* Cropley, 23 App. Cas. 232; Bannagan *v.* District of Columbia, 2 Mackey 285; Johnston *v.* District of Columbia, 1 Mackey 427.

Georgia.— Savannah *v.* Spears, 66 Ga. 304.

Illinois.— Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E. 1043].

Indiana.—Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686 (the error not being due to any lack of ordinary care and skill in preparing the plans); Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; Rozell *v.* Anderson, 91 Ind. 591; Logansport *v.* Wright, 25 Ind. 512; Peru *v.* Brown, 10 Ind. App. 597, 38 N. E. 223.

Iowa.—Wicks *v.* De Witt, 54 Iowa 130, 6 N. W. 176; Powers *v.* Council Bluffs, 50 Iowa 197.

Kansas.— King *v.* Kansas City, 58 Kan. 334, 49 Pac. 88.

Maine.— Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180; Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900; Hamlin *v.* Biddeford, 95 Me. 308, 49 Atl. 1100; Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466; Darling *v.* Bangor, 68 Me. 108.

Maryland.—See Baltimore *v.* Schmitker, 84 Md. 34, 34 Atl. 1132.

Massachusetts.— Manning *v.* Springfield, 184 Mass. 245, 68 N. E. 202; Hewett *v.* Canton, 182 Mass. 220, 65 N. E. 42; Norton *v.* New Bedford, 166 Mass. 48, 43 N. E. 1034; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Emery *v.* Lowell, 104 Mass. 13; Child *v.* Boston, 4 Allen 41, 81 Am. Dec. 680.

New Jersey.— Harrington *v.* Woodbridge Tp., 70 N. J. L. 28, 56 Atl. 141.

New York.— Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636 [*reversing* 21 N. Y. App. Div. 311, 47 N. Y. Suppl. 235]; Garratt *v.* Canandaigua, 135 N. Y. 436, 32 N. E. 142 [*affirming* 16 N. Y. Suppl. 717]; Watson *v.* Kingston, 114 N. Y. 88, 21 N. E. 102; Mills *v.* Brooklyn, 32 N. Y. 489; Bedell *v.* Sea Cliff, 18 N. Y. App. Div. 261, 46 N. Y. Suppl. 226; Schreiber *v.* New York, 11 Misc. 551, 32 N. Y. Suppl. 744; Hardy *v.* Brooklyn, 7 Abb. N. Cas. 403.

Pennsylvania.— Bear *v.* Allentown, 148 Pa. St. 80, 23 Atl. 1062; Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455; Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

Vermont.— Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72 [*following* Winn *v.* Rutland, 52 Vt. 481].

United States.—Johnston *v.* District of Columbia, 118 U. S. 19, 6 S. Ct. 923, 30 L. ed. 75.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1772, 1780.

43. De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618 [*following* Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Indianapolis *v.* Tate, 39 Ind. 282; Indianapolis *v.* Lawyer, 38 Ind. 348; Indianapolis *v.* Huffer, 30 Ind. 235]; Peru *v.* Brown, 10 Ind. App. 597, 38 N. E. 223; New Albany *v.* Ray, 3 Ind. App. 321, 29 N. E. 611; Louisville *v.* Norris, 111 Ky. 903, 907, 64 S. W. 958, 23 Ky. L. Rep. 1195, where it is said: "When a municipality determines to change the natural order of things, by altering surface drainage, and collecting it into artificial channels, it can not fail to use ordinary good judgment in adopting the plan of the work, without liability to any injured thereby." See also Lehn *v.* San Francisco, 66 Cal. 76, 4 Pac. 965 [*followed* in Juzix *v.* San Francisco, (Cal. 1885) 7 Pac. 416]; Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774.

Negligence will not be inferred as a matter of law from the fact that culverts are defective in plan or have become obstructed or filled up with dirt and sand. Peru *v.* Brown, 10 Ind. App. 597, 38 N. E. 223.

Neglecting to employ engineer.— Where a sewer is of such a character as to require the preparation of a plan by a skilled person, it is negligence for councilmen to act on their own judgment, no matter how much they deliberate. Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686.

44. Defer *v.* Detroit, 67 Mich. 346, 34 N. W. 680 [*following* Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Detroit *v.*

laid down that the exercise of a judicial or discretionary power, resulting in a direct physical injury to the property of an individual, which from its nature is liable to be repeated or continued, but which is remediable by a change of plan, or the adoption of prudential measures, renders the municipality liable for such damages as occur in consequence of the continuance of the original cause after notice, and its omission to adopt such remedial measures as experience has shown to be necessary and proper.[45] Where the plan adopted is not carried out but other expedients are adopted, and in consequence injury is caused, the municipality cannot escape liability on the ground that it was exercising its discretion.[46]

3. Liability For Negligence in Construction[47] — a. In General. The actual construction of the class of improvements under discussion is the exercise of a merely ministerial function, and if it is not performed with reasonable care and skill any person who is injured by reason of such negligence may have an action.[48]

Beckman, 34 Mich. 125, 22 Am. Rep. 507]; Tate *v.* St. Paul, 56 Minn. 527, 530, 58 N. W. 158, 45 Am. St. Rep. 501, where it is said: "For a direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise, it would be taking private property for public use without compensation."

45. Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664 [*followed* in Ahrens *v.* Rochester, 97 N. Y. App. Div. 480, 90 N. Y. Suppl. 744].

46. Hardy *v.* Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182, so holding in a case where the sewer was not completed and at the point where the work stopped the city placed a wooden trough or shoot to carry off the sewage, in consequence of which noxious gases were emitted to the injury of plaintiff's premises.

47. Liability of contractor see *infra*, XIV, C, 19.

48. *Alabama.*— Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Arkansas.— Little Rock *v.* Willis, 27 Ark. 572.

Colorado.— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729; McCord *v.* Pueblo, 5 Colo. App. 48, 36 Pac. 1109.

Delaware.— Hession *v.* Wilmington, 1 Marv. 122, 40 Atl. 749, 27 Atl. 830.

Georgia.— Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Savannah *v.* Spears, 66 Ga. 304.

Illinois.— Peoria *v.* Eisler, 62 Ill. App. 26.

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Logansport *v.* Wright, 25 Ind. 512.

Iowa.— Van Pelt *v.* Davenport, 42 Iowa 308, 20 Am. Rep. 622; Wallace *v.* Muscatine, 4 Greene 373, 61 Am. Dec. 131.

Kansas.— King *v.* Kansas City, 58 Kan. 334, 49 Pac. 88; Leavenworth *v.* Casey, McCahon 124.

Maine.— Hamlin *v.* Biddeford, 95 Me. 308, 49 Atl. 1100; Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466.

Maryland.— Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98; Baltimore *v.* Schmitker, 84 Md. 34, 34 Atl. 1132; Frostburg *v.* Dufty, 70 Md. 47, 16 Atl. 642; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Kranz *v.* Baltimore, 64 Md. 491, 2 Atl. 908.

Massachusetts.— Manning *v.* Springfield, 184 Mass. 245, 68 N. E. 202; Hewett *v.* Canton, 182 Mass. 220, 65 N. E. 42; Norton *v.* New Bedford, 166 Mass. 48, 43 N. E. 1034; Morse *v.* Worcester, 139 Mass. 389, 2 N. E. 694; Washburn, etc., Mfg. Co. *v.* Worcester, 116 Mass. 458; Emery *v.* Lowell, 104 Mass. 13; Perry *v.* Worcester, 6 Gray 544, 66 Am. Dec. 431.

Michigan.—Ostrander *v.* Lansing, 111 Mich. 693, 70 N. W. 332; Defer *v.* Detroit, 67 Mich. 346, 34 N. W. 680; Detroit *v.* Corey, 9 Mich. 165, 80 Am. Dec. 78.

Minnesota.—Buchanan *v.* Duluth, 40 Minn. 402, 42 N. W. 204; Simmer *v.* St. Paul, 23 Minn. 408.

Mississippi. — Semple *v.* Vicksburg, 62 Miss. 63, 52 Am. Rep. 181.

Missouri.— Gerst *v.* St. Louis, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580 (failure to give abutting owner notice of proposed excavation in alley for sewer); Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571; Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463 [*overruling* Hoffman *v.* St. Louis, 15 Mo. 651; Taylor *v.* St. Louis, 14 Mo. 20, 55 Am. Dec. 89; St. Louis *v.* Gurno, 12 Mo. 414]; Reeves *v.* Larkin, 19 Mo. 192; Woods *v.* Kansas City, 58 Mo. App. 272.

New Hampshire.— Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32.

New York.— Barton *v.* Syracuse, 36 N. Y. 54, 1 Transcr. App. 317 [*affirming* 37 Barb. 292]; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Munn *v.* Hudson, 61 N. Y. App. Div. 343, 70 N. Y. Suppl. 525; Lewenthal *v.* New York, 5 Lans. 532, 61 Barb. 511; Butler *v.* Edgewater, 2 Silv. Sup. 3, 6 N. Y. Suppl. 174 [*affirmed* in 134 N. Y. 594, 31 N. E. 628].

Ohio.— Cummings *v.* Toledo, 12 Ohio Cir. Ct. 650, 5 Ohio Cir. Dec. 495.

Pennsylvania.— Allentown *v.* Kramer, 73 Pa. St. 406; Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17. See

Where lots have been injured by a change in the flow of water caused by the improper construction of a sewer, the city is liable, although the volume of water thrown upon the land has not been increased.[49] A municipal corporation is not liable for special damages to property-owners by reason of the construction of drains or sewers unless such damages are caused by misconduct, negligence, or unskilfulness.[50] Where a city is authorized by the legislature to lay out and construct common sewers and drains and provision is made by statute for the assessment, under special proceedings, of damages to persons whose estates are thereby injured, the city is not liable to an action for injuries which are the necessary result of the exercise of the powers conferred by the legislature and not due to negligence or an abuse of the powers granted.[51]

b. Negligence of Independent Contractor. Where a municipality adopts a proper system of drainage and lets a contract for the doing of the work, the contractor to use his own method and means for the construction of the drain, the city is not liable for damages resulting from the negligence of the contractor in doing the work.[52]

4. Liability For Obstructions and Failure to Repair. A municipality may also be held liable for misfeasance or nonfeasance in the performance of its duty to exercise reasonable care in the maintenance of its sewers, drains, and watercourses and to keep them in reasonable repair and free from obstruction.[53] Where a city

also Briegel *v.* Philadelphia, 135 Pa. St. 451, 19 Atl. 1038, 20 Am. St. Rep. 885; Beach *v.* Scranton, 5 Lack. Leg. N. 25.

Tennessee.— Nashville *v.* Comar, 88 Tenn. 415, 12 S. W. 1027.

Texas.— Dallas *v.* Webb, 22 Tex. Civ. App. 48, 54 S. W. 398.

Vermont.— Winn *v.* Rutland, 52 Vt. 481.

Virginia.— Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

Wisconsin.— Gillnly *v.* Madison, 63 Wis. 518, 24 N. W. 137, 53 Am. Rep. 299.

Canada.— See Foster *v.* Lansdowne, 12 Manitoba 42.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1772, 1781.

Culvert constructed with county funds.— A city is not released from liability for negligence in the construction of a culvert within its limits by the fact that the money for its construction was appropriated by the board of supervisors of the county. Van Pelt *v.* Davenport, 42 Iowa 308, 20 Am. Rep. 622.

Alteration by private individual under supervision of city.— Where a city grants permission to a person, and appropriates money to aid him, to alter, under the supervision of the city engineer, the course of a sewer over which it has assumed control, and such alteration is negligently made, so as to cause the water and excrement to back up and flow into a private cellar, the city is liable for the damages resulting therefrom. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

Circumstances not amounting to negligent construction.— Where the specifications for grading a street provided for a dry wall, but gave the abutting owners the privilege of constructing a wall of masonry, and the contractor was willing to lay the wall opposite plaintiff's premises in cement, but laid a dry wall because of plaintiff's refusal to pay for the cement, it was held that an action could not be maintained against the municipality for negligence in constructing a wall which allowed water to percolate through it. Watson *v.* Kingston, 114 N. Y. 88, 21 N. E. 102.

49. McArthur *v.* Dayton, 42 S. W. 343, 19 Ky. L. Rep. 882.

50. Uppington *v.* New York, 41 N. Y. App. Div. 370, 58 N. Y. Suppl. 533 [*following* Atwater *v.* Canandaigua, 124 N. Y. 602, 27 N. E. 385], holding that a city is not liable, in the absence of negligence, for damages to abutting property from the settling of the ground, caused by excavating in a street for a sewer.

A failure to adopt the most approved system in excavating for a sewer is not negligence if the system used in making the excavation is reasonably safe. Uppington *v.* New York, 41 N. Y. App. Div. 370, 58 N. Y. Suppl. 533.

51. Washburn, etc., Mfg. Co. *v.* Worcester, 116 Mass. 458.

52. Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126.

53. *California.*—Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158.

Colorado.— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729; Denver *v.* Capelli, 4 Colo. 25, 34 Am. Rep. 62.

Connecticut.— Judd *v.* Hartford, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312.

Delaware.— Hession *v.* Wilmington, 1 Marv. 122, 40 Atl. 749, 27 Atl. 830.

District of Columbia.— District of Columbia *v.* Gray, 6 App. Cas. 314; Johnston *v.* District of Columbia, 1 Mackey 427.

Georgia.— Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446; Brunswick *v.* Tucker, 103 Ga. 233, 29 S. E. 701, 68 Am. St. Rep. 92; Savannah *v.*

constructs sewers, and the owners of adjacent property build and improve with reference to the improvements made by the city, and thereafter they are injured by the failure of the city to keep the sewers in proper repair, it cannot avoid lia-

Cleary, 67 Ga. 153; Savannah *v.* Spears, 66 Ga. 304.

Illinois.— Alton *v.* Hope, 68 Ill. 167; Chicago *v.* Norton Milling Co., 97 Ill. App. 651 [*affirmed* in 196 Ill. 580, 63 N. E. 1043]; Peoria *v.* Eisler, 62 Ill. App. 26; Champaign *v.* Forrester, 29 Ill. App. 117.

Indiana.—Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; South Bend *v.* Paxon, 67 Ind. 228; Valparaiso *v.* Cartwright, 8 Ind. App. 429, 35 N. E. 1051.

Iowa.— Monarch Mfg. Co. *v.* Omaha, etc., R. Co., 127 Iowa 511, 103 N. W. 493; Powers *v.* Council Bluffs, 50 Iowa 197; Ross *v.* Clinton, 46 Iowa 606, 26 Am. Rep. 169; Wallace *v.* Muscatine, 4 Greene 373, 61 Am. Dec. 131.

Kentucky.— Louisville *v.* Gimpell, 59 S. W. 1096, 22 Ky. L. Rep. 1110; Louisville *v.* O'Malley, 53 S. W. 287, 21 Ky. L. Rep. 873.

Maine.— Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180; Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900; Hamlin *v.* Biddeford, 95 Me. 308, 49 Atl. 1100.

Maryland.— Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98; Baltimore *v.* Schmitker, 84 Md. 34, 34 Atl. 1132; Frostburg *v.* Dufty, 70 Md. 47, 16 Atl. 642; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Kranz *v.* Baltimore, 64 Md. 491, 2 Atl. 908.

Massachusetts.— Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Manning *v.* Springfield, 184 Mass. 245, 68 N. E. 202; Hewett *v.* Canton, 182 Mass. 220, 65 N. E. 42; Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423; Washburn, etc., Mfg. Co. *v.* Worcester, 116 Mass. 458; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Emery *v.* Lowell, 109 Mass. 197; Emery *v.* Lowell, 104 Mass. 13; Child *v.* Boston, 4 Allen 41, 81 Am. Dec. 680.

Minnesota.— Tate *v.* St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501; Stoehr *v.* St. Paul, 54 Minn. 549, 56 N. W. 250; Buchanan *v.* Duluth, 40 Minn. 402, 42 N. W. 204; Taylor *v.* Austin, 32 Minn. 247, 20 N. W. 157.

Mississippi.— Semple *v.* Vicksburg, 62 Miss. 63, 52 Am. Rep. 181.

Missouri.— Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Woods *v.* Kansas City, 58 Mo. App. 272. See also McInery *v.* St. Joseph, 45 Mo. App. 296.

New Hampshire.— Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32; Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895; Flanders *v.* Franklin, 70 N. H. 168, 47 Atl. 88.

New York.— Barton *v.* Syracuse, 36 N. Y. 54, 1 Transcr. App. 317; Munn *v.* Hudson, 61 N. Y. App. Div. 343, 70 N. Y. Suppl. 525; Talcott *v.* New York, 58 N. Y. App. Div. 514, 69 N. Y. Suppl. 360; Schumacher *v.* New York, 40 N. Y. App. Div. 320, 57 N. Y. Suppl. 968 [*affirmed* in 166 N. Y. 103, 59 N. E. 773]; Burnett *v.* New York, 36 N. Y. App. Div. 458, 55 N. Y. Suppl. 893; Magee *v.* Brooklyn, 18 N. Y. App. Div. 22, 45 N. Y. Suppl. 473; Nims *v.* Troy, 3 Thomps. & C. 5 [*affirmed* in 59 N. Y. 500]; Wessman *v.* Brooklyn, 16 N. Y. Suppl. 97 [*affirmed* in 133 N. Y. 677, 31 N. E. 626]; Wilson *v.* New York, 1 Den. 595, 43 Am. Dec. 719; New York *v.* Furze, 3 Hill 612.

North Carolina.— Williams *v.* Greenville, 130 N. C. 93, 40 S. E. 977, 89 Am. St. Rep. 860, 57 L. R. A. 207; Downs *v.* High Point, 115 N. C. 182, 20 S. E. 385.

Pennsylvania.— Betterly *v.* Scranton, 208 Pa. St. 370, 57 Atl. 768; Markle *v.* Berwick, 142 Pa. St. 84, 21 Atl. 794; Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17.

Tennessee.— Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823; Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814; Chattanooga *v.* Dowling, 101 Tenn. 342, 47 S. W. 700.

Texas.— Lindsay *v.* Sherman, (Civ. App. 1896) 36 S. W. 1019; Dallas *v.* Schultz, (Civ. App. 1894) 27 S. W. 292.

Utah.— Kiesel *v.* Ogden City, 8 Utah 237, 30 Pac. 758; Levy *v.* Salt Lake City, 3 Utah 63, 1 Pac. 160.

Vermont.— Bragg *v.* Rutland, 70 Vt. 606, 41 Atl. 578; Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72; Winn *v.* Rutland, 52 Vt. 481.

Virginia.— Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

West Virginia.— Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

Wisconsin.— Gilluly *v.* Madison, 63 Wis. 518, 24 N. W. 137, 53 Am. Rep. 299.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1772, 1782.

Even where municipal liability for defective streets is denied (see *infra*, XIV, D, 1) the courts generally recognize and enforce the rule stated in the text with regard to sewers. See Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32.

Jurisdiction of aldermen no excuse.— The negligent omission of a city to make a sewer safe and tight so as not to injure neighboring property cannot be excused on the ground that jurisdiction as to the construction and location of sewers is vested in the aldermen when it does not appear that they ever exercised such jurisdiction, but on the contrary they left the matter entirely to the superintendent of streets. Allen *v.* Boston, 159 Mass. 324, 34 N. E. 159, 38 Am. St. Rep. 423.

Fault or neglect of municipality must be shown.— A municipal corporation can be made liable only upon proof of some fault or neglect on its part, either in the construction of the sewer or in the keeping of it in repair. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900; Smith *v.* New York, 66 N. Y. 295, 23 Am.

bility on the ground that the negligent act caused the water to flow where it did originally.[54] A city has been held liable for damages to property by the collapse of a culvert which it was the duty of the city to maintain, although such collapse was caused by the imperfect construction of a bank by a corporation other than the city.[55] A city is not primarily liable for an obstruction of drainage by an individual or private corporation;[56] but it becomes liable where, after having notice of the obstruction, it does not either compel its removal or itself remove the obstruction or provide an outlet,[57] and this notwithstanding it did not cause or authorize the obstruction.[58]

5. Sewers or Drains Causing Liability. In order to entitle a person to damages for the failure of a municipality to perform the duty imposed upon it by statute, to properly maintain and keep in repair its public drains and sewers, plaintiff must establish that the drain in question is a public drain or sewer, legally established by the act of the municipal officers.[59] The drain or sewer complained of must be under the control of the municipality,[60] and one which it is the duty of the municipality to maintain and keep in repair;[61] and a city is not liable for damage caused by the obstruction of a private drain because it has permitted such drain to be connected with a city sewer.[62] Municipal control of the drain or sewer complained of is sufficient to render the municipality liable for defects or obstructions therein,[63] and it is not necessary that the municipality should have con-

Rep. 53 [*affirming* 4 Hun 637, 6 Thomps. & C. 685].

Statutes giving to drainage commissioners the entire charge and control of sewers, and providing that such commissioners may sue and be sued, do not relieve the municipality from liability for a nuisance arising from the manner in which a sewer is maintained. Bolton *v.* New Rochelle, 84 Hun (N. Y.) 281, 32 N. Y. Suppl. 442 [*following In re* Smiddy, 19 N. Y. Suppl. 949].

54. Powers *v.* Council Bluffs, 50 Iowa 197.

55. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

56. Effingham *v.* Surrells, 77 Ill. App. 460.

57. Effingham *v.* Surrells, 77 Ill. App. 460; Zanesville *v.* Fannan, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664.

58. Powers *v.* Council Bluffs, 50 Iowa 197, holding that, where a city has notice of the construction of improvements which obstruct a sewer, the city is liable for injuries caused by the negligent or improper construction, notwithstanding the city council, which was charged with making the improvements, did not authorize the negligent acts to be done.

Notice of defects or obstructions see, generally, *infra*, XIV, D, 14.

59. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900; Bulger *v.* Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205; Darling *v.* Bangor, 68 Me. 108; Estes *v.* China, 56 Me. 407.

60. Cochrane *v.* Malden, 152 Mass. 365, 25 N. E. 620; Robinson *v.* Danville, 101 Va. 213, 43 S. E. 337.

Railroad culverts.— A city is not liable for injuries caused by a sewer or culvert constructed by a railroad in or under a street for its own exclusive use. Indianapolis *v.* Lawyer, 38 Ind. 348; Stackhouse *v.* Lafayette, 26 Ind. 17, 89 Am. Dec. 450. And where a railroad company has included a portion of a street containing a culvert within the limits of its road so that the duty of maintaining both the street and the culvert has passed from the city to the railroad company, the city is not liable for damage subsequently caused by the insufficiency of the culvert. Lander *v.* Bath, 85 Me. 141, 26 Atl. 1091. But where a city granted a railroad company the right to construct and maintain along and on one of its streets an embankment, and required a sufficient culvert thereunder to carry off the natural drainage of the adjacent land, which was toward the street, and the culvert was insufficient, and as the city constructed a drain or ditch leading to the culvert, water accumulated at this point and overflowed plaintiff's land, the city, in causing the accumulation of water, without a sufficient outlet, was jointly liable with the railroad company for the damages caused. Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134.

61. Lynch *v.* Clarke, 25 R. I. 495, 56 Atl. 779, holding that where a culvert was constructed by a municipal corporation to carry the water of a natural stream under a street, the only duty imposed upon the municipality was to receive the water of the stream at the point where its culvert commenced and carry it under the street to the lower end of the culvert, and it was not called upon to take care of a connecting culvert constructed by someone else to facilitate the flow of water to or through its culvert.

The administrative officers of a city have no authority to convert a private drain into a public sewer, nor to bind the city by any promise or admission in relation thereto. Kosmak *v.* New York, 117 N. Y. 361, 22 N. E. 945 [*affirming* 53 Hun 329, 6 N. Y. Suppl. 453].

62. Kansas City *v.* Brady, 52 Kan. 297, 34 Pac. 884, 39 Am. St. Rep. 349.

63. Kranz *v.* Baltimore, 64 Md. 491, 2 Atl. 908; Nims *v.* Troy, 3 Thomps. & C. 5

structed,[64] or should be the owner of the drain or sewer.[65] The rule as to municipal liability for defects and obstructions in sewers and drains[66] remain the same whether a natural watercourse is adopted for drainage purposes or an artificial channel is built;[67] and so where a municipality converts a running stream into a sewer it is liable for damage resulting from neglect to keep it in proper condition.[68] But a municipality may connect its sewers and drains with any natural channel for the flow of water, without incurring liability to keep such channel open to its mouth.[69] The fact that a municipal sewer or drain is situated wholly or partly on private property does not relieve the municipality from liability for damages caused thereby;[70] but the fact that a city built and repaired a drain does not of itself impose on the city a duty to keep it in repair where the drain is on private property and is itself private property.[71] The acquisition by a city of property on which is located a private drain does not make the drain a public sewer, or impose on the city the duty to remove obstructions for the benefit of a licensee.[72] A covered drain leading from the gutter to a point under the middle of the sidewalk and thence to a culvert is a culvert within a statute making towns liable for injuries by reason of defects in culverts.[73] Where a city, for the sole purpose of abating the nuisance caused by the overflow of a lot after rains, either itself lays or requires or permits the lot owner under its supervision to lay a drain pipe in and across an adjacent street, and thereafter, in constructing a public

[*affirmed* in 59 N. Y. 500]; Schroeder *v.* Baraboo, 93 Wis. 95, 67 N. W. 27. See also Kiesel *v.* Ogden City, 8 Utah 237, 30 Pac. 758, holding that a city is liable for injuries caused by an obstruction in a sewer which was constructed under the supervision of the city originally or of which it had actual or constructive notice.

64. *Illinois.*— Kewanee *v.* Ladd, 68 Ill. App. 154. See also Stack *v.* East St. Louis, 85 Ill. 377, 28 Am. Rep. 619; Pekin *v.* Brereton, 67 Ill. 477, 16 Am. Rep. 629; East St. Louis *v.* Lockhead, 7 Ill. App. 83.

Indiana.— Indianapolis *v.* Lawyer, 38 Ind. 348; Gaff *v.* Hutchinson, 38 Ind. 341.

Massachusetts.— Emery *v.* Lowell, 104 Mass. 13.

Minnesota.— Taylor *v.* Austin, 32 Minn. 247, 20 N. E. 157.

New York.— Bolton *v.* New Rochelle, 84 Hun 281, 32 N. Y. Suppl. 442.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1774.

Where culverts built by a railroad company are adopted by a city for its use, the city is liable for injuries resulting from the culverts being out of repair or insufficient. Indianapolis *v.* Lawyer, 38 Ind. 348.

Where a city is negligent in repairing a sewer, by reason of which damage results, it is not relieved from liability by the fact that the sewer was originally constructed by the state. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

65. Savannah *v.* Cleary, 67 Ga. 153; Kranz *v.* Baltimore, 64 Md. 491, 2 Atl. 908.

66. See *supra*, XIV, C, 2, 3, 4.

67. Owens *v.* Lancaster, 182 Pa. St. 257, 37 Atl. 858; Blizzard *v.* Danville, 175 Pa. St. 479, 34 Atl. 846; Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

68. Kranz *v.* Baltimore, 64 Md. 491, 2 Atl. 908.

69. Munn *v.* Pittsburgh, 40 Pa. St. 364.

Artificial substitute for natural channel.— The right or liability of the city is not changed by the fact that the state or the owners of the lots through which the natural watercourse passes have made an artificial and covered substitute in place of the natural channel. Munn *v.* Pittsburgh, 40 Pa. St. 364, holding that the fact that the municipality occasionally made repairs on the sewer substituted for the natural channel was no evidence of a voluntary assumption of the duty of maintaining it, and that the municipality was not liable for damages done to the lot owners, by the falling in of the old sewer substituted for the natural channel, unless the damage was caused by the negligence of its agents in connecting the sewer with the old one, or in not keeping its own sewer in order or in bringing into the old sewer such an additional quantity of water as to gorge and break it.

70. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Netzer *v.* Crookston City, 59 Minn. 244, 61 N. W. 21 (failure to repair sewer); Stoddard *v.* Saratoga Springs, 4 N. Y. Suppl. 745 [*affirmed* in 127 N. Y. 261, 27 N. E. 1030] (discharge of contents of sewer into natural stream); Levy *v.* Salt Lake City, 5 Utah 302, 16 Pac. 598, 3 Utah 63, 1 Pac. 160 (negligence with respect to public irrigating ditch).

The fact that the city has no right to enter on private property to repair the drain or sewer is no excuse. Netzer *v.* Crookston City, 59 Minn. 244, 61 N. W. 21. But *compare* McCaffrey *v.* Albany, 11 Hun (N. Y.) 613.

71. McCaffrey *v.* Albany, 11 Hun (N. Y.) 613.

72. Kosmak *v.* New York, 117 N. Y. 361, 22 N. E. 945 [*affirming* 53 Hun 329, 6 N. Y. Suppl. 453].

73. Boyd *v.* Derry, 68 N. H. 272, 38 Atl. 1005.

sewer, destroys this drain pipe so that water again accumulates upon the lot, the owner cannot recover from the city for such damages.[74]

6. Degree of Care Required. Ordinary care and diligence is the standard of municipal duty in the construction and maintenance of sewers and drains,[75] by which is meant such as a man of average prudence and discretion would exercise to protect his own property under like conditions;[76] and the care and foresight to be exercised should be in proportion to the magnitude of the injury likely to result from its omission.[77] In the construction of municipal improvements a city is not required to provide against phenomenal floods which are beyond reasonable anticipation;[78] but it is required to guard against floods such as have occasionally occurred and which may be reasonably expected to occur again, and failing to make such provision it is liable for the consequences of its negligence.[79]

7. Inadequacy of Sewers and Drains — a. In General. The general rule is that a municipality is not liable in damages for the inadequacy of a drain or sewer when such inadequacy is due to an error of judgment committed by a municipal body clothed with discretion to determine the width and depth of drains and sewers;[80] and *a fortiori* where sewers or drains were sufficient when constructed

74. Ivey *v.* Macon, 102 Ga. 141, 29 S. E. 151.

75. *Colorado.*—Boulder *v.* Fowler, 11 Colo. 396, 18 Pac. 337, street gutters supplying water for irrigation.

Georgia.— Savannah *v.* Spears, 66 Ga. 304.

Iowa.— Wallace *v.* Muscatine, 4 Greene 373, 61 Am. Dec. 131.

Minnesota.— Netzer *v.* Crookston City, 59 Minn. 244, 61 N. W. 21.

New York.— Barton *v.* Syracuse, 36 N. Y. 54, 1 Transcr. App. 317 [*affirming* 37 Barb. 292].

Tennessee.— Nashville *v.* Sutherland, 94 Tenn. 356, 29 S. W. 228.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1776.

The municipality is not an insurer of the condition of its various appliances for the comfort and convenience of its inhabitants, and hence is not liable for damages for a defect in a sewer where it was guilty of no negligence in the matter and remedied the defect as soon as there was reason to suppose that it existed. Weidman *v.* New York, 84 N. Y. App. Div. 321, 82 N. Y. Suppl. 771 [*affirmed* in 176 N. Y. 586, 68 N. Y. Suppl. 1125].

Changes in season.— The ordinary diligence to be used by city authorities to prevent injury from a canal constituting a part of its sewer system extends not only to keeping up the existing banks of a drain but also to keeping it open and in a suitable condition to protect adjoining landowners, in view of the ordinary and usual changes at different seasons of the year. Savannah *v.* Spears, 66 Ga. 304.

76. *Colorado.*— Boulder *v.* Fowler, 11 Colo. 396, 18 Pac. 337.

Georgia.— Savannah *v.* Spears, 66 Ga. 304.

Indiana.— Madison *v.* Ross, 3 Ind. 236, 54 Am. Dec. 481.

Iowa.— Wallace *v.* Muscatine, 4 Greene 373, 61 Am. Dec. 131.

New York.— Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 53 Am. Dec. 316.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1776.

77. Madison *v.* Ross, 3 Ind. 236, 54 Am. Dec. 481.

78. Madison *v.* Ross, 3 Ind. 236, 54 Am. Dec. 481 (culvert and embankment over small stream); Kansas City *v.* King, 65 Kan. 64, 68 Pac. 1093 (sewer emptying into river).

Storm overflow see, generally, *infra*, XIV, C, 7, b.

79. Kansas City *v.* King, 65 Kan. 64, 68 Pac. 1093.

80. *Arkansas.*— Little Rock *v.* Willis, 27 Ark. 572.

Colorado.— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729.

Delaware.— Hession *v.* Wilmington, 1 Marv. 122, 40 Atl. 749, 27 Atl. 830 (holding that a city, acting in good faith and within its quasi-judicial power and discretion, is not liable for any private damage that may arise from the inadequacy of a sewer, although it delayed the enlargement thereof after knowledge of such inadequacy); Harrigan *v.* Wilmington, 8 Houst. 140, 12 Atl. 779.

Indiana.— Rozell *v.* Anderson, 91 Ind. 591.

Iowa.— Knostman, etc., Furniture Co. *v.* Davenport, 99 Iowa 589, 68 N. W. 887.

Maine.— Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180.

Massachusetts.— Manning *v.* Springfield, 184 Mass. 245, 68 N. E. 202; Buckley *v.* New Bedford, 155 Mass. 64, 29 N. E. 201.

Minnesota.— Dudley *v.* Buffalo, 73 Minn. 347, 76 N. W. 44.

New Jersey.— Harrington *v.* Woodbridge Tp., 70 N. J. L. 28, 56 Atl. 141.

New York.— Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664 [*affirming* 15 Abb. N. Cas. 97]; Mills *v.* Brooklyn, 32 N. Y. 489; Graves *v.* Olean, 64 N. Y. App. Div. 598, 72 N. Y. Suppl. 799.

Pennsylvania.—Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455 [*followed* in Bealafeld *v.* Verona, 188 Pa. St. 627, 41 Atl. 651; Fairlawn Coal Co. *v.* Scranton, 148 Pa. St. 231, 23 Atl. 1069; Collins *v.* Philadelphia, 93 Pa. St. 272]; Siegfried *v.* South Bethlehem

the municipality is not liable if they subsequently become insufficient by reason of increase of population,[81] the improvement of lots by individual owners,[82] or the greater extent of property graded and built on.[83] There is, however, authority for the view that where the plan adopted is obviously insufficient the municipality is liable for resulting damage;[84] and where a municipality has built a sewer or drain and by reason of the insufficiency thereof a nuisance is created, the municipality is liable in damages,[85] if after notice of the nuisance it fails to adopt and execute such measures as are necessary to remove the nuisance.[86] So also where a city constructs improvements so as to throw upon land more surface water than would flow upon it naturally,[87] or obstructs the natural flow of a stream or diverts it into artificial channels,[88] the city is bound to provide adequate means of caring for the flow of water so that it will not be cast upon the property of individuals; and if it fails to do so it is liable in damages, upon the theory that in such case the fixing of the dimensions of the necessary culverts or sewers is a ministerial act.[89] So also where a city, after the construction of a storm sewer in certain

Borough, 27 Pa. Super. Ct. 456; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17; Pressman *v.* Dickson City, 13 Pa. Super. Ct. 236; Sullivan *v.* Pittsburg, 5 Pa. Super. Ct. 357, 40 Wkly. Notes Cas. 542; Costello *v.* Conshohocken, 8 Pa. Co. Ct. 639.

Canada.—Johnston *v.* Toronto, 25 Ont. 312.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1778.

But *compare* Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

Where a city constructs a sewer for carrying off surface water, it is not bound to construct such a sewer as will be sufficient to carry off all the surface water in all cases and under all circumstances. Atchison *v.* Challiss, 9 Kan. 603 [*overruling* Leavenworth *v.* Casey, McCahon 124].

A city, changing the grade of its streets under an ordinance permitting it to do so, is not liable for the flooding of a cellar by the surface water which the culvert built in accordance with the plan adopted was too small to carry off. Stewart *v.* Clinton, 79 Mo. 603.

Error in judgment of city engineer.—Where a city has employed a competent engineer in the planning or construction of a culvert, and he, in the honest exercise of his judgment, has failed to make it of sufficient capacity to avoid injury to property, the city is not liable for the injurious results of his error in judgment. Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Van Pelt *v.* Davenport, 42 Iowa 308, 20 Am. Rep. 622. *Contra*, Helena *v.* Thompson, 29 Ark. 569.

81. Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342.

82. Springfield *v.* Spence, 39 Ohio St. 665.

83. Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342. See also Steinmeyer *v.* St. Louis, 3 Mo. App. 256.

84. Indianapolis *v.* Huffer, 30 Ind. 235, holding that the construction of a sewer, rendered necessary by street improvements, of such incapacity that every sane man knows in advance that it will not afford any relief from the consequences of obstruction to the natural drainage caused by the filling of the street, renders the city liable for damages caused by an overflow, as this is not an error of judgment, but gross and wanton carelessness, a failure to exercise judgment at all. See also Powers *v.* Council Bluffs, 50 Iowa 197; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Papineau *v.* Longueuil, 11 Quebec Super. Ct. 98.

85. Tate *v.* St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501; Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774; Martin *v.* Brooklyn, 32 N. Y. App. Div. 411, 52 N. Y. Suppl. 1086.

Creation of nuisance see, generally, *infra*, XIV, D, 8.

86. Tate *v.* St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501; Seiferd *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664 [*affirming* 15 Abb. N. Cas. 97]; Munk *v.* Watertown, 67 Hun (N. Y.) 261, 22 N. Y. Suppl. 227.

Notice of defects and obstructions see, generally, *infra*, XIV, C, 14.

87. *Alabama.*— Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

Delaware.— Harrigan *v.* Wilmington, 8 Houst. 140, 12 Atl. 779.

Illinois.— Aurora *v.* Love, 93 Ill. 521.

Michigan.— Seaman *v.* Marshall, 116 Mich. 327, 74 N. W. 484.

Texas.— Houston *v.* Hutcheson, (Civ. App. 1904) 81 S. W. 86.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1778.

Surface water see, generally, *infra*, XIV, C, 12.

88. McClure *v.* Red Wing, 28 Minn. 186, 9 N. W. 767 (where the court applied the above rule to a channel in a ravine, although water flowed in considerable quantities at certain seasons and in time of heavy rains); Young *v.* Kansas City, 27 Mo. App. 101.

Watercourses see, generally, *infra*, XIV, C, 11.

89. McClure *v.* Red Wing, 28 Minn. 186, 194, 9 N. W. 767 (where it is said: "In the case at bar, if it turned upon whether the duty was judicial or ministerial, we think the correct rule to apply would be that, in deciding upon the expediency of lay-

streets, changes the established grade of adjoining streets so as to turn additional water into the sewer, overtaxing its capacity, the city is liable for injury to adjoining property-owners caused by the water backing up from the sewer;[90] and a city which undertakes to improve a stream is liable for injury caused by its delay in providing a sufficient outlet into the sea to carry off the water which by its work upon the upper part of the stream has been increased in volume beyond the natural flow.[91] It has also been held that where a city undertakes to build a sewer and compels objecting property-owners to pay the sums assessed against them for that purpose, it becomes bound to use due care to so construct it with reference to its size and fall and the inlets that it will carry away the drainage for the designated district, and if in the case of an ordinary natural rainfall the sewer proves insufficient it may be inferred that there was negligence in the construction thereof, and the city is liable for the resulting damage.[92] Where the municipality has prescribed the capacity of a drain or sewer and it is not constructed as directed,[93] or where it is constructed in a negligent or unskilful manner,[94] the municipality is liable for any damages caused thereby, as is also the case where the sewer or drain becomes inadequate through becoming obstructed or in need of repair.[95]

b. Storm Overflow. There is no municipal liability for insufficiency of sewers or drains to carry off surplus water from an unprecedented or extraordinary storm,[96] especially where such drains or sewers are amply sufficient to meet all

ing out this street, or upon the route thereof to be adopted, or the grade to be established, the city was exercising judicial duties, for errors of judgment in the performance of which they would not be responsible; but, having determined these matters, and having decided it expedient to obstruct the natural channel of these waters, and to divert them into another and artificial channel, then, in executing and carrying this out, including the construction of the sewer and fixing upon its size or capacity, they were exercising purely ministerial duties, in the performance of which they are held to the exercise of reasonable care"); Young *v.* Kansas City, 27 Mo. App. 101.

90. King *v.* Granger, 21 R. I. 93, 41 Atl. 1012.

91. Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320.

92. Litchfield *v.* Southwortb, 67 Ill. App. 398.

93. Little Rock *v.* Willis, 27 Ark. 572.

94. Little Rock *v.* Willis, 27 Ark. 572; Hession *v.* Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749; Peoria *v.* Eisler, 62 Ill. App. 26. And see, generally, *supra*, XIV, C, 3.

95. Hession *v.* Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749; Keeley *v.* Portland, 100 Me. 260, 61 Atl. 180. And see, generally, *supra*, XIV, C, 4.

96. *Alabama.*—Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

California.— Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375.

Colorado.— Aicher *v.* Denver, 10 Colo. App. 413, 52 Pac. 86.

Delaware.— Hession *v.* Wilmington, 1 Marv. 122, 40 Atl. 749, 27 Atl. 830; Harrigan *v.* Wilmington, 8 Houst. 140, 12 Atl. 779.

District of Columbia.— District of Columbia *v.* Gray, 1 App. Cas. 500.

Georgia.— Savannah *v.* Cleary, 67 Ga. 153, where city not chargeable with negligence.

Illinois.— Peoria *v.* Adams, 72 Ill. App. 662; Litchfield *v.* Southworth, 67 Ill. App. 398. See also Chicago *v.* Rustin, 99 Ill. App. 47.

Indiana.— Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86.

Michigan.— Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

Missouri.— Gulath *v.* St. Louis, 179 Mo. 38, 77 S. W. 744.

New York.— Sundheimer *v.* New York, 77 N. Y. App. Div. 53, 79 N. Y. Suppl. 278 [*reversed* on other grounds in 176 N. Y. 495, 68 N. E. 867]; Congress, etc., Spring Co. *v.* Saratoga Springs, 6 N. Y. St. 385. See also O'Donnell *v.* Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1042 [*reversing* 102 N. Y. App. Div. 80, 92 N. Y. Suppl. 555].

North Carolina.— Wright *v.* Wilmington, 92 N. C. 156.

Pennsylvania.—Helbling *v.* Allegheny Cemetery Co., 201 Pa. St. 171, 50 Atl. 970. See also Fairlawn Coal Co. *v.* Scranton, 148 Pa. St. 231, 23 Atl. 1069 [*following* Collins *v.* Philadelphia, 93 Pa. St. 272; Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455].

Wisconsin.— Allen *v.* Chippewa Falls, 52 Wis. 430, 9 N. W. 284, 38 Am. Rep. 748.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1779.

Statute imposing liability as insurer.— Me. Rev. St. c. 16, § 9, providing that "after a public drain is constructed and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it," imposed upon the city in such a case the liability of an insurer, which could not be affected by proof that the rains caus-

demands upon them under ordinary conditions.[97] In order to give a stream or body of water the character of an extraordinary flow it is not necessary that it should be the greatest flow within memory, but its character in this respect is to be tested by comparison with the usual volume of floods ordinarily occurring.[98] Where the negligence of the city was the proximate or immediate cause of an overflow causing damage, the city cannot escape liability because there were extraordinary rainfalls or freshets at the time;[99] and it has been held that where the negligence of a city in failing to keep its sewers open contributed to the damage to property, it is liable, although the rain causing the damage was of an extraordinary character.[1] But there is also authority for the view that even if there is negligence concurring with an extraordinary flood, a municipality is relieved from liability if the flow is so voluminous in character that it would of itself have produced the injury complained of independently of such negligence.[2]

8. Creation of Nuisance.[3] If a municipal drain or sewer is so constructed or maintained as to amount to a nuisance, the municipality is liable in damages therefor.[4] So where a stream is adopted by a city as a storm water sewer, but subsequently householders in the vicinity, with the knowledge of the municipal officers, although without formal leave of the city, connect their closets and waste-pipes with the sewer, by reason of which it becomes a nuisance, the city is liable.[5] A city cannot escape liability because the refuse dumped into the manhole of a sewer near plaintiff's premises, emitting noxious odors therefrom, was not emptied there by the city itself but by certain persons whom the city had licensed to use the sewer in that way.[6]

9. Injury Through Private Drain Connecting With Public Sewer. It has been held that a city is not liable where the injury complained of was suffered through

ing the overflow of the sewer were unusually severe. Blood *v.* Bangor, 66 Me. 154.

A contract by a city with a proprietor whose lands adjoin a county ditch, found to be inadequate for the city sewage emptied therein, to straighten and enlarge the ditch through his premises, so as to provide for carrying off all the waters without saturating or overflowing his land, and to keep the ditch in repair and maintain a good bridge across it on such owner's premises, and not to obstruct or injure cross ditches, cannot be construed as obligating the city to provide against unexpected and extraordinary floods, or to put such adjoining proprietor in any better condition than he would have been in if the ditch had remained as it was without the extra city flowage. Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601.

97. Peoria *v.* Adams, 72 Ill. App. 662; Gulath *v.* St. Louis. 179 Mo. 38, 77 S. W. 744; Sundheimer *v.* New York, 77 N. Y. App. Div. 53, 79 N. Y. Suppl. 278 [*reversed* on other grounds in 176 N. Y. 495, 68 N. E. 867].

98. Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

99. Savannah *v.* Cleary, 67 Ga. 153.

1. Woods *v.* Kansas City, 58 Mo. App. 272 [*following* Haney *v.* Kansas City, 94 Mo. 334, 7 S. W. 417]. See also Helbling *v.* Allegheny Cemetery Co., 201 Pa. St. 171, 50 Atl. 970.

2. Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456; Bolster *v.* City, 13 Pittsb. Leg. J. N. S. (Pa.) 204.

Although there is an obstruction in a sewer the municipality is not liable for an overflow due to an extraordinary rainfall so great that the sewer even if clear could not vent it so as to prevent the damage, if the sewer is of sufficient capacity for all ordinary occasions. Hession *v.* Wilmington, (Del. 1893) 27 Atl. 830.

3. Nuisances generally see Nuisances.

4. *Georgia.*— Maguire *v.* Cartersville, 76 Ga. 84.

Illinois.— Litchfield *v.* Whitenack, 78 Ill. App. 364.

Indiana.— Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126.

Massachusetts.— Manning *v.* Lowell, 130 Mass. 21.

Minnesota.—Tate *v.* St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501.

Missouri.— Edmondson *v.* Moberly, 98 Mo. 523, 11 S. W. 990; Foncannon *v.* Kirksville, 88 Mo. App. 279, although the act of a city in constructing the sewer was irregular, it not being void.

New York.— Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; Bolton *v.* New Rochelle, 84 Hun 281, 32 N. Y. Suppl. 442; Hardy *v.* Brooklyn, 7 Abb. N. Cas. 403.

Tennessee.— Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

Virginia.— Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

5. Demby *v.* Kingston, 60 Hun (N. Y.) 294, 14 N. Y. Suppl. 601 [*affirmed* in 133 N. Y. 538, 30 N. E. 1148].

6. Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

plaintiff's connecting a private drain with a public sewer,[7] especially where the injury is due to the connection being defective,[8] or where the connection was unauthorized.[9] But it has also been held that there is something very like a contract to be implied from the construction of a sewer, at the expense of the adjacent property, that it may be used to drain the property thus charged with its construction, and it would seem that the adjacent property holders have a right to open drains into it, and in a suit by such adjacent property holder, who has opened his drain into the sewer upon his own responsibility, and whose premises have been flooded by backwater through the drain in a freshet, a verdict giving him damages must be sustained.[10]

10. Abandonment of Drain or Sewer. Where a city makes provision by sewers for carrying off surface water it may not abandon the same when it leaves the lot owner in a worse condition than he would have been in if the city had not constructed the sewer;[11] but where a city, by the abandonment of a sewer, does not leave individuals in any worse condition than they would be in if such sewer had never been made, the city is not liable for an injury to such persons caused by the flow of surface water.[12] In a case where a city discontinued an old sewer and built a new one, and sometime afterward walled up the old sewer without notice to or knowledge of plaintiffs, which caused the sewage to back into plaintiff's cellar, it was held that the city was liable unless it took reasonable precautions to avoid injury to plaintiff.[13]

11. Watercourses.[14] Unless such duty is imposed by charter or other statute a municipality is not bound to keep a stream flowing within the city limits in safe condition or free from obstructions,[15] or to protect private property from overflow

7. Roll *v.* Indianapolis, 52 Ind. 547 (so holding where the damage could be avoided by closing up the private drain); Sheriff *v.* Oskaloosa, 120 Iowa 442, 94 N. W. 904; Dermont *v.* Detroit, 4 Mich. 435 (holding that the city was not liable for injury caused by water backing up through such drain into plaintiff's cellar, notwithstanding the fact that plaintiff paid an annual assessment to the city for the privilege of making the connection). But *compare* Evers *v.* Long Island City, 78 Hun (N. Y.) 242, 28 N. Y. Suppl. 825, holding that where a sewer maintained by a city is so constructed that it causes water to flow back into cellars connected with it the city is liable. And see *infra*, XIV, C, 15.

8. Wilson *v.* Waterbury, 73 Conn. 416, 47 Atl. 687, where the damage might have been avoided by plaintiff properly placing a check valve in his drain.

Voluntary connection by city.— A city is not liable for damages resulting from the negligent construction of the connection between a private sewer and the main public sewer, where it was not the duty of the city or its officers to make such connection, but the board of public works voluntarily made it to replace a prior connection which had been broken by the lowering of the main sewer. Streiff *v.* Milwaukee, 89 Wis. 218, 61 N. W. 770.

9. Breuck *v.* Holyoke, 167 Mass. 258, 45 N. E. 732; Ranlett *v.* Lowell, 126 Mass. 431 (holding that one who builds a private drain and connects it with a public sewer without a permit of the board of aldermen, as required by an ordinance of the city, cannot recover for an injury caused by an overflow of the sewer through the drain, although such overflow is caused by the negligence of the city); Dasher *v.* Harrisburg, 20 Pa. Super. Ct. 79.

Ratification of unauthorized connection.— In an action against a city for damages caused by the flooding of plaintiff's house with water flowing back from the city sewer through the connecting pipe, the fact that a city contractor, when laying pavement, moved the connecting pipe and then put it back again, does not amount to such a ratification on the part of the city of plaintiff's action in connecting with the sewer as to estop the city from proving that the connection was made without the city's permission, in violation of a penal ordinance. Atlanta *v.* Word, 78 Ga. 276.

10. Barton *v.* Syracuse, 37 Barb. (N. Y.) 292 [*affirmed* in 36 N. Y. 54, 1 Transcr. App. 317].

11. McAdams *v.* McCook, 71 Nebr. 789, 99 N. W. 656.

12. Atchison *v.* Challiss, 9 Kan. 603.

13. O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385.

14. See, generally, Waters.

15. Goodrich *v.* Chicago, 20 Ill. 445; A. L. Lakey Co. *v.* Kalamazoo, 138 Mich. 644, 101 N. W. 841, 110 Am. St. Rep. 338, 67 L. R. A. 931 (holding that a city is not required to keep a stream free from obstructions merely as a protection to private property); O'Donnell *v.* Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1053. See also Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172.

A mere grant of authority to remove obstructions in a river does not impose the

by such stream.[16] And the municipality assumes no new liability by voluntarily undertaking to remove obstructions,[17] or to protect lands from overflow.[18] But a city is liable if it commences to remove obstructions and proceeds in such an improper manner that damage results.[19] Urban as well as rural landowners have rights appurtenant and burdens incident to riparian ownership, and a municipality may not impair the former or increase the latter with impunity.[20] So a riparian proprietor has a right of action against a municipal corporation for materially diverting in any manner from his premises the course of a running stream,[21] or for causing, to his injury, a material increase in the natural flow of a watercourse on or through his premises;[22] and the municipality is liable in damages to any proprietor for the injury caused by obstructing or turning a watercourse from its natural channel and causing it to overflow his premises,[23] unless such over-

duty to do so. Goodrich *v.* Chicago, 20 Ill. 445.

The Hudson river is a highway for the passage of vessels, but it is not a highway of the city of New York, and the city is under no obligation to remove obstructions therefrom or to keep it safe for navigation. Seaman *v.* New York, 80 N. Y. 239, 36 Am. Rep. 612.

The city of Albany is not responsible to property-owners on account of an obstruction in the Hudson river, within the city limits, where such obstruction was not caused by the city. Coonly *v.* Albany, 132 N. Y. 145, 30 N. E. 382 [*affirming* 57 Hun 327, 10 N. Y. Suppl. 512].

A municipality may be bound by prescription to repair a creek or fleet into which the tide of the sea is accustomed to flow and reflow. Lynn *v.* Turner, Cowp. 86.

16. Moore *v.* Los Angeles, 72 Cal. 287, 13 Pac. 855, holding that this is true, although the municipality owns the bed of the stream and the right to sell water from the stream.

17. Goodrich *v.* Chicago, 10 Fed. Cas. No. 5,542, 4 Biss. 18 [*affirmed* in 5 Wall. 566, 18 L. ed. 511], holding that if a city undertakes to remove obstructions from a river which it is under no legal obligation to remove, and abandons the work without having changed the status of the obstruction, it does not become liable for subsequent damages caused by such obstruction.

18. Hamilton *v.* Ashbrook, 62 Ohio St. 511, 57 N. E. 239, holding that when there is no duty imposed upon a city to make any provision to protect lands from overflow by the waters of a river, it is not liable because of the inadequacy of provisions which it has seen fit to make.

19. Goodrich *v.* Chicago, 20 Ill. 445.

20. *California.*— Conniff *v.* San Francisco, 67 Cal. 45, 7 Pac. 41.

Colorado.— McCord *v.* Pueblo, 5 Colo. App. 48, 36 Pac. 1109.

Kansas.— Parker *v.* Atchison, 58 Kan. 29, 48 Pac. 631; Kansas City *v.* Slangstrom, 53 Kan. 431, 36 Pac. 706.

Maine.— Stone *v.* Augusta, 46 Me. 127.

Maryland.— Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98.

Massachusetts.— Parker *v.* Lowell, 11 Gray 353; Perry *v.* Worcester, 6 Gray 544, 66 Am. Dec. 431.

Nebraska.—Beatrice *v.* Leary, 45 Nebr. 149, 63 N. W. 370, 50 Am. St. Rep. 546.

New Jersey.— Durkes *v.* Union, 38 N. J. L. 21.

New York.— Byrnes *v.* Cohoes, 67 N. Y. 204; Smith *v.* Brooklyn, 18 N. Y. App. Div. 340, 46 N. Y. Suppl. 141; Rider *v.* Amsterdam, 31 Misc. 375, 65 N. Y. Suppl. 579.

Ohio.— McBride *v.* Akron, 12 Ohio Cir. Ct. 610, 6 Ohio Cir. Dec. 739.

Pennsylvania.— Owens *v.* Lancaster, 182 Pa. St. 257, 37 Atl. 858; Blizzard *v.* Danville, 175 Pa. St. 479, 34 Atl. 846.

Virginia.— Smith *v.* Alexandria, 33 Gratt. 208, 36 Am. Rep. 788.

Wisconsin.— Spelman *v.* Portage, 41 Wis. 144.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1784.

21. Smith *v.* Brooklyn, 18 N. Y. App. Div. 340, 46 N. Y. Suppl. 141; Rider *v.* Amsterdam, 31 Misc. (N. Y.) 375, 65 N. Y. Suppl. 579.

22. *Kansas.*— Parker *v.* Atchison, 58 Kan. 29, 48 Pac. 631, improvements narrowing the channel so as to wash and injure property on opposite bank.

Maryland.— Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98.

Minnesota.— O'Brien *v.* St. Paul, 18 Minn. 176.

New York.— Ordway *v.* Canisteo, 66 Hun 569, 21 N. Y. Suppl. 835.

Ohio.— McBride *v.* Akron, 12 Ohio Cir. Ct. 610, 6 Ohio Cir. Dec. 739.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1784.

23. *California.*— Geurkink *v.* Petaluma, 112 Cal. 306, 44 Pac. 570; Conniff *v.* San Francisco, 67 Cal. 45, 7 Pac. 41. See also Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375.

Colorado.— McCord *v.* Pueblo, 5 Colo. App. 48, 36 Pac. 1109.

Connecticut.—Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703.

Georgia.— Phinizy *v.* Augusta, 47 Ga. 260.

Indiana.— Princeton *v.* Gieske, 93 Ind. 102.

Kansas.— Kansas City *v.* Slangstrom, 53 Kan. 431, 36 Pac. 706.

Maryland.— Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98

Massachusetts.— Parker *v.* Lowell, 11 Gray

flow was caused by extraordinary floods, the municipality having constructed its bridge, wall, or other improvement in such way as not to prove a noxious obstruction in ordinary high water.[24] The fact that the acts causing the overflow and damage were done by the municipality for the purpose of protecting its streets and the property of its citizens from damage does not relieve it from liability,[25] nor does the fact that a dam across a stream was constructed by a municipality under legislative authority relieve the municipality from liability for negligently allowing the stream to become obstructed and thus overflow and injure adjoining land.[26] A city is not liable in damages to the owner of land upon a stream for an obstruction to the flow of the water caused by the surface wash from the streets of such city, where such wash is the necessary and incidental result of the growth of the city and the construction of the streets;[27] or by deposits from underground sewers, where such deposit is less injurious than the natural flow of water would have been if the sewers had not been built;[28] or by the defective construction of a bridge built by a railroad corporation under authority of its charter, although it is used for public travel in connection with the highway;[29] or by a bridge built by the city, where it has become injurious since its erection solely because of the acts and trespasses of other corporations and individuals, which have altered the original character of the stream, and not by reason of natural causes or such as might reasonably have been anticipated at its erection.[30] Nor is a city liable for an overflow of a stream into which it drains surface water, where the drain does not increase the flow beyond what could be accommodated by the watercourse in

353; Perry *v.* Worcester, 6 Gray 544, 66 Am. Dec. 431.

Minnesota.— Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Missouri.— Barns *v.* Hannibal, 71 Mo. 449; Imler *v.* Springfield, 55 Mo. 119, 17 Am. Rep. 645; Rose *v.* St. Charles, 49 Mo. 509.

Nebraska.— Beatrice *v.* Leary, 45 Nebr. 149, 63 N. W. 370, 50 Am. St. Rep. 546.

New Hampshire.— Clair *v.* Manchester, 72 N. H. 231, 55 Atl. 935.

New Jersey.— Durkes *v.* Union, 38 N. J. L. 21.

New York.— Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540; Byrnes *v.* Cohoes, 67 N. Y. 204; Ordway *v.* Canisteo, 66 Hun 569, 21 N. Y. Suppl. 835; Sleight *v.* Kingston, 11 Hun 594; Donohue *v.* New York, 3 Daly 65. See also Butler *v.* Edgewater, 2 Silv. Sup. 3, 6 N. Y. Suppl. 174 [*affirmed* in 134 N. Y. 594, 31 N. E. 628].

Pennsylvania.— Owens *v.* Lancaster, 182 Pa. St. 257, 37 Atl. 858; Blizzard *v.* Danville, 175 Pa. St. 479, 34 Atl. 846; Krug *v.* St. Mary's Borough, 152 Pa. St. 30, 25 Atl. 161, 34 Am. St. Rep. 616. See also Rohrer *v.* Harrisburg, 20 Pa. Super. Ct. 543; Beach *v.* Scranton, 5 Lack. Leg. N. 25.

Texas.— See Dallas *v.* Schultz, (Civ. App. 1894) 27 S. W. 292.

Virginia.— Smith *v.* Alexandria, 33 Gratt. 208, 36 Am. Rep. 788.

Wisconsin.— Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210 [*following* Spelman *v.* Portage, 41 Wis. 144].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1784.

The stream need not be a permanent or constantly running one in order to subject a city to liability for damage caused by damming up such stream and thereby flooding the lands of others. Rose *v.* St. Charles, 49 Mo. 509.

The fact that a board of commissioners created by statute has control of a highway does not relieve the municipality of liability for damage caused by the inadequacy of a culvert over a stream, when the municipality had knowledge of such inadequacy and a reasonable opportunity to remedy it. Clair *v.* Manchester, 72 N. H. 231, 55 Atl. 935.

A city authorized to control and regulate the flowage of waters in the city has no right to dam up a stream so as to overflow the lands of private owners. Boye *v.* Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Diverting waters of pond by ditches.— Where a city cuts ditches and canals in such a way that water is emptied from ponds and private property is flooded, the city is liable for the damage. Burton *v.* Chattanooga, 7 Lea (Tenn.) 739.

24. Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375; Sprague *v.* Worcester, 13 Gray (Mass.) 193; Taubert *v.* St. Paul, 68 Minn. 519, 71 N. W. 664.

Storm overflow from sewers and drains see *supra*, XIV, C, 7, b.

25. Ordway *v.* Canisteo, 66 Hun (N. Y.) 569, 21 N. Y. Suppl. 835. But *compare* De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

26. Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98.

27. Wheeler *v.* Worcester, 10 Allen (Mass.) 591.

28. Wheeler *v.* Worcester, 10 Allen (Mass.) 591.

29. Wheeler *v.* Worcester, 10 Allen (Mass.) 591.

30. Wheeler *v.* Worcester, 10 Allen (Mass.) 591.

its natural condition, and the overflow is the result of plaintiff's having unduly narrowed and obstructed the stream.[31] In the case of an artificial watercourse, such as a culvert, a person who has acquired no right therein by prescription or contract cannot recover for an injury to his property caused by closing up such culvert in repairing a highway in a proper and suitable manner.[32] A municipality is not liable for the obstruction of a passage of water through a culvert under a highway, which causes the water to overflow the land of an adjoining owner, where the obstruction is caused by a railroad company that owns land adjoining the highway, in filling up a ravine on their land which constituted the natural channel for the water from the culvert under the highway.[33] The mere failure of a municipality to compel the restoration to its natural channel of a stream which has been diverted by an individual is not of itself such evidence of an adoption or ratification of the wrong as will make the municipality liable as a trespasser *ab initio*.[34]

12. Surface Water.[35] Surface water is a common enemy, which every proprietor must fight for himself so long as it takes its natural course;[36] and a municipality is under no obligation to prevent the natural flow of surface water,[37] or to protect individual property-owners therefrom,[38] even though they may be so unfortunate as to own property below the level of the street,[39] or to provide means for carrying off surface water collecting upon private property.[40] A city

31. Smith *v.* Auburn, 88 N. Y. App. Div. 396, 84 N. Y. Suppl. 725.

32. Drew *v.* Westfield, 124 Mass. 461.

33. Haynes *v.* Burlington, 38 Vt. 350.

34. Allebrand *v.* Duquesne, 11 Pa. Super. Ct. 218.

35. See, generally, Waters.

36. Morris *v.* Council Bluffs, 67 Iowa 343, 25 N. W. 274, 56 Am. Rep. 343; Flagg *v.* Worcester, 13 Gray (Mass.) 601; Stewart *v.* Clinton, 79 Mo. 603; Lafferty *v.* Girardville, (Pa. 1889) 17 Atl. 12.

37. Flanders *v.* Franklin, 70 N. H. 168, 47 Atl. 88; Buchert *v.* Boyertown, (Pa. 1889) 17 Atl. 190 (holding that a borough is not liable to a property-owner for injuries to a house by an overflow of surface water, where the house is built in a ravine in the course of the natural flow of the water from a highway, which was at the time of the injury in the possession of a turnpike company, and over which the borough had not assumed control); Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

Increased flowage through improvement of property.— A city is not liable for the increased flowage of water resulting from the improvement of property within the area of natural drainage. Springfield *v.* Spence, 39 Ohio St. 665 [*approved* in Hamilton *v.* Ashbrook, 62 Ohio St. 511, 57 N. E. 239].

38. St. Paul, etc., R. Co. *v.* Duluth, 56 Minn. 494, 58 N. W. 159, 45 Am. St. Rep. 491, 23 L. R. A. 88.

Improvements by property-owners.— The fact that private property-owners in improving their lots have interfered with the flow of surface water does not impose any additional duty upon the municipality to construct sewers. Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86.

39. *California.*— Lampe *v.* San Francisco, 124 Cal. 546, 57 Pac. 461, 1001; Stanford *v.* San Francisco, 111 Cal. 198, 43 Pac. 605.

Colorado.— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 725; Aicher *v.* Denver, 10 Colo. App. 413, 52 Pac. 86.

Iowa.— Knostman, etc., Furniture Co. *v.* Davenport, 99 Iowa 589, 68 N. W. 887 (holding that an owner of property below the level of the street on which it abuts cannot recover for the overflowing of his property by surface water, as a result of the insufficiency of street drains, where the overflow would not have occurred if his land had been filled so as to be on a level with the street); Freburg *v.* Davenport, 63 Iowa 119, 18 N. W. 705, 50 Am. Rep. 737.

Massachusetts.— Hewett *v.* Canton, 182 Mass. 220, 65 N. E. 42; Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327.

Ohio.— Sharp *v.* Cincinnati, 26 Ohio Cir. Ct. 59.

Rhode Island.— Wakefield *v.* Newell, 12 R. I. 75, 34 Am. Rep. 598 [*followed* in Murray *v.* Allen, 20 R. I. 263, 38 Atl. 497].

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1785.

Overflow caused by obstruction in sewer.— A city has been held not liable for injuries to property resulting from the backing up of surface water from a sewer into the cellar of a house caused by the failure of the city to keep the sewer free from obstruction where there was no drain from the cellar to the sewer. Hewett *v.* Canton, 182 Mass. 220, 65 N. E. 42; Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327; Barry *v.* Lowell, 8 Allen (Mass.) 123, 85 Am. Dec. 690. See also Woodbury *v.* Beverly, 153 Mass. 245, 26 N. E. 851; Kennison *v.* Beverly, 146 Mass. 467, 16 N. E. 278; Turner *v.* Dartmouth, 13 Allen (Mass.) 291.

40. Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322.

may grade, improve, maintain, and repair its streets and highways and is not, in the absence of negligence, liable for injuries resulting from the incidental interruption or change in the flow of the surface water.[41] So, according to some authorities, a city is not liable for damages resulting from the raising of the grade of a street whereby surface water is prevented from flowing off adjacent prop-

41. *Connecticut.*— Downs *v.* Ansonia, 73 Conn. 33, 46 Atl. 243, holding that unless made liable by statute a municipal corporation is not liable for constructing and maintaining its highways at such a grade as to cause the surface water thereon to flow on the adjoining premises.

Delaware.—Benson *v.* Wilmington, 9 Houst. 359, 32 Atl. 1047; Magarity *v.* Wilmington, 5 Houst. 530.

Georgia.— Roll *v.* Augusta, 34 Ga. 326. See also Phinizy *v.* Augusta, 47 Ga. 260.

Indiana.— Evansville *v.* Decker, 84 Ind. 325, 43 Am. Dec. 86; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Vincennes *v.* Richards, 23 Ind. 381; Hirth *v.* Indianapolis, 18 Ind. App. 673, 48 N. E. 876.

Iowa.— Hoffman *v.* Muscatine, 113 Iowa 332, 85 N. W. 17; Gilfeather *v.* Council Bluffs, 69 Iowa 310, 28 N. W. 610; Morris *v.* Council Bluffs, 67 Iowa 343, 25 N. W. 274, 56 Am. Rep. 343, so holding as to the overflow of a stream which the court considered to be practically surface water.

Massachusetts.— Daley *v.* Watertown, 192 Mass. 116, 78 N. E. 143; Turner *v.* Dartmouth, 13 Allen 291; Barry *v.* Lowell, 8 Allen 127, 85 Am. Dec. 690 (holding that no action lies against a city for a failure to keep a public sewer and cesspool in repair, whereby surface water accumulates in a highway and flows into the cellar of a neighboring house, which is not connected by a drain with the public sewer); Flagg *v.* Worcester, 13 Gray 601.

Minnesota.—Alden *v.* Minneapolis, 24 Minn. 254 [*following* Lee *v.* Minneapolis, 22 Minn. 13, and *distinguishing* Kobs *v.* Minneapolis, 22 Minn. 159].

Missouri.— Rychlicki *v.* St. Louis, 98 Mo. 497, 11 S. W. 1001, 14 Am. St. Rep. 651, 4 L. R. A. 594; Foster *v.* St. Louis, 71 Mo. 157 [*affirming* 4 Mo. App. 564]; Cannon *v.* St. Joseph, 67 Mo. App. 367.

New Jersey.— Durkes *v.* Union, 38 N. J. L. 21; Miller *v.* Morristown, 47 N. J. Eq. 62, 20 Atl. 61 [*affirmed* in 48 N. J. Eq. 645, 25 Atl. 20]; Field *v.* West Orange Tp., 46 N. J. Eq. 183, 2 Atl. 236; West Orange Tp. *v.* Field, 37 N. J. Eq. 600, 45 Am. Rep. 670 [*affirming* 36 N. J. Eq. 118]; Wilson *v.* Plainfield, 4 N. J. L. J. 380.

New York.— Rutherford *v.* Holley, 105 N. Y. 632, 11 N. E. 818 [*distinguishing* Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540]; Lynch *v.* New York, 76 N. Y. 60, 32 Am. Rep. 271; Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774; Carll *v.* Northford, 11 N. Y. App. Div. 120, 42 N. Y. Suppl. 576; McCarthy *v.* Far Rockaway, 3 N. Y. App. Div. 379, 38 N. Y. Suppl. 989; Bastable *v.* Syracuse, 8 Hun 587.

Pennsylvania.— Strauss *v.* Allentown, 215 Pa. St. 96, 63 Atl. 1073 [*approving* Brunhouse *v.* York, 5 York Leg. Rec. 164].

Rhode Island.— O'Donnell *v.* White, 24 R. I. 483, 53 Atl. 633.

Texas.— Wallace *v.* Dallas, 2 Tex. Unrep. Cas. 424.

Virginia.— Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

Wisconsin.— Harp *v.* Baraboo, 101 Wis. 368, 77 N. W. 744; Champion *v.* Crandon, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856; Johnson *v.* Chicago, etc., R. Co., 80 Wis. 641, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495; Heth *v.* Fond du Lac, 63 Wis. 228, 23 N. W. 495, 53 Am. Rep. 279; Lessard *v.* Stram, 62 Wis. 112, 22 N. W. 284, 51 Am. Rep. 715; Waters *v.* Bay View, 61 Wis. 642, 21 N. W. 811; Hoyt *v.* Hudson, 27 Wis. 656, 9 Am. Rep. 473.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1785.

As to mere surface water running down a street in no confined channel, the dominant proprietor may divert it and turn it upon the servient land without liability. Stewart *v.* Clinton, 79 Mo. 603; Imler *v.* Springfield, 55 Mo. 119, 17 Am. Rep. 645.

Construction of street railway.— A city is liable for injuries caused to private property by a diversion of surface water thereon by the construction of a street railway which it has authorized to be built. It is bound to provide waterways sufficient to carry off the water that might be reasonably expected to accumulate. Damour *v.* Lyons City, 44 Iowa 276.

Obstruction of definite channel.— The general rule that a municipal corporation in the grading and improvement of streets is not bound to provide for the escape of mere surface water has an exception where the surface water, owing to the conformation of the adjoining country, has formed for itself a definite channel in which it is accustomed to flow, although such channel does not come within the common-law definition of a watercourse, and if the municipality obstructs such channel it is bound to provide for the escape of the water. Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375 [*followed* in Larrabee *v.* Cloverdale, 131 Cal. 96, 63 Pac. 143]. See also Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729; Bloomington *v.* Brokaw, 77 Ill. 194; Imler *v.* Springfield, 55 Mo. 119, 17 Am. Rep. 645. *Contra*, Hoyt *v.* Hudson, 27 Wis. 656, 9 Am. Rep. 473.

Conn. Gen. St. p. 233, § 16, providing that "persons authorized to construct or repair highways, may make or clear any water-

erty,[42] or surface water which formerly flowed in another direction is diverted upon property below the new grade.[43] But other authorities hold that a city is liable in damages where it so changes the grade of a street as to prevent the natural flow of surface water from the street and divert it on to plaintiff's property.[44] And it has also been held that where a municipality in the construction of ditches and sewers in the improvement of streets causes a large quantity of surface water which naturally flowed in another direction to be diverted to flow on to plaintiff's property in destructive quantities, the municipality is liable for the damage done whether or not the work was done negligently.[45] Where a city by unlawfully raising a street above the established grade causes surface water to flow on or to accumulate upon an abutting lot, it is liable to the lot owner for the injury occasioned thereby.[46] A municipal corporation has no right to collect surface water in artificial channels and throw it upon the land of an individual, and if it does so it is liable for the damage so caused.[47] And so a city is liable in damages

course, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water," reënacted in 1881 (Sess. Laws (1881), p. 34, c. 65), with the further provision that the work shall be done in such a way as to do the least damage to such land, exempts a municipality from liability unless it appears that the work was done in such a way as to do unnecessary damage, or that the water was drained into some place prohibited by statute. Bronson *v.* Wallingford, 54 Conn. 513, 9 Atl. 393.

Conduit for drainage of private land.— The rule that a municipality is not liable in tort if, in the performance of its duty to keep a highway safe and convenient for travel, it diverts water upon neighboring land, is not applicable in the case of damage caused by a conduit laid and built to drain a large body of land mostly in private ownership. Westcott *v.* Boston, 186 Mass. 540, 72 N. E. 89.

42. *California.*— Lampe *v.* San Francisco, 124 Cal. 546, 57 Pac. 461, 1001; Corcoran *v.* Benicia, 96 Cal. 1, 30 Pac. 798, 31 Am. St. Rep. 171.

Delaware.— Clark *v.* Wilmington, 5 Harr. 243.

District of Columbia.— Herring *v.* District of Columbia, 3 Mackey 572.

Minnesota.— Follmann *v.* Mankato, 45 Minn. 457, 48 N. W. 192.

New York.— Lynch *v.* New York, 76 N. Y. 60, 32 Am. Rep. 271; Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774; Carll *v.* Northford, 11 N. Y. App. Div. 120, 42 N. Y. Suppl. 576; Wilson *v.* New York, 1 Den. 595, 43 Am. Dec. 719.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

Wisconsin.— Waters *v.* Bay View, 61 Wis. 642, 21 N. W. 811; Hoyt *v.* Hudson, 27 Wis. 656, 9 Am. Rep. 473.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1785.

43. Little Rock *v.* Willis, 27 Ark. 572; Lynch *v.* New York, 76 N. Y. 60, 32 Am. Rep. 271; Miles *v.* Brooklyn, 98 N. Y. App. Div. 195, 90 N. Y. Suppl. 702; Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774; Carll *v.* Northford, 11 N. Y. App. Div. 120, 42 N. Y. Suppl. 576; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

44. Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922; Morley *v.* Buchanan, 124 Mich. 128, 82 N. W. 802; Rice *v.* Flint, 67 Mich. 401, 34 N. W. 719.

Under the provision of the Alabama constitution requiring that municipal corporations shall "make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements," a town is liable for damages caused by so changing the grade of a street as to prevent the natural flow of water from adjacent lots. Avondale *v.* McFarland, 101 Ala. 381, 13 So. 504 [*adopting* opinion of Somerville, J., in Montgomery *v.* Maddox, 89 Ala. 181, 7 So. 433, and *overruling* Montgomery *v.* Townsend, 84 Ala. 478, 4 So. 780, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112].

In Illinois it is held that a city is liable for injuries to a building from flowage of surface water occasioned by a change in the grade of the street (Dixon *v.* Baker, 65 Ill. 518, 16 Am. Rep. 591; Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1. See also Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321), if the injury could have been prevented by proper sewage (Dixon *v.* Baker, *supra*), and the fact that a sewer is provided for the purpose does not relieve the city from liability where through a negligent error of judgment it is wholly insufficient (Dixon *v.* Baker, *supra*).

45. Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47 [*approved* in Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922].

46. Addy *v.* Janesville, 70 Wis. 401, 35 N. W. 931.

47. *California.*— Conniff *v.* San Francisco, 67 Cal. 45, 7 Pac. 41 [*followed* in Larrabee *v.* Cloverdale, 131 Cal. 96, 63 Pac. 143].

Indiana.— Crawfordsville *v.* Bond, 96 Ind. 236; Valparaiso *v.* Kyes, 30 Ind. App. 447, 66 N. E. 175; Thorntown *v.* Fugate, 21 Ind. App. 537, 52 N. E. 763.

Iowa.— Hoffman *v.* Muscatine, 113 Iowa 332, 85 N. W. 17.

for constructing a street improvement or other public work so as to divert surface water from its natural course, collect it in large quantities, and discharge it in a body upon the abutting premises, without providing any means for its escape.[48] A city

Michigan.—Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552.

Minnesota.— Robbins *v.* Willmar, 71 Minn. 403, 73 N. W. 1097; Pye *v.* Mankato, 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; Kobs *v.* Minneapolis, 22 Minn. 159 [*following* O'Brien *v.* St. Paul, 18 Minn. 176].

Nebraska.—Andrews *v.* Steele City, 2 Nebr. (Unoff.) 676, 89 N. W. 739.

New Hampshire.— Flanders *v.* Franklin, 70 N. H. 168, 47 Atl. 88.

New Jersey.—Soule *v.* Passaic, 47 N. J. Eq. 28, 20 Atl. 346; Field *v.* West Orange Tp., 46 N. J. Eq. 183, 2 Atl. 236; West Orange Tp. *v.* Field, 37 N. J. Eq. 600, 45 Am. Rep. 670 [*affirming* 36 N. J. Eq. 118].

New York.— Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540; Byrnes *v.* Cohoes, 67 N. Y. 204 [*affirming* 5 Hun 602]; Miles *v.* Brooklyn, 98 N. Y. App. Div. 195, 197, 90 N. Y. Suppl. 702 (where it is said: "The same proposition must hold equally good as to the collection of the surface water of a street into a catch basin, and the simultaneous elevation of the street grade so as to cause the contents of the catch basin to flood the plaintiff's property"); Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774; Bedell *v.* Sea Cliff, 18 N. Y. App. Div. 261, 46 N. Y. Suppl. 226; Magee *v.* Brooklyn, 18 N. Y. App. Div. 22, 45 N. Y. Suppl. 473; Carll *v.* Northport, 11 N. Y. App. Div. 120, 42 N. Y. Suppl. 576; McCarthy *v.* Far Rockaway, 3 N. Y. App. Div. 379, 38 N. Y. Suppl. 989; Clark *v.* Rochester, 43 Hun 271; Sleight *v.* Kingston, 11 Hun 594; Daggett *v.* Cohoes, 5 Silv. Sup. 183, 7 N. Y. Suppl. 882.

Pennsylvania.— Weir *v.* Plymouth Borough, 148 Pa. St. 566, 24 Atl. 94; Torrey *v.* Scranton, 133 Pa. St. 173, 19 Atl. 351; Elliott *v.* Oil City, 129 Pa. St. 570, 18 Atl. 553; Rohrer *v.* Harrisburg, 20 Pa. Super. Ct. 543.

South Dakota.— Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783.

Texas.— Houston *v.* Bryan, 2 Tex. Civ. App. 553, 22 S. W. 231.

Vermont.— Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533.

West Virginia.— Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519; Gillison *v.* Charleston, 16 W. Va. 282, 37 Am. Rep. 763.

Wisconsin.—Champion *v.* Crandon, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856.

United States.—Arn *v.* Kansas City, 14 Fed. 236, 4 McCrary 558.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1785.

No liability where burden not increased.— The owner of a servient tenement subject to the easement of surface water flow has no action for injury caused by overflow of a sewer from a freshet when the burden is no greater than would be borne by the premises in a natural state. Watson *v.* Kingston, 114 N. Y. 88, 21 N. E. 102.

48. *California.*—Stanford *v.* San Francisco, 111 Cal. 198, 43 Pac. 605, holding that where a city paved a street in such a manner that water collected at the lower end and could escape only by flowing over the curb and sidewalk into plaintiff's premises, the city was liable.

Illinois.— Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321; Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1; Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392 [*followed* in Aurora *v.* Gillett, 56 Ill. 132]; Effingham *v.* Surrells, 77 Ill. App. 460.

Indiana.— Valparaiso *v.* Spaeth, (1905) 74 N. E. 518; Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. 300; North Vernon *v.* Voegler, 89 Ind. 77; Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; New Albany *v.* Lines, 21 Ind. App. 380, 51 N. E. 346; Lebanon *v.* Twiford, 13 Ind. App. 384, 41 N. E. 844.

Massachusetts.— Manning *v.* Lowell, 130 Mass. 21.

Minnesota.— Stoehr *v.* St. Paul, 54 Minn. 549, 56 N. W. 250; Follmann *v.* Mankato, 45 Minn. 457, 48 N. W. 192; O'Brien *v.* St. Paul, 25 Minn. 331, 33 Am. Rep. 470.

Missouri.— Rychlicki *v.* St. Louis, 98 Mo. 497, 11 S. W. 1001, 14 Am. St. Rep. 651, 4 L. R. A. 594; Cannon *v.* St. Joseph, 67 Mo. App. 367.

New Hampshire.— Flanders *v.* Franklin, 70 N. H. 168, 47 Atl. 88.

New Jersey.— Miller *v.* Morristown, 47 N. J. Eq. 62, 20 Atl. 61 [*affirmed* in 48 N. J. Eq. 645, 25 Atl. 20].

New York.— Bastable *v.* Syracuse, 8 Hun 587.

Pennsylvania.— Bohan *v.* Avoca Borough, 154 Pa. St. 404, 26 Atl. 604; Kensington Com'rs *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582.

Rhode Island.— Inman *v.* Tripp, 11 R. I. 520, 23 Am. Rep. 520.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1785.

Ponding on adjacent property.— Where a city, in grading a street, turns water on an adjacent lot, creating an unwholesome pond, rendering the premises unhealthy and unfit for the business for which they have been used, it is liable for damages for such injury. Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392 [*followed* in Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321; Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1; Aurora *v.* Gillett, 56 Ill. 132].

is liable to one whose premises are flooded by a brook or ditch in consequence of surface water being emptied into it by the city through drains, when sufficient provision is not made to carry off the surplus water,[49] but the owner of a swamp which is the natural place of deposit of surface water cannot complain because the city drains such waters into the swamp by a system of sewers after the swamp has been improved.[50] But a municipal corporation which has increased the flow of surface water in a certain direction is bound only to exercise reasonable care in providing means for carrying off the surplus water,[51] and is not an insurer against unprecedented floods or cloud bursts.[52] A municipality has been held not liable for discharging surface water through one of its street culverts into a ditch on plaintiff's land, where that was the natural course of the surface water, the culvert was necessary, and the ditch and culvert, both properly constructed, had existed for more than twenty years.[53] Where property is injured by surface water by reason of the negligence of a municipality in constructing or maintaining its municipal improvements, the municipality is liable.[54]

13. Discharge of Sewage — a. In General. A municipality may be held liable

Enlargement of drainage area through conforming streets to established grade.—Where the quantity of surface water sent to the point where it is discharged on plaintiff's land is increased by an enlargement of the area of drainage, but such enlargement results entirely from making the grade of the street conform to the grade established by the proper city authorities, any injury resulting from the increase in the quantity of water discharged is *damnum absque injuria*. Miller *v.* Morristown, 47 N. J. Eq. 62, 20 Atl. 61 [*affirmed* in 48 N. J. Eq. 645, 25 Atl. 20].

49. Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. 703.

50. St. Paul, etc., R. Co. *v.* Duluth, 56 Minn. 494, 58 N. W. 159, 45 Am. St. Rep. 491, 23 L. R. A. 88, holding further that this rule is not changed by the fact that the municipal corporation has diverted such waters from natural ravines and through such sewers deposited them on the swamp at different points from those at which the ravines terminate; the owner of the swamp having adopted the change made by such diversion by building the road-bed of its railroad across the swamp, by leaving no opening in the raised surface of such road-bed opposite the ends of the ravines, and by building in box culverts across such road-bed opposite the ends of some of the sewers to carry off such waters.

51. Keithsburg *v.* Simpson, 70 Ill. App. 467.

Degree of care required see, generally, *supra*, XIV, C, 6.

52. Keithsburg *v.* Simpson, 70 Ill. App. 467.

Storm overflow of sewers see, generally, *supra*, XIV, C, 7, b.

53. Noble *v.* St. Albans, 56 Vt. 522.

54. *Colorado.*— Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. 729.

Delaware.—Benson *v.* Wilmington, 9 Houst. 359, 32 Atl. 1047.

Illinois.— Elgin *v.* Kimball, 90 Ill. 356.

Indiana.— Princeton *v.* Gieske, 93 Ind. 102.

Iowa.—Wallace *v.* Muscatine, 4 Greene 373, 61 Am. Dec. 131.

Maryland.— Frostburg *v.* Hitchins, 70 Md. 56, 16 Atl. 380; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422.

Michigan.— McAskill *v.* Hancock Tp., 129 Mich. 74, 88 N. W. 78, 55 L. R. A. 738.

Missouri.— Rychlicki *v.* St. Louis, 98 Mo. 497, 11 S. W. 1001, 14 Am. St. Rep. 651, 4 L. R. A. 594; Foster *v.* St. Louis, 71 Mo. 157 [*affirming* 4 Mo. App. 564]; Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; McInery *v.* St. Joseph, 45 Mo. App. 296, holding that a city is liable for negligently piling stone in a street gutter, causing the overflow of surface water on the abutting property, to its damage, the court saying: "The principle of law as to surface water, as it has been announced in this state . . . has no application to the question in this case."

Nebraska.— Kearney *v.* Themanson, 48 Nebr. 74, 66 N. W. 996.

Pennsylvania.— Huddleston *v.* West Bellevue, 111 Pa. St. 110, 2 Atl. 200 (holding that where there is a natural drainage for a road into an adjacent river, it is negligence to drain such road by gutters along its sides, so as to overflow neighboring lands); Beach *v.* Scranton, 5 Lack. Leg. N. 25.

Wisconsin.— Gilluly *v.* Madison, 63 Wis. 518, 24 N. W. 137, 53 Am. Rep. 299 [*distinguishing* Heth *v.* Fond du Lac, 63 Wis. 228, 23 N. W. 495, 53 Am. Rep. 279; Waters *v.* Bay View, 61 Wis. 642, 21 N. W. 811; Allen *v.* Chippewa Falls, 52 Wis. 430, 9 N. W. 284, 38 Am. Rep. 748]. *Compare* Champion *v.* Crandon, 84 Wis. 405, 412, 54 N. W. 775, 19 L. R. A. 856, where it is said: "The allegations of negligence in doing the work in question, and upon a defective plan, are wholly ineffectual, inasmuch as the result complained of is one which the defendant had a lawful right to accomplish, namely, to free the streets and highways and public grounds of the town from surface water, even though its former course should be changed, and it should flow, in consequence, over and upon the premises of the plaintiff, an adjoining proprietor."

Canada.— Foster *v.* Lansdowne Rural Municipality, 12 Manitoba 416 [*following* Atchi-

for discharging its sewage on to the land of an individual,[55] or depositing sewage where it will percolate into and through the land of another,[56] or flow on his land and pollute a watercourse thereon,[57] unless it has in some lawful manner acquired the right to do so.[58] So a city is liable for a nuisance created by an improperly constructed sewer discharging into an open ditch near a person's house, so that noxious odors and stenches arise and make the house unsalable and difficult to rent.[59] But a municipality is not liable for damages caused by sewage discharged from one of its street culverts into a ditch on plaintiff's premises, where it does not appear that the village ever gave permission or knew that the sewage flowed in the culvert, which was constructed merely for surface water, and such flowage was wrongfully caused by a third person.[60]

b. Pollution or Obstruction of Waters. While, in the nature of things, the usual and proper outlet for municipal sewage is into running streams, lakes, or tide-water,[61] a municipality may be held liable for discharging sewage into a stream,[62]

son *v.* Portage le Prairie Rural Municipality, 9 Manitoba 192]; Reeves *v.* Toronto, 21 U. C. Q. B. 157.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1785.

55. *California.*— Bloom *v.* San Francisco, 64 Cal. 503, 3 Pac. 129.

Georgia.— Holmes *v.* Atlanta, 113 Ga. 961, 39 S. E. 458; Smith *v.* Atlanta, 75 Ga. 110; Reid *v.* Atlanta, 73 Ga. 523.

Illinois.— Jacksonville *v.* Lambert, 62 Ill. 519.

Kansas.— King *v.* Kansas City, 58 Kan. 334, 49 Pac. 88.

New Hampshire.—Vale Mills *v.* Nashua, 63 N. H. 136.

New York.— New York Cent., etc., R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. 416 [*affirming* 1 N. Y. Suppl. 456]; Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030 [*affirming* 4 N. Y. Suppl. 745]; Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540 [*followed* in Butler *v.* Edgewater, 6 N. Y. Suppl. 174 (*affirmed* in 134 N. Y. 594, 31 N. E. 628)]; Magee *v.* Brooklyn, 18 N. Y. App. Div. 22, 45 N. Y. Suppl. 473; Gillett *v.* Kinderhook, 77 Hun 604, 28 N. Y. Suppl. 1044; Bradt *v.* Albany, 5 Hun 591; Lewenthal *v.* New York, 61 Barb. 511, 5 Lans. 532; Daggett *v.* Cohoes, 5 Silv. Sup. 183, 7 N. Y. Suppl. 882; Beach *v.* Elmira, 11 N. Y. Suppl. 913.

United States.— Carmichael *v.* Texarkana, 94 Fed. 561.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1786.

Continuing nuisance.— It is not a defense to an action of trespass on the case for discharging sewage on plaintiff's land that defendant began to do it more than four years before. Such a nuisance is a continuing nuisance. Reid *v.* Atlanta, 73 Ga. 523.

56. Bacon *v.* Boston, 154 Mass. 100, 28 N. E. 9, holding that Mass. St. (1881) c. 303, § 3, authorizing the city of Boston to take land on the line of a sewer, and construct works in order to treat sewage, and free it from noxious matter, does not authorize it to deposit sewage at a place where it will percolate into and through the ground of another, thereby rendering water unfit for use, affecting the health of a community, and injuring a manufacturing business.

57. Carmichael *v.* Texarkana, 94 Fed. 561.

58. New York Cent., etc., R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. 416 [*affirming* 1 N. Y. Suppl. 456]; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540.

A parol license permitting a city to discharge the sewage from a particular district on private property does not authorize the discharge of the sewage from a much larger territory. New York Cent., etc., R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. 416 [*affirming* 1 N. Y. Suppl. 456].

59. Bloomington *v.* Murnin, 36 Ill. App. 647.

60. Noble *v.* St. Albans, 56 Vt. 522.

61. See Walker *v.* Aurora, 140 Ill. 402, 29 N. E. 741 (holding that Rev. St. c. 38, § 221, which declares it to be a public nuisance to throw or deposit any offensive matter in any watercourse, or to corrupt the water of any stream, to the injury of others, does not render invalid a city ordinance providing for the construction of a sewer to empty into a neighboring river, where it appears that the pollution of the river water thereby would be very slight); Behan *v.* New York, 24 Fed. 239 (where a canal boat was moored at a wharf belonging to the city directly alongside and beneath the opening of a large main sewer, and during the following night was submerged and sunk from the great outpouring of water consequent upon a sudden storm, and it was held that there was no negligence in the corporation, either in the construction, repair, or maintenance of the sewer, that it was no nuisance to navigation, and that the owner could not recover of the city for the loss).

An ordinance providing for draining part of a city into Lake Michigan is not void as against public policy. Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 255.

62. *Illinois.*— Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247].

Missouri.— Smith *v.* Sedalia, 182 Mo. 1, 81 S. W. 165; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406.

canal,[63] or pond,[64] where in so doing it creates a nuisance [65] by polluting the water,[66]

New York.— Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Butler *v.* White Plains, 59 N. Y. App. Div. 30, 69 N. Y. Suppl. 193; Moody *v.* Saratoga Springs, 17 N. Y. App. Div. 207, 45 N. Y. Suppl. 365 [*affirmed* in 163 N. Y. 581, 57 N. E. 1118]; Butler *v.* Edgewater, 2 Silv. Sup. 3, 6 N. Y. Suppl. 174 [*affirmed* in 134 N. Y. 594, 31 N. E. 628].

Pennsylvania.— Good *v.* Altoona City, 162 Pa. St. 493, 29 Atl. 741, 42 Am. St. Rep. 840, holding that where a city constructs sewers so that they empty into a stream and render unfit for use all the waters on a farm, by reason of part of the stream going underground through seams and fissures in the limestone bed of the stream, damages may be recovered by the owner of the farm.

Texas.— San Antonio *v.* Diaz, (Civ. App. 1901) 62 S. W. 549; San Antonio *v.* Pizzini, (Civ. App. 1900) 58 S. W. 635.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1787.

A municipality which adopts a natural watercourse as an open sewer is bound to keep the channel of the stream open and to prevent the accumulation of filth, and is liable to respond in damages for any injury which may be done to riparian owners in consequence of its acts or negligence. Glasgow *v.* Altoona, 27 Pa. Super. Ct. 55. But *compare* O'Donnell *v.* Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1042 [*reversing* 102 N. Y. App. Div. 80, 92 N. Y. Suppl. 555].

Discharge at some distance from watercourse.— The fact that sewage from a municipal sewer system is discharged at a point some distance from a watercourse, and near a creek which flows into such watercourse, and down which the sewage is carried, does not exempt the municipality from liability for damages to a lower riparian owner. San Antonio *v.* Pizzini, (Tex. Civ. App. 1900) 58 S. W. 635.

Use of sewer by third persons.— It is no defense that the injury arises from the use of the sewer by third persons, who connect their houses with it, and discharge sewage into it. Stoddard *v.* Saratoga Springs, 4 N. Y. Suppl. 745 [*affirmed* in 127 N. Y. 261, 27 N. E. 1030].

63. Boston Rolling Mills *v.* Cambridge, 117 Mass. 396 (holding that a city has no right to discharge sewage into a canal so as to impede navigation or create a nuisance); Proprietors Merrimack River Locks, etc. *v.* Lowell, 7 Gray (Mass.) 223 (discharge into canal constructed in channel of an ancient watercourse).

64. Vale Mills *v.* Nashua, 63 N. H. 136; Schriver *v.* Johnstown, 71 Hun (N. Y.) 232, 24 N. Y. Suppl. 1083 [*affirmed* in 148 N. Y. 758, 43 N. E. 989], holding that where the sewage of a village is collected and emptied through its sewers and gutters into plaintiff's pond, polluting the water, and causing a large deposit of offensive matter, plaintiff is entitled to a perpetual injunction, and to at least nominal damages.

65. Bloomington *v.* Costello, 65 Ill. App. 407; Smith *v.* Sedalia, 182 Mo. 1, 81 S. W. 165; Mansfield *v.* Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628 [*following* Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82]; Standard Bag, etc., Co. *v.* Cleveland, 25 Ohio Cir. Ct. 380.

Creation of nuisance see, generally, *supra*, XIV, C, 8.

66. *Alabama.*— Birmingham *v.* Land, 137 Ala. 538, 34 So. 613.

Kansas.— Topeka Water Supply Co. *v.* Potwin, 43 Kan. 404, 23 Pac. 578, holding that Sess. Laws (1889), c. 232, § 9, providing that "no sewer shall be permitted to empty into any stream from which a water supply is obtained within three miles above the point where said water supply is obtained," is not confined to sewers constructed by cities of the first class, but applies to all others as well.

New York.— Butler *v.* White Plains, 59 N. Y. App. Div. 30, 69 N. Y. Suppl. 193; Huffmire *v.* Brooklyn, 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132 [*affirmed* in 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421]; Moody *v.* Saratoga Springs, 17 N. Y. App. Div. 207, 45 N. Y. Suppl. 365 [*affirmed* in 163 N. Y. 581, 57 N. E. 1118]; Hooker *v.* Rochester, 37 Hun 181 [*affirmed* in 107 N. Y. 676, 14 N. E. 610].

Ohio.— Cleveland *v.* Beaumont, 4 Ohio Dec. (Reprint) 444, 2 Clev. L. Rep. 172, holding that where a city builds a workhouse, which it thereafter controls, it is liable for the corruption of a watercourse into which it has run the sewage of the workhouse.

Pennsylvania.— Good *v.* Altoona City, 162 Pa. St. 493, 29 Atl. 741, 42 Am. St. Rep. 840.

Texas.— Donovan *v.* Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054.

Wisconsin.— Winchell *v.* Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

United States.— See Carmichael *v.* Texarkana, 94 Fed. 561.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1787.

Acquiescence in the construction of a sewer will not estop persons injured from complaining of a nuisance created by the sewer polluting the stream into which it empties. Donovan *v.* Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054.

Limitation of right of recovery.— Where the water of a stream which a riparian proprietor has been in the habit of using in his business has become polluted by the emptying into it of city sewers, he cannot recover against the city for pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them.

and the air,[67] and creating foul and offensive odors,[68] or causing the deposit of filth on the banks,[69] and rendering property in the vicinity unfit for use or occupation,[70] or interfering with the comfortable use, occupation, and enjoyment thereof[71] without acquiring the right to do so by some lawful means, as by purchase or condemnation.[72] And the city cannot escape liability, because under its statutory powers it might have condemned the land injured, where such land was not in fact condemned.[73] The right of a municipality to construct an outfall for a sewer into the sea does not include the right to create a nuisance public or private, but is a right to make deposits temporarily, and not a right to permanently obstruct navigation or the use of wharves,[74] and so a city is liable for injury caused by discharging its sewage into or near docks or ferry slips whereby the same are obstructed or filled up with sand, dirt, and refuse, and the use thereof prevented or interfered with.[75] The fact that a sewer is built or extended under legislative authority does not relieve the city from liability for emptying the sewage into a stream so as to impede navigation or create a nuisance.[76] Where the discharge of sewage into a stream is a continuing nuisance, equity may give relief by injunction;[77] but where the city is endeavoring to remove or obviate the objections to the sewer, it is proper to suspend the injunction for a reasonable time.[78]

14. Notice of Defects or Obstructions. A municipality may be held liable without notice for injuries caused by defects or obstructions in its drains or sewers where they are due to negligence in construction,[79] or in failing to guard against or remove defects or obstructions.[80] But in the absence of negligence the munici-

Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592.

67. Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247]; Moody *v.* Saratoga Springs, 17 N. Y. App. Div. 207, 45 N. Y. Suppl. 365 [*affirmed* in 163 N. Y. 581, 57 N. E. 1118].

68. Birmingham *v.* Land, 137 Ala. 538, 34 So. 613; Butler *v.* White Plains, 59 N. Y. App. Div. 30, 69 N. Y. Suppl. 193; Winchell *v.* Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

69. Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296.

70. Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247].

71. Smith *v.* Sedalia, 182 Mo. 1, 81 S. W. 165.

72. Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406.

73. Birmingham *v.* Land, 137 Ala. 538, 34 So. 613.

74. Franklin Wharf Co. *v.* Portland, 67 Me. 46, 24 Am. Rep. 1, holding that, although it was the right of the proper authorities of the city of Portland, under Rev. St. (1857) c. 16, §§ 2, 3, as amended by Pub. Laws (1860), c. 153, to construct a sewer with an opening in a public dock below low water mark, upon their neglecting to clear the dock of refuse deposit whenever it should become an obstruction to navigation, by diminishing the depth of water about the wharves, the city was liable to the wharf owners in an action of tort.

75. Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800; Brayton *v.* Fall River, 113 Mass. 218, 18 Am. Rep. 470; Haskell *v.* New Bedford, 108 Mass. 208; Sleight *v.* Kingston, 11 Hun (N. Y.) 594; Butchers' Ice, etc., Co. *v.* Philadelphia, 156 Pa. St. 54, 27 Atl. 376.

76. Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; Moody *v.* Saratoga Springs, 17 N. Y. App. Div. 207, 45 N. Y. Suppl. 365 [*affirmed* in 163 N. Y. 581, 57 N. E. 1118]; San Antonio *v.* Pizzini, (Tex. Civ. App. 1900) 58 S. W. 635; Winchell *v.* Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

77. Kewanee *v.* Otley, 204 Ill. 402, 68 N. E. 388; Butler *v.* White Plains, 59 N. Y. App. Div. 30, 69 N. Y. Suppl. 193; Tyler Tube, etc., Co. *v.* Washington Borough, 31 Pittsb. Leg. J. N. S. (Pa.) 363, 14 York Leg. Rec. 205; Winchell *v.* Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902. See also Bailey *v.* New York, 38 Misc. (N. Y.) 641, 78 N. Y. Suppl. 201, discharge of sewage into bay injuring oyster beds.

A judgment at law for damages is not a bar to an injunction. Kewanee *v.* Otley, 204 Ill. 402, 58 N. E. 388.

78. Bailey *v.* New York, 38 Misc. (N. Y.) 641, 78 N. Y. Suppl. 210.

79. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Louisville *v.* Norris, 110 Ky. 903, 64 S. W. 958, 23 Ky. L. Rep. 1195; Dallas *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 321. See also Nims *v.* Troy, 59 N. Y. 500.

80. District of Columbia *v.* Gray, 6 App. Cas. (D. C.) 314 [*distinguishing* Bannagan *v.* District of Columbia, 2 Mackey 285] (holding that where an obstruction was such that its existence could be ascertained only by an inspection of the sewer, which it was the duty of the municipality to make from time to time, notice to the municipality was not a prerequisite to liability); Smith *v.* New York, 66 N. Y. 295, 23 Am. Rep. 53 [*affirming* 4 Hun 637, 6 Thomps. & C. 685];

pality is not liable for defects or obstructions unless or until it has received notice of the same,[81] or unless the facts are such that it is chargeable with constructive notice,[82] as where the defect or obstruction has continued for a considerable time.[83] Notice to the mayor,[84] or to the mayor and street superintendent[85] of a city, or to the trustees of a village,[86] is sufficient.

15. Right to Remedy or Relief. A person cannot recover damages sustained by him from sewage which enters upon his land from an old sewer through a sewer or pipe built on his own land by the municipality with his knowledge and assent if not at his request.[87] But the fact that the property-owner gave the city permission to build a sewer through his property does not work an estoppel upon him to sue the city for damages resulting from its improper construction and negligent use, where the consent was to a mere overflow sewer, and the sewer, as completed, is one used for the constant discharge of noxious sewage.[88] Neither does a property-owner waive his right to damages for the overflowing of his land by reason of the construction of a levee by favoring the work and offering to give the right of way for the levee, or by afterward refusing to give such right of way until the levee is extended so as to protect his lowlands.[89] Where the

McCarthy *v.* Syracuse, 46 N. Y. 194 (holding that no previous notice is necessary to fix the liability of a municipal corporation for damages from the overflow of a sewer which has become obstructed by its own dilapidation, where no care has been taken to guard against such obstruction by occasional examination of the structure); Vanderslice *v.* Philadelphia, 103 Pa. St. 102.

81. *Alabama.*— Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478.

Connecticut.— Morse *v.* Fair Haven East, 48 Conn. 220.

District of Columbia.— Bannagan *v.* District of Columbia, 2 Mackey 285. See also Johnston *v.* District of Columbia, 1 Mackey 427.

Iowa.— Knostman, etc., Furniture Co. *v.* Davenport, 99 Iowa 589, 68 N. W. 887.

Missouri.— Woods *v.* Kansas City, 58 Mo. App. 272.

New Hampshire.— Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464.

New York.— Smith *v.* New York, 66 N. Y. 295, 23 Am. Rep. 53 [*affirming* 4 Hun 637, 6 Thomps. & C. 685].

Pennsylvania.— Vanderslice *v.* Philadelphia, 103 Pa. St. 102.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1789.

82. Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

Repeated flooding from sewer.— Where the section of the city in which plaintiff's property is located has been repeatedly flooded from a sewer so obstructed as to be inadequate, prior to the injury complained of, this warrants a conclusion that the city might by the exercise of reasonable care have discovered the cause of the trouble. Louisville *v.* Gimpeel, 59 S. W. 1096, 22 Ky. L. Rep. 1110.

83. Woods *v.* Kansas City, 58 Mo. App. 272; Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464; Vanderslice *v.* Philadelphia, 103 Pa. St. 102.

The existence for two months of a dangerous depression in the street, caused by the caving in of a sewer, is sufficient to charge the city with notice of defects in other parts of the sewer which ordinary care in repairing the original break would have discovered. Dallas *v.* McAllister, (Tex. Civ. App. 1897) 39 S. W. 173.

84. Nichols *v.* Boston, 98 Mass. 39, 93 Am. Dec. 132, holding that notice to the mayor of a city of an obstruction of a dock constituting a nuisance is sufficient to bind the city and render it liable for a continuance of the nuisance.

85. Daggett *v.* Cohoes, 5 Silv. Sup. (N. Y.) 183, 7 N. Y. Suppl. 882, holding that notice to defendant's street superintendent and mayor that water was running into plaintiff's cellar, followed by evidence that the superintendent thought that defendant should clean out the cellar, was sufficient to warrant a finding that defendant had notice of the obstructed condition of the sewer from which the water was alleged to have been discharged; the court having charged the jury that defendant need exercise only ordinary care to ascertain the existence of the obstruction.

86. Whipple *v.* Fair Haven, 63 Vt. 221, 225, 21 Atl. 533, where it is said: "There was notice to the village, for its trustees had knowledge of the fact, and it was their duty to act in respect of it, and therefore their knowledge, even though obtained when not acting as agents of the village, was notice to the village."

87. Searing *v.* Saratoga Springs, 39 Hun (N. Y.) 307 [*affirmed* in 110 N. Y. 643, 17 N. E. 873], where it is said, by Peckham, J.: "If the plaintiff do not like the sewer as it remains on her land, she can take it up, and thereafter, if any sewage be illegally or improperly thrown upon her land by the agents of defendant, she can then probably recover the damages which she may sustain."

88. Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172.

89. Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210.

structure or work complained of was completed before plaintiff purchased the property claimed to be injured, and there has been no change in the structure or increase of the injury caused thereby since his purchase, plaintiff cannot recover,[90] especially where the structure was so placed at the request of a former owner of the property;[91] but it has been held that the acquiescence of plaintiff's grantor in an injury in the nature of a nuisance will not preclude a recovery by plaintiff for injury occurring since he acquired title, where the acts of the prior owner were not such as to subject the property to a servitude.[92] One who is not a riparian proprietor upon a brook or ditch has no cause of complaint against the city for interfering with the natural flow thereof, increasing the volume or polluting it, if his premises are not flooded thereby.[93] The fact that a person voluntarily connected his house with a sewer does not estop him from suing the municipality for a nuisance arising from the maintenance of the sewer,[94] nor does the fact that a lower riparian owner who is injured by the discharge of the sewerage of a city into a stream owns property in the city which, pursuant to its ordinance, drains into the sewers and thus into the stream, show such contribution on his part to the injury as to deprive him of the right to equitable relief.[95] The fact that plaintiff's premises are not directly connected with a sewer does not prevent his recovering damages sustained by him through the negligent construction or maintenance of the sewer.[96] One who has thwarted the efforts or rejected the offer of a municipality to redress or prevent the injury in a proper manner cannot recover for subsequent damages,[97] or obtain relief by injunction.[98] A landowner's payment

90. Elgin *v.* Welch, 16 Ill. App. 483, 485 (holding that where a city, by grading its streets and neglecting to make suitable culverts, has caused an unnatural flow of surface water upon property, one who purchases the property after the work is completed cannot recover for damages subsequently caused thereby, the court saying: "This work was, in our opinion, of a character so fixed and permanent, that for any damage thereby caused to plaintiff's lot, at any time, independently of what was done or permitted by the city on that street after her purchase, it would not be liable to her"); Davis *v.* New Orleans, 40 La. Ann. 806, 6 So. 100 (holding that a property-owner cannot sustain an action against the city for damages resulting from the alleged construction of a ditch near her property, which at all times was filled with water and overflowed its banks, rendering her property valueless, where the precise condition existing when she brought the action existed at the date of her acquisition of the property, and had existed for many years).

91. Troy *v.* Coleman, 58 Ala. 570 [*followed* in Union Springs *v.* Jones, 58 Ala. 654], so holding on the ground that the former owner could not invest his alienee with greater rights than he himself had.

92. Troy *v.* Coleman, 58 Ala. 570 [*followed* in Union Springs *v.* Jones, 58 Ala. 654].

93. Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. 703.

94. Bolton *v.* New Rochelle, 84 Hun (N. Y.) 281, 32 N. Y. Suppl. 442; Daggett *v.* Cohoes, 5 Silv. Sup. (N. Y.) 183, 7 N. Y. Suppl. 882; But see *supra*, XIV, C, 9.

Agreement releasing damages.— An agreement not to make any claim against a city for damages occasioned by the construction, use, or existence of a sewer, in consideration of being allowed to make a connection with such sewer, made under R. I. Pub. Laws (1873), c. 313, § 5, requiring a release of all damages, while not technically a release, operates as such. King *v.* Granger, 21 R. I. 93, 41 Atl. 1012, 79 Am. St. Rep. 779, holding, however, that such release did not relieve the city from liability for injuries from an overflow caused by a subsequent change in the established grade of certain streets, so as to turn additional water into the sewer, overtaxing its capacity.

95. Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691.

96. Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423.

In Maine the statute gives a right of action against a town for failure to maintain and keep in repair a public sewer only to those who have a right to connect with or to have drainage through it (Evans *v.* Portland, 97 Me. 509, 54 Atl. 1107 [*citing* Me. Rev. St. c. 16, § 9 (Me. Rev. St. (1903) c. 21, § 18)]), but nevertheless it has been held that upon obvious principles of justice one whose property has been injured by a neglect to keep a sewer in repair is entitled to recover for such injury, although he is not entitled to drainage through such sewer (Hamlin *v.* Biddeford, 95 Me. 308, 49 Atl. 1100).

97. Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582, holding that where the owner of property damaged by a change of grade, which diverts the water upon his premises, rejects an offer of the municipality to construct a culvert for the purpose of carrying off the water, he cannot recover for subsequent injuries which would thereby have been prevented.

98. Richardson *v.* Eureka, 110 Cal. 441, 42 Pac. 965.

of an assessment made by a municipal corporation for the construction of a sewer, which he had reason to suppose would be emptied, when completed, where it would be lawful to empty it, cannot be deemed an assent by him to the unlawful discharge of the sewerage upon his land, and will not affect his right of action therefor as a nuisance.[99] The owner of an unfinished building may recover from a city damages to such building caused by defective sewerage, although the contractor was bound by his contract to deliver a completed building, notwithstanding such injury.[1] Where the improper construction of a sewer is a temporary wrong liable to be removed at any time, plaintiff cannot recover on the ground that the sewer permanently diminishes the value of his estate.[2] Where it is the duty of a company to keep a raceway leading to its works in repair, although it does not own the way itself, if a city so constructs a sewer as to deposit dirt and gravel in the raceway and obstructs the flow of water therein, and the company is compelled to expend money to remove such obstruction, an action lies in its favor against the city to recover the money so expended.[3] Where matters complained of are in the nature of a public nuisance, an individual property-owner seeking relief or redress must show that he has sustained some special injury different from that sustained by the general public.[4]

99. Seifert *v.* Brooklyn, 15 Abb. N. Cas. (N. Y.) 97 [*affirmed* in 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664].

1. Nims *v.* Troy, 59 N. Y. 500, 509, where it is said: "No legal objection exists to a recovery by the plaintiff for that which was clearly his, although he might have an action against a third person who in turn would have a remedy over against the city."

2. Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466.

3. Elgin Hydraulic Co. *v.* Elgin, 74 Ill. 433.

4. *Illinois.*— Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247].

Indiana.— Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126, where it was held that such specific private injury was sufficiently shown by the complaint.

Maine.— Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466.

Massachusetts.— Breed *v.* Lynn, 126 Mass. 367 (holding that the owner of a wharf and dock, who dredges out a channel from his dock over flats belonging to other persons and lying between high and low water mark, cannot in a private suit recover damages from a city for an injury to the channel by the discharge of sewage from a common sewer into the dock, whereby the channel is partly filled up and the owner put to additional expense in getting vessels to his wharf, although he dredged out the channel openly and with a claim of right, the court saying: "The injuries to them did not differ in kind from those suffered by other persons owning lands bounding on the harbor or navigating over the flats, and the remedy must be sought by indictment for an injury to the public right of navigation, and not by private suit"); Brayton *v.* Fall River, 113 Mass. 218, 18 Am. Rep. 470 (holding that the owner of a wharf on a tide-water creek cannot maintain an action for an illegal obstruction to the creek, this being a common damage to all who use it; but he can maintain an action for an obstruction adjoining the wharf which prevents vessels from lying at it in the accustomed manner, this being a particular damage).

Rhode Island.— Clark *v.* Peckham, 9 R. I. 455.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1790. And see, generally, NUISANCES."

In New Jersey the rule is that the neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed upon it by law, is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect (Waters *v.* Newark, 56 N. J. L. 361, 28 Atl. 717 [*affirmed* in 57 N. J. L. 456, 35 Atl. 1131], holding that permitting a sewer to become so defective as to overflow adjacent lots was a public wrong, to be remedied by indictment, and did not give rise to a civil action by an individual who had been injured thereby, and that the fact that an individual specially injured gave notice to the municipal authorities is of no avail if the special injury was in fact part of an indictable offense. See also Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170), but where such public misfeasance has resulted not in the creation of a public nuisance for which an indictment would lie, but solely in the infliction of a private injury to the property of an individual, the remedy therefor is by a private action by the party damnified (Jersey City *v.* Kiernan, *supra*. See also Waters *v.* Newark, *supra*), and hence, in any given case of special damage the question as to the right of civil action is narrowed down to the inquiry whether such damage is or is not a part of a public wrong, for which an indictment would lie (Waters *v.* Newark, *supra*).

The water of the Passaic river, where the tide ebbs and flows, belongs to the state,

16. Proximate Cause. There must be some direct and immediate connection between the negligence of a city and the damage complained of in order to render the city liable for such damage.[5] But where the negligence of the municipality is the direct cause of the injury it is liable, although other causes may have contributed thereto;[6] but the liability in such case is limited to the damage which it has caused and does not extend to the entire damage.[7]

17. Contributory Negligence.[8] Where the negligence of plaintiff has contributed to the injury of which he complains he cannot recover;[9] and as a property-owner must exercise reasonable care to protect his property against injury,[10] if plaintiff could have prevented the injury complained of by the use of ordinary diligence and efforts, and at a moderate expense, his failure to do so constitutes

for uses common to all its citizens; and the city of Newark has no such special rights in that water, either by reason of its riparian ownership on the river, or by grant from the state, as to enable it to show an injury, distinct from that which will be suffered by the other inhabitants of the state, to authorize it to maintain its individual suit to restrain the pollution of the Passaic river by the discharge of the sewers of a town situated higher up the stream. Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55].

5. Kansas City *v.* Brady, 52 Kan. 297, 34 Pac. 884, 39 Am. St. Rep. 349 (holding that the mere fact that a city has constructed an insufficient culvert and obstructed a stream does not render it liable for an injury which such obstruction did not cause or contribute to); Reeder *v.* Omaha, 73 Nebr. 845, 103 N. W. 672; Wharton *v.* Bradford, 209 Pa. St. 319, 58 Atl. 621.

One who creates a nuisance on his own property in making a sewer to connect with a city sewer has no remedy against the city. Richards *v.* Waupun, 59 Wis. 45, 17 N. W. 975.

6. Frostburg *v.* Dufty, 70 Md. 47, 16 Atl. 642 (holding that the fact that a person's house is built on ground made by filling up a dry run, thus obstructing the natural outlet for the surface water from the surrounding hills, does not preclude him from recovering for the negligence of a city in the construction of a sewer to which surface water diverted from certain streets is conveyed, by reason of which such surface water is dammed up and floods his premises); Constitution Wharf Co. *v.* Boston, 156 Mass. 397, 30 N. E. 1134 (holding that where plaintiff had a right to erect wharves, and artificially deepen its docks, it is not barred from recovery from the city for filling up its docks with sewage because such use of its property changed somewhat the currents of the tide, and made the matter negligently discharged by the city from its sewers accumulate in larger quantities than it otherwise would have done).

Negligence concurring with extraordinary storm or flood see *supra*, XIV, C, 7, b.

7. Paris *v.* Cracraft, 85 Ill. 294, holding that a city will not be liable for all the damages sustained by a property-owner from the flooding of his premises, which he alleges resulted from its negligence in constructing a sewer of insufficient capacity, where it appears that the injury was caused in part by an adjacent owner's filling up property below grade.

8. See, generally, Negligence.

9. *Indiana.*—Valparaiso *v.* Ramsey, 11 Ind. App. 215, 38 N. E. 875, holding that, in an action for the overflowing of plaintiff's basement, through defendant city's negligent construction of a sewer, it is error to charge that if defendant promised to remedy the sewer, and plaintiff believed such promise and was justified in so believing during the time he so believed, he is not chargeable with contributory negligence on account of defects in the construction of his building or the arrangement of his premises.

Massachusetts.— O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385.

Ohio.— See Curry *v.* Cincinnati, 12 Ohio Cir. Ct. 736, 4 Ohio Cir. Dec. 545.

Oklahoma.— Guthrie *v.* Nix, 5 Okla. 555, 49 Pac. 917.

Texas.— Parker *v.* Laredo, 9 Tex. Civ. App. 221, 28 S. W. 1048; Wallace *v.* Dallas, 2 Tex. Unrep. Cas. 424.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1793.

Ordinance requiring abutting owner to keep gutters in repair.— A city ordinance requiring lot owners to keep the gutters opposite their premises in repair and free from obstructions applies only to the ordinary open gutters, and not to blind ditches or culverts covered with planking and soil, and hence a property-owner is not precluded from recovering for injuries from the obstruction of such a ditch or culvert on the ground that his neglect of duty caused the damage. Gilluly *v.* Madison, 63 Wis. 518, 24 N. W. 137, 53 Am. Rep. 299.

Unless plaintiff's negligence directly contributed to the injury it does not preclude a recovery. Johnson *v.* Cincinnati, 20 Ohio Cir. Ct. 657, 11 Ohio Cir. Dec. 318.

10. German Theological School *v.* Dubuque, 64 Iowa 736, 17 N. W. 153 (holding that where property has been injured in a freshet by reason of the defective construction of a sewer it is the duty of the owner to put his property in repair after the injury and protect it from continued and future injury); O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385.

contributory negligence which precludes a recovery against the city.[11] But the fact that a cellar wall was not constructed so as to keep out sewage from a defective sewer would not indicate negligence preventing recovery against the city, where there is nothing to show that the owner knew of the defective condition of the sewer.[12] A property-owner is justified in building in conformity with the established grade of the street in front of his property and is not chargeable with negligence in so doing, although there is in the street an embankment above the grade,[13] and the fact that a person has built his house on a lot below the grade of the street is not such negligence as will defeat his right to recover for the flooding of his property due to the negligence of the city.[14] It is no defense to an action against a municipality for the overflowing of land from a highway that structures erected by defendant on his own land prevented water escaping from his land as quickly as it would otherwise have done.[15] The mere occupation of an area constructed in the street is not contributory negligence precluding a recovery for an overflow of surface water.[16] It is not negligence for a person to store in his cellar goods likely to be damaged by an inundation;[17] nor is it, as a matter of law, contributory negligence for a property-owner to allow goods to remain in his cellar after the same has once been overflowed because of the obstruction of a sewer.[18] In an action for damages for the flooding of plaintiff's brick yard, a finding that plaintiff's negligence contributed to a loss of wood piled near the stream, in that he should have anticipated from knowledge of prior floods that the material would be carried away and damaged, is not a finding that he was guilty of contributory negligence precluding a recovery for the expense incurred in restoring the yard.[19]

18. Liability of Private Persons. An individual who, or a corporation which, wrongfully or negligently obstructs or causes the obstruction of city drains, sewers, or gutters, is liable for the damage to property-owners whose property is overflowed by reason thereof.[20] But the inhabitants of a city who invoke its

11. Simpson *v.* Keokuk, 34 Iowa 568 [*followed* in Hoehl *v.* Muscatine, 57 Iowa 444, 10 N. W. 830 (*followed* in Fulleam *v.* Muscatine, 57 Iowa 457, 10 N. W. 837)]; Cooper *v.* Dallas, 83 Tex. 239, 18 S. W. 565, 29 Am. St. Rep. 645; Dallas *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 321, holding that plaintiff can recover only such damage as could not be avoided by such care and means. But *compare* Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1, holding that it is no defense in an action against a city for the flooding of property by surface water from a street that plaintiff might have dug ditches or made other improvements which would have protected his property from injury, for he is under no legal obligation to perform a duty which devolves on the city.

Plaintiff is not entitled to recover anything under such circumstances, and hence an instruction that he may recover to the extent of what it would have cost him to take precautionary measures is erroneous. Hoehl *v.* Muscatine, 57 Iowa 444, 10 N. W. 830 [*followed* in Fulleam *v.* Muscatine, 57 Iowa 457, 10 N. W. 837].

What may be treated as a moderate expense will depend upon many considerations and must be determined by the peculiar circumstances of each case. Cooper *v.* Dallas, 83 Tex. 239, 18 S. W. 565, 29 Am. St. Rep. 645, holding that where, in an action against a city for injuries to property resulting from an overflow caused by a change of grade of a street and the deficiency of a sewer, it appeared that if plaintiff's premises had been raised to the new grade, at a cost of five hundred dollars, the overflow would have been prevented, and that the value of his property was greatly increased by the grading of the street, it was error to direct a verdict for defendant on the ground of plaintiff's contributory negligence.

12. Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423.

13. Damour *v.* Lyons City, 44 Iowa 276, so holding upon the ground that the owner has a right to presume that the embankment will be removed or culverts constructed through it to carry off the surface water.

14. Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158.

15. Parker *v.* Nashua, 59 N. H. 402, holding that the same rule applies to a sidewalk constructed for purposes of travel.

16. Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783.

17. Damour *v.* Lyons City, 44 Iowa 276, the building having been built in conformity with the established grade of the street.

18. Taylor *v.* Austin, 32 Minn. 247, 20 N. W. 157.

19. Davelaar *v.* Milwaukee, 123 Wis. 413, 101 N. W. 361.

20. Ball *v.* Armstrong, 10 Ind. 181 (holding that where a person in erecting a build-

power to construct and control a sewer and who use the sewer after its completion for the purpose and in the way prescribed by law, are not liable jointly with the city for the damages which result to third persons from the negligence of the city in the construction, management, or operation of the sewer.[21] Where the grade of a street has been changed by a person owning property fronting on it and the street so changed has been for fifteen years acquiesced in and used as a highway, it will be presumed, in the absence of proof to the contrary, in an action for damages caused by such change in obstructing a watercourse, that the change was made under the direction of the public authorities.[22]

19. Liability of Contractor. An independent contractor doing work for a city is not liable for consequential damages where there was no negligence on the part of the city in creating the plan and fixing the location of the work, or on the part of the contractor in the construction of the work, and no departure from the plan adopted;[23] but the contractor is liable if there was negligence in a faulty plan and location of the work so as to make it a dangerous obstruction to a river which ordinary prudence should have guarded against.[24] A contractor engaged in the construction of a municipal improvement under the direction and control of the city is not liable for injuries resulting from alleged negligence in the work where the negligence charged consists in the method adopted under the direction of the city authorities.[25] Nor is a contractor who constructed a sewer for a city liable for damages to private property caused by the bursting of the sewer after he has completed the work and the city has assumed control thereof.[26]

D. Streets — 1. In General — a. Common-Law Liability. In the absence of statutes imposing liability it has been held in some jurisdictions that the duties of a municipal corporation with regard to its streets are governmental and that it is not liable to an individual injured by its failure to keep them in repair or safe for travel.[27] In other jurisdictions it has been held that such duties are corporate

ing obstructs a gutter with building materials and thereby causes water to flow into the cellar of another, he is liable in damages); Orchard Place Land Co. *v.* Brady, 53 Kan. 420, 36 Pac. 728 (holding that where a city in grading a street filled up a natural watercourse and as a substitute constructed a small sewer under the embankment, and with the consent of a land company extended the same several feet on its private property, and the land company graded up its lots and continued the city sewer through its own property, and subsequently the sewer of the land company on account of its negligent construction fell in and obstructed the sewer built by the city, the land company was liable for the damages to plaintiff's land resulting from its overflow); Helbling *v.* Allegheny Cemetery Co., 201 Pa. St. 171, 50 Atl. 970.

21. Carmichael *v.* Texarkana, 116 Fed. 845, 54 C. C. A. 179, 58 L. R. A. 911.

22. Weitershausen *v.* Jones, 131 Pa. St. 62, 18 Atl. 1072.

23. De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237, holding that in such case neither the contractor nor the city is liable for consequential damages.

24. De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237, holding that in such case the contractor and the city are jointly and severally liable for the entire damage.

25. First Presb. Cong. *v.* Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504.

26. First Presb. Cong. *v.* Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504, so holding, although at the time of the bursting of the sewer the city had not adopted a formal ordinance accepting the work.

27. *Arkansas.*— Collier *v.* Ft. Smith, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237; Ft. Smith *v.* York, 52 Ark. 84, 12 S. W. 157; Arkadelphia *v.* Windham, 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32.

Connecticut.— Beardsley *v.* Hartford, 50 Conn. 529, 47 Am. Rep. 677. See Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397.

Massachusetts.— Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63.

Michigan.— Roberts *v.* Detroit, 102 Mich. 64, 64 N. W. 450, 27 L. R. A. 572; McArthur *v.* Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687; McCutcheon *v.* Homer, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212; Detroit *v.* Blackeby, 21 Mich. 84, 4 Am. Rep. 450.

New Hampshire.— Farnum *v.* Concord, 2 N. H. 392. But *compare* Wheeler *v.* Troy, 20 N. H. 77 [*questioned* in Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302].

New Jersey.— Carter *v.* Rahway, 57 N. J. L. 196, 30 Atl. 863 [*affirming* 55 N. J. L. 177, 26 Atl. 96]; Pray *v.* Jersey City, 32 N. J. L. 394.

and the municipal corporation is liable for the neglect thereof.[28] And by the great weight of authority it is held that where municipal corporations are invested with exclusive authority and control over the streets within their corporate limits and with means for their construction, improvement, and repair, a duty arises to the public from the nature of the powers granted to keep the streets in a reasonably safe condition for the ordinary use to which they are subjected and a corresponding liability exists to respond in damages to those injured by a neglect to perform the duty,[29] although in a few jurisdictions it has been held that no such

South Carolina.— Young *v.* Charleston, 20 S. C. 116, 47 Am. Rep. 827.

Vermont.— Bates *v.* Rutland, 62 Vt. 178, 20 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363. See Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1587–1591.

Where streets are constructed by special assessments.— The fact that a part of the expense for constructing or repairing a street will be paid for by those whose property is specially benefited thereby does not make the duty of repairing the streets any less a governmental one than if the entire expense were to be paid by a general city tax. Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218.

28. *Colorado.*— Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705.

Idaho.— Carson *v.* Genesee, 9 Ida. 244, 74 Pac. 862, 108 Am. St. Rep. 127.

Minnesota.— Welter *v.* St. Paul, 40 Minn. 460, 42 N. W. 392, 12 Am. St. Rep. 752. *Compare* Snider *v.* St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

New York.— Hines *v.* Lockport, 50 N. Y. 236.

Pennsylvania.— See Fritsch *v.* Allegheny, 91 Pa. St. 226.

Tennessee.— Knoxville *v.* Bell, 12 Lea 157; Memphis *v.* Lasser, 9 Humphr. 757.

Washington.— Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1587–1591.

29. *Alabama.*— Selma *v.* Perkins, 68 Ala. 145; Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46.

Colorado.— Denver *v.* Williams, 12 Colo. 475, 21 Pac. 617; Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594; Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632; Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705.

Dakota.— Larson *v.* Grand Forks, 3 Dak. 307, 19 N. W. 414.

Delaware.— Pierce *v* Wilmington, 2 Marv. 306, 43 Atl. 162; Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451 See Anderson *v.* Wilmington, 8 Houst 516, 19 Atl. 509.

Florida.— Jacksonville *v.* Drew, 19 Fla. 106, 45 Am. Rep. 5; Tallahassee *v.* Fortune, 3 Fla. 19, 52 Am. Dec 358.

Georgia.— Greensboro *v.* McGibbony, 93 Ga. 672, 20 S. E. 37; Brunswick *v.* Braxton, 70 Ga. 193; Rome *v* Dodd, 58 Ga. 238; Parker *v.* Macon, 39 Ga. 725, 99 Am. Dec. 486.

Idaho.— Carson *v.* Genesee, 9 Ida. 244, 74 Pac. 862, 108 Am. St. Rep. 127.

Illinois.— Sterling *v.* Thomas, 60 Ill. 264; Bloomington *v.* Bay, 42 Ill. 503; Monmouth *v.* Sullivan, 8 Ill. App. 50.

Indiana.— Grove *v.* Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Higert *v.* Greencastle, 43 Ind. 574; Williamsport *v.* Lisk, 21 Ind. App. 414, 52 N. E. 628; Decatur *v.* Stoops, 21 Ind. App. 397, 52 N. E. 623; Worthington *v.* Morgan, 17 Ind. App. 603, 47 N. E. 235.

Iowa.— Nocks *v.* Whiting, 126 Iowa 405, 102 N. W. 109, 106 Am. St. Rep. 371; Beazan *v.* Mason City, 58 Iowa 233, 12 N. W. 279; Clark *v.* Epworth, 56 Iowa 462, 9 N. W. 359; Montgomery *v.* Des Moines, 55 Iowa 101, 7 N. W. 421; Case *v.* Waverly, 36 Iowa 545; Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200.

Kansas.— Eudora *v.* Miller, 30 Kan. 494, 2 Pac. 685; Jansen *v.* Atchison, 16 Kan. 358. See Kansas City *v.* Bermingham, 45 Kan. 212, 25 Pac. 569; Topeka *v.* Tuttle, 5 Kan. 311.

Louisiana.— Cline *v.* Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851; O'Neill *v.* New Orleans, 30 La. Ann. 220, 31 Am. Rep. 221.

Maryland.— See Baltimore *v.* Marriott, 9 Md. 160, 66 Am. Dec. 326.

Minnesota.— Welter *v.* St. Paul, 40 Minn. 460, 42 N. W. 392, 12 Am. St. Rep. 752; Young *v.* Waterville, 39 Minn. 196, 39 N. W. 97; Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359; Shartle *v.* Minneapolis, 17 Minn. 398.

Mississippi.— Whitfield *v.* Meridian, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A. 834; Bell *v.* West Point, 51 Miss. 262.

Missouri.— Vogelgesang *v.* St. Louis, 139 Mo. 127, 40 S. W. 653; Haniford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Loewer *v.* Sedalia, 77 Mo. 431; Halpin *v.* Kansas City, 76 Mo. 335; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; Bassett *v.* St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Blake *v.* St. Louis, 40 Mo. 569.

Montana.— May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759; Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756; Sullivan *v.* Helena, 10 Mont. 134, 25 Pac. 94.

Nebraska.— Lincoln *v.* Smith, 28 Nebr. 762, 45 N W. 41; Wahoo *v.* Reeder, 27 Nebr. 770, 43 N. W. 1145; Omaha *v.* Olmstead, 5 Nebr. 446.

implied liability arises.[30] And likewise where the specific duty is imposed by charter upon a city to keep its streets in repair, and means are granted to perform it, the general rule is that an individual injured by an omission or neglect to perform it may maintain an action for damages.[31]

b. Statutory and Charter Provisions — (I) *Imposing Liability.* In many jurisdictions express statutes now impose liability upon municipal corporations to persons specially injured by reason of defects or obstructions in the streets,[32]

Nevada.— See McDonough *v.* Virginia City, 6 Nev. 90.

New York.— Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 [*following* Dubois *v.* Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804]; Nelson *v.* Canisteo, 100 N. Y. 89, 2 N. E. 473; Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Weed *v.* Ballston Spa, 76 N. Y. 329; Hines *v.* Lockport, 50 N. Y. 236; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Hickok *v.* Plattsburgh, 16 N. Y. 161; Hutson *v.* New York, 9 N. Y. 163, 59 Am. Dec. 526; Koch *v.* Edgewater, 18 Hun 407; Peach *v.* Utica, 10 Hun 477; Clark *v.* Lockport, 49 Barb. 580; Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563]; Stebbins *v.* Oneida, 1 Silv. Sup. 240, 5 N. Y. Suppl. 483; Davenport *v.* Ruckman, 10 Bosw. 20 [*affirmed* in 37 N. Y. 568, 5 Transcr. App. 254]; McSherry *v.* Canandaigua, 12 N. Y. Suppl. 751 [*affirmed* in 129 N. Y. 612, 29 N. E. 821]; Stebbins *v.* Oneida, 8 N. Y. Suppl. 940. But *compare* Peck *v.* Batavia, 32 Barb. 634; Cole *v.* Medina, 27 Barb. 218.

North Dakota.— Ludlow *v.* Fargo, 3 N. D. 485, 57 N. W. 506.

Oklahoma.— Guthrie *v.* Swan, 5 Okla. 779, 51 Pac. 562.

Oregon.— Farquar *v.* Roseburg, 18 Oreg. 271, 22 Pac. 1103, 17 Am. St. Rep. 732.

Texas.— Baugus *v.* Atlanta City, 74 Tex. 629, 12 S. W. 750; Klein *v.* Dallas, 71 Tex. 280, 8 S. W. 90; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Galveston *v.* Posnainsky, 62 Tex. 118 [*distinguishing* Navasota *v.* Pearce, 46 Tex. 525, 26 Am. Rep. 279].

Virginia.— Roanoke *v.* Harrison, (1894) 19 S. E. 179; McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727; Orme *v.* Richmond, 79 Va. 86; Noble *v.* Richmond, 31 Gratt. 271, 31 Am. Rep. 726.

Washington.— Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76; Lorence *v.* Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42; Saylor *v.* Montesano, 11 Wash. 328, 39 Pac. 653; Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 5 Pac. 606.

West Virginia.— Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512; Curry *v.* Mannington, 23 W. Va. 14; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep 780.

United States.— Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Chicago *v.* Robbins, 2 Black 418, 17 L. ed. 298; Delger *v.* St. Paul, 14 Fed. 567, 4 McCrary 634.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1589.

Annexed territory.— The same rule applies as to annexed territory where under the annexation statute the new territory is added subject to the same laws, ordinances, regulations, obligations, liabilities, etc., as if it had been included within the municipality at the time of the grant and adoption of the first charter of organization thereof. Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

30. Detroit *v.* Blackeby, 21 Mich. 84, 4 Am. Rep. 450. See Colwell *v.* Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Parker *v.* Rutland, 56 Vt. 224. See also cases cited *supra*, note 27.

31. *Alabama.*— Selma *v.* Perkins, 68 Ala. 145; Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656; Smoot *v.* Wetumpka, 24 Ala. 112.

Illinois.— Chicago *v.* Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; Springfield *v.* Le Claire, 49 Ill. 476; Browning *v.* Springfield, 17 Ill. 143, 63 Am. Dec. 345.

Missouri.— Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634.

New York.— See Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261].

North Carolina.— Bunch *v.* Edenton, 90 N. C. 431.

Ohio.— Evans *v.* Cincinnati, 1 Ohio Dec. (Reprint) 462, 10 West. L. J. 122.

Oregon.— Farquar *v.* Roseburg, 18 Oreg. 271, 22 Pac. 1103, 17 Am. St. Rep. 732.

Pennsylvania.— Erie *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87.

Virginia.— Danville *v.* Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162.

West Virginia.— See Griffin *v.* Williamstown, 6 W. Va. 312.

United States.— Cleveland *v.* King, 132 U. S. 295, 10 S. Ct. 90, 33 L. ed. 334 [*affirming* 28 Fed. 835]; Nebraska City *v.* Campbell, 2 Black 590, 17 L. ed. 271; Weightman *v.* Washington, 1 Black 39, 17 L. ed. 52.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1591.

Contra.— Roberts *v.* Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; Young *v.* Charleston, 20 S. C. 116, 47 Am. Rep. 827.

32. See the statutes of the several states. And see the following cases:

Connecticut.— Hillyer *v.* Winsted, 77 Conn. 304, 59 Atl. 40; Hall *v.* Norwalk, 65 Conn. 310, 32 Atl. 400; Manchester *v.* Hartford, 30 Conn. 118.

Maine.— Davis *v.* Bangor, 42 Me. 522.

such liability being restricted in some instances to those cases in which the duty to repair is not charged upon some other person.[33] The liability created by such statutes cannot be extended by construction or implication,[34] nor by contract.[35]

(II) *Exempting From Liability.* A city may be specifically exempted from liability by its charter,[36] in which case general statutes imposing liability are inapplicable;[37] but a provision in the charter of a city giving it power to establish, open, alter, and improve all avenues, streets, and sidewalks, and providing that it shall not be liable for failure to exercise such power, does not relieve it from liability for defects in streets and sidewalks once they are established;[38] nor does the fact that a statute declares that every city is responsible for injuries to property within its limits by mobs or riots indicate a legislative intent to exempt cities from liability for all other torts.[39]

e. Lack of Means or Funds Where the municipal corporation has no means within its control to effect repairs it is not liable for the defective condition of its streets,[40] and the same rule has been held to apply where there is no power to

Massachusetts.— See Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336.

Michigan.— Thompson *v.* West Bay City, 137 Mich. 94, 100 N. W. 280; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; Finch *v* Bangor, 133 Mich. 149, 94 N. W. 738; Roberts *v.* Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R A. 572; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652; Joslyn *v.* Detroit, 74 Mich. 458, 42 N. W. 50; Alexander *v.* Big Rapids, 70 Mich. 224, 38 N. W. 227 (holding that Howell Annot. St. § 1442, which declares the liability of a city for damages to persons by reason of defective cross walks, although repealed by Laws (1887), p. 345, § 1, was substantially reënacted thereby, so that an action brought under the first section, before the passage of the latter law, was not affected); McArthur *v.* Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687; Burnham *v.* Byron Tp., 46 Mich. 555, 9 N. W. 851; Grand Rapids *v.* Wyman, 46 Mich. 516, 9 N. W. 833.

New Hampshire.— Gilman *v.* Laconia, 55 N H. 130, 20 Am. Rep. 175; Johnson *v.* Haverhill, 35 N. H. 74.

Oregon.— Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925.

Rhode Island.— Taylor *v.* Peckham, 8 R. I. 349. 91 Am. Dec. 235, 5 Am. Rep. 578.

Wisconsin.— Daniels *v.* Racine, 98 Wis. 649, 74 N. W. 553; Cairncross *v.* Pewaukee, 78 Wis. 66, 47 N. W. 13. 10 L R. A. 473; Stilling *v.* Thorp, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 29; Ward *v.* Jefferson, 24 Wis. 342; Cook *v.* Milwaukee, 24 Wis. 270, 1 Am. Rep. 183.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1588.

33. See the statutes of the several states. And see Hall *v.* Norwalk, 65 Conn. 310, 32 Atl. 400.

34. Bartram *v.* Sharon, 71 Conn. 686, 43 Atl. 143, 71 Am. St. Rep. 225, 46 L. R. A. 144; Brown *v.* Skowhegan, 82 Me. 273, 19 Atl. 399; Moulton *v.* Sanford, 51 Me. 127; Detroit *v.* Putnam, 45 Mich. 263. 7 N. W. 815; Taylor *v.* Peckham, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 575.

Failure to construct sidewalk.—A statute imposing liability for failure to keep walks in repair does not impose liability for personal injuries resulting solely from a property holder's failure to construct a sidewalk in front of his premises as ordered. Shietart *v.* Detroit, 108 Mich. 309, 66 N. W. 221.

Cities as included by provision as to towns. — A statute imposing a liability upon towns except where special and inconsistent provisions are made with regard to particular towns, counties, cities, or villages imposes liability upon cities. Kittredge *v.* Milwaukee, 26 Wis. 46.

General highway law.—A statute affording a right of action for injuries resulting from the condition of public roads will, it has been held, impose no liability because of municipal streets. Carter *v.* Rahway, 55 N. J. L. 177, 26 Atl. 96 [*affirmed* in 57 N. J. L. 196, 30 Atl. 863].

35. Rouse *v.* Somerville, 130 Mass. 361.

36. Parsons *v.* San Francisco, 23 Cal. 462, holding such a provision not unconstitutional as taking property for public use without compensation or as preventing any person from enjoying the inalienable rights of life and liberty, or acquiring, possessing, and protecting property, or pursuing and obtaining safety and happiness. But *compare* Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451, holding that the act of April 24, 1889, imposing on the owner of land in a city the sole responsibility for damages to persons or property by defects in, or obstructions on, the footway in front of his premises, unless caused by the city or its agents, is unconstitutional and void, so far as it relates to a city whose charter, accepted and acted under, imposed the liability on the city, the right to alter any of its provisions not being expressly reserved by it, or secured by the constitution.

37. See Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925.

38. Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

39. May *v.* Anaconda, (Mont. 1901) 66 Pac. 759.

40. Whitfield *v.* Meridian, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A.

raise a fund for the payment of damages;[41] but the mere absence of funds is no defense,[42] especially where warrants may be drawn against a tax levy,[43] or the expense charged against abutting property,[44] or the city has not exhausted all the means within its control.[45] So it is no defense that all available funds have been expended in the repair of other streets.[46]

d. Delegation of Liability. The duty of a municipal corporation to keep its streets in repair and in a safe condition for travel, when it has once arisen, cannot be delegated;[47] as by entering into a contract under which a third person assumes the duty.[48] And the city cannot shield itself behind the negligence of its officers or agents whose special duty it may be to repair the streets or remove obstructions.[49] Where the duty is imposed by law not upon the corporation but

834; Weed *v.* Ballston Spa, 76 N. Y. 329; Hines *v.* Lockport, 50 N. Y. 236 [*affirming* 41 How. Pr. 435]. See *supra*, XIV, D, 1, a.

41. Williams *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 531, holding that a taxing district having no power to levy taxes to meet such liability is not liable for injuries sustained from defective streets.

42. Peace *v.* Utica, 10 Hun (N. Y.) 477 (holding that a city's liability for injuries from defects in its streets or sidewalks, which it was bound to keep in repair, does not depend on whether it has funds to pay for repairs, but on whether it has the power to raise funds for such expenses); Hutson *v.* New York, 5 Sandf. (N. Y.) 289 [*affirmed* in 9 N. Y. 163, 59 Am. Dec. 526]; Erie *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87 (so holding where funds might have been raised by taxation); McKinney *v.* Brown, (Tex. Civ. App. 1904) 81 S. W. 88; Dallas *v.* Strayer, (Tex. Civ. App. 1903) 73 S. W. 980; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558 (holding that every municipality is bound, at its peril, to keep its highways in sufficient repair or to take precautionary means to protect the public against danger of insufficient highways). See Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328 (holding that where there are no funds to maintain a bridge it should be closed); Moon *v.* Ionia, 81 Mich. 635, 46 N. W. 25 (holding that where the city has ample funds in its treasury, put there for the express purpose of repairing streets and sidewalks, it cannot escape liability for an accident caused by a defective walk on the ground that the funds raised by taxation for that year had all been exhausted, that the city was prohibited by its charter from pledging its credit, and that the money had been raised on the individual credit of members of the common council).

43. Mt. Vernon *v.* Brooks, 39 Ill. App. 426.

44. New Albany *v.* McCulloch, 127 Ind. 500, 26 N. E. 1074 (so holding where it was urged that city had reached the limit of indebtedness); Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Belton *v.* Turner, (Tex. Civ. App. 1894) 27 S. W. 831.

45. Lord *v.* Mobile, 113 Ala. 360, 21 So. 366; Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 [*affirming* 34 Hun 607]; Weed *v.* Ballston Spa, 76 N. Y. 329; Hines *v.* Lockport, 50 N. Y. 236 [*affirming* 41 How. Pr. 435]. See also Moon *v.* Ionia, 81 Mich. 635, 46 N. W. 25.

46. Whitfield *v.* Meridian, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A. 834. See Cincinnati *v.* Frazier, 19 Ohio Cir. Ct. 604, 10 Ohio Cir. Dec. 524; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558. But *compare* Monk *v.* New Utrecht, 104 N. Y. 552, 11 N. E. 268; Hyatt *v.* Rondout, 44 Barb. (N. Y.) 385.

47. Grogan *v.* Broadway Foundry Co., 87 Mo. 321; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; Welsh *v.* St. Louis, 73 Mo. 71; Blake *v.* St. Louis, 40 Mo. 569; McAlister *v.* Albany, 18 Oreg. 426, 23 Pac. 845.

48. Jacksonville *v.* Drew, 19 Fla. 106, 45 Am. Rep. 5; Blake *v.* St. Louis, 40 Mo. 569. Where the city closes the street for travel it may be freed from liability. Southwell *v.* Detroit, 74 Mich. 438, 42 N. W. 118. And see *infra* XIV, D, 2, e.

49. *Colorado.*— Denver *v.* Williams, 12 Colo. 475, 21 Pac. 617.

Illinois.— Champaign *v.* Patterson, 50 Ill. 61.

Indiana.— Turner *v.* Indianapolis, 96 Ind. 51.

Massachusetts.— Waldron *v.* Haverhill, 143 Mass. 582, 10 N. E. 481.

Missouri.— Tritz *v.* Kansas City, 84 Mo. 632; Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96.

New Hampshire.— Grimes *v.* Keene, 52 N. H. 330.

New York.— Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744; Bieling *v.* Brooklyn, 120 N. Y. 98, 24 N. E. 389; Conrad *v.* Ithaca, 16 N. Y. 158; Lloyd *v.* New York, 5 N. Y. 369, 55 Am. Dec. 347; Fitzgerald *v.* Binghamton, 40 Hun 332 [*affirmed* in 111 N. Y. 686, 19 N. E. 286]; Clark *v.* Lockport, 49 Barb. 580.

Washington.— See Normile *v.* Ballard, 33 Wash. 369, 74 Pac. 566.

United States.— Osborne *v.* Detroit, 32 Fed. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1591.

Liability for acts of town officers.— In an action against a town for damages caused by a defective highway, the fact that after defendant town's commissioners were elected but before the accident, part of the town was incorporated into a city, does not render the city in any way liable. Embler *v.* Wallkill, 132 N. Y. 222, 30 N. E. 404.

upon certain officers of the corporation,[50] or where the neglect of the official is with regard to a duty imposed by law and not by the municipality, the municipality is not liable;[51] but the fact that powers which are merely auxiliary and not exclusive are conferred upon a municipal board by statute will not relieve the city from liability.[52]

e. Duty Imposed on Abutting Owners. The fact that the municipal corporation has imposed upon abutting owners the duty of keeping sidewalks in repair or may construct or repair sidewalks at the expense of the abutting owners does not relieve the city from liability to persons injured by the defective condition of such walks,[53] nor will notice served on the abutter to repair relieve the city of its liability,[54] nor is a promise of an owner to repair sufficient to release it.[55]

f. Duty Imposed on Private Corporation. The fact that a railroad or street railroad company is bound to maintain and repair a street occupied by it will not relieve the city from liability to a person injured;[56] and the fact that a street

50 Arnold *v.* San Jose, 81 Cal. 618, 22 Pac. 877; Chope *v.* Eureka, 78 Cal. 588, 21 Pac. 364, 12 Am. St. Rep. 113, 4 L. R. A. 325; Tranter *v.* Sacramento, 61 Cal. 271; Winbigler *v.* Los Angeles, 45 Cal. 36. See King *v.* St. Landry Police Jury, 12 La. Ann. 858. But see Fitzgerald *v.* Binghamton, 40 Hun (N. Y.) 332 [*affirmed* in 111 N. Y. 686, 19 N. E. 286]. *Compare* Williams *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 531.

51. McCann *v.* Waltham, 163 Mass. 344, 40 N. E. 20; Twogood *v.* New York, 11 Daly (N. Y.) 167; Ergholt *v.* New York, 66 How. Pr. (N. Y.) 161, park commissioners. See Jensen *v.* Waltham, 166 Mass. 344, 44 N. E. 339.

52. Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508, holding that the duty to repair streets having once accrued cannot be avoided because auxiliary powers and duties are subsequently conferred by act of the legislature upon the police department.

Park commissioners.— The fact that a board of park commissioners is by statute intrusted with control of the work of embellishing in a certain way streets adjacent to a park does not relieve the city from the duty of maintaining such streets. Kleopfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908; Twogood *v.* New York, 11 Daly (N. Y.) 167. See also Richards *v.* New York, 48 N. Y. Super. Ct. 315.

Police commissioners.— Where an accident occurred upon a sidewalk in front of property belonging to the city, but in charge of the police commissioners, who were appointed by the governor, it was held that it was the duty of the city to keep the sidewalk in repair. Osborne *v.* Detroit, 32 Fed. 36.

A statute making a city a single road district and providing that it shall be under the control of street commissioners appointed by the council does not prevent an action being brought against the city. Rusch *v.* Davenport, 6 Iowa 443.

53. *Connecticut.*— Hillyer *v.* Winsted, 77 Conn. 304, 59 Atl. 40; Manchester *v.* Hartford, 30 Conn. 118.

Delaware.— Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

Massachusetts.— See Bacon *v.* Boston, 3 Cush. 174, holding that St. (1833) c. 128, respecting the streets of Boston, and the city ordinance passed in pursuance thereof, authorizing the surveyors of highways to regulate the width and height of sidewalks, and to accept and bind the city to maintain the same, when built and relinquished to the city by the abutters, do not exonerate the city, when a sidewalk has been thus built, accepted, and relinquished, from their liability, under Rev. St. c. 24, § 22, for defects therein.

Michigan.— See Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584, holding that the fact that a cross walk was built and repaired under the village charter, by assessment on the adjacent property, does not relieve the village from its duty to keep the walk in a safe condition for travel. But *compare* Marquette *v.* Cleary, 37 Mich. 296.

Nebraska.— Lincoln *v.* Pirner, 59 Nebr. 634, 81 N. W. 846; Lincoln *v.* O'Brien, 55 Nebr. 761, 77 N. W. 76.

New York.— Niven *v.* Rochester, 76 N. Y. 619; Haskell *v.* Penn Yan, 5 Lans. 43; Wallace *v.* New York, 2 Hilt. 440, 9 Abb. Pr 40, 18 How. Pr. 169.

Texas.— Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59; Dallas *v.* Strayer, (Civ. App. 1903) 73 S. W. 980; Dallas *v.* Jones, (Civ. App. 1898) 54 S. W. 606.

Wisconsin.— Cuthbert *v.* Appleton, 22 Wis. 642. See also Cronin *v.* Delavan, 50 Wis. 375, 7 N. W. 249; Colby *v.* Beaver Dam, 34 Wis. 285.

United States.— Webster *v.* Beaver Dam, 84 Fed. 280.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1593.

But *compare* Dooley *v.* Sullivan, 112 Ind. 451 14 N. E. 566, 2 Am. St. Rep. 209.

54. Russell *v.* Canastota, 98 N. Y. 496; Wyman *v.* Philadelphia, 175 Pa. St. 117, 34 Atl. 621.

55. Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826.

56. *Kansas.*— Kansas City *v.* Orr, 62 Kan. 61, 61 Pac. 397; Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012.

Massachusetts.— See Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118.

New York.— People *v.* Brooklyn, 65 N. Y.

railroad company has been permitted to occupy a street will not, without more, show that the street has been vacated so as to relieve the city from liability for its condition.[57] But in Canada a municipal corporation has been held not responsible for an accident which occurs on a road within the limits of the municipality, where the road is under the control of a turnpike company.[58] Where under the statute the municipality is not bound to keep highways in repair where other suitable provision is made therefor, the liability of the municipal corporation will not be limited by implication from a special obligation placed upon a railroad company to keep the highway in repair, except in so far as such obligation for the construction or operation of the railroad deprives the municipality of the power to discharge the general statutory duty to which it is subjected.[59]

2. Ways as to Which Duty Is Imposed — a. In General. In order that a municipal corporation may be responsible for an injury resulting from the condition of a traveled way, it is necessary that such way be a public street or highway which the corporation is bound to maintain and repair,[60] and to impose liability under a statute, the place to which the accident is attributable must be within the intention of the statute.[61] But the matter of the establishment of a

349; Binninger *v.* New York, 80 N. Y. App. Div. 438, 81 N. Y. Suppl. 226.

Ohio.— Steubenville *v.* McGill, 41 Ohio St. 235; Toledo Consol. St. R. Co. *v.* Sweeney, 8 Ohio Cir. Ct. 298, 4 Ohio Cir. Dec. 11.

Pennsylvania.— Aiken *v.* Philadelphia, 9 Pa. Super. Ct. 502, 43 Wkly. Notes Cas. 501; Philadelphia *v.* Weller, 4 Brewst. 24.

Rhode Island.— Watson *v.* Tripp, 11 R. I. 98, 23 Am. Rep. 420.

Texas.— Galveston, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 186.

Vermont.— Batty *v.* Duxbury, 24 Vt. 155.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1593.

If the city authorities suffer a railway company to erect a bridge at a street crossing, and maintain it, together with the approaches thereto, in such manner as to render the same a public nuisance, the city is liable for the consequences; and this liability cannot be evaded by urging the duty of the company to bridge its line at street crossings and keep same in proper condition. Bentley *v.* Atlanta, 92 Ga. 623, 18 S. E. 1013.

57. Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567. See also Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118; Steubenville *v.* McGill, 41 Ohio St. 235.

58. Brunet *v.* Corporation de la Pointe Claire, 14 Quebec Super. Ct. 278.

59. Noyes *v.* Gardner, 147 Mass. 505, 18 N. E. 423, 1 L. R. A. 354 [*citing* Hawks *v.* Northampton, 116 Mass. 420; Johnson *v.* Salem Turnpike, etc., Corp., 109 Mass. 522; Pollard *v.* Woburn, 104 Mass. 84; Davis *v.* Leominster, 1 Allen (Mass.) 182; Jones *v.* Waltham, 4 Cush. (Mass.) 299, 50 Am. Dec. 783]; Whitcher *v.* Somerville, 138 Mass. 454; Bailey *v.* Boston, 116 Mass. 423 note; White *v.* Quincy, 97 Mass. 430; Sawyer *v.* Northfield, 7 Cush. (Mass.) 490.

60. *Illinois.*— Chicago *v.* Hannon, 94 Ill. App. 143.

Maine.— Gilpatrick *v.* Biddeford, 51 Me. 182.

Maryland.— Baltimore *v.* Brannan, 14 Md. 227, holding that a city is not responsible for an obstruction in a way not a way of necessity, because others than the person injured used such way.

New Hampshire.— Smith *v.* Northumberland, 36 N. H. 38.

New York.— Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532; Sweet *v.* Poughkeepsie, 75 N. Y. App. Div. 274, 78 N. Y. Suppl. 60.

Vermont.— Hyde *v.* Jamaica, 27 Vt. 443.

Wisconsin.— Bishop *v.* Centralia, 49 Wis. 669, 6 N. W. 353.

61. McNeil *v.* Boston, 178 Mass. 326, 59 N. E. 810 (holding that a stairway leading into a public building was not a "highway or town way" or a "way entering on and uniting with an existing public highway"); Paine *v.* Brocton, 138 Mass. 564 (holding that if a private way has been opened from a public way, and has been dedicated to public use, and has become such a way as is within the Gen. St. c. 43, §§ 82, 83, a town is liable for a defect in the public way between the part wrought for public travel and the entrance of the private way, unless it has cautioned the public against entering upon such private way); Sullivan *v.* Boston, 126 Mass. 540 (holding that a part of a school-house lot, belonging to the city and adjoining a highway left open and graded uniformly with the sidewalk for convenience of access to the school-house was not "a way entering on and uniting with" the public highway); Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485 (holding that paths marked out, graded, paved, repaired, and kept clear of snow by a city, crossing common ground used by the inhabitants as a place of public resort, and serving as one means of communication between public streets with which they connect, between posts such as are used at the entrance of walks designed for foot passengers, are not ways "opened and dedicated to the public use"); Durgin *v.* Lowell, 3 Allen (Mass.) 398 (holding city not liable for defect in private way); Bowman *v.* Boston, 5 Cush. (Mass.) 1; Face *v.* Ionia, 90 Mich. 104, 51 N. W. 184 (holding

way as such a street or highway is not as a rule material.[62] Nothing more is necessary than to show that it was in actnal possession of the city and used by the public as a thoronghfare at the time.[63] Public use alone is not sufficient in the absence of a recognition of the thoroughfare or an exercise of jurisdiction over it by the municipality,[64] althongh snch municipal recognition and sanction may be by the acts of proper officers as well as by formal ordinances.[65] The mere dedication of land for a street will not impose liability for its condition upon the city unless the dedication has been accepted,[66] although a formal acceptance is not necessary.[67] A city not under any duty to construct a highway, which exercises its option to do so, is liable for failure to maintain the highway in a condition reasonably safe for the purpose for which it is intended.[68] Coming now to particular instances of the application of the general rnles relating to this subject, a municipal corporation has been held liable for the condition of a bridge,[69] a viaduct,[70]

that a public alley is not a public street or highway); Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042 (holding a city not liable for a parkway unless it was also a public highway); Bishop *v.* Centralia, 49 Wis. 669, 6 N. W. 353. See also Hemphill *v.* Boston, 8 Cush. (Mass.) 195, 54 Am. Dec. 749.

62. Makepeace *v.* Waterbury, 74 Conn. 360, 50 Atl. 876; Phelps *v.* Mankato, 23 Minn. 276; Sweeney *v.* Newport, 65 N. H. 86, 18 Atl. 86; Gallagher *v.* St. Paul, 28 Fed. 305. See Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832; Batty *v.* Duxbury, 24 Vt. 155.

Prescription.— Establishment of highway by prescription is sufficient. Todd *v.* Rome, 2 Me. 55; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Veale *v.* Boston, 135 Mass. 187; Aston *v.* Newton, 134 Mass. 507, 45 Am. Rep. 347; Smith *v.* Northumberland, 36 N. H. 38; Willey *v.* Portsmouth, 35 N. H. 303.

Illegality of establishment.—A city may be liable for defects in a street which it has laid out and invited the public to use, notwithstanding illegality in the proceedings to open it. Taake *v.* Seattle, 16 Wash. 90, 47 Pac. 220.

63. *Missouri.*— Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634; Beaudean *v.* Cape Girardeau, 71 Mo. 392; Boyd *v.* Springfield, 62 Mo. App. 456; Golden *v.* Clinton, 54 Mo. App. 100.

Montana.—May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759.

New York.— See Brusso *v.* Buffalo, 90 N. Y. 679.

Texas.— Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

United States.— Gallagher *v.* St. Paul, 28 Fed. 305.

64. State *v.* Wilson, 42 Me. 9; Garnett *v.* Slater, 56 Mo. App. 207; Millikin *v.* Bowling Green, 9 Ohio Cir. Ct. 493, 6 Ohio Cir. Dec. 483. See Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342.

65. Conner *v.* Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; Baldwin *v.* Springfield, 141 Mo. 205, 42 S. W. 717; Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634; Beaudean *v.* Cape Girardeau, 71 Mo. 392; Hill *v.* Sedalia, 64 Mo. App. 494; Golden *v.* Clinton, 54 Mo. App. 100; Schenck *v.* Butler, 50 Mo. App. 106; Walker *v.* Point Pleasant, 49 Mo. App. 244; Pittston *v.* Duffy, 1 Lack. Leg. Rec. (Pa.) 370. But see Imperial *v.* Wright, 34 Nebr. 732, 52 N. W. 374.

66. *Connecticut.*— Guthrie *v.* New Haven, 31 Conn. 308.

Kentucky.— Cochran *v.* Shepherdsville, 43 S. W. 250, 19 Ky. L. Rep. 1192. See Clay City *v.* Abner, 82 S. W. 276, 26 Ky. L. Rep. 602.

Maine.— Mayberry *v.* Standish, 56 Me. 342.

Maryland.— Ogle *v.* Cumberland, 90 Md. 59, 44 Atl. 1015; Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

Minnesota.— St. Paul *v.* Seitz, 3 Minn. 297, 76 Am. Dec. 753.

Missouri.— Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

Nebraska.— Imperial *v.* Wright, 34 Nebr. 732, 52 N. W. 374.

New York.— Oswego *v.* Oswego Canal Co., 6 N. Y. 257; Morse *v.* Troy, 38 Hun 301.

Ohio.— Millikin *v.* Bowling Green, 9 Ohio Cir. Ct. 493, 6 Ohio Cir. Dec. 483.

Virginia.— Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37, holding that acceptance may be by such long use by the public as to render its reclamation unjust and improper.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1596.

67. *Missouri.*— Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634.

Montana.— May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759.

Texas.— Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

Virginia.— Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

United States.— Gallagher *v.* St. Paul, 28 Fed. 305.

68. Prather *v.* Spokane, 29 Wash. 549, 70 Pac. 55, 92 Am. St. Rep. 923, 59 L. R. A. 346; Rowe *v.* Ballard, 19 Wash. 1, 52 Pac. 321; Taake *v.* Seattle, 18 Wash. 178, 51 Pac. 362.

69. Jacksonville *v.* Drew, 19 Fla. 106, 45 Am. Rep. 5; Johnson *v.* Milwaukee, 46 Wis. 568, 1 N. W. 187; Weightman *v.* Washington, 1 Black (U. S.) 39, 17 L. ed. 52. See, generally, BRIDGES.

70. Denver *v.* Baldasari, 15 Colo. App. 157, 61 Pac. 190.

a tunnel,[71] a boulevard,[72] a parkway,[73] an alley,[74] or a bicycle path,[75] but not for a sea beach;[76] nor is the municipality bound to furnish a safe and convenient access over private property to a place of exhibition licensed by it.[77] A city is not liable for a defective highway outside the state, although it was constructed under a statute of another state declaring the city liable for improper construction and repair.[78]

b. Unopened or Unimproved Streets. In order that liability may be imposed for the condition of a street it must have been opened for public use,[79] but it is not necessary that it shall have been improved.[80] Irregularity in the manner of ordering an improvement is no defense to an action for personal injuries resulting from negligence in failing to keep the street in a safe condition after it has been opened.[81]

c. Effect of Improvement, Repair, or Other Acts of Recognition of Streets. If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation cannot, when it is sued for such injury, throw the party upon an inquiry into the regularity of the proceedings by which the land became a street, or into the authority by which the street was originally established.[82] This rule

71. Chicago *v.* Hislop, 61 Ill. 86.

72. Burridge *v.* Detroit, 117 Mich. 557, 76 N. W. 84, 72 Am. St. Rep. 582, 42 L. R. A. 684.

73. Kleopfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908. See also Kleopfert *v.* Minneapolis, 93 Minn. 118, 100 N. W. 669. But *compare* Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042, holding that a city maintaining a public park for purposes other than business is not liable for an accident occurring, through the negligence of itself or its employees, on a parkway, which is not a public highway, even though a purely incidental profit results to the city from the management of the park.

74. Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56, holding that an alley retains its character as an alley, so as to render the city liable for injuries caused by obstructions therein, although the lots on both sides are owned by one person, and the alley is so intersected by the railroad as to make it impassable.

75. Prather *v.* Spokane, 29 Wash. 549, 70 Pac. 55, 92 Am. St. Rep. 923, 59 L. R. A. 346.

76. Murphy *v.* Brooklyn, 98 N. Y. 642. See McGraw *v.* District of Columbia, 3 App. Cas. (D. C.) 405, 25 L. R. A. 691.

77. Morgan *v.* Hallowell, 57 Me. 375.

78. Becker *v.* La Crosse, 99 Wis. 414, 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829. But *compare* Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289.

79. See cases cited *infra*, this note. And see *supra*, XIV, D, 2, a.

Paper street.— The mere fact that a street or public way appears upon the plat of the city is not sufficient to impose liability where it is not opened for public travel. Hunter *v.* Weston, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633; Heckler *v.* St. Louis, 13 Mo. App. 277 (holding that a city cannot be held liable for an accident occurring on land which the municipal authorities had laid out as a street and directed to be improved, unless it is shown that under the circumstances it was its duty to have prepared the street and to have thrown it open for travel prior to the accident); Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

The mere fact of establishing a highway by judicial action does not of itself so far open it to the public as to render the municipal corporation responsible for accidents that may occur to persons traveling thereon. Blaisdell *v.* Portland, 39 Me. 113, holding, however, that the inhabitants of a city are liable for damages occasioned by defects in one of their highways, after it is built and opened to the public, although the time they were allowed for its construction after acceptance had not elapsed, if they had reasonable notice of the defects.

Street undergoing repair.—A city is not liable for injuries to one attempting to cross an outlying and wholly improved street, undergoing repair, there being nothing in the surroundings to constitute an invitation from the authorities to use the street, and no reason for them to suppose it would be used under such circumstances. McNish *v.* Peekskill, 22 N. Y. App. Div. 631, 48 N. Y. Suppl. 210.

80. *Indiana.*— Lafayette *v.* Larson, 73 Ind. 367.

Kansas.— Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56.

Missouri.— Meiners *v.* St. Louis, 130 Mo. 274, 32 S. W. 637, holding that the liability of a city for injury on a street does not depend on whether it has changed the natural grade of said street so as to comply with its ordinance relative thereto.

Virginia.— Newport News *v.* Scott, 103 Va. 794, 50 S. E. 266.

Washington.— Brabon *v.* Seattle, 29 Wash. 6, 69 Pac. 365.

81. Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051; Seymour *v.* Salamanca, 137 N. Y. 364, 33 N. E. 304 [*affirming* 14 N. Y. Suppl. 947].

82. *Illinois.*— Pekin *v.* Newell, 26 Ill. 320, 79 Am. Dec. 378 (holding that if a city is

is applicable where the city has caused the street to be graded[83] or paved,[84] or otherwise improved.[85] So evidence that a city repaired a street is admissible to show that it has assumed control of the street;[86] but the fact that the city had repaired other streets in that part of the city where the street in question is located does not constitute an implied acceptance of the latter street;[87] nor does a subsequent resolution to repair a street render the city liable for a prior accident.[88]

d. Streets in Annexed Territory. A city by bringing a highway within its corporate limits and leaving it open for public travel becomes bound to maintain it,[89] and this is true whether it has been formally laid out and opened or has been established by user.[90]

e. Abandonment of Street. A municipal corporation may abandon a street and be exonerated from obligation to keep it in repair and otherwise suitable for public use.[91] But until it has employed such precautions as shall be sufficient to

authorized to construct a highway in a particular manner, but does it in a different one, it will be answerable in damages to a party sustaining injury upon it, as much as though it had not exceeded or deviated from its authority); Chicago *v.* Baker, 95 Ill. App. 413 [*affirmed* in 195 Ill. 54, 62 N. E. 892].

Kansas.— Leavenworth *v.* Laing, 6 Kan. 274.

Massachusetts.— See D'Amico *v.* Boston, 176 Mass. 599, 58 N. E. 158.

New Hampshire.— Gilbert *v.* Manchester, 55 N. H. 298.

New York.— Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418 [*affirming* 11 Hun 626]; May *v.* Brooklyn, 19 N. Y. Suppl. 670 [*affirming* 17 N. Y. Suppl. 348].

Texas.— Still *v.* Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; Waxahachie *v.* Connor, (Civ. App. 1896) 35 S. W. 692.

Wisconsin.— Hart *v.* Red Cedar, 63 Wis. 634, 24 N. W. 410; Lemon *v.* Hayden, 13 Wis. 159.

United States.— New York *v.* Sheffield, 4 Wall. 189, 18 L. ed. 416. See also Manchester *v.* Ericsson, 105 U. S. 347, 26 L. ed. 1099.

Unauthorized acts of officers.— The mere fact that a public officer may have exercised some authority over a public road will not impose liability for its condition upon the city, unless it appears that what he did was under and by the authority of the city. Chicago *v.* Hannon, 115 Ill. App. 183. See also Bishop *v.* Centralia, 49 Wis. 669, 6 N. W. 353.

Private lane.— The fact that the city has laid drains in a private lane within the city is not equivalent to an acceptance of such lane as a public street, nor does the city thereby incur any responsibility for an accident caused by a person falling on the sidewalk of such lane. Tougas *v.* Montreal, 12 Quebec Super. Ct. 532.

83. Leavenworth *v.* Laing, 6 Kan. 274; Treise *v.* St. Paul, 36 Minn. 526, 32 N. W. 857; Lindholm *v.* St. Paul, 19 Minn. 245; Ord *v.* Nasb, 50 Nebr. 335, 69 N. W. 964; Seymour *v.* Salamanca, 137 N. Y. 364, 33 N. E. 304.

84. Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418 [*affirming* 11 Hun 626].

85. Byerly *v.* Anamosa, 79 Iowa 204, 44 N. W. 359; Henderson *v.* White, 49 S. W. 764, 20 Ky. L. Rep. 1525; Meiners *v.* St. Louis, 130 Mo. 274, 32 S. W. 637; Hickok *v.* Plattsburgh, 41 Barb. (N. Y.) 130; Hutson *v.* New York, 5 Sandf. (N. Y.) 289 [*affirmed* in 9 N. Y. 163, 59 Am. Dec. 526]; Greenberg *v.* Kingston, 22 N. Y. Suppl. 511; McCormick *v.* Amsterdam, 18 N. Y. Suppl. 272.

86. McCann *v.* Bangor, 58 Me. 348; Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; O'Malley *v.* Lexington, 99 Mo. App. 695, 74 S. W. 890; Neal *v.* Marion, 129 N. C. 345, 40 S. E. 116.

Incidental improvement of private way.— If the officers of a town, in constructing or repairing a public way, dispose of the waste rocks or earth for the benefit of some individual, in such a manner as to improve a private way belonging to him, the repairs so made upon the private way are made for the owner of it, and not for the town; and the town is not thereby estopped from denying its location, in an action to recover for injuries sustained in consequence of defects in such way. Gilpatrick *v.* Biddeford, 51 Me. 182.

87. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

88. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

89. Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Richards *v.* New York, 48 N. Y. Super. Ct. 315; Hanley *v.* Huntington, 37 W. Va. 578, 16 S. E. 807.

90. Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412.

91. Anderson *v.* Turbeville, 6 Coldw. (Tenn.) 150. See also Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532 [*reversing* 47 Hun 356, and *distinguishing* Driggs *v.* Phillips, 103 N. Y. 77, 8 N. E. 514].

Validity of abandonment.— Where in separating the grade of a street and a railroad, acting under an order of the city council authorizing the mayor to designate the streets which should be closed, and to fix the conditions under which they should remain closed, the mayor authorized the railroad

effectually warn travelers in the exercise of ordinary care and prudence that such highway has been closed to public travel, its liability to all persons without notice remains unchanged;[92] and the question whether or not the means employed were sufficient to bring about an actual discontinuance of the highway is one of fact for the jury to determine in each particular case.[93] The decision of the question may involve the consideration of such matters as the situation of the highway, the modes commonly adopted for closing highways, the traveler's knowledge of such modes, and similar facts.[94]

f. Sidewalks and Cross walks — (i) *In General.* By the weight of authority a sidewalk is regarded as part of the street, and under the general rule imposing liability upon municipal corporations for the care of their streets[95] they are liable to persons injured by the defective conditions of such sidewalks,[96] although, as in the

company, which was required to perform the work, to close a part of the street, it nevertheless remained a public way, which the city was charged with the primary duty of keeping "reasonably safe for the use of travellers." Torphy *v.* Fall River, 188 Mass. 310, 74 N. E. 465.

92. *Connecticut.*— Munson *v.* Derby, 37 Conn. 298, 9 Am. Rep. 332.

Massachusetts.— White *v.* Boston, 122 Mass. 491.

Michigan.— Southwell *v.* Detroit, 74 Mich. 438, 42 N. W. 118.

Missouri.— Stephens *v.* Macon, 83 Mo. 345.

North Carolina.— Neal *v.* Marion, 129 N. C. 345, 40 S. E. 116, holding that in an action to recover for injuries caused by a defective sidewalk it is proper to charge that a place in a street used by the town authorities and the public cannot be abandoned by the town or city so as to put persons on notice not to use it, without some action on the part of municipal authorities showing that it had been abandoned as a walkway, as long as it continues to be used and has the appearance of being safe.

Wisconsin.— Bills *v.* Kaukauna, 94 Wis. 310, 68 N. W. 992.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1599.

93. Norwood *v.* Somerville, 159 Mass. 105, 33 N. E. 1108; Howard *v.* Mendon, 117 Mass. 585; Stephens *v.* Macon, 83 Mo. 345.

94. White *v.* Boston, 122 Mass. 491.

95. See *supra*, XIV, D, 1.

96. *Alabama.*— Lord *v.* Mobile, 113 Ala. 360, 21 So. 366.

District of Columbia.— O'Dwyer *v.* Northern Market Co., 24 App. Cas. 81.

Georgia.— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389.

Idaho.— McLean *v.* Lewiston, 8 Ida. 472, 69 Pac. 478; Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545, holding that a sidewalk is included within the term "streets and public grounds," as used in a city charter, making the city liable to any one for damages sustained by accident or casualty on account of the condition of "any street or public ground" within the city.

Illinois.— Decatur *v.* Besten, 169 Ill. 340, 48 N. E. 186; Champaign *v.* Patterson, 50 Ill. 61; Bloomington *v.* Bay, 42 Ill. 503; Wilmette *v.* Brachle, 110 Ill. App. 356 [*affirmed* in 209 Ill. 621, 71 N. E. 41]; Beardstown *v.* Clark, 104 Ill. App. 568 [*affirmed* in 204 Ill. 524, 68 N. E. 378]; Streator *v.* Liebendorfer, 71 Ill. App. 625; Sciota *v.* Norton, 63 Ill. App. 530.

Indiana.— Boswell *v.* Wakley, 149 Ind. 64, 48 N. E. 637; Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; Evansville *v.* Frazer, 24 Ind. App. 628, 56 N. E. 729.

Iowa.— Padelford *v.* Eagle Grove, 117 Iowa 616, 91 N. W. 899; Wheeler *v.* Boone, 108 Iowa 235, 78 N. W. 909, 44 L. R. A. 821.

Kentucky.— Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448; Louisville *v.* Johnson, 69 S. W. 803, 24 Ky. L. Rep. 685.

Louisiana.— Aucoin *v.* New Orleans, 105 La. 271, 29 So. 502.

Minnesota.— Bieber *v.* St. Paul, 87 Minn. 35, 91 N. W. 20; Graham *v.* Albert Lea, 48 Minn. 201, 50 N. W. 1108; Bohen *v.* Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; Furnell *v.* St. Paul, 20 Minn. 117.

Missouri.— Roe *v.* Kansas City, 100 Mo. 190, 13 S. W. 404; Fockler *v.* Kansas City, 94 Mo. App. 464, 68 S. W. 363 (holding city liable for space between sidewalk and curb); Wallis *v.* Westport, 82 Mo. App. 522; Streeter *v.* Breckenridge, 23 Mo. App. 244.

Nebraska.— Anderson *v.* Albion, 64 Nebr. 280, 89 N. W. 794; Lincoln *v.* O'Brien, 56 Nebr. 761, 77 N. W. 76.

New York.— Saulsbury *v.* Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254; Kirk *v.* Homer, 77 Hun 459, 28 N. Y. Suppl. 1009; Dougherty *v.* Horseheads, 73 Hun 443, 26 N. Y. Suppl. 642; Reinhard *v.* New York, 2 Daly 243; Wallace *v.* New York, 2 Hilt. 440, 9 Abb. Pr. 40, 18 How. Pr. 169; Gage *v.* Hornellsville, 2 N. Y. St. 351. But *compare* Herrington *v.* Corning, 51 Barb. 396; Hart *v.* Brooklyn, 36 Barb. 226.

Pennsylvania.— Kellow *v.* Scranton, 195 Pa. St. 134, 45 Atl. 676; Brown *v.* Towanda Borough, 24 Pa. Super. Ct. 378.

Texas.— Sherman *v.* Williams, 77 Tex. 310, 14 S. W. 130; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Dallas *v.* Meyers, (Civ. App. 1900) 55 S. W. 742; Dallas *v.* Jones, (Civ. App. 1898) 54 S. W. 606.

Virginia.— Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

case of streets, such liability is in some jurisdictions held not to arise in the absence of statute.[97] Liability is in some states expressly imposed by statute[98] or is deduced from statutes imposing liability for the condition of highways,[99] and liability for cross walks is also sometimes specifically imposed.[1] Where the duty is not on the corporation to construct sidewalks it has been held in some cases that to impose liability for their condition it must have assumed control of them;[2] but it is not relieved from this liability by reason of the fact that it does not recognize and assume jurisdiction by formal ordinance;[3] and when once built sidewalks

Washington.— Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 5 Pac. 606.

Extent of care required see *infra*, XIV, D, 4, a.

Bridges in sidewalk — Where the sidewalk of a street in a city crosses another street, and the crossing habitually used by foot passengers is a bridge over a drain, there being no stepping stones or other convenient crossing, such bridge is to all intents and purposes part of the sidewalk, and the city is liable for injuries sustained by foot passengers on account of defects therein to the same extent as if the injuries occurred on the sidewalk itself. Atlanta *v.* Champe, 66 Ga. 659. A city is not liable for a defect in a private bridge across a gutter or drainage ditch at the side of the street not at a regular public crossing or street intersection. Crawford *v.* Griffin, 113 Ga. 562, 38 S. E. 988.

Sidewalk upon county property.— Where a county inclosed only a part of the courthouse square as originally platted, and the remaining strip was used for many years as a street, and the sidewalk constructed by the county next to the square inclosed was in constant use by the people generally as a public thoroughfare of the city, the city is responsible for the sidewalk, the same as for others within its limits. Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658.

Outside of city limits.—A city is not liable for injuries on sidewalks without the city limits. Stealey *v.* Kansas City, 179 Mo. 400, 78 S. W. 599.

97. Saunders *v.* Gun Plains, 76 Mich. 182, 42 N. W. 1088; Williams *v.* Grand Rapids, 59 Mich. 51, 26 N. W. 279; Buchanan *v.* Barre, 66 Vt. 129, 28 Atl. 878, 44 Am. St. Rep. 829, 23 L. R. A. 488; St. John *v.* Campbell, 26 Can. Sup. Ct. 1. See also *supra*, XIV, D, 1, a.

98. See Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075 [*overruling* Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254], holding that in an action against a city for personal injuries resulting from a defective sidewalk, plaintiff need not allege or prove that the street had been used as a highway for the period of ten years, because Pub. Laws (1887), Act 264, § 4, which provides that that act, requiring cities to keep highways in repair, shall not apply to highways which have not been in use for ten years, provides further that nothing in that section shall exempt cities from keeping streets and sidewalks in a safe condition for public travel.

99. See Manchester *v.* Hartford, 30 Conn. 118; McCann *v.* Bangor, 58 Me. 348; Gould *v.* Boston, 120 Mass. 300 (holding that under Gen. St. c. 44, § 1, requiring towns and cities to keep "highways, town ways, streets, causeways and bridges" in repair, and sections 21, 22, and 26, making them responsible for defects in "highways" and bridges, and St. (1816) c. 90, authorizing the city of Boston to widen "alleys," etc., the city was liable for injuries from a defective footway which had been created by prescription); Hall *v.* Manchester, 40 N. H. 410; James *v.* Portage, 48 Wis. 677, 5 N. W. 31. But see Detroit *v.* Putnam, 45 Mich. 263, 7 N. W. 815, holding that Laws (1879), p. 223, which gives a right of action against municipal corporations for any injury sustained by reason of defective public highways, streets, bridges, cross walks, and culverts, does not render a municipal corporation liable for injuries caused by defective sidewalks.

1. Veale *v.* Boston, 135 Mass. 187; Weare *v.* Fitchburg, 110 Mass. 334; Williams *v.* Grand Rapids, 59 Mich. 51, 26 N. W. 279 (holding that a city which has not constructed a cross walk is not liable to one injured from a depression which, had a cross walk been constructed, would constitute a defect); O'Neil *v.* Detroit, 50 Mich. 133, 15 N. W. 48 (holding that where the question of what is to be considered a sidewalk and what a cross walk has received a settled construction by the practice of the city authorities in levying sidewalk rates, and requiring the owners of property to keep certain parts of their walks in repair, such construction will be followed in an action against the city for an injury caused by a defect in an alleged cross walk, in determining its liability therefor, the city being liable for defects in cross walks only); Pequignot *v.* Detroit, 16 Fed. 211 (holding that under Acts (1879), No. 244, relating to the collection of damages sustained by reason of a defective public highway, street or cross walk, and creating a liability in favor of persons sustaining injury on any public highway or street by reason of neglect to keep such highway, street, and all bridges and cross walks in good repair, a walk crossing a public alley is a cross walk, within such section, as distinguished from a sidewalk).

2. Beazan *v.* Mason City, 58 Iowa 233, 12 N. W. 279; Chapman *v.* Milton, 31 W. Va. 384, 7 S. E. 22.

3. Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132; Madisonville *v.* Pemberton, 75 S. W. 229, 25 Ky. L. Rep. 347; O'Malley *v.*

must be kept in repair;[4] and it is immaterial whether the municipality built the sidewalk or not.[5] Where for a term of years there is a general use by pedestrians of the part of a public street lying outside of the improved portion, the city may be deemed to have recognized such use and assumed responsibility for its being made safe, although no sidewalks have been constructed.[6]

(II) *Sidewalks and Crossings Built by Private Citizens.* Although a municipality permits a private person to build a sidewalk in front of his premises, the duty still devolves upon the city to see that it is kept in proper repair, and it will be liable for injuries caused by a failure in this respect.[7] So also where the sidewalk has been constructed without authority, the city having notice of the defect.[8] And even where it is the duty of the abutter to make repairs, the municipality is not relieved from liability.[9] The same rules have been applied to crossings.[10]

Lexington, 99 Mo. App. 695, 74 S. W. 890; Cronin *v.* Delavan, 50 Wis. 375, 7 N. W. 249.

4. Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 5 Pac. 606, holding that a city charter requiring, as a preliminary to the building of sidewalks, and assessing and levying taxes therefor, a petition by a majority of the property holders, or a vote by two thirds of the common council, in its favor, does not relieve the municipality of its duty to keep such sidewalks in repair when once built.

5. See *infra*, XIV, D, 2, f, (II).

6. Atchison *v.* Mayhood, 69 Kan. 672, 77 Pac. 549; Aston *v.* Newton, 134 Mass. 507, 45 Am. Rep. 347 (holding that a city may be liable for an accident caused by an obstruction in a traveled path between a street and a sidewalk, if such path is generally used as a path of convenience, with the knowledge and implied consent of the city); Neal *v.* Marion, 129 N. C. 345, 40 S. E. 116; James *v.* Portage, 48 Wis. 677, 5 N. W. 31. But *compare* Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168.

7. *Illinois.*— Mt. Carmel *v.* Blackburn, 53 Ill. App. 658; Flora *v.* Naney, 31 Ill. App. 493 [*affirmed* in 136 Ill. 45, 26 N. E. 645]; Champaign *v.* McInnis, 26 Ill. App. 338.

Iowa.—Brown *v.* Chillicothe, 122 Iowa 640, 98 N. W. 502.

Maine.—Hutchings *v.* Sullivan, 90 Me. 131, 37 Atl. 883.

Michigan.— Detwiler *v.* Lansing, 95 Mich. 484, 55 N. W. 361; Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721. See also Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584, holding that where a cross walk is maintained by a city on a level with the sidewalk, and an abutting landowner constructs a sidewalk on top of the old one, higher than the cross walk, where they join, thus making a step down, and the cross walk at this point is in a defective condition, the city is liable for injuries to a child falling from the sidewalk.

Minnesota.— Graham *v.* Albert Lea, 48 Minn. 201, 50 N. W. 1108; Furnell *v.* St. Paul, 20 Minn. 117.

Missouri.— Oliver *v.* Kansas City, 69 Mo. 79; Hill *v.* Sedalia, 64 Mo. App. 494; Streeter *v.* Breckenridge, 23 Mo. App. 244.

Nebraska.— Kinney *v.* Tekemah, 30 Nebr. 605, 46 N. W. 835; Plattsmouth *v.* Mitchell, 20 Nebr. 228, 29 N. W. 593.

New Hampshire.— Lambert *v.* Pembroke, 66 N. H. 280, 23 Atl. 81.

New York.— Saulsbury *v.* Ithaca, 94 N. Y. 27, 46 Am. Rep. 122 [*reversing* 24 Hun 12]; Hiller *v.* Sharon Springs, 28 Hun 344; Walker *v.* Lockport, 43 How. Pr. 366.

Ohio.— Alliance *v.* Campbell, 17 Ohio Cir. Ct. 595, 6 Ohio Cir. Dec. 762.

Pennsylvania.— Steel *v.* Huntingdon, 191 Pa. St. 627, 43 Atl. 398.

Texas.— Klein *v.* Dallas, 71 Tex. 280, 8 S. W. 90.

Wisconsin.— Hill *v.* Fond du Lac, 56 Wis. 242, 14 N. W. 25.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1603.

Bridge in sidewalk.—A bridge built by a private citizen with lumber furnished by the city, and forming part of a sidewalk of a platted city street, and used daily, is a public highway, and the city is responsible for personal injuries occasioned by its being covered with ice. McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

8. Higert *v.* Greencastle, 43 Ind. 574; Barnes *v.* Newton, 46 Iowa 567; Bromley *v.* Bodkin, 77 S. W. 696, 25 Ky. L. Rep. 1245.

9. See *supra*, XIV, D, I, e.

10. Aurora *v.* Bitner, 100 Ind. 396, holding that a city is liable for an injury sustained from the defective condition of a street crossing, the defect being one of which the city has notice; and the liability is the same, even though the crossing was constructed by an individual. *Compare* Fortune *v.* St. Joseph, (Mo. 1886) 1 S. W. 287, holding that a person injured by the breaking of a plank, placed across a gully in a public street by the residents of the neighborhood, but without the authority of the city, and at a place where the gully was not a part of the sidewalk or traveled way, cannot recover damages from the city for such injury.

Alley crossing.—A city is under no obligation to construct a crossing over an alley connecting the walks of the street, but if it elects to leave such alley in its natural state, it is its duty to keep it free from obstructions; and if it allows persons to place loose boards there which, by reason of their

g. Walks Outside of Highway. A municipal corporation is liable for damages resulting from its neglect to keep in a reasonably safe condition and repair a sidewalk built or controlled by it within the corporate limits, although it is in fact without the limits of the street,[11] as where it is on the right of way of a railroad company,[12] on the property of an abutting hotel,[13] or on the land of a private citizen;[14] but a city is not liable for a sidewalk established beyond the highway limits without its authority and of which it has not assumed control.[15]

3. Cause Of or Responsibility For Defects, Obstructions, or Dangerous Conditions — a. Acts or Omissions of Private Persons — (I) *In General.* The duty and consequent liability of a municipality to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city.[16] But in such cases the basis of the action being negligence,[17] it devolves upon plaintiff to show that the city had notice of the defect, or might have had knowledge thereof by the use of reasonable care and watchfulness.[18] But a city is not liable for injury caused by an obstruction which it had no agency in establishing and is powerless to remove.[19]

becoming warped and shifted about, renders it dangerous for persons having occasion to cross such alley, it will be liable to the same extent that it would be had it undertaken to construct a crossing and allowed it to become out of repair. Springfield *v.* Tomlinson, 79 Ill. App. 399.

11. Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246 [*affirming* 21 Ill. App. 326]; O'Neil *v.* West Branch, 81 Mich. 544, 45 N. W. 1023; Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62. See also Jewhurst *v.* Syracuse, 108 N. Y. 303, 15 N. E. 409, holding that where an injury is received by reason of a defective sidewalk, outside of the limits of a street, and not built by the city, nor under its control, the city is not liable; but if the boundary line of the street is not visible, so as to inform persons whether they are on the street, and the corporation has notice of its dangerous condition, but fails to erect a guard along the limits of the street, it will be liable for resulting injuries.

12. Mansfield *v.* Moore, 21 Ill. App. 326 [*affirmed* in 124 Ill. 133, 16 N. E. 246].

13. Foxworthy *v.* Hastings, 25 Nebr. 133, 41 N. W. 132, 31 Nebr. 825, 48 N. W. 901.

14. Roodhouse *v.* Christian, 55 Ill. App. 107 [*affirmed* in 158 Ill. 137, 41 N. E. 748]; Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Badams *v.* Toronto, 24 Ont. App. 8.

15. Doyle *v.* Vinalhaven, 66 Me. 348 (holding that a town is not liable for defects in a sidewalk built upon land illegally taken by the road commissioners, outside the limits); Allison *v.* Middletown, 10 N. Y. St. 421; Bishop *v.* Centralia, 49 Wis. 669, 6 N. W. 353 (holding that a city is not rendered liable for injuries received on a sidewalk on an approach over private lands to a bridge owned by a county by the mere fact that it had acquiesced in the use of the sidewalk by the public for several years). And see Stone *v.* Attleborough, 140 Mass. 328, 4 N. E. 570; Stockwell *v.* Fitchburg, 110 Mass. 305.

16. *Alabama.*— Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576.

Illinois.— Galesburg *v.* Higley, 61 Ill. 287.

Indiana.— Elkhart *v.* Ritter, 66 Ind. 136; Centerville *v.* Woods, 57 Ind. 192; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Massachusetts.— Bourget *v.* Cambridge, 159 Mass. 388, 34 N. E. 455; Snow *v.* Adams, 1 Cush. 443.

Michigan.— McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006.

Missouri.— Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108.

North Carolina.— Foy *v.* Winston, 126 N. C. 381, 35 S. E. 609.

Pennsylvania.— Koch *v.* Williamsport, 195 Pa. St. 488, 46 Atl. 67.

Washington.— McKnight *v.* Seattle, 39 Wash. 516, 81 Pac. 998.

West Virginia.— Curry *v.* Mannington, 23 W. Va. 14.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1606.

17. Dotton *v.* Albion, 57 Mich. 575, 24 N. W. 786; Davis *v.* Omaha, 47 Nebr. 836, 66 N. W. 859; Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Bush *v.* Geneva, 3 Thomps. & C. (N. Y.) 409; McCord *v.* Ossining, 10 N. Y. St. 407; Garrett *v.* Buffalo, 7 N. Y. St. 96; McConway *v.* Philadelphia, 209 Pa. St. 236, 58 Atl. 358. See also *infra*, XIV, D, 4, a.

18. See *infra*, XIV, D, 4, d, (I).

Where blasting is done in violation of express directions given by city officers and without their knowledge, the city is not responsible for any injury caused by it. Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35.

19. Belvin *v.* Richmond, 85 Va. 574, 8 S. E. 378, 1 L. R. A. 807, holding that where, by order of the judge of a state court, a rope is put across a public street of a city to prevent travel and the resulting noise, which disturbs the court, and a traveler is injured thereby, the city is not liable, having had no agency in causing the obstruction and being powerless to remove it.

(11) *Abutting Owners.* A municipal corporation is liable for injury resulting from an excavation or obstruction in one of its public streets, made by an abutting owner for his own purposes,[20] if the corporation had actual or constructive notice of the dangerous condition of the street for a sufficient length of time to enable it to guard the public safety.[21]

b. Acts of Railroad Company. The fact that the dangerous condition of a street resulted from acts of a railroad company does not exonerate the city from liability for injuries resulting to a person by reason of the condition of the street,[22] except where the defect in the highway is the necessary result of the building or operation of the railroad, and which therefore the city cannot obviate;[23] and

20. *Colorado.*— Denver *v.* Utzler, 38 Colo. 300, 88 Pac. 143.

Connecticut.— Boucher *v.* New Haven, 40 Conn. 456.

Kentucky.—Covington *v.* Johnson, 69 S. W. 703, 24 Ky. L. Rep. 602.

Maryland.— Baltimore *v.* Pendleton, 15 Md. 12.

Massachusetts.— Bacon *v.* Boston, 3 Cush. 174.

New Hampshire.— Conner *v.* Manchester, 73 N. H. 233, 60 Atl. 436.

New York.— Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261].

Ohio.— Alliance *v.* Campbell, 17 Ohio Cir. Ct. 595, 6 Ohio Cir. Dec. 762.

Pennsylvania.— Trego *v.* Honeybrook Borough, 160 Pa. St. 76, 28 Atl. 639.

West Virginia.— Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

United States.— Webster *v.* Beaver Dam, 84 Fed. 280.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1606.

21. *Indiana.*— Ft. Wayne *v.* De Witt, 47 Ind. 391.

New York.— Hume *v.* New York, 74 N. Y. 264; Sweet *v.* Gloversville, 12 Hun 302.

North Carolina.— Brown *v.* Lonisburg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677.

Pennsylvania.— Philadelphia *v.* Smith, (1889) 16 Atl. 493; Birmingham *v.* Dorer, 3 Brewst. 69.

Virginia.— McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691.

22. *District of Columbia.*— District of Columbia *v.* Sullivan, 11 App. Cas. 533.

Georgia.— Bentley *v.* Atlanta, 92 Ga. 623, 18 S. E. 1013.

Illinois.—Decatur *v.* Hamilton, 89 Ill. App. 561.

Indiana.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518.

Kansas.— Kansas City *v.* Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Ft. Scott *v.* Peck, 5 Kan. App. 593, 49 Pac. 111.

Maine.— Phillips *v.* Veazie, 40 Me. 96.

Massachusetts.— Hawks *v.* Northampton, 116 Mass. 420; Prentiss *v.* Boston, 112 Mass. 43; Pollard *v.* Woburn, 104 Mass. 84.

Michigan.— Cutcher *v.* Detroit, 139 Mich. 186, 102 N. W. 629.

Minnesota.— Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

Missouri.— McCarroll *v.* Kansas City, 64 Mo. App. 283.

New Hampshire.— Elliot *v.* Concord, 27 N. H. 204.

New York.— Byrne *v.* Syracuse, 79 Hun 555, 29 N. Y. Suppl. 912 [*affirmed* in 151 N. Y. 658, 46 N. E. 1145]; Wilson *v.* Watertown, 3 Hun 508, 5 Thomps. & C. 579.

North Carolina.— Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

Ohio.— Stenbenville *v.* McGill, 41 Ohio St. 235.

Rhode Island.— Watson *v.* Tripp, 11 R. I. 98, 23 Am. Rep. 420.

Vermont.— Barber *v.* Essex, 27 Vt. 62; Batty *v.* Duxbury, 24 Vt. 155; Willard *v.* Newbury, 22 Vt. 458.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1607.

Repairs by traction company.— If a traction company chargeable with the repairs of a street is in charge of such repairs, the city is not liable for an accident caused thereby; but if it has finished the work and left the street in a dangerous condition, which has existed long enough to charge the city with notice thereof, then the city is liable in damages. Aiken *v.* Philadelphia, 9 Pa. Super. Ct. 502, 43 Wkly. Notes Cas. 501.

Completion of work enjoined.— In an action against a city for personal injuries caused by a defect in a cross walk left by a street railway company in building its track, it is no defense that thirty days previous to the injury such company was enjoined from completing its work, where such city was not a party to the injunction suit, and in its answer admits that at the time of the injury it was its duty to keep the walk in repair. Dale *v.* Syracuse, 71 Hun (N. Y.) 449, 24 N. Y. Suppl. 968 [*affirmed* in 148 N. Y. 750, 43 N. E. 986].

23. Tatman *v.* Benton Harbor, 115 Mich. 695, 74 N. W. 187; Willey *v.* Portsmouth, 35 N. H. 303; Fitch *v.* New York, 55 N. Y. Super. Ct. 494, 2 N. Y. Suppl. 700 [*affirmed* in 119 N. Y. 608, 23 N. E. 1143].

Limitation of liability.— The general liability of a city to keep its street safe and convenient cannot be limited by implication, except to the extent to which the construction and operation of the railroad deprives the city of the power to discharge the duty imposed upon it by law. Davis *v.* Leominster, 1 Allen (Mass.) 182; Jones *v.* Waltham, 4 Cush. (Mass.) 299, 50 Am. Dec. 783.

Illegal operation of road.—A town is not liable for injuries done to a traveler on the

although the railroad may be also liable, and responsible over to the corporation for whatever damages it is compelled to pay in consequence of it, that does not affect the liability of the municipality to the party injured.[24] Nor does a general railroad act which gives a company authority to occupy a street of a municipal corporation with its tracks discharge the city from its duty to the public to keep its streets in a reasonably safe condition, nor relieve it from liability for the consequences of its negligence in that respect.[25]

c. Acts of Water Company. The right of a person injured by falling at night into an excavation in a city street insufficiently lighted and guarded is not defeated by the fact that the excavation was made by a company engaged in constructing waterworks for the city,[26] provided the city had notice of its existence and failed to remove it.[27] So also the fact that a hydrant was erected by a water company under a license for that purpose does not relieve a city of liability after it has notice that the street is thereby rendered unsafe and dangerous.[28]

d. Acts of Independent Public Officers. If it is the duty of a municipality to keep its streets in repair, or to guard the safety of travelers in case the streets are necessarily out of repair, it cannot escape liability for injuries occasioned by an unguarded excavation or other defects of which it has notice, even though made by an independent public officer in the performance of his duty. The liability is not based upon the act or omission of such officer, but upon the duty of the city as to streets.[29]

e. License or Permission of Municipality — (i) *When Granted in Pursuance of Lawful Authority.* There are some authorities which hold a municipality responsible for the negligence of one who, acting under its license or permission lawfully granted, creates any defect or obstruction which endangers the safety of persons using the streets.[30] These cases proceed upon the theory that, being charged with the care of its streets, it is the duty of the city to supervise the work permitted to be done and to use suitable precautions to prevent accidents;[31]

highway by a locomotive engine run by a railroad corporation on a track illegally laid across the highway. Vinal *v.* Dorchester, 7 Gray (Mass.) 421.

24. Hawks *v.* Northampton, 116 Mass. 420; Zanesville *v.* Fannan, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664.

25. Wilson *v.* Watertown, 3 Hun (N. Y.) 508, 5 Thomps. & C. 579.

26. Butler *v.* Bangor, 67 Me. 385.

27. Sherman *v.* Oneonta, 21 N. Y. Suppl. 137; Scranton *v.* Catterson, 94 Pa. St. 202. See also Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

28. Burnes *v.* St. Joseph, 91 Mo. App. 489.

29. Cassidy *v.* Poughkeepsie, 71 Hun (N. Y.) 144, 24 N. Y. Suppl. 523 (liability for injury as result of a sewer basin in a street having become worn and out of repair from long use); Deyoe *v.* Saratoga Springs, 1 Hun (N. Y.) 341, 3 Thomps. & C. 504 (excavation by water commissioners made in the course of repairing pipes, left unguarded).

30. *Colorado.*— Denver *v.* Aaron, 6 Colo. App. 232, 40 Pac. 587.

Georgia.— Savannah *v.* Donnelly, 71 Ga. 258.

Illinois.— Springfield *v.* Scheevers, 21 Ill. App. 203.

Mississippi.— Nesbitt *v.* Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521.

Missouri.— Haniford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753; Stephens *v.* Macon, 83 Mo. 345; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325.

Montana.— McCune *v.* Missoula, 10 Mont. 146, 25 Pac. 442; Sullivan *v.* Helena, 10 Mont. 134, 25 Pac. 94.

Nebraska.— Davis *v.* Omaha, 47 Nebr. 836, 66 N. W. 859.

Ohio.— Nitz *v.* Toledo, 22 Ohio Cir. Ct. 454, 12 Ohio Cir. Dec. 357; Hewitt *v.* Cleveland, 21 Ohio Cir. Ct. 505, 11 Ohio Cir. Dec. 710.

United States.— District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1609.

Usual and natural consequences.— When a city authorized a bridge company to construct an approach, it only rendered itself liable for the necessary, usual, and natural consequences of its act, such as it might reasonably foresee would probably result from the license granted. East St. Louis *v.* Lockhead, 7 Ill. App. 83.

31. *Connecticut.*— Boucher *v.* New Haven, 40 Conn. 456.

District of Columbia.— McPherson *v.* District of Columbia, 7 Mackey 564.

Georgia.— Savannah *v.* Donnelly, 71 Ga. 258.

Indiana.— Kenyon *v.* Indianapolis, Wils. 129.

Kansas.—Abilene *v.* Cowperthwait, 52 Kan. 324, 34 Pac. 795.

and notice of the defect or obstruction in the street is not necessary, in such case, to fix the city's liability.[32] By the weight of authority, however, where municipal officers, in pursuance of a lawful authority, grant a license or permit to private parties to use the streets for a purpose not intrinsically dangerous,[33] and no right of supervision is reserved or exercised,[34] the city is not liable for the negligence of those doing the work, but only for its own negligence in not correcting the evil after notice, actual or constructive.[35]

(II) *When Granted Without Authority.* If a municipal corporation exceeds its authority and licenses the placing of a public nuisance in a street, or the unlawful and dangerous use of a street for any purpose, and an injury results therefrom, without negligence on the part of the person injured, the municipality is liable to respond in damages for such injury.[36]

f. Failure to Prevent Improper Use of Streets — (I) *In General.* The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty, and for a breach of such duty an action will lie;[37] but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate, powers, and the authorities are well agreed that for a failure to exercise legislative, judicial, or executive powers of government, there is no liability.[38] Hence, upon this principle, it has

Rhode Island.— Seamons *v.* Fitts, 20 R. I. 443, 40 Atl. 3.

Washington.— Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

32. Denver *v.* Aaron, 6 Colo. App. 232, 40 Pac. 587; Haniford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753; Stephens *v.* Macon, 83 Mo. 345; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325.

33. Warsaw *v.* Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209.

34. If supervision is reserved, the negligence of the licensee becomes the negligence of the city, and the latter is liable for an injury caused thereby. Augusta *v.* Cone, 91 Ga. 714, 17 S. E. 1005; Hayes *v.* West Bay City, 91 Mich. 418, 51 N. W. 1067; Wendell *v.* Troy, 4 Abb. Dec. (N. Y.) 563, 4 Keyes 261 [*affirming* 39 Barb. 329]; Schumacher *v.* New York, 40 N. Y. App. Div. 320, 57 N. Y. Suppl. 968 [*affirmed* in 166 N. Y. 103, 59 N. E. 773].

35. *District of Columbia.*— Herfurth *v.* Washington, 6 D. C. 288.

Indiana.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518; Warsaw *v.* Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209.

Kentucky.— Bell *v.* Henderson, 74 S. W. 206, 24 Ky. L. Rep. 2434.

Michigan.— Thompson *v.* West Bay City, 137 Mich. 94, 100 N. W. 280.

New York.— Masterton *v.* Mt. Vernon, 58 N. Y. 391; McDermott *v.* Kingston, 19 Hun 198; Morgan *v.* Penn Yan, 42 N. Y. App. Div. 582, 59 N. Y. Suppl. 504; Dorlon *v.* Brooklyn, 46 Barb. 604. *Compare* Hoyer *v.* North Tonawanda, 79 Hun 39, 29 N. Y. Suppl. 650.

Pennsylvania.—Susquehanna Depot *v.* Simmons, 112 Pa. St. 384, 5 Atl. 434, 56 Am. Rep. 317; West Chester *v.* Apple, 35 Pa. St. 284, 78 Am. Dec. 336.

Tennessee.— Franklin *v.* House, 104 Tenn. 1, 55 S. W. 153.

Texas.— Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622.

Washington.— Copeland *v.* Seattle, 33 Wash. 415, 74 Pac. 582; Sproul *v.* Seattle, 17 Wash. 256, 49 Pac. 489.

United States.— Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1609.

Notice implied from open and continuous neglect.—Although a city giving license to a builder to pile building material in the street is entitled to notice of danger therefrom to passers-by, such notice may be implied from the open and continuous neglect of the builder. Magee *v.* Troy, 48 Hun (N. Y.) 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148].

36. *Iowa.*— Stanley *v.* Davenport, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

New York.— Landau *v.* New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709; Speir *v.* Brooklyn, 139 N. Y. 6, 34 N. E. 727, 36 Am. St. Rep. 664, 21 L. R. A. 641 [*affirming* 19 N. Y. Suppl. 665]; Cohen *v.* New York, 113 N. Y. 532, 21 N. E. 700, 10 Am. St. Rep. 506, 4 L. R. A. 406.

Virginia.— Richmond *v.* Smith, 101 Va. 161, 43 S. E. 345.

Wisconsin.—Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779; Little *v.* Madison, 42 Wis. 643, 24 Am. Rep. 435.

Canada.— Steves *v.* South Vancouver, 6 Brit. Col. 17.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1609.

37. See *supra*, XIV, D, 1; and *infra*, XIV, D, 4, a.

38. *Alabama.*— Davis *v.* Montgomery, 51 Ala. 139, 23 Am. Rep. 545.

been held that a municipal corporation, in the absence of an express statutory declaration to the contrary, is not liable for an injury caused by the failure to pass or to enforce an ordinance prohibiting the firing of cannon or firearms in its streets;[39] the explosion of fireworks;[40] the running at large of cattle and swine;[41] horse-racing;[42] or the riding of bicycles upon the sidewalks.[43] Notwithstanding the municipality may not be liable for a mere failure to enact an ordinance or to enforce one which is enacted, it has been held that its duty to preserve its streets and highways in a reasonably safe condition is independent of such questions, and if it permits such acts, either by failure to enact ordinances or by failure to enforce those in existence, as are a public nuisance, it will be liable for any injury arising therefrom.[44]

(11) *Coasting.* The doctrine of the exemption of a municipal corporation from liability for injuries resulting from the unlawful or improper use of its streets and sidewalks, and not from any defect in their state or condition, has been applied where persons have been injured by "coasting."[45] The suppression of coasting in a public highway is a police duty, and for the non-performance of such duty by its officers and agents the corporation is not liable.[46]

Indiana.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518; Kistner *v.* Indianapolis, 100 Ind. 210; Lafayette *v.* Timberlake, 88 Ind. 330.

New York.— Studeor *v.* Gouverneur, 15 N. Y. App. Div. 229, 44 N. Y. Suppl. 122.

Virginia.— Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

Wisconsin.— Little *v.* Madison, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1927.

Compare Baltimore *v.* Marriott, 9 Md. 160, 66 Am. Dec. 326. And see Maryland cases cited *infra*, notes 43, 45.

39. Arms *v.* Knoxville, 32 Ill. App. 604. See also *supra*, XIV, A, 5, b.

40. Ball *v.* Woodbine, 61 Iowa 83, 15 N. W. 846, 47 Am. Rep. 805. *Compare* Landau *v.* New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709; Speir *v.* Brooklyn, 139 N. Y. 6, 34 N. E. 727, 36 Am. St. Rep. 664, 21 L. R. A. 641.

41. Rivers *v.* Augusta, 65 Ga. 376, 38 Am. Rep. 787; Levy *v.* New York, 1 Sandf. (N. Y.) 465; Kelley *v.* Milwaukee, 18 Wis. 83. *Contra*, Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728, where it was held that the corporation might be liable for failure to exercise due diligence in preventing cattle running at large whereby an injury is inflicted.

42. McCarthy *v.* Munising, 136 Mich. 622, 99 N. W. 865.

43. *Georgia.*— Tarbutton *v.* Tennille, 110 Ga. 90, 35 S. E. 282.

New York.— Rogers *v.* Binghamton, 101 N. Y. App. Div. 352, 92 N. Y. Suppl. 179 [*affirmed* in 186 N. Y. 595, 79 N. E. 1115]; Howard *v.* Brooklyn, 30 N. Y. App. Div. 217, 51 N. Y. Suppl. 1058.

Ohio.— Custer *v.* New Philadelphia, 20 Ohio Cir. Ct. 177, 11 Ohio Cir. Dec. 9.

South Carolina.— Bryant *v.* Orangeburg, 70 S. C. 137, 49 S. E. 229.

Virginia.— Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1610.

Contra.— Hagerstown *v.* Klotz, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940, where it was held that a municipality may be liable for an injury occasioned by a bicycle ridden in violation of a speed ordinance.

44. Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880; Landau *v.* New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709; Spier *v.* Brooklyn, 139 N. Y. 6, 34 N. E. 727, 36 Am. St. Rep. 664, 21 L. R. A. 641, in which last two cases the discharge of fireworks was held to be a nuisance notwithstanding a permit issued by the authorities.

45. *Delaware.*— Wilmington *v.* Vandegrift, 1 Marv. 5, 29 Atl. 1047, 65 Am. St. Rep. 256, 25 L. R. A. 538.

Indiana.— Lafayette *v.* Rose, 88 Ind. 471; Lafayette *v.* Timberlake, 88 Ind. 330; Faulkner *v.* Aurora, 85 Ind. 130, 44 Am. Rep. 1.

Kentucky.— Dudley *v.* Flemingsburg, 115 Ky. 5, 72 S. W. 327, 24 Ky. L. Rep. 1804, 103 Am. St. Rep. 253, 60 L. R. A. 575.

Massachusetts.— Pierce *v.* New Bedford, 129 Mass. 534, 37 Am. Rep. 387; Shepherd *v.* Chelsea, 4 Allen 113.

Michigan.— Burford *v.* Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. St. Rep. 105.

New York.— Toomey *v.* Albany, 14 N. Y. Suppl. 572.

Pennsylvania.— Stevenson *v.* Phœnixville, 1 Chest. Co. Rep. 113; Brumbaugh *v.* Bedford Borough, 23 Pittsb. Leg. J. N. S. 462.

Vermont.— Weller *v.* Burlington, 60 Vt. 28, 12 Atl. 215; Hutchinson *v.* Concord, 41 Vt. 271, 98 Am. Dec. 584.

Wisconsin.— Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1611.

Contra.— Taylor *v.* Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759.

46. Wilmington *v.* Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047, 65 Am. St. Rep. 256,

4. Care and Condition of Streets and Other Public Ways — a. Rule as to Reasonable Care and Safety. Where the municipality is chargeable with notice or knowledge of defects or obstructions, the general municipal duty to exercise ordinary care to keep its streets in a reasonably safe condition is continuing and constant.[47] Its liability is for negligence, however, and for negligence only.[48] It is not liable for damages for every accident that may occur within its limits; it is not an insurer against all defects or obstructions in its streets and is not required or expected to do everything that human energy or ingenuity can do to prevent

25 L. R. A. 538; Lafayette *v.* Rose, 88 Ind. 471; Lafayette *v.* Timberlake, 88 Ind. 330; Faulkner *v.* Aurora, 85 Ind. 130, 44 Am. Rep. 1; Altvater *v.* Baltimore, 31 Md. 462; Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779.

47. *Delaware.*— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379.

Illinois.— Peoria *v.* Gerber, 168 Ill. 318, 48 N. E. 152; Springfield *v.* Tomlinson, 79 Ill. App. 399.

Kansas.— Kansas City *v.* Gilbert, 65 Kan. 469, 70 Pac. 350.

New York.— Coolidge *v.* New York, 99 N. Y. App. Div. 175, 90 N. Y. Suppl. 1078 [*affirmed* in 185 N. Y. 529, 77 N. E. 1192].

Ohio.— Gable *v.* Toledo, 16 Ohio Cir. Ct. 515, 9 Ohio Cir. Dec. 63.

Virginia.— Newport News *v.* Scott, 103 Va. 794, 50 S. E. 266.

Canada.— Kennedy *v.* Portage la Prairie, 12 Manitoba 634.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1612 *et seq.*

48. *Delaware.*—Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605.

Georgia.— Columbus *v.* Ogletree, 96 Ga. 177, 22 S. E. 709.

Indiana.— Rushville *v.* Poe, 85 Ind. 83; Kentland *v.* Hagen, 17 Ind. App. 1, 46 N. E. 43.

Michigan.—McArthur *v.* Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687, as to duty to repair under statute imposing duty with respect to such defects only as are due to want of repair.

Missouri.— Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709; Craig *v.* Sedalia, 63 Mo. 417.

New York.— Twist *v.* Rochester, 165 N. Y. 619, 59 N. E. 1131; Hunt *v.* New York, 109 N. Y. 134, 16 N. E. 320 [*affirming* 52 N. Y. Super. Ct. 198]; Gorham *v.* Cooperstown, 59 N. Y. 660; Aslen *v.* Charlotte, 35 N. Y. App. Div. 625, 54 N. Y. Suppl. 754; Lavasseur *v.* Haverstraw, 18 N. Y. Suppl. 237; Gaudin *v.* Carthage, 12 N. Y. Suppl. 796.

Ohio.— Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

Pennsylvania.— Fitzpatrick *v.* Darby, 184 Pa. St. 645, 39 Atl. 545; Otto Tp. *v.* Wolf, 106 Pa. St. 608; Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202.

United States.— Jacksonville *v.* Smith, 78 Fed. 292, 24 C. C. A. 97.

Canada.— Legault *v.* St. Paul, 12 Quebec Super. Ct. 479.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1612.

Injury to person on street car.— A municipality is not liable to a passenger on a street car who is struck by a trolley pole placed in the gutter near the track, where the municipality neither fixed the location of the track and poles nor owned them, the injury being caused by a defect in the street car system and not by the condition of the street. Kennedy *v.* Lansing, 99 Mich. 518, 58 N. W. 470.

In Massachusetts the statute of 1877 made a material change in the law as to the liability of towns for injuries due to defects in highways. Prior to the statute the town was liable if the defect had existed for twenty-four hours without regard to whether it was negligent in permitting or not removing it, but under that statute the town is liable only for injuries due to defects which might have been remedied or injuries which might have been prevented by ordinary care on the part of the town. Flanders *v.* Norwood, 141 Mass. 17, 5 N. E. 256.

Accident.—There can be no recovery against a city for injuries received from falling into a hole in a sidewalk as the result of a pure accident. Enright *v.* Atlanta, 78 Ga. 288; Aurora *v.* Pulfer, 56 Ill. 270; Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752.

Act of God.—A municipality is not bound for any injury resulting from the act of God, as where the condition is created by a sudden storm. Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451. So where an electric wire belonging to the city was broken down and suspended in a street by reason of sleet adhering to it and without any negligence on the part of the city it was held that the city would not be responsible for such breaking and suspension, although after notice of the dangerous condition, whoever may have been the owner of the wire, the city must remove or repair it within a reasonable time or take precautions to warn travelers of the danger. Colburn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605.

"At all times."— A city cannot be required to keep its streets in such condition that pedestrians may be able to cross with a reasonable degree of safety "at any and all times," since there may be times when that is impossible, as if there was sleet the night before the accident, in which case it would be impossible for the authorities to keep the street safe. Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

Notice of condition see *infra*, XIV, D, 4, d.

Precautions see *infra*, XIV, D, 4, e.

injury to the citizen; but its duty is to exercise reasonable care, and only this degree of care,[49] to make and maintain its streets and walks reasonably safe for the purposes to which such respective parts are devoted,[50] and for the use of persons traveling thereon in the usual modes, by day or by night, and who are themselves in the exercise of reasonable care,[51] whether the defect or condition causing the injury was created by the municipality itself or was created by some third person or by natural causes, and should in the exercise of ordinary care have been

49. *Colorado.*— Denver *v.* Stein, 25 Colo. 125, 53 Pac. 283; Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986.

Connecticut. — Landolt *v.* Norwich, 37 Conn. 615.

Delaware.— Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605.

District of Columbia.— O'Dwyer *v.* Northern Market Co., 24 App. Cas. 81.

Illinois.— Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323; Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035; Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416; Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35; Rockford *v.* Tripp, 83 Ill. 247, 25 Am. Rep. 381; Chicago *v.* McGiven, 78 Ill. 347; Nokomis *v.* Farley, 113 Ill. App. 161; Chicago *v.* Gillett, 108 Ill. App. 455; Elgin *v.* Thompson, 98 Ill. App. 358; Rock Island *v.* Drost, 71 Ill. App. 613; Olney *v.* Riley, 39 Ill. App. 401; Chicago *v.* Glanville, 18 Ill. App. 308; Chicago *v.* Watson, 6 Ill. App. 344; Warren *v.* Wright, 3 Ill. App. 602.

Indiana.— Muncie *v.* Hey, 164 Ind. 570, 74 N. E. 250; Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277; McQueen *v.* Elkkhart, 14 Ind. App. 671, 43 N. E. 460.

Iowa.— Hazzard *v.* Council Bluffs, 79 Iowa 106, 44 N. W. 219.

Kansas.— Kansas City *v.* Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Atchison *v.* Jansen, 21 Kan. 560; Atchison *v.* King, 9 Kan. 550.

Kentucky. — Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. 493, 23 Ky. L. Rep. 43; West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838; Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448; Louisville *v.* Michels, 71 S. W. 511, 24 Ky. L. Rep. 1375.

Louisiana.—O'Neill *v.* New Orleans, 30 La. Ann. 220, 31 Am. Rep. 221.

Michigan.— Finch *v.* Bangor, 133 Mich. 149, 94 N. W. 738; Leslie *v.* Grand Rapids, 120 Mich. 28, 78 N. W. 885.

Minnesota.— Furnell *v.* St. Paul, 20 Minn. 117; Moore *v.* Minneapolis, 19 Minn. 300; Cleveland *v.* St. Paul, 18 Minn. 279; Shartle *v.* Minneapolis, 17 Minn. 308.

Missouri.— Kaiser *v.* St. Louis, 185 Mo. 366, 84 S. W. 19; Craig *v.* Sedalia, 63 Mo. 417; Smith *v.* Brunswick, 61 Mo. App. 578.

Nebraska.— Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964; Lincoln *v.* Calvert, 39 Nebr. 305, 58 N. W. 115; South Omaha *v.* Burke, 3 Nebr. (Unoff.) 309, 91 N. W. 562.

New York.— Hunt *v.* New York, 109 N. Y. 134, 16 N. E. 320 [*affirming* 52 N. Y. Super. Ct. 198]; Nelson *v.* Canisteo, 100 N. Y. 89, 2 N. E. 473; Bullock *v.* New York, 99 N. Y. 654, 2 N. E. 1; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Wendell *v.* Troy, 4 Abb. Dec. 563, 4 Keyes 261 [*affirming* 39 Barb. 329]; Lehmann *v.* Brooklyn, 30 N. Y. App. Div. 305, 51 N. Y. Suppl. 524; Ibbeken *v.* New York, 94 N. Y. Suppl. 568. Where a subway was being excavated in a street under legislative authority by a corporation over which the city had no control, the city was not negligent because it did not keep a gang of men at work repairing the street as it was interfered with from day to day by the contractors making the excavation. Morris *v.* Interurban St. R. Co., 100 N. Y. App. Div. 295, 91 N. Y. Suppl. 479.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Oklahoma.— Norman *v.* Teel, 12 Okla. 69, 69 Pac. 791.

Pennsylvania.— Baker *v.* North East Borough, 151 Pa. St. 234, 24 Atl. 1079; Burns *v.* Bradford, 137 Pa. St. 361, 20 Atl. 997, 11 L. R. A. 726; Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399.

Tennessee.— Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.— Dallas *v.* Muncton, (Civ. App. 1904) 83 S. W. 431; Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95.

Virginia.— Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387.

Washington.— Taylor *v.* Ballard, 24 Wash. 191, 64 Pac. 143.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Griffin *v.* Williamstown, 6 W. Va. 312.

Wisconsin.— Peake *v.* Superior, 106 Wis. 403, 82 N. W. 306.

United States.— Weightman *v.* Washington, 1 Black 39, 17 L. ed. 52.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1612.

Where the ground of the action is a positive misfeasance on the part of the corporation itself in placing, or causing to be placed, a pile of bricks on the sidewalk without guards or lights to protect persons passing over the walk, an instruction leaving it to the jury to say whether or not it was negligence to leave the walk in such a condition is not objectionable because it imposes an absolute duty without reference to whether or not the corporation had notice of the condition. Yearance *v.* Salt Lake City, 6 Utah 398, 24 Pac. 254.

50. Kohlhof *v.* Chicago, 192 Ill. 249, 61 N. E. 446, 85 Am. St. Rep. 335.

51. *Colorado.*— Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986, holding that an instruction casting upon the city the duty to

discovered and repaired.[52] After it has notice, either express or implied, of the existence of defects or obstructions, no matter how they were caused, the obligation immediately arises to exercise reasonable care to restore the street, that it may again be reasonably safe for ordinary travel.[53]

keep the streets in good order and condition was erroneous as imposing a greater duty than that of keeping the street in a reasonably safe condition.

Delaware.— Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418.

Illinois.— Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416; Rockford *v.* Tripp, 83 Ill. 247, 25 Am. Rep. 381 (holding that if there was any duty upon a city in regard to the sufficiency of hitching posts which it might provide, it was not bound to see that absolutely safe posts were set); Chicago *v.* McGiven, 78 Ill. 347; Chicago *v.* Watson, 6 Ill. App. 344.

Indiana.— Centerville *v.* Woods, 57 Ind. 192; Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277; Bucher *v.* South Bend, 20 Ind. App. 177, 50 N. E. 412; Lyon *v.* Logansport, (App. 1892) 32 N. E. 582.

Kentucky.— Louisville *v.* Johnson, 69 S. W. 803, 24 Ky. L. Rep. 685.

Michigan.— Yotter *v.* Detroit, 107 Mich. 4, 64 N. W. 743; Sebert *v.* Alpena, 78 Mich. 165, 43 N. W. 1098.

Mississippi.— Vicksburg *v.* Hennessy, 54 Mich. 391, 28 Am. Rep. 354, holding that the municipality is not required to furnish the best method of passing natural objects but only to make its streets reasonably safe, etc.

Missouri.— Coffey *v.* Carthage, 186 Mo. 573, 85 S. W. 532; Welsh *v.* St. Louis, 73 Mo. 71; St. Louis *v.* Kansas City, 110 Mo. App. 653, 85 S. W. 630; Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53; Smith *v.* Brunswick, 61 Mo. App. 578; Fairgrieve *v.* Moberly, 39 Mo. App. 31; Taubman *v.* Lexington, 25 Mo. App. 218.

Montana.— May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759.

Nebraska.— Plainview *v.* Mendelson, 65 Nebr. 85, 90 N. W. 956; Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964.

New York.— Bullock *v.* New York, 99 N. Y. 654, 2 N. E. 1; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Ohio.— Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

Pennsylvania.— Megargee *v.* Philadelphia, 153 Pa. St. 340, 25 Atl. 1130, 19 L. R. A. 221.

South Dakota.— Jones *v.* Sioux Falls, 18 S. D. 477, 101 N. W. 43.

Tennessee.— Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57; Knoxville *v.* Bell, 12 Lea 157.

West Virginia.— Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416; Waggener *v.* Point Pleasant, 42 W. Va. 798, 26 S. E. 352; Van Pelt *v.* Clarksburg, 42 W. Va. 218, 24 S. E. 878; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Griffin *v.* Williamstown, 6 W. Va. 312. The authorities which hold that the duty to keep in repair is absolute (see *infra*, XIV, D, 4, d, (I), note 99) mean that when the basis or cause of the liability exists, the liability is absolute in the sense only that no notice or other excuse for the defect will excuse the municipality. Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752. But see Biggs *v.* Huntington, 32 W. Va. 55, 9 S. E. 51.

Wisconsin.— Kleiner *v.* Madison, 104 Wis. 339, 80 N. W. 453.

Use of way see *infra*, XIV, D, 5, c.

Known probable cause see *infra*, XIV, D, 4, d, (VII).

52. Atchison *v.* King, 9 Kan. 550; Nelson *v.* Canisteo, 100 N. Y. 89, 2 N. E. 473. See also *supra*, XIV, D, 3.

Notice see *infra*, XIV, D, 4, d, (I).

53. *Alabama.*— Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576; Bradford *v.* Anniston, 92 Ala. 349, 8 So. 683, 25 Am. St. Rep. 60.

Delaware.— Pierce *v.* Wilmington, 2 Marv. 306, 43 Atl. 162.

Georgia.— Rome *v.* Dodd, 58 Ga. 238; Milledgeville *v.* Cooley, 55 Ga. 17.

Illinois.— Hogan *v.* Chicago, 168 Ill. 551, 48 N. E. 210; Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683; Chicago *v.* Hoy, 75 Ill. 530; Rockford *v.* Hildebrand, 61 Ill. 155; Reid *v.* Chicago, 83 Ill. App. 554; Virginia *v.* Plummer, 65 Ill. App. 419.

Indiana.— Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79.

Iowa.— Rea *v.* Sioux City, 127 Iowa 615, 103 N. W. 949; Padelford *v.* Eagle Grove, 117 Iowa 616, 91 N. W. 899; Houston *v.* Council Bluffs, 101 Iowa 33, 69 N. W. 1130, 36 L. R. A. 211; McConnell *v.* Osage, 80 Iowa 293, 48 N. W. 550, 8 L. R. A. 778; Munger *v.* Marshalltown, 59 Iowa 763, 13 N. W. 642, holding that an instruction that a city is not bound to repair its sidewalks when they are injured by teams or wagons is properly refused.

Kansas.— Osborne *v.* Hamilton, 29 Kan. 1.

Kentucky.—Covington *v.* Johnson, 69 S. W. 703, 24 Ky. L. Rep. 602; Henderson *v.* Reed, 62 S. W. 1039, 23 Ky. L. Rep. 463; Henderson *v.* White, 49 S. W. 764, 20 Ky. L. Rep. 1525.

Massachusetts.— Paine *v.* Brockton, 138 Mass. 564.

Michigan.— Belyea *v.* Port Huron, 136 Mich. 504, 99 N. W. 740; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947.

Minnesota.— L'Herault *v.* Minneapolis, 69 Minn. 261, 72 N. W. 73; Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359; Nichols *v.* Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56.

Mississippi.— Natchez *v.* Shields, 74 Miss. 871, 21 So. 797.

Missouri.— Buckley *v.* Kansas City, 156 Mo. 16, 56 S. W. 319; Kling *v.* Kansas City, 27 Mo. App. 231.

b. Determination of Reasonable Care — (I) *In General.* In determining whether the corporation is exercising reasonable care in the performance of its duty to make and maintain its streets reasonably safe, each case must depend upon its own surrounding circumstances;[54] the care must be reasonable and commensurate with the danger.[55]

(II) *Depending on Numbers and Extent.* The degree of care and diligence required by a city in keeping its streets in a reasonably safe condition for travel is not affected by the extent and number thereof,[56] and if the allowance of the existence of a defect or obstruction in a street is negligence, the existence of other such dangerous places is immaterial, since neither the lapse of time nor the existence of like nuisances elsewhere will legalize it.[57]

Nebraska.— Valparaiso *v.* Donovan, 28 Nebr. 406, 44 N. W. 449.

New York.— Brush *v.* New York, 59 N. Y. App. Div. 12, 69 N. Y. Suppl. 51; Warner *v.* Randolph, 18 N. Y. App. Div. 458, 45 N. Y. Suppl. 1112; Walsh *v.* Buffalo, 17 N. Y. App. Div. 112, 44 N. Y. Suppl. 942; Conklin *v.* Elmira, 11 N. Y. App. Div. 402, 42 N. Y. Suppl. 518; Stapleton *v.* Newburgh, 9 N. Y. App. Div. 39, 41 N. Y. Suppl. 96; Lehn *v.* Brooklyn, 19 N. Y. Suppl. 668 [*affirmed* in 143 N. Y. 674, 39 N. E. 21]; Kunz *v.* Troy, 1 N. Y. Suppl. 596; Gillrie *v.* Lockport, 12 N. Y. St. 707; Gage *v.* Hornellsville, 2 N. Y. St. 351.

North Carolina.— Neal *v.* Marion, 129 N. C. 345, 40 S. E. 116.

Ohio.— Durbin *v.* Napoleon, 21 Ohio Cir. Ct. 160, 11 Ohio Cir. Dec. 584; Cincinnati *v.* Frazer, 18 Ohio Cir. Ct. 50, 9 Ohio Cir. Dec. 487; Alliance *v.* Campbell, 17 Ohio Cir. Ct. 595, 6 Ohio Cir. Dec. 762.

Texas.— McKinney *v.* Brown, (Civ. App. 1904) 81 S. W. 88; Patterson *v.* Austin, 15 Tex. Civ. App. 201, 39 S. W. 976; El Paso *v.* Dolan, (Civ. App. 1894) 25 S. W. 669.

Washington.— Cowie *v.* Seattle, 22 Wash. 659, 62 Pac. 121; Saylor *v.* Montesano, 11 Wash. 328, 39 Pac. 653.

Wisconsin.— Cantwell *v.* Appleton, 71 Wis. 463, 37 N. W. 813.

United States.— Balls *v.* Woodward, 51 Fed. 646.

Canada.— Gunlack *v.* Montreal, 17 Quebec Super. Ct. 294; Gaffney *v.* Montreal, 16 Quebec Super. Ct. 260.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1602, 1620.

54. Landolt *v.* Norwich, 37 Conn. 615; Bender *v.* Minden, 124 Iowa 685, 100 N. W. 352; Smith *v.* Brunswick, 61 Mo. App. 578 (referring to the definition of Webster of "reasonably," as applied to the care required, to wit: "In a reasonable manner; in consistency with reason; in a moderate degree; not fully; moderately; tolerably"); Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416; Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752.

55. Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035; Schmidt *v.* Chicago, 107 Ill. App. 64 (where it was held gross negligence to place an electric light lamp improperly insulated four or five feet above a sidewalk); Atchison *v.* Jansen, 21 Kan. 560.

Reasonable care is such as a prudent person or municipality would use under like circumstances. Wilson *v.* Atlanta, 63 Ga. 291; Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833; Norman *v.* Teel, 12 Okla. 69, 69 Pac. 791. An instruction requiring such diligence as like officers with like responsibilities usually and ordinarily employ in the discharge of their duties was held not erroneous. Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464. And in Kent *v.* Wilmington, 7 Houst. (Del.) 397, 32 Atl. 464, it was held that the degree of care required by a city in filling up a trench dug in a street was such as a good business man would use under like circumstances. But in Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303, an instruction that ordinary care and prudence meant such as was exercised by the mass of mankind in their daily affairs was erroneous, since the ordinary care and prudence required are such as the surrounding circumstances would demand and not such as men usually exercise in their daily affairs.

Barriers, lights, etc., see *infra*, XIV, D, 4, e, (IV).

Proximate cause see *infra*, XIV, D, 4, f.

Permitting construction in violation of ordinance.— Where a municipal ordinance directed the construction of a sidewalk of a specified width and designated material within certain limits, and the council permitted the construction of a walk of less width and of greatly inferior material, and allowed it to remain on the street and to be used, such remissness in enforcing its ordinance was held to be some evidence that the walk on which plaintiff was injured was deemed by the city to be unsafe and inadequate for the travel over that particular street. Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53.

56. *Iowa.*— Lindsay *v.* Des Moines, 68 Iowa 368, 27 N. W. 283.

Kansas.— Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842.

Michigan.— Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

Missouri.— Barr *v.* Kansas City, 105 Mo. 550, 16 S. W. 483.

Nebraska.— Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1613.

57. McNerney *v.* Reading, 150 Pa. St. 611,

(III) *Depending on Extent of Use.* The duty of a city to keep streets and sidewalks within its corporate limits in a reasonably safe condition is not withdrawn by the fact that they are in a sparsely settled part of the city and little used,[58] and it cannot escape liability solely upon the probability or expectation that no one acquainted with the defects in a walk would pass over it.[59] And while the same degree of care may be required no matter what the size of the place, yet what may be such care in one place may not be in another, and so the size of the place, the amount of travel, and all other surrounding facts and circumstances are considered in determining defendant's negligence, or whether it has exercised the reasonable care which is imposed upon it in respect of this particular duty.[60]

(IV) *Time Allowed to Make Repairs or Remove Obstructions.* A municipality being responsible only for reasonable diligence in making repairs or removing obstructions after it has notice of the unsafe condition of the street,[61] it must appear that it had such notice a sufficient length of time before the injury to afford a reasonable opportunity to act in the premises,[62] the degree of

25 Atl. 57 [*distinguishing* King *v.* Thompson, 87 Pa. St. 365, 30 Am. Rep. 364, in that an opening in front of a cellar window, such as was usual and customary in the city for lighting and ventilating cellars and reasonably necessary for that purpose, was not *per se* a nuisance, and it being held in the latter case that if such custom existed, under these circumstances, time out of mind, it involved a tacit assent on the part of the municipality as well as acquiescence on the part of the public]; McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

58. Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; Flora *v.* Naney, 136 Ill. 45, 26 N. E. 645 [*distinguishing* Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 950, in that it was there held that if the city could be held liable in any case for exemplary or punitive damages by reason of gross negligence in not keeping a street in repair, such liability would arise where the street was in a populous part of the city rather than in the outskirts, and that it does not hold that the city is not under obligations to exercise ordinary care to keep all the sidewalks within its limits in a reasonably safe condition]; Mt. Morris *v.* Kanode, 98 Ill. App. 373; Bunker Hill *v.* Pearson, 46 Ill. App. 47; Vandalia *v.* Ropp, 39 Ill. App. 344; McLeansboro *v.* Lay, 29 Ill. App. 478; South Omaha *v.* Powell, 50 Nebr. 798, 70 N. W. 391; Wall *v.* Pittsburg, 205 Pa. St. 48, 54 Atl. 497.

Unopened, unimproved, or partially improved streets see *supra*, XIV, D, 2, b.

59. Thomas *v.* Brooklyn, 58 Iowa 438, 10 N. W. 849.

60 Bender *v.* Minden, 124 Iowa 685, 100 N. W. 352; Welsh *v.* Amesbury, 170 Mass. 437, 49 N. E. 735; Forker *v.* Sandy Lake Borough, 130 Pa. St. 123, 18 Atl. 609.

Greater diligence and care are required where a street is much traveled and in use by pedestrians at a particular point than at another point or on other streets but little used. Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350; Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; Rockford *v.* Hollenbeck, 34 Ill. App. 40; Whitfield *v.* Meridan, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A. 834; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96.

Greater degree of care.— Musick *v.* Latrobe, 184 Pa. St. 375, 39 Atl. 226, holding that the general statement that the municipality is bound to the same degree of care over its alleys as over its streets is not correct; that the care to be bestowed upon each must be measured by the public use; that when an alley does in fact become a public street by its use, it should receive the attention that a public street requires, but until it becomes a traveled thoroughfare in fact, it is not incumbent on the borough authorities to treat it as such; and that the measure of care is proportioned to its character and the public needs.

Question for jury see *infra*, XIV, E, 9.

61. See *infra*, XIV, D, 4, d.

62. *Colorado.*— Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986, where it was held error to instruct the jury that the city was liable if the trench had been there for so long a time that the city or its officers knew, or might reasonably have known, of the same, and the city did not promptly repair.

Connecticut.— Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350.

Delaware.— Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

Massachusetts.— Stanton *v.* Salem, 145 Mass. 476, 14 N. E. 519.

Michigan.— McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148; Reed *v.* Detroit, 99 Mich. 204, 58 N. W. 44 (where plaintiff's evidence showed that she stepped through a hole in a culvert in an outlying residence district, which hole was first seen in the morning before the accident, and it was held that a verdict should have been directed for the city); Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721.

Missouri.— Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717 (holding that the fact that defendant had either actual or constructive notice of the defect in the street at the time the accident happened is not *per se* sufficient to show liability); Richardson *v.* Marceline, 73 Mo. App. 360.

celerity required depending on the attendant circumstances, such as the location of the street, the volume of travel over it, and the like.[63]

c. Sufficiency and Safety — (I) *In General.* The way should be reasonably safe for ordinary modes of travel,[64] by all persons regardless of age[65] or condition,[66] but need not be safe for extraordinary use.[67]

(II) *Traveled Track or Way Necessary For Use* — (A) *In General.* It has been held in a number of cases that a city is not bound to put all its streets or all parts of its streets in condition for travel, even though it improves a part for use; but its duty in this regard is confined to such streets and such parts of

United States.— District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1620.

So under a statute in Massachusetts providing that any person who should receive an injury by reason of any defect in a highway which had existed for the space of twenty-four hours might recover, etc., it was held that there could be no recovery unless the defect existed twenty-four hours previous to the injury. Brady *v.* Lowell, 3 Cush. (Mass.) 121. In Winn *v.* Lowell, 1 Allen (Mass.) 177, where the injury was caused by reason of an elevation of one edge of a plank which was laid over an open space left for the passage of water in a public street, and this was found to be an actionable defect, it was enough to authorize a verdict for plaintiff if the plank had been split, loose, liable to change, and unsafe for twenty-four hours before the accident, or if the authorities had reasonable notice of its unsafe condition, although the position of the plank which was the immediate cause of the accident had only continued for a short time.

63. Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986.

64. See the cases cited *supra*, note 51.

Bicycles — *In general.*— Bicycle riders are entitled to the same protection as the drivers of other vehicles. Anderson *v.* Wilmington, 2 Pennew. (Del.) 28, 43 Atl. 841; Laredo Electric, etc., Co. *v.* Hamilton, 23 Tex. Civ. App. 480, 56 S. W. 998, which, however, does not involve directly, although it recognizes, the municipal duty in such cases. So a municipality will be liable for injuries sustained by a bicycle rider on a walk or street which was not reasonably safe for use by pedestrians in the one case, or by ordinary vehicles in the other; but if reasonably sufficient for such uses there will be no liability merely because they were not safe for bicycles. Wheeler *v.* Boone, 108 Iowa 235, 78 N. W. 909, 44 L. R. A. 821; Lee *v.* Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308; Leslie *v.* Grand Rapids, 120 Mich. 28, 78 N. W. 885; Morrison *v.* Syracuse, 45 N. Y. App. Div. 421, 61 N. Y. Suppl. 313; Sutphen *v.* North Hempstead, 80 Hun (N. Y.) 409, 30 N. Y. Suppl. 128; Gagnier *v.* Fargo, 11 N. D. 73, 88 N. W. 1030, 95 Am. St. Rep. 705; Fox *v.* Clarke, 25 R. I. 515, 57 Atl. 305, 65 L. R. A. 234. See also Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229.

But where the municipality maintains a bicycle path, the duty of keeping it in a reasonably safe condition for the use of bicycles follows, and having invited such use of the particular way, the municipality cannot relieve itself of liability by saying that other parts of the street were safe. Prather *v.* Spokane, 29 Wash. 549, 70 Pac. 55, 92 Am. St. Rep. 923, 59 L. R. A. 346.

Persons entitled to redress see *infra*, XIV, D, 5.

65. Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Stinson *v.* Gardiner, 42 Me. 248, 66 Am. Dec. 281. See also Shippy *v.* Au Sable, 65 Mich. 494, 32 N. W. 741, holding that in an action for an injury to a child alleged to have been caused by a defective cross walk, an instruction that practically lays down the rule that anything that was not safe for children was unlawful is erroneous.

Street playing see *infra*, XIV, D, 5, c, (I).

Sufficiency of barrier see *infra*, XIV, D, 4, e, (IV).

66. Lewis *v.* Independence, 54 Mo. App. 183, holding that the fact that a woman's advanced pregnancy renders her more susceptible to injury will not relieve a city from its obligation to keep its streets in such repair that they will be reasonably safe for women in her condition to travel over in a two-wheeled cart. See also *infra*, XIV, D, 6.

67. Kohlhof *v.* Chicago, 192 Ill. 249, 61 N. E. 446, 85 Am. St. Rep. 335, non-liability for injuries by breaking of sidewalk while moving a heavy iron safe on it, although one may use a sidewalk for moving, loading, and unloading.

Safety for use of walking cane.— In Harden *v.* Jackson, 137 Mich. 271, 100 N. W. 389, 66 L. R. A. 986, it was held that the city was not liable for injuries to a pedestrian caused by the cane with which he supported himself going through a crack between two decayed boards, where the sidewalk was in a reasonably safe condition for pedestrians not compelled to use canes.

Between sidewalk and carriageway.— It is the duty of cities and towns to keep that part of the street which lies between the carriageway and the sidewalk in such repair that foot passengers may cross any part thereof with a reasonable degree of safety, using such care and caution as are adapted to the nature of the case; and the establishing of raised crossings at proper distances is not a sufficient compliance with this duty. Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57. But see in this connection *infra*, XIV, D, 6, f.

streets as are necessary for the convenience and use of the traveling public;[68] and that if a street is maintained in a reasonably safe condition on the traveled part and is amply wide for such use and to enable persons to avoid injury with the exercise of reasonable care, the municipality will not be liable merely by reason of defects out of the traveled track.[69] This rule is in accord with, if not based upon, the rule established in other cases as to town or country roads,[70] and has been recognized broadly with respect to cities,[71] and is applied to suburban or village streets upon the principle that the extent of the use must be considered upon the question of the sufficiency of the care exercised by the municipality and of the safety of the road for the purposes for which it is used and intended.[72] But the municipality is bound to keep all of such part of a street as it undertakes to open and put in condition for travel in a reasonably safe condition for such use,[73]

68. *Illinois.*— Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229.

Kentucky.— Henderson *v.* Sandefur, 11 Bush 550.

Michigan.—McArthur *v.* Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687; Keyes *v.* Marcellus, 50 Mich. 439, 15 N. W. 542, 45 Am. Rep. 52.

Missouri.— Tritz *v.* Kansas City, 84 Mo. 632; Craig *v.* Sedalia, 63 Mo. 417; Brown *v.* Glasgow, 57 Mo. 156; Bassett *v.* St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Kling *v.* Kansas City, 27 Mo. App. 231.

United States.— Hannibal *v.* Campbell, 86 Fed. 297, 30 C. C. A. 63.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1617.

But where the city has exercised its discretion and determined to devote less than the full width of a street to travel, the border line between such part and the remainder should be in some way so indicated as to be apparent to travelers. Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229.

69. Brown *v.* Glasgow, 57 Mo. 156. See also the cases cited in the last preceding note.

70. Tasker *v.* Farmingdale, 85 Me. 523, 27 Atl. 464; Brown *v.* Skowhegan, 82 Me. 273, 19 Atl. 399; Morse *v.* Belfast, 77 Me. 44; Blake *v.* Newfield, 68 Me. 365; Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84; Carey *v.* Hubbardston, 172 Mass. 106, 51 N. E. 521; Smith *v.* Wendell, 7 Cush. (Mass.) 498; Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189; Willey *v.* Portsmouth, 35 N. H. 303; Sykes *v.* Pawlet, 43 Vt. 446, 5 Am. Rep. 595; Rice *v.* Montpelier, 19 Vt. 470. It is the general duty of the traveler to remain in the traveled track, hence if without some sufficient reason for so doing, or for his own pleasure or convenience, he voluntarily deviates from the traveled track, which is in good condition, and in so doing meets with an accident from some cause outside of the traveled track, the town will not be liable. Goeltz *v.* Ashland, 75 Wis. 642, 44 N. W. 770 [*citing* Cartright *v.* Belmont, 58 Wis. 370, 17 N. W. 237; Matthews *v.* Baraboo, 39 Wis. 674; Hawes *v.* Fox Lake, 33 Wis. 438; Kelley *v.* Fond du Lac, 31 Wis. 179]. But if in the exercise of ordinary care he goes out of it and within the limits of the road to avoid an unsafe condition and sustains an injury by reason of an unsafe condition there, he may recover. Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

71. Rhymer *v.* Menasha, 97 Wis. 523, 73 N. W. 41; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558. See also Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

72. *Illinois.*— Rankin *v.* Smith, 63 Ill. App. 522, where it was held that a village was not liable for an injury resulting from an obstruction in the margin of a street in the outskirts of the village, the street being unobstructed for such a width as public necessity and convenience required.

Iowa.— Fulliam *v.* Muscatine, 70 Iowa 436, 30 N. W. 861, where it is said that it cannot be held to be the city's duty to keep its streets safe throughout their entire width regardless of location, amount of travel, and other circumstances.

Michigan.— Keyes *v.* Marcellus, 50 Mich. 439, 15 N. W. 542, 45 Am. Rep. 52, where it was held that public travel is not supposed to occupy all the country highway leading out of a village, although within its limits, and that the authorities are not required to put the road in condition as if the public required the use of the whole.

Mississippi.— Butler *v.* Oxford, 69 Miss. 618, 13 So. 626.

Missouri.— Craig *v.* Sedalia, 63 Mo. 417.

New York.— King *v.* Ft. Ann, 180 N. Y. 496, 73 N. E. 481, as to a village road, the traveled part of which was safe and in good condition, the court holding that the village was not chargeable with negligence by reason of a ditch on the side of the road outside of the traveled path but within the lines of the road.

Pennsylvania.— Monongahela City *v.* Fischer, 111 Pa. St. 9, 2 Atl. 87, 56 Am. Rep. 241, holding that in the closely built-up portions of a city it is the duty of the authorities to keep the entire street in a safe condition, but that this is not the rule with regard to country roads within the territorial limits of the city; and that as to the latter it is sufficient that a portion of the width of the road is kept in smooth condition and safe and convenient for travel.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1617.

73. Odom *v.* Dobbs, 25 Ind. App. 522, 58 N. E. 562; Kossmann *v.* St. Louis, 153 Mo. 293, 54 S. W. 513; Walker *v.* Kansas City,

and if the whole street has been opened for travel the entire width must be kept in a reasonably safe condition.[74] If any portion of a sidewalk be negligently left in such condition that pedestrians cannot travel over it with reasonable assurance of safety, by night as well as by day, the municipal authorities may be chargeable with a neglect of this duty to its citizens and the public generally.[75]

(B) *Danger Outside of Traveled Way.* The municipal duty is not confined to keeping the mere bed of the way in proper condition, and one injured by a defect or obstruction outside the prepared part may still be entitled to recover, if the defect is so near the traveled part as to render its use unsafe.[76]

(III) *Effort to Make Repairs.* It is no defense to an action against a city to recover for an injury caused by a defect in a public way that the city used ordinary care in repairing the way, if it is not in fact reasonably safe and convenient.[77]

99 Mo. 647, 12 S. W. 894; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

74. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Illinois.— Spring Valley *v.* Gavin, 81 Ill. App. 456 [*affirmed* in 182 Ill. 232, 54 N. E. 1035].

Indiana.—Thuis *v.* Vincennes, (App. 1905) 73 N. E. 141.

Iowa.— Lamb *v.* Cedar Rapids, 108 Iowa 629, 79 N. W. 366 (where it was held that the city is liable for defects in a street outside of so much of the street as is customarily used by the public, although it may have left the street in its natural condition as it was when opened to the public); Crystal *v.* Des Moines, 65 Iowa 502, 22 N. W. 646; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174; Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668; Rusch *v.* Davenport, 6 Iowa 443.

Kentucky.— Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. 493, 23 Ky. L. Rep. 43, holding that if a city has accepted and improved a street it assumes the duty of maintaining it in a reasonably safe condition for travel throughout its entire width, although the street has not been improved at the particular place where an injury occurs.

Missouri.— Walker *v.* Kansas City, 99 Mo. 647, 12 S. W. 894 [*overruling* Tritz *v.* Kansas City, 84 Mo. 632, in so far as that case holds that a city is not liable for injuries resulting from the defective condition of its streets or sidewalks which it has prepared for the use of the traveling public]; Kling *v.* Kansas City, 27 Mo. App. 231.

Pennsylvania.— See Beach *v.* Scranton, 5 Lack. Leg. N. 25.

Washington.— Saylor *v.* Montesano, 11 Wash. 328, 39 Pac. 653.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1617. And see *infra*, XIV, D, 4, e, (IV), (B).

75. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Colorado.— Denver *v.* Stein, 25 Colo. 125, 53 Pac. 283, with reference to sidewalks in populous portions of a city.

Georgia.— Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389; Atlanta *v.* Milan, 95 Ga. 135, 22 S. E. 43.

Illinois.— Springfield *v.* Burns, 51 Ill. App. 595.

Massachusetts.— Bacon *v.* Boston, 3 Cush. 174, as to a sidewalk six and one-half feet wide in the city of Boston, the court distinguishing the case from those in which the rule as to country roads is applied, holding that the law as to the extent of repair and what will constitute obstructions rendering a public way unsafe must depend, in a good degree, upon the locality of the road, and that such a sidewalk as that above maintained should be for its whole extent so constructed and fitted for use as to be safe for all persons passing over it.

Missouri.— Coffey *v.* Carthage, 186 Mo. 573, 85 S. W. 532; Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699; Goins *v.* Moberly, 127 Mo. 116, 29 S. W. 985; Roe *v.* Kansas City, 100 Mo. 190, 13 S. W. 404 [*disapproving* Tritz *v.* Kansas City, 84 Mo. 632, in so far as it is in conflict with the rule of the text, and further indicating that the rule that the municipality may open and improve only a part of a street has no application to a sidewalk in the street].

Wisconsin.— Whitney *v.* Milwaukee, 57 Wis. 639, 16 N. W. 12.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1618.

76. *Illinois.*— Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229.

Indiana.— Vincennes *v.* Spees, (App. 1904) 72 N. E. 531.

Maine.— Bryant *v.* Biddeford, 39 Me. 193.

Massachusetts.— Snow *v.* Adams, 1 Cush. 443.

Missouri.— Fairgrieve *v.* Moberly, 39 Mo. App. 31, slipping and falling on timber left near a properly constructed cross walk.

Vermont.— Morse *v.* Richmond, 41 Vt. 435, 98 Am. Dec. 600.

Wisconsin.— Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870; Pittenger *v.* Hamilton, 85 Wis. 356, 55 N. W. 423; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

Compare Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729.

Property adjacent to street see *infra*, XIV, D, 4, c, (IV), (G), (2).

Barriers, etc., see *infra*, XIV, D, 4, e, (IV), (B).

77. Wheaton *v.* Hadley, 131 Ill. 640, 23 N. E. 422 [*affirming* 30 Ill. App. 564] (holding that where a plank sidewalk, fourteen

(IV) *DEFECTS AND OBSTRUCTIONS*— (A) *In General.* The duty as to such ways is to keep them in a reasonably safe condition for travel, and has been held to relate only to their construction, maintenance, and repair.[78] But it is held that defects need not be structural but may consist of obstructions;[79] that a street may be put out of repair by obstructions thereon which impede travel and make it dangerous; and that in such a case to repair a street requires the removal of all such obstructions,[80] although the statutory duty in this respect has been confined to narrower limits under the terms of the statute.[81] So the municipality will be liable alike for accidents occasioned by negligently constructing defective sidewalks, or by causing such defects in them after they are constructed,[82] and for negligently permitting the defects to continue, when they might have been remedied by reasonable care.[83] But it will not be liable for every mere inequality

years old, was repaired by the town authorities by replacing some of the boards with new ones, leaving untouched the stringers on which such boards were laid, the town was chargeable with notice that such stringers were so rotten that they would not hold the nails by which the boards were fastened to them); Shelbyville *v.* Brant, 61 Ill. App. 153; Sorento *v.* Johnson, 52 Ill. App. 659; Hutchins *v.* Littleton, 124 Mass. 289 (holding that if the defect is insufficiently repaired it will be a continuing defect and the town will be liable, although the action of the elements have enlarged it and increased its dangerous character); Blood *v.* Hubbardston, 121 Mass. 233; George *v.* Haverhill, 110 Mass. 506; Atherton *v.* Bancroft, 114 Mich. 241, 72 N. W. 208. See also Moon *v.* Ionia, 81 Mich. 635, 46 N. W. 25.

Repair of sidewalk by abutter.— So where the duty of repairing sidewalks is primarily on the municipality, and it appears that before the accident the city knew of the defective condition and required the abutting owner to make repairs, the work of repairing will be considered as if done by the city itself and the city will be presumed to know of defects therein. Woodward *v.* Boscobel, 84 Wis. 226, 54 N. W. 332.

78. Herdenwag *v.* Philadelphia, 3 Pa. Dist. 292 [*affirmed* in 168 Pa. St. 72, 31 Atl. 1063].

Unlawful assemblages do not come within the duty to keep streets "in repair," although such conduct may temporarily endanger the safety of those who are traveling upon the streets. Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656.

Shooting gallery near street.— A statute making a municipality liable for injuries due to "insufficiency or want of repairs" in a street or sidewalk will not authorize a recovery against a municipality for an injury sustained by a person on the sidewalk, caused by a shot fired from a shooting gallery on an adjacent lot but outside of the limits of the street and sidewalk. Hubbell *v.* Viroqua, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 866.

Other corporate acts causing injury in a street may render the municipality liable, although the action would not lie as based upon a defect in the way. Thus in Hand *v.* Brookline, 126 Mass. 324, it was held that a town which accepted a statute authorizing it to lay and maintain water pipes, etc., was liable for an injury sustained by a traveler on the highway which had been undermined by water escaping from the pipes by reason of negligence in their construction, although the circumstances were such that no action would lie under the statute for a defect in the highway. To the same effect see Wilkins *v.* Rutland, 61 Vt. 330, 17 Atl. 735.

79. Davis *v.* Bangor, 42 Me. 522; Griffin *v.* Boston, 182 Mass. 409, 65 N. E. 811.

80. Fritsch *v.* Allegheny, 91 Pa. St. 226.

81. McArthur *v.* Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687, holding that an act "for the collection of damages sustained by reason of defective public highways, streets," etc., covered such defects only as were due to want of repair, and had nothing to do with the presence in the street of building material or other objects that did not affect its condition in that particular; and that the unauthorized or excessive use of a portion of the public highway by an abutting owner in putting lumber or material thereon was a matter that fell within the cognizance of the police power, and had nothing to do with the duty to make or repair highways.

82. Atchison *v.* King, 9 Kan. 550; Moriarty *v.* Lewiston, 98 Me. 482, 57 Atl. 790 (where a plank, set edgewise across a brick sidewalk, for the purpose of securing the brick in position, and rising vertically three inches above the level of the brick pavement of the walk, on a prominent residence street in a city, unlawfully impaired the reasonable safety and convenience of the walk); Sebert *v.* Alpena, 78 Mich. 165, 43 N. W. 1098; Plainview *v.* Mendelson, 65 Nebr. 85, 90 N. W. 956.

Although a city may not be compelled to build and maintain a sidewalk, yet having exercised its discretion by passing an ordinance to construct one, and having constructed it, it will be liable for an injury caused by the dangerous condition of the walk. Miller *v.* Bradford, 186 Pa. St. 164, 40 Atl. 409.

Partially invisible cracks in flagstones of a sidewalk come within the meaning of the word "defect" used in a statute rendering a city liable for injuries received through want of repair of highways. Burt *v.* Boston, 122 Mass. 223.

83. *Illinois.*— Bloomington *v.* Mueller, 71 Ill. App. 268; Chicago *v.* Chase, 33 Ill. App. 551.

or irregularity in the surface of the way not likely to cause injury,[84] and it is not every defect or obstruction that will render the municipality liable;[85] it is only against danger which can or ought to be anticipated, in the exercise of reasonable care and prudence, that the municipality is bound to guard.[86] In each case the way is to be pronounced sufficient or insufficient as it is or is not reasonably safe for the ordinary purposes of travel under the particular circumstances which exist in connection with that particular case,[87] considering the nature of the place and

Indiana.— Muncie *v.* Hey, 164 Ind. 570, 74 N. E. 250; Evansville *v.* Frazer, 24 Ind. App. 628, 56 N. E. 729.

Kansas.— Atcheson *v.* King, 9 Kan. 550; Salina *v.* Kerr, 7 Kan. App. 223, 52 Pac. 901.

Massachusetts.— Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605.

Michigan.— Sebert *v.* Alpena, 78 Mich. 165, 43 N. W. 1098.

Minnesota.— Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

Missouri.— Rusher *v.* Aurora, 71 Mo. App. 418.

Nebraska.— Plainview *v.* Mendelson, 65 Nebr. 85, 90 N. W. 956; Lincoln *v.* Staley, 32 Nebr. 63, 48 N. W. 887.

New York.— Higgins *v.* Glens Falls, 11 N. Y. Suppl. 289 [*affirmed* in 124 N. Y. 666, 27 N. E. 855], failure to remove irregularities in surface of natural rock sidewalk.

Custom.— It is no defense that sidewalks are constructed in the manner customarily adopted by the city. Weber *v.* Creston, 75 Iowa 16, 39 N. W. 126.

84. *Iowa.*— Doulon *v.* Clinton, 33 Iowa 397.

Massachusetts.— Raymond *v.* Lowell, 6 Cush. 524, 53 Am. Dec. 57.

Michigan.—Bigelow *v.* Kalamazoo, 97 Mich. 121, 56 N. W. 339.

New York.— Beltz *v.* Yonkers, 148 N. Y. 67, 42 N. E. 401; Getzoff *v.* New York, 51 N. Y. App. Div. 450, 64 N. Y. Suppl. 636; Tubesing *v.* Buffalo, 51 N. Y. App. Div. 14, 64 N. Y. Suppl. 399; O'Reilly *v.* Syracuse, 49 N. Y. App. Div. 538, 63 N. Y. Suppl. 520.

Pennsylvania.—Morris *v.* Philadelphia, 195 Pa. St. 372, 45 Atl. 1068.

Wisconsin.— Burroughs *v.* Milwaukee, 110 Wis. 478, 86 N. W. 159; De Pere *v.* Hibbard, 104 Wis. 666, 80 N. W. 933; Cook *v.* Milwaukee, 27 Wis. 191.

85. Aurora *v.* Pulfer, 56 Ill. 270; Vandalia *v.* Huss, 41 Ill. App. 517; Gottsberger *v.* New York, 9 Misc. (N. Y.) 349, 29 N. Y. Suppl. 592.

A rope stretched across a highway from a derrick on one side to a stone on the other, both without the limits of the highway, and in actual use by a city marshal in a search for stolen goods, is held not a defect or want of repair in the highway, and the city will not be liable for injuries thereby occasioned to travelers. Barber *v.* Roxbury, 11 Allen (Mass.) 318. See also Griffen *v.* Boston, 182 Mass. 409, 65 N. E. 811, where the principle is announced that if when the injury is done the obstacle is in use, and the acts of a third person who is using it contribute to or are the moving cause of the injury, the municipality is not liable.

86. Gasport *v.* Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164; Hamilton *v.* Buffalo, 173 N. Y. 72, 65 N. E. 944; Beltz *v.* Yonkers, 148 N. Y. 67, 42 N. E. 401; Archer *v.* Mt. Vernon, 57 N. Y. App. Div. 32, 67 N. Y. Suppl. 1040; Ibbeken *v.* New York, 94 N. Y. Suppl. 568; Galveston *v.* Dazet, (Tex. 1892) 19 S. W. 142.

The obstruction must be dangerous in itself or of such a character that a person exercising ordinary prudence cannot avoid danger or injury in passing it. Aurora *v.* Pulfer, 56 Ill. 270; Vandalia *v.* Huss, 41 Ill. App. 517; Barber *v.* Roxbury, 11 Allen (Mass.) 318; Badgley *v.* St. Louis, 149 Mo. 122, 50 S. W. 817; Gottsberger *v.* New York, 9 Misc. (N. Y.) 349, 29 N. Y. Suppl. 592.

The fact that an accident had never before been caused by the defect does not relieve the city from the charge of negligence in not guarding against it. Bradner *v.* Warwick, 91 N. Y. App. Div. 408, 86 N. Y. Suppl. 935; Brush *v.* New York, 59 N. Y. App. Div. 12, 69 N. Y. Suppl. 51. See also Lyon *v.* Logansport, 9 Ind. App. 21, 35 N. E. 128.

87. Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752.

A street need not be paved or improved in a particular way as a matter of law, but its reasonable safety is a question of fact. Brush *v.* New York, 59 N. Y. App. Div. 12, 69 N. Y. Suppl. 51. See also *infra*, XIV, D, 6.

Width.— In Fairbury *v.* Rogers, 2 Ill. App. 961, it was held, in an action for an injury from an alleged unsafe sidewalk in a dark night, that an instruction assuming that maintaining a sidewalk only four feet wide is of itself a circumstantial act of negligence is erroneous.

Stepping-stones.— Assuming that the city is bound to treat an unpaved sidewalk as if it were a part of the highway, yet its allowing stepping-stones placed therein by third persons to remain, they presenting the appearance of stepping-stones, and there being no apparent danger in their form or their distance from each other, and there being nothing to lead to the anticipation of their being or becoming unsafe, violates no duty it owes to, and does not charge it with negligence as to, one who has used the stones with safety knowing their character. Bullock *v.* New York, 51 N. Y. Super. Ct. 36. So in Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752, where a cross walk was muddy and plaintiff stepped on a stone which slipped from under him, causing an injury, it was held that there was no liability under a statute making municipal corporations liable to any person injured by reason of a defective street.

such reasonable limitations as may be put upon the use of the way for travel by

Instances of defects and obstructions creating liability — *Loose stones, bricks, etc.*— Hazard *v.* Council Bluffs, 87 Iowa 51, 53 N. W. 1083, where brickbats and other rubbish were deposited on a street by water washing over the street from an insufficient culvert, and the city was held liable for an injury caused thereby. But see McCool *v.* Grand Rapids, 58 Mich. 41, 24 N. W. 631, 55 Am. Rep. 655, holding that the statute requiring cities to keep their streets in repair did not render a city liable where a horse, while being driven on a trot, was permanently injured by stepping on a cobblestone, several of which were strewn in the street, and which could have been seen by the driver.

Loose bricks out of a walk.— Terre Haute *v.* Constans, 26 Ind. App. 421, 59 N. E. 1078, where some of the bricks were several inches below the level of others, and some stood up edgewise, and some were entirely gone, and there being no light at the place, plaintiff was injured by falling, on a dark night. But in Gosport *v.* Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164, it was held that bricks being displaced by the action of the elements so that persons might stumble or be otherwise inconvenienced, would not necessarily make the municipality liable, so long as the defect was not of itself dangerous and could be easily discovered and avoided.

Piles of dirt or rubbish.— Chicago *v.* Brophy, 79 Ill. 277; Streeter *v.* Marshalltown, 123 Iowa 449, 99 N. W. 114; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174; Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668; Joslyn *v.* Detroit, 74 Mich. 458, 42 N. W. 50; Conner *v.* Manchester, 73 N. H. 233, 60 Atl. 436; Tiers *v.* New York, 74 Hun (N. Y.) 452, 26 N. Y. Suppl. 688; Archer *v.* Johnson City, (Tenn. 1901) 64 S. W. 474 (accumulation of discarded fruit, rinds, and decayed vegetables on sidewalk); Galveston *v.* Reagan, (Tex. Civ. App. 1897) 43 S. W. 48; El Paso *v.* Dolan, (Tex. Civ. App. 1894) 25 S. W. 669 (glass); King *v.* Cleveland, 28 Fed. 835.

Depression.— A depression of an inch and a quarter in a hexagonal cement block in a city sidewalk might constitute such defect. Bieber *v.* St. Paul, 87 Minn. 35, 91 N. W. 20. So a depression three feet wide and three inches deep in a sidewalk, causing an injury to one passing over it at night, is an actionable defect. Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424. But a depression in a street, being not more than an inch and a half deep at any place, into which plaintiff stepped in alighting from a street car at a much used crossing, was held not to be an actionable defect. Burroughs *v.* Milwaukee, 110 Wis. 478, 86 N. W. 159.

Holes.— Robinson *v.* Wilmington, 8 Houst. (Del.) 409, 32 Atl. 347; Bloomington *v.* Mueller, 71 Ill. App. 268; Chicago *v.* Chase, 33 Ill. App. 551 (broken planks in sidewalk); Lawrence *v.* Davis, 8 Kan. App. 225, 55 Pac. 492 (holes in sidewalk caused by broken or decayed and removed pieces of plank, although but a few inches in depth); Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605 (hole from five to six inches in diameter in the flagging of a sidewalk); Lincoln *v.* Staley, 32 Nebr. 63, 48 N. W. 887 (missing boards in walk); Miller *v.* New York, 104 N. Y. App. Div. 33, 93 N. Y. Suppl. 227 (hole seven inches deep in paved roadway of a city street); Brush *v.* New York, 59 N. Y. App. Div. 12, 69 N. Y. Suppl. 51 (hole or rut in city street seven to ten inches in width).

Rotten stringers in board walk.— Joliet *v.* Weston, 22 Ill. App. 225 [*affirmed* in 123 Ill. 641, 14 N. E. 665]; Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745. See also Williams *v.* Hannibal, 94 Mo. App. 549, 68 S. W. 380. And see *infra*, XIV, D, 4, d, (VII), (B).

Defect may be caused by wear.— Lyon *v.* Logansport, 9 Ind. App. 21, 35 N. E. 128 (smooth and slippery condition of iron gutter crossing, from long use); Cromarty *v.* Boston, 127 Mass. 329, 34 Am. Rep. 381 (smooth and slippery condition of a cover, partly of iron and partly of glass, forming a part of the surface of a city sidewalk); Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763.

Post.— Pueblo *v.* Smith, 3 Colo. App. 386, 33 Pac. 685.

Projecting iron rails.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518.

Stump of tree.— Sweet *v.* Poughkeepsie, 97 N. Y. App. Div. 82, 89 N. Y. Suppl. 618; Foley *v.* East Flamborough Tp., 26 Ont. App. 43.

Stake in sidewalk.— Rea *v.* Sioux City, 127 Iowa 615, 103 N. W. 949; Jones *v.* Deering, 94 Me. 165, 47 Atl. 140.

Raised crossing.— A street crossing of plank raised fourteen inches above the level of the sidewalk is held to be a dangerous obstruction. Indianapolis *v.* Mitchell, 27 Ind. App. 589, 61 N. E. 947. So where one was injured in driving over a cross walk which was raised eight inches above the roadway, and the planks of which were warped and loose, it was held that a verdict for him should not be disturbed. Vandalia *v.* Ropp, 39 Ill. App. 344. But a cross walk in a muddy street being laid with heavy plank, and raised above the street grade, the beveling of the ends where they meet the rails of a street car track, being necessary to avoid the car scrapers, is held not a negligent construction. Bigelow *v.* Kalamazoo, 97 Mich. 121, 56 N. W. 339. And negligence on the part of a city in constructing a street crossing, such as to make the city liable for injuries to a person slipping thereon, is not shown by the fact that the crossing had very wide aprons, where it does not appear that the width of the top part was not ample to accommodate pedestrians. Fairgrieve *v.* Moberly, 39 Mo. App. 31.

virtue of other public necessities, convenience, and safety.[88] But on the other hand the fact that contrivances are necessary and usual to effect the purposes

88. Wellington *v.* Gregson, 31 Kan. 99, 1 Pac. 253, 47 Am. Rep. 482; Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57 (holding that the municipality is not bound to keep all of the way by the sidewalk in an equally suitable condition for crossing by pedestrians; that this would be impracticable in view of the necessity for drainage; and that the projection of a movable grating of a culvert from one to two inches above the level of the edge of the sidewalk against which it rests is not such a defect as shows a want of ordinary care on the part of the municipality and renders it liable for an injury occasioned to one stumbling over the grating in the daytime); Dougherty *v.* Horseheads, 159 N. Y. 154, 53 N. E. 799; Harrigan *v.* Brooklyn, 67 Hun (N. Y.) 85, 22 N. Y. Suppl. 39 [*affirmed* in 143 N. Y. 661, 39 N. E. 21], where one was injured while crossing a street away from a cross walk, by stepping into an opening in a curbstone which formed a drain from the street, and it was held that it was the duty of the city to free the street and walks from water, and that this small aperture in the curb line four inches wide and about three inches deep, and not on the sidewalk or cross walk, but detached some feet therefrom, was a prudent exercise of the power to make the streets and walks dry for public use.

Hitching posts, electric light poles, fire plugs, hydrants, and the like are not regarded as unlawful obstructions when placed at the curb or margin of the street or walk so as not to render the way unsafe. Columbus *v.* Sims, 94 Ga. 483, 20 S. E. 332; Bureau Junction *v.* Long, 56 Ill. App. 458; Weinstein *v.* Terre Haute, 147 Ind. 556, 46 N. E. 1004; Lostutter *v.* Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; Vincennes *v.* Thuis, 28 Ind. App. 523, 63 N. E. 315; Macomber *v.* Taunton, 100 Mass. 255; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Van Wie *v.* Mt. Vernon, 26 N. Y. App. Div. 330, 49 N. Y. Suppl. 779; Jordan *v.* New York, 26 Misc. (N. Y.) 53, 55 N. Y. Suppl. 716 (curbstone); Horner *v.* Philadelphia, 194 Pa. St. 542, 45 Atl. 330.

Stepping-stones.— Wolf *v.* District of Columbia, 21 App. Cas. (D. C.) 464, 69 L. R. A. 83; Dubois *v.* Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804; Cincinnati *v.* Fleischer, 63 Ohio St. 229, 58 N. E. 568, which cases are as to carriage blocks placed in proper parts of sidewalks.

Covering over slippery walk.— In Kleiner *v.* Madison, 104 Wis. 339, 80 N. W. 453, non-liability was declared for the placing of an apron and covering over a cement sidewalk in the winter time when the walk became slippery, the court holding that in cold weather sudden changes are liable to occur in consequence of ice and snow, thawing and freezing, and that reasonable care was all that could be required.

Obstructions authorized by statute.— The duty of keeping alleys open and free from nuisances, imposed upon cities by statute, does not apply to such obstructions as a city is specially empowered to authorize, such as the use of its alleys by a railroad company. Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 15 N. W. 573.

Temporary obstructions.— So it is held that as long as an obstruction placed upon a street is temporary and reasonable in its character there will be no liability. Swart *v.* District of Columbia, 17 App. Cas. (D. C.) 407; Simon *v.* Atlanta, 67 Ga. 618, 44 Am. Rep. 739 (non-liability for injury caused by collision with a rope stretched across a street by order of the municipal authorities in order to allow a parade of the fire department); Arthur *v.* Charleston, 51 W. Va. 132, 41 S. E. 171 (holding that the public should be warned of or protected against such temporary obstruction).

Building materials may be deposited in the street by a city or abutting owner and the same are not unlawful obstructions if not permitted to remain an unreasonable time. Winters *v.* New York, 15 Daly (N. Y.) 102, 2 N. Y. Suppl. 695; Pinnix *v.* Durham, 130 N. C. 360, 41 S. E. 932. See also Senhenn *v.* Evansville, 140 Ind. 675, 40 N. E. 69. It is negligence, however, for a city to leave building materials piled in the roadway of a street at night, without any light thereon to give notice to travelers. Van Vranken *v.* Clifton Springs, 86 Hun (N. Y.) 67, 33 N. Y. Suppl. 329. See also *infra*, XIV, D, 4, e, (IV).

A team temporarily stationary in the street under the charge of the owner or driver is not a defect, nor want of repair to be amended, nor obstruction to be removed; and the town is not liable for injuries occasioned thereby. Sikes *v.* Manchester, 59 Iowa 65, 12 N. W. 755; Davis *v.* Bangor, 42 Me. 522.

Fence separating bridle path from foot path.— It is not negligence to construct a fence separating a bridle path from a foot path in a park; and a horseman who goes on the foot path at night, and is injured by his horse falling over such fence, cannot recover. Platt *v.* New York, 8 Misc. (N. Y.) 409, 28 N. Y. Suppl. 672.

Gutters and sloping surfaces.— It being impracticable to bring all streets and walks to a dead level, a slight ascent in a cross walk or gutter crossing the street may sometimes have to exist, and it will not be said that such a condition constitutes a defect. Baker *v.* Madison, 56 Wis. 374, 14 N. W. 289. See also Kaiser *v.* St. Louis, 185 Mo. 366, 84 S. W. 19; Lavasseur *v.* Haverstraw, 18 N. Y. Suppl. 237; Canavan *v.* Oil City, 183 Pa. St. 611, 38 Atl. 1096; Cook *v.* Milwaukee, 27 Wis. 191. But where it appeared that a gutter was cut in the natural rock and as originally constructed was eighteen inches deep and sloped gradually from the

desired will not justify the municipality in maintaining them in such a position as to render the way defective and unsafe.[89]

(B) *Defect in Plan of Construction.* In some cases it has been held that since a municipality in determining the character or plan of construction of streets, sidewalks, and other public ways acts in a legislative, quasi-judicial, and discretionary capacity,[90] it is not liable for injuries resulting from a dangerous or defective condition due solely to a mistake of judgment in the plan of construction adopted;[91] and that the rule is not limited to cases where the plan adopted was determined in advance, but applies equally where it was ratified and adopted by the municipality after the actual work of construction.[92] On the other hand it has been held that since the duty of seeing that such ways are kept in a reasonably safe condition is a positive duty and not a matter of discretion,[93] the municipality may in some cases be held liable for injuries due to a dangerous or defective condition in the plan of construction adopted.[94] Even where the rule

sides to the lowest point in the middle, and the rock had broken out on one side leaving a perpendicular wall about eight inches high, a verdict for plaintiff in an action for an injury caused by the wheels of his wagon running into the gutter at such steep place and throwing him out was sustained. Stone *v.* Troy, 14 N. Y. Suppl. 616. And where an unsafe condition of a sidewalk caused one to overstep the sidewalk at night and fall into a gutter, as where the sidewalk was covered with water, it was held that the failure to guard against such an accident at that place would render the municipality liable. Bly *v.* Whitehall, 120 N. Y. 506, 24 N. E. 943.

Ditches or gutters with walks across the same for the use of pedestrians are of such common necessity and general use that they cannot be considered as defects or obstructions in the highway. Loberg *v.* Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69.

89. *Indiana.*— Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Massachusetts.—St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447; Redford *v.* Woburn, 176 Mass. 520, 57 N. E. 1008.

New York.— Archer *v.* Mt. Vernon, 57 N. Y. App. Div. 32, 67 N. Y. Suppl. 1040.

West Virginia.— Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416.

Wisconsin.— King *v.* Oshkosh, 75 Wis. 517, 44 N. W. 745.

Canada.— Atkinson *v.* Chatham, 26 Ont. App. 521.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1621.

90. Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051; Detroit *v.* Beckman, 34 Mich. 125, 22 Am. Rep. 507; Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168; Urquhart *v.* Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655.

91. *Connecticut.*— Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051.

Georgia.— Augusta *v.* Little, 115 Ga. 124, 41 S. E. 238.

Kentucky.— Clay City *v.* Abner, 82 S. W. 276, 26 Ky. L. Rep. 602.

Michigan.— Shippy *v.* Au Sable, 65 Mich. 494, 52 N. W. 741; Davis *v.* Jackson, 61 Mich. 530, 28 N. W. 526; Toolan *v.* Lansing, 38 Mich. 315; Detroit *v.* Beckman, 34 Mich. 125, 22 Am. Rep. 507. But see Malloy *v.* Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695.

Missouri.— Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168. But see Hinds *v.* Marshall, 22 Mo. App. 208.

New York.— Monk *v.* New Utrecht, 104 N. Y. 552, 11 N. E. 268; Urquhart *v.* Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655; Roach *v.* Ogdensburg, 80 Hun 467, 30 N. Y. Suppl. 450; Rehrey *v.* Newburgh, 28 N. Y. Suppl. 916; Rhinelander *v.* Lockport, 14 N. Y. Suppl. 850; Betts *v.* Gloversville, 8 N. Y. Suppl. 795.

Ohio.— Dayton *v.* Taylor, 62 Ohio St. 11, 56 N. E. 480. *Compare* Circleville *v.* Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777.

Pennsylvania.— See Wright *v.* Lancaster, 203 Pa. St. 276, 52 Atl. 245.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1622.

Statement of rule.— The municipality will not be liable on account of the character of the plan adopted unless it is so obviously dangerous as to show a failure to consider or purpose to misconstruct the work (Clay City *v.* Abner, 82 S. W. 276, 26 Ky. L. Rep. 602), or the plan is so totally and radically deficient as to leave the highway immediately upon its completion in need of repairs to make it safe for travel (Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051).

92. Davis *v.* Jackson, 61 Mich 530, 28 N. W. 526; Lansing *v.* Toolan, 37 Mich. 152; Urquhart *v.* Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655; Rhinelander *v.* Lockport, 14 N. Y. Suppl. 850.

93. Gould *v.* Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; Blyhl *v.* Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596.

94. *Kansas.*— Gould *v.* Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496.

Minnesota.— Blyhl *v.* Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596.

Missouri.— Hinds *v.* Marshall, 22 Mo. App. 208.

of non-liability for the character of the plan adopted is recognized and applied, it will not be extended to cases not clearly within its application,[95] and a municipality cannot avoid liability on this ground if it appears that no particular plan of construction was ever in fact adopted,[96] or the work was not done in conformity with the plan adopted,[97] or where the municipal authorities knew that the plan adopted had resulted in a dangerous condition and they did not remedy the defect or guard against injuries that might result therefrom;[98] but to render a municipality liable for such defective or dangerous plan it must have notice thereof and a reasonable time to remedy it.[99] Where a town is required to keep in repair highways which are located and laid out by county commissioners, it is not liable for injuries due to errors of location over which it had no control.[1]

(c) *Steps or Abrupt Slopes.* A municipality is not required to so construct all its sidewalks that they shall meet upon exactly the same level,[2] and the mere existence of a descent, slope, or step in the sidewalk of a city does not render it liable for accidents to persons in stepping from one elevation to another.[3] But it is the duty of the city, when such steps or slopes are necessary to construct and maintain them in a reasonably and ordinarily safe condition as to such persons as may, lawfully, and in the exercise of ordinary care, use them;[4] and although it is not liable for slight inequalities therein,[5] recovery may be had against it for

Texas.— Belton *v.* Turner, (Civ. App. 1894) 27 S. W. 831.

Washington.— Stone *v.* Seattle, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1622.

But where the question is debatable the mere fact that a better or safer plan might have been adopted is not sufficient to render the municipality liable. Conlon *v.* St. Paul, 70 Minn. 216, 72 N. W. 1073.

95. Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693.

96. Hodges *v.* Waterloo, 109 Iowa 444, 80 N. W. 523; Gould *v.* Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693.

97. Clemence *v.* Auburn, 66 N. Y. 334; Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693.

98. Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693; Circleville *v.* Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777.

99. Dayton *v.* Taylor, 62 Ohio St. 11, 56 N. E. 480; Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193.

1. Smith *v.* Wakefield, 105 Mass. 473.

2. Morgan *v.* Lewiston, 91 Me. 566, 40 Atl. 545.

3. Morgan *v.* Lewiston, 91 Me. 566, 40 Atl. 545; Fairgrieve *v.* Moberly, 39 Mo. App. 31; Clark *v.* Chicago, 5 Fed. Cas. No. 2,817, 4 Biss. 486.

A sidewalk thirty inches above the ground is neither as a matter of law negligence nor conclusive evidence that the place is a dangerous one, requiring a danger signal to be used. Sumner *v.* Scaggs, 52 Ill. App. 551.

4. McQueen *v.* Elkhart, 14 Ind. App. 671, 43 N. E. 460; Weisse *v.* Detroit, 105 Mich. 482, 63 N. W. 423 (holding that a cross walk containing a loose plank, the end of which is raised about two inches above the level of the walk, is reasonably safe within the meaning of 3 Howell Annot. St. § 1446*e*, which makes it the duty of municipal corporations to keep cross walks in a reasonably safe condition for public travel); Nichols *v.* St. Paul, 44 Minn. 494, 47 N. W. 168; Miller *v.* St. Paul, 38 Minn. 134, 36 N. W. 271; Clark *v.* Chicago, 5 Fed. Cas. No. 2,817, 4 Biss. 486.

Where two portions of a sidewalk ascending a hill are built on two different planes divided by a perpendicular wall several feet in height, the building of steps with a suitable railing may be a proper method of connecting the two portions. Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051.

Where the plan of constructing such steps or slopes is one that many prudent men might approve, or where it is doubtful from the facts whether the street as planned or ordered was dangerous or unsafe, or not, the benefit of the doubt should be given to the city, and it should not be held liable. Teager *v.* Flemingsburg, 109 Ky. 746, 60 S. W. 718, 22 Ky. L. Rep. 1442, 95 Am. St. Rep. 400, 53 L. R. A. 791.

Where the sidewalk is on part of the street only its ends or termini must be so graduated to the natural level of the street as to permit pedestrians to safely pass from it to the street. Plainview *v.* Mendelson, 65 Nebr. 85, 90 N. W. 956.

5. Covington *v.* Manwaring, 113 Ky. 592, 68 S. W. 625, 24 Ky. L. Rep. 423; Cook *v.* Milwaukee, 27 Wis. 191, holding that the fact that a stone leading across a gutter from a sidewalk had an inclination of one inch in a foot, and that the sidewalk had an inclination of six inches in two feet immediately adjacent to such stone, does not show an actionable defect.

Illustrations.—Thus an inclination of three or three and a quarter inches in a distance of two and one-half feet in a plank sidewalk in a city of eight hundred inhabitants is not an actionable defect (Schroth *v.* Prescott, 63

negligently constructing or permitting unusual or unnecessary steps or slopes from which injury might have been reasonably anticipated;[6] or where the step or slope was constructed in violation of the reqirements of the common council;[7] or where the plan of construction adopted was manifestly unsafe.[8]

(D) *Rain, Snow, and Ice*—(1) STREETS. A municipal corporation is not required to keep its streets clear of snow and ice to the same extent as its sidewalks,[9] but the same principle applies that it must exercise ordinary care in removing defects and obstructions caused by accumulations of snow and ice which render

Wis. 652, 24 N. W. 405); nor is a fall of one inch in ten in a stone apron leading from a sidewalk to a cross walk, even though combined with a slight lateral inclination, such a defect (De Pere *v.* Hibbard, 104 Wis. 666, 80 N. W. 933); nor an ascent of one inch or so to the foot in a cross walk, or a gutter crossing a street (Baker *v.* Madison, 56 Wis. 374, 14 N. W. 289); nor a shallow gutter in a sidewalk with the bricks on one side three quarters of an inch to an inch higher than those on the other (Haggerty *v.* Lewiston, 95 Me. 374, 50 Atl. 55); nor a rounded depression in a flag sidewalk about four inches deep, thirty-four inches long, and twelve inches wide (Hamilton *v.* Buffalo, 173 N. Y. 72, 65 N. E. 944 [*reversing* 55 N. Y. App. Div. 423, 66 N. Y. Suppl. 990]); nor a depression four feet long, eleven inches wide, and three and one-half inches deep near the curb in a sidewalk fifteen feet wide (Schall *v.* New York, 88 N. Y. App. Div. 64, 84 N. Y. Suppl. 737); nor a depression two and one-half inches deep, seven inches wide, and two feet six inches in length, in a sidewalk eight feet wide (Beltz *v.* Yonkers, 148 N. Y. 67, 42 N. E. 401); nor is a decline or slope in a sidewalk not exceeding three inches in four feet, with a lateral pitch one quarter of an inch to the foot, in connection with an accumulation of snow not unusual or extraordinary, an actionable defect as a matter of law (Koepke *v.* Milwaukee, 112 Wis. 475, 88 N. W. 238).

A municipal corporation must use its own judgment in regard to the manner in which cross walks shall connect with sidewalks, and it cannot be held liable for an injury caused by a part of a cross walk put down by a property-owner being allowed to remain a few inches higher near its intersection with the sidewalk than another part thereof. Shippy *v.* Au Sable, 65 Mich. 494, 32 N. W. 741.

6. *Colorado.*— White *v.* Trinidad, 10 Colo. App. 327, 52 Pac. 214, holding a city negligent in maintaining a section of a sidewalk six feet in length with a slope of eighteen inches, when the street adjoining is level.

Illinois.— Normal *v.* Webb, 91 Ill. App. 183, holding it negligence to construct and maintain a sidewalk three or four feet above the ground without any kind of protection whatever to prevent persons using it from falling over.

Indiana.— Glantz *v.* South Bend, 106 Ind. 305, 6 N. E. 632 (holding that a street crossing consisting of a plank which is raised from two to two and one-half inches above the level of the sidewalk is a dangerous obstruction); Muncie *v.* Spence, 33 Ind. App. 599, 71 N. E. 907.

Iowa.— Ford *v.* Des Moines, 106 Iowa 94, 75 N. W. 630, holding a temporary sidewalk which sloped five feet in a distance of forty feet without cleats or hand rails on it defective.

Louisiana.— Blume *v.* New Orleans, 104 La. 345, 29 So. 106, holding that where a municipality permits one proprietor to raise his sidewalk and lets the grade of the sidewalk on adjacent property remain out of grade for more than a year, and owing to an abrupt descent of about five inches at the dividing lines an accident happens, the city is liable.

Minnesota.— Blyhl *v.* Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596 (holding an unnecessary drop or step instead of a gradual slope an actionable defect); Tabor *v.* St. Paul, 36 Minn. 188, 30 N. W. 765 (holding a difference of from six to nine inches in the heights of the sidewalks of two streets at the place of their intersection sufficient evidence of a defect to go to the jury upon the question of the city's liability by a person injured there).

Mississippi.— Whitfield *v.* Meridian, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A. 834.

Ohio.— Toledo *v.* Higgins, 12 Ohio Cir. Ct. 541, 5 Ohio Cir. Dec. 485, holding that where part of a sidewalk is at grade and part not, requiring a step of seven inches between them, and this condition has remained for a long time and in consequence a person passing at night is injured, the city is liable.

Pennsylvania.— Kellow *v.* Scranton, 195 Pa. St. 134, 45 Atl. 676, holding that where a municipality had notice of a decided depression in a level surface of the pavement of a street and failed to repair it, and plaintiff fell and was injured, by reason of stepping into the depression, at that time concealed by snow and slush, she was entitled to recover.

West Virginia.— Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Wisconsin.— Whitney *v.* Milwaukee, 57 Wis. 639, 16 N. W. 12.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1625.

7. Clemence *v.* Auburn, 66 N. Y. 334.

8. Teager *v.* Flemingsburg, 109 Ky. 746, 60 S. W. 718, 22 Ky. L. Rep. 1442, 95 Am. St. Rep. 400, 53 L. R. A. 791.

9. Cloughessey *v.* Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Lichtenstein *v.* New York, 159 N. Y. 500, 54 N. E. 67 [*reversing* 29 N. Y. App. Div. 542, 51 N. Y. Suppl. 642].

the street unsafe for travel,[10] particularly where the existence of the accumulation is due to some other act or neglect on the part of the municipality,[11] such as the defective construction or condition of the way,[12] or the condition of a water main or hydrant.[13] The municipality is not, however, an insurer of the safety of its streets nor is it required to meet every emergency;[14] it is only required to exercise ordinary care to keep them in a reasonably safe condition,[15] which must be determined by the locality, climate, weather conditions, and other circumstances,[16] it being frequently impossible or entirely impracticable to keep the streets clear of snow and ice.[17] So also a municipality is not liable for an accumulation of snow in the street caused by cleaning off sidewalks and street car tracks,[18] unless the accumulation forms a dangerous obstruction to travel, and the municipality fails to exercise ordinary care in removing it within a reasonable time.[19]

(2) Sidewalks, Footways, and Cross Walks. The rule requiring a municipal corporation to exercise ordinary care to keep its sidewalks in a reasonably safe condition for the ordinary purposes of travel applies to the removal of accumulations of ice and snow,[20] and for injuries due to its negligence in this regard it will be liable;[21] but a municipality is not bound to keep its sidewalks absolutely free

10. *Maine.*— Ellis *v.* Lewiston, 89 Me. 60, 35 Atl. 1016; Rogers *v.* Newport, 62 Me. 101.

Maryland.—Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

New Hampshire.— Dutton *v.* Weare, 17 N. H. 34, 43 Am. Dec. 590.

New York.— Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193.

Ohio.— Cincinnati *v.* Grebner, 25 Ohio Cir. Ct. 700.

Pennsylvania.— Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

Vermont.— Green *v.* Danby, 12 Vt. 338.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1626.

11. Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; Cincinnati *v.* Grebner, 25 Ohio Cir. Ct. 700; Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

12. Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

13. Cincinnati *v.* Grebner, 25 Ohio Cir. Ct. 700.

14. Peard *v.* Mt. Vernon, 83 Hun (N. Y.) 250, 31 N. Y. Suppl. 395 [*affirmed* in 158 N. Y. 681, 52 N. E. 1125].

A person who while crossing a street at a place not prepared for foot passengers falls on the ice on the street, and who does not show that he fell because of any actionable defect in the street, cannot recover. Mueller *v.* Milwaukee, 110 Wis. 623, 86 N. W. 162.

15. Peard *v.* Mt. Vernon, 83 Hun (N. Y.) 250, 31 N. Y. Suppl. 395 [*affirmed* in 158 N. Y. 681, 52 N. E. 1125]; McDonald *v.* Toledo, 63 Fed. 60.

16. Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; Peard *v.* Mt. Vernon, 83 Hun (N. Y.) 250, 31 N. Y. Suppl. 395 [*affirmed* in 158 N. Y. 681, 52 N. E. 1125]; McDonald *v.* Toledo, 63 Fed. 60.

17. Spillane *v.* Fitchburg, 177 Mass. 87, 58 N. E. 176, 83 Am. St. Rep. 262; Lichtenstein *v.* New York, 159 N. Y. 500, 54 N. E. 67 [*reversing* 29 N. Y. App. Div. 542, 51 N. Y. Suppl. 642]; Peard *v.* Mt. Vernon, 83 Hun (N. Y.) 250, 31 N. Y. Suppl. 395 [*affirmed* in 158 N. Y. 681, 52 N. E. 1125].

18. Hutchinson *v.* Ypsilanti, 103 Mich. 12, 61 N. W. 279; Peard *v.* Mt. Vernon, 83 Hun (N. Y.) 250, 31 N. Y. Suppl. 395 [*affirmed* in 158 N. Y. 681, 52 N. E. 1125].

19. Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193.

20. *Connecticut.*— Cloughessey *v.* Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

Iowa.— Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200.

Massachusetts.— Hall *v.* Lowell, 10 Cush. 260.

Missouri.— Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242.

New York.— Beck *v.* Buffalo, 50 N. Y. App. Div. 621, 63 N. Y. Suppl. 499.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1627.

21. *Connecticut.*— Cloughessey *v.* Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Dooley *v.* Meriden, 44 Conn. 117, 26 Am. Rep. 433.

Illinois.— Virginia *v.* Plumer, 65 Ill. App. 419.

Iowa.— Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200.

Maryland.— Baltimore *v.* Marriott, 9 Md. 160, 66 Am. Dec. 326.

Massachusetts.— Street *v.* Holyoke, 105 Mass. 82, 7 Am. Rep. 500; Hall *v.* Lowell, 10 Cush. 260.

Missouri.— Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242; Waltemeyer *v.* Kansas City, 71 Mo. App. 354.

Nebraska.— Foxworthy *v.* Hastings, 25 Nebr. 133, 41 N. W. 132.

New York.— Beck *v.* Buffalo, 50 N. Y. App. Div. 621, 63 N. Y. Suppl. 499; Deufel *v.* Long Island City, 19 N. Y. App. Div. 620, 46 N. Y. Suppl. 355; Hawley *v.* Gloversville, 4 N. Y. App. Div. 343, 38 N. Y. Suppl. 647.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1627.

In Massachusetts the statute of 1896 providing that no city or town shall be liable for

from snow and ice at all times and under all circumstances.[22] It is only required to exercise ordinary care to keep them in a reasonably safe condition,[23] which must be determined with reference to the locality, climate, weather conditions, and other circumstances of the particular case;[24] and a municipality will not be liable unless it is shown that under the circumstances it was negligent.[25] It is ordinarily held that a mere slippery condition of a sidewalk due to a smooth coating of ice or snow is not such a defect as to render the municipality liable for injuries resulting therefrom,[26] and that the rule applies to cases where the presence of the ice or snow causing such slippery condition is due to artificial as well as natural

an injury to persons or property, suffered in a highway, by reason of snow or ice thereon, if the place at which the injury was received was at the time of the accident reasonably safe, is construed to mean that a way will not be deemed unsafe if it would be reasonably safe and convenient for travelers but for the presence of snow and ice. Newton *v.* Worcester, 169 Mass. 516, 48 N. E. 274.

22. Landolt *v.* Norwich, 37 Conn. 615; Kinney *v.* Troy, 108 N. Y. 567, 15 N. E. 728 [*reversing* 38 Hun 285]; Rogers *v.* Rome, 96 N. Y. App. Div. 427, 89 N. Y. Suppl. 130; Kleng *v.* Buffalo, 72 Hun (N. Y.) 541, 25 N. Y. Suppl. 445 [*affirmed* in 156 N. Y. 700, 51 N. E. 1091].

23. Chicago *v.* McGiven, 78 Ill. 347; Gibson *v.* Johnson, 4 Ill. App. 288; Rogers *v.* Rome, 96 N. Y. App. Div. 427, 89 N. Y. Suppl. 130; O'Shaughnessey *v.* Middleport, 93 N. Y. App. Div. 93, 86 N. Y. Suppl. 944; Berger *v.* New York, 65 N. Y. App. Div. 394, 73 N. Y. Suppl. 74; Staley *v.* New York, 37 N. Y. App. Div. 598, 56 N. Y. Suppl. 237; Kleng *v.* Buffalo, 72 Hun (N. Y.) 541, 25 N. Y. Suppl. 445 [*affirmed* in 156 N. Y. 700, 51 N. E. 1091]; Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729; Clark *v.* Chicago, 5 Fed. Cas. No. 2,817, 4 Biss. 486.

24. Moran *v.* New York, 98 N. Y. App. Div. 301, 90 N. Y. Suppl. 596; Rogers *v.* Rome, 96 N. Y. App. Div. 427, 89 N. Y. Suppl. 130; Kleng *v.* Buffalo, 72 Hun (N. Y.) 541, 25 N. Y. Suppl. 445 [*affirmed* in 156 N. Y. 700, 51 N. E. 1091]; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481; Clark *v.* Chicago, 5 Fed. Cas. No. 2,817, 4 Biss. 486.

25. Kannenberg *v.* Alpena, 96 Mich. 53, 55 N. W. 614; Harrington *v.* Buffalo, 121 N. Y. 147, 24 N. E. 186 [*reversing* 2 N. Y. Suppl. 333]; Moran *v.* New York, 98 N. Y. App. Div. 301, 90 N. Y. Suppl. 596; O'Shaughnessey *v.* Middleport, 93 N. Y. App. Div. 93, 86 N. Y. Suppl. 944; Hogan *v.* Watervliet, 42 N. Y. App. Div. 325, 59 N. Y. Suppl. 103; Buck *v.* Glens Falls, 4 N. Y. App. Div. 323, 38 N. Y. Suppl. 582; Lawless *v.* Troy, 18 N. Y. Suppl. 506; Winne *v.* Albany, 15 N. Y. Suppl. 423; Gram *v.* Greenhush, 3 N. Y. Suppl. 76; Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729.

Cross walks.— During a period of storm and repeated heavy falls of snow it is not negligence not to clear off cross walks, where the removal of the snow from the cross walk would involve a more dangerous condition for passing teams and pedestrians than to allow it to remain. O'Shaughnessey *v.* Middleport, 93 N. Y. App. Div. 93, 86 N. Y. Suppl. 944.

26. *Illinois.*— Chicago *v.* McGiven, 78 Ill. 347; Chicago *v.* McDonald, 111 Ill. App. 436; Metzger *v.* Chicago, 103 Ill. App. 605; Aurora *v.* Parks, 21 Ill. App. 459; Gibson *v.* Johnson, 4 Ill. App. 288.

Indiana.— McQueen *v.* Elkhart, 14 Ind. App. 671, 43 N. E. 460.

Iowa.— Broburg *v.* Des Moines, 63 Iowa 523, 19 N. W. 340, 50 Am. Rep. 756.

Maine.— Smyth *v.* Bangor, 72 Me. 249.

Massachusetts.— Billings *v.* Worcester, 102 Mass. 329, 3 Am. Rep. 460; Nason *v.* Boston, 14 Allen 508; Stanton *v.* Springfield, 12 Allen 566.

Minnesota.— Henkes *v.* Minneapolis, 42 Minn. 530, 44 N. W. 1026.

Nebraska.— Bell *v.* York, 31 Nebr. 842, 48 N. W. 878.

New York.— Kaveny *v.* Troy, 108 N. Y. 571, 15 N. E. 726; Kinney *v.* Troy, 108 N. Y. 567, 15 N. E. 728 [*reversing* 38 Hun 285]; Anthony *v.* Glens Falls, 4 N. Y. App. Div. 218, 38 N. Y. Suppl. 536 [*affirmed* in 153 N. Y. 682, 48 N. E. 1104].

North Carolina.— Cresler *v.* Asheville, 134 N. C. 311, 46 S. E. 738.

Ohio.— Stamberger *v.* Cleveland, 22 Ohio Cir. Ct. 65, 12 Ohio Cir. Dec. 42.

Pennsylvania.—Mauch Chunk *v.* Kline, 100 Pa. St. 119, 45 Am. Rep. 364; Fry *v.* Mercer Borough, 4 Pa. Co. Ct. 604.

Washington.— Calder *v.* Walla Walla, 6 Wash. 377, 33 Pac. 1054.

Wisconsin.— De Pere *v.* Hibbard, 104 Wis. 666, 80 N. W. 933; Beaton *v.* Milwaukee, 97 Wis. 416, 73 N. W. 53; Hausmann *v.* Madison, 85 Wis. 187, 55 N. W. 167, 39 Am. St. Rep. 834, 21 L. R. A. 263; Chamberlaine *v.* Oshkosh, 84 Wis. 289, 54 N. W. 618, 36 Am. St. Rep. 928, 19 L. R. A. 513; Grossenbach *v.* Milwaukee, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614; Cook *v.* Milwaukee, 27 Wis. 191; Cook *v.* Milwaukee, 24 Wis. 270, 1 Am. Rep. 183.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1627.

In Connecticut it is held that where a sidewalk had become dangerous for travelers, by an accumulation of ice, and the city had ample notice of its condition and might have rendered it safe by reasonable expenditure, it is liable to a traveler injured by falling thereon, although there was no structural defect in the sidewalk and the ice was smooth and the icy condition extended throughout the

causes.[27] It has been held, however, that a municipality will be liable for injuries due to a smooth coating of ice or snow, for which it would not otherwise be liable if its presence was due to negligence on the part of the municipality with regard to the condition of the walk,[28] or of drains, gutters, conductors, and the like;[29] and a distinction has also been made between slipperiness, which is a part of a generally prevalent condition, and that due to some local cause affecting only a particular place.[30] Where there is a considerable accumulation of ice or snow, or it has formed in drifts or ridges, or so as to present a rough and uneven condition, it is ordinarily held to constitute a defect or obstruction which it is the duty of the municipality to remove;[31] but where an accumulation or rough or uneven surface of ice or snow, which the municipality should have removed, is covered over with a new layer of ice or snow, and an injury occurs upon the new surface before the municipality would be chargeable with negligence in not removing it, it will not be liable,[32] unless it is shown that the original defective condition due to the old accumulation contributed as a proximate cause of the injury.[33]

(3) Accumulations Caused by Defects. A municipal corporation is liable for an injury due to an accumulation of ice or snow upon a sidewalk where its own negligence caused or contributed to its being there,[34] as where it was due

city. Cloughessey *v.* Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

Sanding walk.— A municipality is not liable for failing to sand a walk which is merely smooth and slippery from level ice formed from natural causes, which were not special to the place of the injury, and where the walk was not otherwise defective. McGuinness *v.* Worcester, 160 Mass. 272, 35 N. E. 1068.

27. Nason *v.* Boston, 14 Allen (Mass.) 508; Henkes *v.* Minneapolis, 42 Minn. 530, 44 N. W. 1026.

Application of rule.— The rule as to the non-liability of a municipality for the slippery condition of a sidewalk applies to such condition when caused from the freezing of snow carried on to the sidewalk by the feet of travelers (Nason *v.* Boston, 14 Allen (Mass.) 508), or ice formed from water escaping from hose (Henkes *v.* Minneapolis, 42 Minn. 530, 44 N. W. 1026), or from a fire engine (Cook *v.* Milwaukee, 27 Wis. 191), or dripping from the eaves of a building (Kaveny *v.* Troy, 108 N. Y. 571, 15 N. E. 726; Hausmann *v.* Madison, 85 Wis. 187, 55 N. W. 167, 39 Am. St. Rep. 834, 21 L. R. A. 263).

28. Adams *v.* Chicopee, 147 Mass. 440, 18 N. E. 231; Spellman *v.* Chicopee, 131 Mass. 443; Fitzgerald *v.* Woburn, 109 Mass. 204; Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757. But see Chamberlain *v.* Oshkosh, 84 Wis. 289, 54 N. W. 618, 36 Am. St. Rep. 928, 19 L. R. A. 513.

29. District of Columbia *v.* Frazer, 21 App. Cas. (D. C.) 154; McGowan *v.* Boston, 170 Mass. 384, 49 N. E. 633; Bishop *v.* Goshen, 10 N. Y. St. 401; Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

30. Reedy *v.* St. Louis Brewing Assoc., 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805. But see Billings *v.* Worcester, 102 Mass. 329, 3 Am. Rep. 406.

31. *Connecticut.*— Dooley *v.* Meriden, 44 Conn. 117, 26 Am. Rep. 433.

Iowa.— Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Hodges *v.* Waterloo, 109 Iowa 444, 80 N. W. 523; Huston *v.* Council Bluffs, 101 Iowa 33, 69 N. W. 1130, 36 L. R. A. 211.

Massachusetts.— McAuley *v.* Boston, 113 Mass. 503; Street *v.* Holyoke, 105 Mass. 82, 7 Am. Rep. 500; Hutchins *v.* Boston, 97 Mass. 272 note; Luther *v.* Worcester, 97 Mass. 268.

Missouri.— Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242.

Nebraska.— Nebraska City *v.* Rathbone, 20 Nebr. 288, 29 N. W. 920.

New York.— Keane *v.* Waterford, 130 N. Y. 188, 29 N. E. 130 [*affirming* 8 N. Y. Suppl. 790]; Beck *v.* Buffalo, 63 N. Y. Suppl. 499; Jones *v.* Troy, 4 N. Y. Suppl. 792 [*affirmed* in 127 N. Y. 671, 28 N. E. 255].

Pennsylvania.— Scott *v.* Scranton, 5 Lack. Leg. N. 73.

Utah.— Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

Wisconsin.— Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26; Salzer *v.* Milwaukee, 97 Wis. 471, 72 N. W. 20; Paulson *v.* Pelican, 79 Wis. 445, 48 N. W. 715. *Compare* Dapper *v.* Milwaukee, 107 Wis. 88, 82 N. W. 725.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1627.

In Michigan it is held that a municipal corporation is not liable for an injury caused by a fall on a sidewalk or cross walk occasioned by ice formed by the trampling of snow and freezing and melting until the surface is uneven. Rolf *v.* Greenville, 102 Mich. 544, 61 N. W. 3; McKellar *v.* Detroit, 57 Mich. 158, 23 N. W. 621.

32. Durr *v.* Green Island, 71 Hun (N. Y.) 260, 24 N. Y. Suppl. 1014; Lawless *v.* Troy, 18 N. Y. Suppl. 506; Johnson *v.* Glens Falls, 16 N. Y. Suppl. 585.

33. Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Hodges *v.* Waterloo, 109 Iowa 444, 80 N. W. 523.

34. Gaylord *v.* New Britain, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752; Muncie *v.* Hey,

to the negligently defective construction or condition of the walk,[35] or a defective, insufficient, or obstructed drain,[36] gutter,[37] or catch-basin,[38] a leaky hydrant,[39] or negligence on the part of the municipality in permitting water to be discharged from the conductors from a roof upon the sidewalk,[40] or in failing to prevent the flow of surface waters upon a walk.[41] Where, however, an injury occurs by reason of ice or snow upon a sidewalk which is in a defective condition, if under the circumstances of the case the municipality cannot be chargeable with negligence for the presence of ice or snow upon the sidewalk at the time of the injury, it must be shown that the defect in the walk operated as a cause of the injury;[42] and in the absence of such proof, if the injury might have occurred merely by reason of the slippery condition, without regard to the defect in the walk, the municipality cannot be held liable.[43]

(4) NOTICE OF ICE AND SNOW. In order to charge a municipality with responsibility for the dangerous condition of a street or sidewalk by reason of ice and snow thereon, it must have had reasonable notice of such condition.[44] Except where an ordinance or statute requires actual notice,[45] or where the dangerous con-

164 Ind. 570, 74 N. E. 250; Bishop *v.* Goshen, 10 N. Y. St. 401; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

35. Hughes *v.* Lawrence, 160 Mass. 474, 36 N. E. 485; Fitzgerald *v.* Woburn, 109 Mass. 204; Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757; McDonnell *v.* Philadelphia, 12 Pa. Co. Ct. 672.

36. Bishop *v.* Goshen, 120 N. Y. 337, 24 N. E. 720; Woolsey *v.* Ellenville, 61 Hun (N. Y.) 136, 15 N. Y. Suppl. 647; Bishop *v.* Goshen, 10 N. Y. St. 401; Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

37. Gaylord *v.* New Britain, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752; Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357.

38. Chicago *v.* Smith, 48 Ill. 107.

39. Corbett *v.* Troy, 53 Hun (N. Y.) 228, 6 N. Y. Suppl. 381; Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

40. Muncie *v.* Hey, 164 Ind. 570, 74 N. E. 250; McGowan *v.* Boston, 170 Mass. 384, 49 N. E. 633; Olson *v.* Worcester, 142 Mass. 536, 8 N. E. 441; Hall *v.* Lowell, 10 Cush. (Mass.) 260; Todd *v.* Troy, 61 N. Y. 506; Darling *v.* New York, 18 Hun (N. Y.) 340; Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481. But see Gavett *v.* Jackson, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861.

41. Keith *v.* Brockton, 136 Mass. 119.

If the municipality is not negligent with regard to the overflow of the sidewalk, it is not liable in the absence of proof that it had notice of the existence of the ice formed thereby, or that it had been there for such time that in the exercise of reasonable care it should have known of it. Tracey *v.* Poughkeepsie, 46 Hun (N. Y.) 569.

42. Bailey *v.* Cambridge, 174 Mass. 188, 54 N. E. 523; Ayres *v.* Hammondsport, 130 N. Y. 665, 29 N. E. 265 [*reversing* 7 N. Y. Suppl. 174]; Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Safford *v.* Green Island, 74 Hun (N. Y.) 306, 26 N. Y. Suppl. 669; Grossenbach *v.* Milwaukee, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614. See also Wesley *v.* Detroit, 117 Mich. 658, 76 N. W. 104.

43. Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492.

44. *District of Columbia.*— District of Columbia *v.* Frazer, 21 App. Cas. 154.

Illinois.— Ransom *v.* Belvidere, 87 Ill. App. 167.

Minnesota.— Stanke *v.* St. Paul, 71 Minn. 51, 73 N. W. 629, holding that where, by reason of negligence upon the part of the municipal authorities, a street gutter or water way becomes obstructed, so that it will not carry off accumulated waters, and such waters overflow upon the sidewalk and freeze, a person who falls upon the ice cannot recover, in the absence of proof that the municipality had notice that, because of such negligence, ice usually formed there, or at least in the absence of notice that ice might so form.

New York.— Todd *v.* Troy, 61 N. Y. 506; Smith *v.* Brooklyn, 36 Hun 224 [*affirmed* in 107 N. Y. 655, 14 N. E. 606]; Heintze *v.* New York, 50 N. Y. Super. Ct. 295.

Ohio.— Vandyke *v.* Cincinnati, 1 Disn. 532, 12 Ohio Dec. (Reprint) 778.

Pennsylvania.— Boyle *v.* Mahanoy City, 19 Pa. Co. Ct. 195.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1652.

Under R. I. Gen. Laws, c. 72, § 13, requiring at least twenty-four hours' notice to a city before it can be held liable for injuries caused by snow or ice on a sidewalk, a city is not liable, in the absence of notice, without proof that the injury would not have occurred, but for some defect independent of the ice and snow. Allen *v.* Cook, 21 R. I. 525, 45 Atl. 148.

That an ordinance requires owners to remove the snow and ice from their sidewalks does not excuse the necessity for such notice. Heintze *v.* New York, 50 N. Y. Super. Ct. 295.

45. See the cases cited *infra*, this note.

Under Me. Rev. St. c. 18, c. 80, providing that to render a town liable for injuries received from a defective way, it must have

dition had not existed a sufficient length of time to presume notice,[46] this notice may be either actual[47] or constructive,[48] as where the dangerous conditions have existed for such a length of time, and under such circumstances, that the municipal authorities would necessarily have discovered them by the exercise of ordinary care.[49] Where a municipality has knowledge that a sidewalk is in such a condi-

had twenty-hours' actual notice of the defect, a heavy fall of snow, which drifts the highways of a town generally, but blows off in spots, is not such actual notice of a particular drift from which an injury is received. Gurney *v.* Rockport, 93 Me. 360, 45 Atl. 310.

Under N. Y. Laws (1881), c. 183, requiring actual notice of the defect to be given, in order to render defendant liable, the fact that ice had been on the walk for about three weeks; that there had been sleet a few days before the accident, after which the weather turned cold; that defendant's superintendent of streets had been seen to pass over the walk ten or twelve days, and again about a week before; that when he passed over the walk there was ice on it, but covered with ashes; and that the ice extended almost the entire width of the sidewalk for about five feet in length does not show actual knowledge. McNally *v.* Cohoes, 127 N. Y. 350, 27 N. E. 1043 [*affirming* 53 Hun 202, 6 N. Y. Suppl. 842].

R. I. Gen. St. c. 60, § 15, exempting towns from liability for injuries caused by obstructions of snow and ice in the highways, unless notice of the particular obstruction causing the injury has been given to the highway officers, applies to obstructions of snow and ice produced by artificial causes, as well as to those produced by natural causes. Winsor *v.* Tripp, 12 R. I. 454.

46. Ince *v.* Toronto, 27 Ont. App. 410, holding that where there was a sudden change in the temperature about six o'clock in the morning, and ice then formed on the sidewalk in question, the municipality, in the absence of actual notice of its dangerous condition, was not liable for an accident which happened about eleven o'clock on the same morning.

47. Ransom *v.* Belvidere, 87 Ill. App. 167.

48. Ransom *v.* Belvidere, 87 Ill. App. 167; Todd *v.* Troy, 61 N. Y. 506, holding that where the city authorities permit such an accumulation of snow and ice as will constitute an obstruction to remain on the sidewalk an unreasonable length of time, to the danger of travelers, the city is chargeable with negligence without proof of actual notice.

The falling of snow is sufficient notice to the city to impose upon it the duty of clearing its sidewalks. Foxworthy *v.* Hastings, 25 Nebr. 133, 41 N. W. 132.

49. *District of Columbia.*— District of Columbia *v.* Frazer, 21 App. Cas. 154.

Illinois.— Ransom *v.* Belvidere, 87 Ill. App. 167.

Indiana.— Muncie *v.* Hey, 164 Ind. 570, 74 N. E. 250.

Massachusetts.— McGowan *v.* Boston, 170 Mass. 384, 49 N. E. 633, holding a municipality liable under Pub. St. c. 52, §§ 1, 18, for injuries to a person by her falling on ice which had been on the sidewalk at that place for three or four days.

Michigan.— Corey *v.* Ann Arbor, 124 Mich. 134, 82 N. W. 804, 134 Mich. 376, 96 N. W. 477.

New York.— Todd *v.* Troy, 61 N. Y. 506.

Pennsylvania.— Boyle *v.* Mahanoy City, 19 Pa. Co. Ct. 195.

Virginia.— Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

Canada.— Gunlack *v.* Montreal, 17 Quebec Super. Ct. 294.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1652.

Facts sufficient to charge notice.— That a municipality had constructive notice of the dangerous condition caused by ice or snow has been held to be sufficiently shown from the facts that a defect caused by an accumulation of snow and ice had existed for nine days on a frequented sidewalk, which during that time was patroled by a policeman, and several times passed by one of the selectmen of defendant town (Fortin *v.* Easthampton, 145 Mass. 196, 13 N. E. 599); or from a long continued accumulation of ice on the sidewalk (Ney *v.* Troy, 3 N. Y. Suppl. 679 [*affirmed* in 123 N. Y. 628, 25 N. E. 952]); or from the fact that on the day of the accident about one tenth of an inch of snow had fallen, and in the ten days preceding not more than five tenths of an inch had fallen; that it had thawed in the first portion of the ten days; and that the ice at the place of the accident was rough and uneven and extended the width of the walk and had been so a week or ten days (Masters *v.* Troy, 50 Hun (N. Y.) 485, 3 N. Y. Suppl. 450 [*affirmed* in 123 N. Y. 628, 25 N. E. 952]).

Facts insufficient to charge notice.— That a municipality had constructive notice of a defect caused by ice or snow has been held not to be sufficiently shown by the fact that the accident occurred about eight o'clock in the morning, and that the icy condition at the place where the accident occurred was caused by ice which had formed thereon only the night before (Leipsic *v.* Gerdeman, 68 Ohio St. 1, 67 N. E. 87); nor from the fact that it snowed on the third day before the accident, rained on the second day before, and froze on the night before, together with testimony that there was ice there on the night before (Davis *v.* Kingston, 1 Silv. Sup. (N. Y.) 536, 5 N. Y. Suppl. 506); nor from the fact that the president of the common council of a city lived on the opposite side of the street from a sidewalk on which ice was formed, and took a street car frequently in front of his house (Corey *v.* Ann Arbor, 134 Mich. 376, 96 N. W. 477); nor from the

tion that it would be dangerous when covered with ice and snow, a fall of snow is immediate notice to it that the sidewalk at that point is in a dangerous condition.[50]

(5) Time For Removal. While a municipality must perform its duty of removing dangerous accumulations of ice or snow from its sidewalks within a reasonable time after notice, actual or constructive, of such condition,[51] it is not bound to see that its sidewalks are at all times absolutely free from snow and ice,[52] and it is entitled to a reasonable time to remove such accumulations;[53] what is reasonable being dependent upon the circumstances of the particular case.[54] It may also rely in the first instance for a reasonable time upon residents to attend to the walks adjacent to their premises as required by ordinance,[55] but such a requirement does not entirely relieve the municipality, which must either enforce the ordinance or do the work itself within a reasonable time.[56] Where sudden cold following a rain or melting of snow causes a film of ice upon the sidewalks which it is practically impossible to remove, the municipality may, without being guilty of negligence, wait for a change of temperature to remedy the condition.[57]

(E) *Overhanging and Falling Objects*—(1) In General. A city is liable in damages to one injured by the falling of a tree, pole, or other object standing within the limits of the street or highway, where it knew, or might have known, by the exercise of reasonable diligence, of its dangerous condition, and took no steps to remove the same, or to guard passers-by against it.[58] It has been held,

fact that plaintiff was injured at seven o'clock in the evening by falling on a slippery sidewalk, and that the icy condition of the sidewalk was caused by rain that had fallen in the afternoon (Springer *v.* Philadelphia, 9 Pa. Cas. 395, 12 Atl. 490); nor from the fact that for a week immediately before the accident the temperature of the weather had remained below the freezing point, and that there was snow a week before the accident, but none during the interval (Foley *v.* Troy, 45 Hun (N. Y.) 396).

The failure of the city to remove snow from the sidewalk within forty-eight hours after an intermittent storm had ceased is not sufficient to constitute constructive notice of the sidewalk's dangerous condition, since the city is entitled to wait a reasonable time for abutting owners to remove the snow. Hawkins *v.* New York, 54 N. Y. App. Div. 258, 66 N. Y. Suppl. 623.

50. Corts *v.* District of Columbia, 7 Mackey (D. C.) 277.

Where the defect is harmless in itself, although it may have existed long enough to be known, and can become dangerous only in combination with snow and ice of which the municipal authorities had no notice, the municipality will not be liable because of the notice of the preëxisting defect. Free *v.* District of Columbia, 21 D. C. 608.

51. O'Hara *v.* Brooklyn, 57 N. Y. App. Div. 176, 68 N. Y. Suppl. 210; Wyman *v.* Philadelphia, 175 Pa. St. 117, 34 Atl. 621; Koch *v.* Ashland, 88 Wis. 603, 60 N. W. 990; Cuzner *v.* Calgary, 1 Terr. L. Rep. 162.

52. Landolt *v.* Norwich, 37 Conn. 615.

53. Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Berger *v.* New York, 65 N. Y. App. Div. 394, 73 N. Y. Suppl. 74; Blakeley *v.* Troy, 18 Hun (N. Y.) 167; O'Connor *v.* New York, 16 Daly (N. Y.) 58, 8 N. Y. Suppl. 530, 9 N. Y. Suppl. 492; Duncan *v.* Buffalo, 2 N. Y. Suppl. 503; Harrigan *v.* Hoosick Falls, 1 N. Y. Suppl. 57; Smith *v.* Chicago, 38 Fed. 388.

The municipality will not be liable for an injury caused by slipping on ice and snow, where it appears that the condition of the street was occasioned by heavy snowstorms a few days before and that the city has shown reasonable diligence in removing the snow and ice. Battersby *v.* New York, 7 Daly (N. Y.) 16.

Lapse of statutory period.— Liability will not accrue on account of ice and snow till the lapse of the statutory time to remove. McAllister *v.* Bridgeport, 72 Conn. 733, 46 Atl. 552.

54. Duncan *v.* Buffalo, 2 N. Y. Suppl. 503.

55. Landolt *v.* Norwich, 37 Conn. 615; Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Foley *v.* New York, 95 N. Y. App. Div. 374, 88 N. Y. Suppl. 690; Crawford *v.* New York, 68 N. Y. App. Div. 107, 74 N. Y. Suppl. 261 [*affirmed* in 174 N. Y. 518, 66 N. E. 1106]; Hawkins *v.* New York, 54 N. Y. App. Div. 258, 66 N. Y. Suppl. 623; Calder *v.* Walla Walla, 6 Wash. 377, 33 Pac. 1054.

56. Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242; Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492.

57. Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Staley *v.* New York, 37 N. Y. App. Div. 598, 56 N. Y. Suppl. 237; Betts *v.* Gloversville, 8 N. Y. Suppl. 795.

58. Duffy *v.* Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743; Chase *v.* Lowell, 151 Mass. 422, 24 N. E. 212; McGarey *v.* New York, 89 N. Y. App. Div. 500, 85 N. Y. Suppl. 861; Norristown *v.* Moyer, 67 Pa. St. 355. *Compare* McLoughlin *v.* Philadelphia, 142 Pa. St. 80, 21 Atl. 754, holding that a city is not liable for injury caused to a child by window screens, which the occupant of a building has placed on the side-

however, that if the falling object appeared safe to outward observation, and the city authorities had no reason to suspect its dangerous condition, the city is not liable.[59]

(2) Structures or Projections Over Street. The duty of a municipal corporation to keep its streets in safe condition requires it to take reasonable precautions against dangers from overhead as well as underfoot.[60] The danger and the unsafety may be as great, and the consequences as injurious, as in the case of a defect in, or obstruction upon, the surface of the street; and a city has been held liable for injury to one struck, without contributory negligence, by a structure or object overhanging or projecting into a street dangerously low.[61] On the same principle the liability of cities for injuries occasioned by the fall of dangerous and insufficiently supported structures, which have negligently been permitted to overhang a street, has been maintained in many cases.[62] But the liability of the city in such cases can arise only when the notice of the danger has actually come to the servants of the corporation, or may be imputed to them while in the ordinary exercise of their duty.[63] Under a statute with reference to the liability of municipal corporations for defects in streets, it has been held that anything projecting over the sidewalk from a building, but not connected with the street or sidewalk, and high enough not to interfere with passage underneath, however insecure and dangerous it may be, is not a defect in the street; while a projection, if supported by posts erected upon the sidewalk is such a defect, and, for an injury caused by its fall, the city may be held liable.[64]

(3) Buildings or Other Structures Adjacent to Street. Whenever a structure exists on the side of a street in so unsafe a condition as to endanger the safety of travelers thereon, it is the duty of the city to remove it; and for failure

walk, leaning against his building, falling upon her while she is on the sidewalk, although the screens have been left in that position each day for months.

59. Gubasko *v.* New York, 14 Daly (N. Y.) 559, 1 N. Y. Suppl. 215; Jones *v.* Greenboro, 124 N. C. 310, 32 S. E. 675. But *compare* Vosper *v.* New York, 49 N. Y. Super. Ct. 296.

60. Larson *v.* Grand Forks, 3 Dak. 307, 19 N. W. 414; Bohen *v.* Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564.

61. Talbot *v.* Taunton, 140 Mass. 552, 5 N. E. 616, bridge.

Limb of tree.— Louisville *v.* Michels, 114 Ky. 551, 71 S. W. 511, 24 Ky. L. Rep. 1375.

Electric lights.— Schmidt *v.* Chicago, 107 Ill. App. 64.

Telephone or electric wires.— Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605; District of Columbia *v.* Dempsey, 13 App. Cas. (D. C.) 533.

62. Grove *v.* Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262, cornice.

Awnings.— Larson *v.* Grand Forks, 3 Dak. 307, 19 N. W. 414; Jarrell *v.* Wilmington, 4 Pennew. (Del.) 454, 56 Atl. 379; Bohen *v.* Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; Bieling *v.* Brooklyn, 120 N. Y. 98, 24 N. E. 389; Hume *v.* New York, 74 N. Y. 264.

Sign.— Leary *v.* Yonkers, 95 N. Y. App. Div. 126, 88 N. Y. Suppl. 829.

Shed.— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

63. Grove *v.* Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Hume *v.* New York, 74 N. Y. 264; Leary *v.* Yonkers, 95 N. Y. App. Div. 126, 88 N. Y. Suppl. 829.

64. Jones *v.* Boston, 104 Mass. 75, 6 Am. Rep. 194.

Projection connected with street — city liable.— For an injury received by reason of a defective awning, projecting over and across a sidewalk, and supported on posts at the curbstone, a city is held to be liable. Day *v.* Milford, 5 Allen (Mass.) 98; Drake *v.* Lowell, 13 Metc. (Mass.) 292. So also a city is liable for the fall of a transparency fastened at one end to a building, and at the other end supported by a pole resting on the sidewalk. West *v.* Lynn, 110 Mass. 514.

Projection not connected with street — city not liable.— For an injury received from the fall of snow and ice, projected from the roof of a building, and overhanging the sidewalk, a city is not liable. Hixon *v.* Lowell, 13 Gray (Mass.) 59. Nor is a city liable for an injury caused by the falling of a sign attached to a building and suspended over the sidewalk. Jones *v.* Boston, 104 Mass. 75, 6 Am. Rep. 194.

Objects which have no necessary connection with the road-bed or relation to public travel thereon, and the danger from which arises from mere casual proximity, and not from the use of the road for the purpose of traveling thereon, will not as a general rule render the road defective. Hewison *v.* New Haven, 34 Conn. 136, 91 Am. Dec. 718, fall of weights attached to the corners of a flag suspended across a street.

to do so the city may be liable.[65] If, however, such structure is wholly on private property, although on the line of the street, it has been held that no municipal liability arises for injuries caused by its fall,[66] unless it is made a municipal duty to take down and remove dangerous structures.[67] If such a wall was firm and solid, and was thrown down by a tempest or other act of God, the city is not liable for an injury caused thereby.[68] Where the duty of examining and removing dangerous buildings and structures is vested in the department of buildings and the officers and agents thereof are not the agents of the city, the city is not liable for their failure to remove such a structure.[69]

(F) *Objects Frightening Horses* — (1) IN GENERAL. By the weight of authority an object calculated to frighten horses, negligently permitted to remain in a public street or highway, is such an obstruction as makes a municipality liable in case of an accident happening in consequence thereof,[70] even though it is so far from the traveled path as to avoid all danger of collision.[71] To render the corporation liable in such cases, however, it must appear that the object or obstruction was one naturally calculated to frighten horses of ordinary gentleness,

65. Casan *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192; Bliven *v.* Sioux City, 85 Iowa 346, 52 N. W. 246, which cases are as to bill boards.

66. Temby *v.* Ishpeming, 140 Mich. 146, 103 N. W. 588, 112 Am. St. Rep. 392, 69 L. R. A. 618. But see Grogan *v.* Broadway Foundry Co., 87 Mo. 321; Kiley *v.* Kansas City, 87 Mo. 103, 56 Am. Rep. 443 [*overruling* Kiley *v.* Kansas City, 69 Mo. 102, 33 Am. Rep. 491].

67. Parker *v.* Macon, 39 Ga. 725, 99 Am. Dec. 486; Langan *v.* Atchison, 35 Kan. 218, 11 Pac. 38, 57 Am. Rep. 165.

Wall remote from street.— An action cannot be maintained against a city because of the fall of a dangerous wall left standing after a fire at a point remote from the public street. Cain *v.* Syracuse, 95 N. Y. 83 [*affirming* 29 Hun 105].

68. Parker *v.* Macon, 39 Ga. 725, 99 Am. Dec. 486; Oak Harbor *v.* Kallagher, 52 Ohio St. 183, 39 N. E. 144.

69. Connors *v.* New York, 11 Hun (N. Y.) 439.

70. *Illinois.*— Vandalia *v.* Huss, 41 Ill. App. 517.

Indiana.— Rushville *v.* Adams, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124.

New Hampshire.— Bartlett *v.* Hooksett, 48 N. H. 18; Chamberlain *v.* Enfield, 43 N. H. 356.

New York.— Hoffart *v.* West Turin, 180 N. Y. 516, 72 N. E. 1143, holding, however, that where it appears that the horse was frightened, not by the appearance of a pile of wood, but by the sudden slipping down of a stick of wood, the town was not liable, the commissioner of highways not being bound to anticipate or provide against such an event.

Pennsylvania.— Baker *v.* North East Borough, 151 Pa. St. 234, 24 Atl. 1079.

Rhode Island.— Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832.

Wisconsin.— Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1635.

Advertising banner.— A village, by permitting an advertising banner to remain suspended across a street, renders itself liable to one injured by his horse taking fright at it. Champlain *v.* Penn Yan, 34 Hun (N. Y.) 33 [*affirmed* in 102 N. Y. 680].

A dead animal in a public street, calculated to frighten horses, is such an obstruction as will render the corporation liable for injuries caused by accidents happening in consequence thereof. Chicago *v.* Hoy, 75 Ill. 530.

Ordinary wagons are not such objects as are calculated to frighten horses ordinarily gentle. Studor *v.* Gouverneur, 15 N. Y. App. Div. 229, 44 N. Y. Suppl. 122.

71. *Indiana.*—Rushville *v.* Adams, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124.

North Dakota.— Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Rhode Island.—Bennett *v.* Fifield, 13 R. I. 139, 43 Am. Rep. 17.

Vermont.— Morse *v.* Richmond, 41 Vt. 435, 98 Am. Dec. 600.

Wisconsin.— Foshay *v.* Glen Haven, 25 Wis. 288, 3 Am. Rep. 73.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1635.

In Massachusetts and a few other states it has been held that an object in a highway, with which a traveler does not come in contact or collision, and which is not an actual obstruction in the way of travel, is not a defect, for the sole reason that it is of a nature to cause a horse to take fright, in consequence of which he escapes from the control of his driver, and causes damage. Bowes *v.* Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; Cook *v.* Montague, 115 Mass. 571; Bemis *v.* Arlington, 114 Mass. 507; Cook *v.* Charlestown, 98 Mass. 80; Kingsbury *v.* Dedham, 13 Allen 186, 90 Am. Dec. 191; Keith *v.* Easton, 2 Allen 552. See also Agnew *v.* Corunna, 55 Mich. 428, 21 N. W. 873, 54 Am. Rep. 383; Dunn *v.* Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843. Nor does it make any difference that the object which frightened the horse is one which would have been an

and that the horse frightened was of such a character.[72] Neither the rightful use by men or animals of a highway, which is itself in reasonably safe and fit condition, nor their mere misconduct upon it, although such misconduct may amount to a public nuisance, will of itself render a city liable for damages occasioned by a horse taking fright.[73]

(2) Steam Rollers and Building Materials. The liability of a municipality for permitting objects which are naturally calculated to frighten horses to remain within the limits of a highway arises out of the fact that such objects are permitted to be unlawfully there.[74] Since therefore a city may lawfully use a steam roller for the purpose of constructing or repairing its streets, in the absence of negligence in its management, it is not liable for damages occasioned by a horse becoming frightened thereat;[75] but unnecessarily allowing a steam roller to remain in a street, after the street is finished and the use of the roller has ceased, is sufficient to render the city liable for damages resulting from the frightening of horses by such roller.[76] The same rule applies in the case of building materials temporarily placed upon a portion of the street, whether by the city or an abutting owner.[77] The municipality should give reasonable notice to the traveling public of the presence of such an obstruction,[78] but a view of it in time to avoid it without injury amounts to notice.[79]

(G) *Embankments, Excavations, and Openings* — (1) In Street — (a) Embankments. Where a city in grading a street leaves a high and steep embankment in the street, the city is liable for personal injuries caused by its failure to erect guards or railings to prevent accidental driving or falling over such embankment, in the absence of contributory negligence on the part of the person injured.[80] The negligence consists, not in the plan of the work, or the manner in which it is done, but in the failure to provide suitable protection against accident after the work of grading is completed.[81]

obstruction if he had come in contact with it. Cook *v.* Charlestown, 98 Mass. 80.

72. Rushville *v.* Adams, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124; Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

73. Davis *v.* Bangor, 42 Me. 522; Cole *v.* Newburyport, 129 Mass. 594, 37 Am. Rep. 394; Bartlett *v.* Hooksett, 48 N. H. 18; Ray *v.* Manchester, 46 N. H. 59, 88 Am. Dec. 192.

74. Loberg *v.* Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69; Cairncross *v.* Pewaukee, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473; District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237.

75. Elgin *v.* Thompson, 98 Ill. App. 358; McMulkin *v.* Chicago, 92 Ill. App. 331; Lane *v.* Lewiston, 91 Me. 292, 39 Atl. 999; Sparr *v.* St. Louis, 4 Mo. App. 573; District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237. But see Young *v.* New Haven, 39 Conn. 435; Halstead *v.* Warsaw, 43 N. Y. App. Div. 39, 59 N. Y. Suppl. 518. See also Weatherford *v.* Lowery, (Tex. Civ. App. 1898) 47 S. W. 34.

76. Elgin *v.* Thompson, 98 Ill. App. 358.

77. McCord *v.* Ossining, 10 N. Y. St. 407; Loberg *v.* Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69; McDonald *v.* Dickenson, 24 Ont. App. 31; McDonald *v.* Yarmouth Tp., 29 Ont. 259. *Contra*, Patterson *v.* Austin, 15 Tex. Civ. App. 201, 39 S. W. 976.

78. Lane *v.* Lewiston, 91 Me. 292, 39 Atl. 999; District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237.

79. Lane *v.* Lewiston, 91 Me. 292, 39 Atl. 999; District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237.

80. Aurora *v.* Colshire, 55 Ind. 484; Wyandotte *v.* Gibson, 25 Kan. 236; Wellman *v.* Susquehanna Depot, 167 Pa. St. 239, 31 Atl. 566; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

"Exposed place."— An embankment at the edge of a street, the roadway being in good condition and bounded by a gutter or curbstone eight inches high and by ten feet of sidewalk, over which plaintiff was dragged by his horse, which had become frightened, was held not to be an "exposed place," within the meaning of the provision of a city charter giving the city power to compel or cause the making and repairing of railings at exposed places; and a failure to guard the embankment with railings was not negligence. Hubbell *v.* Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522.

81. Wyandotte *v.* Gibson, 25 Kan. 236.

Falling of bluff.— In an action against a city for the death of a child caused by the falling upon him of a portion of a bluff through which a street was being graded, it is proper to instruct that, although defendant left the bluff in a reasonably safe condition when it ceased work there, yet it afterward, from natural causes or from undermining by digging, became dangerous, and

(b) Excavations[82] — aa. *In General.* When a municipality negligently permits an unguarded excavation to remain in its streets, it is liable to any one who falls therein, while in the exercise of ordinary care.[83]

bb. *Ditches, Culverts, and Sewers.* A municipality has a right to make such excavations in its streets from time to time as, in its judgment, may be necessary and proper to lay down culverts, sewers, and such other subservice conduits as the business, health, convenience, and comfort of the citizens may require. But in so doing the city must use all reasonable care, and take every reasonable precaution to prevent injuries to travelers along the streets;[84] and if a person in the exercise of ordinary care is injured through the neglect of such reasonable precautions, an action will lie against the municipality for such injury.[85]

(c) Openings. An opening in a street or sidewalk such as an area way, coal hole or manhole, properly constructed and covered, is not a nuisance *per se*, but a lawful use of the street, and consistent with the easement of the public to travel over it.[86] Liability for an injury sustained by a pedestrian, who falls into such an opening, depends therefore on whether there was negligence in constructing or maintaining it.[87] If such openings are negligently left open and unprotected for such length of time that the municipal authorities ought, in the exercise of reasonable diligence, to know and remedy the mischief, the city may become liable for injuries occasioned thereby to travelers exercising ordinary care.[88] If,

defendant had notice thereof in time to repair, and failed to do so, it is chargeable with negligence. Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Barriers, lights, etc., see *infra*, XIV, D, 4, e, (IV).

82. License to private party to make excavations see *supra*, XIV, D, 3, e.

83. *Delaware.*— Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

Iowa.— Case *v.* Waverly, 36 Iowa 545.

Kansas.— Fletcher *v.* Ellsworth, 53 Kan. 751, 37 Pac. 115.

Michigan.— Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071; Alexander *v.* Big Rapids, 70 Mich. 224, 38 N. W. 227, holding that a city is liable for injuries received by falling into an excavation left by the city after taking up a cross walk and grading the street, although there was no cross walk there at the time of the injury.

New York.— Pettingill *v.* Yonkers, 4 N. Y. St. 330.

Ohio.— Nitz *v.* Toledo, 22 Ohio Cir. Ct. 454, 12 Ohio Cir. Dec. 357; Hewitt *v.* Cleveland, 21 Ohio Cir. Ct. 505, 11 Ohio Cir. Dec. 710; Walker *v.* Springfield, 3 Ohio Dec. (Reprint) 567.

Wisconsin.— McGrath *v.* Bloomer, 73 Wis. 29, 40 N. W. 585.

United States.— Nichols *v.* Brunswick, 18 Fed. Cas. No. 10,238, 3 Cliff. 81.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1636.

84. Carswell *v.* Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; Savannah *v.* Waldner, 49 Ga. 316; O'Rourke *v.* Monroe, 98 Mich. 520, 57 N. W. 738.

85. *Georgia.*— Americus *v.* Chapman, 94 Ga. 711, 20 S. E. 3; Savannah *v.* Waldner, 49 Ga. 316.

Illinois.— Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Lemont *v.* Rood, 18 Ill. App. 245.

Massachusetts.— Torphy *v.* Fall River, 188 Mass. 310, 74 N. E. 465.

Michigan.— Monje *v.* Grand Rapids, 122 Mich. 645, 81 N. W. 574.

Minnesota.— O'Gorman *v.* Morris, 26 Minn. 267, 3 N. W. 349.

Missouri.— Halpin *v.* Kansas City, 76 Mo. 335.

New York.— Grant *v.* Brooklyn, 41 Barb. 381; Crowther *v.* Yonkers, 15 N. Y. Suppl. 588.

Texas.— Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; White *v.* San Antonio, (Civ. App. 1894) 25 S. W. 1131.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1637.

Compare Hughes *v.* Baltimore, 12 Fed. Cas. No. 6,844, Taney 243.

What is a "culvert."— Where a ditch used to carry off the surplus water of a village runs along the side of a street, the fact that it is covered for the purposes of a sidewalk does not constitute it a culvert, within the meaning of a statute providing for the recovery of damages sustained from defective streets, bridges, cross walks, and culverts. Kowalka *v.* St. Joseph, 73 Mich. 322, 41 N. W. 416.

86. Lafayette *v.* Blood, 40 Ind. 62; Stoetzele *v.* Swearingen, 90 Mo. App. 588; Stege *v.* Milwaukee, 110 Wis. 484, 86 N. W. 161.

87. Stoetzele *v.* Swearingen, 90 Mo. App. 588.

88. *Colorado.*— Denver *v.* Soloman, 2 Colo. App. 534, 31 Pac. 507.

District of Columbia.— McGill *v.* District of Columbia, 4 Mackey 70, 54 Am. Rep. 256.

Illinois.— Galesburg *v.* Higley, 61 Ill. 287.

Wisconsin.— Whitty *v.* Oshkosh, 106 Wis. 87, 81 N. W. 992.

Canada.— Homewood *v.* Hamilton, 1 Ont. L. Rep. 266.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1636.

however, the opening is so guarded as to be safe under all ordinary circumstances for persons traveling upon the streets, the city is not liable for an injury resulting from some fortuitous circumstance, which could not, in the ordinary course of events, be expected or anticipated as likely to occur.[89] Nor is a city chargeable with negligence where the occupant of the premises leaves an area or coal hole uncovered, while using the same, and the city officials have no notice that it is uncovered.[90]

(2) On Property Adjacent to Street — (a) In General. Where a municipal corporation permits an excavation or other dangerous place to remain unfenced or without proper guards, in such close proximity to the highway that one rightfully using it may, without any fault on his part, but as the result of an unintentional deviation or an accidental misstep, sustain injury by falling therein, it will be liable.[91] The danger which requires a railing must be of an unusual character, such as declivities, excavations, steep banks, or deep water.[92] Furthermore, in order to render the corporation liable for injuries occasioned by such excavation, it must substantially adjoin the highway, so that one making a false step, or affected by sudden giddiness, might fall therein.[93] If, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another, the case will be different, for in such case there is no breach of duty from which the liability to respond in damages can result.[94]

Cellar stairway.— Chapman *v.* Macon, 55 Ga. 566; Earl *v.* Cedar Rapids, 126 Iowa 361, 102 N. W. 140, 106 Am. St. Rep. 361; Powers *v.* Penn Mut. L. Ins. Co., 91 Mo. App. 55; Sweeney *v.* Newport, 65 N. H. 86, 18 Atl. 86.

Manhole.— Kankakee *v.* Linden, 38 Ill. App. 657; Lincoln *v.* Detroit, 101 Mich. 245, 59 N. W. 617.

Opening in sewer.— Birmingham *v.* Lewis, 92 Ala. 352, 9 So. 243; Chicago *v.* Seben, 62 Ill. App. 248 [*affirmed* in 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245].

Coal hole.— L'Herault *v.* Minneapolis, 69 Minn. 261, 72 N. W. 73; Stege *v.* Milwaukee, 110 Wis. 484, 86 N. W. 161.

Cesspool.— Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912.

89. Littlefield *v.* Norwich, 40 Conn. 406; Smith *v.* Leavenworth, 15 Kan. 81.

90. Lafayette *v.* Blood, 40 Ind. 62.

Notice see *infra*, XIV, D, 4, d.

91. *Georgia.*— Zettler *v.* Atlanta, 66 Ga. 195.

Iowa.— Hawley *v.* Atlantic, 92 Iowa 172, 60 N. W. 519.

Massachusetts.— Puffer *v.* Orange, 122 Mass. 389, 23 Am. Rep. 363; Alger *v.* Lowell, 3 Allen 504.

Missouri.— Baldwin *v.* Springfield, 141 Mo. 205, 42 S. W. 717; Bassett *v.* St. Joseph, 53 Mo. 290, 14 Am. Rep. 446.

Nebraska.— South Omaha *v.* Cunningham, 31 Nebr. 316, 47 N. W. 930; Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593.

North Carolina.— Bunch *v.* Edenton, 90 N. C. 431.

Oklahoma.— Oklahoma City *v.* Meyers, 4 Okla. 686, 46 Pac. 552.

Tennessee.— Nihlett *v.* Nashville, 12 Heisk. 684, 27 Am. Rep. 755.

Vermont.— Drew *v.* Sutton, 55 Vt. 586, 45 Am. Rep. 644.

Virginia.— Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1638.

92. Damon *v.* Boston, 149 Mass. 147, 21 N. E. 235.

Adjoining land on level with street.— A municipality is not required to erect a railing along a sidewalk which is level with the adjacent land, and is not liable to one injured by walking off the sidewalk and slipping on ice covered with snow, on such land, and it is immaterial that the line of the highway is not marked. Logan *v.* New Bedford, 157 Mass. 534, 32 N. E. 910; Damon *v.* Boston, 149 Mass. 147, 21 N. E. 235.

93. Talty *v.* Atlantic, 92 Iowa 135, 60 N. W. 516; Hudson *v.* Marlborough, 154 Mass. 218, 28 N. E. 147; Sparhawk *v.* Salem, 1 Allen (Mass.) 30, 7 Am. Dec. 700; Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

94. Knowlton *v.* Pittsfield, 62 N. H. 535; Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

A city is not bound to erect barriers to prevent travelers from straying from the highway, although there is a dangerous place at some distance from the highway which they may reach by so straying. Hudson *v.* Marlborough, 154 Mass. 218, 28 N. E. 147 (twenty-five feet distant); Daily *v.* Worcester, 131 Mass. 452 (twenty-eight feet distant); Puffer *v.* Orange, 122 Mass. 389, 23 Am. Rep. 368; McHugh *v.* St. Paul, 67 Minn. 441, 70 N. W. 5; Murphy *v.* Brooklyn, 118 N. Y. 575, 23 N. E. 887 (sixty feet distant); Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703 (fifteen feet distant); Murphy *v.* Brooklyn, 98 N. Y. 642 (fifty feet distant); Taylor *v.* Mt. Vernon, 58 Hun (N. Y.) 384, 12 N. Y. Suppl. 25 [*affirmed* in 129 N. Y. 651, 29 N. E. 1032] (eight feet

(b) Cellar and Basement Openings. Basement entrances and cellar ways on the street side of buildings, and not encroaching upon the sidewalks, are lawful, and a municipality is not liable for injuries caused by a failure to guard such an opening, unless reasonable security to the public requires that it should be fenced or railed.[95]

(h) *Dangerous Approach From Private Property.* While a municipal corporation is generally under no obligation to guard dangerous approaches from private property to its streets,[96] yet it is bound to provide guards or signal lights to prevent persons from receiving injuries in entering a street by a commonly traveled road, although such road is in fact a private way, and has never been laid out as a highway or street.[97] There is no duty, however, to erect barriers or maintain lights to prevent injury to persons entering a street where there is no traveled way either public or private, and nothing to put the city on notice that such entrance is likely to be attempted.[98]

d. Notice of Defects and Obstructions — (i) *In General.* Ordinarily a municipality is not liable for an injury caused by a defect or obstruction in a public street except where it has neglected some duty in that respect after it has had notice of the defect or obstruction, or unless the facts and circumstances are such as to warrant an inference of notice or knowledge of such defect or obstruction, or the defect or obstruction has existed for such a length of time that by the exercise of reasonable diligence it might have been known and corrected.[99] And so if a defect, when known, is repaired and the way is made suffi-

distant); Kelley *v.* Columbus, 41 Ohio St. 263 (thirty feet distant).

95. Beardsley *v.* Hartford, 50 Conn. 529, 47 Am. Rep. 677; Richardson *v.* Boston, 156 Mass. 145, 30 N. E. 478; Fitzgerald *v.* Berlin, 64 Wis. 203, 24 N. W. 879; Fitzgerald *v.* Berlin, 51 Wis. 81, 7 N. W. 836, 37 Am. Rep. 814. See also Lombard *v.* Chicago, 15 Fed. Cas. No. 8,470, 4 Biss. 460.

96. Goodin *v.* Des Moines, 55 Iowa 67, 7 N. W. 411; Mulvane *v.* South Topeka, 45 Kan. 45, 25 Pac. 217, 23 Am. St. Rep. 706; Calhoun *v.* Milan, 64 Mo. App. 398.

97. *Massachusetts.*— Burnham *v.* Boston, 10 Allen 290.

Nebraska.— Omaha *v.* Randolph, 30 Nebr. 699, 46 N. W. 1013.

New York.— Dennis *v.* Elmira Heights, 59 N. Y. App. Div. 404, 70 N. Y. Suppl. 312.

Pennsylvania.— O'Malley *v.* Parsons, 191 Pa. St. 612, 43 Atl. 384, 71 Am. St. Rep. 778.

Virginia.— Orme *v.* Richmond, 79 Va. 86. See 36 Cent. Dig. tit. "Municipal Corporations," § 1640.

Compare Mulvane *v.* South Topeka, 45 Kan. 45, 25 Pac. 217, 23 Am. St. Rep. 706.

Notice.— In Smith *v.* Lowell, 139 Mass. 336, 1 N. E. 412, it was held that where a private way had been dedicated to the public use, under a statute providing that the mayor, etc., should, when public safety demanded it, direct and cause the entrances of such ways entering on and uniting with an existing public way to be closed up or else by other sufficient means caution the public against entering such public ways, etc., a notice posted so as to be conspicuous and legible to persons entering the way indicating that the way is a dangerous one, exempts the city from liability for injuries received by one entering such way, although the notice was not seen by him.

98. Ivester *v.* Atlanta, 115 Ga. 853, 42 S. E. 220.

99. *Colorado.*— Cunningham *v.* Denver, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212; Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632; Boulder *v.* Weger, 17 Colo. App. 69, 66 Pac. 1070; Denver *v.* Saulcey, 5 Colo. App. 420, 38 Pac. 1098.

Connecticut.— Bill *v.* Norwich, 39 Conn. 222.

Delaware.— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379; Downs *v.* Smyrna, 2 Pennew. 132, 45 Atl. 717.

Georgia.— Montezuma *v.* Wilson, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150; Savannah *v.* Waldner, 49 Ga. 316.

Illinois.— Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246 [*affirming* 21 Ill. App. 326]; Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35; Chicago *v.* Murphy, 84 Ill. 224; Chicago *v.* McCarthy, 75 Ill. 602; Decatur *v.* Fisher, 53 Ill. 407; Nokomis *v.* Farley, 113 Ill. App. 161; Sherman *v.* Chicago, 101 Ill. App. 312; Decatur *v.* Hamilton, 89 Ill. App. 561; Ransom *v.* Belvidere, 87 Ill. App. 167; Joliet *v.* Meaghan, 22 Ill. App. 255; Joliet *v.* Gerber, 21 Ill. App. 622; Chatsworth *v.* Ward, 10 Ill. App. 75; Chicago *v.* Watson, 6 Ill. App. 344.

Indiana.— Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728; Madison *v.* Baker, 103 Ind. 41, 2 N. E. 236; Spiceland *v.* Alier, 98 Ind. 467; Ft. Wayne *v.* De Witt, 47 Ind. 391; Linton *v.* Smith, 31 Ind. App. 546, 68 N. E. 617; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; Rosedale *v.* Ferguson, 3 Ind. App. 596, 30

cient by such repair, a new defect will not subject the municipality to liability in

N. E. 156; Ft. Wayne *v.* Patterson, 3 Ind. App. 34, 29 N. E. 167.

Iowa.— Lamb *v.* Cedar Rapids, 108 Iowa 629, 79 N. W. 366; Sikes *v.* Manchester, 59 Iowa 65, 12 N. W. 755; Cramer *v.* Burlington, 39 Iowa 512.

Kansas.— Holitza *v.* Kansas City, 68 Kan. 157, 74 Pac. 594; Pleasanton *v.* Rhine, 8 Kan. App. 452, 54 Pac. 512.

Kentucky.— Bell *v.* Henderson, 74 S. W. 206, 24 Ky. L. Rep. 2434.

Maine.— Haines *v.* Lewiston, 84 Me. 18, 24 Atl. 430.

Massachusetts.— Whitney *v.* Lowell, 151 Mass. 212, 24 N. E. 47; Stanton *v.* Salem, 145 Mass. 476, 14 N. E. 519; Hanscom *v.* Boston, 141 Mass. 242, 5 N. E. 249; Talbot *v.* Taunton, 140 Mass. 552, 5 N. E. 616; Whitehead *v.* Lowell, 124 Mass. 281. See also Bourglet *v.* Cambridge, 159 Mass. 388, 34 N E. 455. Under a statute the defect which was the proximate cause of the injury must have existed for twenty-four hours or been brought to the notice of the town or have been such that with due care the town might have known of its existence before the time of the injury. Hutchins *v.* Littleton, 124 Mass. 289; Ryerson *v.* Abington, 102 Mass. 526. And if the defect was not the same, although occasioned by the earlier defect, the town was not liable except upon notice or its continuance for twenty-four hours. Monies *v.* Lynn, 124 Mass. 165.

Michigan.— Burleson *v.* Reading, 110 Mich. 572, 68 N. W. 294; McGrail *v.* Kalamazoo, 94 Mich 52, 53 N. W. 955.

Minnesota.— Miller *v.* St. Paul, 38 Minn. 134, 36 N. W. 271.

Mississippi.— Butler *v.* Oxford, 69 Miss. 618, 13 So. 626, as to notice of an unsightly object in a gully outside of the traveled way.

Missouri.— Buckley *v.* Kansas City, 156 Mo. 16, 56 S. W. 319; Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709; Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Jordan *v.* Hannibal, 87 Mo. 673 (bridge out of repair); Ball *v.* Neosho, 109 Mo. App. 683, 83 S. W. 777; Williams *v.* Hannibal, 94 Mo. App. 549, 68 S. W. 380; Yocum *v.* Trenton, 20 Mo. App. 489; Schweickhardt *v.* St. Louis, 2 Mo. App. 571.

Nebraska.— Goddard *v.* Lincoln, 69 Nebr. 594, 96 N. W. 273; Davis *v.* Omaha, 47 Nebr. 836, 66 N. W. 859.

New York.— Rehberg *v.* New York, 91 N. Y. 137, 43 Am. Rep. 657; Griffin *v.* New York, 9 N. Y. 456, 61 Am. Dec. 700; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Tarba *v.* Rochester, 41 N. Y. App. Div. 188, 58 N. Y. Suppl. 755; Muller *v.* Newburgh, 32 Hun 24 [*affirmed* in 105 N. Y. 668]; Hart *v.* Brooklyn, 36 Barb. 226; Hunt *v.* New York, 52 N. Y. Super. Ct. 198 [*affirmed* in 109 N. Y. 134, 16 N. E. 320]; McGinity *v.* New York, 5 Duer 674; Beekman *v.* New York, 18 Misc. 509, 41 N. Y. Suppl. 990; Ibbeken *v.* New York, 94 N. Y. Suppl. 568.

Ohio.— Dayton *v.* Taylor, 62 Ohio St. 11, 56 N. E. 480; Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193; Newark *v.* McDowell, 16 Ohio Cir. Ct. 556, 9 Ohio Cir. Dec. 260; Groveport *v.* Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411; Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

Oregon.— Mack *v.* Salem, 6 Oreg. 275.

Pennsylvania.— Rogers *v.* Williamsport, 199 Pa. St. 450, 49 Atl. 293; Otto Tp. *v.* Wolfe, 106 Pa. St. 608; Snader *v.* Murphy, 19 Pa. Super. Ct. 35.

Texas.— Dallas *v.* Jones, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; Galveston *v.* Dazet, (1892) 19 S. W. 142; Galveston *v.* Smith, 80 Tex. 69, 15 S. W. 539; Austin *v.* Ritz, 72 Tex. 391, 9 S W. 884; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Houston *v.* Vatter, 32 Tex. Civ. App. 298, 74 S. W. 806; Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95; Dixon *v.* San Antonio, (Civ. App. 1895) 30 S. W. 359.

Washington.— Sproul *v.* Seattle, 17 Wash. 256, 49 Pac. 489.

Wisconsin.— Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053 (holding that a petition to a village board for a new sidewalk seven feet wide in the place of one four feet wide does not show knowledge by the board of defects in the old walk six months later); Klatt *v.* Milwaukee, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 759.

United States.— See New York *v.* Sheffield, 4 Wall. 189, 18 L. ed. 416; Balls *v.* Woodward, 51 Fed. 646.

Canada.— Legault *v.* St. Paul, 12 Quebec Super. Ct. 479.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1641. And see *infra*, XIV, D, 4, d, (IV).

Where the unsafe condition is caused by third persons the rule of the text applies.

Georgia.— Lewis *v.* Atlanta, 77 Ga. 756, 4 Am. St. Rep. 108, where a property-owner obstructed the street with materials used in constructing a sidewalk and injury occurred by reason of his failure to place guards or signal lights around the obstruction and the rule of the text was applied.

Illinois.— Hogan *v.* Chicago, 168 Ill. 551, 48 N. E. 210 [*reversing* 59 Ill. App. 446].

Indiana.— Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728 (where, in an action against a city for injuries resulting from the negligent piling of lumber in a street, an instruction that if, at the time, defendant had a contract with any person to furnish it with lumber and deliver same, and such person did actually deliver and pile said lumber in the street, then such act was not the act of the city, and the city is not liable for negligence of such person in placing the same in the street, unless it had notice thereof, correctly states the law; that the

the absence of notice or of circumstances to warrant an inference of notice or neglect of duty,[1] although the new defect is connected with the old one.[2]

(II) *Defect in Construction.* The rule requiring notice is not applied,

word "deliver," as used, being synonymous with "place," does not involve acceptance, and therefore notice, by the city); Senhenn *v.* Evansville, 140 Ind. 675, 40 N. E. 69; Huntington *v.* Breen, 77 Ind. 29; Lafayette *v.* Blood, 40 Ind. 62 (where the occupant of premises left an opening in a sidewalk above a coal vault uncovered for a short time while engaged in putting coal into the vault); Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861.

Iowa.— Bender *v.* Minden, 124 Iowa 685, 100 N. W. 352; Jones *v.* Clinton, 100 Iowa 333, 69 N. W. 418, where a plumber employed by a lot owner to repair a water pipe made an excavation in the street.

Maine.— Bragg *v.* Bangor, 51 Me. 532.

Massachusetts.— Hoey *v.* Natick, 153 Mass. 528, 27 N. E. 595; Crosby *v.* Boston, 118 Mass. 71.

Michigan.— Hembling *v.* Grand Rapids, 99 Mich. 292, 58 N. W. 310.

Minnesota.— Estelle *v.* Lake Crystal, 27 Minn. 243, 6 N. W. 775; Moore *v.* Minneapolis, 19 Minn. 300.

Missouri.— Badgley *v.* St. Louis, 149 Mo. 122, 50 S. W. 817; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; McCarroll *v.* Kansas City, 64 Mo. App. 283; Caton *v.* Sedalia, 62 Mo. App. 227.

New Hampshire.— Palmer *v.* Portsmouth, 43 N. H. 265.

New York.— Breil *v.* Buffalo, 144 N. Y. 163, 38 N. E. 977; Weed *v.* Ballston Spa, 76 N. Y. 329; Hume *v.* New York, 74 N. Y. 264; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Griffin *v.* New York, 9 N. Y. 456, 61 Am. Dec. 700 (as to obstructions unlawfully placed on the street by a citizen); Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Leggett *v.* Watertown, 55 N. Y. App. Div. 321, 66 N. Y. Suppl. 910; Morgan *v.* Penn Yan, 42 N. Y. App. Div. 582, 59 N. Y. Suppl. 504 (excavation in street by permission, and failure to put up lights on the evening of and before the accident); Sweet *v.* Gloversville, 12 Hun 302 (excavation made in constructing a sidewalk by a lot owner); Dorlon *v.* Brooklyn, 46 Barb. 604; Bush *v.* Geneva, 3 Thomps. & C. 409.

Ohio.— Walker *v.* Springfield, 3 Ohio Dec. (Reprint) 567.

Pennsylvania.— Mills *v.* Philadelphia, 187 Pa. St. 287, 40 Atl. 821 (where building material was piled on the side of a street, and the light set by the contractor went out during the night on which the accident occurred); Boyle *v.* Hazleton Borough, 171 Pa. St. 167, 33 Atl. 142.

West Virginia.— Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447, 45 Am. St. Rep. 853, 22 L. R. A. 561.

Wisconsin.— Loberg *v.* Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69; Cairncross *v.* Pewaukee, 86 Wis. 181, 56 N. W. 648 (where the owners of a boat placed it partly in a street of a village and partly in a lake for the purpose of launching late in the afternoon, at which time and also on the next morning they were apparently engaged in launching it, and at noon it was still partly in the street and frightened plaintiff's horse, and it was held that in the absence of a showing that the village officers had knowledge that the delay of the owners in launching was unreasonable and had a reasonable time thereafter to launch it themselves, the village was not liable); Cook *v.* Milwaukee, 24 Wis. 270, 1 Am. Rep. 183.

Canada.— Huffman *v.* Bayham Tp., 26 Ont. App. 514; Castor *v.* Uxbridge, 39 U. C. Q. B. 113.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1606.

No notice is required sometimes, as under a statute imposing an absolute duty on the corporation. Arthur *v.* Charlestown, 51 W. Va. 132, 41 S. E. 171; Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447, 45 Am. St. Rep. 853, 22 L. R. A. 561; Evans *v.* Huntington, 37 W. Va. 601, 16 S. E. 801; Chapman *v.* Milton, 31 W. Va. 384, 7 S. E. 22. But this does not apply to injuries not caused by any defect or obstruction in the road-bed, but from a defect in an embankment maintained in lieu of a barrier along and within the boundaries of a public way, fixing the limits of the road within which any one had a right lawfully to use it, such maintenance not being within the statute requiring the corporation to keep its streets, etc., in repair, but coming under the other classes of cases in which the municipality is liable for negligence in the discharge of ministerial or specified duties not discretionary or governmental, assumed in consideration of privileges conferred by its charter, or as a private owner of property.

Care as to condition of streets see *supra*, XIV, D, 4, a.

Notice of ice and snow see *supra*, XIV, D, 4, c, (IV), (D), (4).

Removal of barriers see *infra*, XIV, D, 4, e, (IV), (C).

1. Carter *v.* Monticello, 68 Iowa 178, 26 N. W. 129; Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125; Bonine *v.* Richmond, 75 Mo. 437; Northdurft *v.* Lincoln, 66 Nebr. 430, 92 N. W. 628, 96 N. W. 163. See also Touhey *v.* Rochester, 64 N. Y. App. Div. 56, 71 N. Y. Suppl. 661; Jones *v.* Sioux Falls, 18 S. D. 477, 101 N. W. 43. And see *supra*, XIV, D, 4, c, (III).

2. Hutchins *v.* Littleton, 124 Mass. 289, holding that if the defect is sufficiently repaired so as to make the road safe and convenient and a new defect is afterward produced, as by the action of the elements, either in the same place or in another place, the town would not be liable unless such new defect had existed twenty-four hours or was known to the town.

however, where the defect is one in construction, as distinguished from a mere condition of repair, or an obstruction by a wrong-doer, the municipality being charged *ab initio* with defects of its own making or leaving in the construction or repair of any portion of the highway.[3]

(III) *Unsafe Condition Caused By or Under Authority of Municipality.* Municipal corporations are chargeable with knowledge of their own acts, and those ordered by them; and therefore whenever defective conditions in streets are due to the direct act of the municipality itself, or of persons whose acts are constructively its own, no notice, either actual or constructive, need be shown,[4] or, as it is otherwise stated, notice of the defect is necessarily implied in

3. *Illinois.*— Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*affirming* 27 Ill. App. 43]; Alexander *v.* Mt. Sterling, 71 Ill. 366; Mansfield *v.* Moore, 21 Ill. App. 326 [*affirmed* in 124 Ill. 133, 16 N. E. 246].

Iowa.— Evans *v.* Iowa City, 125 Iowa 202, 100 N. W. 1112; Cramer *v.* Burlington, 39 Iowa 512; Doulon *v.* Clinton, 33 Iowa 397.

Kentucky.— Carroll *v.* Louisville, 117 Ky. 758, 78 S. W. 1117, 25 Ky. L. Rep. 1888.

Minnesota.— McDonald *v.* Duluth, 93 Minn. 206, 100 N. W. 1102.

Missouri.— Barr *v.* Kansas City, 105 Mo. 550, 16 S. W. 483; Brake *v.* Kansas City, 100 Mo. App. 611, 75 S. W. 191.

Ohio.— Alliance *v.* Campbell, 17 Ohio Cir. Ct. 595, 6 Ohio Cir. Dec. 762.

Tennessee.— Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.— Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1642.

4. *Alabama.*— Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630.

Colorado.— Denver *v.* Aaron, 6 Colo. App. 232, 40 Pac. 587.

Connecticut.— Carstesen *v.* Stratford, 67 Conn. 428, 35 Atl. 276.

Georgia.— Brunswick *v.* Braxton, 70 Ga. 193.

Illinois.— Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*affirming* 27 Ill. App. 43] (holding that, if a municipal corporation causes work to be done which is in its nature dangerous to the public, it is bound to take notice of the character of the work and of the condition in which it is left); Chicago *v.* Brophy, 79 Ill. 277; Alexander *v.* Mt. Sterling, 71 Ill. 366; Chicago *v.* Johnson, 53 Ill. 91; Sterling *v.* Schiffmacher, 47 Ill. App. 141.

Indiana.— Ft. Wayne *v.* Patterson, 3 Ind. App. 34, 29 N. E. 167.

Iowa.— See Stein *v.* Council Bluffs, 72 Iowa 180, 33 N. W. 455.

Maine.— Jones *v.* Deering, 94 Me. 165, 47 Atl. 140; Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912.

Maryland.— Baltimore *v.* Walker, 98 Md. 657, 57 Atl. 4; Baltimore *v.* O'Donnell, 53 Md. 110, 36 Am. Rep. 395.

Massachusetts.— Brooks *v.* Somerville, 106 Mass. 271.

Michigan.— Baker *v.* Grand Rapids, 111 Mich. 447, 69 N. W. 740.

Minnesota.— Kleopfert *v.* Minneapolis, 93 Minn. 118, 100 N. W. 669.

Mississippi.— Carver *v.* Jackson, 82 Miss. 583, 35 So. 157; Nesbit *v.* Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521.

Missouri.— Haniford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753; Stephens *v.* Macon, 83 Mo. 345; Golden *v.* Clinton, 54 Mo. App. 100; Smith *v.* St. Joseph, 42 Mo. App. 392.

Nebraska.— Lincoln *v.* Calvert, 39 Nebr. 305, 58 N. W. 115; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Brusso *v.* Buffalo, 90 N. Y. 679; Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131]; Stedman *v.* Rome, 88 Hun 279, 34 N. Y. Suppl. 737; Riddle *v.* Westfield, 65 Hun 432, 20 N. Y. Suppl. 359; Sevestre *v.* New York, 47 N. Y. Super. Ct. 341; Akers *v.* New York, 14 Misc. 524, 35 N. Y. Suppl. 1099; Bauer *v.* Rochester, 12 N. Y. Suppl. 418.

North Dakota.— Ludlow *v.* Fargo, 3 N. D. 485, 57 N. W. 506.

Oklahoma.— Oklahoma City *v.* Welsh, 3 Okla. 288, 41 Pac. 598.

Pennsylvania.— Rowland *v.* Philadelphia, 202 Pa. St. 50, 51 Atl. 589. A city, through its agents appointed to supervise and inspect the work of a contractor in constructing a sewer inlet in a street, has notice of any negligence of his in filling the trench. Burger *v.* Philadelphia, 196 Pa. St. 41, 46 Atl. 262.

Rhode Island.— Hutchinson *v.* Clarke, 26 R. I. 307, 58 Atl. 948.

Tennessee.— Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.— Ringelstein *v.* San Antonio, (Civ. App. 1893) 21 S. W. 634.

Utah.— Yearance *v.* Salt Lake City, 6 Utah 398, 24 Pac. 254.

Washington.— Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847, where the excavation was authorized by the city and had existed for a period of two months.

Wisconsin.— Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1642. And see also *infra*, XIV, D, 4, e, (II).

Notice of absence of proper barriers to guard excavations and the like is not necessary. McPherson *v.* District of Columbia, 7

such cases.[5] And if a city permits a dangerous structure to be erected in its street it must take notice of such defects therein as ordinary care will discover,[6] and it will be liable when the defect is chargeable to its own negligence, as by failure of its officers to perform their duty of supervision and inspection.[7]

(IV) *ACTUAL, IMPLIED, OR CONSTRUCTIVE NOTICE*—(A) *In General.* The notice which is required in order to charge the municipal corporation with knowledge in respect to defects in its streets or sidewalks may be expressed or implied, actual or constructive,[8] unless actual notice is required by statute or charter pro-

Mackey (D. C.) 564; Chicago *v.* Johnson, 53 Ill. 91; Baltimore *v.* O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432; Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Hoyer *v.* North Tonawanda, 79 Hun (N. Y.) 39, 29 N. Y. Suppl. 650. See also *infra*, XIV, D, 4, e, (IV), (C).

Construction of sidewalks by abutters.— When the duty rests on the municipality or its officers to exercise supervisory care and inspection of sidewalks, and in the exercise of ordinary care in this respect the defects could have been discovered, the municipality will be liable for injuries caused by such defects. Boucher *v.* New Haven, 40 Conn. 456 (where the landowner was laying a sidewalk in obedience to an order of the municipality which was thus put upon inquiry) [*distinguished* in Cummings *v.* Hartford, 70 Conn. 115, 38 Atl. 916, where the landowner proceeded upon his own motion, in which case it was necessary to prove either the fact of notice or such an omission by the city to exercise that reasonable supervision over its streets which was incident to its duty to maintain them in repair as would itself be negligence naturally leading to the injury]; Furnell *v.* St. Paul, 20 Minn. 117; Mannis *v.* Woodburn, 57 Ohio St. 330, 48 N. E. 1097. See also Abilene *v.* Cowperthwait, 52 Kan. 324, 34 Pac. 795; Beall *v.* Seattle, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892. And it is the duty of the municipal officers to exercise care in seeing that excavations are guarded, when such work is being done. Boucher *v.* New Haven, *supra*; Cleveland *v.* St. Paul, 18 Minn. 279. But under the rule that there is no absolute duty on the municipality to discover and remedy defects in sidewalks but merely to use ordinary care and diligence so to do, where a sidewalk is constructed by an abutter it is held that, conceding that it is the duty of the municipal authorities to supervise the construction, an instruction which would make the municipality liable for defects therein without reference to whether in the discovery or failure to remedy the defect the municipality was in the exercise of ordinary care is erroneous. Warren *v.* Wright, 3 Ill. App. 602.

Where work is done by contract the rule of the text is applied. Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630; Springfield *v.* Le Claire, 49 Ill. 476; Sterling *v.* Schiffmacher, 47 Ill. App. 141; Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512; Baltimore *v.* O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Monje *v.* Grand Rapids, 122 Mich. 645, 81 N. W. 574; Smith *v.* St. Joseph, 42 Mo. App. 392; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432; Brusso *v.* Buffalo, 90 N. Y. 679 (work by contractor under the direction of a department of the city government); Groves *v.* Rochester, 39 Hun (N. Y.) 5 (work done under control and supervision of municipal board); Bauer *v.* Rochester, 12 N. Y. Suppl. 418; Oklahoma City *v.* Welsh, 3 Okla. 288, 41 Pac. 598. See also *supra*, XIV, A, 4, a (II), (C).

5. Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833 (where a defective sidewalk is constructed under the permission of a member of the street committee); Lincoln *v.* Calvert, 39 Nebr. 305, 58 N. W. 115; Akers *v.* New York, 14 Misc. (N. Y.) 524, 35 N. Y. Suppl. 1099.

6. Nesbitt *v.* Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521. But see further as to acts of licenses, *supra*, XIV, D, 3, e.

7. Boucher *v.* New Haven, 40 Conn. 456; Jones *v.* Deering, 94 Me. 165, 47 Atl. 140; Furnell *v.* St. Paul, 20 Minn. 117.

8. *Colorado.*—Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594.

Connecticut.— Manchester *v.* Hartford, 30 Conn. 118.

Delaware.— Downs *v.* Smyrna, 2 Pennew. 132, 45 Atl. 717; Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

District of Columbia.— Larmon *v.* District of Columbia, 5 Mackey 330.

Illinois.— Sterling *v.* Merrill, 124 Ill. 522, 17 N. E. 6; Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578; Reid *v.* Chicago, 83 Ill. App. 554; Ryan *v.* Chicago, 79 Ill. App. 28; Murphysboro *v.* Baker, 34 Ill. App. 657.

Indiana.— Evansville *v.* Frazer, 24 Ind. App. 628, 56 N. E. 729.

Massachusetts.— Hutchins *v.* Littleton, 124 Mass. 289.

Michigan.— Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652; Dotton *v.* Albion, 50 Mich. 129, 15 N. W. 46.

Missouri.— Shipley *v.* Bolivar, 42 Mo. App. 401.

Nebraska.— Nothdurft *v.* Lincoln, 66 Nebr. 430, 92 N. W. 628, 96 N. W. 163.

New York.— Lynch *v.* Buffalo, 6 Misc. 583, 27 N. Y. Suppl. 303.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Texas.— Klein *v.* Dallas, 71 Tex. 280, 8 S. W. 90.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1647.

vision.[9] Implied or constructive notice may be from facts from which it may be reasonably inferred or from proof of circumstances from which it appears that the defect ought to have been known or remedied,[10] the rule prevailing in such

9. Bradbury *v.* Lewiston, 95 Me. 216, 49 Atl. 1041; Carleton *v.* Caribou, 88 Me. 461, 34 Atl. 269; Hurley *v.* Bowdoinham, 88 Me. 293, 34 Atl. 72 (holding that the words "actual notice" mean something more than an opportunity to obtain notice by the exercise of due care and diligence, and that proof of gross inattention is not proof of actual notice, but that the facts and circumstances in a given case may justify the conclusion that the officer must have had actual notice unless grossly inattentive); Haines *v.* Lewiston, 84 Me. 18, 24 Atl. 430; McNalley *v.* Cohoes, 53 Hun (N. Y.) 202, 6 N. Y. Suppl. 842 [*affirmed* in 127 N. Y. 350, 27 N. E. 1043] (holding that such statute does not conflict with any constitutional right to a remedy, but its object is to demand such certain proofs of liability as shall tend to the more certain administration of justice, and it appearing further in the appellate court that the actual notice required by the statute may be established by evidence either direct or substantially the same as any other fact). Under such a charter provision, evidence that one of the officers had passed over the sidewalk where the injury occurred without showing that he observed the defect is not sufficient to charge the city with notice, although the officer might have been negligent in not observing the defect. Smith *v.* Rochester, 150 N. Y. 581, 44 N. E. 1128 [*affirming* 79 Hun 174, 29 N. Y. Suppl. 539]; McManus *v.* Watertown, 88 N. Y. App. Div. 361, 84 N. Y. Suppl. 638; Tarba *v.* Rochester, 41 N. Y. App. Div. 188, 58 N. Y. Suppl. 755. See also Sprague *v.* Rochester, 159 N. Y. 20, 53 N. E. 697. And see *infra*, XIV, D, 4, d, (VII); XIV, E, 7, d, (III)

The object of the statute in requiring notice to the city authorities of a defect in a sidewalk, as a prerequisite to a right of action to recover damages for an injury caused thereby, is to give the city a reasonable time to repair the defect and prevent an injury therefrom. It is to protect the city from liability for imputed negligence, or negligence that is implied by law from the lapse of time and the failure to discover the defect. Sprague *v.* Rochester, 159 N. Y. 20, 53 N. E. 697.

Such provisions do not apply where the dangerous obstruction or defect is caused or created by the city itself. Jones *v.* Deering, 94 Me. 165, 47 Atl. 140; Holmes *v.* Paris, 75 Me. 559; Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131]; Stedman *v.* Rome, 88 Hun (N. Y.) 279, 34 N. Y. Suppl. 737; Houston *v.* Isaacks, 68 Tex. 116, 3 S. W. 693; Houston *v.* Owen, (Tex. Civ. App. 1902) 67 S. W. 788; Still *v.* Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; Ringelstein *v.* San Antonio, (Tex. Civ. App. 1893) 21 S. W. 634; Adams *v.* Oshkosh, 71 Wis. 49, 36 N. W. 614. See also *supra*, XIV, D, 4, d, (II). And where the charter provision requires particular notice when the defect or condition of repair is the result of gross negligence of the city, the absence of such notice is no defense against liability for ordinary negligence. Peacock *v.* Dallas, 89 Tex. 438, 35 S. W. 8; Dallas *v.* McAllister, (Tex. Civ. App. 1897) 39 S. W. 173. So it is held that a statutory provision that a city shall not be liable for any injury sustained by reason of defective sidewalks and cross walks, unless actual notice of their condition shall have been given to the common council, etc., within forty-eight hours previous to the injury, has no application to an injury caused by the absence of proper guards or railings along the edge of a sidewalk requiring protection. Tompkins *v.* Oswego, 15 N. Y. Suppl. 371 [*affirmed* in 131 N. Y. 581, 30 N. E. 67]. But if the defective construction is the remote cause of the injury, the proximate cause being the city's failure to keep in repair, the statute applies. Houston *v.* Vatter, 32 Tex. Civ. App. 298, 74 S. W. 806. But see Emery *v.* Waterville, 90 Me. 485, 38 Atl. 534, holding that the mere fact that a street commissioner directed a subordinate to construct a cross walk across a street does not of itself charge the street commissioner with "actual notice" that the cross walk was so constructed as to become a defect in the street.

Transfer of duty without restriction.— Upon the transfer to a city of the power and duty pertaining to highways which were before that time exercised by the road supervisors under the general law of the state which made them responsible for damages resulting from unsafe or impassable roads when notified thereof in writing, etc., the charter making no provision or restriction as to the liability of the city in discharging the duty imposed upon it, such restrictions under the general law on the liability of the supervisors do not accompany the transfer of the duties to the city. Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200.

10. *Illinois.*— Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578; Ottawa *v.* Hayne, 114 Ill. App. 21 [*affirmed* in 214 Ill. 45, 73 N. E. 385].

Indiana.— Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861.

Iowa.— Evans *v.* Iowa City, 125 Iowa 202, 100 N. W. 1112.

Massachusetts.— Donaldson *v.* Boston, 16 Gray 508.

Michigan.— Dotton *v.* Albion, 50 Mich. 129, 15 N. W. 46, holding that if there exist facts with which ignorance is incompatible except on the assumption of a failure to exercise reasonable official care, there is sufficient ground for presuming notice.

Missouri.— Fehlhauer *v.* St. Louis, 178 Mo. 635, 77 S. W. 843; Shipley *v.* Bolivar, 42 Mo. App. 401, frequent passing over a defective walk by city officers.

cases requiring the exercise of ordinary care to discover the defect.[11] It is a question of fact for the jury,[12] and the inference may be drawn from the magnitude of the defect,[13] its conspicuity, and the length of time of its continuance, or its notoriety.[14]

(B) *Time of Existence of Defect or Obstruction.* Notice to a city of an unsafe and dangerous condition in its streets or sidewalks may be implied if the defect has existed for such a length of time that the municipal authorities, by the exercise of reasonable care and diligence, could have known of its existence and remedied it.[15] There is no fixed or definite rule as to what length of time would

Nebraska.— Anderson *v.* Albion, 64 Nebr. 280, 89 N. W. 794; Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41.

New York.— See McNally *v.* Cohoes, 53 Hun 202, 6 N. Y. Suppl. 842 [*affirmed* in 127 N. Y. 350, 27 N. E. 1043], where it is said that constructive notice in case of defective streets is an inference of notice drawn from official opportunity to obtain it, and from official obligation to be reasonably vigilant in keeping the public streets safe for travel.

North Carolina.— Jones *v.* Greenshoro, 124 N. C. 310, 32 S. E. 675.

Pennsylvania.— Butcher *v.* Philadelphia, 202 Pa. St. 1, 51 Atl. 330; Frazier *v.* Butler Borough, 172 Pa. St. 407, 33 Atl. 691, 51 Am. St. Rep. 739.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1647.

11. *Connecticut.*— Carstesen *v.* Stratford, 67 Conn. 428, 35 Atl. 276.

District of Columbia.—Domer *v.* District of Columbia, 21 App. Cas. 284; District of Columbia *v.* Payne, 13 App. Cas. 500.

Illinois.— Streator *v.* Chrisman, 182 Ill. 215, 54 N. E. 997 [*affirming* 82 Ill. App. 24]; Nokomis *v.* Farley, 113 Ill. App. 161; Chicago *v.* Gillett, 108 Ill. App. 455; Streator *v.* O'Brien, 103 Ill. App. 85; Chicago *v.* Gillett, 91 Ill. App. 287.

Indiana.— Michigan City *v.* Phillips, 163 Ind. 449, 71 N. E. 205 [*affirming* (App. 1904) 69 N. E. 700].

Massachusetts.— Parker *v.* Boston, 175 Mass. 501, 56 N. E. 569.

Missouri.— Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96; Buckley *v.* Kansas City, 95 Mo. App. 188, 68 S. W. 1069.

Nebraska.— Anderson *v.* Albion, 64 Nebr. 280, 89 N. W. 794 (holding that the duty of diligence cast on the city officers is not discharged or condoned by waiting until the defect has become notorious); Lincoln *v.* Pirner, 59 Nebr. 634, 81 N. W. 846.

New York.— Kuntz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508. The duty of inspecting the streets is as much a part of the duty of a municipal corporation as is that of repairing a street when such an inspection has revealed a condition requiring repair; and if it appears either that the corporation knew of the defect and neglected to repair it, or neglected to inspect and thus failed to know its condition and to make the repair, there is negligence that will sustain a recovery. Smith *v.* New York, 17 N. Y. App. Div. 438, 45 N. Y. Suppl. 239.

Texas.— Klein *v.* Dallas, 71 Tex. 280, 8 S. W. 90; Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95.

Virginia.— Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

Washington.— Beall *v.* Seattle, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892; Cowie *v.* Seattle, 22 Wash. 659, 62 Pac. 121.

Wisconsin.— Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130.

12. See *infra*, XIV, E, 9, f.

13. Isham *v.* Broderick, 89 Minn. 397, 95 N. W. 224.

14. See *infra*, XIV, D, 4, d, (IV), (B), (C).

Actual observation by all passers-by is not necessary for imputation to the municipality of notice of defect or obstruction, but it is sufficient if the defect is of such character as to be noticeable to those who look. Rosevere *v.* Osceola Mills, 169 Pa. St. 555, 32 Atl. 548.

Notice to private citizens.— Notice to or knowledge by citizens is not notice to the municipality. Kenyon *v.* Indianapolis, Wils. (Ind.) 129 (as to a latent defect); Cramer *v.* Burlington, 39 Iowa 512 (notice to two or more citizens); Donaldson *v.* Boston, 16 Gray (Mass.) 508. In these cases it appears that the notice to citizens must be to such an extent as to show that the defect is notorious. But in Mason *v.* Ellsworth, 32 Me. 271, a notice to two or more inhabitants of a town was held to be sufficient notice to the town. And in Bill *v.* Norwich, 39 Conn. 222, it was held that notice to a citizen while not notice to the city might be considered as evidence tending to show notice to the city.

15. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424; Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422; Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46.

Colorado.— Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403; Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440.

Connecticut.— Cusick *v.* Norwich, 40 Conn. 375; Bill *v.* Norwich, 39 Conn. 222; Manchester *v.* Hartford, 30 Conn. 118.

Delaware.— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379; Downs *v.* Smyrna, 2 Pennew. 132, 45 Atl. 717; Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

District of Columbia.— Domer *v.* District of Columbia, 21 App. Cas. 284; Larmon *v.* District of Columbia, 5 Mackey 330.

Georgia.— Chapman *v.* Macon, 55 Ga. 566; Atlanta *v.* Perdue, 53 Ga. 607.

Illinois.— Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498; Hogan *v.* Chicago, 168 Ill. 551, 48 N. E. 210; Chicago *v.* Dalle, 115 Ill. 386,

be required in order to justify such inference of notice on the part of the municipality, but each case must depend upon the facts and peculiar circumstances

5 N. E. 578; Joliet *v.* Seward, 99 Ill. 267; Aurora *v.* Dale, 90 Ill. 46; Springfield *v.* Doyle, 76 Ill. 202; Galesburg *v.* Higley, 61 Ill. 287; Chicago *v.* Fowler, 60 Ill. 322; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553 (failure to repair a water tank in a street); Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229; Chicago *v.* Davies, 110 Ill. App. 427; Chenoa *v.* Kramer, 109 Ill. App. 85; Chicago *v.* Baker, 95 Ill. App. 413 [*affirmed* in 195 Ill. 54, 62 N. E. 892]; Chicago *v.* McCabe, 93 Ill. App. 288; Powell *v.* Bowen, 92 Ill. App. 453; Belvidere *v.* Crichton, 81 Ill. App. 595; Lockport *v.* Richards, 81 Ill. App. 533; Ryan *v.* Chicago, 79 Ill. App. 28; Anna *v.* Boren, 77 Ill. App. 408; De Kalb *v.* Ashley, 61 Ill. App. 647; Joliet *v.* Youngs, 61 Ill. App. 589; Fairfield *v.* Hornick, 53 Ill. App. 558; Ottawa *v.* Stricklin, 45 Ill. App. 288; Brownlee *v.* Alexis, 39 Ill. App. 135; Chicago *v.* Farrell, 27 Ill. App. 526; Galesburg *v.* Benedict, 22 Ill. App. 111; Hearn *v.* Chicago, 20 Ill. App. 249; Chicago *v.* Crooker, 2 Ill. App. 279.

Indiana.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518; Indianapolis *v.* Murphy, 91 Ind. 382; Evansville *v.* Wilter, 86 Ind. 414; Indianapolis *v.* Scott, 72 Ind. 196; Michigan City *v.* Phillips, (App. 1904) 69 N. E. 700; Mt. Vernon *v.* Hoehn, 22 Ind. App. 282, 53 N. E. 654; Ft. Wayne *v.* Duryee, 9 Ind. App. 620, 37 N. E. 299; Monticello *v.* Kennard, 7 Ind. App. 135, 34 N. E. 454.

Iowa.— Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Thomas *v.* Brooklyn, 68 Iowa 438, 10 N. W. 849; Rosenberg *v.* Des Moines, 41 Iowa 415; Rice *v.* Des Moines, 40 Iowa 638.

Kansas.— Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012; Abilene *v.* Cowperthwait, 52 Kan. 324, 34 Pac. 795; Salina *v.* Trosper, 27 Kan. 544; Jansen *v.* Atchison, 16 Kan. 358; Atchison *v.* King, 9 Kan. 550; Atchison *v.* Acheson, 9 Kan. App. 33, 57 Pac. 248.

Kentucky.— Newport *v.* Miller, 93 Ky. 22, 18 S. W. 835, 13 Ky. L. Rep. 889; Madisonville *v.* Pemberton, 75 S. W. 229, 25 Ky. L. Rep. 347; Louisville *v.* Brewer, 72 S. W. 9, 24 Ky. L. Rep. 1671; Covington *v.* Huber, 66 S. W. 619, 23 Ky. L. Rep. 2107.

Louisiana.— Lorenz *v.* New Orleans, 114 La. 802, 38 So. 566.

Massachusetts.—Bourget *v.* Cambridge, 159 Mass. 388, 34 N. E. 455; McGaffigan *v.* Boston, 149 Mass. 289, 21 N. E. 371; Harriman *v.* Boston, 114 Mass. 241; Donaldson *v.* Boston, 16 Gray 508.

Michigan.— Cutcher *v.* Detroit, 139 Mich. 186, 102 N. W. 629; Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191; Scheel *v.* Detroit, 130 Mich. 51, 89 N. W. 554, 90 N. W. 274; Urtel *v.* Flint, 122 Mich. 65, 80 N. W. 991; Rodda *v.* Detroit, 117 Mich. 412, 75 N. W. 939; Moon *v.* Ionia, 81 Mich. 635, 46 N. W. 25.

Minnesota.— Moore *v.* Minneapolis, 19 Minn. 300; Cleveland *v.* St. Paul, 18 Minn. 279.

Mississippi.— Whitfield *v.* Meridian, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A. 834.

Missouri.— Straub *v.* St. Louis, 175 Mo. 413, 75 S. W. 100; Barr *v.* Kansas City, 105 Mo. 550, 16 S. W. 483; Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634; Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Market *v.* St. Louis, 56 Mo. 189; Knight *v.* Kansas City, 113 Mo. App. 561, 87 S. W. 1192; Deland *v.* Cameron, 112 Mo. App. 704, 87 S. W. 597; Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96; Hitt *v.* Kansas City, 110 Mo. App. 713, 85 S. W. 669; Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717; Shipley *v.* Bolivar, 42 Mo. App. 401.

Montana.— May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759, failure to remove a boulder for many months.

Nebraska.— Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41.

New Hampshire.— Parsons *v.* Manchester, 67 N. H. 163, 27 Atl. 88.

New York.— Bieling *v.* Brooklyn, 120 N. Y. 98, 24 N. E. 389; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Niven *v.* Rochester, 76 N. Y. 619; Todd *v.* Troy, 61 N. Y. 506; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Walden *v.* Jamestown, 79 N. Y. App. Div. 433, 80 N. Y. Suppl. 65, 12 N. Y. Annot. Cas. 313 [*affirmed* in 178 N. Y. 213, 70 N. E. 466]; Archer *v.* Mt. Vernon, 57 N. Y. App. Div. 32, 67 N. Y. Suppl. 1040; Fisher *v.* Mt. Vernon, 41 N. Y. App. Div. 293, 58 N. Y. Suppl. 499; O'Hara *v.* Buffalo, 39 N. Y. App. Div. 443, 57 N. Y. Suppl. 367; Williams *v.* Brooklyn, 33 N. Y. App. Div. 539, 53 N. Y. Suppl. 1007; Brewer *v.* New York, 31 N. Y. App. Div. 244, 52 N. Y. Suppl. 865; Laverdure *v.* New York, 28 N. Y. App. Div. 65, 50 N. Y. Suppl. 882; Smith *v.* New York, 17 N. Y. App. Div. 438, 45 N. Y. Suppl. 239; Briel *v.* Buffalo, 90 Hun 93, 35 N. Y. Suppl. 359 [*affirmed* in 156 N. Y. 699, 51 N. E. 1089]; Foels *v.* Tonawanda, 75 Hun 363, 27 N. Y. Suppl. 113; Smid *v.* New York, 49 N. Y. Super. Ct. 126; Reinhard *v.* New York, 2 Daly 243; Strobel *v.* New York, 15 Misc. 115, 36 N. Y. Suppl. 814; Lynch *v.* Buffalo, 6 Misc. 583, 27 N. Y. Suppl. 303; Ryan *v.* New York, 13 N. Y. St. 550; Gillrie *v.* Lockport, 12 N. Y. St. 707; Higgins *v.* Salamanca, 6 N. Y. St. 119; Walker *v.* Lockport, 43 How. Pr. 366.

Ohio.— Matthews *v.* Toledo, 21 Ohio Cir. Ct. 69, 11 Ohio Cir. Dec. 375; Cincinnati *v.* Frazer, 18 Ohio Cir. Ct. 50, 9 Ohio Cir. Dec. 487; Toledo *v.* Center, 16 Ohio Cir. Ct. 308, 8 Ohio Cir. Dec. 503.

Oklahoma.— Norman *v.* Teel, 12 Okla. 69, 69 Pac. 791.

Pennsylvania.— Frazier *v.* Butler Borough,

attending it,[16] except in so far as the question may be controlled by express charter or statutory provision,[17] due weight being given to the consideration that municipal authorities, with their multiplied duties, cannot be expected to act with the promptness and celerity of individuals conducting their private affairs.[18] The time of the existence of the defect or obstruction may be sufficient when, in con-

172 Pa. St. 407, 33 Atl. 691, 51 Am. St. Rep. 739; Philadelphia *v.* Smith, (1889) 16 Atl. 493.

Tennessee.— Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.— Palestine *v.* Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147. See also Austin *v.* Colgate, (Civ. App. 1894) 27 S. W. 896.

Utah.— Tucker *v.* Salt Lake City, 10 Utah 173, 37 Pac. 261; Naylor *v.* Salt Lake City, 9 Utah 491, 35 Pac. 509.

Washington.— Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76; Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138; Devenish *v.* Spokane, 21 Wash. 77, 57 Pac. 340; Lorence *v.* Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42; Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847. See also Sproul *v.* Seattle, 17 Wash. 256, 49 Pac. 489.

Wisconsin.— West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313; Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826; Johnson *v.* Milwaukee, 46 Wis. 568, 1 N. W. 187; Hall *v.* Fond du Lac, 42 Wis. 274.

United States.— District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472.

Canada.— Gaffney *v.* Montreal, 16 Quebec Super. Ct. 260.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1648.

Time allowed to make repairs, etc., see *supra*, XIV, D, 4, b, (IV).

16. Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96; Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717; Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53.

Question for court or jury see *infra*, XIV, E, 9.

17. Hutchins *v.* Littleton, 124 Mass. 289, where the defect must have existed twenty-four hours or have been known to the town. In Crosby *v.* Boston, 118 Mass. 71, it was held that where the landowner had been required by the city to remedy a defect in the cover of a coal hole in a sidewalk, and the landowner replaced the hole cover with a new one which also contained a defect of a different character, the city is not liable for an injury caused by such defect unless the new defect existed for more than twenty-four hours before the accident or the city had reasonable notice thereof.

Provision intended to give time to repair.— In Wisconsin a charter provision declaring that a city should not be liable for defects, etc., unless it appeared that municipal officers had knowledge thereof and that such knowledge should not be presumed unless the defect existed three weeks before the injury "provided, however, that nothing here contained shall be so considered as to mean that knowledge shall be presumed because such three weeks had elapsed," was held to give the city three weeks in which to discover and remove the defect. Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26; Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303; Studley *v.* Oshkosh, 45 Wis. 380. But the fact that the defect has existed for three weeks is held to have no more force in charging the officers with notice than it had before the law was enacted, and a plaintiff not relying upon previous knowledge of the defect by the officers must show that the defect existed for three weeks and also such a state of facts as will charge the proper city officers with notice of the defect before the accident happened. Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303; Sullivan *v.* Oshkosh, 55 Wis. 508, 13 N. W. 468. So in New York it was held that under a charter provision that the city should not be liable for an injury from a defective sidewalk unless actual notice has been given the city officers a reasonable time before the injury and that the officer having charge of the highways shall have power to repair any sidewalk where the property-owner neglects to do so for five days after written notice served on him, notice to the superintendent of repairs of a defective condition of a sidewalk at the time of a notice to the property-owners which is only four days before an injury, was insufficient to charge the city with negligence for failure to repair. Touhey *v.* Rochester, 64 N. Y. App. Div. 56, 71 N. Y. Suppl. 661. But in Cantwell *v.* Appleton, 71 Wis. 463, 37 N. W. 813, under a provision that the city should not be liable unless it be shown that one of the city officers had actual knowledge of the defect three days prior to the accident, it was held that no city official could have such notice where the defect had existed only a few days before the accident, and that in such a case if it is shown that the city had actual knowledge of the defect before the accident, through its proper officers, such provision has no application.

Void provision.—In Washington a provision in a city charter adopted by the city that the municipality should not be liable for injuries sustained from defective conditions of sidewalks, unless notice of such defects should have been given to the superintendent of streets or to the city council within twenty-four hours of the injury, was unreasonable and void as the city could not say whether or not it should be held for personal injuries caused by its neglect of duty. Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386.

18. Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508.

nection with the notoriety[19] and the character and conspicuity of such defect or obstruction, it should have been observed and remedied by the proper municipal authorities.[20]

19. *Colorado.*— Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594.

Iowa.— Thomas *v.* Brooklyn, 58 Iowa 438, 10 N. W. 849.

Massachusetts.— Donaldson *v.* Boston, 16 Gray 508.

Minnesota.— Lindholm *v.* St. Paul, 19 Minn. 245.

Washington.— Elster *v.* Seattle, 18 Wash. 304, 51 Pac. 394.

Wisconsin.— Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1647.

20. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Colorado.— Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

District of Columbia.— Larmon *v.* District of Columbia, 5 Mackey 330.

Illinois.— McLeansboro *v.* Trammel, 109 Ill. App. 524.

Iowa.— Broburg *v.* Des Moines, 63 Iowa 523, 19 N. W. 340, 50 Am. Rep. 756, holding that if those constantly using a street failed to notice an obstruction, it may be presumed that the municipal authorities had no notice of it.

Kansas.— Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012; Salina *v.* Trosper, 27 Kan. 544.

Massachusetts.— Donaldson *v.* Boston, 16 Gray 508.

Michigan.— Urtel *v.* Flint, 122 Mich. 65, 80 N. W. 991.

New York.— Donnelly *v.* Rochester, 166 N. Y. 315, 59 N. E. 989; Kuntz *v.* Tray, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508.

Pennsylvania.— Frazier *v.* Butler Borough, 172 Pa. St. 407, 33 Atl. 691, 51 Am. St. Rep. 739; Philadelphia *v.* Smith, (1889) 16 Atl. 493.

United States.— Balls *v.* Woodward, 51 Fed. 646.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1647.

Time enough for people generally to observe the defect or for it to become generally known is sufficient to support the inference of notice. Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Chicago *v.* Fowler, 60 Ill. 322; Brownlee *v.* Alexis, 39 Ill. App. 135 (a week); Evansville *v.* Wilter, 86 Ind. 414; Thomas *v.* Brooklyn, 58 Iowa 438, 10 N. W. 849; Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191.

Time held sufficient to support inference of notice or knowledge — *Years.*— Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440 (where a derrick stood in a street for a year); Larmon *v.* District of Columbia, 5 Mackey (D. C.) 330 (where a hole four feet long, two feet wide, and one foot deep remained in a sidewalk of a city street for a year); Evansville *v.* Wilter, 86 Ind. 414 (where an obstruction had been upon the sidewalk for a year as testified by one witness, and for months as stated by another); Newport *v.* Miller, 93 Ky. 22, 18 S. W. 835, 13 Ky. L. Rep. 889 (where a stump intended for a hitching post had been standing for sixteen months without being provided with rings or in any way for use as a hitching post); Louisville *v.* Brewer, 72 S. W. 9, 24 Ky. L. Rep. 1671 (where an obstruction consisting of a post two and one-half feet high stood in a street for more than three years); Cutcher *v.* Detroit, 139 Mich. 186, 102 N. W. 629 (where an obstruction in the shape of disused street railway tracks in a street existed for two and one-half years); Whitfield *v.* Meridian, 66 Miss. 570, 6 So. 244, 14 Am. St. Rep. 596, 4 L. R. A. 834 (where a sidewalk at the intersection of two streets ended in a precipitous descent of five or six feet, which condition existed for years).

Months.— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422 (existence of a wash-out eighteen inches wide and about one foot deep in a sidewalk, for several months); Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403 (a plainly visible defect in a sidewalk which had existed for two months prior to the accident); Chicago *v.* Davies, 110 Ill. App. 427; Joliet *v.* Youngs, 61 Ill. App. 589; Chicago *v.* Crooker, 2 Ill. App. 279 (in which last three cases the defect had existed for several months); Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518 (defect in street existing for six months prior to accident); Urtel *v.* Flint, 122 Mich. 65, 80 N. W. 991 (defect in sidewalk which had existed for several months and could be seen for two or three rods); Rodda *v.* Detroit, 117 Mich. 412, 75 N. W. 939 (defective condition of sidewalk existing for several months); Moore *v.* Minneapolis, 19 Minn. 300 (defect in sidewalk which had existed for several months); Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41 (an apparent defect in a sidewalk which had existed for several months); Strobel *v.* New York, 15 Misc. (N. Y.) 115, 36 N. Y. Suppl. 814 (dangerous defect in sidewalk which had existed for three months); West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313 (hole in sidewalk which had existed for six months); Hall *v.* Fond du Lac, 42 Wis. 274 (defect in sidewalk which had existed for several months).

Weeks.— Sweet *v.* Poughkeepsie, 75 N. Y. App. Div. 274, 78 N. Y. Suppl. 60 (two or three weeks); Warner *v.* Randolph, 18 N. Y. App. Div. 458, 45 N. Y. Suppl. 1112 (absence for six weeks or more of guard-rail from outside of a curve in a sidewalk to protect from an embankment); Foels *v.* Tonawanda, 75 Hun (N. Y.) 363, 27 N. Y. Suppl. 113 (hole in sidewalk which had existed for two or three weeks); Smid *v.* New York, 49 N. Y. Super. Ct. 126 (dangerous

(c) *Hidden or Latent Defects.* A municipality is not an insurer against all defects, latent as well as patent, but its liability is for negligence,[21] and injuries resulting from latent defects in a highway not due to faulty municipal work, and

condition of sidewalk which had existed for two weeks); Philadelphia *v.* Smith, (Pa. 1889) 16 Atl. 493 (patent defect which had existed five or six weeks).

Days.— Joliet *v.* Seward, 99 Ill. 267 (several days where dangerous work was being done by the city in a much used street); Ft. Wayne *v.* Duryee, 9 Ind. App. 620, 37 N. E. 299 (where a ditch four feet long, two feet wide, and three feet deep had existed in a street for four days); Monticello *v.* Kennard, 7 Ind. App. 135, 34 N. E. 454 (where a pile of brush two feet high and occupying eight feet on the ground in a principal street remained for three days); Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790 (ten days' or two weeks' existence of a defect in a crossing in a thickly inhabited part of the city); Salina *v.* Trosper, 27 Kan. 544 (defect in sidewalk which had existed for months and its dangerous character had existed for two or three days); O'Hara *v.* Buffalo, 39 N. Y. App. Div. 443, 57 N. Y. Suppl. 367 (where a trench dug in a street by a private person remained unguarded eight days); Briel *v.* Buffalo, 90 Hun (N. Y.) 93, 35 N. Y. Suppl. 359 [*affirmed* in 156 N. Y. 699, 51 N. E. 1089] (obstruction in a much used street, existing for three or four days before the injury); Ryan *v.* New York, 13 N. Y. St. 550 (holes in sidewalk existing for eight or ten days before the accident); Naylor *v.* Salt Lake City, 9 Utah 491, 35 Pac. 509 (pile of stones in street for from three to twelve days).

Hours.— Harriman *v.* Boston, 114 Mass. 241 (evidence that a coal hole in a sidewalk on a much frequented street was opened early in the morning and at noon); Parsons *v.* Manchester, 67 N. H. 163, 27 Atl. 88 (obstruction consisting of a pile of dirt which had existed in a much traveled street for about ten hours).

Time held insufficient to justify inference — *Recent origin.*—Notice should not be imputed where the defects are of recent origin, and particularly where they are concealed in any wise. Bell *v.* Henderson, 74 S. W. 206, 24 Ky. L. Rep. 2434, holding that where, on the evening before the night on which plaintiff was injured, a plank broke in a platform which the city had permitted a business firm to erect over a gutter in the street to enable the firm to receive and deliver goods, the break being behind a stack of wire and not observable by one passing along the sidewalk, although it could be seen from the street, notice could not be inferred. See also Warsaw *v.* Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568 (where an obstruction created by a third person and which had existed one and three-quarters hours before the injury was held not to have remained long enough to charge the city with notice); Canfield *v.* Newport, 73 S. W. 788, 24 Ky. L. Rep. 2213 (where a manhole in a street was opened by boys in the forenoon and a barrel was immediately placed over it by a citizen which was removed at night by some unauthorized person and before daylight an accident was caused by the opening, and it was held that constructive notice could not be imputed); Butler *v.* Oxford, 69 Miss. 618, 13 So. 626 (where an hour or two during which objects were placed in a ditch by the side of a street, and which frightened plaintiff's horse, is held not sufficient time to charge the municipality with notice of the presence of such articles); McFeeters *v.* New York, 102 N. Y. App. Div. 32, 92 N. Y. Suppl. 79 (where the injury was caused by falling into a sewer excavation owing to the absence of a danger signal, and it appeared that a red light was burning up to within one hundred and fifty-three minutes of the time of the accident, and that in the interval the lantern containing the light had been removed and broken without the knowledge of defendant, and it was held that the period of time was insufficient to charge defendant with notice of such removal).

Sudden defect.— Where no defect existed on the day of the accident but it was caused by a hard rain and the corporate authorities had been reasonably diligent in examining the place before this time just before the rain and the accident occurred just after, it was held that the municipality could not be charged with notice. Montezuma *v.* Wilson, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150.

Overnight.— Where a barrier protecting a sidewalk was removed over night, the municipality was held not charged with notice of such removal. Theissen *v.* Belle Plaine, 81 Iowa 118, 46 N. W. 854. So where persons working on an abutting lot had left a pile of dirt in the street at the end of the day it was held that the municipality was not charged with notice of the existence of the obstruction during that night. Breil *v.* Buffalo, 144 N. Y. 163, 38 N. E. 977.

After repair.— Where the injury from a defective sidewalk occurred on the day following that on which the sidewalk had been repaired and placed in a reasonably safe condition, it was held that the time was not sufficient to justify an inference of notice. Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125. So where a gate had been made secure two days before plaintiff was injured and it was safe on the evening before the injury occurred, it was held that there being no evidence tending to show that the authorities had ascertained or might have ascertained the unsecure condition of the gate by the use of ordinary care, plaintiff was not entitled to a verdict. Jackson *v.* Boone, 93 Ga. 662, 20 S. E. 46.

21. See *infra*, XIV, D, 4, a.

which could not have been discovered by ordinary care and diligence, do not give a right of action against the corporation.[22] Under this rule it is held that before a municipality can be found guilty of negligence on account of defects in sidewalks,[23]

22. *Georgia.*— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois.— Powell *v.* Bowen, 92 Ill. App. 453. See also Williams *v.* Carterville, 97 Ill. App. 160.

Indiana.— Kenyon *v.* Indianapolis, Wils. 129.

Iowa.— Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296; Parmenter *v.* Marion, 113 Iowa 297, 85 N. W. 90; Cook *v.* Anamosa, 66 Iowa 427, 23 N. W. 907.

Massachusetts.— Miller *v.* North Adams, 182 Mass. 569, 66 N. E. 197; Stoddard *v.* Winchester, 154 Mass. 149, 27 N. E. 1014, 26 Am. St. Rep. 223, in which cases it is held that implied notice must rest upon the existence of such a condition as fairly to indicate that there may at any time be danger in using the road.

Michigan.— Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475.

Missouri.— Buckley *v.* Kansas City, 156 Mo. 16, 56 S. W. 319 (holding that where plaintiff fell through a glass sidewalk resting on framework, and sustained injuries, and it did not appear what the natural life of such a walk was, and the defect was not calculated to attract attention, constructive notice could not be imputed to the city); Baustian *v.* Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462 (hollow under sidewalk caused by the ground being washed out, there being nothing to show when the washout occurred); Carvin *v.* St. Louis, 151 Mo. 334, 52 S. W. 210.

Nebraska.— Lincoln *v.* Pirner, 59 Nebr. 634, 81 N. W. 846.

New York.— Vandeskie *v.* New York, 89 N. Y. App. Div. 625, 85 N. Y. Suppl. 836; Matthews *v.* New York, 78 N. Y. App. Div. 422, 80 N. Y. Suppl. 360; Hart *v.* Brooklyn, 36 Barb. 226; Scanlon *v.* New York, 12 Daly 81.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Ohio.— Alliance *v.* Campbell, 17 Ohio Cir. Ct. 595, 6 Ohio Cir. Dec. 762.

Pennsylvania.— Byrne *v.* Philadelphia, 211 Pa. St. 598, 61 Atl. 80; Fitzpatrick *v.* Darby, 184 Pa. St. 645, 39 Atl. 545, where the sinking of earth filling an excavation was caused by a heavy rainstorm in the morning just before the accident.

Tennessee.— Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1644.

23. *Colorado.*— Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594.

Indiana.— See Kenyon *v.* Indianapolis, Wils. 129.

Iowa.— Cook *v.* Anamosa, 66 Iowa 427, 23 N. W. 907; Cramer *v.* Burlington, 39 Iowa 512; Donlon *v.* Clinton, 33 Iowa 397. See also Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296, holding that an instruction requiring the city to exercise reasonable diligence in making discovery of existing defects did not require a search for and discovery of latent defects.

Michigan.— Hembling *v.* Grand Rapids, 99 Mich. 292, 58 N. W. 310 (holding that in the absence of actual notice, municipalities are liable only for such defects in sidewalks as are apparent, or suggested by appearances, or disclosed by a test in the nature of the ordinary use of such walks); McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955.

New York.— Hart *v.* Brooklyn, 36 Barb. 226.

Pennsylvania.— Lohr *v.* Philipsburg, 165 Pa. St. 109, 30 Atl. 822, 156 Pa. St. 246, 27 Atl. 133 (in the latter report of which case, which was twice tried, it was said that the duty of a municipality as to sidewalks is secondary and supplemental, to see that the property-owner makes and maintains a safe pavement; that its breach of duty is not in failing to do the work but in failing to compel the owner to do it); Burns *v.* Bradford, 137 Pa. St. 361, 20 Atl. 997, 11 L. R. A. 726 (where it is held that if the defective condition be such that it is discovered by only one out of very many persons who pass it in the ordinary pursuit of business or pleasure it cannot be said to be notorious or to be such a defect that the municipality is chargeable with constructive notice of its existence); Cole *v.* Scranton, 4 Lack. Leg. N. 287.

South Dakota.— See Jones *v.* Sioux Falls, 18 S. D. 477, 101 N. W. 43, holding that the existence in a plank sidewalk six feet wide, of a hole seventeen inches long, seven inches wide, and two and one-half inches deep, where one of the planks had broken off at the end and been forced downward at a place where the walk had been repaired three months before, and to which the attention of no witness had ever been called, although they had frequently been over the walk, is not enough to charge the city, which had no actual notice of the defect, with negligence.

Tennessee.— Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324, holding that the corporation is not required to examine and inspect wooden sidewalks laid on the ground, and that an instruction which would permit a recovery for a latent defect if it might have been discovered "by inspection, observation, or otherwise," is erroneous, such a rule applying only to structures over dangerous places.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1644.

Cover over coal hole.— Where the defect in a sidewalk consisted of a cover to a coal hole which was not properly fastened, it was held that the city was not liable if the condition of the cover was not known to the city officers or was not apparent from the street, under a statute which gave a right of action when by reasonable care and diligence the

or in streets, not arising from their original construction, or from an obstruction placed thereon by a wrong-doer,[24] either express notice of the existence of the defect or obstruction must be brought home to it, or they must be so notorious as to be observable by all.[25] In other cases, however, it would seem that under the rule the mere fact that the defect was hidden, or not observable to passers-by, and the corporation had no notice of it will not exempt from liability, if the defect was of such a nature that reasonable caution on the part of the municipal authorities would have discovered it.[26]

city might have prevented the injury. Hanscom *v.* Boston, 141 Mass. 242, 5 N. E. 249 [*distinguished* in McGaffigan *v.* Boston, 149 Mass. 289, 21 N. E. 371, in that in the latter case the evidence showed that the cover was loose, and that the stone into which it was fitted was rounded underneath so that the cover would balance and tip up when stepped on; that this was apparent from the street; and that, although the cover would be secure if fastened by a bolt on the inside, it was usually left unfastened, and that this condition had existed for a considerable time]. And in Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130, although laying down the rule that the city was bound to be vigilant in observing defects in the sidewalk, and in remedying them, when they became observable to an officer exercising intelligent and reasonably vigilant supervision over them, it was said that it is not the duty of the municipality to examine covers to coal-hole openings to ascertain if they are unfastened, unless there is something apparent on the surface or otherwise brought to their attention, to lead them to believe that the same are loose and likely to become misplaced.

24. See cases cited in last note.

25. Scanlon *v.* New York, 12 Daly (N. Y.) 81 (excavation filled in street by permission of city but not under its supervision); Otto Tp. *v.* Wolf, 106 Pa. St. 608 (where an adjacent landowner placed a gas pipe under the highway so that it was exposed and broken by a passing team and one thereafter passing with a light was injured by an explosion); Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202 (as to latent defect in a bridge). See also Bragg *v.* Bangor, 51 Me. 532.

26. *Georgia.*— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois.— Mattoon *v.* Worland, 97 Ill. App. 13 (where a casual inspection would have discovered a defect in a cover of a catch-basin in a street, although apparently sound on top); Chicago *v.* McCabe, 93 Ill. App. 288 (as to duty to make reasonably frequent examinations of streets to discover defects); Powell *v.* Bowen, 92 Ill. App. 453 (where it is said that it is only reasonable that notice of latent defects should not be so readily presumed from their continuance as open and notorious ones); Joliet *v.* McCraney, 49 Ill. App. 381 (holding that the duty of using reasonable care in discovering defects in sidewalks does not devolve on mere passers-by). A municipal corporation will not be considered to have notice of a defect in a sidewalk which was not such as to put a reasonably prudent man, whose business it was to look after the repairs, on inquiry to examine its condition. Joliet *v.* Walker, 7 Ill. App. 267. But if the circumstances are such that an inference of notice to any officer or agent of the city whose duty it is to report the defect may be drawn, this will be sufficient without regard to whether the circumstances show notice to the particular person having special supervision of the sidewalks. Hearn *v.* Chicago, 20 Ill. App. 249.

Indiana.— See Columbia City *v.* Langohr, 20 Ind. App. 395, 50 N. E. 831, as to duty of inspection to discover loose boards in a plank walk.

Kansas.— Abilene *v.* Cowperthwait, 52 Kan. 324, 34 Pac. 795.

Missouri.— Drake *v.* Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759; Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23 (which cases hold that it is the duty of the city and not of passers-by to notice defects in streets and sidewalks, and that it does not follow because the defect is not of a character necessarily to attract the attention of passers-by, that the city, by the exercise of due care, would not have discovered it); Carvin *v.* St. Louis, 151 Mo. 334, 52 S. W. 210 (where the non-liability of the city was put upon the ground that the defect was latent and had not existed for a sufficient length of time to justify the assumption that defendant knew of the defective condition).

Nebraska.— See Anderson *v.* Albion, 64 Nebr. 280, 89 N. W. 794.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 34 S. E. 675, where it is said that notice will be inferred from notoriety of defect, open to reasonable observation, but if it be concealed or obscured "so as to escape the attentive observation on the part of the defendant" (the corporation) notice will not be attributed to it.

Ohio.— Matthews *v.* Toledo, 21 Ohio Cir. Ct. 69, 11 Ohio Cir. Dec. 375, duty to examine sidewalks from time to time. See also Morris *v.* Woodburn, 57 Ohio St. 330, 48 N. E. 1097.

Washington.— Beall *v.* Seattle, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1644.

Structure subject to decay.— But even where the rule obtains that there must be some outward indication observable to all

(v) *Notice to Municipal Officers or Agents.* The municipality is charged with notice of any defect or obstruction in the highway, to any officer or agent whose duty it was to report, or make provision for the correction of the defect,[27] or to look after or control the making of repairs or removal of

passers, it has been recognized that the corporation is not under all circumstances relieved from all active duty of inspection, and that if the structure is one which is subject to decay and has stood for the period when decay might be expected to have set in, it would be negligence to omit all precautions to ascertain the condition of the structure. Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594; Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202, as to timbers in a bridge, which case is distinguished in Lohr *v.* Philipsburg Borough, 156 Pa. St. 246, 27 Atl. 133, from those holding that the defects must be patent, in that the duty to maintain the bridge was primarily and absolutely on the town. But see Miller *v.* North Adams, 182 Mass. 569, 66 N. E. 197.

27. *Connecticut.*— Cummings *v.* Hartford, 70 Conn. 115, 38 Atl. 916, holding that, although a policeman is charged with the duty of reporting defects in the streets, he may presume that one who is laying a sidewalk has a permit therefor and he need not report that the sidewalk is being relaid.

Georgia.— Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749, policeman.

Illinois.— Joliet *v.* Looney, 159 Ill. 471, 42 N. E. 854 [*affirming* 56 Ill. App. 502]; Mareck *v.* Chicago, 89 Ill. App. 358; Lundon *v.* Chicago, 83 Ill. App. 208; Looney *v.* Joliet, 49 Ill. App. 621 (in which cases notice to policemen was held sufficient); Hearn *v.* Chicago, 20 Ill. App. 249. Where the evidence showed that a plank in a sidewalk had been loose for some time and that a member of the village board, upon learning the fact, nailed down the loose board but the stringers were decayed and insufficient to hold it, a finding that the defect was known to the city authorities is warranted. Sorento *v.* Johnson, 52 Ill. 659.

Indiana.— Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79, notice to councilman.

Iowa.— Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281 (mayor); Trapnell *v.* Red Oak Junction, 76 Iowa 744, 39 N. W. 884 (councilman); Carter *v.* Monticello, 68 Iowa 178, 26 N. W. 129 (holding that notice to a councilman is sufficient, but that such notice must relate to the defects which cause the injury, and notice of defects which have been repaired before the injury is insufficient, although the injury occurs at the place where the repairs have been made).

Kansas.— Salina *v.* Trosper, 27 Kan. 544, mayor and marshal.

Kentucky.— Louisville *v.* Keher, 117 Ky. 841, 79 S. W. 270, 25 Ky. L. Rep. 2003.

Maine.— Ham *v.* Lewiston, 94 Me. 265, 47 Atl. 548, alderman.

Massachusetts.—Chase *v.* Lowell, 151 Mass. 422, 24 N. E. 212 (holding that where the superintendent of streets knew of the unsafe condition of a tree standing in a street, his knowledge was that of the city, although he could not remove the tree except by order of the mayor and aldermen); Purple *v.* Greenfield, 138 Mass. 1.

Michigan.— Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143, notice to an alderman, where under the city charter the common council are commissioners of the highways having care and supervision of streets and sidewalks.

Minnesota.— Cleveland *v.* St. Paul, 18 Minn. 279, policeman.

Missouri.— Small *v.* Kansas City, 185 Mo. 291, 84 S. W. 901 (inspector); Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 50 Am. Rep. 168 (where the police force constituted a department of the city government and a policeman was an officer and agent thereof, by express provision, it being held therefore that his knowledge of an obstruction or defect in a sidewalk was notice to the city, the court distinguishing Attwater *v.* Mayor, 31 Md. 462, which held that the city was not liable for the failure to remove a nuisance from a public street because the power was lodged in the police and they were not city officers, the distinction between the two cases being based upon the difference between the statutes of the two states); Small *v.* Kansas City, 110 Mo. App. 721, 85 S. W. 627 (inspector); Clark *v.* Brookfield, 97 Mo. App. 16, 70 S. W. 934 (where it was held that an instruction that there was no evidence "of actual notice" of the defect in a sidewalk was erroneous where there was evidence that the hole in the walk had existed for a month, or all of the fall, and that an alderman resided within seventy-five feet of the place of the accident); Cropper *v.* Mexico, 62 Mo. App. 385 (councilman).

New York.— Schumacher *v.* New York, 166 N. Y. 103, 59 N. E. 773 (inspector); Twogood *v.* New York, 102 N. Y. 216, 6 N. E. 275 (policeman who observed the defects made entries in his book and left notices at the station house that the defects had not been removed, which the inspector was accustomed to forward to headquarters and thence to the corporation counsel); Rehberg *v.* New York, 91 N. Y. 137, 43 Am. Rep. 657 (knowledge of policeman of dangerous obstruction, where the police are charged with the duty of removing nuisances); Weed *v.* Ballston Spa, 76 N. Y. 329 (village trustee); Elias *v.* Rochester, 49 N. Y. App. Div. 597, 63 N. Y. Suppl. 712 [*affirmed* in 169 N. Y. 614, 62 N. E. 1095] (clerk of board); Higgins *v.* Salamanca, 6 N. Y. St. 119 (village president).

obstructions,[28] but not to other officers or agents not charged with such duties,[29] or to

Ohio.— Newark *v.* McDowell, 16 Ohio Cir. Ct. 556, 9 Ohio Cir. Dec. 260, councilman.

Pennsylvania.—Burger *v.* Philadelphia, 196 Pa. St. 41, 46 Atl. 262, supervisor.

Texas.— San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28 (policeman); Dallas *v.* Meyers, (Civ. App. 1900) 55 S. W. 742.

Wisconsin.— McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298, alderman.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1645.

Officer's opinion as to danger.— Where a city ordinance required policemen on duty to inspect cross walks, the failure of a policeman to report a defect is not a defense, although the policeman was of opinion that the defect did not render the cross walk dangerous. Goodfellow *v.* New York, 100 N. Y. 15, 2 N. E. 462.

De jure officer.— Where one acts as street commissioner and is admitted to be such by the village, his duties being to examine the streets and sidewalks, notice to him is notice sufficient to charge the village, notwithstanding neither the charter nor the by-laws of the village provided for the appointment of such officer. McSherry *v.* Canandaigua, 12 N. Y. Suppl. 751 [*affirmed* in 129 N. Y. 612, 29 N. E. 821].

28. *Colorado.*— Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594, holding that by virtue of an ordinance prescribing the duties of the chief of police he was charged with the care of coal holes and caps in sidewalks, and that where he had knowledge of a defect existing in a cap the city should be charged with actual notice if it had reasonably sufficient time before the accident to remedy the defect, but that "means of knowledge" within the rule as to constructive notice, except in so far as the term might include cases of neglect to anticipate and nrevent certain defects naturally arising from use and climatic influence, is applicable only to defects or obstructions which are so open and notorious as to be observable by all, and knowledge on the part of the officer of latent defects is not "means of knowledge."

Illinois.— Mattoon *v.* Russell, 91 Ill. App. 252 (aldermen who were members of the street committee); Decatur *v.* Hamilton, 89 Ill. App. 561 (city electrician whose duties included supervision of the use of electrical appliances on the streets).

Iowa.— Padelford *v.* Eagle Grove, 117 Iowa 616, 91 N. W. 899 (street commissioner); Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77.

Kansas.— Pittsburg *v.* Broderson, 10 Kan. App. 430, 62 Pac. 5, street committee.

Michigan.— McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006 (street superintendent); Hayes *v.* West Bay City, 91 Mich. 418, 51 N. W. 1067 (marshal); Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721 (street commissioner).

Minnesota.— Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763.

Missouri.— Miller *v.* Canton, 112 Mo App. 322, 87 S. W. 96.

New York.— Sprague *v.* Rochester, 159 N. Y. 20, 53 N. E. 697 (foreman); Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131] (patrol superintendent); Deyoe *v.* Saratoga Springs, 1 Hun 341, 3 Thomps. & C. 504 (superintendent); Gillrie *v.* Lockport, 12 N. Y. St. 707 (superintendent).

North Carolina.— Foy *v.* Winston, 126 N. C. 381, 35 S. E. 609, board of aldermen.

Ohio.— Toledo *v.* Nitz, 23 Ohio Cir. Ct. 350 (market superintendent); Nitz *v.* Toledo, 22 Ohio Cir. Ct. 454, 12 Ohio Cir. Dec. 357 (market superintendent); Newark *v.* McDowell, 16 Ohio Cir. Ct. 556, 9 Ohio Cir. Dec. 260 (councilman).

Oklahoma.— Norman *v.* Teel, 12 Okla. 69, 69 Pac. 791, city marshal.

Tennessee.— Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.— Patterson *v.* Austin, (Civ. App. 1895) 29 S. W. 1139, street commissioner.

Virginia.— Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

Washington.— Saylor *v.* Montesano, 11 Wash. 328, 39 Pac. 653, street commissioner.

Wisconsin.— Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816 (street commissioner); Fife *v.* Oshkosh, 89 Wis. 540, 62 N. W. 541 (alderman); McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298 (notice to one of the aldermen of a city, the city council being vested with control of the streets).

See 36 Cent. Dig. tit. "Municipal Corporations," § 1645.

Notice to individual councilmen has been held insufficient, although the town council, as a body, has much to do with the care of the highways. Jordan *v.* Peckham, 19 R. I. 28, 31 Atl. 305. And in Frazier *v.* Butler Borough, 172 Pa. St. 407, 33 Atl. 691, 51 Am. St. Rep. 739, it is held that, although notice given a member of the borough council officially and while in the exercise of his official duties will be sufficient, his mere personal knowledge will not be chargeable to the borough, as where the obstruction was caused by a contractor in grading a sidewalk for a member of the council. But see Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227, holding that an alderman's knowledge of an excavation in a sidewalk imputes notice to the city, although the excavation is made by him in the erection of a private building without direct authority from the city.

Personal knowledge of one bound to act on knowledge, the law fixing no channel through which such knowledge must reach him in order to impose the duty on him personally, must be imputed to him as an officer. Canfield *v.* East Stroudsburg Borough, 19 Pa. Super. Ct. 649.

29. *Georgia.*— Columbus *v.* Ogletree, 96 Ga. 177, 22 S. E. 709, as to notice to a police-

employees,[30] and knowledge before election or induction to office will not bind the corporation.[31]

(VI) *General Condition or Particular Defect.* Notice of a defect is notice of that condition of things which constitutes a defect, although the authorities may think that it does not constitute a defect.[32] So notice of the particular defect causing the injury is not required, where the municipality has knowledge or notice, actual or constructive, of a general local defective condition in the walk or way,[33] or where knowledge of a particular defect is necessarily extended to

man if it is not the duty of the police to look after and report the condition of streets.

Illinois.— Savanna *v.* Trusty, 98 Ill. App. 277 (treasurer); Reid *v.* Chicago, 83 Ill. App. 554 (policeman, in the absence of any showing that policemen were charged with any duty in respect to streets and sidewalks).

Iowa.— Cook *v.* Anamosa, 66 Iowa 427, 23 N. W. 907, city marshal.

Michigan.— Corey *v.* Ann Arbor, 134 Mich. 376, 96 N. W. 477, city clerk.

New York.— Touhey *v.* Rochester, 64 N. Y. App. Div. 56, 71 N. Y. Suppl. 661 (holding that knowledge by a sidewalk inspector of a defect in a sidewalk, such inspector having no authority to make repairs but being charged only with the duty of inspecting and notifying property-owners to repair, and if such repairs are not made within five days to report the fact to the foreman of repairs or the chief inspector, is not sufficient notice to officers having charge of the highways within a charter provision which allows the property-owner five days' notice to make the repairs after which the inspector is to notify the officers who have authority to make them); Bush *v.* Geneva, 3 Thomps. & C. 409 (village trustees). The fact that an alderman had knowledge that a gas company was excavating and laying gas pipes under an ordinance requiring it to keep proper signal lights burning at holes, etc., without reserving to the city officers any right of supervision, and none being in fact exercised by them, is not *per se* evidence of negligence on the part of the city, where the injury was occasioned by one's falling into an unguarded excavation. McDermott *v.* Kingston, 19 Hun 198 [*reversing* 6 Abb. N. Cas. 246, 57 How. Pr. 196].

Ohio.— Cleveland *v.* Payne, 72 Ohio St. 347, 74 N. E. 177, 70 L. R. A. 841, policeman.

Texas.— Austin *v.* Colgate, (Civ. App. 1894) 27 S. W. 896.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1645.

30. Rich *v.* Rockland, 87 Me. 188, 32 Atl. 872 (foreman); Foster *v.* Boston, 127 Mass. 290 (holding that knowledge by a janitor of a public school-house that a coal hole in front of the school-house is uncovered is not notice to the city of a defect in the highway, the janitor being appointed by the school committee of the city, and having nothing to do with the streets); Monies *v.* Lynn, 119 Mass. 273 (holding that notice to a lamplighter of a defect in a sidewalk does not warrant a finding of notice to the city which was under no legal obligation to cause its streets to be lighted).

31. Lohr *v.* Philipsburg Borough, 156 Pa. St. 246, 27 Atl. 133.

32. Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

Knowledge of danger.— It is no defense that the city did not know that an unlawful obstruction was dangerous, where it did not act with reasonable diligence after notice of the obstruction and before injury was occasioned thereby. Rehberg *v.* New York, 91 N. Y. 137, 43 Am. Rep. 657. But where an injury was caused by an explosion of gas in a manhole constructed and owned by a corporation in a street it was held that the city was not liable, having no notice of the probability of danger. Hunt *v.* New York, 52 N. Y. Super. Ct. 198 [*affirmed* in 109 N. Y. 134, 16 N. E. 320].

33. *Illinois.*— Paxton *v.* Frew, 52 Ill. App. 393.

Iowa.— Weber *v.* Creston, 75 Iowa 16, 39 N. W. 126, knowledge of defective construction of walk.

Massachusetts.— Noyes *v.* Gardner, 147 Mass. 505, 18 N. E. 423, 1 L. R. A. 354, injury from rotten plank in sidewalk, although the defect in the particular plank had not been observed.

Michigan.— Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668; Strudgson *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075, rotten plank in sidewalk.

Nebraska.— Nothdurft *v.* Lincoln, 66 Nebr. 430, 92 N. W. 628, 96 N. W. 163.

Washington.— Durham *v.* Spokane, 27 Wash. 615, 68 Pac. 383, holding that if the sidewalk at the place where the injury occurred was old, rotten, full of holes, and out of repair, and dangerous generally, and had been so for a period of four months prior thereto, and such condition was the cause of the injury, it can make no difference as to the city's liability therefor whether the injured person stepped into an existing hole, or a hole made by her at the time of the injury, or, if she did step into an existing hole, whether that particular hole existed for a long or for a short period of time, provided of course she was not guilty of contributory negligence.

Wisconsin.— Viellesse *v.* Green Bay, 110 Wis. 160, 85 N. W. 665; Weisenberg *v.* Appleton, 26 Wis. 56, 7 Am. Rep. 89.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1649.

include what reasonable diligence in remedying such defect would have disclosed.[34] But notice of one particular defect which caused an injury cannot be established by proof of notice of another particular defect which is in no way related to the former and did not contribute to the injury.[35]

(VII) *Known Probable Causes*—(A) *In General.* Knowledge or notice of a condition from which defects proximately follow as a probable cause may be sufficient to charge the municipality with notice of such defects.[36] But on the

Thus notice that a particular board is loose in a plank walk need not be brought home to the municipality, if there is sufficient to charge it with notice of the general condition of the walk. Aurora *v.* Hillman, 90 Ill. 61; Columbia City *v.* Langohr, 20 Ind. App. 395, 50 N. E. 831; Riley *v.* Iowa Falls, 83 Iowa 761, 50 N. W. 33; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652; Huff *v.* Marshall, 97 Mo. App. 542, 71 S. W. 477; Plattsmouth *v.* Mitchell, 20 Nebr. 228, 29 N. W. 593; Aslen *v.* Charlotte, 35 N. Y. App. Div. 625, 54 N. Y. Suppl. 754 (where the municipal officers were charged with the duty of inspection); Ripon *v.* Bittel, 30 Wis. 614 (holding that such a defect is not properly a latent one). But in Ruggles *v.* Nevada, 63 Iowa 185, 18 N. W. 866, it was held that to charge a town with constructive notice of a defective plank in a sidewalk, by reason of which an injury has occurred, it is necessary to show that the identical defect which led to the accident was open and visible; and no questions with respect to the condition of the walk in the "locality near-by" can be admitted.

An express notice without specifying the place, given to a member of the street committee for the purpose of conveying knowledge that a plank is loose in a sidewalk, has been held to be insufficient to charge notice of any particular plank being loose. Rogers *v.* Orion, 116 Mich. 324, 74 N. W. 463.

A statutory notice of twenty-four hours must be a notice of the identical defect which caused the injury and notice of another or of the existence of a cause likely to produce the defect is not sufficient. Bradbury *v.* Lewiston, 95 Me. 216, 49 Atl. 1041; Smyth *v.* Bangor, 72 Me. 249.

34. Dallas *v.* McAllister, (Tex. Civ. App. 1897) 39 S. W. 173, where an injury was caused by the sinking of ground covering a defective sewer at some distance from a point where a dangerous depression had existed in the street for a period of two months, and when the injury occurred the ground caved all the way from the place of the accident to the point where the original depression existed, and it was held that it was a reasonable inference that the sewer was in an unsafe condition all the way down and that notice of this would have followed ordinary care in repairing the first break.

35. Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721; Nothdurft *v.* Lincoln, 66 Nebr. 430, 92 N. W. 628, 96 N. W. 163; Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606, holding that where the cause of the injury sued for was the stepping on a loose board in a sidewalk, the municipality cannot, as a matter of law, be charged with notice of such defect merely because it had knowledge of the existence of a general defect in the walk in that it had become dished through the settling of the middle stringers.

Notice of the defective condition of the sidewalks generally for one or two blocks each way from the street crossing and not as to the particular defect in the crossing itself, which caused the injury, is not sufficient. Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143. To the same effect see Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52. And evidence that a city's wooden walks were generally in a defective condition is held insufficient to show notice of a particular defect in a particular wooden sidewalk. Boulder *v.* Weger, 17 Colo. App. 69, 66 Pac. 1070.

Notice by the corporation to an abutter to repair a sidewalk is not, as a matter of law, an admission of notice of any other defect than the one stated in the notice or of one so related to it that the existence of the latter according to the usual course of affairs may be inferred from the former. Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606.

36. Corts *v.* District of Columbia, 7 Mackey (D. C.) 277; Bourget *v.* Cambridge, 159 Mass. 388, 34 N. E. 455; Olson *v.* Worcester, 142 Mass. 536, 8 N. E. 441 (where the defect was produced by a water conductor upon a building adjacent to a sidewalk, which emptied its water upon the sidewalk and which had been there for a long time, the court holding that the existence of the water conductor might be considered in determining whether the officers of the city might have had notice by the exercise of proper care of the defect caused in the sidewalk by it); Milledge *v.* Kansas City, 100 Mo. App. 490, 74 S. W. 892 (where the defect consisted of a condition caused by a quantity of earth on a sloping sidewalk becoming saturated with rain).

Knowledge of dangerous use.— Sweeney *v.* Butte, 15 Mont. 274, 39 Pac. 286, holding that where a city knows that trap-doors which it permits to exist in the sidewalk are dangerous whenever used in the manner in which they were built to be used, and are ordinarily used, and an injury is caused through such dangerous use, it need not be shown that the city knew that the doors were being used at the time of the accident. To the same effect see McClure *v.* Sparta, 84 Wis. 269, 54 N. W. 337, 36 Am. St. Rep. 924. But the mere presence of boxes in the street and knowledge thereof by the authorities does

other hand notice or knowledge of a cause which might produce the defect is not equivalent to a statutory notice of the identical defect which caused the injury.[37]

(B) *Condition of Structure From Use and Decay.* Common prudence dictates that a city in the exercise of its duty to care for the safety of the streets should look after the effects of long wear upon a structure in a street, as a sewer basin, which is likely to become dangerous in the course of time,[38] and the knowledge of the action of the elements on structures of wood, and of the liability of timber to decay under certain conditions, is to be attributed to municipalities, just as to natural persons. The duty of the municipality to exercise ordinary care to detect such natural decay, and to guard against injuries therefrom, follows necessarily.[39]

e. Precautions Against Injury — (I) *In General.* The general municipal duty to put and keep streets in a reasonably safe condition requires the corporation to exercise reasonable care and prudence in adopting such precautionary measures as will prevent persons, exercising due care, from suffering injury from obstructions or defects,[40] whether the defects or obstructions are caused by its own

not constitute notice that the property-owner, who has a certain right to use the street in this way, is exceeding his right or is making an unreasonable or unlawful use of the street. Loberg *v.* Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69. So where a manufacturer of machinery has stored iron wheels and other machinery on a public lawn between the sidewalk and roadway there was held to be no liability on the part of the municipality for injuries sustained by reason of a wheel being so negligently placed on the lawn as to fall when touched unless the municipality has distinct notice of the particular negligence in the placing of such wheel or others, and a mere petition of citizens remonstrating against allowing such use of the lawn upon the ground that it was unsightly and liable to frighten horses is not sufficient to give notice of the negligence above referred to. Mattimore *v.* Erie, 144 Pa. St. 14, 22 Atl. 817.

Notice of ice and snow see *supra*, XIV, D, 4, c, (IV), (D), (4).

37. Bradbury *v.* Lewiston, 95 Me. 216, 49 Atl. 1041; Gurney *v.* Rockport, 93 Me. 360, 45 Atl. 310; Carleton *v.* Caribou, 88 Me. 461, 34 Atl. 269; Hurley *v.* Bowdoinham, 88 Me. 293, 34 Atl. 72; Pendleton *v.* Northport, 80 Me. 598, 16 Atl. 253; Smyth *v.* Bangor, 72 Me. 249.

38. Cassidy *v.* Poughkeepsie, 71 Hun (N. Y.) 144, 24 N. Y. Suppl. 523 [*affirmed* in 143 N. Y. 670, 39 N. E. 20], holding that this duty is equally incumbent where the foothold was originally constructed by lawful authority as where it was the work of trespass or the elements.

39. Nesbitt *v.* Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521 (wooden structure in street); Rapho *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202 (holding that where the wooden timbers of a bridge have stood for such a time that decay might reasonably be expected to have set in, omission of all precautions to ascertain the conditions will be negligence); Norristown *v.* Moyer, 67 Pa. St. 355 (pole in street). See also Danaher *v.* Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592. But see Miller *v.* North Adams, 182 Mass. 569, 66 N. W. 197, where it is held otherwise as to defective condition of a culvert, no indications of the defect appearing on the surface.

Wooden sidewalks.— The rule of the text is applied to wooden sidewalks, gutter crossings, etc. Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594; Sherwood *v.* District of Columbia, 3 Mackey (D. C.) 276, 51 Am. Rep. 776 (where the wooden structure is laid across an excavation upon which a sidewalk is laid); Wheaton *v.* Hadley, 131 Ill. 640, 23 N. E. 422 [*affirming* 30 Ill. App. 564]; Indianapolis *v.* Scott, 72 Ind. 196 (decay of wooden gutter crossing); Smith *v.* Sioux City, 119 Iowa 50, 93 N. W. 81; Furnell *v.* St. Paul, 20 Minn. 117. *Compare* Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 334.

Falling objects see *supra*, XIV, D, 4, c, (IV), (E), (1).

40. *Delaware.*— Carswell *v.* Wilmington, 2 Marv. 360, 43 Atl. 169; Anderson *v.* Wilmington, 2 Pennew. 28, 43 Atl. 841.

Illinois.— Mt. Vernon *v.* Brooks, 39 Ill. App. 426.

Indiana.— Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277; Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

Kansas.— Kansas City *v.* Gilbert, 65 Kan. 469, 70 Pac. 350.

Kentucky.— Louisville *v.* Keher, 117 Ky. 841, 79 S. W. 270, 25 Ky. L. Rep. 2003.

Massachusetts.— Jones *v.* Boston, 188 Mass. 53, 74 N. E. 295; Leonard *v.* Boston, 183 Mass. 68, 66 N. E. 596.

Missouri.— Burnes *v.* St. Joseph, 91 Mo. App. 489; Campbell *v.* Stanberry, 85 Mo. App. 159.

Ohio.— Gable *v.* Toledo, 16 Ohio Cir. Ct. 515, 9 Ohio Cir. Dec. 63.

South Carolina.— Hutchison *v.* Summerville, 66 S. C. 442, 45 S. E. 8.

Texas.— Dallas *v.* Jones, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377.

Virginia.— Newport News *v.* Scott, 103 Va. 794, 50 S. E. 266.

Washington.— McClammy *v.* Spokane, 36 Wash. 339, 78 Pac. 912.

agency,[41] or by others;[42] and one using the street may assume that it is passable and that excavations which may be therein are properly guarded,[43] unless he knows of the defect before the injury.[44] But impossibilities or unreasonable precautions are not required.[45]

(II) *Precautions While Making Improvements.* Where improvements are being made in a street, it is the duty of the city to guard them so as to protect travelers on the street, who are themselves in the exercise of due care, from receiving injury therefrom,[46] and the necessity for obstructions and excavations

Canada.— Kennedy *v.* Portage la Prairie, 12 Manitoba 634; Homewood *v.* Hamilton, 1 Ont. L. Rep. 266.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1653.

Inspection.— There is no inflexible rule as to the frequency or particularity of inspection upon the question of municipal negligence, but all pertinent circumstances of each case must be considered. Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359. The failure of a municipality to make tests as to the condition of trees in public places after a preliminary examination may be taken as a circumstance on the subject of its negligence in ascertaining whether the safety of the public requires any alteration in a case where such examination disclosed a condition from which suspicion of danger may fairly arise. McGarey *v.* New York, 89 N. Y. App. Div. 500, 85 N. Y. Suppl. 861.

Error of judgment.— The municipality is not liable for error in judgment in devising its precautionary plans, in the absence of anything to indicate danger. Rotsell *v.* Warren, 10 Pa. Super. Ct. 283, 44 Wkly. Notes Cas. 569.

Work done by contractors see *supra*, XIV, A, 4, a, (II), (C).

Licensees see *supra*, XIV, D, 3, e.

41. Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605; Holitza *v.* Kansas City, 68 Kan. 157, 74 Pac. 594; Burnes *v.* St. Joseph, 91 Mo. App. 489; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

42. *District of Columbia.*— District of Columbia *v.* Dempsey, 13 App. Cas. 533.

Illinois.— Peoria *v.* Gerber, 168 Ill. 318, 48 N. E. 152; Springfield *v.* Tomlinson, 79 Ill. App. 399.

Indiana.— Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277.

Kansas.— Holitza *v.* Kansas City, 68 Kan. 157, 74 Pac. 594.

Missouri.— Burnes *v.* St. Joseph, 91 Mo. App. 489.

New York.— Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Hoyer *v.* North Tonawanda, 79 Hun 39, 29 N. Y. Suppl. 650; Tiers *v.* New York, 74 Hun 452, 26 N. Y. Suppl. 688.

Virginia.— McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1653.

43. Carswell *v.* Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483, holding that there may be cases where the conformation of the ground itself would clearly indicate that the center of a public road is not the traveled route, and in such case this circumstance may be sufficient to give notice; but that in all ordinary cases the center of a public street passing between the open lots of a populous town, in the usual course of travel, and in the night-time, or when the route is obscured by snow, may be taken as the traveled route.

44. Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087, 107 Wis. 436, 83 N. W. 695. See also *infra*, XIV, D, 6, c.

45. *Indiana.*— Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277.

Minnesota.— Tarras *v.* Winona, 71 Minn. 22, 73 N. W. 505.

Missouri.— Myers *v.* Kansas City, 108 Mo. 480, 18 S. W. 914.

New York.— Parker *v.* Cohoes, 10 Hun 531 [*affirmed* in 74 N. Y. 610].

Pennsylvania.—Heidenway *v.* Philadelphia, 168 Pa. St. 72, 31 Atl. 1063.

South Dakota.— Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1653. And see *supra*, XIV, D, 4, a.

46. *Delaware.*— Carswell *v.* Wilmington, 2 Marv. 360, 43 Atl. 169.

Illinois.— Chicago *v.* Johnson, 53 Ill. 91; Canton *v.* Dewey, 71 Ill. App. 346; Mt. Carmel *v.* Guthridge, 52 Ill. App. 632; Aurora *v.* Seidelman, 34 Ill. App. 285.

Indiana.— Ft. Wayne *v.* Patterson, 3 Ind. App. 34, 29 N. E. 167.

Kentucky.— Covington *v.* Bryant, 7 Bush 248.

Maine.— Kimball *v.* Bath, 38 Me. 219, 61 Am. Dec. 243.

Massachusetts.—Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118; Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622 (liability for acts of water commissioners in leaving excavations in the streets insufficiently guarded and lighted); Prentiss *v.* Boston, 112 Mass. 43.

Nebraska.— Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Childs *v.* West Troy, 23 Hun 68.

Pennsylvania.— Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

can be no stronger than the duty of reasonable care and precaution to protect the public from injury.[47]

(III) *Lighting Streets.* The common law does not require municipal lighting of streets, and therefore a right of action for personal injuries sustained in the night-time cannot be founded solely upon the alleged negligence of the city in this respect.[48] And so the mere failure to exercise a discretionary power under a charter or to assume the function under a permissive grant in the charter will not be sufficient alone upon which to base liability.[49] Nor will the voluntary assumption of the function impose liability.[50] On the other hand this absence of duty refers to ways which are reasonably safe for travel,[51] and if dangerous defects or obstructions exist, the failure to light the street may become pertinent in determining the question of negligence in the performance of the municipal duty to keep the street in a reasonably safe condition for travel, the municipality having assumed to perform the function.[52]

(IV) *Barriers, Guards, Covers, Lights, or Signals*—(A) *In General.* The duty of the municipality is generally measured by the requirements of ordi-

Wisconsin.— Milwaukee *v.* Davis, 6 Wis. 377.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1659.

Sign warning as to steam roller.— Where a city street in the middle of which a car track is laid, dividing the ordinary course of travel into two streams, is undergoing repairs, and so is in a defective condition, it cannot be held as matter of law that a danger sign, giving warning of the use of a steam roller, placed upon one side of the car track, is not a reasonable warning to those approaching on the other. Mulligan *v.* New Britain, 69 Conn. 96, 36 Atl. 1005.

47. Chicago *v.* Brophy, 79 Ill. 277; La Salle *v.* Evans, 111 Ill. App. 69; Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207; Bennett *v.* Sing Sing, 14 N. Y. Suppl. 463.

48. *Georgia.*— Columbus *v.* Sims, 94 Ga. 483, 20 S. E. 332; Gaskins *v.* Atlanta, 73 Ga. 746.

Massachusetts.— Randall *v.* Eastern R. Co., 106 Mass. 276, 8 Am. Rep. 327.

Minnesota.—McHugh *v.* St. Paul, 67 Minn. 441, 70 N. W. 5; Miller *v.* St. Paul, 38 Minn. 134, 36 N. W. 271.

Pennsylvania.— Canavan *v.* Oil City, 183 Pa. St. 611, 38 Atl. 1096.

South Dakota.— Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1656.

49. Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729; Wolf *v.* District of Columbia, 21 App. Cas. (D. C.) 464, 69 L. R. A. 83; Daytona *v.* Edson, 46 Fla. 463, 34 So. 954; Freeport *v.* Isbell, 83 Ill. 440, 25 Am. Rep. 407; Chicago *v.* Apel, 50 Ill. App. 132. But see Baltimore *v.* Beck, 96 Md. 183, 53 Atl. 976, where the city was held liable, and the fact that the lighting was to be done by a light company and that the failure to light was the fault of the company was held no defense in favor of the city.

Governmental duty.— Street lighting is held to be a purely governmental function, in the performance of which there can be no liability. Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277; Vincennes *v.* Thuis, 28 Ind. App. 523, 63 N. E. 315.

50. Lyon *v.* Cambridge, 136 Mass. 419; Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315.

51. Canavan *v.* Oil City, 183 Pa. St. 611, 38 Atl. 1096. See also Denison *v.* Warren, (Tex. Civ. App. 1895) 36 S. W. 296. So in Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729, it is said that the extent and measure of duty resting upon a city as to lighting a street, which is open for travel, at a point where from any cause there is reasonable ground to anticipate danger in its use by persons who are themselves in the exercise of the required care, is a different matter from the general duty with regard to lighting streets.

52. Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*affirming* 27 Ill. App. 43] (holding that the jury should not be instructed as a matter of law that the failure to light streets at a certain crossing was not an act of negligence, and that if the accident occurred solely from such failure plaintiff could not recover); Freeport *v.* Isbell, 83 Ill. 440, 25 Am. Rep. 407; Miller *v.* St. Paul, 38 Minn. 134, 36 N. W. 271. See also Terre Haute *v.* Constans, 26 Ind. App. 421, 59 N. E. 1078; Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122; McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691.

Sufficient lighting.— The corporation upon undertaking to light its streets is bound only to light them so that they may be in a reasonably safe condition for travel in the ordinary modes. Chicago *v.* McDonald, 57 Ill. App. 250; Chicago *v.* Apel, 50 Ill. App. 132.

Lighting is not an absolute defense but may be material only in determining the question of contributory negligence. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Steps in park walk.— O'Rourke *v.* New York, 17 N. Y. App. Div. 349, 45 N. Y. Suppl. 261, holding that the duty of the city of New York as to the walks in Central park

nary prudence in keeping its streets in a condition of reasonable safety for travel,[53] and while lighting, railing, or guarding, according to the peculiar circumstances, may answer the demands of the law,[54] the one or the other of these precautions may be necessary to relieve the city from liability, where the defect or obstruction is such that under the particular conditions the danger may be reasonably apprehended and the adoption of such precaution is necessary, in the exercise of reasonable care, to afford protection against the danger.[55] The precaution should be sufficient to give such warning as will reasonably notify all persons using the street that the danger is there,[56] and whenever a barrier, guard-rail, or covering

is one of reasonable care; that such walks are not generally used in the night-time for pleasure travel and that there is no duty imposed upon the city to light up such walks so that the attention of people will necessarily be called to irregularities like steps that are found in different parts of the park, which are used for connecting the more or less irregular surfaces.

53. See *supra*, XIV, D, 4, a.

54. Colburn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605 (where a policeman was stationed to warn travelers of the danger of a fallen electric wire); Sevestre *v.* New York, 47 N. Y. Super. Ct. 341 (holding that if the excavation into which plaintiff fell was sufficiently barricaded, it is immaterial that there was no light or watchman); Reed *v.* Spokane, 21 Wash. 218, 57 Pac. 803.

55. *Connecticut.*— Cummings *v.* Hartford, 70 Conn. 115, 38 Atl. 916; Boucher *v.* New Haven, 40 Conn. 456.

Illinois.— Chicago *v.* Johnson, 53 Ill. 91; La Salle *v* Evans, 111 Ill. App. 69; Salem *v.* Webster, 95 Ill. App. 120 [*affirmed* in 192 Ill. 369, 61 N. E. 323]; Canton *v.* Dewey, 71 Ill. App. 346 (where a crossing was removed and the grade of the street lowered several feet and no signal lights or barricades were put up at night to give warning and the city was held guilty of negligence); Aurora *v.* Seidelman, 34 Ill. App. 285.

Kansas.— Olathe *v.* Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308; Atchison *v.* Acheson, 9 Kan. App. 33, 57 Pac. 248.

Kentucky.— Glasgow *v.* Gillenwaters, 113 Ky. 140, 67 S. W. 381, 23 Ky. L. Rep. 2375.

Maine.— Kimball *v.* Bath, 38 Me. 219, 61 Am. Dec. 243.

Massachusetts.— Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622.

Michigan.— Welsh *v.* Lansing, 111 Mich. 589, 70 N. W. 129; Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071.

Missouri.— Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325.

Nebraska.— Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Russell *v.* Canastota, 98 N. Y. 496 (as to duty to place barrier around defective sidewalk, although the owner of the property has been notified to repair); Storrs *v.* Utica, 17 N. Y. 104, 72 Am. Dec. 437; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693; O'Hara *v.* Buffalo, 39 N. Y. App. Div. 443, 57 N. Y. Suppl. 367; Hoyer *v.* North Tonawanda, 79 Hun 39, 29 N. Y. Suppl. 650; Seneca Falls *v.* Zalinski, 8 Hun 571; Crawford *v.* Wilson, etc., Mfg. Co., 8 Misc. 48, 28 N. Y. Suppl. 514 [*affirmed* in 144 N. Y. 708, 39 N. E. 857].

Pennsylvania.— Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483.

Texas.— Corsicana *v.* Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319, where failure to observe an ordinance requiring barriers and danger signals along ditches in the streets was held to be negligence as a matter of law.

Virginia.— Petersburg *v.* Todd, (1896) 24 S. E. 232; McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691.

Washington.— Drake *v.* Seattle, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844; White *v.* Ballard, 19 Wash. 284, 53 Pac. 159.

Wisconsin.— Milwaukee *v.* Davis, 6 Wis. 377.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1655.

Duty performed by others.—If a dangerous place is properly guarded by barriers and signals by those in charge of the work in a street, the city will be protected in the same manner as if such guards and signals had been placed there by it. Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; Kansas City *v.* Bermingham, 45 Kan. 212, 25 Pac. 569; Walker *v.* Ann Arbor, 111 Mich. 1, 69 N. W. 87. But on the other hand, if the municipality trusts to others, to see that guards or covering are properly kept up, it will be liable for the consequences of their negligence, although the barriers are down but temporarily. Blessington *v.* Boston, 153 Mass. 409, 26 N. E. 1113; Prentiss *v.* Boston, 112 Mass. 43. See also *infra*, XIV, D, 4, e, (IV), (C).

Dangerous approach from adjacent property see *supra*, XIV, D, 4, c, (IV), (H).

56. Anderson *v.* Wilmington, 2 Pennew. (Del.) 28, 43 Atl. 841 (holding that in such proportion as the character of the obstruction is not manifest to the ordinary observer, the duty on the part of the city to plainly make known its existence by such signals as can reasonably be observed is the more imperative); Carswell *v.* Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169 (holding that the rule is, not that the city must do the wisest and best thing possible, but that it shall exercise such care and caution as a reasonably prudent and careful man would under

is erected along or over an excavation in the street or near thereto, it should be of such a character and placed in such position in reference to the use of the street as will afford protection, and not produce a peril to persons passing on the way.[57] If necessary to prevent accidents when improvements are being made, the municipality should, by some barrier, close the street against the public so that no harm may happen if the work on the street is delayed.[58]

like circumstances); Prentiss *v.* Boston, 112 Mass. 43; Foy *v.* Winston, 126 N. C. 381, 35 S. E. 609 (where in an action for injuries caused by falling into an open ditch in a street it was held not error to refuse to charge that placing planks across the ditch and hanging up a red lantern established the city's freedom from negligence).

Warning signals or lights at night.— There is a municipal duty to warn the traveling public of all casual obstructions or defects in streets, not otherwise safeguarded, by warning lights or signals. Mt. Carmel *v.* Guthridge, 52 Ill. App. 632 (leaving a street crossing unfinished without placing any danger signal thereon); Baltimore *v.* O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Salem *v.* Webster, 95 Ill. App. 120 [*affirmed* in 192 Ill. 369, 61 N. E. 323]; Canton *v.* Dewey, 71 Ill. App. 346; Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622; Hayes *v.* West Bay City, 91 Mich. 418, 51 N. W. 1067; Joslyn *v.* Detroit, 74 Mich. 458, 42 N. W. 50; Ray *v.* Poplar Bluff, 70 Mo. App. 252; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693; O'Hara *v.* Buffalo, 39 N. Y. App. Div. 443, 57 N. Y. Suppl. 367; Tiers *v.* New York, 74 Hun (N. Y.) 452, 26 N. Y. Suppl. 688; Seneca Falls *v.* Zalinski, 8 Hun (N. Y.) 571; Petersburg *v.* Todd, (Va. 1896) 24 S. E. 232; McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691; Drake *v.* Seattle, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844; Milwaukee *v.* Davis, 6 Wis. 377.

Violation of ordinance.— Joslyn *v.* Detroit, 74 Mich. 458, 42 N. W. 50, holding that where contractors building a house left a heap of sand in the street, the city cannot escape liability by showing that an ordinance required that proper warnings and signals should be used in such cases, and that its failure to comply with these were mere omissions of police duty. But it was held otherwise in Maryland because the police department was the only agency to enforce such ordinance and that department was not under the control of the city. Sinclair *v.* Baltimore, 59 Md. 592.

57. *District of Columbia.*— Koontz *v.* District of Columbia, 24 App. Cas. 59, where the obstruction consisted of a post with a projecting plank attached, which was too near the line of the cars running on the street.

Kansas.— Garnett *v.* Hamilton, 69 Kan. 866, 77 Pac. 583, where, while a sidewalk was being repaired, loose planks were insecurely laid over an excavation.

Kentucky.— Glasgow *v.* Gillen Waters, 113 Ky. 140, 67 S. W. 381, 23 Ky. L. Rep. 2375, holding that where a barbed wire is stretched across a street, without any other warning for night travelers, it is a nuisance.

Maryland.— Baltimore *v.* O'Donnell, 53 Md. 110, 36 Am. Rep. 396, holding a rope, stretched across the street without a light at night, not sufficient, the injury being caused by running against the rope at night.

Massachusetts.— Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166. See also Powers *v.* Boston, 154 Mass. 60, 27 N. E. 995.

New York.— Ott *v.* Buffalo, 131 N. Y. 594, 30 N. E. 67, where a barrier which on one's tripping and falling against it gave way and precipitated him into an excavation was held insufficient.

Washington.— Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847, holding that evidence that an excavation near a public street was protected only by a loose plank resting on one end of a barrel and supported on the other by a board fastened to a post near the edge of the sidewalk would support a finding that the protection was insufficient.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1655.

Protection to children.— Where, to protect travelers from a precipice, a city maintained a fence three and a half feet high, composed of a board nailed flat on top of the posts, and two boards nailed on the sides of the posts with ten-inch spaces between them, it was held that, since the fence was sufficient protection to persons on the street, the city was not negligent for not providing a fence which children could not surmount or go through. Lineburg *v.* St. Paul, 71 Minn. 245, 73 N. W. 723.

Question for jury see *infra*, XIV, E, 9, e, (II).

58. Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442. So as to a tunnel which is one of the municipal highways. Chicago *v.* Hislop, 61 Ill. 86.

That part of a street being repaired, graded, or paved should be cut off from travel in order to protect the municipality from liability. Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071; Southwell *v.* Detroit, 74 Mich. 438, 42 N. W. 118.

All responsibility in streets closed for repairs may be suspended by due notice to the public by sufficient signs or barriers (Chicago *v.* McKenna, 114 Ill. App. 270; Torphy *v.* Fall River, 188 Mass. 310, 74 N. E. 465; Jones *v.* Collins, 177 Mass. 444, 59 N. E. 64; Hamilton *v.* Detroit, 105 Mich. 514, 63 N. W. 511; Stainback *v.* Meridian, 79 Miss. 447, 28 So. 947, 30 So. 607); but their removal will

(B) *Dangers Outside of and Close to Way.* Ordinarily fences or barriers are not required along ways to prevent travelers from straying out of their limits;[59] but, if there are excavations or other dangerous defects or obstructions close to the way, the city or local authorities are required to erect barriers or take other reasonable precautions to protect travelers against the danger.[60]

revive it (Torphy *v.* Fall River, *supra*; Blessington *v.* Boston, 153 Mass. 409, 26 N. E. 1113; Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071).

Work on sidewalk.— But it is not necessary to close a street to travel because a new sidewalk is in process of construction; the most that is required is that the public shall be excluded from that portion of the walk that is not reasonably safe and fit for travel. Walker *v.* Ann Arbor, 111 Mich. 1, 69 N. W. 87.

59. Sparhawk *v.* Salem, 1 Allen (Mass.) 30, 79 Am. Dec. 700; McHugh *v.* St. Paul, 67 Minn. 441, 70 N. W. 5; Hannibal *v.* Campbell, 86 Fed. 297, 30 C. C. A. 63. See also cases cited *infra*, note 60.

Leaving traveled way see *infra*, XIV, D, 6, f.

60. *Illinois.*— Chicago *v.* Baker, 95 Ill. App. 413 [*affirmed* in 195 Ill. 54, 62 N. E. 892]; Mt. Vernon *v.* Brooks, 39 Ill. App. 426, as to the duty to erect railings or other guards on the sides of a walk to protect from injury by falling from the walk.

Indiana.— Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277; Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

Massachusetts.—Alger *v.* Lowell, 3 Allen 402, where it is said that the true test is not whether the dangerous place is outside of the way or whether some small strip not included in the way must be traversed in reaching the danger, but whether there is such risk of a traveler in using ordinary care in passing along the way being thrown or falling into a dangerous place that a railing is required to make the way itself safe and convenient; and that the city would have an undoubted right to erect such a railing, although it might obstruct the entrance to the passageway of an abutter; because no person has a right to an open access to his land, adjoining a street, of such a character as to endanger persons lawfully using the street for purposes of travel.

Minnesota.—Ray *v.* St. Paul, 40 Minn. 458, 42 N. W. 297 (holding that it can make no difference in the principle controlling that the dangerous place is at the end instead of alongside of the street, if the nearness of the dangerous place renders the street unsafe for public use); St. Paul *v.* Kuby, 8 Minn. 154 (as to a sidewalk next to which was a perpendicular descent of twenty feet and in addition a rapid descent of thirty feet).

Missouri.— Wiggin *v.* St. Louis, 135 Mo. 558, 37 S. W. 528.

Nebraska.— Kinney *v.* Tekemah, 30 Nebr. 605, 46 N. W. 835.

New Hampshire.— Davis *v.* Hill, 41 N. H. 329, holding that the want of a sufficient railing, barrier, and protection to prevent travelers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stones, or other dangerous obstructions, outside the limits of the road, or in the general direction of the travel thereon, may properly be alleged as a defect in the highway itself.

New York.—Warner *v.* Randolph, 18 N. Y. App. Div. 458, 45 N. Y. Suppl. 1112 (guard-rails on outside of sidewalk); Bennett *v.* Sing Sing, 14 N. Y. Suppl. 463 (as to necessity of guards where the street was graded down leaving the sidewalk elevated above the surface of the street).

Pennsylvania.— Pittston *v.* Hart, 89 Pa. St. 389, where a railroad ran parallel to a street about twelve feet below its level, and an injury was caused by a team of horses running over the unguarded side of the street upon becoming frightened at a passing engine. But in Scranton *v.* Hill, 102 Pa. St. 378, 48 Am. Rep. 211, where a pedestrian on a public street at night intentionally left the highway to take a by-path, but, turning off the street too soon, missed the path, and was injured by falling off the end of a culvert which projected beyond the street line, on a level therewith, it was held that the city was not liable for failure to erect guards at the point where he turned off.

Washington.— Prather *v.* Spokane, 29 Wash. 549, 70 Pac. 55, 92 Am. St. Rep. 923, 59 L. R. A. 346 (holding that where there is a sharp turn in a bicycle path maintained by a city at a point about four feet from a gutter and sidewalk, with no barrier or light at the turn, the city is liable to one injured, owing to such condition, while using ordinary care); Taylor *v.* Ballard, 24 Wash. 191, 64 Pac. 143.

Wisconsin.— Olsom *v.* Chippewa Falls, 71 Wis. 558, 37 N. W. 575 (embankment by side of street); Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1655. And see *supra*, XIV, D, 4, c, (II), (B).

Canal.— But in Veeder *v.* Little Falls, 100 N. Y. 343, 3 N. E. 306, where a village street as used embraced state land on the property of the Erie canal, the municipality was held not liable for not erecting a barrier on the state land, which it had no right to do, or on the dividing line between the municipal and state land, if to erect the barrier on such dividing line would render the street more unsafe than it was in its existing condition. And in Reinhardt *v.* South Easton, 2 Pa. Cas. 90, 4 Atl. 532, where a narrow street ran parallel with a tow-path of a canal which was at right angles to a street crossing the canal by a bridge, it was held

(c) *Temporary Removal Without Fault on Part of Municipality.* If sufficient barriers are suddenly removed without warning to or fault on the part of the municipality, and an injury occurs before it may be charged with notice of the condition,[61] it will not be liable,[62] as where, under all the circumstances, including the nature and extent of the excavation, the character of the locality, the state of travel, the manner of the construction of the barrier, and the dangers to which it might reasonably be expected to be exposed if left unguarded by a watchman, the barricade is sufficient protection to persons using ordinary care and prudence, and is removed overnight by the michievous acts of third persons,[63] or by accident of which the municipality has no notice.[64]

f. Proximate Cause — (1) *In General.* Generally, where an injury is alleged to have been caused by a defect or obstruction in a public street, liability depends upon negligence.[65] Such negligence, or in other words, the defect or obstruction chargeable to such negligence, must be the natural and probable cause of the injury, proximately contributing thereto;[66] and the danger must be such as in

that the municipality was under no duty to guard the canal from entrance by way of the tow-path.

To prevent going upon lot.— In Dennison *v.* Warren, (Tex. Civ. App. 1895) 36 S. W. 296, it was held that where a street was graded below a lot there was no negligence in failing to erect barriers to prevent travelers from walking up on to the private lot.

Approach to bridge.—The municipality will be liable for failure to keep the approaches to a bridge, maintained as a part of the street, in safe condition for ordinary travel. Chicago *v.* Gallagher, 44 Ill. 295 (negligence in failing to guard the outer edge of a curved sidewalk leading to a bridge narrower than the street); O'Leary *v.* Mankato, 21 Minn. 65. But see Goeltz *v.* Ashland, 75 Wis. 642, 44 N. W. 770, where, applying the rule that only the traveled track need be kept safe, it was held that a wagon bridge and a sidewalk, both sufficiently guarded by side railings, having been built across a ravine in a street, leaving an open space between the walk and the wagon bridge, there was no liability for the death of a boy by drowning in a hole which had been dug in the open space by some unauthorized person. And see, generally, BRIDGES, 5 Cyc. 1049.

61. See *supra*, XIV, D, 4, d.

62. Weirs *v.* Jones County, 80 Iowa 351, 45 N. W. 883; Klatt *v.* Milwaukee, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 759.

Where a defective railing around an excavation had been repaired and made secure two days before an injury caused by the breaking of the railing, it was held that the municipality was not liable in the absence of evidence of notice that the railing had become defective again. Jackson *v.* Boone, 93 Ga. 662, 20 S. E. 46.

63. *Indiana.*— Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209.

Iowa.— Theissen *v.* Belle Plaine, 81 Iowa 118, 46 N. W. 854.

Massachusetts.— Prentiss *v.* Boston, 112 Mass. 43.

Michigan.— Walker *v.* Ann Arbor, 111 Mich. 1, 69 N. W. 87.

Missouri.— Myers *v.* Kansas City, 108 Mo. 480, 18 S. W. 914; Ball *v.* Independence, 41 Mo. App. 469. So where persons making improvements pile stones on a sidewalk and leave them in a reasonably safe condition for the night, the municipality will not be liable for an injury caused by the act of some third person during the night scattering the stones on the sidewalk. Hesselbach *v.* St. Louis, 179 Mo. 505, 78 S. W. 1009.

New York.— McFeeters *v.* New York, 102 N. Y. App. Div. 32, 92 N. Y. Suppl. 79; Parker *v.* Cohoes, 10 Hun 531 [*affirmed* in 74 N. Y. 610]; Sevestre *v.* New York, 47 N. Y. Super. Ct. 341.

Vermont.— Mullen *v.* Rutland, 55 Vt. 77.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1655 *et seq.*

Where a watchman is employed and the barriers and lights are sufficient and are removed by a stranger and an injury occurs while the watchman employed to keep up the barrier is at another part of the trench attending to his duty, there will be no liability. O'Neil *v.* Bates, 20 R. I. 793, 40 Atl. 236. However, in Baltimore *v.* O'Donnell, 53 Md. 110, 36 Am. Rep. 395, a street being made impassable, a rope was stretched across it and a lamp was suspended from the rope, and the lamp having become broken and extinguished by the act of third persons, the man in charge took it away to repair it but did not replace it that night, and during his absence one attempting to pass up the street drove against the rope, of which he had no warning, and it was held that the city was liable.

64. Mullen *v.* Rutland, 55 Vt. 77.

65. See *supra*, XIV, D, 4, a.

66. *Illinois.*— Rockford *v.* Tripp, 83 Ill. 247, 25 Am. Rep. 381, where an injury to a person in a street caused by a horse which was hitched to a post set by the city for a hitching post, becoming frightened at a runaway team which caused him to break the post and run against the person injured, was held too remote.

Indiana.— Vincennes *v.* Thuis, 28 Ind. App. 523, 63 N. E. 315, holding that, although the municipality is chargeable with negligence

the exercise of ordinary care might reasonably have been anticipated from the condition complained of.[67]

(II) *CONCURRENT AND INTERVENING CAUSES*—(A) *In General.* Where other causes concur with municipal negligence to produce the injury, the corporation is

in respect of defects or obstructions in a street, it cannot be made liable for an injury which results from other causes and to which such negligence does not contribute.

Kentucky.— Setter *v.* Maysville, 114 Ky. 60, 69 S. W. 1074, 24 Ky. L. Rep. 828.

Massachusetts.— Kelley *v.* Boston, 180 Mass. 233, 62 N. E. 259, where absence of a cover of a catch-basin from its place was held not to be the proximate cause of the injury sustained from voluntarily descending into the basin to rescue a child who had fallen into it.

Michigan.— Hembling *v.* Grand Rapids, 99 Mich. 292, 58 N. W. 310, holding that if, while plaintiff was advancing on the walk, a horse hitched thereto jerked a plank from its place, and plaintiff stepped into the opening so made, and was injured, the defect in the walk was not the primary cause of the injury.

New York.— Hubbell *v.* Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522; Fitch *v.* New York, 55 N. Y. Super. Ct. 494, 2 N. Y. Suppl. 700 (holding that where a street car, from which plaintiff had alighted at a turn-table, was so negligently turned before plaintiff could move a safe distance away that it struck and injured her, the city's permission to locate the turn-table so that a part of a car in turning would pass over the sidewalk did not render the city liable, as the accident would have happened had the location been such that the car would turn wholly between the curbs); Gaudin *v.* Carthage, 12 N. Y. Suppl. 796.

Wisconsin.— Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1666.

Where a street car stops near an open trench in the street, and a passenger in attempting to board it falls into the trench, it is held that the doctrine of proximate cause has no application, the court saying that, although if the car had been somewhere else plaintiff would have gone near the open trench, yet it would be difficult to imagine a case where one would fall into a trench but for the fact that some other fact led him to go near enough to fall into it. Monje *v.* Grand Rapids, 122 Mich. 645, 81 N. W. 574.

Loss of profits are held not to be the immediate consequence of the neglect of municipal duty to keep the streets in proper repair. Farrelly *v.* Cincinnati, 2 Disn. (Ohio) 516 [*affirming* 3 Ohio Dec. (Reprint) 115, 3 Wkly. L. Gaz. 277].

67. *District of Columbia.*—Free *v.* District of Columbia, 21 D. C. 608.

Indiana.— Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277.

Kentucky.— Setter *v.* Maysville, 114 Ky. 60, 69 S. W. 1074, 24 Ky. L. Rep. 828.

New York.— Smith *v.* Henderson, 54 N. Y. App. Div. 26, 66 N. Y. Suppl. 347, where one riding a bicycle along the middle of a street forty-two feet wide and sloping down from the middle two feet to the sidewalk, lost control of the bicycle and it turned diagonally to the right and ran across the sidewalk, dropping with the rider five or six feet to the ground below, and it was held that the failure of the municipality to maintain a guard-rail at such point did not subject to liability for the injury, since the municipal authorities were not bound to anticipate such an accident.

Pennsylvania.— Heidenwag *v.* Philadelphia, 168 Pa. St. 72, 31 Atl. 1063; Wellman *v.* Susquehanna Depot, 167 Pa. St. 239, 31 Atl. 566 (holding that the failure to provide barriers on a road running along an embankment is not the proximate cause of an injury to one being thrown over the embankment by a horse suffering from blind staggers); Kieffer *v.* Hummelstown Borough, 151 Pa. St. 304, 24 Atl. 1060, 17 L. R. A. 217; Herr *v.* Lebanon, 149 Pa. St. 222, 24 Atl. 207, 34 Am. St. Rep. 603, 16 L. R. A. 106 (holding that where the falling of a horse was not due to any municipal negligence, and in its struggles to get up it fell repeatedly until it went over a declivity on the lower side of the street, the fall was the proximate cause of the injury); Allegheny *v.* Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649 (holding that where a liberty pole standing in the street fell because of an extraordinary wind storm, the pole being sound and so secured and protected that careful and prudent persons considered it safe, the injury resulting from the fall was too remote from the erection of the pole to render the city liable).

See 36 Cent. Dig. tit. "Municipal Corporations," § 1666.

Remote consequences.—In an action against a city for an injury received on a defective street, a recovery cannot be had for injuries received after the accident when in attempting to walk plaintiff's injured ankle failed her and she fell and broke her leg. Raymond *v.* Haverhill, 168 Mass. 382, 47 N. E. 101. But in Wieting *v.* Millston, 77 Wis. 523, 46 N. W. 879, where the injury first attributable to the negligence of a town was a broken leg, and when the injured person was able to go about on crutches his leg was again broken by the overturning of a buggy, the second injury being attributed to the weakened condition of the leg, it was held that he was entitled to recover for the second breaking. In Hazel *v.* Owensboro, 99 S. W. 315, 30 Ky. L. Rep. 627, 9 L. R. A. N. S. 235, it was held that the fact that a defective condition of a street delayed a fire department in responding to an alarm does

liable for all damages which its culpable negligence contributed substantially and proximately to cause,[68] as where one, while observing due care for his personal safety, is injured by the combined result of an accident, and the negligence of the municipal corporation in respect of a defect or obstruction, and without such negligence the injury would not have occurred,[69] and the fact that the injury may be increased by other concurring causes will not excuse the municipal negligence without which the injury would not have happened.[70] If the result is attributable

not make the municipality liable for a loss caused by the burning of property.

68. *District of Columbia.*— District of Columbia *v.* Dempsey, 13 App. Cas. 533.

Florida.— Jones *v.* Tampa, (1907) 42 So. 729.

Indiana.— Muncie *v.* Spence, 33 Ind. App. 599, 71 N. E. 907.

Kansas.— Atchison *v.* King, 9 Kan. 550, accident partly result of slippery condition of walk and partly of a defect in the walk.

Kentucky.— Louisville *v.* Johnson, 69 S. W. 803, 24 Ky. L. Rep. 685.

New York.—Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574.

Texas.— San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922.

Wisconsin.— Papworth *v.* Milwaukee, 64 Wis. 389, 25 N. W. 431, holding that where the actual neglect of the city, and not merely permitting the owner of a lot to maintain a dangerous opening in a sidewalk, concurred in causing injury to a traveler, it is no defense, in an action against the city, that the wrongful act of such owner contributed to the injury.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1667.

But see Rowell *v.* Lowell, 7 Gray (Mass.) 100, 66 Am. Dec. 464, where it was held that the injury to plaintiff having commenced by her foot slipping on steps without the limits of the highway, which steps were covered with ice and were unsafe, by reason of which she fell to the sidewalk, there could be no recovery against the city, and that the only exception to the rule that plaintiff cannot recover unless the defect in the highway is the sole cause of the injury must be under circumstances like those in Palmer *v.* Andover, 2 Cush. (Mass.) 600, where the contributing cause was a pure accident which common prudence and sagacity could not have foreseen and provided against and does not include a case in which the contributing cause involves default and negligence without the limits of the highway. So in De Camp *v.* Sioux City, 74 Iowa 392, 37 N. W. 971, where the injury was caused by a collision with a vehicle being negligently driven in a street, there can be no recovery, although a defect in the street contributed, the first cause being held to be the proximate cause.

Sudden displacement of plank in walk.— In Chacey *v.* Fargo, 5 N. D. 173, 64 N. W. 932, it was held that one injured by stepping into a hole in the sidewalk, made by the sudden displacement of a loose plank by a bicycle which passed as he was about to step on the plank, could recover, the municipality being charged with notice of the defective condition of the walk. But see Hembling *v.* Grand Rapids, 99 Mich. 292, 58 N. W. 310, where for injuries similarly sustained the defect in the walk was held not to be the proximate cause, but the circumstances were not such as to charge the municipality with notice of the defect and the plank was pulled from its place suddenly by a horse which was hitched to it, the municipality being held under no obligation to anticipate such use of the plank.

69. *Illinois.*— Joliet *v.* Shufeldt, 144 Ill. 403, 408, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750; Lacon *v.* Page, 48 Ill. 499.

Indiana.— Crawfordsville *v.* Smith, 79 Ind. 308, 41 Am. Rep. 612.

Kentucky.— Covington *v.* Billiter, 99 S. W. 318, 30 Ky. L. Rep. 650, starting of fall caused by ice and snow.

Michigan.— Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071.

Missouri.— Vogelgesang *v.* St. Louis, 139 Mo. 127, 40 S. W. 653; Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Hull *v.* Kansas City, 54 Mo. 598, 14 Am. Rep. 487; Bassett *v.* St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Vogel *v.* West Plains, 73 Mo. App. 588; Fairgrieve *v.* Moberly, 39 Mo. App. 31.

New Hampshire.— Winship *v.* Enfield, 42 N. H. 197.

New York.— Ott *v.* Buffalo, 131 N. Y. 594, 30 N. E. 67; Halstead *v.* Warsaw, 43 N. Y. App. Div. 39, 59 N. Y. Suppl. 518.

North Carolina.— Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

Vermont.— Hunt *v.* Pownal, 9 Vt. 411.

Wisconsin.— Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568, where the concurring cause is not the act of a third person.

United States.— Gallagher *v.* St. Paul, 28 Fed. 305.

Canada.— Homewood *v.* Hamilton, 1 Ont. L. Rep. 266; Sherwood *v.* Hamilton, 37 U. C. Q. B. 410.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1667.

70. Atchison *v.* Jansen, 21 Kan. 560 (where, as to an injury caused by a defect in a sidewalk, it was held that the question was as to the negligence of the city in respect of such defect and not in respect of the existence of an area under the walk notwithstanding such area may enhance the injury resulting from the defect); Conklin *v.* Elmira, 11 N. Y. App. Div. 402, 42 N. Y. Suppl. 518; Galveston *v.* Posnainsky, 62 Tex. 118, 50 Am. Rep. 517 (where it is held that

to the original negligence and the injury would not have been produced by the intervening cause in the absence of such negligence, the intervening cause will not constitute the proximate cause.[71] But if the intervening acts constitute an independent and efficient cause and the result cannot be said to be the natural and probable consequence of the primary cause, the intervening cause will be regarded as the proximate cause.[72]

(B) *Ice and Snow.* The presence of ice or snow constituting an additional or contributory cause of the injury will not exempt the corporation from liability.[73]

if a fall is caused by a defective condition in a sidewalk, it is the proximate cause of the injury resulting from falling upon pieces of glass in the excavation into which the person fell).

71. *District of Columbia.*— District of Columbia *v.* Dempsey, 13 App. Cas. 533.

Illinois.— Rock Falls *v.* Wells, 169 Ill. 224, 48 N. E. 440; Chicago *v.* Schmidt, 107 Ill. 186; Weick *v.* Lander, 75 Ill. 93.

Indiana.— Mt. Vernon *v.* Hoehn, 22 Ind. App. 282, 53 N. E. 654.

Kentucky.— Carlisle *v.* Secrest, 75 S. W. 268, 25 Ky. L. Rep. 336; Louisville *v.* Johnson, 69 S. W. 803, 24 Ky. L. Rep. 685.

Michigan.—Burrell *v.* Greenville, 133 Mich. 235, 94 N. W. 732.

New York.— Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131].

Washington.— Eskildsen *v.* Seattle, 29 Wash. 583, 70 Pac. 64.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1671.

The precise injury need not result immediately from the defect or obstruction, but if in natural sequence it follows as the natural and probable result and would not have occurred but for the negligence of the municipality, the municipality will be liable. Schmidt *v.* Chicago, etc., R. Co., 83 Ill. 405 (holding that the city is liable for an injury to a person run over by a train of cars before he could rise from a fall occasioned by a hole in a sidewalk); Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47; Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695. *Contra,* Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84; Anderson *v.* Bath, 42 Me. 346; Moore *v.* Abbot, 32 Me. 46; Marble *v.* Worcester, 4 Gray (Mass.) 395, in which cases the rule is maintained that the injury must accrue through the defect alone. And see Watters *v.* Waterloo, 126 Iowa 199, 101 N. W. 871, where it is said that the negligence must be the "direct and proximate cause" of the injury, although the decision seems to be based upon the principle that where the negligence gives rise only to a condition and a subsequent independent act is the direct and immediate cause of the injury, the first cause is remote.

72. Parmenter *v.* Marion, 113 Iowa 297, 85 N. W. 90 (where one was injured passing along a sidewalk under a platform projecting from the second story of a building by a bale of hay being pushed off the platform into the street below by the occupant of the premises, and it was held that if the platform and its use were an obstruction in the street, the negligence of the occupant of the building was the proximate cause of the injury and that the platform was a mere condition); Setter *v.* Maysville, 114 Ky. 60, 69 S. W. 1074, 24 Ky. L. Rep. 828; Stanley *v.* Union Depot R. Co., 114 Mo. 606, 21 S. W. 832; Storey *v.* New York, 29 N. Y. App. Div. 316, 51 N. Y. Suppl. 580 (where a school child had to go on the street to pass around a mound of earth from an excavation in front of a house near the school and in so doing was run down by a wagon on the street and it was held that the mound was not the proximate cause of the injury, but it was indicated that if the child, while passing around the mound of earth, had tripped over it and been thrown so as to be injured by a passing vehicle, the case would have come within Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622, and Schafer *v.* New York, 154 N. Y. 466, 48 N. E. 749, in the first of which cases plaintiff drove into a ditch in a street, breaking the axle of his carriage, and the question was whether the injuries from which he subsequently suffered were due directly to the accident or to the exposure as the result thereof and compensation for the exposure was allowed; while in the latter case it appeared that before plaintiff's wagon reached a manhole he was thrown from the seat to the pole, whence, by reason of the manhole, he was thrown into the street, and it was held that he was entitled to go to the jury on the question whether the manhole was the proximate cause of the injury); Magee *v.* Caro, 1 N. Y. City Ct. 147 (holding that where an abutter placed a box on a sidewalk and certain boys afterward threw it on plaintiff, the unlawful act in placing the box on the street was not the proximate cause of the injury).

73. Atchison *v.* King, 9 Kan. 550; Covington *v.* Billiter, 99 S. W. 318, 30 Ky. L. Rep. 650; Hamilton *v.* Buffalo, 55 N. Y. App. Div. 423, 66 N. Y. Suppl. 990 [*affirmed* in 173 N. Y. 72, 65 N. E. 944]; Conklin *v.* Elmira, 11 N. Y. App. Div. 402, 42 N. Y. Suppl. 518; Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732. See also *supra,* XIV, D, 4, c, (IV), (D).

Where the sole cause is found to be the defect the fact that snow had fallen on the crossing recently before the accident does not relieve the city from liability. Lyon *v.* Logansport, 9 Ind. App. 21, 35 N. E. 128.

That the defect was concealed by snow will not relieve the municipality of liability. Street *v.* Holyoke, 105 Mass. 82, 7 Am. Rep.

(c) *Wrongful Act of Third Person.* Generally, if municipal negligence in respect of the duty to care for streets proximately contributes to the injury, such negligence is not excused or obviated by the negligent or wrongful act of a third person concurring to cause the injury.[74] On the other hand, the municipality is not liable where its negligence does not produce a proximate cause.[75]

(d) *Fright of or Accident to Horses* — (1) In General. According to the weight of authority, if a horse of ordinary gentleness, without fault on the part of his driver, takes fright at an unlawful obstruction,[76] or at a defect or obstruction chargeable to the negligence of the municipality, and becomes unmanageable and causes an injury, the proximate cause is the defect or obstruction.[77] And so

500; Waters *v.* Kansas City, 94 Mo. App. 413, 68 S. W. 366; Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41.

74. *Illinois.*— Carterville *v.* Cook, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 248, 4 L. R. A. 721 [*affirming* 29 Ill. App. 495] (falling off a sidewalk, the accident being caused directly by the act of a third person in negligently or inadvertently pushing the person who fell); Aurora *v.* Hillman, 90 Ill. 61.

Indiana.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Knouff *v.* Logansport, 26 Ind. App. 202, 59 N. E. 347, 84 Am. St. Rep. 292.

New York.— Cohen *v.* New York, 113 N. Y. 532. 21 N. E. 700, 10 Am. St. Rep. 506, 4 L. R. A. 406, holding that where another vehicle collided with a wagon left standing on a street, causing its thills, which were improperly tied up, to fall down and injure plaintiff's intestate, the unlawful obstruction, and not the negligent fastening of the thills, was the proximate cause of the injury.

Pennsylvania.— Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483.

Wisconsin.— McClure *v.* Sparta, 84 Wis. 269, 54 N. W. 337, 36 Am. St. Rep. 924.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1670.

Contra.— Block *v.* Worcester, 186 Mass. 526, 72 N. E. 77; Shepherd *v.* Chelsea, 4 Allen (Mass.) 113; Merrill *v.* Portland, 17 Fed. Cas. No. 9,470, 4 Cliff. 138. See also Griffin *v.* Boston, 182 Mass. 409, 65 N. E. 811. But where the only way in which a third person could have contributed to the accident was by helping to create the defect which it was the duty of the municipality to abate, in an action to enforce liability for failure to abate the defect it was held proper to refuse an instruction exempting the municipality from liability if the negligence of the third person contributed to the accident. Bourget *v.* Cambridge, 159 Mass. 388, 34 N. E. 455.

Avoiding collision on walk.— Where an excavation was made by the city authorities in a public street, the end of which extended up to a narrow cross walk at an intersecting street, and was left over night uncovered, without guards or danger signals, and a woman, in crossing the street over the cross walk, met persons who did not turn aside to let her pass, and she, to avoid collision, diverged from the cross walk, and, without any knowledge of the excavation, fell therein and was hurt, she may recover from the city for the injury, and the fact that the strangers did not yield the walk, and caused her to step aside and into the excavation, will not preclude such recovery. Olathe *v.* Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308.

75. Setter *v.* Maysville, 114 Ky. 60, 69 S. W. 1074, 24 Ky. L. Rep. 828 (the obstruction being one leaving only a narrow path between it and a street railroad's tracks, in which plaintiff was walking when struck by a street car and injured); Childrey *v.* Huntington, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313 (where a hole in a sidewalk was such that one's foot could only be got into it endwise or sidewise, and would not go in if he stepped immediately upon it, and a policeman in a struggle with a prisoner whom he had arrested had his foot jammed into the hole, which caused him to fall with the prisoner on top of him and break his leg, it was held that the hole was only the remote cause of the injury).

Wilful act of another.— Where one is wilfully thrown into an excavation by another, the negligence, if any, in maintaining the excavation in the street is not the proximate cause of the injury, the fall being occasioned entirely by the act of another. Alexander *v.* New Castle, 115 Ind. 51, 17 N. E. 200.

Imputable negligence see Negligence.

76. Lee *v.* Union R. Co., 12 R. I. 383, 34 Am. Rep. 668.

77. *Colorado.*— Denver *v.* Johnson, 8 Colo. App. 384, 46 Pac. 621.

Kansas.— Topeka *v.* Tuttle, 5 Kan. 311.

North Dakota.— Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Pennsylvania.— Quinlan *v.* Philadelphia, 205 Pa. St. 309, 54 Atl. 1026, where plaintiff's horse was frightened by stepping into a hole in the pavement of the street and ran away, colliding with a wagon and overturning plaintiff's carriage.

Wisconsin.— Cairncross *v.* Pewaukee, 86 Wis. 181, 56 N. W. 648.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1669.

Contra.— Bowes *v.* Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; Marble *v.* Worcester, 4 Gray (Mass.) 395.

An injury to a person on the street cannot be attributed to the obstruction, however, where the horse of a third person became

when the injury occurs from a negligent defect or obstruction, the fact that the horse was at the time uncontrollable or running away furnishes no defense, the person in charge of the horse having been in the exercise of reasonable care. The rule is applied in such cases that when two causes combine to produce an injury, both of which are in their nature proximate, the one being a culpable defect or obstruction and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect or obstruction.[78] In other jurisdictions, however, it is held that municipal corporations cannot be bound to make their roads so that travelers shall be safe when their horses become frightened and unmanageable and are running away; that the conduct of the horse is the primary cause of the injury in such cases, and that as there are two efficient proximate causes of the injury and the primary cause is one for which the municipal corporation is not responsible, it cannot be said that but for the primary cause the injury would not have occurred.[79] If the particular occurrence is of such a character, considering the circumstances, that a person in the exercise of ordinary sagacity in such matters could not be reasonably expected to foresee it, the failure to provide against it will not be negligence in the particular instance,[80] and if the injury is occasioned by the

frightened and ran away, running against a telegraph pole set in the street between the sidewalk and the driveway, after which it broke loose from the wagon, ran down the street, and ran over a person on the street. Gaudin *v.* Carthage, 12 N. Y. Suppl. 796.

78. *Florida.*— Janes *v.* Tampa, 52 Fla. 292, 42 So. 729.

Georgia.— Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289; Wilson *v.* Atlanta, 60 Ga. 473; Atlanta *v.* Wilson, 59 Ga. 544, 27 Am. Rep. 396.

Illinois.— Joliet *v.* Shufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750 (negligent construction of street); Belleville *v.* Hoffman, 74 Ill. App. 503.

Indiana.— Crawfordsville *v.* Smith, 79 Ind. 308, 41 Am. Rep. 612, where the driver was thrown from the buggy and the horse continued until, by reason of the obstruction, it was killed.

Iowa.— Manderschid *v.* Dubuque, 25 Iowa 108.

Kansas.— Missouri Pac. R. Co. *v.* Hackett, 54 Kan. 316, 38 Pac. 294, 28 L. R. A. 696.

Montana.— Meisner *v.* Dillon, 29 Mont. 116, 74 Pac. 130.

New Hampshire.— Winship *v.* Enfield, 42 N. H. 197.

New York.— Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574, where it is said that the rule stated in the text is the reasonable rule, since it exacts no duty from municipalities which has not already rested on them; that they are not bound to furnish roads upon which it will be safe for horses to run away, but only reasonably safe roads, and if the road is not reasonably safe and an injury is caused thereby it does not matter that the horse was running away at the time.

North Carolina.— Dillon *v.* Raleigh, 123 N. C. 184, 32 S. E. 548.

Canada.— Sherwood *v.* Hamilton, 37 U. C. Q. B. 410.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1669.

79. *Maine.*— Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84; Moulton *v.* Sanford, 51 Me. 127, holding that the injury cannot be said to have been received "through such defect," etc., under the statute giving the action.

Massachusetts.— Scannal *v.* Cambridge, 163 Mass. 91, 39 N. E. 790; Higgins *v.* Boston, 148 Mass. 484, 20 N. E. 105; Horton *v.* Taunton, 97 Mass. 266 note; Titus *v.* Northbridge, 97 Mass. 258, 93 Am. Dec. 91.

Missouri.— Brown *v.* Glasgow, 57 Mo. 156, in which the decision is predicated upon the facts that the driver wholly lost control of his team and then jumped out of the vehicle and abandoned the team.

Pennsylvania.— Schaeffer *v.* Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 292, 18 L. R. A. 100, where it is said that the fact that in some other states the right of action is given by statute is not material, as the statutes are merely declaratory of the common law.

Washington.— Teator *v.* Seattle, 10 Wash. 327, 38 Pac. 1006.

West Virginia.— Hungerman *v.* Wheeling, 46 W. Va. 761, 34 S. E. 778.

Wisconsin.— Ritger *v.* Milwaukee, 99 Wis. 190, 74 N. W. 815; Schillinger *v.* Verona, 96 Wis. 456, 71 N. W. 888; Jackson *v.* Bellevieu, 30 Wis. 250.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1669.

80. Bleil *v.* Detroit St. R. Co., 98 Mich. 228, 57 N. W. 117; Tarras *v.* Winona, 71 Minn. 22, 73 N. W. 505 (where it was held that unless the place is peculiarly dangerous, as where the roadway is narrow and the sides precipitous, or where there is something along the side of the highway which it should be foreseen is ordinarily likely to frighten horses, the municipality will not be liable for an injury caused by a horse stopping and backing, thereby precipitating the driver and vehicle over an embankment next to a road, the road in this case being on an embank-

viciousness,[81] or disease of the animal, that will be taken to be the proximate cause.[82] But the fact that there was a defect in the vehicle or harness, although a contributing cause of the ultimate injury, will not defeat the action.[83]

(2) Shying or Momentary Loss of Control. If a horse shys or starts or is momentarily not controlled by his driver, and in this state runs into an obstruction or defect, the shying will not be regarded as the sole cause of the injury;[84]

ment thirty-three feet wide and seven feet high); Hubbell *v.* Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522 (non-liability of a city for injuries sustained by falling over an embankment where it appeared by the evidence that the roadway was perfectly safe, in good condition, bounded by a gutter or curb-stone eight inches high and ten feet of sidewalk, and that plaintiff was dragged over the embankment by his horse becoming frightened and unmanageable at a place where no danger from the embankment was to be expected); Kieffer *v.* Hummelstown Borough, 151 Pa. St. 304, 24 Atl. 1060, 17 L. R. A. 217 (non-liability where it appeared that on one side of the road next to the fence was a pile of stone, five or six feet wide; that the remaining width of the road (twenty-six or twenty-seven feet) was available for travel; that plaintiff was familiar with the condition of the road; that while passing along the road with his wagon, his horses became frightened at some boys in the field shooting pigeons; and in their struggles the one on which plaintiff was riding fell on the stone pile, and plaintiff was injured); Schaeffer *v.* Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100 (where the axle of the vehicle broke, and the horse became frightened and turned around, and the dragging axle caused the vehicle to strike the defect in the road); Johnston *v.* Philadelphia, 139 Pa. St. 646, 21 Atl. 316 (non-liability of a city to one who, while driving on a street eighty-four feet wide, the center forty feet of which are twelve or eighteen inches lower than the twenty-two feet on each side, is thrown from his wagon because of his horse shying and making the wheels strike one of the elevated sides).

Where a horse securely tied to a post broke away upon becoming frightened, ran along the street, and plunged down an unfenced precipice crossing the street which was impassable except by a stairway for foot passengers, and was killed, it was held that the city was not liable. Moss *v.* Burlington, 60 Iowa 438, 15 N. W. 267, 46 Am. Rep. 82.

81. Macon *v.* Dykes, 103 Ga. 847, 31 S. E. 443; Stone *v.* Hubbardston, 100 Mass. 49; Titus *v.* Northbridge, 97 Mass. 258, 93 Am. Dec. 91; Hungerman *v.* Wheeling, 46 W. Va. 761, 34 S. E. 778.

The mere fact that a horse was for a moment unmanageable does not show that it was vicious or unsafe or that the person in charge of him was careless. Kennedy *v.* New York, 73 N. Y. 365, 29 Am. Rep. 169.

82. McClain *v.* Garden Grove, 83 Iowa 235, 48 N. W. 1031, 12 L. R. A. 482, non-liability for breaking of a railing by the falling against it of a horse which had dropped dead. But see Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568, where it was held otherwise, **when** a horse stopped, staggered, and fell off of a bridge containing no railing, no fault of a third person intervening and there being no negligence on the part of plaintiff.

Knowledge.— In Winship *v.* Enfield, 42 N. H. 197, it was held that, if it appears that vices of the horse or defects in the vehicle contributed to the injury, plaintiff must show not only that he did not know and had no reason to suppose that such vices or defects existed, but also that he was not at fault in not knowing of their existence.

83. Joliet *v.* Shufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750; Manderschid *v.* Dubuque, 25 Iowa 108; Winship *v.* Enfield, 42 N. H. 197; Hunt *v.* Pownal, 9 Vt. 411, where it was said that the traveler is not bound to see to it that his carriage and harness are always perfect and his team of the most manageable character and in the most perfect training; that if he be always sure of all this he would not require any further guaranty of his safety unless the roads were absolutely impassable.

Where the horse's bit broke upon his becoming frightened at an obstruction, it was held that this fact should not be considered. Cairncross *v.* Pewaukee, 86 Wis. 181, 56 N. W. 648. See also Halstead *v.* Warsaw, 43 N. Y. App. Div. 39, 59 N. Y. Suppl. 518.

84. *Illinois.*—Peoria *v.* Gerber, 68 Ill. App. 255; Rockford *v.* Russell, 9 Ill. App. 229.

Indiana.— Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Iowa.— Moss *v.* Burlington, 60 Iowa 438, 15 N. W. 267, 46 Am. Rep. 82.

Minnesota.— Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

Missouri.— Hull *v.* Kansas City, 54 Mo. 598, 14 Am. Rep. 487 (where a horse having got the line under his tail began backing and as the driver was about to jump from the wagon it went into a hole); Burnes *v.* St. Joseph, 91 Mo. App. 489 (where a horse shyed so that the driver did not lose control of him but was injured by coming in contact with an obstruction).

New York.— Kennedy *v.* New York, 73 N. Y. 365, 29 Am. Rep. 169, where a horse backed off a dock, the negligence being in failing to have a string-piece on the dock.

United States.— Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

Canada.— Toms *v.* Whitby, 37 U. C. Q. B. 100.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1669.

Absence of barriers or railings to protect against such accidents at embankments has

and this rule is recognized even in those states which deny liability if the horse is beyond control and running away.[85]

5. Rights of Persons Injured — a. Persons Entitled to Redress. If any one of the public in the ordinary use of the way, without fault on his part, suffers special damage, not common to the public, because of the negligence of the municipality either in constructing or in maintaining it, he has ground for an action; the legal liability arises from the neglect of the legal duty to keep the way reasonably safe for ordinary public requirements.[86] So an occupant of premises not bound by contract or law to keep the sidewalk in repair may recover for injury occasioned by defects therein.[87]

b. Nature of Injury Sustained. An action based upon a failure of the munici-

been held to be negligence creating liability in such cases. Rockford *v.* Russell, 9 Ill. App. 229; Harvey *v.* Clarinda, 111 Iowa 528, 82 N. W. 994; Byerly *v.* Anamosa, 79 Iowa 204, 44 N. W. 359; Pittston *v.* Hart, 89 Pa. St. 389; Hey *v.* Philadelphia, 81 Pa. St. 44, 22 Am. Rep. 733; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922.

85. *Massachusetts.*— Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166; Stone *v.* Hubbardston, 100 Mass. 49; Titus *v.* Northbridge, 97 Mass. 258, 93 Am. Dec. 91. See also St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447.

Missouri.— Vogelgesang *v.* St. Louis, 139 Mo. 127, 40 S. W. 653.

Pennsylvania.— Pittston *v.* Hart, 89 Pa. St. 389.

Washington.— Taylor *v.* Ballard, 24 Wash. 191, 64 Pac. 143.

Wisconsin.— Olson *v.* Chippewa Falls, 71 Wis. 558, 37 N. W. 575.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1669.

Loss of control.— Where the animal is frightened and uncontrollable and backs across a bridge and along the highway at the side of which a railing was constructed for several rods to the end of the railing and then off the embankment, it is held that the act of the horse is the proximate cause of the accident and the city is not liable. Horton *v.* Taunton, 97 Mass. 266 note. See also Schillinger *v.* Verona, 96 Wis. 456, 71 N. W. 888.

86. *Kansas.*— Kansas City *v.* Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783 (holding that where a railway is built on a street by authority of a city, and a railway employee in the performance of his ordinary duties walks over the street, and is injured by reason of a defect in the street, of which the city has or should have knowledge, the city is liable for the injuries sustained); Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Massachusetts.— Eaton *v.* Woburn, 127 Mass. 270, holding that one employed and paid by another who has contracted with a town to light and take care of its street lamps is not a servant or agent of the town; and if, while engaged in his work, he suffers injury from a defect in a highway, he can maintain an action therefor against the town.

Michigan.— Coots *v.* Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

New York.— Avery *v.* Syracuse, 29 Hun 537.

Pennsylvania.— Megargee *v.* Philadelphia, 153 Pa. St. 340, 25 Atl. 1130, 19 L. R. A. 221.

Texas.— Galveston *v.* Hemmis, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 828.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1660. And see *supra*, XIV, A, 2, b.

Intoxication at the time of receiving an injury will not prevent a recovery where the intoxication does not contribute to the injury. Alger *v.* Lowell, 3 Allen (Mass.) 402; Healy *v.* New York, 3 Hun (N. Y.) 708, 6 Thomps. & C. 92. See also Stuart *v.* Machias Port, 48 Me. 477; Ott *v.* Buffalo, 131 N. Y. 594, 30 N. E. 67. And see *infra*, XIV, E, 9, j, (I).

Immorality of plaintiff is no ground for denying the right to recover. Thus the fact that the person injured by falling into an excavation in the street was returning from a bawdy-house, however immoral it may be to visit such a place, will not preclude a recovery if the other elements of municipal liability exist. McVoy *v.* Knoxville, 85 Tenn. 19, 1 S. W. 498. So the fact that a woman lived in immoral relations with a man will not defeat her right to recover for an injury caused by a defective sidewalk. Wright *v.* Kansas City, 187 Mo. 678, 86 S. W. 452.

Author of defect.—One whose extraordinary use of a way, not intended for such use and sufficient for the purposes for which it was constructed, puts it out of repair may not recover for an injury occasioned by the defect caused by himself. Megargee *v.* Philadelphia, 153 Pa. St. 340, 25 Atl. 1130, 19 L. R. A. 221.

The assignee of non-assignable tolls under a void lease of a pier built for the use of the public acquires no right with respect to such tolls which can be impaired by a failure of the city to keep in repair a road to the pier. Lord *v.* Oconto, 47 Wis. 386, 2 N. W. 785.

Contributory negligence see *infra*, XIV, D, 6.

Injury to employee, fireman, etc., see *supra*, XIV, A, 2, b.

Care as to streets see *supra*, XIV, D, 4, a.

87. Burt *v.* Boston, 122 Mass. 223 (where it was held that a sublessee of a part of a house might recover for injuries resulting from defects in a sidewalk, he having no control of the premises, although an owner or lessee of the premises might be liable over to the city for damages recovered against it

pality to perform its duty with respect to the keeping of its streets in repair is maintainable by those only who have suffered some special injury differing in kind and not merely in degree from that inconvenience or injury which is common to the public.[88] And where the statute giving the action limits the remedy to injuries which are received directly from a defect by one who is using or attempting to use the highway, consequential damages resulting indirectly to the property of an abutting owner cannot be recovered.[89]

c. Use of Way at Time of Injury — (I) *In General.* Any person injured by a defect in a highway while he is lawfully there and using it for those purposes for which there is a municipal duty to maintain it in a reasonably safe condition may recover damages for the injury so resulting.[90] This liability is declared without regard to the purpose with which the person goes upon the way, whether he happens to be there out of idle curiosity or in pursuit of business or pleasure,

for injury resulting from such a defect and could not therefore himself recover against the city); Avery *v.* Syracuse, 29 Hun (N. Y.) 537 (a lessee who had not agreed to keep the sidewalk in repair, the charter of the city having conferred on the city the power to make and repair sidewalks, and having imposed on the owner of the premises the duty of maintaining the sidewalk in suitable repair).

88. *Missouri.*— Beaudean *v.* Cape Girardeau, 71 Mo. 392.

Ohio.— Farrelly *v.* Cincinnati, 2 Disn. 516 [*affirming* 3 Ohio Dec. (Reprint) 115, 3 Wkly. L. Gaz. 277].

Pennsylvania.— Gold *v.* Philadelphia, 115 Pa. St. 184, 8 Atl. 386.

West Virginia.— Hale *v.* Weston, 40 W. Va. 313, 21 S. E. 742.

Wisconsin.— Zettel *v.* West Bend, 79 Wis. 316, 48 N. W. 379, 24 Am. St. Rep. 715.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1661.

Compulsory circuitous travel.— Thus an obstruction which requires plaintiff in going from his house to his market garden to pursue a longer and less direct route does not give a cause of action. Zettel *v.* West Bend, 79 Wis. 316, 48 N. W. 379, 24 Am. St. Rep. 715. But in Beaudean *v.* Cape Girardeau, 71 Mo. 392, liability was declared where an obstruction, consisting of a fence which cut off the road, was held to give a right of action, the injury being special and peculiar to plaintiff.

Loss of business or profit will not constitute such damage resulting from defects in the streets as may be recovered. Farrelly *v.* Cincinnati, 2 Disn. (Ohio) 516 [*affirming* 3 Ohio Dec. (Reprint) 115, 3 Wkly. L. Gaz. 277]; Gold *v.* Philadelphia, 115 Pa. St. 184, 8 Atl. 386; Hale *v.* Weston, 40 W. Va. 313, 21 S. E. 742. But under a statute authorizing the construction of a sewer it was held that the duty of the city to keep the highway where the sewer was building "safe and convenient" was remitted impliedly for such time as was reasonably necessary for the work, but that if there was unreasonable delay in doing the work, during which time access to plaintiff's property was cut off or obstructed, causing him loss of profits and increase in expense and trouble in the conduct of his business, the municipality will be liable. Williams *v.* Tripp, 11 R. I. 447.

Diverting travel from a ferry outside of a city, by reason of the failure of the city to keep a certain street in repair, will give no cause of action to the owner of the ferry. Prosser *v.* Ottumwa, 42 Iowa 509.

Injury caused by the natural flow of water see *supra*, XIV, C, 11, 12.

Nuisances see *supra*, XIV, A, 5, c, (II).

89. Ball *v.* Winchester, 32 N. H. 485.

Loss of services and society.— So where the statute provides for the recovery of damages for an injury suffered by any one in his person or property by means of a defect, etc., in an action for injuries to plaintiff's wife caused by a defective sidewalk, there can be no recovery for loss of services and society. Lounsbury *v.* Bridgeport, 66 Conn. 360, 34 Atl. 93.

90. Bath *v.* Blake, 97 Ill. App. 35; Waverly *v.* Reesor, 93 Ill. App. 649; Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592; McVoy *v.* Knoxville, 85 Tenn. 19, 1 S. W. 498; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

Persons not in use of street.— A right of action which may accrue to one as a traveler on the street cannot be extended to embrace persons who are not in the use of the street at the time of the injury (see *supra*, XIV, D, 4, c, (IV), (E), (3)); and one injured while passing to a private way over a planking placed for that purpose over a gutter within the limits of a street but outside of the traveled portion thereof is held not to be a traveler upon the street within the meaning of the statute so as to entitle him to maintain an action for failure to keep the street in repair. Philbrick *v.* Pittston, 63 Me. 477.

Proper use.— Where one went into a street to see a procession formed, and while standing there from three to five minutes was injured by the falling of a pile of lumber on him it was held that it could not be said as a matter of law that he was not "traveling upon a highway." Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592. So in Murray *v.* McShane, 52 Md. 217, 36 Am. Rep. 367, it is held that travelers on a street have not only the right to pass but to stop on necessary and reasonable occasions so that they do not obstruct the streets or doorways. See

sometimes upon the theory that he need not be a traveler,[91] and sometimes because such purpose is not inconsistent with his presence on the street as a traveler,[92] the particular purpose being immaterial if he is there as a traveler,[93] and to this extent children are not restricted in passing and repassing on the streets more than adults.[94] But while this may be so as to the mere purpose of being on the way, when the decisions turn upon the proper or reasonable use of the street, as in the case of children or others playing there, the rules are not uniform in the various jurisdictions. Thus in some the duty to keep the streets in a reasonably safe condition is the same with respect to children who are playing thereon as with respect to others using the way,[95] although an adult so engaged has been considered as not

also Duffy *v.* Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743.

An improper use of a structure in a street cannot create liability against the municipality. Stickney *v.* Salem, 3 Allen (Mass.) 374, where the injury was to one while stopping in a highway for the purpose of conversation who leaned against a defective railing, the court holding that the obligation to keep a railing was imposed when it is necessary to mark the bounds of that part of the road within which persons may safely travel, or to furnish a guard against dangerous places so that proper protection might be afforded to those in the exercise of due care; that if a person without fault or negligence on his part is forced against a railing or takes hold of it to aid his passage, or falls against it by accident, or has occasion to use it in any way in furtherance of the lawful or reasonable exercise of his right as a traveler, and by reason of any defect or insufficiency it gives way and causes an injury, there would be liability, but that one who leans against or sits upon such a railing is not using it for a proper purpose, or for a purpose for which the city is under any obligation to maintain it.

Protection against surging crowd.— An action lies to recover damages sustained by being pushed from a public street down an unguarded and dangerous declivity, by a crowd, if it was not done through the wilful act or negligence of the crowd or any person therein. Alger *v.* Lowell, 3 Allen (Mass.) 402. But see Roe *v.* Crimmins, 10 Misc. (N. Y.) 711, 31 N. Y. Suppl. 807 [*affirmed* in 155 N. Y. 690, 50 N. E. 1122].

Bicycles see *supra*, XIV, D, 4, c, (I), note 64.

Motor vehicles see MOTOR VEHICLES, *ante*, p. 41.

91. Chicago *v.* Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860.

92. Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

Use in entering private premises.— One who, on finding an entrance to the building which he occupied locked, went on the sidewalk to another entrance, was a "traveler on the street" so that he is entitled to recover for injury from a defective condition of the sidewalk, under a statute giving persons the right to recover therefor. Strack *v.* Milwaukee, 121 Wis. 91, 98 N. W. 947.

93. Stinson *v.* Gardiner, 42 Me 248, 66 Am. Dec. 281, where it is held that all persons have a right to pass and repass upon public roads so long as they violate no laws for the common good or for the protection of individuals; that within these restrictions they are entitled to the use of the highway for the purposes of travel whether the object of that travel is business or pleasure, whether they pass on foot, with carriages, or in the various modes which each individual may choose to adopt.

94. Stinson *v.* Gardiner, 42 Me. 248, 66 Am. Dec. 281.

95. *District of Columbia.*— District of Columbia *v.* Boswell, 6 App. Cas. 402.

Illinois.— Chicago *v.* Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; Bath *v.* Blake, 97 Ill. App. 35; Waverly *v.* Reesor, 93 Ill. App. 649.

Indiana.— Indianapolis *v.* Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65.

Mississippi.— Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Missouri.— Donoho *v.* Vulcan Iron Works, 75 Mo. 401 [*affirming* 7 Mo. App. 447].

New York.— McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Crawford *v.* Wilson, etc., Mfg. Co., 8 Misc. 48, 28 N. Y. Suppl. 514 [*affirmed* in 144 N. Y. 708, 39 N. E. 857].

West Virginia.— Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447, 45 Am. St. Rep. 853, 22 L. R. A. 561.

Canada.— Ricketts *v.* Markdale, 31 Ont. 610.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1663.

Care with respect to children — *In general.* — In estimating the degree of negligence with which the municipality is chargeable, it has been held that the character of the defect or obstruction is to be considered with reference to the proper uses of the street as a thoroughfare of travel and not as a place for the recreation of children. Chicago *v.* Starr, 42 Ill. 174, 89 Am. Dec. 422, holding that where a six-year-old child had wandered some blocks from its home and in climbing upon a heavy counter which had been leaned against a fence by the sidewalk by some person unauthorized by the city was killed, the city was not liable; that the most prudent and cautious person would not have anticipated such an accident; and that the negligence of the child's parents was greater than that of the city, and upon this last point the case

to be in the reasonable use of the way.[96] In other jurisdictions protection is withdrawn from those who are in the street merely for the purpose of playing, the municipality being held under no duty to keep its streets in a condition of safety for that purpose under the statutory requirement that it keep such ways in a condition of reasonable safety for the ordinary purposes of travel,[97] although the fact that one had been engaged in playing will not affect his right to recover if at the time he actually sustained the injury he is proceeding in the ordinary use of the way,[98] and if he is proceeding on the way it is not necessarily inconsistent with his being a traveler that he may stop to amuse himself momentarily in some childish pastime.[99]

(II) *Injury Sustained While Violating Law.* A defendant who is sued in tort cannot justify the tort, whether wilful or negligent, by proving that plaintiff, when injured, was transgressing the law, so long as the tort and the transgressions are independent or disconnected, except in time and place, in their relation to each other.[1]

seems to turn principally. But see District of Columbia *v.* Boswell, 6 App. Cas. (D. C.) 402 (where it is said that the use of a sidewalk for play is a use which the municipality must anticipate); Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553 [*distinguished* in Chicago *v.* Starr, *supra*] (where the injury was caused by reason of the falling into a water tank which was defectively closed and covered, and an instruction which required only such care as would render the street reasonably safe for all persons who ordinarily make use of streets was properly refused); Kuntz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508 (where under facts very similar to those in the case last cited, it was held improper to direct a nonsuit).

Place attracting children.— In Indianapolis *v.* Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65, it was held that a city was liable where it made an excavation in the bed of a creek at a street crossing and that the city must be held to know that children are attracted to such a place in July weather; that it was gross carelessness with such knowledge, to leave an unguarded pit filled with water in a street into which an unsuspecting child might fall, and that any inference of neglect on the part of the parent is repelled by an averment that he was ignorant of the existence of the danger of the place in question. See also Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47. So where the municipality negligently allowed water to accumulate partly on the street and partly on adjoining land, without guarding against injury to children therein, liability has been declared. Bowman *v.* Omaha, 59 Nebr. 84, 80 N. W. 259; Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528.

Improper conduct proximate cause.—Where a boy of seven years climbing in play to reach an awning rod from the top of a pile of empty barrels kept on the pavement in violation of a city ordinance slipped and fell to the street, and one of the barrels fell on him, it was held that the city was not liable inasmuch as the improper use of the awning fixtures was the cause of the injury and not the presence of the barrels upon the sidewalk, the awning rods being lawful structures and the boy being in a place where he had no right to be. Ganghan *v.* Philadelphia, 119 Pa. St. 503, 13 Atl. 300.

So where a street is closed against travel and guarded against accidents to persons in the ordinary use of it and a child is attracted there by machinery employed in the construction of a public sewer which induces him to climb upon barriers and he falls into an excavation the city will not be liable. Hamilton *v.* Detroit, 105 Mich. 514, 63 N. W. 511.

96. Jackson *v.* Greenville, 72 Miss. 220, 16 So. 382, 48 Am. St. Rep. 553, 27 L. R. A. 527.

97. Stinson *v.* Gardiner, 42 Me. 248, 66 Am. Dec. 281; Tighe *v.* Lowell, 119 Mass. 472; Blodgett *v.* Boston, 8 Allen (Mass.) 237.

98. Graham *v.* Boston, 156 Mass. 75, 30 N. E. 170, where several boys had been playing on their way home in a public street and had stopped to rest, and one of them, while walking along before the others, came in contact with an electric wire which had been allowed to hang within a few feet of the street, and it was held that he was a traveler.

99. Gulline *v.* Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102, where it was held that a child of seven years of age could not be said to have been guilty of a want of due care because while walking with his father he steps aside for an instant to clasp in his hands a post in the street and almost in his path, nor that in so doing he is making an unlawful use of the street.

At play while traveling.— The fact that a child on her way to a particular place may incidentally play on the way is not inconsistent with her being at the same time a traveler, where the playing does not divert her from going straight on toward her destination. Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

1. Atchison *v.* Acheson, 9 Kan. App. 33, 57 Pac. 248 (the matter set up being intoxication at the time of the injury and also that plaintiff had stopped in the alley in question

6. Contributory Negligence[2] — a. In General. As a general rule, where a person injured by reason of a defect or obstruction in a street or other public way, is himself guilty of some act or omission amounting to a want of ordinary care which concurring or coöperating with the negligence of defendant materially contributes to or is the proximate cause of the injury complained of, he is guilty of contributory negligence precluding a recovery, notwithstanding negligence on the part of defendant in causing or permitting such defect or obstruction,[3] and notwithstanding a charter or statutory provision imposing a liability upon the municipality for injuries arising on account of the condition of any

to urinate, in violation of an ordinance against indecent exposure of the person); Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042 (the violation in this case being the driving on a road in a public park contrary to an ordinance prohibiting the driving of teams in a park for business purposes and making such acts criminal).

While the violation of a speed ordinance might subject the offender to a penalty, unless the commission of the act contributed to produce the injury, the negligence of the municipality is not thereby excused. Pueblo *v.* Smith, 3 Colo. App. 386, 33 Pac. 685; Baker *v.* Portland, 58 Me. 199, 4 Am. Dec. 274, driving into an unguarded obstruction at night.

Contra — *Violation of speed ordinance.*— Heland *v.* Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670, as to the violation of a speed regulation, of which case it is said in Baker *v.* Portland, 58 Me. 199, 4 Am. Dec. 274, that it was clear the court could not have meant that a concurrence merely in point of time between a breach of law by plaintiff and the accident would bar plaintiff's right of recovery because they had just said in Alger *v.* Lowell, 3 Allen (Mass.) 402, that intoxicated persons are not relieved from all protection of law and that if one uses due care his intoxication has nothing to do with the accident.

Sunday travel.— In Gorman *v.* Lowell, 117 Mass. 65, evidence that plaintiff, a woman employed in defendant city, went on a Saturday to an adjoining town to see her children, that one of them being sick she returned to defendant city on Sunday to procure medicine, when she was injured by a defect in the highway, was held sufficient to warrant a finding that she was traveling from necessity or charity.

Injury attributable to plaintiff's act — *In general.*— Where the injury is attributable to such act rather than to any negligence on the part of the municipality there can be no recovery. Thus in Mullen *v.* Owosso, 100 Mich. 103, 58 N. W. 663, 43 Am. St. Rep. 436, 23 L. R. A. 693, where the owner was riding and carelessly drove over a pile of sand in the street with full knowledge of the obstruction at a rate of speed prohibited by ordinance it was held that the city was not liable for the injury caused thereby. So in Thunborg *v.* Pueblo, 18 Colo. App. 80, 70 Pac. 148, an instruction was held erroneous which would preclude a recovery without regard to whether plaintiff was able to restrain a horse going at an excessive rate of speed, since unless plaintiff was himself responsible for the immoderate speed it constituted no defense to the city. See also Anderson *v.* Wilmington, 2 Pennew. (Del.) 28, 43 Atl. 841 (as to injury caused by riding bicycle at excessive rate of speed); Luke *v.* El Paso, (Tex. Civ. App. 1900) 60 S. W. 363.

Driving on sidewalk.— In Arey *v.* Newton, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604, it was held that without considering whether an intentional violation of an ordinance against driving upon a sidewalk, if it contributed to the injury, would necessarily defeat an action, evidence that the driver, without being able to distinguish where the line of the sidewalk was, voluntarily undertook to drive by another vehicle on a narrow street, the width of which was known to him, tended to show negligence on his part.

Violation of speed ordinance by fireman see *supra*, XIV, A, 2, b.

2. Comparative negligence see Negligence.

Imputed negligence see Negligence.

3. *Delaware.*— Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451.

Georgia.— Massey *v.* Columbus, 75 Ga. 658.

Illinois.—Lovenguth *v.* Bloomington, 71 Ill. 238.

Iowa.— Hazard *v.* Council Bluffs, 87 Iowa 51, 53 N. W. 1083.

Kentucky.— Covington *v.* Bryant, 7 Bush 248.

Maine.— Whitman *v.* Lewiston, 97 Me. 519, 55 Atl. 414.

Massachusetts.— Fallon *v.* Boston, 3 Allen 38.

Michigan.— McCool *v.* Grand Rapids, 58 Mich. 41, 24 N. W. 631, 55 Am. Rep. 655.

Minnesota.— Hudon *v.* Little Falls, 68 Minn. 463, 71 N. W. 678.

Mississippi.— Walker *v.* Vicksburg, 71 Miss. 899, 15 So. 132.

New York.— Carolus *v.* New York, 6 Bosw. 15.

North Carolina.— Neal *v.* Marion, 126 N. C. 412, 35 S. E. 812, 129 N. C. 345, 40 S. E. 116.

Ohio.— Nitz *v.* Toledo, 22 Ohio Cir. Ct. 454, 12 Ohio Cir. Dec. 357, 23 Ohio Cir. Ct. 350; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Pennsylvania.— Iseminger *v.* York Haven Water, etc., Co., 206 Pa. St. 591, 56 Atl. 66; Graham *v.* Philadelphia, 19 Pa. Super. Ct. 292; Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399; Fruh *v.* Philadelphia, 11 Pa. Co. Ct. 473.

street or public ground.[4] Thus if, by the exercise of ordinary care and diligence, the person injured could have avoided the injury, and he fails to exercise such care and diligence, he cannot recover for injuries arising from a nuisance erected and maintained in a public street,[5] or by reason of defendant's failure to properly safeguard excavations.[6] But where the party injured exercises ordinary and reasonable care, he is not guilty of contributory negligence even though his acts or omissions in some manner contribute to his injury.[7] So a failure to use one's senses to discover and avoid a dangerous defect or obstruction does not defeat a recovery if their employment would not have prevented the injury.[8]

b. Care Required — (i) *In General.* A person using or passing along a street or other public way has a right to use it in the ordinary manner, and is required only to exercise ordinary care, or in other words, such care as a reasonably prudent person would exercise under like circumstances, to protect himself against injury.[9] He is not required to exercise extraordinary care;[10] but on the other hand, in exercising reasonable care and diligence, a person using a street or public way has the right, in the absence of knowledge to the contrary, to act on

Texas.— Ft. Worth *v.* Johnson, 84 Tex. 137, 19 S. W. 361; Whitewright *v.* Taylor, 23 Tex. Civ. App. 486, 57 S. W. 311.

Virginia.— Roanoke *v.* Harrison, (1894) 19 S. E. 179.

United States.— Delger *v.* St. Paul, 14 Fed. 567, 4 McCrary 634; Brady *v.* Chicago, 3 Fed. Cas. No. 1,796, 4 Biss. 448, holding that the failure of a pedestrian to use reasonable care and caution in crossing a swing bridge will prevent recovery even though the city is negligent.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1672.

Moving a safe weighing fourteen hundred pounds over a wooden sidewalk raised several feet from the ground is such contributory negligence as will preclude a recovery for injuries received by the breaking of the sidewalk. Chicago *v.* Koblhof, 64 Ill. App. 349.

4. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Kelley *v.* Boston, 180 Mass. 233, 62 N. E. 259.

5. Irvin *v.* Sprigg, 6 Gill (Md.) 200, 46 Am. Dec. 667.

6. Fallon *v.* Boston, 3 Allen (Mass.) 38; Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

7. Western Union Tel. Co. *v.* Eyser, 2 Colo. 141; Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246.

8. Rome *v.* Dodd, 58 Ga. 238; Centerville *v.* Woods, 57 Ind. 192; Owings *v.* Jones, 9 Md. 108.

9. *Alabama.*— Lord *v.* Mobile, 113 Ala. 360, 21 So. 366.

District of Columbia.— District of Columbia *v.* Haller, 4 App. Cas. 405.

Georgia.— Massey *v.* Columbus, 75 Ga. 658; Wilson *v.* Atlanta, 63 Ga. 291.

Illinois.— Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035 [*affirming* 81 Ill. App. 456]; Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246; Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35; Chicago *v.* Gillett, 108 Ill. App. 455; Herrin *v.* Newton, 103 Ill. App. 423; Chicago *v.* Hickok, 16 Ill. App. 142.

Indiana.— Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90.

Iowa.— Hanlon *v.* Keokuk, 7 Iowa 488, 74 Am. Dec. 276.

Kansas.— Jewell *v.* Van Meter, 70 Kan. 887, 79 Pac. 149.

Maryland.— Owings *v.* Jones, 9 Md. 108; Irwin *v.* Sprigg, 6 Gill 200, 46 Am. Dec. 667.

Michigan.—Burrell *v.* Greenville, 133 Mich. 235, 94 N. W. 732.

Minnesota.— Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868; St. Paul *v.* Kuby, 8 Minn. 154.

Missouri.— Coffey *v.* Carthage, 186 Mo. 573, 85 S. W. 532; Deland *v.* Cameron, 112 Mo. App. 704, 87 S. W. 597; Johnson *v.* St. Joseph, 96 Mo. App. 663, 71 S. W. 106.

Nebraska.—Atkinson *v.* Fisher, 4 Nebr. (Unoff.) 21, 93 N. W. 211.

New York.— Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Lloyd *v.* Walton, 57 N. Y. App. Div. 288, 67 N. Y. Suppl. 929; Carolus *v.* New York, 6 Bosw. 15.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Pennsylvania.— Wood *v.* Bridgeport Borough, 143 Pa. St. 167, 22 Atl. 752.

Texas.— Ft. Worth *v.* Johnson, 84 Tex. 137, 19 S. W. 361.

Virginia.— Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Washington.— White *v.* Ballard, 19 Wash. 284, 53 Pac. 159.

Wisconsin.— Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464.

United States.— Brady *v.* Chicago, 3 Fed. Cas. No. 1,796, 4 Biss. 448.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1673.

10. *Illinois.*— Beardstown *v.* Smith, 150 Ill. 169, 37 N. E. 211; Chicago *v.* Gillett, 108 Ill. App. 455.

Iowa.— Langhammer *v.* Manchester, 99 Iowa 295, 68 N. W. 688; Hanlon *v.* Keokuk, 7 Iowa 488, 74 Am. Dec. 276.

Nebraska.— Lincoln *v.* Walker, 18 Nebr. 244, 250, 20 N. W. 113, 25 N. W. 66.

New York.— Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453,

the assumption that the sidewalk or roadway is in a reasonably or ordinarily safe condition, and is not required as a matter of law to be on the lookout for defects or obstructions therein.[11] Whether or not the person injured by reason of a defect or obstruction exercised ordinary care and diligence at the time of the accident depends upon the surrounding circumstances existing at that time and place,[12]

holding that travelers are not required to use greater care and caution than before in crossing a street soon after excavations have been made therein, unless there is something to apprise them of danger.

Virginia.— Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Washington.— Cowie *v.* Seattle, 22 Wash. 659, 62 Pac. 121.

Wisconsin.— Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1673.

11. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

California.— Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698.

Connecticut.—Bunnell *v.* Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533.

District of Columbia.— Ward *v.* District of Columbia, 24 App. Cas. 524.

Florida.— Tallahassee *v.* Fortune, 3 Fla. 19, 52 Am. Dec. 358.

Illinois.— Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035 [*affirming* 81 Ill. App. 456]; East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077; Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; McLeansboro *v.* Trammel, 109 Ill. App. 524; Chicago *v.* Gillett, 108 Ill. App. 455; Campbell *v.* Chicago, 100 Ill. App. 358; Savanna *v.* Trusty, 98 Ill. App. 277; Salem *v.* Webster, 95 Ill. App. 120 [*affirmed* in 192 Ill. 369, 61 N. E. 323]; Rockford *v.* Rannie, 77 Ill. App. 665; Chicago *v.* Hickok, 16 Ill. App. 142.

Indiana.— Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729.

Iowa.— Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907.

Kansas.— Topeka Water Co. *v.* Whiting, 58 Kan. 639, 50 Pac. 877, 39 L. R. A. 90.

Kentucky.— Louisville *v.* Keher, 117 Ky. 841, 79 S. W. 270, 25 Ky. L. Rep. 2003; Covington *v.* Bryant, 7 Bush 248.

Maryland.— Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

Missouri.— Haxton *v.* Kansas City, 190 Mo. 53, 88 S. W. 714; Perrette *v.* Kansas City, 162 Mo. 238, 62 S. W. 448; Deland *v.* Cameron, 112 Mo. App. 704, 87 S. W. 597, holding that people using public sidewalks may, to some extent, rely upon the implied assurance that, after the lapse of sufficient time in which to make repairs, defects previously noticed have been remedied.

Nebraska.— Lincoln *v.* Walker, 18 Nebr. 244, 250, 20 N. W. 113, 25 N. W. 66.

New York.— Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341]; Godfrey *v.* New York, 104 N. Y. App. Div. 357, 93 N. Y. Suppl. 899 [*affirmed* in 185 N. Y. 563, 77 N. E. 1187]; Swart *v.* New York, 1 Silv. Sup. 103, 5 N. Y. Suppl. 98; Gribben *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 196.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Virginia.— Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Washington.— Lemman *v.* Spokane, 38 Wash. 98, 80 Pac. 280; Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1672.

12. *Illinois.*— Rockford *v.* Hollenbeck, 34 Ill. App. 40, holding that a person tripped by another's stepping on the end of a plank laid lengthwise in a walk is not thereby guilty of contributory negligence.

Iowa.— Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Robinson *v.* Cedar Rapids, 100 Iowa 662, 69 N. W. 1064.

Massachusetts.— Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622; Calkins *v.* Springfield, 167 Mass. 68, 44 N. E. 1055; Murphy *v.* Worcester, 159 Mass. 546, 34 N. E. 1080; Gilbert *v.* Boston, 139 Mass. 313, 31 N. E. 734.

Missouri.— Wiggin *v.* St. Louis, 135 Mo. 558, 37 S. W. 528.

New York.— Stone *v.* Poughkeepsie, 15 N. Y. App. Div. 582, 44 N. Y. Suppl. 609; McPherson *v.* Buffalo, 13 N. Y. App. Div. 502, 43 N. Y. Suppl. 658; McGoldrick *v.* York Cent., etc., R. Co., 20 N. Y. Suppl. 914.

Ohio.— Toledo *v.* Center, 16 Ohio Cir. Ct. 308, 8 Ohio Cir. Dec. 503.

Oklahoma.— Guthrie *v.* Swan, 5 Okla. 779, 51 Pac. 562.

Pennsylvania.— Butcher *v.* Philadelphia, 202 Pa. St. 1, 51 Atl. 330; Bruch *v.* Philadelphia, 181 Pa. St. 588, 37 Atl. 818 [*reversing* 5 Pa. Dist. 718, 19 Pa. Co. Ct. 90]; Allen *v.* Du Bois Borough, 181 Pa. St. 184, 37 Atl. 195; Schively *v.* Jenkintown, 180 Pa. St. 196, 36 Atl. 754 [*affirming* 13 Montg. Co. Rep. 24].

Texas.— Whitewright *v.* Taylor, 23 Tex. Civ. App. 486, 57 S. W. 311.

Washington.— Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888.

Wisconsin.— Milwaukee *v.* Davis, 6 Wis. 377.

United States.— Scott *v.* New Orleans, 75 Fed. 373, 21 C. C. A. 402.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1672.

Illustrations.— Thus it is not contributory negligence for a person to merely pass under a scaffold erected over a sidewalk (Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698), to go upon a street little used and largely occupied with building materials (Bunnell *v.* Berlin Iron

and upon the danger reasonably to be apprehended,[13] and is ordinarily a question of fact for the jury.[14]

(II) *Of Children.* A child in a street is ordinarily not held to the same degree of care and prudence as would be expected of adults under similar circumstances;[15] nor, in case of injury by a defect or obstruction, is a child contributorily negligent by reason of the mere fact that it was playing upon the sidewalk at the time.[16] A child so injured is guilty of contributory negligence only where it fails to exercise such care and prudence as could be reasonably expected of a child of its age and intelligence under like circumstances.[17] Subject to these rules, the question as to whether or not a child was so negligent depends upon the circumstances of the particular case.[18]

Bridge Co., 66 Conn. 24, 33 Atl. 533), to stop on a public street or thoroughfare (Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772), to hitch a horse in a public street (Tallahassee *v.* Fortune, 3 Fla. 19, 52 Am. Dec. 358), to drive a horse in a trot upon a bridge (Jordan *v.* Hannibal, 87 Mo. 673), or to drive in a violent storm through the streets of a city with which the driver is unacquainted (Milwaukee *v.* Davis, 6 Wis. 377). Nor is an omission to obey orders of one not an officer to get out of the way of an impending discharge of a gun or firecrackers in a public street such contributory negligence as will excuse or mitigate consequent damages (Marionneaux *v.* Brugier, 35 La. Ann. 13); nor in driving from one side of the street to the other in which a railroad track is laid is it negligence as a matter of law to pass across the track obliquely (Lynch *v.* New Rochelle, 78 Hun (N. Y.) 207, 28 N. Y. Suppl. 962); nor does the mere fact that plaintiff while walking along the sidewalk in the daytime stepped into an open area way and was injured justify a direction to the jury to find for defendant on account of plaintiff's contributory negligence (Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271).

13. Swart *v.* District of Columbia, 17 App. Cas. (D. C.) 407; Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035 [*affirming* 81 Ill. App. 456]; Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

14. See *infra*, XIV, E, 9, j.

15. District of Columbia *v.* Boswell, 6 App. Cas. (D. C.) 402; Kerr *v.* Forgue, 54 Ill. 482, 5 Am. Rep. 146; Dowd *v.* Chicopee, 116 Mass. 93; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

16. *District of Columbia.*— District of Columbia *v.* Boswell, 6 App. Cas. 402.

Georgia.—Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389.

Massachusetts.— Gulline *v.* Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102.

Missouri.— Straub *v.* St. Louis, 175 Mo. 413, 75 S. W. 100; Caskey *v.* La Belle, 101 Mo. App. 590, 74 S. W. 113.

New York.— McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Crawford *v.* Wilson, etc., Mfg. Co., 8 Misc. 48, 28 N. Y. Suppl. 514 [*affirmed* in 144 N. Y. 708, 39 N. E. 857].

Wisconsin.— Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1674.

17. *Colorado.*— Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440.

District of Columbia.— District of Columbia *v.* Boswell, 6 App. Cas. 402.

Illinois.— Kerr *v.* Forgue, 54 Ill. 482, 5 Am. Rep. 146.

Louisiana.— Lorenz *v.* New Orleans, 114 La. 802, 38 So. 566.

Massachusetts.— Dowd *v.* Chicopee, 116 Mass. 93.

Michigan.— Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

Missouri.— Stern *v.* Bensieck, 161 Mo. 146, 61 S. W. 594.

Nebraska.— Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528.

Pennsylvania.— Oakland R. Co. *v.* Fielding, 48 Pa. St. 320.

West Virginia.— Parris *v.* Huntington, 57 W. Va. 286, 50 S. E. 416.

Wisconsin.— Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1674.

18. *Illinois.*— Chicago *v.* McCrudden, 92 Ill. App. 257.

Massachusetts.—Casey *v.* Malden, 163 Mass. 507, 40 N. E. 849, 47 Am. St. Rep. 473, holding that a boy nine or ten years of age of average intelligence cannot recover for an injury from falling into a manhole left open and unguarded in a public street, where it appears that he was walking backwards and looking in another direction at the time of the injury.

Minnesota.— St. Paul *v.* Kuby, 8 Minn. 154.

New York.— Brennan *v.* New York, 22 N. Y. Suppl. 304.

Pennsylvania.— Miller *v.* Pennsylvania R. Co., 5 Pa. Cas. 118, 8 Atl. 209.

Wisconsin.— Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1674.

That a boy eight years old fell through a hole in a bridge which had existed for a long time, and of which he was presumed to have notice, does not raise a presumption of negligence on his part which would shift the

(III) *Of Persons Physically Disabled.* It is not negligence *per se* for a person whose eyesight is defective, or who is otherwise physically impaired, to go upon a public street.[19] But such person is bound to exercise a degree of care and prudence in proportion to his impairment, or in other words, such care and prudence as a reasonably prudent person with a like infirmity would exercise under like circumstances;[20] and ordinary care in his case would be a greater degree of care than would be required of a sound person under the same circumstances.[21] It is not contributory negligence for a traveler overcome with illness or fatigue to stop and rest upon the street.[22]

(IV) *Of Intoxicated Persons.* The fact that a person injured by a defect or obstruction in a public street had been drinking or was intoxicated at the time does not bar a recovery,[23] unless by reason of such intoxication he fails to exercise ordinary care and thereby contributes to the accident.[24] Yet intoxication in any degree is a material circumstance to be considered, as tending to show a want of ordinary care.[25]

c. Knowledge of Defect or Dangers in General.[26] The mere fact that one using a street or public way had knowledge of the defect or obstruction by reason of which he was injured does not, as a matter of law, constitute contributory negligence precluding a recovery, if in view of such knowledge he exercised reasonable and ordinary care under the circumstances;[27] although such knowledge is

burden of proof. Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425.

19. *Illinois.*—Normal *v.* Webb, 91 Ill. App. 183, holding it no defense to an action against a municipality for injuries sustained in falling from a sidewalk that plaintiff was subject to dizzy spells and fell from the sidewalk during one of such spells.

Indiana.— Franklin *v.* Harter, 127 Ind. 446, 26 N. E. 882 (holding that in an action for injuries caused by falling into a cellar way alleged to have been negligently left open, the fact that plaintiff was blind does not authorize the conclusion that he was guilty of contributory negligence, against an allegation in the complaint that he was free from fault); Salem *v.* Goller, 76 Ind. 291 (holding that the mere fact that plaintiff, who was injured by reason of a defective sidewalk, was blind is not conclusive evidence of negligence in venturing upon a sidewalk which he had a right to presume was in a safe condition).

Iowa.— Hill *v.* Glenwood, 124 Iowa 479, 100 N. W. 522.

Maine.— Ham *v.* Lewiston, 94 Me. 265, 47 Atl. 548.

Massachusetts.— Smith *v.* Wildes, 143 Mass. 556, 10 N. E. 446, blind person.

Montana.— Sweeney *v.* Butte, 15 Mont. 274, 39 Pac. 286.

New York.— Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341].

North Carolina.— Foy *v.* Winston, 126 N. C. 381, 35 S. E. 609.

Canada.— Homewood *v.* Hamilton, 1 Ont. L. Rep. 266.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1675.

20. Garbanati *v.* Durango, 30 Colo. 358, 70 Pac. 686; Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051; Carter *v.* Nunda, 55 N. Y. App. Div. 501, 66 N. Y. Suppl. 1059.

21. Mt. Vernon *v.* Brooks, 39 Ill. App. 426 (holding that a cripple using crutches has the same right to use a sidewalk as a sound person, but must exercise a higher degree of care); Ham *v.* Lewiston, 94 Me. 265, 47 Atl. 548; Pittman *v.* El. Reno, 4 Okla. 638, 46 Pac. 495.

One whose eyesight is impaired is bound to use more care than one who is physically whole in this respect. Smith *v.* Cairo, 48 Ill. App. 166; Winn *v.* Lowell, 1 Allen (Mass.) 177. *Compare* Hill *v.* Glenwood, 124 Iowa 479, 100 N. W. 522 (holding that a blind person is held to no higher degree of care and caution to avoid an injury than one in possession of his sight; but in determining the question of ordinary care the fact of the blindness should be considered by the jury in connection with the other circumstances); Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341].

22. Kessler *v.* Berger, 205 Pa. St. 289, 54 Atl. 887, 61 L. R. A. 611.

23. Robinson *v.* Pioche, 5 Cal. 460; Aurora *v.* Hillman, 90 Ill. 61; Thuis *v.* Vincennes, (Ind. App. 1905) 73 N. E. 141, 35 Ind. App. 350, 73 N. E. 1098; Ott *v.* Buffalo, 16 N. Y. Suppl. 1 [*affirmed* in 131 N. Y. 594, 30 N. E. 67].

24. Lynch *v.* New York, 47 Hun (N. Y.) 524.

25. Aurora *v.* Hillman, 90 Ill. 61; Thuis *v.* Vincennes, (Ind. App. 1905) 73 N. E. 141, 35 Ind. App. 350, 73 N. E. 1098.

26. Traveling in the night-time with knowledge of danger as contributory negligence see *infra*. XIV, D, 6, g, (II).

27. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Delaware.— Anderson *v.* Wilmington, 2 Pennew. 28, 43 Atl. 841.

District of Columbia.— Corts *v.* District of Columbia, 7 Mackey 277.

always an important circumstance to be considered in determining whether under the circumstances of the particular case the party injured exercised ordinary care.[28] A traveler with such knowledge is required to exercise ordinary care and pru-

Idaho.— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Illinois.— Streator *v.* Chrisman, 182 Ill. 215, 54 N. E. 997 [*affirming* 82 Ill. App. 24]; Sandwich *v.* Dolan, 133 Ill. 177, 24 N. E. 526, 23 Am. St. Rep. 598 [*affirming* 34 Ill. App. 199], 141 Ill. 430, 31 N. E. 416 [*affirming* 42 Ill. App. 53]; Bloomington *v.* Chamberlain, 104 Ill. 268; Aurora *v.* Dale, 90 Ill. 46; Fulton *v.* Green, 103 Ill. App. 96; Savanna *v.* Trusty, 98 Ill. App. 277; Chicago *v.* McCahe, 93 Ill. App. 288; Litchfield *v.* Anglim, 83 Ill. App. 55; Chicago *v.* Fitzgerald, 75 Ill. App. 174; Noble *v.* Hanna, 74 Ill. App. 564; Mt. Sterling *v.* Crummy, 73 Ill. App. 572; Coffeen *v.* Lang, 67 Ill. App. 359; Mt. Carmel *v.* Blackburn, 53 Ill. App. 658; Springfield *v.* Rosenmeyer, 52 Ill. App. 301; Flora *v.* Naney, 31 Ill. App. 493 [*affirmed* in 136 Ill. 45, 26 N. E. 645]; Clayton *v.* Brooks, 31 Ill. App. 62; Ellis *v.* Peru, 23 Ill. App. 35.

Indiana.— Huntington *v.* Folk, 154 Ind. 91, 54 N. E. 759; Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133; Poseyville *v.* Lewis, 126 Ind. 80, 25 N. E. 593; Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Ft. Wayne *v.* Breese, 123 Ind. 581, 23 N. E. 1038; Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512; Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Williamsport *v.* Lisk, 21 Ind. App. 414, 52 N. E. 628; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; Noblesville Gas, etc., Co. *v.* Teter, 1 Ind. App. 322, 27 N. E. 635.

Iowa.— Rea *v.* Sioux City, 127 Iowa 615, 103 N. W. 949; Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Hollingsworth *v.* Ft. Dodge, 125 Iowa 627, 101 N. W. 455; Brown *v.* Chillicothe, 122 Iowa 640, 90 N. W. 502; Harvey *v.* Clarinda, 111 Iowa 528, 82 N. W. 994; Graham *v.* Oxford, 105 Iowa 705, 75 N. W. 473; Ross *v.* Davenport, 66 Iowa 548, 24 N. W. 47; Munger *v.* Marshalltown, 59 Iowa 763, 13 N. W. 642; Rice *v.* Des Moines, 40 Iowa 638.

Kansas.— Horton *v.* Trompeter, 53 Kan. 150, 35 Pac. 1106; Langan *v.* Atchison, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893; Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985; Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842.

Kentucky.— Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. 493, 23 Ky. L. Rep. 43; West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838.

Maryland.— Baltimore *v.* Holmes, 39 Md. 243.

Massachusetts.—St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447; Fox *v.* Chelsea, 171 Mass. 297, 50 N. E. 622; Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219.

Michigan.— Belyea *v.* Port Huron, 136 Mich. 504, 99 N. W. 740; Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075; Urtel *v.* Flint, 122 Mich. 65, 80 N. W. 991; Schwingschlegl *v.* Monroe, 113 Mich. 683, 72 N. W. 7; Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78; Argus *v.* Sturgis, 86 Mich. 344, 48 N. W. 1085.

Minnesota.— Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868; Maloy *v.* St. Paul, 54 Minn. 398, 56 N. W. 94; Nichols *v.* Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56; McKenzie *v.* Northfield, 30 Minn. 456, 16 N. W. 264; Estelle *v.* Lake Crystal, 27 Minn. 243, 6 N. W. 775.

Missouri.— Beauvais *v.* St. Louis, 169 Mo. 500, 69 S. W. 1043; Chilton *v.* St. Joseph, 143 Mo. 192, 44 S. W. 766; Graney *v.* St. Louis, 141 Mo. 180, 42 S. W. 941; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Boulton *v.* Columbia, 71 Mo. App. 519; Culverson *v.* Maryville, 67 Mo. App. 343; Taylor *v.* Springfield, 61 Mo. App. 263; Smith *v.* Butler, 48 Mo. App. 663; Hedges *v.* Kansas City, 18 Mo. App. 62.

Nebraska.— South Omaha *v.* Taylor, 4 Nebr. (Unoff.) 757, 96 N. W. 209.

New York.— Ott *v.* Buffalo, 131 N. Y. 594, 30 N. E. 67; Shook *v.* Coboes, 108 N. Y. 648, 15 N. E. 531; Weed *v.* Ballston Spa, 76 N. Y. 329; Beck *v.* Buffalo, 50 N. Y. App. Div. 621, 63 N. Y. Suppl. 499; Richardson *v.* Syracuse, 41 N. Y. App. Div. 118, 58 N. Y. Suppl. 487; Smith *v.* Ryan, 8 N. Y. Suppl. 853; Colburn *v.* Canandaigua, 15 N. Y. St. 668; Gage *v.* Hornellsville, 2 N. Y. St. 351.

North Carolina.— Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823.

North Dakota.— Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Ohio.— Leber *v.* Kelley Island Lime, etc., Co., 21 Ohio Cir. Ct. 773, 11 Ohio Cir. Dec. 568; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762; Toledo *v.* Center, 16 Ohio Cir. Ct. 308, 8 Ohio Cir. Dec. 503.

Texas.— Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922; Weatherford *v.* Lowery, (Civ. App. 1898) 47 S. W. 34; Denison *v.* Sanford, 2 Tex. Civ. App. 661, 21 S. W. 784.

Utah.— Dwyer *v.* Salt Lake City, 19 Utah 521, 57 Pac. 535.

Virginia.— Danville *v.* Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162.

Washington.— McQuillan *v.* Seattle, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1677. And see *infra*, XIV, E, 9, j, (II).

That the person injured had an opportunity to learn of the defect or obstruction does not necessarily impute negligence. Cox *v.* Des Moines, 111 Iowa 646, 82 N. W. 993.

28. *Colorado.*— Highlands *v.* Raine, 23 Colo. 295, 47 Pac. 283.

dence in proportion to the known danger;[29] and such knowledge will hold him to a higher degree of caution than if he were ignorant of the defect or obstruction,[30] although it does not require extraordinary care.[31] Thus a person is guilty of contributory negligence precluding a recovery, notwithstanding defendant's negligence where, knowing of the defect or obstruction, he fails to exercise ordinary care in passing or avoiding it;[32] as where the known defect or obstruction was of such a dangerous character that a prudent man, knowing of its existence, would not assume the hazard of encountering it, he voluntarily attempted to use or pass along where the defect or obstruction was.[33] But a recovery is not barred where, notwithstanding such knowledge, the person injured exercised care and prudence in proportion to the danger, with a reasonable belief that he could avoid

Illinois.— Sandwich *v.* Dolan, 133 Ill. 177, 24 N. E. 526, 23 Am. St. Rep. 598 [*reversing* 34 Ill. App. 199], 141 Ill. 430, 31 N. E. 416 [*affirming* 42 Ill. App. 43]; East St. Louis *v.* Donahue, 77 Ill. App. 574; Bloomington *v.* Read, 2 Ill. App. 542.

Indiana.— Indianapolis *v.* Mitchell, 27 Ind. App. 589, 61 N. E. 947; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246.

Iowa.— Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Graham *v.* Oxford, 105 Iowa 705, 75 N. W. 473; Lichtenberger *v.* Meriden, 100 Iowa 221, 69 N. W. 424.

Massachusetts.— Dipper *v.* Milford, 167 Mass. 555, 46 N. E. 122.

Missouri.— Rusher *v.* Aurora, 71 Mo. App. 418; Waltemeyer *v.* Kansas City, 71 Mo. App. 354.

New York.— Neddo *v.* Ticonderoga, 77 Hun 524, 28 N. Y. Suppl. 887 [*affirmed* in 148 N. Y. 735, 42 N. E. 725].

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762; Moon *v.* Middletown, 14 Ohio Cir. Ct. 498, 7 Ohio Cir. Dec. 579.

Oklahoma.— Guthrie *v.* Finch, 13 Okla. 496, 75 Pac. 288.

Pennsylvania.— Evans *v.* Brookville, 5 Pa. Super. Ct. 298.

Texas.— Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95; Hillsboro *v.* Jackson, 18 Tex. Civ. App. 325, 44 S. W. 1010.

Utah.— Dwyer *v.* Salt Lake City, 19 Utah 521, 57 Pac. 535.

Virginia.— Charlottesville *v.* Stratton, 102 Va. 95, 45 S. E. 737.

Washington.— Cowie *v.* Seattle, 22 Wash. 659, 62 Pac. 121.

Wisconsin.— Salzer *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1677. And see *infra*, XIV, E, 9, j, (II).

29. Bloomington *v.* Chamberlain, 104 Ill. 268; Owen *v.* Chicago, 10 Ill. App. 465; Gosport *v.* Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164; Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90; Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125; Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675 [*reversing* 54 N. Y. Super. Ct. 295]; Koch *v.* Edgewater, 14 Hun (N. Y.) 544. And see cases cited in preceding note.

30. *Colorado.*— Denver *v.* Hubbard, 29 Colo. 529, 69 Pac. 508.

Delaware.— Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605.

Iowa.— Hoover *v.* Mapleton, 110 Iowa 571, 81 N. W. 776; Hanlon *v.* Keokuk, 7 Iowa 488, 74 Am. Dec. 276.

Kansas.— Kinsley *v.* Morse, 40 Kan. 577, 20 Pac. 217.

Kentucky.— West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838.

New York.— Walsh *v.* Central New York Tel., etc., Co., 176 N. Y. 163, 68 N. E. 146 [*reversing* 75 N. Y. App. Div. 1, 77 N. Y. Suppl. 798]; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Holloway *v.* Lockport, 54 Hun 153, 7 N. Y. Suppl. 363.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Virginia.— Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Wisconsin.— Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1673.

Compare Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

31. Huntington *v.* Green, 77 Ind. 29; Koch *v.* Ashland, 88 Wis. 603, 60 N. W. 990.

32. *California.*— Davis *v.* California St. Cable R. Co., 105 Cal. 131, 38 Pac. 647.

District of Columbia.— Sorts *v.* District of Columbia, 7 Mackey 277.

Illinois.— Dehlinger *v.* Chicago, 100 Ill. App. 314; Sumner *v.* Scaggs, 52 Ill. App. 551; Aurora *v.* Brown, 12 Ill. App. 122 [*affirmed* in 109 Ill. 165].

Indiana.— Plymouth *v.* Milner, 117 Ind. 324, 20 N. E. 235; Evansville *v.* Christy, 29 Ind. App. 44, 63 N. E. 867.

Iowa.— Gribble *v.* Sioux City, 38 Iowa 390.

Pennsylvania.— Barnes *v.* Sowden, 119 Pa. St. 53, 12 Atl. 804; Hentz *v.* Somerset, 2 Pa. Super. Ct. 225.

Virginia.— Roanoke *v.* Harrison, 19 S. E. 179.

Wisconsin.— Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087; Cooper *v.* Waterloo, 98 Wis. 424, 74 N. W. 115.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1677.

33. *Delaware.*— Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605.

Georgia.— Sheats *v.* Rome, 92 Ga. 535, 17 S. E. 922.

Illinois.— Lockport *v.* Licht, 113 Ill. App.

the danger,[34] and there was no other reasonably safe or convenient way to use,[35] or the way was ordinarily used by travelers;[36] or where the injured person's knowledge was remote,[37] or imperfect,[38] or insufficient to give a full appreciation of the danger;[39] or where he rightfully acted on the assumption that the municipality had, in the exercise of its duty, remedied the defect and obviated the danger.[40] So temporary inattention to or forgetfulness of a known defect or obstruction, although a circumstance to be considered, does not of itself constitute contributory negligence.[41]

613, 123 Ill. App. 426 [*reversed* on other grounds in 221 Ill. 35, 77 N. E. 581]; Chicago *v.* Richardson, 75 Ill. App. 198; Macomb *v.* Smithers, 6 Ill. App. 470.

Indiana.— Ft. Wayne *v.* Breese, 123 Ind. 581, 23 N. E. 1038; Gosport *v.* Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164; Crown Point *v.* Thompson, 31 Ind. App. 195, 65 N. E. 13, 67 N. E. 555; Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90.

Iowa.— Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Barce *v.* Shenandoah, 106 Iowa 426, 76 N. W. 747.

Kentucky.— Henderson *v.* Burke, 44 S. W. 422, 19 Ky. L. Rep. 1781.

Maine.— Keyes *v.* Second Baptist Church, 99 Me. 308, 59 Atl. 446.

Massachusetts.— Torphy *v.* Fall River, 188 Mass. 310, 74 N. E. 465; Norwood *v.* Somerville, 159 Mass. 105, 33 N. E. 1108.

Michigan.— Black *v.* Manistee, 107 Mich. 60, 64 N. W. 868; Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78.

Minnesota.—Friday *v.* Moorehead, 84 Minn. 273, 87 N. W. 780.

Missouri.— Wheat *v.* St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 29 Am. Rep. 503.

New York.— Kleng *v.* Buffalo, 72 Hun 541, 25 N. Y. Suppl. 445 [*affirmed* in 156 N. Y. 700, 71 N. E. 1091]; Roe *v.* Crimmins, 10 Misc. 711, 31 N. Y. Suppl. 807 [*reversing* 8 Misc. 496, 28 N. Y. Suppl. 750, and *affirmed* in 155 N. Y. 690, 50 N. E. 1122]; Conneughton *v.* Brooklyn, 7 Misc. 289, 27 N. Y. Suppl. 888; Harrigan *v.* Brooklyn, 16 N. Y. Suppl. 743.

Ohio.— Schaefler *v.* Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533; Bond Hill *v.* Atkinson, 16 Ohio Cir. Ct. 470, 9 Ohio Cir. Dec. 185.

Virginia.— Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Danville *v.* Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162; Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

Wisconsin.— De Pere *v.* Hibbard, 104 Wis. 666, 80 N. W. 933.

United States.— District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237 [*reversing* 15 App. Cas. (D. C.) 363].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1677.

34. Gosport *v.* Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164.

35. Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422; Aurora *v.* Dale, 90 Ill. 46; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Tuttle *v.* Clear Lake, (Iowa 1905) 102 N. W. 136; Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379. And see *infra*, XIV, D, 6, e.

36. Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

37. Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219; Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075.

38. St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447.

39. Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

40. Thompson *v.* Winston, 118 N. C. 662, 24 S. E. 421 (holding that the fact that plaintiff had previous knowledge of the defects does not show that he actually saw and understood the condition of the street at the time of the accident, since he had a right to assume that defendant had discharged its duty by removing the defects, and to act upon that presumption); Durbin *v.* Napoleon, 21 Ohio Cir. Ct. 160, 11 Ohio Cir. Dec. 584; Simonds *v.* Baraboo, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895.

41. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Illinois.— Springfield *v.* Rosenmeyer, 52 Ill. App. 301.

Kentucky.— Lancaster *v.* Walter, 80 S. W. 189, 25 Ky. L. Rep. 2189.

Massachusetts.— Barton *v.* Springfield, 110 Mass. 131.

Minnesota.— Maloy *v.* St. Paul, 54 Minn. 398, 56 N. W. 94.

Missouri.— Bradley *v.* Spickardsville, 90 Mo. App. 416.

New York.— Kelly *v.* Doody, 116 N. Y. 575, 22 N. E. 1084.

Tennessee.— Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 734.

Washington.— McQuillan *v.* Seattle, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799.

Wisconsin.— Simonds *v.* Baraboo, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1677. And see *infra*, XIV, E, 9, j.

Compare Richmond *v.* Courtney, 32 Gratt. (Va.) 792.

Presumption.— If a person knows of a dangerous defect in a sidewalk and is injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent; but the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the ques-

d. Duty to Observe and Avoid Defect or Obstruction. A person using or traveling on a street or public way is required to reasonably exercise his faculties to discover and avoid dangerous defects and obstructions, the care required being commensurate with the danger or appearances thereof;[42] and he is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect or obstruction which is visible and obvious,[43] or where the surrounding circumstances indicate danger;[44] as where he fails to pay attention of plaintiff's contributory negligence. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087.

42. *Delaware.*— Anderson *v.* Wilmington, 2 Pennew. 28, 43 Atl. 841, holding that where a bicyclist is riding at an unlawful rate of speed by reason whereof he runs against an obstruction lawfully in the street, or has his head down and is not looking or using ordinary care to avoid the obstruction, he is not entitled to recover damages for injury, although the city was negligent in not giving proper warning of the obstruction.

Georgia.— Cook *v.* Atlanta, 94 Ga. 613, 19 S. E. 987 (holding a nonsuit properly granted); Massey *v.* Columbus, 75 Ga. 658.

Illinois.— Chicago *v.* Watson, 6 Ill. App. 344.

Iowa.— Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192; Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984; Munger *v.* Marshalltown, 56 Iowa 216, 9 N. W. 192.

Mississippi.— Vicksburg *v.* Hennessy, 54 Miss. 391, 28 Am. Rep. 354.

New York.— Brush *v.* New York, 59 N. Y. App. Div. 12, 69 N. Y. Suppl. 51; Rommeney *v.* New York, 49 N. Y. App. Div. 64, 63 N. Y. Suppl. 186.

North Carolina.— Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823.

Pennsylvania.— Wood *v.* Bridgeport, 143 Pa. St. 167, 22 Atl. 752; Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

Virginia.— Richmond *v.* Leaker, 99 Va. 1, 37 S. E. 348.

Wisconsin.— Hausmann *v.* Madison, 85 Wis. 187, 55 N. W. 167, 39 Am. St. Rep. 834, 21 L. R. A. 263.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1678.

43. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Delaware.— Pierce *v.* Wilmington, 2 Marv. 306, 43 Atl. 162.

District of Columbia.— District of Columbia *v.* Ashton, 14 App. Cas. 571.

Georgia.— Columbus *v.* Griggs, 113 Ga. 597, 38 S. E. 953, 84 Am. St. Rep. 257.

Illinois.— Chicago *v.* Bixby, 84 Ill. 82, 25 Am. Rep. 429; Kewanee *v.* Depew, 80 Ill. 119, holding that one injured by a defective sidewalk in the daytime when his view of the walk is not obstructed, simply through his failure to look where he is walking, is guilty of contributory negligence.

Indiana.— Weinstein *v.* Terre Haute, 147 Ind. 556, 46 N. E. 1004.

Iowa.— Bender *v.* Minden, 124 Iowa 685, 100 N. W. 352; Yahn *v.* Ottumwa, 60 Iowa 429, 15 N. W. 257; Cressy *v.* Postville, 59 Iowa 62, 12 N. W. 757.

Kentucky.— Covington *v.* Manwaring, 113 Ky. 592, 68 S. W. 625, 24 Ky. L. Rep. 423.

Maine.— Lane *v.* Lewiston, 91 Me. 292, 39 Atl. 999; Gallagher *v.* Proctor, 84 Me. 41, 24 Atl. 459.

Michigan.— King *v.* Colon Tp., 125 Mich. 511, 84 N. W. 1077; Cloney *v.* Kalamazoo, 124 Mich. 655, 83 N. W. 618.

Mississippi.— Vicksburg *v.* Hennessey, 54 Miss. 391, 28 Am. Rep. 354.

Missouri.— Jennings *v.* Kansas City, 105 Mo. App. 677, 78 S. W. 1041.

New York.— Minick *v.* Troy, 83 N. Y. 514; Williams *v.* Port Leyden, 62 N. Y. App. Div. 490, 70 N. Y. Suppl. 1100; Jordan *v.* New York, 44 N. Y. App. Div. 149, 60 N. Y. Suppl. 696 [*affirmed* in 165 N. Y. 657, 59 N. E. 1124]; Stephenson *v.* Equitable Gas-Light Co., 60 Hun 77, 14 N. Y. Suppl. 67.

North Carolina.— Pinnix *v.* Durham, 130 N. C. 360, 41 S. E. 932.

Ohio.— Monroeville *v.* Weihl, 13 Ohio Cir. Ct. 689, 6 Ohio Cir. Dec. 188.

Pennsylvania.— Sickels *v.* Philadelphia, 209 Pa. St. 113, 58 Atl. 128; Shallcross *v.* Philadelphia, 187 Pa. St. 143, 40 Atl. 818; Boyle *v.* Mahanoy City, 187 Pa. St. 1, 40 Atl. 1093; Stackhouse *v.* Vendig, 166 Pa. St. 582, 31 Atl. 349; Robb *v.* Connellsville Borough, 137 Pa. St. 42, 20 Atl. 564 (holding one guilty of contributory negligence if she was walking along without paying any attention to the pavement or without looking or thinking of anything); Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399.

Rhode Island.— Nicholas *v.* Peck, 20 R. I. 523, 40 Atl. 418, 21 R. I. 404, 43 Atl. 1038, holding one guilty of contributory negligence as a matter of law who, being familiar with the sidewalk and the stones thereon projecting above the surface against which she struck her foot and around which she had been in the habit of going, met with the accident in the middle of a pleasant day when there was nothing to prevent her seeing the stones.

Virginia.— Charlottesville *v.* Failes, 103 Va. 53, 48 S. E. 511; Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387.

Wisconsin.— Hausmann *v.* Madison, 85 Wis. 187, 55 N. W. 167, 39 Am. St. Rep. 834, 21 L. R. A. 263.

Canada.— Gunlack *v.* Montreal, 17 Quebec Super. Ct. 294.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1678.

44. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

tion to signals of danger,[45] or fails to notice such structures as the necessities of commerce or the convenient occupation of dwelling-houses may require;[46] where he recklessly drives over rough streets,[47] or where he drives in one direction while looking in another.[48] A traveler upon a street, however, is not bound at his peril to discover every defect or obstruction, although it may be an open one;[49] but in exercising care and prudence he has a right to act upon the assumption as to unknown or latent defects that the street is in a reasonably good and safe condition for travel, and he is not contributorily negligent if while acting on that assumption he fails to discover and avoid a defect or obstruction which is not so obvious that a person in the exercise of ordinary care should have seen it,[50] or where the surrounding circumstances are such that he has no reason to apprehend

Connecticut.— Rowell *v.* Stamford St. R. Co., 64 Conn. 376, 30 Atl. 131.

District of Columbia.— Howes *v.* District of Columbia, 2 App. Cas. 188.

Michigan.— Howey *v.* Fisher, 122 Mich. 43, 80 N. W. 1004; Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339; Kornetzski *v.* Detroit, 94 Mich. 341, 53 N. W. 1106.

Missouri.— Buesching *v.* St. Louis Gas-Light Co., 6 Mo. App. 85.

New York.— Jordan *v.* New York, 44 N. Y. App. Div. 149, 60 N. Y. Suppl. 696 [*affirmed* in 165 N. Y. 657, 59 N. E. 1124]; Stephenson *v.* Equitable Gas-Light Co., 60 Hun 77, 14 N. Y. Suppl. 67; Conneughton *v.* Brooklyn, 7 Misc. 289, 27 N. Y. Suppl. 888.

Ohio.— Conneaut *v.* Naef, 54 Ohio St. 529, 44 N. E. 236.

Pennsylvania.— Boyle *v.* Mahanoy City, 187 Pa. St. 1, 40 Atl. 1093; Barnes *v.* Sowden, 119 Pa. St. 53, 12 Atl. 804.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1678.

45. Wilkins *v.* Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418; Durant *v.* Palmer, 29 N. J. L. 544.

46. Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823.

47. Hursen *v.* Chicago, 85 Ill. App. 298; Morris *v.* Interurban St. R. Co., 100 N. Y. App. Div. 295, 91 N. Y. Suppl. 479, driving automobile across street car tracks at a high rate of speed.

48. Tuffree *v.* State Centre, 57 Iowa 538, 11 N. W. 1; Benton *v.* Philadelphia, 198 Pa. St. 396, 48 Atl. 267.

49. Streator *v.* Hamilton, 61 Ill. App. 509; Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984.

50. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424; Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576.

California.— Barry *v.* Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55.

Georgia.— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois.—Wilmette *v.* Brachle, 110 Ill. App. 356 [*affirmed* in 209 Ill. 621, 71 N. E. 41]; Strehmann *v.* Chicago, 93 Ill. App. 206; Centralia *v.* Baker, 36 Ill. App. 46.

Indiana.— Indianapolis *v.* Gaston, 58 Ind. 224; Decatur *v.* Stoops, 21 Ind. App. 397, 52 N. E. 623; Kenyon *v.* Indianapolis, Wils. 129.

Iowa.— Cason *v.* Ottumwa, 102 Iowa 99, 71 Mo. 192.

Kansas.— Garnett *v.* Hamilton, 69 Kan. 866, 77 Pac. 583.

Maine.— Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912, holding that a traveler has the right to presume that he may drive with safety over all parts of a public street and is not required to leave his team in the middle of a street while stopping, but may drive to the side of the street near the curb.

Massachusetts.— Murphy *v.* Brooks, 109 Mass. 202.

Michigan.— Oesterreich *v.* Detroit, 137 Mich. 415, 100 N. W. 593.

Missouri.— Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Williams *v.* Hannibal, 94 Mo. App. 549, 68 S. W. 380; Burnes *v.* St. Joseph, 91 Mo. App. 489.

New Jersey.—Durant *v.* Palmer, 29 N. J. L. 544.

New York.— Morrison *v.* Syracuse, 175 N. Y. 523, 67 N. E. 1085 [*affirming* 53 N. Y. App. Div. 490, 65 N. Y. Suppl. 939]; Jennings *v.* Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459 [*affirming* 13 Daly 438]; Mogk *v.* New York, etc., Tel. Co., 78 N. Y. App. Div. 560, 79 N. Y. Suppl. 685; Cummings *v.* New Rochelle, 38 N. Y. App. Div. 583, 56 N. Y. Suppl. 701; Laverdure *v.* New York, 28 N. Y. App. Div. 65, 50 N. Y. Suppl. 882; Beltz *v.* Yonkers, 74 Hun 73, 26 N. Y. Suppl. 106 [*affirmed* in 148 N. Y. 67, 42 N. E. 401]; Clark *v.* Lockport, 49 Barb. 580; Sherman *v.* Oneonta, 21 N. Y. Suppl. 137; Wells *v.* Herman, 4 N. Y. St. 773.

North Carolina.—Neal *v.* Marion, 126 N. C. 412, 35 S. E. 812, 129 N. C. 345, 40 S. E. 116.

Pennsylvania.— Curry *v.* Erie, 209 Pa. St. 283, 58 Atl. 476; Dean *v.* New Castle, 201 Pa. St. 51, 50 Atl. 310; Manross *v.* Oil City, 178 Pa. St. 276, 35 Atl. 959; Brown *v.* Weaver, 1 Pa. Cas. 458, 5 Atl. 32.

Texas.— Houston *v.* Isaacks, 68 Tex. 116, 3 S. W. 693.

Washington.— Saylor *v.* Montesano, 11 Wash. 328, 39 Pac. 653.

Wisconsin.— Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317.

United States.— New York L. Ins. Co. *v.* Savage, 58 Fed. 338, 7 C. C. A. 260.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1678.

danger,[51] even though he had previously known of the defect.[52] Nor is such a person contributorily negligent from the mere fact that his attention was attracted in another direction at the time.[53]

e. Choice of Ways.[54] Where a person voluntarily elects to travel along a route which he knows to be unsafe or obviously dangerous, with knowledge of another safe and convenient way, he thereby assumes the risk of the chosen way, and if injured while traveling thereon is guilty of contributory negligence precluding a recovery;[55] as where, knowing of the dangerous condition of a sidewalk, he elects to walk thereon when he could have avoided the accident by taking the opposite side of the street which was safe,[56] or by walking in the road-

A spike projecting from a plank in a sidewalk, and loose planks in such a walk, are not of themselves such obvious defects as to charge a pedestrian with notice thereof as matter of law. Rusch *v.* Dubuque, 116 Iowa 402, 90 N. W. 80.

That the person injured had room to pass safely by a defect in a sidewalk, which occasioned her injury, is not of itself sufficient evidence to imperatively call for the conclusion that she was guilty of negligence in not so doing; but that with the fact that she was not thinking of the condition of the sidewalk is a circumstance to be considered in the absence of proof of previous knowledge. Gillrie *v.* Lockport, 12 N. Y. St. 707.

51. *Colorado.*— Denver *v.* Peterson, 5 Colo. App. 41, 36 Pac. 1111.

District of Columbia.— Washington Gas Light Co. *v.* Poore, 3 App. Cas. 127.

New York.— May *v.* Brooklyn, 19 N. Y. Suppl. 670.

Pennsylvania.— Carr *v.* Easton, 142 Pa. St. 139, 21 Atl. 822.

Texas.— Palestine *v.* Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1678.

52. Mishawaka *v.* Kirby, 32 Ind. App. 233, 69 N. E. 481; Bothell *v.* Seattle, 17 Wash. 263, 49 Pac. 491; Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322. And see *supra*, XIV, D, 6, c.

53. *California.*— Barry *v.* Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55.

Illinois.— Nokomis *v.* Salter, 61 Ill. App. 150.

Iowa.— Kaiser *v.* Hahn, 126 Iowa 561, 102 N. W. 504.

Massachusetts.— Talbot *v.* Taunton, 140 Mass. 552, 5 N. E. 616.

New Jersey.— Houston *v.* Traphagen, 47 N. J. L. 23.

Wisconsin.— Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Kenyon *v.* Mondovi, 98 Wis. 50, 73 N. W. 314; West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1678.

54. Traveling in the night-time see *infra*, XIV, D, 6, g.

55. *District of Columbia.*— Mosheuvel *v.* District of Columbia, 17 App. Cas. 401; District of Columbia *v.* Brewer, 7 App. Cas. 113.

Georgia.— Rome *v.* Baker, 107 Ga. 347, 33 S. E. 406.

Illinois.— Quincy *v.* Barker, 81 Ill. 300, 25 Am. Rep. 278 (holding a city not liable for a personal injury in daylight occasioned by an ice obstruction on a sidewalk where there was plenty of space on either side for the pedestrian to pass); Centralia *v.* Krouse, 64 Ill. 19; Peoria *v.* Walker, 47 Ill. App. 182.

Indiana.— Boswell *v.* Wakley, 149 Ind. 64, 48 N. E. 637.

Iowa.— Evans *v.* Iowa City, 125 Iowa 202, 100 N. W. 1112; Marshall *v.* Belle Plaine, 106 Iowa 508, 76 N. W. 797; Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281; Hartman *v.* Muscatine, 70 Iowa 511, 20 N. W. 859; Fulliam *v.* Muscatine, 70 Iowa 436, 30 N. W. 861; McGinty *v.* Keokuk, 66 Iowa 725, 24 N. W. 506; Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853.

Massachusetts.— Harvey *v.* Malden, 188 Mass. 133, 74 N. E. 327; Wilson *v.* Charlestown, 8 Allen 137, 85 Am. Dec. 693.

Michigan.— Irion *v.* Saginaw, 120 Mich. 295, 79 N. W. 572.

Minnesota.— Wright *v.* St. Cloud, 54 Minn. 94, 55 N. W. 819.

Missouri.— Cohn *v.* Kansas City, 108 Mo. 387, 18 S. W. 973; Ray *v.* Poplar Bluff, 70 Mo. App. 252.

New York.— Rogers *v.* Rome, 96 N. Y. App. Div. 427, 89 N. Y. Suppl. 130; Kleng *v.* Buffalo, 72 Hun 541, 25 N. Y. Suppl. 445 [*affirmed* in 156 N. Y. 700, 51 N. E. 1091]; Durkin *v.* Troy, 61 Barb. 437; Carolus *v.* New York, 6 Bosw. 15.

North Carolina.—Neal *v.* Marion, 126 N. C. 412, 35 S. E. 812, 129 N. C. 345, 40 S. E. 116.

Ohio.— Dayton *v.* Taylor, 62 Ohio St. 11, 56 N. E. 480; Farrelly *v.* Cincinnati, 2 Disn. 516 [*affirming* 3 Ohio Dec. (Reprint) 115, 3 Wkly. L. Gaz. 277].

Pennsylvania.— Smith *v.* New Castle, 178 Pa. St. 298, 35 Atl. 973; Lynch *v.* Erie City, 151 Pa. St. 380, 25 Atl. 43; Forker *v.* Sandy Lake, 130 Pa. St. 123, 18 Atl. 609; Crescent *v.* Anderson, 114 Pa. St. 643, 8 Atl. 379, 60 Am. Rep. 367; Boyle *v.* Mahanoy City, 19 Pa. Co. Ct. 195.

South Dakota.— Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315.

Wisconsin.— Devine *v.* Fond du Lac, 113 Wis. 61, 88 N. W. 913.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1679.

56. Lovenguth *v.* Bloomington, 71 Ill. 238; Centralia *v.* Krouse, 64 Ill. 19; Cohn *v.* Kan-

way.[57] But this rule applies only where the danger is so great and apparent that an ordinarily prudent person would regard it as dangerous and avoid it;[58] and the mere fact that the way he used was defective or obstructed, and that there was another and safer way which he might have taken, does not *per se* establish contributory negligence, if he exercised ordinary care, in accordance with the conditions existing at that place.[59] And in considering whether or not plaintiff exercised proper care in taking the route he did, the fact that such route was generally used by the public,[60] or that the alternative route was also dangerous,[61] or was long and difficult,[62] should be taken into consideration. The fact that the person injured chose the dangerous way does not constitute contributory negligence if he did not know of the danger;[63] nor does the fact that there was another and safer way;[64] nor is it negligence to use a way known to be merely defective,

sas City, 108 Mo. 387, 18 S. W. 973; Twogood *v.* New York, 12 Daly (N. Y.) 220 [*reversed* on other grounds in 102 N. Y. 216, 6 N. E. 275]; Lynch *v.* Erie City, 151 Pa. St. 380, 25 Atl. 43; Murphy *v.* Girardville, 16 Pa. Co. Ct. 153.

57. Cosner *v.* Centerville, 90 Iowa 33, 57 N. W. 636; Carolus *v.* New York, 6 Bosw. (N. Y.) 15; Forker *v.* Sandy Lake, 130 Pa. St. 123, 18 Atl. 609; Erie *v.* Magill, 101 Pa. St. 616, 47 Am. Rep. 739; Bohl *v.* Dell Rapids, 15 S. D. 619, 91 N. W. 315.

58. Mellor *v.* Bridgeport, 191 Pa. St. 562, 43 Atl. 365.

59. *Illinois.*— Waverly *v.* Henry, 67 Ill. App. 407; Morehouse *v.* Dixon, 39 Ill. App. 107.

Indiana.— Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Missouri.— Graney *v.* St. Louis, 141 Mo. 180, 42 S. W. 941.

New York.— Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 [*affirming* 34 Hun 607]; Wells *v.* Herman, 4 N. Y. St. 773.

Pennsylvania.— Mellor *v.* Bridgeport, 191 Pa. St. 562, 43 Atl. 365, holding that a person who uses a street or highway which is thrown open to public travel, knowing at the time that there is a safer route, which he might take to reach his destination, is not necessarily guilty of contributory negligence because he does not take the safe route.

Texas.— Dallas *v.* Muncton, (Civ. App. 1904) 83 S. W. 431, holding that one may travel on a street, although he knows it to be in an unsafe condition, and there are other streets on which he may travel to his destination, where the street is not in such a condition as to require him, in the use of ordinary care, to depart from his customary route.

Washington.— McClammy *v.* Spokane, 36 Wash. 339, 78 Pac. 912; Rowe *v.* Ballard, 19 Wash. 1, 52 Pac. 321.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1679.

A statute requiring that when persons shall meet, each shall drive to the right of the middle of the traveled way is to be considered in determining whether plaintiff exercised proper care to avoid a defect in a roadway, on which men were working. Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336.

60. Kokomo *v.* Boring, 24 Ind. App. 552, 57 N. E. 202; Ball *v.* El Paso, 5 Tex. Civ. App. 221, 23 S. W. 835.

61. Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984; Pascagoula *v.* Kirkwood, 86 Miss. 630, 38 So. 547; Evans *v.* Philadelphia, 205 Pa. St. 193, 54 Atl. 775, 97 Am. St. Rep. 732.

62. *Illinois.*— Danville *v.* Makemson, 32 Ill. App. 112.

Minnesota.— Erd *v.* St. Paul, 22 Minn. 443.

Pennsylvania.— Mellor *v.* Bridgeport, 191 Pa. St. 562, 43 Atl. 365.

Washington.— Jordan *v.* Seattle, 30 Wash. 298, 70 Pac. 743.

Wisconsin.— Cairncross *v.* Pewaukee, 86 Wis. 181, 56 N. W. 648.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1679.

63. *Connecticut.*— Carstesen *v.* Stratford, 67 Conn. 428, 35 Atl. 276.

Illinois.— Aurora *v.* Hillman, 90 Ill. 61.

Indiana.— Muncie *v.* Hey, 164 Ind. 570, 74 N. E. 250; Huntington *v.* Breen, 77 Ind. 29; Kokomo *v.* Boring, 24 Ind. App. 552, 57 N. E. 202; Bluffton *v.* McAfee, 23 Ind. App. 112, 53 N. E. 1058; Lyon *v.* Logansport, 9 Ind. App. 21, 35 N. E. 128.

Iowa.— Bussell *v.* Ft. Dodge, 126 Iowa 308, 101 N. W. 1126; Considine *v.* Dubuque, 126 Iowa 283, 102 N. W. 102; Hartman *v.* Muscatine, 70 Iowa 511, 30 N. W. 859.

Michigan.—Comiskie *v.* Ypsilanti, 116 Mich. 321, 74 N. W. 487.

Missouri.— Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 27 S. W. 615; Stephens *v.* Macon, 83 Mo. 345.

New York.— Wright *v.* Saunders, 65 Barb. 214 [*affirmed* in 3 Keyes 323, 1 Transcr. App. 263, 36 How. Pr. 136].

Ohio.— Cincinnati *v.* Frazer, 18 Ohio Cir. Ct. 50, 9 Ohio Cir. Dec. 487; Farrelly *v.* Cincinnati, 2 Disn. 516 [*affirming* 3 Ohio Dec. (Reprint) 115, 3 Wkly. L. Gaz. 277].

Pennsylvania.— Chilton *v.* Carbondale, 160 Pa. St. 463, 28 Atl. 833.

Wisconsin.— Perkins *v.* Fond du Lac, 34 Wis. 435.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1679.

64. Mt. Sterling *v.* Crummy, 73 Ill. App. 572; Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Wright *v.* Saunders, 65 Barb. (N. Y.) 214 [*affirmed* in 3 Keyes 323, 1 Transcr. App. 263, 36 How. Pr. 136].

but believed to be safe with ordinary caution.[65] It has been held that the fact that the dangerous way was not closed warrants travelers in using it, and excuses apparent negligence.[66]

f. Leaving Traveled Way — (I) *In General.* There is no rule of law requiring a traveler at his peril to keep in the usually traveled portion of a public way;[67] and the mere fact that a person is off the traveled portion of a street at the time he was injured does not constitute contributory negligence;[68] but he must exercise ordinary care and prudence in leaving the traveled way and going along at another place.[69]

(II) *Pedestrian Leaving Walkway.* It is not negligence *per se* for a pedestrian to step off or pass along the street elsewhere than on the sidewalk,[70] or to cross it elsewhere than at a cross walk,[71] particularly where he does so to avoid a dangerous sidewalk or crossing.[72] But he must exercise ordinary care and

65. Nichols v. Laurens, 96 Iowa 388, 65 N. W. 335.

66. Erie v. Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87, holding that if there were other streets by which the person injured might have reached his destination and he was hurt, the city was equally liable if it did not give notice or warning by closing up a street out of repair, or in some other way.

67. Ringelstein v. San Antonio, (Tex. Civ. App. 1893) 21 S. W. 634.

68. Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; Emery v. Philadelphia, 208 Pa. St. 492, 57 Atl. 977; Austin v. Ritz, 72 Tex. 391, 9 S. W. 884; Ringelstein v. San Antonio, (Tex. Civ. App. 1893) 21 S. W. 634.

69. Burr v. Plymouth, 48 Conn. 460 (holding that if a traveler errs in judgment in taking a side-track upon a highway when the main track is passable and safe, although the side-track is generally used, it is contributory negligence); Carolus v. New York, 6 Bosw. (N. Y.) 15; Austin v. Ritz, 72 Tex. 391, 9 S. W. 884; Biggs v. Huntington, 32 W. Va. 55, 9 S. E. 51 (holding that where a traveler unnecessarily, for his own convenience, leaves a highway, and in so doing meets with an accident outside of the highway, the city cannot be responsible no matter how near the highway the obstruction may be).

Where a person without any reasonable cause therefor drives out of the way prepared for travel, or carelessly allows his horse to get out of it, and thereby receives an injury, he cannot recover therefor. Carey v. Hubbardston, 172 Mass. 106, 51 N. E. 521.

70. *Georgia.*— Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389.

Kansas.— Junction City v. Blades, (1898) 52 Pac. 444; Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104, holding that a person unacquainted with a street is not guilty of contributory negligence in stepping toward the inside of a walk to avoid a crowd, and thereby stepping off and falling four or five feet to the ground.

North Carolina.— Neal v. Marion, 126 N. C. 412, 35 S. E. 812, 129 N. C. 345, 40 S. E. 116.

North Dakota.— Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427.

Pennsylvania.— Reed v. Schuylkill Haven Borough, 22 Pa. Super. Ct. 27, holding that the fact that plaintiff walked in the roadway instead of on the sidewalk for a considerable distance and returned to the sidewalk only when it was covered by an awning and the pavement was protected, the sidewalk at other places being icy, instead of being contributory negligence was of itself evidence of care.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1681.

But see Groveport v. Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411 [*affirmed* in 30 Cinc. L. Bul. 351], holding that where a pedestrian for his own convenience leaves the sidewalk which is in good condition and resorts to the street and in doing so sustains an injury while off of such sidewalk, he is guilty of such negligence as precludes a recovery.

71. *Iowa.*— Rea v. Sioux City, 127 Iowa 615, 103 N. W. 949; Bell v. Clarion, 113 Iowa 126, 84 N. W. 962, 115 Iowa 357, 88 N. W. 824; O'Langhlin v. Dubuque, 52 Iowa 746, 3 N. W. 655. *Compare* O'Langhlin v. Dubuque, 42 Iowa 539.

Kansas.— Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308.

Kentucky.— Glasgow v. Gillenwaters, 113 Ky. 381, 67 S. W. 381, 23 Ky. L. Rep. 2375; Louisville v. Johnson, 69 S. W. 803, 24 Ky. L. Rep. 685, holding that a pedestrian is not confined to the footway crossing, but if ignorant of any danger may cross a street at any point which suits his convenience without imputation of negligence.

Maryland.— Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

Michigan.— Baker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740.

Minnesota.— Collins v. Dodge, 37 Minn. 503, 35 N. W. 368.

New York.— Brusso v. Buffalo, 90 N. Y. 679; Bennett v. Sing Sing, 14 N. Y. Suppl. 463.

North Dakota.— Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427.

Ohio.— Durbin v. Napoleon, 21 Ohio Cir. Ct. 160, 11 Ohio Cir. Dec. 584.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1681.

72. East St. Louis v. Dougherty, 74 Ill.

precaution to avoid such dangerous defects or obstructions which he knows or has reasonable grounds to believe will beset him;[73] and in so crossing the traveler assumes the risk of danger ordinarily present in a street kept in an ordinarily safe condition;[74] but he does not assume the risk of injury, without his fault, from unnecessary defects or from obstructions and nuisances that are suffered to remain in the street through the negligence of the municipal authorities.[75]

g. Traveling in Night-Time — (i) *In General.* A person traveling on a street or public way in the night-time is required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness;[76] and ordinary care in the night-time may call for

App. 490; O'Laughlin *v.* Dubuque, 42 Iowa 539 (holding that in an action for injuries received in crossing a street not at a cross walk, but diagonally, plaintiff may recover if he shows that the cross walk was dangerous and that he avoided it and crossed on the street because it was dangerous); Laverdure *v.* New York, 28 N. Y. App. Div. 65, 50 N. Y. Suppl. 882.

73. *Colorado.*— Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729.

Georgia.— Zettler *v.* Atlanta, 66 Ga. 195.

Illinois.— Mattoon *v.* Worland, 97 Ill. App. 13; Monmouth *v.* Sullivan, 8 Ill. App. 50.

Iowa.— Rea *v.* Sioux City, 127 Iowa 615, 103 N. W. 949; Bell *v.* Clarion, 113 Iowa 126, 84 N. W. 962, 115 Iowa 357, 88 N. W. 824; Alline *v.* Le Mars, 71 Iowa 654, 33 N. W. 160; McLaury *v.* McGregor, 54 Iowa 717, 7 N. W. 91.

Kansas.— Junction City *v.* Blades, (1898) 52 Pac. 444.

Massachusetts.— Raymond *v.* Lowell, 6 Cush. 524, 53 Am. Dec. 57, holding plaintiff guilty of contributory negligence in not selecting a suitable place to cross.

Michigan.— Flater *v.* Fey, 70 Mich. 644, 38 N. W. 656.

Missouri.— Holding *v.* St. Joseph, 92 Mo. App. 143.

North Dakota.— Heckman *v.* Evenson, 7 N. D. 173, 73 N. W. 427.

Pennsylvania.— Easton *v.* Philadelphia, 26 Pa. Super. Ct. 517.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1681.

74. Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57 (holding that a person so crossing has no right to assume that the way from the sidewalk to the street is smooth and even, but must exercise a caution and prudence adapted to the nature of the case); Dayton *v.* Taylor, 62 Ohio St. 11, 56 N. E. 480; Durbin *v.* Napoleon, 21 Ohio Cir. Ct. 160, 11 Ohio Cir. Dec. 584; Belding *v.* Hamilton, 3 Ont. L. Rep. 318 (holding that a pedestrian who crosses a street at night at a place other than a crossing cannot recover for an injury caused by slipping in a depression which is not dangerous to horses or vehicles, since a foot passenger, although entitled to walk in the street, is not entitled to have it kept in any higher degree of repair than is necessary for the safety of horses and vehicles).

75. Durbin *v.* Napoleon, 21 Ohio Cir. Ct. 160, 11 Ohio Cir. Dec. 584.

76. *Illinois.*— Hutchison *v.* Collins, 90 Ill. 410.

Iowa.— Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

Kansas.— Ft. Scott *v.* Peck, 5 Kan. App. 593, 49 Pac. 111.

Michigan.— Smith *v.* Jackson, 106 Mich. 136, 63 N. W. 982.

Missouri.— Ray *v.* Poplar Bluff, 70 Mo. App. 252.

Montana.— May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759.

Nebraska.— Ponca *v.* Crawford, 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144.

New York.— O'Brien *v.* Syracuse, 31 N. Y. App. Div. 328, 52 N. Y. Suppl. 224; Wright *v.* Saunders, 65 Barb. 214 [*affirmed* in 3 Keyes 323, 1 Transcr. App. 263, 36 How. Pr. 136].

North Carolina.— Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823, holding that a person walking at night on a sidewalk is only required to use ordinary care to avoid defects in the sidewalk and is not required to remember the location of defects he may have seen during the day, and to use more than ordinary care to avoid injury therefrom.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762; Newark *v.* McDowell, 16 Ohio Cir. Ct. 556, 9 Ohio Cir. Dec. 260.

Oklahoma.— Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

Pennsylvania.— Scranton *v.* Hill, 102 Pa. St. 378, 48 Am. Rep. 211, holding that where a pedestrian leaves the public street intentionally at night in order to take a by-path, but misses the path and is injured by falling off the end of a culvert, he cannot be allowed to recover.

Texas.— Dallas *v.* Webb, 22 Tex. Civ. App. 48, 54 S. W. 398.

Wisconsin.— Gutkind *v.* Elroy, 97 Wis. 649, 73 N. W. 325.

Canada.— Belling *v.* Hamilton, 3 Ont. L. Rep. 318.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1682.

A collision with a boulder in an unlighted city street, which had been used and traveled for years, while plaintiff was driving slowly along the center of the street on a dark night, without knowledge of the boulder, is not contributory negligence. May *v.* Anaconda, 26 Mont. 140, 66 Pac. 759.

greater caution than in the daytime.[77] In exercising ordinary care a traveler at night, in the absence of knowledge to the contrary, has the right to act on the assumption that the street or way is in a reasonably safe condition for travel by night as well as by day,[78] and is not bound to anticipate that he will encounter excavations, without having some notice thereof by lights, or without other precautions taken for his protection.[79] A failure to use prudence commensurate with obvious conditions constitutes negligence.[80] It is not negligence *per se* for a traveler to run or to trot his horse at night,[81] or to drive a blind horse after dark;[82] but it is contributory negligence to drive at a trot along a street on a dark night in close proximity to danger signals, which were seen at some distance.[83]

(11) *With Knowledge of Danger.* The mere fact that one, knowing of a defect or obstruction, travels on a street or public way after dark, although it is a circumstance tending to show negligence, does not *per se* constitute contributory

77. Hall *v.* Manson, 90 Iowa 585, 58 N. W. 881; Stier *v.* Oskaloosa, 41 Iowa 353.

78. *Delaware.*— Seward *v.* Wilmington, 2 Marv. 189, 42 Atl. 451; Robinson *v.* Wilmington, 8 Houst. 409, 32 Atl. 347.

Illinois.— Vieths *v.* Skinner, 47 Ill. App. 325.

Indiana.— Noblesville Gas, etc., Co. *v.* Loehr, 124 Ind. 79, 24 N. E. 579.

Iowa.— Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281.

Kansas.— Rainey *v.* Lawrence, 70 Kan. 518, 79 Pac. 116.

Massachusetts.— Pollard *v.* Woburn, 104 Mass. 84.

Minnesota.— Collins *v.* Dodge, 37 Minn. 503, 35 N. W. 368, holding plaintiff not guilty of contributory negligence in turning into an unimproved street in the night-time at a place other than the regular crossing.

Missouri.— Conner *v.* Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; Holloway *v.* Kansas City, 184 Mo. 10, 82 S. W. 89; Hitt *v.* Kansas City, 110 Mo. App. 713, 85 S. W. 669.

Nebraska.— Lincoln *v.* Walker, 18 Nebr. 244, 250, 20 N. W. 113, 25 N. W. 66.

New York.— Bly *v.* Whitehall, 120 N. Y. 506, 24 N. E. 943 [*affirming* 14 N. Y. St. 294]; Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341]; Collett *v.* New York, 51 N. Y. App. Div. 394, 64 N. Y. Suppl. 693; Wright *v.* Saunders, 65 Barb. 214 [*affirmed* in 3 Keyes 323, 1 Transcr. App. 263, 36 How. Pr. 136].

North Carolina.— Neal *v.* Marion, 126 N. C. 412, 35 S. E. 812, 129 N. C. 345, 40 S. E. 116.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Pennsylvania.— Bloomsburg Steam, etc., Co. *v.* Gardner, 126 Pa. St. 80, 17 Atl. 521, where he had passed over it earlier on the same day and found it safe.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1682.

A traveler at night has a right to presume that there are no hidden or secret dangers, and that streets, passages, or footways, without warning, may be traversed safely, and should he in the night-time step into a hole existing by reason of want of diligence on the part of the city, the city would be liable, although such danger existing in the daytime, which he could see and which he ran into, would be contributory negligence. Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451.

79. Chicago *v.* Harris, 113 Ill. App. 633; Wright *v.* Saunders, 65 Barb. (N. Y.) 214 [*affirmed* in 3 Keyes 323, 1 Transcr. App. 263, 36 How. Pr. 136]. And see cases cited in preceding notes.

80. *Indiana.*— Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209, disregarding danger signals.

Iowa.— Perry *v.* Cedar Falls, 87 Iowa 315, 54 N. W. 225, in which case it was held that plaintiff was guilty of contributory negligence in driving where it was so dark that he could not see.

Kentucky.— Carroll *v.* Louisville, 117 Ky. 758, 78 S. W. 1117, 25 Ky. L. Rep. 1888.

Maine.— Knowlton *v.* Augusta, 84 Me. 572, 24 Atl. 1039.

Missouri.— Holding *v.* St. Joseph, 92 Mo. App. 143, holding that crossing the sidewalk into the street at an unusual place on a dark night, without proper caution, is contributory negligence.

Pennsylvania.— Kaseman *v.* Sunbury, 197 Pa. St. 162, 46 Atl. 1032.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1682.

A traveler riding with another as his guest on a dark night along an unlighted street with an equal opportunity to discover and avoid danger, and with equal knowledge that they are driving at a reckless speed, is guilty of such negligence as precludes recovery against the city for injuries sustained by a collision with a water hydrant at its proper place in the street. Vincennes *v.* Thuis, 28 Ind. App. 523, 63 N. E. 315.

81. Sweet *v.* Poughkeepsie, 97 N. Y. App. Div. 82, 89 N. Y. Suppl. 618.

82. Brackenridge *v.* Fitchburg, 145 Mass. 160, 13 N. E. 457.

83. Smith *v.* Jackson, 106 Mich. 136, 63 N. W. 982.

negligence,[84] particularly where the knowledge was acquired sometime before,[85] or the route selected by him was the one ordinarily traveled by the public.[86] All the law requires is that he exercise ordinary care commensurate with the danger of which he has knowledge, taking into consideration the fact of darkness;[87] although more caution is required in such case, than if he were ignorant of the defect or obstruction, or if there were no defect, and it was daylight.[88] It is negligence for him to fail to exercise such care and caution as the fact of such knowledge, of the darkness, or other circumstances would reasonably require of an ordinarily prudent man,[89] as where at night he voluntarily uses a dangerous

84. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Illinois.— Clayton *v.* Brooks, 150 Ill. 97, 37 N. E. 574 [*affirming* 31 Ill. App. 62]; Ottawa *v.* Hayne, 114 Ill. App. 21 [*affirmed* in 214 Ill. 45, 73 N. E. 385], holding that it is not necessarily contributory negligence for a person to run along an obstructed sidewalk on a rainy night with his head down, close to the building line, notwithstanding he may have been familiar with such sidewalk and knew its ordinary condition.

Kansas.— Maultby *v.* Leavenworth, 28 Kan. 745.

Massachusetts.— McGuinness *v.* Worcester, 160 Mass. 272, 35 N. E. 1068, holding that if a reasonably intelligent person could not have understood the danger, then plaintiff's knowledge of the defect was not in law negligence, but was to be considered with other facts to determine whether a reasonably intelligent and prudent person would have stepped on the dangerous sidewalk.

Michigan.— Schwingschlegl *v.* Monroe, 113 Mich. 683, 72 N. W. 7.

Minnesota.— Taylor *v.* Mankato, 81 Minn. 276, 83 N. W. 1084, holding that one who, while traveling along a public thoroughfare in the suburbs of a city on a dark night, with knowledge of a defect in the sidewalk, leaves the road and takes the walk and is injured by falling into an opening, which he is trying to avoid, is not as a matter of law guilty of contributory negligence.

Missouri.— Flynn *v.* Neosho, 114 Mo. 567, 21 S. W. 903; Loewer *v.* Sedalia, 77 Mo. 431; Burnes *v.* St. Joseph, 91 Mo. App. 489.

Montana.— Cannon *v.* Lewis, 18 Mont. 402, 45 Pac. 572.

New York.— Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165 (holding that the fact that a pedestrian at night-time attempts to walk over a sidewalk which he knows is covered with ice does not establish, as a matter of law, negligence on his part); Colburn *v.* Canandaigua, 15 N. Y. St. 668 [*affirmed* in 114 N. Y. 617, 20 N. E. 880].

Texas.— Hillsboro *v.* Jackson, 18 Tex. Civ. App. 325, 44 S. W. 1010.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1683.

Knowledge that a town is laying waterways does not charge one, stepping in the dark into an unguarded excavation therefor close to a sidewalk crossing on which he has undertaken to cross the street, with negligence in not discovering and avoiding the excavation. Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207.

85. Finn *v.* Adrian, 93 Mich. 504, 53 N. W. 614.

86. Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

87. *Illinois.*— Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*affirming* 27 Ill. App. 43]; Pana *v.* Taylor, 56 Ill. App. 60.

Indiana.— Bloomington *v.* Rogers, 13 Ind. App. 121, 41 N. E. 395.

Iowa.— Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833, holding that if plaintiff, knowing of the defect, reasonably believed that it was not imprudent to go upon the walk, and had the right as a reasonably prudent man to so believe, his going upon the walk would not be negligence, and if, after going thereon, he used such care as an ordinarily prudent man would use under the circumstances, it is not contributory negligence.

Massachusetts.— McGuinness *v.* Worcester, 160 Mass. 272, 35 N. E. 1068; Barton *v.* Springfield, 110 Mass. 131.

Michigan.— Sias *v.* Reed City, 103 Mich. 312, 61 N. W. 502.

New York.— Walsh *v.* Central New York Tel., etc., Co., 176 N. Y. 163, 68 N. E. 146 [*reversing* 75 N. Y. App. Div. 1, 77 N. Y. Suppl. 798]; Scanlon *v.* Watertown, 14 N. Y. App. Div. 1, 43 N. Y. Suppl. 618; Parcells *v.* Auburn, 77 Hun 137, 28 N. Y. Suppl. 471.

North Carolina.— Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823.

Washington.— McQuillan *v.* Seattle, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1683.

88. Bedford *v.* Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; Kinsley *v.* Morse, 40 Kan. 577, 20 Pac. 217. *Compare* Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*affirming* 27 Ill. App. 43].

89. *California.*— Davis *v.* California St. Cable R. Co., 105 Cal. 131, 38 Pac. 647.

Indiana.— Bedford *v.* Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; Indianapolis *v.* Cook, 99 Ind. 10 (holding that one who, knowing of the existence of an obstruction in the sidewalk, stumbles over it in the dark, is guilty of contributory negligence); Bruker *v.* Covington, 69 Ind. 33, 35 Am. Rep. 202; Rogers *v.* Bloomington, 22 Ind. App. 601, 52 N. E. 242.

Kansas.— Corlett *v.* Leavenworth, 27 Kan. 673.

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quently becomes dangerous,[99] or who has failed to exercise reasonable care with regard to building material piled in the street.[1] But it is not negligence to fail to guard against accidents which cannot reasonably be anticipated.[2] A contractor with a street railroad company who digs a trench parallel to the track is not liable to a passenger upon a car of the company in case he has provided suitable bridges to enable the company to permit passengers to alight in safety.[3] But one excavating a trench across a city street is required to keep it properly guarded, and is not relieved from liability for an injury caused by a failure to do so by the fact that this duty, with his knowledge, had been assumed by a street railroad company for the purpose of facilitating the movement of its cars.[4] In order to impose liability for causing a defect in a public highway it is not necessary that the highway should ever have been formally accepted by the city or improved.[5]

(II) *Liabilities of Abutting Owners.* In the absence of statute a property-owner is under no obligation to repair the street in front of his premises and is not liable for an injury resulting from a defect therein which does not result from his affirmative action.[6] But where for his own convenience he has interfered with the street, rendering it less safe for use, he is liable to any person who in the exercise of due care sustains injury by reason of his act.[7] Where an adjoining

v. San Antonio, (Tex. Civ. App. 1894) 25 S. W. 1131, holding that where a railroad company, with permission of the city, digs a ditch across a street and permits it to remain unguarded, if the city becomes liable for injuries received by one falling into such ditch, the railroad company is also liable.

Keeping guards in position.—Where guards placed around excavations made by defendant in a street in a thickly settled neighborhood are liable to be thrown down by boys, it is defendant's duty to station a man to see that the guards are kept up. Crawford *v.* Wilson, etc., Mfg. Co., 8 Misc. (N. Y.) 48, 28 N. Y. Suppl. 514 [*affirmed* in 144 N. Y. 708, 39 N. E. 857].

Impracticability of guarding.—It was gross negligence on the part of a light and power company to leave entirely unguarded an excavation in the street, where passengers alighting from street cars were likely to fall into it, although, owing to its proximity to the street car track, it may have been impracticable to fence it in the mode prescribed by a city ordinance. Macdonald *v.* St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001.

99. Reeves *v.* Larkin, 19 Mo. 192.

Acceptance of the work by the city will not relieve the person from liability. Dillon *v.* Washington Gas Light Co., 1 MacArthur (D. C.) 626.

1. Ramsey *v.* National Contracting Co., 49 N. Y. App. Div. 11, 63 N. Y. Suppl. 286 (holding that where defendant caused iron rails to be piled in a street in such manner that a boy who sat on them was injured by a rail slipping with him from the pile, defendant was liable, since it was bound to exercise such care as to render the obstruction reasonably safe in view of the fact that pedestrians would probably step on it, and children play about and sit on it); Earl *v.* Crouch, 10 N. Y. Suppl. 882; Thomas *v.* Hook, 4 Phila. (Pa.) 119 (holding that one who leaves a heavy mass of timber standing unguarded in a city street is responsible for the injury that may result from its being thrown down by the wind on a passer-by, although there is no proof that he put it in the place where it fell, or that it was not negligently removed there by someone else from the spot where he negligently left it, in the first instance). *Compare* Kramer *v.* Southern R. Co., 127 N. C. 328, 37 S. E. 468, 52 L. R. A. 359.

Obstruction caused by contractor with plaintiff.— The fact that an obstruction was caused by one who was constructing a building under contract with plaintiff will not prevent a recovery. Rochester *v.* Montgomery, 72 N. Y. 65.

2. Sikes *v.* Sheldon, 58 Iowa 744, 13 N. W. 53, holding that the fact that defendant, while he took his horses into a stable near by, left a sleigh about eleven feet from one sidewalk and sixty-three feet from the other, with the tongue suspended by the neck-yoke in such a way that a runaway horse struck the tongue and knocked the neck-yoke on to the head of plaintiff who was passing on the nearest sidewalk, does not show negligence. See also Nilan *v.* Richmond County Gas Light Co., 1 N. Y. App. Div. 234, 37 N. Y. Suppl. 259.

3. Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336.

4. Boston *v.* Coon, 175 Mass. 283, 56 N. E. 287.

5. Beck *v.* Carter, 68 N. Y. 283, 23 Am. Rep. 175; Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431. See, generally, *supra*, XIV, D, 2.

Establishment of street see *supra*, XII, A, 2.

6. Eustace *v.* Jahns, 38 Cal. 3; Sneeson *v.* Kupfer, 21 R. I. 560, 45 Atl. 579.

7. Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 27 S. W. 615, holding that it is, as a question of law, actionable negligence on the part of a manufacturer to obstruct for weeks the street in front of his premises for the purpose of receiving and discharging his goods.

landowner makes a rightful use of the street for the deposit of building materials[8] he is not under ordinary circumstances charged with the duty to render them safe for persons using them for their own purposes, whether of pleasure, convenience, or profit.[9] He must, however, exercise due care for the safety of travelers[10] and exercise reasonable diligence in providing warning signals during periods of darkness.[11]

(III) *PUBLIC CONTRACTORS.* A person engaged in work under contract with a city is not liable for acts performed in pursuance of such contract in the absence of negligence;[12] but he is bound to use due care to protect persons lawfully using the street from injury,[13] and the same rule applies to one employed by the

Lumber piles.— One maintaining lumber piles on a street without authority is liable to one injured because thereof without fault of his own. McKune *v.* Santa Clara Valley Mill, etc., Co., 110 Cal. 480, 42 Pac. 980; Smith *v.* Davis, 22 App. Cas. (D. C.) 298; Covington Saw Mill, etc., Co. *v.* Drexilius, 120 Ky. 493, 87 S. W. 266, 27 Ky. L. Rep. 903, 117 Am. St. Rep. 593; Holly *v.* Bennett, 46 Minn. 386, 49 N. W. 189, holding a complaint for damages resulting from injury to a minor child, caused by the fall of a stick of timber from defendants' lumber pile, alleged to have been carelessly and insecurely constructed in the street, to state a cause of action.

Obstruction of public alley.— The owner of the abutting premises who maintains a dangerous obstruction in an alley is liable for injuries resulting. Osage City *v.* Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56. Where the owner of land abutting on a public alley digs a blind ditch in the alley for its own benefit and without permission of the municipal authorities, the duty to keep the ditch in repair rests upon the property-owner. Covington Saw Mill, etc., Co. *v.* Drexilius, 120 Ky. 493, 87 S. W. 266, 27 Ky. L. Rep. 903, 117 Am. St. Rep. 593.

Persons toward whom liability exists.— Where a boy, on his way home from a game of ball, sits down near lumber piled in the street without authority, and, without fault on the part of the boy, the lumber falls on him, the person piling the lumber is liable for the injuries. Kessler *v.* Berger, 205 Pa. St. 289, 54 Atl. 887, 61 L. R. A. 611.

8. See *supra*, XII, A, 7.

9. Friedman *v.* Snare, etc., Co., 71 N. J. L. 605, 61 Atl. 401, 108 Am. St. Rep. 764, 70 L. R. A. 147. See also Pueschell *v.* Kansas City Wire, etc., Works, 79 Mo. App. 459, holding that for the purpose of erecting a building, a reasonably necessary portion of the street may be withdrawn from public use for piling material, etc.; and when so withdrawn the building contractor is under no obligation to keep such withdrawn space in proper condition for public travel, or a playground for children.

Invitation to children.— That building materials lying in a street may be attractive to children as a place for play or as a resting place does not impose on the landowner a duty to so arrange them as to render them safe for such purposes. Friedman *v.* Snare, etc., Co., 71 N. J. L. 605, 61 Atl. 401, 108 Am. St. Rep. 764, 70 L. R. A. 147. But *compare* Harper *v.* Kopp, 73 S. W. 1127, 24 Ky. L. Rep. 2342, holding that one who, without necessity or license, left a dangerous pile of lumber in a public street where small children were in the habit of playing, was not relieved from liability because the lumber was not negligently stacked.

10. Christman *v.* Meierhoffer, 116 Mo. App. 46, 92 S. W. 141. See Wood *v.* Mears, 12 Ind. 515, 74 Am. Dec. 222, holding that a compliance by a builder with a city ordinance regulating the placing of materials in the street will protect him against an action by a person falling over the pile of materials.

11. Christman *v.* Meierhoffer, 116 Mo. App. App. 46, 92 S. W. 141, holding that a property-owner, piling in the street in front of his premises materials for use in constructing a sidewalk, is not relieved of the duty of placing a warning light upon the obstruction by the fact that it was the custom of the city to light the street lights early enough to disclose the presence of the obstruction.

12. Thieme *v.* Gillen, 41 Hun (N. Y.) 443; Cunningham *v.* Wright, 28 Hun (N. Y.) 178. See Kulwicki *v.* Munro, 95 Mich. 28, 54 N. W. 703.

13. Barton *v.* McDonald, 81 Cal. 265, 22 Pac. 855 (holding that where a contractor, in violation of a city ordinance, leaves a hole unguarded by light or barriers in a public street which he is repairing, he is responsible to one injured thereby without contributory negligence); Reilly *v.* Sicilian Asphalt Paving Co., 16 Misc. (N. Y.) 65, 37 N. Y. Suppl. 638 (holding that an asphalt company, leaving a bank of gravel about four feet from the gutter, without a light, is liable to one driving over it in the night, and injured thereby, although piles of asphalt, about twenty feet distant from the gravel, but nearer the gutter, have lights thereon); Zehnder *v.* Miller, 6 Phila. (Pa.) 556 (holding that particular safeguards to a ditch were insufficient).

Unforeseen results.— Where a company placed planking four inches thick over a hole which it had lawfully made in the pavement at some distance from the usual crossing, and at a point where there was heavy traffic, and the street was well lighted, it was not guilty of negligence rendering it liable for injuries to a pedestrian caused by stub-

state.[14] In case the city has assumed control of a structure placed in the street by a contractor, it and not the contractor is liable for a resulting injury.[15] A provision in a contract for public work by which the contractor agrees to indemnify the city for any damages occasioned by his negligence does not impose liability upon the contractor for acts done at the express direction of the municipal authorities,[16] in case the contractor has not been negligent;[17] and a third person cannot avail himself of a provision imposing upon the contractor, as between himself and the city, liability for acts of subcontractors.[18] A mere contract to light the streets of a city will not impose liability upon the contractor toward an individual injured by the fact that the streets are improperly lighted.[19] But where a lighting company agrees to keep its lamps and lamp posts in repair, it has been held that an individual injured by non-performance of the duty so imposed may sue.[20] A statute requiring persons operating steam engines on the highway, on meeting travelers, to stop until they have passed, applies only to moving engines on the county roads, and does not regulate the movements of steam rollers on the streets of cities.[21]

b. Sidewalks — (I) *In General.* Any person who for his own private purposes interferes with a sidewalk and fails to restore it to a safe condition is guilty of a nuisance and liable to any person sustaining injury thereby.[22]

(II) *Lack of Repair.* In the absence of statute, an abutting owner is not liable for injuries occasioned to a person through failure to maintain a sidewalk in repair,[23] and such liability will not grow out of a statute or ordinance authoriz-

bing her toe on the planking. Derby *v.* Degnon-McLean Contracting Co., 112 N. Y. App. Div. 324, 98 N. Y. Suppl. 592 [*affirmed* in 188 N. Y. 631, 81 N. E. 1163]. See also Carr *v.* Degnon Contracting Co., 48 Misc. (N. Y.) 531, 96 N. Y. Suppl. 277.

Subsidence of material.—A contractor with the city for work requiring excavation in the street is bound not only to leave his work in proper condition for the time, but to anticipate and provide for the natural effect of rains upon the earth excavated and replaced. Southern Express Co. *v.* Texarkana Water Co., 54 Ark. 131, 15 S. W. 361; Johnson *v.* Friel, 50 N. Y. 679.

Necessity of responsibility of city.— The contractor's liability does not depend on the authority of his employer to have the street repaired, or whether the employer would be responsible for the injury. Barton *v.* McDonald, 81 Cal. 265, 22 Pac. 855.

14. Bliss *v.* Schaub, 48 Barb. (N. Y.) 339, holding that one who digs a hole in a public street, and leaves the same open and unprotected, is liable for damages to others arising therefrom, even though he is in the employ of the state, and acts under its control in digging the hole.

15. Burnes *v.* St. Joseph, 91 Mo. App. 489, a hydrant built by a water company under contract with the city, then leased to the city, the water company being only required to supply it with water.

16. Kulwicki *v.* Munro, 95 Mich. 28, 54 N. W. 703.

Contracts for indemnity see INDEMNITY, 22 Cyc. 78.

Right of person for whose benefit contract is made to sue thereon see, generally, CONTRACTS, 9 Cyc. 374 *et seq.*

17. Charlock *v.* Freel, 50 Hun (N. Y.) 395, 3 N. Y. Suppl. 226 [*affirmed* in 125 N. Y. 357, 26 N. E. 262], holding that one who has contracted to make a sewer in the streets of a city, and to save the city harmless from all suits arising from negligence in guarding the same, is liable to a person injured in consequence of such neglect, although the work was to be done under the direction of the city engineer.

18. Haefelin *v.* McDonald, 96 N. Y. App. Div. 213, 89 N. Y. Suppl. 395. But *compare* St. Paul Water Co. *v.* Ware, 16 Wall. (U. S.) 566, 21 L. ed. 485, holding, where there was an agreement between a city and an incorporated aqueduct company that the latter would protect all persons injured by reason of excavations made by them in laying pipes, that a person injured through a defect or want of repair in a street occasioned by the neglect in doing the work of the contracting party, or of those for whose acts he is responsible, may, at his election, sue the contracting party for redress, or pursue his remedy against the municipality.

Liability for acts of independent contractors in general see MASTER AND SERVANT, 26 Cyc. 1546 *et seq.*

19. Montgomery *v.* Halse, (Ala. 1906) 40 So. 665.

20. Lampert *v.* Laclede Gaslight Co., 14 Mo. App. 376, holding that where a gaslight company permitted a fallen lamp post to remain in the street, causing injury to one who stumbled over it, such company was liable therefor.

21. Kerney *v.* Barber Asphalt Paving Co., 86 Mo. App. 573.

22. Smith *v.* Ryan, 8 N. Y. Suppl. 853 [*affirmed* in 130 N. Y. 653, 29 N. E. 1033]; O'Hanlin *v.* Carter Oil Co., (W. Va. 1904) 46 S. E. 565.

23. *California.*— Martinovich *v.* Wooley, 128 Cal. 141, 60 Pac. 760.

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owner[32] or other person[33] may be liable for a special and peculiar injury caused by his own artificial accumulation of snow or ice upon the sidewalk, as by the discharge of water at a time when the natural result would be to form ice.[34] The liability is confined to what a reasonable man might anticipate and the owner is required to do only what is reasonably necessary to prevent the injury;[35] but when he knows that a nuisance has been created he then becomes absolutely liable until he has remedied it.[36] A statute limiting the liability of cities and towns to persons injured by reason of snow and ice does not apply to abutting owners.[37]

(IV) *Area Ways, Coal Holes and Other Permanent Openings.* An abutting owner who maintains a coal hole or other covered opening in a sidewalk without authority from the municipality is usually regarded as maintaining a nuisance and liable for all injuries sustained by a passer-by therefrom.[38] In case,

Massachusetts.— Kirby *v.* Boylston Market Assoc., 14 Gray 249, 74 Am. Dec. 682.

Michigan.— Taylor *v.* Lake Shore, etc., R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457.

New York.— Moore *v.* Gadsden, 93 N. Y. 12; Fuchs *v.* Schmidt, 8 Daly 317; Harkin *v.* Crumbie, 14 Misc. 439, 35 N. Y. Suppl. 1027.

Pennsylvania.— New Castle *v.* Kurtz, 210 Pa. St. 183, 59 Atl. 989.

Rhode Island.— Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1686.

32. Rohling *v.* Eich, 23 N. Y. App. Div. 179, 48 N. Y. Suppl. 892. And see cases cited *infra*, note 34.

Piling up snow.— Where the proprietor of premises abutting on a sidewalk piled up snow thereon in such an accumulated mass as to interfere with travel or by means of the operation of natural causes which he ought to have foreseen to create danger by its melting and freezing, he was liable for injuries resulting therefrom to a pedestrian who was herself in the exercise of due care. Dahlin *v.* Walsh, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. N. S. 615.

33. Canfield *v.* Chicago, etc., R. Co., 78 Mich. 356, 44 N. W. 385.

34. Brown *v.* White, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321.

Discharge from roofs.—Where the owner of a building negligently maintains a leader from the roof of the building so as to discharge on the sidewalk, so that ice accumulates thereon, and the walk becomes dangerous, he is liable to any person injured thereby. Davis *v.* Rich, 180 Mass. 235, 62 N. E. 375; Leahan *v.* Cochran, 178 Mass. 566, 60 N. E. 382, 86 Am. St. Rep. 506, 53 L. R. A. 891; Shipley *v.* Proctor, 177 Mass. 498, 59 N. E. 119; Tremblay *v.* Harmony Mills, 171 N. Y. 598, 64 N. E. 501. But *compare* Wenzlick *v.* McCotter, 87 N. Y. 122, 41 Am. Rep. 358 [*reversing* 22 Hun 60], holding that where a pipe discharging water from the roof of a building on the sidewalk is constructed with due care, the owner of the building is not liable for an injury occasioned by a person slipping on ice which had formed by water escaping from such pipe, in the absence of any municipal ordinance prohibiting such mode of carrying off water from the roof of the building.

Drippings from awning.— One who maintains an awning so constructed that water collected thereon flows off upon the sidewalk is liable for injuries to a person caused by slipping upon the ice formed by the freezing of the water. McConnell *v.* Bostelmann, 72 Hun (N. Y.) 238, 25 N. Y. Suppl. 390.

Railroad water tank.— Where a railroad company, without a license from the city, allows water to flow from its tank upon the sidewalk of a street, where it freezes, the company is liable to persons who are injured by falling on the ice. Canfield *v.* Chicago, etc., R. Co., 78 Mich. 356, 44 N. W. 385; Thuringer *v.* New York Cent., etc., R. Co., 71 Hun (N. Y.) 526, 24 N. Y. Suppl. 1087, 82 Hun 33, 31 N. Y. Suppl. 419; McGoldrick *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 914 [*affirmed* in 142 N. Y. 640, 37 N. E. 567].

Where defendant did not continue nuisance.— Where one buys premises having upon them, or on the boundary line, a pipe discharging water from the roof for the accommodation of his and adjoining premises, but changes the flow and does not use the pipe for his own premises, but the pipe continues to discharge the water from the adjoining premises, he is not liable to one who, passing along the sidewalk, falls upon ice formed by such discharge and is injured. Wenzlick *v.* McCotter, 87 N. Y. 122, 41 Am. Rep. 358 [*reversing* 22 Hun 60].

Effect of custom.— Defendant is not relieved from liability to a person injured by his draining water from his house over the sidewalk, through an uncovered drain, forming a ridge of ice, by evidence that in that borough it was customary to so drain water, it not being shown that this was necessary. Brown *v.* White, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321.

35. Davis *v.* Rich, 180 Mass. 235, 62 N. E. 375; New Castle *v.* Kurtz, 210 Pa. St. 183, 59 Atl. 989, 105 Am. St. Rep. 798, 69 L. R. A. 488.

36. Davis *v.* Rich, 180 Mass. 235, 62 N. E. 375.

37. Shipley *v.* Proctor, 177 Mass. 498, 59 N. E. 119.

38. Calder *v.* Smalley, 66 Iowa 219, 23 N. W. 638, 55 Am. Rep. 270; O'Malley *v.* Gerth, 67 N. J. L. 610, 52 Atl. 563; Congreve

however, such opening is maintained under municipal authority or permission the owner is liable only in case of negligence in its construction or repair.[39] But in some jurisdictions negligence is made the test of liability in either case.[40] In any event where the owner fails to properly guard or protect an open coal hole, cellar, area way, or other opening,[41] or maintains a defective cover over such an opening,[42] so that passage is not reasonably safe to persons traveling in the street, he is liable in case of injury sustained by them.

(v) *Excavations.* An abutting owner who for his own private purposes makes an excavation in a sidewalk and fails to restore it to a safe condition,[43] or who fails to keep the excavation safely guarded while open,[44] is liable to a person injured thereby, and it is immaterial that there is a safe walk upon the other side

v. Smith, 18 N. Y. 79; Clifford *v.* Dam, 44 N. Y. Super. Ct. 391 [*affirmed* in 81 N. Y. 52]; Irvin *v.* Fowler, 5 Rob. (N. Y.) 482; Berger *v.* Content, 47 Misc. (N. Y.) 390, 94 N. Y. Suppl. 12.

Recovery over by city against abutter see INDEMNITY, 22 Cyc. 96 text and note 6.

39. Calder *v.* Smalley, 66 Iowa 219, 23 N. W. 638, 55 Am. Rep. 270; Schubkegel *v.* Butler, 76 N. Y. App. Div. 10, 78 N. Y. Suppl. 644; Cottrell *v.* Dimick, 1 N. Y. St. 304; Stackhouse *v.* Vendig, 166 Pa. St. 582, 31 Atl. 349; Mixer *v.* Herrick, 78 Vt. 349, 62 Atl. 1019.

Presumption of consent.— The consent of the municipal authorities may be presumed from lapse of time without objection. Korte *v.* St. Paul Trust Co., 54 Minn. 530, 56 N. W. 246; Jorgensen *v.* Squires, 144 N. Y. 280, 39 N. E. 373 [*affirming* 21 N. Y. Suppl. 383]; Jennings *v.* Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459 [*affirming* 13 Daly 438]; Hart *v.* McKenna, 106 N. Y. App. Div. 219, 94 N. Y. Suppl. 216; Schubkegel *v.* Butler, 76 N. Y. App. Div. 10, 78 N. Y. Suppl. 644.

40. Fisher *v.* Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Kirkpatrick *v.* Knapp, 28 Mo. App. 427.

41. *Delaware.*— Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

Maryland.— Condon *v.* Sprigg, 78 Md. 330, 28 Atl. 395; Irwin *v.* Sprigg, 6 Gill 200, 46 Am. Dec. 667.

Minnesota.—Landru *v.* Lund, 38 Minn. 538, 38 N. W. 699.

New York.— Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341]; Schubkegel *v.* Butler, 76 N. Y. App. Div. 10, 78 N. Y. Suppl. 644; Downey *v.* Low, 22 N. Y. App. Div. 460, 48 N. Y. Suppl. 207]; Kuechenmeister *v.* Brown, 1 N. Y. App. Div. 56, 37 N. Y. Suppl. 95 [*reversing* 13 Misc. 139, 34 N. Y. Suppl. 180].

Pennsylvania.— Snader *v.* Murphy, 19 Pa. Super. Ct. 35.

United States.— Robbins *v.* Chicago, 4 Wall. 657, 18 L. ed. 427 (holding that where it appears, in an action by a corporation which has been compelled to pay damages for injuries received from defects in a public street, that the defects were caused by constructing an area for defendant's use, which was left unguarded, it is no defense that, as a part of such construction, the grade of the street was raised so as to conform to a public improvement directed by the corporation); New York L. Ins. Co. *v.* Savage, 58 Fed. 338, 7 C. C. A. 260; Beardsley *v.* Swann, 2 Fed. Cas. No. 1,187, 4 McLean 333.

Degree of care.— Where defendant maintained trap elevator doors in the sidewalk of a city street, where people were constantly passing, adjacent to its place of business, it was bound to use the greatest care and caution in the operation thereof. Bowley *v.* Mangrum, 3 Cal. App. 229, 84 Pac. 996.

42. *Illinois.*— McDaneld *v.* Logi, 143 Ill. 487, 32 N. E. 423.

Missouri.— Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590; Jegglin *v.* Roeder, 79 Mo. App. 428.

New Jersey.— O'Malley *v.* Gerth, 67 N. J. L. 610, 52 Atl. 563.

New York.— Berger *v.* Content, 47 Misc. 390, 94 N. Y. Suppl. 12.

Vermont.— Mixer *v.* Herrick, 78 Vt. 349, 62 Atl. 1019.

Reasonable care must be exercised in making and keeping an opening safe and secure. Jegglin *v.* Roeder, 79 Mo. App. 428 (holding that an abutting owner will be charged with knowledge of defects in his grating over the space beneath the sidewalk, of which he might have known by the use of due diligence, the same as if he had actual knowledge thereof); Dickson *v.* Hollister, 123 Pa. St. 421, 16 Atl. 484, 10 Am. St. Rep. 533 (holding that defendants would not be excused for failure to have the covering reasonably secure by employing a man of skill and experience to make it so, although after repairing it he informed them that it was safe).

43. Smith *v.* Ryan, 8 N. Y. Suppl. 853 [*affirmed* in 130 N. Y. 653, 29 N. E. 1033].

44. *Illinois.*— Schiffmacher *v.* Kircher, 59 Ill. App. 113.

Iowa.— Ottumwa *v.* Parks, 43 Iowa 119.

Nebraska.— Stuart *v.* Havens, 17 Nebr. 211, 22 N. W. 419.

Pennsylvania.— Homan *v.* Stanley, 66 Pa. St. 464, 5 Am. Rep. 389.

Canada.— Cox *v.* Nova Scotia Tel. Co., 35 Nova Scotia 148.

Degree of care.— In protecting an excavation in the process of constructing a walk the owner is bound to ordinary care only. Lanark First Nat. Bank *v.* Eitemiller, 14 Ill. App. 22.

of the street.[45] An owner who permits an excavation on his land adjoining the sidewalk is bound to use at least reasonable care to see that the sidewalk does not cave in.[46]

(VI) *OBSTRUCTIONS.* A person who is allowed an extraordinary use of the sidewalk for his private convenience is bound to exercise reasonable care to guard the public from injury,[47] but where such care has been exercised and his use is proper and reasonable no liability for injury exists.[48] Where the abutting owner wrongfully uses or obstructs a sidewalk[49] he is liable for any resulting injury to a passer-by who is in the exercise of ordinary care.

(VII) *FALLING OBJECTS.* Where an abutter negligently maintains a structure,[50] such as an awning[51] or a sign,[52] he is liable toward a person injured by its fall.

45. Stuart *v.* Havens, 17 Nebr. 211, 22 N. W. 419.

46. Queck-Berner *v.* Atlantic Trust Co., 80 N. Y. App. Div. 460, 81 N. Y. Suppl. 146.

47. *California.*— Wile *v.* Los Angeles Ice, etc., Co., 2 Cal. App. 190, 83 Pac. 271, protruding spike.

Georgia.— Maddox *v.* Cunningham, 68 Ga. 431, 45 Am. Rep. 500.

Massachusetts.— Morris *v.* Whipple, 183 Mass. 27, 66 N. E. 199, holding that, conceding that the proprietor of a hotel had the right to place a carpet and canopy across from the hotel entrance to the curb, it was his duty to exercise reasonable care and diligence that travelers in the exercise of due care were not injured thereby.

Missouri.— Perrigo *v.* St. Louis, 185 Mo. 274, 84 S. W. 30, holding an adjoining property-owner liable for the construction of a cellar door and stone base in a sidewalk so high above the pavement as to render the sidewalk unsafe for pedestrians.

New Jersey.— Rupp *v.* Burgess, 70 N. J. L. 7, 56 Atl. 166, holding a property-owner liable for injuries caused by the negligent maintenance of a drain across the sidewalk.

48. Welsh *v.* Wilson, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698 (holding that one who is injured in climbing over skids placed temporarily across the sidewalk, instead of waiting or crossing the street, cannot recover); Maltbie *v.* Bolting, 6 Misc. (N. Y.) 339, 26 N. Y. Suppl. 903; Denby *v.* Willer, 59 Wis. 240, 18 N. W. 169 (holding that whether one who temporarily places articles used in his business upon the outer edge of the sidewalk in a city, leaving ample room for passage, is guilty of such negligence as will make him liable to a person injured by falling over such articles, is, in the absence of any law or ordinance prohibiting such obstructions, a question of fact).

Use permitted to abutting owner see *supra*, XII, A, 7.

A stepping stone upon a sidewalk in front of a house, which does not interfere with the use of the roadway and bed of the street, nor to any appreciable or unreasonable extent with the use of the sidewalk, does not constitute a public nuisance and is a reasonable and necessary use of the street, and the owner of the house before which it is placed is not liable in damages for injuries sustained by a person who stumbles over the stone. Robert *v.* Powell, 168 N. Y. 411, 61 N. E. 699, 85 Am. St. Rep. 673, 55 L. R. A. 775.

Care as to unobstructed portion.— Where an owner obstructs the sidewalk with goods he is bound to use reasonable care to see that the portion of the walk left free for passage is kept in a reasonably safe condition. Garibaldi *v.* O'Connor, 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73 [*affirming* 112 Ill. App. 53].

Duty to guard against unanticipated acts. — One erecting a temporary platform on the sidewalk in front of his property for the purpose of taking down a wall is only bound to take reasonable precautions against injury to persons lawfully using the sidewalk, and is not bound to anticipate that a person will attempt a dangerous trespass by jumping on a moving train just at the edge of the platform, and so is not liable for an injury received by him in so doing by striking against a post in the platform. Price *v.* Betz, 199 Pa. St. 457, 49 Atl. 217.

49. O'Dwyer *v.* Northern Market Co., 24 App. Cas. (D. C.) 81; Maddox *v.* Cunningham, 68 Ga. 431, 45 Am. Rep. 500; Mullins *v.* Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112 [*affirming* 95 N. Y. App. Div. 234, 88 N. Y. Suppl. 737]; Murphy *v.* Leggett, 164 N. Y. 121, 58 N. E. 42 [*affirming* 29 N. Y. App. Div. 309, 51 N. Y. Suppl. 472]; McCarten *v.* Flagler, 69 Hun (N. Y.) 134, 23 N. Y. Suppl. 263; Jochem *v.* Robinson, 66 Wis. 638, 29 N. W. 642, 57 Am. Rep. 298.

Electric guard-rail in front of window.— Where a bank, facing on a public street, extends a rail in front of a window to protect it from persons congregating on the sidewalk, and connects the rail with an electric battery, operated inside the bank building, it will be liable for injuries sustained by a person receiving a shock from contact with the rail, on the ground that it was maintaining a nuisance in a public street. Whaley *v.* Citizens' Nat. Bank, 28 Pa. Super. Ct. 531.

50. See cases cited in the following notes.

Objects falling upon streets from abutting property see NEGLIGENCE.

51. Morris *v.* Barrisford, 9 Misc. (N. Y.) 14, 29 N. Y. Suppl. 17.

52. Hearst's Chicago American *v.* Spiss, 117 Ill. App. 436, holding that where a sign, unlawfully suspended over a public street, falls and injures a pedestrian, a presumption

And an abutting owner is bound to use reasonable care to prevent a tree planted in the sidewalk by him or his predecessors in title from becoming dangerous to passers-by.[53] And it is his duty where work undertaken by him renders the sidewalk dangerous by reason of falling objects to give notice by warnings or barriers to passers-by that the work is going on.[54]

e. License or Permission. Where an act affecting the safety of a street or sidewalk is done under municipal permission the act itself does not impose liability,[55] but the permission of the municipality to perform the act will not exempt the person from taking proper precautions to prevent injury therefrom to persons using the street,[56] as for example where excavations are made[57] or poles and wires

of negligence against the owner of such sign arises.

53. Weller *v.* McCormick, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798.

54. Keyes *v.* Second Baptist Church, 99 Me. 308, 59 Atl. 446.

55. Cowan *v.* Muskegon R. Co., 84 Mich. 583, 48 N. W. 166 (excavation and throwing up earth by street railroad while engaged in repairing or laying its tracks); Klein *v.* Missouri Pac. R. Co., 114 Mo. App. 89, 89 S. W. 75 (railroad crossing gates and the boxes containing the machinery to operate the same); Babbage *v.* Powers, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398 [*affirming* 4 Silv. Sup. 211, 7 N. Y. Suppl. 306] (holding that the owner of a city lot who has, with consent of the city authorities, constructed a vault under the sidewalk in front of his lot, is not responsible for injuries received by a pedestrian who falls into the vault on account of the breaking of the flagstone over it, where no actual negligence on the part of the lot owner is shown); Cottrell *v.* Dimick, 1 N. Y. St. 304 (construction of a platform and an area or vault in the sidewalk); White *v.* Roydhouse, 211 Pa. St. 13, 60 Atl. 316 (act of a contractor in placing a mortar bed on the side of a street, near which he was erecting a building); Smith *v.* Simmons, 103 Pa. St. 32, 49 Am. Rep. 113 (ditch dug in a street of a borough to lay a water pipe from a spring to a private dwelling-house).

Acts of contractors for public work see *supra*, XIV, D, 7, a, (III).

Area way, coal holes, and other openings in sidewalk see *supra*, XIV, D, 7, h, (IV).

Suspension of electric light.— Since an electric lighting company would have no authority to place an electric light in the streets near a trolley wire except it obtained the same from the city, its act in placing the same so near the wire that it could be struck and broken by a trolley pole escaping from the wire was not wrongful, so as to render the lighting company liable for injuries to a person injured under such circumstances by the falling glass. Nelson *v.* Narragansett Electric Lighting Co., 26 R. I. 258, 58 Atl. 802, 106 Am. St. Rep. 711, 67 L. R. A. 116.

56. Wile *v.* Los Angeles Ice, etc., Co., 2 Cal. App. 190, 83 Pac. 271 (holding that a city ordinance authorizing planks to be placed across a sidewalk, in order to create a driveway giving access to a building in process of construction, is no defense to an action for injuries sustained by one who tripped over a spike protruding from a plank); Perry *v.* People's Gas Light, etc., Co., 119 Ill. App. 389 (maintenance of plug); Larson *v.* Ring, 43 Minn. 88, 44 N. W. 1078 (holding that in an action against a builder for negligence in stretching a guy rope across a street so low that plaintiff was swept off his wagon by it and injured, an ordinance of the city regulating the height of such guys is not admissible, as the grant of a privilege by the city cannot exempt the builder from liability for injuries resulting from not stretching the guy high enough); Durfield *v.* New York, 101 N. Y. App. Div. 581, 92 N. Y. Suppl. 204 (erection of banner pole); Seneca Falls *v.* Zalinski, 8 Hun (N. Y.) 571 (holding that where a municipal corporation authorizes one to deposit building material in one of its public streets, it is his duty to place proper guards or lights by night around the obstruction); Morris *v.* Barrisford, 9 Misc. (N. Y.) 14, 29 N. Y. Suppl. 17 (holding that a municipal license to maintain an awning over a sidewalk is no license for it in a decayed and dangerous condition).

57. *Illinois.*—Pfau *v.* Reynolds, 53 Ill. 212.

Iowa.— Ottumwa *v.* Parks, 43 Iowa 119, holding that the fact that a mayor of a city, in granting permission to an individual to excavate a street, provided the kind of barriers to be used, does not relieve the person making the excavation from liability for injuries to third persons in case the barriers are unsuitable.

Kentucky.— Endicott *v.* Triple-State Natural Gas, etc., Co., 76 S. W. 516, 25 Ky. L. Rep. 862.

Montana.—Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114, holding that under Pol. Code, § 4800, subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as formerly existed by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc.

New Jersey.— Finegan *v.* Moore, 46 N. J. L. 602.

New York.— Sexton *v.* Zett, 44 N. Y. 430 [*affirming* 56 Barb. 119], holding that it is negligence, as a matter of law, for a person to dig a ditch across a public sidewalk and allow it to remain open at night with no provision for warning or protecting travelers.

erected.[58] A permission which the municipality had no power to grant will not afford protection.[59] Where openings are left open during the process of construction of a walk which has been ordered to be constructed within a certain time the owner, for the purpose of determining whether he has exercised due care, will not be regarded as having the entire time allotted to complete the work if it might have been completed in less with reasonable diligence.[60]

d. Failure to Comply With Ordinance. Where an act is done in violation of a city ordinance[61] or of a statute[62] it is negligent *per se*, or it may be regarded as a nuisance for all consequences of which the owner is responsible;[63] and a person

58. Williams *v.* Louisiana Electric Light, etc., Co., 43 La. Ann. 295, 8 So. 938 (holding that notice of the tendency of timber to decay must be taken and examinations of poles made to see that they have not become dangerous); Wolfe *v.* Erie Tel., etc., Co., 33 Fed. 320. *Compare* Powell *v.* New Omaha Thomson-Houston Electric Light Co., (Nebr. 1905) 104 N. W. 162, holding that where an employee of a cold storage company was sent to lock the door of a car on a spur track, and found the car being moved by a switch engine of the railroad company, and ascended part way up the ladder, and stood there until the car reached a pole of the electric light company, and was caught between the car and the pole, the court, in an action against the electric light company, properly directed a verdict for defendants.

Liability of telegraph or telephone company see TELEGRAPHS AND TELEPHONES.

59. Hearst's Chicago American *v.* Spiss, 117 Ill. App. 436 (holding that where the ordinances of a city prohibit the suspension of a sign across a public street, the suspension of a sign over a public street is unlawful, notwithstanding a permit authorizing the same may have been granted); Chambers *v.* Ohio L. Ins., etc., Co., 1 Disn. (Ohio) 327, 12 Ohio Dec. (Reprint) 650 (holding that in an action to recover for the death of a person, occasioned by the falling of a portion of the cornice work on a building being erected, which projected outwardly and a short distance over the line of the street, ordinances relating to the construction of buildings cannot be invoked, since, as to any liability in a civil action, such ordinances have no controlling application; for the city has no authority, by an ordinance, to authorize a nuisance so as to protect a party from liability for it in a civil action, nor to subject the party to liability in a civil action for an act from which, but for the ordinance, no liability would arise).

60. Independence *v.* Jekel, 38 Iowa 427, holding that an instruction susceptible of such construction is misleading.

61. McKune *v.* Santa Clara Valley Mill, etc., Co., 110 Cal. 480, 42 Pac. 980 (lumber piled in street); McCloughry *v.* Finney, 37 La. Ann. 27; Skinner *v.* Stifel, 55 Mo. App. 9 (display of danger signals at excavation); Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622. See Manney *v.* Curtis, 113 N. Y. App. Div. 421, 99 N. Y. Suppl. 288, unguarded coal hole. But see Zimmerman *v.* Baur, 11 Ind. App. 607, 39 N. E. 299, holding that the fact that defendant, in digging a ditch along a public way, tapping a private sewer, violated a city ordinance intended to prevent the use of a public sewer without payment of an imposed tax, does not give a right of action to one whose horse was injured by the negligent doing of the work.

When ordinance does not apply.— Where the owner of a building abutting on a city sidewalk has obtained permission from the city to repair the building and lower the sidewalk, and under such permission has erected barriers to close the walk to the public, the measure of the owner's duty to a person employed by another to make the repairs within the barriers must be determined by the common law, and not by a city ordinance requiring openings in the sidewalk to be properly covered. Sullivan *v.* Dallas City Nat. Bank, 27 Tex. Civ. App. 359, 65 S. W. 39.

Violation of ordinance requiring removal of snow or ice see *supra*, XIV, D, 7, b, (III).

62. Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032, holding that the act of a compress company in building an inclined gangway from a platform on one side of the street to a platform on the other side without any authority from the city, and in such a way that it left a space of from hut fifteen to twenty feet in width for the passage of horses and vehicles, being an obstruction of the street, and a violation of Pen. Code (1895), art. 480, prescribing a fine for the wilful obstruction of any street in an incorporated town or city, is, as to a person injured while using the highway at the place of the obstruction, negligence *per se*.

Where there is no negligence in construction.— The building of an obstruction across a street in violation of law is an unlawful act, and, where it results in injury to another, subjects the one building it to liability, notwithstanding the fact that there is no defect in its construction. Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

63. Pfau *v.* Reynolds, 53 Ill. 212 (holding that a person who makes an excavation in a public street without a license from the city is liable for any damage caused thereby, without reference to the question whether the excavation was well guarded or not); McNaughton *v.* Elkhart, 85 Ind. 384 (excavation in sidewalks); Owings *v.* Jones, 9 Md. 108 (construction of sewer); Skelton *v.* Larkin, 82 Hun (N. Y.) 388, 31 N. Y. Suppl. 234

is liable for resulting injury where he has not complied with the ordinance, although there is no showing that the act of third persons did not contribute to the injury.[64] But failure to secure a permit for an excavation as required by ordinance will not render the maker liable where the person injured has been negligent.[65]

e. Persons Liable.[66] In order that liability may exist the obstruction or defect must have been created by the person whom it is sought to charge or it must be within his control.[67] A tangible and defined interest in the premises involved, coupled with the control thereof, is usually regarded as sufficient to impose lia-

[*affirmed* in 146 N. Y. 365, 41 N. E. 90] (holding that placing a flagstone against a tree in the sidewalk in front of one's premises without permission is a nuisance, and renders him liable for injuries caused by it); Wright *v.* Saunders, 65 Barb. (N. Y.) 214 [*affirmed* in 3 Keyes 323, 1 Transcr. App. 263, 36 How. Pr. 136].

64. Barry *v.* Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55, holding that where a city ordinance forbids vaults under sidewalks unless covered with an iron cover, a property-owner who maintains such vault covered with a wooden cover is liable to a person receiving injury caused by a defect therein. *Compare* Wilson *v.* White, 71 Ga. 506, 51 Am. Rep. 269, holding that where a municipal ordinance requires the owners of materials forming an obstruction in a street to prepare and place lights thereon with such care and diligence as reasonably to secure their burning until daylight, such owner is liable to persons injured from failure to perform such duty, even though the lights were extinguished by an unknown cause.

65. Kepperly *v.* Ramsden, 83 Ill. 354.

66. **Liability as between landlord and tenant** see LANDLORD AND TENANT, 24 Cyc. 1124 *et seq.*

Liability for act of independent contractor see MASTER AND SERVANT, 26 Cyc. 1562 *et seq.*

Liability of street railroad see STREET RAILROADS.

Successful defense by one tort-feasor as bar to action against others see JUDGMENTS, 26 Cyc. 1213.

67. *Maine.*— Staples *v.* Dickson, 88 Me. 362, 34 Atl. 168.

Maryland.— Walker *v.* Marye, 94 Md. 762, 51 Atl. 1054 (holding that an owner of property adjacent to a street is not liable for injuries caused by a water pipe, appurtenant to the premises and belonging to him, extending above the level of the sidewalk, when the pipe was constructed by another, and when he has not the right to repair it); Flynn *v.* Baltimore Canton Co., 40 Md. 312, 17 Am. Rep. 603.

Michigan.— Davis *v.* Michigan Bell Tel. Co., 61 Mich. 307, 28 N. W. 108, holding that one not owning the premises in which he has his office, and to whom therefore no duty accrues as to maintaining the adjacent sidewalk, does not, by lifting up a loose board in such sidewalk and replacing it, become liable to one who steps on it thereafter, to his injury.

New York.— English *v.* Brennan, 60 N. Y. 609.

United States.— Mahoney *v.* Helena, 96 Fed. 790, holding that a receiver of a water company cannot be held liable in damages for a personal injury received by a person in tripping and falling over the top of a stop box which projected above the surface of the ground on the part of a street used for sidewalk purposes, where the box when constructed was placed flush with the surface of the sidewalk, as required by a city ordinance, and its projection was caused by the removal of the sidewalk from around it by someone other than the water company or its receiver.

England.— Chapman *v.* Fylde Waterworks Co., [1894] 2 Q. B. 599, 59 J. P. 5, 64 L. J. Q. B. 15, 71 L. T. Rep. N. S. 539, 9 Reports 582, 43 Wkly. Rep. 1.

Canada.— Ewing *v.* Hewitt, 27 Ont. App. 296, holding that a purchaser of premises from one who had, without authority, placed a trap-door with projecting hinges in the sidewalk to obtain an entrance to his cellar, is not liable for an injury to one stumbling over the hinges, merely because she did not remove and occasionally used the door for the purpose for which it was originally intended.

Person originally causing obstruction.— Where contractors ordered sand, but after it was unloaded in the street, in front of where they were erecting a building, claimed that it was not the kind they had bought, and directed the seller to remove it, which was not done, and an accident occurred from its presence in the street, the contractors are liable for the injury, since they were primarily responsible for its being in the street. Rommeney *v.* New York, 49 N. Y. App. Div. 64, 63 N. Y. Suppl. 186.

Liability of contractor after completion of work.— A contractor who has completed an excavation in a sidewalk, as required by his contract, is not liable for injuries to persons falling therein, due to the absence of proper guards, if he did not contract to guard the excavation after it was completed. Cotter *v.* Lindgren, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255.

Liability for acts of person invited on sidewalk.— An abutting owner may be liable for defects in a sidewalk caused by persons who occupy such sidewalk at his invitation. O'Dwyer *v.* Northern Market Co., 24 App. Cas. (D. C.) 81, holding that a market company, which has no authority to occupy the

bility upon a person as an abutting owner.[68] Such liability is *prima facie* upon the occupier of the premises.[69]

f. Concurrent Liability of City.[70] Where a person would otherwise be charged with liability it is no defense that the city is also liable for the injury.[71]

g. Notice of Defect or Danger. Where a person is responsible only for negligence he is not liable for the act of a third person of which he has no notice,[72] unless he is negligent in not anticipating such act and guarding against it.[73] But one whose active agency has brought about a dangerous condition in the street is bound to take cognizance of the natural consequence of his own wrongful or negligent act and the rule requiring notice of defect is not applicable;[74] and it is sufficient to charge such a person with negligence that he might by the exercise of due care have known of the danger.[75] In order to hold an owner who is out

sidewalk adjoining its market house for market purposes, but which nevertheless exercises dominion over the sidewalk for such purpose by inviting dealers and hucksters to occupy it, and collects tolls from them according to the space they occupy, and undertakes in a lease of a store fronting on such sidewalk to have the sidewalk cleaned each day, is liable to a pedestrian who steps and falls on refuse vegetable matter on the sidewalk and is injured, the occupation of the hucksters and dealers being the occupation of the market company.

68. Denver *v.* Solomon, 2 Colo. App. 534, 31 Pac. 507, holding that in an action for injuries received by falling into an open area, evidence that defendant had the equitable and beneficial title to the property, and received the income, is sufficient to establish her liability, although the actual title was in another as trustee. See Condon *v.* Sprigg, 78 Md. 330, 28 Atl. 395, holding that where two lots were conveyed to defendant without his knowledge, and defendant, on learning thereof, refused to hold title thereto, and the grantor then presented him a deed to execute, which covered only one lot, defendant was chargeable with the liability which attached to the ownership of the lot, title to which remained in him for injuries received from a defect in the sidewalk in front thereof.

69. Lowell *v.* Spaulding, 4 Cush. (Mass.) 277, 50 Am. Dec. 775.

70. Recovery over by municipality against person causing defect resulting in injury see INDEMNITY, 22 Cyc. 96 *et seq.*

71. McDaneld *v.* Logi, 143 Ill. 487, 32 N. E. 423; Landru *v.* Lund, 38 Minn. 538, 38 N. W. 699.

72. Ackerly *v.* Sullivan, 34 La. Ann. 1156 (holding that a suit for damages resulting from falling over a piece of scantling which stretched across a banquette of a street, with one end resting on a doorsill of a house in charge of defendant, cannot be sustained, in the absence of proof that defendant or his employees placed the scantling there or knew of its being so placed); Cottrell *v.* Dimick, 1 N. Y. St. 304. See also Lampert *v.* Laclede Gas-Light Co., (Mo. 1887) 2 S. W. 842.

Removal of light or barrier.— Where a person whose duty it is to guard an obstruction lawfully placed in a public street so as to prevent danger to persons using the street for travel in the exercise of ordinary care performs his duty by the use of a proper light or otherwise, and the guard after being properly placed is removed without fault on such person's part, and a traveler is thereby injured before sufficient time has elapsed for such person in the exercise of ordinary care to discover such removal and remedy it, then he is not liable. Raymond *v.* Keseberg, 91 Wis. 191, 64 N. W. 861.

73. Cox *v.* Nova Scotia Tel. Co., 35 Nova Scotia 148, holding that a telephone company which makes an excavation from its premises into the street, and guards the same only by a row of empty barrels, with planks stretching from one to the other and lights attached to the planks, is liable for an injury to one who falls into the excavation, without contributory negligence, at a time when the barriers have been removed by a third person during the temporary absence of a watchman.

74. Southern Express Co. *v.* Texarkana Water Co., 54 Ark. 131, 15 S. W. 361 (holding that to fix the liability of a waterworks company which left a street in dangerous condition after laying the water mains, it is not necessary that it should have had notice of the dangerous condition of the streets); Flynn *v.* New York El. R. Co., 49 N. Y. Super. Ct. 60 (holding that where a person exercises his right of making an excavation in a street, the obligation to use diligence in protecting passers-by is imperative so long as the excavation exists; and therefore notice that it is not sufficiently protected is not a condition of legal responsibility for injuries from the excavation, although the right is exercised by means of a contract made with other persons); Cairncross *v.* Pewaukee, 86 Wis. 181, 56 N. W. 648 (holding that under Rev. St. § 1339, providing that action for injuries from a defect in a highway cannot be maintained against a village unless notice is given it, failure to give the notice cannot avail the parties who put an obstruction in a road.

75. Stevenson *v.* Joy, 152 Mass. 45, 25 N. E. 78 (holding that where the injury arose from the fact that a cover of a coal hole was not fastened, it is not necessary that defendant should have known that it was not fastened, if by due care he might have known it); Dickson *v.* Hollister, 123

of possession for an obstruction on a sidewalk in front of land in possession of a tenant he must be shown to have had an obligation to repair and notice of necessity.[76] The owner of property in a city, whose title extends to the middle of the street, is chargeable with notice that he is the owner of a tree planted on the sidewalk in front of his property, and of his liability as such for injuries to wayfarers occasioned by his allowing it to become dangerous, where the city makes no claim to the tree.[77]

h. Abandonment of Property or Use Thereof. Where a structure has been placed in the sidewalk or street for the convenience of abutting property, the owner cannot relieve himself from liability by abandoning the use of such structure.[78] Nor can the owner of property placed in the street under license from the city relieve himself from liability by abandoning his property.[79]

E. Actions For Torts — 1. Nature and Form of Remedy — a. In General. If the injury results from a proper exercise of statutory authority, an action for damages must be in the manner, if any, prescribed by statute;[1] but if it is caused by the unlawful act or negligence of the municipality, an action on the case is the proper remedy;[2] and in such case a statutory proceeding applicable to damages caused by the taking of land under the right of eminent domain will not lie.[3] If the municipal negligence also amounts to a breach of its contract, the injured party may either sue for the breach of the contract or sue in tort.[4] A recovery under a statute giving damages for injury under the power of eminent domain precludes an action for tort for the same injury.[5]

b. Injunction. An injunction will lie where danger of injury is impending and probable.[6] But an injunction will not be granted to protect private property where the result thereof would be to jeopardize the public health or convenience.[7]

2. Conditions Precedent — a. In General. In the absence of statutory or charter requirement the only condition precedent in an action on the case for tort against a municipality is some unlawful act or breach of duty on the part of the municipality and injuries resulting therefrom.[8] But in most jurisdictions there are, by charter or statute, various requirements which the injured party

Pa. St. 421, 16 Atl. 484, 10 Am. St. Rep. 533 (holding that to render defendants liable for an injury received by stepping into a coal hole before defendants' premises and used by them, it is not requisite that they should have been so notorious as to be evident to all pedestrians passing in the neighborhood).

76. Chroust *v.* Acme Bldg., etc., Assoc., 214 Pa. St. 179, 63 Atl. 595.

77. Weller *v.* McCormick, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798.

78. Wabasha *v.* Southworth, 54 Minn. 79, 55 N. W. 818, trap-door. But *compare* Staples *v.* Dickson, 88 Me. 362, 34 Atl. 168, holding that where a grantor erected a water box on the sidewalk in front of his premises, the cover of which extended one and one-half inches above the sidewalk, and which constituted a common nuisance, and the grantee, on taking possession, discontinued use of the same, and constructed another box in another place in its stead, the grantee was not liable for injuries occurring through the cover of the old box becoming displaced.

79. Nichols *v.* Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56, holding that where wires of a telegraph company in a public street were broken by the weight of ice produced by water thrown on them by the city fire department in extinguishing a fire, and fell into the street, where they became partly imbedded in ice, and formed a dangerous obstruction, it was the duty of the company to remove the fallen wires within a reasonable time after notice, and that it could not relieve itself from this duty by assuming to abandon the property.

1. Holleran *v.* Boston, 176 Mass. 75, 57 N. E. 220; Matheny *v.* Aiken, 68 S. C. 163, 47 S. E. 56.

2. Hamlin *v.* Biddeford, 95 Me. 308, 49 Atl. 1100. See, generally, Case, Action on, 6 Cyc. 681; Negligence.

3. Fiske Wharf, etc., Co. *v.* Boston, 178 Mass. 526, 60 N. E. 7.

4. Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430, holding this to be true where a city, under contract to supply water to plaintiff, negligently allowed the pipes to be exposed whereby the water froze and cut off plaintiff's supply, causing him damage.

5. Beach *v.* Scranton, 25 Pa. Super. Ct. 430.

6. Standard Bag, etc., Co. *v.* Cleveland, 25 Ohio Cir. Ct. 380. And see, generally, Injunctions, 22 Cyc. 888 *et seq.*

7. Standard Bag, etc., Co. *v.* Cleveland, 25 Ohio Cir. Ct. 380.

8. Kansas City *v.* King, 65 Kan. 64, 68 Pac. 1093. See Standard Bag, etc., Co. *v.* Cleveland, 25 Ohio Cir. Ct. 380.

must comply with before he can maintain an action for damages against the municipality.[9]

b. Exhaustion of Remedy Against Negligent Person. Under some statutes where a party is injured by reason of a defective or obstructed street or sidewalk, the primary liability for such injury is on the abutting owner or other person whose wrong or neglect produced or caused such defect or obstruction, and the party injured must exhaust his remedy against such negligent person as a condition precedent to his right to maintain an action against the city.[10] Under such a statute before an action can be maintained against a city for injuries sustained, a judgment must have been recovered against the negligent persons and execution thereon returned wholly or partially unsatisfied.[11] But where the injury is caused by the actual neglect of the city, concurring with the neglect of the individual, an action may be brought against it without first exhausting the remedy against such person.[12]

c. Notice or Presentment of Claim For Injury — (i) *Necessity.* Unless expressly required by statute previous notice or presentment of a claim for injuries by tort, to the city council, treasurer, or other proper authorities is not necessary as a condition precedent to an action thereon against the municipality.[13] But it is well settled that the legislature has power to make provisions requiring notice or presentation of claims for damages as a condition precedent to actions thereon against the municipality;[14] and in most jurisdictions it is required, either by the charter of the municipality, or by the provisions of the general statutes, that in order that a person who has suffered damages by reason of defective streets or other unlawful or negligent acts of a municipality may maintain an action therefor against the municipality, he must first give notice of or file or present his claim in the time and manner prescribed by such charter or statute; and

9. See *infra*, XIV, E, 2.

10. Gordon *v.* Sullivan, 116 Wis. 543, 93 N. W. 457; Devine *v.* Fond du Lac, 113 Wis. 61, 88 N. W. 913; Schaefer *v.* Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287; Raymond *v.* Sheboygan, 76 Wis. 335, 45 N. W. 125; Henker *v.* Fond du Lac, 71 Wis. 616, 38 N. W. 187; Hiner *v.* Fond du Lac, 71 Wis. 74, 36 N. W. 632; Raymond *v.* Sheboygan, 70 Wis. 318, 35 N. W. 540; Papworth *v.* Milwaukee, 64 Wis. 389, 25 N. W. 431; McFarlane *v.* Milwaukee, 51 Wis. 691, 8 N. W. 728; Amos *v.* Fond du Lac, 46 Wis. 695, 1 N. W. 346.

Such a statute being in derogation of the common law should be construed most favorably to the municipality. Schaefer *v.* Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287.

11. Gordon *v.* Sullivan, 116 Wis. 543, 93 N. W. 457.

Wis. Laws (1889), c. 471, providing that a negligent person is liable, but that the city may be joined as defendant with him and judgment shall be entered against all parties found liable, but further action against the city shall be stayed until an execution against the negligent person has been returned wholly or partially unsatisfied, although retroactive, affects the remedy only, and therefore applies to an injury for which suit was pending when it was enacted. Raymond *v.* Sheboygan, 76 Wis. 335, 45 N. W. 125.

A city is not merely a guarantor of the collectability of a judgment against the negligent person under such statute and therefore is not released from liability by delay in prosecuting the claim. Raymond *v.* Sheboygan, 76 Wis. 335, 45 N. W. 125.

12. Papworth *v.* Milwaukee, 64 Wis. 389, 25 N. W. 431.

13. *California.*— Cook *v.* San Francisco, (1890) 23 Pac. 1094.

Connecticut.— Hillyer *v.* Winsted, 77 Conn. 304, 59 Atl. 40, holding that the presentment of a claim for damages as required under 12 Spec. Laws, p. 769, to the warden or burgesses is neither expressly nor by implication a condition precedent to bringing suit upon it.

Illinois.— Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571; Galesburg *v.* Benedict, 22 Ill. App. 111.

Iowa.— Green *v.* Spencer, 67 Iowa 410, 25 N. W. 681.

Ohio.— Scherer *v.* Cincinnati, 8 Ohio Dec. (Reprint) 552, 8 Cinc. L. Bul. 326.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1697.

A claim for damages resulting from defective sewers need not be presented to the board of supervisors before suit upon the claim. Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Lehn *v.* San Francisco, 66 Cal. 76, 4 Pac. 965; Bloom *v.* San Francisco, 64 Cal. 503, 3 Pac. 129.

14. Merz *v.* Brooklyn, 11 N. Y. Suppl. 778 [*affirmed* in 128 N. Y. 617, 28 N. E. 253].

Where the right to recover of a city is wholly a creature of the statute, the legisla-

unless he does so there can be no recovery.[15] The requirements of these charters or statutes are variant; and therefore what notice or presentation of the claim shall be made in a particular case depends upon the terms of the charter or statute under which recovery is sought.[16] Thus it is variously provided that no action can be maintained against a municipality for personal injuries sustained through its negligence or unlawful acts, unless notice of an intention to sue, and of the time, character, and place of the injury is filed within a specified time after the happening of the injury;[17] or unless the claim for damages has been

ture may grant the right, take it away, or make the exercise of it contingent upon the performance of such conditions, as in its wisdom it may deem best (Schaefer *v.* Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287), as by reducing the time within which notice of injuries shall be given to municipal corporations (Daniels *v.* Racine, 98 Wis. 649, 74 N. W. 553).

15. *Iowa.*— Ulbrecht *v.* Keokuk, 124 Iowa 1, 97 N. W. 1082, under Code, § 1051. *Compare* Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296.

Massachusetts.—Mitchell *v.* Worcester, 129 Mass. 525.

Michigan.— Tattan *v.* Detroit, 128 Mich. 650, 87 N. W. 894, under Detroit city charter as amended by Local Acts (1895), No. 463.

Minnesota.— Engstrom *v.* Minneapolis, 78 Minn. 200, 80 N. W. 962; Doyle *v.* Duluth, 74 Minn. 157, 76 N. W. 1029; Bausher *v.* St. Paul, 72 Minn. 539, 75 N. W. 745; Ray *v.* St. Paul, 44 Minn. 340, 46 N. W. 675; Nichols *v.* Minneapolis, 30 Minn. 545, 16 N. W. 410.

Nebraska.— Schmidt *v.* Fremont, 70 Nebr. 577, 97 N. W. 830, under Comp. Sts. (1901) c. 13, art. 3, § 39.

New York.— Freligh *v.* Saugerties, 70 Hun 589, 24 N. Y. Suppl. 182, holding that notice required by Laws (1889), c. 440, applies to a village created by special charter, although the latter required no such notice.

Rhode Island.— Fugere *v.* Cook, 27 R. I. 134, 60 Atl. 1067 (holding, however, that where an owner of land abutting on a highway claims damages by reason of the negligent delay of the city in constructing a sewer therein, notice by him under Gen. Laws (1896), c. 36, § 15, is sufficient, and that he need not give the notice required by section 16 of that statute of the time, place, etc., of the injury); Maloney *v.* Cook, 21 R. I. 471, 44 Atl. 692.

Washington.— Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386.

Canada.— The Consolidated Municipal Act of 1892, § 581, subs. 1, as amended by 57 Vict. c. 50, § 13, and 59 Vict. c. 51, § 20, applies to all cases of non-repair of highways. Aldis *v.* Chatham, 28 Ont. 525. But this statute applies only to actions brought against such corporations singly and not to actions brought against two or more municipal corporations jointly. Leizert *v.* Matilda, 29 Ont. 98.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1697.

Notwithstanding the neglect is imputed to servants of the municipality, the prescribed notice to certain officers of the municipality is a condition precedent, where it is not imputable to such servants individually. Parsons *v.* Ft. Worth, 26 Tex. Civ. App. 273, 63 S. W. 889.

Commencement of the action cannot be such notice, as is required as a condition precedent to its maintenance. Curry *v.* Buffalo, 135 N. Y. 366, 32 N. E. 80.

16. See cases hereafter cited.

Where notice is given in the manner prescribed by a general statute, the claimant need not, in addition thereto, present his claim to the municipal authorities as prescribed by its special charter as a condition precedent to his suing on the claim. McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233.

A provision requiring claimant to furnish the names of witnesses to the common council within a stated time imposes no duty upon him to produce such witnesses before the council. Monje *v.* Grand Rapids, 122 Mich. 645, 81 N. W. 574.

17. Biggs *v.* Geneva, 100 N. Y. App. Div. 25, 90 N. Y. Suppl. 858 [*affirmed* in 184 N. Y. 580, 77 N. E. 1182]; De Vore *v.* Auburn, 64 N. Y. App. Div. 84, 71 N. Y. Suppl. 747 (holding also that such provision in the Auburn City Charter, § 140, was not repealed by Laws (1897), c. 172, amending such charter); Krall *v.* New York, 44 N. Y. App. Div. 259, 60 N. Y. Suppl. 661; Walsh *v.* Buffalo, 92 Hun (N. Y.) 438, 36 N. Y. Suppl. 997; Frankel *v.* New York, 2 N. Y. Suppl. 294.

New York Laws (1886), c. 572, § 1, providing that no action against a city having fifty thousand inhabitants for personal injuries shall be maintained unless notice of intention to sue shall have been filed within six months after accrual with the corporation counsel or other proper law officer, has been held to apply to such actions against the city of Brooklyn, although the words "mayor, aldermen and commonalty" as used in the statute form no part of the corporate title of that city. Merz *v.* Brooklyn, 11 N. Y. Suppl. 778 [*affirmed* in 128 N. Y. 617, 28 N. E. 253]. Where the action is for injury both to person and property, the failure to serve notice of an intention to sue is not grounds for a nonsuit, as such statute does not require such notice as to injuries to property. Werner *v.* Rochester, 149 N. Y. 563, 55 N. E. 300 [*affirming* 77 Hun 33, 28 N. Y. Suppl. 226]. This statute has been

presented to the common council or other proper municipal authorities within the prescribed time;[18] or in case of injuries received by reason of a defective bridge, sidewalk, street, or thoroughfare, unless notice of the intention to sue and of the time and place of the injury is given within the prescribed time.[19] Under some statutes the amount of compensation claimed for the injury must be stated in the notice or no action can be maintained against the city therefor;[20] but the claimant is not concluded in his action by the amount stated in his notice, but

held to apply to a cause of action for personal injuries caused by the fall of a tree because of its rottenness and decay, although the tree is also claimed to have been a nuisance (Kelly *v.* New York, 19 Misc. (N. Y.) 257, 44 N. Y. Suppl. 217), and to a cause of action for a loss of services of claimant's wife or child by reason of personal injuries (White *v.* New York, 15 N. Y. App. Div. 440, 44 N. Y. Suppl. 454; Kellogg *v.* New York, 15 N. Y. App. Div. 326, 44 N. Y. Suppl. 39).

The absence or presence of notice of intention to sue relates to the remedy, and not to the right, and hence its service is not strictly a part of plaintiff's cause of action. Sheehy *v.* New York, 160 N. Y. 139, 54 N. E. 749 [*reversing* 29 N. Y. App. Div. 263, 51 N. Y. Suppl. 519].

18. *California.*— Bancroft *v.* San Diego, 120 Cal. 432, 52 Pac. 712, holding that under San Diego City Charter (St. (1889), p. 658, art. 2, c. 2, § 10) the failure to present a claim for damages for tort to the common council and file it with the clerk within the time specified defeats the cause of action.

Georgia.— Saunders *v.* Fitzgerald, 113 Ga. 619, 38 S. E. 978.

Michigan.— Woodworth *v.* Kalamazoo, 135 Mich. 233, 97 N. W. 714 (Local Acts (1897), p. 1116, No. 475, c. 16, § 2); Pollard *v.* Cadillac, 133 Mich. 503, 94 N. W. 536; Davidson *v.* Muskegon, 111 Mich. 454, 69 N. W. 670 (holding that Muskegon City Charter, tit. 6, § 20, applies to claims for personal injuries); Springer *v.* Detroit, 102 Mich. 300, 60 N. W. 688 (unliquidated claim).

New York.— Forseyth *v.* Oswego, 107 N. Y. App. Div. 187, 95 N. Y. Suppl. 33 (claim for injury by defective street); Jewell *v.* Ithaca, 72 N. Y. App. Div. 220, 76 N. Y. Suppl. 126 [*affirming* 36 Misc. 499, 73 N. Y. Suppl. 953] (holding that the charter of Ithaca (Laws (1888), c. 212, tit. 8, § 8, requires presentation of the claim to be made to the common council within sixty days from the date of the accident and that sixty days is not so short as to be unreasonable); Jones *v.* Albany, 62 Hun 353, 17 N. Y. Suppl. 232 (holding that under the Albany city charter, a presentation of the claim to the common council and an opportunity to the law department to investigate the same are conditions precedent to the right to maintain an action thereon); Nagel *v.* Buffalo, 34 Hun 1.

Ohio.— Warren *v.* Davis, 43 Ohio St. 447, 3 N. E. 301 (holding that the word "damages" as used in Rev. St. § 2326, means damages of the subject-matter and does not include damages for personal injuries); Scherer *v.* Cincinnati, 8 Ohio Dec. (Reprint) 552, 8 Cinc. L. Bul. 326 (holding that Rev. St. § 2326, applies only to damages arising from the construction of an improvement).

Wisconsin.—Steltz *v.* Wausau, 88 Wis. 618, 60 N. W. 1054 (statement of damages to land by overflow of culvert must be presented to the common council within ninety days after the happening thereof); Vogel *v.* Antigo, 81 Wis. 642, 51 N. W. 1008.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1697.

19. *Iowa.*— Kenyon *v.* Cedar Rapids, 124 Iowa 195, 99 N. W. 692 (holding that under Code, §§ 1050, 1051, one injured by a defective sidewalk must give notice of the injury within thirty days); Sachs *v.* Sioux City, 109 Iowa 224, 80 N. W. 336.

Minnesota.— Moran *v.* St. Paul, 54 Minn. 279, 56 N. W. 80 (holding such a provision to apply only to injuries resulting from defects in public ways as such, and not to a nuisance to adjoining property maintained in such ways); Ray *v.* St. Paul, 44 Minn. 340, 46 N. W. 675; Nichols *v.* Minneapolis, 30 Minn. 545, 16 N. W. 410 (holding such provision (Spec. Laws (1881), c. 8, § 20) to apply to injuries to property as well as to injuries to the person).

North Dakota.— Trost *v.* Casselton, 8 N. D. 534, 79 N. W. 1071.

Texas.— Ft. Worth *v.* Shero, 16 Tex. Civ. App. 487, 41 S. W. 704.

Wisconsin.— Ziegler *v.* West Bend, 102 Wis. 17, 78 N. W. 164, holding Rev. St. (1898) § 1339, to apply to an injury caused by the improper adjustment of the cover of a manhole over a catch basin as a result of which it slid out of place when stepped on.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1697.

Notice for injuries occurring in a ditch in a street is required under a statute applying to injuries resulting from defective "streets or sidewalks." Giles *v.* Shenandoah, 111 Iowa 83, 82 N. W. 466.

20. Doyle *v.* Duluth, 74 Minn. 157, 76 N. W. 1029; Bausher *v.* St. Paul, 72 Minn. 539, 75 N. W. 745; Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386, holding that a reasonable compliance with such regulation by stating as nearly as possible the amount of damages is all that is required in view of the fact that the claimant may at the time of trial show damages developing subsequent to the date of notice to the city. But see Morgan *v.* Lewiston, 91 Me. 566, 40 Atl. 545.

A notice demanding a gross amount of damages for several claims is not objection-

may recover his actual damages.[21] Some statutes requiring notice within a prescribed time are held to apply only where suit is delayed for more than that time; and where the suit is brought within such time, the service of a summons and complaint is the only notice required.[22] Where there is no provision excepting infants, such requirements apply alike to infants and adults.[23]

(II) *Construction of Statutes.* Such charter or statutory provisions, so far as the requirement of a notice or presentment as a condition precedent is concerned, are in derogation of common right, and should be strictly construed,[24] and cannot be extended by implication beyond their own terms,[25] and therefore will not require such notice with respect to damages which are not within the intention of the statute;[26] but where a notice or presentation has been given or made, its sufficiency under the statute is a remedial matter, and it should be liberally construed.[27] Such provisions are generally declared not to be retroactive.[28] It has been held that the requirement of a prescribed notice or presentation does not

able. Hunter *v.* Ithaca, 135 Mich. 281, 97 N. W. 712.

21. See *infra*, XIV, E, 12, f.

22. Sachs *v.* Sioux City, 109 Iowa 224, 80 N. W. 336 (under Acts 26 Gen. Assembly, c. 63); McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233; Duff *v.* New York, 60 N. Y. Super. Ct. 29, 15 N. Y. Suppl. 863; Meyer *v.* New York, 14 Daly (N. Y.) 395, 12 N. Y. St. 674 (holding that such provision applies only to cases where suit is delayed beyond the prescribed time, and therefore is not necessary where suit is commenced by summons and complaint within that time). See Dawson *v.* Troy, 49 Hun (N. Y.) 322, 2 N. Y. Suppl. 137. *Contra*, Bauer *v.* Buffalo, 18 N. Y. Suppl. 672.

23. Davidson *v.* Muskegon, 111 Mich. 454, 69 N. W. 670; Donovan *v.* Oswego, 42 N. Y. App. Div. 539, 59 N. Y. Suppl. 759 (holding that an infant who has been injured by reason of a defect in a street may make a valid statement of her claim for damages, describing the time, place, cause, and extent of her injuries, when such a statement is required by the city charter before action against it); Norton *v.* New York, 16 Misc. (N. Y.) 303, 38 N. Y. Suppl. 90.

24. Tattan *v.* Detroit, 128 Mich. 650, 87 N. W. 894.

25. Garnett *v.* Hamilton, 69 Kan. 866, 77 Pac. 583.

A provision applying to injuries from street defects does not include injuries occurring to workmen in sewer construction (McIntee *v.* Middletown, 80 N. Y. App. Div. 434, 81 N. Y. Suppl. 124), or for want of a safe place to work (Kelly *v.* Faribault, 95 Minn. 293, 104 N. W. 231).

A provision that no action can be maintained until the claim has been presented and disallowed, or the council has neglected to act thereon for a specified period, does not require presentation of a claim based upon a contract made by the council and acceptance by the claimant of a certain sum in settlement of a claim for a larger amount. Sharp *v.* Mauston, 92 Wis. 629, 66 N. W. 803.

26. Scherer *v.* Cincinnati, 8 Ohio Dec. (Reprint) 552, 8 Cinc. L. Bul. 326, holding that a claim for damages for a defective street is not within Rev. St. § 2326, unless the damages are caused by the construction of improvements.

Notice required by Wis. Rev. St. § 1339, for damages occasioned by the "insufficiency or want of repairs of a bridge, sluiceway or road" need not be given where the injuries are occasioned by the obstruction of navigation in consequence of the negligent management of a drawbridge maintained by the municipality; but it is sufficient to comply with section 824 by filing a statement of the claim with the town-clerk. Winneconne *v.* Wiesenberg, 56 Wis. 667, 14 N. W. 871.

27. See *infra*, XIV, E, 2, c, (v), text and note 53.

28. *Iowa.*— Kennedy *v.* Des Moines, 84 Iowa 187, 50 N. W. 880, Acts 22d Gen. Assembly, c. 25, § 1, held not to apply to causes of action subsisting when it went into effect.

Massachusetts.— Shallow *v.* Salem, 136 Mass. 136, holding a statutory provision that notice of the place where the injury was sustained "shall not be deemed invalid" because of "any inaccuracy in stating the time, place, or cause of the injury" not to apply to a notice given before its enactment.

Michigan.— Broffee *v.* Grand Rapids, 127 Mich. 89, 86 N. W. 401; Angell *v.* West Bay City, 117 Mich. 685, 76 N. W. 128; Atherton *v.* Bancroft, 114 Mich. 241, 72 N. W. 208.

Minnesota.— Powers *v.* St. Paul, 36 Minn. 87, 30 N. W. 433.

New York.— Sehl *v.* Syracuse, 81 N. Y. App. Div. 543, 81 N. Y. Suppl. 482; Lee *v.* Greenwich, 48 N. Y. App. Div. 391, 63 N. Y. Suppl. 160; Bullock *v.* Durham, 64 Hun 380, 19 N. Y. Suppl. 635; Williams *v.* Oswego, 25 Hun 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1699.

Contra.— Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; Plum *v.* Fond du Lac, 51 Wis. 393, 8 N. W. 283, holding that Rev. St. § 1339, applies to actions for injuries received some ten days before such statute took effect, the action not having been commenced until after the statute took effect, even though the statute in describing the cause of action used the future tense — "if any damage shall happen," etc.

apply where the injury is caused by a nuisance;[29] nor to a suit in equity for relief from continued wrongful acts in the nature of a trespass, although there is also involved a demand for damages in the past;[30] nor to injuries sustained by reason of a breach of a municipal contract to repair;[31] nor to injuries received in a city where the statute applies to towns only.[32] So it is generally held that charter or statutory provisions requiring notice or presentation of "debts, claims and demands" upon which only actions *ex contractu* can be brought do not apply to an action for tort;[33] but such a requirement as to "any claim or demand of whatsoever nature" has been held to apply to claims in tort as well as in contract,[34] as have also the terms "all demands,"[35] or no "claim," etc.[36] So a statute prohibiting the allowance of costs to plaintiff in an action against a municipal corporation in which the complaint demands a judgment for money only, unless the claim is before the commencement of the action presented for payment to the chief fiscal officer of the corporation, does not apply to an action for damages for injuries caused by the negligence of the servants of the corporation.[37] Inconsistency and discrepancy between different acts of legislation, charter or statutory, in regard to such notice are resolved by the application of the canon of construction in

29. Bloom *v.* San Francisco, 64 Cal. 503, 3 Pac. 129; Ziegler *v.* West Bend, 102 Wis. 17, 78 N. W. 164; Hughes *v.* Fond du Lac, 73 Wis. 380, 41 N. W. 407.

30. Sammons *v.* Gloversville, 175 N. Y. 346, 67 N. E. 622 [*affirming* 74 N. Y. Suppl. 1145]; Gerow *v.* Liberty, 106 N. Y. App. Div. 357, 94 N. Y. Suppl. 949.

31. D'Amico *v.* Boston, 176 Mass. 599, 58 N. E. 158.

32. Beaudette *v.* Fond du Lac, 40 Wis. 44.

33. *Idaho.*— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Michigan.— Hunter *v.* Ithaca, 135 Mich. 281, 97 N. W. 712; Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475; Mackie *v.* West Bay City, 106 Mich. 242, 64 N. W. 25; Lay *v.* Adrian, 75 Mich. 438, 42 N. W. 959.

Missouri.— Cropper *v.* Mexico, 62 Mo. App. 385.

Montana.— Dawes *v.* Great Falls, 31 Mont. 9, 77 Pac. 309.

Nebraska.— Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62; Nance *v.* Falls City, 16 Nebr. 85, 20 N. W. 109 (holding that Comp. St. c. 14, § 80, providing that all claims against cities of a certain class must be presented to the city council for allowance or rejection in order to entitle a party to recover costs does not extend to a claim for damages for negligence, as "claims" as used therein refer alone to those arising on contract); Crete *v.* Childs, 11 Nebr. 252, 9 N. W. 55.

New York.— Harrigan *v.* Brooklyn, 119 N. Y. 156, 23 N. E. 741; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Brusso *v.* Buffalo, 90 N. Y. 679; Howell *v.* Buffalo, 15 N. Y. 512; Quinn *v.* New York, 68 N. Y. App. Div. 175, 74 N. Y. Suppl. 89; McClure *v.* Niagara County, 50 Barb. 594 [*affirmed* in 3 Abb. Dec. 83, 4 Transcr. App. 275, 4 Abb. Pr. N. S. 202]; McDonough *v.* New York, 15 Misc. 593, 37 N. Y. Suppl. 1; Sherman *v.* Oneonta, 21 N. Y. Suppl. 137 [*affirmed* in 142 N. Y. 637, 37 N. E. 566]; Denair *v.* Brooklyn, 5 N. Y. Suppl. 835; Cavan *v.* Brooklyn, 5 N. Y. Suppl. 758 [*affirming* 2 N. Y. Suppl. 21].

North Carolina.— Frisby *v.* Marshall, 119 N. C. 570, 26 S. E. 251; Shields *v.* Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293.

Oregon.— Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925.

Rhode Island.—Lonsdale Co. *v.* Woonsocket, 25 R. I. 428, 56 Atl. 448.

Washington.— Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978; Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

Wisconsin.— Sommers *v.* Marshfield, 90 Wis. 59, 62 N. W. 937; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053; Vogel *v.* Antigo, 81 Wis. 642, 51 N. W. 1008; Jung *v.* Stevens Point, 74 Wis. 547, 43 N. W. 513; Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555; Bradley *v.* Eau Claire, 56 Wis. 168, 14 N. W. 10; Kelley *v.* Madison, 43 Wis. 638, 28 Am. Rep. 576.

United States.— Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1562.

34. O'Donnell *v.* New London, 113 Wis. 292, 89 N. W. 511; McCue *v.* Waupun, 96 Wis. 625, 71 N. W. 1054; Van Frachen *v.* Ft. Howard, 88 Wis. 570, 60 N. W. 1062. See Pollard *v.* Cadillac, 133 Mich. 503, 95 N. W. 536.

35. Adams *v.* Modesto, (Cal. 1900) 61 Pac. 957.

36. Barrett *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54.

37. Hunt *v.* Oswego, 107 N. Y. 629, 14 N. E. 97; Gage *v.* Hornellsville, 106 N. Y. 667, 12 N. E. 817 (Code Civ. Proc. § 3245); McClure *v.* Niagara County, 50 Barb. (N. Y.) 594 [*affirmed* in 3 Abb. Dec. 83, 4 Transcr. App. 275, 4 Abb. Pr. N. S. 202]. But see Judson *v.* Olean, 40 Hun (N. Y.) 158 [*reversed* on other grounds in 116 N. Y. 655, 22 N. E. 555]; Hart *v.* Brooklyn, 36 Barb. (N. Y.) 226.

implied repeal, viz.: Both laws stand so far as reconcilable;[38] and although the repeal of statutes by implication is not favored, where two repugnant statutes are found relating to the same subject and enacted for the same purpose, the former must be deemed to have been repealed.[39]

(III) *ABUTTERS OR OBSTRUCTORS.* Statutes requiring notice to the municipality as a condition precedent to an action for street negligence do not by implication require such notice to abutters or other persons causing the defect or obstruction, as a condition precedent to a suit against them.[40]

(IV) *WAIVER.* In some jurisdictions the requirement of such a notice of presentation cannot be waived by the municipal authorities,[41] as by the mayor.[42] In other jurisdictions, however, such requirements may be waived by the city council;[43] or by other officers or agents speaking or acting within the scope of their authority;[44] and in such jurisdictions formal defects are waived if not objected to when the claim is acted upon by the proper authorities.[45] A waiver, however, can only be predicated upon some duty of the municipality to act; and where no such duty is imposed by statute, expressly or impliedly, the municipality

38. De Vore *v.* Auburn, 64 N. Y. App. Div. 84, 71 N. Y. Suppl. 747 (Laws (1897), c. 172, held not to repeal Auburn City Charter, § 140); Harris *v.* Fond du Lac, 104 Wis. 44, 80 N. W. 66 (holding Rev. St. (1878) § 1339, as amended by Laws (1897), c. 236, in respect to notice of injuries from defective highways not applicable to cities having special and inconsistent charter provisions and that therefore such charter provisions will prevail); Hiner *v.* Fond du Lac, 71 Wis. 74, 36 N. W. 632.

N. Y. Laws (1886), c. 572, § 1, was held not to be repealed as to the city of New York by the Greater New York Charter, § 261 (Quinn *v.* New York, 68 N. Y. App. Div. 175, 74 N. Y. Suppl. 89. See Krall *v.* New York, 44 N. Y. App. Div. 259, 60 N. Y. Suppl. 661), nor as to the city of Brooklyn by the subsequent revised charter of that city (Merz *v.* Brooklyn, 11 N. Y. Suppl. 778 [*affirmed* in 128 N. Y. 617, 28 N. E. 253]), nor N. Y. Laws (1890), c. 31, requiring demand on the financial officer of the city before action against it (Merz *v.* Brooklyn, *supra*). Nor is such statute in conflict with the charter of the city of Buffalo (Laws (1870), tit. 3, c. 519, § 7, as amended by Laws (1886), c. 479, § 8), providing that such an action shall not be brought until forty days after the claim therefor has been presented to the common council for audit. Curry *v.* Buffalo, 135 N. Y. 366, 32 N. E. 80 [*affirming* 57 Hun 25, 10 N. Y. Suppl. 392].

39. Nicol *v.* St. Paul, 80 Minn. 415, 83 N. W. 375 (Laws (1897), c. 248, held to supersede and repeal charter provisions of St. Paul (Spec. Laws (1885), c. 7, § 19), as to giving notice of personal injuries); Neissen *v.* St. Paul, 80 Minn. 414, 83 N. W. 376; Eagan *v.* Rochester, 68 Hun (N. Y.) 331, 22 N. Y. Suppl. 955 (holding that the provision in the Rochester City Charter, § 218 (Laws (1880), c. 14, as amended by Laws (1881), c. 343), to the effect that no person who claims damages shall be allowed costs unless he shall have notified the city of the time and place of the injury was repealed by implication by later provisions of section 80 of the charter as amended by Laws (1890), c. 561.

40. Leahan *v.* Cochran, 178 Mass. 566, 60 N. E. 382, 86 Am. St. Rep. 506, 53 L. R. A. 891; Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22; Rider *v.* Mt. Vernon, 87 Hun (N. Y.) 27, 33 N. Y. Suppl. 745.

41. Starling *v.* Bedford, 94 Iowa 194, 62 N. W. 674 (city council); Veazie *v.* Rockland, 68 Me. 511.

42. Veazie *v.* Rockland, 68 Me. 511.

43. Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665; Foster *v.* Bellaire, 127 Mich. 13, 86 N. W. 383; Brown *v.* Owosso, 126 Mich. 91, 85 N. W. 256; Sharp *v.* Mauston, 92 Wis. 629, 66 N. W. 803.

Failure to interpose objection to the presentment of the claim at the trial waives such objection. Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444.

An agreement to arbitrate a claim for personal injuries does not waive the filing of a verified claim. Clark *v.* Davison, 118 Mich. 420, 76 N. W. 971.

The subsequent introduction of testimony to meet plaintiff's case does not waive an objection raised at the close of plaintiff's case that he did not present his claim to defendant municipality before bringing suit. Selden *v.* St. Johns, 114 Mich. 698, 72 N. W. 991.

44. Hamilton *v.* Buffalo, 55 N. Y. App. Div. 423, 66 N. Y. Suppl. 990 [*reversed* on other grounds in 173 N. Y. 72, 65 N. E. 944]; Kennedy *v.* New York, 34 N. Y. App. Div. 311, 54 N. Y. Suppl. 261 [*affirming* 18 Misc. 303, 41 N. Y. Suppl. 1077], conduct held not to amount to a waiver. But see Borst *v.* Sharon, 24 N. Y. App. Div. 599, 48 N. Y. Suppl. 996, holding that the town or municipal officers cannot waive any statutory requirements as to notice of claim imposed for the protection of the municipality.

45. Spier *v.* Kalamazoo, 138 Mich. 652, 101 N. W. 846, holding that where notice was given, and was recognized and acted upon by the city council, without objection, such objection cannot be raised in an action on the claim.

is under no duty to object to the sufficiency of the notice or presentation until the claimant institutes his suit.[46] Where the municipal authorities have a prescribed time after presentation to reject the claim for damages, and the claim is not objected to within that time, its form and verification will be deemed sufficient.[47] It has also been held that objection to the sufficiency of a notice cannot be taken after verdict.[48] Where a claim for damages is barred by reason of its not being presented within the prescribed time, it cannot be subsequently revived by the municipal authorities, in the absence of express statutory authority.[49]

(v) *Form and Sufficiency*—(A) *In General.* In order that it may be valid as a condition precedent to an action for injuries caused by a defect in a street, or other tort, it is essential that the prescribed notice, statement, or presentation of the claim, as to its form and contents, should at least substantially comply with the statutory requirements in stating the elements required.[50] Such statutory requirements being for the benefit of the municipality, in order to put its officers in possession of the facts upon which the claim for damages is predicated, and the place where the injuries are alleged to have occurred in order that they may investigate them and adjust the claim without the expense of litigation,[51] a reason-

46. Wilton *v.* Detroit, 138 Mich. 67, 100 N. W. 1020; Holtham *v.* Detroit, 136 Mich. 17, 98 N. W. 754 (holding that the fact that the common council of the city directed plaintiff to appear and produce his witnesses is not a waiver of the notice, it not appearing that the council knew at the time it directed plaintiff to appear that plaintiff had failed to give such notice, and it also appearing that at that time more than three months had elapsed since his injury); Woodworth *v.* Kalamazoo, 135 Mich. 233, 97 N. W. 714 (holding notice not waived by the act of a city council in receiving the claim after the time had expired and referring it to a committee which at the time of the hearing provided for by statute refused to hear and pass upon evidence because not presented within the prescribed time); Chamberlain *v.* Saginaw, 135 Mich. 61, 97 N. W. 156 (holding that where the notice presented to the city council was an insufficient statement and the statement was referred to the committee on finance and auditing and no action was taken by the committee and the claimant did not ask a hearing nor the city offer one, there was no waiver of any defect or irregularity in the notice); Blumrich *v.* Highland Park, 131 Mich. 209, 91 N. W. 129; Currier *v.* Concord, 68 N. H. 294, 44 Atl. 386 (failure to object at hearing before committee upon plaintiff's claim for damages); Forseyth *v.* Oswego, 107 N. Y. App. Div. 187, 95 N. Y. Suppl. 33.

Failure of the officer upon whom the notice is served to object to its sufficiency at the time of the service upon him does not constitute a waiver by the city of its insufficiency, where he was not bound to reply to the notice when served. Shea *v.* Lowell, 132 Mass. 187, city clerk.

47. Sweet *v.* Buffalo, 92 Hun (N. Y.) 404, 36 N. Y. Suppl. 760 [*affirmed* in 158 N. Y. 695, 53 N. E. 1132].

48. Cowan *v.* Bucksport, 98 Me. 305, 56 Atl. 901.

49. Van Auken *v.* Adrian, 135 Mich. 534, 98 N. W. 15.

50. *Alabama.*— Bland *v.* Mobile, 142 Ala. 142, 37 So. 843.

Iowa.— Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355.

Kansas.— Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985.

Maine.— Cowan *v.* Bucksport, 98 Me. 305, 56 Atl. 901.

Massachusetts.—Dalton *v.* Salem, 139 Mass. 91, 28 N. E. 576; Miles *v.* Lynn, 130 Mass. 398; Kenady *v.* Lawrence, 128 Mass. 318.

Michigan.— Brown *v.* Owosso, 126 Mich. 91, 85 N. W. 256.

Missouri.— Lyons *v.* St. Joseph, 112 Mo. App. 681, 87 S. W. 588.

New York.—Sheehy *v.* New York, 160 N. Y. 139, 54 N. E. 749; De Vore *v.* Auburn, 64 N. Y. App. Div. 84, 71 N. Y. Suppl. 747; Walsh *v.* Buffalo, 92 Hun 438, 36 N. Y. Suppl. 997 (must state time and place); Kennedy *v.* New York, 18 Misc. 303, 41 N. Y. Suppl. 1077 [*affirmed* in 34 N. Y. App. Div. 311, 54 N. Y. Suppl. 261]; Denair *v.* Brooklyn, 5 N. Y. Suppl. 835.

Canada.— McQuillan *v.* St. Mary's, 31 Ont. 401.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1701, 1702.

Residence of claimant.— Under the charter of the city of Troy (Laws (1892), c. 670, tit. 10, § 19), the claim must state the claimant's residence by street and number; and he is not excused from stating the street upon which his residence is located by reason of the fact that the house being unnumbered it is impossible to state the street number, and in such case a statement which gives a claimant's residence as the city of Troy merely is fatally defective. Johnson *v.* Troy, 24 N. Y. App. Div. 602, 48 N. Y. Suppl. 998.

Notice may consist of two or more papers properly connected. Walsh *v.* Buffalo, 92 Hun (N. Y.) 438, 36 N. Y. Suppl. 997, holding that where a notice of an intention to sue is accompanied with a copy of the statement of the claim filed the two papers should be read together to make a complete notice.

51. Giles *v.* Shenandoah, 111 Iowa 83, 82

able or substantial compliance with the terms of the statute is all that is required; and where an effort to comply with such requirements has been made and the notice, statement, or presentation when reasonably construed is such as to accomplish the object of the statute, it should be regarded as sufficient.[52] In accordance with this principle, such notice or presentation is to be construed with liberality,[53] although express provisions of the statute cannot be ignored;[54] and enough should appear in the notice or presentation to show that it is intended as a basis of a claim against defendant municipality,[55] and is given by or in behalf of the person who brings the suit.[56] Ordinarily the notice or statement should be in writing,[57] and signed by the person injured or by some person thereto by him duly authorized.[58] Usually a notice is only required to state the time, place, and character and circumstances of the injury in general terms;[59] and need not contain specifi-

N. W. 466; Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123. And see cases cited in following notes.

52. *Colorado.* — Denver *v.* Bradbury, 19 Colo. App. 441, 75 Pac. 1077, holding that a notice giving the date and place where the injury occurred and the cause thereof, as a hole into which the person fell, meets the requirements.

Georgia.— Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

Michigan.— Nestle *v.* Flint, 141 Mich. 153, 104 N. W. 406; Hunter *v.* Ithaca, 135 Mich. 281, 97 N. W. 712; Brown *v.* Owosso, 126 Mich. 91, 85 N. W. 256, holding that where the notice of an injury received from a defective sidewalk contains a reasonably definite statement of the circumstances, and that the injured person is entitled to certain damages, the city council cannot refuse to act thereon until the time for filing notice and then reject the claim for informality in the notice.

Minnesota.— Ljungberg *v.* North Mankato, 87 Minn. 484, 92 N. W. 401.

New York.— Sheehy *v.* New York, 160 N. Y. 139, 54 N. E. 749; Shaw *v.* New York, 83 N. Y. App. Div. 212, 82 N. Y. Suppl. 44, holding the notice sufficient, although addressed to the controller, and omitting any explicit statement of an intention to sue.

North Dakota.— Coleman *v.* Fargo, 8 N. D. 69, 76 N. W. 1051, holding presentation of claim sufficient, although the claim was never audited and allowed.

Washington.— Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1701, 1702.

53. Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298; Olcott *v.* St. Paul, 91 Minn. 207, 97 N. W. 879; Lyons *v.* St. Joseph, 112 Mo. App. 681, 87 S. W. 588; Lincoln *v.* Pirner, 59 Nebr. 634, 81 N. W. 846.

54. Lyons *v.* St. Joseph, 112 Mo. App. 681, 87 S. W. 588.

55. Driscoll *v.* Fall River, 163 Mass. 105, 39 N. E. 1003; Mooney *v.* Salem, 130 Mass. 402; McNulty *v.* Cambridge, 130 Mass. 275.

Unless it appears to have been made with the intention of giving notice, no statement of facts of the injuries or accident can be regarded as notice under the statute. Kenady *v.* Lawrence, 128 Mass. 318.

56. Driscoll *v.* Fall River, 163 Mass. 105, 39 N. E. 1003; Roach *v.* Somerville, 131 Mass. 189 (holding that a notice given in a casual conversation with a police officer by an attending physician of the person injured, but not at his request nor on his behalf, is not sufficient); McNulty *v.* Cambridge, 130 Mass. 275; Mitchell *v.* Worcester, 129 Mass. 525; Seliger *v.* New York, 88 N. Y. Suppl. 1003 (holding that a parent in an action for injury to his infant son cannot rely on notice filed on behalf of the son); Davis *v.* Seattle, 37 Wash. 223, 79 Pac. 784 (holding that a claim presented by a wife alone for personal injuries is sufficient to enable her husband and herself to jointly prosecute the action); McKeague *v.* Green Bay, 106 Wis. 577, 82 N. W. 708 (holding this to be true in an action by a husband for the loss of his wife's services where the only notice of her injury stated that she would claim satisfaction and did not show that she was a married woman, that her husband had sustained any damage, or that he was intending to prosecute therefor).

57. Dalton *v.* Salem, 139 Mass. 91, 28 N. E. 576; Kenady *v.* Lawrence, 128 Mass. 318; De Vore *v.* Auburn, 64 N. Y. App. Div. 84, 71 N. Y. Suppl. 747; Foley *v.* New York, 1 N. Y. App. Div. 586, 37 N. Y. Suppl. 465; Stedman *v.* Rome, 88 Hun (N. Y.) 279, 34 N. Y. Suppl. 737; Cross *v.* Elmira, 86 Hun (N. Y.) 467, 33 N. Y. Suppl. 947; Jones *v.* Albany, 62 Hun (N. Y.) 353, 17 N. Y. Suppl. 232.

Written notice is implied where a statute requires a notice to be filed. Norton *v.* New York, 16 Misc. (N. Y.) 303, 38 N. Y. Suppl. 90.

58. Dalton *v.* Salem, 139 Mass. 91, 28 N. E. 576; Terryll *v.* Faribault, 81 Minn. 519, 84 N. W. 458 (notice and statement of claim signed by plaintiff with initials of her husband's name instead of her own held *prima facie* sufficient); Sheehy *v.* New York, 160 N. Y. 139, 54 N. E. 749; McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434 (holding that a notice signed by plaintiff and her husband is valid, as the signature of the husband is mere surplusage).

59. Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123; Burnette *v.* St. Joseph, 112 Mo. App. 668, 87 S. W. 589. And see *infra*, XIV, E, 2, c, (v), (B).

cations of all details of the injury[60] or defect;[61] nor does surplusage invalidate it;[62] nor need it state sufficient facts to show the liability of the municipality.[63] Some statutes save all such objections by providing that defects or mere inaccuracies in the notice shall not nullify it, unless they were intentional and actually misled defendant;[64] but under other statutes it is otherwise.[65] A defect in the notice cannot be cured after suit is brought;[66] nor will a good notice given after the prescribed period cure a defective notice given before such period had expired.[67] An unnotified action, brought within the time required for notice, and voluntarily dismissed, may, by its pleadings, operate as a notice for a new action brought in due time.[68] A single notice will serve for any number of actions which may be instituted for the same injury.[69]

(B) *Time, Place, Cause, and Nature of Injury.* Where the statute so requires, the notice or statement should set forth with reasonable certainty both the time and the place, cause, and character of the injuries sustained.[70] Such notice should at least substantially comply with the statutory provision in respect to stating an intention to hold the city liable or to commence an action;[71] and should state with such substantial accuracy as to inform and aid the munici-

60. Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195; Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123; Dovey *v.* Plattsmouth, 52 Nebr. 642, 73 N. W. 11 (holding that a detailed statement is required only in actions for negligence, but need not be filed in an action to recover damages for the location and improper construction of a sewer); McCarthy *v.* Syracuse, 96 N. Y. App. Div. 566, 89 N. Y. Suppl. 89.

Notice need not detail the facts elemental to a recovery with the exactness required in a petition. Lyons *v.* St. Joseph, 112 Mo. App. 681, 87 S. W. 588.

61. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80; Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355; Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123.

62. Bland *v.* Mobile, 142 Ala. 142, 37 So. 843; McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80; McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

63. Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123.

64. Gardner *v.* Weymouth, 155 Mass. 595, 30 N. E. 363; Liffin *v.* Beverly, 145 Mass. 549, 14 N. E. 787; Hoffman *v.* North Milwaukee, 118 Wis. 278, 95 N. W. 274; Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695.

65. Gardner *v.* New London, 63 Conn. 267, 28 Atl. 42; Rauber *v.* Wellsville, 83 N. Y. App. Div. 581, 82 N. Y. Suppl. 9.

That defendant was not misled by defective notice does not relieve plaintiff from noncompliance with the statute, and from the insufficiency of the notice served thereunder. Rauber *v.* Wellsville, 83 N. Y. App. Div. 581, 82 N. Y. Suppl. 9.

66. Maloney *v.* Cook, 21 R. I. 471, 44 Atl. 692, holding that the fact that counsel for plaintiff appeared before the city authorities and particularly notified them of the claim within the prescribed time does not cure a defect in the notice.

67. McNulty *v.* Cambridge, 130 Mass. 275.

68. Pardey *v.* Mechanicsville, 112 Iowa 68, 83 N. W. 828.

69. Pardey *v.* Mechanicsville, 112 Iowa 68, 83 N. W. 828; McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

70. See cases hereafter cited.

Time, place, cause, and character of the injuries by reason of a defect on a street held to be sufficiently designated see Pendergast *v.* Clinton, 147 Mass. 402, 18 N. E. 75; Aston *v.* Newton, 134 Mass. 507, 45 Am. Rep. 347; Savory *v.* Haverhill, 132 Mass. 324; Oesterreich *v.* Detroit, 137 Mich. 415, 100 N. W. 593; Stedman *v.* Rome, 88 Hun (N. Y.) 279, 34 N. Y. Suppl. 737; Cross *v.* Elmira, 86 Hun (N. Y.) 467, 33 N. Y. Suppl. 947; Werner *v.* Rochester, 77 Hun (N. Y.) 33, 28 N. Y. Suppl. 226 [*affirmed* in 149 N. Y. 563, 44 N. E. 300]; Connor *v.* Salt Lake City, 28 Utah 248, 78 Pac. 479.

If the notice or statement is specific as to the time, place, and nature of the injury it is sufficient, although it alleges more than one defect in the vicinity where the injury occurred. Bauer *v.* Dubuque, 120 Iowa 500, 98 N. W. 355.

71. Higgins *v.* North Andover, 168 Mass. 251, 47 N. E. 85 (holding "I hereby give notice that I hold the town of North Andover responsible for serious injury sustained by my wife" sufficient notice to authorize a suit by the wife); Brown *v.* Owosso, 126 Mich. 91, 85 N. W. 256 (holding that notice that the person injured believes she is entitled to five thousand dollars for injuries received is sufficient under Comp. Laws, § 3173, in the absence of a request for a more specific notice); Sheehy *v.* New York, 160 N. Y. 139, 54 N. E. 749 [*reversing* 29 N. Y. App. Div. 263, 51 N. Y. Suppl. 519] (holding a notice sufficient in this respect, which, while not stating in terms an intention to commence an action, informs the corporation counsel of the nature of the claim, the place where and the circumstances under which it arose, and of a purpose to enforce it); Halpin *v.* New York, 82 N. Y. App. Div. 311, 81 N. Y. Suppl. 982; De Vore *v.* Auburn, 64 N. Y. App. Div. 84, 71 N. Y. Suppl. 747 (holding notice not containing a statement of an inten-

pal authorities in investigating the claim, the time,[72] place,[73] nature, and character

tion to sue defective notwithstanding the claimant when presenting the statement told the city clerk that such was his intention); Walsh *v.* Buffalo, 92 Hun (N. Y.) 438, 36 N. Y. Suppl. 997.

72. Gardner *v.* New London, 63 Conn. 267, 28 Atl. 42; Shaw *v.* Waterbury, 46 Conn. 263 (holding that Gen. St. tit. 16, c. 7, § 10, contemplates such precise information of the time of such injury as would enable the officers of the municipality to inquire into the fact); Wilton *v.* Flint, 128 Mich. 156, 87 N. W. 86; Forseyth *v.* Oswego, 107 N. Y. App. Div. 187, 95 N. Y. Suppl. 33; Freligh *v.* Saugerties, 70 Hun (N. Y.) 589, 24 N. Y. Suppl. 182; Maloney *v.* Cook, 21 R. I. 471, 44 Atl. 692.

A mistake of three days in the notice as to the time of the occurrence is fatal even though the municipality was not misled thereby. Gardner *v.* New London, 63 Conn. 267, 28 Atl. 42.

A slight variation in time will not render the notice so defective as to defeat the action. Murphy *v.* Seneca Falls, 57 N. Y. App. Div. 438, 67 N. Y. Suppl. 1013; Sullivan *v.* Syracuse, 77 Hun (N. Y.) 440, 29 N. Y. Suppl. 105, holding that a notice which states that the injury occurred August 5 is sufficient, although it appears that it occurred on the evening of August 4. *Compare* Lee *v.* Greenwich, 48 N. Y. App. Div. 391, 63 N. Y. Suppl. 160.

Naming the day sufficiently describes the time of the accident, in the absence of evidence that anything depended upon the nature of the defect, or upon the particular hour of the accident. Donnelly *v.* Fall River, 132 Mass. 299.

73. **Notice held sufficient,** in designating the place of the accident, so as to enable the municipal authorities to locate it, see the following cases:

Colorado.— Denver *v.* Barron, 6 Colo. App. 72, 39 Pac. 989, at a point where a line of sewer "crossed Thirty-Fourth avenue, between F. and H. streets."

Iowa.— Rusch *v.* Dubuque, 116 Iowa 402, 90 N. W. 80; Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281.

Kansas.— Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985.

Maine.— Hutchings *v.* Sullivan, 90 Me. 131, 37 Atl. 883, "a hole in the sidewalk situated between Hotel Cleaves and Dunbar Brothers' store upon town way in said town of Sullivan."

Massachusetts.— Fuller *v.* Hyde Park, 162 Mass. 51, 37 N. E. 782 (holding that notice that plaintiff fell over a root of a tree on the sidewalk of C avenue is not necessarily insufficient); Sargent *v.* Lynn, 138 Mass. 599 (holding that where a defect at the corner of two ways is minutely described, the notice is not defective merely because it fails to specify the particular corner); Lowe *v.* Clinton, 133 Mass. 526.

Michigan.— Nestle *v.* Flint, 141 Mich. 153, 104 N. W. 406; Wilton *v.* Flint, 128 Mich. 156, 87 N. W. 86; Wheeler *v.* Detroit, 127 Mich. 329, 86 N. W. 822, holding that a description that a defect is on a certain side of a named street between two other named streets is sufficient as to the locality, where the city receives and acts on the notice without objection.

Minnesota.— Harder *v.* Minneapolis, 40 Minn. 446, 42 N. W. 350.

Missouri.— Strange *v.* St. Joseph, 112 Mo. App. 629, 87 S. W. 2.

Nebraska.— Lincoln *v.* Pirner, 59 Nebr. 634, 81 N. W. 846; Lincoln *v.* O'Brien, 56 Nebr. 761, 77 N. W. 76 (holding the notice good, although a space of two city blocks was described); Lincoln *v.* Mays, 2 Nebr. (Unoff.) 204, 96 N. W. 484 (notice that injury occurred on the sidewalk along the east side of a certain block between two named streets held sufficient).

New York.— Murphy *v.* Seneca Falls, 57 N. Y. App. Div. 438, 67 N. Y. Suppl. 1013.

Texas.— Dallas *v.* Myers, (Civ. App. 1901) 64 S. W. 683, along a certain street at a point opposite a well-known hotel.

Washington.— Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138.

Wisconsin.— Ruscher *v.* Stanley, 120 Wis. 380, 98 N. W. 223; Kolb *v.* Fond du Lac, 118 Wis. 311, 95 N. W. 149; Hoffman *v.* North Milwaukee, 118 Wis. 278, 95 N. W. 274.

Canada.— McQuillan *v.* St. Mary, 31 Ont. 401.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1702.

Notice held insufficient in designating the place of the accident see the following cases:

Maine.— Kaherl *v.* Rockport, 87 Me. 527, 33 Atl. 20.

Massachusetts.— Miller *v.* Springfield, 177 Mass. 373, 58 N. E. 1013; Gardner *v.* Weymouth, 155 Mass. 595, 30 N. W. 363 (holding that, although the statute (Pub. St. c. 52, § 19, and St. (1888) c. 14) provides that no notice shall be deemed invalid or insufficient solely by reason of any "inaccuracy," a statement that the injury happened on a sidewalk where there was a hydrant without attempting to designate the place of the injury is a fatal defect); Dalton *v.* Salem, 139 Mass. 91, 28 N. E. 576; Cronin *v.* Boston, 135 Mass. 110; Shea *v.* Lowell, 132 Mass. 187; Miles *v.* Lynn, 130 Mass. 398; Noonan *v.* Lawrence, 130 Mass. 161; Donnelly *v.* Fall River, 130 Mass. 115; Larkin *v.* Boston, 128 Mass. 521.

New Hampshire.— Currier *v.* Concord, 68 N. H. 294, 44 Atl. 386.

New York.— Forseyth *v.* Oswego, 107 N. Y. App. Div. 187, 95 N. Y. Suppl. 33; Rauber *v.* Wellsville, 83 N. Y. App. Div. 581, 82 N. Y. Suppl. 9; Lee *v.* Greenwich, 48 N. Y. App. Div. 391, 63 N. Y. Suppl. 160; Freligh *v.* Saugerties, 70 Hun 589, 24 N. Y. Suppl. 182.

Rhode Island.— Maloney *v.* Cook, 21 R. I. 471, 34 Atl. 692.

Wisconsin.— Benson *v.* Madison, 101 Wis.

of the injury,[74] and the defect in the street, or other tort, which caused the injury;[75]

312, 77 N. W. 161; Dolan *v.* Milwaukee, 89 Wis. 497, 61 N. W. 564; Sowle *v.* Tomah, 81 Wis. 349, 51 N. W. 571.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1702.

The exact locality need not be stated; and if the notice gives reasonable information as to the locality so as to enable a municipality to investigate it is sufficient. McQuillan *v.* St. Mary, 31 Ont. 401.

A slight deviation in the description of the place of the accident does not render the notice defective. Wood *v.* Stafford Springs, 74 Conn. 437, 51 Atl. 129; Cloughessey *v.* Waterbury, 51 Conn. 405, 50 Am. Rep. 38 ("sidewalk in Bank Street, at a point on the west side of the street in front of the property No. 117, occupied by D. B.," held sufficient, although the place was in fact on the east side of the street); Davis *v.* Rumney, 67 N. H. 591, 38 Atl. 18 ("at a point indicated by a stake between two large rocks, about 847 feet southerly" from a certain point, although the stake is actually eight hundred and sixty feet southerly from the main point).

Where the injury was caused by a horse becoming frightened and running away, by reason of a defect in a street, the place where the defect was is the place of the injury, in a legal sense, although the loss or damage may have resulted from a collision during the runaway. Carstesen *v.* Stratford, 67 Conn. 428, 35 Atl. 276. And a notice not indicating any place as defective except where the injury actually occurred is insufficient, where the defect which caused the injury was some distance away. Miller *v.* Springfield, 177 Mass. 373, 58 N. E. 1013.

Misnaming one of the streets at the juncture of which the notice locates the accident does not make the notice insufficient where one could not be misled thereby as to the exact spot of the accident. Hein *v.* Fairchild, 87 Wis. 258, 58 N. W. 413.

An incorrect description of the street numbers of the houses in front of which the injuries were sustained renders the notice fatally defective under N. Y. Laws (1886), c. 572, although the complaint contains a correct description of the street numbers of the scene of the accident; nor is the defect assisted by an answer which after admitting the filing of a paper purporting to be a notice denies upon the part of the city any knowledge or information sufficient to form a belief as to any of the allegations of the complaint "not hereinbefore specifically admitted or denied." Learned *v.* New York, 21 Misc. (N. Y.) 601, 48 N. Y. Suppl. 142.

74. *Connecticut.*—Wood *v.* Stafford Springs, 74 Conn. 437, 51 Atl. 129, sufficient description.

Iowa.— Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298, sufficient description.

Michigan.— Nestle *v.* Flint, 141 Mich. 153, 104 N. W. 406 (sufficient description); Tattan *v.* Detroit, 128 Mich. 650, 87 N. W. 894 (insufficient specification of the nature of the injury).

Minnesota.— Olcott *v.* St. Paul, 91 Minn. 207, 97 N. W. 879.

New York.— Place *v.* Yonkers, 43 N. Y. App. Div. 380, 60 N. Y. Suppl. 171, notice held sufficient to embrace injury to an eye.

Texas.— Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95, sufficient.

Vermont.— Pratt *v.* Sherburne, 53 Vt. 370.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1702.

A notice need not specify the various elements of the damages (Salina *v.* Kerr, 7 Kan. App. 223, 52 Pac. 901; Morgan *v.* Lewiston, 91 Me. 566, 40 Atl. 545; Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195), where it states that specific injuries developed at the time (Wilkins *v.* Flint, *supra*).

75. The description of the cause of the injury must be sufficiently definite and circumstantial to direct attention to the substantial defect for which recovery is demanded. Olcott *v.* St. Paul, 91 Minn. 207, 97 N. W. 879.

Description held sufficient of the defect or negligence causing the injury see the following cases:

Connecticut.— Wood *v.* Stafford Springs, 74 Conn. 437, 51 Atl. 129.

Iowa.— Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298.

Massachusetts.— Cronan *v.* Woburn, 185 Mass. 91, 70 N. E. 38; Canterbury *v.* Boston, 141 Mass. 215, 4 N. E. 808 (holding that a notice in compliance with St. (1882) c. 36, is not defective in omitting to state that the improper construction of its sidewalk was the cause of the injury, if it partially describes the actual cause); Grogan *v.* Worcester, 140 Mass. 227, 4 N. E. 230 (that injury was caused by the lack of a railing to protect an embankment); Dalton *v.* Salem, 136 Mass. 278 (injury by falling on sidewalk "the falling being consequent upon the icy and slippery condition of the said sidewalk"); Spellman *v.* Chicopee, 131 Mass. 343.

Michigan.— Nestle *v.* Flint, 141 Mich. 153, 104 N. W. 406; Oesterreich *v.* Detroit, 137 Mich. 415, 100 N. W. 593; Brown *v.* Owosso, 126 Mich. 91, 85 N. W. 256.

New York.— McCarthy *v.* Syracuse, 96 N. Y. App. Div. 566, 89 N. Y. Suppl. 89.

Rhode Island.— Maloney *v.* Cook, 21 R. I. 471, 44 Atl. 692.

Washington.— Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138.

Wisconsin.— Collins *v.* Janesville, 107 Wis. 436, 53 N. W. 695.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1702.

Description held insufficient see the following cases:

Colorado.— Stoors *v.* Denver, 19 Colo. App. 159, 73 Pac. 1094.

Iowa.— Giles *v.* Shenandoah, 111 Iowa 83, 82 N. W. 466, verdict for defendant properly

and recovery cannot be based upon defects or acts of negligence different from those described in the notice.[76]

(VI) *VERIFICATION.* A notice or statement of a claim for injuries need not be verified unless expressly required by statute.[77] If a particular method of verification is prescribed, it must be pursued;[78] if not the usual method in the state is sufficient.[79] Immaterial defects, however, will not be fatal to the verification,[80] and it may be entirely waived.[81] Where the claimant has presented his

directed where notice contained none of the "circumstances" of the injury.

Maine.— Lord *v.* Saco, 87 Me. 231, 32 Atl. 887.

Massachusetts.— Lyon *v.* Cambridge, 136 Mass. 419; Cronin *v.* Boston, 135 Mass. 110; Shea *v.* Lowell, 132 Mass. 187; Dalton *v.* Salem, 131 Mass. 551; Madden *v.* Springfield, 131 Mass. 441; Miles *v.* Lynn, 130 Mass. 398; McNulty *v.* Cambridge, 130 Mass. 275.

Missouri.— Lyons *v.* St. Joseph, 112 Mo. App. 681, 87 S. W. 588.

New York.— Paddock *v.* Syracuse, 61 Hun 8, 15 N. Y. Suppl. 387, holding that an averment as to the cause of the injury which is a mere conclusion is insufficient.

Washington.— Mears *v.* Spokane, 22 Wash. 323, 60 Pac. 1127.

Wisconsin.— Dolan *v.* Milwaukee, 89 Wis. 497, 61 N. W. 564; Van Loan *v.* Lake Mills, 88 Wis. 430, 60 N. W. 710.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1702.

A general description of the insufficiency or want of repair of a sidewalk is sufficient. Van Frachen *v.* Ft. Howard, 88 Wis. 570, 60 N. W. 1062.

An enumeration of the causes which produced the injury is not necessary. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80.

An immaterial misstatement of the cause of the injury does not render the notice defective. Denver *v.* Barron, 6 Colo. App. 72, 39 Pac. 989; McCabe *v.* Cambridge, 134 Mass. 484; Pecor *v.* Oconto, 125 Wis. 335, 104 N. W. 88; Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317.

That the cause of the injury was an accumulation of ice and snow which nature had removed long prior to the time when plaintiff's claim was filed does not excuse a failure to describe with particularity the cause of the injury. Mears *v.* Spokane, 22 Wash. 323, 60 Pac. 1127.

That the injury was caused by stepping into a hole in the sidewalk is not a sufficient description of the cause of an injury to support an action for an injury caused by a loose board in the walk turning and causing plaintiff's foot to slip into such hole. Gagan *v.* Janesville, 106 Wis. 652, 82 N. W. 558.

76. Olcott *v.* St. Paul, 91 Minn. 207, 97 N. W. 879, holding that where the notice given sets forth, as the sole distinct ground of claim, conditions caused by ice and snow upon a sidewalk, an action cannot be maintained for a dangerous hole into which the injured party fell, caused by age and decay to which the slippery condition was merely incidental.

77. See cases hereafter cited in this note.

A charter or statutory provision requiring all claims against the city to be verified has no application to demands *ex delicto*. Angell *v.* West Bay City, 117 Mich. 685, 76 N. W. 128; Evans *v.* Joplin, 84 Mo. App. 296; Neal *v.* Marion, 126 N. C. 412, 35 S. E. 812; Hill *v.* Fond du Lac, 56 Wis. 242, 14 N. W. 25. *Compare* Griswold *v.* Ludington, 116 Mich. 401, 74 N. W. 663.

78. *In re* Dasent, 2 N. Y. Suppl. 609, holding that a claim for damages must be sworn to before the controller under the Consolidation Act of New York city (Laws (1882), c. 410, § 123).

Verification by a husband as agent of the claimant is sufficient under Kan. Gen. St. (1897) c. 37, § 67. Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985.

79. See Allen *v.* West Bay City, 140 Mich. 111, 103 N. W. 514.

That the notary, before whom the claim was verified, also acted as attorney for plaintiff in the suit for injuries does not vitiate the claim. Allen *v.* West Bay City, 140 Mich. 111, 103 N. W. 514.

Verification by wife alone held sufficient see McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

80. Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123; Burnette *v.* St. Joseph, 112 Mo. App. 668, 87 S. W. 589; Strange *v.* St. Joseph, 112 Mo. App. 629, 87 S. W. 2.

Dating the jurat the day before the accident occurred does not affect the validity of the claim where it is shown that the claim was actually verified and filed on that day of the following month. Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31.

Failure of plaintiff to subscribe the affidavit of verification does not render the verification defective where the notary's certificate recites that plaintiff was sworn, and the notary testifies to that fact on the trial. Place *v.* Yonkers, 43 N. Y. App. Div. 380, 60 N. Y. Suppl. 171.

Although the notary may omit the date from his certificate to the affidavit and notice required to be given to the city by one who desires to maintain an action for injuries caused by a defective sidewalk, yet the notice will not be defective if by other evidence it is shown that the notice was served within the proper time. Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123.

81. Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191 (holding that the failure of one having a claim against a city for injuries to verify a notice to the city was waived, where, when the notice was received, none of the city officials objected to the lack of verification

claim for damages, executed in the manner and form, and verified as required by the charter or statute, he is not further required to make proof of his claim before the board or committee acting upon it.[82]

(VII) *SERVICE OR PRESENTATION.* Service of notice or presentation of the claim must be made in the manner prescribed by the statute;[83] or, if not prescribed, then as provided by general law for the service of notice,[84] and within the time prescribed.[85] The notice or statement must be served upon or presented to the board or officers, designated in the statute to be notified,[86] such as the corporation counsel,[87] or city council.[88] Service upon or presentation to the city council or other municipal board or body may be made by service upon or presentation

and the common council appointed a committee to investigate the claim and the commission employed by the committee subjected plaintiff to a physical examination); Griswold *v.* Ludington, 116 Mich. 401, 74 N. W. 663.

82. La Flamme *v.* Albany, 91 Hun (N. Y.) 65, 36 N. Y. Suppl. 686 [*affirmed* in 158 N. Y. 699, 53 N. E. 1127].

83. Denver *v.* Saulcey, 5 Colo. App. 420, 38 Pac. 1098; Frankel *v.* New York, 2 N. Y. Suppl. 294; Dorsey *v.* Racine, 60 Wis. 292, 18 N. W. 928.

84. Ljungberg *v.* North Mankato, 87 Minn. 484, 92 N. W. 401 (service of carbon copy of notice held sufficient); Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615.

Presentation to the controller of a verified claim for injuries is sufficiently made, in the absence of objection, by showing the original claim signed and verified to him, and leaving a copy with him. Magee *v.* Troy, 48 Hun (N. Y.) 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148]; McDonald *v.* Troy, 13 N. Y. Suppl. 385.

Service of notice by mail has been held sufficient. Small *v.* Prentice, 102 Wis. 256, 78 N. W. 415, under Rev. St. (1878) § 1339. *Contra,* Burford *v.* New York, 26 N. Y. App. Div. 225, 49 N. Y. Suppl. 969, on corporation counsel under Laws (1886), c. 572.

85. Babcock *v.* New York, 56 Hun (N. Y.) 196, 9 N. Y. Suppl. 368; Hildman *v.* Phillips, 106 Wis. 611, 82 N. W. 566.

The time of service allowed is the prescribed time after the date of the injury.— McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; Biggs *v.* Geneva, 100 N. Y. App. Div. 25, 90 N. Y. Suppl. 858 [*affirmed* in 184 N. Y. 580, 77 N. E. 1182], holding that where the accident occurred on Feb. 10, 1902, the month allowed for filing notice expired March 10, 1902.

86. Denver *v.* Saulcey, 5 Colo. App. 420, 80 Pac. 1098; Clark *v.* Austin, 38 Minn. 487, 38 N. W. 615; Burnette *v.* St. Joseph, 112 Mo. App. 668, 87 S. W. 589 (service of notice on mayor of city held properly made); Dorsey *v.* Racine, 60 Wis. 292, 18 N. W. 928; Winneconne *v.* Weisenberg, 56 Wis. 667, 14 N. W. 871.

Notice to both the controller and corporation counsel must be given under N. Y. Laws (1886), c. 572, and N. Y. City Consolidation Act, § 1104. Frankel *v.* New York, 2 N. Y. Suppl. 294. See Babcock *v.* New York, 56 Hun (N. Y.) 196, 9 N. Y. Suppl. 368.

Illustrations.— Service on the "mayor, the city clerk, or the treasurer" is properly made by handing the notice to an alderman, who causes it to be acted upon by the board of aldermen after which it is delivered to the city clerk in the regular course of business by the board. Wormwood *v.* Walthan, 144 Mass. 184, 10 N. E. 800. But service on an alderman is not sufficient where the statute requires the notice to be given to the mayor or city council. Denver *v.* Saulcey, 5 Colo. App. 420, 38 Pac. 1098. So service on the city council does not comply with a requirement of notice to the mayor or city clerk. Dorsey *v.* Racine, 60 Wis. 292, 18 N. W. 928. And service upon the street commissioner or sidewalk superintendent of the city or an alderman of the ward in which the injury occurred is not complied with by service on the mayor and city clerk. Harris *v.* Fond du Lac, 104 Wis. 44, 80 N. W. 66.

87. Bedell *v.* New York, 99 N. Y. App. Div. 128, 90 N. Y. Suppl. 936; Walsh *v.* Buffalo, 92 Hun (N. Y.) 438, 36 N. Y. Suppl. 997.

Service of a notice upon the corporation counsel or other proper law officer of cities of a certain class as required by N. Y. Laws (1886), c. 572, § 1, is not excused by compliance with the charter provisions of a city of such a class (Buffalo City Charter, Laws (1870), tit. 3, c. 519, § 7, as amended by Laws (1886), c. 479, § 8) by presentation of the claim for damages to the common council. Curry *v.* Buffalo, 135 N. Y. 366, 32 N. E. 80 [*affirming* 57 Hun 35, 10 N. Y. Suppl. 392].

Notice of intention to sue to corporation counsel may be served by delivering it in his office to one who is acting for an assistant in making the examination of plaintiff regarding the same claim. McMahon *v.* New York, 1 N. Y. App. Div. 321, 37 N. Y. Suppl. 289. So such notice is substantially served, where the paper is addressed to and served on the city controller, who sends it to the corporation counsel, who files it in his office and acts on it by examining plaintiff on the notice given him by defendant to appear. Missano *v.* New York, 160 N. Y. 123, 54 N. E. 744 [*reversing* 17 N. Y. App. Div. 536, 45 N. Y. Suppl. 592].

88. Kleopfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908, holding that under Laws (1897), c. 248, in case of an injury through the negligence of a park board service of notice on such board is not necessary, but service thereof on the city council is sufficient.

to the chairman,[89] the president,[90] or the recorder or clerk of such board or body,[91] although the notice is addressed to the mayor and city council;[92] but notice to the council or other governing body is not properly served on the mayor.[93] Service upon a municipal officer is properly made upon a deputy or assistant exercising functions appertaining to the business.[94] Service may be accepted by the proper officer on behalf of the corporation.[95]

(VIII) *TIME FOR INVESTIGATION.* Provision is also made in some of the charters and statutes that suit on the claim cannot be brought until the municipal authorities have acted upon the claim or until the lapse of a specified time after the notice or presentation of the claim;[96] but such a prohibition must be explicit and clear and will not be inferred.[97] Where the time to elapse after notice before suit is not prescribed by law, then a reasonable time must be given to permit investigation of the claim.[98]

89. McIntee *v.* Middletown, 80 N. Y. App. Div. 434, 81 N. Y. Suppl. 124.

90. O'Donnell *v.* Syracuse, 102 N. Y. App. Div. 80, 92 N. Y. Suppl. 555 [*reversed* on other grounds in 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1053] (acting president); McIntee *v.* Middletown, 80 N. Y. App. Div. 434, 81 N. Y. Suppl. 124.

91. Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615; Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735; Clark *v.* Austin, 38 Minn. 487, 38 N. W. 615; Dobson *v.* Oneida, 106 N. Y. App. Div. 377, 94 N. Y. Suppl. 958 (holding notice to a board of trustees of a village properly served upon the clerk of such board, although not made at the meeting of the board, and although he failed to present the claim to the board); O'Donnell *v.* Syracuse, 102 N. Y. App. Div. 80, 92 N. Y. Suppl. 555 [*reversed* on other grounds in 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558, 3 L. R. A. N. S. 1053]; McIntee *v.* Middletown, 80 N. Y. App. Div. 434, 81 N. Y. Suppl. 124; Durham *v.* Spokane, 27 Wash. 615, 68 Pac. 383 (presentment of claim to city sufficiently made by filing with city clerk); Bacon *v.* Antigo, 103 Wis. 10, 79 N. W. 31. *Compare* Ft. Worth *v.* Shero, 16 Tex. Civ. App. 487, 41 S. W. 704, holding that service on the city secretary of a notice of injuries caused by a defective street is insufficient under a provision in the charter requiring it to be served on the city council.

Service on the city clerk or recorder must be served upon that officer at his office or place of transacting the official business pertaining to his office. Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615.

Where the board or committee is not in session at the time of service, it is sufficient to direct the notice to the council or other governing body, and then deliver it to the officer having the care and custody of the records and files of such body, within the time fixed by statute. Kelly *v.* Minneapolis, 77 Minn. 76, 79 N. W. 653; Roberts *v.* St. James, 76 Minn. 456, 79 N. W. 519; Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868, holding that where the notice is left with the clerk and is by him presented and read to the council, the notice is properly served on the council.

Whether the clerk or recorder presented the notice to the council for their action or not is immaterial in so far as the right of recovery against the municipality is concerned, where the notice is properly served on such officer. Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615; Dobson *v.* Oneida, 106 N. Y. App. Div. 377, 94 N. Y. Suppl. 958.

92. Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735.

93. Doyle *v.* Duluth, 74 Minn. 157, 76 N. W. 1029.

94. McCabe *v.* Cambridge, 134 Mass. 484; McMahon *v.* New York, 1 N. Y. App. Div. 321, 37 N. Y. Suppl. 289.

Delivery of notice in the city clerk's office to an assistant clerk, in the absence of the clerk, is properly served. McCabe *v.* Cambridge, 134 Mass. 484; Kelly *v.* Minneapolis, 77 Minn. 76, 79 N. W. 653.

95. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80, holding that the mayor of a city has power under Code, §§ 3531, 3518, to acknowledge service of notice required by Code, § 3437, requiring written notice to be served upon the municipality.

96. Saunders *v.* Fitzgerald, 113 Ga. 619, 38 S. E. 978; Kenyon *v.* Cedar Rapids, 124 Iowa 195, 99 N. W. 692 (thirty days after notice); Smith *v.* New York, 88 N. Y. App. Div. 606, 85 N. Y. Suppl. 150; Pulitzer *v.* New York, 48 N. Y. App. Div. 6, 62 N. Y. Suppl. 587; Moriarty *v.* Albany, 8 N. Y. App. Div. 118, 40 N. Y. Suppl. 583 (holding under the Albany city charter that where the common council refers a claim to the law department no action will lie until the law department has reported to the council, which it may do at any time within three months); Duryea *v.* New York, 26 Hun (N. Y.) 120 (holding that under Laws (1860), c. 379, an action for damages occasioned by the discharge of water and sewage on plaintiff's land cannot be maintained against the city until after the lapse of twenty days from the time the claim has been presented to the controller for adjustment).

97. Jones *v.* Albany, 151 N. Y. 223, 45 N. E. 557, holding that Albany City Charter, Laws (1883), p. 298, tit. 3, §§ 45, 51, created no such prohibition as to a claim for personal injury.

98. Dundas *v.* Lansing, 75 Mich. 499, 42

(IX) *FAILURE TO GIVE NOTICE AND EXCUSE THEREFOR.* A failure to give the notice or present the claim in the time and manner prescribed by statute is a bar to the action, and such failure is not excused by the mere fact that the city council or other officers of the municipality had knowledge of the circumstances of the injury,[99] nor by the fact that the person injured had no suspicion or knowledge of the injuries until after the time for giving the notice had expired.[1] Mental and physical incapacity, however, caused by the accident, of such a character as to make it impossible to give the prescribed notice, is ordinarily a sufficient excuse for failing to give the notice within the time prescribed.[2] But disability during a portion of the period allowed will not extend the time of performance provided a reasonable time remains within the period after the disability is removed.[3] In some jurisdictions the court may in its discretion grant leave to file a notice or presentment after the statutory period has expired, if the claimant has been unavoidably prevented from filing it within the prescribed time, and it is manifest that injustice would otherwise be done.[4] When the injured party dies before

N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143; Freligh *v.* Saugerties, 70 Hun (N. Y.) 589, 24 N. Y. Suppl. 182. But see Gutkind *v.* Elroy, 97 Wis. 649, 73 N. W. 325, holding that service of notice under Rev. St. § 1339, is complied with, although the summons and complaint are served immediately after the service of such notice and on the same day.

99. Crocker *v.* Hartford, 66 Conn. 387, 34 Atl. 98; Mears *v.* Spokane, 22 Wash. 323, 60 Pac. 1127 (holding that the filing of a complaint against the city before the expiration of the time for presentment of the claim does not excuse the required presentment); Sowle *v.* Tomah, 81 Wis. 349, 51 N. W. 571 (holding that the fact that some of the city officers were at the place of the injury immediately after the accident and knew precisely where it occurred does not dispense with the required notice).

Actual knowledge by officers of the city relative to the time, place, cause, and character of the injury is without effect to dispense with the giving of the notice or with the statement therein of any essential fact. Lyons *v.* St. Joseph, 112 Mo. App. 681, 87 S. W. 588.

Oral information to the city officers from plaintiff of the place and cause of the injury does not excuse the giving of the required written notice. Dalton *v.* Salem, 139 Mass. 91, 28 N. E. 576; Shea *v.* Lowell, 132 Mass. 187.

1. Crocker *v.* Hartford, 66 Conn. 387, 34 Atl. 98.

2. *Massachusetts.*— Barclay *v.* Boston, 167 Mass. 596, 46 N. E. 113, 173 Mass. 310, 53 N. E. 822 (where the person injured is incapable by any ordinary means to procure the notice to be given); May *v.* Boston, 150 Mass. 517, 23 N. E. 220 (holding that under Pub. St. c. 52, §§ 19, 21, if it is impossible to give the notice within the prescribed time by reason of mental or physical disability, it may be given ten days after such disability is removed); Lyons *v.* Cambridge, 132 Mass. 534 (disability held insufficient); McNulty *v.* Cambridge, 130 Mass. 275; Mitchell *v.* Worcester, 129 Mass. 525.

Minnesota.— Ray *v.* St. Paul, 44 Minn. 340, 46 N. W. 675, "bereft of reason" in consequence of injury.

New York.— Walden *v.* Jamestown, 178 N. Y. 213, 70 N. E. 466 [*affirming* 79 N. Y. App. Div. 433, 80 N. Y. Suppl. 65] (notice of intention to sue required within forty-eight hours held properly served within seventy-two hours where plaintiff was suffering much pain through and in consequence of the injury and was in a condition where she was unable to transact business); Williams *v.* Port Chester, 97 N. Y. App. Div. 84, 89 N. Y. Suppl. 671 [*affirmed* in 183 N. Y. 550, 76 N. E. 1116]; Green *v.* Port Jervis, 55 N. Y. App. Div. 58, 66 N. Y. Suppl. 1042 (notice of intention to sue required to be filed within forty-eight hours held sufficiently served five days after the occurrence, as soon as the injured person recovered from the semiconscious condition resulting from the shock and the anesthetics administered.

Washington.— Ehrhardt *v.* Seattle, 33 Wash. 664, 74 Pac. 827; Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386.

United States.— Webster *v.* Beaver Dam, 84 Fed. 280.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1706.

Physical and mental incapacity will not excuse if it still enables the injured party to procure another person to give a notice on his behalf, even though he cannot give it personally. Barclay *v.* Boston, 167 Mass. 596, 46 N. E. 113, 173 Mass. 310, 53 N. E. 822; Saunders *v.* Boston, 167 Mass. 595, 46 N. E. 98.

3. Hastings *v.* Foxworthy, 45 Nebr. 676, 63 N. W. 955, 34 L. R. A. 321. See Schmidt *v.* Fremont, 70 Nebr. 577, 97 N. W. 830.

4. Welsh *v.* Franklin, 70 N. H. 491, 48 Atl. 1102 (holding that such leave may be granted where the claimant was unavoidably prevented from seasonably filing his statement and where the evidence is conflicting as to the nature of the defect and the cause of the accident and there are questions in controversy which plaintiff should be permitted to investigate); Boyd *v.* Derry, 68 N. H. 272, 38 Atl. 1005; Chadbourne *v.* Exeter, 67 N. H. 190, 29 Atl. 408.

lapse of the period for notice, the law of notice does not apply to his personal representative in an action for such death resulting from the injuries.[5]

(x) *New Notice.* A new notice may be given within the statutory period specifying additional injuries;[6] and it does not waive or impair the former one,[7] nor is it ineffectual because of the insufficiency of the previous notice,[8] nor is plaintiff confined to the first notice in proving his injury.[9]

(xi) *Appeal From Disallowance of Claim.* Under some statutes an appeal to the proper court may be taken from the disallowance of a claim for injuries properly presented to the city council or other municipal board or officer,[10] provided it is taken within the time prescribed therefor,[11] and the proper bond is given.[12] Such provisions, however, for an appeal do not apply where the municipal board or committee refuses to act upon the claim until the claimant fulfils certain conditions which it has no right to impose; but in such case the claimant may maintain an original action to enforce his claim.[13] Nor can an appeal from such disallowance be taken where it is not authorized by charter or statute.[14]

3. Notice by Municipality of Liability of Third Person. Some charters or statutes provide that where a third person is also liable for the negligent or wrongful acts, and the city alone is sued for damages, it may notify plaintiff or his attorney in writing within a prescribed time of such third person's liability, whereupon he shall be joined as defendant; and the suit cannot be prosecuted further until he is so joined, unless the prescribed notice is not given.[15]

4. Time to Sue and Limitations. The legislature may, either by general statute or by charter provision, fix the period of limitation, usually one year, within which actions may be instituted against a municipality for negligence in relation to streets or other tort;[16] and such special statutes of limitation prevail over the

5. McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298. See Barclay *v.* Boston, 167 Mass. 596, 46 N. E. 113, 173 Mass. 310, 53 N. E. 822.

6. George *v.* St. Joseph, 97 Mo. App. 56, 71 S. W. 110.

Second notice of claim.— Where plaintiff filed a notice of intention to commence an action for injuries with the corporation counsel, and a notice of her claim for such injuries with the controller, as required by the city charter, and an action was commenced, but discontinued, and a second action commenced after filing a new notice of intention, the filing of a second notice of claim was not essential to maintaining the second action. Ward *v.* Troy, 55 N. Y. App. Div. 192, 66 N. Y. Suppl. 925.

7. Bradbury *v.* Benton, 69 Me. 194.

8. McLean *v.* Boston, 180 Mass. 69, 61 N. E. 758.

9. George *v.* St. Joseph, 97 Mo. App. 56, 71 S. W. 110.

10. Dollar *v.* Marquette, 123 Mich. 184, 82 N. W. 33 (to the circuit court); Schaefer *v.* Ashland, 117 Wis. 553, 94 N. W. 303; Morrison *v.* Eau Claire, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955 [*distinguishing* Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515], holding such presentation and appeal essential conditions to the jurisdiction of the court over the subject-matter of any claim of the character required to be presented.

11. Morgan *v.* Rhinelander, 105 Wis. 138, 81 N. W. 132, twenty days under Laws (1889), c. 326, § 60.

12. Schaefer *v.* Ashland, 117 Wis. 553, 94 N. W. 303, holding that the bond required, with two sureties, need not be so framed as to make the obligors severally liable.

13. Dollar *v.* Marquette, 123 Mich. 184, 82 N. W. 33.

14. Vogel *v.* Antigo, 81 Wis. 642, 51 N. W. 1008.

15. Waltemeyer *v.* Kansas City, 71 Mo. App. 354, holding, however, that the city is not compelled to give such notice.

16. Wilton *v.* Detroit, 138 Mich. 67, 100 N. W. 1020 (holding the action barred under Local Acts (1895), p. 724, No. 463, § 46, although the declaration was filed within one year, where service of a copy of the declaration was not made on the proper officer within that time); Klass *v.* Detroit, 129 Mich. 35, 88 N. W. 204, 95 Am. St. Rep. 407 (holding city not estopped from setting up limitations); Springer *v.* Detroit, 118 Mich. 69, 76 N. W. 122 (holding that cause of action did not accrue until rejection of claim); Powers *v.* St. Paul, 36 Minn. 87, 30 N. W. 433; Quinn *v.* New York, 68 N. Y. App. Div. 175, 74 N. Y. Suppl. 89; Merz *v.* Brooklyn, 11 N. Y. Suppl. 778 [*affirmed* in 128 N. Y. 617, 28 N. E. 253]. *Compare* Lonisville *v.* McGill, 52 S. W. 1053, 21 Ky. L. Rep. 718, holding that St. § 2752, prescribing a limitation of six months as to actions against cities of the first class for injuries to personal property, is special legislation and therefore unconstitutional.

A provision that no action on contract, obligation, or liability, express or implied,

general statutes.[17] But in the absence of such special provisions, or in cases to which the special provisions do not apply, the general statute of limitations relating to torts applies.[18] In some states the special provisions apply unless due notice is given within a fixed period,[19] and if such notice is duly given the action is controlled by the general statutes.[20]

5. PARTIES. The question who are proper or necessary parties, plaintiff or defendant, to an action in tort against a municipality, is, in the absence of express statutory provisions relating thereto, regulated by the rules governing parties generally.[21] Where the common duty of keeping a sidewalk or street in repair

shall be commenced against a city except in one year after the cause of action shall have accrued, does not include actions for tort, and therefore does not apply to an action against a city for damages resulting from negligence in not keeping the sidewalks in proper repair. McGaffin *v.* Cohoes, 74 N. Y. 387, 30 Am. Rep. 307 [*affirming* 11 Hun 531].

In New York the words "personal injuries," as used in Laws (1886), p. 801, c. 572, limiting the time for bringing certain actions against a city of fifty thousand inhabitants or over, include injuries resulting in death and apply to actions brought by an executor or administrator. Crapo *v.* Syracuse, 98 N. Y. App. Div. 376, 90 N. Y. Suppl. 553. And the words "after such cause of action shall have accrued" contained in such statute refer to the time of the intestate's death in such a case and not to the time when the letters of administration were issued. Crapo *v.* Syracuse, *supra*.

A statute of limitation of actions for injuries caused by street negligence controls an action for injuries received from an unsafe bill board falling on the sidewalk (Bliven *v.* Sioux City, 85 Iowa 346, 52 N. W. 246); but not a case brought to redress injuries from the overflow of a watercourse obstructed by raising a street (Pye *v.* Mankato, 38 Minn. 536, 38 N. W. 621).

17. Crapo *v.* Syracuse, 98 N. Y. App. Div. 376, 90 N. Y. Suppl. 553. But see Foxworthy *v.* Hastings, 23 Nebr. 772, 37 N. W. 657, holding that general provisions of the code limiting the time within which actions may be brought applies to cities of the second class, and that an action against such a city for negligence will be valid if brought within the time thus limited, notwithstanding a provision in the act creating such cities that the action shall be brought within six months.

A special statute will not be held to have been repealed by a city by a subsequent statute, general in its terms, unless the intention to repeal or alter is manifest, although the general act would, but for the special law, include the case provided for by the latter; and hence N. Y. Laws (1886), c. 572, providing that actions for personal injuries resulting from negligence against cities of a certain class shall be commenced within one year after the cause of action has accrued, does not repeal or amend the Syracuse Charter, § 250, as amended by Laws (1885), c. 26, which provided a different period of limitation for such cities. Lewis *v.* Syracuse, 13 N. Y. App. Div. 587, 43 N. Y. Suppl. 455.

A general statute extending the limitation of actions in the case of infants to the prescribed period after disability ceases does not apply to a special statutory limitation if there is no saving clause in the latter statute. Norton *v.* New York, 16 Misc. (N. Y.) 303, 38 N. Y. Suppl. 90.

18. McGaffin *v.* Cohoes, 74 N. Y. 387, 30 Am. Rep. 307 [*affirming* 11 Hun 531]. See Louisville *v.* Norris, 111 Ky. 903, 64 S. W. 958, 23 Ky. L. Rep. 1195.

19. Robinson *v.* Cedar Rapids, 100 Iowa 662, 69 N. W. 1064; Bliven *v.* Sioux City, 85 Iowa 346, 52 N. W. 246.

20. Robinson *v.* Cedar Rapids, 100 Iowa 662, 69 N. W. 1064, holding that, under Acts of 22 Gen. Assembly, providing that no suit shall be brought for personal injuries against the city after six months from the time of injury unless notice shall be served on the city within ninety days from the injury, an action therefor may be brought at any time within the general statutory limitation of two years when such notice is served.

21. See, generally, PARTIES.

Plaintiff.— An owner of property which has been injured by municipal negligence need not join as a party plaintiff to an action against the municipality therefor one who was using the property at the time. Welsh *v.* Argyle, 85 Wis. 307, 55 N. W. 412, holding that in an action for injuries to a team from a defective highway while being driven by one who had hired it, such hirer is not a proper or necessary party.

A municipal servant who was guilty of no breach of duty, although engaged at the time in operating the municipal property which caused the injury, is not a necessary party to an action against a municipality for its negligence in constructing or maintaining such property. Stephani *v.* Manitowoc, 89 Wis. 467, 62 N. W. 176, holding in an action against a municipality for injuries resulting from the leaving open of a drawbridge without harriers or lights, that the bridge tender need not be joined as defendant when it was not his duty to furnish such harriers or lights.

A lessor of premises on which the lessee has created a nuisance is not a necessary party to an action for damages caused thereby against the city and such lessee. Grogan *v.* Broadway Foundry Co., 87 Mo. 321 [*affirming* 14 Mo. App. 588].

rests both upon the city and the abutting owner, they are jointly and severally liable for injuries caused by a defect or obstruction in such street, and the party injured may at his election sue them jointly or severally,[22] or such property-owners may be made co-defendants at the instance of the city;[23] but such owner is not a necessary party defendant to an action against the municipality,[24] except where a charter or statute provides that the party negligently or unlawfully causing the injury shall be joined as defendant,[25] and it has given due notice thereof;[26] or where a judgment must be recovered against such other in order that the action may be maintained against the city.[27] Where, however, the city and such other negligent party cannot be considered joint tort-feasors, they cannot be joined as co-defendants,[28] although under some statutes another who is remotely liable may be brought in as a third party at the instance of the municipality for the purpose

Inhabitants requesting the exercise of a municipal power are not proper parties to an action for injuries caused by the improper or negligent exercise of such power by the municipality. Carmichael *v.* Texarkana, 116 Fed. 845, 54 C. C. A. 179, 58 L. R. A. 911.

22. *Colorado.*— Elliott *v.* Field, 21 Colo. 378, 41 Pac. 504.

Illinois.— Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683; Severin *v.* Eddy, 52 Ill. 189.

Louisiana.— Cline *v.* Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851.

Missouri.— Noble *v.* Kansas City, 95 Mo. App. 167, 68 S. W. 969. See Donoho *v.* Vulcan Iron Works, 75 Mo. 401, holding also that the joining of a person who is found upon the trial not to be liable will not prevent a recovery against the city. A charter requiring the property-owner to be joined with the city in cases of injuries resulting from the bad condition of the sidewalks, in so far as it tends to regulate practice and proceedings in the courts, is invalid because in conflict with the Practice Act, Rev. St. (1889) § 545 (1905), providing that an injured party has a right to sue all the joint tort-feasors or any one of them. Badgley *v.* St. Louis, 149 Mo. 122, 50 S. W. 817; Noble *v.* Kansas City, 95 Mo. App. 167, 68 S. W. 969. But *compare* Mancuso *v.* Kansas City, 74 Mo. App. 138.

New York.— Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341].

Pennsylvania.— Dutton *v.* Lansdowne, 10 Pa. Super. Ct. 204, 7 Del. Co. 400, 44 Wkly. Notes Cas. 290.

Wisconsin.— Schaefer *v.* Fond du Lac, 104 Wis. 39, 80 N. W. 59.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1709.

23. San Antonio *v.* Talerico, 98 Tex. 151, 81 S. W. 518. See Luke *v.* El Paso, (Tex. Civ. App. 1900) 60 S. W. 363.

24. Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242, holding such property-owner not a necessary party under St. Louis Charter (2 Rev. St. p. 1626, § 9).

25. Jones *v.* Minneapolis, 31 Minn. 230, 17 N. W. 377.

In Connecticut an action under Rev. St. (1902) § 3838, which permits the municipality to be joined as a co-defendant with a street railway company for injuries caused by a defect in that portion of a highway which is lawfully occupied by the tracks of such company and for which the railroad company alone is liable cannot be maintained against the municipality alone. Lavigne *v.* New Haven, 75 Conn. 693, 55 Atl. 569.

Under Oswego City Charter, § 364 (N. Y. Laws (1895), c. 394), providing that a surety or sureties on the bond of a person or company against whom the city would have a right of action must be made co-defendants in an action against a city on the claim, a resident who obtains permission to make excavations in the street and binds himself to pay all costs or damages resulting to the city on account thereof is a necessary party defendant to an action against the city for injuries sustained through the improper guarding of such excavations, notwithstanding the penal sum mentioned in the instrument binding such resident is less than the amount of the damages claimed in the action. Donovan *v.* Oswego, 42 N. Y. App. Div. 539, 59 N. Y. Suppl. 759.

Objections to a failure to join such person under the Minneapolis Charter, c. 8, § 18, must be raised by demurrer or answer; and if by answer it must name the person who should be joined. Jones *v.* Minneapolis, 31 Minn. 230, 17 N. W. 377.

26. See *supra*, XIV, E, 3.

27. See Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242.

28. Mooney *v.* Edison Electric Illuminating Co., 185 Mass. 547, 70 N. E. 933 (holding that private corporations through whose negligence a highway becomes charged with electricity, and a city which negligently allows a highway to become so charged are not joint tort-feasors and cannot be sued as such, as the private corporation's liability is based upon the common law and the liability of the municipality upon the statute); Zeigler *v.* Ashley, 5 Ohio S. & C. Pl. Dec. 163, 7 Ohio N. P. 388 (holding that the city and persons responsible for an unguarded excavation in a street cannot be joined as co-defendant in an action for resulting injuries); Baines *v.* Woodstock, 10 Ont. L. Rep. 694 (holding also that plaintiff may be ordered to elect against which defendant he will proceed); Hinds *v.* Barrie, 6 Ont. L. Rep. 656.

of enforcing a remedy over.[29] Two adjoining municipalities may be jointly sued for a defective bridge between them;[30] but a city is not a proper co-defendant with a town, because a portion of the latter, wherein the injury occurred, was incorporated into the former just after the injury.[31] Objections for non-joinder of tort-feasors will not prevail unless seasonably made.[32]

6. Pleading — a. Declaration, Petition, or Complaint[33] — (i) *In General.* Plaintiff's declaration, petition, or complaint in an action for tort against a municipality is governed by the rules regulating pleadings in such actions generally.[34] Subject to such rules, plaintiff should set forth in his complaint, declaration or petition, with such reasonable certainty as is necessary to inform defendant of the wrong complained of,[35] all facts essential to his cause of action.[36] He should

29. Erdman *v.* Walkerton, 15 Ont. Pr. 12, holding that where, under the Municipal Act, 55 Vict. c. 42, § 531, subs. 5, a defendant municipality seeks to have another corporation or person added as a party for the purpose of enforcing a remedy over, such person should be made a third party and not a defendant, unless plaintiff seeks some relief from such added party; and it is improper to add such party both as defendant and third party. See Rice *v.* Whitby, 25 Ont. App. 191.

30. Peckham *v.* Burlington, etc., Brayt. (Vt.) 134.

31. Emhler *v.* Wallkill, 132 N. Y. 222, 30 N. E. 404.

32. Denver *v.* Solomon, 2 Colo. App. 534, 31 Pac. 507 (holding the objection not seasonably made when it was not raised in the pleading or on the trial, but it appears for the first time in instructions asked); Mancuso *v.* Kansas City, 74 Mo. App. 138.

33. Joinder of causes see Joinder and Splitting of Actions, 23 Cyc. 432 note 84.

34. See Slowey *v.* Grand Ridge, 95 Ill. App. 39. And see, generally, Pleading; Torts.

Matters of defense need not be averred in the complaint. Amos *v.* Fond du Lac, 46 Wis. 695, 1 N. W. 346, holding that under Fond du Lac City Charter, c. 13, § 11, plaintiff need not aver that he had exhausted his remedies against an abutting owner.

Venue is sufficiently stated where the declaration in an action for injury caused by wrongfully overflowing plaintiff's land shows that the land was situated in a certain county, and the declaration is entitled in the circuit court of that county. Guest *v.* Church Hill, 90 Md. 689, 45 Atl. 882.

35. Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376] (count in an action for injuries caused by bursting water pipes held not definite enough to state a cause of action); Slowey *v.* Grand Ridge, 95 Ill. App. 39; Logansport *v.* Kihm, 159 Ind. 68, 64 N. E. 595; Wilton *v.* Flint, 128 Mich. 156, 87 N. W. 86; Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475.

In a justice's court the complaint is sufficient if it reasonably advises defendant of plaintiff's claim and is sufficient to be a bar to another cause of action. Van Cleave *v.* St. Louis, 159 Mo. 574, 60 S. W. 1091.

36. Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830.

Complaint held sufficient in an action for injuries received from a defective street (see Goshen *v.* Alford, 154 Ind. 58, 55 N. E. 27; New Albany *v.* McCulloch, 127 Ind. 500, 26 N. E. 1074; Portland *v.* Taylor, 125 Ind. 522, 25 N. E. 459; Brown *v.* Chillicothe, 122 Iowa 640, 98 N. W. 502; Kansas City *v.* Smith, 8 Kan. App. 82, 54 Pac. 329; Whitty *v.* Oshkosh, 106 Wis. 87, 81 N. W. 992), as against a demurrer (Trippe *v.* Atlanta, 68 Ga. 834; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; McCauley *v.* Greenville, (Miss. 1905) 37 So. 818), in an action for injuries from a defective sewer (see Bowser *v.* Toledo, 9 Ohio Cir. Ct. 294, 6 Ohio Cir. Dec. 83), from closing a public street (Heard *v.* Connor, (Tex. Civ. App. 1905) 84 S. W. 605), from a negligently constructed gutter (Comanche *v.* Zettlemoyer, (Tex. Civ. App. 1897) 40 S. W. 641), or from change in grade of streets and construction of drain (Guest *v.* Church Hill, 90 Md. 689, 45 Atl. 882).

Complaint held insufficient in an action for injuries caused by a defective sidewalk (Waggener *v.* Point Pleasant, 42 W. Va. 798, 26 S. E. 352), or by a horse becoming frightened at an obstruction in the street (Rome *v.* Suddeth, 116 Ga. 649, 42 S. E. 1032).

A formal complaint is not necessary in the circuit court under Wis. Laws (1876), c. 47, subs. 5, §§ 25–27, where the person injured filed with the city clerk a notice of the injury and a claim against the city for damages containing all the essential requisites of the complaint, and on defendant's failure to take action thereon appealed to the circuit court. Koch *v.* Ashland, 83 Wis. 361, 53 N. W. 674; Cantwell *v.* Appleton, 71 Wis. 463, 37 N. W. 813.

A complaint against a city for a penalty prescribed for the neglect to repair a highway should state in the claim or prayer that the relief demanded is that given by the statute. Lavigne *v.* New Haven, 75 Conn. 693, 55 Atl. 569.

Ownership of lands adjoining a sidewalk on which the accident occurred need not be alleged. Huntington *v.* Breen, 77 Ind. 29.

In joint actions the essentials of the case against each defendant must be alleged to warrant recovery against both. Elliott *v.* Field, 21 Colo. 378, 41 Pac. 504; Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729;

allege with reasonable certainty facts and circumstances showing that defendant was a municipal corporation,[37] that it had power to do the act complained of,[38] unless such power is given by a general statute;[39] that the act was done by an officer or agent of the city while in the legitimate exercise of a corporate duty which devolved upon him by law or by the direction or authority of the city,[40] although he need not show the particular officer guilty of the tort;[41] that it was not in the performance of a governmental function;[42] and that such act was wrongful.[43] Thus, in an action for injuries caused by municipal negligence, plaintiff should allege facts showing the municipal duty in the premises,[44] its breach of that

South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396.

37. Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254; Mitchell *v.* Clinton, 99 Mo. 153, 12 S. W. 793. *Compare* Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753 [*affirming* 26 Ill. App. 173], holding that the fact of incorporation need not be alleged.

38. New Albany *v.* Ray, 3 Ind. App. 321, 29 N. E. 611; Mitchell *v.* Clinton, 99 Mo. 153, 12 S. W. 793; Ft. Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840, holding, however, that, where it is alleged that the injury was caused by negligent acts of defendant, it need not be alleged that it acted under an ordinance.

When a complaint relates to an act which can only be lawfully done under an ordinance of the corporation, an averment in the petition that the act was done by the corporation implies that it was done in pursuance of an ordinance. Stewart *v.* Clinton, 79 Mo. 603. Thus an allegation that the city "raised the grade" is equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinance. Werth *v.* Springfield, 78 Mo. 107.

39. Honey Grove *v.* Lamaster, (Tex. Civ. App. 1899) 50 S. W. 1053, holding that authority to operate an electric light plant need not be alleged in an action for injuries caused by a shock from an electric light wire, where it is alleged that the city was chartered under the general laws, which conferred such authority on such cities.

40. Huntville *v.* Ewing, 116 Ala. 576, 22 So. 984; Fowler *v.* Kansas City, 64 Kan. 566, 68 Pac. 33; Arnold *v.* Stanford, 113 Ky. 852, 69 S. W. 726, 24 Ky. L. Rep. 626; Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

The declaration must impute liability to the municipality through its actors, its officers, agents, or servants. It must allege some act or default by those for whom the corporation must respond, under the well-established principle of *respondeat superior*. This rule is especially applicable to a municipal corporation which can be made liable for the acts or defaults of its agents or servants only in certain cases. Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649.

An action against a town or city may be brought against its treasurer, yet, if it be sought to charge the municipal corporation with liability for alleged negligence, the declaration must charge such negligence against the city, or its servants or agents. Lucier *v.* Granger, 20 R. I. 364, 39 Atl. 190.

41. Lafayette *v.* Allen, 81 Ind. 166.

42. Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

43. Conway *v.* Beaumont, 61 Tex. 10, holding that, since municipal corporations are not uniformly liable for tort, a petition seeking to charge liability must set forth facts showing that the act complained of was unlawful.

44. *Alabama.*— Huntville *v.* Ewing, 116 Ala. 576, 22 So. 984, holding that a complaint against a city for failure to erect an embankment to confine water within a ditch, or to dig it deeper, should allege not only the city's duty to take care of the ditch, but also its duty to deepen it, or make the embankment.

Colorado.— Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729.

Connecticut.— Hewison *v.* New Haven, 34 Conn. 136, 91 Am. Dec. 718.

Indiana.— Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277, (App. 1904) 72 N. E. 531, complaint held insufficient as to duty to maintain barrier in the street.

Iowa.— Ross *v.* Clinton, 46 Iowa 606, 26 Am. Rep. 169.

Missouri.— Martinowsky *v.* Hannibal, 35 Mo. App. 70.

New Hampshire.— Edgerly *v.* Concord, 59 N. H. 341.

New York.— Dougherty *v.* Horseheads, 73 Hun 443, 26 N. Y. Suppl. 642.

Ohio.— Brink *v.* Columbus, 8 Ohio S. & C. Pl. Dec. 671, complaint for defective bridge in street held sufficient on demurrer.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1712.

Facts must be alleged.—An allegation that there was a duty is not sufficient; but the facts from which the law raises the duty must be alleged. Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376]; Wakefield *v.* Newell, 12 R. I. 75, 34 Am. Rep. 598.

An allegation that defendant was bound to keep its sidewalks in repair sufficiently alleges that duty. Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

The charter of the city showing its duties in the premises may be set out in the complaint. Logansport *v.* Wright, 25 Ind. 512.

Statutory duties need not be alleged as the court will take judicial notice thereof. Cronan *v.* Woburn, 185 Mass. 91, 70 N. E. 38, duty to keep streets in repair.

duty,[45] the special damage to plaintiff,[46] and that such negligence or breach of duty was the proximate cause of the injury.[47] Also in an action for injuries resulting from defective streets, a declaration, petition, or complaint should allege facts showing that at a particular place and time by neglecting its municipal duty it caused or permitted one of its streets to become unsafe for travel, setting forth the circumstances, and, if permitted rather than caused, that it was after due notice and time for repair;[48] and that plaintiff, exercising due care as a traveler

Possession of funds for repairs need not be alleged unless by its charter the possession of such means is a condition precedent to its liability. Shartle *v.* Minneapolis, 17 Minn. 308.

Ownership or construction of a sidewalk as a condition precedent to liability need not be alleged. Haire *v.* Kansas City, 76 Mo. 438.

45. *Alabama.*— Huntville *v.* Ewing, 116 Ala. 576, 22 So. 984.

Colorado.— Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729.

Illinois.— Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376]; English *v.* Danville, 170 Ill. 131, 48 N. E. 328; Arms *v.* Knoxville, 32 Ill. App. 604.

Indiana.—Alexandria *v.* Liebler, 162 Ind. 438, 70 N. E. 512; Senhenn *v.* Evansville, 140 Ind. 675, 40 N. E. 69; Bluffton *v.* Mathews, 92 Ind. 213; Indianapolis *v.* Crans, 28 Ind. App. 584, 63 N. E. 478; Lafayette *v.* Ashby, 8 Ind. App. 214, 34 N. E. 238, 35 N. E. 516.

Kansas.— Lawrence *v.* Littell, 9 Kan. App. 130, 58 Pac. 495.

Michigan.— Storrs *v.* Grand Rapids, 110 Mich. 483, 68 N. W. 258.

Minnesota.— O'Brien *v.* St. Paul, 25 Minn. 331, 33 Am. Rep. 470.

Mississippi.— Stainback *v.* Meridian, 79 Miss. 447, 28 So. 947, 30 So. 607.

Missouri.— Vogelgesang *v.* St. Louis, 139 Mo. 127, 40 S. W. 653; Fairall *v.* Cameron, 97 Mo. App. 1, 70 S. W. 929; Mitchell *v.* Plattsburg, 33 Mo. App. 555.

New York.— Dougherty *v.* Horseheads, 73 Hun 443, 26 N. Y. Suppl. 642.

Ohio.— Chase *v.* Cleveland, 44 Ohio St. 505, 9 N. E. 225, 58 Am. Rep. 843.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789, as to lights in street.

Wisconsin.— Koepke *v.* Milwaukee, 112 Wis. 475, 88 N. W. 238; Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779; Smith *v.* Milwaukee, 18 Wis. 63.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1712.

General allegation of duty and of negligence by non-action may suffice to withstand a demurrer (Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376]; Senhenn *v.* Evansville, 140 Ind. 675, 40 N. E. 69; Rushville *v.* Adams, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415; Thompson *v.* Corpus Christi, (Tex. Civ. App. 1896) 38 S. W. 373; Curry *v.* Mannington, 23 W. Va. 14); but not a motion for specific statement (Rushville *v.* Adams, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124).

46. Storrs *v.* Grand Rapids, 110 Mich. 483, 68 N. W. 258 (complaint held sufficiently specific as to injuries received when attacked for the first time on trial); Guilford *v.* Minneapolis, etc., R. Co., 94 Minn. 108, 102 N. W. 365 (complaint held insufficient in not showing that plaintiff was specially injured in a manner different in degree or kind from the injuries suffered by the public generally); Houston *v.* Hutcheson, (Tex. Civ. App. 1904) 81 S. W. 86.

47. *Alabama.*— Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Illinois.— English *v.* Danville, 170 Ill. 131, 48 N. E. 328.

Indiana.— Logansport *v.* Kihm, 159 Ind. 68, 64 N. E. 595 (complaint in action for injuries from defective street held insufficient in not connecting the alleged negligence with the injury); Davis *v.* Crawfordsville, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; Bluffton *v.* Mathews, 92 Ind. 213; Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415.

Kentucky.— Thoman *v.* Covington, 62 S. W. 721, 23 Ky. L. Rep. 117.

Michigan.—Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071.

Mississippi.— Tyler *v.* Bay St. Louis, (1903) 34 So. 215.

Rhode Island.— Lee *v.* Union R. Co., 12 R. I. 383, 34 Am. Rep. 668.

Washington.—Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1712.

A complaint which alleges facts connecting defendant's negligence with the injury is sufficient, although it does not expressly state that the negligence was the proximate cause of the injury. Franklin *v.* Davenport, 31 Ind. App. 648, 68 N. E. 907.

Allegations which are mere conclusions as to the cause of the injuries, such inferences not being justified by the facts stated, are insufficient. Logansport *v.* Kihm, 159 Ind. 68, 64 N. E. 595.

48. *Colorado.*— Elliott *v.* Field, 21 Colo. 378, 41 Pac. 504.

Georgia.— Trippe *v.* Atlanta, 68 Ga. 834.

Illinois.— Wilmette *v.* Brachle, 209 Ill. 621, 71 N. E. 41.

Indiana.— Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412.

Kansas.— Lawrence *v.* Littell, 9 Kan. App. 130, 58 Pac. 495.

Michigan.— Griswold *v.* Ludington, 116

on said street, suffered injury from said defect as a proximate or efficient cause, detailing circumstantially the manner thereof.[49]

(II) *Location and Nature of Defect*—(A) *Location.* The declaration, petition, or complaint should also allege facts showing that the defect which caused the injury complained of was within the limits of the municipality.[50] In the case of an injury from negligence in caring for streets and sidewalks, it should show by distinct allegation or reasonable intendment that the defect was on a public street or highway within the corporate limits,[51] and that such street was a public way,[52] or was treated and controlled by the municipality as a public street or thoroughfare at the time when and the place where the accident occurred;[53] and should designate with reasonable certainty the location of the defect which caused the injury.[54] If the complaint describes the place of the defect with reasonable certainty, its failure to point out the place with particularity is not ground for demurrer,[55]

Mich. 401, 74 N. W. 663; Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071.

Mississippi.— McCauley *v.* Greenville, (1905) 37 So. 818.

Oklahoma.— Guthrie *v.* Finch, 13 Okla. 496, 75 Pac. 288.

Wisconsin.— Whitty *v.* Oshkosh, 106 Wis. 87, 81 N. W. 992.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1711.

Where the complaint alleges facts showing that a sidewalk was unsafe or dangerous, it is not necessary to use the technical words that the sidewalk was unsafe or dangerous. Columbus *v.* Neise, (Kan. 1901) 65 Pac. 643; Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474. *Compare* Plummer *v.* Milan, 70 Mo. App. 598, holding that the petition should definitely allege that the sidewalk was in an unsafe and dangerous condition for ordinary travel. An allegation that it was out of repair and in a defective, insufficient, and dangerous condition is sufficient. Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26 [*distinguishing* Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303].

The petition need not allege that defendant had time to repair the street after it discovered, or might, by the exercise of ordinary care, have discovered, the defect, the burden being on defendant to plead and prove that it did not have time to repair the street before the injury was received. Covington *v.* Diehl, 59 S. W. 492, 22 Ky. L. Rep. 955.

49. *Georgia.*— Trippe *v.* Atlanta, 68 Ga. 834.

Indiana.— Goshen *v.* Alford, 154 Ind. 58, 55 N. E. 27; Hammond *v.* Winslow, 33 Ind. App. 92, 70 N. E. 819; Huntington *v.* Burke, 21 Ind. App. 665, 52 N. E. 415; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412.

Michigan.—Alexander *v.* Big Rapids, 76 Mich. 282, 42 N. W. 1071.

Rhode Island.— Lee *v.* Union R. Co., 12 R. I. 383, 34 Am. Rep. 668.

West Virginia.— Waggener *v.* Point Pleasant, 42 W. Va. 798, 26 S. E. 352.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1711, 1712.

50. Huntsville *v.* Ewing, 116 Ala. 576, 22 So. 984, holding that a complaint for injuries to land from the cutting of a ditch should show that the ditch is in the city.

51. *Indiana.*— Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Indianapolis *v.* Scott, 72 Ind. 196; Indianapolis *v.* Crans, 28 Ind. App. 584, 63 N. E. 478.

Kansas.— Ottawa *v.* McCreery, 10 Kan. App. 443, 61 Pac. 986.

Michigan.— Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254.

Minnesota.— Kloepfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908.

Missouri.—Arnold *v.* St. Louis, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291.

Rhode Island.— Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042.

Washington.— Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1713.

52. Goodin *v.* Des Moines, 55 Iowa 67, 7 N. W. 411; Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254.

53. Parish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416.

54. *Georgia.*— Bryan *v.* Macon, 91 Ga. 530, 18 S. E. 351.

Indiana.— Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Indianapolis *v.* Scott, 72 Ind. 196; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609; Rosedale *v.* Ferguson, 3 Ind. App. 596, 30 N. E. 156.

Kansas.— Ottawa *v.* McCreery, 10 Kan. App. 443, 61 Pac. 986.

Michigan.— Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254.

Minnesota.— Kleopfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908.

Missouri.—Allen *v.* Springfield, 61 Mo. App. 270.

Washington.— Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1713.

Walking "along the sidewalk" when injured is equivalent to alleging that the party injured was on the sidewalk. Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

55. *Florida.*— Orlando *v.* Heard, 29 Fla. 581, 11 So. 182.

although its failure in this respect may be good ground for a motion to amend or to make more definite.[56]

(B) *Nature.* A declaration which describes the nature of the defect so as to make it intelligible to a person of ordinary understanding, and shows culpability, is good against demurrer,[57] although it may be insufficient as against a motion to have the complaint made more definite and certain,[58] or for a bill of particulars.[59] But if the declaration omit any essential element in setting forth an actionable defect, it will be held bad on demurrer.[60]

(III) *Notice of Defect or Obstruction.* Notice to the municipality of the defect or obstruction need not be alleged where the complaint alleges facts showing that the corporation itself caused or licensed the defect or obstruction,[61] nor where the allegations show a *prima facie* liability.[62] But ordinarily the complaint should allege facts showing that the defect or obstruction was occasioned by some positive misfeasance of the corporation, its officers or employees under its authority, in which case notice will be implied;[63] or where it alleges facts showing that the municipality did not cause the defect or obstruction, it should allege either that it had actual notice thereof a sufficient length of time before the injury to remedy the defect or obstruction,[64] or should allege facts from which such notice can be reasonably inferred,[65] as that the defect or obstruction had existed for such a length of time that notice may be fairly presumed.[66] Thus where the liability

Georgia.— Bryan *v.* Macon, 91 Ga. 530, 18 S. E. 351.

Illinois.— Springfield *v.* Doyle, 76 Ill. 202.

Minnesota.— Kleopfert *v.* Minneapolis, 90 Minn. 158, 95 N. W. 908.

Washington.— Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1713.

56. Orlando *v.* Heard, 29 Fla. 581, 11 So. 182.

57. *Colorado.*— See Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729.

Indiana.— New Albany *v.* McCulloch, 127 Ind. 500, 26 N. E. 1074 (holding the complaint not demurrable for failure to allege that proper signals of the dangerous condition of the sidewalk were negligently placed); Portland *v.* Taylor, 125 Ind. 522, 25 N. E. 459; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

Nebraska.—Aurora *v.* Cox, 43 Nebr. 727, 62 N. W. 66.

New York.— Sherman *v.* Oneonta, 21 N. Y. Suppl. 137 [*affirmed* in 142 N. Y. 637, 37 N. E. 566].

Ohio.— Middleport *v.* Taylor, 2 Ohio Cir. Ct. 366, 1 Ohio Cir. Dec. 534.

Wisconsin.— Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Barney *v.* Hartford, 73 Wis. 95, 40 N. W. 581.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1713.

Time of defect.—A complaint alleging that "at the time of the commission of the grievances hereinafter alleged," etc., and then setting out a defective condition of the sidewalk as a cause of the injuries sufficiently shows the sidewalk was defective on the day plaintiff was injured, where the only date thereinafter alleged was the date of the injury. Hammond *v.* Winslow, 33 Ind. App. 92, 70 N. E. 819.

Precautions.—A failure to allege that defendant negligently permitted the obstruction to remain without using suitable precautions to prevent injuries to persons using the street, by having placed at that point the necessary and proper lights and signals, does not state a cause of action, in an action for injuries caused by obstructions on a street. McCoull *v.* Manchester, (Va. 1888) 4 S. E. 848.

58. Sherman *v.* Oneonta, 21 N. Y. Suppl. 137 [*affirmed* in 142 N. Y. 637, 37 N. E. 566].

59. Sherman *v.* Oneonta, 21 N. Y. Suppl. 137 [*affirmed* in 142 N. Y. 637, 37 N. E. 566.

60. Cotter *v.* Lindgren, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255 (holding complaint demurrable for not showing that the defect was unguarded at the time of the accident); Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277; Bretsh *v.* Toledo, 1 Ohio S. & C. Pl. Dec. 96, 1 Ohio N. P. 210.

61. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Elwood *v.* Laughlin, 29 Ind. App. 667, 65 N. E. 18; Middleport *v.* Taylor, 2 Ohio Cir. Ct. 366, 1 Ohio Cir. Dec. 534; Groveport *v.* Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411 [*affirmed* in 30 Cinc. L. Bul. 351].

62. Serrot *v.* Omaha City, 21 Fed. Cas. No. 12,673, 1 Dill. 313.

63. Middleport *v.* Taylor, 2 Ohio Cir. Ct. 366, 1 Ohio Cir. Dec. 354; Groveport *v.* Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411 [*affirmed* in 30 Cinc. L. Bul. 351].

64. Anderson *v.* Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119; Groveport *v.* Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411 [*affirmed* in 30 Cinc. L. Bul. 351].

65. Elkhart *v.* Ritter, 66 Ind. 136. And see cases cited in following notes.

66. Groveport *v.* Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411 [*affirmed* in 30 Cinc. L. Bul. 351]; Archer *v.* Johnson City,

depends upon the municipality's neglect to repair a defect or remove an obstruction, the complaint should either allege that it had actual notice thereof or should allege facts showing that the circumstances were such that it should have had notice.[67] It has been held that the mere allegation of a negligent omission to repair or remove the obstruction is a sufficient allegation of notice,[68] especially after verdict,[69] or in the absence of a motion to make more specific,[70] or a demurrer.[71]

(IV) *Notice or Presentation of Claim.* It is a general rule of pleading under code and common-law systems alike that plaintiff must aver compliance with statutory conditions precedent to action,[72] such as notice of intention to commence action,[73] or notice or presentation of claim,[74] and statutory or reasonable

(Tenn. 1901) 64 S. W. 474; Randall *v.* Hoquiam, 30 Wash. 435, 70 Pac. 1111.

67. *Delaware.*— Downs *v.* Smyrna, 2 Pennew. 132, 45 Atl. 717.

Florida.— Daytona *v.* Edson, 46 Fla. 463, 34 So. 954; Orlando *v.* Heard, 29 Fla. 581, 11 So. 182.

Illinois.— Mattoon *v.* Worland, 97 Ill. App. 13; Nokomis *v.* Salter, 61 Ill. App. 150.

Indiana.—Anderson *v.* Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119; Indianapolis *v.* Tanselz, 157 Ind. 463, 62 N. E. 35; Turner *v.* Indianapolis, 96 Ind. 51; Elkhart *v.* Ritter, 66 Ind. 136; Huntington *v.* Lusch, 33 Ind. App. 476, 70 N. E. 402; Linton *v.* Smith, 31 Ind. App. 546, 68 N. E. 617; Odon *v.* Dobbs, 25 Ind. App. 522, 58 N. E. 562; Mt. Vernon *v.* Hoehn, 22 Ind. App. 282, 53 N. E. 654; Huntington *v.* Burke, 12 Ind. App. 133, 39 N. E. 170.

Iowa.— Padelford *v.* Eagle Grove, 117 Iowa 616, 91 N. W. 899.

Kansas.— Lewis *v.* Eskridge, 52 Kan. 282, 34 Pac. 892.

Kentucky.— Covington *v.* Diehl, 59 S. W. 492, 22 Ky. L. Rep. 955.

Michigan.— Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78; Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52.

Missouri.— Rusher *v.* Aurora, 71 Mo. App. 418.

Ohio.— Middleport *v.* Taylor, 2 Ohio Cir. Ct. 366, 1 Ohio Cir. Dec. 534; Groveport *v.* Bradfield, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411 [*affirmed* in 30 Cinc. L. Bul. 351].

Virginia.— Noble *v.* Richmond, 31 Gratt. 271, 31 Am. Rep. 726.

Washington.— Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978; Randall *v.* Hoquiam, 30 Wash. 435, 70 Pac. 1111; Durham *v.* Spokane, 27 Wash. 615, 68 Pac. 383.

Wisconsin.— Wilbert *v.* Sheboygan, 121 Wis. 518, 99 N. W. 330; Knsterer *v.* Beaver Dam, 52 Wis. 146, 8 N. W. 726; Cuthbert *v.* Appleton, 22 Wis. 642.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1714.

68. Lord *v.* Mobile, 113 Ala. 360, 21 So. 366; Mattoon *v.* Worland, 97 Ill. App. 13; Nokomis *v.* Salter, 61 Ill. App. 150; Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012; Carroll *v.* Allen, 20 R. I. 144, 37 Atl. 704, holding that an allegation that the town was negligent is a sufficient allegation of notice, without a specific charge to that effect.

69. Madison *v.* Baker, 103 Ind. 41, 2 N. E. 236.

70. Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609; Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012.

71. Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012; Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78.

72. Thrall *v.* Cuba, 88 N. Y. App. Div. 410, 84 N. Y. Suppl. 661.

The court will not examine the summons, complaint, and answer for the purpose of ascertaining by analysis of dates whether the conditions precedent have been performed. Thrall *v.* Cuba, 88 N. Y. App. Div. 410, 84 N. Y. Suppl. 661.

Compliance with notice or presentation applying to demands ex contractu need not be alleged in a complaint for personal injuries. Frisby *v.* Marshall, 119 N. C. 570, 26 S. E. 251.

73. Krall *v.* New York, 44 N. Y. App. Div. 259, 60 N. Y. Suppl. 661 (holding a complaint not alleging the giving of notice of such intention properly dismissed, although the answer did not allege the non-giving of notice); Norton *v.* New York, 16 Misc. (N. Y.) 303, 38 N. Y. Suppl. 90.

74. Pardey *v.* Mechanicsville, 101 Iowa 266, 70 N. W. 189; Goddard *v.* Lincoln, 69 Nebr. 594, 96 N. W. 273; Hastings *v.* Foxworthy, 45 Nebr. 676, 63 N. W. 955, 34 L. R. A. 321; Foley *v.* New York, 1 N. Y. App. Div. 586, 37 N. Y. Suppl. 465; Olmstead *v.* Pound Ridge, 71 Hun (N. Y.) 25, 24 N. Y. Suppl. 615; Arthur *v.* Glens Falls, 66 Hun (N. Y.) 136, 21 N. Y. Suppl. 81; Nagel *v.* Buffalo, 34 Hun (N. Y.) 1; Russell *v.* New York, 1 Daly (N. Y.) 263; Jewell *v.* Ithaca, 36 Misc. (N. Y.) 499, 73 N. Y. Suppl. 953 [*affirmed* in 72 N. Y. App. Div. 220, 76 N. Y. Suppl. 126]; O'Donnell *v.* New London, 113 Wis. 292, 89 N. W. 511; Steltz *v.* Wausau, 88 Wis. 618, 60 N. W. 1054; Koch *v.* Ashland, 83 Wis. 361, 53 N. W. 674; Dorsey *v.* Racine, 60 Wis. 292, 18 N. W. 928; Benware *v.* Pine Valley, 53 Wis. 527, 10 N. W. 695. *Compare* Hawley *v.* Johnstown, 40 N. Y. App. Div. 568, 58 N. Y. Suppl. 49, holding that under Laws (1895), c. 568, § 230, providing that an omission to present a claim against a city for negligence within three months from the injury shall bar action thereon, the matter in bar is defensive, and the affirmative need not be pleaded by plaintiff.

delay before suit.[75] An objection for failure to make such allegations in correct terms comes too late after trial where no one was misled by the defective pleading.[76]

(v) *Care on Part of Plaintiff.* In some jurisdictions, except where defendant is charged with having committed a positive wrong which renders it liable independently of the question of negligence,[77] plaintiff must allege that he had no knowledge of the defect or obstruction which caused his injury,[78] and that he was otherwise free from contributory negligence, although this may be alleged in general terms or circumstantially;[79] but it is not necessary for him to allege the same of a companion,[80] or of a driver not under his control.[81] By weight of authority, however, contributory negligence is a matter of defense, and freedom therefrom need not be alleged by plaintiff,[82] unless other matters alleged by him show negligence on his part.[83] In any case if his negligence appears from the circumstances alleged, his complaint or declaration is demurrable;[84] and if such

In Wisconsin a complaint which does not allege that plaintiff complied with the requirements of a city charter by filing his claim and taking an appeal from its disallowance fails to state a cause of action. Morrison *v.* Eau Claire, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955; Koch *v.* Ashland, 83 Wis. 361, 53 N. W. 674.

An allegation of notice in compliance with a repealed statute is fatally defective. Hiner *v.* Fond du Lac, 71 Wis. 74, 36 N. W. 632.

Amendment.—Compliance with the requirement of a city charter that claims against the city shall be presented in writing to the council, and redress refused, before suit thereon, may be alleged in an amended petition, which will be treated as constituting a new suit. El Paso *v.* Ft. Dearborn Nat. Bank, (Tex. Civ. App. 1903) 71 S. W. 799.

75. Smith *v.* New York, 88 N. Y. App. Div. 606, 85 N. Y. Suppl. 150; Thrall *v.* Cuba, 88 N. Y. App. Div. 410, 84 N. Y. Suppl. 661 (holding that a complaint in an action governed by such a section of the statute which does not allege compliance therewith is fatally defective, although it alleges compliance with other provisions of the statute); Pulitzer *v.* New York, 48 N. Y. App. Div. 6, 62 N. Y. Suppl. 587; Olmstead *v.* Pound Ridge, 71 Hun (N. Y.) 25, 24 N. Y. Suppl. 615. *Compare* Welsh *v.* Argyle, 85 Wis. 307, 55 N. W. 412, under Rev. St. 824.

76. Magee *v.* Troy, 48 Hun (N. Y.) 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148].

77. Lebanon *v.* Twiford, 13 Ind. App. 384, 41 N. E. 844.

78. Washington *v.* Small, 86 Ind. 462; Elwood *v.* Laughlin, 29 Ind. App. 667, 65 N. E. 18 (holding that an allegation that the injury was caused without any fault or negligence on plaintiff's part sufficiently negatives his knowledge of the defect); Huntingburgh *v.* First, 15 Ind. App. 552, 43 N. E. 17.

Ignorance of the unprotected condition of a ditch at the side of a street is sufficiently alleged by a statement that plaintiff fell into it while going home in a careful manner and without knowledge, and without being able to see the location of said ditch. Bloomington *v.* Rogers, 9 Ind. App. 230, 36 N. E. 439.

79. Elkhart *v.* Witman, 122 Ind. 538, 23 N. E. 796; Washington *v.* Small, 86 Ind. 462; Bloomington *v.* Robers, 83 Ind. 261; Murphy *v.* Indianapolis, 83 Ind. 76; Huntington *v.* Breen, 77 Ind. 29; Elwood *v.* Laughlin, 29 Ind. App. 667, 65 N. E. 18; Mt. Vernon *v.* Hoehn, 22 Ind. App. 282, 53 N. E. 654; Hobbs *v.* Marion, 123 Iowa 726, 99 N. W. 577; McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148.

A complaint for negligence, resulting in the death of plaintiff's child, which does not show that the child was negligent, is not subject to demurrer, in failing to allege the child's freedom from contributory negligence, and only stating that it was free from fault, since the allegation of freedom from contributory negligence is not necessary if the child is *non sui juris*, and the question whether a seven-year-old child is *sui juris* is for the jury. Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

80. Elwood *v.* Laughlin, 29 Ind. App. 667, 65 N. E. 18; Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

81. Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Lee *v.* Union R. Co., 12 R. I. 383, 34 Am. Rep. 668.

82. *Kentucky.*— See Louisville *v.* Michels, 114 Ky. 551, 71 S. W. 511, 24 Ky. L. Rep. 1375.

Montana.— Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

New York.— Urquhart *v.* Ogdensburg, 23 Hun 75 [*reversed* on other grounds in 91 N. Y. 67, 43 Am. Rep. 655].

Texas.— Denison *v.* Sanford, 2 Tex. Civ. App. 661, 21 S. W. 784.

Washington.— Randall *v.* Hoquiam, 30 Wash. 435, 70 Pac. 1111.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1716.

Where plaintiff alleges that without knowledge of the defect he was injured by it, he need not allege that the proximate cause of the injury was not his own act. Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

83. Louisville *v.* Michels, 114 Ky. 551, 71 S. W. 511, 24 Ky. L. Rep. 1375; Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

84. Anderson *v.* Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119 (holding, however, that allegations that plaintiff had no

circumstances fully and fairly show that plaintiff was guilty of contributory negligence, the complaint will be bad notwithstanding a general averment of freedom from fault;[85] but a general averment of freedom from fault will not be overcome, on demurrer, by the allegation of circumstances which do not necessarily infer contributory negligence.[86]

b. Demurrer, Motion, Etc. A demurrer is ordinarily the proper form of objection to the declaration or complaint on the ground that it fails to state a substantial cause of action,[87] as for insufficiency in describing the location,[88] the nature of the defect,[89] or the place of the accident;[90] for insufficiency in alleging notice of the defect or obstruction,[91] or a variance between the complaint and the notice or presentation of the claim;[92] or of objecting to the notice or presentation.[93] It is also the proper remedy for objecting to the complaint for failing to allege a compliance with the statutory requirement as to notice or presentation of a claim,[94] although it has been held that such objection should be set up as a matter of defense by answer,[95] or plea in abatement,[96] and that such objection may be taken at any stage of the action as by a motion to dismiss,[97] or by a general objection at the trial to the admission of any evidence under the complaint.[98] But a motion to make more specific or for a bill of particulars, and not demurrer, is the proper form of objecting where the complaint states a substantial cause of action but does not use sufficient particularity in describing the location,[99] or nature of the defect,[1] or in alleging notice of the defect or obstruction.[2] Mere formal defects in the complaint are generally waived if objection thereto is not made before the case goes to trial.[3]

notice or knowledge of the excavation and was unable to see it on account of the darkness of the night, and that no warning signals were displayed, are not bad as showing contributory negligence on his part); Bedford *v.* Woody, 23 Ind. App. 401, 55 N. E. 499 (complaint held not demurrable as showing contributory negligence); Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658; Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76.

85. Murphy *v.* Indianapolis, 83 Ind. 76.

86. Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Murphy *v.* Indianapolis, 83 Ind. 76; Bedford *v.* Woody, 23 Ind. App. 231, 53 N. E. 838.

A complaint for injuries caused by a defective sidewalk showing that plaintiff, in approaching an open hatchway, into which she fell and was injured, traveled at such an angle with it that the opening was not in her line of vision till she was close upon it, and alleging that she was free from negligence, does not conclusively show that she was guilty of contributory negligence. Whitty *v.* Oshkosh, 106 Wis. 87, 81 N. W. 992.

87. Indianapolis *v.* Crans, 28 Ind. App. 584, 63 N. E. 478; Cronan *v.* Woburn, 185 Mass. 91, 70 N. E. 38. But see Thrall *v.* Cuba Village, 88 N. Y. App. Div. 410, 84 N. Y. Suppl. 661, holding that objection that the complaint does not state a cause of action need not be taken by demurrer, but may be interposed at any time.

88. See cases cited *supra*, XIV, E, 6, a, (II), (A).

89. See cases cited *supra*, XIV, E, 6, a, (II), (B).

90. Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652, holding that an objection that a declaration does not point out the exact place of the accident with sufficient particularity should be taken by demurrer and comes too late at the trial.

91. See cases cited *supra*, XIV, E, 6, a, (III).

92. Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, holding that objection on the ground of variance should be taken advantage of by special demurrer, the notice being attached to the petition as an exhibit.

93. Jewell *v.* Ithaca, 72 N. Y. App. Div. 220, 76 N. Y. Suppl. 126 [*affirming* 36 Misc. 499, 73 N. Y. Suppl. 953].

94. O'Donnell *v.* New London, 113 Wis. 292, 89 N. W. 511; Steltz *v.* Wausau, 88 Wis. 618, 60 N. W. 1054; Koch *v.* Ashland, 83 Wis. 361, 53 N. W. 674.

95. Nagel *v.* Buffalo, 34 Hun (N. Y.) 1; Bunker *v.* Hudson, 122 Wis. 43, 99 N. W. 448.

96. Bunker *v.* Hudson, 122 Wis. 43, 99 N. W. 448.

97. Olmstead *v.* Pound Ridge, 71 Hun (N. Y.) 25, 24 N. Y. Suppl. 615.

98. Benware *v.* Pine Valley, 53 Wis. 527, 10 N. W. 695.

99. See cases cited *supra*, XIV, E, 6, a, (II), (A).

1. See cases cited *supra*, XIV, E, 6, a, (II), (B).

Any indefiniteness in the complaint as to the length of time the defect had existed should be taken advantage of by motion to make more definite and certain and not by demurrer. Wilbert *v.* Sheboygan, 121 Wis. 518, 99 N. W. 330.

2. See cases cited *supra*, XIV, E, 6, a, (III).

3. Fairall *v.* Cameron, 97 Mo. App. 1, 70 S. W. 929.

c. Answer. An answer setting up contributory negligence should specify with reasonable certainty the acts constituting such negligence,[4] although any objections in this respect are waived by plaintiff filing his replication and going to trial on the answer.[5] Under a statute postponing municipal liability to that of the real wrong-doer it suffices for the answer to allege facts showing the primary liability of another.[6] An answer verified by the mayor and denying any knowledge or information sufficient to form a belief touching the matters alleged in the complaint is sufficient to raise an issue as to such matters and whether plaintiff was injured thereby while exercising ordinary care.[7] An answer admitting that the claim described in the complaint was duly filed admits every allegation as to the description of the claim, such as that it was in certain words and figures, duly verified, and presented by plaintiff on the date named.[8]

d. Amendment. An amendment of the declaration or complaint which does not state a new cause of action, nor surprise or prejudice defendant, may be permitted in furtherance of plaintiff's action[9] at any time before the case has been submitted to the jury;[10] but not so as to change the original action to a distinctly different ground.[11]

e. Issues, Proof, and Variance — (i) *In General.* In an action for injuries received through a tort of a municipality, as in other similar actions, plaintiff can rely for recovery only upon the particular cause of action which is set forth in his pleading and established by his proof;[12] and in like manner defendant can rely upon such matters of defense only as are put in issue by its answer, or other pleading;[13] and the jury may properly consider only the issues made by the pleadings and proof.[14] All material facts must be proven as alleged,[15] even to unnecessary

4. Durham *v.* Bolivar, 106 Mo. App. 601, 81 S. W. 463, holding that an answer which alleged that plaintiff was guilty of contributory negligence and that she was not careful, prudent, or watchful in her walking over the sidewalk was sufficiently specific.

5. Durham *v.* Bolivar, 106 Mo. App. 601, 81 S. W. 463.

6. Raymond *v.* Sheboygan, 70 Wis. 318, 35 N. W. 540.

7. Smalley *v.* Appleton, 70 Wis. 340, 35 N. W. 729.

8. Durham *v.* Spokane, 27 Wash. 615, 68 Pac. 383.

9. *Georgia.*— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Newman *v.* Daviston, 118 Ga. 122, 44 S. E. 861.

Illinois.— Cicero *v.* Bartelme, 212 Ill. 256, 72 N. E. 437.

Iowa.— Sachra *v.* Manilla, 120 Iowa 562, 95 N. W. 198.

Michigan.— Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668.

Missouri.— Goodman *v.* Kahoka, 100 Mo. App. 278, 73 S. W. 355.

New York.— Shaw *v.* New York, 83 N. Y. App. Div. 212, 82 N. Y. Suppl. 44; Denair *v.* Brooklyn, 5 N. Y. Suppl. 835.

Oklahoma.— Guthrie *v.* Finch, 13 Okla. 496, 75 Pac. 288.

Texas.— El Paso *v.* Ft. Dearborn Nat. Bank, (Civ. App. 1903) 71 S. W. 799.

10. Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

11. Wittman *v.* New York, 80 N. Y. App. Div. 585, 80 N. Y. Suppl. 1022, holding that where the complaint charges negligence in the maintenance of streets, the court cannot allow an amendment so as to charge defendant with nuisance.

12. Hesselbach *v.* St. Louis, 179 Mo. 505, 78 S. W. 1009; Thrush *v.* Cameron, 21 Mo. App. 294; Wittman *v.* New York, 80 N. Y. App. Div. 585, 80 N. Y. Suppl. 1022.

Election of causes of action see Hall *v.* Cadillac, 114 Mich. 99, 72 N. W. 33.

The constitutional provision that "private property shall not be taken or damaged for public use without just compensation" has no application to a suit against the city for damages to the goods of a storekeeper which were injured by the overflow of a sewer. In such case if the storekeeper recovers, it must be on the ground of negligence, and not as for the taking or damaging of private property for a public use. Gulath *v.* St. Louis, 179 Mo. 38, 77 S. W. 744.

13. Denver *v.* Hickey, 9 Colo. App. 137, 47 Pac. 908, holding that where the answer admits defendant's duty as alleged in the complaint in regard to constructing and repairing sidewalks, but denies the unsafe condition, it cannot insist that the federal government owned the lots, had jurisdiction over the same, and constructed the walk.

14. Womach *v.* St. Joseph, 168 Mo. 236, 67 S. W. 588.

15. Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180; Fauvia *v.* New Orleans, 20 La. Ann. 410; Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

Joint action.— Where in an action against a city and a contractor for injuries caused by obstructions on a sidewalk, plaintiff predicates her right of recovery solely on the contractor's negligence in causing the obstruc-

particularity;[16] but immaterial allegations need not be proven;[17] and what is not alleged may not lawfully be proven,[18] unless there is an amendment,[19] except that incident and appurtenant circumstances which have a tendency to prove or explain the facts alleged may be admitted without specific allegation.[20]

(II) *General Issues.* The general issue or its statutory equivalent is usually sufficient for defendant.[21] But matters of justification, avoidance, or excuse must be specially pleaded.[22] A general denial or plea of the general issues puts plaintiff to proof of all his material allegations, deniable by plea in bar,[23] including the filing of his claim in the time and manner prescribed;[24] but a general denial does not deny the corporate character of defendant.[25] A general denial also puts in issue the negligence that caused the injury, and permits defendant to show that it arose from some other cause,[26] or any other fact negativing its negligence.[27] In some jurisdictions plaintiff's contributory negligence is put in issue under a general denial so as to admit evidence thereof in defense;[28] but in other jurisdictions

tion, and the city's permission of the obstruction, she is not entitled to judgment against the city where she failed to obtain and did not show herself entitled to judgment against the contractor. Hesselbach *v.* St. Louis, 179 Mo. 505, 78 S. W. 1009.

16. Chicago *v.* Dignan, 14 Ill. App. 128.

17. Lafayette *v.* Weaver, 92 Ind. 477.

18. Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296; Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Cahill *v.* Baltimore, 93 Md. 233, 48 Atl. 705; Frostburg *v.* Dufty, 70 Md. 47, 16 Atl. 642; Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; Bedell *v.* New York, 99 N. Y. App. Div. 128, 90 N. Y. Suppl. 936; Kosmak *v.* New York, 53 Hun (N. Y.) 329, 6 N. Y. Suppl. 453 [*affirmed* in 117 N. Y. 361, 22 N. E. 945].

Where the gravamen of plaintiff's action is the negligence of defendant in making a fill above a sewer, and there is no complaint of defect in the sewer itself, it is not error to reject evidence offered in rebuttal that the sewer was imperfectly constructed, as the evidence of its construction was immaterial to the issue. Smith *v.* St. Joseph, 42 Mo. App. 392.

19. Bedell *v.* New York, 99 N. Y. App. Div. 128, 90 N. Y. Suppl. 936.

20. *Connecticut.*— Driscoll *v.* Ansonia, 73 Conn. 743, 47 Atl. 718.

Illinois.— Cullom *v.* Justice, 161 Ill. 372, 43 N. E. 1098 [*affirming* 59 Ill. App. 304] (holding that in an action for an injury sustained by reason of a defective sidewalk plaintiff may testify that the street lamp was not lighted, although it is not alleged in her declaration, it being proper for consideration on the question of her care and the manner of her traveling on the sidewalk and also in her going on it); Elgin *v.* Anderson, 89 Ill. App. 527.

Massachusetts.—Alger *v.* Lowell, 3 Allen 402, holding that under an allegation of a want of repair in a way it may be proved that the way was defective by reason of a want of a railing to protect travelers from going down a declivity just outside of the limits of the way.

Michigan.— Haynes *v.* Hillsdale, 113 Mich. 44, 71 N. W. 466; Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

Nebraska.— Omaha *v.* Houlihan, 72 Nebr. 326, 100 N. W. 415.

New York.—Sawyer *v.* Amsterdam, 20 Abb. N. Cas. 227.

Ohio.— Toledo *v.* Radbone, 23 Ohio Cir. Ct. 268.

Pennsylvania.— Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

Wisconsin.—Addy *v.* Janesville, 70 Wis. 401, 35 N. W. 931; Cole *v.* Black River Falls, 57 Wis. 110, 14 N. W. 906; Luck *v.* Ripon, 52 Wis. 196, 8 N. W. 815.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1720.

21. Young *v.* Kansas City, 27 Mo. App. 101.

22. Netzer *v.* Crookston City, 59 Minn. 244, 61 N. W. 21; Kobs *v.* Minneapolis, 22 Minn. 159; Bradt *v.* Albany, 5 Hun (N. Y.) 591.

23. Eron *v.* Stevens Point, 85 Wis. 379, 55 N. W. 410.

24. Clark *v.* Davison, 118 Mich. 420, 76 N. W. 971; Eron *v.* Stevens Point, 85 Wis. 379, 55 N. W. 410. *Compare* McHugh *v.* New York, 31 N. Y. App. Div. 299, 52 N. Y. Suppl. 623, holding that where, in an action against a city for personal injuries, received through its alleged negligence, an allegation in the complaint, in due form, that a notice was filed with the corporation counsel on a specified date of plaintiff's intention to sue upon the cause of action, giving the time and place at which the injuries were received, is not denied by the answer, the sufficiency of the notice thus filed cannot be challenged at the trial.

25. Bedford *v.* Woody, 23 Ind. App. 231, 53 N. E. 838.

26. Young *v.* Kansas City, 27 Mo. App. 101.

27. Nellums *v.* Nashville, 106 Tenn. 222, 61 S. W. 88, holding that in an action for an injury from a defective plank walk upon an alleged street, the city may show under a plea of not guilty that it had never accepted the street nor become responsible for its repair.

28. New Albany *v.* McCulloch, 127 Ind. 500, 26 N. E. 1074.

contributory negligence is an affirmative defense which must be specially pleaded, and evidence thereof is not admissible under the general issue.[29]

(III) *VARIANCE*—(A) *In General.* The proof must correspond with the pleadings and issues.[30] But substantial correspondence of proof to allegation is sufficient and slight variances are immaterial.[31] Where, however, the proof differs substantially from the material facts as alleged, even though plaintiff's case has some merits, the variance is fatal to a recovery.[32]

29. Young *v.* Kansas City, 27 Mo. App. 101; South Omaha *v.* Cunningham, 31 Nebr. 316, 47 N. W. 930, intoxication.

30. Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201 (holding that under an allegation of injuries from falling into a ditch from the side where there is no pretense that he fell from the end of a bridge spanning the ditch, testimony as to the absence of a railing on the bridge is improper); Thompson *v.* Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734 (where the allegation of the injury sustained was held sufficiently specific to warrant admission of evidence that plaintiff's arm was broken by a fall upon a defective sidewalk).

General allegations of a defective sidewalk will admit proof of details of defect. Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498; Clayton *v.* Brooks, 150 Ill. 97, 37 N. E. 574 [*affirming* 31 Ill. App. 62], holding that where the declaration in an action for injuries caused by defective sidewalk contains averments covering the defect, evidence of the defective condition of the walk may be received.

Proof of either actual or constructive notice is sufficient to support an allegation that "defendant had notice." La Salle *v.* Porterfield, 138 Ill. 114, 27 N. E. 937; Indianapolis *v.* Tansel, 157 Ind. 463, 62 N. E. 35; Indianapolis *v.* Mitchell, 27 Ind. App. 589, 61 N. E. 947; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

31. *Colorado.*— Denver *v.* Baldasari, 15 Colo. App. 157, 61 Pac. 190.

District of Columbia.— Young *v.* District of Columbia, 3 MacArthur 137.

Illinois.— Cicero *v.* Bartelme, 212 Ill. 256, 72 N. E. 437 [*affirming* 114 Ill. App. 9]; Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498 [*affirming* 71 Ill. App. 423] (holding that an allegation that planks were broken and unfastened is sustained by proof that some of the planks were unfastened, although there was no proof of any planks being broken); Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753 [*affirming* 26 Ill. App. 173] (holding that under an allegation that planks in a sidewalk were broken and not fastened to the stringers, evidence that they were loose and not fastened to the stringers is sufficient); Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1; Springfield *v.* Purdy, 61 Ill. App. 114; Springfield *v.* Rosenmeyer, 52 Ill. App. 301; Bloomington *v.* Murnin, 36 Ill. App. 647; Rockford *v.* Hollenbeck, 34 Ill. App. 40; Chicago *v.* Chase, 33 Ill. App. 551.

Indiana.— Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

Iowa.— Rea *v.* Sioux City, 127 Iowa 615, 103 N. W. 949.

Missouri.— Sneed *v.* Salisbury, 94 Mo. App. 426, 68 S. W. 369.

Nebraska.— South Omaha *v.* Taylor, 4 Nebr. (Unoff.) 757, 96 N. W. 209.

New York.— Dobson *v.* Oneida, 106 N. Y. App. Div. 377, 94 N. Y. Suppl. 958; Magee *v.* Brooklyn, 18 N. Y. App. Div. 22, 45 N. Y. Suppl. 473.

Tennessee.— Niblett *v.* Nashville, 12 Heisk. 684, 27 Am. Rep. 755.

Washington.— McClammy *v.* Spokane, 36 Wash. 339, 78 Pac. 912.

Wisconsin.— Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1722.

Illustrations.— Thus a variance is immaterial between an allegation that at the place where the injury occurred the boards on the sidewalk were taken up for a space of from twenty to thirty feet, and evidence that the defect in the walk was but from two to four feet wide (South Omaha *v.* Taylor, 4 Nebr. (Unoff.) 757, 96 N. W. 209); between an allegation that an excavation was "in and on" an alley and proof that it was adjacent to the alley (Niblett *v.* Nashville, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755); and between an allegation of a permit to repair a sidewalk and trap door, and evidence of a permit to construct a brick walk at the same place (McClammy *v.* Spokane, 36 Wash. 339, 78 Pac. 912).

32. Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609; Rich *v.* Minneapolis, 40 Minn. 82, 41 N. W. 455; Smith *v.* Auburn, 88 N. Y. App. Div. 396, 84 N. Y. Suppl. 725; Gagan *v.* Janesville, 106 Wis. 662, 82 N. W. 558.

Illustrations.— Thus there is a material variance between an allegation that a city wrongfully and negligently put or allowed to be put on a sidewalk a certain box, and proof that it failed to put up a notice or guard around the obstruction, and failed to remove it or have it removed (Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576); between an allegation of negligence in leaving uncovered a dangerous pit on the premises in defendant's possession adjoining a public highway, and evidence that defendant was possessed of the highway but not of the adjoining premises (Ayers *v.* Chicago, 111 Ill. 406); between an allegation confining plaintiff's cause of action to injuries received from falling into an excavation, and evidence that the improvement had been completed and that plaintiff had fallen down a flight of steps in the sidewalk (Kane *v.* Joliet, 103

(B) *Notice and Pleading or Proof.* The notice or presentation of claim often required to be given as a condition precedent to action must be substantially followed by plaintiff in both pleading and proof and a material variance therefrom is fatal.[33] Plaintiff cannot sue for more,[34] although he may for less than the sum demanded in the claim;[35] and his pleading and proof may be more plenary and particular than his notice.[36] Unintentional variance without intention to mislead is excused in Massachusetts when defendant was not actually misled.[37]

7. EVIDENCE — a. Presumptions. Neither negligence nor defects are presumable from the mere fact of an accident.[38] In the absence of evidence to the contrary, a presumption exists in favor of the performance of sworn official duty,[39] and also of municipal permission for the existence of a hatchway in a sidewalk of which the city has exclusive control,[40] and that the stopping of a street car at a crossing was momentary for the receipt or discharge of passengers;[41] but not that the city ordered or planned a defective walk,[42] or that a sidewalk at a certain place was constructed on a general plan adopted by the municipality;[43] but the unex-

Ill. App. 195); between an allegation that the injuries were caused by a portion of the sidewalk being out of repair so that large and deep holes were in the sidewalk, and proof that two planks were removed from the sidewalk (Bloomington *v.* Goodrich, 88 Ill. 558); between a declaration of damages from a defective highway, and proof of negligent acts of the city's firemen in the highway (Edgerly *v.* Concord, 59 N. H. 78); and between an allegation of negligence in permitting an excavation to remain in a street without guards or a light, and proof of negligence in failing to erect a guard between the line of the street and an excavation on an adjoining lot (Caven *v.* Troy, 15 N. Y. App. Div. 163, 44 N. Y. Suppl. 244).

Waiver.— Where defendant fails to take advantage of a remedy provided by statute (Ky. Code Civ. Pr. § 129) for a misleading variance between the pleading and proof, such variance is waived. Covington *v.* Miles, 82 S. W. 281, 26 Ky. L. Rep. 609. So where no objection of variance is made at the trial, it cannot avail defendant on his motion for a new trial, since an amendment to the declaration can be allowed to conform to the evidence. Cowan *v.* Bucksport, 98 Me. 305, 56 Atl. 901.

33. Denver *v.* Barron, 6 Colo. App. 72, 39 Pac. 989; Shallow *v.* Salem, 136 Mass. 136; McDougall *v.* Boston, 134 Mass. 149; McCarroll *v.* Spokane, 34 Wash. 344, 75 Pac. 973; Bell *v.* Spokane, 30 Wash. 508, 71 N. W. 31; Van Frachen *v.* Ft. Howard, 88 Wis. 570, 60 N. W. 1062.

If the notice or claim and the complaint correspond in all substantial respects as to the matters, information of which is required to be given, the variance is immaterial. Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486; Van Frachen *v.* Ft. Howard, 88 Wis. 570, 60 N. W. 1062.

A slight discrepancy in the location of the place of the accident between the notice of claim and the complaint or proof is not a material variance. Cowan *v.* Bucksport, 98 Me. 305, 56 Atl. 901; Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138; Kolb *v.* Fond du Lac, 118 Wis. 311, 95 N. W. 149; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053. Thus a difference of sixty feet between the place of the accident as proved and the place as stated in the claim filed by plaintiff is immaterial. Masters *v.* Troy, 50 Hun (N. Y.) 485, 3 N. Y. Suppl. 450 [*affirmed* in 123 N. Y. 628, 25 N. E. 952].

34. Bland *v.* Mobile, 142 Ala. 142, 37 So. 843.

35. Minick *v.* Troy, 83 N. Y. 514 [*affirming* 19 Hun 253].

36. Bradbury *v.* Benton, 69 Me. 194; Laue *v.* Madison, 86 Wis. 453, 57 N. W. 93.

37. Cronan *v.* Woburn, 185 Mass. 91, 70 N. E. 38 (variance, if any, held cured by amendment); Hughes *v.* Lawrence, 160 Mass. 474, 36 N. E. 485; Conners *v.* Lowell, 158 Mass. 336, 33 N. E. 514; Bowes *v.* Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365.

38. Atlanta *v.* Stewart, 117 Ga. 144, 43 S. E. 443 (holding that no presumption of negligence arises from mere proof of injury caused by a defect in the streets); Tiborsky *v.* Chicago, etc., R. Co., 124 Wis. 243, 102 N. W. 549; Grossenbach *v.* Milwaukee, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614.

39. Miller *v.* [illegible], 112 Mo. App. 322, 87 S. W. 96. *Compare* McCormick *v.* Amsterdam, 18 N. Y. Suppl. 272, holding that in the absence of evidence that the city had complied with its charter, providing that the common council should designate on the city map all such streets as could not be put in proper condition for general travel without too great expense, after which the city should not be liable for accidents or injuries to persons caused by their defective condition, it will be presumed that the city had not so designated a street on which plaintiff received an injury but had elected to treat the same as one of the streets for which it was responsible.

40. Kenyon *v.* Indianapolis, Wils. (Ind.) 129.

41. McDonald *v.* Toledo, 63 Fed. 60, holding also, therefore, that it should be assumed that it was not necessary for plaintiff to drive around it.

42. Gould *v.* Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496.

43. Metz *v.* Butte, 27 Mont. 506, 71 Pac. 761.

plained existence of a dirt pile on a sidewalk for days is presumptively unlawful.[44] Work of a public character being done in a public street, or about property of which the city has exclusive control, is presumed to be done under the orders or permission of the proper city authorities.[45] Municipal acceptance of a bridge on a street is presumed from its being open and repaired by the corporation, and from its exercising supervision and control over it;[46] and the existence of a bridge fund may be presumed from charter power to levy therefor.[47] Where there is no direct evidence as to the cause of the injury and nothing to indicate any want of reasonable care on the injured person's part, he is presumed to have exercised reasonable care for his own safety;[48] and there is no presumption of negligence of plaintiff from the unexplained fright of a gentle horse,[49] from his falling at night into a hole in a sidewalk seen by him several days before,[50] or from the mere presence of his child in the street unattended;[51] nor in such case is there a presumption of negligence on the part of the child.[52]

b. Burden of Proof — (i) *In General.* Plaintiff has the burden of proving, in the first instance, all facts essential to establish at least a *prima facie* case in his favor.[53] Thus the burden is upon plaintiff to show facts proving that defendant municipality was negligent;[54] that the negligent acts were done by or under the authority of the municipality;[55] that, in the case of an action for injuries caused by defects or obstructions, it had notice, actual or constructive, of the defect or obstruction at the time of the injury;[56] the fact of the consequent

44. Shook *v.* Cohoes, 108 N. Y. 648, 15 N. E. 531.

45. Chicago *v.* Brophy, 79 Ill. 277 (holding therefore that plaintiff is not bound to prove that the work was done by the proper city authorities or by persons employed by the city); Peoria *v.* Crawl, 28 Ill. App. 154 (holding that it will be presumed that a culvert maintained by a city was built by persons employed by it); Goshen *v.* Alford, 154 Ind. 58, 55 N. E. 27 (holding that evidence that the city paid men employed by the city marshal for doing certain work in a street raised the presumption that the work was authorized by the city); Kenyon *v.* Indianapolis, Wils. (Ind.) 129 (holding that where vaults were constructed under a sidewalk over which the city has exclusive control, it will be presumed that they were constructed by a license or under permission of the city).

46. Shartle *v.* Minneapolis, 17 Minn. 308.

47. Shartle *v.* Minneapolis, 17 Minn. 308.

48. Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298; Holding *v.* St. Joseph, 92 Mo. App. 143; Baker *v.* North East Borough, 151 Pa. St. 234, 24 Atl. 1079; Jochem *v.* Robinson, 66 Wis. 638, 29 N. W. 642, 57 Am. Rep. 298.

49. Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

50. Deland *v.* Cameron, 112 Mo. App. 704, 87 S. W. 597.

51. St. Paul *v.* Kuby, 8 Minn. 154.

52. St. Paul *v.* Kuby, 8 Minn. 154.

53. Werth *v.* Springfield, 22 Mo. App. 12; Henker *v.* Fond du Lac, 71 Wis. 74, 36 N. W. 632, holding that under Fond du Lac City Charter, §§ 206, 207, the burden is on plaintiff to show that he has exhausted his remedies against an adjoining lot owner for injuries caused by defects in sidewalk in front of such lot owner's premises.

In an action for a nuisance by dumping refuse material on a vacant lot adjoining plaintiff's premises, it is incumbent on plaintiff to prove that the deposit complained of was injurious to health, and that defendant's use of the premises was unreasonable under all the circumstances. Lane *v.* Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643.

The burden of proving that there was no intention to mislead and that the party notified was not misled by a defective notice is upon the person giving such defective notice. Bowes *v.* Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365.

54. *Delaware.*— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379; Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418.

Georgia.—Atlanta *v.* Stewart, 117 Ga. 144, 43 S. E. 443; Brown *v.* Atlanta, 66 Ga. 71.

Illinois.— Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553.

Massachusetts.— Newton *v.* Worcester, 174 Mass. 181, 54 N. E. 521; Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327.

Missouri.— Carey *v.* Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65.

New York.— McGinity *v.* New York, 5 Duer 674, holding that plaintiff must show affirmatively a neglect of duty by the municipality.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Oklahoma.— Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

United States.— Delger *v.* St. Paul, 14 Fed. 567, 4 McCrary 634.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1725.

55. McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; York *v.* Spellman, 19 Nebr. 357, 27 N. W. 213.

56. *Alabama.*— Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863.

injury;[57] and that the municipality's negligence was the cause of such injury.[58] But in general it is sufficient that plaintiff prove such of his allegations as make out his *prima facie* case without anticipation of the defense;[59] and he is not bound to prove every incident or detail.[60] But, where plaintiff has established a *prima facie* case, the burden is then upon defendant municipality to prove all matters of excuse or defense relied upon by it,[61] such as the fact that plaintiff's injury was aggravated by negligence on his part,[62] or that the city had abandoned the street on which the injury occurred.[63]

(II) *Contributory Negligence.* In some jurisdictions the burden is upon plaintiff to show that he was free from contributory negligence at the time of the injury,[64] particularly where the circumstances shown by his evidence give rise to

Maine.— Haines *v.* Lewiston, 84 Me. 18, 24 Atl. 430, twenty-four hours actual notice.

Michigan.— McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; Tice *v.* Bay City, 84 Mich. 461, 47 N. W. 1062.

Nebraska.— Nothdurft *v.* Lincoln, 66 Nebr. 430, 92 N. W. 628, 96 N. W. 163; York *v.* Spellman, 19 Nebr. 357, 27 N. W. 213.

New York.— McGinity *v.* New York, 5 Duer 674; Seliger *v.* New York, 88 N. Y. Suppl. 1003.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Pennsylvania.— Hopkins *v.* Williamsport, 25 Pa. Super. Ct. 498.

Texas.— Sherman *v.* Greening, (Civ. App. 1903) 73 S. W. 424.

Wisconsin.— Sullivan *v.* Oshkosh, 55 Wis. 508, 13 N. W. 468.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1725.

57. Brown *v.* Atlanta, 66 Ga. 71.

58. *Georgia.*— Brown *v.* Atlanta, 66 Ga. 71.

Louisiana.— Romano *v.* Seidel Furniture Mfg. Co., 114 La. 432, 38 So. 409.

Massachusetts.— Newton *v.* Worcester, 174 Mass. 181, 54 N. E. 521; Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327.

New York.— Slevin *v.* New York, 56 N. Y. Super. Ct. 604, 7 N. Y. Suppl. 906.

Oklahoma.— Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

Pennsylvania.— Hopkins *v.* Williamsport, 25 Pa. Super. Ct. 498.

Wisconsin.— Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729, holding that the burden is on plaintiff to show how and why the accident occurred.

Canada.— Beaulieu *v.* St-Urbain Premier Corp., 22 Quebec Super. Ct. 208.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1725.

Burden of proving injury from mob see Fauvia *v.* New Orleans, 20 La. Ann. 410; Salisbury *v.* Washington County, 22 Misc. (N. Y.) 41, 48 N. Y. Suppl. 122 [*reversed* on other grounds in 30 N. Y. App. Div. 187, 51 N. Y. Suppl. 1070].

59. Caskey *v.* La Belle, 101 Mo. App. 590, 74 S. W. 113.

60. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82 (holding that in an action to recover for injuries resulting from negligence in constructing a sewer, it is not necessary for plaintiff to prove that the ordinance directing its construction was regularly adopted; it being sufficient to show that the city had assumed to adopt it and under it had constructed the sewer); Lindholm *v.* St. Paul, 19 Minn. 245 (holding that in an action for injuries for a defective street, plaintiff is not obliged to show that the city had means to repair it); Stern *v.* Bensieck, 161 Mo. 146, 61 S. W. 594.

61. Wilkins *v.* Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418 (holding that where a city relies upon an extraordinary storm as an excuse for injuries caused by a defective street, it must show that the defect resulted from such storm and not from its own negligence); Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042 (holding that under Pub. St. c. 52, § 20, providing that in an action against a city for personal injuries, no more damages than one-fifth of one per cent of the state valuation of the city or more than four thousand dollars shall be recovered, the burden of proving that one fifth of one per cent was less than four thousand dollars is on defendant); McCormick *v.* Amsterdam, 18 N. Y. Suppl. 272 (holding that the burden is on the city to show compliance with the Amsterdam City Charter, § 88, providing that the common council shall designate on the city map all such streets as cannot be put in proper condition).

Where a municipal corporation cuts a ditch across one of its streets, whereby a large and unusual quantity of water is turned upon private property of another, the act being *prima facie* wrongful, and the ditch a nuisance, for which the corporation is liable, circumstances rebutting such *prima facie* character are matters of defense to be pleaded and proved by the corporation. Kobs *v.* Minneapolis, 22 Minn. 159.

62. Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

63. Hanley *v.* Huntington, 37 W. Va. 578, 16 S. E. 807.

64. *Illinois.*— Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Abingdon *v.* McGrew, 42 Ill. App. 109.

Indiana.— Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82 [*disapproving* Roll *v.* Indianapolis, 52 Ind. 547]; Trout *v.* Elkhart, 12 Ind. App. 343, 39 N. E. 1048.

a presumption of contributory negligence,[65] and where the circumstances cast imputations upon his conduct.[66] In other jurisdictions, however, contributory negligence is held to be a matter of defense, and the burden is on defendant to prove it,[67] unless plaintiff by his own evidence discloses contributory negligence.[68]

c. Admissibility of Evidence[69]—(i) *In General.* The general rules governing the admissibility or competency of evidence in civil actions[70] regulate the competency and admissibility of evidence in actions for injuries from municipal negligence or other tort,[71] such as that facts too remote for proper probative influence are inadmissible,[72] that secondary evidence is inadmissible where the best is attainable,[73] and that hearsay testimony is inadmis-

Iowa.— Hubbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772.

Massachusetts.— Tuttle *v.* Lawrence, 119 Mass. 276, holding that he was not driving at a greater rate of speed than was allowed by the city ordinance.

Michigan.— Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191.

Mississippi.— Vicksburg *v.* Hennessy, 54 Miss. 391, 28 Am. Rep. 354, holding that plaintiff will not be relieved from affirmatively showing freedom from contributory negligence, by remissness in the city authorities.

New York.— Weston *v.* Troy, 139 N. Y. 281, 34 N. E. 780 [*reversing* 20 N. Y. Suppl. 269].

Oklahoma.— Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

Tennessee.— Stewart *v.* Nashville, 96 Tenn. 50, 33 S. W. 613.

Canada.— Beaulieu *v.* St-Urbain Premier Corp., 22 Quebec Super. Ct. 208.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1725.

65. Lockport *v.* Licht, 113 Ill. App. 613, 123 Ill. App. 426 [*reversed* on other grounds in 221 Ill. 35, 77 N. E. 581].

66. Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605, so held under a statute making cities and towns liable for damages caused by mobs, except where the damage was caused by his "illegal or improper" conduct.

67. *Colorado.*— Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092.

Delaware.— Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418.

Missouri.— Holding *v.* St. Joseph, 92 Mo. App. 143.

North Carolina.— Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823.

Texas.— San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; Dallas *v.* Myers, (Civ. App. 1901) 64 S. W. 683.

Virginia.— Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Wisconsin.— McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1725.

68. Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092; Peat *v.* Norwalk, 26 Ohio Cir. Ct. 161; Monroeville *v.* Weihe, 13 Ohio Cir. Ct. 689, 6 Ohio Cir. Dec. 188; San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

69. Admissibility of evidence of damages see Damages, 13 Cyc. 194 *et seq.*

70. See, generally, Evidence, 16 Cyc. 821.

71. See Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691; Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120]; Coolidge *v.* New York, 99 N. Y. App. Div. 175, 90 N. Y. Suppl. 1078 [*affirmed* in 185 N. Y. 529, 77 N. E. 1192].

Evidence of motives which influenced municipal officers in refusing to repair a street, or that they were influenced by malice toward plaintiff, is irrelevant and inadmissible. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Contract between a city and street contractor is admissible in an action for injuries caused by the failure of such contractor to properly guard obstructions created by him, to show the relation of the city and such contractor. Godfrey *v.* New York, 104 N. Y. App. Div. 357, 93 N. Y. Suppl. 899 [*affirmed* in 185 N. Y. 563, 77 N. E. 1187].

An ordinance may be given in evidence, although it is not pleaded, where the cause of action is not based on it. Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182. Thus an ordinance declaring that public safety requires openings in sidewalks to be properly guarded is admissible as an act or declaration concerning a matter involved in the suit, and also as being passed in the performance of a common-law duty. McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57. So an ordinance regulating the construction and safe-guarding of cellar ways is admissible in an action for injuries from an open and unguarded cellar way as a declaration of the city concerning a matter involved in the action. McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

72. Gilmer *v.* Montgomery, 26 Ala. 665. And see cases more specifically cited in the following notes.

73. Cleveland *v.* Beaumont, 7 Ohio Dec. (Reprint) 627, 4 Cinc. L. Bul. 345, holding that in an action against a city for damages due to the corruption of a watercourse by sewage, it was not error to exclude a question, asked of its civil engineer, as to whether the city had adopted a system of sewage and districted the city for that purpose, as such

sible.[74] Such rules govern the competency, relevancy, and materiality of evidence on the question of whether or not the municipality was engaged in a private enterprise;[75] or to show that the acts causing the defect or obstruction or other negligence were done under the authority of the municipality,[76] or whether the acts complained of constituted a nuisance;[77] or to show the cause of the injury,[78] or the place of the accident.[79] The length of time a street has been opened may be proven by parol;[80] and also the average duration of a sidewalk.[81] Any evidence competent to prove that the place of the accident was a public street or way, or that the city otherwise had control and dominion over it, is admissible.[82]

facts should be proved by its ordinance to that effect.

Where a policeman, charged in part with the duty of reporting to the city defects in sidewalks on his beat, makes his reports in writing, such reports are the best evidence, and a record of them is not admissible, where it is not shown to be one authorized by the law, on the issue of what information had been received. Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717.

74. Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

75. Collins *v.* Greenfield, 172 Mass. 78, 51 N. E. 454.

76. Ross *v.* Madison, Smith (Ind.) 98 (parol evidence held admissible); Carle *v.* Desoto, 156 Mo. 443, 57 S. W. 113; Betts *v.* Gloversville, 8 N. Y. Suppl. 795; Corsicana *v.* Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319 (holding that evidence of the non-enforcement of a city ordinance in permitting a private sewer to be connected with a city sewer and the mayor's knowledge thereof is admissible to show implied consent by the city).

Ratification of the acts may be shown by evidence that the town council approved bills incurred by the officer or agent in doing such acts, and subsequently paid them. Willoughby *v.* Allen, 25 R. I. 531, 56 Atl. 1109. Thus a bill furnished to municipal trustees for the laying of a flagstone covering a gutter and forming that part of the cross walk on which plaintiff fell, and that the same was audited and ordered paid, is admissible as tending to show that the laying of the cross walk was approved by the board. Betts *v.* Gloversville, 8 N. Y. Suppl. 795.

Parol testimony is competent to show that a surveyor of highways was duly authorized to do work on the highways in his district which resulted in the turning of surface water upon plaintiff's land, and plaintiff is not limited in his proof to record evidence of such authority by a formal vote of the town council. Willoughby *v.* Allen, 25 R. I. 531, 56 Atl. 1109.

A certified copy of a resolution of a city council authorizing the use of a sewer adjacent to plaintiff's premises in violation of an ordinance is competent to show that the city knowingly consented to such improper use. Champaign *v.* Forrester, 29 Ill. App. 117.

Declarations of a municipal officer or agent are inadmissible to show his authority. Betts *v.* Gloversville, 8 N. Y. Suppl. 795.

77. Suddeth *v.* Boone, 121 Iowa 258, 96 N. W. 853.

Non-expert witnesses in an action for a nuisance from the discharge of a sewer may state that the smell of gases from the sewer's outlet made them sick. Suddeth *v.* Boone, 121 Iowa 258, 96 N. W. 853.

In an action for a nuisance maintained near plaintiff's premises, his testimony of what the attending physician said caused his wife's illness is properly rejected, because this is a matter of mere hearsay. Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

78. Monarch Mfg. Co. *v.* Omaha, etc., R. Co., 127 Iowa 511, 103 N. W. 493; Johnson *v.* Sioux City, 114 Iowa 137, 86 N. W. 212; Scranton *v.* Dean, 33 Leg. Int. (Pa.) 281, holding general evidence as to probable cause of the death admissible, where a dead body was found under a bridge whose abutments were not properly guarded by barriers, it being the city's duty to maintain and repair such bridge.

Expert testimony.— In an action for injuries caused by the giving way of the iron covering over a cesspool entrance in the sidewalk, the stone rim or flange in which it rested being broken in places, it is not error to refuse to allow a civil engineer to testify for defendant that it was a mechanical impossibility for such cover to tip before it slid or before it was dislodged from the rim or edge of the hole, since it is not a subject for expert testimony, the jury being as competent as witness to judge of the mechanical possibilities of the situation. Ward *v.* Troy, 55 N. Y. App. Div. 192, 66 N. Y. Suppl. 925.

79. Seeley *v.* Bridgeport, 53 Conn. 1, 22 Atl. 1017.

The street line on either side of the *locus in quo* as marked by buildings or fences is admissible as tending to show the location of an unmarked line at the place. Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355.

An incorrect scale will not exclude a street-map otherwise correct. Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355.

80. Atchison *v.* Rose, 43 Kan. 605, 23 Pac. 561.

81. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80.

82. *Connecticut.*— Hillyer *v.* Winsted, 77 Conn. 304, 59 Atl. 40.

Iowa.— Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184; Sachra *v.* Manilla, 120 Iowa 562, 95 N. W. 198, competent for witness to give name of streets as shown in the town map.

(II) *Negligence of Defendant* — (A) *In General.* Subject to the general rules of evidence, any evidence of the facts and circumstances surrounding the accident is admissible for the purpose of proving or disproving negligence on the part of defendant municipality,[83] or the degree thereof.[84] But evidence is inadmissible which is immaterial, or which is not otherwise pertinent or competent,[85]

Massachusetts.— D'Amico *v.* Boston, 176 Mass. 599, 58 N. E. 158.

Missouri.— Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182.

Pennsylvania.— Brown *v.* Towanda Borough, 24 Pa. Super. Ct. 378.

Admissibility of subsequent repairs as evidence of ownership or control see *infra*, XIV, E, 7, c, (VI), text and note 67.

Records or resolutions of the municipal authorities recognizing the place as a public street or way are admissible to show that it was under its control. Huntington *v.* Mendenhall, 73 Ind. 460; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341. Thus resolutions by a city council for the grading and paving of the place where the accident occurred are competent as tending to show the city's control over it. Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418. But records referring to a contract for the construction of a sewer in a certain street are incompetent to show that another way had been recognized as a street. Carll *v.* Desoto, 156 Mo. 443, 57 S. W. 113.

Records of the county court showing that the pavement where the injury occurred belonged to and was controlled by the fiscal court of the county are admissible for defendant in an action against a city for injuries from negligence of defendant in constructing and maintaining the pavement between the court-house and the city hall. Graves *v.* Hopkinsville, 65 S. W. 339, 23 Ky. L. Rep. 1411.

That the corporation was informed, at a meeting of its council, through the report of one of its committees, that some slight repairs had been made upon a street, is admissible evidence for plaintiff, as tending to show a recognition of the street by the corporation, as well as notice to it of the character of the repairs. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

83. *Alabama.*—Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565.

Illinois.—Aurora *v.* Scott, 82 Ill. App. 616.

Massachusetts.— O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350; Hayes *v.* Cambridge, 136 Mass. 402; Rooney *v.* Randolph, 128 Mass. 580.

Michigan.— Edwards *v.* Three Rivers, 96 Mich. 625, 55 N. W. 1003; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652.

New York.—Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 44 Am. St. Rep. 453 (evidence of members of city council as to the amount of attention they had given their duty of keeping streets in order held admissible); Crawford *v.* New York, 68 N. Y. App. Div. 107, 74 N. Y. Suppl. 261 [*affirmed* in 174 N. Y. 518, 66 N. E. 1106].

Oregon.— Chan Sing *v.* Portland, 37 Oreg. 68, 60 Pac. 718.

Pennsylvania.— Butchers' Ice, etc., Co. *v.* Philadelphia, 156 Pa. St. 54, 27 Atl. 376.

United States.— District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1727.

Evidence of the duty of a policeman to report obstructions is admissible on the question of the liability of a city for an accident caused by an obstruction in a street. Bowman *v.* Tripp, 14 R. I. 242.

Request to repair street and refusal is competent in an action for injuries for negligently permitting water to run on plaintiff's lands, owing to alleged insufficient repair of a street. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Opinion evidence.— The opinion of a witness as to what is ordinary care on the part of a city is inadmissible. Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791.

Opinion of city officers is not admissible to show due care. Augusta *v.* Lombard, 99 Ga. 282, 25 S. E. 772. So opinion evidence of the inequalities in that portion of the highway between a carriage way and a sidewalk, that they are not deemed to be a portion of the highway which is required to be kept in repair for the use of foot passengers, is inadmissible. Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57. A mining engineer and consulting chemist, who never, as a scientist, investigated ventilation of sewers and never saw any test made of a blower or fan for extracting explosive gases in a sewer and knows nothing of the actual results of such tests if really made is not qualified as an expert to testify that the use of a blower or fan would have rendered the gases non-explosive. Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136. A question requiring a witness to state whether a bill board, by the blowing over of which plaintiff was injured, was in any sense in the way of people walking along the sidewalk is properly excluded as calling for the opinion of the witness. Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192. But testimony of an engineer as to the necessary capacity of a sewer in a particular locality for ordinary occasions is proper evidence of what is an extraordinary rainfall. Hession *v.* Wilmington, (Del. 1893) 27 Atl. 830.

84. Chicago *v.* Gallagher, 44 Ill. 295; Flater *v.* Fey, 70 Mich. 644, 38 N. W. 656.

85. Frostburg *v.* Hitchins, 70 Md. 56, 16 Atl. 380; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453, 109

such as evidence of the failure of persons in the immediate vicinity to observe the defect,[86] evidence of defendant's habitual negligence in other cases and places,[87] evidence of the failure of the mayor to notify the street committee of an obstruction,[88] or evidence which would greatly tend to confuse the minds of the jury, such as a matter of common knowledge.[89] Nor is evidence of a custom or usage admissible to excuse negligence on the part of defendant.[90] Municipal ordinances and resolutions in respect to the duty of the municipality and its officers as to the care of streets may be admitted on the question of defendant's negligence with respect to defective or obstructed streets.[91] Declarations of a municipal officer or agent are inadmissible to prove negligence on the part of the municipality,[92] unless they are made in the course of his official duty in respect to the acts of negligence complained of.[93]

(B) *Condition of Way and Nature of Defect or Obstruction* — (1) IN GENERAL. Ordinarily evidence of any fact or surrounding circumstance existing at the time and place of the accident is admissible for plaintiff for the purpose of proving negligence in respect to the alleged defect or obstruction,[94] such as evi-

N. Y. 637, 16 N. E. 681, holding that one on whom the city charter imposes the duty of superintending all work on its streets cannot testify that such work was under the supervision of another.

86. Grand Rapids *v.* Wyman, 46 Mich. 516, 9 N. W. 833.

87. Stone *v.* Seattle, 33 Wash. 644, 74 Pac. 808. And see *infra*, XIV, E, 7, c, (IV).

88. Edwards *v.* Three Rivers, 96 Mich. 625, 55 N. W. 1003.

89. Stone *v.* Seattle, 33 Wash. 644, 74 Pac. 808, holding that evidence that an opening in a sidewalk which caused the injury was necessary to carry off surface water is inadmissible, since it is a matter of common knowledge that surface water may be otherwise disposed of.

90. Larson *v.* Ring, 43 Minn. 88, 44 N. W. 1078; Crocker *v.* Schureman, 7 Mo. App. 358; McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57.

91. *Illinois.*— Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206.

Indiana.— Indianapolis *v.* Gaston, 58 Ind. 224.

Iowa.— Herries *v.* Waterloo, 114 Iowa 374, 86 N. W. 306; Shumway *v.* Burlington, 108 Iowa 424, 79 N. W. 123; Smith *v.* Pella, 86 Iowa 236, 53 N. W. 226.

Missouri.— Crocker *v.* Schureman, 7 Mo. App. 358.

New York.— Kane *v.* Troy, 1 N. Y. Suppl. 536.

Texas.— Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224.

See 36 Cent. Dig. tit. "Municipal Corporations," 1727.

An ordinance requiring occupants or owners of abutting property to keep streets clear from ice and snow is admissible to show that the city had provided for keeping the walks clear, and is entitled to wait a reasonable time for the persons specified to perform their duty. Calder *v.* Walla Walla, 6 Wash. 677, 33 Pac. 1054. But evidence of such an ordinance is inadmissible where there is no offer to prove that work was done under it. Hayes *v.* Cambridge, 138 Mass. 461.

The record of the common council showing a report of the committee appointed by that body, and the action taken thereon, in respect to the defect in question is admissible in evidence against a municipality. Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98.

Ordinances held inadmissible.— Evidence of an ordinance relating to the width of sidewalks is inadmissible in an action for negligence in the construction of a street crossing. Fairgrieve *v.* Moberly, 39 Mo. App. 31. So in the absence of a question of contributory negligence, ordinances providing for the placing of lights by persons occupying the streets for storage of building materials is inadmissible in an action for injuries from a collision with a pile of cinders in the street. Mills *v.* Philadelphia, 187 Pa. St. 287, 40 Atl. 821. An ordinance prohibiting the suspension of any obstruction over a sidewalk in such a manner as to interfere with free passage over it is inadmissible in an action for injuries by a sign dropping on plaintiff, where there is no evidence to show that the sign in question was an obstruction. Gray *v.* Emporia, 43 Kan. 704, 23 Pac. 944. An ordinance adopted after the walk, the defect in which caused the injury, was built is inadmissible in an action for such defect. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80.

92. Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

93. Smyth *v.* Bangor, 72 Me. 249.

94. *Georgia.*— Brunswick Light, etc., Co. *v.* Gale, 91 Ga. 813, 18 S. E. 11.

Illinois.— Joliet *v.* McCraney, 49 Ill. App. 381.

Indiana.— Bloomington *v.* Rogers, 13 Ind. App. 121, 41 N. E. 395.

Iowa.— Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132; Ford *v.* Des Moines, 106 Iowa 94, 75 N. W. 630 (that the sidewalk

dence of inadequate lighting at the time and place,[95] or that other obstructions narrowed the roadway;[96] or as to the act of defendant in taking up the sidewalk,[97] and as to faulty methods employed in restoring it.[98] Defendant may prove any fact tending to show its diligence in the matter.[99] But evidence which is too remote or uncertain is inadmissible for the purpose of proving or disproving the particular defect or obstruction;[1] and witnesses may not give their opinion as to the safety of the way,[2] or the danger of the obstruction.[3] Evidence of the usual or customary method of constructing, repairing, or safeguarding streets is not admissible to show that there was no negligence as to the conditions existing at the time and place of the accident,[4] especially where such evidence is the mere

sloped five feet within a distance of forty feet and that no cleats were fastened on it or hand rails on the side); Hazzard *v.* Council Bluffs, 79 Iowa 106, 44 N. W. 219; Haskell *v.* Des Moines, 74 Iowa 110, 37 N. W. 6 (that the sidewalk inclined or tipped to one side).

Kansas.— Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Minnesota.—Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4.

Nebraska.— York *v.* Spellman, 19 Nebr. 357, 27 N. W. 213, holding that where the alleged negligence consists in allowing a crossing to project above the street to an unusual height, testimony tending to show at what angle the side piece of the crossing met the street is admissible, as such angle will show the abruptness of the approach.

New York.— Smith *v.* Ryan, 8 N. Y. Suppl. 853.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1728–1731.

The frightening quality of a municipal street roller may be proven by its effect upon horses generally. Elgin *v.* Thompson, 98 Ill. App. 358.

Photographs exhibiting the exact condition of a certain sidewalk and driveway as it existed at the time of the accident thereon, except for the absence of snow and ice on the ground, are admissible in evidence. Considine *v.* Dubuque, 126 Iowa 283, 102 N. W. 102.

In an action for a nuisance by the improper use of sewers, evidence of a health officer of a city as to whether the sewer or the flushing tanks were out of repair about the time that plaintiff made complaint to him is admissible. Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

A model of an alleged defective walk is admissible in evidence, where it is shown to be a substantial reproduction and the witness points out the details in which the correspondence is not exact. Lush *v.* Parkersburg, 127 Iowa 701, 104 N. W. 336.

Payment for other injuries.— In an action against a town to recover for an injury to a carriage, caused by a defective highway, it is competent for plaintiff to show payments by the town of damages for injuries caused by the same accident to a passenger in the carriage. Grimes *v.* Keene, 52 N. H. 330.

95. Indianapolis *v.* Scott, 72 Ind. 196; Indianapolis *v.* Gaston, 58 Ind. 224; Keim *v.* Ft. Dodge, 126 Iowa 27, 101 N. W. 443; McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

96. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

97. Smith *v.* Ryan, 8 N. Y. Suppl. 853.

98. Smith *v.* Ryan, 8 N. Y. Suppl. 853.

99. O'Neill *v.* Lowell, 6 Allen (Mass.) 110 (holding that a witness for plaintiff who described the condition of the sidewalk at the time of the injury may be asked upon cross-examination if ice and snow were not removed from the sidewalk as well as could conveniently be done by a man with a shovel); Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

1. Rock Falls *v.* Wells, 59 Ill. App. 155; Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055, holding that in an action for personal injuries caused by the breaking of a defective plank which had been put in the sidewalk shortly before to repair a rotten place, and where it appeared that the plank broke when plaintiff stepped on it, it is inadmissible to show that a sound plank of those dimensions would support the weight of two heavy men; nor is it admissible to prove in such case that cows sometimes passed along the walk as tending to show that one might have broken the plank.

Contractor's specifications and engineer's reports are not competent to show the actual depth of a street excavation. Moon *v.* Middletown, 14 Ohio Cir. Ct. 498, 7 Ohio Cir. Dec. 579.

Upon the question whether the streets of a city are reasonably safe and suitable for the public travel, the city ordinances are not competent evidence. Davis *v.* Manchester, 62 N. H. 422.

2. Aurora *v.* Brown, 12 Ill. App. 122. *Compare* Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568.

Testimony that a sidewalk was in a rotten, shaky, and bad condition at the time of an injury is not the expression of an opinion. Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132.

3. Gilmer *v.* Atlanta, 77 Ga. 688, that roots projecting from the sidewalk would be likely to trip a foot passenger.

4. Koester *v.* Ottumwa, 34 Iowa 41; Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055, holding that evidence that it is the common practice to repair sidewalks in the manner in which the one in question was repaired is inadmissible.

expression of an opinion.[5] The identity of the place of injury and the location of the defect or obstruction may be proven by any competent evidence.[6]

(2) Prior to Accident.[7] For the purpose of proving or disproving a defect or obstruction at the time of the accident, evidence is admissible which tends to show its existence or non-existence within a reasonable time prior thereto, where the evidence is such, in character and time, as to justify the inference that the conditions were the same at the time of the accident.[8] Such evidence is admissible in corroboration of direct evidence of the defect or obstruction.[9] Evidence of the condition existing even at a considerable period before the accident is admissible, where it appears that there has been no change in the conditions in the meantime.[10] And defendant may also prove its good material and construction,[11] and its previous good condition or repair.[12] But evidence of facts or circumstances which are too remote to bear on the question whether it was defective at the time of the accident is inadmissible,[13] such as evidence of similar negligence by defendant in former years,[14] or of the condition existing before important changes have been made.[15] The court may, in its discretion, properly exclude as irrelevant proof of previous acts of negligence at or near the place, where the conditions do not appear to have been the same.[16]

(3) Subsequent to Accident. Likewise for the purpose of showing the existence of a defect or obstruction at the time and place of the accident, evidence is admissible which tends to show the condition of the place within a reasonable

5. Magee *v.* Troy, 48 Hun (N. Y.) 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148].

6. Brunswick Light, etc., Co. *v.* Gale, 91 Ga. 813, 18 S. E. 11; Ronn *v.* Des Moines, 78 Iowa 63, 42 N. W. 582. But see Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087, holding that evidence that witness knows the place in which it is claimed that plaintiff was injured is immaterial.

7. **Admissibility of evidence of prior defective condition or obstruction to show notice** see *infra*, XIV, E, 7, c, (III), (B).

8. *Illinois.*— Chicago *v.* Baker, 195 Ill. 54, 62 N. E. 892 [*affirming* 95 Ill. App. 413]; Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578; Strehmann *v.* Chicago, 93 Ill. App. 206.

Iowa.— Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341; Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717, holding that a policeman charged with the duty of reporting defects in sidewalks can testify as to its age and condition a short time before the accident.

Massachusetts.— Sheren *v.* Lowell, 104 Mass. 24.

Michigan.— Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444.

Minnesota.— Pearson *v.* Duluth, 40 Minn. 438, 42 N. W. 394.

New York.— Fox *v.* Lansingburgh, 13 N. Y. Suppl. 174.

Texas.— Belton *v.* Turner, (Civ. App. 1894) 27 S. W. 831.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1732.

9. Upham *v.* Salem, 162 Mass. 483, 39 N. E. 178.

10. Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Neal *v.* Boston, 160 Mass. 518, 36 N. E. 308 (holding that a policeman who could not remember specifically the condition of the walk on the day of the accident could testify as to its condition between certain dates which include the day of the accident); Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872 (holding that in an action for injuries from a defective sidewalk in October where evidence shows that it was repaired in August, evidence is admissible to show its condition during the fall, winter, and spring previous where it appears that the repairs did not improve its condition); Haus *v.* Bethlehem, 134 Pa. St. 12, 19 Atl. 437.

Testimony that from the time witness noticed the sidewalk until plaintiff was injured thereby, a period of six months, "it did not get in any better shape" is not a mere conclusion but an affirmation that there was no change in its condition and is admissible. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

11. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80.

12. Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565; Randall *v.* Hoquiam, 30 Wash. 435, 70 Pac. 1111.

13. Neal *v.* Boston, 160 Mass. 518, 36 N. E. 308; Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053, holding that a witness cannot testify that five months before the accident her daughter, with whom she was walking near the place of the accident, stepped on the end of a sidewalk plank which flew up causing the witness to fall.

14. Crawford *v.* New York, 68 N. Y. App. Div. 107, 74 N. Y. Suppl. 261 [*affirmed* in 174 N. Y. 518, 66 N. E. 1106].

15. Hebert *v.* Northampton, 152 Mass. 266, 25 N. E. 467.

16. Woodcock *v.* Worcester, 138 Mass. 268.

time thereafter,[17] if it is of such a character and within such a reasonable time as to justify the inference that it was in such condition at the time of the accident,[18] and in the absence of evidence of any material change in the meantime.[19] In some jurisdictions the rule is broadly stated that evidence of conditions subsequent to the accident is inadmissible in the absence of any evidence tending to show that the conditions had not changed since the accident.[20] But ordinarily evidence of its condition a considerable time thereafter is inadmissible,[21] unless accompanied by evidence that there has been no material change in the conditions,[22] or unless in rebuttal of other evidence as to the condition thereafter.[23]

17. *District of Columbia.*— District of Columbia *v.* Gray, 6 App. Cas. 314.

Illinois.— Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068; Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578. *Compare* Chicago *v.* Vesey, 105 Ill. App. 191; Chicago *v.* Early, 104 Ill. App. 398.

Iowa.— Wissler *v.* Atlanta, 123 Iowa 11, 98 N. W. 131.

Kansas.—Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121.

Massachusetts.— Daniels *v.* Lowell, 139 Mass. 56, 29 N. E. 222.

Michigan.— Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075; Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584.

Minnesota.— Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121; Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735.

Missouri.— Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699; Plummer *v.* Milan, 79 Mo. App. 439; Richardson *v.* Marceline, 73 Mo. App. 360.

New York.— Forde *v.* Nichols, 12 N. Y. Suppl. 922.

Ohio.— Monroeville *v.* Weihl, 13 Ohio Cir. Ct. 689, 6 Ohio Cir. Dec. 188, and where the description agrees with other descriptions given by witnesses who saw it on the day of the accident.

Pennsylvania.— Lohr *v.* Philipsburg, 165 Pa. St. 109, 30 Atl. 822.

Washington.— Bell *v.* Spokane, 30 Wash. 508, 70 Pac. 31.

Wisconsin.— Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317; Ruscher *v.* Stanley, 120 Wis. 380, 98 N. W. 223; Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1733. And see the other cases cited in the notes following.

18. *District of Columbia.*— District of Columbia *v.* Gray, 6 App. Cas. 314.

Massachusetts.— Berrenberg *v.* Boston, 137 Mass. 231, 50 Am. Rep. 296.

Michigan.— Shippy *v.* Au Sahle, 85 Mich. 280, 48 N. W. 584.

Minnesota.— Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735.

Missouri.— Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1733.

The time within which such evidence is admissible depends upon the character of the defect or obstruction or other circumstances in the particular case. Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853.

19. Berrenberg *v.* Boston, 137 Mass. 231, 50 Am. Rep. 296; Monroeville *v.* Weihl, 13 Ohio Cir. Ct. 689, 6 Ohio Cir.. Dec. 188; Lohr *v.* Philipsburg, 165 Pa. St. 109, 30 Atl. 822; McClosky *v.* Dubois Borough, 4 Pa. Super. Ct. 181.

20. Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132; Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831; Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63; Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; Cramer *v.* Burlington, 49 Iowa 213; Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317; Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731.

Evidence that there was no change in the condition of the walk for a month after the accident is admissible, there being other evidence as to its condition just after the accident. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

Testimony as to an analysis of the water flowing through plaintiff's land, made after the discharge of the sewage was discontinued, is inadmissible in the absence of a showing that the water was in the same condition as before the action. Vogt *v.* Grinnell, 123 Iowa 332, 98 N. W. 782.

21. *Alabama.*— Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863.

Indiana.— Indianapolis *v.* Scott, 72 Ind. 196.

Iowa.— Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853.

Kansas.— Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985, one year after.

Massachusetts.— George *v.* Haverhill, 110 Mass. 506, ten months.

New York.— Perkins *v.* Poughkeepsie, 83 Hun 76, 31 N. Y. Suppl. 368.

Texas.— Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95.

Wisconsin.— Gordon *v.* Sullivan, 116 Wis. 543, 93 N. W. 457.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1733.

22. Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863; Indianapolis *v.* Scott, 72 Ind. 196; Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; Berrenberg *v.* Boston, 137 Mass. 231, 50 Am. Rep. 296.

23. Perkins *v.* Poughkeepsie, 83 Hun (N. Y.) 76, 31 N. Y. Suppl. 368.

(III) *Notice of Defect* — (A) *Actual Notice.* Evidence of any fact or circumstance tending to prove previous knowledge by, or notice actually given to, some board, or officer, or agent representing the municipality, and whose duty it is to report or to act upon such knowledge,[24] of the defect or obstruction, such as ordinances, resolutions, or orders indicating such notice;[25] or evidence of complaints thereof to such officers,[26] or of the fact that the city had given, or ordered to be given, notice to abutting owners or others to repair;[27] or that the city had previously repaired such street;[28] or that witness had made repairs thereon under the direction of a proper officer[29] is admissible for the purpose of showing notice

24. *Alabama.*— Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Connecticut.—Hillyer *v.* Winsted, 77 Conn. 304, 59 Atl. 40; Wood *v.* Stafford Springs, 74 Conn. 437, 51 Atl. 129, holding that a third person's testimony that a month before she said to the street commissioner that owing to snow and ice "it was dangerous there for man or beast" is admissible.

Georgia.— Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Illinois.— Brownlee *v.* Alexis, 39 Ill. App. 135, holding that evidence of notice to the village authorities a year before as to the defective condition is not too remote.

Indiana.— Lafayette *v.* Larson, 73 Ind. 367.

Iowa.— Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77, holding conversations with the city sidewalk commissioner before the accident, relative to the condition of the walk, admissible.

New York.— Johnson *v.* Poughkeepsie, 29 N. Y. App. Div. 16, 51 N. Y. Suppl. 190 (notice to a police officer of the city); Michels *v.* Syracuse, 92 Hun 365, 36 N. Y. Suppl. 507 (evidence that a few days before the accident the attention of the city superintendent of public works had been called to the condition of the walk is admissible).

Ohio.— Payne *v.* Cleveland, 25 Ohio Cir. Ct. 457.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1729.

Evidence by the street commissioner of a city that he knew by personal examination that the stringers of a sidewalk were "all used up" established actual notice to the city of the defective condition of the walk in that regard at the particular place therein which was in controversy. Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

A report of the committee on streets and alleys previous to the injury, recommending the building of a new sidewalk on a specified side of a certain street, is admissible to show notice to the street and alley committee as to the defective condition of the walk. Pittsburg *v.* Broderson, 10 Kan. App. 430, 63 Pac. 5.

25. Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355.

An ordinance directing a sidewalk to be made passable is competent evidence of knowledge of its defective condition. Erd *v.* St. Paul, 22 Minn. 443.

Ordinance making it the duty of policemen to endeavor to remove obstructions from sidewalks or report the same to the department of public works is admissible on the question of notice, unless such notice is not controverted. Bibbins *v.* Chicago, 193 Ill. 359, 61 N. E. 1030 [*reversing* 94 Ill. App. 319].

Resolutions during previous two years ordering repairs, when connected with evidence that the repairs were not made, is admissible. Thompson *v.* Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734.

A record of proceedings of a common council after the accident showing an order to the engineer to examine the defective walk and report a remedy is admissible as tending to show that the walk was recognized by the city as defective. Lafayette *v.* Weaver, 92 Ind. 477.

A rule of the police department requiring policemen to note and report coal holes left open is admissible as tending to show that if such fact came to the knowledge of a policeman, it was duly reported by him to someone having authority to remedy the matter. Payne *v.* Cleveland, 25 Ohio Cir. Ct. 457.

26. Trapnell *v.* Red Oak Junction, 76 Iowa 744, 39 N. W. 884.

A book kept in the office of a city messenger for the purpose of entering complaints as to the condition of streets, sidewalks, etc., and recording the time when such complaints were attended to, is admissible to show notice to the city of the defect. Blake *v.* Lowell, 143 Mass. 296, 9 N. E. 627.

27. Wilson *v.* Cedar Rapids, 123 Iowa 10, 98 N. W. 119; Fee *v.* Columbus Borough, 168 Pa. St. 382, 31 Atl. 1076.

An ordinance requiring property-owners adjoining a street in which a defective sidewalk was located to rebuild said sidewalk is admissible on behalf of plaintiff to show that the adjoining owners had been notified to rebuild. Beardstown *v.* Clark, 204 Ill. 524, 68 N. E. 378 [*affirming* 104 Ill. App. 568].

A resolution of the common council ordering the street commissioner to notify parties to repair the sidewalk is admissible as tending to show that the authorities knew of the need of repairs. Aurora *v.* Pennington, 92 Ill. 564; Butler *v.* Malvern, 91 Iowa 397, 59 N. W. 50.

28. Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668.

29. Lafayette *v.* Larson, 73 Ind. 367.

to the municipality of the particular defect or obstruction, including admissions or declarations of such boards or officers made by them while acting in the discharge of their official duties.[30]

(B) *Constructive Notice.* For the purpose of showing constructive notice to the municipality, evidence of any facts or circumstances is relevant which tends to show that the defect or obstruction was of such a notorious character as to raise the inference that the city could and ought to have discovered it,[31] such as evidence of the length of time for which the defect or obstruction had existed,[32] of the defective or obstructed condition at other times within a reasonable time before or after the accident,[33] of the existence of other similar defects or obstructions in the

30. Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63 (holding, however, that evidence that after the accident the sidewalk commissioner stated that he had given notice to repair the walk is inadmissible where it does not appear whether the notice was given before or after the accident, or where the officer is not shown to have been acting in the discharge of his official duty when making the statement); Smyth *v.* Bangor, 72 Me. 249; Bonham *v.* Crider, (Tex. Civ. App. 1894) 27 S. W. 419 (holding that statements as to the bad condition of the walk made before the accident by an alderman who has since died are admissible to show that the city had notice of the defect).

Hearsay declarations of a deceased street commissioner without any evidence that such knowledge had ever been communicated to the borough or owner is inadmissible to show notice to the borough of the alleged defect. Fowler *v.* Jersey Shore, 17 Pa. Super. Ct. 366.

The statements, after an accident, of a trustee of the village, who was chairman of the street committee at the time and as such had the condition of the street especially in charge, is competent as tending to show that he and the village authorities generally knew before the injury occurred that the street was defective. Mt. Morris *v.* Kanode, 98 Ill. App. 373.

31. *Georgia.*— Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Illinois.— Ottawa *v.* Hayne, 214 Ill. 45, 73 N. E. 385 [*affirming* 114 Ill. App. 21].

Iowa.— Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192; Varnham *v.* Council Bluffs, 52 Iowa 698, 3 N. W. 792.

Maryland.— Kranz *v.* Baltimore, 64 Md. 491, 2 Atl. 908, holding that the fact that municipal servants were working in a sewer a few days before it hurst is admissible to charge the municipality with notice of its defective condition.

Massachusetts.—Chase *v.* Lowell, 151 Mass. 422, 24 N. E. 212.

New York.—Masters *v.* Troy, 50 Hun 485, 3 N. Y. Suppl. 450 [*affirmed* in 123 N. Y. 628, 25 N. E. 952], holding evidence of the distance from the defect to the city hall admissible.

Ohio.— Toledo *v.* Higgins, 12 Ohio Cir. Ct. 646, 7 Ohio Cir. Dec. 29.

Texas.— Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95.

Utah.— Scott *v.* Provo City, 14 Utah 31, 45 Pac. 1005.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1729.

Declarations of third persons as to the condition of the place at which plaintiff was injured is admissible to show that its condition was a matter of public notoriety and therefore as tending to prove notice thereof to the city. Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138. Thus the acts and declarations of persons who exposed by excavations the roots of an old tree and saw its decayed condition in regard to it are admissible for this purpose. Chase *v.* Lowell, 151 Mass. 422, 24 N. E. 212.

A petition to a village board for the building of a sidewalk seven feet wide in place of one four feet wide is not admissible in evidence to show that the village authorities had notice of defects existing six months later in the old walk. Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053.

32. *Illinois.*— Elgin *v.* Nofs, 212 Ill. 20, 72 N. E. 43; Strehmann *v.* Chicago, 93 Ill. App. 206.

Iowa.— Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192.

Kansas.— Smith *v.* Leavenworth, 15 Kan. 81.

Michigan.— Nestle *v.* Flint, 141 Mich. 153, 104 N. W. 406; Tice *v.* Bay City, 84 Mich. 461, 47 N. W. 1062, holding that evidence of the long-continued existence of the defect is admissible to show notice, although it also shows the existence of such defect before the law which renders the city liable for injuries occasioned thereby went into effect.

Missouri.— Richardson *v.* Marceline, 73 Mo. App. 360.

North Dakota.— Chacey *v.* Fargo, 5 N. D. 173, 64 N. W. 932.

Ohio.— Toledo *v.* Higgins, 12 Ohio Cir. Ct. 646, 7 Ohio Cir. Dec. 29.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1729.

33. *Iowa.*—Hofacre *v.* Monticello, 128 Iowa 239, 103 N. W. 488; Parker *v.* Ottumwa, 113 Iowa 649, 85 N. W. 805; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319, holding evidence of a witness, who lived in the house next to the defective sidewalk, descriptive of the defective condition a year before the accident and to the fact that it was substantially

immediate vicinity under the same conditions,[34] of other similar accidents from the same defect or obstruction,[35] or of the fact that the sidewalk in the immediate vicinity under the same conditions was in a generally bad condition, and the length of time it had so continued.[36] Evidence is also admissible on the issue of

unchanged about the time of the accident admissible.

Michigan.— Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652.

Minnesota.— Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4.

New York.— Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442, holding it competent to show the condition of the street and the absence of lights in the night-time, prior to the accident and on the night thereafter.

Utah.— Scott *v.* Provo City, 14 Utah 31, 45 Pac. 1005.

Washington.— Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31; Randall *v.* Hoquiam, 30 Wash. 435, 70 Pac. 1111.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1729.

Subsequent repairs as evidence of notice see *infra*, XIV, E, 7, c, (VI), text and note 63.

It is within the discretion of the court to reject evidence of the bad condition a week before, on the question of notice, where the conditions are not shown to be the same or where in fact they appear to be different. Woodcock *v.* Worcester, 138 Mass. 268.

Evidence of the previous existence of a like condition not continuous in its nature is not admissible on the question of notice. Carlisle *v.* Secrest, 75 S. W. 268, 25 Ky. L. Rep. 336.

34. *Illinois.*— Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624 [*affirming* 99 Ill. App. 418].

Iowa.— Ledgerwood *v.* Webster City, 93 Iowa 726, 61 N. W. 1089, evidence of other loose planks on the same part of the walk. See Ruggles *v.* Nevada, 63 Iowa 185, 18 N. W. 866.

Michigan.—Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

Washington.— Laurie *v.* Ballard, 25 Wash. 127, 64 Pac. 906.

Wisconsin.— Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1729.

Evidence that a grating which had been taken from an old walk and put into a new sidewalk had been defective for some time before its removal is irrelevant, the city having no reason to anticipate that the old broken grating would be put into the new walk. Stellwagen *v.* Winona, 54 Minn. 460, 56 N. W. 51.

35. See *infra*, XIV, E, 7, c, (V), text and note 56.

36. *Illinois.*— Elgin *v.* Nofs, 200 Ill. 252, 65 N. E. 679 [*reversing* 103 Ill. App. 11], 212 Ill. 20, 72 N. E. 43; Shelbyville *v.* Brant, 61 Ill. App. 153; Streator *v.* Hamilton, 49 Ill. App. 449, holding, however, that evidence as to the condition of the walk for a space of two city blocks is inadmissible.

Iowa.— Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184; Spicer *v.* Webster City, 118 Iowa 561, 92 N. W. 884; Beaver *v.* Eagle Grove, 116 Iowa 485, 89 N. W. 1100; Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717; Aryman *v.* Marshalltown, 90 Iowa 350, 57 N. W. 867; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77; Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180.

Michigan.— Boyle *v.* Saginaw, 124 Mich. 348, 82 N. W. 1057; Rodda *v.* Detroit, 117 Mich. 412, 75 N. W. 939; Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872; Haynes *v.* Hillsdale, 113 Mich. 44, 71 N. W. 466 (holding that evidence that other portions of the walk built at the same time as that portion on which the accident occurred were out of repair is admissible); Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454; O'Neil *v.* West Branch, 81 Mich. 544, 45 N. W. 1023.

Minnesota.— Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868; Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359; Gude *v.* Mankato, 30 Minn. 256, 15 N. W. 175.

Missouri.— Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96; Kuntsch *v.* New Haven, 83 Mo. App. 174; Smallwood *v.* Tipton, 63 Mo. App. 234.

North Dakota.— Chacey *v.* Fargo, 5 N. D. 173, 64 N. W. 932.

Texas.— Belton *v.* Turner, (Civ. App. 1894) 27 S. W. 831.

Washington.— Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76.

Wisconsin.— Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464; Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053; Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271.

United States.— Osborne *v.* Detroit, 32 Fed. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1729.

Evidence by a street commissioner of a city to the effect that a sidewalk was generally out of repair, both as to the surface thereof and the stringers, some three months before the happening of an accident alleged to have been caused by reason of a defect in the walk at a particular point, is competent for the purpose of showing constructive notice to the city of such particular defect, notwithstanding evidence by the street commissioner that he repaired the walk, so far as practicable, by using the old material and without putting in new stringers before the accident happened. Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

notice of its condition, that the sidewalk was built of old material,[37] or had not been repaired for a considerable length of time.[38] Such evidence may be given by any witness who had observed the defects or obstructions,[39] such as a night watchman paid by private parties.[40] But it is inadmissible to show the total length of defendant's streets on the question of constructive notice,[41] or other defects of a different nature at the same place,[42] or any other evidence which is too remote or uncertain in point of time or relation to the defect or obstruction in question.[43] As tending to rebut such notice it is competent for a municipality to give evidence showing that the sidewalk was in an apparently safe condition,[44] as that it was laid down in the ordinary way and constructed out of sound and suitable material.[45]

(iv) *Similar Defects and Conditions at Other Places.* For the purpose of proving or disproving negligence with respect to the particular defect or obstruction which caused the injury, evidence of similar defects, obstructions, or conditions existing at other places,[46] or of like conditions, obstructions, or methods in other cities is ordinarily inadmissible.[47] But evidence of similar defects, obstructions, or conditions in the immediate vicinity under like conditions is admissible as tending to show the existence of the particular defect or obstruction,[48]

Mere remoteness as to time, or whether the generally defective condition existed after as well as before the accident, where the nature of the particular defect is so connected with such condition that the latter would reasonably suggest the probability of the former, does not render such evidence incompetent. Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051.

37. Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341.

38. Haynes *v.* Hillsdale, 113 Mich. 44, 71 N. W. 466 (twenty-one years); Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022.

39. Varnham *v.* Council Bluffs, 52 Iowa 698, 3 N. W. 792, although he be a non-resident.

A policeman, charged in part with the duty of reporting to the city defects in the sidewalks of his beat, can testify to the age of a walk, and its condition a short time before an accident, which resulted on account of a defect in it. Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717.

40. Ottawa *v.* Hayne, 214 Ill. 45, 73 N. E. 385 [*affirming* 114 Ill. App. 45].

41. Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791.

42. Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861.

43. See Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82.

44. McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

45. Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

46. *Alabama.*— Gilmer *v.* Montgomery, 26 Ala. 665.

Illinois.— Streator *v.* Hamilton, 49 Ill. App. 449; Galesburg *v.* Hall, 45 Ill. App. 290.

Indiana.— Bauer *v.* Indianapolis, 99 Ind. 56, that crossing was similar to other crossings.

Iowa.—Vogt *v.* Grinnell, 123 Iowa 332, 98 N. W. 782; Goodson *v.* Des Moines, 66 Iowa 255, 23 N. W. 655; Conklin *v.* Marshalltown, 66 Iowa 122, 23 N. W. 294; German Theological School *v.* Dubuque, 64 Iowa 736, 17 N. W. 153.

Kentucky.— Newport *v.* Miller, 93 Ky. 22, 18 S. W. 835, 13 Ky. L. Rep. 889.

Massachusetts.— Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605; George *v.* Haverhill, 110 Mass. 506; Payne *v.* Lowell, 10 Allen 147; Bacon *v.* Boston, 3 Cush. 174.

Michigan.— Haynes *v.* Hillsdale, 113 Mich. 44, 71 N. W. 466; Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52; Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143.

Missouri.— Bowles *v.* Kansas City, 51 Mo. App. 416.

New York.— Hyatt *v.* Rondout, 44 Barb. 385 [*affirmed* in 41 N. Y. 619].

Tennessee.— Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

Wisconsin.— Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Radichel *v.* Kendall, 121 Wis. 560, 99 N. W. 348; Olson *v.* Luck, 103 Wis. 33, 79 N. W. 29; Everman *v.* Menomonie, 81 Wis. 624, 51 N. W. 1013.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1734.

Evidence as to the usual method of constructing walks but not confined to defendant or like cities at any time is inadmissible. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80.

In an action for a nuisance in maintaining a sewer evidence by defendant that another sewer of similar construction and use produced offensive smells is inadmissible, except where defendant shows that the two sewers are alike in their construction and use. Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268.

47. George *v.* Haverhill, 110 Mass. 506; Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520; Stone *v.* Seattle, 33 Wash. 644, 74 Pac. 808. *Compare* Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57.

48. *Colorado.*— Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909.

or to fix constructive notice thereof on the municipality.[49] Thus such evidence is generally held admissible where the accident or injury occurs on a sidewalk of uniform construction and material for considerable length, and the other defects or conditions offered in evidence were in the same walk and vicinity.[50]

(v) *Other Accidents at Same Place.* Evidence of other accidents at the same place or from the same defect or obstruction is generally inadmissible to show negligence in the particular case,[51] or care and prudence on the part of plaintiff;[52] and for the same reason evidence that no other accident of the same kind or at the same place had happened is inadmissible.[53] But by the weight of authority evidence of such other accidents within a reasonable time prior to the accident complained of and under the same conditions is admissible as tending to show the existence of the defect, obstruction, or other dangerous conditions,[54] and the pos-

Georgia.— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois.— Chase *v.* Chicago, 20 Ill. App. 274.

Iowa.— McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80; Spicer *v.* Webster City, 118 Iowa 561, 92 N. W. 884; Ledgerwood *v.* Webster City, 93 Iowa 726, 61 N. W. 1089; Damour *v.* Lyons City, 44 Iowa 276.

Massachusetts.— Packard *v.* New Bedford, 9 Allen 200, holding that, where the alleged defect consisted in a gutter running obliquely across the highway, defendant may show upon the question of ordinary care that a great many gutters equally deep cross the streets in the same manner, in the same town or towns near it.

Michigan.— Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872. See Grand Rapids *v.* Wyman, 46 Mich. 516, 9 N. W. 833.

Missouri.— Smallwood *v.* Tipton, 63 Mo. App. 234.

Wisconsin.— See Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1734.

As to whether defendant had taken reasonable pains to remove ice, evidence is admissible that in other places on the sidewalk similarly situated the ice had been removed with a shovel only. Shea *v.* Lowell, 8 Allen (Mass.) 136.

49. See *supra*, XIV, E, 7, c, (III), (B), text and note 34.

50. Kankakee *v.* Steinbach, 89 Ill. App. 513; Ledgerwood *v.* Webster City, 93 Iowa 726, 61 N. W. 1089; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652.

Where a sidewalk is of uniform material, put down at the same time, it is competent in an action for injuries to prove the condition of the walk in other places, without limiting it to the particular defect. Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568.

Admission of evidence as to condition of the sidewalk two hundred feet from the place of the accident is not error, there being evidence that the walk for the distance of the entire block within which the accident occurred was out of repair, and in a dangerous condition. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

51. Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624 [*affirming* 99 Ill. App. 418]; Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193; Ashtabula *v.* Bartram, 3 Ohio Cir. Ct. 640, 2 Ohio Cir. Dec. 372; Ware *v.* Shafer, (Tex. Civ. App. 1894) 27 S. W. 764.

52. Ashtabula *v.* Bartram, 3 Ohio Cir. Ct. 640, 2 Ohio Cir. Dec. 372. And see *infra*, XIV, E, 7, c, (VII).

53. Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605; Ward *v.* Troy, 65 N. Y. App. Div. 192, 66 N. Y. Suppl. 925.

54. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Georgia.— Gilmer *v.* Atlanta, 77 Ga. 688.

Illinois.— Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624 [*affirming* 99 Ill. App. 418]; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216 [*affirming* 40 Ill. App. 185, 48 Ill. App. 459]; Rowlands *v.* Elgin, 66 Ill. App. 66.

Iowa.— Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77; Moore *v.* Burlington, 49 Iowa 136. *Compare* Mathews *v.* Cedar Rapids, 80 Iowa 459, 45 N. W. 894, 20 Am. St. Rep. 436.

Kansas.— Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

Kentucky.— Yates *v.* Covington, 119 Ky. 228, 83 S. W. 592, 26 Ky. L. Rep. 1154.

Massachusetts.— Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254.

Michigan.— Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947; Thompson *v.* Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734.

Missouri.— Golden *v.* Clinton, 54 Mo. App. 100. But see Goble *v.* Kansas City, 148 Mo. 470, 50 S. W. 84.

New York.— Fordham *v.* Gouverneur, 160 N. Y. 541, 55 N. E. 290; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 [*affirming* 34 Hun 607]; Perry *v.* Potsdam, 106 N. Y. App. Div. 297, 94 N. Y. Suppl. 683; Lundbeck *v.* Brooklyn, 26 N. Y. App. Div. 595, 50 N. Y. Suppl. 421; Masters *v.* Troy, 50 Hun 485, 3 N. Y. Suppl. 450 [*affirmed* in 123 N. Y. 628, 25 N. E. 952];

sibility or probability that the injury complained of resulted therefrom;[55] and as tending to show notice on the part of the city of the defective or obstructed condition of the place.[56] Similar accidents under the same conditions in other places closely related to the place of the accident are admissible as tending to show the existence of the particular defect or obstruction.[57] But evidence of other accidents happening at the same place at a time too remote from the occurrence of the injury complained of,[58] or which does not show a similarity of conditions,[59] is inadmissible. So evidence of subsequent accidents is inadmissible to show a defective or obstructed condition or notice thereof,[60] unless the testimony further shows a similarity of condition of the defect at the subsequent date and at the time of the injury.[61]

Magee *v.* Troy, 48 Hun 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148]; Avery *v.* Syracuse, 29 Hun 537; Burns *v.* Schenectady, 24 Hun 10; Quinlan *v.* Utica, 11 Hun 217 [*affirmed* in 74 N. Y. 603]; Sherman *v.* Oneonta, 21 N. Y. Suppl. 137; Gillrie *v.* Lockport, 12 N. Y. St. 707.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193; Russell *v.* Toledo, 19 Ohio Cir. Ct. 418, 10 Ohio Cir. Dec. 367; Ashtabula *v.* Bartram, 3 Ohio Cir. Ct. 640, 2 Ohio Cir. Dec. 372.

Washington.— Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

United States.— District of Columbia *v.* Arms, 107 U. S. 519, 2 S. Ct. 840, 27 L. ed. 618; Oshorne *v.* Detroit, 32 Fed. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1735.

But *compare* Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520; Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387; Richards *v.* Oshkosh, 81 Wis. 226, 51 N. W. 256.

That other ordinarily gentle horses were frightened by the same obstruction is admissible to show that it was a public nuisance rendering driving on the street unsafe. Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254.

Evidence as to injury from overflow of surface water to property situated on another street than the property in question, where the same is not confined to any locality, and it is not shown that the conditions were the same and the property similarly situated, is inadmissible. Monarch Mfg. Co. *v.* Omaha, etc., R. Co., 127 Iowa 511, 103 N. W. 493.

55. Aurora *v.* Brown, 12 Ill. App. 122 [*affirmed* in 109 Ill. 165].

56. *District of Columbia.*— Domer *v.* District of Columbia, 21 App. Cas. 284.

Illinois.— Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216 [*affirming* 40 Ill. App. 185, 48 Ill. App. 459]; Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418.

Indiana.— Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98.

Iowa.— Wilberding *v.* Dubuque, 111 Iowa 484, 82 N. W. 957; Moore *v.* Burlington, 49 Iowa 136.

Michigan.—Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947.

Minnesota.— Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745.

New York.— Lundbeck *v.* Brooklyn, 26 N. Y. App. Div. 595, 50 N. Y. Suppl. 421; Stebbins *v.* Oneida, 1 Silv. Sup. 240, 5 N. Y. Suppl. 483.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193; Ashtabula *v.* Bartram, 3 Ohio Cir. Ct. 640, 2 Ohio Cir. Dec. 372, holding also that such evidence is not rendered inadmissible to prove notice, because other evidence in the case would prove the same fact if not rebutted by defendant.

Texas.— Ware *v.* Shafer, (Civ. App. 1894) 27 S. W. 764.

Washington.— Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674; Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138; Elster *v.* Seattle, 18 Wash. 304, 51 Pac. 394.

Wisconsin.— See Richards *v.* Oshkosh, 81 Wis. 226, 51 N. W. 256.

United States.— Osborne *v.* Detroit, 32 Fed. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1735.

57. Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95; Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933, holding that where a sidewalk adjacent to a lot is built of unsuitable material and defectively constructed, accidents on that part of the walk so built may be shown, although they did not happen at the precise spot where plaintiff was injured.

58. Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357 [*reversing* 12 N. Y. St. 707].

59. Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63; Vander Velde *v.* Leroy, 140 Mich. 359, 103 N. W. 812 (holding that in an action for injuries from a defective sidewalk, evidence that others had previously fallen over the walk at such place is inadmissible, where a barrier had been erected after such accidents and was there when plaintiff was hurt); Ster *v.* Tuety, 45 Hun (N. Y.) 49; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053.

60. Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863; Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375; Chicago *v.* Vesey, 105 Ill. App. 191; McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955.

61. Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863; Taylor *v.* Austin, 32 Minn. 247,

(VI) *Subsequent Repairs or Precautions.* By the weight of authority evidence of changes or repairs made subsequent to the injury, or of precautions taken against recurrence of the injury, is not admissible as showing previous negligence, or as amounting to an admission of negligence;[62] or to show previous notice of the defect,[63] particularly where the changes or repairs are made a considerable time after the accident,[64] or are made by a stranger.[65] But evidence of repairs or changes made and precautions taken soon after the accident is admissible in rebuttal of defendant's testimony as to the safe condition of the place of the accident at and after the time thereof,[66] or for the purpose of showing that the municipality exercised ownership or control over the place,[67] and that the defect was one which the city was bound to repair,[68] or as tending to show the nature or character of the defect or obstruction, or other conditions existing at the time and place of the accident,[69] or that the condition was an unnecessary one,[70] and as tending to show authority in the person who did it to make such repairs.[71] Where such evidence is admissible for other purposes, it will not be discredited by reason of the fact that it incidentally discloses such changes or repairs.[72]

20 N. W. 157, holding that evidence of the flooding of a cellar from same cause and on several occasions within a few days subsequent to the date mentioned is admissible.

62. *Illinois.*— Warren *v.* Wright, 103 Ill. 298; Chicago *v.* Richardson, 75 Ill. App. 198; Streator *v.* Hamilton, 49 Ill. App. 449. But see Vandalia *v.* Ropp, 39 Ill. App. 344.

Iowa.— Achey *v.* Marion, 126 Iowa 47, 101 N. W. 435; Sylvester *v.* Casey, 110 Iowa 256, 81 N. W. 455; Cramer *v.* Burlington, 45 Iowa 627.

Missouri.— Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Mitchell *v.* Plattsburg, 33 Mo. App. 555.

New York.— Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. 309; Sherman *v.* Oneonta, 59 Hun 294, 12 N. Y. Suppl. 950; Sweeny *v.* New York, 17 N. Y. Suppl. 797.

Pennsylvania.— Brown *v.* Towanda, 24 Pa. Super. Ct. 378.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1733.

But *compare* Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

63. Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893; Dallas *v.* Meyers, (Tex. Civ. App. 1900) 55 S. W. 742.

64. Allison *v.* Middletown, 10 N. Y. St. 421, several years after. See Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853.

65. Rogers *v.* Orion, 116 Mich. 324, 74 N. W. 463; Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. 309.

66. Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624; Parker *v.* Ottumwa, 113 Iowa 649, 85 N. W. 805.

Where defendant introduced photographs of the place of the accident, it is competent for plaintiff in rebuttal to show changes in the walk between the time of the accident and the taking of the photographs. Achey *v.* Marion, 126 Iowa 47, 101 N. W. 435.

67. Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182; Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Brown *v.* Towanda Borough, 24 Pa. Super. Ct. 378.

68. Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Rusher *v.* Aurora, 71 Mo. App. 418; Bowles *v.* Kansas City, 51 Mo. App. 416 (holding that such evidence being competent only as an admission of the city's duty to repair, it must be coupled with proof that it was the city that made the repairs); Mitchell *v.* Plattsburg, 33 Mo. App. 555; Ashtabula *v.* Bartram, 3 Ohio Cir. Ct. 640, 2 Ohio Cir. Dec. 372.

Record of proceedings of the city council after the accident ordering an examination of the walk and a report of a remedy is admissible to show that the city considered the walk defective and one that it was bound to repair. Lafayette *v.* Weaver, 92 Ind. 477.

69. *Kansas.*— Olathe *v.* Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308; Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893.

Michigan.— Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947.

Minnesota.— O'Leary *v.* Mankato, 21 Minn. 65.

New York.— Sherman *v.* Oneonta, 59 Hun 294, 12 N. Y. Suppl. 950. See Hillesum *v.* New York, 56 N. Y. Super. Ct. 596, 4 N. Y. Suppl. 806; Sweeny *v.* New York, 17 N. Y. Suppl. 797.

United States.— Osborne *v.* Detroit, 32 Fed. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1733.

But see Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

To show the location of the former defect, a depression in the street, evidence of a witness having seen the place in the street about where the accident occurred, where gravel had been placed after the accident, is admissible. Grundy *v.* Janesville, 84 Wis. 574, 54 N. W. 1085.

70. Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

71. Sprague *v.* Rochester, 52 N. Y. App. Div. 53, 64 N. Y. Suppl. 846; Morton *v.* Smith, 48 Wis. 265, 4 N. W. 330, 33 Am. Rep. 811.

72. Achey *v.* Marion, 126 Iowa 47, 101 N. W. 435; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341.

(VII) *CONTRIBUTORY NEGLIGENCE*—(A) *In General.* Any legal evidence bearing on the question of contributory negligence, whether circumstantial or direct, is admissible,[73] such as evidence of plaintiff's intoxication at the time of the accident,[74] his defective sight,[75] his knowledge of the defect or obstruction and of its danger,[76] his duty or service at the time,[77] and the relative danger of other possible routes.[78] But where there is direct evidence as to plaintiff's conduct at the time, evidence as to his ordinary habits or general character for care and caution is inadmissible.[79]

(B) *Harmless Use at Other Times.* As bearing on the question of contributory negligenee on the part of plaintiff evidence is admissible, in some jurisdictions, that plaintiff or other persons had previously used the way, or passed the obstruction, without accident, when it was in the same condition as at the time of the accident complained of.[80] In other jurisdictions, however, such evi-

73. *Alabama.*— Gilmer *v.* Montgomery, 26 Ala. 665.

Colorado.— Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403, holding evidence for plaintiff that there was no light at the intersection of streets adjacent to the place of the accident admissible.

Delaware.—Benson *v.* Wilmington, 9 Houst. 359, 32 Atl. 1047.

Illinois.— El Paso *v.* Causey, 1 Ill. App. 531; Mendota *v.* Fay, 1 Ill. App. 418.

Michigan.— Baker *v.* Grand Rapids, 111 Mich. 447, 69 N. W. 740, holding that where a person is injured by falling into a sewer opening while crossing a street, where there was no walk, evidence that it was customary for persons to cross at that place, and that a path had been worn there is admissible on the question of plaintiff's care.

Wisconsin.— Simonds *v.* Baraboo, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895, holding, however, that in an action by one who while driving in a wagon-load of wood was injured by reason of defects in the street, evidence as to the customary way of loading and hauling wood is inadmissible on the issue of contributory negligence.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1730.

That plaintiff knew that the person who was driving him was a careless driver is immaterial in an action for an obstruction in a street, whereby his vehicle was overturned. Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668.

Evidence of an ordinance prohibiting fast driving is admissible in support of a defense of contributory negligence, although no evidence of plaintiff's immoderate driving has been introduced. Fernbach *v.* Waterloo, 76 Iowa 598, 41 N. W. 370, (1887) 34 N. W. 610.

An ordinance requiring owners or occupants of real property to make repairs on adjoining sidewalks is not competent evidence to show that the tenant of such property was guilty of contributory negligence, because of his failure to keep such sidewalk in repair. Ford *v.* Kansas City, 181 Mo. 137, 79 S. W. 923.

74. Hubbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772.

That plaintiff was in the habit of using intoxicating liquors prior to the injury is incompetent to prove that he was intoxicated at the time. Hubbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772; Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622. See, generally, NEGLIGENCE.

75. Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

76. *Arizona.* — Huachuca Water Co. *v.* Swain, 4 Ariz. 113, 77 Pac. 619.

Iowa.— Keim *v.* Ft. Dodge, 126 Iowa 27, 101 N. W. 443.

Minnesota.— Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745.

Missouri.— Bradley *v.* Spickardsville, 90 Mo. App. 416.

Washington.— Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805, that the sidewalk was an old one, and plaintiff had been over it many times, and had seen the defect, is admissible.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1730.

Evidence that plaintiff believed he could safely walk on a certain place is immaterial where according to his own pleading and evidence it appears that he did not know that such place was defective until after he was injured. Keim *v.* Ft. Dodge, 126 Iowa 27, 101 N. W. 443.

77. Chicago *v.* Sheehan, 113 Ill. 658, duties as fireman.

78. Hollingworth *v.* Ft. Dodge, 125 Iowa 627, 101 N. W. 455; Fox *v.* Ft. Edward, 48 Hun (N. Y.) 363, 1 N. Y. Suppl. 81 [*affirmed* in 121 N. Y. 666, 24 N. E. 1093].

To rebut the inference of contributory negligence of plaintiff in not going to his destination by some other way, where it appears that he had knowledge of the defect, evidence that he knew that the sidewalk on the opposite side of the street was dangerous is admissible. Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745.

79. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120].

80. Calkins *v.* Hartford, 33 Conn. 57, 87 Am. Dec. 194; Smith *v.* Gilman, 38 Ill. App. 393; Fairbury *v.* Rogers, 2 Ill. App. 96. Charlottesville *v.* Stratton, 102 Va. 95, 45 S. E. 737.

dence is held not to be inadmissible on the ground that it is a matter collateral to the issue.[81]

(VIII) *Evidence Supplementary to Notice of Claim.* Extrinsic evidence of actual notice by the proper city authorities is admissible, as supplementary to a written notice of plaintiff's claim or demand,[82] for the purpose of showing that the city was not misled by a defective description in the written notice.[83] In the case of presentation of the claim by an administrator his letters of administration are admissible for the purpose of showing that he was administrator when he presented the claim.[84] Upon proof of the loss or destruction of the original preliminary notice of injuries, secondary notice thereof is admissible.[85]

d. Sufficiency of Evidence — (I) *In General.* The rules governing the weight and sufficiency of evidence in civil cases generally[86] apply in actions against a municipal corporation or property-owner for injuries caused by a defect or obstruction in the street, or by other torts for which either is responsible.[87] In accordance with such rules, in order to warrant a recovery, plaintiff's evidence must preponderate,[88] and must be of such weight and sufficiency as will reasonably justify the jury in finding all material facts essential to his cause of action.[89] The evi-

81. Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576; Bauer *v.* Indianapolis, 99 Ind. 56; Trenton Temperance Hall Assoc. *v.* Giles, 33 N. J. L. 260; Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

82. Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281; Sheehy *v.* New York, 160 N. Y. 139, 54 N. E. 749 (holding that where the notice is deficient merely in failing to state in terms an intention to commence an action, it is error on the trial of the subsequent action to refuse to permit plaintiff to show the books of the corporation counsel's office, in substantiation of a virtual compliance with the statute); Schaefer *v.* Ashland, 117 Wis. 553, 94 N. W. 303.

83. Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281; Fuller *v.* Hyde Park, 162 Mass. 51, 37 N. E. 782.

84. Warn *v.* Flint, 140 Mich. 573, 104 N. W. 37.

85. Considine *v.* Dubuque, 126 Iowa 283, 102 N. W. 102.

86. See, generally, Evidence, 12 Cyc. 753 *et seq.*

87. See cases cited in following notes.

An ordinance prohibiting the dumping of refuse material on vacant lots is competent evidence upon the question of reasonable use in an action against a municipality for creating a nuisance by such acts, but is not conclusive thereof. Lane *v.* Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643.

Evidence to prove similar accidents from the same defect or obstruction must establish with definiteness and accuracy that they were due to such defect or obstruction. Corson *v.* New York, 78 N. Y. App. Div. 481, 79 N. Y. Suppl. 604.

That an awning did not fall until seven years after it was erected is not conclusive evidence that it was properly constructed. Hume *v.* New York, 74 N. Y. 264 [*reversing* 9 Hun 674].

That a street commissioner officially examined a bridge three days before the accident and noticed no defect is not conclusive evidence that the defect did not then exist. Sherman *v.* Nairey, 77 Tex. 291, 13 S. W. 1028.

That many people passed over a sidewalk crossing in safety does not override a finding that it was in a dangerous condition. Lyon *v.* Logansport, 9 Ind. App. 21, 35 N. E. 128.

Evidence held sufficient to sustain a finding that defendant was the person who maintained the nuisance, an awning over a sidewalk, which caused the injury. McConnell *v.* Bostelmann, 72 Hun (N. Y.) 238, 25 N. Y. Suppl. 390, where it was admitted that the building in front of which the awning was erected belonged to defendant and the evidence showed that his name was over the door of a saloon occupying the entire ground floor, and that he had been seen in and about the saloon and building for four or five years before the accident.

Ownership of premises is sufficiently proved to sustain a recovery for injuries thereto by flooding, by evidence that plaintiff was in possession at the time of the recovery and had been for a period of twenty years. Peoria *v.* Crawl, 28 Ill. App. 154.

Authority for act.— Evidence that the work on a drain which diverted surface water on to plaintiff's land was done under the supervision of the town marshal, and was accepted and paid for by the town, is sufficient to show that it was done by the order and under the authority of the town. Thorntown *v.* Fugate, 21 Ind. App. 537, 52 N. E. 763.

Proof of an act which a statute or ordinance characterizes as negligence establishes negligence as a matter of law. Belleville *v.* Hoffman, 74 Ill. App. 503.

88. Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605; Ross *v.* New York, 4 Rob. (N. Y.) 49.

89. Rushton *v.* Allegheny, 192 Pa. St. 574, 44 Atl. 249.

Evidence held sufficient to support a finding that plaintiff's lot line at the time of

dence need not be direct and positive by someone who witnessed the occurrence and saw how it happened;[90] but it must be such that the negligence can reasonably be presumed from the facts shown, or such as will satisfy reasonable minds that defendant was negligent as charged,[91] and that the injury complained of

the damage was at grade (Monarch Mfg. Co. *v.* Omaha, etc., R. Co., 127 Iowa 511, 103 N. W. 493); to justify a verdict for plaintiff for injuries received by his horse becoming frightened by a steam roller operated by order of the board of public works (Denver *v.* Peterson, 5 Colo. App. 41, 36 Pac. 1111), or at other obstructions and backing into an unguarded excavation (Vandalia *v.* Huss, 41 Ill. App. 517); by his sleigh being overturned by a pile of rubbish in the street (Kane *v.* Troy, 1 N. Y. Suppl. 536); by his cart being upset by reason of lumber stacked on the side of a street (Palacie *v.* Gardiner, 112 La. 489, 36 So. 504); by his vehicle colliding with a stump of a tree (Sebert *v.* Alpena, 78 Mich. 165, 43 N. W. 1098), or sinking into a hole in the paving adjacent to street car tracks (Eckert *v.* New York, 59 N. Y. App. Div. 611, 69 N. Y. Suppl. 124); by his horse breaking through a water pipe or stepping into an unguarded hole caused by a break in the pipe (Hopkins *v.* Ogden City, 5 Utah 390, 16 Pac. 596); by his falling into an open sewer (Milledgeville *v.* Brown, 87 Ga. 596, 13 S. E. 638; Columbus *v.* Pearson, 82 Ga. 288, 9 S. E. 1102), ditch (Atlanta *v.* Martin, 88 Ga. 21, 13 S. E. 805), or other unguarded excavations in the street (Grand Island *v.* Oberschulte, 36 Nebr. 696, 55 N. W. 301; Lenich *v.* Beaver, 199 Pa. St. 420, 49 Atl. 220); by his stepping into a hole or depression in the street (Walker *v.* Philadelphia, 211 Pa. St. 33, 60 Atl. 318); by his being struck by the falling of a rotten limb of a tree (McGarey *v.* New York, 89 N. Y. App. Div. 500, 85 N. Y. Suppl. 861); by a fall on a defective sidewalk (Minden *v.* Vedene, 72 Nebr. 657, 101 N. W. 330; Bancroft *v.* Newburgh, 22 N. Y. Suppl. 38), by reason of ice or snow thereon (Bell *v.* York, 31 Nebr. 842, 48 N. W. 878; Provost *v.* New York, 15 Daly (N. Y.) 87, 3 N. Y. Suppl. 531 [*affirmed* in 117 N. Y. 626, 22 N. E. 1128]; Colburn *v.* Canandaigua, 15 N. Y. St. 668 [*affirmed* in 114 N. Y. 617, 20 N. E. 880]); by falling through a defective sidewalk (Edgar *v.* Mills, 32 Nebr. 718, 49 N. W. 710) or bridge (Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425), or through a trap door therein (Grove *v.* Kansas City, 75 Mo. 672), or over an iron cylinder used as a "water cut-off" (Rome *v.* Stewart, 116 Ga. 738, 42 S. E. 1011); by being injured by a loose plank in a sidewalk (Riley *v.* Iowa Falls, 83 Iowa 761, 50 N. W. 33), or by reason of any other defect or obstruction in the street or sidewalk (Michigan City *v.* Ballance, 123 Ind. 334, 24 N. E. 117; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Rothrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475; Gasink *v.* New Ulm, 92 Minn. 52, 99 N. W. 624; Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615; Lincoln *v.* Woodward, 19 Nebr. 259, 27 N. W. 110; Omaha *v.* Krantz, 5 Nebr. (Unoff.) 235, 97 N. W. 1059; Nicholson *v.* Philadelphia, 194 Pa. St. 460, 45 Atl. 375), or by the city's negligence in the maintenance or operation of its sewers (Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814).

Evidence held insufficient to sustain a verdict for plaintiff for injuries received by stepping upon or stumbling over a water box upon the sidewalk (North *v.* New Britain, 78 Conn. 145, 61 Atl. 68), by tripping and falling on a sidewalk, from which the boards had been taken, and which was filled in with gravel and cinders (Harvard *v.* Senger, 34 Ill. App. 223), or by falling on an icy sidewalk (Foxworthy *v.* Hastings, 31 Nebr. 825, 48 N. W. 901).

That defendant owns and occupies the lot in front of which a shade tree stands, which tree the city had authority to rear and trim, is not sufficient evidence that defendant planted or maintained the tree for his own use, so as to charge him with the duty of trimming the same, and with responsibility for injury received by plaintiff on whom a neglected rotten limb had fallen. Weller *v.* McCormick, 47 N. J. L. 397, 1 Atl. 516, 54 Am. Rep. 175.

Evidence of physicians, some of whom attended plaintiff, and others of whom visited and examined premises in which rubbish was dumped by a city, that the foul air and gases generated by the rubbish were sufficient to cause plaintiff's sickness, and were its origin, and that plaintiff was sick with a contagious fever, although whether it was miasmatic or typhoid there was some divergence of opinion, is sufficient to sustain a verdict of damages for the city's negligence in the maintenance and operation of its sewer system. Knoxville *v.* Klasing, 111 Tenn. 134, 76 S. W. 814.

90. Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234.

91. Hodges *v.* Waterloo, 109 Iowa 444, 80 N. W. 523; Baltimore *v.* Schnitker, 84 Md. 34, 34 Atl. 1132 (as to obstruction of sewer); Ferracane *v.* Brooklyn Alcatraz Asphalt Co., 101 N. Y. App. Div. 605, 91 N. Y. Suppl. 866; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234.

Evidence held sufficient to justify a finding of negligence in failing to properly and safely guard excavations in a sidewalk (Hildman *v.* Phillips, 106 Wis. 611, 82 N. W. 566); in permitting a street or sidewalk to become and remain defective (Ledgerwood *v.* Webster City, 93 Iowa 726, 61 N. W. 1089), by ice or snow thereon (Morse *v.* Boston, 109 Mass. 446; Fitzgerald *v.* Woburn, 109 Mass. 204; Graham *v.* Poughkeepsie, 68 N. Y. App. Div. 262, 74 N. Y. Suppl. 97); in permitting a dangerous

resulted from such negligence.[92] No recovery can be had when the evidence

obstruction, a large rock, upon the sidewalk (Davis *v.* Austin, 22 Tex. Civ. App. 460, 54 S. W. 927); in permitting a hole to remain in the driveway of a street (Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907), between the tracks of a street railway (Block *v.* Worcester, 186 Mass. 526, 72 N. E. 77); in permitting a hole to remain in a sidewalk or cross walk for a year or more (Diamond *v.* Brooklyn, 36 N. Y. Suppl. 97); in filling a trench in a street (Bingham *v.* Boston, 161 Mass. 3, 36 N. E. 473); in failing to discover the dangerous character of a rotten limb of a tree (McGarey *v.* New York, 89 N. Y. App. Div. 500, 85 N. Y. Suppl. 861); in permitting a sewer to become obstructed (Talcott *v.* New York, 58 N. Y. App. Div. 514, 69 N. Y. Suppl. 360); to charge defendant, owner of a coal hole constructed by permission of the municipal authorities, with negligence in respect to its maintenance (Matthews *v.* New York, 78 N. Y. App. Div. 422, 80 N. Y. Suppl. 360); and to justify a finding that defendant's superintendent of streets did not use due care in notifying plaintiff of danger impending from operations being carried on in the street where plaintiff's team was hitched (Champaign *v.* White, 38 Ill. App. 233).

Evidence held insufficient to warrant the jury in finding that the defect in a street existed twenty-four hours, under Mass. Gen. St. c. 44, § 22 (Crocker *v.* Springfield, 110 Mass. 135); to sustain a finding of negligence in placing a water box upon a sidewalk near the curb (North *v.* New Britain, 78 Conn. 145, 61 Atl. 68); in respect to an excavation between the rails of a street railway track (Martin *v.* Chelsea, 175 Mass. 516, 56 N. E. 703); in respect to ice and snow on a sidewalk (Lichtenstein *v.* New York, 159 N. Y. 500, 54 N. E. 67 [*reversing* 29 N. Y. App. Div. 542, 51 N. Y. Suppl. 642]); in respect to a slippery walk on which plaintiff fell (O'Keeffe *v.* New York, 29 N. Y. App. Div. 524, 51 N. Y. Suppl. 710); in permitting a hole to remain in a cross walk or sidewalk (Beltz *v.* Yonkers, 148 N. Y. 67, 42 N. E. 401 [*reversing* 74 Hun 73, 26 N. Y. Suppl. 106); and in respect to an excavation caused by the grade of a street (Gilchrist *v.* South Omaha, 36 Nebr. 163, 54 N. W. 258).

A prima facie case of negligence is not established by proof that the municipal authorities laid out a street, and directed it to be improved, and that at the time of the accident the land remained in its natural condition, having a pond on it, into which plaintiff fell while passing over private property used for travel around the edge of the pond. Hacker *v.* St. Louis, 13 Mo. App. 277.

Possession of requisite funds for the repair of a road may be inferred from evidence that it might have been repaired for fifty dollars and that defendant was provided by tax with two thousand eight hundred dollars and had expended from two thousand dollars to three thousand dollars. Hyatt *v.* Rondout, 44 Barb. (N. Y.) 385.

A verdict or finding that the way was not reasonably safe or convenient for public travel is not warranted by evidence that a brick sidewalk had some depressions in it varying from one half to two inches in depth, where there are no sharp corners and the surface of the depression is smooth. Newton *v.* Worcester, 174 Mass. 181, 54 N. E. 521; Jackson *v.* Lansing, 121 Mich. 279, 80 N. W. 8.

An approach from a street to a sidewalk on a slope of one foot in seven is not negligence *per se* in the absence of evidence that this slope made the walk dangerous, and a finding that the town was negligent in so constructing and maintaining the same will not be warranted. Lush *v.* Parkersburg, 127 Iowa 701, 104 N. W. 336.

That lumber piled in a street fell and inflicted an injury is sufficient proof to justify an inference that it was liable to fall and that there was a probability of the occurrence of such an accident as did in fact occur. Smith *v.* Davis, 22 App. Cas. (D. C.) 298.

92. Schubkegel *v.* Butler, 76 N. Y. App. Div. 10, 78 N. Y. Suppl. 644 (evidence held to conclusively establish that the accident was not caused by any negligence on the part of defendant, an abutting property-owner, in respect to an ash pit under the sidewalk); Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234. See Hart *v.* Union City, 107 Tenn. 294, 64 S. W. 6.

Evidence held sufficient to justify a finding that the proximate cause of the injury was a defective sidewalk (Kennedy *v.* St. Cloud, 90 Minn. 523, 97 N. W. 417); the defective condition of a temporary bridge over an excavation in the sidewalk (Willdigg *v.* Brooklyn, 30 N. Y. Suppl. 75); a hole in a vault cover in the sidewalk, in which plaintiff's foot caught (Blaechinska *v.* Howard Mission, 56 Hun (N. Y.) 322, 9 N. Y. Suppl. 679 [*reversed* on other grounds in 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215]), or a hole in a sidewalk in which plaintiff's foot became fastened until she fell and her ankle was broken (West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313).

Testimony of plaintiff and other witnesses that she fell into an existing hole in the sidewalk is sufficient to make a case for the jury even if it is contradicted. Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978.

Injury by fire.— It is not necessary, in an action against a city to recover damages for the destruction of property therein by fire, during the existence of a riot, in order to make such city liable therefor, to establish the absolute impossibility of the occurrence of the fire unless by the agency of the rioters. It is enough to establish, by circumstantial evidence, the probability of the origination of such fire by the rioters, so great as to render that of its having originated in any

merely raises a conjecture or probability as to defendant's negligence,[93] or that such negligence was the cause of the injury.[94] Evidence of the mere fact of the happening of the accident,[95] or of the happening of other accidents at the same place,[96] does not of itself ordinarily establish negligence on the part of defendant; nor does the existence of similar defects or obstructions in other parts of the city justify an inference that they were not actionable defects or obstructions.[97]

(II) *Existence or Location of Street.* In an action for injuries caused by a defect or obstruction in a public street, the evidence should be sufficient to show that the way on which the accident occurred was a public way or street,[98] and that the defect or obstruction complained of was located within the limits thereof.[99] That the defect or obstruction was on a public street or highway which the city was bound to keep in safe repair is sufficiently proven by evidence showing that the place of the accident was one over which the municipality had assumed care and control,[1] as by evidence that the city authorities had treated it as a public street by taking charge of it and regulating it as other streets,[2] or by making

other way, on any ordinary principles of experience and reasoning, so remote and improbable as to make it morally, even if not physically, impossible. Ross *v.* New York, 4 Rob. (N. Y.) 49.

Statements of plaintiff soon after the injury that she stepped on some round object which rolled and threw her is not conclusive against her in an action for injuries alleged to have been caused by stepping into a hole in the sidewalk, it not appearing that there was any such object on or about the walk. De Soto *v.* Buckles, 40 Ill. App. 85.

93. Brummett *v.* Boston, 179 Mass. 26, 60 N. E. 388; Menzies *v.* Interstate Paving Co., 106 N. Y. App. Div. 107, 94 N. Y. Suppl. 492.

94. Menzies *v.* Interstate Paving Co., 106 N. Y. App. Div. 107, 94 N. Y. Suppl. 492; McCarty *v.* Lockport, 13 N. Y. App. Div. 494, 43 N. Y. Suppl. 693; McInerney *v.* Elmira, 11 N. Y. App. Div. 354, 42 N. Y. Suppl. 308; Higgins *v.* Glens Falls, 57 Hun (N. Y.) 594, 11 N. Y. Suppl. 289; Sweeney *v.* New York, 17 N. Y. Suppl. 797; Dapper *v.* Milwaukee, 107 Wis. 88, 82 N. W. 725; Small *v.* Prentice, 102 Wis. 256, 78 N. W. 415; Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729.

95. Lush *v.* Parkersburg, 127 Iowa 701, 104 N. W. 336 (holding that the fact that plaintiff slipped and fell on the approach to the sidewalk will not justify a finding that the same was negligently constructed and maintained); Kendall *v.* Boston, 118 Mass. 234, 19 Am. Rep. 446; Smalley *v.* Yonkers Electric Light, etc., Co., 56 N. Y. App. Div. 547, 67 N. Y. Suppl. 503 (holding that proof that a bicycle rider came into collision with an electric lamp lowered for the purpose of cleaning it, unaccompanied by other evidence of want of due care on the part of defendant, creates no presumption of negligence on its part); Welsh *v.* Murray, 2 N. Y. App. Div. 205, 37 N. Y. Suppl. 882; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234. *Compare* Larmon *v.* District of Columbia, 5 Mackey (D. C.) 330, holding that the fact that plaintiff fell into a hole in the sidewalk is, without more, evidence that the hole was dangerous.

If a sewer and drain proved adequate up to the time of the overflow to carry away the surface water and sewage, the very fact of the occurrence of the overflow tends to show that at that time the sewer had become in some way defective or obstructed, and the rule *res ipsa loquitur* applies, calling upon the municipal corporation to explain the difficulty with the sewer on the particular occasion, and show that it was not responsible for that difficulty. Magee *v.* Brooklyn, 18 N. Y. App. Div. 22, 45 N. Y. Suppl. 473.

96. Dubois *v.* Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804.

97. Bacon *v.* Boston, 3 Cush. (Mass.) 174.

98. Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184.

99. Barr *v.* Bainbridge, 42 N. Y. App. Div. 628, 59 N. Y. Suppl. 132, holding that a pile of rubbish about eight feet southerly from the southerly side of the traveled track, about one rod in width, and which was all on the northerly side of the center line of the street, which was three feet in width, is sufficiently shown to be within the limits of the street.

Evidence held sufficient to establish prima facie that an excavation by an abutting owner was within the street line, although such line was not shown by survey or deed. See Ann *v.* Herter, 79 N. Y. App. Div. 6, 79 N. Y. Suppl. 825.

1. Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77, holding that evidence that the defective sidewalk was on a public street is sufficient to show that the city had assumed control of it in the absence of evidence to the contrary.

2. Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17, holding that such evidence, together with proof of the defect and injury, makes out a *prima facie* case for plaintiff under W. Va. Code, c. 43, § 53, providing that every street in an incorporated city used and occupied as a public street shall be taken and deemed to be a public street; and it is not necessary to show that such street was laid out properly and that it was actually within the corporate limits.

repairs.[3] Where a statute prescribes the limits of a highway or street, proof of such limits which satisfies all the requirements of the statute is sufficient.[4]

(III) *NOTICE OF DEFECT.* The above general rules regulate the weight and sufficiency of the evidence of defendant's actual[5] or constructive notice of the defect or obstruction complained of.[6] Thus the jury may infer notice from the

3. Anna *v.* Boren, 77 Ill. App. 408; Gilpatrick *v.* Biddeford, 51 Me. 182 (holding that where the city denies the location of the street and it is shown that repairs have been made by a street commissioner it will be presumed in the absence of evidence to the contrary that repairs were made by the city); Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925.

4. Hutchings *v.* Sullivan, 90 Me. 131, 37 Atl. 883.

5. **Evidence held to establish actual notice** see Cowan *v.* Bucksport, 98 Me. 305, 56 Atl. 901; Hurley *v.* Bowdoinham, 88 Me. 293, 34 Atl. 72. Thus a finding of actual notice by a street commissioner is warranted by evidence that he was informed that there was a defect on a certain street together with the assumption that he did his duty in going to look (Welch *v.* Portland, 77 Me. 384), or by evidence that, although the defective sidewalk had been repaired three days before the accident, yet numerous witnesses noticed the defect during these three days, while casually passing over the sidewalk, and the admission of the street commissioner that he passed over the walk during each of these days (Moon *v.* Ionia, 81 Mich. 635, 46 N. W. 25). So evidence showing a defective refilling of a sewer ditch from which a hole in the sidewalk resulted, and that the city had filled other holes along the ditch and near the one in question, warrants an inference of actual knowledge on the part of the city of the hole in question. Dallas *v.* Muncton, (Tex. Civ. App. 1904) 83 S. W. 431.

Evidence held insufficient to show actual notice of defects see McNally *v.* Cohoes, 127 N. Y. 350, 27 N. E. 1043 [*affirming* 53 Hun 202, 6 N. Y. Suppl. 842].

That defendant's officers had actual notice of the defective condition of a walk is sufficiently shown by evidence that such officers frequently passed over the walk, and that the defective condition was observed by some of them shortly before the accident, and that a man was seen to repair it, although it is not certainly shown that the repair was made. Smith *v.* Pella, 86 Iowa 236, 53 N. W. 226.

Where injuries occur from plaintiff catching his foot on a guy wire from an electric light pole from a tree which had given way, and there is evidence that a member of the city council knew that the tree had been partly burned away several years before, and more than two months before knew that the wire was attached to the tree, it cannot be said that there is an entire absence of notice or knowledge on the part of the city. Lafayette *v.* Ashby, 8 Ind. App. 214, 34 N. E. 238, 35 N. E. 516.

Testimony of an alderman that he knew before the accident that the street was more or less defective and that work had been done upon it a few days before, taken with the fact that he described the condition as being such as required careful driving, is sufficient to show notice of the defect to the municipality. Mt. Morris *v.* Kanode, 98 Ill. App. 373.

Sending a man to repair a sidewalk is evidence that the city has notice of its bad condition. East Dubuque *v.* Burhyte, 74 Ill. App. 99.

6. **Evidence held sufficient** to sustain a finding of constructive notice (Bill *v.* Norwich, 39 Conn. 222), of a defective sewer lid (District of Columbia *v.* Payne, 13 App. Cas. (D. C.) 500; Woodbury *v.* District of Columbia, 5 Mackey (D. C.) 127), of a defect consisting of an acoustic wire coming into contact with a defectively insulated electric light wire (Bourget *v.* Cambridge, 159 Mass. 388, 34 N. E. 455), of a defective or obstructed sidewalk or street (Hoover *v.* Mapleton, 110 Iowa 571, 81 N. W. 776; Weber *v.* Creston, 75 Iowa 16, 39 N. W. 126; Ritschdorf *v.* St. Paul, 95 Minn. 370, 104 N. W. 129; Archer *v.* Mt. Vernon, 57 N. Y. App. Div. 32, 67 N. Y. Suppl. 1040; Aslen *v.* Charlotte, 35 N. Y. App. Div. 625, 54 N. Y. Suppl. 754; Harrington *v.* Buffalo, 2 N. Y. Suppl. 333, ice and snow), of a ditch across a street dug by a private person (Ft. Worth *v.* Johnson, 84 Tex. 137, 19 S. W. 361), or of a defective bridge (McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434).

Evidence held insufficient to establish constructive notice of a defective sign over a street (Leary *v.* Yonkers, 95 N. Y. App. Div. 126, 88 N. Y. Suppl. 829), or of a defective sidewalk (Burns *v.* Bradford, 137 Pa. St. 361, 20 Atl. 997, 11 L. R. A. 726; Bergevin *v.* Chippewa Falls, 82 Wis. 505, 52 N. W. 588). Thus where injuries occur from the misplacement of a cover to a manhole, evidence that workmen were seen cleaning a sewer through the manhole two days before the accident is insufficient to establish notice. Whitney *v.* Lowell, 151 Mass. 212, 24 N. E. 47. So evidence that the authorities at the court-house were notified of a defect in a sidewalk does not conclusively establish notice to the municipal authorities. Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Resolutions of the city council dated more than a year before the accident, and while a tree, the stump of which caused the accident, was still standing, to the effect that obstructions in the form of trees should be removed, etc., is no evidence of actual notice to the city of the defect. Lappread *v.* Detroit, 95 Mich. 255, 54 N. W. 870.

situation and method of construction of the street at the place of the accident, and from want of evidence that the defect was a recent one.[7]

(iv) *Contributory Negligence.* A preponderance of evidence, direct or circumstantial, is necessary to prove contributory negligence,[8] or freedom from contributory negligence, according to the burden of proof in the particular case.[9] In those jurisdictions in which there can be no recovery without proof of due care, there can be no recovery where the evidence is equally consistent with either negligence or care on plaintiff's part.[10]

(v) *Notice of Claim.* Circumstantial as well as direct and positive evidence may sufficiently show a proper service of notice or presentation of the claim,[11] or that defendant was not misled by an ambiguity in the written notice.[12]

7. Sawyer *v.* Newburyport, 157 Mass. 430, 32 N. E. 653.

8. Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727.

Evidence held sufficient to show contributory negligence in an action for injuries caused by a defective sidewalk (Bohn *v.* Racine, 119 Wis. 341, 96 N. W. 813); for injuries resulting from collision of plaintiff's buggy with lumber piled in the street (Black *v.* Mishawaka, 30 Ind. App. 104, 65 N. E. 538), in driving over an embankment (Johnson *v.* Superior, 103 Wis. 66, 78 N. W. 1100), or in passing over a defect of which plaintiff had knowledge (Tuttle *v.* Clear Lake, (Iowa 1905) 102 N. W. 136). Testimony of nine witnesses that plaintiff was drunk at the time is sufficient against his denial to support a finding of contributory negligence where the jury found that one using ordinary care could pass over the defective place without danger. McCracken *v.* Markesan, 76 Wis. 499, 45 N. W. 323.

Evidence held insufficient to show contributory negligence see Oesterreich *v.* Detroit, 137 Mich. 415, 100 N. W. 593; Dickson *v.* Hollister, 123 Pa. St. 421, 16 Atl. 484, 10 Am. St. Rep. 533.

Where plaintiff received her injuries from contact with a telephone wire lying in the street, at half-past six o'clock on a cloudy morning, as she was hurrying to her work through falling snow, with her mind dwelling on the serious condition of a sick sister whom she had attended through the greater part of a previous night, the mere fact that she had on another occasion, within four days before receiving her injuries, observed the wire with which she came in contact, is not sufficient to show contributory negligence as a matter of law. West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838.

9. Huhbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772.

Evidence held sufficient to show freedom from contributory negligence or due care (Hazard *v.* Council Bluffs, 87 Iowa 51, 53 N. W. 1083), in an action for injuries from a defective sidewalk (Normal *v.* Gresham, 49 Ill. App. 196; Indianapolis *v.* Mitchell, 27 Ind. App. 589, 61 N. E. 947; Shipley *v.* Proctor, 177 Mass. 498, 59 N. E. 119; Weare *v.* Fitchburg, 110 Mass. 334; Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767; Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763; Bartley *v.* New York, 102 N. Y. App. Div. 23, 92 N. Y. Suppl. 82; Thompson *v.* Albany, 8 N. Y. St. 518, holding that the legal imputation of contributory negligence from walking on an icy or dangerous sidewalk was met by proof that plaintiff wore new rubber shoes and walked very carefully; Nowell *v.* New York, 52 N. Y. Super. Ct. 382); to warrant a finding that plaintiff was free from contributory negligence in falling on an icy sidewalk (Graham *v.* Poughkeepsie, 68 N. Y. App. Div. 262, 71 N. Y. Suppl. 97); to warrant a finding that plaintiff did not know of the existence of a hole in the sidewalk a short time prior to the accident, and was not guilty of contributory negligence (Hildman *v.* Phillips, 106 Wis. 611, 82 N. W. 566); to justify an inference of freedom from contributory negligence in driving over a manhole projecting over the street (Schafer *v.* New York, 154 N. Y. 466, 48 N. E. 749 [*reversing* 12 N. Y. App. Div. 384, 42 N. Y. Suppl. 744]); or to warrant a finding that plaintiff, a girl nearly nineteen years old, who fell over an embankment unguarded by a hand-rail, exercised the prudence incident to her sex and age (Snow *v.* Provincetown, 120 Mass. 580).

Evidence held insufficient to show that plaintiff was exercising ordinary care when she fell on a defective sidewalk, where a companion stepped on a loose plank causing her to trip. Huntingburgh *v.* First, 15 Ind. App. 552, 43 N. E. 17.

10. Crafts *v.* Boston, 109 Mass. 519.

11. Beattie *v.* Detroit, 137 Mich. 319, 100 N. W. 574 (evidence held sufficient to raise a presumption that notice was properly served); Omaha *v.* Ayer, 32 Nebr. 375, 49 N. W. 445 (holding that the fact that a witness stated that he copied a notice from the petition filed in the suit, and the fact that the petition was not filed until after the expiration of the prescribed time for serving notice, does not overcome his testimony that the notice had been served in time, since he evidently meant that he had copied the notice from a draft of the petition); Cresler *v.* Asheville, 134 N. C. 311, 46 S. E. 738 (evidence of three witnesses held insufficient to show notice).

12. Veno *v.* Waltham, 158 Mass. 279, 33 N. E. 398.

8. Trial in General. The general rules of procedure in the trial of civil actions apply in actions for tort against a municipal corporation.[13]

9. Questions For Court and For Jury — a. In General. Questions of law are for the determination of the court,[14] while issues of fact are to be determined by the jury.[15] Thus it is a question for the jury whether or not the particular act or omission which caused the injury was authorized by the municipality;[16] as is also the question of damages,[17] or whether plaintiff was a person in respect to whom the particular act or omission complained of was a breach of defendant's duty.[18] Whether a street temporarily occupied by an abutting owner while making improvements on his land has been so closed by the city as to notify the public and exempt the city from liability is a question for the jury.[19]

b. As Determined by the Evidence. Where there is evidence from which the jury might be justified in finding the existence of the fact in issue, the issue should be submitted to them for determination under proper instructions from the court,[20] as where there is evidence tending to show the fact in issue but it is

13. See, generally, Trial. And see cases cited *infra*, this note.

View by jury.— Unless it appears that the condition of the *locus* has not been materially changed since the accident an order allowing the jury to view the premises should not be granted. Seward *v.* Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451.

A jury may not use a magnifying glass to examine a rotted piece of wood taken from the sidewalk. Elgin *v.* Nofs, 200 Ill. 252, 65 N. E. 679 [*reversing* 103 Ill. App. 11].

Severance of defenses.— Where a gas company and municipality are joint defendants the order in which they shall present their respective defenses including the order of jury challenge and cross-examination is in the discretion of the trial judge. Grundy *v.* Janesville, 84 Wis. 574, 54 N. W. 1085.

Objection to petition.— It is too late to object for the first time, upon the trial of a cause, to the insufficiency of a petition upon mere technical grounds, or any amendment or amendments thereto which have been fully answered and issues joined thereon. Guthrie *v.* Finch, 13 Okla. 496, 75 Pac. 288.

Dismissal.— Where the facts stated by plaintiff's counsel in his opening, if taken to be true, and every fair inference be drawn therefrom which might reasonably be drawn, fails to state a cause of action, on which the jury could have fairly found a verdict in his favor, the complaint should be dismissed on motion. Jordan *v.* New York, 44 N. Y. App. Div. 149, 60 N. Y. Suppl. 696 [*affirmed* in 165 N. Y. 657, 59 N. E. 1124].

Motion to strike out evidence.— It is not error for the trial court, in an action against a municipality to overrule a motion by defendant to strike out the testimony of one of plaintiff's witnesses to the effect that he had seen other persons stumble and fall in the same place where plaintiff was hurt, upon the ground that it was not shown that the stumbling had occurred previous to the accident, where defendant failed to make such objection while the witness was on the stand, or to cross-examine him on the subject, but made the motion after the witness had been discharged from attendance on the trial. District of Columbia *v.* Dietrich, 23 App. Cas. (D. C.) 577.

14. Shippy *v.* Au Sable, 65 Mich. 494, 32 N. W. 741; Bonine *v.* Richmond, 75 Mo. 437 (holding that what is the nature and extent of the city charter duty as to its streets is a question for the court); Easton *v.* Neff, 102 Pa. St. 474, 48 Am. Rep. 213.

15. Arthur *v.* Cohoes, 56 Hun (N. Y.) 36, 9 N. Y. Suppl. 160 [*affirmed* in 134 N. Y. 589, 31 N. E. 628]; Cresler *v.* Ashville, 134 N. C. 311, 46 S. E. 738; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451, holding that it is a question for the jury whether a property-owner should have remained on the land when his health was being seriously impaired by backwater from defectively constructed drains.

16. Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449 [*affirming* 60 Hun 183, 14 N. Y. Suppl. 721] (whether workmen were at the time servants of the city); Bohan *v.* Avoca Borough, 154 Pa. St. 404, 26 Atl. 604.

17. Litchfield *v.* Whitenack, 78 Ill. App. 364.

18. Livingstone *v.* Taunton, 155 Mass. 363, 28 N. E. 635.

19. Stephens *v.* Macon, 83 Mo. 345.

20. *Georgia.*— Jackson *v.* Buena Vista, 88 Ga. 466, 14 S. E. 867.

Illinois.— Wilmette *v.* Brachle, 209 Ill. 621, 71 N. E. 41 [*affirming* 110 Ill. App. 356].

Michigan.— Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872.

Missouri.— Darrell *v.* St. Joseph, 109 Mo. App. 168, 82 S. W. 1130.

New York.— Schumacher *v.* New York, 166 N. Y. 103, 59 N. E. 773 [*affirming* 40 N. Y. App. Div. 320, 57 N. Y. Suppl. 968]; Macauley *v.* New York, 67 N. Y. 602; Coolidge *v.* New York, 99 N. Y. App. Div. 175, 90 N. Y. Suppl. 1078 [*affirmed* in 185 N. Y. 529, 77 N. E. 1192].

Oklahoma.— Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

Pennsylvania.— Olin *v.* Bradford, 24 Pa. Super. Ct. 7; Canfield *v.* East Stroudsburg

conflicting,[21] or is such that reasonable minds might come to different conclusions therefrom;[22] and in such case it is error for the court to declare the issue established as a matter of law.[23] Where, however, there is no evidence on an issue of fact, or if there is evidence but it is legally insufficient to justify the jury in finding the existence or non-existence of such fact,[24] or if the evidence is such that but one inference can be reasonably drawn therefrom,[25] the question is one of law for the court and should be disposed of without the intervention of a jury,[26] as by dismissal or nonsuit,[27] or by directing a verdict.[28] Issues not made by the

Borough, 19 Pa. Super. Ct. 649; Graham *v.* Philadelphia, 19 Pa. Super. Ct. 292; Kane *v.* Philadelphia, 7 Pa. Super. Ct. 109; Rockwell *v.* Eldred, 7 Pa. Super. Ct. 95.

Washington.— Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1745.

Although there may be no direct evidence that the premises were set on fire by a mob, and plaintiff seeks to maintain his action solely by force of circumstantial evidence, yet inasmuch as the tendency of the facts proved to raise the presumption that the fire was the act of the rioters depends entirely upon natural presumptions to be derived from the circumstances of the case, by the application of the common experience of mankind, based upon the natural capability of such facts to generate conviction in the mind, it is proper that the case should be submitted to the jury. Ross *v.* New York, 4 Rob. (N. Y.) 49.

21. Behl *v.* Philadelphia, 206 Pa. St. 329, 55 Atl. 1029; O'Hey *v.* Commonwealth Title Ins., etc., Co., 27 Pa. Super. Ct. 137; Shaughnessy *v.* Pittsburg, 20 Pa. Super. Ct. 609.

Where the evidence is conflicting, the jury should reconcile it, if they can; but, if they cannot do so, they should give credence to so much of it as in their opinion is entitled to belief. Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605.

Damages.— Where the evidence as to the extent of plaintiff's injury is conflicting, it is proper to leave the question to the jury, although the physician who called to see her has testified that her injury was trivial. Styles *v.* Decatur, 91 Mich. 443, 91 N. W. 622.

22. Belleville *v.* Hoffman, 74 Ill. App. 503; Rothrock *v.* Cedar Rapids, 128 Iowa 252, 103 N. W. 475; Kauffman *v.* Harrisburg, 204 Pa. St. 26, 53 Atl. 521; Maanum *v.* Madison, 104 Wis. 272, 80 N. W. 591.

Where plaintiff makes out a prima facie case of negligence on the part of defendant and the defense is that the rainfall which caused the overflow of a sewer was an extraordinary one, the case is one for the jury. District of Columbia *v.* Gray, 6 App. Cas. (D. C.) 314.

23. Yates *v.* Covington, 119 Ky. 228, 83 S. W. 592, 26 Ky. L. Rep. 1154; Ross *v.* New York, 4 Rob. (N. Y.) 49; Wells *v.* Sibley, 9 N. Y. Suppl. 343 (nonsuit held erroneous); Shaw *v.* Philadelphia, 159 Pa. St. 487, 28 Atl. 354.

Where there is in a given case a prima facie sufficiency of testimony on the part of plaintiff but a preponderance of testimony in favor of defendant, the trial court is not justified in peremptorily instructing a jury to find for defendant. District of Columbia *v.* Gray, 6 App. Cas. (D. C.) 314.

24. *Massachusetts.*— Randall *v.* Lowell, 156 Mass. 255, 30 N. E. 1020, holding plaintiff not entitled to go to the jury on the question whether the public had acquired a right of way over a narrow strip of land, where he failed to show that there was a public use continued uninterruptedly for the length of time required by the statute, which was adverse and under a claim of right, and not merely a use which was tolerated or permitted.

New York.— Kaveny *v.* Troy, 13 N. Y. Suppl. 213.

Pennsylvania.— Martin *v.* Williamsport, 208 Pa. St. 590, 57 Atl. 1063.

Texas.— San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; Texas, etc., R. Co. *v.* Hightower, 12 Tex. Civ. App. 41, 33 S. W. 541.

Wisconsin.— Maanum *v.* Madison, 104 Wis. 272, 80 N. W. 591.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1745.

25. Lord *v.* Mobile, 113 Ala. 360, 21 So. 366; Belleville *v.* Hoffman, 74 Ill. App. 503; Capital Printing Co. *v.* Raleigh, 126 N. C. 516, 36 S. E. 33; District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237 [*reversing* 15 App. Cas. (D. C.) 363].

26. Lord *v.* Mobile, 113 Ala. 360, 21 So. 366.

27. Coolidge *v.* New York, 99 N. Y. App. Div. 175, 90 N. Y. Suppl. 1078 [*affirmed* in 185 N. Y. 529, 77 N. E. 1192]; Holland *v.* New York, 16 Daly (N. Y.) 124, 9 N. Y. Suppl. 499 [*affirmed* in 129 N. Y. 674, 30 N. E. 66]; Kaveny *v.* Troy, 13 N. Y. Suppl. 213; Martin *v.* Williamsport, 208 Pa. St. 590, 57 Atl. 1063; Rushton *v.* Allegheny, 192 Pa. St. 574, 44 Atl. 249; Maanum *v.* Madison, 104 Wis. 272, 80 N. W. 591.

28. Pottner *v.* Minneapolis, 41 Minn. 73, 42 N. W. 784 (verdict for defendant held properly directed); Gagan *v.* Janesville, 106 Wis. 662, 82 N. W. 558.

Where the facts proved, the probabilities, and all reasonable inferences are overwhelmingly against plaintiff's case, the trial court should, on motion, direct a verdict for defendant. Maanum *v.* Madison, 104 Wis. 272, 80 N. W. 591.

pleadings and proof should not be submitted to the jury under any state of the evidence.[29]

c. Location of Accident. Except where the evidence is legally insufficient, or is undisputed and free from doubt,[30] the place where the accident occurred is ordinarily a question for the jury,[31] as whether or not it was on a public street,[32] or whether the place was one of which the city had assumed control for street purposes, so as to impose upon it the duty of keeping it in repair.[33] Whether the city had established a sidewalk at the point where the accident occurred is a question for the jury.[34]

d. Negligence of Defendant. The doctrine generally recognized and enforced is not only that the jury decide the facts when the evidence is conflicting, but also that even where there is no conflict of testimony, and the street conditions and circumstances attending the accident are obvious and undoubted, if there is any evidence to show dereliction of duty, the jury are the proper judges to decide whether these circumstances and conditions, so conceded or established, show defendant to have been wanting in ordinary care, commensurate to the danger, and therefore guilty of culpable negligence, as in respect to its streets or public way,[35]

29. Lush *v.* Parkersburg, 127 Iowa 701, 104 N. W. 336; Hargreaves *v.* Yonkers, 47 N. Y. App. Div. 642, 61 N. Y. Suppl. 1003.

30. Randall *v.* Lowell, 156 Mass. 255, 30 N. E. 1020, holding evidence insufficient to submit the question to the jury, as to whether the city had obtained a right of way over a strip of land.

31. Alexander *v.* Big Rapids, 70 Mich. 224, 38 N. W. 227.

32. Corbett *v.* Troy, 53 Hun (N. Y.) 228, 6 N. Y. Suppl. 381; Whitford *v.* Newbern, 111 N. C. 272, 16 S. E. 327; O'Hey *v.* Commonwealth Title Ins., etc., Co., 27 Pa. Super. Ct. 137; Lansdowne *v.* Hoffman, 8 Del. Co. (Pa.) 149.

33. Gilpatrick *v.* Biddeford, 51 Me. 182; Johnson *v.* St. Joseph, 96 Mo. App. 663, 71 S. W. 106; Still *v.* Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; White *v.* San Antonio, (Tex. Civ. App. 1894) 25 S. W. 1131; Manchester *v.* Ericsson, 105 U. S. 347, 26 L. ed. 1099.

34. Cannady *v.* Durham, 137 N. C. 72, 49 S. E. 50.

35. *Alabama.*— Lord *v.* Mobile, 113 Ala. 360, 31 So. 366; Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Delaware.— Colhourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605.

District of Columbia.— District of Columbia *v.* Whipps, 17 App. Cas. 415.

Georgia.— Dempsey *v.* Rome, 94 Ga. 420, 20 S. E. 335; Central City Ice Works *v.* Macon, 92 Ga. 413, 17 S. E. 660; Augusta *v.* Hafers, 59 Ga. 151.

Illinois.—Belleville *v.* Hoffman, 74 Ill. App. 503; Chicago *v.* McCarthy, 61 Ill. App. 300; Champaign *v.* Jones, 32 Ill. App. 179 [*affirmed* in 132 Ill. 304, 23 N. E. 1125]; Powers *v.* Chicago, 20 Ill. App. 178.

Iowa.—Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Achey *v.* Marion, 126 Iowa 47, 101 N. W. 435; Howard *v.* Lamoni, 124 Iowa 348, 100 N. W. 62; Fink *v.* Des Moines, 115 Iowa 641, 89 N. W. 28; Ford *v.* Des Moines, 106 Iowa 94, 75 N. W. 360; Ronn *v.* Des Moines, 78 Iowa 63, 42 N. W. 582; Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833.

Kansas.— Anderson *v.* Pierce, 68 Kan. 57, 74 Pac. 638; Lawrence *v.* Littell, 9 Kan. App. 130, 58 Pac. 495.

Kentucky.— Endicott *v.* Triple-State Natural Gas, etc., Co., 76 S. W. 516, 25 Ky. L. Rep. 862; Louisville *v.* Bailey, 74 S. W. 688, 25 Ky. L. Rep. 6; Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448; Fordsville *v.* Spencer, 65 S. W. 132, 23 Ky. L. Rep. 1260.

Maryland.— Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

Massachusetts.— Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118; Stanford *v.* Hyde Park, 185 Mass. 253, 70 N. E. 51; Hickey *v.* Waltham, 159 Mass. 460, 34 N. E. 681; Fleming *v.* Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268; Hall *v.* Lowell, 10 Cush. 260.

Michigan.—Finch *v.* Bangor, 133 Mich. 149, 94 N. W. 738; Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; Navarre *v.* Benton Harbor, 126 Mich. 618, 86 N. W. 138.

Minnesota.— McDonald *v.* St. Paul, 82 Minn. 308, 84 N. W. 1022, 83 Am. St. Rep. 428; Grant *v.* Stillwater, 35 Minn. 242, 28 N. W. 660.

Mississippi.— Meridian *v.* McBeath, 80 Miss. 485, 32 So. 53; Nesbitt *v.* Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521.

Missouri.— Fischer *v.* St. Louis, 189 Mo. 567, 88 S. W. 82, 107 Am. St. Rep. 380; Biermann *v.* St. Louis, 120 Mo. 457, 25 S. W. 369; Franke *v.* St. Louis, 110 Mo. 516, 19 S. W. 938.

Montana.— Sweeney *v.* Butte, 15 Mont. 274, 39 Pac. 286.

Nebraska.— Omaha *v.* Houlihan, 72 Nebr. 326, 100 N. W. 415; Plainview *v.* Mendelson, 65 Nebr. 85, 90 N. W. 956; Foxworthy *v.* Hastings, 25 Nebr. 133, 41 N. W. 132; Nebraska City *v.* Rathbone, 20 Nebr. 288, 29 N. W. 920.

New Jersey.— Stein *v.* Koster, 67 N. J. L. 481, 51 Atl. 480.

or in respect to its sewers or waters,[36] such as whether, under all the circumstances, the municipality exercised ordinary care and prudence to discover and remedy the defect or obstruction,[37] whether it had sufficient time to remedy the defect or obstruction,[38] whether the obstruction was reasonably necessary for public improvement,[39] or whether it was such as to have created a reasonable apprehension of danger;[40] and it is erroneous for the court in such cases to dis-

New York.— Fordham *v.* Gouverneur Village, 160 N. Y. 541, 55 N. E. 290; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Allison *v.* Middletown, 101 N. Y. 667, 5 N. E. 334; Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418; Hume *v.* New York, 47 N. Y. 639; McMahon *v.* New York, 33 N. Y. 642; Shane *v.* National Biscuit Co., 102 N. Y. App. Div. 188, 92 N. Y. Suppl. 637 [*affirmed* in 186 N. Y. 514, 78 N. E. 1112]; Durfield *v.* New York, 101 N. Y. App. Div. 581, 92 N. Y. Suppl. 204; Coolidge *v.* New York, 99 N. Y. App. Div. 175, 90 N. Y. Suppl. 1078 [*affirmed* in 185 N. Y. 529, 77 N. E. 1192]; Klaus *v.* Buffalo, 86 N. Y. App. Div. 221, 83 N. Y. Suppl. 620; Brush *v.* New York, 59 N. Y. App. Div. 12, 69 N. Y. Suppl. 51; Murphy *v.* Seneca Falls, 57 N. Y. App. Div. 438, 67 N. Y. Suppl. 1013; O'Hara *v.* Brooklyn, 57 N. Y. App. Div. 176, 68 N. Y. Suppl. 210; Leggett *v.* Watertown, 55 N. Y. App. Div. 321, 66 N. Y. Suppl. 910; Morris *v.* Saratoga Springs, 55 N. Y. App. Div. 263, 66 N. Y. Suppl. 821; Cummings *v.* New Rochelle, 38 N. Y. App. Div. 583, 56 N. Y. Suppl. 701; Kuechenmeister *v.* Brown, 1 N. Y. App. Div. 56, 37 N. Y. Suppl. 95; Roach *v.* Ogdensburg, 91 Hun 9, 36 N. Y. Suppl. 112 [*affirmed* in 153 N. Y. 683, 48 N. E. 1107]; Skelton *v.* Larkin, 82 Hun 388, 31 N. Y. Suppl. 234 [*affirmed* in 146 N. Y. 365, 41 N. E. 90]; Mosey *v.* Troy, 61 Barb. 580 [*affirmed* in 61 N. Y. 506]; Morrassy *v.* New York, 54 N. Y. Super. Ct. 432; Gubasko *v.* New York, 12 Daly 183; Wells *v.* Brooklyn, 16 Misc. 314, 38 N. Y. Suppl. 309 [*reversed* on other grounds in 9 N. Y. App. Div. 61, 41 N. Y. Suppl. 143] (permitting showcase on sidewalk); Goff *v.* Little Falls, 20 N. Y. Suppl. 175; Parris *v.* Green Island, 14 N. Y. Suppl. 703; Paine *v.* Rochester, 14 N. Y. Suppl. 180; Lynn *v.* Troy, 10 N. Y. Suppl. 594; Keane *v.* Waterford, 8 N. Y. Suppl. 790.

Oklahoma.— Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

Pennsylvania.— Dougherty *v.* Philadelphia, 210 Pa. St. 591, 60 Atl. 261; Guinter *v.* Williamsport, 208 Pa. St. 587, 57 Atl. 1064; Iseminger *v.* York Haven Water, etc., Co., 206 Pa. St. 591, 56 Atl. 66; Wall *v.* Pittsburg, 205 Pa. St. 48, 54 Atl. 497; Corbin *v.* Philadelphia, 195 Pa. St. 461, 45 Atl. 1070, 78 Am St. Rep. 825, 49 L. R. A. 715; Mooney *v* Luzerne Borough, 186 Pa. St. 161, 40 Atl. 311, 40 L. R. A. 811; Fee *v.* Columbus Borough, 168 Pa. St. 382, 31 Atl. 1076; Shaw *v.* Philadelphia, 159 Pa. St. 487, 28 Atl. 354; Gschwend *v.* Millvale Borough, 159 Pa. St. 257, 28 Atl. 139; Kibele *v.* Philadelphia, 105 Pa. St. 41; Fritsch *v.* Allegheny, 91 Pa. St. 226; Graham *v.* Philadelphia, 19 Pa. Super. Ct. 292.

Rhode Island.— Hutchinson *v.* Clarke, 26 R. I. 307, 58 Atl. 948.

Texas.— White *v.* San Antonio, (Civ. App. 1894) 25 S. W. 1131.

Vermont.— Willard *v.* Newbury, 22 Vt. 458.

Washington.— McClammy *v.* Spokane, 36 Wash. 339, 78 Pac. 912; Noll *v.* Seattle, 29 Wash. 28, 69 Pac. 382.

Wisconsin.— Heer *v.* Warren-Scharf Asphalt Paving Co., 118 Wis. 57, 94 N. W. 789; Laue *v.* Madison, 86 Wis. 453, 57 N. W. 93; Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055.

United States.— Watertown *v.* Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865; Philbrick *v.* Niles, 25 Fed. 265.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1747.

36. *Delaware.*— Harrigan *v.* Wilmington, 8 Houst. 140, 12 Atl. 779.

Massachusetts.— Westcott *v.* Boston, 186 Mass. 540, 72 N. E. 89.

Missouri.— Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932; Fuchs *v.* St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118.

New York.— Sundheimer *v.* New York, 176 N. Y. 495, 68 N. E. 867 [*reversing* 77 N. Y. App. Div. 53, 79 N. Y. Suppl. 278].

North Carolina.— Capital Printing Co. *v.* Raleigh, 126 N. C. 516, 36 S. E. 33.

Pennsylvania.— Rumsey *v.* Philadelphia, 171 Pa. St. 63, 32 Atl. 1133; Shaughnessy *v.* Pittsburg, 20 Pa. Super. Ct. 609.

Virginia.— Powell *v.* Wytheville, 95 Va. 73, 27 S. E. 805.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1800.

Whether the weather conditions which caused the damage reasonably were to be expected and reasonably could have been guarded against is a question for the jury. Westcott *v.* Boston, 186 Mass. 540, 72 N. E. 89.

37. Kennedy *v.* St. Cloud, 90 Minn. 523, 97 N. W. 417; Hume *v.* New York, 47 N. Y. 639; Stebbins *v.* Oneida, 1 Silv. Sup. (N. Y.) 240, 5 N. Y. Suppl. 483; Rumsey *v.* Philadelphia, 171 Pa. St. 63, 32 Atl. 1133.

38. Enright *v.* Atlanta, 78 Ga. 288; Ljungberg *v.* North Mankato, 87 Minn. 484, 92 N. W. 401; Shook *v.* Cohoes, 108 N. Y. 648, 15 N. E. 531; Parris *v.* Green Island, 14 N. Y. Suppl. 703.

39. Frazier *v.* Butler Borough, 172 Pa. St. 407, 33 Atl. 691, 51 Am. St. Rep. 739.

40. Allegheny *v.* Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649.

pose of the case without the intervention of the jury, as by dismissal, nonsuit, or by direction of a verdict.[41] But where the evidence is legally insufficient, or where the facts are undisputed and the inference to be drawn from them is clear and certain, the question of defendant's negligence is one of law for the court and it may dispose of the question without the intervention of a jury,[42] as by a dismissal or nonsuit,[43] or by directing a verdict for defendant.[44] Nor need the court submit to the jury a question of negligence, other than that on which the action is based, although there is evidence of such negligence.[45]

e. Sufficiency and Safety of Way — (1) *In General.* Where there is sufficient evidence for the jury, but it is conflicting or is such that reasonable minds might arrive at different conclusions, it is a question for the jury whether or not there existed, at the place and time of the accident, a defect or obstruction for which defendant was responsible,[46] as whether the street was, with the defect or

41. Hume *v.* New York, 47 N. Y. 639; Klaus *v.* Buffalo, 86 N. Y. App. Div. 221, 83 N. Y. Suppl. 620; Morris *v.* Saratoga Springs, 55 N. Y. App. Div. 263, 66 N. Y. Suppl. 821; Gubasko *v.* New York, 12 Daly (N. Y.) 183; Shaw *v.* Philadelphia, 159 Pa. St. 487, 28 Atl. 354.

42. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Illinois.— Kluska *v.* Chicago, 97 Ill. App. 665; Belleville *v.* Hoffman, 74 Ill. App. 503.

Iowa.— Lush *v.* Parkersburg, 127 Iowa 701, 104 N. W. 336.

Massachusetts.— Stoddard *v.* Winchester, 154 Mass. 149, 27 N. E. 1014, 26 Am. St. Rep. 223.

Missouri.— Carey *v.* Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65.

Pennsylvania.— Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

South Dakota.— Strait *v.* Eureka, 17 S. D. 326, 96 N. W. 695.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1747.

Leaving a steam roller close to the curb on a street for several days without any change in its appearance to enhance the danger of frightening animals except by putting over it the usual canvas cover does not present a case of negligence for the jury where a horse becomes frightened thereby. District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237 [*reversing* 15 App. Cas. (D. C.) 363].

43. Jenney *v.* Brooklyn, 120 N. Y. 164, 24 N. E. 274 [*reversing* 8 N. Y. St. 808]; Martin *v.* Williamsport, 208 Pa. St. 590, 57 Atl. 1063; Hanson *v.* Warren, (Pa. 1888) 14 Atl. 405.

44. *District of Columbia.*— Swart *v.* District of Columbia, 17 App. Cas. 407.

Illinois.— Kluska *v.* Chicago, 97 Ill. App. 665.

Massachusetts.— Stanton *v.* Salem, 145 Mass. 476, 14 N. E. 519.

Missouri.— Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

South Dakota.— Strait *v.* Eureka, 17 S. D. 326, 96 N. W. 695.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1747.

45. Gordon *v.* Sullivan, 116 Wis. 543, 93 N. W. 457, holding that, where plaintiff's right of recovery is based upon a failure to repair a sidewalk, the fact that some testimony tends to show original faulty construction does not require the court to submit defendant's negligence in that regard to the jury.

46. *Colorado.*— Denver *v.* Strobridge, 19 Colo. App. 435, 75 Pac. 1076.

District of Columbia.— Domer *v.* District of Columbia, 21 App. Cas. 284.

Illinois.— Decatur *v.* Hamilton, 89 Ill. App. 561; Pfiefer *v.* Lake, 37 Ill. App. 367; Evanston *v.* Fitzgerald, 37 Ill. App. 86.

Iowa.— Rea *v.* Sioux City, 127 Iowa 615, 103 N. W. 949; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Patterson *v.* Council Bluffs, 91 Iowa 732, 59 N. W. 63; Troxel *v.* Vinton, 77 Iowa 90, 41 N. W. 580.

Kansas.— Wellington *v.* Gregson, 31 Kan. 99, 1 Pac. 253, 47 Am. Rep. 482.

Kentucky.— Fugate *v.* Somerset, 97 Ky. 48, 29 S. W. 970, 16 Ky. L. Rep. 807; House *v.* Covington, 82 S. W. 374, 26 Ky. L. Rep. 660; Carlisle *v.* Secrest, 75 S. W. 268, 25 Ky. L. Rep. 336; Paducah R., etc., Co. *v.* Ledsinger, 63 S. W. 11, 23 Ky. L. Rep. 441.

Maine.— Cleveland *v.* Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326.

Massachusetts.— Upham *v.* Boston, 187 Mass. 220, 72 N. E. 946; Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118; Stanford *v.* Hyde Park, 185 Mass. 253, 70 N. E. 51; Coles *v.* Revere, 181 Mass. 175, 63 N. E. 430; Redford *v.* Woburn, 176 Mass. 520, 57 N. E. 1008; Flynn *v.* Watertown, 173 Mass. 108, 53 N. E. 147; Welsh *v.* Amesbury, 170 Mass. 437, 49 N. E. 735; Sawyer *v.* Newburyport, 157 Mass. 430, 32 N. E. 653; Davis *v.* Charlton, 140 Mass. 422, 5 N. E. 473; Pratt *v.* Amherst, 140 Mass. 167, 2 N. E. 772; Burt *v.* Boston, 122 Mass. 223; Gerald *v.* Boston, 108 Mass. 580; Loan *v.* Boston, 106 Mass. 450; Hall *v.* Lowell, 10 Cush. 260.

Michigan.— Warn *v.* Flint, 140 Mich. 573, 104 N. W. 37; Newman *v.* Ann Arbor, 134 Mich. 29, 95 N. W. 995.

Minnesota.— St. Paul *v.* Kuby, 8 Minn. 154.

Missouri.— Barr *v.* Kansas City, 121 Mo. 22, 25 S. W. 562; Strange *v.* St. Joseph, 112 Mo. App. 629, 87 S. W. 2.

obstruction in it, nevertheless reasonably safe and sufficient for public travel,[47] or whether the particular defect or obstruction rendered the street or sidewalk unsafe for travel;[48] and in such cases it is error for the court to dispose of such

Montana.— Leonard *v.* Butte, 25 Mont. 410, 65 Pac. 425.

Nebraska.— Omaha *v.* Lewis, (1905) 103 N. W. 1041.

New Hampshire.— Stack *v.* Portsmouth, 52 N. H. 221.

New York.—Farley *v.* New York, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; Hart *v.* McKenna, 106 N. Y. App. Div. 219, 94 N. Y. Suppl. 216; Ladrick *v.* Green Island, 103 N. Y. App. Div. 71, 92 N. Y. Suppl. 622; Barr *v.* Bainbridge, 42 N. Y. App. Div. 628, 59 N. Y. Suppl. 132; Thompson *v.* Saratoga Springs, 22 N. Y. App. Div. 186, 47 N. Y. Suppl. 1032; Michels *v.* Syracuse, 92 Hun 365, 36 N. Y. Suppl. 507; Dougherty *v.* Horseheads, 73 Hun 443, 26 N. Y. Suppl. 642; Granger *v.* Seneca Falls, 45 Hun 60; St. John *v.* New York, 6 Duer 315, 13 How. Pr. 527.

North Dakota.— Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Pennsylvania.— Wall *v.* Pittsburg, 205 Pa. St. 48, 54 Atl. 497; Elias *v.* Lancaster, 203 Pa. St. 638, 53 Atl. 507; Henry *v.* Williamsport, 197 Pa. St. 465, 47 Atl. 740; Miller *v.* Bradford, 186 Pa. St. 164, 40 Atl. 409; Glase *v.* Philadelphia, 169 Pa. St. 488, 32 Atl. 600; Readdy *v.* Shamokim, 137 Pa. St. 98, 20 Atl. 396 (whether dangerous sidewalk so that it was negligence to permit it to remain in that condition); Wible *v.* Philadelphia, 21 Pa. Super. Ct. 486; Rockwell *v.* Eldred, 7 Pa. Super. Ct. 95; McClasky *v.* Dubois Borough, 4 Pa. Super. Ct. 181.

Texas.— Dallas *v.* Webb, 22 Tex. Civ. App. 48, 54 S. W. 398.

Washington.— Stone *v.* Seattle, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253; Ziegler *v.* Spokane, 25 Wash. 439, 65 Pac. 752.

West Virginia.—Arthur *v.* Charleston, 46 W. Va. 88, 32 S. E. 1024.

Wisconsin.— La Fave *v.* Superior, 104 Wis. 454, 80 N. W. 742; Hein *v.* Fairchild, 87 Wis. 258, 58 N. W. 413; McClure *v.* Sparta, 84 Wis. 269, 54 N. W. 337, 36 Am. St. Rep. 924; Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890; Schroth *v.* Prescott, 63 Wis. 652, 24 N. W. 405, 68 Wis. 678, 32 N. W. 621; McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; Sullivan *v.* Oshkosh, 55 Wis. 508, 13 N. W. 468; McMaugh *v.* Milwaukee, 32 Wis. 200.

United States.— Wolfe *v.* Erie Tel., etc., Co., 33 Fed. 220.

Canada.— Derochie *v.* Cornwall, 21 Ont. App. 279; Ferguson *v.* Southwold, 27 Ont. 66.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1748.

That an awning did not fall until after the lapse of seven years is not, as a matter of law, conclusive evidence that it was properly constructed, and that its fall was not attributable to its defective condition; and hence it is proper to submit such questions to the jury. Hume *v.* New York, 74 N. Y. 264 [*reversing* 9 Hun 674].

An obstruction two inches high in a sidewalk or street crossing cannot be said, as a matter of law, not to be such a defect as will render the city liable for injuries caused by it. Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

In determining the question of care of a city in regard to a walk, the jury may consider the material used, and the manner of construction of the walk, with reference to its decay and probable need of repair. Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592].

47. *Delaware.*— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379.

Michigan.— Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195; Williams *v.* West Bay City, 126 Mich. 156, 85 N. W. 458; Urtel *v.* Flint, 122 Mich. 65, 80 N. W. 991; Schrader *v.* Port Huron, 106 Mich. 173, 63 N. W. 964.

Missouri.— Young *v.* Kansas City, 45 Mo. App. 660.

Montana.—Meisner *v.* Dillon, 29 Mont. 116, 74 Pac. 130.

New York.— Bullock *v.* New York, 99 N. Y. 654, 2 N. E. 1.

Ohio.— Bloom *v.* Toledo, 25 Ohio Cir. Ct. 235.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1748.

48. *Delaware.*— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379.

Georgia.—Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389.

Illinois.— Vandalia *v.* Huss, 41 Ill. App. 517.

Kentucky.— Fugate *v.* Somerset, 97 Ky. 48, 29 S. W. 970, 16 Ky. L. Rep. 807; Newport *v.* Miller, 93 Ky. 22, 18 S. W. 835, 13 Ky. L. Rep. 889; Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448.

Massachusetts.— Talbot *v.* Taunton, 140 Mass. 552, 5 N. E. 616; Davis *v.* Charleston, 140 Mass. 422, 5 N. E. 473.

Missouri.— Perrigo *v.* St. Louis, 185 Mo. 274, 84 S. W. 30; Quinlan *v.* Kansas City, 104 Mo. App. 616, 78 S. W. 660; Burnes *v.* St. Joseph, 91 Mo. App. 489; Young *v.* Kansas City, 45 Mo. App. 600.

New York.— Goodfellow *v.* New York, 100 N. Y. 15, 2 N. E. 462; Fisher *v.* Mt. Vernon, 41 N. Y. App. Div. 293, 58 N. Y. Suppl. 499.

North Dakota.— Heckman *v.* Evenson, 7 N. D. 173, 73 N. W. 427.

Washington.— Saylor *v.* Montesano, 11 Wash. 328, 39 Pac. 653.

West Virginia.— Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416.

Wisconsin.— Benedict *v.* Fond du Lac, 44 Wis. 495.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1748.

case without the intervention of the jury.[49] Ordinarily it is a question for the jury whether the particular defect or obstruction amounted to a public nuisance in the highway;[50] whether it was such a defect or obstruction as the municipality was bound to use reasonable care, diligence, and prudence to guard against and remedy;[51] or whether the municipality exercised reasonable care in permitting the defect or obstruction to remain,[52] or in removing it.[53] But where the evidence is insufficient, or is clear and undisputed, the question of negligence in respect to the particular defect or obstruction is one for the court.[54]

(II) *Lights and Guards.* In case of an accident occurring because of an unguarded or unlighted opening, pitfall, or obstruction on a sidewalk or driveway, it is ordinarily a question for the jury whether under the circumstances of the particular case it was defendant's duty to have guards, barriers, or lights at the place of the accident, for the protection of travelers, and consequently whether it was negligent in that respect,[55] as, for example, whether the guards, barriers, or lights at the place of the accident were adequate or sufficient for the purpose;[56]

49. Domer *v.* District of Columbia, 21 App. Cas. (D. C.) 284; Osage City *v.* Brown, 27 Kan. 74; Hartford *v.* Graves, (Kan. App. 1899) 57 Pac. 133; Goodfellow *v.* New York, 100 N. Y. 15, 2 N. E. 462 (holding a nonsuit, founded on the opinion of a policeman that a defect did not render the sidewalk dangerous, improper); Barstow *v.* Berlin, 34 Wis. 357.

50. Shipley *v.* Proctor, 177 Mass. 498, 59 N. E. 119.

51. Shumway *v.* Burlington, 108 Iowa 424, 79 N. W. 123; Lamb *v.* Worcester, 177 Mass. 82, 58 N. E. 474; Post *v.* Boston, 141 Mass. 189, 4 N. E. 815; Vosper *v.* New York, 49 N. Y. Super. Ct. 296.

52. Redford *v.* Woburn, 176 Mass. 520, 57 N. E. 1008; Schafer *v.* New York, 154 N. Y. 466, 48 N. E. 749 [*reversing* 12 N. Y. App. Div. 384, 42 N. Y. Suppl. 744]; Bradner *v.* Warwick, 91 N. Y. App. Div. 408, 86 N. Y. Suppl. 935; San Antonio *v.* Chism, (Tex. Civ. App. 1903) 71 S. W. 606; Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

53. O'Connor *v.* New York, 16 Daly (N. Y.) 58, 8 N. Y. Suppl. 530, 9 N. Y. Suppl. 492 (what is reasonable time for removal of snow); Russell *v.* Toledo, 19 Ohio Cir. Ct. 418, 10 Ohio Cir. Dec. 367.

54. Kinney *v.* Springfield, 35 Mo. App. 97; O'Connor *v.* New York, 16 Daly (N. Y.) 58, 8 N. Y. Suppl. 530, 9 N. Y. Suppl. 492; Kelchner *v.* Nanticoke Borough, 209 Pa. St. 412, 58 Atl. 851; Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416; Koepke *v.* Milwaukee, 112 Wis. 475, 88 N. W. 238; Benedict *v.* Fond du Lac, 44 Wis. 495.

55. *Illinois.*—Chicago *v.* Baker, 195 Ill. 54, 62 N. E. 892 [*affirming* 95 Ill. App. 413]; Rockford *v.* Russell, 9 Ill. App. 229.

Iowa.— Sutherland *v.* Council Bluffs, (1904) 99 N. W. 572; Goucher *v.* Sioux City, 115 Iowa 639, 89 N. W. 24; Lichtenberger *v.* Meriden, 91 Iowa 45, 58 N. W. 1058; Day *v.* Mt. Pleasant, 70 Iowa 193, 30 N. W. 853.

Kansas.— Rosedale *v.* Cosgrove, 10 Kan. App. 211, 63 Pac. 287.

Michigan.— Hannon *v.* Gladstone, 136 Mich. 621, 99 N. W. 790; Sterling *v.* Detroit, 134 Mich. 22, 95 N. W. 986; Baker *v.* Grand Rapids, 111 Mich. 447, 69 N. W. 740.

Minnesota.— Weiser *v.* St. Paul, 86 Minn. 26, 90 N. W. 8.

Missouri.— Myers *v.* Kansas City, 108 Mo. 480, 18 S. W. 914; Loewer *v.* Sedalia, 77 Mo. 431; Jackson *v.* Kansas City, 106 Mo. App. 52, 79 S. W. 1174; Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717.

New York.— Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Kane *v.* Yonkers, 43 N. Y. App. Div. 599, 60 N. Y. Suppl. 216 [*reversed* on other grounds in 169 N. Y. 392, 62 N. E. 428]; Pettengill *v.* Yonkers, 39 Hun 449; Sevestre *v.* New York, 47 N. Y. Super. Ct. 341; Akers *v.* New York, 14 Misc. 524, 35 N. Y. Suppl. 1099; Sheridan *v.* New York, 12 Misc. 47, 33 N. Y. Suppl. 71; Cunningham *v.* Nilson, 84 N. Y. Suppl. 668; Wienke *v.* North Tonawanda, 20 N. Y. Suppl. 390 [*affirmed* in 148 N. Y. 725, 42 N. E. 726]; Tompkins *v.* Oswego, 15 N. Y. Suppl. 371 [*affirmed* in 131 N. Y. 581, 30 N. E. 67]; McDonald *v.* Troy, 13 N. Y. Suppl. 385.

Pennsylvania.— O'Malley *v.* Parsons, 191 Pa. St. 612, 43 Atl. 384, 71 Am. St. Rep. 778.

Rhode Island.— Sauthof *v.* Granger, 19 R. I. 606, 35 Atl. 300; Mayor *v.* Everson, 18 R. I. 748, 30 Atl. 626.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1749.

That a hole in a sidewalk was left unguarded for one and one-half hours in a town of four hundred or five hundred inhabitants is not sufficient evidence of negligence of the town to warrant its submission to the jury. Bender *v.* Minden, 124 Iowa 685, 100 N. W. 352.

56. *Connecticut.*— Mulligan *v.* New Britain, 69 Conn. 96, 36 Atl. 1005.

District of Columbia.— Koontz *v.* District of Columbia, 24 App. Cas. 59, holding that the question whether a rail or barrier placed along an excavation was suitable and sufficient to afford safety to passengers on cars is ordinarily a question of fact.

Illinois.— Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 [*af-*

and in cases of removal of precautions, whether the municipality was at fault in not replacing them.[57]

f. Notice of Defect or Obstruction. Except where the evidence is legally insufficient, or the facts are undisputed and but one inference can be reasonably drawn from them,[58] it is ordinarily a question for the jury whether, under all the circumstances, the municipality had notice, actual or constructive, of the particular defect or obstruction,[59] as whether under the circumstances the defect or obstruction existed for such a length of time as to charge the municipality with

firming 27 Ill. App. 43]; Pfeifer *v.* Lake, 37 Ill. App. 367.

Massachusetts.— Tisdale *v.* Bridgewater, 167 Mass. 248, 45 N. E. 730; Norwood *v.* Somerville, 159 Mass. 105, 33 N. E. 1108; White *v.* Boston, 122 Mass. 491, whether a paver's barrier, consisting of a wooden horse with a lantern thereon, was a sufficient notice that the sidewalk, as well as the roadway, was closed.

Michigan.— Brydon *v.* Detroit, 117 Mich. 296, 75 N. W. 620.

Minnesota.— St. Paul *v.* Kuby, 8 Minn. 154.

New York.— Donnelly *v.* Rochester, 166 N. Y. 315, 59 N. E. 989 [*reversing* 42 N. Y. App. Div. 624, 58 N. Y. Suppl. 1140]; Godfrey *v.* New York, 104 N. Y. App. Div. 357, 93 N. Y. Suppl. 899 [*affirmed* in 185 N. Y. 563, 77 N. E. 1187]; Kane *v.* Yonkers, 43 N. Y. App. Div. 599, 60 N. Y. Suppl. 216 [*reversed* on other grounds in 169 N. Y. 392, 62 N. E. 428]; Kiernan *v.* New York, 14 N. Y. App. Div. 156, 43 N. Y. Suppl. 538; Tompkins *v.* Oswego, 15 N. Y. Suppl. 371 [*affirmed* in 131 N. Y. 581, 30 N. E. 67].

North Carolina.— Foy *v.* Winston, 126 N. C. 381, 35 S. E. 609.

Pennsylvania.— Wood *v.* Bridgeport Borough, 143 Pa. St. 167, 22 Atl. 752.

South Dakota.— Overpeck *v.* Rapid City, 14 S. D. 507, 85 N. W. 990.

Texas.— San Antonio *v.* Chism, (Civ. App. 1903) 71 S. W. 606.

Washington.— Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1749.

Whether the duty to light an excavation in a public street was discharged by the act of the excavators in leaving at the place a lighted lantern is a question for the jury, where there is evidence that the lantern did not contain sufficient oil to keep it lighted during the time the light was required. Baker *v.* Grand Rapids, 111 Mich. 447, 69 N. W. 740.

57. Prentiss *v.* Boston, 112 Mass. 43; Crawford *v.* Wilson, etc., Mfg. Co., 8 Misc. (N. Y.) 48, 28 N. Y. Suppl. 514 [*affirmed* in 144 N. Y. 708, 39 N. E. 857].

58. Bell *v.* Henderson, 74 S. W. 206, 24 Ky. L. Rep. 2434; Dwyer *v.* Boston, 180 Mass. 381, 62 N. E. 397 (holding that where there is no evidence as to the length of time during which the defect existed or as to the time of the accident, a verdict for defendant is properly directed); Stoddard *v.* Winchester, 154 Mass. 149, 27 N. E. 1014, 26 Am. St. Rep. 223 (holding that where there is nothing to show that any defect existed until within an hour before the accident or that the municipality might in the exercise of reasonable diligence have had notice of the defect, the case should be withdrawn from the jury); Stanton *v.* Salem, 145 Mass. 476, 14 N. E. 519; Sherman *v.* Greening, (Tex. Civ. App. 1903) 73 S. W. 424.

Where it appeared that one of the city councilmen, at noon of the day of the accident, discovered a sound plank out of the walk at the place where the accident subsequently occurred, and replaced it without nailing it, and upon the evening of the same day notified the street commissioner, it was error to permit the jury to base a finding of negligence upon the failure of such official sooner to notify the commissioner. McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148.

59. *Colorado.*— Denver *v.* Strobridge, 19 Colo. App. 435, 75 Pac. 1076.

Delaware.— Jarrell *v.* Wilmington, (1903) 56 Atl. 379.

District of Columbia.— O'Dwyer *v.* Northern Market Co., 24 App. Cas. 81; Domer *v.* District of Columbia, 21 App. Cas. 284; District of Columbia *v.* Boswell, 6 App. Cas. 402.

Illinois.— Decatur *v.* Besten, 169 Ill. 340, 48 N. E. 186; Decatur *v.* Hamilton, 89 Ill. App. 561; Coffeen *v.* Lang, 67 Ill. App. 359.

Iowa.— Hodges *v.* Waterloo, 109 Iowa 444, 80 N. W. 523; Troxel *v.* Vinton, 77 Iowa 90, 41 N. W. 580.

Kentucky.— Newport *v.* Miller, 93 Ky. 22, 18 S. W. 835, 13 Ky. L. Rep. 889.

Massachusetts.— Comerford *v.* Boston, 187 Mass. 564, 73 N. E. 661; Stanford *v.* Hyde Park, 185 Mass. 253, 70 N. E. 51; Welsh *v.* Amesbury, 170 Mass. 437, 49 N. E. 735.

Michigan.— Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195; Menard *v.* Bay City, 114 Mich. 450, 72 N. W. 231.

Missouri.— Reedy *v.* St. Louis Brewing Assoc., 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53; Squiers *v.* Kansas City, 100 Mo. App. 628, 75 S. W. 194; Goodman *v.* Kahoka, 100 Mo. App. 278, 73 S. W. 355.

Montana.— Leonard *v.* Butte, 25 Mont. 410, 65 Pac. 425.

New York.— Dobson *v.* Oneida, 106 N. Y. App. Div. 377, 94 N. Y. Suppl. 958; Magee

constructive notice thereof;[60] or whether, considering its nature, location, and duration, the exercise of ordinary care and diligence by the municipal authorities would have disclosed its existence and danger in time for repair or warning before plaintiff received his injury therefrom.[61]

g. Negligence of Abutting Owners. Unless the circumstances of the accident and the condition of the sidewalk are such that but one conclusion can be reached by reasonable men, the negligence of an abutting owner, in front of whose premises the accident has occurred, or of his servants, is a question of fact for the jury.[62]

v. Troy, 48 Hun 383, 1 N. Y. Suppl. 24 [*affirmed* in 119 N. Y. 640, 23 N. E. 1148].

Pennsylvania.— Kibele *v.* Philadelphia, 105 Pa. St. 41; Graham *v.* Philadelphia, 19 Pa. Super. Ct. 292; McHale *v.* Throop Borough, 13 Pa. Super. Ct. 394; Dutton *v.* Lansdowne, 10 Pa. Super. Ct. 204, 7 Del. Co. 400; Aiken *v.* Philadelphia, 9 Pa. Super. Ct. 541; Rockwell *v.* Eldred, 7 Pa. Super. Ct. 95. See also McClosky *v.* Dubois Borough, 4 Pa. Super. Ct. 181.

Texas.— Parker *v.* Laredo, 9 Tex. Civ. App. 221, 28 S. W. 1048.

Utah.— Johnson *v.* Park City, 27 Utah 420, 76 Pac. 216.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1750.

60. *Connecticut.*— Manchester *v.* Hartford, 30 Conn. 118.

Illinois.— McLeansboro *v.* Trammel, 109 Ill. App. 524; Savanna *v.* Trusty, 98 Ill. App. 277; Kunkel *v.* Chicago, 37 Ill. App. 325; Chicago *v.* McCulloch, 10 Ill. App. 459.

Indiana.— Huntington *v.* Lusch, 33 Ind. App. 476, 70 N. E. 402; Evansville *v.* Senhenn, 26 Ind. App. 362, 59 N. E. 863.

Kansas.— Holitza *v.* Kansas City, 68 Kan. 157, 74 Pac. 594.

Kentucky.— Bromley *v.* Bodkin, 77 S. W. 696, 25 Ky. L. Rep. 1245; Madisonville *v.* Pemberton, 75 S. W. 229, 25 Ky. L. Rep. 347; Bell *v.* Henderson, 74 S. W. 206, 24 Ky. L. Rep. 2434.

Massachusetts.— Leonard *v.* Boston, 183 Mass. 68, 66 N. E. 596.

Michigan.— Allen *v.* West Bay City, 140 Mich. 111, 103 N. W. 514.

Missouri.— Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699.

Nebraska.— Lincoln *v.* Mays, 2 Nebr. (Unoff.) 204, 96 N. W. 484.

New York.— Higgins *v.* Brooklyn, etc., R. Co., 54 N. Y. App. Div. 69, 66 N. Y. Suppl. 334; Barr *v.* Bainbridge, 42 N. Y. App. Div. 628, 59 N. Y. Suppl. 132; Kirk *v.* Homer, 77 Hun 459, 28 N. Y. Suppl. 1009; Reich *v.* New York, 12 Daly 72; Kunz *v.* Troy, 1 N. Y. Suppl. 596; Thompson *v.* Albany, 8 N. Y. St. 518.

Pennsylvania.— Crumlich *v.* Harrisburg, 162 Pa. St. 624, 29 Atl. 707; Davis *v.* Corry City, 154 Pa. St. 598, 26 Atl. 621; Reed *v.* Schuylkill Haven Borough, 22 Pa. Super. Ct. 27.

Texas.— Austin *v.* Colgate, (Civ. App. 1894) 27 S. W. 896.

Utah.— Scoville *v.* Salt Lake City, 11 Utah 60, 39 Pac. 481.

Wisconsin.— Schroth *v.* Prescott, 68 Wis. 678, 32 N. W. 621; Sheel *v.* Appleton, 49 Wis. 125, 5 N. W. 27.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1750.

61. *Colorado.*— Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403; Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632.

Georgia.— Enright *v.* Atlanta, 78 Ga. 288.

Kentucky.— Wickliffe *v.* Moring, 113 Ky. 597, 68 S. W. 641, 24 Ky. L. Rep. 419; Newport *v.* Miller, 93 Ky. 22, 18 S. W. 835, 13 Ky. L. Rep. 889; Covington *v.* Jones, 79 S. W. 243, 25 Ky. L. Rep. 1983.

Massachusetts.— Comerford *v.* Boston, 187 Mass. 564, 73 N. E. 661; Bingham *v.* Boston, 161 Mass. 3, 56 N. E. 473.

Michigan.— Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

New Hampshire.— Lambert *v.* Pembroke, 66 N. H. 280, 23 Atl. 81.

New York.— Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; McVee *v.* Watertown, 92 Hun 306, 36 N. Y. Suppl. 870; Fitzgerald *v.* Troy, 4 Silv. Sup. 62, 57 N. Y. Suppl. 103 [*affirmed* in 125 N. Y. 761, 27 N. E. 408].

Washington.— Laurie *v.* Ballard, 24 Wash. 127, 64 Pac. 906.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1750.

62. *Iowa.*— Calder *v.* Smalley, 66 Iowa 219, 23 N. W. 638, 55 Am. Rep. 270, holding that evidence that the cover of a coal hole maintained by defendant was without fastenings is sufficient to go to the jury on the question of negligence.

Massachusetts.—Smith *v.* Wildes, 143 Mass. 556, 10 N. E. 446.

Montana.— Cannon *v.* Lewis, 18 Mont. 402, 45 Pac. 572.

New York.—O'Reilly *v.* Long Island R. Co., 4 N. Y. App. Div. 139, 38 N. Y. Suppl. 779; Williams *v.* Hynes, 55 N. Y. Super. Ct. 86, 18 N. Y. St. 316; Wells *v.* Sibley, 17 N. Y. Suppl. 417 [*affirmed* in 138 N. Y. 607, 33 N. E. 1082].

Pennsylvania.— Carson *v.* Mackin, 23 Pa. Super. Ct. 50.

Wisconsin.— Jochem *v.* Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178; Morton *v.* Smith, 48 Wis. 265, 4 N. W. 330, 33 Am. Rep. 811.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1751.

Whether an abutting owner's exercise of his right to obstruct a sidewalk for the purposes of business is necessary, reasonable, or temporary is ordinarily a question of fact to be solved with reference to the time, place,

But where the evidence discloses no actionable negligence the question is one for the court, and it may dispose of the case by dismissal or nonsuit.[63]

h. Negligence of Person Causing Obstruction. In accordance with the rules heretofore considered,[64] it is usually a question for the jury, in an action against a person other than an abutting owner, through whose agency the defect or obstruction complained of was caused, whether such person was negligent in causing or guarding the defect or obstruction.[65]

i. Proximate Cause of Injury. It is ordinarily a question of fact for the jury whether under all the circumstances of the particular case plaintiff's injuries were proximately caused by defendant's negligence or whether they were attributable to some other cause;[66] as whether or not the injuries were caused by defend-

and circumstances. Kelly *v.* Otterstedt, 80 N. Y. App. Div. 398, 80 N. Y. Suppl. 1008; Jochem *v.* Robinson, 72 Wis. 199, 31 N. W. 383, 1 L. R. A. 178. See Morris *v.* Whipple, 183 Mass. 27, 66 N. E. 199. Thus whether the use of cellar doors, in opening or leaving them open, has been proper and legitimate for the business of the owner, or capricious and unnecessary, and if legitimate whether habitually used so negligently as to endanger passers-by, are questions for the jury. Chapman *v.* Macon, 55 Ga. 566.

63. Martin *v.* Pettit, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794 [*reversing* 49 Hun 166, 1 N. Y. Suppl. 613]; Knoth *v.* Meltzer, 3 Misc. (N. Y.) 596, 23 N. Y. Suppl. 342.

64. See *supra*, XIV, E, 9, b.

65. *Illinois.*— Chicago, etc., R. Co. *v.* Nelson, 153 Ill. 89, 38 N. E. 560 [*affirming* 53 Ill. App. 151], evidence held sufficient for jury as to a pile of ashes left in the street.

Missouri.— Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 27 S. W. 615, whether iron pillars were allowed to remain in the street an unreasonable time.

Nebraska.— American Water-Works Co. *v.* Dougherty, 37 Nebr. 373, 55 N. W. 1051.

New Jersey.— See Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553 [*reversed* on other grounds in 59 N. J. L. 441, 31 Atl. 721].

New York.— Earl *v.* Crouch, 10 N. Y. Suppl. 882 (holding that where defendant caused lumber to be placed in a street, the mere fact that a child five years old, in attempting to climb on the pile, pulled it over on himself was sufficient evidence of defendant's negligence to make a question for the jury); Clarke *v.* Crimmins, 10 N. Y. Suppl. 868; Peard *v.* Karst, 10 N. Y. Suppl. 463 (holding plaintiff entitled to go to the jury on the question as to whether defendant had charge of the premises in which the defect existed, so as to be responsible for the accident).

Pennsylvania.— Douglass *v.* Monongahela City Water Co., 172 Pa. St. 435, 34 Atl. 50.

Texas.— Paris Gaslight Co. *v.* McHam, 2 Tex. App. Civ. Cas. § 651.

Wisconsin.— Denby *v.* Willer, 59 Wis. 240, 18 N. W. 169, holding that whether one who temporarily places articles used in his business on the outer edge of the sidewalk, leaving ample room for passage, is guilty of such negligence as will make him liable to a person injured by falling over such articles is, in the absence of any law or ordinance prohibiting such obstructions, a question of fact.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1752.

In an action against a railroad company for injuries to plaintiff from slipping on ice which had accumulated on the sidewalk from water dripping from the spout of defendant's water-tank, it is a question for the jury whether defendant was negligent and whether its negligence caused or contributed to plaintiff's injury. Thuringer *v.* New York Cent., etc., R. Co., 71 Hun (N. Y.) 526, 24 N. Y. Suppl. 1087, 82 Hun 33, 31 N. Y. Suppl. 419.

Verdict for defendant held properly directed in respect to its negligence in filling up a trench see Grundy *v.* Janesville, 84 Wis. 574, 54 N. W. 1085.

66. *Colorado.*— Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 352.

Delaware.— Jarrell *v.* Wilmington, 4 Pennew. 454, 56 Atl. 379.

Illinois.— Flora *v.* Pruett, 81 Ill. App. 161.

Iowa.— Brown *v.* Chillicothe, 122 Iowa 640, 98 N. W. 502; Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298; Bridgeman *v.* Missouri Valley, (1902) 88 N. W. 1069; Correll *v.* Cedar Rapids, 116 Iowa 333, 81 N. W. 724.

Maine.— Cleveland *v.* Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; Lake *v.* Milliken, 62 Me. 240, 16 Am. Rep. 456.

Massachusetts.— Block *v.* Worcester, 186 Mass. 526, 72 N. E. 77; Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118; Coles *v.* Revere, 181 Mass. 175, 63 N. E. 430.

Michigan.— Alexander *v.* Big Rapids, 70 Mich. 224, 38 N. W. 227.

New York.— Fordham *v.* Gouverneur, 160 N. Y. 541, 55 N. E. 290; Hume *v.* New York, 47 N. Y. 639; Dale *v.* Syracuse, 71 Hun 449, 24 N. Y. Suppl. 968 [*affirmed* in 148 N. Y. 750, 43 N. E. 986]; Roe *v.* New York, 56 N. Y. Super. Ct. 298, 4 N. Y. Suppl. 447.

Pennsylvania.— Behl *v.* Philadelphia, 206 Pa. St. 329, 55 Atl. 1029; Koch *v.* Williamsport, 195 Pa. St. 488, 46 Atl. 67; Crumlich *v.* Harrisburg, 162 Pa. St. 624, 29 Atl. 707; McClosky *v.* Dubois Borough, 4 Pa. Super. Ct. 181.

Texas.— Gonzales *v.* Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17.

ant's negligence in respect to the alleged defect or obstruction,[67] or in respect to its sewers and waters.[68] But where the evidence is legally insufficient to show a causal connection between plaintiff's injuries and defendant's negligence, or is undisputed, and but one inference can be reasonably drawn therefrom, the question becomes one of law for the court,[69] as where the evidence shows merely a bare possibility or probability that defendant's negligence caused the accident.[70]

j. Contributory Negligence — (i) *In General.* Where there is evidence tending to show contributory negligence, but the facts are conflicting, or are such that different inferences might be reasonably shown therefrom, the question as to whether or not plaintiff was guilty of such negligence at the time of the accident as will preclude him from recovering damages is for the jury to determine from all the circumstances of the particular case.[71] Thus it is ordinarily a ques-

See 36 Cent. Dig. tit. "Municipal Corporations," § 1753.

67. *Iowa.*— Hodges *v.* Waterloo, 109 Iowa 444, 80 N. W. 523, holding that the mere fact that the jury might have difficulty in determining whether the accident was caused by the defect does not warrant the court in determining the question in defendant's favor.

Kentucky.— Fugate *v.* Somerset, 97 Ky. 48, 29 S. W. 970, 16 Ky. L. Rep. 807.

Massachusetts.— Hyde *v.* Boston El. R. Co., 186 Mass. 115, 71 N. E. 118; Stanford *v.* Hyde Park, 185 Mass. 253, 70 N. E. 51.

Missouri.— Goodman *v.* Kahoka, 100 Mo. App. 278, 73 S. W. 355.

Pennsylvania.— Wible *v.* Philadelphia, 21 Pa. Super. Ct. 486.

Wisconsin.— Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1753. And see cases cited in preceding note.

68. Harrigan *v.* Wilmington, 8 Houst. (Del.) 140, 12 Atl. 779; Daggett *v.* Cohoes, 5 Silv. Sup. (N. Y.) 183, 7 N. Y. Suppl. 882; McArthur *v.* Collingwood, 9 Ont. 368.

69. Southworth *v.* Shea, 131 Ala. 419, 30 So. 774; Westfall *v.* Detroit Water Com'rs, 93 Mich. 210, 53 N. W. 161 (holding that where there was no evidence as to what caused the accident, judgment for defendant should have been directed); Pottner *v.* Minneapolis, 41 Minn. 73, 42 N. W. 784; Mason *v.* Philadelphia, 205 Pa. St. 177, 54 Atl. 773 (holding a nonsuit properly granted, where it is apparent that the accident was caused by an unfortunate slip on the part of plaintiff); Tompsett *v.* Glade Tp., 198 Pa. St. 376, 48 Atl. 255 (holding binding instructions for defendant proper where there is no evidence as to what caused the accident).

70. Menzies *v.* Interstate Paving Co., 106 N. Y. App. Div. 107, 94 N. Y. Suppl. 492.

Where there is no direct evidence explaining how or why the injury occurred, and the circumstances are as consistent with the theory that it was ascribable to a cause not actionable as otherwise, it is the duty of the court to direct a verdict for defendant when requested. Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729.

71. *Colorado.*— Denver *v.* Strobridge, 19 Colo. App. 435, 75 Pac. 1076.

District of Columbia.— District of Columbia *v.* Whipps, 17 App. Cas. 415; Muller *v.* District of Columbia, 5 Mackey 286.

Georgia.— Pate *v.* Atlanta, 119 Ga. 671, 46 S. E. 827; Shiflett *v.* Cedartown, 111 Ga. 834, 36 S. E. 221.

Illinois.— Altamont *v.* Carter, 97 Ill. App. 196 [*affirmed* in 196 Ill. 286, 63 N. E. 613]; Pfeifer *v.* Lake, 37 Ill. App. 367; Chicago *v.* Kimball, 18 Ill. App. 240.

Indiana.— Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

Iowa.— Templin *v.* Boone, 127 Iowa 91, 102 N. W. 789; Bussell *v.* Ft. Dodge, 126 Iowa 308, 101 N. W. 1126; Considine *v.* Dubuque, 126 Iowa 283, 102 N. W. 102; Hollingworth *v.* Ft. Dodge, 125 Iowa 627, 101 N. W. 455; Evans *v.* Iowa City, 125 Iowa 202, 100 N. W. 1112.

Kansas.— Anderson *v.* Pierce, 68 Kan. 57, 74 Pac. 638; Osage City *v.* Brown, 27 Kan. 74; Lawrence *v.* Littell, 9 Kan. App. 130, 58 Pac. 495.

Kentucky.— Matheny *v.* Wolffs, 2 Duv. 137; Endicott *v.* Triple-State Natural Gas, etc., Co., 76 S. W. 516, 25 Ky. L. Rep. 862; Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448; Fordsville *v.* Spencer, 65 S. W. 132, 23 Ky. L. Rep. 1260.

Massachusetts.— Torphy *v.* Fall River, 188 Mass. 310, 74 N. E. 465; Baker *v.* Fall River, 187 Mass. 53, 72 N. E. 336; Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118; Sampson *v.* Boston, 184 Mass. 46, 67 N. E. 866; Coles *v.* Revere, 181 Mass. 175, 63 N. E. 430; Lamb *v.* Worcester, 177 Mass. 82, 58 N. E. 474; Welsh *v.* Amesbury, 170 Mass. 437, 49 N. E. 735; Hickey *v.* Waltham, 159 Mass. 460, 34 N. E. 681; Bourget *v.* Cambridge, 156 Mass. 391, 31 N. E. 390, 16 L. R. A. 605; Hunt *v.* Salem, 121 Mass. 294.

Michigan.— Herring *v.* St. Joseph, 137 Mich. 480, 100 N. W. 747; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; Wilton *v.* Flint, 128 Mich. 156, 87 N. W. 86; Kopelka *v.* Bay City, 125 Mich. 625, 84 N. W. 1106; Corcoran *v.* Detroit, 95 Mich. 84, 54 N. W. 692.

Minnesota.— Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767; Stoker *v.* Minneapolis, 32 Minn. 478, 21 N. W. 557.

Mississippi.— Meridian *v.* McBeath, 80 Miss. 485, 32 So. 53; Nesbitt *v.* Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521.

tion for the jury whether under the circumstances plaintiff was guilty of contributory negligence in going to the place of the accident with imperfect eyesight,[72] or while intoxicated;[73] in crossing a street at a place other than a

Missouri.— Haxton *v.* Kansas City, 190 Mo. 53, 88 S. W. 714; Fischer *v.* St. Louis, 189 Mo. 567, 88 S. W. 82, 107 Am. St. Rep. 380; Coffey *v.* Carthage, 186 Mo. 573, 85 S. W. 532; Deland *v.* Cameron, 112 Mo. App. 704, 87 S. W. 597; Hitt *v.* Kansas City, 110 Mo. App. 713, 85 S. W. 669; Darrell *v.* St. Joseph, 109 Mo. App. 168, 82 S. W. 1130; Jennings *v.* Kansas City, 105 Mo. App. 677, 78 S. W. 1041; Powers *v.* Penn Mut. L. Ins. Co., 91 Mo. App. 55.

Nebraska.— Beatrice *v.* Forbes, (1905) 103 N. W. 1069; Lexington *v.* Kreitz, 73 Nebr. 770, 103 N. W. 444; Omaha *v.* Houlihan, 72 Nebr. 326, 100 N. W. 415; Plattsmouth *v.* Mitchell, 20 Nebr. 228, 29 N. W. 593; South Omaha *v.* Taylor, 4 Nebr. (Unoff.) 757, 96 N. W. 209.

New York.— Fordham *v.* Gouverneur Village, 160 N. Y. 541, 55 N. E. 290; Nichols *v.* New Rochelle, 105 N. Y. App. Div. 77, 93 N. Y. Suppl. 796; Ladrick *v.* Green Island, 103 N. Y. App. Div. 71, 92 N. Y. Suppl. 622; Shane *v.* National Biscuit Co., 102 N. Y. App. Div. 188, 92 N. Y. Suppl. 637 [*affirmed* in 186 N. Y. 514, 78 N. E. 1112]; Bradner *v.* Warwick, 91 N. Y. App. Div. 408, 86 N. Y. Suppl. 935; Link *v.* New York, 82 N. Y. App. Div. 486, 81 N. Y. Suppl. 577; Queck-Berner *v.* Atlantic Trust Co., 80 N. Y. App. Div. 460, 81 N. Y. Suppl. 146; Ann *v.* Herter, 79 N. Y. App. Div. 6, 79 N. Y. Suppl. 825; Walsh *v.* Central New York Tel., etc., Co., 75 N. Y. App. Div. 1, 77 N. Y. Suppl. 798 [*reversed* on other grounds in 176 N. Y. 163, 68 N. E. 146]; O'Hara *v.* Brooklyn, 57 N. Y. App. Div. 176, 68 N. Y. Suppl. 210; Morris *v.* Saratoga Springs, 55 N. Y. App. Div. 263, 66 N. Y. Suppl. 821; Birngruber *v.* Eastchester, 54 N. Y. App. Div. 80, 66 N. Y. Suppl. 278; Higgins *v.* Brooklyn, etc., R. Co., 54 N. Y. App. Div. 69, 66 N. Y. Suppl. 334; O'Hara *v.* Buffalo, 39 N. Y. App. Div. 443, 57 N. Y. Suppl. 367; Mosey *v.* Troy, 61 Barb. 580 [*affirmed* in 61 N. Y. 506]; Francis *v.* New York Steam Co., 13 Daly 510 [*affirmed* in 114 N. Y. 380, 21 N. E. 988]; Durand *v.* Acken, 7 Misc. 440, 27 N. Y. Suppl. 937; Goff *v.* Little Falls, 20 N. Y. Suppl. 175; Crowther *v.* Yonkers, 15 N. Y. Suppl. 588; Bishop *v.* Goshen, 10 N. Y. St. 401; Thompson *v.* Albany, 8 N. Y. St. 518.

North Carolina.— Willis *v.* Newbern, 118 N. C. 132, 24 S. E. 706.

Oklahoma.— Guthrie *v.* Swan, 3 Okla. 116, 41 Pac. 84.

Pennsylvania.— Dougherty *v.* Philadelphia, 210 Pa. St. 591, 60 Atl. 261; Johnson *v.* Philadelphia, 208 Pa. St. 182, 57 Atl. 363; Brown *v.* White, 206 Pa. St. 106, 55 Atl. 848; Wall *v.* Pittsburg, 205 Pa. St. 48, 54 Atl. 497; Glading *v.* Philadelphia, 202 Pa. St. 324, 51 Atl. 886; Butcher *v.* Philadelphia, 202 Pa. St. 1, 51 Atl. 330; O'Malley *v.* Parsons, 191 Pa. St. 612, 43 Atl. 384, 71 Am. St. Rep. 778; Glase *v.* Philadelphia, 169 Pa. St. 488, 32 Atl. 600; Feather *v.* Reading, 155 Pa. St. 187, 26 Atl. 212; Forker *v.* Sandy Lake Borough, 130 Pa. St. 123, 18 Atl. 609; King *v.* Thompson, 87 Pa. St. 365, 30 Am. Rep. 364; Shenandoah *v.* Erdman, 9 Pa. Cas. 470, 12 Atl. 814; Farrell *v.* Plymouth Borough, 26 Pa. Super. Ct. 183; Canfield *v.* East Stroudsburg Borough, 19 Pa. Super. Ct. 649; Graham *v.* Philadelphia, 19 Pa. Super. Ct. 292.

Texas.— Galveston *v.* Hemmis, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 828.

Virginia.— Newport News *v.* Scotts, 103 Va. 794, 50 S. E. 266.

Washington.— Lemman *v.* Spokane, 38 Wash. 98, 80 Pac. 280; McClammy *v.* Spokane, 36 Wash. 339, 78 Pac. 912; Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978; Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805; Mischke *v.* Seattle, 26 Wash. 616, 67 Pac. 357.

West Virginia.— Arthur *v.* Charleston, 51 W. Va. 132, 41 S. E. 171; Snoddy *v.* Huntington, 37 W. Va. 111, 16 S. E. 442; Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17; Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512.

Wisconsin.— Pecor *v.* Oconto, 125 Wis. 335, 104 N. W. 88; Hoffman *v.* North Milwaukee, 118 Wis. 278, 95 N. W. 274; Richards *v.* Oshkosh, 81 Wis. 226, 51 N. W. 256; McNamara *v.* Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; Philbrick *v.* Niles, 25 Fed. 265.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1754.

Contributory negligence of child or parent in case of an injury to a child as a question for the jury see St. Paul *v.* Kuhy, 8 Minn. 154; Brown *v.* Syracuse, 77 Hun (N. Y.) 411, 28 N. Y. Suppl. 792; Newport News *v.* Scott, 103 Va. 794, 50 S. E. 266; Lorence *v.* Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42.

When there is some evidence showing the exercise of reasonable care, the fact that, owing to the circumstances, the evidence of care is weak, does not justify taking the question of contributory negligence from the jury. Schafer *v.* New York, 154 N. Y. 466, 48 N. E. 749 [*reversing* 12 N. Y. App. Div. 384, 42 N. Y. Suppl. 744].

72. Chapman *v.* Macon, 55 Ga. 566; Davenport *v.* Ruckman, 37 N. Y. 568 [*affirming* 10 Bosw. 20].

73. Kingsley *v.* Mulhall, 95 Iowa 754, 64 N. W. 659; Cramer *v.* Burlington, 39 Iowa 512; American Water-Works Co. *v.* Dougherty, 37 Nebr. 373, 55 N. W. 1051; Healy *v.* New York, 3 Hun (N. Y.) 708, 6 Thomps. & C. 92; Tompkins *v.* Oswego, 15 N. Y. Suppl. 371 [*affirmed* in 131 N. Y. 581, 30 N. E. 67]; Arthur *v.* Charleston, 51 W. Va. 132, 41 S. E. 171.

crossing;[74] in attempting to save another from injury;[75] whether he used due care and caution in riding or driving along a defective or obstructed street or public way;[76] or whether he used due care to properly treat and care for himself after the injury.[77] But where the facts are undisputed, or but one conclusion can be drawn therefrom by reasonable minds, the question whether or not plaintiff was contributorily negligent becomes one of law for the court to determine.[78]

(II) *Knowledge of Defect or Obstruction.* Whether or not the person injured had knowledge of the defect or obstruction, or other dangerous condition existing at the time and place of the accident, is ordinarily a question of fact for the jury.[79] The mere fact that he previously had such knowledge does not make him guilty of contributory negligence as a matter of law in attempting to use such place; but his negligence is ordinarily a question of fact for the jury to determine from the fact of such knowledge, in connection with all other circumstances existing at the time and place,[80] such as the facts that it was dark at the

74. Bell *v.* Clarion, 113 Iowa 126, 84 N. W. 962; Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; Plummer *v.* Milan, 79 Mo. App. 439.

75. Corbin *v.* Philadelphia, 195 Pa. St. 461, 45 Atl. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715.

76. *California.*— McKune *v.* Santa Clara Valley Mill, etc., Co., 110 Cal. 480, 42 Pac. 980.

Colorado.— Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705.

Georgia.—Central City Ice Works *v.* Macon, 92 Ga. 413, 17 S. E. 660.

Iowa.— Herries *v.* Waterloo, 114 Iowa 374, 86 N. W. 306.

Maryland.— Baltimore *v.* Holmes, 39 Md. 243.

Massachusetts.— Butman *v.* Newton, 179 Mass. 1, 60 N. E. 401, 88 Am. St. Rep. 349; St. Germain *v.* Fall River, 177 Mass. 550, 59 N. E. 447.

Michigan.— Warn *v.* Flint, 140 Mich. 573, 104 N. W. 37.

New York.— Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418 [*affirming* 11 Hun 626]; Godfrey *v.* New York, 104 N. Y. App. Div. 357, 93 N. Y. Suppl. 899 [*affirmed* in 185 N. Y. 563, 77 N. E. 1187]; Roach *v.* Ogdensburg, 91 Hun 9, 36 N. Y. Suppl. 112 [*affirmed* in 153 N. Y. 683, 48 N. E. 1107]; Byrne *v.* Syracuse, 79 Hun 555, 29 N. Y. Suppl. 912 [*affirmed* in 151 N. Y. 658, 46 N. E. 1145]; Lynch *v.* New Rochelle, 78 Hun 207, 28 N. Y. Suppl. 962; Dougherty *v.* Horseheads, 73 Hun 443, 26 N. Y. Suppl. 642.

Pennsylvania.— Quinlan *v.* Philadelphia, 205 Pa. St. 309, 54 Atl. 1026.

South Dakota.— Overpeck *v.* Rapid City, 14 S. D. 507, 85 N. W. 990.

Washington.—Helbig *v.* Grays Harbor Electric Co., 37 Wash. 130, 79 Pac. 612; Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76.

Wisconsin.— Jung *v.* Stevens Point, 74 Wis. 547, 43 N. W. 513.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1754.

77. Gilman *v.* Haley, 7 Ill. App. 349.

78. *Connecticut.*— Wood *v.* Danbury, 72 Conn. 69, 43 Atl. 554.

Iowa.— Evans *v.* Iowa City, 125 Iowa 202, 100 N. W. 1112.

Kansas.— Osage City *v.* Brown, 27 Kan. 74.

Massachusetts.— Casey *v.* Fitchburg, 162 Mass. 321, 38 N. E. 499.

Michigan.— Zanger *v.* Detroit City R. Co., 87 Mich. 646, 49 N. W. 879.

Nebraska.— Beatrice *v.* Forbes, (1905) 103 N. W. 1069.

New York.— Bishop *v.* Goshen, 10 N. Y. St. 401. See Whalen *v.* Citizens' Gas Light Co., 151 N. Y. 70, 45 N. E. 363 [*reversing* 10 Misc. 281, 30 N. Y. Suppl. 1077].

Rhode Island.— Nicholas *v.* Peck, 20 R. I. 533, 40 Atl. 418, 21 R. I. 404, 43 Atl. 1038.

Wisconsin.— Ruscher *v.* Stanley, 120 Wis. 380, 98 N. W. 223.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1754.

79. Lafayette *v.* Fitch, 32 Ind. App. 134, 69 N. E. 414; Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 27 S. W. 615; Miller *v.* Bradford, 186 Pa. St. 164, 40 Atl. 409; McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

80. *Alabama.*—Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630.

District of Columbia.— District of Columbia *v.* Crumbaugh, 13 App. Cas. 553; Muller *v.* District of Columbia, 5 Mackey 286.

Illinois.— Harvard *v.* Wilson, 100 Ill. App. 9; Altamont *v.* Carter, 97 Ill. App. 196 [*affirmed* in 196 Ill. 286, 63 N. E. 613].

Indiana.— Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246.

Iowa.— Sachra *v.* Manilla, 120 Iowa 562, 95 N. W. 198; Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379.

Kansas.— Langan *v.* Atchison, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; Osage City *v.* Brown, 27 Kan. 74.

Kentucky.— Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. 493, 23 Ky. L. Rep. 43; Carlisle *v.* Secrest, 75 S. W. 268, 25 Ky. L. Rep. 336; Madisonville *v.* Pemberton, 75 S. W. 229, 25 Ky. L. Rep. 347; Fordsville *v.* Spencer, 65 S. W. 132, 23 Ky. L. Rep. 1260.

Massachusetts.— Hyde *v.* Boston El. R. Co., 186 Mass. 115, 71 N. E. 118.

Michigan.— Oesterreich *v.* Detroit, 137 Mich. 415, 100 N. W. 593; Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; McGrail *v.*

time,[81] and plaintiff was not sure of the location of the defect or obstruction,[82] and that his knowledge previously acquired was momentarily forgotten by reason of his mind being diverted to other matters;[83] or that, although knowing of the defect he did not know it was dangerous,[84] or also knew that repairs had recently been made in the vicinity.[85] Thus it is ordinarily a question for the jury whether plaintiff was guilty of contributory negligence in using a walk or way which he knew was in a dangerous condition, when another convenient way might have

Kalamazoo, 94 Mich. 52, 53 N. W. 955; Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143; Lowell *v.* Watertown Tp., 58 Mich. 568, 25 N. W. 517.

Minnesota.— Isham *v.* Broderick, 89 Minn. 397, 95 N. W. 224.

Mississippi.— Pascagoula *v.* Kirkwood, 86 Miss. 630, 38 So. 547.

Missouri.— Perrigo *v.* St. Louis, 185 Mo. 274, 84 S. W. 30; Swanson *v.* Sedalia, 89 Mo. App. 121; Loewer *v.* Sedalia, 77 Mo. 431.

Nebraska.— Beatrice *v.* Forbes, (1905) 103 N. W. 1069.

New York.— Bullock *v.* New York, 99 N. Y. 654, 2 N. E. 1; Niven *v.* Rochester, 76 N. Y. 619; Holloway *v.* Lockport, 54 Hun 153, 7 N. Y. Suppl. 363; Fox *v.* Ft. Edward, 48 Hun 363, 1 N. Y. Suppl. 81 [*affirmed* in 121 N. Y. 666, 24 N. E. 1093]; Gibbons *v.* Phœnix, 15 N. Y. Suppl. 410.

Ohio.— Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Pennsylvania.— Brown *v.* White, 206 Pa. St. 106, 55 Atl. 848; Shaffer *v.* Harmony Borough, 204 Pa. St. 339, 54 Atl. 168; Musselman *v.* Hatfield, 202 Pa. St. 489, 52 Atl. 15; Altoona *v.* Lotz, 114 Pa. St. 238, 7 Atl. 240, 60 Am. Rep. 346.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

Washington.— Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805; Jordan *v.* Seattle, 26 Wash. 61, 66 Pac. 114; Cowie *v.* Seattle, 22 Wash. 659, 62 Pac. 121; Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

West Virginia.— Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17.

Wisconsin.— Strack *v.* Milwaukee, 121 Wis. 91, 98 N. W. 947; Cumisky *v.* Kenosha, 87 Wis. 286, 58 N. W. 395.

United States.— Mosheuvel *v.* District of Columbia, 191 U. S. 247, 24 S. Ct. 57, 48 L. ed. 170; Swift *v.* Langbein, 127 Fed. 111, 62 C. C. A. 111 [*affirming* 121 Fed. 416].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1755.

Whether a laborer engaged in digging a trench for a sewer became aware of its unsafe condition and thereafter assumed the risk by continuing in the service is a question for the jury. Donahoe *v.* Kansas City, 136 Mo. 657, 48 S. W. 571.

81. *Georgia.*— Dempsey *v.* Rome, 94 Ga. 420, 20 S. E. 335.

Iowa.— Houseman *v.* Belle Plaine, 124 Iowa 510, 100 N. W. 343.

Missouri.— Maus *v.* Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634.

New Hampshire.— Dow *v.* Portsmouth, etc., R. Co., 70 N. H. 410, 49 Atl. 570.

New York.— Twist *v.* Rochester, 37 N. Y. App. Div. 307, 55 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 619, 59 N. E. 1131].

Pennsylvania.—Walton *v.* Colwyn Borough, 19 Pa. Super. Ct. 172.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1755.

82. *Iowa.*— Thiessen *v.* Belle Plaine, 81 Iowa 118, 46 N. W. 854.

Kansas.— Wiens *v.* Ebel, 69 Kan. 701, 77 Pac. 553.

Michigan.— Belyea *v.* Port Huron, 136 Mich. 504, 99 N. W. 740.

Oklahoma.— Pitman *v.* El Reno, 2 Okla. 414, 37 Pac. 851.

Pennsylvania.— Merriman *v.* Phillipsburg Borough, 158 Pa. St. 78, 28 Atl. 122.

Washington.— Drake *v.* Seattle, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1755.

83. *Idaho.*— Carson *v.* Genesee, 9 Ida. 244, 74 Pac. 862, 108 Am. St. Rep. 127.

Illinois.— Veach *v.* Champaign, 113 Ill. App. 151.

Kentucky.— West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838; Louisville *v.* Brewer, 72 S. W. 9, 24 Ky. L. Rep. 1671; Maysville *v.* Guilfoyle, 62 S. W. 493, 23 Ky. L. Rep. 43.

Massachusetts.—Coffin *v.* Palmer, 162 Mass. 192, 38 N. E. 509; Powers *v.* Boston, 154 Mass. 60, 27 N. E. 995.

Michigan.— Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143.

New York.— Delaney *v.* Mt. Vernon, 89 N. Y. App. Div. 209, 85 N. Y. Suppl. 799; Darling *v.* New York, 18 Hun 340.

Wisconsin.— Collins *v.* Janesville, 117 Wis. 415, 94 N. W. 309.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1755.

84. *Indiana.*— Richmond *v.* Mulholland, 116 Ind. 173, 18 N. E. 832.

Iowa.— Troxel *v.* Vinton, 77 Iowa 90, 41 N. W. 580.

Missouri.— Huff *v.* Marshall, 97 Mo. App. 542, 71 S. W. 477.

Pennsylvania.— Bauerle *v.* Philadelphia, 184 Pa. St. 545, 39 Atl. 298.

Washington.— Lemman *v.* Spokane, 38 Wash. 98, 80 Pac. 280.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1755.

85. Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191, where plaintiff testified that he knew of such repairs.

been taken,[86] in walking over an obviously icy sidewalk,[87] in attempting to pass around a defect or obstruction,[88] or in riding or driving a horse or team along a street with knowledge of conditions rendering it dangerous.[89] Where, however, it is apparent from the evidence that the hazard resulting from an attempt to use or pass over such a place is so great that a reasonably prudent person would not have made the attempt, the question of contributory negligence becomes one of law for the court.[90]

(III) *Duty to Observe and Avoid Danger.* Whether or not the injured person, familiar with the circumstances, used ordinary care and caution to discover and avoid the defect, obstruction, or other danger is ordinarily a question for the jury,[91] except where the evidence is undisputed and is such that but one inference can be reasonably drawn from it.[92]

k. Sufficiency of Notice or Presentation of Claim. Whether the notice of the claim for injury was sufficient in form is usually a question for the court to determine;[93] as is also the question whether it was sufficient in other respects

86. Carter *v.* Lineville, 117 Iowa 532, 91 N. W. 777; Hoover *v.* Mapleton, 110 Iowa 571, 81 N. W. 776; Sylvester *v.* Casey, 110 Iowa 256, 81 N. W. 455; Vander Velde *v.* Leroy, 140 Mich. 359, 103 N. W. 812; Musselman *v.* Hatfield, 202 Pa. St. 489, 52 Atl. 15; Biggs *v.* West Newton Borough, 164 Pa. St. 341, 30 Atl. 204; McCue *v.* Knoxville Borough, 146 Pa. St. 580, 23 Atl. 439; Altoona *v.* Lotz, 114 Pa. St. 238, 7 Atl. 240, 60 Am. Rep. 346; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

87. Arnold *v.* Waterloo, 128 Iowa 410, 104 N. W. 442.

88. Gerald *v.* Boston, 108 Mass. 580; Orleans Village *v.* Perry, 24 Nebr. 831, 40 N. W. 417.

89. *Illinois.*— Aurora *v.* Scott, 185 Ill. 539, 57 N. E. 440 [*affirming* 82 Ill. App. 616].

Iowa.— Byerly *v.* Anamosa, 79 Iowa 204, 44 N. W. 359.

Nebraska.— Omaha *v.* Ayer, 32 Nebr. 375, 49 N. W. 445; Lincoln *v.* Gillilan, 18 Nebr. 114, 24 N. W. 444.

Pennsylvania.— Hotchkin *v.* Philipsburg, 5 Pa. Cas. 188, 8 Atl. 434.

Wisconsin.— Simonds *v.* Baraboo, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895; Brennan *v.* Friendship, 67 Wis. 223, 29 N. W. 902.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1755.

90. Mosheuvel *v.* District of Columbia, 191 U. S. 247, 24 S. Ct. 57, 48 L. ed. 170.

91. *California.*— Van Praag *v.* Gale, 107 Cal. 438, 40 Pac. 555.

District of Columbia.— Ward *v.* District of Columbia, 24 App. Cas. 524.

Georgia.— Shiflett *v.* Cedartown, 111 Ga. 834, 36 S. E. 221.

Illinois.— Chicago *v.* McLean, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765 [*distinguishing* and *limiting* Kewanee *v.* Depew, 80 Ill. 119]; Upper Alton *v.* Green, 112 Ill. App. 439.

Iowa.— Streeter *v.* Marshalltown, 123 Iowa 449, 99 N. W. 114; Lichtenberger *v.* Meriden, 91 Iowa 45, 58 N. W. 1058.

Massachusetts.— Leonard *v.* Boston, 183 Mass. 68, 66 N. E. 596; Flynn *v.* Watertown, 173 Mass. 108, 53 N. E. 147; Slee *v.* Lawrence, 162 Mass. 405, 38 N. E. 708; Fuller *v.* Hyde Park, 162 Mass. 51, 37 N. E. 782; Woods *v.* Boston, 121 Mass. 337.

Michigan.— Mackie *v.* West Bay City, 106 Mich. 242, 64 N. W. 25.

Missouri.— Barr *v.* Kansas City, 105 Mo. 550, 16 S. W. 483; McCormick *v.* Monroe, 64 Mo. App. 197; Boland *v.* Kansas City, 32 Mo. App. 8.

New York.—Gillispie *v.* Newburgh, 54 N. Y. 468; Mogk *v.* New York, etc., Tel. Co., 78 N. Y. App. Div. 560, 79 N. Y. Suppl. 685; Thuringer *v.* New York Cent., etc., R. Co., 71 Hun 526, 24 N. Y. Suppl. 1087; Dale *v.* Syracuse, 71 Hun 449, 24 N. Y. Suppl. 968 [*affirmed* in 148 N. Y. 750, 43 N. E. 986]; Thomas *v.* New York, 28 Hun 110; Driscoll *v.* New York, 11 Hun 101; Fitzgerald *v.* Troy, 4 Silv. Sup. 62, 7 N. Y. Suppl. 103 [*affirmed* in 125 N. Y. 761, 27 N. E. 408]; O'Reilly *v.* Sing Sing, 1 N. Y. Suppl. 582.

Oklahoma.— Oklahoma City *v.* Welsh, 3 Okla. 288, 41 Pac. 598.

Pennsylvania.— Iseminger *v.* York Haven Water, etc., Co., 206 Pa. St. 591, 56 Atl. 66, 209 Pa. St. 615, 59 Atl. 64; Ringrose *v.* Bloomsburg, 167 Pa. St. 621, 31 Atl. 863; Scranton *v.* Gore, 124 Pa. St. 595, 17 Atl. 144; Philadelphia *v.* Smith, (1889) 16 Atl. 493.

Texas.— Sherman *v.* Nairey, 77 Tex. 291, 13 S. W. 1028; Palestine *v.* Addington, (Civ. App. 1903) 75 S. W. 322.

Washington.— Reed *v.* Spokane, 21 Wash. 218, 57 Pac. 803.

West Virginia.— Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512.

Wisconsin.— Stege *v.* Milwaukee, 110 Wis. 484, 86 N. W. 161; Cantwell *v.* Appleton, 71 Wis. 463, 37 N. W. 813; Barstow *v.* Berlin, 34 Wis. 357; Weisenberg *v.* Appleton, 26 Wis. 56, 7 Am. Rep. 89.

United States.— Osborne *v.* Detroit, 32 Fed. 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1756.

92. Cloney *v.* Kalamazoo, 124 Mich. 655, 83 N. W. 618; Nicholas *v.* Peck, 20 R. I. 523, 40 Atl. 418, 21 R. I. 404, 43 Atl. 1038.

93. Schaefer *v.* Ashland, 117 Wis. 553, 94 N. W. 303.

where the facts are undisputed.[94] Ordinarily, however, it is a question for the jury whether the notice or presentment of the claim was properly served or made;[95] whether or not there was an intention to mislead and whether the city was in fact misled;[96] or whether the excuse for not presenting it in time was sufficient, as whether or not plaintiff was physically or mentally incapacitated from serving or presenting it in time.[97]

10. Instructions — a. Form and Sufficiency in General. The general rules applicable to instructions in civil actions[98] ordinarily apply in actions against a municipality for tort.[99] As in other cases the instructions should be clear, concise, and definite, so as to be readily understood by the jury, in presenting the facts and defining the issues in the case,[1] such as the facts and issue of defendant's negligence,[2]

94. Owen *v.* Ft. Dodge, 98 Iowa 281, 67 N. W. 281; Schaefer *v.* Ashland, 117 Wis. 553, 94 N. W. 303.

95. Ljungberg *v.* North Mankato, 87 Minn. 484, 92 N. W. 401; Schaefer *v.* Ashland, 117 Wis. 553, 94 N. W. 303; Hildman *v.* Phillips, 106 Wis. 611, 82 N. W. 566, whether the notice was served within the prescribed time.

96. Norwood *v.* Somerville, 159 Mass. 105, 33 N. E. 1108; Liffin *v.* Beverly, 145 Mass. 549, 14 N. E. 787.

97. Ebrhardt *v.* Seattle, 33 Wash. 664, 74 Pac. 827; Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386.

98. See, generally, Trial.

99. See Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191, holding it not erroneous to refuse an instruction on an unfounded assumption by counsel.

Where a special verdict is to be rendered, the instructions appropriate to each question should be submitted to the jury in immediate connection with the question to which they are respectively applicable. Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303, holding also that in such a case instructions only applicable to a general verdict should not be given.

1. See Vocke *v.* Chicago, 208 Ill. 192, 70 N. E. 325; Huff *v.* Marshall, 97 Mo. App. 542, 71 S. W. 477.

The facts necessary to authorize a recovery need not be stated with the same exactness in instructions as in pleadings. If an instruction be so drawn as to predicate the right to recovery upon a portion only of the facts constituting the cause of action, it will nevertheless be held sufficient, if in view of all the evidence the court can say that the other essential facts necessarily follow those which are required by the instruction to be found. Reno *v.* St. Joseph, 169 Mo. 642, 70 S. W. 123.

2. See Taylor *v.* Ballard, 24 Wash. 191, 64 Pac. 143; and other cases cited *infra*, this note.

Instructions held proper or erroneously refused on the question of defendant's negligence in respect to the failure of sewers to carry off surface water (Parker *v.* Des Moines, 53 Iowa 679, 6 N. W. 37), in respect to fence around a reservoir (Carey *v.* Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65), and in respect to a defective or obstructed street or sidewalk (Johnson *v.* Sioux City, 114 Iowa 137, 86 N. W. 212, instruction held not objectionable as requiring the city to keep its streets in repair the whole width thereof; Coffey *v.* Carthage, 186 Mo. 573, 85 S. W. 532; Oklahoma City *v.* Meyers, 4 Okla. 686, 46 Pac. 552; Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271; Hill *v.* Fond du Lac, 56 Wis. 242, 14 N. W. 25; Osborne *v.* Detroit, 32 Fed. 36, instruction held not erroneous in calling attention of the jury to the proximity of the defect to a police station).

Instructions held erroneous or properly refused as to defendant's negligence (Crete *v.* Childs, 11 Nebr. 252, 9 N. W. 55, holding an instruction that under certain given circumstances a city is liable for its failure to perform its duties where there is no explanation as to what such duties are is erroneous; Kelchner *v.* Nanticoke Borough, 209 Pa. St. 412, 58 Atl. 851, holding that a charge of negligence which does not state to the jury that the question of defendant's negligence is for their consideration and does not give any definition of negligence or the degree of care or supervision which a municipal corporation is bound to exercise over its streets is inadequate; Ringelstein *v.* San Antonio, (Tex. Civ. App. 1893) 21 S. W. 634, holding that an instruction that a city is responsible for any negligence in cleaning its ditches is too general, and does not limit the city's responsibility for such negligence to injuries resulting directly or proximately therefrom), in respect to a defective or obstructed street or sidewalk (Colorado Springs *v.* May, 20 Colo. App. 204, 77 Pac. 1093; Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592]; Hofacre *v.* Monticello, 128 Iowa 239, 103 N. W. 488, inaccurate as to diligence required in removing obstructions; Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448; Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Jerowitz *v.* Kansas City, 104 Mo. App. 202, 77 S. W. 1088; Salmon *v.* Trenton, 21 Mo. App. 182; Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520; Ster *v.* Tuety, 45 Hun (N. Y.) 49; Peake *v.* Superior, 106 Wis. 403, 82 N. W. 306), as imposing too great a degree of care (Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565; Rock Falls *v.* Wells, 59 Ill. App. 155; Caldwell *v.* Detroit, 137 Mich. 667, 100 N. W. 897; Phalen *v.* Detroit, 126 Mich. 683, 86 N. W. 126).

or notice of the defect or obstruction,[3] and in stating the law applicable thereto.[4] Such instructions must not be confusing or misleading,[5] nor be

An instruction need not lay down a comparison as to the duty of the city with respect to one street and its duty as to another street, the question for the jury being the city's duty to the street at the place of the accident. Ney *v.* Troy, 3 N. Y. Suppl. 679 [*affirmed* in 123 N. Y. 628, 25 N. E. 952].

An instruction that negligence means a want or lack of ordinary care and prudence, and that ordinary care and prudence is such care and prudence as is exercised by the mass of mankind in their own daily affairs, without qualification, or limiting it to the same or similar circumstances to those in issue, is error, and such error is not cured by afterward correctly instructing the jury. Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303.

An instruction that the city is not an insurer of the safety of persons traveling upon its sidewalks accompanied by the true rule as to the city's liability is not impertinent and uncalled for. Lindsay *v.* Des Moines, 74 Iowa 111, 37 N. W. 9; Gilson *v.* Cadillac, 134 Mich. 189, 95 N. W. 1084; Meisner *v.* Dillon, 29 Mont. 116, 74 Pac. 130.

3. Chicago *v.* Stearns, 105 Ill. 554 (holding that the necessity for notice is inferable from the words "was permitted to remain out of repair" used in an instruction); Spicer *v.* Webster City, 118 Iowa 561, 92 N. W. 884; Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303 (holding that the instruction should be so framed as to permit the jury to find whether under all the facts and circumstances of the case the conditions were such as to bring constructive notice home to defendant).

An instruction that notice to a councilman was notice to the council is not an answer to a request to charge that notice to a council member was notice to the municipality. Frazier *v.* Butler Borough, 172 Pa. St. 407, 33 Atl. 691, 51 Am. St. Rep. 739.

4. *Massachusetts.*— Parker *v.* Lowell, 11 Gray 353.

Missouri.— Drake *v.* Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292.

Nebraska.— Kearney *v.* Thoemason, 25 Nebr. 147, 41 N. W. 115.

Ohio.— Toledo *v.* Nitz, 23 Ohio Cir. Ct. 350.

Pennsylvania.—Weir *v.* Plymouth Borough, 148 Pa. St. 566, 24 Atl. 94.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

Compare Boyd *v.* Ames, 110 Iowa 749, 82 N. W. 774.

An instruction relating solely to the measure of damages, and the elements thereof, in the event defendant is found guilty of negligence, need not refer to the care exercised by plaintiff nor need it include the hypothesis that plaintiff used due care and diligence to be cured of his injuries, that being a matter in mitigation of damages and the subject of a proper instruction for defendant. Sheridan *v.* Hibbard, 119 Ill. 307, 9 N. E. 901 [*affirming* 19 Ill. App. 421].

An instruction which substitutes the judgment of the jury as to what would be a fit improvement of a street for that of the city council is erroneous. Clay City *v.* Abner, 82 S. W. 276, 26 Ky. L. Rep. 602.

Special charges, requested by counsel, should be complete and state the law correctly and clearly within themselves. Thus, a charge that it is "a question of fact for the jury to determine, from the evidence, whether the city had either actual or constructive notice of the defect, and if the jury find that the city did not have such notice, the plaintiff" could not recover, without defining constructive notice, and following a general charge, which contained no definition of constructive notice, might have misled the jury and should not have been given, although, standing alone, it does not constitute reversible error. Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

5. See Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986; Vocke *v.* Chicago, 208 Ill. 192, 70 N. E. 325; Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416.

Instructions held misleading: That if plaintiff was injured on the street by being pressed in a crowd of people or by horses or carriages running against her, or in any other way than by a defect in a sidewalk, she cannot recover, in the absence of testimony tending to show that the injury was received in another way than by a defective sidewalk. Smalley *v.* Appleton, 70 Wis. 340, 35 N. W. 729. Upon the question of defendant's negligence in respect to defective or obstructed streets or sidewalks. Chicago *v.* Bixby, 84 Ill. 82, 25 Am. Rep. 429; Chicago *v.* Scholten, 75 Ill. 468; Kornazsewska *v.* West Chicago St. R. Co., 76 Ill. App. 366; Monies *v.* Lynn, 124 Mass. 165; O'Malley *v.* Lexington, 99 Mo. App. 695, 74 S. W. 890; Guthrie *v.* Swan, 5 Okla. 779, 51 Pac. 562; Sullivan *v.* Dallas City Nat. Bank, 27 Tex. Civ. App. 359, 65 S. W. 39. On the question of defendant's notice of the defect or obstruction. Sterling *v.* Merrill, 124 Ill. 522, 17 N. E. 6 [*affirming* 25 Ill. App. 596]; Clark *v.* Brookfield, 97 Mo. App. 16, 70 S. W. 934; Nitz *v.* Toledo, 22 Ohio Cir. Ct. 454, 12 Ohio Cir. Dec. 357; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762; Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130. On the question of damages. Finley *v.* Williamsburg, 71 S. W. 502, 24 Ky. L. Rep. 1536.

Instructions held not misleading: On the question of defendant's negligence, in respect to depositing a carcass near plaintiff's residence (Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012); or in respect to defective or obstructed streets or sidewalks (Denver *v.* Murray, 18 Colo. App. 142, 70

conflicting or inconsistent,[6] ambiguous,[7] suggestive or argumentative,[8] or immaterial.[9] The instructions must also not give undue prominence to particular facts or issues in the case;[10] nor omit or refuse to charge upon material facts or issues, on which there is evidence,[11] such as the municipal duty for breach of which the suit is brought,[12] or the subject of notice,[13] or upon the time thereafter for repair before liability for negligence would accrue;[14] nor fail to point out the character of defect of which notice would be imputed,[15] unless the evidence is sufficient to establish such questions as a matter of law.[16] Mere errors of form or phraseology which could not have misled the jury are immaterial.[17] A party to the suit can-

Pac. 440; Aurora *v.* Rockabrand, 149 Ill. 399, 36 N. E. 1004 [*affirming* 47 Ill. App. 106]; Indianapolis *v.* Doherty, 71 Ind. 5; Indianapolis St. R. Co. *v.* James, 35 Ind. App. 543, 74 N. E. 536; Bussell *v.* Ft. Dodge, 128 Iowa 308, 101 N. W. 1126; Snyder *v.* Ward, 125 Iowa 146, 100 N. W. 348; Lindsay *v.* Des Moines, 74 Iowa 111, 37 N. W. 9; Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015; Ghenn *v.* Provincetown, 105 Mass. 313; Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 27 S. W. 615; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292; Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114; Grand Island *v.* Oberschulte, 36 Nebr. 696, 55 N. W. 301; Morrison *v.* Syracuse, 45 N. Y. App. Div. 421, 61 N. Y. Suppl. 313; Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74); on the question of defendant's notice or knowledge of the defect or obstruction (Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296; Kelleher *v.* Keokuk, 60 Iowa 473, 15 N. W. 280; Kansas City *v.* Bradbury, 45 Kan. 381, 25 Pac. 889, 23 Am. St. Rep. 731; Toledo *v.* Nitz, 23 Ohio Cir. Ct. 350); and on the question of damages (Grattan *v.* Williamston, 116 Mich. 462, 74 N. W. 668; Toledo *v.* Clopeck, 17 Ohio Cir. Ct. 585, 9 Ohio Cir. Dec. 432; Jones *v.* Seattle, 23 Wash. 753, 63 Pac. 553).

6. Denver *v.* Hickey, 9 Colo. App. 137, 47 Pac. 908; Wright *v.* Kansas City, 187 Mo. 678, 86 S. W. 452; Biermann *v.* St. Louis, 120 Mo. 457, 25 S. W. 369; Wallis *v.* Westport, 82 Mo. App. 522; Raynor *v.* Wymore, 3 Nebr. (Unoff.) 51, 90 N. W. 759.

7. Muncie *v.* Spence, 33 Ind. App. 599, 71 N. E. 907.

8. Morehouse *v.* Dixon, 39 Ill. App. 107; Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614.

9. Shannon *v.* Tama City, 74 Iowa 22, 36 N. W. 776; McDonald *v.* Troy, 13 N. Y. Suppl. 385, holding an instruction for defendant, that a verdict for it on the ground of plaintiff's failure to present his claim to the controller will not prevent plaintiff bringing another action, properly refused as immaterial.

10. Bibbins *v.* Chicago, 193 Ill. 359, 61 N. E. 1030 [*reversing* 94 Ill. App. 319]; Morehouse *v.* Dixon, 39 Ill. App. 107; Haney *v.* Kansas, 94 Mo. 334, 7 S. W. 417.

11. *Georgia.*— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois.— Elgin *v.* Hoag, 25 Ill. App. 650.

Indiana.—Franklin *v.* Harter, 127 Ind. 446, 26 N. E. 882; Indianapolis St. R. Co. *v.* James, 35 Ind. App. 543, 74 N. E. 536.

Kentucky.— Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448.

Missouri.— Kossman *v.* St. Louis, 153 Mo. 293, 54 S. W. 513; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292.

Nebraska.— Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964.

New York.— Tobey *v.* Hudson, 49 Hun 318, 2 N. Y. Suppl. 180.

Texas.— San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

12. Rock Island *v.* Carlin, 44 Ill. App. 610; Thuis *v.* Vincennes, (Ind. App. 1905) 73 N. E. 141; Garrett *v.* Buffalo, 7 N. Y. St. 96; Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387.

13. *Georgia.*— Bellamy *v.* Atlanta, 75 Ga. 167.

Kentucky.— Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448.

Missouri.— Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717; Doherty *v.* Kansas City, 105 Mo. App. 173, 79 S. W. 716.

Nebraska.— South Omaha *v.* Hager, 66 Nebr. 803, 92 N. W. 1017, 95 N. W. 13.

North Carolina.— Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

Texas.— Klein *v.* Dallas, 71 Tex. 280, 9 S. W. 90.

Wisconsin.— Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

14. Midway *v.* Lloyd, 74 S. W. 195, 24 Ky. L. Rep. 2448.

15. Duncan *v.* Philadelphia, 173 Pa. St. 550, 34 Atl. 235, 51 Am. St. Rep. 780; Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130.

Where the defect is a secret one it is error for the court not to point out to the jury the nature and character of the defect, notice of which would be imputed to the city. Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130.

16. South Omaha *v.* Hager, 66 Nebr. 803, 92 N. W. 1017, 95 N. W. 13; New York *v.* Sheffield, 4 Wall. (U. S.) 189, 18 L. ed. 416.

17. Upper Alton *v.* Green, 112 Ill. App. 439; Indianapolis *v* Doherty, 71 Ind. 5; Kansas City *v.* Bermingham, 45 Kan. 212, 25 Pac. 569; San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764.

not complain of an instruction which is more favorable than one requested by him, or than he is entitled to.[18] Where an instruction is requested, the court instead of refusing it may properly modify it, if it is defective, and then give it as an instruction to the jury.[19]

b. Invading Province of Jury. Such instructions must not invade the province of the jury by commenting on the evidence;[20] by assuming or undertaking to determine the existence or non-existence of material facts, and thereby excluding them from the consideration of the jury;[21] by assuming or deciding that defendant was or was not guilty of negligence in a given particular,[22] that a reasonably safe condition did or did not exist at the place and time of the accident,[23] or that the city did or did not have constructive notice of the defect or obstruction;[24] or

18. Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092; Dewey *v.* Detroit, 15 Mich. 307; Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

19. *District of Columbia.*— District of Columbia *v.* Dietrich, 23 App. Cas. 577.

Illinois.— Cullom *v.* Justice, 161 Ill. 372, 43 N. E. 1098; Chicago *v.* Sheehan, 113 Ill. 658; Streator *v.* O'Brien, 103 Ill. App. 85.

Massachusetts.— Davis *v.* Rich, 180 Mass. 235, 62 N. E. 375.

Michigan.— Tice *v.* Bay City, 84 Mich. 461, 47 N. W. 1062.

Minnesota.— Nichols *v.* St. Paul, 44 Minn. 494, 47 N. W. 168.

Missouri.— Drake *v.* Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759.

20. *Illinois.*— Kornazsewska *v.* West Chicago St. R. Co., 76 Ill. App. 366, holding an instruction erroneous in telling the jury to disregard the evidence of an impeached witness, since impeachment goes only to the weight of the testimony.

Iowa.— Hofacre *v.* Monticello, 128 Iowa 239, 103 N. W. 488 (holding that an instruction that the opinion of experts who had treated plaintiff and had opportunities of knowing her condition for a longer period of time might be entitled to greater weight than the opinions of experts who based their opinion on hypothetical questions or less extensive observations or examinations while sometimes justified is not commendable); Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

Missouri.— Mitchell *v.* Plattsburg, 33 Mo. App. 555, holding, however, that an instruction that it did not follow that defendant was not liable because passers-by did not observe the defects or because they were not of a character to attract the attention of passers-by, was not a comment on the evidence, but a direction as to the character of the defect, for permitting which defendant would be liable.

Virginia.— Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

Wisconsin.— Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

21. *Colorado.*— Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092.

Illinois.— Kornazsewska *v.* West Chicago St. R. Co., 76 Ill. App. 366.

Indiana.— Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246.

Iowa.— Parmenter *v.* Marion, 113 Iowa 297, 85 N. W. 90.

Kentucky.— Clay City *v.* Abner, 82 S. W. 276, 26 Ky. L. Rep. 602, holding that an instruction assuming a dedication and acceptance of a city street, and that the city was bound to keep the same in a reasonably safe condition, is erroneous.

Maryland.— Magaha *v.* Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

Missouri.— Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292.

Texas.— Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

Utah.— Tucker *v.* Salt Lake City, 10 Utah 173, 37 Pac. 261, holding an instruction erroneous for assuming that the city need not keep the whole width of its sidewalks in good condition.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

22. *Georgia.*— Columbus *v.* Ogletree, 96 Ga. 177, 22 S. E. 709.

Illinois.— Chicago *v.* Sheehan, 113 Ill. 658 (instruction held, however, not to assume that a pile of stones made a street in an unsafe condition for ordinary travel); Chicago *v.* Scholten, 75 Ill. 468; Smith *v.* Gilman, 38 Ill. App. 393.

North Carolina.— Cresler *v.* Asheville, 134 N. C. 311, 46 S. E. 738.

Ohio.— Strong *v.* Pickering Hardware Co., 9 Ohio Cir. Ct. 248, 4 Ohio Cir. Dec. 268.

Texas.— Sullivan *v.* Dallas City Nat. Bank, 27 Tex. Civ. App. 359, 65 S. W. 39.

Virginia.— Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

Wisconsin.— Hill *v.* Fond du Lac, 56 Wis. 242, 14 N. W. 25.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

23. Jerseyville *v.* Kingston, 15 Ill. App. 161; Covington *v.* Asman, 113 Ky. 608, 68 S. W. 646, 24 Ky. L. Rep. 415; Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347, 27 S. W. 615.

24. Hoopeston *v.* Eads, 32 Ill. App. 75 (holding that where evidence of notice is inconclusive it is prejudicial error to charge that notice will be presumed from the existence of the defect for a considerable time); Wilberding *v.* Dubuque, 111 Iowa 484, 82

by assuming that a partially graded street was presumably safe for its entire length,[25] unless such facts are conceded or conclusively established.[26] But the court may instruct the jury as to what facts, as a matter of law, would constitute negligence, and leave it to the jury to determine whether such facts have been established.[27]

e. Conformity to Pleadings and Proof. The instructions must conform and be confined to the issues made by the pleading and proof,[28] and to the facts admit-

N. W. 957; Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831; Robinson *v.* Cedar Rapids, 100 Iowa 662, 69 N. W. 1064; Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130.

25. Guthrie *v.* Swan, 3 Okla. 116, 41 Pac. 84; Tucker *v.* Salt Lake City, 10 Utah 173, 37 Pac. 261.

26. Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440 (holding that an instruction that leaves established facts to the jury is faulty); Hart *v.* New Haven, 130 Mich. 181, 89 N. W. 677; Fee *v.* Columbus Borough, 168 Pa. St. 382, 31 Atl. 1076.

Where a charge assumes that the streets in question were public streets and highways, and is based upon that assumption, positive instructions to that effect need not be given unless a special charge thereon is requested. Klein *v.* Dallas, 71 Tex. 280, 8 S. W. 90.

27. Joliet *v.* Fitzgerald, 38 Ill. App. 483; McGrath *v.* Bloomer, 73 Wis. 29, 40 N. W. 585.

28. *Georgia.*— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95.

Illinois.— Wilmette *v.* Brachle, 209 Ill. 621, 71 N. E. 41; Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498 [*affirming* 71 Ill. App. 423]; Beardstown *v.* Smith, 150 Ill. 169, 37 N. E. 211; Chicago *v.* Scholten, 75 Ill. 468; Morehouse *v.* Dixon, 39 Ill. App. 107.

Indiana.— Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412.

Iowa.— Cressy *v.* Postville, 59 Iowa 62, 12 N. W. 757, holding that where the evidence shows an injury solely from stepping into a hole it is error to instruct as to injuries caused by stepping on ice.

Kansas.— Rainey *v.* Lawrence, 70 Kan. 518, 79 Pac. 116.

Kentucky.— Louisville *v.* Shanahan, 56 S. W. 808, 23 Ky. L. Rep. 163, holding that where the pleading does not raise the question as to whether the person who did the work was an independent contractor, an instruction upon that question is properly refused.

Maryland.— Baltimore *v.* Beck, 96 Md. 183, 53 Atl. 976.

Massachusetts.— Hilton *v.* Boston, 171 Mass. 478, 51 N. E. 114.

Michigan.— Girard *v.* Kalamazoo, 92 Mich. 610, 52 N. W. 1021; Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584; Moon *v.* Ionia, 81 Mich. 635, 46 N. W. 25.

Missouri.— Drake *v.* Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759; Reedy *v.* St. Louis Brewing Assoc., 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805; Goltz *v.* Griswold, 113 Mo. 144, 20 S. W. 1044; Haynes *v.* Trenton, 108 Mo. 123, 18 S. W. 1003; Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Delaplain *v.* Kansas City, 109 Mo. App. 107, 83 S. W. 71; Jackson *v.* Kansas City, 106 Mo. App. 52, 79 S. W. 1174; Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292; Buckley *v.* Kansas City, 95 Mo. App. 188, 68 S. W. 1069.

Nebraska.— McAdams *v.* McCook, 71 Nebr. 789, 99 N. W. 656; Omaha *v.* Coombe, 48 Nebr. 879, 67 N. W. 885; York *v.* Spellman, 19 Nebr. 357, 27 N. W. 213; Crete *v.* Childs, 11 Nebr. 252, 9 N. W. 55.

New Hampshire.— Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895.

New York.— Touhey *v.* Rochester, 64 N. Y. App. Div. 56, 71 N. Y. Suppl. 661; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42, 69 N. Y. Suppl. 1122; Deufel *v.* Long Island City, 19 N. Y. App. Div. 620, 46 N. Y. Suppl. 355; Ney *v.* Troy, 3 N. Y. Suppl. 679 [*affirmed* in 123 N. Y. 628, 25 N. E. 952]; Harrington *v.* Buffalo, 2 N. Y. Suppl. 333.

Oklahoma.— Guthrie *v.* Swan, 6 Okla. 423, 41 Pac. 84.

Texas.— Ware *v.* Shafer, 88 Tex. 44, 29 S. W. 756 [*affirming* (Civ. App. 1894) 27 S. W. 764]; San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28 [*affirmed* in 98 Tex. 151, 81 S. W. 518]; Houston *v.* Bryan, 2 Tex. Civ. App. 553, 22 S. W. 231.

Vermont.— Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

Washington.— McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

Wisconsin.— Benson *v.* Madison, 101 Wis. 312, 77 N. W. 161; Cooper *v.* Milwaukee, 97 Wis. 458, 72 N. W. 1130; Hiner *v.* Fond du Lac, 71 Wis. 74, 36 N. W. 632; Smalley *v.* Appleton, 70 Wis. 340, 35 N. W. 729.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1762.

Illustrations.— Thus an instruction as to negligent construction of a sidewalk or street is erroneous where such negligence is not charged, or there is no evidence thereof. Driscoll *v.* Ansonia, 73 Conn. 743, 47 Atl. 718; Barce *v.* Shenandoah, 106 Iowa 426, 76 N. W. 747; Cressy *v.* Postville, 59 Iowa 62, 12 N. W. 757. So where negligent construction is the matter in issue an instruction as to negligence in repairing is erroneous. Achey *v.* Marion, 126 Iowa 47, 101 N. W. 435. So where plaintiff is entitled to recover on either of two counts, one negligent construction and the other negligence in repairing, an instruction that the city is not liable unless the accident was caused by a loose plank and the city had notice of the defect

ted or proved;[29] otherwise the instruction is erroneous, even though as an abstract proposition it be a correct statement of the law.[30] It is not erroneous to omit proper words of instruction or definition where there is no evidence to require them;[31] nor to give instructions upon the basis of correct and pertinent legal presumptions.[32] An immaterial variance between pleading or proof and instructions does not justify reversal.[33]

d. Construction. The instructions are to be construed as a whole, and the fact that one portion considered separately might be open to objection does not constitute error if the charge is correct in its entirety.[34] A requested instruction

is properly refused. Dallas *v.* Jones, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377. An instruction as to the liability of one who leaves a dangerous hole in a sidewalk is irrelevant in an action against the city for such injury. Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224. Where there was no allegation of defective construction of a sidewalk, it is proper for the court to instruct, where there has been some evidence of defective construction, that there is no evidence of such fact, and thus confine the jury's attention to the issues made by the pleading. Womach *v.* St. Joseph, 168 Mo. 236, 67 S. W. 588.

29. *Illinois.*— Mareck *v.* Chicago, 89 Ill. App. 358.

Missouri.— Hemphill *v.* Kansas City, 100 Mo. App. 563, 75 S. W. 179.

Nebraska.— Omaha *v.* Coombe, 48 Nebr. 879, 67 N. W. 885; Raynor *v.* Wymore, 3 Nebr. (Unoff.) 51, 90 N. W. 759.

New York.— Keane *v.* Waterford, 2 N. Y. Suppl. 182.

Texas.— San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28 [*affirmed* in 98 Tex. 151, 81 S. W. 518].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1762.

Instructions held proper or erroneously refused under the evidence: As to the fact that if lights were necessary and there were none, the absence would be one of the elements in determining whether the barrier was a defect or not. Powers *v.* Boston, 154 Mass. 60, 27 N. E. 995. As to the effect of rain and storms in streets. Beattie *v.* Detroit, 137 Mich. 319, 100 N. W. 574. As to the fact of constructive notice. Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729; Beaver *v.* Eagle Grove, 116 Iowa 485, 89 N. W. 1100; Small *v.* Kansas City, 185 Mo. 291, 84 S. W. 901.

Instructions held erroneous or properly refused as not applicable to the facts: Barce *v.* Shenandoah, 106 Iowa 426, 76 N. W. 747; Kansas City *v.* Bradbury, 45 Kan. 381, 25 Pac. 889, 23 Am. St. Rep. 731; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Haus *v.* Bethlehem, 134 Pa. St. 12, 19 Atl. 437. As to negligence of a contractor. Benson *v.* Madison, 101 Wis. 312, 77 N. W. 161. As to notice to the city of the defect or obstruction. Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624 [*affirming* 99 Ill. App. 418]; Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Monies *v.* Lynn, 121 Mass. 442. As to the exoneration of a city from liability for extraordinary rainfalls. Louisville *v.* Gimpell, 59 S. W. 1096, 22 Ky. L. Rep. 1110. As to the fact of latent defects. Drake *v.* Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759. As to the duty to keep the entire width of the street in repair. Lincoln *v.* Gillilan, 18 Nebr. 114, 24 N. W. 444.

A request for an unqualified instruction that if certain facts are found plaintiff is entitled to recover must be disregarded where there is evidence of other facts having some tendency to show negligence on the part of plaintiff and want of it on the part of defendant. Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

In an action for the death of a fireman caused by the overturning of a hose cart on account of defects in a street, an instruction precluding a recovery if the accident was due to the driver's negligence is erroneous, where there is no evidence that the driver's negligence was the sole cause of the accident. Brabon *v.* Seattle, 29 Wash. 6, 69 Pac. 365.

30. Wilmette *v.* Brachle, 209 Ill. 621, 71 N. E. 41; Chicago *v.* Scholten, 75 Ill. 468; Stein *v.* Council Bluffs, 72 Iowa 180, 33 N. W. 455; Jackson *v.* Kansas City, 106 Mo. App. 52, 79 S. W. 1174; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37. And see cases cited in preceding notes.

31. Cronin *v.* Holyoke, 162 Mass. 257, 38 N. E. 445; Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416; Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

32. Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412 (that a public way existed); Germaine *v.* Muskegon, 105 Mich. 213, 63 N. W. 78; Garrett *v.* Buffalo, 7 N. Y. St. 96.

33. Louisville, etc., R. Co. *v.* Shanks, 132 Ind. 395, 31 N. E. 1111; Hemphill *v.* Kansas City, 100 Mo. App. 563, 75 S. W. 179.

34. *Colorado.*— Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440; Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986.

Illinois.— Macon *v.* Holcomb, 205 Ill. 643, 69 N. E. 79 [*reversing* 109 Ill. App. 135]; Rock Island *v.* Starkey, 189 Ill. 515, 59 N. E. 971 [*reversing* 91 Ill. App. 592]; Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246.

Indiana.— Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728; Indianapolis St. R. Co. *v.* James, 35 Ind. App. 543, 74 N. E. 536.

Iowa.— Correll *v.* Cedar Rapids, 110 Iowa

need not ordinarily be given in its exact language; it is sufficient if it is covered in substance by the instructions as given;[35] nor is it error to refuse a requested instruction which is covered in substance by other instructions given,[36] or to refuse to charge upon an immaterial matter;[37] but it is error to refuse an instruction which is applicable to the case on a material matter if it is not substantially covered by other instructions.[38] An erroneous instruction which positively lays down a rule directly in conflict with the rule laid down in a correct instruction is

333, 81 N. W. 724; Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831; Robinson *v.* Cedar Rapids, 100 Iowa 662, 69 N. W. 1064; Hall *v.* Manson, 90 Iowa 585, 58 N. W. 881; Cosner *v.* Centerville, 90 Iowa 33, 57 N. W. 636; Ross *v.* Davenport, 66 Iowa 548, 24 N. W. 47.

Massachusetts.— Lawrence *v.* New Bedford, 160 Mass. 227, 35 N. E. 459.

Michigan.— Beattie *v.* Detroit, 137 Mich. 319, 100 N. W. 574; Strudgeon *v.* San Beach, 107 Mich. 496, 65 N. W. 616.

Missouri.— Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699; Britton *v.* St. Louis, 120 Mo. 437, 25 S. W. 366; Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122; Barr *v.* Kansas City, 105 Mo. 550, 16 S. W. 483; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292; Quinlan *v.* Kansas City, 104 Mo. App. 616, 78 S. W. 660.

Montana.—Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114.

New York.— Fox *v.* Lansingburgh, 13 N. Y. Suppl. 174; Meigs *v.* Buffalo, 7 N. Y. St. 855.

Ohio.— Peat *v.* Norwalk, 26 Ohio Cir. Ct. 161; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Pennsylvania.—Bloomsburg Steam, etc., Co. *v.* Gardner, 126 Pa. St. 80, 17 Atl. 521.

Texas.— San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922.

Utah.— Scott *v.* Provo City, 14 Utah 31, 45 Pac. 1005.

Wisconsin.— Lyman *v.* Green Bay, 91 Wis. 488, 65 N. W. 167 (holding that a judgment will not be reversed for an instruction that the municipal duty to discover a street defect required greater care than that of an ordinary observer, where it was also charged that defendant was not liable for latent defects unless it knew of them or by reasonable diligence could have known of them); McClure *v.* Sparta, 84 Wis. 269, 54 N. W. 337, 36 Am. St. Rep. 924.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

That the element of notice to a city is not referred to in every instruction or if referred to is incorrectly stated does not render the whole charge erroneous if it is sufficiently set forth in any part of the instruction. Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246; Sheridan *v.* Hibbard, 19 Ill. App. 421 [*affirmed* in 119 Ill. 307, 9 N. E. 901]; Hazard *v.* Council Bluffs, 87 Iowa 51, 53 N. W. 1083; Montgomery *v.* Des Moines, 55 Iowa 101, 7 N. W. 421; Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141.

35. See McCabe *v.* Whitman, 187 Mass. 484, 73 N. E. 535.

36. *Georgia.*— Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois.— Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338; Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035 [*affirming* 81 Ill. App. 456]; Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498 [*affirming* 71 Ill. App. 423]; Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247].

Indiana.— Evansville *v.* Senhenn, 26 Ind. App. 362, 59 N. E. 863; Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729.

Iowa.— Belken *v.* Iowa Falls, 122 Iowa 430, 98 N. W. 296; Beaver *v.* Eagle Grove, 116 Iowa 485, 89 N. W. 1100; Wilberding *v.* Dubuque, 111 Iowa 484, 82 N. W. 957; Shannon *v.* Tama City, 74 Iowa 22, 36 N. W. 776.

Kansas.— Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

Kentucky.— Henderson *v.* Reed, 62 S. W. 1039, 23 Ky. L. Rep. 463.

Massachusetts.— Davis *v.* Rich, 180 Mass. 235, 62 N. E. 375; O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587; Norwood *v.* Somerville, 159 Mass. 105, 33 N. E. 1108; Stevenson *v.* Joy, 152 Mass. 45, 25 N. E. 78; Alger *v.* Lowell, 3 Allen 402.

Michigan.— Hart *v.* New Haven, 130 Mich. 181, 89 N. W. 677.

Missouri.—Wright *v.* Kansas City, 187 Mo. 678, 86 S. W. 452; Haney *v.* Kansas City, 94 Mo. 334, 7 S. W. 417; Huff *v.* Marshall, 97 Mo. App. 542, 71 S. W. 477.

New York.— Keane *v.* Waterford, 8 N. Y. Suppl. 790 [*affirmed* in 130 N. Y. 188, 29 N. E. 130].

Tennessee.— Oliver *v.* Nashville, 106 Tenn. 273, 61 S. W. 89; Nellums *v.* Nashville, 106 Tenn. 222, 61 S. W. 88.

Texas.— San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28; Marshall *v.* McAllister, (Civ. App. 1898) 43 S. W. 1043.

Vermont.— Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

Wisconsin.— Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 1758–1760.

37. Masters *v.* Troy, 50 Hun (N. Y.) 485, 3 N. Y. Suppl. 450 [*affirmed* in 123 N. Y. 628, 25 N. E. 952].

38. Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728; Walsh *v.* Central New York Tel., etc., Co., 176 N. Y. 163, 68 N. E. 146 [*reversing* 75 N. Y. App. Div. 1, 77 N. Y. Suppl. 798]; Kane *v.* Yonkers, 169 N. Y. 392, 62 N. E. 428 [*reversing* 43 N. Y. App. Div. 599, 60 N. Y. Suppl. 216]; Jones *v.* Greensboro, 124 N. C. 310, 32 S. E. 675.

not cured by the latter, where it is impossible to say which instruction the jury followed.[39]

e. Contributory Negligence. The above general rules apply to instructions on the questions of plaintiff's contributory negligence or freedom therefrom.[40] Such instructions should be clear, concise, and accurate, in stating and defining the facts and issue of contributory negligence,[41] as in respect to the degree of care required of plaintiff under the circumstances existing at the time and place of the accident,[42] stating to the jury what matters may be considered by it in determining such issue,[43] and the law applicable to the case.[44] Such instructions

39. Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632; Macon *v.* Holcomb, 205 Ill. 643, 69 N. E. 79 [*reversing* 109 Ill. App. 135].

40. See Sheridan *v.* Hibbard, 119 Ill. 307, 9 N. E. 901 [*affirming* 19 Ill. App. 421] (holding that an instruction as to plaintiff's right to recover for personal injuries resulting from the alleged negligence of defendant should include the hypothesis of ordinary care on the part of plaintiff to avoid injury); Burdoin *v.* Trenton, 116 Mo. 358, 22 S. W. 728 (holding that an instruction that the jury must find that plaintiff "without fault or want of proper care on her part" fell is substantially equivalent to requiring them to find that she used ordinary care); Lynchburg *v.* Wallace, 95 Va. 640, 29 S. E. 675.

41. See Thuis *v.* Vincennes, (Ind. App. 1905) 73 N. E. 141, 35 Ind. App. 350, 73 N. E. 1098; Brightman *v.* Bristol, 65 Me. 426, 20 Am. Rep. 711; McLaughlin *v.* Philadelphia Traction Co., 175 Pa. St. 565, 34 Atl. 863; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 435.

42. *Arizona.*— Huachuca Water Co. *v.* Swain, 4 Ariz. 113, 77 Pac. 619.

Illinois.— Chicago *v.* Moore, 139 Ill. 201, 28 N. E. 1071; Chicago *v.* Sheehan, 113 Ill. 658; Chicago *v.* Morse, 33 Ill. App. 61.

Indiana.—Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

Iowa.— Bell *v.* Clarion, 115 Iowa 357, 88 N. W. 824; Ely *v.* Des Moines, 86 Iowa 55, 52 N. W. 475, 17 L. R. A. 124, holding it reversible error to refuse an instruction to the effect that if it was imprudent to enter an alley on account of darkness and if plaintiff insisted upon going in there when he might have taken a nearer and safer route, he was guilty of contributory negligence.

Kansas.— Kinsley *v.* Morse, 40 Kan. 577, 20 Pac. 217.

Michigan.— Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191.

Missouri.— Perrette *v.* Kansas City, 162 Mo. 238, 62 S. W. 448; Jackson *v.* Kansas City, 106 Mo. App. 52, 79 S. W. 1174; Plummer *v.* Kansas City, 48 Mo. App. 482, holding that an instruction that the jury should not find for defendant on the ground of plaintiff's negligence, unless plaintiff acted recklessly or heedlessly, is erroneous, since recklessness implies wilfulness and wantonness.

New York.—Hawley *v.* Gloversville, 4 N. Y. App. Div. 343, 38 N. Y. Suppl. 647.

Pennsylvania.— Bradwell *v.* Pittsburgh, etc., Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623.

Virginia.—Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387.

Wisconsin.—Jung *v.* Stevens Point, 74 Wis. 547, 43 N. W. 513.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

Instructions as to the degree of care required of one of defective sight or locomotion see Kaiser *v.* Hahn, 128 Iowa 561, 102 N. W. 504; Winn *v.* Lowell, 1 Allen (Mass.) 177; Smart *v.* Kansas City, 91 Mo. App. 586.

Instructions as to the degree of care of one having knowledge of the defect or obstruction see Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Cohn *v.* Kansas City, 108 Mo. 387, 18 S. W. 973; Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520; McDonald *v.* Holbrook, etc., Contracting Co., 105 N. Y. App. Div. 90, 93 N. Y. Suppl. 920; Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

43. Donoho *v.* Vulcan Iron Works, 75 Mo. 401 [*affirming* 7 Mo. App. 447], holding that a minor is entitled to an instruction that the jury should consider his age and whether he possessed the discretion of an adult person.

44. *Illinois.*— Hoopeston *v.* Eads, 32 Ill. App. 75, holding an instruction erroneous as shifting the burden of proving contributory negligence to defendant.

Massachusetts.— Loftus *v.* North Adams, 160 Mass. 161, 35 N. E. 674, holding that an instruction that plaintiff cannot recover if he was "more or less drunk, and this state was a contributing cause to the injury" is properly modified by adding that he cannot recover "if without drunkenness he would not have been injured."

Ohio.—Toledo *v.* Nitz, 23 Ohio Cir. Ct. 350.

Virginia.— Richmond *v.* Leaker, 99 Va. 1, 37 S. E. 348.

Washington.— Reed *v.* Spokane, 21 Wash. 218, 57 Pac. 803.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

Where the issue of plaintiff's intoxication is submitted to the jury, defendant is entitled to an instruction that if plaintiff was intoxicated such intoxication is evidence from which the jury may infer that plaintiff was guilty of contributory negligence, the instruction being requested in conjunction with another connecting such intoxication with

must not be confusing, misleading,[45] or argumentative;[46] must conform and be confined to the issues and evidence in the case;[47] and must not invade the province of the jury by assuming or determining the existence or non-existence of facts, or by deciding that they do or do not establish reasonable care or freedom therefrom,[48] nor omit or refuse to charge thereon,[49] unless the evidence is sufficient to justify the withdrawal of such issue from the jury.[50] A formal or technical error in one instruction on such question may be corrected in another part of the instructions;[51] and a requested instruction is sufficiently complied with if it is substantially covered by the instructions as given.[52]

the accident. Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303.

45. *Illinois.*— Vocke *v.* Chicago, 208 Ill. 192, 70 N. E. 325; Wheaton *v.* Hadley, 131 Ill. 640, 23 N. E. 422 [*affirming* 30 Ill. App. 564]; Lemont *v.* Rood, 18 Ill. App. 245.

Iowa.— Keim *v.* Ft. Dodge, 126 Iowa 27, 101 N. W. 443.

Michigan.— Beaudin *v.* Bay City, 136 Mich. 333, 99 N. W. 285; Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614.

Missouri.— Barr *v.* Kansas City, 105 Mo. 550, 16 S. W. 483.

New Hampshire.— Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Wisconsin.—Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695 (holding that an instruction that a traveler may indulge in a presumption that the street on which he travels is not defective, while correct in the abstract, is misleading where plaintiff admitted she knew of the defect in question); Cronin *v.* Delavan, 50 Wis. 375, 7 N. W. 249.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

46. Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614.

47. *Illinois.*—Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338.

Iowa.— Bell *v.* Clarion, 115 Iowa 357, 88 N. W. 824; Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833.

Kansas.— Rainey *v.* Lawrence, 70 Kan. 518, 79 Pac. 116.

Massachusetts.— Hilton *v.* Boston, 171 Mass. 478, 51 N. E. 114.

Michigan.— Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454.

Missouri.—Womach *v.* St. Joseph, 168 Mo. 236, 67 S. W. 588; Kossman *v.* St. Louis, 153 Mo. 293, 54 S. W. 513; Williams *v.* Hannibal, 94 Mo. App. 549, 68 S. W. 380.

Ohio.— Peat *v.* Norwalk, 26 Ohio Cir. Ct. 161; Werner *v.* Cincinnati, 23 Ohio Cir. Ct. 475; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. 142, 10 Ohio Cir. Dec. 762.

Texas.— Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884; Luke *v.* El Paso, (Civ. App. 1900) 60 S. W. 363, as to fast driving.

Virginia.—Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

Washington.— Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

Wisconsin.— Jochem *v.* Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

48. *Illinois.*— Sandwich *v.* Dolan, 133 Ill. 177, 24 N. E. 526, 23 Am. St. Rep. 598 [*reversing* 34 Ill. App. 199, and *distinguishing* Aurora *v.* Hillman, 90 Ill. 61]; Galesburg *v.* Hall, 45 Ill. App. 290; Gilman *v.* Haley, 7 Ill. App. 349.

Iowa.— Mathews *v.* Cedar Rapids, 80 Iowa 459, 45 N. W. 894, 20 Am. St. Rep. 436.

Massachusetts.— O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587.

Missouri.— Coffey *v.* Carthage, 186 Mo. 573, 85 S. W. 532.

Texas.— San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28 [*modified* in 98 Tex. 151, 81 S. W. 518]; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922.

Wisconsin.— Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890.

United States.— Swift *v.* Langbein, 127 Fed. 111, 62 C. C. A. 111 [*affirming* 121 Fed. 416].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

49. *Colorado.*— Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632.

Idaho.— Griffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Illinois.— Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683.

Iowa.— McKern *v.* Albia, 69 Iowa 447, 29 N. W. 421.

Missouri.— Powers *v.* Penn Mut. L. Ins. Co., 91 Mo. App. 55.

Nebraska.— Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

50. Dallas *v.* Meyers, (Tex. Civ. App. 1900) 55 S. W. 742.

51. Bell *v.* Clarion, 115 Iowa 357, 88 N. W. 824; Parker *v.* Springfield, 147 Mass. 391, 18 N. E. 70; Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022; Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292.

52. *Iowa.*—Larsh *v.* Des Moines, 74 Iowa 512, 38 N. W. 384.

Kansas.— Kansas City *v.* Bermingham, 45 Kan. 212, 25 Pac. 569.

Massachusetts.— Smith *v.* Lowell, 6 Allen 39.

North Carolina.— Whitford *v.* Newbern, 111 N. C. 272, 16 S. E. 327.

Texas.— San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764.

11. VERDICT, FINDINGS, AND JUDGMENT — a. In General. The rules applicable to verdicts and findings in civil actions generally[53] govern general[54] and special[55] verdict and findings in actions against a municipality for tort. Thus, in order to sustain a judgment in such cases, the verdict or findings must be definite and unambiguous as to all material facts;[56] and must be supported by the evidence,[57] and responsive to the issues or instructions;[58] and if the verdict or findings are,

Washington.— Reed *v.* Spokane, 21 Wash. 218, 57 Pac. 803.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1761.

53. See, generally, TRIAL.

54. See cases cited *infra*, this and following notes.

A verdict cures all formal defects.— Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386 [*affirming* 104 Ill. App. 376].

Verdict should be for that party in whose favor is the preponderance or greater weight of evidence. Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605.

55. See Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051, holding that where there was no notice that the defect was caused by snow, as is required by Gen. St. § 2673, defendant was entitled to an explicit finding, if one were possible, as to whether it was the snow that caused the accident.

A contractor bound to keep in repair, who is called in to defend, may not demand a special finding that the accident was caused by municipal negligence as to construction. Harvey *v.* Chester, 211 Pa. St. 563, 61 Atl. 118.

Where the element of responsible causation appears as a matter of law from the evidence and other facts found, a special finding on the question of proximate cause is not necessary. Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051.

Admissions of counsel on the trial obviate the necessity of findings of the same fact. Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045.

An unqualified statement in a finding that a certain thing was the probable cause of the accident imports that it was in fact the cause. Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051, holding that a finding that plaintiff slipped on a sidewalk and was unable to save himself from falling "probably because of snow upon said stone" imports that the snow was the probable cause of the accident.

56. Goshen *v.* Alford, 154 Ind. 58, 55 N. E. 27; McQueen *v.* Elkhart, 14 Ind. App. 671, 43 N. E. 460 (holding that a finding that plaintiff "walked with ordinary care and at her ordinary gait" is not sufficient to warrant the court in holding that she was free from contributory negligence); Gaston *v.* Bailey, 14 Ind. App. 581, 43 N. E. 254 (facts found insufficient to sustain judgment against abutting owner); Bluffton *v.* McAfee, 12 Ind. App. 490, 40 N. E. 549 (holding that, where the only fact found showing the care exercised by plaintiff, who was injured in the daytime by reason of a defect in a sidewalk known and visible, was that at the time of the accident she "was walking slowly," the special finding was insufficient to support a judgment in her favor); Elwood *v.* Carpenter, 12 Ind. App. 459, 40 N. E. 548; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182; Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643; Klatt *v.* Milwaukee, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 759.

A special verdict in the disjunctive on a material point, as that the street was "in a defective or dangerous condition or out of repair," without any other fact to support it, fails to show actionable negligence on the part of the city, and is fatally defective. Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303.

A special finding that defendant had no notice of the defective condition of the walk before the time of the accident negatives the existence of constructive as well as actual notice, and entitles defendant to judgment. Bergvin *v.* Chippewa Falls, 82 Wis. 505, 52 N. W. 588.

To authorize a verdict for injuries sustained by contact with a wire in a street, the jury must find that the falling of the wire rendered travel dangerous to pedestrians using the same with ordinary care, that plaintiff was injured by contact with the wire while using the street with such care, and that the dangerous obstruction of the street by the fallen wire was known, or by the exercise of ordinary care could have been known, to defendants city and telephone company in time to have enabled them to remove the wire before the injury. West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838.

57. Hoyt *v.* Danbury, 69 Conn. 341, 37 Atl. 1051 (holding, however, that it is not necessary that the triers should be free from all reasonable doubt as to the probable conclusions to be drawn from the evidence, but it is enough if the judgment rests upon a probability so strong as to induce a reasonable belief in an impartial mind); Bluffton *v.* McAfee, 23 Ind. App. 112, 53 N. E. 1058 (holding that the fact that a pedestrian knew of a defect in a sidewalk a month before her injury is not inconsistent with a finding that she had no knowledge of it when injured); Nicholas *v.* Peck, 20 R. I. 533, 40 Atl. 418, 21 R. I. 404, 43 Atl. 1038.

58. Galveston *v.* Hemmis, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 828, holding a verdict for plaintiff not in violation of an instruction that if the jury believe plaintiff had equal means of knowing the condi-

as to a substantial matter, inexplicit or defective,[59] or unsupported by the proof,[60] a verdict thereon may be set aside and a new trial granted.[61] Nor can a judgment be based upon inconsistent findings,[62] except where the inconsistency is an immaterial one.[63]

b. General Verdict and Special Findings. A general verdict or finding carries with it all pertinent and necessary averments and implications and warrants judgment thereon,[64] unless it is in irreconcilable conflict with some adverse special finding on a material point, in which case the special finding controls, and judgment may be entered thereon notwithstanding the general verdict;[65] and this antagonism must be apparent upon the face of the record before the court can be called upon to direct judgment in favor of the party against whom a general verdict has been rendered.[66] But every reasonable presumption should be indulged against the special findings and in support of the general verdict, and if the general verdict thus aided is not in irreconcilable conflict with the findings it must stand;[67] and nothing will be presumed in support of the special findings as against the general verdict.[68]

c. Special Interrogatories. Special interrogatories in an action in tort against a municipality are governed by the rules applicable to such questions in civil actions generally.[69] The submission of such interrogatories is largely within the

tion of the sidewalk where he was injured as defendant and the defect was patent, open, and visible, they should find for defendant. Drake *v.* Seattle, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844.

Notice.—A special verdict is not defective in failing to find whether notice of an accident was served upon the city where only the sufficiency of the notice and not its service is questioned. Salzer *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20.

59. Munley *v.* Scranton, 4 Pa. Dist. 117; Salzer *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20.

60. Hutchings *v.* Sullivan, 90 Me. 131, 37 Atl. 883; Parris *v.* Green Island, 14 N. Y. Suppl. 703 (holding that the evidence on contributory negligence being strong and clear and the jury having failed to take the same into consideration and give it due weight, the court should set aside the verdict of the jury and grant a new trial); Kolb *v.* Knoxville, 111 Tenn. 311, 76 S. W. 823.

A verdict will not be set aside merely because the jury fail to find certain facts on undisputed evidence where such facts, if found, would not have changed the result. Ft. Wayne *v.* Durnell, 13 Ind. App. 669, 42 N. E. 242.

61. Parris *v.* Green Island, 14 N. Y. Suppl. 703; Salzer *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20.

62. Benson *v.* Madison, 101 Wis. 312, 77 N. W. 161 (holding that findings that the apron over a gutter was not in place at the time of the accident and that its absence was not through any fault or neglect of the contractor are inconsistent where there is no evidence that it had been removed after the contractor had put it in place as testified by him); Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

63. Robinson *v.* Washburn, 81 Wis. 404, 51 N. W. 578, holding that, where certain findings amounted to a general verdict for defendant, an inconsistency between a finding that plaintiff was injured by reason of the defect and one that plaintiff suffered no damage therefrom is immaterial.

64. Wood *v.* Danbury, 72 Conn. 69, 43 Atl. 554; South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396; Lyman *v.* Green Bay, 91 Wis. 488, 65 N. W. 167; McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

65. Smith *v.* McCarthy, 33 Ill. App. 176 (holding a special finding, in an action for injuries caused by the giving way of a guard-rail of a basement area, that plaintiff was leaning against the rail, not inconsistent with a general verdict for plaintiff); South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396; Buscher *v.* Lafayette, 8 Ind. App. 590, 36 N. E. 371; Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149.

66. Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149.

67. South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396; Poseyville *v.* Lewis, 126 Ind. 80, 25 N. E. 593; Mishawaka *v.* Kirby, 32 Ind. App. 233, 69 N. E. 481; Jewell *v.* Sullivan, 5 Ind. App. 188, 31 N. E. 829; Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149; Ft. Wayne *v.* Patterson, 3 Ind. App. 34, 29 N. E. 167; Evansville *v.* Thacker, 2 Ind. App. 370, 28 N. E. 559, holding a special finding that plaintiff knew of the defect six or eight months before the accident not inconsistent with a general verdict for plaintiff.

68. Mishawaka *v.* Kirby, 32 Ind. App. 233, 69 N. E. 481; Bluffton *v.* McAfee, 23 Ind. App. 112, 53 N. E. 1058; Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149.

69. See Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 (holding that where plaintiff was partially blind the question whether it was so imprudent for her to go into the street unattended in her then con-

discretion of the court,[70] and it need not submit them in the form in which they are requested, if they are substantially and intelligently submitted in other forms;[71] and may refuse to submit them at all, if they are unsupported by the evidence,[72] or are upon immaterial matters;[73] or where they are informal, irrelevant, insufficient, or likely to mislead the jury.[74] But it is error to refuse such interrogatories, in the proper form upon material matters.[75]

d. Verdict Against Joint Defendants. A verdict in an action against a municipality and the person causing the defect or obstruction may, if the evidence justifies it, be for or against both defendants or against one and in favor of the other;[76] and in case the verdict is against the city and in favor of a co-defendant, the city cannot move for a new trial on the ground that the verdict ought to have been against the co-defendant also, unless it makes the co-defendant a party to the motion.[77] But where the municipal liability depends upon negligence or other tort primarily chargeable to the other defendant, judgment cannot be entered on a verdict finding the city guilty, but the other defendant not guilty.[78] The same rules as to consistency and sufficiency of findings obtain in joint as in several actions.[79]

e. Judgment. A judgment against a municipality for tort is regulated by the rules governing judgments generally.[80]

12. Damages — a. In General. In accordance with the rules governing damages generally,[81] the measure of damages in an action in tort against a municipality is ordinarily the actual loss sustained by plaintiff,[82] although if the evidence as to the actual loss is not clear, or the loss is trivial, but a legal right has been invaded, nominal damages may be allowed.[83] The fixing of such damages is ordinarily within the discretion of the jury,[84] which should not be interfered with

dition of sight as to prevent her recovering compensation for any injury she might sustain from the negligence of others while passing along the street was proper to be submitted to the jury on the question of her contributory negligence); Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182. And see, generally, Trial.

To combine two interrogatories in one so that a negative answer would inform no one what the conclusion of the jury was upon them separately, or whether any unanimous conclusion at all was reached upon the separate question, is prejudicial error. Peake *v.* Superior, 106 Wis. 403, 82 N. W. 306.

70. Smith *v.* Pella, 86 Iowa 236, 53 N. W. 226, holding that where the issue was whether defendant was negligent as to the construction of a sidewalk, the court properly submitted an interrogatory as to whether the sidewalk in question was originally constructed in a safe and proper manner.

71. Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182.

72. Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182.

73. Grapes *v.* Sheldon, 119 Iowa 112, 93 N. W. 57 (holding it not error to refuse a special interrogatory as to the manner in which defendant's officers received notice of the defect); Smith *v.* Pella, 86 Iowa 236, 53 N. W. 226 (holding it not error to refuse a special interrogatory as to what particular officer acquired the notice).

74. Larsh *v.* Des Moines, 74 Iowa 512, 38 N. W. 384; Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Smalley *v.* Appleton, 70 Wis. 340, 35 N. W. 729.

75. Day *v.* Mt. Pleasant, 70 Iowa 193, 30 N. W. 853.

76. Clark *v.* Austin, 38 Minn. 487, 38 N. W. 615.

77. Clark *v.* Austin, 38 Minn. 487, 38 N. W. 615.

78. Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

79. See Benson *v.* Madison, 101 Wis. 312, 77 N. W. 161; Salzer *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20; Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

80. See Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352, holding that judgments rendered for riot damages have the same force against the property of the city as judgments recovered for any other cause of action. And see, generally, Judgments.

81. See, generally, Damages.

82. See Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446. See cases more specifically cited hereafter.

83. Wilde *v.* New Orleans, 12 La. Ann. 15 (holding that in an action against a city for damages occasioned by the tortious acts of municipal officers within the scope of their employment, and ratified by their superiors, when the evidence is unsatisfactory as to the amount of damages and the property of the use of which plaintiff had been deprived is of trifling value, only nominal damages will be awarded); Clay *v.* Board, 85 Mo. App. 237. And see, generally, Damages, 13 Cyc. 14 *et seq.*

84. Myers *v.* San Francisco, 42 Cal. 215; Litchfield *v.* Whitenack, 78 Ill. App. 364.

by the court except in cases of a palpable abuse of such discretion.[85] The amount awarded must not be excessive.[86]

b. Injuries to Property — (i) *In General.* As a general rule the measure of damages for an injury to or loss of property by a municipal tort is compensation for the actual loss sustained thereby.[87] This compensation in the case of destruction of personal property is the value of the property at the time it was destroyed.[88] In case of injury to real property, the measure of damages ordinarily is the difference in its value before and after the injury,[89] which in some cases is measured by the difference in the rental value of the property before and after the injury;[90] and in other cases by the cost or expense of repairing or restoring

85. Myers *v.* San Francisco, 42 Cal. 215.

86. Myers *v.* San Francisco, 42 Cal. 215 (holding a verdict for five thousand dollars for the death of a child run over by a fire engine not excessive); Chicago *v.* Elzeman, 71 Ill. 131 (three thousand dollars held not excessive); West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838; Toledo *v.* Clopeck, 17 Ohio Cir. Ct. 585, 9 Ohio Cir. Dec. 432 (holding one thousand dollars for a permanent womb injury inadequate rather than excessive).

87. *Georgia.*— Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446.

Illinois.— Jacksonville *v.* Lambert, 62 Ill. 519, holding that, where a city constructs a sewer of good material and in a skilful manner, it is liable to one on whose land filth is discharged thereon only for actual damages.

Iowa.— Vogt *v.* Grinnell, 123 Iowa 332, 98 N. W. 782.

Massachusetts.— O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385; Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423.

Missouri.— Clay *v.* Board, 85 Mo. App. 237.

Pennsylvania.— McCartney *v.* Philadelphia, 22 Pa. Super. Ct. 257 (holding that in an action for injury caused by flowage, the actual damage sustained is the measure of damages, and not the difference in value between the market value before and after the injury); Peach *v.* Scranton, 5 Lack. Leg. N. 25.

Texas.— Ostrom *v.* San Antonio, 33 Tex. Civ. App. 683, 77 S. W. 829.

Washington.— Jones *v.* Seattle, 23 Wash. 753, 63 Pac. 553.

Where damages are claimed for using plaintiff's lands as a dumping ground, it should be assumed that such damages will not be permanent, since it may be abated by the removal of the deposit or by the action of the elements; and the measure of damages is the loss of the rental value up to the time of trial and such other accrued special damages as may be shown, including the necessary cost of removing the deposit. San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760.

Where a drainage ditch becomes, through the negligence of the municipality, the depository of dead animals and so choked that water overflows the premises of one residing near by, the municipality is liable only for damages to the property and not for physician's bills, medicines, increase in expense of plaintiff's family, or his loss of time, which results from illness caused by the condition of the drain. Williams *v.* Greenville, 130 N. C. 93, 40 S. E. 977, 89 Am. St. Rep. 860, 57 L. R. A. 207.

Damages for vexation, humiliation, and annoyance cannot be allowed in an action against a municipality for a trespass on lands. Ostrom *v.* San Antonio, 33 Tex. Civ. App. 683, 77 S. W. 829.

88. Colbourn *v.* Wilmington, 5 Pennew. (Del.) 443, 56 Atl. 605; Hermits of St. Augustine *v.* Philadelphia County, Brightly (Pa.) 116.

89. Covington *v.* Berry, 120 Ky. 582, 87 S. W. 317, 27 Ky. L. Rep. 962 (holding also that this difference in value should not be measured by the difference in market value where the land has increased in value by a general raise in the land values in the vicinity); Bunker *v.* Hudson, 122 Wis. 43, 99 N. W. 448.

90. *Alabama.*— Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47, holding that in an action for a nuisance caused by the faulty condition of sewers, plaintiff is entitled to recover the diminished rental value of the premises during the time the nuisance continued.

Georgia.— Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172.

Kentucky.— Louisville *v.* O'Malley, 53 S. W. 287, 21 Ky. L. Rep. 873.

Massachusetts.— O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385.

New York.— Ahrens *v.* Rochester, 97 N. Y. App. Div. 480, 90 N. Y. Suppl. 744.

Pennsylvania.— McCartney *v.* Philadelphia, 22 Pa. Super. Ct. 257.

Value as dwelling place.— In an action for constructing sewers so as to cause water to flow and collect on plaintiff's premises, if plaintiff's property is of less value as a dwelling place for herself and family because of the flow of water on it, and the overflow was caused by defendant's wrong, the jury may assess to her the difference to her in the value of the lot as a dwelling place so overflowed, and its value as a dwelling place if not overflowed. Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47.

the property to its former state,[91] unless the expense thereof exceeds the entire value of the property, in which case the value of the property is the limit of the measure of damages.[92] In determining the measure of damages to real property the jury may consider any circumstance which has an elemental bearing on the question,[93] including the cost of repairing or restoring the property,[94] the permanency of injury,[95] and, in the case of injuries by flowage, the effect thereof upon the health of plaintiff and his family and upon others may be considered as bearing upon the rental value of the property, but not for the purpose of finding damages by reason of such illness;[96] and they should deduct such damages as are the result of plaintiff's failure to exercise ordinary care to prevent damages,[97] or such as are the result of separate torts of other persons or corporations.[98] But the jury can consider no element not alleged.[99] Prospective damages should not be allowed where the injury is remediable.[1]

(n) *Injuries by Mob.* Ordinarily the measure of damages for injury to property by mob violence is the full amount of the damages sustained,[2] although

91. Covington *v.* Berry, 120 Ky. 582, 87 S. W. 317, 27 Ky. L. Rep. 962; Glasgow *v.* Altoona, 27 Pa. Super. Ct. 55; Bunker *v.* Hudson, 122 Wis. 43, 99 N. W. 448, holding that, if plaintiff could restore the property for a less sum than the depreciated value, recovery would be limited to such lesser sum.

92. Glasgow *v.* Altoona, 27 Pa. Super. Ct. 55.

93. *Alabama.*— Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47.

Iowa.— Vogt *v.* Grinnell, 123 Iowa 332, 98 N. W. 782; Correll *v.* Cedar Rapids, 110 Iowa 333, 81 N. W. 724.

Maryland.— Frostburg *v.* Hitchins, 99 Md. 617, 59 Atl. 49, holding that in an action for unlawfully tearing down plaintiff's building alleged to be a nuisance, a verbal agreement between the city's attorney and counsel for the property-owner to the effect that nothing further should be done in the matter until after the decision of a pending cause between other parties involving similar principles, and the fact of its breach, may be considered by the jury in ascertaining the damages.

New York.— Wing *v.* Rochester, 9 N. Y. St. 473.

Wisconsin.— Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210.

Enhancement.—Where plaintiff sued a city for damage caused by the flow of sewage along the border of his land, it was error to admit testimony on the part of defendant to show that the sewage enhanced the value of land through which it flowed, for agricultural purposes, where the sewage did not flow on plaintiff's land, and it was not possible for him to use it. Smith *v.* San Antonio, (Tex. Civ. App. 1900) 57 S. W. 881.

94. Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446 (holding that where damages are claimed for depreciation in the value of the lot as well as injuries to houses situated thereon, evidence of the cost of repairing and rendering the house inhabitable is relevant and admissible, only as such evidence is confined to the items of cost necessary to repair or supply defects occasioned by the collection of water on the lot); Macon *v.* Small, 108 Ga. 309, 34 S. E. 152; O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385; Davelaar *v.* Milwaukee, 123 Wis. 413, 101 N. W. 361.

95. Glasgow *v.* Altoona, 27 Pa. Super. Ct. 55, holding that the municipality may show that the injury was not permanent.

96. *Alabama.*— Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47.

Delaware.—Benson *v.* Wilmington, 9 Houst. 359, 32 Atl. 1047.

Illinois.— Litchfield *v.* Whitenack, 78 Ill. App. 364.

Kentucky.— Kemper *v.* Louisville, 14 Bush 87; Louisville *v.* O'Malley, 53 S. W. 287, 21 Ky. L. Rep. 873.

New York.— Clark *v.* Rochester, 43 Hun 271.

Texas.—Houston, etc., R. Co. *v.* Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401.

In a joint action by lot owners for acts of the city in walling up a sewer, plaintiffs cannot recover for injuries to their health. O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385.

97. Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446; O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. 385.

98. Macon *v.* Dannenberg, 113 Ga. 1111, 39 S. E. 446; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Standard Bag, etc., Co. *v.* Cleveland, 25 Ohio Cir. Ct. 380.

Where the injuries were caused by the joint tort of the municipality and other persons, and each and all are jointly and severally liable for the entire damage done, the fact that other persons acted together with the municipality will not afford it a defense. San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760.

99. Fidelity, etc., Co. *v.* Seattle, 16 Wash. 445, 47 Pac. 963.

1. Carson *v.* Springfield, 53 Mo. App. 289.

Loss of the use of a vehicle for a reasonable time while it is being repaired is not an element of damages, in an action against a municipality for injury to such vehicle by a defect in the highway. McLaughlin *v.* Bangor, 58 Me. 398.

2. Baltimore *v.* Poultney, 25 Md. 107.

under some statutes only a fractional part of the actual value of the property at the time of its destruction can be recovered.[3]

e. Personal Injuries. Compensation for the actual injury sustained is ordinarily the measure of damages for personal injuries suffered by reason of a municipal tort,[4] including the loss of time,[5] and expenses incurred in effecting a cure;[6] the pain and suffering undergone,[7] except such as results from plaintiff's want of ordinary care in being restored;[8] and in case of permanent injury including prospective as well as present or past damages,[9] especially where the injury causes a disability for further exertion, and consequent pecuniary loss.[10] Under some statutes the measure of damages cannot be greater than a specified sum.[11] The fact of plaintiff's misconduct in inducing a mob to violence may be considered in mitigation of damages claimed by him for injuries received by reason of such mob.[12]

d. Exemplary Damages. In accordance with the rules governing damages generally,[13] punitive, exemplary, or vindictive damages, as they are variously termed, can be recovered against a municipality only where the injury was wilfully or maliciously inflicted,[14] unless authorized by statute.[15]

e. Interest. In some cases interest may be allowed on a claim for damages, as an element thereof.[16]

3. Brightman *v.* Bristol, 65 Me. 426, 20 Am. Rep. 711.

4. Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423 (holding that in an action against a city for defects in a sewer damages are recoverable for injuries to health and business when specially alleged); Wallace *v.* New York, 2 Hilt. (N. Y.) 440, 9 Abb. Pr. 40, 18 How. Pr. 169; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

5. Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Sanford *v.* Augusta, 32 Me. 536; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

6. Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Houston, etc., R. Co. *v.* Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

7. Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

8. Gilman *v.* Haley, 7 Ill. App. 349.

9. Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Weisenberg *v.* Appleton, 26 Wis. 56, 7 Am. Rep. 89.

Previous permanent injuries to plaintiff cannot be considered in assessing damages. Marshall *v.* Kansas City, 93 Mo. App. 154.

10. Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

11. Raymond *v.* Keseberg, 91 Wis. 191, 64 N. W. 861.

12. Adams *v.* Salina, 58 Kan. 246, 48 Pac. 918; Fortunich *v.* New Orleans, 14 La. Ann. 115.

13. See, generally, DAMAGES, 13 Cyc. 105 *et seq.*

14. *District of Columbia.*— Herfurth *v.* Washington, 6 D. C. 288.

Illinois.— Chicago *v.* Kelly, 69 Ill. 475; Jacksonville *v.* Lambert, 62 Ill. 519; Chicago *v.* Langlass, 52 Ill. 256, 4 Am. Rep. 603; Chicago *v.* Martin, 49 Ill. 241, 95 Am. Dec. 590.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558.

Kansas.— Parsons *v.* Lindsay, 26 Kan. 426.

Louisiana.— McGary *v.* Lafayette, 12 Rob. 674, 43 Am. Dec. 239.

Missouri.— Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299.

New York.— Costich *v.* Rochester, 68 N. Y. App. Div. 623, 73 N. Y. Suppl. 835; Wallace *v.* New York, 2 Hilt. 440, 9 Abb. Pr. 40, 18 How. Pr. 169.

Ohio.— Newark *v.* McDowell, 16 Ohio Cir. Ct. 556, 9 Ohio Cir. Dec. 260.

Pennsylvania.— Hermits of St. Augustine *v.* Philadelphia County, Brightly 116.

Texas.— Ostrom *v.* San Antonio, 33 Tex. Civ. App. 683, 77 S. W. 829.

Vermont.— Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

15. See Myers *v.* San Francisco, 42 Cal. 215; Bennett *v.* Marion, 102 Iowa 425, 71 N. W. 360, 63 Am. St. Rep. 454; Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299.

16. Orr *v.* New York, 64 Barb. (N. Y.) 106 (holding that in an action founded on the statute of April 13, 1855 (Laws (1855), c. 428, p. 800), against a city for the destruction of property by a mob, the jury may allow interest on the value of the property if they think justice requires it); Greer *v.* New York, 3 Rob. (N. Y.) 406 (holding that under the above act interest should be allowed upon the value of the property destroyed from the time of demand made upon the corporation); Hermits of St. Augustine

f. Dependent on Notice of Claim. The amount of plaintiff's recovery is not limited to the amount demanded by him in the notice or presentment of his claim; but he may recover all damages sustained, although they exceed such amount.[17] But it has been held that the recovery must be limited to the damages sustained at the time of the presentation of the claim and that damages occurring subsequent to such presentation cannot be recovered.[18]

13. Costs.[19] In the absence of statutory provision otherwise, a recovery of damages against a municipality also entitles plaintiff to have his costs taxed against defendant as in other civil cases.[20] Under some statutes, however, in order that plaintiff may be entitled to costs, he must have duly presented his claim to the proper municipal authorities at the time and in the manner prescribed by the statute.[21] But a statute or ordinance requiring such presentation as a condition to recovering costs in an action on a claim *ex contractu* does not apply to claims *ex delicto*, and the successful party in an action upon the latter sort of claims is entitled to his costs notwithstanding he has not presented his claim in the manner prescribed for the former kind of claim.[22]

14. Appeal and Error — a. In General. Appeals in actions in tort against a municipality are regulated by the rules governing appeals in civil cases generally.[23]

v. Philadelphia County, Brightly (Pa.) 116. And see, generally, Damages, 13 Cyc. 86.

17. *Kansas.*— Wyandotte *v.* White, 13 Kan. 191; Salina *v.* Kerr, 7 Kan. App. 223, 52 Pac. 901.

Minnesota.—Terryll *v.* Farihault, 34 Minn. 341, 87 N. W. 917.

New Hampshire.— Noble *v.* Portsmouth, 67 N. H. 183, 30 Atl. 419.

New York.— Reed *v.* New York, 97 N. Y. 620.

Washington.— Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386.

18. Duryea *v.* New York, 26 Hun (N. Y.) 120. But see Born *v.* Spokane, 27 Wash. 719, 68 Pac. 386, holding that subsequent damages arising from the injury may be shown.

19. Liability of municipality for costs in prosecutions under ordinances see Costs, 11 Cyc. 278.

Costs on appeal against municipality see Costs, 11 Cyc. 287.

20. Taylor *v.* Cohoes, 105 N. Y. 54, 11 N. E. 282 [*distinguishing* Baine *v.* Rochester, 85 N. Y. 523, and *overruling* Dressel *v.* Kingston, 32 Hun (N. Y.) 526], holding that an action for damages against a municipality brought before the code of civil procedure went into effect is governed by the act of 1859, and being an action *ex delicto* plaintiff, if he prevails, may, under the provisions of Laws (1859), c. 262, § 2, recover costs, although he did not prior to the commencement of his action present his claim to the chief fiscal officer of the corporation as required by the code of civil procedure, section 3245); Eagan *v.* Rochester, 68 Hun (N. Y.) 331, 22 N. Y. Suppl. 955 (holding the provision in section 218 of the Charter of Rochester (Laws (1880), c. 14 as amended by Laws (1881), c. 343, requiring fifteen days' notice precedent to the right to tax costs in an action for negligence, repealed by implication by section 80 of the charter as amended by Laws (1890), c. 561); Childs *v.* West Troy, 23 Hun (N. Y.) 68 (holding that under the charter of the village of West Troy a claimant in an action for injuries received on a street is not required, to entitle him to recover costs, to present his claim to the fiscal officer of the village before bringing his action).

21. Ft. Scott *v.* Elliott, 68 Kan. 805, 74 Pac. 609 (under Gen. St. (1901) § 860); Wyandotte *v.* White, 13 Kan. 191; Oklahoma City *v.* Welsh, 3 Okla. 288, 41 Pac. 598 (holding also that the fact that the damages recovered exceed the amount claimed does not prevent plaintiff from recovering costs if his claim was duly presented). See Dressel *v.* Kingston, 32 Hun (N. Y.) 526.

Under Kan. Gen. St. (1889) p. 826, it is not necessary, in order to enable a claimant to recover costs in a subsequent action, that, in presenting a bill to a city council for damages for injuries received, his claim should specify the various elements of damage. Salina *v.* Kerr, 7 Kan. App. 223, 52 Pac. 901.

22. Haggard *v.* Carthage, 168 Mo. 129, 67 S. W. 567; Quinlan *v.* Utica, 11 Hun (N. Y.) 217 [*affirmed* in 74 N. Y. 603], holding that the Utica Charter, § 123, providing that "no costs shall be recovered against the city in any action brought against it for any unliquidated claim which has not been presented to the common council to be audited," does not exempt the city from liability for costs in actions against it for negligence in repairing public streets.

23. See, generally, Appeal and Error.

In passing upon the question of variance between the pleadings and proofs the supreme court does not weigh the evidence, and the objection of variance must be overruled if there is any evidence in the record, when taken as true, together with all inferences to be legitimately drawn therefrom, fairly tending to sustain the averments of the pleading. Cicero *v.* Bartelme, 212 Ill. 256, 72 N. E. 437.

Thus as a general rule the appellate court will review only such questions or objections as are properly raised and saved for review in the lower court,[24] or on the application for a new trial,[25] except where they are apparent on the face of the record.[26] Presumptions are indulged or not, on appeals in such actions, the same as in appeals in other civil actions.[27] An abutting owner who is liable over and who is brought in to defend or has appeared and defended may appeal from a judgment against a municipality, even after it has paid and satisfied the judgment.[28] So a municipality held liable for tort may on appeal attack a verdict in favor of a co-defendant primarily liable.[29]

b. Sufficiency of Verdict and Findings. Ordinarily the appellate court will not disturb a verdict or finding in the lower court on a question of fact if there is any evidence to sustain it.[30] But it will reverse a verdict and judgment which is

Where an assignment of error challenges the complaint as an entirety, and any paragraph thereof is sufficient, the assignment must fail. South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396; Thorntown *v.* Fugate, 21 Ind. App. 537, 52 N. E. 763.

24. *Colorado.*—Denver *v.* Murray, 18 Colo. App. 142, 70 Pac. 440; Denver *v.* Baldasari, 15 Colo. App. 157, 61 Pac. 190; Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986, holding that where defendant makes a specific objection to an instruction the appellate court cannot review alleged errors in the instruction not embraced in the special objection.

District of Columbia.— District of Columbia *v.* Dietrich, 23 App. Cas. 577.

Kansas.— Gray *v.* Emporia, 43 Kan. 704, 23 Pac. 944.

Michigan.— Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584.

New York.— Bishop *v.* Goshen, 120 N. Y. 337, 24 N. E. 720; Hawley *v.* Gloversville, 4 N. Y. App. Div. 343, 38 N. Y. Suppl. 647; McCarthy *v.* Far Rockaway, 3 N. Y. App. Div. 379, 38 N. Y. Suppl. 989.

Pennsylvania.— Erie *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87.

Tennessee.— Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324, holding that reversal will not be had for the erroneous admission of incompetent evidence unless the records show that specific objection was taken to its incompetency.

Texas.— Dallas *v.* Jones, (Civ. App. 1898) 54 S. W. 606.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1771.

Where plaintiff's petition was dismissed because proper notice had not been served on the city, of the injury alleged to have been occasioned by a defective sidewalk, a second averment in the petition that the injury was due to improper lighting of the street will not be considered on appeal as dispensing with the necessity of notifying the city of the injury, where no evidence was introduced at the trial to sustain such averment. Giles *v.* Shenandoah, 111 Iowa 83, 82 N. W. 466.

25. Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584; Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224, holding that objection that the damages found by the jury were excessive and given under the influence of passion and prejudice should be taken by a motion for a new trial, otherwise the appellate court will not take notice of such assignment of error.

26. South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396.

The total absence from the complaint of an averment of a fact essential to the existence of the cause of action, or the averment of a fact that absolutely destroys plaintiff's right of recovery, may be raised for the first time on appeal by an independent assignment of error, under Burns Rev. St. Ind. (1894) § 346, but mere uncertainty, or inadequacy of averment, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection. South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396.

27. See District of Columbia *v.* Dietrich, 23 App. Cas. (D. C.) 577. And see, generally, APPEAL AND ERROR, 3 Cyc. 266 *et seq.*

In applying the rules relating to negligence and ordinary care to an appellee, this court must give him the benefit of considering to be true every fact favorable to his case which there is any evidence tending to prove. Belleville *v.* Hoffman, 74 Ill. App. 503.

28. Fowler *v.* Jersey Shore, 17 Pa. Super. Ct. 366.

29. Wiggin *v.* St. Louis, 135 Mo. 558, 37 S. W. 528.

30. *Colorado.*— Denver *v.* Teeter, 31 Colo. 486, 74 Pac. 459.

Illinois.— Rock Falls *v.* Wells, 169 Ill. 224, 48 N. E. 440 (holding that whether the failure of a city to remove unused street railway tracks was the proximate cause of the injury is a question of fact not reviewable on appeal); Bloomington *v.* Murnin, 36 Ill. App. 647.

Kansas.— Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

Louisiana.— Romano *v.* Seidel Furniture Mfg. Co., 114 La. 432, 38 So. 409, holding that where the evidence is confused and conflicting as to the cause of the accident and

clearly contrary to the law and the weight of the evidence,[31] or for a prejudicial error in the admission of evidence,[32] or in the giving or refusing of instructions.[33]

c. Harmless Error. A judgment will not be reversed for an error in the lower court which resulted in no prejudice to the party seeking to take advantage of it,[34] as for harmless error in the admission or exclusion of evidence,[35] or the giving or refusing of instructions.[36]

there is evidence to support it, the judgment of the district court in favor of defendant will not be disturbed.

Nebraska.— Omaha *v.* Coombe, 48 Nebr. 879, 67 N. W. 885; Omaha *v.* Doty, 2 Nebr. (Unoff.) 726, 89 N. W. 992.

New York.— Hume *v.* New York, 74 N. Y. 264 [*reversing* 9 Hun 674]; Provost *v.* New York, 15 Daly 87, 3 N. Y. Suppl. 531 [*affirmed* in 117 N. Y. 626, 22 N. E. 1128]; Sweeny *v.* New York, 17 N. Y. Suppl. 797; Forde *v.* Nichols, 12 N. Y. Suppl. 922; Bly *v.* Whitehall, 14 N. Y. St. 294.

Pennsylvania.—Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399, holding that the appellate court will not disturb a verdict where the trial court has left the questions of the city's negligence and plaintiff's contributory negligence to the jury after having explained in a clear and adequate charge the degree of care required by each party.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1771.

31. Omaha *v.* Doty, 2 Nebr. (Unoff.) 726, 89 N. W. 992; Schubkegel *v.* Butler, 76 N. Y. App. Div. 10, 78 N. Y. Suppl. 644; Stone *v.* Troy, 4 N. Y. Suppl. 528; Davis *v.* Austin, 22 Tex. Civ. App. 460, 54 S. W. 927; Charlottesville *v.* Failes, 103 Va. 53, 48 S. E. 511.

32. Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880; Davis *v.* Manchester, 62 N. H. 422, holding that the admission of city ordinances to show liability of a municipality is reversible error unless the jury are unequivocally instructed to disregard them.

33. Newdick *v.* Hamilton, 18 Ohio Cir. Ct. 266, 10 Ohio Cir. Dec. 115, holding an instruction as to the city's knowledge of the incompetency of a servant prejudicial to plaintiff.

34. Denver *v.* Baldasari, 15 Colo. App. 157, 61 Pac. 190; Correll *v.* Cedar Rapids, 110 Iowa 333, 81 N. W. 724; Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042; Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614.

Remarks of the trial court in directing a verdict in favor of one joint defendant, a gas company, giving reasons therefor, are not improper or prejudicial to defendant city where plaintiff has shown a clear right to recover against either the company or the city, and the court has been careful not to speak of the merits of the case against the city. Grundy *v.* Janesville, 84 Wis. 574, 54 N. W. 1085.

35. *Colorado.*— Denver *v.* Teeter, 31 Colo. 486, 74 Pac. 459.

Georgia.— Enright *v.* Atlanta, 78 Ga. 288.

Illinois.— Chicago *v.* Elzeman, 71 Ill. 131.

Iowa.—Cramer *v.* Burlington, 49 Iowa 213.

Kansas.— Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

New York.— Hawley *v.* Gloversville, 4 N. Y. App. Div. 343, 38 N. Y. Suppl. 647, holding that the admission of evidence of notice to a police officer of a defect in a street to show notice to the city, if error, is harmless, where it appears that the city had notice through its superintendent of streets.

North Carolina.— Whitford *v.* Newbern, 111 N. C. 272, 16 S. E. 327.

Texas.—Houston, etc., R. Co. *v.* Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401; Dallas *v.* Jones, (Civ. App. 1898) 54 S. W. 606.

Washington.— Reed *v.* Spokane, 21 Wash. 218, 57 Pac. 803.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; Wunderlich *v.* New York, 33 Fed. 854.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1771.

The admission of evidence of the defective condition of a sidewalk after an accident was not prejudicial error, when the evidence was merely cumulative of testimony describing the walk at the time of the accident. Bell *v.* Spokane, 30 Wash. 508, 70 Pac. 31.

The admission of evidence of plaintiff's mental anguish caused by injury to his wife, if error, is harmless, where the court properly instructed the jury what to consider in rendering their verdict, and the amount thereof is not excessive. Dallas *v.* Jones, (Tex. Civ. App. 1898) 54 S. W. 606.

The exclusion of evidence relating solely to the measure of damages is not error, where the jury finds plaintiff not entitled to recover anything after clear proof of damage. Lush *v.* Parkersburg, 127 Iowa 701, 101 N. W. 336.

The admission of an ordinance requiring owners and occupants of lands and buildings to keep their sidewalks clear, being material on plaintiff's behalf, is not prejudicial to defendant, in an action against a municipality for injuries by reason of an accumulation of ice and snow on a sidewalk. Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 [*affirming* 34 Hun 607].

36. *Colorado.*— Colorado Springs *v.* Floyd, 19 Colo. App. 167, 73 Pac. 1092 (holding that an instruction that it was the duty of the city to "see that its streets were in a safe condition for travel" is harmless where the evidence would have justified the court in directing a verdict for plaintiff and submitting only the question of damages); Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986.

XV. FISCAL MANAGEMENT, DEBT, SECURITIES, AND TAXATION.

A. Power to Incur Debt and Expenditure — 1. In General — a. Nature and Scope of Power. The officers of a municipal corporation cannot create obligations binding on the corporation, unless the power to do so is either expressly granted in the charter of the corporation or necessarily or rationally implied from the powers that are expressly granted, or is essential to the objects for which the corporation was created.[37] And where authority is expressly delegated to a municipality to raise and apply money for a special purpose, such authority must be strictly construed.[38] But the courts cannot generally determine what municipal expenditures are necessary; if a given expenditure is within charter authorization, and therefore, abstractly considered, a legitimate municipal charge, the courts cannot pass upon the advisability or wisdom of its being incurred. That is a matter within the discretion of the municipal authorities, except, it may be, that abuse of the discretion would be controlled, or, if bad faith attended its exercise, the courts would intervene.[39]

b. Constitutional and Statutory Provisions. The legislature may by charter or general law confer upon or withhold from municipal corporations any fiscal power,[40] within constitutional limitations,[41] and may prescribe the manner

Georgia.— Enright *v.* Atlanta, 78 Ga. 288.

Illinois.— Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338; Wheaton *v.* Hadley, 131 Ill. 640, 23 N. E. 422 [*affirming* 30 Ill. App. 564], holding that the fact that an erroneous instruction is given or a proper one erroneously refused is not reversible error where the evidence fully sustains the judgment.

Iowa.— Correll *v.* Cedar Rapids, 110 Iowa 333, 81 N. W. 724; Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831; Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028, holding that a reference in an instruction to a defect as the "dangerous character of the walk" is not a prejudicial error where under the findings of the jury the defect was of a dangerous character.

Kansas.— Erie *v.* Phelps, 56 Kan. 135, 42 Pac. 336, holding an instruction that notice to the city marshal was notice to the city is harmless where it appears that the marshal acted also as street commissioner and was directed by the mayor to keep the streets in condition.

Kentucky.— Louisville *v.* Keher, 117 Ky. 841, 79 S. W. 270, 25 Ky. L. Rep. 2003.

Missouri.— Campbell *v.* Stanberry, 105 Mo. App. 56, 78 S. W. 292, holding that any error in an instruction requiring a city both to place a guard-rail or barricade about a street excavation and to place lights along its sides is harmless where there is no evidence that either precaution was taken); Ross *v.* Kansas City, 48 Mo. App. 440.

New York.— Bishop *v.* Goshen, 120 N. Y. 337, 24 N. E. 720; Hawley *v.* Gloversville, 4 N. Y. App. Div. 343, 38 N. Y. Suppl. 647, holding that an instruction that notice to a policeman is notice to the city, if error, was harmless where it appeared that the city had notice through its superintendent of streets.

Oklahoma.— Oklahoma City *v.* Meyers, 4 Okla. 686, 46 Pac. 552.

Pennsylvania.— Rumsey *v.* Philadelphia, 171 Pa. St. 63, 32 Atl. 1133; Boyle *v.* Hazleton, 8 Kulp 239.

Wisconsin.— Laue *v.* Madison, 86 Wis. 453, 57 N. W. 93.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1771.

Where the record shows that the damages awarded were strictly compensatory, this court will not inquire into the correctness of charges as to the right to recover punitive damages, since, if erroneous, they could not have injured defendant, who is the appellant. Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47.

An instruction that the burden of proof was on plaintiff, and that it was for her to prove her case by a preponderance of the evidence, yet "the degree of preponderance is not material," was not prejudicial by reason of the use of the words quoted. Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338.

37. Wilson *v.* Shreveport, 29 La. Ann. 673. See also *supra*, III; IX.

38. *Ex p.* Sim, 40 Fla. 432, 25 So. 280; Eaton *v.* Berlin, 49 N. H. 219.

39. White *v.* Decatur, 119 Ala. 476, 23 So. 999. See also Roberts *v.* New York, 5 Abb. Pr. (N. Y.) 41.

40. Hill *v.* Easthampton, 140 Mass. 381, 4 N. E. 811; Stone *v.* Charlestown, 114 Mass. 214; Houston *v.* Stewart, (Tex. 1905) 87 S. W. 663; Defiance Water Co. *v.* Defiance, 90 Fed. 753; Georgetown *v.* Stimson, 23 Ont. 33. And see *supra*, III.

41. *California.*— Robertson *v.* Alameda Free Public Library, etc., 136 Cal. 403, 69 Pac. 88.

Michigan.— Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677, holding that there is no constitutional objection to an act authorizing a city to pay the entire cost of the erection of a county court-house, to be repaid by the county on the removal of the county-seat,

and conditions of its exercise.[42] The legislature, cannot, however, force a municipality to repudiate existing obligations lawfully incurred.[43] The validity and effect of such legislation is to be determined by the application of the general rules as to the construction of statutes.[44] What is meant by the phrase "ordinary"[45] or "necessary"[46] expenses, which frequently occurs in statutes, as to municipal indebtedness,[47] has been discussed in several cases. Municipal indebtedness is not included within the constitutional phrase "debt or liability of the state."[48]

c. Purposes of Appropriation — (1) *In General.* Municipal funds may be appropriated to any public purpose,[49] within the scope of charter powers;[50] but *ultra vires* appropriations are invalid.[51]

because of the probability that it may affect the subsequent removal of the county-seat.

New York.—Newburgh Sav. Bank *v.* Woodbury, 64 N. Y. App. Div. 305, 72 N. Y. Suppl. 222 [*affirmed* in 173 N. Y. 55, 65 N. E. 858]; Matter of Fallon, 28 Misc. 748, 59 N. Y. Suppl. 849.

Texas.— Houston *v.* Stewart, (1905) 87 S. W. 663; Chambers *v.* Gilbert, 17 Tex. Civ. App. 106, 42 S. W. 630.

United States.— Livingston County *v.* Darlington, 101 U. S. 407, 25 L. ed. 1015.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1814. See also *supra*, III, D, 2.

42. *Iowa.*—Swanson *v.* Ottumwa, 118 Iowa 161, 91 N. W. 1048, 59 L. R. A. 620.

Louisiana.— Knollman *v.* King, 109 La. 799, 33 So. 776.

New York.— Cooke *v.* Saratoga Springs, 23 Hun 55, charter providing that "no debt shall be incurred or created . . . nor shall any expenditure be made or incurred until the money or tax for that specific object shall have been voted or levied."

North Carolina.— Young *v.* Henderson, 76 N. C. 420, charter providing that the municipality could incur no debt without the consent of the general assembly.

Oregon.— Ladd *v.* Gambell, 35 Oreg. 393, 59 Pac. 113.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1814.

43. See Semmes *v.* Columbus, 19 Ga. 471; Kansas City *v.* Wyandotte Gas Co., 9 Kan. App. 325, 61 Pac. 317; Stone *v.* Charlestown, 114 Mass. 214. And see *supra*, IV, H, 1; IX, K, 2.

44. *California.*—Hammond *v.* San Leandro, 135 Cal. 540, 67 Pac. 692.

Colorado.— Leadville Illuminating Gas Co. *v.* Leadville, 9 Colo. App. 400, 49 Pac. 268.

Kentucky.— House of Reform *v.* Lexington, 112 Ky. 171, 65 S. W. 350, 23 Ky. L. Rep. 1470.

Massachusetts.— Wheelwright *v.* Boston, 188 Mass. 521, 74 N. E. 937.

Michigan.— Menominee Water Co. *v.* Menominee, 124 Mich. 386, 83 N. W. 127.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1814.

45. People *v.* Geneva, 45 Misc. (N. Y.) 237, 92 N. Y. Suppl. 91 [*affirmed* in 98 N. Y. App. Div. 383, 90 N. Y. Suppl. 275] (holding that an expenditure for voting machines is an extraordinary one); Wichita Falls *v.* Skeen, 18 Tex. Civ. App. 632, 45 S. W. 1037 (holding that the expense of printing the delinquent tax list is an item of ordinary municipal expenditure within the statute forbidding the incurring of debts other than ordinary expenses, unless provision for payment is made at the same time).

46. Raleigh Gas-Light Co. *v.* Raleigh, 75 N. C. 274; Fowle *v.* Raleigh, 75 N. C. 273; Tucker *v.* Raleigh, 75 N. C. 267, all holding that debts incurred for ordinary city purposes, such as work on streets, wells, cemeteries, and to pay the police, were debts for necessary expenses.

47. See the statutes of the different states.

48. Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, 58 Atl. 571.

49. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212 (holding that a municipality receives such special benefits from the location of a county-seat within its limits as to authorize the imposition on such municipality of the entire cost of procuring such location and of the necessary public buildings); Dunn *v.* Framingham, 132 Mass. 436 (holding that a town may vote to appropriate money for the enforcement of the liquor law and to employ agents and counsel to suppress the sale of intoxicating liquors); State *v.* St. Louis, 169 Mo. 31, 68 S. W. 900; Coleman *v.* Chester, 14 S. C. 286 (holding that, although a municipality is not liable for a trespass committed by its officers under authority of the corporation, yet it may bind itself to pay for benefits derived from acts of trespass contingent upon the injured party refraining from prosecuting a remedy given by statute).

Street railway.— In view of the condition of travel in the city of New York, the proposed construction by the city, at its own expense, of a railroad, on the failure of private enterprise and capital to intervene, is necessary for the welfare of the people and is for a city purpose and cannot be restrained. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788 [*affirming* 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607].

50. East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166, holding that a municipality may contribute money for the purchase of a library for a college located just outside its boundaries.

51. *Kentucky.*— Henderson *v.* Covington, 14 Bush 312, holding that a municipal corporation has no right to appropriate its reve-

(II) *Celebrations and Entertainments.* Unless expressly authorized so to do,[52] a municipality has no power to appropriate municipal funds for celebrations, even of patriotic holidays,[53] nor to the entertainment of persons or societies as municipal guests.[54]

(III) *Donations, Gratuities, and Charities.* As a general rule municipalities cannot make appropriations for gratuities, charities, or private uses,[55] nor

nues to obtain an increase of its powers through persons sent by the city council to appear before the state general assembly and congress.

Massachusetts.— Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413, holding that a town cannot, out of the public funds, compensate persons employed to procure the passage by the legislature of an unconstitutional act.

North Carolina.— Thrift *v.* Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.

South Dakota.— Shannon *v.* Huron, 9 S. D. 356, 69 N. W. 598, holding that a city has no authority to incur indebtedness for the expenses of a campaign to secure the selection of the city as the capital of the state.

United States.— The Liberty Bell, 23 Fed. 843.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1815. See also *supra*, IX.

Schools.— In Alabama the Greenville city charter conferred no authority on the city in respect to its public schools. The act of Feb. 25, 1887 (Acts (1886–1887), p. 629) authorized the city to issue bonds for the purpose of purchasing school lots, erecting school buildings, and furnishing the same, the proceeds of the bonds to be set aside for the exclusive benefit of the schools and used for that purpose, and the act of Feb. 28, 1887 (Acts (1886–1887), p. 1009) constituted the city of Greenville a separate school-district and provided for the management of the public schools therein. It was held that the city of Greenville had no authority to pledge its general revenues for the payment of furniture purchased to fit up a school, and that a vote executed by the city for such purpose was unenforceable. Cleveland School Furniture Co. *v.* Greenville, 146 Ala. 559, 41 So. 862.

52. Hubbard *v.* Taunton, 140 Mass. 467, 5 N. E. 157; Morton *v.* Philadelphia, 4 Pa. Dist. 523; Tatham *v.* Philadelphia, 11 Phila. (Pa.) 276; Tagg *v.* Philadelphia, 18 Wkly. Notes Cas. (Pa.) 79. See also Lilly *v.* Indianapolis, 149 Ind. 648, 49 N. E. 887.

53. New London *v.* Brainard, 22 Conn. 552; Gerry *v.* Stoneham, 1 Allen (Mass.) 319; Hood *v.* Lynn, 1 Allen (Mass.) 103; Tash *v.* Adams, 10 Cush. (Mass.) 252; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110; Love *v.* Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192.

54. Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110; Stem *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 15. Expenses incurred for meals and lodging rendered by the proprietors of a hotel in entertaining a party of representatives of the press, the entertainment having been authorized and directed by the board of trustees, was held not a debt for which the municipality was liable; such entertainment not being a duty for which the municipality was created. Gamble *v.* Watkins, 7 Hun (N. Y.) 448.

55. *Arkansas.*— Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180, holding that, under a constitutional provision that no county, city, or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution, or individual, the common council has no power to appropriate money to aid the building of a court-house in such municipality.

California.— Taylor *v.* Mott, 123 Cal. 497, 56 Pac. 256; Heslep *v.* Sacramento, 2 Cal. 580.

Louisiana.— State *v.* New Orleans, 50 La. Ann. 880, 24 So. 666.

Massachusetts.— Under Gen. St. c. 24, it was held that the vote of a town having a fire department duly established to appropriate a certain sum for the purpose of paying the members of a private organization, who had not been appointed engine-men under section 14 or 15, for services rendered to the town as engine-men for the preceding year, was *ultra vires* and void. Greenough *v.* Wakefield, 127 Mass. 275.

Minnesota.— Castner *v.* Minneapolis, 92 Minn. 84, 99 N. W. 361, holding that the reimbursement by a city council, of a defeated candidate for a public office, for expenses incurred in conducting an election contest, is an expenditure of public funds for a private purpose and therefore illegal.

Missouri.— State *v.* Ziegenhein, 144 Mo. 283, 45 S. W. 1099, 66 Am. St. Rep. 420, holding that a statute requiring a city to provide pensions for policemen and their families is unconstitutional.

New York.— People *v.* Phillips, 88 N. Y. App. Div. 560, 85 N. Y. Suppl. 200 (holding that a city cannot appropriate money to pay damages to an abutting landowner who did not acquire title until the change of grade causing the damages had been completed); Mahon *v.* New York Bd. of Education, 68 N. Y. App. Div. 154, 74 N. Y. Suppl. 172 (holding that an act to pension teachers who have already retired is unconstitutional); Matter of Fallon, 28 Misc. 748, 59 N. Y. Suppl. 849 (holding that an act providing for the payment of expenses of public officials wrongfully subjected to removal proceedings is unconstitutional); *In re* Jensen, 28 Misc. 378, 59 N. Y. Suppl. 653 [*affirmed* in 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933] (holding that an act providing for the payment of the expenses of public officials wrongfully subjected to criminal

for a debt barred by statute.[56] Such diversion of public funds is the perversion of a public trust.[57] But it has been held that an appropriation made by a municipality to a municipal officer to reimburse or indemnify him for expenses or losses incurred while in the performance of his duties is valid,[58] and that a municipality may appropriate money received from the state, arising from the taxation of foreign insurance companies, to a firemen's relief association;[59] and that under legislative direction fines from certain sources may be applied to the support of homes for friendless women.[60] When authorized by statute municipal funds may be appropriated to a textile school,[61] to a reform school,[62] to a free library,[63] or to other public purposes not strictly of a municipal character.[64] A constitutional provision prohibiting a municipality from becoming a stock-holder in a corporation does not prevent the legislature from authorizing a city to become interested in, and contract with, a charitable organization for the management of a hospital to provide medical aid for indigent sick persons.[65]

(IV) *Rewards For Criminals.* It is generally held that a municipality has no authority to appropriate money to the payment of rewards for the apprehension of criminals.[66]

2. Municipal Purposes — a. In General. Municipal purposes for which an indebtedness may be incurred or for which expenditures may be made have been held to include the lighting of streets and public places,[67] the development of natural municipal resources for manufacturing purposes,[68] the employment of counsel for the benefit of the municipality,[69] the establishing and conducting of liquor dispen-

prosecution is unconstitutional); Mercer *v.* Floyd, 24 Misc. 164, 53 N. Y. Suppl. 433 (holding that a statute is invalid which provides for the relief of tax-collectors who have lost tax moneys collected by them, through the failure of a national bank).

Canada.— The only powers a public corporation can exercise are those expressly given, or, by implication, those necessary to carry the former into effect. No power to pay newspaper reporters their contingent expenses is expressly, or by necessary implication, to be found in the charter of the city of Montreal, and a resolution of the city council to that effect is *ultra vires*, null and void. Tremblay *v.* Montreal, 28 Quebec Super. Ct. 411, per Saint-Pierre, J.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1817.

56. Trowbridge *v.* Schmidt, 82 Miss. 475, 34 So. 84.

57. Hitchcock *v.* St. Louis, 49 Mo. 484.

58. Hotchkiss *v.* Plunkett, 60 Conn. 230, 22 Atl. 535; Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 485; Crow *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; State *v.* Hammonton, 38 N. J. L. 430, 20 Am. Rep. 404; Sherman *v.* Carr, 8 R. I. 431. See also *supra*, VII, A, 13, a, (I), (L).

59. Com. *v.* Barker, 211 Pa. St. 610, 61 Atl. 253.

60. Indianapolis *v.* Indianapolis Home for Friendless Women, 50 Ind. 215.

61. Hanscom *v.* Lowell, 165 Mass. 419, 43 N. E. 196.

62. Livingston County *v.* Darlington, 101 U. S. 407, 25 L. ed. 1015.

63. Hunt *v.* Palmerston, 5 Ont. L. Rep. 76.

64. State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622, holding that the legislature may authorize a municipality to levy taxes therein for public purposes not strictly of a municipal character, but from which the public will receive some direct advantage, or where the tax is to be expended in defraying the expenses of the government, or in promoting the welfare of society, or in paying claims founded upon natural justice and equity, or upon gratitude for public services or expenditures, or in discharging the obligations of charity and humanity. See, however, Waters *v.* Bonvouloir, 172 Mass. 286, 52 N. E. 500, holding that a statute which provides that city councils may appropriate money for armories, holiday celebrations, and other public purposes does not authorize a city to provide money to defray the expenses of a committee to represent it at a convention of American municipalities.

65. Zanesville *v.* Crossland, 8 Ohio Cir. Ct. 652, 4 Ohio Cir. Dec. 363.

66. Crofut *v.* Danbury, 65 Conn. 294, 32 Atl. 365; Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Patton *v.* Stephens, 14 Bush (Ky.) 324. But see York *v.* Forscht, 23 Pa. St. 391. See *supra*, IX, A, 6, j.

67. Laycock *v.* Baton Rouge, 35 La. Ann. 475; Hequembourg *v.* Dunkirk, 49 Hun (N. Y.) 550, 2 N. Y. Suppl. 447. See also *supra*, IX, A, 6, c; XIII, A, 2, g.

68. Hackett *v.* Ottawa, 99 U. S. 86, 25 L. ed. 363.

69. Smith *v.* Sacramento City, 13 Cal. 531; Bloomington *v.* Lillard, 39 Ill. App. 616. See also Smedley *v.* Grand Haven, 125 Mich. 424, 84 N. W. 626. See *supra*, VII, C, 4; IX, A, 6, o. But *compare* Daniel *v.* Memphis, 11 Humphr. (Tenn.) 582, holding that a city cannot employ corporate funds to pay for services in a suit to destroy itself.

Suits in which municipality is without interest.—A municipality cannot pay for the

saries,[70] operating gas works,[71] establishing waterworks,[72] building a bridge,[73] maintaining a police force,[74] providing for a police pension fund,[75] having surveys for a ship canal made,[76] purchasing necessary real estate,[77] erecting a memorial arch to soldiers and sailors,[78] erecting a market house,[79] and building a town house.[80] But erecting a grand army hall,[81] encouraging the establishment of a private manufacturing enterprise,[82] and having scrip engraved[83] have been held to be purposes for which indebtedness may not be incurred. It has been held that the power to incur indebtedness for municipal buildings is not to be implied from the duty to erect them.[84]

b. Indebtedness Incurred Before Incorporation. Unless expressly authorized by legislation, a municipality has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence, in procuring the passage of its charter.[85] The legislature, however, may impose on a municipal corporation debts contracted by it before it was lawfully incorporated,[86] and may, when granting a new charter to, and changing the name of, a municipality, expressly provide for the payment of liabilities previously incurred.[87]

c. Beyond Corporate Limits. The power of a municipality to make expenditures for corporate purposes is not limited to expenditures within its corporate limits.[88]

d. Fire Apparatus. A municipality under its general charter powers has authority to provide the means necessary for the extinguishment of fires, and

services of attorneys employed in suits in which it has no interest. Peck *v.* Spencer, 26 Fla. 23, 7 So. 642; Smith *v.* Nashville, 4 Lea (Tenn.) 69 (holding that a city has no interest in a suit directed exclusively against its officers, although the bill filed therein may enjoin such officers from performing their official duties); Memphis *v.* Adams, 9 Heisk. (Tenn.) 518, 24 Am. Rep. 331. See also Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123 [*reversing* 80 Ill. App. 33]; Jarvis *v.* Fleming, 27 Ont. 309.

Attorney not employed by municipal authority.— The city of New York is not liable for fees of counsel other than corporation counsel not employed by direction of the common council, for services rendered in suits in which the city was interested. Roberts *v.* New York, 5 Abb. Pr. (N. Y.) 41.

Suit to obtain city property.—A city corporation may be compelled to pay the expenses incurred by one of its officers by the employment of his own counsel in a contest to gain the possession of its property, in the result of which it is interested. Stillwell *v.* New York, 19 Abb. Pr. (N. Y.) 376.

70. Equitable Loan, etc., Co. *v.* Edwardsville, 143 Ala. 182, 38 So. 1016, 11 Am. St. Rep. 34.

71. Wheeler *v.* Philadelphia, 77 Pa. St. 338. See *supra*, VIII, B, 2, e; IX, A, 6, c; XIII, A, 2, g.

72. Comstock *v.* Syracuse, 5 N. Y. Suppl. 874. See *supra*, VIII, B, 2, e; IX, A, 6, b; XIII, A, 2, f.

73. People *v.* Kelly, 76 N. Y. 475.

74. State *v.* Mason, 153 Mo. 23, 54 S. W. 524. See *supra*, VII, B, 5.

75. Com. *v.* Walton, 182 Pa. St. 373, 38 Atl. 790, 61 Am. St. Rep. 712. But see State *v.* Ziegenheim, 144 Mo. 283, 45 S. W. 1099, 66 Am. St. Rep. 420. See *supra*, VII, B, 5, d, (XIV).

76. Com. *v.* Pittsburg, 183 Pa. St. 202, 38 Atl. 628, 63 Am. St. Rep. 752.

77. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460. See *supra*, VIII, A, B.

78. Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329, 67 N. Y. Suppl. 1054.

79. Spaulding *v.* Lowell, 23 Pick. (Mass.) 71. See *supra*, VIII, B, 2, c; XII, C, 3.

80. Friend *v.* Gilbert, 108 Mass. 408. See *supra*, VIII, B, 2, c; XII, C.

81. Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123.

82. Sutherland-Innes Co. *v.* Evart, 86 Fed. 597, 30 C. C. A. 305. And see *supra*, VIII, B, 2, a; VIII, D, 4.

83. Cheeney *v.* Brookfield, 60 Mo. 53.

84. Leavenworth *v.* Norton, 1 Kan. 432.

85. Frost *v.* Belmont, 6 Allen (Mass.) 152.

86. Cooper *v.* Springer, 65 N. J. L. 594, 48 Atl. 605.

87. People *v.* San Francisco, 21 Cal. 668. See *supra*, II, C, 1, e, (III).

88. *In re* New York, 99 N. Y. 569, 2 N. E. 642; People *v.* Kelly, 76 N. Y. 475 (both holding that land adjoining a city may be purchased by it for use as a park); People *v.* Kelly, 5 Abb. N. Cas. (N. Y.) 383 (indebtedness may be incurred for a bridge connecting two cities); East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166 (holding that a city may grant aid to an educational institution just outside its limits). But see Jacksonport *v.* Watson, 33 Ark. 704, holding that a municipal corporation has no authority to expend corporate funds to operate a free ferry outside its corporate limits to promote the business interests of such municipality, and that it may be

pledge the municipal credit therefor,[89] unless the creation of municipal indebtedness is forbidden.[90]

3. Limitation of Amount — a. In General. Constitutional limitations upon the amount of municipal indebtedness are mandatory,[91] and so likewise are some statutory limitations;[92] but others are directory only,[93] acting as inhibitions upon officers, but not as absolute restrictions upon the corporation.[94] Constitutional limitations restrict both statutes and ordinances,[95] and a violation thereof under any pretext renders contracts and levies void;[96] but a statutory restriction may be removed by subsequent legislation.[97] General statutes of limitation bind all municipalities not having special authority from the same source;[98] but a special provision, constitutional or statutory, may authorize a transgression of a general limitation.[99] The legislature of a territory has no power to impose upon or require a city to pay debts and liabilities which are in excess of the maximum limit fixed by congress.[1] A statute limiting municipal indebtedness does not authorize municipalities to contract indebtedness but limits their powers.[2] The general rules of statutory interpretation fix the scope and meaning of statutes of limitation,[3]

enjoined at the suit of a taxpayer from so doing. *Compare supra*, VIII, A, 2.

89. *Alabama.*— Birmingham *v.* Rumsey, 63 Ala. 352.

Kansas.— Stewart *v.* Schoonmaker, 50 Kan. 573, 32 Pac. 913; Stewart *v.* Kansas Town Co., 50 Kan. 553, 32 Pac. 121; Burrton *v.* Harvey County Sav. Bank, 28 Kan. 390.

Massachusetts.—Allen *v.* Taunton, 19 Pick. 485.

Vermont.— Van Sicklen *v.* Burlington, 27 Vt. 70.

United States.— Desmond *v.* Jefferson, 19 Fed. 483.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1823. And see *supra*, VIII, B, 2, b; IX, A, 6, f.

90. Hudson *v.* Marietta, 64 Ga. 286.

91. *California.*— Smith *v.* Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167.

Illinois.— Griswold *v.* East St. Louis, 47 Ill. App. 480.

Michigan.— Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677.

Pennsylvania.— Pepper *v.* Philadelphia, 181 Pa. St. 566, 37 Atl. 579 [*reversing* 6 Pa. Dist. 317]; Ackerman *v.* Buchman, (1885) 6 Atl. 218; Erie's Appeal, 91 Pa. St. 398.

Texas.— Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Gould *v.* Paris, 68 Tex. 511, 4 S. W. 650.

Virginia.— Robertson *v.* Staunton, 104 Va. 73, 51 S. E. 178.

Washington.— Burlington German-American Sav. Bank *v.* Spokane, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259.

United States.— Gamewell Fire-Alarm Tel. Co. *v.* Laporte, 96 Fed. 664 [*affirmed* in 102 Fed. 417, 42 C. C. A. 405]; Helena *v.* Mills, 94 Fed. 916, 36 C. C. A. 1.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1824.

92. Woulfe *v.* St. Paul, 107 La. 777, 32 So. 88; Purcell *v.* East Grand Forks, 91 Minn. 486, 98 N. W. 351; Spencer *v.* Gray, 5 Okla. 216, 48 Pac. 110; Martin *v.* Territory, 5 Okla. 188, 48 Pac. 106.

Limitation as to bonds see *infra*, XV, C, 3.

93. McCracken *v.* San Francisco, 16 Cal. 591; Argenti *v.* San Francisco, 16 Cal. 255.

94. Argenti *v.* San Francisco, 16 Cal. 255; Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666.

95. Reynolds *v.* Waterville, 92 Me. 292, 42 Atl. 553; Martin *v.* Territory, 5 Okla. 188, 48 Pac. 106; Ottumwa *v.* City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604. See also Morris *v.* Taylor, 31 Oreg. 62, 49 Pac. 660.

96. *Illinois.*— Baltimore, etc., R. Co. *v.* People, 200 Ill. 541, 66 N. E. 148.

Iowa.— Des Moines Citizens' Bank *v.* Spencer, 126 Iowa 101, 101 N. W. 643.

Massachusetts.— Browne *v.* Boston, 179 Mass. 321, 60 N. E. 934.

New York.— Cahill *v.* Hogan, 99 N. Y. App. Div. 619, 90 N. Y. Suppl. 1091 [*affirming* 44 Misc. 360, 89 N. Y. Suppl. 1022].

West Virginia.— Spilman *v.* Parkersburg, 35 W. Va. 605, 14 S. E. 279.

United States.—Buchanan *v.* Litchfield, 102 U. S. 278, 26 L. ed. 138.

97. Amey *v.* Allegheny City, 24 How. (U. S.) 364, 16 L. ed. 614.

Curative statutes see *infra*, XV, A, 6, d.

98. Moore *v.* Walla Walla, 60 Fed. 961.

99. Hixon *v.* Gould, 181 Mass. 567, 64 N. E. 409; People *v.* Salt Lake City, 23 Utah 13, 64 Pac. 460.

1. Martin *v.* Territory, 5 Okla. 188, 48 Pac. 106.

2. Robertson *v.* Staunton, 104 Va. 73, 51 S. E. 178.

3. *Georgia.*— Butts *v.* Little, 68 Ga. 272; Walsh *v.* Augusta, 67 Ga. 293.

Kentucky.— Holzhauer *v.* Newport, 94 Ky. 396, 22 S. W. 752, 15 Ky. L. Rep. 188.

Massachusetts.— Hixon *v.* Gould, 181 Mass. 567, 64 N. E. 409.

New Mexico.— Raton Waterworks Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898.

New York.— Gibson *v.* Knapp, 21 Misc. 499, 47 N. Y. Suppl. 446.

Pennsylvania.— Sener *v.* Ephrata, 176 Pa. St. 80, 34 Atl. 954; Bruce *v.* Pittsburg, 166 Pa. St. 152, 30 Atl. 831.

and also determine the question of repeal by implication.[4] Provisions limiting indebtedness are never retroactive;[5] but a constitutional provision operates immediately on promulgation, and before the enactment of a statute in conformity therewith,[6] unless it is otherwise provided by the constitution itself,[7] or unless its operation is prevented by a valid executory contract.[8] Limitations on state or county indebtedness do not affect municipalities,[9] and municipal limitations do not affect taxation by counties,[10] townships,[11] or districts,[12] including the corporations, nor cities not within the class inhibited.[13] A limitation merely upon the power of taxation does not prohibit contracting indebtedness;[14] but implied as well as express liabilities are included in a statute of interdiction.[15] Such a limitation cannot be evaded by contracting for paying rental in lieu of cash;[16] but a contract for a lighting plant is valid which is to be paid for out of the annual levy for lighting purposes.[17] A contract for indebtedness partly within and partly beyond the limitation is void only as to the excess.[18] Power to erect and maintain a light plant or a system of waterworks does not authorize a pledge of future general revenues for that purpose.[19] A contract, made pursuant to an

Rhode Island.— Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

South Carolina.— Germania Sav. Bank *v.* Darlington, 50 S. C. 337, 27 S. E. 846.

Wisconsin.— State *v.* Tomahawk, 96 Wis. 73, 71 N. W. 86.

United States.— Ft. Madison *v.* Ft. Madison Water Co., 114 Fed. 292, 52 C. C. A. 204 [*affirming* 110 Fed. 901].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1825.

4. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341. See also Ladd *v.* Gambell, 35 Oreg. 393, 59 Pac. 113.

5. Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452 (holding that a constitutional provision limiting the amount of indebtedness to be incurred by municipalities to two per cent of the value of the property within the municipality does not affect indebtedness incurred prior to its adoption, so as to prevent its being funded); Powell *v.* Madison, 107 Ind. 106, 8 N. E. 31; Ludington Water-Supply Co. *v.* Ludington, 119 Mich. 480, 78 N. W. 558.

6. Beard *v.* Hopkinsville, 95 Ky. 239, 24 S. W. 872, 15 Ky. L. Rep. 756, 44 Am. St. Rep. 222, 23 L. R. A. 402.

7. Holzhauer *v.* Newport, 94 Ky. 396, 22 S. W. 752, 15 Ky. L. Rep. 188.

8. Sheehan *v.* Long Island City, 11 Misc. (N. Y.) 487, 33 N. Y. Suppl. 428. See also *Ex p.* Lexington, 96 Ky. 258, 28 S. W. 665, 16 Ky. L. Rep. 467; Aydelott *v.* South Louisville, 26 S. W. 717, 16 Ky. L. Rep. 166.

9. State *v.* Madison, 7 Wis. 688; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585.

10. Adams *v.* East River Sav. Inst., 65 Hun (N. Y.) 145, 20 N. Y. Suppl. 12 [*affirmed* in 136 N. Y. 52, 32 N. E. 622].

11. Irwin *v.* Lowe, 89 Ind. 540, holding that a vote of aid to a railroad by a township is not invalidated by the fact that the township includes a city which is indebted to the full amount authorized by the constitution.

12. Kennebec Water Dist. *v.* Waterville, 96 Me. 234, 52 Atl. 774; Todd *v.* Laurens, 48 S. C. 395, 26 S. E. 682; Hyde *v.* Ewert, 16 S. D. 133, 91 N. W. 474.

13. Sweet *v.* Syracuse, 60 Hun (N. Y.) 28, 14 N. Y. Suppl. 421 [*affirming* 11 N. Y. Suppl. 114 (*reversed* on other grounds in 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289)]; Comstock *v.* Syracuse, 5 N. Y. Suppl. 874.

14. Emerson *v.* Blairsville, 2 Pittsb. (Pa.) 39, holding that a limitation on the taxing power of a municipal corporation does not amount to a prohibition to contract debts; and when such a corporation exceeds the limits of its taxing power the courts are powerless to control it, if the law creating the corporation does not restrain it.

15. Buck *v.* Eureka, 124 Cal. 61, 56 Pac. 612; Windsor *v.* Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280.

16. Baltimore, etc., R. Co. *v.* People, 200 Ill. 541, 66 N. E. 148. See also Voss *v.* Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 106 Am. St. Rep. 201, 66 L. R. A. 95; Hall *v.* Cedar Rapids, 115 Iowa 199, 88 N. W. 448.

Bona fide contract for rental.— "A municipal corporation may contract for a supply of water, gas, or like necessary, and may stipulate for the payment of an annual rental for the water or gas furnished each year, notwithstanding the aggregate of the rentals during the life of the contract may exceed the amount of indebtedness limited by the charter. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341. But see Beard *v.* Hopkinsville, 95 Ky. 239, 24 S. W. 872, 15 Ky. L. Rep. 756, 44 Am. St. Rep. 222, 23 L. R. A. 402; Murphy *v.* East Portland, 42 Fed. 308.

17. Hay *v.* Springfield, 64 Ill. App. 671.

18. Winamac *v.* Hess, 151 Ind. 229, 50 N. E. 81; Gray *v.* Bourgeois, 107 La. 671, 32 So. 42. See also State *v.* Blake, 26 Wash. 237, 66 Pac. 396; Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681.

19. Windsor *v.* Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280 [*distinguishing* Grant *v.* Davenport, 36 Iowa 396].

ordinance exceeding the prescribed limitation, is void;[20] but an ordinance is not void which provides for a contract when financial conditions will permit.[21] A contract by a municipal corporation which, when properly construed, does not fix the amount of the liability from its date does not create a present indebtedness, within the meaning of a constitutional restriction on municipal indebtedness.[22] Limitations as to departmental expenditures are subject to like rules with municipal limitations.[23]

b. Limitations For Particular Purposes. A limitation of the amount of permanent debt to be incurred for a certain work is not a restriction upon the total expenditure to be made therefor;[24] nor does a limitation upon the amount of annual expenditure for a particular purpose invalidate a contract in excess thereof;[25] but a liability may not be incurred in excess of the sum limited to be raised by bonds,[26] and a contract price exceeding the statutory limit is void as to the excess.[27] A limitation upon the amount which may be expended for "foundation of a public library" does not prevent additional expenditure for a library building;[28] nor does one for the expenses of a fire department apply to the cost of engines and apparatus.[29] A limitation of the amount to be expended by the mayor of a city for a particular purpose may not bind the city council.[30] Stipulated interest on a debt for an improvement is computable as part of the cost of the work in determining whether the debt limit is being exceeded.[31] An exception to a constitutional limitation of municipal indebtedness to a certain per cent of assessed values, if more should be necessary to obtain a certain utility, does not apply to cities already possessing such utility.[32] The insufficiency of the limited sum to complete an improvement constitutes no objection to its expenditure;[33] illegal expenditures are not ratified by an act giving authority to complete an improvement.[34] In ascertaining the balance of a fund which may be subjected to the payment of an improvement illegal expenditures should be rejected.[35]

c. Expenses Exceeding Yearly Revenue. "Pay as you go" expresses a municipal rule prevailing in some states that annual expenditures must be restricted to annual revenue,[36] of which every person contracting with a municipal corporation

See also Spilman *v.* Parkersburg, 35 W. Va. 605, 14 S. E. 279; Earles *v.* Wells, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886.

20. Salem Water Co. *v.* Salem, 5 Oreg. 29; Helena *v.* Mills, 94 Fed. 916, 36 C. C. A. 1.

21. Burlington Water Co. *v.* Woodward, 49 Iowa 58.

22. Chicago *v.* Galpin, 183 Ill. 399, 55 N. E. 731.

23. Grady *v.* Landram, 63 S. W. 284, 23 Ky. L. Rep. 506.

24. Foote *v.* Salem, 14 Allen (Mass.) 87; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

25. People *v.* Lowber, 7 Abb. Pr. (N. Y.) 158 (holding that where the charter of a municipal corporation gave it the sole right to establish markets, the attorney-general or any taxpayer could not enjoin the purchase of property for the purpose of establishing the market, on the ground that the amount expended was in excess of the amount which the charter declared that the city might annually expend for the purchase of land); Howard *v.* Oshkosh, 33 Wis. 309.

26. Trump Mfg. Co. *v.* Buchanan, 116 Mich. 113, 74 N. W. 466; Nelson *v.* New York, 63 N. Y. 535 [*affirming* 5 Hun 190].

27. Hasbrouck *v.* Milwaukee, 13 Wis. 37, 80 Am. Dec. 718.

28. Dearborn *v.* Brookline, 97 Mass. 466.

29. Leonard *v.* Long Island City, 20 N. Y. Suppl. 26.

30. See Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374.

31. Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702.

32. Palmer *v.* Helena, 19 Mont. 61, 47 Pac. 209.

33. People *v.* Kelly, 76 N. Y. 475.

34. Kingsley *v.* Brooklyn, 78 N. Y. 200, 7 Abb. N. Cas. 28 [*affirming* 5 Abb. N. Cas. 1].

35. Kingsley *v.* Brooklyn, 78 N. Y. 200, 7 Abb. N. Cas. 28 [*affirming* 5 Abb. N. Cas. 1].

36. *California.*— Montague *v.* English, 119 Cal. 225, 51 Pac. 327 (holding that under a constitutional provision that a city shall not incur any indebtedness in any year in excess of the revenue for that year, unless assented to by two thirds of the qualified electors, materials purchased by a city during one year cannot be paid for out of the revenues of any future year); San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641.

Illinois.— Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359.

Michigan.— Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 330.

New York.— Matter of Plattsburgh, 157 N. Y. 78, 51 N. E. 512 [*reversing* 27 N. Y. App. Div. 353, 50 N. Y. Suppl. 356]. See

must take notice at his peril;[37] but "income and revenue" includes sums coming into the municipal treasury from other sources than taxation.[38] Municipal contracts may be made, however, covering excess of revenue over fixed charges for more than a single year.[39] What is a current expense is for the courts to determine;[40] whether it is reasonable and necessary is for the municipal council.[41]

d. Debts and Expenditures Subject to Limitation — (I) *In General.* Limitations on municipal indebtedness do not apply to such liabilities as are cast by law upon the corporation,[42] but only to those created by voluntary act or contracts.[43] If so created, no indebtedness, whatever its form or purpose, is exempt;[44] and the fact that municipal wants are urgent will not validate an excessive indebtedness.[45] Warrants drawn on funds already in the treasury or to arise from a tax already levied,[46] or funding bonds,[47] or a contract to pay for services rendered in com-

also Griffith *v.* New York, 73 N. Y. App. Div. 549, 77 N. Y. Suppl. 136 [*affirmed* in 173 N. Y. 612, 66 N. E. 1109].

Utah.— State *v.* Quayle, 26 Utah 26, 71 Pac. 1060.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1827.

Application of surplus revenue to debts of former years see Siegel *v.* New Orleans, 81 Fed. 522, 26 C. C. A. 492.

37. Weaver *v.* San Francisco, 111 Cal. 319, 43 Pac. 972. See also State *v.* Helena, 24 Mont. 521, 63 Pac. 99, 81 Am. St. Rep. 453, 55 L. R. A. 336; Atlantic City Water-Works Co. *v.* Read, 50 N. J. L. 665, 15 Atl. 10.

38. Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157, money from licenses included.

39. Weston *v.* Syracuse, 17 N. Y. 110.

40. Helena Waterworks Co. *v.* Helena, 31 Mont. 243, 78 Pac. 220.

41. Helena Waterworks Co. *v.* Helena, 31 Mont. 243, 78 Pac. 220.

42. McCracken *v.* San Francisco, 16 Cal. 591; Thomas *v.* Burlington, 69 Iowa 140, 28 N. W. 480, holding that a constitutional provision that no municipal corporation shall be allowed to become indebted to an amount exceeding five per cent of the value of the taxable property within it does not apply to an indebtedness to a taxpayer accruing by reason of the collection of an illegal tax.

43. *California.*— McCracken *v.* San Francisco, 16 Cal. 591.

Georgia.— Conyers *v.* Kirk, 78 Ga. 480, 3 S. E. 442, a debt arising from a breach of contract to pay cash is not within a provision limiting indebtedness.

Illinois.— Springfield *v.* Edwards, 84 Ill. 626.

Iowa.— Thomas *v.* Burlington, 69 Iowa 140, 28 N. W. 480.

Kentucky.— O'Bryan *v.* Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. L. Rep. 469, 645.

And see *infra*, XV, A, 3, d, (VII).

Liability arising ex delicto.— The liability of a city for negligently failing to raise a fund to pay certain warrants is one arising *ex delicto* and not *ex contractu*, and therefore the city is liable for damages arising therefrom, although its limit of indebtedness has been reached. Little *v.* Portland, 26 Oreg. 225, 37 Pac. 911.

Damages caused by a change of grade are not an expense or liability, within a charter provision, prohibiting the incurring of any liability by contract or otherwise in excess of estimates fixed by the annual municipal meeting. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

44. Windsor *v.* Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280 (holding that a constitutional provision that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per cent on the value of its taxable property applies to implied, as well as express, promises creating such indebtedness); French *v.* Burlington, 42 Iowa 614; Com. *v.* Louisville, etc., R. Co., 105 Ky. 206, 48 S. W. 1092, 20 Ky. L. Rep. 1127; Adams *v.* Waterville, 95 Me. 242, 49 Atl. 1042. But *compare* Smith *v.* Dedham, 144 Mass. 177, 10 N. E. 782.

Temporary loan.— If a loan, although temporary in its inception, or any part thereof, is carried over into the next municipal year, it loses its temporary character and becomes a debt of the city within the inhibition of the article limiting the municipal indebtedness to five per cent of the city valuation. Blood *v.* Beal, 100 Me. 30, 60 Atl. 427.

Salary of a health officer.— Norton *v.* East St. Louis, 36 Ill. App. 171.

Indebtedness for school purposes.— Com. *v.* Louisville, etc., R. Co., 105 Ky. 206, 48 S. W. 1092, 20 Ky. L. Rep. 1127; Richmond *v.* Powell, 27 S. W. 1, 16 Ky. L. Rep. 174.

Indebtedness for waterworks. — Helena Water Works Co. *v.* Helena, 31 Mont. 243, 78 Pac. 220; Brown *v.* Corry, 175 Pa. St. 528, 34 Atl. 854 [*affirming* 4 Pa. Dist. 645, 17 Pa. Co. Ct. 490].

45. Bradford *v.* San Francisco, 112 Cal. 537, 44 Pac. 912.

46. Blanchard *v.* Benton, 109 Ill. App. 569; Phillips *v.* Reed, 107 Iowa 331, 76 N. W. 850, 77 N. W. 1031; Booth *v.* Weiss, 15 Phila. (Pa.) 159.

47. *Indiana.*— Powell *v.* Madison, 107 Ind. 106, 8 N. E. 31, holding that neither the issuing of new bonds by a municipal corporation for the payment of a preëxisting debt and accrued interest, nor the execution of coupons for the payment of interest yet to accrue on such preëxisting debt, is the

promising a municipal debt,[48] do not constitute an indebtedness within the meaning of a provision limiting indebtedness. The issuance of negotiable bonds in payment for lands purchased by a city is not making a loan in violation of a statute prohibiting loans exceeding the levy and tax for any given year.[49] And using a trust fund for which a city is already liable does not increase its indebtedness.[50]

(II) *Current Expenses.* A city having an aggregate indebtedness exceeding the limitation imposed by law is powerless to create any additional debt even for its ordinary current expenses.[51] A provision in a charter limiting the power of the city to borrow money and issue bonds applies as a limitation to the incurring of liabilities by borrowing money and not to those incurred as part of the current expenses of the city.[52] A contract by a city for a street improvement is not a current expense to which current yearly revenues are applicable.[53]

(III) *Improvements, Property, and Works*—(A) *In General.* Legislative limitations as to indebtedness may be transcended by special legislative authority for the purpose of paying for public works or improvements.[54] And restrictions as to indebtedness for general purposes do not apply to indebtedness incurred for special objects,[55] nor do limitations, either constitutional or legislative, apply to improvements to be paid for out of a special assessment,[56] or cash in the municipal treasury.[57] After a city's indebtedness has reached the limit fixed by law, it cannot make a contract binding it unconditionally to pay for public improvements, although it contemplates a reimbursement for such payments from proceeds of the sale of bonds which do not increase the indebtedness within said limit, being

creation of a new indebtedness, or the increase of an old one.

Iowa.— Cedar Rapids *v.* Bechtel, 110 Iowa 196, 81 N. W. 468.

Montana.— Palmer *v.* Helena, 19 Mont. 61, 47 Pac. 209.

New York.— Poughkeepsie *v.* Quintard, 136 N. Y. 275, 32 N. E. 764 [*affirming* 65 Hun 141, 19 N. Y. Suppl. 944].

Oregon.— Morris *v.* Taylor, 31 Oreg. 62, 49 Pac. 660.

South Dakota.— Hyde *v.* Ewert, 16 S. D. 133, 91 N. W. 474; National L. Ins. Co. *v.* Mead, 13 S. D. 37, 82 N. W. 78, 79 Am. St. Rep. 876, 48 L. R. A. 785, 13 S. D. 342, 83 N. W. 335; Mitchell *v.* Smith, 12 S. D. 241, 80 N. W. 1077.

Texas.— Tyler *v.* Jester, 97 Tex. 344, 78 S. W. 1058.

United States.— Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Lake County Bd. of Com'rs *v.* Keene Five Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534.

And see *infra*, XV, C, 3, c.

But see Birkholz *v.* Minnie, 6 N. D. 511, 72 N. W. 931.

48. Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587.

49. Richmond *v.* McGirr, 78 Ind. 192.

50. Ayer *v.* Bangor, 85 Me. 511, 27 Atl. 523.

51. Chicago *v.* McDonald, 176 Ill. 404, 52 N. E. 982; Prince *v.* Quincy, 105 Ill. 215; Prince *v.* Quincy, 105 Ill. 138, 44 Am. Rep. 785; Gold *v.* Peoria, 65 Ill. App. 602; Sackett *v.* New Albany, 88 Ind. 473, 45 Am. Rep. 467; Spilman *v.* Parkersburg, 35 W. Va. 605, 14 S. E. 279. *Contra*, O'Bryan *v.* Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. L. Rep. 469, 645; Gladwin *v.* Ames, 30 Wash. 608, 71 Pac. 189; Hull *v.* Ames, 26 Wash. 272, 66 Pac. 391, 90 Am. St. Rep. 743; Centerville *v.* Fidelity Trust, etc., Co., 118 Fed. 332, 55 C. C. A. 348.

52. Barrett *v.* East St. Louis, 89 Ill. 175.

53. Berlin Iron Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 408.

54. *Illinois.*— Dutton *v.* Aurora, 114 Ill. 138, 28 N. E. 461.

Iowa.— Marion Water Co. *v.* Marion, 121 Iowa 306, 96 N. W. 883.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

New Jersey.— Stroud *v.* Consumers' Water Co., 56 N. J. L. 422, 28 Atl. 578.

Rhode Island.— Peabody *v.* Westerly Water Works Co., 20 R. I. 176, 37 Atl. 807.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1830.

55. *Iowa.*— Rice *v.* Keokuk, 15 Iowa 579.

Kentucky.— Warren *v.* Newport, 64 S. W. 852, 23 Ky. L. Rep. 1006.

Texas.— Galveston *v.* Loonie, 54 Tex. 517, indebtedness for sidewalks.

Washington.— Petros *v.* Vancouver, 13 Wash. 423, 43 Pac. 361, indebtedness for light plant.

United States.— Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659, indebtedness for grading and paving streets. See also Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1830.

56. See *infra*, XV, A, 3, d, (IV).

57. Quill *v.* Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681.

payable from special taxes for the improvement.[58] But it is otherwise where the remedy of the holders of the bonds is confined exclusively to the special funds provided for, and to the collection of, assessments by enforcing the lien upon the lots or parcels of ground assessed with the cost of the improvements.[59] Where a city has already reached its constitutional limit of indebtedness it has no power to render itself liable for the cost of street improvements contracted for subsequent thereto, even though the city fails to levy an assessment and provide a special fund for such improvement as it is required to do.[60] Excessive indebtedness may not be incurred for the purchase of property on the ground that it is worth more than the price and will increase the municipal revenue;[61] a municipal corporation cannot avoid restrictions upon the amount of indebtedness which it may incur by purchasing property for public purposes subject to liens.[62] In Iowa it has been held that the obligation created by a contract made by a city for water for fire protection is not an indebtedness within the meaning of the constitutional limitation of the indebtedness which may be contracted by municipal corporations.[63]

(B) *Damages or Compensation.* Condemnation awards for property taken for public use are not to be counted as municipal indebtedness under constitutional restrictions as to the amount of municipal indebtedness;[64] and excess of the lawful limit of indebtedness is no defense to an action for damages resulting from the negligent or unskilful construction of a street gutter,[65] or for damages for change of a street grade.[66]

(IV) *Indebtedness Payable Specially.* The fact that a municipality has passed beyond its debt limit does not prevent it from contracting a debt payable expressly out of a special fund,[67] or a special assessment,[68] or both;[69] but the gen-

58. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

59. Quill *v.* Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; Catlettsburg *v.* Self, 115 Ky. 669, 74 S. W. 1064, 25 Ky. L. Rep. 161; Adams *v.* Ashland, 80 S. W. 1105, 26 Ky. L. Rep. 184. But *compare* Burlington Sav. Bank *v.* Clinton, 111 Fed. 439.

60. Soule *v.* Seattle, 6 Wash. 315, 33 Pac. 384, 1080.

61. Scott *v.* Davenport, 34 Iowa 208.

62. Ironwood Water Works Co. *v.* Ironwood, 99 Mich. 454, 58 N. W. 371.

63. Creston Waterworks Co. *v.* Creston, 101 Iowa 687, 70 N. W. 739.

64. Goshen Highway Com'rs *v.* Jackson, 165 Ill. 17, 45 N. E. 1000; Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

65. Bartle *v.* Des Moines, 38 Iowa 414.

66. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183; Smith *v.* St. Joseph, 122 Mo. 643, 27 S. W. 344.

67. *Colorado.*— Leadville Illuminating Gas Co. *v.* Leadville, 9 Colo. App. 400, 49 Pac. 268.

Indiana.— Quill *v.* Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681.

Missouri.— See Lexington *v.* Lafayette County Bank, 165 Mo. 671, 65 S. W. 943.

Montana.— State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15.

Pennsylvania.— Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916; McDonough *v.* Washington Borough, 20 Pa. Co. Ct. 345.

Rhode Island.— McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

Texas.— Dallas Electric Co. *v.* Dallas, 23 Tex. Civ. App. 323, 58 S. W. 153.

Washington.— Winston *v.* Spokane, 12 Wash. 524, 41 Pac. 888; Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1832.

68. *Iowa.*— Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568, 89 N. W. 7; Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. 431; Tuttle *v.* Polk, 92 Iowa 433, 60 N. W. 733; Davis *v.* Des Moines, 71 Iowa 500, 32 N. W. 470.

Kansas.— State *v.* Neodesha, 3 Kan. App. 319, 45 Pac. 122.

Minnesota.—Kelly *v.* Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

Missouri.— Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600.

New York.— Baldwin *v.* Oswego, 1 Abb. Dec. 62, 2 Keyes 132.

Oregon.— Little *v.* Portland, 26 Oreg. 235, 37 Pac. 911.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1832.

69. Jacksonville R. Co. *v.* Jacksonville, 114 Ill. 562, 2 N. E. 478; Addyston Pipe, etc., Co. *v.* Corry, 197 Pa. St. 41, 46 Atl. 1035, 80 Am. St. Rep. 812, in which case it was held that the indebtedness of a city is not increased, within a prohibition against indebtedness exceeding seven per cent of the assessed value of its taxable property, by the making of a contract for a sewer which provides the contract price by an appropriation of money in the treasury, and assessments in good faith on the property benefited, although it is afterward determined that the assessments as to non-abutting property cannot be enforced.

eral revenues of the city must not be made liable or the limitation as to indebtedness will apply.[70]

(v) *Anticipatory Obligations.* A contract may be entered into, an appropriation made, or a warrant drawn by an overburdened municipality in anticipation of taxes thereafter to be collected,[71] provided that, at the time, the tax has been actually levied and the municipality does not thereby incur any liability.[72] This is treated as an assignment of anticipated revenue.[73] But the debt limitation may not be evaded by the device of a "temporary loan."[74]

(vi) *Executory Contracts.* A contract by a municipality to pay for water, lights, sewage, and the like, at stated times in the future, does not create an indebtedness for the aggregate amount of such payments, within the meaning of a provision limiting the indebtedness of municipalities, and the validity of such a contract is to be tested by the amount of the first payment due thereunder.[75] A

70. Atkinson *v.* Great Falls, 16 Mont. 372, 40 Pac. 877; Austin *v.* Seattle, 2 Wash. 667, 27 Pac. 557; Fowler *v.* Superior, 85 Wis. 411, 54 N. W. 800. See also Jutte, etc., Co. *v.* Altoona, 94 Fed. 61, 36 C. C. A. 84.

71. Fuller *v.* Heath, 89 Ill. 296 [*affirming* 1 Ill. App. 118]; Law *v.* People, 87 Ill. 385; Springfield *v.* Edwards, 84 Ill. 626; East St. Louis *v.* Flannigan, 26 Ill. App. 449; Alpena *v.* Alpena Cir. Judge, 97 Mich. 550, 56 N. W. 941; Shannon *v.* Huron, 9 S. D. 356, 69 N. W. 598; *In re* State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852; Denny *v.* Spokane, 79 Fed. 719, 25 C. C. A. 164.

Form of warrant.— To anticipate the uncollected taxes of any fund, the warrant must be specifically against, and to be paid only out of the taxes levied for that fund. It is not sufficient that the warrant directs the treasurer to charge it to a particular fund. Fuller *v.* Chicago, 89 Ill. 282.

72. Springfield *v.* Edwards, 84 Ill. 626.

73. Fuller *v.* Heath, 89 Ill. 296; Law *v.* People, 87 Ill. 385; Springfield *v.* Edwards, 84 Ill. 626.

74. Law *v.* People, 87 Ill. 385.

75. *California.*— Doland *v.* Clark, 143 Cal. 176, 76 Pac. 958; Higgins *v.* San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794.

Colorado.— Denver *v.* Hubbard, 17 Colo. App. 346, 68 Pac. 993.

Illinois.— East St. Louis *v.* East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97; Cain *v.* Wyoming, 104 Ill. App. 538; Carlyle Water, etc., Co. *v.* Carlyle, 31 Ill. App. 325.

Indiana.— Voss *v.* Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 106 Am. St. Rep. 201, 66 L. R. A. 95; South Bend *v.* Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795; Foland *v.* Frankton, 142 Ind. 546, 41 N. E. 1031; Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416. See also Laporte *v.* Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 58 Am. St. Rep. 359, 35 L. R. A. 686.

Iowa.— See Grant *v.* Davenport, 36 Iowa 396.

Missouri.— Webb City, etc., Waterworks Co. *v.* Carterville, 153 Mo. 128, 54 S. W. 557; Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157, 140 Mo. 145, 39 S. W. 768; Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 653, 27 L. R. A. 769.

New Mexico.— Raton Waterworks Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898.

Oklahoma.— Territory *v.* Oklahoma, 2 Okla. 158, 37 Pac. 1094.

Oregon.— Salem Water Co. *v.* Salem, 5 Oreg. 29.

Pennsylvania.—Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959.

Texas.— Tyler *v.* Jester, 97 Tex. 344, 78 S. W. 1058.

Wisconsin.— Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681; Burham *v.* Milwaukee, 98 Wis. 128, 73 N. W. 1018; Stedman *v.* Berlin, 97 Wis. 505, 73 N. W. 57.

United States.— Columbia Ave. Sav. Fund, etc., Co. *v.* Dawson, 130 Fed. 152 [*reversed* on other grounds in 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713]; Fidelity Trust, etc., Co. *v.* Fowler Water Co., 113 Fed. 560; Anoka Waterworks, etc., Co. *v.* Anoka, 109 Fed. 580; Cunningham *v.* Cleveland, 98 Fed. 657, 39 C. C. A. 211; Walla Walla Water Co. *v.* Walla Walla, 60 Fed. 957 [*affirmed* in 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341]. But see Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1834.

But see Beard *v.* Hopkinsville, 95 Ky. 239, 24 S. W. 872, 15 Ky. L. Rep. 756, 44 Am. St. Rep. 222, 23 L. R. A. 402 (holding that where a city contracts to pay a certain sum per year for a given number of years, for water and electric lights, it incurs an indebtedness for the total amount which the contract provides shall be paid during all the years it continues); Niles Water-Works *v.* Niles, 59 Mich. 311, 26 N. W. 525 [*distinguished* in Monroe Water Co. *v.* Heath, 115 Mich. 277, 73 N. W. 234] (holding that where a city cannot contract debts or incur liabilities exceeding in any one year the revenue for that year, unless authorized by popular vote, the contract made without such vote for the use of water hydrants for thirty years at a yearly rental creates a liability to the full extent of the thirty years' rental,

municipality already overburdened may not, however, increase annual expenses beyond annual revenue by any contract.[76] A contract whereby a city agrees to pay a definite sum on the completion of a waterworks plant creates a debt against the city for the full amount from the time of execution of the contract.[77]

(VII) *TORTS.* Indebtedness beyond the limit, statutory or constitutional, is no defense against an action for municipal tort.[78]

e. Computation of Limit or Amount — (I) *IN GENERAL.* In computing the amount of municipal indebtedness with reference to constitutional and statutory limitations, the language of express provisions on the subject is controlling.[79] In such computation are to be included, unless otherwise expressly provided,[80] the principal and overdue interest of all bonded indebtedness,[81] all special funds diverted or misappropriated, and all unauthorized expenditures which must be reimbursed;[82] and judgments against the city not provided for,[83] but not city stock or bonds in the hands of the sinking fund commission,[84] nor bonds specially excepted or authorized,[85] nor state or county indebtedness,[86] nor a contract under which a debt may arise,[87] nor indebtedness proposed to be incurred thereafter,[88] nor unaccrued interest,[89] nor floating indebtedness, the money to pay which is in the city treasury,[90] nor special assessments,[91] nor a sinking fund,[92] nor anticipation tax

and this being in excess of the revenue for any one year the contract is void).

76. *Illinois.*— Chicago *v.* McDonald, 176 Ill. 404, 52 N. E. 982; Prince *v.* Quincy, 28 Ill. App. 490 [*affirmed* in 128 Ill. 443, 21 N. E. 768].

Indiana.— See Laporte *v.* Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 58 Am. St. Rep. 359, 35 L. R. A. 686.

Montana.— State *v.* Helena, 24 Mont. 521, 63 Pac. 99, 81 Am. St. Rep. 453, 55 L. R. A. 336; Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

New Jersey.— Read *v.* Atlantic City, 49 N. J. L. 558, 9 Atl. 759.

Pennsylvania.— Nankivil *v.* Yeosock, 7 Kulp 518.

South Carolina.— Duncan *v.* Charleston, 60 S. C. 532, 39 S. E. 265.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1834.

77. Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781. See also Windsor *v.* Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280.

78. Bloomington *v.* Perdue, 99 Ill. 329; Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568, 89 N. W. 7; Rice *v.* Des Moines, 40 Iowa 638; Conner *v.* Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; Lorence *v.* Bean, 18 Wash. 36, 50 Pac. 582.

79. Ashland *v.* Culbertson, 103 Ky. 161, 44 S. W. 441, 19 Ky. L. Rep. 1812; Shelbyville *v.* Shelbyville Water, etc., Co., 27 S. W. 85, 16 Ky. L. Rep. 176; Adams *v.* East River Sav. Inst., 65 Hun (N. Y.) 145, 20 N. Y. Suppl. 12 [*affirmed* in 136 N. Y. 52, 32 N. E. 622]; Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238; Millsaps *v.* Terrell, 60 Fed. 193, 8 C. C. A. 554.

Any debt expressly excepted by law is not included. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970; Swanson *v.* Ottumwa, 118 Iowa 161, 91 N. W. 1048, 59 L. R. A. 620; Lines *v.* Otego, 91 N. Y. Suppl. 785; State *v.* Quayle, 26 Utah 26, 71 Pac. 1060.

80. Soule *v.* McKibben, 6 Cal. 142.

81. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970; State *v.* Tomahawk, 96 Wis. 73, 71 N. W. 86.

82. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; Rice *v.* Milwaukee, 100 Wis. 516, 76 N. W. 341. See also Joliet *v.* Alexander, 194 Ill. 457, 62 N. E. 861.

83. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970.

84. New York Sav. Bank *v.* Grace, 102 N. Y. 313, 7 N. E. 162; Brooke *v.* Philadelphia, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781.

85. Los Angeles *v.* Hance, 137 Cal. 490, 70 Pac. 475.

86. Lancaster School Dist. *v.* Robinson-Humphrey Co., 64 S. C. 545, 42 S. E. 998; Todd *v.* Laurens, 48 S. C. 395, 26 S. E. 682; State *v.* Tomahawk, 96 Wis. 73, 71 N. W. 86.

87. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; Keihl *v.* South Bend, 76 Fed. 921, 22 C. C. A. 618, 36 L. R. A. 228.

88. Peck-Williamson Heating, etc., Co. *v.* Oklahoma City Bd. of Education, 6 Okla. 279, 50 Pac. 236.

89. Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803; Blanchard *v.* Benton, 109 Ill. App. 569; Ashland *v.* Culbertson, 103 Ky. 161, 44 S. W. 441, 19 Ky. L. Rep. 1812; Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681.

90. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970.

Funds included among the cash resources which have been set apart pursuant to statutory authority to meet some specific indebtedness should be deducted, but funds on hand not so set apart should not be deducted. Kronsbein *v.* Rochester, 76 N. Y. App. Div. 494, 78 N. Y. Suppl. 813.

91. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970.

92. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970.

bonds,[93] nor merely optional obligations,[94] nor illegal or void obligations.[95] According to some of the decisions assets of a municipality, applicable to the payment of its debts, consisting of cash on hand, taxes assessed for municipal purposes during the year in which indebtedness is contracted, and unpaid taxes for prior years are to be deducted in determining the amount of indebtedness;[96] but according to other decisions a provision limiting municipal indebtedness refers to outstanding debts and not net indebtedness.[97] A deduction of damages for a city contractor's failure to complete work within the time specified is not to be subtracted from the amount due on the contract, in determining whether the city's indebtedness has exceeded the legal limit.[98] Revenue anticipated from licenses,[99] or from a tax roll not yet in the hands of the collector,[1] or money derived from the sale of bonds,[2] or borrowed to erect a school building is not to be considered in computing municipal indebtedness.[3] In a constitutional sense, prohibited indebtedness must be a burden and payable by a city from funds which cannot be lawfully appropriated to the purpose.[4] A provision that a municipality shall not be allowed to become indebted in any manner or for any purpose beyond a certain amount is not confined to bonded indebtedness, but in determining the amount all classes of indebtedness are to be included.[5] The acquisition of property by a municipality, on the credit of a special fund not in existence but to be subsequently created, does not create a debt against the city within a constitutional debt limit.[6] A debt contracted by popular vote is not chargeable to ordinary municipal indebtedness.[7] "Funded debts" includes coupon bonds payable, principal and interest, out of future levies.[8]

(II) *Value of Taxable Property.* The basis of computation to ascertain the limit of indebtedness for a municipality is the aggregate valuation of property in the boundaries of such municipality, as determined by the last preceding assessment thereof for taxation.[9] Under some provisions on this subject such compu-

93. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970.

94. Windsor *v.* Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280; Stedman *v.* Berlin, 97 Wis. 505, 73 N. W. 57.

95. Freeman *v.* Huron, 10 S. D. 368, 73 N. W. 260.

96. French *v.* Burlington, 42 Iowa 614; Kelly *v.* Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; Graham *v.* Spokane, 19 Wash. 447, 53 Pac. 714. See also Phillips *v.* Reed, 107 Iowa 331, 76 N. W. 850, 77 N. W. 1031; Crogster *v.* Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; Earles *v.* Wells, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886.

97. Chicago *v.* McDonald, 176 Ill. 404, 52 N. E. 982 (holding that in determining the aggregate indebtedness of a municipal corporation, the amount in the treasury should not be deducted from the sum total of the debt as the question is one of indebtedness and not of insolvency); Jordan *v.* Andrus, 27 Mont. 22, 69 Pac. 118 (holding that indebtedness means what a city owes irrespective of demands which it may hold against others); Davis *v.* Braddock Borough, 31 Pittsb. Leg. J. N. S. (Pa.) 145. See also City Water Supply Co. *v.* Ottumwa, 120 Fed. 309, holding that the fact that a city which is already indebted in excess of the constitutional limit has in its treasury a part of the money necessary to discharge the obligation it assumes in entering into a contract for a public improvement, and may be able to collect the remainder from taxes by the time the obligation matures, does not alter the fact that such contract creates an indebtedness within a constitutional inhibition.

98. Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681.

99. Rice *v.* Milwaukee, 100 Wis. 516, 76 N. W. 341.

1. Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132; Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681.

2. Webb City, etc., Waterworks Co. *v.* Carterville, 142 Mo. 101, 43 S. W. 625.

3. Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681.

4. Bailey *v.* Sioux Falls, 19 S. D. 231, 103 N. W. 16.

5. Chicago *v.* Galpin, 183 Ill. 399, 55 N. E. 731; Council Bluffs *v.* Stewart, 51 Iowa 385, 1 N. W. 628.

6. Faulkner *v.* Seattle, 19 Wash. 320, 53 Pac. 365.

7. Hazeltine *v.* Blake, 26 Wash. 231, 66 Pac. 394. See also Keller *v.* Scranton, 202 Pa. St. 586, 52 Atl. 26; Austin *v.* Seattle, 2 Wash. 667, 27 Pac. 557.

8. People *v.* Carpenter, 31 N. Y. App. Div. 603, 52 N. Y. Suppl. 781.

9. *Illinois.*— Chicago *v.* Fishburn, 189 Ill. 367, 59 N. E. 791; Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781.

Minnesota.— Du Toit *v.* Belview, 94 Minn. 128, 102 N. W. 216; Beck *v.* St. Paul, 87 Minn. 381, 92 N. W. 328.

tation must be based on the assessment made for state and county purposes,[10] while under others the valuation fixed by the municipal authorities is the proper basis.[11] Any refund or rebate of corporation taxes,[12] and any subsequent reduction of values, is to be disregarded.[13] Unless restricted in terms to real estate, personalty is embraced in the aggregate;[14] and in New York certain public franchises are to be considered as part of the assessable real estate of a municipality.[15]

4. Exercise of Power — a. In General. Power to incur indebtedness and to make expenditures is an inherent function of the governing body of a municipality,[16] and is not within the capacity of other boards or officers,[17] unless it is expressly conferred by statute or delegated by ordinance;[18] but merely ministerial functions may be directed by resolution.[19] Constitutional provisions as to the mode of exercise of the power are mandatory;[20] so likewise usually are those enacted by the legislature;[21] and a substantial departure therefrom invalidates the corporate action.[22] Under a statute prohibiting a city from incurring liabilities until the city council has duly voted an appropriation sufficient to meet such liabilities, together with all unpaid liabilities which are payable therefrom, the city is precluded from contracting a new liability only where prior unpaid liabilities in excess of the appropriation have been actually incurred, and not where the mere estimated expenses exceed the appropriation.[23]

Missouri.— State *v.* Allen, 183 Mo. 283, 82 S. W. 103.

Oklahoma.— Guthrie *v.* New Vienna Bank, 4 Okla. 194, 38 Pac. 4.

Pennsylvania.— Brown's Appeal, 111 Pa. St. 72, 2 Atl. 77, valuation fixed by the last assessment is conclusive.

South Carolina.— Germania Sav. Bank *v.* Darlington, 50 S. C. 337, 27 S. E. 846.

Washington.— West *v.* Chehalis, 12 Wash. 369, 41 Pac. 171, 50 Am. St. Rep. 896.

Wisconsin.— State *v.* Tomahawk, 96 Wis. 73, 71 N. W. 86.

United States.— City Water Supply Co. *v.* Ottumwa, 120 Fed. 309; Prickett *v.* Marceline, 65 Fed. 469.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1838.

Actual value.— Value, as used in Iowa Const. art. 11, § 3, prohibiting municipalities from becoming indebted in an amount exceeding a certain per centum on the value of the taxable property located therein, means actual value and not the value as assessed for taxation. Halsey *v.* Belle Plaine, 128 Iowa 467, 104 N. W. 494. *Contra*, City Water Supply Co. *v.* Ottumwa, 120 Fed. 309, construing Iowa Const. art. 11, 33.

10. *Illinois.*— Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781.

Iowa.— Windsor *v.* Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280.

Oklahoma.— Guthrie *v.* New Vienna Bank, 4 Okla. 194, 38 Pac. 4.

South Carolina.— Cleveland *v.* Spartanburg, 54 S. C. 83, 31 S. E. 871; Todd *v.* Laurens, 48 S. C. 395, 26 S. E. 682.

United States.— Prickett *v.* Marceline, 65 Fed. 469.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1838.

11. Reynolds *v.* Waterville, 92 Me. 292, 42 Atl. 553; Bruce *v.* Pittsburg, 166 Pa. St. 152, 30 Atl. 831; Dupont *v.* Pittsburgh, 69 Fed. 13.

Prior to any municipal valuation, a new corporation may act upon the basis of state and county assessment. Childs *v.* Anacortes, 5 Wash. 452, 32 Pac. 217.

12. Germania Sav. Bank *v.* Darlington, 50 S. C. 337, 27 S. E. 846; Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28.

13. Childs *v.* Anacortes, 5 Wash. 452, 32 Pac. 217.

14. Nalle *v.* Austin, (Tex. Civ. App. 1897) 42 S. W. 780.

15. Kronsbein *v.* Rochester, 76 N. Y. App. Div. 494, 78 N. Y. Suppl. 813.

16. Duggan *v.* New Orleans, 15 La. Ann. 449.

Veto power of mayor see People *v.* Amsterdam, 90 Hun (N. Y.) 488, 36 N. Y. Suppl. 59; State *v.* Brown, 8 Ohio Cir. Ct. 103, 4 Ohio Cir. Dec. 345.

17. Duggan *v.* New Orleans, 15 La. Ann. 449.

18. Duggan *v.* New Orleans, 15 La. Ann. 449.

Contracts for current charges.— A city is not required to enact an ordinance to enable its officers to execute contracts for current charges of the administration of its affairs. Tyler *v.* Jester, 97 Tex. 344, 78 S. W. 1058.

19. See Tyler *v.* Columbus, 6 Ohio Cir. Ct. 224, 3 Ohio Cir. Dec. 427.

20. Beiknap *v.* Louisville, 99 Ky. 474, 36 S. W. 1118, 18 Ky. L. Rep. 313, 59 Am. St. Rep. 478, 34 L. R. A. 256; Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

21. Hackman *v.* Staunton, 42 Ill. App. 409; Knollman *v.* King, 109 La. 799, 33 So. 776. See also State *v.* Brown, 8 Ohio Cir. Ct. 103, 4 Ohio Cir. Dec. 345. *Compare* Poillon *v.* Brooklyn, 101 N. Y. 132, 4 N. E. 191.

22. Hackman *v.* Staunton, 42 Ill. App. 409; *Re* Cooke, 18 Ont. 72.

23. Webb Granite, etc., Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639.

b. Petition by Property-Owners. The statutory requirement of a petition of a majority of citizens or property-owners,[24] as evidence of taxpayers' assent to the incurring of municipal indebtedness, is mandatory, and compliance therewith is essential to the validity of the corporate act creating a debt;[25] but such a petition is not a condition precedent to a valid contract for lighting the streets for a number of years, as such a contract does not create a debt or liability.[26]

c. Submission to Popular Vote. The submission to a popular vote of the question of municipal expenditure or indebtedness for certain purposes is required by constitutional or statutory provisions in various jurisdictions.[27] Ordinances, by-laws, and contracts in violation of these restrictions are *ultra vires* and void.[28] The action of a city council may, however, be validated by an election held sub-

24. See the statutes of the different states. And see Hubbell *v.* Custer City, 15 S. D. 55, 87 N. W. 520.

Genuineness of signatures.—Where a special statute provided that the officers should have no power to borrow until they had first filed the written assent of two thirds of the resident taxpayers named in the tax list, with an affidavit that the persons whose assents were attached were two thirds, the affidavit was not intended to be an affidavit as to the genuineness of the signatures. Starin *v.* Genoa, 23 N. Y. 439.

25. Pratt *v.* Luther, 45 Ind. 250; Hubbell *v.* Custer City, 15 S. D. 55, 87 N. W. 520. But *compare* Fowler *v.* F. C. Austin Mfg. Co., 5 Ind. App. 489, 32 N. E. 596, holding that such a requirement does not apply when a debt is incurred for an indispensable matter.

26. Seward *v.* Liberty, 142 Ind. 551, 42 N. E. 39.

27. See the constitutions and statutes of the several states. And see the following cases:

Kentucky.— O'Bryan *v.* Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. L. Rep. 469, 645; Frantz *v.* Jacob, 88 Ky. 525, 11 S. W. 654, 11 Ky. L. Rep. 55.

Massachusetts — Foote *v.* Salem, 14 Allen 87.

Michigan.— Savidge *v.* Spring Lake, 112 Mich. 91, 70 N. W. 425; Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677.

Minnesota.— Purcell *v.* East Grand Forks, 91 Minn. 486, 98 N. W. 351, holding that the restriction of the rights of the people of a city to increase its indebtedness above the limit specified by law cannot be enlarged by a two-thirds vote of the electors.

New York.— Champlain *v.* McCrea, 165 N. Y. 264, 59 N. E. 83; Averne-by-the-Sea *v.* Shepard, 20 N. Y. App. Div. 12, 46 N. Y. Suppl. 653; Allen *v.* Northville, 39 Hun 240.

North Carolina.— Thrift *v.* Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427; Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

Pennsylvania.— Roye *v.* Columbia Borough, 192 Pa. St. 146, 43 Atl. 597; Barr *v.* Philadelphia, 191 Pa. St. 438, 43 Atl. 335; Pepper *v.* Philadelphia, 181 Pa. St. 566, 37 Atl. 579 [*reversing* 6 Pa. Dist. 317]; Wheeler *v.* Philadelphia, 32 Leg. Int. 75.

South Carolina.— Duncan *v.* Charleston, 60 S. C. 532, 39 S. E. 265.

United States.— Office Specialty Mfg. Co. *v.* Elbert, 73 Fed. 324, construing Ga. Const. art. 7, § 7, par. 1.

Canada.— Chicoutimi *v.* Price, 29 Can. Sup. Ct. 135; Gagnon *v.* Pointe-au-Pie, 22 Quebec Super. Ct. 396.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1841. See also, as to the submission of questions to the popular vote, *infra*, XV, A, 5, g; XV, C, 5.

In construing certain provisions as to municipal indebtedness the courts have held that an election is not necessary to authorize the funding of a debt already existing (Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580), or the making of an executory contract not exceeding for annual disbursement the usual annual revenue (McMaster *v.* Waynesboro, 122 Ga. 231, 50 S. E. 122, where a city makes a ten-year-lighting contract without a popular vote authorizing the same there is no creation of a debt; such an agreement being operative only so long as neither party repudiated it; Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 32 S. E. 907; Cartersville Water Works Co. *v.* Cartersville, 89 Ga. 689, 16 S. E. 70; Cartersville Imp., etc., Co. *v.* Cartersville, 89 Ga. 683, 16 S. E. 25; Lott *v.* Waycross, 84 Ga. 681, 11 S. E. 558), or the providing of water, sewerage, and light for a municipality (Greensboro *v.* Scott, 138 N. C. 181, 50 S. E. 589; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870; Tucker *v.* Raleigh, 75 N. C. 267, 272). See also Savidge *v.* Spring Lake, 112 Mich. 91, 70 N. W. 425; Merrill R., etc., Co. *v.* Merrill, 80 Wis. 358, 49 N. W. 965.

28. Ramsey *v.* Shelbyville, 119 Ky. 180, 83 S. W. 116, 1136, 26 Ky. L. Rep. 1102, 68 L. R. A. 300, 83 S. W. 1136, 27 Ky. L. Rep. 141, 68 L. R. A. 300 (the gift of a library building conditioned upon raising a certain amount necessitates an election); Grady *v.* Pruit, 111 Ky. 100, 63 S. W. 283, 23 Ky. L. Rep. 506; Knipper *v.* Covington, 109 Ky. 187, 58 S. W. 498, 22 Ky. L. Rep. 676 (even though an emergency exists an election must be held); Harrodsburg *v.* Harrodsburg Water Co., 64 S. W. 658, 23 Ky. L. Rep. 956; Painter *v.* Norfolk, 62 Nebr. 330, 87 N. W. 31; Keller *v.* Scranton, 200 Pa. St. 130, 49 Atl. 781, 86 Am. St. Rep. 708; *In re* Oliver, 20 Ont. App. 529. And see Hudson *v.* Marietta, 64 Ga. 286.

sequent to such action.[29] A voluntary *referendum* is void,[30] unless treated as advisory merely.[31] Voters or electors and taxpayers or ratepayers are not equivalent terms.[32] The details of expenditure need not appear on the ballot.[33] But the purpose of the indebtedness must be published,[34] and the expenditure confined to the object so approved or authorized;[35] and there must be a separate vote on each subject.[36] The notice of election must comply as to time and manner with the constitutional or legislative requirement,[37] but need not conform to the order of the municipal council when such order departs from the requirements prescribed by law.[38] A resolution or order authorizing an election is sufficient where a formal ordinance is not expressly required.[39] Although fraud or substantial variation from lawful requirements will vitiate municipal action,[40] mere irregularities in the proceeding will not invalidate it;[41] nor will improper influence upon the electorate,[42] where it does not appear that any voter was actually coerced to cast his ballot contrary to his wishes. Such an election is usually conducted in accordance with the general election laws of the state, applicable to municipalities, where no special provision is made on the subject.[43] A single election is sufficient to authorize original and supplementary expenditures within the amount limited.[44] Authority to incur the indebtedness voted upon is conferred upon a subsequent as well as an existing council.[45] Where a proposition as to municipal indebtedness is submitted at a general election, the assent of a majority of the voters voting on the proposition, and not a majority of all the voters voting at the election, is necessary.[46] And a statute which provides that the water commissioners of a village shall not proceed to acquire lands unless the majority of voters and of tax-

29. Youngerman *v.* Murphy, 107 Iowa 686, 76 N. W. 648; Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157; Bell *v.* Waynesboro Borough, 195 Pa. St. 299, 45 Atl. 930; Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

30. Purcell *v.* East Grand Forks, 91 Minn. 486, 98 N. W. 351. And see *infra*, XV, A, 5, g.

31. Davies *v.* Toronto, 15 Ont. 33.

32. Squire *v.* Preston, 82 Hun (N. Y.) 88, 31 N. Y. Suppl. 174. See also Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677.

33. People *v.* Seaman, 59 N. Y. App. Div. 76, 69 N. Y. Suppl. 55; Sherman *v.* Clifton Springs, 27 Hun (N. Y.) 390; Barr *v.* Philadelphia, 8 Pa. Dist. 19; Seymour *v.* Tacoma, 6 Wash. 138, 32 Pac. 1077.

34. North Tonawanda *v.* Western Transp. Co., 16 Abb. Pr. N. S. (N. Y.) 297.

35. Tukey *v.* Omaha, 54 Nebr. 370, 74 N. W. 613, 69 Am. St. Rep. 711; Major *v.* Aldan Borough, 209 Pa. St. 247, 58 Atl. 490.

36. Denver *v.* Hayes, 28 Colo. 110, 63 Pac. 311; Cain *v.* Smith, 117 Ga. 902, 44 S. E. 5; North Tonawanda *v.* Western Transp. Co., 16 Abb. Pr. N. S. (N. Y.) 297; McBryde *v.* Montesano, 7 Wash. 69, 34 Pac. 559, holding that two propositions may be decided by the same ballot but the voter must have an opportunity to express himself separately as to each one.

37. *Georgia.*— Thomasville *v.* Thomasville Electric Light, etc., Co., 122 Ga. 399, 50 S. E. 169.

Minnesota.— Hamilton *v.* Detroit, 83 Minn. 119, 85 N. W. 933.

Missouri.— Canton *v.* Allen, 178 Mo. 555, 77 S. W. 868.

New York.— North Tonawanda *v.* Western Transp. Co., 16 Abb. Pr. N. S. 297. See also Cartwright *v.* Sing Sing, 46 Hun 548.

Pennsylvania.— See Major *v.* Aldan Borough, 209 Pa. St. 247, 58 Atl. 490.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1841.

38. Hamilton *v.* Detroit, 83 Minn. 119, 85 N. W. 933.

39. Hamilton *v.* Detroit, 83 Minn. 119, 85 N. W. 933; Canton *v.* Allen, 178 Mo. 555, 77 S. W. 868.

40. Thomasville *v.* Thomasville Electric Light, etc., Co., 122 Ga. 399, 50 S. E. 169; Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 32 S. E. 907; Tukey *v.* Omaha, 54 Nebr. 370, 74 N. W. 613, 69 Am. St. Rep. 711. See also Dupont *v.* Pittsburgh, 69 Fed. 13.

41. Torrey *v.* Millbury, 21 Pick. (Mass.) 64; Hamilton *v.* Detroit, 83 Minn. 119, 85 N. W. 933; Canton *v.* Allen, 178 Mo. 555, 77 S. W. 868; Lebanon Light, etc., Co. *v.* Lebanon, 163 Mo. 246, 63 S. W. 809. See also Dupont *v.* Pittsburgh, 69 Fed. 13.

42. Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803.

43. Jacoby *v.* Dallis, 115 Ga. 272, 41 S. E. 611. See also Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711. But see Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 32 S. E. 907.

44. Gainesville *v.* Simmons, 96 Ga. 477, 23 S. E. 508; Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946; Endly *v.* Whitsett, 85 Mo. App. 79; Lima Gas Co. *v.* Lima, 4 Ohio Cir. Ct. 22, 2 Ohio Cir. Dec. 396.

45. Barr *v.* Philadelphia, 191 Pa. St. 438, 43 Atl. 335.

46. Winchester Bd. of Education *v.* Winchester, 120 Ky. 591, 87 S. W. 768, 27 Ky.

payers whose names appear upon the last assessment roll of the village, voting at such meeting, shall vote in favor of levying a tax for that purpose, does not require a majority of all the voters and taxpayers of the village.[47]

d. Requirement of Fund For Payment. In some states there exist constitutional or statutory inhibitions against the creation of municipal indebtedness without a concurrent definite appropriation or provision for its payment.[48] These apply only to claims arising *ex contractu*.[49] Where there is such a provision, one claiming compensation under a contract with a city must show that the obligation was to be satisfied out of the current revenues or out of some fund within the immediate control of the city, and was not therefore a debt within such provision, or he must prove compliance with the provision as to the payment thereof.[50] It has been decided that such inhibitions do not apply to municipal salaries,[51] necessary current expenses,[52] contracts for water, sewerage, and light,[53]

L. Rep. 994; Montgomery County Fiscal Ct. *v.* Trimble, 104 Ky. 629, 47 S. W. 773, 20 Ky. L. Rep. 827, 42 L. R. A. 738 [*overruling* McGoodwin *v.* Franklin, 38 S. W. 481, 18 Ky. L. Rep. 752; Belknap *v.* Louisville, 36 S. W. 1118, 18 Ky. L. Rep. 313].

47. Water Com'rs *v.* Clark, 3 N. Y. Suppl. 347.

48. See the constitutions and statutes of the different states. And see the following cases:

Georgia.— Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803, holding that there is no constitutional provision that a municipal corporation, desiring to incur a debt, shall make provision for the payment of the debt until "at or before" the liability is created, and it is not necessary that provision for payment should be made before the application to validate the debt; and if, on the hearing of such application, nothing appears to the contrary, the presumption is that provision will be made at the time and in the manner prescribed by the constitution.

Illinois.— Danville *v.* Danville Water Co., 180 Ill. 235, 54 N. E. 224; Carlyle Water, etc., Power Co. *v.* Carlyle, 31 Ill. App. 325.

Massachusetts.— Webb Granite, etc., Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639.

Mississippi.— Greenville *v.* Laurent, 75 Miss. 456, 23 So. 185.

New York.— Cooke *v.* Saratoga Springs, 23 Hun 55; People *v.* Brennan, 39 Barb. 522.

Pennsylvania.— An act providing that no debt shall be incurred without a contemporaneous appropriation was applicable only to funded debts or loans of the city. Tatham's Appeal, 80 Pa. St. 465.

Texas.— Terrell *v.* Dessaint, 71 Tex. 770, 9 S. W. 593.

United States.— Defiance Water Co. *v.* Defiance, 90 Fed. 753, holding that Ohio Rev. St. § 2702, prohibiting cities from making any contracts involving expenditure of money, unless the funds therefor are in the treasury, does not preclude them from making contracts for improvements not involving payment for a year and a half or more thereafter.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1842. See also *supra*, IX, H, 2.

As to what constitutes sufficient provision see the following cases:

California.— Doland *v.* Clark, 143 Cal. 176, 76 Pac. 958.

Georgia.— Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803; Jacoby *v.* Dallis, 115 Ga. 272, 41 S. E. 611.

Illinois.— Dehm *v.* Havana, 28 Ill. App. 520.

Indiana.— Indianapolis *v.* Wann, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743.

Louisiana.— New Orleans Gas Light Co. *v.* New Orleans, 42 La. Ann. 188, 7 So. 559.

Missouri.— Mister *v.* Kansas, 18 Mo. App. 217.

Nebraska.— McElhinney *v.* Superior, 32 Nebr. 744, 49 N. W. 705 [*following* Blair *v.* Lantry, 21 Nebr. 247, 31 N. W. 790].

Texas.— Dallas Fourth Nat. Bank *v.* Dallas, (Civ. App. 1903) 73 S. W. 841; Winston *v.* Ft. Worth, (Civ. App. 1898) 47 S. W. 740.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1842.

49. McGuiness *v.* New York, 52 How. Pr. (N. Y.) 450 [*reversed* on other grounds in 26 Hun 142]; Dallas *v.* Miller, 7 Tex. Civ. App. 503, 27 S. W. 498.

50. McNeal *v.* Waco, 89 Tex. 83, 33 S. W. 322. See also Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359; Winston *v.* Ft. Worth, (Tex. Civ. App. 1898) 47 S. W. 740.

51. Oak Cliff *v.* Etheridge, (Tex. Civ. App. 1903) 76 S. W. 602; Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359.

52. Wood *v.* New York, 34 How. Pr. (N. Y.) 501; Dwyer *v.* Brenham, 65 Tex. 526.

53. *Louisiana.*—Blanks *v.* Monroe, 110 La. 944, 34 So. 921; New Orleans Gas Light Co. *v.* New Orleans, 42 La. Ann. 188, 7 So. 559.

Michigan.—Mitchell *v.* Negaunee, 113 Mich. 359, 71 N. W. 646, 67 Am. St. Rep. 468, 38 L. R. A. 157.

Nebraska.— North Platte *v.* North Platte Water-Works Co., 56 Nebr. 403, 76 N. W. 906.

New York.— Port Jervis Water Works Co. *v.* Port Jervis, 151 N. Y. 111, 45 N. E. 388.

Texas.— Cleburne *v.* Cleburne Water, etc., Co., 14 Tex. Civ. App. 229, 37 S. W. 655.

Wisconsin.— Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681; Stedman *v.* Berlin, 97 Wis. 505, 73 N. W. 57.

United States.— Santa Ana Water Co. *v.* San Buenaventura, 56 Fed. 339.

or for fire apparatus,[54] or those made in the exercise of implied powers necessary to carry out powers expressly granted,[55] nor to expenditures imposed by or incurred under express legislative authority.[56] But the purchase of a cemetery cannot be made by a city until an appropriation has been made or a fund provided for that purpose.[57] Wherever applicable such provisions are mandatory and render void all contracts, resolutions, and ordinances obnoxious to their provisions.[58] A contract in conformity with the requirement of the law when entered into cannot be invalidated by any subsequent malversation or diversion of the fund or appropriation.[59] Inhibition by general statutes or charter provision is subject to subsequent legislation,[60] which may operate either to repeal, modify, or make exception to it. Liability exists to the extent of the fund provided, although the contract be in excess thereof.[61] The refunding of valid obligations without increase of liability is not obnoxious to such inhibition;[62] but it is otherwise as to the renewing of debts barred by the statute of limitations.[63]

e. Certificate as to Funds. Where there is a provision, under the requirement of special appropriation or provision for payment of municipal indebtedness, that the existence of the fund shall be certified by the proper officer,[64] a

See 36 Cent. Dig. tit. "Municipal Corporations," § 1842.

Contra.— Kiichli *v.* Minnesota Brush Electric Co., 58 Minn. 418, 59 N. W. 1088, 49 Am. St. Rep. 523.

54. New Albany Second Nat. Bank *v.* Danville, 60 Ind. 504; Carleton *v.* Washington, 38 Kan. 726, 17 Pac. 656; Leonard *v.* Long Island City, 20 N. Y. Suppl. 26. See also Doland *v.* Clark, 143 Cal. 176, 76 Pac. 958.

55. Denver *v.* Webber, 15 Colo. App. 511, 63 Pac. 804.

56. Richmond *v.* McGirr, 78 Ind. 192; Wood *v.* New York, 34 How. Pr. (N. Y.) 501; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225.

57. Latham *v.* Richards, 12 Hun (N. Y.) 360; Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359.

58. *Colorado.*— Smith Canal, etc., Co. *v.* Denver, 20 Colo. 84, 36 Pac. 844.

Illinois.— Chicago *v.* Shober, etc., Lith. Co., 6 Ill. App. 560.

Louisiana.— Wilson *v.* Shreveport, 29 La. Ann. 673.

Minnesota.— Kiichli *v.* Minnesota Brush Electric Co., 58 Minn. 418, 59 N. W. 1088, 49 Am. St. Rep. 523.

Nebraska.— McElhinney *v.* Superior, 32 Nebr. 744, 49 N. W. 705.

New York.— Kingsland *v.* New York, 5 Daly 448.

Ohio.— McGrew *v.* Elmwood Place, 17 Ohio Cir. Ct. 676, 6 Ohio Cir. Dec. 106.

Oregon.— Brockway *v.* Roseburg, 46 Oreg. 77, 79 Pac. 335.

Pennsylvania.— Deysher *v.* Reading, 18 Pa. Co. Ct. 611; Gamble *v.* Philadelphia, 14 Phila. 223; Hubbs *v.* Philadelphia, 6 Phila. 550.

Texas.— Austin *v.* McCall, 95 Tex. 565, 68 S. W. 791; Howard *v.* Smith, 91 Tex. 8, 38 S. W. 15; Terrell *v.* Dessaint, 71 Tex. 770, 9 S. W. 593; Dallas Fourth Nat. Bank *v.* Dallas, (Civ. App. 1903) 73 S. W. 841.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1842.

59. Cooke *v.* Saratoga Springs, 23 Hun (N. Y.) 55; McGlue *v.* Philadelphia, 10 Phila. (Pa.) 348; Gate *v.* Philadelphia, 14 Wkly. Notes Cas. (Pa.) 274, holding that one who had a contract with a city for supplies of a certain kind under a specific item of appropriation was not bound to take notice that a part of the appropriation had been diverted to another use, and is entitled to recover for supplies furnished within the appropriation.

60. Port Jervis Water Works Co. *v.* Port Jervis, 151 N. Y. 111, 45 N. E. 388; Mingay *v.* Hanson, 102 N. Y. 695, 7 N. E. 304; Cincinnati *v.* Holmes, 56 Ohio St. 104, 46 N. E. 514; Wilson *v.* Cincinnati, 10 Ohio Dec. (Reprint) 123, 19 Cinc. L. Bul. 10; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225.

61. Keith *v.* Du Quoin, 89 Ill. App. 36; Lines *v.* Otego, 91 N. Y. Suppl. 785; Continental Bridge Co. *v.* Philadelphia, 12 Phila. (Pa.) 185.

62. Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359, holding that a city cannot, on the renewal of an existing debt, increase the rate of interest thereon or provide for attorney's fees for its collection unless provision is made at the same time for the payment thereof.

63. Tyler *v.* Jester, (Tex. Civ. App. 1903) 74 S. W. 359.

64. See the constitutions and statutes of the different states. And see Pollok *v.* San Diego, 118 Cal. 593, 50 Pac. 769 (such provision is constitutional); People *v.* Green, 64 N. Y. 499 [*reversing* 6 Hun 11] (not applicable where the common council takes a lease deemed by it to be required for city purposes); Comstock *v.* Nelsonville, 61 Ohio St. 288, 56 N. E. 15 (not applicable to improvements to be paid for by special assessment); Ryan *v.* Hoffman, 26 Ohio St. 109 (such provision is not retroactive); Clark *v.* Columbus, 10 Ohio Dec. (Reprint) 760, 23 Cinc. L. Bul. 289 (not applicable where a contract is made by a city with a lighting company).

No certificate when contract for future work or supplies.— An ordinance which is a contract, or which directs the making of a

resolution or ordinance passed, or a contract made, which creates municipal indebtedness is invalid unless such requirement has been complied with.[65] Municipal corporations are sometimes required to file a statement of indebtedness before they can incur additional obligations.[66]

f. Borrowing Money. Municipalities are not empowered to borrow money for municipal purposes,[67] unless expressly authorized to do so by statute,[68] or in

contract, for the performance of work or the furnishing of supplies in the future, need not be referred to the city treasurer for his certificate that there is sufficient unappropriated money in the treasury to meet its requirements. Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157.

Certificate as to each item unnecessary.— An act providing for a certificate of the auditor or city clerk before money for municipal purposes should be appropriated was not intended to require that each item of such current expense should be anticipated by certificate of the city clerk in order to make its payment valid. Findlay *v.* Parker, 17 Ohio Cir. Ct. 294, 9 Ohio Cir. Dec. 710.

Applicable to salary of solicitor.— An act requiring a certificate that money appropriated by a municipal corporation is in its treasury to the credit of the proper fund, and unappropriated for any other purpose, applies to an ordinance designating the salary of its solicitor. Easton *v.* Hyde Park, 9 Ohio S. & C. Pl. Dec. 512, 6 Ohio N. P. 257.

65. *California.*— Higgins *v.* San Diego, (1896) 45 Pac. 824.

New York.— Matter of Simis, 11 N. Y. App. Div. 24, 42 N. Y. Suppl. 282.

Ohio.— Kerr *v.* Bellefontaine, 13 Ohio Cir. Ct. 24, 7 Ohio Cir. Dec. 93; Bond *v.* Madisonville, 2 Ohio Cir. Ct. 449, 1 Ohio Cir. Dec. 581; Cope *v.* Wellsville, 11 Ohio Dec. (Reprint) 205, 25 Cinc. L. Bul. 250; *In re* Street Lighting, 5 Ohio S. & C. Pl. Dec. 579; Ampt *v.* Cincinnati, 2 Ohio S. & C. Pl. Dec. 504, 2 Ohio N. P. 332.

Pennsylvania.— Harrisburg *v.* Shepler, 190 Pa. St. 374, 42 Atl. 893 [*affirming* 7 Pa. Super. Ct. 491], certificate may be placed on contract after the completion of the work done for a city.

United States.— Continental Constr. Co. *v.* Altoona, 92 Fed. 822, 35 C. C. A. 27, certificate cannot be dispensed with by city council or electors.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1843.

66. See the statutes of the different states. And see Schuylkill Co. *v.* Snyder, 20 Pa. Co. Ct. 649.

67. *Alabama.*— Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497.

Illinois.— Lockport *v.* Gaylord, 61 Ill. 276.

Indiana.— See Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452.

New Jersey.— Swackhamer *v.* Hackettstown, 37 N. J. L. 191.

New York.— Wells *v.* Salina, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759. See also New York Tenth Nat. Bank *v.* New York, 80 N. Y. 660 [*affirming* 4 Hun 429]; Fitzpatrick *v.* Flagg, 5 Abb. Pr. 213.

Ohio.— Dunham *v.* Opes, 3 Ohio Cir. Ct. 274, 2 Ohio Cir. Dec. 155. But see Chillicothe Bank *v.* Chillicothe, 7 Ohio, Pt. II, 31, 30 Am. Dec. 185.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1844.

68. *Alabama.*— Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497.

Indiana.— Heinl *v.* Terre Haute, 161 Ind. 44, 66 N. E. 450.

Iowa.— Coggeshall *v.* Des Moines, 78 Iowa 235, 41 N. W. 617, 42 N. W. 650.

Michigan.— Corliss *v.* Highland Park, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416.

New York.— Wells *v.* Salina, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759.

Ohio.— See Mt. Adams, etc., Inclined R. Co. *v.* Cincinnati, 11 Ohio Dec. (Reprint) 149, 25 Cinc. L. Bul. 91.

Pennsylvania.— Barr *v.* Philadelphia, 191 Pa. St. 438, 43 Atl. 335; Fidelity Ins., etc., Co. *v.* Scranton, 102 Pa. St. 387.

United States.—Brenham *v.* German-American Bank, 144 U. S. 173, 12 S. Ct. 559, 36 L. ed. 390 [*reversing* 35 Fed. 185] (holding that charter power to borrow money "for general purposes," "on the credit of the city," only includes authority to borrow money for ordinary governmental purposes, such as are generally carried out, from revenues derived from taxation); Savannah *v.* Kelly, 108 U. S. 184, 2 S. Ct. 468, 27 L. ed. 696; Louisiana *v.* Wood, 102 U. S. 294, 26 L. ed. 153; Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61 (holding that when a city is authorized to borrow money for a public work, a loan effected after the completion of the work to pay therefor is within the statute giving such authority); White *v.* Rahway, 11 Fed. 853.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1844.

Express power to a municipal corporation to borrow money must be construed and limited with reference to the express object of the loan. Thus "power to borrow for general purposes on the credit of the city" authorizes only a temporary loan to be repaid out of the annual revenue. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164. And "power to borrow money on its bonds" does not authorize issuance of scrip or warrants to raise money for ordinary municipal expenses. Patton *v.* Chattanooga, 108 Tenn. 197, 226, 65 S. W. 414; Colburn *v.* Chattanooga, 2 Tenn. Cas. 22.

Borrowing forbidden by charter.— And it is sometimes provided by charter that a municipality cannot borrow money unless it

the absence of statute, unless the power is necessarily implied from some special duty imposed, for the discharge of which the power to borrow money is not only convenient but necessary.[69] When money is borrowed by a municipal corporation without authority of law, but for a legitimate purpose and is used and applied for that purpose, although a warrant issued to the lender may be *ultra vires* and void, the corporation is liable on principles of equity and justice, as on an implied assumpsit, for money had and received;[70] but this principle does not apply where there is an express prohibition of the power to borrow money.[71] In exercising the power to borrow money conferred upon it by charter, a municipal corporation is not exercising sovereign power, but is responsible for the acts of its agents as is a private corporation.[72] A contract made by a city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt, as well interest to become due as interest already due, is not a borrowing of money but is a contract for the payment of a debt.[73]

5. Aid to Corporations and Stock Subscriptions — a. In General. Municipal corporations have no inherent power to lend their credit to aid private corporations, nor to make subscriptions to or purchase stock therein, but such power is derived solely from express legislative grants,[74] and all unauthorized municipal transactions of this character are *ultra vires* and void;[75] but under general authority to give municipal aid, the corporation may in its discretion subscribe for

is authorized to do so by the vote of its citizens. Lockport *v.* Gaylord, 61 Ill. 276. See also Baltimore *v.* Gill, 31 Md. 375. See *supra*, XV, A, 4, c.

69. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; Wells *v.* Salina, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759. See also Swackhamer *v.* Hackettstown, 37 N. J. L. 191. But *compare* Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

70. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. See *supra*, IX, G, 3, b.

71. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. See *supra*, IX, G, 3, b.

72. De Voss *v.* Richmond, 18 Gratt. (Va.) 338, 98 Am. Dec. 646.

73. Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 221, 17 L. ed. 519.

74. *Alabama.*— Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76.

Arkansas.— Mississippi, etc., R. Co. *v.* Camden, 23 Ark. 300.

California.— French *v.* Teschemaker, 24 Cal. 518.

Georgia.— See Covington, etc., R. Co. *v.* Athens, 85 Ga. 367, 11 S. E. 663.

Illinois.— Sampson *v.* People, 141 Ill. 17, 30 N. E. 781.

Indiana.— Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; Aurora *v.* West, 9 Ind. 74.

Kansas.— See Burnes *v.* Atchison, 2 Kan. 454.

Maine.— Stevens *v.* Anson, 73 Me. 489.

Missouri.— State *v.* Greene County, 54 Mo. 548. See also St. Louis *v.* Alexander, 23 Mo. 483.

New York.— Duanesburgh *v.* Jenkins, 40 Barb. 574. See also People *v.* Peck, 62 Barb. 545, 42 How. Pr. 425.

Ohio.— See Fosdick *v.* Perrysburg, 14 Ohio St. 472.

South Carolina.— State *v.* Charleston, 10 Rich. 491.

Tennessee.— Cook *v.* Sumner Spinning, etc., Co., 1 Sneed 698, holding that authority to purchase stock in a manufacturing company cannot be derived from the ordinary power of taxation conferred on municipal corporations.

Wisconsin.— Hasbrouck *v.* Milwaukee, 13 Wis. 37, 80 Am. Dec. 718; Clark *v.* Janesville, 10 Wis. 136, holding that a statute authorizing a city to subscribe its bonds for certain railroad stock authorizes that railroad to receive the subscription. See also Hewitt *v.* Grand Chute, 7 Wis. 282.

United States.— Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1845.

Railroad subsequently incorporated.— An act authorizing a city to loan its credit to a certain railroad company and to any other railroad company duly incorporated leading in a certain direction, and which in the opinion of the council is entitled to such aid by the city, warrants the lending of the city credit to a railroad company thereafter duly incorporated as well as the lending of such credit to those in existence at the time of the passage of the act. James *v.* Milwaukee, 16 Wall. (U. S.) 159, 21 L. ed. 267.

Where authority is given to municipalities generally, by statute, to subscribe to the capital stock of railroad companies, such authority is not limited to towns and cities incorporated at the date of the passage of the act. Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541; Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 329.

75. Fulton *v.* Northern Illinois College, 158 Ill. 333, 42 N. E. 138 [*affirming* 56 Ill. App. 372] (donation to a college); Scott *v.* Laporte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Memphis *v.* Memphis Water Co., 8 Baxt. (Tenn.) 587 (subscription to a water company).

stock or make a donation.[76] A statute validating a municipal subscription for stock operates retrospectively to legalize the subscription to the same extent as though authority had been previously given.[77] As such statutes grant a power unknown to the common law they should be strictly construed,[78] and a grant of such power cannot be assumed from implication or innuendo merely.[79] Without legislative sanction the assent of a majority of the voters of a municipality does not authorize it to make a subscription to the stock of a private corporation.[80] An act authorizing municipal construction and operation of a public utility plant does not *ipso facto* repeal an act authorizing stock subscription in a private company to furnish the same utility.[81] A municipal corporation with power to erect public buildings may employ a railway company to do the work of construction.[82] The sale of a railway owned by a municipality is not the loan of municipal credit to the purchaser or to any corporation that may obtain control of the road, although in making the sale it is contemplated that the road will pass into the hands of the corporation and a per centum of the future gross earnings of the road is to be paid as a part of the price.[83]

b. Constitutional Restrictions. The right or power of municipal corporations to subscribe for stock, make donations, or otherwise lend their aid to individuals or private corporations is in many states limited by constitutional provisions.[84]

76. Indiana, etc., R. Co. *v.* Attica, 56 Ind. 476; Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541. See also CORPORATIONS, 10 Cyc. 379.

Power to issue bonds see *infra*, XV, C, 2, d–f.

77. Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016, holding that a subscription obtained by fraud and bribery cannot be validated. See *infra*, XV, A, 6, d.

78. *Georgia.*— Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135.

Indiana.— Indiana, etc., R. Co. *v.* Attica, 56 Ind. 476; Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Iowa.— Chamberlain *v.* Burlington, 19 Iowa 395.

Kansas.— Lewis *v.* Bourbon County Com'rs, 12 Kan. 186.

United States.— Allen *v.* Louisiana, 103 U. S. 80, 26 L. ed. 318.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1845.

79. Pitzman *v.* Freeburg, 92 Ill. 111; Williamson *v.* Keokuk, 44 Iowa 88.

Illustrations.— A clause in the charter of a railroad company providing that "it shall be lawful for all persons of lawful age or for the agent of any corporate body to subscribe to the capital stock of said company" manifestly refers to private corporations and confers no power upon municipal corporations to subscribe for such stock. Campbell *v.* Paris, etc., R. Co., 71 Ill. 611; East Oakland Tp. *v.* Skinner, 94 U. S. 255, 24 L. ed. 125. A provision in the charter of a railroad company authorizing its directors to receive subscriptions to the capital stock of the company "from any county, city, town or village" does not confer power upon municipal corporations to subscribe for the stock of the company. Pitzman *v.* Freeburg, 92 Ill. 111.

80. Lewis *v.* Bourbon County Com'rs, 12 Kan. 186; Jarrolt *v.* Moberly, 103 U. S. 580, 26 L. ed. 492.

81. Vincennes *v.* Callender, 86 Ind. 484.

82. Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

83. Cincinnati *v.* Dexter, 55 Ohio St. 93, 44 N. E. 526.

84. See the constitutions of the different states. And see Woolfolk *v.* Paducah, 80 S. W. 186, 25 Ky. L. Rep. 2149; People *v.* Banks, 67 N. Y. 568 (holding that a statute requiring a city in the first instance to pay the cost of the public burden, to be reimbursed thereafter by a tax upon the property benefited, does not constitute the payment of a loan to the property-owners so as to violate the constitutional provision prohibiting cities from loaning their money or credit to, or in aid of, any individual, association, or corporation); Kronsbein *v.* Rochester, 76 N. Y. App. Div. 494, 78 N. Y. Suppl. 813 (holding that a stipulation in a contract for a local improvement that the city "shall not be required or liable to make the aforesaid payments . . . any sooner or faster than there shall be money or funds in the treasury . . . properly applicable to that purpose, and which shall have been collected or paid into said treasury on account of said work or improvement," does not violate Const. art. 8, § 10, which prohibits a city from pledging its credit "in aid of any individual, association or corporation"); People *v.* Kelly, 5 Abb. N. Cas. (N. Y.) 383 (holding that a statute authorizing two cities, already owning stock in a company organized to build a bridge between such cities, to become the owners of the whole stock by purchasing the stock of the private stock-holders, or in case of a failure to agree, by taking it by eminent domain, is not in conflict with a constitutional provision that no municipality shall give money or loan its credit to any individual or corporation, or

Such limitations are not retroactive,[85] and the obligation of existing contracts is not impaired thereby;[86] but any municipal or legislative action, which is prohibited thereby, taken after the limitation goes into operation, is null and void.[87] A statute authorizing a city to subscribe for stock in a corporation confers a power which may be modified, changed, enlarged, restrained, or repealed by a state constitution, as such a statute does not import a contract within the clause of the United States constitution prohibiting a law which impairs the obligation of a contract.[88] A constitutional provision against state aid does not apply to municipal corporations;[89] nor do provisions against giving municipal aid in money or credit to any person or corporation operate to forbid sole municipal construction or ownership.[90] A municipality may not, however, under a constitutional prohibition against municipal aid, build a section of a railroad in its limits, intended ultimately to form part of a continuous line of road to be operated and equipped by private capital,[91] exchange railroad bonds for capital stock,[92] donate money, obtained on the forfeiture of its franchise by a railway company, to its successor,[93] or obtain for a railroad a right of way through municipal boundaries.[94]

c. Purpose of Corporation. In the absence of constitutional prohibition, municipal aid may be authorized and granted to a plank road company,[95] to a private corporation furnishing water to a municipality,[96] or to a hospital which cares for a municipality's indigent sick.[97] Railways are highways, and their construction even by private corporations is a public purpose,[98] to which legislatures in most states may authorize municipalities to give aid.[99] A municipality cannot,

become the owner of corporate stock or bonds); Purcell *v.* Riverside, 1 Ohio Cir. Ct. 12, 1 Ohio Cir. Dec. 7 (holding that a municipal ordinance authorizing the condemnation of land for the purpose of having the county commissioners build an avenue thereon, under a special law authorizing them to do so, is not within Const. art. 8, § 6, prohibiting the legislature from authorizing any municipality to become a stock-holder in any association, or to raise money for, or to loan its credit to, or in aid of, such an association.

In New York the constitutional provision against municipal aid to corporations includes gifts to public as well as to private corporations. Deady *v.* Lyons, 39 N. Y. App. Div. 139, 57 N. Y. Suppl. 448.

85. State *v.* Macon County Ct., 41 Mo. 453; Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369 [*affirming* 2 N. Y. Suppl. 514]; Rogers *v.* Smith, 5 Hun (N. Y.) 475; Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410.

In Illinois the constitutional provision which forbids a donation by a town for railroads expressly excepts donations made by towns under laws existing prior to the adoption of this provision. Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Chicago, etc., R. Co. *v.* Pinckney, 74 Ill. 277.

86. Buffalo, etc., R. Co. *v.* Collins R. Com'rs, 5 Hun (N. Y.) 485; Clay County *v.* Savings Soc., 104 U. S. 579, 26 L. ed. 856; Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410.

87. Wright *v.* Bishop, 88 Ill. 302; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491 [*affirming* 7 Hun 499]; Wheatland *v.* Taylor, 29 Hun (N. Y.) 70; Harter Tp. *v.* Kernochan, 103 U. S. 562, 26 L. ed. 411.

Election called before provision effective.— A corporate subscription cannot be made in aid of a railway corporation in pursuance of a vote had after the date on which the provisions of the constitution prohibiting municipal aid took effect, although an election had been called for that purpose prior to such date. Richards *v.* Donagho, 66 Ill. 73; Schall *v.* Bowman, 62 Ill. 321.

88. List *v.* Wheeling, 7 W. Va. 501.

89. Robertson *v.* Rockford, 21 Ill. 451; New Orleans *v.* Graihle, 9 La. Ann. 561; Bushnell *v.* Beloit, 10 Wis. 195; Clark *v.* Janesville, 10 Wis. 136; Taylor *v.* Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Talcott *v.* Pine Grove, 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. 666, 22 L. ed. 227].

90. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; Walker *v.* Cincinnati, 1 Cinc. Super. Ct. (Ohio) 121; Wheeler *v.* Philadelphia, 77 Pa. St. 338. See also Baily *v.* Philadelphia, 184 Pa. St. 594, 39 Atl. 494, 63 Am. St. Rep. 812, 39 L. R. A. 837.

91. Pleasant Tp. *v.* Ætna L. Ins. Co., 138 U. S. 67, 11 S. Ct. 215, 34 L. ed. 864.

92. Wheatland *v.* Taylor, 29 Hun (N. Y.) 70.

93. Adams *v.* Jackson Electric R., etc., Co., 78 Miss. 887, 30 So. 58.

94. Covington, etc., R. Co. *v.* Athens, 85 Ga. 367, 11 S. E. 663.

95. Wetumpka *v.* Winter, 29 Ala. 651; Mitchell *v.* Burlington, 4 Wall. (U. S.) 270, 18 L. ed. 350.

96. Vincennes *v.* Callender, 86 Ind. 484.

97. Zanesville *v.* Crossland, 8 Ohio Cir. Ct. 652, 4 Ohio Cir. Dec. 363.

98. Perry *v.* Keene, 56 N. H. 514.

99. *Alabama.*— Opelika *v.* Daniel, 59 Ala. 211.

however, lend its aid to corporations engaged in manufacturing,[1] navigation,[2] or other private enterprises.[3] Authority to aid a "public improvement" does not include authority to embark in speculative schemes.[4]

d. Loan of Credit or Indorsing Bonds. The guaranty of bonds of a railroad company by municipal indorsement is not within ordinary charter powers;[5] but requires special legislative grant which is found in the words "to obtain money

California.— Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; Robinson *v.* Bidwell, 22 Cal. 379.

Connecticut.— Douglas *v.* Chatham, 41 Conn. 211.

Georgia.— Griffin *v.* Inman, 57 Ga. 370.

Louisiana.— See MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

Mississippi.— New Orleans, etc., R. Co. *v.* McDonald, 53 Miss. 240.

Missouri.— State *v.* Greene County, 54 Mo. 540.

New Hampshire.— Perry *v.* Keene, 56 N. H. 514.

North Carolina.— Wood *v.* Oxford, 97 N. C. 227, 2 S. E. 653.

Pennsylvania.— Com. *v.* Taylor, 56 Pa. St. 263; Com. *v.* Pittsburgh, 34 Pa. St. 496; Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

Wisconsin.— Phillips *v.* Albany, 28 Wis. 340; Bushnell *v.* Beloit, 10 Wis. 195.

United States.— Rogers *v.* Keokuk, 154 U. S. 546, 14 S. Ct. 1162, 18 L. ed. 74; Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 22 L. ed. 227 [*disapproving* People *v.* State Treasurer, 23 Mich. 499; People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400]; Von Hostrup *v.* Madison City, 1 Wall. 291, 17 L. ed. 538; Long *v.* New London, 5 Fed. 559, 9 Biss. 539; Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1846.

Contra.— Hanson *v.* Vernon, 27 Iowa 28, 1 Am. Rep. 215; Chamberlain *v.* Burlington, 19 Iowa 395; Thomas *v.* Port Huron, 27 Mich. 320; People *v.* State Treasurer, 23 Mich. 499; People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400; Risley *v.* Howell, 57 Fed. 544 (following Michigan cases *supra*).

In Illinois, Kentucky, New York, and Texas the constitutional provisions now in force prohibit municipal aid to railroads. Middleport *v.* Aetna L. Ins. Co., 82 Ill. 562; Chicago, etc., R. Co. *v.* Pinckney, 74 Ill. 277; Woolfolk *v.* Paducah, 80 S. W. 186, 25 Ky. L. Rep. 2149; Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491; Cleburne *v.* Gulf, etc., R. Co., 66 Tex. 457, 1 S. W. 342, holding that the terms of Const. art. 11, § 3, are broad enough to prohibit a city or town from appropriating its revenues or using its credit to obtain a right of way and depot grounds for a railway company. Under former constitutional provisions in these states such aid might have been given. McWhorter *v.* People, 65 Ill. 290; Chicago, etc., R. Co. *v.* Smith, 62 Ill. 268, 14 Am. Rep. 99; Butler *v.* Dunham, 27 Ill. 474; Johnson *v.* Stark County, 24 Ill. 75; Talbot *v.* Dent, 9 B. Mon. (Ky.) 526; Clarke *v.* Rochester, 28 N. Y. 605 [*affirming* 24 Barb. 446 and *reversing* 13 How. Pr. 204]; Rome Bank *v.* Rome, 18 N. Y. 38; Anderson County *v.* Houston, etc., R. Co., 52 Tex. 228; Harcourt *v.* Good, 39 Tex. 455; San Antonio *v.* Jones, 28 Tex. 19. Under the New York constitutional provision a city is not prohibited from sharing in the expense of changing the grade of a railroad and thus returning a portion of a street to general use. Tocci *v.* New York, 73 Hun (N. Y.) 46, 25 N. Y. Suppl. 1089.

Foreign railroad corporation.— The mere fact that a railroad company is a foreign corporation and that its road terminates at a point in another state from which it runs a line of boats to a city issuing its bonds in aid of such road affords no ground for a constitutional objection to the grant of power by the legislature to such city to subscribe to the stock of the company. Moulton *v.* Evansville, 25 Fed. 382. See also Quincy, etc., R. Co. *v.* Morris, 84 Ill. 410.

"Road" in a municipal aid statute includes railroad. Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Aurora *v.* West, 9 Ind. 74; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760.

Disposition of stock subscribed for see Newark *v.* Elliott, 5 Ohio St. 113.

1. MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128; Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; Opinion of Judges, 58 Me. 590; Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586 [*affirming* 4 Hun 201, 6 Thomps. & C. 514]. But *compare Re* Farlinger, 16 Ont. 722.

2. Low *v.* Marysville, 5 Cal. 214. See also Pennsylvania R. Co. *v.* Philadelphia, 47 Pa. St. 189. But see Taylor *v.* Newberne, 55 N. C. 141, 64 Am. Dec. 566, holding that an act of the legislature, authorizing the commissioners of an incorporated town to subscribe for stock in a navigation company, for the use of the town, is within the constitutional power of the legislature, although the improvement contemplated was to commence ten miles above the boundaries of the town.

3. Geneseo *v.* Geneseo Natural Gas, etc., Co., 55 Kan. 358, 40 Pac. 655 (holding that a statute authorizing a municipality to take stock in a corporation organized for development of mineral resources and to place the product mined on the general market for profit is unconstitutional); Cleburne *v.* Brown, 73 Tex. 443, 11 S. W. 404.

4. Low *v.* Marysville, 5 Cal. 214.

5. Blake *v.* Macon, 53 Ga. 172.

on loan on the faith and credit of the city";[6] but not "to subscribe for stock and issue bonds to pay for the same."[7] A city has no power to execute a guaranty of a promissory note, as incidental to a power given by charter to sell negotiable paper.[8] Giving premium notes for assessments to meet fire losses;[9] assuming the entire expense of track elevation, of which one half is to be repaid by the railway company;[10] or indorsing on the bonds of a water company certain stipulations as to the payment of rentals[11] has been held not a loan of municipal credit.

e. Limitation of Amount. Statutes authorizing municipal aid generally limit the amount thereof.[12] Under a statute limiting the amount of subscription or loan of credit to a railroad by a municipality, such limit is not confined to the subscription or loan to any one railroad, but restricts indebtedness for railroad purposes generally, whether the aid be extended to one or more railroads.[13]

f. Consent or Petition of Taxpayers or Citizens. When there is a statutory requirement of assent or petition of a definite portion of citizens or taxpayers[14] a substantial compliance therewith is essential to the validity of a municipal subscription;[15] and where a petition is required it must appear therefrom that it is signed by the persons designated in the statute;[16] but the corporation aided need not be designated by name if it is identified by description.[17] "Inhabitants"

6. Savannah *v.* Martin, 108 U. S. 191, 2 S. Ct. 472, 27 L. ed. 698; Savannah *v.* Kelley, 108 U. S. 184, 2 S. Ct. 468, 27 L. ed. 696.

7. Blake *v.* Macon, 53 Ga. 172.

8. Carter *v.* Dubuque, 35 Iowa 416.

9. French *v.* Millville, 67 N. J. L. 349, 51 Atl. 1109 [*affirming* 66 N. J. L. 392, 49 Atl. 465].

10. Brooke *v.* Philadelphia, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781.

11. State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15; Brady *v.* Bayonne, 57 N. J. L. 379, 30 Atl. 968.

12. See the statutes of the different states. And see Robertson *v.* Rockford, 21 Ill. 451; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Empire Tp. *v.* Darlington, 101 U. S. 87, 25 L. ed. 878 (holding that under a statute providing that any municipality along a railroad may subscribe to the capital stock of said railroad, in a sum not exceeding two hundred and fifty thousand dollars, the power of a municipality to subscribe was not exhausted by the subscription of fifty thousand dollars made after a popular election); Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28 (holding that a city charter permitting the city to issue bonds in aid of the construction of railroads, to any amount, is not in conflict with a constitutional provision limiting the indebtedness of municipal corporations to a certain per cent of their taxable property, since the charter provision will operate only within the constitutional limit); Long *v.* New London, 5 Fed. 559, 9 Biss. 539.

13. Dumphey *v.* Humboldt Co., 58 Iowa 273, 12 N. W. 306; Chicago, etc., R. Co. *v.* Osage County Com'rs, 38 Kan. 597, 16 Pac. 828.

14. See the statutes of the different states. And see Kokomo *v.* State, 57 Ind. 152 (holding that a petition to a city council for a donation to aid in the construction of a railroad is not invalidated by false representations as to the amount of stock to be received by the city, where under the petition the city was entitled to receive no stock); Thompson *v.* Peru, 29 Ind. 305 (holding that the proviso in Act (1867), § 60, relates to donations by cities to railroads, not subscriptions to stock); People *v.* Van Valkenburgh, 63 Barb. (N. Y.) 105 (holding that a petition to raise and invest a certain sum of money "in stocks or bonds, or both," was defective and irregular and not a compliance with the act of 1869.

Determination of sufficiency of petition.— The adjudication of municipal authorities as to whether the petition for an election for the purpose of having decided a proposition to vote a tax to aid in the construction of a railroad is signed by the number of resident taxpayers required by law is not conclusive, and if it should appear from the return to a writ of certiorari that such fact was not shown to the authorities or that it was shown by insufficient evidence, their action thereon will be set aside. Jordan *v.* Hayne, 36 Iowa 9. But *compare* Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395, holding that where the common council of a city is authorized to determine whether the requisite number of freeholders of a city have petitioned for subscriptions to a railroad company's stock, and no other tribunal is provided for that purpose, the determination of the council is conclusive.

15. Wilson *v.* Hamilton County Com'rs, 68 Ind. 507; Williams *v.* Hall, 65 Ind. 129; Petty *v.* Myers, 49 Ind. 1; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; St. Louis *v.* Alexander, 23 Mo. 483; Duanesburgh *v.* Jenkins, 40 Barb. (N. Y.) 574, 46 Barb. 294 [*affirmed* in 57 N. Y. 177].

16. People *v.* Smith, 55 N. Y. 135; Rich *v.* Mentz, 19 Fed. 725.

17. Scipio *v.* Wright, 101 U. S. 665, 25 L. ed. 1037.

means legal voters of the municipality;[18] a petition for an appropriation to aid in the construction of a railroad is not vitiated because it contains a condition that the railroad company should build a depot in a certain town.[19]

g. Submission to Popular Vote. The common law gives no recognition to the American practice of submitting the question of municipal aid to a railroad or other corporation to a popular vote,[20] and therefore elections held by municipal corporations without legislative direction or authority are unnecessary[21] and futile.[22] On the contrary where such election is prescribed by constitution or statute as authority for giving municipal aid to corporations it is indispensable to the municipal action,[23] and every requirement of the law must be complied with or the election will be invalid.[24] It is sufficient that a majority of the persons voting vote for a municipal aid proposition, although a majority of the whole number of the qualified voters do not vote at all,[25] unless the assent of a majority of all the qualified voters is expressly required.[26] And the legislature is impotent to reduce the majority prescribed by the constitution as authority for municipal aid.[27] When a proposition has received such vote as is required the municipality is bound without a subsequent contract of subscription.[28] Constitutional provisions as to elections are prospective only and do not affect valid action previously taken by a municipality;[29] but when inhibitory they operate to repeal all authorizing statutes not expressly excepted.[30] Fraud in obtaining a vote in favor of municipal aid, if participated in by the beneficiary, will vitiate the election.[31] But an election is not invalidated by printing on the ballot a full statement of the question involved in the election;[32] nor because the petition, notice, and vote fix the time when the bonds will mature, although the statute authorizing the election is silent on the subject;[33] nor by reason of a failure to furnish to the election commissioners a certified list of voters;[34] nor because the registration com-

18. Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526.

19. Bittinger *v.* Bell, 65 Ind. 445.

20. Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351.

21. Keithsburg *v.* Frick, 34 Ill. 405; Perry *v.* Keene, 58 N. H. 40.

22. Quincy, etc., R. Co. *v.* Morris, 84 Ill. 410. See also Helm *v.* Port Hope, 22 Grant Ch. (U. C.) 273.

23. People *v.* Jackson County, 92 Ill. 441; Phillips *v.* Albany, 28 Wis. 340; Jarrolt *v.* Moberly, 103 U. S. 580, 26 L. ed. 492.

24. People *v.* Laenna, 67 Ill. 65 (strict compliance necessary); People *v.* Santa Anna, 67 Ill. 57 (strict compliance necessary); Reynolds, etc., Constr. Co. *v.* Monroe, 45 La. Ann. 1024, 13 So. 400; Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351 (strict compliance necessary). See also Kansas City, etc., R. Co. *v.* Rich Tp., 45 Kan. 275, 25 Pac. 595; Portland, etc., R. Co. *v.* Standish, 65 Me. 63, holding that not only the vote to raise the necessary funds and to use them in aid of the road, but also that directing the particular method of affording assistance, whether by loan, or by subscribing for stock, or in some other manner, must appear to have been carried by the assent of two thirds of the voters.

Illustration.— Where, under the statutes, municipal corporations are permitted to subscribe for railroad stock on certain conditions, an act of the mayor in ordering an election, without any ordinance passed in compliance with the statutory conditions, but on motion adopted by the city council, was invalid. State *v.* Shreveport, 27 La. Ann. 623.

25. Griffin *v.* Inman, 57 Ga. 370; Black *v.* Cohen, 52 Ga. 621; Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; St. Joseph Tp. *v.* Rogers, 16 Wall. (U. S.) 644, 21 L. ed. 328.

26. State *v.* Walker, 85 Mo. 41; Orr *v.* Lawrence County, 75 Mo. 246; State *v.* Holladay, 72 Mo. 499; Webb *v.* Lafayette County, 67 Mo. 353.

27. State *v.* Walker, 85 Mo. 41; Orr *v.* Lawrence County, 75 Mo. 246; State *v.* Holladay, 72 Mo. 499; Webb *v.* Lafayette County, 67 Mo. 353; Jarrolt *v.* Moberly, 103 U. S. 580, 26 L. ed. 492.

28. Augusta *v.* Maysville, etc., R. Co., 97 Ky. 145, 30 S. W. 1, 16 Ky. L. Rep. 890; East Lincoln *v.* Davenport, 94 U. S. 801, 24 L. ed. 322.

29. Quincy, etc., R. Co. *v.* Morris, 84 Ill. 410; Louisiana City *v.* Taylor, 105 U. S. 454, 26 L. ed. 1133.

30. People *v.* Jackson County, 92 Ill. 441; Quincy, etc., R. Co. *v.* Morris, 84 Ill. 410.

31. People *v.* Cline, 63 Ill. 394. See also Truesdell *v.* Green, 57 Iowa 215, 10 N. W. 630, holding that a tax which has been voted in aid of a railroad company cannot be enforced where it was procured by means of promises made to the voters that it would be enforced only against non-residents, and such a tax is void.

32. Bras *v.* McConnell, 114 Iowa 401, 87 N. W. 290.

33. People *v.* Harp, 67 Ill. 62.

34. New Orleans *v.* Cordeviolle, 10 La.

missioners styled themselves "commissioners of election,"[35] or failed to make a certified return of the result.[36] Where there is no express provision as to the mode of conducting such an election, it should be conducted in the usual manner of conducting elections in the municipality.[37] The notice of election should contain such statements as will fairly advise the voters of the object thereof.[38] Where the only object of the electors of a town in granting aid to a railway company is to procure the construction of a railway from a certain point to such town, the question may be submitted to them in such a form as to provide that the aid shall be given to that one of two companies which shall first complete its road between such points.[39]

h. Requisites and Validity. A subsidy is valid, which has been granted in substantial compliance with the essential statutory or constitutional requisites,[40] or when imperfections or defects have been cured by a validating act.[41] It has been decided that municipal power to grant aid includes authority to impose conditions to the grant.[42] A subsidy cannot be voted to a completed railroad under a statute authorizing the issue of bonds to aid in the construction of the railroad,[43] and a subscription cannot be made to a road other than that designated by the petition.[44] A subscription, conditioned upon a like subscription by other municipalities, is invalidated by their incapacity to subscribe.[45] A municipality cannot avoid a subscription to a railway company on the ground that the contract of subscription contains a stipulation which the company was unauthorized to make; such stipulation may be disregarded and the contract enforced as far as valid.[46] An absolute donation, if authorized, is not invalid;[47] but a vote of a "donation" does not mean a gift, if it appears otherwise that an agreement to give for a consideration is intended.[48] Where a popular vote is not required the municipal council may make the grant of aid.[49]

i. Rescission or Modification. A municipal subscription to a railway company may be rescinded by consent of the beneficiary,[50] or on the ground that the company has violated the contract of subscription,[51] or when nothing has been done and no rights of third parties have intervened.[52] But the conditions of a municipal subscription in aid of a railway can be changed by a vote at a subsequent municipal election only by express statutory authority.[53]

j. Performance of Conditions. Failure to construct a railway over the contemplated route releases a municipality from its subscription to its stock;[54] but a subscription for the construction of a designated section of a railroad may, after

Ann. 732; New Orleans *v.* De St. Romes, 9 La. Ann. 573.

35. Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

36. Winter *v.* Montgomery, 65 Ala. 403. See, however, Reynolds, etc., Constr. Co. *v.* Monroe, 45 La. Ann. 1024, 13 So. 400.

37. People *v.* Harp, 67 Ill. 62; People *v.* Dutcher, 56 Ill. 144. But *compare* Bras *v.* McConnell, 114 Iowa 401, 87 N. W. 290.

38. Winter *v.* Montgomery, 65 Ala. 403; Bras *v.* McConnell, 114 Iowa 401, 87 N. W. 290; MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

39. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

40. Fielder *v.* Montgomery, etc., R. Co., 51 Ala. 178; Wetumpka *v.* Winter, 29 Ala. 651; *In re* Lloyd, 44 U. C. Q. B. 235.

41. Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

Curative acts see *infra*, XV, A, 6, d.

42. Jacks *v.* Helena, 41 Ark. 213; Coe *v.* Caledonia, etc., R. Co., 27 Minn. 197, 6 N. W. 621. See also Danville *v.* Montpelier, etc., R. Co., 43 Vt. 144. But *compare* Wilkinson *v.* Peru, 61 Ind. 1; Indiana, etc., R. Co. *v.* Attica, 56 Ind. 476.

43. State *v.* Highland, 25 Minn. 355.

44. Rochester, etc., R. Co. *v.* Cuyler, 7 Lans. (N. Y.) 431.

45. Phillips *v.* Albany, 28 Wis. 340.

46. Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395.

47. Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; Wilkinson *v.* Peru, 61 Ind. 1.

48. Goodhue *v.* Beloit, 21 Wis. 636.

49. Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Perry *v.* Keene, 58 N. H. 40; Com. *v.* Pittsburgh, 34 Pa. St. 496.

50. Troy *v.* Atchison, etc., R. Co., 13 Kan. 70.

51. Butler County *v.* Northwestern R. Co., 28 Leg. Int. (Pa.) 52.

52. Estey *v.* Starr, 56 Vt. 690.

53. People *v.* Waynesville, 88 Ill. 469.

54. Jacks *v.* Helena, 41 Ark. 213; State *v.* Morristown, 93 Tenn. 239, 24 S. W. 13.

it is completed by the railroad company's own means, be applied by the company to discharge a mortgage debt.[55] For the failure of a railroad company to perform its promise to erect certain taxable improvements in municipal limits, it becomes liable to the city for the value of such improvements for purposes of taxation.[56]

k. Municipal Rights and Liabilities. *Ultra vires* subscriptions to private corporations are void;[57] money paid thereon may be recovered,[58] and no liability follows such subscription, although the stock be issued thereon.[59] A municipality is not liable on an invalid assessment on corporate stock because its council has voted to pay the same.[60] A municipal corporation making a valid subscription to stock is subject to the same liabilities as other subscribers or stock-holders.[61] A municipality may take any lawful steps to protect or preserve the value of its pecuniary interest in a railway.[62] A city which has in the exercise of statutory authority subscribed to railroad stock and appointed directors to represent such stock cannot without express authority appoint directors to represent an increase of stock derived from a stock dividend.[63] Where a city issues its bonds in aid of a railroad company without authority of law and receives therefor the bonds of the company, secured with other bonds by a mortgage upon its road, the city is not such a lien creditor for a valuable consideration as to entitle it to claim a share of the proceeds of the sale of the mortgaged premises made in satisfaction of the mortgage.[64]

6. Unauthorized Debts and Expenditures — a. In General. Unauthorized debts and expenditures do not as a general rule create municipal liability;[65] but where money is lent in good faith to a municipality, the money applied to legitimate municipal uses and such application ratified by the municipality it becomes liable therefor.[66] A city which has authorized a proper expenditure cannot by a subsequent resolution, of which persons advancing money for the expenditure have no notice, limit the amount of its liability.[67]

b. Contracts in Excess of Debt Limit. A contract made by a municipality in excess of its debt limit as fixed by the constitution or by statute is void,[68] at least

55. Myer *v.* Dupont, 79 Ky. 416, 3 Ky. L. Rep. 36.

56. Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435.

57. Geneseo *v.* Geneseo Natural Gas, etc., Co., 55 Kan. 358, 40 Pac. 655.

58. Geneseo *v.* Geneseo Natural Gas, etc., Co., 55 Kan. 358, 40 Pac. 655; Adams *v.* Jackson Electric R., etc., Co., 78 Miss. 887, 30 So. 58.

59. Geneseo *v.* Geneseo Natural Gas, etc., Co., 55 Kan. 358, 40 Pac. 655.

60. Pike *v.* Bangor, etc., R. Co., 68 Me. 445.

61. Shipley *v.* Terre Haute, 74 Ind. 297; Boutte *v.* Bryant, 10 La. Ann. 659. See also People *v.* San Francisco, 27 Cal. 655.

62. Athens *v.* Camak, 75 Ga. 429, may make an agreement with a corporation to complete a railroad to the stock of which it has subscribed.

63. Wheeling *v.* Baltimore, 29 Fed. Cas. No. 17,502, 1 Hughes 90.

64. Smith *v.* Milwaukee, etc., R. Co., 22 Fed. Cas. No. 13,082.

65. *Illinois.*— Law *v.* People, 87 Ill. 385; Brauns *v.* Peoria, 82 Ill. 11.

Kentucky.— See Grady *v.* Pruit, 111 Ky. 100, 63 S. W. 283, 23 Ky. L. Rep. 506.

Massachusetts.— Railroad Nat. Bank *v.* Lowell, 109 Mass. 214.

New York.— People *v.* Green, 3 Hun 208, 5 Thomps. & C. 376.

Canada.— Real Estate Invest. Co. *v.* Richmond, 23 Quebec Super. Ct. 151.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1857.

Compare Kansas City *v.* Wyandotte Gas Co., 9 Kan. App. 325, 61 Pac. 317.

Unlawful expenditures are not those resulting from errors of judgment or unbusiness-like methods, whereby public moneys are wasted. Matter of East Syracuse, 20 Abb. N. Cas. (N. Y.) 131.

Partially invalid appropriation.— Where moneys are appropriated by a municipal corporation for two purposes, one of which is lawful and the other unlawful, the court, if it is practicable to do so, will distinguish between the two objects, so as to sustain the appropriation so far as it is for a lawful purpose; but, if this be impossible, the entire appropriation will be held invalid. Roberts *v.* New York, 5 Abb. Pr. (N. Y.) 41.

66. Hurd *v.* St. Albans, 81 Me. 343, 17 Atl. 168; Belfast Nat. Bank *v.* Stockton, 72 Me. 522; Billings *v.* Monmouth, 72 Me. 174.

What amounts to ratification see Otis *v.* Stockton, 76 Me. 506; Lincoln *v.* Stockton, 75 Me. 141.

67. Duncombe *v.* Ft. Dodge, 38 Iowa 281.

68. Prince *v.* Quincy, 128 Ill. 443, 21 N. E. 768 [*affirming* 28 Ill. App. 490]; Carter *v.* Dubuque, 35 Iowa 416, holding that a contract of guaranty executed by municipal cor-

as to the excess;[69] and every one dealing with a municipality is charged with notice of a limitation upon the amount of its indebtedness.[70]

c. Ratification. Municipal indebtedness in excess of a constitutional limitation cannot be made good by ratification, since power to authorize originally is a condition precedent to the power to ratify subsequently.[71] But an expenditure made in excess of a limitation imposed by a municipal ordinance may be ratified by the municipal council.[72] Where it is provided by statute that no contract shall be made or expense incurred by a city, unless an appropriation therefor shall have been previously made, a contract in violation of this provision can be ratified only by making an appropriation expressly for its performance[73] The fact that a municipality through its officers holds possession and control of notes given by one of them for an unauthorized loan of the municipal money to himself will not operate as a ratification of the loan.[74]

d. Curative Statutes. A municipal contract, expenditure, or appropriation invalid when made may be cured by subsequent legislation,[75] unless the invalidity result from a violation of a constitutional inhibition.[76]

e. Municipal Recovery of Money Paid. When the money of a municipality is paid out on a contract or for an indebtedness which the municipality had no authority to make or incur, it may be recovered.[77]

poration in excess of the constitutional limit against the contracting of indebtedness is void, even as against the assignee of the original holder. *Compare* Ford *v.* Cartersville, 84 Ga. 213, 10 S. E. 732; Arbuckle-Ryan Co. *v.* Grand Ledge, 122 Mich. 491, 81 N. W. 358.

69. Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781; Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568, 89 N. W. 7; McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215. See also Cincinnati *v.* Cameron, 33 Ohio St. 336.

70. Griswold *v.* East St. Louis, 47 Ill. App. 480; Gutta-Percha, etc., Mfg. Co. *v.* Ogalalla, 40 Nebr. 775, 59 N. W. 513, 42 Am. St. Rep. 696; Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132.

71. Grady *v.* Pruit, 111 Ky. 100, 63 S. W. 283, 23 Ky. L. Rep. 506; State *v.* Helena, 24 Mont. 521, 63 Pac. 99, 81 Am. St. Rep. 453, 55 L. R. A. 336; Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132.

72. Silsby Mfg. Co. *v.* Allentown, 153 Pa. St. 319, 26 Atl. 646.

73. Gutta-Percha, etc., Mfg. Co. *v.* Ogalalla, 40 Nebr. 775, 59 N. W. 513, 42 Am. St. Rep. 696.

74. Holderness *v.* Baker, 44 N. H. 414.

75. *Alabama.*— Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410.

Connecticut.— Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475.

Georgia.— Bass *v.* Columbus, 30 Ga. 845; Winn *v.* Macon, 21 Ga. 275.

Louisiana.— New Orleans First Municipality *v.* Orleans Theatre Co., 2 Rob. 209.

Michigan.— Crittenden *v.* Robertson, 13 Mich. 58.

Minnesota.— Merchants' Nat. Bank *v.* East Grand Forks, 94 Minn. 246, 102 N. W. 703.

Missouri.— Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294, holding that an act of the legislature providing that subscriptions to the stock of a railroad company previously made by a county court, if approved after the passage of the act by such court, shall be valid and binding, is constitutional.

New York.— New York *v.* Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618 [*affirming* 1 N. Y. Suppl. 840]; People *v.* Mitchell, 35 N. Y. 551; Matter of Brennan, 19 Abb. Pr. 376 note, holding that where the legislature declares a claim against the city valid, and provides the means of raising the money to pay it, it is the controller's duty to settle it, whether or not the act directs him to draw his warrant.

South Carolina.— State *v.* Charleston, 10 Rich. 491.

Virginia.—Redd *v.* Henry County, 31 Gratt. 695.

Washington.— McBryde *v.* Montesano, 7 Wash. 69, 34 Pac. 559 (validation of indebtedness incurred by a city in a territory by state legislature after admission of territory to statehood); Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

United States.— Confarr *v.* Santa Anna, 116 U. S. 366, 6 S. Ct. 418, 29 L. ed. 636; Anderson *v.* Santa Anna, 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633; Jonesboro City *v.* Cairo, etc., R. Co., 110 U. S. 192, 4 S. Ct. 67, 28 L. ed. 116 (validation by general statute); Campbell *v.* Kenosha, 5 Wall. 194, 18 L. ed. 610; U. S. *v.* Holliday, 3 Wall. 407, 18 L. ed. 182. *Compare* Hayes *v.* Holly Springs, 114 U. S. 120, 5 S. Ct. 785, 29 L. ed. 81.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1860. See also *supra*, IX, I, 2; *infra*, XV, C, 13, c.

Compare Richland County *v.* People, 3 Ill. App. 210.

76. Barnes *v.* Lacon, 84 Ill. 461; Wiley *v.* Silliman, 62 Ill. 170; Marshall *v.* Silliman, 61 Ill. 218; Richland County *v.* People, 3 Ill. App. 210.

77. Geneseo *v.* Geneseo Natural Gas, etc., Co., 55 Kan. 358, 40 Pac. 655; Griffin *v.* Sha-

B. Administration, Appropriation, Warrants, and Payments — 1. In General — a. Collection and Custody of Funds. How municipal funds shall be collected or received and held is, like other fiscal operations, a matter as to which the legislature may make provision;[78] and such a provision cannot be altered by ordinance or by-law.[79] The courts will not hear any complaint from strangers of the mismanagement of municipal funds.[80]

b. Adjustment of Accounts With State. State funds are frequently collected by municipal officials,[81] and when, under the method of collection or receipt by municipal officers of state and county taxes due on property within municipal boundaries, collection thereof is made at the same time with municipal taxes and the moneys deposited in a common account, the quota of state and county taxes has preference of payment out of such fund.[82] A fiscal officer of a municipality having only ministerial functions as to the payment of state taxes has no power to withhold payment thereof or raise objections of irregularity and informality in their assessment and collection.[83]

c. Adjustment With County or Other Municipality. The legislature may provide by general or special law a method of adjustment of local taxes between municipalities and counties by their official representatives;[84] but their failure to perform such function does not effect a waiver or estoppel of municipal right,[85] nor does a county's retention of municipal taxes even with municipal consent have such effect.[86]

d. Disbursements. A disbursing officer may pay out municipal funds only as authorized by law,[87] and a void ordinance affords him no legal protection.[88] But a city may not refuse to disburse money in its treasury, on the ground of doubt of its power to make the levy which brought it in.[89]

e. Loaning or Investing Funds. Surplus money in a municipal treasury, not appropriated for immediate payment, may be loaned or invested by the municipality, until needed for municipal use,[90] at any lawful rate of interest which may be agreed upon,[91] and a borrower will not be heard to set up the want of cor-

kopee, 53 Minn. 528, 55 N. W. 738; Chaska *v.* Hedman, 53 Minn. 525, 55 N. W. 737; People *v.* Fields, 58 N. Y. 491; Kent *v.* Dithridge, etc., Cut Glass Co., 10 Ohio Cir. Ct. 629, 5 Ohio Cir. Dec. 107. But *compare* Schell City *v.* L. M. Rumsey Mfg. Co., 39 Mo. App. 264, a recovery defeated where a payment was made under a mistake of law, but with full knowledge of the facts and without fraud.

78. East St. Louis *v.* Launtz, 20 Ill. App. 644; Clinton *v.* Clintonia, 3 Ill. App. 36; McFarland *v.* People, 2 Ill. App. 615; Interstate Nat. Bank *v.* Ferguson, 48 Kan. 732, 30 Pac. 237; State *v.* Goetz, 24 Minn. 114.

79. Tampa *v.* Salomonson, 35 Fla. 446, 17 So. 581.

80. Silver *v.* Tobin, 28 Fed. 545.

81. See Louisville *v.* Com., 4 Metc. (Ky.) 63; Louisville *v.* Com., 9 Dana (Ky.) 70.

82. Rahway Water Com'rs *v.* Brewster, 42 N. J. L. 125; Bayonne *v.* State, 41 N. J. L. 368.

Warrants but not bonds are treated as cash, where state and county taxes are payable out of the first money collected. Sheridan *v.* Rahway, 44 N. J. L. 587.

83. People *v.* Myers, 13 N. Y. Suppl. 182 [*affirmed* in 126 N. Y. 639, 27 N. E. 411].

84. See the statutes of the different states. And see Logan County *v.* Lincoln, 81 Ill. 156; Richardson *v.* Boske, 111 Ky. 893, 64 S. W. 919, 23 Ky. L. Rep. 1209.

Repeal of charter provisions by general statute see Buffalo *v.* Neal, 86 Hun (N. Y.) 76, 33 N. Y. Suppl. 346; Green County *v.* Monroe, 55 Wis. 175, 12 N. W. 472; Walworth County Sup'rs *v.* Whitewater, 17 Wis. 193.

The term "unpaid taxes" in Wis. Rev. St. § 1114, regulating settlements between town and county treasurers, includes unpaid special assessments for street improvements. Sheboygan County *v.* Sheboygan, 54 Wis. 415, 11 N. W. 598.

85. Logan County *v.* Lincoln, 81 Ill. 156.

86. Iowa City *v.* Johnson County, (Iowa 1895) 61 N. W. 995.

87. Ealer *v.* Millspaugh, 32 La. Ann. 901; Todd *v.* Patterson, 55 Pa. St. 496; Com. *v.* Gingrich, 21 Pa. Super. Ct. 286; Com. *v.* Gingrich, 22 Pa. Co. Ct. 244.

88. Herzo *v.* San Francisco, 33 Cal. 134.

89. School Directors *v.* Shreveport, 47 La. Ann. 21, 16 So. 563.

90. Foote *v.* Salem, 14 Allen (Mass.) 87; Spaulding *v.* Arnold, 6 N. Y. Suppl. 336. But *compare* Simmons *v.* Hanover, 23 Pick. (Mass.) 188; Bonham *v.* Taylor, 81 Tex. 59, 16 S. W. 555.

91. Hillsborough, etc., R. Co. *v.* Cincinnati, 5 Ohio Dec. (Reprint) 122, 2 Am. L. Rec. 724; North Gwillimbury *v.* Moore, 15 U. C. C. P. 445.

porate power to make his loan.[92] A municipal officer who is bound to deposit the public money in some bank[93] may contract with the bank that it shall pay interest on the deposit for the benefit of the municipality;[94] but a bank is not bound to pay interest on such deposit unless it is so agreed.[95]

f. Reports and Statements of Officers. Official statements and reports of fiscal conditions constitute the proper basis for administrative or legislative action, when made by officers thereunto duly authorized,[96] and in manner and form required by law.[97]

g. General Funds. General municipal funds may be appropriated by a municipal council in its discretion to any municipal object.[98] And a city holding a fund in general trust with specific direction as to the application of the interest may, by payment of the interest for the designated object, use the principal for any municipal purpose.[99] A general fund provided for a municipal department may be expended by the department commissioners as they see fit, provided they confine their expenditures to the object specified in the statute.[1] A creditor whose claim is payable out of a special municipal fund cannot compel payment out of a general fund.[2]

h. Special Funds. Special municipal funds, which are dedicated by express statutory provision or by the act of a municipal council or board, duly authorized, to a specific municipal object, may not be diverted either directly or indirectly to any other purpose;[3] whenever diversion is threatened, it may be enjoined by those entitled to the fund,[4] and no misapplication of such fund can hinder or defeat the right of creditors to be paid therefrom.[5] Whether a fund is a special

92. Adelphi *v.* Swinhart, 3 Ohio Dec. (Reprint) 551; Scheussler *v.* Mason, (Tex. Civ. App. 1894) 28 S. W. 42.

93. State *v.* Bowers, 26 Ohio Cir. Ct. 326 [*affirmed* without opinion in 70 Ohio St. 423, 72 N. E. 1155].

94. New York *v.* National Broadway Bank, 10 N. Y. Suppl. 555 [*affirmed* in 126 N Y. 665, 27 N. E. 555].

95. New York *v.* Tradesmen's Nat. Bank, 11 N. Y. Suppl. 95 [*affirmed* in 126 N. Y. 665, 27 N. E. 555].

96. Vose *v.* Frankfort, 64 Me. 229; Laird *v.* Greensburg, 8 Pa. Co. Ct. 621. And see Hover *v.* People, 17 Colo. App. 375, 68 Pac. 679, holding that the mayor of Denver may not modify estimates made by the fire and police board.

97. Osterhoudt *v.* Rigney, 98 N. Y. 222 (holding that the fact that an audit of the account of an overseer of the poor was made without a comparison of the items thereof with those of his book did not vitiate the audit); People *v.* Wright, 68 Hun (N. Y.) 264, 22 N. Y. Suppl. 961. *Compare* Langstaff *v.* Daly, 49 N. J. L. 403, 8 Atl. 526.

98. State *v.* Hammonton, 38 N. J. L. 430, 20 Am. Rep. 404; State *v.* Snodgrass, 1 Wash. 305, 25 Pac. 1014; Metcalfe *v.* Seattle, 1 Wash. 297, 25 Pac. 1010. See also Higgins *v.* San Diego, 131 Cal. 294, 63 Pac. 470. *Compare* Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

99. Ayer *v.* Bangor, 85 Me. 511, 27 Atl. 523

1. People *v* Green, 65 Barb. (N. Y.) 505.

2. Chicago Public Library *v.* Arnold, 60 Ill. App. 328; Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R A. 157.

3. *California.*— Higgins *v.* San Diego, 131 Cal. 294, 63 Pac. 470; Brooks *v.* San Luis Obispo, 109 Cal. 50, 41 Pac. 791 (holding that under a statute prohibiting the drawing of a warrant for any expense of the improvement of a street on any other than the special fund raised by assessment for such improvement, the expenses of printing a delinquent assessment list in proceedings to improve a street are only payable out of such special fund); People *v.* Swift, 28 Cal. 397.

Illinois.— Water Com'rs *v.* Hall, 98 Ill. 371, water rents may not be used for erecting expensive structures for improving the quality of the water.

New Jersey.— Hoboken *v.* Ivison, 20 N. J. L. 65.

New York.— People *v.* Wilson, 46 Hun 134; McKane *v.* Voorhies, 19 N. Y. Suppl. 141; People *v.* Weston, 10 N. Y. St. 743 (municipal officer not bound by act of predecessor in ordering payment from a fund not applicable to the purpose); People *v.* Lathrop, 19 How. Pr. 358.

Ohio.— Daley *v.* Board of Public Works, 9 Ohio Dec. (Reprint) 118, 11 Cinc. L. Bul. 25 [*affirmed* in 11 Cinc. L. Bul. 320], holding that where, under an act of the legislature, a fund is produced by the levy of a tax for grading and completing a street, damages suffered by a laborer employed in the work on account of the negligence of the superintendent cannot be paid out of such fund.

United States.— Hart *v.* New Orleans, 12 Fed. 292.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1869.

4. Rice *v.* Walker, 44 Iowa 458.

5. State *v.* Pilsbury, 30 La. Ann. 705; Chaffee *v.* Granger, 6 Mich. 51; Quaker City

fund, and if so what is the nature, purpose, and extent of its dedication, is determined by the statute or ordinance under which it is raised or held,[6] and those towns having the custody and disposition of it have a discretion in its expenditure only within the requirements and provisions of law.[7] Special annual funds are applicable primarily to the annual expenses; and that of one year may not be applied to expenses of any other year until all the expenses of the year to which the fund belongs have been satisfied.[8]

i. Apportionment of Funds. It is sometimes required by statute that municipal revenue shall be apportioned by the council to the different municipal funds.[9] An apportionment of revenues is not an appropriation thereof.[10]

j. Appropriations — (1) *In General.* Under statutes forbidding the incurring of debts for which there is no appropriation,[11] there is no municipal liability for work done for a municipal corporation before an appropriation has been made therefor,[12] and persons seeking payment from budgeted appropriations are restricted to such appropriations and have no action against the municipality until there are funds to the credit of such appropriations.[13] But where an ordinance provides that certain salaries shall be paid out of the municipal treasury, an appropriation for such salaries is unnecessary.[14] An appropriation without consideration will not be enforced.[15] A general limitation upon the power of the municipal council to appropriate money does not apply as to money authorized to be borrowed for a specific purpose by a majority of the legal voters of the municipality.[16] Authority to appropriate a fund to either of two purposes does not authorize a division of the fund between such purposes.[17] A proviso in an appropriation for its expenditure by an officer other than the one authorized by law is void.[18] The awarding of damages to persons whose property is injured by the location or alteration of a street is not an appropriation.[19] An ordinance directing the improvement of a street at the expense of the property-owners, the city not to be liable therefor, is not an ordinance appropriating money.[20] Interest on

Nat. Bank *v.* Tacoma, 27 Wash. 259, 67 Pac. 710.

6. *Louisiana.*— State *v.* Board of Liquidation, 51 La. Ann. 1849, 26 So. 679; Barber Asphalt Paving Co. *v.* New Orleans, 43 La. Ann. 464, 9 So. 484; State *v.* New Orleans, 32 La. Ann. 268; New Orleans *v.* Louisiana Branch State Bank, 10 La. Ann. 762.

Maryland.— Callaway *v.* Baltimore, 99 Md. 315, 57 Atl. 661.

Massachusetts.— Hennessey *v.* New Bedford, 153 Mass. 260, 26 N. E. 999.

Michigan.— People *v.* Bay City, 36 Mich. 186.

Nebraska.— State *v.* Cobb, 44 Nebr. 434, 62 N. W. 867.

New York.—Locke *v.* Buffalo, 97 N. Y. App. Div. 483, 90 N. Y. Suppl. 550; McKane *v.* Voorhies, 19 N. Y. Suppl. 141.

Pennsylvania.— Drhew *v.* Altoona City, 121 Pa. St. 401, 15 Atl. 636.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1869.

License-fees received by a city for the privilege of selling liquor, in accordance with a provision of its charter to that effect, are not taxes, and the general assembly can dispose of the fund for any public use; and it is not required, by any constitutional requirement, to be applied solely to municipal purposes. East St. Louis *v.* Schools Trustees, 102 Ill. 489, 40 Am. Rep. 606.

7. Water Com'rs *v.* Hall, 98 Ill. 371; Ayer *v.* Bangor, 85 Me. 511, 27 Atl. 523.

8. Bilby *v.* McKenzie, 112 Cal. 143, 44 Pac. 341. See also Badger *v.* New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540.

9. See the statutes of the different states. And see San Francisco *v.* Broderick, 111 Cal. 302, 43 Pac. 960; Fay *v.* Wood, 65 Mich. 390, 32 N. W. 614; State *v.* Smith, 11 Wis. 65.

10. State *v.* Kansas City, 58 Mo. App. 124.

11. See the statutes of the different states. And see Du Quoin First Nat. Bank *v.* Keith, 183 Ill. 475, 56 N. E. 179 [*affirming* 84 Ill. App. 103]; Danville *v.* Water Co., 180 Ill. 235, 54 N. E. 224; Kearney *v.* Downing, 59 Nebr. 549, 81 N. W. 509; Firemen's Relief Assoc. *v.* Scranton, 7 Lack. Jur. (Pa.) 33, 1 Lehigh Co. L. J. 380. See also *supra*, IX, H, 2.

12. Marysville *v.* Schoonover, 78 Ill. App. 189.

13. Wadsworth *v.* New Orleans, 48 La. Ann. 886, 19 So. 935.

14. Kendall *v.* Raybould, 13 Utah 226, 44 Pac. 1034.

15. Paine *v.* Boston, 124 Mass. 486.

16. State *v.* Martin, 27 Nebr. 441, 43 N. W. 244.

17. People *v.* Cairo, 50 Ill. 154.

18. Hover *v.* People, 17 Colo. App. 375, 68 Pac. 679.

19. Preble *v.* Portland, 45 Me. 241.

20. Becker *v.* Henderson, 100 Ky. 450, 38 S. W. 857, 18 Ky. L. Rep. 881.

municipal bonds is not an item of governmental expenditure for which an appropriation may be made.[21] Appropriations from contingent funds must be made in accordance with statutory provisions on the subject.[22]

(II) *Making and Requisites.* Unless it is otherwise provided by law, in passing an appropriation ordinance the council of a municipality may put their mandate in any form they choose; all that is necessary is that the language should clearly express their intent to make an appropriation.[23] But statutes are mandatory which prescribe requirements for municipal appropriations,[24] such as a popular vote,[25] the vote of a certain majority of the municipal council,[26] a detailed and specific statement of the object of expenditure,[27] the lapse of a specified period between the introduction and enactment of the appropriation ordinance,[28] or the passage of the appropriation ordinance at or within a certain time;[29] and appropriations made in violation of them are void. An appropriation must be made by the municipal council[30] even when a municipal board is empowered to estimate the amount necessary to be appropriated.[31]

21. Anniston *v.* Hurt, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45, holding that a council may not in making up the budget estimate interest as a governmental expense, and so by anticipation appropriate revenues to be collected to the payment thereof, thus defeating the rights of creditors of the city to subject to their claims revenues in excess of the necessary current expenditures.

22. Huntington *v.* Cincinnati, 3 Ohio S. & C. Pl. Dec. 62, 1 Ohio N. P. 379, what constitutes "unforeseen emergency" within Rev. St. § 2690*h*. *Compare* State *v.* New Orleans, 30 La. Ann. 129.

23. Com. *v.* Barker, 211 Pa. St. 610, 61 Atl. 253.

Whether an appropriation is to be made by resolution or ordinance depends upon statutory provisions on the subject. Fox *v.* Clark, 72 N. J. L. 100, 59 Atl. 224; Tappan *v.* Long Branch Police Sanitary, etc., Commission, 59 N. J. L. 371, 35 Atl. 1070 (all holding that an appropriation may be made either by resolution or ordinance); State *v.* Cleveland, 10 Ohio Dec. (Reprint) 571, 22 Cinc. L. Bul. 113 (holding that an act providing that a city council shall make no appropriation of money for any purpose, except by ordinance, does not apply to the payment of salaries of employees of the city work-house out of funds which the council had previously set apart as applicable to the payment of the ordinary obligations arising in the carrying on of that institution). See also Shelby *v.* Burlington, 125 Iowa 343, 101 N. W. 101.

24. **General laws prescribing conditions precedent** for municipal appropriations do not control cities with special charters. Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781.

25. Woodward *v.* Reynolds, 58 Conn. 486, 19 Atl. 511; People *v.* Florville, 207 Ill. 79, 69 N. E. 623; Christensen *v.* Fremont, 45 Nebr. 160, 63 N. W. 364; Engstad *v.* Dinnie, 8 N. D. 1, 76 N. W. 292.

26. Sullivan *v.* Leadville, 11 Colo. 483, 18 Pac. 736; Bishop *v.* Lambert, 114 Mich. 110, 72 N. W. 35; People *v.* Geneva, 98 N. Y. App. Div. 383, 90 N. Y. Suppl. 275; Kirk *v.* McGuire, 32 Misc. (N. Y.) 596, 67 N. Y. Suppl. 315.

Evasion by motion.—A charter provision that no resolution appropriating money shall be adopted by the council, except by a specified vote, cannot be evaded by embracing such action in the form of a motion. Bishop *v.* Lambert, 114 Mich. 110, 72 N. W. 35.

27. Engstad *v.* Dinnie, 8 N. D. 1, 76 N. W. 292; Stem *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 15; Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 475, 5 Ohio N. P. 98; Sank *v.* Philadelphia, 4 Brewst. (Pa.) 133, 8 Phila. 117. *Compare* Hoey *v.* Lewis, 39 N. J. L. 501 [*affirming* 39 N. J. L. 75].

A statement of every item is not required, a classification of the funds for various purposes being held sufficient. Leadville *v.* Matthews, 10 Colo. 125, 14 Pac. 112; State *v.* Smith, 11 Wis. 65.

28. Danville *v.* Shelton, 76 Va. 325.

29. Fuller *v.* Chicago, 89 Ill. 282; Raton Waterworks Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898. *Compare* Com. *v.* Larkin, 27 Pa. Super. Ct. 397, holding that it is not necessary that an ordinance for the raising and appropriating of money borrowed for a specific purpose should be passed within the month in which by law the taxes and revenues of the city are required to be appropriated.

What is compliance.—It is sufficient, where the appropriations are required to be made within a certain period, that the board acts within that time; a vote of confirmation over the mayor's veto may be later. King *v.* Chicago, 111 Ill. 63; Fairfield *v.* People, 94 Ill. 244.

30. State *v.* New Orleans, 52 La. Ann. 1263, 27 So. 572 (a board of health cannot determine amount of appropriation for itself); Ampt *v.* Cincinnati, 4 Ohio Cir. Ct. 253, 2 Ohio Cir. Dec. 530. See also Baltimore *v.* Gorter, 93 Md. 1, 48 Atl. 445; State *v.* Ames, 31 Minn. 440, 18 N. W. 277, holding that under the charter of Minneapolis the making or authorizing of appropriations is exclusively vested in the common council, and the mayor has no veto of the action of the council in the making of the same.

31. Baltimore *v.* Gorter, 93 Md. 1, 48 Atl. 445.

(III) *Operation and Effect.* A voluntary appropriation of public property or the proceeds thereof by a municipality, when such appropriation is not associated with a contract as part of its obligation, does not remove such property or proceeds from the control of the municipality, but it may alter or repeal such appropriation at pleasure.[32] The estimate of revenues for a current year by the mayor and council of a city, and the appropriation by them of a large excess to a sinking fund, is *prima facie* proof of a surplus for the year, and it is not overcome by the mayor's opinion that probably the revenues will not exceed the current expenses.[33] When a municipality borrows money and specifically appropriates it to a particular purpose, it is not necessary that the money so borrowed should be appropriated over and over again by the council ordinance in case some of it should happen not to be disbursed during the year.[34] Although a city council has, under its charter, entire control of the moneys belonging to the city, and no committee of the council or either branch thereof may, except as authorized by vote or ordinance of the council, incur any liability or expend any money, yet, after an appropriation has been made by the council for a department, the committee in charge thereof may lawfully incur debts and audit bills to be paid out of the appropriation therefor.[35]

(IV) *Transfer or Diversion.* Except when it is otherwise provided by law,[36] a transfer of an appropriation in whole or in part may be made by a municipal council at any time;[37] but purely administrative officers have no authority to divert or transfer appropriations;[38] and an unauthorized transfer or diversion does not discharge a municipal obligation.[39] Where the amount of all the taxes collected by a city is sufficient to meet all the necessary expenses, the funds in the treasury may be applied to the full payment of the sum needed to exhaust one appropriation, even if that should not leave money enough to cover the full amount of another appropriation, if the exigencies of the city do not require that the whole of the latter appropriation be expended.[40]

k. Payment of Indebtedness. Municipal debts incurred in a certain fiscal year are usually payable primarily out of the revenue for that year.[41] While a municipality cannot levy a tax beyond the limitation assigned in its charter, such available means as are at the disposal of the municipality, raised under the taxing power and which can be used without diverting the funds from their original purposes, should be applied to the payment of a judgment against the municipality.[42]

32. San Francisco *v.* Beideman, 17 Cal. 443.

33. White *v.* Decatur, 119 Ala. 476, 23 So. 999.

34. Com. *v.* Larkin, 27 Pa. Super. Ct. 397.

35. Pope Mfg. Co. *v.* Granger, 21 R. I. 298, 43 Atl. 590.

36. *Illinois.*— People *v.* Hummel, 215 Ill. 71, 74 N. E. 78.

Louisiana.— Parish School Directors *v.* Shreveport, 47 La. Ann. 1310, 17 So. 823; Shotwell *v.* New Orleans, 36 La. Ann. 938.

New Mexico.— Raton Waterworks Co. *v.* Raton, 8 N. M. 70, 49 Pac. 898.

New York.— People *v.* Fitch, 9 N. Y. App. Div. 439, 41 N. Y. Suppl. 349 [*affirmed* in 151 N. Y. 673, 46 N. E. 1150].

Ohio.— Stem *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 15.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1874.

37. People *v.* Fitch, 9 N. Y. App. Div. 439, 41 N. Y. Suppl. 349 [*affirmed* in 151 N. Y. 673, 46 N. E. 1129]. See also Shelby *v.* Burlington, 125 Iowa 343, 101 N. W. 101.

Transfer is not appropriation.— The legal transfer of money from one fund to another by the authorities of a municipal corporation is not an appropriation. Chicago *v.* Berger, 100 Ill. App. 158.

Payment of moral obligation.— A city council has the power by ordinance to transfer public money from one appropriation to another for the purpose of paying a moral obligation incurred by the city. Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691.

38. Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123 [*reversing* 80 Ill. App. 33]; Bird *v.* New York, 33 Hun (N. Y.) 396.

39. McGlue *v.* Philadelphia, 10 Phila. (Pa.) 348.

40. Fuller *v.* Heath, 89 Ill. 296.

41. See the constitutions and statutes of the different states. And see Theiss *v.* Hunter, 4 Ida. 788, 45 Pac. 2; Barber Asphalt Paving Co. *v.* New Orleans, 43 La. Ann. 464, 9 So. 484; Bergen *v.* New Orleans, 35 La. Ann. 523. *Compare* People *v.* Cartwright, 9 Hun (N. Y.) 159.

42. People *v.* Cairo, 50 Ill. 154.

Where a municipal creditor accepts municipal bonds[43] or scrip,[44] or certificates of indebtedness,[45] he has no claim against the municipality for losses incurred by him in realizing upon the same.[46] An obligation to pay money, on the part of a municipal corporation, is a sufficient authority to its officers to pay it without a special vote or order.[47] But merely administrative officers have no authority to pay claims, except when ordered to do so by the municipal council[48] or fiscal board.[49] Municipalities cannot bind themselves to pay their indebtedness at any other place than at the municipal treasury, unless specially authorized by statute.[50]

l. Insufficiency or Exhaustion of Appropriation. The fact that an insufficient sum was appropriated for certain claims,[51] or that the special fund out of which certain claims are payable is exhausted,[52] or has been appropriated for other purposes,[53] will not prevent the payment of such claims so long as there is money in the municipal treasury which may be applied thereto.

m. Investigation of Expenditures. In some jurisdictions the statutes provide for the summary investigation of municipal expenditures by experts appointed by the courts.[54]

2. Warrants and Certificates of Indebtedness[55] — a. In General. Warrants of a municipal corporation are generally orders payable when funds are found. They are issued for the payment of general municipal debts and expenses, subject to a rule providing that they shall be paid in the order of presentation; the time of presentation to be indorsed by the treasurer on the warrants.[56] They are usually payable in lawful money of the United States, but in the absence of prohibitory legislation they may be made payable in gold coin.[57] Both warrants and certificates may be made payable out of special funds.[58] When authorized by law, municipal warrants are receivable in payment of municipal taxes.[59]

b. Power to Issue. A municipality has, even without express authority, the

43. Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 26 L. ed. 923.

44. State *v.* Davenport, 12 Iowa 335.

45. Looney *v.* District of Columbia, 19 Ct. Cl. 230; Morgan *v.* District of Columbia, 19 Ct. Cl. 156.

46. Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 26 L. ed. 923; Looney *v.* District of Columbia, 19 Ct. Cl. 230; Morgan *v.* District of Columbia, 19 Ct. Cl. 156.

47. Semmes *v.* Columbus, 19 Ga. 471.

48. East St. Louis *v.* Flannigen, 34 Ill. App. 596.

49. Harris *v.* San Francisco, 52 Cal. 553; People *v.* Neilson, 48 How. Pr. (N. Y.) 454.

50. Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244; People *v.* Tazewell County, 22 Ill. 147.

51. San Francisco *v.* Broderick, 111 Cal. 302, 43 Pac. 960.

52. Higgins *v.* San Diego, 131 Cal. 294, 63 Pac. 470; Speed *v.* Detroit, 100 Mich. 92, 58 N. W. 638. See also Eaton Rapids *v.* Houpt, 63 Mich. 371, 29 N. W. 860; Van Wart *v.* New York, 52 How. Pr. (N. Y.) 78.

53. Smith *v.* New York, 5 Hun (N. Y.) 237. See also People *v.* New York, 77 N. Y. 45.

54. See the statutes of the different states. And see Park Ridge *v.* Reynolds, 73 N. J. L. 116, 62 Atl. 190; Matter of Eastchester, 53 Hun (N. Y.) 181, 6 N. Y. Suppl. 120.

55. **Certificates of indebtedness equivalent to bonds** see Christie *v.* Duluth, 82 Minn. 202, 84 N. W. 754.

56. Shelley *v.* St. Charles County Ct., 21 Fed. 699.

57. Kenyon *v.* Spokane, 17 Wash. 57, 48 Pac. 783.

58. Jones *v.* Portland, 35 Oreg. 512, 58 Pac. 657.

Misappropriation of moneys belonging to a special fund of the city, by the city, will render it generally liable to the holders of warrants drawn upon the special fund to the amount of money so misappropriated, and the payment of warrants drawn upon a special fund, issued subsequent in time to other warrants drawn upon the same fund, is a misappropriation if the effect of such payments is to exhaust the fund and leave prior warrants unpaid. Quaker City Nat. Bank *v.* Tacoma, 27 Wash. 259, 67 Pac. 710; Potter *v.* New Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135, 25 Wash. 207, 65 Pac. 197.

A city cannot be rendered liable generally upon warrants drawn against a special fund for the payment of a street improvement, even though the remedy of a street assessment proceeding is not longer available. Wilson *v.* Aberdeen, 19 Wash. 89, 52 Pac. 524.

59. Lindsey *v.* Rottaken, 32 Ark. 619; Little Rock *v.* U. S., 103 Fed. 418, 43 C. C. A. 261.

power to issue warrants or other ordinary evidences of indebtedness,[60] even though the treasury be empty;[61] but express authority is necessary to make them negotiable.[62] Such evidences of debt have been held not to be "bills of credit" within the meaning of the federal constitution.[63]

c. Power and Duty of Officers.[64] The duty of drawing, signing, or paying municipal warrants being generally ministerial only,[65] municipal officers should, when ordered by the proper authority, sign or draw warrants,[66] or pay them when drawn in the proper form[67] and signed by the proper authority.[68]

d. Issuance, Requisites, and Validity. To be valid, municipal warrants and certificates of indebtedness must be authorized by law.[69] And compliance with

60. *Kansas.*— Burrton *v.* Harvey County Sav. Bank, 28 Kan. 390; Buffalo School Furniture Co. *v.* School Dists. Nos. 4, etc., 7 Kan. App. 796, 54 Pac. 115, may be payable instantly or in the future.

Missouri.— Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

New Jersey.— Slingerland *v.* Newark, 54 N. J. L. 62, 23 Atl. 129; Hawthorne *v.* Hoboken, 32 N. J. L. 172.

Texas.— Corpus Christi *v.* Woessner, 58 Tex. 462.

Wyoming.— Ivinson *v.* Hance, 1 Wyo. 270.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1881.

Compare Colburn *v.* Chattanooga, 2 Tenn. Cas. 22.

A city which is authorized to issue scrip to a certain amount, for the purpose of defraying the expense of a public work, may lawfully issue the same all at once, and invest the money not required for immediate use upon the work in United States securities. Foote *v.* Salem, 14 Allen (Mass.) 87.

61. Aull Sav. Bank *v.* Lexington, 74 Mo. 104; Ivinson *v.* Hance, 1 Wyo. 270. See also Little Rock *v.* U. S., 103 Fed. 418, 43 C. C. A. 261.

62. Slingerland *v.* Newark, 54 N. J. L. 62, 23 Atl. 129; Bangor Sav. Bank *v.* Stillwater, 46 Fed. 899. And see *infra*, XV, B, 2, h.

63. New Orleans *v.* Mount, 24 La. Ann. 37. And see STATES.

Certificates of indebtedness issued in the name of the mayor and common council do not pledge the faith of the state and are not bills of credit within the federal constitution. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

64. See MANDAMUS, 26 Cyc. 318 *et seq.*

65. State *v.* Smith, 5 Mo. App. 427. See also McMurray *v.* Hayden, 13 Colo. App. 51, 56 Pac. 206; State *v.* Cook, 43 Nebr. 318, 61 N. W. 693.

66. *Michigan.*— Alberts *v.* Torrent, 98 Mich. 512, 57 N. W. 569.

Minnesota.— State *v.* Ames, 31 Minn. 440, 18 N. W. 277.

Missouri.—State *v.* Smith, 5 Mo. App. 427.

New York.—People *v.* Green, 56 N. Y. 476; People *v.* Haws, 36 Barb. 59. See also People *v.* Flagg, 17 N. Y. 584 [*reversing* 16 Barb. 503]; People *v.* New York, 3 Abb. Dec. 502, 3 Keyes 81. See, however, People *v.* Booth, 49 Barb. 31, 32 How. Pr. 17; People *v.* Wood, 35 Barb. 653, 13 Abb. Pr. 374, 22 How. Pr. 286, holding that an officer may refuse to sign a warrant known to be for a dishonest or fraudulent debt.

Ohio.— State *v.* Cleveland, 10 Ohio Dec. (Reprint) 571, 22 Cinc. L. Bul. 113.

Pennsylvania.— See Flick *v.* Harpham, 13 Pa. Co. Ct. 648. See, however, Com. *v.* Hancock, 9 Phila. 535.

Washington.— James *v.* Seattle, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957, holding that where a municipal council is without power to authorize the payment of a claim, a municipal officer may properly refuse to countersign a warrant directing payment thereof.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1882.

Compare Berry *v.* Rahway, 50 N. J. L. 356, 13 Atl. 6.

To whom payable.— A municipal officer cannot draw a warrant in favor of some other person than the one to whom it is ordered to be paid. Scheerer *v.* Edgar, 76 Cal. 569, 18 Pac. 681.

67. East St. Louis *v.* Flannigen, 69 Ill. App. 167; Wolf *v.* Oller, 16 Pa. Co. Ct. 235. See also Bayerque *v.* San Francisco, 3 Fed. Cas. No. 1,137, McAllister 175.

Payment out of proper funds see Tippecanoe County *v.* Cox, 6 Ind. 403.

68. Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691; Wolf *v.* Oller, 16 Pa. Co. Ct. 235.

69. *California.*— Grogan *v.* San Francisco, 18 Cal. 500.

Kentucky.— See Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176.

Louisiana.— See Labatt *v.* New Orleans, 38 La. Ann. 283.

New York.— East River Nat. Bank *v.* New York, 93 N. Y. App. Div. 242, 87 N. Y. Suppl. 803.

Wisconsin.— Hubbard *v.* Lyndon, 28 Wis. 674.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1883.

Violation of penal law.— Certificates of indebtedness issued by a municipality, receivable in payment of public dues, are binding upon the municipality, even though the act of issuing them may have been in violation of a penal law. Black *v.* Cohen, 52 Ga. 621.

Authorization should be shown by reference to the appropriation under which they were issued, and the date of the order or ordinance making it. Martin *v.* San Francisco,

the requirements of the statute or ordinance under which they are issued is essential.[70] They must be dated[71] and signed and countersigned as required,[72] and must be issued by the officer charged with that duty.[73] The purpose for which they are drawn should be stated therein;[74] but it is not essential that they should specify from what particular fund they are payable,[75] unless a special fund for a special purpose has been created.[76] If receivable for taxes they may so show on their face.[77] The corporate seal is not essential to their validity.[78] They need not be payable on sight.[79] Neither the vote of a municipal corporation authorizing the payment of money to a person,[80] nor the minutes of a meeting of municipal officers showing an audit of a claim against the municipality,[81] constitute a warrant.

e. Construction and Operation. Municipal warrants signed by the proper officers are *prima facie* valid,[82] and establish *prima facie* the validity of the claims for which they are issued and authorize their payment.[83] But the allowance of claims by granting warrants therefor is not a final and conclusive adjudication so as to conclude the municipality, but it may set up the defense of *ultra vires* or fraud, or want or failure of consideration.[84] A city, by drawing warrants against a fund composed largely of assessments and judgments against itself as quasi-owner of the streets and public squares, is estopped to deny the validity of those assessments and judgments.[85] The form of a warrant attempting to carry on its face an agreement in accordance with an ordinance in effect prohibiting its acceptance as payment of debts due the city until previous warrants have been paid does not change its legal effect.[86]

f. Discounting Warrants and Certificates. A city cannot issue its warrants or certificates of indebtedness at a discount in payment of a debt, or for the purpose of borrowing money.[87]

g. Interest.[88] It is sometimes expressly provided by statute or ordinance that municipalities shall be liable for interest on their warrants or certificates of indebt-

16 Cal. 285; Argenti *v.* San Francisco, 16 Cal. 255.

70. Hadley *v.* Dague, 130 Cal. 207, 62 Pac. 500; Newgass *v.* New Orleans, 42 La. Ann. 163, 7 So. 565, 21 Am. St. Rep. 368, 43 La. Ann. 78, 9 So. 25; Galloway *v.* Gilmour, 5 Pa. Dist. 553. See also Stephens *v.* Spokane, 11 Wash. 41, 39 Pac. 266.

71. Shipman *v.* Forbes, 97 Cal. 572, 32 Pac. 599.

72. Valley Bank *v.* Brodie, (Ariz. 1904) 76 Pac. 617. See also Waldo *v.* Portland, 33 Conn. 363; Com. *v.* Diamond Nat. Bank, 9 Pa. Super. Ct. 118, 43 Wkly. Notes Cas. 378; Com. *v.* Pirotti, 17 Pa. Co. Ct. 81.

In Pennsylvania under the act of May 23, 1874 (Pamphl. Laws 230), a controller of a city of the third class has the duty imposed on him of countersigning warrants of the board of school controllers. Com. *v.* Hitchens, 18 Pa. Super. Ct. 349.

73. State *v.* Corzilius, 35 Ohio St. 69; Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691.

City treasurer.— All parties dealing with a city treasurer are bound to take notice of the fact that he has no authority to issue city warrants. Bardsley *v.* Steruberg, 17 Wash. 243, 49 Pac. 499.

74. Raymond *v.* People, 2 Colo. App. 329, 30 Pac. 504 [*following* Travelers' Ins. Co. *v.* Denver, 11 Colo. 434, 18 Pac. 556]; Minor *v.* Loggins, 14 Tex. Civ. App. 15, 37 S. W. 1086; Reeve *v.* Oshkosh, 33 Wis. 477.

75. Stevens *v.* Truman, 127 Cal. 155, 59 Pac. 397; Minor *v.* Loggins, 14 Tex. Civ. App. 15, 37 S. W. 1086. See also Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

76. Fuller *v.* Chicago, 89 Ill. 282; East St. Louis *v.* Flannigen, 36 Ill. App. 50; People *v.* Wood, 71 N. Y. 371; Minor *v.* Loggins, 14 Tex. Civ. App. 15, 37 S. W. 1086.

77. Fuller *v.* Heath, 89 Ill. 296.

78. Condon *v.* Eureka Springs, 135 Fed. 566.

79. Burrton *v.* Harvey County Sav. Bank, 28 Kan. 390.

80. Paine *v.* Boston, 124 Mass. 486.

81. People *v.* Wood, 71 N. Y. 371.

82. Cheeney *v.* Brookfield, 60 Mo. 53.

83. Field *v.* Highland Park, 141 Mich. 69, 104 N. W. 393. See also Pacific Paving Co. *v.* Mowbray, 127 Cal. 1, 59 Pac. 205; U. S. *v.* Capdevielle, 118 Fed. 809, 55 C. C. A. 421.

84. Cheeney *v.* Brookfield, 60 Mo. 53; Goldsmith *v.* Baker City, 31 Oreg. 249, 49 Pac. 973; Com. *v.* Sholtis, 24 Pa. Super. Ct. 487. See also Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. 938.

85. Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238.

86. *Ex p.* Willis, 74 Ark. 498, 86 S. W. 300.

87. Pugh *v.* Little Rock, 35 Ark. 75; Million *v.* Soule, 15 Wash. 261, 46 Pac. 234; Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

88. See, generally, INTEREST.

edness[89] after they have been presented and payment thereof refused.[90] And it seems that municipal liability for interest upon demand and refusal of payment exists even in the absence of such enactments.[91] Where municipal certificates of indebtedness stipulate on their face that they bear no interest, a judgment thereon cannot allow interest except from judicial demand.[92] Where municipal certificates of indebtedness on their face bear interest, a resolution of the municipal council, and the publication of a notice in the official municipal paper that after a certain date interest on such certificates would cease, does not, in the absence of any proof that such notice ever came to his knowledge, affect the rights of the holder of such certificates.[93] General fund warrants issued as a substitute for warrants drawn on a special fund should be so drawn that when paid they will amount to no more than the amount for which the latter were drawn with simple interest thereon.[94]

h. Negotiability and Transfer. Municipalities possess no power to incur debts and issue negotiable instruments therefor, unless specially authorized to do so by their charters or by statute, or the power to do so can be clearly implied from some power expressly given, which cannot be fairly exercised without it.[95] Municipal warrants or certificates of indebtedness, while so far negotiable that they are transferable by delivery,[96] and the holder may maintain an action thereon in his own name,[97] are not, then, generally negotiable instruments in the sense of the law merchant,[98] so that when in the hands of a *bona fide* holder evidence of

89. Smith *v.* Buffalo, 39 N. Y. Suppl. 881, holding that a charter which provides that warrants issued for the cost of repairing sewers should bear interest does not affect the right of the holder of warrants issued in settlement of a claim for repairing sewers, to demand interest from the time when his claim was audited until the warrants were issued

90. *Missouri.*— State *v.* Pacific, 61 Mo. 155.

New Jersey.— Naar *v.* Trenton, 42 N. J. L. 500.

Oregon.— Shipley *v.* Hacheney, 34 Oreg. 303, 55 Pac. 971.

Pennsylvania.—Scranton *v.* Hyde Park Gas Co., 102 Pa. St. 382.

South Dakota.—Freeman *v.* Huron, 10 S. D. 368, 73 N. W. 260.

United States.— New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96 [*modifying* 81 Fed. 645, 26 C. C. A. 508].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1886.

91. Naar *v.* Trenton, 42 N. J. L. 500; Monteith *v.* Parker, 36 Oreg. 170, 59 Pac. 192, 78 Am. St. Rep. 768; Seymour *v.* Spokane, 6 Wash. 362, 33 Pac. 832. See also Boustead *v.* Penn Dist., 1 Phila. (Pa.) 180. *Compare* Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244. *Contra*, Smith *v.* New Orleans, 27 La. Ann. 187; Scranton *v.* Hyde Park Gas Co., 102 Pa. St. 382.

Interest on special fund warrants.— Where city officials have issued warrants on a special fund which is to be collected from property benefited by the construction of street improvements, the city is not liable for interest thereon until the delinquency of the assessments made for such improvements. Soule *v.* Seattle, 6 Wash. 315, 33 Pac. 384, 1080.

Presentation to one having no municipal funds.— Where a city charter provided that warrants of a city should be drawn on the city treasurer, and the warrant was presented to one who had none of the funds in his possession or any access thereto, there was not such a presentation as would cause the warrant to bear interest thereafter, irrespective of whether the one to whom the presentment was made had any claim to the office of treasurer. Valley Bank *v.* Brodie, (Ariz. 1904) 76 Pac. 617.

92. Creole Steam Fire-Engine Co. *v.* New Orleans, 39 La. Ann. 981, 3 So. 177.

93. Read *v.* Buffalo, 74 N. Y. 463.

94. Portland Sav. Bank *v.* Montesano, 14 Wash. 570, 45 Pac. 158.

95. Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Hill *v.* Memphis, 134 U. S. 198, 10 S. Ct. 562, 33 L. ed. 887; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264. See also People *v.* Stupp, 49 Hun (N. Y.) 544, 2 N. Y. Suppl. 537.

96. Field *v.* Highland Park, 141 Mich. 69, 104 N. W. 393; Knapp *v.* Hoboken, 38 N. J. L. 371; Winfield *v.* Hudson, 28 N. J. L. 255; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264.

97. Field *v.* Highland Park, 141 Mich. 69, 104 N. W. 393; Scranton *v.* Hyde Park Gas Co., 102 Pa. St. 382; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264. But see Com. *v.* Sholtis, 24 Pa. Super. Ct. 487.

Demand unnecessary.— A demand for payment is unnecessary as a condition precedent to a right of action upon a municipal warrant. Read *v.* Buffalo, 67 Barb. (N. Y.) 526.

98. *California.*— Pacific Paving Co. *v.* Mowbray, 127 Cal. 1, 59 Pac. 205.

Illinois.— Morrison *v.* Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225; Delfosse *v.* Metropolitan Nat. Bank, 98 Ill. App. 123.

their invalidity, or defenses against the original payee, will be excluded.[99] Where a city order has never been delivered to or indorsed by the payee, no one can acquire such a title to it as will enable him to collect it from the city.[1]

i. Surrender For Reissue, Funding, or Redemption. Warrants issued by a municipality in consideration of illegal scrip issued previously by the municipality in payment of *bona fide* debts or in exchange for valid municipal warrants are valid, and are not open to the objection of illegality of consideration.[2] The act of a city official in canceling certificates of city stock and issuing others therefor at the request of the transferee, without requiring proof of the genuineness of the transfer, is negligence rendering the city liable to one who advanced money on such new certificates, the indorsement of the transferee proving to be a forgery.[3] A statute which empowers municipalities to call in outstanding warrants by order for cancellation and reissue not oftener than once a year, and provides that if any warrant is not presented pursuant to such an order it shall be barred, is not retroactive and does not apply to warrants issued before its psssage.[4]

j. Payment — (i) *In General.* Where municipal warrants are payable out of a particular fund,[5] payment thereof is rightfully refused when there is no

Indiana.— Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Kansas.— Arkansas City First Nat. Bank *v.* Gates, 66 Kan. 505, 72 Pac. 207, 97 Am. St. Rep. 383.

Maine.— Emery *v.* Mariaville, 56 Me. 315; Sturtevant *v.* Liberty, 46 Me. 457.

Michigan.— Field *v.* Highland Park, 141 Mich. 69, 104 N. W. 393; Miner *v.* Vedder, 66 Mich. 101, 33 N. W. 47; Lansing Second Nat. Bank *v.* Lansing, 1 Mich. N. P. 181.

Mississippi.— Chandler *v.* Bay St. Louis, 57 Miss. 326.

Missouri.— Matthis *v.* Cameron, 62 Mo. 504.

Nebraska.— State *v.* Cook, 43 Nebr. 318, 61 N. W. 693.

New Jersey.— North Bergen Tp. *v.* Eager, 41 N. J. L. 184; Winfield *v.* Hudson, 28 N. J. L. 255.

New York.— People *v.* Stupp, 49 Hun 544, 2 N. Y. Suppl. 537. But see Bull *v.* Sims, 23 N. Y. 570.

Pennsylvania.— Com. *v.* Sholtis, 24 Pa. Super. Ct. 487.

Texas.— Sonnenthiel *v.* Skinner, 67 Tex. 453, 3 S. W. 686.

Washington.— West Philadelphia Title, etc., Co. *v.* Olympia, 19 Wash. 150, 52 Pac. 1015.

United States.— Nashville *v.* Ray, 19 Wall. 468, 22 L. ed. 164; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264. But see Burleigh *v.* Rochester, 5 Fed. 667.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1887.

Warrant payable to bearer.— A city warrant is not a negotiable instrument, although payable to a person named or bearer. The word "bearer" must be struck out in construing it. O'Donnell *v.* Philadelphia, 2 Brewst. (Pa.) 481.

99. *Arkansas.*— Lindsey *v.* Rottaken, 32 Ark. 619.

Connecticut.— Goodwin *v.* East Hartford, 70 Conn. 18, 38 Atl. 876.

Indiana.—Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Kansas.— Arkansas City First Nat. Bank *v.* Gates, 66 Kan. 505, 72 Pac. 207, 97 Am. St. Rep. 383.

Louisiana.— New Orleans *v.* Strauss, 25 La. Ann. 50.

Michigan.— Field *v.* Highland Park, 141 Mich. 69, 104 N. W. 393.

Mississippi.— Chandler *v.* Bay St. Louis, 57 Miss. 326.

New Jersey.— North Bergen Tp. *v.* Eager, 41 N. J. L. 184; Knapp *v.* Hoboken, 38 N. J. L. 371.

New York.— Halstead *v.* New York, 5 Barb. 218 [*affirmed* in 3 N. Y. 430], holding that a draft or warrant drawn by the corporation of the city of New York upon the treasurer of the city, not in the course of its proper legitimate business, is void in the hands of a *bona fide* holder without actual notice of its consideration.

South Dakota.— Hubbell *v.* Custer City, 15 S. D. 55, 87 N. W. 520.

Washington.—West Philadelphia Title, etc., Co. *v.* Olympia, 19 Wash. 150, 52 Pac. 1015; Bardsley *v.* Sternberg, 17 Wash. 243, 49 Pac. 499.

United States.— New Orleans *v.* Warner, 180 U. S. 199, 21 S. Ct. 353, 45 L. ed. 493 [*affirming* 101 Fed. 1005, 41 C. C. A. 676]; Nashville *v.* Ray, 19 Wall. 468, 22 L. ed. 164; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264; School Dist. Tp. *v.* Lombard, 21 Fed. Cas. No. 12,478, 2 Dill. 493.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1887.

1. Terry *v.* Allis, 20 Wis. 32.

2. Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

3. Metropolitan Sav. Bank *v.* Baltimore, 63 Md. 6.

4. Condon *v.* Eureka Springs, 135 Fed. 566.

5. Diggs *v.* Lobsitz, 4 Okla. 232, 43 Pac. 1069 (holding that city treasury warrants duly registered and not paid for want of

money belonging to such fund in the municipal treasury.[6] And warrants issued by a city for public improvements, to be paid out of a special fund, cannot be collected against the city generally, although the remedy to collect from the special fund has been lost.[7] But where a city treasurer has properly received money belonging to a certain fund and has improperly and wrongfully paid it out, he cannot refuse payment on the ground that there is no money in his possession belonging to such fund.[8] Where void city warrants are ratified by vote of the people, the city council cannot provide for their payment out of a fund other than that on which they are drawn, without creating such a fund.[9] A city treasurer, being merely a ministerial officer, must refuse to pay city warrants if ordered to do so by the city.[10] But it has been held that a city treasurer cannot be compelled to make a partial payment of a warrant, although he is directed to do so by the city council.[11] Where a city treasurer pays out city money to obtain city warrants from the holders thereof, his mere intent to afterward reissue them cannot defeat the city's right to treat them as paid.[12] City warrants regularly issued by the proper officers and in the hands of innocent purchasers are not affected by the subsequent loss of bank deposits applicable to their payment, arising from the insolvency of the banks.[13]

(II) *Priorities and Order of Payment.* The order of payment of municipal warrants is frequently provided for by statute or ordinance.[14] Where, how-

funds, and subsequently included in funding bonds, are payable only from funds realized from the sale of such bonds and not from funds applicable to current expenses); Kenyon *v.* Spokane, 17 Wash. 57, 48 Pac. 783 (holding that holders of interest-bearing city warrants having no stated time to run, but having payment provided for from a particular fund, cannot complain of the payment thereof by funds derived from the issue of new warrants to refund them).

Payment of interest.— Where warrants are directed to be paid out of a certain fund, it is the duty of the city treasurer to pay both the principal and the interest of the warrants as long as there is any money in the fund. Jordan *v.* Hnbert, 54 Cal. 260.

6. Affeld *v.* Detroit, 112 Mich. 560, 71 N. W. 151; People *v.* Wood, 71 N. Y. 371; People *v.* Lathrop, 19 How. Pr. (N. Y.) 358; State *v.* Boyden, 18 Ohio Cir. Ct. 282, 10 Ohio Cir. Dec. 137.

7. North Western Lumber Co. *v.* Aberdeen, 22 Wash. 404, 60 Pac. 1115; Wilson *v.* Aberdeen, 19 Wash. 89, 52 Pac. 524.

8. Northampton First Nat. Bank *v.* Arthur, 12 Colo. App. 90, 54 Pac. 1107.

9. La France Fire-Engine Co. *v.* Davis, 9 Wash. 600, 38 Pac. 154.

10. State *v.* Cook, 43 Nebr. 318, 61 N. W. 693.

11. State *v.* Grant, 31 Oreg. 370, 49 Pac. 855. But see Potter *v.* Black, 15 Wash. 186, 45 Pac. 787, holding that a city treasurer may be compelled to pay part of a warrant drawn against a particular fund, although he has not money enough in his hands to pay the whole of it.

12. Beardsley *v.* Sternberg, 17 Wash. 243, 49 Pac. 499.

13. New York Security, etc., Co. *v.* Tacoma, 21 Wash. 303, 57 Pac. 810.

14. See the statutes of the different states. And see the following cases:

Colorado.— Northampton First Nat. Bank *v.* Arthur, 10 Colo. App. 283, 50 Pac. 738, holding that an ordinance providing for the payment of warrants in the order of registration is applicable to warrants issued for the payment of obligations that were contracted for prior to its passage, as it does not impair the obligation of contracts in so doing.

Iowa.— Phillips *v.* Reed, 109 Iowa 188, 80 N. W. 347, construing a provision requiring city warrants to be paid in order of presentation.

New Mexico.— Raton Water Works Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898, holding that an ordinance making town warrants receivable in payment of town licenses is void in view of a statute making such warrants payable in the order of presentation.

Pennsylvania.— O'Donnell *v.* Philadelphia, 2 Brewst. 481, holding that an ordinance providing for the payment of warrants in the order of presentation is not binding on the holders of warrants, as the obligation of a contract cannot be varied by postponing the time of payment.

South Dakota.— Shannon *v.* Huron, 9 S. D. 356, 69 N. W. 598 (construing a provision requiring payment of warrants in the order of their registration); State *v.* Campbell, 7 S. D. 568, 64 N. W. 1125 (holding that municipal warrants should be paid in the order of registration, although some of them were issued in payment of an indebtedness of a prior year).

Washington.— Lorence *v.* Bean, 18 Wash. 36, 50 Pac. 582 (holding that, where it is provided that warrants shall be paid in the order of their issue, a warrant given for a judgment for damages against a city is entitled to payment in the order of its issue and is not to be postponed in favor of claims for necessary municipal expenses); Eidemiller *v.* Tacoma, 14 Wash. 376, 44 Pac. 877 (holding that where it is provided that a

ever, no particular order of payment is provided, municipal warrants should be paid in the order either of their date or presentation for payment.[15] Money derived by a city from special assessments becomes a trust fund in its custody, to be applied to the redemption of warrants drawn upon such fund, in the order in which the warrants are issued or presented for payment, and the city is liable to any warrant holder whose rights have been infringed by a misapplication of such fund.[16] Where a city has outstanding warrants for the salaries of its necessary officers, and insufficient funds to pay all warrants, its officials may be enjoined from paying warrants subsequently issued until such warrants for salaries are paid.[17] A city council cannot divide the amount levied for general city purposes into separate funds and appropriate it to the payment of warrants issued in any particular year, so as to deprive the holder of warrants on the general fund, issued the year previous, of the right to apply the same to the payment of his city taxes as he has a right to do by statute.[18]

3. Remedies[19] — a. In General. The remedies open to the holder of a dishonored warrant or certificate of indebtedness are: (1) An action at law against the corporation;[20] and (2) mandamus[21] against the fiscal officers to compel payment,[22] or against the council to compel a levy to satisfy it.[23] It is no defense to an action upon municipal warrants that there is no money in the treasury for their payment,[24] or that the money for the warrants has been embezzled.[25] A city is estopped to deny the validity of the fund on which it has drawn its warrant;[26]

treasurer shall pay warrants in the order of their date of issuance, a statute enacted after the warrants are issued, providing for the diversion of the fund out of which they are to be paid in such order so that subsequent orders may be paid first, is invalid as impairing the obligation of contracts).

See 36 Cent. Dig. tit. "Municipal Corporations," § 1890.

15. La France Fire-Engine Co. *v.* Davis, 9 Wash. 600, 38 Pac. 154. *Compare* Northampton First Nat. Bank *v.* Arthur, 10 Colo. App. 283, 50 Pac. 738, holding that, in the absence of a law providing in what order city warrants shall be paid, the courts will direct such application as will be fair to the warrant holders and thus subserve the best interests of the city, although the city treasurer if permitted to use his discretion would make a different application.

16. Red River Valley Nat. Bank *v.* Fargo, 14 N. D. 88, 103 N. W. 390; Northwestern Lumber Co. *v.* Aberdeen, 22 Wash. 404, 60 Pac. 1115.

17. Hull *v.* Ames, 26 Wash. 272, 66 Pac. 391, 90 Am. St. Rep. 743.

18. Western Town-Lot Co. *v.* Lane, 7 S. D. 1, 62 N. W. 982.

19. Limitation of actions on warrants see Limitations of Actions. And see Hubbell *v.* South Hutchinson, 64 Kan. 645, 68 Pac. 52; Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378; Miller *v.* Socorro, 9 N. M. 416, 54 Pac. 756; Potter *v.* Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135; Condon *v.* Eureka Springs, 135 Fed. 566; Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238.

20. *Colorado.*— Travelers' Ins. Co. *v.* Denver, 11 Colo. 434, 18 Pac. 556.

Indiana.— Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184.

Maine.— Augusta Bank *v.* Augusta, 49 Me. 507.

New York.— Matter of Brennan, 19 Abb. Pr. 376 note.

Oregon.— Goldsmith *v.* Baker City, 31 Oreg. 249, 49 Pac. 973.

Pennsylvania.— Scranton *v.* Hyde Park Gas Co., 102 Pa. St. 382.

Wisconsin.— Terry *v.* Milwaukee, 15 Wis. 490.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1891.

Compare Martin *v.* San Francisco, 16 Cal. 285; Argenti *v.* San Francisco, 16 Cal. 255.

Presentation for payment.— A town order drawn by the selectmen on its treasurer must be presented to the treasurer for payment before any action can be sustained on it. Varner *v.* Noblesborough, 2 Me. 126, 11 Am. Dec. 48.

A purchaser of void warrants cannot recover from the city the amount paid therefor, as for money had and received, unless it is proved that the city rightfully received the money and actually used it for legitimate purposes. Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264.

21. See Mandamus, 26 Cyc. 305 *et seq.*

22. Springfield *v.* Edwards, 84 Ill. 626; Matter of Brennan, 19 Abb. Pr. 376 note; Goldsmith *v.* Baker City, 31 Oreg. 249, 49 Pac. 973; Cloud *v.* Lawrence, 12 Wash. 163, 40 Pac. 741.

Laches.— The right to mandamus may be defeated by laches. Clark *v.* Earle, 42 N. J. L. 94.

23. Turner *v.* Guthrie, 13 Okla. 26, 73 Pac. 283; Wilson *v.* Aberdeen, 19 Wash. 89, 52 Pac. 524.

24. Aull Sav. Bank *v.* Lexington, 74 Mo. 104. See also Terry *v.* Milwaukee, 15 Wis. 490.

25. Potter *v.* New Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135.

26. Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238.

but where there is no recital in a municipal warrant that any or all of the requirements of the law, with reference to its issue, have been complied with, the municipality is not estopped from showing its want of power.[27] The holder of void certificates of indebtedness must exhaust his contractual remedies before he can sue for damages.[28] Under the charter of the city of New Orleans, appropriations on the budget of that city proposing payment out of the revenues of the year of debts and liabilities of a previous year are illegal, and payments under such appropriations may be enjoined by any party in interest.[29]

b. Pleading. In an action on a warrant it is necessary to allege presentation and demand;[30] and on a warrant on a special fund, that there is money in that fund to pay it.[31] And in an action based upon the diversion of a special fund by the payment out of their order of subsequent warrants, the diversion of sufficient money to have paid all warrants drawn on the special fund, which were prior to those held by plaintiff, must be alleged.[32] It is not necessary to set forth the consideration of a warrant, where by statute it is a negotiable instrument,[33] nor to allege that there was money in the general fund on which it was drawn,[34] nor to allege the council proceedings by which the person signing warrants became acting mayor.[35] An allegation that warrants were registered according to law at the date of presentation is not a mere legal conclusion.[36] Where it is claimed that warrants are invalid because the city had exceeded its constitutional limit of indebtedness, the court cannot consider, on demurrer to the petition, financial statements of the city showing such indebtedness not contained in the petition.[37] A plea of *non est factum* challenges both the genuineness of the official signatures to a warrant, and the authority of the officers to issue it.[38] An answer is not demurrable which sets up that the certificate sued on was issued and delivered without consideration or authority, that the pretended consideration was a collusive contract which was *ultra vires* and illegal, and that the municipal revenue had been anticipated to its full extent.[39]

c. Evidence. Consideration for a warrant need not be proven, as one will be presumed.[40] In an action upon municipal warrants, if they are set out in the petition by copy and not denied under oath, they may be admitted in evidence without proof of the signature of the officer drawing them or of the authority to issue them.[41] Where an order on a municipal treasurer is offered in evidence, showing on its face that it is payable out of money in the treasury, from a special assessment tax, it devolves upon the holder to show, before he can recover, that there is money in the treasury to pay his order arising from such special assessment tax.[42] But an indorsee may recover against the indorser of a municipal warrant payable "out of any funds belonging to the city, not before specially appropriated," without proving that funds were appropriated for its payment and in

27. Hubbell *v.* Custer City, 15 S. D. 55, 87 N. W. 520.

28. Newgass *v.* New Orleans, 43 La. Ann. 78, 9 So. 25.

29. Badger *v.* New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540; Barber Asphalt Paving Co. *v.* New Orleans, 43 La. Ann. 464, 9 So. 484; Creole Steam Fire-Engine Co. *v.* New Orleans, 39 La. Ann. 981, 3 So. 177.

30. Central *v.* Wilcoxen, 3 Colo. 566; Fergurson *v.* St. Louis, 6 Mo. 499, demand on treasurer must be alleged.

31. Travelers' Ins. Co. *v.* Denver, 11 Colo. 434, 18 Pac. 556.

32. Northwestern Lumber Co. *v.* Aberdeen, 35 Wash. 636, 77 Pac. 1063.

33. Travelers' Ins. Co. *v.* Denver, 11 Colo. 434, 18 Pac. 556.

34. Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184; Reeve *v.* Oshkosh, 33 Wis. 477.

35. Stephens *v.* Spokane, 11 Wash. 41, 39 Pac. 266.

36. Freeman *v.* Huron, 10 S. D. 368, 73 N. W. 260.

37. Phillips *v.* Reed, 109 Iowa 188, 80 N. W. 347.

38. Central *v.* Brown, 2 Colo. 703.

39. Bangor Sav. Bank *v.* Stillwater, 45 Fed. 544.

40. O'Donnell *v.* Philadelphia, 2 Brewst. (Pa.) 481.

41. Clark *v.* Polk County, 19 Iowa 248; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

42. Marysville *v.* Schoonover, 78 Ill. App. 189.

the treasury.[43] Where, in an action against the city on its warrants, there was no claim that the transfer of the warrants to plaintiff was without notice, or before maturity, the admission of evidence that the agent of plaintiff at the time of the purchase of the warrants had never heard of any defense to them, although erroneous, was not prejudicial to defendant.[44]

d. Findings and Judgment. Holders of municipal certificates of indebtedness who are entitled to payment only out of funds appropriated for that purpose, cannot recover an absolute judgment against the city therefor, in case the fund proves inadequate from any cause.[45] A finding that when a certain warrant was issued the city had exceeded the constitutional limit of indebtedness does not show that such limit was reached when the indebtedness was incurred, for which the warrant was issued, and does not establish the invalidity of such warrant.[46]

C. Bonds, Securities, and Sinking Funds — 1. In General — a. Power to Issue Securities. Municipalities cannot issue bonds or other like securities unless the power to do so is conferred by legislative authority, either express or clearly implied,[47] and any doubt as to the existence of such power ought to be resolved against its existence.[48] It has been held, however, that power given to a municipality to contract debts[49] or to borrow money[50] implies a power to issue bonds,

43. Bull *v.* Sims, 23 N. Y. 570.

44. Blackman *v.* Hot Springs, 14 S. D. 497, 85 N. W. 996.

45. Abascal *v.* New Orleans, 48 La. Ann. 565, 19 So. 568; Johnson *v.* New Orleans, 46 La. Ann. 714, 15 So. 100; Creole Steam Fire-Engine Co. *v.* New Orleans, 39 La. Ann. 981, 3 So. 177.

46. Western Town-Lot Co. *v.* Lane, 7 S. D. 599, 65 N. W. 17.

47. *Illinois.*— Coquard *v.* Oquawka, 192 Ill. 355, 61 N. E. 660 [*affirming* 91 Ill. App. 648]; Bourdeaux *v.* Coquard, 47 Ill. App. 254.

Indiana.— State *v.* Hauser, 63 Ind. 155.

Louisiana.— Newgass *v.* New Orleans, 42 La. Ann. 163, 7 So. 565, 21 Am. St. Rep. 368.

New Jersey.— Knapp *v.* Hoboken, 39 N. J. L. 394.

Texas.— Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

United States.—Rathbone *v.* Kiowa County, 73 Fed. 395 [*following* Brenham *v.* German-American Bank, 144 U. S. 173, 12 S. Ct. 559, 36 L. ed. 390]; Merrill *v.* Monticello, 14 Fed. 628; Hopper *v.* Covington, 8 Fed. 777, 10 Biss. 488; Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584; Gause *v.* Clarksville, 10 Fed. Cas. No. 5,276, 5 Dill. 165, 19 Alb. L. J. (N. Y.) 253; Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,532, 2 Woods 272 [*reversed* on other grounds in 96 U. S. 341, 24 L. ed. 659]. *Compare* Memphis *v.* Brown, 20 Wall. 289, 22 L. ed. 264.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1894.

Compare Black *v.* Cohen, 52 Ga. 621 (holding that the authority to issue municipal bonds is impliedly embraced by a power vested in a municipality to make all contracts which it may deem necessary for its welfare); Com. *v.* Pittsburgh, 41 Pa. St. 278.

Authority by estoppel.— Authority to issue municipal bonds cannot be conferred by estoppel. Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670.

Negotiable bonds.— The power to issue bonds includes power to make them negotiable unless restrained by positive enactment. The character of municipal bonds is as well established as that of bills of exchange or promissory notes and it is no more necessary to say "negotiable bonds" than to say "negotiable notes" or "negotiable bills." Klamath Falls *v.* Sachs, 35 Oreg. 325, 57 Pac. 329, 76 Am. St. Rep. 501; Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876; Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739; Howard *v.* Kiowa County, 73 Fed. 406 [*affirmed* in 83 Fed. 296, 27 C. C. A. 531].

Power exhausted by exercise.— Where a municipality is authorized by a special act to borrow a specified sum of money and issue its bonds therefor, and the money is borrowed and bonds issued accordingly, the power is thereby exhausted. Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584.

To imply the existence of this power it must be essential to the exercise of the function which the municipality is seeking to perform. Farr *v.* Grand Rapids, 112 Mich. 99, 70 N. D. 411.

48. Brenham *v.* German-American Bank, 144 U. S. 173, 12 S. Ct. 559, 36 L. ed. 390; Rathbone *v.* Kiowa County, 73 Fed. 395.

49. Tucker *v.* Raleigh, 75 N. C. 267; Com. *v.* Pittsburgh, 88 Pa. St. 66; Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208; Holmes *v.* Shreveport, 31 Fed. 113.

50. Griffin *v.* Inman, 57 Ga. 370 (a charter power to subscribe for railroad stock and borrow money to pay for the same embraces an implied power to issue bonds); Dutton *v.* Aurora, 114 Ill. 138, 28 N. E. 461 (power to borrow money for a proposed public improvement gives as a necessary incident the power to issue bonds); Com. *v.* Pittsburgh, 34 Pa. St. 496 (power to borrow money to pay a subscription to a railroad company includes that of giving bonds to the lender); Evansville *v.* Woodbury, 60 Fed. 718, 9 C. C. A.

but this last proposition has been expressly denied.[51] Power granted to a municipal corporation to give such bonds as may be necessary in the conduct of its litigation or in the current administration of its affairs does not authorize the issue of bonds for raising money.[52]

b. Constitutional and Statutory Provisions. State legislatures may and frequently do, by statute, authorize municipalities to issue bonds for certain purposes and upon certain conditions;[53] but such statutes must be passed in accordance with constitutional requirements,[54] and must not violate constitutional provisions.[55] Whether the effect of statutory or constitutional provisions as to issuing bonds is to repeal former acts or abrogate existing powers is to be determined by the courts under the general rules of construction.[56]

c. Issuance and Validity of Bills and Notes. The issuance by municipalities of bills, scrip, or other corporate obligations to circulate as money has been fre-

244 [*following* Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395] (under a statute authorizing a city "to borrow money for the use of the city" the city has power to issue bonds for money borrowed).

51. Brenham *v.* German-American Bank, 144 U. S. 173, 549, 12 S. Ct. 559, 36 L. ed. 390 [*reversing* 35 Fed. 185, *overruling* Mitchell *v.* Burlington, 4 Wall. (U. S.) 270, 18 L. ed. 350; Rogers *v.* Burlington, 3 Wall. (U. S.) 654, 18 L. ed. 73, and *distinguishing* Dwyer *v.* Hackworth, 57 Tex. 245] (power to borrow money "for general purposes . . . on credit of . . . city" does not give power to issue bonds); Merrill *v.* Monticello, 138 U. S. 673, 11 Ct. 441, 34 L. ed. 1069; Lehman *v.* San Diego, 73 Fed. 105 [*affirmed* in 83 Fed. 669, 27 C. C. A. 668] (power "to borrow money upon the faith and credit of the city" gives no power to issue bonds); Ashuelot Nat. Bank *v.* Valley County School Dist. No. 7, 56 Fed. 197, 5 C. C. A. 468.

52. Wilson *v.* Shreveport, 29 La. Ann. 673.

53. See the statutes of the different states. And see the following cases:

California.— Fritz *v.* San Francisco, 132 Cal. 373, 64 Pac. 566; San Francisco Bd. of Education *v.* Fowler, 19 Cal. 11.

New York.— Angel *v.* Hume, 17 Hun 374.

South Dakota.— National L. Ins. Co. *v.* Mead, 13 S. D. 37, 82 N. W. 78, 79 Am. St. Rep. 876, 48 L. R. A. 785, 13 S. D. 342, 83 N. W. 835.

Texas.— Austin *v.* Valle, (Civ. App. 1902) 71 S. W. 414.

United States.— Schmidt *v.* Defiance, 117 Fed. 702 [*affirmed* in 123 Fed. 1, 59 C. C. A. 159].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1895.

Strict construction.— Statutes which authorize the issuance of bonds by the minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where, from a careful study and analysis of the whole act and its several parts, the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers. State *v.* Moore, 45 Nebr. 12, 63 N. W. 130.

Prohibition for certain time.— Where by statute a municipality is prohibited from issuing bonds for a fixed period, any preliminary steps taken within that period are invalid. Rathbone *v.* Kiowa County, 73 Fed. 395; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288.

Town includes village.— A statute granting authority to towns to issue municipal coupon bonds includes villages and grants them the same authority. Brown *v.* Grangeville, 8 Ida. 784, 71 Pac. 151.

54. Debnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3; Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667, 26 L. ed. 1204. *Compare* Wilkes County *v.* Coler, 113 Fed. 725, 51 C. C. A. 399 [*affirmed* in 190 U. S. 107, 23 S. Ct. 738, 47 L. ed. 971].

55. Fitzgerald *v.* Walder, 55 Ark. 148, 17 S. W. 702; State *v.* Caffrey, 49 La. Ann. 1748, 22 So. 756, 1008; Moore *v.* New Orleans, 32 La. Ann. 726; Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565; Clegg *v.* Richardson County School Dist., 8 Nebr. 178; Sun Mut. Ins. Co. *v.* U. S., 118 U. S. 147, 6 S. Ct. 1001, 30 L. ed. 69; New Orleans Bd. of Liquidation *v.* U. S., 118 U. S. 136, 6 S. Ct. 995, 30 L. ed. 65; John Hancock Mut. L. Ins. Co. *v.* Huron, 80 Fed. 652; U. S. *v.* Board of Liquidation, 73 Fed. 769.

56. *Alabama.*— Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410.

California.— Wichmann *v.* Placerville, 147 Cal. 162, 81 Pac. 537; Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; Mill Valley *v.* House, 142 Cal. 698, 76 Pac. 658; McHugh *v.* San Francisco, 132 Cal. 381, 64 Pac. 570; Fritz *v.* San Francisco, 132 Cal. 373, 64 Pac. 566; Wetmore *v.* Oakland, 99 Cal. 146, 33 Pac. 769.

Illinois.— Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970.

Michigan.— Tillotson *v.* Saginaw, 94 Mich. 240, 54 N. W. 162.

Minnesota.— Schmitz *v.* Zen, 91 Minn. 290, 97 N. W. 1049.

New Jersey.— Mittag *v.* Park Ridge, 61 N. J. L. 151, 38 Atl. 750.

New York.— Calhoun *v.* Delhi, etc., R. Co., 28 Hun 379, 64 How. Pr. 291; Angel *v.* Hume, 17 Hun 374.

Oregon.— Stratton *v.* Oregon City, 35 Oreg. 409, 60 Pac. 905.

Pennsylvania.— Johns *v.* Borough, 10 North. Co. Rep. 240.

quently prohibited by express statutes;[57] and it seems that, even in the absence of such express prohibition, municipalities have no right to exercise this prerogative.[58] A city may, however, execute valid notes for the property purchased by it or for rentals,[59] which will not be invalidated because the city council contemplates their circulation as money.[60] Notes issued by a city which on their face are made receivable for all debts and demands due the city are not within the prohibition of the federal constitution against emitting bills of credit.[61] Where notes purport to be executed by municipal officers the payee takes them at the risk of the authority of such officers.[62]

2. Purpose of Issue — a. In General. The legislature has no power to authorize the issuance of municipal bonds for any purpose except a public one.[63] A later grant of general power to issue bonds for municipal purposes is not restricted by a prior grant of power to issue them for specific purposes.[64]

b Aid of Confederate States. Municipal notes and bonds executed and issued in aid of the Confederacy have been held void.[65]

c. Public Improvements and Property. The legislature may expressly authorize municipal corporations to issue bonds for public improvements or for the purchase of property for public purposes,[66] or it may impose restrictions upon this

South Carolina.— Wilson *v.* Florence, 40 S. C. 426, 19 S. E. 4.

Tennessee.— Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

Wisconsin.— Oleson *v.* Green Bay, etc., R. Co., 36 Wis. 383.

United States.— Lyons *v.* Munson, 99 U. S. 684, 25 L. ed. 451; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; Balcheller *v.* Mascoutah, 2 Fed. Cas. No. 792.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1895.

57. *Arkansas.*— Lindsey *v.* Rottaken, 32 Ark. 619.

Georgia.— Cothran *v.* Rome, 77 Ga. 582.

Iowa.— Dively *v.* Cedar Falls, 21 Iowa 565.

Pennsylvania.— Allegheny City *v.* McClurkan, 14 Pa. St. 81.

United States.— Thomas *v.* Richmond, 12 Wall. 349, 20 L. ed. 453; McCormick *v.* Allegheny City, 15 Fed. Cas. No 8,717.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1896.

58. Lindsey *v.* Rottaken, 32 Ark. 619; Thomas *v.* Richmond, 12 Wall. (U. S.) 349, 20 L. ed. 453.

59. New Albany Second Nat. Bank *v.* Danville, 60 Ind. 504; Shreveport *v.* Flournoy, 26 La. Ann. 709; Douglass *v.* Virginia City, 5 Nev. 147; Mineral Wells *v.* Darby, (Tex. Civ. App. 1899) 51 S. W. 351.

60. Dively *v.* Cedar Falls, 27 Iowa 227.

61. Smith *v.* New Orleans, 23 La. Ann. 5.

62. Smith *v.* Epping, 69 N. H. 558, 45 Atl. 415.

63. State *v.* Osawkee Tp., 14 Kan. 418, 19 Am. Rep. 99 (relief bonds invalid); Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366; Grant *v.* Sherrill, 71 Nebr. 219, 98 N. W. 681; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455; Kearney *v.* Woodruff, 115 Fed. 90, 53 C. C. A. 117, a canal constructed for "irrigation purposes" is a work of a public character.

Aid to fire sufferers.— The legislature cannot authorize a city to issue bonds to persons whose property has been burned to enable them to rebuild. Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39; Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6.

A plank road is a public purpose for which municipal bonds may he issued where such road leads from, extends to, or passes through the limits of its territory. Larned *v.* Burlington, 4 Wall. (U. S.) 275, 18 L. ed. 353; Mitchell *v.* Burlington, 4 Wall. (U. S.) 270, 18 L. ed. 350.

Improvement of water power.— Bonds issued by a city and given to a private corporation to be expended in the improvement of the water power upon certain rivers within the city are void, not having been issued for a corporate purpose. Mather *v.* Ottawa, 114 Ill. 659, 3 N. E. 216; Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669 [*reversing* 8 Fed. 199].

Manufacturing establishment.— A legislature cannot authorize a municipality to issue bonds in aid of a private manufacturing establishment. Kissell *v.* Columbus Grove, 11 Ohio Dec. (Reprint) 501, 27 Cinc. L. Bul. 183; Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896 [*affirming* 19 Fed. 871]; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455.

64. Pierre *v.* Dunscomb, 106 Fed. 611, 45 C. C. A. 499.

65. Weith *v.* Wilmington, 68 N. C. 24; Isaacs *v.* Richmond, 90 Va. 30, 17 S. E. 760.

66. State *v.* Linn County Ct., 44 Mo. 504; Biddle *v.* Riverton, 58 N. J. L. 289, 33 Atl. 279; Mutual Ben. L. Ins. Co. *v.* Elizabeth, 42 N. J. L. 235; Allen *v.* Adams, 66 S. C. 344, 44 S. E. 938; Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141, 51 Am. St. Rep. 819; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885.

power.[67] Where a city is authorized to construct and maintain public improvements or to purchase property for public uses, it is authorized by implication to issue bonds to provide for such purposes.[68] Public improvements for which municipal bonds may be issued include streets,[69] bridges,[70] sewers and drains,[71] parks and boulevards,[72] public buildings,[73] school-houses,[74] waterworks,[75] and lighting plants.[76] The location of a county-seat within a city and the erection of the neces-

The estimate for improvements cannot be increased at the stage of issuing and marketing bonds. Porter *v.* Tipton, 141 Ind. 347, 40 N. E. 802.

67. State *v.* Weston, 69 Nebr. 695, 96 N. W. 668; State *v.* Benton, 26 Nebr. 154, 41 N. W. 1068.

Implied restrictions.— Although there is no express prohibition against the issuing of bonds for municipal improvements, charter provisions may impliedly negative the existence of this power. Uncas Nat. Bank *v.* Superior, 115 Wis. 340, 91 N. W. 1004. See also Grace *v.* Hawkinsville, 101 Ga. 553, 28 S. E. 1021; Farr *v.* Grand Rapids, 112 Mich. 99, 70 N. W. 411; Hitchcock *v.* Galveston, 10 Fed. Cas. No. 5,632, 2 Woods 272.

68. *Indiana.*—Richmond *v.* McGirr, 78 Ind. 192.

Iowa.— Mullarky *v.* Cedar Falls, 19 Iowa 21.

Nebraska.— State *v.* Weston, 69 Nebr. 695, 96 N. W. 668; State *v.* Babcock, 25 Nebr. 278, 41 N. W. 155; State *v.* Babcock, 22 Nebr. 614, 35 N. W. 941.

New York.— Hubbard *v.* Sadler, 104 N. Y. 233, 10 N. E. 426; Ketchum *v.* Buffalo, 14 N. Y. 356 [*affirming* 21 Barb. 294].

Pennsylvania.— Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208.

South Carolina.—See Neely *v.* Yorkville, 10 S. C. 141.

Wisconsin.— State *v.* Madison, 7 Wis. 688.

United States.— Desmond *v.* Jefferson, 19 Fed. 483; Sturtevants *v.* Alton, 23 Fed. Cas. No. 13,580, 3 McLean 393. But see Ganse *v.* Clarksville, 10 Fed. Cas. No. 5,276, 5 Dill. 165.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1899.

Under the "general welfare clause" usually found in the charters of towns and cities, such municipal corporations may, within the limits fixed by the constitution, incur a debt, and, in a manner pointed out by law, issue bonds for the purpose of raising money to be used in the erection of needed public improvements. Grace *v.* Hawkinsville, 101 Ga. 553, 28 S. E. 1021.

69. Mill Valley *v.* House, 142 Cal. 698, 76 Pac. 658; Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; Canandaigua *v.* Hayes, 90 N. Y. App. Div. 336, 85 N. Y. Suppl. 488; Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141, 51 Am. St. Rep. 819. See also People *v.* Gravesend, 154 N. Y. 381, 48 N. E. 813 [*reversing* 6 N. Y. App. Div. 225, 39 N. Y. Suppl. 983]. *Compare* Parkland *v.* Gaines, 88 Ky. 562, 11 S. W. 649, 11 Ky. L. Rep. 64; Tate *v.* Parkland, 13 S. W. 443, 11 Ky. L. Rep. 838.

70. Mullarky *v.* Cedar Falls, 19 Iowa 21; Berlin Iron-Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 408; Dodge County *v.* Chandler, 96 U. S. 205, 24 L. ed. 625.

71. Greeley *v.* Jacksonville, 17 Fla. 174; State *v.* Babcock, 22 Nebr. 614, 35 N. W. 941.

72. Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; Sonoma County Bank *v.* Fairbanks, 52 Cal. 196; People *v.* Brislin, 80 Ill. 423; Choate *v.* Buffalo, 39 N. Y. App. Div. 379, 57 N. Y. Suppl. 383 [*affirmed* in 167 N. Y. 597, 60 N. E. 1108].

73. Argentine *v.* State, 46 Kan. 430, 26 Pac. 751; Ketchum *v.* Buffalo, 14 N. Y. 356 [*affirming* 21 Barb. 294]; Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141, 51 Am. St. Rep. 819.

74. Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; Gardner *v.* Haney, 86 Ind. 17, holding that bonds issued to build a school-house are not necessarily void because the school-house was not built within the corporate limits. See also Wetmore *v.* Oakland, 99 Cal. 146, 33 Pac. 769; Williams *v.* Albion, 58 Ind. 329; Allen *v.* Adams, 66 S. C. 344, 44 S. E. 938. *Compare* Waxahachie *v.* Brown, 67 Tex. 519, 4 S. W. 207.

75. *Florida.*— Greeley *v.* Jacksonville, 17 Fla. 174.

Georgia.—Heilbron *v.* Cuthbert, 96 Ga. 312, 23 S. E. 206.

Minnesota.— Janeway *v.* Duluth, 65 Minn. 292, 68 N. W. 24.

New York.— Sweet *v.* Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289 [*reversing* 60 Hun 28, 14 N. Y. Suppl. 421].

Washington.— Smith *v.* Seattle, 25 Wash. 300, 65 Pac. 612.

Wisconsin.— Appleton Waterworks Co. *v.* Appleton, 116 Wis. 363, 93 N. W. 262; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885.

United States.— National Bank of Commerce *v.* Granada, 41 Fed. 87.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1899.

Misappropriation of proceeds.— The council of a city whose treasurer has misapplied a part of the funds realized by negotiating city bonds to raise moneys to construct waterworks, leaving debts unpaid on account of such works, may issue and sell other bonds to supply the deficiency. Daily *v.* Columbus, 49 Ind. 169.

76. Heilbron *v.* Cuthbert, 96 Ga. 312, 23 S. E. 206; Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885; Fellows *v.* Walker, 39 Fed. 651. But see Biddle *v.* Riverton, 58 N. J. L. 289, 33 Atl. 279.

sary county buildings are not public improvements or public works for which municipal bonds may be issued.[77]

d. Donations. Bonds may not be issued as a donation to aid mills, factories, or any other private enterprise;[78] but a city may when authorized by popular vote issue bonds to purchase lands which it is authorized to give, to aid in the establishment of a university.[79]

e. Aid to Internal Improvements. Statutes authorizing municipalities to issue bonds in aid of works of internal improvement have been held to include bridges,[80] canals for irrigation purposes,[81] and public grist-mills.[82]

f. Aid to Railways. In the absence of some constitutional provision prohibiting it,[83] the legislature of a state has power to authorize municipalities to issue bonds in aid of railroads designed to benefit the public interests of the community;[84] but a municipality is without authority to issue bonds for this purpose

77. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

78. *Illinois.*— Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554.

Kansas.— Cleveland Nat. Bank *v.* Iola, 9 Kan. 689.

New York.— Sweet *v.* Hulbert, 51 Barb. 312.

West Virginia.— Ohio Valley Iron Works *v.* Moundsville, 11 W. Va. 1.

United States.—Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1900.

79. Burr *v.* Carbondale, 76 Ill. 455.

80. State *v.* Babcock, 23 Nebr. 179, 36 N. W. 474.

81. Keith County *v.* Citizens' Sav., etc., Assoc., 116 Fed. 13, 53 C. C. A. 525. See also Kearney *v.* Woodruff, 115 Fed. 90, 53 C. C. A. 117.

82. Burlington Tp. *v.* Beasley, 94 U. S. 310, 24 L. ed. 161 [*distinguished* in Osborne *v.* Adams County, 106 U. S. 181, 1 S. Ct. 168, 27 L. ed. 129, 109 U. S. 1, 3 S. Ct. 150, 27 L. ed. 835 (*affirming* 7 Fed. 441, 2 McCrary 97)].

A mill for the manufacture of beet sugar, which is not operated for toll, is not included. Getchell *v.* Benton, 30 Nebr. 870, 47 N. W. 468.

83. See the constitutions of the different states. And see Norton *v.* Brownsville Taxing Dist., 129 U. S. 479, 9 S. Ct. 322, 32 L. ed. 774; Risley *v.* Howell, 57 Fed. 544 [*following* People *v.* State Treasurer, 23 Mich. 499; People *v.* Salem, 20 Mich. 452, 4 Am. Rep. 400].

In Illinois, Kentucky, New York, and Texas, the constitutional provisions now in force prohibit the issuance of municipal bonds in aid of railroads. Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491 [*affirming* 7 Hun 499]; Buffalo, etc., R. Co. *v.* Collins R. Com'rs, 5 Hun (N. Y.) 485. And see *supra*, XV, A, 5, b. Under former constitutional provisions of these states bonds for this purpose might have been issued. Hutchinson *v.* Self, 153 Ill. 542, 39 N. E. 27; Casey *v.* People, 132 Ill. 546, 24 N. E. 570; Eddy *v.* People, 127 Ill. 428, 20 N. E. 83; Richeson *v.* People, 115 Ill. 450, 5 N. E. 121; Wade *v.* La Moille, 112 Ill. 79; People *v.* Bishop, 111 Ill. 124, 53 Am. Rep. 605; Schall *v.* Bowman, 62 Ill. 321; Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174; Cumines *v.* Jefferson County, 63 Barb. (N. Y.) 287; People *v.* Henshaw, 61 Barb. (N. Y.) 409; Gould *v.* Venice, 29 Barb. (N. Y.) 442; Clarke *v.* Rochester, 24 Barb. (N. Y.) 446 [*reversing* 13 How. Pr. 204]; Matter of Kingston Tax-Payers, 40 How. Pr. (N. Y.) 444; San Antonio *v.* Gould, 34 Tex. 49; Harter Tp. *v.* Kernochan, 103 U. S. 562, 25 L. ed. 411.

Effect of prohibitory constitutional provisions upon existing authority see Syracuse Sav. Bank *v.* Seneca Falls, 86 N. Y. 317; Buffalo, etc., R. Co. *v.* Collins R. Com'rs, 5 Hun (N. Y.) 485; Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219.

84. *California.*— People *v.* Coon, 25 Cal. 635.

Connecticut.— Douglas *v.* Chatham, 41 Conn. 211; Savings Soc. *v.* New London, 29 Conn. 174.

Indiana.— Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Kansas.— Leavenworth, etc., R. Co. *v.* Douglas County Com'rs, 18 Kan. 169.

Wisconsin.— Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543; Rogan *v.* Watertown, 30 Wis. 259.

United States.— Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331; Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Red Rock *v.* Henry, 106 U. S. 596, 1 S. Ct. 434, 27 L. ed. 251; Pine Grove *v.* Talcott, 19 Wall. 666, 22 L. ed. 227 [*affirming* 23 Fed. Cas. No. 13,735, 1 Flipp. 120, and *disapproving* People *v.* State Treasurer, 23 Mich. 499; People *v.* Salem, 20 Mich. 452, 4 Am. Rep. 400]; Queensbury *v.* Culber, 19 Wall. 83, 22 L. ed. 100; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; Amey *v.* Allegheny City, 24 How. 364, 16 L. ed. 614; Municipal Trust Co. *v.* Johnson City, 116 Fed. 458, 53 C. C. A. 178 (in Tennessee authority to issue bonds for railroads is limited to railroads incorporated under the general laws of that state); Atlantic Trust Co. *v.* Darlington, 63 Fed. 76 [*affirmed* in 68 Fed. 849, 16 C. C. A. 28]; Bard *v.* Augusta, 30 Fed. 906; Taylor *v.* Ypsilanti, 11 Fed. 925; Smith *v.* Fond du Lac, 8 Fed. 289, 10 Biss. 418.

See 36 Cent. Dig. tit. "Municipal Cor-

unless the power to do so is conferred expressly or by reasonable implication.[85] And the power to become a stock-holder in a railroad company or to appropriate money thereto, expressly conferred by the legislature, does not carry with it the power to issue negotiable bonds in payment of such subscription or appropriation unless the latter power is also expressly or by reasonable implication conferred by the statute.[86] It has been held that municipal bonds may be issued to enable a

porations," §§ 1902, 1903. See also *supra*, XV, A, 5.

Compare Williamson *v.* Keokuk, 44 Iowa 88.

Power to aid two railroads authorizes the issue of bonds in favor of either separately. St. Johnsbury First Nat. Bank *v.* Concord, 50 Vt. 257.

Municipality subsequently incorporated.— Under a statute authorizing any municipality in any county through which any portion of a certain railroad was run to issue and deliver its bonds to such railroad, a village which came into existence after the passage of that act and while the road named therein was in process of construction, had authority to issue its bonds in pursuance of that act. Perrin *v.* New London, 67 Wis. 416, 30 N. W. 623.

Companies afterward incorporated.— An act of a state legislature authorizing a city to issue its bonds in aid of railroads incorporated and organized does not extend to companies afterward incorporated. Smith *v.* Milwaukee, etc., R. Co., 22 Fed. Cas. No. 13,082.

Railroads in county where municipality situated.— The power to issue bond for railroads is sometimes limited by statute to railroads running through the county in which the municipality is situated. People *v.* Adirondack County, 57 Barb. (N. Y.) 656; Mellen *v.* Lansing, 11 Fed. 820, 19 Blatchf. 512.

Railroad outside of city limits.— The legislature may authorize a city to issue its bonds to a railroad company to aid in its construction and to levy and collect taxes to pay the same, although the company may be already bound to construct its road and it is to be built outside of the city limits. Davidson *v.* Ramsey County Com'rs, 18 Minn. 482.

Power in railroad charter.— The power to issue bonds may be conferred, not only by municipal charter or general law (State *v.* Babcock, 19 Nebr. 230, 27 N. W. 98), but also by the charter of the railway company (Maddox *v.* Graham, 2 Metc. (Ky.) 56; Glenn *v.* Wray, 126 N. C. 730, 36 S. E. 167; Richmond Union Bank *v.* Oxford Com'rs, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, 116 N. C. 339, 21 S. E. 410; Wood *v.* Oxford, 97 N. C. 227, 2 S. E. 653).

Bonds issued before statute effective.— Bonds issued by a municipality in aid of a railroad before the authorizing law has been published or has taken effect are void. Berliner *v.* Waterloo, 14 Wis. 378; Rochester *v.* Alfred Bank, 13 Wis. 432, 80 Am. Dec. 746. *Compare* Com. *v.* Pittsburgh, 43 Pa. St. 391.

As to repeal of authority by statute see Babcock *v.* Helena, 34 Ark. 499; Jeffries *v.* Lawrence, 42 Iowa 498; Balcheller *v.* Mascoutah, 2 Fed. Cas. No. 792.

85. Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413; Lafayette *v.* Cox, 5 Ind. 38; Sykes *v.* Columbus, 55 Miss. 115 (holding that a charter provision that the mayor and aldermen "may exercise all the rights and privileges usually appertaining to bodies politic" and may make such ordinances, etc., for the good government of the city as they may think proper, and may levy a tax, etc., did not authorize the issuing of bonds in aid of a railroad); Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054; Lewis *v.* Pima County, 155 U. S. 54, 15 S. Ct. 22, 39 L. ed. 67; Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Lewis *v.* Shreveport, 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728 [*affirming* 2 Fed. Cas. No. 8,331, 3 Woods 205]; Myer *v.* Muscatine, 1 Wall. (U. S.) 384, 17 L. ed. 564; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 227, 17 L. ed. 530; Bard *v.* Augusta, 30 Fed. 906 (holding that a provision that the council of a city shall take all needful steps to protect the interests of the city in any railroad leading from or toward the same did not authorize the city to become interested in railroad construction by issuing bonds in aid thereof); Scott *v.* Shreveport, 20 Fed. 714. See also Tensas Parish Police Jury *v.* Britton, 15 Wall. (U. S.) 566, 21 L. ed. 251.

Authority to borrow money for any purpose does not authorize a municipality to issue bonds in aid of a railroad. Chamberlain *v.* Burlington, 19 Iowa 395. And power to borrow money and issue bonds therefor is not sufficient to authorize the issuing of bonds for that purpose. Jonesboro *v.* Cairo, etc., R. Co., 110 U. S. 192, 4 S. Ct. 67, 28 L. ed. 116.

86. Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Milan *v.* Tennessee Cent. R. Co., 11 Lea (Tenn.) 329 [*approved* in Kelley *v.* Milan, 127 U. S. 139, 8 S. Ct. 1101, 32 L. ed. 77]; Hill *v.* Memphis, 134 U. S. 198, 10 S. Ct. 562, 33 L. ed. 887 [*affirming* 23 Fed. 872]; Norton *v.* Dyersburg, 127 U. S. 160, 8 S. Ct. 1111, 32 L. ed. 85; Kelley *v.* Milan, 127 U. S. 139, 8 S. Ct. 1101, 32 L. ed. 77 [*affirming* 21 Fed. 842]; Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 S. Ct. 947, 30 L. ed. 911 [*affirming* 16 Fed. 745]; Concord *v.* Robinson, 121 U. S. 165, 7 S. Ct. 937, 30 L. ed. 885; Green *v.* Dyersburg, 10 Fed. Cas. No. 5,756, 2 Flipp. 477. See, however, Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Burnes *v.* Atchison, 2 Kan. 454; Stevens *v.* Anson, 73 Me. 489; Wood *v.* Oxford, 97 N. C. 227, 2 S. E. 653; Gause *v.* Clarkfield, 10 Fed. Cas. No. 5,276, 5 Dill. 165.

railroad to purchase land for a depot,[87] to erect machine shops,[88] and to provide terminal facilities.[89]

g. Funding and Refunding. Power to issue renewal or refunding bonds does not result merely because of the existence of municipal indebtedness;[90] but a municipality may, when duly authorized by the legislature, issue its bonds to fund or refund its indebtedness.[91] And the power conferred upon a municipality to borrow money and issue bonds for all municipal purposes necessarily includes the power to do so for the purpose of paying or funding the floating indebtedness

Power to subscribe "as fully as an individual" confers authority to issue bonds. Com. *v.* Pittsburgh, 41 Pa. St. 278 [*approved* in Seybert *v.* Pittsburg, 1 Wall. (U. S.) 272, 17 L. ed. 553]. *Contra*, Oelrich *v.* Pittsburgh, 18 Fed. Cas. No. 10,442.

Authority to subscribe for stock and to raise by loans or taxes the money to pay the subscription authorizes bonds. Com. *v.* Williamson, 156 Mass. 70, 30 N. E. 472.

Authority to subscribe for stock and to borrow money therefor authorizes bonds. Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632.

87. Jefferson *v.* Jennings Banking, etc., Co., (Tex. Civ. App. 1904) 79 S. W. 876, (Civ. App. 1902) 70 S. W. 1005. See also New Orleans, etc., R. Co. *v.* McDonald, 53 Miss. 240. But *compare* Lewis *v.* Shreveport, 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728 [*affirming* 15 Fed. Cas. No. 8,331, 3 Woods 205].

88. Jarrott *v.* Moberly, 103 U. S. 580, 26 L. ed. 492 [*affirming* 13 Fed. Cas. No. 7,223, 5 Dill. 253]. *Compare* Casey *v.* People, 132 Ill. 546, 24 N. E. 570.

89. Jefferson *v.* Jennings Banking, etc., Co., (Tex. Civ. App. 1904) 79 S. W. 876, (Civ. App. 1902) 70 S. W. 1005; Rock Creek Tp. *v.* Strong, 96 U. S. 271, 24 L. ed. 815.

90. Oquawka *v.* Graves, 82 Fed. 568, 27 C. C. A. 327. See also Hardin County *v.* McFarlan, 82 Ill. 138.

91. *California.*— Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580; Meyer *v.* Brown, 65 Cal. 583, 26 Pac. 281.

Illinois.— Kane *v.* Charleston, 161 Ill. 179, 43 N. E. 611; East St. Louis *v.* Maxwell, 99 Ill. 439.

Kansas.— Brown *v.* Atchison, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515.

Kentucky.— Farson *v.* Louisville Sinking Fund Com'rs, 97 Ky. 119, 30 S. W. 17, 16 Ky. L. Rep. 856.

Maryland.— Smith *v.* Stephan, 66 Md. 381, 7 Atl. 561, 10 Atl. 671.

New York.— People *v.* Parmerter, 158 N. Y. 385, 53 N. E. 40; Poughkeepsie *v.* Quintard, 136 N. Y. 275, 32 N. E. 764 [*affirming* 65 Hun 141, 19 N. Y. Suppl. 944].

Ohio.— Cincinnati *v.* Guckenberger, 60 Ohio St. 353, 54 N. E. 376; Guckenberger *v.* Dexter, 17 Ohio Cir. Ct. 115, 9 Ohio Cir. Dec. 667; Cincinnati *v.* Anderson, 10 Ohio Cir. Ct. 265, 6 Ohio Cir. Dec. 594.

South Carolina.— State *v.* Columbia, 12 S. C. 370.

Washington.— Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1905.

Negotiable bonds.— A statute authorizing cities to issue refunding bonds must be construed as giving authority to issue negotiable bonds in the usual form. Santa Cruz *v.* Waite, 98 Fed. 387, 39 C. C. A. 106 [*affirming* 89 Fed. 619]. See also Klamath Falls *v.* Sachs, 35 Oreg. 325, 57 Pac. 329, 76 Am. St. Rep. 501.

Matured interest coupons evidencing earned interest, attached to a municipal bond, inhere in and form a part of the bond itself, and are comprehended in the term "bonded indebtedness actually existing" and are to be included in ascertaining the amount of refunding bonds authorized by statute. Kelly *v.* Cole, 63 Kan. 385, 65 Pac. 672.

Present floating debt.— A commission constituted by statute to ascertain "the present floating debt" of the city for which it acts and raise a fund for payment thereof cannot include therein sums due for work and materials furnished after the date of the act, although contracted for prior thereto. State *v.* Faran, 24 Ohio St. 536.

Payment of judgments.— Under a statute empowering the common council of a municipality to "issue new bonds for the refunding of bonds and evidences of indebtedness already issued," the common council can issue new bonds to raise money for the satisfaction of judgments. Stone *v.* Chicago, 207 Ill. 492, 69 N. E. 970; Port Huron *v.* McCall, 46 Mich. 565, 10 N. W. 23. But *compare* Duchenne *v.* Board of Liquidation, 51 La. Ann. 1142, 26 So. 55. And municipalities are sometimes expressly authorized to issue bonds to pay judgments. U. S. *v.* New Orleans Bd. of Liquidation, 60 Fed. 387, 9 C. C. A. 37 [*affirmed* in 108 Fed. 689, 47 C. C. A. 587]; Fisher *v.* Board of Liquidation, 56 Fed. 49.

To whom payable.— A statute authorizing municipal corporations to refund their indebtedness by the issue of new bonds does not restrict the issue to bonds payable to the holders of indebtedness to be refunded. West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553.

Exceeding debt limit.— A refunding contract which increases the bonded indebtedness beyond the aggregate amount provided by law, although at a lower rate of interest, is void. Guckenberger *v.* Dexter, 17 Ohio Cir. Ct. 115 9 Ohio Cir. Dec. 667. A constitutional amendment limiting the amount of indebtedness to be incurred by a municipality to two per cent of the taxable property does not render invalid prior indebtedness exceeding that

of the municipality.[92] But power to issue new negotiable bonds having the attributes of commercial paper to take the place of a former issue cannot be implied merely from ordinary municipal powers, nor from the power conferred by statute to issue the original bonds,[93] nor from a mere power to borrow money without authority to issue bonds.[94] Power to issue bonds to replace in the treasury money already used in paying prior bonds is not conferred by a grant of authority to issue "refunding bonds" or original bonds to procure money for use in the "legitimate exercise of the corporate powers" and for the payment of legitimate corporate debts.[95] Bonds which are void for lack of power in a municipality to issue them cannot constitute the basis of valid funding bonds.[96] Municipal bonds issued for the purpose of retiring existing bonds cannot be made to bear interest from a date prior to that at which the old bonds fell due, where the municipality is without power to contract a new debt.[97]

3. Limitation of Amount — a. In General.[98] In consequence of constitutional[99] or statutory[1] provisions, municipalities cannot as a general rule issue bonds beyond a certain amount. The fact that municipal bonds previously issued are now in excess of the limit on municipal indebtedness does not render them void,

limit, nor deny the right of the city so indebted to refund such debt by the issue of a new bond. Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452.

Reducing amount of bonds.— Under the authority given a board of education by statute, when necessary for school sites or buildings, or to fund a bonded indebtedness, to borrow money and issue bonds therefor, and to sell the bonds at not less than par, it may refund an old debt by exchanging bonds at par for a greater amount of preëxisting bonds. Ewert *v.* Mallery, 16 S. D. 151, 91 N. W. 479.

Validity of ordinance authorizing issue.— Under a statute authorizing a city council to pass ordinances to provide for refunding the debt of a city, funding bonds can be issued only by ordinance duly passed and a purchaser of such bonds must see that the ordinance has been regularly passed and that it confers authority to issue bonds, but he is not charged with notice of other parts of the record not connected with such bonds. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750.

Assent of voters to creation of debt.— Where the expenses of a municipal corporation, in excess of its revenues, have been allowed to accumulate for a series of years, the municipality has no lawful authority to issue its bonds to raise a fund for the payment of such indebtedness, although two thirds of the qualified voters of the municipality may assent thereto at an election held for the purpose of deciding whether such bonds shall be issued, since before bonds of a municipality can be lawfully issued, two thirds of its qualified voters must vote, at an election held for that purpose, for the municipality to incur or create the debt which the bonds are to cover. Macon *v.* Jones, 122 Ga. 455, 50 S. E. 340.

92. Hyde Park *v.* Ingalls, 87 Ill. 11; Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557; Quincy *v.* Warfield, 25 Ill. 317, 79 Am. Dec. 330; Morris *v.* Taylor, 31 Oreg. 62, 49 Pac. 660; Montpelier Nat. L. Ins. Co. *v.* Mead, 13 S. D. 37, 82 N. W. 78, 83 N. W. 335, 79 Am. St. Rep. 876, 48 L. R. A. 785; Pierre *v.* Dunscomb, 106 Fed. 611, 45 C. C. A. 499; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534. See also Sullivan *v.* Walton, 20 Fla. 552; Portland Sav. Bank *v.* Evansville, 25 Fed. 389.

93. Coquard *v.* Oquawka, 192 Ill. 355, 61 N. E. 660 [*affirming* 91 Ill. App. 648, and *reviewing* and *explaining* Kane *v.* Charleston, 161 Ill. 179, 43 N. E. 611; Burr *v.* Carbondale, 76 Ill. 455; Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557; Quincy *v.* Warfield, 25 Ill. 317, 79 Am. Dec. 330]; Hardin County *v.* McFarlan, 82 Ill. 138.

94. Heins *v.* Lincoln, 102 Iowa 69, 71 N. W. 189; Merrill *v.* Monticello, 138 U. S. 673, 11 S. Ct. 441, 34 L. ed. 1069 [in effect *overruling* Merrill *v.* Monticello, 22 Fed. 589]. See, however, Post *v.* Evansville, 25 Fed. 393; Portland Sav. Bank *v.* Evansville, 25 Fed. 389.

95. Coffin *v.* Indianapolis, 59 Fed. 221.

96. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* (Civ. App. 1904) 82 S. W. 1066]. See also Kuhn *v.* Wooster, 13 Ohio Cir. Ct. 270, 7 Ohio Cir. Dec. 456.

97. Louisville Sinking Fund Com'rs *v.* Zimmerman, 101 Ky. 432, 41 S. W. 428, 19 Ky. L. Rep. 689.

98. See *supra*, XV, A, 3.

99. See the constitutions of the different states. And see Ludlow *v.* Ludlow Bd. of Education, 29 S. W. 854, 16 Ky. L. Rep. 805; Coe *v.* Caledonia, etc., R. Co., 27 Minn. 197, 6 N. W. 621; State *v.* Clark, 23 Minn. 422; Fisk *v.* Kenosha, 26 Wis. 23; John Hancock Mut. L. Ins. Co. *v.* Huron, 80 Fed. 652.

1. See the statutes of the different states. And see Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610 (holding that when a limitation is imposed by statute it may be changed by statute); Bray *v.* Florence, 62 S. C. 57, 39 S. E. 810 (holding that a statute limiting municipal bonded indebtedness in the words of the state constitution is inoperative after the constitution is so amended as to remove the limit); Mauldin

the test being whether they were valid when sold by the municipality.[2] A limitation upon counties or townships from giving bonds in aid of railroads, beyond a certain amount, does not forbid a municipality within the county or township from giving its bonds in addition to the maximum amount of bonds allowed to be given by the county or township.[3] A provision in a state constitution that municipal corporations shall not become indebted in any manner nor for any purpose to an amount exceeding a certain per cent of the taxable property therein forbids implied as well as expressed indebtedness, and is as binding on a court of equity as on a court of law.[4]

b. Particular Purposes. Municipalities are frequently empowered to issue bonds in excess of the general debt limit for such special purposes as railroads,[5] waterworks,[6] light plants,[7] and the like. A statute authorizing a municipality to issue bonds "in any amount" in aid of a railroad will be construed to mean any amount within the constitutional limit, and therefore not in conflict with it.[8] Bonds issued for the purpose of providing a city with funds from which it may reimburse itself for amounts paid to contractors under a contract creating an indebtedness on the part of the city in excess of the constitutional limit are void, although bearing on their face the condition that they are payable only out of a paving fund created by the collection of a special tax levied on abutting property.[9]

c. Funding or Refunding Bonds. Bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness.[10]

d. Computation of Limit or Amount.[11] Bonds of a municipality which are void because in excess of the constitutional limit of indebtedness are not to be counted in estimating the indebtedness of the municipality with reference to the validity of another issue of bonds.[12] Interest to accrue is not included in com-

v. Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Palestine *v.* Royall, 16 Tex. Civ. App. 36, 40 S. W. 621; Bassett *v.* El Paso, (Tex. Civ. App. 1894) 28 S. W. 554; Chilton *v.* Gratton, 82 Fed. 873, holding that when limitations as to amount of indebtedness are imposed by statute, and not by the constitution, the legislature may create a board with authority to determine the questions of fact upon which the amount of limitation depends, and its finding will be conclusive in favor of *bona fide* purchasers.

2. Gibson *v.* Knapp, 21 Misc. (N. Y.) 499, 47 N. Y. Suppl. 446.

3. Iola *v.* Merriman, 46 Kan. 49, 26 Pac. 485; State *v.* Lancaster County Com'rs, 6 Nebr. 214; Chilton *v.* Gratton, 82 Fed. 873.

4. Litchfield *v.* Ballou, 114 U. S. 190, 29 L. ed. 132.

5. Chicago, etc., R. Co. *v.* Manhattan, 45 Kan. 419, 25 Pac. 879; State *v.* Rush County Com'rs, 35 Kan. 150, 10 Pac. 535.

6. Weldin *v.* Wilmington, 3 Pennew. (Del.) 472, 51 Atl. 157; Woodbridge *v.* Duluth City, 57 Minn. 256, 59 N. W. 296; Wells *v.* Sioux Falls, 16 S. D. 547, 94 N. W. 425; State *v.* Snodgrass, 1 Wash. 305, 25 Pac. 1014; Metcalfe *v.* Seattle, 1 Wash. 297, 25 Pac. 1010.

7. Woodbridge *v.* Duluth City, 57 Minn. 256, 59 N. W. 296; State *v.* Snodgrass, 1 Wash. 305, 25 Pac. 1014; Metcalfe *v.* Seattle, 1 Wash. 297, 25 Pac. 1010.

8. Atlantic Trust Co. *v.* Darlington, 63 Fed. 76. See also Germania Savings Bank *v.* Darlington, 50 S. C. 337, 27 S. E. 846.

9. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

10. *California.*— Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580.

Kentucky.— See Farson *v.* Louisville Sinking Fund Com'rs, 97 Ky. 119, 30 S. W. 17, 16 Ky. L. Rep. 856.

Pennsylvania.— Hirt *v.* Erie, 200 Pa. St. 223, 49 Atl. 796.

South Dakota.— Mitchell *v.* Smith, 12 S. D. 241, 80 N. W. 1077.

Texas.— Cass County *v.* Wilbarger County, 25 Tex. Civ. App. 52, 60 S. W. 988.

Wisconsin.— Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439, *quære.*

United States.— Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38. But *compare* Doon Dist. Tp. *v.* Cummins, 142 U. S. 366, 12 S. Ct. 220, 35 L. ed. 1044 [*reversing* 42 Fed. 644].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1908. And see *supra*, XV, A, 3, d, (I).

Amount of refunding bonds.— Refunding bonds must not exceed in amount the original issue, and so where the original bonds were sold at a premium provision cannot be made for additional bonds to compensate the holders of the original bonds for premiums paid. Altaffer *v.* Nelson, 18 Ohio Cir. Ct. 145, 9 Ohio Cir. Dec. 599.

11. See *supra*, XV, A, 3, e, (I).

12. Ashuelot Nat. Bank *v.* Lyon County, 81 Fed. 127.

puting the amount of bonds which may be issued,[13] and the sinking fund on hand is to be deducted from the amount of outstanding bonds in determining whether the municipal debt limit has been exceeded.[14] Bonds issued for municipal utilities are not to be considered in ascertaining the amount of bonds which may be issued in aid of a railroad,[15] but railroad aid bonds are to be included in counting the total amount of bonds which may be issued.[16]

e. Time of Creation of Indebtedness. The time of the actual issue of municipal bonds is the time for determining whether the debt limit is exceeded.[17] A charter provision for funding floating indebtedness does not include a portion of the present floating indebtedness which did not actually exist at the time the provision was adopted.[18]

f. Valuation of Property. The basis for computing the limitation of municipal indebtedness is not the actual value of property within the municipality,[19] but the value thereof as shown by the last regular tax assessment made by the proper authorities,[20] and completed at the time the debt is created.[21]

g. Validity of Excessive Issues. Where municipal bonds have been already issued to the amount authorized by law, all bonds issued thereafter are void;[22] but where the limit has not been previously reached, bonds which in the aggregate exceed the limit are void only to the extent of the excessive issue.[23] Where an issue of bonds is only partially excessive if the bonds are delivered at different dates those first delivered up to the amount of the debt the municipality can law-

Test of validity.— The test of the validity of municipal bonds, for the purpose of determining whether they are to be included as a part of the outstanding indebtedness of the municipality at the time a subsequent issue was made, is not whether they were recognized as valid by the officers of the corporation, but whether they were legally enforceable; and where the indebtedness of the corporation exceeded the constitutional limit when they were issued, they at no time constitute a legal indebtedness, although they may have been afterward paid, and their validity had not been questioned. German Ins. Co. *v.* Manning, 95 Fed. 597.

13. Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; Blanchard *v.* Benton, 109 Ill. App. 569; Finlayson *v.* Vaughn, 54 Minn. 331, 56 N. W. 49.

14. Kelly *v.* Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

15. State *v.* Babcock, 19 Nebr. 223, 230, 27 N. W. 94, 98.

16. Waxahachie *v.* Brown, 67 Tex. 519, 4 S. W. 207.

17. Redding *v.* Esplen, 33 Pittsb. Leg. J. N. S. (Pa.) 21 [*affirmed* in 207 Pa. St. 248, 56 Atl. 431]; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723. See also Prickett *v.* Marceline, 65 Fed. 469.

18. Smith *v.* Vicksburg, 86 Miss. 577, 38 So. 301.

19. State *v.* Babcock, 24 Nebr. 640, 39 N. W. 783, 20 Nebr. 522, 31 N. W. 8.

20. State *v.* Babcock, 24 Nebr. 640, 39 N. W. 783, 20 Nebr. 522, 31 N. W. 8; Buchanan *v.* Litchfield, 102 U. S. 278, 26 L. ed. 138 (what evidence admissible to determine assessed value of municipal property when there has been no assessment of such property taken separately from the assessments for state and county taxes); Atlantic Trust Co. *v.* Darlington, 63 Fed. 76.

Special assessment.—The limitation of municipal indebtedness cannot be computed upon the basis of a special assessment taken with a view to a particular debt. State *v.* Tolly, 37 S. C. 551, 16 S. E. 195.

21. Chicago, etc., R. Co. *v.* Wilber, 63 Nebr. 624, 88 N. W. 660 (holding that assessment means not merely the act of the local assessors, but the completed act of all the agencies employed in determining the amount and value of taxable property); State *v.* Cornwell, 40 S. C. 26, 18 S. E. 184; Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059 (holding that the items upon an assessment roll must be added up before the assessment is complete, and can be used as a basis for computing the limitation of municipal indebtedness).

Failure to file a report of the assessment within the time prescribed by law will not invalidate municipal bonds, where it was filed soon after accepted and acted on and taxes collected thereunder. Atlantic Trust Co. *v.* Darlington, 63 Fed. 76.

22. Millsaps *v.* Terrell, 60 Fed. 193, 8 C. C. A. 554.

23. McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Turner *v.* Woodson County, 27 Kan. 314; Schmitz *v.* Zeh, 91 Minn. 290, 97 N. W. 1049; Prickett *v.* Marcelline, 65 Fed. 469. But *compare* Thornbridge *v.* School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

Excessive issue authorized by voters.— The voting for an issue of bonds in excess of the amount allowed by law does not invalidate the vote, and bonds may be issued thereunder up to the lawful limit; but where at the same election bonds are voted to two railroads, in amounts which taken singly are in excess of the limit, and a subscription is first made by the county commissioners to one of the roads for the full amount voted for it, a subsequent subscription to the other

fully create should be paid and the others should be treated as nullities;[24] but if the bonds were delivered at the same time so that none has priority over the others, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.[25]

4. Preliminary Proceedings — a. In General. While the power of a municipality to issue bonds must be exercised in conformity with the legal requirements as to preliminary proceedings,[26] yet such bonds are valid notwithstanding slight irregularities in such proceedings.[27]

b. Ordinance or Resolution. Where the passage of an ordinance or resolution by the city council, authorizing the issuance of bonds, is required by statute,[28] bonds issued without any ordinance or resolution are void,[29] although issued under the corporate seal.[30] In the absence of a statutory provision requiring a city council to authorize an issuance of bonds by ordinance,[31] authority may be given by resolution.[32]

is entirely void. Chicago, etc., R. Co. *v.* Osage County, 38 Kan. 597, 16 Pac. 828; Rathbone *v.* Kiowa County, 73 Fed. 395.

24. Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Ætna L. Ins. Co. *v.* Burrton, 75 Fed. 962.

25. Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Columbus *v.* Woonsocket Sav. Inst., 114 Fed. 162, 52 C. C. A. 118.

26. Leavenworth, etc., R. Co. *v.* Douglas County Com'rs, 18 Kan. 169; People *v.* Peck, 4 Lans. (N. Y.) 528, 62 Barb. 545, 42 How. Pr. 425; People *v.* Walter, 4 Thomps. & C. (N. Y.) 638; Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351. See also on this point Territory *v.* Whitehall, 13 Okla. 534, 76 Pac. 148.

Subsequent compliance.— A statute providing that municipal railroad aid bonds or subscriptions shall not be valid and binding until a compliance with the conditions precedent prescribed by the act does not make a performance of the conditions before the subscription or issuance of the bonds essential to their validity; a subsequent performance thereof being sufficient. Eagle *v.* Kohn, 84 Ill. 292.

27. Burr *v.* Carbondale, 76 Ill. 455; Leavenworth, etc., R. Co. *v.* Douglas County Com'rs, 18 Kan. 169; Carriger *v.* Morristown, 1 Lea (Tenn.) 243; National Bank of Commerce *v.* Grenada, 44 Fed. 262, 41 Fed. 87.

28. See the statutes of the different states. And see Derby *v.* Modesto, 104 Cal. 515, 38 Pac. 900 (passage of ordinance on the same day it is introduced); Cleveland *v.* Spartanburg, 54 S. C. 83, 31 S. E. 871 (holding that ordinances and proceedings under which municipal bonds are issued need not show upon their face that the issue will not exceed the constitutional limit of indebtedness); Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163 (holding that in an ordinance the authorization of bonds not to exceed a certain amount is equivalent, in legal effect, to fixing the amount of such bonds at such sum).

Necessity for recording and publishing ordinance or resolution see Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532 (provision requiring only directory); Johnson *v.* Elyria, 8 Ohio S. & C. Pl. Dec. 362, 6 Ohio N. P. 372; Amey *v.* Allegheny City, 24 How. (U. S.) 364, 16 L. ed. 614; National Bank of Commerce *v.* Grenada, 44 Fed. 262, 41 Fed. 87.

Prescribing form and contents of bonds.— A charter requirement that an ordinance for the issuance of bonds to cover the cost of a street improvement shall prescribe their form and may provide that the entire issue shall be paid to the contractor is sufficiently complied with, where a contract providing for delivering to the contractor the entire issue of bonds was made prior to the passage of the ordinance approving the assessment roll, and the bonds conformed to a general ordinance prescribing the form of all local improvement bonds, which was in force at the time the contract was entered into. Jones *v.* Seattle, 19 Wash. 669, 53 Pac. 1105. A resolution need not copy the proposed bonds in full; but it is sufficient to specify that the bonds shall be issued to represent the cost of the proposed improvement, and shall be serial, specifying terms, time of payment, and interest, which description is to be construed in connection with the positive requirements of the statute concerning the form and contents of the bonds. Chase *v.* Trout, 146 Cal. 350, 80 Pac. 81.

Statements as to time and manner of paying bonds see Canandaigua *v.* Hayes, 90 N. Y. App. Div. 336, 85 N. Y. Suppl. 488; *Re* Caldwell, 30 Ont. 378.

When resolution equivalent to ordinance.— A resolution adopted by a city council by the same vote which is necessary for the adoption of an ordinance has the same force and effect as if in the form of an ordinance. Kline *v.* Streator, 78 Ill. App. 42.

29. McCoy *v.* Briant, 53 Cal. 247; Peck *v.* Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653; Swan *v.* Arkansas City, 61 Fed. 478.

30. McCoy *v.* Briant, 53 Cal. 247; Swan *v.* Arkansas City, 61 Fed. 478.

31. Edminson *v.* Abilene, 7 Kan. App. 305, 54 Pac. 568; Paterson *v.* Barnet, 46 N. J. L. 62; Atchison Bd. of Education *v.* De Kay, 148 U. S. 391, 13 S. Ct. 706, 37 L. ed. 573.

32. Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573; Roberts *v.* Paducah, 95 Fed. 62.

Notes for an existing indebtedness may be authorized by resolution or order; an ordinance is unnecessary. Tyler *v.* Jester, (Tex.

c. Petition or Consent of Taxpayers — (i) *In General.* Where a petition or consent in writing is required by law as a prerequisite to the issuance of municipal bonds,[33] such bonds, if issued without such petition or written consent,[34] containing the requisite statements, recitals, or averments,[35] signed[36] by the number

Civ. App. 1903) 74 S. W. 359 [*affirmed* in 97 Tex. 344, 78 S. W. 1058].

33. See the statutes of the different states. And see Clark *v.* Noblesville, 44 Ind. 83 (holding that petitions from property holders are not necessary in incorporated towns to authorize the trustees to issue bonds to build school-houses); People *v.* Hutton, 18 Hun (N. Y.) 116; Whiting *v.* Potter, 2 Fed. 517, 18 Blatchf. 165.

Several petitions.— In proceedings to bond a municipality in aid of a railroad, several petitions for the issuance of bonds may be signed and presented to the county judge at different times. People *v.* Hughitt, 5 Lans. (N. Y.) 89.

Time for filing petition.— Under Ky. Act, March 17, 1896, providing that it shall be the duty of the county court, "at the next regular term thereof" after receiving the required petition for a vote upon the proposition to have free turnpike roads, to order an election, the petition may be filed at a called term of the county court. Turpin *v.* Madison County Fiscal Ct., 105 Ky. 226, 48 S. W. 1085, 20 Ky. L. Rep. 1131.

Verification or proof of petition or consent see People *v.* Suffern, 68 N. Y. 321; Duanesburg *v.* Jenkins, 57 N. Y. 177 [*affirming* 46 Barb. 294] (construing N. Y. Laws (1864), c. 402); People *v.* Hulburt, 46 N. Y. 110 [*reversing* 59 Barb. 446]; People *v.* Smith, 45 N. Y. 772 [*affirming* 3 Lans. 291]; People *v.* Mitchell, 35 N. Y. 551; People *v.* Hutton, 18 Hun (N. Y.) 116 (construing N. Y. Laws (1867), c. 874); Angel *v.* Hume, 17 Hun (N. Y.) 374; People *v.* Hughitt, 5 Lans. (N. Y.) 89; Whiting *v.* Potter, 2 Fed. 517, 18 Blatchf. 165 (all construing N. Y. Laws (1869), c. 907); Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131; Smith *v.* Ontario, 22 Fed. Cas. No. 13,085, 15 Blatchf. 267 (both construing N. Y. Laws (1869), c. 241).

34. Duanesburgh *v.* Jenkins, 46 Barb. (N. Y.) 294, 40 Barb. 574 [*affirmed* in 57 N. Y. 177].

35. People *v.* Spencer, 55 N. Y. 1; Angel *v.* Hume, 17 Hun (N. Y.) 374 (holding that a petition for bonds for a railroad must show that the amount of the proposed subscription does not exceed the per centum of taxable property which the law prescribes as a basis for the subscription); Cleveland *v.* Spartanburg, 54 S. C. 83, 31 S. E. 871 (holding that petitions of freeholders for an election to authorize the issuance of bonds need not recite that the subscribers are a majority of the freeholders).

Statements as to railroad aided.— A petition for the issuance of railroad bonds must designate the railroad company for whose benefit the bonds are to be issued (Horton *v.* Thompson, 71 N. Y. 513; People *v.* Franklin, 5 Lans. (N. Y.) 129), and must state that such railroad is an existing incorporated company (People *v.* Franklin, *supra*. But see People *v.* Peck, 4 Lans. (N. Y.) 528, 62 Barb. 545, 42 How. Pr. 425), in the state (*In re* Gorham, 43 How. Pr. (N. Y.) 263).

Expression as to investment of proceeds.— The expression of a desire by some of the petitioners for the issuance of railroad aid bonds, that the proceeds thereof should be invested in first mortgage bonds of the railroad, does not render the petition insufficient or informal. People *v.* Hughitt, 5 Lans. (N. Y.) 89. A desire expressed in a petition by taxpayers, for authority to bond a municipality, that the bonds be invested in stock of a railroad company is within the statute authorizing a desire that the bonds or the proceeds be so invested and the variance does not affect the jurisdictional character of the petition. Cherry Creek *v.* Becker, 2 N. Y. Suppl. 514.

Necessity and sufficiency of statement as to majority of taxpayers see Solan *v.* Williamsburgh Sav. Bank, 35 Hun (N. Y.) 1 [*affirmed* in 114 N. Y. 122, 21 N. E. 168]; People *v.* Hughitt, 5 Lans. (N. Y.) 89.

Excluding persons "taxed for dogs or highways only."— A petition to the county judge under N. Y. Laws (1871), c. 925, for bonding a town in aid of a railroad must set forth that the petitioners are a majority of the taxpayers of the town, appearing on the last preceding assessment roll, not including those "taxed for dogs or highways only." An averment that they are a majority and that their names appear thereon is insufficient. Mentz *v.* Cook, 108 N. Y. 504, 15 N. E. 541; Wellsborough *v.* New York, etc., R. Co., 76 N. Y. 182; Strang *v.* Cook, 47 Hun (N. Y.) 46; Rich *v.* Mentz, 134 U. S. 632, 10 S. Ct. 610, 33 L. ed. 1074 [*affirming* 19 Fed. 725, and *reversing* 18 Fed. 52, 21 Blatchf. 492]; Clarke *v.* Northampton, 120 Fed. 661, 57 C. C. A. 123. *Contra*, Chandler *v.* Attica, 18 Fed. 299, 21 Blatchf. 499.

36. People *v.* Hulburt, 46 N. Y. 110, holding that where a trustee signs a petition in favor of the issuing of railroad aid bonds, in his representative capacity, his authority to represent and bind the estate of his beneficiary must be shown affirmatively.

Signatures procured by misrepresentation. — Where a taxpayer has been induced to sign a petition for the issuance of railroad aid bonds by misrepresentation as to the nature of the instrument signed or as to the company being benefited, and had no opportunity to inform himself as to its contents, his signature is invalid. People *v.* Franklin, 5 Lans. (N. Y.) 129.

Signatures obtained by bribes.—Signatures of taxpayers to a petition for the issuance of railroad aid bonds are valid, although induced by payments in the nature of bribes. People *v.* Franklin, 5 Lans. (N. Y.) 129.

of persons required,[37] who possess the prescribed qualifications,[38] are void,[39] at least in the hands of those to whom they are issued, if not in the hands of every subsequent holder.[40] And where it is required by statute that a consent in writing shall be filed and recorded, it must be both filed and recorded before the issuance of municipal bonds can be compelled.[41] Attaching conditions to the signatures to a petition for the issue of railroad bonds does not necessarily vitiate it.[42]

(II) *Withdrawal of Assent.* Persons who have signed a petition for or consent to the issuance of municipal bonds may withdraw their names therefrom at any time before a determination has been reached by the officer or board whose duty it is to pass upon such petition or consent.[43]

d. Determination and Effect. The judgment and determination of a municipal officer or board charged by law with the duty of deciding the questions

Where the name of a corporation appears on the petition for railroad aid bonds, its corporate existence, the authority of those signing it, and that the corporation is solvent must be proved. People *v.* Hulburt, 46 N. Y. 110. The power of a corporation, as a taxable inhabitant of a town, to consent to the bonding of the town for the construction of a railroad through it must be shown in the acknowledgment of an instrument giving such consent, which is to be acknowledged like deeds. People *v.* Deyoe, 2 Thomps. & C. (N. Y.) 142.

Signature by petitioner necessary.— Under N. Y. Laws (1869), c. 907, relating to municipal aid for railroads, the petitioner must either subscribe the petition himself or his name must be subscribed by some other person by his direction and in his presence. People *v.* Hulburt, 46 N. Y. 110; People *v.* Smith, 45 N. Y. 772; People *v.* Peck, 4 Lans. (N. Y.) 528, 62 Barb. 542, 42 How. Pr. 425.

37. People *v.* Hughitt, 5 Lans. (N. Y.) 89; Venice *v.* Breed, 1 Thomps. & C. (N. Y.) 130; People *v.* McMaster, 10 Abb. Pr. N. S. (N. Y.) 132.

In ascertaining the number of freeholders so as to determine numerically whether a petition for railroad aid bonds is signed by a majority of the resident freeholders, all persons resident within the municipality and owning a freehold interest in land therein must be counted. State *v.* Kokomo, 108 Ind. 74, 8 N. E. 718.

Guardian or trustee.—A person assessed individually and also as guardian or trustee must be counted but once in ascertaining whether a majority of taxpayers have signed a petition. People *v.* Franklin, 5 Lans. (N. Y.) 129.

Persons representing estates of deceased persons are not counted as taxpayers. People *v.* Franklin, 5 Lans. (N. Y.) 129.

Joint owners.— In ascertaining whether a majority of the taxpayers whose names are on the last assessment roll have consented to bond the town for railroad purposes, joint owners of property are to be counted separately. People *v.* Franklin, 5 Lans. (N. Y.) 129. Joint owners, when taxed as a partnership, are to be regarded as one taxpayer only. People *v.* Peck, 4 Lans. (N. Y.) 528, 62 Barb. 545, 42 How. Pr. 425. See also People *v.* Franklin, 5 Lans. (N. Y.) 129.

Petitioner who has sold his property or moved away counted.— People *v.* Franklin, 5 Lans. (N. Y.) 129.

Assessment roll from which number and names of taxpayers obtained see Biddle *v.* Riverton, 58 N. J. L. 289, 33 Atl. 279; People *v.* Hughitt, 5 Lans. (N. Y.) 89; Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131.

38. Hamilton *v.* Detroit, 85 Minn. 83, 88 N. W. 419; Cummings *v.* Hyatt, 54 Nebr. 35, 74 N. W. 411 (holding that a married woman who holds lands in fee is a freeholder within a statute prescribing that the signers of a petition shall be freeholders); Starin *v.* Genoa, 23 N. Y. 439; People *v.* Oliver, 1 Thomps. & C. (N. Y.) 570; Chilton *v.* Gratton, 82 Fed. 873.

39. Starin *v.* Genoa, 23 N. Y. 439; Duanesburgh *v.* Jenkins, 46 Barb. (N. Y.) 294 [*affirmed* in 57 N. Y. 177], 40 Barb. 574; Venice *v.* Breed, 1 Thomps. & C. (N. Y.) 130.

40. Duanesburgh *v.* Jenkins, 40 Barb. (N. Y.) 574.

41. Essex County R. Co. *v.* Lunenburgh, 49 Vt. 143.

42. Cherry Creek *v.* Becker, 2 N. Y. Suppl. 514 (by statute, a petition for issuing railroad aid bonds may be either absolute or conditional); People *v.* Hutton, 18 Hun (N. Y.) 116; Andes *v.* Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. ed. 996 [*disapproving* Craig *v.* Andes, 93 N. Y. 405]. See, however, *In re* Gorham, 43 How. Pr. (N. Y.) 263.

43. Biddle *v.* Riverton, 58 N. J. L. 289, 33 Atl. 279; People *v.* Sawyer, 52 N. Y. 296 [*overruling* Matter of Greene Taxpayers, 38 How. Pr. (N. Y.) 515]; People *v.* Hatch, 65 Barb. (N. Y.) 430, 1 Thomps. & C. 113; People *v.* Deyoe, 2 Thomps. & C. (N. Y.) 142. *Contra*, People *v.* Peck, 4 Lans. (N. Y.) 529, 62 Barb. 545, 42 How. Pr. 425; People *v.* Henshaw, 61 Barb. (N. Y.) 409; North Bennington First Nat. Bank *v.* Dorset, 9 Fed. Cas. No. 4,808, 16 Blatchf. 62.

Filing revocation of consent.— Written revocations of consent need not be filed in the town or county clerk's office. It is sufficient if they are delivered to the assessors while the consents are before them, and before they have been acted upon. Springport *v.* Teutonia Sav. Bank, 84 N. Y. 403.

preliminary to the issue of bonds are conclusive until reversed in a direct proceeding by an appellate court.[44] Under a statute providing that a judgment of a county judge authorizing a town to create a bonded debt "shall have the same force and effect as other judgments," the judgment of the county judge may be questioned for want of jurisdiction;[45] but the burden of proving that such judgment is void for want of jurisdiction is upon those who assert it.[46] The judgment of a county court that a majority of the taxpayers of a municipality consented to the issue of railroad bonds creates no absolute right in the railroad company thereto.[47] The representations of municipal officers who are authorized to borrow money upon obtaining the assent of certain taxpayers that such assent has been obtained does not bind the municipality.[48]

5. Election on Question of Bond Issue[49] — a. In General. Where a constitutional provision requires the submission of the question of issuing municipal bonds to the voters of the municipality, a statute authorizing the issue of bonds without such submission is invalid.[50] And where the issuance of municipal bonds is authorized only when the proposition has been submitted to and approved by the voters of the municipality,[51] the holding of an election,[52] conducted as prescribed

44. Madison *v.* Smith, 83 Ind. 502; Augusta Bank *v.* Augusta, 49 Me. 507; Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369 [*affirming* 2 N. Y. Suppl. 514]; Calhoun *v.* Delhi, etc., R. Co., 28 Hun (N. Y.) 379, 64 How. Pr. 291; Bissell *v.* Jeffersonville, 24 How. (U. S.) 287, 16 L. ed. 664 [*reversing* 3 Fed. Cas. No. 1,449]; Syracuse Third Nat. Bank *v.* Seneca Falls, 15 Fed. 783; Foote *v.* Hancock, 9 Fed. Cas. No. 4,911, 15 Blatchf. 343; Munson *v.* Lyons, 17 Fed. Cas. No. 9,935, 12 Blatchf. 539 [*affirmed* in 99 U. S. 684, 25 L. ed. 451]. *Compare* Kokomo *v.* State, 57 Ind. 152.

45. Craig *v.* Andes, 93 N. Y. 405.

46. Hoag *v.* Greenwich, 133 N. Y. 152, 30 N. E. 842.

47. Buffalo, etc., R. Co. *v.* Collins R. Com'rs, 5 Hun (N. Y.) 485.

48. Starin *v.* Genoa, 23 N. Y. 439.

49. See *supra*, XV, B, 4, c.

50. Broadfoot *v.* Fayetteville, 128 N. C. 529, 39 S. E. 20; Hill *v.* Memphis, 134 U. S. 198, 10 S. Ct. 562, 33 L. ed. 887 [*affirming* 23 Fed. 872]; Jarrolt *v.* Moberly, 103 U. S. 580, 26 L. ed. 492; Norton *v.* Brownsville Taxing Dist., 36 Fed. 99. *Compare* Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580; Middleton *v.* St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227; Richmond Union Bank *v.* Oxford Com'rs, 116 N. C. 339, 21 S. E. 410; Moller *v.* Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116; Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002, holding that a clause in a state constitution requiring the assent of two thirds of the qualified voters to the giving of aid to railroad companies does not apply where a debt has already been created for a subscription and the legislature may thereafter authorize the issue of bonds to pay therefor, without submitting the question to the people.

51. See the constitutions and statutes of the different states. And see Santa Cruz Water Co. *v.* Kron, 74 Cal. 222, 15 Pac. 772; Adams *v.* Rome, 59 Ga. 765; Warsop *v.* Hastings, 22 Minn. 437; Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48; Mittag *v.* Park Ridge, 61 N. J. L. 151, 38 Atl. 750; Dodge *v.* Platte County, 16 Hun (N. Y.) 285 [*reversed* on other grounds in 82 N. Y. 218]; Cincinnati *v.* Ferguson, 11 Ohio S. & C. Pl. Dec. 101, 8 Ohio N. P. 361; Hyde *v.* Ewert, 16 S. D. 133, 91 N. W. 474; Phillips *v.* Albany, 28 Wis. 340; Brown *v.* Ingalls Tp., 86 Fed. 261, 30 C. C. A. 27, holding that where it is provided that a bond issue shall not be valid "unless assented to by the legal voters of such township at an election," it is the fact of the assent of the voters and not the certificate of that fact, or the canvass of the vote, which confers the right to issue bonds. See 36 Cent. Dig. tit. "Municipal Corporations," § 1919.

Revocation of authority.—Authority conferred by voters to issue bonds may be revoked at a subsequent election. Moore *v.* Duluth, 74 Minn. 105, 76 N. W. 1022.

Bonds already issued, although not sold, are not affected by such a provision. Moller *v.* Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116.

Renewal bonds.— Where railroad aid bonds were issued under authority of law on a vote of the town, the legislature could authorize the issuance of renewal bonds without a new vote by the town on the question of reissue. Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291.

52. *Illinois.*— Force *v.* Batavia, 61 Ill. 99.

Kentucky.— Covington *v.* McKenna, 36 S. W. 518, 18 Ky. L. Rep. 288.

Maryland.— Cumberland *v.* Magruder, 34 Md. 381.

Michigan.— Spitzer *v.* Blanchard, 82 Mich. 234, 46 N. W. 400. *Compare* Muskegon *v.* Gow, 94 Mich. 453, 54 N. W. 170.

Minnesota.— Elgin *v.* Winona, etc., R. Co., 36 Minn. 517, 32 N. W. 749 [*affirmed* in 143 U. S. 371, 12 S. Ct. 530, 36 L. ed. 191]; Plainview *v.* Winona, etc., R. Co., 36 Minn. 505, 32 N. W. 745; Harrington *v.* Plainview, 27 Minn. 224, 6 N. W. 777.

Missouri.— Carpenter *v.* Lathrop, 51 Mo. 483.

New York.— Horton *v.* Thompson, 71 N. Y.

by statute,[53] and the assent of the number of voters required thereby,[54] is necessary to the validity of the bonds. And even where it is not required, it is proper for the municipal authorities to submit the question of a bond issue to the voters of the municipality to obtain an indication of their opinion,[55] but this expression of opinion is not binding upon the authorities.[56]

b. Order For Election and Form of Submission. Unless there is some statutory provision requiring the question of issuing bonds to be submitted by an ordinance,[57] it may be submitted by resolution,[58] or motion.[59] An order or resolution directing a bond election need not be published,[60] unless it is so provided by statute.[61] The proposition submitted should conform to the statute authorizing the submission,[62] and should state the amount of bonds to be issued[63] and the

513; People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

South Carolina.— State *v.* Tolly, 37 S. C. 551, 16 S. E. 195.

Tennessee.— Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1919.

In North Carolina, as the constitution, article 7, section 7, does not require that debts contracted by a municipality for necessary expenses shall be submitted to the qualified voters of the municipality, a submission to the voters is not necessary to authorize the issuing of bonds to fund a debt incurred for necessary expenses (Raleigh Gas Light Co. *v.* Raleigh, 75 N. C. 274; Fowle *v.* Raleigh, 75 N. C. 273; Tucker *v.* Raleigh, 75 N. C. 267), or to provide light or water for a municipality (Davis *v.* Fremont, 135 N. C. 538, 47 S. E. 671; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 87 [*overruling* Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163]). But where a charter provides that bonds for a lighting plant may be issued when submitted to and approved by the voters, a municipality cannot issue such bonds without such vote. Robinson *v.* Goldsboro, 135 N. C. 382, 47 S. E. 462; Wadsworth *v.* Concord, 133 N. C. 587, 45 S. E. 948.

53. Carpenter *v.* Lathrop, 51 Mo. 483; Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670.

54. *Arizona.*— Cronly *v.* Tucson, 6 Ariz. 235, 56 Pac. 876.

California.— Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014; Fritz *v.* San Francisco, 132 Cal. 373, 64 Pac. 566.

Georgia.— Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803; Smith *v.* Dublin, 113 Ga. 833, 39 S. E. 327; Gavin *v.* Atlanta, 86 Ga. 132, 12 S. E. 262.

Missouri.— Carpenter *v.* Lathrop, 51 Mo. 483.

New York.— Culver *v.* Ft. Edward, 8 Hun 340.

South Carolina.— Wilson *v.* Florence, 40 S. C. 290, 18 S. E. 792.

Washington.— Faulkner *v.* Seattle, 19 Wash. 320, 53 Pac. 365.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1919.

Majority of all votes at general election.— A proposition to authorize the issuance of funding bonds was submitted to the electors of a city pursuant to the provisions of such section of the statutes at the same time and place as the general city election. It was held, under the facts shown, to be but one election; that the presumption is that all the electors voted at such election, and the proposition to work its adoption must have received a majority of all the votes cast at such election. Bryan *v.* Lincoln, 50 Nebr. 620, 70 N. W. 252, 35 L. R. A. 752. *Contra,* Worthington *v.* Lexington Bd. of Education, 71 S. W. 879, 24 Ky. L. Rep. 1510.

55. Mason *v.* Shawneetown, 77 Ill. 533; Sinking Fund Com'rs *v.* Kentucky Northern Bank, 1 Metc. (Ky.) 174.

56. Sinking Fund Com'rs *v.* Kentucky Northern Bank, 1 Metc. (Ky.) 174.

57. Alma *v.* Guaranty Sav. Bank, 60 Fed. 203, 8 C. C. A. 564; National Bank of Commerce *v.* Granada, 54 Fed. 100, 4 C. C. A. 212. See also National Bank of Commerce *v.* Granada, 44 Fed. 262.

58. State *v.* Allen, 178 Mo. 555, 77 S. W. 868; Alma *v.* Guaranty Sav. Bank, 60 Fed. 203, 8 C. C. A. 564.

59. State *v.* Babcock, 20 Nebr. 522, 31 N. W. 8.

60. Heilbron *v.* Cuthbert, 96 Ga. 312, 23 S. E. 206.

61. Derby *v.* Modesto, 104 Cal. 515, 38 Pac. 900; National Bank of Commerce *v.* Granada, 48 Fed. 278 [*affirmed* in 54 Fed. 100, 4 C. C. A. 212].

62. Cairo, etc., R. Co. *v.* Sparta, 77 Ill. 505; Lewis *v.* Bourbon County Com'rs, 12 Kan. 186. See also New York, etc., Cement Co. *v.* Davis, 173 N. Y. 235, 66 N. E. 9 [*affirming* 62 N. Y. App. Div. 577, 71 N. Y. Suppl. 185].

Recital as to statute.—A recital in an ordinance submitting a proposition to bond a city for the establishment of an electric lighting plant, that said ordinance was passed in pursuance of a certain act, is mere surplusage; and where the act recited is no longer in force, but is substantially reënacted by the repealing act under which the ordinance must in fact have been adopted, there is no ground for issuing an injunction against the bond issue. Lewis *v.* Port Angeles, 7 Wash. 190, 34 Pac. 914.

63. Chicago, etc., R. Co. *v.* Wilber, 63 Nebr. 624, 88 N. W. 660; Canandaigua *v.* Hayes, 90 N. Y. App. Div. 336, 85 N. Y. Suppl. 488.

purpose of issuing them.[64] The propositions should be submitted in such a way as to obtain a full and fair expression of the will of the voters on their merits.[65] Two or more propositions for issuing bonds may be submitted at the same election unless this is forbidden by statute,[66] but two separate and distinct propositions should not be presented as one so as to have one assent of the voters answer for both.[67] An offer in a proposition to employ *bona fide* residents on the work for which it is proposed to issue bonds is not an offer of an unlawful inducement so as to invalidate the bonds.[68] No formal proposition authorizing the levy of a tax need be submitted along with the proposition to issue bonds to be donated to a railroad, as a vote to issue bonds is impliedly a vote to levy the requisite tax to pay them.[69]

c. Application and Notice. The application or petition for a bond election must be made by the persons authorized by law to make it.[70] It need not be formally addressed to the officer who is to call the election, it being sufficient that he receives and acts upon it.[71] A petition to the mayor of a city need not be submitted by him to the city council.[72] The names of persons who have been induced to sign such a petition by false and fraudulent representations should not be counted.[73] The notice of election should contain such particulars as are required by statute,[74] and should be published for such a time and in compliance with such formalities as are required by law.[75]

See also Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

Interest.— It was not necessary to submit to the voters the alternative of making the interest on the proposed bonds payable annually or semiannually, but it is sufficient that the ordinance states the time at which the interest shall be payable; and it is only the amount of the bonds and the rate of interest which constitute the indebtedness proposed to be incurred, and upon which the voters are to express their wishes. Murphy *v.* San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444.

64. Coffin *v.* Richards, 6 Ida. 741, 59 Pac. 562; Callaghan *v.* Alexandria, 52 La. Ann. 1013, 27 So. 540; Canandaigua *v.* Hayes, 90 N. Y. App. Div. 336, 85 N. Y. Suppl. 488; Knight *v.* Western Union, 45 W. Va. 194, 32 S. E. 163. See, however, Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

65. Truelsen *v.* Duluth, 61 Minn. 48, 63 N. W. 714; Hempstead *v.* Seymour, 34 Misc. (N. Y.) 92, 59 N. Y. Suppl. 462; Hensly *v.* Hamilton, 3 Ohio Cir. Ct. 201, 2 Ohio Cir. Dec. 114.

66. Woolfolk *v.* Paducah, 80 S. W. 186, 25 Ky. L. Rep. 2149; Petros *v.* Vancouver, 13 Wash. 423, 32 Pac. 361; Wetzell *v.* Paducah, 117 Fed. 647.

67. *Kansas.*— Leavenworth *v.* Wilson, 69 Kan. 74, 76 Pac. 400.

Missouri.— State *v.* Allen, 186 Mo. 673, 85 S. W. 531. *Compare* State *v.* Allen, 178 Mo. 555, 77 S. W. 868.

New York.— Hempstead *v.* Seymour, 34 Misc. 92, 69 N. Y. Suppl. 462.

Ohio.— Elyria Gas, etc., Co. *v.* Elyria, 57 Ohio St. 374, 49 N. E. 335. *Compare* Ryan *v.* Orbison, 7 Ohio Cir Ct. 30, 3 Ohio Cir. Dec. 647.

United States.— Sioux Falls *v.* Farmers' L. & T. Co., 136 Fed. 721, 69 C. C. A. 373 [*reversing* 131 Fed. 890].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1920.

Compare Louisville *v.* Board of Park Com'rs, 112 Ky. 409, 65 S. W. 860, 24 Ky. L. Rep. 38; Hamilton *v.* Detroit, 83 Minn. 119, 85 N. W. 933; Kemp *v.* Hazlehurst, 80 Miss. 443, 31 So. 908.

68. Perkins County *v.* Graff, 114 Fed. 441, 52 C. C. A. 243.

69. Douglas *v.* Niantic Sav. Bank, 97 Ill. 228; Windsor *v.* Hallett, 97 Ill. 204; Prairie *v.* Lloyd, 97 Ill. 179.

70. Berkley *v.* Lexington Bd. of Education, 58 S. W. 506, 22 Ky. L. Rep. 638, holding that under the charter of cities of the second class, a board of education has no authority to petition the county court for a submission of the question of issuing bonds for schoolhouses to the voters of the city.

71. Marcy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813].

72. State *v.* Topeka, 68 Kan. 177, 74 Pac. 647.

73. Wullenwaber *v.* Dunigan, 33 Nebr. 477, 50 N. W. 428.

74. San Luis Obispo *v.* Haskin, 91 Cal. 549, 27 Pac. 929 [*distinguishing* People *v.* Baker, 83 Cal. 149, 23 Pac. 364, 1112]; Wilkins *v.* Waynesboro, 116 Ga. 359, 42 S. E. 767; Smith *v.* Dublin, 113 Ga. 833, 39 S. E. 327 (notice should specify what amount of bonds are to be issued and for what purpose); Thatcher *v.* People, 93 Ill. 240; Brown *v.* Ingalls Tp., 81 Fed. 485. *Compare* Fletcher *v.* Collingswood, (N. J. Sup. 1904) 59 Atl. 90 (holding that the failure to name the place of a bond election held at the same time as an election for municipal officers does not invalidate the election); National Bank of Commerce *v.* Grenada, 44 Fed. 262 [*reversing* 41 Fed. 87].

75. *Idaho.*— Sommercamp *v.* Kelly, 8 Ida. 712, 71 Pac. 147.

d. Conduct and Record of Election. The forms of proceedings in the submission of the question of issuing municipal bonds being designed as a protection to the taxpayers, a due observance of these forms is essential to valid action;[76] and therefore bond issue elections should be conducted in the manner[77] and by the prescribed officers[78] provided for by statute. But mere informalities of the election officers in holding and ascertaining and declaring the result of a bond election, unless it is otherwise provided by statute, will not vitiate an election otherwise fair and impartial.[79] Such elections should be held on the day[80] and during the hours[81] prescribed by law. The requirement of a statute that a record of the election shall be made is directory merely, and a failure to comply therewith does not invalidate the election.[82] Where it is alleged that an election is invalid because the ballots used were not in the proper form, the election will be upheld if the ballots used were not so ambiguous as to deprive any one of his right to vote,[83] and there has been a full and fair expression of opinion.[84] To ascertain how many votes are cast upon a proposition, in the absence of fraud or mistake, the legal and countable ballots found in the ballot box at the close of the polls, upon which the voter has intelligently expressed himself, is primarily determinate of the question.[85] The method of determining whether a majority of the qualified voters have voted for the issuance of bonds is by reference to the list of registered voters, if a system of registration has by legislative enactment been provided for the municipality desiring to make the issue; if not, then by reference to the tally sheets of the last general election held for such municipality.[86] Where outside territory is annexed to a city at such a time that no provision can be made for the residents of such territory to vote at a bond election, the fact that such resi-

Minnesota.— Warsop *v.* Hastings, 22 Minn. 437.

Mississippi.— Clarksdale *v.* Broaddus, 77 Miss. 667, 28 So. 954.

Nebraska.— State *v.* Weston, 67 Nebr. 385, 93 N. W. 728; State *v.* Babcock, 25 Nebr. 500, 41 N. W. 450.

New York.—People *v.* Ft. Edward, 70 N. Y. 28; Culver *v.* Ft. Edward, 8 Hun 340.

South Carolina.—Cleveland *v.* Spartanburg, 54 S. C. 83, 31 S. E. 871.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1921.

Requirements as to notice directory.— "The formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that unless the formalities are observed the election shall be void." Hesseltine *v.* Wilbur, 29 Wash. 407, 410, 69 Pac. 1094 [*quoting* Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059].

An order requiring the notice of an election to be published need not be in writing, nor is it necessary that the order and notice should be contained in separate instruments. Solon *v.* Williamsburgh Sav. Bank, 35 Hun (N. Y.) 1.

76. Lewis *v.* Bourbon County Com'rs, 12 Kan. 186.

77. Richmond Union Bank *v.* Oxford, 116 N. C. 339, 21 S. E. 410; Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163; Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323.

78. Harmon *v.* Auditor Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502 [*affirming* 22 Ill. App. 129]; Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323. *Compare* Marcy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813].

79. Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163; Marcy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813].

80. Hill *v.* Memphis, 23 Fed. 872.

81. Hammond *v.* San Leandro, 135 Cal. 540, 67 Pac. 692.

82. Turpin *v.* Madison County Fiscal Ct., 105 Ky. 226, 48 S. W. 1085, 20 Ky. L. Rep. 1131; Wiley *v.* Minneapolis Bd. of Education, 11 Minn. 371.

83. Brown *v.* Grangeville, 8 Ida. 784, 71 Pac. 151.

84. Fletcher *v.* Collingswood, (N. J. Sup. 1904) 59 Atl. 90.

85. State *v.* Topeka, 68 Kan. 177, 74 Pac. 647.

86. Wilkins *v.* Waynesboro, 116 Ga. 359, 42 S. E. 767. See also Claybrook *v.* Rockingham County, 117 N. C. 456, 23 S. E. 360.

Excessive number of votes.— When an election is held in a municipality to determine whether two thirds of the qualified voters will give their assent to the issuance of bonds, and there is no law authorizing or requiring a registration of the voters of the town, and at the election held the total number of votes cast exceeds the total number cast at the last general election in the town, as shown by the tally-sheets of that election, and no question is raised as to the right of any one of the voters to participate in the bond election, the assent of two thirds of the qualified voters is not obtained where the number voting in favor of bonds is less than two thirds of the votes cast at the bond election. McKnight *v.* Senoia, 115 Ga. 915, 42 S. E. 256.

dents were not provided with ballots and booths at such election will not invalidate it.[87]

e. Operation and Effect of Election. Where a proposition to issne bonds has been submitted and acted upon favorably by the voters of the municipality, the executive officers thereof cannot refuse to issue the bonds,[88] nor may they vary the terms and conditions of the submission.[89] And where a municipality, at an election for that purpose, accepts a written proposal to issue bonds in aid of a railroad company, the terms and construction of the proposal cannot be modified by representations of the company made to the voters between the time of the proposition and the election.[90] The defeat of a proposition to issue bonds does not prevent a second submission of the proposition;[91] and the defeat of one proposition, submitted concurrently with others, does not affect the validity of those receiving the requisite majority.[92] Separate bond propositions all carried at the same election do not necessitate separate bond issues; a single issue for the aggregate amount of all the bonds authorized may be made.[93] Where the votes of a majority of the citizens of a municipality have been given in favor of a municipal loan and bonds have been issued therefor, no one interposing to prevent the issue and all parties acting in good faith, the municipality cannot afterward object to the regularity of the preliminary proceedings and set up that the vote was not taken in the form in which under the statute it ought to have been taken.[94]

6. Denomination and Interest — a. Denomination. Where a municipality is authorized to issue bonds of a certain denomination, bonds for a greater denomination cannot lawfully be issued.[95] It is no valid objection to municipal bonds that a single bond was at first issued in payment of the whole of a subscription in aid of a railroad, and afterward bonds of smaller denomination were given in exchange for the single bond.[96]

b. Interest. It has been held that where a city is authorized to issue bonds bearing a certain rate of interest, bonds cannot lawfully be issued at an increased rate of interest.[97] But the rule generally laid down is that when bonds bear a greater rate of interest than that authorized they are valid obligations for the principal and the authorized rate of interest.[98] The validity of municipal bonds will not be affected by the fact that they provide for interest at a lesser rate than that which they are authorized to bear.[99] Whether the interest on bonds shall be payable annually or semiannually is generally a matter to be determined by the officers authorized to issue them.[1] An objection to the rate of interest which bonds in aid of a railroad are to bear, and the time they are to run, comes too late after mandamus has been granted requiring the issuance and delivery of such bonds.[2] The fact that a charter provision limits the interest to be paid on certain

87. O'Bryan *v.* Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800; Lancaster *v.* Owensboro, 73 S. W. 775, 24 Ky. L. Rep. 2249.

88. State *v.* Jennings, 48 Wis. 549, 4 N. W. 641.

89. Skinner *v.* Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512; Big Grove *v.* Wells, 65 Ill. 263; Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48; Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375. But *compare* Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014.

90. Platteville *v.* Galena, etc., R. Co., 43 Wis. 493.

91. Savings Soc. *v.* New London, 29 Conn. 174; Robinson *v.* Goldsboro, 122 N. C. 211, 30 S. E. 324; Caldwell *v.* Burke County Justices, 57 N. C. 323.

92. Law *v.* San Francisco, 144 Cal. 384, 77 Pac. 1014.

93. Mill Valley *v.* House, 142 Cal. 698, 76 Pac. 658.

94. Myer *v.* Muscatine, 1 Wall. (U. S.) 384, 17 L. ed. 564.

95. Milan *v.* Tennessee Cent. R. Co., 11 Lea (Tenn.) 329.

96. Rockmulh *v.* Pittsburgh, 20 Fed. Cas. No. 11,982.

97. Milan *v.* Tennessee Cent. R. Co., 11 Lea (Tenn.) 329.

98. Quincy *v.* Warfield, 25 Ill. 317, 79 Am. Dec. 330; Parkinson *v.* Parker, 85 Pa. St. 313; Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 329.

99. Omaha Nat. Bank *v.* Omaha, 15 Nebr. 333, 18 N. W. 63; Cleveland *v.* Spartanburg, 54 S. C. 83, 31 S. E. 371.

1. Derby *v.* Modesto, 104 Cal. 515, 38 Pac. 900; Maddox *v.* Graham, 2 Metc. (Ky.) 56. See also Starin *v.* Genoa, 23 N. Y. 439; Newark *v.* Alliott, 5 Ohio St. 113; Lyons *v.* Lyons Nat. Bank, 8 Fed. 369, 19 Blatchf. 279.

2. People *v.* Barnett, 91 Ill. 422.

bonds therein authorized to be issued to a certain rate does not by implication deny the right to pay a higher rate of interest upon any other character of indebtedness.[3] Matured municipal, interest-bearing, coupon bonds continue to bear interest after their maturity where there is nothing in the statute providing for them to indicate the contrary; and the fact that the coupons for interest attached to the bonds extend only to the maturity of the bonds is indicative only of a presumption that the bonds will be paid at maturity, and does not affect the continuance of interest if the bonds are not so paid.[4] The liability of a municipality for interest on coupons attached to its bonds is fully discussed elsewhere.[5]

7. Payment or Redemption — a. In General. A requirement that before bonds are issued provision must be made for their payment or redemption must be complied with for the bonds to be valid,[6] and no plan or scheme for making such provision other than that prescribed by statute can lawfully be substituted.[7] Where an act conferring power upon a city council to incur an indebtedness and issue its bonds therefor is silent in regard to the time when the bonds shall be made payable, and in regard to the terms and conditions upon which they shall be payable, such matters will be left to the city and the person to whom the bonds are to be issued, to be settled, and when agreed to, the city may make the payment of such bonds depend upon conditions mutually assented to.[8] Municipal bonds having on their face many years to run, but issued and put in circulation with an indorsement upon each of them to the effect that in case default be made in paying any of the interest coupons at maturity then as a part of the contract the bond itself shall become due and payable, are legally due, as to the whole of the principal, whenever a default in paying interest according to any of the coupons occurs.[9] A promise to pay contained in municipal bonds "without relief from the valuation or appraisement laws of the state" is a mere waiver by the debtor of the benefit of valuation or appraisal in case the obligation shall be enforced by execution at law, and cannot be construed to require levies for payment of the bonds to be made upon the same valuation that existed in the municipality when the bonds were issued.[10] Municipal bonds issued upon a subscription to the stock of a railroad company, under an ordinance which declared that the stock "should remain for ever pledged for the payment of the bonds," are an absolute obligation of the city, the ordinance creating only a pledge of the stock by way of col-

3. Douglass *v.* Virginia City, 5 Nev. 147.

4. Kendall *v.* Porter, 120 Cal. 106, 45 Pac. 333, 52 Pac. 143; People *v.* Getzendaner, 137 Ill. 234, 34 N. E. 297.

5. See Interest, 22 Cyc. 1507.

6. *Georgia.*— Wilkins *v.* Waynesboro, 116 Ga. 359, 42 S. E. 767.

Louisiana.— See Knox *v.* Baton Rouge, 36 La. Ann. 431.

Pennsylvania.— Bruce *v.* Pittsburg, 166 Pa. St. 152, 30 Atl. 831; Barr *v.* Philadelphia, 8 Pa. Dist. 19; Fyan *v.* Rainsburg Borough, 5 Pa. Co. Ct. 443 [*affirmed* in 127 Pa. St. 74, 17 Atl. 678, 4 L. R. A. 336].

Texas.— Bassett *v.* El Paso, 88 Tex. 168, 30 S. W. 893 (an ordinance providing for payment of bonds and interest thereon is a part of the contract between the city and the bondholders); Nalle *v.* Austin, (Civ. App. 1897) 42 S. W. 780. *Compare* Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

United States.— See Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1926.

Partial provision.— Where a municipality is prohibited from contracting debts without providing means by which to pay them, it is liable on its bonds only to the extent of the provision made for their payment. Maurin *v.* Donaldsonville, 33 La. Ann. 671; Dugas *v.* Donaldsonville, 33 La. Ann. 668; Oubre *v.* Donaldsonville, 33 La. Ann. 386; Johnson *v.* Donaldsonville, 33 La. Ann. 366.

Even after bonds have been validated a provision for an annual tax must be made before the bonds can be sold and the debt thereby actually incurred. Woodall *v.* Adel, 122 Ga. 301, 50 S. E. 102.

Provision greater than required.— Bonds issued by a city providing for a sinking fund of five per cent for their payment are not rendered invalid by the fact that the charter of the city provided for two per cent only. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

Providing a fund when none is required does not vitiate bonds. Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876.

7. Wilkins *v.* Waynesboro, 116 Ga. 359, 42 S. E. 767.

8. Chicago, etc., R. Co. *v.* Aurora, 99 Ill. 205.

9. Griffin *v.* Macon City Bank, 58 Ga. 584.

10. U. S. *v.* Cicero, 41 Fed. 83.

lateral security for their payment.[11] Where an ordinance of a city authorizing a contract with a gas company and the issue to it of bonds of the municipality provides that such company shall "guarantee the said bonds and assume the payment of the principal thereof at maturity," the indorsement on the bonds by the president of such company guaranteeing "the payment of the principal and interest" by them is a compliance with the ordinance and contract as to the guaranty.[12] A municipality is liable upon the coupons of municipal bonds, although such coupons themselves show no promise or undertaking on the part of the municipality, where by the express terms of the bonds the municipality is bound for their payment.[13]

b. Time of Payment. Where it is provided by a state constitution or by statute that an issue of municipal bonds shall not extend beyond a certain number of years from the date of issuance,[14] such limitation must be regarded as in the nature of a restriction on the power to issue bonds, and bonds having a longer time to run than that prescribed are void.[15] But the fact that a statute providing that no more than a certain per cent of an entire loan for which bonds were issued shall fall due in any one year[16] is violated does not invalidate bonds which are regular in every other respect.[17] Where the rate of interest which municipal

11. U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225.

12. Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

13. Nashville *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296.

14. See the constitutions and statutes of the different states. And see Wilkins *v.* Waynesboro, 116 Ga. 359, 42 S. E. 767; Little River Tp. *v.* Reno County Com'rs, 65 Kan. 9,68 Pac. 1105; Hoyt *v.* Martin, 47 Minn. 278, 50 N. W. 130; McCormick *v.* West Duluth, 47 Minn. 272, 50 N. W. 128; Hoyt *v.* Braden, 27 Minn. 490, 8 N. W. 591; Singer Mfg. Co. *v.* Elizabeth, 42 N. J. L. 249; Rochester *v.* Quintard, 65 Hun (N. Y.) 460, 20 N. Y. Suppl. 396 [*affirmed* in 136 N. Y. 221, 32 N. E. 760]; Syracuse Sav. Bank *v.* Seneca Falls, 21 Hun (N. Y.) 304 [*affirmed* in 86 N. Y. 317]; Radford *v.* Heth, 100 Va. 16, 40 S. E. 99; Roberts *v.* Paducah, 95 Fed. 62; Washington *v.* Coler, 51 Fed. 362, 2 C. C. A. 272. See 36 Cent. Dig. tit. "Municipal Corporations," § 1927.

15. New Orleans Second Municipality *v.* Morgan, 1 La. Ann. 111; Barnum *v.* Okolona, 148 U. S. 393, 13 S. Ct. 638, 37 L. ed. 495; Brenham *v.* German-American Bank, 144 U. S. 173, 12 S. Ct. 559, 36 L. ed. 390 [*reversing* 35 Fed. 185]; Norton *v.* Dyersburg, 127 U. S. 160, 8 S. Ct. 1111, 32 L. ed. 85. *Compare* Brattleboro People's Nat. Bank *v.* Ayer, 24 Ind. App. 212, 56 N. E. 267 (holding that where a statute provided that assessments for sewers "may" be made to run for twenty years, and the bonds issued to anticipate them "may" be issued and made payable during a period of twenty years, the word "may" was used in its ordinary meaning and vested a discretion in the common council to make the assessments for building sewers, and the bonds issued in anticipation thereof run for a less period than twenty years); Pontotoc *v.* Fulton, 79 Miss. 511, 31 So. 102; Elmwood *v.* Dows, 136 U. S. 651, 10 S. Ct. 1074, 34 L. ed. 555 [*affirming* 34 Fed. 114] (holding that where bonds bore date April 27, 1869, and were delivered on that date, but it was set out on their face that they ran twenty years from July 1, 1869, and drew interest from that date, the bonds were not void as in excess of the authority conferred, the interval between April 27, 1869, and July 1, 1869, being only a reasonable time for issuing and delivering the bonds and putting them on the market); Rock Creek Tp. *v.* Strong, 96 U S. 271, 24 L. ed. 815 (holding that the provisions of a statute authorizing municipalities to issue railroad aid bonds that the bonds shall be payable in not less than five or more than thirty years from the date thereof, with interest not to exceed ten per cent per annum, all in the discretion of the officers issuing the same, are directory and not of the essence of the power to issue); South St. Paul *v.* Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585 (holding that under a charter provision authorizing the issuance of bonds "payable at such times, not to exceed thirty years," as may be determined, the bonds are not void when they run thirty years from the time they first begin to bear interest, although this is more than thirty years from the time they were executed); Luling *v.* Racine, 15 Fed. Cas. No. 8,603, 1 Biss. 314 (holding that an act authorizing a city to issue bonds payable in twenty years gives authority to make them payable twenty years from the date of the act, although this is less than twenty years from the date of the bonds).

Time of payment fixed by chance.—An act providing for the issuance of bonds to fund a municipal debt is rendered void by the provision for the payment of principal and interest on the bonds at a time to be determined by chance in a lottery, rather than at the fixed time provided at the original issue of bonds. Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

16. See Syracuse Sav. Bank *v.* Seneca Falls, 21 Hun (N. Y.) 304 [*affirmed* in 86 N. Y. 371].

17. Hoag *v.* Greenwich, 133 N. Y. 152, 30

bonds bear does not exceed that provided by the statute authorizing the issuance of the bonds, although the time of payment of interest may vary from that provided in the statute, yet the bonds are valid.[18] Bonds issued for a certain number of years are not redeemable before maturity without the consent of the persons holding them.[19]

c. Place of Payment. Municipal bonds should be made payable at the place prescribed by law;[20] but where a statute authorizing the issuance of such bonds does not designate the place at which they shall be made payable, the place of payment is within the discretion of the municipal officers whose duty it is to issue them.[21]

d. Medium of Payment. Where a statute authorizing the issuing of municipal bonds is silent as to the kind of currency in which the bonds shall be paid, the municipality has power to make them payable in gold coin of the United States, of the present standard weight and fineness.[22]

8. Authority of Officers or Agents. The right and duty of municipal officers and boards to issue bonds is derived from and depends upon the provisions of the statutes authorizing their issue.[23] Officers appointed by a court or authorized by a city council to issue municipal bonds or to execute other municipal securities must pursue their authority or their acts will not be binding upon the municipality.[24]

N. E. 842 [*affirming* 15 N. Y. Suppl. 743]. See also Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685.

18. Mobile Sav. Bank *v.* Oktibbeha, 24 Fed. 110.

19. Memphis *v.* Memphis Sav. Bank, 99 Tenn. 104, 42 S. W. 16. See Allentown School Dist. *v.* Derr, 115 Pa. St. 439, 9 Atl. 55.

20. Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580; Middleton *v.* St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227. See also Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673.

21. Maddox *v.* Graham, 2 Metc. (Ky.) 56; Myer *v.* Muscatine, 1 Wall. (U. S.) 384, 17 L. ed. 564. But *compare* Sherlock *v.* Winnetka, 68 Ill. 530 (holding that municipal authorities, in the absence of express statutory authority, have no right to make bonds issued by them payable at any other place than the municipal treasury, but that if they are made payable at some other place this will not invalidate the bonds, the provision to pay at some other place being void); Mygatt *v.* Green Bay, 17 Fed. Cas. No. 9,998, 1 Biss. 292.

22. Judson *v.* Bessemer, 87 Ala. 240, 6 So. 267, 4 L. R. A. 742; Farson *v.* Louisville Sinking Fund Com'rs, 97 Ky. 119, 30 S. W. 17, 16 Ky. L. Rep. 856; Winston *v.* Ft. Worth, (Tex. Civ. App. 1898) 47 S. W. 740 (holding that bonds payable in gold coin of the United States, of the present standard weight and fineness, are money obligations and not obligations for the delivery of specific articles); Moore *v.* Walla Walla, 60 Fed. 961. *Compare* Murphy *v.* San Luis Obispo, (Cal. 1897) 48 Pac. 974 (holding that a city has no power to issue bonds payable in "gold coin of the United States," where the statute authorizing the bond issue provides for payment in "gold coin or lawful money of the United States"); Woodruff *v.* Mississippi, 162 U. S. 291, 16 S. Ct. 820, 40 L. ed. 973. But see Cincinnati *v.* Anderson, 10 Ohio Cir. Ct. 265, 6 Ohio Cir. Dec. 594; Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541, making a distinction between the power of cities and counties in this respect.

23. *Kentucky.*— Frantz *v.* Jacob, 88 Ky. 525, 11 S. W. 654, 11 Ky. L. Rep. 55; Maddox *v.* Graham, 2 Metc. 56, bonds issued by city council.

Michigan.— Detroit Parks, etc., Com'rs *v.* Rush, 84 Mich. 154, 47 N. W. 676, park and boulevard bonds issued without approval of the board of estimates.

New York.— Alvord *v.* Syracuse Sav. Bank, 98 N. Y. 599 (bonds issued by a commissioner appointed by the "board of town officers"); People *v.* White Plains, 93 N. Y. App. Div. 599, 88 N. Y. Suppl. 506; Mitchell *v.* Strough, 35 Hun 83 (holding that railroad commissioners appointed by the county judge to issue town bonds have a right to issue them notwithstanding the pendency of a proceeding to review the judge's decision, there being no injunction). *Compare* People *v.* Gravesend, 154 N. Y. 381, 48 N. E. 813 [*reversing* 6 N. Y. App. Div. 225, 39 N. Y. Suppl. 983], bonds issued by mayor and controller.

Ohio.— Hafer *v.* Cincinnati, 11 Ohio Dec. (Reprint) 625, 28 Cinc. L. Bul. 131, bonds issued by board of administration.

Wyoming.— Diefenderfer *v.* State, 13 Wyo. 387, 80 Pac. 667, power to issue bonds conferred upon the mayor and council.

United States.— Bernards Tp. *v.* Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. ed. 766, railroad aid bonds issued by commissioners appointed by the court.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1930.

24. Joslyn *v.* Dow, 19 Hun (N. Y.) 494. See also Little Rock *v.* State Bank, 8 Ark. 227.

Where an order appointing commissioners to issue bonds is reversed in a proceeding whereof, before they were issued, the commis-

Where the citizens of a municipality assent at an election[25] or by petition[26] to a bond issue, the provisions of the proposition submitted, or of the petition, must be complied with. And after the acceptance of a bid based upon valid proceedings, officers have no discretion to refuse to issue bonds.[27] Under an act authorizing a city to issue funding bonds to be deposited with its fiscal agent who is required by the act to give such bonds at par to the creditors mentioned in a statement of debts, to be prepared by the city controller, a bank acting as the city's fiscal agent has no power to go behind such statement and refuse to deliver bonds in payment of debts embraced therein.[28]

9. SALE OR DISPOSAL OF BONDS — a. In General. Authority to borrow money and issue bonds impliedly authorizes the sale of the bonds when issued.[29] The power of a municipal council to sell bonds[30] is one which cannot be delegated by the council by ordinance or otherwise.[31] It is not necessary, however, that municipal authorities should act personally in selling bonds and investing the proceeds, but they may do so through the medium of a broker[32] or other agent.[33] Where it is required that bonds shall be sold after advertisement and to the highest and best bidder,[34] a sale without advertisement, without competition, and not to the highest bidder, is void.[35] Where, however, there is no such requirement a municipality authorized to issue and sell bonds to pay a debt or subscription may, the debtor or beneficiary consenting, deliver the bonds at par in payment of the debt or subscription in lieu of raising money upon them by loan and then paying that money in discharge of the debt or subscription.[36] Although a notice has been published inviting bids for municipal securities, yet the contract

sioners and the railroad company in aid of which they were issued had notice, as between the town and the commissioners the bonds are invalid. Stewart *v.* Lansing, 104 U. S. 505, 26 L. ed. 866.

25. See Winter *v.* Montgomery, 65 Ala. 403.

26. See Kokomo *v.* State, 57 Ind. 152; People *v.* Hughitt, 5 Lans. (N. Y.) 89.

27. Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274.

28. New Orleans *v.* Southern Bank, 31 La. Ann. 560.

29. Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

30. **Sale by resolution.**—A city council may make a sale of bonds by resolution duly passed; an ordinance is not necessary for that purpose. Smalley *v.* Yates, 36 Kan. 519, 13 Pac. 845, 41 Kan. 550, 21 Pac. 622.

Compliance with statutory provisions necessary see Elyria Gas, etc., Co. *v.* Elyria, 57 Ohio St. 374, 49 N. E. 335.

31. State *v.* Hauser, 63 Ind. 155. *Compare* Frantz *v.* Jacob, 88 Ky. 525, 11 S. W. 654, 11 Ky. L. Rep. 55.

32. Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685.

33. Armstrong *v.* Ft. Edward, 159 N. Y. 315, 53 N. E. 1116 [*reversing* 84 Hun 261, 32 N. Y. Suppl. 433].

34. See the statutes of the several states. And see Fenner *v.* Cincinnati, 11 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 340; State *v.* Columbia, 12 S. C. 370.

Variance between advertisement and resolution.— It does not lie with the bidder for municipal bonds to complain of a material variance, as to time of redemption, between the advertisement and the resolution authorizing the bonds, where the board had power to, and did, make the bonds payable according to the advertisement. State *v.* Allison, 11 Ohio S. & C. Pl. Dec. 62, 8 Ohio N. P. 170.

Conditional bid.—A bid for municipal bonds, containing the clause, "Our bid is to be subject to the approval of the legality of the issues by our counsel," is a conditional bid. Trowbridge *v.* New York, 24 Misc. (N. Y.) 517, 53 N. Y. Suppl. 616.

Right to reject bids reserved.— Where a city reserves the right to reject any and all bids for municipal bonds, it may award the bonds to a person offering "one hundred dollars more than the best bid"; the only restriction placed upon it by law being that it shall not dispose of its bonds for less than their par value. Lamprecht Bros. Co. *v.* Williamsport, 22 Pa. Co. Ct. 603.

Boroughs are not required to expose their bonds to public sale after advertising and notice to bidders. Cox *v.* Connellsville Borough, 22 Pa. Co. Ct. 657.

35. Guckenberger *v.* Dexter, 17 Ohio Cir. Ct. 115, 9 Ohio Cir. Dec. 667; Roberts *v.* Taft, 116 Fed. 228 [*affirming* 109 Fed. 825, 48 C. C. A. 681].

36. *Georgia.*— Griffin *v.* Inman, 57 Ga. 370.

Indiana.— Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395.

Minnesota.— Wiley *v.* Minneapolis Bd. of Education, 11 Minn. 371.

Virginia.— Clifton Forge *v.* Brush Electric Co., 92 Va. 289, 23 S. E. 288.

Wisconsin.— Cady *v.* Watertown, 18 Wis. 322.

United States.— See Converse *v.* Ft. Scott, 92 U. S. 503, 23 L. ed. 621.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1932.

But *compare* Venice *v.* Breed, 1 Thomps. & C. (N. Y.) 130.

is incomplete until the proposal is accepted and the municipality inviting the proposals is not liable for damages for refusing to accept an offer even though it be the highest regular offer made.[37] Where, however, after the acceptance of a contract for the sale of municipal bonds a question arises as to the validity of the sale, the fact that a better bid is made for the bonds does not authorize the municipality to ignore its previous acceptance of the buyer's proposal, neither bid being made in response to an advertisement for bids.[38] One who, pursuant to an advertisement of sale, makes a bid for municipal bonds of a certain kind cannot be required to take part of the amount in other bonds, although equally valuable.[39] But one who has contracted to purchase certain municipal bonds to be issued from time to time, the proceeds to be issued for drainage and sewerage, cannot refuse to accept the second issue of such bonds on the ground that the proceeds of the first have been used for street improvements, such use being within the general scope of the legislative act authorizing their issue.[40] A buyer of municipal bonds from the city is not liable in damages for refusing to accept them when their marketable value is destroyed or impaired by questions of legality arising from facts shown by, or omissions in, the city's own records; and it is immaterial that after his refusal, and after the bonds have been sold by the city to other parties, the state supreme court adjudges the bonds to be valid, as the purchaser then has no opportunity to accept them with the benefit of such adjudication.[41] A sale of its bonds by a municipality to the members of its council is void, irrespective of the principles of equity as applied to persons acting in a fiduciary capacity, and independent of the fact that it is a part of a scheme to pervert the property of the municipality from its legitimate municipal purposes to private ends, on the ground that no man can contract with himself.[42] A municipality authorized to issue bonds during the Civil war could receive payment for them in Confederate money.[43]

b. Discount and Commission. When expressly authorized to do so by statute,[44] or unless there is an express prohibition against such action,[45] a municipality may sell its bonds for less than their par value.[46] Where the rate of interest which bonds issued by a municipality may bear is fixed by statute, the municipality cannot sell its bonds below par when they bear on their face the statutory rate of interest, as this would result in raising the rate of interest above the statutory limit.[47] But where the rate of interest is not limited bonds are not invalid because

37. Coquard *v.* Joplin School Dist., 46 Mo. App. 6.

38. Diefenderfer *v.* State, 13 Wyo. 387, 80 Pac. 667.

39. Coffin *v.* Indianapolis, 59 Fed. 221.

40. Moses *v.* Key West, 15 Misc. (N. Y.) 15, 36 N. Y. Suppl. 979 [*affirmed* in 157 N. Y. 689, 51 N. E. 1092].

41. Great Falls *v.* Theis, 79 Fed. 943.

42. Sherlock *v.* Winnetka, 59 Ill. 389, 68 Ill. 530.

43. Lynchburg *v.* Slaughter, 75 Va. 57.

44. Myer *v.* Muscatine, 1 Wall. (U. S.) 384, 17 L. ed. 564.

45. Starin *v.* Genoa, 23 N. Y. 439; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

Accrued interest.— Interest which had accrued on municipal bonds at the time of their sale is as much a part of the amount secured thereby as the principal, and an agreement to sell such bonds for a sum representing their par value exclusive of interest is an agreement to sell the bonds at less than par. Ft. Edward *v.* Fish, 86 Hun (N. Y.) 548, 33 N. Y. Suppl. 784 [*affirmed* in 156 N. Y. 363, 50 N. E. 973]. Purchasers of municipal bonds with notice that they cannot be sold "for less than par and accrued interest" are liable for the interest accruing up to the time of the delivery of the bonds to them. Edward C. Jones Co. *v.* Mt. Vernon Bd. of Education, 30 N. Y. App. Div. 429, 51 N. Y. Suppl. 950.

Exchange of bonds for railroad stock.— Where a municipality agrees to give a certain amount to aid in the construction of a railroad, and such amount is expended in the construction of the road, and the municipality pays its subscription in its bonds, of the face value of the amount of its subscription, it does not violate a provision of a statute permitting it to issue bonds in aid of railroad construction — that no bond shall be sold for less than its par value — although in return it is given stock in the road of no marketable value. Atlantic Trust Co. *v.* Darlington, 63 Fed. 76. But *compare* Horton *v.* Thompson, 71 N. Y. 513; Starin *v.* Genoa, 23 N. Y. 439.

46. Lynchburg *v.* Slaughter, 75 Va. 57.

47. Atchison *v.* Butcher, 3 Kan. 104. *Compare* Sherlock *v.* Winnetka, 68 Ill. 530.

sold below par, if the discount added to the interest expressed does not make the rate usurious.[48] A statute which authorizes the issue of municipal bonds which "shall be sold at no less than par" and provides that "the councils may allow a reasonable compensation for the sale or negotiation of the said bonds" does not warrant the allowance of a commission to the purchaser of the bonds at par, as such an arrangement is virtually a sale at less than par. The intent of the statute is that compensation shall be paid to an agent of the municipality for his services in effecting a sale of such bonds at or above par, but not to one who purchases the bonds direct from the city.[49]

c. **Proceeds of Sale.** All the proceeds of a sale of bonds issued for a particular purpose,[50] premium included,[51] belong to the fund to which they were dedicated.

10. **Form and Contents of Bonds.** Where a special act authorizing the issuance of municipal bonds contains provisions prescribing the form and conditions of such bonds, it supersedes the general statutory provisions on that subject, and is alone to be looked to in determining the formal sufficiency of bonds issued thereunder.[52] A mistake in a date,[53] or of a single word in the title of the statute,[54] or a misnomer of a municipality,[55] will not invalidate municipal bonds. Where the power to issue municipal bonds has been vested in a city by appropriate legislation, a recital on the face of the bonds of a statute which does not grant the authority is not fatal to the securities or material to the issue of their validity,[56] where it is not claimed that any condition precedent to the issuance required by the statute under which they were in fact issued was omitted.[57] It is the right and duty of municipal officers to refer in issuing bonds to the authority under which they are acting.[58] And where municipal bonds do not contain recitals asserting them to be issued conformably to law, a purchaser for value cannot recover.[59] The fact that a statutory requirement that bonds must state on their face the class of indebtedness to which they belong[60] is not complied with is not a legal defense to an action on such bonds when they represent a valid indebtedness.[61] A statutory provision that all bonds issued by municipal corporations shall express on their face the purpose for which they were issued, and under what ordinance,[62] does not require that notes given by a municipal corporation for money borrowed by it shall state the purpose for which such money is to be used.[63] The conditions on which municipal bonds are authorized to be issued need not be expressed in such bonds.[64] Whether railroad aid bonds should be made payable to bearer and not to the railroad company,[65] or to the company, its assigns, or bearer,[66] depends

48. Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960.

49. Whelen's Appeal, 108 Pa. St. 162, 1 Atl. 88.

50. State *v.* Griffin, 4 Ohio Cir. Ct. 156, 2 Ohio Cir. Dec. 474; State *v.* Columbia, 12 S. C. 370.

51. People *v.* Dakin, 43 Hun (N. Y.) 382.

52. D'Esterre *v.* New York, 104 Fed. 605, 44 C. C. A. 75.

53. State *v.* Madison, 7 Wis. 688.

54. Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573.

55. Fosdick *v.* Perrysburg, 14 Ohio St. 472.

56. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; Starin *v.* Genoa, 23 N. Y. 439; Fernald *v.* Gilman, 123 Fed. 797 [*affirmed* in 141 Fed. 941]; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; D'Esterre *v.* New York, 104 Fed. 605, 44 C. C. A. 75.

57. D'Esterre *v.* New York, 104 Fed. 605, 44 C. C. A. 75.

58. New Orleans *v.* Louisiana, 179 U. S. 622, 21 S. Ct. 263, 45 L. ed. 347.

59. Bergen County *v.* Merchants' Exch. Nat. Bank, 12 Fed. 743, 21 Blatchf. 13.

60. Barnett *v.* Denison, 145 U. S. 135, 12 S. Ct. 819, 36 L. ed. 652; Cadillac *v.* Woonsocket Sav. Inst., 58 Fed. 935, 7 C. C. A. 574.

61. Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61.

62. Kuhn *v.* Wooster, 13 Ohio Cir. Ct. 270, 7 Ohio Cir. Dec. 456; Clapp *v.* Marice City, 111 Fed. 103, 49 C. C. A. 251; Kent *v.* Dana, 100 Fed. 56, 40 C. C. A. 281, all construing Ohio Rev. St. § 2703.

63. Ohio Farmers' Ins. Co. *v.* New Philadelphia, 9 Ohio Dec. (Reprint) 793, 17 Cinc. L. Bul. 250.

64. State *v.* Columbia, 12 S. C. 370; Mercy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813].

65. Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291; Arents *v.* Com., 18 Gratt. (Va.) 750.

66. Maddox *v.* Graham, 2 Metc. (Ky.) 56.

upon the provisions of the statute authorizing their issue. Instruments which are notes in form and which recite that they are notes will not be treated as bonds.[67] Bonds may be antedated when it is so provided by the ordinance authorizing their issue.[68] Printed bonds duly executed and substituted for typewritten bonds are valid, if the typewritten bonds were.[69] Although the officers of a municipality have been negligent in signing and issuing bonds without such an examination as would have disclosed an error in their provisions, yet as against one who, when he purchased the bonds, had full knowledge of the error and of the claim of the municipality with regard to it and is seeking to take an unjust advantage of the error, the municipality is entitled to have the error corrected.[70]

11. Execution and Issuance of Bonds — a. Execution. Municipal bonds should be executed in the manner and by the officers prescribed in the statute authorizing their issue.[71] The fact that such bonds are not under seal does not necessarily invalidate them.[72] Municipal bonds are not invalidated because after their issue

67. Tyler *v.* Jester, 97 Tex. 344, 78 S. W. 1058 [*affirming* (Civ. App. 1903) 74 S. W. 359].

68. Moller *v.* Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116. See also Flagg *v.* Palmyra, 33 Mo. 440.

69. Oswego City Sav. Bank *v.* Union Free School Dist. No. 2 Bd. of Education, 70 N. Y. App. Div. 538, 75 N. Y. Suppl. 417 [*affirmed* in 174 N. Y. 515, 66 N. E. 1113].

70. Essex *v.* Day, 52 Conn. 483, 1 Atl. 620.

71. Wiley *v.* Minneapolis Bd. of Education, 11 Minn. 371; Neely *v.* Yorkville, 10 S. C. 141; Bissell *v.* Spring Valley Tp., 110 U. S. 162, 3 S. Ct. 555, 28 L. ed. 105; Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131 (holding that a statement in bonds that the commissioners have caused one of their number to sign the coupons is equivalent to a signing of the coupons by all of them); Montgomery *v.* St. Mary's Tp., 43 Fed. 362 (holding that bonds were not invalidated by the fact that the name of a township trustee was signed for him by a third person, in his presence and at his request, the bonds being subsequently duly delivered and certified, and the interest paid thereon by the township for a number of years); Aroma *v.* State Auditor, 15 Fed. 843; Currie *v.* Lewiston, 15 Fed. 377, 21 Blatchf. 236; Burleigh *v.* Rochester, 5 Fed. 667. *Compare* Statesville Bank *v.* Statesville, 84 N. C. 169, holding that where a town was authorized, subject to the vote of the qualified voters, to issue certain bonds which were to be signed by the town magistrate, treasurer, and commissioners, and where after a vote approving the same the bonds were issued, signed only by the town magistrate and treasurer, the omission of the commissioners to sign the bonds was not fatal to a recovery upon them, the act being merely directory.

Officer whose term has expired.— Under a statute authorizing a city to issue bonds, and providing that the bonds shall be signed by the mayor of such city, the city council has no power after the term of the mayor has expired to authorize him to sign bonds as of a date during his term of office. Coler *v.* Cleburne, 131 U. S. 162, 9 S. Ct. 720, 33 L. ed. 146.

Subsequently elected official.—A statute which requires city bonds to be signed by the mayor of the city is sufficiently complied with by the signing of the bonds by the person occupying the office at the date of their negotiation and delivery, although he was elected after the day of their date. Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014.

Persons not officers at time of issue.— Bonds which upon their face purport to have been issued in conformity with an act specified, but which in fact were not issued until after the repeal of said act, being antedated, so as to appear to have been issued prior to such repeal, and which were signed by persons as president and clerk who were not such officials at the date on which the bonds purport to have been issued, are void in the hands of *bona fide* holders. Lehman *v.* San Diego, 83 Fed. 669, 27 C. C. A. 668.

Execution by majority of officers sufficient see Hill *v.* Peekskill, 46 Hun (N. Y.) 180; North Bennington First Nat. Bank *v.* Arlington, 9 Fed. Cas. No. 4,806, 16 Blatchf. 57.

Signature lithographed.—The fact that railroad aid bonds have the signature of the clerk of the council lithographed thereon does not render them invalid. Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291.

Validity of bonds signed in blank see Niantic Sav. Bank *v.* Douglas, 5 Ill. App. 579.

Certificates.— It is sometimes required that a certificate shall be indorsed upon or annexed to bonds stating that they are issued pursuant to or in accordance with law. See State *v.* Babcock, 19 Nebr. 230, 27 N. W. 98; Lackawanna Iron, etc., Co. *v.* Little Wolf, 38 Wis. 152; Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005.

72. People *v.* Mead, 24 N. Y. 114; Solon *v.* Williamsburgh Sav. Bank, 35 Hun (N. Y.) 1; Gould *v.* Venice, 29 Barb. (N. Y.) 442; Thornberg *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054; Draper *v.* Springport, 104 U. S. 501, 26 L. ed. 812; San Antonio *v.* Mehaffy, 96 U. S. 312, 24 L. ed. 816. See, however, San Antonio *v.* Gould, 34 Tex. 49; Avery *v.* Springport, 2 Fed. Cas. No. 676, 14 Blatchf. 272.

a stranger affixes to them wafer seals opposite the names of the officers who signed them but neglected to affix their seals as required by law.[73] Where a city having no such seal as is prescribed by statute issues bonds sealed with the seal of the city clerk, recitals in the bonds to the effect that the seal attached is the corporate seal estops the corporation to deny the validity of the seal.[74] If bonds to which coupons are annexed are properly signed and sealed by the municipal officers it is no defense to an action on the coupons that they are signed by only one of such officers.[75] The fact that a municipal corporation, although properly a city, issued bonds under the name of a village, does not render the bonds invalid as against a *bona fide* purchaser, where the corporation has been previously recognized by the legislature as a village and has acted as such.[76]

b. Issue and Delivery — (I) *In General.* "Issuance" properly signifies the ultimate act whereby possession and control of executed bonds passes from the municipality to the donee or purchaser,[77] and so bonds, although executed and placed in the hands of a public officer, do not become operative if not delivered by him.[78] The delivery of bonds by an officer authorized to sign but not to deliver them confers upon the holder no right to enforce their payment.[79] But in the signing and delivery to a purchaser of municipal bonds, the acts of officers *de facto* are, as to third persons, equally as binding on a municipality as though they had been officers *de jure*.[80] A statute providing that municipal officers shall issue bonds within a certain number of days after an election authorizing such issue does not imply that they may not issue them after the time specified.[81] And the fact that municipal bonds were not issued till nearly two years after the passage of an ordinance making provision for their payment does not invalidate them.[82] Where a subscription to a railroad has been authorized by the assent of the number of taxable residents appearing upon the last assessment roll required by statute, bonds issued for such subscription are not invalid because not issued until after the assessment roll for the next year is by law required to be completed.[83]

(II) *Fulfilment of Conditions.* Where the issuance of municipal bonds is made to depend upon the performance or fulfilment of certain conditions precedent,[84] such, for example, as the construction of a railroad[85] to or through certain

73. Armfield *v.* Solon, 19 N. Y. Suppl. 44.

74. Schmidt *v.* Defiance, 117 Fed. 702 [*affirmed* in 123 Fed. 1, 59 C. C. A. 159].

75. Thayer *v.* Montgomery County, 23 Fed. Cas. No. 13,870, 3 Dill. 389. See also Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291.

76. Cornell University *v.* Maumee, 68 Fed. 418.

77. Chicago, etc., R. Co. *v.* Dundy County, 3 Nebr. (Unoff.) 391, 91 N. W. 554; Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685 [*affirming* 44 Hun 611], holding that, as bonds are not issued until actually sold, their validity is determinable by the law in force at the time of the sale.

Issuing bonds means delivering them and does not embrace the preliminary acts of signing and dating. Austin *v.* Valle, (Tex. Civ. App. 1902) 71 S. W. 414; Perkins County *v.* Graff, 114 Fed. 441, 52 C. C. A. 243.

Right to destroy bonds not negotiated and issue others see Radford *v.* Heth, 100 Va. 16, 40 S. E. 99.

78. Young *v.* Clarendon Tp., 132 U. S. 340, 10 S. Ct. 107, 33 L. ed. 356.

79. Portsmouth Sav. Bank *v.* Ashley, 91 Mich. 670, 52 N. W. 74, 30 Am. St. Rep. 511.

80. Waite *v.* Santa Cruz, 89 Fed. 619.

De facto officers see *supra*, VII, A, 7.

81. Chickaming Tp. *v.* Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. ed. 307.

82. Moller *v.* Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116.

83. Scipio *v.* Wright, 101 U. S. 665, 25 L. ed. 1037.

84. Echols *v.* Bristol, 90 Va. 165, 17 S. E. 943, holding that where a city was authorized to issue its bonds in aid of a railroad, provided the railroad company should subscribe a certain amount to the stock of a blast furnace company, a mere transfer to the railroad company of stock in the furnace company, on which the railroad company did not even pay the assessments, was not a compliance with the condition precedent to the issuance of the bonds by the city.

85. Eagle *v.* Kohn, 84 Ill. 292; State *v.* Lake City, 25 Minn. 404; Warsop *v.* Hastings, 22 Minn. 437; Wayne *v.* Sherwood, 14 Hun (N. Y.) 423 [*affirmed* in 76 N. Y. 599]; People *v.* Hitchcock, 2 Thomps. & C. (N. Y.) 134.

Right to impose condition.— Where a statute authorizes a town to determine by vote whether it will subscribe to a railway company, and requires the town supervisor to make a subscription if it be so voted, but leaves it optional with the town whether it

places,[86] municipal officers appointed to issue such bonds cannot do so until the conditions are fully complied with.[87] But if such bonds are issued the presumption is that the conditions were complied with and the bonds are *prima facie* valid.[88] And it would seem that when municipal railway aid bonds are delivered to a third person to be delivered to the company, on performance of certain conditions, the municipality should bear the loss from any premature or irregular delivery thereof by him.[89] The delivery of bonds by a trustee with whom they have been placed in escrow for delivery upon the construction of a railroad is not conclusive as to the construction of such road.[90] Where authority to issue municipal bonds on the performance of certain conditions is conferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not.[91]

12. Validity of Bonds[92] — a. In General. In determining the validity of municipal bonds, the questions which most frequently arise are whether the

will subscribe at all, in determining the question of subscription the town may impose any conditions it thinks proper and the supervisor has no power in making the subscription to disregard the conditions. People *v.* Dutcher, 56 Ill. 144.

Waiver of condition as to time of construction see Randolph County *v.* Post, 93 U. S. 502, 23 L. ed. 957.

86. State *v.* Hastings, 24 Minn. 78; Taylor *v.* Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Mellen *v.* Lansing, 11 Fed. 820, 19 Blatchf. 512.

Location and designation of route see People *v.* Morgan, 55 N. Y. 587; Purdy *v.* Lansing, 128 U. S. 557, 9 S. Ct. 172, 32 L. ed. 531; Thomas *v.* Lansing, 14 Fed. 618, 21 Blatchf. 119; Mellen *v.* Lansing, 11 Fed. 829, 20 Blatchf. 278.

Failure to complete a railroad within a certain time is a ground for cancellation of bonds issued in aid of such railroad, where the petition presented by the railroad asking for a subscription and the issuance of bonds to pay the same agreed to return such bonds for cancellation if the road should not be completed to a certain point within a certain time, and the action of the council in extending the time of completion of the road is of no effect. Clark *v.* Rosedale, 70 Miss. 542, 12 So. 600.

Bond for completion.—A vote, at a town meeting called to vote aid to a railroad, that before the bonds of the town shall be issued a bond for the completion of the extension of the road shall be given "in all respects satisfactory, and accepted by, the selectmen" gives the latter discretionary power not only as to the obligors therein, but also as to the form and substance thereof. Canton *v.* Smith, 65 Me. 203.

87. Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491 [*affirming* 7 Hun 499].

88. Belo *v.* Forsythe County Com'rs, 76 N. C. 489. See also Com. *v.* Pittsburgh, 43 Pa. St. 391, holding that where a subscription for the stock of a railroad company is authorized by ordinance to be made on certain conditions precedent, the subsequent issue of bonds in payment of the subscription proves the conditions to be either complied with or waived by the city.

89. Mercy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813].

90. Mercer County *v.* Provident Life, etc., Co., 72 Fed. 623, 19 C. C. A. 44.

91. Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

92. In Georgia "the legislature has declared the sound policy of determining, by judicial inquiry in advance of the sale, the validity of the bonds about to be placed on the market. The machinery employed is a proceeding in the name of the State against the municipality, county, or political division intending to issue bonds, wherein is alledged a compliance with the constitutional requirements relative to incurring bonded indebtedness. The judgment of the superior court is against the municipality, county, or political division, confirming the issuance of the bonds as in compliance with the statutes and the constitution. As an additional safeguard against possible carelessness or collusion the clerk is required to publish, in a gazette having general circulation in the territory affected, notice of the time of hearing the application to validate the bonds. A substantial compliance with this section of the act is all that is required. No judgment *in personam* is sought against the individual citizen, but he is permitted and invited to investigate the proceeding and to resist the legality of the proposed bond issue." Rhodes *v.* Louisville, 121 Ga. 551, 553, 49 S. E. 681; Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803, both construing Acts (1897), p. 82. Section 6 of this act, providing for the validation of municipal bonds and for a published notice to the citizens of the municipality, is designed to give information to the citizens of the municipality of the pending proceeding, and a substantial compliance with the section as to notice is all that is required. And where the validating proceeding was served on a municipality described in the caption as "the town of Louisville, Jefferson County," and there is no municipality in such county having such corporate name, but there is a municipality with the corporate name "City of Louisville," such notice is sufficient to notify the citizens of the city of the proceedings to validate its bonds. Rhodes *v.* Louisville, *supra*. The mis-

municipality was authorized to issue the bonds,[93] for the purpose under consideration;[94] whether the debt limit has been exceeded;[95] whether the preliminary steps required by law have been taken;[96] whether the officers or agents issuing them have pursued their authority;[97] whether proper provision has been made for the payment of the bonds;[98] whether the bonds are in the proper form;[99] whether they have been duly executed and delivered;[1] and whether they have been sold or disposed of in accordance with law.[2] Bonds issued by a municipality having no power to issue bonds are not voidable, but void.[3] And where municipal bonds carry upon their face unmistakable evidence that the forms of law under which they purport to have been issued have not been complied with, they are likewise void.[4] Where bonds are issued by a city for two considerations, as to one of which it has power to issue bonds, but as to the other of which it has none, such bonds are wholly void.[5] And where a number of bonds purporting to be refunding bonds are issued as one series, but part of them are not in fact refunding bonds but are illegal, their illegality attaches to the whole issue.[6] Bonds legally issued, but illegally made negotiable, are not void but are merely not negotiable.[7] It is no defense to a suit on bonds issued by a municipality in settlement by compromise of claims against it that such claims were barred by the statute of limitations when the bonds were issued.[8] Bonds issued by a city to obtain the money for public improvements are not void merely because the statutory provision for levying the assessment to pay such bonds is illegal,[9] or because the formalities required in making such assessment have not been complied with.[10] The dissolution of a municipal corporation and its reincorporation with less territory does not invalidate bonds issued before its dissolution.[11] The validity of bonds cannot be tried in a collateral proceeding.[12]

b. Who May Challenge Validity. The validity of municipal bonds may not

nomer of the municipality in a petition to validate bonds under this act does not vitiate the judgment of confirmation, where the officers of the city acknowledged service of the petition and answered the same under oath in its corporate name, and the judgment sets forth the proper corporate name. Rhodes *v.* Louisville, *supra*. A judgment validating bonds issued by a town determines that the town has a right to incur the debt and has complied with the conditions authorizing it to issue bonds. Woodall *v.* Adel, 122 Ga. 301, 50 S. E. 102. Where, in an application for the validation of an issue of bonds, a citizen is made a party to the proceeding, and interposes objections on facts which do not appear in the pleading, he must prove the truth of the facts thus set up, and, unless this is done, the objection should be overruled. Epping *v.* Columbus, *supra*. That the authorities of a municipal corporation have contracted to sell those bonds which it is seeking to have validated at a sum much less than they are really worth is no reason for refusing to enter judgment validating the issue. Epping *v.* Columbus, *supra*.

93. See *supra*, XV, C, 1.
94. See *supra*, XV, C, 2.
95. See *supra*, XV, C, 3.
96. See *supra*, XV, C, 4, 5.
97. See *supra*, XV, C, 8.
98. See *supra*, XV, C, 7.
99. See *supra*, XV, C, 10.
1. See *supra*, XV, C, 11.
2. See *supra*, XV, C, 9.
3. Burr *v.* Carbondale, 76 Ill. 455; Williamson *v.* Keokuk, 44 Iowa 88; Weith *v.* Wilmington, 68 N. C. 24 (holding that bonds of a municipal corporation issued in violation of a constitutional or statutory provision are void); McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154 (holding that want of legislative authority in a town to issue bonds is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them).
4. McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129. See also Gilson *v.* Dayton, 123 U. S. 59, 8 S. Ct. 66, 31 L. ed. 74; Crow *v.* Oxford Tp., 119 U. S. 215, 7 S. Ct. 180, 30 L. ed. 388.
5. Gause *v.* Clarksville, 1 Fed. 353, 1 McCrary 78.
6. Coffin *v.* Indianapolis, 59 Fed. 221.
7. Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786.
8. Maurin *v.* Donaldsonville, 33 La. Ann. 671.
9. Horn *v.* New Lots, 83 N. Y. 100, 38 Am. Rep. 402; Burlington Sav. Bank *v.* Clinton, 106 Fed. 269.
10. Gable *v.* Altoona, 200 Pa. St. 15, 49 Atl. 367; Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61; Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28.
11. Uvalde *v.* Spier, 91 Fed. 594, 33 C. C. A. 501.
12. Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786. See also Oneida *v.* Madison County, 136 N. Y. 269, 32 N. E. 852.

be challenged by one not injured thereby,[13] nor by one for whose benefit they were issued when the municipality has never repudiated them or denied its obligation to pay them, principal and interest, and does not propose to repudiate them;[14] nor by a ministerial officer of the municipality charged only with the duty of paying the bonds;[15] nor by the holders of bonds duly authorized, who have, without objection, allowed a large amount of bonds to be issued in violation of their rights and to pass into the hands of *bona fide* holders.[16] Where corporate bonds recite their issue under a certain valid statute, and in pursuance of its provisions, and nothing upon their face indicates their invalidity, a defendant to a bill, seeking their sale in part satisfaction of certain liens, may, by cross bill, show that they are in reality void, and thus prevent the court from decreeing a sale, whereby they may pass for value to innocent purchasers.[17]

13. Estoppel, Ratification, and Cure — a. Estoppel to Dispute Validity. Where there is a total want of power to issue bonds, a municipality cannot be estopped from raising such a defense[18] by admissions,[19] by recitals in the bonds,[20] by the conduct of its officers as to the bonds,[21] by acts of acquiescence and approval on the part of the inhabitants of the municipality after knowledge of the facts,[22] by issuing securities negotiable in form,[23] nor even by receiving and enjoying the proceeds of such bonds.[24] But a municipal corporation which, by the regularity of the execution of its bonds, which is apparent upon their face, induces persons to buy them, is thereby estopped from denying their validity or effect on the ground that, in their execution, or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have complied, but which they negligently disregarded.[25] A municipality having received and retained stock which was issued in exchange for its bonds cannot raise the objection that the bonds and coupons were not made payable at the time directed by the statute.[26] One at whose instance municipal bonds have been issued is estopped to question their validity.[27] Abutting owners will not be heard to question the legality of municipal bonds issued to pay for street paving or other like improvements, where the bonds were issued before the assessment was made

13. Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

14. Sala *v.* New Orleans, 21 Fed. Cas. No. 12,246, 2 Woods 188.

15. Oxford First Nat. Bank *v.* Wheeler, 72 N. Y. 201; Ross *v.* Curtiss, 31 N. Y. 606 [*affirming* 30 Barb. 238].

16. Ranger *v.* New Orleans, 20 Fed. Cas. No. 11,564, 2 Woods 128.

17. Alessandro Irr. Dist. *v.* Cleveland Sav., etc., Co., 88 Fed. 928.

18. Colburn *v.* McDonald, 72 Nebr. 431, 100 N. W. 961; Graves *v.* Saline County, 161 U. S. 359, 16 S. Ct. 526, 40 L. ed. 732.

Denial of law authorizing issue.— A town cannot be estopped to deny the existence of a law under which its bonds purport to have been issued. South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154.

19. Graves *v.* Saline County, 161 U. S. 359, 16 S. Ct. 526, 40 L. ed. 732.

20. Uncas Nat. Bank *v.* Superior, 115 Wis. 340, 91 N. W. 1004.

Effect of recitals in bonds generally see *infra*, XV, C, 20.

21. Washington County *v.* David, 2 Nebr. (Unoff.) 649, 89 N. W. 737; Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586 [*affirming* 4 Hun 201]; Peck *v.* Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040; Oxford Bd. of Com'rs *v.* Richmond Union Bank, 96 Fed. 293, 37 C. C. A. 493; Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584. *Compare* Coolidge *v.* Connecticut Gen. Hospital Soc., (Kan. App. 1899) 58 Pac. 562.

22. Weismer *v.* Douglass, 64 N. Y. 91, 21 Am. Rep. 586 [*affirming* 4 Hun 201].

23. Graves *v.* Saline County, 161 U. S. 359, 16 S. Ct. 526, 40 L. ed. 732.

24. Thornburg *v.* School Dist. No. 3, 175 Mo. 12, 75 S. W. 81; State *v.* Anderson County, 8 Baxt. (Tenn.) 249; Graves *v.* Saline County, 161 U. S. 359, 16 S. Ct. 526, 40 L. ed. 732; Merrill *v.* Monticello, 138 U. S. 673, 11 S. Ct. 441, 34 L. ed. 1069; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238. *Compare* State *v.* Columbia, 12 S. C. 370.

25. Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101. See also Moran *v.* Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; Cronin *v.* Patrick County, 89 Fed. 79.

26. Munson *v.* Lyons, 17 Fed. Cas. No. 9,935, 12 Blatchf. 539 [*affirmed* in 99 U. S. 684, 25 L. ed. 451], bonds issued in aid of the construction of a railroad.

27. State *v.* Mastin, 103 Mo. 508, 15 S. W. 529.

and the abutting owners allowed the work to proceed to completion without objection.[28]

b. Ratification of Invalid Bonds — (I) *In General.* An issue of municipal bonds without authority of law cannot be ratified[29] without legislative sanction,[30] nor will any act of its officers or inhabitants estop the corporation from denying its authority.[31] Irregularities in the execution and issue of bonds may, however, be cured by ratification.[32] Where a town was a *de facto* corporation at the time it issued certain bonds, and after reincorporation of the town the succeeding *de jure* corporation assumed the payment thereof as authorized by statute, the bonds became valid obligations of the succeeding corporation.[33]

(II) *Levy of Taxes For Payment.* The levy of a tax to pay municipal bonds issued without authority[34] or in excess of the constitutional limit,[35] or to aid a purely private enterprise,[36] or fraudulently issued by officers in satisfaction of a judgment already paid,[37] does not estop a municipality from denying the validity of the bonds. And where municipal officers who issue illegal bonds make a tax levy for the purpose of paying interest thereon, and the voters and taxpayers of the municipality at the first opportunity repudiate the officers and the bonds and refuse to pay the interest to the bondholders or to levy further taxes to pay the same, they do not ratify the issue of the bonds.[38] Where, however, the power to issue bonds existed but has been irregularly exercised, the levy of a tax for their payment estops the municipality to deny their validity.[39]

(III) *Payment of Principal or Interest.* Where municipal bonds are void in their inception for want of power to issue them,[40] or because in excess of

28. Boehme *v.* Monroe, 106 Mich. 401, 64 N. W. 204.

29. Uncas Nat. Bank *v.* Superior, 115 Wis. 340, 91 N. W. 1004; Rochester *v.* Alfred Bank, 13 Wis. 432, 80 Am. Dec. 746; Clark *v.* Janesville, 13 Wis. 414; Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 S. Ct. 947, 30 L. ed. 911 [*affirming* 16 Fed. 745]; Sage *v.* Fargo Tp., 107 Fed. 383, 46 C. C. A. 361; Thomas *v.* Lansing, 14 Fed. 618, 21 Blatchf. 119.

Ratification of contracts generally see *supra*, IX, I.

30. Campbell *v.* Kenosha, 5 Wall. (U. S.) 194, 18 L. ed. 610 (holding that legislative recognition of the validity of municipal bonds may be made by implication); Lewis *v.* Shreveport, 15 Fed. Cas. No. 8,331, 3 Woods 205 [*affirmed* in 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728]; Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

31. Ryan *v.* Lynch, 68 Ill. 160; Kelley *v.* Milan, 127 U. S. 139, 8 S. Ct. 1101, 32 L. ed. 77; Scott *v.* Shreveport, 20 Fed. 714; Lewis *v.* Shreveport, 15 Fed. Cas. No. 8,331, 3 Woods 205 [*affirmed* in 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728].

32. Shoemaker *v.* Goshen Tp., 14 Ohio St. 569. See also Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; and *supra*, IX, I.

33. Bradford *v.* Westbrook, (Tex. Civ. App. 1905), 88 S. W. 382.

34. Lippincott *v.* Pana, 92 Ill. 24 [*affirming* 2 Ill. App. 466].

Bonds issued before charter effective.— Where a legislature has authorized a municipal bond issue, invalid because made before the charter of the municipality went into effect, a levy of a tax to pay such bonds is evidence of a ratification of them by the municipality. Knapp *v.* Grant, 27 Wis. 147. And where it appears that the proceeds of bonds issued before the charter of a municipality became effective went into the treasury of the municipality and were expended by it, and that after the charter was in force their validity was recognized by levying a tax for the payment of the interest, this ratifies the bonds and binds the municipality. Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

35. McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215.

36. McConnell *v.* Hamm, 16 Kan. 228.

37. Decorah First Nat. Bank *v.* Doon, 86 Iowa 330, 53 N. W. 301, 41 Am. St. Rep. 489.

38. Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276.

39. Eminence *v.* Grasser, 81 Ky. 52.

40. *Illinois.*—Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048.

Kentucky.— Green County *v.* Shortell, 116 Ky. 108, 75 S. W. 251, 25 Ky. L. Rep. 357.

Michigan.— Bogart *v.* Lamotte, 79 Mich. 294, 44 N. W. 612.

Nebraska.— Colburn *v.* McDonald, 72 Nebr. 431, 100 N. W. 961.

New York.— Mentz *v.* Cook, 108 N. Y. 504, 15 N. E. 541.

North Carolina.— Glenn *v.* Wray, 126 N. C. 730, 36 S. E. 167; Buncombe County *v.* Payne, 123 N. C. 432, 31 S. E. 711.

Ohio.— Sullivan *v.* Urbana, 3 Ohio Dec. (Reprint) 554, holding that a city is not estopped from defending against an interest coupon on a bond fraudulently issued by the city clerk without authority, because of having paid prior coupons.

South Carolina.— Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6.

the debt limit,[41] or because issued in aid of a private enterprise,[42] and not merely because of irregularities in their issuance, the payment of a part of the principal or the payment of interest thereon by the municipality, however long continued, does not amount to a ratification which estops the municipality from pleading their invalidity. But if there is authority to issue bonds a municipality may, by paying a part of the principal thereof or the interest thereon, become estopped to deny that they are binding obligations,[43] because of irregularities or defects in their issuance or in the proceedings preliminary thereto,[44] particularly where the bonds contain recitals that they were duly authorized and regularly issued,[45] and where the municipality receives and retains the proceeds of such bonds.[46] And the fact that a city has for a number of years promptly paid the interest on an issue of bonds raises a strong equity in favor of a holder who purchased during such time, and even if it does not create an estoppel against the city, in a strict sense, is entitled to be considered by the court, in connection with the other facts, where the city subsequently denies the validity of the bonds.[47] When a city is authorized by the legislature to ratify the illegal issue of its bonds, and to levy taxes to pay the interest on such bonds, the levy of taxes for such purpose and the application of the proceeds to the payment of the interest for a number of years constitutes a ratification of the bonds.[48] Where a municipality has issued bonds and has paid interest upon them for a number of years without questioning their validity, a court of equity will not at the municipality's instance cancel them in the hands of an innocent purchaser for value, even though they are actually invalid, but will leave the municipality to its remedy by defense at law.[49]

Tennessee.— Memphis *v.* Bethel, (1875) 17 S. W. 191; Barnard *v.* Hawkins County, 2 Tenn. Cas. 97.

United States.— Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154; Clarke *v.* Northampton, 120 Fed. 661, 57 C. C. A. 123; Oxford *v.* Union Bank, 96 Fed. 293, 37 C. C. A. 493; Brown *v.* Ingalls Tp., 81 Fed. 485; Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351; Leslie *v.* Urbana, 15 Fed. Cas. No. 8,276, 8 Biss. 435.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1950.

Liberal construction of authorizing statute. — While obligations issued by a municipal corporation cannot acquire validity through the operation of the doctrine of estoppel if the corporation was without statutory power to issue them in the first instance, yet, where the act from which the power is derived is susceptible of different constructions, and the right to issue bonds is doubtful, the fact that they have been recognized by the municipality and its citizens as valid for a long number of years, during which it has paid interest thereon without objection, will entitle the holders to a more liberal construction of the statute under which the power was exercised than would be given if their validity had been challenged before their issuance or soon thereafter. Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621. See also Portsmouth Sav. Bank *v.* Springfield, 4 Fed. 276.

41. Doon Dist. Tp. *v.* Cummins, 142 U. S. 366, 12 S. Ct. 220, 35 L. ed. 1044; Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026.

42. Eufaula *v.* McNabb, 67 Ala. 588, 42 Am. Rep. 118.

43. Savings Soc. *v.* New London, 29 Conn. 174; Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291; Moulton *v.* Evansville, 25 Fed. 382; Luling *v.* Racine, 15 Fed. Cas. No. 8,603, 1 Biss. 314.

44. Keithsburg *v.* Frick, 34 Ill. 405; Brown *v.* Milliken, 42 Kan. 769, 23 Pac. 167; Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573; Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359; Anderson County *v.* Beal, 113 U. S. 227, 5 S. Ct. 433, 28 L. ed. 966; Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Dudley *v.* Lake County, 80 Fed. 672, 26 C. C. A. 82.

45. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Heed *v.* Cowley County, 82 Fed. 716; Aroma *v.* State Auditor, 15 Fed. 843.

Effect of recitals in bonds see *infra*, XV, C, 20.

46. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

Receiving railroad stock.— Where a municipality has received and retained railroad stock in payment of which bonds were issued, and has paid the interest on such bonds for a number of years without objection, it is estopped by its own acts to question the validity of such bonds. Syracuse Third Nat. Bank *v.* Seneca Falls, 15 Fed. 783; Oswego First Nat. Bank *v.* Walcott, 7 Fed. 892, 19 Blatchf. 370.

47. Wetzell *v.* Paducah, 117 Fed. 647. See also Moulton *v.* Evansville, 25 Fed. 382.

48. Atchison *v.* Butcher, 3 Kan. 104. See also Columbus *v.* Dennison, 69 Fed. 58, 16 C. C. A. 125; Denison *v.* Columbus, 62 Fed. 775.

49. Cherry Creek *v.* Becker, 123 N. Y. 161,

c. Curative Statutes. The rule that a subsequent legislative ratification within constitutional limits is equivalent to a prior authorization applies to curative statutes relating to municipal bonds,[50] or an issue of scrip or other evidence of indebtedness,[51] providing no vested rights have intervened;[52] but the legislative intention to do so must clearly appear from the terms of the act.[53] Where a municipality has authority to issue bonds the legislature may cure any defects or irregularities in the exercise of such power,[54] or in the manner of disposing of the

25 N. E. 369 [*affirming* 2 N. Y. Suppl. 514]; Alvord *v.* Syracuse Sav. Bank, 98 N. Y. 599 [*affirming* 34 Hun 143]; Calhoun *v.* Delhi, etc., R. Co., 28 Hun (N. Y.) 379. See also Goshen Tp. *v.* Springfield, etc., R. Co., 12 Ohio St. 624, 80 Am. Dec. 386.

50. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212; McMillen *v.* Boyles, 6 Iowa 304; Rogers *v.* Smith, 5 Hun (N. Y.) 475; Utter *v.* Franklin, 172 U. S. 416, 19 S. Ct. 183, 43 L. ed. 498; Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786; Beloit *v.* Morgan, 7 Wall. (U. S.) 619, 19 L. ed. 205; and other cases cited in the notes following.

Curative acts generally see *supra*, VIII, D, 13; IX, I, 2.

51. McCutchen *v.* Freedom, 15 Minn. 217, holding further that where the act validates the action of the authorities in making the issue it applies to an obligation to pay interest as well as to the principal.

52. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

53. Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942.

The Kansas statute of 1874, providing for the levying and collecting of taxes to pay municipal bonds, was not intended as a curative act or to validate any bonds that would otherwise be void (January *v.* Johnson County, 13 Fed. Cas. No. 7,219, 3 Dill. 402); nor is the statute of 1872, providing for the registration of municipal bonds, a curative act, and it does not affect any valid defense which the municipality would otherwise have to bonds previously issued (January *v.* Johnson County, 13 Fed. Cas. No. 7,218, 3 Dill. 392 note).

A statute purporting only to cure defects in the mode of submitting to a vote the question of issuing bonds, and assuming that the authority to vote the bonds existed, does not validate any bonds which were voted without authority of law. Williamson *v.* Keokuk, 44 Iowa 88.

54. *Florida.*— Middleton *v.* St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227.

Georgia.— Black *v.* Cohen, 52 Ga. 621.

Illinois.— Butler *v.* Dubois, 29 Ill. 105.

Indiana.— Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

Iowa.— McMillen *v.* Boyles, 6 Iowa 304.

New York.— Rogers *v.* Stephens, 86 N. Y. 623 [*affirming* 21 Hun 44]; Williams *v.* Duanesburgh, 66 N. Y. 129; Duanesburgh *v.* Jenkins, 57 N. Y. 177 [*reversing* 46 Barb. 294]; People *v.* Clark, 53 Barb. 171.

North Carolina.— Alexander *v.* McDowell County Com'rs, 70 N. C. 208. And see Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

Virginia.— Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942.

Wisconsin.— Knapp *v.* Grant, 27 Wis. 147.

United States.— Rogers *v.* Keokuk, 154 U. S. 546, 14 S. Ct. 1162, 18 L. ed. 74; Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331; Beloit *v.* Morgan, 7 Wall. 619, 19 L. ed. 205; Springfield Safe-Deposit, etc., Co. *v.* Attica, 85 Fed. 387, 29 C. C. A. 214; Jarecki Mfg. Co. *v.* Toledo, 53 Fed. 329; Gray *v.* York, 10 Fed. Cas. No. 5,731, 15 Blatchf. 335; Portsmouth Sav. Bank *v.* Yellow Head, 19 Fed. Cas. No. 11,296, 3 Biss. 474.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1951.

The legislature may cure any defects or irregularities where the thing done or omitted, or the manner in which it was done, might have been dispensed with or made immaterial by a prior statute. Middleton *v.* St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227.

Bonds issued in excess of the amount authorized by statute may be validated by a curative act. Read *v.* Plattsmouth, 107 U. S. 568, 2 S. Ct. 208, 27 L. ed. 414.

A judicial determination that the proceedings were void because not within the authority originally granted in no way impairs the power of the legislature to cure the defective proceedings by declaring them to be valid. Rogers *v.* Smith, 5 Hun (N. Y.) 475. Where certain bonds of a municipality have been judicially declared to be invalid, an act of the legislature legalizing them is not objectionable as an attempt on the part of the legislature to exercise judicial power in violation of the constitutional prohibition, as respects an action involving the validity of such bonds commenced after the passage of the legalizing act. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212.

An act expressly relating only to bonds previously issued does not validate bonds issued subsequently to its passage. Concord *v.* Robinson, 121 U. S. 165, 7 S. Ct. 937, 30 L. ed. 885.

A constitutional prohibition against any "special act conferring corporate powers" does not prevent a statute validating defects and irregularities in corporate bonds, as the statute does not confer any corporate powers, but merely takes away from the municipality the power to interpose an unconscionable defense to a just claim. Read *v.* Plattsmouth, 107 U. S. 568, 2 S. Ct. 208, 27 L. ed. 414.

The South Carolina statute of 1888 providing for the payment of certain bonds issued in aid of railroads, which were declared invalid because of a constitutional defect in the act authorizing their issue, is not a vali-

bonds;[55] or where the preliminary proceedings were instituted without authority they may be validated and the issue authorized so as to render valid the bonds subsequently issued.[56] Even where there was no authority for the issue of bonds by a municipal corporation, the legislature may subsequently ratify and validate whatever it might constitutionally have authorized in the first instance,[57] although the bonds have been declared invalid;[58] and the legislature cannot subsequently repeal the validating act so as to deprive the obligee of his right to enforce the contract so recognized and made valid.[59] But the legislature cannot ratify what it has no constitutional right to authorize in the first instance,[60] and this rule applies where the constitutional inhibition did not exist at the time of the issue of the bonds but intervened prior to the curative act.[61] So the legislature cannot validate bonds which have been issued without the consent of the voters or taxpayers of the municipality and which it could not have authorized to be so issued;[62]

dating act but was passed by the legislature in the exercise of its powers of taxation and as such is constitutional. Coleman *v.* Broad River Tp., 50 S. C. 321, 27 S. E. 774; Bouknight *v.* Davis, 33 S. C. 410, 12 S. E. 96; State *v.* Neely, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672; State *v.* Harper, 30 S. C. 586, 9 S. E. 664; State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

55. Thompson *v.* Perrine, 103 U. S. 806, 26 L. ed. 612; Cooper *v.* Thompson, 6 Fed. Cas. No. 3,202, 13 Blatchf. 434.

56. Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475; Shurtleff *v.* Wiscasset, 74 Me. 130; Quincy *v.* Cooke, 107 U. S. 549, 2 S. Ct. 614, 27 L. ed. 549.

57. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212; Duke *v.* Williamsburg County, 21 S. C. 414; Knapp *v.* Grant, 27 Wis. 147; Utter *v.* Franklin, 172 U. S. 416, 19 S. Ct. 183, 43 L. ed. 498; Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786; Beloit *v.* Morgan, 7 Wall. (U. S.) 619, 19 L. ed. 205; Deyo *v.* Otoe County, 37 Fed. 246; Dows *v.* Elmwood, 34 Fed. 114.

Where bonds were issued as a donation to a railroad company where the statute only authorized a subscription to the capital stock of the company, they may be subsequently ratified by the legislature. Columbus *v.* Dennison, 69 Fed. 58, 16 C. C. A. 125 [*affirming* 62 Fed. 775].

Where bonds were issued under an invalid statute but were issued and disposed of in good faith and the municipality received the full benefit of the proceeds so that they constitute a moral obligation upon the municipality, the legislature may recognize the same and provide for the payment as valid obligations of the municipality. New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233.

A statute validating an ordinance under which bonds were issued and validating all bonds issued under and in accordance with the provisions of such ordinance does not validate bonds which were not issued in accordance with the provisions of the ordinance. Lehman *v.* San Diego, 73 Fed. 105.

58. Utter *v.* Franklin, 172 U. S. 416, 19 S. Ct. 183, 43 L. ed. 498.

59. Duke *v.* Williamsburg County, 21 S. C. 414.

60. *Mississippi.*— Sykes *v.* Columbus, 55 Miss. 115.

New York.— Horton *v.* Thompson, 71 N. Y. 513 [*reversing* 7 Hun 452]; Hardenbergh *v.* Van Keuren, 16 Hun 17 [*reversing* 4 Abb. N. Cas. 43].

South Carolina.— State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

Texas.— Mitchell County *v.* City Nat. Bank, 15 Tex. Civ. App. 172, 39 S. W. 628.

United States.— Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 S. Ct. 947, 30 L. ed. 911.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1951.

61. Sykes *v.* Columbus, 55 Miss. 115; Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 S. Ct. 947, 30 L. ed. 911.

62. Sykes *v.* Columbus, 55 Miss. 115; Horton *v.* Thompson, 71 N. Y. 513 [*reversing* 7 Hun 452]; Hardenbergh *v.* Van Keuren, 16 Hun (N. Y.) 17 [*reversing* 4 Abb. N. Cas. 43]; Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 S. Ct. 947, 30 L. ed. 911.

Validating elections for issuance of bonds. — The legislature may validate an election held to submit to the voters or taxpayers of the municipality the question of issuing bonds which was merely irregular (Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942; Springfield Safe-Deposit, etc., Co. *v.* Attica, 85 Fed. 387, 29 C. C. A. 214); as where there was an irregularity in the publication of the notice of the election (Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331); but while it may validate the election so as to authorize a municipality to issue the bonds the legislature cannot compel it to do so against its will (Gaddis *v.* Richland County, 92 Ill. 119; Williams *v.* Roberts, 88 Ill. 11); nor can the municipality be compelled by mandamus to do so (Cairo, etc., R. Co. *v.* Sparta, 77 Ill. 505); and the legislature cannot validate an election which was not merely irregular but absolutely void (Berkley *v.* Lexington Bd. of Education, 58 S. W. 506, 22 Ky. L. Rep. 638), or cure the entire omission of any election (Sykes *v.* Columbus, 55 Miss. 115), except where under the constitution it might have authorized the issue in the first instance without the necessity of submitting the question to the voters or taxpayers (Middleton *v.*

nor has it the power to validate an issue of municipal bonds which is in excess of the constitutional debt limit.[63]

14. Registration of Bonds. Where a statute expressly provides that bonds must be registered and certified as such before they shall obtain validity or be negotiated, a compliance with the statute is essential to the validity of the bonds;[64] but if it merely provides that they shall be registered and does not provide that they shall not be valid until registered, the statute will be construed as directory and a failure to register will not invalidate the bonds,[65] although all bonds issued as registered bonds, notwithstanding the registration is not a condition precedent to their validity, ought to be registered.[66] Where bonds have been duly certified as registered by the proper officer, the fact that he failed to make a record of such registration in his office will not destroy their validity.[67] In some cases it is provided by statute that bonds shall not be entitled to registration unless the question of creating the indebtedness was submitted to the voters of the municipality at an election,[68] or that when presented for registration any interest coupons shall be detached which will mature before the first tax levied to pay the same will become due and collectable,[69] or that after registration the auditor shall notify the authorities issuing the bonds of the fact of such registration.[70] The certificate of the municipal officer required by statute as to a compliance with the conditions entitling the bonds to registration need not be positive but may be sworn to upon the best of that officer's knowledge and belief.[71] Where the bonds issued were not signed by the proper officers as required by statute, the fact and certificate of registration does not estop the municipality from denying their validity.[72] Where bonds are presented for registration but the registration is delayed by injunction, they should, when actually registered, be registered as of the date when presented.[73] Negotiable bonds are not wholly deprived of their negotiable character by registration.[74] Payment or tender of the prescribed registration fee is necessary before mandamus will be granted to compel registration,[75] and where convertible coupon bonds contain a recital that they may be registered at the option of the holder, the proper remedy, in case of a refusal of the authorities to register them on demand, is a suit for specific performance of the contract and not mandamus or an action for damages.[76]

15. Rights of Payees or Purchasers — a. In General. Where municipal bonds have been issued under authority of law, and there is a law, at the time of their

St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227; Jonesboro *v.* Cairo, etc., R. Co., 110 U. S. 192, 4 S. Ct. 67, 28 L. ed. 116).

63. Mitchell County *v.* City Nat. Bank, 15 Tex. Civ. App. 172, 39 S. W. 628.

64. Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005.

65. North Bennington First Nat. Bank *v.* Arlington, 9 Fed. Cas. No. 4,806, 16 Blatchf. 57.

66. D'Esterre *v.* Brooklyn, 90 Fed. 586.

67. Rock Creek Tp. *v.* Strong, 96 U. S. 271, 24 L. ed. 815.

68. Flack *v.* Hughes, 67 Ill. 384, holding that where the statute provided that bonds should not be entitled to registration unless the question of incurring the indebtedness was first submitted to an election of the voters of the municipality "under the provisions of the laws of this State," and an election was held but without any legislative authority therefor, a subsequent statute legalizing the election, while it might validate the bonds, could not entitle them to registration under the former statute, since the latter statute could not alter the fact that when the election was held there was no law authorizing it.

Election on question of bond issue see *supra*, XV, C, 5.

69. Brinkworth *v.* Grable, 45 Nebr. 647, 63 N. W. 952.

70. Bissell *v.* Spring Valley Tp., 110 U. S. 162, 3 S. Ct. 555, 28 L. ed. 105, holding that where the statute requires such notice and provides that the bonds shall thereafter be considered registered bonds it necessarily means that they shall not be so considered until the happening of that event.

71. Decker *v.* Hughes, 68 Ill. 33.

72. Bissell *v.* Spring Valley Tp., 110 U. S. 162, 3 S. Ct. 555, 28 L. ed. 105. See also Coler *v.* Cleburne, 131 U. S. 162, 9 S. Ct. 720, 33 L. ed. 146.

73. Brinkworth *v.* Grable, 45 Nebr. 647, 63 N. W. 952.

74. D'Esterre *v.* Brooklyn, 90 Fed. 586.

75. People *v.* Parmerter, 158 N. Y. 385, 53 N. E. 40.

76. Benwell *v.* Newark, 55 N. J. Eq. 260, 36 Atl. 668.

issuance, directing a tax to be levied for their protection, the law for the tax becomes a part of the contract, and the holder of such bonds has a right to regard it as a part of his security; the measure of his right being the constitutional limit of the power which the legislature could grant to the municipality when the contract was made.[77] A purchaser of bonds to be paid out of a special tax is bound to take notice of the limitations on the power of taxation, the extent of the special taxing district, and the valuation of the property therein, and if he makes a mistake the loss must fall on him, rather than upon the property-owners in such special district.[78] So also where the taxing power of a municipality is limited, a creditor accepting a bond payable out of the yearly revenue of the city cannot insist on remedies beyond the limit;[79] but he is entitled to insist upon the full and proper exercise of the taxing power within the limitation.[80] Where a city issues improvement bonds stipulating that they shall be payable only out of the assessment levied on and collected by the city from property-owners, a creditor by acceptance of such bonds agrees that he will look primarily to the fund raised by assessment for payment;[81] but such agreement is subject to the condition that the city shall make lawful assessments, file lawful liens, and preserve and enforce them by lawful proceedings, and, if assessments are lost by the negligence of the city in failing to file and enforce liens, the city is liable to the bondholders for the amount of the loss.[82] It is incumbent upon a purchaser of municipal bonds to examine into whether the power to issue such bonds has been duly granted,[83] and if the bonds were issued without authority they are absolutely void in his hands.[84] So where jurisdictional defects in proceedings to bond a town in aid of a railroad are patent upon the record the bonds issued thereunder are void in the hands of the railroad company.[85] But where a city is authorized to borrow money for some purposes, notes issued by it for money borrowed for an unauthorized purpose are enforceable in the hands of the lender where he did not know for what purpose the money was to be used.[86] The ownership of municipal bonds necessarily includes the ownership of the right to interest secured by them and of the coupons attached, which are a part of the securities.[87]

b. Refunding Bonds. Where municipal corporations, already having the power to contract debts and levy and collect taxes for their payment, are authorized to fund such indebtedness and issue new bonds therefor, the same remedy will exist to enforce payment of these as of the old ones, if no provision is made in the law under which the funding is made as to the means by which collection may be had.[88] Refunding bonds authorized, issued, and accepted in composition or settlement of an existing and outstanding indebtedness are valid obligations, although the original evidences of debt, may not have been enforceable.[89]

77. Brodie *v.* McCabe, 33 Ark. 690.

78. Miller *v.* Hixson, 64 Ohio St. 39, 59 N. E. 749.

79. Beaulieu *v.* Pleasant Hill, 14 Fed. 222, 4 McCrary 554.

80. Beaulieu *v.* Pleasant Hill, 14 Fed. 222, 4 McCrary 554.

81. Scranton Dime Deposit, etc., Bank *v.* Scranton, 208 Pa. St. 383, 57 Atl. 770.

82. Scranton Dime Deposit, etc., Bank *v.* Scranton, 208 Pa. St. 383, 57 Atl. 770 [*following* O'Hara *v.* Scranton City, 205 Pa. St. 142, 54 Atl. 713; Gable *v.* Altoona, 200 Pa. St. 15, 49 Atl. 367].

83. Union Bank *v.* Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; East Oakland Tp. *v.* Skinner, 94 U. S. 255, 24 L. ed. 125.

84. Clark *v.* Hancock County, 27 Ill. 305; Union Bank *v.* Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Marsh *v.* Fulton, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

The payment of interest is no ratification, for there can be no ratification when there is want of power. Union Bank *v.* Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Doon Tp. *v.* Cummins, 142 U. S. 366, 12 S. Ct. 220, 35 L. ed. 1044; Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178; Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026; Lewis *v.* Shreveport, 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728.

85. Angel *v.* Hume, 17 Hun (N. Y.) 374.

86. Ohio Farmers' Ins. Co. *v.* New Philadelphia, 9 Ohio Dec. (Reprint) 793, 17 Cinc. L. Bul. 250.

87. Com. *v.* Pittsburgh, 34 Pa. St. 496.

88. People *v.* Lippincott, 81 Ill. 193.

89. Dugas *v.* Donaldsonville, 33 La. Ann. 668; Braud *v.* Donaldsonville, 28 La. Ann.

16. Negotiability and Transfer — a. In General. Municipal bonds were originally held to be not negotiable because they were sealed instruments;[90] but they subsequently came to be acknowledged by the courts as negotiable instruments,[91] and it is now well established that bonds issued by a municipal corporation under statutory authority are negotiable, with all the qualities and incidents of negotiability,[92] notwithstanding the fact that they are sealed instruments,[93] where they possess the essential requisites of negotiable instruments.[94] The weight of authority seems to be that municipal corporation bonds payable to bearer are negotiable paper,[95] and are deemed payable to the holder, who is not regarded as the assignee of the contract but as the holder through transfer by delivery,[96] and it is also well settled by authority that the omission to insert the name of a payee

558; Hills *v.* Peekskill Sav. Bank, 101 N. Y. 490, 5 N. E. 327; Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* (Civ. App. 1904) 82 S. W. 1066]; Little Rock *v.* Merchants Nat. Bank, 98 U. S. 308, 25 L. ed. 108 [*affirming* 17 Fed. Cas. No. 9,445, 5 Dill. 299]; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Chandler *v.* Attica, 18 Fed. 299, 21 Blatchf. 499. See also Keene Five-Cent Sav. Bank *v.* Lyon County, 97 Fed. 159 [*affirmed* in 100 Fed. 337, 40 C. C. A. 391].

In the hands of bona fide purchasers, refunding bonds issued in compliance with the statute authorizing them, and which recite a compliance with its provisions, are valid, although the original bonds were void and the funding transaction was a mere subterfuge to avoid that objection. Brown *v.* Ingalls Tp., 81 Fed. 485.

90. See Griffith *v.* Burden, 35 Iowa 138.

91. Griffith *v.* Burden, 35 Iowa 138.

92. *Alabama.*— Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57.

Arkansas.— Hancock *v.* Chicot County, 32 Ark. 575.

Colorado.— Cripple Creek *v.* Adams, 36 Colo. 320, 85 Pac. 184.

Connecticut.—Savings Soc. *v.* New London, 29 Conn. 174.

Iowa.— Griffith *v.* Burden, 35 Iowa 138.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56, 86, where it is said: "Although the bonds may not be commercial paper in the sense of the law merchant, yet they are negotiable."

Louisiana.— Smith *v.* New Orleans, 27 La. Ann. 286, 288, where it is said: "Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given."

Mississippi.— Vicksburg *v.* Lombard, 51 Miss. 111.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

New York.— Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640 [*affirming* 53 N. Y. App. Div. 635, 65 N. Y. Suppl. 757, and *following* Chase Nat. Bank *v.* Faurot, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605; Brainerd *v.* New York, etc., R. Co., 25 N. Y. 496; Rome Bank *v.* Rome, 19 N. Y. 20, 75 Am. Dec. 272]; Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Texas.— Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960.

Virginia.— Arents *v.* Com., 18 Gratt. 750.

Wisconsin.— Bushnell *v.* Beloit, 10 Wis. 195; Clark *v.* Janesville, 10 Wis. 136.

United States.— Independent School-Dist. *v.* Hall, 113 U. S. 135, 5 S. Ct. 371, 28 L. ed. 954; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. ed. 752; Moran *v.* Miami County, 2 Black 722, 17 L. ed. 342; Knox County *v.* Aspinwall, 21 How. 539, 16 L. ed. 208; D'Esterre *v.* Brooklyn, 90 Fed. 586.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1955; and Counties, 11 Cyc. 565 note 99.

93. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51; Weith *v.* Wilmington, 68 N. C. 24.

94. Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57.

Form of bonds importing negotiability see Savings Soc. *v.* New London, 29 Conn. 174; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. ed. 752.

Promissory notes of municipality.— Where certain instruments, not under seal, called "Town of Rochester Bonds," declared that the town had caused these presents to be signed by the chairman of the board of supervisors, and countersigned, as required, by the town-clerk thereof, and the form of the obligation was that the town of Rochester was justly indebted and promised to pay to the order of the Fox River Valley Railroad Company the sum of five hundred dollars, with interest as set forth in the coupons, these instruments were essentially promissory notes of the town of Rochester, and negotiable as such, like ordinary promissory notes under the law merchant. Burleigh *v.* Rochester, 5 Fed. 667.

95. Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57; Bartholomew County *v.* Bright, 18 Ind. 93; Weith *v.* Wilmington, 68 N. C. 24.

96. Farr *v.* Lyons, 13 Fed. 377, 21 Blatchf. 116. See also Pettit *v.* Hope, 2 Fed. 623, 18 Blatchf. 180 [*following* Cooper *v.* Thompson, 6 Fed. Cas. No. 3,202, 13 Blatchf. 434].

is not a feature, or a defect, which affects the negotiability of the bonds;[97] but such bonds are payable to bearer.[98] The registration of municipal bonds does not deprive them of their negotiable quality,[99] nor is the negotiability of municipal bonds affected by the fact that by the statute under which they were issued the municipality has the right, at its option, to pay them before they are due.[1] In order that municipal bonds may constitute commercial paper they must contain recitals that prerequisites or conditions precedent imposed by statute have been complied with.[2] Municipal bonds are not negotiable when they are payable upon a contingency,[3] or only out of a particular fund.[4] The coupons usually attached to municipal bonds may be negotiated after they have been separated from the bond, and the holder of a coupon may recover upon it without producing the bond to which it was attached and without being interested in such bond.[5]

b. Power to Issue Negotiable Bonds. Unless authorized by their charters or by statute, municipal corporations have no power to make and place in the market commercial paper,[6] and persons dealing in municipal bonds must see that the power to issue them exists.[7] Where a municipal corporation has the power to bind itself by written obligation, without the power to make the same negotiable, and it executes its written obligation, making the same negotiable in form, the instrument will not in fact be negotiable,[8] but it will not be void;[9] and a recovery

97. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 170 N. Y. 58, 62 N. E. 1079, 86 Am. St. Rep. 640 [*affirming* 53 N. Y. App. Div. 635, 65 N. Y. Suppl. 757].

A **municipal bond payable "to — or —" is negotiable.**— Gamble *v.* Allison Independent School Dist., 132 Fed. 514 [*reversed* on other grounds in 146 Fed. 113, 76 C. C. A. 539].

98. Lyon County *v.* Keene, etc., Bank, 100 Fed. 337, 40 C. C. A. 391 [*affirming* 97 Fed. 159].

99. D'Esterre *v.* Brooklyn, 90 Fed. 586.

A **statutory requirement** that a certain issue of municipal bonds should be registered in the city clerk's office, in a book kept for that purpose, does not of itself make the bonds non-negotiable. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

1. Ackley Independent School Dist. *v.* Hall, 113 U. S. 135, 5 S. Ct. 371, 38 L. ed. 954.

2. Sullivan *v.* Urbana, 3 Ohio Dec. (Reprint) 554 (holding that a bond purporting to be a bond of the city, which fails to recite any ordinance authorizing its issue, is not commercial paper); Buchanan *v.* Litchfield, 102 U. S. 278, 26 L. ed. 138. See also Moultrie County *v.* Rockingham Sav. Bank, 92 U. S. 631, 23 L. ed. 631; Knox *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208.

3. Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57, holding that municipal bonds issued in aid of a railroad, which stipulate that they are not payable until said railroad is in running order and the cars run to a certain place, are not negotiable. See also Merriweather *v.* Saline County, 17 Fed. Cas. No. 9,485, 5 Dill. 265, holding that a township bond containing a statement that "it is to be converted into a county bond" whenever a certain injunction shall be finally dissolved, and county bonds issued under the order enjoined, not being a promise to pay money absolutely, but a stipulation for bonds thereafter to be issued, is not negotiable in such a sense as to preclude the maker from defenses, although it may be held by the plaintiff for value before due and without actual notice of the maker's defenses.

4. Northern Trust Co. *v.* Wilmette, 220 Ill. 417, 77 N. E. 169 [*following* Morrison *v.* Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225; La Crosse Nat. Bank *v.* Petterson, 200 Ill. 215, 65 N. E. 687 (*affirming* 102 Ill. App. 501)], holding that municipal improvement bonds which are payable only out of instalments of assessment levied to pay for the improvement are not negotiable, and the holders thereof occupy the same position as the contractor to whom they are issued, and cannot recover on the bonds, where he could not, by reason of his fraud or wrong in failing to perform the work according to the ordinance authorizing the same. See also Cleveland R. Co. *v.* Jones Co., 20 Ind. App. 87, 50 N. E. 319.

5. Arents *v.* Com., 18 Gratt. (Va.) 750 [*following* Beaver County *v.* Armstrong, 44 Pa. St. 63; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Knox County Com'rs *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208].

6. Hewitt *v.* Normal School Dist. Bd. of Education, 94 Ill. 528 [*approved* in Northern Trust Co. *v.* Wilmette, 220 Ill. 417, 77 N. E. 169]; Carter *v.* Sinton, 120 U. S. 517, 7 S. Ct. 650, 30 L. ed. 701 [*affirming* 23 Fed. 535, and *following* Claiborne *v.* Brooks, 111 U. S. 400, 4 S. Ct. 489, 28 L. ed. 470]; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164 [*approved* in Swackhamer *v.* Hackettstown, 37 N. J. L. 191]; Merrill *v.* Monticello, 14 Fed. 628.

7. Hewitt *v.* Normal School Dist. Bd. of Education, 94 Ill. 528 [*approved* in Northern Trust Co. *v.* Wilmette, 220 Ill. 417, 77 N. E. 169]. And see *infra*, XV, C, 19, d.

8. Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786; Merrill *v.* Monticello, 14 Fed. 628.

9. Sioux City *v.* Weare, 59 Iowa 95, 12 N. W. 786.

may be had upon such a bond as an evidence of debt, although even in the hands of a third person it is subject to equitable defenses.[10] An express legislative grant of power is not essential to confer the authority to give municipal bonds a negotiable and commercial form and character, but such power may be inferred from the intent of the act, indicated by its purpose and scope;[11] and it has been frequently held that a mere grant of power to issue bonds implies that bonds having the commercial quality of negotiability may be issued.[12]

c. Mode of Transfer. Municipal bonds which are on their face payable to bearer or to a person therein named or bearer are transferable by delivery,[13] without indorsement[14] or assignment,[15] and the holder may sue upon them in his own name.[16] Where the payee of municipal certificates of indebtedness has delivered

10. Pacific Imp. Co. *v.* Clarksdale, 74 Fed. 528, 20 C. C. A. 635.

11. Vicksburg *v.* Lombard, 51 Miss. 111, 125 (where it is said: "Where, therefore, municipal bonds, bearing annual or semi-annual interest, with long maturities, are authorized to be issued for these, or such purposes, it must be presumed that the legislature intended that they shall conform to the known usage; that they shall have that form, and those incidents necessary to their availability. It is necessary that they should be negotiable, readily so, that each purchaser and holder would acquire a legal title, divested of all equities that might exist between the original parties. If they have not the characteristics of negotiable instruments under the law merchant, they would not be readily saleable, and would not accomplish the object designed"); Carter *v.* Sinton, 120 U. S. 517, 7 S. Ct. 650, 30 L. ed. 701 [*affirming* 23 Fed. 535].

12. *Oregon.*— Klamath Falls *v.* Sachs, 35 Oreg. 325, 57 Pac. 329, 76 Am. St. Rep. 501, holding that a town charter providing for the issuance of warrants in liquidation of its debts, which shall be void if in excess of the debt limit, and must so state on their face, and further providing that for a specified purpose the town may incur debts beyond the limit of indebtedness prescribed by the charter, and issue bonds therefor, authorizes the issuance, for such purpose, of negotiable bonds.

Texas.— Austin *v.* Nalle, 85 Tex. 520, 543, 22 S. W. 668, 960 [*citing* Ottawa *v.* Portsmouth First Nat. Bank, 105 U. S. 342, 26 L. ed. 1127; Hackett *v.* Ottawa, 99 U. S. 86, 25 L. ed. 363, as necessarily resting on the doctrine of the text, and *followed* in Jennings Banking, etc., Co. *v.* Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005] (where it is said: "A municipal bond, in its ordinary commercial sense, means a negotiable bond"); Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876.

Virginia.— Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722.

Wisconsin.— Bushnell *v.* Beloit, 10 Wis. 195.

United States.— Howard *v.* Kiowa County, 73 Fed. 406 [*following* West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553; Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455; Cadillac *v.* Woonsocket Inst., 58 Fed. 935, 7 C. C. A. 574 (*distinguishing* Barnett *v.* Denison, 145 U. S. 135, 12 S. Ct. 819, 36 L. ed. 652)].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1956.

Negotiability is a usual and valuable feature of municipal bonds, and a statute authorizing the issuance of bonds by municipalities will be construed as giving power to make them negotiable, in the absence of provisions clearly showing a contrary intention. D'Esterre *v.* Brooklyn, 90 Fed. 586.

A grant of power to borrow money carries with it the necessary incidental power of executing and delivering such evidences of indebtedness as are sanctioned by the known usages of business in such cases, and it is therefore competent to issue negotiable bonds. State *v.* Goshen Tp., 14 Ohio St. 588.

13. Com. *v.* Allegheny County Com'rs, 37 Pa. St. 237; Clark *v.* Janesville, 10 Wis. 136; Ottawa *v.* Portsmouth First Nat. Bank, 105 U. S. 342, 26 L. ed. 1127; Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557, 5 Phila. (Pa.) 512. See also Com. *v.* Pittsburgh, 34 Pa. St. 496.

Where municipal bonds are issued with the name of the payee left blank, they are payable to bearer and pass by delivery, unless their negotiability is subsequently restricted by the insertion of the name of some particular payee. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640 [*affirming* 53 N. Y. App. Div. 635, 65 N. Y. Suppl. 757], 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

14. Ottawa *v.* Portsmouth First Nat. Bank, 105 U. S. 342, 26 L. ed. 1127.

15. Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557, 5 Phila. (Pa.) 512.

Statute changing rule.— Under a statute providing that every instrument which is payable to bearer shall not be construed as payable to whoever may be the holder, but to the person from whom the consideration moves, the title to a municipal bond payable to bearer can be derived only through the indorsement or assignment of the person from whom the consideration moved. Blackman *v.* Lehman, etc., Co., 63 Ala. 547, 35 Am. Rep. 57.

16. Ottawa *v.* Portsmouth First Nat. Bank. 105 U. S. 342, 26 L. ed. 1127. Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557, 5 Phila. (Pa.) 512.

them to a third person indorsed in blank, it becomes the payee's duty to inform the municipality of any fact on which he, the payee, might object to the redemption of the certificates in favor of the holder and claim payment to himself, and in the absence of such notice the indorsement in blank and possession by the transferee give him apparent ownership and justify the city in making payment to him.[17] Where the statute authorizing the issuance of municipal bonds provides that they shall be transferable only on the books of the city, interest coupons, which have been attached to the bonds, are not transferable, except in the same manner as the bonds themselves, and one suing upon the coupons cannot recover without showing a legal assignment of the bonds to him, for his mere possession of the coupons creates no presumption that he is entitled to the interest.[18] Where bonds in excess of the amount which a township was authorized to issue in aid of a railroad were obtained from the state treasurer on a false certificate by the township trustee that the conditions on which they were issued had been complied with, and the railway company was cognizant of the fraud, and receipted to the treasurer for the bonds, but never had actual possession of them, although it assented to their delivery to the contractor by the township trustees in payment for construction work, this did not constitute a negotiation of the bonds to an innocent purchaser; and, as the conditions on which they were issued were not complied with, the consideration failed, and the township was entitled to a decree for their surrender and cancellation.[19]

17. Rights and Liabilities on Transfer — a. In General. Purchasers of municipal bonds take the same subject to the law in force at the time of their issuance, including a constitutional limitation upon the taxing power of the city,[20] and their rights are to be determined by the law as it was judicially construed when the bonds were put on the market as negotiable paper.[21] The holder of coupons cut from county bonds issued in satisfaction of a judgment is the owner of a part of the debt evidenced by the judgment, and in privity with the judgment creditor, and in an action on the coupons he may invoke every presumption and estoppel in support of his claim which the judgment creditor could invoke in an action upon the judgment.[22] A suit on bonds issued in payment for street improvements is based primarily on the proceedings of the common council and the assessment of the property, and the rights of the assignee of the bonds are no greater than the rights of those to whom they were issued.[23] Where plaintiff purchased certain town bonds from the agent of the alleged owner, who received a portion of the proceeds of the sale from his agent, such owner being estopped to deny the validity of the purchase, the town could not deny plaintiff's title to the bonds.[24] Where a municipality has statutory power to contract for the making of public improvements and issue its bonds in payment for the work performed, a bond so issued for work actually done becomes a voucher or evidence of indebtedness to that extent, and an assignee in good faith may recover upon such bond, although the municipality has never been specifically empowered to issue negotiable paper.[25] Where municipal bonds do not contain recitals asserting them to be issued conformably to law, a purchaser for value cannot recover.[26]

b. Purchasers of Stolen Bonds. A municipality is not liable on bonds stolen and put on the market before they were issued by the municipal officers, even

17. Strong *v.* District of Columbia, 4 Mackey (D. C.) 242.

18. Oelrich *v.* Pittsburgh, 18 Fed. Cas. No. 10,442, 1 Pittsb. (Pa.) 522.

19. Wilson *v.* Union Sav. Assoc., 42 Fed. 421.

20. Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542.

21. Green County *v.* Conners, 109 U. S. 104, 3 S. Ct. 69, 27 L. ed. 872 [*following* Ralls County *v.* Douglass, 105 U. S. 728, 26 L. ed. 957 (*following* Douglass *v.* Pike County, 101 U. S. 677, 25 L. ed. 968)].

22. Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87.

23. Cleveland, etc., R. Co. *v.* Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319.

24. Schmid *v.* Frankfort, 141 Mich. 291, 104 N. W. 668.

25. Dorian *v.* Shreveport, 28 Fed. 287.

26. Bergen County *v.* Merchants' Exch. Nat. Bank, 12 Fed. 743, 21 Blatchf. 13.

though such bonds have passed into the hands of a *bona fide* purchaser for value.[27] But when negotiable municipal bonds, after issuance, are stolen from the owner, and sold or pledged before maturity to a person who acts in good faith, such person has a good title as against the former owner,[28] and is entitled to recover the money due on the bond from the city,[29] notwithstanding the fact that the number of the bond has been altered by the thief.[30] Where, however, a coupon promising to pay a certain sum as interest on a municipal bond designated by a specified number, and stating that it is due on a certain day, is stolen after such day, a subsequent innocent holder of the coupon is not the lawful owner, and cannot maintain an action thereon against a guarantor.[31]

c. Purchase by City Officer. Where, under an agreement between a city and the holder of its bonds, they are assigned for less than their face value to trustees appointed by and in behalf of the city, the fact that some of such trustees are members of the common council, and have contributed to a fund for the payment of the bonds a sum equal to their proportion of taxes necessary to pay them, does not forfeit the debt to the city, under a statute providing that any bond purchased by an officer of the city for less than its face value shall be forfeited to the city.[32]

d. Liability of Assignor — (I) *IN GENERAL.* There is no implied warranty or guaranty on the sale of municipal bonds;[33] and where, on a sale of such bonds, their invalidity not having been determined, the seller stated that he believed the bonds were valid, and the buyer, after notice that the town claimed that the bonds were invalid, sued the town for the value thereof, and their invalidity was determined, the buyer could not recover the price on the ground of false representations by the seller as to their validity.[34]

(II) *TO MUNICIPALITY WHERE INVALID SECURITY KNOWINGLY NEGOTIATED.* Where a railroad company has wrongfully and without authority of law procured the issuance of municipal aid bonds and has negotiated the same, and the holders have by judicial proceedings fixed the liability of the municipality on such bonds, the municipality has a right of action against the railroad company for the amount of the bonds with interest;[35] and an officer of a railroad company who sells to *bona fide* purchasers municipal bonds issued in aid of the company, which he knows to be invalid in the hands of the company, is liable to the municipality for the value of such bonds.[36]

27. Germania Sav. Bank *v.* Suspension Bridge, 73 Hun (N. Y.) 590, 26 N. Y. Suppl. 98.

28. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640 [*affirming* 53 N. Y. App. Div. 635, 65 N. Y. Suppl. 757], 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

29. Force *v.* Elizabeth, 28 N. J. Eq. 403 [*affirmed* as to this point in 29 N. J. Eq. 587].

30. Elizabeth *v.* Force, 29 N. J. Eq. 587 [*reversing* 28 N. J. Eq. 403].

31. Arents *v.* Com., 18 Gratt. (Va.) 750.

32. Aurora *v.* Lamar, 59 Ind. 400.

33. Ruohs *v.* Chattanooga Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303.

34. Ruohs *v.* Chattanooga Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303.

35. Plainview *v.* Winona, etc., R. Co., 36 Minn. 505, 32 N. W. 745, holding that where a railroad company procured negotiable bonds to be illegally issued by the officers of a town, which were in form the obligations of the town, and recited on their face that they were issued under an agreement between the company and the town authorities, which agreement was, however, invalid by reason of the unconstitutionality of the statute pursuant to which it was made, and the bonds were accepted by such company, and negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another state, who, in an action in the circuit court of the United States, brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which fixed the liability of the town for the whole amount of such bonds to the holders thereof, the acts of the company in procuring and negotiating the bonds were without authority of law and wrongful, and that, by reason thereof, a cause of action arose in favor of the town, and against the company, for the recovery of the amount of such bonds with interest.

36. Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784, holding that where, after the corporate existence of an alleged railroad corporation had ceased by reason of its failure to comply with the law regulating such

18. Bona Fide Purchasers — a. In General. As municipal bonds are negotiable instruments,[37] one who purchases such bonds from the holder thereof in good faith, for value, and before maturity, acquires title free of any equities or defenses available between the original parties and may enforce them according to their tenor.[38] And the presumption is that the holder of a municipal bond took it before maturity for value and without notice of defenses.[39] The bonds in the hands of a *bona fide* holder are not assailable upon any ground that does not relate to the authority for their issue,[40] and such a holder is not chargeable with any fraud or irregularity in the conduct of the officers or agents of the city in negotiating the bonds,[41] nor can his right be defeated by a defect in the considera-

corporations, an officer of such defunct corporation, knowing its condition, and having in his hands bonds given by a village to such corporation, and knowing that such bonds were void, and could not be enforced by such corporation, fraudulently sold them to innocent parties, representing them to be *bona fide* securities, and valid bonds of the village, the officer was liable to the village for the value of such bonds, although he had accounted to the company for the proceeds.

37. See *supra*, XV, C, 16, a.

38. *Alabama.*— State *v.* Montgomery, 74 Ala. 226.

Colorado.— Cripple Creek *v.* Adams, 36 Colo. 320, 85 Pac. 184.

Illinois.— Barnes *v.* Lacon, 84 Ill. 461.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56.

Massachusetts.— Suffolk Sav. Bank *v.* Boston, 149 Mass. 364, 21 N. E. 665, 4 L. R. A. 516.

New Jersey.— Lane *v.* Schomp, 20 N. J. Eq. 82.

North Carolina.— Union Bank *v.* Oxford, 116 N. C. 339, 21 S. E. 410.

Texas.— Jefferson *v.* Jennings Banking, etc., Co., 34 Tex. Civ. App. 74, 79 S. W. 876.

Virginia.— Lynchburg *v.* Slaughter, 75 Va. 57; De Voss *v.* Richmond, 18 Gratt. 338, 98 Am. Dec. 646.

United States.— Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233; Syracuse Tp. *v.* Rollins, 104 Fed. 958, 44 C. C. A. 277; D'Esterre *v.* New York, 104 Fed. 605, 44 C. C. A. 75; Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1961; and *infra*, XV, C, 24, d.

Transfer constituting purchaser a bona fide holder see Briggs *v.* Phelps, 70 Fed. 29.

Circumstances not affecting good faith.— The good faith of purchasers of municipal bonds issued in fact to aid a private enterprise is not destroyed by the fact that, in addition to relying on a recital in the bonds of a public purpose, they also have before them proceedings for the submission of aid for such public purpose to a vote, and a letter of the prosecuting attorney declaring that the proceedings were valid on their face, and that they took a guaranty of payment from the person negotiating the bonds. Schmid *v.* Frankfort, 134 Mich. 619, 96 N. W. 1056.

Purchase from officer of district.— The fact that a holder of bonds of an irrigation district, containing recitals that they were issued in all respects in conformity with the requirements of the statute authorizing the same, purchased them from the president of the district, does not impeach the *bona fides* of his ownership, nor render the bonds in his hands subject to the defense that the recitals were untrue, where there was no law prohibiting the president of the district from purchasing or owning them, in the absence of any other evidence to charge the holder with notice of invalidity. Perris Irr. Dist. *v.* Thompson, 116 Fed. 832, 54 C. C. A. 336.

Circumstances constituting sale.— Where a city board of education, authorized to issue bonds for certain purposes, and to sell them for not less than ninety-eight cents on the dollar, issued bonds purporting to be for such purposes, but in fact for an unauthorized purpose, accepted a bid from S therefor at par, delivered them to him, received part of the price, and transferred its right to the balance to the city, receiving a city warrant for the amount, and S sold the bonds for ninety-seven and a half cents on the dollar, this constituted an executed sale of the bonds to S at par, and purchasers from him, who were strangers to his purchase from the board, were not chargeable with notice of the invalidity of the bonds, because they supposed they were buying from the board. Montpelier Nat. L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

If municipal bonds are absolutely void they cannot be enforced either by the original holder or by a purchaser for value. Barnes *v.* Lacon, 84 Ill. 461.

39. Ampt *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 237, 3 Ohio N. P. 184; Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1.

40. Citizens' Sav. Bank *v.* Greenburgh, 173 N. Y. 215, 65 N. E. 978 [*reversing* 60 N. Y. App. Div. 225, 70 N. Y. Suppl. 68 (*affirming* 31 Misc. 428, 65 N. Y. Suppl. 554)].

41. Citizens' Sav. Bank *v.* Greenburgh, 173 N. Y. 215, 65 N. E. 978 [*reversing* 60 N. Y. App. Div. 225, 70 N. Y. Suppl. 68 (*affirming* 31 Misc. 428, 65 N. Y. Suppl. 554)], holding that under Laws (1892), c. 493, which provides for the issuance of bonds for the construction of highways running through two or more towns of the same county, the bonds

tion for the bonds.[42] But if municipal bonds are issued and sold before the time when the municipality has authority to issue them, the purchasers and holders cannot claim to be innocent purchasers and holders.[43] A *bona fide* holder may transfer his good title and right to protection to another, regardless of whether or not the latter knows of the original taint or infirmity,[44] whether the assignment or transfer is made before or after maturity,[45] and whether or not a consideration is paid therefor.[46] But a person who purchases bonds payable to bearer and unindorsed, having notice of defenses to the bonds, cannot claim the right of a *bona fide* holder on the ground that his vendor was a *bona fide* holder, in the absence of proof that his vendor was not the original payee.[47] In order to entitle one to protection as a *bona fide* purchaser of municipal bonds, he must be such not only at the time of the contract but also at the time of the payment of the price;[48] and a purchaser who wilfully closes his ears to information or refuses to make inquiry when circumstances of grave suspicion imperatively demand it is not entitled to protection.[49] Where municipal bonds were issued without authority or are otherwise void as between the original payee and the municipality, it is incumbent upon a holder of the bonds to show that he or someone through whom he claims title to them was a *bona fide* purchaser for a valuable consideration.[50]

b. Consideration For Transfer. One who receives a municipal bond in pay-

to be executed by the supervisor and town-clerk, and delivered to the commissioners, to be paid out by them at not less than par, in liquidation of damages, or at their option to be sold at not less than par, and the proceeds applied for the construction of such highways, the sale of such bonds, without taking into account the interest which had accrued upon them, by such commissioners, although an irregular exercise of the power to dispose of the bonds, did not affect their validity in the hands of innocent holders for value.

42. Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876.

43. Altaffer *v.* Nelson, 18 Ohio Cir. Ct. 145, 9 Ohio Cir. Dec. 599, holding that where an ordinance provided for the issuance of bonds to be dated March 1, 1897, and bonds issued thereunder were dated on that day and on their face purported to have been signed by the proper officers on that day, but in fact the bonds were issued before March 1, 1897, and even before the day (Feb. 7, 1897) when the ordinance took effect, and an injunction against the issuance of the bonds was granted on Feb. 6, 1897, after they had been actually issued, the purchasers and holders were not entitled to protection.

44. Suffolk Sav. Bank *v.* Boston, 149 Mass. 364, 21 N. E. 665, 4 L. R. A. 516; Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876; Lynchburg *v.* Slaughter, 75 Va. 57; Gunnison County *v.* Rollins, 173 U. S. 255, 19 S. Ct. 390, 43 L. ed. 689 [*affirming* as to this point but *reversing* on other grounds 80 Fed. 692, 26 C. C. A. 91]; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167; Rathbun *v.* Kiowa County, 83 Fed. 125, 27 C. C. A. 477 [*reversing* 73 Fed. 395]; Hill *v.* Scotland County, 34 Fed. 208.

A purchaser of a past-due and dishonored municipal bond of the face value, including accrued interest, of more than two thousand two hundred dollars, for a consideration of fifty dollars, such bond having been fraudulently issued, and invalid in the hands of the original holder, of which fact the purchaser had knowledge, is entitled to recover thereon only the consideration paid, although the seller was a *bona fide* purchaser for value before maturity, protected by the recitals therein, and entitled to recover the full amount. Gamble *v.* Allison Rural Independent School Dist., 132 Fed. 514 [*reversed* on other grounds in 146 Fed. 113, 76 C. C. A. 589].

45. Edwards *v.* Bates County, 117 Fed. 526; Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

46. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

47. Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

48. Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78 [*affirming* 38 Fed. 204].

49. Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78 [*affirming* 38 Fed. 204].

In the absence of bad faith a purchaser's title as a *bona fide* holder is not defeated by his having had a suspicion of a defect of title or knowledge of circumstances which would excite the suspicions of a prudent man, or even by gross negligence on his part at the time of the transfer. Ronede *v.* Jersey City, 20 Fed. Cas. No. 12,031*a* [*following* Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857].

50. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78 [*affirming* 38 Fed. 204]; Gamble *v.* Allison Rural Independent School Dist., 132 Fed. 514 [*reversed* on other grounds in 146 Fed. 113, 76 C. C. A. 589]; Edwards *v.* Bates County, 117 Fed. 526.

ment of a preëxisting debt,[51] or in payment for services rendered and to be rendered, and which are in fact rendered,[52] is a holder for value. *Bona fide* purchasers of municipal bonds or coupons are not restricted in their claims upon such securities to the sums which were paid for them.[53]

c. Pledgees and Their Transferees. One who receives municipal bonds before their maturity as collateral security for an antecedent debt, and surrenders other collateral therefor, is a *bona fide* purchaser;[54] but where a railroad company pledges municipal aid bonds issued to it, giving the pledgees authority to sell them, such pledgee, although he would be protected to the amount of his advances to secure which the bonds were pledged, is not such a *bona fide* holder as to entitle his transferee to recover upon the bonds, where they are invalid.[55]

d. Purchase Directly From Municipality. Where a municipality sells its bonds in the open market the right and title of the first purchaser directly from the municipality is as perfectly and fully enforced and protected as if he were a third person buying the bonds in a subsequent market sale.[56]

e. Effect of Repeal of Enabling Act. The right of a *bona fide* purchaser of municipal bonds cannot be taken away or affected by the subsequent repeal of the statute under which the bonds were issued.[57]

f. Effect of Decree Enjoining Further Sales. Where an act of the legislature authorized cities to make and negotiate certain bonds, and recited that the council might allow a reasonable compensation for the sale and negotiation of the bonds, but a contract was entered into for the sale of bonds in excess of the authority conferred, and after a large amount of the bonds had been sold a bill was brought and a decree entered enjoining further sale and delivery, it was held that, the city having authority to issue the bonds, the rights of *bona fide* purchasers were not affected by this decree.[58]

g. Purchase After Maturity. Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder,[59] unless he can show title derived through a holder in due course;[60] and protection has also been denied to a purchaser of overdue coupons.[61] But where a bond is purchased before maturity, the fact that unpaid and overdue coupons

51. Thompson *v.* Mecosta, 127 Mich. 522, 86 N. W. 1044 (holding also that where the holder of a village bond indorsed and delivered it to plaintiffs to secure an extension of time and to apply as part payment upon a debt which he owed to them, the extension of time was a valuable consideration and plaintiffs were holders of the bond for value); Mobile Sav. Bank *v.* Oktibbeha County, 24 Fed. 110; Foote *v.* Hancock, 9 Fed. Cas. No. 4,911, 15 Blatchf. 343 (holding that the delivery of municipal aid bonds by the commissioners of the town issuing the same, at the direction of the railroad company, to a contractor for building the railroad, in payment for work thereon, makes such contractor a purchaser of the bonds for value, although he took them for an antecedent debt).

Bond not payable to bearer.—Where a municipal bond illegally issued to a railroad company below par, which is not payable to bearer, although the coupons attached are so payable, is transferred by the company in payment of an antecedent debt, the holder occupies the same position in reference to the bond and coupons that the company held. Atchison *v.* Butcher, 3 Kan. 104, where it is said, however, that this might be different if the coupons had been received detached from the bond.

52. Gamble *v.* Rural Independent School Dist., 132 Fed. 514 [*reversed* on other grounds in 146 Fed. 113, 76 C. C. A. 589], holding that one who obtained a bond from a prior holder in payment for legal services rendered and to be rendered, and which were rendered to the full value of the bond, was an innocent holder for value, where the bond was not due and contained nothing on its face to indicate its invalidity and he had no knowledge or notice of any defect therein.

53. Cumberland County *v.* Randall, 89 Va. 614, 16 S. E. 722 [*following* Cromwell *v.* Sac County, 96 U. S. 351, 24 L. ed. 195].

54. D'Esterre *v.* Brooklyn, 90 Fed. 586.

55. Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78.

56. Griffith *v.* Burden, 35 Iowa 138.

57. Marsh *v.* Little Valley, 1 Hun (N. Y.) 554 [*affirmed* in 64 N. Y. 112].

58. Whelen's Appeal, 108 Pa. St. 162, 1 Atl. 88.

59. Belo *v.* Forsythe County Com'rs, 76 N. C. 489; Cromwell *v.* Sac County, 96 U. S. 351, 24 L. ed. 195.

60. See *supra*, XV, C, 18, a.

61. Arents *v.* Com., 18 Gratt. (Va.) 750

are attached does not render the whole bond dishonored, so as to deprive the purchaser of the character of a holder in due course.[62]

19. Constructive and Implied Notice — a. In General. Where the power to issue bonds existed, the purchaser is not bound to go back and examine all the intermediate steps which should have been taken before the bonds were issued,[63] especially where the bonds bear upon their face the statement that they have been issued in pursuance of law and under the contingencies required by law.[64] Neither is a holder in due course of bonds issued under proper authority charged with knowledge of any collateral facts tending to invalidate the bonds in the hands of a purchaser with notice.[65] A purchaser of municipal aid bonds is not required to ascertain what conditions as to time of completing the enterprise were imposed by the proposition voted on,[66] nor as to whether the corporation pursued the regular steps necessary to entitle it to receive the bonds;[67] but he is chargeable with notice of any inherent incapacity of the corporation to receive public aid under the statute.[68] A purchaser of negotiable municipal bonds is not affected with constructive notice of the pendency of a suit involving the validity of such

(holding that there could be no recovery against the state, as guarantor of municipal bonds, on coupons from such bonds, where the coupons were overdue by lapse of time when taken by plaintiff, they not having been presented for payment within a reasonable time); German-American Bank *v.* Brenham, 35 Fed. 185 (holding that where the holder of city bonds, whose proceeds were unlawfully used by the city, took the bonds before any of the coupons came due, and after some of the coupons became due, and while they were unpaid, pledged the bonds and coupons to plaintiff to secure a loan, if the holder knew that the city, in borrowing money on the bonds, intended to or did use the proceeds as it did, plaintiff, as to the dishonored coupons, should not recover).

62. Cromwell *v.* Sac County, 96 U. S. 351, 24 L. ed. 195; Ronede *v.* Jersey City, 20 Fed. Cas. No. 12,031*a*.

63. South St. Paul *v.* Lamprecht Bros. Co., 88 Fed. 449, 454, 31 C. C. A. 585 (where it is said: "Since the city had undertaken to aid in the construction of such a bridge across the river at that point, it was the duty of the city authorities to obtain from the secretary of war an approval of the plan of the structure and its proposed location before the bonds were issued; and a purchaser of the bonds in the open market was entitled to presume from their mere presence in the market that this duty had been duly performed, and that such approval had been obtained"); Davis *v.* Kendallville, 7 Fed. Cas. No. 3,638, 5 Biss. 280 (holding that the purchaser is not presumed to have notice of everything which takes place before the issuing of the bonds, and an averment that the proceedings of the city council were spread upon the records of the city is not sufficient to charge him with notice).

64. Davis *v.* Kendallville, 7 Fed. Cas. No. 3,638, 5 Biss. 280. See also *infra*, XV, C, 20.

65. Uvalde *v.* Spier, 91 Fed. 594, 33 C. C. A. 501; Portland Sav. Bank *v.* Evansville, 25 Fed. 389.

66. Chilton *v.* Gratton, 82 Fed. 873, holding this to be true where such conditions are not shown on the face of the bonds and the bonds recite a compliance with the law.

67. Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394, holding that where county bonds, issued by the county court in payment of its subscription to the stock of a railroad company, show on their face that they were issued pursuant to the law which authorized their issue without the assent of the qualified voters of the county, and there is nothing upon them to show that they were not regularly issued, the fact that subsequent to making the subscription, but before the issue of the bonds, the company transferred its franchise to another company, does not make it incumbent upon a purchaser of the bonds to inquire whether the company pursued the regular steps necessary to entitle it to receive them.

Statutory conditions precedent to issuance.— Where a statute provided that a county might issue bonds in aid of a railroad upon the vote of a majority of the legal voters, and prescribed the conditions upon which they should be made, and that such bonds should not be valid until such conditions should be complied with, and a county voted to issue bonds on condition that the road should be begun and completed in the county within specified periods, and the road was not completed within the time prescribed by the original vote, the bonds were invalid in the hands of *bona fide* purchasers, especially when issued and purchased after a decision by the supreme court of the state holding similar bonds void. German Sav. Bank *v.* Franklin County, 128 U. S. 526, 9 S. Ct. 159, 32 L. ed. 519 [*following* Eagle *v.* Kohn, 84 Ill. 292 (*followed* in Richeson *v.* People, 115 Ill. 450, 5 N. E. 121), and *distinguishing* Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323; Pana *v.* Bowler, 107 U. S. 529, 27 L. ed. 424; American L. Ins. Co. *v.* Bruce, 105 U. S. 328, 26 L. ed. 1121; Randolph County *v.* Post, 93 U. S. 502, 23 L. ed. 957].

68. Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745.

bonds,[69] nor is the pendency of such a suit constructive notice of any invalidity of the bonds.[70] A purchaser before maturity of bonds payable to bearer is not *ipso facto* chargeable with constructive notice of their alleged invalidity because he investigated as to the fulfilment of the conditions necessary to their issuance;[71] but such knowledge is, when there are no marks of infirmity on the face of the bonds and no want of power in the municipality, a question of fact.[72] The test as to whether the officers of a bank, at the time of its purchasing municipal bonds, had notice of facts and circumstances requiring inquiry, is not whether the facts were such as would naturally and reasonably lead an ordinarily careful and prudent man to make inquiry as to what the bonds were given for, but whether the facts were such as to make it bad faith not to do so.[73] Although a statute provides that registered bonds shall be made payable to the person to whom they are issued, instead of to bearer, the fact that the bonds are issued by a town with the place for the name of the payee left blank, where in all other respects they comply with the requirements of the law, and contain a certificate of their registry, does not charge a subsequent purchaser with notice of defenses existing against them in the hands of the person to whom they were issued.[74]

b. Matters Apparent on Face of Bonds.[75] A purchaser of municipal bonds is chargeable with notice of the recitals contained therein,[76] and no person can claim protection as a *bona fide* purchaser where the bonds show on their face that they were not issued in compliance with the law,[77] or that they were issued in violation of the statute authorizing them and of the consent of the taxpayers required by such statute.[78] But where a statute authorizes the issuance of bonds for the purchase of school sites and the erection of school buildings, a recital in such bonds that they are issued "for the purchase of school sites and the erection of school buildings, and general improvements" is no notice to a purchaser that they are issued for any purpose other than the purchasing of the sites and erection of the buildings.[79] The fact that municipal bonds bear a date prior to the time when the ordinance under which they were issued went into effect under the statute is not sufficient to defeat a recovery on such bonds in the hands of a *bona fide* holder, where there is no proof of the date of their actual issue, and their premature issue would be contrary to the recitals on the face of the

69. Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1; Hill *v.* Scotland County, 34 Fed. 208; Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131.

70. Enfield *v.* Jordan, 119 U. S. 680, 693, 7 S. Ct. 358, 30 L. ed. 523, where it is said: "This general rule cannot be changed by state laws or decisions so as to affect the rights of persons not residing and not being within the state."

71. Carrier *v.* Shawangunk, 10 Fed. 220, 20 Blatchf. 307.

72. Carrier *v.* Shawangunk, 10 Fed. 220, 20 Blatchf. 307.

73. Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694.

74. D'Esterre *v.* Brooklyn, 90 Fed. 586, holding that such an omission is merely an irregularity, which would at most only put the purchaser on inquiry as to whether they had in fact been issued to the person through whom he acquired them.

75. Recitals affording protection to bona fide holders see *infra*, XV, C, 20.

76. Wilbur *v.* Wyatt, 63 Nebr. 261, 88 N. W. 499.

77. George *v.* Oxford Tp., 16 Kan. 72 (holding that where a statute authorized a town to issue bonds, provided a majority of the electors should so decide at an election to be held for that purpose; the time and place for holding such election to be designated by at least thirty days' notice, posted in three public places in the town, and the election was held only eighteen days after the act took effect, and the bonds were issued only twenty-five days thereafter, all of which appeared on the face of the bonds, both the election and the bonds were void, and no person could be deemed an innocent purchaser of such bonds); Wright *v.* East Riverside Irr. Dist., 138 Fed. 313, 70 C. C. A. 603.

78. Horton *v.* Thompson, 71 N. Y. 513 [*reversing* 7 Hun 452]; Harshman *v.* Bates County, 92 U. S. 569, 23 L. ed. 747 [*affirming* 11 Fed. Cas. No. 6,148, 3 Dill. 150], holding that bonds issued for stock in a consolidated company under a vote for subscription for stock in a constituent company, where the facts were recited therein, were void in the hands of a *bona fide* holder for value.

79. Pierre Bd. of Education *v.* McLean, 106 Fed. 817, 45 C. C. A. 658, so holding on the ground that the term "general improvements" is qualified and restricted to the preceding particular recital of the purpose of the issue.

bonds.[80] Neither is the purchaser of municipal bonds put upon inquiry in relation to pending suits because a provision appears upon the face of the bonds that they are payable at a place other than the town treasurer's office, which provision is illegal under the law of the state, as such provision is merely void in itself and does not avoid the bonds.[81] It has been held that a *bona fide* purchaser of railway aid bonds which recite that they are issued under an order of the proper court, pursuant to legislative authority, is not affected with constructive notice of facts recited in such order, contrary to the recitals of the bonds.[82] Purchasers of municipal bonds or coupons must always take the risk of the genuineness of the official signatures of those who executed the paper they buy,[83] and this includes not only the genuineness of the signature itself but also the official character of him who makes it.[84] So also if municipal bonds are not executed in the manner required by statute, a purchaser is chargeable with notice.[85] Where coupons refer to the bonds to which they are attached and purport to be for the periodical interest accruing thereon, the purchaser of such coupons is charged with notice of all which the bonds contain.[86]

c. Matters of Record. Where the constitution or the statute under which municipal bonds are issued prescribes a public record which furnishes the test of compliance with the conditions and the validity of the issue, a purchaser is charged with notice of the contents of such record;[87] and in such case the record and not the recitals in the bonds must be looked to by all persons proposing to deal in the bonds.[88] But a purchaser is not charged with notice of parts of the record not connected with such bonds,[89] nor is he required to look beyond the record;[90] and if the record fails to show the illegality of the bonds the purchaser may rely upon the presumption that the officers faithfully discharged their duty in issuing such bonds and upon the recitals which the bonds contained.[91]

d. Lack of Power to Issue. A purchaser of municipal bonds is bound at his peril to inform himself as to the power of the municipality to issue such bonds,[92] and is chargeable with notice of any want of power on the part of the munici-

80. Kent *v.* Dana, 100 Fed. 56, 40 C. C. A. 281.

81. Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523.

82. Nicolay *v.* St. Clair County, 18 Fed. Cas. No. 10,257, 3 Dill. 163.

83. Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005.

84. Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005 [*distinguishing* Weyauwega *v.* Ayling, 99 U. S. 112, 25 L. ed. 470, and *followed* in Coler *v.* Cleburne, 131 U. S. 162, 9 S. Ct. 720, 33 L. ed. 146].

85. Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005, where the bonds were not indorsed by the state auditor as required by statute.

86. McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129. See also Harshman *v.* Bates County, 92 U. S. 569, 23 L. ed. 747 [*affirming* 11 Fed. Cas. No. 6,148, 3 Dill. 150].

87. Bell *v.* Waynesboro Borough, 195 Pa. St. 299, 45 Atl. 930; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

A purchaser of township bonds is bound to take notice of the township records, and can claim no protection if such records do not show any authority for the issuance of the bonds. Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276.

Conditions.— Where bonds in aid of a railroad are issued on specified conditions to be performed by the railroad, which conditions are not printed on the bonds but appeared on the orders of record in the county court, a purchaser of such bonds is charged with notice of the conditions upon which they were to be issued, a non-compliance with which is available as a defense to a suit by him on the bonds. Green County *v.* Shortell, 116 Ky. 108, 75 S. W. 251, 25 Ky. L. Rep. 357.

88. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Dixon County *v.* Field, 111 U. S. 83, 28 L. ed. 360; Quaker City Bank *v.* Nolan County, 59 Fed. 660 [*affirmed* in 66 Fed. 883, 14 C. C. A. 157]; Francis *v.* Howard County, 54 Fed. 487, 4 C. C. A. 460. See also *infra*, XV, C, 20, f.

89. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* (Civ. App. 1904) 82 S. W. 1066].

90. Bell *v.* Waynesboro Borough, 195 Pa. St. 299, 45 Atl. 930; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

91. Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

92. *Illinois.*— Gaddis *v.* Richland County, 92 Ill. 119.

Iowa.— McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215.

New York.— Craig *v.* Andes, 93 N. Y. 405 [*following* Lyons *v.* Chamberlain, 89 N. Y. 578; Cagwin *v.* Hancock, 84 N. Y. 532].

pality [93] and of all requirements of the statute under which the bonds were issued,[94]

North Carolina.—Stanley County *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; Richmond Union Bank *v.* Oxford Com'rs, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

Texas.— Tyler *v.* Tyler Bldg., etc., Assoc., (1905) 86 S. W. 750 [*reversing* (Civ. App. 1904) 82 S. W. 1066].

Wisconsin.— Clark *v.* Janesville, 10 Wis. 136.

United States.—Dixon County *v.* Field, 111 U. S. 83, 28 L. ed. 360; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005; McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154; Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579; Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288 [*following* Dixon County *v.* Field, *supra*, and *approving* State *v.* Haskell County Com'rs, 40 Kan. 65, 19 Pac. 362] (holding that under 1 Kan. St. pp. 535, 536, § 120, providing for the organization of counties, which declares that after certain steps have been taken the governor shall appoint county officers upon whose qualification the county shall be deemed "duly organized," and that no county bonds shall be issued within one year thereafter, as an examination of the records in the executive department of the state would show the date of the appointment of such county officers, all purchasers of bonds were charged with notice of such date, and the county was not estopped to deny the validity of bonds issued within one year thereafter as against a *bona fide* holder); National Bank of Republic *v.* St. Joseph, 31 Fed. 216, 24 Blatchf. 436; Merrill *v.* Monticello, 14 Fed. 628; Hopper *v.* Covington, 8 Fed. 777, 10 Biss. 488 (holding that where bonds contain no recitals to estop the municipality the holder is bound to know that they were issued under express legislative authority, and to inquire whether they were issued in the mode and for the purposes provided by the law authorizing their issuance).

See 36 Cent. Dig. tit. "Municipal Corporations," § 1969.

Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds or in the proceedings under which they are issued, a purchaser takes with notice, and there can be no such thing as an innocent holder. Claybrook *v.* Rockingham County Com'rs, 114 N. C. 453, 19 S. E. 593.

93. *Illinois.*— Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554.

Iowa.— Swanson *v.* Ottumwa, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. N. S. 860; McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215.

Mississippi.— Woodruff *v.* Okolona, 57 Miss. 806.

North Carolina.— Richmond Union Bank *v.* Oxford Com'rs, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

Wisconsin.— Rochester *v.* Alfred Bank, 13 Wis. 432, 80 Am. Dec. 746. See also Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

United States.— Sage *v.* Fargo Tp., 107 Fed. 383, 46 C. C. A. 361, holding that under a statute relating to the organization of new counties, which directs that no bonds shall be voted for and issued by any county or township within one year after the organization of such new county, where bonds issued by a township show on their face the date of the election at which they were authorized, which was less than one year after the organization of the county, purchasers are chargeable with notice of their invalidity. See also Crow *v.* Oxford Tp., 119 U. S. 215, 7 S. Ct. 180, 30 L. ed. 388.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1969.

A recital in a municipal bond that it is issued in payment of a subscription made in pursuance of a vote at a certain election therein specified is notice to the holder of the illegality of the subscription, if there was no law authorizing such election and subscription. Barnes *v.* Lacon, 84 Ill. 461.

94. *Alabama.*— Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

Kansas.— Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745.

Missouri.— Flagg *v.* Palmyra, 33 Mo. 440.

North Dakota.— People's Bank *v.* School Dist. No. 52, 3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642.

Texas.— Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003.

United States.— Wright *v.* East Riverside Irr. Dist., 138 Fed. 313, 70 C. C. A. 603; Mercer County *v.* Provident Life, etc., Co., 72 Fed. 623, 19 C. C. A. 44 (holding that where an act authorizing a county to issue bonds in aid of a railroad provides that the bonds shall be deposited in escrow with a trustee, who shall deliver them to the company on the construction of the road, a purchaser is not absolved from the necessity of inquiring whether the road has been constructed by a recital in the bonds that they were issued pursuant to the authority conferred upon the said county by such act, and that the fact that the bonds were in form negotiable securities, and were bought on the open market by purchasers innocent as to non-completion of the railroad, does not give such purchasers the status of *bona fide* purchasers for value; the bonds containing on their face no recital implying the completion of the railroad in whose aid they were issued); Quaker City Nat. Bank *v.* Nolan County, 59 Fed. 660 [*affirmed* in 66 Fed. 883, 14 C. C. A. 157].

See 36 Cent. Dig. tit. "Municipal Corporations," § 1969.

Omission of statements required by statute.— Where the act of the legislature under which municipal bonds are issued requires

especially where the bonds upon their face refer to such statute.[95] And so where a municipality has exceeded its statutory power in issuing bonds, such bonds are void even in the hands of an innocent purchaser for value.[96] So also where municipal bonds state on their face that they are issued under a certain ordinance, holders are bound by the provisions thereof.[97] Purchasers of municipal bonds must at their peril ascertain that the authority assumed by the officers or agents executing or issuing them has been conferred,[98] and that the power granted has not been exceeded.[99]

e. Defects or Irregularities in Preliminary Proceedings. Irregularities in the exercise of a general power in a municipality to issue bonds are not available

that the bond shall state the purpose for which it is issued, and the bond fails to contain such statement, a purchaser is chargeable with notice of the defect in the bond. Brewton *v.* Spira, 106 Ala. 229, 17 So. 606.

95. Chamberlain *v.* Burlington, 19 Iowa 395 (holding that where bonds issued by a municipal corporation show upon their face the authority under which they are executed, and such authority is insufficient, they are void in the hands of a *bona fide* purchaser); Thompson *v.* Mamakating, 37 Hun (N. Y.) 400 (holding that a municipal bond, which on its face refers to the statute under which it purports to be issued, and is so numbered as to make it apparent, from an examination of the statute and proceedings thereunder, that it was issued without authority, is void); Claybrook *v.* Rockingham County, 114 N. C. 453, 19 S. E. 593 (holding that therefore, where bonds issued by the commissioners of a county on behalf of a town under an act of the legislature authorizing the issue upon an affirmative vote of a majority of the qualified voters of the town, and neither the declaration of the result of the election by the commissioners nor the recitals in the bonds show that a majority of the voters of the town voted in favor of the subscription, the purchasers of the bonds, although *bona fide* and for value, will not be protected in a suit by taxpayers to restrain the collection of taxes to pay the same, unless a jury shall find that question in the affirmative); McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129.

96. People's Bank *v.* School Dist. No. 52, 3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642 (holding that where a statute authorized the issue of municipal bonds payable in not less than ten years from date, bonds issued thereunder, payable in eleven days less than ten years from date, are void even in the hands of a *bona fide* purchaser); Green *v.* Dyersburg, 10 Fed. Cas. No. 5,756, 2 Flipp. 477 (so holding where a municipal corporation, authorized by statute to issue bonds bearing six per cent interest, to be paid in six annual instalments, issued bonds at seven per cent payable in ten years).

97. Klamath Falls *v.* Sachs, 35 Oreg. 325, 57 Pac. 329, 76 Am. St. Rep. 501 (holding that the purchaser of a municipal bond reciting that it was issued pursuant to a certain ordinance of the municipality, giving its date and full title, is put on inquiry as to the provisions of the ordinance and its validity, although the bond also recites that it was issued pursuant to the town charter since the latter recital, being as to a matter of law, does not estop the municipality from showing the validity of the bonds); Gould *v.* Paris, 68 Tex. 511, 4 S. W. 650. See also U. S. Trust Co. *v.* Mineral Ridge, 104 Fed. 851, 44 C. C. A. 218, holding that where the statute relating to municipal bonds requires that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance," and the only reference to any ordinance contained in bonds issued by a village, purporting to be refunding bonds, is a statement that they were issued to take up former bonds of a certain date, "as provided in the ordinance of said village," and it is admitted that no valid or sufficient ordinance authorizing the issuance of such bonds was passed, and that the bonds refunded were void, every purchaser is charged with notice of the invalidity of such bonds.

Reference to both statute and ordinance.— An innocent purchaser of municipal bonds, which recite that they are issued in pursuance of an act of the legislature, which authorizes their issue for a lawful purpose, and which also recite that they are issued in pursuance of an ordinance or resolution of a given date or title, which, if read, would disclose the fact that they are issued for an unlawful purpose, is not chargeable with notice of the terms or contents of the ordinance or resolution. Fairfield *v.* Allison Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342 [*reversing* 111 Fed. 453].

Reference to invalid ordinance.— Where bonds issued by a municipality refer by date to an invalid ordinance as one source of authority for their issuance, this reference is notice of the provisions of the ordinance, and of its invalidity, and the bonds are void, even in the hands of innocent purchasers. Risley *v.* Howell, 57 Fed. 544.

98. Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351. See also Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

99. Merchants' Exch. Nat. Bank *v.* Bergen County, 115 U. S. 384, 6 S. Ct. 88, 29 L. ed. 430 [*affirming* 12 Fed. 743, 21 Blatchf. 13], holding that a county bond containing no recitals, and which, although apparently regular, was in fact issued by the county collector in excess of the amount author-

against a *bona fide* holder for value.[1] So a *bona fide* purchaser of municipal securities has a right to presume that everything preliminary to their lawful issue has been done,[2] and is not bound to see that all the details provided by the law authorizing the issue have been duly complied with by the corporate authorities.[3] Where the duly ascertained vote of a majority of the qualified voters is a prerequisite to a bond issue, bonds issued without such vote being ascertained and declared, are invalid even in the hands of an innocent purchaser,[4] but the action of the persons or tribunal authorized by law to determine the result of such an election is conclusive and a *bona fide* purchaser of the bonds is under no obligation to look beyond it.[5] Where, however, a statute conferring upon cities the right to issue funding bonds requires the power to be exercised by ordinance, an attempt to confer authority on the mayor and clerk of the city to put such bonds in circulation by resolution is void, and a purchaser of such bonds in open market is bound to take notice of the defect.[6]

f. Excess of Debt Limit. A purchaser of municipal securities must at his peril ascertain whether the constitutional debt limit of the city is thereby exceeded, for in case of such excess, every purchaser is chargeable with notice thereof and no one is entitled to protection as a *bona fide* holder.[7] And where an issue of municipal bonds which are all sold to the same purchaser in itself exceeds the constitutional limit of the city's indebtedness, the purchaser is limited in his recovery against the city to the amount of indebtedness which the city could lawfully contract.[8] A purchaser of county bonds, in determining whether the aggregate issue exceeds the statutory limit of a certain per cent of the assessed value of the county property, has a right to rely upon the amount of the assessment as finally established by the board of equalization and certified by the county clerk to the auditor of the state, without going to the books of the several precinct assessors.[9]

ized, and pledged as security for his personal debt, is void, even in the hands of an innocent holder for value, when an inspection of the public registry of bonds would have disclosed the overissue.

1. Greeley *v.* Jacksonville, 17 Fla. 174, holding that where a city has issued bonds which are authorized by its charter, and which have come into the hands of *bona fide* purchasers, a taxpayer of the city cannot have the bonds declared illegal, because the notice of the election to be held to decide whether the bonds should be issued was not given in conformity with the city ordinances. But *compare* Duanesburgh *v.* Jenkins, 40 Barb. (N. Y.) 574, holding that persons receiving bonds issued by towns are presumed to know the law, and bound at their peril to ascertain whether the statute authorizing their creation has been complied with.

2. Com. *v.* Pittsburgh, 34 Pa. St. 496, holding that one buying railroad aid bonds that have been executed by a city and delivered to the railroad company has a right to presume that the mayor had complied with the ordinance requiring him not to issue the bonds until the road was located.

3. Danielly *v.* Cabaniss, 52 Ga. 211.

4. Claybrook *v.* Rockingham, 114 N. C. 453, 19 S. E. 593.

5. Rock Creek Tp. *v.* Strong, 94 U. S. 271, 24 L. ed. 815. But *compare* Faulkenstein Tp. *v.* Fitch, 2 Kan. App. 193, 43 Pac. 276, holding that where the statute relating to township bonds contains a sufficient notice to an intending purchaser of bonds issued under that act that an election must be held to authorize the action of the township officers in issuing the bonds, such purchaser is bound to examine into the legality of the election.

6. Edminson *v.* Abilene, 7 Kan. App. 305, 54 Pac. 568.

7. Decorah First Nat. Bank *v.* Doon Dist. Tp., 86 Iowa 330, 53 N. W. 301, 41 Am. St. Rep. 489; Kane *v.* Rock Rapids Independent School-Dist., 82 Iowa 5, 47 N. W. 1076; Mosher *v.* Ackley Independent School Dist., 44 Iowa 122; McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Millerstown *v.* Fredericks, 114 Pa. St. 435, 7 Atl. 156; Peck *v.* Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653 (holding that where the rate of taxation which may be levied by a city is positively limited by the constitution, a purchaser of bonds of such city is required to take notice of the fact that such limit was reached before the bonds were issued); Salmon *v.* Allison Rural Independent School Dist., 125 Fed. 235; Kearney *v.* Woodruff, 115 Fed. 90, 53 C. C. A. 117; Burlington Sav. Bank *v.* Clinton, 111 Fed. 439; Bates *v.* Independent School Dist., 25 Fed. 192. See also French *v.* Burlington, 42 Iowa 614.

A purchaser of refunding bonds is bound to take notice that the original bonds exceeded the constitutional limitation of indebtedness. Shaw *v.* Riverside Independent School Dist., 62 Fed. 911.

8. Burlington Sav. Bank *v.* Clinton, 111 Fed. 439.

9. McLean *v.* Valley County, 74 Fed. 389.

20. Effect of Recitals in Bonds — a. In General. A purchaser of municipal bonds is not required to examine further than the act of the legislature authorizing the issue and the recitals of the bond, when no such duty is imposed by statute;[10] and where innocent persons invest money in the bonds of a municipality because of authorized recitals of its officers and of the commercial credit given to them by payment of interest thereon for many years, they should be sustained unless an insuperable legal obstacle prevents.[11] Consequently it is well settled that where the authority to issue municipal bonds exists, purchasers are entitled to rely upon recitals therein that such authority has been regularly exercised, and the municipality is estopped to deny such recitals.[12] Recitals in municipal bonds are, however, binding only in respect to matters of fact[13] which it may be fairly presumed that the officers of the municipality were left to determine,[14] and not in respect to matters of law of which all are bound to take cognizance;[15] and even as to matters of fact they are not estopped if the facts recited are matters of public record open to the inspection of every inquirer.[16] Where an act authorizing the issuance of township bonds vests the power to issue them, when the conditions precedent have been complied with, in the township board, but without specifying the manner of its exercise, they may direct the bonds to be executed and signed by the appropriate officers of the township, and in such case recitals contained in the bonds are to be given as full effect as though made by the board

10. Brewton *v.* Spira, 106 Ala. 229, 17 So. 606; Lyons *v.* Munson, 99 U. S. 684, 25 L. ed. 451; Foote *v.* Hancock, 9 Fed. Cas. No. 4,911, 15 Blatchf. 343; Mygatt *v.* Green Bay, 17 Fed. Cas. No. 9,998, 1 Biss. 292.

11. Platt *v.* Hitchcock County, 139 Fed. 929, 17 C. C. A. 649.

12. *Maine.*— Shurtleff *v.* Wiscasset, 74 Me. 130 [*following* Lane *v.* Embden, 72 Me. 354; Deming *v.* Houlton, 64 Me. 254, 18 Am. Rep. 253; Augusta Bank *v.* Augusta, 49 Me. 507].

Minnesota.—St. Paul Gaslight Co. *v.* Sandstone, 73 Minn. 225, 75 N. W. 1050 [*following* Fulton *v.* Riverton, 42 Minn. 395, 44 N. W. 257].

New York.— Dodge *v.* Platte County, 16 Hun 285 [*reversed* on other grounds in '82 N. Y. 218].

Pennsylvania.— Kerr *v.* Corry, 105 Pa. St. 282.

Tennessee.— Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670.

Virginia.— See De Voss *v.* Richmond, 18 Gratt. 338, 98 Am. Dec. 646.

United States.— Lyons *v.* Munson, 99 U. S. 684, 25 L. ed. 451; Waite *v.* Santa Cruz, 89 Fed. 619; Kiowa County *v.* Howard, 83 Fed. 296, 27 C. C. A. 531; Syracuse Third Nat. Bank *v.* Seneca Falls, 15 Fed. 783; Phelps *v.* Yates, 19 Fed. Cas. No. 11,082, 16 Blatchf. 192, holding that in a suit against a town on coupons belonging to bonds issued by it, by a *bona fide* purchaser, defendant cannot show that the bonds were delivered before any seals were affixed, and with the dates and numbers in blank, and were sealed and filled out and negotiated before the fulfilment of the conditions under which they were delivered, where the bonds recited that they were issued under the hands and seals of the commissioners.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1972.

Defective notice of election.— Where bonds are issued without giving the notice of an election to authorize the same for the length of time required by the statute, the defect is not cured by recitals in the bonds. Springfield Safe Deposit, etc., Co. *v.* Attica, 85 Fed. 387, 29 C. C. A. 214.

13. U. S. *v.* Cicero, 41 Fed. 83.

14. Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670; Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288; National Bank of Commerce *v.* Grenada, 54 Fed. 100, 4 C. C. A. 212.

Population of municipality.— Where the bonds of a municipality in aid of a railroad recited on their face that they were issued "in pursuance of law," and one of the statutes relied on provided that towns having more than one thousand inhabitants might issue bonds in payment of their matured liabilities, the recital does not estop the town from showing that in fact it did not have the requisite population, because neither by the statutes nor by any other law was the duty devolved on the officials issuing the bonds, or the town itself, to ascertain the population. Kelly *v.* Milan, 21 Fed. 842.

15. U. S. *v.* Cicero, 41 Fed. 83.

16. Sutliff *v.* Lake County, 147 U. S. 230, 13 S. Ct. 318, 37 L. ed. 145; Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288. And see as to matters of record *supra*, XV, C, 19, c.

itself;[17] but a city is not bound by recitals contained in bonds issued by the board of public works where such board is a distinct corporation, acting independently of the city, under the provisions of a special statute.[18] Where bonds recite that the city has caused the bonds to be signed by certain officers, who have in fact signed them, the city cannot urge that they were signed by such officers without its authority.[19] A recital that municipal bonds were issued under the authority of a state and in pursuance of a city ordinance does not necessarily import a compliance with the state constitution,[20] nor does a recital in bonds that they were issued by virtue of a certain statute and in accordance with the vote of the electors of the town preclude inquiry into the performance of a condition to be performed after issuance of the bonds.[21] City bonds are not invalidated by misrecitals therein respecting the particular act of assembly under which the ordinance authorizing the issuance of the bonds was passed.[22] A recital in municipal bonds that they were ordered to be issued at a date prior to that fixed by statute for their issuance is, if the bonds are in fact prematurely issued, notice of their invalidity to all persons acquiring them;[23] but such recital is not conclusive, and it may be shown that the bonds were not ordered to be issued nor issued until the time prescribed by statute.[24]

b. Power to Issue. A lack of power on the part of a municipality to issue bonds cannot be cured or supplied by any recital in the bonds,[25] and hence no recitals can estop the municipality to deny its power to issue the bonds,[26] where the laws are such that there can be no state of facts or of conditions under which

17. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

18. Liebman *v.* San Francisco, 24 Fed. 705.

19. German Ins. Co. *v.* Manning, 78 Fed. 900.

20. Buchanan *v.* Litchfield, 102 U. S. 278, 26 L. ed. 138.

21. Parker *v.* Smith, 3 Ill. App. 356.

22. Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532.

23. Chicago, etc., R. Co. *v.* Dundy County, 3 Nebr. (Unoff.) 391, 91 N. W. 554.

24. Chicago, etc., R. Co. *v.* Dundy County, 3 Nebr. (Unoff.) 391, 91 N. W. 554.

25. *Illinois.*— Lippincott *v.* Pana, 92 Ill. 24.

New York.—Craig *v.* Andes, 93 N. Y. 405; Dodge *v.* Platte County, 16 Hun 285 [*reversed* on other grounds in 82 N. Y. 218].

North Carolina.— Debnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3; Wilkes County *v.* Call, 123 N. C. 308, 31 S. E. 481.

Tennessee.— Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670.

Texas.— Cass County *v.* Wilbarger County, 25 Tex. Civ. App. 52, 60 S. W. 988. See also Peck *v.* Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653.

United States.— Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005; McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129; Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579; Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288; Thomas *v.* Lansing, 14 Fed. 618, 21 Blatchf. 119.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1973.

Where the statutory power to issue bonds has been exceeded a purchaser is not protected by recitals in the bonds that they are issued in conformity to the statute. Woodruff *v.* Oklahoma, 57 Miss. 806, so holding where the statute authorized an issue of bonds to be payable at a time "not to extend beyond ten years from the date of issuance," and the bonds issued were made payable for twenty years.

26. *Illinois.*— Lippincott *v.* Pana, 92 Ill. 24 [*following* Williams *v.* Roberts, 88 Ill. 13; Force *v.* Batavia, 61 Ill. 99].

New Jersey.— Hudson *v.* Winslow Tp., 35 N. J. L. 437.

North Carolina.— Debnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3.

Texas.— Peck *v.* Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653.

Wisconsin.— Uncas Nat. Bank *v.* Superior, 115 Wis. 340, 91 N. W. 1004.

United States.— Hedges *v.* Dixon County, 150 U. S. 182, 187, 14 S. Ct. 71, 37 L. ed. 1044 [*affirming* 37 Fed. 304] (where it is said: "Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds"); Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 S. Ct. 947, 30 L. ed. 911; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; D'Esterre *v.* Brooklyn, 90 Fed. 586 (holding that a recital in a municipal bond that it is issued in pursuance of a statute referred to is conclusive against the municipality only as to matters of fact, and does

the municipality would have the authority to emit the bonds.[27] It has been laid down that if the laws are such as that there might under any state of facts or circumstances be lawful power in a municipality or quasi-municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send the bonds forth,[28] unless the constitution or the law under which the bonds were issued prescribed some public record as the test of the existence of some of those facts or circumstances;[29] but this statement should be modified so as to limit the application of the rule to cases in which the fact represented by the recital is one which the law empowers or makes it the duty of the local board to ascertain and determine as a condition to its further proceeding.[30] The federal courts hold that a recital in municipal bonds that they were issued under a particular statute which is invalid does not preclude inquiry as to whether there is other and valid legislative authority under which the power to issue the bonds can be upheld,[31] but a state court has held

not estop it from denying the power of its officers to issue such a bond under the statute); Swan *v.* Arkansas City, 61 Fed. 478 (holding that a recital in city bonds that all the requirements of the statutes have been strictly complied with in issuing them does not estop the city from pleading a want of power to issue the bonds); Travelers' Ins. Co. *v.* Oswego, 55 Fed. 361 (holding that the municipality cannot be estopped, by recitals in the bonds, to deny, even as against *bona fide* purchasers, the powers of commissioners appointed by the legislature to issue them); Kelly *v.* Milan, 21 Fed. 842; Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584 (holding that where a municipal corporation without authority of law subscribed for stock in a plank road company, and issued its bonds in payment, it was not estopped, by the negotiable form or other matter appearing on the face of the bonds, from denying the authority of its officers to pledge its faith in aid of the road, or to issue such bonds).

See 36 Cent. Dig. tit. "Municipal Corporations," § 1973.

Unconstitutionality of statute.—A municipal corporation, which has issued bonds purporting to be issued according to a state law, is not estopped by recitals in the bonds to prove that the law was never constitutionally passed. South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154. See also Cass County *v.* Wilbarger County, 25 Tex. Civ. App. 52, 60 S. W. 988.

Where lack of power not ascertainable.—Recitals in municipal bonds may constitute an estoppel in favor of a *bona fide* purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of the bonds, if the fact of this want of power does not appear from the bonds, the statutes under which they are issued, or the public records referred to therein. National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

Adoption of ordinance.—A recital on the face of municipal bonds that they were issued under an ordinance "adopted" does not estop the city to show, as against a purchaser of the bonds, that such ordinance was never published as required by law, and that the bonds were therefore invalid. National Bank of Commerce *v.* Grenada, 44 Fed. 262.

27. Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

28. State *v.* Wichita County, 62 Kan. 494, 64 Pac. 45; Platt *v.* Hitchcock County, 139 Fed. 929, 71 C. C. A. 649; Gamble *v.* Allison Rural Independent School Dist., 132 Fed. 514 [*reversed* on other grounds in 146 Fed. 113, 76 C. C. A. 539]; Henderson County *v.* Travelers' Ins. Co., 128 Fed. 817, 63 C. C. A. 467; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Hopper *v.* Covington, 8 Fed. 777, 10 Biss. 488.

Municipal aid to corporation not entitled thereto.—Where a city is authorized to issue bonds only in aid of a domestic corporation, the fact that the bonds recited on their face that they were issued to a railroad company incorporated under the general laws of the state does not estop the city thereafter to show that such corporation was in fact a foreign corporation. Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 146, 44 S. W. 670, where it is said: "This recital . . . did not estop the city . . . from disputing the existence of any fact which its board was not by the enactment required to decide in the first instance, or which was to be determined by some other authority or from some record accessible to the public." *Contra*, Municipal Trust Co. *v.* Johnson City, 116 Fed. 458, 53 C. C. A. 178.

29. Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541. See *infra*, XV, C, 20, f.

30. Municipal Trust Co. *v.* Johnson City, 116 Fed. 458, 53 C. C. A. 178. See also Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258 [*affirming* 5 Fed. 568, and *distinguishing* Coloma *v.* Evans, 92 U. S. 484, 23 L. ed. 579]. And see *infra*, XV, C, 20, c.

31. Defiance *v.* Schmidt, 123 Fed. 1, 59 C. C. A. 159 [*affirming* 117 Fed. 702]; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Wilkes County *v.* Coler, 113 Fed. 725,

that in such case the bondholders are estopped from setting up some other statutory or constitutional authority.[32]

c. Performance and Existence of Conditions — (1) *In General.* Where the power to issue municipal bonds exists, a *bona fide* purchaser of such bonds in the open market is entitled to rely on recitals in the bonds that all antecedent steps necessary to validate the securities have been taken.[33] Accordingly it is well established that the recitals of the officers of a municipal corporation who are invested with power to perform a condition precedent to the issue of negotiable bonds or with authority to determine when that condition has been performed, that they have found that all the requirements of law necessary to authorize the issuance of the bonds have been fully complied with, precludes inquiry as against an innocent purchaser for value as to whether a condition precedent had actually been performed before the bonds were issued,[34] for such recital is of itself a deci-

51 C. C. A. 399 [*affirmed* in 190 U. S. 107, 23 S. Ct. 738, 47 L. ed. 971, and *citing* Wilkes County *v.* Coler, 180 U. S. 506, 21 S. Ct. 458, 45 L. ed. 642; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760; Knox County *v.* Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93; Anderson County *v.* Beal, 113 U. S. 227, 5 S. Ct. 433, 28 L. ed. 966; Johnson County *v.* January, 94 U. S. 202, 24 L. ed. 110].

32. Wilkes County *v.* Call, 123 N. C. 308, 31 S. E. 481.

33. Shurtleff *v.* Wiscasset, 74 Me. 130 [*following* Lane *v.* Embden, 72 Me. 354; Deming *v.* Houlton, 64 Me. 254, 18 Am. Rep. 253; Augusta Bank *v.* Augusta, 49 Me. 507]; St. Paul Gaslight Co. *v.* Sandstone, 73 Minn. 225, 75 N. W. 1050 [*following* Fulton *v.* Riverton, 42 Minn. 395, 44 N. W. 257]; Waite *v.* Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. ed. 552 [*reversing* 98 Fed. 387, 39 C. C. A. 106]; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760; Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208; Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192; Kearney *v.* Woodruff, 115 Fed. 90, 53 C. C. A. 117; Heed *v.* Cowley County, 82 Fed. 716. See also Defiance *v.* Schmidt, 123 Fed. 1, 59 C. C. A. 159 [*affirming* 117 Fed. 702].

Irregularities in exercise of power to issue bonds may be cured by recitals. Wilkes County *v.* Call, 123 N. C. 308, 31 S. E. 481.

34. *Kansas.*— South Hutchinson *v.* Barnum, 63 Kan. 872, 66 Pac. 1035.

Maine.— Shurtleff *v.* Wiscasset, 74 Me. 130 [*following* Lane *v.* Embden, 72 Me. 354; Deming *v.* Houlton, 64 Me. 254, 18 Am. Rep. 253; Augusta Bank *v.* Augusta, 49 Me. 507].

Minnesota.— St. Paul Gaslight Co. *v.* Sandstone, 73 Minn. 225, 75 N. W. 1050 [*following* Fulton *v.* Riverton, 42 Minn. 395, 44 N. W. 257].

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Elizabeth, 42 N. J. L. 235.

North Dakota.— Coler *v.* Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649.

Oregon.— Klamath Falls *v.* Sachs, 35 Oreg. 325, 57 Pac. 329, 76 Am. St. Rep. 501.

South Dakota.—Coler *v.* Rhoda School Tp., 6 S. D. 640, 63 N. W. 158.

Texas.— Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Peck *v.* Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653.

Virginia.— Cumberland County *v.* Randolpn, 89 Va. 614, 16 S. E. 722.

United States.— Waite *v.* Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. ed. 552 [*reversing* 98 Fed. 387, 39 C. C. A. 106 (*affirming* 89 Fed. 619)]; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760; Andes *v.* Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. ed. 996; Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585; Cairo *v.* Zale, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359; Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323; Anderson County *v.* Beal, 113 U. S. 227, 5 S. Ct. 433, 28 L. ed. 966; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Steamboat Rock Independent School Dist. *v.* Stone, 106 U. S. 183, 1 S. Ct. 84, 27 L. ed. 90; American L. Ins. Co. *v.* Bruce, 105 U. S. 328, 26 L. ed. 1121 (holding that where a city, having authority by statute to make unconditional subscriptions to a railroad, issued certain bonds which recited that they conformed to the statutory requirements, the bonds were valid in the hands of a *bona fide* holder, notwithstanding that by the permission of the statute conditions had been imposed by popular vote which had not been fulfilled, and the statute declared that in such case the bonds should not be binding); Clay County *v.* Savings Soc., 104 U. S. 579, 26 L. ed. 856; Pompton Tp. *v.* Cooper Union, 101 U. S. 196, 25 L. ed. 803; Bourbon County *v.* Block, 99 U. S. 686, 25 L. ed. 491; Orleans *v.* Platt, 99 U. S. 676, 25 L. ed. 404; Nauvoo *v.* Ritter, 97 U. S. 389, 24 L. ed. 1050; San Antonio *v.* Mehaffy, 96 U. S. 312, 24 L. ed. 816; Douglas County *v.* Bolles, 94 U. S. 104, 25 L. ed. 46; Marcy *v.* Oswego, 92 U. S. 637, 23 L. ed. 748; Moultrie County *v.* Rockingham Sav. Bank, 92 U. S. 631, 23 L. ed. 631; Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579; Mercer County *v.* Hackett, 1 Wall. 83, 17 L. ed. 548; Moran *v.* Miami County, 2 Black 722, 17 L. ed. 342; Knox County *v.* Aspinwall,

sion by the appointed tribunal that the requisite facts exist.[35] Such an estoppel may arise in a proper case upon a recital that an act or condition required by the constitution has been performed or fulfilled as well as upon a recital of compliance with the statutory requirements.[36] But this estoppel does not arise except upon matters of fact which the corporate officers have authority by law to determine and certify.[37]

(II) *Officers Authorized to Make Binding Recitals.* In order that recitals in municipal bonds shall constitute an estoppel as against the municipality, it is not necessary that the officers by whom the bonds are issued should be given express authority to decide as to compliance with preliminary conditions, but it

21 How. 539, 16 L. ed. 208; Bradford *v.* Cameron, 145 Fed. 21, 76 C. C. A. 21; Platt *v.* Hitchcock County, 139 Fed. 929, 71 C. C. A. 649; Rees *v.* Olmsted, 135 Fed. 296, 68 C. C. A. 50; Defiance *v.* Schmidt, 123 Fed. 1, 59 C. C. A. 159 [*affirming* 117 Fed. 702]; Wetzell *v.* Paducah, 117 Fed. 647; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Wilkes County *v.* Coler, 113 Fed. 725, 51 C. C. A. 399 [*affirmed* in 190 U. S. 107, 23 S. Ct. 738, 47 L. ed. 971]; Stanley County *v.* Coler, 113 Fed. 705, 51 C. C. A. 379, 96 Fed. 284, 37 C. C. A. 484 [*affirming* 89 Fed. 257, and *affirmed* in 190 U. S. 437, 23 S. Ct. 811, 47 L. ed. 1126]; Clapp *v.* Marice City, 111 Fed. 103, 49 C. C. A. 251; Pierre Bd. of Education *v.* McLean, 106 Fed. 817, 45 C. C. A. 658; Clapp *v.* Otoe County, 104 Fed. 473, 45 C. C. A. 579; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Kent *v.* Dana, 100 Fed. 56, 40 C. C. A. 281; Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1; Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Brattleboro Sav. Bank *v.* Hardy Tp., 98 Fed. 524 [*affirmed* in 106 Fed. 986, 46 C. C. A. 66]; Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84 [*affirming* 82 Fed. 873]; Haskell County *v.* National L. Ins. Co., 90 Fed. 228, 32 C. C. A. 591; Waite *v.* Santa Cruz, 89 Fed. 619; South St. Paul *v.* Lamprecht, 88 Fed. 449, 31 C. C. A. 585; Ninety-Six Tp. *v.* Folsom, 87 Fed. 304, 30 C. C. A. 657; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; Brown *v.* Ingalls Tp., 86 Fed. 261, 30 C. C. A. 27; Rollins *v.* Gunnison County, 80 Fed. 692, 26 C. C. A. 91; Second Ward Sav. Bank *v.* Huron, 80 Fed. 660; Wesson *v.* Salina County, 73 Fed. 917, 20 C. C. A. 227 [*following* Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760, *overruling* Post *v.* Pulaski County, 49 Fed. 628, 1 C. C. A. 405, and *followed* in Ashman *v.* Pulaski County, 73 Fed. 927, 20 C. C. A. 232]; Mercer County *v.* Provident Life, etc., Co., 72 Fed. 623, 19 C. C. A. 44; Columbus *v.* Dennison, 69 Fed. 58, 16 C. C. A. 125; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637; Washington Tp. *v.* Coler, 51 Fed. 362, 2 C. C. A. 272; Kimball *v.* Lakeland, 41 Fed. 289; Moulton *v.* Evansville, 25 Fed. 382; Carrier *v.* Shawangunk, 10 Fed. 220, 20 Blatchf. 307; Marshal *v.* Elgin, 8 Fed. 783, 3 McCrary 35; Hopper *v.* Covington, 8 Fed. 777, 10 Biss. 488; Davis *v.* Kendallville, 7 Fed. Cas. No. 3,638, 5 Biss. 280; Foote *v.* Hancock, 9 Fed. Cas. No. 4,911, 15 Blatchf. 343; Jordan *v.* Cass County, 13 Fed. Cas. No. 7,518, 3 Dill. 245 [*affirmed* in 95 U. S. 373, 24 L. ed. 419]; Miller *v.* Berlin, 17 Fed. Cas. No. 9,562, 13 Blatchf. 245; Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131; Pollard *v.* Pleasant Hills, 19 Fed. Cas. No. 11,253, 3 Dill. 195; Portsmouth Sav. Bank *v.* Yellow Head, 19 Fed. Cas. No. 11,296, 3 Biss. 474; Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1974.

In New York the mere fact that town bonds recite that all necessary legal steps have been taken to comply with the statute authorizing their issue does not estop the town from questioning the validity of the bonds, even in the hands of a *bona fide* holder, unless it is estopped by an express legislative enactment. Ontario *v.* Union Bank, 21 Misc. 770, 47 N. Y. Suppl. 927, where it is said that the New York courts "have refused to follow the decisions of the federal courts in reference to *bona fide* holders of municipal bonds." See also Starin *v.* Geneva, 23 N. Y. 439.

Recital of compliance with statute and invalid amendment.— When bonds contain a recital to the effect that they were issued in pursuance of a specified statute, and of a later act amendatory of the first, and the later act is invalid, a purchaser without notice to the contrary may presume that the requirements of the original statute were complied with. Moulton *v.* Evansville, 25 Fed. 382.

35. Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579 [*approved* in Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360]; Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131; Foote *v.* Hancock, 9 Fed. Cas. No. 4,911, 15 Blatchf. 343.

36. King *v.* Superior, 117 Fed. 113, 54 C. C. A. 499; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

37. Spitzer *v.* Blanchard, 82 Mich. 234, 46 N. W. 400; Dixon County *v.* Field, 111 U. S. 83, 94, 4 S. Ct. 315, 28 L. ed. 360 [*followed* in National Bank of Commerce *v.* Granada, 54 Fed. 100, 4 C. C. A. 212 (*affirming* 48 Fed. 278, 44 Fed. 262)], where it is said: "If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof.

is sufficient if they are given full control of the matter.[38] It seems that a municipal corporation may be estopped, by recitals in its bonds that all conditions necessary to their issue have been complied with, to dispute the performance of such conditions, although the bonds were not issued by the regular municipal officers, but by commissioners named by a court.[39] Where a statute authorizes the board of commissioners of a county, on petition therefor, to appoint road commissioners for a district, who shall have power to issue bonds for road improvements, to be attested and registered by the county auditor and at once reported to the county board, which has general charge of the improvements and the levying of the tax to pay the bonds, such commissioners, in the issuance of the bonds, as well as in supervising the work done, act simply as agents for the county board, and recitals made by them in the bonds that all things required by the act as conditions precedent to their issuance have been properly done and performed must be regarded as having been made by authority of the county board, and create an estoppel in favor of *bona fide* purchasers of the bonds, which precludes a defense thereto on the ground of any irregularity in the action of the board as well as of the road commissioners.[40] An act authorizing the trustees of a township to issue bonds for the purpose of refunding its outstanding indebtedness, which contains no reference to any record of indebtedness, or requirement that such a record shall be kept, but provides that the bonds shall contain a recital that they are issued under and by authority of such act, must be held to confer power on the trustees, who are the officers charged with the duty of incurring the indebtedness of the township, to recite in the bonds that the valid indebtedness of the township is such as to authorize their issuance under the act, in order to refund it.[41]

(III) *Form and Construction of Recitals.* Fulfilment of all conditions precedent in the issuance of bonds by a municipal corporation and compliance with all requirements is imported by a recital that the bonds are issued "in pursuance of,"[42] "pursuant to,"[43] "in conformity with,"[44] "in accordance with,"[45]

In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject. This is the rule which has been constantly applied by this court in the numerous cases in which it has been involved. The differences in the result of the judgments have depended upon the question, whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being." See also Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258 [*affirming* 5 Fed. 568, and *distinguishing* Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579].

38. Coler *v.* Dwight, 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; Bernards Tp. *v.* Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. ed. 766 [*following* Oregon *v.* Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. ed. 323].

39. Andes *v.* Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. ed. 996.

40. Rees *v.* Olmsted, 135 Fed. 296, 68 C. C. A. 50.

41. Brattleboro Sav. Bank *v.* Hardy Tp., 98 Fed. 524 [*affirmed* in 106 Fed. 986, 46 C. C. A. 66].

42. Coler *v.* Dwight, 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84 [*affirming* 82 Fed. 873]; Bates *v.* Riverside Independent School Dist., 25 Fed. 192.

43. Clay County *v.* Savings Soc., 104 U. S. 579, 26 L. ed. 856; Stanly County *v.* Coler, 113 Fed. 705, 51 C. C. A. 379, 96 Fed. 284, 37 C. C. A. 484 [*affirming* 89 Fed. 257, and *affirmed* in 190 U. S. 437, 23 S. Ct. 811, 47 L. ed. 1126].

44. Kent *v.* Dana, 100 Fed. 56, 40 C. C. A. 281; Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84 [*affirming* 82 Fed. 873]; Bates *v.* Riverside Independent School Dist., 25 Fed. 192.

45. Haskell County *v.* National L. Ins. Co., 90 Fed. 228, 32 C. C. A. 591.

"by virtue of,"[46] or "by authority of"[47] a particular statute or that they are "authorized by" a statute to which reference is made,[48] or by a recital that "all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law."[49] So also a recital that bonds were issued by virtue of an ordinance of the city concludes the city as to any irregularities that may have existed in carrying into execution the power to issue the bonds.[50] A recital in bonds issued on account of a municipal subscription to the stock of a railroad company, that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof," imports not only compliance with the act of the legislature, but that the ordinances of the city council conform to the statute.[51] A general recital in bonds issued by a city that "all acts, conditions, and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law," has been held to estop the city, as against a *bona fide* holder of such bonds for value, to deny that before or at the time of issuing the bonds it provided for the collection of a tax sufficient to pay the interest and principal thereof as required by the constitution of the state; such act being one to be done by the city, and which it had power to certify that it had done.[52]

(IV) *RECITAL OF PERFORMANCE OF CONDITIONS AT IMPROPER TIME.* When municipal bonds recite upon their face that they are issued in accordance with the provisions of a particular act of the legislature, and that certain steps required by such act to be taken as a condition of their issue were taken at a time when the act itself shows they could not legally be taken, such bonds are invalid, even in the hands of a *bona fide* purchaser for value.[53]

(V) *NEW RECITALS IN BONDS ISSUED IN EXCHANGE FOR OTHERS.* Where the holder of bonds which were issued illegally and without consideration, and were in themselves in excess of the constitutional limit of indebtedness, procured new bonds to be issued in exchange therefor, containing a recital that they were issued in accordance with the constitution of the state, which recital was not contained in the original bonds, he could not rely on such recital to validate the new bonds in his hands.[54]

(VI) *RECITALS AS TO POPULAR ASSENT.* The rule that recitals in municipal bonds that the conditions precedent to their issuance have been fulfilled are conclusive in favor of *bona fide* purchasers, and the municipality is estopped to deny their truth, applies in full force when the statute requires a petition or the consent of the voters or taxpayers as a condition precedent to the issuance of bonds.[55] But

46. Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760; Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84 [*affirming* 82 Fed. 873].

47. Jordan *v.* Cass County, 13 Fed. Cas. No. 7,518, 3 Dill. 245 [*affirmed* in 95 U. S. 373, 24 L. ed. 419].

48. South St. Paul *v.* Lamprecht, 88 Fed. 449, 31 C. C. A. 585.

49. Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192.

50. Von Hostrup *v.* Madison City, 1 Wall. (U. S.) 291, 17 L. ed. 538.

51. Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760.

52. King *v.* Superior, 117 Fed. 113, 54 C. C. A. 499. But *compare* Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439, holding that where bonds recited that they were issued in pursuance of a certain statute, a general recital in the bonds that "all the acts and things required to be done" had been done as required by law referred only to the acts required by the law referred to in the bond, and did not constitute a statement that a constitutional requirement that a tax should be levied at the time the bonds were issued had been complied with.

53. Manhattan Co. *v.* Ironwood, 74 Fed. 535, 20 C. C. A. 642 [*following* McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129].

54. Salmon *v.* Rural Independent School Dist., 125 Fed. 235, holding that one who obtained title by descent from the original holder could not recover.

55. Fulton *v.* Riverton, 42 Minn. 395, 44 N. W. 257; Coler *v.* Rhoda School Tp., 6 S. D. 640, 63 N. W. 158; Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722; Waite *v.* Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. ed. 552 [*reversing* 98 Fed. 387, 39

a recital in municipal bonds that they were for a subscription to the capital stock of a railroad company, authorized by acts of the state legislature referred to by title and date, does not estop the municipality from setting up, in an action on the bonds, that their issue was not authorized by the vote of two thirds of the voters of the municipality, as required by the constitution of the state.[56]

d. Recitals as to Debt Limit. It has been held that a purchaser of municipal bonds is not obliged to go behind recitals therein to ascertain whether they exceed the debt limit fixed by statute,[57] but a recital that the limit is not exceeded is conclusive in favor of a *bona fide* purchaser.[58] But other cases hold that a *bona fide* purchaser of municipal bonds is not entitled to rely solely on the recital therein that the debt thereby created does not exceed the constitutional limit,[59] and the city is not estopped by recitals in the bonds from asserting that the debt created by their issuance exceeds the constitutional[60] or statutory[61] limit, since the purchaser is bound to take notice of the existing indebtedness and the assessed valuation of property in the city.[62] The best rule appears to be that a recital on the face of municipal bonds that the indebtedness thereby created does not exceed the constitutional or statutory limit is conclusive in favor of a *bona fide* holder, and the municipality is estopped to deny it,[63] where there is nothing on the face

C. C. A. 106 (*affirming* 89 Fed. 619)]; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760; Chaffee County Com'rs *v.* Potter, 142 U. S. 355, 12 S. Ct. 216, 35 L. ed. 1040; Bernards Tp. *v.* Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. ed. 766; Comanche County Com'rs *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604 [*affirming* 35 Fed. 343]; San Antonio *v.* Mehaffy, 96 U. S. 312, 24 L. ed. 816; Venice *v.* Murdock, 92 U. S. 494, 23 L. ed. 583; Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579; Von Hostrup *v.* Madison City, 1 Wall. (U. S.) 291, 17 L. ed. 538; Bissell *v.* Jeffersonville, 24 How. (U. S.) 287, 16 L. ed. 664; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Moulton *v.* Evansville, 25 Fed. 382; Ganse *v.* Clarksville, 1 Fed. 353, 1 McCrary 78; Huidekoper, *v.* Buchanan County, 12 Fed. Cas. No. 6,847, 3 Dill. 175; Judson *v.* Plattsburg, 14 Fed. Cas. No. 7,570, 3 Dill. 181; Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632. See also Orleans *v.* Platt, 99 U. S. 676, 25 L. ed. 404; Hackett *v.* Ottawa, 99 U. S. 86, 25 L. ed. 363 [*reversing* 11 Fed. Cas. No. 5,889]. But *compare* Carpenter *v.* Lathrop, 51 Mo. 483; Liebman *v.* San Francisco, 24 Fed. 705.

56. Carroll County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517.

57. Sherman County *v.* Simonds, 109 U. S. 735, 3 S. Ct. 502, 27 L. ed. 1093 [*following* Wilson *v.* Salamanca Tp., 99 U. S. 499, 25 L. ed. 330; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. ed. 752; Marcy *v.* Oswego, 92 U. S. 637, 23 L. ed. 748].

Where a municipality issues two series of bonds the bonds of each series containing recitals showing that such series does not exceed the lawful debt limit, a *bona fide* holder of bonds of one series is entitled to recover thereon, although the aggregate of the two series exceeds the debt limit. Rathbone *v.* Kiowa County, 83 Fed. 125, 27 C. C. A. 477 [*reversing* 73 Fed. 395].

58. Dallas County *v.* McKenzie, 110 U. S. 686, 4 S. Ct. 184, 28 L. ed. 285 [*following* Wilson *v.* Salamanca Tp., 99 U. S. 499, 25 L. ed. 330; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. ed. 752; Marcy *v.* Oswego, 92 U. S. 637, 23 L. ed. 748]; Municipal Trust Co. *v.* Johnson City, 116 Fed. 458, 53 C. C. A. 178, holding that under a statute limiting the amount of railroad bonds which may be issued by a city to a certain per cent of its "taxable property," the assessment rolls for the year preceding that in which bonds are issued are not conclusive upon the value of the taxable property of the city at the time of their issuance, and a recital in the bonds, by the officers vested with the duty of determining the question, that the statute has been fully complied with, is conclusive upon the city, in favor of a *bona fide* holder, that they do not exceed in amount the statutory limit.

59. Fairfield *v.* Rural Independent School Dist., 111 Fed. 453 [*reversed* on other grounds in 116 Fed. 838, 54 C. C. A. 342].

60. Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Prickett *v.* Marceline, 65 Fed. 469 (in which case it was held that a municipal corporation may deny the validity of its bonds because creating an indebtedness in excess of the limit fixed by Mo. Const. art. 10, § 12, notwithstanding recitals thereon in the certificate of the state auditor, who, by Mo. Rev. St. (1889) § 847, must register them before they shall be valid, it being further provided that his certificate shall be only *prima facie* evidence of facts therein stated); Bates *v.* Independent School Dist., 25 Fed. 192.

61. Montpelier Nat. L. Ins. Co. *v.* Mead, 13 S. D. 37, 342, 82 N. W. 78, 83 N. W. 335, 79 Am. St. Rep. 876, 48 L. R. A. 785; Springfield Safe Deposit, etc., Co. *v.* Attica, 85 Fed. 387, 29 C. C. A. 214.

62. Montpelier Nat. L. Ins. Co. *v.* Mead, 13 S. D. 37, 342, 82 N. W. 78, 83 N. W. 335, 79 Am. St. Rep. 876, 48 L. R. A. 785.

63. Chaffee County Com'rs *v.* Potter, 142

of the bonds to indicate that the recital is untrue and the limit has in fact been exceeded;[64] but the municipality is not estopped by such a recital where it appears from the face of the bonds that the limit has in fact been exceeded,[65] as where the total amount of the issue is stated, so that an examination of the assessment rolls and a simple arithmetical conclusion would show the excess,[66] or where the constitution or the statute prescribes some public record as a test of whether the limit has been exceeded.[67] Where the statute under which municipal bonds are issued does not authorize the board or officers issuing them to determine whether the proposed issue would, in fact, exceed the limit prescribed by law, and there is no recital in the bonds that they do not exceed such limit, and each bond on its face, when taken in connection with the assessment roll, shows the limit to have been exceeded, a general recital that all the requirements of the law have been complied with will not estop the municipality issuing them from showing that the bonds issued exceed the legal limit; and, when that is shown, they are void in the hands of everyone, whether the limit is imposed by the state constitution or by general statute.[68] Where an entire issue of bonds exceeding the constitutional limit is purchased from the holder thereof by one person, as a single transaction, such person is not entitled to protection as a *bona fide* holder, no matter what recitals appear on the face of the bonds.[69] Where bonds, void because in excess of the amount for which the district could become indebted under the constitution, are canceled by the owner, who is not a *bona fide* holder, in consideration of new bonds issued to him under a statute authorizing the issue of refunding bonds, no estoppel arises from recitals in the refunding bonds to prevent showing the vice of the original issue.[70] When the recital is only that the bonds are issued "under" the provisions of a given statute, this is simply an assertion that the bonds are subject to and controlled by the provisions of the statute named, and the municipality is not estopped by such recital from showing that

U. S. 355, 12 S. Ct. 216, 35 L. ed. 1040 [*followed* in Gunnison County *v.* Rollins, 173 U. S. 255, 19 S. Ct. 390, 43 L. ed. 689]; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167. See also Buchanan *v.* Litchfield, 102 U. S. 278, 26 L. ed. 138.

64. Chaffee County Com'rs *v.* Potter, 142 U. S. 355, 12 S. Ct. 216, 35 L. ed. 1040 [*distinguishing* Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360, and *followed* in Gunnison County *v.* Rollins, 173 U. S. 255, 19 S. Ct. 390, 43 L. ed. 689]; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601.

65. Chaffee County Com'rs *v.* Potter, 142 U. S. 355, 12 S. Ct. 216, 35 L. ed. 1040 [*approving* Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360]; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

66. Chaffee County Com'rs *v.* Potter, 142 U. S. 355, 12 S. Ct. 216, 35 L. ed. 1040 [*approving* Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360].

67. Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167. And see *infra*, XV, C, 20, f.

68. Geer *v.* Ouray County School Dist. No. 11, 97 Fed. 732, 38 C. C. A. 392. See also Steamboat Rock Independent School Dist. *v.* Stone, 106 U. S. 183, 24 L. ed. 90, holding that a recital in a bond that it "is issued by the board of school directors by authority of an election of the voters of said school district held on [a certain day] in conformity with the provisions of" a particular statute, while it implies that the bond was issued by authority of the election, and that the election was in conformity with the statute, does not necessarily import a compliance with a provision of the statute which, following the state constitution, prohibited independent school-districts from incurring indebtedness exceeding in the aggregate five per cent of their taxable property, and therefore the school-district is not estopped, in a suit on the bond, from showing that it is invalid because issued in violation of that provision.

69. Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 617, 619, 12 S. Ct. 746, 36 L. ed. 562 [*affirming* 25 Fed. 635], where it is said: "If not charged with knowledge of the prior indebtedness, she [plaintiff] was with the fact that, independent of such indebtedness, these bonds alone were an overissue, and beyond the power of the district; for she was bound to take notice of the value of taxable property within the district, as shown by the tax list. . . . This case does not turn upon that question [the effect of the recitals] at all. . . . An additional fact, that of notice from the amount of the bonds purchased, was proved."

70. Shaw *v.* Riverside School Dist., 62 Fed. 911.

the bonds are void because they created an indebtedness in excess of the constitutional limitation.[71]

e. Recitals as to Purpose and Consideration. A *bona fide* purchaser of municipal bonds is entitled to rely on recitals therein as to their purpose or consideration, and the municipality is estopped as against such a holder to deny the truth of such recitals or set up that the bonds or the proceeds were not used for the purpose recited,[72] even though a diversion from the lawful purpose may be shown by the municipal records.[73] So where municipal bonds recite that they were issued for the purpose of funding the existing debt of the city, and the city is authorized to issue such bonds, it is estopped as against a *bona fide* holder to set up that the antecedent indebtedness was fraudulent or invalid,[74] or that the refunding bonds either created or increased any indebtedness of the municipality;[75] and an innocent purchaser of such bonds is not required to consider or inquire into the question of excessive indebtedness.[76] A charter provision requiring all municipal bonds to specify the purpose for which they are issued is not complied with so as to cut off equitable defenses against an innocent holder by a negotiable bond which merely gives the date of the ordinance authorizing its issuance, without

71. Bates *v.* Independent School Dist., 25 Fed. 192.

72. Brewton *v.* Spira, 106 Ala. 229, 17 So. 606; Thompson *v.* Mecosta, 127 Mich. 522, 86 N. W. 1044; Aberdeen *v.* Sykes, 59 Miss. 236; Waite *v.* Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. ed. 552 [*reversing* 98 Fed. 387, 39 C. C. A. 106 (*affirming* 89 Fed. 619)]; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760; Harter Tp. *v.* Kernochan, 103 U. S. 562, 26 L. ed. 411; Hackett *v.* Ottawa, 99 U. S. 86, 25 L. ed. 363 [*reversing* 11 Fed. Cas. No. 5,889, and *followed* in Ottawa *v.* Portsmouth First Nat. Bank, 105 U. S. 342, 26 L. ed. 1127; Risley *v.* Howell, 64 Fed. 453, 12 C. C. A. 218]; Defiance *v.* Schmidt, 123 Fed. 1, 59 C. C. A. 159 [*affirming* 117 Fed. 702]; Fairfield *v.* Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342 [*reversing* 111 Fed. 453]; Clapp *v.* Marice City, 111 Fed. 103, 49 C. C. A. 251; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Brattleboro Sav. Bank *v.* Hardy Tp., 98 Fed. 524 [*affirmed* in 106 Fed. 986, 46 C. C. A. 66]; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250; Haskell County *v.* National L. Ins. Co., 90 Fed. 228, 32 C. C. A. 591; Second Ward Sav. Bank *v.* Huron, 80 Fed. 660; Wesson *v.* Saline County, 73 Fed. 917, 20 C. C. A. 227 [*following* Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760, *overruling* Post *v.* Pulaski County, 49 Fed. 628, 1 C. C. A. 405, and *followed* in Ashman *v.* Pulaski County, 73 Fed. 927, 20 C. C. A. 232]; West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637; Cadillac *v.* Woonsocket Sav. Inst., 58 Fed. 935, 7 C. C. A. 574; Portland Sav. Bank *v.* Evansville, 25 Fed. 389; Guernsey *v.* Burlington, 11 Fed. Cas. No. 5,855, 4 Dill. 372.

Authority to make recitals.— An act authorizing the trustees of a township to issue bonds for the purpose of refunding its outstanding indebtedness, which contains no reference to any record of such indebtedness, or requirement that such a record shall be kept, but provides that the bonds shall contain a recital that they are issued under and by authority of such act, must be held to confer power on the trustees, who are the officers charged with the duty of incurring the indebtedness of the township, to recite in the bonds that the valid indebtedness of the township is such as to authorize their issuance under the act, in order to refund it; and such recital is conclusive on the township, in favor of a *bona fide* purchaser of the bonds. Brattleboro Sav. Bank *v.* Hardy Tp., 98 Fed. 524 [*affirmed* in 106 Fed. 986, 46 C. C. A. 66].

73. Portland Sav. Bank *v.* Evansville, 25 Fed. 389. See also Fairfield *v.* Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342 [*reversing* 111 Fed. 453].

74. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* (Civ. App. 1904) 82 S. W. 1066]; Waite *v.* Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. ed. 552 [*reversing* 98 Fed. 387, 39 C. C. A. 106]; Fairfield *v.* Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342 [*reversing* 111 Fed. 453]; Pierre *v.* Dunscomb, 106 Fed. 611, 45 C. C. A. 499; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Wesson *v.* Mt. Vernon, 98 Fed. 804, 39 C. C. A. 301; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; Kiowa County *v.* Howard, 83 Fed. 296, 27 C. C. A. 531; Cadillac *v.* Woonsocket Sav. Inst., 58 Fed. 935, 7 C. C. A. 574; National Bank of Commerce *v.* Grenada, 41 Fed. 87.

Purchaser not bound to investigate nature of refunded indebtedness.—Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455.

75. Fairfield *v.* Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342 [*reversing* 111 Fed. 453]; Pierre *v.* Dunscomb, 106 Fed. 611, 45 C. C. A. 499; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534.

76. Pierre *v.* Dunscomb, 106 Fed. 611, 45 C. C. A. 499; Huron *v.* Second Ward Sav.

stating the contents or title therein;[77] but bonds purporting to be "refunding bonds" issued to take up former bonds "falling due" sufficiently comply with a statute requiring each municipal bond to show upon its face "the class of indebtedness to which it belongs and from what fund it is payable."[78]

f. Recitals as to Matters of Record. Recitals in municipal bonds do not estop the municipality where the constitution or the law under which the bonds are issued prescribes some public record as the test of the existence of the facts or circumstances recited.[79]

g. Recitals as to Seal. Recitals in municipal bonds to the effect that the seal attached is the corporate seal estops the municipality to deny the validity of the seal.[80]

21. Records, Decisions, Affidavits, and Certificates — a. Records. A *bona fide* purchaser of municipal bonds has a right to rely on recitals in the municipal records as to matters affecting the validity of the bonds and as against him the municipality is estopped from contradicting such records.[81]

b. Official and Judicial Decisions. Where matters respecting an issue of bonds, such as the existence of certain facts or the fulfilment of conditions

Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534.

77. Barnett *v.* Denison, 145 U. S. 135, 12 S. Ct. 819, 36 L. ed. 652 [*distinguishing* State *v.* School Dist., 34 Kan. 237, 8 Pac. 208].

Bonds issued by a municipal corporation in Ohio, under Rev. St. § 2701, which authorizes municipal councils to issue bonds for the purpose of extending the time of payment of other bonds formerly issued, are subject to the requirement of section 2703, that all bonds issued under authority of that chapter shall express on their face the purpose for which they were issued; and a recital on the face of such refunding bonds that they were issued for the purpose of refunding and extending the time of payment of a debt of the city, and that such indebtedness was a legal and subsisting indebtedness of the city, is not a sufficient compliance with that section, and will not estop the city from asserting the illegal purpose for which the original bonds were issued. Keehn *v.* Wooster, 13 Ohio Cir. Ct. 270, 7 Ohio Cir. Dec. 456.

78. Cadillac *v.* Woonsocket Sav. Inst., 58 Fed. 935, 7 C. C. A. 574 [*distinguishing* Barnett *v.* Denison, 145 U. S. 135, 12 S. Ct. 819, 36 L. ed. 652].

79. *Kansas.*— State *v.* Wichita County, 62 Kan. 494, 64 Pac. 45.

Missouri.—Thornburg *v.* School Dist. No. 3, 175 Mo. 12, 75 S. W. 81 [*following* Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577; Carpenter *v.* Lathrop, 51 Mo. 483; Heard *v.* Calhoun School Dist., 45 Mo. App. 660, and *followed* in Evans *v.* McFarland, 186 Mo. 703, 85 S. W. 873].

Tennessee.— Johnson City *v.* Charleston, etc., R. Co., 100 Tenn. 138, 44 S. W. 670.

Texas.— Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003.

Wisconsin.— Veeder *v.* Lima, 19 Wis. 280.

United States.— Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541.

See 37 Cent. Dig. tit. "Municipal Corporations," § 1972 *et seq.*

The record is the best evidence of the facts where the law requires a record of the facts to be kept, and, primarily, no other evidence is admissible. Thornburg *v.* School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

Failure to keep record as required by statute.— Under the Colorado act of March 24, 1877, which authorized counties to issue negotiable bonds for certain purposes and on certain conditions, within the constitutional limitation as to indebtedness, and required the commissioners to make out, publish, and cause the clerk to record, in a book kept by him for that purpose only, and open at all times to public inspection, semiannual statements, showing "the amount of the debt owing by their county," with other material facts and details relating thereto, where the clerk of a county kept no such book, and no statements containing the facts required by the statute were made and recorded, a purchaser of bonds issued by the commissioners, containing recitals that they were issued in conformity to the statute, was authorized to rely on such recitals, which the county was estopped to contradict by other records, for the purpose of showing that the bonds were issued in excess of the constitutional limit of indebtedness. Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167.

80. Schmidt *v.* Defiance, 117 Fed. 702 [*affirmed* in 123 Fed. 1, 59 C. C. A. 159].

81. *Connecticut.*— New Haven, etc., R. Co. *v.* Chatham, 42 Conn. 465.

Mississippi.— Greene *v.* Rienzi, 87 Miss. 463, 40 So. 17.

New York.— See Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397, holding that the record of the proceedings for the issuance of bonds created a *prima facie* liability.

Pennsylvania.— Bell *v.* Waynesboro Borough, 195 Pa. St. 299, 45 Atl. 930.

United States.— Harter Tp. *v.* Kernochan,

precedent, are left to the decision of certain officers, their decision is conclusive in favor of a *bona fide* purchaser,[82] and *a fortiori* where the supreme court, before the issuance of bonds by a city, decides in a proper action that it may lawfully issue such bonds, persons afterward purchasing them have a right to rely on the law as declared by such court, and the validity of the bonds cannot afterward be questioned.[83]

c. Affidavits. The federal courts hold that official affidavits required by statute as evidence of certain authorizing conditions for the issuance of municipal bonds are conclusive in favor of *bona fide* purchasers,[84] but the New York courts hold that such affidavits do not preclude proof that the bonds were illegally issued.[85]

d. Certificates. Where a municipality has power to issue bonds on certain conditions, the determination as to the existence or performance of which is devolved upon a designated board or officer, a *bona fide* purchaser of the bonds may rely implicitly upon the certificate of such board or officer as to the existence or performance of such conditions precedent, and the municipality is estopped to deny the truth of the matters recited therein.[86] The certificate of the auditor of

103 U. S. 562, 26 L. ed. 411; Clarksdale *v.* Pacific Imp. Co., 81 Fed. 329, 26 C. C. A. 434; Mathis *v.* Runnels County, 66 Fed. 494, 13 C. C. A. 600; National Bank of Commerce *v.* Grenada, 44 Fed. 262, 41 Fed. 87.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1978.

Time of making order.— Where the record of the proceedings of a municipal corporation contains an order in due form for the issue of bonds, purporting to have been made before their issue, although appearing to have been entered on the record after such issuance, parol evidence cannot be received as against a *bona fide* holder of the bonds to show that the order was not made until the time when it was entered. Mathis *v.* Runnels County, 66 Fed. 494, 13 C. C. A. 600.

82. *Maine.*— Deming *v.* Houlton, 64 Me. 254, 18 Am. Rep. 253.

Mississippi.— Vicksburg *v.* Lombard, 51 Miss. 111, holding that under a statute authorizing municipalities to vote aid to the construction of a railroad, and rendering a two-thirds majority of the votes cast at an election to determine whether such aid shall be voted essential to authorize the loan to the company, a decision in favor of the loan by the proper city authorities, vested with that exclusive power and duty to determine the fact and to canvass the votes and declare the result, estops the city to set up that such official decision of the result of the election is false, as against a *bona fide* holder of bonds issued in pursuance thereof; such objection being available only for the purpose of preventing the issuance of the bonds in the first instance.

New Jersey.— Cotton *v.* New Providence, 47 N. J. L. 401, 2 Atl. 253 [*following* Mutual Ben. L. Ins. Co. *v.* Elizabeth, 42 N. J. L. 235].

New York.— People *v.* Morgan, 65 Barb. 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587]. See also Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397.

United States.—New Providence *v.* Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. ed. 904; Bourbon County *v.* Block, 99 U. S. 686, 25 L. ed. 491.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1979.

83. Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

Effect of reversal.— It has also been held that a subsequent reversal by a higher court does not defeat the rights of a *bona fide* purchaser. Orleans *v.* Platt, 99 U. S. 676, 25 L. ed. 404.

Issuance pending certiorari.— Where bonds are issued by the commissioners of a town to a railroad company pending a certiorari to review the decision of the county judge authorizing the issue of such bonds, and are transferred by the railroad company to a *bona fide* holder for value and before maturity, the latter is entitled to recover against the town, although the judgment of the county judge has been reversed. Bailey *v.* Lansing, 2 Fed. Cas. No. 738, 13 Blatchf. 424, 2 N. Y. Wkly. Dig. 562.

84. Bernards Tp. *v.* Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. ed. 766; McCall *v.* Hancock, 10 Fed. 8, 20 Blatchf. 344; Irwin *v.* Ontario, 3 Fed. 49, 18 Blatchf. 259; Phelps *v.* Lewistown, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131.

85. Cagwin *v.* Hancock, 84 N. Y. 532 [*reversing* 22 Hun 201]; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; People *v.* Mead, 36 N. Y. 224, 24 N. Y. 114.

86. *Connecticut.*— Savings Soc. *v.* New London, 29 Conn. 174.

New York.— Rome Bank *v.* Rome, 19 N. Y. 20, 75 Am. Dec. 272 [*affirming* 27 Barb. 65].

North Carolina.— Claybrook *v.* Rockingham County, 117 N. C. 456, 23 S. E. 360.

North Dakota.— Flagg *v.* Barnes County School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363, whether the bond is negotiable or not.

United States.— Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Lewis *v.* Barbour County, 105 U. S.

the state that a municipal bond is regularly issued, that the signatures are genuine, and that the bond has been duly registered is conclusive upon the municipality where he is authorized to make such certificate,[87] but not otherwise.[88]

22. **Rights and Remedies of Holders of Invalid Securities — a. In General.** While a municipal corporation may in some cases be liable for the consideration received for its negotiable bonds, which are void for want of legal authority to issue them, such liability in no case arises on the instruments themselves which are void for all purposes.[89] When negotiable bonds are issued by a corporation without authority of law and are void as negotiable instruments, an action cannot be maintained upon them as non-negotiable instruments.[90] A purchaser with notice of the invalidity of bonds cannot maintain their validity under an act to which they do not refer, as valid upon their face under such act, if such act was not complied with and the bonds were actually invalid under it.[91] The fact that money has been collected for the purpose of paying illegal bonds will not afford the holder of the bonds the right to have such funds paid over to him where he has no valid claim against the city.[92]

b. Statutory Provisions. Under some statutes, although the issuance of scrip by a municipal corporation is prohibited under penalty, it is provided that in case the corporation has issued such scrip it shall be liable to the holder for the face value thereof.[93]

c. Recovery of Money Paid — (I) *In General.* Where a city has received money for bonds illegally issued it may be compelled to pay such money back when the purpose of the loan was lawful and the creation of the debt was not

739, 26 L. ed. 993; Menasha *v.* Hazard, 102 U. S. 81, 26 L. ed. 83; Warren County *v.* Marcy, 97 U. S. 96, 24 L. ed. 977; Venice *v.* Murdock, 92 U. S. 494, 23 L. ed. 583; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; McLean *v.* Valley County, 74 Fed. 389; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1981.

A certificate upon the face of municipal bonds that they have been issued in pursuance of legislative authority for the purpose of funding the indebtedness of the municipality is a declaration that they have been issued for the purpose of funding a valid debt in the method prescribed by the law, and that they neither create nor increase any indebtedness of the municipality; and, as against a *bona fide* purchaser, they estop the municipality from denying this declaration. Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364. Where municipal bonds contain a provision that they shall be valid only when it is thereon duly certified that the conditions upon which they were voted, issued, and deposited by the town have been performed, a duly executed certificate indorsed on the bonds to that effect estops the town to deny their validity. Menasha *v.* Hazard, 102 U. S. 81, 26 L. ed. 83, holding that the form of the certificate was proper.

87. Comanche County *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604.

Where bonds are issued by a city in excess of the statutory limit and without giving the notice of an election authorizing the same for the length of time required by statute authorizing their issuance, such defects are not cured by a certificate of the state auditor that the bonds have been regularly and legally issued. Springfield Safe-Deposit, etc., Co. *v.* Attica, 85 Fed. 387, 29 C. C. A. 214.

88. Crow *v.* Oxford Tp., 119 U. S. 215, 7 S. Ct. 180, 30 L. ed. 388, holding that where the recitals in township bonds show that they were issued under an act under which the auditor had no authority to register them and certify that they were regularly and legally issued, a recital of such registration and certificate will be ineffectual to make such bonds valid and binding on the municipality under a general act to which they do not refer and under which in fact they were not issued.

89. Swanson *v.* Ottumwa, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. N. S. 860; Thornburgh *v.* School Dist. No. 3, 175 Mo. 12, 75 S. W. 81; Milan *v.* Tennessee Cent. R. Co., 11 Lea (Tenn.) 329; German Ins. Co. *v.* Manning, 95 Fed. 597; Gause *v.* Clarksville, 1 Fed. 353, 1 McCrary 78; Gause *v.* Clarksville, 10 Fed. Cas. No. 5,276, 5 Dill. 165.

90. Swanson *v.* Ottumwa, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. N. S. 860; Dodge *v.* Memphis, 51 Fed. 165.

91. Crow *v.* Oxford Tp., 119 U. S. 215, 7 S. Ct. 180, 30 L. ed. 388.

92. Gould *v.* Paris, 68 Tex. 511, 4 S. W. 650.

93. See Allegheny City *v.* McClurkan, 14 Pa. St. 81, holding that the act of April 12, 1828, was not repealed by the act of June 1, 1842, increasing the penalty for issuing such scrip.

prohibited by law.[94] But such repayment cannot be compelled when the municipal corporation has never received the benefit of the money,[95] or the loan itself was in excess of its authority to create a debt.[96] An action to recover from the municipality money paid to it for bonds which it had no power to issue is not based upon an express or implied contract, as distinguished from quasi-contract, but upon an obligation which the law supplies from the circumstances that defendant should pay for the benefit which it has derived at the expense of plaintiff.[97] A return of the consideration may be compelled by an action in equity when the issues involved otherwise present grounds for equitable jurisdiction.[98] It has been held, however, that where bonds were issued for the purpose of

94. *New York.*— Hoag *v.* Greenwich, 133 N. Y. 152, 30 N. E. 842.

Ohio.— Ampt *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 237, 3 Ohio N. P. 184.

Pennsylvania.—Rainsburg Borough *v.* Fyan, 127 Pa. St. 74, 17 Atl. 678, 4 L. R. A. 336, holding that where bonds were void for failure of the proper officer to have filed a statement of the assessed valuation of the property and of the amount of the annual tax levied to pay the same, the holders could recover their amount on contract.

South Dakota.— Livingston *v.* Brookings County School Dist. No. 7, 11 S. D. 150, 76 N. W. 301, holding that the holder of a bond issued for the erection of a school-house, which is void because issued in excess of the amount allowed by statute, may recover as on a *quantum meruit* the value of the school-house erected, where it has been retained for continuous use by the school-district.

United States.— Louisiana *v.* Wood, 102 U. S. 294, 26 L. ed. 153 [*affirming* 30 Fed. Cas. No. 17,948, 5 Dill. 122]; Fernald *v.* Gilman, 141 Fed. 941 [*affirming* 123 Fed. 797]; Chelsea Sav. Bank *v.* Ironwood, 130 Fed. 410, 66 C. C. A. 230; Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539 (holding that a school-district which had implied power to create a general indebtedness for the purpose of erecting school-houses, which exercised such power by a vote of its electors at an election duly held to borrow a sum of money for that purpose, by borrowing such money and using it in the building of school-houses, was liable to the lender for its repayment and could not avoid such liability because the lender had accepted bonds which were void); Dodge *v.* Memphis, 51 Fed. 165; Bangor Sav. Bank *v.* Stillwater, 49 Fed. 721; Gause *v.* Clarksville, 1 Fed. 353, 1 McCrary 78. See Read *v.* Plattsmouth, 107 U. S. 568, 2 S. Ct. 108, 27 L. ed. 414; Chapman *v.* Douglas County, 107 U. S. 348, 2 S. Ct. 62, 27 L. ed. 378; Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1992.

Where period for redemption is unlawful. — Where bonds are void as running for a greater length of time than the municipality has power to make them, the purchaser may recover the amount paid under an implied promise. Hoag *v.* Greenwich, 133 N. Y. 152, 30 N. E. 842, holding that a promise to repay the purchaser the amount paid for the bonds at the time and according to the terms which should have been inserted in the bonds would be implied.

95. Hedges *v.* Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. ed. 1044; Ætna L. Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537; Litchfield *v.* Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. ed. 132; Chelsea Sav. Bank *v.* Ironwood, 130 Fed. 410, 66 C. C. A. 230; Travellers' Ins. Co. *v.* Johnson City, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123.

96. Swackhamer *v.* Hackettstown, 37 N. J. L. 191 (holding that where a municipal corporation has no authority to borrow money, a recovery based upon an implied promise cannot be had against it where it has issued a note for an unauthorized loan); Chelsea Sav. Bank *v.* Ironwood, 130 Fed. 410, 66 C. C. A. 230; Morton *v.* Nevada, 41 Fed. 582 (so holding with regard to bonds of a city which were void because issued under an act violating Mo. Const. (1865) art. 11, § 14, declaring that the general assembly could not authorize any city to loan its credit to any corporation unless two thirds of the qualified voters assented thereto).

Excess of debt limit.— Where the creation of indebtedness beyond a prescribed limit is prohibited there can be no recovery as for a debt of money paid for bonds issued in excess of such limit. McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Litchfield *v.* Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. ed. 132.

97. Travellers' Ins. Co. *v.* Johnson City, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123.

98. Chelsea Sav. Bank *v.* Ironwood, 130 Fed. 410, 66 C. C. A. 230, holding that where the receiver of an original purchaser of bonds had recovered a judgment against the city for the amount paid therefor and brought a new action in the federal court to enforce such judgment, a court of equity had jurisdiction of a suit by the transferees of the bonds against the city and the receiver in behalf of itself and other holders to enforce their equitable right to the amount due from the city on either of the following grounds: (1) That it sought to charge the receiver as a trustee holding the judgment for the benefit of the bond-holders; (2) that it sought to follow a fund which had been tendered by the city and in which complainants claimed an equitable interest; (3) because it appeared from the pleadings that there might be conflicting

raising funds to pay for the construction of a levee to protect lands from an overflow, and such issuance was without authority of law, a court of equity had no power to determine that certain lands received the benefit of the funds and on that ground declare a lien thereon in favor of the bondholders.[99]

(II) *Benefit Received by Municipality.* The benefit received by a municipal corporation must be money paid to it or property delivered into its actual possession under such circumstances that had no express contract been attempted a contract might have been implied.[1]

(III) *Right to Follow Specific Funds.* The money paid for invalid bonds may be followed *in rem* into the thing bought with it.[2] But where it is sought in equity to pursue the money the complainants must clearly identify the money or the fund, or other property which represents the money, in such a manner that it can be reclaimed and delivered without taking other property with it or injuring other persons or interfering with others' rights.[3] A decree declaring the amount of money advanced for invalid bonds a lien upon certain property purchased therewith is inconsistent with a bill which seeks to follow the money into such property, and seeks such property not as that of the city but as that of complainant.[4]

(IV) *Persons Entitled to Recover.* The transfer of the bonds carries with it the right to recover from the municipal corporation the money paid to it for them in case the bonds prove to be invalid.[5] A railroad which has received

interests between the holders and pledgees of the bonds which could only be adequately adjusted by a court of equity.

99. O'Brien *v.* Whelock, 95 Fed. 883, 37 C. C. A. 309, holding that the fact alone that landowners advocated and used their influence to secure the passage of a law under which bonds were issued to be paid by special assessments against their land, which law was subsequently declared unconstitutional and the assessments void, did not afford ground on which a court of equity could declare a lien upon such lands in favor of the bondholders, in the absence of fraud, and where both the lien-holders and the purchasers of the bonds acted in the mistaken belief that the law was valid.

1. Read *v.* Plattsmouth, 107 U. S. 568, 2 S. Ct. 208, 27 L. ed. 414; Chapman *v.* Douglas County, 107 U. S. 348, 2 S. Ct. 62, 27 L. ed. 378; Louisiana *v.* Wood, 102 U. S. 294, 26 L. ed. 153; Travellers' Ins. Co. *v.* Johnson City, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123, holding that a purchaser in the market of negotiable bonds payable to bearer and unindorsed, issued by a city to a railroad company of another state, to which it had no power to issue the bonds, in payment of a subscription to the company's stock which it had no power to make, although it had power to subscribe to the stock of a domestic corporation and to issue its bonds in payment therefor, cannot recover from the city the amount paid for such bonds as money had and received to the city's use and benefit on the ground that the stock had been delivered and retained and that the railroad and depot were constructed, which were the conditions upon which the subscription was made, since in such case the stock was void in the hands of the city for want of its power to become a stock-holder, and the railroad and depot built on lands owned by the company did not become the property of the city or confer upon it any such direct benefits as could raise an implied promise to pay therefor independently of its void contract. See also Swanson *v.* Ottumwa, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. N. S. 860, holding that where a city donated negotiable bonds, which were void for want of power, to a railroad to reimburse it for money paid for depot grounds purchased and paid for by the railroad company, subsequent holders of the bonds were not entitled to recover against the city on a *quantum meruit*.

2. Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238.

3. Litchfield *v.* Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. ed. 132, holding that no such identification can be made where the money received from the bonds has been invested in waterworks along with an indefinite amount of other funds.

4. Litchfield *v.* Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. ed. 132, holding that where money received on the sale of invalid bonds issued without any authority of law has been used in the construction of waterworks, the purchaser cannot have a lien for the amount paid out by him on the works, such lien being inconsistent with the theory by which he sought to hold the waterworks as his property purchased with his money.

5. Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; Chelsea Sav. Bank *v.* Ironwood, 130 Fed. 410, 66 C. C. A. 230 (holding that where a city issued bonds which were subsequently adjudged invalid for irregularity in the manner of issuance and sold the same to a firm which paid a part of the purchase-price and resold them to others, the right to recover from the city the consideration received by it passed with the bonds to the holders to the exclusion of a general receiver appointed for the original

bonds in exchange for its stock and has transferred such bonds cannot object, where, the bonds having been declared void, the municipal corporation takes up the bonds from the transferee and restores to him the stock received from the railroad.[6]

(v) *INTEREST.* It has been held that in a proceeding to recover the money back, interest may be awarded at the legal rate from the time the city denied its obligation to pay.[7]

(vi) *LIMITATIONS.* It has been held that where a municipality issues void bonds as evidence of an indebtedness which it had power to incur for work or property of which it received the benefit, and subsequently pays the holder of the bonds interest as it matures, according to the tenor of the bonds, the statute of limitations does not begin to run against an action brought to recover the money so long as the municipality recognizes its express obligation to pay the bonds and pays the holder interest thereon according to the requirements of the bonds themselves.[8] But on the other hand it has been held that a right of action upon an implied promise by a city to repay money received for void municipal bonds accrues at the time payment is made, and not from the time bonds were adjudged void, or from the discovery of his mistake by plaintiff in the absence of fraudulent concealment by defendant, or from the time of demand.[9] Where an action is brought upon refunding bonds issued without authority by a municipal corporation, recovery cannot be allowed on the common counts upon the original bonds or indebtedness, where such indebtedness is barred by limitations pleaded in the suit.[10]

d. Rescission of Transaction. One who purchases from a city bonds which prove to be invalid has the right to rescind the contract of purchase and recover the portion of the purchase-money which has been paid to the city,[11] but he cannot do this unless he is willing and able to restore to the city all of the bonds delivered to him.[12]

purchaser); Bangor Sav. Bank *v.* Stillwater, 49 Fed. 721 (holding that where negotiable certificates of indebtedness were issued in payment of work done under a contract with the city to a person not a party to the contract, but at the request of the contractor, and the money was received by the city and paid over to the contractor, the person to whom they were issued might maintain an action for money had and received); Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539; Gause *v.* Clarksville, 1 Fed. 353, 1 McCrary 78. But *compare* Coquard *v.* Oquawka, 192 Ill. 355, 61 N. E. 660 [*affirming* 91 Ill. App. 648]; German Ins. Co. *v.* Manning, 95 Fed. 597 [*citing* Ætna L. Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537].

6. Illinois Grand Trunk R. Co. *v.* Wade, 140 U. S. 65, 70, 11 S. Ct. 709, 35 L. ed. 342, holding further that the railroad could not claim that the transaction between it and the municipal corporation was void, and hence the corporation never acquired the legal title to the stock where it had sold the bonds and received value therefor, and had never offered to return any of them or asserted any right to the stock.

7. Louisiana *v.* Wood, 102 U. S. 294, 26 L. ed. 153 [*affirming* 30 Fed. Cas. No. 17,948, 5 Dill. 122].

8. Fernald *v.* Gilman, 141 Fed. 941 [*affirming* 123 Fed. 797]; Kearny County *v.* Irvine, 126 Fed. 689, 61 C. C. A. 607; Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539. See also Morton *v.* Nevada, 41 Fed. 582, holding that, although illegal bonds of a city are regarded as voidable only at the will of the city, an action for money had and received was barred by Mo. Rev. St. § 3980, limiting actions on implied promises to five years, where more than five years before action was brought the city refused to pay interest thereon and pleaded in an action thereon that they were void, although it was stipulated in that action that suit might be continued until decision in another suit involving the validity of similar bonds, as on a plea of *ultra vires* plaintiff could abandon his suit and sue on the implied promise.

9. Gould *v.* Paris, 68 Tex. 511, 4 S. W. 650; Morton *v.* Nevada, 41 Fed. 582.

10. Coquard *v.* Oquawka, 192 Ill. 355, 61 N. E. 660 [*affirming* 91 Ill. App. 648].

11. Ironwood *v.* Wickes, 93 N. Y. App. Div. 164, 87 N. Y. Suppl. 554. See also Brown *v.* Atchison, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515, holding that where a contract for the refunding of bonds providing for the issue and delivery of additional bonds to the original bondholders is void, although not immoral, inequitable, or unjust, and such contract has been performed by the bondholders, the city may be required in equity to rescind the contract and place the bondholders *in statu quo*, or account to them for all benefit received for which it has rendered no equivalent.

12. Ironwood *v.* Wickes, 93 N. Y. App. Div. 164, 87 N. Y. Suppl. 554, so holding regardless of the amount sought to be re-

e. Reformation of Bonds. Where a bond is invalid as running for more than the period permitted by statute it cannot be reformed in equity.[13]

f. Rights of Person Exchanging Valid For Invalid Securities. Where the holder of valid bonds surrenders them to the municipality and receives in exchange therefor other bonds which the municipality had not the lawful right to issue he is not divested of his title to the bonds surrendered and may maintain an action on them after they mature.[14]

23. Sinking Funds, Redemption, and Payment — a. Sinking Fund — (1) *Duty to Provide.* By statute provision is usually made for the creation of a sinking fund with the view of meeting the payment of the principal and interest on bonds,[15] and under some statutes no valid issue of bonds can be made in the absence of provision for such a fund.[16] Under other statutes provision for a sinking fund is not necessary unless the city's debts have reached the constitutional limit.[17] And it will not be presumed in the absence of proof that such limit has been reached.[18] The provision for a sinking fund may have been made prior to the issuance of the bonds to which it refers.[19] And under a statute requiring the provision for a tax to create a sinking fund upon the creation of an indebtedness, a city may provide for such a tax in providing for new bonds to refund an existing indebtedness.[20] It has been held that the measure of damages arising from the failure of a city to provide a sinking fund as it has agreed in the contract with its bond-

covered or the proportion of the bonds the purchaser was willing and able to return. But see Paul *v.* Kenosha, 22 Wis. 266, 94 Am. Dec. 598, holding that where the bonds had been placed in evidence and declared void and of no value by the court, one who sought to recover back the money paid on them, as upon a failure of consideration, need not offer to return the bonds.

13. Potter *v.* Greenwich, 92 N. Y. 662, so holding where there was no showing of any mistake in the drafting of the bond. See also Potter *v.* Greenwich, 26 Hun (N. Y.) 326 [*affirmed* in 92 N. Y. 662].

14. Deyo *v.* Otoe County, 37 Fed. 246 [*citing* Plattsmouth *v.* Fitzgerald, 10 Nebr. 401, 6 N. W. 470]; Gause *v.* Clarksville, 1 Fed. 353, 1 McCrary 78, holding that where the holder of a valid bond presented it when due and received in payment a renewal bond which was void, the old bond, although surrendered for cancellation, was not extinguished and that recovery might be had as if the new bond had not been given.

15. See the statutes of the several states. And see Minot *v.* Boston, 142 Mass. 274, 7 N. E. 920, in which the powers of the Boston water board were considered.

16. See the statutes of the several states. And see Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003.

Necessity of provision for payment of bonds see *supra*, XV, C, 7, a.

Amendment of statute.— A city charter which provides that provision shall be made for a levy of two per cent to create a sinking fund to pay bonds is not amended by a constitutional provision providing for a levy to provide at least two per cent as a sinking fund for the payment of the debts of cities. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

A special act applicable to a particular town, requiring the establishment of a sinking fund for the payment of bonds, does not supersede a general act providing for the payment of such bonds, but merely provides an additional security. Van Tassell *v.* Derrenbacher, 56 Hun (N. Y.) 477, 10 N. Y. Suppl. 145 [*affirmed* in 123 N. Y. 661, 23 N. E. 750].

Necessity of specific provision.— Where the charter makes a provision for a sinking fund in accordance with the constitutional requirement, a specific provision by the city council is unnecessary. Berlin Iron Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 208.

Period of accumulation.— A statutory provision that a sinking fund must be provided for the payment of a principal indebtedness within twenty years is complied with where provision is made for the completion of a sufficient sinking fund within twenty years, although the period of accumulation of such fund is less than twenty years. Boise City *v.* Union Bank, etc., Co., 7 Ida. 342, 63 Pac. 107.

On funding existing debt.— A statute providing that no debt shall be created without making provision for its payment does not apply to provisions for the funding of an existing debt. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

17. See Rochester *v.* Quintard, 136 N. Y. 221, 32 N. E. 760; Rome *v.* Whitestown Water Works Co., 113 N. Y. App. Div. 547, 100 N. Y. Suppl. 357 [*affirmed* in 187 N. Y. 542, 80 N. E. 1106].

18. Rome *v.* Whitestone Water Works Co., 113 N. Y. App. Div. 547, 100 N. Y. Suppl. 357 [*affirmed* in 187 N. Y. 542, 80 N. E. 1106].

19. Berlin Iron Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 208.

20. Louisville Sinking Fund Com'rs *v.* Zimmerman, 101 Ky. 432, 41 S. W. 428, 19 Ky. L. Rep. 689.

holders, being the difference in the value of the bonds, is not capable of legal computation.[21]

(II) *Vested Rights in Funds.* A statute providing for the creation of a sinking fund for the payment of bondholders becomes a part of the contract between the city and its bondholders, and cannot be subsequently changed to their detriment.[22] So where at the time of a bond issue the law authorizes and in effect requires the levy of a tax to pay the interest on it as it accrues, the legislature cannot by an act passed subsequent to the issue of the bonds exhaust the taxing power of the city and direct the application of the proceeds of such taxation to other subjects to the exclusion of the bond issue in question,[23] and a limit upon the taxing power of a city, imposed by a constitution adopted after the issue of bonds, is inoperative as against such bonds.[24]

(III) *Revenues Constituting Fund.* Where the statute provides what revenues shall be placed in the sinking fund, no special appropriation of such revenues is necessary in order to render them applicable to such fund.[25] Where it is provided that a certain portion of the revenue of a city, derived from a particular source, shall be set aside as a sinking fund, it has been held that it is intended that such proportion of the gross revenue shall be so set aside.[26]

(IV) *Custody and Control* — (A) *In General.* The right to the custody and control of sinking funds is in general fixed by the statutes making provision for such fund.[27] The legal title to money raised for a sinking fund is in the city and it has the right to manage and invest the same and sue for its collection, and defend for the bondholders against any attempted depletion of the fund,[28] but such legal title is held in trust for the bondholders.[29] The actions of officers vested

21. Memphis *v.* Brown, 20 Wall. (U. S.) 289, 22 L. ed. 264 [*reversing* 16 Fed. Cas. No. 9,415, 1 Flipp. 188].

22. Bates *v.* Porter, 74 Cal. 224, 15 Pac. 732 [*followed* in Haumeister *v.* Porter, (Cal. 1887) 16 Pac. 187]; Kennedy *v.* Sacramento, 19 Fed. 580, holding that where by the terms of a subsequent statute the levy of a tax to create a sinking fund was permissive instead of mandatory, the provision must still be construed as mandatory. See also Maenhaut *v.* New Orleans, 16 Fed. Cas. No. 8,939, 2 Woods 1, holding that a statute providing for a bond issue and prescribing the manner in which a tax for the payment thereof shall be levied and its collection safeguarded constitutes a contract which the purchaser of bonds upon the faith thereof may enforce.

Where there is no pledge of specific revenue.— A bondholder cannot object to a lease of a municipal gas plant upon the ground that the ordinance authorizing the issue of bonds for an extension of the plant provided for a retention of a certain amount of the annual receipts of the plant for the purpose of creating a sinking fund, where there is no pledge of the receipts of the plant for the security of the loan and there is no showing that the sinking fund has not been kept up by appropriation from the city treasury from time to time as required by law. Baily *v.* Philadelphia, 184 Pa. St. 594, 39 Atl. 494, 63 Am. St. Rep. 812, 39 L. R. A. 837 [*distinguishing* Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, as being a case in which the revenues of a gas plant were distinctly pledged for security and payment of bonds and provision made for the management of proceeds for that purpose].

23. Sibley *v.* Mobile, 22 Fed. Cas. No. 12,829, 3 Woods 535.

24. Sibley *v.* Mobile, 22 Fed. Cas. No. 12,829, 3 Woods 535.

25. Reg. *v.* Smith, 26 Ont. 632, holding that where, although no appropriation had been made, a member of the municipal council voted for defraying certain of the current expenses of the municipality out of the amount attributable to the sinking fund, his election as reeve of the village should be set aside and he should be declared disqualified from any municipal office for a period of two years pursuant to the Consolidated Municipal Act, 55 Vict. c. 42, § 573.

26. Bates *v.* Porter, 74 Cal. 224, 15 Pac. 732 [*followed* in Haumeister *v.* Porter, (Cal. 1887) 16 Pac. 187].

27. See the statutes of the several states. And see Gardner *v.* Philadelphia, 1 Pa. Co. Ct. 109, holding that a sinking fund created by the city of Philadelphia for the payment of a gas loan is no part of the general sinking fund of the city and any surplus should be paid into the city treasury and not to the sinking fund commissioners.

28. Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542, holding that in an action by a holder of certain original bonds to enforce his rights as to moneys collected for interest and for the sinking fund of such bonds, the holders of refunding bonds were not necessary parties in their own persons but were constructively present before the court through their trustee, the city.

29. Vickrey *v.* Sioux City, 104 Fed. 164 (holding that under a statute providing that an assessment for a street improvement shall constitute a sinking fund for the payment of

with supervision over a sinking fund cannot be controlled by injunction, unless the fund is in danger of being wasted or impaired,[30] or unless a liability will be incurred or an injury done by threatened or probable misfeasance for which the officers' bonds or personal responsibility will afford no probable or adequate redress.[31]

(B) *Investment.* A statutory provision for a sinking fund, in the absence of an express provision therefor, authorizes the proper investment of such fund.[32] Where an investment is made of a sinking fund, such investment must be such as is prescribed by statute.[33] Under some statutes the investment may be in bonds of the municipality;[34] but, although the purchase of municipal bonds for the sinking fund is authorized, commissioners of such fund cannot purchase bonds at the time they are offered for sale by the city.[35] A purchase by the city of its own bonds to be placed in a sinking fund does not operate as a cancellation of such bonds.[36] The city as trustee for bondholders is liable for interest on non-applied special assessments collected by it only at the rate paid to it by depositories of the fund.[37]

(V) *Application of Funds.* A sinking fund cannot be diverted from the purpose for which it is created;[38] but where it is not pledged to the redemption of any specific bonds, it may be applied to the redemption of bonds held as a part of the fund under a statute authorizing the sinking fund commissioners to

the improvement, and providing further for the issuance of bonds to be used for such payment, a city which has issued such bonds is charged as a trustee with the duty of collecting and applying the special assessments); Maenhaut *v.* New Orleans, 16 Fed. Cas. No. 8,939, 2 Woods 1 (holding that money which has been levied, collected, and set apart to pay the interest upon bonds under the terms of the statute under which they are issued constitutes a trust fund which the bondholder may enjoin the city from diverting).

30. San Francisco *v.* San Francisco Funded Debt, 10 Cal. 585.

31. San Francisco *v.* San Francisco Funded Debt, 10 Cal. 585.

32. Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739.

The deposit of a sinking fund in a bank, at interest, is to be regarded as a temporary investment thereof within the meaning of the Municipal Act of 1873, § 248, subs. 5. *Re* Barber, 39 U. C. Q. B. 406.

Funds which may be loaned.— Under a power to loan a sinking fund the corporation has no power to loan a portion of the proceeds of a sale of bonds issued for the purpose of construction of waterworks. Bonham *v.* Taylor, 81 Tex. 59, 16 S. W. 555.

Interest.— While it may be conceded that preservation is the principal object to be accomplished in dealing with sinking funds, their earning capacity in the way of interest should not be entirely ignored. Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739 [*citing* State Sinking Fund *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496].

33. Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437, holding that where the statute required the city to advertise for bids and invest the funds in the bonds of those parties who offered them at the lowest price, the city had no power to contract with a brokerage company to repay it the amount it should expend in the purchase of the city bonds, not exceeding their par value and a stated premium, and to pay the company for its services in addition a sum amounting to more than sixteen per cent of the par value of the bonds it bought, and that such contract was void, as was also a contract to pay the reasonable value of such services.

34. See the statutes of the several states. And see Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739, holding that a provision that municipal officers shall honor no drafts upon a sinking fund except to pay interest on or redeem the bonds for which it is provided does not prevent a draft being drawn upon the fund for the purpose of purchasing bonds to be used as an investment of the fund.

Bonds which may be purchased.— Bonds may be purchased and held in a sinking fund, although they do not mature until after the maturity of the bonds which the fund is collected to pay. Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739, holding that the securities might be made available by resale when needed.

Power of council.— A duty imposed upon the city controller to see that the sinking fund is properly invested does not require the city council to consult him before making an investment of the funds in the securities in which it is authorized by statute to invest. Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739.

35. Kelly *v.* Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

36. Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739.

37. Jewell *v.* Superior, 135 Fed. 19, 67 C. C. A. 623.

38. Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739.

cancel all bonds that may have been purchased by them for the redemption of the debt of the city.[39] Where a sinking fund is created by statute for existing bonds, holders of interest coupons which mature while the statute remains in force have a vested interest in the fund;[40] but holders of coupons which mature after the repeal of such a statute acquire no rights therein.[41]

b. Refunding, Extension, and Exchange. A right to call in bonds for redemption must be exercised in accordance with the statute or condition in the bonds by which it is conferred.[42] Where the statute authorizing an issue of new bonds in exchange for outstanding bonds provides that the holders of outstanding bonds shall have the right to surrender them and receive the new bonds in lieu thereof, such holders of outstanding bonds cannot be required to receive the new bonds at a premium.[43] A provision for refunding the indebtedness of a city does not extend the time for refunding such indebtedness beyond the time in which an action upon such indebtedness should be commenced, and a bondholder who fails to present his bonds until they have become barred is not entitled to the issuance of refunding bonds in their place.[44] Where a statute confers upon bondholders the right to an extension, its terms must be complied with by the bondholders to entitle them to demand such an extension.[45]

c. Payment of Bonds — (I) *In General.* A municipal corporation does not free itself from liability upon its bonds by merely placing funds for their payment in the hands of the proper officers.[46]

(II) *Place of Payment.* In the absence of contrary provision bonds are payable at the treasury of the municipality.[47] A municipal corporation is not required to seek its creditors in order to discharge its debts.[48] So in order to stop the running of interest it is not bound to seek out its creditor and tender him the money due.[49]

(III) *To Whom Made.* Where a city has had notice of the theft or loss of bonds it is, in order to justify a payment, bound to show that the holders to whom payment was made were purchasers in good faith before maturity and for value;[50] and it has been held that the city pays overdue coupons at its peril.[51]

39. McDermott *v.* Jersey City Sinking Fund Com'rs, 69 N. J. L. 575, 55 Atl. 37, holding that it could not be contended, where there had been no specific direction, that the sinking fund could not be used to pay bonds issued under acts directing that they should be paid by the insertion of the amount in annual tax levies.

40. Hall *v.* New Orleans, 19 Fed. 870.

41. Hall *v.* New Orleans, 19 Fed. 870.

42. Memphis *v.* Memphis Sav. Bank, 99 Tenn. 104, 42 S. W. 16, holding that the provision in Acts (1883), c. 170, as to the right of the city of Memphis to redeem at the expiration of six years was abrogated by the act of June 5, 1885 (Acts Ex. Sess. (1885) c. 2), and that a bond thereafter issued without any stipulation thereon as to redemption was not subject to call after the lapse of six years.

43. Lloyd *v.* Altoona City, 134 Pa. St. 545, 19 Atl. 675.

44. Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891.

45. State *v.* New Orleans, 43 La. Ann. 130, 8 So. 833, holding that under a statute allowing the holders of certain bonds to have them extended upon the condition that all unmatured coupons maturing after Jan. 1, 1883, should be attached to such bonds, one who had collected the interest coupons maturing after such date and detached them from the bonds was not entitled to have such bonds extended.

46. Federgreen *v.* Fallsburgh, 25 Hun (N. Y.) 152, holding that the fact that a town has raised an amount sufficient to pay the interest upon its bonds by taxation and has paid such amount to the commissioners appointed, for the payment of such interest, does not discharge the liability of the town until the persons entitled have actually received such interest.

47. Williamson *v.* Farson, 101 Ill. App. 328 [*affirmed* in 199 Ill. 71, 64 N. E. 1086, and *citing* Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244; Johnson *v.* Stark County, 24 Ill. 75]; Friend *v.* Pittsburgh, 131 Pa. St. 305, 18 Atl. 1060, 17 Am. St. Rep. 811, 6 L. R. A. 636.

48. Williamson *v.* Farson, 101 Ill. App. 328 [*affirmed* in 199 Ill. 71, 64 N. E. 1086, and *citing* Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244; People *v.* Tazewell County, 22 Ill. 147].

49. Friend *v.* Pittsburgh, 131 Pa. St. 305, 18 Atl. 1060, 17 Am. St. Rep. 811, 6 L. R. A. 636.

50. Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153.

51. Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153, holding that the rule stated is particularly applicable where the city has had notice of loss by the real owner,

Where a coupon passes by delivery like a bank-note the holder is not bound to show his chain of title at the time he demands payment.[52]

(IV) *DEMAND, AUDIT, AND ALLOWANCE.* Municipal corporations are not bound to discharge their indebtedness elsewhere than at their treasury,[53] and a creditor must make demand there when payment is desired unless provision has been made for another place of payment.[54] While municipal bonds, being ascertained and liquidated claims, need not be presented for audit,[55] if the bond is transferable by delivery it should be presented by the holder or notice given to the corporate body in order that the owner may be known.[56] But if no actual notice is given to the holder of an interest-bearing municipal bond which is overdue to present it for payment and surrender, and there is no statutory method provided for the calling in of such a bond and fixing a day beyond which interest will not run, interest will continue to accrue on such an obligation in the same manner as upon an ordinary note of a private person.[57]

(V) *FUNDS APPLICABLE.* A tax levied and collected as required by law to pay the interest[58] or the principal[59] of specific bonds cannot be diverted to other purposes. So in case bonds are made payable from a specific fund a claim against the general fund of the city cannot be enforced,[60] particularly where there has been no failure upon the part of the city with regard to the steps necessary to provide such a special fund.[61] But where the bond contains a general obligation to pay it cannot be converted into a promise to pay from a particular fund, except upon the plainest grounds of construction.[62] It is in some cases held that where a city has issued improvement bonds and pledged special assessments therefor, it is not a guarantor of the bonds, but a mere statutory trustee for the collection of such assessment.[63]

but that the fact that the paper is overdue is such a notice of want of title as will place the city upon inquiry.

52. Williamsport *v.* Com., 90 Pa. St. 498.

53. See *supra*, XV, C, 23, c, (II).

54. Williamson *v.* Farson, 101 Ill. App. 328 [*affirmed* in 199 Ill. 71, 64 N. E. 1086].

55. Leach *v.* Fayetteville Com'rs, 84 N. C. 829.

A statute requiring the presentation of claims within two years, being for the purpose of enabling a municipal corporation to make a record of its valid outstanding obligations, does not apply to a bond of the existence and character of which the corporate authorities have actual notice. Leach *v.* Fayetteville Com'rs, 84 N. C. 829; Wharton *v.* Currituck County Com'rs, 82 N. C. 11.

Interest coupons upon bonds which are not demands are not required to be presented for allowance. Freehill *v.* Chamberlain, 65 Cal. 603, 4 Pac. 646.

56. Leach *v.* Fayetteville Com'rs, 84 N. C. 829.

57. Williamson *v.* Farson, 101 Ill. App. 328 [*affirmed* in 199 Ill. 71, 64 N. E. 1086, and *citing* Read *v.* Buffalo, 74 N. Y. 463; Hummel *v.* Brown, 24 Pa. St. 310].

58. Ranger *v.* New Orleans, 20 Fed. Cas. No. 11,564, 2 Woods 128.

59. See cases cited *infra*, this note.

Bonds declared invalid.— Where moneys have been raised by a municipality by means of a special tax to pay off certain bonds, and the bonds are thereafter declared void, the municipality cannot devote the funds to other purposes and such appropriation may be enjoined at the suit of any taxpayer. Aurora *v.* Chicago, etc., R. Co., 119 Ill. 246, 10 N. E. 27.

Refunding bonds.— A provision for the application of taxes upon the property of railroads to bonds issued in aid of such railroads applies to renewal bonds issued to refund the original aid bonds. Van Tassel *v.* Derrenbacher, 56 Hun (N. Y.) 477, 10 N. Y. Suppl. 145 [*affirmed* in 123 N. Y. 661, 26 N. E. 750], so holding, although the road has been sold under a mortgage and purchased by another company.

60. Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462. See also Baker *v.* Meacham, 18 Wash. 319, 51 Pac. 404.

61. Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

62. Mutual Ben. L. Ins. Co. *v.* Elizabeth, 42 N. J. L. 235.

63. Jewell *v.* Superior, 135 Fed. 19, 67 C. C. A. 623, holding that it was required only to exercise due diligence to collect the same according to law and enforce the lien thereof for the benefit of the bondholders, and was liable only for a failure to perform such duty or to pay over the money collected. See Roter *v.* Superior, 115 Wis. 243, 91 N. W. 651; New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96.

The extension of the time for the payment of special assessments will not render the city absolutely liable for the payment of improvement bonds in case the bondholder contemporaneously extends the time of payment of the bonds to a corresponding date and retains his lien. Jewell *v.* Superior, 135 Fed. 19, 67 C. C. A. 623.

(VI) *PRIORITIES.* A mere provision that a certain sum annually shall be paid upon certain bonds does not give the holders priority over other bonds;[64] nor does the fact that one issue is older than another give it priority.[65] Priority of demand of payment will not create priority between bondholders.[66]

(VII) *EFFECT.* Payment and cancellation of bonds work an absolute extinguishment of the same, and they cannot be vitalized by theft and fraudulent recirculation.[67]

(VIII) *RELIEF WHERE BONDS HAVE BEEN LOST OR STOLEN.* Where bonds have been lost or stolen the owner may have relief in equity in order to secure himself against payment to persons not entitled to it.[68]

(IX) *INTEREST.*[69] In the absence of a provision to the contrary interest may accrue upon bonds after their maturity.[70] A rule providing that compound interest cannot be recovered has been held not to prevent the recovery of interest upon unpaid coupons after maturity, under a statute allowing interest upon money due on any instrument in writing.[71]

24. ACTIONS — a. Nature and Form of Remedy in General. In the federal courts the proper procedure for the enforcement of bonds and coupons is to sue at law and by the judgment establish the validity of the claim and the amount due, after which if upon return of an ordinary execution it is ascertained that no

Where taxes are collected by the county.— When delinquent special assessments applicable to the payment of street improvement bonds are returned by the city to the county, as delinquent taxes, the city is liable only to account to the holders of local improvement bonds entitled to such assessments when collected for such as were received by the city from the county after collection. Jewell *v.* Superior, 135 Fed. 19, 67 C. C. A. 623, holding that Wis. Rev. St. (1898) § 1114, providing that delinquent taxes returned by a city to the county shall belong to the county when the county levy is equal to or exceeds the amount of the delinquent taxes in the return, the excess, if any, when collected to be returned to the city, applies only to the relations between cities and counties with respect to the collection of taxes and does not affect the obligations existing between the city and holders of street improvement bonds with reference to the collection of special assessments applicable to the payment of bonds.

Apportionment of funds.— A holder of bonds issued to pay for particular improvements is entitled to such proportion of special assessments collected for their payment as the amount of bonds held by him bears to the total amount of bonds issued less the sums previously paid to him. Jewell *v.* Superior, 135 Fed. 19, 67 C. C. A. 623.

64. Maenhaut *v.* New Orleans, 16 Fed. Cas. No. 8,940, 3 Woods 1.

65. Maenhaut *v.* New Orleans, 16 Fed. Cas. No. 8,940, 3 Woods 1.

66. Meyer *v.* Widber, 126 Cal. 252, 58 Pac. 532, holding that it was no defense to mandamus to compel payment of a bond from a particular fund that other bondholders had made prior demands which had been refused for want of funds.

67. Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440.

68. See Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153, holding that while ordinarily the real owner might tender a bond of indemnity which would authorize payment to him by the maker, yet in a case where the bonds were numerous and would not mature for many years the proper remedy was, where the parties were already in a court of equity, by a petition for an injunction restraining the maker from paying the bonds or coupons to any claimant until his right against the real owner was determined, with an order requiring the maker to make each claimant a party to the suit as the bond or coupon was presented so that he might litigate it with plaintiff.

69. **Interest upon sinking fund** see *supra*, XV, C, 23, a, (IV), (B).

Necessity of demand to fix liability see *supra*, XV, C, 23, c, (IV), text and note 57.

70. Kendall *v.* Porter, 120 Cal. 106, 45 Pac. 333, 52 Pac. 143, holding that since there is nothing in the California act of April 24, 1858 (St. (1858) p. 267), providing in sections 35, 37, 38, 40, for an issue of city bonds bearing six per cent annual interest, which, with the principal, is directed to be paid by the treasurer, when due, from the interest and sinking fund therein provided for, to show an intention that interest shall cease upon maturity of the bonds, interest can be collected on the bonds after maturity, and a writ of mandate will issue to compel the treasurer to pay such interest.

The fact that interest coupons attached to bonds do not extend beyond maturity of the bonds does not raise the presumption that the bonds were not intended to bear interest after maturity. Kendall *v.* Porter, 120 Cal. 106, 45 Pac. 333, 52 Pac. 143.

71. Cripple Creek *v.* Adams, 36 Colo. 320, 85 Pac. 184. See Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301, holding that the fact that a street improvement bond becomes delinquent will not in itself stop the accrual of interest.

property of the corporation may be found to satisfy the judgment a mandamus may be issued to compel the corporation to raise the amount necessary to satisfy the debt by taxation in case the authority to levy and collect taxes for such purpose exists.[72] In the state courts a bondholder is usually regarded as entitled to maintain an action at law thereon.[73] The action upon bonds is properly covenant.[74] Where the obligation of a city to pay bonds is unconditional an action may be maintained against it, although they are issued under a statute by which they are payable through the agency of state officials.[75] And the fact that the revenue for the payment of bonds is to be collected by special assessment does not relieve the city from liability to suit thereon.[76] The production of the bond is not essential to a suit upon coupons.[77]

b. Statutory Restrictions. Where bonds are issued by a municipal board under a statute specifically providing that the municipal corporation shall not be liable for the payment thereof, no action on them may be maintained against the corporation.[78] And where a statute provides that no action shall be brought against the city by its creditors, no suit may be maintained by one taking bonds subject to such provision.[79] But the right of a bondholder to sue a city cannot be impaired by subsequent legislation.[80]

72. Heine *v.* Madison, etc., Parish Levee Com'rs, 19 Wall. (U. S.) 655, 22 L. ed. 223; Shepard *v.* Tulare Irr. Dist., 94 Fed. 1, holding that an action in a federal court against a municipal corporation to recover judgment on its bonds is not defeated by the fact that the bonds are payable only out of a special fund required to be created by the corporation, and which it has failed to provide, as if it be conceded that its primary liability is upon the contract to create the fund, and not upon the bonds, that obligation can only be enforced by mandamus, to which a judgment is a necessary prerequisite in a federal court. See Walkley *v.* Muscatine, 6 Wall. (U. S.) 481, 18 L. ed. 980; Galena *v.* U. S., 5 Wall. (U. S.) 705, 18 L. ed. 560; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

Mandamus to compel payment of bonds see MANDAMUS, 26 Cyc. 307.

73. Hammond *v.* Place, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543 (holding that the holders were not compelled to resort to mandamus to compel an assessment to pay them as they become due); Marsh *v.* Little Valley, 64 N. Y. 112 (holding that the holder of town bonds might maintain an action against the town, although the statute under which they were issued made it the duty of the board of supervisors of the county to impose and levy a tax for their payment).

74. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462, holding that under Howell Annot. St. Mich. § 7778, providing that no bond shall be deemed invalid for want of a seal, negotiable obligations issued by a township under a statute authorizing the issuance of bonds which were denominated bonds on their face might be treated in law as specialties and an action of covenant maintained thereon, although they were not in fact sealed.

Action of covenant see COVENANT, ACTION OF.

75. Toothaker *v.* Boulder, 13 Colo. 219, 22 Pac. 468.

76. Wyandotte *v.* Zeitz, 21 Kan. 649; Com. *v.* Pittsburgh, 88 Pa. St. 66; Mather *v.* San Francisco, 115 Fed. 37, 52 C. C. A. 631.

77. Clark *v.* Janesville, 10 Wis. 136.

78. Shapter *v.* San Francisco, 110 Fed. 615 (holding that in case of bonds issued by a city under the California act of March 23, 1876, authorizing the widening of a street and the issuance of the bonds therefor, and providing, as recited in the bonds, that they shall be payable at the office of the city treasurer from the fund that may be raised by taxation of the property benefited, and that the completion of the work shall operate as an acceptance by the landowners of the lien created by the act and a waiver of all claim on the city for the debt, action cannot, where no fund is collected for payment of the bonds, be maintained against the city for a judgment that a certain amount is due on the bonds, and that the judgment be paid from the fund as provided in the act, or by enforcement of any lien created by the act against the lands, the owners of such lands are the proper defendants); Liebman *v.* San Francisco, 24 Fed. 705.

79. Kennedy *v.* Sacramento, 19 Fed. 580, holding that one taking bonds was estopped to assert a right to sue the city given by a constitutional provision that all corporations should be subject to suit by proper persons.

Remedy in such a case.— Where by statute it was provided that no action should be brought against the city of Sacramento by its creditors, and that the city should issue its bonds for the purpose of funding its debt and should levy an annual tax of one per cent, of which a specified portion should be set aside for the payment of the bonds, no action would lie upon bonds issued to those surrendering claims against the city and taking bonds instead, but the remedy of the bondholders was by mandamus against the proper officer to compel him to carry out the terms of the statute. Kennedy *v.* Sacramento, 19 Fed. 580.

80. Bates *v.* Gregory, (Cal. 1889) 22 Pac. 683. See *supra*, IV, H, 1.

c. Equitable Remedies. A bondholder is not entitled to proceed in equity to enforce his bonds where he has an adequate remedy at law,[81] although the duty of the city as a trustee to collect and apply special assessments to the payment of improvement bonds may be enforced in equity, notwithstanding there is a right to an action at law upon the bonds themselves.[82] Where a municipal corporation has refused to pay bonds upon the ground that the bonds issued increased its debt beyond the constitutional limit, the facts may be inquired into in a court of equity at the suit of the bondholders to ascertain what part, if any, of the debt created may be enforced without violating the constitutional limitation.[83] The holder of bonds in payment of street improvements which are to be paid from the proceeds of assessments upon property benefited has the right to require the city to exercise for his protection every lawful power which it possesses to levy and collect from the property benefited by the improvement so much of its cost as is legally chargeable thereon, and for that purpose may bring all property-owners affected into a court of equity where their rights can be determined and appropriate relief granted to complainant by mandatory injunction against the city or other proper process.[84]

d. Defenses — (i) *In General.* A city, having delivered railroad bonds, payable to bearer, to the railroad company, cannot defeat a recovery thereon by a purchaser, on the ground that it gave the railroad company no directions as to how the bonds should be transferred.[85] A delay in issuing bonds for fourteen months after the election authorizing the same is not so unreasonable as to constitute a good defense as against an innocent holder.[86] The failure of the clerk of a municipal corporation to make a record of proceedings relating to the issuance of bonds cannot avail the corporation to defeat the enforcement of such bonds, but parol evidence is admissible to supply the place of the missing parts of the record.[87] The fact that a judgment may not be enforceable constitutes no defense to an action on municipal bonds,[88] nor is the fact that an injunction restraining the corporation from paying the bonds involved has been granted in a taxpayer's suit a defense to an action by a bondholder who was not a party to such suit.[89] Where the right to sue for the principal of bonds has accrued by reason of failure to pay interest it has been held that the acceptance of a tender of the interest and costs does not, in the absence of agreement to that effect, waive the right to prosecute a suit already begun to recover the principal and interest.[90]

(ii) *Protection of Bona Fide Holders Against Defenses.*[91] As municipal bonds are commercial paper,[92] it follows that many defenses which might be available against the original payees cannot be set up against holders in due course.[93] One who purchases bonds from the company to which they were issued

Impairment of remedy upon bonds as impairing obligation of contract see Constitutional Law, 8 Cyc. 951.

81. Heine *v.* Madison Parish Levee Com'rs, 19 Wall. (U. S.) 655, 22 L. ed. 223; Goelet *v.* Elizabeth, 10 Fed. Cas. No. 5,502, holding that a bill will not lie by the holder of bonds of an insolvent city for an injunction and receiver on default in payment where the owners have a remedy by mandamus to compel the levy of taxes to pay the bonds.

82. Vickrey *v.* Sioux City, 104 Fed. 164. See Spidell *v.* Johnson, 128 Ind. 235, 25 N. E. 889; Farson *v.* Sioux City, 106 Fed. 278.

83. Everett *v.* Rock Rapids Independent School Dist., 109 Fed. 697.

84. Burlington Sav. Bank *v.* Clinton, 111 Fed. 439.

85. Com. *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 496.

86. Mercy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813].

87. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

88. Shepard *v.* Tulare Irr. Dist., 94 Fed. 1, so holding where it was urged that if judgment should be obtained no writ of mandate could be issued under the law to enforce its collection.

89. Clagett *v.* Duluth Tp., 143 Fed. 824, 74 C. C. A. 620 [*citing* Mankato *v.* Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439].

90. Moore *v.* Jefferson, 45 Mo. 202.

91. Bona fide purchasers generally see *supra*, XV, C, 18.

92. See *supra*, XV, C, 16, a.

93. Cripple Creek *v.* Adams, 36 Colo. 320, 85 Pac. 184; Schmid *v.* Frankfort, 134 Mich. 619, 96 N. W. 1056; Washington County *v.* Davis, 2 Nebr. (Unoff.) 649, 89 N. W. 737; Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; Moran *r.* Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; Fidelity

with knowledge that they were improperly issued is not, however, a *bona fide* holder, and all defenses against the payee are available against him.[94] And so also third holders of negotiable bonds of a parish, issued by the police jury in exchange for illegal parish warrants, against whom the facts raise a legal presumption of notice, negligence, or *mala fides*, have no better right than the original holders.[95]

(III) *Fraud or Misconduct in Issuing Bonds.* Where the power to issue municipal bonds exists, the fraud[96] or misconduct[97] of the officers or agents of the municipality in issuing such bonds is not available as a defense against a *bona fide* purchaser.

(IV) *Irregularities in Issuing Bonds.* Where the power to issue municipal bonds exists, irregularities in the exercise of such power will not avail as a defense to defeat the bonds in the hands of *bona fide* purchasers,[98] especially where the bonds contain recitals of regularity.[99]

(V) *Invalidity of Enabling Act.* The invalidity of the statute under which bonds were issued is available as a defense even as against a *bona fide* purchaser for value.[1]

(VI) *Want of Authority to Issue.* Want of authority to issue municipal bonds is a good defense to an action on such bonds whether they are in the hands

Trust, etc., Co. *v.* Fowler Water Co., 113 Fed. 560; Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1; Whiting *v.* Potter, 2 Fed. 517, 18 Blatchf. 165; Bailey *v.* Lansing, 2 Fed. Cas. No. 738, 13 Blatchf. 424; Wood *v.* Allegheny County, 30 Fed. Cas. No. 17,939, 3 Wall. Jr. 267, holding that a county which has issued bonds payable absolutely to bearer for subscription to stock in a railroad on recommendation of the grand jury, as required by law, is liable on them in the hands of a *bona fide* holder for value, who bought them in the market in the course of trade, although the grand jury coupled with their recommendation a proviso that the bonds should not be sold below par, and the bonds were in fact sold at a great discount by the railroad company. And see *supra*, XV, C, 18, a.

Estoppel of taxpayers.— Where taxpayers, without protest or interference, suffered an election to take place under Ohio acts of March 12, 1849, and Jan. 16, 1851, authorizing the trustees of the township to make a subscription to the stock of a certain railroad, and allowed the bonds therefor to be negotiated, they could not afterward, as against innocent bondholders, question the validity of the bonds on the ground that the railroad was not located until after the election and subscription. State *v.* Van Horne, 7 Ohio St. 327.

94. Starin *v.* Genoa, 23 N. Y. 439.

95. Johnson *v.* Butler, 31 La. Ann. 770.

96. Black *v.* Cohn, 52 Ga. 621; Copper *v.* Jersey City, 44 N. J. L. 634; Citizens' Sav. Bank *v.* Greenburgh, 173 N. Y. 215, 65 N. E. 978 [*reversing* 60 N. Y. App. Div. 225, 70 N. Y. Suppl. 68 (*affirming* 31 Misc. 428, 64 N. Y. Suppl. 554)]; East Lincoln *v.* Davenport, 94 U. S. 801, 24 L. ed. 322; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 355, 21 L. ed. 170; Rouede *v.* Jersey City, 18 Fed. 719, 20 Fed. Cas. No. 12,031*a*, 17 Reporter 263. See also Fletcher *v.* Hickman, 136 Fed. 568, 69 C. C. A. 350.

97. Rouede *v.* Jersey City, 18 Fed. 719, 20 Fed. Cas. No. 12,031*a*, 17 Reporter 263.

98. *Alabama.*— State *v.* Montgomery, 74 Ala. 226.

California.— Derby *v.* Modesto, 104 Cal. 515, 38 Pac. 900.

Georgia.— Black *v.* Cohen, 52 Ga. 621.

Illinois.— Ryan *v.* Lynch, 68 Ill. 160.

New York.— Citizens' Sav. Bank *v.* Greenburgh, 173 N. Y. 215, 65 N. E. 978 [*reversing* 60 N. Y. App. Div. 225, 70 N. Y. Suppl. 68 (*affirming* 31 Misc. 428, 65 N. Y. Suppl. 554)]; Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685; Gould *v.* Venice, 29 Barb. 442.

Pennsylvania.— See Com. *v.* Pittsburgh, 43 Pa. St. 391.

Vermont.— St. Johnsbury First Nat. Bank *v.* Concord, 50 Vt. 257, premature issue.

Virginia.— De Voss *v.* Richmond, 18 Gratt. 338, 98 Am. Dec. 646.

United States.—East Lincoln *v.* Davenport, 94 U. S. 801, 24 L. ed. 322; Grand Chute *v.* Winegar, 15 Wall. 355, 21 L. ed. 170; Rouede *v.* Jersey City, 18 Fed. 719, 20 Fed. Cas. No. 12,031*a*, 17 Reporter 263.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1985.

99. Platt *v.* Hitchcock County, 139 Fed. 929, 71 C. C. A. 649.

Effect of recitals generally see *supra*, XV, C, 20.

1. *District of Columbia.*— Grant *v.* Cooke, 7 D. C. 165.

Illinois.— Ryan *v.* Lynch, 68 Ill. 160.

Missouri.— Webb *v.* Lafayette County, 67 Mo. 353.

North Carolina.— Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873.

United States.— Commercial Nat. Bank *v.* Iola, 6 Fed. Cas. No. 3,061, 2 Dill. 353.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1983.

Constructive notice of lack of power on the part of a municipal corporation to issue bonds see *supra*, XV, C, 19, d.

of the original payee or of a *bona fide* purchaser for value,[2] and it is also an available defense that the bonds were issued in excess of the power conferred.[3] So bonds which upon their face purport to have been issued in conformity with an act specified, but which in fact were not issued until after the repeal of said act, being antedated so as to appear to have been issued prior to such repeal, and which are signed as president and clerk by persons who were not such officials at the date on which the bonds purport to have been issued, are void in the hands of *bona fide* holders.[4]

(VII) *NON-PERFORMANCE OF CONDITIONS PRECEDENT.* Where the power to issue bonds is dependent upon the performance of certain conditions precedent, a failure to comply with such conditions is available as a defense to the bonds,[5] and this has been held to be true even though the bonds were in the hands of a *bona fide* purchaser for value[6] unless the municipality is estopped by its own

2. *Arkansas.*— Hancock *v.* Chicot County, 32 Ark. 575.

Illinois.— Gaddis *v.* Richland County, 92 Ill. 119; Ryan *v.* Lynch, 68 Ill. 160; Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554 [*following* Marsh *v.* Fulton County, 12 Wall. (U. S.) 676, 19 L. ed. 1040].

Indiana.— Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452.

Iowa.— McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Williamson *v.* Keokuk, 44 Iowa 88.

Louisiana.— Wilson *v.* Shreveport, 29 La. Ann. 673.

Michigan.— Bogart *v.* Lamotte, 79 Mich. 294, 44 N. W. 612.

Mississippi.— Sykes *v.* Columbus, 55 Miss. 115.

Ohio.— State *v.* Gibson, 11 Ohio S. & C. Pl. Dec. 90, 8 Ohio N. P. 367; Sullivan *v.* Urbana, 3 Ohio Dec. (Reprint) 554, holding that a bond of a municipal corporation which was fraudulently issued by the clerk without authority, and which recites no ordinance authorizing its issue, is void in the hands of an innocent purchaser.

United States.—Brenham *v.* German-American Bank, 144 U. S. 173, 12 S. Ct. 559, 36 L. ed. 390; Merrill *v.* Monticello, 14 Fed. 628; Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1984.

Where municipal bonds contain no recital that the corporation is actually authorized to issue them, the corporation is not estopped to deny the authority of its officers to execute them. Concord *v.* Robinson, 121 U. S. 165, 7 S. Ct. 937, 30 L. ed. 885.

Non-compliance with enabling statute.— Under Mills Annot. St. Colo. § 4403, subd. 6, authorizing towns to incur a debt for the construction of waterworks, and requiring the debt to be authorized by ordinance providing for the levy of a tax sufficient to pay it with interest, and providing that such debt shall mature in not less than ten or more than fifteen years, bonds payable on demand, issued under an ordinance which did not provide for any levy, were invalid in the hands of a *bona fide* purchaser for value, notwithstanding a recital in the bonds that they were issued in compliance with law. Sauer *v.* Gillett, 20 Colo. App. 365, 78 Pac. 1068.

Coupons improperly left on bonds when issued.— Under Nebr. Comp. St. (1893) c. 9, § 37, providing that when municipal bonds shall be presented to the auditor for registration, the auditor shall detach as many interest-bearing coupons as shall mature before the first taxes levied to meet the same, where municipal bonds dated Nov. 1, 1889, with interest payable semiannually, evidenced by coupons maturing May 1, 1890, and every six months thereafter, were deposited with the auditor on Dec. 21, 1889, for registration, and the auditor was prevented by injunction from registering the bonds until Jan. 1, 1891, the coupons maturing prior to Oct. 1, 1890, being properly detachable, were void, although in the hands of subsequent innocent purchasers. Brinkworth *v.* Grable, 45 Nebr. 647, 63 N. W. 952.

3. Eagle *v.* Kohn, 84 Ill. 292; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562.

4. Lehman *v.* San Diego, 83 Fed. 669 [*affirming* 73 Fed. 105].

5. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611 (holding that where the statute giving power to issue bonds provided that "no bonds shall be issued but upon an entire concurrence of the board of mayor and aldermen, upon a full attendance of all the members of the board, and when there is no vacancy; which shall be manifest by an entry of the order of the issuing being made on the minutes of the board and signed by each member thereof," bonds issued without compliance with these requirements were void); Green County *v.* Shortell, 116 Ky. 108, 75 S. W. 251, 25 Ky. L. Rep. 357; Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

6. Sauer *v.* Gillett, 20 Colo. App. 365, 78 Pac. 1068; Eagle *v.* Kohn, 84 Ill. 292; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Parker *v.* Smith, 3 Ill. App. 356; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760.

Failure to provide for payment.— Bonds are invalid even in the hands of *bona fide* purchasers when issued without compliance with a constitutional requirement that provision shall be made at the time of incurring any debt for levying a sufficient tax to

acts[7] or by recitals in the bonds.[8] Other cases hold, even independent of recitals, that where a city is authorized to issue bonds they are binding in the hands of *bona fide* purchasers, although conditions precedent to their issuance were not observed.[9]

(VIII) *LACK OF POPULAR ASSENT.*[10] It has been held that where the statute authorizing the issuance of municipal bonds makes the exercise of the power dependent upon the consent of the taxpayers, a lack of such consent is available as a defense, even as against a *bona fide* holder;[11] but there is also a judicial authority for the contrary view.[12] Where bonds issued to aid in the construction of an irrigation ditch recited that they were issued after submission to popular vote of a proposition to issue them for the purpose of aiding in the construction of a canal for irrigation and water-power purposes, it was held no defense to an action by a *bona fide* purchaser, based thereon, that the proposition submitted was not the same as that recited in the bonds.[13] A city cannot repudiate its bonds which are in the hands of a *bona fide* purchaser on the ground of irregularities in the election authorizing their issue;[14] nor can a municipality attack the validity of negotiable bonds issued by it and in the hands of *bona fide* purchasers for value on the ground that the records do not show a proper and legal canvass of the votes cast at the election called to determine whether such bonds should be issued, where the bonds recite the performance of all required conditions precedent to their issuance.[15]

(IX) *EXCESS OF DEBT LIMIT.*[16] It has been held that the fact that constitutional limitations of municipal indebtedness or bond issues are exceeded in the issue of bonds is a good and sufficient defense against any holder;[17] but that, where limitations as to the amount of indebtedness are imposed by statute and not by the constitution, the legislature may create a board with authority to determine the question of fact upon which the amount of the limitation depends, and the findings of such board will be conclusive in favor of *bona fide* purchasers.[18]

pay the interest and create a sinking fund. Quaker City Nat. Bank *v.* Nolan County, 59 Fed. 660 [*affirmed* in 66 Fed. 883, 14 C. C. A. 157]. But *compare* National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637, holding that non-compliance with such requirement was not available as a defense against a *bona fide* purchaser of the bonds, where the bonds recited that "all conditions and things required to be done precedent to and in the issuing of said bonds have duly happened and been performed in regular and due form as required by law."

7. Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

8. Green County *v.* Shortell, 116 Ky. 108, 75 S. W. 251, 25 Ky. L. Rep. 357; Evansville *v.* Dennett, 161 U. S. 434, 16 S. Ct. 613, 40 L. ed. 760.

Estoppel by recitals see *supra*, XV, C, 20.

9. Sala *v.* New Orleans, 21 Fed. Cas. No. 12,246, 2 Woods 188 [*following* Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Von Hostrup *v.* Madison City, 1 Wall. (U. S.) 291, 17 L. ed. 538].

10. **Effect of recitals of popular assent** see *supra*, XV, C, 20, c, (VI).

11. Board of Education Dist. No. 3 *v.* Taft, 7 Ill. App. 571; Cagwin *v.* Hancock, 84 N. Y. 532 [*reversing* 22 Hun 201]; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; People *v.* Mead, 36 N. Y. 224, 24 N. Y. 114; Wilson *v.* Caneadea, 15 Hun (N. Y.) 218, petition not made by majority of taxpayers.

12. San Antonio *v.* Lane, 32 Tex. 405.

13. Kearney *v.* Woodruff, 115 Fed. 90, 53 C. C. A. 117.

14. Finney County School Dist. No. 40 *v.* Cushing, 8 Kan. App. 728, 54 Pac. 924; Clark *v.* Janesville, 10 Wis. 136; Roberts *v.* Bolles, 101 U. S. 119, 24 L. ed. 880 (application for election not signed by required number of voters, and notice not given for length of time required); Keane *v.* Ft. Scott, 14 Fed. Cas. No. 7,631 (holding that when a municipal corporation is authorized to issue negotiable bonds, it cannot defend against them, in the hands of *bona fide* holders for value, on the ground that the question submitted to the voters embraced two distinct proposals).

15. Syracuse Tp. *v.* Rollins, 104 Fed. 958, 44 C. C. A. 277, where it is said that even if the recitals could be contradicted it could only be by showing the non-assent of the voters and not merely formal omissions. See also *supra*, XV, C, 20, c, (VI).

16. **Effect of recitals as to debt limit** see *supra*, XV, C, 20, d.

17. McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Mosher *v.* Ackley Independent School Dist., 44 Iowa 122; Millerstown *v.* Frederick, 114 Pa. St. 435, 7 Atl. 156.

18. Chilton *v.* Gratton, 82 Fed. 873, holding also that when the limit of an issue of bonds is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, or they have better access to the

Bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of a municipality, but merely change the form of indebtedness; and, as against an innocent purchaser in the open market without notice, the fact that, at the time the bonds were issued, the indebtedness of the city already exceeded the prescribed limitations is no defense to an action on such bonds.[19]

(x) *Failure or Want of Consideration.* Failure or want of consideration for municipal bonds is not an available defense as against *bona fide* holders in due course.[20]

(xi) *Denial of Official Character of Officers.* A municipal corporation cannot deny the official character of its own officers, who acted as such in performing duties necessary to execute conditions precedent to the issuance of negotiable bonds.[21]

(xii) *Denial of Corporate Existence.* A municipality cannot question its own corporate existence in a suit brought upon evidences of debt issued by it.[22]

(xiii) *Sale on Credit Contrary to Statute.* The fact that the municipal authorities gave a credit to the purchaser of the bonds of a town instead of selling them for cash as required by the statute is not a defense to an action on such bonds by a subsequent *bona fide* purchaser.[23]

(xiv) *Non-Compliance With Ordinance as to Date of Maturity.* A *bona fide* holder of the negotiable bonds of a municipal corporation having express and unrestricted authority to issue them may recover thereon, although they are made payable at an earlier date than directed in the ordinance of the municipality relating to the mode of executing them.[24]

(xv) *Illegal Contract With Reference to Sale.* It is no defense to an action upon bonds of a municipal corporation in the hands of an assignee without notice that an illegal contract was made for the payment of a commission upon

information than other persons and can ascertain the amount with more certainty than strangers, the bonds will be held valid in the hands of *bona fide* purchasers.

19. Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534. See also Pierre *v.* Dunscomb, 106 Fed. 611, 45 C. C. A. 499.

20. *California.*— Meyer *v.* Brown, 65 Cal. 583, 26 Pac. 281.

Colorado.— Cripple Creek *v.* Adams, 36 Colo. 320, 85 Pac. 184.

Indiana.— Myers *v.* Jeffersonville, 145 Ind. 431, 44 N. E. 452.

Kentucky.— Eminence *v.* Grasser, 81 Ky. 52 (holding that where bonds issued by a municipal corporation to aid in the construction of a railroad have passed into the hands of innocent third persons without notice, the corporation cannot avoid payment of the bonds because of a change in the proposed route of the road or a failure to build it according to the original plan); Maddox *v.* Graham, 2 Metc. 56; Cook *v.* Lyon County, 6 Ky. L. Rep. 361 (holding that an innocent holder of bonds issued by a county to a railroad company is not bound to look to the delivery to the county of the stock certificates).

Louisiana.— Smith *v.* New Orleans, 27 La. Ann. 286.

Texas.— Tyler *v.* Tyler Bldg., etc., Assoc., (1905) 86 S. W. 750 [*reversing* (Civ. App. 1904) 82 S. W. 1066]; Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876.

Virginia.— Lynchburg *v.* Slaughter, 75 Va. 57.

United States.— Bernards Tp. *v.* Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. ed. 766; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. ed. 364; D'Esterre *v.* New York, 104 Fed. 605, 44 C. C. A. 75; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541.

See 36 Cent. Dig. tit. "Municipal Corporations," § 1986.

But *compare* Edminson *v.* Abilene, 7 Kan. App. 305, 54 Pac. 568, holding that refunding bonds issued by the mayor and clerk under authority of a resolution of the city council are invalid in the hands of an innocent purchaser, when such bonds were not issued to fund a lawful debt against the city.

In an action by an assignee of non-negotiable bonds, defendant could show want of consideration for the bonds, in that it received for them neither cash nor audited and canceled warrants. Flagg *v.* Barnes County School Dist. No. 70, 5 N. D. 191, 65 N. W. 674, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363.

21. Eminence *v.* Grasser, 81 Ky. 52.

22. Allen *v.* Cameron, 1 Fed. Cas. No. 243, 3 Dill 198; Bonham *v.* Harrisonville Bd. of Education, 3 Fed. Cas. No. 1,629, 4 Dill. 156 [*followed* in Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46].

23. Greenburg *v.* International Trust Co., 94 Fed. 755, 36 C. C. A. 471.

24. Gilchrist *v.* Little Rock, 10 Fed. Cas. No. 5,421, 1 Dill. 261.

the sale of such bonds to an officer of the corporation, the first purchaser thereof, such commission never having been actually paid.[25]

(xvi) *Improper Seal.* Under a statute which provides that all bonds issued by municipal corporations shall be signed by the mayor and clerk and be sealed with the seal of the corporation, where bonds issued by a city, under an ordinance containing similar provisions, signed by the mayor and clerk, and attested as bearing the seal of the city, were sealed with the seal of the city clerk, if the same was not in fact the corporate seal of the city a mistake was made by the officers against which an innocent holder of the bonds was entitled to relief in a court of equity by a decree requiring the city to affix the proper seal, or enjoining it from setting up its absence as a defense to an action on the bonds.[26]

(xvii) *Fraud in Procuring Authority.* Railroad aid bonds issued in payment of a subscription, required by act of assembly to be made on the recommendation of the grand jury, are valid in the hands of an innocent purchaser, although the recommendation was obtained by unfair and corrupt means.[27]

(xviii) *Collateral Agreements and Conditions.* The existence or the breach of collateral conditions or agreements, not appearing in the statute or ordinance authorizing bonds or on the face of the bonds, cannot avail a municipality as a ground of defense against the enforcement of such bonds by a holder in due course.[28] But where a city has power to subscribe to the stock of a railroad company and to issue bonds in payment of the subscription, the proceeds of such bonds in all cases to be expended within the limits of the county in which such city is situate, as between the city and the railroad company, or its assignee with notice, such bonds cannot be enforced where no part of the proceeds of the subscription has been expended in the county, and no part of the railroad subscribed to has been constructed therein.[29]

(xix) *Use of Proceeds.* As it is no part of the duty of a bondholder to direct or look after the application of municipal funds,[30] the diversion or misapplication of the proceeds of municipal bonds constitutes no defense to the enforcement of such bonds by an innocent holder.[31]

(xx) *Set-Off.* Debts or claims arising out of transactions on the same bond or series of bonds cannot be set off as against innocent purchasers not connected with such transactions.[32]

25. Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61.

26. Defiance *v.* Schmidt, 123 Fed. 1, 59 C. C. A. 159 [*affirming* 117 Fed. 702].

27. Com. *v.* Allegheny County Com'rs, 37 Pa. St. 237.

28. Suffolk Sav. Bank *v.* Boston, 149 Mass. 364, 21 N. E. 665, 4 L. R. A. 516; Shoemaker *v.* Goshen Tp., 14 Ohio St. 569; Com. *v.* Perkins, 43 Pa. St. 400; Com. *v.* Pittsburgh, 34 Pa. St. 496; Graves *v.* Saline County, 161 U. S. 359, 16 S. Ct. 526, 40 L. ed. 732; Brooklyn *v.* Ætna L. Ins. Co., 99 U. S. 362, 25 L. ed. 416; Denison *v.* Columbus, 62 Fed. 775; *In re* Bloomington, 3 Fed. Cas. No. 1,561, 42 How. Pr. 283; Keane *v.* Ft. Scott, 14 Fed. Cas. No. 7,631; Rockmulh *v.* Pittsburgh, 20 Fed. Cas. No. 11,982.

29. Foote *v.* Mt. Pleasant, 9 Fed. Cas. No. 4,914, 1 McCrary 101, holding further that where the owner of certain mortgage bonds upon the K., Mt. P. & M. railroad, including all its "property, real and personal, and all rights and interests therein now owned or hereafter to be acquired," proceeded to foreclose the mortgage, and obtained a decree under which he purchased the property, and the mortgage provided that the bonds secured by it should in no case be issued or disposed of except at the rate of eight thousand five hundred dollars for every mile of road as completed, as to the bonds issued by the city of Mt. Pleasant, under the circumstances named above, the purchaser at sale under the decree did not become a *bona fide* holder.

30. Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141, 51 Am. St. Rep. 819; Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

31. Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141, 51 Am. St. Rep. 819; Clifton Forge *v.* Alleghany Bank, 92 Va. 283, 23 S. E. 284 (although the original purchaser of the bonds was aware of the intention to use the proceeds for unauthorized purposes); Lynchburg *v.* Slaughter, 75 Va. 57; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; Risley *v.* Howell, 64 Fed. 453, 12 C. C. A. 218 [*following* Hackett *v.* Ottawa, 99 U. S. 86, 25 L. ed. 363]; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

32. Taylor *v.* Daviess County, 32 S. W.

(xxi) *Recognition of Validity as Waiver of Defenses.* It has been held that long recognition by a municipality of the validity of bonds issued by it may amount to a ratification and a waiver of defenses.[33]

e. Time to Sue. The fact that a municipal corporation repudiates its obligation upon bonds will not cause them to mature before the time specified in them.[34]

f. Limitations. The statute of limitations may be pleaded by the municipality against the payment of its bonds, unless it appears that there has been legislation extending the time of payment or which has set apart a special fund for payment and so dedicated the same to the special purpose as to create an express trust.[35] Where a specific fund has been raised to pay interest coupons and has become a pledge for their benefit, it has been held that the operation of the statute of limitations against the coupons is interrupted.[36] Where interest coupons are payable as money comes into the treasury, the statute of limitations does not run against them until the money is received in the treasury.[37]

g. Persons Who May Sue. Where bonds are payable to bearer suit may be maintained by the legal holder thereof,[38] although they are held only for the purpose of collection and the equitable title is in another.[39] A bondholder may sue to enforce the payment of his bonds without holding or representing the entire issue.[40] It has been held that where a municipal board is charged with an official duty to see that bonds issued by them are paid when due they have such interest as will entitle them to maintain mandamus to compel payment.[41]

h. Defendants. The fact that bonds are to be paid from the proceeds of assessments against specific property does not render the owners of such property necessary parties to an action thereon.[42] When the money for payment of bonds has been placed in the hands of officers charged with the duty of paying them, an action will lie on behalf of a bondholder against such officers.[43] A committee of the city government whose consent is not essential to the raising of funds for the payment of bonds is not a necessary party to a suit thereon.[44] A board of education possessing corporate powers may be sued upon bonds issued by it, although, since the issue of the bonds, the city has been changed from a city of the second class to a city of the first class and the powers of its board of education have been correspondingly altered.[45]

416, 17 Ky. L. Rep. 711; Granniss *v.* Cherokee Tp., 47 Fed. 427.

33. Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291. And see, generally, *supra*, XV, C, 13. But *compare* Clarke *v.* Northampton, 105 Fed. 312, 57 C. C. A. 123, holding that where it has been authoritatively determined by the courts that certain averments required by the statute in a petition presented to a county judge as the basis of proceedings authorizing the issuance of municipal bonds are jurisdictional, and that their omission renders all subsequent proceedings void, bonds issued in pursuance of proceedings based on a petition which does not contain such averments cannot be validated by estoppel, and the municipality may plead their illegality as against any holder, notwithstanding it continued to pay interest thereon for twenty years.

34. Braud *v.* Donaldsonville, 28 La. Ann. 558.

35. Robertson *v.* Blaine County, 85 Fed. 735 [*distinguishing* Freehill *v.* Chamberlain, 65 Cal. 603, 4 Pac. 646; Underhill *v.* Sonora, 17 Cal. 172; Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766], holding that the fact that a county has not levied a tax for the payment of bonds, as provided by the law authorizing their issue, will not prevent it from pleading limitations. See also Galbraith *v.* Knoxville, 105 Tenn. 453, 58 S. W. 643, holding that the statute of limitations was a good defense to an action upon a coupon bond which was not brought until thirteen years after its maturity.

36. Hall *v.* New Orleans, 19 Fed. 870.

37. Freehill *v.* Chamberlain, 65 Cal. 603, 4 Pac. 646.

38. Jennings Banking, etc., Co. *v.* Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005.

39. Jennings Banking, etc., Co. *v.* Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005.

40. Perris Irr. Dist. *v.* Thompson, 116 Fed. 832, 54 C. C. A. 336.

41. People *v.* East Saginaw, 33 Mich. 164. Mandamus to compel payment of bonds generally see MANDAMUS, 26 Cyc. 307.

42. Mather *v.* San Francisco, 115 Fed. 37, 52 C. C. A. 631; Burlington Sav. Bank *v.* Clinton, 106 Fed. 269.

43. Murdoch *v.* Aikin, 29 Barb. (N. Y.) 59.

44. Leach *v.* Fayetteville Com'rs, 84 N. C. 829; Hawley *v.* Fayetteville, 82 N. C. 22.

45. Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573.

i. Pleading—(I) *Complaint or Petition.* In actions upon municipal bonds the rules governing the sufficiency of the complaint or petition in civil actions generally apply.[46] The petition should show the authority to issue the bond, either by averment of the special act conferring such authority or by stating the recital of the bond in that respect,[47] although when it is alleged that plaintiff is a *bona fide* holder and the bonds recite their issuance in conformity with law, it is not necessary that the facts showing the regularity and legality of issuance should be set out.[48] Where, however, the bonds contain no recital which will preclude the municipality from impeaching them in the hands of a *bona fide* holder, plaintiff must show in his complaint that they were issued in substantial compliance with the legislative enactments and for a proper purpose.[49] Subject to these general rules the complaint need not negative matters of defense,[50] although it has been held that a compliance with the constitutional provision requiring provision to be made for the payment of the indebtedness must be alleged.[51]

(II) *Plea or Answer.* Defendant may plead generally *non est factum* or a

46. See Veeder *v.* Lima, 11 Wis. 419, holding that a bond for money and coupon attached, issued by a town, is a written instrument for the payment of money, within the meaning of Code, § 68, prescribing the requisites of a complaint in an action founded on an instrument for the payment of money only.

Pleading generally see PLEADING.

Amendment.— In a suit upon interest coupons of bonds which have been issued in excess of the amount authorized, plaintiff should be permitted to amend by alleging facts necessary to show how the holders of the bonds are entitled to share in the amount of the debt the city was authorized to contract. Citizens' Bank *v.* Terrell, 78 Tex. 450, 14 S. W. 1003.

Sufficiency of particular averments.— That bonds were sold at par (Wetumpka *v.* Winter, 29 Ala. 651); that bonds were duly authorized and executed (Wiley *v.* Minneapolis Bd. of Education, 11 Minn. 371); and that bonds have been properly issued and registered (Bissell *v.* Spring Valley Tp., 28 Fed. 54).

47. Kennard *v.* Cass County, 14 Fed. Cas. No. 7,697, 3 Dill. 147.

Coupons.— In an action on negotiable coupons, cut from bonds of a public corporation which has no general authority to make negotiable paper, special authority must be alleged. Kennard *v.* Cass County, 14 Fed. Cas. No. 7,697, 3 Dill. 147.

Authority of agents.— In an action on an obligation of a municipal corporation issued by the corporation or its general agents, no averments to show the authority of such agents are essential. Ridgefield Tp. Bd. of Education *v.* Cliffside Park Bd. of Education, 63 N. J. L. 371, 43 Atl. 722 [*affirmed* in 67 N. J. L. 415, 53 Atl. 1124]. Where an act gives authority to certain commissioners to issue bonds of the city for certain purposes, the commissioners are thus made agents of the city to issue such bonds, and an averment in a declaration upon such bonds that they were issued by the city is proper. Rahway Sav. Inst. *v.* Rahway, 53 N. J. L. 48, 20 Atl. 756.

Denomination of bonds.— Where the act authorizing the issue of bonds by a city provided that the bonds were to be denominated on their face "Rahway City Water Bonds," it was held that as such denomination was not made essential to the validity of the bonds, it was not necessary to aver in a declaration upon such bonds that they were so denominated; but, if necessary, an averment that the bonds were writings denominated "Rahway City Water Bonds," was sufficient. Rahway Sav. Inst. *v.* Rahway, 53 N. J. L. 48, 20 Atl. 756.

Acts to be performed after issue.— The declaration in an action on city bonds need not aver that certain duties, which the acts authorizing the issue of the bonds required to be done by city officials after the issue, had been performed, for the non-performance of such duties could not affect the validity of the city's obligation previously issued. Rahway Sav. Inst. *v.* Rahway, 53 N. J. L. 48, 20 Atl. 756.

The ordinance under which the bonds are issued need not be set out. Underhill *v.* Sonora, 17 Cal. 172.

48. Lincoln Tp. *v.* Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518; Shepard *v.* Tulare Irr. Dist., 94 Fed. 1. See Bernards Tp. *v.* Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. ed. 766.

49. Hopper *v.* Covington, 118 U. S. 148, 6 S. Ct. 1025, 30 L. ed. 190 [*affirming* 8 Fed. 777, 10 Biss. 488].

50. Mosher *v.* Steamboat Rock Independent School Dist., 42 Iowa 632; Wiley *v.* Minneapolis Bd. of Education, 11 Minn. 371 (holding that in an action upon a bond of a municipal corporation, taken by a creditor in payment of a debt due from the corporation, it is not necessary that the complaint should allege that the bond was taken at par); Brown *v.* Point Pleasant, 36 W. Va. 290, 15 S. E. 209; Lincoln Tp. *v.* Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518; U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394.

51. Biddle *v.* Terrell, 82 Tex. 335, 18 S. W. 691.

Sufficiency of averment.— An averment, in an action against a city, that due provision was made before the issuance of bonds for the levy of a special tax annually, to meet annual

plea in the nature thereof,[52] or may plead specially setting up special matter avoiding liability upon the bond after its issuance.[53] Where it is alleged that plaintiff obtained possession of the bond in suit the facts constituting the fraud should be specifically pleaded.[54]

j. Evidence — (I) *Presumptions.* It will be presumed as a general rule that the bonds of a municipal corporation issued in apparent compliance with a law authorizing their issue have been actually so issued,[55] especially where they are in the hands of *bona fide* holders.[56] Where bonds are shown to have been delivered by an officer of the municipal corporation it will be presumed that he was acting in his official capacity.[57] Under some statutes bonds issued for street improvements are *prima facie* evidence of the regularity of the proceedings.[58] Possession of negotiable bonds raises a presumption of ownership.[59] Want of notice of defects cannot be presumed from mere evidence of a purchase for value.[60]

(II) *Burden of Proof.* Where bonds for a particular purpose are valid only in case they fall within an exception of a statute forbidding the issuance of bonds for such purpose generally, the burden is upon plaintiff to establish that they are within such exception.[61] Where a bond upon its face shows the condi-

interest thereon and provide for a sinking fund, as required by the constitution and the city charter, sufficiently shows that the provision was for at least the minimum per cent required thereby, judicial notice being taken of both the constitution and the charter. Berlin Iron-Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 408.

52. Galbreath *v.* Knoxville, (Tenn. Ch. App. 1900) 59 S. W. 178 (holding that an allegation in a particular paragraph of an answer that the interest upon the bond in suit was paid from the general fund, and that a sinking fund was created for retiring it at maturity, would be construed in connection with other paragraphs denying that any sinking fund or special tax had been created to pay the bond sued on in such manner as to prevent the city from being estopped to deny the issuance of the bond); Coler *v.* Cleburne, 131 U. S. 162, 9 S. Ct. 720, 33 L. ed. 146 (holding a plea sufficient as against an objection that it did not negative the idea that the bonds might have been signed by someone authorized by defendant or by law); Merrill *v.* Monticello, 14 Fed. 628.

An affidavit made in behalf of a village by its president, and filed in an action against the village to recover on a bond, denying the execution and delivery of the bond, although not entitled in the cause, is sufficient to require plaintiff to prove the execution and delivery. Thompson *v.* Mecosta, 127 Mich. 522, 86 N. W. 1044.

53. Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440 (holding that an answer in defense to a bill to collect certain railroad aid bonds from a county, averring that the bonds had been paid and canceled and some unknown persons had purloined them and erasing the cancellation fraudulently placed them upon the market again, properly pleaded a defense which was not available under a plea of *non est factum*); Galbreath *v.* Knoxville, (Tenn. Ch. App. 1900) 59 S. W. 178.

54. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

55. *Illinois.*— Quincy *v.* Warfield, 25 Ill. 317, 79 Am. Dec. 330.

Missouri.— Flagg *v.* Palmyra, 33 Mo. 440 [*limited* in Carpenter *v.* Lathrop, 51 Mo. 483; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87].

Oklahoma.— Greer County *v.* Gregory, 15 Okla. 208, 81 Pac. 422.

South Carolina.— State *v.* Columbia, 12 S. C. 370.

Wisconsin.— Clark *v.* Janesville, 10 Wis. 136.

United States.— Gladstone *v.* Throop, 71 Fed. 341, 18 C. C. A. 61; Desmond *v.* Jefferson, 19 Fed. 483; Oelrich *v.* Pittsburgh, 18 Fed. Cas. No. 10,442, 1 Pittsb. (Pa.) 522. But see Liebman *v.* San Francisco, 24 Fed. 705, holding that to maintain an action on bonds issued for street improvements, the sufficiency of the petition by property-owners for the improvement must be affirmatively shown, as it cannot be conclusively presumed from the recitals in the bond.

But see Meyer *v.* Elizabeth, 2 N. J. L. J. 281.

56. Flagg *v.* Palmyra, 33 Mo. 440 [*limited* in Carpenter *v.* Lathrop, 51 Mo. 483; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87]; Knapp *v.* Newtown, 1 Hun (N. Y.) 268, 3 Thomps. & C. 748; Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

Bona fide holders see *supra*, XV, C, 18.

57. Weyauwega *v.* Ayling, 99 U. S. 112, 25 L. ed. 470.

58. See Creed *v.* McCombs, 146 Cal. 449, 80 Pac. 679.

59. Memphis *v.* Bethel, (Tenn. 1875) 17 S. W. 191; Edwards *v.* Bates County, 99 Fed. 905, 40 C. C. A. 161; Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

60. Thompson *v.* Mecosta, 127 Mich. 522, 86 N. W. 1044.

61. Sampson *v.* People, 141 Ill. 17, 30 N. E. 781; Choisser *v.* People, 140 Ill. 21, 29 N. E. 546; Williams *v.* People, 132 Ill. 574, 24 N. E. 647; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Rock Rapids Independent Dist. *v.* Cleveland Sav. Soc., 98 Iowa 581, 67 N. W.

tions upon which it is payable the holder has the burden of showing that such conditions have been complied with.[62] Where a corporation has power to issue bonds to a limited amount only, the burden is upon it to show that a particular bond in suit was issued after this limit was exceeded.[63] Municipal bonds payable to bearer are subject to the same rules as other negotiable paper;[64] and when they are regular upon their face it is presumed that plaintiff became the holder for value at its date in the usual course of business.[65] But where the municipality proves that there was fraud or illegality in the inception of the bond, the burden is thrown upon plaintiff to show that he is a *bona fide* holder for value.[66] But a mere irregularity not amounting to illegality does not place upon plaintiff the burden of showing that he is a holder for value.[67] Where *nil debet* has been pleaded it places upon plaintiff the burden of showing that the execution of a non-negotiable note was within the power of the corporation.[68]

(III) *Admissibility and Sufficiency.* The rules applicable to civil actions in general[69] control the admissibility of evidence, including the admissibility of parol and documentary evidence, in proceedings to enforce municipal bonds.[70]

370; Jeffries *v.* Lawrence, 42 Iowa 498. *Compare* Hutchinson *v.* Self, 153 Ill. 542, 39 N. E. 27, holding that where payment of a tax to pay interest on town bonds is resisted on the ground that the bonds are illegal, and the bonds, although issued after adoption of the constitution of 1870, forbidding the issue of such bonds unless "authorized under existing laws by a vote of the people prior to such adoption," recite that they were duly authorized by a majority of voters at an election held prior to the adoption of the constitution, the burden of proof is on the property holder to show their illegality.

62. Green *v.* Dyersburg, 10 Fed. Cas. No. 5,756, 2 Flipp. 477, holding that the holder of coupons of negotiable railroad aid bonds cannot recover thereon without proof of a compliance with the recited condition that the railroad shall be constructed in a certain manner.

63. Neely *v.* Yorkville, 10 S. C. 141.

64. Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681.

65. Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424.

66. Schmid *v.* Frankfort, 141 Mich. 291, 104 N. W. 668; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78 [*affirming* 38 Fed. 204]; Gamble *v.* Rural Independent School Dist., 132 Fed. 514; Salmon *v.* Rural Independent School Dist., 125 Fed. 235; Edwards *v.* Bates County, 117 Fed. 526; John Hancock Mut. L. Ins. Co. *v.* Huron, 80 Fed. 652; Tracey *v.* Phelps, 22 Fed. 634, 23 Blatchf. 71.

67. Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424.

68. Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460, holding that in an action against a municipal corporation on a bond, or other common-law security given for deferred payments on real estate purchased by the corporation, the burden of proof was on plaintiff to show that the real estate purchased by defendant was reasonably necessary to the proper exercise and enjoyment by it of the powers and duties conferred upon it by its charter.

69. See, generally, Evidence.

70. See the cases cited *infra*, this note.

Illustrations.—The poll book of an election is admissible to show the vote of a majority of the taxpayers upon the issuance of bonds. Hannibal *v.* Fauntleroy, 105 U. S. 408, 26 L. ed. 1103. Evidence that the assent of taxpayers to an issue of bonds was secured by threats of the president of the corporation, in aid of which they were issued, is not admissible where it is not shown that the statements were not true or that they were not made in good faith in the course of legitimate discussion. North Bennington First Nat. Bank *v.* Arlington, 9 Fed. Cas. No. 4,806, 16 Blatchf. 57. Where the money was received by the borough, evidence that the consideration of the bond was paid to the wrong person is inadmissible. Freeport *v.* Marks, 59 Pa. St. 253. Evidence that the borough councilmen had individually incurred the debt which the money was borrowed to discharge, and had as officers recognized it as a debt of the city, is irrelevant. Rainsburg *v.* Fyan, 127 Pa. St. 74, 17 Atl. 678, 4 L. R. A. 336. A certificate of a municipal officer as to the indebtedness of the city and as to its assessed property is inadmissible to show an estoppel of the city, where it is not shown that the bondholders saw or relied upon such certificate. Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534. Signatures of persons signing a petition of assent must be proved by ordinary evidence. Starin *v.* Genoa, 23 N. Y. 439. Where bonds have been placed in escrow evidence that the custodian had reported their delivery to the council is admissible. Schmid *v.* Frankfort, 131 Mich. 197, 91 N. W. 131. Upon the question of whether at the time refunding bonds were issued there were outstanding bonds to be refunded, a certificate showing the registration of such bonds with the said auditor is admissible. State *v.* Wichita County, 59 Kan. 512, 53 Pac. 526.

Parol evidence is admissible to supply the parts of a record left missing by the failure

And the same is true with regard to the rules governing the weight and sufficiency of evidence.[71]

k. Questions For Jury. Disputed questions of fact are for the jury when there is a trial to a jury[72] as in other civil actions.[73]

l. Submission of Controversy. The statutory provision that in pleading the judgment of a court of special jurisdiction the facts conferring jurisdiction need not be set out is applicable to the statement of a case filed for the submission of a controversy with regard to the validity of a bond.[74]

m. Findings. Findings of fact by the court in proceedings upon bonds are governed by the rules usually applicable to findings in other civil actions.[75]

n. Judgment and Enforcement Thereof. Judgments in proceedings to enforce bonds have the conclusiveness and effect of judgments in other civil actions.[76] A court of equity, after ascertaining at the suit of bondholders the proportion of a bond issue which may be enforced without violating a constitutional limitation of

of the clerk of a municipal corporation to make a record of proceedings relating to the issuance of bonds. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462. See also *supra*, V, B, 6

On the question of bona fides evidence of the former owner of the bonds that prior to the sale thereof he informed plaintiff that the bonds were bonus bonds given for building a factory, by a letter properly addressed and mailed, was admissible. Schmid *v.* Frankfort, 141 Mich. 291, 104 N. W. 668.

71. See the cases cited *infra*, this note.

Prima facie case.— In an action upon coupons of township bonds issued to pay a subscription to railway stock, plaintiff makes out a *prima facie* case by showing the law under which the bonds were issued, the vote thereon, their issue, the acceptance by the company and compliance with the conditions upon which the vote was taken. Mercy *v.* Ohio, 17 Fed. Cas. No. 9,457 [*affirmed* in 18 Wall. 552, 21 L. ed. 813]. For evidence sufficient to establish a *prima facie* case that a bank was a *bona fide* purchaser see Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694. For evidence held sufficient to establish *prima facie* that a tax was sufficient to provide for the payment of interest and principal of bonds see Cass County *v.* Wilbarger County, 25 Tex. Civ. App. 52, 60 S. W. 988.

Evidence held sufficient.— For cases in which the evidence to establish particular facts has been held sufficient see Schmid *v.* Frankfort, 141 Mich. 291, 104 N. W. 668 (to require submission to a jury whether plaintiff was a *bona fide* purchaser); Thompson *v.* Mecosta, 127 Mich. 522, 86 N. W. 1044 (to show that bonds were delivered by authority of the council); Galbraith *v.* Knoxville, 105 Tenn. 453, 58 S. W. 643 (to establish a plea of *non est factum*); Jefferson *v.* Jennings Banking, etc., Co., 35 Tex. Civ. App. 74, 79 S. W. 876 (to show that the city received a consideration); Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406 (that provision for sinking fund was made when bonds were sold); Davis *v.* Kendallville, 7 Fed. Cas. No. 3,638, 5 Biss. 280 (to show a subscription by the city to railroad stock).

Evidence held insufficient.— For cases in which the evidence to establish particular facts was held insufficient see Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694 (notice to purchaser that bonds were invalid); Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406 (holding that a failure to provide a sinking fund, as required by a constitutional provision, in advance of the sale of bonds, was not shown by proof that the ordinances authorizing the issuance of such bonds did not contain such a provision).

72. Schmid *v.* Frankfort, 141 Mich. 291, 104 N. W. 668 (holding the question of whether the denial of receipt of a letter overcame the presumption arising from the fact of its mailing, was for the jury); Schmid *v.* Frankfort, 131 Mich. 197, 91 N. W. 131 (holding the question of *bona fides* for the jury); Woodbridge *v.* Duluth, 57 Minn. 256, 59 N. W. 296 (holding that the reasonableness of the time after a special election for the issuance of bonds was a question of fact); Tracey *v.* Phelps, 22 Fed. 634, 23 Blatchf. 71 (holding that the question of *bona fides* was properly submitted to the jury).

73. See, generally, TRIAL.

74. Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685 [*affirming* 44 Hun 611], so holding with regard to a recital that a county judge had duly adjudged the sufficiency of a petition for the issuance of bonds in aid of a railroad company.

75. See, generally, TRIAL. And see Thompson *v.* Mecosta, 127 Mich. 522, 86 N. W. 1044, holding that where findings recite the records of a village, stating that a village bond payable to bearer was "given to" a certain firm, speak of the bond as issued by the village and state that the bond came into the hands of such firm, they sufficiently find the fact of delivery.

76. See, generally, JUDGMENTS, 23 Cyc. 1106 *et seq.* And see Marion County *v.* Coler, 88 Fed. 59, 31 C. C. A. 389, holding that where a judgment has been recovered against a county upon its refunding bonds, and subsequently mandamus is issued to compel the levy of a tax to pay such bonds, their validity is concluded as between the same parties and cannot be again raised in the same suit.

legal indebtedness, may award judgment in accordance with such determination.[77] Where an action is brought solely for recovery upon bonds and coupons, questions arising out of the liability of the municipal corporation upon a stock subscription, in payment of which the bonds were issued, cannot be determined.[78] A judgment at law upon a bond is not conclusive upon the question of whether it is entitled to share in the benefit of a trust imposed by statute, by which the property and revenues of the corporation were pledged to the payment of bonds issued under the authority of the statute.[79] A judgment must be enforced in accordance with specific statutory provisions in case such provisions exist.[80] In case only the surplus remaining after the payment of current expenses may be applied to the payment of bonds, a court has no right to anticipate the existence of such a surplus and direct the payment of a fixed sum upon such bonds annually.[81]

D. Taxes and Other Revenue[1]**—1. Power to Tax in General — a. Inherent and Delegated Power.** The power of taxation is a sovereign power and belongs exclusively to the legislative department of the government.[2] While municipal corporations are almost universally invested with the power to lexy taxes for local purposes,[3] they have no inherent power to levy taxes but only such as is conferred upon them by constitutional, statutory, or charter provisions.[4] The power, how-

77. Everett *v.* Rock Rapids Independent School Dist., 109 Fed. 697.

78. Norton *v.* Dyersburg, 127 U. S. 160, 8 S. Ct. 1111, 32 L. ed. 85.

79. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

80. Browne *v.* New Orleans, 35 La. Ann. 51, holding that one obtaining a judgment for interest upon bonds could not in the same proceedings obtain an order directing the levy of a tax for its satisfaction, but must first have his judgment registered.

Enforcement by mandamus see Mandamus.

Enforcement of judgment against city in general see *infra*, XVII, P.

81. East St. Louis *v.* U. S., 110 U. S. 321, 4 S. Ct. 21, 28 L. ed. 162.

1. See, generally, Taxation.

Assessments and taxes by irrigation districts see Waters.

Assessments for public improvements see *supra*, XIII, E.

County taxes see Counties, 11 Cyc. 575 *et seq.*

In District of Columbia see District of Columbia, 14 Cyc. 535.

Legislative control over municipal revenue see *supra*, IV, I.

Licenses and occupation taxes see Licenses, 25 Cyc. 597 *et seq.*

Mandamus to compel levy of tax see Mandamus, 26 Cyc. 320 *et seq.*

Right to taxes collected as between city and county see Taxation.

School-district taxes see Schools and School-Districts.

Township taxes see Towns.

Taxation after consolidation, annexation, or diminution of territory see *supra*, II, B, 2, g, (I), (H), (II), (D); II, C, 1, e, (IV).

2. Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949.

3. *Louisiana.*— Torian *v.* Shayot, 47 La. Ann. 589, 17 So. 203.

New Hampshire.— Ainsworth *v.* Dean, 21 N. H. 400.

New Jersey.— Perkins *v.* Perkins, 24 N. J. L. 409.

North Carolina.— Rodman-Heath Cotton Mills *v.* Waxhaw, 130 N. C. 293, 41 S. E. 488.

Virginia.— Standard Oil Co. *v.* Fredericksburg, 105 Va. 82, 52 S. E. 817.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2010 *et seq.*

Construction of charter.— A provision in a town charter conferring power to "pass such rules and ordinances as may be necessary . . . for the levying of taxes" confers a right to levy taxes. State *v.* Hoff, (Tex. Civ. App. 1895) 29 S. W. 672.

Repeal of statutes see Monaghan *v.* Lewis, (Del. 1905) 59 Atl. 948; Doggett *v.* Walter, 15 Fla. 355 (holding Act, Feb. 4, 1869, § 23, not repealed by Act, June 24, 1869, § 79); New Orleans *v.* Hart, 14 La. Ann. 803; *In re* Tax Sale of Lot No. 172, 42 Md. 196; State *v.* Beaufort, 39 S. C. 5, 17 S. E. 355.

4. *Alabama.*— Gambill *v.* Erdrich, 143 Ala. 506, 39 So. 297; Baldwin *v.* Montgomery, 53 Ala. 437.

Arkansas.— Vance *v.* Little Rock, 30 Ark. 435.

Connecticut.— Webster *v.* Harwinton, 32 Conn. 131.

Iowa.— Clark *v.* Davenport, 14 Iowa 494.

Maryland.— James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661.

Mississippi.— Adams *v.* Ducate, 86 Miss. 276, 38 So. 497.

Missouri.— State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592.

Nebraska.— York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065.

New York.— *In re* Second Ave. M. E. Church, 66 N. Y. 395.

North Carolina.— Edgerton *v.* Goldsboro Water Co., 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444; Asheville *v.* Means, 29 N. C. 406.

South Carolina.— State *v.* Maysville, 12 S. C. 76.

ever, need not be expressly conferred, but may be implied from the grant of other powers.[5] Where power has been delegated, mere non-user by the municipality of its power to tax certain property, no matter for how long continued, cannot be construed as a forfeiture of the power.[6]

b. Power Conferred by Constitution. Municipal power to levy taxes is sometimes granted by constitutional provisions.[7] Ordinarily, however, constitutional provisions conferring the power to tax are not self-executing,[8] although in some cases it is otherwise and an act of the legislature is not necessary.[9]

c. Power of Legislature to Delegate Authority. Subject to constitutional limitations and exceptions,[10] the legislature has power to delegate to municipalities authority to levy taxes for local purposes within its corporate limits;[11] and it may

United States.— Denike *v.* Rourke, 7 Fed. Cas. No. 3,787, 3 Biss. 39. But see U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2010.

But see Blanc *v.* New Orleans, 1 Mart. (La.) 119.

Express power to levy and collect particular taxes excludes by implication any further power. Baldwin *v.* Montgomery, 53 Ala. 437; Blanc *v.* New Orleans, 1 Mart. (La.) 119; State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592.

Personal property.— Where only the power to tax real property has been delegated, the municipality cannot tax personal property. Adams *v.* Ducate, 86 Miss. 276, 38 So. 497.

Poll tax.— A municipality has no power to impose a poll tax except where it is expressly or impliedly authorized so to do by the legislature. Morris *v.* Cummings, 91 Tex. 618, 45 S. W. 383.

Power of state officer to compel.— Where a city is without power to levy a tax on personal property, acting through its own legally constituted fiscal officers, the state revenue agent cannot compel it to levy such tax. Adams *v.* Ducate, 86 Miss. 276, 38 So. 497.

Taxation of corporation.— A charter vesting a city with power to make assessments on those who hold "taxable property" within the same gave no right to assess a specific tax of one thousand dollars on each and every of certain corporations, the legislature not having recognized an incorporated company as taxable property. Augusta *v.* Walton, 37 Ga. 620.

Grant by judicial construction.— No taxing power can be vested in a municipality, nor can a restricted grant of power be expanded, by judicial construction. Adams *v.* Ducate, 86 Miss. 276, 38 So. 497.

Extent of power granted.— It is settled law that where the legislature confers upon a municipality the general power of taxation, it grants all the power possessed by itself in respect to the imposition of taxes. Woodall *v.* Lynchburg, 100 Va. 318, 40 S. E. 915.

The power to tax operates prospectively and never retrospectively. Municipality No. 3 *v.* Michoud, 6 La. Ann. 605.

5. Slocomb *v.* Fayetteville, 125 N. C. 362, 34 S. E. 436; State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031. See also *infra*, XV, D, 3.

6. Wells *v.* Savannah, 107 Ga. 1, 32 S. E. 669; Lake Charles *v.* Calcasieu Parish Police Jury, 50 La. Ann. 346, 23 So. 376.

7. Sleight *v.* People, 74 Ill. 47.

Implied authority.— The constitution, in prohibiting the legislature from imposing taxes for municipal purposes, and in authorizing cities of sufficient population to adopt freeholders' charters, which the legislature cannot change or amend, vests in such cities, by necessary implication, the power of taxation, which is essential to municipal existence. Security Sav. Bank, etc., Co. *v.* Hinton, 97 Cal. 214, 32 Pac. 3.

Limiting rate of taxation.— A clause of the constitution limiting the rate of taxation in cities and towns confers no power upon cities to levy taxes; that power is derived from acts of the legislature. State *v.* Van Every, 75 Mo. 530.

8. Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

9. See CONSTITUTIONAL LAW, 8 Cyc. 755.

10. See *infra*, XV, D, 1, d.

11. *Alabama.*— Stein *v.* Mobile, 24 Ala. 591.

California.— Kelsey *v.* Nevada, 18 Cal. 629.

Illinois.— Huck *v.* Chicago, etc., R. Co., 86 Ill. 352; People *v.* Salomon, 51 Ill. 37.

Indiana.— Logansport *v.* Seybold, 59 Ind. 225.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Kentucky.—Bradley *v.* McAtee, 7 Bush 667, 3 Am. Rep. 309.

Louisiana.— Chicago, etc., R. Co. *v.* Kentwood, 49 La. Ann. 931, 22 So. 192; Bracey *v.* Ray, 26 La. Ann. 710; New Orleans *v.* Turpin, 13 La. Ann. 56.

Mississippi.— Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830.

New York.— *In re* Zborowski, 68 N. Y. 88.

North Carolina.— Wingate *v.* Sluder, 51 N. C. 552. See also Moore *v.* Fayetteville, 80 N. C. 154, 30 Am. Rep. 75.

Pennsylvania.— Butler's Appeal, 73 Pa. St. 448; Durach's Appeal, 62 Pa. St. 491; Chess *v.* Birmingham, 1 Grant 438.

South Carolina.— State *v.* Kelly, 45 S. C. 457, 23 S. E. 281.

Tennessee.— Hope *v.* Deaderick, 8 Humphr. 1, 47 Am. Dec. 597.

Virginia.— Peters *v.* Lynchburg, 76 Va. 927.

Wisconsin.—Bond *v.* Kenosha, 17 Wis. 284.

confer such measure of power in regard thereto as it deems expedient where it is not different from nor greater than that possessed by the state;[12] but such power is limited to taxes for public objects in which the people of the municipality have a general interest.[13] Where the grant of power to municipalities to levy taxes is not required by the constitution to be in express terms, the legislature may grant such power by necessary implication.[14] The legislature ordinarily has no power to authorize persons not corporate officers to levy a tax, either directly or indirectly, without the consent of those to be affected thereby, or the municipal authorities.[15] The power cannot be delegated to a private individual or private corporation,[16] nor to officers of the corporation as such.[17] The legislature has no power to establish, or to delegate the power to establish, a district less in area than a political corporation or division of the state, within which to impose taxes.[18]

d. Restrictions on Power of Legislature. The power of the legislature in reference to municipal taxation is limited by various constitutional provisions in the different states,[19] such as provisions that the legislature shall not impose taxes on municipal corporations for municipal purposes;[20] that the legislature shall restrict

United States.— Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2017.

Poll tax.— A legislature which itself has power to impose a poll tax may authorize a municipality to impose one. Perry *v.* Rockdale, 62 Tex. 451.

Succession tax.— The power to impose a succession tax may be delegated by the legislature to municipal corporations. Peters *v.* Lynchburg, 76 Va. 927.

12. Baldwin *v.* Montgomery, 53 Ala. 437; Vance *v.* Little Rock, 30 Ark. 435; Perry *v.* Rockdale, 62 Tex. 451, poll tax.

Taxes in aid of railroads.— The legislature, having the control of municipal organizations, and the power to enlarge or abridge their powers at pleasure, may authorize them to make subscriptions for public improvements, such as railroads, and levy taxes and issue bonds to meet the assessment thereon. Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; State *v.* Linn County Ct., 44 Mo. 504. See also *supra*, XV, A, 5.

Franchise tax.— Const. art. 9, § 1, providing that the general assembly shall have power to tax persons or corporations owning or using franchises, does not prevent the general assembly from authorizing municipal corporations to impose taxes thereon. Huck *v.* Chicago, etc., R. Co., 86 Ill. 352.

13. State *v.* Owsley, 122 Mo. 68, 26 S. W. 659 (holding, however, that a statute providing for the registration of voters in cities of over one hundred thousand population through a recorder of voters, appointed by the governor, all expenses of the registration and of such recorder's office to be paid out of the city and county treasuries, is not unconstitutional, as authorizing municipal authorities to levy a local tax for other than a local purpose); Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455. See also *infra*, XV, D, 2, b.

14. State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031.

15. Wider *v.* East St. Louis, 55 Ill. 133.

16. Taylor *v.* Smith, 50 N. J. L. 101, 11 Atl. 321.

17. Harward *v.* St. Clair, etc., Levee, etc., Co., 51 Ill. 130; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278; Waterhouse *v.* Cleveland Public Schools, 8 Heisk. (Tenn.) 857, holding that the power cannot be delegated to a separate corporation to consist of the mayor and aldermen of the city constituted as a board, etc., *ex officio*.

18. State *v.* Raritan Tp., 52 N. J. L. 319, 19 Atl. 610.

Taxing districts within city.— The legislature cannot bestow upon the common council of a city the power to establish taxing districts within the city narrower in extent than the city limits. Morgan *v.* Elizabeth, 44 N. J. L. 571.

19. See the constitutions of the several states. See also Braun *v.* Chicago, 110 Ill. 186; Cornell *v.* People, 107 Ill. 372; State *v.* Van Every, 75 Mo. 530; Ballentine *v.* Pulaski, 15 Lea (Tenn.) 633.

Delegation to other than corporate authorities.— A constitutional provision that the corporate authorities of cities, etc., may be vested with power to tax for corporate purposes is to be construed as limiting the power of the legislature to authorize any other than corporate authorities to assess and collect local taxes. Cornell *v.* People, 107 Ill. 372; People *v.* Salomon, 51 Ill. 37.

Taxation as limited to ad valorem.— Under a constitutional provision that taxation on property shall be *ad valorem* only, the legislature cannot authorize a municipality to levy a specified sum on each horse, etc., in the city, but the tax must vary with the value of the animal. Livingston *v.* Albany, 41 Ga. 21.

20. Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; State *v.* Mason, 153 Mo. 23, 54 S. W. 524; Aachen, etc., F. Ins. Co. *v.* Omaha, 72 Nebr. 518, 101 N. W. 3 (holding that a tax by the state on a foreign fire insurance company for a municipal purpose was invalid); State *v.* Wheeler, 33 Nebr. 563, 50 N. W. 770; Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609 (hold-

the municipal power of taxation;[21] that every law that imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied;[22] etc.

e. Construction of Statutes. Statutes conferring upon municipal corporations authority to impose taxes must be strictly construed.[23] If the authority of the municipality to levy and collect a tax is doubtful, the doubt must always be resolved against the tax.[24]

f. Power of Legislature to Repeal or Change. The delegation of power to tax to a municipality does not deprive the legislature of the power to control such taxing power.[25] The legislature may repeal or change the authority granted to a municipality to levy taxes;[26] but not so as to violate a contract right or impair the

ing provision to relate to the imposition of taxes concerning ordinary corporate affairs incidental to the existence of the corporation, and not contravened by requiring the corporation to submit to vote of the people, on petition of a certain proportion of the voters, a proposed amendment of its charter, although this will occasion expense to the corporation).

A statute appointing a state revenue agent to supervise the action of county and municipal taxing officers was not unconstitutional, in so far as it applied to a city operating under a special charter delegating to it the power of taxation, on the ground that the city was thereby deprived of the right of local self-government. Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830.

Indirect violation.— Where the constitution forbids the legislature to levy taxes on persons or property for the corporate uses of municipal corporations, that which is forbidden to be done directly cannot lawfully be done by indirection. Aachen, etc., F. Ins. Co. *v.* Omaha, 72 Nebr. 518, 101 N. W. 3.

A statute creating a board of health for a city is not in conflict with that provision of the constitution forbidding the raising of the tax for local purposes without the consent of the city as the preservation of the public health is not a local purpose. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

A statute requiring a city to set apart annually for a certain purpose a certain proportion of whatever amount it may derive from taxes imposed by itself cannot be said to be the exercising of the power of taxation confided by the constitution to the city. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792.

21. People *v.* Mahaney, 13 Mich. 481; Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

Construction of provision.— Where the constitution provides that the legislature shall restrict municipal power of taxation, the legislature cannot confer upon a municipality an unlimited power to levy taxes aside from and above what may be necessary and proper for legitimate municipal purposes. Foster *v.* Kenosha, 12 Wis. 616, holding that, although a charter forbids taxation or raising of money, except for legitimate municipal purposes, without the previous sanction of a majority of the voters, it violates the constitutional provision, as the constitution requires the restriction to be imposed by the legislature, and not by the people. A constitutional provision that the legislature shall provide for the organization of municipalities and shall "restrict their powers of taxation" does not imply that a municipality must be limited to a certain rate of taxation but means that the power of taxation must be restricted as to the subjects and objects of the tax imposed. State *v.* Beaufort, 39 S. C. 5, 17 S. E. 355. A charter giving a town "power to levy and collect taxes on all persons and subjects of taxation, which it is in the power of the General Assembly to tax for State and county purposes," is not in conflict with such a constitutional provision. State *v.* Irvin, 126 N. C. 989, 35 S. E. 430. A provision which limits the power of taxation for the maintenance of a police department to the actual expenses as estimated by the governing board, after first limiting the power of the board to incur expenses beyond the narrow limits, is as much a restriction of the power of taxation as if it confined the power to a certain percentage upon taxable property, or to a sum proportioned to the number of inhabitants in the city, and complies with the constitutional requirement. People *v.* Mahaney, 13 Mich. 481.

22. People *v.* Mahaney, 13 Mich. 481.

When statute "imposes" tax.— A statute authorizing the levy of taxes by cities in aid of the purchase or construction of waterworks is not in contravention of Const. art. 7, § 7, providing that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied, and that it is not sufficient to refer to any other law to fix such tax or object, as the act itself does not impose the tax. Youngerman *v.* Murphy, 107 Iowa 686, 76 N. W. 648.

23. *Ex p.* Sims, 40 Fla. 432, 25 So. 280; Moseley *v.* Tift, 4 Fla. 402; Aachen, etc., F. Ins. Co. *v.* Omaha, 72 Nebr. 518, 101 N. W. 3. *Compare* South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58.

24. Edgerton *v.* Goldsboro Water Co., 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444; Morris *v.* Cummings, 91 Tex. 618, 45 S. W. 383.

25. Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830.

26. St. Louis *v.* Shields, 52 Mo. 351; Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90; Williamson *v.* New Jersey, 130 U. S. 189, 9 S. Ct. 453, 32 L. ed. 915.

rights of creditors of the municipality, who, in becoming creditors, relied upon the power to tax as a security.[27]

g. Submission to Popular Vote. In some jurisdictions provisions limit municipal power to levy taxes, at least for certain purposes, to cases where the tax is authorized by a vote of the people.[28] Substantial compliance with the essential requirements of the statute is sufficient to validate the levy.[29] The declaration of the mayor and common council as to the result of the election is conclusive until reversed by a direct proceeding.[30] Such consent of the people applies only to legal conditions existing at the date of the election.[31]

27. Hawesville Bd. of Education *v.* Louisville, etc., R. Co., 110 Ky. 932, 62 S. W. 1125, 23 Ky. L. Rep. 376; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090. See also CONSTITUTIONAL LAW, 8 Cyc. 951.

The power of taxation existing at the date of a contract made by a municipal corporation becomes part of the contract, and may be exerted, so far as necessary for the satisfaction of the obligations of the contract, irrespective of subsequent legislation restricting the corporation's power of taxation. State *v.* New Orleans, 37 La. Ann. 528; State *v.* New Orleans, 37 La. Ann. 13.

Waiver.— The right of a creditor to insist on a levy is not waived by accepting the interest for several years raised in a different way from that provided by the statute. Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

28. *Alabama.*— Stein *v.* Mobile, 24 Ala. 591.

Iowa.— Bartemeyer *v.* Rohlfs, 71 Iowa 582, 32 N. W. 673.

Kentucky.—Slack *v.* Maysville, etc., R. Co., 13 B. Mon. 1.

Louisiana.— MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

North Carolina.— State *v.* Irvin, 126 N. C. 989, 35 S. E. 430; Wilson *v.* Charlotte, 74 N. C. 748; Weinstein *v.* Newbern, 71 N. C. 535.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2013.

Power of legislature.— The legislature may provide that the propriety of levying a tax be submitted to a vote of the people. Stein *v.* Mobile, 24 Ala. 591; Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; Matter of Neilly, 37 U. C. Q. B. 289.

A charter provision for submitting to a vote of the people whether an additional tax shall be levied in excess of the ordinary charter provision, "for any purposes the accomplishment of which is authorized by [the charter]," has been held not applicable to a levy to pay preëxisting debts as distinguished from future debts. Denison *v.* Foster, 90 Tex. 22, 36 S. W. 401.

Tax for educational purposes.— In some jurisdictions a municipal tax for educational purposes cannot be levied without a vote of the people. Mitchell *v.* Fox, 5 Lea (Tenn.) 420; El Paso *v.* Conklin, 91 Tex. 537, 44 S. W. 988. A tax to maintain a public library is not one for education, within Ky. Const. § 184, prohibiting a tax for education other than in common schools, until it has been authorized at an election. Ramsey *v.* Shelbyville, 119 Ky. 180, 83 S. W. 116, 1136, 26 Ky. L. Rep. 1102, 27 Ky. L. Rep. 141, 68 L. R. A. 300. In other jurisdictions such a vote is necessary when the tax is in excess of a certain rate. Boguechitto *v.* Lewis, 75 Miss. 741, 23 So. 549.

In North Carolina municipal taxation for anything except "necessary expenses" must be authorized by a majority vote of the qualified electors. The cost of providing water for a city is not a "necessary expense," and the legislature cannot, by conferring power on a city to provide the city with water, make a water-supply such a "necessary expense." Edgerton *v.* Goldsboro Water Co., 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444. So the expense of erecting city waterworks is not a "necessary expense." Charlotte *v.* Shepard, 120 N. C. 411, 27 S. E. 109.

Effect of partial invalidity.— Authorization to levy a special tax by a vote of the people is not void in its entirety merely because it attempted to convey a power greater than the taxpayers were competent to grant but the power granted is valid up to and within the amount of the special tax lawfully provided for. Gray *v.* Bourgeois, 107 La. 671, 32 So. 42.

29. See Bartemeyer *v.* Rohlfs, 71 Iowa 582, 32 N. W. 673.

Sufficiency of petition.— Where a petition described the direction of the proposed railroad to be aided by a tax, as "northwestwardly" to a certain point, while the notice described it as "westwardly" to the same point, the variance was not material. Bartemeyer *v.* Rohlfs, 71 Iowa 582, 32 N. W. 673.

An ordinance ordering a vote of the taxpayers on the question of a special tax, although supplemented by an amendment after it is advertised, will not be vitiated thereby, provided the amendment does not materially affect its essential parts. MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

Scope of election.— An election, which submitted merely the question of the issuance of bonds, but not the question of the levy of a tax to pay therefor, did not confer implied power to levy the tax. Charlotte *v.* Shepard, 120 N. C. 411, 27 S. E. 109.

Notice to voters of election relative to making an appropriation in aid of railroad see Demaree *v.* Johnson, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376.

30. Smallwood *v.* Newbern, 90 N. C. 36.

31. State *v.* Des Moines, 103 Iowa 76, 72 N. W. 639, 64 Am. St. Rep. 157, 39 L. R. A. 285.

2. Restrictions on Power to Tax and Constitutional Requirements — a. Constitutional Provisions in General. Constitutional provisions that taxation shall be uniform and equal apply to municipal taxation as well as to state and county[32] Other provisions found in many of the state constitutions, which are applicable to municipal taxes, are that property shall be taxed in proportion to its value;[33] that the taxes shall be levied and collected under general laws;[34] that all the property except such as is exempt shall be taxed for payment of debts;[35] that no tax levied and collected for one purpose shall ever be devoted to another purpose;[36] that every ordinance levying a tax shall specify the purpose for which such tax is levied;[37] and that any municipality incurring a debt shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on the debt as it falls due.[38] The constitutional prohibition against the taking of private property for public use without compensation has been held not applicable to the power of taxation.[39] The option given to municipalities by a constitutional provision to substitute for the *ad valorem* tax on personalty a tax based on income, licenses, or franchises necessarily carries with it the power to define the class of property as to which the substitution is made.[40]

b. Public Purpose.[41] The power to levy a tax is subject to the restriction that it must be for a public as distinguished from a private purpose.[42] The incidental

32. See Taxation. See also The Hub *v.* Hanberg, 211 Ill. 43, 71 N. E. 826; Mayo *v.* Dover, etc., Fire Co., 96 Me. 539, 53 Atl. 62.

Different systems for different kinds of corporations.— The legislature may properly classify taxpayers in devising an equal system of taxation, and may properly authorize municipal corporations to provide different systems of taxation for different kinds of corporations. German Washington Mut. F. Ins. Assoc. *v.* Louisville, 117 Ky. 593, 78 S. W. 472, 80 S. W. 154, 25 Ky. L. Rep. 2097.

Statutes violating constitutional provisions. — The statute providing that no city shall impose or collect a greater tax on banks or solvent credits than the state tax for the same year is void. Adams *v.* Mississippi State Bank, 75 Miss. 701, 23 So. 395.

Construction of ordinance.— An ordinance imposing a tax on "merchandise, meaning dealers in varied stock of goods," and also imposing taxes upon persons engaged in the sale of various articles which would be embraced under the term "merchandise," will not, unless the terms of the ordinance imperatively require it, be construed to authorize the collection of more than one tax on dealers in general merchandise. Wynne *v.* Eastman, 105 Ga. 614, 31 S. E. 737.

33. Adams *v.* Mississippi State Bank, 75 Miss. 701, 23 So. 395; Stehmeyer *v.* Charleston, 53 S. C. 259, 31 S. E. 322.

34. Monaghan *v.* Lewis, (Del. 1905) 59 Atl. 948; Adams *v.* Mississippi State Bank, 75 Miss. 701, 23 So. 395.

A statute relating to the collection of taxes in a given class of cities does not violate the constitutional requirements that all taxes shall be levied and collected under general laws. Com. *v.* Macferron, 152 Pa. St. 244, 25 Atl. 556, 19 L. R. A. 568.

35. Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; Stehmeyer *v.* Charleston, 53 S. C. 259, 31 S. E. 322.

36 Covington Bd. of Education *v.* Covington Public Library, 68 S. W. 10, 24 Ky L. Rep. 98. See also *infra*, XV, D, 11.

37. See *infra*, XV, D, 5, c.

38. West Chicago Park Com'rs *v.* Chicago, 216 Ill. 54, 74 N. E. 771; Ewing *v.* West Chicago Park Com'rs, 215 Ill. 357, 74 N. E. 400; Pettibone *v.* West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387; Jefferson *v.* Marshall Nat. Bank, 18 Tex. Civ. App. 539, 46 S. W. 97, holding constitutional provisions not applicable to an ordinance under which bonds are issued for a debt incurred prior to its adoption.

39. Groff *v.* Frederick City, 44 Md. 67. See also Taxation.

40. Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588.

41. See, generally, Taxation.

Aid to railroads and other corporations and private enterprises see *infra*, XV, D, 3, e.

42. *Massachusetts.*— Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39.

Montana.— See Butte *v.* School Dist. No. 1, 29 Mont. 336, 74 Pac. 869, holding that the only basis on which special taxation or special assessments can be sustained is that the property subject to assessment or taxation will be enhanced in value to the extent of the burden imposed.

New York.— Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933.

North Dakota.— Manning *v.* Devils Lake, 13 N. D. 47, 99 N. W. 51, 112 Am. St. Rep. 652, 65 L. R. A. 187.

Pennsylvania.— McDermond *v.* Kennedy, 6 Pa. L. J. 66.

Wisconsin.— Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2038.

benefits which accrue to the inhabitants of the municipality from the development of its commercial interests will not sustain the power of taxation as for a public purpose.[43] It has been held that a tax for street sprinkling,[44] or the maintenance of a gas or electric light plant for furnishing lights to all persons within the limits of the municipality,[45] or to pay bounties to volunteers credited to the quota of the municipality where soldiers are being drafted during a war,[46] is for a public purpose. On the other hand it has been held that a tax to pay for entertaining official visitors;[47] to build a house of entertainment;[48] to reimburse a tax-collector who has taken a note for certain taxes and accounted therefor to the town as money, and is thereafter unable to collect the note;[49] to repay a municipal officer for expenses incurred by him in successfully resisting removal upon a criminal charge;[50] for expenses incurred in opposing before the legislature the passage of an act annexing the whole or a part of the territory to another municipality;[51] or to raise money to assist the county in repairing its buildings located in the municipality[52] was for a private rather than a public purpose and hence invalid. Taxation for the establishment of a state university in the municipality has been held to be authorized,[53] but the legislature cannot authorize a municipal tax for the benefit of an existing private educational institution.[54]

c. Amount or Rate — (I) *IN GENERAL.*[55] In the absence of constitutional, statutory, or charter limitation, a municipality may levy such rate or amount as it deems best.[56] But in most jurisdictions constitutional provisions, statutes, charter

The construction and maintenance of a bridge outside of the territorial boundaries of a city, to serve the convenience of the inhabitants of an outlying district, and to promote the business interests of the city by increasing the trade of its business men, is not such a corporate purpose as will sustain the exercise of the power of taxation. Manning *v.* Devils Lake, 13 N. D. 47, 99 N. W. 51, 112 Am. St. Rep. 652, 65 L. R. A. 187.

A tax to raise a statue or monument, unless in populous and wealthy towns they should be thought suitable ornaments to buildings or squares, is not for a public purpose. Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

A city purpose, according to the general definition, "must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character and authorized by the legislature." Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933.

Gratuity.— The taxing power cannot be used to furnish a gratuity to a corporation engaged in a private enterprise, although it be one in which many persons are interested, but it may be used to compensate it for a public service. Wisconsin Industrial School *v.* Clark County, 103 Wis. 651, 79 N. W. 422.

Charitable association.— A constitutional provision prohibiting the giving of money of the state to or in aid of any association or private undertaking does not prevent a municipality collecting a tax and paying it to a charitable corporation to be applied to its purposes and objects. Shepherd's Fold *v.* New York, 96 N. Y. 137 [*reversing* 10 Daly 319].

43. Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39; Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586 [*affirming* 4 Hun 201]; Manning *v.* Devils Lake, 13 N. D. 47, 99 N. W. 51, 112 Am. St. Rep. 652, 65 L. R. A. 187; Curtis *v.* Whipple, 24 Wis. 350, 1 Am. Rep. 187.

44. Maydwell *v.* Louisville, 116 Ky. 885, 76 S. W. 1091, 25 Ky. L. Rep. 1062, 105 Am. St. Rep. 245, 63 L. R. A. 655.

45. State *v.* Allen, 178 Mo. 555, 77 S. W. 868; State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

46. Dinehart *v.* La Fayette, 19 Wis. 677; Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

Amount of tax.— Under an act empowering municipalities to raise by tax funds necessary to pay bounties to volunteers credited to its quota, electors were not limited in fixing the amount of the tax to the precise amount necessary to satisfy the quota, but might raise more to provide against contingencies. Dinehart *v.* La Fayette, 19 Wis. 677.

47. Law *v.* People, 87 Ill. 385. And see *supra*, XV, A, 1, c, (II).

48. Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

49. Thorndike *v.* Camden, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463.

50. Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933 [*affirming* 28 Misc. 378, 59 N. Y. Suppl. 653].

51. Coolidge *v.* Brookline, 114 Mass. 592.

52. Deady *v.* Lyons, 39 N. Y. App. Div. 139, 57 N. Y. Suppl. 448.

53. Burr *v.* Carbondale, 76 Ill. 455; Merrick *v.* Amherst, 12 Allen (Mass.) 500.

54. Curtis *v.* Whipple, 24 Wis. 350, 1 Am. Rep. 187.

55. **Amount of special assessment for public improvements** see *supra*, XIII, E.

56. Mohmking *v.* Bowes, 65 N. J. L. 469, 47 Atl. 507; State *v.* Beaufort, 39 S. C. 5,

provisions, or ordinances limit to a certain rate or amount taxes which may be levied for any one year,[57] and a limitation is also often imposed upon the amount

17 S. E. 355; Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682. See also Hale *v.* People, 87 Ill. 72.

Amount in excess of that required.— Under a charter directing that taxes shall be assessed at such rate as will be sufficient to produce the sum required, together with the fees for assessing and collecting them, and a reasonable allowance for losses by delinquencies after deducting the whole tax, the raising by an assessment of an amount exceeding that required is not improper, unless it appears that such excess was for illegal purposes. State *v.* Powers, 24 N. J. L. 408.

Different rate on suburban property.— Under a statute establishing a rate of taxation of property in the city designated as the highest rate, and a rate which is to be assessed on the rural or suburban portions of the city, the property in the built-up portions of the city should be taxed at the highest rate, although it is at a distance from the center of the city, it appearing that the portion of the city in which such property is located is a populous district. Castor *v.* Philadelphia, 26 Leg. Int. (Pa.) 189.

Review by courts.— Where the law confides in certain officers the discretion to determine the extent of the levy and the amount of money necessary to meet the current expenses of municipalities, the courts cannot supervise or control such discretion. Ward *v.* Piper, 69 Kan. 773, 77 Pac. 699.

Delegation of power.— A statute amending a city charter and providing that the board of estimates may strike from the yearly budget any item or items it may deem advisable is not a delegation of powers conferred by the constitution on the common council. Robinson *v.* Detroit, 107 Mich. 168, 65 N. W. 10.

57. *Alabama.*— State *v.* Southern R. Co., 115 Ala. 250, 22 So. 589; Elyton Land Co. *v.* Birmingham, 89 Ala. 477, 7 So. 901; *Ex p.* Montgomery. 64 Ala. 463, holding the limitation to have no reference to specific taxes on privileges but merely to define the extent of municipal taxation on property.

California.—Santa Barbara *v.* Eldred, 95 Cal. 378, 30 Pac. 562.

Delaware.— Monaghan *v.* Lewis, 5 Pennew. 218, 59 Atl. 948.

Illinois.— People *v.* Knopf, 186 Ill. 457, 57 N. E. 1059; Cicero *v.* McCarthy, 172 Ill. 279, 50 N. E. 188; People *v.* Lake Erie, etc., R. Co., 167 Ill. 283, 47 N. E. 518; Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781; Sparland *v.* Barnes, 98 Ill. 595; Weber *v.* Traubel, 95 Ill. 427; Edwards *v.* People, 88 Ill. 340; Spring *v.* Olney, 78 Ill. 101.

Iowa.— Scott *v.* Davenport, 34 Iowa 208.

Kansas.— Columbus Water-Works Co. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354; Chicago, etc., R. Co. *v.* Stanfield, 7 Kan. App. 274, 53 Pac. 772.

Louisiana.— Endon *v.* Monroe, 112 La. 779, 36 So. 681; Washington State Bank *v.* Baillio, 47 La. Ann. 1471, 17 So. 880; Laycock *v.* Baton Rouge, 36 La. Ann. 328.

Missouri.— Stanberry *v.* Jordan, 145 Mo. 371, 46 S. W. 1093.

New Mexico.— Territory *v.* Socorro, 12 N. M. 177, 76 Pac. 283.

North Carolina.— State *v.* Atkinson, 107 N. C. 317, 12 S. E. 202; French *v.* Wilmington, 75 N. C. 477; Weinstein *v.* Newbern, 71 N. C. 535.

Oregon.— Gadsby *v.* Portland, 38 Oreg. 135, 63 Pac. 14, license-tax in excess held valid.

Pennsylvania.— Fingal *v.* Millvale Borough, 162 Pa. St. 393, 29 Atl. 644; *In re* Millvale Borough, 162 Pa. St. 374, 29 Atl. 641, 644; Williamsport *v.* Brown, 84 Pa. St. 438.

Texas.— Voorhies *v.* Houston, 70 Tex. 331, 7 S. W. 679; Lufkin *v.* Galveston, 63 Tex. 437; Muller *v.* Denison, 1 Tex. Civ. App. 293, 21 S. W. 391.

West Virginia.— Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163.

Wisconsin.— Somo Lumber Co. *v.* Lincoln County, 110 Wis. 286, 85 N. W. 1023, statute held not void for uncertainty.

United States.— Sibley *v.* Mobile, 22 Fed. Cas. No. 12,829, 3 Woods 535; U. S. *v.* Cicero, 41 Fed. 83.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2011, 2018, 2025.

Effect of charter limitation on power of legislature.— The fact that the charter limits the amount of the tax does not preclude the right of the legislature to empower the municipality to levy a special tax in excess thereof, as such a statute is in effect an amendment of the charter. Kelsey *v.* Nevada, 18 Cal. 629.

Indirect violation.— The prohibition cannot be indirectly evaded by a levy by the state for municipal purposes. State *v.* Southern R. Co., 115 Ala. 250, 22 So. 589.

Such statutes are constitutional.— Somo Lumber Co. *v.* Lincoln County, 110 Wis. 286, 85 N. W. 1023.

Amount as fixed by amount collected.— A yearly deficit in the taxes collected cannot be considered in determining whether the percentage of the tax levy exceeded the charter limit. Bassett *v.* El Paso, (Tex. Civ. App. 1894) 28 S. W. 554.

Effect of undertaxation in past years.— Where the charter of a city places a limitation upon the total levy of taxes for all general purposes in any one year, the fact that in past years it has not made the full levy does not authorize it to make a levy in excess of the limitation in a subsequent year. Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383.

Including taxes for preceding years.— Prohibiting cities from levying taxes "for" any one year which shall exceed two and a half per cent of the taxable property of the city does not prohibit the city from levying "in" one year a tax omitted to be levied in a past

or rate of certain special tax levies.[58] A limitation as to special taxes has no

year, where such tax is not, in connection with other valid taxes, in excess of the tax limit for such past year, although the levy for the year in which it is made may exceed the limit for that year. Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542. But where the fiscal year was changed by charter amendment and the tax levy ordinance thereafter passed described the period for which the levy was made as the "municipal" and the "fiscal" year ending at the time fixed by the amendment and as "the municipal year 1891–92" the levy was held not for the old fiscal year ending in March and the interim to June (the new fiscal year), but for one year only, and hence was invalid as to the excess over the statutory limitation. San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496 [*modifying* (Civ. App. 1898) 46 S. W. 273].

Reorganization of municipality.— Where a village, after a cause of action has accrued against it, reorganizes under the general incorporation law, thereby obtaining a right to levy taxes at a higher rate than before, and the cause of action is then reduced to judgment, the village may levy taxes at the higher rate in order to pay such judgment. Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328.

A limitation on the power to incur debts does not operate as a limitation upon the taxing power. Habersham County *v.* Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547.

Different limits for different municipalities. — Under some constitutional provisions the legislature may authorize certain municipalities to levy heavier taxes than other municipalities, although the municipalities are of the same class according to the constitutional classification. Cave *v.* Houston, 65 Tex. 619.

Effect of reducing claim to judgment.— The fact that a claim payable out of the general revenue fund of the city has been placed in judgment does not alter the nature of the claim, so that an assessment for its payment can be levied in excess of the maximum levy allowed for the general revenue fund. Chicago, etc., R. Co. *v.* Stanfield, 7 Kan. App. 274, 53 Pac. 772.

Poll tax.— The constitutional provision that the legislature shall levy a capitation tax equal on each person to the tax on property valued at three hundred dollars applies solely to state and county taxation. Wingate *v.* Parker, 136 N. C. 369, 48 S. E. 774 [*following* Jones *v.* Person County, 107 N. C. 248, 12 S. E. 69].

As determined by population.—Where there is no method prescribed by the statute for determining when a city has more than a certain number of inhabitants, but the legislature has conferred upon the city council power to levy and collect a given rate of tax, conditioned upon the fact that the city has the requisite population, there is an implied grant of authority to ascertain the facts as to population upon which the right to levy the tax depends. Tyler *v.* Tyler Bldg., etc., Assoc., 98 Tex. 69, 81 S. W. 2.

In Illinois the aggregate tax levy for corporate purposes, in cities working under the general act of 1872, cannot exceed in any one year two per cent of the aggregate valuation of its taxable property as equalized for the "preceding" year, but in computing the rate per cent necessary to raise the required amount the assessed valuation for the year in which the tax is levied must be taken as the basis. People *v.* Lake Erie, etc., R. Co., 167 Ill. 283, 47 N. E. 518.

What constitutes excessive levy.— A statute which does no more than require a city to set apart annually for a certain purpose a certain proportion of whatever amount she may derive from taxes imposed by herself cannot be said to be the levying of a tax in excess of the constitutional limit. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792.

58. *Arkansas.*— Vance *v.* Little Rock, 30 Ark. 435.

Illinois.— Baltimore, etc., R. Co. *v.* People, 200 Ill. 541, 66 N. E. 148; Otis *v.* People, 196 Ill. 542, 63 N. E. 1053, educational and building purposes. See also Baltimore, etc., R. Co. *v.* People, 200 Ill. 623, 66 N. E. 246.

Louisiana.— See Clifton *v.* Hobgood, 106 La. 535, 31 So. 46.

Michigan.— Diamond Match Co. *v.* Ontonagon, 140 Mich. 183, 103 N. W. 578.

Nebraska.— State *v.* Royse, 71 Nebr. 1, 98 N. W. 459, 3 Nebr. (Unoff.) 269, 97 N. W. 473.

Ohio.— Fosdick *v.* Perrysburg, 14 Ohio St. 472.

Texas.— Sandmeyer *v.* Harris, 7 Tex. Civ. App. 515, 27 S. W. 284.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2011, 2026.

Repeal or modification of statutes see Atlantic City Free Public Library *v.* Atlantic City, 71 N. J. L. 437, 58 Atl. 1101. Limitations as to the amount of a special levy may be modified, expressly or by implication, by subsequent statutory or charter provisions. U. S. *v.* Howard County Ct., 2 Fed. 1, 1 McCrary 218. A statute or charter provision authorizing a special tax not to exceed a certain amount is not repealed by statutes or charter provisions fixing a limit for general taxes. Galena *v.* U. S., 5 Wall. (U. S.) 705, 18 L. ed. 560.

Effect of failure to levy in past years.— A statute forbidding cities to levy a special tax for water rents exceeding three mills on the dollar "for" any one year, does not prohibit a city from levying a greater tax "in" any one year, to pay what is due the water company under its contract with the city, where no water tax has been levied for several years, and the levy then made does not exceed the three-mill rate for each year of the entire period to be covered thereby. Bowen *v.* West, 10 Colo. App. 322, 50 Pac. 1085.

Tax for lighting.— The statute which authorizes cities to levy an annual tax, not ex-

application to taxes for general purposes.[59] The power granted by a charter to a particular city, expressed in general terms, to impose taxes, must be considered in subordination to a general law of the state imposing a limit on taxation by cities generally.[60] Under some constitutional provisions a limit is fixed for municipal taxation which, however, may be increased by a vote of the people.[61] A limitation on the amount to be levied to pay interest on certain bonds does not preclude the right to resort to the general funds of the municipality, the power to levy general taxes being without limit, where the rate of the special tax is insufficient to pay the interest.[62]

(II) *Taxes Included Within Limitation.* It is sometimes expressly provided by statute that certain taxes for special purposes shall not be included in the aggregate of municipal taxes within the general constitution or statutory limitation;[63] but whether special authority to a municipality to do an act will impliedly repeal *pro tanto* existing charter limitations upon the rate or amount of taxation is a question upon which the authorities are not in accord.[64] In determining whether the taxes are in excess of the general limitation, it is sometimes held, under particular constitutional statutory or charter provisions, that the amount of a special tax authorized by statute is to be added to the amount of the other taxes;[65] but in most cases it is held that the power to exceed the general limit by a tax for a special purpose is necessarily implied from the authority to levy the special tax.[66] Taxation to pay municipal debts accruing prior to the adoption of

ceeding three mills on the dollar of the taxable property, for lighting purposes, does not apply to a city empowered by its special charter to levy taxes for lighting purposes without limitation, except the general limitation for all purposes. Baltimore, etc., R. Co. *v.* People. 200 Ill. 623, 66 N. E. 246.

As determined by state tax.— Where the amount of a certain tax is required by the constitution not to exceed one half of the tax levied by the state for the same period, the legislature must impose a tax for the benefit of the state before a municipal corporation can tax it. Hoefling *v.* San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608 [*distinguishing* Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124].

59. Bristol *v.* Dixon, 8 Heisk. (Tenn.) 864.

60. Smith *v.* Vicksburg, 54 Miss. 615.

61. Evans *v.* McFarland, 186 Mo. 703, 85 S. W. 873.

62. Darlington *v.* Atlantic Trust Co., 78 Fed. 596, 24 C. C. A. 257.

63. Wabash R. Co. *v.* People, 187 Ill. 289, 58 N. E. 254; Chicago, etc., R. Co. *v.* Baldridge, 177 Ill. 229, 52 N. E. 263.

64. Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

65. *Illinois.*— Weber *v.* Traubel, 95 Ill. 427; Bulliner *v.* People, 95 Ill. 394 [*following* Binkert *v.* Jansen, 94 Ill. 283].

Iowa.— Clark *v.* Davenport, 14 Iowa 494.

Kansas.— Clark *v.* Atkinson, etc., R. Co., 8 Kan. App. 733, 54 Pac. 930; McIntire *v.* Williamson, 8 Kan. App. 711, 54 Pac. 928.

Kentucky.— Bardwell *v.* Harlin, 118 Ky. 232, 80 S. W. 773, 26 Ky. L. Rep. 101.

Oregon.—Corbett *v.* Portland, 31 Oreg. 407, 48 Pac. 428.

Texas.— Muller *v.* Denison, 1 Tex. Civ. App. 293, 21 S. W. 391 [*following* Lufkin *v.* Galveston, 63 Tex. 437].

See 36 Cent. Dig. tit. "Municipal Corporations," § 2011.

Water tax.— Under the statute providing that the aggregate amount of city taxes for any one year shall not exceed two per cent, a water tax which the city is authorized to collect must be included within the two per cent, like taxes for other corporate purposes. Dollahon *v.* Whittaker, 187 Ill. 84, 58 N. E. 301.

A **levy to pay a judgment** against the municipality is included in the general limitation. Chicago, etc., R. Co. *v.* People, 177 Ill. 91, 52 N. E. 439; State *v.* New Orleans, 32 La. Ann. 709.

Current debts incurred by a municipal corporation for water furnished for public uses and for the lighting of public streets are for ordinary expenses, which may be incurred without special legislative authority; and the fact that the power to contract for water and lighting is among those specially enumerated in the city's charter does not imply any special and additional power of taxation to meet such expense, beyond the limitation imposed by the charter upon taxation for general municipal purposes. Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383.

A **grant of a new power** to a municipality working under the general law, with the right to levy a tax to carry out the object of the grant, does not authorize a tax levy over and above the general two per cent limitation, unless so expressly provided or necessarily implied in the terms of the grant. People *v.* Lake Erie, etc., R. Co., 167 Ill. 283, 47 N. E. 518.

66. *California.*— People *v.* Rigney, 63 Cal. 296.

Illinois.— East St. Louis *v.* People, 124 Ill. 655, 17 N. E. 447; Thatcher *v.* Chicago, etc., R. Co., 120 Ill. 560, 11 N. E. 853.

Kansas.— Columbus Water-Works Co. *v.*

the constitution or statute limiting the amount or rate is not included in the general limitations as to the amount of the tax which may be levied.[67]

(III) *EFFECT OF TAXATION IN EXCESS OF LIMIT.* Levies in excess of the rate or amount permitted by law are illegal and void,[68] although if the taxes are separable the excess only is invalid.[69]

3. POWER AND DUTY TO TAX FOR SPECIAL PURPOSES[70] — a. In General. The gen-

Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354.

Louisiana.— New Orleans *v.* Burthe, 26 La. Ann. 497.

Missouri.— Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157 [*overruling* State *v.* Columbia, 111 Mo. 365, 20 S. W. 90].

Pennsylvania.— Fingal *v.* Millvale Borough, 162 Pa. St. 393, 29 Atl. 644; *In re* Millvale Borough, 162 Pa. St. 374, 29 Atl. 641, 644; Wilkes-Barre's Appeal, 116 Pa. St. 246, 9 Atl. 308; Scranton *v.* Delaware, etc., R. Co., 2 C. Pl. 1.

Texas.— Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960 [*affirming* (Civ. App. 1893) 21 S. W. 375].

United States.— East St. Louis *v.* U. S., 120 U. S. 600, 7 S. Ct. 739, 30 L. ed. 798; Quincy *v.* Jackson, 113 U. S. 332, 5 S. Ct. 544, 28 L. ed. 1001; U. S. *v.* Key West, 78 Fed. 88, 23 C. C. A. 663.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2011.

Authority to a borough to increase its indebtedness involves the right to levy a tax sufficient to pay it, in addition to that already authorized for ordinary purposes. *In re* Millvale Borough No. 2, 14 Pa. Co. Ct. 82.

From an express grant of power to a municipal corporation to create a debt for a specified purpose, a power of taxation for its payment will, in the absence of some other adequate means of payment, be implied, although at the date of such grant there is a statutory limitation upon the corporation's general power of taxation. Olean *v.* King, 5 N. Y. St. 169; Brooks *v.* Memphis, 4 Fed. Cas. No. 1,954. *Contra*, see Shackelton *v.* Guttenberg, 39 N. J. L. 660; U. S. *v.* Cicero, 41 Fed. 83.

School taxes are not to be considered in determining whether the tax is in excess of the limit. Columbus Water-Works Co. *v.* Columbus, 48 Kan. 378, 29 Pac. 762. *Contra*, State *v.* Brewster, 9 Ohio Dec. (Reprint) 357, 12 Cinc. L. Bul. 223. Under an act authorizing municipal corporations to levy a certain tax for school purposes, a city may levy such tax in excess of the amount of taxes authorized by its charter, the legislature having authority to extend its taxing power. Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159. *Compare* U. S. *v.* Cicero, 41 Fed. 83.

Taxation for waterworks.— Dutton *v.* Aurora, 114 Ill. 138, 28 N. E. 461. Where the limitation for current expenses is insufficient to raise an amount to pay the current expenses for fire protection, and the legislature has expressly authorized municipalities to contract for water for fire protection and other purposes, such delegation of authority clothes the municipality with power to levy the necessary tax to discharge the debt created beyond the charter limitations. Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

Where a charge of an extraordinary kind is imposed upon a municipality by the legislature, municipal power to levy a tax to pay it is implied, although the limit of taxation has been reached. Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858.

Tax levy to pay judgment.— Rice *v.* Walker, 44 Iowa 458 [*distinguishing* Iowa R. Land Co. *v.* Sac County, 39 Iowa 124]; Watts *v.* Port Deposit, 46 Md. 500; State *v.* Van Every, 75 Mo. 530; Dawson County *v.* Clark, 58 Nebr. 756, 79 N. W. 822; Britton *v.* Platte City, 4 Fed. Cas. No. 1,907, 2 Dill. 11. See also MANDAMUS, 26 Cyc. 325–329.

67. French *v.* Wilmington, 75 N. C. 477; Weinstein *v.* Newbern, 71 N. C. 535; Voorhies *v.* Houston, 70 Tex. 331, 7 S. W. 679; U. S. *v.* New Orleans, 17 Fed. 483.

68. *California.*— Hays *v.* Hogan, 5 Cal. 241.

Illinois.— People *v.* Lake Erie, etc., R. Co., 167 Ill. 283, 47 N. E. 518; People *v.* Peoria, etc., R. Co., 116 Ill. 410, 6 N. E. 459; Binkert *v.* Jansen, 94 Ill. 283.

Kansas.— Stewart *v.* Adams, 50 Kan. 568, 32 Pac. 912; Stewart *v.* Schoonmaker, (1893) 32 Pac. 126; Stewart *v.* Kansas Town Co., 50 Kan. 553, 32 Pac. 121; Manley *v.* Emlen, 46 Kan. 655, 27 Pac. 844; Burnes *v.* Atchison, 2 Kan. 454.

Michigan.—Schnreewind *v.* Niles, 103 Mich. 301, 61 N. W. 498; Wattles *v.* Lapeer, 40 Mich. 624.

Missouri.— Benoist *v.* St. Louis, 19 Mo. 179.

Ohio.— Cummings *v.* Fitch, 40 Ohio St. 56; State *v.* Humphreys, 25 Ohio St. 520; State *v.* Brewster, 9 Ohio Dec. (Reprint) 357, 12 Cinc. L. Bul. 223.

Oregon.— Gadsby *v.* Portland, 38 Oreg. 135, 63 Pac. 14; Corbett *v.* Portland, 31 Oreg. 407, 48 Pac. 428.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2011.

69. Cummings *v.* Fitch, 40 Ohio St. 56 (holding that, under authority to levy fifteen mills for all municipal purposes, where the city levied that amount and by a subsequent ordinance levied two mills additional for a sinking fund, the latter ordinance is void but not the first); Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306; Basset *v.* El Paso, 88 Tex. 168, 30 S. W. 893.

70. Mandamus to compel see MANDAMUS, 26 Cyc. 325 *et seq.*

eral rule is that taxes cannot be imposed for special purposes, as distinguished from general municipal purposes, except where power to impose such taxes is delegated either expressly or by necessary implication.[71]

b. Public Improvements. Under delegated authority a municipality may levy a tax to pay for a public improvement.[72] While ordinarily street improvements are assessable only upon abutting property,[73] yet where the improvement is one inuring to the benefit of all the taxpayers the cost thereof may be taxed as a common charge upon all,[74] or a part of the cost may be assessed on abutting property and the balance raised by a special tax on all the taxpayers.[75] In some jurisdictions

Necessity for vote of people see *supra*, XV, D, 1, g.

71. Vance *v.* Little Rock, 30 Ark. 435. And see South Park Com'rs *v.* Chicago First Nat. Bank, 177 Ill. 234, 52 N. E. 365; Jonas *v.* Cincinnati, 18 Ohio 318; Perkins *v.* Slack, 86 Pa. St. 270; Corpus Christi *v.* Woessner, 58 Tex. 462.

Paying a demand not a lawful debt against a municipality is not a "corporate purpose" within the constitutional provision allowing municipalities to levy taxes for corporate purposes. Sleight *v.* People, 74 Ill. 47.

Taxes to abate a particular class of other taxes.— Towns have no authority to assess taxes and raise money for the purpose of abating a particular class of taxes, and therefore have no right to appropriate the interest of the surplus revenue to the payment of poll taxes. Cooley *v.* Granville, 10 Cush. (Mass.) 56.

Fire fund.— Authority in a city charter to license and tax insurance companies or their agents to raise a fund with which to procure apparatus for extinguishing fires and constructing reservoirs does not justify an ordinance levying a tax upon premiums earned by such companies in the city to constitute a fund to be applied to the support of the fire department generally. Alton *v.* Ætna Ins. Co., 82 Ill. 45.

"Other necessary town charges."— Under a statute authorizing the qualified voters of a town to raise necessary sums for the support of schools, for making repairs on town ways, and for other necessary town charges, the words "other necessary town charges" embrace only incidental expenses arising directly or indirectly in the legitimate exercise of the powers granted, and confer no power to raise money for other purposes at the will of the majority of the voters. *In re* Opinion of Justices, 52 Me. 595.

Repeal of statute.— An act authorizing a tax for a special purpose and expressly providing that it is "in lieu of all taxes now assessed," except those under a specified statute, repeals other statutes authorizing the levy of taxes. Amy *v.* Selma, 12 Fed. 414.

72. Frederick *v.* Augusta, 5 Ga. 561; Frantz *v.* Jacob, 88 Ky. 525, 11 S. W. 654, 11 Ky. L. Rep. 55; Covington *v.* Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, 11 Ky. L. Rep. 141; Spaulding *v.* Lowell, 23 Pick. (Mass.) 71, tax for building market house.

Implied power.— Under a statute giving a city authority to levy and collect taxes for city purposes, it has been held that the council has power to levy and collect taxes for city improvements. Shepard *v.* Kaysville, 16 Utah 340, 52 Pac. 592. Power to establish and maintain a public library has been held to authorize a tax to establish and maintain it. Ramsey *v.* Shelbyville, 119 Ky. 180, 83 S. W. 116, 1136, 26 Ky. L. Rep. 1102, 68 L. R. A. 300.

Bridge not on legal highway.— It has been held that the taxing power of a city cannot be lawfully invoked to raise funds to construct a bridge which is not located on a street or highway having a legal existence. Manning *v.* Devils Lake, 13 N. D. 47, 99 N. W. 51, 112 Am. St. Rep. 652, 65 L. R. A. 187.

Sewer tax.— St. Louis Bridge Co. *v.* People, 125 Ill. 226, 17 N. E. 468. It has been held that a municipality may levy a sewer tax where abutting property cannot be assessed as such. Byrne *v.* Covington, 21 S. W. 1050, 15 Ky. L. Rep. 33.

The expense of fitting up a building for necessary municipal offices is an ordinary current expense which may be paid from a general levy for ordinary expenses. Rome *v.* McWilliams, 67 Ga. 106.

Survey of railroad route.— A municipality cannot levy a tax for making a survey of a railroad route to another municipality. Douglass *v.* Placerville, 18 Cal. 643.

73. Webster *v.* People, 98 Ill. 343. See also *supra*, XIII, E.

74. Maybin *v.* Biloxi, 77 Miss. 673, 28 So. 566, holding that where a municipal corporation levied taxes on all the taxable property of the city for the purpose of paving one of the streets in the business portion of the city, the tax was not invalid, since, the improvement inuring to the convenience of all citizens, it was proper that it should be a common charge on all.

Tax after assessment.— Where the legislature, under its taxing powers, may direct that a municipal street improvement be charged on the city at large, it is no objection that such act was not passed until after the assessment was levied, and paid by abutting owners, and that the city had thereby acquired a vested right in the money received, of which the legislature could not deprive it, since by the act the city is not deprived of the assessment, but only directed to collect it from the taxpayers at large, and reimburse those who have paid. People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099].

75. See 1 Cooley Tax. 244.

a special tax for public improvements, such as sewers and the like, is authorized to be levied according to a division of the municipality into districts.[76] Provisions for a special tax for the erection of a permanent improvement does not authorize the maintenance of such improvement by a special as distinguished from a general tax.[77]

c. Waterworks or Supplies. In some jurisdictions the statutes expressly authorize a municipal water tax.[78] Subject to constitutional, statutory, or charter limitations,[79] a municipal corporation may levy a tax for water purposes when authorized to erect waterworks,[80] to purchase an existing water plant,[81] or to contract for a water-supply.[82] So a charter provision requiring the amount of water rents collected over expenses to equal a certain per cent on the water debt does not impair the municipal power to resort to taxation for that purpose.[83] A water tax is not void because every part of the municipality is not supplied with water.[84]

d. Educational Purposes.[85] A municipality may be expressly authorized to levy a tax for school purposes;[86] but it has been held that a school tax is not one

76. Grunewald *v.* Cedar Rapids, 118 Iowa 222, 91 N. W. 1059.

Tax as inequitable.— Where a city had constructed lateral sewers at the expense of the abutting owners, and trunk sewers at its own cost, in various portions of the city, the adoption of the plan of creating a sewer district and levying a tax on the realty therein for the cost of the construction of other sewers was not inequitable. Grunewald *v.* Cedar Rapids, 118 Iowa 222, 91 N. W. 1059.

77. Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294.

78. Youngerman *v.* Murphy, 107 Iowa 686, 76 N. W. 648 (repeal of statutes); State *v.* Kearney, 49 Nebr. 337, 70 N. W. 255 (holding statute not retrospective); State *v.* Kearney, 49 Nebr. 325, 68 N. W. 533; Gay *v.* New Whatcom, 26 Wash. 389, 67 Pac. 88.

Sufficiency of tax.— Statutes empowering a municipality to provide for the payment of its debts and to levy and collect taxes for general and special purposes are limited by provisions limiting the levy for the payment of water rents to a certain rate, so that, if such levy is insufficient to pay a debt for water rents, the municipality is powerless to pay the deficiency; and the fact that complainant spent large sums to establish a waterworks system for the use of which the municipality contracted to pay and that it received the benefits thereof does not authorize a court to compel it to raise more money by taxation than is authorized by the statutes in order to fulfil such contract. Raton Waterworks Co. *v.* Raton, 9 N. M. 70, 49 Pac. 898.

79. Taylor *v.* McFadden, 84 Iowa 262, 50 N. W. 1070; State *v.* Royse, 71 Nebr. 1, 98 N. W. 459. *Compare* Lemont *v.* Jenks, 197 Ill. 363, 64 N. E. 362.

Territory within which tax may be levied. — A tax imposed by a city council on all the polls and ratable property in the city for the maintenance of waterworks erected within and for the supply of a limited precinct is illegal, because it violates provisions in the act authorizing construction of the waterworks which restricted taxation therefor to the water precinct. Brown *v.* Concord, 56 N. H. 375.

80. Taylor *v.* McFadden, 84 Iowa 262, 50 N. W. 1070, holding that where a city council, being authorized to erect waterworks, passes an ordinance levying a tax for a certain amount for the sinking of an artesian well, the fact that the cost cannot be known in advance, or that the effort to obtain water may prove a failure, cannot prevent taxation.

81. Allentown *v.* Henry, 73 Pa. St. 404, holding that, although an act incorporating a water company is unconstitutional in so far as it seeks to authorize it to levy and collect a tax on the inhabitants of the city, it may be made available by an act permitting the city to buy its works and franchises, and giving it all the rights, privileges, and franchises which previous acts had declared to be given to the company.

82. State *v.* Summit Tp., (N. J. Sup. 1890) 19 Atl. 966. But see Edgerton *v.* Goldsboro Water Co., 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444.

Waterworks and contracts for water-supply see *supra*, IX, A, 6, b; XIII, A, 2, f.

83. People *v.* Long Island City, 76 N. Y. 20.

84. Van Giesen *v.* Bloomfield, 47 N. J. L. 442, 2 Atl. 249.

85. Tax to establish university as one for a public purpose see *supra*, XV, D, 2, b.

86. Ayers *v.* McCalla, 95 Ga. 555, 22 S. E. 295. See also People *v.* Lathrop, 19 How. Pr. (N. Y.) 358.

Repeal of statutes see Americus Bd. of Public Education *v.* Barlow, 49 Ga. 232. A statute giving to a city the power to collect taxes for school purposes, and charging it with the duty of supporting its schools, in force at the time of the adoption by the city as its charter of the general incorporation law, and the passage of the general school law, did not modify or impair any former special laws authorizing such city as a public agency to levy and collect taxes for school purposes. Fuller *v.* Heath, 89 Ill. 296.

for a municipal purpose,[87] nor "a necessary expense"[88] within constitutional or statutory provisions authorizing a levy for such purposes; nor authorized under the general welfare clause of a charter.[89]

e. Aid to Corporations. No tax can be levied, even by legislative authority, as a bonus to a private manufactory.[90] But, in the absence of any constitutional prohibition,[91] the legislature has power to authorize a municipality to levy taxes to aid a railroad running from, by, or through the municipality,[92] or to aid a private toll bridge,[93] or turnpike road company.[94] However, a municipality has no power to tax to aid a railroad where no such power is expressly or impliedly conferred upon it.[95] In some jurisdictions municipal authority to levy special taxes in aid of railroads is expressly conferred by constitutional or statutory provisions,[96]

Erection of school-house.— Nill *v.* Jenkinson, 15 Ind. 425; Piper *v.* Moulton, 72 Me. 155.

Discretion of council.— Under Gen. St. (1897) c. 63, § 178, providing that the board of education shall levy a tax for the support of city schools, "which levy shall be approved by the city council," the council may exercise its discretion in approving or refusing to approve such levy. State *v.* Addis, 59 Kan. 762, 54 Pac. 1065.

The power to levy the tax is in the city council and not in the board of education. State *v.* Omaha, 7 Nebr. 267.

Compelling council to fix rate.— Under Ky. St. § 3219, requiring the board of education of each city of the second class to annually ascertain approximately the amount of money necessary to maintain the schools, and requiring the general council to levy and collect such taxes for that purpose as may be requested by the board, the board cannot prescribe the exact rate of taxation, and the court will not compel the general council to fix any given rate of taxation, unless it is made manifest that the general council perversely refuses to fix such rate as will raise the necessary amount. Covington Bd. of Education *v.* Covington, 103 Ky. 634, 45 S. W. 1045, 20 Ky. L. Rep. 289.

87. Nelson *v.* Homer, 48 La. Ann. 258, 19 So. 271. See also Henderson *v.* Lambert, 8 Bush (Ky.) 607.

88. Rodman *v.* Washington, 122 N. C. 39, 30 S. E. 118, holding that a school tax is not a necessary expense of a town, under Const. art. 2, § 14, and art. 7, § 7, providing for acts to authorize cities to levy special taxes above the constitutional limit for necessary expenses, without taking and entering the yeas and nays on the journals of the house and senate upon the passage of the act.

89. Nelson *v.* Homer, 48 La. Ann. 258, 19 So. 271.

90. Weismer *v.* Douglas, 4 Hun (N. Y.) 201, 6 Thomps. & C. 514 [*affirmed* in 64 N. Y. 91, 21 Am. Rep. 586]; Cleveland Commercial Nat. Bank *v.* Iola, 154 U. S. 617, 14 S. Ct. 1199, 22 L. ed. 463 [*affirming* 6 Fed. Cas. No. 3,061, 2 Dill. 353]. See also *supra*, XV, A, 1, c, (III).

91. Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

92. *Alabama.*— Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; Stein *v.* Mobile, 24 Ala. 591.

Indiana.—Brocaw *v.* Gibson County, 73 Ind. 543.

Iowa.— Stewart *v.* Polk County, 30 Iowa 9, 1 Am. Rep. 238.

Kansas.— Leavenworth County *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. 1.

Ohio.— Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24. *Compare* Taylor *v.* Ross County, 23 Ohio St. 22.

Pennsylvania.— Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

United States.— Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2040.

Contra.— People *v.* State Treasurer, 23 Mich. 499; People *v.* Salem, 20 Mich. 452, 4 Am. Rep. 400.

Aid to corporations generally see *supra*, XV, A, 5.

It is immaterial that the railroad extends beyond the city or state limits.— Stein *v.* Mobile, 24 Ala. 701.

93. Pritchard *v.* Magoun, 109 Iowa 364, 80 N. W. 512, 46 L. R. A. 381.

94. Clark County Ct. *v.* Paris, etc., Turnpike Co., 11 B. Mon. (Ky.) 143.

95. Jones *v.* Columbus, 25 Ga. 610; Morehouse *v.* Norwalk, 8 Ohio Dec. (Reprint) 199, 6 Cinc. L. Bul. 267; McDermond *v.* Kennedy, Brightly (Pa.) 332. *Compare* State *v.* Charleston, 10 Rich. (S. C.) 491. See also *supra*, XV, A. 5.

96. *Indiana.*— Reynolds *v.* Faris, 80 Ind. 14; Brocaw *v.* Gibson County, 73 Ind. 543, construing statute as to amount of levy.

Iowa.— Bartemeyer *v.* Rohlfs, 71 Iowa 582, 32 N. W. 673.

Kentucky.— Louisville *v.* Murphy, 86 Ky. 53, 5 S. W. 194, 9 Ky. L. Rep. 310.

Louisiana.— Fullilove *v.* Bossier Parish Police Jury, 51 La. Ann. 359, 25 So. 302.

Missouri.—Cape Girardeau *v.* Riley, 72 Mo. 220.

See 36 Cent. Dig. tit. "Municipal Corporations." § 2040. And see *supra*, XV, A, 5.

Double taxation see Vicksburg, etc., R. Co. *v.* Goodenough, 108 La. 442, 32 So. 404, 66 L. R. A. 314.

In Louisiana, under the statutes, it is competent, on obtaining the assent of the property taxpayers in the manner required, to impose a special tax in aid of a railroad which neither passes through nor terminates

while in other jurisdictions the power to levy such taxes is implied from a grant of general power to levy taxes to pay debts.[97]

f. Payment of Debts — (i) *In General.* While the legislature may authorize a municipality to levy taxes to pay municipal debts,[98] and in many jurisdictions authority is expressly conferred upon all or particular municipalities to levy taxes to pay bonds and other indebtedness,[99] and the authority may be implied in some cases,[1] the municipality has no such authority except where it is conferred expressly or by implication.[2]

(ii) *Power by Necessary Implication.* The legislature may by implication grant a municipal corporation the power to levy taxes to pay municipal debts, unless there is some provision in the constitution requiring such grant of power

in the municipality taxed. Clifton *v.* Hobgood, 106 La. 535, 31 So. 46. In an action to compel a police jury to levy a tax in aid of a railroad company in pursuance of an election and an ordinance of the police jury, grounds of defense only assertable by the taxpayers who have acquiesced in the election and its result cannot be urged. Missouri, etc., Trust Co. *v.* Smart, 51 La. Ann. 416, 25 So. 443.

97. Aurora *v.* Lamar, 59 Ind. 400, holding that a grant to a municipality of power to levy a tax to pay the whole interest of the public debt authorizes a levy of a special tax to pay the whole of the interest accrued on a railroad debt of the municipality.

Authority to issue bonds in payment of a subscription to the stock of a railroad authorizes by implication a tax to pay such bonds. Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; Quincy *v.* U. S., 113 U. S. 332, 5 S. Ct. 544, 28 L. ed. 1001.

98. Sonoma County Bank *v.* Fairbanks, 52 Cal. 196; Basnett *v.* Jacksonville, 19 Fla. 664; Scranton *v.* Delaware, etc., R. Co., 2 Walk. (Pa.) 365; Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542. See also U. S. *v.* Cicero, 50 Fed. 147, 1 C. C. A. 499, holding that a statute which provides that town trustees shall add to the tax duplicate of each year a levy sufficient to pay the annual interest on and create a sinking fund for, any debt contracted upon petition of the citizen owners of five eights of the taxable property of the town, does not authorize the levy of a tax to pay interest on bonds issued under a different statute, and not on petition of property-owners.

Bonds issued but not outstanding.—A statute authorizing a four-mill tax to pay interest on outstanding bonds of the city does not authorize a tax to pay interest on bonds issued, but not outstanding, although it was probable they would be sold before the next tax levy. Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489.

Time when debt contracted.— A judgment recovered against a city subsequent to Jan. 1, 1889, for an injury occurring prior to that date, is a "debt lawfully contracted prior to the first day of January, 1889," within a statute authorizing certain cities, for the purpose of paying such debts, to levy and collect a tax of twenty-five cents on the one hundred dollars valuation, in addition to the amount levied for general purposes. Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961.

Repeal of statutes.— The grant of power to assess and collect a tax for a particular purpose is a repeal *pro tanto* of all prior statutory restrictions upon the exercise of the power of taxation. Com. *v.* Pittsburgh, 34 Pa. St. 496.

99. Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959. See also Sullivan *v.* Walton, 20 Fla. 552; Severs *v.* Winton Borough, 1 Lack. Leg. N. (Pa.) 103.

Effect of failure to issue bonds.— Under authority granted by the taxpayers of a town to the municipal authorities to incur a debt and to issue bonds, and to secure the debt and bonds by a special tax, the authorities may, without issuing bonds at all, create the debt and levy a special tax within the constitutional limit, if it be more advantageous and advisable so to do. Gray *v.* Bourgeois, 107 La. 671, 32 So. 42.

Construction of authority.— The authority given the city to levy a tax to pay interest on, and provide a sinking fund for the extinction of, an indebtedness, authorizes the levy of a tax to pay instalments of such indebtedness which, by the terms of the contract creating it, fall due from year to year. Mayfield Woolen Mills *v.* Mayfield, 111 Ky. 172, 61 S. W. 43, 22 Ky. L. Rep. 1676.

The statute of limitations is no defense to the levy of a tax on the property of a city to pay funding bonds issued ten years before, in settlement of an indebtedness of the township of which the city was formerly a part, where the failure to levy the tax before was due to a mutual mistake on the part of the township and the city as to the latter's liability on the funding bonds. Brown *v.* Milliken, 42 Kan. 769, 23 Pac. 167.

Statutes as applicable to boroughs.— A statute conferring authority to direct the proper officers of a district or township to collect by special taxation an amount sufficient to pay its indebtedness has been held to vest no authority to order special tax by incorporated boroughs and it cannot be extended to them by construction. Heiser *v.* Shenandoah, 1 Leg. Chron. (Pa.) 118.

1. See *infra*, XV, D, 3, f, (II).

2. Corbett *v.* Portland, 31 Oreg. 407, 48 Pac. 428; U. S. *v.* Macon County, 99 U. S. 582, 25 L. ed. 331.

to be in express terms.[3] For instance, in the absence of constitutional or statutory limitations or restrictions,[4] authority granted by the legislature to a municipality having power to levy taxes, to contract a debt for some specific object or to issue bonds to pay certain indebtedness, where no special provision for payment is made, clothes the municipal authorities with power by necessary implication to levy the requisite tax to discharge the debt.[5] But authority conferred on a municipality to incur a debt does not carry with it the power to levy a tax to pay the debt where other provision is expressly made for such payment.[6]

(III) *Illegal or Invalid Indebtedness.* A municipality has no power to levy a tax to pay bonds where the issuance thereof was forbidden by statute,[7] nor where the bonds are otherwise invalid.[8] So where a debt is in excess of the constitutional debt limit a tax cannot be levied in so far as the excess is concerned.[9] So where a levy for payment of a claim against a municipality is invalid, one for payment of a judgment on such claim will also be invalid.[10] And where no contract calling for payments beyond the current fiscal year can be made, a special tax cannot be levied to pay a debt for services rendered several years before.[11] But a levy is not rendered void because the intention is to pay it to parties with whom the municipality has a void contract.[12]

3. State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031.

Authority to levy and collect taxes for city purposes carries with it authority to levy taxes to pay debts incurred for such purposes. Shepard *v.* Kaysville, 16 Utah 340, 52 Pac. 592.

Construction of particular powers.— The power to levy taxes by a city "for general and contingent expenses, or any other expenses not herein otherwise provided for," is sufficiently broad to authorize the levy of a tax thereunder to pay ordinary debts. Spring *v.* Olney, 78 Ill. 101.

4. Charlotte *v.* Shepard, 122 N. C. 602, 29 S. E. 842; U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383.

5. *Iowa.*—Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

North Carolina.— Slocomb *v.* Fayetteville, 125 N. C. 362, 34 S. E. 436; Charlotte *v.* Shepard, 122 N. C. 602, 29 S. E. 842.

South Carolina.— Wilson *v.* Florence, 40 S. C. 426, 19 S. E. 4.

Tennessee.— State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031.

Wisconsin.— Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

United States.— U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225; U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394; U. S. *v.* Capdevielle, 118 Fed. 809, 55 C. C. A. 421; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; U. S. *v.* Kent, 107 Fed. 190; U. S. *v.* New Orleans, 17 Fed. 483; *Ex p.* Parsons, 18 Fed. Cas. No. 10,774, 1 Hughes 282.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2043.

Compare Corbett *v.* Portland, 31 Oreg. 407, 48 Pac. 428.

Power to compromise disputed claims.— A municipality or its officers duly authorized may settle a disputed claim against it, and, doing so in the exercise of good faith and sound discretion, may enforce a tax duly assessed upon its citizens to raise money for its payment. Vose *v.* Frankfort, 64 Me. 229. See *supra*, IX, A, 6, k; *infra*, XVI, C; XVII, B.

6. Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; U. S. *v.* New Orleans, 27 Fed. Cas. No. 15,871, 2 Woods 230 [*reversed* on other grounds in 98 U. S. 381, 25 L. ed. 225].

Duty to make a second levy.— Where the act authorizing the issuance of bonds directs a special tax to pay the interest thereon, and such a tax, sufficient by computation but in fact insufficient, is levied annually, there is no implied power or duty to levy an additional tax because the levy for a certain year or years was insufficient because of delinquent taxes. Gay *v.* New Whatcom, 26 Wash. 389, 67 Pac. 88.

7. Jeffries *v.* Lawrence, 42 Iowa 498.

A limitation upon the amount of bonds which may be issued also limits the power to tax to pay bonds issued in excess of such limitation. Crowley *v.* Fulton, 112 La. 234, 36 So. 334.

8. Sherlock *v.* Winnetka, 68 Ill. 530.

Presumptions.— In the absence of contradictory evidence, municipal obligations to pay which the municipality has levied taxes, will be presumed valid. Bigelow *v.* Washburn, 98 Wis. 553, 74 N. W. 362.

Proof as to invalidity of bonds.— Taxpayers can defend against the assessment of taxes to pay interest and create a sinking fund on void municipal bonds, but they must prove conclusively that the bonds are void in the hands of any holder, and cannot afford a basis of recovery against the city. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* on other grounds (Civ. App. 1904) 82 S. W. 1066].

9. Baltimore, etc., R. Co. *v.* People, 200 Ill. 541, 66 N. E. 148; Schulenburg, etc., Lumber Co. *v.* East St. Louis, 63 Ill. App. 214.

10. Smith *v.* Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167.

11. Jonas *v.* Cincinnati, 18 Ohio 318.

12. Mayfield Woolen Mills *v.* Mayfield, 111 Ky. 172, 61 S. W. 43, 22 Ky. L. Rep. 1676.

(iv) *Duty to Tax as Included in Power to Tax.* The grant of power to tax for a payment of municipal indebtedness imposes on the municipality the duty of exercising such power,[13] which may be enforced by mandamus.[14] But in some cases the municipality is vested with a certain amount of discretion as to the time and amount to be levied.[15] In some jurisdictions the duty is imposed upon a municipality, under certain circumstances, to levy a tax to pay a judgment against the municipality.[16] A tax to be imposed as long as needed to pay a particular debt means an imposition of the tax until the debt is satisfied or until a sum sufficient for that purpose has been raised by tax.[17] An agreement to levy a special tax cannot be implied from an ordinance making it the duty of the council to provide means to meet the payment of a designated debt when it becomes due.[18]

g. Sinking Fund. Taxation to create a sinking fund must be based upon legislative authority,[19] which may be implied[20] as well as express.[21] But taxes cannot

13. Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840; Com. *v.* Pittsburgh, 34 Pa. St. 496; Galena *v.* Amy, 5 Wall. (U. S.) 705, 18 L. ed. 560; Kent *v.* U. S., 113 Fed. 232, 51 C. C. A. 189 [*affirming* 107 Fed. 190]. See also U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394; *Ex p.* Parsons, 18 Fed. Cas. No. 10,774, 1 Hughes 282.

Levy sufficient only to pay current expenses.— But when the whole amount of the taxes which municipal officers are allowed by law to levy is absorbed by the necessary current expenses of the corporation, they are not bound to comply with a demand of a judgment creditor for the levy of a tax to pay his judgment. Porter *v.* Thomson, 22 Iowa 391.

14. See MANDAMUS, 26 Cyc. 325 *et seq.*

15. State *v.* Mutty, 39 Wash. 624, 82 Pac. 118.

16. Omaha *v.* State, 69 Nebr. 29, 94 N. W. 979; Dawson County *v.* Clark, 58 Nebr. 756, 79 N. W. 822; Supervisors *v.* U. S., 18 Wall. (U. S.) 71, 21 L. ed. 771; U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394; Helena *v.* U. S., 104 Fed. 113, 43 C. C. A. 429. *Compare* State *v.* New Orleans, 30 La. Ann. 129.

Conflict of statutes.— Statutes conferring powers and imposing duties on municipal officers to levy taxes to pay judgments against their cities supersede statutes and limitations conferring less extensive powers on such officers to levy taxes and pay bonds, when the bonds have been merged in final judgments. U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394.

Judgments as barred by limitations.— In determining power of a city to levy a tax to pay judgments against it, the judgments partake of the character of, and are governed by the same rules of limitation as, the original claim upon which they are based. State *v.* Royse, 3 Nebr. (Unoff.) 262, 91 N. W. 559.

17. Louisville *v.* Murphy, 86 Ky. 53, 5 S. W. 194, 9 Ky. L. Rep. 310.

18. U. S. *v.* Burlington, 24 Fed. Cas. No. 14,687 [*reversed* on other grounds in 154 U. S. 568, 14 S. Ct. 1212, 19 L. ed. 495].

19. Newark Aqueduct Bd. *v.* Newark, 50 N. J. L. 126, 10 Atl. 881.

20. Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406, holding that a charter provision that interest and a sinking fund must be annually provided for on the city's bonded debt authorizes a levy of taxes to meet such debts without the formal action of the council.

21. Youngerman *v.* Murphy, 107 Iowa 686, 76 N. W. 648 (holding, under particular statutes, that tax may be levied before the creation of the debt); Burlington Water Co. *v.* Woodward, 49 Iowa 58; Louisville Sinking Fund Com'rs *v.* Grainger, 98 Ky. 319, 32 S. W. 954, 17 Ky. L. Rep. 901; Newark Aqueduct Bd. *v.* Newark, 50 N. J. L. 126, 10 Atl. 881.

Sufficiency of levy.— A tax levy to pay interest on bonds and create a sinking fund for their payment is not invalidated by the fact that the levy is not sufficient to provide the fund necessary to pay the bonds at their maturity. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

Time of sale of bonds.— Where a city bond issue is sold with the interest accrued thereon, the city may collect a tax to pay the annual interest and sinking fund on the same, although the bonds have been sold less than one year prior to the levy. Nalle *v.* Austin, (Tex. Civ. App. 1897) 42 S. W. 780.

Levy to pay instalments.— The authority given the city to levy a tax to pay interest on, and provide a sinking fund for, the extinction of, an indebtedness, authorizes the levy of a tax to pay instalments of such indebtedness which, by the terms of the contract creating it, fall due from year to year. Mayfield Woolen Mills *v.* Mayfield, 111 Ky. 172, 61 S. W. 43, 22 Ky. L. Rep. 1676.

Sale of bonds to city.— A tax levied on the issue of bonds is not invalidated by the fact that the bonds were sold to the city which issued them as an investment for its sinking fund, which was required by the charter to be invested in good interest-bearing securities. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

Bonds not sold.— Where a city levied a tax to pay interest and provide a sinking fund on a bond issue of one million four hundred thousand dollars, and at the time of the levy only nine hundred and fifty thousand dollars of the issue had been sold, no tax could be collected to pay interest and provide a sinking fund on the bonds not sold;

be levied to create a sinking fund for void bonds.[22] Where a levy for the sinking fund is discretionary with the council, such a levy cannot be compelled by the courts.[23] A report to the common council by sinking fund commissioners as to the amount to be raised for such fund is required, under some statutes, before such a levy can be made.[24]

h. Deficit Tax. In the absence of statutory or charter restrictions a municipality may assess the deficiency of the preceding year in the next,[25] or may levy a tax to provide for a prospective deficiency.[26] And in some jurisdictions statutory and charter provisions expressly provide as to a levy of a deficit tax to make up for uncollected taxes of past years.[27]

4. Persons and Property Taxable, and Place of Taxation[28] **— a. General Considerations.** All property within the corporate limits, whether real or personal, if taxable by the state, is ordinarily subject to municipal taxation under authority conferred by the legislature.[29] Unless prohibited by paramount law, real and

but the tax which could be legally collected being easily ascertainable and divisible, only so much of the entire tax as was not necessary for the purpose for which it was levied was void. Nalle *v.* Austin, (Tex. Civ. App. 1897) 42 S. W. 780.

22. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* on other grounds (Civ. App. 1904) 82 S. W. 1066].

Burden of proof.— Taxpayers can defend against the assessment of taxes to pay interest and create a sinking fund on void municipal bonds, but they must prove conclusively that the bonds are void in the hands of any holder, and cannot afford a basis of recovery against the city. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. 750 [*reversing* on other grounds (Civ. App. 1904) 82 S. W. 1066].

23. Louisville Sinking Fund Com'rs *v.* Grainger, 98 Ky. 319, 32 S. W. 954, 17 Ky. L. Rep. 901.

24. St. Louis County *v.* Nettleton, 22 Minn. 356.

25. Harmed *v.* Manning, 41 N. J. L. 275 [*affirmed* in 42 N. J. L. 163].

26. Oakey *v.* New Orleans, 1 La. 1.

27. McDonald *v.* Louisville, 113 Ky. 425, 68 S. W. 413, 24 Ky. L. Rep. 271.

28. See, generally, Taxation.

29. Athens City Waterworks Co. *v.* Athens, 74 Ga. 413; Savannah *v.* La Roche, 55 Ga. 309; Hughes *v.* Carl, 106 Ky. 533, 50 S. W. 852, 21 Ky. L. Rep. 6; Frankfort *v.* Scott, 101 Ky. 615, 42 S. W. 104, 19 Ky. L. Rep. 1068; Richmond *v.* Gibson, 46 S. W. 702, 20 Ky. L. Rep. 358; Louisville Trust Co. *v.* Louisville, 42 S. W. 340, 19 Ky. L. Rep. 977; Bogart *v.* Belleville, 6 U. C. C. P. 425.

The good-will of a business is not subject to taxation. People *v.* Feitner, 44 N. Y. App. Div. 278, 60 N. Y. Suppl. 687.

Land below high water mark.— It has been held that a water tax should be assessed only on land above high water mark. Roberts *v.* Jersey City, 25 N. J. L. 525.

Slaves brought to market from another state were taxable. State *v.* Charleston, 10 Rich. (S. C.) 240.

Gas pipes laid in the streets of a municipality are not taxable as land or capital stock, within a statute authorizing the taxation of such property. Pittsburgh's Appeal, 123 Pa. St. 374, 16 Atl. 621.

Personal property.— Authority to tax real property does not confer any power to tax personal property. Adams *v.* Ducate, 86 Miss. 276, 38 So. 497.

Waterworks.— Waterworks within a city are properly taxed where there is nothing in the contract or circumstances to authorize their exemption. Athens City Waterworks Co. *v.* Athens, 74 Ga. 413.

Territorial extent.— A tax imposed by a city council on all the polls and ratable property in the city for the maintenance of waterworks erected within and for the supply of a limited precinct is illegal, where it violates provisions in the act authorizing construction of the waterworks which restricted taxation therefor to the water precinct. Brown *v.* Concord, 56 N. H. 375.

The products of mines are personal property, which may be taxed for municipal purposes. Virginia *v.* Chollar-Potosi Gold, etc., Min. Co., 2 Nev. 86.

Buildings apart from land see State *v.* Elfe, 3 Strobh. (S. C.) 395.

Whisky stored in warehouses and owned by residents is taxable as personal property, but the distillers cannot be taxed on whisky which has been sold by them, although it is still in their warehouses. Frankfort *v.* Gaines, 88 Ky. 59, 10 S. W. 123, 10 Ky. L. Rep. 902.

Double taxation.—The general power to tax conferred on towns and cities ought not to be construed as to subject the property of a corporation to be twice taxed, unless by express words of a statute or necessary implication. Georgia Bank *v.* Savannah, Dudley (Ga.) 130. An ordinance imposing a tax on "merchandise, meaning dealers in varied stock of goods," and also imposing taxes upon persons engaged in the sale of various articles which would be embraced under the term "merchandise," will not, unless the term of the ordinance imperatively require it, be construed to authorize the collection of more than one tax on dealers in general merchandise. Wynne *v.* Eastman, 105 Ga. 614, 31 S. E. 737.

Statutory or charter authority to assess all taxable property includes not only such

personal property may be taxed separately.[30] Authority is also often conferred to impose capitation taxes.[31] Assessment of personal property for state and county purposes does not preclude its taxation by a municipality where the owner removes with it into corporate limits before the beginning of the fiscal year.[32] A taxpayer is assessable where he resides on the annual date fixed by statute,[33] even though a change of territory may operate to change his residence before the assessment is completed;[34] but the mere storage of property not in use in a municipality other than that where the owners carry on their business does not give them a place of business therein.[35] And a beneficiary's stocks and bonds are, in the absence of a statute to the contrary, taxable at his own residence rather than that of his guardian,[36] or the executor,[37] or trustee.[38]

b. Property Outside of City Limits — (i) *Real Property.* Municipal taxes cannot be levied upon land situated beyond the corporate limits,[39] the legislature having no power to authorize a municipality to tax for its own local purposes lands lying beyond the corporate limits.[40] Where real estate lies partly within

as was then taxable by the general law of the state but also whatever should be made subject to taxation by any subsequent statute. Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370; Buffalo *v.* Le Couteulx, 15 N. Y. 451.

Retroactive tax.— A tax levied on all merchandise purchased for twelve months prior to the time of the levy is retroactive and therefore unconstitutional. Young *v.* Henderson, 76 N. C. 420.

30. New Orleans Second Municipality *v.* Duncan, 2 La. Ann. 182.

Power as mandatory.— Power to tax real and personal estate does not require the corporation to tax both species of property. New Orleans Second Municipality *v.* Duncan, 2 La. Ann. 182; Oakey *v.* New Orleans, 1 La. 1.

31. Morgan *v.* Rowan, 17 Fed. Cas. No. 9,807, 2 Cranch C. C. 148.

An East Indian, although a "free person of color," is not liable to a capitation tax under a city ordinance imposing such tax on "every free male negro, or free person of color, whether a descendant of an Indian or otherwise"; such ordinance relating to the class of persons who have always been the subject of such tax by the city and state. *Ex p* Ferrett, 1 Mill (S. C.) 194.

32. Hilgenberg *v.* Wilson, 55 Ind. 210.

33. Harman *v.* New Marlborough, 9 Cush. (Mass.) 525.

34. Harman *v.* New Marlborough, 9 Cush. (Mass.) 525.

35. Little *v.* Cambridge, 9 Cush. (Mass.) 298.

Under a statute authorizing the taxation of a partnership in a municipality in which it has a place of business, where it has places of business in two or more municipalities, the term "place of business" must be construed as a place where business was carried on by them under their own control and on their own account. Little *v.* Cambridge, 9 Cush. (Mass.) 298.

36. McDougal *v.* Brazil, 83 Ind. 211; Louisville *v.* Sherley, 80 Ky. 71.

37. McDougal *v.* Brazil, 83 Ind. 211.

38. Carlisle *v.* Marshall, 36 Pa. St. 397.

39. Lafferranderie *v.* New Orleans, 3 La. 246; Sioux City Bridge Co. *v.* Dakota County, 61 Nebr. 75, 84 N. W. 607; Gilchrist's Appeal, 16 Wkly. Notes Cas. (Pa.) 261. See also Atchison, etc., R. Co. *v.* Maquilkin, 12 Kan. 301, curative statutes. *Compare* Bradshaw *v.* Omaha, 1 Nebr. 16, holding that if lands adjoining a city have been divided into town lots, and purchasers of small parcels have been invited to settle thereon, and the owner has done any affirmative act inducing the corporate authorities to treat them as town property, or if town settlements have approached near to them, so that their enjoyment in peace and good order demands the police regulations of a city, they are justly liable to municipal taxation.

Prescriptive right to tax.— A town does not gain a prescriptive right to tax inhabitants of a tract lying within the bounds of another town by exercising municipal authority over them for twenty years. Ham *v.* Sawyer, 38 Me. 37.

The fact that a city extended its streets outside of its corporate limits, and that a property-owner subjected them to certain uses with the consent of the city, did not give the city authority to levy taxes on the property so situated. Pacific Sheet Metal Works *v.* Roeder, 26 Wash. 183, 66 Pac. 428.

Where a statute divided a town into two, and provided that all persons dwelling on lands adjoining the division line should have liberty to belong, with their lands, to either town, at their election, made within a limited time, an election so made was not merely a personal privilege, terminating at the death of the party, but was a definite and perpetual change of the line of territorial jurisdiction, and his estate was therefore taxable in the town to which he had elected to belong, and not in the other. Cumberland *v.* Prince, 6 Me. 408.

40. Wells *v.* Weston, 22 Mo. 384, 66 Am. Dec. 627.

But, in the absence of constitutional restrictions, the legislature has been held to have power to authorize the municipality to tax not only property within the city limits but also property within certain boundaries

and partly without the corporate limits, the part lying within the limits is taxable by the municipality,[41] but not that lying outside.[42]

(II) *PERSONAL PROPERTY.*[43] Personal property situated outside the city limits has been held not taxable by the municipality,[44] although the owner has his domicile in the municipality.[45] But in some jurisdictions the *situs* of personal property for the purpose of taxation is the domicile of the owner rather than the actual *situs* of the property itself.[46] A municipality cannot tax personal property merely temporarily within its limits.[47] The *situs* at the date of the accrual of the tax is the test of taxability.[48]

c. Property of Non-Resident. A municipality may tax not only the lands of non residents situated within its limits,[49] but also such of their personal property as they habitually keep therein.[50] In some jurisdictions, by statute, moneys, notes, credits, etc., in the hands of a resident agent of a non-resident owner are taxable and the agent is personally liable for the tax.[51] So, by statute, in some jurisdictions, persons living outside the corporate limits but whose ordinary avocations are pursued within the limits of the municipality are taxable the same as actual residents;[52] and such statutes have been held constitutional.[53]

d. Property Annexed. Property brought within municipal limits by annexation is subject to municipal taxation,[54] although the municipality cannot levy taxes

outside the corporate limits to pay railroad obligations. Langhorne *v.* Robinson, 20 Gratt. (Va.) 661, holding that a statute authorizing a city to tax persons and property, within the corporate limits and for half a mile around and outside of the corporate limits, to pay the interest upon the guaranty by the city of certain railroad stock, is not in violation of the constitution.

41. Nicholasville *v.* Rarick, 102 Ky. 352, 43 S. W. 450, 19 Ky. L. Rep. 1415 [*distinguishing* Covington *v.* Southgate, 15 B. Mon. (Ky.) 491].

42. Sioux City Bridge Co. *v.* Dakota County, 61 Nebr. 75, 84 N. W. 607.

43. See also *infra*, XV, D, 4, c.

44. Wilkey *v.* Pekin, 19 Ill. 160; Lafferranderie *v.* New Orleans, 3 La. 246.

Removal after accrual of liability.— Where the duty to pay a tax on property arose while the property was in the city, it makes no difference that it was removed from the city before the ordinance was passed prescribing the amount of tax to be paid, and the manner of assessing and collecting. Virginia *v.* Chollar-Potosi Gold, etc., Min. Co., 2 Nev. 86.

45. Wilkey *v.* Pekin, 19 Ill. 160; Plattsburg *v.* Clay, 67 Mo. App. 497, cattle.

As a general rule personal property follows the person of the owner, and in contemplation of law has its place where he is domiciled; but municipal corporations, having no power to protect property not within their corporate limits, can render no equivalent for the right of taxation of such property, and there is no propriety in the application of this rule to them for purposes of revenue. Wilkey *v.* Pekin, 19 Ill. 160.

46. London *v.* Boyd, 77 S. W. 931, 25 Ky. L. Rep. 1337; St. Paul *v.* Merritt, 7 Minn. 258. See also Corry *v.* Baltimore, 96 Md. 310, 53 Atl. 942, 103 Am. St. Rep. 364.

Where the holder of the equitable title is, by statute, required to pay the taxes thereon, a trustee need not list personal property for taxation, where the beneficial owner resides elsewhere. Lexington *v.* Fishback, 109 Ky. 770, 60 S. W. 727, 22 Ky. L. Rep. 1392.

Statutory provisions as to removal from city between January 1 and May 1 see Lee *v.* Boston, 2 Gray (Mass.) 484.

47. Blanc *v.* New Orleans, 1 Mart. (La.) 119.

48. Hilgenberg *v.* Wilson, 55 Ind. 210.

49. Alexander *v.* Alexandria, 5 Cranch (U. S.) 1, 3 L. ed. 19. See also Lamprey *v.* Batchelder, 40 N. H. 522.

50. Dunleith *v.* Reynolds, 53 Ill. 45. See also Corry *v.* Baltimore, 96 Md. 310, 53 Atl. 942, 103 Am. St. Rep. 364. And see *supra*, XV, D, 4, b, (II).

Statutes.— A provision in a statute for the incorporation of cities, prohibiting cities having a population exceeding twenty thousand from the taxation of notes, bonds, or other evidences of debt which are or may be in the hands of any resident of such city as guardian of persons not residents therein, or as executor or administrator of the estate of a person who does not reside therein, and in which such guardian, executor, or administrator has no financial interest, does not contemplate that such property shall be taxed for such purpose in cities of less than twenty thousand. McDougal *v.* Brazil, 83 Ind. 211.

51. German Trust Co. *v.* Davenport Bd. of Equalization, 121 Iowa 325, 96 N. W. 878.

52. Moore *v.* Fayetteville, 80 N. C. 154, 30 Am. Rep. 75, holding that a tax to pay an existing debt incurred in the past is a tax for municipal purposes, within the statute. See also Petersburg *v.* Cocke, 94 Va. 244, 26 S. E. 576, 36 L. R. A. 432.

53. Worth *v* Fayetteville, 60 N. C. 617.

54. Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031 (holding that it is no objection that the property is situated in a river bottom which is sometimes subject to overflow); Langworthy *v.* Dubuque, 16 Iowa 271; Butler *v.* Muscatine, 11 Iowa 433; Swift *v.* Newport, 7 Bush (Ky.) 37; Specht *v.* Louis-

on such property where the corporate limits were extended so as to include it solely for the purpose of creating municipal revenue at the expense of the owner and without benefit to him.[55] But land included within the city limits after the first of the year and before the assessment of taxes has been held not subject to municipal taxes for such year.[56] *A fortiori* property annexed after the time it was the duty of the assessor to return his list of taxable property cannot be taxed for that year.[57] The mere platting of land for addition does not amount *per se* to annexation.[58]

e. Agricultural and Unplatted Lands. In some jurisdictions agricultural and unplatted lands within the corporate limits of a municipality are taxable according to their value, the same as other lands, although they receive little or no benefit from such taxation;[59] but in other jurisdictions such property cannot be taxed

ville, 58 S. W. 607, 22 Ky. L. Rep. 699; Alexander *v.* Alexandria, 5 Cranch (U. S.) 1, 3 L. ed. 19; Alexandria *v.* Wise, 1 Fed. Cas. No. 187, 2 Cranch C. C. 27. See also Sherman *v.* Benford, 10 R. I. 559, holding that a tax assessed on the members of a fire district for the purpose of supporting the fire department is binding on members included in such district by statute extending its territorial limits, which takes effect after the passage of a vote to assess such taxes and before the time at which it was voted that it should be assessed.

Grounds for exemption.— Residents of territory annexed to a city cannot escape taxation because the portion of the territory occupied by them has not yet been assigned to a ward of the city, or because they do not yet enjoy all the benefits of the city government. Specht *v.* Louisville, 58 S. W. 607, 22 Ky. L. Rep. 699.

Taxation to pay debt.— Property annexed to a city after the creation of a public debt by the city is subject to taxation for the payment of such debt. Stilz *v.* Indianapolis, 81 Ind. 582; Lebanon *v.* Bevill, 38 S. W. 872, 18 Ky. L. Rep. 924. See *supra*, II, B, 2, g, (I), (H).

Estoppel of taxpayer.— When owners and residents of platted grounds, to include which the limits of a city have been extended, acquiesce in the extension and vote at elections for city officers, and sign petitions for bond elections, as a result of which bonds are issued by the city, and improvements are made by the city in the added territory, such property holders are estopped from denying the liability of their property for city taxes. Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423. So one whose property has been included within the boundary of a city upon a petition to the general assembly in which he united is estopped to deny the right of the city to tax it on the ground that it does not receive its full measure of the benefits of city government, his remedy for a denial of such benefits being against those who control the city government. Lebanon *v.* Edmonds, 101 Ky. 216, 40 S. W. 573, 19 Ky. L. Rep. 297.

55. Swift *v.* Newport, 7 Bush (Ky.) 37; Covington *v.* Southgate, 15 B. Mon. (Ky.) 491. See also Elkton *v.* Gill, 94 Ky. 138, 21 S. W. 579, 14 Ky. L. Rep. 755; Beattyville *v.* Daniel, 25 S. W. 746, 15 Ky. L. Rep. 793.

56. Austin *v.* Butler, (Tex. Civ. App. 1897) 40 S. W. 340.

57. Latonia *v.* Meyer, 86 S. W. 686, 27 Ky. L. Rep. 746.

58. Cameron *v.* Stephenson, 69 Mo. 372. *Compare* Pidgeon *v.* McCarthy, 82 Ind. 321.

59. *California.*— Dixon *v.* Mayes, 72 Cal. 166, 13 Pac. 471.

Indiana.— Cicero *v.* Sanders, 62 Ind. 208; Conklin *v.* Cambridge City, 58 Ind. 130. See also Leeper *v.* South Bend, 106 Ind. 375, 7 N. E. 1.

Kansas.— Hurla *v.* Kansas City, 46 Kan. 738, 27 Pac. 143 [*following* Mendenhall *v.* Burton, 42 Kan. 570, 22 Pac. 558].

Kentucky.— Hughes *v.* Carl, 100 Ky. 533, 50 S. W. 852, 21 Ky. L. Rep. 6; Latonia *v.* Hopkins, 104 Ky. 419, 47 S. W. 248, 20 Ky. L. Rep. 620; Frankfort *v.* Scott, 101 Ky. 615, 42 S. W. 104, 19 Ky. L. Rep. 1068; Briggs *v.* Russellville, 99 Ky. 515, 36 S. W. 558, 18 Ky. L. Rep. 389, 34 L. R. A. 193; Bell County Coke, etc., Co. *v.* Pineville, 64 S. W. 525, 23 Ky. L. Rep. 933; Louisville Bridge Co. *v.* Louisville, 58 S. W. 598, 22 Ky. L. Rep. 703 (bridge); Ryan *v.* Central City, 54 S. W. 2, 21 Ky. L. Rep. 1070; Richmond *v.* Gibson, 46 S. W. 702, 20 Ky. L. Rep. 358. Formerly the rule was to the contrary. Eifert *v.* Central Covington, 91 Ky. 194, 15 S. W. 180, 12 Ky. L. Rep. 943; Courtney *v.* Louisville, 12 Bush 419; Maltus *v.* Shields, 2 Metc. 553; Pineville *v.* Creech, 26 S. W. 1101, 16 Ky. L. Rep. 172; Covington *v.* Arthur, 14 S. W. 121, 12 Ky. L. Rep. 163; Torbett *v.* Louisville, 4 S. W. 345, 9 Ky. L. Rep. 202.

Michigan.— See Mitchell *v.* Negaunee, 113 Mich. 359, 71 N. W. 646, 67 Am. St. Rep. 468, 38 L. R. A. 157, holding that the fixing of city limits and taxing districts is within the legislative discretion, and hence a tax on all city property for the cost of an electric light plant cannot be enjoined on the ground that vacant and remote property is not benefited by such lighting.

Nebraska.— Lancaster County *v.* Rush, 35 Nebr. 119, 52 N. W. 837.

New Jersey.— State *v.* Brown, 53 N. J. L. 162, 20 Atl. 772.

New York.— People *v.* Weaver, 41 Hun 133.

Pennsylvania.— Hewitt's Appeal, 88 Pa. St. 55; Kelly *v.* Pittsburgh, 85 Pa. St. 170, 27 Am. Rep. 633; Hummelstown Borough *v.* Brunner, 17 Pa. Co. Ct. 140.

where it receives no benefit from the municipal expenditures.[60] In some jurisdictions agricultural and unimproved property is expressly exempted by statute from liability to municipal taxation to a greater or less extent,[61] and the courts

Texas.— Norris *v.* Waco, 57 Tex. 635.

Washington.— Frace *v.* Tacoma, 16 Wash. 69, 47 Pac. 219; Ferguson *v.* Snohomish, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795.

West Virginia.— Davis *v.* Point Pleasant, 32 W. Va. 289, 9 S. E. 228; Powell *v.* Parkersburg, 28 W. Va. 698.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2050.

60. Taylor *v.* Waverly, 94 Iowa 661, 63 N. W. 347; Deiman *v.* Ft. Madison, 30 Iowa 542; Deeds *v.* Sanborn, 26 Iowa 419; Deeds *v.* Sanborn, 22 Iowa 214; O'Hare *v.* Dubuque, 22 Iowa 144; Davis *v.* Dubuque, 20 Iowa 458; Buell *v.* Ball, 20 Iowa 282; Ellison *v.* Linford, 7 Utah 166, 25 Pac. 744. See also Hershey *v.* Muscatine, 22 Iowa 184; Kaysville City *v.* Ellison, 18 Utah 163, 55 Pac. 386, 72 Am. St. Rep. 772, 43 L. R. A. 81.

In Iowa, where property within the city limits, of a suburban character, remote from the center of a city, is improved with a view of putting it on the market as such when it shall reach a value corresponding with the views of the owner, it is subject to municipal taxation. Durant *v.* Kauffman, 34 Iowa 194.

When benefit arises.—When the proprietors of undedicated town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advantages, without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax arises. Taylor *v.* Waverly, 94 Iowa 661, 63 N. W. 347; Brooks *v.* Polk County, 52 Iowa 460, 3 N. W. 494; Fulton *v.* Davenport, 17 Iowa 404. See also Perkins *v.* Burlington, 77 Iowa 553, 42 N. W. 441; Cook *v.* Crandall, 7 Utah 344, 26 Pac. 927. Where land adjoining a town is brought in by an extension of the limits, and is subdivided into lots, and a street is extended through them, a four-acre lot, mostly unfit for cultivation, and on which the owner has built a house, and carries on the business of a tailor, is town property, for purposes of taxation. Lebanon *v.* Bevill, 38 S. W. 872, 18 Ky. L. Rep. 124.

Taxes to which rule applies.— The municipal taxes from which farm property located within the limits of the city is exempt must be limited to those which are required for purposes strictly municipal, and from which the farm property derives no benefit. Sears *v.* Iowa Midland R. Co., 39 Iowa 417. Farming lands situated within the limits of a city are liable for a tax voted by the city in aid of the construction of a railroad. Sears *v.* Iowa Midland R. Co., *supra.* The legislature may authorize property within the corporate limits of a city to be taxed to aid the building of a railroad, although such property may be so situated with reference to the population of the city as not to be taxable for strictly municipal purposes. Courtney *v.* Louisville, 12 Bush (Ky.) 419.

61. *Connecticut.*— Gillette *v.* Hartford, 31 Conn. 351.

Indiana.— Leeper *v.* South Bend, 106 Ind. 375, 7 N. E. 1; Hamilton *v.* Ft. Wayne, 40 Ind. 491.

Iowa.— Windsor *v.* Polk County, 109 Iowa 156, 80 N. W. 323; Allen *v.* Davenport, 107 Iowa 90, 77 N. W. 532; Perkins *v.* Burlington, 77 Iowa 553, 42 N. W. 441 (holding statute not applicable to extensions made prior to the passage thereof); Winzer *v.* Burlington, 68 Iowa 279, 27 N. W. 241 (holding that the fact that the owner is a merchant and erected a dwelling on the land and resides there will not prevent the land from being exempt).

Kentucky.— Henderson *v.* Lambert, 8 Bush 607; Arbegust *v.* Louisville, 2 Bush 271. At present no such exemption exists. Shuck *v.* Lebanon, 107 Ky. 252, 53 S. W. 655, 21 Ky. L. Rep. 969.

Louisiana.— New Orleans *v.* Michoud, 10 La. Ann. 763.

Maryland.— Baltimore *v.* Rosenthal, 102 Md. 298, 62 Atl. 579, less rate of taxation.

Michigan.— Baldwin *v.* Hastings, 83 Mich. 639, 47 N. W. 507, exemption from levy for fire department tax.

Ohio.— Barker *v.* State, 18 Ohio 514, holding that exemption does not extend to taxes for street improvements.

South Carolina.— See State *v.* Newberry, 12 Rich. 339.

Tennessee.— Carriger *v.* Morristown, 1 Lea 116, holding statute applicable only to land used for cultivation of crops or pasturage of stock in the usual routine of farming operations.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2064.

When land is used exclusively for agricultural purposes.—A tract of about fifteen acres of land, of which seven or eight are used for pasture, about one acre for garden, and the remainder for barn, residence, stables, and hog yard, is not land used exclusively for farming purposes, so as to exempt it from municipal taxes under a law exempting land so used from such taxes. Simms *v.* Paris, 1 S. W. 543, 8 Ky. L. Rep. 344.

Whether property is rural "landed" property within statute see Goebel *v.* Baltimore, 93 Md. 749, 49 Atl. 649; Sindall *v.* Baltimore, 93 Md. 526, 49 Atl. 645. The right of way and tracks of a railroad company are not landed property within the meaning of a provision in a statute annexing territory to a city, that the rate of taxation on landed property in the annexed district should not be increased until streets were laid through it, and there should be a certain number of

have sustained such exemptions except where they have been held to be in contravention of special constitutional provisions.[62]

f. Money, Stocks, and Choses in Action in General. Moneys and choses in action owned by residents are generally taxable by a municipality.[63] But a municipality has no authority, except where expressly conferred, to tax either its own bonds[64] or bonds issued by the state.[65] So mortgages in which the funds of the state have been invested are not taxable.[66] Shares of stock are taxable in the hands of their owners as personal property,[67] although the corporation is located outside the municipality or state.[68] The capital stock of a corporation is not taxable as a corporate asset under a general provision authorizing the taxation of all

buildings on every block. United R., etc., Co. *v.* State, 93 Md. 630, 619, 49 Atl. 655, 923, 52 L. R. A. 772, 86 Am. St. Rep. 453, 54 L. R. A. 942.

Property annexed before passage of statute. — A tract of thirteen acres within the city's limits, used for agricultural purposes and for the owner's residence,. is exempt from taxation for city purposes, under Laws (1876), c. 47, § 4, as amended by Laws (1878), c. 169, although it was annexed to the city before the passage of these laws. Tubbesing *v.* Burlington, 68 Iowa 691, 24 N. W. 514, 28 N. W. 19; Winzer *v.* Burlington, 68 Iowa 279, 27 N. W. 241.

Statute not retroactive.— Stilz *v.* Indianapolis, 81 Ind. 582.

Taxes to which exemption applies.— Where agricultural land within the limits of a city is expressly exempted from taxation for city purposes, the lands are exempt from taxation for the purpose of raising money to pay a bonus voted by the city to aid the building of a railroad; but they are not exempt from taxation for school purposes, although all of the territory embraced within the limit of the city constitutes a school-district, and although the school officers levying the tax are the regular municipal authorities, as the tax for school purposes is a special tax, and not a "municipal assessment" in any sense. Bamberger *v.* Louisville, 82 Ky. 337; Henderson *v.* Lambert, 8 Bush (Ky.) 607.

Repeal of statutes or charter provisions see Hayward *v.* People, 145 Ill. 55, 33 N. E. 885; Thomas *v.* Butler, 139 Ind. 245, 38 N. E. 808; Blain *v.* Bailey, 25 Ind. 165; Zanesville *v.* Richards, 5 Ohio St. 589; Serrill *v.* Philadelphia, 38 Pa. St. 355; Powell *v.* Parkersburg, 28 W. Va. 698.

A mere temporary occupation and use of land for agricultural purposes, when purchased for speculation with intent to lay it out into lots and sell them, is not a good-faith occupancy and use for agricultural purposes within the meaning of an exemption from taxation for city purposes. Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63.

62. Kansas City *v.* Cook, 69 Mo. 127; Lee *v.* Thomas, 49 Mo. 112. *Compare* Smith *v.* Americus, 89 Ga. 810, 15 S. E. 752; State *v.* Birch, 186 Mo. 205, 85 S. W. 361, both holding certain provisions unconstitutional.

63. *Alabama.*— Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 729.

Georgia.— Harper *v.* Elberton, 23 Ga. 566.

Kentucky.— Newport *v.* Ringo, 87 Ky. 635, 10 S. W. 2, 60 Ky. L. Rep. 1046 [*distinguishing* Louisville *v.* Henning, 1 Bush 381; Covington *v.* Powell, 2 Metc. 226; Johnson *v.* Lexington, 14 B. Mon. 648].

New Jersey.—Perkins *v.* Perkins, 24 N. J. L. 409.

South Carolina.— State *v.* Charleston, 1 Mill 36.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2051.

But see Pullen *v.* Raleigh, 68 N. C. 451 (holding that a municipal corporation can levy a tax upon such subjects only as are specified in its charter; and therefore a city cannot levy a tax upon the money or credits of its citizens, when the power to do so is not specially conferred upon the city by its charter); Mifflintown *v.* Jacobs, 69 Pa. St. 151. *Compare* Goepp *v.* Bethlehem, 28 Pa. St. 249, exemption of debts.

A charter provision that "all property not exempt from taxation under the general laws of this state shall be subject to taxation, as herein mentioned, for city purposes," embraces choses in action. Trimble *v.* Mt. Sterling, 12 S. W. 1066, 11 Ky. L. Rep. 727. But a charter provision that no stocks, bonds, etc., of a corporation situated within the limits of the municipality, owned by persons residing outside of the city, shall be taxed, refers to owners of stock living in the state but not in the city, and does not apply to non-resident owners of stock. Corry *v.* Baltimore, 96 Md. 310, 53 Atl. 942, 103 Am. St. Rep. 364.

64. Macon *v.* Jones, 67 Ga. 489. But see Jenkins *v.* Charleston, 5 S. C. 393, 22 Am. Rep. 14, holding that a city may lawfully tax its own stock, issued as evidence of a debt, whether owned by non-residents or by residents of the city.

If municipal bonds are not entitled to registration under the act of April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," etc., the property thereof is not liable to be taxed therefor, even if the bonds are valid. Flack *v.* Hughes, 67 Ill. 384.

65. Augusta *v.* Dunbar, 50 Ga. 387.

66. Public Schools Trustees *v.* Trenton, 30 N. J. Eq. 667.

67. Seward *v.* Rising Sun, 79 Ind. 351.

68. Seward *v.* Rising Sun, 79 Ind. 351; Dwight *v.* Springfield Centre Fire Dist., 11 Metc. (Mass.) 374.

real and personal property.[69] The *situs* of infants under guardianship, and not that of their guardian, is the test of liability for municipal taxation on stocks and bonds held by him for their benefit.[70] So statutory authority to tax debts does not authorize a tax on a debt where the creditor is a non-resident, although the trustee is a resident.[71] But notes, accounts, and other choses in action in the hands of an agent of a non-resident doing business in a city, and which were received in the course of the business so conducted, have been held taxable by such city, it having general authority to tax property of every kind situated within its limits.[72]

g. Bank-Stock and Property. Ordinarily a bank is subject to taxation by a municipality,[73] except where expressly exempted therefrom.[74] But exemption from, or a limitation on, state taxation has been held not applicable to municipal taxes.[75] In some jurisdictions the capital stock of a bank is not taxable as an asset of the bank,[76] but in most municipalities the contrary rule governs.[77] Except where it is expressly exempted from taxation,[78] bank-stock in the hands of stock-holders is generally taxable.[79]

69. Macon *v.* Macon Constr. Co., 94 Ga. 201, 21 S. E. 456.

70. Louisville *v.* Sherley, 80 Ky. 71.

71. Carlisle *v.* Marshall, 36 Pa. St. 397.

72. Armour Packing Co. *v.* Augusta, 118 Ga. 552, 45 S. E. 424; Armour Packing Co. *v.* Savannah, 115 Ga. 140, 41 S. E. 237.

73. Ontario Bank *v.* Bunnell, 10 Wend. (N. Y.) 186; Farmers' Bank *v.* Fox, 8 Fed. Cas. No. 4,658, 4 Cranch C. C. 330. But see Georgia Bank *v.* Savannah, Dudley (Ga.) 130.

Limitations on amount.—A tax levied by a municipal corporation on the solvent credits of a bank in excess of the limitation prescribed by Laws (1890), p. 9, which provides that "cities and towns are prohibited from levying or collecting any other tax on banks, or on solvent credits, owned by individuals or corporations, greater than seventy-five per cent. of the state tax," is illegal, regardless of the purpose for which it is levied. Huntley *v.* Winona Bank, 69 Miss. 663, 13 So. 832.

74. Louisville Trust Co. *v.* Louisville, 30 S. W. 991, 17 Ky. L. Rep. 265 (holding, however, that exemption did not extend to bank buildings); New Orleans *v.* New Orleans Southern Bank, 15 La. Ann. 89.

75. Paris *v.* Farmers' Bank, 30 Mo. 575; Lexington *v.* Aull, 30 Mo. 480.

76. Eminence *v.* Eminence Deposit Bank, 12 Bush (Ky.) 538; Chester Bank *v.* Chester, 10 Rich. (S. C.) 104, holding that a bank charter provision forbidding taxing the capital stock without authority first had from the legislature was not affected by a subsequent act authorizing the city to impose a tax on various subjects, among them, "all stocks of every kind." See also Madison *v.* Whitney, 21 Ind. 261. *Compare* Troy *v.* Mutual Bank, 20 N. Y. 387.

77. McGregor *v.* McGregor State Bank, 12 Iowa 79; Greenboro Bank *v.* Greenboro, 74 N. C. 385; Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821.

"Capital" as distinguished from "capital stock."— Imposing a tax on the "capital stock" of banks located within the city is not in violation of a statutory provision that no tax shall be assessed on the "capital" of any bank. West *v.* Newport News, 104 Va. 21, 51 S. E. 206.

78. King *v.* Madison, 17 Ind. 48.

Stock of national bank.— Craft *v.* Tuttle, 27 Ind. 332; Rich *v.* Packard Nat. Bank, 138 Mass. 527.

Exemption from taxation "for municipal purposes."— Under the act of March 15, 1867, providing that nothing therein shall be so construed as to authorize the taxation of stock in a bank for municipal purposes, a tax on the capital stock of a national bank for school-house purposes in a city is not a tax levied for municipal purposes, where they are levied to carry out the system of common school education provided for by the state; and a tax on the capital stock of a national bank for a donation made by a township to aid in the building of a railroad is not a tax for municipal purposes. Evansville *v.* Bayard, 39 Ind. 450; Root *v.* Erdelmeyer, 37 Ind. 225.

79. *Georgia.*— Augusta *v.* Augusta Nat. Bank, 47 Ga. 562; Georgia Bank *v.* Savannah, Dudley 130.

Indiana.— Richmond *v.* Scott, 48 Ind. 568; De Pauw *v.* New Albany, 22 Ind. 204; Stiltz *v.* Tutewiler, Wils. 507.

Maryland.— Gordon *v.* Baltimore, 5 Gill 231.

South Carolina.— Bulow *v.* Charleston, 1 Nott & M. 527.

Virginia.— West *v.* Newport News, 104 Va. 21, 51 S. E. 206.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2052.

But see Baldwin *v.* Montgomery, 53 Ala. 437. *Compare* Howell *v.* Cassopolis, 35 Mich. 471.

Stock of national bank.— The validity of a tax levied by a city for municipal purposes on national bank shares held on April 1, pursuant to the authority conferred by the act of March 4, 1873, is not impaired by the fact that the money paid for such stock may have been taxed for municipal purposes to the same person as money on hand on the

h. Railroad Stock and Property. Except where the state expressly or impliedly reserves the sole right to tax,[80] or the property is exempted by statute,[81] railroad property within the municipal limits, or at least a part thereof, is ordinarily subject to municipal taxation.[82] Shares of capital stock in railway

first day of January. Richmond *v.* Scott, 48 Ind. 568.

80. Houston County *v.* Central R. Co., 72 Ga. 211; Albany *v.* Savannah, etc., R. Co., 71 Ga. 158. See also Pacific R. Co. *v.* Watson, 61 Mo. 57; Union Pac. R. Co. *v.* Ryan, 113 U. S. 516, 5 S. Ct. 601, 28 L. ed. 1098; Savannah *v.* Atlantic, etc., R. Co., 21 Fed. Cas. No. 12,385, 3 Woods 432.

81. Elizabethtown, etc., R. Co. *v.* Elizabethtown, 12 Bush (Ky.) 233; Com. *v.* Louisville, etc., R. Co., 46 S. W. 206, 20 Ky. L. Rep. 351 (holding that under an opinion holding that a railroad is exempt from city taxation, to the extent that it is located on land used exclusively for farming purposes, it was proper to allow an exemption from only one half the tax where the lands on one side of the road were used for farming purposes, the other side being laid off into building lots); Louisville, etc., R. Co. *v* Com., 30 S. W. 624, 17 Ky. L. Rep. 136 (holding that railroad property located on land within the limits of a city, but not subject to municipal taxes, because used exclusively for agricultural purposes, is also exempt from taxation by the city). See also Savannah *v.* Jesup, 106 U. S. 563, 1 S. Ct. 512, 27 L. ed. 276. But see St. Joseph *v.* Hannibal, etc., R. Co., 39 Mo. 476, holding that an exemption from further state and county taxes is not applicable to municipal taxes.

82. Savannah, etc., R. Co. *v.* Savannah, 112 Ga. 164, 37 S. E. 393 (street car company); Macon *v.* Central R., etc., Co., 50 Ga. 620; Illinois Cent. R. Co. *v.* Hamilton County, 73 Iowa 313, 35 N. W. 238; Detroit United R. Co. *v.* State Tax Com'rs, 136 Mich. 96, 98 N. W. 997 (machinery of street car company constituting fixtures); Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176. But see Dubuque, etc., R. Co. *v.* Dubuque, 17 Iowa 120.

Legislative authority.— A municipal ordinance imposing a tax of a specified amount on every railroad company operating within the corporate limits, when imposed under legislative authority, is valid. Piedmont R. Co. *v.* Reidsville, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284.

Lands owned by railroad.— Under Gen. Laws, c. 53, §§ 5, 9, lands owned by a railroad and not used in operating the road are subject to municipal taxation, and such tax cannot be abated because the lands have been subjected to taxation under the special assessment required by law in case of railroads. Nashua, etc., R. Co. *v.* Nashua, 62 N. H. 602. Under the act of Jan. 4, 1859, enabling Pittsburg to raise additional revenue, and providing that all realty within the city owned by any railroad company should be subject to taxation for city purposes, the same as other realty in the city, the lands and improvements of railroad companies are taxable as real estate, over objection that the term "real estate" had no application to real property which was indispensable to the railroad as such and constituted part of its franchise. Pennsylvania R. Co. *v.* Pittsburgh, 104 Pa. St. 522.

Street railroads.— The fact that the lines of a street railway system extend beyond the limits of any one municipality does not prevent its taxation by a city whose streets it traverses. Newport News, etc., Electric Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645.

Railroad bridge.— Point Pleasant Bridge Co. *v.* Point Pleasant, 32 W. Va. 328, 9 S. E. 231. Under Const. § 174, a railroad bridge within the limits of a city is subject to city taxation, although it derives no benefit from the city government. Louisville Bridge Co. *v.* Louisville, 65 S. W. 814, 23 Ky. L. Rep. 1655.

A statutory provision declaring a tax on gross earnings of a railroad company to be in lieu of taxes for all purposes has been held to apply only to state and county taxes and not to prevent taxation by a city authorized to tax all taxable property within the limits, of the depot grounds, buildings, and road-bed within the limits. Dubuque, etc., R. Co. *v.* Dubuque, 17 Iowa 120; Davenport *v.* Mississippi, etc., R. Co., 16 Iowa 348.

Specific tax on cars.— Where a municipal ordinance provides for a specified tax per year on street cars "for each car running within the said borough," the borough may collect the tax on each car running having a separate number, and such car need not be scheduled and run every day, nor for the whole of any particular day. Braddock Borough *v.* Monongahela St. R. Co., 28 Pa. Super. Ct. 262.

Rolling stock.—A city has no authority to tax the rolling stock of a railroad corporation whose road runs through, and whose chief place of business is in, such city. Dubuque, etc., R. Co. *v.* Dubuque, 17 Iowa 120. But see Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176.

In New Jersey, where a portion of lands adjacent to a railroad right of way, and owned by the railroad, is used for railroad purposes, the part so used is not subject to local taxation, but only to special taxation imposed by the state board of assessors. *In re* West Shore, etc., Terminal Co., (Sup. 1901) 49 Atl. 543; New Jersey Junction R. Co. *v.* Jersey City, 63 N. J. L. 120, 43 Atl. 577. So land leased to a railroad company, and used for railroad purposes, is subject to assessment by the state, and not the municipality. *In re* Pennsylvania R. Co., (Sup. 1901) 49 Atl. 543. But property not used for railroad purposes is taxable. Camden, etc., R. Co. *v.* Atlantic City, 58 N. J. L. 316,

companies are subject to municipal taxation, just as other stocks, in the hands of the holders.[83]

i. Insurance Companies. Under particular statutes or charter provisions the shares of stock of an insurance company are taxable as property of the company.[84] A statutory provision that a fixed license-tax on a company shall be in lieu of further assessment throughout the state has been held applicable only to state taxes and not to preclude municipal taxation.[85] In any event such a provision has no retroactive effect,[86] and in some states such a provision is unconstitutional if applicable to municipal taxation.[87] It has been held that annual premiums received by an agent residing in a city are not subject to taxation as personal property, but that such premiums are income and do not constitute property in its proper sense;[88] but other courts hold such premiums to be property and taxable as such.[89] Power to tax insurance companies to procure fire apparatus and proper reservoirs does not authorize a levy for the support of the fire department.[90] An ordinance requiring agents of foreign insurance companies to pay to the city two per cent of the premiums received is not one for a license, within a clause limiting the amount of license-fees, as it does not grant permission to do business, but assumes that the authority already exists[91]

j. Bridge Companies. Except where it is otherwise provided by constitutional or statutory provisions,[92] a bridge within the corporate limits is subject to municipal taxation,[93] although it derives no material benefit from the municipal government.[94]

k. Earnings, Receipts, and Sales.[95] In the absence of express or implied authority delegated by the legislature, a municipality has no power to tax earnings, receipts, and sales.[96] Authority to tax property and levy a poll tax does not

33 Atl. 198 [*affirmed* in 60 N. J. L. 242, 41 Atl 1116]. A street railway company owns no interest in the soil of the highways over which its road passes which may be taxed as real estate, but the inherent value of its property above the cost of reproducing the material constituents of its line arises from its franchise, which is subject only to state, and not municipal, taxation. Newark *v.* State Bd. of Taxation, 67 N. J. L. 246, 51 Atl. 67 [*reversing* 66 N. J. L. 466, 49 Atl. 525].

Revocation of power.—Authority given by a city charter to the council to levy and collect taxes on realty and personalty in the city is not taken away by power subsequently conferred on the board of equalization to assess the taxable value of all railroad property in the state, including such property located in the city. Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. 14.

83. Dubuque, etc., R. Co. *v.* Dubuque, 17 Iowa 120. *Contra*, see Richmond *v.* Daniel, 14 Gratt. (Va.) 385.

84. Mobile *v.* Stonewall Ins. Co., 53 Ala. 570.

85. Insurance Co. *v.* New Orleans, 12 Fed. Cas. No. 7,052, 1 Woods 85. See also New Orleans *v.* Salamander Ins. Co., 25 La. Ann. 650.

86. New Orleans *v.* Louisiana Mut. Ins. Co., 26 La. Ann. 499.

87. Raymond *v.* Hartford F. Ins. Co., 196 Ill. 329, 63 N. E. 745.

88. Dubuque *v.* Northwestern L. Ins. Co., 29 Iowa 9.

89. Phœnix Ins. Co. *v.* Omaha, 23 Nebr. 312, 36 N. W. 522.

Discrimination.—An ordinance requiring agents of foreign insurance companies to pay a percentage upon the premiums received or effected is not invalid, as discriminating against such companies. Hartford F. Ins. Co. *v.* Peoria, 156 Ill. 420, 40 N. E. 967.

90. Alton *v.* Ætna Ins. Co., 82 Ill. 45.

91. Hartford F. Ins. Co. *v.* Peoria, 156 Ill. 420, 40 N. E. 967.

92. Monongahela Bridge Co. *v.* Pittsburgh, 12 Pa. Co. Ct. 87, holding that under the act conferring on a city power to tax the real estate of corporations, except such as is indispensable to the exercise of the corporate rights of public or quasi-public corporations, a strip of land used by a bridge company as an approach to its bridge, for the accommodation of foot passengers and vehicles, is not liable to taxation.

93. Henderson Bridge Co. *v.* Henderson, 90 Ky. 498, 14 S. W. 493, 12 Ky. L. Rep. 414; Henderson Bridge Co. *v.* Henderson, 36 S. W. 561, 18 Ky. L. Rep. 417; Henderson Bridge Co. *v.* Henderson, (Ky. 1890) 14 S. W. 85; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823.

94. St. Louis Bridge Co. *v.* East St. Louis, 121 Ill. 238, 12 N. E. 723; Louisville Bridge Co. *v.* Louisville, 65 S. W. 814, 23 Ky. L. Rep. 1655, 58 S. W. 598, 22 Ky. L. Rep. 703. *Contra*, Louisville Bridge Co. *v.* Louisville, 81 Ky. 189.

95. Premiums of insurance companies see *supra*, XV, D, 4, i.

96. See Charleston *v.* Condy, 4 Rich. (S. C.) 254.

Tax on sales of cotton.—A city ordinance assessing a tax "on all gross sales of cotton on commission, by warehousemen, factors," etc., is not a tax on business, and violates

include authority to impose a gross income tax.[97] But authority to tax the gross amount of sales, receipts, or earnings has been held to be conferred on a municipality by a grant of full power to tax inhabitants or those who hold taxable property as shall appear expedient.[98] So authority to license, tax, and regulate merchants, express companies, etc., has been held to confer power to impose an *ad valorem* tax on the gross annual receipts of an express company from its business done in the city.[99] Likewise authority to levy and assess goods, etc., and all articles of trade and commerce, sold in the city, including sales at auction or otherwise, confers power to tax the annual sales of a butcher selling his meat at a public market.[1] On the other hand, no such power is conferred by a mere grant of authority to levy on real and personal property,[2] or taxable property,[3] nor does power to tax auction sales and sales of merchandise authorize a tax on the gross receipts of warehouses.[4] So the gross receipts of a gas company are not taxable as "goods, wares, and merchandise, and upon all articles of trade and commerce."[5] But the salary of a bank officer is assessable under a by-law taxing income from employment.[6]

l. Franchises. While municipal power to tax a franchise may be conferred by statute,[7] such power is not given by authority to tax real estate, personal estate, shares and moneys, stocks, bonds, and other securities.[8]

m. Public Property. While ordinarily public property,[9] including property owned by the municipality itself,[10] is not taxable by the municipality; yet such property is ordinarily taxable in the hands of a grantee,[11] or lessee,[12] or where the

the law of 1873 against any "tax on cotton, or the sales thereof." Columbus *v.* Flournoy, 65 Ga. 231.

97. Savannah *v.* Hartridge, 8 Ga. 23.

98. Pearce *v.* Augusta, 37 Ga. 597.

99. American Union Express Co. *v.* St. Joseph, 66 Mo. 675, 27 Am. Rep. 382.

1. Pittsburgh *v.* Kalchthaler, 114 Pa. St. 547, 7 Atl. 921.

Sales through agents — Vendors of goods subject to a municipal tax "upon all goods, etc., sold in said city" are liable for the tax on sales made through agents who make contracts of sales outside the city. Shriver *v.* Pittsburg, 66 Pa. St. 446.

2. New Orleans *v.* Fassman, 14 La. Ann. 865, profits not taxable as income.

3. Lott *v.* Ross, 38 Ala. 156.

4. Selma *v.* Selma Press, etc., Co., 67 Ala. 430.

5. Pittsburgh's Appeal, (Pa. 1888) 16 Atl. 92.

6. Lining *v.* Charleston, 1 McCord (S. C.) 345.

7. Frankfort *v.* Stone, 108 Ky. 400, 56 S. W. 679, 22 Ky. L. Rep. 25 [*affirmed* in 58 S. W. 373, 22 Ky. L. Rep. 502]; Dallas *v.* Dallas Consol. Electric St. R. Co., 95 Tex. 268, 66 S. W. 835.

Not occupation tax. — The tax upon the capital stock and franchise of a corporation is a tax upon property, and not a tax upon occupation. The Hub *v.* Hanberg, 211 Ill. 43, 71 N. E. 806.

Franchise of bank. — A city ordinance levying a tax for the fiscal year beginning May 1, 1893, on all taxable property in the city as of its value Nov. 1, 1892, embraced the franchise of a bank, although the law authorizing the taxation of the franchises of banks did not become effective, and was not even passed, until Nov. 11, 1892, and although no valuation thereof had been made at the date of the ordinance. Middlesboro *v.* Coal, etc., Bank, 108 Ky. 630, 57 S. W. 497, 22 Ky. L. Rep. 380.

8. Covington Gaslight Co. *v.* Covington, 92 Ky. 312, 17 S. W. 808, 13 Ky. L. Rep. 577.

9. Piper *v.* Singer, 4 Serg. & R. (Pa.) 354.

An ordinance imposing a tax on certain stock of the United States is repugnant to the United States constitution, authorizing congress to borrow money on the credit of the United States, since such a tax on the government stock is a tax on the contract and on the power to borrow money. Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481. But see Weston *v.* Charleston, Harp. (S. C.) 340.

10. Low *v.* Lewis, 46 Cal. 549. But see Louisville *v.* McAteer, 81 S. W. 698, 26 Ky. L. Rep. 425, 1 L. R. A. N. S. 766.

Property willed to the city of New Orleans, and in the hands of trustees acting for it in setting apart the revenues in favor of beneficiaries who were for a time to share therein, cannot be taxed by the city, and the tax collected by an action against the trustees, who represent no one but the city, whose mandataries they are. New Orleans *v.* McDonogh, 12 La. Ann. 240.

11. Wells *v.* Savannah, 87 Ga. 397, 13 S. E. 442; Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986 [*affirming* 107 Ga. 1, 32 S. E. 669].

Statements made by municipal officers on the sale of lands by a municipality that they would not be taxable and similar statements contained in the reports of committees do not constitute a contract of exemption. Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986 [*affirming* 107 Ga. 1, 32 S. E. 669].

12. Stein *v.* Mobile, 24 Ala. 591, 17 Ala.

municipality has no present interest but only one to become vested in the future.[13] The legislature, however, unless prohibited by the constitution, may expressly authorize municipal taxation of state and county property.[14]

n. Vessels. The *situs* of a vessel is the place of registration and port from and to which it regularly departs and returns.[15] It is also taxable where it is being regularly used, although it is registered as a coasting vessel under the federal statutes, or although the owner is a resident of another state where he is assessed therefor.[16] A municipality cannot levy a tax on all vessels which pass a certain bridge.[17]

o. Property Taxable by State or County. Whatever property is taxable according to the general law of the state is subject to municipal taxation in most municipalities.[18] Conversely, property not taxable for county purposes is not taxable by a municipality in such county.[19] But where the legislature confers upon a municipality general powers of taxation, the municipality may impose taxes on all subjects not withheld from taxation by the legislature, without regard to whether they are actually taxed by the state.[20]

p. Inheritance Tax. A collateral inheritance tax upon property is void, in the absence of any express legislative or charter authority to impose such tax.[21]

q. Exemptions From Taxation[22] — (i) *In General.* Although exemption from taxation is sometimes forbidden by constitutional, statutory, or charter provision,[23] yet in many jurisdictions, where not forbidden, certain property is specially exempted from municipal taxation.[24] For instance there are many statu-

234; Los Angeles *v.* Los Angeles City Waterworks Co., 49 Cal. 638.

13. Mobile *v.* Stein, 54 Ala. 23; Fall *v.* Marysville, 19 Cal. 391.

14. State *v.* Recorder of Mortgages, 45 La. Ann. 566, 12 So. 880.

15. Wilkey *v.* Pekin, 19 Ill. 160; Newport *v.* Berry, 19 S. W. 238, 14 Ky. L. Rep. 29; St. Joseph *v.* Saville, 39 Mo. 460; Wheeling, etc., Transp. Co. *v.* Wheeling, 99 U. S. 273, 25 L. ed. 412.

16. Battle *v.* Mobile, 9 Ala. 234, 44 Am. Dec. 438.

17. Rabassa *v.* New Orleans, 3 Mart. (La.) 218.

18. Toledo, etc., R. Co. *v.* Lafayette, 22 Ind. 262.

Under an authority given to a city to "levy a tax upon the tax payers of the city, taxable under the revenue laws of the State," for a certain purpose, not only the same persons but also the same property is liable, as under the state revenue laws. Barret *v.* Henderson, 4 Bush (Ky.) 255.

19. Evansville *v.* Hall, 14 Ind. 27.

20. Woodall *v.* Lynchburg, 100 Va. 318, 40 S. E. 915; Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645.

A proviso to the power to raise taxes for the use of a city that the laws shall not be repugnant to the laws and constitution of the state or the United States does not limit the power of the city to tax to such subjects only as are taxed by the state. Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176.

21. Schoolfield *v.* Lynchburg, 78 Va. 366.

Construction of authority.—Authority to impose a collateral inheritance tax is not conferred on a city by an act authorizing the levy of taxes upon any property in the town limits and on such other subjects as may at the time be assessed with state taxes against persons residing in the town. Schoolfield *v.* Lynchburg, 78 Va. 366 [*overruling* Peters *v.* Lynchburg, 76 Va. 927].

22. See, generally, TAXATION.

Agricultural and unimproved lands see *supra*, XV, D, 4, e.

Exemptions from assessments for public improvements see *supra*, XIII, E, 5, f.

23. Nashville *v.* Cumberland Tel., etc., Co., 145 Fed. 607, 76 C. C. A. 297.

What constitutes violation.—A statute authorizing a city having power to pave the streets at the expense of the city or of the abutting owners or partly at the expense of the city and partly at the expense of the abutters, to allow the latter an abatement of their general city taxes on the same property equivalent to a portion of the assessment for the improvement, is not within the constitutional provision forbidding exemptions from taxation. Erie *v.* Griswold, 184 Pa. St. 435, 39 Atl. 231.

Tax to pay debts.—A constitutional requirement that all property within the limits of a municipal corporation shall be taxed for the payment of its debts seems to prohibit exemptions only so far as the tax is levied for the payment of debts. State *v.* Beaufort, 39 S. C. 5, 17 S. E. 355.

24. See cases cited *infra*, this note.

Insurance companies.— Under Ky. act of May 8, 1886, applicable to insurance companies other than life companies, and providing "that no *ad valorem* tax shall be imposed by any city or town on the shares of the capital stock, or the invested and accumulated funds of any company organized under the laws of this state," a building purchased by a fire insurance company with money ac-

tory provisions delegating to municipalities power to exempt from taxation certain manufacturing establishments.[25] The fact that for many years annual ordinances have exempted certain lands from taxation for the respective years does not preclude their taxation thereafter.[26] A taxpayer not prejudiced by an exemption of certain property, his taxes not having been thereby increased, cannot object to such exemption.[27]

(II) *POWER.* Although there are a few cases holding that a municipality has inherent power to exempt property from taxation,[28] the general rule is that a municipality has no such inherent power.[29] But, in the absence of constitutional

cumulated in its business, and held as an investment, was exempt from taxation. Franklin Ins. Co. *v.* Louisville, 46 S. W. 502, 20 Ky. L. Rep. 489.

Contracts.— Where a city council enters into a contract to exempt certain property of a corporation from taxation in consideration of the corporation transferring to it other property, the fact that the city has accepted the benefits of the contract will not estop it from avoiding the same on the ground that the city council had no authority to enter into it. McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.

The condition imposed by congress on the admission of Louisiana into the Union that the people of that state disclaim title to waste and unappropriated land, and that each and every "tract of land" sold by congress should be exempt from any state or local taxation for the term of five years, included town lots sold by the United States, although they were not strictly "tracts of land" within the ordinary meaning of the term. New Orleans *v.* Picquet, 2 La. 474.

25. *Kentucky.*— Middlesboro *v.* New South Brewing, etc., Co., 108 Ky. 351, 56 S. W. 427, 21 Ky. L. Rep. 1782; Continental Tobacco Co. *v.* Louisville, 94 S. W. 11, 29 Ky. L. Rep. 616.

Maryland.— Havre de Grace Real Estate, etc., Co. *v.* Havre de Grace, 102 Md. 33, 61 Atl. 662; Frederick Electric Light, etc., Co. *v.* Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130, holding that an electric light company is not a manufacturing company.

New Hampshire.— Franklin Falls Pulp Co. *v.* Franklin, 66 N. H. 274, 20 Atl. 333, holding that a vote to exempt "any establishment thereafter erected in this town for the manufacture of fabrics," etc., is not sufficient to exempt an establishment not expressly mentioned in the vote.

New Jersey.— Liondale Bleach, etc., Works *v.* McGrath, 68 N. J. L. 215, 52 Atl. 714 [*affirmed* in 68 N. J. L. 731, 54 Atl. 1214], holding that where a municipal resolution purported to grant exemption for a certain number of years from the time the manufacturing business should be commenced, but the municipal authorities exempted the property for a less time, and the owners accepted such exemption, the latter will be precluded from claiming any further exemption under such resolution.

Vermont.— Richardson *v.* St. Albans, 72 Vt. 1, 47 Atl. 100.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2062 *et seq.*

Exemption as including shares of stock.— Under Vt. St. § 365, providing that certain manufacturing establishments, and all capital and personal property used in their business, may be exempt from taxation for a term of years, if the town so votes, where the stock of a manufacturing corporation had been exempt from taxation by a vote of the city in which it was located, its shares of stock in the hands of the shareholders were exempt. Richardson *v.* St. Albans, 72 Vt. 1, 47 Atl. 100.

Performance of contract.—A contract, in consideration of exemption from taxation, to move a shoe manufacturing business to a city, and there continuously operate a shoe factory to the full capacity of certain buildings, is not performed by using part of the building for such business and part of it for other manufacturing operations. Havre de Grace Real Estate, etc., Co. *v.* Havre de Grace, 102 Md. 33, 61 Atl. 662.

In Kentucky the statute is applicable only to new manufacturing establishments and does not apply to going concerns. Middlesboro *v.* New South Brewing, etc., Co., 108 Ky. 351, 56 S. W. 427, 21 Ky. L. Rep. 1782; Continental Tobacco Co. *v.* Louisville, 94 S. W. 11, 29 Ky. L. Rep. 616.

26. Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986 [*affirming* 107 Ga. 1, 32 S. E. 669].

27. State *v.* Beaufort, 39 S. C. 5, 17 S. E. 355.

28. Athens *v.* Long, 54 Ga. 330; State *v.* Addison, 2 S. C. 499.

29. *Florida.*— Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202.

Illinois.— Fitch *v.* Pinckard, 5 Ill. 69.

Kentucky.— Shuck *v.* Lebanon, 68 S. W. 843, 24 Ky. L. Rep. 451.

Louisiana.— New Orleans *v.* St. Charles St. R. Co., 28 La. Ann. 497.

Michigan.— See Coit *v.* Grand Rapids, 115 Mich. 493, 73 N. W. 811, holding that an agreement by a city to release a property-owner from general taxation for maintenance of sewers, in consideration of permission to construct a sewer through his land, is void.

Missouri.— State *v.* Hannibal, etc., R. Co., 75 Mo. 208.

Nebraska.— Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568.

Rhode Island.— McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.

Texas.— Dallas *v.* Dallas Consol. Electric

prohibition, the legislature may authorize a municipality to exempt certain property from taxation.[30] Where, by statute, property can be exempted from municipal taxation only by a vote of the citizens, an agreement for exemption without such vote is a nullity.[31] It is not competent, by the petition for incorporation, to exempt from taxation for municipal purposes property which otherwise, under the law, would be subject to such taxation.[32]

(III) *CONSTRUCTION AND OPERATION.* Statutes and ordinances granting exemptions from the common burden of taxation are strictly construed.[33] Exemp-

St. R. Co., 95 Tex. 268, 66 S. W. 835 [*reversing* on other grounds (Civ. App. 1901) 65 S. W. 201]; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383; Austin *v.* Austin Gas-Light, etc., Co., 69 Tex. 180, 7 S. W. 200.

Virginia.— Thomas *v.* Snead, 99 Va. 613, 39 S. E. 586; Whiting *v.* West Point, 88 Va. 905, 14 S. E. 698, 29 Am. St. Rep. 750, 15 L. R. A. 860.

Wisconsin.— Monroe Water Works Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2063.

Public service.— The keeping of a hotel, although for the public good, is for private gain, and not a "public service," and hence not properly exempted from taxation within a constitutional provision that "no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." Lancaster *v.* Clayton, 86 Ky. 373, 5 S. W. 864, 9 Ky. L. Rep. 611.

Commuting taxes.— The city of New Orleans cannot lawfully contract for a commutation of taxation; and an agreement that one erecting sheds on certain public spaces in the levee may, in lieu of taxes thereon, pay a specific proportion of the gross profits realized, is void. New Orleans *v.* New Orleans Sugar Shed Co., 35 La. Ann. 548. A city council has no power to remit or compromise taxes due the city, and therefore the fact that it has attempted to remit the taxes of a number of persons does not entitle another person similarly situated to exemption from taxation. Shuck *v.* Lebanon, 68 S. W. 843, 24 Ky. L. Rep. 451. A municipality may, however, make a contract for the use of land and agree as consideration that the property shall not be subject to taxation. Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682. And it was competent for the city to agree with a company upon the amount to be paid by the latter for or in lieu of all taxes or charges which the city had lawful authority to impose upon it on account of its use and occupation of the streets and other public places of the city. Nashville *v.* Cumberland Tel., etc., Co., 145 Fed. 607, 76 C. C. A. 297. But a municipality cannot agree to accept a certain sum per annum in full for all city taxes without regard to the property or the rate of taxation levied thereon. Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202.

Estoppel to deny power.— The municipality is not estopped to deny the validity of a contract for exemptions by an acceptance of benefits thereunder. McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526; Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539.

30. Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589. *Contra,* see Farnsworth Co. *v.* Lisbon, 62 Me. 451; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395.

31. McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.

32. Hayzlett *v.* Mt. Vernon, 33 Iowa 229.

33. *Georgia.*— Macon *v.* Central R., etc., Co., 50 Ga. 620.

Indiana.— Fitch *v.* Madison, 24 Ind. 425; Madison *v.* Martin, 18 Ind. 35; Madison *v.* Fitch, 18 Ind. 33.

Kentucky.— Middlesboro *v.* New South Brewing, etc., Co., 108 Ky. 351, 56 S. W. 427, 21 Ky. L. Rep. 1782.

Maryland.— Frederick Electric Light, etc., Co. *v.* Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 75 Miss. 275, 22 So. 824.

Wisconsin.— Monroe Water Works Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2062.

Duration of exemption.—Miss. Laws (1882), p. 838, § 8, providing that a railroad company's property, necessary to railroad purposes, shall be exempt from taxation for twenty years after completing its line to a certain point, and when the exemption period has expired its property shall be taxed at the same rate as other taxable property, and that "all of said taxes to which the property of said company may be subject in this state, whether for county or state, shall be collected . . . dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns," does not perpetually and absolutely exempt the company from municipal taxation. Adams *v.* Yazoo, etc., R. Co., 75 Miss. 275, 22 So. 824.

Goods and produce for export or in transit. — The proviso in a municipal charter exempting from municipal taxation "goods and produce for export or in transit, owned or in possession of any inhabitants of the city," etc., is to be construed strictly. Madison *v.* Martin, 18 Ind. 35; Madison *v.* Fitch, 18 Ind. 33. It does not exempt pork owned by non-residents of the city, which has been brought thereto by them to be slaughtered, cured, and stored there, subject to their order.

tion from taxation is not favored by the courts, and unless the language of a statute is so clear and unambiguous that the intention to create the exemption indisputably appears, such a construction will not be given to it.[34] In many instances exemptions from taxation in general do not apply to municipal taxes,[35] although the general statute is often so worded as to be held to include municipal taxes,[36] there being no general rule deducible from the conflicting cases as to when the general exemption does or when it does not include municipal taxes. The exemption in some cases has been considered as applicable only to general, as distinguished from special, municipal taxes.[37] Under authority to exempt property for a term of years, the term of exemption does not necessarily commence running from the passage of the statute; but, if the exemption is voted within a reasonable time thereafter by the city council, it may begin then.[38] So where a statute authorizes an exemption from city taxes for a specified number of years a vote of the council to exempt for a lesser time is valid.[39] An immunity from taxation under a contract by a municipality with a street railroad company whereby it pays a percentage of its earnings in lieu of all other taxes has been held assignable.[40]

(IV) *Repeal or Revocation.* The general rule is that an exemption from taxation may be repealed or revoked at any time,[41] although it would seem that where the exemption was an inducement to a contract based upon a consideration entered into between the municipality and the person claiming the exemption the municipality has no right to revoke such exemption within the period for which the exemption was granted.[42]

(V) *Exemption of Particular Property*[43]—(A) *Railroads.*[44] Exemption of the property of a railroad company from taxation by a municipal corporation may be effected by statutory or charter provisions,[45] or by contract between the

Powell *v.* Madison, 21 Ind. 335. But where persons were engaged in pork packing in such city, and had all of their capital invested in pork held for export and in process of shipment to a foreign market, the pork, being "produce for export," was not subject to taxation under the charter. Fitch *v.* Madison, 24 Ind. 425 [*overruling* Madison *v.* Fitch, 18 Ind. 33].

34. People *v.* Davenport, 91 N. Y. 574; People *v.* Feitner, 71 N. Y. App. Div. 479, 75 N. Y. Suppl. 738 [*affirmed* in 171 N. Y. 683, 64 N. E. 1124].

35. People *v.* Davenport, 91 N. Y. 574; Phœbus *v.* Manhattan Social Club, 105 Va. 144, 52 S. E. 839. See also *infra*, XV, D, 4, q, (V).

36. Johnson Home *v.* Seneca Falls, 37 N. Y. App. Div. 147, 55 N. Y. Suppl. 803; Memphis *v.* Hernando Ins. Co., 6 Baxt. (Tenn.) 527.

37. Bamberger *v.* Louisville, 82 Ky. 337, holding that exempting from further taxation merchandise on which a license-tax is paid creates an exemption only from taxes for strictly municipal purposes and has no application to a school tax or a railway aid tax.

38. Portland *v.* Portland Water Co., 67 Me. 135.

39. Portland *v.* Portland Water Co., 67 Me. 135.

40. Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589.

41. Rose *v.* Charleston, 3 S. C. 369; Galloway *v.* Memphis, 116 Tenn. 736, 94 S. W. 75; McCallie *v.* Chattanooga, 3 Head (Tenn.) 317; Powell *v.* Parkersburg, 28 W. Va. 698; Probasco *v.* Moundsville, 11 W. Va. 501; Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364.

42. Middlesborough *v.* New South Brewing, etc., Co., 56 S. W. 427, 21 Ky. L. Rep. 1782; Merchants' Ins. Co. *v.* Newark, 54 N. J. L. 138, 23 Atl. 305 [*reversed* on other grounds in 55 N. J. L. 145, 26 Atl. 137]; Erie *v.* Griswold, 184 Pa. St. 435, 39 Atl. 231.

43. Agricultural and unimproved property see *supra*, XV, D, 4, e.

44. See also *supra*, XV, D, 4, h.

45. See the statutes of the several states and charters of particular cities.

Property not used in ordinary business.— Under Ga. Acts (1883), pp. 39–41, declaring that the only property of railroads subject to be taxed by counties and cities is that not used in their usual and ordinary business, a city cou'd not levy a tax on a depot of a railroad within the city. Atlanta *v.* Georgia Pac. R. Co., 74 Ga. 16. Only so much of a railroad company's property as is indispensable to the construction of its road and fitting it for use is exempt from municipal taxation, and not all which it can lawfully take and hold under its charter. *In re* East Pennsylvania R. Co., 1 Walk. (Pa.) 428. The exemption from municipal taxation of real estate held by railroad companies extends only to such property as, being capable of acquisition, may be ascertained to be "necessary and convenient" for its use under Pa. Act, Feb. 19, 1849, § 2, declaring what real estate railroad companies may purchase and hold. Berks *v.* East Pennsylvania R. Co., 1 Woodw. (Pa.) 376.

Power house.— Under Pa. Act, April 21,

company and the municipality.[46] Particular statutory provisions exempting all or a part of the property of a railroad company from taxation or providing for a fixed tax in lieu of all other taxes have been held applicable to and to include municipal taxation;[47] but other statutory provisions have been held not to exempt the property from municipal taxation but to be applicable only to state and county taxation.[48] The payment of a license-fee on each car run over the road for the franchise and privilege of operating the road does not exempt the railroad company from the payment of an *ad valorem* tax on its property.[49]

(B) *Water, Gas, and Electric Light Companies.* Generally a municipality has no power to exempt from taxation the property of a water, gas, or electric light company;[50] but to some municipalities such power is delegated to a greater or less extent by the legislature.[51] Conceding that a municipality cannot exempt

1858 (Pamphl. Laws 385), providing that real property of railroad corporations — the superstructure of the road and water stations alone excepted — shall be subject to taxation for city purposes, a power house for the manufacture of electricity, owned and used by a traction motor company operating street railways, is exempt from taxation. Philadelphia *v.* Electric Traction Co., 208 Pa. St. 157, 57 Atl. 354.

46. Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589; Detroit *v.* Detroit City R. Co., 76 Mich. 421, 43 N. W. 447, holding that a municipality may agree with a street railroad company for the payment of a certain per cent of its gross earnings in lieu of all taxes except land taxes.

Construction of contract.—A contract between a city and a street railroad company, that "the road, rolling and live stock of said company" should be exempt from taxation, did not exempt stables, shops, and houses for storage of lumber; and this, although the president testified that he understood "road" to include such appurtenances or conveniences. Atlanta St. R. Co. *v.* Atlanta, 66 Ga. 104.

47. *Georgia.*—Augusta *v.* Georgia R., etc., Co., 26 Ga. 651.

Illinois.— Neustadt *v.* Illinois Cent. R. Co., 31 Ill. 484.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Elizabethtown, 12 Bush 233.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 75 Miss. 275, 22 So. 824.

Missouri.— Aurora *v.* McGannon, 138 Mo. 38, 39 S. W. 469.

New Jersey.— Morris, etc., R. Co. *v.* Haight, 35 N. J. L. 40.

Rhode Island.— McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.

Virginia.— Richmond Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821; Petersburg *v.* Cocke, 94 Va. 244, 26 S. E. 576, 36 L. R. A. 432.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2065.

Property taxable by state.— Under the charter giving a city the right to tax all property within its limits "which is by law taxable for territorial and county purposes," it had no authority to impose taxes on the property of a railroad company which was exempted by general law from taxation for territorial and county purposes. Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163.

48. *Iowa.*— Dunlieth, etc., Bridge Co. *v.* Dubuque, 32 Iowa 427.

Louisiana.— New Orleans Second Municipality *v.* New Orleans, etc., R. Co., 10 Rob. 187.

Missouri.— Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516; St. Joseph *v.* Hannibal, etc., R. Co., 39 Mo. 476.

Virginia.— Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. 176.

United States.— Moore *v.* Holliday, 17 Fed. Cas. No. 9,765, 4 Dill. 52.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2065.

Compare Macon *v.* Central R., etc., Co., 50 Ga. 620.

49. Newport *v.* South Covington, etc., R. Co., 89 Ky. 29, 11 S. W. 954, 11 Ky. L. Rep. 319; Louisville City R. Co. *v.* Louisville, 4 Bush (Ky.) 478. See also Dallas *v.* Dallas Consol. Electric St. R. Co., 95 Tex. 268, 66 S. W. 835 [*reversing* on other grounds (Civ. App. 1901) 65 S. W. 201]. *Compare* Detroit *v.* Detroit City R. Co., 76 Mich. 421, 43 N. W. 447; Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163.

50. Cartersville Water Works Co. *v.* Cartersville, 89 Ga. 689, 16 S. E. 70; Monroe Water Works Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685.

Payment of license-tax.—Under a city charter providing that merchants and others paying a license or specific tax on their business shall be exempt from any *ad valorem* tax thereon, the property of a gas company, used in the manufacture and distribution of gas, is not exempt from *ad valorem* taxation, although it has paid a license or specific tax, imposed by the general council of the city. Newport Light Co. *v.* Newport, 20 S. W. 434, 14 Ky. L. Rep. 464.

51. Bowen *v.* Newell, 16 R. I. 238, 14 Atl. 873, holding that under a statute permitting any town council to grant the right to lay water pipes in a highway, and to erect and maintain reservoirs, including the power to exempt such pipes and reservoirs from taxation, the exemption can only be made as one of the terms of the grant, and cannot be given to works already built.

such a company from taxation, it is well settled that it may agree with the company that as a price of the services to be rendered or commodities furnished the municipality, the latter will pay a sum equal to the amount of the taxes to be levied, where the sum stipulated to be paid is a fair and just allowance and the stipulation is *bona fide* and not in the nature of an evasion of the prohibition against exemption from taxation.[52]

(c) *Educational and Charitable Institutions.* General exemptions of educational and charitable institutions have been held not applicable to local municipal taxes,[53] although there are cases to the contrary.[54] The mere grant of authority to exempt is usually not mandatory.[55] Exemption of property occupied by religious or educational institutions includes athletic and pleasure grounds as well as halls and dormitories,[56] but not outside property not used by them.[57] A half century of exemption has been held to estop the city from changing its construction of a doubtful ordinance.[58]

(VI) *Pleading and Proof.* A property-owner claiming an exemption must plead[59] and prove[60] his exemption.

5. Levy and Assessment — a. General Considerations. The municipal function of taxation generally belongs to the common council,[61] and cannot be delegated by it to any other board or officer.[62] The method of levying and assessing taxes for municipal purposes is largely the same as in case of state, county, or

Machinery.— The provision in a city charter exempting from taxation "machinery in manufactories" does not exempt the pipes, lamp posts, and meters of a gas company. Covington Gaslight Co. *v.* Covington, 84 Ky. 94; Covington *v.* Covington Gaslight Co., 2 S. W. 326, 8 Ky. L. Rep. 515.

Public property.—A water district created for supplying the inhabitants of such district and certain municipalities with pure water for domestic and municipal purposes is a public municipal corporation, and under Me. Rev. St. c. 9, § 6, such of its property as is appropriated to public uses is exempt from municipal taxation. Augusta *v.* Augusta Water Dist., 101 Me. 148, 63 Atl. 663.

In Pennsylvania real estate of an electric light company is exempt from local taxation, although such property is merely held as a reserve plant, to be used in the manufacture of electricity only in case of emergency. The exemption from local taxation of property used in "supplying" electricity includes property used in "manufacturing" it. Southern Electric Light, etc., Co. *v.* Philadelphia, 191 Pa. St. 170, 43 Atl. 123.

52. Cartersville Imp., etc., Co. *v.* Cartersville, 89 Ga. 683, 16 S. E. 25; Grant *v.* Davenport, 36 Iowa 396; Maine Water Co. *v.* Waterville, 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294; Portland *v.* Portland Water Co., 67 Me. 135; Monroe Water Works Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685. But see Columbia Ave. Sav. Fund, etc., Co. *v.* Dawson, 130 Fed. 152 [*reversed* on other grounds in 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713]. *Contra*, Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383 [*following* Austin *v.* Austin Gas Light, etc., Co., 69 Tex. 180, 7 S. W. 200].

A statute exempting the aqueducts, pipes, and conduits of water companies when the town takes water therefrom for the extinguishment of fires without charge does not exempt the property of a water company which is paid for all water used by the town. Dover *v.* Maine Water Co., 90 Me. 180, 38 Atl. 101.

53. Morgan *v.* Cree, 46 Vt. 773, 14 Am. Rep. 640.

54. Lefranc *v.* New Orleans, 27 La. Ann. 188.

55. Cook County *v.* Chicago, 103 Ill. 646.

56. People *v.* New York, 6 Hun (N. Y.) 109 [*affirmed* in 64 N. Y. 656]. See also La Cote des Neiges *v.* Notre Dame, 12 Quebec Super. Ct. 444.

57. Limoilou *v.* Quebec Seminary, 7 Quebec Q. B. 44.

58. State *v.* Addison, 2 S. C. 499.

59. Donaldsonville *v.* Ascension Parish Police Jury, 113 La. 16, 36 So. 873.

60. Hummelstown *v.* Brunner, 2 Dauph. Co. Rep. (Pa.) 376; Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986 [*affirming* 107 Ga. 1, 32 S. E. 669].

A contract of exemption will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986 [*affirming* 107 Ga. 1, 32 S. E. 669].

Evidence.—A memorandum, indorsed on the assessment roll of a municipal corporation, to the effect that the property of a corporation, not included in any constitutional or statutory exemption, is exempt from taxation, is incompetent to prove that it is in fact exempt, and cannot operate as notice of such fact to purchasers of municipal bonds. Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28.

61. Johnston *v.* Macon, 62 Ga. 645; Baltimore *v.* Robert Poole, etc., Co., 97 Md. 67, 54 Atl. 681; *Ex p.* Wilkes-Barre, 8 Luz. Leg. Reg. (Pa.) 113.

62. Johnston *v.* Macon, 62 Ga. 645.

township taxes,[63] except where it is otherwise provided by statute or charter provisions.[64] The power to make a levy depends upon the power to tax,[65] and the grant of power to levy carries with it the authority to adopt any reasonable method to make the power effectual.[66] Statutory and charter provisions as to making the levy and assessment must be substantially complied with.[67]

b. Time For Levy. Generally the time for making the annual levy is fixed by statute or charter provisions.[68] Some of such provisions have been held mandatory,[69] while others have been held merely directory.[70] If no time for the levy is fixed the ordinance may be passed at any time,[71] provided it is made within the year.[72] In particular jurisdictions a levy cannot be made prior to the adoption of the appropriation bill for the year,[73] or before the report of the board of estimate fixing a rate of taxation,[74] or before the assessment roll is completed;[75] but mere informalities in regard thereto have been held not fatal to the levy.[76] Where an original tax levy ordinance was valid, a subsequent alleged validating ordinance was ineffective to change the date of the levy to the date of the passage of such subsequent ordinance.[77] A levy to meet contract expenses cannot ordinarily be made before the contract is entered into,[78] but taxes to meet the payment of bonds may be levied in advance of the time when such obligations fall due.[79]

63. See TAXATION.

64. Burke *v.* Jeffries, 20 Iowa 145, holding that where there is no provision in a general law relating to municipal corporations applying expressly to the levy and collection of taxes, etc., by cities incorporated under a previous special statute, the provisions of the special statute on the subject still remain in force.

65. See *supra*, XV, D, 1-3.

Levy as included in assessment.—Authority to "levy" taxes has been held to be conferred by a provision for "assessing and collecting" taxes. San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694.

66. Aurora *v.* McGannon, 138 Mo. 38, 39 S. W. 469.

67. People *v.* Florville, 207 Ill. 79, 69 N. E. 623; People *v.* Wright, 68 Hun (N. Y.) 264, 22 N. Y. Suppl. 961; Matter of Wood, 24 Misc. (N. Y.) 561, 54 N. Y. Suppl. 30 [*reversed* on other grounds in 35 N. Y. App. Div. 363, 54 N. Y. Suppl. 978]; Com. *v.* Board of Revision, 4 Leg. Gaz. (Pa.) 109. See also The President *v.* Elizabeth, 40 Fed. 799.

68. Cairo *v.* Campbell, 116 Ill. 305, 5 N. E. 114, 8 N. E. 688. See Bartemeyer *v.* Rohlfs, 71 Iowa 582, 32 N. W. 673.

69. San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976; Dranga *v.* Rowe, 127 Cal. 906, 59 Pac. 944; Williamsport *v.* Kent, 14 Ind. 306.

70. Peed *v.* Millikan, 79 Ind. 86 (holding that, although a statute required the levy of a tax voted in favor of a railroad company to be made at the next June session after the vote, the duty to make the levy was absolute, and was not lost by failure to make it at said session); New Orleans *v.* Mechanics', etc., Bank, 15 La. Ann. 107 (holding that an act of the legislature requiring the city council to pass an ordinance levying a special railroad tax in the month of January of each year is merely directory as to the time, and such ordinance is valid, although passed at a later period); Baltimore *v.* Gorter, 93 Md. 1, 48 Atl. 445; State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115; Witheril *v.* Mosher, 9 Hun (N. Y.) 412, holding that a statute providing that village trustees shall, within twenty days after any extraordinary expenditure shall have been voted, proceed to assess its amount, is directory, and the validity of the tax is not affected by their failure to assess it within such time.

71. San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694; Harper *v.* Elberton, 23 Ga. 566. See also Cruger *v.* Ginnuth, 3 Tex. App. Civ. Cas. § 24.

When the fiscal and calendar years do not coincide, and neither is specified by the legislature, the council may adopt either. Benoist *v.* St. Louis, 19 Mo. 179.

72. Williamsport *v.* Kent, 14 Ind. 306.

Imposing taxes for past years.—An act providing that "the mayor and board of aldermen shall levy the municipal taxes at the regular meeting in September of each year, or, in case of failure so to do, at any other regular meeting thereafter," gives no power to impose taxes for past years. Adams *v.* Greenville, 77 Miss. 881, 27 So. 990.

73. Riverside County *v.* Howell, 113 Ill. 256; People *v.* Lee, 112 Ill. 113; Engstad *v.* Dinnie, 8 N. D. 1, 76 N. W. 292. *Contra*, Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682.

Before publication of appropriation ordinance.—A tax levy ordinance passed after the appropriation ordinance is passed and signed, but before it has been published, is void. People *v.* Florville, 207 Ill. 79, 69 N. E. 623.

74. Baltimore *v.* Gorter, 93 Md. 1, 48 Atl. 445.

75. New Orleans *v.* New Orleans Union Bank, 15 La. Ann. 123.

76. Clayton *v.* Chicago, 44 Ill. 280.

77. Nalle *v.* Austin, (Tex. Civ. App. 1906) 93 S. W. 141.

78. Brewer *v.* Bridges, 164 Ind. 358, 73 N. E. 811.

79. Wright *v.* People, 87 Ill. 582.

Generally a municipal corporation is authorized to make only one levy a year for the same purpose.[80]

c. Ordinance or Resolution Levying Tax — (I) *In General.* Ordinarily the legislative function of levying taxes is to be exercised by a municipal corporation by ordinance,[81] and no notice to taxpayers is necessary before the adoption of the ordinance.[82] Ordinarily a mere resolution is insufficient.[83] The ordinance must be passed by the council at a meeting held at the regular place,[84] and when a quorum is present,[85] although it may ordinarily be at a special meeting if due notice thereof is given;[86] and the vote must be recorded as required by the charter.[87] In some jurisdictions the levy must be approved by the mayor,[88] while in others he has no veto power.[89] An ordinance levying a tax for railroad aid after the result of an election voting aid cannot be repealed after the road has been built.[90]

(II) *Contents and Construction.* The ordinance or resolution must fully comply with the statutory requirements.[91] It must ordinarily state the rate or

80. Gay *v.* New Whatcom, 26 Wash. 389, 67 Pac. 88. See also Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874; State *v.* Rahway, 51 N. J. L. 279, 17 Atl. 122; Squire *v.* Cartwright, 67 Hun (N. Y.) 218, 22 N. Y. Suppl. 899.

Where a levy for general purposes has been made for the year, although less than the maximum rate allowed by statute or charter, no other levy, even for an object that might properly be classed under "general purposes," can be made, except where there is statutory authority therefor. State *v.* Van Every, 75 Mo. 530.

81. San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694; Harper *v.* Elberton Com'rs, 23 Ga. 566; Memphis *v.* Memphis, 9 Baxt. (Tenn.) 76; People's Nat. Bank *v.* Ennis, (Tex. Civ. App. 1899) 50 S. W. 632, holding that a levy made pursuant to an adoption by the council of a report of a finance committee recommending the amount of taxes to be collected, and how it should be apportioned, and not by ordinance, was void. See also Cape May *v.* Cape May Transp. Co., 64 N. J. L. 80, 44 Atl. 948. But see Smith *v.* Louisville, 14 S. W. 349, 12 Ky. L. Rep. 337.

The tax rolls are not competent to prove the levy of a tax by a municipal corporation. Such proof must be made by proving the city ordinance levying the tax. Earle *v.* Henrietta, 91 Tex. 301, 43 S. W. 15.

But statutes requiring a levy for a sinking fund, and in case of omission authorizing clerical extension at a specified rate, are equivalent to levying ordinances, and sales thereunder are valid. Davis *v.* Brace, 82 Ill. 542.

Present or future levy.— Where a motion to "levy a tax of one per cent. upon the taxable property" of a city was carried in its council, and the clerk duly certified to the auditor that such a levy had been made, such action of the council amounts to a present levy, and the tax is valid. Meservey *v.* Webster County, 46 Iowa 702; Snell *v.* Ft. Dodge, 45 Iowa 564.

82. Memphis *v.* Memphis, 9 Baxt. (Tenn.) 76.

83. Miller *v.* State, 44 Tex. Cr. 99, 69 S. W. 522, holding that where statutes authorize a city to levy a tax by virtue of an election to be had under an ordinance passed for that purpose, an election had under a mere resolution is void. But see People *v.* Lee, 112 Ill. 113 (holding that in order to constitute an "ordinance" it is all sufficient that the board of trustees should, by resolution, or by any other proceeding entered upon their journal or record, declare the ascertained amount of all appropriations, and indicate their determination that such amount shall be levied and assessed upon the taxable property within the town); Witheril *v.* Mosher, 9 Hun (N. Y.) 412.

84. Springfield *v.* People's Deposit Bank, 111 Ky. 105, 63 S. W. 271, 23 Ky. L. Rep. 519.

85. Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129. See also Spring *v.* Olney, 78 Ill. 101.

86. Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881, holding that city taxes voted at a special meeting of the council were not invalid because it did not appear in the record of such meeting that the members were duly notified of the call therefor, as it will not be presumed that proof of such notice was not on file.

87. Pontiac *v.* Axford, 49 Mich. 69, 12 N. W. 914, holding that a tax voted by the city council without the votes being recorded at large upon the minutes, as required by its charter, is invalid, and cannot be made valid subsequently by an amendment adopted by a subsequent council, showing such votes, where a majority of the members of the latter were not members of the former council.

88. O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

Acting mayor.—A resolution levying taxes, passed by the board of aldermen, the president of which, who was then acting mayor, voting thereon, but never formally submitted to the acting mayor for his approval, is invalid. Walker *v.* Burlington, 56 Vt. 131.

89. Truman *v.* San Francisco, 110 Cal. 128, 42 Pac. 421.

90. Missouri, etc., Trust Co. *v.* Smart, 51 La. Ann. 416, 25 So. 443.

91. See cases cited *infra*, this note.

amount of the tax or both,[92] the property in general subject to the tax,[93] and the purpose of the tax.[94] On the other hand it is not necessary to designate the par-

Ordinance providing for submission to vote. — An ordinance providing for a vote to levy an additional tax of one and one-third mills on the taxable property of the city does not violate the spirit of the act which permits municipalities to submit a proposition to vote for a tax of a specific per cent. Austin *v.* Austin Gas-Light, etc., Co., 69 Tex. 180, 7 S. W. 200.

A mere reference in the ordinance to another void ordinance passed at the same time does not invalidate it. Baltimore *v.* Gorter, 93 Md. 1, 48 Atl. 445.

92. Hawkins *v.* Jonesboro, 63 Ga. 527; Fairfield *v.* People, 94 Ill. 244; Boyce *v.* Peterson, 84 Mich. 490, 47 N. W. 1095 (holding that under a statute authorizing a village to raise by general tax sums not exceeding a certain rate per cent for the several funds specified, it is sufficient for the council in levying the tax to specify the rate per cent for each fund, and it need not state the sums to be raised); *In re* Cloquet Lumber Co., 61 Minn. 233, 63 N. W. 628 (holding that where statutes provided that the council should fix the specific amounts of corporate taxes and that subsequently a specified officer should fix the rate per cent, a resolution fixing a certain rate per cent, and not specifying the amount of the tax, was void).

The amount levied may be less than the amount appropriated.— Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197, 72 N. E. 774.

Statement of rate in report.— Where a tax rate has not been fixed by an ordinance of the city, but is merely a statement of a rate in the report of the board of estimates to the council, as required by the charter, it has no force as a rate on which to base a tax levy. Baltimore *v.* Gorter, 93 Md. 1, 48 Atl. 445.

Review of amount.— The power vested in certain commissioners to approve or reject any part of a tax levy confers power to exercise a veto but does not authorize modification of such estimates, since the power to levy taxes is one of the legislative functions of the common council. Ampt *v.* Cincinnati, 10 Ohio Dec. (Reprint) 824, 21 Cinc. L. Bul. 216.

Construction of levy on banks and solvent credits.—Adams *v.* Capital State Bank, 74 Miss. 307, 20 So. 881.

Rate.— Extending a city tax at the rate of two per cent which will raise an amount fourteen per cent greater than the appropriation ordinance calls for if entirely collected is not an abuse of discretion, where no showing is made as to the amount actually realized from the collection of the tax. Baltimore, etc., R. Co. *v.* People, 200 Ill. 623, 66 N. E. 246. The county clerk may extend a city tax at a rate per cent which will raise the net amount required by the appropriation ordinance, exclusive of the probable cost of collection and losses and deductions, provided such rate does not exceed the two per cent limit imposed by law. Baltimore, etc., R. Co. *v.* People, *supra*.

Different rates.— In some municipalities real estate may be classified for purposes of taxation and a different rate levied on each class of property. Jermyn *v.* Scranton City, 212 Pa. St. 598, 62 Atl. 29. See also Baltimore *v.* Rosenthal, 102 Md. 298, 62 Atl. 579.

93. Covington Gaslight Co. *v.* Covington, 84 Ky. 94, holding that under the provision of a city charter, authorizing the levy of an *ad valorem* tax on real estate in the city, and on such personal estate "as the city council may designate," it is sufficient for the purpose of taxing gas pipes, meters, lamp posts, and the like, that they be designated under the general term "personal estate . . . and any property of any kind subject to taxation under the laws of this Commonwealth."

Construction of ordinance.—A city ordinance levying a tax for the fiscal year beginning May 1, 1893, on all taxable property in the city as of its value Nov. 1, 1892, as assessed by the city assessor, and equalized by the board of equalization, embraces all property in the city liable for *ad valorem* taxation for the fiscal year named, and not merely all property assessed by the city assessor, and equalized by the board of equalization. Middlesboro *v.* Coal, etc., Bank, 108 Ky. 680, 57 S. W. 497, 22 Ky. L. Rep. 380.

94. Otis *v.* People, 196 Ill. 542, 63 N. E. 1053; Clayton *v.* Chicago, 44 Ill. 280 (holding that an ordinance imposing a tax of one mill on the dollar for "permanent improvements" sufficiently specifies the "object of the levy"); Covington Bd. of Education *v.* Covington Public Library, 113 Ky. 234, 68 S. W. 10, 24 Ky. L. Rep. 98; Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129; Shugars *v.* Hamilton, 92 S. W. 564, 29 Ky. L. Rep. 127 (not applicable to license-fee). *Compare* Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682.

Failure to specify as cured by reference to other ordinances.— Where a tax levy ordinance refers to the appropriation ordinance, which specifies in detail the objects for which the tax is levied, the failure of the tax levy ordinance to itself specify the objects of the tax is not fatal. Chicago, etc., R. Co. *v.* People, 218 Ill. 463, 75 N. E. 1021. See also Spring Valley Coal Co. *v.* People, 157 Ill. 453, 41 N. E. 874.

Effect of invalidity.— Where a tax levy made by a city council is void for failure to specify the purpose for which the tax was levied, the council may subsequently make a proper levy. Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129.

Including taxes for different purposes in one levy.— In some jurisdictions taxes for different purposes cannot be levied by the

ticular manner in which the tax is to be collected,[95] and a provision making it payable to a person or board not entitled thereto does not invalidate the levy.[96] Ordinances levying taxes are to be construed most strongly against the government and in favor of a citizen, and their provisions are not to be extended by implication beyond the clear import of the language used.[97] The ordinance must not delegate the authority to levy.[98] Ordinarily the levy can be only for the taxes for one year,[99] but under some circumstances a levy for a longer period is justifiable.[1] A tax levy ordinance is invalid where none of the items of the levy agree with those specified in the appropriation ordinance.[2] Where a municipality is authorized by different statutes to levy different special taxes, it cannot combine the objects and give notice and take the vote upon the proposal to tax for an entire sum.[3]

(III) *Publication and Filing Copy.* In some jurisdictions the ordinance must be published,[4] and a certified copy must be filed.[5]

same ordinance. People *v.* Peoria, etc., R. Co., 116 Ill. 410, 6 N. E. 459. So a levy may be invalid where it mingles, without specification, in one assessment, two or more taxes required to be kept separate. Scranton *v.* Delaware, etc., R. Co., 2 C. Pl. (Pa.) 29. Where authority is given to levy a tax to pay interest on the public debt and also a certain rate to create a sinking fund to pay the debt, a levy is not rendered illegal by the fact that it does not specify the proportion to be applied to the liquidation of each. Aurora *v.* Lamar, 59 Ind. 400.

Levy of general tax as compliance with duty to levy special tax.— Where a city is required to levy a special tax, and set apart the proceeds for a special purpose, this duty will not be performed by the levy of a general tax. State *v.* Davenport, 12 Iowa 335.

In Illinois an ordinance for the levy of municipal taxes must specify in detail the purposes of the appropriations and the amount appropriated for each purpose. Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566, 69 N. E. 938.

Where bonds of a specific kind were described in the ordinance making the levy as being bonds of a previous year, in which no such bonds were issued, the description is material, and the levy is void; and the ordinance is not correctable by averment that such bonds were issued of a date ten years previous to the date described in the levy. Hellman *v.* Los Angeles, 147 Cal. 653, 82 Pac. 313.

95. Frantz *v.* Jacob, 88 Ky. 525, 11 S. W. 654, 11 Ky. L. Rep. 55.

96. Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357.

97. Metropolitan L. Ins. Co. *v.* Darenkamp, 66 S. W. 1125, 23 Ky. L. Rep. 2249.

98. Bassett *v.* El Paso, (Tex. Civ. App. 1894) 28 S. W. 554, holding that a provision that, in case the amount of the tax is insufficient, certain city officer shall levy the requisite amount, does not render the ordinance void, in that it delegates the authority to levy taxes, as such provision will be treated as surplusage.

Apportionment among wards.— Where apportionment of a municipal levy is directed to be made among the wards *pro rata* according to the last assessment, it may be effected by the supervisors, under resolution of the council, as a ministerial function. Fay *v.* Wood, 65 Mich. 390, 32 N. W. 614. In case of a tax to pay a judgment against the corporation, action by the council is unnecessary, the supervisors being required to apportion on receiving a transcript. Shippy *v.* Mason, 90 Mich. 45, 51 N. W. 353.

99. Hernandez *v.* San Antonio, (Tex. Civ. App. 1897) 39 S. W. 1022.

1. New Orleans Second Municipality *v.* Orleans Cotton Press Co., 6 Rob. (La.) 411; Hernandez *v.* San Antonio, (Tex. Civ. App. 1897) 39 S. W. 1022. See also Clifton *v.* Hobgood, 106 La. 535, 31 So. 46.

2. Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566, 69 N. E. 938.

3. North Tonawanda *v.* Western Transp. Co., 16 Abb. Pr. N. S. (N. Y.) 297.

4. Southern Warehouse, etc., Co. *v.* Mechanics' Trust Co., 56 S. W. 162, 21 Ky. L. Rep. 1734.

Presumptions.— Where the tax bills are properly authenticated, it must be presumed that the ordinances were duly published. Fonda *v.* Louisville, 49 S. W. 785, 20 Ky. L. Rep. 1652.

In Nebraska the failure to publish an ordinance making the annual levy of taxes for a city of the metropolitan class, in the official newspaper of the city, as required by Comp. St. (1895) c. 12*a*, § 133, did not prevent such ordinance from becoming a law, where it was duly passed and approved, and signed by the mayor, and a section thereof provided that the ordinance should be in force from and after its passage. Johnson *v.* Finley, 54 Nebr. 733, 74 N. W. 1080.

In Illinois an appropriation ordinance must be published before the ordinance directing the levy is passed. People *v.* Florville, 207 Ill. 79, 69 N. E. 623; People *v.* Peoria, etc., R. Co., 116 Ill. 410, 6 N. E. 459. But the statute requiring all ordinances making appropriations to be published in a newspaper or by posting does not require ordinances levying taxes to be published. Mix *v.* People, 106 Ill. 425.

5. People *v.* Kankakee, etc., R. Co., 218 Ill. 588, 75 N. E. 1063; People *v.* Lee, 112 Ill. 113.

d. Operation and Effect of Levy — (i) *Informalities.* Mere errors or informalities in the levy not affecting the substantial justice of the tax itself do not ordinarily invalidate the levy.[6]

(ii) *Partial Invalidity.* A tax levy partially invalid is not invalid *in toto* if the valid part can be readily separated from the invalid part,[7] but if it cannot be so separated the entire levy is invalid.[8]

(iii) *As Conclusive on Courts.* While certiorari will lie to review the proceedings of a municipal organization in levying a tax,[9] the determination of the council as to the necessity for a levy and what taxes should be levied will not ordinarily be interfered with by the courts so long as the amount of the levy is within the limits prescribed by constitutional, statutory, or charter provision.[10]

(iv) *On Dissolution of Municipality.* The dissolution of the municipality annuls a tax levy,[11] unless its force is preserved and continued by statute.[12]

e. Assessors and Procedure For Assessing — (i) *General Considerations.* The mode of making assessments and the procedure connected therewith is generally fixed by express statutory or charter provision,[13] and it is well settled that in

Filing original ordinance.— The filing of a certified copy of the tax levy ordinance with the county clerk is essential to his authority to extend the tax, and neither the original appropriation ordinance nor the original tax levy ordinance can be substituted for it. Russellville *v.* Purdy, 206 Ill. 142, 68 N. E. 1085.

Curing error.— On application for judgment of sale for taxes, error in filing the original tax levy ordinance, instead of a certified copy thereof, cannot be cured by allowing a certificate of authentication to be attached to the ordinance. People *v.* Kankakee, etc., R. Co., 218 Ill. 588, 75 N. E. 1063. If the paper filed does not purport to be a certified copy the court has no power to permit the addition of a certificate to the paper under the guise of an amendment. Cincinnati, etc., R. Co. *v.* People, 213 Ill. 558, 73 N. E. 310.

6. People *v.* Chicago, etc., R. Co., 189 Ill. 397, 59 N. E. 946; Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874; People *v.* Lee, 112 Ill. 113; Purrington *v.* People, 79 Ill. 11; Taylor *v.* McFadden, 84 Iowa 262, 50 N. W. 1070 (holding that, although the council of a city fails to certify to the county auditor, on or before the first Monday in September, the percentage of taxes levied for the ensuing year, as required by statute, the omission is without prejudice to the taxpayers, and does not prevent the collection of the tax); Bartemeyer *v.* Rohlfs, 71 Iowa 582, 32 N. W. 673; Hixon *v.* Eagle River, 91 Wis. 649, 65 N. W. 366.

Presumptions.— Where a resolution for the levy of a tax is offered at the meeting of a city council, and certified to the auditor, but the record fails to show that it was adopted by the council, the adoption may, notwithstanding this omission, be inferred from the fact that it was offered, and ordered to be so certified. Taylor *v.* McFadden, 84 Iowa 262, 50 N. W. 1070. In the absence of an express provision of the charter requiring entries of estimates of general expenditures to be made on the records of the council, courts will not assume, for the purpose of invalidating a municipal tax, that no such estimates were made from the fact that no entry was made of such on the records. Turner *v.* Hutchinson, 113 Mich. 245, 71 N. W. 514.

Failure of presiding officer to sign ordinance.—An assessment of taxes, made pursuant to an ordinance passed by a city council, is not rendered invalid by the omission of the presiding officer of the council to sign the ordinance. Blanchard *v.* Bissell, 11 Ohio St. 96.

7. Joseph *v.* Milledgeville, 97 Ga. 513, 25 S. E. 323; Mowry *v.* Mowry, 20 R. I. 74, 37 Atl. 306; San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496 [*affirming* (Civ. App. 1898) 46 S. W. 273]; Nalle *v.* Austin, 91 Tex. 424, 44 S. W. 66 [*affirming* (Civ. App. 1897) 42 S. W. 780]. See also Hellman *v.* Los Angeles, 147 Cal. 653, 82 Pac. 313; Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542.

8. Sioux City Bridge Co. *v.* Dakota County, 61 Nebr. 75, 84 N. W. 607. *Compare* Gadsby *v.* Portland, 38 Oreg. 135, 63 Pac. 14.

9. State *v.* Bell, 91 Wis. 271, 64 N. W. 845.

Review of constitutionality of statute.— On certiorari to review the proceedings of a municipal organization levying a tax, the court may pass on the constitutionality of a statute from which the organization assumes to derive its power. State *v.* Bell, 91 Wis. 271, 64 N. W. 845.

10. Hawkins *v.* Jonesboro, 63 Ga. 527; Hyde Park *v.* Ingalls, 87 Ill. 11; McInerney *v.* Huelefeld, 116 Ky. 28, 75 S. W. 237, 25 Ky. L. Rep. 272; Mayfield Woolen Mills *v.* Mayfield, 111 Ky. 172, 61 S. W. 43, 22 Ky. L. Rep. 1676; People *v.* East Saginaw, 33 Mich. 164.

11. Pensacola *v.* Sullivan, 23 Fla. 1, 6 So. 922.

12. Pensacola *v.* Sullivan, 23 Fla. 1, 6 So. 922; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

13. See the statutes of the several states and charter provisions of particular municipalities.

The mere statements of the assessors after their work has been completed cannot be al-

making an assessment such provisions must be complied with in every substantial particular, or the assessment will be invalid.[14]

(II) *APPOINTMENT AND AUTHORITY.* The assessment must be made by the proper and duly appointed or elected municipal officer or officers,[15] except where constitutional or statutory provisions require the assessment to be made by one other than a municipal officer.[16]

lowed to invalidate what they have done. Von Storch *v.* Scranton, 3 Pa. Co. Ct. 567.

In boroughs provisions of the general tax laws relative to the mode of assessment for state or county purposes are applicable. Ridgefield *v.* Goodday, 65 N. J. L. 153, 46 Atl. 590.

The provision of the Greater New York charter requiring the apportionment of the new deputy tax commissioners to the several boroughs was not intended to limit the duties of such officers to the boroughs from which they were selected. People *v.* Feitner, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094 [*affirmed* in 156 N. Y. 694, 51 N. E. 1093].

Conflict between charter and general law.— Where a city charter conflicts with a general law, subsequently passed, as to assessment of property for taxation, the charter must be held to be superseded to the extent of any conflict that may exist. Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. 14. On the other hand, it has been held that the legislature may authorize taxes within a city to be assessed in a different mode from that prescribed by the general laws of the state, and the rights thus conferred upon a city by its charter are not repealed by subsequent general enactments, however inconsistent. State *v.* Blundell, 24 N. J. L. 402.

Effect of bad faith of assessors.— Where a city assessor places upon the city tax roll taxable property, and properly values and extends the taxes due thereon, such assessment is valid, although the assessor knows that the city does not intend to collect such taxes, and his motive in assessing it is to deceive the public into the belief that such property is being taxed. Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202.

Whether franchise can be assessed as a separate item see Dallas *v.* Dallas Consol. Electric St. R. Co., 95 Tex. 268, 66 S. W. 835.

Repeal of statutes see Com. *v.* Chester City, 123 Pa. St. 626, 16 Atl. 591.

14. Matter of Wood, 24 Misc. (N. Y.) 561, 54 N. Y. Suppl. 30; Glass *v.* White, 5 Sneed (Tenn.) 475.

15. *California.*— Kelsey *v.* Nevada, 18 Cal. 629.

Georgia.— Hawkins *v.* Jonesboro, 63 Ga. 527.

Kentucky.— Murphy *v.* Louisville, 114 Ky. 762, 71 S. W. 934, 24 Ky. L. Rep. 1574; Springfield *v.* People's Deposit Bank, 111 Ky. 105, 63 S. W. 271, 23 Ky. L. Rep. 519, holding that an assessment made by one of the trustees of a town by permission of his associates, when he had not been elected and had not qualified as assessor, was void, especially as no board of equalization was appointed to pass upon complaints of taxpayers.

Massachusetts.— Nason *v.* Whitney, 1 Pick. 140, holding all taxes granted for parochial or municipal purposes for any one year must be assessed by assessors chosen for that year.

Michigan.— Atty.-Gen. *v.* Cogshall, 107 Mich. 181, 65 N. W. 2.

Missouri.— State *v.* Tracy, 94 Mo. 217, 6 S. W. 709.

New Jersey.— Kearney *v.* East Newark, 59 N. J. L. 86, 34 Atl. 942 [*affirmed* in 59 N. J. L. 587, 39 Atl. 1113]; State *v.* Segoine, 53 N. J. L. 339, 21 Atl. 852 [*affirmed* in 54 N. J. L. 212, 25 Atl. 963].

Washington.— Port Townsend *v.* Sheehan, 6 Wash. 220, 33 Pac. 427.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2076.

Record of appointment.— The fact that there was no record of the appointment of assessors by the mayor of a city will not invalidate assessments made by them. Dobbins *v.* Cartersville, 73 Ga. 137.

Appointment of deputies.— The act of March 27, 1901, relating to the government of cities of forty thousand to one hundred thousand inhabitants, and requiring the tax commissioner to make oath to the correctness of the entire assessment, is not void for uncertainty in empowering him to appoint deputies to assist in making it, on the ground that such assistance is incompatible with his personal knowledge as to the correctness of the return. State *v.* Aitken, 62 Nebr. 428, 87 N. W. 153.

The statutory requirement that capital stock and franchises of certain enumerated corporations shall be assessed by the board of equalization while the capital stock and franchises of other corporations are to be assessed by the local assessors is not a violation of the constitutional rule of uniformity. The Hub *v.* Hanberg, 211 Ill. 43, 71 N. E. 826.

16. Cobb *v.* Elizabeth City, 75 N. C. 1; Germania Sav. Bank *v.* Darlington, 50 S. C. 337, 27 S. E. 846, holding that a statute authorizing a municipality to make assessments for taxation was unconstitutional as violating provisions that the general assembly shall provide by law for a uniform and equal rate of assessment and that all taxes shall be laid upon the actual value of property, since such provision permits of but one assessment which the law requires to be made by state officers.

Inherent right to have assessment made by municipal officers.— The taxpayers of a village have no inherent right to have the as-

(III) *TIME OF ASSESSMENT.*[17] Except where otherwise provided,[18] municipal assessments are usually made every year,[19] it generally being provided that the assessment shall be made or completed on or before a certain day, assessments made thereafter being invalid.[20]

(IV) *NEW ASSESSMENTS AND USE OF STATE ASSESSMENT ROLL.* Generally a new assessment must be made each year.[21] Under some charter and statutory provisions, however, the municipal authorities need not make an independent assessment but may use the town, county, or state assessment roll,[22] and in some jurisdictions such provisions are not merely permissive but mandatory.[23]

f. Mode of Assessment — (I) *IN GENERAL.* Statutory and charter provisions in reference to the mode of assessing taxes must be substantially pursued,[24]

sessment or collection of their taxes done by an officer elected by them, and a law providing that such duties shall be performed by town officers is not unconstitutional. Jones *v.* Kolb, 56 Wis. 263, 14 N. W. 177.

17. **Assessment of omitted property** see *infra*, XV, D, 5, f, (V).

18. Kelsey *v.* Nevada, 18 Cal. 629.

19. Nason *v.* Whitney, 1 Pick. (Mass.) 140; Atty.-Gen. *v.* Cogshall, 107 Mich. 181, 65 N. W. 2; State *v.* Powers, 68 Mo. 320; Philadelphia *v.* Pennsylvania Inst. for Instruction of Blind, 28 Pa. Super. Ct. 421 [*affirmed* in 214 Pa. St. 138, 63 Atl. 420]. But see Worton *v.* Paducah, 93 S. W. 617, 29 Ky. L. Rep. 450.

Incorporation of city after assessment by board of railroad assessors.— Where a city of the third class is incorporated after the board of railroad assessors has made assessment of the railroad property of the state, and the returns of such assessment have been transmitted by the auditor of the state to the various counties where the property is located, such city cannot make a valid levy of taxes for that year on railroad property within its limits. Atchison, etc., R. Co. *v.* Maxwell, 10 Kan. App. 370, 59 Pac. 1087.

Property annexed during fiscal year see State *v.* Craig, 21 Ohio Cir. Ct. 13, 11 Ohio Cir. Dec. 348.

20. Dranga *v.* Rowe, 127 Cal. 506, 59 Pac. 944; Stockton *v.* Western F. & M. Ins. Co., 73 Cal. 621, 15 Pac. 314; Eatontown *v.* Metzgar, 43 N. J. L. 170; Cohoes *v.* Cohoes Co., 4 How. Pr. (N. Y.) 343.

Special statutes control general ones in fixing dates. Cohoes *v.* Cohoes Co., 4 How. Pr. (N. Y.) 343.

Change of time.— The discretionary power given to a common council to change the time from the first Monday in May, before which assessment of taxes shall be made, may be exercised after said Monday has passed. Tousey *v.* Bell, 23 Ind. 423. Where a city charter refers to the general law of the state for the subject of taxation, and such general law requires that the property shall be assessed by a certain date, and thereafter the general law is changed as to such date, such change works a corresponding change as to the time of taxation by the municipality. Tackaberry *v.* Keokuk, 32 Iowa 155.

Provision as merely directory.—A charter requirement that the assessment roll must be delivered to the receiver of taxes on or before a certain day has been held merely directory and not mandatory, so that failure to follow it does not vitiate the tax. New York *v.* Ferris, 91 N. Y. App. Div. 223, 86 N. Y. Suppl. 600.

21. Lebanon *v.* Ohio, etc., R. Co., 77 Ill. 539; Nason *v.* Whitney, 1 Pick. (Mass.) 140. See also Lockey *v.* Walker, 12 Mont. 577, 31 Pac. 639.

Previous municipal assessment under old charter.— Garey *v.* Galveston, 42 Tex. 627.

22. *Indiana.*— Jones *v.* Columbus, 62 Ind. 421.

Mississippi.— Deason *v.* Dixon, 54 Miss. 585.

Montana.— Lockey *v.* Walker, 12 Mont. 577, 31 Pac. 639.

New York.— People *v.* Schoonover, 47 N. Y. App. Div. 278, 62 N. Y. Suppl. 180 [*affirmed* in 166 N. Y. 629, 60 N. E. 1118].

Pennsylvania.— Harding *v.* Repp, 19 Pa. Super. Ct. 439, holding that where a borough has been created out of a township, the borough may collect taxes on property situated in the borough without any other assessment than that made by the township assessor prior to the incorporation of the borough.

Washington.— Wingate *v.* Ketner, 8 Wash. 94, 35 Pac. 591.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2075.

23. James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661; Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523; West *v.* Newport News, 104 Va. 21, 51 S. E. 206; State *v.* Carson, 6 Wash. 250, 33 Pac. 428. See also Bessemer *v.* Tennessee Coal, etc., R. Co., 131 Ala. 138, 31 So. 492.

Railroad property.—Atlanta *v.* Wright, 119 Ga. 207, 45 S. E. 994; State *v.* Back, 72 Nebr. 402, 100 N. W. 952, 69 L. R. A. 561. But in South Carolina the statute providing for the assessment by a state board of all the property of a railroad company in the state for the taxes to be collected by county treasurers contains nothing which makes such assessments applicable to cities authorized to assess property within their limits for local taxation. State *v.* Talley, 50 S. C. 374, 27 S. E. 803.

24. Powell *v.* Madison, 21 Ind. 335.

Number of assessors.—An assessment required to be made by one of the assessors of the city is not rendered invalid by the fact that it was made and reported by two

although the legislature may authorize taxes within a city to be assessed in a different mode from that prescribed by the general laws of the state.[25]

(II) *Listing Property by Taxpayer.* In some jurisdictions it is provided that residents shall, by a specified time, deliver to the assessor or other officer a written list of their property for the purposes of taxation,[26] or that such a list shall be furnished on demand.[27] So it has been held that a city may require keepers of boarding houses, restaurants, and hotels to furnish the names of persons liable to poll tax, boarding or lodging in their houses, and impose a fine for refusal to do so.[28] The list is merely evidence from which an assessment may be made and the listing is not a condition precedent to a valid assessment.[29]

(III) *Description.* An accurate description of the land assessed is essential to the validity of the assessment,[30] but it is generally sufficient that the description be capable of being made certain by extrinsic evidence.[31] In some jurisdictions the failure to state the abstract and survey numbers of the land does not invalidate the assessment.[32] The property must be assessed in the name of the true owner.[33]

assessors. Matter of Gardner, 41 How. Pr. (N. Y.) 255.

Power of clerk of court.— Where the duty of levying taxes is imposed on the county court, its clerk cannot certify the amount due from any taxpayer, simply from a certificate from the city clerk as to the city rate of taxation, and without an order from the court. Kansas *v.* Hannibal, etc., R. Co., 81 Mo. 285.

Bank-stock.— Under a charter authorizing the city to tax bank-stock, the proper mode of taxing such stock is to assess it against the individual stock-holder and not in the name of the bank. Madison *v.* Whitney, 21 Ind. 261.

Assessment by wards.—Under Laws (1880), c. 596, an assessment in New York city was properly made by wards, and a confirmation by the board of aldermen is sufficient. McMahon *v.* Palmer, 11 Daly (N. Y.) 214 [*affirmed* in 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796].

25. State *v.* Blundell, 24 N. J. L. 402.

26. Wohlford *v.* Escondido, 2 Cal. App. 429, 84 Pac. 56; German Trust Co. *v.* Davenport Tp. Bd. of Equalization, 121 Iowa 325, 96 N. W. 878, holding that the statutory requirement applies to a resident agent having possession and control of taxable property of a non-resident of the state. See also Philadelphia *v.* Unknown Owner, 20 Pa. Super. Ct. 203; Hill *v.* Washington, 12 Fed. Cas. No. 6,501, 5 Cranch C. C. 114.

27. Gordon *v.* Norris, 29 N. H. 198; Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161, holding that a notice given by assessors, failing to require persons liable to taxation to bring in an exact account of their taxable property, was fatally defective.

28. Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

29. Dobbins *v.* Cartersville, 73 Ga. 137; Boothbay *v.* Race, 68 Me. 351. But see Powell *v.* Madison, 21 Ind. 335, holding that an assessor receiving an unsworn statement as to property thereby waives such oath and cannot disregard it and himself make a list of the person's taxable property.

30. Rochester *v.* Farrar, 44 Misc. (N. Y.) 394, 89 N. Y. Suppl. 1035; *Re* Jenkins, 25 Ont. 399. See also Matter of Wood, 35 N. Y. App. Div. 363, 54 N. Y. Suppl. 978 [*affirmed* in 163 N. Y. 605, 57 N. E. 1128], necessity for stating in assessment roll quantity of land assessed. *Compare* Coles *v.* Platt, 24 N. J. L. 108.

Sufficiency of particular descriptions.— Description of property, as contained in an assessment, as "store S. 4th and Mary Sts.," owned by "Moore Bros.," is sufficient for the purpose of an action to enforce a lien for the taxes, there being no difference between the several lots as to their liability for taxes, although the ordinance provides for giving the numbers of the block and lots. Cooper Grocery Co. *v.* Waco, 30 Tex. Civ. App. 623, 71 S. W. 619.

31. Eustis *v.* Henrietta, 90 Tex. 468, 39 S. W. 567.

32. Eustis *v.* Henrietta, 90 Tex. 468, 39 S. W. 567; Dallas Title, etc., Co. *v.* Oak Cliff, 8 Tex. Civ. App. 217, 27 S. W. 1036.

33. Washington *v.* Pratt, 8 Wheat. (U. S.) 681, 5 L. ed. 714. See also Glover *v.* Edgewater, 3 Thomps. & C. (N. Y.) 497, holding that the assessment of real property to a non-resident owner in the same manner as if he were a resident did not render the assessment void.

Registration of title.— But when the owner has not availed himself of the protection afforded by the registration of his title, the mention of his name in connection with the assessment of the land is only required as descriptive of the land; and, when the assessment and the claim within themselves clearly and absolutely identify the land, that is all that is required. Philadelphia *v.* Unknown Owner, 20 Pa. Super. Ct. 203.

Estates of deceased persons.— Where no form of assessment is prescribed by law, an assessment to "the estate of . . . deceased," where a large estate is shown to have been well known by that designation, is not such an error as will authorize setting aside the assessment. State *v.* Platt, 24 N. J. L. 108.

(iv) *Valuation.* The property should be taxed at its true value to be determined by the proper assessing officer in the manner prescribed by statute, charter provision, or ordinance.[34] In some municipalities the assessment, so far as the value of the property is concerned, must be made from the state, county, or town assessment book of the preceding year,[35] while in others the valuation must not exceed the valuation for state and county purposes.[36] But where not prohibited, a municipality may place a higher valuation on property than that placed on it by the state and county if such higher value is not an overvaluation.[37] The assessment in the prescribed mode, when without fraud or collusion, is conclusive upon the question of value, so far as the courts are concerned.[38]

(v) *Property Omitted From List.* The power of the assessor, unless it is otherwise specially provided, generally ends with the return of his roll or list to the proper office.[39] But in some jurisdictions provisions are made for placing upon the roll property overlooked when the assessment was made,[40] and taxable

34. Augusta *v.* Pearce, 79 Ga. 98, 4 S. E. 104; Howell *v.* Richards, 47 N. J. L. 434, 1 Atl. 495; Coles *v.* Platt, 24 N. J. L. 108 (assessment of building lots); People *v.* Feitner, 44 N. Y. App. Div. 278, 60 N. Y. Suppl. 687. See also Cumming *v.* Savannah, R. M. Charlt. (Ga.) 26, holding that the assessment of the value of goods from the best information obtainable was an arbitrary assessment violating private rights.

Fair approximation to reasonable value.— It is generally sufficient that the methods employed result in a fair approximation to reasonable value. Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489.

In Maine it is proper for the assessors to make only one valuation for each tax, state, county, and town, and blend together the several sums to be thus levied, making but one assessment for the whole. Rockland *v.* Ulmer, 84 Me. 503, 24 Atl. 949.

Separate valuation of lots.— Under a charter, providing that the assessors shall assess all the real estate in the city both of residents and non-residents by valuing the same at its true, full, fair value, designating the number of lots or parcels of land, the assessment of a block of lots of different values at their collective value in a round sum is not exceptionable. Coles *v.* Platt, 24 N. J. L. 108. The assessors may make and list one appraisal in gross of three separate lots of land not adjoining, nor in any way connected with, one another, instead of making and listing a separate appraisal for each lot. Rockland *v.* Ulmer, 84 Me. 503, 24 Atl. 949.

Actual value of unimproved lands.— Where the constitution declares that all assessments on property shall be at its "cash value," a charter providing that in assessing lands within the city held merely as farming lands, or wild and unimproved, they shall be assessed at their true cash value, considering the location, and not according to any prospective or supposed value as city property, is unconstitutional, the actual value of the land being the proper basis. Saltonstall *v.* Cheboygan, 132 Mich. 196, 93 N. W. 246. See also State *v.* O'Brien, 89 Mo. 631, 1 S. W. 763.

35. See *supra*, XV, D, 5, e, (iv).

36. Center Bldg. Co. *v.* St. Joseph, 108 Mo. 304, 18 S. W. 910, holding that where land was assessed at a certain valuation for taxation for state and county purposes and afterward buildings were erected thereon, the city assessor could not make an additional assessment on the buildings for city taxes where the last assessment roll for state and county purposes did not include such buildings.

37. Fulgum *v.* Nashville, 8 Lea (Tenn.) 635.

38. Bower *v.* Bainbridge, 116 Ga. 794, 43 S. E. 67; Augusta *v.* Pearce, 79 Ga. 98, 4 S. E. 104; Gadshy *v.* Portland, 38 Oreg. 135, 63 Pac. 14.

39. Oregon Steam Nav. Co. *v.* Portland, 2 Oreg. 81.

40. Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150; Owensboro *v.* Callaghan, 17 S. W. 278, 13 Ky. L. Rep. 418; Hodding *v.* New Orleans, 48 La. Ann. 982, 20 So. 199; Wheeling *v.* Hawley, 18 W. Va. 472.

Hearing and appeal.— Where an ordinance providing for the assessment of omitted property gave the taxpayer an opportunity to be heard before the city council, it was not invalid because it did not authorize an appeal from the decision of the council. Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150.

Conferring judicial power on council.— Where a city ordinance authorized the assessment of omitted property by the city council on five days' notice of hearing to the property-owner, it was not void on the ground that it conferred on the council jurisdiction of a judicial nature, violative of the constitutional limitations on the legislature to create any judicial tribunals other than the courts expressly named in that instrument. Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150.

Notice.— The power to assess property omitted carries the necessity of notice to the owner indispensable in all assessments. But the failure to give notice of the assessment of omitted property as required by law is waived by the payment of state taxes based on such assessment, since such payment shows that he had knowledge of the assessment. Hodding *v.* New Orleans, 48 La. Ann. 982, 20 So. 199.

property omitted for several years may be assessed for each of the years.[41] But authority conferred on the collector of taxes to assess persons whom the assessor has failed to list does not authorize him to add to an assessment property omitted therefrom belonging to a person assessed by the assessor.[42] And after the assessment has been returned and the tax levied thereon, the council has no power, in the absence of special statutory provisions, to order an additional assessment to be made of property subsequently coming within the city limits.[43] When an assessment roll has been substantially completed before passage of an ordinance levying a city tax, the fact that property not reported by owners is afterward added to the roll does not invalidate the tax.[44]

(VI) *POLL TAX.* The assessor is generally required to ascertain the names of all persons liable to a poll tax and enter them on the roll.[45]

(VII) *NOTICE OF COMPLETION OF ASSESSMENT.* In some jurisdictions notice to the taxpayers of the completion of the assessment and the receipt of the tax roll by the collector, with opportunity for inspection, must be given by publication or otherwise.[46]

g. Assessment Rolls, Books, and Warrants. The assessment roll, when completed, is generally required to be signed and verified,[47] and filed[48] or delivered to the receiver of taxes.[49] So the tax warrant is generally required to be

41. Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539.

Authority independent of statute.— Where property taxable in a city is not assessed there during the period prescribed by statute for making the assessment, the assessor is authorized, independently of statute, to assess it retrospectively at any time before the right to assess and collect taxes is barred by limitations. Botto *v.* Louisville, 117 Ky. 798, 79 S. W. 241, 25 Ky. L. Rep. 1918.

42. Wise *v.* Eastham, 30 Ind. 133.

43. Oregon Steam Nav. Co. *v.* Portland, 2 Oreg. 81.

44. Scollard *v.* Dallas, 16 Tex. Civ. App. 620, 42 S. W. 640.

45. Trumbull *v.* Palmer, 42 Misc. (N. Y.) 628, 87 N. Y. Suppl. 614.

46. Sherman *v.* Fisher, 138 Mich. 391, 101 N. W. 572 (holding that the absence of proof on file that notices were given was insufficient to create a presumption that the notices were not given as required by law, where there was no provision of the charter requiring such proof to be filed); New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659 (holding that publication in the City Record was sufficient unless the board designated some other way); People *v.* New Rochelle, 17 N. Y. App. Div. 603, 45 N. Y. Suppl. 836 (in which case it was held that the requirement of a village charter that notice of the completion of the assessment roll shall be given by advertisement in a newspaper, and that a copy of the assessment shall be left for a certain time with the village clerk for public inspection, is jurisdictional).

Deposit of books for inspection.— Where the board of tax commissioners made an assessment, and deposited the books for the inspection of the public, as required by law, an erroneous statement by the secretary as to the time when the assessment would be made up would not invalidate the act. People *v.* Feitner, 65 N. Y. App. Div. 224, 72 N. Y. Suppl. 641.

47. Lord *v.* Cooper, 19 N. Y. App. Div. 535, 46 N. Y. Suppl. 519, holding, however, that the provision in a village charter that the village assessor shall compile the assessment roll as nearly as practicable in the manner prescribed by law in respect to town assessors does not require that such assessment rolls shall be verified as town assessment rolls are verified.

In New Hampshire the signature on the assessments and invoices by the assessors is required. Signature at the end of the record of the warrant is sufficient as it is not required that it be signed in any particular way. Paul *v.* Linscott, 56 N. H. 347. Where an official invoice of the board of assessors of a town is correctly made and signed by them, and contains a proper description of the land assessed, and such invoice is made up and signed by the assessors as the true one, the fact that the original memorandum of one assessor contains an error in the description cannot vitiate the true official invoice as finally signed. Drew *v.* Morrill, 62 N. H. 23. Where an official certificate of assessment of municipal taxes is signed by a majority of the board of assessors, it is sufficient. Drew *v.* Morrill, *supra*. However, such a provision has been held merely directory and failure to sign does not invalidate the assessment. Odiorne *v.* Rand, 59 N. H. 504.

48. State *v.* Ensign, 54 Minn. 372, 56 N. W. 41, holding that a charter provision requiring the assessment roll and district judge's order confirming it to be filed and preserved in the office of the board of public works was not invalid for putting a district court record in a city office, where it was not in violation of the constitution.

49. New York *v.* Ferris, 91 N. Y. App. Div. 223, 86 N. Y. Suppl. 600, holding that the requirement of the New York city charter

signed[50] and sealed.[51] In some jurisdictions a tax bill authenticated by the assessor by his signature is *prima facie* proof that all steps have been taken to make it binding;[52] and affidavits annexed to the assessment roll that the same is correct have been held conclusive of the fact recited as against a collateral attack.[53]

h. Review of Assessment — (I) *In General.* In levying an assessment the assessors act judicially and their action has all the force and effect of a judgment.[54] Every presumption is to be taken in favor of the regularity of assessments,[55] and they will not be disturbed unless clearly excessive.[56] In some jurisdictions curative statutes have been passed which preclude reliance on any irregularity in the assessment.[57] Illegality in the assessment is not ground for setting it aside where it does not appear that the objecting taxpayer was not liable to taxation when the taxes were levied or that they exceed the sums justly assessable against him.[58] Except where it is otherwise provided by statute,[59] there is generally no power to arbitrarily reduce or remit a particular assessment after the levy and assessment,[60] especially after the delivery of the roll to the collector.[61] Where one whose property is subject only to a certain rate of taxation different from other property has no statutory remedy where the assessment is at a higher rate than is provided for by law, he may obtain relief by injunction.[62]

(II) *Statutory and Charter Provisions* — (A) *General Considerations.* In some jurisdictions a statutory board, which is sometimes the common council, is provided for to review the work of the assessors, either to examine individual assessments to correct errors and inequalities or to examine the assessment as an entirety to equalize assessments.[63] In some jurisdictions the board of review is

that the assessment roll shall be delivered to the receiver of taxes on the first day of September is merely directory, and not mandatory, and a failure to follow it does not vitiate the tax.

50. New York *v.* Streeter, 180 N. Y. 507, 72 N. E. 631 [*affirming* 91 N. Y. App. Div. 206, 86 N. Y. Suppl. 665], holding that where a city charter provides that the vice-chairman of the council may act as president when the latter is sick or absent or acting as mayor, his signature to a city tax warrant will be presumed to have been necessitated by one of the causes stated.

51. Rochester *v.* Bloss, 77 N. Y. App. Div. 28, 79 N. Y. Suppl. 236 [*affirmed* in 173 N. Y. 646, 66 N. E. 1105], holding that where the municipal tax warrant is required to be sealed an unsealed warrant is void.

52. Reed *v.* Louisville, 61 S. W. 11, 22 Ky. L. Rep. 1636.

53. New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

54. Commonwealth Bank *v.* New York, 43 N. Y. 184; New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

55. Wohlford *v.* Escondido, 2 Cal. App. 429, 84 Pac. 56 (holding that it is presumed that an assessment for taxes was regularly made and in conformity to a valid ordinance, and not in conformity to a subsequent invalid ordinance); Von Storch *v.* Scranton City, 3 Pa. Co. Ct. 567.

56. New Orleans *v.* Jefferson Gas Light Co., 35 La. Ann. 627.

57. Musselman *v.* Logansport, 29 Ind. 533; Rochester *v.* Fourteenth Ward Co-Operative Bldg. Lot Assoc., 183 N. Y. 23, 75 N. E. 692 (holding that failure to have the warrant of the mayor affixed to the assessment roll was a mere irregularity cured by the statute, but that the failure of the city to serve a certain required notice was not cured); Rochester *v.* Farrar, 44 Misc. (N. Y.) 394, 89 N. Y. Suppl. 1035 (holding, however, that a curative statute did not validate an assessment which was wholly void for a failure to sufficiently describe land).

58. Saunders *v.* Morris, 48 N. J. L. 99, 2 Atl. 666.

59. *In re* Briggs, 29 N. H. 547, holding that where the statute authorizes the common council to abate any tax where good cause therefor is shown, a tax may be abated where the person against whom it was assessed has become insolvent since the assessment.

60. See Manufacturers' Bank *v.* Troy, 24 How. Pr. (N. Y.) 250.

In Pennsylvania the city councils of cities of the third class have no power to exonerate taxpayers from the payment of a portion of the taxes for one year. Stevens *v.* Scranton, 3 Lanc. L. Rev. 393.

While the assessing authorities have the rolls in their possession in an incomplete state they may reduce the assessment, but not after the assessment has passed from their hands. City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313.

61. Collins *v.* Davis, 57 Iowa 256, 10 N. W. 643.

62. Joesting *v.* Baltimore, 97 Md. 589, 55 Atl. 456.

63. *Indiana.*— Jones *v.* Columbus, 62 Ind. 421.

Iowa.— Garrett *v.* Wells, 63 Iowa 256, 18

authorized to make alterations of its own motion.[64] Failure of the taxpayer to avail himself of the remedy by presenting evidence to the board precludes his right to resort to the courts in the first instance to procure a revision of the assessment.[65]

(B) *Jurisdiction and Power.* Such tribunals to review assessments have only the powers conferred upon them by statute.[66] Authority to equalize confers no power to determine taxability,[67] nor does mere power to equalize confer authority to raise the assessed value of all the property in the municipality a certain per cent.[68] But generally the board may increase[69] or decrease[70] the valuation of any particular property.

(C) *Procedure.* The procedure of the board of review must be in strict compliance with the statutory or charter provisions.[71] It must act at a regular meet-

N. W. 899; Kinsey *v.* Sweeney, 63 Iowa 254, 18 N. W. 896.

Maryland.— James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661.

New Jersey.— Cooper *v.* Cape May Point, 72 N. J. L. 164, 60 Atl. 516, holding, under a particular charter, that it was the duty of the council to examine the assessment list and duplicate, make such corrections as found necessary, and return the corrected duplicate to the assessor.

New York.— People *v.* McCue, 173 N. Y. 347, 66 N. E. 15 [*reversing* on other grounds 74 N. Y. App. Div. 40, 77 N. Y. Suppl. 303].

Ohio.— State *v.* Holmes, 20 Ohio St. 474.

Virginia.— Heth *v.* Radford, 96 Va. 272, 31 S. E. 8.

Wisconsin.— Morey *v.* Racine, 116 Wis. 8, 92 N. W. 426, holding that, under particular charter provisions, it was part of the duty of the assessors to serve on the board of review and that their compensation covers such duties.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2083.

Constitutional provisions as applicable to municipal taxes.— Const. art. 8, § 18, which declares that the county commissioners' court shall constitute a board of equalizing assessments, applies to state and county taxes, and not to city taxes. Scollard *v.* Dallas, 16 Tex. Civ. App. 620, 42 S. W. 640.

Appointment.— In Kentucky a taxpayer who has not complained of his assessment cannot complain that the board of equalization was not regularly appointed, as the statute provides that, when the taxpayer complains of his assessment, a board shall then be chosen, if none has theretofore been elected. Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Fonda *v.* Louisville, 49 S. W. 785, 20 Ky. L. Rep. 1652.

Implied power.— Power conferred upon the mayor and aldermen to levy, assess, and collect taxes through a city assessor authorizes them to amend an assessment so made. East Tennessee, etc., R. Co. *v.* Morristown, (Tenn. Ch. App. 1895) 35 S. W. 771.

Repeal of provisions see State Tax Com'rs *v.* Grand Rapids, 124 Mich. 491, 83 N. W. 209; State *v.* Clarke, 68 Ohio St. 463, 67 N. E. 887; State *v.* Godfrey, 25 Ohio Cir. Ct. 62; Pierce County *v.* Spike, 19 Wash. 652, 54 Pac. 41.

64. Ludlow *v.* Lewis, 9 Ohio S. & C. Pl. Dec. 600, 6 Ohio N. P. 513.

65. People *v.* Feitner, 65 N. Y. App. Div. 224, 72 N. Y. Suppl. 641, holding that where a corporation sent a notice applying for the revision of a personal tax assessed against it, but took no further steps to procure a hearing, and offered no testimony respecting the claim, it had no standing to procure a revision of the assessment on certiorari.

66. *California.*— Oakland *v.* Southern Pac. Co., 131 Cal. 226, 63 Pac. 371.

Indiana.— Jones *v.* Columbus, 62 Ind. 421.

Louisiana.— Mercier *v.* New Orleans, 38 La. Ann. 958.

Ohio.— Gazlay *v.* Humphreys, 7 Ohio Dec. (Reprint) 102, 1 Cinc. L. Bul. 114; Ludlow *v.* Lewis, 9 Ohio S. & C. Pl. Dec. 600, 6 Ohio N. P. 513.

Pennsylvania.— Castor *v.* Philadelphia, 26 Leg. Int. 189.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2085.

67. Indianapolis *v.* Sturdevant, 24 Ind. 391; Board of Liquidation *v.* Thoman, 42 La. Ann. 605, 8 So. 482; San Antonio St. R. Co. *v.* San Antonio, 22 Tex. Civ. App. 341, 54 S. W. 907. See also Wood *v.* Quimby, 20 R. I. 482, 40 Atl. 161. *Compare* Lee *v.* Thomas, 49 Mo. 112.

68. Dalton *v.* East Portland, 11 Oreg. 426, 5 Pac. 193.

69. Ludlow *v.* Lewis, 9 Ohio S. & C. Pl. Dec. 600, 6 Ohio N. P. 513 (holding that members of boards are not to enter upon the property but may form their opinion in such manner as seems to them advisable); Rose *v.* Durham, 10 Okla. 373, 61 Pac. 1100; Streight *v.* Durham, 10 Okla. 361, 61 Pac. 1096.

In California the board cannot raise an assessment without a hearing and the introduction of evidence. Oakland *v.* Southern Pac. Co., 131 Cal. 226, 63 Pac. 371.

70. Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489.

71. Los Angeles *v.* Los Angeles City Waterworks Co., 49 Cal. 638; U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863, holding, however, that the legislature has the power in creating a board to declare that errors or omissions in the failure to publish a printed notice of the place or time of the sittings of the board should not invalidate the tax. See also Board of Liquidation *v.* Thoman, 42

ing,[72] or at a regularly adjourned meeting,[73] at the time and place prescribed by law and fixed by the notice given,[74] and usually notice of the sittings must be duly given.[75] So it is usually expressly provided that notice of an increase of an assessment on particular property must be given before the increase will become effectual.[76]

(D) *Effect of Unauthorized Alterations.* An unauthorized alteration of items on an assessment roll is void;[77] but it does not invalidate the entire assessment.[78] The city council has no statutory authority to restore an assessment to the amount originally fixed by the assessor after it has been reduced by the board, although the latter acted without authority.[79]

(E) *Review of Acts of Board.* In some jurisdictions the decisions of the board are subject to review by the courts by appeal,[80] or by certiorari.[81] In some jurisdictions where the court has once confirmed a report of the board it cannot subsequently modify or amend the order of confirmation.[82] Generally the action of the board is judicial and not subject to collateral attack,[83] except for want of jurisdiction,[84] or for fraud.[85]

La. Ann. 605, 8 So. 482, approval or rejection of act of board by common council.

72. See Cramer *v.* Stone, 38 Wis. 259.

Acts of majority.— The action of the majority of a city board of equalization in making an assessment is legal, if all the members are notified of the meeting. Cuming *v.* Grand Rapids, 46 Mich. 150, 9 N. W. 141.

73. Nixon *v.* Biloxi, 76 Miss. 810, 25 So. 664.

74. Curtis *v.* South Omaha, 67 Nebr. 539, 93 N. W. 743, holding that meetings held at a place other than that named in the notice invalidated the action of the board.

75. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

Publication.— Failure of the assessors to publish notice of their meeting to hear complaints as to the assessment roll in both papers published in a village is not fatal where a notice was given, and it is not shown that an opportunity to be heard was denied any taxpayer. Trumbull *v.* Palmer, 42 Misc. (N. Y.) 628, 87 N. Y. Suppl. 614.

Effect of failure to have notice appear of record.— Where the records of a village council do not contain any proof of the posting of the notices of the meeting of the board of review required under Howell Annot. St. Mich. § 2930, this omission alone will not render the assessment void. Boyce *v.* Peterson, 84 Mich. 490, 47 N. W. 1095.

Irregularities in giving the notice which do not affect the substantial justice of the tax do not vitiate the proceedings where it is provided by the charter that irregularities not affecting the substantial justice of the tax will not vitiate it. Cramer *v.* Stone, 38 Wis. 259.

76. Los Angeles *v.* Los Angeles City Waterworks Co., 49 Cal. 638; Baltimore *v.* Robert Poole, etc., Co., 97 Md. 67, 54 Atl. 681, holding that failure to notify the property-owner is a jurisdictional defect and the assessment is void. But see Clayton *v.* Chicago, 44 Ill. 280; Scammon *v.* Chicago, 44 Ill. 269. *Compare* Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661; Apgar *v.* Hayward, 110 N. Y. 225, 18 N. E. 85 [*reversing* 53 N. Y. Super. Ct. 357].

What constitutes waiver see Cedar Rapids, etc., R. Co. *v.* Redmond, 120 Iowa 601, 94 N. W. 1096. Appearance before the board, and a hearing of his objections, is a waiver of a taxpayer's right to notice of an increase in his assessment. People *v.* Schoonover, 47 N. Y. App. Div. 278, 62 N. Y. Suppl. 180 [*affirmed* in 166 N. Y. 629, 60 N. E. 1118].

77. Sherlock *v.* Winnetka, 68 Ill. 530; St. Louis County *v.* Nettleton, 22 Minn. 356.

78. Sherlock *v.* Winnetka, 68 Ill. 530; Wead *v.* Omaha, 73 Nebr. 321, 102 N. W. 675, holding that where proceedings up to the time of an assessment by the board of equalization of a city are regular, and in its determination the board errs so as to cause an excessive apportionment of a tax on a particular piece of property, such error will not in equity defeat the whole tax.

79. Blume *v.* Bowes, 65 N. J. L. 470, 47 Atl. 487.

80. Randell *v.* Bridgeport, 62 Conn. 440, 26 Atl. 578; Joesting *v.* Baltimore, 97 Md. 589, 55 Atl. 456, holding that, although Acts (1898), p. 336, c. 123, § 170, provides for appeal from the appeal tax court to the city court in cases of erroneous valuation of property by the former tribunal, yet for erroneous classification of property for taxation no remedy is given by that section.

81. Collins *v.* Davis, 57 Iowa 256, 10 N. W. 643, holding that the action of a city council in receiving and acting upon a petition by an individual for the reduction of taxes is a judicial act, and may be reviewed by certiorari.

Discretionary acts cannot be reviewed by certiorari.— Polk County *v.* Des Moines, 70 Iowa 351, 30 N. W. 614.

82. Rutherford *v.* Meginnis, 72 N. J. L. 444, 60 Atl. 1125.

83. Wead *v.* Omaha, 73 Nebr. 321, 102 N. W. 675.

84. Ludlow *v.* Lewis, 9 Ohio S. & C. Pl. Dec. 600, 6 Ohio N. P. 513.

85. Wead *v.* Omaha, 73 Nebr. 321, 102

6. Lien of Taxes[86]**— a. Existence.** Municipal taxes are liens upon the property upon which they are assessed only where they are expressly made so by statute or charter provision,[87] or by act of the municipality pursuant to authority delegated by the legislature.[88] Substantial compliance with the statutory provisions is essential to the validity of the lien.[89] When fixed it is superior to the rights of subsequent purchasers.[90]

b. Accrual and Duration. The lien usually attaches at the time when the assessment roll and the warrants for collection come into the hands of the receiver or collector of taxes.[91] The duration of the lien is generally fixed by statutes or charter provisions at a certain number of years,[92] but the claim may be merged

N. W. 675 (holding that under the Omaha charter, the action of the board is not open to collateral attack except for fraud, gross injustice, or mistake, and that the charter provision that no court shall entertain any complaint that a party was authorized to make and did not make to the board nor any complaint not specified in the notice fully enough to advise the city of the exact nature thereof, nor any complaint that does not go to the equity of the tax do not apply to cases of fraud, gross injustice, or mistake); Ludlow *v.* Lewis, 9 Ohio S. & C. Pl. Dec. 600, 6 Ohio N. P. 513.

"Gross injustice."—Nebr. Comp. St. (1901) c. 12*a*, § 161, providing that the action of the board of equalization of the city of Omaha may be attacked for fraud, gross injustice, or mistake, in the use of the term "gross injustice" means an act so excessive in its nature as to deprive a citizen of his property or a part thereof without due process of law. Wead *v.* Omaha, 73 Nebr. 321, 102 N. W. 675.

86. Enforcement see *infra*, XV, D, 8, e.

87. *Alabama.*— Daughdrill *v.* Crosby, 35 Ala. 345.

Kentucky.—Middlesboro *v.* Coal, etc., Bank, 108 Ky. 680, 57 S. W. 497, 22 Ky. L. Rep. 380.

Missouri.— State *v.* Shepherd, 74 Mo. 310; Jefferson *v.* Whipple, 71 Mo. 519; Springfield *v.* Starke, 93 Mo. App. 70.

Oregon.— Ross *v.* Portland, 42 Oreg. 134, 70 Pac. 373.

Pennsylvania.— Camac *v.* Beatty, 5 Phila. 129.

Texas.—People's Nat. Bank *v.* Ennis, (Civ. App. 1899) 50 S. W. 632.

United States.— Georgetown *v.* Smith, 10 Fed. Cas. No. 5,347, 4 Cranch C. C. 91.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2087.

Lien as confined to real property only see Daughdrill *v.* Crosby, 35 Ala. 345.

Constitutional objections.—A statute making taxes liens on real estate in certain classes of cities violates the constitutional provision that taxes shall be levied and collected under general laws. Pittsburgh *v.* Hughes, 13 Pa. Co. Ct. 535; Miller *v.* Cunningham, 7 Pa. Co. Ct. 500.

Retroactive effect.—A charter provision that all taxes shall be a lien on property until paid applies only to taxes levied after the charter went into effect. Brummer *v.* Galveston, 97 Tex. 93, 76 S. W. 428.

General statutes as applicable to municipalities see Stewart's Succession, 41 La. Ann. 127, 6 So. 587; People's Nat. Bank *v.* Ennis, (Tex. Civ. App. 1899) 50 S. W. 632.

Repeal of statute see State *v.* Sheperd, 74 Mo. 310; Philadelphia *v.* Congers, 150 Pa. St. 35, 24 Atl. 675; Philadelphia *v.* Kates, 150 Pa. St. 30, 24 Atl. 673; Barclay *v.* Leas, 9 Pa. Co. Ct. 314; Camac *v.* Beatty, 5 Phila. (Pa.) 129.

88. Springfield *v.* Starke, 93 Mo. App. 70; Houstonia *v.* Grubbs, 80 Mo. App. 433; Barker *v.* Smith, 10 S. C. 226.

89. Reading *v.* Krause, 167 Pa. St. 23, 31 Atl. 366; Lancaster *v.* Dean, 1 Lanc. L. Rev. (Pa.) 249.

Certification of unpaid taxes by treasurer. — Under the act of May 23, 1889, requiring the city treasurer at a certain time to certify schedules of unpaid taxes to the city solicitor, to be registered by him as liens, certification by the treasurer is essential to authorize filing of the liens. Reading *v.* Krause, 167 Pa. St. 23, 31 Atl. 366.

90. Middlesboro *v.* Coal, etc., Bank, 108 Ky. 680, 57 S. W. 497, 22 Ky. L. Rep. 380; Georgetown *v.* Smith, 10 Fed. Cas. No. 5,347, 4 Cranch C. C. 91.

91. Eaton *v.* Chesebrough, 82 Mich. 214, 46 N. W. 365; Hohenstatt *v.* Bridgeton, 62 N. J. L. 169, 40 Atl. 649, holding that where the tax lien, in cities whose charter does not otherwise provide, extends three years from the "date of levy and assessment," the lien begins to run from the day of the delivery of the tax duplicate to the collector. *Compare* Camac *v.* Beatty, 5 Phila. (Pa.) 129.

92. *Kentucky.*— Louisville *v.* Burke, 87 S. W. 269, 27 Ky. L. Rep. 896.

Louisiana.— Rousset *v.* New Orleans, 115 La. 551, 39 So. 596; Peoples' Homestead Assoc. *v.* Garland, 107 La. 476, 31 So. 892.

New Jersey.— Harned *v.* Camden, 66 N. J. L. 520, 49 Atl. 1082; Hohenstatt *v.* Bridgeton, 62 N. J. L. 169, 40 Atl. 649; *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363; Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802.

Pennsylvania.— Philadelphia *v.* Reeves, 15 Pa. Super. Ct. 535; Brooke *v.* Kaufman, 6 Pa. Dist. 513; Grubb *v.* Weaver, 19 Pa. Co. Ct. 609; Chester *v.* Sinex, 8 Del. Co. 160.

South Carolina.— Barker *v.* Smith, 10 S. C. 226.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2088.

into a judgment during such time and thus continue as a lien under the general statutes relating to judgments or under special statutory provisions.[93] In some municipalities, however, it is provided that the taxes shall constitute a lien until paid,[94] at least where certain required steps are taken from time to time.[95]

c. Priority. Priority of the tax lien is often fixed by express provisions in a statute or charter.[96] In some jurisdictions the statutes give the tax lien priority over mortgages, although executed before the tax was levied;[97] but where the statute does not so provide, expressly or by necessary implication, a prior mortgage is ordinarily entitled to priority.[98]

d. Discharge. A sale of land for taxes, where it is insufficient to pay all back taxes, does not discharge the lien.[99] Where municipal authorities destroy the lien of a tax lien certificate by settling with the owner of the land and accepting from him a reduced amount, an implied obligation arises that the municipality will pay the difference to the holder of the certificate.[1]

7. Payment[2] — a. In General — (i) *Time When Due.* Taxes are due and payable at the time fixed by the statute, charter provisions, or ordinances.[3] Where no time is fixed for the payment, the tax does not become delinquent until the council has determined by ordinance the date when it shall be paid.[4] Municipal power to provide for the levy and collection of local taxes includes power to provide that such taxes shall become due at a different time from the general taxes.[5]

Where an action to enforce the lien is commenced before the expiration of the statutory period fixed for the duration of the lien, the lien is lost if for any reason the action abates or is dismissed; and the lien is also lost where the municipality is guilty of gross negligence in prosecuting the action in which the lien is asserted. Louisville *v.* Burke, 87 S. W. 269, 27 Ky. L. Rep. 896.

Confusion of goods.— The lien may be lost by the negligence of the municipality in permitting a confusion of goods so that the property on which the lien exists cannot be separated from other property belonging to the owner. Ft. Worth *v.* Boulware, 26 Tex. Civ. App. 76, 62 S. W. 928.

93. Philadelphia *v.* Congers, 150 Pa. St. 35, 24 Atl. 675 [*reversing* on other grounds 28 Wkly. Notes Cas. 152]; Philadelphia *v.* Kates, 150 Pa. St. 30, 24 Atl. 673.

94. Chester *v.* Sinex, 8 Del. Co. (Pa.) 160; State *v.* Mutty, 39 Wash. 624, 82 Pac. 118.

95. Brooke *v.* Kaufman, 6 Pa. Dist. 513; Ellis *v.* Kies, 1 Dauph. Co. Rep. (Pa.) 195.

96. *In re* First Drainage Dist., 28 La. Ann. 513; Smith *v.* Meadowbrook Brewing Co., 3 Lack. Jur. (Pa.) 145. See also Middlesboro *v.* Coal, etc., Bank, 108 Ky. 680, 57 S. W. 497, 22 Ky. L. Rep. 380.

97. Macknet *v.* Newark, 42 N. J. L. 38 (holding that a charter provision that personal taxes shall be a lien on all the real estate of the taxpayer, and that taxes on real estate shall be a lien on the real estate assessed, notwithstanding any encumbrance thereof, taxes on real estate have priority over mortgages, but taxes on personal property of the owner of the land have no such priority); Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Hardenbergh *v.* Converse, 31 N. J. Eq. 500; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667; Barclay *v.* Leas, 9 Pa. Co. Ct. 314. See also Smith *v.* Gatewood, 3 S. C. 333.

Mortgages to state or public officers.— Such provisions do not apply to mortgages made to the state or its representatives. Jersey City *v.* Foster, 32 N. J. Eq. 825; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667 [*affirming* 30 N. J. Eq. 618].

98. Doane *v.* Chittenden, 25 Ga. 103 (holding that under a provision that the tax execution shall bind the property only from the date thereof, a prior mortgage is superior to the tax); Lucking *v.* Ballantyne, 132 Mich. 584, 94 N. W. 8 (chattel mortgage); Ft. Worth *v.* Boulware, 26 Tex. Civ. App. 76, 62 S. W. 928.

Priority against other lien in case of confusion of goods.— The burden is on the city to point out the particular goods or portion of the whole stock on which its tax lien existed, and, if it has negligently permitted the confusion of such goods with goods which were subsequently purchased, and which were not subject to the tax, it cannot recover. Ft. Worth *v.* Boulware, 26 Tex. Civ. App. 76, 62 S. W. 928.

99. Duffy *v.* Philadelphia, 42 Pa. St. 192.

1. Lyon *v.* District of Columbia, 19 Ct. Cl. 649.

2. See, generally, Payment; Taxation.

3. Brunswick *v.* Finney, 54 Ga. 317, holding that where a tax was required by the charter to be made payable in quarterly instalments at such times as the mayor and council should direct, and the fiscal year was the same as the calendar year, the council could indulge taxpayers for the first or second quarter and make instalments payable in the second or third quarter so long as they did not make any quarterly instalment payable before each would be due under the charter.

4. Dixon *v.* Mayes, 72 Cal. 166, 13 Pac. 471.

5. Eustis *v.* Henrietta, (Tex. Civ. App. 1896) 37 S. W. 632.

In some jurisdictions the time when the taxes shall become payable and the rate of interest which shall thereafter accrue must be determined at the time the tax levy is made.[6]

(II) *Medium of Payment.* Municipal taxes are generally required to be paid in money,[7] although it is sometimes provided that payment may be made in other specified property,[8] or that the taxpayers may work out such taxes if they so elect.[9] Except where it is otherwise provided, the municipality cannot be compelled to accept as payment a cancellation of a debt it owes to the taxpayer,[10] nor can the taxpayer set up a counter-claim or set-off.[11]

(III) *Interest.* Except where it is otherwise specially provided,[12] interest on taxes does not begin to run until after a default in making payment.[13] Where the municipal charter itself creates a liability for interest on unpaid city taxes, no ordinance is necessary to make such provision operative.[14]

(IV) *Power to Take Security For Payment.* Public policy does not forbid a municipality to take the taxpayer's note and mortgage for his delinquent taxes.[15]

6. Rockland *v.* Rockland Water Co., 82 Me. 188, 19 Atl. 163.

7. Trenholm *v.* Charleston, 3 S. C. 347, 16 Am. Rep. 732; Houston *v.* Stewart, (Tex. 1905) 87 S. W. 663; Wagner *v.* Porter, (Tex. Civ. App. 1900) 56 S. W. 560. And see, generally, TAXATION.

Void municipal certificates.— Certificates of city indebtedness which are void as having been issued in excess of the constitutional limitation of indebtedness are not receivable in payment of taxes. Fuller *v.* Chicago, 89 Ill. 282.

8. New Orleans *v.* Jackson, 33 La. Ann. 1038; Western Town-Lot Co. *v.* Lane, 7 S. D. 599, 65 N. W. 17 (holding that a statute making city warrants receivable for city taxes does not restrict the use of warrants in payment of taxes to such as were issued on account of debts incurred during the year for which the taxes were assessed); Houston *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49 (coupons and scrip). See also Miller *v.* Lynchburg, 20 Gratt. (Va.) 330.

Privilege as personal.— The privilege conferred upon particular parties to pay taxes in judgments or evidences of debt against the city does not enable other parties to claim the same privilege. Jones *v.* Shreveport, 28 La. Ann. 835.

When privilege terminates.— When the privilege is given of paying in coupons, warrants, or scrip, it must be exercised before the time for payment has passed. Bummel *v.* Houston, 68 Tex. 10, 2 S. W. 740.

9. White Sulphur Springs *v.* Pierce, 21 Mont. 130, 53 Pac. 103.

10. Trenholm *v.* Charleston, 3 S. C. 347, 16 Am. Rep. 732; Wagner *v.* Porter, (Tex. Civ. App. 1900) 56 S. W. 560.

Warrants or certificates of indebtedness.— A city is not bound to receive its own warrants or certificates of indebtedness in payment of city taxes, it never having been authorized by law to issue corporate obligations to circulate as money. Lindsey *v.* Rottaken, 32 Ark. 619.

Right to receive city scrip where nothing can be collected.— But an injunction to restrain a city from receiving city scrip in payment of arrears of taxes levied to pay interest on certain bonds will be denied, where it appears that, unless such scrip is taken, the taxes cannot be collected at all. Ranger *v.* New Orleans, 20 Fed. Cas. No. 11,564, 2 Woods 128.

11. Hawkins *v.* Sumter County, 57 Ga. 166.

12. King *v.* Marvin, 51 N. J. L. 298, 17 Atl. 162; Hoboken Land, etc., Co. *v.* Marvin, 51 N. J. L. 285, 17 Atl. 158, holding that where a statute provided that the assessment should be collected "with interest thereon" in annual instalments, the interest was due from the date of the assessment.

13. New Orleans Second Municipality *v.* Orleans Cotton Press, 6 Rob. (La.) 411; Morehouse *v.* Bowen, 9 Minn. 314; Prindle *v.* Campbell, 9 Minn. 212; Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537. See, generally, TAXATION.

Rate.—A charter provision that unpaid taxes shall bear interest at the rate of eight per cent from the date they are due is not in conflict with a constitutional provision limiting the rate of interest under contracts to ten per cent, and providing that when no interest is agreed on the rate shall not exceed six per cent. Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537.

14. Nalle *v.* Austin, (Tex. Civ. App. 1906) 93 S. W. 141.

15. Buffalo *v.* Balcom, 134 N. Y. 532, 32 N. E. 7; Clark *v.* Locke, 9 N. Y. Suppl. 918; Belleville *v.* Fahey, 5 Can. L. J. N. S. 73. See also Lapierre *v.* St.-Louis du Mile-End, 12 Quebec Super. Ct. 129.

In the absence of charter restrictions, a city to which land is struck off at a tax-sale in default of other bidders has the power to surrender the certificates of sale to the taxpayer, and to take from him a mortgage to secure the payment of the delinquent taxes, as there is no rule of public policy which requires the city to sell such certificates of sale for cash only, or which prevents its dealing directly with the owners of the land. Buffalo *v.* Balcom, 134 N. Y. 532, 32 N. E. 7.

(v) *Payment Out of Proceeds of Judicial or Execution Sale.* Except where it is otherwise provided by statute, municipal taxes are not payable out of sales of land to satisfy a debt.[16]

b. Refunding or Recovery of Taxes Paid — (i) *In General.*[17] The refunding of illegal or excessive taxes is often expressly provided for by statute.[18] Independent of statute, the right to recover illegal taxes which have been paid has been held to exist in some cases without considering the question whether the payment was voluntary or involuntary,[19] and even where the payment was voluntary.[20] Generally, however, if taxes, although illegal, are voluntarily paid without coercion and without mistake of fact, they cannot be recovered back;[21] but

16. South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58.

General statute as applicable to municipal taxes.— The code provision making it the duty of a sheriff selling property under a levy to ascertain the amount of taxes due, and pay them over to the tax-collector, has no application to taxes due to, and collectable by, a municipal corporation. State *v.* Vincent, 78 Ala. 233; Holling *v.* Thomas, 62 Ala. 4.

Where claim for taxes a prior lien.— But proceeds of property sold under execution are subject to the lien of the city for unpaid taxes. Vanarsdalen's Appeal, 3 Wkly. Notes Cas. (Pa.) 463.

17. See, generally, Payment; Taxation.

18. Corbett *v.* Widher, 123 Cal. 154, 55 Pac. 764; Indianapolis *v.* Ritzinger, 24 Ind. App. 65, 56 N. E. 141. *Compare* Stevens *v.* Scranton, 3 Lanc. L. Rev. (Pa.) 393.

Statute as mandatory.— A statutory provision that the common council may at any time order the amounts erroneously assessed against and collected from any taxpayer to be refunded is mandatory. De Pauw Plate-Glass Co. *v.* Alexandria, 152 Ind. 443, 52 N. E. 608; Indianapolis *v.* McAvoy, 86 Ind. 587; Indianapolis *v.* Ritzinger, 24 Ind. App. 65, 56 N. E. 141.

It is within the power of the legislature to require a municipality to guarantee the return, with interest, of all money paid for void delinquent tax certificates. State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

Defenses.— Under an ordinance requiring a city to refund taxes erroneously levied, a taxpayer is not precluded from recovering by the mere fact that he paid the first instalment of a tax without protest, or that he saw without protest the making of the improvement for which it was levied, he not knowing that the city intended to assess the adjacent property for the cost thereof. Robinson *v.* Burlington, 50 Iowa 240.

Conditions precedent.— Under a statute giving a municipal corporation ninety days either to refund an assessment which it is claimed is illegal or refuse to do so, there can be no recovery where there is nothing to indicate that a formal protest has been made or that the city council has passed on and rejected the claim McClay *v.* Lincoln, 32 Nebr 412, 49 N W. 282.

What constitutes agreement to refund.— A city ordinance acknowledging the illegality of certain taxes, directing the issuance of certificates of payment of such taxes, and attempting to make such certificates receivable for city taxes contrary to the statute, which provides in what kind of funds taxes shall be paid, does not constitute an agreement to refund such illegal taxes. Conklin *v.* Springfield, 132 Ill. 420, 24 N. E. 67 [*affirming* 19 Ill. App. 167].

Repeal of statutes see Leonard *v.* Indianapolis, 9 Ind. App. 262, 36 N. E. 725.

19. Hurley *v.* Texas, 20 Wis. 634. See also New Orleans Bank *v.* New Orleans, 12 La. Ann. 421; Loring *v.* St. Louis, 10 Mo. App. 414 [*affirmed* in 80 Mo. 461]. But see Hyde *v.* New Orleans, 11 La. Ann. 191, holding that where plaintiff paid in error municipal taxes illegally levied for certain years, and afterward a law authorized the taxes for those years to be, and they actually were, levied, plaintiff cannot recover back to-day what he will be forced to return to-morrow.

20. Galveston *v.* Sydnor, 39 Tex. 236.

21. *Connecticut.*— Goddard *v.* Seymour, 30 Conn. 394.

Georgia.— McGehee *v.* Columbus, 69 Ga. 581.

Illinois.—Farmers', etc., Bank *v.* Vandalia, 57 Ill. App. 681. *Compare* Aurora *v.* Chicago, etc., R. Co., 19 Ill. App. 360.

Louisiana.— Campbell *v.* New Orleans, 12 La. Ann. 34. See also New Orleans Bank *v.* New Orleans, 12 La. Ann. 421.

Maine.— Smith *v.* Readfield, 27 Me. 145.

Maryland.— Morris *v.* Baltimore, 5 Gill 244.

Missouri.— Christy *v.* St. Louis, 20 Mo. 143, 61 Am. Dec. 598; Walker *v.* St. Louis, 15 Mo. 563.

New York.— New York, etc., R. Co. *v.* Marsh, 12 N. Y 308; U. S. Trust Co. *v.* New York, 77 Hun 182, 28 N. Y. Suppl. 344 [*affirmed* in 144 N. Y. 488, 39 N. E. 383]; People *v.* Brinckerhoff, 40 Hun 381; Union Bank *v.* New York, 51 Barb. 159. See also Commonwealth Bank *v.* New York, 43 N. Y. 184.

Pennsylvania.—Union Ins. Co. *v.* Allegheny, 101 Pa. St. 250; McCrickart *v.* Pittsburgh, 88 Pa. St. 133; Allentown *v.* Saeger, 20 Pa. St 421.

Rhode Island.—Dunnell Mfg. Co. *v.* Newell, 15 R. I. 233, 2 Atl. 766.

Wisconsin.— Babcock *v.* Fond du Lac, 58 Wis. 230, 16 N. W. 625.

See 36 Cent. Dig. tit. "Municipal Corpora-

where the payment is involuntary, taxes paid may be recovered back.[22] Whether a payment is voluntary or involuntary is to be determined by the rules relating to payments in general.[23] Where the payment is of an excessive amount, the only remedy in some jurisdictions is by an application under the statute for an abatement.[24]

(II) *Mistake of Law or Fact.* Payments made because of a mistake of fact are ordinarily recoverable,[25] but not where the mistake is one of law.[26] Mistake in believing an illegal assessment to be legal has been held a mistake of law so as to preclude a recovery.[27]

tions," § 2100. And see, generally, TAXATION.

22. Deady *v.* Lyons, 39 N. Y. App. Div. 139, 57 N. Y. Suppl. 448; Matheson *v.* Mazomanie, 20 Wis. 191. *Compare* Gordon *v.* Baltimore, 5 Gill (Md.) 231; Lorillard *v.* Monroe, 11 N. Y. 392, 62 Am. Dec. 120 [*affirming* 12 Barb. 161]. And see, generally, TAXATION.

Liability of county for amount of tax received by city see Merchants' Nat. Bank *v.* New York County, 3 Hun (N. Y.) 156, 5 Thomps. & C. 393 [*affirmed* in 62 N. Y. 629].

23. See, generally, PAYMENT; TAXATION. See also Gordon *v.* Baltimore, 5 Gill (Md.) 231; Union Bank *v.* New York, 51 N. Y. 638 [*reversing* 51 Barb. 159]; Union Ins. Co. *v.* Allegheny, 101 Pa. St. 250; Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974.

When collector may summarily distrain.— Where, in case a tax is not paid, the tax-collector may without suit enforce payment by levy and sale, a payment of the tax is not voluntary, so as to preclude an action to recover it back. Mills *v.* Hopkinsville, 11 S. W. 776, 11 Ky. L. Rep. 164.

Existence of warrants for collection.— The mere fact that the taxes were paid collectors who had warrants for collection is not sufficient proof of duress to make the payment involuntary. Chicago *v.* Fidelity Sav. Bank, 11 Ill. App. 165; Smith *v.* Readfield, 27 Me. 145. *Contra*, Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120 [*affirmed* in 153 N. Y. 331, 47 N. E. 593].

Effect of protest.—A protest at the time of payment does not itself show that the payment was not made voluntarily in the legal sense of the term. Union Ins. Co. *v.* Allegheny, 101 Pa. St. 250; Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974. See, generally, PAYMENT. Payment of taxes is voluntary where it is made at a time when the receiver of taxes could not institute proceedings to enforce the payment, although at the time of the payment a written protest was served. Baker *v.* Big Rapids, 65 Mich. 76, 31 N. W. 810; U. S. Trust Co. *v.* New York, 77 Hun (N. Y.) 182, 28 N. Y. Suppl. 344 [*affirmed* in 144 N. Y. 488, 39 N. E. 383]. In some jurisdictions, however, by statute or charter provision, a tax paid under protest is not a voluntary payment. Hellman *v* Los Angeles, 147 Cal. 653, 82 Pac. 313. See, generally, TAXATION.

24. Osborn *v.* Danvers, 6 Pick. (Mass.) 98. See also Watson *v.* Princeton, 4 Metc. (Mass.) 599, holding that where one is taxed, and pays more than his due proportion of a town tax, in consequence of the omission of the assessors to tax other persons their due proportion, he cannot maintain an action against the town for money had and received to recover back any part of the tax so paid. And see, generally, TAXATION.

Where there is one entire assessment on a person in a representative capacity, and he is legally liable for a portion of the tax thus assessed as the representative of certain persons, but not for another part as the representative of other persons, the excess constitutes an overvaluation for which his sole remedy is by an application to the tax officers for an abatement. Bourne *v.* Boston, 2 Gray (Mass.) 494.

25. Indianapolis *v.* Patterson, 112 Ind. 344, 14 N. E. 551; Dietrich *v.* New York, 5 Hun (N. Y.) 421. But see Patterson *v.* Philadelphia, 5 Pa. Co. Ct. 626, holding that a voluntary payment of taxes made without duress and without protest or objection cannot be recovered, although there was a mistake in the estimate of the amount of land on which the taxes were assessed. See, generally, TAXATION.

Non-resident's ignorance of law.— Where a non-resident pays taxes unlawfully assessed on property owned by him in New York, in ignorance of the New York law, his mistake is one of fact, as non-residents are not presumed to know the law, as in the case of residents. Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120 [*affirmed* in 153 N. Y. 331, 47 N. E. 593].

Ignorance that property was exempt.—A payment of taxes in ignorance of the fact that the property was exempt from taxation is involuntary, and may be recovered by the taxpayer. Barney *v.* New York, 78 Hun (N. Y.) 337, 29 N. Y. Suppl. 175 [*affirmed* in 146 N. Y. 364, 41 N. E. 88].

26. See cases cited *infra*, note 27.

In Kentucky, however, a tax paid by mistake of law can be recovered back. Newport *v.* Ringo, 87 Ky. 635, 10 S. W. 2, 10 Ky. L. Rep. 1046; Louisville *v.* Anderson, 79 Ky. 334, 42 Am. Rep. 220; Torbett *v.* Louisville, 4 S. W. 345, 9 Ky. L. Rep. 202. *Compare* Hubbard *v.* Hickman, 4 Bush 204, 96 Am. Dec. 297.

27. Goddard *v.* Seymour, 30 Conn. 394; Simonson *v.* West Harrison, 5 Ind. App. 459, 32 N. E. 585; Espy *v.* Ft. Madison, 14 Iowa 226; Kraft *v.* Keokuk, 14 Iowa 86; Bradley *v.* Laconia, 66 N. H. 269, 20 Atl. 331. But see Newport *v.* Ringo, 87 Ky. 635,

(III) *ACTIONS.*[28] It has been held that the essential elements of an action to recover taxes paid are (1) a void tax, (2) payment under compulsion, and (3) payment by the collector into the treasury; and the absence of any of these elements is fatal to the action against the municipality.[29] A taxpayer may sue either the officer who illegally collected the money or the municipality which illegally received it.[30] Where the action is against the municipality the remedy is assumpsit for money had and received,[31] and in such action the liability is limited to the amount of the payment with interest.[32] The action must be brought within the time fixed by the statutes of limitations applicable thereto.[33] Whether the claim must be presented to the municipality before action is brought depends upon the terms of the particular statutes or charter provisions, the action generally being considered as *ex delicto* rather than *ex contractu.*[34]

8. COLLECTION AND ENFORCEMENT — a. In General. The right of a municipality to collect taxes depends primarily upon its authority to levy and impose taxes.[35] Tax-collectors, after the assessment roll or tax warrant is delivered to them, have authority to receive taxes and to take the steps prescribed by statute or charter provisions to enforce them after they become delinquent.[36] But before taxes

10 S. W. 2, 10 Ky. L. Rep. 1046; Louisville *v.* Anderson, 79 Ky. 334, 42 Am. Rep. 220; Torbett *v.* Louisville, 4 S. W. 345, 9 Ky. L. Rep. 202. See, generally, TAXATION.

28. See, generally, PAYMENT; TAXATION.

29. Chicago *v.* Fidelity Sav. Bank, 11 Ill. App. 165.

30. Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974. But see Fish *v.* Higbee, 22 R. I. 223, 47 Atl. 212, holding that the action should be against the city and not the collector.

31. Chicago *v.* Fidelity Sav. Bank, 11 Ill. App. 165; Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974. See, generally, MONEY RECEIVED. But see Goddard *v.* Seymour, 30 Conn. 394, holding that where a tax has been legally laid and assessed, but has been collected by proceedings that were irregular and invalid, the taxpayer cannot recover the money back from the town in such an action.

32. Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974. See also Torrey *v.* Millbury, 21 Pick. (Mass.) 64.

Interest.— The right to recover includes interest from the time of payment if paid under protest, and from time of demand if without protest; but interest is not recoverable on the legal taxes subject only to partial abatement by reason of overrating. Boott Cotton Mills *v.* Lowell, 159 Mass. 383, 34 N. E. 367.

33 Covington *v.* Voskotter, 80 Ky. 219 (special statute); Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974 (two years).

Where money a trust fund.— Where a town collected taxes from a railroad to pay interest on bonds which turned out to be void, the money became a trust fund, and hence limitation did not run against a right to recover it back. Aurora *v.* Chicago, etc., R. Co., 19 Ill. App. 360.

General statute as applicable to municipal taxes.— The statute providing that taxes due the state must be paid and, if deemed illegal or unjust, suit must be brought to recover them back within thirty days, has no application to taxes paid to a city or county. Little Rock, etc., R. Co. *v.* Williams, 101 Tenn. 146, 46 S. W. 448.

34. Flieth *v.* Wausau, 93 Wis. 446, 67 N. W. 731 (holding applicable a charter provision that no action for a tort shall lie unless a statement of the claim is presented to the council within ninety days after the happening of the tort); Bradley *v.* Eau Claire, 56 Wis. 168, 14 N. W. 10 (holding that a provision that no action shall be maintained against the city "upon any claim or demand" until presentation, etc., referred only to claims arising upon contract and not to one growing out of the illegal collection of taxes); Ruggles *v.* Fond du Lac, 53 Wis. 436, 10 N. W. 565 (holding that an action for the recovery of taxes wrongfully collected is not an action on contract, within the meaning of a city charter prohibiting the maintenance of an action against the city on contract until the claim has been presented to the city council). But see Mead *v.* Lansing, 56 Mich. 601, 23 N. W. 444, holding that under a charter provision that the council shall audit and allow "all accounts chargeable against the city" an action to recover taxes paid under protest cannot be maintained before a claim for the refunding thereof has been presented to the city council for its allowance.

In Rhode Island, the statute providing that claims against a town for money due "for any matter, cause or thing whatsoever" shall be presented to the town council before suit, embraces restitution of an illegal tax. Fish *v.* Higbee, 22 R. I. 223, 47 Atl. 212.

35. Brown *v.* Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28.

36. See, generally, TAXATION.

Back taxes.— Under a statute authorizing cities to collect back taxes, the collection of which had been defeated, where the city was unable to collect municipal taxes levied for previous years because of irregularity in the mode of procedure, the fact that such back taxes were not then needed, and that they would not be applied to particular corporate

will become delinquent so as to authorize resort to measures to collect them, it is generally provided that a demand or certain notices must be given.[37] The particular officer or officers who are authorized to collect the taxes is governed wholly by statutory and charter provisions,[38] as are the fees to which they are entitled.[39] Except where it is forbidden by statute or charter provision, a municipality may make a contract with any person for the collection of any of its taxes,[40] and is liable like any other contracting party for breach thereof;[41] but where it is the duty of a particular city officer to collect taxes, a contract made with any other person to collect them has been held *ultra vires*.[42] The collector must pay over or account for taxes collected,[43] and the sureties on his bond are liable for his failure so to do.[44]

purposes for which they were originally required when attempted to be collected, does not render their collection improper. Fairfield *v.* People, 94 Ill. 244.

37. D'Antignac *v.* Augusta, 31 Ga. 700; Clayton *v.* Chicago, 44 Ill. 280; St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

38. Placerville *v.* Wilcox, 35 Cal. 21; Pensacola *v.* Sullivan, 23 Fla. 1, 6 So. 922; Springfield *v.* Edwards, 84 Ill. 626; Morgan *v.* Smith, 4 Minn. 104. See also Webb *v.* Beaufort, 88 N. C. 496, holding that a town may, if it chooses, appoint a special tax-collector to levy and collect taxes necessary to pay a judgment against the town.

39. Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133; Boltz *v.* Newport, 59 S. W. 503, 22 Ky. L. Rep. 961 (holding that under a city ordinance fixing the compensation of the tax-collector at a certain per cent on "the sums collected by him," he was not entitled to commissions on money paid into the city treasury by national banks under an agreement negotiated by him in compromise of claims asserted by the city against such banks for franchise taxes, national banks not being subject to a franchise tax); Hagerstown *v.* Startzman, 93 Md. 606, 49 Atl. 838.

40. State *v.* Heath, 20 La. Ann. 172, 96 Am. Dec. 390; Hiestand *v.* New Orleans, 14 La. Ann. 330; San Antonio *v.* Raley, (Tex. Civ. App. 1895) 32 S. W. 180.

The duty of searching for secreted property is not imposed upon the tax officers of a city, and therefore a city may, under the general power to levy and collect taxes upon all property subject to taxation, contract with a private person to search for property secreted and omitted from the tax duplicate. Richmond *v.* Dickinson, 155 Ind. 345, 58 N. E. 260.

41. Lafferranderie *v.* New Orleans, 3 La. 246, holding that where a municipal corporation sells the right to receive a tax which has been illegally imposed and cannot be collected it is responsible in damages to the purchaser to the amount of the revenue which he was unable to collect in consequence of the illegality of the tax so imposed and sold. *Compare* Hiestand *v.* New Orleans, 14 La. Ann. 330, holding that the common council has the right at any time to change or repeal a resolution conferring such power, with the sole condition that the city shall be liable for any compensation earned under and in pursuance of the resolution before its repeal.

42. Ft. Wayne *v.* Lehr, 88 Ind. 62; Gurley *v.* New Orleans, 41 La. Ann. 75, 5 So. 659, holding that a contract by a city for the collection of taxes for a remuneration is *ultra vires* when the municipal corporation relieves one of its officers from the duty of collection, which forms part of his functions, without additional pay, and intrusts it to another officer, or even to an individual, under terms which are onerous, and may be repudiated by the corporation.

43. Nashville *v.* Knight, 12 Lea (Tenn.) 700.

But a clerk or deputy is not liable to the municipality but only to his principal. Snapp *v.* Com., 82 Ky. 173.

What constitutes final settlement.— An informal settlement by a tax-collector with the city, made upon a statement of the accounts furnished by the collector himself, and without any examination of his books, certain items being omitted, is not a final settlement. Nashville *v.* Knight, 12 Lea (Tenn.) 700.

Opening accounts.— A fiduciary relation exists between a tax-collector and the municipal corporation by which he is elected or appointed; and the least evidence of bad faith on his part, or of the existence of errors in the settlement of his accounts, is sufficient to open such accounts. Nashville *v.* Knight, 12 Lea (Tenn.) 700.

The borough auditors are not authorized to settle the accounts of collectors of the borough taxes. Girardville *v.* Kiehl, 2 Leg. Rec. (Pa.) 260.

44. Delker *v.* Owensboro, 61 S. W. 362, 22 Ky. L. Rep. 1777, holding that street assessments are "taxes," within the statute making it the duty of the tax-collector of a city to collect "all taxes" levied by the city; and the sureties in the tax-collector's bond are liable for such assessments collected by him.

Common-law bond.— The sureties of the collector are liable for breach of his bond as a common-law bond, although it is not good as a statutory bond. Delker *v.* Owensboro, 61 S. W. 362, 22 Ky. L. Rep. 1777.

Who may sue.— Where the bond is payable to the state, the municipality cannot sue upon it. House *v.* Dallas, 96 Tex. 594, 74 S. W. 901.

b. Authority to Compromise. Independent of statutory provisions, it has been held that a city may compromise a claim for taxes,[45] as by accepting a deed of land for a road.[46] But under constitutional or statutory provision providing that the legislature has no power to authorize a municipality to release or extinguish in whole or in part the indebtedness or liability of any person or corporation to the municipality, it is held that after the assessment rolls have passed from the hands of the assessors into the hands of the collector, the municipality has no power to compromise a claim for taxes;[47] and a municipality forbidden by its charter to compromise municipal taxes cannot ratify an unauthorized compromise made by another.[48]

c. Modes of Collection in General. The methods of collecting unpaid taxes, as fixed by statute, charter provisions, and ordinances, vary to a considerable extent in different states and municipalities.[49] The ordinary modes of collection are (1) by distraint,[50] (2) by action to recover a personal judgment for the tax,[51] (3) by a summary sale of land on which the taxes are a lien,[52] or (4) by an action to enforce a lien on land for the unpaid taxes.[53] The statutes in some jurisdictions authorize summary proceedings for the sale of property in general for unpaid taxes,[54] and such provisions have been held applicable to taxes delinquent before the statute was passed as well as to those becoming delinquent thereafter;[55] but the municipality has no right to summarily sell property for unpaid taxes except where power to do so is delegated by the legislature either expressly or by necessary implication.[56] In some jurisdictions an execution against the property in general

45. San Antonio *v.* San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281. See also *infra*, XV, D, 8, d, (III).

Compromise generally see *infra*, XVI, C; XVII, B.

46. Ostrum *v.* San Antonio, 30 Tex. Civ. App. 462, 71 S. W. 304.

47. Louisville *v.* Louisville R. Co., 111 Ky. 1, 63 S. W. 14, 23 Ky. L. Rep. 390; City-Item Co-Operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313. See also Kansas City *v.* Hannibal, etc., R. Co., 81 Mo. 285; State *v.* Hannibal, etc., R. Co., 75 Mo. 208; State *v.* Central Pac. R. Co., 9 Nev. 79; Ollivier *v.* Houston, 93 Tex. 201, 54 S. W. 940, 943.

48. Kansas City *v.* Hannibal, etc., R. Co., 81 Mo. 285.

49. See, generally, TAXATION.

Procedure same as in case of state taxes.—Where, subsequent to a granting of plaintiff's charter, which authorized its tax-collector to proceed to collect its taxes in the same manner as the sheriff could collect state taxes, the authority of sheriffs was increased, the authority of plaintiff's tax-collector was likewise increased. Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348.

Collection of tax on city securities.—Where a city taxes its own stock, payment may be enforced by deducting the amount of the tax from interest due on the stock. Jenkins *v.* Charleston, 5 S. C. 393, 23 Am. Rep. 14.

Repeal of statutes see Bond *v.* Hiestand, 20 La. Ann. 139; State *v.* Tufts, (Mo. 1891) 15 S. W. 954; Kansas City *v.* Payne, 71 Mo. 159; Mattes *v.* Ruth, 1 Lack. Leg. N. (Pa.) 311; Goodbar *v.* Memphis, 113 Tenn. 20, 81 S. W. 1061; Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537. Where the provisions of a city charter as to the collection of taxes conflict with those of the general tax law thereafter passed, the provisions of the city charter are not repealed, in the absence of express words for that purpose in the general law. Stonington Sav. Bank *v.* Davis, 14 N. J. Eq. 286.

50. Wise *v.* Eastham, 30 Ind. 133, holding that delivery of the tax duplicate and warrant is a condition precedent to the right to seize and sell property in order to enforce payment of taxes.

Condition precedent.—To preserve the right of distress, charter provisions in some cities require the delinquent lists to be sent to the collector at least once a year. Covington Gaslight Co. *v.* Covington, 84 Ky. 94, 2 S. W. 326, 8 Ky. L. Rep. 515.

51. See *infra*, XV, D, 8, d.

52. See *infra*, XV, D, 8, e.

53. See *infra*, XV, D, 8, e.

54. See the statutes of the several states.

55. Haskel *v.* Burlington, 30 Iowa 232.

56. Hays *v.* Hogan, 5 Cal. 241; Howard *v.* Savannah, T. U. P. Charlt. (Ga.) 173; Gage *v.* Dudley, 64 N. H. 437, 13 Atl. 865.

Railroad taxes.—Payment of taxes imposed on the property of a railroad company within the limits of a town for municipal purposes can only be enforced in equity, and not by seizure and sale of the company's cars. Elizabethtown, etc., R. Co. *v.* Elizabethtown, 12 Bush (Ky.) 233.

Tax against public utility company.—Where a corporation, the functions of which are to supply water to a city, refuses to pay its taxes, its property cannot be seized and sold by a collecting officer, as the property should not be so dealt with as to deprive the public of water. Louisville Water Co. *v.* Hamilton, 81 Ky. 517. So where a company is under contract to furnish a city gas, de-

of the taxpayer may be issued in the first instance,[57] while in other jurisdictions a recovery by motion has been authorized.[58] So, in some municipalities, collection may be enforced by garnishing any one indebted to the delinquent taxpayer.[59] Arrest for non-payment of a tax is not authorized except where power so to do is expressly conferred by the legislature.[60] Where the tax is against the estate of a decedent it is sometimes provided that collection may be enforced by presenting to the court a brief statement showing the fact and amount of such delinquency and the issuance of an order to show cause.[61]

d. Action to Recover Personal Judgment — (i) *Right of Action.* In most municipalities power is conferred upon them, either by statute or charter provisions, to sue for recovery of a personal judgment for unpaid taxes.[62] Independent

linquent taxes due from it cannot be collected by distress if the property seized is necessary in supplying gas; but, by a proceeding in equity, the company may be required to pay the taxes into court, and, failing to do so, the court may place the property in the hands of a receiver. Covington Gaslight Co. *v.* Covington, 84 Ky. 94.

Goods of a tenant cannot be sold for taxes due by the owner except where power to do so is expressly conferred. McAfee *v.* Bumm, 10 Phila. (Pa.) 157.

Resort to personalty first.— Where the taxes on personalty and realty are a general lien on all the real property of the taxpayer, such real estate may, under some statutes, be sold for taxes on personal property before resorting to such personal property. State *v.* Newark, 42 N. J. L. 38. See also Thompson *v.* Carroll, 22 How. (U. S.) 422, 16 L. ed. 387.

57. Miller *v.* Brooks, 120 Ga. 232, 47 S. E. 646, holding that an execution for municipal taxes, not describing any particular property, but simply directing the seizure of the goods and chattels, lands and tenements, of the estate of A J M, is void, and a purchaser at a sale under the levy of such an execution obtains no title.

In North Carolina a tax list delivered to the collector has the force of a judgment and execution. Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348.

58. Alexandria *v.* Hunter, 2 Munf. (Va.) 228; Alexander *v.* Alexandria, 5 Cranch (U. S.) 1, 3 L. ed. 19.

59. Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348.

60. McDonald *v.* Lane, 80 Ga. 497, 5 S. E. 628; Cooper *v.* Savannah, 4 Ga. 68.

61. Cullop *v.* Vincennes, 34 Ind. App. 667, 72 N. E. 166.

62. Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129; Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323; Louisville Bridge Co. *v.* Louisville, 65 S. W. 814, 23 Ky. L. Rep. 1655 (statute held applicable to franchise taxes); Covington *v.* Covington Gas Light Co., 2 S. W. 326, 8 Ky. L. Rep. 515; St. Joseph *v.* Kansas City, etc., R. Co., 118 Mo. 671, 24 S. W. 467; Jefferson *v.* Curry, 77 Mo. 230; Rochester *v.* Bloss, 185 N. Y. 42, 77 N. E. 749, 6 L. R. A. N. S. 694 [*reversing* 100 N. Y. App. Div. 125, 91 N. Y. Suppl. 642] (holding that the original tax only, and not percentages and interest, can be recovered by such suit); Brummer *v.* Galveston, 97 Tex. 93, 76 S. W. 428; Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537; Houston *v.* Dooley, (Tex. Civ. App. 1905) 89 S. W. 777.

The legislature may authorize a city to collect taxes by suit; and where this remedy is given, it will not be held to exclude a summary mode of collection already provided by statute nor will it be limited to cases in which the summary mode may have proved ineffectual, unless the statute so provides. Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323.

Authority granted by ordinance.— Where the charter of a city provides that the collection of taxes shall be made as may be provided by ordinance, and an ordinance is enacted providing for the recovery of delinquent taxes by suit, an action may be maintained by such city to recover any delinquent tax due to it. Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

The fact that a void sale has been made of the property will not preclude the municipality from resorting to a suit to enforce the tax. Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619.

Associate counsel for a city may continue to represent it in the suit after the city attorney has resigned. Wilmington *v.* Stolter, 122 N. C. 395, 30 S. E. 12.

Dismissal of action.— Under charter provisions authorizing an order dismissing such an action where defendant has an equitable defense, moving papers which simply denied that defendant was liable for an assessment for the year in question, and stated that he had never before been taxed on his personalty, and received no notice of the assessment until long after the time for correcting the assessment rolls, and had no personal property subject to taxation, but not stating that defendant was unable to pay his tax, show no ground for dismissing the action. New York *v.* Holzderber, 44 Misc. (N. Y.) 509, 90 N. Y. Suppl. 63.

Power of attorney to bind a city by agreement that action abide result of another suit. — An agreement by a city attorney that a suit involving the right of the city to collect a tax shall abide the result of another suit to which the city is not a party, and of which it has no control, does not bind the city, as the power of taxation is a sovereign

of statute, there is a considerable conflict of authority as to whether taxes constitute a debt which may be enforced by a personal action.[63] In some jurisdictions it is held that a municipality cannot sue to collect a tax due it except where it is expressly authorized so to do,[64] while in other jurisdictions the right to sue is the same as in the case of any other debt owing to the municipality.[65] A statutory remedy other than a personal action has been held to be exclusive where no personal action is provided for by statute,[66] although there is authority to the contrary.[67] Where the statutes or charter provisions give a remedy by action and also other remedies, such remedies are generally held to be cumulative.[68]

(II) *Conditions Precedent.* Conditions precedent fixed by statute or ordinance must be complied with before bringing suit to recover taxes.[69] Efforts to collect the tax by distress are not, in some jurisdictions, a condition precedent in an action to recover the tax.[70] A resolution is usually sufficient as a basis for the institution of the action.[71]

(III) *Compromise of Suit.*[72] The compromise of a suit to recover taxes has been held within the authority of a municipality,[73] although under some statutes it has been held that neither the common council nor the city attorney has power to compromise claims for taxes after suit brought.[74]

(IV) *Defenses*—(A) *In General.* It is no defense that the taxpayer is not benefited by the tax,[75] nor that it is being improperly expended,[76] nor that the

power, and cannot be lost in this way. Frankfort *v.* Frankfort Deposit Bank, 60 S. W. 19, 22 Ky. L. Rep. 1384, 108 Ky. 766, 57 S. W. 787, 22 Ky. L. Rep. 466.

63. See, generally, Taxation.

64. Louisville Bridge Co. *v.* Louisville, 65 S. W. 814, 23 Ky. L. Rep. 1655; Rochester *v.* Bloss, 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. N. S. 694 [*reversing* on other grounds 100 N. Y. App. Div. 125, 91 N. Y. Suppl. 642].

65. Amite *v.* Clementz, 24 La. Ann. 27; New Orleans *v.* Graihle, 9 La. Ann. 561; New Castle *v.* Chicago Electric Illuminating Co., 16 Pa. Co. Ct. 663 (holding that a city can collect a tax imposed by ordinance on electric light poles and wires in an action of debt, and need not resort to the penalty provided in the ordinance); Jonesborough *v.* McKee, 2 Yerg. (Tenn.) 167. See also Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619.

66. Johnston *v.* Louisville, 11 Bush (Ky.) 527; Faribault *v.* Misener, 20 Minn. 396; Rochester *v.* Gleichauf, 40 Misc. (N. Y.) 446, 82 N. Y. Suppl. 750.

67. Burlington *v.* Burlington, etc., R. Co., 41 Iowa 134; Baltimore *v.* Howard, 6 Harr. & J. (Md.) 383 (holding that an action of assumpsit lies notwithstanding the existence of statutory remedies by way of distress or action of debt), Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619.

68. Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323 [*following* Covington *v.* People's Bldg. Assoc., (Ky. 1882) 2 S. W. 322]; State *v.* Tufts, (Mo. 1891) 15 S. W. 954; Reed *v.* Camden, 50 N. J. L. 87, 11 Atl. 137; New Castle *v.* Chicago Electric Illuminating Co., 16 Pa. Co. Ct. 663.

69. Frankfort *v.* Frankfort Safety Vault, etc., Co., 115 Ky. 660, 74 S. W. 676, 25 Ky. L. Rep. 46 (return of "no property found"); Brummer *v.* Galveston, 97 Tex. 93, 76 S. W. 428 (holding, under particular charter provisions, that preparation of lists and direction to city attorney to file suit for taxes is not a condition precedent); McCrary *v.* Comanche, (Tex. Civ. App. 1896) 34 S. W. 679 (verified claims made by tax-collector and placed in hands of city attorney).

Where a compromise of a claim for city taxes was void, and not merely voidable, for want of power on the part of the council to make such a compromise, it was not necessary for the city to tender to the taxpayer the amount received thereunder in order to enable it to enforce its claim by suit, defendant being entitled to credit merely by the sum paid. Louisville *v.* Louisville R. Co., 68 S. W. 840, 24 Ky. L. Rep. 538.

In Michigan the village treasurer need not be authorized by the county treasurer to bring suit. Wayne *v.* Goldsmith, 141 Mich. 528, 104 N. W. 689, 3 L. R. A. N. S. 1126.

70. Covington Gaslight Co. *v.* Covington, 84 Ky. 94; Covington *v.* Covington Gaslight Co., 2 S. W. 326, 8 Ky. L. Rep. 515; Chelsea *v.* Holmes, 137 Mich. 195, 100 N. W. 448.

71. Dallas Title, etc., Co. *v.* Oak Cliff, 8 Tex. Civ. App. 217, 27 S. W. 1036.

72. See also *supra*, XV, D, 8, b; *infra*, XVII, B.

73. San Antonio *v.* San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281.

74. Louisville *v.* Louisville R. Co., 111 Ky. 1, 63 S. W. 14, 23 Ky. L. Rep. 390.

75. Gold Hill *v.* Caledonia Silver Min. Co., 10 Fed. Cas. No. 5,512, 5 Sawy. 575

76. Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370.

Tax to acquire lighting plant.— A taxpayer cannot defeat the collection of a tax levied by a city for the purpose of acquiring a lighting plant by showing that the city intends to use the plant to furnish lights to private consumers, the taxpayer having his remedy in case the city should use the plant in an unlawful manner. Baltimore, etc., R. Co. *v.* People, 200 Ill. 541, 66 N. E. 148.

assessment is illegal or excessive unless the facts are such as to warrant an injunction,[77] nor that the bonds for which the tax was levied were irregularly issued,[78] nor that there were irregularities in the appointment or proceedings of the board of review.[79] The power of a *de facto* municipal corporation to levy taxes for duly authorized municipal purposes cannot be collaterally attacked in a proceeding to collect the tax.[80] Where the validity of the tax depends upon the population of the city, the taxpayer cannot raise the question whether the city had the requisite number of inhabitants except by a quo warranto proceeding.[81] A purchaser of land may set up as a defense a certificate by the register of unpaid taxes that he found none against the land purchased, where he relied thereon.[82] A defense that defendant was not an inhabitant of the municipality in which he was taxed at the time the tax was assessed but had removed therefrom, where unsuccessful, does not preclude a defense on the ground that he has not removed from the municipality since the tax was assessed.[83] An assessment of certain property as belonging to one other than the owner is no defense to the assessment as a whole where statutory provisions as to the raising of such an objection have not been complied with.[84] To prove the invalidity of the tax it is not sufficient to show that none of the ordinances authorizing the issuance of bonds contained provisions for a tax therefor, where it is not clearly shown that such provisions were not made at the time the bonded debt was created.[85]

(B) *Estoppel to Urge.* A taxpayer may be estopped to deny the validity of the tax,[86] as by his silence while work is going on to pay for which the tax is levied.[87] But payment of taxes in past years does not estop the taxpayer to set up the defense that the property is not taxable.[88] So the reduction of the assessment, where it is not shown that the taxpayer asked for the reduction or that he appeared before the board of review does not estop him from questioning the validity of the assessment roll.[89]

(V) *Time to Sue and Limitations.* In some jurisdictions the general statutes of limitations do not apply to a suit by the municipality to recover taxes, and lapse of time will not bar the action, although it may raise a rebuttable presumption of payment.[90] Generally, however, the time within which suit must be brought is limited either by special statutory or charter provision or by general

77. Erie *v.* Reed, 113 Pa. St. 468, 6 Atl. 679.

78. Tyler *v.* Tyler Bldg., etc., Assoc., 98 Tex. 69, 81 S. W. 2.

79. Southern Warehouse, etc., Co. *v.* Mechanics' Trust Co., 56 S. W. 162, 21 Ky. L. Rep. 1734.

80. People *v.* Pederson, 220 Ill. 554, 77 N. E. 251.

81. Tyler *v.* Tyler Bldg., etc., Assoc., 98 Tex. 69, 81 S. W. 2; Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. Civ. App. 1904) 82 S. W. 1066 [*reversed* on other grounds in (1905) 86 S. W. 750].

82. Philadelphia *v.* Anderson, 142 Pa. St. 357, 21 Atl. 976, 12 L. R. A. 751. *Contra*, Anonymous, 10 N. J. L. 60.

83. Crapo *v.* Stetson, 8 Metc. (Mass.) 393.

84. Joyes *v.* Louisville, 82 S. W. 432, 26 Ky. L. Rep. 713.

85. Berry *v.* San Antonio, (Tex. Civ. App. 1898) 46 S. W. 273.

86. State *v.* Mastin, 103 Mo. 508, 15 S. W. 529 (holding that in an action to enforce taxes in payment of municipal bonds issued under a statute which also confers power to levy a certain tax to meet them, a party who admits their validity cannot dispute the legality of the tax sanctioned by the same law); Buffalo *v.* Balcom, 134 N. Y. 532, 32 N. E. 7 (holding that where a city, to which land is struck off at a tax-sale, surrenders the certificate of sale to the taxpayer, and takes from him a mortgage to secure the payment of the taxes, although the city may not have the legal capacity to take and enforce the mortgage, neither the mortgagor nor persons claiming under him can set up the defense of *ultra vires* in an action by the city to foreclose the mortgage, since they have enjoyed the benefits conferred by it — an extension of the time within which to pay the taxes).

87. Johnson *v.* Kessler, 76 Iowa 411, 41 N. W. 57; Lamb *v.* Burlington, etc., R. Co., 39 Iowa 333. But see Truesdale *v.* Green, 57 Iowa 215, 10 N. W. 630, holding that where it does not appear that a person resisting a railroad tax, upon the faith of which the road was constructed, knew that expenditures were so made, he is not estopped to deny the validity of the tax.

88. Deiman *v.* Ft. Madison, 30 Iowa 542; Cameron *v.* Stephenson, 69 Mo. 372.

89. New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

90. Elliott *v.* Williamson, 11 Lea (Tenn.) 38.

statutes held applicable thereto.[91] A tax to pay a judgment may be sued on after payment of the judgment,[92] and one levied by a military authority, after the belligerent occupation has ceased.[93]

(VI) *PARTIES.*[94] Generally the municipality may sue in its own name.[95] But under some statutory provisions suit must be brought in the name of the state,[96] or county.[97] A taxpayer may, in an action against him for taxes to pay bonds, impeach the validity of the bonds without making bondholders parties.[98]

(VII) *PROCESS.* The general rules relating to process and service thereof in civil actions generally are applicable, except as modified by particular statutes or charter provisions.[99]

(VIII) *PLEADING* — (A) *Complaint.*[1] The complaint or petition must state the facts necessary to show a cause of action;[2] but in some jurisdictions the facts constituting the levy need not be set out,[3] and a petition to recover special taxes to pay bonded indebtedness, where the ordinances making the levy are alleged, need not allege the existence of the debt.[4] A petition alleging that the property

91. State *v.* Recorder of Mortgages, 45 La. Ann. 566, 12 So. 880; Zacharie's Succession, 30 La. Ann. 1260; Canonge's Succession, 1 La. Ann. 209; Gunther *v.* Baltimore, 55 Md. 457; Houston *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49 (holding that a city charter providing that a taxpayer might rely on the four-year statute of limitations in any action for taxes alleged to be due the city was valid, except as to suits pending at the time it was passed and with the qualification that a reasonable time must be allowed the city in which to institute suits for taxes due prior to its passage); Link *v.* Houston, (Tex. Civ. App. 1900) 59 S. W. 566 [*affirmed* in 93 Tex. 378, 60 S. W. 664].

Taxes as liability imposed by statute.— City taxes on omitted property, being "a liability imposed by statute," are barred by limitations in five years. Muir *v.* Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150.

Action as one on a judgment.— An action by a town to recover taxes due on forfeited property is not an action on a judgment, so as to make the period of limitation twenty years. Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089.

92. State *v.* Hamilton, 94 Mo. 544, 7 S. W. 583.

93. Rutledge *v.* Fogg, 3 Coldw. (Tenn.) 554, 91 Am. Dec. 299.

94. See, generally, PARTIES.

95. Wayne *v.* Goldsmith, 141 Mich. 528, 104 N. W. 689, 3 L. R. A. N. S. 1126; Aurora *v.* Lindsay, 146 Mo. 509, 48 S. W. 642; State *v.* Hamilton, 94 Mo. 544, 7 S. W. 583; Memphis *v.* Looney, 9 Baxt. (Tenn.) 130; Lockhart *v.* Houston, 45 Tex. 317, holding that a suit for unpaid taxes due the city may be brought by the assessor and collector in the name of the city, in the absence of any ordinance or charter provision to the contrary.

Action by city or ward.— Under a statute providing that taxes shall become a debt to the township, ward, or city from the persons to whom they are assessed, taxes assessed in a ward in a city where each ward has a tax roll are collectable by the city, and not by the ward. St. Joseph *v.* Vail, 137 Mich. 276, 100 N. W. 388.

Proving authority of treasurer to sue.— Under the statute conferring authority upon a village treasurer to bring suit to collect taxes, he cannot be required in such a suit to prove his authority to represent plaintiff village, as required in other cases by Comp. Laws (1897), § 762, providing that the authority of an attorney to appear must be proven, when requested by the opposite party. Wayne *v.* Goldsmith, 141 Mich. 528, 104 N. W. 689, 3 L. R. A. N. S. 1126.

96. Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830; State *v.* Robyn, 93 Mo. 395, 6 S. W. 243.

97. St. Joseph *v.* Kansas City, etc., R. Co., 118 Mo. 671, 24 S. W. 467.

98. Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. Civ. App. 1904) 82 S. W. 1066 [*reversed* on other grounds in (1905) 86 S. W. 750].

99. See, generally, PROCESS.

In Louisiana a summary mode of proceeding against delinquent taxpayers by advertisement in lieu of citation is provided for. New Orleans *v.* De St. Romes, 28 La. Ann. 17 (holding that where, in a suit by a city for the collection of delinquent taxes, the publication of a notice to the delinquent taxpayers is addressed to the "Heirs of St. Romes," such publication does not warrant a judgment against the persons who may be such heirs, as it is too indefinite to amount to a citation to any one); New Orleans *v.* Rawlins, 26 La. Ann. 470; New Orleans *v.* Saloy, 12 La. Ann. 751; New Orleans *v.* Schmidt, 10 La. Ann. 771; Botts *v.* New Orleans, 9 La. Ann. 233; New Orleans *v.* Cochrane, 8 La. Ann. 365.

1. See, generally, PLEADING; TAXATION.

2. Frankfort *v.* Frankfort Safety Vault, etc., Co., 115 Ky. 660, 74 S. W. 676, 25 Ky. L. Rep. 46, holding that an allegation of non-payment by unknown owners is necessary.

3. Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537.

4. Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406; Berry *v.* San Antonio, (Tex. Civ. App. 1898) 46 S. W. 273.

was duly assessed for taxation authorizes proof of the assessment.[5] Where the tax bill is *prima facie* evidence of the correctness thereof and that all proper steps were taken, the petition need not allege the publication of the ordinance levying the tax, it being sufficient to allege the facts which the statute makes *prima facie* evidence of the right to recover.[6]

(B) *Answer.*[7] Affirmative defenses must be specially pleaded,[8] and an answer denying any knowledge or information as to the allegations relating to matters of public record is frivolous.[9] A plea that defendant "has no information sufficient to form a belief" as to whether certain ordinances were ever published, as "required by law," is bad.[10] A plea in abatement that the state and county are necessary parties, in order that their respective tax liens may be marshaled, is properly overruled where it does not appear that the state and county taxes are unpaid.[11]

(IX) *PROOF*—(A) *Presumptions and Burden of Proof.* Certain presumptions will be indulged in favor of the validity of the tax,[12] and ordinarily the burden of proof is on defendant where he relies upon the invalidity of, or defects in, the tax.[13]

(B) *Admissibility and Objections.*[14] The tax rolls are not competent to prove the levy of a tax, but such proof must be made by proving the city ordinance levying the tax.[15] An objection to a certificate or tax bill sued on that it was not such as the law contemplated is too general.[16]

(C) *Sufficiency to Make Prima Facie Case.* Generally, by charter or statutory provisions, the municipality makes out a *prima facie* case by introducing the tax roll or a certified statement of delinquent taxes in evidence.[17] But, except where it is otherwise provided, the establishment of a valid assessment

5. Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406.

6. Shuck *v.* Lebanon, 107 Ky. 252, 53 S. W. 655, 21 Ky. L. Rep. 969.

To make a prima facie case under the statute, the petition should allege that the ordinance levying the tax and the assessment were duly made, that the assessment was returned to the clerk, and that he from it made out the tax bills for the year, signed them, and turned them over to the city collector; and the tax bill should be pleaded according to its words or substance, as other writings, and, if to be had, should be filed with the petition, as should also a copy of the ordinance and a copy of the assessment. Shuck *v.* Lebanon, 107 Ky. 252, 53 S. W. 655, 21 Ky. L. Rep. 969.

7. See, generally, PLEADING; TAXATION.

8. New York *v.* Matthews, 180 N. Y. 41, 72 N. E. 629 [*affirming* 86 N. Y. Suppl. 1132]. But see New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659, holding that an answer in an action to collect a city personal property tax, admitting defendant's residence, and denying knowledge or information sufficient to form a belief as to the other allegations of the complaint, puts in issue all essential averments, and requires proof by plaintiff, among other things, of a valid assessment roll.

9. New York *v.* Matthews, 180 N. Y. 41, 72 N. E. 629 [*affirming* 86 N. Y. Suppl. 1132].

10. Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323.

11. Bennison *v.* Galveston, 34 Tex. Civ. App. 382, 78 S. W. 1089.

12. Powell *v.* Louisville, 52 S. W. 798, 21 Ky. L. Rep. 554 (holding that where the tax bills are properly authenticated, it must be presumed that the proceedings of the council were duly published); New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

13. Sherley *v.* Louisville, 53 S. W. 530, 21 Ky. L. Rep. 945; New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659; Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. Civ. App. 1904) 82 S. W. 1066 [*reversed* on other grounds in (1905) 86 S. W. 750]; Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406 (holding that one attempting to escape the payment of a city tax on the ground that municipal debts, for which it was levied, are invalid, has the burden of proving it); Berry *v.* San Antonio, (Tex. Civ. App. 1898) 46 S. W. 273.

14. See, generally, EVIDENCE; TAXATION.

15. Earle *v.* Henrietta, 91 Tex. 301, 43 S. W. 15.

16. St. Joseph *v.* Pitt, 109 Mo. App. 635, 83 S. W. 544.

17. Albin Co. *v.* Louisville, 117 Ky. 895, 79 S. W. 274, 25 Ky. L. Rep. 2055; Fonda *v.* Louisville, 49 S. W. 785, 20 Ky. L. Rep. 1652; State *v.* Edwards, 162 Mo. 660, 63 S. W. 388; Houston *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49. *Contra*, Los Angeles *v.* Los Angeles City Waterworks Co., 49 Cal. 638.

Formal defects in the certificate of delinquent taxes are cured by the production of the original assessments, if they sustain the certificate. State *v.* Edwards, 162 Mo. 660, 63 S. W. 388.

roll is necessary.[18] Where a valid roll is established it is sometimes conclusive of plaintiff's right to recover and not open to attack by defendant.[19] If there is no evidence to show any delinquent tax against defendant, the municipality cannot recover.[20]

(x) *Judgment, Enforcement, and Review.*[21] Where an action by the municipality to recover unpaid taxes is authorized, a personal judgment for the amount of the tax may be rendered,[22] bearing interest from its date,[23] in addition to any right to subject the property of the taxpayer to a foreclosure of the lien for the amount of the taxes.[24] In a joint action against numerous delinquents, a general judgment against all is permissible.[25] Where a judgment inadvertently entered by default is void, it does not affect the validity of a judgment properly rendered at a subsequent time.[26] Where a part of the taxes were unauthorized recovery may be had for the authorized taxes.[27] Asking for excessive relief, as where a lien is sought, will not prevent recovery as in an ordinary action,[28] but the judgment must correspond with the pleadings and proof.[29] Interest is generally allowed in the judgment.[30] An execution sale under such judgment does not divest the title of the owner where he was not a party to the suit in which the sale was made and the sale was made after the return-day of the writ had expired, and the constable failed to return it and retain a copy as required by law.[31] The acceptance of taxes by a clerk according to a judgment reducing their amount, in ignorance of the fact that an appeal had been taken from the judgment, is not such an assent to the judgment by the municipality as to authorize a dismissal of the appeal.[32]

(xi) *Costs and Fees.* The costs and fees in proceedings to collect taxes are generally expressly fixed by statute,[33] or by ordinance under legislative authorization.[34] Usually attorney's fees are not allowable.[35]

e. Sale of Land — (i) *Power and Duty to Sell.* The sale of land for

18. New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

In New York, where, in a suit to collect a tax alleged to have been "duly imposed" on the personal property of defendant, defendant denied any knowledge as to the truth of the allegation, and plaintiff introduced evidence of books of annual record and showed the preparation of the assessment rolls, their delivery, the computation of the tax, and the delivery of the assessment rolls by the municipal assembly to the receiver of taxes, the certificate of the board of taxes and assessments, with the warrant of the municipal assembly indorsed thereon, and certified copies of the City Record, together with proofs of publication, a *prima facie* case in favor of plaintiff was established, entitling it to judgment, in the absence of any evidence in favor of defendant. New York *v.* Streeter, 91 N. Y. App. Div. 206, 86 N. Y. Suppl. 665 [*affirmed* in 180 N. Y. 507, 72 N. E. 631].

19. New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

20. People *v.* Chicago, etc., R. Co., 214 Ill. 25, 73 N. E. 339.

21. **Collateral attack** see Judgments, 23 Cyc. 1058.

Judgment as res judicata see Judgments, 23 Cyc. 1346.

22. Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323; New Orleans *v.* Fisk, 14 La. Ann. 862; Berry *v.* San Antonio, (Tex. Civ. App. 1898) 46 S. W. 273.

23. Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323.

24. Berry *v.* San Antonio, (Tex. Civ. App. 1898) 46 S. W. 273.

Where the municipality has a right to sue for the taxes and also a lien upon the property assessed, a judgment may be rendered in an action to recover the taxes against the delinquent taxpayer and a decree also entered foreclosing the lien of the municipality as in case of other liens. Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619.

25. New Orleans *v.* Rawlins, 26 La. Ann. 470.

26. New Orleans *v.* Ker, 26 La. Ann. 491.

27. Law *v.* People, 87 Ill. 385; Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406.

28. Jefferson *v.* McCarty, 74 Mo. 55.

29. Fonda *v.* Louisville, 49 S. W. 785, 20 Ky. L. Rep. 1652.

30. New Orleans *v.* Fisk, 14 La. Ann. 862.

31. Jacobshagen *v.* Moylan, 26 La. Ann. 735.

32. Serrill *v.* New Orleans, 27 La. Ann. 520.

33. Southworth *v.* New Orleans, 25 La. Ann. 333; Boutte *v.* Bryant, 10 La. Ann. 659; Philadelphia *v.* Milligan, 147 Pa. St. 338, 23 Atl. 454.

Payment of costs must be in cash.— New Orleans *v.* Jackson, 33 La. Ann. 1038.

34. Cheever *v.* Merritt, 5 Allen (Mass.) 563; Cape Girardeau *v.* Riley, 72 Mo. 220.

35. Cape Girardeau *v.* Riley, 72 Mo. 220.

municipal taxes imposed thereon is generally provided for by statute, charter provision, or ordinance;[36] and such authority conferred upon the municipality makes the sale mandatory and not discretionary.[37] However, real property cannot be sold for unpaid taxes thereon except where such power has been conferred upon the municipality, either expressly or by necessary implication.[38] The power to sell is not to be inferred from mere power to levy and collect taxes,[39] but is necessarily implied from charter power to provide for redemption of land sold for taxes,[40] or from power to collect taxes in the same manner as township officers authorized to sell real estate for unpaid taxes.[41] The municipality may be estopped, however, to sell because of a compromise made by a city officer and ratified by the municipality.[42]

(II) *Restraining Sale.*[43] A sale for taxes may be enjoined where it is unauthorized,[44] as where the tax is illegal.[45]

(III) *Procedure*—(A) *In General.* The procedure to sell land for taxes thereon may be either summary,[46] or by an action to foreclose the lien on the real

36. *Indiana.*— Noble *v.* Indianapolis, 16 Ind. 506.

Louisiana.— Hodge *v.* Cleary, 18 La. 514.

New Jersey.— Gavenesch *v.* Jersey City, (Sup. 1904) 59 Atl. 25.

New York.— Glover *v.* Edgewater, 3 Thomps. & C. 497.

Ohio.—Zumstein *v.* Consolidated Coal, etc., Co., 11 Ohio Dec. (Reprint) 156, 25 Cinc. L. Bul. 95.

Texas.— Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619; McCrary *v.* Comanche, (Civ. App. 1896) 34 S. W. 679.

Washington.— Port Townsend *v.* Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2124.

Second sale.— A city may maintain an action to collect and enforce a lien for taxes, although the land taxed has been previously sold to the city for such taxes, where no tax deed has been executed and delivered, and the sale is probably invalid. McCrary *v.* Comanche, (Tex. Civ. App. 1896) 34 S. W. 679. But where property was sold under a municipal claim for curbing, and the duty of the city officials was to discharge out of the proceeds a lien for taxes on the land, but instead they gave a receipt for money on account of the curbing, the property cannot be subjected to another sale for such taxes, since the fact that a lien existed for the taxes and that a judgment had been obtained in the suit on the lien must be presumed to have been within the knowledge of the city officials. Philadelphia *v.* Lewis, 4 Phila. (Pa.) 135.

Repeal of statutes or charter provisions see State *v.* Tufts, 108 Mo. 418, 22 S. W. 91, (1891) 15 S. W. 954; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861; Campbell *v.* Dewick, 20 N. J. Eq. 186; Janesville *v.* Markoe, 18 Wis. 350.

Sale by authority of state.— The sale of land for non-payment of municipal taxes is essentially a sale by authority of the state. Denike *v.* Rourke, 7 Fed. Cas. No. 3,787, 3 Biss. 39.

37. Hugg *v.* Camden, 39 N. J. L. 620.

38. Johnston *v.* Louisville, 11 Bush (Ky.) 527. See also *supra*, XV, D, 8, c.

39. Ham *v.* Miller, 20 Iowa 450.

40. St. Louis *v.* Russell, 9 Mo. 507.

41. Rellstab *v.* Belmar, 58 N. J. L. 489, 34 Atl. 885.

42. Kneeland *v.* Gilman, 24 Wis. 39.

43. See, generally, Injunction; Taxation.

Restraining enforcement of taxes in general see *infra*, XV, D, 8, g, (I).

44. Middlesboro *v.* New South Brewing, etc., Co., 108 Ky. 351, 56 S. W. 427, 21 Ky. L. Rep. 1782 (holding that the tax-collector was properly enjoined from levying upon plaintiff's real estate before he had exhausted the personal property); Burnet *v.* Cincinnati, 3 Ohio 73, 17 Am. Dec. 582.

Abandonment of suit.— A suit brought for the collection of city taxes is considered as abandoned when the city, proceeding extrajudicially under statutory provisions, advertises the property for the payment of taxes due thereon, and cannot serve as a basis for an injunction to arrest the advertisement and sale on the ground of *lis pendens*. Carre *v.* New Orleans, 41 La. Ann. 996, 6 So. 893.

45. Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey (D. C.) 217.

46. *Louisiana.*— Carmichael *v.* Aikin, 13 La. 205; Piron *v.* Bach, 10 La. Ann. 13.

Montana.— Lockey *v.* Walker, 12 Mont. 577, 31 Pac. 639.

New Jersey.— Poillon *v.* Rutherford, 58 N. J. L. 113, 32 Atl. 688.

Tennessee.— See Shoalwater *v.* Armstrong, 9 Humphr. 217.

Washington.— Port Townsend *v.* Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2126.

In Georgia the fact that an execution embraces claims not collectable by execution with claims which may be lawfully collected does not invalidate the writ. Montford *v.* Allen, 111 Ga. 18, 36 S. E. 305.

General statutes as applicable to municipal taxes.—Particular statutes providing that all orders of sale for taxes shall be conclusive except as to payment of the tax have been held not applicable to municipal taxes. Glass *v.* White, 5 Sneed (Tenn.) 475.

estate for the unpaid taxes.[47] In some jurisdictions the summary mode prescribed by statute or charter is exclusive,[48] while in other jurisdictions the municipality may proceed in either way.[49] In at least one state the procedure is by a scire facias sur municipal claim,[50] while in another jurisdiction the procedure is by an

47. *Florida.*— Parker *v.* Jacksonville, 37 Fla. 342, 20 So. 538, holding, however, that a suit cannot be brought to foreclose a tax lien for a gross sum assessed against several lots in a block, upon the aggregate valuation and assessment of them made by the city authorities, without a return of the lots as one tract or parcel of land by the owner.

Kentucky.— Newport *v.* Masonic Temple Assoc., 103 Ky. 592, 45 S. W. 881, 46 S. W. 697, 20 Ky. L. Rep. 266; Long *v.* Louisville, 97 Ky. 364, 30 S. W. 987, 17 Ky. L. Rep. 253.

New York.— Lockport *v.* Mangold, 78 N. Y. App. Div. 15, 79 N. Y. Suppl. 86, construing provision authorizing suit where taxes amount to fifty dollars.

Tennessee.— Edgefield *v.* Brien, 3 Tenn. Ch. 673, holding that where the prior sale of land for taxes, at which the municipal corporation became the purchaser, was invalid, the municipal corporation may, by treating the judgments of condemnation and other proceedings as void, sue in equity to enforce its lien for all the unpaid taxes.

Texas.— Grace *v.* Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158; McCrary *v.* Comanche, (Civ. App. 1896) 34 S. W. 679, holding that a city may maintain an action to collect and enforce a lien for taxes, although the land taxed has been previously sold to the city for such taxes, where no tax deed has been executed and delivered, and the sale is probably invalid.

Washington.— Port Townsend *v.* Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2126.

Action in name of state.— Where a city charter provided that a tax should be a lien on the real estate and afterward a general statute was passed providing that there should be a lien in favor of the state for city taxes, a suit for city taxes to enforce the lien should be brought in the name of the state. State *v.* Van Every, 75 Mo. 530.

Pleading.— A bill or petition to sell land for taxes must show a valid levy and assessment, describe the land, and state the name of the owner, if known or ascertainable, the amount due, and the non-payment thereof after due notice. Parker *v.* Jacksonville, 37 Fla. 342, 20 So. 538. Where a bill filed to enforce a general lien for an aggregate sum for municipal taxes upon several distinct city lots does not show whether the assessment upon said lots was made upon a return of the same for taxation by the owner, who listed the several lots in question as one tract or parcel of land, or whether they were listed, valued, and assessed by the city authorities in the absence of such return, it cannot be construed as alleging a return or listing of the property for taxation by the owner. But allegations as to assessment of the property "that upon the parcels of land so owned by the defendant, the complainant, for the year 1890, duly assessed and levied a tax for the sum of three dollars and thirty cents," are a sufficient averment of the manner of making the assessment of the property. Parker *v.* Jacksonville, *supra.* Where the land is described sufficiently to identify it, and defendant could not have been misled, the description will support a judgment. Grace *v.* Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158.

A return of nulla bona upon a distress warrant is a condition precedent in some jurisdictions. Parker *v.* Jacksonville, 37 Fla. 342, 20 So. 538.

Judgment.— Defendant in an action to subject property to the payment of taxes cannot complain that the judgment describes the property more fully than it is described in the petition. Powell *v.* Louisville, 52 S. W. 798, 21 Ky. L. Rep. 554. When lots are ordered to be sold for the payment of taxes due to the corporation, the judgment condemning the lots for sale should be in the name of the corporation; and a judgment in the name of the state is erroneous. Shoalwater *v.* Armstrong, 9 Humphr. (Tenn.) 217.

Costs.— Where it is impracticable to tax the costs *pro rata* against various pieces of property on which a tax lien is foreclosed, it is proper to charge the whole amount of costs against all the property, thereby making each bear an equal share of the burden. Cave *v.* Houston, 65 Tex. 619.

48. Johnston *v.* Louisville, 11 Bush (Ky.) 527.

49. Landis *v.* Sea Isle City, 66 N. J. L. 558, 49 Atl. 685; Port Townsend *v.* Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

50. Philadelphia *v.* Merritt, 29 Pa. Super. Ct. 433; Pittsburg *v.* Magee, 15 Pa. Super. Ct. 264.

Amount due.— Real estate cannot be sold where the amount of the taxes due is less than the specified sum fixed by statute. Bole *v.* McKelvy, 189 Pa. St. 505, 42 Atl. 42; Hunter *v.* Jones, 31 Pittsb. Leg. J. N. S. (Pa.) 251.

Process see Philadelphia *v.* Merritt, 29 Pa. Super. Ct. 433.

Opening judgment.—The judgment ordering a sale will not be opened except for good cause shown why the taxes should not be paid. Philadelphia *v.* Unknown Owner, 20 Pa. Super. Ct. 203, holding that it is no ground for opening a judgment entered on a tax lien in the city of Philadelphia that the property against which the taxes were assessed embraces two or more lots belonging to different persons, and the mere fact that the lien of the taxes for certain of the years had expired before the issue of the scire

application for judgment of sale without formal pleadings.[51] Where the sale is summary it must be in strict compliance with the statutes.[52] The action must be brought,[53] or the sale made,[54] within the time fixed by statute. It has been held that the sale cannot be set aside in equity as invalid because the amount of the taxes was excessive;[55] but where the sale is for an entire sum and the fees charged and included in the sale are greater than are allowed by law the sale is void.[56] Except where expressly authorized,[57] a sale of land for taxes is void where it

facias is insufficient, since the taxes may still be due, although the lien is gone, and may be collectable from the owner or from the property if yet in the same hands.

51. Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691 (holding that where a city tax is attacked on the ground that, at the time of its levy and extension, no ordinance authorizing its levy had been passed, proof that the ordinance was filed with the county clerk after the extension of the tax is not sufficient to prove that the tax was extended before passage of the ordinance); Hutchinson *v.* Self, 152 Ill. 542, 39 N. E. 27.

Objections on application for judgment.— On application for judgment of sale an objection that the purported tax levy ordinance was not certified by the county clerk is broad enough to allow the point to be raised that it was not a certified copy of the tax levy ordinance. People *v.* Kankakee, etc., R. Co., 218 Ill. 588, 75 N. E. 1063. Where the validity of a city tax is questioned below on the ground that it is excessive, and the ordinance is introduced merely for the purpose of showing an excessive rate, the tax cannot be attacked on appeal because the ordinance was defective. Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293. The burden of proving an appropriation ordinance invalid because it purports to be for the fiscal year subsequent to the one in which it was passed is upon the objector, and if he fails to introduce such ordinance in evidence, relying upon proof as to its substance, and the levy ordinance, which was in evidence, recites that the appropriation was made for the "current" fiscal year, the objection is not sustained by the proof. People *v.* Chicago, etc., R. Co., 189 Ill. 397, 59 N. E. 946.

52. *Georgia.*— Ansley *v.* Wilson, 50 Ga. 418.

Illinois.— See People *v.* Chicago, etc., R. Co., 189 Ill. 397, 59 N. E. 946.

Kentucky.—Johnston *v.* Louisville, 11 Bush 527.

Minnesota.— St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

Mississippi.— Nixon *v.* Biloxi, 76 Miss. 810, 25 So. 664.

New York.— Erschler *v.* Lennox, 11 N. Y. App. Div. 511, 42 N. Y. Suppl. 805; Ely *v.* Azoy, 39 Misc. 669, 80 N. Y. Suppl. 620.

Washington.— Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

United States.— Washington *v.* Pratt, 8 Wheat. 681, 5 L. ed. 714.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2126.

Misdescription of property.— A sale of a lot for city taxes is invalid where the description of the lot in the order of sale made by the common council gives boundaries which include another lot not owned by the person for whose taxes the sale was ordered, the city charter providing that, before sale of land for taxes, an order shall be made by the common council, and entered on the records, "particularly describing the premises to be sold." Erschler *v.* Lennox, 11 N. Y. App. Div. 511, 42 N. Y. Suppl. 805.

Sale for taxes of previous years.— Under a municipal charter provision that, on the first day of May, all property in default for taxes should be then subject to execution sale, the proper city official has authority to issue executions for municipal taxes due the city on assessments regularly made for previous years, where there has been a failure to issue such executions during the years for which the assessments were made. Du Bignon *v.* Brunswick, 106 Ga. 317, 32 S. E. 102.

Name of owner.— In a sale for taxes due New Orleans by non-resident owners of lots, the owner's name must in all cases be given and published in the proceedings. The statement that the owner is unknown cannot make such a sale valid. Carmichael *v.* Aikin, 13 La. 205.

Excess in amount.— A summary sale is void where there is an excess of one dollar charged, taken in connection with such other irregularities as failure to comply with the requirements to accompany the roll with an affidavit as to its correctness, to carry out in separate columns the amount issued against each owner, to sell in the alphabetical order of the names of the owners, and to offer to sell to the person who would take the least quantity and pay all taxes against the owner. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

Postponing sale.— Where it is the duty of the marshal to conduct the sale, the city clerk has no authority to postpone the sale or grant other indulgence. Montford *v.* Allen, 111 Ga. 18, 36 S. E. 305.

53. People's Homestead Assoc. *v.* Garland, 107 La. 476, 31 So. 892; Port Townsend *v.* Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

54. O'Flinn *v.* McInnis, 80 Miss. 125, 31 So. 584.

Time of sale.— A sale made on a day other than the one fixed by law is void. Brown *v.* Sharp, (Miss. 1902) 31 So. 712; O'Flinn *v.* McInnis, 80 Miss. 125, 31 So. 584.

55. Devine *v.* Franks, (N. J. Eq. 1900) 47 Atl. 228.

56. Gabel *v.* Williams, 42 Misc. (N. Y.) 475, 87 N. Y. Suppl. 240.

57. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73, holding that a charge for the certificate of sale could not be regarded as costs.

includes costs.[58] On failure of the purchaser to complete the purchase, the land should be resold.[59]

(B) *Notice.* Notice to the owner or agent, as provided for by constitutional, statutory, or charter provisions, either by personal service, by mail, or by advertisement, is an essential prerequisite to a valid tax-sale.[60] It is not necessary, under some statutes, to show that notice by mail was actually received,[61] although it must be shown that it was mailed to the owner if that is the method provided.[62] If posting or publication is required, it must appear that the notice was given as many times,[63] and for as long a period,[64] as is required by law; and that, if the publication was in a newspaper, it was in an authorized paper.[65] It must also appear that the notice contained the matter required by the statute or ordinance.[66]

(C) *Mode of Sale.* The sale must be at public auction.[67] In most jurisdictions the municipality is only authorized to sell the land in fee,[68] but in some jurisdictions a sale of the land to the municipality cannot be for a longer term than a specified number of years.[69] Under some statutes a sale to the municipality for a term of years does not exhaust its power to sell in fee if at the time of the subsequent sale it is still the purchaser for years.[70] The general rule is that only as much of the land of one proprietor may be sold as will bring enough to satisfy his entire delinquency.[71]

(IV) *PURCHASE BY MUNICIPALITY.*[72] A municipality has no power to buy in realty for taxes,[73] unless it is expressly authorized so to do;[74] or it has general authority to purchase land for governmental purposes.[75] When so authorized to

58. May *v.* Jackson, (Tex. Civ. App. 1903) 73 S. W. 988.

59. *In re* Lindner, 114 La. 895, 38 So. 610.

60. McPhee *v.* Venable, 77 Ga. 772; Worman *v.* Miller, McGloin (La.) 158; Nelson *v.* Goebel, 17 Mo. 161. See also Baltimore *v.* Bouldin, 23 Md. 328. But see Philadelphia *v.* Scott, 72 Pa. St. 92.

Strict compliance with statute.— A provision of the city charter fixing the time for giving notice of a municipal tax-sale must be strictly complied with, and in this respect municipal tax-sales are to be distinguished from tax-sales in pursuance of the general laws of the state. Montford *v.* Allen, 111 Ga. 18, 36 S. E. 305.

Notice to agent.— Under an ordinance providing that "where real estate is levied on, it shall be the duty of the marshal to give the owner, or the tenant in possession if the owner is unknown, a written notice of such levy five days before the sale," a sale of taxes of the land of a non-resident who has a resident agent who is known to the municipal officers as the owner's agent is void, if notice is not given to the agent. McPhee *v.* Venable, 77 Ga. 772.

61. Ross *v.* Drouilhet, 34 Tex. Civ. App. 327, 80 S. W. 241.

62. Ross *v.* Drouilhet, 34 Tex. Civ. App. 327, 80 S. W. 241.

63. Worman *v.* Miller, McGloin (La.) 158, holding that, under the statute requiring the tax-sale to be made "after advertising three times, within ten days," a tax-sale of immovable property within the city of New Orleans which had not been advertised three times within ten consecutive days before the sale was void.

64. Worman *v.* Miller, McGloin (La.) 158; Morehouse *v.* Bowen, 9 Minn. 314; Prindle *v.* Campbell, 9 Minn. 212.

65. Ely *v.* Azoy, 39 Misc. (N. Y.) 669, 80 N. Y. Suppl. 620. See Scheurman *v.* Columbus, 106 Ga. 34, 31 S. E. 787.

66. Washington *v.* Pratt, 8 Wheat. (U. S.) 681, 5 L. ed. 714.

67. Stevens *v.* Williams, 70 Ind. 536; Langley *v.* Chapin, 134 Mass. 82, holding that when a city has taken a deed of land sold for taxes, it cannot, after the expiration of the two years allowed for redemption, sell the land to one not entitled to redeem, except at public auction.

68. Conkie *v.* Grisson, 24 Misc. (N. Y.) 115, 52 N. Y. Suppl. 500.

69. *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363; Morgan *v.* Elizabeth, 44 N. J. L. 571; Baldwin *v.* Elizabeth, 42 N. J. Eq. 11, 6 Atl. 275. *Compare* Schatt *v.* Grosch, 31 N. J. Eq. 199, holding that the act of 1873, repealing the fifty-year limitation in the first clause of section 83 of the charter of Elizabeth City as to the lowest term for which lands may be sold for delinquent taxes, does not affect the second clause, that if not bid for they shall be struck off to the city for the term of fifty years.

70. Devine *v.* Franks, (N. J. Eq. 1900) 47 Atl. 228.

71. Washington *v.* Pratt, 8 Wheat. (U. S.) 681, 5 L. ed. 714.

72. Right to purchase in fee see *supra*, XV, D, 8, e, (III), (C).

73. Champaign *v.* Harmon, 98 Ill. 491; Logansport *v.* Humphrey, 84 Ind. 467.

74. Ogden *v.* Hamer, 12 Utah 337, 42 Pac. 1113; Bannon *v.* Burnes, 39 Fed. 892, holding that where city bids in property there can be no resale.

75. Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471; Jefferson *v.* Curry, 71 Mo. 85. *Contra*, Champaign *v.* Harmon, 98 Ill. 491.

purchase for its own security, it will hold as trustee for itself and the state;[76] and, by statute, it may generally assign its own interest under such sale to one who will repay the amount of its bid and interest.[77]

(v) *Rights and Remedies of Purchasers.* Sales of land for municipal taxes are generally governed by the rule *caveat emptor.*[78] Ordinarily the purchaser cannot recover his purchase-money because of defects in the proceedings,[79] although such as to invalidate the sale,[80] except where the right to recover is expressly conferred by statute.[81] Statutes limiting the time within which an action may be commenced to avoid the sale of property for taxes have been held not applicable to an action by the tax-sale purchaser against the former owner,[82] nor, in any event, where the deed is void on its face.[83] Summary proceedings for possession instituted by the purchaser must be in strict compliance with the statute.[84] After the expiration of the period limited for redemption, the purchaser may compel a conveyance to be executed to him.[85] Where a statute regulating the sale of lands leased from the state provides that only the title of the lessee or his assignee shall pass by the sale, the provision cannot be changed by an ordinance.[86]

76. *In re* Lindner, 114 La. 895, 38 So. 610.

77. Bannon *v.* Burnes, 39 Fed. 892.

Terms of sale.— Where pursuant to a city charter, property sold for unpaid taxes is, in default of bidders, struck off to the city, the rights acquired by the city may be sold by it, and it may sell to the original owner. There is no rule of public policy requiring such a sale to be for cash, and in the absence of any provision of the charter requiring it the sale may be upon credit, with such security as in the exercise of good faith and good judgment the common council may deem for the best interests of the city. Buffalo *v.* Balcom, 134 N. Y. 532, 32 N. E. 7.

78. Logansport *v.* Humphrey, 84 Ind. 467; Homestead Assoc. *v.* Garland, 107 La. 476, 31 So. 892; Lynde *v.* Melrose, 10 Allen (Mass.) 49.

Purchaser as charged with notice of existing liens.— A purchaser at a tax-sale is charged with notice of all existing liens thereon for unpaid prior assessments. Bell *v.* New York, 66 N. Y. App. Div. 578, 73 N. Y. Suppl. 298.

79. Lynde *v.* Melrose, 10 Allen (Mass.) 49.

In the absence of fraud, accident, or mistake, money paid by a purchaser of real estate at a sale for the non-payment of city taxes cannot be recovered back. Indianapolis *v.* Langsdale, 29 Ind. 486.

Fraud of collector.— In an action to recover back the purchase-money paid by the purchaser of land at a tax-sale, on the ground of fraudulent representations of the collector, the fact that the town received from the collector who sold the land the note given for the purchase-money does not show that the town had such connection with the fraud as to render it liable for the purchase-money to the purchaser. Treat *v.* Orono, 26 Me. 217.

80. Logansport *v.* Humphrey, 84 Ind. 467.

81. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

Defenses.— Money paid to a city on a sale by it of property for municipal taxes, under an ordinance providing that, where such sales were illegal, the money should be refunded, does not become the absolute property of the city; and the fact that its indebtedness exceeds the constitutional limit does not constitute a defense to an action to recover such money where the sale was illegal. Phelps *v.* Tacoma, 15 Wash. 367, 46 Pac. 400.

Complaint as stating cause of action.— Under an ordinance providing that a purchaser of a certificate of sale for delinquent taxes may recover the purchase-price if such certificate was illegally or erroneously issued, allegations that the assessor did not fix a true value on the property, but, for the purpose of increasing the debt limit of the city in order that certain bonds might be issued with an appearance of legality, he intentionally and fraudulently assessed the property at least four times its true value, stated a cause of action. Gove *v.* Tacoma, 26 Wash. 474, 67 Pac. 261.

When action barred by limitations.—Where an ordinance provides that the purchaser of a certificate of sale for delinquent taxes illegally or erroneously issued may recover the purchase-price, and that the city controller, on discovering such an error as would place the certificate under the operation of the ordinance, shall cause notice to be given to the holder of such certificate, the statute of limitations does not run against the right to recover until the giving of such notice. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73 (holding that the payment by the purchaser of an illegally exacted certificate fee of one dollar did not charge the purchaser with knowledge that the fee was illegal, so as to cause the statute of limitations to run from the time of the payment); Gove *v.* Tacoma, 26 Wash. 474, 67 Pac. 261.

82. Daniels *v.* Case, 45 Fed. 843.

83. Daniels *v.* Case, 45 Fed. 843.

84. People *v.* Andrews, 52 N. Y. 445.

85. Johnston *v.* Louisville, 11 Bush (Ky.) 527.

86. Street *v.* Columbus, 75 Miss. 822, 23 So. 773.

f. Redemption From Sale — (I) *In General.* The right to redeem from a tax-sale is wholly governed by statutory and charter provisions,[87] but such right may be conferred either expressly or by implication.[88] However, as in the case of state and county taxes,[89] it is almost universally provided that the owner or other person shall have a right to redeem property sold for taxes upon the payment of a certain sum within a specified time.[90] A municipality has the power to make a compromise by which it receives a lump sum from the delinquent taxpayer to effect a redemption and the council cannot subsequently forbid the execution of a conveyance to the person redeeming.[91]

(II) *Amount Required to Redeem.* The amount required to be paid to redeem from a municipal tax-sale is generally prescribed by statute or charter provision,[92] or by ordinance.[93] The amount usually includes all the taxes for which the property was sold and after-accrued taxes,[94] interest at a specified rate,[95] and sometimes fixed penalties[96] and expenses incurred by the purchaser in proceedings to perfect title thereto.[97] A joint owner may, in some municipalities, redeem

87. See the statutes of the several states.

88. Johnston *v.* Louisville, 11 Bush (Ky.) 527.

89. See, generally, TAXATION.

90. See cases cited *infra*, this note.

Redemption by resale to interested party.— Where, after the time to redeem has expired, the city, which has become the purchaser at the tax-sale, sells the property at private sale to one, a grantee on condition, for whose delinquency the land was sold for taxes, the title of the city is extinguished and the payment inures to the benefit of the grantor of the payor. Langley *v.* Chapin, 134 Mass. 82.

Estoppel to deny title after redemption.— Where the officers of a municipal corporation without authority assess against a person for taxation land belonging to the municipality and collect taxes thereon, and return the same as delinquent for non-payment of taxes, buy the same at the tax-sale, and convey the same upon redemption, the municipality will not be estopped, by these acts of her officers and agents, to claim the property as her own. St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

Service upon the owner of a notice to redeem, after the expiration of two years from the time of the sale, requiring him to redeem within thirty days, is necessary, under some charters, before the city, the purchaser at the tax-sale, can maintain an action for the foreclosure of the equity of redemption. Rochester *v.* Fourteenth Ward Co-Operative Bldg. Lot Assoc., 183 N. Y. 23, 75 N. E 692 [*affirming* 105 N. Y. App. Div. 625, 93 N. Y. Suppl. 1124]. Under a statute requiring a tax-purchaser of lands actually in possession of a third person to give notice to the occupant stating the sale and the amount necessary to redeem, a waiver of notice by an occupant who has no interest in the property is not equivalent to a notice. Jackson *v.* Esty, 7 Wend. (N. Y.) 148.

Recovery of redemption money by purchaser.— A purchaser of lands sold for taxes cannot maintain an action against the city to recover moneys paid to the collector to redeem such lands from the tax-sale, and which moneys the collector has refused to pay over to plaintiff on demand made. Onderdonk *v.* Brooklyn, 31 Barb. (N. Y.) 505. But it is otherwise where the charter of the corporation provides for payment over, and contains a provision for payment on surrender of the certificate of purchase and payment is made to the assignor of the certificate without requiring a surrender, after the assignment, the municipality is liable therefor to the assignee. Bidwell *v.* Tacoma, 26 Wash. 518, 67 Pac. 259. Under a charter provision that money received by the city to redeem property sold for taxes shall be paid to the purchaser or his assigns on surrender of the certificate of purchase, limitations do not commence to run against an action to recover such money until the owner of the certificate has offered to return the same and demanded the money. Bidwell *v.* Tacoma, *supra*.

91. Hintrager *v.* Richter, 85 Iowa 222, 52 N. W. 188.

92. See the statutes of the several states.

93. Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Augustine *v.* Jennings, 42 Iowa 198; People *v.* Cady, 41 Hun (N. Y.) 539.

Power of municipality.— Under a statute providing for the sale of property for the collection of delinquent taxes, and directing that the towns coming under the provisions thereof may provide by ordinance for the method of conducting sales of property sold for delinquent taxes, and also to provide all other needful rules and regulations for the proper enforcement of the rights granted, an incorporated town is authorized to provide for penalties and interest on delinquent taxes, the payment of which shall be a condition attached to redemption. Augustine *v.* Jennings, 42 Iowa 198.

94. State *v.* Tufts, 108 Mo. 418, 22 S. W. 91; *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

95. Barton *v.* McWhinney, 85 Ind. 481; Augustine *v.* Jennings, 42 Iowa 198; People *v.* Cady, 41 Hun (N. Y.) 539.

96. Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Augustine *v.* Jennings, 42 Iowa 198.

97. Devine *v.* Franks, (N. J. Eq. 1900) 47 Atl. 228, holding, under a particular statute, that such costs and expenses cannot be al-

his undivided interest by payment of his proportionate share of the whole amount necessary to redeem.[98]

(III) *Time of Redemption.* The time for redemption, as fixed by general statutes, charter provisions, or ordinances, generally begins to run from the date of the sale or the filing of the deed.[99] Usually a longer time is provided for in case of persons under disability,[1] and, in some jurisdictions, in case of remaindermen.[2] After the time fixed by the statute for redemption has expired the right to redeem is gone,[3] and there is no power even in a court of equity to thereafter authorize a redemption of the property.[4]

g. Remedies For Wrongful Collection of Tax — (I) *Restraining Collection*[5] — (A) *Grounds and Propriety of Writ.* While an injunction to prevent the collection of a municipal tax will not ordinarily be granted at the suit of a taxpayer merely because of irregularities in the proceedings of the taxing officers,[6] nor because the tax is excessive,[7] nor to compel a set-off,[8] nor because of the failure to enforce the tax against other persons,[9] nor because the land was so situated as not to receive the benefit of the taxes;[10] yet an injunction will issue to enjoin the

lowed a person seeking redemption of his lands without proof that they were necessary and approved by the mayor.

98. People *v.* Detroit, 8 Mich. 14, 77 Am. Dec. 433.

99. Lander *v.* Bromley, 79 Wis. 372, 48 N. W. 594; West *v.* Duncan, 42 Fed. 430; Berthold *v.* Hoskins, 38 Fed. 772, holding that where, under a city charter, eighteen months from the time the deed is filed with the mayor are allowed in which to redeem from a tax-sale, the period of redemption is to be computed from the time a deed, properly acknowledged, is filed.

1. Mockbee *v.* Upperman, 17 Fed. Cas. No. 9,687, 5 Cranch C. C. 535, infant.

2. Tiddy *v.* Graves, 127 N. C. 502, 37 S. E. 513, 126 N. C. 620, 36 S. E. 127, holding that the fact that a city charter, authorizing redemption of land from sale for city taxes within one year from the date of sale, does not make any provision for redemption by remainder-men from sales by reason of the life-tenant's failure to pay city taxes after the expiration of a year, did not preclude a remainder-man from redeeming from such taxes under a statute allowing redemption by remainder-men at any time within two years, such statute being a general law, and applying to city as well as other taxes.

3. Montford *v.* Allen, 111 Ga. 18, 36 S. E. 305; Johnston *v.* Louisville, 11 Bush (Ky.) 527.

4. Montford *v.* Allen, 111 Ga. 18, 36 S. E. 305.

5. See, generally, INJUNCTIONS.

6. Morrison *v.* Hershire, 32 Iowa 271.

Restatement of rule.— If a municipal corporation erroneously or illegally taxes property, which it has the power to tax in a proper manner, the remedy for such error must be sought generally in a court of law; but if it acts *ultra vires* by taxing property not subject to taxation, or by taxing property, which it has a right to tax, beyond the limit fixed by the law conferring the power to tax, a court of equity will on a bill filed by the owner of the property enjoin the collection of such tax. Christie *v.* Malden, 23 W. Va. 667.

Requiring correction.— Where the constitution requires an *ad valorem* tax to be levied on both realty and personalty and a city ordinance provides for such tax on realty, the omission to assess certain personalty in the mode prescribed does not render the entire ordinance void, so as to entitle a taxpayer to an injunction to restrain the collection of taxes thereunder; but a court of equity may require the city council to correct the ordinance by assessing the personalty omitted from the *ad valorem* system, its value to be ascertained as of the date when the original assessment was required to be made. Levi *v.* Louisville, 97 Ky. 394, 30 S. W. 973, 16 Ky. L. Rep. 872, 28 L. R. A. 480.

Collection of a general tax for proper city purposes will not be restrained merely because it was levied in part to replace funds illegally expended. Clee *v.* Trenton, 108 Mich. 293, 66 N. W. 48.

Before issuance of bonds.— Where an ordinance has been passed to raise money by the issuance of bonds, but no bonds have been issued, an action to enjoin the collection of the tax does not lie before the debt has been incurred. Delaware, etc., R. Co. *v.* Scranton City, 5 Pa. Co. Ct. 437.

Action to restrain misapplication as remedy.— Where the objection is as to the application of part of the tax to the payment of an indebtedness in excess of the constitutional limit the action should be to restrain the misapplication and not the collection of the tax. Strohm *v.* Iowa City, 47 Iowa 42.

7. Mobile *v.* Waring, 41 Ala. 139; Erie *v.* Reed, 113 Pa. St. 468, 6 Atl. 679. *Contra*, see National Tube Co. *v.* Shearer, (Del. Ch. 1905) 62 Atl. 1093; Erie's Appeal, 3 Walk. (Pa.) 251.

8. Cartersville Water-Works Co. *v.* Cartersville, 89 Ga. 689, 16 S. E. 70.

9. Augusta Factory *v.* Augusta, 83 Ga. 734, 10 S. E. 359; Page *v.* St. Louis, 20 Mo. 136.

10. Linton *v.* Athens, 53 Ga. 588; McFerran *v.* Alloway, 14 Bush (Ky.) 580; Groff *v.* Frederick City, 44 Md. 67.

collection of illegal taxes,[11] as where the property is not liable,[12] or the levy is invalid.[13] However, there is no right to an injunction where there is an adequate remedy at law,[14] or by proceedings before a board to review the assessment.[15] The municipality cannot, by ordinance, deprive the courts of power to issue an injunction.[16] Payment of so much of the tax as is admitted to be legal is a condition precedent to an action to enjoin the collection of an illegal tax,[17] and long acquiescence in the validity of annexation proceedings bars the right to enjoin the collection on the ground of invalidity of such proceedings.[18] The collection of a railroad aid tax may be enjoined because of false representations as to the road,[19] or where the bonds were irregularly issued,[20] but not where there is no valid legal defense to the payment of the bonds in the hands of the holders.[21]

11. Howell *v.* Peoria, 90 Ill. 104; Windman *v.* Vincennes, 58 Ind. 480; Finney *v.* Lamb, 54 Ind. 1. *Compare* Freeland *v.* Hastings, 10 Allen (Mass.) 570.

Taxes in excess of statutory limit.— If a municipal corporation taxes property beyond the limit fixed by the organic law conferring the power to tax, a court of equity will enjoin the collection of the amount illegally assessed. Tygart's Valley Bank *v.* Philippi, 38 W. Va. 219, 18 S. E. 489.

Constitutionality of act to incorporate municipality.— Equity has jurisdiction to entertain a bill to enjoin the officers of a town from undertaking to collect taxes on the ground that the act purporting to incorporate the town is unconstitutional and void. Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638.

Cloud on title.— Where the apparent lien of an invalid tax is a cloud upon plaintiff's title, relief may be obtained by injunction. Vesta Mills *v.* Charleston, 60 S. C. 1, 38 S. E. 226.

12. Augusta *v.* Central R. Co., 78 Ga. 119; Sioux City Bridge Co. *v.* Dakota County, 61 Nebr. 75, 84 N. W. 607, holding that where defendant city levied a tax, on property of plaintiff, the *situs* of which was not within its jurisdiction, plaintiff's failure to appeal from such assessment did not estop him from disputing its validity, since a property-owner is not required to appear before a taxing board in opposition to the assessment of a tax on property whose *situs* is not within the jurisdiction of such board, the levy in such case being void.

Exempt property.— Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227 [*affirmed* in 12 N. J. Eq. 545]; Scranton City Guard Assoc. *v.* Scranton, 2 C. Pl. (Pa.) 217; Vesta Mills *v.* Charleston, 60 S. C. 1, 38 S. E. 226. But one is not entitled to injunction against enforcement of taxes as in violation of a contract for exemption, where it appears that he has not complied with his undertaking in the contract to give an indemnity mortgage, and he gives no reason for or explanation of his failure to do so. Havre de Grace Real Estate, etc., Co. *v.* Havre de Grace, 102 Md. 33, 61 Atl. 662.

13. Atlanta *v.* Jacobs, 125 Ga. 523, 54 S. E. 534.

14. Verdery *v.* Summerville, 82 Ga. 138, 8 S. E. 213; Mutual Ben. L. Ins. Co. *v.* New York, 2 Abb. Pr. N. S. (N. Y.) 233, 32 How. Pr. 359.

Effect of insolvency.— Injunction will not lie to restrain the collection of a tax assessed by a municipal corporation on the capital stock of a national bank, although the municipality be insolvent, where there is an adequate remedy at law. National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15.

15. Macklot *v.* Davenport, 17 Iowa 379, holding that when the charter of a city authorizes the council "to correct or equalize any erroneous or injudicious assessment" of taxes, it is not competent for a court of equity to interfere by injunction to restrain the collection of taxes erroneously assessed in said city.

16. Vesta Mills *v.* Charleston, 60 S. C. 1, 38 S. E. 226.

Ordinance not retroactive.— Where, subsequent to the commencement of a suit to restrain the collection of taxes by a city, it passed an ordinance providing that the collection and enforcement of taxes for municipal purposes on property within the city should not be stayed or prevented by injunction or order issued by any court or judge, but did not indicate that it was to have a retroactive effect, such ordinance did not deprive the court of jurisdiction to grant the injunction. Vesta Mills *v.* Charleston, 60 S. C. 1, 38 S. E. 226.

17. Mobile *v.* Waring, 41 Ala. 139; London *v.* Wilmington, 78 N. C. 109. See also Augusta Factory *v.* Augusta, 83 Ga. 734, 10 S. E. 359.

18. Logansport *v.* La Rose, 99 Ind. 117; Worley *v.* Harris, 82 Ind. 493.

19. Curry *v.* Decatur County, 61 Iowa 71, 15 N. W. 602.

Estoppel to set up misrepresentation.— In an action to restrain the collection of a railroad aid tax, the taxpayers are not estopped from setting up misrepresentations which induced the voting of the tax, where a notice was served upon the president of the company, before any grading had been done, that the tax would be contested for fraud and misrepresentation. Curry *v.* Decatur County, 61 Iowa 71, 15 N. W. 602.

20. Hills *v.* Peekskill Sav. Bank, 26 Hun (N. Y.) 161.

21. Wilkinson *v.* Peru, 61 Ind. 1. See also Mt. Vernon *v.* Hovey, 52 Ind. 563.

(B) *Pleading.*[22] The allegations of the bill must be definite and certain,[23] but mere informalities do not make it demurrable.[24] Suing the municipality in its corporate name on the ground that it had forfeited its charter before the taxes were levied is not an admission of the legal existence of the municipality.[25]

(C) *Parties.*[26] One municipality cannot obtain an injunction to restrain the collection of a tax levied by another municipality, since the remedy can only be invoked by taxpayers.[27] An action may be brought by a taxpayer in his own name,[28] or on behalf of all others similarly situated;[29] and it is proper to allow all citizens other than the original plaintiff to be made parties plaintiff.[30] But taxpayers cannot join as plaintiffs where their interests are separate and distinct.[31] The persons to whom the taxes are to be ultimately paid have been held not necessary parties,[32] although in an action to enjoin the collection of taxes to pay bonds the bondholders are necessary parties;[33] and where an injunction is asked to restrain a city treasurer from collecting a school tax irregularly assessed, the school-district is a necessary party.[34] The municipality itself need not be made a party by name where the mayor and members of the council are made defendants, and appear and answer in their official capacity as well as individuals.[35]

(II) *Recovery of Property, or Money Received.* Property unlawfully seized for taxes may be replevied,[36] and previous payment of a similar tax will not defeat the action.[37] So money received from an unlawful distress may be recovered from the municipality.[38]

(III) *Liability For Damages.* Generally a municipality is not liable in tort for the unauthorized and unlawful acts of its officers in collecting taxes,

Narrow gauge road.— The collection of a town railroad aid tax will not be enjoined on a mere showing that since the vote for the tax a narrow gauge road has been constructed, in the absence of any averment or showing that the road as constructed is not fully adequate to meet all the wants or requirements of the taxpayers. Sioux City, etc., R. Co. *v.* Herron, 46 Iowa 701; Meader *v.* Lowry, 45 Iowa 684.

22. See, generally, INJUNCTIONS; TAXATION.

23. Albertville *v.* Rains, 107 Ala. 691, 18 So. 255.

24. Winkler *v.* Halstead, 36 Mo. App. 25.

25. Hornbrook *v.* Elm Grove, 40 W. Va. 543, 21 S. E. 851, 28 L. R. A. 416.

26. See, generally, INJUNCTIONS; PARTIES; TAXATION.

27. Waverly *v.* Public Accounts, 100 Ill. 354; Nunda *v.* Chrystal Lake, 79 Ill. 311; Donaldsonville *v.* Ascension Parish Police Jury, 113 La. 16, 36 So. 873.

28. *New York.*—People *v.* Morgan, 65 Barb. 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587].

North Carolina.— London *v.* Wilmington, 78 N. C. 109.

Pennsylvania.— Wheeler *v.* Philadelphia, 32 Leg. Int. 75.

South Carolina.— Vesta Mills *v.* Charleston, 60 S. C. 1, 38 S. E. 226.

Texas.— Nalle *v.* Austin, (Civ. App. 1893) 21 S. W. 375.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2121.

29. London *v.* Wilmington, 78 N. C. 109.

30. Cobb *v.* Elizabeth City, 75 N. C. 1.

31. Lewis *v.* Eshleman, 57 Iowa 633, 11 N. W. 617.

32. Leitch *v.* Wentworth, 71 Ill. 146. But see Howell *v.* Peoria, 90 Ill. 104, holding that a bill to enjoin the levy and collection of a tax to pay a debt which a city has incurred in excess of its powers should not be dismissed, because the person to whom the debt is due is not made a party, but should be retained, that proper parties may be made.

33. Edwards *v.* People, 88 Ill. 340 (unless bonds are clearly shown to be void); Board *v.* Texas, etc., R. Co., 46 Tex. 316.

Allegations in pleadings as excusing failure to join.— In a suit by taxpayers to annul proceedings authorizing the issuance of bonds as a donation to a railroad company to aid in the construction of the road, and to enjoin the collection of taxes to pay interest on such bonds, an allegation that the bonds had been fraudulently issued and delivered to the company, and by it transferred to the holders with notice of the fraud, will not dispense with the necessity of bringing such holders before the court as parties. Board *v.* Texas, etc., R. Co., 46 Tex. 316.

34. Folkerts *v.* Power, 42 Mich. 283, 3 N. W. 857.

35. Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638.

36. Buell *v.* Ball, 20 Iowa 282, holding that in replevin to recover property levied upon by a city marshal for the payment of the city taxes, plaintiff is not precluded from denying the validity of the tax by the fact that he asked for and aided in procuring the original city charter.

37. Buell *v.* Ball, 20 Iowa 282.

38. Teall *v.* Syracuse, 120 N. Y. 184, 24 N. E. 450, holding no previous demand necessary.

although done under color of office,[39] unless such acts were afterward ratified by the municipality.[40] On the other hand the municipality is liable for damages resulting from acts of its officers in attempting in good faith to exercise powers and perform duties of the corporation but not conducted according to law.[41] So one whose property has been seized for a tax assessed under an invalid ordinance has a cause of action where the mayor and council, with malicious intent to prevent him from competing with resident merchants, passed a resolution declaring him by name to be within the ordinance.[42] Whether an action may be maintained against a municipality to recover damages for malicious prosecution of a suit for taxes is doubtful.[43]

9. Tax Deeds and Leases[44] — a. Applicability of General Statutes. Statutes applicable to tax deeds for state and county taxes have been held not applicable to tax deeds for municipal taxes.[45]

b. Necessity For and Conditions Precedent to Right To Deed. Where the time for redemption has expired, the purchaser, in order to maintain summary proceedings against an occupant, must generally first obtain a deed in the manner provided by the charter.[46] In some jurisdictions it is provided by statute that notice of the expiration of the time to redeem from a tax-sale must be served on the person in whose name the land is taxed before a tax deed can be demanded.[47]

c. Authority to Issue. A tax deed cannot be issued by an officer except where he is authorized so to do by statute or charter provision.[48]

d. Form and Contents. A tax deed must comply, in so far as form and contents are concerned, with the statutory or charter provisions in regard thereto.[49]

Refunding or recovery of taxes paid see *supra*, XV, D, 7, b.

39. Leeds *v.* Hardy, 44 La. Ann. 556, 11 So. 1; Trafton *v.* Alfred, 15 Me. 258. *Compare* Caston *v.* Toronto, 30 Ont. 16.

Sale of property of wrong person.— A city is not liable in tort for the act of its officer in selling the property of one person for the delinquent taxes of another. Everson *v.* Syracuse, 100 N. Y. 577, 3 N. E. 784 [*reversing* 29 Hun 485]; Wallace *v.* Menasha, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804.

40. Everson *v.* Syracuse, 100 N. Y. 577, 3 N. E. 784 [*reversing* 29 Hun 485], holding, however, that the receipt of the proceeds of sale, in the absence of notice that the tax was collected from the wrong person, was not a ratification, nor was a resolution of the council agreeing to save the officer harmless in collecting the tax.

41. Williams *v.* Dunkirk, 3 Lans. (N. Y.) 44, holding that a village may be held liable for acts of its trustees in seizing and selling goods of a taxpayer for a tax which they have assumed to assess upon him, under authority conferred on them as trustees, but which is void through irregularity of their acts or proceedings.

42. Gould *v.* Atlanta, 60 Ga. 164.

43. Brown *v.* Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28, holding that where, in an action against a municipal corporation to recover damages for the malicious prosecution of a suit for taxes, the petition contains no statement of facts sufficient to enable the court to determine whether or not the corporation had or had not the authority to levy and impose, and to collect, the taxes involved in the suit, it not appearing therefrom what said taxes were for, or when or how imposed, it is fatally defective, and a demurrer thereto will be sustained. See, generally, Malicious Prosecution.

44. See, generally, Taxation.

Rights and remedies of purchasers in general see *supra*, XV, D, 8, e, (v).

45. Johnson *v.* Phillips, 89 Ga. 286, 15 S. E. 368.

Remedies of grantee in deed.— Statutory remedies applicable to the holder of a tax deed have been held not to include municipal tax deeds. Grimmer *v.* Sumner, 21 Wis. 179.

But a statute prohibiting the issuance of a tax deed unless a certain notice has been served on the occupant or owner by the holder of the certificate applies to deeds issued by the city as well as county officers. State *v.* Hundhausen, 23 Wis. 508. See also Scheftels *v.* Tabert, 46 Wis. 439, 1 N. W. 156.

46. Gabel *v.* Williams, 42 Misc. (N. Y.) 475, 87 N. Y. Suppl. 240.

47. Crawford *v.* Liddle, 101 Iowa 148, 70 N. W. 97, holding that when land is taxed to a person by name by the county in which a city is located and the land is sold for city taxes, the owner must be given said notice, although the city taxed the land to one "unknown."

48. Doe *v.* Chunn, 1 Blackf. (Ind.) 336; Swain *v.* Comstock, 18 Wis. 463.

49. Daniels *v.* Case, 45 Fed. 843.

"Public" sale.— Under a charter prescribing that a tax deed shall recite that the property was publicly exposed for sale on a certain day "at the sale begun and 'pub-

And it has been held that a tax deed should run in the name of the city and not in the name of the state.[50]

e. Operation and Effect. Where the statute provides what the deed shall contain, the recitals therein are not covenants of warranty and do not estop the municipality issuing the conveyance.[51] So there is no implied warranty of the validity of a tax lease, on an agreement to assign it.[52] Where the tax is illegal and void, the deed conveys no title.[53] Under some statutes all prior taxes and assessments are paramount to a tax lease.[54] Where tax leases are purchased from a city, the title of the purchaser thereunder vests from the date of the lease.[55] Where a purchaser of tax leases from a city obtained a lease or leases covering all of the years for which the land had been bid in by the city, all of the leases bearing the same date, it was no objection to the validity thereof that, inasmuch as the city had bid in the land, it was not authorized to tax it thereafter[56]

f. Tax Deeds as Evidence. Ordinarily a municipal tax deed is not sufficient evidence of the validity of the sale,[57] and the party relying thereon must show that all the necessary prerequisites to a legal sale were complied with.[58] But in some municipalities, by statute, charter provisions, or ordinances, such deeds are *prima facie* evidence of the regularity of the proceedings,[59] and even conclusive as to some facts.[60] The power of a municipality to provide that the deed shall be *prima facie* evidence of a compliance with all necessary prerequisites has been denied,[61] although there are cases to the contrary.[62]

10. Forfeiture and Penalties For Non-Payment. Usually a penalty for non-payment of a tax after it is due is provided for by statute, charter provisions, or

licly' held on the first Monday . . . the first day on which said real property was advertised for sale," and requiring tax deeds to comply substantially with the forms prescribed, a tax deed is void which omits the word "publicly" in the clause "at the sale begun and publicly held." Daniels *v.* Case, 45 Fed. 843.

50. Stieff *v.* Hartwell, 35 Fla. 606, 17 So. 899; Florida Sav. Bank *v.* Brittain, 20 Fla. 507; Sams *v.* King, 18 Fla. 557; McNamara *v.* Estes, 22 Iowa 246.

51. Meday *v.* Rutherford, 65 N. J. L. 645, 48 Atl. 529; Bell *v.* New York, 66 N. Y. App. Div. 578, 73 N. Y. Suppl. 298.

The word "demise," in the operative words of conveyance in a tax deed executed by the officers of a municipality, does not import a covenant for quiet enjoyment. Meday *v.* Rutherford, 65 N. J. L. 645, 48 Atl. 529.

52. Bensel *v.* Gray, 62 N. Y. 632.

53. Low *v.* Lewis, 46 Cal. 549.

54. Rochester *v.* Parker, 41 Misc. (N. Y.) 514, 85 N. Y. Suppl. 13.

55. Sherman *v.* Fisher, 138 Mich. 391, 101 N. W. 572.

56. Sherman *v.* Fisher, 138 Mich. 391, 101 N. W. 572.

57. Collins *v.* Robinson, 33 Ala. 91.

58. Parker *v.* Burgen, 20 Ala. 251; Fitch *v.* Pinckard, 5 Ill. 69; Nelson *v.* Goebel, 17 Mo 161; Sanders *v.* Leavey, 38 Barb. (N. Y.) 70.

59. Carpenter *v.* Shinners, 108 Cal. 359, 41 Pac. 473 (holding, however, under particular statutes, that, when a deed of land sold for taxes of such city contains no recital of the ordinance, such ordinance must be proved before the deed will become *prima facie* evidence of compliance with its requirements); Lever *v.* Grant, 139 Mich. 273, 102 N. W. 848, 103 N. W. 843.

Construction of statutes.—A statutory provision that "all tax deeds for lots or lands sold under ordinances of the City of St. Louis for the non-payment of taxes due said city, shall be received in like manner, and shall have the same force and effect, when recorded, as State tax deeds," etc., cannot be construed as making tax deeds of the city of St. Louis *prima facie* evidence of title in fee simple in the grantee, as are state tax deeds. Stierlin *v.* Daley, 37 Mo. 483.

Prima facie but not conclusive evidence.—In a contest upon the title of land sold for city taxes, where the deed is made *prima facie* evidence, the introduction of a tax deed does not preclude proof that the demand, required by the city charter to be made within a reasonable time before sale, was in fact not made, and that consequently the deed was invalid. Lathrop *v.* Howley, 50 Iowa 39.

60. Carpenter *v.* Shinners, 108 Cal. 359, 41 Pac. 473; Holbrook *v.* Dickinson, 46 Ill. 285, holding, however, that where a city charter provided that, upon the sale of land for taxes, the deed should be conclusive evidence of the regularity of the sale, but it prescribed no mode of sale except that it should be made upon an order of the city council, a claimant under such a deed must prove that by-laws regulating the proceedings were adopted by the city and pursued in making the sale.

61. Fitch *v.* Pinckard, 5 Ill. 69.

62. Howe *v.* Barto, 12 Wash. 627, 41 Pac. 908. See also Carpenter *v.* Shinners, 108 Cal. 359, 41 Pac. 473.

ordinance.[63] However, the general rule is that a municipality cannot, without express authority, prescribe a penalty for neglect to pay taxes promptly,[64] although in some cases the power has been implied.[65] Such penalties may be remitted by the council as against the objection of the collector of taxes.[66] When collected, the penalty forms no part of the municipal revenues but should be included with the tax where it is held in trust for a particular purpose,[67] but the penalty is not to be computed in determining whether the amount of the tax is in excess of constitutional or statutory provisions.[68] Unless expressly so provided the penal rate of interest does not continue after judgment on a scire facias.[69] Penalties are collectable in the same manner as the tax;[70] but where the person owing such tax is liable to an additional penalty, no penalty can be recovered in a suit against a purchaser from the one who owned the land at the time the taxes were assessed.[71] A penalty paid under protest, to prevent a seizure, may be recovered back by the taxpayer.[72]

11. Disposition of Taxes and Other Revenue Collected — a. In General. The mode of disposition for municipal purposes of taxes and other revenue, after collection, is generally specifically regulated by statute or charter provision.[73] In

Invasion of power of legislature to change rules of evidence.— Such a provision is not objectionable as prescribing a rule of evidence for state courts. Howe *v.* Barto, 12 Wash. 627, 41 Pac. 908. *Contra*, Fitch *v.* Pinckard, 5 Ill. 69.

63. *Kentucky.*— Owensboro Waterworks Co. *v.* Owensboro, 75 S. W. 268, 25 Ky. L. Rep. 434.

Louisiana.— Victoria Lumber Co. *v.* Rives, 115 La. 996, 40 So. 382; New Orleans Second Municipality *v.* Morgan, 1 La. Ann. 111.

Missouri.— Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523.

New Jersey.— Durant *v.* Jersey City, 37 N. J. L. 271.

New York.— Rochester *v.* Bloss, 100 N. Y. App. Div. 125, 91 N. Y. Suppl. 642 [*reversed* on other grounds in 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. N. S. 694].

Pennsylvania.— Altoona *v.* Morrison, 24 Pa. Super. Ct. 417, holding that one per cent per month penalty could be added only until judgment entered but that thereafter only six per cent could be collected.

United States.— New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485, holding statute applicable to school taxes.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2144.

Such provisions are not retroactive.— Nalle *v.* Austin, (Tex. Civ. App. 1906) 93 S. W. 141; Houston *v.* Stewart, (Tex. Civ. App. 1905) 90 S. W. 49.

Repeal of statute.— Penalties which have accrued are not affected by the subsequent repeal of the statute authorizing the imposition of the tax where a general statute expressly provides that the repeal of a statute shall not affect any penalty incurred thereunder. Chicago, etc., R. Co. *v.* Hartshorn, 30 Fed. 541.

Amount.— Where not prohibited from so doing, power to fix a penalty includes power to impose a greater penalty than that imposed for failure to pay state taxes. Carpenter *v.* Lambert, 92 S. W. 607, 29 Ky. L. Rep. 183.

64. Augusta *v.* Dunbar, 50 Ga. 387; Jefferson City *v.* Whipple, 71 Mo. 519; San Antonio *v.* Raley, (Tex. Civ. App. 1895) 32 S. W. 180.

Where no penalty is provided by a city charter for non-payment of taxes, none can be imposed; and where the charter of another city has been applied to it by the legislature, "so far as applicable," the court will not look to such adopted charter to see whether a penalty can be imposed for the non-payment of taxes. Price *v.* Bellevue, 1 Ky. L. Rep. 276.

65. Burlington *v.* Burlington, etc., R. Co., 41 Iowa 134.

Power to fix method of enforcement.— A board of aldermen of a city authorized to prescribe by ordinance the method of enforcing payment of taxes may prescribe a penalty for non-payment. Virginia *v.* Chollar-Potosi Gold, etc., Co., 2 Nev. 86.

66. Wheatly *v.* Covington, 11 Bush (Ky.) 18.

67. New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485 [*affirming* 91 Fed. 574, 34 C. C. A. 15].

68. Tobin *v.* Hartshorn, 69 Iowa 648, 29 N. W. 764; Chicago, etc., R. Co. *v.* Hartshorn, 30 Fed. 541.

69. Altoona *v.* Morrison, 24 Pa. Super. Ct. 417. But see Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523.

70. Burlington *v.* Burlington, etc., R. Co., 41 Iowa 134.

71. San Antonio *v.* Raley, (Tex. Civ. App. 1895) 32 S. W. 180.

72. Hodges *v.* Coffee, (Miss. 1893) 13 So. 878.

73. *Alabama.*— White *v.* Decatur, 119 Ala. 476, 23 So. 999.

Delaware.— Weldin *v.* Wilmington, 3 Penew. 472, 51 Atl. 157.

Illinois.— Chicago *v.* Brede, 218 Ill. 528, 75 N. E. 1044 (purchase of improvement bonds); Iuka *v.* Schlosser, 97 Ill. App. 222 (distribution of road and bridge tax between village and town).

Louisiana.— State *v.* New Orleans, 106

the absence of any special direction as to the application of specific revenues, the municipality may apply them in any manner not inconsistent with the charter provisions.[74] Taxes are to be apportioned between different funds as provided for by the statutes,[75] but where the amount raised by a tax was a common fund to meet all of certain indebtedness, an appropriation among other kinds of such indebtedness will not prevent its application to any of such indebtedness.[76] Any surplus in special funds is often required to be transferred to the general fund,[77] or the option is given to apply the excess to supply the deficiency in any other fund.[78] Whether the penalty for non-payment is a part of the tax and to be paid out as such with the tax to the proper fund depends upon the particular statutory or charter provisions governing.[79]

b. Change of Purpose. Generally taxes levied for one purpose cannot be

La. 469, 31 So. 55; State *v.* New Orleans, McGloin 47.

Nebraska.— King *v.* State, 50 Nebr. 66, 69 N. W. 307.

New Jersey.— Sheehey *v.* Hoboken, 62 N. J. L. 182, 40 Atl. 629.

New York.— People *v.* Brooklyn Comptroller, 152 N. Y. 399, 46 N. E. 852 [*affirming* 11 N. Y. App. Div. 114, 42 N. Y. Suppl. 657]; Clark *v.* Sheldon, 134 N. Y. 333, 32 N. E. 23, 19 L. R. A. 138; People *v.* Grout, 79 N. Y. App. Div. 61, 79 N. Y. Suppl. 1027; People *v.* Fitch, 9 N. Y. App. Div. 439, 41 N. Y. Suppl. 349 [*affirmed* in 151 N. Y. 673, 46 N. E. 1150], holding that the controller of New York city cannot refuse to pay funds over to the treasurer of the police department, in accordance with the resolution of the board of estimate, because he fears the funds will be misappropriated.

Ohio.— Alter *v.* Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737; State *v.* Pohling, 17 Cinc. L. Bul. 60, 18 Cinc. L. Bul. 18 [*reversing* 1 Ohio Cir. Ct. 486, 1 Ohio Cir. Dec. 271].

See 36 Cent. Dig. tit. "Municipal Corporations," § 2014.

Maintenance of common schools.— White *v.* Decatur, 119 Ala. 476, 23 So. 999; King *v.* State, 50 Nebr. 66, 69 N. W. 307. A city which is charged with the duty of collecting school taxes, and which collects taxes and interest, and fails to pay the same over to its school-board, which is entitled thereto, but uses the money in its own affairs, is chargeable with interest on the sum so retained in a creditors' suit by judgment creditors of the school-board who are entitled to the fund. New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15.

Investment of taxes in arrears, after payment, in future revenue bonds see Gibson *v.* Knapp, 21 Misc. (N. Y.) 499, 47 N. Y. Suppl. 446.

Paying debts contracted during previous years see *In re* Plattsburgh, 157 N. Y. 78, 51 N. E. 512 [*reversing* 27 N. Y. App. Div 353, 50 N. Y. Suppl. 356].

Contingent funds.— A decision to hold the Grand Army encampment in Cincinnati not having been reached until the estimates and semiannual appropriations for that year had been made, whatever increase in the legitimate expenses of the city is required by such event will be paid out of the contingent fund, which by Rev. St. § 2690 *et seq.*, is created to meet contingent expenses arising after the appropriations are made, and which could not have been foreseen. Stem *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 15.

What are legitimate municipal expenses.— Payments by a city for lights and water, under a charter making express provisions for such expenses, and also payments on account of streets, are legitimate municipal expenditures. White *v.* Decatur, 119 Ala. 476, 23 So. 999.

To whom revenues payable in first instance. — Ordinarily the revenues are payable to the treasurer (McFarland *v.* People, 2 Ill. App. 615; Galena *v.* Highway Com'rs, 2 Ill. App. 255; Cramer *v.* Stone, 33 Wis. 212), but may, by statute, be directed to be paid over to others (Osterhoudt *v.* Rigney, 98 N. Y. 222; People *v.* Brown, 55 N. Y. 180), and when any fund is not specially disposed of by law, it is subject, within lawful limits, to the control of the fiscal officers of the municipality (Center Tp. *v.* Marion County, 70 Ind. 562).

Annual revenues undisposed of are usually carried over to the same fund for the next year, but not so as to swell the fund beyond its legal limits. State *v.* Elizabeth, 51 N. J. L. 246, 17 Atl. 91.

74. Blood *v.* Beal, 100 Me. 30, 60 Atl. 427; Hunt *v.* New York, 47 N. Y. App. Div. 295, 62 N. Y. Suppl. 184, excise fund.

75 Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588, holding that a city council may properly apportion a franchise tax between the different objects for which taxes are levied in the same proportion as the *ad valorem* tax is divided, and may set apart to the school fund such a per cent thereof as thirty-three per cent of the *ad valorem* tax bears to the whole of it.

76. Carter *v.* Tilghman, 119 Cal. 104, 51 Pac. 34.

77. Chamberlain *v.* Tampa, 40 Fla. 74, 23 So. 572

78. *In re* Plattsburgh, 157 N. Y. 78, 51 N. E. 512 [*reversing* on other grounds 27 N. Y App Div. 353, 50 N. Y. Suppl. 356].

79. Louisville *v.* Louisville School Bd., 119 Ky. 574, 84 S. W. 729, 27 Ky. L. Rep. 209.

applied to another purpose.[80] And this rule is often reiterated by constitutional or statutory provisions.[81] It follows that holders of claims against a city which are entitled to payment only from and out of the funds appropriated to payment of such claims are not entitled to an absolute judgment against the city.[82] But where the taxes collected for a special purpose are in excess of the amount necessary therefor, the municipality cannot be required to pay over the excess to those in charge of such fund.[83] However, a city has no power to transfer a surplus in a special fund levied to meet accruing interest on bonds, to other funds, where it has already levied for the latter purposes the maximum amounts allowed by its charter for that year.[84] Where a tax is collected to pay interest on void bonds and the taxpayers cannot recover it back, it has been held that it may be carried into the general fund of the city and expended like other money in that fund.[85]

c. Priorities. Ordinarily current expenses are payable in preference to debts.[86]

80. *Florida.*— Chamberlain *v.* Tampa, 40 Fla. 74, 23 So. 572, holding funds derived from a tax levied by a city to meet accruing interest on bonds cannot be diverted to any other purpose so long as the city has interest-bearing bonds outstanding.

Illinois.— See Chicago *v.* Brede, 218 Ill. 528, 75 N. E. 1044, holding that where an ordinance provides that a local improvement shall be paid for by special assessment, and the assessment is levied and the work completed, and bonds are issued, the city may not afterward pay for a portion of the improvement by a general fund raised by general taxation.

Louisiana.— State *v.* New Orleans, 109 La. 110, 33 So. 102.

Missouri.— State *v.* Cottengin, 172 Mo. 129, 72 S. W. 498.

Texas.— Austin *v.* Cahill, (1905) 88 S. W. 542.

United States.— Coler *v.* Stanly County, 89 Fed. 257 [*affirmed* in 190 U. S. 437, 23 S. Ct. 811, 47 L. ed. 1126].

See 36 Cent. Dig. tit. "Municipal Corporations," § 2014.

Tax levied for school purposes.—A tax levied and collected by the common council of a city for school purposes cannot be appropriated by act of the legislature to maintain a public library which is open to the pupils of the common schools only as a part of the general public, and which is not under the control of the board of education or of the common schools. Covington Bd. of Education *v.* Covington Public Library, 113 Ky. 234, 68 S. W. 10, 24 Ky. L. Rep. 98.

Tax as trust fund.— The levying and collection of a tax by a city to pay its bonds does not make the taxes a trust fund for payment of the bonds where the right to sue on the bonds is barred by limitations. Wurth *v.* Paducah, 116 Ky. 403, 76 S. W. 143, 25 Ky. L. Rep. 586, 105 Am. St. Rep. 225. Money raised by assessment on land for paving certain streets is a trust fund, and cannot be lawfully appropriated by the city to pay for paving other streets. Allen *v.* Davenport, 107 Iowa 30, 77 N. W. 532.

Including interest or penalties.— The municipal taxes of particular years, including interest or penalties collected on them, must go to the payment of the debt for the payment of which such taxes have been assessed. State *v.* New Orleans, 109 La. 110, 33 So. 102.

Effect of judgment on claim.— The fact that interest coupons on bonds of a municipality are merged in a judgment does not affect the character of the indebtedness, and the holder of such judgment is entitled to have funds raised by taxation to pay interest on bonds applied to the payment of the judgment. Ward *v.* Piper, 69 Kan. 773, 77 Pac. 699.

81. State *v.* Emporia, 57 Kan. 710, 47 Pac. 833; Louisville *v.* Button, 118 Ky. 732, 82 S. W. 293, 26 Ky. L. Rep. 606. See also Kerr *v.* Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024.

Sinking fund.— Moneys collected pursuant to tax levies to accumulate a sinking fund on bonds of the city cannot be legally appropriated to the interest on other bonds. Austin *v.* Cahill, (Tex. Civ. App. 1905) 88 S. W. 536.

School taxes.— Cynthiana *v.* Board of Education, 52 S. W. 969, 21 Ky. L. Rep. 731.

82. Johnson *v.* New Orleans, 50 La. Ann. 920, 24 So. 635.

Where funds applicable to claims of particular years out of the taxes of those years are illegally misapplied to the payment of the claims of later years, it does not transform creditors entitled to payment out of such funds into general creditors, with the right to obtain absolute general judgments against the city. Johnson *v.* New Orleans, 50 La. Ann. 920, 24 So. 635.

83. Paducah Bd. of Education *v.* Paducah, 56 S. W. 149, 21 Ky. L. Rep. 1650.

84. Chamberlain *v.* Tampa, 40 Fla. 74, 23 So. 572.

85. Irwin *v.* Exton, 125 Cal. 622, 58 Pac. 257.

86. White *v.* Decatur, 119 Ala. 476, 23 So. 999 (holding that where interest and principal of municipal bonds are specially charged on the general revenues of the city, only the surplus income, after legitimate expenses have been provided for, can be applied to such debt); Denison *v.* Foster, (Tex. Civ. App. 1896) 37 S. W. 167 [*following* Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294].

Priorities in the right to payment are sometimes fixed by statutes,[87] especially in case of surplus revenues.[88]

d. Liability and Remedies. A judgment creditor whose claims are payable out of a special tax is entitled to require the city to account for the amount of such tax collected by it for such fund, where the proper board declines to make or compel such an accounting.[89] Where the tax is levied to meet certain contract expenses, the municipality is bound to remit whatever has been collected to the person to whom the money is due under the contract.[90] However, a city is not liable in trover to the holder of its warrants, issued without authority and to pay a debt which it could not legally contract, because its treasurer, having collected a tax pledged to the payment of such warrants, has diverted it to other purposes.[91]

E. Rights and Remedies of Taxpayers — 1. In General. Taxpayers cannot interfere with the exercise of the discretionary powers of municipal authorities in the absence of fraud or abuse,[92] or assume to act on behalf of the municipality unless its duly constituted authorities wrongfully refuse to do so,[93] or sue to redress public wrongs by which they are affected only as members of the general public,[94] or to restrain or contest acts of the municipal authorities, although unauthorized or illegal, which do not affect their rights as taxpayers;[95] but whenever their pecuniary interests as taxpayers are affected they are entitled to invoke the protection of the courts,[96] and in such cases they may by appropriate proceedings contest the validity of municipal ordinances or acts,[97] or sue to enjoin any threatened unauthorized or illegal acts,[98] or for affirmative relief against a wrong already committed,[99] or they may by mandamus compel the performance of a duty affecting their interests;[1] and in Louisiana by statute a taxpayer may be a relator in quo warranto proceedings to test the right to office of a municipal

87. Ross *v.* Walton, 63 N. J. L. 435, 44 Atl. 430 [*affirmed* in (1902) 52 Atl. 1132]; Freeman *v.* Huron, 10 S. D. 368, 73 N. W. 260.

88. White *v.* Decatur, 119 Ala. 476, 23 So. 999.

89. New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485 [*affirming* 91 Fed. 574, 34 C. C. A. 15].

Interest.— Interest will not commence to run upon the amount of school taxes collected by a city as agent for its school-board, and retained by it, until after a failure to pay such sums when required so to do, or failure to account on demand. New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485 [*affirming* 91 Fed. 574, 34 C. C. A. 15].

90. Lake Charles Ice, etc., Co. *v.* Lake Charles, 106 La. 65, 30 So. 289.

91. Schulenburg, etc., Lumber Co. *v.* East St. Louis, 63 Ill. App. 214.

92. Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666; Wells *v.* Atlanta, 43 Ga. 67; Talcott *v.* Buffalo, 125 N. Y. 280, 26 N. E. 263 [*reversing* 57 Hun 43, 10 N. Y. Suppl. 370].

93. Dunn *v.* Long Beach Land, etc., Co., 114 Cal. 605, 46 Pac. 607; Reed *v.* Cunningham, 126 Iowa 302, 101 N. W. 1055; Arkenburgh *v.* Wood, 23 Barb. (N. Y.) 360.

94. Cosby *v.* Owensboro, etc., R. Co., 10 Bush (Ky.) 288; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

An action in the nature of quo warranto to try the validity of the corporate existence of a municipal corporation cannot be brought by a taxpayer in his own name. Miller *v.* Palermo, 12 Kan. 14.

95. Blanton *v.* Merry, 116 Ga. 288, 42 S. E. 211; Gilgar *v.* Low, 38 Misc. (N. Y.) 292, 77 N. Y. Suppl. 852; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.

96. *Iowa.*— Cascaden *v.* Waterloo, 106 Iowa 673, 79 N. W. 333.

Louisiana.— Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593.

Maryland.— Baltimore *v.* Gill, 31 Md. 375.

Minnesota.— Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48.

New Jersey.— Lewis *v.* Cumberland, 56 N. J. L. 416, 28 Atl. 553.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2147.

In New York any taxpayer of a town may apply by petition to a county judge for an order to compel a county treasurer to comply with a statute requiring that the taxes collected on the assessed value of a railroad in any town which has issued bonds in aid of the railroad shall be applied to the purchase of such bonds and their cancellation. Clark *v.* Sheldon, 134 N. Y. 333, 32 N. E. 23, 19 L. R. A. 138 [*reversing* on other grounds 10 N. Y. Suppl. 357].

97. See *infra*, XV, E, 3.

98. See *infra*, XV, E, 4.

99. Russell *v.* Tate, 52 Ark. 541, 31 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180; Jackson *v.* Norris, 72 Ill. 364; Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146.

1. Santa Rosa Lighting Co. *v.* Woodward,

officer.[2] In some jurisdictions the right of taxpayers to sue in certain cases is expressly conferred by statutory provisions,[3] which are liberally construed to protect their rights.[4] A taxpayer cannot, where money of a municipality has been wrongfully paid out, sue the municipality in assumpsit to recover an amount proportionate to the taxes paid by him.[5] Taxpayers have no right to a general inspection of documents in the hands of municipal officers, such as contracts and vouchers for payments for public works, where they have no private interest in the information to be derived therefrom;[6] and a charter right to inspect tax books is not unlimited but may be restricted to an examination of the assessments against the property of the applicant, or such persons as he represents, and may be reasonably regulated as to time and place.[7]

2. Suing or Defending on Behalf of Municipality. Where a cause of action exists in favor of a municipal corporation it is the proper party to sue to enforce it, and a taxpayer cannot do so except when necessary to prevent a failure of justice, as where the municipal authorities wrongfully refuse or neglect to act;[8] and so before a taxpayer may sue on behalf of the municipality its proper

119 Cal. 30, 50 Pac. 1025 (mandamus to compel advertisement for bids as required by statute before letting municipal contract); State *v.* Allison, 11 Ohio S. & C. Pl. Dec. 62, 8 Ohio N. P. 170 (mandamus to compel the award of municipal bonds to the highest bidder as required by statute); State *v.* Cornwall, 97 Wis. 565, 73 N. W. 63 (mandamus to compel a county clerk to carry into effect an equalization of taxes made by commissioners pursuant to a statute and to give a city credit for an excess payment made the previous year).

Mandamus to control location of railroad. — Where a municipality voted aid to a railroad company on condition of a certain location, which the company subsequently changed, a taxpayer cannot, by mandamus, compel a return to the original route without showing that the interests of the public have been injuriously affected by the change. Crane *v.* Chicago, etc., R. Co., 74 Iowa 330, 37 N. W. 397, 7 Am. St. Rep. 479.

2. State *v.* Kohnke, 109 La. 838, 33 So. 793.

3. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Bush *v.* O'Brien, 164 N. Y. 205, 58 N. E. 106 [*reversing* 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685]; Peck *v.* Belknap, 130 N. Y. 394, 29 N. E. 977 [*reversing* 55 Hun 91, 8 N. Y. Suppl. 265]; Ziegler *v.* Chapin, 126 N. Y. 342, 27 N. E. 471; Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610; Adamson *v.* Union R. Co., 74 Hun (N. Y.) 3, 26 N. Y. Suppl. 136; Pugh *v.* Edison Electric Light Co., 19 Ohio Cir. Ct. 594, 10 Ohio Cir. Dec. 573; Knorr *v.* Miller, 5 Ohio Cir. Ct. 609, 3 Ohio Cir. Dec. 297 [*affirming* 11 Ohio Dec. (Reprint) 165, 25 Cinc. L. Bul. 128]; Haskins *v.* Cincinnati Consol. St. R. Co., 7 Ohio Dec. (Reprint) 713, 4 Cinc. L. Bul. 1126; Ampt *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 394, 6 Ohio N. P. 401.

In Ohio, Rev. St. §§ 1777, 1778, make it the duty of the city solicitor to sue in the name of the corporation to restrain the misapplication of corporate funds, abuse of corporate powers, or the execution or performance of unauthorized or illegal contracts, but provide that if he fails to do so upon written request of a taxpayer the taxpayer may sue for such purpose. Knorr *v.* Miller, 5 Ohio Cir. Ct. 609, 3 Ohio Cir. Dec. 297.

A state officer such as the superintendent of public instruction is not subject to an injunction at the suit of a taxpayer under the New York statute. Hutchinson *v.* Skinner, 21 Misc. (N. Y.) 729, 49 N. Y. Suppl. 360.

4. Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610; Haskins *v.* Cincinnati Consol. St. R. Co., 7 Ohio Dec. (Reprint) 713, 4 Cinc. L. Bul. 1126.

5. Withington *v.* Harvard, 8 Cush. (Mass.) 66.

6. People *v.* Cornell, 35 How. Pr. (N. Y.) 31 [*reversing* 47 Barb. 329].

7. Matter of Lord, 59 N. Y. App. Div. 591, 69 N. Y. Suppl. 678 [*affirming* 34 Misc. 271, 68 N. Y. Suppl. 873].

8. *California.*— Dunn *v.* Long Beach Land, etc., Co., 114 Cal. 605, 46 Pac. 607.

Indiana.— Davis *v.* Fogg, 78 Ind. 301; Carr *v.* McCamphell, 61 Ind. 97.

Iowa.— Reed *v.* Cunningham, 126 Iowa 302, 101 N. W. 1055.

New York.— Arkenburgh *v.* Wood, 23 Barb. 360.

Rhode Island.— Bosworth *v.* Norman, 14 R. I. 521.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2149.

Where a town is divided into two towns, private individuals cannot of their own motion maintain a bill to establish the rights of the towns with respect to lands owned by the town prior to its division. Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320.

Under an Illinois statute providing that "a suit may be brought by any tax payer, in the name and for the benefit of any city or village, against any person or corporation, to recover any money or property belonging to the city or village, or for any money which may have been paid, expended or released

authorities must be requested to do so unless the circumstances are such as to indicate affirmatively that such a demand would be unavailing;[9] but where the municipal authorities improperly refuse and neglect to act a taxpayer may sue on behalf of the municipality,[10] proceeding in equity, since the cause of action is in the municipality,[11] and making the municipality a party defendant.[12] Under similar circumstances a taxpayer may intervene in a pending proceeding to protect a right of the municipality without instituting a separate action,[13] or may prosecute an appeal,[14] or intervene in an appeal taken by the adverse party.[15] Taxpayers suing on behalf of the municipality have, however, no greater rights than the municipality itself.[16]

3. Contesting Validity of Ordinances or Acts — a. In General. Taxpayers cannot contest municipal ordinances or acts merely upon the ground that they are unauthorized or invalid;[17] but they may judicially contest the validity of any ordinance, resolution, or official act which prejudicially affects their rights as taxpayers by increasing the burden of taxation or otherwise.[18] This they may do by certiorari to review the ordinance or resolution,[19] by suit to have the ordinance declared invalid,[20] by injunction to restrain threatened wrongful action on the part of the municipal authorities,[21] or on the part of third persons pursuant to

without authority of law," a taxpayer may sue to recover from the persons receiving it money wrongfully paid out by the municipal authorities. Knight *v.* Thompsonville, 74 Ill. App. 550.

9. See *infra*, XV, E, 5, b.

10. Stone *v.* Bevans, 88 Minn. 127, 92 N. W. 520, 97 Am. St. Rep. 506; Cone *v.* Wold, 85 Minn. 302, 88 N. W. 977; Bailey *v.* Strachan, 77 Minn. 526, 80 N. W. 694; Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941; Land, etc., Co. *v.* McIntyre, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915; Quaw *v.* Paff, 98 Wis. 586, 74 N. W. 369.

Where it is discretionary and not a positive duty on the part of municipal authorities to institute an action, a taxpayer will not be allowed to do so where it appears that the municipal authorities are exercising a wise discretion by refusing at the time to commence unnecessary and hazardous litigation (Dunn *v.* Long Beach Land, etc., Co., 114 Cal. 605, 46 Pac. 607); but their discretion as to instituting actions is a legal discretion which cannot be abused, and if they refuse to perform their duty in a clear case a taxpayer may sue (Land, etc., Co. *v.* McIntyre, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915).

11. Land, etc., Co. *v.* McIntyre, 100 Wis. 258, 75 N. W. 964, 69 Am. St. Rep. 925.

12. Land, etc., Co. *v.* McIntyre, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915.

13. Cone *v.* Wold, 85 Minn. 302, 88 N. W. 977. See also Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 325.

14. Pugh *v.* Edison Electric Light Co., 19 Ohio Cir. Ct. 594, 10 Ohio Cir. Dec. 573; *In re* Cole, 102 Wis. 1, 78 N. W. 402, 72 Am. St. Rep. 854.

The Pennsylvania statute of 1877 authorizing a taxpayer of any municipal district to intervene to "inquire into the validity of any judgment, or defend said district in any suit or judgment" was restricted in terms to suits in the court of common pleas and did not authorize an appeal by a taxpayer from a judgment of a justice. Bowman *v.* Lebanon School Dist., 2 Pa. Dist. 321.

15. Miller *v.* Socorro, 9 N. M. 416, 54 Pac. 756.

16. New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943.

17. Iske *v.* Newton, 54 Iowa 586, 7 N. W. 13; Cole *v.* Atlantic City, 69 N. J. L. 131, 54 Atl. 226; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.

The validity of an ordinance prohibiting the sale of liquors cannot be contested on certiorari by a taxpayer who is not affected thereby other than as a member of the general public. Iske *v.* Newton, 54 Iowa 586, 7 N. W. 13.

18. City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313; Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593; Paterson Chronicle Co. *v.* Paterson, 66 N. J. L. 129, 48 Atl. 589; Lewis *v.* Cumberland, 56 N. J. L. 416, 28 Atl. 553; Middleton *v.* Robbins, 54 N. J. L. 566, 25 Atl. 471 [*reversing* 53 N. J. L. 555, 22 Atl. 481].

An illegal reduction of a tax assessment by a city council reduces the revenue to which the municipality is entitled and gives a taxpayer the right to review the proceeding by certiorari. Collins *v.* Davis, 57 Iowa 256, 10 N. W. 643.

19. Paterson Chronicle Co. *v.* Paterson, 66 N. J. L. 129, 48 Atl. 589; Lewis *v.* Cumberland, 56 N. J. L. 416, 28 Atl. 553.

A resident who pays only a poll tax may prosecute a writ of certiorari to test the legality of an ordinance providing for the expenditure of public funds. Stroud *v.* Consumers' Water Co., 56 N. J. L. 422, 28 Atl. 578.

20. Ramsey *v.* Shelbyville, 119 Ky. 180, 83 S. W. 116, 1136, 26 Ky. L. Rep. 1102, 27 Ky. L. Rep. 141, 68 L. R. A. 300; City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313; Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593.

21. See *infra*, XV, E, 4.

authority improperly granted,[22] or suit for affirmative relief against a wrong already committed.[23] They may also contest the result of an election held to determine the question of incurring an indebtedness or issuing bonds,[24] whether the result be in favor of or against the proposition.[25]

b. Contracts.[26] Taxpayers cannot oppose or question a municipal contract merely on the ground that it is unauthorized or invalid,[27] but if their rights as taxpayers are affected thereby they may do so,[28] by certiorari to review the ordinance authorizing the contract,[29] or suit to declare invalid and annul the ordinance,[30] or the contract;[31] but the municipality will be required to do equity by paying the reasonable value of what it has received under the contract prior to the institution of the action.[32]

c. Purchase or Conveyance of Property.[33] Taxpayers may oppose or question the validity of the action of municipal authorities in making a conveyance of municipal property,[34] or a purchase of property for municipal purposes.[35]

d. Aid to Corporations. Taxpayers may contest the validity of a grant of municipal aid to a corporation such as a railroad company,[36] by suit to contest the result of an election held to submit the question to the voters,[37] certiorari to review

22. Adamson *v.* Union R. Co., 74 Hun (N. Y.) 3, 26 N. Y. Suppl. 136.

23. Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242; Strang *v.* Cook, 47 Hun (N. Y.) 46.

24. Gibson *v.* Trinity County, 80 Cal. 359, 22 Pac. 225; Sentell *v.* Avoyelles Parish Police Jury, 48 La. Ann. 96, 18 So. 910.

One who is neither an elector nor a taxpayer of a municipality cannot maintain an action to contest an election held to determine the question of incurring an indebtedness and issuing bonds for the construction or acquisition of waterworks. McConoughey *v.* San Diego, 128 Cal. 366, 60 Pac. 925.

25. Gibson *v.* Trinity County, 80 Cal. 359, 22 Pac. 225.

26. Injunction to restrain execution or carrying out of contract see *infra*, XV, E, 4, b.

27. Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383; Waco Water, etc., Co. *v.* Waco, (Tex. Civ. App. 1894) 27 S. W. 675.

28. Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593; Read *v.* Atlantic City, 49 N. J. L. 558, 9 Atl. 759 [*affirmed* in 50 N. J. L. 665, 15 Atl. 10].

29. Read *v.* Atlantic City, 49 N. J. L. 558, 9 Atl. 759 [*affirmed* in 50 N. J. L. 665, 15 Atl. 10].

30. Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146; Hanson *v.* Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84; Conery *v.* New Orleans Water-Works Co., 39 La. Ann. 770, 2 So. 555; Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593.

31. *Alabama.*— Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

California.— Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826.

Indiana.— Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146.

Iowa.— Hanson *v.* Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

Louisiana.— Conery *v.* New Orleans Water-Works Co., 39 La. Ann. 770, 2 So. 555.

Nebraska.— Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242.

Pennsylvania.— Frame *v.* Felix, 167 Pa. St. 47, 31 Atl. 375, 27 L. R. A. 802.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2152.

32. Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242.

33. Injunction to prevent the purchase of property by a municipal corporation see *infra*, XV, E, 4, h.

34. Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

In New York it was formerly held that a taxpayer could not sue to set aside an unauthorized conveyance of municipal property (Roosevelt *v.* Draper, 23 N. Y. 318 [*affirming* 7 Abb. Pr. 108, 16 How. Pr. 137]; Warwick *v.* New York, 28 Barb. 210, 7 Abb. Pr. 265, 16 How. Pr. 357); but the rule of these cases has been changed by statute expressly giving taxpayers a right of action (Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610).

35. Lore *v.* Wilmington, 4 Del. Ch. 575; Stroud *v.* Consumers' Water Co., 56 N. J. L. 422, 28 Atl. 578; Ziegler *v.* Chapin, 126 N. Y. 342, 27 N. E. 471 [*affirming* 59 Hun 214, 13 N. Y. Suppl. 783]; Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610; Avery *v.* Job, 25 Oreg. 512, 36 Pac. 293.

36. Sentell *v.* Avoyelles Parish Police Jury, 48 La. Ann. 96, 18 So. 910; Strang *v.* Cook, 47 Hun (N. Y.) 46.

The question whether a statute is invalid in so far as it attempts to authorize subscriptions to the stock of a railroad by towns through which the road will not run cannot be raised by the taxpayers of a town through which it is required to run by its charter or by the conditions of the subscription made by such town. Lawson *v.* Milwaukee, etc., R. Co., 30 Wis. 597.

37. Sentell *v.* Avoyelles Parish Police Jury, 48 La. Ann. 96, 18 So. 910.

the proceedings of the municipal authorities,[38] suit to annul the ordinance imposing the tax,[39] or to have bonds illegally issued for such purpose delivered up and canceled.[40]

e. Grants of Rights or Franchises. Taxpayers cannot oppose or question the validity of grants of rights or franchises which can in no way affect their rights as such;[41] but they may do so where their interests as taxpayers are affected,[42] and may do so by suit to declare the franchise void,[43] or certiorari to review the validity of the ordinance or resolution,[44] or suit to enjoin the grantee from proceeding thereunder.[45]

f. Audit or Settlement of Claims. A taxpayer may sue to vacate the audit of an illegal claim which the board of audit had no authority to audit or where such audit was fraudulent or collusive,[46] and may oppose the payment of any unauthorized or illegal claim against the municipality[47] or any illegal release of any one indebted to the municipality.[48] Since, in the absence of any restriction, a municipality may compromise a disputed claim against it, such settlement cannot be questioned by a taxpayer in the absence of fraud or collusion;[49] but a taxpayer may sue to annul an ordinance providing for a compromise with a delinquent taxpayer which is in violation of a constitutional provision.[50]

4. Restraining Municipal Action — a. In General. It is well settled that a court of equity will in a proper case enjoin illegal or unauthorized acts of a municipal corporation or its officers,[51] and any resident or taxpayer who sustains a special injury different from that of the public generally may sue to enjoin the unauthorized or illegal act.[52] A taxpayer cannot, however, maintain such a suit where he has not sustained or is not threatened with any injury peculiar to himself as distinguished from the public generally,[53] as in such case the suit must be brought in the name of the state by the proper public officer;[54] and this rule has been applied where there was an injury to taxpayers as such, but no special injury to plaintiff as distinguished from other taxpayers.[55] A distinction should, however, be made between a case where the act of a municipality affects plaintiff

38. People *v.* Morgan, 65 Barb. (N. Y.) 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587].

39. Sentell *v.* Avoyelles Parish Police Jury, 48 La. Ann. 96, 18 So. 910.

40. Metzger *v.* Attica, etc., R. Co., 79 N. Y. 171; Strang *v.* Cook, 47 Hun (N. Y.) 46.

A mere irregularity in the proceedings directing the issue of bonds is not ground for declaring them invalid and canceling them. Sauerhering *v.* Iron Ridge, etc., R. Co., 25 Wis. 447.

41. Dodge *v.* Council Bluffs, 57 Iowa 560, 10 N. W. 886; Harrison *v.* Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265.

42. Lewis *v.* Cumberland, 56 N. J. L. 416, 28 Atl. 553; Adamson *v.* Union R. Co., 74 Hun (N. Y.) 3, 26 N. Y. Suppl. 136.

43. Adamson *v.* Union R. Co., 74 Hun (N. Y.) 3, 26 N. Y. Suppl. 136.

44. Lewis *v.* Cumberland, 56 N. J. L. 416, 28 Atl 553.

45. Adamson *v.* Union R. Co., 74 Hun (N. Y.) 3, 26 N. Y. Suppl. 136.

46. Osterhoudt *v.* Rigney, 98 N. Y. 222.

47. Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A 180; Pleasants *v.* Shreveport, 110 La. 1046, 35 So. 283; Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648.

Under the Omaha charter any taxpayer "may appeal from the allowance of any claim against the city" except in the case of salaries and interest upon the public debt. Lobeck *v.* State, 72 Nebr. 595, 101 N. W. 247.

48. City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313.

49. Warren *v.* St. Paul, 29 Fed. Cas. No. 17,199, 5 Dill. 498.

50. City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313.

51. See Injunctions, 22 Cyc. 888 *et seq.*

52. Texarcana *v.* Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; Rees *v.* West Pennsylvania Exposition Soc., 2 Pa. Co. Ct. 385.

53. Demarest *v.* Wickham, 63 N. Y. 320; Doolittle *v.* Broome County, 18 N. Y. 155; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; Davis *v.* New York, 2 Duer (N. Y.) 663; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

54. Doolittle *v.* Broome County, 18 N. Y. 155; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

55. Roosevelt *v.* Draper, 23 N. Y. 318 [*affirming* 7 Abb. Pr. 108, 16 How. Pr. 137 (*reversing* 12 How. Pr. 469)]; Tifft *v.* Buffalo, 65 Barb. (N. Y.) 460; Comins *v.* Jefferson County, 3 Thomps. & C. (N. Y.) 296 [*affirmed* in 64 N. Y. 626]; Korff *v.* Green, 16 How. Pr. (N. Y.) 140; De Baum *v.* New York, 2 Edm. Sel. Cas. (N. Y.) 396.

merely as a citizen of the municipality and where it directly affects his rights as a taxpayer;[56] and where it is prejudicial to the rights of taxpayers as such, as involving the levy of a tax, creation of a municipal debt, or appropriation or expenditure of public funds, or in any way tending to increase the burden of taxation,[57] the great weight of authority is that if such action be illegal or unauthorized taxpayers may sue to restrain it,[58] without showing any special injury different from that sustained by other taxpayers,[59] and may sue in their own names without making the attorney-general or other public officer a party.[60] A person is a taxpayer and entitled to sue if he is the owner of property listed for taxation, although he has not resided within the municipality long enough to have actually paid any taxes,[61] and if he pays taxes on such property he may sue, although he does not reside within the municipality.[62] It has been held that if plaintiff is a taxpayer and his rights as such are affected, his motives in bringing the action are not material,[63] and his right to sue is not affected by the fact that he may have some purely private right or interest which will be affected by the action sought to be enjoined.[64] The discretionary powers of municipal authorities will not be interfered with in the absence of illegality, fraud, or palpable abuse,[65] nor will the

56. Baltimore *v.* Gill, 31 Md. 375; Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48; Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

57. Bradford *v.* San Francisco, 112 Cal. 537, 44 Pac. 912; Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; Cascaden *v.* Waterloo, 106 Iowa 673, 79 N. W. 333; Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

58. *Alabama.*— Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

California.— Bradford *v.* San Francisco, 112 Cal. 537, 44 Pac. 912.

Florida.— Peck *v.* Spencer, 26 Fla. 23, 7 So. 642.

Georgia.— Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 42.

Illinois.— Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359.

Indiana.— Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811.

Iowa.— Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333.

Maine.— Blood *v.* Beal, 100 Me. 30, 60 Atl. 427; Reynolds *v.* Waterville, 92 Me. 292, 42 Atl. 553.

Maryland.— Baltimore *v.* Gill, 31 Md. 375.

Michigan.— Alpena *v.* Alpena Cir. Judge, 97 Mich. 550, 56 N. W. 941.

Montana.— Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

New York.— Bush *v.* O'Brien, 164 N. Y. 205, 58 N. E. 106 [*reversing* 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685]; Meyers *v.* New York, 58 N. Y. App. Div. 534, 69 N. Y. Suppl. 529 [*reversing* 54 N. Y. App. Div. 631, 66 N. Y. Suppl. 755 (*affirming* 32 Misc. 522)]; Norris *v.* Wurster, 23 N. Y. App. Div. 124, 48 N. Y. Suppl. 656.

Pennsylvania.— Graeff *v.* Felix, 24 Pa. Co. Ct. 657; Bloomsburg Town Election Case, 18 Pa. Co. Ct. 449.

South Carolina.— Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

Texas.— Austin *v.* McCall, 95 Tex. 565, 68 S. W. 791 [*reversing* (Civ. App. 1902) 67 S. W. 192].

United States.— Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. ed. 1070; Davenport *v.* Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2157, 2158.

59. Springfield *v.* Edwards, 84 Ill. 626.

60. See *infra*, XV, E, 5, c.

61. Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811.

62. Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

63. Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32; Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215; Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693. But see Hull *v.* Ely, 2 Abb. N. Cas. (N. Y.) 440.

Under the Ohio statute authorizing a taxpayer to sue on behalf of the municipality upon refusal of the municipal solicitor to do so, a taxpayer cannot maintain an action to enjoin the awarding of a municipal contract to a certain person or company, where it appears that he is not suing in good faith in the interest of the municipality but in the interest of a person or company whose interests are adverse to those of the municipality (Gallagher *v.* Johnson, 1 Ohio S. & C. Pl. Dec. 264, 31 Cinc. L. Bul. 24), or where he was himself a competitor for the award (Mathers *v.* Cincinnati, 7 Ohio Dec. (Reprint) 521, 3 Cinc. L. Bul. 709).

64. Times Pub. Co. *v.* Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865; Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

65. Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666; Wells *v.* Atlanta, 43 Ga. 67; Parker *v.* Concord, 71 N. H. 468, 52 Atl. 1095; Talcott *v.* Buffalo, 125 N. Y. 280, 26 N. E. 263 [*reversing* 57 Hun 43, 10 N. Y. Suppl 370]; New York Cent., etc., R. Co. *v.* Maine, 71 Hun (N. Y.) 417, 24 N. Y. Suppl. 962; People *v.* Lowber, 28 Barb. (N. Y.) 65.

mere fact that an act is unauthorized or illegal entitle a taxpayer, regardless of its nature and effect, to sue to enjoin it.[66] An injunction will not be granted where it is not shown that the act sought to be enjoined is in fact unauthorized or illegal,[67] or prejudicial to the rights of taxpayers,[68] or that there is any imminent danger of plaintiff's rights being violated,[69] or where an injunction under the circumstances would be inequitable rather than equitable,[70] or is not the proper remedy,[71] or there is an adequate remedy at law,[72] although the existence of a legal remedy will not preclude the granting of an injunction if it is not as adequate and efficient as the remedy in equity.[73] The rights of taxpayers to an injunction may be barred by laches.[74]

b. Contracts. Municipal authorities will not, in the absence of illegality, fraud, or misconduct, be interfered with in the exercise of their discretionary powers in contracting on behalf of the municipality,[75] nor will an injunction be granted where it is not shown that the contract in question is unauthorized or illegal,[76] or of such a character as to prejudice the rights of taxpayers;[77] but if the contract affects the rights of taxpayers as involving the creation of a municipal debt or expenditure of public funds, taxpayers may, if it be illegal or unauthor-

66. Blanton *v.* Merry, 116 Ga. 288, 42 S. E. 211; Rogers *v.* O'Brien, 153 N. Y. 357, 47 N. E. 456 [*affirming* 7 N. Y. App. Div. 612, 39 N. Y. Suppl. 1131, 1 N. Y. App. Div. 397, 37 N. Y. Suppl. 358]; Gilgar *v.* Low, 38 Misc. (N. Y.) 292, 77 N. Y. Suppl. 852; Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

In New York the statute expressly authorizes a suit by a taxpayer "to prevent any illegal official act" on the part of municipal officers (Bush *v.* O'Brien, 164 N. Y. 205, 58 N. E. 106 [*reversing* 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685]), but the statute does not apply to every illegal official act irrespective of whether it involves waste of public property or violation of public rights or injury to taxpayers as such, and does not authorize a suit by a private individual to enjoin an unauthorized official act affecting a purely private right (Rogers *v.* O'Brien, 153 N. Y. 357, 47 N. E. 456 [*affirming* 7 N. Y. App. Div. 612, 39 N. Y. Suppl. 1131]), or to prevent an unauthorized act which would be a benefit instead of an injury to the municipality (Gilgar *v.* Low, 38 Misc. 292, 77 N. Y. Suppl. 852).

67. McLean *v.* North St. Paul, 73 Minn. 146, 75 N. W. 1042.

68. *Georgia.*— Blanton *v.* Merry, 116 Ga. 288, 42 S. E. 211; Gainesville *v.* Simmons, 96 Ga. 477, 23 S. E. 508.

Indiana.— Richmond *v.* Davis, 103 Ind. 449, 3 N. E. 130.

Louisiana.— Louisiana Nat. Bank *v.* New Orleans, 27 La. Ann. 446.

Pennsylvania.— Gilfillan *v.* Grier, 145 Pa. St. 317, 22 Atl. 593.

Wisconsin.— Bell *v.* Platteville, 71 Wis. 139, 36 N. W. 831.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2157, 2158.

69. Press Pub. Co. *v.* Holahan, 29 Misc. (N. Y.) 684, 62 N. Y. Suppl. 872 [*affirmed* in 54 N. Y. App. Div. 638, 67 N. Y. Suppl. 1144]; Christian *v.* Dunn, 8 Kulp (Pa.) 320; Bailey *v.* Sioux Falls, 19 S. D. 231, 103 N. W. 16; Hurlbut *v.* Lookout Mountain, (Tenn. Ch. App. 1898) 49 S. W. 301.

70. Parsons *v.* Northampton, 154 Mass. 410, 28 N. E. 350; Fitzpatrick *v.* Flagg, 5 Abb. Pr. (N. Y.) 213.

71. Chittenden *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809 [*reversing* 14 N. Y. App. Div. 483, 43 N. Y. Suppl. 1035].

72. Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586; Tackett *v.* Stevenson, 155 Ind. 407, 58 N. E. 534; Brewer *v.* Springfield, 97 Mass. 152.

73. Webster *v.* Harwinton, 32 Conn. 131; Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146; Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811.

74. Parker *v.* Concord, 71 N. H. 468, 52 Atl. 1095, holding that where the act sought to be enjoined is authorized, and the only available objection is the mode of procedure, the doctrine of laches will be applied with full force.

Laches is not attributable to a taxpayer in not objecting to a resolution passed by a city council providing for an unauthorized expenditure, unless he had actual notice or knowledge of the resolution. Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660.

75. Tahlequah *v.* Guinn, 5 Indian Terr. 497, 82 S. W. 886; Schinzel *v.* Best, 45 Misc. (N. Y.) 455, 92 N. Y. Suppl. 754 [*affirmed* in 109 N. Y. App. Div. 917, 96 N. Y. Suppl. 1145]; Basselin *v.* Pate, 30 Misc. (N. Y.) 368, 63 N. Y. Suppl. 653.

76. Public Ledger Co. *v.* Memphis, 93 Tenn. 77, 23 S. W. 51.

An affidavit made on information and belief, charging fraud and collusion but containing no allegations as to affiant's means of knowledge of the facts alleged, will not authorize the granting of a preliminary injunction where the allegations are denied under oath by defendant. Schuck *v.* Reading City, 20 Pa. Co. Ct. 190.

77. McMahon *v.* New Orleans, 52 La. Ann. 1226, 27 So. 650; Public Ledger Co. *v.* Memphis, 93 Tenn. 77, 23 S. W. 51.

ized, sue to prevent its being executed or carried out,[78] and it is not necessary to wait until the contract has been consummated,[79] or until the municipality is about to pay out money thereon.[80] An injunction will also be granted where the authorities are proceeding in violation of constitutional, statutory, or charter requirements as to how the contract shall be made or awarded,[81] as where it is required that it be let to the lowest bidder,[82] or that provision shall be first made

78. *Alabama.*— Inge *v.* Mobile Bd. of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

California.— Yarnell *v.* Los Angeles, 87 Cal. 603, 25 Pac. 767.

Indiana.— Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416.

Louisiana.—Conery *v.* New Orleans Water-Works Co., 39 La. Ann. 770, 2 So. 555; Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593.

Maryland.— Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32; Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. 706.

Michigan.— Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 336.

Minnesota.—Flynn *v.* Little Falls Electric, etc., Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

Montana.— Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

Nebraska.— McElhinney *v.* Superior, 32 Nebr. 744, 49 N. W. 705; Grand Island Gas Co. *v.* West, 28 Nebr. 852, 45 N. W. 242.

New York.—Wenk *v.* New York, 171 N. Y. 607, 64 N. E. 509; Appleby *v.* New York, 15 How. Pr. 428.

North Dakota.—Roberts *v.* Fargo, 10 N. D. 230, 86 N. W. 726.

Ohio.— Davy *v.* Hyde Park, 16 Ohio Cir. Ct. 506, 8 Ohio Cir. Dec. 371.

Pennsylvania.— Frame *v.* Felix, 167 Pa. St. 47, 31 Atl. 375, 27 L. R. A. 802; Breen *v.* McCallin, 6 Pa. Co. Ct. 658; Davis *v.* Doylestown, 3 Pa. Co. Ct. 573; McIntyre *v.* Perkins, 9 Phila. 484.

Texas.— Austin *v.* McCall, 95 Tex. 565, 68 S. W. 791 [*reversing* (Civ. App. 1902) 67 S. W. 192].

Virginia.— Lynchburg, etc., R. Co. *v.* Dameron, 95 Va. 545, 28 S. E. 951.

Washington.— Times Pub. Co. *v.* Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2159.

In Massachusetts it is held that a bill by taxpayers cannot be maintained under the general equity jurisdiction of the court to restrain a municipality from carrying out an invalid contract (Steele *v.* Municipal Signal Co., 160 Mass. 36, 35 N. E. 105); but it is provided by statute that a petition may be brought for such purpose by ten taxable inhabitants of the municipality, which, however, must be brought in the supreme judicial court and not in the superior court (Baldwin *v.* Wilbraham, 140 Mass. 459, 4 N. E. 829).

In Ohio the statute makes it the duty of the city solicitor to sue to restrain the execution or performance of an unlawful contract, but provides that if he fails to do so after a request in writing by a taxpayer, the taxpayer may sue in his own name. Knorr *v.* Miller, 5 Ohio Cir. Ct. 609, 3 Ohio Cir. Dec. 297 [*affirming* 11 Ohio Dec. (Reprint) 165, 25 Cinc. L. Bul. 128].

The fact that a taxpayer is to be indemnified against the costs and expenses of the action by a company which may be incidentally benefited by the success of the action will not affect the right to sue where it appears that the taxpayer intended to sue, and his principal object was to prevent the execution by the municipality of an unlawful contract, but he was unable to undertake the payment of the costs and expenses in case he should fail in the action. McClain *v.* McKisson, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357.

A taxpayer is not guilty of laches who at the letting of a contract for public works protested against it and within a week brought a taxpayer's action to enjoin payment and had the issue settled and a first hearing in five weeks and a final determination in less than two months when only four days' work on the contract had been performed. Hortenstein *v.* Herrmann, 9 Ohio S. & C. Pl. Dec. 205, 6 Ohio N. P. 93.

When injunction will be denied.— Payment of the consideration of a contract by a municipality will not be enjoined, although the contract was *ultra vires*, where it was entered into in good faith by both parties and performed by the other party to the contract, and the municipality has enjoyed its benefits and it does not appear that its payment would be prejudicial to the rights of taxpayers. McMahon *v.* New Orleans, 52 La. Ann. 1226, 27 So. 650.

79. Austin *v.* McCall, 95 Tex. 565, 68 S. W. 791 [*reversing* (Civ. App. 1902) 67 S. W. 192].

80. Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

81. Inge *v.* Mobile, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Packard *v.* Hays, 94 Md. 233, 51 Atl. 32; Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. 706.

"Highest and best bidder."— Under a constitutional requirement that a franchise must be granted to the "highest and best bidder," due effect will be given to both the words "highest" and "best," and an injunction will not be granted unless there is about to be a plain and palpable violation of the constitution. Keith *v.* Johnson, 109 Ky. 421, 59 S. W. 487, 22 Ky. L. Rep. 947.

82. *Alabama.*— Inge *v.* Mobile, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

for a tax to meet the indebtedness incurred,[83] or where the contract does not conform to the advertisement for proposals to do the work,[84] or contains unauthorized provisions the effect of which is to increase the cost to the municipality.[85] A taxpayer may also sue to enjoin the other contracting party from carrying out an unlawful contract made with the municipality.[86]

c. Issuance or Delivery of Bonds. Where a municipal corporation is authorized to issue bonds a court of equity will not, in the absence of a clear abuse of authority, interfere with its discretionary powers;[87] but municipal corporations will be enjoined at the suit of taxpayers from making an unauthorized or illegal issue of bonds,[88] or delivering bonds already issued,[89] or indorsing or guaranteeing without authority the bonds of another corporation.[90] An authorized issue of bonds will not be enjoined because the ordinance providing for the issue does not also provide for levying taxes to pay the interest and provide a sinking fund to pay the principal,[91] and injunctive relief cannot be granted where the bonds have been issued and actually delivered before the proceedings are instituted.[92]

Louisiana.— Rederscheimer *v.* Flower, 52 La. Ann. 2089, 28 So. 299.

Maryland.— Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32.

New York.— Appleby *v.* New York, 15 How. Pr. 428.

Pennsylvania.— Safford *v.* Pittsburgh, 6 Pa. Co. Ct. 107.

Washington.— Times Pub. Co. *v.* Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865.

Wisconsin.— Ricketson *v.* Milwaukee, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2159.

"Lowest responsible bidder."— Under a requirement that a contract must be awarded to the "lowest responsible bidder," the municipal authorities have no discretion except as to the responsible character of the bid or bidder. Safford *v.* Pittsburgh, 6 Pa. Co. Ct. 107.

83. Davis *v.* Doylestown, 3 Pa. Co. Ct. 573.

84. McIntyre *v.* Perkins, 9 Phila. (Pa.) 484.

85. Inge *v.* Mobile, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20; Meyers *v.* New York, 58 N. Y. App. Div. 534, 69 N. Y. Suppl. 529 [*reversing* 32 Misc. 522, 66 N. Y. Suppl. 755].

86. Haskins *v.* Cincinnati Consol. St. R. Co., 7 Ohio Dec. (Reprint) 713, 4 Cinc. L. Bul. 1126, decided under the Ohio statute authorizing a suit to enjoin the "performance of any contract" made on behalf of the municipality in contravention of the laws or ordinances governing the same.

87. Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665; Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960.

88. *Indiana.*— Winamac *v.* Huddleston, 132 Ind. 217, 31 N. E. 561.

Minnesota.—Hamilton *v.* Detroit, 85 Minn. 83, 88 N. W. 419; Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48.

Nebraska.— George *v.* Cleveland, 53 Nebr. 716, 74 N. W. 266.

New York.— Ayers *v.* Lawrence, 59 N. Y. 192 [*reversing* 63 Barb. 454].

Ohio.— Elyria Gas, etc., Co. *v.* Elyria, 57 Ohio St. 374, 49 N. E. 335.

Oregon.— Avery *v.* Job, 25 Oreg. 512, 36 Pac. 293.

South Carolina.—Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

Texas.— Nalle *v.* Austin, (Civ. App. 1893) 21 S. W. 375.

Washington.—Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059.

Wisconsin.— Fowler *v.* Superior, 85 Wis. 411, 54 N. W. 800; Nœsen *v.* Port Washington, 37 Wis. 168.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2160.

Exceeding debt limit.—Where the indebtedness of a municipality has already reached the authorized limit an issue of bonds will be enjoined (Fowler *v.* Superior, 85 Wis. 411, 54 N. W. 800), and if the proposed issue will exceed the authorized limit it will be enjoined as to the excess (Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059).

A sale of bonds at a discount or for less than their par value, if in violation of law, will be enjoined, although the issue of the bonds was authorized. Roumfort *v.* Harrisburg, 2 Pearson (Pa.) 101.

It is not material whether the bonds are void so that the city could successfully defend against their collection. Fowler *v.* Superior, 85 Wis. 411, 54 N. W. 800.

The issuing of bonds will not be enjoined where the issue was authorized and the only illegality alleged is that the ordinance provides that they are to be sold and the proceeds received and expended by an illegally constituted body of trustees. In such case the injunction will only prohibit the delivery and sale of the bonds and the receipt and expenditure of their proceeds by such unauthorized persons. Tampa *v.* Salomonson, 35 Fla. 446, 17 So. 581.

89. George *v.* Cleveland, 53 Nebr. 716, 74 N. W. 266; Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

90. Blake *v.* Macon, 53 Ga. 172; Lynchburg, etc., R. Co. *v.* Dameron, 95 Va. 545, 28 S. E. 951.

91. Cleveland *v.* Spartanburg, 54 S. C. 83, 31 S. E. 871.

92. Alma *v.* Loehr, 42 Kan. 368, 22 Pac. 424.

d. Levy, Collection, and Disposition of Tax. A municipal corporation will be enjoined at the instance of taxpayers from levying and collecting an illegal tax,[93] but not to prevent the expenditure of money already collected on the ground that the tax which produced it was illegal;[94] nor will a municipal corporation be enjoined from collecting authorized taxes upon the speculative allegation that if collected the municipal authorities will misapply them.[95]

e. Incurring Indebtedness or Expenditures. Municipal authorities will be enjoined at the suit of taxpayers from incurring an unauthorized or illegal indebtedness,[96] as where it will exceed the authorized debt limit,[97] or the revenues of the current year where expenditures are so limited,[98] or where the indebtedness is for an unauthorized purpose,[99] or the authorities are proceeding in an illegal manner,[1] or the contract contains an unauthorized provision, the necessary effect of which is unduly to increase the cost to the municipality;[2] and they will be similarly enjoined from paying out money of the municipality upon an indebtedness so incurred.[3] The court will not, however, in the absence of fraud, ille-

93. *Alabama.*— Davis *v.* Petrinovich, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615.

California.— Bradford *v.* San Francisco, 112 Cal. 537, 44 Pac. 912.

Illinois.— Sherlock *v.* Winnetka, 68 Ill. 530.

Indiana.— Finney *v.* Lamb, 54 Ind. 1.

Nebraska.—Morton *v.* Carlin, 51 Nebr. 202, 70 N. W. 966.

New York.— Hills *v.* Peekskill Sav. Bank, 26 Hun 161; Wood *v.* Draper, 24 Barb. 187, 4 Abb. Pr. 322; Shepard *v.* Wood, 13 How. Pr. 47. *Compare* Trumbull *v.* Palmer, 104 N. Y. App. Div. 51, 93 N. Y. Suppl. 349.

North Carolina.— London *v.* Wilmington, 78 N. C. 109.

United States.— Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2161.

The portion of a tax in excess of the limit allowed by law will be enjoined. Dollahon *v.* Whittaker, 187 Ill. 84, 58 N. E. 301.

A tax for the payment of void bonds or the interest on such bonds will be enjoined. Sherlock *v.* Winnetka, 68 Ill. 530; Morton *v.* Carlin, 51 Nebr. 202, 70 N. W. 966; Hills *v.* Peekskill, 26 Hun (N. Y.) 161.

Plaintiff must sue on behalf of all the taxpayers and not for himself alone. Wood *v.* Draper, 24 Barb. (N. Y.) 187, 4 Abb. Pr. 322.

94. Seligman *v.* Santa Rosa, 81 Fed. 524; Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

95. Lemont *v.* Singer, etc., Stone Co., 98 Ill. 94; Bardrick *v.* Dillon, 7 Okla. 535, 54 Pac. 785.

96. *California.*— Bradford *v.* San Francisco, 112 Cal. 537, 44 Pac. 912.

Maryland.— Baltimore *v.* Gill, 31 Md. 375.

Massachusetts.— Draper *v.* Fall River, 185 Mass. 142, 69 N. E. 1068.

Michigan.— Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 330.

Minnesota.— Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48.

Nebraska.— Tukey *v.* Omaha, 54 Nebr. 370, 74 N. W. 613, 69 Am. St. Rep. 711.

New York.— Gerlach *v.* Brandreth, 34 N. Y. App. Div. 197, 54 N. Y. Suppl. 479.

Ohio.— Pullen *v.* Smith, 26 Ohio Cir. Ct. 549; Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 475, 5 Ohio N. P. 98.

West Virginia.— Spilman *v.* Parkersburg, 35 W. Va. 605, 14 S. E. 279.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2162.

97. *Illinois.*— Springfield *v.* Edwards, 84 Ill. 626; Grayville *v.* Gray, 19 Ill. App. 120.

Indiana.— Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416.

Maine.— Blood *v.* Beal, 100 Me. 30, 60 Atl. 427; Reynolds *v.* Waterville, 92 Me. 292, 42 Atl. 553.

Montana.— Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

New York.— Gerlach *v.* Brandreth, 34 N. Y. App. Div. 197, 54 N. Y. Suppl. 479.

West Virginia.— Spilman *v.* Parkersburg, 35 W. Va 605, 14 S. E. 279.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2162.

The purpose of the indebtedness, whether for a legal or illegal purpose, is immaterial if it will exceed the constitutional limit. Blood *v.* Beal, 100 Me. 30, 60 Atl. 427.

98. Bradford *v.* San Francisco, 112 Cal. 537, 44 Pac. 912; Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 330.

99. Tukey *v.* Omaha, 54 Nebr. 370, 74 N. W. 613, 69 Am. St. Rep. 711.

1. Baltimore *v.* Gill, 31 Md. 375; Draper *v.* Fall River, 185 Mass. 142, 69 N. E. 1068; Savidge *v.* Spring Lake, 112 Mich. 91, 70 N. W. 425; Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 475, 5 Ohio N. P. 98.

2. Meyers *v.* New York, 58 N. Y. App. Div. 534, 69 N. Y. Suppl. 529 [*reversing* 54 N. Y. App. Div. 631, 66 N. Y. Suppl. 755 (*affirming* 32 Misc. 522)].

3. *Massachusetts.*— Draper *v.* Fall River, 185 Mass. 142, 69 N. E. 1068.

Michigan.— Savidge *v.* Spring Lake, 112 Mich. 91, 70 N. W. 425.

New York.— Gerlach *v.* Brandreth, 34 N. Y. App. Div. 197, 54 N. Y. Suppl. 479.

Pennsylvania.— O'Malley *v.* Olyphant, 198 Pa. St. 525, 48 Atl. 483.

gality, or bad faith, interfere with the exercise of discretionary powers in regard to incurring or paying an indebtedness,[4] or merely upon the ground of bad judgment or incompetence.[5]

f. Misapplication of Funds. The authorities of a municipal corporation will be enjoined at the suit of taxpayers from making any illegal or unauthorized appropriation, use, or expenditure of the corporate funds,[6] and it makes no difference in principle whether the amount sought to be wrongfully appropriated is large or small.[7] It has also been held that taxpayers may by certiorari question the validity of a resolution of municipal authorities in order to prevent an illegal expenditure of corporate funds,[8] and in New York a summary proceeding to investigate municipal finances is provided by statute,[9] but injunction is the usual and proper remedy.[10] An injunction will not be granted, however, to restrain acts falling within the discretionary powers of the municipal authorities, in the absence of fraud or palpable abuse,[11] or where it is not shown that the act sought

United States.—Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2162.

4. Moses *v.* Risdon, 46 Iowa 251; Hearst *v.* McClellan, 102 N. Y. App. Div. 336, 92 N. Y. Suppl. 484.

5. Hearst *v.* McClellan, 102 N. Y. App. Div. 336, 92 N. Y. Suppl. 484. And see Moses *v.* Risdon, 46 Iowa 251.

6. *Alabama.*— Inge *v.* Mobile, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

Alaska.— Bates *v.* Nome, 1 Alaska 208.

Connecticut.— Webster *v.* Harwinton, 32 Conn. 131; New London *v.* Brainard, 22 Conn. 552.

District of Columbia.— Roberts *v.* Bradfield, 12 App. Cas. 453.

Florida.— Chamberlain *v.* Tampa, 40 Fla. 74, 23 So. 572.

Georgia.— Adel *v.* Woodall, 122 Ga. 535, 50 S. E. 481; Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 42.

Illinois.— Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359; Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129 [*reversing* on other grounds 25 Ill. App. 600]; Jackson *v.* Norris, 72 Ill. 364; Gorman *v.* Tidholm, 94 Ill. App. 371; Stadler *v.* Fahey, 87 Ill. App. 411.

Indiana.— Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811; Mitchell *v.* Wiles, 59 Ind. 364.

Iowa.— Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333.

Louisiana.—Gray *v.* Bourgeois, 107 La. 671, 32 So. 42; State *v.* New Orleans, 50 La. Ann. 880, 24 So. 666.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

Michigan.— Savidge *v.* Spring Lake, 112 Mich. 91, 70 N. W. 425.

Minnesota.— Smith *v.* St. Paul, 72 Minn. 472, 75 N. W. 708.

Nebraska.— Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941; Tukey *v.* Omaha, 54 Nebr. 370, 74 N. W. 613, 63 Am. St. Rep. 711.

New Hampshire.— Blood *v.* Manchester Electric Light Co., 68 N. H. 340, 39 Atl. 335; Merrill *v.* Plainfield, 45 N. H. 126.

New York.— De Baun *v.* New York, 16 Barb. 392; Mercer *v.* Floyd, 24 Misc. 164, 53 N. Y. Suppl. 433.

Ohio.— Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 475, 5 Ohio N. P. 98.

Pennsylvania. — Webster *v.* Hopewell Borough, 19 Pa. Super. Ct. 549.

Wisconsin.— Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

United States.— The Liberty Bell, 23 Fed. 843.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2163.

The fact that the taxpayer has a purely private interest which the expenditure sought to be prevented would prejudice does not prevent him from suing as a taxpayer to enjoin a misuse of public funds. Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 93.

A taxpayer is not estopped to enjoin an illegal expenditure of public funds by the fact that he made no attempt to restrain a previous expenditure for the same purpose. Savidge *v.* Spring Lake, 112 Mich. 91, 70 N. W. 425.

The use of a particular fund which is legally applicable only to a particular purpose to general municipal purposes will be enjoined. Chamberlain *v.* Tampa, 40 Fla. 74, 23 So. 572.

7. Bates *v.* Nome, 1 Alaska 208.

8. State *v.* Jersey City, 54 N. J. L. 437, 24 Atl. 571. *Compare* Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

9. *In re* Plattsburgh, 157 N. Y. 78, 51 N. E. 512; Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101].

In New York the municipal law of 1892 provides for a summary proceeding to investigate municipal finances, which may be instituted before a justice of the supreme court upon affidavit of twenty-five taxpaying freeholders of any town or village. *In re* Plattsburgh, 157 N. Y. 78, 51 N. E. 512 [*reversing* on other grounds 27 N. Y. App. Div. 363, 50 N. Y. Suppl. 356].

10. New London *v.* Brainard, 22 Conn. 552; Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

11. Richmond *v.* Davis, 103 Ind. 449, 3

to be enjoined is in fact unauthorized,[12] or would prejudice the pecuniary rights of the municipality or its taxpayers.[13]

g. Payment of Claims, Bonds, or Warrants. The authorities of a municipal corporation may be enjoined at the suit of taxpayers from paying out money of the municipality upon illegal or unauthorized claims or warrants,[14] or void municipal bonds,[15] or a contract which was authorized but not performed by the other party according to his agreement.[16] They may also be enjoined from paying a judgment if fraudulently or collusively obtained;[17] but in the absence of fraud or collusion, if the liability of the municipality has been established by the judgment of a court of competent jurisdiction, it cannot be relitigated in a court of equity and its payment enjoined at the suit of a taxpayer.[18] An injunction will not be granted for every trifling injury or technical irregularity,[19] or where its effect would be inequitable rather than equitable,[20] so if the claim is just and equitable and based upon a benefit to the public so that its payment cannot be said to be prejudicial to the rights of taxpayers, the payment will not be enjoined, although there may be some doubt as to the authority of the municipality or irregularity in the proceedings;[21] but where the claim is clearly unauthorized or illegal the fact that the claimant may have rendered services or incurred expenses in good faith in reliance upon the authority of the municipality is not ground for refusing to enjoin its payment.[22]

h. Purchase of Property. Where municipal authorities are authorized to pur-

N. E. 130; Reynolds *v.* Albany, 8 Barb. (N. Y.) 597; Holtz *v.* Diehl, 26 Misc. (N. Y.) 224, 56 N. Y. Suppl. 841; Fergus *v.* Columbus, 8 Ohio S. & C. Pl. Dec 290, 6 Ohio N. P. 82.

12. McLean *v.* North St. Paul, 73 Minn. 146, 75 N. W. 1042.

13. Richmond *v.* Davis, 103 Ind. 449, 3 N. E. 130; Keator *v.* Dalton, 29 Misc. (N. Y.) 692, 62 N. Y. Suppl. 878 [*affirmed* in 67 N. Y. App. Div. 619, 73 N. Y. Suppl. 1138].

14. *Arkansas.*— Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 193.

Florida.— Peck *v.* Spencer, 26 Fla. 23, 7 So. 642.

Georgia.— Adel *v.* Woodall, 122 Ga. 535, 50 S. E. 481.

Idaho.— Nuckols *v.* Lyle, 8 Ida. 589, 70 Pac. 401.

Louisiana.— Pleasants *v.* Shreveport, 110 La. 1046, 35 So. 283.

Massachusetts.— Claflin *v.* Hopkinton, 4 Gray 502.

Nebraska.— South Omaha *v.* Taxpayers' League, 42 Nebr. 671, 60 N. W. 957.

New York.— West *v.* Utica, 71 Hun 540, 24 N. Y. Suppl. 1075; Beebe *v.* Sullivan County, 64 Hun 377, 19 N. Y. Suppl. 629 [*affirmed* in 142 N. Y. 631, 37 N. E. 566].

Oregon.— Brownfield *v.* Houser, 30 Oreg. 534, 49 Pac. 843.

Pennsylvania.— Bergner *v.* Harrisburg, 1 Pearson 291.

Rhode Island.— Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648.

Wisconsin.— Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2164.

15. Metzger *v.* Attica, etc., R Co., 79 N. Y. 171; Strang *v.* Cook, 47 Hun (N. Y.) 46; Newton *v.* Keech, 9 Hun (N. Y.) 355.

An injunction will not be granted to prevent the payment of negotiable bonds already issued as representing a valid debt which should have been acknowledged in some other form. Scott *v.* Twombley, 20 N. Y. App. Div. 535, 46 N. Y. Suppl. 699.

16. Pleasants *v.* Shreveport, 110 La. 1046, 35 So. 283.

17. Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132; Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771; Nevil *v.* Clifford, 55 Wis. 161, 12 N. W. 419.

18. Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328.

19. Fitzpatrick *v.* Flagg, 5 Abb. Pr. (N. Y.) 213; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723.

20. Parsons *v.* Northampton, 154 Mass. 410, 28 N. E. 350; Fitzpatrick *v.* Flagg, 5 Abb. Pr. (N. Y.) 213.

21. *Illinois.*— Westbrook *v.* Middlecoff, 99 Ill. App. 327.

Massachusetts.— Parsons *v.* Northampton, 154 Mass. 410, 28 N. E. 350.

Michigan.— Chaffee *v.* Granger, 6 Mich. 51.

New York.— Fitzpatrick *v.* Flagg, 5 Abb. Pr. 213; Brady *v.* New York, 35 How. Pr. 81.

Pennsylvania.— Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691.

United States.— Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2164.

A municipality may recognize a moral obligation as a good consideration for the payment of public money and will not be enjoined from making such payment. Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691.

22. Claflin *v.* Hopkinton, 4 Gray (Mass.) 502; Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648

chase property a court of equity will not interfere with the exercise of their discretion in the absence of fraud or collusion or manifest abuse of their powers;[23] but a purchase will be enjoined at the instance of a taxpayer where it is unauthorized and illegal,[24] or where it will create an indebtedness in excess of the charter limit,[25] or where the conduct of the municipal authorities amounts to a manifest abuse of their discretion or a fraud upon the rights of taxpayers,[26] as where it is clearly shown or admitted that the purchase-price is grossly excessive,[27] or where the property is wholly inadequate and insufficient for the purpose intended.[28]

i. Waste or Disposition of, or Injury to, Property. A court of equity will not interfere at the suit of a taxpayer to restrain the authorities of a municipal corporation in the exercise of their discretionary powers with regard to the control of property of the municipality, in the absence of illegality, fraud, or clear abuse of their authority;[29] but a taxpayer may sue to enjoin any unauthorized or illegal disposition of or injury to the corporate property.[30] In New York the statutes expressly authorize a suit by taxpayers to prevent any waste of or injury to the corporate property.[31]

5. Actions — a. In General. The court will not assume jurisdiction merely to advise or give an opinion upon a purely abstract question,[32] such as the proper construction of a provision of a municipal charter,[33] or to consider or determine irrelevant and collateral matters;[34] nor can the title to a public office be tried in a suit brought against the municipal authorities to enjoin the payment of sala-

23. Ziegler *v.* Chapin, 126 N. Y. 342, 27 N. E. 471 [*affirming* 59 Hun 214, 13 N. Y. Suppl. 783]; Newell *v.* Bradford City, 18 Pa. Co. Ct. 465.

24. Ziegler *v.* Chapin, 126 N. Y. 342, 27 N. E. 471 [*affirming* 59 Hun 214, 13 N. Y. Suppl. 783]; Lewis *v.* Providence, 10 R. I. 97.

25. Lore *v.* Wilmington, 4 Del. Ch. 575.

26. Avery *v.* Job, 25 Oreg. 512, 36 Pac. 293.

27. Winkler *v.* Summers, 5 N. Y. Suppl. 723, 22 Abb. N. Cas. 80; Avery *v.* Job, 25 Oreg. 512, 36 Pac. 293.

28. Avery *v.* Job, 25 Oreg. 512, 36 Pac. 293.

29. Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666; Arkenburgh *v.* Wood, 23 Barb. (N. Y.) 360; Adamson *v.* Nassau Electric R. Co., 89 Hun (N. Y.) 261, 34 N. Y. Suppl. 1073 [*reversing* 12 Misc. 600, 33 N. Y. Suppl. 732]; Holtz *v.* Diehl, 26 Misc. (N. Y.) 224, 56 N. Y. Suppl. 841; Olp *v.* Leddick, 14 N. Y. Suppl. 41.

30. *Georgia.*— Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 42.

Illinois.— Jackson *v.* Norris, 72 Ill. 364.

Iowa.— Cascaden *v.* Waterloo, 106 Iowa 673, 77 N. W. 333; Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

Louisiana.— Sugar *v.* Monroe, 108 La. 677, 32 So. 961, 59 L. R. A. 723.

New York.— Adamson *v.* Union R. Co., 74 Hun 3, 26 N. Y. Suppl. 136; Armstrong *v.* Grant, 56 Hun 226, 9 N. Y. Suppl. 388.

United States.— Davenport *v.* Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2166.

A non-resident owner of property within the municipality upon which he pays taxes has the same right as a resident taxpayer to sue to enjoin an unauthorized conveyance of municipal property. Brockman *v.* Creston, 79 Iowa 587, 44 N. W. 822.

Where a special tax is voted to raise money for the construction of a public building for a specified purpose, taxpayers may sue to prevent the building being used for a different purpose. Sugar *v.* Monroe, 108 La. 677, 32 So. 961, 59 L. R. A. 723.

31. Adamson *v.* Union R. Co., 74 Hun (N. Y.) 3, 26 N. Y. Suppl. 136; Armstrong *v.* Grant, 56 Hun (N. Y.) 226, 9 N. Y. Suppl. 388; Standart *v.* Burtis, 46 Hun (N. Y.) 82.

An injunction will not be granted under the statute, on the ground of preventing waste or injury, to enjoin the granting of a mere revocable license to lay a street railroad track across a bulkhead from a street to a ferry (Hart *v.* New York, 16 N. Y. App. Div. 227, 44 N. Y. Suppl. 767); or to enjoin a person elected as a trustee of a village from acting as such on the ground that he was not a resident of the ward which he was elected to represent, as required by the charter (Fahy *v.* Johnstone, 21 N. Y. App. Div. 154, 47 N. Y. Suppl. 402); nor does the statute authorize an interference with discretionary powers of the municipal authorities in the absence of illegality, fraud, or bad faith (Adamson *v.* Nassau Electric R. Co., 89 Hun (N. Y.) 261, 34 N. Y. Suppl. 1073).

32. Ramsay *v.* Marble Rock, 123 Iowa 7, 98 N. W. 134; Hurlbut *v.* Lookout Mountain, (Tenn. Ch. App. 1898) 49 S. W. 301.

33. Hurlbut *v.* Lookout Mountain, (Tenn. Ch. App. 1898) 49 S. W. 301.

34. Fingal *v.* Millvale Borough, 162 Pa. St. 393, 29 Atl. 644; *In re* Millvale Borough, 162 Pa. St. 374, 29 Atl. 641, 644; Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

ries.[35] Where one taxpayer sues on behalf of the municipality upon refusal of the municipal solicitor to do so, the pendency of such a suit is a bar to another suit by a different taxpayer for the same cause.[36] A statute providing the time within which suit must be brought to test the legality of bonds will not be given a retroactive operation, where such intent upon the part of the legislature is not clearly apparent.[37]

b. Requesting Action by Municipal Officers. A taxpayer cannot sue to enforce a cause of action existing in favor of the municipality without first requesting the proper municipal authorities to do so,[38] unless the circumstances are such as to indicate affirmatively that such a request would be unavailing.[39] The Ohio statute authorizing suits to enjoin a misapplication of corporate funds and certain abuses of corporate powers provides that before a taxpayer may sue the municipal solicitor must be requested in writing to do so;[40] but the requirement does not apply where the municipality has no such officer,[41] or where plaintiff is suing not as a taxpayer to protect the public interest but to protect a private interest which the act sought to be enjoined will affect.[42]

c. Parties. In a suit by taxpayers where their rights as such are directly affected the suit may be brought in their own names,[43] and it is not necessary to sue in the name of the state, or that the attorney-general or other public officer should be made a party,[44] although a suit brought by such public officer on the relation of a taxpayer is not improper.[45] In such cases where the parties interested as plaintiffs are numerous a part may be permitted to represent the whole,[46] but the bill should allege that the suit is brought on behalf of all as well as those who are parties;[47] and under the Ohio statute authorizing taxpayers to sue upon a refusal of the city solicitor to do so, a taxpayer, while he may sue in his own name, must allege that the suit is on behalf of the corporation.[48] But taxpayers may join as parties plaintiff,[49] although some are resident and others

35. Prince *v.* Boston, 148 Mass. 285, 19 N. E. 218; Green *v.* Knox, 175 N. Y. 432, 67 N. E. 910 [*affirming* 76 N. Y. App. Div. 405, 78 N. Y. Suppl. 779].

36. Mathers *v.* Cincinnati, 7 Ohio Dec. (Reprint) 496, 3 Cinc. L. Bul. 551.

37. Citizens' State Bank *v.* Jess, 127 Iowa 450, 103 N. W. 471; Waples *v.* Dubuque, 116 Iowa 167, 89 N. W. 194, holding that Code, § 989, providing that no action shall be brought questioning the legality of any street improvement or sewer certificates or bonds, from and after three months from the time the issuance of such certificates or bonds is ordered, will not be given a retroactive operation, since it evidently relates to bonds of different import from those issued under prior laws.

38. Davis *v.* Fogg, 78 Ind. 301; Reed *v.* Cunningham, 126 Iowa 302, 101 N. W. 1055.

39. Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826; Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941.

Where the municipal authorities are parties to the injury sought to be redressed, any demand upon them to sue would obviously be futile and it is therefore held to be unnecessary. Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771.

40. Findlay Gaslight Co. *v.* Findlay, 2 Ohio Cir. Ct. 237, 1 Ohio Cir. Dec. 463; Johnson *v.* Cincinnati, 11 Ohio Dec. (Reprint) 383, 26 Cinc. L. Bul. 223.

But the city solicitor may sue in the name of taxpayers with their consent without being requested by them in writing to do so. Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291.

41. Cope *v.* Wellsville, 11 Ohio Dec. (Reprint) 205, 25 Cinc. L. Bul. 250.

42. Lake Shore Foundry *v.* Cleveland, 8 Ohio Cir. Ct. 671, 4 Ohio Cir. Dec. 230; Moore *v.* Cincinnati, 9 Ohio Dec. (Reprint) 587, 15 Cinc. L. Bul. 196.

43. New Orleans, etc., R. Co. *v.* Dunn, 51 Ala. 128; Baltimore *v.* Gill, 31 Md. 375; Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48; Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

44. New Orleans, etc., R. Co. *v.* Dunn, 51 Ala. 128; Baltimore *v.* Gill, 31 Md. 375.

45. Jackson *v.* Norris, 72 Ill. 364.

46. Wood *v.* Draper, 24 Barb. (N. Y.) 187, 4 Abb. Pr. 322.

47. Wood *v.* Draper, 24 Barb. (N. Y.) 187, 4 Abb. Pr. 322.

48. Wood *v.* Pleasant Ridge, 12 Ohio Cir. Ct. 177, 1 Ohio Cir. Dec. 516; Hensley *v.* Hamilton, 3 Ohio Cir. Ct. 201, 2 Ohio Cir. Dec. 114; Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

The court will allow plaintiff to amend and state that the action is brought on behalf of the corporation instead of on behalf of himself and other taxpayers. Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

49. Mathers *v.* Cincinnati, 7 Ohio Dec. (Reprint) 496, 3 Cinc. L. Bul. 551.

non-resident taxpayers.[50] All persons who are interested in the subject-matter of the suit and whose rights are to be affected by the judgment or decree to be rendered therein or whose presence is essential to a complete determination of the controversy must be made parties.[51] So in a suit to cancel municipal bonds or to enjoin their payment or the payment of interest thereon, where the bonds have been delivered, the holders of such bonds must be made parties,[52] and also the municipality itself;[53] and in a suit to vacate the audit of claims against a municipality, those in whose favor the claims were audited must be made parties.[54] The municipality itself and not merely the officers thereof must be made a party where the effect of the suit is to divest it of its property,[55] or where its presence as a party is necessary to a complete determination of the controversy,[56] as in a suit to set aside a conveyance of property already made to the municipality,[57] or to set aside a contract of which it has received the consideration;[58] but in a suit to enjoin unauthorized or illegal official acts the municipality itself is not always a necessary party,[59] although since an injunction against the municipality binds its officers and agents the suit may be brought against the municipality alone without making its officers and agents parties.[60] In a suit to enjoin acts of municipal officers those acting as such at the time of the suit are the proper parties defendant, and former incumbents, although they were the authors of the initial wrong, are not necessary parties unless some affirmative relief is sought against them personally,[61] but in a suit to enjoin payment of illegal claims it is proper to join as defendants with the mayor and aldermen the officials who are intrusted with the power of paying claims.[62] In a suit to enjoin the execution of an unauthorized contract or a donation of public funds, it is not necessary to join as a party the person with whom the municipality proposes to contract,[63] or the beneficiary of the proposed illegal donation.[64] In a purely statutory proceeding the express provisions of the statute as to who may or must be made parties must be strictly followed.[65]

50. Sentell *v.* Avoyelles Parish Police Jury, 48 La. Ann. 96, 18 So. 910.

51. Hope *v.* Gainesville, 72 Ga. 246; Osterhoudt *v.* Ulster County, 98 N. Y. 239; Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

52. *Georgia.*— Hope *v.* Gainesville, 72 Ga. 246.

Iowa.— Ramsay *v.* Marble Rock, 123 Iowa 7, 98 N. W. 134.

Ohio.— Griffith *v.* Tiffin, 27 Ohio Cir. Ct. 626.

Texas.—Bradford *v.* Westbrook, (Civ. App. 1905) 88 S. W. 382.

Washington.—Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2169.

The court will not on certiorari inquire into the validity of bonds which have been issued by a municipal corporation in payment for work done under a municipal contract, where the bonds have been delivered and the contractor is not made a party to the writ. Cunningham *v.* Merchantville, 61 N. J. L. 466, 39 Atl. 639.

53. Bradford *v.* Westbrook, (Tex. Civ. App. 1905) 88 S. W. 382.

54. Osterhoudt *v.* Ulster County, 98 N. Y. 239.

55. Moore *v.* Held, 73 Iowa 538, 35 N. W. 623.

56. Eames *v.* Kellar, 102 N. Y. App. Div. 207, 92 N. Y. Suppl. 665.

57. Moore *v.* Held, 73 Iowa 538, 35 N. W. 623; Turner *v.* Cruzen, 70 Iowa 202, 30 N. W. 483.

58. Eames *v.* Kellar, 102 N. Y. App. Div. 207, 92 N. Y. Suppl. 665.

But in a suit to enjoin the other contracting party from carrying out a contract made with the municipality, where no relief is sought against the municipality or is necessary to a complete determination of the controversy, the municipality is not a necessary party. Knorr *v.* Miller, 11 Ohio Dec. (Reprint) 165, 25 Cinc. L. Bul. 128.

59. Wilkins *v.* New York, 9 Misc. (N. Y.) 610, 30 N. Y. Suppl. 424, holding that in a suit under the New York statute to enjoin the sale of a ferry franchise and lease of a wharf the municipality is not a proper party and should not be joined as a defendant.

60. Adel *v.* Woodall, 122 Ga. 535, 50 S. E. 481.

61. Wenk *v.* New York, 171 N. Y. 607, 64 N. E. 509 [*reversing* 69 N. Y. App. Div. 621, 75 N. Y. Suppl. 1135].

62. Barnes *v.* McGuire, 33 Misc. (N. Y.) 438, 68 N. Y. Suppl. 485.

63. City Water Supply Co. *v.* Ottumwa, 120 Fed. 309.

64. Adel *v.* Woodall, 122 Ga. 535, 50 S. E. 481.

65. Watts *v.* Wichita County, 41 Kan. 402, 22 Pac. 313; Chicago, etc., R. Co. *v.* Evans, 41 Kan. 94, 21 Pac. 216.

In proceedings under the Kansas statute of 1871 to contest an election held to vote upon the question of issuing bonds in aid

The absence on appeal of one who was a party on the trial but not a necessary party is not ground for dismissal.[66]

d. Pleading. In a taxpayer's action the complaint or bill must allege facts showing a right or interest in plaintiff which entitles him to sue,[67] and all facts necessary to authorize the relief demanded.[68] The complaint must allege that plaintiff is a taxpayer,[69] and show that his interests as such are or will be affected by the act sought to be enjoined or redressed,[70] and that the acts complained of are in fact unauthorized, fraudulent, or illegal.[71] It must allege issuable facts and not mere conclusions,[72] and the allegations must be definite and certain.[73] In a suit to enjoin or set aside a contract on the ground of fraud or illegality a general allegation is not sufficient, but the facts constituting the fraud or illegality must be alleged;[74] and, in a suit to declare void an election held to determine the question of issuing bonds, it is not sufficient to allege that illegal votes were received but it must be shown that such votes affected the result of the election.[75] Irrelevant or impertinent allegations may be stricken out on motion.[76]

e. Presumptions and Evidence. In suits to enjoin threatened municipal action the presumption is that the municipal authorities are acting regularly within the limits of their authority and without intention of violating the law, and the

of a railroad company, plaintiff can proceed only against the municipal officers and litigate only the question of the validity of the election, and it is not proper to make the railroad company a party. Chicago, etc., R. Co. *v.* Evans, 41 Kan. 94, 21 Pac. 216.

66. Kansas City *v.* Hanson, 8 Kan. App. 290, 55 Pac. 513, holding that in a suit to enjoin the making of payments on a paving contract the petition in error may be brought by the city alone without making the city clerk, who was a defendant below, a party, he having no independent interest in the proceeding.

67. Searle *v.* Abraham, 73 Iowa 507, 35 N. W. 612; Comins *v.* Jefferson County, 3 Thomps. & C. (N. Y.) 296 [*affirmed* in 64 N. Y. 626]; Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375.

68. Brashear *v.* Madison, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; Sheehy *v.* McMillan, 26 N. Y. App. Div. 140, 49 N. Y. Suppl. 1088.

69. Barker *v.* Phelps, 39 Mo. App. 288.

70. Searle *v.* Abraham, 73 Iowa 507, 35 N. W. 612.

Sufficiency of allegations.— It is not necessary to allege in express terms that the burden of taxation will be increased and plaintiff prejudicially affected by the illegal act, but it is sufficient to allege equivalent facts showing such to be the case. Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593. A complaint shows an injury to plaintiff where it shows that he is a taxpayer and that payments upon an unauthorized contract are to be made out of the general treasury of the municipality. Hanson *v.* Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84. In a suit to enjoin the execution of a contract illegally awarded without examining all the bids, it is not necessary to allege that the bid which was not opened and examined was lower than the one accepted. Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. 706. In a suit to enjoin the misapplication of public funds, it is not necessary to allege the amount of taxes paid or to be paid by plaintiff. Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359. In a suit to enjoin the collection of a tax by a municipal corporation the extent to which it will increase plaintiff's taxes should be stated either directly or by alleging facts from which it may be shown. Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.

71. Seward *v.* Liberty, 142 Ind. 551, 42 N. E. 39; Bush *v.* Coler, 60 N. Y. App. Div. 56, 69 N. Y. Suppl. 770 [*affirmed* in 170 N. Y. 587, 63 N. E. 1115]; Steffin *v.* Hill, 16 Oreg. 232, 17 Pac. 874; Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375.

The presumption is that municipal officers have performed their duties and acted in an authorized and legal manner, and the complaint must allege facts which clearly show the contrary. Brashear *v.* Madison, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474.

72. Foland *v.* Frankton, 142 Ind. 546, 41 N. E. 1031; Bush *v.* Coler, 60 N. Y. App. Div. 56, 69 N. Y. Suppl. 770 [*affirmed* in 170 N. Y. 587, 63 N. E. 1115]; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659; Weber *v.* Dillon, 7 Okla. 568, 54 Pac. 894.

73. Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375.

74. Seward *v.* Liberty, 142 Ind. 551, 42 N. E. 39; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659; Knowles *v.* New York, 37 Misc. (N. Y.) 195, 75 N. Y. Suppl. 189 [*affirmed* in 74 N. Y. App. Div. 632, 77 N. Y. Suppl. 1130].

75. Woolley *v.* Louisville Southern R. Co., 93 Ky. 223, 19 S. W. 595, 15 Ky. L. Rep. 13.

76. *In re* Millvale Borough No. 1, 14 Pa. Co. Ct. 79, holding that, in an action to enjoin the execution of a contract and issue of bonds for waterworks, allegations as to political influence and personal motives and feelings are irrelevant and impertinent and will be stricken out.

burden is upon plaintiff to show the contrary,[77] and to sustain by proof all material allegations of the bill or complaint essential to authorize the relief demanded;[78] but it is not necessary to show the amount of taxes paid or to be paid by plaintiff.[79] In a suit to enjoin the issuing of bonds evidence is not admissible as to how a witness voted upon the proposition when submitted to the voters, in the absence of any evidence discrediting the certificate of the election officers or tending to show that illegal votes were cast or the existence of any irregularity,[80] and evidence as to the motives that prompted individual taxpayers to vote in favor of the issue is immaterial and properly excluded.[81]

f. Costs.[82] In taxpayer's actions the court may decree costs against the municipality but has no power to award an execution therefor.[83] In actions against municipal officers relating to their official duties costs should not be awarded against them in the absence of any showing of gross negligence, bad faith, or malice, although the act complained of is shown to be unauthorized and is enjoined.[84] In a suit by a taxpayer under the Ohio statute where the city solicitor has refused to sue plaintiff may be allowed his costs and a reasonable compensation for his attorney.[85]

XVI. CLAIMS AGAINST CORPORATION.[86]

A. Necessity For Presenting. A distinction is to be observed between presenting a claim as a statutory condition precedent to the bringing of an action,[87] and the presentation for audit, the former not being a presentation for audit.[88] Usually it is expressly provided by statute or ordinance that unliquidated claims against the municipality must be presented to a specified officer or board for audit and allowance or rejection.[89] Many of the statutes apply to claims for damages

77. Brashear *v.* Madison, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; McLean *v.* North St. Paul, 73 Minn. 146, 75 N. W. 1042; Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 92 N. W. 643.

78. Smith *v.* Hayes, 98 Md. 485, 57 Atl. 535; Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 92 N. W. 643.

79. Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359.

80. New York, etc., Cement Co. *v.* Keator, 62 N. Y. App. Div. 577, 71 N. Y. Suppl. 185 [*affirmed* in 173 N. Y. 235, 66 N. E. 9].

81. Day *v.* Austin, (Tex. Civ. App. 1893) 22 S. W. 757.

82. See, generally, COSTS, 11 Cyc. 1.

83. Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359.

84. O'Connor *v.* Walsh, 83 N. Y. App. Div. 179, 82 N. Y. Suppl. 499.

85. Guckenberger *v.* Dexter, 18 Ohio Cir. Ct. 244, 10 Ohio Cir. Dec. 174.

Compensation for counsel.— Compensation for plaintiff's counsel will not be allowed under the Ohio statute in an action to enjoin an issue of bonds which is not brought in the interest of the municipality but at the instance of the bidders for such bonds in order to test their validity (Brown *v.* Toledo, 10 Ohio Cir. Ct. 642, 5 Ohio Cir. Dec. 115); and it is held that such allowance cannot be made in a case where the municipality had no solicitor, as the statute authorizes such allowance only where the solicitor has been requested to sue and refused to do so (Brundige *v.* Ashley, 62 Ohio St. 526, 57 N. E. 226); but in a case where the solicitor having filed the petition changed his opinion of the merits of the case and filed an answer against the ground taken by the petition, but consented that plaintiff should employ other counsel, it was held proper that compensation for such counsel should be allowed (Miller *v.* Pearce, 2 Cinc. Super. Ct. (Ohio) 44). The amount of compensation allowed plaintiff's counsel should never be so large as to invite litigation for the purpose of obtaining it, or determined by what is paid by private persons or corporations for similar services, or on a basis of a percentage of the amount saved to the municipality, but rather by what is allowed to public officers for like services. Guckenberger *v.* Dexter, 18 Ohio Cir. Ct. 244, 10 Ohio Cir. Dec. 174.

86. See also COUNTIES, 11 Cyc. 585 *et seq.*

Claims against municipality affected by creditors' suits see CREDITORS' SUITS, 12 Cyc. 28.

Collection of claims after amendment, repeal, or forfeiture of charter see *supra*, II, C, 1, e, (III), 2, f, (IV).

Definition of "claim" as used in statutes relating to municipal corporations see CLAIM, 7 Cyc. 181 note 49.

87. See *supra*, XIV, E, 2, c; and *infra*, XVII, C, 2.

88. Eppig *v.* New York, 57 N. Y. App. Div. 114, 68 N. Y. Suppl. 41.

89. *Iowa.*— Green Bay Lumber Co. *v.* Thomas, 106 Iowa 420, 76 N. W. 749.

Kansas.— Syracuse *v.* Reed, 46 Kan. 520, 26 Pac. 1043.

New Jersey.— Bradley *v.* Hammonton, 38 N. J. L. 430, 20 Am. Rep. 404.

New York.— Warrin *v.* Baldwin, 105 N. Y.

arising from tort as well as to those arising upon contract, although some of the statutes have been held to refer only to claims arising upon contracts.[90] Other statutory provisions have been held applicable only to claims for damages arising *ex delicto*.[91] Generally a claim for the salary of an officer or for other like fixed charges is not required to be presented for audit.[92]

B. Audit — 1. In General. The question as to what officer or board has the power to audit claims, and the scope of their duties, is usually fixed by the statutes and ordinances.[93] Presentation of the claim must be made to the officer or board designated by the statute,[94] within the time prescribed by statute.[95] Substantial compliance with statutory requirements as to the formal statement and itemization of claims is a condition precedent to their allowance,[96] but objec-

534, 12 N. E. 49 [*reversing* 35 Hun 334] (holding that the claim of a county treasurer for fees and expenses of bidding off for a town land sold for taxes must be submitted to the town board of audit); MacDonald *v.* New York, 42 N. Y. App. Div. 263, 59 N. Y. Suppl. 16. See also People *v.* Board of Apportionment, etc., 52 N. Y. 224; People *v.* Green, 2 Thomps. & C. 62.

North Carolina.— Pitt County Bd. of Education *v.* Greenville, 132 N. C. 4, 43 S. E. 472.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2173 *et seq.*

The execution by a town of its note for the price of articles bought is a sufficient allowance of the claim therefor. La France Fire Engine Co. *v.* Mt. Vernon, 11 Wash. 203, 39 Pac. 367.

90. See *supra*, XIV, E, 2, c.

91. Sheafe *v.* Seattle, 18 Wash. 298, 51 Pac. 385.

92. Stevens *v.* Truman, 127 Cal. 155, 59 Pac. 397; State *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

93. *California.*— San Francisco *v.* Broderick, 111 Cal. 302, 43 Pac. 960 (holding that the city auditor is bound to audit a legal claim which is unpaid where its payment is authorized by law, and cannot be restricted in the exercise of his office by a city ordinance); Smith *v.* Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167 (holding that a disallowance by the city auditor of a claim exceeding the revenue for the current year was proper).

Indiana.— Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184.

Missouri.— Campbell *v.* St. Louis, 71 Mo. 106, holding that where the controller and not the city council had power to make a contract for printing, the council had no power to adjust a dispute between the city and the printer as to the amount due.

New Jersey.—Butts *v.* Hoboken, 38 N. J. L. 391.

New York.— People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348 (holding that the legislature had power to authorize the county board to audit expenses incurred by it on appeal by a city); People *v.* Jackson, 85 N. Y. 541 [*reversing* 23 Hun 568] (holding that the duties imposed upon the auditor by charter were not merely clerical but that he was authorized to revise and settle the accounts and pass upon their validity and legality); People *v.* Fields, 58 N. Y. 491; People *v.* Green, 56 N. Y. 476 [*overruling* People *v.* Flagg, 15 How. Pr. 553, as to necessity of examination of allowance both by auditor and controller]; McGinness *v.* New York, 26 Hun 142 [*reversing* 52 How. Pr. 450] (holding that the city council could not settle disputed claims against the city nor determine what claims should be paid since the power to adjust claims was given to the finance department); *In re* Freel, 38 N. Y. Suppl. 143; People *v.* Flagg, 16 How. Pr. 36 [*overruling* People *v.* Flagg, 16 Barb. 503] (holding that it was not within the power of the council to determine that a particular sum was due for services and to require the controller to draw his warrant for the payment of such sum); Morris *v.* People, 3 Den. 381.

Rhode Island.— Foster *v.* Angell, 19 R. I. 285, 33 Atl. 406, holding that, where the duty of auditing bills is imposed on the town council, a town ordinance requiring bills so audited to be approved by a special agent appointed by it for that purpose is valid.

See 36 Cent. Dig. tit. "Municipal Corporations," §§ 2176, 2177.

94. Fox *v.* Clark, 72 N. J. L. 100, 59 Atl. 224 (mayor); Murphy *v.* Buffalo, 38 Hun (N. Y.) 49 (holding that a statutory requirement that a claim against a city shall be "presented to the common council for audit" is complied with by a presentation to the clerk of the common council); Matter of Agar, 21 Misc. (N. Y.) 145, 47 N. Y. Suppl. 477. See MacDonald *v.* New York, 42 N. Y. App. Div. 263, 59 N. Y. Suppl. 16.

Usurping board.— Presentation to a board which has usurped the office under an invalid election will not bind a municipality. Murphy *v.* Moies, 18 R. I. 100, 25 Atl. 977.

95. Oshkosh Waterworks Co. *v.* Oshkosh, 106 Wis. 83, 81 N. W. 1040, holding that a claim against a city is "presented" when filed with the clerk, and not when actually introduced into the council, within the meaning of charter provisions as to filing of appeals within twenty days after disallowance.

Revival.— A claim barred for failure to present in due time is not revived by repeal of the statute. Morgan *v.* Rhinelander, 105 Wis. 138, 81 N. W. 132.

96. Kelso *v.* Teale, 106 Cal. 477, 39 Pac. 948 (holding that where the demand consists of but one item, dates and amounts

tions as to verification and itemization may be waived.[97] Auditing officers are restricted in their powers by the statutes and ordinances,[98] although power to audit generally includes power to determine whether the claim is just and legal, in whole or in part.[99] A council, as the governing body, may, by ordinance, allow just claims which are not collectable by action,[1] and, in some jurisdictions, even after the claim has been disapproved by other officers.[2]

2. Hearing. The audit of a claim is generally considered as a quasi-judicial act,[3] and must be conducted as directed by the charter or other governing statute.[4] It is generally the duty of the auditing officer or board to ascertain the correctness of any claim before approving it.[5] The claimant has, in some jurisdictions, the right to offer his proof and to confront and examine opposing witnesses;[6] and some statutes give the auditing officer power to require any person presenting a claim to be sworn concerning it and answer orally as to any facts relevant to the justness thereof.[7]

3. Decision or Award — a. In General. The claim, where not rejected, must be audited in full or for some exact amount.[8] But a claim may be allowed conditionally as where it is allowed to be paid when there is money in the treasury.[9] The auditor is not justified in showing any favoritism by auditing the claim of one person in preference to that of another, upon the theory that there may not be sufficient money in the treasury to meet all demands upon it.[10] An award of a

need not be separately stated); State *v.* Smith, 89 Mo. 408, 14 S. W. 557; People *v.* Green, 3 Hun (N. Y.) 208, 5 Thomps. & C. 376.

The verification of a claim against a city by the husband, as agent of claimant, is sufficient to satisfy the requirement of a statute providing that all claims against a city must be presented in writing and verified by the oath of the claimant or his agent. Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985.

Nature of claim.— Where a constable's claim against a town for services in killing dogs did not show whether the proceeding was had under the statutes or an ordinance, it was properly rejected, it not being shown whether the charge was properly against the town or the county. Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101]. A city charter providing that no claim against the city for damages caused by negligence shall be received for audit unless made out in detail, specifying "when, where and how occasioned," does not require the claim to aver negligence on the part of the city. Werner *v.* Rochester, 77 Hun (N. Y.) 33, 28 N. Y. Suppl. 226 [*affirmed* in 149 N. Y. 563, 44 N. E. 300].

97. Wright *v.* Portland, 118 Mich. 23, 76 N. W. 141.

Lapse of time.— Objections to the form and verification may be waived by a failure to urge them within the time provided by the charter for rejection on that ground. Sweet *v.* Buffalo, 92 Hun (N. Y.) 404, 36 N. Y. Suppl. 760 [*affirmed* in 158 N. Y. 695, 53 N. E. 1132].

98. People *v.* Fields, 58 N. Y. 491.

99. People *v.* Penn Yan, 2 N. Y. App. Div. 29, 37 N. Y. Suppl. 535 [*affirmed* in 153 N. Y. 643, 47 N. E. 1110].

1. State *v.* Brown, 8 Ohio Cir. Ct. 103, 4 Ohio Cir. Dec. 345; Bailey *v.* Sherry, 3 Pa. Dist. 543.

2. Schweers *v.* Muhlenberg, 19 Pa. Super. Ct. 388; Riggins *v.* Richards, (Tex. Civ. App. 1904) 79 S. W. 84.

3. State *v.* St. Louis County Dist. Ct., 90 Minn. 457, 97 N. W. 132; Osterhoudt *v.* Rigney, 98 N. Y. 222; Vedder *v.* Schenectady County, 5 Den. (N. Y.) 564.

4. People *v.* Amsterdam, 90 Hun (N. Y.) 488, 36 N. Y. Suppl. 59.

Time of audit.— Where claims against a town are not audited by the trustees until after they have been paid by the treasurer, there is a substantial, and not merely a technical, violation of the statute requiring such audit to be made prior to payment. Matter of Plattsburgh, 27 N. Y. App. Div. 353, 50 N. Y. Suppl. 356 [*reversed* on other grounds in 157 N. Y. 78, 51 N. E. 512].

5. Butts *v.* Hoboken, 38 N. J. L. 391.

Presumptions.— In the absence of proof to the contrary, the presumption is that the duty of a common council, in auditing claims, to ascertain the correctness of any bill before giving its approval, was performed, and that the account as audited and allowed is correct. Butts *v.* Hoboken, 38 N. J. L. 391.

6. People *v.* Amsterdam, 90 Hun (N. Y.) 488, 36 N. Y. Suppl. 59.

7. Matter of Grout, 105 N. Y. App. Div. 98, 93 N. Y. Suppl. 711, 34 N. Y. Civ. Proc. 231, holding that, under such statute, officers of a corporation could be examined; that the right did not exist after suit brought; and that the questions asked must be competent and material to the justness of the claim.

8. Spring Valley Water-Works *v.* Ashbury, 52 Cal. 126.

9. National Lumber Co. *v.* Wymore, 30 Nebr. 356, 46 N. W. 622.

10. San Francisco *v.* Broderick, 111 Cal. 302, 43 Pac. 960.

board is insufficient where it is not signed by all the board, as required by statute, and where it is not shown to refer to the contract sued on.[11] An allowance of a claim after the expiration of the time prescribed by statute for its allowance or rejection is a nullity.[12] An invalid audit may be validated by competent authority.[13]

b. Review of Decision. In some jurisdictions, by statute, the only mode of review is by an appeal to a particular court from the allowance or disallowance, as provided for in the statute;[14] and in some jurisdictions the right of appeal is also given to taxpayers.[15] In other jurisdictions the remedy is by certiorari,[16] and not by mandamus.[17] Where the proper board passes on a claim presented to it, the common council has no power to review such action and increase the amount of the award.[18]

c. Effect of Allowance or Disallowance. The acts of a board of audit, within its jurisdiction, in the absence of fraud and collusion, are final and conclusive, and

11. Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814 [*affirming* 1 Silv. Sup. 471, 5 N. Y. Suppl. 688].

12. State *v.* Bardon, 103 Wis. 297, 79 N. W. 226.

13. Curtis *v.* Gowan, 34 Ill. App. 516.

14. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813; Monroe Water Works *v.* Monroe, 110 Wis. 11, 85 N. W. 685; Oshkosh Waterworks *v.* Oshkosh, 106 Wis. 83, 81 N. W. 1040; Stephani *v.* Manitowoc, 101 Wis. 59, 76 N. W. 1110; Telford *v.* Ashland, 100 Wis. 238, 75 N. W. 1006; Mason *v.* Ashland, 98 Wis. 540, 74 N. W. 357; West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313; Watson *v.* Appleton, 62 Wis. 267, 22 N. W. 475; Fleming *v.* Appleton, 55 Wis. 90, 12 N. W. 462. See also People *v.* Sutphin, 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49.

In Wisconsin, the sixty-day period of delay which operates, for the purposes of an appeal, as a disallowance of a claim, commences to run as soon as it is presented to the council for allowance by filing the same with its clerk for its action thereon, and an appeal must be taken within twenty days after the expiration of such sixty days. Mason *v.* Ashland, 98 Wis. 540, 74 N. W. 357. See also Watson *v.* Appleton, 62 Wis. 267, 22 N. W. 475; Fleming *v.* Appleton, 55 Wis. 90, 12 N. W. 462. However, by Laws (1901), p. 88, c. 68, the time to appeal does not begin to run until service of a notice by the clerk of the council of the action or non-action of the council. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311. Where the council has not acted on a claim for sixty days, it cannot, after the time for appeal has expired, by an express vote of disallowance thereof, give the claimant a right to appeal within twenty days from such express allowance. Seegar *v.* Ashland, 101 Wis. 515, 77 N. W. 880. An objection that the appeal was not taken in time goes to the jurisdiction and is not waived, although not made on the trial. Telford *v.* Ashland, 100 Wis. 238, 75 N. W. 1006. The appeal-bond must be substantially in compliance with the statute (Stephani *v.* Manitowoc, 101 Wis. 59, 76 N. W. 1110; West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313; Drinkwine *v.* Eau Claire, 83 Wis. 428, 53 N. W. 673), and an objection to its insufficiency to give jurisdiction to the appellate court cannot be waived by the action of the city attorney and controller in approving the bond (Oshkosh Waterworks Co. *v.* Oshkosh, 106 Wis. 83, 81 N. W. 1040). On appeal no formal pleadings are required and a general denial will be implied. Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813. If a complaint is filed, it is not demurrable merely because of the failure to allege the making and filing of the city clerk's return in response to the appeal. Horan *v.* Eau Claire, 123 Wis. 86, 100 N. W. 1063. But the complaint must allege the facts made requisite by the statute to give the appellate court jurisdiction. Watson *v.* Appleton, 62 Wis. 267, 22 N. W. 475. In some cases it is permissible on appeal to interpose a proper counter-claim. Monroe Water Works Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685.

15. Lobeck *v.* State, 72 Nebr. 595, 101 N. W. 247, holding that where an appeal from the allowance of a partial estimate on a paving contract by the city council is perfected it suspends the order of the council, and during its pendency the city controller is not required to deliver the warrant for the payment of the estimate to the claimant.

16. Hoxsey *v.* Paterson, 39 N. J. L. 489 [*reversing* 39 N. J. L. 72, in so far as it held that only final action on the merits could be reviewed by certiorari]; People *v.* Hannibal, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165 (holding, however, that the remedy by certiorari must be taken, if at all, before the delivery of the certificate of audited accounts to the supervisor); People *v.* Barnes, 44 Hun (N. Y.) 574 [*affirmed* in 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739]; People *v.* Highland, 8 N. Y. St. 531. See also CERTIORARI, 6 Cyc. 752 note 60.

17. People *v.* Barnes, 44 Hun (N. Y.) 574 [*affirmed* in 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739]; People *v.* Highland, 8 N. Y. St. 531. See also MANDAMUS, 26 Cyc. 313.

18. Schneider *v.* Blades, 108 Mich. 3, 65 N. W. 559.

cannot be questioned in a collateral proceeding.[19] But boards of audit, in allowing accounts, are limited to the powers conferred upon them by the statute; and when they transgress these limitations, their acts, like those of any other tribunal of limited jurisdiction, are void.[20] Generally the allowance of a claim, where the officer or board has jurisdiction, constitutes an adjudication binding upon the municipality.[21] But a rejection of the claim does not preclude the right of the claimant to resort to the courts.[22] Where the claimant takes no steps to review the order nor to compel a further audit, he cannot ordinarily sue for the balance of his claim in excess of that allowed;[23] and the acceptance by the claimant of the amount allowed, although less than the amount claimed, is a waiver of the right to insist upon payment of the balance rejected.[24] The auditing officer or board has no power to re-audit claims which have been passed upon by their predecessors in office.[25] Where the claim is disallowed, and thereafter a corrected bill is presented to the same auditors, the claimant cannot thereafter allege that they were without power to reëxamine and allow or disallow the claim.[26]

C. Compromise.[27] Power to compromise doubtful claims is inherent in the common council as the representative of the municipality,[28] and may be specially

19. Osterhoudt *v.* Rigney, 98 N. Y. 222.

20. Osterhoudt *v.* Rigney, 98 N. Y. 222.

21. McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; Com. *v.* Patterson, 206 Pa. St. 522, 56 Atl. 27. See also People *v.* Board of Education, 26 N. Y. App. Div. 208, 49 N. Y. Suppl. 915; Pittman *v.* New York, 3 Hun (N. Y.) 370, 6 Thomps. & C. 89 [*affirmed* in 62 N. Y. 637]; La France Fire Engine Co. *v.* Mt. Vernon, 11 Wash. 203, 39 Pac. 367. But see Higgins *v.* San Diego, (Cal. 1896) 45 Pac. 824 (holding that the city itself is not precluded from showing that an amount allowed in pursuance of a void contract was in excess of reasonable value); Com. *v.* Sholtis, 24 Pa. Super. Ct. 487 (holding that the allowance of a claim by granting an order therefor is not a final and conclusive adjudication, so as to conclude the municipality, and it may set up want or failure of consideration, or *ultra vires*). *Compare* People *v.* Green, 2 Thomps. & C. (N. Y.) 62.

A vote by a town to appropriate money to settle a claim against it is binding, even if, upon subsequent examination, it is ascertained that the claim was one which could not have been successfully maintained. Matthews *v.* Westborough, 131 Mass. 521.

Fraud.— But the auditing of a claim by the board of audit for the amount due on a contract with the city does not estop the city from denying liability on the ground of fraud in the making of the contract. Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814 [*affirming* 1 Silv. Sup. 471, 5 N. Y. Suppl. 688].

Conditional allowance.— The allowance of a claim by the city council with the condition annexed to it, "to be paid when there is money in the treasury to pay with," is binding on the city, and the condition will not defeat an action to recover a judgment thereon. National Lumber Co. *v.* Wymore, 30 Nebr. 356, 46 N. W. 622.

Acceptance.— Where a common council of a city had allowed a sum smaller than that claimed in settlement of a claim for personal injuries, a written demand by the claimant for an order on the city treasurer for the amount so allowed constituted an unconditional acceptance of such settlement and made a binding contract for the payment of the sum so allowed. Sharp *v.* Mauston, 92 Wis. 629, 66 N. W. 803.

22. San Francisco Gas Co. *v.* San Francisco, 6 Cal. 190; Fitch *v.* Manitou County, 132 Mich. 178, 94 N. W. 952; Gallaher *v.* Lincoln, 63 Nebr. 339, 88 N. W. 505; Port Jervis Water Works Co. *v.* Port Jervis, 151 N. Y. 111, 45 N. E. 388.

23. Guidet *v.* New York, 12 Hun (N. Y.) 566.

24. Davey *v.* Big Rapids, 85 Mich. 56, 48 N. W. 178; Perry *v.* Cheboygan, 55 Mich. 250, 21 N. W. 333; People *v.* Rockland County, 31 N. Y. App. Div. 557, 52 N. Y. Suppl. 89; Callahan *v.* New York, 6 Daly (N. Y.) 230 [*affirmed* in 66 N. Y. 656]. See also Looby *v.* West Troy, 24 Hun (N. Y.) 78; Guidet *v.* New York, 12 Hun (N. Y.) 566; Sharp *v.* Mauston, 92 Wis. 629, 66 N. W. 803; Kaime *v.* Omro, 49 Wis. 371, 5 N. W. 838. *Compare* Smith *v.* Salt Lake City, 83 Fed. 784.

25. People *v.* Clarke, 174 N. Y. 259, 66 N. E. 819 [*reversing* 79 N. Y. App. Div. 78, 79 N. Y. Suppl. 1111]; Ousterhoudt *v.* Rigney, 98 N. Y. 222.

Estoppel.— The fact that a public officer has not objected to a re-audit of his accounts for certain years by the controller will in no way estop him from objecting to another audit of the same years by a new controller. Com. *v.* Patterson, 206 Pa. St. 522, 56 Atl. 27.

26. Matter of Weeks, 106 N. Y. App. Div. 45, 94 N. Y. Suppl. 468, 97 N. Y. App. Div. 131, 89 N. Y. 826.

27. See also *supra*, IX, A, 6, k; and, generally, COMPROMISE AND SETTLEMENT.

Of actions see *infra*, XVII, B.

Compromise of claim for taxes see *supra*, XV, D, 8, b.

Right of taxpayer to enjoin see *supra*, XV, E, 4.

28. *Illinois.*— Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230.

conferred by statute on other officers or boards.[29] But the mayor cannot, unless specially authorized, compromise any claim, nor, by acting under such a compromise, estop the assertion of the city's legal rights.[30] Before satisfaction the compromise may be revoked by the municipality;[31] and the promise of an annuity in satisfaction of a claim,[32] or a compromise of illegal claims,[33] is not binding.

D. Arbitration.[34] The power to contract and to sue and be sued implies municipal power to submit to arbitration.[35] And a statute providing for arbitration by "all persons" includes municipal corporations.[36] But the legislature has no power to direct that claims against a municipality shall be ascertained by arbitrators instead of a jury, without requiring the consent of the corporation.[37] The officer or board who may consent to arbitration is often fixed by statute;[38] but, independently thereof, it has been held that the municipal attorney may consent to an arbitration for the city,[39] and *a fortiori* the council may intrust the selection of arbitrators to him.[40] So an agent appointed by a municipality to compromise a claim may submit it to arbitration.[41]

E. Assignment.[42] Unless there is some statute or ordinance forbidding it,[43] claims against a municipality are assignable the same as other choses in action;[44] but notice to it is essential to perfect the assignment.[45] The fact that there was

Nebraska.— State *v.* Martin, 27 Nebr. 441, 43 N. W. 244.

Pennsylvania.— Com. *v.* Gingrich, 22 Pa. Co. Ct. 244.

Texas.— San Antonio *v.* San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281.

United States.—Warren *v.* St. Paul, 29 Fed. Cas. No. 17,199, 5 Dill. 498.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2181.

Compare People *v.* San Francisco, 27 Cal. 655; Baileyville *v.* Lowell, 20 Me. 178; Prout *v.* Pittsfield Fire Dist., 154 Mass. 450, 28 N. E. 679. *Contra*, see McGuinness *v.* New York, 26 Hun (N. Y.) 142 [*reversing* 52 How. Pr. 450].

Ratification.— A compromise made in behalf of a city by the mayor and finance committee of the common council of the city is not valid unless ratified by the common council. San Antonio *v.* San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281. The adoption by the council of an ordinance carrying out the terms of a compromise of litigation effected by the mayor and finance committee in behalf of the city, and appropriating money for such purpose, constitutes a ratification. San Antonio *v.* San Antonio St. R. Co., *supra*.

29. People *v.* Coon, 25 Cal. 635.

30. New Orleans *v.* Tulane Educational Fund, 46 La. Ann. 861, 15 So. 161.

31. Rock Island *v.* McEniry, 39 Ill. App. 218.

32. Mitchell *v.* Cincinnati, 7 Ohio Dec. (Reprint) 310, 2 Cinc. L. Bul. 96.

33. Ft. Edward *v.* Fish, 86 Hun (N. Y.) 548, 33 N. Y. Suppl. 784 [*affirmed* in 156 N. Y. 363, 50 N. E. 973].

34. See also *supra*, IX, A, 6, l; and, generally, ARBITRATION AND AWARD.

35. *Illinois.*— Shawneetown *v.* Baker, 85 Ill. 563.

Iowa.— Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 29 N. W. 806.

Kentucky.—Remington *v.* Harrison County Ct., 12 Bush 148.

Massachusetts.— Buckland *v.* Conway, 16 Mass. 396; Boston *v.* Brazer, 11 Mass. 447.

New Jersey.— Paret *v.* Bayonne, 39 N. J. L. 559 [*affirmed* in 40 N. J. L. 333].

New York.— Brady *v.* Brooklyn, 1 Barb. 584.

Pennsylvania.— Smith *v.* Wilkinsburg Borough, 172 Pa. St. 121, 33 Atl. 371; Smith *v.* Philadelphia, 13 Phila. 177.

Vermont.—Dix *v.* Dummerston, 19 Vt. 262.

Wisconsin.— Kane *v.* Fond du Lac, 40 Wis. 495.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2183.

36. Springfield *v.* Walker, 42 Ohio St. 543.

37. Baldwin *v.* New York, 1 Abb. Dec. (N. Y.) 75, 3 Keyes 387 [*affirming* 45 Barb. 359].

38. Cleveland *v.* Jersey City Bd. of Finance, etc., 38 N. J. L. 259.

39. Paret *v.* Bayonne, 39 N. J. L. 559 [*affirmed* in 40 N. J. L. 333].

40. Kane *v.* Fond du Lac, 40 Wis. 495.

41. Schoff *v.* Bloomfield, 8 Vt. 472.

42. See, generally, ASSIGNMENTS.

Of warrants see *supra*, XV, B, 2, h.

43. Gordon *v.* Jefferson City, 111 Mo. App. 23, 85 S. W. 617. See also Lowry *v.* Duluth, 94 Minn. 95, 101 N. W. 1059, holding that a charter provision forbidding the assignment of contracts for public work did not prevent an assignment of the money due or to become due on the contract, made after the subject-matter of the contract had been completely executed by the contractor.

44. Gordon *v.* Jefferson City, 111 Mo. App. 23, 85 S. W. 617; Field *v.* New York, 2 Seld. (N. Y.) 179, 57 Am. Dec. 435.

But the demand cannot be split and portions assigned to different individuals except where the municipality consents thereto. Gordon *v.* Jefferson City, 111 Mo. App. 23, 85 S. W. 617.

45. See Miller *v.* Stockton, 64 N. J. L. 614, 46 Atl. 619; Shultz *v.* Galveston, 3 Tex. App. Civ. Cas. § 438.

no fund in existence from which the claim could be paid at the time of its assignment, or that the claim was not then enforceable by action because based on an unauthorized contract, does not prevent the assignment of the claim operating as an equitable assignment in case the municipality should subsequently voluntarily recognize its liability or become bound to pay the claim.[46]

F. Interest.[47] Liability of a municipal corporation for interest on its debts does not ordinarily differ from that of an individual,[48] although in some jurisdictions no interest is recoverable, in the absence of express agreement therefor, except in case of money wrongfully obtained and illegally retained by it.[49] Of course interest is recoverable where expressly provided for by statute.[50] Generally, however, interest accrues only from the date of demand or presentation of the claim;[51] and where the statute provides that no suit can be brought except on audited bills it has been held that interest can only be allowed from the time of the audit.[52] It has also been held that where, by statute, no right of action exists against the municipality until the lapse of a specified time after the presentation of the demand, interest can be allowed only from the lapse of such time after presentation.[53] In some jurisdictions interest is recoverable only after money is in the treasury and the municipality refuses to pay.[54] The holder of a claim is not bound by an advertisement of a municipality, where in ignorance thereof, that it is ready to pay all obligations and will pay no interest after a certain date.[55]

G. Payment.[56] Disbursing officers, performing only municipal functions, cannot refuse payment of a claim allowed by the proper auditing officer or board,[57]

To whom notice to be given.— Notice to the controller of the city is notice to the corporation. Field *v.* New York, 2 Seld. (N. Y.) 179, 57 Am. Dec. 435. But notice served only on the treasurer of a town has been held insufficient (Miller *v.* Stockton, 64 N. J. L. 614, 46 Atl. 619), as has notice given only to the city clerk (Shultz *v.* Galveston, 3 Tex. App. Civ. Cas. § 438).

Assignment of part of claim.— Provisions in a charter or statute for the presentation to a city tribunal of an assignment of a claim against the city have been held not to apply to an assignment of part of the claim. Jones *v.* New York, 47 N. Y. Super. Ct. 242 [*affirmed* in 90 N. Y. 387].

46. Jones *v.* New York, 90 N. Y. 387 [*affirming* 47 N. Y. Super. Ct. 242].

47. See, generally, INTEREST.

On warrants see *supra*, XV, B, 2, g.

On claims relating to municipal improvements see *supra*, XIII, C, 9, e, (II).

48. Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Shipley *v.* Hacheney, 34 Oreg. 303, 55 Pac. 971.

49. Danville *v.* Danville Water Co., 180 Ill. 235, 54 N. E. 224; Peoria *v.* Fruin-Bambrick Constr. Co., 169 Ill. 36, 48 N. E. 435 [*reversing* 68 Ill. App. 277]; Vider *v.* Chicago, 164 Ill. 354, 45 N. E. 720 [*affirming* 60 Ill. App. 595]; South Park Com'rs *v.* Dunlevy, 91 Ill. 49; Chicago *v.* People, 56 Ill. 327; Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244.

50. Coughlin *v.* New York, 35 Misc. (N. Y.) 446, 71 N. Y. Suppl. 91.

51. O'Keeffe *v.* New York, 176 N. Y. 297, 68 N. E. 588 [*affirming* 83 N. Y. Suppl. 1112]; Sweeny *v.* New York, 173 N. Y. 414, 66 N. E. 101 [*reversing* 69 N. Y. App. Div. 80, 74 N. Y. Suppl. 589]; Taylor *v.* Mayor, 67 N. Y. 87; Stoddart *v.* New York, 80 N. Y. App. Div. 254, 80 N. Y. Suppl. 344; Wilson *v.* Troy, 60 Hun (N. Y.) 183, 14 N. Y. Suppl. 721 [*affirmed* in 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449]; Barnes *v.* New York, 27 Hun (N. Y.) 236; Paul *v.* New York, 7 Daly (N. Y.) 144; Holihan *v.* New York, 33 Misc. (N. Y.) 249, 68 N. Y. Suppl. 148; Fredrichs *v.* New York, 27 Misc. (N. Y.) 588, 58 N. Y. Suppl. 285; *In re* York, 69 N. Y. Suppl. 178; Donnelly *v.* Brooklyn, 7 N. Y. Suppl. 49.

Sufficiency of demand.— Where a demand against a city is necessary to entitle a claimant to interest on his claim, the demand must be for the sum actually due. Sweeny *v.* New York, 69 N. Y. App. Div. 80, 74 N. Y. Suppl. 589.

52. Cooke *v.* Saratoga Springs, 23 Hun (N. Y.) 55.

53. Van Wart *v.* New York, 52 How. Pr. (N. Y.) 78.

54. Rosetta Gravel Paving, etc., Co. *v.* New Orleans, 50 La. Ann. 1173, 24 So. 237; Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378; Fernandez *v.* New Orleans, 42 La. Ann. 1, 7 So. 57.

55. Keith *v.* New Orleans, 10 La. Ann. 423.

56. See, generally, PAYMENT. See also *supra*, XVI, B, 3, c.

Of judgments see *infra*, XVII, P.

57. McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; Rice *v.* Gwinn, 5 Ida. 394, 49 Pac. 412; Ireland *v.* Hunnel, 90 Iowa 98, 57 N. W. 715. See also People *v.* Johnston, 38 Misc. (N. Y.) 645, 78 N. Y. Suppl. 212 [*affirmed* in 78 N. Y. Suppl. 1131].

nor decide priorities between different claims.[58] Under statutes providing that no money shall be paid except upon a warrant, payment cannot be compelled upon a mere showing of an audit of the claim.[59] A statute authorizing a particular officer to adjust any claim on which a suit has been brought, and, when adjusted, to duly provide for its payment, has been held mandatory in respect to providing for payment.[60] The unauthorized payment by officers of a public corporation of part of a claim against the corporation will not estop the corporation from denying the validity of the claim.[61] Where a claim is voluntarily paid with full knowledge of all the facts, the money cannot be recovered back, although it was not due or owing.[62]

XVII. ACTIONS.[63]

A. In General. A municipal corporation may sue,[64] and be sued,[65] but not before it is incorporated.[66] The power to sue and be sued is incident to its exist-

58. See State *v.* Norvell, 80 Mo. App. 180.

59. People *v.* Wood, 71 N. Y. 371.

60. People *v.* Connolly, 4 Abb. Pr. N. S. (N. Y.) 375.

61. McGillivray *v.* Barton Dist. Tp., 96 Iowa 629, 65 N. W. 974.

62. Advertiser, etc., Co. *v.* Detroit, 43 Mich. 116, 5 N. W. 72. See, generally, PAYMENT. See also COUNTIES, 11 Cyc. 597.

63. **Actions ex delicto** see *supra*, XIV, E.

Actions to recover penalties see *supra*, XI, B, 4.

Actions on warrants and bonds see *supra*, XV, B, 3; XV, C, 24.

Actions for taxes see *supra*, XV, D, 8, d.

Actions to recover taxes paid see *supra*, XV, D, 7, b.

Actions relating to assessments and special taxes see *supra*, XIII, D, 11; XIII, E, 21; XIII, F.

Creditors' suits against see CREDITORS' SUITS, 12 Cyc. 28.

Criminal prosecution see *infra*, XVIII.

Forcible entry and detainer by or against see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1141, 1143.

Summary proceedings against municipal corporation tenant see LANDLORD AND TENANT, 24 Cyc. 1417.

Rights and remedies of contractor and municipality see *supra*, IX, M.

Taxpayers' suits see *supra*, XV, E.

64. See Cox *v.* Griffin, 18 Ga. 728 (action by mayor and council held authorized by charter); Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55] (holding that statutory authority to sue for nuisance to watercourses connected with its waterworks does not constitute the city a public agent to sue to restrain a public nuisance); Warren *v.* Philips, 30 Barb. (N. Y. 646 (holding that village may sue on official bond); Kensington Com'rs *v.* Philadelphia County, 13 Pa. St. 76 (holding a municipality within the statute authorizing "any person or persons" to sue a county for injury to property by a mob); Jonesborough *v.* McKee, 2 Yerg. (Tenn.) 167; Milwaukee *v.* Herman Zoebrlaut Leather Co., 114 Wis. 276, 90 N. W. 187. See also Bath Com'rs *v.* Boyd, 23 N. C. 194.

Action on note.— A town may receive by indorsement a negotiable note for the purpose of meeting an expected claim upon the town by the payee, and may maintain a suit thereon as indorsee in the name of the town. Augusta *v.* Leadbetter, 16 Me. 45.

Bill for rescission of sale of municipal lands.— Denver *v.* Kent, 1 Colo. 336.

Bill to remove cloud from title.— New York *v.* North Shore Staten Island Ferry Co., 9 Hun (N. Y.) 620.

Ejectment.— Seabright *v.* Allgor, 69 N. J. L. 641, 56 Atl. 287; Port Townsend *v.* Lewis, 34 Wash. 413, 75 Pac. 982.

65. Jonesborough *v.* McKee, 2 Yerg. (Tenn.) 167; Palatka Waterworks *v.* Palatka, 127 Fed. 161.

Where receiver of fund appointed.— No action can be brought against a city as administrator or collector of a fund where a receiver of such fund has been appointed. Wilder *v.* New Orleans, 67 Fed. 567.

An individual cannot maintain an action against a corporation for their fault or neglect, from which he suffers only in common with the rest of the public. The only remedy for such fault is by an indictment. Weightman *v.* Washington, 1 Black (U. S.) 39, 17 L. ed. 52.

An action to quiet title lies against a city. San Francisco *v.* Holladay, 76 Cal. 18, 17 Pac. 942.

Quo warranto.— Where the corporation unlawfully holds or exercises a franchise outside of its charter limits the attorney-general is ordinarily authorized, by statute, to bring quo warranto. People *v.* Oakland, 92 Cal. 611, 28 Pac. 807, holding a municipal corporation a "person" within the meaning of the statute.

School charges.—An action cannot be maintained against a city on a demand payable out of a fund over which its charter gives a board of education control to the exclusion of the municipal officers. Crane *v.* Urbana, 2 Ill. App. 559. So where a town or city is a distinct municipal corporation for school purposes, and the school corporations thus created can sue and be sued, an action for school services cannot be brought against the town or city in its ordinary municipal capacity but only as a school corporation. Huntington *v.* Day, 55 Ind. 7.

66. State *v.* Arnold, 38 Ind. 41; Winne-

ence, although not expressly given by its charter.[67] But a city cannot sue in behalf of its inhabitants merely to protect their interests.[68] As a general rule, whenever a cause of action exists in favor of or against a municipal corporation it may be prosecuted by an action in any form which would be appropriate in an action between individuals.[69] Ordinarily an action *ex contractu* will lie against a municipality without regard to whether there is a remedy by mandamus.[70]

B. Compromise and Settlement.[71] The municipal council generally has power to compromise and settle suits brought by the municipality,[72] unless it is deprived of such power by charter or general statute.[73] So where a town, by a vote, authorizes its agents to settle an action brought by it, such town and the taxpayers therein are bound by a settlement made in good faith by such agent.[74] Likewise, a municipal corporation may, by the action of its law officer, definitely compromise a suit against the city, and the consideration is adequate where, in the opinion of responsible city officers, the compromise discharges a moral obligation of the city and averts an apprehended recovery in a far greater amount.[75]

conne *v.* Winneconne, 111 Wis. 10, 86 N. W. 589 (holding that where a suit was instituted against a municipal corporation, and defendant pleaded in abatement the non-existence of the corporation, because the statute under which defendant had attempted to incorporate had been declared unconstitutional, the fact that a curative act had been passed before trial did not render the plea ineffective); Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

67. Jonesborough *v.* McKee, 2 Yerg. (Tenn.) 167; Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

68. Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932. See also New Haven *v.* New Haven, etc., R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256.

69. See Winslow *v.* Perquimans County Com'rs, 64 N. C. 218. See also State Bd. of Education *v.* Aberdeen, 56 Miss. 518, corporation liable on implied promise.

Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract. Burrill *v.* Boston, 4 Fed. Cas. No. 2,198, 2 Cliff. 590. See *supra*, IX, G, 3, b; IX, M, 1.

70. *Illinois.*— Chicago *v.* McNichols, 98 Ill. App. 447.

Indiana.— Gosport *v.* Pritchard, 156 Ind. 400, 59 N. E. 1058.

New York.— Buck *v.* Lockport, 6 Lans. 251; Vacheron *v.* New York, 34 Misc. 420, 69 N. Y. Suppl. 608.

North Carolina.— Winslow *v.* Perquimans County Com'rs, 64 N. C. 218.

Wisconsin.— Sharp *v.* Mauston, 92 Wis. 629, 66 N. W. 803.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2180. See also MANDAMUS, 26 Cyc. 293, 305–320.

In Washington, while it seems that one holding a warrant drawn upon the general fund of a city cannot maintain an action upon it, yet an action at law will lie against a city for an amount due on warrants, where the city has agreed to provide a fund for the payment of the warrants according to law, and has failed to do so. British Columbia Bank *v.* Port Townsend, 16 Wash. 450, 47 Pac. 896.

The fact that municipal bonds are payable out of a special fund, known as a "sinking fund," does not prevent the holder from maintaining an action at law thereon to enforce collection. Waite *v.* Santa Cruz, 75 Fed. 967.

71. Compromise of claim against municipality see *supra*, XVI, C.

Compromise of suit for taxes see XV, D, 8, d, (III).

72. Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230; Petersburg *v.* Mappin, 14 Ill. 193, 56 Am. Dec. 501; Com. *v.* Gingrich, 22 Pa. Co. Ct. 244; New Orleans Bd. of Liquidation *v.* Louisville, etc., R. Co., 109 U. S. 221, 3 S. Ct. 144, 27 L. ed. 916. See also Marshall *v.* Cleveland, etc., R. Co., 80 Ill. App. 531, holding that in an action to recover for a violation of a city ordinance, where defendant pleads a release by the city attorney, he should further show that the city attorney had authority to make the release from the city council. *Compare* City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313, compromise of taxpayer's suit.

73. Louisville *v.* Louisville R. Co., 68 S. W. 840, 24 Ky. L. Rep. 538. See also Com. *v.* Tilton, 111 Ky. 341, 63 S. W. 602, 23 Ky. L. Rep. 753; Austin *v.* McCall, (Tex. Civ. App. 1902) 67 S. W. 192.

74. Kinsley *v.* Norris, 62 N. H. 652.

75. O'Brien *v.* New York, 25 Misc. (N. Y.) 219, 55 N. Y. Suppl. 50 [*affirmed* in 40 N. Y. App. Div. 331, 57 N. Y. Suppl. 1039 (*affirmed* in 160 N. Y. 691, 55 N. E. 1098)].

The corporation counsel of the city of New York has power, in the settlement of actions against the city involving at least three million dollars, the outcome of which he considers doubtful, to allow judgments aggregating seven hundred thousand dollars to be entered against the city, where such decision is made in good faith, upon the advice and approval of the counsel in charge of the litigation and of those familiar with the subject-matter thereof. O'Brien *v.* New York, 40 N. Y. App. Div. 331, 57 N. Y. Suppl. 1039 [*affirmed* in 160 N. Y. 691, 55 N. E. 1098].

C. Conditions Precedent — 1. In General. In the absence of a statute or charter provision to the contrary,[76] the conditions precedent to an action by a municipality are ordinarily the same as if the action were brought by an individual.[77] Where an action is brought against a municipality, conditions precedent, such as a demand,[78] or a showing that there is a fund in the treasury applicable to the payment of the amount claimed on the contract,[79] or other like conditions,[80] must first be complied with, or shown to exist, before a recovery is authorized. Especially is this so as to conditions precedent imposed by statute.[81]

2. Notice, Demand, or Presentation of Claim.[82] As a condition precedent to the right to sue a municipality, it is usually provided by statute that notice, demand, or presentation of the claim must precede an action thereon;[83] but such

76. See the statutes of the several states.

77. See Covington *v.* McNickle, 18 B. Mon. (Ky.) 262, holding that trustees of a town who convey grounds dedicated to the public use and receive a part of the price are not bound to tender back such price before suing in a court of law for the possession of the grounds; for there is no case to which such principle applies in a court of law, except where a party seeks the rescission of a contract entered into while an infant.

An order of the mayor and treasurer of a city to begin an action in the name of the city against the devisees of a certain decedent authorizes a suit against those devisees by name. Rockland *v.* Ulmer, 87 Me. 357, 32 Atl. 972.

78. State *v.* New Orleans, 41 La. Ann. 71, 7 So. 691. See also *infra*, XVII, C, 2.

79. Lawrence *v.* New York, 54 How. Pr. (N. Y.) 255.

80. Swift *v.* New York, 83 N. Y. 528.

81. People *v.* Wood, 71 N. Y. 371; Dannat *v.* New York, 6 Hun (N. Y.) 88 [*affirmed* in 66 N. Y. 585].

82. As condition precedent to particular actions against municipality: Actions for tort in general see *supra*, XIV, E, 2. Actions for injury from defective streets see *supra*, XIV, E, 2. Actions for injury from defects or obstructions in sewers, drains, and watercourses see *supra*, XIV, E, 2. Actions for injuries from construction of improvements see *supra*, XIII, D, 11.

For audit see *supra*, XVI, A, B.

Pleading notice or demand see *infra*, XVII, M, 3.

As prerequisite to recovery of costs see *infra*, XVII, Q.

83. *Alabama.*— Rumsey *v.* Bessemer, 138 Ala. 329, 35 So. 353.

California.— Adams *v.* Modesto, (1900) 61 Pac. 957; Ames *v.* San Francisco, 76 Cal. 325, 18 Pac. 397; Yolo County *v.* Sacramento, 36 Cal. 193. But see Lehn *v.* San Francisco, 66 Cal. 76, 4 Pac. 965, and Juzix *v.* San Francisco, (1885) 7 Pac. 416, holding that Pol. Code, § 4072, is inapplicable to the city and county of San Francisco.

Michigan.— Crittenden *v.* Mt. Clemens, 86 Mich. 220, 49 N. W. 144 (holding presentation a condition precedent to maintaining a suit to recover taxes paid under protest); Detroit *v.* Michigan Paving Co., 38 Mich. 358.

Minnesota.—State *v.* St. Louis County Dist. Ct., 90 Minn. 457, 97 N. W. 132.

Nebraska.— Lincoln *v.* Finkle, 41 Nebr. 575, 59 N. W. 915; Lincoln *v.* Grant, 38 Nebr. 369, 56 N. W. 995.

New York.— Reining *v.* Buffalo, 102 N. Y. 308, 6 N. E. 792; People *v.* Buffalo, 76 N. Y. 558, 32 Am. Rep. 337; Ruprecht *v.* New York, 102 N. Y. App. Div. 309, 92 N. Y. Suppl. 421; Williams *v.* Buffalo, 14 N. Y. St. 81.

Texas.— Luke *v.* El Paso, (Civ. App. 1900) 60 S. W. 363.

Vermont.— Dalrymple *v.* Whitingham, 26 Vt. 345.

Wisconsin.— Morrison *v.* Eau Claire, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955.

United States.— Gamewell Fire-Alarm Tel. Co. *v.* New York, 31 Fed. 312, construing N. Y. Laws (1882), c. 410, § 1104, as applicable only to such claims as can be prosecuted in state courts by the actions or proceedings mentioned in section 1103.

Strict construction.— Statutes requiring the presentation of claims against a municipality a certain period before action shall be brought thereon are to be strictly construed, and substantial compliance therewith rigidly enforced. MacDonald *v.* New York, 42 N. Y. App. Div. 263, 59 N. Y. Suppl. 16.

Who must give notice.— Generally the notice must emanate from the claimant or his agent. Ruprecht *v.* New York, 102 N. Y. App. Div. 309, 92 N. Y. Suppl. 421. Presentation of a claim by one who has assigned it as security is sufficient to enable him to sue, where done with the knowledge and acquiescence of the assignee. Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78.

Under the forcible entry and detainer statute, a notice addressed to a person as mayor of the city, instead of to the city, is not for that reason invalid. Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

Mandamus.— Statutes requiring a demand before suing a municipality do not apply to mandamus proceedings to enforce a judgment against it. Nicholson *v.* Dare County Com'rs, 121 N. C. 27, 27 S. E. 996.

Contents.— The mere presentation of the claim of an officer without disclosing the character and extent of his services has been held insufficient. Walpole *v.* Pueblo, 12 Colo. App. 151, 54 Pac. 910.

presentation and notice is not a condition precedent where not required by statutory or charter provisions.[84] The statutory requirement of notice and presentation does not, however, apply to a set-off of the claim in an action by a municipality.[85] The general statutes, other than those relating only to personal injuries and to actions for torts, vary considerably in their phraseology in the different jurisdictions, with the result that many of them have been construed as embracing all claims,[86] including demands arising from a tort,[87] while other statutes are held to relate only to claims arising *ex contractu*.[88] The claim must be presented to the particular officer or board designated in the statute,[89] and within the time designated therein.[90] In case of unliquidated damages, it has been held that the notice need not state the amount claimed.[91] Usually the statement of the claim is required to be verified.[92] Where a claim is presented, reasonable time must be given to investigate and pass upon the claim before suing,[93] especially where the statute so provides.[94] But where, after presentation, no action is taken on the claim for an unreasonable time, claimant may sue notwithstanding the charter provides that no suit shall be brought until the claim has been disallowed.[95] It

Failure of auditor to forward.— Where an auditor is authorized to receive and audit claims against the city and forward them to the controller, the fact that the auditor failed to forward a claim properly presented to him is no defense to an action thereon. MacDonald *v.* New York, 42 N. Y. App. Div. 263, 59 N. Y. Suppl. 16.

Retroactive effect.— Such statutes will not ordinarily be given a retroactive effect. Thoeni *v.* Dubuque, 115 Iowa 482, 88 N. W. 967.

84. Gill *v.* Oakland, 124 Cal. 335, 57 Pac. 150; Judevine *v.* Hardwick, 49 Vt. 180.

85. Taylor *v.* New York, 82 N. Y. 10.

86. Adams *v.* Modesto, (Cal. 1900) 61 Pac. 957; Reining *v.* Buffalo, 102 N. Y. 308, 6 N. E. 792. See also Matter of Rooney, 26 Misc. (N. Y.) 106, 56 N. Y. Suppl. 855 (proceedings in surrogate's court); McCue *v.* Waupun, 96 Wis. 625, 71 N. W. 1054.

87. See *supra*, XIV, E, 2.

88. Jones *v.* Albany, 151 N. Y. 223, 45 N. E. 557; Harrigan *v.* Brooklyn, 119 N. Y. 156, 23 N. E. 741 [*affirming* 1 Silv. Sup. 330, 5 N. Y. Suppl. 673]; Shelden *v.* Asheville, 119 N. C. 606, 25 S. E. 781. See also Adams *v.* Modesto, 131 Cal. 501, 63 Pac. 1083; Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515, holding that the statute does not apply to an action solely for equitable relief. See also *supra*, XIV, E, 2.

What constitutes claim.— A demand that a city treasurer shall receive the tax on certain property without requiring, as a condition, payment of an assessment on other property, is not a "claim" against the city, which must be presented to the council for audit before it can be sued on. Hutchinson *v.* Rochester, 92 Hun (N. Y.) 393, 36 N. Y. Suppl. 766.

89. Leonard *v.* Holyoke, 138 Mass. 78 (holding that where notice is required to be given to the mayor, the city clerk, or the treasurer, a notice addressed to the city clerk is sufficient where it expressly states that the plaintiff claims damages against the city mentioned in the designation of the city clerk); Mark *v.* West Troy, 69 Hun (N. Y.) 442, 23 N. Y. Suppl. 422 (holding that the presentation of a bill to the chamberlain and president of the village is not a presentation to the "board of trustees"); Rafferty *v.* Pittsburg, 15 Pa. Super. Ct. 77 (notice to assistant solicitor sufficient where notice required to be given to city solicitor); McKenna *v.* Bates, (R. I. 1896) 35 Atl. 580 (presentation to board of aldermen not sufficient where presentation to be made to city council); Whalen *v.* Bates, 19 R. I. 274, 33 Atl. 224 (notice addressed to mayor and one branch of council not sufficient as presentation to council).

90. See Werner *v.* Rochester, 77 Hun (N. Y.) 33, 28 N. Y. Suppl. 226 [*affirmed* in 149 N. Y. 563, 44 N. E. 300].

91. Burdick *v.* Richmond, 16 R. I. 502, 17 Atl. 917.

92. Patterson *v.* Brooklyn, 6 N. Y. App. Div. 127, 40 N. Y. Suppl. 581. But see Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884, holding that an action may be maintained on a claim, although not verified, as required by the charter, where it was rejected solely on the ground that the city was not liable.

The officer or board may waive the verification and affidavit. Kriseler *v.* Le Valley, 122 Mich. 576, 81 N. W. 580.

93. Mason *v.* Muskegon, 111 Mich. 687, 70 N. W. 332.

94. Whitney *v.* Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291, holding that a claimant may sue where more than two months has elapsed after presenting his claim, during which time the common council has had four meetings at which no action was taken in regard to the claim.

95. Kraft *v.* Madison, 98 Wis. 252, 73 N. W. 775. See also Gregory *v.* New York, 33 Hun (N. Y.) 451, holding that where an employee is required to apply for a warrant before he can sue for compensation, an unreasonable refusal of the departmental board to give a warrant gives him the right to sue.

Where two claims under one contract are presented to a city at the same time, and the council acts on one, it is presumed that it has had a reasonable time to act on the other

has been held that in no case is a second presentation necessary.[96] Compliance with the statutory provisions cannot be waived by officers to whom the claim is to be presented.[97]

D. Defenses. The fact that there are no funds for the payment of a claim usually constitutes no defense in an action against a municipality.[98] A municipality may set up any facts constituting a set-off.[99] An appropriation by the municipality does not estop it from pleading fraud therein.[1] Where one seeks to recover money paid under protest to avoid prosecution under an invalid ordinance, the invalidity of the ordinance is no defense.[2] The fact that the commencement of a suit against a city for services prevents the city from negotiating its bonds does not authorize a counter-claim of such damages.[3]

E. Jurisdiction and Venue.[4] Although there are cases to the contrary,[5] the general rule is that actions against municipal corporations are not transitory but local and must be brought in the county where the municipality is located,[6] except where jurisdiction outside of such county is expressly conferred by statute.[7] Where a city is partly situated within two counties, it must be sued in the county where its municipal offices and government are located.[8] A municipality may be sued in courts of general jurisdiction,[9] unless otherwise specially provided by law.[10] Jurisdiction over a municipality cannot be obtained by attachment of its property in the courts of another state.[11] Consent of the officers or agents of

also, within a charter provision that the city shall not be subject to suit on a claim until it has had reasonable time to pass on it. Ludington Water-Supply Co. *v.* Ludington, 119 Mich. 480, 78 N. W. 558.

96. Williams *v.* Buffalo, 14 N. Y. St. 81.

97. MacDonald *v.* New York, 42 N. Y. App. Div. 263, 59 N. Y. Suppl. 16.

98. Weaver *v.* San Francisco, 111 Cal. 319, 43 Pac. 972; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229; Kent *v.* North Tarrytown, 26 Misc. (N. Y.) 86, 56 N. Y. Suppl. 885 [*affirmed* in 50 N. Y. App. Div. 502, 64 N. E. 178], holding that the defense of "no funds" to a claim for services rendered, payable out of the general funds, cannot be interposed, unless there were no funds at the command of the village at the time the person rendering the services was employed.

99. Corbett *v.* Widber, 123 Cal. 154, 55 Pac. 764.

1. Lewis *v.* Philadelphia, 3 Phila. (Pa.) 267.

2. Harvey *v.* Olney, 42 Ill. 336.

3. McGregor *v.* Cook, (Tex. Civ. App. 1890) 16 S. W. 936.

4. See, generally, COURTS; VENUE.

5. Muskingum County Infirmary *v.* Toledo, 15 Ohio St. 409; Fox *v.* Fostoria, 14 Ohio Cir. Ct. 471, 8 Ohio Cir. Dec. 39; Hunt *v.* Pownal, 9 Vt. 411.

6. Jones *v.* Statesville, 97 N. C. 86, 2 S. E. 346; Heckscher *v.* Philadelphia, 6 Pa. Cas. 346, 9 Atl. 281; Evans *v.* Wrightsville School Dist., 1 Lanc. Bar, Feb. 12, 1870; Hughart *v.* Bedford, etc., R. Co., 2 Leg. Op. (Pa.) 63; Nashville *v.* Webb, 114 Tenn. 432, 85 S. W. 404; North Yakima *v.* King County Super. Ct., 4 Wash. 655, 30 Pac. 1053. See also Schuyler County *v.* Mercer County, 9 Ill. 20 (holding that the act of Illinois, Jan. 29, 1827, authorizing process in certain cases to issue against defendants residing in foreign counties, applies to persons only and not to municipal corporations); Goldstein *v.* New Orleans, 38 Fed. 626 (construing La. Code Pr. art. 165, No. 6, declaring that when the defendants are joint obligors they may be sued at the domicile of any of them).

Objection not jurisdictional.— Even if an action against a town for an injury caused by a defect in a highway, which is required to be brought in the county where the town is situated, is a local action, it is discretionary with the court to refuse to dismiss it when brought in the wrong county. Osgood *v.* Lynn, 130 Mass. 335.

7. North Yakima *v.* King County Super. Ct., 4 Wash. 655, 30 Pac. 1053.

8. Fostoria *v.* Fox, 60 Ohio St. 340, 54 N. E. 370.

9. *In re* Albers, 113 Mich. 640, 71 N. W. 1110. See also Horan *v.* Eau Claire, 123 Wis. 86, 100 N. W. 1063.

In New York the court of common pleas, now abolished, had jurisdiction of all actions against the city of New York. New York, etc., R. Co. *v.* New York, 1 Hilt. 562. But the marine court, now the city court of New York city, had no jurisdiction of such actions. Callahan *v.* New York, 66 N. Y. 656.

In New Jersey district courts have no jurisdiction in actions against municipalities. Townsend *v.* Essex County School Dist. No. 12, 41 N. J. L. 312.

10. *In re* Albers, 113 Mich. 640, 71 N. W. 1110; Getman *v.* New York, 66 Hun (N. Y.) 236, 21 N. Y. Suppl. 116, holding statute unconstitutional so far as it attempted to limit the jurisdiction of the supreme court.

Power of judge at chambers to grant injunction order, under N. Y. Code Civ. Proc. § 605, see Vick *v.* Rochester, 46 Hun (N. Y.) 607.

11. Parks Co. *v.* Decatur, 138 Fed. 550, 70 C. C. A. 674.

the municipality does not give jurisdiction of actions where jurisdiction is not conferred by law.[12]

F. Time to Sue and Limitations.[13] Generally, statutes of limitation run for and against municipalities as well as natural persons.[14] In some jurisdictions a shorter period of limitations, usually a year or less, is prescribed by special statutes in actions against a city, or a particular class of cities, for damages from personal injuries;[15] but such statutes do not affect prior charter provisions fixing a different period of limitations.[16] Special limitations fixed by a city charter are ordinarily valid,[17] unless contrary to some special constitutional provision.[18] So the municipality may limit the time to sue on a contract by provisions in the contract itself.[19] Where a statute of limitations is made applicable only to certain actions against a named city, only the city can take advantage thereof.[20] It may be provided by charter that no action shall lie until a specified time after the presentation of the claim to the municipality.[21]

G. Suits in Corporate Name. Except where it is otherwise provided by statute,[22] actions by or against a municipal corporation should be brought in its proper corporate name.[23] Where two corporate names appear in the charter

12. Callahan *v.* New York, 66 N. Y. 656.

13. When action accrues on municipal bonds see LIMITATIONS OF ACTIONS, 25 Cyc. 1101.

Limitation of actions for tort see *supra*, XIV, E, 4.

Who may make acknowledgment or promise to take claim out of statute see LIMITATIONS OF ACTIONS, 25 Cyc. 1361.

14. See LIMITATIONS OF ACTIONS, 25 Cyc. 1008.

Where collections are held in trust by a municipality, and there has been no repudiation of the trust, limitations is no defense. New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485 [*modifying* 91 Fed. 574, 34 C. C. A. 15].

When statute begins to run.— A fund for payment of municipal warrants must be provided by the municipality before the statute begins to run in favor of the municipality against an action thereon. Barnes *v.* Turner, 14 Okla. 284, 78 Pac. 108; Greer County *v.* Clarke, 12 Okla. 197, 70 Pac. 206. See also Hubbell *v.* South Hutchinson, 64 Kan. 645, 68 Pac. 52.

When action is commenced.—The presentation of a claim to the proper officer of the city, although a necessary preliminary to enable an action to be brought against the city, is not the commencement of an action so as to stop the running of limitations. Brehm *v.* New York, 104 N. Y. 186, 10 N. E. 158.

15. See *supra*, XIV, E, 4.

16. See *supra*, XIV, E, 4.

17. Dallas *v.* Young, (Tex. Civ. App. 1894) 28 S. W. 1036.

18. Louisville *v.* Kuntz, 104 Ky. 584, 47 S. W. 592, 20 Ky. L. Rep. 805; Louisville *v.* Seibert, 51 S. W. 310, 31 Ky. L. Rep. 328.

19. Barber Asphalt Paving Co. *v.* Erie, 203 Pa. St. 120, 52 Atl. 22.

20. Rosetta Gravel-Paving, etc., Co. *v.* Kennedy, 51 La. Ann. 1535, 26 So. 468.

21. Scurry *v.* Seattle, 8 Wash. 278, 36 Pac. 145. See also *supra*, XVII, C, 2.

22. Miller *v.* Bush, 87 Hun (N. Y.) 507, 34 N. Y. Suppl. 286; Eastern Dist. Fire Dept. *v.* Acker, 26 How. Pr. (N. Y.) 263 (holding that under Laws (1860), c. 472, authorizing a certain board of trustees of the fire department to bring action in its own name to recover certain penalties, the action must be in the individual name of the trustees with the addition of the name of their office and not merely by the designation of their official title); Lucier *v.* Granger, 20 R. I. 364, 39 Atl. 190; Valcourt *v.* Providence, 18 R. I. 160, 26 Atl. 45.

23. *Alabama.*— Powers *v.* Decatur, 54 Ala. 214, holding it unnecessary to set forth in the pleading the names of the individuals filling the office of mayor and councilmen.

Georgia.—Augusta Southern R. Co. *v.* Tennille, 119 Ga. 804, 47 S. E. 179 (statute); Dexter *v.* Gay, 115 Ga. 765, 42 S. E. 94 (holding that where a town was incorporated under the name of the town of Dexter, and the act declared that the government of the town should be vested in a mayor and five aldermen, who should be styled the "Mayor and Aldermen of Dexter," and by that name it was made a body corporate, and as such might sue and be sued, such town could be sued only in the corporate name last referred to); Boon *v.* Jackson, 98 Ga. 490, 25 S. E. 518.

Indiana.— Sims *v.* McClure, 52 Ind. 267.

Louisiana.— Opelousas *v.* Andrus, 37 La. Ann. 699, holding that the fact that the board of police of a town is authorized to appoint a collector to collect its taxes and pay them over to the board through its treasurer does not prevent the corporation from suing in its own name to recover dues which its collector has failed to collect.

Maine.— Levant Ministerial, etc., Fund *v.* Parks, 10 Me. 441.

Massachusetts.— Lowell *v.* Morse, 1 Metc. 473.

Michigan.— Menominee *v.* Menominee Cir. Judge, 81 Mich. 577, 46 N. W. 23.

New York.— See Miller *v.* Bush, 87 Hun 507, 34 N. Y. Suppl. 286.

the municipality may sue or be sued in either.[24] The municipality may sue in its own name on contracts made by some officer or agent for its benefit.[25] A stranger cannot, without authority, prosecute a suit in the name of a municipality;[26] but the corporate name may generally be used by any officer or board authorized to represent the corporate interest involved in the action.[27] If the name of the corporation is changed it must sue or be sued, in respect to its prior rights and liabilities, by its new name.[28] A statute authorizing actions to be brought by and in the name of the state to recover municipal money unlawfully obtained does not deprive a municipality of the right to set off such cause of action in an action brought against it.[29]

H. Parties.[30] The rules in civil actions in general as to who is the proper plaintiff,[31] or defendant,[32] and the propriety or necessity of joinder of persons as plaintiffs[33] or defendants,[34] apply to actions by or against municipal corporations

North Carolina.—Loughran *v.* Hickory, 129 N. C. 281, 40 S. E. 46; Young *v.* Barden, 90 N. C. 424.

Ohio.— See Defiance *v.* Defiance, 23 Ohio Cir. Ct. 96.

Vermont.— See Castleton *v.* Langdon, 19 Vt. 210.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2197.

Compare Den *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213.

Change of statutes.— An action brought on a contract of a town officer after passage of an act providing that it shall be brought against the town should be against the town, although the contract was made while the officer could be sued thereon, the contract not being impaired, but merely the remedy modified, by the statute. Miller *v.* Bush, 87 Hun (N. Y.) 507, 34 N. Y. Suppl. 286.

Slight variances have been held immaterial. Opelousas *v.* Andrus, 37 La. Ann. 699.

Substantial accuracy.— It is sufficient to use a name which beyond question identifies the corporation. *In re* Brophy, 26 U. C. C. P. 290; Hawkins *v.* Huron County, 2 U. C. C. P. 72; *In re* Barclay, 11 U. C. Q. B. 470; Johnston *v.* Reesor, 10 U. C. Q. B. 101; Flewellyn *v.* Webster, 6 U. C. Q. B. O. S. 586. But see Sams *v.* Toronto, 9 U. C. Q. B. 181, holding that a rule *nisi* against the "corporation of Toronto" insufficiently designates the corporation of the city of Toronto.

Amendments to substitute proper corporate name see *infra*, XVII, M, 1.

24. Gainesville *v.* Caldwell, 81 Ga. 76, 7 S. E. 99; Neely *v.* Yorkville, 10 S. C. 141.

25. Garland *v.* Reynolds, 20 Me. 45; Boston *v.* Schaffer, 9 Pick. (Mass.) 415; Middletown *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191.

26. Philadelphia *v.* Strawbridge, 12 Phila. (Pa.) 482.

27. Philadelphia *v.* Germantown Pass. R. Co., 10 Phila. (Pa.) 165. See also State *v.* Bowers, 26 Ohio Cir. Ct. 326 [*affirmed* in 70 Ohio St. 423, 72 N. E. 1155].

Presumption.— Authority of its proper law officers to sue in the name of the municipality will be presumed. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

28. Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36; Dousman *v.* Milwaukee, 1 Pinn. (Wis.) 81.

29. Wood *v.* New York, 73 N. Y. 556.

30. See, generally, PARTIES. See also *supra*, XVII, G.

Power of attorney-general to sue in general see ATTORNEY-GENERAL, 4 Cyc. 1029–1031.

Taxpayers' suits see *supra*, XV, E.

In injunction suits on behalf of or against municipalities see INJUNCTIONS, 22 Cyc. 912, 914.

Board of health as a proper or necessary party see HEALTH, 21 Cyc. 402.

31. See Potter *v.* Morris, 26 N. H. 330 (holding that where a police justice was required by the charter to account for and pay over to the city all the fees received by him, he might sue in his own name for the benefit of the city to recover from the persons liable the amount of fees accruing in civil cases entered in the police court); People's Pass. R. Co. *v.* Memphis, (Tenn. 1875) 16 S. W. 973.

32. See, generally, PARTIES. See also Burrill *v.* Boston, 4 Fed. Cas. No. 2,198, 2 Cliff. 590, holding that where an action is brought on a contract made by an authorized officer or agent of a municipality the municipality and not the officer or agent should be made defendant.

33. See, generally, PARTIES.

34. See Amy *v.* Selma, 77 Ala. 103 (holding that the city was not a necessary party to information by attorney-general to prevent the erection of a building above the statutory limit); Emmert *v.* De Long, 12 Kan. 67 (holding that where an action is brought against the mayor for a demand or claim which if valid should be settled or paid by the corporation in its corporate capacity, the corporation is a necessary defendant, and where the claim is payable out of a trust fund all the trustees and *cestuis que trustent* must be joined as defendants); Simrall *v.* Covington, 29 S. W. 880, 16 Ky. L. Rep. 770 (holding that where, before the commencement of an action for services rendered to a board of trustees for the construction of city waterworks, the board had completed the work and turned over all funds in its hands to the city, failure to join the board as a

except as modified by statute. And the same is true of the right to intervene,[35] etc. Inasmuch as a town council is a continuing body, it is not necessary to bring into a suit against it members who have been newly elected during the pendency of the action.[36] Unless the statute has prescribed a different remedy,[37] the state, by its attorney-general, may sue to recover moneys which have been unlawfully raised by officers of the municipality or board and converted to their own use,[38] or to restrain a municipality from making a contract which is not authorized by its charter.[39] So the state and not the city has been held the proper party to bring suit on a forfeited bond where the statute provides summary proceedings in the name of the state for the collection of such bonds, although the amount of the forfeiture inures to the benefit of the municipality.[40] On the other hand, other cases hold that where moneys belonging to the municipality are misappropriated, it alone and not the state can sue for their recovery.[41]

I. Process[42] — **1. In General.** The rules relating to the contents, service, and return of process in actions by or against municipal corporations are the same as those governing process in other actions, except in so far as modified by statute.[43] In an action in the federal courts service of process on a municipality

party was merely a formal defect not reached by a general demurrer).

Where a municipality is dissolved, and subsequently a new municipality covering the same territory and inhabitants is incorporated, a bill filed by commissioners appointed to collect the assets of the old municipality, to interpret the powers conferred upon them, must join the new municipality as a defendant. Amy *v.* Selma, 77 Ala. 103.

A city treasurer, holding funds alleged to be applicable to the payment of a claim sued for, cannot be impleaded in the claimant's action against the city, unless he is averred to have been in default. Berlin Iron-Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 408.

35. State *v.* Dubuclet, 22 La. Ann. 365, holding that, where an officer of a municipal board sues in behalf of the board, the board has a right to intervene to show that the action was commenced without its approval or in contravention of its orders.

36. Matteson *v.* Whaley, 19 R. I. 648, 35 Atl. 962.

37. See the statutes of the several states.

38. People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 25.

39. People *v.* New York, 32 Barb. (N. Y.) 35.

40. State *v.* Harris, 2 La. Ann. 516.

41. People *v.* Fields, 58 N. Y. 491; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

42. See, generally, Process.

43. See cases cited *infra,* this note.

Necessity.— A judgment rendered against a municipality is void for want of jurisdiction where there is no proper service of process. Fairfax *v.* Alexandria, 28 Gratt. (Va.) 16 [*affirmed* in 95 U. S. 774, 24 L. ed. 583]; Mariner *v.* Waterloo, 75 Wis. 438, 44 N. W. 512; Young *v.* Dexter, 18 Fed. 201.

Declaration as process.— Under a statute permitting actions against municipalities to be commenced by declaration, such declaration is process within the meaning of a charter requiring all process against the city to run against it in its corporate name and to be served on the proper city officer at least ten days before the return-day. Menominee *v.* Menominee Cir. Judge, 81 Mich. 577, 46 N. W. 23.

Contents.— The summons is properly directed to the municipality in its corporate name. Loughran *v.* Hickory, 129 N. C. 281, 40 S. E. 46. A summons is not vitiated because it not only commands the corporation to be summoned but also names the mayor and aldermen. Houston *v.* Emery, 76 Tex. 282, 13 S. W. 264.

Who may serve.— In Connecticut inhabitants of a town might sign and serve writs. Windham *v.* Hampton, 1 Root (Conn.) 175.

Manner of service.— The provision of a charter requiring a certified copy of a summons to be served in all suits brought against the town does not apply to an action of ejectment. In such case a copy of the declaration and notice is a sufficient service. Robertson *v.* Roe, 20 Fed. Cas. No. 11,927, 5 McLean 459.

Place of service.— Summons against a corporation which is situated in two counties may be served on the mayor in one of such counties, although the action is brought in the other. Fox *v.* Fostoria, 14 Ohio Cir. Ct. 471, 8 Ohio Cir. Dec. 39.

Time of service.— In the absence of a statutory provision, the common-law practice in the court of king's bench, requiring fifteen days to intervene between the day of service and the return-day of a summons in an action against a municipal corporation, prevails in New Jersey. McNeal *v.* Gloucester City, 51 N. J. L. 444, 18 Atl. 112.

Proof of service.— Proof that a city was a defendant and served with process may be established by proof filed pursuant to a *nunc pro tunc* order consisting of an affidavit entitled in the action, naming the city as one of defendants, and averring that a summons and complaint were served on defendants and on the members of the city council. People *v.* Dwyer, 90 N. Y. 402.

Effect of service.— Service of process on a municipal officer does not of itself make him

is regulated by the law of the state.[44] Statutes expressly relating to service of process on private corporations do not apply to municipal corporations.[45] The mere delivery of a copy of a summons to an officer of the municipality does not of itself make him a party so as to authorize him to file an answer.[46]

2. Person to Be Served. In the absence of statute, service should be made on the mayor or other head of the corporation as at common law.[47] But in most of the states statutes expressly provide as to the person or persons upon whom process must be served in actions against a municipality.[48] A charter provision as to who must be served prevails over a later general statute.[49] Service upon one other than the officer or agent named in the statute gives no jurisdiction,[50] and when the statute provides for service upon two, service on one only is insufficient.[51] Service upon an officer elect before acceptance and qualification,[52] or upon an officer whose term has expired,[53] is insufficient. Where the act creating a quasi-public corporation does not provide for organization with any head officer, service upon all the members is sufficient in the absence of proof of organization.[54]

3. Waiver. The acceptance or waiver of service by officers not designated in the statute as officers who may be served is ineffectual to confer jurisdiction.[55] However, it has been held that an appearance by the mayor in behalf of the

a party nor authorize him to file an answer. Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148.

44. Perkins *v.* Watertown, 19 Fed. Cas. No. 10,991, 5 Biss. 320.

45. Cloud *v.* Pierce City, 86 Mo. 357. See also People *v.* Cairo, 50 Ill. 154.

46. Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148.

47. Lyon *v.* Lorant, 3 Ala. 151; People *v.* Cairo, 50 Ill. 154; Houston *v.* Emery, 76 Tex. 282, 321, 13 S. W. 264, 266. See also Loughran *v.* Hickory, 129 N. C. 281, 40 S. E. 46.

Where there is no mayor, service on the clerk and three members of the council is sufficient. Cooper *v.* Cape May Point, 67 N. J. L. 437, 51 Atl. 511.

Who is chief officer.— The chairman of the board of trustees of a town incorporated under Mo. Gen. St. (1865) c. 41, is its chief officer, on whom, in the absence of a statute, service must be made in a suit against the town. Cloud *v.* Pierce City, 86 Mo. 357.

48. Glencoe *v.* People, 78 Ill. 382 (holding that under the statute where the municipal government of a town is vested in the council consisting of a president and five councilmen, a summons in a suit against the council in a proceeding to compel the performance of a public duty is properly served upon the president alone); Sacramento *v.* Fowle, 21 Wall. (U. S.) 119, 22 L. ed. 592 (holding that president of board of trustees was "president or other head of the corporation" within California statute). See also Amy *v.* Watertown, 130 U. S. 301, 9 S. Ct. 530, 32 L. ed. 946 (holding that Wis. Laws (1879), c. 46, did not give the chairman of board of street commissioners power to receive service of process against the city); Young *v.* Dexter, 18 Fed. 201 (holding the town-clerk not the head of the corporation nor its managing agent). And see the statutes of the several states.

Where there is no mayor.— Service of the summons by delivering copies thereof to the city clerk and the last-elected chairman of the board of street commissioners of such city, at a time when the office of mayor is vacant and there is no president or presiding officer of the common council, is a sufficient service where the statute requires service on the mayor and city clerk. Worts *v.* Watertown, 16 Fed. 534.

49. Stabler *v.* Alexandria, 42 Fed. 490.

50. Fairfax *v.* Alexandria, 28 Gratt. (Va.) 16 [*affirmed* in 95 U. S. 774, 24 L. ed. 583]; Amy *v.* Watertown, 130 U. S. 301, 9 S. Ct. 530, 32 L. ed. 946.

Where there is a vacancy in the office of mayor and there is no president or presiding officer of the common council, service upon the chairman of the board of street commissioners and upon the city clerk is insufficient to support a default judgment where the charter requires service on the mayor. Watertown *v.* Robinson, 69 Wis. 230, 34 N. W. 139. And the same rule applies where the sheriff is unable to find the mayor. Watertown *v.* Robinson, 59 Wis. 513, 17 N. W. 542.

51. Mariner *v.* Waterloo, 75 Wis. 438, 44 N. W. 512.

52. Perkins *v.* Watertown, 19 Fed. Cas. No. 10,991, 5 Biss. 320.

53. Amy *v.* Watertown, 130 U. S. 301, 9 S. Ct. 530, 32 L. ed. 946. But see Jones *v.* Jefferson, 66 Tex. 576, 1 S. W. 903, holding that, where the constitution provides that officers shall continue to perform the duty of their office until the qualification of their successors, service is properly made upon a city officer whose term has expired but whose successor has not been elected.

54. King *v.* Harbor Bd., 57 Ala. 135.

55. Chicago, etc., R. Co. *v.* Hitchcock County, 60 Nebr. 722, 84 N. W. 97. See McGarry *v.* New York, 7 Rob. (N. Y.) 464; People *v.* New York, 11 Abb. Pr. (N. Y.) 66.

municipality is a waiver of service of process and is binding upon the municipal corporation.[56] A defect in the return, in failing to show on what officer the summons was served, may be waived by the appearance of the officer served and a receipt by the proper officer of the proceeds of the judgment.[57]

J. Appearance and Representation by Attorney.[58] A city or village attorney is generally a municipal officer and has control over municipal litigation.[59] He generally represents the entire corporation and not any particular officer or board thereof.[60] His general functions, as prescribed by charter, cannot be varied, nor can his authority be diminished, by the common council by order, resolution, or by-law,[61] and his appearance in judicial proceedings is presumed to be authorized.[62] Other counsel may represent the corporation with his consent,[63] but not otherwise.[64] He is amenable to judicial rule and restraint,[65] the same as counsel for other parties.[66] His general partner, it has been held, cannot appear for the city without special authority,[67] although he has power, in the absence of a statute or ordinance to the contrary, to delegate his authority to another.[68] The corporation counsel has no larger powers to bind his client than those connected with the ordinary relation of attorney and client,[69] and he cannot waive the issuance and service of process so as to give jurisdiction by his mere appearance.[70] His default in failing to appear, whereby a default judgment is rendered,

56. North Lawrence *v.* Hoysradt, 6 Kan. 170.

57. Dugan *v.* Baltimore, 70 Md. 1, 16 Atl. 501.

58. Power of attorney to compromise see *supra*, XVII, B.

59. See cases cited *infra*, this note.

Duties.— It is not his duty to defend municipal officers in actions to which the municipality is not a party and for whose acts the municipality is not liable, and in such a case he cannot bind the municipality by a contract for the services of a stenographer. Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123 [*reversing* 80 Ill. App. 33].

Dismissal.— The rule that, where an attorney has been retained and has appeared in the action, the party will not be allowed to revoke his authority and appoint a new one without an order of the court, or of a judge at chambers, duly entered in the minutes of the court, applies to a city attorney. Parker *v.* Williamsburgh, 13 How. Pr. (N. Y.) 250.

A provision in a city charter that "the city attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, and when so ordered by the common council," does not affect the question of the city's legal capacity to sue; and the objection that the city attorney had not been ordered by the council to commence an action is not ground for demurrer but must be raised, if at all, by answer. Milwaukee *v.* Herman Zoehrlaut Leather Co., 114 Wis. 276, 90 N. W. 187.

60. Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 325.

61. Hoxsey *v.* Paterson, 40 N. J. L. 186, holding that although, under a charter, the corporate authorities may employ associate counsel in defending suits against the city, they cannot take out of the hands of the city counsel any particular class of cases, and confide the management thereof to others.

62. Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Seattle *v.* McDonald, 26 Wash. 98, 66 Pac. 145.

63. New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537; New York *v.* Exchange F. Ins. Co., 9 Bosw. (N. Y.) 424 [*affirmed* in 3 Abb. Dec. 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103]; New York *v.* Exchange Fire Ins. Co., 9 Abb. Pr. (N. Y.) 243 note, 17 How. Pr. 380.

64. New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537 [*affirmed* in 39 N. Y. 45, 6 Transcr. App. 244, 100 Am. Dec. 400].

Presumptions.— Attorneys appearing for a municipality will be presumed to be duly authorized, although such corporation has by law an official counsel and law department charged with the control of all the law business in which the city is interested. New York *v.* Exchange F. Ins. Co., 3 Abb. Dec. (N. Y.) 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103 [*affirming* 9 Bosw. 424].

65. Sharp *v.* New York, 31 Barb. (N. Y.) 578, 19 How. Pr. 193; Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 325.

66. Sharp *v.* New York, 31 Barb. (N. Y.) 578, 19 How. Pr. 193, holding that the city officers may apply for, and the court will grant, protection, if it appear that the conduct of the counsel is prejudicial to the rights of the city.

67. Wilcox *v.* Clement, 4 Den. (N. Y.) 160.

68. New York *v.* Exchange F. Ins. Co., 9 Abb. Pr. (N. Y.) 243 note, 17 How. Pr. 380.

69. People *v.* New York, 11 Abb. Pr. (N. Y.) 66. See also McGarry *v.* New York, 7 Rob. (N. Y.) 464.

70. Chicago, etc., R. Co. *v.* Hitchcock County, 60 Nebr. 722, 84 N. W. 97. See also McGarry *v.* New York, 7 Rob. (N. Y.) 464.

will be more readily excused in the case of the corporation than in the case of a default of an individual.[71]

K. Attachment and Garnishment.[72] Municipalities are generally exempt from attachment and garnishment,[73] and property owned by a municipality and devoted to the services of the public cannot be seized in an admiralty suit *in rem*.[74] Where an action is brought by a municipal corporation it may, in a proper case, attach property of the defendant, and it is usually provided by statute that no undertaking need be given to procure the attachment.[75]

L. Injunction[76] **and Receivers.**[77] The procedure in injunction suits is practically the same as where an individual is a party.[78] The same public policy which prevents a claim against a city being attached prevents it from being reached by a suit in equity to restrain the payment thereof and the appointment of a receiver to receive it.[79] It has been held that a receiver may be appointed for an insolvent municipality,[80] but only in case of insolvency and where irreparable damage will otherwise ensue.[81]

M. Pleading[82] **— 1. In General.** Municipal corporations are ordinarily subject to the same rules of pleading as private persons,[83] except where otherwise provided by statute.[84] It has been held that the pleadings need not be signed by an officer of the corporation,[85] and that a pleading of a municipality may be verified on information and belief by a member of the common council.[86] Amendments are liberally allowed, to set out the proper corporate title,[87] and a petition against the trustees of a town may be amended so as to make the town itself a

71. Lewis *v.* Elizabeth, 25 N. J. Eq. 298.

72. **Obtaining jurisdiction by attachment** see *supra*, XVII, E.

73. See GARNISHMENT, 20 Cyc. 988.

74. See ADMIRALTY, 1 Cyc. 869.

75. Morgan *v.* Menzies, 60 Cal. 341, holding that such an undertaking given by a city was void as a common-law bond as well as a statutory bond.

76. **Right to injunction** see INJUNCTIONS, 23 Cyc. 879-897.

77. See, generally, RECEIVERS.

78. See cases cited *infra*, this note.

Damages on dissolution of bond.— The fact that a city attorney is personally interested in city bonds will not deprive the city of its right to damages on the dissolution of an injunction against the collection of taxes to pay interest on such bonds. Mason *v.* Shawneetown, 77 Ill. 533. On the dissolution of an injunction against a city, counsel fees should not be allowed by way of damages, when no special counsel was employed by the city. Nixon *v.* Biloxi, 76 Miss. 810, 25 So. 664; Uhrig *v.* St. Louis, 47 Mo. 528.

Bond by corporation to dissolve injunction.— Under the New Orleans charter a city may obtain the dissolution of an injunction against it without furnishing the bond required of other litigants. Jefferson, etc., R. Co. *v.* New Orleans, 30 La. Ann. 970.

Bond by city to prevent dissolution must be executed by the direction or authority of the city council. Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

79. Granite Co. *v.* Douglass, 3 Pa. Dist. 133.

80. Garrett *v.* Memphis, 5 Fed. 860, holding that where taxes have been duly levied in pursuance of law before the repeal of a municipal charter, the court has power to lay hold by its receiver of the assets belonging to the city when its charter was repealed, including such taxes as were levied and collected, but undisposed of, and all taxes uncollected, and all property of every description, except property held for strictly public uses, and may administer such assets for the benefit of the creditors.

81. Hurlburt *v.* Lookout Mountain, (Tenn. Ch. App. 1898) 49 S. W. 301.

82. See, generally, PLEADING.

Pleading ordinances see *supra*, VI, N.

In actions ex delicto see *supra*, XIV, E, 6.

83. Hunt *v.* San Francisco, 11 Cal. 250.

84. See the statutes of the several states.

85. Larrison *v.* Peoria, etc., R. Co., 77 Ill. 11 (holding that where the name of the corporation is written to an answer in equity and there is nothing to show that it is unauthorized, it is sufficient); Deatrick *v.* Defiance, 1 Ohio Cir. Ct. 340, 1 Ohio Cir. Dec. 189 (holding that a statute providing that a city solicitor shall prosecute and defend all suits in which the municipality is a party does not necessitate the signature by the solicitor of a petition in an action by the city).

86. Hitchcock *v.* Galveston, 12 Fed. Cas. No. 6,534, 3 Woods 287.

87. Lake Erie, etc., R. Co. *v.* Boswell, 137 Ind. 336, 36 N. E. 1103; Georgetown *v.* Beatty, 10 Fed. Cas. No. 5,344, 1 Cranch C. C. 234.

The Consolidation Act of 1856 did not destroy, but continued, the corporation of the city of San Francisco; and the change in name which it directed did not require any alteration in the pleadings, or any suggestion upon the records in a suit then pending. People *v.* San Francisco, 21 Cal. 668.

defendant where the issues are not thereby changed;[88] and it has been held that a municipality will not be so strictly held to promptness in asking for leave to amend as will an individual.[89]

2. EXISTENCE AND INCIDENTS OF INCORPORATION. Describing a municipality by its proper name is a sufficient averment that it is a municipal corporation,[90] and a distinct averment of the existence of a municipal corporation is equivalent to an allegation that it was duly organized.[91] But where the cause of action depends upon the statutory class to which defendant municipality belongs the complaint should designate the class.[92] An allegation by a city that it is a municipal corporation and has been for a specified number of years does not fix the date of its incorporation nor preclude it from proving the true date.[93] Where the complaint avers that the board of police commissioners was "organized and acting as such under the laws providing for such board," an objection that it does not aver that the board was a legally constituted one is not tenable.[94] A bare denial will not put in issue its existence as a corporation,[95] and generally a specific denial thereof must be verified.[96] Where the municipality appears and makes an affirmative defense it admits its corporate existence.[97] A municipality sued as a defendant may plead by way of abatement its non-existence because the statute under which defendant had attempted to incorporate had been declared unconstitutional and the fact that a curative act had been passed before trial does not render the plea ineffective.[98] A variance between the pleading and proof as to the name of the corporation, the payee of a bond sued on, may be fatal.[99]

3. COMPLAINT. Where an action is brought by a municipality it need not specially allege its power to sue.[1] So where an action is brought by the proper officers in the name of the city, it is not necessary in the first instance to plead that the city authorized the bringing of the action.[2] When it is sought to enforce against the corporation a purely statutory obligation, all the facts requisite to make the liability complete must be pleaded.[3] But the petition need not plead provisions of its charter on which the action is based, where the charter has been declared a public act of which judicial notice must be taken.[4] Where the claim must be presented to the municipality for allowance before bringing suit, such presentation must generally be alleged in the complaint;[5] and it must be alleged

88. Latonia *v.* Hopkins, 104 Ky. 419, 47 S. W. 248, 20 Ky. L. Rep. 620.

89. Brooks *v.* New York, 12 Abb. N. Cas. (N. Y.) 350.

90. Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422; Stier *v.* Oskaloosa, 41 Iowa 353; Rains *v.* Oshkosh, 14 Wis. 372. See also Smith *v.* Warrior, 90 Ala. 481, 12 So. 418; Morris *v.* School Trustees, 15 Ill. 266; People *v.* Wilson, 3 Ill. App. 368; Stier *v.* Oskaloosa, 41 Iowa 353; Lewis *v.* Eskridge, 52 Kan. 282, 34 Pac. 892; Eskridge *v.* Lewis, 51 Kan. 376, 32 Pac. 1104; Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254.

91. Crockett *v.* Barre, 66 Vt. 269, 29 Atl. 147.

92. Pritchett *v.* Stanislaus Co., 73 Cal. 310, 14 Pac. 795. *Contra*, Brookfield *v.* Tooey, 141 Mo. 619, 43 S. W. 387, where, by express statutory provision, court takes judicial notice thereof.

93. Eustis *v.* Henrietta, (Tex. Civ. App. 1896) 37 S. W. 632.

94. Huntington *v.* Boyd, 25 Ind. App. 250, 57 N. E. 939.

95. Stier *v.* Oskaloosa, 41 Iowa 353.

Where an action is brought against the president and trustees of a named town, a plea that defendants say there is no body corporate known by the name of "the president," etc., is bad. Connersville *v.* Wadleigh, 6 Blackf. (Ind.) 297.

96. Downs *v.* Smyrna, 2 Pennew. (Del.) 132, 45 Atl. 717; Hixon *v.* George, 18 Kan. 253; Bradley *v.* Spickardsville, 90 Mo. App. 416.

Section 33 of the Illinois Practice Act (Rev. St. (1874) p. 779), which provides that no "person" shall be permitted to deny the execution of a written instrument except by verified pleas, establishes a rule of evidence embracing in its terms all persons, natural or artificial, and includes municipal corporations. Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711 [*affirming* 98 Ill. App. 434].

97. Erie *v.* Phelps, 56 Kan. 135, 42 Pac. 336; Eubank *v.* Edina, 88 Mo. 650.

98. Winneconne *v.* Winneconne, 111 Wis. 10, 86 N. W. 589.

99. Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36.

1. Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

2. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

3. Clearwater *v.* Garfield, 65 Nebr. 697, 91 N. W. 496.

4. See PLEADING.

5. *Alabama.*— Barret *v.* Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54.

that there has elapsed, since the presentation, the statutory time provided before the expiration of which suit cannot be brought.[6] Where, however, the statutory provision merely provides that the omission to present the claim shall be a bar to an action against the city, the presentation is not a condition precedent but is merely matter of defense which need not be pleaded by plaintiff.[7] Where an action is brought on a claim against the original city, but after its consolidation with another city, the complaint must state the facts showing that the cause of action accrued against the original city prior to its consolidation.[8] In an action against a city on a contract which on its face is valid and within the scope of the general powers of the city, the declaration need not allege that the city had power to make the contract;[9] but the existence of conditions made necessary by statutory or organic law to the execution and validity of the contract must be alleged.[10] If the contract was made with municipal agents, it is sufficient to allege that the

California.— Bigelow *v.* Los Angeles, 141 Cal. 503, 75 Pac. 111.

Georgia.— Columbus *v.* McDaniel, 117 Ga. 823, 45 S. E. 59.

Kansas.— Atchison *v.* King, 9 Kan. 550, holding that where presentation is a condition precedent to the right to recover costs, costs cannot be recovered if the presentation is not alleged in the complaint.

Minnesota.—Eisenmenger *v.* St. Paul Water Bd., 44 Minn. 457, 47 N. W. 156, sufficiency of allegation.

Nebraska.— Lincoln *v.* Finkle, 41 Nebr. 575, 59 N. W. 915; Lincoln *v.* Grant, 38 Nebr. 369, 56 N. W. 995.

New York.— Reining *v.* Buffalo, 102 N. Y. 308, 6 N. E. 792.

Oregon.— Philomath *v.* Ingle, 41 Oreg. 289, 68 Pac. 803.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2203.

6. Reining *v.* Buffalo, 102 N. Y. 308, 6 N. E. 792.

7. Hawley *v.* Johnstown, 40 N. Y. App. Div. 568, 58 N. Y. Suppl. 49 [*distinguishing* Reining *v.* Buffalo, 102 N. Y. 308, 6 N. E. 792].

Waiver.— Failure to raise the objection by answer or demurrer has been held a waiver where the presentation is not jurisdictional. Devlin *v.* New York, 4 Misc. (N. Y.) 106, 23 N. Y. Suppl. 888; Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515 (holding that a statute providing that no action shall be maintained against a city, on any claim or demand of any kind whatsoever, until such claim shall have been presented to the council, is not a condition precedent to the right of action, but is in the nature of a statute of limitations, and hence plaintiff need not allege compliance with it, but defendant must allege failure to comply, or the point will be waived); O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831; Sheel *v.* Appleton, 49 Wis. 125, 5 N. W. 27.

8. Adams *v.* Minneapolis, 20 Minn. 484.

9. Newport News *v.* Potter, 122 Fed. 321, 58 C. C. A. 483. See also Merrill R., etc., Co. *v.* Merrill, 80 Wis. 358, 49 N. W. 965. But see Texas Water, etc., Co. *v.* Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393. *Compare* Lauenstein *v.* Fond du Lac, 28 Wis. 336, where allegation of power of board was held insufficient.

Purpose of lease.— A complaint against a municipal corporation alleging a lease of property by it is not bad because it does not show the purpose for which the property was leased, as it will be presumed that it was for a lawful municipal purpose, and if it is claimed that the purpose was unlawful, this is matter of defense. Anderson *v.* O'Conner, 98 Ind. 168.

Ordinances.— A petition counting on a contract with a municipality need not aver that the contract was made in pursuance of an ordinance. The allegation that the contract was made implies the existence of the ordinance. Devers *v.* Howard, 88 Mo. App. 253. An allegation that defendant city "duly" entered into a contract authorizes proof that the contract was entered into under a valid city ordinance. British Columbia Bank *v.* Port Townsend, 16 Wash. 450, 47 Pac. 896. Where the contract was made with a committee of the city council, the ordinance empowering the committee to make the contract need not be set out, where the complaint alleges that the committee had power to make the contract, and that the city council had recognized its validity. Harrison *v.* Sulphur Springs, (Tex. Civ. App. 1898) 50 S. W. 1064.

In an action to recover the contract price for lighting the streets with electric light, it is not necessary to state in the complaint the population of the town, the amount of its taxables, the amount of its current expenses, etc., in order that the court may know that the contract is one which the town had the right to make, since towns have the right to enter into such contracts, under Burns (1894), § 4301, and fraud or abuse of discretion is never presumed, but must be alleged and proved. Gosport *v.* Pritchard, 156 Ind. 400, 59 N. E. 1058.

10. Kerr *v.* Bellefontaine, 13 Ohio Cir. Ct. 24, 7 Ohio Cir. Dec. 93; Texas Water, etc., Co. *v.* Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393. But see Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 220, 17 L. ed. 530, holding that where a suit is brought on a contract made by a city, where the laws require the consent of two thirds of its electors to validate debts for borrowed money, such consent need not be averred, since it will be presumed.

municipality made the contract;[11] and an allegation that municipal trustees employed plaintiff for a specific purpose is a sufficient averment that such trustees acted officially.[12] Where the action is for services in selling bonds, the complaint need not allege that the bonds were legally issued.[13] Where an action is brought against officers of a municipality as such, the word "as" should precede their official designation.[14] Where a municipality is sued for services on a *quantum meruit* a mere averment of acceptance is insufficient unless it is also stated that such acceptance is evidenced by ordinance or express corporate action to that effect.[15] But a petition against a city averring that plaintiff built a bridge for it along one of its streets, which, when finished, was accepted and used, is sufficient, as stating a case on an implied contract to pay for the reasonable value thereof, although other averments therein are insufficient to show liability on an express contract.[16]

4. ANSWER, DEMURRER, AND REPLY.[17] The rule which requires a defendant to answer positively as to the facts alleged in the complaint which are presumably within his knowledge applies to municipal corporations.[18] So a statutory provision forbidding an extension of time to a corporation to answer or demur in certain specified actions, except on notice to plaintiff's attorney, has been held applicable to municipal corporations,[19] as has a statute authorizing a judgment by default in certain actions unless defendant corporation serves with its answer or demurrer a copy of an order directing the issues to be tried.[20] In some states, by statute, municipalities are exempt from filing affidavits of defense in certain cases.[21] The answer of the municipality, where it is indefinite and uncertain,[22]

Appropriations.— In an action by a physician to recover for services rendered to a village, a petition which does not allege a prior appropriation for such services is bad on general demurrer. De Wolf *v.* Bennett, 3 Nebr. (Unoff.) 470, 91 N. W. 855. In an action to recover compensation as policeman, it was sufficient to aver in general terms the appropriation of sufficient funds to pay plaintiff's claims. Gorley *v.* Louisville, 65 S. W. 844, 23 Ky. L. Rep. 1782. In Texas a petition in an action of debt against a city which fails to allege that at the time of the creation of the debt provision was made by the city for its payment is demurrable. Ellis *v.* Clehurne, (Tex. Civ. App. 1896) 35 S. W. 495; Waco *v.* McNeill, (Tex. Civ. App. 1895) 29 S. W. 1109. It must be alleged that the city had made provision to meet the obligations of the contract or had funds which it had a right to apply to such purpose. Peck-Smead Co. *v.* Sherman, 26 Tex. Civ. App. 208, 63 S. W. 340. An averment that due provision was made before the issuance of bonds for the levy of a special tax annually, to meet annual interest thereon and provide for a sinking fund, as required by the constitution and the city charter, sufficiently shows that the provision was for at least the minimum per cent required thereby; judicial notice being taken of both the constitution and the charter. Berlin Iron-Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 408.

Power of agent to make.— Where a contract is made on behalf of a municipality by persons not general municipal officers, who have no power to contract for the municipality except as authorized by a municipal board, and they can only be authorized under circumstances and upon the condition prescribed in the statute, a complaint on such contract which fails to set forth the taking of any of the preliminary steps which are required by the statute to be taken is insufficient. Holroyd *v.* Indian Lake, 75 N. Y. App. Div. 197, 77 N. Y. Suppl. 672.

11. Rochester School Town *v.* Shaw, 100 Ind. 268.

In an action based on a tort the rule is generally otherwise. Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649; Lucier *v.* Granger, 20 R. I. 364, 39 Atl. 190; Wilson *v.* Bristley, 13 Tex. Civ. App. 200, 35 S. W. 837. But it has been held that an allegation that a fraudulent oral representation complained of was made by "the defendant" is sufficient without setting out the name of the agent through whom it was made. Wilson *v.* Reading, 105 Fed. 217.

12. Reed *v.* Orleans, 1 Ind. App. 25, 27 N. E. 109.

13. Reed *v.* Orleans, 1 Ind. App. 25, 27 N. E. 109.

14. Bennett *v.* Whitney, 94 N. Y. 302.

15. Stubbs *v.* Galveston, 3 Tex. App. Civ. Cas. § 143.

16. Berlin Iron-Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 408.

17. See, generally, PLEADING.

18. San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

19. Moran *v.* Long Island City, 101 N. Y. 439, 5 N. E. 80 [*reversing* 38 Hun 122].

20. Moran *v.* Long Island City, 101 N. Y. 439, 5 N. E. 80.

21. Malone *v.* Philadelphia, 8 Pa. Co. Ct. 385, holding that the act of April 11, 1858, which so provides, was not repealed by implication by the act of May 25, 1887, section 3.

22. New York Mut. Gas-light Co. *v.* New York, 49 How. Pr. (N. Y.) 227.

frivolous,[23] or sham,[24] is subject to the same procedure as in the case of the pleading of an individual. So defects in the complaint may be cured by the answer.[25] New matters constituting a defense must be specially pleaded by the municipality,[26] and this applies to the defense of *ultra vires*.[27] If judicial notice is taken of the charter, the question whether certain work was within the powers of the city may be raised by demurrer.[28] The necessity and sufficiency of a reply is governed by the rules relating to replies in civil actions in general.[29]

N. Evidence.[30] The general rules of evidence as to the admissibility thereof,[31]

23. New York Mut. Gas-light Co. *v.* New York, 49 How. Pr. (N. Y.) 227.

24. New York Mut. Gas-light Co. *v.* New York, 49 How. Pr. (N. Y.) 227.

25. Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

26. McNulty *v.* New York, 168 N. Y. 117, 61 N. E. 111 [*affirming* 60 N. Y. App. Div. 250, 70 N. Y. Suppl. 133] (exhaustion of appropriation); Ocorr, etc., Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 79 N. Y. Suppl. 251 [*affirmed* in 178 N. Y. 622, 70 N. E. 1104]. But see Bennett *v.* New Orleans, 14 La. Ann. 120, holding that under a plea of the general issue a municipality might avail itself of exemption from suit on the ground that the act complained of involved the disbursement of the corporate revenue and was discretionary with the corporate authorities.

27. Ryan *v.* Lone Tree, 122 Iowa 420, 98 N. W. 287; Louisville *v.* Gosnell, 60 S. W. 411, 61 S. W. 476, 22 Ky. L. Rep. 1524; Richmond County S. P. C. C. *v.* New York, 73 N. Y. App. Div. 607, 77 N. Y. Suppl. 41.

28. Duncan *v.* Lynchburg, (Va. 1900) 34 S. E. 964, 48 L. R. A. 331.

29. See PLEADING. See also Grafton *v.* Sellwood, 24 Oreg. 118, 32 Pac. 1026, holding that an issue of fact was raised by an answer alleging that a contract was executed before the taking effect of the ordinance authorizing it so that the court might enter judgment for a failure to reply thereto.

30. See, generally, EVIDENCE.

Admissions of agents see EVIDENCE, 16 Cyc. 1024.

Records as evidence in general see EVIDENCE, 17 Cyc. 296 *et seq.*

Book-entries as evidence in general see EVIDENCE, 17 Cyc. 391 note 94.

Parol evidence to contradict municipal records see EVIDENCE, 12 Cyc. 582.

Judicial notice of cities and villages with their subdivisions see EVIDENCE, 16 Cyc. 909, 910.

Of corporate existence see *supra*, II, A, 18.

31. See, generally, EVIDENCE, 16 Cyc. 824 *et seq.* See also Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746; Rafferty *v.* Pittsburg, 15 Pa. Super. Ct. 77 (evidence to show authority of city officer to sue); Detroit *v.* Grummond, 121 Fed. 963, 58 C. C. A. 301 (evidence of ratification of contract).

Self-serving statements.— In an action by a city to recover for wharfage, an ordinance of the common council reciting that the suit was commenced without its knowledge or consent, and instructing the attorney of the corporation to forbid the further use of its name, was inadmissible. Trowbridge *v.* Albany, 7 Hill (N. Y.) 429.

Parol evidence.— One contracting with a city is not confined to the minutes of the proceedings of the council for proof of his contract. Wanting these, he can show his contract, and its performance with the city's knowledge, by parol. Belton *v.* Sterling, (Tex. Civ. App. 1899) 50 S. W. 1027. See *supra*, V, B, 6.

Municipal claims.— Under a statute providing that municipal claims may, in suits thereon, be read in evidence of the facts therein set forth, material averments in the claim filed are *prima facie* evidence of the things averred. Philadelphia *v.* Esau, 10 Phila. (Pa.) 425.

Admissions.— East St. Louis Gas Light, etc., Co. *v.* East St. Louis, 45 Ill. App. 591 (official publication of city's indebtedness); Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587 (report of committee of counsel on plaintiff's claim admissible so far as it admits that counsel had notice of contract and that plaintiff was proceeding under it); People *v.* Green, 5 Thomps. & C. (N. Y.) 376 (admissions by agents of a city of advances made to them in its behalf, made more than a month after the last check was drawn in their favor, not admissible against the city).

A public record of lamps lighted, kept by a *de facto* officer of a city, is competent against the city as to the number of lamps lighted. St. Louis Gaslight Co. *v.* St. Louis, 12 Mo. App. 573 [*affirmed* in 86 Mo. 495].

A city ordinance providing a punishment for maintaining a nuisance was not admissible as evidence for the city in a prosecution against it for suffering a nuisance. Newport *v.* Com., 108 Ky. 151, 55 S. W. 914, 21 Ky. L. Rep. 1591. An ordinance is admissible in an action against a city to explain in what way the city is carrying out the trust committed to it, what officers represent it, and for whose acts it is responsible. Levy *v.* Salt Lake City, 5 Utah 302, 16 Pac. 598.

Amount of city's indebtedness.— Where an attorney rendered services for a city under an implied contract, the liability was incurred when, from time to time, the services were fully rendered and accepted, so that, in an action therefor, evidence as to whether there were sufficient unappropriated revenues at such times to meet the liability was admissible, the constitution limiting the city's liability for one year to the revenue provided for that year. Buck *v.* Eureka, 124 Cal. 61,

and also as to presumptions[32] and burden of proof,[33] and as to the weight and

56 Pac. 612. An official publication of a city's indebtedness is competent to prove the amount thereof, and a certificate of the city clerk as to the amount of taxable property within the city, "as appears from the record" in his office, is admissible. East St. Louis Gas Light, etc., Co. *v.* East St. Louis, 45 Ill. App. 591. The certificate of a city controller as to the city's indebtedness is not evidence thereof, being a mere statement of his conclusions from the records of his office. Chicago *v.* English, 180 Ill. 476, 54 N. E. 609 [*modifying* 80 Ill. App. 163]. But see Norton *v.* East St. Louis, 36 Ill. App. 171.

Verbal instructions by members of a city council to the city marshal to notify a waterworks company to discontinue its supply of water to the city, and evidence of the marshal's having accordingly done so, are incompetent to prove a discontinuance of the contract existing between the city and the company for the supplying of water to the former, since corporate action alone could discontinue such contract, such action could only be proved by written minutes and records of the council. Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764.

32. See, generally, EVIDENCE, 16 Cyc. 1050 *et seq.*

Legality.— It will be presumed that a corporation has acted legally in making a contract. Connell *v.* Hill, 30 La. Ann. 251. It will be presumed that whatever was necessary to the contract in respect to entries on the record of the proceedings of the council was done. Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587. When a municipal corporation seeks to avoid its contract on the ground of its want of power to contract, and the contract is not upon its face necessarily beyond the scope of its authority, such authority will be presumed. Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]. See also Anderson *v.* O'Conner, 98 Ind. 168; and *supra*, V, B, 6, c; IX, H, 5.

Compliance with the law will be presumed. Enterprise *v.* Fowler, 38 Kan. 415, 16 Pac. 703 (holding that where the claim was presented to the council, and referred to a committee, who reported in favor of the allowance of part of the claim, it will be presumed to have complied with the statute requiring claims to be presented in writing with a full account of the items, and sworn to be correct, reasonable, and just); St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202 [*affirming* 11 Mo. App. 55] (holding that the fact that a city auditor enters as charges against a city on his books the bills of a gas company is presumptive evidence that each bill was properly audited at its entry); Howard *v.* Oshkosh, 33 Wis. 309 (holding that it will be presumed that a claim against a city was duly verified as required by the charter before the common council acted upon it).

Incorporation.— Where a complaint against a village alleges its incorporation, and defendant admits that it is a municipal corporation organized under the laws of the state, it will be presumed that defendant is incorporated under the general statutes; there being no other mode for becoming an incorporated village. Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615.

33. See, generally, EVIDENCE, 16 Cyc. 926 *et seq.*

Absence of ordinance.— In an action on city warrants issued for current expenses, where the defense is that they were not issued in pursuance of an ordinance previously passed appropriating money to the payment thereof, the burden is on the city to affirmatively show that no such ordinance had been passed. Hubbell *v.* South Hutchinson, 64 Kan. 645, 68 Pac. 52.

Excessiveness of fees.— In an action by a city against a tax-collector, the city has the burden to show that the fees charged were excessive. Ysleta *v.* Lowenstein, (Tex. Civ. App. 1894) 25 S. W. 444.

Power to execute note.— Where defendant city, in an action on a renewed note executed by its mayor, pleads *non est factum*, the burden of showing that the mayor was authorized to execute such renewal note is on plaintiff. Tyler *v.* Adams, (Tex. Civ. App. 1901) 62 S. W. 119.

Power to make contract.— In an action against a city on a contract, the city having had general authority to make the contract, it is not incumbent on plaintiff to show that taking of the steps and existence of conditions requisite to authorize the city to make the contract, such as the making of an appropriation, the letting to the lowest bidder after advertisement, etc. Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711 [*affirming* 98 Ill. App. 434]. *Compare* Kerr *v.* Bellefontaine, 13 Ohio Cir. Ct. 24, 7 Ohio Cir. Dec. 93. But when a party who is sued in virtue of a contract made by a municipal corporation denies in general terms that the corporation has complied with the law authorizing it to make such a contract, the burden of proof is on him to show that the law has not been complied with. Connell *v.* Hill, 30 La. Ann. 251. And where, in an action on non-negotiable notes given for land purchased from plaintiff by defendant, defendant pleads *nil debet*, the burden is on plaintiff to show that the municipality had power to purchase the land. Richmond, etc., Land, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460. But where a city defends an action against it on a contract on the ground that such contract is invalid because it created an indebtedness in excess of the limit fixed by the constitution of the state, it has the burden of proving all the facts necessary to establish such defense. Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711 [*affirming* 98 Ill. App. 434]; Adams *v.* Waterville, 95 Me. 242, 49 Atl. 1042; Crebs *v.* Lebanon, 98 Fed. 549. See also Arbuckle-Ryan Co. *v.* Grand Lodge, 122 Mich. 491, 81 N. W. 358.

Presentation of claim.— The burden is on

sufficiency[34] in civil actions in general apply to evidence in actions by or against a municipal corporation.

O. Trial.[35] Except where it is otherwise provided by statute,[36] trials in municipal cases are conducted as in other actions,[37] the respective functions of judge and jury as to law and fact being preserved and maintained.[38] Where a town appoints agents to prosecute an action, such authority to prosecute the suit implies power to refer it by rule of court.[39]

P. Judgment[40] — **1. In General.** Ordinarily there is no difference, so far as the judgment is concerned, whether a municipal corporation is a party or the action is between individuals,[41] except as to the effect thereof as a lien and as to the subsequent procedure to enforce it.[42] For instance the rules relating to the power to vacate the judgment upon motion,[43] the right to collaterally attack the

plaintiff to prove presentation of his claim before suit. Lincoln *v.* Finkle, 41 Nebr. 575, 59 N. W. 915; Lincoln *v.* Grant, 38 Nebr. 369, 56 N. W. 995; Luke *v.* El Paso, (Tex. Civ. App. 1900) 60 S. W. 363.

Shifting burden.—Where the special duties of a controller of a municipal corporation are not defined by law, proof of his usage to receive and file notices affecting the indebtedness of the city is sufficient, in an action against the corporation, to cast on it the burden of proving that his duties did not include the subject in question. Hall *v.* Buffalo, 2 Abb. Dec. (N. Y.) 301, 1 Keyes 193.

34. See, generally, Evidence, 17 Cyc. 753 *et seq.* See also San Francisco *v.* Bradbury, 92 Cal. 414, 28 Pac. 803 (sufficiency of evidence to show reservation by city of land for engine lots); McWilliams *v.* Plaquemine, 19 La. Ann. 74; Tribune *v.* New York, 48 Barb. (N. Y.) 240.

A stipulation by the attorney for a city, in an action of covenant on a lease for a water office, that there was an appropriation for the rent sufficient to cover the entire period up to the time of suit, must be regarded as evidence of such appropriation, as against the city's objection, on appeal, that no proof of an appropriation was made. Chicago *v.* English, 180 Ill. 476, 54 N. E. 609 [*modifying* 80 Ill. App. 163].

35. See, generally, Trial.

Officers as jurors in action against municipality see Juries, 24 Cyc. 268.

Competency of inhabitants as jurors in action against municipality see Juries, 24 Cyc. 271.

36. Lewenthal *v.* New York, 5 Lans. (N. Y.) 532, 61 Barb. 511, holding that under the act of April 19, 1871, providing that no judgment except on issues of law should be entered up thereafter against the city of New York except on the verdict of a jury, judgment cannot be entered on the report of a referee made subsequent to the passing of such act.

37. Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54].

Instructions see Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746; Kemper *v.* Burlington, 81 Iowa 354, 47 N. W. 72; Strahan *v.* Malvern, 77 Iowa 454, 42 N. W. 369.

Construction of findings.— Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54].

38. Guthrie *v.* Dubuque, 105 Iowa 653, 75 N. W. 500; Kemper *v.* Burlington, 81 Iowa 354, 47 N. W. 72 (whether resolution of city council related to certain repairs held question for jury); Saginaw Tp. *v.* Saginaw School Dist. No. 1, 9 Mich. 541 (identity of plaintiff with certain school-district held question of law); Pass Christian *v.* Washington, 81 Miss. 470, 34 So. 225 (construction of order of board a question of law for court).

39. Buckland *v.* Conway, 16 Mass. 396. See also *supra*, XVI, D.

40. See, generally, Judgments.

In actions on bonds see *supra*, XV, C, 24, h.

41. See cases cited *infra*, this note.

Delivery of copy.— Where a judgment against the city directs that a certified copy thereof be delivered to the city counsel, compliance therewith is not essential to the validity of the judgment or proceedings to enforce it. Cairo *v.* Everett, 107 Ill. 75.

Payment. — Statute authority to pay "judgments against the city" does not include judgments against a special board. U. S. *v.* New Orleans Bd. of Liquidation, 60 Fed. 387, 9 C. C. A. 37. Payment of a default judgment obtained against a city is made at the city's peril where pending an action to restrain the city from paying an award to one named in the award as entitled to damages. Spears *v.* New York, 87 N. Y. 359. Transfer, by the act of 1877, of the powers of the park commissioners to the city council of New Orleans, did not relieve the common council from providing for payment of any judgment which the park commissioners had obtained against the city. State *v.* Pilsbury, 30 La. Ann. 705. Where the city corporation and the county organization are separate, county officers have no authority to interfere to prevent payment of a judgment against the city. Baker *v.* New York, 9 Abb. Pr. (N. Y.) 82.

Negligence of officer as ground for setting aside default judgment against municipality see Judgments, 23 Cyc. 936 note 73.

42. See *infra*, XVII, P, 3.

43. See Judgments, 23 Cyc. 899 note 57.

Statutory provisions.— Under N. Y. Laws (1859), p. 1127, § 5, the controller of the

same,[44] and its effect as *res judicata*,[45] are the same as where only individuals are parties to the action. So a municipal corporation may consent to, or confess, a judgment in the same manner and to the same effect as a natural person or a private corporation.[46] But judgment should not be rendered absolutely against a municipality on claims payable only out of a particular fund,[47] and, in most jurisdictions, the judgment cannot award execution.[48] However, a constitutional provision that no city shall incur indebtedness exceeding in any year the income of such year does not require that a judgment rendered for a past indebtedness shall provide that it be paid out of the revenues received for the years in which it was incurred.[49] Where a municipality having an option of paying in money or in city orders fails to exercise the option, a money recovery may be had.[50] A judgment against a municipality is payable only in legal tender.[51]

2. PRIORITIES AND FUNDS APPLICABLE TO PAYMENT. It has been held that a municipal budget is not an appropriation of the funds to pay any particular debt due by the municipality, and hence a judgment is the first appropriation and should have precedence;[52] and that the municipality cannot exhaust the entire revenue provided for unbonded expenditures, with one class of disbursements, and refuse to pay a judgment out of the revenues for the current year.[53] But judgments are not payable out of funds raised by levy for another purpose,[54] nor out of the general funds when chargeable only upon the surplus fund.[55] Generally a judgment does not take precedence over other claims.[56] In some states,

city of New York had power to proceed to open judgments against the city. Sharp *v.* New York, 31 Barb. (N. Y.) 572, 9 Abb. Pr. 243, 18 How. Pr. 97; Lowber *v.* New York, 26 Barb. (N. Y.) 262; Macomber *v.* New York, 17 Abb. Pr. (N. Y.) 35. See also Law *v.* New York, 32 How. Pr. (N. Y.) 385.

Where a compromise judgment is entered against the municipality by consent, it cannot set aside the judgment, in the absence of any irregularity, fraud, or mistake, simply because a new corporation counsel believes a better result can be obtained by contesting the litigation. Law *v.* New York, 32 How. Pr. (N. Y.) 385.

44. See Com. *v.* Hinkson, 161 Pa. St. 266, 28 Atl. 1081 (holding that an officer cannot refuse to pay a judgment because he deems it unauthorized); U. S. *v.* Ottawa, 28 Fed. 407 (holding that after a judgment has been rendered against the town by a court of competent jurisdiction, even if the court erred in so rendering it, the judgment is binding on the town until reversed by an appellate court). See also JUDGMENTS, 23 Cyc. 1067 note 91, as to the right of an inhabitant to collaterally attack a judgment against the municipality.

Proceeding by mandamus to compel levy and collection of tax to provide funds for payment of judgment against municipality, as collateral to judgment, within rule as to collateral attack on judgments see JUDGMENTS, 23 Cyc. 1064, 1065.

45. See JUDGMENTS, 23 Cyc. 1269, 1279, notes 19, 20. See also People *v.* San Francisco, 21 Cal. 668; Parker *v.* Scogin, 11 La. Ann. 629; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225; U. S. *v.* Ottawa, 28 Fed. 407.

Consolidation of corporations.— Where, pending suit, a new corporation succeeds defendant, the judgment is binding upon both. People *v.* San Francisco, 21 Cal. 668.

Judgment for or against public officers as conclusive on municipal corporation see JUDGMENTS, 23 Cyc. 1270.

46. Smith *v.* State, 64 Kan. 730, 68 Pac. 641; Parker *v.* Scogin, 11 La. Ann. 629; Chaffee *v.* Granger, 6 Mich. 51; Law *v.* New York, 32 How. Pr. (N. Y.) 385.

47. Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378; Johnson *v.* New Orleans, 46 La. Ann. 714, 15 So. 100. See also Weaver *v.* San Francisco, 111 Cal. 319, 43 Pac. 972.

Judgment against a city for water furnished it can only be allowed to the amount of revenues for the respective fiscal years when water was furnished, which were unappropriated when the claims for water accrued. Such judgment need not be expressly made payable out of the revenues of such years, but may be general in form. Higgins *v.* San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

Judgment on judgment.— Where the judgment is made payable only out of certain funds a subsequent judgment in an action thereon must contain such limitation. Weaver *v.* San Francisco, 146 Cal. 728, 81 Pac. 119.

48. Chicago *v.* English, 180 Ill. 476, 54 N. E. 609 [*modifying* 80 Ill. App. 163]; Danville *v.* Mitchell, 63 Ill. App. 647.

49. Buck *v.* Eureka, 119 Cal. 44, 50 Pac. 1065.

50. Herman *v.* Oconto, 100 Wis. 391, 76 N. W. 364. See also PAYMENT.

51. Porter *v.* Thompson, 22 Iowa 391.

52. Evans *v.* Pittsburgh, 8 Fed. Cas. No. 4,568.

53. New Orleans *v.* U. S., 49 Fed. 40, 1 C. C. A. 148.

54. U. S. *v.* New Orleans, 44 Fed. 590.

55. Smith *v.* Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167.

56. Fresno Canal, etc., Co. *v.* McKenzie, 135 Cal. 497, 67 Pac. 900, (1901) 65 Pac. 473.

by statute, current expenses have precedence over judgments;[57] and it has been held, irrespective of statute, that necessary current expenses are entitled to payment out of the current revenues in preference to a judgment against the city for a tort.[58]

3. Lien and Enforcement. The general rule is that a judgment against a municipality is not a lien on its property held for public uses,[59] and that such property is not subject to execution.[60] Likewise a judgment is not a lien on the individual property of the inhabitants of the municipality,[61] nor is such property subject to execution.[62] Mandamus is usually the proper remedy to enforce a judgment against a municipality,[63] such remedy performing the office of an execution in ordinary cases.[64] Statutes prescribing the particular mode of collecting judgments against towns have been held not applicable to judgments against cities.[65] A judgment against a municipality becomes dormant where no tax is levied and mandamus to enforce it is not brought within the statutory time provided for issuing execution in ordinary cases to keep the judgment alive;[66] and after the judgment has become dormant, the levy of a tax and payment on such judgment will not revive it.[67] Scire facias is the appropriate, but not the exclusive, mode of reviving a judgment either for or against a municipality.[68] Where a judgment by default is recovered against a municipality and an individual, resort need not be first had to the property of the individual.[69] Where a municipality is the judgment creditor, it has the same right to control its judgment and fieri facias as any judgment creditor,[70] and may cause a fieri facias once issued to be set aside.[71] Public moneys raised by a municipality by taxation, when in the hands of its fiscal officers are not the property of the corporation or a debt due to it, within a statute providing for supplementary proceedings.[72] Upon the disso-

57. State *v.* New Orleans, 111 La. 374, 35 So. 605; Fernandez *v.* New Orleans, 50 La. Ann. 485, 23 So. 611.

58. Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294.

59. *Illinois.*— People *v.* Cook County Super. Ct., 55 Ill. App. 376.

Iowa.— Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276, statute, public buildings.

Louisiana.— See New Orleans, etc., R. Co. *v.* Municipality No. 1, 7 La. Ann. 148; Municipality No. 3 *v.* Hart, 6 La. Ann. 570.

Ohio.— Cincinnati *v.* Frost, 8 Ohio Dec. (Reprint) 107, 5 Cinc. L. Bul. 684.

Pennsylvania.—Schaffer *v.* Cadwallader, 36 Pa. St. 126, real estate.

Texas.—Sherman *v.* Williams, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

United States.— Townsend *v.* Greeley, 5 Wall. 326, 18 L. ed. 547, lands.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2210.

Money in a constable's hands, the proceeds of taxes to be paid to the city treasury, and judgments for fines for violation of city ordinances, cannot be seized on execution against the city. Municipality No. 3 *v.* Hart, 6 La. Ann. 570.

Private property.— But a municipal corporation cannot by its own act, independent of legislative authority, make a thing which is not necessary to the exercise of its functions a permanent source of revenue, so as to exempt it from execution. New Orleans *v.* Morris, 18 Fed. Cas. No. 10,182, 3 Woods 103.

60. See Executions, 17 Cyc. 998.

Where an execution sale is authorized by statute, municipal officers have no power as such to redeem. People *v.* Hays, 4 Cal. 127.

61. Horner *v.* Coffey, 25 Miss. 434; Lyon *v.* Elizabeth, 43 N. J. L. 158; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 19; Fowle *v.* Alexandria, 3 Pet. (U. S.) 398, 7 L. ed. 719 [*affirming* 9 Fed. Cas. No. 4,993, 3 Cranch C. C. 70]. *Contra,* Beardsley *v.* Smith, 16 Conn. 368, 41 Am. Dec. 148.

62. See Executions, 17 Cyc. 979.

63. See Mandamus, 26 Cyc. 307.

The federal courts have no power, where mandamus proceedings have been unavailing because of the want of municipal officers or other devices, to appoint their marshal to assess, levy, and collect the requisite taxes. Rees *v.* Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72 [*disapproving* Welch *v.* Ste. Genevieve, 29 Fed. Cas. No. 17,372, 1 Dill. 130].

64. Alter *v.* State, 62 Nebr. 239, 86 N. W. 1080; U. S. *v.* Oswego Tp., 28 Fed. 55.

65. Watertown *v.* Cady, 20 Wis. 501; State *v.* Milwaukee, 20 Wis. 87.

66. Alter *v.* State, 62 Nebr. 239, 86 N. W. 1080; Brockway *v.* Oswego, 40 Fed. 612.

67. Alter *v.* State, 62 Nebr. 239, 86 N. W. 1080.

68. See Littlefield *v.* Greenfield, 69 Me. 86. See also Judgments, 23 Cyc. 1441 note 12.

69. Palmer *v.* Stacy, 44 Iowa 340.

70. Lynne *v.* New Orleans, 26 La. Ann. 48.

71. Lynne *v.* New Orleans, 26 La. Ann. 48.

72. Lowber *v.* New York, 7 Abb. Pr. (N. Y.) 248.

lution of the corporation, all taxes levied or uncollected are subject to the demands of creditors and may be collected and disbursed by a receiver.[73]

Q. Costs.[74] The general rule that costs are imposed upon the unsuccessful party applies in municipal corporation cases,[75] except where the municipality sues or is sued in the capacity of agent of the state in the enforcement of local government,[76] or where it is otherwise provided by statute.[77] In some jurisdictions, by statute, costs cannot be awarded to one who sues a municipality unless the claim was presented to it before the commencement of the action.[78] A judgment for costs will not be enforced by execution,[79] but the proper remedy is by mandamus to compel a levy.[80] Where the city is entitled to the costs, suit should be brought in its name on an undertaking for costs given by the opposing party.[81]

R. Appeal and Error.[82] Except where it is otherwise expressly provided by statute,[83] appeals in actions in which a municipality is a party are regulated by the same rules as are applicable to appeals from judgments and orders in civil actions in general.[84] For instance the rules that error cannot first be urged on appeal;[85] that questions must be preserved for review by exceptions;[86] that harmless error

73. Garrett *v.* Memphis, 5 Fed. 860.

74. See, generally, COSTS.

75. Grafton *v.* Mooney, 89 Ill. App. 622; Edwardsville *v.* Barnsback, 66 Ill. App. 381.

76. Grafton *v.* Mooney, 89 Ill. App. 622.

77. See the statutes of the several states.

78. See the statutes of the several states.

In **New York,** Code Civ. Proc. § 3245, provides that "costs cannot be awarded to plaintiff, in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only, unless the claim, on which the action is founded, was, before the commencement of the action, presented to the board of such corporation having the power to audit the same, or to its chief fiscal officer, at least ten days before the commencement of said action." This code provision does not apply to actions *ex delicto* (Gage *v.* Hornellsville, 106 N. Y. 667, 12 N. E. 817 [*reversing* 41 Hun 87]; Taylor *v.* Cohoes, 105 N. Y. 54, 11 N. E. 282), nor to special proceedings (*In re* Jetter, 78 N. Y. 601), nor to the costs of an appeal (Utica Water-Works Co. *v.* Utica, 31 Hun 426), nor to an action commenced in the justice's court and appealed to the county court (Marsh *v.* Lansingburgh, 31 Hun 514). The "chief fiscal officer" is the officer who receives, keeps, and disburses the moneys of the corporation (Gage *v.* Hornellsville, *supra*), and it is generally held that the treasurer is such officer (Gage *v.* Hornellsville, *supra*; Hunt *v.* Oswego, 45 Hun 305; Fisher *v.* Cortland, 42 Hun 173; Dressel *v.* Kingston, 32 Hun 526; Taylor *v.* Cohoes, 5 N. Y. St. 92 [*reversed* on other grounds in 105 N. Y. 54, 11 N. E. 282]), although in some cases presentation of the claim to the common council has been held sufficient (Williams *v.* Buffalo, 25 Hun 301; Butler *v.* Rochester, 4 Hun 321, 6 Thomps. & C. 572). It has been held that presentation of a claim to the treasurer of the water board was insufficient. King *v.* Randolph, 28 N. Y. App. Div. 25, 50 N. Y. Suppl. 902. *Contra*, Hallinan *v.* Ft. Edward, 26 Misc. 422, 57 N. Y. Suppl. 162. The omission to present the claim is not excused because the officer to whom the claim must be presented has no power to adjust and pay the claim. Baine *v.* Rochester, 85 N. Y. 523, 1 N. Y. Civ. Proc. 269, 62 How. Pr. 346. If the claim is not presented and plaintiff succeeds, neither party is entitled to costs. Baine *v.* Rochester, *supra*. The statement must be verified (King *v.* Randolph, 28 N. Y. App. Div. 25, 50 N. Y. Suppl. 902), and must be presented by one asserting authority to act for the claimant (Spaulding *v.* Waverly, 12 N. Y. App. Div. 594, 44 N. Y. Suppl. 112). The claim must be presented in such a manner as to afford opportunity and sufficient information to the officer to enable him to present it to the proper auditing officers and procure authority to pay. Spaulding *v.* Waverly, *supra*. No certificate of the judge presiding on the trial is required to defeat plaintiff's claim for costs where the claim is not presented. Baine *v.* Rochester, *supra*.

79. Kansas *v.* Juntgen, 84 Ill. 360; Kinmundy *v.* Mahan, 72 Ill. 462.

80. Hodges *v.* Board of Revision, 3 L. T. Rep. N. S. (Pa.) 77.

81. New York *v.* Bannan, 42 N. Y. App. Div. 191, 58 N. Y. Suppl. 1031.

82. See, generally, APPEAL AND ERROR.

Right to appeal in forma pauperis see APPEAL AND ERROR, 2 Cyc. 825 note 76.

Necessity of payment of costs by municipality before taking appeal see APPEAL AND ERROR, 2 Cyc. 817 note 51.

83. See the statutes of the several states.

Statutes dispensing with necessity of giving bond see APPEAL AND ERROR, 2 Cyc. 822.

84. See, generally, APPEAL AND ERROR.

85. Flynn *v.* Neosho, 114 Mo. 567, 21 S. W. 903; La Crosse *v.* Melrose, 22 Wis. 459, holding that it cannot he first urged on appeal that an action is brought in the name of a city against the town instead of in the name of the mayor and common council of the city against the supervisors of the town.

86. Chicago *v.* Altgeld, 33 Ill. App. 23; Potter *v.* Whatcom, 25 Wash. 207, 65 Pac. 197.

is not ground for reversal;[87] and that the decision on a former appeal is the law of the case[88] are applicable. Generally the city attorney is authorized to take an appeal from a judgment against the municipality, or at least his authority to do so will be presumed until the contrary appears.[89] The mayor is not entitled to appeal, it seems, where not personally aggrieved by the judgment and where not authorized so to do by the common council.[90] Where the action is against a city and its board of equalization, notice of appeal served on the mayor or city clerk has been held a sufficient service as to both defendants when such persons are *ex-officio* officers of the board.[91]

XVIII. PROSECUTIONS.

A. Criminal Liability of Municipality. Although a municipality cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects,[92] it is indictable at common law for either non feasance or misfeasance in respect of public duties imposed upon it by law,[93] and modern judicial tendency, like public sentiment, is toward assimilating such corporations to natural persons in their liabilities, criminal as well as civil.[94] So a municipality may be indicted for creating a public nuisance,[95] or for neglecting its duty to keep its streets or

87. Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400 [*affirming* 53 Hun 206, 6 N. Y. Suppl. 54].

88. La Franc Fire Engine Co. *v.* Mt. Vernon, 11 Wash. 203, 39 Pac. 367.

89. Connett *v.* Chicago, 114 Ill. 233, 29 N. E. 280; Hanna *v.* Kankakee, 34 Ill. App. 186; Spencer *v.* McDonough, 11 La. Ann. 420; Boon *v.* Utica, 4 Misc. (N. Y.) 583, 25 N. Y. Suppl. 846.

90. Spellman *v.* Scranton, 17 Pa. Super. Ct. 223.

91. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

92. See Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339. And see, generally, CORPORATIONS.

93. *Maine.*— State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586 [*overruling* State *v.* Great Works Mill, etc., Co., 20 Me. 41, 37 Am. Dec. 38]. See also State *v.* Bangor, 41 Me. 533; State *v.* Bangor, 30 Me. 341.

Massachusetts.— Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Com. *v.* Boston, 16 Pick. 442; Com. *v.* Dedham, 16 Mass. 141; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63; Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

New Hampshire.— State *v.* Dover, 46 N. H. 452.

New Jersey.— State *v.* Hudson County, 30 N. J. L. 137; Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530.

New York.— People *v.* Albany, 11 Wend. 539, 27 Am. Dec. 95.

Pennsylvania.—Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921; Com. *v.* Lansford Borough, 3 Pa. Dist. 365, 14 Pa. Co. Ct. 376; Phillips *v.* Com., 44 Pa. St. 197.

Tennessee.— McCrowell *v.* Bristol, 5 Lea 685; Chattanooga *v.* State, 5 Sneed 578; State *v.* Shelbyville Corp., 4 Sneed 176; State *v.* Murfreesboro, 11 Humphr. 217; State *v.* Barksdale, 5 Humphr. 154.

Wisconsin.— Sankville *v.* State, 69 Wis. 178, 33 N. W. 88.

England.— This doctrine has received recognition in the English courts, where it is so extended as to include prescriptive as well as statutory duties. Rex *v.* Oxfordshire, 16 East 223; Rex *v.* Stratford-upon-Avon, 14 East 348.

See 36 Cent. Dig. tit. "Municipal Corporations," § 2215.

Failure to perform duty imposed by general law.—A municipal corporation is not liable to indictment for failure to perform a duty imposed upon it, not by its charter, but by a general law of the state, except where expressly made liable thereto by statute. State *v.* Burlington, 36 Vt. 521.

94. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921. See also State *v.* Shelbyville Corp., 4 Sneed (Tenn.) 176.

95. State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586; Com. *v.* Gloucester, 110 Mass. 491 (holding that an indictment will lie against a municipal corporation for obstructing navigable waters by building a dam therein); People *v.* Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

A city is answerable for a merely permissive nuisance arising from sewage matter deposited in tide-water, although there is no allegation of negligence or defect in the plan of the sewer, in adopting which the city exercised its best judgment as to the proper location of the outfalls, and although the city has been guilty of no negligence but constructed its sewers upon a system as good as any one knew how to build at the time of their construction. State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

Burning infected bedding.— Municipal officers cannot be convicted of maintaining an indictable nuisance in burning infected bedding during a smallpox epidemic, although noxious vapors are thus created. State *v.*

highways,[96] municipal bridges,[97] or its sewers[98] in reasonable repair and proper condition. And a town has been held liable to an indictment for not erecting a bridge ordered by the road commissioners.[99] It has even been held that a municipality is indictable for permitting a public nuisance to be maintained within the corporate limits,[1] but this has been denied.[2] A municipal corporation is not punishable for a failure to perform a duty to put up sign-boards at railroad crossings imposed by statute upon overseers of common roads.[3]

B. Limitations of Prosecutions. An indictment against a town on behalf of an executor or administrator to recover a statutory penalty for a defect in the highways, whereby deceased lost his life, is not barred by a statute requiring actions or suits by individuals to be commenced within one year, or by a statute requiring process for the use of the state to be commenced within two years.[4]

C. Indictment. It has been held that the indictment should be against the municipality and not against the mayor and city council;[5] but it has also been held that if persons named in an indictment for maintaining a nuisance are described as the burgess and councilmen of a borough, naming the borough, the

Knoxville, 12 Lea (Tenn.) 146, 47 Am. Rep. 331.

96. *Kentucky.*— Com. *v.* Hopkinsville, 7 B. Mon. 38.

Maine.— State *v.* Madison, 63 Me. 546; Davis *v.* Bangor, 42 Me. 522; State *v.* Gorham, 37 Me. 451; State *v.* Bangor, 30 Me. 341. See also State *v.* Great Works Mill, etc., Co., 20 Me. 41, 37 Am. Dec. 38.

Massachusetts.— Com. *v.* Boston, 16 Pick. 442.

New Hampshire.—State *v.* Dover, 46 N. H. 452.

Pennsylvania.—Com. *v.* Lansford Borough, 3 Pa. Dist. 365, 14 Pa. Co. Ct. 376.

Tennessee.— McCrowell *v.* Bristoe, 5 Lea 685; Chattanooga *v.* State, 5 Sneed 578; State *v.* Barksdale, 5 Humphr. 154 [*followed* in State *v.* Murfreesboro, 11 Humphr. 217].

See 36 Cent. Dig. tit. "Municipal Corporations," § 2216.

In all cases where the municipality may be held for damages for a defective highway, it may be indicted. Davis *v.* Bangor, 42 Me. 522.

The forfeiture incurred by a town, under the Maine statute for a defect in its highways, whereby a loss of life has occurred, may be recovered by the executor or administrator of the deceased by an indictment. State *v.* Bangor, 30 Me. 341.

Street in remote part of town.— The fact that a street kept open by a town corporation as a public highway is in a remote and sparsely inhabited part of the town, that it is but little used, and not indispensable to the public convenience, or that the keeping of it in repair would involve an outlay of money which the corporation could not afford, constitutes no defense in an indictment against the corporation for failure to repair said street. As long as it is kept open as one of the highways of the town, the corporation is bound to keep it in repair. Chattanooga *v.* State, 5 Sneed (Tenn.) 578.

97. State *v.* Madison, 63 Me. 546; State *v.* Bangor, 41 Me. 533; State *v.* Gorham, 37 Me. 451; Saukville *v.* State, 69 Wis. 178, 33 N. W. 88.

To what bridges liability extends.— The inhabitants of counties were not liable at common law for not repairing bridges over canals, but only bridges over rivers; and the inhabitants of counties in New Jersey are not responsible for not repairing bridges over rivers in the state. State *v.* Hudson County, 30 N. J. L. 137.

Structures for the passage of travelers erected over a railroad, where it crosses an established highway, fall under the designation of bridges as that term is used in the Maine statute, and such bridges and their abutments, although constructed by the railroad company, form part of the highway which the town is bound to maintain, and hence the town may be indicted for failure to repair them. State *v.* Gorham, 37 Me. 451.

98. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921. See also State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

99. State *v.* Whitingham, 7 Vt. 390.

1. State *v.* Shelbyville Corp., 4 Sneed (Tenn.) 176 [*approved* in McCrowell *v.* Bristol, 5 Lea (Tenn.) 685], holding that a municipal corporation, vested by its charter with the power to enact such ordinances as may be necessary and proper to preserve the public health, and to prevent the removal of the nuisance, is indictable for permitting a slaughter-house to be kept upon the private property of a citizen within the town, to the detriment of the public health or comfort.

2. Georgetown *v.* Com., 115 Ky. 382, 73 S. W. 1011, 24 Ky. L. Rep. 2285, 61 L. R. A. 673; State *v.* Burlington, 36 Vt. 521.

3. State *v.* Manchester, 3 Baxt. (Tenn.) 416 [*following* Louisville, etc., Turnpike Co., 3 Heisk. (Tenn.) 129 (*overruling* State *v.* Loudon, 3 Head (Tenn.) 264)].

4. State *v.* Bangor, 30 Me. 341.

5. Com. *v.* Ephrata Borough, 2 Pa. Dist. 349.

persons so named are indicted in their corporate capacity and not as individuals,[6] and that the indictment or presentment need not allege in terms that the mayor and aldermen are an incorporated body.[7] An indictment for failure to keep a highway in repair need not allege the authority by which the highway was laid out,[8] or set forth the width of the highway.[9] On indictment against a town for not erecting a bridge ordered by the road commissioners, it is not necessary to set forth that the selectmen had, previous to such order, neglected to build such bridge;[10] and it is not necessary in an indictment for a nuisance caused by a sewer to allege negligence in the adoption of the plan of the sewerage system or careless execution of the same.[11] Where a notice, signed by citizens of a borough, requesting a constable to return a nuisance, is attached by the constable to his return, the notice is a part of the return and is sufficient to support an indictment.[12]

D. Trial and Evidence. An allegation or averment in the indictment, not necessary or material to a perfect description of the offense but suited only to negative an anticipated defense, need not be proved in order to authorize a conviction.[13] Where an indictment on behalf of an administrator to recover a statutory penalty for a defect in a highway, whereby decedent's death occurred, describes decedent as late of a certain county, the right of the administrator to prosecute the indictment may be proved by letters of administration granted by the probate court of another county.[14]

E. Fines, Penalties, and Forfeitures. Under a statute subjecting municipal corporations to a fine, penalty, or forfeiture for defects in highways, whereby loss of life has occurred, the amount of the amercement, within the limits of the statute, is to be fixed by the court in its discretion and not by the jury,[15] and the decision of the trial court as to the amount is final.[16]

MUNICIPAL COURT. A court usually located in a city and having jurisdiction over adjacent territory,[1] such as the mayor's or recorder's court, etc.[2] (See, generally, COURTS; MUNICIPAL CORPORATIONS.)

MUNICIPAL FINE. A fine imposed by a municipal corporation.[3] (See, generally, FINES; MUNICIPAL CORPORATIONS.)

MUNICIPALITY. See MUNICIPAL CORPORATIONS.

MUNICIPAL JURISDICTION. A phrase which does not necessarily designate the jurisdiction of a common council, but may designate the jurisdiction of any public authority, administering a business pertaining to a city, such as would have to be administered by the common council in the absence of specially constituted authority.[4] (See, generally, MUNICIPAL CORPORATIONS.)

6. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921.
7. State *v.* Murfreesboro, 11 Humphr. (Tenn.) 217.
8. State *v.* Madison, 63 Me. 546, holding that where the indictment alleged that the highway was duly and legally laid out and established in defendant town, a clause describing the highway as "laid out by the town" might be rejected as surplusage.
9. State *v.* Madison, 63 Me. 546.
10. State *v.* Whitingham, 7 Vt. 390.
11. State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.
12. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921.
13. State *v.* Bangor, 30 Me. 341.
14. State *v.* Bangor, 30 Me. 341.
15. State *v.* Bangor, 41 Me. 533.
16. State *v.* Bangor, 41 Me. 533.

1. State *v.* McArthur, 13 Wis. 383, 385, where it is said: "When reference is had to the laws of other states and countries upon the subject it is found, as was shown upon the argument, that although the municipal courts are usually located in cities, yet they have usually had jurisdiction over the adjacent territory. This was so in Chicago, Boston, London, and probably in other instances. Therefore we think that those words in the constitution require at most nothing more than that municipal courts should be located in cities or incorporated villages, and that it was never intended to prevent the legislature from giving them such powers as they have usually had in other states."
2. Uridias *v.* Morrill, 22 Cal. 473, 478.
3. People *v.* Johnson, 30 Cal. 98, 102.
The term does not include a penalty imposed by statute for transacting an insurance business without obtaining a certificate of authority. Thomas *v.* Justice's Ct., 80 Cal. 40, 42, 22 Pac. 80.
4. State *v.* Orleans Levee Dist., 109 La. 403, 435, 33 So. 385.

MUNICIPAL LAW. A rule of civil conduct prescribed by the supreme power in a state,[5] commanding what is right, and prohibiting what is wrong;[6] a prescribed rule of civil conduct;[7] the expression of the legislative will of the state according to the forms of the constitution;[8] that which pertains solely to the citizens and inhabitants of a state, and is thus distinguished from political law and commercial law;[9] a law confined to a particular place;[10] the rule of law by which a particular district, community, or nation is governed;[11] in a strict sense, the law of a particular place, such as a city or town; and originally the law of a municipium, or free town.[12] It is now, however, more usually applied to the customary laws that obtain in any particular city or province, and which have no authority in neighboring places.[13] (See, generally, COMMON LAW; LAW; MUNICIPAL CORPORATIONS; STATUTES.)

MUNICIPAL LIEN. See MUNICIPAL CORPORATIONS.

MUNICIPAL MARKET. A market conducted under municipal regulations for the sale of provisions.[14] (See MARKET; and, generally, MUNICIPAL CORPORATIONS.)

MUNICIPAL OFFENSE. An offense against a particular state or separate community.[15] (See, generally, CRIMINAL LAW, and Cross-References Thereunder.)

MUNICIPAL OFFICER. See MUNICIPAL CORPORATIONS.

MUNICIPAL ORDINANCE. See MUNICIPAL CORPORATIONS.

MUNICIPAL PURPOSE. A public or governmental purpose, as distinguished from a private purpose;[16] a purpose intended to embrace some of the functions

5. Blackstone Comm. 44 [*quoted* in Hunt *v.* Chicago, etc., R. Co., 20 Ill. App. 282, 288; People *v.* Tiphaine, 3 Park. Cr. (N. Y.) 241, 244; Currie *v.* Mutual Assur. Soc., 4 Hen. & M. (Va.) 315, 346, 4 Am. Dec. 517; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 370, 18 S. E. 620; Higbee *v.* Higbee, 4 Utah 19, 27, 5 Pac. 693]; Burrill L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106]; 1 Kent Comm. 446 [*quoted* in Rohrbacher *v.* Jackson, 51 Miss. 735, 773].

6. Blackstone Comm. 44 [*quoted* in Hunt *v.* Chicago, etc., R. Co., 20 Ill. App. 282, 288; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 371, 18 S. E. 620 (where it is said: "The rule of civil conduct is based upon certain principles, which can neither be ignored nor left out. These principles controlled in their application by custom constitute the common-law"); Currie *v.* Mutual Assur. Soc., 4 Hen. & M. (Va.) 315, 346, 4 Am. Dec. 517.

This definition is criticized in Davis *v.* Ballard, 1 J. J. Marsh. (Ky.) 563, 565, 576, as incompatible with the genius of our form of government; neither is it literally true as applicable to our system, in that we accept no supreme power except that of the people. The following definition is there given: "Municipal law may be properly defined to be a rule of civil conduct, prescribed by any power in a state, having, according to its constitution or form of government, authority to act." See also Currie *v.* Mutual Assur. Soc., 4 Hen. & M. (Va.) 315, 346, 4 Am. Dec. 517.

7. Ward *v.* Barnard, 1 Aik. (Vt.) 121, 128.

8. State *v.* Johnson, 25 Miss. 625, 747.

9. Wharton L. Lex. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106]. To the same effect is Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544; Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533 (where it is said: The term is not confined to "the law of a city only"); Burrill L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106].

10. Somerset *v.* Stewart, Lofft 1, 12.

11. Burrill L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106].

12. Burrill L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106].

13. Wharton L. Lex. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 106].

14. Cincinnati *v.* Buckingham, 10 Ohio 257, 261.

A "municipal market" consists (1) in a place for the sale of provisions and articles of daily consumption; (2) convenient fixtures; (3) a system of police regulations fixing market hours, making provisions for the lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller; and (4) proper officers to preserve order and enforce obedience to rulers. Cincinnati *v.* Buckingham, 10 Ohio 257, 261.

15. Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544; Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533.

16. Cook *v.* Portland, 20 Oreg. 580, 584, 27 Pac. 263, 13 L. R. A. 533, where it is said: Such purposes "embrace, by the common speech of men, before and since the days of Blackstone, state or national purposes. And therefore, while cities, towns and villages are for municipal purposes, there are also other corporations for municipal purposes that are not of that class." See also Root *v.* Erdelmyer, 37 Ind. 225, 226, 227; Meagher *v.* Storey County, 5 Nev. 244, 249.

They are not words of any definite technical import, and may be so construed as to apply to a corporation established for the

of government, local or general.[17] (See, generally, EMINENT DOMAIN; MUNICIPAL CORPORATIONS.)

MUNICIPAL RECORD. See MUNICIPAL CORPORATIONS.

MUNICIPAL REGULATION. A term which is said to have substantially the same meaning as the terms "by-law" and "ordinance" and means the laws of the corporate district, made by the authorized body, in distinction from the general laws of the state.[18] (See, generally, MUNICIPAL CORPORATIONS.)

MUNICIPAL REVENUE. As defined by statute, a term which includes all taxes collected for municipal purposes from all sources whatsoever.[19] (See, generally, MUNICIPAL CORPORATIONS; TAXATION.)

MUNICIPAL SECURITIES. See MUNICIPAL CORPORATIONS.[20]

MUNICIPAL TAXATION. See MUNICIPAL CORPORATIONS; TAXATION.

MUNICIPAL WARRANT. See MUNICIPAL CORPORATIONS.[21]

MUNICIPIUM. A free, or privileged town; one that had the right of being governed by its own laws and customs;[22] the name given in the Roman law to a city enjoying the right of local self-government.[23] (See, generally, MUNICIPAL CORPORATIONS.)

MUNIMENTS OF TITLE. A general expression for all means of evidence, by which an owner, corporate or individual, may defend title to real property.[24] (See, generally, DEEDS; ESTATES; PROPERTY; VENDOR AND PURCHASER.)

MUNITIONS OF WAR.[25] See WAR.

MURAGE. A duty for the repairs of the town walls.[26]

MURDER. See HOMICIDE.

MUSCOGEE NATION. One of the five civilized tribes of Indians settled by the United States government in the Indian Territory.[27] (See, generally, INDIANS.)

MUSCOVADO. Raw sugar.[28]

MUSEUM. See THEATERS AND SHOWS.

MUSICAL.[29] Pertaining to music or the performance of music.[30] (Musical: Composition — Copyright of, see COPYRIGHT; Literary Property in, see LITERARY PROPERTY.)

MUSICIAN.[31] See LICENSES; THEATERS AND SHOWS.

MUSSEL BED. A bed or repository of mussels.[32] (See ISLAND.)

purpose of carrying on the business of a public free school and to raise funds for its support. Horton *v.* Mobile School Com'rs, 43 Ala. 598, 607.

17. State *v.* Leffingwell, 54 Mo. 458, 476 [*citing* Hamilton County *v.* Mighels, 7 Ohio St. 109; Angell & Ames Corp. § 17, § 15–24; Cooley Const. Lim. c. 8; Dillon Mun. Corp. §§ 30, 31].

18. Rutherford *v.* Swink, 96 Tenn. 564, 567, 35 S. W. 554, where it is said: "They are local regulations for the government of the inhabitants of the particular place." They are not laws in the legal sense, although binding on the supreme power of the state, from which alone a law can emanate, and therefore cannot be statutes, which are the written will of the legislature, expressed in the form necessary to constitute parts of the law.

19. Mo. Rev. St. (1899) § 5346.

20. See also MUNICIPAL BOND; and, generally, COUNTIES; DRAINS; LEVEES; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS; WATERS.

21. See also, generally, COUNTIES; DRAINS; LEVEES; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS; WATERS.

22. Burrill L. Dict. [*quoted* in Root *v.* Erdelmyer, Wils. (Ind.) 99, 107].

23. Winspear *v.* Holman District Tp., 37 Iowa 542, 544; Brinckerhoff *v.* Board of Education, 37 How. Pr. (N. Y.) 499, 515.

24. Browne *v.* Perris, 23 Abb. N. Cas. (N. Y.) 226, 229, 7 N. Y. Suppl. 172 [*citing* Abbott L. Dict.; Bouvier L. Dict.].

25. "Munitions of war" include living fat cattle. U. S. *v.* Sheldon, 2 Wheat. (U. S.) 119, 122, 4 L. ed. 199.

26. Truro *v.* Reynalds, 8 Bing. 275, 282, 21 E. C. L. 538.

27. Cowell *v.* State, 16 Tex. App. 57, 61, where it said that the court will take judicial notice of the fact that "Muscogee Nation" is the same as "Creek Nation."

28. Gossler *v.* Goodrich, 10 Fed. Cas. No. 5,631, 3 Cliff. 71.

29. The term "music" is said to be included in the meaning of the terms "goods, wares, or merchandise." Com. *v.* Nax, 13 Gratt. (Va.) 789, 791.

30. Standard Dict.

31. "Itinerant musicians" see Com. *v.* Plaisted, 148 Mass. 375, 380, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

32. Century Dict.

Does not constitute an island.—A mussel bed, over which the water flows at every tide, cannot properly be called an island. King *v.* Young, 76 Me. 76, 79, 49 Am. Rep. 596.

MUST. In its ordinary and mandatory sense, obliged, or required;[33] although the term is often used in a directory or permissive sense as synonymous with MAY,[34] *q. v.* (See MAY, and Cross-References Thereunder.)

MUSTER. As a noun, a term sometimes applied to a troop of soldiers already enrolled, armed, and trained.[35] As a verb, to call together a military force;[36] to accept or approve the troops collected.[37] (See, generally, ARMY AND NAVY; MILITIA. See also ENLIST.)

MUSTIZO. An issue of a negro and an Indian.[38] (See COLORED PERSONS; INDIANS.)

MUTATION OF LIBEL. See ADMIRALTY.

MUTATIS-MUTANDIS. With the necessary changes in points of detail.[39]

MUTE. A dumb person.[40] (See DEAF; DUMB.)

MUTILATE. To cut off a limb or an essential part of the body;[41] to deprive of some essential part;[42] to render imperfect.[43] (See MUTILATION.)

MUTILATION. A word sometimes used in the sense of a revocation.[44] (Mutilation: Of Ballot, see ELECTIONS. Of Bank-Note, see BANKS AND BANKING. Of Instrument in General, see ALTERATIONS OF INSTRUMENTS. Of Landmark, see BOUNDARIES. Of Mark or Brand, see ANIMALS; LOGGING. Of Member of a Person's Body, see MAYHEM. Of Record, see RECORDS. Of Will, see WILLS. See also CUT; COVENTRY; MUTILATE.)

MUTINY. In shipping parlance, a term which consists in attempts to usurp the command of the vessel from the master, or to deprive him of it for any pur-

33. People *v.* Thomas, 32 Misc. (N. Y.) 170, 173, 66 N. Y. Suppl. 191, where it is said: "The word 'must' is mandatory. It . . . imports a physical or moral necessity. The word 'may,' when used in a statute which imposes an imperative duty, is construed to mean 'must,' but the word 'must' has never been construed to mean 'may.' It is peremptory. It excludes all discretion, and imposes upon the court an absolute duty to perform the requirements of the statute in which it is employed."

Its imperative sense is ordinarily the one intended when this word is employed. West Chicago St. R. Co. *v.* Scanlan, 168 Ill. 34, 36, 48 N. E. 149; Hodecker *v.* Hodecker, 39 N. Y. App. Div. 353, 357, 56 N. Y. Suppl. 954; Hemmer *v.* Hustace, 51 Hun (N. Y.) 457, 460, 3 N. Y. Suppl. 850; Eaton *v.* Alger, 57 Barb. (N. Y.) 179, 190; Osborn *v.* Lidy, 51 Ohio St. 90, 95, 37 N. E. 434.

It "must be paid" see Rogers *v.* Stephens, 2 T. R. 713, 719, 1 Rev. Rep. 605.

"Must necessarily have known" is not synonymous with "could have known," or "must have known." Galveston, etc., R. Co. *v.* English, (Tex. Civ. App. 1900) 59 S. W. 626, 628.

34. *In re* Thurber, 162 N. Y. 244, 252, 56 N. E. 631; *In re* Rutledge, 162 N. Y. 31, 40, 56 N. E. 511, 47 L. R. A. 721.

As implying use of discretion see Jenkins *v.* Putnam, 106 N. Y. 272, 275, 12 N. E. 613; Matter of O'Hara, 40 Misc. (N. Y.) 355, 359, 82 N. Y. Suppl. 293 [*citing In re* Thurber, 162 N. Y. 244, 252, 56 N. E. 631]; Uhlfelder *v.* Tamsen, 18 Misc. (N. Y.) 173, 175, 41 N. Y. Suppl. 438.

Used in a directory sense see Merrill *v.* Shaw, 5 Minn. 148, 150; Dutchess County Mut. Ins. Co. *v.* Van Wagonen, 132 N. Y. 398, 30 N. E. 971; Jenkins *v.* Putnam, 106 N. Y. 272, 275, 12 N. E. 613; Spears *v.* New York, 72 N. Y. 442, 443; Brinkley *v.* Brinkley, 56 N. Y. 192; People *v.* Ulster County, 34 N. Y. 268; Stone *v.* Pratt, 90 Hun (N. Y.) 39, 42, 35 N. Y. Suppl. 519; People *v.* McAdam, 28 Hun (N. Y.) 284; Wallace *v.* Feely, 61 How. Pr. (N. Y.) 225, 226. *Compare* People *v.* McAdam, 28 Hun (N. Y.) 284.

35. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480, 498.

36. Mechanics' Sav. Bank *v.* Sallade, 1 Woodw. (Pa.) 23, 24.

37. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480, 498.

"Mustered into service" as used in connection with the enrolling of troops for the purposes of the war, or for the organizing of them into companies and regiments, is a term equivalent to "accepted." Mechanics' Sav. Bank *v.* Sallade, 1 Woodw. (Pa.) 23, 26.

38. Miller *v.* Dawson, Dudley (S. C.) 174, 176.

39. Wharton L. Lex. See also James *v.* Young, 27 Ch. D. 652, 663, 53 L. J. Ch. 793, 51 L. T. Rep. N. S. 75, 32 Wkly. Rep. 981; Young *v.* Saylor, 23 Ont. 513, 533.

40. Standard Dict.

41. Webster Dict. [*quoted* in State *v.* Cody, 18 Oreg. 506, 519, 23 Pac. 891, 24 Pac. 895].

The term includes tearing out of the tongue of an animal. Hodge *v.* State, 11 Lea (Tenn.) 528, 530, 47 Am. Rep. 307.

42. Martin *v.* Blydenburgh, 1 Daly (N. Y.) 314, 317.

43. Woodfill *v.* Patton, 76 Ind. 575, 583, 40 Am. Rep. 269.

44. Woodfill *v.* Patton, 76 Ind. 575, 583, 40 Am. Rep. 269, where it is said: "'Mutilate' means something less than total destruction. Mere mutilation of a will would not, of itself, take from a will all legal force. A mutilation, however, which takes from the instrument an element essential to its validity, would have the effect to revoke it."

pose by violence, or in resisting him in the free and lawful exercise of his authority; the overthrowing of the legal authority of the master, with an intent to remove him against his will, and the like.[45] (Mutiny: By Seamen, see SEAMEN. By Soldiers, see ARMY AND NAVY; MILITIA.)

MUTUAL.[46] Reciprocally acting or related, reciprocally receiving, reciprocally giving and receiving, reciprocally interchanged;[47] a word which in itself denotes a common interest.[48] (Mutual: Account, see ACCOUNTS AND ACCOUNTING; COMPROMISE AND SETTLEMENT; LIMITATIONS OF ACTIONS. Aid Society, see MUTUAL BENEFIT INSURANCE. Assent, see CONTRACTS. Assumption of Marital Rights, see MARRIAGE. Benefit Association, see MUTUAL BENEFIT INSURANCE. Benefit Insurance, see MUTUAL BENEFIT INSURANCE. Benefit Society, see MUTUAL BENEFIT INSURANCE. Combat, see MUTUAL COMBAT. Consent, see CONTRACTS. Contract, see CONTRACTS. Covenant, see MUTUAL COVENANT. Credits, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Dealings, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Debts, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Insurance, see INSURANCE, and the Insurance Titles. Mistake, see MISTAKE, and Cross-References Thereunder. Pool, see MUTUAL POOL. Promises, see CONTRACTS. Wills, see WILLS. See also MUTUALITY.)

MUTUAL ACCOUNT. See ACCOUNTS AND ACCOUNTING.

MUTUAL AID SOCIETY. See MUTUAL BENEFIT INSURANCE.

MUTUAL ASSENT. See CONTRACTS.

45. Thompson *v.* The Stacey Clarke, 54 Fed. 533, 534.

In common parlance there is little or no difference between the term and "insurrection." McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 313, 43 Am. Dec. 180.

46. "Mutually agree" see Page *v.* Cook, 164 Mass. 116, 41 N. E. 115, 49 Am. St. Rep. 449, 28 L. R. A. 759.

"Mutually chosen and agreed on" see Aldis *v.* Burdick, 8 Vt. 21, 24.

"Mutual debts" as synonymous with "dealing together" and "indebted to each other" see Pape *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155.

47. Webster Dict. [*quoted* in Sharon *v.* Sharon, 75 Cal. 1, 31, 16 Pac. 345]. See also Hamilton *v.* Des Moines Valley R. Co., 36 Iowa 31, 39.

"Mutual" means and requires reciprocity of action, correlation, and interdependence, and finds its best illustration in the relation existing between parents and children, which is always mutual. Matter of Birdsall, 22 Misc. (N. Y.) 180, 185, 49 N. Y. Suppl. 450 [*citing* Matter of Butler, 58 Hun (N. Y.) 400, 403, 12 N. Y. Suppl. 201]; *In re* Stilwell, 34 N. Y. Suppl. 1123.

"Mutual dealings" see Benjamin *v.* Webster, 65 Me. 170, 171.

"Mutual negligence" see Hamilton *v.* Des Moines Valley R. Co., 36 Iowa 31, 39.

48. Robison *v.* Wolf, 27 Ind. App. 683, 62 N. E. 74, 77.

"Mutual" is not synonymous with "common."—The latter word, in one of its meanings, denotes that which is shared, in the same or different degrees, by two or more persons; but the former implies reciprocal action or interdependent connection. Black L. Dict.